# 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 in the area of commercial law and business practices. 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.

To further our goal of providing bullet points of commercial intelligence to help people do business better and better monitor the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs, the Bullet Point will provide previews of cases before the United States Supreme Court (SCOTUS) and the U.S. Sixth Circuit Court of Appeal. When appropriate, *The Bullet Point* will highlight industry issues that would benefit from amicus brief support. 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.

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***Lucarell v. Nationwide Mut. Ins. Co., Slip Op. No. 2018-Ohio-15.***

This was an appeal by an insurance company to the Ohio Supreme Court of a jury verdict entered in favor of a former employee for breach of contract, fraud, invasion of privacy, and bad faith. The former employee had argued that the insurance company induced her to open a new insurance agency when it intended to terminate her after she generated a profitable book of business. At trial, she received a jury verdict in the amount of $42 million. This amount was reduced to $14 million by the trial court, which was affirmed in part by the Seventh Appellate District, which found that the former employee could recover punitive damages for breach of contract if she proved her fraud claim.

The Ohio Supreme Court reversed, finding that punitive damages are not recoverable for breach of a contract.

***The Bullet Point:*** In a wide-ranging opinion, the Ohio Supreme Court reaffirmed a number of contract and tort law principals:

1. Punitive damages are not recoverable in an action for breach of contract.
2. When a breach of contract involves conduct that also constitutes a tort, punitive damages may be awarded only for the tort, not for the breach, and any punitive damages awarded are subject to the statutory limitations on punitive damages imposed in R.C. 2315.21.
3. A party to a contract does not breach the implied duty of good faith and fair dealing by seeking to enforce the agreement as written or by acting in accordance with its express terms, nor can there be a breach of the implied duty unless a specific obligation imposed by the contract is not met.
4. An unconditional release of liability becomes effective upon execution and delivery and bars any claims encompassed within it, unless it was procured by fraud, duress, or other wrongful conduct.
5. A party seeking to avoid a release of liability on the basis that it was procured under duress is required to prove duress by clear and convincing evidence.
6. The prevention of performance doctrine—which states that a party who prevents another from performing a contractual obligation may not rely on that failure of performance to assert a claim for breach of contract—is not a defense to a release of liability and therefore cannot be asserted as a defense to a release.
7. A fraud claim cannot be predicated on predictions or projections relating to future performance or on misrepresentations made to third parties.

All businesses should understand these rules when disputes arise as they exemplify the saying that "just because something is legal doesn't make it right." Knowing what is actionable and what damages are available is critical when assessing disputes and the proper strategy to address same.

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***Alford v. Collins-McGregor Operating Co., Slip. Op. No. 2018-Ohio-8.***

A group of landowners sued an oil company for partial termination of an oil and gas lease. The landowners hold interest in 74 acres. The land is subject to an oil and gas lease from 1980. "[T]he sole and only purpose" of the lease is to permit "mining and operating for oil and gas and laying pipe lines, and building tanks, powers, stations, and structures thereon, to produce, save, and take care of said products." In return for permission to mine the land, the oil company agreed to make royalty payments based on the amount of gas produced. The lease is silent on drilling and production. The landowners claimed that the oil company breached the lease by not exploring or drilling for oil at certain depths and sought termination of the lease as a result. The landowners claimed this violated an implied covenant of reasonable development and the implied covenant to explore further. The oil company moved to dismiss, arguing that Ohio law does not recognize these implied covenants. The trial court and Fourth Appellate District agreed.

The Ohio Supreme Court affirmed, finding that Ohio law does not recognize the implied covenant to explore further.

***The Bullet Point:*** Oil and gas leases are ordinarily subject to an implied covenant to reasonably develop the land. According to the Ohio Supreme Court, this implied covenant sufficiently protects a landowner's interest in development of the land, and thus a new implied covenant to explore further is not necessary. Indeed, the purpose of the implied covenant of reasonable development is to protect the lessor's interest in the lease, which is to obtain production and, hence, profits, once the right to drill has been granted to the lessee. In fact, recognizing a separate implied covenant to explore further would not support the overarching purpose of an oil and gas lease: "the profit motive [is] an instrumental force in oil and gas leases on behalf of both lessee and lessor," and to fail to recognize the profit motive "is to ignore the very essence of the contract."

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***Brannon v. Edman, 9th Dist. Summit No. 28544, 2018-Ohio-70.***

This appeal involved the dismissal of a lawsuit for fraud and breach of contract for violating the statute of frauds. The plaintiff alleged that he orally agreed to purchase real property from the defendant by making monthly payments. Plaintiff further claimed he made all of the monthly payments and that defendant subsequently refused to accept payments. Plaintiff then sued when defendant refused to deed the real property to him. Defendant moved to dismiss, arguing that the allegations violated the statute of frauds, which requires that real estate transactions be in writing and signed by the party to be charged. The trial court agreed and dismissed the action.

On appeal, the Ninth Appellate District reversed, finding that the doctrine of part performance removed the contract from the statute of frauds.

***The Bullet Point:*** At its core, the statute of frauds makes clear that, under certain circumstances, if a contract is not written, it is not binding. Ohio's version, as every state has its own, is in O.R.C. Section 1305.05:

*No action shall be brought whereby to charge the defendant . . . upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.*

The statute of frauds is riddled with exceptions and qualifications. One such exception is the doctrine of part performance. The Ohio Supreme Court has limited application of the doctrine of part performance to "cases involving the sale or leasing of real estate, wherein there has been a delivery of possession of the real estate in question, and in settlements made upon consideration of marriage, followed by actual marriage." The doctrine takes a case out of the operation of the statute of frauds if the acts of the parties "* * * are such that it is clearly evident that such acts would not have been done in the absence of a contract and * * * there is no other explanation for the performance of such acts except a contract containing the provisions contended for by the plaintiff."

For part performance to apply, three factors must be met: (1) evidence of a change in who possesses the land, (2) payment of all or part of the consideration for the land, and (3) improvements, alterations, or repairs upon the land.

Though the statute of frauds has long existed, it is often the core of contractual disputes; businesses not only need to be aware of it, but also aware of all its exceptions and qualifications.

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***Bayview Loan Servicing, LLC v. Vasko, 6th Dist. Wood No. WD-17-029, 2018-Ohio-38.***

This appeal involved a lien priority challenge between competing lienholders. The plaintiff filed a foreclosure lawsuit on a residential mortgage recorded in 2008. It named a law firm as a defendant in the lawsuit because the title record reflected that it held a mortgage on the property recorded in October 2012. Subsequently, the plaintiff modified its mortgage and the modified mortgage was recorded in October 2014.

The defendant law firm opposed the plaintiff's lien priority, arguing that it took priority because the plaintiff's lien was modified subsequent to its mortgage being recorded, and it therefore lost its priority. The trial court disagreed and the law firm appealed.

On appeal, the Sixth Appellate District affirmed, finding that the plaintiff's mortgage had priority because it was recorded first.

***The Bullet Point:*** Ohio follows a "first in time first in right" theory on lien recording. That is, mortgages and encumbrances are to be paid in the order they are recorded. In certain circumstances, a mortgage can retain its priority even when it has been modified because the modification "relates back" to the original date of recording. Factors the courts may consider in determining whether a modification "relates back" for priority purposes include whether there were additional funds in the modification, whether the interest rate increased, whether the repayment period was extended, and whether the monthly payments were reduced.

**SLIP OPINION NO. 2018-OHIO-15**

**LUCARELL, APPELLEE, *v.* NATIONWIDE MUTUAL INSURANCE COMPANY, APPELLANT.**

**[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Lucarell v. Nationwide Mut. Ins. Co.*, Slip Opinion No. 2018-Ohio-15.]**

*Contracts—Breach of contract—Punitive damages—Implied duty of good faith and fair dealing—Release of liability—Prevention-of-performance doctrine—Fraud—Punitive damages are not recoverable in a breach-of-contract action—When a breach of contract involves conduct that also constitutes a tort, punitive damages may be awarded only for the tort, not for the breach, and any punitive damages awarded are subject to the statutory limitations on punitive damages imposed in R.C. 2315.21—A party to a contract does not breach the implied duty of good faith and fair dealing by seeking to enforce the agreement as written or by acting in accordance with its express terms, nor can there be a breach of the implied duty unless a specific obligation imposed by the contract is not met—An unconditional release of* *liability becomes effective upon execution and delivery and bars any claims encompassed within it unless it was procured by fraud, duress, or other wrongful conduct—A party seeking to avoid a release of liability on the basis that it was procured under duress is required to prove duress by clear and convincing evidence—The prevention-of-performance doctrine, which states that a party who prevents another from performing a contractual obligation may not rely on that failure of performance to assert a claim for breach of contract, is not a defense to a release of liability and therefore cannot be asserted as a defense to a release—A fraud claim cannot be predicated on predictions or projections relating to future performance or on misrepresentations made to third parties.*

(No. 2016-0585—Submitted April 5, 2017—Decided January 4, 2018.)

APPEAL from the Court of Appeals for Mahoning County,
Nos. 13-MA-74 and 13-MA-133, 2015-Ohio-5286.

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**SYLLABUS OF THE COURT**

1. Punitive damages are not recoverable in an action for breach of contract. (*Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922), paragraph two of the syllabus, approved and followed.)
2. When a breach of contract involves conduct that also constitutes a tort, punitive damages may be awarded only for the tort, not for the breach, and any punitive damages awarded are subject to the statutory limitations on punitive damages imposed in R.C. 2315.21.
3. A party to a contract does not breach the implied duty of good faith and fair dealing by seeking to enforce the agreement as written or by acting in accordance with its express terms, nor can there be a breach of the implied duty unless a specific obligation imposed by the contract is not met.

4. An unconditional release of liability becomes effective upon execution and delivery and bars any claims encompassed within it, unless it was procured by fraud, duress, or other wrongful conduct.
5. A party seeking to avoid a release of liability on the basis that it was procured under duress is required to prove duress by clear and convincing evidence.
6. The prevention of performance doctrine—which states that a party who prevents another from performing a contractual obligation may not rely on that failure of performance to assert a claim for breach of contract—is not a defense to a release of liability and therefore cannot be asserted as a defense to a release.
7. A fraud claim cannot be predicated on predictions or projections relating to future performance or on misrepresentations made to third parties.

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**O'DONNELL, J.**

**{¶ 1}** Nationwide Mutual Insurance Company appeals from a judgment of the Seventh District Court of Appeals, which affirmed a jury verdict in favor of Christine Lucarell on her claims for breach of contract and invasion of privacy but reversed a directed verdict entered by the trial court in favor of Nationwide on her claim for fraud.

**{¶ 2}** Lucarell sued Nationwide for breach of contract, fraudulent misrepresentation, invasion of privacy, retaliation, and constructive discharge, asserting it had fraudulently and in bad faith induced her to open a new insurance agency when it intended to terminate her after she generated a profitable book of business. The case proceeded to trial, and at the close of her case-in-chief, the court directed a verdict in favor of Nationwide on the fraud claim. The jury returned verdicts in favor of Lucarell in excess of $42 million in compensatory and punitive damages, finding that Nationwide had breached its contracts with her, invaded her privacy, retaliated against her, and constructively discharged her. The trial court, applying statutory caps on damages, entered judgment against Nationwide for more than $14 million in compensatory and punitive damages. Both parties appealed.

**{¶ 3}** The appellate court affirmed the breach of contract judgment, affirmed the invasion of privacy judgment in part, reversed the retaliation and constructive discharge judgments, and reinstated and remanded the fraud claim for a new trial. It also held that punitive damages could be awarded for breach of contract if Lucarell proved her fraud claim and that the jury could have found that Nationwide prevented her from performing obligations of releases she signed, allowing her to avoid them. It rejected Nationwide's assignments of error challenging the sufficiency of the evidence supporting the jury's verdicts on the breach of contract claims and the trial court's instruction on the standard of proof for duress.

**{¶ 4}** Nationwide appealed to this court, asserting that Ohio law does not permit punitive damages to be awarded for any breach of contract, that App.R. 12 required the appellate court to review the assignment of error challenging the sufficiency of the evidence of breach of contract, that Lucarell had the burden to present clear and convincing evidence of duress to avoid the releases she signed, that the prevention of performance doctrine is not a defense to a release, and that she failed to prove her claim for fraud.

**{¶ 5}** Upon review, we reaffirm that in Ohio, punitive damages may not be awarded for a breach of contract. We also clarify that a party to a contract does not breach the implied duty of good faith and fair dealing by seeking to enforce the agreement as written or by acting in accordance with its express terms, nor can there be a breach of the implied duty unless a specific obligation imposed by the contract is not met.

**{¶ 6}** In addition, a release of liability is an absolute bar to a later action on any claim encompassed within it absent a showing of fraud, duress, or other wrongful conduct in procuring it, and a party claiming duress is required to prove duress by clear and convincing evidence. We further recognize that the prevention of performance doctrine—which states that a party who prevents another from performing a contractual obligation may not rely on that failure of performance to assert a claim for breach of contract—is not a defense to a release of liability and therefore cannot be asserted as a defense to a release. Lastly, a claimant cannot rely on predictions or projections that relate to future performance or that are made to third parties to establish a fraud claim.

**{¶ 7}** After careful review, we have concluded that the court of appeals erred as a matter of law in holding that punitive damages are available for a breach of contract, in failing to review the sufficiency of the evidence of breach of contract and the jury instruction on duress, in considering the prevention of performance doctrine as a defense to a release of liability, and in reinstating the fraud claim.

**{¶ 8}** Accordingly, we reverse the judgment of the court of appeals and remand the matter to the appellate court for further proceedings consistent with this opinion.

**Facts and Procedural History**

**{¶ 9}** Nationwide designed an Agency Executive Program ("AE Program") to recruit new insurance agents by offering planning, training, and startup financing from Nationwide Federal Credit Union to build profitable, self-sustaining agencies over a three-year period. The new agents were independent contractors who agreed to exclusively sell and service Nationwide products.

**{¶ 10}** Nationwide determined that to be profitable, a new agency would need to generate $1.2 million in direct written premium from new and renewed policies each year. If the program agent reached that sales goal in three years, that agent became a career agent, and if additional production goals were met, Nationwide would forgive part or all of any loans made to start the agency.

**{¶ 11}** Nationwide brought the AE Program to Ohio in 2004 and recruited Lucarell the next year. Based on a pro forma and business plan presented to her by Bill Helfer, a Nationwide sales manager, she anticipated revenues of $200,000 a year. Working with Nationwide, she developed her own business plan and pro forma, but she did not see the final version before authorizing Helfer to sign it on her behalf. Those documents represented that Lucarell had an active role in developing the business plan and pro forma, and Nationwide disclaimed any guarantee of success.

**{¶ 12}** In November 2005, Lucarell signed an Independent Contractor Agent's Agreement, which specified that she was not a Nationwide employee and was responsible for her agency's expenses. She also signed the AE Program Performance Agreement, which included the schedule for disbursement of her $290,000 loan from Nationwide Federal Credit Union, the terms to qualify for a waiver of repayment of that loan, and the minimum production requirements to complete the AE Program. The exhibit containing the minimum production requirements is not part of the record in this case, however, and according to Lucarell, it was never part of her contract.

**{¶ 13}** Lucarell used the loan to start her agency in January 2006, renting, renovating, and furnishing office space, hiring two employees, and throwing a grand-opening party. She initially exceeded her minimum production requirements and won awards for her performance but began to have difficulty writing new policies and maintaining her cash flow.

**{¶ 14}** Other agents in the AE Program were also not meeting the minimum production requirements and were undercapitalized, so Nationwide began to modify the terms of the program. It offered agents the choice to (1) remain in the program, (2) leave with loans forgiven and Nationwide's agreement to pay off agency obligations such as leases, or (3) participate in a modified version of the AE Program. Nationwide also provided funds for agents to consult with accountants to prepare revised business plans in order to determine whether continuing in the program made financial sense.

**{¶ 15}** On February 7, 2007, Lucarell met with her sales manager Helfer and signed a Memorandum of Understanding ("MOU"), in which Nationwide offered her $15,000 in cash to prepare a new business plan and promised to reimburse $35,000 in business expenses as consideration for her to "completely release and forever discharge any and all claims which Agent may have against Nationwide * * * whether known or unknown, which were or could have been asserted against Nationwide from the beginning of time until the date of this MOU." Lucarell testified that when she signed the MOU, she had "no choice. * * * They would have terminated me and my agency, and my loan would become due in full."

**{¶ 16}** Lucarell submitted a new business plan prepared by a local certified public accountant, but Nationwide rejected it. Another Nationwide agent agreed to assist her in drafting a new business plan, which was supposed to be mutually acceptable, but according to Lucarell, Nationwide dictated it to her.

**{¶ 17}** Lucarell fell below her yearly minimum production requirements in August 2007 and continued to fall short throughout 2008. Nonetheless, between February 2007 and September 2008, Nationwide provided Lucarell additional cash infusions totaling $214,922, which she did not have to repay. She was also hoping to receive the books of business of two agents, Michael Ivan and Dennis White, who were considering retirement.

**{¶ 18}** On September 19, 2008, Lucarell entered into a Modified AE Program Agreement with Nationwide. In that contract, she acknowledged that Nationwide had given her the opportunity to exit the AE Program with Nationwide paying off her loan. She also "represent[ed] and warrant[ed] to Nationwide that [she] has made the decision to continue in the AE Program while under no economic duress," and she agreed that she "has entered this Modification voluntarily and of [her] own accord, without reliance on any inducement, promise, or representations by any other party, except those which are expressly set forth in this Modification." She acknowledged that she had approved her new business plan and that it was not dictated by Nationwide.

**{¶ 19}** The Modified AE Program Agreement extended the time to complete the AE Program by 36 months, but it increased the total amount of direct written premium required to complete it to $1,534,676. The agreement also provided that the minimum production requirements would be calculated as "the sum of all of Agent's direct written premiums * * * during the previous 12 month period and shall be calculated on a 12 month moving basis." In place of the loan, Nationwide agreed to provide cash infusions of up to $429,448 during the term of the Modified AE Program, paid in monthly disbursements if Lucarell achieved her minimum production requirement for that month. The contract also permitted her to request refinancing of her loan from Nationwide Bank (successor to Nationwide Federal Credit Union), and Nationwide promised to participate in the refinancing if Nationwide Bank denied her application.

**{¶ 20}** The Modified AE Program Agreement contained a release, which provided:

> In consideration of the foregoing, Agent hereby releases and discharges Nationwide, its employees, officers, directors, and representatives of any and all claims or causes of action Agent has in any way relating to the AE Program, the AE Agreement, and the IC Agreement from the beginning of time to the present, including but not limited to, any claims for fraud, negligence, breach of contract, and any statutory claims.

It also contained an integration clause stating that the Modified AE Program Agreement, the AE Program Performance Agreement it modified, and the Independent Contractor Agent's Agreement superseded all prior oral or written understandings between Lucarell and Nationwide and provided that these contracts constituted the entire agreement between them.

**{¶ 21}** For the next five months, Lucarell met the modified minimum production requirements and received the cash infusions pursuant to the Modified AE Program Agreement but continued to have insufficient cash flow. After Nationwide Bank refused to refinance her loan, Lucarell did not request Nationwide's assistance in refinancing; she had also missed her first interest-only payment on the loan in December 2008. She stopped paying federal and state taxes, fired her only agent in January 2009, and stopped paying rent for the agency the next month.

**{¶ 22}** Lucarell failed to meet her minimum production requirements in March 2009, and Nationwide placed her on probation in April 2009. Her March 2009 production was within 95 percent of the minimum required, and she sought an exception to enable her to receive that month's disbursement. Nationwide discovered that she had defaulted on her loan and initially denied her request but reconsidered and sent her the March disbursement on May 20, 2009. But it also informed her that beginning in July 2009, it would withhold part of her commissions to repay the defaulted loan. Her production never recovered, and she resigned in July 2009.

*Trial Proceedings*

**{¶ 23}** Lucarell sued Nationwide for breach of the original AE Program Agreement, the Independent Contractor Agent's Agreement, and the MOU, for fraudulent misrepresentation, and for invasion of privacy. Nationwide counterclaimed for the balance due on her loan. She amended her complaint and added claims that Nationwide retaliated against her by filing a counterclaim, constructively discharged her, and breached the Modified AE Program Agreement.

**{¶ 24}** At trial, she claimed she had been on track to complete the original AE Program, but Nationwide fraudulently induced her to sign the Modified AE

Program Agreement by misrepresenting her production data and by promising mergers with other agencies. She also asserted that Nationwide coerced her into signing the MOU by threatening to terminate her agency and then breached it by unilaterally rejecting her accountant's business plan. She further claimed that Nationwide designed the Modified AE Program to fail by changing the method of calculating the minimum production requirements to a 12-month moving basis while burdening her with loan payments, withholding a cash infusion, and diverting her commissions. Then, after terminating her, it invaded her privacy by using her name on its mailings.

**{¶ 25}** Lucarell presented expert testimony that she suffered $4.8 million in lost earnings projected over a 25-year career, with a present value of $2.817 million. And Michael Weisenburger, a former employee at Nationwide Federal Credit Union, testified that her business plan had been fraudulently altered by her sales manager to allow her to qualify for the loan.

**{¶ 26}** The trial court directed a verdict in favor of Nationwide on her fraudulent misrepresentation claim but allowed the remaining claims to go forward.

**{¶ 27}** Nationwide presented its expert, Rebekah Smith, who opined that Lucarell's agency could not have survived for 25 years because her negative cash flow would result in more than a million dollars in losses in the first 9 years. Smith noted that Lucarell's tax forms and reported expenses revealed an unexplained shortfall of $456,825 and that the agency had no value, so that Lucarell suffered no damages.

**{¶ 28}** The jury returned verdicts in favor of Lucarell on all remaining claims and counterclaims: $4.2 million in lost profits on the breach of contract claims, $1.5 million in lost profits and $500,000 in emotional damages for the claim of constructive discharge, $400,000 for the retaliation claim plus $100,000 in costs to defend the counterclaim, and $10 in nominal damages and $100,000 in emotional damages on the claim for invasion of privacy. It also awarded $36 million in punitive damages, consisting of $20 million for constructive discharge, $11 million for retaliation, and $5 million for invasion of privacy.

**{¶ 29}** The trial court reduced the $5.7 million award for lost profits on the breach of contract and constructive discharge claims to $2.817 million to conform the verdict to the evidence, reduced the retaliation verdict to $250,000 in conformity with statutory caps on noneconomic damages and to reflect the lack of evidence of defense costs on the counterclaim, and also reduced the $36 million punitive damages award to $10.5 million pursuant to the statutory cap on punitive damages. It entered judgment for $3,667,010 in compensatory damages, $10.5 million in punitive damages, $187,546.50 in attorney fees, $21,557.64 in costs, and prejudgment interest.

*Appellate Proceedings*

**{¶ 30}** Both parties appealed. The appellate court affirmed the verdicts in favor of Lucarell on the breach of contract claims, because Nationwide's failure to request interrogatories precluded review of the findings that it breached the contracts. 2015-Ohio-5286, 44 N.E.3d 319, ¶ 71. It noted that the trial court may have erred when it failed to instruct the jury on the burden to prove duress by clear and convincing evidence; nonetheless, it explained, the trial court had given instructions on two separate defenses to the releases—duress and prevention of performance—and because Nationwide had not requested interrogatories to indicate which issue the jury resolved in Lucarell's favor, the appellate court presumed that the jury found the releases could be avoided because Nationwide prevented Lucarell's performance, rendering harmless any error in instructing the jury on duress. *Id*. at ¶ 80-82. The appellate court affirmed the judgment against Nationwide on the invasion of privacy claim but reduced punitive damages on that claim to $200,020, and it affirmed the judgment denying Nationwide's counterclaim for the balance of its loan. *Id*. at ¶ 90, 142, 154. However, it reversed the judgments in favor of Lucarell on the retaliation and constructive discharge claims because they were not supported by the evidence. *Id*. at ¶ 123.

**{¶ 31}** In connection with Lucarell's cross-appeal, the appellate court reversed the directed verdict on her claims that Nationwide fraudulently induced her to join the AE Program by leading her to anticipate revenues of $200,000 a year when it knew or should have known that its AE Program agents were failing and that it had fraudulently altered her loan application to mislead the bank into giving her a loan. *Id*. at ¶ 172. The court remanded that claim for a new trial, including "punitive damages on her breach of contract claims, which can be awarded if the jury finds in Lucarell's favor on the fraud claim." *Id*. at ¶ 191.

*Appeal to the Ohio Supreme Court*

**{¶ 32}** Nationwide appealed to this court, urging that the appellate court ignored precedent that punitive damages are not recoverable in breach of contract claims. It asserts that it had no need to seek interrogatories on how it breached the contracts because there is no evidence of any breach. It also contends that as a matter of law, the prevention of performance doctrine does not apply to a release, which is fully performed at the moment it is signed. And finally, Nationwide maintains that the appellate court erred in reinstating Lucarell's fraud claim, because she could not reasonably have relied on a pro forma, which is only a projection, she failed to establish that Nationwide knew program agents were failing at the time it recruited her, and even if Nationwide altered her loan documents to get a loan for her, she could not have personally relied on representations that Nationwide made to third parties. It did not, however, appeal from the judgment of the court of appeals in connection with the claim for invasion of privacy or its counterclaim on the note, and those matters are not before us.

**{¶ 33}** Lucarell asserts that the appellate court did not hold that punitive damages could be recovered for breach of contract but rather that punitive damages could be awarded because her contract claims were accompanied by connected but independent torts—fraudulent misrepresentation and breach of the implied duty of good faith and fair dealing. She notes that it was Nationwide's failure to seek interrogatories that now precludes review of the jury's verdict in her favor on the breach of contract claims, and she further suggests that the jury found that the releases did not cover any of her claims and were void because Nationwide procured them through fraud and duress. She also asserts that Nationwide prevented her from performing her contractual obligations, so that the releases do not bar her claims, and in any case, she was not required to comply with a contract when the other party engaged in bad faith. Lastly, she maintains that evidence supporting her fraud claims includes representations that she would earn $200,000 a year in the AE Program when Nationwide knew agents were failing in that program and other testimony that Nationwide fraudulently altered loan applications.

**{¶ 34}** Accordingly, we are asked to address whether punitive damages may be awarded for breach of contract, whether the appellate court erred in failing to review assignments of error challenging the breach of contract verdicts and the jury instructions on duress, whether the prevention of performance doctrine permits Lucarell to avoid the releases of liability she signed, and whether she proved that Nationwide defrauded her.

## Law and Analysis

### *Punitive Damages*

**{¶ 35}** Ohio common law provides that punitive damages may not be awarded for breach of contract, no matter how willful the breach. *Digital & Analog Design Corp. v. N. Supply Co.,* 44 Ohio St.3d 36, 46, 540 N.E.2d 1358 (1989); *Davis v. Tunison*, 168 Ohio St. 471, 474, 155 N.E.2d 904 (1959). The court articulated this rule almost a century ago in *Ketcham v. Miller,* 104 Ohio St. 372, 136 N.E. 145 (1922), paragraph two of the syllabus: "Punitive damages are not recoverable in an action for breach of contract."

**{¶ 36}** Nonetheless, Ohio appellate courts, including the Seventh District Court of Appeals in this case, have suggested that there is an "exception" to the common law rule and that punitive damages may be awarded if a breach of contract is accompanied by a connected but independent tort. *See*, *e.g.*, *Lucarell*, 2015-Ohio-5286, 44 N.E.3d 319, at ¶ 177; *Meisel v. Buildt*, 8th Dist. Cuyahoga No. 70168, 1996 WL 596451, *6 (Oct. 17, 1996); *Goldfarb v. The Robb Report, Inc.*, 101 Ohio App.3d 134, 140, 655 N.E.2d 211 (10th Dist.1995).

**{¶ 37}** However, this court has never recognized an exception to the common law rule precluding the award of punitive damages for breach of contract. Although we have noted that the *conduct* constituting a breach of contract can also constitute a tort, we have made clear that punitive damages are available only when the claimant "suffered a harm distinct from the breach of contract action and attributable solely to the alleged tortious conduct." *Shimola v. Nationwide Ins. Co.*, 25 Ohio St.3d 84, 86, 495 N.E.2d 391 (1986). Thus, punitive damages " 'are recoverable for a tort committed in connection with, but independently of, the breach of contract, where the essentials of an award of such damages are otherwise present, the allowance of such damages being for the tort and not for the breach of contract.' " *Saberton v. Greenwald*, 146 Ohio St. 414, 426, 66 N.E.2d 224 (1946), quoting 25 Corpus Juris Secundum, Damages, Section 120, at 716.

**{¶ 38}** We recently applied this principle in *Sivit v. Village Green of Beachwood, L.P.*, 143 Ohio St.3d 168, 2015-Ohio-1193, 35 N.E.3d 508. In that case, a fire caused by negligent construction and maintenance destroyed an apartment building; the jury awarded the tenants punitive damages, and the trial court declined to apply the statutory cap on punitive damages provided by R.C. 2315.21. *Sivit v. Village Green of Beachwood, L.P.*, 8th Dist. Cuyahoga No. 98401, 2013-Ohio-103, ¶ 66. The court of appeals affirmed, explaining that the statutory cap applies only to a "tort action," which pursuant to R.C. 2315.21(A)(1), "does not include a civil action for damages for a breach of contract or another agreement between persons." The appellate court reasoned that the cap did not apply to the tenants' award, because "Landlord-Tenant agreements are contractual in nature and injurious conduct arising out of the contract is not a tort action." *Id*. at ¶ 59.

**{¶ 39}** We reversed that determination and explained that although the tenants' claims sounded both in contract and in tort, punitive damages could be awarded only for the tortious conduct, not for the breach of contract. *Sivit*, 143 Ohio St.3d 168, 2015-Ohio-1193, 35 N.E.3d 508, at ¶ 5. Thus, when a breach of contract involves conduct that also constitutes a tort, punitive damages may be awarded only for the tort, not for the breach, *Saberton* at 426, and any punitive damages awarded are subject to statutory limitations on punitive damages imposed in R.C. 2315.21, *Sivit* at ¶ 5.

**{¶ 40}** Accordingly, punitive damages are not recoverable for the breach of contract claims Lucarell alleged in her amended complaint, including her claim that Nationwide breached its implied contractual duty of good faith and fair dealing.

*Breach of Contract*

**{¶ 41}** A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the breach. *See Natl. City Bank of Cleveland v. Erskine & Sons*, 158 Ohio St. 450, 110 N.E.2d 598 (1953), paragraph one of the syllabus; *Tidewater Fin. Co. v. Cowns*, 197 Ohio App.3d 548, 2011-Ohio-6720, 968 N.E.2d 59, ¶ 12 (1st Dist.); *Carpenter v. Long*, 196 Ohio App.3d 376, 2011-Ohio-5414, 963 N.E.2d 857, ¶ 220 (2d Dist.); *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶ 18 (10th Dist.).

**{¶ 42}** In addition to a contract's express terms, every contract imposes an implied duty of good faith and fair dealing in its performance and enforcement. *See Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 443, 662 N.E.2d 1074 (1996); Restatement of the Law 2d, Contracts, Section 205 (1981); *see also*

R.C. 1301.304. We have recognized that " ' "[g]ood faith" is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could have not been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.' " *Ed Schory & Sons* at 443-444, quoting *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir.1990).

**{¶ 43}** As a comment in the Restatement explains, "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement, Section 205, comment a. However, we have rejected the contention that a party breaches the implied duty of good faith and fair dealing merely by seeking to enforce the contract or by acting as permitted by its express terms. *Ed Schory & Sons* at 443-444; *see also Wendy's Internatl., Inc. v. Saverin*, 337 Fed.Appx. 471, 477 (6th Cir.2009) (applying Ohio law); 23 Lord, *Williston on Contracts*, Section 63:22 (4th Ed.2003). Thus, there is no violation of the implied duty unless there is a breach of a specific obligation imposed by the contract, such as one that permits a party to exercise discretion in performing a contractual duty or in rejecting the other party's performance. *See Ed Schory & Sons* at 443-444; 23 Lord, Section 63:22; Restatement, Section 205, comment e.

**{¶ 44}** Courts in Ohio have therefore recognized that there is no independent cause of action for breach of the implied duty of good faith and fair dealing apart from a breach of the underlying contract. *E.g.*, *Patrick v. CitiMortgage, Inc.*, 676 Fed.Appx. 573, 577 (6th Cir.2017); *Macklin v. Citimortgage, Inc.*, 8th Dist. Cuyahoga No. 101077, 2015-Ohio-97, ¶ 14; *Interstate Gas Supply, Inc. v. Calex Corp.*, 10th Dist. Franklin No. 04AP-980, 2006-Ohio-638, ¶ 98.

**{¶ 45}** Although Nationwide asserted in the court of appeals that Lucarell failed to prove any breach of contract, that court concluded that it could not review the error assigned because Nationwide had failed to request special interrogatories to determine whether the jury found a breach of an express term of the contracts, the implied duty, or both.

**{¶ 46}** Contrary to the view of the court of appeals, this assignment of error is reviewable. It is true that when there are two causes of action raising distinct issues and the jury returns a general verdict not tested by special interrogatories, a reviewing court will presume that the jury resolved all issues in favor of the successful party. *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 185, 729 N.E.2d 726 (2000). According to this "two-issue rule," if one issue has been tried free from error, any error relating to the second issue is deemed harmless as a matter of law. *Id.*; *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 460, 709 N.E.2d 162 (1999) ("The two-issue rule is in essence a rule concerned with prejudice").

**{¶ 47}** However, the court of appeals erred in applying the two-issue rule. Because there is no separate cause of action for breach of the implied duty of good faith and fair dealing, Lucarell's contract claims fail unless she proved Nationwide breached specific obligations imposed by the contracts. The court of appeals was therefore obligated to determine whether sufficient evidence supported the jury's verdicts on the contract claims, and its failure to conduct this review violates App.R. 12 and is reversible error.

*Defenses to the Releases*

**{¶ 48}** A release is an absolute bar to a later action on any claim encompassed within it, absent a showing of fraud, duress, or other wrongful conduct in procuring it. *See Haller v. Borror Corp.*, 50 Ohio St.3d 10, 13, 552 N.E.2d 207 (1990); *O'Donnel v. Langdon*, 170 Ohio St. 528, 530, 166 N.E.2d 756 (1960), *overruled on other grounds, Sloan v. Std. Oil Co.*, 177 Ohio St. 149, 203 N.E.2d 237 (1964), paragraph one of the syllabus; 29 Lord, Section 73:14, at 42. However, a release procured by fraud in the inducement or under duress is "voidable only, and can be contested only after a return or tender of consideration." *Haller* at 14.

Duress

**{¶ 49}** Avoiding a release on the basis that it was procured through duress requires proof of coercion by the other party to the contract. *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 246, 551 N.E.2d 1249 (1990). But as the court explained in *Blodgett*, "[a] person who claims to have been a victim of economic duress must show that he or she was subjected to '* * * a wrongful or unlawful act or threat, * * * ' and that it '* * * deprive[d] the victim of his unfettered will.' " (Ellipses and bracket in *Blodgett*.) *Id*. at 246, quoting 13 *Williston on Contracts*, Section 1617, at 704 (3d Ed.1970). "The real and ultimate fact to be determined in every case is whether the party affected really had a choice; whether he had his freedom of exercising his will." *Tallmadge v. Robinson*, 158 Ohio St. 333, 340, 109 N.E.2d 496 (1952).

**{¶ 50}** The court has not yet definitively set forth the standard of proof that applies when a party seeks to avoid a release on the grounds that it was procured through duress. It is apparent that we require clear and convincing evidence to establish other contract defenses such as fraudulent misrepresentation (*see Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph two of the syllabus) and mutual mistake (*see Sloan* at paragraph one of the syllabus). In *Std. Sanitary Mfg. Co. v. George*, 118 Ohio St. 564, 162 N.E. 35 (1928), we suggested that clear and convincing evidence should be required to prove duress, *id*. at 575.

**{¶ 51}** Our review further reveals that the prevailing rule in other jurisdictions is that the party asserting duress has the burden of proving it by clear and convincing evidence. *E.g., Country Cove Dev., Inc. v. May*, 143 Idaho 595, 599, 150 P.3d 288 (2006); *Hawken Northwest, Inc. v. State Dept. of Administration*, 76 P.3d 371, 377 (Alaska 2003); *Berardi v. Meadowbrook Mall Co.*, 212 W.Va. 377, 382, 572 S.E.2d 900 (2002); *Holland v. FEM Elec. Assn., Inc.*, 2001 S.D. 143, 637 N.W.2d 717, ¶ 10; *Isaac v. First Natl. Bank of Maryland, D.C.*, 647 A.2d 1159, 1162-1163 (D.C.1994); *B & W Const. Co. v. N.C. Ribble Co.*, 105 N.M. 448, 450, 734 P.2d 226 (1987); *Wurtz v. Fleischman*, 97 Wis.2d 100, 110-111, 293 N.W.2d 155 (1980); *Pagano v. Walker*, 539 P.2d 452, 454 (Utah 1975); *Donner v. Donner*, 46 Wash.2d 130, 132, 278 P.2d 780 (1955); 28 Lord, Section 71:10, at 460.

**{¶ 52}** Accordingly, today we hold that a party seeking to avoid a release of liability on the basis that it was procured under duress is required to prove duress by clear and convincing evidence. The trial court therefore erred in giving an instruction that allowed the jury to find duress by a preponderance of the evidence rather than by clear and convincing evidence.

Prevention of Performance

**{¶ 53}** Although the court of appeals acknowledged that the trial court's duress instruction "may have been in error," 2015-Ohio-5286, 44 N.E.3d 319, ¶ 80, it noted that the jury had also been instructed that Lucarell would be excused from performing under the contracts if Nationwide had prevented her performance. And because Nationwide did not seek special interrogatories to indicate which of these defenses the jury resolved in Lucarell's favor, the appellate court again applied the two-issue rule and presumed that the jury found that prevention of performance allowed Lucarell to avoid the releases. This reasoning confuses two legal doctrines.

**{¶ 54}** The prevention of performance doctrine provides that a party who prevents another from performing its contractual obligations cannot rely on that failure of performance to assert breach of contract. *Suter v. Farmers' Fertilizer Co.*, 100 Ohio St. 403, 126 N.E. 304 (1919), paragraph four of the syllabus; *Buckley Towers Condominium, Inc. v. QBE Ins. Corp.*, 395 Fed.Appx. 659, 662 (11th Cir.2010); 13 Lord, Section 39:3, at 569-571. "[T]he doctrine is based on the long-established principle of law that a party should not be able to take advantage of its own wrongful act." 13 Lord, Section 39:6, at 582.

**{¶ 55}** The other legal doctrine involves a release of liability. "[A] release is a binding agreement between the parties under which at least one party to the agreement relinquishes an existing claim or cause of action against another party to the agreement * * *." 29 Lord, *Williston on Contracts*, Section 73:1, at 8 (4th Ed.2003). It is effective on execution and delivery, discharging the duty owed to the releasor either immediately or upon occurrence of a condition. Restatement of the Law 2d, Contracts, Section 284, at 392 (1981); *see also Leonard v. Kebler's Admr.*, 50 Ohio St. 444, 453, 34 N.E. 659 (1893), quoting 1 Daniel, *Negotiable Instruments*, Section 63, at 81 (4th Ed.1891) (" 'Delivery is the final step necessary to perfect the existence of any written contract' "); *Hartford Fire Ins. Co. v. Whitman*, 75 Ohio St. 312, 319, 79 N.E. 459 (1906) ("It is a general rule that delivery is necessary to the validity of a written instrument").

**{¶ 56}** Thus, when a party signs and delivers a release, that party relinquishes all claims encompassed within it and has no other contractual or other duties to perform. The analysis of the court of appeals that the jury in this case could have found prevention of performance to be a defense to a release is therefore erroneous as a matter of law—no further performance by Lucarell was needed for the releases she signed to be effective.

**{¶ 57}** For this reason, the appellate court also erred in applying the two-issue rule and in failing to determine whether the erroneous jury instruction constitutes reversible error. An error in instructing the jury is reversible only if "the jury charge was so misleading and prejudicial as to result in an erroneous verdict," *Hayward v. Summa Health Sys./Akron City Hosp.*, 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶ 25, based on a " 'thorough review of the entire transcript of proceedings before the trial court,' " *id.*, quoting *Hampel*, 89 Ohio St.3d at 186, 729 N.E.2d 726.

**{¶ 58}** The only way to hold that the trial court's instruction was not prejudicial, however, would be to find that Lucarell demonstrated by clear and convincing evidence that she had signed the releases as a result of duress. But here, there is scant evidence proving duress. Importantly, in signing the Modified AE Program Agreement, she expressly "represent[ed] and warrant[ed] to Nationwide that [she] has made the decision to continue in the AE Program while under no economic duress," and she agreed that she "has entered this Modification voluntarily and of [her] own accord."

**{¶ 59}** And although she testified that in June 2008 Nationwide had threatened to withhold her next cash infusion if she did not sign the Modified AE Program Agreement, she received the cash infusion the next month, and in any case, the cash infusions—which totaled $214,922 from February 2007 to September 2008—were not yet required by any contract but rather were good faith advances on money that Lucarell would be entitled to receive only after she signed the Modified AE Program Agreement.

**{¶ 60}** In light of the limited evidence in the record, the failure to instruct the jury on the heightened standard of proof was prejudicial. Accordingly, if the court of appeals holds that the trial court did not err in allowing the contract claims to go to the jury, a new trial is required based upon the erroneous jury instruction on duress.

*Fraud*

**{¶ 61}** The elements of a fraud claim are stated in *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170:

> "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) 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, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the

> representation or concealment, and (f) a resulting injury proximately caused by the reliance."

*Id*. at ¶ 47, quoting *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

**{¶ 62}** Here, the court of appeals concluded that there were triable issues of fraud based on evidence that Nationwide led Lucarell to believe she would earn $200,000 a year in commissions when it knew or should have known that its AE program agents were failing, that sales managers had a financial incentive to recruit new program agents, and that someone fraudulently altered Lucarell's loan application to mislead the bank into giving her a loan. 2015-Ohio-5286, 44 N.E.3d 319, at ¶ 172.

**{¶ 63}** However, a party cannot predicate fraud on predictions or projections relating to future performance; rather, we have long recognized that to be actionable, a misrepresentation must involve a matter of fact that relates to the past or present. *See Block v. Block*, 165 Ohio St. 365, 377, 135 N.E.2d 857 (1956); *Armstrong v. Karshner*, 47 Ohio St. 276, 24 N.E. 897 (1890), paragraph one of the syllabus. Thus, a pro forma is "not * * * an actionable representation because it is a prediction about the future, not a statement about the past or even the present." *Bye v. Nationwide Mut. Ins. Co.*, 733 F.Supp.2d 805, 819 (E.D.Mich.2010); *see also Rorig v. Thiemann*, S.D.Ohio No. 1:05CV801, 2007 WL 2071909, *7 (July 17, 2007) ("a proforma by definition represents figures based on financial assumptions or projections").

**{¶ 64}** Further, while Lucarell asserted that her sales manager showed her a sample pro forma indicating that she could earn an average of $200,000 in commissions and revenue a year over five years, the pro forma included a disclaimer that Nationwide could not guarantee any results, and Lucarell testified that she understood that the pro forma contained "projections" of what she could be earning, not a "promise or guarantee." Lucarell therefore could not reasonably rely on the pro forma because predictions of future financial performance are speculative and subject to changing economic conditions. *See Bye* at 822 (fraud claim based on pro forma projections "is ultimately foreclosed by the fact that any reliance * * * on such representations * * * was unreasonable").

**{¶ 65}** In addition, there is no evidence that Nationwide knew its program agents were failing when it recruited her in 2005; rather, the testimony at trial indicated that the program agents were not struggling initially because "they were relatively well capitalized, but as time went by, they started to struggle financially." A witness testified that it was in 2006, after Lucarell's recruitment, that Nationwide "became aware of perceived shortcomings in the design of the program." Thus, testimony that sales managers had an incentive to recruit new program agents cannot be the basis for a claim for fraudulent misrepresentation, and in any case, witnesses explained that Nationwide wanted the program agents to succeed and build viable insurance businesses.

**{¶ 66}** Lastly, the effort by Lucarell to assert fraud based on a representation made to a third party but not to her does not state a cause of action for fraud. *See Wells v. Cook*, 16 Ohio St. 67, 74 (1865). Although Lucarell asserts that the altering of her loan application "was in furtherance of Nationwide's fraudulent scheme," she failed to prove that any fraudulent misrepresentation regarding that application had been made to her. The trial court therefore properly directed a verdict on Lucarell's fraud claim.

## Conclusion

**{¶ 67}** We reaffirm and follow the common law rule articulated in *Ketcham*: "Punitive damages are not recoverable in an action for breach of contract." 104 Ohio St. 372, 136 N.E. 145, at paragraph two of the syllabus. Even if the conduct constituting a breach of contract is also a tort, punitive damages may be awarded only for the tort and are subject to the statutory limitations provided in R.C.

2315.21. Thus, punitive damages are not recoverable on a claim for breach of contract, including a claim for breach of the implied duty of good faith and fair dealing.

**{¶ 68}** We clarify today that the doctrine of prevention of performance is separate from and not a defense to a release of liability. An unconditional release of liability becomes effective upon execution and delivery and bars any claims encompassed within it, unless it was procured by fraud, duress, or other wrongful conduct. A claimant asserting duress is required to prove duress by clear and convincing evidence. Although the prevention of performance doctrine precludes a party who prevents another from performing its contractual obligations from relying on that failure of performance to assert a claim for breach of contract, it has nothing to do with a release of liability, which requires no further performance by the releasor to be effective. Lastly, a fraud claim cannot be predicated on predictions or projections relating to future performance or on misrepresentations made to third parties.

**{¶ 69}** For these reasons, we reverse the judgment of the court of appeals that affirmed the trial court's judgment on the breach of contract claims and on the fraud claim, and we reinstate the directed verdict on the fraud claim entered by the trial court. We further recognize that Nationwide did not appeal the judgment on the invasion of privacy claim, its counterclaim on the note, or the award of attorney's fees and costs, and Lucarell did not appeal the dismissal of her constructive discharge and retaliation claims. Accordingly, those matters are not before us, and we make no ruling in connection with those claims.

**{¶ 70}** The matter is remanded to the court of appeals for further proceedings consistent with this opinion.

Judgment accordingly.

O'CONNOR, C.J., and KENNEDY, FRENCH, FISCHER, and DEWINE, JJ., concur.

O'NEILL, J., concurs that punitive damages are not recoverable in an action for breach of contract and dissents from the remainder of the opinion and the judgment.

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Randy J. Hart, A. Scott Fromson, and Patricia A. Morris, for appellee.

Baker & Hostetler L.L.P., Thomas D. Warren, and G. Karl Fanter; Jones Day and Yvette McGee Brown; and Bricker & Eckler L.L.P., and Quintin Lindsmith, for appellant.

Vorys, Sater, Seymour and Pease, L.L.P., Thomas E. Szykowny, and Rebecca E. Wilson, urging reversal for amici curiae Ohio Insurance Institute, Ohio Chamber of Commerce, Ohio Alliance for Civil Justice, Ohio Manufacturers' Association, and National Association of Mutual Insurance Companies.

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**SLIP OPINION NO. 2018-OHIO-8**

**ALFORD ET AL., APPELLANTS, *v.* COLLINS-MCGREGOR OPERATING COMPANY ET AL., APPELLEES.**

**[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Alford v. Collins-McGregor Operating Co.*, Slip Opinion No. 2018-Ohio-8.]**

*Oil and gas—Leases—Action seeking partial termination of lease for lessees' failure to explore or drill at depths below those currently being exploited—Motion to dismiss for failure to state claim properly granted—Ohio does not recognize implied covenant to explore further.*

(No. 2016-1281—Submitted September 26, 2017—Decided January 3, 2018.)

APPEAL from the Court of Appeals for Washington County, No. 16CA9, 2016-Ohio-5082.

**O'CONNOR, C.J.**

## I. Introduction

**{¶ 1}** Appellants, Linda Griffith Alford, George Alford Jr., Bershelle Alford Giambattista, Joseph Alford, Judith Hanlon Farnsworth, Donna R. Hanlon, and James C. Eutzler (collectively, the "Landowners"), sued appellees, Collins-McGregor Operating Company and Winston Oil Company (collectively, "Collins-McGregor"), seeking the partial termination of an oil and gas lease. The trial court granted Collins-McGregor's motion to dismiss for failure to state a claim and the Fourth District Court of Appeals affirmed.

**{¶ 2}** This appeal requires us to consider whether the Landowners' claim for breach of the implied covenant to explore further is cognizable in Ohio, and if so, the availability of partial horizontal forfeiture as a remedy for such a breach. We conclude that Ohio does not recognize an implied covenant to explore further separate and apart from the implied covenant of reasonable development. We therefore need not reach the issue of remedy.

## II. Relevant Background

**{¶ 3}** The Landowners hold interests in approximately 74 acres of land in Washington County, not far from the Ohio River. The land is subject to an oil and gas lease entered into on September 16, 1980, between the owners of the property at that time and Collins-McGregor.[1] "[T]he sole and only purpose" of the lease is to permit "mining and operating for oil and gas and laying pipe lines, and building tanks, powers, stations, and structures thereon, to produce, save and take care of said products." In return for permission to mine the land, Collins-McGregor committed to make royalty payments based on the amount of gas produced from the land and to deliver a portion of the oil produced from the land to the lessors.

[1] Appellee Winston Oil Company was not a party to the original lease. It obtained its interest in the lease by way of an assignment in 1992.

**{¶ 4}** The lease provides that it "shall remain in force for a term of One (1) years from [the effective] date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." It is silent as to certain aspects of drilling and production. For example, the lease does not require production from any specific number of wells or from any particular depth. The lease also does not disclaim the application of any implied covenants.

**{¶ 5}** A well was drilled in 1981 and has produced oil and gas in paying quantities since then from a formation called the Gordon Sand. To date there has not been any production from the land at any depths below the Gordon Sand. The Landowners contend, however, that exploration and production of oil and gas have been occurring near their property from below the Gordon Sand—specifically, from the Marcellus and Utica formations—but Collins-McGregor has failed to explore whether production can be obtained from those deep formations because it does not have the equipment or financial resources required to do so.

**{¶ 6}** On November 20, 2015, the Landowners filed an amended complaint against Collins-McGregor alleging that it has improperly failed to explore or drill for oil at depths below the Gordon Sand. They sought a judgment that the portion of the lease covering depths below the Gordon Sand has terminated because it has either expired or been abandoned and that Collins-McGregor has breached numerous implied covenants. They also sought a judgment quieting title in the Landowners' favor as to the depths below the Gordon Sand. The Landowners have not sought to terminate Collins-McGregor's rights under the lease with respect to the well that has produced oil from 1981 to the present.

**{¶ 7}** Among the implied covenants that the Landowners claim Collins-McGregor has breached are the implied covenant of reasonable development and the implied covenant to explore further. Ultimately, the remedy sought by the Landowners is partial forfeiture of Collins-McGregor's rights under the lease such that all rights to explore for, develop, and exploit resources from depths below the

Gordon Sand revert to the Landowners. Collins-McGregor describes this as horizontal forfeiture (i.e., forfeiture of the right to drill to a particular horizontal layer or formation beneath the surface).

**{¶ 8}** Collins-McGregor moved to dismiss under Civ.R. 12(B)(6), arguing that Ohio law does not recognize the remedy of horizontal forfeiture. The trial court agreed and dismissed the case, holding that under the plain terms of the lease, the still-productive well drilled in 1981 was sufficient to hold the lease across all acres and at all depths. The Fourth District Court of Appeals affirmed, holding that Ohio law does not recognize partial horizontal forfeiture of oil and gas rights as an available form of relief.

**{¶ 9}** We accepted the Landowners' discretionary appeal.

## III. Analysis

**{¶ 10}** We review de novo a decision granting a motion to dismiss under Civ.R. 12(B)(6). *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. In conducting this review, we accept as true all factual allegations in the complaint. *Id.* "[T]hose allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor." *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12. To grant the motion, "it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Id.*

### A. The Implied Covenant to Explore Further

**{¶ 11}** We begin by addressing the Landowners' second proposition. They argue that the appellate court erred by affirming the dismissal of their amended complaint for failure to state a claim because they alleged a breach of the implied covenant to explore further, and a breach of that covenant may be remedied by horizontal forfeiture. Collins-McGregor raises two principal arguments in response. It argues that Ohio law does not recognize the implied covenant to explore further, and even if it did, partial horizontal forfeiture is not an available remedy for a breach of an implied covenant in an oil and gas lease. We agree with Collins-McGregor that Ohio does not recognize an implied covenant to explore further.

**{¶ 12}** Oil and gas leases are contracts, and therefore, " '[t]he rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument.' " *Lutz v. Chesapeake Appalachia, L.L.C.*, 148 Ohio St.3d 524, 2016-Ohio-7549, 71 N.E.3d 1010, ¶ 9, quoting *Harris v. Ohio Oil Co.,* 57 Ohio St. 118, 129, 48 N.E. 502 (1897). "It is a well-known and established principle of contract interpretation that '[c]ontracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language.' " *Lutz*, quoting *Skivolocki v. E. Ohio Gas Co.,* 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. Notwithstanding this principle, we have also long held that oil and gas leases are ordinarily subject to an implied covenant to reasonably develop the land. *See Harris* at paragraph one of the syllabus (recognizing "an implied covenant on part of the lessee that he will drill and operate such number of oil wells on the lands as would be ordinarily required for the production of oil contained in such lands, and afford ordinary protection to the lines").

**{¶ 13}** The parties can prevent application of the implied covenant of reasonable development by including in the lease "express provisions to the contrary." *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph two of the syllabus. For example, the parties can include a general disclaimer of implied covenants. *E.g., State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals*, 145 Ohio St.3d 180, 2016-Ohio-178, 47 N.E.3d 836, ¶ 32, 33 (holding that the parties' disclaimer prevented application of an implied covenant). The parties can also describe the development of the land sought by the parties in the terms of the lease itself. *See Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 133, 443 N.E.2d 504 (1983) ("Thus, where a lease fails to contain any specific reference to the timeliness of development, the law will infer a duty to operate with reasonable diligence"); *see also Kachelmacher v. Laird*, 92 Ohio St. 324, 110 N.E. 933 (1915), paragraph one of the syllabus ("There can be no implied covenants in a contract in relation to any matter that is specifically covered by the written terms of the contract itself").

**{¶ 14}** Here, the lease does not contain a disclaimer of implied covenants, nor does it otherwise address whether any specific number of wells must be drilled or the depth to which any wells must be drilled. As a result, at least with respect to the matters at issue in this case, the lease is subject to the implied covenant of reasonable development.

**{¶ 15}** In this proposition, the Landowners raise the implied covenant to explore further, a covenant we have not before considered. The Landowners cite decisions of the Fifth Appellate District, which they claim have recognized the covenant. *See Am. Energy Servs., Inc. v. Lekan*, 75 Ohio App.3d 205, 215, 598 N.E.2d 1315 (5th Dist.1992); *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, ¶ 35; *Mauger v. Positron Energy Resources, Inc.*, 5th Dist. Morgan No. 14AP0001, 2014-Ohio-4613, ¶ 65. In the Landowners' view, recognition of the implied covenant to explore further would support the purpose of the lease by encouraging exploration and development of mining activities for the mutual profit of the parties.

**{¶ 16}** Collins-McGregor argues that although several cases from the Fifth District include the covenant to explore further in a list of commonly accepted covenants, none actually applies the covenant. Importantly, Collins-McGregor argues, these cases do not provide any discussion of what should guide any consideration of a claim that the implied covenant to explore further has been breached. Collins-McGregor also argues that there is no need for the covenant because the covenant of reasonable development provides sufficient protection to landowners concerning the productive use of the land. Finally, Collins-McGregor points to decisions from the Texas and Oklahoma Supreme Courts, both of which have specifically declined to recognize an independent implied covenant to explore further. *See Sun Exploration & Prod. Co. v. Jackson*, 783 S.W.2d 202 (Tex.1989); *Mitchell v. Amerada Hess Corp.*, 638 P.2d 441 (Okla.1981). Both courts held there was no implied covenant to explore further separate and apart from the implied covenant of reasonable development. *See Sun Exploration* at 204; *Mitchell* at 449.

**{¶ 17}** We agree with Collins-McGregor. Although the Landowners have an interest in the development of the land, that interest is sufficiently protected by the implied covenant of reasonable development and does not require recognition of a new implied covenant to explore further.

**{¶ 18}** The purpose of the implied covenant of reasonable development is to protect the lessor's interest in the lease, which is to obtain production and, hence, profits once the right to drill has been granted to the lessee. *Summers Oil and Gas*, Section 17:10 (3d Ed.2008). This protection is needed because oil and gas leases typically provide, as the one here does, that the lessor's compensation is a royalty payment based on the production of oil from the land. *Id.*; *see also Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 16, quoting 1 Brown, Brown & Gillaspia, *The Law of Gas and Oil Leases*, Section 6.01 (2d Ed.2014) (" 'The principal or basic consideration for a [mineral rights] lease is the agreement by the lessee to develop the premises for oil and gas and pay royalties thereon to the lessor' ").

**{¶ 19}** The first case in which we recognized the covenant reflected this purpose. In *Harris*, 57 Ohio St. 118, 126, 48 N.E. 502, the lessor was entitled to receive a royalty payment based on the amount of oil produced from the land. When wells on adjacent land presented a risk of draining the oil from under the lessor's property, the lessor demanded that the lessee drill additional wells. The lessee refused and then sued to prevent the lessor from drilling new wells himself.

We agreed with the lessor, holding that "under an oil lease which is silent as to the number of wells to be drilled, there is an implied covenant that the lessee shall reasonably develop the lands, and reasonably protect the lines." *Id.* at 127.

**{¶ 20}** More recently, we have applied the implied covenant of reasonable development to protect the lessor's interest in production even when the lessor receives annual payments under the lease as advance payments of royalties. In *Ionno*, 2 Ohio St.3d 131, 443 N.E.2d 504, the lease provided that annual payments would be credited against future royalties, and the lessees argued that these payments prevented application of the covenant because the lease gave the lessees the freedom to choose whether to develop the land as long as the payments are made. We disagreed. We held that despite the annual advance-royalty payments, "there is manifestly an implied covenant on the part of the lessees that they will work the land with ordinary diligence, not simply for their own advantage and profit, but also so that lessors may secure the actual consideration for the lease, *i.e.*, the production of minerals and the payment of a royalty on the minerals mined." *Id.* at 134. We recognized that if annual payments were deemed to be a sufficient substitute for timely development, we would "reward mere speculation without development, effort, or expenditure on the part of the lessees" and "allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum." *Id.*

**{¶ 21}** On the other hand, the implied covenant of reasonable development is not entirely one-sided in favor of landowners. We have recognized that lessees face various risks in any oil and gas lease, including substantial upfront investments with an uncertain potential for returns. We have therefore held that the covenant imposes on the lessee only the obligation to act as a reasonably prudent operator would as it develops the land under the lease. *See Harris*, 57 Ohio St. at 127, 48 N.E. 502 ("The development and protection of lines which is thus implied when the lease is silent is such as is usually found in the same business of an ordinarily prudent man—neither the highest nor lowest, but about medium or average").

Whether the lessee has breached the implied covenant of reasonable development should be determined by the facts and circumstances of each particular case. *See Summers Oil and Gas*, Section 17:15.

**{¶ 22}** In light of this, the Landowners' interests in exploration of deep formations below the Gordon Sand are sufficiently protected by the implied covenant of reasonable development. We therefore decline to recognize a separate covenant to explore further.

**{¶ 23}** In this regard, we agree with the Oklahoma Supreme Court that recognition of a separate implied covenant to explore further would not support the overarching purpose of an oil and gas lease. As that court stated, "the profit motive [is] an instrumental force in oil and gas leases on behalf of both lessee and lessor," and to fail to recognize the profit motive "is to ignore the very essence of the contract." *Mitchell*, 638 P.2d at 447. The implied covenant of reasonable development furthers this purpose by focusing on all facts and circumstances relevant to development, whether they relate to exploration—for example, the costs of exploration and likelihood that exploration will result in production at or above a particular level—or to some other aspect of development. As the Oklahoma Supreme Court put it, the issue is whether a prudent operator would further develop the land "having due consideration for the interest of both the lessee and lessor, considering all factors, including what is known about the market, the geology and adjoining activity." *Id.* Recognizing a separate implied covenant to explore further would prove unhelpful at best, as it would focus on just a small subset of factors relevant to the overall profitability of development to the lessor and the lessee.

**{¶ 24}** We also note that the implied covenant of reasonable development is well suited to address the primary driver of the Landowners' interests here, namely, the emergence of new drilling technologies permitting production from deep strata that could not be obtained before. We need not address that issue here, however, because the Landowners have raised only the implied covenant to explore further in this proposition, and we express no opinion with respect to how a prudent operator would or would not employ new deep-drilling technologies. Finally, as noted above, to the extent the parties wish to address exploration or the use of new technologies in the terms of the lease itself, they are of course free to do so.

**{¶ 25}** We therefore hold that under Ohio law concerning oil and gas leases, there is no implied covenant to explore further separate and apart from the implied covenant of reasonable development. As a result, it is unnecessary for us to address the Landowners' second argument concerning the availability of partial horizontal forfeiture as a remedy, and we express no opinion on the appellate court's decision on that issue to the extent it applies to the implied covenants raised by the Landowners other than the implied covenant to explore further.

### B. The Law Applicable to an Oil and Gas Lease

**{¶ 26}** The Landowners' first proposition is that the law applicable to one form of oil and gas lease may not be, and generally is not applicable to another and different form. This proposition is uncontroversial and simply appears to restate what this court has recognized since 1897: "The rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form." *Harris*, 57 Ohio St. at 129, 48 N.E. 502.

## IV. Conclusion

**{¶ 27}** For these reasons, we affirm the judgment of the court of appeals dismissing the Landowners' complaint for failure to state a claim.

Judgment affirmed.

O'DONNELL, KENNEDY, FRENCH, FISCHER, and DEWINE, JJ., concur.

O'NEILL, J., dissents.

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Scullin & Cunning, L.L.C., and Sean R. Scullin, for appellants.

Geiger, Teeple, Robinson & McElwee, P.L.L.C., and Bruce Smith, for appellees.

Porter, Wright, Morris & Arthur, L.L.P., Christopher J. Baronzzi, L. Bradfield Hughes, and Ryan T. Steele, urging affirmance for amicus curiae American Petroleum Institute.

Vorys, Sater, Seymour & Pease, L.L.P., Timothy B. McGranor, and Gregory D. Russell, urging affirmance for amici curiae Ohio Oil and Gas Association and Southeastern Ohio Oil and Gas Association.

[Cite as **_Brannon v. Edman_, 2018-Ohio-70.**]

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

| | |
|---|---|
| MICHAEL BRANNON<br><br>Appellant<br><br>v.<br><br>DERRICK EDMAN, et al.<br><br>Appellees | C.A. No. 28544<br><br>APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2016-10-4593 |

DECISION AND JOURNAL ENTRY

Dated: January 10, 2018

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CARR, Judge.

**{¶1}** Plaintiff-Appellant Michael Brannon appeals from the judgment of the Summit County Court of Common Pleas dismissing his complaint. This Court reverses.

I.

**{¶2}** In October 2016, Mr. Brannon filed a complaint against Defendants-Appellees Derrick and Nancy Edman ("the Edmans") asserting claims for breach of contract and fraud concerning an alleged contract for the sale of real property. The Edmans filed a motion to dismiss asserting that the breach of contract claim violated the statute of frauds and that the fraud claim was not stated with particularity. Thereafter, Mr. Brannon moved to amend the complaint asserting that, while he believed the complaint would withstand a motion to dismiss, the amended complaint would provide more specificity and resolve the issues raised by the Edmans. In addition, he filed a response to the motion to dismiss arguing that the complaint contained allegations of partial performance which removed the contract from the statute of frauds and that he had pleaded fraud with the necessary particularity. Without specifically referring to Mr. Brannon's motion to amend or his fraud claim, the trial court granted the Edmans' motion to dismiss the complaint. The trial court appeared to conclude that the statute of frauds was applicable and that Mr. Brannon's failure to attach a written contract to the complaint warranted dismissal of the complaint.

**{¶3}** Mr. Brannon has appealed, raising three assignments of error for our review, which will be addressed out of sequence to facilitate our analysis.

II.

**ASSIGNMENT OF ERROR II**

THE TRIAL COURT ERRED BY GRANTING THE EDMANS' MOTION TO DISMISS BECAUSE BRANNON'S ALLEGATIONS EXHIBITED PART PERFORMANCE BY BRANNON AND PART PERFORMANCE OF AN ORAL AGREEMENT TO TRANSFER REAL PROPERTY SHOULD WITHSTAND SUCH A DISMISSAL MOTION.

**{¶4}** Mr. Brannon argues in his second assignment of error that the trial court erred in dismissing the complaint because the allegations of the complaint supported that Mr. Brannon partially performed the contract, thereby removing the contract from the statute of frauds.

**{¶5}** "An appellate court reviews a trial court order granting a motion to dismiss pursuant to Civ.R. 12(B)(6) under a de novo standard of review." *Hudson v. Akron*, 9th Dist. Summit No. 28011, 2017-Ohio-7590, ¶ 8, citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4632, ¶ 5. "In reviewing whether a motion to dismiss should be granted, an appellate court must accept as true all factual allegations in the complaint and all reasonable inferences must be drawn in favor of the nonmoving party." *Hudson* at ¶ 9, citing *Rossford* at ¶ 5. "To prevail on a Civ.R. 12(B)(6) motion to dismiss, it must appear on the face of the complaint that the plaintiff cannot prove any set of facts that would entitle him to recover." (Internal quotations and citations omitted.) *Hudson* at ¶ 9.

**{¶6}** We begin by noting that the trial court appears to have dismissed the entire complaint on the basis that the statute of frauds prevented Mr. Brannon's recovery. However, the Edmans did not argue in their motion to dismiss that the fraud claim was barred by the statute of frauds. Even if we were to assume that it could be appropriate under these circumstances for the trial court to dismiss the fraud claim on the basis of the statute of frauds, because there are allegations of partial performance that would remove the agreement from the application of the statute of frauds, dismissal on that basis was error, as will be discussed below.

**{¶7}** In their motion to dismiss, the Edmans argued that Mr. Brannon's breach of contract claim was barred by the provisions of the statute of frauds that require that an agreement concerning the transfer of an interest of land be in writing and signed by the party to be charged as Mr. Brannon's complaint failed to allege the existence of a written agreement. Mr. Brannon opposed the motion to dismiss arguing that the court could enforce the oral agreement to transfer real estate because there were allegations of partial performance that would remove the contract from the application of the statute of frauds.

**{¶8}** The Edmans relied on the following provisions in support of their motion: R.C. 1335.04 and 1335.05. R.C. 1335.04 provides that "[n]o lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law." R.C. 1335.05 provides, in relevant part, that "[n]o action shall be brought whereby to charge the defendant * * * upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them * * * unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

**{¶9}** Pursuant to Civ.R. 8(C), the statute of frauds is an affirmative defense. It is not included in the list of defenses that may be raised in a Civ.R. 12(B) motion to dismiss. *See Jefferson v. Bunting*, 140 Ohio St.3d 62, 2014-Ohio-3074, ¶ 10; *see also* Civ.R. 12(B). "The statute of frauds is, in fact, a fact-sensitive affirmative defense that is riddled with qualifications and exceptions." (Internal quotations and citations omitted.) *OBLH, LLC v. O'Brien*, 11th Dist. Trumbull No. 2015-Ohio-1208, at ¶ 20. Accordingly, a Civ.R. 12(B)(6) motion to dismiss based upon an affirmative defense is only properly granted where the defense is conclusively established from the face of the complaint. *See Jones v. Goodyear Tire & Rubber Co.*, 9th Dist. Summit No. 21724, 2004-Ohio-2821, ¶ 12; *see also OBLH, LLC* at ¶ 20.

**{¶10}** The doctrine of part performance can remove certain agreements from the statute of frauds. *Kiser v. Williams*, 9th Dist. Summit No. 24968, 2010-Ohio-3390, ¶ 15. The Ohio Supreme Court has limited application of the doctrine to "'cases involving the sale or leasing of real estate, wherein there has been a delivery of possession of the real estate in question, and in settlements made upon consideration of marriage, followed by actual marriage.'" *Id.*, quoting *Hodges v. Ettinger*, 127 Ohio St. 460 (1934), syllabus. "The doctrine takes a case out of the operation of the statute of frauds if the acts of the parties * * * are such that it is clearly evident that such acts would not have been done in the absence of a contract and * * * there is no other explanation for the performance of such acts except a contract containing the provisions contended for by the plaintiff." (Internal quotations and citations omitted.) *Kiser* at ¶ 15.

**{¶11}** "There are generally three criteria for establishing part performance: '(1) evidence of a change in who possesses the land, (2) payment of all or part of the consideration for the land, and (3) improvements, alterations or repairs upon the land.'" *Areawide Home Builders, Inc. v. Hershberger*, 9th Dist. Summit No. 18514, 1998 Ohio App. LEXIS 340, *8-9 (Feb. 4, 1998); quoting *Geiger v. Geiger*, 2d Dist. Montgomery No. 13841, 1993 Ohio App. LEXIS 5532, *12 (Nov. 16, 1993). "Generally, the performance of only one of the three acts is insufficient to establish part performance." *Hershberger* at *9.

**{¶12}** First, we note that the complaint itself does not specify whether the agreement was written or oral. Under similar circumstances, at least one court has concluded that the complaint could be interpreted as alleging a valid written contract. *See Maguire v. Nat'l City Bank*, 2d Dist. Montgomery No. 22168, 2007-Ohio-4570, ¶ 16. Thus, there is an argument to be made that the Edmans have not demonstrated that the affirmative defense has been conclusively established. *See id.; see also Jones,* 2004-Ohio-2821, at ¶ 12. Further, that same court concluded that the failure to attach the written agreement or explain its absence did not warrant dismissal. *See Maguire* at ¶ 19.

**{¶13}** However, given that in Mr. Brannon's response to the Edmans' motion to dismiss he appears to concede that the agreement was oral, we will proceed to determine whether sufficient facts were alleged such that Mr. Brannon could possibly succeed on his claim.

**{¶14}** Mr. Brannon's complaint provides as follows:

> 1. Plaintiff and defendants had a contract whereby plaintiff would purchase the real property at 1323 Weiser Ave., Akron, Ohio 44314 from defendants by making monthly payments.
>
> 2. Plaintiff has diligently made the required payments to defendants as agreed.

> 3. Plaintiff attempted to make his Oct.[] 2016 payment to defendants, who refused to accept the payment and also refused to issue plaintiff a receipt for his house payment.
>
> 4. Defendants accepted each of his house payments and credited each against the balance remaining reducing the original amount of $21,000 to $10,474.00.
>
> 5. The agreement between these parties was that plaintiff would continue making his monthly house payments to defendants until the amount was fully paid, including taxes and insurance.
>
> 6. On the date the Oct.[] 2016 payment was due, and plaintiff tried to pay defendants and receive a receipt for his payment, defendants breached the terms of the sales agreement by refusing to take the Oct.[] 2016 payment and refusing to issue a receipt to plaintiff for this house payment.
>
> 7. Subsequently, plaintiff again tried to pay the defendants and get a receipt from defendants, but they refused to grant plaintiff a receipt and take his payment.
>
> 8. Defendants falsely induced plaintiff to make years of house payments to defendants from Oct.[] 2013 and now have breached their contract for this sale and are threatening to evict plaintiff when he is not a tenant but a purchaser of the real property located at 1323 Weiser Ave., Akron, Ohio.
>
> 9. Plaintiff relied upon the agreement of the defendants to sell him the real property and made significant improvements to the house investing time and money relying upon his receiving ownership of this property.
>
> 10. Defendants have breached the agreement with plaintiff.
>
> 11. Defendants intentionally deceived the plaintiff into making monthly payments and making improvements while they never intended to keep their agreement to sell this real property to plaintiff.
>
> 12. As the direct and proximate result of defendants' breach of contract, plaintiff has suffered damages
>
> 13. As the direct and proximate result of defendants' fraud & deception of plaintiff, plaintiff has suffered damages.

**{¶15}** Viewing the allegations in a light most favorable to Mr. Brannon, we conclude they are sufficient to withstand a motion to dismiss based on the affirmative defense of the statute of frauds as there are allegations which if proven would support part performance. In so doing, we remain mindful that "Ohio is a notice-pleading state" and, thus, "the plaintiff need not prove his or her case at the pleading stage." (Internal quotations and citations omitted.) *Chunyo v. Gauntner,* 9th Dist. Summit No. 28346, 2017-Ohio-5555, ¶ 10. From the allegations, one can infer that Mr. Brannon had possession of the premises, that he paid approximately half of the amount due, that he made improvements to the property, and that he relied upon the agreement in making said improvements. *See Kiser*, 2010-Ohio-3390, at ¶ 15; *Hershberger*, 1998 Ohio App. LEXIS 340, at *8-9.

**{¶16}** Thus, the trial court erred in granting Edmans' motion to dismiss based upon the affirmative defense of the statute of frauds. Mr. Brannon's second assignment of error is sustained.

**ASSIGNMENT OF ERROR III**

THE TRIAL COURT ERRED BY GRANTING THE EDMANS' MOTION TO DISMISS BECAUSE BRANNON'S ALLEGATIONS IN THE COMPLAINT[] WERE SUFFICIENT TO GO FORWARD ON FRAUD.

**{¶17}** Mr. Brannon argues in his third assignment of error that the trial court erred in dismissing the fraud count because his factual allegations were sufficiently particular to survive a motion to dismiss.

**{¶18}** The Edmans moved to dismiss the fraud claim on the basis that the allegations were not stated with sufficient particularity. *See* Civ.R. 9(B). However, the trial court did not mention Civ.R. 9(B) in its ruling, and instead, appears to have dismissed the entire complaint on the basis of the statute of frauds. As we have determined previously that the trial court erred in dismissing the complaint on the basis of the statute of frauds, and, as the trial court has not yet considered whether the allegations were stated with sufficient particularity, we are not inclined to resolve this issue in the first instance. *See Savoy v. Kramer,* 9th Dist. Summit No. 26668, 2013-Ohio-3607, ¶ 6; *see also State ex rel. Midview Local School Dist. Bd. of Edn. v. Ohio School

*Facilities Comm.*, 9th Dist. Lorain No. 14CA010596, 2015-Ohio-435, ¶ 8. Therefore, we decline to consider the merits of this assignment of error in the first instance. Upon remand, the trial court can consider the Edmans' arguments on this point and determine whether dismissal is warranted.

**<u>ASSIGNMENT OF ERROR I</u>**

> THE TRIAL COURT ERRED WHEN IT IGNORED AND DID NOT EVEN MENTION IN ITS ORDER GRANTING DISMISSAL OF THE COMPLAINT THAT BRANNON MOVED THE COURT TO AMEND HIS COMPLAINT TO GIVE MORE SPECIFICITY TO THE ALLEGATIONS.

**{¶19}** Mr. Brannon argues in his first assignment of error that the trial court erred in failing to mention his motion to amend his complaint and in thereby implicitly denying his motion.

**{¶20}** In the instant matter, the trial court never explicitly ruled on Mr. Brannon's motion to amend his complaint. "[W]e have generally held that a trial court's failure to rule [on a motion] gives rise to a presumption that the trial court has denied the motion." *GMAC Mtge., LLC v. Jacobs*, 196 Ohio App. 3d. 167, 2011-Ohio-1780, ¶ 9 (9th Dist.). Nonetheless, the absence of an explicit ruling and the lack of analysis also inherently limits this Court's ability to evaluate whether the trial court abused its discretion in denying Mr. Brannon's motion to amend. *See Copen v. CRW, Inc.*, 9th Dist. Wayne No. 15AP0064, 2017-Ohio-349, ¶ 16-17.

**{¶21}** Mr. Brannon sought to amend the complaint to address the Edmans' argument that his fraud claim lacked specificity. The trial court dismissed the entire complaint on the basis that the statute of frauds barred Mr. Brannon's claims. It is unclear whether the trial court denied the motion to amend the complaint because it believed that granting Mr. Brannon's motion would not alter the outcome of the proceedings in light of its conclusion regarding the statute of frauds, or whether the trial court denied the motion for another reason, notwithstanding the preference in the rules for liberally granting said motions. *See id.* Accordingly, as this Court cannot discern the trial court's basis for denying the motion, we remand the matter to the trial court for it to clarify its reasoning. *See MSRK, LLC v. Twinsburg*, 9th Dist. Summit No. 24949, 2012-Ohio-2608, ¶ 10. If the trial court denied the motion solely based on its statute of frauds determination, then the trial court must reconsider the motion.

**{¶22}** Given the specific circumstances of this case, we conclude it is appropriate for the trial court to clarify its basis for denying the motion to amend and reconsider its ruling if necessary. Therefore, Mr. Brannon's first assignment of error is sustained to that extent.

III.

**{¶23}** Mr. Brannon's first assignment of error is sustained to the extent discussed above. Mr. Brannon's second assignment of error is also sustained. We decline to rule on the merits of the third assignment of error at this time as the trial court has yet to consider the issue.

Judgment reversed,
and cause remanded.

---

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

WILLIAM LOVE, II, Attorney at Law, for Appellant.

COLIN MEEKER, Attorney at Law, for Appellees.

**[Cite as *Bayview Loan Servicing, L.L.C. v. Vasko*, 2018-Ohio-38.]**

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

| | |
|---|---|
| Bayview Loan Servicing, LLC | Court of Appeals No. WD-17-029 |
| Appellee | Trial Court No. 2016CV0215 |
| v. | |
| Dane M. Vasko, et al. | **DECISION AND JUDGMENT** |
| Appellant | Decided: January 5, 2018 |

* * * * *

Phillip Barragate and Ashlyn Heider, for appellees.

Troy L. Moore, for appellant.

* * * * *

**SINGER, J.**

**{¶ 1}** This case is before the court on the appeal of appellant, Ballenger & Moore Co., L.P.A., from the March 22, 2017, April 14, 2017 and April 27, 2017 judgments of the Wood County Court of Common Pleas. For the reasons that follow, we affirm the trial court's judgments.

**{¶ 2}** Appellant sets forth the following assignments of error:

> First Assignment of Error: The trial court committed reversible error when it found, as a matter of law as between competing lienholders, that the "effective/priority date" of the modification of a mortgage lien pursuant to Ohio Revised Code § 5301.231 relates back to the same "effective/ priority date" as the original mortgage lien pursuant to Ohio Revised Code § 5301.23.
>
> Second Assignment of Error: The mortgage assignments attached to Plaintiff Bank of America, N.A.'s April 13, 2017 Motion to Substitute party Plaintiff excluded its October 2, 2014 (as recorded) Loan Modification Agreement on the subject property and, therefore, the trial court's April 14, 2017 Order Substituting Plaintiff should be vacated.
>
> Third Assignment of Error: The trial court's April 27, 2017 Final Judgment Entry for Foreclosure exceeded the relief sought by the April 25, 2017 Motion of Substitute Party for Default Judgment and failed to reference, mention, or include (without limitation) Appellant Ballenger & Moore Co., L.P.A.'s October 19, 2012 (as recorded) mortgage on the subject property and Plaintiff Bank of America, N.A.'s October 2, 2014 (as recorded) Loan Modification Agreement on the subject property and, therefore, should be vacated.

## Facts

**{¶ 3}** On February 25, 2008, Dane Vasko executed a promissory note ("the note") in the amount of $157,391.00 in favor of Realty Mortgage Corporation ("Realty") to finance the purchase of property in Millbury, Ohio ("the property"). The loan's interest rate was 5.875 percent and the maturity date was March 1, 2038. The note was secured with a mortgage signed by Vasko. The mortgage was filed on March 4, 2008, with the Wood County Recorder. In addition, an undated allonge was attached to the note, which contained the indorsement "Pay to the Order of" BAC Home Loans Servicing, L.P., fka, Countrywide Home Loans Servicing, L.P. ("BAC"), and was signed by Realty's vice president.

**{¶ 4}** On June 14, 2010, a complaint in foreclosure was filed by BAC against Vasko and others in Wood County Court of Common Pleas, being case No. 2010CV0565. The case was dismissed without prejudice in May 2011.

**{¶ 5}** On March 14, 2012, Bank of America, N.A., Successor by Merger to BAC ("BOA"), filed a complaint in foreclosure against Vasko and others in Wood County Court of Common Pleas, being case No. 2012CV0208. In July 2013, summary judgment was granted to BOA. In December 2014, a joint motion to vacate judgment was filed and an order was entered by the court dismissing the complaint without prejudice.

**{¶ 6}** In August 2012, Vasko executed a Revolving Promissory Note ("revolving note") in the amount of $180,000 in favor of appellant. An Open-End Mortgage on the property was given by Vasko to appellant to secure the revolving note. On October 19, 2012, this mortgage was recorded.

**{¶ 7}** On September 1, 2014, BOA and Vasko entered into a Loan Modification Agreement ("the Modification") which referenced the note and the mortgage previously recorded on March 4, 2008. The principal amount of the Modification was $141,923.11, the interest rate was 4.625 percent, the new maturity date was August 1, 2044, and the monthly mortgage payments were lowered from $995.63 to $815.92. The Modification was recorded on October 2, 2014.

**{¶ 8}** In April 2016, BOA filed a complaint for money judgment and foreclosure against Vasko, appellant and others in Wood County Court of Common Pleas, being case No. 2016CV0215. Appellant filed a counterclaim against BOA and sought a declaration that appellant has the first valid lien on the property.

**{¶ 9}** In January 2017, BOA filed a motion for summary judgment on appellant's counterclaim. Appellant filed a cross-motion for summary judgment. On March 22, 2017, the court granted summary judgment to BOA and found the recording of the Modification did not affect the priority of the original mortgage. In support of its finding, the court relied on *Community Action Commt. of Pike Cty., Inc. v. Maynard*, 4th Dist. Pike No. 02CA695, 2003-Ohio-4312. Appellant appealed; the appeal was dismissed as the judgment was not a final appealable order.

**{¶ 10}** On April 13, 2017, BOA filed a motion to substitute party plaintiff requesting that Bayview Loan Servicing, LLC ("Bayview") be substituted for BOA. In the motion, BOA represented the mortgage loan was transferred to Bayview, and Bayview is now the holder of the note and mortgage. The trial court granted the motion on April 14, 2017.

**{¶ 11}** On April 25, 2017, Bayview filed a motion for default judgment against Vasko and his unknown spouse, if any.

**{¶ 12}** On April 27, 2017, the trial court issued a Final Judgment Entry for Foreclosure which encompassed all matters before the court. The court made numerous finding including: Vasko and his unknown spouse, if any, were in default; the United States of America may have a right, title, interest or claim upon the property; the Treasurer of Wood County, Ohio, was due taxes and assessments on the property; there was due to Bayview on the note $136,341.62 plus interest, and there may be due to Bayview any monies advanced for real estate taxes, insurance and property protection; to secure payment of the note, Vasko executed a mortgage, recorded on March 4, 2008; there was no just reason for delay; and, the property shall be foreclosed and sold and the proceeds distributed first to the Wood County Clerk of Courts, then the Treasurer of Wood County, then Bayview, and any balance to the clerk pending further court order.

**{¶ 13}** Appellant appealed.

**First Assignment of Error**

**{¶ 14}** Appellant contends the trial court erred when it held the "effective/priority date" of the Modification relates back to the same "effective/ priority date" as the original mortgage lien. In support of its position, appellant cites to *Panzica Constr. Co. v. Bridgeview Crossing, L.L.C.*, 2015-Ohio-3478, 39 N.E.3d 529 (8th Dist.).

**{¶ 15}** Bayview counters the trial court properly granted summary judgment, as Ohio's law is first in time, first in right. Bayview contends its mortgage was filed four years before appellant's mortgage. Bayview asserts the Modification does not affect its mortgage priority and appellant's junior mortgage position was not prejudiced by the Modification. In support, Bayview cites to *Community Action Commt. of Pike Cty., Inc. v. Maynard*, 4th Dist. Pike No. 02CA695, 2003-Ohio-4312.

**{¶ 16}** We review a trial court's summary judgment decision on a *de novo* basis. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we undertake our own independent examination of the record and make our own determination of whether the moving party is entitled to summary judgment. *Dupler v. Mansfield Journal*, 64 Ohio St.2d 116, 119-120, 413 N.E.2d 1187 (1980).

**{¶ 17}** R.C. 5301.231 states in relevant part:

> (A) All amendments or supplements of mortgages, or modifications or extensions of mortgages or of the debt secured by mortgages, that have been executed in the manner provided in section 5301.01 of the Revised Code shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record.

**{¶ 18}** R.C. 5301.01(A) provides in pertinent part:

> A deed, mortgage, land contract as referred to in division (A)(21) of section 317.08 of the Revised Code * * * shall be signed by the grantor, mortgagor, vendor, or lessor in the case of a deed, mortgage, land contract, or lease * * *. The signing shall be acknowledged by the grantor, mortgagor, vendor, or lessor, or by the trustee, before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary

public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement.

**{¶ 19}** R.C. 317.08(A)(21) provides:

> The county recorder shall record all instruments in one general record series to be known as the "official records." The county recorder shall record in the official records all of the following instruments that are presented for recording, upon payment of the fees prescribed by law:
>
> Options to purchase real estate, including supplements, modifications, and amendments of the options, but no option of that nature shall be recorded if it does not state a specific day and year of expiration of its validity[.]

**{¶ 20}** R.C. 5301.23 reads in relevant part:

> (A) All properly executed mortgages shall be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and shall take effect at the time they are delivered to the recorder for record. If two or more mortgages pertaining to the same premises are presented for record on the same day, they shall take effect in the order of their presentation. The first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference.

**{¶ 21}** In *Community Action Commt. of Pike Cty., Inc. v. Maynard*, 4th Dist. Pike No. 02CA695, 2003-Ohio-4312, ¶ 11, the court observed the original mortgage secured advances up to $ 9,500.00, and the modification of the promissory note altered the original note by granting an extension of the repayment period and reducing the monthly payments. The court further observed the modification of the note did not provide additional funds nor did it raise the interest rate established in the original note. *Id.*

**{¶ 22}** In its analysis, the court rejected the argument that the modification invalidated the original mortgage. *Id.* at ¶ 10. The court relied on the case of *Riegel v. Belt*, 119 Ohio St. 369, 164 N.E. 347 (1928), paragraph three of the syllabus, where the Supreme Court of Ohio held:

> "The purpose of a mortgage is to secure the payment of a debt. A note described in the condition of a mortgage is only evidence of the debt. No change in the form of the evidence, or the mode or time of payment, not amounting to actual payment of the debt, or an express release, will operate to discharge the mortgage." *Id.*

The court also cited a treatise which provided "[a]n extension that merely alters the time period for the payment of the obligation generally has no effect on the priority position of the extended mortgage as against intervening junior encumbrances. * * * 4 Powell on Real Property (1997), 37-219, Section 37.31." *Id.* at ¶ 10. The court then concluded the modification of the note did not invalidate the mortgage, nor did the modification affect the priority of the mortgage. *Id.* The court found the mortgage had the first and best lien on the property. *Id.* at ¶ 11.

**{¶ 23}** *Panzica Constr. Co. v. Bridgeview Crossing, L.L.C.*, 2015-Ohio-3478, 39 N.E.3d 529, ¶ 9, concerned a lien priority dispute between mechanic's lien holders and a bank with respect to a commercial shopping mall project. The bank had entered into a construction loan agreement with the project property owner and had judgment liens on the subject property. *Id.* The bank and project property owner also entered into several mortgage modifications because the owner purchased additional property for the project. *Id.* at ¶ 5. The bank asserted its mortgage had priority over the mechanic's liens. *Id.* at ¶ 9. The trial court found the mechanic's lien had priority over the bank's mortgage because the modifications added significant property and did not include a construction mortgage covenant. *Id.* at ¶ 14. On appeal, the bank claimed the trial court erred, inter alia, because its mortgage lien was superior in priority as it arose from a construction mortgage and an open-end mortgage, and the modifications were contemplated by the terms of the original mortgage and related back to the date of the mortgage. *Id.* at ¶ 15. The appellate court noted R.C. 5301.231 does not define the phrase "shall take effect." *Id.* at ¶ 48. The court then found "based on our review of similar statutes," the phrase means a modification is invalid as against other creditors until recorded, and the modification's priority is determined as of the date of recording, not the date the original mortgage was recorded. *Id.*

**{¶ 24}** Our review of these cases causes us to conclude that we should follow the rationale and holding in *Community Action*, where the court supported its conclusion with a detailed analysis. In contrast, the court in *Panzica* did not undertake such an in-depth analysis in reaching its conclusion that the modifications take effect when recorded. Moreover, the fact situation in *Community Action* is aligned with the facts of this case, as both cases involved a modification of a note where there were no additional funds, the interest rate was not increased, the repayment period was extended and the monthly payments were reduced. Whereas in *Panzica*, the fact pattern involved a construction loan, several modifications and mechanic's liens.

**{¶ 25}** We therefore find the recording of the Modification did not affect the priority of the original mortgage. Thus, Bayview's lien has priority over appellant's lien. Accordingly, the trial court did not error when it found, between competing lienholders, the "effective/priority date" of the Modification relates back to the same "effective/ priority date" as the original mortgage. It follows that appellant's first assignment of error is not well-taken.

**Second Assignment of Error**

**{¶ 26}** Appellant contends BOA failed to attach the Modification to its motion to substitute party plaintiff, filed on April 13, 2017, so the substitution order should be vacated. Appellant also advances the argument that BOA did not enter into a mortgage assignment directly with Bayview. Instead, appellant submits BOA assigned to HUD BOA's interest in the February 25, 2008 mortgage, and not the Modification. Then, HUD assigned its interest in the February 25, 2008 mortgage, and not the Modification, to Bayview. As such, appellant asserts, "it is not a stretch to characterize" these mortgage assignments "as an effort by BOA to 'launder' its Loan Modification Agreement * * * out of the 'chain-of-title' of the mortgage assigned to * * * Bayview by HUD, not * * *BOA." Based on this, appellant maintains Bayview does not have a right, title and interest in the Modification, upon which the foreclosure action is based. Appellant submits "[s]uch failure to assign Bayview the right, title, and interest in the operative modified mortgage * * * directly impacts * * * the efficacy of the April 27, 2017 Final Judgment * * *."

**{¶ 27}** Bayview counters the substitution of a party is not a substantive issue and substitution was not required, as the action could have continued in BOA's name. Bayview observes appellant does not dispute that BOA transferred its interest in the note to Bayview, and the transfer of a note acts as an equitable assignment of the mortgage. Thus, Bayview contends the trial court did not abuse it discretion by granting the substitution when there is no dispute that the note was transferred.

**{¶ 28}** Civ.R. 25(C) provides that a party to whom an interest has been transferred may be substituted in an action in place of the party that previously held the interest. *See Boedecker v. Rogers*, 140 Ohio App.3d 11, 19-20, 746 N.E.2d 625 (8th Dist.2000). The substitution of a party operates as if the action had been commenced in the successor party's name. *Id.*; Civ.R. 17(A). A trial court's decision to allow a substitution of parties is reviewed for an abuse of discretion. *Ahlrichs v. Tri-Tex Corp.*, 41 Ohio App.3d 207, 210, 534 N.E.2d 1231 (1st Dist.1987). Thus, we will not reverse the trial court's judgment unless it is arbitrary, unconscionable or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶ 29}** In order to establish an interest in a note or mortgage, the party can show an assignment of either the note or the mortgage. *Fed. Home Loan Mtge. Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶ 24. One who is not a party to, or a third-party beneficiary of, the assignment of a mortgage, lacks standing to challenge the validity of a mortgage assignment. *Bank of Am., N.A. v. Hizer*, 6th Dist. Lucas No. L-11.

13-1035, 2013-Ohio-4621, ¶ 22. Whether standing exists is a matter of law which we review de novo. *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 23; *Bank of Am., N.A. v. Merlo,* 11th Dist. Trumbull No. 2012-T-0103, 2013-Ohio-5266, ¶ 9.

**{¶ 30}** Here, appellant challenges both the trial court's order substituting Bayview as a plaintiff as well as the assignment of the mortgage from BOA to Bayview. With respect to the mortgage assignment, appellant was not a party to the mortgage assignment, and has not claimed the status as a third-party beneficiary to the assigned mortgage. As such, appellant does not have standing to challenge the assignment of the mortgage. As to the court's order substituting Bayview as a plaintiff, a review of the record shows the trial court allowed Bayview, as the holder of the note and mortgage, to be substituted for BOA upon its finding that good cause had been shown. We conclude the trial court's decision to grant the motion to substitute party was not arbitrary, unconscionable or unreasonable, and therefore, the trial court did not abuse its discretion. Accordingly, appellant's second assignment of error is not well-taken.

**Third Assignment of Error**

**{¶ 31}** Appellant contends the trial court's April 27, 2017 Final Judgment Entry of Foreclosure exceeded the relief sought by Bayview in its April 25, 2017 motion for default judgment and far exceeded the scope of Civ.R. 55. In addition, appellant argues the court's judgment failed to reference or include appellant's mortgage and the Modification and, therefore, should be vacated.

**{¶ 32}** We review a trial court judgment granting a motion for default using an abuse of discretion standard. *Tikaradze v. Kenwood Garden Apts.*, 6th Dist. Lucas No. L-11-1217, 2012-Ohio-3735, ¶ 6.

**{¶ 33}** Civ.R. 55(C) provides in relevant part that "a judgment by default is subject to the limitations of Rule 54(C)." In turn, Civ.R. 54(C) states in pertinent part that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

**{¶ 34}** Here, in BOA's complaint for money judgment and foreclosure against Vasko, BOA alleged Vasko defaulted under the terms of the note and Modification. BOA sought enforcement of the mortgage as its conditions had been broken, and BOA has the right to foreclose on the property. BOA named defendants, United States of America, appellant and Treasurer of Wood County, Ohio, as parties who may claim an interest in the property.

**{¶ 35}** A review of the record shows the trial court, in granting the motion for default, awarded Bayview the relief its predecessor sought in the complaint. In its judgment, the trial court set forth "Vasko [was] in default of Answer or other pleading and thereby confesses the allegations of the Complaint to be true." The court further stated "the liens of any parties that have filed an answer asserting a valid and subsisting lien are hereby transferred to proceeds." The court then ordered the distribution of the proceeds to certain parties. We therefore conclude the trial court did not abuse its discretion in rendering its April 27, 2017 judgment. Accordingly, appellant's third assignment of error is not well-taken.

**{¶ 36}** The judgments of the Wood County Court of Common Pleas are affirmed. Appellant is ordered to pay the costs of this appeal, pursuant to App.R. 24, and the clerk is ordered to serve all parties with notice of this decision.

Judgment affirmed.

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

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| Mark L. Pietrykowski, J. | JUDGE |
| Arlene Singer, J. | |
| James D. Jensen, J. | JUDGE |
| CONCUR. | |
| | JUDGE |