The Bullet Point: Ohio Commercial Law Bulletin

Have I established grounds for a prescriptive easement?

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Prescriptive easements

Miller Land Co. v. McCaleb, 4th Dist. Pike No. 19CA898, 2020-Ohio-794

In this appeal, the Fourth Appellate District affirmed the trial court's decision to grant the defendants' motion for summary judgment, finding that the plaintiff failed to produce evidence to support a prescriptive easement.

- **The Bullet Point**
  In Ohio, a prescriptive easement is the acquisition of an easement, over the property owned by another, through adverse use of that property. Prescriptive easements are not favored in Ohio, as such easements deprive the legal property owner of rights to their land without compensation. In order to acquire an easement by prescription, the court requires the claimant to demonstrate clear and convincing evidence of 1) open, 2) notorious, 3) adverse, and 4) continuous use by it or its predecessor of an easement over property owned by another for a period of 21 years or more.

Defamation

Halliday v. Bd. of Dirs. of the Mental Health & Recovery Bd. of Erie & Ottawa Counties, 6th Dist. Erie No. E-19-011, 2020-Ohio-702

In this appeal, the Sixth Appellate District affirmed the trial court's decision to grant the defendants' motions for summary judgment, finding that there was no evidence the alleged defamatory statements were made with actual malice.

- **The Bullet Point**
  Statements made about a public official are constitutionally protected when the statements concern "any matter which may touch on the official's fitness for office." As such, a public official in a defamation action has a higher burden of proof as compared to a private individual bringing a defamation action. In order for a private individual to succeed on a claim of defamation, it must show the defendant made or published a false statement with "a degree of fault which injured the plaintiff's reputation, exposed the plaintiff to public hatred, contempt, ridicule, shame or disgrace, or adversely affected the plaintiff's profession." However, in order for a public official to succeed on a claim of defamation, it must also

prove with clear and convincing evidence that the false statement was made with 'actual malice'. Stated differently, a public official must prove the defamatory statement was made with knowledge that it was false or with reckless disregard of whether the statement was false or not. The public official plaintiff establishes "reckless disregard" by presenting evidence that the defendant made the defamatory statement even though it had "serious doubts regarding the truth of the statements or the accuracy or veracity of the sources."

Waiver of Right to Arbitrate

Blue Technologies Smart Sols, L.L.C. v. Ohio Collaborative Learning Solutions, Inc., 8th Dist. Cuyahoga No. 108535, 2020-Ohio-806

In this appeal, the Eighth Appellate District affirmed the trial court's decision to deny the defendant's motion to stay and to compel arbitration, finding that the defendant waived the right to compel arbitration.

- **The Bullet Point**
  Although the law favors arbitration, the right to arbitration may be waived just like any other contractual right. To establish waiver of an arbitration clause, the party seeking waiver must demonstrate "1) that the defendant knew of its right to assert an argument or defense for arbitration, and 2) that the totality of the circumstances establish that the defendant acted inconsistently with that right of arbitration." The court presumes that a contracting party is aware of the contents of the contract it signed, including the existence and scope of an arbitration clause. As such, unless the defendant overcomes this presumption, the defendant will be deemed to have knowledge of its right to arbitration. In analyzing the totality of the circumstances to determine if the defendant acted inconsistently with its right of arbitration, the court weighs factors such as, "1) whether the defendant invoked the jurisdiction of the trial court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of proceedings; 2) the delay, if any, by the defendant in requesting a stay of proceedings or an order compelling arbitration; 3) the extent to which the defendant participated in the litigation, including the status of discovery, dispositive motions, and the trial date; and 4) any prejudice to the plaintiff due to the defendant's prior inconsistent actions."

Civil Contempt

Young v. Young, 5th Dist. Stark No. 2019CA00035, 2020-Ohio-754

In this appeal, the Fifth Appellate District reversed the trial court's decision and remanded the case to the trial court for further proceedings, finding that the defendant had not been afforded the opportunity to purge himself of civil contempt.

- **The Bullet Point**
  Failure to comply with a court order can result in a party being held in contempt. Trial courts impose sanctions, such as a jail sentence, to coerce a party who is in civil contempt into complying with a court order. However, courts are guided by the principle that due process must be observed in both civil and criminal contempt proceedings. As such, a sanction for civil contempt must allow the contemnor the "opportunity to purge" himself of contempt. Stated plainly, a court's sentencing order imposing a

sanction must include specific language guiding the contemnor as to what conditions must be met in order to remove the contempt prior to the sanction being imposed.

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[Cite as *Miller Land Co., Inc. v. McCaleb*, 2020-Ohio-794.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

Miller Land Company, Inc.,	:	Case No. 19CA898
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Walter L. McCaleb, et al.,	:	
Defendants-Appellees.	:	**RELEASED 2/27/2020**

APPEARANCES:

Robert Huff Miller, Robert Huff Miller L.L.C., Columbus, Ohio, for appellant.

James L. Mann, Circleville, Ohio, for appellees.

Hess, J.

{¶1} Miller Land Company, Inc. ("MLC") appeals from a judgment of the Pike County Court of Common Pleas that granted summary judgment in favor of Walter and Ann McCaleb on MLC's prescriptive easement claim. The McCalebs satisfied their initial burden to demonstrate entitlement to summary judgment, and MLC failed to set forth specific facts to show that a genuine issue of material fact existed for trial. Accordingly, the trial court properly granted summary judgment to the McCalebs on the prescriptive easement claim, and we affirm its judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶2} MLC and the McCalebs own adjoining properties in Pike County. It appears that the McCalebs obtained their property in 1999; however, it has been in their family

since at least 1871. MLC obtained its property in 2000. A legal description of the MLC property indicated it was landlocked.

{¶3} According to averments of Mrs. McCaleb, MLC "purchased an easement from Hubert Ingall, so that it could obtain access to its landlocked property to timber it." Ingall lived at the property where the easement was located, but a trust owned the property. At some point, Tom Smith purchased the property. In 2016, through counsel, MLC claimed that it and its predecessors had crossed over the property "for decades and decades" and requested that Smith sign an easement agreement to "formalize and document" its rights. After Smith ignored the request, MLC sought access to the MLC property through the McCaleb property.

{¶4} In 2017, MLC filed a complaint against the McCalebs alleging they had interfered with its right to use an "Access Road" that crossed the McCaleb property, connected to Buck Hollow Road, and had been used by MLC and its predecessors in interest to access the MLC Property for at least 100 years. MLC asserted claims for declaratory judgment, quiet title, easement by prescription, easement by necessity, trespass, and tortious interference with a business relationship with a survey crew.

{¶5} MLC moved for summary judgment on its claims for declaratory judgment, quiet title, and easement by necessity. The McCalebs filed a memorandum in opposition and moved for summary judgment on all claims. The McCalebs filed affidavits to support their motion and filed MLC's responses to discovery requests, which they asserted "provided no facts which would refute the information contained in the defendants' affidavits."

{¶6} Relevant here, the McCalebs submitted the affidavit of Bryant Abt, a licensed surveyor, who averred that he conducted a survey of the McCaleb property and "found no evidence of any road or easement on the McCaleb property" or of "any road or easement which extended across the McCaleb property to the adjoining property owned by the Miller Land Company, Inc." He "found the remnants of a logging road which began and ended on the McCaleb property and which had obviously not been used for some period of time. The logging road did not extend to the border of the McCaleb property or to any existing County or Township Road."

{¶7} The McCalebs also submitted the affidavit of Mrs. McCaleb who averred that the Access Road "did not cross" the McCaleb property. She averred that the Access Road was "at one time a private road which in the past was used by persons to travel to the area of the Buck Hollow Community Church; that church had a different name at the time the private road was used." The Access Road had "not been used by anyone for over 50 years." The road "no longer exists and only the very end of it at the church is even visible." In addition, she averred:

> At no time has anyone ever attempted to use a road or pathway of any type to cross our land and thereby gain access to the real property owned by the Miller Land Company Inc. This is true for a period of time far greater than 21 years, and far greater than 21 years prior to the date the plaintiff filed its complaint.

She averred that MLC's surveyors had tried to survey a logging road created to timber the McCaleb property around 1990-1991, that the logging road was entirely on the McCaleb property, and that it was not used by MLC or its agents to access MLC's property.

{¶8} MLC filed a memorandum in opposition which it supported with the admissions of the McCalebs that the Access Road "was at one time a private road," that "in the past persons used the Access Road to travel from the area of Swift Creek Road and/or Five Bucks Road to the area of the Buck Hollow Community Church," and that "the Access Road historically provided access to and from" the MLC property. MLC also submitted the affidavit of Gerald Wallingford, a civil engineer and licensed surveyor. He averred that the Access Road was "the only access to the MLC Property from a public right-of-way" and was "located on property owned by" the McCalebs. He further averred that the road was "plainly visible where it intersects with Buck Hollow Road at the intersection of Buck Hollow Road and Ervin Hill Road and, while it is not passable due to vegetation and stream erosion, it is plainly visible and can be followed and located as it runs from Buck Hollow Road to the MLC Property, and beyond." Wallingford averred that the Access Road was "different and distinct from the logging road identified * * * on the survey by Mr. Abt" and was "much older than the logging road * * * and dates back over 100 years." In addition, Wallingford averred that the Access Road was depicted on five maps from 1906 to 1957 that were attached to his affidavit. Wallingford averred that the Access Road "was and has been the access to the MLC Property for over one hundred years" and "shows continuous, apparent, permanent and necessary use for access to the MLC Property for over one hundred years."

{¶9} The trial court granted the McCalebs summary judgment on the prescriptive easement claim, explaining:

> * * * [T]here is no evidence in the record showing open, continuous, adverse, and notorious use for over twenty-one years of any of the land now owned by the Defendants.

> The assertion in Defendant Ann McCaleb's affidavit that the "access road" referred to in the Plaintiff's complaint did not cross the Defendant's property and the assertion in surveyor Abt's affidavit that he found no evidence of any road or easement which extended across the McCaleb property to the adjoining property owned by the Miller Land Company, Inc. are contradicted, at least in part, by the affidavit of surveyor Wallingford; however, there is no contradiction in the evidence of the assertions by Defendant Ann McCaleb, whose family has owned their land for over 140-years, that the way previously used to travel to the area of the Buck Hollow Community Church has not been used by anyone for over 50-years.
>
> * * * [T]he Court finds that the Defendants have satisfied their burden of showing that there is no genuine issue of material fact that the Defendants' land has not been used by others as an access road openly, continuously, adversely, and notoriously for a period of over twenty-one years, and that the Plaintiff has not set forth specific facts showing that there is a genuine issue for trial concerning whether any portion of the Defendants[']land has been so used."

The court also granted the McCalebs summary judgment on the other claims except the tortious interference claim. The court made an express determination that there was "no just reason for delay." *See* Civ.R. 54(B) ("the court may enter final judgment as to one or more but fewer than all of the claims * * * only upon an express determination that there is no just reason for delay"). MLC then appealed the summary judgment decision.

II. ASSIGNMENT OF ERROR

{¶10} MLC assigns one error for our review: "The trial court erred as a matter of law in granting summary judgment in Defendants' favor on the issue of whether an easement by prescription exists."

III. STANDARD OF REVIEW

{¶11} "Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56." *Gardner v. Paxton*, 4th Dist. Washington No. 18CA13, 2018-Ohio-4586, ¶ 15. Summary judgment is appropriate if the party who moved for summary judgment "establishes that (1) there is no genuine issue of material fact, (2)

reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made, and (3) the moving party is entitled to judgment as a matter of law." *Id.*, citing Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24. "[A] court that is reviewing a summary judgment motion must construe all reasonable inferences that can be drawn from the evidentiary materials in a light most favorable to the nonmoving party." *National City Real Estate Servs., LLC v. Frazier*, 4th Dist. Ross No. 17CA3585, 2018-Ohio-982, ¶ 25.

{¶12} "Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion and to identify those portions of the record that demonstrate the absence of a material fact." *Graf v. Nelsonville*, 4th Dist. Athens No. 18CA28, 2019-Ohio-2386, ¶ 38. "The moving party cannot discharge its initial burden with a conclusory assertion that the nonmoving party has no evidence to prove its case." *Id.* "[T]he moving party must specifically refer to 'the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action,' that affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims." *Barclay Petroleum, Inc. v. Bailey*, 4th Dist. Hocking No. 16CA14, 2017-Ohio-7547, ¶ 16, quoting Civ.R. 56(C). We have previously explained:

> "[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant summary judgment." *Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc.* (1996), 110 Ohio App.3d 732, 742, 675 N.E.2d 65. Once the moving party satisfies its burden, the nonmoving party bears a corresponding duty to set forth specific facts showing that there is a genuine issue for trial.

(Alteration sic.) *Mitchell v. Strong*, 163 Ohio App.3d 638, 2005-Ohio-5354, 839 N.E.2d 965, ¶ 23 (4th Dist.).

IV. EASEMENT BY PRESCRIPTION

{¶13} " 'Prescription is the acquisition of an easement, over the property of another, through adverse use of that property.' " *Dunn v. Ransom*, 4th Dist. Pike No. 10CA806, 2011-Ohio-4253, ¶ 76, quoting *Crawford v. Matthews*, 4th Dist. Scioto No. 97CA2555, 1998 WL 720734, *2 (Sept. 21, 1998). "Prescriptive easements are not favored in law, because they deprive the legal property owner of rights without compensation." *Fitzpatrick v. Palmer*, 186 Ohio App.3d 80, 2009-Ohio-6008, 926 N.E.2d 651, ¶ 25 (4th Dist.). "The required elements of a prescriptive easement are similar to those in the law of adverse possession. The person seeking the easement must demonstrate clear and convincing evidence of open, notorious, adverse, and continuous use of the easement for a 21-year period." (Citation omitted.) *Dunn* at ¶ 77.

{¶14} " 'Open' and 'notorious' use requires that the actual use be of a character that is capable of giving the legal owner notice." *Id.* at ¶ 78. " 'Property is used "openly" when it is used "without attempted concealment," and it is used "notoriously" when its use is "known to some who might reasonably be expected to communicate their knowledge to the owner if he maintained a reasonable degree of supervision over his premises." ' " *Id.*, quoting *Crawford* at *3, quoting *Hindall v. Martinez*, 69 Ohio App.3d 580, 583, 591 N.E.2d 308 (3d Dist.1990). "Use of a claimed prescriptive easement is 'adverse' when it is without the permission of, or inconsistent with the rights of the true property owner." *Id.* at ¶ 91. Continuous use is "use that is 'neither interrupted by acts of the owner nor abandoned by the adverse user' throughout the 21-year statute of

limitations." *Id.* at ¶ 99, quoting *Crawford* at *3. "The acts of the prescriptive claimant 'do not need to be daily or constant; rather, occasional use that will "fairly indicate an uninterrupted use" to the true owner will suffice.' " *Id.*, quoting Curry & Durham, *Ohio Real Property Law and Practice*, Section 7.02[5], 7-13 (6th Ed.2006). To meet the 21-year requirement a claimant may tack time from when others owned the claimant's property onto the years the claimant personally owned it if the claimant proves that " ' "(a) persons in privity, (b) sequentially and continuously used the disputed property, (c) in the same or similar manner, (d) openly, (e) notoriously, (f) adversely to the title holder's interests, and (g) for at least twenty-one years." ' " *Queen v. Hanna*, 2012-Ohio-6291, 985 N.E.2d 929, ¶ 37 (4th Dist.), quoting *Stillman v. T.W. Grogan Co.*, 8th Dist. Cuyahoga No. 58579, 1991 WL 127265, *1 (June 27, 1991), quoting *J.F. Gioia, Inc. v. Cardinal Am. Corp.*, 23 Ohio App.3d 33, 37, 491 N.E.2d 325 (8th Dist.1985).

V. ANALYSIS

{¶15} MLC contends that the McCalebs failed to meet their initial burden to demonstrate entitlement to summary judgment on the prescriptive easement claim. MLC maintains that the admissions that the Access Road was at one time a private road and historically provided access to and from the MLC property "alone create genuine issues of material fact" because they "establish the essential elements of a prescriptive easement benefitting the MLC Property." MLC also asserts that Wallingford's affidavit and the maps incorporated into it "not only create genuine issues of material facts" but "affirmatively establish that the Access Road is an easement by prescription benefitting the MLC Property." MLC argues that "adversity can fairly be inferred." In addition, it argues that there "is abundant evidence that the Access Road existed in at least 1906

and continued through today (and was on maps through 1957) in the same location" and that the McCalebs admitted the Access Road was used by the general public to travel to and from the area. According to MLC, we held that similar evidence established a prescriptive easement in *White v. Emmons*, 4th Dist. Scioto No. 11CA3438, 2012-Ohio-2024. MLC asserts that because an easement was perfected, the "only possible path for success" for the McCalebs is proving the easement was abandoned. However, it asserts that the McCalebs did not argue abandonment, non-use is insufficient to establish abandonment, and no property owner would intentionally landlock its property.

{¶16} The McCalebs met their initial burden to establish entitlement to summary judgment. They supported their motion with affidavit statements that the Access Road did not cross their property, that there was no evidence of a road that extended across their property to the MLC property, and that no one had "ever attempted to use a road or pathway of any type to cross" their land and gain access to the MLC property. This evidence demonstrated there was no genuine issue of material fact that the McCaleb land had not been used openly, notoriously, adversely, or continuously to access the MLC property for a 21-year period.

{¶17} MLC failed to set forth specific facts demonstrating a genuine issue of material fact regarding the existence of a prescriptive easement. MLC submitted evidence to contradict the McCalebs' evidence about the location of the Access Road. However, even if the Access Road crossed the McCaleb property, MLC did not set forth specific facts to show open, notorious, adverse, and continuous use of the Access Road to access the MLC property during the time it owned the property, which was fewer than 21 years. Even if we inferred some past adverse use by prior owners of the MLC

property, MLC identified no evidence showing that use was open, notorious, and continuous for a 21-year period. Such use cannot be reasonably inferred from the mere existence of the road or its appearance on maps.

{¶18} The trial court correctly disregarded Wallingford's affidavit testimony that the Access Road "has been the access to the MLC Property for over one hundred years" and "shows continuous, apparent, permanent and necessary use for access to the MLC Property for over one hundred years." Pursuant to Civ.R. 56(E), an affidavit must: (1) "be made on personal knowledge," (2) "set forth such facts as would be admissible in evidence," and (3) "show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." " '[C]onclusory affidavits that merely provide legal conclusions or unsupported factual assertions are not proper under Civ. R. 56(E)' and are insufficient to establish a genuine issue of material fact." *Graf*, 4th Dist. Athens No. 18CA28, 2019-Ohio-2386, ¶ 40, quoting *Moore v. Smith*, 4th Dist. Washington No. 07CA61, 2008-Ohio-7004, ¶ 15 (lead opinion).

{¶19} Wallingford's affidavit statements are conclusory. They appear to be based on his findings that the Access Road was the only access to MLC's property "from a public right-of-way," was "plainly visible," and was depicted on maps between 1906 and 1957. These facts do not show that the Access Road provided access to the MLC property for over 100 years or show continuous, apparent, permanent, and necessary use of the Access Road to access the MLC property for over 100 years, particularly given Wallingford's averment that the Access Road was "not passable due to vegetation and stream erosion."

{¶20} MLC's reliance on *White* is misplaced. In that case, relevant here, we affirmed the trial court's finding, following a bench trial, of a prescriptive easement in favor of Albert and Joanna Hyland over a strip of land known as "Lute Road." *White*, 4th Dist. Scioto No. 11CA3438, 2012-Ohio-2024, at ¶ 3, 5-6, 10-12. We explained that "abundant evidence * * * revealed that Lute Road existed as early as 1917 and continued in its same location until today. Many witnesses testified that Lute Road existed, and was used, far longer than the period necessary to establish a prescriptive easement." *Id.* at ¶ 10. Specifically:

> David Wilson, a former township trustee, testified that he is sixty three years old and Lute Road had "always been there and it was there before I was even born probably." Seventy eight year old Ray Lute testified that his family moved to the area in 1939 and used Lute Road to access that farm until 1953 when they presumably left the area. Carolyn Hobbs's family bought the Lute property and continued to use Lute Road to access their land during the 1970s, 1980s and 1990s. James McClary confirmed this when he testified that he was "positive" the road was there into the 2000s. Appellee Joanna Hyland affirmed that she and her husband used Lute Road to access their home since their 2008 purchase. She further affirmed that no other access exists to her home.

Id. Although not explicitly stated in our decision, Ray Lute and Carolyn Hobbs had lived on the Hyland property. *See White v. Emmons*, Scioto C.P. No. 07-CIH-482 (Feb. 3, 2010).

{¶21} Contrary to MLC's contention, *White* did not hold that a prescriptive easement was established based solely on the existence of a private road that was "in use" more than 21 years. Rather, we relied on testimony from individuals who had lived on the Hyland property regarding actual use of the road to access the Hyland property for decades to conclude the elements of a prescriptive easement had been satisfied. *White* at ¶ 10-12. MLC did not submit similar evidence of usage in this case.

{¶22} For the foregoing reasons, we overrule the sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Smith, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *Halliday v. Bd. of Dirs. of the Mental Health & Recovery Bd. of Erie & Ottawa Ctys.*, 2020-Ohio-702.]

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

Dr. Kirk Halliday	Court of Appeals No. E-19-011
Appellant	Trial Court No. 2017 CV 0561
v.	
The Board of Directors of the Mental Health and Recovery Board of Erie and Ottawa Counties, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: February 28, 2020

* * * * *

Peter D. Traska and Michelle L. Traska, for appellant.

Patrick Kasson and Francesca R. Boland, for appellee The Mental Health and Recovery Board of Erie and Ottawa Counties.

James W. Kart, for appellee Firelands Regional Medical Center.

* * * * *

SINGER, J.

{¶ 1} Appellant, Dr. Kirk Halliday, appeals from the February 1, 2019 judgment of the Erie County Court of Common Pleas, granting the motions for summary judgment

of appellees, the Board of Directors of the Mental Health and Recovery Board of Erie and Ottawa Counties ("Board"), fourteen individual Board members and Firelands Regional Medical Center ("Firelands"). For the reasons that follow, we affirm.

{¶ 2} Appellant sets forth one assignment of error:

> The trial court failed to consider evidence of Appellees' reasons for advancing a false narrative concerning the Appellant's termination as Executive Director of the Appellee Mental Health and Recovery Board of Erie and Ottawa Counties.

Background Facts

{¶ 3} Appellant served as the executive director of the Board from 1993 until November 2016, when the Board suspended him. The Board held an administrative hearing on March 21, 2017, after which the Board terminated appellant's employment. Appellant appealed this decision to the Erie County Court of Common Pleas, case No. 2017 CV 0161. On January 5, 2018, the trial court affirmed the termination. Appellant appealed to this court and we affirmed the trial court's judgment. *See Halliday v. Mental Health & Recovery Bd. of Erie & Ottawa Ctys.*, 6th Dist. Erie No. E-18-005, 2018-Ohio-4053.

{¶ 4} On November 2, 2017, appellant filed his complaint for defamation/libel against appellees in Erie County Court of Common Pleas, case No. 2017 CV 0561. In his complaint, appellant alleged the following. On January 17, 2017, the Board held a meeting where defamatory statements were made and then published in the Board's

minutes ("FY17 [fiscal year 2017] contract for Firelands Counseling and Recovery Services [("FCRS")] will need to be increased due to incorrect budget allocation previously given"). On February 21, 2017, the Board held a meeting where defamatory statements were made and then published in the Board's minutes (Authorization to increase FY17 9-month purchase of service contract with FCRS "due to board staff mathematical error when calculating agency budgets"). In the Fiscal Year 2017 9-Month Purchase of Service/Grant Contract Amendment-1 and Amendment-2, the Board and Firelands made defamatory statements ("Whereas the Board desires to increase the 9-Month Purchase of service/Grant Contract due to a mathematical error"). In the Fiscal Year 9-Month Purchase Wrap/Grant Contract, the Board and Firelands made a defamatory statement ("Whereas the Board desires to increase the 9-Month Wrap/Grant Contract due to mathematical error, by Board staff, resulting in an unapproved budget cut to the provider").

{¶ 5} Appellant further alleged the defamatory statements denote "budgeting was done incorrectly, and the mistake was attributed to [appellant] whom the * * * Board indicated was responsible for 'the mathematical error' allegedly causing the budget error." Appellant alleged the budgeting was accurate and the math error statement by the Board and Firelands "was patently false and defamatory, was directed at [appellant] because he oversaw the budgeting process by staff, and this statement caused him injuries."

{¶ 6} On November 19, 2018, Firelands filed a motion for summary judgment asserting there is no evidence the alleged defamatory statements were "of or concerning" appellant, nor is there clear and convincing evidence that Firelands acted with actual malice. The Board and its members also filed a motion for summary judgment arguing, inter alia, there is no evidence the statements were false, the Board and its members are immune and the Board members did not act recklessly or with malice. On February 1, 2019, the trial court granted the motions for summary judgment. Appellant timely appealed.

Summary Judgment Standard

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

{¶ 8} Summary judgment is appropriate when (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion, and that is adverse to the nonmoving party. Civ.R. 56; *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). "The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the

record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party meets that burden, the nonmoving party has a reciprocal burden and "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

Law

{¶ 9} Defamation is a false statement published by a defendant acting with a degree of fault which injures a person's reputation, exposes the person to public hatred, contempt, ridicule, shame or disgrace, or adversely affects the person's profession. *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283 (1995).

{¶ 10} Statements made about public officials are constitutionally protected when the statements concern any matter which may touch on the official's fitness for office. *Soke v. Plain Dealer*, 69 Ohio St.3d 395, 397, 632 N.E.2d 1282 (1994). "In order to be actionable, a plaintiff in a defamation action must show that the alleged defamatory statement was 'of and concerning' the plaintiff." *Whiteside v. United Paramount Network*, 12th Dist. Madison No. CA2003-02-008, 2004-Ohio-800, ¶ 15, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 267, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) ("[W]here the plaintiff is a public official his place in the governmental hierarchy is sufficient

evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge.") Under the *New York Times* standard, a public official seeking damages for a defamatory statement relating to official conduct must prove "the statement was made with 'actual malice'- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280.

{¶ 11} "Reckless disregard" is established if the plaintiff presents evidence which permits a finding that the defendant had serious doubts regarding the truth of the statements or the accuracy or veracity of the sources. *A & B-Abell Elevator Co.*, at 12-13. Proof of actual malice must be clear and convincing. *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218, 520 N.E.2d 198 (1988), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). "Clear and convincing evidence is that measure or degree of proof * * * which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 12} "The question of whether a publication is defamatory * * * or is published with actual malice * * * is a question of law." *Early v. The Toledo Blade*, 130 Ohio App.3d 302, 319, 720 N.E.2d 107 (6th Dist.1998). "When making this legal determination, the trial court must 'review the statement under the totality of the circumstances.' *Mendise v. Plain Dealer Publishing Co.* (1990), 69 Ohio App.3d 721, 726, 591 N.E.2d 789, 792." *Id.* at 321.

Argument

{¶ 13} Appellant argues appellees' statements that Board staff made a math error were false and said with actual malice. Appellant notes that Firelands was one of about a dozen contractors who received funds from the Board and oversight of the contracts and money was central to the job of the Board's executive director. Appellant contends reasonable minds could find the Board and Firelands concocted the math error story to cover up appellant's reason for hesitating to forward the disputed funds to Firelands, as appellant asserts he had reason to believe Firelands was seeking to maximize its benefits by moving 11 of its neediest clients out of the county.

{¶ 14} Appellant submits no Board members appear to have shown any interest in whether the math error statements were true or false. Appellant claims when the evidence is viewed in his favor, the math error statements should have signaled the Board that there was more to the story, and "[t]he recklessness of this oversight lead[s] to the mistaken belief that the $440,000 shortfall was attributed to Appellant's error rather than [Firelands'] failure to go through proper procedures." Appellant maintains the statements, which were concerning him, were made with reckless disregard for the truth.

Deposition Testimony

{¶ 15} The record includes the deposition testimony of appellant, Marsha Mruk, Lisa Crescimano and Elizabeth (Betsy) Wilbur. The relevant testimony is summarized below.

Appellant

{¶ 16} Appellant testified two bases of his lawsuit were "the action of Firelands for sending people * * * out of the county" and the math error statements concerning Firelands. He stated "Firelands has said some things about me in writing that are clearly incorrect. * * * As it says in the paper, [Firelands] alleged that certain funds of money were not given to them because of a staff mathematical error. That's totally false." Firelands "repeatedly said that an amount of money, approximately $424,087, * * * was money that they were entitled to, which was absolutely false. And that it was a staff error by my staff and me that caused Firelands not to be able to embezzle this money." Also, "Firelands had no right to the funds * * * and they knew that, because we had done this before. And we had gone through the procedures as we do every year, of sending them a formal resolution from the board stating the contracts of the old year would be terminated and that they were, however, invited to apply for new contracts."

{¶ 17} Regarding the Board, appellant testified Wilbur, the Board chair, made statements which were in the newspaper "suggesting she had a wide range of issues against me, when they had nothing." The Board, in general, made a statement "[t]hat I was a bad administrator." Appellant was asked if he "had reason to believe that the board knew what Firelands was saying was untrue" and he responded no. In addition, appellant was asked if he "explain[ed] to the board at the disciplinary hearing why that [Board staff math error] statement was incorrect" and he replied in the negative.

Marsha Mruk

{¶ 18} Mruk testified she has worked at Firelands since 1985, and has been the vice president of FCRS for seven or eight years. FCRS gets funding from the Board in exchange for services. The Board undertakes planning by looking at the services it is mandated to provide and what the community needs. The Board then decides what services it will provide and puts a contract out or a request for proposal. FCRS, as a provider, prepares a proposal.

{¶ 19} Mruk testified, regarding fiscal year 2017, new Board members were voted in and did not understand the process, as it is complex. The Board decided all of the agencies would receive the same amount as the previous year, and the Board extended the 2016 contracts by three months, then nine months. When FCRS received the nine-month contract from the Board, Mruk and her finance director noticed there was a $500,000 shortfall. Mruk's finance director spoke with Crescimano, they worked the numbers, and found an error. Mruk attended a Board finance committee meeting where Crescimano indicated there was a math error, an error in the spreadsheet, and people on the Board agreed. Mruk noted three-month and nine-month contracts are very difficult and cumbersome, so "[e]verybody can understand how an error is made. * * * [I]t was an error on * * * the Board's spreadsheet. It was corrected, and no one was blamed for it." The error "wasn't attributed to any one person - not Beth Williams [the Board's former finance director], not Dr. Halliday, an error in the spreadsheet, and people move on.

That's as much attention as it got." Mruk agreed that no one on the Board or appellant told her that FCRS was going to perform less services in 2017.

{¶ 20} Mruk also mentioned the $500,000 shortfall in the nine-month budget to Betsy Wilbur, who was the Board chair; Wilbur was not aware of a decrease. Mruk explained the shortfall occurred due to shortages in two contracts, one for $440,000 and the other for $61,000. No one ever told Mruk that the $500,000 shortfall was money that appellant, as the executive director, had not allocated yet because he had not gone through the competitive bidding process.

{¶ 21} In an email Mruk received from Crescimano, Crescimano stated that when Williams "did the budget for fiscal year 2017, she based it on actual expenditures for '13, '14 and '15. * * * She did not have the actual for fiscal year '16, so she did not use that figure." Mruk testified that actual fiscal year 2016 should not have been used, rather budget fiscal year 2016 should have been used.

Lisa Crescimano

{¶ 22} Crescimano testified she is the Board's Chief Financial Officer, and she started working for the Board on October 26, 2016. She described the state of the Board's finances at that time as a mess. The accounting financial system was archaic and crashed at the end of November 2016, and a new program was purchased. Also in November 2016, she spoke with Mruk who stated there was an error regarding approximately $440,000 that should have been budgeted to Firelands for 2017.

Crescimano spoke with Beth Williams, who was training Crescimano. Williams, who had prepared the budget, opened some spreadsheets and said she, Williams, made an error.

{¶ 23} Crescimano testified that at the January 17, 2017 Board meeting, she reported to the Board that the fiscal year 2017 contract for FCRS needed to be increased due to an incorrect budget allocation previously given. She told the Board she had discussed it with Williams, and it was a math error. The Board made the correction in February 2017, which was easy, and the error did not cause a problem between Firelands and the Board. Crescimano was informed by the Board at either a finance committee meeting or a Board meeting that the contracts for 2017 were supposed to be the same amounts as they were in 2016. She was told "[a]ll of the other agencies received contracts at the same fiscal year '16 amounts."

{¶ 24} Crescimano testified appellant was responsible for overseeing Williams' work, but Crescimano did not have a conversation with appellant about the math error because he was under suspension. Crescimano had no knowledge that the amount Firelands said was an incorrect budget allocation was actually something appellant had intended to put for a competitive bid.

Elizabeth Wilbur

{¶ 25} Wilbur testified she was the chairman of the Board for two years, starting in the summer of 2016. The Board gets money from the state, taxes and grants and funnels the funds to providers. Regarding the math error concerning Firelands and the

re-budgeting issue, Wilbur testified the Board had asked for strategic planning and did not get it, so the Board approved giving all of the providers a three-month contract. When the contract was converted to the next nine months, there was a math error, "so, now, we're correcting the problem that kind of we caused by breaking the year up." She could not recall the January 2017 Board meeting where the math error was mentioned. After the meeting, Firelands' contract was corrected, but Wilbur did not remember who told her that. "It's not a big thing * * * It isn't something we would talk about. It's not a big issue."

{¶ 26} Wilbur testified that at the February 21, 2017 Board meeting, the Board went into executive session, and appellant was terminated. When asked if other entities could have competitively bid on the roughly $424,000, Wilbur said no. Wilber did not discuss this sum with appellant and she never learned appellant did not intend for the money to be automatically allocated to Firelands, that he wanted to put it for a competitive bid.

Analysis

{¶ 27} We will focus our analysis on whether appellant has established, by clear and convincing evidence, that the Board staff math error and budget error statements were made with actual malice—whether the Board, Board members or Firelands knew the statements were false or made the statements with reckless disregard of the truth.

{¶ 28} Initially we observe there is no dispute that appellant was a public official and the Board staff math error and budget error statements concern matters for which

appellant, as the executive director of the Board, was ultimately responsible. Therefore, we conclude the statements were of and concerning appellant.

{¶ 29} Our review of the record reveals there is no evidence that the Board or its members had knowledge that the Board staff math error or budget error statements were false. At deposition, appellant acknowledged he did not have reason to believe the Board knew what Firelands was saying was not true, nor did he explain to the Board why the statements were not correct. We therefore find appellant has not established, by clear and convincing evidence, that the Board or its members knew the statements were false.

{¶ 30} As to whether the statements were made by the Board or its members with reckless disregard, we find appellant failed to present clear and convincing evidence that the statements were made with a high degree of awareness of their probable falsity or that the Board or its members entertained serious doubts as to the truthfulness of the statements. The record shows the Board decided that all of the providers' contracts for 2017 would be the same amounts as they were in 2016. Crescimano informed the Board that FCRS' 2017 contract needed to be increased due to an incorrect budget allocation, and she had discussed the matter with Williams who said it was a math error. There is no evidence in the record that the Board or its members had any reason to disbelieve Crescimano or have serious doubts as to her representations that Williams, the Board's former financial director, indicated there was a math error.

{¶ 31} With respect to Firelands and its knowledge that the Board staff math error or budget error statements were false or were made with reckless disregard, a review of

the record shows appellant testified that Firelands knew it was not entitled to the approximately $424,087, because every year the Board sent Firelands a formal resolution that the old year's contract would be terminated and it could apply for a new contract. However, both Crescimano and Mruk testified the Board stated all of the agencies' contracts for 2017 would be the same amounts as they were in 2016. Mruk testified she and her finance director discovered a $500,000 shortfall in the nine-month 2017 contract, so the finance director spoke with Crescimano. Crescimano testified Williams, who prepared the budget, said there was an error. In addition, Wilbur testified the Board gave three-month contracts to all of the providers but when Firelands' contract was converted to a nine-month contract, there was a math error.

{¶ 32} Based on the record, we find appellant has not demonstrated, by clear and convincing evidence, that Firelands knew the math error and budget error statements were false, that Firelands made the statements with a high degree of awareness of probable falsity or that Firelands entertained serious doubts as to the truthfulness of the statements. Since appellant has not established, by clear and convincing evidence, that appellees made the math error and budget error statements with actual malice, there is no genuine issue of material fact, and the Board, its members and Firelands are entitled to summary judgment as a matter of law. Accordingly, appellant's assignment of error is not well-taken.

{¶ 33} The judgment of the Erie County Court of Common Pleas is affirmed.

Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Gene A. Zmuda, P.J. _____
CONCUR.
JUDGE

[Cite as *Blue Technologies Smart Solutions, L.L.C. v. Ohio Collaborative Learning Solutions, Inc.*, 2020-Ohio-806.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

BLUE TECHNOLOGIES SMART SOLUTIONS, L.L.C., :

Plaintiff-Appellee, :

No. 108535

v. :

OHIO COLLABORATIVE LEARNING SOLUTIONS, INC., ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 5, 2020

Civil Appeal from the Cuyahoga County Common Pleas Court
Case No. CV-18-902719

Appearances:

Climaco, Wilcox, Peca, Tarantino & Garofoli Co., L.P.A., John R. Climaco, and Scott D. Simpkins, *for appellee*.

Schneider, Smeltz, Spieth, Bell, L.L.P., Mark M. Mikhaiel, and Nicholas M. Vento, *for appellants*.

SEAN C. GALLAGHER, J.:

{¶ 1} Defendants-appellants[1] have appealed the trial court's denial of their motion to stay and to compel arbitration. Upon review, we affirm the trial court's decision.

Background

{¶ 2} On August 24, 2018, plaintiff-appellee Blue Technologies Smart Solutions, L.L.C., filed a complaint asserting claims for breach of an asset purchase agreement ("APA"), breach of a services agreement, and misappropriation of trade secrets. Along with seeking compensatory and punitive damages and other relief, plaintiff requested injunctive relief. Plaintiff sought, in part, to prevent defendants from competing with plaintiff in alleged violation of the noncompete provisions and to prevent the misappropriation of trade secrets. On September 13, 2018, the defendants filed an answer, and defendant Ohio Collaborative Learning Solutions, Inc., filed a counterclaim. Subsequently, an amended complaint was filed, and an amended complaint and counterclaim was filed.

{¶ 3} Among the allegations stated in the complaint and amended complaint was that "Relevant portions of the APA are attached hereto as Exhibit A. A complete copy of the APA with all exhibits and schedules is not attached hereto due to its length and because Defendants are already in possession of complete copy

[1] The defendants named in the complaint included Ohio Collaborative Learning Solutions, Inc.; Anand Julka; Vijay Julka; Neeraj Julka, trustee of the Julka 2005 Irrevocable Gift Trust; and Anand Julka, trustee of the Anand Julka Revocable Trust. The claims against defendant Vijay Julka only were dismissed without prejudice. The remaining defendants are appellants herein.

of the APA." Defendants admitted this allegation in their answer and in their amended answer. Although the APA contains an arbitration clause, defendants did not raise this as an affirmative defense.

{¶ 4} The parties proceeded with discovery in the matter. In March 2019, defendants obtained new counsel, and a notice of substitution of counsel was filed.

{¶ 5} On March 27, 2019, approximately seven months after the filing of the complaint, defendants filed a motion to stay and to compel arbitration. The motion also was filed shortly before the extended discovery deadline and the dispositive motion deadline. Defendants asserted that plaintiff's claims are subject to a mandatory arbitration provision contained in the APA. Defendants noted that the complaint did not attach the entire APA and only included excerpts. However, they did not dispute having received a copy of the entire APA, which they admitted in their answer.

{¶ 6} Section 5.6(b) of the APA states as follows:

> Arbitration. Any dispute, controversy or claim arising out of or relating to this Agreement (except for such disputes or controversies which are to be resolved in a specific manner as set forth in this agreement), the performance by the parties of its or their obligations, including the determination of the scope of this agreement to arbitrate, which is not settled through mediation as provided above or issues or disputes arising pursuant to Article V, shall be resolved by binding arbitration held in Cleveland, Ohio administrated by the AAA in accordance with its published Commercial Arbitration Rules (the "AAA Rules") in effect on the Closing Date, except as specifically otherwise provided in this Article V. Notwithstanding the foregoing, any party to this Agreement may, in its discretion, apply to a court of competent jurisdiction for equitable relief concerning matters for which such equitable relief is available to any such party in accordance with applicable statutory and/or case law, including, but not limited

> to, injunctive relief. The institution and maintenance of any judicial action as permitted in this Agreement and the pursuit of any such rights or remedies shall not constitute a waiver of the right or obligation of any party hereto to submit any dispute to negotiation, mediation or arbitration that may arise from the exercise of such rights or remedies. The institution and maintenance of an action for judicial relief or pursuit of provisional rights or remedies, all as provided herein, shall not constitute a waiver of the right of any party, including the plaintiff(s) seeking relief or remedies, to submit such dispute to negotiation, mediation or arbitration.

{¶ 7} Defendants sought to compel arbitration under this provision and requested the court to stay any claim that may be deemed not subject to arbitration. Defendants did not request a hearing on their motion. Defendants also made an alternative request for leave to amend their answer and counterclaim.

{¶ 8} In opposing the motion, plaintiff argued that defendants waived any right to demand arbitration by filing a counterclaim, actively participating in extensive discovery, and not timely seeking a stay pending arbitration. Plaintiff further argued that a stay at this juncture of the proceedings would be highly prejudicial to plaintiff, who was seeking, in part, injunctive relief to prevent defendants from violating the noncompete provisions of the APA and the services agreement. Plaintiff also argued that the court should reject defendants' alternative request to amend their answer and counterclaim.

{¶ 9} On April 11, 2019, the trial court denied defendants' motion to stay and to compel arbitration. The trial court recognized that the APA included a valid arbitration clause, but determined "based on the totality of the circumstances, * * *

both parties waived any right to compel arbitration." The trial court cited the factors to be considered and stated as follows:

> The circumstances of the instant litigation lead this Court to a finding against Defendants with respect to all four factors to be weighed. Defendants filed their Motion to Stay approximately seven months after Plaintiff filed its complaint and Motion for Temporary Restraining Order and Preliminary Injunction, a significant delay. Defendants have extensively participated in the litigation from the onset, as described above. Defendants filed two answers and counterclaims without moving to stay or including the right to arbitrate as an affirmative defense. Lastly, Plaintiff raised its prejudice in its opposition to the current motion.
>
> Simple judicial notice of the docket in this matter would indicate arbitration at this juncture would go against Ohio and federal policy favoring arbitration by adding costs and time to a case which has been heavily litigated.

{¶ 10} Defendants timely filed this appeal.

Law and Analysis

{¶ 11} Defendants raise two assignments of error for our review. Under their first assignment of error, defendants claim the trial court erred by overruling their motion for a stay of proceedings because, according to defendants, they "properly and timely asserted their right to arbitration."

{¶ 12} R.C. 2711.01(A) provides that a provision in a contract for arbitration of a controversy "shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." A party may obtain a stay of litigation in favor of arbitration under R.C. 2711.02(B), which states:

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for

> arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

{¶ 13} "'The right to arbitration may be waived just like any other contractual right.'" *Aljaberi v. Neurocare Ctr., Inc.*, 5th Dist. Stark No. 2018CA00154, 2019-Ohio-2181, ¶ 22, quoting *Murtha v. Ravines of McNaughton Condominium Assn.*, 10th Dist. Franklin No. 09AP-709, 2010-Ohio-1325. "To establish waiver, the party seeking waiver must demonstrate (1) that the party knew of its right to assert an argument or defense and (2) that the totality of the circumstances establish that the party acted inconsistently with that right." *Gembarski v. PartsSource, Inc.*, 157 Ohio St.3d 255, 2019-Ohio-3231, 134 N.E.3d 1175, ¶ 25, citing *Donnell v. Parkcliffe Alzheimer's Community*, 6th Dist. Wood No. WD-17-001, 2017-Ohio-7982, ¶ 21; and *Atkinson v. Dick Masheter Leasing II, Inc.*, 10th Dist. Franklin No. 01AP-1016, 2002-Ohio-4299, ¶ 20.

{¶ 14} Generally, an order "that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order" that may be reviewed on appeal. R.C. 2711.02(C). Because "'[t]he question of waiver is usually a fact-driven issue,'" an appellate court will not reverse a trial court's decision on whether a party waived its right to arbitration absent a showing of an abuse of discretion. *Neel v. A. Perrino Constr., Inc.*, 2018-Ohio-1826, 113 N.E.3d 70, ¶ 32 (8th Dist.), quoting *Ohio Bell Tel. Co. v.*

Cent. Transport, Inc., 8th Dist. Cuyahoga No. 96472, 2011-Ohio-6161, ¶ 17. An "abuse of discretion" means the court's ruling "is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 15} In this case, defendants argue that there is a presumption in favor of arbitration, and that the failure to plead the right to arbitrate as an affirmative defense is not a waiver. The trial court recognized that the law favors arbitration, but after finding all the factors considered weighed against the defendants, the court concluded the totality of circumstances warranted a finding of waiver. The trial court engaged in the appropriate analysis. Defendants also argue that the terms of the arbitration provision expressly state that there can be no waiver. However, the arbitration provision permits a party to the APA to apply to a court of competent jurisdiction for equitable relief, and the nonwaiver of the right to arbitrate applies to "any judicial action as permitted in this Agreement" and "as provided herein." Also, under Ohio law, a party may waive a contractual right to arbitration. *Aljaberi* at ¶ 22.

{¶ 16} Next, defendants claim that plaintiff failed to prove defendants knew of an existing right to arbitration. The record reflects that defendants admitted in their answer that they were in possession of a complete copy of the APA. Furthermore, "a contracting party is presumed to know the reasonable import of the contents of a signed agreement, including the existence and scope of an arbitration clause." *Garcia v. Wayne Homes*, 2d Dist. Clark No. 2001 CA 53, 2002-Ohio-1884,

¶ 64, citing *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231, 240-241 (6th Cir.2000); *see also Long v. N. Illinois Classic Auto Brokers*, 9th Dist. Summit No. 23259, 2006-Ohio-6907, ¶ 13; *Melia v. OfficeMax N. Am., Inc.*, 8th Dist. Cuyahoga No. 87249, 2006-Ohio-4765, ¶ 35.

{¶ 17} Nonetheless, defendants argue that the APA does not contain an "integration clause" and that each page of the APA was not initialed, as was the case in *Patrick v. Dixie Imports, Inc.*, 12th Dist. Butler No. CA2017-05-063, 2017-Ohio-9093, ¶ 17. However, in *Patrick*, these facts were addressed in relation to the parties' intent and unambiguous agreement to arbitrate, and nothing in that decision suggests that initials are required to establish knowledge of an arbitration clause. *See id.* at ¶ 17-18. The *Patrick* court determined that although the parties had entered into an unambiguous agreement to arbitrate, the defendant had waived its right to arbitrate. *Id.* at ¶ 19. With regard to the defendant's knowledge of an existing right to arbitration, it was stated that "[t]he trial court determined Dixie Imports was aware of the right to arbitrate the dispute as the arbitration clause was contained within the documents prepared and used by Dixie Imports." *Id.* at ¶ 23.

{¶ 18} Accordingly, we find no merit to defendants' argument. Defendants are presumed to have knowledge of the contents of the APA, including the existence and scope of the arbitration provision. They did not overcome that presumption.

{¶ 19} Defendants further claim that plaintiff failed to prove defendants acted inconsistently with the right to arbitrate under the totality of the

circumstances. Factors that may be considered in determining whether the totality of the circumstances supports a finding of waiver include the following:

> "(1) whether the party seeking arbitration invoked the jurisdiction of the trial court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of proceedings; (2) the delay, if any, by the party seeking arbitration in requesting a stay of proceedings or an order compelling arbitration; (3) the extent to which the party seeking arbitration participated in the litigation, including the status of discovery, dispositive motions, and the trial date; and (4) any prejudice to the non-moving party due to the moving party's prior inconsistent actions."

Am. Gen. Fin. v. Griffin, 8th Dist. Cuyahoga No. 99088, 2013-Ohio-2909, ¶ 18, quoting *Ohio Bell Tel. Co.*, 8th Dist. Cuyahoga No. 96472, 2011-Ohio-6161, at ¶ 16.

{¶ 20} Defendants maintain that the factors weigh in their favor. Defendants argue that they did not invoke the jurisdiction of the court by filing a counterclaim because they were unaware of the arbitration clause. They also claim that they did not delay in seeking arbitration because they moved for arbitration as soon as they learned of the arbitration clause. However, as stated above, defendants acknowledged that they possessed a full copy of the APA, and there is a presumption that defendants had knowledge of the arbitration provision in the agreement.

{¶ 21} Defendants also argue that other courts have permitted arbitration after longer delays and where limited discovery has occurred. The cases cited by defendants in support of their argument are factually distinguishable. In *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App.3d 406, 701 N.E.2d 1040 (3d Dist.1997), the court found that no waiver of the right to arbitration had occurred when the defendant had filed a motion for stay of proceedings and referral to arbitration

within three months after filing its answer, during which time very limited discovery took place and a limited number of depositions were conducted. *Id.* at 416. However, in *Harsco,* the defendant had raised the arbitration agreement as an affirmative defense in its answer and had not filed a third-party complaint, counterclaim, or summary judgment motion, "any one of [which] * * * would demonstrate [defendant's] recognition of the trial court's authority to determine the suit pending before it." *Id.* In *Travelers Cas. & Sur. Co. v. Aeroquip-Vickers, Inc.*, 6th Dist. Lucas No. L-06-1201, 2007-Ohio-5305, no counterclaim or cross-claims were asserted and the court noted that "the length of the delay alone is insufficient to impute waiver; rather, the totality of circumstances must be considered." *Id.* at ¶ 38-39. In *Neel,* 2018-Ohio-1826, 113 N.E.3d 70, although the defendant had filed an answer and counterclaim, the defendant expressly stated that it was not waiving its right to arbitration, its participation in the litigation was limited, and its motion was filed three months after the initiation of litigation. *Id.* at ¶ 5, 35. Likewise, other cases cited by defendants are distinguishable upon their facts.

{¶ 22} Although defendants herein claim that their participation prior to requesting arbitration was limited and that the prejudice to plaintiff was minimal, the trial court did not find this to be the case. There is no dispute that defendants filed two answers and a counterclaim without seeking a stay or including the right to arbitrate as an affirmative defense. The trial court considered defendants' seven-month delay in requesting arbitration and recognized defendants had "extensively participated in the litigation from the onset." Indeed, various motions were filed,

pretrials were conducted, and as plaintiff states, "Defendants served numerous interrogatories, took the depositions of three of Plaintiff's employees, and served an extremely broad set of written discovery requests to which Plaintiff responded producing over 200,000 electronic files." The record reflects that defendants' motion was filed after their new counsel entered an appearance, and shortly before the extended discovery deadline and the dispositive motion deadline. The trial court noted that at that juncture of the proceedings, the case had been heavily litigated, which is reflected by the docket. Plaintiff argued that a stay of proceedings would be prejudicial at this juncture in the proceedings, and it is seeking, in part, injunctive relief to prevent defendants from alleged ongoing violations of noncompete provisions. The totality of circumstances establishes defendants acted inconsistently with their right to arbitration.

{¶ 23} Upon our review, we are unable to conclude that the trial court abused its discretion in finding a waiver occurred. Defendants' first assignment of error is overruled.

{¶ 24} Under their second assignment of error, defendants claim the trial court erred by failing to hold a hearing on their motion to compel arbitration. They argue that R.C. 2711.03 explicitly requires a hearing on a motion to compel arbitration.

{¶ 25} R.C. 2711.03(A) provides in relevant part as follows:

> The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing

> the parties to proceed to arbitration in accordance with the agreement.

{¶ 26} In *Marks v. Morgan Stanley Dean Witter Commercial Fin. Servs.*, 8th Dist. Cuyahoga No. 88948, 2008-Ohio-1820, which is cited by defendants, it was stated that "[p]ursuant to R.C. 2711.03, * * * where a party has filed a motion to compel arbitration, the court must, in a hearing, make a determination as to the validity of the arbitration clause." *Id.* at ¶ 21, citing *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7, ¶ 18. Although the statute requires "a hearing" on a motion to compel arbitration, "because R.C. 2711.03 does not specifically provide for an oral hearing, it would appear that Civ.R. 7(B) permits a trial court to hear the matter upon a non-oral hearing." *Chrysler Fin. Servs., Ams., LLC v. Henderson*, 4th Dist. Athens No. 11CA4, 2011-Ohio-6813, ¶ 19; *see also Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806, 874 N.E.2d 795, ¶ 31 (5th Dist.) ("Although an oral hearing was never conducted, the non-oral hearing allowed the parties to be heard, as required by R.C. 2711.03.") As explained in *Panzica Constr. Co. v. Zaremba, Inc.*, 8th Dist. Cuyahoga No. 95103, 2011-Ohio-620, "The plain language in this statute is different from language the legislature used in statutes requiring the court to *hold a formal hearing*." (Emphasis sic.) *Id.* at ¶ 32. Therefore, "a trial court need not hold an oral or evidentiary hearing regarding an R.C. 2711.03 motion absent a proper request." *Chrysler Fin. Servs.* at ¶ 21; *see also Church* at ¶ 29; *Mattox v. Dillard's, Inc.*, 8th Dist. Cuyahoga No. 90991, 2008-Ohio-6488, ¶ 15.

{¶ 27} In this case, defendants did not request an oral hearing on their motion and the validity of the arbitration clause was not at issue. Rather, the issue was whether defendants waived their right to compel arbitration. Defendants' motion and plaintiff's opposition brief were submitted to the court. Also, the record reflects that the trial court addressed the outstanding motion at a pretrial conference held on April 4, 2019, and that defendants had filed a complete copy of the APA on the morning of the pretrial conference. Upon our review, we find that the trial court did "hear" the parties regarding defendants' motion to compel arbitration. Defendants' second assignment of error is overruled.

{¶ 28} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

SEAN C. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR

[Cite as *Young v. Young*, 2020-Ohio-754.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARGARET YOUNG

Plaintiff-Appellee

-vs-

TIMOTHY YOUNG

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 2019CA00035

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 1997DR01641
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	March 2, 2020

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Timothy Young appeals the decision of the Stark County Court of Common Pleas, Domestic Relations Division, which imposed a sixty-day jail sentence against him for contempt of court. Appellee Margaret Young is appellant's former spouse. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and appellee were married in 1988.

{¶3} On November 3, 1997, appellee filed a complaint for divorce in the Stark County Court of Common Pleas, Domestic Relations Division ("trial court"). Appellant did not thereafter file an answer or appear for the final hearing. The trial court issued a final decree of divorce on March 18, 1998, ordering *inter alia* that appellant pay the sum of $4,000.00 per month in spousal support, for a period of forty-eight months, commencing on May 1, 1998. The decree also mandated that appellant provide life insurance for appellee in connection with the spousal support obligation.

{¶4} Appellee thereafter pursued numerous attempts to enforce the spousal support order and other divorce decree provisions, including registration/enforcement of the orders in West Virginia (appellant's State of residence) and court intervention by the Stark County CSEA. The trial court also issued a bench warrant for appellant's arrest in 2003.

Initial 2018 Proceedings

{¶5} More recently, on April 9, 2018, appellant, with the assistance of counsel, filed a "request for a status hearing" with the trial court.

{¶6} The matter proceeded to a hearing on April 17, 2018. At that time, the court cancelled the aforementioned warrant that had been issued in 2003, and ordered appellant to pay $21,000.00 to appellee toward his arrearages.

August 2018 Contempt Motions

{¶7} Appellee filed a motion to show cause against appellant on August 6, 2018, and a second motion to show cause against appellant on August 21, 2018. Appellant filed a motion to dismiss in part on September 12, 2018. The court scheduled a hearing for both contempt motions for September 18, 2018, which was thereafter converted to a pretrial set for October 15, 2018.

{¶8} The contempt matters then proceeded to a hearing before the chief magistrate on November 29, 2018.

{¶9} In her entry filed on December 3, 2018, the chief magistrate first determined that as to appellee's show cause motion of August 6, 2018, there was "insufficient clarity to find [appellant] guilty of contempt ***." Decision at 1.

{¶10} Also, as to the show cause motion of August 21, 2018, the chief magistrate found appellant not guilty of contempt for his alleged failure to provide health insurance. However, under another prong of the August 21, 2018 motion, the chief magistrate found appellant guilty of contempt for failing to maintain, as required by the divorce decree, a $200,000.00 life insurance policy for the period when his spousal support obligations remained ongoing. Furthermore, while noting appellant's laches argument, the chief magistrate, having concluded that appellant, conservatively speaking, still owed appellee at least $50,000.00 in spousal support arrearages, reasoned that appellant's failure to provide life insurance, "leaves [appellee's] rights in jeopardy even today." Decision at 2.

The magistrate then sentenced appellant to sixty days in the Stark County Jail and scheduled an imposition hearing for February 5, 2019. But the magistrate specifically noted she would *"consider limitation of jail sentence* upon a lump sum payment equal to the 4-17-18 bank account, and upon his attendance at a Debtor Examination to be conducted by either the Plaintiff's Ohio attorney or West Virginia attorney within 30 days." *Id.*, emphasis added. Finally, the magistrate indicated she would "address any purge conditions as under advisement to be included in a subsequent entry." *Id.*

{¶11} The imposition hearing went forward as scheduled before the judge on February 5, 2019. The court thereupon imposed the 60-day sentence and ordered appellant to report to the Stark County Jail on March 15, 2019. The trial court specifically found appellant had "failed to purge the finding of contempt." *See* Imposition Entry, February 6, 2019.

{¶12} Furthermore, in a written decision also issued on February 6, 2019, the chief magistrate among other things denied appellee's requested award of interest.

{¶13} On February 19, 2019, appellee filed an objection to the aforesaid chief magistrate's decision. Then, on February 28, 2019, appellant objected to the chief magistrate's decision on the basis that it had failed to provide purge conditions even though the December 3, 2018 decision had indicated that purge conditions would be forthcoming.

{¶14} On March 8, 2019, appellant filed a notice of appeal to this Court of the February 6, 2019 imposition judgment entry. However, because appellant's and appellee's objections to the magistrate's decision remained pending, appellant thereafter filed a motion for remand, citing App.R. 4(B)(2)(c). On May 21, 2019, this Court granted

said motion and remanded the matter to the trial court so it could rule upon the pending objections. On remand, the trial court found "[t]he provision for payment of a lump-sum payment and appearance for a debtor exam constitutes a condition for purge as required by law." Judgment Entry, June 6, 2019, at 1. In addition, the trial court approved and adopted the chief magistrate's decision in regard to the objections of February 19, 2019 and February 28, 2019. The trial court made no determination regarding whether appellant had satisfied the conditions, but it ordered the case returned to this Court.

{¶15} With leave from this Court, on July 3, 2019, appellant filed an amended notice of appeal to include an appeal from the trial court's June 6, 2019 judgment entry. The trial court has stayed the jail sentence during the pendency of the appeal.

{¶16} Appellant herein raises the following sole Assignment of Error:

{¶17} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT IN CIVIL CONTEMPT OF COURT WITHOUT FIRST PROVIDING HIM WITH PURGE CONDITIONS RENDERING THE CONTEMPT JUDGMENT VOID."

I.

{¶18} In his sole Assignment of Error, appellant contends the trial court erred or abused its discretion by sanctioning him for contempt of court without providing him with purge provisions. We agree in part.

{¶19} "The purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice." *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815, paragraph two of the syllabus. "A trial court may employ sanctions to coerce a party who is in contempt into complying with a court order." *Peach v. Peach,* Cuyahoga App. Nos. 82414 and 82500, 2003–Ohio–

5645, ¶ 37. But a sanction for civil contempt must allow the contemnor the opportunity to purge himself or herself of contempt. *See O'Brien v. O'Brien,* 5th Dist. Delaware No. 2003–CA–F12069, 2004–Ohio–5881, ¶ 68 (additional citations omitted).

{¶20} Typically, the failure to pay court-ordered spousal support is classified as a civil contempt. *See Fisher v. Fisher,* Fairfield App. No. 2008 CA 00049, 2009–Ohio–4739, ¶ 48. The parties herein do not appear to dispute that the proceedings below were in the nature of civil contempt.

{¶21} Generally, an appellate court's standard of review of a trial court's finding of contempt is abuse of discretion. *See State ex rel. Celebrezze v. Gibbs,* 60 Ohio St.3d 69, 573 N.E.2d 62 (1991). However, in this instance, we find the issue of the existence of a purge provision is a question of law, which we will review *de novo*.

{¶22} Appellant directs us to *Ruben v. Ruben*, 10th Dist. Franklin No. 12AP-717, 2013-Ohio-3924. In that case, the Franklin County Court of Common Pleas, Division of Domestic Relations ("trial court"), had conducted a hearing on the former wife's motions and found the appellant, former husband, in contempt of court for failure to pay spousal support and for failure to maintain a life insurance policy collateralizing the spousal support obligation. The trial court had thereupon sentenced former husband to thirty days in jail for the two contempt findings, but had set the matter for further hearing a few months later, as follows: "This matter shall come before the Court for further hearing on July 30, 2012 at 10:00 AM for purposes of review at which time the Court shall make a further finding relative to the imposition of the jail sentence." *Ruben* at ¶ 7, ¶ 38. The Tenth District Court of Appeals, noting that the parties agreed the contempt was civil in nature, concluded the trial court had erred in finding former husband in civil contempt without

including in its order an opportunity for former husband to purge the contempt. *Id.* at ¶ 37, ¶ 46. The Court also noted: "Notably absent from the court's [sentencing] order is any reference to an 'opportunity to purge' or 'purge conditions,' and the lack of specific purge language parallels a general lack of guidance as to the [trial] court's expectations of [appellant]." *Id.* at ¶ 38.

{¶23} In the case *sub judice*, as noted in our recitation of the facts, the chief magistrate ruled in her December 3, 2018 decision that the court would consider "limiting" the 60-day jail sentence if appellant made a lump-sum payment and attended a debtor's examination, and she indicated that purge provisions would be forthcoming. Subsequently, in the June 6, 2019 judgment entry under appeal, the trial court found these requirements to be purge conditions even though the magistrate had characterized them as reasons to merely limit the jail sentence, and she had indicated purge conditions would be addressed in a subsequent entry. However, in its ordinary usage, "purge" means "to get rid of." *People v. Ivy*, 2019 IL App (1st) 160400-U, ¶ 18 (Ill.App.) (unpublished), 2019 WL 1087409. We are also guided by the principle that due process must be observed in both civil and criminal contempt proceedings. *See Sano v. Sano*, 5th Dist. Stark No. 2010CA00252, 2011-Ohio-2110, ¶ 13, citing *In re Oliver* (1948), 333 U.S. 257, 274–275, 68 S.Ct. 499, 92 L.Ed. 682.

{¶24} We hold the trial court's utilization of a conditional limitation of jail time failed as a matter of law to afford appellant a proper opportunity to purge his contempt as required. Appellant's sole Assignment of Error is therefore sustained in part.[1]

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[1] In so holding, we do not accept appellant's proposition that the contempt finding is "void" under the circumstances. *See* Appellant's Brief at 8.

{¶25} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, Stark County, Ohio, is hereby reversed and remanded for further proceedings, with directions to issue purge provisions regarding the chief magistrate's contempt finding issued on December 3, 2018.

By: Wise, J.

Hoffman, P. J., and

Gwin, J., concur.

JWW/d 0211