The Bullet Point: Ohio Commercial Law Bulletin

Am I a party entitled to enforce a promissory note?

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Jim Sandy and Stephanie Hand-Cannane

Shareholder Derivative Lawsuit

Aungst v. Light, 9th Dist. Summit No. 29349, 2020-Ohio-3347

In this appeal, the Ninth Appellate District affirmed the trial court's decision, finding that when a shareholder's derivative lawsuit is based upon acts beyond a corporation's authority (i.e., an ultra vires act) that have already been committed, the shareholder must demonstrate that its claim satisfies both the fraud on minority exception and the wrongdoer control exception before the lawsuit is permitted to proceed.

- **The Bullet Point**
  Where an individual shareholder of a company seeks to bring a lawsuit to recover compensation for a company's loss caused by an ultra vires transaction, the harm was done to the company and not the shareholder. As such, the company has the right of redress and not the shareholder. Under this so-called "Foss" rule, a shareholder may bring a derivative claim on behalf of a company only if a simple majority of the shareholders could not ratify the conduct on which the lawsuit is based. In other words, no individual shareholder can maintain an action if the alleged wrong is capable of ratification by a simple majority of the shareholders. As this court noted, the four exceptions to this Foss rule which permit a shareholder to maintain a derivative lawsuit apply when the conduct is at issue are: "1) ultra vires; 2) requires a special majority to ratify; 3) infringes a shareholder's personal rights, or 4) qualifies as a 'fraud on the minority.'" Moreover, where the ultra vires act complained of has already occurred, the shareholder must demonstrate that its claim satisfies both the fraud on minority exception and the wrongdoer control exception. As such, the minority shareholder must plead fraud on the minority in addition to alleging past ultra vires conduct in order to survive a motion to dismiss.

Garnishment Proceedings

Univ. of Akron v. Rushin, 9th Dist. Summit No. 29467, 2020-Ohio-3268

In this appeal, the Ninth Appellate District reversed and remanded the trial court's decision, finding that the trial court lacked authority at a garnishment hearing to determine whether the debtor's underlying debt had been discharged.

- **The Bullet Point**
  Pursuant to Ohio law, a person who obtains a judgment against another may garnish that person's wages to satisfy the judgment through a statutory proceeding referred to as a garnishment hearing. R.C. 2716.01(A). As this court stressed, a garnishment hearing "is not a vehicle for re-litigating the underlying

lawsuit which resulted in the original judgment against the judgment debtor." Instead, the garnishment hearing is limited to a determination of the amount of the judgment debtor's wages that can be used for the satisfaction of the judgment owed to the judgment creditor. R.C. 2716.06(C). No objection to the judgment itself can be heard or considered at the hearing. As such, a judgment debtor will not be permitted to use garnishment proceedings to object to or re-litigate the underlying debt.

Ability to Enforce Promissory Note

Bank of New York Mellon v. Workman, 11th Dist. Lake No. 2019-L-134, 2020-Ohio-3330

In this appeal, the Eleventh Appellate District affirmed the trial court's decision, granting judgment in a foreclosure action to the bank.

- **The Bullet Point**
  In order to have standing to bring a mortgage foreclosure action in Ohio, the mortgage lender must establish an interest in the promissory note or in the mortgage at the commencement of the lawsuit. A party who is considered a "holder" of a negotiable instrument has standing and the ability to enforce it. "To be a 'holder,' a party must be in possession of the instrument that is either payable to the party in possession (specifically endorsed) or payable to bearer (blank endorsement)." Moreover, as this court held, "[a] person is a holder of a negotiable instrument, and entitled to enforce the instrument, when the instrument is in the physical possession of his or her agent." Accordingly, "[a] plaintiff does not lose constructive and legal possession of bearer paper merely because it was held by an agent on behalf of the plaintiff." Stated differently, in cases where the holder's agent is in physical possession of the note, the holder may still enforce the note based upon its constructive possession of the note. That being said, a note indorsed in blank does not establish who is in possession of the note and when said possession transpired. In such cases, the holder must submit a supporting affidavit that attests to how and when the entity became the holder of the note and the affiant must produce supporting business records to establish possession of the note.

Right to Intervene

Huntington Natl. Bank v. Rex, 8th Dist. Cuyahoga No. 108670, 2020-Ohio-3305

In this appeal, the Eighth Appellate District affirmed the trial court's decision, finding that the debtor's former husband did not have a right to intervene in the foreclosure action as he did not have a judgment lien on the foreclosed property.

- **The Bullet Point**
  Under Civ.R. 24(A)(2), a party seeking intervention as of right must show in part that they claim an interest relating to the subject of the action. In Ohio foreclosure actions, the mortgaged property is the subject matter of the action. Parties who claim an interest in the property include mortgage holders, parties who have judgment liens, or parties who may have signed contracts to purchase or lease the property. As this court noted, an order from a court that does not set forth a judgment creditor, judgment debtor, the amount of judgment, and interest, if any, does not meet the criteria for a judgment lien under R.C. 2329.02. Moreover, a judgment lien is not created merely because it was filed with a county's recorder and auditor's office.

  Likewise, an affidavit of facts relating to title does not create an equitable lien or encumbrance on property

to give one a right to intervene in a foreclosure. Pursuant to R.C. 5301.252(A), "an affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy, shall be evidence of the facts stated, insofar as such facts affect title to real estate." As explained in R.C. 5301.252(B)(3), such an affidavit of facts may provide information relating to the "happening of any condition or event that may create or terminate an estate or interest." That being said, the filing of an affidavit of facts "can only be evidence of an adverse interest, not an interest itself." Consequently, even if a party seeking intervention files such an affidavit, this will not create an interest in the property or encumbrance on the title that is the subject of the foreclosure action.

Discovery Rule

Tchankpa v. Ascena Retail Group, Inc., 10th Dist. Franklin No. 19AP-760, 2020-Ohio-3291

In this appeal, the Tenth Appellate District affirmed the trial court's decision, finding that because the plaintiff had actual knowledge of his injury caused by the defendant, the statute of limitations had run.

- **The Bullet Point**
  It is a long-established rule in Ohio that a "[s]tatute of limitations commences to run so soon as the injurious act complained of is perpetrated, although the actual injury is subsequent." Plainly stated, a cause of action begins to accrue when the wrongful act is committed. There are exceptions to this general rule "where an unconscionable result would be had if a plaintiff's right to recovery was barred by the statute of limitations before he or she was even aware of his or her injuries." One exception is the so-called discovery rule. Under the discovery rule, when an injury does not manifest itself immediately, the cause of action does not 'arise' for the purposes of determining the statute of limitations until the plaintiff knows, or by the exercise of reasonable diligence should have known, that he had been injured by the conduct of the defendant. In applying the discovery rule's two-pronged test, the statute of limitations begins to accrue when the plaintiff has actual knowledge that he had been injured and that his injury was caused by the conduct of the defendant.

contact

James Sandy
member > cleveland

T (216) 378-9911
jsandy@mcglinchey.com

Stephanie Hand-Cannane
associate > cleveland

T (216) 378-4989
shandcannane@mcglinchey.com

[Cite as *Aungst v. Light*, 2020-Ohio-3347.]

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

JOSANNE AUNGST	C.A. No. 29349
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARK S. LIGHT, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2017-09-3665

DECISION AND JOURNAL ENTRY

Dated: June 17, 2020

SCHAFER, Judge.

{¶1} Plaintiff-Appellant, Josanne Aungst, derivatively on behalf of Signet Jeweler, LTD. ("Aungst"), appeals the judgment of the Summit County Court of Common Pleas granting the motion to dismiss the complaint. For the reasons that follow, this Court affirms.

I.

{¶2} On September 1, 2017, Aungst filed a verified complaint for a shareholder derivative action asserting claims for breach of fiduciary duty, abuse of control, gross mismanagement, and unjust enrichment against Mark S. Light, Mark Jenkins, H. Todd Stitzer, Michael Barnes, Virginia Drosos, Dale Hilpert, Helen McCluskey, Marianne Miller Parrs, Thomas Plaskett, Jonathan Sokoloff, Robert J. Stack, Brian Tilzer, Eugenia Ulasewicz, and Russell Walls (the "Individual Defendants"), and nominal defendant, Signet Jewelers Limited ("Signet") collectively (the "Defendants"). The Individual Defendants are past or present officers and

directors of Signet. Signet—a retailer of jewelry and related services—is a Bermuda company. Signet's corporate offices are located in Akron, OH.

{¶3} The Individual Defendants and Signet jointly moved the trial court to dismiss the complaint. Defendants argued that, under the applicable Bermuda law, Aungst lacked standing to maintain a derivative action on behalf of Signet. The parties fully briefed the issues and the trial court set the matter for an oral hearing. At the conclusion of the hearing, the trial court took the matter under advisement. On February 28, 2019, the trial court issued its ruling granting the motion and dismissing Aungst's complaint.

{¶4} Aungst timely appealed the trial court's judgment and raised two assignments of error for our review.

II.

Assignment of Error I

> *** * * The trial court misapplied the *Foss* rule, and erred in concluding that Aungst failed to sufficiently plead derivative standing under the ultra vires exception.**

{¶5} In her first assignment of error, Aungst contends, under Bermuda law, a shareholder has standing to assert a derivative claim where ultra vires conduct is alleged. She asserts that she has alleged ultra vires conduct that cannot be ratified by Signet, and that the trial court erred in conflating the ultra vires exception with the fraud on the minority exception. Aungst argues that the trial court applied the wrong legal standard and, consequently, erred in granting the motion to dismiss.

{¶6} A Civ.R. 12(B)(6) motion tests the sufficiency of the complaint, and dismissal is appropriate where the complaint "fail[s] to state a claim upon which relief can be granted." In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual

allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). Before a court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. In determining a motion pursuant to Civ.R. 12(B)(6), the court cannot rely on evidence or allegations outside of the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207 (1997). "'An order of dismissal entered pursuant to Civ.R. 12(B)(6) is an adjudication on the merits of the issue the rule presents, which is whether a pleading put before the court states a claim for relief. It does not adjudicate the merits of the claim itself, unless it can be pleaded in no other way[.]'" *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶ 17, quoting *Collins v. Natl. City Bank*, 2d Dist. Montgomery No. 19884, 2003-Ohio-6893, ¶ 51. This Court reviews an order granting a Civ.R. 12(B)(6) motion to dismiss de novo. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

{¶7} The Defendants' motion to dismiss asserted, in part, that Aungst lacked standing to sue derivatively on behalf of Signet under Bermuda law. Aungst opposed the motion arguing that Bermuda law allows a shareholder derivative action to be maintained where, as here, ultra vires conduct is alleged. The parties agree that Bermuda law applies to this dispute. They also agree, to a limited extent, on the Bermuda law relevant to shareholder derivative actions.

{¶8} As Aungst asserts in her merit brief, "Bermuda follows the rule of *Foss v. Harbottle* in determining the circumstances under which a company's shareholders may maintain a derivative action." The "rule in *Foss*" is derived from an English case decided in 1843. *See Foss v. Harbottle*, 67 Eng. Rep. 189 (Ch. 1843). "Under the rule in *Foss*, 'the proper plaintiff in a suit addressing a wrong done to a company is the company itself, not the shareholder.'" *Saratoga*

Advantage Tr. Technology & Communications Portfolio v. Marvell Technology Group, Ltd., N.D.California No. 15-cv-04881-RMW, 2016 WL 4364593, *3 (Aug. 16, 2016), quoting *Voss v. Sutardja*, N.D.California Nos. 14-CV-01581-LHK, 14-CV-02523-LHK, 14CV-03214, 2015 WL 349444, *10 (Jan. 26, 2015). The rule is based on a fundamental principle of Bermuda law: a company has a legal personality that is separate and distinct from its shareholders, owns its own property, and acts in the company's own name when it created obligations and liabilities. *Erie Cty. Emps. Retirement Sys. v. Isenberg*, S.D.Texas No. H-11-40522012, 2012 WL 3100463, *3 (July 30, 2012).

{¶9} The essence of the rule in *Foss* is that "a shareholder may ordinarily bring a derivative claim on behalf of a corporation only if a simple majority of the shareholders could not ratify the conduct on which the suit is based." *In re Tyco Intern., Ltd.*, 340 F.Supp.2d 94, 98 (D.N.H.2004); *see City of Harper Woods Emps.' Retirement Sys. v. Olver*, 589 F.3d 1292, 1299 (D.C.Cir.2009) ("[N]o individual shareholder can maintain an action if the alleged wrong is capable of ratification by a simple majority of shareholders."). The rule is "subject to four 'exceptions' which permit a shareholder to bring suit when the conduct at issue is: (1) ultra vires; (2) requires a special majority to ratify; (3) infringes a shareholder's personal rights; or (4) qualifies as a 'fraud on the minority.'" *Tyco* at 98, citing *Edwards v. Halliwell,* 2 All E.R. 1064 (1950). "[I]n its adherence to the rule in *Foss* [], Bermuda law does not permit shareholder derivative suits unless an exception to the rule applies[.]" *Isenberg* at *4.

{¶10} Aungst maintains that the ultra vires exception is applicable here. The Defendants contend that, under Bermuda law, the ultra vires exception alone is insufficient to confer standing in this matter. The trial court agreed with the Defendants and held that "[t]he right to seek redress for [the wrongs alleged by Aungst] belongs to Signet, unless it is shown that the wrongdoers

perpetrated a fraud on the minority (a claim that [Aungst] does not make herein)." (Emphasis omitted.)

{¶11} To ascertain a correct statement of Bermudian law, the trial court considered a variety of legal sources, including English case law, Bermuda court cases, and United States federal cases. The trial court found persuasive the legal authority standing "for the proposition that a minority shareholder cannot maintain a lawsuit on behalf of a company for alleged past *ultra vires* acts without separately pleading that the wrongdoers perpetrated a fraud on the minority." The court ultimately determined that, under Bermuda law, "in order for a plaintiff to maintain a shareholder derivative suit on behalf of a company, she must demonstrate that a fraud on the minority occurred."

{¶12} In her merit brief, Aungst initially sets forth an argument, within the first assignment of error, focusing on her claim that she has alleged ultra vires conduct. She contends she has standing to bring this derivative action because the alleged ultra vires acts cannot be ratified by a majority of Signet shareholders. However, there is a threshold issue preceding our consideration of whether Aungst has alleged ultra vires conduct or acts—which cannot be ratified by Signet—giving rise to the causes of action asserted in the complaint. First, we must determine whether the trial court erred in holding that Aungst was required to plead fraud on the minority *in addition to alleging past ultra vires conduct* in order to bring a derivative shareholder action within an exception to the rule in *Foss*. Aungst conceded below that she did not allege fraud on the minority. Thus, if the trial court's statement of law is correct, the conclusion that Aungst lacks standing is also correct. Therefore, if the trial court accurately stated and applied the law, Aungst's arguments in her merit brief regarding the ultra vires nature of the alleged conduct are irrelevant.

{¶13} In support of her contention that the trial court erred in conflating the ultra vires exception with the fraud on the minority exception, Aungst argues that the trial court disregarded authority that "identify these two exceptions as separate and independent." Aungst argues that the trial court's ruling suffers from a "fatal defect" in that "it relie[s] heavily on two non-binding, inapposite decisions[:]" *Clark v. Energia Global Intl. Ltd.,* 2001 Supreme Court Civil Jurisdiction No. 173, 10 (Bermuda.2002) and *Smith v. Croft* (No. 3), [1987] BCLC 355.

{¶14} In its decision, the trial court found instructive the Bermuda trial court's reference in *Energia*, to the decision in *Smith*, a decision from the Chancery Division of the Courts of England and Wales. As the trial court discussed in its decision, *Smith* held "[t]o have standing to bring a shareholder's action it was necessary for a shareholder to establish a prima facie case (i) that the company was entitled to the relief claimed and (ii) that the action fell within the boundaries of one of the exceptions to the rule in *Foss*[.]" *Smith* at 355h. *Smith* explained that the first condition was satisfied where the company was entitled to relief for a transaction that "was both ultra vires and illegal and as such unratifiable[.]" *Id.* at 356b. "As it regards the second condition * * *, namely that the action fell within the proper boundaries of an exception to the rule in *Foss*[,]" *Smith* noted a question as to whether there were circumstances in which an ultra vires transaction could fall within the rule in *Foss* such that the court would not allow the action. *Id*. at 356c-d.

{¶15} *Smith* reasoned that the solution to the issue "is to be found by a correct analysis of the rights which the minority shareholder is seeking to exercise or enforce in relation to the result of an ultra vires transaction." *Id*. at 385f. *Smith* noted a distinction between a shareholder bringing a personal or representative action to restrain the company from ultra vires conduct, and a shareholder seeking to bring an action for losses already sustained by a company's ultra vires actions or transactions. *Id*. at 387f-g. In the first instance, "the wrong which needs redress is the

minority shareholder's wrong." *Id*. at 389c. In the latter instance, however, "[w]here what is sought is compensation for the company for loss caused by ultra vires transactions the wrong * * * is a wrong to the company which has the substantive right to redress." *Id*. at 389b.

{¶16} *Smith* held that

> [w]here a shareholder sought to prevent a company from entering into an ultra vires transaction he was enforcing a personal right, but where he sought to recover for any loss caused by an executed ultra vires transaction the wrong was one done to the company and it was the company which had the right of redress.

Id. at 356d. Considering the two relevant exceptions to the rule in *Foss*—losses attributable to ultra vires conduct and transactions constituting a fraud on the minority—*Smith* observed that "a company acting either through an independent board of directors or pursuant to a resolution passed by a majority of independent shareholders, can always compromise or waive the cause of action vested in it so long as the decision in question to compromise or waive is taken by the persons concerned bona fide, and for reasons genuinely believed to be in the best interests of the company." *Id*. at 387i-388a. *Id.* at 391b-d.

{¶17} In *Energia*, *supra*, the court contemplated why the plaintiffs in that case had not, and could not, pursue a derivative action. *Energia* discussed the principles underling the rule in *Foss*, the exceptions to the rule, and stated: "[t]o proceed with a derivative action a shareholder must first satisfy the [c]ourt that wrongdoer control coupled with 'fraud on the minority' exists." *Energia*, 2001 Supreme Court Civil Jurisdiction No. 173 at 10. *Energia* also noted the ultra vires exception, "where the acts complained of involve the company, or company directors, acting outside the scope of the terms of the company's memorandum of association or Bye-Laws[.]" *Id*. Citing to *Smith*, *Energia* observed that decision made clear "that where the *ultra vires* act complained of had already been committed (as opposed to being threatened, when a shareholder

can injunct the proposed act), the shareholder must demonstrate that the claim satisfied the fraud on minority / wrongdoer control exception before the action could continue." *Id*. at 10-11.

{¶18} Aungst argues that the trial court erred in its reliance on *Energia* because: (1) it is a trial court decision and, therefore, "even if correctly decided," it is not binding on the trial court or this Court; (2) the cited law is not the holding in *Energia*, but dicta reflecting the court's opinion as to why the plaintiff did not assert a derivative claim; and (3) even if the case was "applicable," it is factually distinguishable. Regarding *Smith*, Aungst contends that it is distinguishable from the present matter because: (1) the allegations in that case involved "facially intra vires" conduct; (2) the Individual Defendants would never relinquish control to allow a shareholder vote, and no shareholder vote has occurred, thus it is "illogical to require Aungst to plead a fraud-on-the-minority exception" as stated in *Smith*; and (3) *Smith* was not resolved at the pleading stage, so the trial court's reliance on *Energia*, which relied upon *Smith*, is misplaced.

{¶19} Although Aungst outlines these arguments in her merit brief, she fails to distinguish *Energia* or *Smith* from the present matter in any relevant or meaningful way. Aungst has not presented argument or legal authority sufficient to convince this Court that the law cited by the trial court—as stated in *Energia* and *Smith*—is anything other than an accurate statement of Bermuda law. Moreover, Aungst's argument ignores the trial court's consideration of various federal court decisions applying the legal standard from *Energia* and *Smith*. *See e.g.*, *Saratoga*, 2016 WL 4364593 at *4, *Winn v. Schafer*, 499 F.Supp.2d 390, 397 (S.D.N.Y.2007); *Tyco*, 340 F.Supp.2d at 101-102 (Finding that "both English and Bermudian courts have recognized that when a shareholder seeks to bring a derivative action to recover damages for past *ultra vires* acts, the shareholder must demonstrate that the case qualifies under the fraud on the minority exception.").

{¶20} We conclude that Aungst's argument that the trial court applied the wrong legal standard is without merit. Because Aungst has admittedly not "pleaded fraud on the minority, her attempt to rely on the *ultra vires* exception [] fails" and we need not dispose of her arguments that "attempt to invoke the *ultra vires* exception" as a basis for maintaining her derivative action. *Tyco*, 101-102. Therefore, her first assignment of error is overruled.

Assignment of Error II

*** * * The trial court erred in denying Aungst's request for leave to amend her initial complaint in contravention of [Civ.R.] 15(A)'s liberal policy.**

{¶21} In her second assignment of error, Aungst argues that the trial court erred when it "decided the legal question of futility and denied leave to amend without any analysis."

{¶22} This Court reviews the denial of a motion for leave to amend a pleading for an abuse of discretion. *Jacobson-Kirsch v. Kaforey*, 9th Dist. Summit No. 26708, 2013-Ohio-5114, ¶ 12, citing *Wilmington Steel Products, Inc. v. Cleveland Elec. Illuminating Co.*, 60 Ohio St.3d 120, 122 (1991). An abuse of discretion denotes that the trial court's determination was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, a reviewing court may not simply substitute its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶23} Civ.R. 15(A) states, in pertinent part, that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires." "Because Civ.R. 15(A) expresses a preference for liberality with respect to amendments, 'a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party.'" *Jacobson-Kirsch* at ¶ 12, quoting *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6 (1984). However, an attempt to amend a complaint following the

filing of a dispositive motion raises the "spectre of prejudice." *Brown v. FirstEnergy Corp.*, 159 Ohio App.3d 696, 2005-Ohio-712, ¶ 6 (9th Dist.).

{¶24} The record reflects that Aungst did not file a formal motion for leave to file an amended complaint pursuant to Civ.R. 15(A). Instead, in the final paragraph of her brief in response to the Individual Defendant's and Signet's joint motion to dismiss, Aungst requested that if the trial court were inclined to grant the motion to dismiss, she be granted "leave to amend to cure any designated pleading deficiency."

{¶25} As we discussed in the previous assignment of error, the trial court ruled that Aungst, as a minority shareholder, "cannot maintain a lawsuit on behalf of a company for alleged past ultra vires acts without separately pleading that the wrongdoers perpetrated a fraud on the minority." Considering Aungst's request for an opportunity to amend the complaint in lieu of dismissal, the trial court stated:

> In the present case, [Aungst] concedes she did not plead a claim for fraud on the minority. In the absence of this claim, the [c]ourt finds she does not have standing to pursue a claim on behalf of Signet against the Individual Defendants for their alleged ultra vires acts. Given that [Aungst] stated in open court that she is not pursuing this claim, the [c]ourt overrules her Motion for Leave to Amend pursuant to Civ.R.15(A).

{¶26} """[W]here a plaintiff fails to make a *prima facie* showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading.""" *Gasper v. Bank of America, N.A.*, 9th Dist. Medina No. 17CA0091-M, 2019-Ohio-1150, ¶ 16, quoting *State ex rel. N. Ohio Chapter of Associated Builders & Contrs., Inc. v. Barberton City School Bd. of Educ.*, 188 Ohio App.3d 395, 2010-Ohio-1826, ¶ 28 (9th Dist.), quoting *Wilmington Steel Prods., Inc.*, 60 Ohio St.3d 120 (1991), syllabus. In this case, Aungst did not propose an amended pleading, but merely requested an *opportunity* to file an amended complaint depending on the trial court's ruling on the motion to dismiss. Aungst did not make a

prima facie showing of support for a new pleading and did not provide the trial court with an opportunity to consider whether an amended complaint might have set forth a claim upon which relief could be granted. Consequently, we cannot say the trial court abused its discretion when it overruled Aungst's request. *See White v. Roch*, 9th Dist. Summit No. 22239, 2005-Ohio-1127, ¶ 8 (finding that the trial court did not abuse its discretion by denying leave to amend a complaint where the appellant did not "file a formal motion with the court seeking leave to amend, but rather made a passing request for leave to amend in her brief opposing the * * * motion to dismiss."). Therefore, Aungst's second assignment of error is overruled.

III.

{¶27} Aungst's first and second assignments of error are overruled. The judgment of the Summit 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 Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

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

Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

CALLAHAN, P. J.
CARR, J.
CONCUR.

APPEARANCES:

DREW T. LEGANDO, Attorney at Law, for Appellant.

FRANCIS A. BOTTINI, JR., ALBERT Y. CHANG, and YURY A. KOLESNIKOV, Attorneys at Law, for Appellant.

JOSEPH A. ALLERHAND, STEPHEN A. RADIN, and STACY NETTLETON, Attorneys at Law, for Appellees.

RONALD S. KOPP and JESSICA A. LOPEZ, Attorneys at Law, for Appellees.

[Cite as *Univ. of Akron v. Rushin*, 2020-Ohio-3268.]

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

UNIVERSITY OF AKRON Appellant v. FELISHA S. RUSHIN Appellee	C.A. No. 29467 APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE No. 18 CVF 05396

DECISION AND JOURNAL ENTRY

Dated: June 10, 2020

TEODOSIO, Judge.

{¶1} The University of Akron appeals the judgment of the Akron Municipal Court. We reverse and remand.

I.

{¶2} In 2018, the University of Akron filed a complaint against Felisha S. Rushin alleging money due on account and unjust enrichment for tuition and other educational services rendered. Upon the plaintiff's motion, default judgment was granted in favor of the University of Akron and against Ms. Rushin in August 2018. In September 2018, a letter from Ms. Rushin was filed stating:

> I Felisha Rushin [am] disputing this debt. To my understanding it's not a student loan and has been included and discharged in my bankruptcy. Please review [the] enclosed documents and my response and notify me of my rights and obligations.

Attached were certain bankruptcy documents, including an order of discharge. No responsive briefs or entries followed.

{¶3} The University of Akron subsequently initiated garnishment proceedings on its judgment and filed an affidavit, order and notice of garnishment. After a garnishment hearing was subsequently held, an entry by the trial court followed, indicating that no funds were currently being held.

{¶4} In December 2018, Ms. Rushin filed a motion for release of garnishment, again indicating that she believed the debt had been discharged in bankruptcy. A second garnishment hearing was held in March 2019, with the University of Akron filing an affidavit in lieu of appearance. The subsequent magistrate's decision of April 15, 2019, stated that the hearing was "at the request of the Defendant as provided for by [R.C.] 2716.13(C)(2) and [R.C.] 2716.13(B)." The decision also stated that the hearing was "limited to the consideration of the amount of wages, money, property, or credits other than wages of the Defendant in the hands of the garnishee, if any, that can be used to satisfy all or part of the debt owed to the Plaintiff and whether the funds are exempt as provided by statute * * *." The decision further determined that "A proper defense was raised that Defendant provided copy of 'order of discharge' dated 04/24/18 as well as 'certificate of notice' which indicates service was completed upon plaintiff on April 24, 2018. Plaintiff did not appear to [sic] scheduled hearing." A judgment entry was also filed on April 15, 2019, indicating that after independent review, the trial court adopted the decision of the magistrate, and further ordering that the "case be dismissed as the Plaintiff's judgment has been discharged in Bankruptcy Court."

{¶5} The University of Akron filed objections to the magistrate's decision regarding the determination of the discharge of the debt, which were overruled by the trial court. The trial court sustained an objection challenging the court's actual dismissal of the judgment and vacated the

dismissal as void ab initio. The University of Akron now appeals, raising three assignments of error.

II.

ASSIGNMENT OF ERROR ONE

> THE AKRON MUNICIPAL COURT LACKS JURISDICTION TO DETERMINE THE DISCHARGEABILITY OF THE DEBT THAT WAS THE SUBJECT OF THE LOWER COURT ACTION AND AS SUCH, ERRED WHEN IT DETERMINED THAT THE APPELLEE'S DEBT WAS DISCHARGED. SAID ERROR WAS AN ABUSE OF DISCRETION.

{¶6} In its first assignment of error the University of Akron argues the trial court erred in determining that the debt was discharged because it lacked jurisdiction to do so.

{¶7} "Generally, the decision to adopt, reject, or modify a magistrate's decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse of discretion." *Barlow v. Barlow*, 9th Dist. Wayne No. 08CA0055, 2009-Ohio-3788, ¶ 5. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying this standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). However, "[i]n so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. Medina No. 08CA0049-M, 2009-Ohio-3139, ¶ 18. We review questions of law de novo. *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 64 Ohio St .3d 145, 147 (1992).

{¶8} "Garnishments are purely statutory proceedings, and a court can grant garnishment relief only in accordance with the terms and upon the grounds set forth in the garnishment statutes." *Wiegand v. Fabrizi Trucking & Paving Co.*, 9th Dist. Lorain No. 18CA011406, 2019-Ohio-2615,

¶ 12, quoting *Doss v. Thomas*, 183 Ohio App.3d 795, 2009-Ohio-2275, ¶ 11 (10th Dist.), citing *Rice v. Wheeling Dollar Sav. & Trust Co.*, 163 Ohio St. 606 (1955); *Bazzoli v. Larson*, 40 Ohio App. 321 (5th Dist.1931); *Southern Ohio Fin. Corp. v. Wahl*, 34 Ohio App. 518 (1st Dist.1929). R.C. 2716.01(A) provides: "A person who obtains a judgment against another person may garnish the personal earnings of the person against whom judgment was obtained only through a proceeding in garnishment of personal earnings and only in accordance with this chapter." R.C. 2716.06 governs service of notice to the judgment debtor of the garnishment order, and it sets forth a sample form entitled, "Notice to the Judgment Debtor." The form provides in part, "If you dispute the judgment creditor's right to garnish your personal earnings and believe that you are entitled to possession of the personal earnings because they are exempt or if you feel that this order is improper for any other reason, you may request a hearing before this court by disputing the claim in the request for hearing form, appearing below, or in a substantially similar form, and delivering the request for hearing to this court * * *." The form further provides, "NO OBJECTIONS TO THE JUDGMENT ITSELF WILL BE HEARD OR CONSIDERED AT THE HEARING. The hearing will be limited to a consideration of the amount of your personal earnings, if any, that can be used in satisfaction of the judgment you owe to the judgment creditor." R.C. 2716.06(C) further provides, "The hearing shall be limited to a consideration of the amount of the personal earnings of the judgment debtor, if any, that can be used in satisfaction of the debt owed by the judgment debtor to the judgment creditor."

{¶9} "The hearing contemplated by the statute is not a vehicle for relitigating the lawsuit which resulted in the original judgment." *Scumacher v. Stacey*, 9th Dist. Summit No. 11936, 1985 WL 10816, *2 (May 8, 1985). Rather, R.C. 2716.06 merely gives the trial court authority to determine the amount of wages, if any, that can be used for satisfaction of the debt. *Id. See also*

Merchants Acceptance, Inc. v. Bucholz, 2d Dist. Montgomery No. 24425, 2011-Ohio-5556, ¶ 33 (holding that at a garnishment hearing a trial court lacks jurisdiction as a matter of law to vacate the underlying judgment and is limited by the clear language of R.C. 2716.06 to considering the amount of personal earnings that can be used in satisfaction of the debt). "No objection to the judgment itself can be heard or considered at the hearing." *Wiegand* at ¶ 13, quoting *Leonard v. Delphia Consulting, LLC*, 10th Dist. Franklin No. 06AP-874, 2007-Ohio-1846, ¶ 24. "Thus, '[t]he judgment debtor may not use garnishment proceedings to relitigate the underlying debt.'" *Id.*, quoting *E. Liverpool v. Buckeye Water Dist.*, 7th Dist. Columbiana Nos. 11 CO 41 and 11 CO 42, 2012-Ohio-2821, ¶ 34.

{¶10} The trial court in this matter granted default judgment on the underlying debt, and the debt remained unchallenged and undisturbed prior to garnishment proceedings. Because of the statutory limitations as to what the trial court may consider during a garnishment hearing, the trial court was without authority at that stage to determine that the underlying debt had been discharged.

{¶11} The University of Akron's first assignment of error is sustained.

ASSIGNMENT OF ERROR TWO

> THE AKRON MUNICIPAL COURT, IN DEEMING THE UNDERLYING DEBT DISCHARGED[,] EXCEEDED THE JURISDICTION CONFERRED UPON IT AND LIMITED BY [R.C.] 2716.06, BY HEARING, CONSIDERING AND MOVING ON AN OBJECTION TO THE UNDERLYING JUDGMENT ITSELF.

ASSIGNMENT OF ERROR THREE

> THE AKRON MUNICIPAL COURT INCORRECTLY DETERMINED THE UNDERLYING DEBT TO BE DISCHARGED IN APPELLEE'S BANKRUPTCY.

{¶12} Having sustained the University of Akron's first assignment of error, we decline to review the remaining assignments of error. *See* App.R. 12(A)(1)(c).

III.

{¶13} The University of Akron's first assignment of error is sustained. We decline to address the second and third assignments of error. The judgment of the Akron Municipal Court is reversed and remanded.

Judgment reversed
and remanded.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellee.

THOMAS A. TEODOSIO
FOR THE COURT

CALLAHAN, P. J.
SCHAFER, J.
CONCUR.

APPEARANCES:

SUSAN KRASNICKI, Attorney at Law, for Appellant.

FELISHA S. RUSHIN, pro se, Appellee.

[Cite as *Bank of New York Mellon v. Workman*, 2020-Ohio-3330.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

THE BANK OF NEW YORK MELLON f.k.a. THE BANK OF NEW YORK, AS TRUSTEE FOR ALTERNATIVE LOAN TRUST 2004-28CB, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-28CB,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2019-L-134**
- vs -	:	
SUSAN D. WORKMAN, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2014 CF 001548.

Judgment: Affirmed.

Nathan B. Blaske and *Shannon O'Connell Egan*, Dinsmore & Shohl LLP, 255 East Fifth Street, Suite 1900, Cincinnati, OH 45202; and *Jeffrey J. Hanneken* and *Kellie A. Kulka,* Graydon, Head, & Ritchey, LLP, 312 Walnut Street, Suite 1800, Cincinnati, OH 45202 (For Plaintiff-Appellee).

Marc E. Dann and *William C. Behrens,* Dann Law, P.O. Box 6031040, Cleveland, OH 44103 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Susan Workman, appeals the September 30, 2019 Judgment Entry of the Lake County Court of Common Pleas adopting the Magistrate's Decision and foreclosing on certain property. For the reasons discussed herein, we affirm.

{¶2} Ms. Workman owns a certain parcel of land in Lake County, Ohio, Parcel No. 28A-045F-00-029-0 (the "Property"). On October 28, 2004, Ms. Workman entered into a mortgage loan (the "Mortgage Loan") with Countrywide Home Loans, Inc. in the amount of $99,680.00, as evidenced by a certain note (the "Note"), and secured by the Property, as evidenced in a mortgage (the "Mortgage"). Subsequently, the Note was endorsed in blank; the Mortgage was assigned to appellee, Bank of New York Mellon fka The Bank of New York, as Trustee for Alternative Loan Trust 2004-28CB, Mortgage Pass-Through Certificates Series 2004-23CB ("BONYM").

{¶3} The Bank of America has been the master servicer of the Mortgage Loan throughout the entirety of the life of the Mortgage Loan, though various entities have acted as sub-servicers. Of particular relevance to this appeal, effective August 2015 and throughout trial, NewRez dba Shellpoint Mortgage Servicing ("Shellpoint") was the sub-servicer, replacing the prior sub-servicer, Ocwen Loan Servicing, LLC ("Ocwen").

{¶4} In 2005, Ms. Workman defaulted on the Mortgage Loan, resulting in the Lake County Court of Common Pleas entering judgment in foreclosure against her in March 2007 (the "2007 Judgment"). Shortly thereafter, she filed for bankruptcy and avoided the sale of her home. She was discharged from bankruptcy in December 2011. The 2007 Judgment was not vacated by the Lake County Court of Common Pleas until April 17, 2013.

{¶5} In 2012, Ms. Workman again defaulted on the Mortgage Loan. Ocwen sent a notice of default on October 16, 2012, and in August 2014, BONYM initiated the underlying action in foreclosure. As Ms. Workman had obtained a discharge of her

obligations under the United States Bankruptcy Code, the foreclosure action was brought in rem, and sought no personal or money judgment.

{¶6} The parties proceeded to a bench trial before the magistrate on September 4, 2019. In his September 30, 2019 decision, the Magistrate specifically found that BONYM had established by clear and convincing evidence that it was the holder of the Note and Mortgage, and was prior to the filing of the complaint; BONYM was entitled to enforce the Mortgage Loan; Ms. Workman was in default; BONYM complied with all conditions precedent; the amount due and owing to BONYM is $87,166.20, plus interest, taxes, and fees; and BONYM was entitled to have the equity of redemption of Ms. Workman foreclosed. The trial court adopted the Magistrate's decision the same day.

{¶7} Ms. Workman timely filed objections to the Magistrate's findings and subsequently supplemented them upon receipt of the trial transcript. Before the court ruled on those objections, Ms. Workman filed a notice of appeal in this court to preserve her right to appeal. This court remanded the case to the trial court to rule on the objections, which it overruled on December 20, 2019. It is from this decision that Ms. Workman now appeals, assigning five errors for our review. The first states:

> **{¶8}** The trial court erred by improperly considering hearsay evidence in Plaintiff's trial exhibits E and F.

{¶9} "This court has previously held that a de novo standard of review applies to determine whether evidence was inadmissible hearsay." *State v. Doak*, 11th Dist. Portage No. 2018-P-0022, 2020-Ohio-66, ¶67, citing *Jack F. Neff Sand & Gravel, Inc. v. Great Lakes Crushing, Ltd.*, 11th Dist. Lake No. 2012-L-145, 2014-Ohio-2875, ¶23.

{¶10} There is no dispute that Shellpoint began servicing the Mortgage Loan in August 2015. At trial, BONYM entered into evidence, inter alia, Plaintiff's Exhibit E, the

loan history summary, and Plaintiff's Exhibit F, the notice of default letter dated October 16, 2012. Exhibit E contains a summary of the loan history both before and after Shellpoint began servicing the loan on August 15, 2015. Exhibit F, the notice of default, was created and sent by Ocwen, the servicer at the time of default. At trial, BONYM called Ms. Jean Knowles, a paralegal at Shellpoint, to testify as to these records. Because on cross-examination Ms. Knowles admitted she had no knowledge of Ocwen's business-records practices or the circumstance surrounding Ocwen's creation of these records, Ms. Workman argues that Ms. Knowles' testimony was insufficient to lay a foundation for the admission of these two exhibits under the "business records" hearsay exception found in Evid.R 803(6), and thus, the trial court should have excluded these exhibits as hearsay.

{¶11} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is generally inadmissible unless it falls within an exception in Evid.R. 803. Evid.R. 802. Evid.R. 803(6) provides an exception for:

> **{¶12}** [a] memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. * * *

{¶13} "In other words, Evid.R. 803(6) excepts from the hearsay rule records kept in the course of a regularly conducted business activity if it was the regular practice of that business to make such records, and those records were made by or from information

transmitted by a person with knowledge." *Ohio Receivables, L.L.C. v. Purola*, 11th Dist. Lake No. 2012-L-092, 2013-Ohio-5806, ¶23, citing Evid.R. 803(6).

{¶14} BONYM argues that Ms. Knowles' testimony was sufficient to lay the foundation for Exhibits E and F as admissible under the adoptive business records doctrine, which this court implicitly applied in *Purola*. In *Purola,* the creditor sought the admission, under the business records hearsay exception, of certain documents and a related affidavit to establish the transfer of the account to the lender. The borrower argued that because the lender did not create the records it sought to admit, and the affidavit did not identify the source of the information or how it created the documents, the lender did not lay the proper foundation for the documents to fall within the business-records exception to the hearsay rule. This court disagreed.

{¶15} This court noted that Evid.R. 803(6) is substantially similar to Fed.R.Evid. 803(6) and found federal circuit courts case law to be instructive on this matter. "'A number of circuit courts have held that exhibits can be admitted as business records of an entity, even when that entity was not the maker of those records; provided that the other requirements of Rule 803(6) are met, and the circumstances indicate that the records are trustworthy.'" *Purola, supra,* at ¶24, quoting *Great Seneca Financial v. Felty*, 170 Ohio App.3d 737, 2006–Ohio–6618, ¶14 (1st Dist.). "Furthermore, '[r]ecords need not be actually prepared by the business offering them if they are received, maintained, and relied upon in the ordinary course of business. If the document is originally created by another entity, the creator need not testify if the document is incorporated into the business records of the testifying entity.'" *Purola, supra,* at ¶25, quoting *Shawnee*

Associates, LP v. Village of Shawnee Hills, 5th Dist. Delaware No. 09-CAE-05 0051, 2010-Ohio-1183, ¶50.

{¶16} This court ultimately found the affidavit was sufficient to lay the foundation as business records because "although Ohio Receivables did not actually prepare the records being offered, they were 'received, maintained, and relied upon in the ordinary course of business.'" *Purola, supra,* at ¶26 quoting *Shawnee, supra,* at ¶50. Further, the affidavit attested that the "testimony of the affiant is based on 'information and records submitted and provided as a result of the purchase of [Purola's] debt and warranted and represented to be true and accurate' * * * [and] describes in detail how Ohio Receivables received the documents, incorporated them into its business records, and relied on them in conducting its business." *Purola, supra.*

{¶17} Ms. Workman likens this case to *Estie Invest. Co. v. Braff*, 11th Dist. Lake No. 2017-L-172, 2018-Ohio-4378. In *Estie,* a landlord brought suit against a former tenant for failing to care for the premises. The landlord did not enter into evidence an itemized list of the repairs necessary as required to support his claim, but only generalized the expenses. When questioned on direct examination, the landlord estimated a $2,500 cost to repair the carpet, based upon what a carpet repairperson had previously charged him for installations in other apartments. On appeal, this court found that estimate to be inadmissible hearsay because "the person providing the estimate would have to be called as a witness so the opposing party could cross-examine him." No argument was made that the landlord incorporated the prior quote into his records or relied on it in making business decisions. Accordingly, *Estie* is distinguishable from the case at bar. The same distinction exists in *State v. Phillips*, 11th Dist. Lake No. 2016-L-029, 2017-Ohio-1204 and

Mentor Economic Assistance Corp. v. Eichels, 11th Dist. No. 2015-L-097, 2016-Ohio-1162.

{¶18} Ms. Workman also cites *State v. Struble*, 11th Dist. Lake No. 2016-L-108, 2017-Ohio-9326, in support of her argument. However, in *Struble,* this court did not address this issue. There, the state conceded that the testimony of these witnesses was insufficient to lay an adequate foundation for admissibility and this court rejected the state's harmless error argument.

{¶19} Here, BONYM sought to admit a loan history summary, part of which was created by a prior sub-servicer, and the notice of default, wholly created by a prior sub-servicer. BONYM called Ms. Knowles, an employee of the current sub-servicer, Shellpoint, with personal knowledge of the subject Mortgage Loan. Contrary to Ms. Workman's apparent argument that there was no evidence the exhibits were trustworthy, Ms. Knowles also testified as to the records transfer process between the prior sub-servicer and Shellpoint, in which the information is "scrubbed" and audited for accuracy in a three-step boarding process; if any discrepancies are found, they are either corrected or the accounts are repurchased by Bank of America. The records that pass auditing are incorporated into Shellpoint's systems. Furthermore, Ms. Knowles specifically testified that Shellpoint bases its business decisions on these records generated by prior servicers and relies on them in the case of every loan because Shellpoint does not originate loans.

{¶20} Following the precedent set by this court in *Purola,* we find that under the circumstances of the case at hand, Ms. Knowles' testimony was sufficient to establish a foundation for the admission of those exhibits under the business records exception.

{¶21} Accordingly, Ms. Workman's first assignment of error is without merit.

{¶22} Ms. Workman's second assignment of error states:

> **{¶23}** The trial court erred by finding that the Plaintiff/Appellee complied with the Notice of Acceleration condition precedent to foreclosure by notice in October of 2012, where the debt had been reduced to judgment which was not vacated until April of 2013.

{¶24} Under this assignment of error, Ms. Workman argues, briefly and without citing any authority, that BONYM was required to first vacate the 2007 Judgment before serving a new notice of default. BONYM argues that the bankruptcy court's discharge order effectively nullified the 2007 Judgment as the amount due was no longer reflected accurately in that judgment; the loan was considered "current" and BONYM could not execute upon the 2007 Judgment. Thus, it argues, the trial court's 2013 order to vacate the 2007 Judgment only acknowledged what the bankruptcy court had already determined.

{¶25} In support of her argument, Ms. Workman's points to the fact that Shellpoint sent another notice of acceleration in September 2015 as evidence that BONYM did not truly believe the October 16, 2012 letter was sufficient. However, this argument is not persuasive as Ms. Knowles testified that it was Shellpoint's standard practice upon the transfer of a loan in default to them from a prior sub-servicer to send out a new notice of acceleration in cases of default.

{¶26} Additionally, Ms. Workman argues that until the 2007 Judgment was vacated "there was no debt to accelerate." However, this argument ignores the proceedings in Bankruptcy Court and contradicts Ms. Workman's Voluntary Petition for bankruptcy. In her Voluntary Petition Schedule A she lists the Property and notes that, at the time of filing, there was a secured claim against the Property in the amount of $132,200.00, and in Schedule D she lists "Bank of New York c/o Countrywide Home

Loans" as one of the creditors. Notably, she did not mark the box to indicate this debt was "disputed." Moreover, the Bankruptcy Court found that Ms. Workman owed the Bank of New York an arrearage on the Mortgage Loan, and set up a repayment plan, which Ms. Workman complied with. Ms. Workman cannot now argue that there was no debt until the 2007 Judgment was vacated. *See Trumbull Twp. Bd. of Trustees v. Rickard*, 11th Dist. Ashtabula No. 2017-A-0048, 2019-Ohio-2502, ¶25, quoting *Lynch v. Lakewood City School Dist. Bd. of Edn.*, 116 Ohio St. 361 (1927), paragraph three of the syllabus (""If a 'judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away * * * the right to appeal or prosecute error or even to move for vacation of judgment.'").

{¶27} While there appears to be no case law in Ohio discussing this particular question, the Bankruptcy Code provides that "a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured * * * until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law." 11 U.S.C. §1322(c)(1). This provision, "makes it clear that cure and deceleration are permissible until an actual foreclosure sale." *In re Boylan*, 255 B.R. 311, 313 (Bankr. S.D. Ohio 2000).

{¶28} Here, the Property was not sold following the 2007 Judgment as Ms. Workman's order of sale was cancelled pending her bankruptcy proceedings. After the Bankruptcy Court entered its Order of Discharge on December 15, 2011 and its Final Decree closing the case on May 10, 2012, Ms. Workman was considered "current" on her Mortgage Loan. As Ms. Workman had cured the Mortgage Loan arrearages, the Mortgage Loan was decelerated, and Ms. Workman was returned to pre-default status

considered current. Ms. Workman, however, was required to continue payments in accordance with the Mortgage Loan after being discharged from bankruptcy. Indeed, the Bankruptcy Court specifically stated, in reference to the Mortgage Loan, that the "Debtor shall pay all post-petition mortgage payments and real estate taxes as those payments ordinarily come due beginning with the first payment due after the filing of the case."

{¶29} Further, upon Ms. Workman's discharge in bankruptcy, BONYM could no longer execute upon the 2007 Judgment as the amount owing was no longer correctly reflected in the order. Thus, we agree that the Bankruptcy Court's judgments effectively nullified the 2007 Judgment. As such, prior to bringing an action in foreclosure, BONYM was required to, and did, issue a new notice of default. Whether or not the 2007 Judgment was vacated at the time the notice of default was sent, it nevertheless served to inform Ms. Workman that she was again in default and that failure to bring her account current may result in acceleration of the note and foreclosure. Thus, the notice of default sent in 2012 was sufficient to satisfy this condition precedent to foreclosure.

{¶30} Accordingly, we find the Bankruptcy Court's discharge order effectively nullified the 2007 Judgment, such that BONYM was not required to seek vacation of that order prior to sending a new notice of default.

{¶31} Ms. Workman's second assignment of error is without merit.

{¶32} Ms. Workman's third assignment of error states:

{¶33} The trial court erred by finding that the Plaintiff/Appellee was a valid Assignee of the Mortgage.

{¶34} Under this assignment of error, Ms. Workman first argues that the assignment bears the same defect present in the notice of default; to wit, it was ineffective because it was assigned before the 2007 Judgment was vacated. As we have discussed

this matter under the second assignment of error, we will not reiterate it again here and find this argument to be without merit.

{¶35} Ms. Workman also argues that BONYM presented no evidence that a power of attorney was ever recorded in Lake County prior to the execution and recording of the assignment, as required by R.C. 1338.04 and R.C. 5301.231(A). Accordingly, she argues, the assignment of mortgage must be deemed invalid, rendering BONYM without standing to bring this action.

{¶36} BONYM argues that Ms. Workman has no standing to challenge the assignment of mortgage to BONYM, and that even if she did have standing, a lack of a power of attorney does not render the assignment invalid or provide a basis for reversal. Moreover, BONYM argues, it has standing because the negotiation of the note to BONYM operates as an equitable assignment of mortgage as a matter of law. Ms. Workman counters that she has standing as she is the third party the statute is intended to protect.

{¶37} Here, the assignment of mortgage entered into evidence purports to assign the mortgage from "Bank of New York Mellon as Trustee for the Certificateholders of Cwalt 2004-28CB" (the "Assignor") to BONYM. The Assignor executed the document: "Bank of New York Mellon as Trustee for the Certificateholders of CWalt 2004-28CB by it's [sic] attorney-in-fact Ocwen Loan Servicing, LLC." However, Ms. Workman correctly notes there is no evidence in the record to show that a power of attorney was recorded as required by R.C. 1338.04, which states:

> **{¶38}** A power of attorney for the conveyance, mortgage, or lease of an interest in real property must be recorded in the office of the county recorder of the county in which such property is situated, previous to the recording of a deed, mortgage, or lease by virtue of such power of attorney.

{¶39} "In a mortgage foreclosure action, the mortgage lender must establish an interest in the promissory note or in the mortgage in order to have standing to invoke the jurisdiction of the common pleas court." *Wells Fargo Bank v. Watson*, 11th Dist. Ashtabula No. 2014-A-0062, 2015-Ohio-2599, ¶24 citing *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶28. "The requirement of an 'interest' can be met by showing an assignment of either the note or mortgage." *Fed. Home Loan Mtge. Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶24. Whether standing exists is a matter of law that we review de novo. *Watson, supra,* at ¶25, citing *Bank of Am., NA v. Barber*, 11th Dist. Lake No. 2013-L-014, 2013-Ohio-4103, ¶19.

{¶40} "[I]t is well settled in Ohio that mortgage debtors do not have standing to challenge mortgage assignments." *Watson, supra,* at ¶52. "[W]hen a mortgagor/debtor * * * is not a party to the mortgage assignment, and his contractual obligations under the mortgage are not affected in any way by the assignment, the debtor lacks standing to challenge the validity of the assignment." *Id.,* citing *Waterfall Victoria Master Fund v. Yeager*, 11th Dist. Lake No. 2012-L-071, 2013-Ohio-3206, ¶21. See also *Bank of New York Mellon v. Antes*, 11th Dist. Trumbull No. 2014-T-0028, 2014-Ohio-5474, ¶36; *PennyMac Corp. v. Nardi*, 11th Dist. Portage No. 2014-P-0014, 2014-Ohio-5710, ¶17.

{¶41} Here, as there is no evidence that Ms. Workman's obligations under the mortgage were in any way affected by the assignment, she does not have standing to challenge the mortgage assignment at issue here. And further, contrary to Ms. Workman's argument that she is the third-party R.C. 1337.04 is intended to protect, "[t]he recording statute, R.C. 1337.04, was not enacted for the benefit of mortgagors, but for

the protection of third persons who might acquire legal interests in the property." *Henry v. BancOhio Natl. Bank of Columbus*, 74 Ohio App.3d 209, 212, (10th Dist.1991), citing *Fosdick v. Barr*, 3 Ohio St. 471 (1854); *Van Thorniley v. Peters*, 26 Ohio St. 471 (1875). See also *Wells Fargo Bank, N.A. v. Todt*, 8th Dist. Cuyahoga No. 95558, 2011-Ohio-1376, ¶9.

{¶42} Accordingly, Ms. Workman's third assignment of error is without merit.

{¶43} Ms. Workman's fourth assignment of error states:

{¶44} The trial court erred by finding that Plaintiff/Appellee had any right to enforce the Note on the day the Complaint was filed, and thus any standing to file this action.

{¶45} Under this assignment of error, Ms. Workman argues BONYM did not have standing to enforce the Note as it was not the holder of the Note at the time of filing the complaint. The original Note produced at trial is endorsed in blank and Ms. Knowles testified that, though Ocwen determined the original Note to be lost at the time of the filing of the complaint, she retrieved the original Note from the Bank of America subsequent to the filing of the complaint. Accordingly, Ms. Workman argues, as Bank of America was in possession of the original Note endorsed in blank at the time of the filing of the complaint, it was the one entitled to enforce the Mortgage Loan, not BONYM. She also argues that "Bank of America itself claims to be the investor, not just the servicer, until well after the complaint was filed." BONYM asserts that Bank of America, the master servicer of the Mortgage Loan, held the Note as BONYM's agent, and that BONYM had constructive possession of the original Note at the time of filing the complaint and throughout trial.

{¶46} The lender must establish it was the holder of the note or a party entitled to enforce the note at the time the complaint was filed. *Schwartzwald, supra*, at ¶3. There

is no standing to proceed with the foreclosure if the interest did not exist at the time the foreclosure complaint was filed. *Id.* at ¶27. "Although the plaintiff in a foreclosure action must have standing at the time suit is commenced, proof of standing may be submitted subsequent to the filing of the complaint." *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, ¶17. As noted under the third assignment of error, appellate courts review issues of standing de novo. *Watson, supra.*

{¶47} "To be a 'holder,' a party must be in possession of the instrument that is either payable to the party in possession (specifically endorsed) or payable to bearer (blank endorsement)." (Citations omitted.) *Deutsche Bank National Trust Company, As Trustee For American Home Mortgage Assets Trust 2007-2, Mortgage-Backed Pass-Through Certificates Series 2007-2, v. Julie A. Ayers, et al.,* 11th Dist. Portage No. 2019-P-0094, 2020-Ohio-1332, ¶73. Further, this court has recently held that "[a] person is a holder of a negotiable instrument, and entitled to enforce the instrument, when the instrument is in the physical possession of his *or her agent*." (Emphasis added.) *Id.,* citing *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶25. Accordingly, "[a] plaintiff does not lose constructive and legal possession of bearer paper merely because it was held by an agent on behalf of the plaintiff." *U.S. Bank Natl. Assn. v. Crow*, 7th Dist. Mahoning No. 15 MA 0113, 2016-Ohio-5391, ¶33, citing *Gray, supra*.

{¶48} "The doctrine of constructive possession is consistent with UCC principles governing transfer of negotiable instruments. As recognized in the official comment to the UCC's definition of negotiation, '[n]egotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, *either*

directly or through an agent.' (Emphasis added.)" *Gray*, *supra*, quoting UCC Official Comment, Section 3–201, Comment 1 (1990). See also, *Freedom Mtge. Corp. v. Vitale*, 5th Dist. Tuscarawas No. 2013 AP 08 0037, 2014-Ohio-1549, ¶16.

{¶49} Furthermore, "[i]n situations where the holder's agent is in physical possession of the note, the holder may still enforce the note based upon constructive possession of the note. However, a note indorsed in blank does not, on its face, establish who is in possession of the note and when that possession transpired. Thus, a supporting affidavit must attest to how and when the entity became the holder of the note and generally the affiant must produce supporting business records, other than the note, to establish possession." (Citations omitted.) *Fed. Natl. Mtge. Assn. v. McFerren*, 9th Dist. Summit No. 28814, 2018-Ohio-5319, ¶21.

{¶50} Here, it is not disputed the Bank of America was in possession of the original Note at the time of the filing of the complaint. Ms. Knowles testified that Bank of America was the master servicer of the Mortgage Loan; that Bank of America had been in possession of the original Note since 2004, as evidenced by the routing history she reviewed; and that it was the historical practice of Bank of America, as master servicer, to hold the notes for the life of the loan. Under these circumstances, this was sufficient to show that BONYM had constructive possession of the Note at the time of filing the complaint. Thus, the trial court did not err in drawing this conclusion.

{¶51} Furthermore, we note that Ms. Workman's argument that Bank of America itself claimed to be the owner of the Mortgage Loan is without merit. In support, she points to Defendant's Exhibits 2 through 6 entered into evidence, which she suggests supports her argument.

{¶52} Defendant's Exhibit 2, an August 15, 2015 letter from Shellpoint, informs Ms. Workman "that the servicing of your loan has been transferred from Bank of America, N.A. to Shellpoint Mortgage Servicing." This does not support Ms. Workman's argument as the letter states, apparently incorrectly, that Bank of America was the prior servicer, not owner.

{¶53} Defendant's Exhibit 5, an October 26, 2015 letter from Shellpoint to Ms. Workman states: "The Bank of New York Mellon FKA the Bank of New York, as Trustee for the certificate holders of CWALT, Inc., Alternative Loan Trust 2004-28cb, Mortgage Pass-Through Certificates, Series 2004-28cb ("BONY") is currently the owner of the above referenced loan." This exhibit also does not support Ms. Workman's argument, as this letter states BONYM is the owner of the loan.

{¶54} Defendant's Exhibit 3, an August 24, 2015 Validation of Debt Notice from Shellpoint to Ms. Workman, states: "The creditor to whom the debt is owed is Bank of America, N.A.. [sic] Shellpoint Mortgage Servicing ("Shellpoint") is collecting the debt on behalf of Bank of America, N.A." And Defendant's Exhibit 4 and Defendant's Exhibit 6, are both letters, dated October 8, 2015 and October 14, 2016, respectively, to Ms. Workman in response to an inquiry. Both letters state her "account [is] serviced by [Shellpoint] on behalf of Bank of America, N.A., the owner of your loan. Their contact information is: Address: 101 Barclay St., 8W, New York, NY 10286." However, Ms. Knowles testified that this is BONYM's address.

{¶55} None of these exhibits, nor anything in the record, support Ms. Workman's argument that Bank of America *itself* made the assertion that it was the owner of the Mortgage Loan. The five documents that Ms. Workman cites are letters from Shellpoint,

not Bank of America. Further, the documents from Shellpoint which stated that Bank of America is the owner of the Mortgage Loan appear to be a typographical error, corrected in other documents by Shellpoint and clarified by Ms. Knowles' testimony at trial.

{¶56} Accordingly, Ms. Workman's fourth assignment of error is without merit.

{¶57} Ms. Workman's fifth assignment of error states:

{¶58} The trial court erred by dismissing the Appellant's counterclaims.

{¶59} Ms. Workman's counterclaim asserts that BONYM violated the Fair Debt Collection Practices Act, 15 U.S.C. 1692, and that BONYM is a debt collector attempting to collect a debt not owned by BONYM. However, as we have established above, BONYM owned the Mortgage Loan and was entitled to bring this action in foreclosure. Accordingly, the trial court did not err in dismissing Ms. Workman's counterclaim.

{¶60} Ms. Workman's fifth assignment of error is without merit.

{¶61} In light of the foregoing, the judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J.,

MARY JANE TRAPP, J.,

concur.

[Cite as *Huntington Natl. Bank v. Rex*, 2020-Ohio-3305.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

HUNTINGTON NATIONAL BANK, :

Plaintiff-Appellee, :

No. 108670

v. :

HALLE REX, ET AL., :

Defendants. :

[Appeal by Richard T. Conner]

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 11, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-899717

Appearances:

Carlisle, McNellie, Rini, Kramer & Ulrich Co., L.P.A., and Eric T. Deighton, *for appellee*.

Andrew J. Simon, *for appellant* Richard T. Conner.

LARRY A. JONES, SR., P.J.:

{¶ 1} In this appeal, appellant Richard Conner ("Conner") challenges the trial court's May 15, 2019 judgment denying his motion to intervene in this foreclosure action. For the reasons that follow, we affirm.

Procedural History

{¶ 2} In June 2018, plaintiff-appellee Huntington National Bank ("Huntington") initiated this foreclosure action against defendant-appellant Halle Rex ("Rex") and "John Doe, real name unknown, the unknown spouse, if any, of Halle Rex." After the defendants were served and failed to answer, the bank moved for default judgment in October 2018. On October 23, 2018, a hearing was held on Huntington's motion, at the conclusion of which the trial court granted the motion in favor of the bank and against Rex and her unknown spouse.

{¶ 3} In January 2019, Conner filed a motion to intervene, which the bank opposed. In April 2019, Conner filed a motion for declaration of priority of lien. On May 15, 2019, the trial court denied Conner's motions to intervene and for declaration of priority of lien. Conner did not file a motion to stay the proceeding, and Huntington continued its efforts to foreclose on the subject property. The foreclosure sale occurred in the summer of 2019, and the sale was confirmed in the fall of 2019.

Factual History

{¶ 4} Conner is Rex's former husband; their divorce was finalized in 2009. During the course of their marriage, Rex was the owner of property located in Solon, Ohio, and which consisted of two parcels of land. In 2002, during the divorce proceeding, Conner obtained an ex parte restraining order against Rex relative to the subject property. Specifically, the order restrained Rex from "encumbering,

transferring, selling, or otherwise hypothecating her interest in the real property." Conner filed the order with the county recorder and auditor on August 15, 2002.

{¶ 5} In 2017, Rex and Conner filed an agreed judgment in their divorce case. Apparently, Rex sought to sell one parcel of land. Under the agreed judgment, the 2002 restraining order was dissolved against Rex as to the one parcel of land in exchange for Rex paying a fixed amount out of the proceeds of the sale to Conner. The agreement stated that the 2002 restraining order "is specifically **NOT** dissolved as it relates to [the other] parcel * * * owned by Plaintiff, Halle Rex." (Emphasis sic.) The remaining parcel is the one the bank foreclosed on and subject to this appeal.

Conner's Motion to Intervene

{¶ 6} In his motion, Conner contended that he had a valid lien against the subject property and that his lien had priority over the bank's lien. According to Conner, Huntington had been aware of his lien prior to its filing the foreclosure action. In support of his contention, Conner attached a copy of the restraining order from the domestic relations court that he filed with the county recorder and auditor on August 15, 2002.

{¶ 7} In its opposition to Conner's motion to intervene, the bank contended that Conner had "no valid lien against the real property. Instead, Richard T. Conner has, at best, a contempt of court order claim against Defendant, Halle Rex, in the Domestic Relations division of this Court."[1] Huntington contended that, because it

[1]Neither the preliminary nor the final judicial reports filed by the bank listed Conner as a lienholder against the property.

was not a party to Rex and Conner's divorce case, it was not bound by any judgments in that case.

{¶ 8} Further, according to Huntington, the recorded document filed with the recorder in 2002 did not "constitute evidence that title to the subject real estate is affected." Rather, Huntington maintained that, under R.C. 5301.252, Conner was required to "record a proper affidavit as to Defendant, Halle Rex's[,] lack of legal capacity in order to provide constructive notice and evidence of same."

Trial Court's Judgment

{¶ 9} The trial court found that Rex held title to the property since 1997, and that Conner "failed to establish that he has any right, title, or interest in the subject property or possesses a lien that attached to the subject property." Thus, the trial court found that Conner was not a necessary party to the foreclosure action and denied his motions to intervene and for declaration of priority of lien.

Law and Analysis

{¶ 10} The sole assignment of error reads, "The trial court erred in denying Richard T. Conner's motion to intervene."

{¶ 11} Intervention is governed by Civ.R. 24; intervention can be "of right" or "permissive." In his motion at the trial-court level, Conner did not state which avenue he was attempting to intervene under, but here on appeal he contends that it was "of right." Under Civ.R. 24(A), which governs intervention of right,

> upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the

> property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

{¶ 12} Conner contends that subsection (2) applied to him.

{¶ 13} Although motions to intervene should be liberally construed, the standard of review of a ruling on a motion to intervene, whether as of right or by permission, is whether the trial court abused its discretion. *Grogan v. T.W. Grogan Co.*, 143 Ohio App.3d 548, 560, 758 N.E.2d 702 (8th Dist.2001), citing *Peterman v. Pataskala*, 122 Ohio App.3d 758, 761, 702 N.E.2d 965 (5th Dist.1997).

{¶ 14} A party seeking intervention of right must show: (1) the application is timely; (2) the intervenor claims an interest relating to the subject of the action; (3) the intervenor is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest; and (4) the existing parties do not adequately represent his or her interest. *Grogan* at *id.*, citing *Widder & Widder v. Kutnick*, 113 Ohio App.3d 616, 624, 681 N.E.2d 977 (8th Dist.1996).

{¶ 15} As it pertains to the ground upon which the trial court denied Conner's motion — the requirement that the proposed intervenor claims an interest relating to the property or transaction that is the subject of the action — the proposed intervenor's interest must be "direct, substantial, and legally protectable." *Fairview Gen. Hosp. v. Fletcher*, 69 Ohio App.3d 827, 832, 591 N.E.2d 1312 (10th Dist.1990);

Grover Court Condominium Unit Owners' Assn. v. Hartman, 8th Dist. Cuyahoga No. 94910, 2011-Ohio-218, ¶ 16.

{¶ 16} In a foreclosure action, the mortgaged property is the subject matter of the action. *Women's Fed. Sav. Bank v. Akram*, 33 Ohio App.3d 255, 256, 515 N.E.2d 939 (8th Dist.1986). "'Parties who claim an interest in the property * * * include mortgage holders, parties who have judgment liens, or parties who may have signed contracts to purchase or lease the property.'" *KeyBank Natl. Assn. v. Liberty Holding Group, L.L.C.*, 8th Dist. Cuyahoga No. 93888, 2011-Ohio-923, ¶ 18, quoting *Green v. Lemarr*, 139 Ohio App.3d 414, 431, 744 N.E.2d 212 (2d Dist.2000). Conner first contends that he had an interest in the property because he had a lien on the property under the 2002 filing with the auditor and recorder's offices. We disagree.

{¶ 17} The 2002 restraining order, and Conner's filing of it, did not create a lien. R.C. 2329.02 governs judgment liens, and provides in relevant part as follows:

> Any judgment or decree rendered by any court of general jurisdiction, including district courts of the United States, within this state shall be a lien upon lands and tenements of each judgment debtor within any county of this state from the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of such judgment, setting forth the court in which the same was rendered, the title and number of the action, the names of the judgment creditors and judgment debtors, the amount of the judgment and costs, the rate of interest, if the judgment provides for interest, and the date from which such interest accrues, the date of rendition of the judgment, and the volume and page of the journal entry thereof.

{¶ 18} The restraining order that Conner relies on for his contention that he had a lien against the subject property does not meet the criteria for a judgment lien under R.C. 2329.02. The order does not set forth a judgment creditor, judgment

debtor, the amount of judgment, and interest, if any. Rather, it restrains Rex from "encumbering, transferring, selling, or otherwise hypothecating her interest in the real property." Further, no lien was created merely because he filed it with the recorder and auditor's offices.

{¶ 19} As mentioned, Huntington contends that Conner could have filed an affidavit under R.C. 5301.252, which is titled "affidavits on facts relating to title." Subsection (A) of the statute provides as follows:

> An affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy, shall be evidence of the facts stated, insofar as such facts affect title to real estate.

{¶ 20} Under subsection (B)(3), an affidavit filed under this section may provide information relating to the "happening of any condition or event that may create or terminate an estate or interest." R.C. 5301.252(B)(3). Conner did not file an affidavit under the statute. But even had he done so, such an affidavit would not have created an equitable lien or encumbrance on the property. *See Bradford v. Reid*, 126 Ohio App.3d 448, 453, 710 N.E.2d 761 (1st Dist.1998) ("The filing [of an affidavit] itself creates no interest in the property or encumbrance on the title. The filing can only be *evidence* of an adverse interest, not an interest itself.") (Emphasis sic.)

{¶ 21} Conner next contends that his interest in the property was protected under the doctrine of lis pendens. R.C. 2703.26 generally explains the doctrine:

> When a complaint is filed, the action is pending so as to charge * * * third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title.

{¶ 22} The following elements are required to invoke the doctrine of lis pendens:

> (1) The property must be of a character to be subject to the rule; (2) the court must have jurisdiction over both the person and the res; and (3) the property or res involved must be sufficiently described in the pleadings. It may be added that the litigation must be about some specific thing that must be necessarily affected by the termination of the suit.

Third Fed. Sav. & Loan Assn. v. Hayward, 9th Dist. Summit No. 18561, 1998 Ohio App. LEXIS 3765, 13 (Aug. 19, 1998), quoting *Cook v. Mozer*, 108 Ohio St. 30, 37, 140 N.E. 590 (1923). "The doctrine of lis pendens protects a plaintiff's interest in real estate *while the case is pending*." (Emphasis added.) *Bank of New York v. Stambaugh*, 11th Dist. Trumbull No. 2002-T-0184, 2003-Ohio-6416, ¶ 25.

{¶ 23} In *Hayward*, the Ninth Appellate District considered the doctrine of lis pendens in a foreclosure involving divorced spouses. In that case, the husband and wife's divorce decree ordered the subject property sold and instructed how the proceeds were to be divided. The divorce decree was not recorded but the Ninth District Court of Appeals held that lis pendens protected the wife's interest in the property.

{¶ 24} But in *Hayward*, unlike here, the divorce decree explicitly stated that the domestic relations court retained jurisdiction over the subject property "until it is sold." Thus, the Ninth District determined that the "doctrine of lis pendens

continued to protect [the wife's] interest in the * * * property until the sale of that property had been effected as ordered pursuant to the 1993 divorce decree." *Id.* at 14-15. Thus, even though the husband and wife's divorce case was not pending at the time of the foreclosure, the divorce decree at issue relative to the subject property specifically stated that the court retained jurisdiction over the property until it was sold.

{¶ 25} *Hayward* contrasts with *Stambaugh*, 11th Dist. Trumbull No. 2002-T-0184, 2003-Ohio-6416. In *Stambaugh*, the Stambaughs were divorced in 1981, and the wife was awarded the marital residence, which was previously titled in her name. The husband was awarded a $66,927.50 lien against the property. The husband did not record his lien.

{¶ 26} In 1986, the Stambaughs were in the domestic relations court again litigating various issues. Relative to the property, the court issued a judgment stating that the husband's lien was the first lien of priority. The judgment entry ended with the language "all this until further order of the court." *Id.* at ¶ 3.

{¶ 27} In 1995, the wife executed a mortgage with the Bank of New York. The mortgage was recorded in the county recorder's office. The wife became delinquent and the bank commenced foreclosure proceedings. The husband intervened in the action, and maintained that he had superior interest in the property because of the lien conveyed to him via the 1981 judgment in the divorce action. The issue before the Eleventh Appellate District was whether the husband or the bank's lien had priority.

{¶ 28} The appellate court found that the bank's lien had priority. The court first noted that regardless of the domestic relations court's judgment granting the husband an interest in the subject property, it needed to be recorded as mandated by R.C. 5301.23 and 5301.25. The Eleventh District distinguished its case from *Hayward*, finding that in *Hayward*, no lien was granted; rather, the property was ordered sold. The appellate court further distinguished *Hayward* by noting that the domestic relations court's judgment in *Hayward* specifically stated that it retained jurisdiction over the property, while the judgment in *Stambaugh* merely stated "all this until further order of the court." *Stambaugh* at ¶ 24.

{¶ 29} Here, not only was Rex and Conner's divorce case not pending at the time of the foreclosure, the judgment entry in their divorce proceeding did not make any disposition regarding the property and did not state that the domestic relations court had continuing jurisdiction over the property. Moreover, as previously discussed, the judgment did not give Conner a lien against the property.

{¶ 30} In light of the above, lis pendens does not apply here, and Conner did not have a lien against the subject property. The trial court did not abuse its discretion by denying Conner's motion to intervene. His sole assignment of error is therefore overruled.

{¶ 31} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

LARRY A. JONES, SR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
RAYMOND C. HEADEN, J., CONCUR

[Cite as *Tchankpa v. Ascena Retail Group. Inc.*, 2020-Ohio-3291.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kassi Tchankpa,	:	
Plaintiff-Appellant,	:	No. 19AP-760 (C.P.C. No. 15CV-10472)
v.	:	(ACCELERATED CALENDAR)
Ascena Retail Group, Inc.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 11, 2020

On brief: *DeWitt Law, LLC*, and *Michael W. DeWitt*, for appellant.

On brief: *Littler Mendelson, P.C.*, *Brooke E. Niedecken*, and *Benjamin W. Mounts*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

BROWN, J.

{¶ 1} Kassi Tchankpa, plaintiff-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by Ascena Retail Group, Inc., defendant-appellee.

{¶ 2} Appellee is a retailer of apparel, shoes, and accessories. In June 2011, appellant began working for appellee's subsidiary as a database administrator. On December 21, 2012, appellant was injured lifting two laptop computers while working for appellee. In January 2013, appellant started receiving medical treatment which was initially paid through appellee's health insurance plan.

{¶ 3} On May 9, 2013, appellant reported his injury to appellee's human resources department and the department advised appellant to file a workers' compensation claim if he believed he received a work-related injury, instead of billing his medical costs through the health insurance plan. Appellee's health insurance plan eventually stopped providing coverage for appellant's medical bills after being informed the injury was part of a potential workers' compensation claim.

{¶ 4} On September 30, 2013, appellant requested reimbursement of his medical expenses through Ohio Bureau of Workers' Compensation. On October 4, 2013, appellee, who is a self-insurer for purposes of workers' compensation, denied the claim, citing on the C-9 request form: "Denied. [C]laim requires further investigation." On October 11, 2013, appellee denied appellant's workers' compensation claim in the FROI-1, First Report of an Injury, Occupational Disease or Death form ("FROI-1"), checking the box that indicated "Rejection—The employer rejects the validity of this claim for the reason(s) listed below." Appellee indicated below: "Delay in reporting; under investigation." On July 3, 2014, a district hearing officer ("DHO") for the Industrial Commission of Ohio ("commission") allowed appellant's workers' compensation claim for temporary total disability ("TTD"). On July 15, 2014, appellee filed an appeal of the DHO's order. On September 18, 2014, a staff hearing officer ("SHO") denied TTD. The commission upheld the denial of appellant's claim on October 7, 2014. Appellant appealed the commission's decision but voluntarily dismissed the appeal on June 21, 2016.

{¶ 5} On November 23, 2015, appellant, pro se, filed the present action against appellee, alleging a claim for intentional tort for bodily injury, pursuant to R.C. 2745.01, based on appellee's refusal to pay his medical bills and withholding workers' compensation benefits. On December 18, 2015, appellee filed a motion to dismiss pursuant to Civ.R. 12(B)(6). On February 19, 2016, the trial court granted appellee's motion to dismiss. Appellant appealed. In *Tchankpa v. Ascena Retail Group., Inc.*, 10th Dist. No. 16AP-190, 2016-Ohio-8354, this court reversed the trial court's decision finding the facts appellant alleged in his complaint were sufficient to support a claim that appellee acted in bad faith in terminating his medical coverage, knowing it would cause physical and psychological harm. Thus, we concluded appellant stated a claim for intentional tort for bodily injury pursuant to R.C. 2745.01.

{¶ 6} On remand, the trial court stayed the matter on April 18, 2017 pending the outcome of appellant's action against appellee in the Southern District of Ohio. On August 7, 2018, the federal court declined to address appellant's intentional tort claim. On January 18, 2019, appellant filed a motion to lift the stay which the trial court granted on March 4, 2019. On June 10, 2019, appellee filed a motion for summary judgment claiming appellant's action was barred by the two-year statute of limitations in R.C. 2305.10.

{¶ 7} On October 30, 2019, the trial court granted appellee's motion for summary judgment on the basis that appellant's claim for intentional tort for bodily injury was barred by the two-year statute of limitations. Appellant appeals the judgment of the trial court, asserting the following three assignments of error:

> [I.] The Common Pleas Court committed reversible error when it granted Summary Judgment in favor of Ascena on Tchankpa's viable intentional tort claims based upon the two-year statute of limitations.
>
> [II.] The Common Pleas Court committed reversible error when it granted summary judgment in favor of Ascena by failing to address Mr. Tchankpa's viable bad faith claims governed by the four-year statute of limitations.
>
> [III.] The Common Pleas Court committed reversible error when it granted summary judgment in favor of Ascena on Tchankpa's common-law intentional tort and bad faith claims filed within the two-year and four-year statutes of limitations.

{¶ 8} All three of appellant's assignments of error alleged the trial court erred when it granted summary judgment. Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the non-moving party, and that conclusion is adverse to the non-moving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770*

W. Broad AGA, L.L.C., 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 9} When seeking summary judgment on the ground the non-moving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Id*. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the non-moving party has no evidence to support its claims. *Id*. If the moving party meets its burden, then the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id*.

{¶ 10} Appellant argues in his first assignment of error the trial court erred when it granted summary judgment to appellee on his intentional tort claims based on the two-year statute of limitations. The Supreme Court of Ohio has found that the statute of limitations for claims under R.C. 2745.01 is two years pursuant to R.C. 2305.10. *See Funk v. Rent-All Mart, Inc.*, 91 Ohio St.3d 78, 81 (2001). R.C. 2305.10 governs the statute of limitations for personal injuries and provides in relevant part that "an action for bodily injury * * * shall be brought within two years after the cause of action accrues. [A] cause of action accrues under this division when the injury or loss to person * * * occurs." R.C. 2305.10(A). It is a long-established rule that a "[s]tatute of limitations commences to run so soon as the injurious act complained of is perpetrated, although the actual injury is subsequent." *Kerns v. Schoonmaker*, 4 Ohio 331 (1831), syllabus.

{¶ 11} One exception to the above rule, however, is the discovery rule. Under that rule "[w]hen an injury does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or by the exercise of reasonable diligence should have known, that he [or she] had been injured by the conduct of the defendant, for purposes of the statute of limitations." *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 87 (1983),

paragraph two of the syllabus. The Supreme Court has held that the exceptions to the statute of limitations can apply where an " 'unconscionable result' " would be had if a plaintiff's right to recovery was barred by the statute of limitations before he or she was even aware of his or her injuries. *LGR Realty, Inc. v. Frank & London Ins. Agency*, 152 Ohio St.3d 517, 2018-Ohio-334, ¶ 26, quoting *Wyler v. Tripi*, 25 Ohio St.2d 164, 168 (1971). The discovery rule entails a two-pronged test—i.e., actual knowledge not just that one has been injured but also that the injury was caused by the conduct of the defendant. *O'Stricker* at 90.

{¶ 12} In the present case, the trial court, in its decision granting appellee's motion for summary judgment, addressed the statute of limitations in two contexts. With regard to any cause of action based on the actual injury sustained in late December 2012, the trial court found the statute of limitations for an intentional tort by an employer would have expired in December 2014, nearly one year before appellant filed his case in November 2015. With regard to a cause of action based on appellee's denial of appellant's benefits, the trial court found the statute of limitations for an intentional tort by an employer would have expired on October 11, 2015, because the cause of action accrued on October 11, 2013, the day appellee issued an affirmative rejection of appellant's workers' compensation claim, and any actions or denials after that date occurred as a result of the appellate process.

{¶ 13} In his present appeal, appellant sets forth the following arguments as to why his claim was not barred by the two-year statute of limitations: (1) the discovery rule applies here, and appellant did not discover that appellee had denied payments for his injury and disability medical treatment claim until November 2013, not October 11, 2013, as the trial court determined, (2) appellee waived the statute of limitations defense as an affirmative defense because, in its third answer to appellant's February 11, 2019 amended complaint, it only generally asserted that appellant's claims were barred by the applicable statute of limitations, and (3) appellee waived the statute of limitations defense as an affirmative defense because, in its third answer to appellant's February 11, 2019 amended complaint, appellee only reserved the right to assert the statute of limitations defense and did not actually assert the defense.

{¶ 14} However, in his response in opposition to appellee's motion for summary judgment in the trial court, appellant failed to raise any of the above arguments he now asserts. The entirety of appellant's response to the statute of limitations argument was the following:

> It is undisputed that Tchankpa's claims fall under the two-year statute of limitations contained in R.C. 2745.01. The only logical time Tchankpa's claims could have arisen is when the claim was denied. Ascena picks two arbitrary dates as the date the claim was denied, May 9, 2013, which was the date Tchankpa first filed the workers' compensation claim after his May 3rd meeting with Null, and October 11, 2013, the date that payments were *suspended* allegedly for lack of medical records. As noted above, the OIC's letter was dated November 9, 2013 and gave Ascena 14 days to appeal so the first date that could be deemed to be a denial of the claim was the next day, November 24th. As such, November 23, 2015 was within two years. However, Ascena continued to investigate the claim and request information from Tchankpa's doctors well into the spring of 2014. If the claim had been denied, there was no reason to continue the investigation. As such, November 23, 2015 was well within the two-year statute of limitation.

(Emphasis sic.)

{¶ 15} Thus, it is apparent appellant never raised his current arguments regarding the discovery rule and waiver of the statute of limitations defense at the trial court level. Interestingly, appellant does not specifically raise the above-quoted argument in the current appeal although it was the sole argument he relied on at the trial court level.

{¶ 16} Insofar as appellant seeks to raise for the first time on appeal the discovery rule and waiver of the statute of limitations defense, appellant has waived those arguments. Ordinarily, the doctrine of waiver precludes a litigant from raising an issue for the first time on appeal. *S & P Lebos, Inc. v. Ohio Liquor Control Comm.*, 163 Ohio App.3d 827, 2005-Ohio-5424, ¶ 12 (10th Dist.). The waiver rule is tempered somewhat by the doctrine of plain error. *Id.* However, in a civil case, the doctrine of plain error will be applied only in the " 'extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of

the underlying judicial process itself.' " *Id.*, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122-23 (1997). Here, we find no plain error in the trial court's determination, and appellant directs us to none.

{¶ 17} To the extent that we can strain appellant's general argument on appeal—that appellee's October 11, 2013 denial of his claim was not a final, definite, confirmatory, or affirmative denial but was only conditional because it indicated that the "[C]laim requires further investigation"—to square with appellant's general contention in the trial court—that the October 11, 2013 document was not a final denial but only "suspended" payments due to a lack of medical records—we find no error in the trial court's determination that the October 11, 2013 document was an affirmative denial that triggered the running of the statute of limitations. Initially, appellant does not accurately quote the October 11, 2013 document. It was in the October 4, 2013 C-9 request form that appellee indicated: "Denied. [C]laim requires further investigation." In the October 11, 2013 FROI-1, appellee checked the box indicating "Rejection—The employer rejects the validity of this claim for the reason(s) listed below." Below that box, appellee indicated: "Delay in reporting; under investigation." We agree with the trial court that the denial in the October 11, 2013 FROI-1 is clear. Appellee explicitly rejected appellant's claim and stated the reason. Although further proceedings took place after the October 11, 2013 rejection, we agree with the trial court that those proceedings were all appeals of the original October 11, 2013 denial. Furthermore, the "under investigation" language included in the October 11, 2013 denial does not in any way diminish the definite and unreserved rejection language. The rejection clearly informed appellant he was being denied workers' compensation benefits and commenced the running of the statute of limitations for any claim based on such denial. For these reasons, we find the trial court did not commit any error, plain or otherwise, when it granted summary judgment in favor of appellee on appellant's intentional tort claim based on the two-year statute of limitations. Appellant's first assignment of error is overruled.

{¶ 18} Appellant argues in his second assignment of error the trial court erred when it granted summary judgment to appellee by failing to address his bad-faith claim which he now contends is governed by the four-year statute of limitations found in R.C. 2305.09(D). Appellant claims he raised a bad-faith tort claim based on appellee's failure

to process and pay for his injury and disability medical treatment bills as requested after it unilaterally terminated and transferred his injury and disability medical treatment coverage from the health insurance carrier, Aetna, to appellee's self-insured workers' compensation program, thereby causing him to suffer more physical and psychological harm. Appellant asserts that, in granting summary judgment to appellee, the trial court disregarded the viability of his bad-faith tort claim, as if his intentional tort claim and bad-faith claim were the same.

{¶ 19} We find the trial court did not err. We conclude appellant waived his argument that his bad-faith claim against appellee was subject to a four-year statute of limitations and invited any error in the trial court's determination that appellant's claims were subject to a two-year statute of limitations. However, before we address waiver and invited error, we note that it is debatable whether appellant's "bad-faith" claim, in the context of this case, is actually an intentional tort claim under R.C. 2745.01 subject to a two-year statute of limitations. In the majority decision in *Tchankpa*, although we concluded that "the complaint filed by Tchankpa clearly alleges that Ascena terminated Tchankpa's medical coverage under conditions which indicate bad faith and which indicate knowledge that the termination of the coverage would do physical harm to Tchankpa,"throughout the decision we only referred to an intentional tort claim under R.C. 2745.01. *Id.* at ¶ 17. Nowhere did we say appellant had alleged a common-law bad-faith claim in his complaint. Indeed, in appellant's complaint, he alleges that his claims are all governed by R.C. 2745.01. Also, in his December 29, 2015 and January 15, 2016 responses to appellee's motion to dismiss, appellant contends all of his claims are governed by R.C. 2745.01. In addition, as noted in the dissent in *Tchankpa*, in *White v. Mt. Carmel Med. Ctr.*, 150 Ohio App.3d 316, 2002-Ohio-6446 (10th Dist.), this court addressed the arguments relating to bad faith against a self-insured employer in administering workers' compensation claims under the asserted intentional tort claim. *See Tchankpa* at ¶ 22-23.

{¶ 20} Regardless, whether appellant's bad-faith claim was separate from his intentional tort claim is a question we need not answer. We can find nowhere in the trial record where appellant asserted any of his claims were subject to a four-year statute of limitations. Appellant clearly does not raise this argument in his response in opposition to

appellee's motion for summary judgment when he had the opportunity and obligation to address the issue. The failure to raise an argument in response to a motion for summary judgment waives the argument for purposes of appellate appeal. *Lacey v. Ohio Aud. of State*, 10th Dist. No. 19AP-110, 2019-Ohio-4266, ¶ 13, fn. 1, citing *Betz v. Penske Truck Leasing Co., L.P.*, 10th Dist. No. 11AP-982, 2012-Ohio-3472, ¶ 34 (failure to raise argument in response to motion for summary judgment waives argument on appeal); *Shutway v. Chesapeake Exploration, LLC*, 7th Dist. No. 18 BE 0030, 2019-Ohio-1233, ¶ 57, citing *Covert v. Koontz*, 7th Dist. No. 13 MO 8, 2015-Ohio-228, ¶ 16 (because filings in response to motion for summary judgment did not raise the argument, it is waived); *Clifton Care Ctr. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-709, 2013-Ohio-2742, ¶ 13 (a party may not change its theory of the case and present new arguments for the first time on appeal). While it is true that "[a]ppellate courts review summary judgment decisions de novo[,] * * * the parties are not given a second chance to raise arguments that they should have raised below." *Whitson v. One Stop Rental Tool & Party*, 12th Dist. No. CA2016-03-004, 2017-Ohio-418, ¶ 18. Therefore, because appellant failed to raise the argument that his "bad-faith" claims were subject to a four-year statute of limitations, including his response in opposition to appellee's motion for summary judgment, we find appellant waived such argument for purposes of appeal.

{¶ 21} Furthermore, to the extent that his "bad-faith" claims might be properly subject to a four-year statute of limitations, appellant has invited any error in the trial court's determination that his claims were subject to a two-year statute of limitations. Appellant specifically alleged in his complaint that his claims were subject to a two-year statute of limitations. Importantly, in his July 8, 2019 response in opposition to appellee's motion for summary judgment, appellant conceded that his claims were subject to a two-year statute of limitations, and his entire argument was based on the premise that a two-year statute of limitations applied. In his response, appellant stated "[i]t is undisputed that Tchankpa's claims fall under the two-year statute of limitations contained in R.C. 2745.01." In its July 29, 2019 reply in support of its motion for summary judgment, appellee pointed out appellant's concession to the trial court: "Plaintiff concedes that his intentional-tort claims are subject to a two[-]year statute of limitations under O.R.C. § [2745.01]. *See* Pl.'s Memo. In Opp., 12-13."

{¶ 22} Under the invited-error doctrine, "[a] party will not be permitted to take advantage of an error which he himself invited or induced." *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20 (1986). *See also De Bourbon v. State Med. Bd. of Ohio*, 10th Dist. No. 17AP-769, 2018-Ohio-4682, ¶ 22 (finding that under the invited-error doctrine, appellant is not entitled to take advantage of an error that he induced the trial court to make). A party that makes an admission in a memorandum contra summary judgment that is consistent with the trial court's determination in granting summary judgment is precluded by the invited-error doctrine from arguing on appeal that the trial court committed error in making such determination. *Thomas v. Shaevitz*, 10th Dist. No. 98AP-1370 (Sept. 16, 1999). In the present case, appellant invited any error in the trial court's determination that the two-year statute of limitations applied to all of appellant's claims. For the foregoing reasons, we overrule appellant's second assignment of error.

{¶ 23} Appellant argues in his third assignment of error the trial court erred when it granted summary judgment to appellee on his common-law intentional tort and bad-faith claims filed within the two-year and four-year statutes of limitations. In this assignment of error, appellant claims the trial court erred when it found that, because the commission terminated his TTD payments in the commission's final order on October 7, 2014, appellee was not required to pay for any TTD compensation prior to the commission's October 7, 2014 final order. Appellant claims that because appellee waived the right to appeal the DHO's July 3, 2014 order granting him TTD via a July 30, 2014 waiver, the July 3, 2014 order was a final determination until reversed by the commission on October 7, 2014 and he was entitled to continuing TTD payments throughout that period, pursuant to R.C. 4123.511(I), 4123.56(A), and Ohio Adm.Code 4121-3-32(B). Appellant then contends that his common-law intentional tort and bad-faith claims began to run on the dates appellee terminated his TTD payments, which were on August 18, September 3, and 11, 2014.

{¶ 24} Initially, we make three observations. First, our review of the trial court's decision fails to reveal that the trial court made a determination on any specific claim regarding non-payment of TTD benefits prior to October 7, 2014 and any associated application of such a claim to the statute of limitations, as raised here by appellant on appeal. Second, the SHO specifically indicated in its September 18, 2014 order that it was

hearing the matter upon appellee's appeal of the DHO's order, and we find no evidence in the record that appellant ever raised an objection as to the alleged waiver of appellee's appeal. Third, the July 30, 2014 "waiver" appellant refers to is an online request by appellee to continue the SHO hearing on its appeal of the DHO's order. This request indicates all parties agreed to the continuance and to waive the timeframes contained in R.C. 4123.511 and any other applicable provisions in the Ohio Revised Code. Appellant fails to explain how this agreement to continue the SHO hearing constituted a waiver by appellee of its appeal to the SHO. Thus, the main underlying bases of appellant's current argument are unfounded.

{¶ 25} Regardless, appellant has waived this argument. Appellant did not allege any intentional tort claim in his complaint with regard to non-payment of TTD benefits prior to the October 7, 2014 order. He did not raise this argument in his December 29, 2015 response to appellee's motion to dismiss. We did not mention this claim as a viable claim in our decision in *Tchankpa*. It is not until appellant's July 8, 2019 response in opposition to the motion for summary judgment that appellant first raises this claim. Raising such a claim for the first time in his response to appellee's motion for summary judgment is insufficient to thwart a motion for summary judgment.

> A plaintiff cannot fulfill her burden under Civ.R. 56 merely by asserting new claims in response to a properly supported motion for summary judgment. See *White v. Mt. Carmel Med. Ctr.*, 150 Ohio App.3d 316, 2002-Ohio-6446, at ¶ 30, 780 N.E.2d 1054 (concluding that, while, plaintiff is not bound to a particular theory of her case, it is inequitable to permit a plaintiff to assert new claims in response to a motion for summary judgment without amending the complaint.). See, also, *Scassa v. Dye*, 7th Dist. No. 02CA0779, 2003-Ohio-3480, at ¶ 25-30. This tactic, if successful, would permit every nonmoving party-plaintiff to avoid summary judgment by simply asserting different claims based on different substantive law with different material facts.

Bradley v. Sprenger Ents., 9th Dist. No. 07CA009238, 2008-Ohio-1988, ¶ 8. *See also Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741 (1st Dist.) (a plaintiff cannot fulfill his burden to show a triable issue of fact by asserting new claims or theories in response to a properly supported motion for summary judgment); *Aronhalt v. Castle*, 10th Dist. No. 12AP-196, 2012-Ohio-5666, ¶ 26 (a plaintiff cannot fulfill its Civ.R. 56

burden by merely raising new grounds for recovery in response to a properly supported motion for summary judgment), citing *Morris v. Dobbins Nursing Home*, 12th Dist. No. CA2010-12-102, 2011-Ohio-3014, ¶ 29; *Bradley*; *Stadium Lincoln-Mercury, Inc. v. Heritage Transport*, 160 Ohio App.3d 128, 2005-Ohio-1328, ¶ 35 (7th Dist.); and *White*, 2002-Ohio-6446 at ¶ 30. Holding otherwise would deprive the defendant of fair notice and an opportunity to respond to the plaintiff's claims. *Aronhalt* at ¶ 26, citing *Karsnak v. Chess Fin. Corp.*, 8th Dist. No. 97312, 2012-Ohio-1359, ¶ 48; *Stadium Lincoln-Mercury, Inc.* at ¶ 35; and *White*, 2002-Ohio-6446 at ¶ 30. A plaintiff must respond to a motion for summary judgment based on the claims already presented rather than surprise the defendant and court with new theories of recovery. *Aronhalt* at ¶ 26, citing *Stadium Lincoln-Mercury, Inc.* at ¶ 35.

{¶ 26} For these reasons, in the present case, appellant waived this issue by failing to allege it in his complaint and by first asserting it in his response in opposition to appellee's motion for summary judgment. Therefore, we overrule appellant's third assignment of error.

{¶ 27} Accordingly, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER, P.J., and DORRIAN, J., concur.
