

The Bullet Point – Volume I, Issue 3

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

[Altercare of Mayfield Village, Inc. v. Berner, 8th Dist. Cuyahoga Nos. 104259 and 104306, 2017-Ohio-958.](#)

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

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

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

[Carrington Mtge. Srvs., LLC v. Shepherd, 5th Dist. Tuscarawas No. 2016 AP 07 0038, 2017-Ohio-868.](#)

This was an appeal of a trial court's decision to grant summary judgment in a foreclosure action and deny the borrower's motion to strike the lender's summary judgment affidavit. The borrower argued that the lender's summary judgment evidence was insufficient to entitle it to judgment because it provided two "different" copies of the promissory note to the court. The Fifth Appellate Disagreed, finding that the lender provided

summary judgment evidence to explain the discrepancy between the two notes and, notably, the borrower never presented any evidence to contest that explanation. Regarding the borrower's motion to strike, the Fifth Appellate District found that the lender's summary judgment affiant adequately laid the business records foundation to testify to the records attached to her affidavit and explained the personal knowledge she had to testify to those records. The court also found that the lender could testify to its predecessors records under the "adoptive business records exception" because it incorporated those records into its own records and relied upon them.

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

[Madfan, Inc. v. Makris, et. al., 8th Dist. Cuyahoga No. 103655, 2017-Ohio-979.](#)

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

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

[Wright State University v. Fraternal Order of Police, 2d Dist. Greene No. 2016-CA-35, 2017-Ohio-854.](#)

This was an appeal of a trial court's order agreeing with an arbitrator's award to modify a disciplinary sentence against a police officer. The university claimed the arbitrator exceeded his authority and his award violated public policy. The Second Appellate District disagreed. In finding that the arbitrator did not exceed his authority, the court looked to the terms of the collective bargaining agreement finding that nothing in the collective bargaining agreement precluded the arbitrator from reviewing the appropriateness of the discipline against the officer. The court also disagreed that the arbitrator's award violated public policy, noting that while an award could be vacated if the contract itself violates public policy, there is not authority to set aside an award as against public policy.

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

[Zook v. JP Morgan Chase Bank, 10th Dist. Franklin No. 15AP-750, 2017-Ohio-838.](#)

This was an appeal of a summary judgment decision in favor of a institutional trustee on claims for negligence and breach of fiduciary duty. The beneficiaries to a trust brought suit against the institutional trustee, claiming that its actions resulted in the significant loss in value to the trust assets. The Tenth Appellate District affirmed the trial court’s decision to grant the institutional trustee summary judgment based on a release the beneficiaries signed.

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

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