The Bullet Point: Ohio Commercial Law Bulletin

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Jim Sandy and Richik Sarkar

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.

***Bilbaran Farm, Inc. v. Sandusky Street Invest., LLC*, 5th Dist. Delaware No. 17 CAE 06 042, 2018-Ohio-299.**

This action involved a challenge to an easement between two parties. The defendant filed counterclaims and then abruptly dismissed them. In response, the plaintiff sought sanctions against the defendant and its counsel under Ohio's frivolous conduct statute. After a hearing, the trial court denied the motion for sanctions and plaintiff appealed.

On appeal, the Fifth Appellate District affirmed the trial court's decision. In so ruling, the court found that counsel was not unreasonable in relying on his client to file the counterclaim, and that no evidence was presented that the counterclaim was designed merely to harass the plaintiff.

The Bullet Point: Ohio's frivolous conduct statute, codified at R.C. 2323.51, provides redress in the way of costs, attorneys' fees, and other relief for a party who is subject to frivolous conduct in a lawsuit. Frivolous conduct is statutorily defined as conduct that: (1) serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation; (2) conduct that is not warranted under existing law, or cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law; or (3) conduct that consists of allegations that have no evidentiary support. This is necessarily a case-specific analysis.

***Parker v. ACE Hardware Corp.*, 2d Dist. Champaign No. 16-cv-131, 2018-Ohio-320.**

This was an appeal of the trial court's order granting ACE Hardware summary judgment in a negligence action. The plaintiff had been assisting a friend with household chores after his friend's surgery. His friend needed some brush cleared from his property, so the plaintiff went to ACE Hardware to purchase kerosene to start a fire. An ACE Hardware employee assisted the plaintiff in purchasing the product. However, it turned out it was not kerosene, but camp lighter fluid, and when plaintiff started a brush fire, the fumes caught fire, and he suffered extensive burns over his body.

Plaintiff then filed suit against ACE Hardware alleging various negligence theories, failure to warn, and breach of warranty claims. Eventually, ACE Hardware moved for summary judgment arguing, among other things, that plaintiff assumed the risk, failed to read the warnings on the product before using it, and his claims were abrogated by the Ohio Products Liability Act. The trial court agreed and plaintiff appealed.

On appeal, the Second Appellate District affirmed. The court found that the plaintiff's claims were all precluded by the Ohio Product Liabilities Act.

The Bullet Point: When the Ohio General Assembly enacted the current version of the [Ohio Products Liability Act, R.C. 2307.71 *et seq.*], it abrogated all common law claims relating to product liability causes of actions." This includes any and all claims that can be asserted in a civil action for damages from a manufacturer or supplier for death, physical injury, damage, or distress from the design or formulation of

a product, any warning or instruction, or lack of instruction, on the product, or a failure of the product to meet a stated representation or warranty.

***City of Cleveland v. Laborers International Union*, 8th Dist. Cuyahoga No. 105378, 2018-Ohio-161.**

The City of Cleveland appealed a trial court's decision to modify an arbitrator's award for back pay with a union. During arbitration, the arbitrator awarded the union members "reasonable and demonstrable lost back pay." After various appeals, the arbitrator then held a hearing on the amount of back pay. The arbitrator determined he lacked jurisdiction to decide the issue, and so the union filed a motion with the trial court seeking a post-judgment award in excess of $309,000 to cover back pay. The trial court ultimately granted the request and the city appealed.

On appeal, the Eighth Appellate District affirmed, finding that while a trial court's jurisdiction to modify an arbitrator's award is very limited, the court had the authority to reduce the award of "reasonable and demonstrable lost back pay" to a sum certain.

The Bullet Point: Once an arbitration is completed, the jurisdiction of the trial court is limited to confirmation, vacation, modification, or enforcement of the award, and only on the terms provided by the statute. "The agreement to submit to arbitration describes the issues and defines the perimeters of the arbitration tribunal's powers with respect to them. When the submitted issues are decided, the arbitrators' powers expire." That being said, a trial court has the powers to enforce its own judgments and issue rules in accordance with the Ohio Rules of Civil Procedure. To that end, R.C. 2711.12 provides that "[u]pon the granting of an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding, the court must enter judgment in conformity therewith."

***Multibank 2009-1CML-ADC Venture LLC v. South Bass Island Resort*, 6th Dist. Ottawa No. OT-17-005, 2018-Ohio-120.**

In this case, appellee agreed to loan $8.6 million to the appellant for a real estate development. In exchange, the appellant granted the appellant a mortgage on the real property. Appellee then filed a foreclosure complaint against appellant. It also filed a separate action on the note. It eventually obtained judgment on the note. Thereafter, appellee moved for judgment in the foreclosure action and its motion was granted.

The appellant appealed arguing that appellee was precluded from obtaining judgment in the foreclosure because judgment had already been entered in the note action. The Sixth Appellate District disagreed, noting that actions on notes and mortgages are separate and distinct actions that can be brought together or concurrently.

The Bullet Point: Notes and Mortgages are separate and distinct instruments and separate and distinct causes of action. While they are typically filed together in a single lawsuit, it is not required. Because "a foreclosure action is a separate and distinct action from a complaint on a note, res judicata and/or collateral estoppel does not apply, and a plaintiff need not include both in a single complaint in order to preserve all issues."

[Cite as *Bilbaran Farm, Inc. v. Sandusky St. Invests., L.L.C.*, 2018-Ohio-299.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BILBARAN FARM, INC.	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 17 CAE 06 0042
	:	
SANDUSKY STREET INVESTMENTS, LLC.	:	
	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 16-CVH-11-0703
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	January 24, 2018

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee:
WILLIAM PAUL BRINGMAN 7100 North High Street, Suite 101 Worthington, OH 43085-2316	H. RITCHEY HOLLENBAUGH RYAN S. BUNDY 366 East Broad Street Columbus, OH 43215

Delaney, J.

{¶1} Plaintiff-Appellant Bilbaran Farm, Inc. appeals the May 25, 2017 judgment entry of the Delaware County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} Defendant-Appellee Sandusky Street Investments, Inc. is the fee-simple owner of property located at 17 West William Street in Delaware, Ohio. Plaintiff-Appellant Bilbaran Farm, Inc. is the fee-simple owner of property located at 18 South Sandusky Street in Delaware, Ohio. Both parties are subject to a July 30, 2001 easement agreement where the 17 West William Street parcel would have a non-exclusive easement for ingress and egress as well as limited parking over certain portions of the 18 South Sandusky Street in return for an annual $300.00 payment.

{¶3} On November 26, 2016, Bilbaran filed a complaint against Sandusky in the Delaware County Court of Common Pleas alleging Sandusky failed to make the $300.00 easement payment for the 2016 calendar year. The complaint also sought declaratory judgment that the easement was void and cancelled.

{¶4} Sandusky filed an answer and counterclaim on December 28, 2016. Sandusky alleged that on December 8, 2016, it sent a letter to Bilbaran along with two $300.00 easement checks for the 2016 and 2017 calendar years. In its counterclaim, Sandusky sought declaratory judgment asking the trial court to affirm the validity of the easement or, if the trial court determined the easement was void, to determine that Sandusky was entitled to an easement by necessity over portions of 18 South Sandusky Street.

{¶5} Bilbaran voluntarily dismissed its complaint without prejudice on January 13, 2017.

{¶6} On January 31, 2017, Bilbaran filed a motion for extension to respond to Sandusky's answer and counterclaim. The trial court granted the motion.

{¶7} On February 27, 2017, Bilbaran filed a motion to dismiss pursuant to Civ.R. 12(B)(6) in lieu of an answer. Sandusky voluntarily dismissed its answer and counterclaim two days later.

{¶8} On March 25, 2017, Bilbaran filed a motion seeking sanctions against Sandusky pursuant to R.C. 2323.51. In its motion, Bilbaran contended that Sandusky's counterclaim (1) was not supported by the evidence, (2) was merely meant to harass the plaintiff and increase the cost of litigation, and (3) was not warranted under existing law.

{¶9} On May 19, 2017, the trial court held an evidentiary hearing. The only witness at the hearing was counsel for Sandusky. Counsel testified the counterclaim was filed to preserve Sandusky's right to utilize the easement. Bilbaran requested in its complaint that the trial court declare the easement void. In the event the trial court found the easement void, Sandusky requested the trial court find the easement existed by necessity. While Bilbaran dismissed its complaint, counsel testified he was not confident Bilbaran would accept the tendered easement payments and concerned that Bilbaran would refile the complaint. It was for these reasons Sandusky was reluctant to dismiss its counterclaim after Bilbaran voluntarily dismissed its complaint. After Bilbaran filed its motion to dismiss, counsel consulted with Sandusky and determined the cost of pursuing the counterclaim at that time outweighed the need to proceed with the counterclaim. Sandusky's counterclaim was then dismissed.

{¶10} On May 25, 2017, the trial court denied Bilbaran's motion for sanctions.

{¶11} It is from this judgment Bilbaran now appeals.

ASSIGNMENT OF ERROR

{¶12} Bilbaran raises one Assignment of Error:

{¶13} "THE TRIAL COURT ERRED IN DENYING THE MOTION OF APPELLANT FOR A FRIVOLOUS CONDUCT SANCTIONS AGAINST DEFENDANT, ITS ATTORNEYS AND ITS ATTORNEYS' LAW FIRM HEREIN."

ANALYSIS

{¶14} Bilbaran contends in its sole Assignment of Error that the trial court erred in denying its request for sanctions pursuant to R.C. 2323.51. We disagree.

{¶15} Bilbaran based his frivolous conduct motion on R.C. 2323.51(B)(1), which states as follows:

> Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

{¶16} Frivolous conduct is statutorily defined as conduct that (1) serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation; (2) conduct that is not warranted under existing law, or cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law; or (3) conduct that consists of allegations that have no evidentiary support. *Carbone v. Nueva Construction Group, L.L.C.*, 8th Dist. Cuyahoga No. 103942, 2017–Ohio–382, ¶ 21, citing R.C. 2323.51(A)(2)(a).

{¶17} We have recognized that "[n]o single standard of review applies in R.C. 2323.51 cases." *Croxton v. Maggiore*, 5th Dist. Stark No. 2016CA00165, 2017–Ohio–1535, ¶ 68, citing *Wiltberger v. Davis,* 110 Ohio App.3d 46, 51, 673 N.E.2d 628 (10th Dist.1996). A determination that the conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law requires a legal analysis. *Croxton*, *supra*, citing *Ferron v. Video Professor, Inc.*, 5th Dist. Delaware No. 08–CAE–09–0055, 2009–Ohio–3133, ¶ 44. With respect to purely legal issues, we follow a de novo standard of review and need not defer to the judgment of the trial court. *Id.* However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations and will not disturb such factual determinations where the record contains competent, credible evidence to support such findings. *Id.* A trial court's decision on whether to actually award sanctions under R.C. 2323.51 is reviewed under a standard of abuse of discretion. *See State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 957 N.E.2d 19, 2011–Ohio–5350, ¶ 11.

{¶18} We have reviewed the record in this case and find the trial court's May 25, 2017 judgment entry denying Bilbaran's request for sanctions thoroughly analyzed each of Bilbaran's arguments.

{¶19} Bilbaran first argued Sandusky's counterclaim stating it was entitled to an easement was not supported by the evidence. The trial court rejected this argument because the facts established that counsel permissibly relied upon the representations of its client that without the easement, its property would be landlocked. "It is not frivolous conduct for an attorney to reasonably rely on the representations of his or her client." *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, 777 N.E.2d 857, ¶ 31 (1st Dist.).

{¶20} Bilbaran next argued Sandusky's counterclaim merely served to harass Bilbaran by causing unnecessary delay or a needless increase in the cost of litigation. The trial court found Bilbaran failed to present any evidence to support his argument. Further, the counterclaim was supported by law because counsel testified he filed the counterclaim to preserve Sandusky's right to the easement. Sandusky ultimately chose to dismiss the counterclaim when considering the costs of litigation.

{¶21} Bilbaran finally argued Sandusky's counterclaim was on its face frivolous because it did not sufficiently satisfy the elements for a declaratory judgment. The trial court examined Sandusky's claim that it was entitled to a declaration the easement was valid, or in the alternative, it was entitled to an easement by necessity. Pursuant to R.C. 2721.02 and Civ.R. 8(A), the trial court found Sandusky's counterclaim met the procedural requirements for declaratory judgment and a counterclaim.

{¶22} We have the reviewed the record and upon our consideration of the trial court's factual determinations and legal conclusions under our somewhat blended

standard of review, we find no error by the trial court to deny Bilbaran's request for sanctions.

{¶23} Bilbaran's sole Assignment of Error is overruled.

CONCLUSION

{¶24} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

J. Wise, J. and

Baldwin, J., concur.

[Cite as *Parker v. Ace Hardware Corp.*, 2018-Ohio-320.]

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

DAVID A. PARKER	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2017-CA-8
	:	
v.	:	T.C. NO. 16-CV-131
	:	
ACE HARDWARE CORPORATION, et al.	:	(Civil Appeal from Common Pleas Court)
	:	
Defendants-Appellees	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 26th day of January, 2018.

. . . . . .

JAMES P. CONNORS, Atty. Reg. No. 0034651, 580 South High Street, Suite 150, Columbus, Ohio 43215
Attorney for Plaintiff-Appellant

LISA M. FEDYNYSHYN-CONFORTI, Atty. Reg. No. 0074324, 311 S. Wacker Drive, Suite 2400, Chicago, Illinois 60606
Attorney for Defendants-Appellees

. . . . . .

DONOVAN, J.

{¶ 1} This matter is before the Court on the April 17, 2017 Notice of Appeal of David A. Parker. Parker appeals from the trial court's March 17, 2017 journal entry

granting the motion for summary judgment of ACE Hardware Corporation, McAuliffe's ACE Hardware, and McAuliffe's Rental LLC (collectively, "ACE"). We hereby affirm the judgment of the trial court.

{¶ 2} On March 20, 2015 Parker filed a complaint against ACE, Frederick Stevens, the Coleman Company Inc., and John Does 1-10, in the Franklin County Court of Common Pleas. In Count 1, Parker alleged negligence against Stevens; in Count 2, he alleged negligence against ACE; in Count 3, he alleged negligent misrepresentation against ACE; in Count 4 he alleged breaches of express and implied warranties against all defendants; and in Count 5, he alleged "a combined claim for damages under both strict liability and statutory strict products liability under both Ohio common law and Ohio Revised Code §§ 2307.71-80" against all defendants except Stevens. On January 15, 2016, Parker dismissed all claims against Coleman and the products liability claim in Count 5. On March 16, 2016, Parker dismissed his claims against Stevens.

{¶ 3} The matter was subsequently transferred to Champaign County on Parker's request and refiled on August 19, 2016. The complaint sets forth the following allegations: Parker and Stevens became friends in 2010-2011, and when Stevens had surgery in 2013, Parker helped Stevens by clearing his property of brush and performing other chores. On September 8, 2013, after a significant amount of brush had been consolidated into a large pile, Stevens asked Parker to "stop at the hardware store to purchase five cans of kerosene * * * to be used to ignite and burn the brush pile."

{¶ 4} After having his chain saw serviced and repaired at McAuliffe's ACE Hardware, Parker inquired if he could also purchase kerosene for a brush fire, and a male employee directed Parker to "a female clerk down another aisle in the store and told

[Parker] that she would assist him." Parker asked the female clerk for kerosene, and she inquired as to his intended use of the product. Parker advised the clerk that he intended to "start a large brush fire about the size of a truck, and needed kerosene to start the fire." The clerk then directed Parker to a product that she identified as kerosene, and he purchase the product. The product was in fact Coleman Camp Fuel, and when Parker ignited the brush pile with the fuel, "vapors were ignited and quickly exploded and engulfed [Parker] in flames. [Parker] was severely burned over 90% of his body."

{¶ 5} On September 7, 2016, the "Motion of Defendants McAuliffe ACE, McAuliffe Rental LLC and ACE Hardware Corporation for Summary Judgment" was filed. ACE therein asserted that "Parker cannot prevail under his various legal theories because Plaintiff was explicitly warned not to use the product in question for the purpose he intended, Plaintiff ignored that warning and Plaintiff assumed the risk of his own unsafe conduct." The motion provides that "there can be no dispute that McAuliffe's, through warnings displayed on the Coleman's product, specifically warned Plaintiff of the dangers involved in using Coleman's Camp Fuel in the manner Plaintiff contemplated using it."

{¶ 6} The motion provides that Parker "cannot establish reasonable reliance on McAuliffe's alleged statements when the product's label directly contradicted any assertion that the Coleman's Camp Fuel could be used as a fire starter – a fact Plaintiff could * * * have learned by simply reading the label's clear, unambiguously stated warnings which appeared on the product."

{¶ 7} The motion argues that Parker "assumed the risk of injury in using a product to start a fire while he was in close proximity to the fire." According to the motion, there "is no question that fire *is ipso facto* dangerous, and presents a danger that is open and

obvious, and not latent." ACE argued that Parker's use of a product "he assumed to be a fire accelerant in starting a fire was a straightforward, ordinary risk."

{¶ 8} The motion provided that Parker's common law breach of warranty claims "have been abrogated by Ohio's enactment of the Ohio Products Liability Act." The motion asserts that there "is no allegation in Plaintiff's Complaint or evidence that Plaintiff provided any pre-suit notice to McAuliffe's on his breach of warranty claim. Without any such evidence, Plaintiff's breach of warranty claims fail for want of pre-suit notice." Also on September 7, 2016, the depositions of Parker and Stevens were filed in conjunction with the motion for summary judgment.

{¶ 9} On December 19, 2016, Parker filed a "Memorandum Contra Defendants ACE Hardware and McAuliffe's Motion for summary Judgment and Plaintiff's Cross Motion for Summary Judgment." Parker asserted that Ace owed him duties to advise him as follows:

> * * *(a) where the product he requested was located, (b) that it was fit for the purpose which he told them it was going to be used when they asked him what he was using it for, and (c) that the product they sold him was suitable to be used to start a brush pile fire, which they also advised him following his response to the question about what he was using it for.

{¶ 10} Regarding negligent misrepresentation, Parker asserted that the fact that "the store clerk in this case failed to use reasonable care in communicating information to Mr. Parker is established by the only evidence presented on the claim. Summary judgment for Mr. Parker is required since there is no evidence to the contrary that she made the statements which were provably false." Regarding his failure to warn claim,

Parker argued that once ACE and McAuliffe's "admittedly assume[d] a duty to advise customers about products and services, they are indeed liable for failing to warn them and for incorrectly advising them and providing false information."

{¶ 11} Parker argued that he did not assume the risk of injury because starting "a fire with kerosene is a safe activity, as opposed to starting one with a highly volatile camp fuel." Parker argued that there "was no basis for him to assume the risk of something about which he had no knowledge, a prerequisite to assuming the risk." Parker attached his affidavit.

{¶ 12} On December 27, Defendants filed a reply brief in support of summary judgment, as well as a brief in opposition to Parker's motion for summary judgment. On January 5, 2017, Parker opposed the motion to strike his affidavit, as well as a reply to Defendants' motion for summary judgment.

{¶ 13} In granting summary judgment in favor of ACE, the trial court noted that Parker's "entire case * * * is premised on the assumption that he would not have been injured when he started the fire if the cans he purchased at McAuliffe's had contained kerosene, instead of Coleman Camp Fuel." Regarding Parker's negligence claim, the court noted that the "existence of a duty depends on the foreseeability of harm." Accordingly, the court noted, it "must determine whether a reasonably prudent person would have anticipated Ms. Reigle's misidentification of Coleman Camp Fuel as kerosene was likely to result in injury."

{¶ 14} The court cited Parker's deposition testimony acknowledging that two photographs of Coleman Camp Fuel accurately depict the product he purchased on September 8, 2013, that the labels reflect that the cans were not labeled as containing

kerosene and further warn that "Coleman Camp Fuel should not be used in kerosene, alcohol, or lamp/stove oil appliances." The court concluded that had Parker read the cans before proceeding to the checkout counter, he would have learned that they did not contain kerosene. According to the court, Parker's "purported reliance on Ms. Reigle's expertise and professionalism is misplaced since the cans themselves clearly and unequivocally inform the purchaser that the contents were Coleman Camp Fuel, and not kerosene." The court concluded that it "cannot articulate the duty breached when Ms. Reigle allegedly identified Coleman Camp Fuel as kerosene," and that "ACE and McAuliffe's are entitled to summary judgment on the negligence claim, to the extent that it can be read as alleging the breach of duty owed to [Parker.]"

{¶ 15} The court then noted as follows:

> After reviewing [Parker's] complaint, the Court also believes that his negligence claim can be construed as alleging the following on the part of defendants: (1) failure to warn; (2) negligent misrepresentation; and (3) breach of implied warranty of fitness for a particular purpose. [Parker] has pled the latter two theories in his complaint. Since the allegations can also be construed as alleging failure to warn, the Court will also analyze the negligence claim in this fashion.

{¶ 16} Citing Parker's deposition, the court noted that it "is * * * undisputed that the warnings on the can inform the user that Coleman Camp Fuel is not to be used as a fire starter" and that "fuel vapors are invisible, explosive, and can be ignited by ignition sources many feet/meters away."

{¶ 17} The court noted that it "is also undisputed that [Parker] never read the

warnings on the can prior to starting the fire. During his deposition, [Parker] admitted that the front of the can urges the user to 'carefully read all warnings on the back panel.' " According to the court, Parker "also admitted that he would have learned that the product was not kerosene and would not have used it to start the fire, if he would have read the labeling on the can." The court concluded that given "these circumstances, the only reasonable conclusion is that [Parker] cannot prevail on any 'failure to warn' claim."

{¶ 18} Regarding Parker's claim of negligent misrepresentation, the court concluded that ACE was entitled to summary judgment, since "the cans were labeled 'Coleman Camp Fuel,' and not 'kerosene.' It is also undisputed that either [Parker] or Ms. Reigle could have easily learned that the cans did not contain kerosene by simply looking at them. Since the true facts were available to both, any reliance on Ms. Reigle's statements was misplaced and does not create a material issue of fact."

{¶ 19} Finally, the court noted that Parker "has also alleged that the defendants breached both express and implied warranties, including the warranty that the product was suitable for its intended use." The court further noted, however, that Parker "does not articulate an express warranty allegedly made by Ms. Reigle at the time of the transaction. Thus, any warranty claim against ACE and McAuliffe's must be premised on the breach of an implied warranty." The court determined that since Parker "does not contend that the purchased goods, (i.e., Coleman Camp Fuel), were not suitable for use in Coleman Liquid fuel appliances, such as camping stoves and lanterns," his "breach of warranty claim does not arise under UCC § 2-314 (merchantability), but instead can only arise under UCC § 2-315 (fitness for particular purpose)."

{¶ 20} The court concluded that Parker "allegedly asked Ms. Reigle where he

could find kerosene. In response, she allegedly showed him Coleman Camp Fuel and mistakenly identified this product as kerosene." The court noted that Parker "never asked Ms. Reigle what product she would recommend to ignite a large brush pile. As such, he was not relying on her skill and expertise to select the appropriate goods for fire starting." Instead, Parker "asked Ms. Reigle where he could find a particular product and was sent in the wrong direction. Therefore, any claim alleging breach of [an] implied warranty of fitness for a particular [purpose] must fail, and ACE and McAuliffe's are entitled to summary judgment on [Parker's] Warranty claims."

{¶ 21} Parker asserts one assignment of error herein as follows:

> THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DISMISSING ALL CLAIMS AS A MATTER OF LAW.

{¶ 22} Parker asserts that he "was never warned by anyone, including the defendants' store clerk, not to use the product which they told me was kerosene on the day that they sold it to me." According to Parker, the trial court "failed to properly address the duty issue, the first element of a negligence claim."

{¶ 23} Parker asserts as follows:

> The trial court erred by not properly evaluating and deciding the negligence claims. ACE and McAuliffe's owed and breached duties to advise Mr. Parker as a customer (a) where the product he requested was located, (b) that it was fit for the purpose which he told them it was going to be used when they asked, (c) that the product they sold him was suitable to be used to start a brush pile fire, which they also advised him following his

> response to the question about what he was using it for, (d) that what they sold him was actually camp fuel and not kerosene, and (e) failed to warn him that it should not be used to start a fire. Even under the most liberal construction of the term "duty," the defendants clearly owed him a duty of ordinary care to provide accurate information and advice once they undertook to provide him with advice. Their breach of these duties constitutes negligence under Ohio law as a matter of law which therefore entitles Mr. Parker to summary judgment on the negligence claims.

{¶ 24} Parker asserts that he did not realize that he had been sold a "highly volatile camp fuel instead of kerosene," and there "was no basis for him to assume the risk of something about which he had no knowledge, a prerequisite to assuming the risk." Finally, Parker notes that ACE and McAuliffe's "argue that the claims for breach of warranty for merchantability and fitness for a particular purpose also fail because Mr. Parker supposedly failed to give pre-suit notice." Parker asserts that "these claims are not preempted by the product liability statute, therefore they are not eliminated as a matter of law as defendants assert because ACE and McAuliffe's are not manufacturers subject to product liability claims."

{¶ 25} ACE and McAuliffe's respond that they "produced evidence to demonstrate the absence of material fact regarding the breach of duty of care," and that Parker "failed to respond with competent evidence to show otherwise. Rather, [Parker] relied upon conclusory allegations and unfiled deposition testimony."

{¶ 26} As this Court has previously noted:

> Summary judgment is appropriate when the moving party

> demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.,* 127 Ohio St.3d 54, 2010–Ohio–4505, 936 N.E.2d 481, ¶ 29; *Sinnott v. Aqua–Chem, Inc.,* 116 Ohio St.3d 158, 2007–Ohio–5584, 876 N.E.2d 1217, ¶ 29. When reviewing a summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. of Edn.,* 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 119–20, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

Huntington Natl. Bank v. Payson, 2d Dist. Montgomery No. 26396, 2015-Ohio-1976, ¶ 14.

{¶ 27} We initially note that "when the Ohio General Assembly enacted the current version of the [Ohio Products Liability Act, R.C. 2307.71 *et seq.*], it abrogated all common law claims relating to product liability causes of actions." *Evans v. Hanger*

Prosthetics & Orthotics, Inc., 735 F.Supp.2d 785, 795 (N.D.Ohio 2010). As further noted in *Evans*:

> Specifically, the General Assembly added a section stating that "Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability causes of action." R.C. 2307.71(B). Furthermore, the OPLA applies to "recovery of compensatory damages based on a product liability claim," as well as "[a]ny recovery of punitive damages or exemplary damages in connection with a product liability claim." R.C. 2307.72(A)-(B). *See also Delahunt v. Cytodyne Techs.,* 241 F.Supp.2d 827, 842 (S.D.Ohio 2003).

{¶ 28} The OPLA defines a "product liability claim" as follows:

> "Product liability claim" means a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:
>
> (a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
>
> (b) Any warning or instruction, or lack of warning or instruction, associated with that product;
>
> (c) Any failure of that product to conform to any relevant representation or warranty.

R.C. 2307.71(A)(13).

{¶ 29} R.C. 2307.71 defines a "supplier" in relevant part as: "(i) A person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce." We conclude that ACE is a supplier.

{¶ 30} R.C. 2307.78(A) provides in relevant part:

> * * * a supplier is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, that either of the following applies:
>
> (1) The supplier in question was negligent and that, negligence was a proximate cause of harm for which the claimant seeks to recover compensatory damages;
>
> (2) The product in question did not conform, when it left the control of the supplier in question, to a representation made by that supplier, and that representation and the failure to conform to it were a proximate cause of harm for which the claimant seeks to recover compensatory damages. A supplier is subject to liability for such a representation and the failure to conform to it even though the supplier did not act fraudulently, recklessly, or negligently in making the representation.

{¶ 31} In other words, the OPLA imposes liability based upon a supplier's negligence or misrepresentation. In Counts 2 and 3, Parker alleged negligence, negligent failure to warn, and negligent misrepresentation, and we conclude these are product liability claims. As noted by the Southern District of Ohio, Eastern Division:

> * * * These common law claims have all been abrogated by the OPLA. *See Hempy v. Breg, Inc.,* No. 2:11–CV–900, 2012 WL 380119 at *3 (S.D.Ohio Feb.6, 2012) (concluding that claims for negligence and breach of warranty constitute common law product liability claims); *Bowles v. Novartis Pharm. Corp.,* No. 3:12–CV–145, 2013 WL 5297257, at *7 (S.D.Ohio Sept.19, 2013) (concluding that claims for negligent manufacture and negligent failure to warn were subject to the OPLA); *Miller v. ALZA Corp.,*759 F.Supp.2d 929, 943 (S.D.Ohio 2010) ("Further, common law warranty claims have also been abrogated by the OPLA...."); *Miles,* 612 F.Supp.2d at 924 (concluding that "implied warranty claims (both merchantability and fitness for a particular purpose) ... constitute common law products liability claims subject to preemption by the OPLA.").

Hendricks v. Pharmacia Corp., N.D.Ohio No. 2:12-CV-00613, 2014 WL 2515478, *4 (June 4, 2014); *see also Amendola v. R.J. Reynolds Tobacco Co.*, 198 F.3d 244, 1999 WL 1111515, *2 (6th Cir.1999) (holding in part that plaintiff's negligent misrepresentation claim is governed by the OPLA). Since the OPLA provided the exclusive remedy for the claims in Counts 2 and 3, we conclude that ACE was entitled to summary judgment as a matter of law on those counts.

{¶ 32} In Count 4, Parker alleged breach of express and implied warranties, and as noted above, the trial court addressed the breach of warranties claims pursuant to "R.C. 1302.27(A) (UCC § 2-314)" and "R.C. 1302.28 (UCC § 2-315)." In *Miller v. ALZA Corp.*, 759 F.Supp.2d 929 (S.D.Ohio 2010), the plaintiff argued that his breach of warranty claims were "statutory warranty claims under Ohio's codification of the Uniform

Commercial Code ('UCC') in O.R.C. Chapter 1302," and that those claims were accordingly not abrogated by the OPLA, in reliance upon *Miles v. Raymond Corp.*, 612 F.Supp.2d 913, 924-25 (N.D.Ohio 2009). *Miller*, at 943.

{¶ 33} The Southern District of Ohio analyzed the issue as follows:

> Here, Defendant argues that the allegations in the Complaint do not support Plaintiff's contention that the warranty claims are asserted under R.C. Chapter 1302. Defendants point out that the "Complaint makes no reference—expressly or impliedly—to the UCC or its codification in Ohio [.]" (Doc. 48). The Court agrees with Defendants that nothing in Plaintiff's Complaint indicates that the warranty claims are being pursued under R.C. Chapter 1302. Not only does the Complaint not cite Ohio's codification of the UCC, Plaintiff's Response to Defendants' Motion fails to identify the specific UCC sections under which the warranty claims are being pursued. (Doc. 47).
>
> This district has dealt with the failure to specifically state whether warranty claims are asserted under the UCC. In *Miles,* the court seemingly allowed the UCC claims to stand, only to dismiss them as being time-barred under R.C. 1302.98. *Miles*, 612 F.Supp.2d at 926–27, n. 13. In *Donley* [*v. Pinnacle Foods Group*, LLC, S.D.Ohio No. 2:09-CV-540, 2009 WL 5217319 (Dec. 28, 2009)], however, the court stated:
>
> Plaintiff's Complaint ... contained no reference to the Uniform Commercial Code, or to the two statutes he cites in his memorandum contra [i.e., O.R.C. §§ 1302.27 and 1302.28]. The defendants are again entitled to

> "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.Pro. 8(a)(2). To the extent that Plaintiff now alleges that he is (and always was) suing under the Uniform Commercial Code, his Complaint failed to state such claims. To the extent that Plaintiff was suing under common-law theories of product liability, Defendants' unrefuted argument that these theories have been statutorially [sic] abrogated is correct. Plaintiff is free to move to amend his complaint to add claims arising under the Uniform Commercial Code, but he has, as yet, not stated any. The common law product liability claims he did state are barred as a matter of law.
>
> *Donely*, 2009 WL 5217319, at *4.
>
> Here, Plaintiff fails to cite any portion of R.C. Chapter 1302 in the Complaint (Doc. 1) or in the Response to Defendants' Motion. (Doc. 46). In fact, in Plaintiff's Response, Plaintiff merely asserts in conclusory fashion that the claims are UCC claims, not common law claims. Based on *Donley,* and in light of Plaintiff's conclusory arguments in attempting to establish that the warranty claims are UCC claims, the Court finds that summary judgment is proper.

Miller, at 943-44 (further granting summary judgment as a matter of law in favor of ALZA Corp. with regard to Miller's negligence and negligent misrepresentation claims).

{¶ 34} As in *Miller*, Parker failed to cite any portion of R.C. Chapter 1302 in his complaint or in his response to ACE's motion for summary judgment. Like Fed.R.Civ.Pro. 8, Civ.R. 8(A)(1) also requires "a short and plain statement of the claim

showing that the party is entitled to relief," and we conclude that Parker's breach of warranty claims are not UCC claims.

{¶ 35} In his response to ACE's motion for summary judgment and again in his brief, Parker cited to *Wright v. Harts Machine Services, Inc.,* 6th Dist. Fulton No. F-15-004, 2016-Ohio-4758, 69 N.E.3d 63 (6th Dist.) in support of breach of warranties claims. Therein, the riders of a self-assembled trike asserted claims of breach of implied warranties against Harts Machine Services, Inc. ("Harts"), and the Sixth District affirmed the trial court's decision that the claims were not abrogated by OPLA, which as noted above is limited to "products liability claims" for compensatory damages from a manufacturer or supplier. The Sixth District determined that "Harts has already litigated this issue, leading the trial court to find that it is not a manufacturer or supplier." *Id.,* ¶ 28. Since ACE is a supplier, we conclude that *Wright* does not support Parker's assertion that his claims are not abrogated by the OPLA.

{¶ 36} We finally conclude, as in *Miller,* and pursuant to R.C. 2307.71(B), that summary judgment on Parker's claims of negligence, negligent failure to warn, negligent misrepresentation, and breach of warranties is proper as a matter of law. Accordingly, Parker's assigned error is overruled, and the judgment of the trial court is affirmed.

. . . . . .

HALL, J., concurs.

TUCKER, J., concurring in part and dissenting in part:

{¶ 37} The majority opinion concludes that Parker's negligence and breach of warranty causes of action are abrogated by the OPLA. The majority opinion, based upon this determination, concludes that the trial court correctly granted ACE's summary

judgment motion. I note, initially, that Parker does not discuss his warranty claims in his appellate brief, and, based upon this, I conclude that the trial court's summary judgment determination on the warranty claims should be affirmed. I conclude, turning to Parker's negligence causes of action, that these causes of action are not product liability claims as defined by the OPLA, and, as such, Parker's negligence causes of action are not abrogated. I also conclude, assuming, as we must, that Parker's recitation regarding his interaction with Reigle is accurate, that ACE, since Reigle rendered assistance to Parker, had a duty to provide such assistance with reasonable care. I, finally, conclude there exists an issue of fact concerning whether ACE breached its assumed duty of care toward Parker making summary judgment inappropriate. I, therefore, concur, in part, and dissent, in part, with the majority decision.

Negligence Causes of Action

{¶ 38} Though Parker's complaint asserts two negligence causes of action against ACE (negligence and negligent misrepresentation), Parker, as distilled by his deposition testimony, asserts a single negligence cause of action. This cause of action asserts, in essence, that ACE, through Reigle's conduct, negligently sold Parker Coleman Camp Fuel instead of the kerosene he requested. The following OPLA analysis is based upon this negligence assertion.

OPLA

{¶ 39} ACE's summary judgment motion did not assert that Parker's negligence cause of action is within the coverage of the OPLA and, as a result, abrogated. Further,

ACE's brief and reply brief do not suggest such abrogation. These omissions, I suggest, are based upon ACE's recognition that Parker's negligence claim is not a products liability claim as defined by the OPLA.

{¶ 40} A products liability claim is defined at R.C. 2307.71(A)(13) as follows:

> "Product liability claim" means a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:
>
> (a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
>
> (b) Any warning or instruction, or lack of warning or instruction, associated with that product;
>
> (c) Any failure of that product to conform to any relevant representation or warranty.

Parker's negligence cause of action does not make any allegation regarding Coleman Camp Fuel that fits into R.C. 2307.71(A)(13)(a) because it is not asserted that the Coleman Camp Fuel is defective. Also, when the statutory definitions regarding subsections (b) and (c) are reviewed, it becomes apparent that Parker's negligence claim does not make any allegations regarding Coleman Camp Fuel that fit into either subsection.

{¶ 41} R.C. 2307.76 sets forth how a product may be defective based upon an

inadequate warning or instruction stating in relevant part as follows:

> (1) It is defective due to inadequate warning or instruction at the time of marketing if, when it left the control of its manufacturer, both of the following applied:
>
> (a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;
>
> (b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

As can be seen, a product is defective based upon an inadequate warning or instruction based upon the conduct of the manufacturer. Parker's negligence cause of action makes no allegations regarding the manufacturer of the Coleman Camp Fuel leading to the conclusion that R.C. 2307.71(A)(13)(b) has no application to the analysis.

{¶ 42} R.C. 2307.77 defines when a product is defective based upon the product not conforming to a representation, with the provision stating as follows:

> A product is defective if it did not conform, when it left the control of its manufacturer, to a representation made by that manufacturer. A product may be defective because it did not conform to a representation even

> though its manufacturer did not act fraudulently, recklessly, or negligently in making the representation.

A product, again as can be seen, is defective based upon the manufacturer's conduct. Parker's negligence claim does not assert that Coleman Camp Fuel was defective based upon the product not being in conformance with a manufacturer's representation.

{¶ 43} The OPLA, in most circumstances, does not, as noted, impose liability for a products liability claim upon a supplier. This preferential status, under R.C. 2307.78, has three exceptions. The first, set forth at R.C. 2307.78(B), occurs when the supplier is placed into the "shoes" of the manufacturer.[1] The second and third exceptions, as articulated by R.C. 2307.78(A), involve a supplier's independent liability for a products liability claim based upon a supplier's misrepresentation or negligence. The misrepresentation exception, R.C. 2307.78(A)(2), makes a supplier liable, irrespective of fault, for a product representation made by a supplier and the product does not conform to the representation. Parker's negligence cause of action does not assert that ACE made any nonconforming representations regarding Coleman Camp Fuel. Parker's negligence cause of action, as such, cannot be considered a product liability claim on this basis.

{¶ 44} The final supplier liability carve out is R.C. 2307.78(A)(1) which provides that a supplier may be liable in a products liability claim if the supplier's negligence was

---

[1] These circumstances are: (1) the manufacturer is not subject to process in Ohio; (2) the manufacturer is insolvent; (3) the supplier owns the manufacturer of the product; (4) the manufacturer owns the supplier; (5) the supplier created or furnished the manufacturer with the product's design or formulation; (6) the supplier altered, modified, or failed to maintain the product, and this failure made the product defective; (7) the supplier marketed the product under its own label; and (8) the supplier, upon request, failed to provide a claimant with the manufacturer's name and address.

a proximate cause of a claimant's injury. However, a supplier's negligence liability under R.C. 2307.78(A)(1) must emanate from a products liability claim as defined by R.C. 2307.71 et seq. It is, of course, realized that the determination of whether a claim is a product liability cause of action is not based upon the name given to the cause of action by the plaintiff but by the plaintiff's factual allegations. Parker's factual assertions, this being said, do not assert that the Coleman Camp Fuel was a defective product as statutorily defined or otherwise. Parker, instead and as noted, asserts that ACE, through Reigle's conduct, sold him Coleman Camp Fuel instead of the kerosene he requested. This claim is simply not a product liability claim under the OPLA.[2] This conclusion, of course, does not end the discussion because the trial court's summary judgment determination must be analyzed.

Duty Analysis

{¶ 45} The trial court's summary judgment decision is based upon the conclusion that, under the circumstances of this case, ACE owed Parker no duty of care. The elements of a negligence cause of action are (1) a defendant's duty of care toward the plaintiff, (2) defendant's breach of the duty of care, and (3) injury to the plaintiff that is proximately caused by defendant's violation of the duty of care. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, citing *Mussivand*

[2] It would seem, since, under R.C. 2307.78(A)(1), a plaintiff may establish a products liability claim against a supplier based upon the supplier's negligence, that, assuming Parker's claim is a products liability cause of action, the issue of whether ACE's negligence proximately caused Parker's injuries was before the trial court. Therefore, it would also seem, again assuming that we are dealing with a products liability cause of action, that the OPLA would not act to abrogate Parker's claim that ACE's negligence proximately caused his injuries.

v. David, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). The threshold duty element, in contrast to the breach and proximate cause elements, is a legal issue for the court's determination. *Id*.

{¶ 46} The issue of duty is, in most cases, a given, but, on occasion, as here, the issue is difficult and "at times elusive." *Wallace* at ¶ 23. In such cases, the determination of whether to impose a duty of care involves consideration of which party, under the facts of the case, should bear the loss. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

{¶ 47} The duty determination, though not subject to a formulaic resolution, does rest upon an evaluation of the relationship between the parties and whether, based upon this relationship, the person upon which a duty is asserted should have foreseen that his act, or failure to act, would probably cause harm to another person. *Wallace v. Ohio Dept. of Commerce*, ¶ 23. As stated by the Ohio Supreme Court in *Wallace*, "[t]his court has often stated that the existence of a duty depends upon the foreseeability of harm: if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied." *Wallace*, ¶ 23 (citations omitted). The duty analysis, at its core, involves a decision concerning whether the "plaintiff's interests are entitled to legal protection against the defendant's conduct." *Douglass v. Salem Community Hospital*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107 (7th Dist.), citing *Morgan v. Fairfield Family Counseling Center*, 77 Ohio St.3d 284, 298, 673 N.E.2d 1311 (1997).

{¶ 48} This review, turning to the pending case, is useful, but it does not answer the question of whether ACE, under the presented facts, had a duty of due care toward

Parker. ACE, without dispute, owed Parker no duty regarding his product selection until Parker approached Reigel for assistance. Even then, Reigel had no legal duty to render the requested assistance, but, when a person otherwise without a duty to act decides to act, this decision may impose a duty of care upon the actor, with this concept referred to as the Good Samaritan doctrine. *Indian Towing Co. v. United States of America*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). In this case it was asserted that the United States was liable to Indian Towing based upon the Coast Guard's negligent operation of a lighthouse with this negligence causing an Indian Towing tug to run aground. The Supreme Court stated that the "Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light… and engendered reliance on the guidance afforded by the light, it was obligated to use good care to make certain that the light was kept in good working order…" *Id*. at 69.

{¶ 49} The Good Samaritan concept was embraced by the Ohio Supreme Court in *Briere v. The Lathrop Co.*, 22 Ohio St.2d 166, 258 N.E.2d 597 (1970). The Ohio Supreme Court, within the context of a claim asserted by an injured employee of a subcontractor against a general contractor, stated the following:

> Where an employee of a general contractor, in the scope of his employment, voluntarily and gratuitously undertakes to assist an employee of a subcontractor in moving a scaffold, the act must be performed with the exercise of due care under the circumstances, and the failure of the general contractor's employee to exercise such care, thereby proximately causing plaintiff to fall from the scaffold, results in liability of the general contractor for the resulting injury.

Briere, paragraph one of the syllabus.

{¶ 50} The *Briere* decision cited with approval to the Restatement of the Law 2d, Torts (1965), 135, Section 323 which states as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

We applied Section 323 in *Plank v. DePaul Cranes, Inc.*, 2d Dist. Montgomery No. 10486, 1988 WL 110312 (Oct. 21, 1988). In this case Tally, an employee of a company involved in the removal of an overhead crane, assisted Plank, an employee of another company involved in the crane removal, in Plank's effort to remove an overhead obstruction to the crane's removal. Plank, while on a ladder using a crowbar to dislodge the obstruction, came into contact with an energized crane runway system. This caused Plank to fall resulting in his death as a result of a skull fracture and/or ventricular fibrillation caused by Plank's exposure to electricity.

{¶ 51} Tally's role, according to Plank's estate, involved his gratuitous decision to obtain and then hold the ladder from which Plank fell. Plank's estate argued that since

Tally decided to lend assistance, he had a duty to provide such assistance with due care and he failed to do so because he should have either de-energized the crane runway or, at least, warned Plank that the overhead runway was energized.

{¶ 52} We reversed the trial court's summary judgment decision in favor of Tally's employer based upon Section 323. We initially noted that Section 323 provides alternate recovery avenues, that liability under subsection (b) requires the plaintiff's reliance upon the defendant's conduct, that such reliance is not required for the imposition of liability under subsection (a), and that Plank's situation implicated subsection (a).

{¶ 53} We, turning to the rationale for the summary judgment reversal, concluded that "[i]f it is found that Tally undertook to perform [the alleged] acts, that Tally failed to exercise reasonable care in assisting Plank to ascend the ladder without taking adequate precautions to guard against his falling or against the electrical hazard, that the risk of harm to Plank increased as a result, and that these facts proximately caused Plank's death, [Tally's employer] would be liable for Plank's death pursuant to Section 323 of the Restatement." *Plank* at *8.

{¶ 54} In this case, since Parker requested Reigel's assistance, it seems that Section 323(b) is the better fit. Section 323(b) allows the imposition of liability upon a gratuitous actor if the intended beneficiary's reliance upon the conduct proximately causes the injury at issue. The "Restatement does not define the precise contours of § 323(b) liability," but the case law suggests that the imposition of liability requires that a "plaintiff's reliance must be reasonably foreseeable by the defendant under the circumstances." *Turbe v. Gov't of the Virgin Islands*, 938 F.2d 427, 431 (3d Cir.1991) citing *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 522-23, 429 N.Y.S.2d 606, 407

N.E.2d 451 (1980).

{¶ 55} I, turning to the pending case, would reverse the trial court's summary judgment decision based upon Section 323(b). I reach this conclusion because if a jury would conclude that Reigel acted as Parker asserts, that Reigel should have recognized that her conduct, though gratuitous, was necessary for Parker's protection, that Reigel failed to use reasonable care in assisting Parker by selecting Coleman Camp Fuel, that Parker purchased and then used the Coleman Camp Fuel in reliance upon Reigel's conduct, that Reigel should have reasonably foreseen Parker's reliance, and that Parker's reliance proximately caused his injuries, liability against ACE under Section 323(b) could appropriately be imposed. Of course, a jury's assessment would include consideration of whether Parker was comparatively negligent with this consideration potentially mitigating or eliminating ACE's liability.

{¶ 56} This conclusion rejects ACE's argument that, as a matter of law, its only duty to Parker was to insure that the manufacturer's warning was affixed to the cans of Coleman Camp Fuel Parker purchased. This duty contention, though not articulated with Section 323 in mind, goes to the issue of whether Reigel should have reasonably foreseen that Parker, instead of reading the warning, would rely upon her selection of the Coleman Camp Fuel to start the brush fire. Resolution of this issue is appropriately left to a jury. Parker's failure to read the warning label is a comparative negligence issue, but, given Reigel's asserted conduct, I am unwilling to conclude that an affixed warning label was ACE's only duty to Parker.

{¶ 57} This conclusion also rejects ACE's argument that primary assumption of the risk acts as an absolute shield to ACE's liability. Primary assumption of the risk acts, in

appropriate circumstances, to preclude the imposition of a duty of due care. *Horvath v. Ish*, 134 Ohio St.3d 48, 2012-Ohio 5333, 979 N.E.2d 1246. If triggered, it is an absolute defense to a plaintiff's claim that a defendant's negligence proximately caused injury to the plaintiff. *Id.*

{¶ 58} Primary assumption of the risk, usually applicable in the context of a recreational activity, recognizes that certain activities expose an individual to dangers that cannot be eliminated, and if one chooses to engage in such an activity, he cannot look to someone else for protection. *Brumage v. Green*, 2d Dist. Champaign No. 2014-CA-7, 2014-Ohio-2552. Primary assumption of the risk applies to those risks which are inherent to the activity. *Id*., ¶ 12. For instance, a racetrack's negligent design is not a risk inherent to participation in a go-cart racing event, and, as such, primary assumption of the risk would not act to eliminate a plaintiff's negligent design claim. *Goffe v. Mower*, 2d Dist. Clark No. 98-CA-49, 1999 WL 55693 (Feb. 5, 1999).

{¶ 59} In this case, the risk that Reigel would select Coleman Camp Fuel when Parker requested kerosene is not a risk inherent to the ignition of the brush fire that caused Parker's injuries. Primary assumption of the risk, given this, is simply not applicable to this case.

Conclusion

{¶ 60} I, based upon the foregoing, would reverse and remand the trial court's summary judgment decision.

Copies mailed to:

James P. Connors
Lisa M. Fedynyshyn-Conforti
Hon. Nick A. Selvaggio

[Cite as *Cleveland v. Laborers Internal. Union Local 1099*, 2018-Ohio-161.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105378

CITY OF CLEVELAND

PLAINTIFF-APPELLANT

vs.

LABORERS INTERNATIONAL UNION LOCAL 1099

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-08-660660

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

RELEASED AND JOURNALIZED: January 18, 2018

ATTORNEYS FOR APPELLANT

Barbara A. Langhenry
Director of Law
City of Cleveland

Drew A. Carson
Austin Tyler Opalich
Assistant Law Directors
601 Lakeside Ave., Room 106
Cleveland, OH 44114

ATTORNEYS FOR APPELLEE

Joseph J. Guarino
Basil William Mangano
Mangano Law Offices Co. L.P.A.
2245 Warrensville Center Rd., Suite 213
Cleveland, OH 44118

TIM McCORMACK, J.:

{¶1} Plaintiff-appellant, the city of Cleveland appeals from the trial court's order of December 16, 2016, in which the trial court awarded Laborers' International Union of North America, Local Union No. 1099 ("Local 1099" or "the union") reasonable and demonstrable lost back pay in the amount of $309,797.86 following an arbitration award in favor of the union. For the reasons that follow, we affirm.

Procedural History

{¶2} Local 1099 is an organization whose workers maintain public parks and malls and other public areas. In 2006, Local 1099 filed a grievance against the city, alleging that the city had violated the parties' collective bargaining agreement and prior settlement agreements by having a private contractor — Downtown Cleveland Alliance ("DCA") and/or Block by Block — perform work traditionally performed by the union. In 2008, the arbitrator determined that the city did, in fact, violate its collective bargaining agreement and letter of understanding with Local 1099, and the arbitrator ordered the city to pay "reasonable and demonstrable lost back pay" to bargaining unit members. The arbitrator retained jurisdiction for 60 days to resolve any issues arising from implementation of the award.[1]

{¶3} Thereafter, the city appealed the arbitrator's decision by filing with the trial court a motion to vacate the arbitrator's award. In its motion, the city argued that the

[1] The arbitrator later extended this jurisdiction for another 60 days total, until June 27, 2008.

arbitrator relied on external law, in violation of the collective bargaining agreement ("CBA"), the arbitrator improperly modified the grievance, and the arbitrator incorrectly found the creation of the "Special Improvement District" created a subcontract between the city and DCA and/ or Block by Block. The city argued in the alternative that the trial court should hold its proceedings in abeyance in order for the city to address the purported back pay and overtime damages during the period of time in which the arbitrator retained jurisdiction over this matter.

{¶4} The union then filed an application to confirm the arbitrator's award. The union also filed a motion to strike the city's motion to vacate, stating that the city failed to serve upon the union a copy of the city's motion pursuant to R.C. 2711.13. In February 2009, the trial court denied the city's motion to vacate the arbitration award and it granted the union's motion to confirm the award. The city appealed. In December 2009, this court affirmed the decision of the trial court, finding that the city failed to comply with the procedural requirements of R.C. 2711.13 and, therefore, the trial court lacked jurisdiction to entertain the city's motion to vacate. *See Cleveland v. Laborers Internatl. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313.

{¶5} Following this court's 2009 decision, the union returned to the arbitrator with a request for a hearing on the back pay award. The parties agreed to submit briefs in lieu of an evidentiary hearing on back pay amounts, and the arbitrator agreed to accept the briefs for consideration. In May 2010, the union filed its brief on damages to the arbitrator, and the city filed a brief in opposition. In its opposition, the city challenged

the arbitrator's jurisdiction to issue a supplemental award on damages in light of the trial court's order of February 2009 confirming the arbitrator's initial award of "reasonable and demonstrable lost back pay."

{¶6} On March 27, 2013, approximately three years after Local 1099 filed its brief on damages, the arbitrator issued his decision, finding he lacked jurisdiction to issue an additional award. In doing so, the arbitrator determined he was rendered "functus officio" following issuance and confirmation of the initial award and stated as follows:

> As the confirmed award is final and thus unalterable, and the arbitrator functus officio, disputes as to whether remedies required under the award have been met are necessarily submitted to litigation if they cannot be grieved under the agreement. In any case, litigation of the present matter seems likely, irrespective of any additional remedy award issued by this arbitrator.

{¶7} On June 28, 2013, the union filed with the trial court a motion to show cause or alternative post-judgment motion to determine reasonable and demonstrable lost back pay. In its motion, Local 1099 requested the trial court issue an order requiring the city to show cause why it should not be found in contempt for refusing to pay "reasonable and demonstrable" back pay. Alternatively, the union requested the trial court, pursuant to Civ.R. 69, issue a post-judgment order setting the amount of "reasonable and demonstrable" back pay in the amount of $309,797.86.[2] The city responded, denying it

[2] The union also filed a motion to vacate the arbitrator's March 2013 award in Cuyahoga C.P. No. CV-13-809525, *Laborers' Local Union No. 1099 v. Cleveland*, to preserve this remedy. The record shows that the parties jointly agreed to stay the matter in Case No. CV-13-809525 pending the resolution of the case at hand.

was violating the arbitrator's decision, and it moved to dismiss the union's complaint for lack of jurisdiction.

{¶8} Three additional years later, on December 16, 2016, the trial court issued an order stating that it "reviewed the Laborer's Local 1099's motion to show cause or alternative post-judgment motion to determine reasonable and demonstrable lost back pay, briefs in opposition, various motions filed by both parties in furtherance of their arguments, exhibits, affidavits, and all pleadings," and it awarded the union $309,797.86 in "reasonable and demonstrable lost back pay" as well as prejudgment interest from May 23, 2006.

Assignments of Error

{¶9} The city now appeals the trial court's 2016 decision, assigning two errors for our review:

> I. The trial court erred in awarding damages as it lacked jurisdiction to modify the underlying arbitration award.
>
> II. The trial court abused its discretion in awarding $309,797.86 in "reasonable and demonstrable lost back pay" as damages.

Law and Analysis

{¶10} In its first assignment of error, the city contends that the trial court lacked jurisdiction to modify the arbitrator's award of "reasonable and demonstrable lost back pay" and therefore the court erred in awarding damages not stated in the arbitrator's initial award. In support, the city cites to R.C. Chapter 2711 and argues that the trial court's awarded sum of $309,797.86 was an improper modification of the arbitrator's

award. The city further argues that the trial court abused its discretion in awarding the back pay because (1) the union cannot show that the DCA performed services that have been "traditionally and exclusively" performed by members of Local 1099, and (2) the union cannot establish that its members lost wages and overtime opportunities because of the work performed by DCA.

{¶11} In response, the union contends that the trial court had jurisdiction to monetize the arbitrator's award of "reasonable and demonstrable" back pay as part of its February 2009 order confirming the arbitrator's award. The union provides that the trial court's general jurisdiction under Civ.R. 69 to entertain execution proceedings supports its position. The union further provides that the trial court's December 2016 award is supported by the evidence.

{¶12} Arbitration procedures are governed by R.C. Chapter 2711. And R.C. 2711.09 through 2711.14 provide the only procedures for challenges to, or arguments in support of, an arbitrator's decision. *Strnad v. Orthohelix Surgical Designs*, 8th Dist. Cuyahoga No. 94396, 2010-Ohio-6161, ¶ 23. Once an arbitration is completed, the jurisdiction of the trial court is limited to confirmation, vacation, modification, or enforcement of the award, and only on the terms provided by the statute. *Lockhart v. Am. Res. Ins. Co.*, 2 Ohio App.3d 99, 101, 440 N.E.2d 1210 (8th Dist.1981), paragraph two of the syllabus.

{¶13} R.C. 2711.09 governs the process of confirming an arbitration award:

> At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. Thereupon the court shall grant such an order and enter judgment thereon, unless the award is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code. Notice in writing of the application shall be served upon the adverse party or his attorney five days before the hearing thereof.

{¶14} "The purpose of [R.C. 2711.09] is to enable parties to an arbitration to obtain satisfaction of the award." *Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 172, 480 N.E.2d 456 (1985). Therefore, when a timely motion is made under R.C. 2711.09 to confirm an arbitration award, the court must grant the motion, "unless a timely motion for modification or vacation has been made and cause to modify or vacate is shown." *Id.* at 174.

{¶15} Under R.C. 2711.10, a trial court may vacate an arbitration award, by application of any party, only under the following circumstances:

> (A) The award was procured by corruption, fraud, or undue means.
>
> (B) Evident partiality or corruption on the part of the arbitrators, or any of them.
>
> (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

> (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

{¶16} R.C. 2711.11 provides similarly limited conditions upon which a trial court may, upon application of any party, modify or correct an arbitration award:

> (A) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;
>
> (B) The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;
>
> (C) The award is imperfect in matter of form not affecting the merits of the controversy.

{¶17} Thus, the trial court's jurisdiction to review an arbitration award is "narrow and limited." *Warren Edn. Assn.*, 18 Ohio St.3d at 173, 480 N.E.2d 456. And a trial court is precluded from examining the actual merits upon which the arbitrator based his or her award. *See Motor Wheel Corp. v. Goodyear Tire & Rubber Co.*, 98 Ohio App.3d 45, 51, 647 N.E.2d 844 (8th Dist.1994).

{¶18} Likewise, appellate review of arbitration proceedings is confined to those orders the trial court has issued pursuant to R.C. Chapter 2711, and the substantive merits, or the original arbitration award, are not reviewable on appeal. *Lockhart*, 2 Ohio App.3d at 101, 440 N.E.2d 1210. "The agreement to submit to arbitration describes the issues and defines the perimeters of the arbitration tribunal's powers with respect to them. When

the submitted issues are decided, the arbitrators' powers expire. Thus, a second award on a single, circumscribed submission is a nullity." *Id.* at 101-102; *Reynoldsburg City School Dist. Bd. of Edn. v. Licking Hts. Local School Dist. Bd. of Edn.*, 10th Dist. Franklin No. 08AP-415, 2008-Ohio-5969, ¶ 22.

{¶19} Here, the arbitrator determined in February 2008 that the city had a relationship with the private contractor, DCA and/or Block by Block, the services included work traditionally performed by the union, and the city did not give the union an opportunity to submit an alternative proposal, in violation of the parties' CBA, and the arbitrator awarded the union "reasonable and demonstrable lost back pay." This award, in totality, was confirmed by the trial court, upon the union's application, and later affirmed by this court. *See Cleveland*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313. Because the submitted issues had been decided — by the arbitrator, the trial court, and the court of appeals — the arbitrator's powers had expired. Therefore, the arbitrator was correct when he declined to revisit his award of "reasonable and demonstrable lost back pay" after this court affirmed the trial court's order confirming the arbitrator's award.

{¶20} As a result of this court's decision in 2009, and the arbitrator's lack of jurisdiction to review its initial award, the parties are bound by the arbitrator's determination that the city violated the parties' CBA and the union is due "reasonable and demonstrable lost back pay." Unfortunately, an award for "reasonable and demonstrable lost back pay" lacks a specific dollar amount and is therefore unenforceable as awarded.

{¶21} We find that the trial court's award of a sum certain, $309,797.86, was a proper and necessary exercise of the court's enforcement powers.

{¶22} It is well established that trial courts have inherent power to interpret and enforce its own judgments. *Mike McGarry & Sons, Inc. v. Marous Bros. Constr., Inc.*, 11th Dist. Lake No. 2011-L-001, 2011-Ohio-6859, 23, citing *Armco, Inc. v. United Steelworkers of Am.*, 5th Dist. Richland No. 2002CA0071, 2003-Ohio-5368, ¶43; *Howard v. Howard*, 10th Dist. Franklin No. 14AP-292, 2014-Ohio-5248, ¶ 15. Additionally, trial courts have the power to issue orders pursuant to the rules of civil procedure, and these orders necessarily "ensure that litigation progresses toward final resolution." *McCord v. McCord*, 10th Dist. Franklin Nos. 06AP-102 and 06AP-684, 2007-Ohio-164, ¶ 12. "Courts of general jurisdiction possess inherent power to do all things necessary to the administration of justice and to protect their own powers and processes." *Slabinski v. Servisteel Holding Co.*, 33 Ohio App.3d 345, 346, 515 N.E.2d 1021 (9th Dist.1986). Such power is "necessary to the orderly and efficient exercise of jurisdiction" and without which "no other [power] could be exercised." *Hale v. State*, 55 Ohio St. 210, 213, 45 N.E. 199 (1896).

{¶23} Importantly, a confirmed arbitration award has the effect of a judgment and can be enforced by the trial court. *Athens Cty. Commrs. v. Ohio Patrolmen's Benevolent Assn.*, 4th Dist. Athens No. 06CA49, 2007-Ohio-6895, ¶47. R.C. 2711.12 provides that "[u]pon the granting of an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding, the court must enter judgment in conformity

therewith." The judgment is then docketed "and in all respects has the same effect and is subject to all laws relating to a judgment in an action and may be enforced as if rendered in an action in the court in which it is entered." *Champion v. Kraftmaid Cabinetry, Inc.*, 190 Ohio App.3d 202, 2010-Ohio-5398, 941 N.E.2d 124 (11th Dist.).

{¶24} This court previously denied mandamus where we found that a teacher had other avenues of enforcement available concerning her award of back pay in *Hunt v. Westlake City School Dist. Bd. of Edn.*, 114 Ohio App.3d 563, 683 N.E.2d 803 (8th Dist.1996). In *Hunt*, the relator-teacher initially filed a cause of action against the board of education and the school principal, seeking reinstatement, back pay, and other damages. When the trial court rendered judgment for the board, Hunt appealed to this court, which reversed the trial court and awarded Hunt "'all compensation and benefits which she has lost as a result of the unlawful nonrenewal of her contract.'" *Id.* at 565, quoting *Hunt v. Westlake City School Dist.*, 100 Ohio App.3d 233, 244, 653 N.E.2d 732 (8th Dist.1995). The board ultimately tendered her compensation in an amount the board deemed appropriate, and Hunt declined the offer and filed an application seeking a writ of mandamus to enforce the appellate judgment of this court. *Id.* at 566-567.

{¶25} In denying mandamus, we found that Hunt's remedy remained with the trial court's general enforcement powers:

> The use of mandamus to enforce a judgment is not popular and widespread because other avenues of enforcement are readily available. For example, when the Supreme Court of Ohio remands a judgment to this Court for

> execution, this Court has jurisdiction to entertain a motion for an order against an offending party to show cause why the offender should not be held in contempt for noncompliance with the judgment of the Supreme Court. * * * Likewise, when this Court remands a judgment to the Common Pleas Court for execution, the Common Pleas Court has jurisdiction to entertain execution proceedings.

Id. at 568, citing App.R. 27; Civ.R. 69, 70; R.C. Chapters 2327 (execution generally), 2329 (execution against property), 2331 (execution against the person). We therefore denied the writ, finding that the Cuyahoga County Common Pleas Court had "acquired jurisdiction to enforce the judgment of this court." *Hunt* at 568.

{¶26} Here, we have an arbitrator's award that has been confirmed, and pursuant to R.C. 2711.12, it has the effect of a judgment and can be enforced by the trial court. In considering Local 1099's motion to show cause or alternative post-judgment motion to determine "reasonable and demonstrable lost back pay," reviewing the parties' briefs and responses, examining the evidence, and awarding the union $309,797.86, the trial court did not improperly modify the arbitrator's award of "reasonable and demonstrable lost back pay." Rather, the court exercised its authority to issue orders pursuant to the rules of civil procedure and its inherent power to interpret and enforce a judgment of the court. Such action was necessary to provide meaning and effect to the judgment and ensure that litigation progresses toward final resolution. Without the court's order, the

arbitration award of "reasonable and demonstrable lost back pay" was meaningless and unenforceable.

{¶27} The city's first assignment of error is overruled.

{¶28} In its second assignment of error, the city argues that the trial court abused its discretion in awarding $309,797.86 in "reasonable and demonstrable lost back pay." In response, the union contends that the correct standard of review is whether some evidence exists in the record to support the trial court's ultimate conclusion. The union further contends that because the city failed to request findings of fact and conclusions of law pursuant to Civ.R. 52, it cannot now argue the trial court abused its discretion.

{¶29} Civ.R. 52 applies when a case proceeds to a bench trial:

> When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the findings of fact found separately from the conclusions of law.

{¶30} The purpose of findings of fact and conclusions of law is to enable proper appellate review. *Galloway v. Butler*, 8th Dist. Cuyahoga No. 91256, 2008-Ohio-5352, ¶ 16, citing *Fox v. Fox*, 8th Dist. Cuyahoga No. 62454, 1993 Ohio App. LEXIS 3550 (July 15, 1993). The findings of fact and conclusions of law "aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment." *Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). A party may file a Civ.R. 52 request for findings "'to ensure the fullest possible review.'"

Redmond v. Wade, 4th Dist. Lawrence No. 16CA16, 2017-Ohio-2877, ¶ 51, quoting *Cherry v. Cherry*, 66 Ohio St.3d 348, 356, 421 N.E.2d 1293 (1981).

{¶31} In the absence of findings of fact and conclusions of law, a reviewing court would presume regularity in the trial below and assume the trial court followed the proper application of the rules in arriving at its decision. *Law Office of Natalie F. Grubb v. Bolan*, 11th Dist. Geauga No. 2010-G-2965, 2011-Ohio-4302, ¶ 26; *Larko v. Dearing*, 11th Dist. Ashtabula No. 2013-A-0007, 2013-Ohio-4304, ¶ 29 (where findings of fact were never requested, the reviewing court will presume the trial court "considered all relevant facts").

{¶32} As the Fifth District Court of Appeals explained:

> [W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence.
>
> The message should be clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already "uphill" burden of demonstrating error becomes an almost insurmountable "mountain."

Pettet v. Pettet, 55 Ohio App.3d 128, 130, 562 N.E.2d 929 (5th Dist.1988).

{¶33} Thus, where there are no findings of fact, we must review the record to determine whether there is "some evidence" to support the trial court's decision. *Galloway,* 8th Dist. Cuyahoga No. 91256, 2008-Ohio-5352, at ¶ 19; *Bolan* at ¶ 26. And

where there is some evidence supporting the trial court's conclusion, "we assume regularity and affirm the judgment." *Galloway*.

{¶34} Here, the trial court reviewed the record to determine what constituted "reasonable and demonstrable lost back pay" — a factual determination. The city did not request findings and conclusions, and the trial court issued a general judgment in favor of the union. We therefore review the record for "some evidence" supporting the trial court's award of $309,797.86 in "reasonable and demonstrable lost back pay."

{¶35} Before entering judgment, the trial court considered the union's motion to show cause or alternative post-judgment motion to determine reasonable and demonstrable lost back pay, briefs in opposition, various motions filed by both parties, exhibits, affidavits, and "all pleadings." Considering this matter has been in litigation in some form or another since the union filed its initial grievance in 2006, the record is considerable.

{¶36} Specifically, the trial court considered the union's "damages brief" attached to the union's motion to show cause/post-judgment motion, which was initially prepared for the arbitrator's consideration and in lieu of an evidentiary hearing on "reasonable and demonstrable lost back pay." This brief identified documentation received in response to a subpoena served upon Block by Block, which included time cards of employees and/or volunteers who worked on public areas maintained by the city "from May 23, 2006 to present," payroll records of these workers, a list of all employees who worked on the

public areas, and "any documents describing where and what type of work the employees and/or volunteers performed."

{¶37} Additionally, on November 23, 2015, the union filed a notice of supplemental filings to its motion to show cause/post-judgment motion, which included Excel spreadsheets summarizing the payroll data produced by Block by Block, along with a CD containing all documents produced by Block by Block; arbitration transcripts from 2007 and 2008 concerning the initial grievance that contained evidence of the duties performed by Block by Block that was purportedly historically performed by Local 1099; and information from the Ohio Department of Taxation concerning how to calculate interest from 2006.

{¶38} These documents produced by Block by Block included the total number of hours the members of the Block by Block's "Clean Team" worked on public property owned or maintained by the city as 11,763.25 hours. They also included the hours the relevant members of the Clean Team worked during each applicable period: 3,818.75 hours in 2006; 5,544.50 hours in 2007; and 2,400 hours in 2008.

{¶39} Local 1099's damages brief also included the union's wage sheets, which contained the wages for bargaining unit classifications for 2006 through 2008. These wage sheets depict the straight time and overtime pay for the ground maintenance worker and the real estate maintenance worker for each of these years. For the ground maintenance worker, straight time is listed as $16.41 (2006), $16.75 (2007), and $17.09 (2008); and overtime pay is $24.61 (2006), $25.12 (2007), and $25.64 (2008). For the

real estate maintenance worker, straight time is listed as $17.25 (2006), $17.60 (2007), and $17.95 (2008); and overtime pay is $25.87 (2006), $26.40 (2007), and $26.93 (2008).

{¶40} Based upon our review of the record, including the documentation discussed above, we find there is "some evidence" in the record that demonstrates the work performed by Block by Block, the total number of hours that members of Block by Block worked, and the wages attributed to the relevant members of the union during the applicable time period. We therefore conclude that the trial court did not error in awarding Local 1099 "reasonable and demonstrable lost back pay" in the amount of $309,797.86, because there is "some evidence" supporting the trial court's determination. In presuming regularity in the trial court, as we must, we affirm the trial court's award.

{¶41} The city's second assignment of error is overruled.

{¶42} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

_____

TIM McCORMACK, JUDGE

EILEEN A. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR

[Cite as *Multibank 2009-1CML-ADC Venture, L.L.C. v. S. Bass Island Resort, Ltd.*, 2018-Ohio-120.]

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

Multibank 2009-1CML-ADC Venture LLC (fka Columbian Bank & Trust Co.)	Court of Appeals No. OT-17-005
Appellee	Trial Court No. 2008 CV 0479
v.	
South Bass Island Resort, Ltd., et al.	**DECISION AND JUDGMENT**
Appellants	Decided: January 12, 2018

* * * * *

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

D. Jeffery Rengel and Thomas R. Lucas, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from the judgment of the Ottawa County Court of Common Pleas, granting appellee's, Multibank 2009-1CML-ADC Venture LLC (fka Columbian Bank & Trust Co.), motion for summary judgment on its complaint in

foreclosure against appellants, South Bass Island Resort, Ltd. ("SBIR"), Cecil Weatherspoon, Terry L. Ross, John C. Tomberlin, and 250 Centre, Ltd. For the reasons that follow, we affirm.

I. Facts and Procedural Background

{¶ 2} This litigation stems from a 2006 loan agreement between appellee and appellants whereby appellee was to loan SBIR up to $8,600,000 for the development of real property. As a condition of the loan, and in addition to the mortgage on the property, Weatherspoon, Tomberlin, and 250 Centre, Ltd. executed separate cognovit unconditional guarantees of the loan. Weatherspoon also executed, as collateral, an assignment of an insurance policy. It is undisputed that appellants have not made any payments on the loan.

{¶ 3} On August 15, 2008, appellee filed its complaint in foreclosure against appellants in the present action. At the same time, appellee also filed a complaint for judgment on the note in a companion case in Erie County (the "Erie County case").

{¶ 4} On January 13, 2012, appellee moved for summary judgment in this foreclosure action.[1] In support of its motion, appellee relied on the November 22, 2011 judgment in the Erie County case finding that appellee owned the note and that appellants defaulted on the note, and entering judgment against appellants in the amount of $7,849,093.30 plus interest, payment of taxes, assessments and insurance, and costs. In particular, appellee argued that the Erie County judgment collaterally estopped appellants

[1]Appellee had previously moved for summary judgment on December 16, 2011, which the trial court summarily denied because the motion failed to comply with a local rule.

from re-litigating the issue of liability under the note. Appellee further argued that it had satisfied all pertinent requirements, and was entitled to an order of foreclosure.

{¶ 5} In response, appellants argued that the Erie County judgment was not yet final because there remained an issue for trial regarding the validity of Tomberlin's guaranty, and because appellants intended to appeal the Erie County judgment. Thus, appellants claimed that appellee could not rely on the Erie County judgment to establish its right to foreclosure.

{¶ 6} On January 22, 2013, the trial court granted appellee's motion for summary judgment. That decision was appealed to this court, and in *Multibank 2009-1 CML-ADC Venture, LLC v. South Bass Island Resort, Ltd.*, 6th Dist. Ottawa No. OT-13-004, 2014-Ohio-4513, we reversed. In our decision, we agreed with appellants that the Erie County judgment was not a final judgment entitled to preclusive effect. *Id.* at ¶ 33. Thus, we were required to determine whether summary judgment was properly granted solely upon consideration of the evidence submitted in support of appellee's motion. Upon such consideration, we held that the evidence was insufficient to support summary judgment in that the affidavit submitted by appellee failed to state that SBIR was in default or that appellee had complied with all conditions precedent for foreclosure. *Id.* at ¶ 45. Accordingly, we remanded the matter to the trial court for further proceedings.

{¶ 7} On November 20, 2015, appellee renewed its motion for summary judgment. In its renewed motion, appellee stated that the Erie County judgment had now become final, in that the remaining issue concerning Tomberlin's guaranty had been resolved by an April 21, 2014 judgment entry finding Tomberlin liable on the loan as a guarantor.

Further, appellee submitted affidavits indicating that appellants were in default of the loan and mortgage, and that all conditions precedent to foreclosure had been satisfied. Therefore, appellee again requested summary judgment in its favor on its complaint in foreclosure.

{¶ 8} Appellants, in response, opposed appellee's renewed motion for summary judgment, and moved for summary judgment in their favor on appellee's claims. In particular, appellants argued that appellee failed to seek leave of court before filing its third motion for summary judgment, and thus the motion must be denied. Alternatively, appellants argued for the first time that appellee was prohibited by the doctrines of res judicata and merger and bar from prosecuting its foreclosure action because appellee had already chosen to litigate liability under the note in Erie County. Appellants asserted that because the breach of the loan agreement and foreclosure of the mortgage involved the same parties and the same transaction, the principles of res judicata required that appellee litigate its claims for liability under the note and for foreclosure at the same time.

{¶ 9} On January 12, 2017, the trial court entered its judgment granting appellee's motion for summary judgment, and denying appellants' cross-motion for summary judgment.

II. Assignments of Error

{¶ 10} Appellants have timely appealed the trial court's January 12, 2017 judgment, and now assert two assignments of error for our review:

I. The trial court erred when it granted appellee's third motion for summary judgment in violation of the doctrines of res judicata and merger and bar.

II. The trial court erred when it considered appellee's third motion for summary judgment filed without leave.

III. Analysis

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

{¶ 12} In their first assignment of error, appellants argue that appellee is barred by res judicata from proceeding in the foreclosure action. Appellants assert that appellee's claims for breach of the loan agreement and breach of the mortgage agreement arose out of the same transaction, and they note that, in the foreclosure action, appellee was not seeking foreclosure based upon a judgment lien from another county, but rather upon breach of the loan agreement. Thus, appellants contend that because appellee elected to litigate its claims separately, in two different courts, appellee was bound by the decision

of the first court to enter a final judgment, and is prevented from seeking additional relief or recovery in a second action based upon the same transaction involving the same parties.

{¶ 13} Appellee, in response, argues that a note and mortgage are legally distinct transactions, and thus claims related to each may be brought in separate actions. In support, appellee relies on *First Fed. S. & L. Assn. of Newark v. Community Hous. Dev., Inc.*, 5th Dist. Fairfield No. 10-CA-10, 2010-Ohio-4280. In that case, the bank sought judgment in Franklin County on the cognovit note. Later, the bank filed a foreclosure action in Fairfield County. Similar to appellants, the debtor in *First Fed.* argued that res judicata barred the bank from proceeding in the foreclosure action. However, the Fifth District recognized that "an action on a cognovit note does not necessarily also involve or require a foreclosure action and an action on a note does not involve the property securing the note." *Id.* at ¶ 25. Therefore, the court held that because "a foreclosure action is a separate and distinct action from a complaint on a note, res judicata and/or collateral estoppel does not apply, and a plaintiff need not include both in a single complaint in order to preserve all issues." *Id.* at ¶ 28; *see also Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, 894 N.E.2d 65, ¶ 17 (9th Dist.) ("Because a mortgage and an accompanying promissory note securing the mortgage constitute separate contracts, they give rise to legally distinct remedies that cannot be pursued in a single-count foreclosure suit. * * * [A] mortgage foreclosure expressly has been held not to bar a subsequent suit on a guaranty. * * * [A] judgment of foreclosure

[does] not adjudicate the defendant's rights and liabilities under a guaranty contract, and, therefore, the doctrine of res judicata [does] not apply.").

{¶ 14} We find the reasoning of the Fifth District in *First Fed.* to be persuasive. Therefore, we hold that the doctrine of res judicata does not apply to bar appellee's complaint in foreclosure.

{¶ 15} Accordingly, appellants' first assignment of error is not well-taken.

{¶ 16} In their second assignment of error, appellants argue that appellee's motion for summary judgment should have been denied because it did not comply with Civ.R. 56(A), which provides, in pertinent part,

> A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

{¶ 17} Here, although disputed by appellee, we will presume for purposes of our analysis that appellee was required to, but did not, seek leave of court before filing its renewed motion for summary judgment.

{¶ 18} Notably, appellants raised this same argument in their first appeal in this matter, and our holding is the same now as it was then. In our view, the trial court impliedly granted appellee leave to file its renewed motion for summary judgment when it considered and ruled on the motion. *See St. Paul Fire & Marine Ins. Co. v. Corwin*,

6th Dist. Wood No. WD-00-058, 2001 Ohio App. LEXIS 2223, * 5-6 (May 18, 2001); *Capital One Bank (USA) N.A. v. Ryan*, 10th Dist. Franklin No. 14AP-102, 2014-Ohio-3932, ¶ 31.

{¶ 19} Accordingly, appellants' second assignment of error is not well-taken.

IV. Conclusion

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

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, P.J. _____
CONCUR.
JUDGE