The Bullet Point: Ohio Commercial Law Bulletin

Am I subject to the Consumer Sales Practices Act?

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The Marketable Title Act

Garden Botanical Garden v. Drewien, 8th Dist. Cuyahoga No. 108536, 2020-Ohio-1278

In this case, the Eighth Appellate District affirmed in part and reversed in part the trial court's decision, holding that the defendants' reversionary interest in the property was not extinguished and that plaintiff's continuous possession of the property satisfied the notice requirement under the Ohio Marketable Title Act.

- **The Bullet Point**
  The Ohio Marketable Title Act provides that a person who has an unbroken chain of title of record to any interest in land for forty years or more, has a "marketable record title" to such interest. R.C. 5301.48. The marketable record title operates to extinguish such interests and claims that existed prior to the effective date of the "root of title". R.C. 5301.47(A). The root of title is the conveyance in the chain of title that was most recently recorded as of a date forty years prior to the date when marketability is being determined. R.C. 5301.47(E). Put another way, the act gives the record owner clear, marketable title to the property free from competing interests that existed forty years before the person took record ownership of the property. To prevent the act from extinguishing an interest and to preserve such an interest, a person must assert their interest with a written notice recorded within the look-back period or the same owner must be in continuous possession of the property for forty years or more during which time there are no title transactions recorded with respect to said interest.

Consumer Transactions under the CSPA

Capital One Bank v. Jones, 9th Dist. Medina No. 18CA0116-M, 2020-Ohio-1204

In this appeal, the Ninth Appellate District affirmed the trial court's decision, agreeing that the attorneys who filed the complaint on behalf of the financial institution were exempt from claims under the Ohio Consumer Sales Practices Act as the financial institution's exemption extended to its counsel.

- **The Bullet Point**
  A claim brought under the Ohio Consumer Sales Practices Act (OCSPA) fails when there is no consumer transaction between the parties and when the defendant is not considered a "supplier" under the act. Transactions between a financial institution and its customers are not considered "consumer transactions" under the OCSPA. R.C. 5725.01. Furthermore, as the court explained, this exemption

from the OCSPA extends to a financial institution's own counsel. Consequently, "when an attorney represents a financial institution in a transaction that is exempted from the OCSPA, the attorney is similarly exempt from liability under the statute."

Arbitration Agreement Incorporated by Reference

Bennett v. KeyBank, N.A., 6th Dist. Lucas No. L-19-1249, 2020-Ohio-1152

In this appeal, the Sixth Appellate District affirmed the trial court's decision that the matter was subject to arbitration, finding that the arbitration agreement was incorporated by specific reference into the signed contract.

- **The Bullet Point**
  Ohio law adheres to the "long-held principle that parties to contracts are presumed to have read and understood them and that a signatory is bound by a contract that he or she willingly signed." As the court detailed, separate, unsigned agreements may be incorporated by reference into a signed contract. Under this so-called "incorporation doctrine", when a document is incorporated into a contract by explicit or precise reference, that document becomes part of the signed contract. As such, the parties to a signed contract do not need to separately execute the incorporated arbitration agreement in order to be bound by its terms.

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[Cite as *Cleveland Botanical Garden v. Drewien*, 2020-Ohio-1278.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CLEVELAND BOTANICAL GARDEN, :

Plaintiff-Appellee, :

No. 108536

v. :

STACI K. WORTHINGTON DREWIEN, ET AL., :

Defendants-Appellants.

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART AND REMANDED
RELEASED AND JOURNALIZED: April 2, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CV-13-812284, CV-14-827728, and CV-18-905027

Appearances:

Hahn, Loeser & Parks, L.L.P., Stephen J. Knerly, Jr., Eric B. Levasseur, Dennis R. Rose, and Sarah K. Lewis, *for appellee* Cleveland Botanical Garden.

Squire Patton Boggs, L.L.P., Steven A. Friedman, and Sean L. McGrane, *for appellee* University Circle, Inc.

Barbara A. Langhenry, Director of Law, L. Stewart Hastings, Jr., Assistant Director of Law, *for appellee* City of Cleveland.

Strauss Troy Co., L.P.A., Matthew W. Fellerhoff, William K. Flynn, Amy L. Hunt, and Stephen E. Schilling, *for appellants* heirs or beneficiaries of Wade Trust.

PATRICIA ANN BLACKMON, J.:

{¶ 1} Defendants-appellants, the trustee, heirs, and beneficiaries of the Jeptha H. Wade Trust (collectively referred to as "the heirs"), appeal from the trial court's declaratory judgment in favor of plaintiff-appellee, Cleveland Botanical Garden ("Botanical Garden"), determining that: (1) Botanical Garden's imposition of admission and parking fees, and limited hours of operation do not violate the "Public Park for the benefit of all people" ("park use") and "open at all times to the public" ("open") restrictions in the 1882 deed of Wade Park to Cleveland; (2) the deed's "fence restriction" is enforceable only by adjacent landowners; and (3) the heirs' reversionary interest was extinguished by operation of the Marketable Title Act, R.C. 5301.47, et seq. The heirs assign the following errors for our review:

> I. The trial court erred by granting summary judgment to [Botanical Garden] by holding the Marketable Title Act, R.C. 5301.47, et seq., extinguished [the heirs'] reversionary interest created in the root of title conveying Wade Park to the City of Cleveland in trust [under the Wade deed].
>
> II. The trial court erred by granting summary judgment to [Botanical Garden] by holding [that Botanical Garden's] admission and parking fees do not violate the conditions of the [Wade deed].
>
> III. The trial court erred by granting summary judgment to [Botanical Garden] because it is undisputed that Wade Park is not "open at all times to the public."
>
> IV. The trial court erred by granting summary judgment to [Botanical Garden] by holding: the [Wade deed] created a fee simple subject to a condition subsequent; but then holding the open wrought-iron fence condition is a restrictive covenant enforceable only by adjacent landowners.

V. The trial court erred by conducting an in camera review without giving [the heirs] the benefit of a privilege log.

{¶ 2} For the sake of clarity, we will address the assigned errors out of this predesignated order. Having reviewed the record and the controlling case law, we reverse the court's determination that the heirs' reversionary interest was extinguished by operation of the Marketable Title Act, we affirm the trial court's decision that Botanical Garden is not in violation of the "park use" and "open" restrictions in the deed, and we reverse the determination that the deed's "fence restriction" is enforceable only by adjacent landowners.

{¶ 3} In 1882, Jeptha H. Wade granted 73 acres of property, known as Wade Park, to the city of Cleveland for a park "to be kept open" to the public. In relevant part, the 1882 Wade deed provides:

> Know all men by these presents that I, Jeptha H. Wade of the City of Cleveland, County of Cuyahoga and State I, Jeptha H. Wade of the City of Cleveland, * * * being desirous of securing to the citizens of Cleveland for all time the opportunity of re-creating, having, improving and maintaining a beautiful and attractive Public Park therein for the benefit of all the people and being the owner of lands suitable for this purpose situated near the place where several important institutions of learning are about to be permanently located and on which grounds larger expenditures with a view to such a Park have already been made, do hereby freely give, grant and convey unto the said City of Cleveland and the successors, to have and to hold forever, [a 73-acre parcel].
>
> This conveyance is made to the said City of Cleveland forever in trust for the following purposes and upon the express conditions following to wit: * * * The said grounds at all times thereafter to be kept and maintained by said City in such repair and condition as to make it an attractive and desirable place of resort — as a Public Park to be open at all times to the public. The abutting land owners, their heirs and assigns, to have free ingress and egress through the same, subject forever to all rules and regulations prescribed by the Park Commissioners. To be for no other purpose than a public park and to

> be called and known forever by the name of Wade Park; If fencing shall ever be placed on said Park grounds except along the westerly and southerly boundary, it shall be open wrought- iron fence.
>
> I also reserve the right for myself and my heirs forever to place and maintain a Street Railroad in and along the Avenues forming the easterly and northerly boundaries of said Park. Said Railroad to be subject to laws and ordinances of the City, and stipulate that the abutting property owners, their heirs and assigns forever, may connect with any water pipe the City may place in said Park at the most proper and convenient places, subject however to water rules and regulations prescribed by the City, and may make all necessary drives and walks to connect with said easterly and northerly Avenue, and if the grounds aforesaid or any part thereof shall be perverted or diverted from the public purposes and uses herein expressed, the said property and every part thereof to revert to me or my heirs forever.

{¶ 4} After its founding in the 1930s, Botanical Garden was granted permission to occupy a converted boathouse on the Wade Park Lagoon. At this time, Botanical Garden assured the heirs that it would "not interfere with the adequate and reasonable use of said Wade Park" by the public.

{¶ 5} In 1964, Cleveland entered into a lease with Botanical Garden that incorporated all "conditions, restrictions or limitations and covenants" in the Wade deed. The lease provided that Botanical Garden would not "close" off or "barricade" the park, or any part of the park, and would not charge admission "for entrance" to the Botanical Garden apart from special event fees. In 1966, Botanical Garden moved to its present location.

{¶ 6} In 1971, Cleveland entered into a lease with appellee University Circle Incorporated ("UCI"). UCI assumed maintenance obligations for the Wade Oval portion of the park. This lease expressly incorporated the terms of the 1882 Wade deed, and provides that UCI shall only use the property in a manner that is

"consistent with any conditions, restrictions or limitations and covenants contained in [that] deed." By 2001, Botanical Garden subleased additional parcels from UCI in accordance with the terms of the 1971 lease. The 2001 sublease permitted Botanical Garden to install an underground parking garage. Botanical Garden currently occupies ten acres of Wade Park.

{¶ 7} By 2003, Botanical Garden undertook an expansion that quadrupled its building space and included a glass conservatory. The cost of the expansion was $70 million. Approximately $50 million of this sum was paid by contributions, and Botanical Garden planned to pay the remaining balance with bonds that would be paid from admission fees to a ten-acre section of the property. Fencing for the area includes a "wall" along portions of East Boulevard, chain-link fencing along portions of East Boulevard, and areas of wooden fencing. On a select few days of the year, admission is free.

{¶ 8} In 2010, Botanical Garden refinanced its bond debt, borrowing $11.5 million from Huntington Bank and giving Huntington Bank a "Leasehold Mortgage" on its interest in Wade Park. Huntington Bank later sold the loan, and the lease was in turn assigned to The Holden Arboretum.

{¶ 9} By 2019, Botanical Garden collected approximately $13 million from parking and admission fees. The heirs subsequently asserted a "reversionary interest," complaining that the "park use," "open," and fencing restrictions in the deed were violated.

{¶ 10} Botanical Garden filed this declaratory judgment action, seeking judicial determinations that: (1) its use, operation, and maintenance of the property is consistent with the deed restrictions; (2) it may, consistent with the 1882 deed, charge admission fees to a portion of its facilities and exhibits; (3) it may charge parking fees; (4) it may erect and maintain fencing. In opposition, the heirs asked the court to enjoin Botanical Garden from charging admission into the gardens and the parking facility, and order Botanical Garden to remove all but the limited wrought-iron fencing authorized in the 1882 deed.[1]

{¶ 11} The parties filed opposing motions for partial summary judgment. Botanical Garden maintained that the 1882 deed gave the heirs a right of entry, and that the heirs failed to preserve it in accordance with the Marketable Title Act. Botanical Garden also argued that the operation of a botanical garden, the charging of fees, regulating hours of operation, operation of a parking facility, and installation of fencing do not violate the terms of the deed or trigger a reversion to the heirs. In opposition, the heirs maintained that they possess a possibility of reverter that was not extinguished by the Marketable Title Act because it was both created in the "root of title" and incorporated in the 1964 and 1971 leases. The heirs further argued that Botanical Garden violated the "park use," "open," and "fencing restrictions" provisions of the 1882 deed by imposing admission and parking fees, installing

[1] The heirs also filed taxpayer actions against Cleveland in order to enforce the terms of the 1882 deed and the relevant leases. *See Cleveland, ex rel. William G. Wade v. Cleveland*, Cuyahoga C.P. Nos. CV-14-827728 and CV-18-905027. The taxpayer actions were stayed pending decision on the declaratory judgment action.

prohibited fencing, closing the area all but "24.5 [percent] of the year," and charging admission all but several days per year.

{¶ 12} The trial court ruled that the deed created a "fee simple subject to a condition subsequent / right of entry," and not a possibility of reverter, and that the heirs failed to preserve this interest in accordance with the Marketable Title Act. The court also concluded that Botanical Garden's "use and operation of the [Botanical Garden] Property as a botanical garden is a permissible public park use," so there was no violation of the terms of the Wade deed. The court held that the charging of admission or fees does not violate the "park use" or "open" restrictions in the 1882 deed, because "the term 'open, at all times to the public' does not mean 'free.'" Similarly, the court held that "having specific hours of operation does not mean that the property is 'closed off' to the public." The court also ruled that the construction and operation of parking facilities is consistent with the "park use" restriction in the 1882 deed.

{¶ 13} As to the fencing issue, Botanical Garden asserted that the provision regarding fencing is a restrictive covenant, enforceable only by the adjacent landowners. In opposition, the heirs argued that the deed language created a fee simple subject to a condition subsequent. The court held that the deed created a restrictive covenant, enforceable only by adjacent property owners.

Claimed Violations of the 1882 Deed

A. "Park Use" and "Open" Provisions

{¶ 14} In the second and third assigned errors, the heirs argue that the trial court erred in determining that Botanical Garden is not in violation of the "park use" and "open" terms of the Wade deed because the facility has limited hours and charges admission and parking fees.

{¶ 15} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). To prevail on a motion for summary judgment, the movant must first be able to point to evidentiary materials that demonstrate there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the movant overcomes that initial burden, the nonmoving party may not merely resting upon the allegations contained in the pleadings to establish a genuine issue of material fact. Civ.R. 56(E). Instead, it has the reciprocal burden of responding and setting forth specific facts that demonstrate the existence of a "genuine triable issue." *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996).

{¶ 16} The construction of instruments of conveyance is a matter of law that is subject to de novo review. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996); *Bath Twp. v. Raymond C. Firestone Co.*, 140 Ohio App.3d 252, 256, 747 N.E.2d 262 (9th Dist.2000). In Ohio, the first rule of deed construction is that when the parties' intention is clear from the four corners of the

deed, courts will give effect to that intention. *Koprivec v. Rails-to-Trails of Wayne Cty.*, 153 Ohio St.3d 137, 2018-Ohio-465, 102 N.E.3d 444, ¶ 29.

{¶ 17} Turning to the issue of whether Botanical Garden's operation of facilities, buildings, and gardens is consistent with the "park use" restriction, we note that the Wade deed provides "the opportunity of re-creating, having, improving, and maintaining a beautiful and attractive Public Park for the benefit of all the people." It further states that the "grounds [are] to be kept and maintained by the City in such repair and condition to make it an attractive and desirable place of resort." The operation of botanical gardens has repeatedly been found within the use of land for park purposes. *See Kinney v. Kansas Fish & Game Commn.*, 238 Kan. 375, 381, 710 P.2d 1290 (1985); *Behrens v. Spearfish*, 84 S.D. 615, 620, 175 N.W.2d 52 (1970); *Bernstein v. Pittsburgh*, 366 Pa. 200, 206-208, 77 A.2d 452 (1951); *Spires v. Los Angeles*, 150 Cal. 64, 66, 87 Pac. 1026 (1906); *Slavich v. Hamilton*, 201 Cal. 299, 257 Pac. 60 (1927).

{¶ 18} With regard to the charging of fees, the trial court held that the term "open, at all times to the public" does not mean "free." The court explained:

> [Botanical Garden's] charging of [an] admission fee and having specific hours of operation does not mean that the property is "closed off" to the general public. Rather, [Botanical Garden] charges fees in order to provide an educational, cultural, and recreational botanical experience to the public. [Botanical Garden's] charging fees for use of its facilities is consistent with the Wade deed provision of "re-creating, having, improving and maintaining a beautiful and attractive Public Park for the benefit of the people."

{¶ 19} This conclusion is supported by *Bernstein*. *Id*. at 209-210. *Accord Mansour v. Monroe*, 767 N.Y.S.2d 341, 1 A.D.3d 976 (4th Dept.2003). Moreover, "open to public use" does not require the area to be open to "everybody all the time." *Gally v. Delponte*, Tolland Jud. Dist. No. 44598, 1991 Conn. Super. LEXIS 3170 (Dec. 9, 1991). Right of access is not absolute and hours may be limited. *Accord Wyatt v. Hargadine*, C.D. Ill. No. 13-3150, 2013 U.S. Dist. LEXIS 149819 (Oct. 18, 2013).

{¶ 20} The provision of parking is also included within permitted park uses. *See Behrens* at 621; *Bernstein* at 204. Further, in *Save Our Heritage Organisation v. San Diego*, 237 Cal. App.4th 163, 187 Cal. Rptr.3d 754 (2015), the court upheld the construction of a for-pay parking facility in an urban park complex where the land was dedicated to use as a free public park.

{¶ 21} In light of our discussion of fencing in the discussion below, we do not reach the issue of the hours of operation of Botanical Garden.

{¶ 22} In accordance with all of the foregoing, the trial court properly concluded that the challenged terms of the 1882 deed were not violated. The second and third assigned errors are without merit and are overruled.

B. Fencing Provision

{¶ 23} In the second portion of the fourth assigned error, the heirs argue that the trial court erred in concluding that the fence condition is a restrictive covenant that is enforceable only by adjacent landowners.

{¶ 24} Considering the nature of the fence provision set forth in the deed, we begin by noting that ""A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."" *State ex rel. New Wen, Inc. v. Marchbanks*, Slip Opinion No. 2020-Ohio-63, ¶ 24, quoting *Dispatch Printing Co. v. Recovery Ltd. Partnership*, 2015-Ohio-381, 28 N.E.3d 562, ¶ 51 (10th Dist.), quoting *United States v. Craft*, 535 U.S. 274, 278, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002). State law determines which sticks are in a person's bundle. *Id*., citing *Craft,* 535 U.S. at 278. We therefore consider the nature of this provision in light of whether the parties' intention is clear from the four corners of the deed. *Koprivec*, 153 Ohio St.3d 137, 2018-Ohio-465, 102 N.E.3d 444, ¶ 29. If the deed restriction is "indefinite, doubtful and capable of contradictory interpretation, that construction must be adopted which least restricts the free use of the land." *Corna v. Szabo*, 6th Dist. Ottawa No. OT-05-025, 2006-Ohio-2764, ¶ 39.

{¶ 25} Additionally, conditions subsequent are not favored in law and are looked upon with disfavor in equity; conditions subsequent must be clearly expressed and strictly construed. *Second Church of Christ, Scientist v. Le Prevost*, 67 Ohio App. 101, 104, 35 N.E.2d 1015 (9th Dist. 1941). Key facts include whether there are words in the provision creating a reverter. *Id*.; *Wayne Lakes Park, Inc. v. Warner*, 104 Ohio App. 167, 147 N.E.2d 269 (2d Dist.1957). The Ohio Supreme Court held that the descriptive phrase, "so long as" or the words "during" or "until"

when used in the deed could be sufficient to create a fee simple estate subject to a reversion. *Koprivec* at ¶ 31-32. Conversely,

> "A restrictive covenant is a 'private agreement, [usually] in a deed or lease, that restricts the use or occupancy of real property, [especially] by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put.'" * * * *City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 28 (2002), citing Black's Law Dictionary 371 (7th Ed.Rev.1999). In the context of property law, a "covenant" denotes a contract that is either personal or "runs with the land." *Maasen v. Zopff*, 12th Dist. Warren Nos. CA98-10-135, 1999 Ohio App. LEXIS 3422, 1999 WL 552747, 3 (July 26, 1999).

State Cty. Park Dist. v. Dickerhoof, 2018-Ohio-4319, 122 N.E.3d 608, ¶ 62 (5th Dist.).

{¶ 26} In *Dickerhoof*, the court considered the following provision: "Provided always and these presents are upon this express condition, that the said party of the second part shall construct its railroad on said premises." The court concluded that this created a restrictive covenant and not a reversion, explaining as follows:

> Instead of a reversion, this language establishes a restriction or covenant regarding the use of the land. * * *
>
> The deed contains language expressing the expectation that the grantee will use the property "to conveniently operate said railroad, and for no other use or purpose" but it contains no language qualifying the transfer of the property as being effective only for "so long as" the property is used to operate the railroad and we cannot add such language. The intention of the parties is clear and "the first rule of deed construction in Ohio is that when the parties' intention is clear from the four corners of the deed, we will give effect to that intention." *Koprivec*, supra at ¶ 29.

Id. at ¶ 62-63. *Accord Giancarli v. Arroyo,* 9th Dist. Summit No. 18223, 1997 LEXIS 4751 (Oct. 29, 1997).

{¶ 27} Similarly, in this matter, the following language is included as an "express condition":

> The abutting land owners, their heirs and assigns, to have free ingress and egress through the same, subject forever to all rules and regulations prescribed by the Park Commissioners. To be for no other purpose than a public park and to be called and known forever by the name of Wade Park; If fencing shall ever be placed on said Park grounds except along the westerly and southerly boundary, it shall be open wrought- iron fence.

{¶ 28} The reversionary language of the deed provides:

> [I]f the said City shall fail to comply with the aforesaid stipulations for the expenditure of seventy-five thousand dollars if the grounds aforesaid or any part thereof shall be perverted or diverted from the public purposes and uses herein expressed, the said property and every part thereof to revert to me or my heirs forever.

{¶ 29} We therefore hold, viewing the fence provision or "stick within the bundle" conveyed in the deed, that it sets forth a restrictive covenant that runs with the land in the event that improper fencing is installed. The deed contains language expressing the expectation that the grantee will limit fencing as specified in the deed, but this portion of the deed does not contain reversionary language.

{¶ 30} As to Botanical Garden's contention that the restrictive covenant is only enforceable by abutting landowners, we note that in *Dixon v. Van Sweringen Co.*, 121 Ohio St. 56, 166 N.E. 887 (1929), the Supreme Court held that:

> "Every owner of real property has the right so to deal with it, as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only

> restriction on this right is, that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint of trade. Nor can there be any doubt that in whatever form such a restraint is placed on real estate by the terms of a grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, *it is binding as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both in law and equity*."

(Emphasis added.) *Id.* at 69-70, quoting *Whitney v. Union Railway Co.*, 11 Gray 359 (1860). *Accord Morgan Woods Homeowners' Assn. v. Wills*, 5th Dist. Licking No. 11 CA 57, 2012-Ohio-233, ¶ 61-62 (homeowners' association may enforce restrictive covenant in deed).

{¶ 31} Therefore, we conclude that the restrictive covenant is binding by the heirs of the grantor and Botanical Garden and therefore enforceable by the heirs. In this connection, the trial court erred insofar as it held that the restrictive covenant is enforceable only by the adjacent landowners.

{¶ 32} The second portion of the fourth assigned error is well-taken in part and is sustained.

Marketable Title Act

{¶ 33} In the first assigned error, the heirs argue that the trial court erred in concluding that their asserted reversionary interests expired by operation of the Marketable Title Act for failure of notice in accordance with R.C. 5301.51.

{¶ 34} In *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132, the Ohio Supreme Court explained the Marketable Title Act as follows:

> the act provides that a person "who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest." R.C. 5301.48. The marketable record title "operates to extinguish such interests and claims, existing prior to the effective date of the root of title." R.C. 5301.47(A). (A "root of title" is "that conveyance or other title transaction in the chain of title of a person * * * which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined." R.C. 5301.47(E).) The act facilitates title transactions, as the record marketable title "shall be taken by any person dealing with the land free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title." R.C. 5301.50.
>
> Balanced against the desire to facilitate title transactions is the need to protect interests that predate the root of title. To this end, the act provides that the marketable record title is subject to interests inherent in the record chain of title, "provided that a general reference * * * to * * * interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such * * * interest." R.C. 5301.49(A).

Id. at ¶ 7-8.

{¶ 35} Effective as of 1961, the purpose of the Marketable Title Act is to "simplify and facilitat[e] land title transactions by allowing persons to rely on a record chain of title as described in Section 5301.48 of the Revised Code, subject only to such limitations as appear in, section 5301.49 of the Revised Code." R.C. 5301.55.

{¶ 36} The applicable definitions of terms used in the Marketable Title Act are set forth in R.C. 5301.47 as follows:

> (A) "Marketable record title" means a title of record, as indicated in section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in section 5301.50 of the Revised Code.

(B) "Records" includes probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate.

(C) "Recording," when applied to the official public records of the probate or other court, includes filing.

(D) "Person dealing with land" includes a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

(E) "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when market-ability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(F) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrators, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

{¶ 37} R.C. 5301.49 governs record marketable title and provides:

Such record marketable title shall be subject to:

(A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in section 5301.51 of the Revised Code;

(B) All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with section 5301.51 of the Revised Code;

(C) The rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title;

(D) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title or record is started; provided that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of section 5301.50 of the Revised Code * * *.

{¶ 38} The relevant prior interests are set forth in R.C. 5301.50 as follows:

Subject to the matters stated in section 5301.49 of the Revised Code, such record marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title. All such interests, claims, or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims, or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

{¶ 39} The preservation of interests is governed by R.C. 5301.51 which states:

(A) Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. * * *

(B) If the same record owner of any possessory interest in land has been in possession of such land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him on his behalf as provided in division (A) of this section, and

> such possession continues to the time when marketability is being determined, such period of possession is equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in division (A) of this section.

{¶ 40} We begin by noting that the trial court held that "[i]t is undisputed by the parties that the root of title is the Wade Deed, recorded in 1882." Therefore, it is clear that the heirs' interests were created "in the root of title" and not "prior to the effective date of the root title." Therefore, their interests are not extinguished by operation of R.C. 5301.50. *Accord Blackstone*, 2018-Ohio-4959 at ¶ 7; *Toth v. Berks Title Ins. Co.*, 6 Ohio St.3d 338, 340, 453 N.E.2d 639 (1983).

{¶ 41} Botanical Garden maintains, however, that in *Carlson v. Koch*, 8th Dist. Cuyahoga Nos. 36497 and 36498, 1978 Ohio App. LEXIS 9501 (Jan. 19, 1978), this court required the reversionary heirs to comply with the requirements of R.C. 5301.49(A) and 5301.51 even though their reversionary interest was created "in the root of title." However, in *Carlson*, the reversionary interest was in fact created prior to the root of title, because the court concluded that the heirs' claimed reversionary interests were created in deeds from 1896 and 1898, whereas "the root of title was established at the 1906 annexation of the real estate parcels in question." The court therefore held that:

> Appellants' reversionary interest existed prior to the root of title and specific mention of such interest in the root of title within forty years of the date upon which marketability was to be discovered would have served to preserve such interest.

Id.

{¶ 42} Botanical Garden also notes that in *Verona United Methodist Church v. Shock*, 2d Dist. Preble No. CA 252, 1978 Ohio App. LEXIS 10863 (Oct. 13, 1978), the Second District Court of Appeals held that reversionary heirs were required to comply with the requirements of R.C. 5301.49(A) and 5301.51 even though their reversionary interest was created "in the root of title." However, an unpublished opinion issued before May 1, 2002, by another judicial district is not controlling case law. *See* Rep.Op.R. 4; *Watson v. Neff*, 4th Dist. Jackson No. 08CA12, 2009-Ohio-2062, ¶ 16. We decline to follow it herein. Moreover, it is inapposite to this matter in that it, unlike the instant matter, does not concern land owned by a municipal corporation as owner or trustee of property for park purposes, pursuant to R.C. 755.19 and did not involve any claimed continuous possession, recorded leases, or other relevant "title transactions."

{¶ 43} Turning next to the heirs' argument that the Marketable Title Act does not extinguish their interests herein because, as a matter of law and pursuant to R.C. 755.19, the Wade deed requires Cleveland to hold the property "in trust for the benefit of all people" to be maintained as a public park and "for no other purpose than a public park."

{¶ 44} We note, as a matter of law, that under R.C. 755.19,

> In any municipal corporation which is the owner or trustee of property for park purposes, or of funds to be used in connection therewith, by deed of gift, devise, or bequest, such property or funds shall be managed and administered in accordance with the provisions or conditions of such deed of gift, devise or bequest.

{¶ 45} We agree that in light of the statutory mandate that Cleveland manage and administer the property in accordance with the terms of the Wade deed, Cleveland is compelled to "hold the property in trust for the benefit of all people," so Wade Park cannot be subject to conventional "land title transactions" that are the general subject of the Marketable Title Act as stated in R.C. 5301.55.

{¶ 46} The heirs additionally argue that Cleveland's continuous possession of the property in trust for the benefit of all people satisfies the notice provision by operation of R.C. 5301.49(B) ("All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with section 5301.51 of the Revised Code."). Botanical Garden insists that this provision is inapplicable because the Wade heirs have not personally been in continuous possession of the property. However, Cleveland's continuous possession of the property "in trust for the benefit of all people" satisfies the notice provision by operation of R.C. 5301.51(B), which states:

> If the same record owner of any possessory interest in land has been in possession of the land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him on his behalf as provided in division (A) of this section, and such possession continues to the time when marketability is being determined, the period of possession is equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in division (A) of this section.

{¶ 47} That is, Cleveland is the "same record owner" in continuous possession of the property in trust for the benefit of all people, and this satisfies the notice provision by operation of R.C. 5301.51(B). Likewise, the leases executed in

this matter incorporated the terms of the Wade deed and these "title transactions" were recorded in the chain of title. R.C. 5301.51(B).

{¶ 48} In accordance with the foregoing, the trial court erred insofar as it held that the interests claimed herein expired by operation of the Marketable Title Act.

{¶ 49} The first assigned error is well-taken and sustained.

In Camera Review Lacking Privilege Log

{¶ 50} The fifth assigned error stems from the trial court's denial of the heirs' motion to compel discovery of communications between Botanical Garden, UCI, and their counsel. The heirs assert that the court erroneously conducted an in camera review, and improperly failed to require Botanical Garden and UCI to prepare a privilege log before ruling that the communications were not discoverable. In opposition, Botanical Garden maintains that the heirs agreed to the in camera review during a pretrial conference, and that no privilege log was needed because Botanical Garden and UCI apprised the heirs that they were asserting the common-interest and work-product privileges.

{¶ 51} This court employs the de novo standard of review in order to determine whether information sought is confidential and privileged from disclosure. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13.

{¶ 52} The common-interest privilege is applicable "'where two or more clients, each represented by their own lawyers, meet to discuss matters of common

interest — commonly called a joint defense agreement or pooled information situation.'" *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504 (10th Dist.), quoting McCormick, *Evidence*, Section 91.1, at 413-414 (6th Ed.2006). This privilege "provides a qualified privilege protecting the attorney's mental processes in preparation of litigation, establishing 'a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary.'" *Squire Sanders & Dempsey v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 54, quoting *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir.2006).

{¶ 53} The purpose of the work-product rule is to protect "the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases" and "to prevent an attorney from taking undue advantage of his adversary's industry or efforts." *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 16, citing Civ.R. 26(A). "To that end, Civ.R. 26(B)(3) places a burden on the party seeking discovery to demonstrate good cause for the sought-after materials." *Id.*

{¶ 54} In response to a discovery dispute, a trial court may conduct an in camera review as an accepted procedure for evaluating disputed records. *See generally State ex rel. Essi v. Lakewood*, 8th Dist. Cuyahoga No. 104659, 2018-Ohio-5027 (conducting in camera inspection of documents for consideration of various privilege claims including common interest privilege and work product).

{¶ 55} Here, the court conducted a telephonic conference and then the parties briefed the issue. Botanical Garden maintained that the communications were protected by the work-product and common-interest privileges. The court concluded:

> Upon review of the documents produced under seal by UCI for in camera inspection, the court finds that the common interest exception applies and that the documents produced are attorney work product, including emails regarding litigation strategy. The court finds that UCI and [Botanical Garden] have a common interest in the claims of this declaratory judgment action, specifically, regarding whether [Botanical Garden's] current use of the property is consistent with the 1882 deed. As the documents are attorney work product and are covered by the common interest doctrine, [Botanical Garden] and UCI are not required to produce a privilege log.

{¶ 56} We fully concur with this analysis. It is supported in the record, and, significantly, this contention is supported by a signed Common Interest Agreement dated August 17, 2015. It is also consistent with UCI and Botanical Garden's stated common interest as appellees' sharing a single brief herein.

{¶ 57} Further, because the basis of the parties' privilege claims was made clear to the heirs, no prejudicial error occurred due to the absence of a privilege log. *Accord Csonka-Cherney v. ArcelorMittal Cleveland, Inc.*, 2014-Ohio-836, 9 N.E.3d 515, ¶ 23-24 (8th Dist.) (employee's challenge to the production of the medical records was not waived despite not having filed a privilege log under Civ.R. 26(B)(6)(a) because she consistently and unequivocally gave the employers notice that she was not waiving her right to assert privilege).

{¶ 58} The fifth assigned error lacks merit and is overruled.

{¶ 59} In accordance with the foregoing, the judgment of the trial court is affirmed insofar as it determined that the "park use" and "open" restrictions in the 1882 deed of Wade Park to Cleveland have not been violated; it is reversed insofar as it determined that the fencing restrictions have not been violated; it is reversed insofar as it determined that the fencing restrictions are enforceable only by adjacent landowners; and it is reversed insofar as it determined that the heirs' claimed interests have been extinguished by operation of the Marketable Title Act

{¶ 60} The judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

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

KEY WORDS:

Deed restriction; parks; restrictive covenant; fences; Marketable Title Act; discovery; in camera; privilege log

Trial court properly concluded that Botanical Garden's use and operation of facility and underground parking structure did not violate park use restriction in 1882 deed; court properly found that charging admission for some displays and for parking does not violate the portion of the deed requiring parcel to be open at all times to the public; fence provision was a restrictive covenant but was enforceable by grantor's heirs; trial court erred in concluding that heirs' claimed interests were extinguished by the Marketable Title Act; trial court did not err in considering common interest and work product privilege claims in an in camera hearing.

[Cite as *Capital One Bank v. Jones*, 2020-Ohio-1204.]

STATE OF OHIO))ss: COUNTY OF MEDINA)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
CAPITAL ONE BANK, et al. Appellees v. KAREN L. JONES Appellant	C.A. No. 18CA0116-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 09-CIV-2388

DECISION AND JOURNAL ENTRY

Dated: March 31, 2020

HENSAL, Judge.

{¶1} Karen Jones appeals a judgment of the Medina County Court of Common Pleas that granted summary judgment to Capital One Bank on her counterclaims. For the following reasons, this Court affirms.

I.

{¶2} In 2009, "Capital One Bank" filed a complaint against Ms. Jones, alleging that she had breached her credit card agreement and owed it nearly $9,000. In her answer, Ms. Jones alleged that the claims were barred under the applicable statute of limitations and that Capital One Bank was not the real party in interest. She also filed a counterclaim against Capital One Bank and its attorneys, Morgan & Pottinger, PSC ("M&P"). After the bank dismissed its claim against Ms. Jones, she amended her counterclaim to include claims against the bank and M&P for violations of the Ohio Consumer Sales Practices Act ("OCSPA") and Federal Debt Collection

Practices Act ("FDCPA"), among others. Capital One Bank eventually entered into a settlement regarding Ms. Jones's counterclaims.

{¶3} In 2017, M&P moved for summary judgment on Ms. Jones's counterclaims. Although a magistrate initially denied the motion, the trial court rejected the magistrate's decision after it was discovered that an entire box of materials had been misplaced and not considered by the magistrate. After requesting supplemental memoranda from the parties, the magistrate reviewed the motion for summary judgment again and determined that it should be granted. Ms. Jones objected to the magistrate's decision, but the trial court overruled her objections and granted summary judgment to M&P. Ms. Jones has appealed, assigning two errors.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO CONSIDER EVIDENCE DEMONSTRATING THAT THE PLACE OF ACCRUAL OF THE CAUSE OF ACTION ALLEGED IN THIS CASE WAS IN VIRGINIA, AND THAT THE STANDARDS FOR APPLICATION OF A STATUTE OF LIMITATIONS FOR WRITTEN CONTRACTS WERE NOT MET.

{¶4} Ms. Jones argues that the trial court incorrectly granted summary judgment to M&P because it incorrectly determined that Missouri's statute of limitations applied to the bank's claims against her instead of Virginia's statute. Under Civil Rule 56(C), summary judgment is appropriate if:

> [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary

materials that demonstrate there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id*. at 293, quoting Civ.R. 56(E). This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶5} The parties agreed that, under Ohio's borrowing statute, Ohio's statutes of limitations did not apply to the bank's claims if the causes of action accrued in a different state. R.C. 2305.03(B). M&P argued that Missouri's statute of limitations applied to the bank's claims because, under the terms of the credit card agreement, Ms. Jones was required to make her payments to a location in Missouri. Ms. Jones argued that she never sent any payments to Missouri but submitted them electronically at capitalone.com instead. According to Mr. Jones, because the capitalone.com internet domain was registered in Virginia and Virginia is where Capital One Bank resided, the bank's claims accrued in Virginia and Virginia's statutes of limitations applied.

{¶6} In *Taylor v. First Resolution Investment Corp.*, 148 Ohio St.3d 627, 2016-Ohio-3444, the Ohio Supreme Court considered where a cause of action for default on a credit card accrues. The cardholder lived in Ohio, but Delaware was the home state for the bank that issued the card and is where the cardholder made her payments. *Id*. at ¶ 1. The Court noted that it had previously held that a claim on an unpaid promissory note arose where the contract was made payable. *Id*. at ¶ 43, citing *Meekison v. Groschner*, 153 Ohio St.3d 301, 306-307 (1950). It also noted that, as a practical matter, the only way the card issuer can determine if a cardholder is in default is when payment is not received at the designated location by a certain date. *Id*. at ¶ 47, citing *Conway v. Portfolio Recovery Assocs.*, 13 F.Supp.3d 711, 720-721 (E.D.Ky.2014). Following its precedent, a majority of the Court held that a card issuer's cause of action against a

cardholder "accrue[s] in the jurisdiction where the debt was to be paid, Delaware." *Id*. at ¶ 48; *Id*. at ¶ 109 (Kennedy, J., concurring).

{¶7} Although Ms. Jones may have had the option of making her payments electronically, the statements she received around the time of her default indicated that her payments should be mailed to an address in Missouri. Under *Taylor*, we are compelled to conclude that the debt accrued in Missouri because that is where it was to be paid. *Id*. Upon review of the record, we conclude that the trial court did not err when it concluded that Capital One Bank's claims against Ms. Jones did not accrue in Virginia. Ms. Jones's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO CONSIDER EVIDENCE THAT THE PLAINTIFF WAS A FICTITIOUS NAME REGISTERED AS A WORD MARK AND OWNED BY CAPITAL ONE FINANCIAL CORPORATION, AND THAT CAPITAL ONE BANK, USA, N.A., WAS NOT THE REAL PARTY IN INTEREST.

{¶8} Ms. Jones argues that the trial court incorrectly disregarded evidence that Capital One Bank was not the real party in interest to bring an action against her. Some of Ms. Jones's counterclaims were based on her allegation that M&P filed an action against her in the name of a party that was not the real party in interest.

{¶9} The complaint that M&P filed against Ms. Jones listed the plaintiff as "Capital One Bank." According to Ms. Jones, at the time that the complaint was filed the only entity permitted to use the name "Capital One Bank" was Capital One Financial Corporation, which had registered "Capital One Bank" as a word mark. Ms. Jones argues that because her account was with Capital One Bank (USA), N.A., not Capital One Financial Corporation, M&P did not file the action in the name of the real party in interest.

{¶10} Civil Rule 17(A) provides that "[e]very action shall be prosecuted in the name of the real party in interest." In its motion for summary judgment, M&P argued that the complaint was, in fact, brought by the real party in interest. In support of its argument, M&P submitted an affidavit from one of the attorneys who filed the complaint against Ms. Jones. The attorney averred that M&P's in-house file related to Ms. Jones's account lists Capital One Bank (USA), N.A. as the creditor. M&P also submitted the affidavit of one of its shareholders who averred that Capital One Bank (USA), N.A., was the creditor of Ms. Jones's account. He explained that the firm's computer software, however, had populated the "creditor" field with only the name "Capital One Bank." He attached screenshots of M&P's computer records of Ms. Jones's file that show the "Cred:" as "Capital One Bank." One of the screenshots shows "Capital One Bank (USA), N.A." in the field for original creditor. M&P also submitted evidence that "Capital One Bank" was the bank's name at the time that it opened Ms. Jones's account and at the time that Ms. Jones defaulted on the account. It further submitted evidence that "Capital One Bank" converted into a national bank in 2008, becoming "Capital One Bank (USA), N.A." M&P correctly named Capital One Bank (USA), N.A. as the plaintiff in the caption of every document it submitted after the complaint. M&P also notes that, under Rule 17(A), if an action is not initially prosecuted in the name of the real party in interest, that party may be substituted in and such substitution "shall have the same effect as if the action had been commenced in the name of the real party in interest." M&P argues that it did not have the opportunity to correct the complaint's caption because Capital One Bank (USA), N.A. dismissed its action before Ms. Jones amended her counterclaim to add claims related to the incorrect caption.

{¶11} The evidence M&P submitted in support of its motion for summary judgment demonstrated that it filed the complaint on behalf of the real party in interest, Capital One Bank

(USA), N.A., even if it incorrectly wrote only "Capital One Bank" in the caption of the complaint. In opposition to M&P's motion, Ms. Jones did not submit any evidence demonstrating that M&P filed the action on behalf of Capital One Financial Corporation or any other entity that was not the real party in interest.

{¶12} Ms. Jones also argues that Capital One Bank (USA), N.A. was not the real party in interest because Capital One Bank had transferred all of the receivables from Ms. Jones's account to Capital One Funding, LLC. According to Ms. Jones, the real party in interest is the entity that would enjoy the ultimate benefit or injury from the outcome of the case. Ms. Jones argues that Capital One Bank (USA), N.A.'s role was limited to being nothing more than a collection agent for Capital One Funding. She argues that the trial court should have looked beyond which entity had ownership of her account to determine the real party in interest.

{¶13} "A 'real party in interest' has been defined as '* * * one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, *i.e.*, one who is *directly* benefitted or injured by the outcome of the case * * *.'" *Shealy v. Campbell*, 20 Ohio St.3d 23, 24 (1985), quoting *West Clermont Edn. Assn. v. West Clermont Bd. of Edn.*, 67 Ohio App.2d 160, 162 (1st Dist.1980). "To determine whether the requirement that the action be brought by the real party in interest is sufficed, courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief." *Id*.

{¶14} In its motion for summary judgment, M&P argued that the owner of Ms. Jones's account was Capital One Bank which had later converted into a national bank, becoming Capital One Bank (USA), N.A. It submitted evidence of those facts. In opposition, Ms. Jones did not dispute that the "owner" of her account was Capital One Bank (USA), N.A., but she argued that

the bank was not the real party in interest because it had transferred its right to the receivables from the account to Capital One Funding, LLC.

{¶15} Ms. Jones cites to an order of the trial court from June 2012, in which the court stated that the bank's role was limited to that of a collection agent. The trial court, however, was permitted to reconsider its understanding of the relationship between the parties as well as the relationship between Capital One Bank (USA), N.A. and Capital One Funding, LLC. *See Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379 (1981), fn. 1; Civ.R. 54(B). Ms. Jones also notes that the evidence in the record that the bank was merely a collection agent for other entities pertains to the relationship between the various entities in 2010 instead of their relationship at the time the complaint was filed.

{¶16} Upon review of the record, we conclude that Capital One Bank (USA), N.A. demonstrated that it was the owner of Ms. Jones's credit card account. Ms. Jones has not pointed to any evidence in the record that creates a genuine issue of material fact that, at the time the complaint was filed, a different entity was the real party in interest.

{¶17} Ms. Jones also argues that the trial court failed to consider whether the use of a name other than the real party in interest by M&P would constitute a misleading or deceptive practice under the Fair Debt Collection Practices Act. She also argues that M&P's concealment of the real party in interest could also constitute a false or misleading practice. Because M&P established that it filed the complaint in the name of the real party in interest, however, these issues were and are moot.

{¶18} Ms. Jones next argues that the trial court incorrectly concluded that Capital One Financial Corporation or Capital One Funding, LLC. met the definition of a financial institution

under Ohio Revised Code Section 5725.01. She also argues that, even if they are financial institutions, M&P cannot enjoy derivative use of the OCSPA's financial institution exemption.

{¶19} The trial court determined that Ms. Jones's OCSPA claim failed because there was no consumer transaction at issue and M&P did not constitute a supplier under the act. Ms. Jones notes that in *Taylor*, 148 Ohio St.3d 627, 2016-Ohio-3444, the Ohio Supreme Court determined that an attorney who attempted to collect on a debt and later filed suit on behalf of the creditor met the definition of a supplier under the OCSPA. *Id*. at ¶ 22, 95.

{¶20} In *Taylor*, an attorney attempted to collect an unpaid credit card balance on behalf of First Resolution Investment Corporation ("FRIC"), which had purchased the debt from a company that had purchased the debt from the bank that issued the card. The Ohio Supreme Court held that, under those circumstances, neither FRIC nor the attorney were financial institutions within the meaning of the OCSPA. In this case, M&P filed the complaint on behalf of the financial institution that originally issued the credit card to Ms. Jones. R.C. 5725.01(A)(1) (including a "national bank" within the definition of financial institution); R.C. 1345.01(A) (providing that a consumer transaction does not include transactions between a financial institution and its customers). *Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710, 719 (6th Cir.2015). Capital One Bank (USA), N.A. could not have initiated an action against Ms. Jones without the assistance of an attorney. We, therefore, conclude that the OCSPA's exemptions must extend to a financial institution's own counsel. *Gionis v. Javitch, Block & Rathbone*, 405 F.Supp.2d 856, 869 (S.D.Ohio 2005); *Perkins v. Wells Fargo Bank, N.A.*, S.D.Ohio No. 2:11-CV-952, 2012 WL 5077712, * 14 (Oct. 18, 2012) ("When an attorney represents a financial institution in transaction that is exempted from the [OCSPA], the attorney is similarly exempt from liability under the statute.").

{¶21} Ms. Jones also argues that the trial court incorrectly concluded that the account was not subject to Ohio's interest rate caps because they were preempted under the National Bank Act. Her argument is based on her assertion that the real party in interest is not Capital One Bank (USA), N.A. but Capital One Funding, LLC, or an entity known as Capital One Master Trust, which are not national banks. As previously explained, M&P established that there was no genuine issue of material fact that the owner of Ms. Jones's account and the real party in interest to file a claim against her was Capital One Bank (USA), N.A. We conclude that the trial court correctly determined that the bank was not subject to Ohio's interest rate caps because it is a national bank. 12 U.S.C. 85; *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996).

{¶22} Ms. Jones further argues that the trial court incorrectly concluded that M&P could request costs and interest in the complaint. The trial court, however, correctly explained that costs and interest are allowed to be recovered under Civil Rule 54(D) and Section 1343.03(A). Civ.R. 54(D); *Magnum Steel & Trading, LLC v. Mink*, 9th Dist. Summit Nos. 26127, 26231, 2013-Ohio-2431, ¶ 55.

{¶23} Upon review of the record, we conclude that the trial court did not err when it determined that Capital One Bank (USA), N.A. was the real party in interest and determined that M&P was entitled to judgment on Ms. Jones's claims as a matter of law. Ms. Jones's second assignment of error is overruled.

III.

{¶24} Ms. Jones's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

CALLAHAN, P. J.
CONCURS.

CARR, J.
DISSENTING.

{¶25} I respectfully dissent from the judgment of the majority as I would conclude that M&P failed to meet its burden to establish the absence of a genuine issue of material fact.

{¶26} As to Ms. Jones's first assignment of error, I would conclude that the materials submitted in support of M&P's motion for summary judgment do not definitively demonstrate which state's statute of limitations should apply. The key to that determination rests upon where the action accrued. *See Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 2016-Ohio-3444, ¶ 38, 42. Under the facts of *Taylor*, the Supreme Court of Ohio determined that the cause of action "accrued in the jurisdiction where the debt was to be paid, Delaware." *Id.* at ¶ 48. However, in so doing, the Supreme Court stated that it was following its "own precedent and that of New York's highest court and the cited federal courts * * *." *Id.* One of those cited cases contained language indicating that, "[i]f the claimed injury is an economic one, the cause of action typically accrues where the plaintiff resides and sustains the economic impact of the loss." (Internal quotations and citations omitted.) *Id.* at ¶ 44, quoting *Portfolio Recovery Assocs., L.L.C. v. King*, 14 N.Y.3d 410, 416 (2010). Another one provided that, in order to determine where the cause of action accrued, the court would identify where "the injurious consequences of the alleged wrongful conduct occurred." (Internal quotations and citation omitted.) *Taylor* at ¶ 46, quoting *Conway v. Portfolio Recovery Assocs., L.L.C.,* 13 F.Supp.3d 711, 718 (E.D.Ky.2014).

{¶27} Here, it is true that Ms. Jones's statements from the time of her default indicate that payments should be mailed to an address in Missouri. However, those same statements from the time period during which payments could be mailed to Missouri, evidence that Ms. Jones made electronic payments. Nothing in the record suggests, let alone demonstrates, that doing so was prohibited. In fact, nothing suggests that those payments were not accepted. M&P did not submit

any evidence demonstrating where electronic payments were received. Thus, I would conclude M&P did not meet its burden on this issue.

{¶28} As to Ms. Jones's second assignment of error, I would conclude there is a genuine issue of material fact with respect to what entity even issued Ms. Jones's card. In a January 2012 affidavit, Richard Napolitano averred that Capital One Bank (USA), N.A. issued Ms. Jones a credit card and that since the account's inception, Capital One Bank (USA), N.A. has been and continued to be the owner of the account and issuer of the credit card. Only months later, in July 2012, Mr. Napolitano averred instead that Capital One Bank issued Ms. Jones's credit card. He then asserted that, on March 1, 2008, Capital One Bank converted from a Virginia bank to a national bank named Capital One Bank (USA), N.A. The affidavits clearly contradict each other. Further, if Capital One Bank, (USA), N.A. issued Ms. Jones's card and owned her account for the duration, it seems there could be an argument that filing a complaint under the name Capital One Bank could be misleading.

{¶29} Given the totality of the record before this Court, I cannot say that M&P demonstrated its entitlement to summary judgment. I would sustain Ms. Jones's assignments of error and reverse the judgment of the trial court.

APPEARANCES:

ANAND N. MISRA, Attorney at Law, for Appellant.

ROBERT S. BELOVICH, Attorney at Law, for Appellant.

LORI E. BROWN, MAIA E. JERIN, and RICHARD C.O. REZIE, Attorneys at Law, for Appellee.

[Cite as *Bennett v. KeyBank, N.A.*, 2020-Ohio-1152.]

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

Susan Bennett	Court of Appeals No. L-19-1249
Appellant	Trial Court No. CI0201802587
v.	
KeyBank, N.A.	**DECISION AND JUDGMENT**
Appellee	Decided: March 27, 2020

* * * * *

John J. McHugh, III, for appellant.

Scott A. King, Anthony J. Rospert, and Todd M. Seaman, for appellee.

* * * * *

ZMUDA, P.J.

I. Introduction

{¶ 1} In this accelerated appeal, appellant, Susan Bennett, appeals the judgment of the Lucas County Court of Common Pleas, ordering the parties to proceed to arbitration of appellant's claims against appellee, KeyBank, N.A., and staying the matter pending arbitration.

A. Facts and Procedural Background

{¶ 2} On May 30, 2018, appellant filed her complaint with the trial court, alleging that appellee breached its certificates of deposit agreement with her husband, David, who passed away in March 2017. According to the complaint, David established an individual retirement account ("IRA") with the Toledo Trust Company[1] on July 27, 1984, and funded the account with contributions of $18,971.84 and $102,244.60 at that time. The contributions were used to acquire two Certificates of Deposit ("CDs") from the Toledo Trust Company.

{¶ 3} According to their terms, the CDs matured over a term of 480 months, ending on July 27, 2024, at an annual interest rate of 12.75%, compounded quarterly. In 1999, David turned 70.5 years old, and was therefore required to take certain required minimum distributions ("RMD") in order to ensure the continuation of the CDs. David took the required RMD as necessary, and appellee continued to manage the IRA account.

{¶ 4} On March 10, 2017, appellant notified appellee of David's death. Appellee then informed appellant that she was the beneficiary under the terms of David's IRA, which held a balance of $3,815,196.41 as of March 27, 2017. During the remainder of 2017, appellant and appellee allegedly discussed the idea of a spousal rollover of David's IRA into appellant's name, along with a transfer of the CDs contained within that IRA.

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[1] Appellee is the successor in interest to the Toledo Trust Company.

Additionally, the parties discussed how to ensure that the 2017 RMD was taken from the IRA before the end of the year in order to comply with applicable tax law.

{¶ 5} Following the parties' discussions, on December 15, 2017, appellee liquidated the CDs and placed the funds into a newly established money market IRA account that it opened for appellant. The money market account that appellee opened on behalf of appellant earns interest at a variable rate (approximately .15% according to the complaint) that is far lower than the rate previously earned by the liquidated CDs.

{¶ 6} According to appellant's complaint, appellee was not authorized to liquidate the CDs. Rather, appellant claimed that appellee was expected to transfer the CDs into her money market IRA in order to retain the favorable terms of the CDs for appellant's benefit. In unilaterally liquidating the CDs, appellant alleged that appellee "breached its certificates of deposit agreement with David, which specifically permitted transfer by assignment of the CDs on the books of the Bank." Appellant sought judgment in her favor on her claim of breach of the certificates of deposit agreement in the amount of $3,897,000, which represented the alleged reduction in value of appellant's spousal interest in David's IRA resulting from appellee's liquidation of the CDs.[2]

{¶ 7} On July 3, 2018, appellee responded to appellant's complaint by filing its motion to dismiss the complaint. In its motion, appellee argued, among other things, that

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[2] Appellant's complaint was later amended to allege that she "has been damaged by KeyBank's self-dealing in liquidation of the CDs and the placement of the cash proceeds in a variable rate KeyBank Money Market Account in the amount of not less than $4,000,000.00."

this matter is governed by a broad arbitration provision set forth in a deposit agreement referred to as the "Deposit Account Agreement and Funds Availability Policy." The deposit agreement was filed with the trial court and authenticated by the affidavit of Denis Preston, appellee's custodian of records.[3] Appellee reasoned that the deposit agreement and its arbitration provision became binding on appellant when she opened her money market IRA and transferred the cash value of David's CDs into the account. Therefore, appellee urged the trial court to dismiss the action and submit it to arbitration.

{¶ 8} On September 18, 2018, appellant filed her memorandum in opposition to appellee's motion to dismiss. In her memorandum, appellant argued that the arbitration provision set forth in the deposit agreement governing appellant's money market IRA did not apply to David's IRA, which was opened several decades earlier with the Toledo Trust Company and did not originally include an agreement to arbitrate disputes.

{¶ 9} In its October 1, 2018 reply to appellant's memorandum in opposition, appellee pointed to the broad terms of the arbitration provision, insisting that the provision applied to "any claims relating to her own money market account." As such, appellee argued that "the fact that Plaintiff and Key entered into a contract requiring arbitration is determinative of the issue of arbitrability, not whether Mr. Bennett agreed to arbitration." Additionally, appellee argued that David's IRA was subject to a deposit

[3] A second affidavit from Preston was filed with the trial court by appellee on June 26, 2019. The relevant documents pertaining to David's IRA were attached to, and authenticated by, the second affidavit.

agreement that did, in fact, contain an arbitration provision to which David assented by maintaining his IRA and CDs with appellee.

{¶ 10} Because the parties' briefs relating to appellee's motion to dismiss referenced numerous exhibits not contained in appellant's complaint, the trial court converted the motion to dismiss under Civ.R. 12(B)(6) into a motion for summary judgment, and permitted the parties to supplement their arguments accordingly. On June 17, 2019, the trial court held a hearing on appellee's motion for summary judgment.

{¶ 11} The trial court issued its decision on appellee's motion for summary judgment on September 30, 2019. In its decision, the court found that appellant's claims were not subject to arbitration under the deposit agreement that governed appellant's money market IRA. However, the court found that appellant's claims were subject to the arbitration provision contained in the Deposit Account Agreement that governed David's IRA.

{¶ 12} Specifically, the court noted that David, wishing to extend the maturity date on one of the retirement accounts contained within his IRA, executed a "Retirement Account Change of Investment Term" form in 1996. By signing the form, David acknowledged receipt of written disclosures about the terms and conditions governing his IRA and agreed to such terms and conditions. These disclosures were contained on another form entitled "Facts about your Retirement Deposit Account," which was attached to the Retirement Account Change of Investment Term form and explained that David's IRA was "subject to [appellee's] Deposit Account Agreement." In turn, the Deposit Account Agreement contained an arbitration provision at paragraph 25,

providing that either party "may require that any dispute relating to your Account * * * be submitted to arbitration." Under its terms, this agreement stated that it governed "all Accounts you maintain with [appellee]," and reserved the right to change the terms of David's IRA with notice of such changes.

{¶ 13} In addition to its reliance on the foregoing documents, the court, in its decision, referenced an IRA statement that was sent to David on December 31, 2012, which included language of an "IMPORTANT NOTICE OF CHANGE TO THE ARBITRATION PROVISION OF YOUR DEPOSIT ACCOUNT AGREEMENT" that amended the arbitration provision found at paragraph 25 of David's Deposit Account Agreement and Funds Availability Policy. Under the new language, the arbitration provision applied to any "claim, dispute, or controversy between [David] and [appellee] arising from or relating to this [Deposit Account Agreement] or [David's] Account(s)." The notice informed David that the changes to the arbitration provision contained in the Deposit Account Agreement would "apply to your Account(s) unless you notify us in writing that you reject the Arbitration Provision within 60 days of opening your Account(s)."

{¶ 14} Based upon the documents submitted by appellee in support of its motion for summary judgment, the trial court found that David agreed to arbitrate any claims regarding his IRA in 1996. The court also found that the 1996 arbitration provision was appropriately modified in 2012, as permitted by the Deposit Account Agreement. Because appellant's claims involved appellee's handling of David's IRA, and in light of the court's determination that claims pertaining to David's IRA were subject to the

arbitration provision contained in the Deposit Account Agreement, the trial court granted appellee's motion for summary judgment, in part, and ordered the parties to proceed to arbitration.

{¶ 15} Appellant timely appealed the trial court's judgment, and we subsequently placed this matter on our accelerated calendar.

B. Assignments of Error

{¶ 16} On appeal, appellant assigns the following assignment of error:

> The trial court erred prejudicially in concluding that plaintiff, as an IRA spousal beneficiary, was required to arbitrate her claims for breach of contract and breach of fiduciary duty against KeyBank, N.A., when the Bank unilaterally reduced her contracted rate of return from 12.75% to .1% and eliminated the extended maturity date on the retirement account assets, following the death of her husband.[4]

II. Analysis

{¶ 17} In her sole assignment of error, appellant argues that the trial court erred in finding that the claims raised in her complaint were subject to arbitration.

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[4] The language of appellant's assignment of error seemingly raises two issues: (1) the applicability of the arbitration clause to the dispute in this case; and (2) the propriety of appellee's unilateral liquidation of the CDs. The parties argue the first issue in their briefs, but the second issue is not separately argued. The second issue relates to the merits of appellant's underlying claims. However, the judgment that is on appeal here merely resolved the first issue, namely whether the parties are required to resolve their dispute in arbitration, and our review will therefore be limited to that issue.

{¶ 18} Whether a party has agreed to submit an issue to arbitration is an issue we review de novo. *Arnold v. Burger King*, 2015-Ohio-4485, 48 N.E.3d 69, ¶ 11 (8th Dist.); *see also Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 2. Because arbitration is a matter of contract, a party may only be forced to arbitrate a dispute that it has agreed to submit to arbitration. *Taylor v. Ernst & Young, LLP*, 130 Ohio St.3d 411, 2011–Ohio–5262, 958 N.E.2d 1203, ¶ 20.

{¶ 19} "A state court may rely on a federal standard in applying state law on the issue of arbitrability, but that standard must be a correct statement of both Ohio law and applicable federal precedent." *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 15.

{¶ 20} Appellant, both in the trial court below and in this court on appeal, argues that her obligation to arbitrate, if any, could only arise were we to find the existence of an arbitration provision attached to David's IRA. We agree. The dispute in this case relates to the bank's unilateral liquidation of the CDs and whether the bank was authorized to do so. The CDs were contained within David's IRA, and thus resolution of the dispute here requires reference to David's IRA. Arguments that go to the merits are premature at this point, because the issue of arbitrability, the only issue before us, merely decides the forum in which to hear and decide the merits in this case.

{¶ 21} In this case, appellant does not argue that the arbitration provision contained in David's Deposit Account Agreement is so limited in scope that it would not, if applicable, cover the claims raised by appellant. Indeed, the arbitration provision governs "all disputes" between David and appellee related to his IRA, and is therefore

broad in its scope. However, appellant argues that this arbitration provision does not apply to her because David did not separately sign the Deposit Account Agreement containing the provision, and appellee "offered no evidence that David Bennett ever saw [the] Deposit Account Agreement." In essence, appellant challenges the enforceability of the arbitration provision because its applicability is through an incorporation by reference to a *chain* of documents.[5]

{¶ 22} In response, appellee contends that the arbitration provision is enforceable as it was properly incorporated as a term of David's IRA when David executed the Retirement Account Change of Investment Term form in 1996. Appellee posits that the incorporated arbitration provision is enforceable irrespective of whether David reviewed it or separately signed it. Appellee separately contends that David acquiesced to arbitration when he failed to object to the arbitration terms outlined in his 2012 IRA statement.

{¶ 23} The enforceability of the amendments to the arbitration provision that are outlined in the 2012 IRA statement hinges upon our determination as to whether the 1996 arbitration provision contained in David's Deposit Account Agreement was properly

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[5] A fiduciary relationship between David and appellee was presumably in existence prior to the date on which David executed the Retirement Account Change of Investment Term form that incorporated the arbitration provision by reference. However, whether appellee breached a fiduciary duty to David when it presented the Retirement Account Change of Investment Term form, allegedly without expressly disclosing the arbitration provision that was thereby incorporated, is not before us. Appellant has not alleged a separate claim of breach of fiduciary duty on that basis, and the sole issue raised by appellant in this appeal is whether the arbitration provision is enforceable, not whether appellee violated a duty owed to David in incorporating the arbitration provision.

incorporated into the Retirement Account Change of Investment Term form in 1996, because the authority to make changes to David's IRA was first instituted in the 1996 Deposit Account Agreement. Moreover, if the original arbitration provision was properly incorporated by reference, the enforceability of the 2012 amendments to the arbitration provision becomes immaterial, as the parties' dispute in this case would be subject to arbitration under the original arbitration provision in any event. For the reasons stated below, we conclude that the original arbitration provision was properly incorporated by reference and is therefore binding on the parties in this case. Since the 1996 arbitration provision provides an independent basis for referring this matter to arbitration, we need not, and therefore will not, address appellee's argument that arbitration is required under the terms of David's 2012 IRA statement.

{¶ 24} In Ohio, separate agreements may be incorporated by reference into a signed contract. *KeyBank Natl. Assn. v. Columbus Campus, L.L.C.*, 2013-Ohio-1243, 988 N.E.2d 32, ¶ 21 (10th Dist.). Under the incorporation doctrine, when a document is incorporated into a contract by reference, that document becomes part of the contract. *Id.* The parties to the contract need not separately execute the incorporated document in order to be bound by its terms. *Garcia v. Wayne Homes*, 2d Dist. Clark No. 2001CA53, 2002-Ohio-1884, ¶ 44. Rather, a party to a contract, which incorporates terms contained in another document, has a duty to review the contract and those documents incorporated into it before signing the contract. *Info. Leasing Corp. v. GDR Invs., Inc.*, 152 Ohio App.3d 260, 2003-Ohio-1366, 787 N.E.2d 652, ¶ 22 (1st Dist.).

{¶ 25} In general, "the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including * * * a separate document which is unsigned[,]" if "the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt." 11 Lord, Williston on Contracts, Section 30:25, at 294–301 (4th Ed.2012). Consequently, "mere reference to another document is not sufficient to incorporate that document into a contract; the contract language must also clearly demonstrate that the parties intended to incorporate all or part of the referenced document." (Citations omitted). *Volovetz v. Tremco Barrier Solutions, Inc.*, 2016-Ohio-7707, 74 N.E.3d 743, ¶ 27 (10th Dist.). Stated succinctly:

> the language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract * * *.

Northrop Grumman Information Technology, Inc. v. United States, 535 F.3d 1339, 1345 (Fed.Cir.2008).

{¶ 26} Here, there is no dispute that David executed the Retirement Account Change of Investment Term form in 1996. According to the express terms of that form, David's signature constituted an acknowledgment that he received "written disclosures about the terms and conditions governing [his] Retirement Deposit Account and [agreed] to such terms and conditions." Whether David actually reviewed the terms and conditions referenced by the Retirement Account Change of Investment Term form is 11.

irrelevant, because the incorporation was clearly stated within the document David voluntarily executed. Indeed, Ohio law adheres to the "long-held principle that parties to contracts are presumed to have read and understood them and that a signatory is bound by a contract that he or she willingly signed." *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, 860 N.E.2d 741, ¶ 10, citing *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990) and *DeCamp v. Hamma*, 29 Ohio St. 467, 471-472 (1876).

{¶ 27} The terms and conditions governing David's Retirement Deposit Account were conspicuously set forth in the "Facts about your Retirement Deposit Account" form, which was attached to the Retirement Account Change of Investment Term form. Included within those terms and conditions was the statement that "Retirement Deposit Accounts are also subject to our Deposit Account Agreement." Here, the reference explicitly referenced the incorporated document, the Deposit Account Agreement, by name.

{¶ 28} Appellant concedes that both of the foregoing documents (the Retirement Account Change of Investment Term form and the Facts about your Retirement Deposit Account form) were provided to David at the time of his execution of the Retirement Account Change of Investment Term form. The arbitration provision at issue here was clearly set forth in the Deposit Account Agreement referenced by the Facts about your Retirement Deposit Account form.

{¶ 29} As noted above, a document may be incorporated into a contract, and therefore treated as part of the contract, so long as it is clearly referenced in the contract

that is executed by the parties, and so long as the intention to incorporate the document into the contract is clear from the language employed. Both of these requirements are met in this case as to each step in the chain of incorporation; the Retirement Account Change of Investment Term form expressly incorporates the terms and conditions contained in the Facts about your Retirement Deposit Account form, which expressly references and incorporates the Deposit Account Agreement containing the arbitration provision.

{¶ 30} The salient issue raised by appellant in this case is how many incorporations by reference are allowed in these cases. Having extensively reviewed the law on this issue, there appears to be no upper limit so long as each layer of incorporation complies with traditional contract principles concerning incorporation by reference. We are making no new law in this case, as multiple incorporations by reference that are less direct than those involved here have been upheld previously. *See Exchange Mut. Ins. Co. v. Haskell Co.*, 742 F.2d 274, 275-76 (6th Cir.1984) (holding that the following "series of contract agreements" in a construction case required the matter to be referred to arbitration; a performance bond between appellant, the bond company, and subcontractor incorporated the subcontractor's Subcontract with appellee, the general contractor, which incorporated the General Contract containing the arbitration provision). Because each layer in this case comports with the requirements of the incorporation by reference doctrine, we conclude that the arbitration provision contained in the Deposit Account Agreement became binding on David (and appellant by extension) when he executed the Retirement Account Change of Investment Term form that incorporated the provision by

reference in 1996. Thus, we conclude that the trial court properly found that this matter is subject to arbitration. We note that our determination in this case does not impact appellant's *substantive* arguments, which we have not examined in this appeal. Rather, we have merely determined that arbitration is the appropriate forum in which this matter is to proceed.

{¶ 31} Accordingly, appellant's sole assignment of error is not well-taken.

III. Conclusion

{¶ 32} In light of the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

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