The Bullet Point: Ohio Commercial Law Bulletin

What do I need to Prove in Order to Enforce a Promissory Note?

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Statute of Repose

Wilson v. Durrani, Slip Opinion No. 2020-Ohio-6827
In this appeal, the Supreme Court of Ohio reversed the lower court's decision, determining that the plaintiffs' claims were time-barred because Ohio's saving statute does not create an exception to a true statute of repose.

- **The Bullet Point:** Statutes of limitations establish a time limit for bringing a lawsuit based on the date when the plaintiff's claim accrued. Statutes of repose bar an action that is brought after a specified period of time since the defendant acted, regardless of whether or not the plaintiff has yet to be injured by the defendant's actions. Simply stated, both statutes of limitations and statutes of repose limit the period of time in which a plaintiff may file an action. On the other hand, saving statutes extend that period of time. Under Ohio's saving statute, a plaintiff is afforded a limited period of time in which to refile a dismissed claim that would otherwise be time-barred. R.C. 2305.19(A). However, Ohio's saving statute does not toll the statute of limitations, and it does not operate as a statute of limitations itself. In this matter, the Court analyzed the interplay between the statute of limitations, statute of repose, and saving statute and determined the plaintiffs' medical malpractice claims against the defendant were time-barred. The Court noted that although the plaintiffs voluntarily dismissed their claims, they could not take advantage of the one-year filing period provided by the saving statute as their claims were dismissed after the statute of repose had already passed. The Court explained that the statute under which the plaintiffs brought their claims contains "a true statute of repose that, except as expressly stated [in the statute], clearly and unambiguously precludes the commencement" of a medical claim after the specified period of time. As the statute under which the plaintiffs brought their claims does not contain an express exception for application of the saving statute, the Court determined the Ohio General Assembly did not intend for the savings statute to apply. As such, the expiration of the statute of repose precluded the plaintiffs from using the saving statute to commence their actions against the defendant.

Chain of Title to Enforce a Promissory Note

***U.S. Bank Natl. Assn. v. George*, 10th Dist. Franklin No. 20AP-43, 2020-Ohio-6758**
In this appeal, the Tenth Appellate District affirmed the trial court's decision, agreeing that a lender does not need to prove a promissory note's chain of custody for all time in order to enforce the note and mortgage.

- **The Bullet Point:** A promissory note secured by a mortgage is a negotiable instrument. Under R.C. 1303.31(A), a person entitled to enforce such a promissory note includes the "holder" of the instrument. To qualify as a holder, a person must 1) have possession of the note, and 2) the note must be indorsed either in blank to the bearer or specifically to the one presenting it. R.C. 1301.201(B)(21)(a). In this matter, the borrowers argued the lender did not prove its possession of the original note as it did not demonstrate the note's chain of custody prior to the lawsuit. As the court explained, proving "possession" does not mean that the lender must track the physical location of the original note at all times. On the contrary, the lender must prove possession of the note at the time of trial. The court further explained that a "chain of custody is needed only when an item is by nature fungible and indistinguishable, having no unique characteristics, like a pill." The note had identifiable characteristics, namely, the borrowers' acknowledged signatures. Further, there was no evidence the note had been altered in any way since the borrowers signed it. Therefore, proof of the note's chain of custody was not necessary. The borrowers also argued the lender was not entitled to enforce the note as it failed to prove the note's chain of transfer. Pursuant to R.C. 1303.36(A), in actions with respect to an instrument, such as a foreclosure, "the authenticity of, and authority to make, each signature on an instrument is admitted" unless specifically denied in the pleadings. If the defendant makes this specific denial, the burden of establishing validity is on the plaintiff. That being said, there is a "rebuttable presumption that the signature is authentic and authorized." Here, the borrowers failed to specifically deny the authenticity of any signature or any person's authority to make any of the indorsements on the note. Moreover, they failed to present any evidence to overcome the rebuttable presumption of validity that attached to the signatures. As the lender proved possession by producing the original note at trial, and the indorsements were deemed valid, the court determined the lender was the holder entitled to enforce the note and mortgage against the borrowers.

Grounds to Vacate a Sheriff Sale

***New Residential Mtge. LLC v. Barnes*, 12th Dist. Warren No. CA2020-04-027, 2020-Ohio-6907**
In this appeal, the Twelfth Appellate District affirmed in part and reversed in part the trial court's decision, holding that the sheriff's sale should be set aside under the doctrine of mistake.

- **The Bullet Point:** Although judicial sales have a certain degree of finality, such sales may be set aside depending upon the facts surrounding the sale. In determining whether or not to set aside a judicial sale, Ohio courts consider factors such as "(1) the difference between what the property sold for at a judicial sale and the amount of mortgage indebtedness; (2) the timeliness of the motion to set aside; and (3) the likelihood of a higher bid if the sale is set aside." In this matter, the creditor filed a motion to set aside a sheriff's sale on the ground of mistake. Specifically, the creditor's counsel was mistaken when it sent local counsel to make an in-person bid instead of an online bid on behalf of the creditor. Although the creditor's counsel tried to correct this mistake by making an online bid, the bid was rejected as there was insufficient time to register the creditor. The property was sold to the lowest bidder, and the creditor's counsel immediately moved to set aside the sheriff's sale. The appellate court agreed the sale should be set aside, explaining that "the primary objective of judicial sales is to raise the money due to the creditor, not to allow the property to be sacrificed at a price significantly below its market value due to the mistake of a party or the party's counsel." In this instance, the property was sold the morning of the first day that the sheriff's sales took place online instead of in person. Although there were three higher bids, the property was sold to the lowest bidder as it was the only bidder who was able to register online to make a deposit. Further, if the sheriff's sale were to stand, the creditor would be faced with a deficiency judgment in excess of $38,000. Considering all of the factors, the appellate court determined "the equities of the situation dictate that the doctrine of mistake should be applied and the sale vacated."

Action for Money Had and Received

***LRC Realty, Inc. v. B.E.B. Properties*, 11th Dist. Geauga No. 2016-G-0076, 2020-Ohio-6999**
In this appeal, the Eleventh Appellate District reversed in part the trial court's decision and remanded the matter, holding that the court's balancing of equities under Ohio's theory of money had and received is inappropriate on summary judgment as there existed genuine issues of material fact.

- **The Bullet Point:** Under longstanding Ohio law, an action for money had and received exists when one party to a contract fully performs its obligations and the other party is unjustly enriched thereby. As explained by the court, an action for money had and received is not based on contract. Rather, it is an equitable action based upon "a moral obligation to make restitution where retention of benefits bestowed would result in inequity and injustice." As such, a party may defeat an action on the contract but still be liable to the other party in equity. Judgment may also be entered against a non-contracting party under this theory when the non-contracting party withholds money that, in justice and equity, belongs to another. The court further explained that such an equitable claim exists when one party receives money from another without giving valuable consideration. When analyzing such equitable actions, Ohio courts must balance the competing equities. In this matter, the defendants argued it would be inequitable for them to pay damages to the co-defendant for rental payments they received under a lease. In support of their claim, the defendants presented evidence they were the only party to pay value for the right to receive said rental payments. In addition, the evidence demonstrated the co-defendant may have had prior knowledge it did not own the right to receive the rental payments. Analyzing the evidence presented, the court agreed with the defendants and determined they raised genuine issues of material fact regarding the co-defendant's entitlement to recover damages for the rental payments.

HUD Face-to-Face Requirements

***Wilmington Sav vs. Fund Soc., FSB v. Salahuddin*, 10th Dist. Franklin No. 19AP-190, 2020-Ohio-6934**
In this case, the Tenth Appellate District affirmed in part and reversed in part the trial court's decision, finding that the mortgagee failed to demonstrate it complied with the HUD requirements under 24 C.F.R. 203.602 prior to initiating foreclosure.

- **The Bullet Point:** Part 203, Title 24 of the Federal Code of Regulations contains the regulations applicable to federally insured mortgages for single-family mortgage insurance, and mortgagees must comply with these HUD regulations prior to initiating foreclosure proceedings. One of these conditions precedent is detailed in 24 C.F.R. 203.602, which states that the mortgagee must provide each mortgagor in default with a delinquency notice "on a form supplied by the Secretary or, if the mortgagee wishes to use its own form, on a form approved by the Secretary." As a condition precedent, a mortgagee moving for summary judgment on a note secured by a mortgage must present Civ.R. 56 evidence establishing that it complied with the default notice requirements in 24 C.F.R. 203.602 prior to bringing its foreclosure action. In this matter, the mortgagor opposed the mortgagee's motion for summary judgment, alleging the notice of default did not satisfy the HUD requirements. In support of her argument, the mortgagor submitted to the court documentation outlining what HUD requires in a default notice to satisfy 24 C.F.R. 203.602, as well as the information that must be included in the cover letter and accompanying brochure. In response, the mortgagee made a blanket assertion that the notice of default satisfied the HUD requirements. The court noted that the mortgagee failed to provide testimony in any affidavit averring that any of the default letters were on a form supplied by HUD or on a form approved by HUD. Moreover, the mortgagee failed to respond to or provide compliance evidence in

response to the mortgagor's argument that HUD requires a specific brochure publication to accompany default letters. As a result, the court determined the mortgagee did not satisfy its burden under Civ.R. 56 with respect to the conditions precedent under 24 C.F.R. 203.602 as it did not respond to the mortgagor's arguments by demonstrating the default letter satisfied all the HUD requirements under 24 C.F.R. 203.602.

On the other hand, the court determined the mortgagee did satisfy its burden under Civ.R. 56 by providing evidence it complied with the conditions precedent under 24 C.F.R. 203.604. In further opposition to the motion for summary judgment, the mortgagor argued the mortgagee failed to comply with the conditions precedent under 24 C.F.R. 203.604. Under 24 C.F.R. 203.604(b), a mortgagee is required to have a "face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." However, this face-to-face meeting is not required if "[t]he mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either." 24 C.F.R. 203.604(c)(2). The mortgagee responded to the mortgagor's argument by providing the court with an affidavit containing an averment that neither the mortgagee nor the servicer has an office or branch within 200 miles of the mortgaged property. Consequently, the mortgagee satisfied its burden and was not required to comply with 24 C.F.R. 203.604(b)'s face-to-face meeting requirement.

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SLIP OPINION NO. 2020-OHIO-6827

WILSON ET AL., APPELLEES, *v.* DURRANI ET AL., APPELLANTS.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Wilson v. Durrani*, Slip Opinion No. 2020-Ohio-6827.]

Statutes of limitations—Statutes of repose—Saving statutes—Plaintiff may not use the saving statute to refile a medical claim after the statute of limitations has expired if the statute of repose has expired—Judgment reversed.

(No. 2019-1560—Submitted August 5, 2020—Decided December 23, 2020.)

APPEAL from the Court of Appeals for Hamilton County, Nos. C180194 and C180196, 2019-Ohio-3880.

FRENCH, J.

{¶ 1} This appeal asks whether a plaintiff may take advantage of Ohio's saving statute to refile a medical claim after the applicable one-year statute of limitations has expired if the four-year statute of repose for medical claims has also expired. We apply the plain and unambiguous language of the statute of repose and answer that question in the negative.

Facts and procedural background

{¶ 2} Appellees, Robert Wilson and Mike and Amber Sand, filed complaints against appellants, Abubakar Atiq Durrani, M.D.; his clinic, Center for Advanced Spine Technologies, Inc.; West Chester Hospital, L.L.C.; and UC Health, in the Hamilton County Court of Common Pleas in December 2015. The Sands asserted claims that arose out of a spinal surgery that Dr. Durrani had performed on Mike Sand in April 2010, and Wilson asserted claims that arose out of spinal surgeries that Dr. Durrani had performed on him in February and April 2011. Appellees are but a few of the many plaintiffs who have filed similar malpractice and related claims against Dr. Durrani and his clinic.

{¶ 3} Both the Wilson complaint and the Sands complaint acknowledge that appellees had previously filed their claims against appellants in prior actions that were dismissed without prejudice, pursuant to Civ.R. 41(A)(1)(a), but neither complaint provides any additional information about those actions. Nevertheless, the parties agree that the Sands and Wilson initially filed their claims against appellants in the Butler County Court of Common Pleas in March and April 2013 respectively and that appellees voluntarily dismissed those claims without prejudice in late 2015—the Sands on November 25 and Wilson on December 11—before refiling their claims in Hamilton County.

{¶ 4} Appellants moved for judgment on the pleadings in both refiled cases, arguing that Ohio's medical statute of repose, R.C. 2305.113(C), barred appellees' refiled claims because they arose out of surgeries that had been performed more than four years before appellees refiled. The trial court agreed and granted appellants' motions.

{¶ 5} Appellees appealed to the First District Court of Appeals, where they argued that the trial court erred by entering judgment on the pleadings in favor of appellants, because the Ohio saving statute afforded them one year after the voluntary dismissals of their claims in Butler County in which to refile their claims,

notwithstanding the expiration of the statute of repose. The First District reversed the trial court's judgment. 2019-Ohio-3880, 145 N.E.3d 1071, ¶ 31-32, 34. It held that appellees had timely refiled their claims pursuant to the saving statute and that the statute of repose did not bar their refiled claims. *Id.* at ¶ 32.

{¶ 6} This court accepted appellants' discretionary appeal to address whether the saving statute permits the refiling of actions beyond the expiration of the medical statute of repose. *See* 157 Ohio St.3d 1562, 2020-Ohio-313, 138 N.E.3d 1152.

Analysis

Statutes of limitations, statutes of repose, and saving statutes

{¶ 7} The question presented in this appeal requires us to consider the interplay between three distinct types of statutes: (1) statutes of limitations, (2) statutes of repose, and (3) saving statutes.

{¶ 8} Statutes of limitations and statutes of repose share a common goal of limiting the time during which a putative wrongdoer must be prepared to defend a claim, but they operate differently and have distinct applications. *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 11, citing *CTS Corp. v. Waldburger*, 573 U.S. 1, 7, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014).

{¶ 9} A statute of limitations establishes "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1707 (11th Ed.2019). A statute of limitations operates on the remedy, not on the existence of the cause of action itself. *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 290, 503 N.E.2d 717, fn. 17 (Douglas, J., concurring). A statute of repose, on the other hand, bars "any suit that is brought after a specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* at 1707. A statute of repose bars the claim—the right of action—itself. *Treese v. Delaware*,

95 Ohio App.3d 536, 545, 642 N.E.2d 1147 (10th Dist.). The United States Supreme Court has likened the bar imposed by a statute of repose to a discharge in bankruptcy—as providing "a fresh start" and "embod[ying] the idea that at some point a defendant should be able to put past events behind him." *CTS Corp.* at 9.

{¶ 10} Statutes of limitations and statutes of repose target different actors. *Id*. at 8. Statutes of limitations emphasize plaintiffs' duty to diligently prosecute known claims. *Id*., citing *Black's Law Dictionary* 1546 (9th Ed.2009). Statutes of repose, on the other hand, emphasize defendants' entitlement to be free from liability after a legislatively determined time. *Id.* at 9. In light of those differences, statutory schemes commonly pair a shorter statute of limitations with a longer statute of repose. *California Pub. Emps.' Retirement Sys. v. ANZ Securities, Inc.*, ___ U.S.____, 137 S.Ct. 2042, 2049, 198 L.Ed.2d 584 (2017). When the discovery rule—that is, the rule that the statute of limitations runs from the discovery of injury—governs the running of a statute of limitations, the "discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability." *Id.* at __, 137 S.Ct. at 2050.

{¶ 11} In contrast to statutes of limitations and statutes of repose, both of which limit the time in which a plaintiff may file an action, saving statutes extend that time. Saving statutes are remedial and are intended to provide a litigant an adjudication on the merits. *Wasyk v. Trent*, 174 Ohio St. 525, 528, 191 N.E.2d 58 (1963). Generally, a saving statute will provide that "where an action timely begun fails in some manner described in the statute, other than on the merits, another action may be brought within a stated period from such failure." Annotation, 6 A.L.R.3d 1043 (1966). It acts as an exception to the general bar of the statute of limitations. *Chadwick v. Barba Lou, Inc.*, 69 Ohio St.2d 222, 232, 431 N.E.2d 660 (1982) (Krupansky, J., concurring in part and dissenting in part).

{¶ 12} We now turn to the specific statutes applicable here.

The applicable statutes: R.C. 2305.113(A), 2305.113(C), and 2305.19

{¶ 13} The court of appeals held—and no party disputes—that appellees' claims constitute "medical claims" as defined in R.C. 2305.113(E)(3). 2019-Ohio-3880, 145 N.E.3d 1071, ¶ 19. R.C. 2305.113 sets out both a one-year statute of limitations, R.C. 2305.113(A), and a four-year statute of repose, R.C. 2305.113(C), that apply to medical claims in Ohio.

{¶ 14} R.C. 2305.113(A) states, "Except as otherwise provided in this section, an action upon a medical * * * claim shall be commenced within one year after the cause of action accrued." A claim for medical malpractice accrues, and the one-year statute of limitations begins to run, "(a) when the patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury, or (b) when the physician-patient relationship for that condition terminates, whichever occurs later." *Frysinger v. Leech*, 32 Ohio St.3d 38, 512 N.E.2d 337 (1987), paragraph one of the syllabus.

{¶ 15} R.C. 2305.113(C) sets out Ohio's statute of repose for medical claims:

> Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply:
>
> (1) No action upon a medical * * * claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical * * * claim.
>
> (2) If an action upon a medical * * * claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical * * *claim, then, any action upon that claim is barred.

{¶ 16} R.C. 2305.113(C) "exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 19. It is a "true statute of repose that applies to both vested and nonvested claims. Therefore, any medical-malpractice action must be filed within four years of the occurrence of the act or omission alleged to have caused a plaintiff's injury." *Antoon*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 1.

{¶ 17} Finally, the relevant saving statute is R.C. 2305.19(A), which provides:

> In any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

{¶ 18} R.C. 2305.19(A) neither operates as a statute of limitations nor operates to toll the statute of limitations. *Lewis v. Connor*, 21 Ohio St.3d 1, 4, 487 N.E.2d 285 (1985), citing *Reese v. Ohio State Univ. Hosp.*, 6 Ohio St.3d 162, 163, 451 N.E.2d 1196 (1983). Rather, it provides a plaintiff with a limited period of time in which to refile a dismissed claim by commencing a new action that would otherwise be barred by the statute of limitations. *Internatl. Periodical Distrib. v. Bizmart, Inc.*, 95 Ohio St.3d 452, 2002-Ohio-2488, 768 N.E.2d 1167, ¶ 7.

Unless the saving statute applies as an exception to the statute of repose, appellees' refiled claims are time-barred

{¶ 19} As applicable here, R.C. 2305.113(C) requires plaintiffs to have filed their medical claims within four years of the occurrence of the acts or omissions that allegedly caused their injuries. Those acts or omissions are alleged to have occurred in April 2010 and February and April 2011, when Dr. Durrani operated on Mike Sand and Wilson.

{¶ 20} Appellees initially filed complaints in Butler County within four years of appellants' alleged acts or omissions, but they voluntarily dismissed those complaints without prejudice. A dismissal without prejudice "gives to the complaining party the right to state a new case, if he can. But it takes away no right of defense to such suit save that which might be based on the bar of the first action." *DeVille Photography, Inc. v. Bowers*, 169 Ohio St. 267, 272, 159 N.E.2d 443 (1959). "A dismissal without prejudice leaves the parties as if no action had been brought at all." *Id.* When a complaint has been dismissed without prejudice, the action "is deemed to never have existed." *Antoon*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 24, citing *DeVille Photography, Inc.* at 272.

{¶ 21} In *Antoon*, we rejected an argument that the initial filing of a medical claim commences suit and indefinitely suspends the running of the statute of repose, regardless of a subsequent dismissal without prejudice. *Id.* at ¶ 24. There, the plaintiffs had originally filed medical-malpractice claims within the repose period, but they had voluntarily dismissed those claims without prejudice. We held that their action on their malpractice claims commenced, for purposes of the statute of repose, only when they refiled their claims, after the four-year repose period had expired. *Id.*

{¶ 22} The only notable, relevant difference between this appeal and *Antoon* is that plaintiffs here refiled their claims by commencing new actions—purportedly pursuant to the saving statute—within one year of their voluntary

dismissals without prejudice. Unless R.C. 2305.19 operates as an exception to the statute of repose, appellees' refiled claims, like the claims in *Antoon*, are time-barred.

R.C. 2305.19(A) does not create an exception to the statute of repose

{¶ 23} Appellees contend that, having voluntarily dismissed their claims in Butler County pursuant to Civ.R. 41(A) and having thus failed otherwise than on the merits, *see Frysinger*, 32 Ohio St.3d 38, 512 N.E.2d 337, at paragraph two of the syllabus, they were entitled to refile those claims within one year, pursuant to R.C. 2305.19(A). Appellants do not dispute that the saving statute acts as an exception to a statute-of-limitations defense to appellees' refiled claims, but they maintain that it does not also serve as an exception to the statute of repose.

{¶ 24} This court acknowledged but declined to decide in *Antoon* whether the saving statute, if properly invoked, may allow the refiling of an action beyond the expiration of the statute of repose. 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 30. To answer that question now, we first turn to the language of R.C. 2305.113(C)(1), which clearly and unambiguously states, "No action upon a medical claim * * * shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis for" the claim. R.C. 2305.113(C) "means what it says. If a lawsuit bringing a medical * * * claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action upon that claim is barred." *Antoon*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 23. We must apply clear and unambiguous statutory language as the General Assembly wrote it. *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 23.

{¶ 25} We have already rejected the argument that commencement of a medical claim within the four-year repose period satisfies the statute of repose once and for all, irrespective of a later voluntary dismissal. *See Antoon,* at ¶ 24 ("We

reject the Antoons' assertion that filing then dismissing a claim will indefinitely suspend the statute of repose by 'commencing' the suit on the date of the first filing"). But appellees also argue that by refiling their claims within one year of the voluntary dismissal of their Butler County claims, the new actions relate back to the dates they initially filed their Butler County claims for purposes of the statute of repose. We disagree.

{¶ 26} *Frysinger* does state:

> Where R.C. 2305.19 applies, the date for filing the new action relates back to the filing date for the preceding action for limitations purposes. *Lewis v. Connor* (1985), 21 Ohio St.3d 1, 4, 21 OBR 266, 268, 487 N.E.2d 285, 287; *Reese v. Ohio State Univ. Hosp.* (1983), 6 Ohio St.3d 162, 163-164, 6 OBR 221, 222-223, 451 N.E.2d 1196, 1198.

{¶ 27} 32 Ohio St.3d at 42, 512 N.E.2d 337. Neither *Lewis* nor *Reese*, however, actually describes a claim refiled pursuant to the saving statue as relating back to the date of the prior action. Moreover, our statement in *Frysinger* about a refiled action relating back was dicta. *See Vogel v. Northeast Ohio Media Group, L.L.C.*, 9th Dist. Medina No. 19CA0003-M, 2020-Ohio-854, ¶ 13. The questions presented in *Frysinger* were when a cause of action for medical malpractice accrues and whether a voluntary dismissal pursuant to Civ.R. 41(A)(1) constitutes a failure otherwise than on the merits. The statement about relation back was of no consequence to our determination of those issues, and we are not obligated to give it binding effect. *See Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.*, 70 Ohio St.3d 281, 284, 638 N.E.2d 991 (1994) (plurality).

{¶ 28} As the Ninth District recognized in *Vogel*, our more recent characterization of the saving statute in *Internatl. Periodical Distribs.*, 95 Ohio

St.3d 452, 2002-Ohio-2488, 768 N.E.2d 1167, at ¶ 7, is more consistent with the text of R.C. 2305.19. There, we stated, "Savings statutes operate to give a plaintiff a limited period of time in which to refile a dismissed claim that would otherwise be time-barred." That characterization is also consistent with our precedent that an action that has been dismissed without prejudice is deemed to never have existed. *Antoon*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 24. The saving statute anticipates the commencement of a new action, not the reactivation of the prior action, and it says nothing about the new action relating back to the filing date of the prior action. *See id.* In fact, because the saving statute specifically permits the refiling of an action beyond the expiration of the statute of limitations, so long as the refiling occurs within one year of a failure of the prior action otherwise than on the merits, there is no need for the refiled complaint to relate back.

{¶ 29} In light of the purpose of a statute of repose—to create a bar on a defendant's temporal liability—exceptions to a statute of repose require "a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances," as when the statute of repose itself contains an express exception. *California Pub. Emps.' Retirement Sys.*, ___ U.S. at ____, 137 S.Ct. at 2050, 198 L.Ed. 584. The General Assembly did incorporate into R.C. 2305.113(C) two express exceptions. First, the statute of repose is tolled "as to persons within the age of minority or of unsound mind as provided in" R.C. 2305.16. Second, R.C. 2305.113(D) extends the four-year repose period for two specific categories of claims: (1) those that accrue in the last year of the repose period, R.C. 2305.113(D)(1), and (2) those based upon a foreign object left in a patient's body. R.C. 2305.113(D)(2). R.C. 2305.113(C) notably does not contain an exception for application of the saving statute, and we may not read one into the statute by implication. Unless one of the stated exceptions applies, R.C. 2305.113(C) clearly

and unambiguously prohibits the commencement of any action upon a medical claim more than four years after the act or omission upon which the claim is based.

{¶ 30} The absence of an express exception in R.C. 2305.113(C) for application of the saving statute takes on additional import when we compare R.C. 2305.113(C) with R.C. 2305.10(C), which imposes a ten-year statute of repose for product-liability claims, and unlike R.C. 2305.113(C), expressly states that it applies "[e]xcept as otherwise provided in" R.C. 2305.19, the saving statute. In the same bill in which it enacted R.C. 2305.10(C), with its express inclusion of the saving statute, the General Assembly also enacted R.C. 2305.131, which created a statute of repose for premises-liability and construction-defect claims. 2004 Am.Sub.S.B. No. 80, 150 Ohio Laws, Part V, 7915, 7937-7938. The General Assembly did not include the saving statute as an express exception to application of the premises-liability and construction-defect statute of repose. Nor did it take the opportunity to incorporate the saving statute as an express exception to the medical statute of repose, even though it made other minor amendments to R.C. 2305.113 in that bill. *Id.* at 7933, 7936-7937. The "General Assembly's use of particular language to modify one part of a statute but not another part demonstrates that the General Assembly knows how to make that modification and has chosen not to make that modification in the latter part of the statute." *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 26.

{¶ 31} Not only does the General Assembly's incorporation of the saving statute in the product-liability statute, R.C. 2305.10(C), demonstrate that the General Assembly knew how to create an exception to a statute of repose for application of the saving statute when it intended to do so, but it also demonstrates the General Assembly's understanding that without an express indication to the contrary, the saving statute would not override the statutes of repose. Otherwise,

there would have been no need for the General Assembly to have expressly included the saving statute as an exception in R.C. 2305.10(C).

{¶ 32} Nearly 35 years ago, the Tenth District Court of Appeals held that a prior version of the medical statute of repose did *not* preclude application of the saving statute to permit the refiling of a medical claim beyond the repose period. *Wade v. Reynolds*, 34 Ohio App.3d 61, 61-62, 517 N.E.2d 227 (10th Dist.1986). But the version of the statute of repose at issue in *Wade* differed appreciably from the current statute. The prior version of the statute of repose applied to " 'all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code.' " *Id.* at 61, quoting former R.C. 2305.11(B), 1976 Am.H.B. No. 1426, 136 Ohio Laws, Part II, 3840, 3841. That is, R.C. 2305.16—a statutory provision that would otherwise have tolled the running of limitations periods based on a plaintiff's youth or legal disability—did *not* extend the repose period. Because the version of the statute of repose at issue in *Wade* expressly excluded only application of R.C. 2305.16 and did not expressly exclude application of the saving statute, the Tenth District reasoned that the saving statute applied to the statute of repose. *Id.*

{¶ 33} While appellees cite *Wade* in support of their position that the saving statute operates as an exception to the statute of repose, the Tenth District's reasoning in *Wade* actually supports appellants' contrary position. R.C. 2305.113(C) now expressly *provides for* tolling of the statute of repose under R.C. 2305.16 when a claimant is a minor or of unsound mind, while not providing for application of any other statutory provisions that would toll or extend statutory time periods. Because the statute of repose now expressly incorporates only one statutory exception, other statutes that extend the time in which to bring an action must necessarily be excluded.

{¶ 34} The Federal District Court for the Southern District of Ohio—in another case against Dr. Durrani—recently held, contrary to our holding today, that

Ohio's medical statute of repose does not bar medical claims that have been refiled, pursuant to R.C. 2305.19, more than four years after the occurrence of the defendants' alleged conduct. *Atwood v. UC Health*, S.D.Ohio No. 1:16cv593, 2018 WL 3956766, * 8 (Aug. 17, 2018). The district court was persuaded in part by *Hinkle v. Henderson*, 85 F.3d 298 (7th Cir.1996), in which the Seventh Circuit held that Illinois's saving statute permitted a plaintiff to refile a voluntarily dismissed claim within one year of the dismissal even if the refiling occurred after the expiration of the statute of repose. *Atwood* at * 8.

{¶ 35} The Illinois saving statute differs from the Ohio saving statute; it provided: " 'where the time for commencing an action is limited, if * * * the action is voluntarily dismissed * * *, the plaintiff * * * may commence a new action within one year or within the remaining period of limitation, whichever is greater.' " *Hinkle* at 300, quoting 735 Ill.Stat.Ann. 5/13-217. The Seventh Circuit stated, "The savings statute expressly applies to cases 'where the time for commencing an action is limited,' which on its face includes both statutes of limitations and statutes of repose." *Id.* at 302, quoting 735 Ill.Stat.Ann. 5/13-217. Likewise, the statute's use of the phrase "within the remaining period of limitation" reasonably encompasses not only the statute of limitations, but also the statute of repose. *Id.* R.C. 2305.19(A), in contrast, refers exclusively to the "statute of limitations." Where the Illinois saving statute, on its face, broadly applied when "the time for commencing an action is limited," *id.,* including by a statute of repose, the court held that "emphasizing the inherent differences" between statutes of limitations and statutes of repose "beg[ged] the question." *Hinkle* at 302. The Ohio saving statute, however, does not contain this same broad language.

{¶ 36} The Seventh Circuit ultimately turned to a comparison of the legislative policy purposes behind the statute of repose and the saving statue. It noted that the legislature had enacted the medical statute of repose in response to a perceived medical-malpractice-insurance crisis and to mitigate the effects of the

discovery rule. *Id.* at 301. It stated that the statute of repose embodied two related purposes: "to prevent indefinite potential liability for a particular act or omission [and] to afford defendants (and insurance companies) greater certainty in predicting potential liability." *Id*. at 302. It concluded that application of the saving statute, which provided only a year in which to refile a dismissed claim, did not create "indefinite potential liability" and that, except in the rare case in which the defendant was unaware of the first action, application of the saving statute would not affect defendants' and insurers' certainty in predicting potential liability. *Id*. at 303. Thus, the court determined that application of the saving statute would not frustrate the purposes of the statute of repose.

{¶ 37} In light of the absence of an express incorporation of the Ohio saving statute as an exception in the medical statute of repose, the General Assembly's express incorporation of the saving statute as an exception to another statute of repose in R.C. Chapter 2305, and the general character of statutes of repose as providing an absolute temporal limit on a defendant's potential liability, we are unpersuaded by the Seventh Circuit's analysis in *Hinkle*. But even were we persuaded by the Seventh Circuit that, as a policy matter, application of the saving statute to afford a claimant a limited time to refile a medical claim beyond the expiration of the statute of repose would not impair the underlying purpose of the statute of repose, that is a call for the legislature, not this court. *See Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212 ("It is not this court's role to establish legislative policies or to second guess the General Assembly's policy choices").

Conclusion

{¶ 38} R.C. 2305.113(C) is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D), clearly and unambiguously precludes the commencement of a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim. Expiration of the statute

of repose precludes the commencement, pursuant to the saving statute, of a claim that has previously failed otherwise than on the merits in a prior action. Had the General Assembly intended the saving statute to provide an extension of the medical statute of repose, it would have expressly said so in R.C. 2305.113(C), as it did in the R.C. 2305.10(C), the statute of repose that governs product-liability claims.

{¶ 39} For these reasons, we reverse the judgment of the First District Court of Appeals. Because appellees commenced their actions in Hamilton County more than four years after the alleged conduct that formed the basis of their claims, the statute of repose barred appellees' refiled actions. Accordingly, the trial court appropriately granted appellants' motion for judgment on the pleadings.

Judgment reversed.

O'CONNOR, C.J., and KENNEDY, GWIN, and KLATT, JJ., concur.

STEWART, J., dissents, with an opinion joined by DONNELLY, J.

W. SCOTT GWIN, J., of the Fifth District Court of Appeals, sitting for FISCHER, J.

WILLIAM A. KLATT, J., of the Tenth District Court of Appeals, sitting for DEWINE, J.

STEWART, J., dissenting.

{¶ 40} I disagree with most of the majority opinion's analysis and its conclusion that R.C. 2305.19 does not apply to save a medical-malpractice claim recommenced outside the four-year statute of repose contained in R.C. 2305.113(C). I therefore dissent.

Problems with the majority opinion's textual analysis

{¶ 41} According to the majority opinion, the only exceptions to the four-year period of repose on medical-malpractice claims are those exceptions expressly referred to in R.C. 2305.113(C). One of these exceptions tolls the statute of repose

for persons within the age of minority or of unsound mind when the action accrues. Another grants a plaintiff an additional year to commence an action from the date he discovers his injury provided that the injury is discovered in the final year of the repose period. The final exception provides a plaintiff with one year to commence an action from the date he discovers or should have discovered a foreign object left in his body. The majority asserts that the legislature's express inclusion of these exceptions must mean that no other exception applies or possibly could apply. Majority opinion at ¶ 30.

{¶ 42} There are two problems apparent in this conclusion. First, if the majority is correct that the express exceptions referred to in R.C. 2305.113(C) indicate the legislature's intent to preclude application of R.C. 2305.19, the saving statute, when the four-year statute of repose has expired, then we would also have to find that the language in R.C. 2305.113(A) similarly precludes application of R.C. 2305.19 after the one-year statute of limitations has expired. R.C. 2305.113(A), which sets forth the general statute of limitations for medical-malpractice claims, states: "*Except as otherwise provided in this section*, an action upon a medical, dental, optometric, or chiropractic claim *shall be commenced within one year* after the cause of action accrued." (Emphases added.) R.C. 2305.113(B) goes on to provide an exception to the one-year limitation period contained in R.C. 2305.113(A) by explaining that the period of limitation can be extended by up to 180 days if the plaintiff gives written notice to the defendant within the one-year limitations period that he intends to bring a claim. R.C. 2305.113(A), exactly like R.C. 2305.113(C), includes an express exception to the general rule that commencement of the action outside the specified time-frame is prohibited. Thus, if we follow the majority opinion's reasoning that such an exception is an indication that no other exceptions apply, then R.C. 2305.19 cannot apply to save a claim recommenced outside the one-year statute of limitations described in R.C. 2305.113(A). But the majority departs from its own logic when

it reaffirms this court's longstanding holding that, if properly invoked, R.C. 2305.19 *does* apply to save an action recommenced outside the limitations period of the medical-malpractice statute of limitations. Majority opinion at ¶ 14. If the majority insists upon such rigid reliance on the existence of exceptions within R.C. 2305.113(C) as the basis for its holding today, it needs also to explain why that same reasoning does not apply to R.C. 2305.113(A). This would be no small feat.

{¶ 43} The second problem with the majority opinion's textual analysis is that it wrongly assumes that if found to apply to this case or others like it, R.C. 2305.19 would operate as an exception to the requirement that an action be commenced within the four-year repose period contained in R.C. 2305.113(C). Majority opinion at ¶ 16. This allows the majority to conclude that the absence of R.C. 2305.19 from R.C. 2305.113(C) as an explicit exception to the general rule regarding the statute of repose implies legislative intent to *exclude* its application when the repose period has expired. Majority opinion at ¶ 31. But it does not follow that because R.C. 2305.19 provides an additional year to *recommence* an action, the statute abrogates the general rule that a medical-malpractice action must be commenced within four years of the act or omission giving rise to the claim. What is unique about R.C. 2305.19, compared to the express exceptions listed in R.C. 2305.113(C), is that it requires that an action have been timely commenced for its saving provision to have any effect. *See Moore v. Mount Carmel Health Sys.*, __ Ohio St.3d __, 2020-Ohio-4113, __ N.E.3d __, ¶ 2. Indeed, it is *only* when an action is timely commenced, and fails otherwise than on the merits, that R.C. 2305.19 can save an action that would otherwise be time-barred. *See id.* at ¶ 30. In contrast, the three exceptions listed in R.C. 2305.113(C) operate as true exceptions to the general four-year period of repose by either tolling the time to commence an action or adding additional time to commence an action. These exceptions also evince a legislative understanding that because of disability or delayed discovery, *see* R.C. 2305.113(C), citing R.C. 2305.16 and 2305.113(D), the plaintiff will likely

be unable to commence an action within the four-year repose period—hence the need for tolling or additional time modifications to the general rule. The same is not true for R.C. 2305.19, which anticipates a timely original filing.

{¶ 44} For these reasons, and for others I discuss below, it seems clear that the legislature does not view R.C. 2305.19 as an exception to either the statute of limitations or the statute of repose. Instead, the function of R.C. 2305.19 is that of a limited, but freestanding remedial statute that separately and concomitantly upholds both limitation provisions, and thus operates on equal footing and in conjunction with those provisions to save an action that previously had been timely commenced. As such, there was no need for the legislature to include it as "an exception" to R.C. 2305.113(C).[1]

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1. I am not convinced, though the majority seems to be, majority opinion at ¶ 30, that the legislature's inclusion of R.C. 2305.19 as an express exception to the ten-year repose period in R.C. 2305.10(C) means that it intended R.C. 2305.19 to not apply to other statutes of repose unless also explicitly excepted.

To begin, the inclusion of R.C. 2305.19 as an express exception to R.C. 2305.10(C)(1) makes little sense when you look at the language of the statute:

> Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, *no cause of action based on a product liability claim shall accrue* against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser * * *.

(Emphasis added.) R.C. 2305.10(C)(1). This repose statute focuses on the date of accrual. A cause of action "accrues" on the date of injury or discovery of the injury. Majority opinion at ¶ 9. R.C. 2305.19 has nothing to do with whether a cause of action accrues. Instead, R.C. 2305.19 saves previously commenced lawsuits on causes of action *that have already accrued*. With this in mind, the portion of R.C. 2305.10(C)(1) quoted above becomes baffling: how would a saving statute have any effect on when a cause of action accrues? Maybe the majority can explain it, but I cannot.

It is worth noting too that 2004 Am.Sub.S.B. No. 80, as originally introduced and voted on by the Senate, did not include any reference to R.C. 2305.19 in R.C. 2305.10(C)(1). *See* 125th General Assembly Regular Session 2003-2004, *Sub.S.B. No. 80 As Passed by the Senate*, http://archives.legislature.state.oh.us/bills.cfm?ID=125_SB_80_PS (accessed Dec. 18, 2020) [https://perma.cc/9H77-LLE4]. This language was added at some point after the bill moved to the House and there is no explanation in the legislative record as to why it was added—although the record does contain explanations for almost all other additions. *See* 125th General Assembly Regular Session 2003-2004, *Am.Sub.S.B. No. 80 As Passed by the House of Representatives* http://archives.legislature.state.oh.us/bills.cfm?ID=125_SB_80_PH (accessed Dec. 18, 2020)

This court's case law in conjunction with the history and purpose of R.C. 2305.19 and 2305.113(C) supports the conclusion that the saving statute applies even when the statutory repose period has expired

{¶ 45} We explained how the saving statute worked over 30 years ago in *Frysinger v. Leech*: "Where R.C. 2305.19 applies, the date for filing the new action relates back to the filing date for the preceding action for limitations purposes." 32 Ohio St.3d 38, 42, 512 N.E.2d 337 (1987). Between then and now, we have never once questioned our analysis in that case, nor has the legislature indicated any disagreement with it—likely because it is straightforward and makes sense. Our analysis of R.C. 2305.19's "relation back" properties has been widely adopted and used by the appellate courts in many decisions over the decades.[2] It has withstood

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[https://perma.cc/PT5H-RB86]**;** *Synopsis of House Committee Amendments*, https://www.lsc.ohio.gov/documents/gaDocuments/synopsis125/s0080-125.pdf (accessed Dec. 18, 2020) **[**https://perma.cc/5N3D-B742]. The Senate voted on the amended bill—which, by the way, contained extensive tort-reform legislation—on December 9, 2004, during a lame-duck, special session. *See* Ohio Senate Session held on December 18, 2004, consideration of Am.Sub.S.B. No. 80 at 00:12:59-00:35:10 and 00:51:28-00:53:20, https://ohiochannel.org/video/ohio-senate-session-part-7 (accessed Dec. 18, 2020) **[**https://perma.cc/B3UM-3QFH]. During the Senate floor debates, one senator expressed concern that he had only just received a copy of the amended bill a few hours earlier and was expected to vote on it without reading it. *See id.*

Given all this, and considering too how a R.C. 2305.19 exception in R.C. 2305.10(C) does not seem to fit, the majority is overconfident in its position that the inclusion of R.C. 2305.19 as an express exception to R.C. 2305.10(C) shows some sort of legislative intent that R.C. 2305.19 does not apply to statutes of repose unless expressly noted. After all, this just might be a legislative oversight or drafting error. Either conclusion makes at least as much sense as the majority's reading but requires less reliance on assumptions and inferences.

2. The First, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth District Courts of Appeals have explicitly relied on *Frysinger*'s relation-back language when resolving questions related to R.C. 2305.19. *See U.S. Bank Natl. Assn. v. Broadnax,* 1st Dist. Hamilton No. C-180650, 2019-Ohio-5212, ¶ 12*; Mihalcin v. Hocking College,* 4th Dist. Athens No. 99CA32, 2000 Ohio App. LEXIS 1188, *15 (Mar. 20, 2000); *Johnson v. Stachel*, 2020-Ohio-3015, 154 N.E.3d 577, ¶ 23 (5th Dist.); *Topazio v. Acme Co.,* 186 Ohio App.3d 377, 2010-Ohio-1002, 928 N.E.2d 469, ¶ 20 (7th Dist.); *Vaught v. Pollack*, 8th Dist. Cuyahoga No. 103819, 2016-Ohio-4963, ¶ 17; *Byers v. Robinson*, 10th Dist. Franklin No. 08AP-204, 2008-Ohio-4833, ¶ 43 (French, J., concurring); *Johnson v. H & M Auto Serv.*, 10th Dist. Franklin No. 07AP-123, 2007-Ohio-5794, ¶ 8 (French and Klatt, JJ., concurring); *Thompson v. Ohio State Univ. Hosps.*, 10th Dist. Franklin No. 06AP-1117, 2007-Ohio-4668, ¶ 24 (majority opinion of French, J.).

the test of time and offered an easy-to-understand and logical explanation of how a second action could ever be considered "timely" when filed outside of the express timing limitations for commencement of an action. Nevertheless, the majority opinion now repudiates our relation-back analysis as nothing more than ill-considered dicta. Majority opinion at ¶ 27.

{¶ 46} Why the majority does this is clear. If it cannot distinguish away *Frysinger*'s analysis, then the present case must be decided in favor of upholding the recommenced actions as properly commenced within the four-year statute of repose. And so what the majority does is masticate *Frysinger* into a paste, spitting it out in unrecognizable, and safely ignorable, form.

{¶ 47} For instance, the majority opinion points out that R.C. 2305.19 does not say that the recommenced action relates back to the date of the prior commencement; it finds that the relation-back analysis does not follow from the cases cited as support; it argues that a more recent decision from this court characterizes R.C. 2305.19 differently; and it argues that the relation-back analysis is inconsistent with our precedent that an action dismissed without prejudice is deemed to never have existed.[3] Majority opinion at ¶ 20. But in doing all this, it is

3. None of these arguments is sound. To begin, it is not at all clear that the relation-back analysis in *Frysinger* is dicta. Although the specific issue before the court was whether a voluntary dismissal under Civ.R. 41(A) counted as a "failure otherwise than on the merits" within the meaning of R.C. 2305.19, the more general and overarching questions were whether the plaintiff's original action was timely commenced and whether the second action could be considered timely commenced based on the first. *See id.*, 32 Ohio St.3d at 39, 512 N.E.2d 337. The court's interpretation of R.C. 2305.19 assisted in answering those questions. Furthermore, for a court to decide whether a particular statute applies, it has to have an understanding of *how* it applies. The statements regarding relation back ultimately reflect the court's understanding of how the statute applied.

The court's relation-back analysis in *Frysinger* also is not at odds with the two cases used to support it, *Lewis v. Connor*, 21 Ohio St.3d 1, 4, 487 N.E.2d 285 (1985), and *Reese v. Ohio State Univ. Hosp.*, 6 Ohio St.3d 162, 163, 451 N.E.2d 1196 (1983). In fact, the relation-back concept dovetails nicely with the description of the statute in both decisions. It is also worth noting that these three decisions, which were decided within only a few years of each other, were decided by a court composed of essentially the same justices. So perhaps we should take heed when in *Frysinger*, those justices expounded on what was meant by their earlier analyses in *Lewis* and *Reese*.

curious that the majority—which otherwise focuses so closely on the language of R.C. 2305.113(C) and 2305.19 and what intent it implies—never stops to consider

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In a similar vein, the relation back-analysis is not at odds with our more recent characterization of saving statutes in *Internatl. Periodical Distribs. v. Bizmart, Inc.*, 95 Ohio St.3d 452, 2002-Ohio-2488, 768 N.E.2d 1167, ¶ 7. To say as we did in that decision that "savings statutes operate to give a plaintiff a limited period of time in which to refile a dismissed claim that would otherwise be time-barred," *id.* at ¶ 7, in no way nullifies the relation-back concept. In fact, one could easily tag *Frysinger*'s analysis onto the end of our more recent analysis in *Internatl. Periodical* and end up with a single, cohesive interpretative statement that is supported by both decisions. Case in point: "saving statutes operate to give a plaintiff a limited period of time in which to refile a dismissed claim that would otherwise be time-barred by permitting the refiled complaint to relate back to the date the complaint was filed in the prior action."

The majority's reliance on *Internatl. Periodical*'s interpretation of R.C. 2305.19 over *Frysinger*'s is flawed for yet another reason. The issue before the court in *Internatl. Periodical* was which saving statute should apply—the general saving statute, R.C. 2305.19, which gives a plaintiff a year to refile, or the Uniform Commercial Code saving provision found in R.C. 1302.98(C), which gives a plaintiff six months. *Internatl. Periodical* at ¶ 6. The specific question how either statute applied was not before the court. If we follow the majority opinion's reasoning for labeling the relation-back analysis in *Frysinger* dicta, the characterization of R.C. 2305.19 in *Internatl. Periodical* must also be dicta. Majority opinion at ¶ 27. By its own logic then, the majority is simply swapping dicta for dicta.

The majority opinion also distinguishes *Frysinger*'s analysis as being inconsistent with this court's statement in *Antoon v. Cleveland Clinic*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 24, that an action that has been dismissed without prejudice is deemed to never have existed. Majority opinion at ¶ 28**.** [Majority at p. 15:8-10] The implication is, presumably, that a recommenced action cannot relate back to the date of a previously commenced action that has been dismissed, because the previous action does not exist and never did exist. This is just wrong. What was stated in *DeVille Photography, Inc. v. Bowers*—the case on which this court relied for its statement in *Antoon*—is that "[a] dismissal without prejudice leaves the parties as if no action had been brought at all." 169 Ohio St. 267, 272, 159 N.E.2d 443 (1959). Importantly, the question before the court in *Deville* was whether an interlocutory judgment, entered by a court prior to the plaintiff's voluntary dismissal of the action, still had effect after the dismissal. *See id.* at 269. We answered that question in the negative on several grounds, one being that once a case is voluntarily dismissed, the parties go back to the position they were in before the action was commenced. *See id.* at 272-273. Nothing in *Deville* suggests that as a metaphysical matter a dismissed action completely ceases to exist altogether. Indeed, court records would confirm its existence. What the majority seems not to realize is that by going down a path that upholds the incorrect notion that a voluntarily dismissed action "never existed," the saving statute fails to have any meaning or application. The reason for this is that the saving statute *relies* on the existence of a previously filed action. *See* R.C. 2305.19(A).

Lastly, the fact that R.C. 2305.19 fails to mention anything about relation-back hardly means that is not how it works. Indeed, recently this court has used relation-back concepts to explain how other similarly worded statutes and rules relate to each other. *See Moore,* __ Ohio St.3d __, 2020-Ohio-4113, __ N.E.3d __, at ¶ 14-16.

what, if any, effect our statements in *Frysinger* have had on the legislature's wording of either statute. This consideration is at least as important as anything else the majority opinion discusses because the General Assembly legislates against the backdrop of judicial decisions and is presumed to have full knowledge of our interpretation of statutes. *Wayt v. DHSC, L.L.C.*, 155 Ohio St. 3d 401, 2018-Ohio-4822, 122 N.E.3d 92, ¶ 23, citing *State ex rel. Huron Cty. Bd. of Edn. v. Howard*, 167 Ohio St. 93, 96, 146 N.E.2d 604 (1957). Regardless of whether we were right or wrong, or whether what we said was dicta or not, there can be no disagreement that in *Frysinger*, we interpreted the saving statute when we explained how it functions within the greater context of statutory timing requirements in R.C. Chapter 2305 for commencement of actions. Accordingly, what we said in that decision matters here.

{¶ 48} Since our decision in *Frysinger*, the legislature has shown no sign of moving to supersede our judicial interpretation of R.C. 2305.19. In fact, the statute remains in substantially the same form as it was then, the only difference being an expansion of the time a plaintiff has to refile.[4] As for the statute of repose, the

4. The version of the saving statute in effect when we decided *Frysinger* stated:

> In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff * * * may commence a new action within one year after such date.

Former R.C. 2305.19(A), G.C. 11233. Notably, the statutory language included the phrase "time limited for the commencement." This language is nearly identical to language that the majority agrees "reasonably encompasses not only the statute of limitations, but also the statute of repose." Majority opinion at ¶ 35.

R.C. 2305.19(A) now states:

> In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

legislative history shows that the tolling exception based on minority or disability and the extension exception based on delayed discovery both first appeared in the statute in 1995. *See* former R.C. 2305.11, 1995 Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 3867, 3912-3914. The third exception, which offers a limited time extension for late discovery of foreign objects left inside the body, was added to the statute of repose in 2001. *See* 2001 Am.Sub.S.B. No. 281, 149 Ohio Laws, Part II, 3791, 3799-3801. Accordingly, all three express exceptions to the statute of repose, which now exist in their current form in R.C. 2305.113(C) and (D), were added by the General Assembly *after* this court's pronouncements in *Frysinger*. If we presume—as we should—that our analysis in *Frysinger* provided the backdrop for these legislative enactments, then it makes perfect sense that the General Assembly did not include R.C. 2305.19 as an express exception within the repose

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Although the 2004 amendments to the statute removed the phrase "and the time limited for the commencement of such action at the date of reversal or failure has expired," Am.Sub.H.B. No. 161, 150 Ohio Laws, Part II, 3423, this should not be taken to mean that the statute no longer applies beyond the expiration of the statute of repose. What this means is that now a plaintiff may take advantage of the saving statute's recommencement timeframe *even though* the time limited for commencement might not have expired. Before the 2004 amendments, this was not the case. Then, for R.C. 2305.19 to apply, the originally commenced action must have failed following the expiration of the "time limited for commencement." To illustrate, suppose that an action is dismissed without prejudice ten days before the time limited for commencement expires. Under the former version of the statute, R.C. 2305.19 would not apply and the plaintiff would have only ten days to recommence the action. Under the current version of the statute, the plaintiff would have one year to recommence.

Looking at the current and former versions of R.C. 2305.19 also brings into focus the superficial nature of the majority opinion's conclusion that because R.C. 2305.19 mentions the "statute of limitations," it is meant to apply only when the statute of limitations has expired and not when the statute of repose has expired. Majority opinion at ¶ 35. R.C. 2305.19's reference to the statute of limitations is not meant to limit its application in this way. Rather, the statement that a plaintiff may commence a new action within one year of its failure, "or within the period of the original applicable statute of limitations, whichever occurs later," indicates only that in those limited circumstances when the time left on the statute of limitations exceeds a year, a plaintiff will have that additional time to recommence the action. It is an expansion of the time to recommence. That's it.

statute. That is not how the saving statute functions. Instead, as noted in our analysis in *Frysinger*, R.C. 2305.19 operates within the confines of the statute of repose through the concept of relation back.

{¶ 49} That the saving statute acts as a complement to the statute of repose and not an exception to it is also in line with what we know about the purposes of each statute. R.C. 2305.19, the saving statute, provides a small window of time for a plaintiff to recommence an action that had been previously commenced but failed otherwise than on the merits. The statute is remedial in nature, and as such, should be given a liberal construction that permits a decision on the merits of the action rather than a disposition on technical or procedural grounds. *Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 85, 167 N.E.2d 774 (1960). By its terms, the statute insulates a recommenced action from statutory time-bar defenses only when the original action was commenced in a timely fashion.

{¶ 50} On the other hand, the purpose of the statute of repose is to limit indefinite potential liability and give defendants greater certainty and predictability by placing an outer time limit on the commencement of a lawsuit. It cannot seriously be said that giving a plaintiff an additional year to recommence an action that has already been timely commenced "create[s] the type of indefinite potential liability that [the statute of repose] was designed to abolish." *Hinkle v. Henderson*, 85 F.3d 298, 303 (7th Cir.1996). Nor does it affect the certainty and predictability that the statute of repose affords. *See id*; *see also See v. Hartley*, 257 Kan. 813, 823, 896 P.2d 1049 (1995); *Cronin v. Howe*, 906 S.W.2d 910, 914 (Tenn.1995); *Vesolowski v. Repay*, 520 N.E.2d 433, 434 (Ind.1988).

{¶ 51} I agree with the majority opinion that it is not our job to establish legislative policies or to second guess the General Assembly's policy choices. Majority opinion at ¶ 37. But that is exactly what the majority is doing here when it goes out of its way to manufacture reasons to find that two otherwise perfectly

compatible statues are operating at odds with each other. I would affirm the judgment of the First District Court of Appeals.

DONNELLY, J., concurs in the foregoing opinion.

Paul W. Flowers Co., L.P.A., Paul W. Flowers, and Louis E. Grube; Robert A. Winter Jr.; The Deters Law Firm Co. II, P.A., Benjamin M. Maraan II, and James F. Maus; and Law Offices of Glenn D. Feagan, P.S.C., and Glenn D. Feagan, for appellees.

Taft Stettinius & Hollister, L.L.P., Aaron M. Herzig, Russell S. Sayre, and Philip D. Williamson, for appellants.

Paul W. Flowers Co., L.P.A., Paul W. Flowers, and Louis E. Grube, urging affirmance for amicus curiae Ohio Association for Justice.

Zagrans Law Firm, L.L.C., and Eric H. Zagrans, urging affirmance for amicus curiae Cleveland Academy of Trial Attorneys.

Squire Patton Boggs (US), L.L.P., Benjamin Beaton, Lauren S. Kuley, Heather L. Stutz, and Christopher Haas, urging reversal for amici curiae Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association.

Sean McGlone, urging reversal for amicus curiae Ohio Hospital Association.

Tucker Ellis L.L.P., Susan M. Audey, Raymond Krncevic, and Elisabeth C. Arko, urging reversal for amicus curiae Academy of Medicine of Cleveland & Northern Ohio.

[Cite as *U.S. Bank Natl. Assn. v. George*, 2020-Ohio-6758.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

U.S. Bank National Association, as Trustee, Successor in Interest to Wachovia Bank, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2003-D,	:	No. 20AP-43
	:	(C.P.C. No. 12CV-13226)
Plaintiff-Appellee,	:	(REGULAR CALENDAR)
v.	:	
Douglas George et al.,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on December 17, 2020

On brief: *Thompson Hine LLP, Scott A. King*, and *Todd M. Seaman*, for appellee. **Argued:** *Scott A. King.*

On brief: *McGookey Law Offices, LLC,* and *Daniel L. McGookey*, for appellants Douglas George and Robin George. **Argued:** *Daniel L. McGookey*.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendants-appellants, Douglas George and Robin George, appeal from a foreclosure judgment of the Franklin County Court of Common Pleas entered in favor of plaintiff-appellee, U.S. Bank, National Association ("U.S. Bank"), as trustee, successor in interest to Wachovia Bank, National Association ("Wachovia Bank"), as trustee for the Wells Fargo Asset Securities Corporation, mortgage passthrough certificates, series 2003-D (the "trust"). For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} On August 8, 2002, the Georges executed a promissory note and mortgage in favor of M/I Financial Corp. ("M/I Financial") in connection with their purchase of 7511 Windsor Drive, Dublin, Ohio. Nine years later, in September 2009, U.S. Bank initiated a foreclosure action against the Georges based on their default under the terms of the note and the mortgage securing the same. However, that action was dismissed upon the Georges' execution of a loan modification agreement on May 18, 2010. The Georges failed to make payments under the terms of the note as amended, and on October 19, 2012, U.S. Bank again initiated a foreclosure action against them.

{¶ 3} In September 2013, U.S. Bank moved for summary judgment. The trial court granted U.S. Bank's summary judgment motion and then entered a foreclosure decree. The Georges appealed from that judgment.

{¶ 4} In December 2015, this court reversed the judgment of the trial court. *U.S. Bank Natl. Assn. v. George*, 10th Dist. No. 14AP-817, 2015-Ohio-4957 ("*George I*"). This court found that summary judgment was erroneously entered because there existed a genuine issue of fact as to whether U.S. Bank was entitled to enforce the Georges' note. *Id.* at ¶ 23. U.S. Bank moved for reconsideration, which this court denied. *U.S. Bank Natl. Assn. v. George*, 10th Dist. No. 14AP-817, 2016-Ohio-7788 ("*George II*").

{¶ 5} On remand, a bench trial was held regarding the matter in January 2019. The following four witnesses testified: Jodie Kane, a loan administration manager in the specialty operations department at Wells Fargo Bank, National Association ("Wells Fargo Bank"); John Richards, a vice president in the global corporate trust and custody group at U.S. Bank; Jennifer Robinson, a loan administration manager for Wells Fargo Bank; and appellant Douglas George. U.S. Bank introduced numerous documents into evidence, including a copy of the note it was seeking to enforce. At trial, the Georges objected to U.S. Bank's exhibits, and the trial court requested post-trial briefing on their admissibility. The Georges submitted written objections to U.S. Bank's trial exhibits, arguing they were irrelevant, unauthenticated, and inadmissible hearsay.

{¶ 6} In December 2019, the trial court entered findings of fact and conclusions of law. The trial court rejected the Georges' objections to U.S. Bank's trial exhibits and found, among other things, that U.S. Bank had proven it was a "holder" entitled to enforce the

note. (Dec. 19, 2019 Findings of Fact and Conclusions of Law.) In January 2020, the trial court entered a foreclosure decree.

{¶ 7} The Georges timely appeal.

II. Assignments of Error

{¶ 8} The Georges assign the following errors for our review:

> [1.] The trial court erred in allowing inadmissible evidence into the record.
>
> [2.] The trial court erred in finding that plaintiff/appellee proved it was entitled to enforce the subject promissory note and awarding it foreclosure judgment.

III. Discussion

A. First Assignment of Error – Admission into Evidence of U.S. Bank's Trial Exhibits

{¶ 9} The Georges' first assignment of error alleges the trial court erred in admitting U.S. Bank's trial exhibits. More specifically, the Georges challenge the admission of the following: the note (Exhibit 1); the Wells Fargo Bank ICMP printout of the history of images taken of the note (Exhibit 1A); the Wells Fargo Bank image of the note uploaded on September 23, 2002 (Exhibit 1B); the Wells Fargo Bank image of the note uploaded on September 30, 2009 (Exhibit 1C); the Wells Fargo Bank image of the note uploaded on July 2, 2012 (Exhibit 1D); the Wells Fargo Bank image of the note uploaded on September 12, 2013 (Exhibit 1E); the Wells Fargo Bank collateral file tracking documents (Exhibit 4); the Wells Fargo Asset Securities Corporation (seller), Wells Fargo Bank Minnesota, National Association ("Wells Fargo Bank Minnesota") (master servicer), and Wachovia Bank (trustee) pooling and servicing agreement dated February 26, 2003 (Exhibit 5A); the mortgage loan schedule to the February 26, 2003 pooling and servicing agreement (Exhibit 5B); the November 29, 2005 purchase agreement between Wachovia Corporation and U.S. Bank (Exhibit 6A); the annex to the November 29, 2005 purchase agreement between Wachovia Corporation and U.S. Bank (Exhibit 6B); ACS deal info report (Exhibit 6C); the collateral file (Exhibit 15); and the February 26, 2003 servicing agreement between Wells Fargo Bank Minnesota and Wells Fargo Home Mortgage, Inc. ("WFHMI") (Exhibit 16). This assignment of error lacks merit.

{¶ 10} The decision to admit or exclude relevant evidence rests within the sound discretion of the trial court. *State v. Angus*, 10th Dist. No. 05AP-1054, 2006-Ohio-4455, ¶ 16, citing *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Absent a clear showing that the court abused its discretion in a manner that materially prejudices a party, a reviewing court will not disturb a ruling on the admission of evidence. *State v. Phelps*, 10th Dist. No. 14AP-4, 2015-Ohio-539, ¶ 27; *State v. Issa*, 93 Ohio St.3d 49, 64 (2001). An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 11} First, we address the admission of certain documents contained in the collateral file: the note, the loan modification agreement, the mortgage, and the mortgage assignments. The Georges argue these documents should have been excluded from evidence because they were not authenticated and were inadmissible hearsay.

{¶ 12} Evid.R. 901(A) provides that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(B) sets forth a non-exhaustive list of examples of authentication or identification conforming with the requirements of the rule including testimony of a witness with knowledge that a matter is what it is claimed to be. Evid.R. 901(B)(1). "Courts have interpreted Evid.R. 901(B) to allow any competent witness who has knowledge that a matter is what its proponent claims may testify to such pertinent facts, thereby establishing, in whole or in part, the foundation for identification." (Internal quotations omitted.) *State v. Ross*, 10th Dist. No. 17AP-141, 2018-Ohio-3027, ¶ 37.

{¶ 13} Certain categories of documents are "self-authenticating." *See Deutsche Bank Natl. Trust Co. v. Boreman*, 6th Dist. No. OT-18-031, 2020-Ohio-3545, ¶ 66 ("Under Evid.R. 902, certain categories of documents are designated as 'self-authenticating' documents that do not require extrinsic evidence of authenticity to be admissible."). Evid.R. 902(8) provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to * * * [d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public." Further, pursuant to Evid.R. 902(9), "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to * * * [c]ommercial paper,

signatures thereon, and documents relating thereto to the extent provided by general commercial law."

{¶ 14} As commercial paper, and a document relating thereto, the note and loan modification agreement were admissible without extrinsic evidence of authenticity. And because the mortgage and mortgage assignments were notarized, they were also self-authenticating. Consequently, it was not necessary for U.S. Bank to present testimony to authenticate these documents. Therefore, we reject the Georges' argument that these documents were not properly authenticated.

{¶ 15} We also reject the Georges' contention that the note, loan modification agreement, mortgage, and mortgage assignments were inadmissible hearsay. Hearsay is defined as 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). Under the rules of evidence, a statement includes a written assertion. Evid.R. 801(A). Hearsay is generally not admissible unless it falls within one of the exceptions to the rule against hearsay. *State v. Clay*, 187 Ohio App.3d 633, 2010-Ohio-2720, ¶ 27 (5th Dist.), citing Evid.R. 802, 803-04.

{¶ 16} The note, loan modification agreement, mortgage, and mortgage assignments were not inadmissible hearsay because they "were not offered to prove the truth of the matters asserted therein; rather, they were offered to prove that persons engaged in transactions creating legal rights and responsibilities." (Internal quotation omitted.) *Christiana Trust v. Barth*, 9th Dist. No. 16CA010959, 2017-Ohio-6924, ¶ 10 ("the note, the mortgage, [and] the assignment of the mortgage * * * are not hearsay"). *See* Staff Note to Evid.R. 801(C) ("Words constituting conduct are not hearsay, e.g., words of a contract."). Therefore, these documents were not inadmissible hearsay.

{¶ 17} We also reject the Georges' challenge to the admission of Wells Fargo Bank's EMB Trust, Arrow, and ICMP records. Testimony at trial indicated Wells Fargo Bank's EMB Trust system documents when the "collateral file leaves the vault and when it's returned to the vault," its Arrow system "tracks the movement of the file after it leaves the vault until it is returned to the vault," and its ICMP system documents the imaging of the note at various points in time. (Jan. 14, 2019 Tr. at 57-58.) Thus, collectively, these exhibits reflect Wells Fargo Bank's electronic recordkeeping as to the loan and related documents.

The Georges contend these exhibits should not have been admitted into evidence because the trial witnesses were not qualified to authenticate them. We disagree.

{¶ 18} Pursuant to Evid.R. 901(B)(10), "authentication of business records * * * is governed by Evid.R. 803(6)," which sets forth an exception to the hearsay rule for business records of regularly conducted activity. *Great Seneca Fin. v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, ¶ 9 (1st Dist.). Evid.R. 803(6) provides an exception to the hearsay evidence prohibition for records of "regularly conducted business activity * * * if it was the regular practice of that business activity to make the * * * record * * * as shown by the testimony of the custodian or other qualified witness." To qualify for admission under Evid.R. 803(6), a business record must satisfy four essential elements: (1) it must be one regularly recorded in a regularly conducted activity, (2) it must have been entered by a person with knowledge of the act, (3) it must have been recorded at or near the time of the transaction, and (4) a foundation must be laid by the custodian of records or some other qualified witness. *State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, ¶ 39. A qualified witness is someone with enough familiarity with the record-keeping system of the business to explain how the record came into existence in the ordinary course of business. *Id.* However, "Evid.R. 803(6) does not require the witness whose testimony establishes the foundation for a business record to have personal knowledge of the exact circumstances of preparation and production of the document or of the transaction giving rise to the record." (Internal quotations omitted.) *Cach v. Alderman*, 10th Dist. No. 15AP-980, 2017-Ohio-5597, ¶ 16.

{¶ 19} Jodie Kane, a loan administration manager for Wells Fargo Bank, testified regarding the bank's collateral file recordkeeping practices. The collateral file always contains the original note and may, as in this case, contain other documents pertaining to the note. She testified that Wells Fargo Bank keeps collateral files in a vault in Minnesota. She also testified that Wells Fargo Bank maintains electronic records regarding collateral files as part of its ordinary course of business, that those records are created by Wells Fargo Bank personnel who are under a business duty to timely and accurately enter information into the records, and that those employees have personal knowledge of the information they enter into the bank's computer system at or near the time of the events reflected. She further testified regarding the contents of the printed documents from Wells Fargo Bank's

computer systems and indicated they accurately reflected the information stored on those systems. We find Kane's testimony demonstrated that she was sufficiently familiar with Wells Fargo Bank's recordkeeping practices and that its business records produced at trial reasonably met the requirements of Evid.R. 803(6) to be admissible as an exception to the hearsay rule. Thus, we conclude the trial court did not abuse its discretion in admitting Wells Fargo Bank's EMB Trust, Arrow, and ICMP records.

{¶ 20} The Georges also contend the February 26, 2003 pooling and servicing agreement, involving Wells Fargo Asset Securities Corporation (seller), Wells Fargo Bank Minnesota (master servicer), and Wachovia Bank (trustee), and a related mortgage schedule, should not have been admitted into evidence as business records under Evid.R. 803(6). They additionally argue this pooling and servicing agreement was not relevant to the issues at trial. We are unpersuaded.

{¶ 21} John Richards, a vice president in U.S. Bank's global corporate trust and custody group, testified as to his familiarity with U.S. Bank's recordkeeping practices regarding loan securitizations. Richards testified that U.S. Bank maintains agreements regarding securitizations in its ordinary course of business and its employees are under a duty to timely and accurately upload such documents into its computer system. He further testified that the documents printed for trial accurately reflected those stored on U.S. Bank's computer system. Similarly, Jennifer Robinson, a loan administration manager for Wells Fargo Bank, testified that Wells Fargo Bank, in the ordinary course of its business, maintains a computer system for imaging documents such as the pooling and servicing agreement. Wells Fargo Bank employees are under a duty to timely and accurately enter the information into the computer system, and the printouts from its business records accurately reflected the information on its system. The testimony of Richards and Robinson reasonably demonstrated the pooling and servicing agreement and the related mortgage schedule were business records and not inadmissible hearsay.

{¶ 22} We also reject the Georges' argument that the pooling and servicing agreement was not relevant to the issues at trial. The Georges correctly observe that the pooling and servicing agreement identifies Wells Fargo Asset Securities Corporation as the seller of the loans in the trust to Wachovia Bank, as trustee. They therefore reason that the note should have contained an indorsement from Wells Fargo Asset Securities Corporation

to Wachovia Bank, not an indorsement from WFHMI to Wachovia Bank as it exists on the note. According to them, the absence of Wells Fargo Asset Securities Corporation on the note renders the pooling and serving agreement irrelevant to the issues in this case. But the pooling and servicing agreement itself expressly authorized the indorsement directly from WFHMI to Wachovia Bank, as made on the note. Thus, the pooling and servicing agreement was relevant to the issues at trial.

{¶ 23} We next address the Georges' contention that the purchase agreement documents relating to U.S. Bank's acquisition of certain Wachovia Corporation businesses should not have been admitted. They argue these documents were irrelevant. This argument is premised in part on the Georges' contention regarding Wells Fargo Asset Securities Corporation being identified as the seller of the loans in the trust to Wachovia Bank on the pooling and servicing agreement. But as discussed above, that contention is not persuasive as the agreement itself authorized a negotiation of loans from WFHMI to Wachovia Bank. The Georges also assert the purchase agreement was between U.S. Bank and Wachovia Corporation, not U.S. Bank and Wachovia Bank, and thus U.S. Bank's acquisition of Wachovia Bank businesses cannot be assumed. But the Georges' assertion is belied by the purchase agreement itself. The purchase agreement identifies Wachovia Bank as a wholly owned subsidiary of Wachovia Corporation and one of the sellers under the agreement. Consistent with the terms of the purchase agreement, Richards testified at trial that U.S. Bank acquired the corporate trust business of Wachovia Bank. In view of this evidence, we find the trial court did not abuse its discretion in admitting the purchase agreement and related documents.

{¶ 24} Lastly, the Georges contend the trial court erred in admitting the servicing agreement between Wells Fargo Bank Minnesota and WFHMI. They argue the servicing agreement is irrelevant in this case because it does not show the Georges' obligation was transferred to U.S. Bank and there is no reference to the trust at issue in the servicing agreement. However, under the terms of the servicing agreement, WFHMI, which was later acquired by Wells Fargo Bank, was the servicer of the trust at issue. While the servicing agreement itself does not show the transfer of the Georges' loan to the trust, it still was relevant as it was pertinent to the servicing of the Georges' loan. Thus, the trial court did not abuse its discretion in admitting the servicing agreement.

{¶ 25} For these reasons, we overrule the Georges' first assignment of error.

B. Second Assignment of Error – U.S. Bank's Entitlement to Enforce the Note and Mortgage

{¶ 26} In their second assignment of error, the Georges contend the trial court erred in finding U.S. Bank proved its entitlement to enforce the note and mortgage. This assignment of error is not well-taken.

{¶ 27} A promissory note secured by a mortgage is a negotiable instrument. *Bank of Am., N.A. v. Pasqualone*, 10th Dist. No. 13AP-87, 2013-Ohio-5795, ¶ 29. Pursuant to R.C. 1303.31(A), a "person entitled to enforce" such a promissory note includes the "holder" of the instrument. "[F]or U.S. Bank to qualify as a 'holder' of the note (and thereby be a person entitled to enforce the instrument as set forth in R.C. 1303.31(A)(1)), it must have both possession of the note, and the note must be indorsed either in blank to the bearer or specifically to the one presenting it (U.S. Bank)." *George II* at ¶ 19, citing former R.C. 1301.01(T)(1)(a) and (b) (2002) (currently set forth in R.C. 1301.201(B)(21)(a)).

{¶ 28} Here, the trial court found that U.S. Bank, through its agent Wells Fargo Bank, had possession of the note at the time of trial, and that the note contains an indorsement making it payable to U.S. Bank. Consequently, the trial court concluded that U.S. Bank qualifies as a holder of the note. The Georges contend the trial court erred in reaching this conclusion. They argue U.S. Bank did not prove its possession of the note because the evidence did not track the physical location of the note at all times. According to the Georges, U.S. Bank needed to show the note's chain of custody to prove its possession of the note. The Georges also allege U.S. Bank failed to prove the note's chain of transfer.

{¶ 29} In addressing the possession issue, we first acknowledge that in *George II* this court stated that the deposition testimony of John McCray, a records custodian for Wells Fargo Bank, did not include "any semblance of a chain of custody as to how the purported original note came to be at the deposition for his identification of it." *Id.* at ¶ 17. This statement was in the context of a discussion regarding U.S. Bank's argument that the evidence undisputedly showed that it had possession of the original note "because it was putatively produced at [McCray's] deposition." *Id.* The Georges cite this "chain of custody" observation as the basis for their assertion that U.S. Bank, in order to prove its possession of the original note, needed to prove the physical location of the original note at all times.

We are unconvinced. This statement was not essential to this court's resolution of U.S. Bank's application for reconsideration of this court's decision reversing the trial court's granting of summary judgment. In reversing the award of summary judgment, this court concluded that a genuine question of fact existed as to whether U.S. Bank is entitled to enforce the note. *George I*. The summary judgment evidence contained discrepancies as to the indorsement status of the version of the note in U.S. Bank's possession, thus creating a genuine issue of fact as to whether U.S. Bank was a holder entitled to enforce the note. *George I*.

{¶ 30} Further, " '[c]hain of custody' is only an evidentiary tool to establish identity of some item of personal property. [For example,] [i]t often becomes important in criminal drug cases to establish that the suspected substance submitted to a laboratory test is the identical substance found in the possession of a person charged with a drug offense." *Hawkins v. Marion Corr. Inst.*, 62 Ohio App.3d 863, 871 (3d Dist.1990); *see State v. Thompson*, 11th Dist. No. 2018-P-0099, 2020-Ohio-67, ¶ 92. Demonstrating a chain of custody in a criminal case enables the state to show the personal property has been in its continuous possession, thus proving its authenticity and "eliminating the possibility that the item has been tampered with or altered from its original form." *State v. Bowling*, 8th Dist. No. 93052, 2010-Ohio-3595, ¶ 32. Thus, a "chain [of custody] is needed only when an item is by nature fungible and indistinguishable, having no unique characteristics, like a pill." (Internal quotations omitted.) *State v. Ramos*, 2d Dist. No. 28214, 2019-Ohio-3588, ¶ 23.

{¶ 31} Here, the original note was produced at trial and a copy of that note was admitted into evidence. Appellant Douglas George acknowledged at trial that this note contains his signature and the signature of his wife, appellant Robin George. While the Georges generally challenged U.S. Bank's possession of the note, they presented no evidence at trial in support of their contention. As noted above, their challenge to the trial court's possession finding is essentially premised on their assertion that U.S. Bank did not prove the physical location of the note at all times before the lawsuit. But the note has identifiable characteristics. Namely, it contains the Georges' acknowledged signatures. And there was no evidence the note had been altered in any way since the Georges signed

it. Therefore, the Georges fail to show the trial court erred in finding U.S. Bank, through its agent Wells Fargo Bank, possessed the original note.

{¶ 32} We also reject the Georges' chain of transfer argument. Demonstrating the chain of transfer is one of the necessary elements a plaintiff must prove in a foreclosure action. *CitiMortgage, Inc. v. Taylor*, 10th Dist. No. 15AP-726, 2016-Ohio-8337, ¶ 18. "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course." R.C. 1303.22(B). "Negotiation" means "a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who by the transfer becomes the holder of the instrument." R.C. 1303.21(A). "An instrument, when specially indorsed, becomes payable to the identified person and may be negotiated only by the indorsement of that person." R.C. 1303.25(A). An "indorsement" is "a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words" serves to "negotiate" the instrument. R.C. 1303.24(A)(1).

{¶ 33} R.C. 1303.36(A) provides that, "[u]nless specifically denied in the pleadings, in an action with respect to an instrument, the authenticity of, and authority to make, each signature on an instrument is admitted." If the defendant makes this specific denial, the burden of establishing validity is on the plaintiff. *Romano's Carryout, Inc. v. P.F. Chang's China Bistro, Inc.*, 196 Ohio App.3d 648, 2011-Ohio-4763, ¶ 13 (10th Dist.). However, while the plaintiff then carries the burden, there is a "rebuttable presumption that the signature is authentic and authorized." *Id. See Deutsche Bank Natl. Trust Co. v. Sopp*, 10th Dist. No. 14AP-343, 2016-Ohio-1402, ¶ 15, quoting *Bates & Springer, Inc. v. Stallworth*, 56 Ohio App.2d 223 (8th Dist.1978), paragraph five of the syllabus (" 'The signature [on an instrument] is presumed genuine and authorized, but this presumption is rebuttable and may be overcome by evidence to the contrary.' ").

{¶ 34} The note U.S. Bank attached to its complaint and produced at trial was first indorsed by the lender, M/I Financial, to WFHMI. WFHMI indorsed the note to "Wachovia Bank, National Association, as Trustee under the pooling and servicing agreement dated as

of February 26, 2003." (Pl.'s Trial Ex. PX-1 at 5.) And an allonge[1] to the note bears an indorsement to U.S. Bank, "as trustee, successor in interest to Wachovia Bank * * * by Wells Fargo Bank, N.A. its attorney in fact." (Ex. PX-1 at 6.) In their answer, the Georges did not specifically deny the authenticity of any signature or any person's authority to make any of the indorsements. Thus, pursuant to R.C. 1303.36(A), authenticity and authority as to the indorsements on the note were admitted. And even if they were not deemed admitted, the Georges failed to overcome the rebuttable presumption of authenticity and authority that attached to the signatures.

{¶ 35} The Georges argue U.S. Bank is not entitled to enforce the note because the indorsement from WFHMI to Wachovia Bank occurred after WFHMI ceased to exist. They contend this circumstance invalidated the transfer and created a break in the chain of transfers. The indorsement from WFHMI to Wachovia Bank occurred sometime between September 23, 2002, and September 30, 2009. The image of the note taken on September 23, 2002, only contained the indorsement from M/I Financial to WFHMI, and the image taken on September 30, 2009, included the indorsement from WFHMI to Wachovia Bank, as trustee for the trust. Evidence in the record further established that, on May 8, 2004, Wells Fargo Bank acquired WFHMI. The Georges assert that pursuant to the pooling and servicing agreement, the indorsement to Wachovia Bank should have occurred by February 26, 2003, but testimony at trial suggested the 2009 image of the note was taken soon after that indorsement. The Georges further assert that, if that indorsement was made after WFHMI ceased to exist, U.S. Bank needed to demonstrate proof of value paid by Wachovia Bank under the "curative indorsement rule" of R.C. 1303.22(C), and that U.S. Bank did not meet that burden. But this assertion does not account for the principle that they had to present evidence to overcome the rebuttable presumption of validity that attached to the signature. Moreover, the trial court, as the finder of fact, could evaluate and resolve any discrepancies in the evidence regarding the timing of the indorsement from WFHMI to Wachovia Bank. Therefore, considering the evidence produced at trial, it was

[1] An allonge is "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." *Black's Law Dictionary* 88 (9th Ed.2009). *See* R.C. 1303.24(A)(2) (An allonge is considered part of the instrument being indorsed if it is "affixed to the instrument.").

reasonable for the trial court to conclude the indorsement from WFHMI to Wachovia Bank was valid.

{¶ 36} The Georges also argue there was a break in the chain of transfers because there was no indorsement from Wachovia Bank to U.S. Bank. The evidence at trial, however, demonstrated U.S. Bank became the successor trustee to the trust at issue based on U.S. Bank's acquisition of Wachovia Bank's corporate trust business. Thus, the absence of an indorsement from Wachovia Bank to U.S. Bank on the note does not constitute a break in the chain of transfer.

{¶ 37} Accordingly, we conclude the trial court did not err in finding U.S. Bank qualifies as a holder entitled to enforce the note. And as the holder of the note, U.S. Bank is also entitled to enforce the mortgage. *See Bank of New York Mellon v. Primes*, 8th Dist. No. 105678, 2018-Ohio-1833, ¶ 9 (the "current holder of the promissory note is entitled to enforce the mortgage lien."); *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. No. 98502, 2013-Ohio-1657, ¶ 65 ("[U]nder Ohio law, the mortgage 'follows the note' it secures."); *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, ¶ 52 (7th Dist.) (Internal citations omitted.) (Ohio has long recognized "that whenever a promissory note is secured by a mortgage, the note constitutes the evidence of the debt, and the mortgage is a mere incident to the obligation. Therefore, the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.").

{¶ 38} Because the trial court did not err in concluding U.S. Bank is entitled to enforce both the note and mortgage, we overrule the Georges' second assignment of error.

IV. Disposition

{¶ 39} Having overruled the Georges' first and second assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER, P.J., and BROWN, J., concur.

[Cite as *New Residential Mtge. v. Barnes*, 2020-Ohio-6907.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

NEW RESIDENTIAL MORTGAGE LLC,	:	
Appellant,	:	CASE NO. CA2020-04-027
	:	O P I N I O N
- vs -		12/28/2020
	:	
SARA L. BARNES, et al.,	:	
Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 19CV092563

Reimer Law Co., Mike L. Wiery, Katherine D. Carpenter, 30455 Solon Road, Solon, Ohio 44139, for appellant

Kaufman & Florence, Mark Florence, 144 East Mulberry Street, P.O. Box 280, Lebanon, Ohio 45036, for appellee Heritage Building Group, LLC

HENDRICKSON, P.J.

{¶1} Appellant, New Residential Mortgage LLC ("NRM"), appeals from a decision of the Warren County Court of Common Pleas denying its motion to set aside a sheriff's sale of real property sold to appellee, Heritage Building Group, LLC ("Heritage"). For the reasons set forth below, we affirm in part, reverse in part, and remand the matter for further proceedings.

{¶2} On August 30, 2007, Sara L. Barnes and Jesse L. Oliver executed a promissory note in favor of Guardian Savings Bank in the amount of $136,000 for the purchase of real property located at 3864 Townsley Drive in Loveland, Ohio. The promissory note called for monthly payments for a period of 30 years, with interest accumulating on the principal amount at a yearly rate of 7.375 percent. The promissory note was secured by a mortgage on the property giving the mortgagee-bank, its successors and assigns the first and best lien on the property. The note and mortgage were eventually assigned to NRM.

{¶3} In 2013, Barnes and Oliver received a Chapter 7 bankruptcy discharge. In April 2018, Barnes and Oliver entered into a loan modification agreement. The terms of the loan modification agreement provided that as of April 1, 2018, the new principal balance of the note was $139,464.10, which was to be paid over 40 years with a yearly interest rate of 3.875 percent. Barnes and Oliver failed to make payments under the terms of the loan modification agreement, and on August 28, 2019, NRM filed an in rem foreclosure action. In its complaint, NRM alleged that the sum of $138,228.98 plus interest at the rate of 3.875 percent per annum from February 1, 2019 was due and owed. Neither Barnes nor Oliver filed an answer or otherwise appeared in the action and default judgment was granted to NRM on November 27, 2019.

{¶4} On January 8, 2020, NRM filed a praecipe for an order of sale. Subsequently, on January 27, 2020, NRM filed a Notice of Sale in which NRM stated that sale of the property would take place "on February 10, 2020 at 8:30 A.M. in the Grand Jury Room, Warren County Common Pleas Courthouse, 500 Justice Drive, Lebanon, Ohio 45036." This Notice of Sale was not signed by the trial court.

{¶5} Around the same time that NRM filed its Notice of Sale, the Warren County Sheriff's Office published on its official website information regarding sheriff's sales,

informing the public that sheriff's sales were moving online as of February 10, 2020. The notice specifically provided as follows:

> *Effective February 10, 2020, the Warren County Sheriff's Office will conduct the sale of all real estate subject to foreclosure on the "Official Public Sheriff's Sale Website*" which is operated by RealAuction based on a contract with the Ohio Department of Administrative Services. The process under which these sales will be completed is detailed at the Warren County RealAuction website (https://warren.sheriffsaleauction.ohio.gov). *All prospective bidders should familiarize themselves with this new process.*

(Emphasis added). The website then set forth "key points" interested buyers should be aware of, including that:

1. *Any person wanting to bid on a property offered by the Warren County Sheriff's Office must register with RealAuction.* Registration includes completion of the Purchaser Information Form.

2. Properties will be open for bid at least seven days prior to the date of sale. This is generally known as a proxy bid.

3. *Unless otherwise advertised, we will continue auctions every other Monday at 8:30 a.m. Eastern Time (EST).* Auctions will be conducted for each individual property; however, only one property will be sold at a time. After a property is sold, the next scheduled property sale will begin.

4. To qualify as a participant, bidders must submit a deposit based on the total deposit requirement ($2000/ $5000/ $10,000 set by law) for any properties by the predefined deadlines. The only acceptable deposit types are bank wire transfers or ACH – no cash deposits will be accepted. All Wire Deposits must be received by 5 p.m. EST two (2) business days before the auction sale date. All ACH Deposits must be initiated by 4 p.m. EST five (5) business days before the auction sale date. It is the bidder's responsibility to allow enough time for their bidding deposits to be received and processed within the time frames described above.

5. Plaintiff/Judgment Creditors – A Judgment Creditor is defined as the creditors (plaintiff or defendants) who are awarded judgment in the foreclosure case. *Judgment Creditors are required to register for a Username and Password and fill in all appropriate fields. Per Ohio Revised Code 2329.211, in every*

> *action of Judicial Sale or Execution of residential property, if the Judgment Creditor is the purchaser, they shall not be required to make a deposit on the sale. However, Judgment Creditors are required to submit the bidding style choice (pre-sale manage bid or live bid) AND a copy of the court order stating they are the Judgment Creditor on the case they are bidding to RealAuction Customer Service * * * at least one (1) business day prior to the sale date.* Submission can be done via email or fax. Submission must include the bidder number and user account contact first and last name in the submission. * * *

(Emphasis added.)

{¶6} Notice of the sheriff's sale of the Townsley Drive property was published in a newspaper on January 26, 2020, February 2, 2020, and February 9, 2020. The published notice provided that the sale would be "online @ https://warren.sheriffsaleauction.ohio.gov on **Monday, February 10, 2020 at 9:00 o'clock A.M.**" and that the appraised value of the property was $150,000. (Bold emphasis sic.)

{¶7} Despite the published notice that the sale would occur online, Angelica Nelson, counsel for NRM, arranged for local counsel to appear in person in order to bid on the property on behalf of NRM. When local counsel appeared for the sale in the Grand Jury Room and discovered that the sale would be online, local counsel contacted Nelson. Nelson attempted to submit an online bid for the property. However, as Nelson did not have sufficient time to register NRM as a judgment creditor exempt from the deposit requirement, NRM's bid was rejected as lacking the required deposit. The minimum bid of $100,000 submitted by Heritage was accepted for purchase of the Townsley Drive property.

{¶8} Eight days later, on February 18, 2020, NRM moved to set aside the sale of the property, claiming it intended to place a bid at the February 10, 2020 sheriff's sale but was unable to do so due to a mistaken belief that the sale was to be held in-person, rather than online. NRM supported its motion with an affidavit from Nelson, who averred that (1) she monitored the court's docket and the sheriff's website for a sale date for the property,

(2) she discovered the property was listed to be sold on February 10, 2020, (3) the listing indicated the sale date but did not state that the sheriff's sale was to be conducted online, (4) neither she nor anyone from her office received notice that Warren County sheriff's sales had been moved to an online platform, despite the fact that she has had several communications with the Warren County Sheriff's Office about previous sales over the past 10 years, (5) she had received "bidding instructions from [NRM] * * * to bid to an amount significantly in excess of the minimum/opening bid," (6) local counsel hired to attend the in-person sale of the property advised her via a phone call that the sale was being conducted online, and (7) "[i]mmediately upon learning this information, [she] logged online and attempted to enter a bid on behalf of [NRM] on the property * * * [but her] bidding efforts were rejected as there had not been enough time to link the bid so that the online system would know that it was coming from the Judgment Creditor."

{¶9} On February 27, 2020, Heritage appeared in the action and filed a memorandum opposing NRM's motion to set aside the sale. Attached to Heritage's memorandum in opposition was the affidavit of Aaron T. Hoyt, the Clerical Specialist for the Warren County Sheriff's Department who is in charge of implementing and facilitating the county's sheriff's sales In his affidavit, Hoyt averred that on January 27, 2020, the Warren County Sheriff's Department published on the official public sheriff's sale website the "Notice of Online Sheriff's Sales," which provided that effective February 10, 2020, all sheriff's sales would be held online. The notice has been published continuously on the website since January 27, 2020. Hoyt further attested that the "last time that Sheriff's Sales were held in the Warren County Grand Jury Room was on March 8, 2017." After March 8, 2017, the sheriff's sales occurred in the Warren County Court until they moved online on February 10, 2020. Hoyt's affidavit further states that the notice of the sheriff's sale of the

Townsley Drive property was published in a newspaper, and that the notice specifically stated the sale would be "online."

{¶10} Hoyt's affidavit indicates that four bids were made on the Townsley Drive property on February 10, 2020. Ross made a bid in the amount of $100,100, Hoyle made a bid in the amount of $100,100, NRM bid $130,500, and Heritage bid $100,000. Hoyt stated that the "bids attempted to be made by Ross, Hoyle, and [NRM] did not comply with the requirement of depositing money with the Sheriff's Department * * * [and the] only successful bid was by Heritage." Due to the successful bid by Heritage, the Warren County Sheriff's Department prepared and filed the real estate judicial sale purchaser information form with the clerk of courts on February 11, 2020.

{¶11} NRM moved to strike Heritage's memorandum in opposition to its motion to set aside the sheriffs sale on the basis that Heritage was not a party to the case, had not been granted leave to intervene in the case, and had no interest in the Townsley Drive property as the sale had yet to be confirmed. On March 23, 2020, the trial court issued a decision denying NRM's motion to set aside the sale, finding that

> [t]he location of the Sheriff's Sales were changed prior to the February 10, 2020 sale and some effort was made on the part of the Sheriff's Office to notify the parties of this change. Simply because [NRM's] counsel was mistaken regarding the location of the sale does not constitute such excusable neglect as to set aside what was presumably a lawfully held Sheriff's Sale. [NRM's] argument that the Notice of Sale in this case did not mention online sales is unpersuasive as [NRM's] counsel prepared the Notice of Sale and actually listed a location of the sale that has not been utilized in some time.

The trial court did not, however, expressly rule on NRM's motion to strike Heritage's memorandum in opposition to its motion to set aside the sheriff's sale.

{¶12} NRM timely appealed, raising two assignments of error for review.

{¶13} Assignment of Error No. 1:

{¶14} THE TRIAL COURT ERRED BY FAILING TO REQUIRE NON-PARTY HERITAGE BUILDING GROUP, LLC TO FIRST SEEK LEAVE OF COURT TO INTERVENE IN THE TRIAL COURT BEFORE CONSIDERING THEIR MEMORANDA IN OPPOSITION TO NEW RESIDENTIAL MORTGAGE LLC'S MOTION TO SET ASIDE SALE.

{¶15} In its first assignment of error, NRM contends the trial court erred by not striking Heritage's memorandum in opposition to NRM's motion to set aside as NRM was not a party to the action and did not seek leave to intervene in accordance with Civ.R. 24.

{¶16} The trial court did not expressly rule on NRM's motion to strike Heritage's memorandum in opposition to its motion to set aside the sheriff's sale before denying the motion to set aside. When a trial court fails to rule on a motion, an appellate court considers the motion denied. *Bank of Am., N.A. v. Singh*, 12th Dist. Butler No. CA2012-07-146, 2013-Ohio-1305, ¶ 23; *Takacs v. Baldwin*, 106 Ohio App.3d 196, 209 (6th Dist.1995). An appellate court reviews a trial court's decision granting or denying a motion to strike under an abuse-of-discretion standard of review. *Allgeier v. Allgeier*, 12th Dist. Clinton No. CA2009-12-019, 2010-Ohio-5313, ¶ 11. An abuse of discretion is more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Id.*

{¶17} In *Bayview Loan Servicing, LLC v. Griffen*, 12th Dist. Warren No. CA2020-02-013, 2020-Ohio-6666, a recently decided case, this court had the opportunity to consider whether the purchaser of property at a sheriff's sale, prior to judicial confirmation of the sale, was permitted to participate in trial court proceedings without filing a motion to intervene. We held that

> [a]lthough it appears [the purchaser] would not have had standing to appeal "regarding the granting or denying of confirmation of said sale," *Bank of N.Y. v. Rains*, 12th Dist.

> Butler No. CA2012-04-092, 2013-Ohio-2389, ¶ 27, citing *Ohio Savings Bank v. Ambrose*, 56 Ohio St.3d 53, 55 (1990), once [the purchaser] became the successful bidder of the property at the sheriff's sale, [the purchaser] did have standing to appear and participate in the proceedings before the trial court to protect [its] newly acquired interest in the property. This holds true despite the fact that [the purchaser] did not first move the trial court to allow [it] to intervene in the case. *See, e.g., Treasurer v. Kafele*, 10th Dist. Franklin No. 05AP-252, 2005-Ohio-6618, ¶ 8 ("once [the buyer] became the successful bidder at sheriff's sale, he had standing to appear in the trial court and to move to protect his acquired interest in the property, although better practice may have been to move to intervene prior to doing so").

Griffen at ¶ 15. *See also Mid-Am. Natl. Bank v. Heiges*, 6th Dist. Ottawa No. 94OT025, 1994 WL 645780, *2 (Nov. 18, 1994) (noting that "[a]lthough lacking vested title and property rights prior to confirmation of the sale, a purchaser at a foreclosure sale is a party to the accompanying court proceedings").

{¶18} Accordingly, pursuant to our holding in *Griffen*, Heritage was not required to file a motion to intervene prior to appearing in the case and filing its memorandum in opposition to NRM's motion to set aside. The trial court was entitled to consider Heritage's memorandum in opposition and the affidavit attached in support of the memorandum in ruling on NRM's motion to set aside the sheriff' sale. The trial court, therefore, did not abuse its discretion in denying NRM's motion to strike, and NRM's first assignment of error is overruled.

{¶19} Assignment of Error No. 2:

{¶20} THE TRIAL COURT ERRED BY APPLYING AN EXCUSABLE NEGLECT STANDARD INSTEAD OF THE DOCTRINE OF MISTAKE WHEN DECIDING APPELLANT'S MOTION TO SET ASIDE [THE] SHERIFF'S SALE AND BY DECLINING APPELLANT'S MOTION TO SET ASIDE [THE] SALE WHEN JUST CAUSE EXISTS TO SET ASIDE SAID SALE.

{¶21} "[T]he question of whether to confirm or set aside a judicial sale is a matter within the sound discretion of the trial court." *Am. Sav. & Loan Assn. v. Taylor*, 12th Dist. Butler No. CA85-02-015, 1985 WL 7691, *1 (July 31, 1985). *See also Wells Fargo Bank, N.A. v. Fortner*, 2d Dist. Montgomery 26010, 2014-Ohio-2212, ¶ 8. "A decision constitutes an abuse of discretion when the trial court acted unreasonably, arbitrarily, or unconscionably." *Wells Fargo Bank v. Maxfield*, 12th Dist. Butler No. CA2016-05-089, 2016-Ohio-8102, ¶ 32, citing *Bank of Am., N.A. v. Jackson*, 12th Dist. Warren No. CA2014-01-018, 2014-Ohio-2480, ¶ 9.

{¶22} A trial court's exercise of discretion "'must be bottomed upon the factual situations surrounding each sale.'" *Taylor* at *1, quoting *Merkle v. Merkle*, 116 Ohio App. 370, 372 (4th Dist.1961) Factors a court may consider in determining whether or not to set aside a sale include (1) the difference between what the property sold for at a judicial sale and the amount of mortgage indebtedness; (2) the timeliness of the motion to set aside; and (3) the likelihood of a higher bid if the sale is set aside. *Id.* at *2; *Chase Manhattan Mtge. Corp. v. Koan*, 6th Dist. Huron No. H-02-011, 2002-Ohio-6182, ¶ 18.

{¶23} NRM argues that the trial court abused its discretion in denying its motion to set aside the sheriff's sale on the ground of mistake. NRM contends that it was mistaken and acted under an erroneous conviction of fact when it sent local counsel to the Warren County Grand Jury Room on February 10, 2020 to make an in-person bid on the Townsley Drive property. NRM argues that under this court's prior decisions in *Taylor*, 1985 WL 7691, and *Kissell v. Lane*, 12th Dist. Warren No. CA85-04-017, 1985 WL 7746 (Sept. 30, 1985), the trial court should have granted its motion to set aside the sale. We agree.

{¶24} In *Taylor*, counsel for the mortgagee-judgment creditor appeared at a sheriff' sale with instructions to submit a bid on the foreclosed property at a maximum amount sufficient to cover the balance due on the mortgage, taxes in arrears, and estimated court

costs. *Taylor* at *1. Counsel for the mortgagee submitted an opening bid of $14,000, which was the minimum permissible bid. *Id.* While making notations relevant to a previous transaction, counsel for the mortgagee did not hear another party place a bid in the amount of $14,100. *Id.* The sale was then closed, with the mortgagee's counsel believing he had made the only bid on the property. *Id.* Upon learning that the property had been sold to another bidder for $14,100, counsel asked the deputy to rescind the sale. *Id.* The deputy refused to do so. *Id.* The next day, the mortgagee's counsel filed a motion to set aside the sale on the grounds of mistake and inadvertence. *Id.* The trial court denied the motion, confirmed the sale, and the mortgagee appealed. *Id.*

{¶25} On appeal, this court reversed the trial court's denial of the motion to set aside the sale, observing that the "primary object of judicial sales is to raise the money due the creditor, * * * not to allow the property to be sacrificed at a price significantly below its market value." *Id.* at *2. We noted that "the equities of the situation dictate[d] that the doctrine of mistake should be applied and the sale vacated" as the mortgagee's counsel promptly brought the mistake to the attention of the deputy and court and permitting the sale at $14,100 would have resulted in an $8,000 loss to the mortgagee-judgement creditor, as the mortgagee could not recover from the mortgagor who had filed for bankruptcy. *Id.* We therefore found the trial court abused its discretion in denying the judgment creditor's motion to set aside the sale. *Id.*

{¶26} In *Kissell*, the attorney for the mortgagee-judgment creditor failed to attend the sheriff's sale and bid on the foreclosed property due to a mistake as to the sale date. *Kissell*, 1985 WL 7746 at *1. The attorney for the mortgagee claimed he never received a copy of the legal notice of sale and was advised by an employee of the sheriff's office that the sale would occur on January 18, 1985. *Id.* However, the property was offered for sale and was sold on January 14, 1985. *Id.* The winning bidder placed the minimum bid of two-

thirds the appraised value. *Id.* Upon learning on January 18, 1985 that the property had been sold, counsel for the mortgagee immediately moved to set aside the sale. *Id.* at *1-2. The trial court granted the motion to set aside the sale and the winning bidder appealed. *Id.* at *2. We upheld the trial court's decision to set aside the sale, noting that "if the original sale to [the winning bidder] for two-thirds of the appraised value were to stand, the mortgagor would be faced with a deficiency judgment in excess of $21,000 and such would also effectively defeat the purpose of the sale to raise money due the creditor." *Id.*

{¶27} The present case presents facts similar to those in *Taylor* and *Kissell,* and the rationale expressed in those cases applies herein. NRM's counsel, despite the exercise of some diligence in determining when the sheriff's sale was to be held, was unaware that the sheriff's sale for the Townsley Drive property was being held online. The grid listing of sheriff's sales that NRM's counsel viewed on the Sheriff's Office's website did not indicate the scheduled sale was online. The departure from in-person to online sales occurred for the first time in the county on February 10, 2020 – making the Townsley Drive property one of the first properties to be auctioned online. Furthermore, notice of the county's shift from in-person sales to online sales was not posted online until January 26, 2020 – a mere two weeks before the Townsley Drive property was scheduled to be sold online.[1] According to Nelson's affidavit, counsel for NRM did not receive notice from the sheriff's office about the change in format for the sale and did not see the notice of the online sale on the sheriff's website.

{¶28} Once NRM's counsel learned that the sheriff's sale was being held online, counsel immediately sought to participate by registering with RealAuction and submitting a

1. Warren County's shift from in-person sheriff's sales to online sheriff's sales does not explain NRM's counsel's confusion about where the in-person sheriff's sales used to take place, the Warren County Court versus the Grand Jury Room. Nonetheless, as discussed in the body of our opinion, equitable considerations demonstrate that under the facts presented in this case, the doctrine of mistake should be applied and the sheriff's sale set aside.

bid. However, because NRM was not able to register as a judgment creditor, and it did not otherwise have money deposited, its bid was rejected. Heritage's minimum bid of $100,000 was accepted. The difference between the sale price of the property and the amount due to NRM is in excess of $38,000. Like the judgment-creditor in *Taylor*, NRM is unable to seek further redress from Barnes and Oliver due to their bankruptcy discharge. NRM moved within eight days of the auction to set aside the sale. Furthermore, based on Nelson's affidavit – and the amount of NRM's rejected bid amount ($130,500) – it is reasonable to expect a higher bid for the sale of the Townsley Drive property if the sheriff's sale is vacated and another sale is held. As the primary objective of judicial sales is to raise the money due to the creditor, and not to allow the property to be sacrificed at a price significantly below its market value due to the mistake of a party or the party's counsel, we find that the trial court abused its discretion in denying NRM's motion to set aside the sale. *See Taylor; Kissell.*

{¶29} NRM's second assignment of error is therefore sustained. The trial court's decision denying NRM's motion to set aside is hereby reversed and the matter is remanded for the issuance of an order granting NRM's motion to set aside the sheriff' sale and for further proceedings in accordance with law.

{¶30} Judgment affirmed in part, reversed in part and the matter remanded for further proceedings.

RINGLAND and M. POWELL, JJ., concur.

[Cite as *LRC Realty, Inc. v. B.E.B. Properties*, 2020-Ohio-6999.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

LRC REALTY, INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2016-G-0076
- vs -	:	
B.E.B. PROPERTIES,	:	
Defendant,	:	
NEW PAR, d.b.a. VERIZON WIRELESS, et al.,	:	
Defendants-Appellees,	:	
- vs -	:	
BRUCE BIRD, et al.,	:	
Plaintiffs-Appellants.		

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 2014M000690.

Judgment: Affirmed in part and reversed in part; remanded.

Timothy J. Fitzgerald, Koehler Fitzgerald LLC, 1111 Superior Avenue East, Suite 2500, Cleveland, OH 44114 (For Plaintiff-Appellee).

Nelson Reid, Bricker & Eckler, LLP, 100 South Third Street, Columbus, OH 43215-4291 (For Defendant-Appellee New Par, d.b.a. Verizon Wireless).

Robert T. Dove, Kegler, Brown, Hill & Ritter Co., LPA, 60 East State Street, Suite 1800, Columbus, OH 43215 (For Defendant-Appellee 112 Parker Court LLC).

James B. Rosenthal and *Ellen M. Kramer*, Cohen Rosenthal & Kramer LLP, 3208 Clinton Avenue, One Clinton Place, Cleveland, OH 44113 (For Plaintiffs-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants Bruce and Sheila Bird ("the Birds") appealed the decision of the Geauga County Court of Common Pleas, granting summary judgment in favor of Appellees 112 Parker Court LLC ("112 Parker Court") and LRC Realty, Inc. ("LRC Realty"). This matter is currently before this court on remand from the Supreme Court of Ohio. At issue is who owns the right to receive rental payments from a cellular tower's owner following the transfer of the underlying property. Following remand, LRC Realty and the Birds, individually and as successors to B.E.B. Properties, reached a settlement of all claims between them in the consolidated actions that are part of this appeal. The only claims and issues remaining for adjudication are those related to damages as between 112 Parker Court and the Birds, individually and as successors to B.E.B. Properties. The trial court's judgment is affirmed in part and reversed in part, and the matter is remanded for further proceedings.

{¶2} The facts of the matter at hand have previously been conveyed at length in *LRC Realty, Inc. v. B.E.B. Properties*, 11th Dist. Geauga No. 2016-G-0076, 2018-Ohio-2887 ("*The Birds I*"). The following synopsis is adopted from *LRC Realty, Inc. v. B.E.B. Properties*, 160 Ohio St.3d 218, 2020-Ohio-3196 ("*The Birds II*").

{¶3} In 1994, B.E.B. Properties leased a portion of the roughly three-acre commercial property it owned in Chardon, Ohio, to Northern Ohio Cellular Telephone Company ("Northern Ohio Cellular"). B.E.B. Properties also granted Northern Ohio Cellular an easement on that same property. Both the lease and the easement were subsequently recorded, and a cellular tower was erected on the site.

{¶4} In 1995, B.E.B. Properties sold the property to two individuals, Keith Baker and Joseph Cyvas. Within months after selling the property to Baker and Cyvas, two of the three general partners in B.E.B. Properties sold their interests in the partnership to the third partner and his wife, the Birds. The Birds understood this transaction to include the assignment of the right to receive all future rental payments for the cellular tower located on the partnership's former property.

{¶5} Pertinently, throughout the time that Baker and Cyvas owned the property, the Birds did, in fact, receive annual rental payments from Northern Ohio Cellular and its successor in interest, Appellee New Par d.b.a. Verizon Wireless ("New Par"). New Par continued to send the Birds its rental payments even after 112 Parker Court purchased the land from Baker and Cyvas's successor in interest in 2003.

{¶6} In 2013, LRC Realty acquired the property from 112 Parker Court and began inquiring about its rights to the rental payments. Shortly thereafter, this litigation commenced.

{¶7} In 2014, LRC Realty filed a complaint against B.E.B. Properties, 112 Parker Court, and New Par, seeking a declaratory judgment that it was entitled to the annual rental payments for the cellular tower located on its property. LRC Realty also sought to recover the rental payments that New Par had paid the Birds in 2013. As the assignees of B.E.B. Properties, the Birds responded and filed a counterclaim and cross-claim, asking the court to declare that they were entitled to receive the rental payments and to reform a warranty deed in the chain of title of the property to reflect that fact.

{¶8} In 2015, after New Par filed a notice of interpleader of that year's rental payment, the parties filed cross-motions for summary judgment. The trial court denied

the Birds' motion for summary judgment, including their request for reformation of the deed. The trial court granted 112 Parker Court's and LRC Realty's motions for summary judgment in part. The Birds were ordered to pay 112 Parker Court the rent they had received from New Par beginning April 1, 2007 (eight years preceding suit, *see* R.C. 2305.06) through March 31, 2013; and to pay LRC Realty the rent they had received from April 1, 2013, through March 31, 2014. The trial court also awarded LRC Realty the funds that New Par had deposited with the court.

{¶9} Following that ruling, the Birds appealed to this court. The majority opinion affirmed the trial court's judgment with respect to reformation of the deed and with respect to all claims against New Par. *The Birds I*, *supra*, at ¶48. The majority reversed the trial court's judgment with respect to the legal claims involved, holding that the Birds were entitled to the past and future rental payments based on the language contained in the deed transferring the property from B.E.B. Properties to Baker and Cyvas. *Id.* at ¶45. The case was remanded with an instruction for the trial court to enter judgment in favor of the Birds. *Id.* at ¶49.

{¶10} LRC Realty and 112 Parker Court separately appealed to the Supreme Court of Ohio, which accepted jurisdiction. The Supreme Court held that "B.E.B. Properties did not reserve the right to receive future rental payments for the leased land when it conveyed the property to Baker and Cyvas and its subsequent assignment of that interest to the Birds was thus ineffective." *The Birds II*, *supra*, at ¶21. Consequently, the Supreme Court reversed this court's majority opinion concluding otherwise. *Id.* The case was remanded to this court to address other issues that remained unresolved in our previous opinion. *Id.* at ¶22.

{¶11} The text of the Birds' assignments of error reads as follows:

> [1.] The trial court committed prejudicial error in granting summary judgment and awarding damages in favor of [112 Parker Court and LRC Realty], and denying [the Birds'] motion for summary judgment, holding that [the Birds'], individually and as successors and assigns of B.E.B. Properties, never had any right to receive rent from the cellphone tower lease and must pay all rent received within 8 years of filing the Complaints to past and current owners of the property.
>
> [2.] The trial court committed prejudicial error in granting judgment and awarding damages to [112 Parker Court and LRC Realty], when [their] direct claims against [the Birds] for money were equitable in nature, and when derivative liability was not briefed on summary judgment.
>
> [3.] The trial court committed prejudicial error in granting judgment to [112 Parker Court], and requiring [the Birds] to pay to [112 Parker Court] all rent they received from 2007 through 2012, when undisputed evidence established that [112 Parker Court] had actual knowledge of the reservation of rent to a prior owner.
>
> [4.] The trial court committed prejudicial error in granting judgment to [112 Parker Court], and requiring [the Birds] to pay to [112 Parker Court] all rent they received from 2007 through 2012, based on R.C. 2305.06, the statute of limitations for written contracts, when the undisputed evidence established no contract between the Birds and [Parker Court], written or otherwise.

Our review upon remand is limited to the arguments raised under these assignments of error as to whether any equitable defenses should apply based on the parties' courses of conduct. *Id.* As a result of a settlement reached between the Birds and LRC Realty as to all claims between them in the actions that are part of this appeal, our review is further limited to the claims and issues between the Birds and 112 Parker Court.

{¶12} "Because our analysis of these issues arises out of the trial court's grant of summary judgment in this case, we apply a de novo standard of review." *Id.* at ¶11, citing *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is proper when (1) the evidence shows "that

there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor." Civ.R. 56(C).

{¶13} 112 Parker Court moved for summary judgment to recover rent payments made by New Par to the Birds. 112 Parker Court argued that New Par was liable for breach of lease and that the Birds were liable for tortious interference with contract.

{¶14} The trial court granted New Par's motion for summary judgment and denied Parker Court's motion with respect to its claim against New Par, but the court rendered judgment against the Birds. The trial court found:

> After BEB sold the property, Baker and Cyvas, (and then their company Magnum), owned the property, were the landlords, and were entitled to the rent. Baker and Cyvas agreed with BEB and the Birds not to collect the rent. Baker and Cyvas allowed Northern/New Par to pay rent as instructed by BEB and the Birds. These agreements, however, do not override the right of the succeeding property owners to rely on recorded documents and to receive rent according to the recorded lease and deeds.

The trial court held that "Northern/New Par fulfilled its duty to pay rent as instructed" and was "not required to pay past rental installments to property owners who failed to provide payment instructions." The judgment in favor of New Par has not been challenged on appeal.

{¶15} On appeal, the Birds argue that in the absence of any express legal theory relied upon by the trial court in ordering them to pay 112 Parker Court, the damage awards were necessarily equitable in nature; derivative liability was not argued in 112 Parker

Court's motion for summary judgment; and 112 Parker Court invoked claims for "money had and received" and "money mistakenly received."

{¶16} "Ohio recognizes an action for money had and received when a party to a contract has fully performed and another party has been unjustly enriched thereby. The action is an equitable action, based not on contract but on a moral obligation to make restitution where retention of benefits bestowed would result in inequity and injustice. Thus, a party to a contract may defeat an action on the contract but, nevertheless, be liable in equity." *Natl. City Bank, Norwalk v. Stang*, 84 Ohio App.3d 764, 766-767 (6th Dist.1992), citing *Hummel v. Hummel*, 133 Ohio St. 520, 526 (1938). Under the theory of money had and received, judgment may be rendered against a party who was not a contracting party, but who nevertheless acted to withhold money that in justice and equity belonged to another. *See Hummel*, *supra*, at 529-530. Further, "[a] cause of action for money had and received lies when one receives money from another *without* valuable consideration given on the receiver's part." *Hameroff/Milenthal/Spence, Inc. v. Grigg*, 10th Dist. Franklin No. 96APE03-289, 1996 WL 598537, *2 (Oct. 15, 1996) (emphasis added), citing *Hummel*, *supra*, at 527.

{¶17} Tortious interference with a contract has been described as follows: "'One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.'" *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 418-419 (1995), quoting Restatement of the Law 2d, Torts, Section 766 (1979).

{¶18} The Birds maintain that it is inequitable for them to pay 112 Parker Court damages for the rent payments they received. The Birds assert they were the only party to pay value for the right to receive cellular tower lease payments. Specifically, the Birds note that when B.E.B. Properties sold the property to Baker and Cyvas, the parties understood that the transfer did not include the right to receive rental payments. When B.E.B. Properties assigned the right to receive rental payments to the Birds, they paid value for the right.

{¶19} David J. Eardley, a partner in B.E.B. Properties and the partnership's attorney, testified by affidavit as follows:

> In March 1995, B.E.B. Properties entered into an agreement to sell the property to Keith Baker and Joseph Cyvas for $430,000. I handled the negotiations on behalf of the partnership. In the course of those negotiations, B.E.B. Properties offered Baker and Cyvas the right to receive the lease payments for an additional payment of $100,000, above the Original Purchase Price of $430,000 that had been previously agreed upon. Baker and Cyvas declined to acquire those rights, instead paying $430,000 for the property without the right to receive the cellphone tower lease payments.

{¶20} An affidavit submitted by Keith Baker confirms B.E.B. Properties' offer to sell the right to receive royalties from the cellular tower lease and Baker and Cyvas's rejection of the offer: "Mr. Cyvas and I did not feel that we would have received a reasonable return on that additional investment and declined to acquire rights to the income from the cellphone tower."

{¶21} Bruce Bird testified by deposition that he and Sheila Bird paid $66,666.66 to acquire the right to receive rent under the cellular tower lease. This figure represented the interest of the other two partners in B.E.B. Properties ($33,333.33 each) based on the same offering price of $100,000.00 presented to Baker and Cyvas. The understanding

was reflected in the Assignment executed by B.E.B. Properties and the Birds. In a letter dated July 18, 1995, Eardley advised Northern Ohio Cellular that the Birds had "acquired the rights under the lease agreement," including the right to receive payments.

{¶22} The Birds further claim that 112 Parker Court did not pay value for the right to receive rent payments and that 112 Parker Court had knowledge that the Birds were receiving payment under the Assignment.

{¶23} Baker testified by affidavit that, when Baker and Cyvas (Magnum Machine Co.) sold the property to 112 Parker Court, he "explained to Mr. Bennett [principal for 112 Parker Court] that the deal [they] were offering him had nothing to do with the cellphone tower" and "[they] did not own the rights to the cellphone tower royalties." In a document created in or around June 2004 as part of an application for financing with the Small Business Administration, Bennett acknowledged "that lessee is currently paying rent to a prior owner of the property and not the owner [112 Parker Court] and that the owner has not assumed any of the obligations as the lessor under the lease nor is owner entitled to any rent under the lease at this time."

{¶24} Bernard Casamento, owner of LRC Realty, testified by deposition that when LRC Realty acquired the property from 112 Parker Court, there was no understanding that he would be acquiring the right to receive rental payments under the cellular tower lease.

{¶25} 112 Parker Court disputes the Birds' claims regarding its knowledge of the cellular tower lease and the balance of equities. For present purposes, it is sufficient to recognize that the Birds have raised genuine issues of material fact regarding 112 Parker Court's entitlement to recover damages for the rent payments received by the Birds from

New Par. *See Blue View Corp. v. Rhynes*, 9th Dist. Summit No. 23034, 2006-Ohio-4084, ¶14 ("Such balancing of equities involves a weighing of the evidence, which is inappropriate on summary judgment.").

{¶26} Accordingly, the Birds' assignments of error have merit to the extent indicated herein.

{¶27} For the foregoing reasons, the decision of the Geauga County Court of Common Pleas is affirmed with respect to the Birds' claim for reformation and with respect to all claims against New Par. The decision is reversed with respect to the damage claims against the Birds in favor of 112 Parker Court. Further, the matter is settled with respect to all claims between the Birds and LRC Realty. This matter is remanded to the trial court for further proceedings consistent with this opinion. Costs to be taxed against all parties equally.

THOMAS R. WRIGHT, J.,

MARY JANE TRAPP, J.,

concur.

[Cite as *Wilmington Savings Fund Society v. Salahuddin*, 2020-Ohio-6934.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wilmington Savings Fund Society, FSB, d.b.a. Christiana Trust as Owner Trustee of The Residential Credit Opportunities Trust III,	:	
Plaintiff-Appellee,	:	No. 19AP-190 (C.P.C. No. 17CR-11307)
v.	:	(REGULAR CALENDAR)
Ameena C. Salahuddin,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 29, 2020

On brief: *Keith D. Weiner & Associates Co., LPA* and *Suzana Krasnicki*, for appellee. **Argued:** *Suzana Krasnicki.*

On brief: *Ameena C. Salahuddin*, pro se. **Argued**: *Ameena C. Salahuddin.*

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant, Ameena C. Salahuddin, pro se, appeals from a judgment entry and foreclosure decree of the Franklin County Court of Common Pleas entered on March 6, 2019, in favor of plaintiff-appellee, Wilmington Savings Fund Society, FSB, d.b.a. Christiana Trust as Owner of The Residential Credit Opportunities Trust III ("Wilmington"). In its decision, the trial court granted Wilmington's motion for summary judgment against Salahuddin and its motion for default judgment against other defendants who are not parties to this appeal. Additionally, the trial court dismissed Salahuddin's counterclaim against Wilmington and her motion for summary judgment. For the reasons

that follow, we sustain in part and reverse in part the decision of the trial court and remand the matter for further proceedings consistent with this decision.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} The underlying foreclosure action commenced December 22, 2017, with the filing of a complaint for money damages, foreclosure, and other equitable relief by Wilmington that named as defendants Salahuddin and other parties not involved in this appeal.[1]

{¶ 3} Salahuddin purchased a home at 6147 Olde Orchard Drive, Columbus, Ohio 43213 in 2008 with a loan she obtained from The American Eagle Mortgage Corp. On or about October 16, 2008, Salahuddin signed and delivered to The American Eagle Mortgage Corp. a promissory note ("the Note") in which she promised to pay The American Eagle Mortgage Corp. or its transferee the principal of $132,863.00, plus interest at the rate of 6.25 percent per annum. The loan was insured through the Federal Housing Administration ("FHA"). As part of the same transaction, Salahuddin signed and delivered the mortgage deed ("the Mortgage") for the Olde Orchard Drive home as security for the Note. The Note and the Mortgage were subsequently assigned to other entities, including JPMorgan Chase Bank, N.A., and ultimately to Wilmington.

{¶ 4} Wilmington claims Salahuddin has defaulted in payment of the Note. Consequently, Wilmington has declared the debt due, has accelerated the debt, and demands immediate payment in full. Wilmington attached to its complaint numerous exhibits, including a copy of the Note executed October 16, 2008, a copy of the Mortgage executed October 16, 2008, the assignments of the Mortgage from The American Eagle Mortgage Corp. to numerous successors until Wilmington, to which it was assigned on or about May 10, 2017.

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[1] Prior to the commencement of the underlying matter, JPMorgan Chase Bank, N.A. had filed a foreclosure action against Salahuddin for the Note and the Mortgage on October 25, 2013. *JPMorgan Chase Bank, N.A. v. Salahuddin*, Franklin C.P. No. 13CV-11816. The trial court permitted Wilmington to be substituted as plaintiff in that action on May 5, 2015. After the trial court found that required notices had not been given before the foreclosure action had been commenced, Wilmington moved for dismissal without prejudice, which the trial court granted on February 4, 2016. Wilmington filed a second foreclosure action against Salahuddin on July 27, 2016, which the trial court dismissed, again on Wilmington's motion, on July 14, 2017. *Wilmington Trust v. Salahuddin*, Franklin C.P. No. 16CV-6987

{¶ 5} Salahuddin, pro se, filed a request for mediation on February 2, 2018 and, on February 12, 2018, filed her answer and counterclaim. Wilmington answered Salahuddin's counterclaim on March 12, 2018.

{¶ 6} The trial court referred the underlying matter to mediation. However, at the scheduled mediation hearing, Salahuddin indicated she did not wish to proceed without legal counsel and, therefore, mediation was not held. The trial court restored the underlying matter to the active docket and issued an order amending the case schedule.

{¶ 7} On September 24, 2018, Wilmington filed a motion for summary judgment against Salahuddin on its complaint and on Salahuddin's counterclaim against Wilmington. Wilmington attached in support of its motion the affidavit of Michael Surowiec,[2] Vice-President of Asset Management for AMIP Management, LLC, the mortgage servicer for Wilmington at the time the underlying action was filed. Attached as exhibits to the Surowiec affidavit were a stated true and accurate copy of the Note, a stated true and accurate copy of the Mortgage, stated true and accurate copies of the assignments of the Mortgage beginning February 20, 2013 through May 10, 2017, a stated true and accurate notice of default and intent to accelerate that Wilmington sent Salahuddin by both certified and first class mail on February 23, 2016, and a payment history of payments received on Salahuddin's loan. Also attached to the Surowiec affidavit were stated true and accurate copies of two letters JPMorgan Chase Bank, N.A. had sent to Salahuddin on October 9 and December 11, 2012 regarding her options to pay the past-due amount on the mortgage. Both letters also contained the following language, "[a]s required by [HUD], we have scheduled a JM Adjustment Services representative to visit your home on behalf of Chase within the next 20 days to discuss a possible repayment plan. * * * This face-to-face meeting could provide a solution to help you pay the past-due amount on your mortgage." (Ex. 9 at 1, 3, attached to Sept. 24, 2018 Wilmington's Mot. for Summ. Jgmt.) Neither contained a date for the face-to-face meeting that was referenced in each letter.

{¶ 8} On October 22, 2018, Salahuddin filed a motion requesting leave to file a memorandum contra Wilmington's motion for summary judgment, instanter. Salahuddin

[2] We note that affiant's surname is spelled "Suroweic" in this affidavit but is spelled "Surowiec" in a supplemental affidavit of this individual and in Wilmington's briefs. Not knowing which spelling is correct, we use the spelling "Surowiec" throughout this decision for the sake of consistency.

attached numerous exhibits to the motion, including an affidavit she had executed on October 8, 2015. The same date, she filed a motion for summary judgment and memorandum contra Wilmington's motion for summary judgment. On November 6, 2018, the trial court granted Salahuddin's motion for leave and accepted as filed the memorandum in opposition she had filed on October 22, 2018. The trial court also granted Wilmington additional time to respond to Salahuddin's motion for summary judgment and memorandum contra Wilmington's motion for summary judgment.

{¶ 9} On November 27, 2018, Wilmington filed a brief in opposition to Salahuddin's motion for summary judgment and reply brief in support of its motion for summary judgment. Wilmington included in its motion for summary judgment Paragraph 6(B) of the Note, which references HUD regulations limiting a lender's right to require immediate payment, which states as follows:

> **6. BORROWER'S FAILURE TO PAY**
>
> * * *
>
> **(B) Default**
>
> If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(Emphasis sic.) (Ex. 1 at 2, attached to Wilmington's Mot. for Summ. Jgmt.)

{¶ 10} Paragraph 9(d) of the Mortgage provides:

> **9. Grounds for Acceleration of Debt.**
>
> * * *
>
> **(d) Regulations of HUD Secretary.** In many circumstances regulations issued by the Secretary will limit Lender's rights. In the case of payment defaults, to require

> immediate payment in full and foreclose if not paid. This Security instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

(Emphasis sic.) (Ex. 2 at 5, attached to Wilmington's Mot. for Summ. Jgmt.)

{¶ 11} Wilmington also addressed Salahuddin's claim regarding Wilmington's failure to schedule a face-to-face meeting as required by 24 C.F.R. 203.604. Wilmington argued it was in compliance with the FHA regulations for face-to-face meetings, and stated in pertinent part:

> Further, [Wilmington], even though it isn't located within 200 miles of the mortgaged property nor is its servicer, sent [Salahuddin] another request for a Face to Face [sic] Meeting. Said letter is dated July 14, 2017. Said letter was sent by certified mail, and after a visit to the property was completed, [Wilmington] was told that [Salahuddin] did not reside at the property, and that the property was rental property. (Fn. 1. *See* the Supplemental Affidavit of Michael Surowiec[3], ¶¶ 6-8, which is attached hereto, incorporated herein and marked as Exhibit A; *see also* the Exhibits attached to said Affidavit. The Supplemental Affidavit will be referred to as "Pl. Supp. Aff.") [Wilmington] was exempt from 24 CFR 203.604 but sent [Salahuddin] a request for a face to face meeting anyway to ensure compliance. [Salahuddin] avoided the meeting since the individuals whom opened the door advised [Wilmington] that they were renters, and the Ms. Salahuddin did not reside there. (Fn. 2. Pl. Supp. Aff. ¶¶ 6-8.)
>
> 24 CFR 203.604 requires that the mortgagor make a reasonable effort to arrange a face to face meeting, and such reasonable effort requires that a letter be sent out and a visit to the property be made, as long as the property is within 200 miles of the lender or its servicer. * * * There is no requirement that [Wilmington] actually meet with [Salahuddin]; the only requirement is that a reasonable effort be made to make contact with [Salahuddin]. Both JPMorgan Chase and [Wilmington] attempted to make contact with [Salahuddin]. [Salahuddin] is obviously avoiding contact so that she can later try to allege that [Wilmington] did not comply with the regulations. * * *
>
> * * *

[3] As noted earlier in this decision, Wilmington filed an affidavit of this individual as exhibit A in support of its motion for summary judgment, but the individual's surname on the earlier affidavit was spelled "Suroweic."

> [Wilmington] also directs the [trial court] to [Salahuddin's] Affidavit, which was attached to her Motion for Summary Judgment, at ¶ 5, where she states that no one ever conducted a face to face meeting with her. It is important to note here that [Salahuddin] doesn't say that she never received the letters sent to her regarding the face to face meetings, and further, she doesn't say that no one ever came to the property to conduct a face to face meeting, she specifically says that the face to face meetings didn't occur. 24 CFR 203.604 doesn't require that a face to face meeting actually take place; it only requires that the lender or servicer make a reasonable effort to arrange a meeting, which was done by both JPMorgan Chase and [Wilmington], in this matter.

(Nov. 27, 2018 Wilmington's Memo. in Opp. to Salahuddin's Mot. for Summ. Jgmt. at 3-4.)

{¶ 12} On December 13, 2018, the trial court granted Salahuddin's motion for an extension of time to file a reply in support of her own motion for summary judgment, giving her until December 21, 2018 to file. On December 21, 2018, however, Salahuddin filed a 23-page reply brief titled "Memorandum in Support of Defendant's Motion for Summary Judgment; Reply Memorandum of Defendant in Opposition of Plaintiff's Motion for Summary Judgment."

{¶ 13} On December 28, 2018, the trial court sua sponte ordered Salahuddin's December 21, 2018 filing stricken for failure to conform with the trial court's December 13, 2018 decision and entry and because the 15-page reply brief exceeded the page limitation for a reply brief by more than 16 pages.[4] The trial court's December 28, 2018 order allowed Salahuddin to file a complying amended reply brief within seven days of the date of the order; i.e., not later than January 4, 2019. The trial court's order specified that no further extensions would be granted, and page limitations would be strictly enforced.

{¶ 14} On January 9, 2019, Salahuddin filed a motion for leave to file her amended reply brief, instanter. In her motion, she stated she received notice from the trial court's e-filing system on January 3, 2019 and that the trial court had stricken the reply brief she had filed December 21, 2018. She also stated that, because the trial court had given her an additional seven days to file a reply brief, she had until January 9, 2019—the seventh day

[4] The trial court subsequently acknowledged that, in its December 28, 2018 decision, it had referred to Loc.R. 12.01 of the Franklin County Court of Common Pleas, General Division, in error, and that the section applying to page limits of reply briefs is Loc.R. 12.02, which limits reply briefs to no more than seven pages. *See* Feb. 9, 2019 Decision and Entry at 2.

after she received notice of the trial court's December 28, 2018 order—to file a conforming reply brief. The trial court denied Salahuddin's motion on January 14, 2019.

{¶ 15} On January 25, 2019, Salahuddin filed a motion requesting that the trial court reconsider its January 14, 2019 decision denying her January 9, 2019 motion to file her amended reply brief instanter, arguing that it both conformed to the page limitation of Loc.R. 12.01 [sic] of the Franklin County Court of Common Pleas, General Division and was timely filed. Wilmington timely filed a brief in opposition. On February 19, 2019, the trial court denied Salahuddin's motion for reconsideration because the brief exceeded the seven-page limit for reply briefs under Loc.R. 12.02, and it was untimely, having been filed five days late. Additionally, the trial court stated it found no excusable neglect by Salahuddin.

{¶ 16} On March 6, 2019, the trial court entered judgment on Wilmington's complaint, its motion for default judgment, and its motion for summary judgment on its complaint (and on Salahuddin's counterclaim), and on Salahuddin's answer and counterclaim and her motion for summary judgment. The trial court found there were no genuine issues of material fact and that Wilmington was entitled to summary judgment as a matter of law. The trial court further found Salahuddin's motion for summary judgment not well-taken. Therefore, the trial court granted Wilmington's motion for summary judgment, denied Salahuddin's motion for summary judgment, dismissed Salahuddin's counterclaim with prejudice, and issued a foreclosure decree.

{¶ 17} Salahuddin timely appeals from the trial court's March 6, 2019 judgment.

II. ASSIGNMENTS OF ERROR

{¶ 18} Salahuddin presents for our review six assignments of error.

> 1. The trial court erred when it granted summary judgment in favor of appellee, where appellee failed to meet all conditions precedent prior to initiating foreclosure.
>
> 2. Trial court erred when it granted summary judgment in favor of appellee, as there were genuine issues of material fact, including but not limited to, whether Wilmington Savings Fund Society, FSB is a holder in due course, whether plaintiff violated the Real Estate Settlement Procedures Act, the Ohio Consumer Sales Practices Act, allocation of payments, doctrine of unclen [sic] hands, equitable estoppel, and whether the mortgage was properly executed.

> 3. Trial court erred in denying appellants' [sic] motion for leave to file instainer [sic] and granting summary judgment in favor of appellee.
>
> 4. Trial court erred when it granted summary judgment in favor of appellee when there is uncertainty of the accounting of appellee.
>
> 5. Trial court erred by awarding summary judgment in favor of the appellee when there is an uncertainty of common law fraud prior to initiating foreclosure called into question.
>
> 6. Trial court erred when it granted summary judgment in favor of appellee when appellee's jury trial was requested and never waived.

III. LAW AND DISCUSSION

A. Standard of Review

{¶ 19} The trial court resolved Wilmington's claims against Salahuddin by summary judgment after orders were entered governing discovery between the parties.

> Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App. 3d 158, 162, 703 N.E.2d 841. When reviewing a trial court's decision granting summary judgment, we conduct an independent review of the record, and the appellate court "stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App. 3d 100, 103, 701 N.E.2d 383.

Rose v. Ohio Dept. of Rehab. & Corr., 173 Ohio App.3d 767, 2007-Ohio-6184, ¶ 18 (10th Dist.).

{¶ 20} When reviewing on appeal an order granting a motion for summary judgment, an appellate court must use the same standard of review as the trial court. *Freeman v. Brooks*, 154 Ohio App.3d 371, 2003-Ohio-4814, ¶ 6 (10th Dist.), citing *Maust v. Bank One of Columbus, N.A.*, 83 Ohio App.3d 103, 107 (10th Dist.1992), *jurisdictional motion overruled*, 66 Ohio St.3d 1488 (1993). An appellate court's review of summary judgment disposition is independent and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). In determining whether a trial court properly granted summary judgment, an appellate court must review the evidence according to the standard set forth in Civ.R. 56,

as well as that stated in applicable case law. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356 (1992); *Cooper v. Red Roof Inns, Inc.*, 10th Dist. No. 00AP-876 (Mar. 30, 2001).

{¶ 21} Civ.R. 56(C) requires that:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civ.R. 56 has been described as a means to facilitate the early assessment of the merits of claims, to foster pre-trial dismissal of meritless claims, and to define and narrow issues for trial. *Telecom Acquisition Corp. I v. Lucic Ents.*, 8th Dist. No. 102119, 2016-Ohio-1466, ¶ 92. *See also Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 170 (1997) (Cook, J., concurring in part and dissenting in part). As such, summary judgment is a procedural device designed to promote judicial economy.

> "The goal of a motion for summary judgment is to narrow the issues in a case to determine which, if any, should go to trial. ' "The purpose of summary judgment is not to try issues of fact, but is, rather, to determine whether triable issues of fact exist." ' *State ex rel. Anderson v. The Village of Obetz*, 10th Dist. No. 06AP-1030, 2008-Ohio-4064, ¶ 64, quoting *Lakota Local School Dist. Bd. of Edn. v. Brickner*, 108 Ohio App.3d 637, 643, 671 N.E.2d 578 (1996) (citations omitted.)"

Erickson v. Ohio Dept. of Rehab. & Corr., 10th Dist. No. 16AP-74, 2017-Ohio-1572, ¶ 19, quoting *Thevenin v. White Castle Mgt. Co.*, 10th Dist. No. 15AP-204, 2016-Ohio-1235, ¶ 45 (Brunner, J., concurring). Thus, a party seeking summary judgment on the grounds that a nonmoving party cannot prove its case bears the initial burden of informing the trial court of the basis for the motion and must identify those parts of the record which demonstrate the absence of a genuine issue of material fact on the elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93 (1996).

{¶ 22} If the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party does not respond, summary judgment, if otherwise appropriate, shall be entered against the nonmoving party. *Id.* The nonmoving party may not rest on the mere

allegations or denials of his or her pleadings but must respond with specific facts showing there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293; *see also Erickson* at ¶ 19-20.

{¶ 23} More specifically, under our standard of review of Civ.R. 56(C) motions for summary judgment, a plaintiff moving for summary judgment on a note secured by a mortgage must present Civ.R. 56 evidence establishing (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instruments, (2) if the movant is not the original note holder and/or mortgagee, an unbroken chain of assignments and transfers, (3) all conditions precedent have been met, (4) the grantor of the note and mortgagor is in default, and (5) the amount of principal and interest due. *U.S. Bank Natl. Assn. v. Lewis,* 10th Dist. No. 18AP-550, 2019-Ohio-3014, ¶ 23, citing *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio- 3203, ¶ 40-45. *See also U.S. Bank Natl. Assn. v. George*, 10th Dist. No. 14AP-817, 2015-Ohio-4957, ¶ 10-13 .

B. Assignments of Error

1. First Assignment of Error

{¶ 24} For her first assignment of error, Salahuddin argues the trial court erred in granting Wilmington's motion for summary judgment because there remained a genuine issue of material fact as to whether Wilmington met all conditions precedent prior to initiating the foreclosure action.

{¶ 25} Part 203, Title 24 of the Federal Code of Regulations contains the regulations applicable to federally insured mortgages for single-family mortgage insurance. As relevant here, Salahuddin asserts Wilmington failed to demonstrate through its Civ.R. 56 evidentiary quality materials that it satisfied the conditions precedent contained in both 24 C.F.R. 203.602 and 203.604.

{¶ 26} Although Salahuddin construes compliance with the Department of Housing and Urban Development ("HUD") regulations as conditions precedent, appellate districts in Ohio are split on whether certain provisions in Part 203, Title 24, C.F.R., constitute conditions precedent to bringing a foreclosure action or whether they constitute affirmative defenses. *See U.S. Bank Natl. Assn. v. Cavanaugh*, 10th Dist. No. 18AP-358, 2018-Ohio-5365, ¶ 15-18, 35 (noting Ohio courts of appeals differ over whether 24 C.F.R. 203.604(b) operates as a condition precedent or an affirmative defense; a condition precedent would place the initial burden of demonstrating compliance with 24 C.F.R. 203.604(b) on the party moving for summary judgment, while an affirmative defense would place the burden

on the party opposing summary judgment to raise the affirmative defense and come forward with evidence demonstrating a dispute of fact). Here, because Salahuddin also raised Wilmington's alleged failure to comply with the HUD regulations as a defense, the issue is whether Wilmington satisfied its evidentiary burden on summary judgment demonstrating there remained no genuine issue of material fact as to whether it complied with 24 C.F.R. 203.602 and 203.604(b).

{¶ 27} First, we examine whether Wilmington as the moving party demonstrated there remains no genuine issue of material fact about its compliance with 24 C.F.R. 203.602 relating to the delinquency notice precedent to following the provisions in 24 C.F.R. 203.604(b) for the required face-to-face contact with the mortgagor.[5]

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[5] 24 C.F.R. 203.604 provides:

> Contact with the mortgagor.
>
> (a) [Reserved]
>
> (b) The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced, or at least 30 days before assignment is requested if the mortgage is insured on Hawaiian home land pursuant to section 247 or Indian land pursuant to section 248 or if assignment is requested under § 203.350(d) for mortgages authorized by section 203(q) of the National Housing Act.
>
> (c) A face-to-face meeting is not required if:
>
> (1) The mortgagor does not reside in the mortgaged property,
>
> (2) The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either,
>
> (3) The mortgagor has clearly indicated that he will not cooperate in the interview,
>
> (4) A repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current thus making a meeting unnecessary, and payments thereunder are current, or
>
> (5) A reasonable effort to arrange a meeting is unsuccessful.
>
> (d) A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property, unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of

{¶ 28} In her memorandum in opposition to Wilmington's motion for summary judgment, Salahuddin argued that none of the default letters sent by Wilmington or its predecessors in interest complied with 24 C.F.R. 203.602. Specifically, Salahuddin argued that 24 C.F.R. 203.602 requires the notice of default to be "on a form supplied by [HUD] or, if the mortgagee wishes to use its own form, on a form approved by [HUD]." Salahuddin provided documents to the trial court outlining what HUD requires in a notice to satisfy 24 C.F.R. 203.602, including the information that must be included in the cover letter and an accompanying brochure. Salahuddin maintained throughout the proceedings that she never received a letter satisfying these requirements and that there was no indication that the letters from Wilmington or its predecessors in interest were in a form approved by HUD.

{¶ 29} In its response to Salahuddin's memorandum in opposition, Wilmington made a blanket assertion that the January 28, 2013 letter from Chase, its predecessor in interest, to Salahuddin satisfied the HUD requirements. Wilmington did not provide

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> either, or it is known that the mortgagor is not residing in the mortgaged property.
>
> (e)
>
> (1) For mortgages insured pursuant to section 248 of the National Housing Act, the provisions of paragraphs (b), (c) and (d) of this section are applicable, except that a face-to-face meeting with the mortgagor is required, and a reasonable effort to arrange such a meeting shall include at least one trip to see the mortgagor at the mortgaged property, notwithstanding that such property is more than 200 miles from the mortgagee, its servicer, or a branch office of either. In addition, the mortgagee must document that it has made at least one telephone call to the mortgagor for the purpose of trying to arrange a face-to-face interview. The mortgagee may appoint an agent to perform its responsibilities under this paragraph.
>
> (2) The mortgagee must also:
>
> (i) Inform the mortgagor that HUD will make information regarding the status and payment history of the mortgagor's loan available to local credit bureaus and prospective creditors;
>
> (ii) Inform the mortgagor of other available assistance, if any;
>
> (iii) Inform the mortgagor of the names and addresses of HUD officials to whom further communications may be addressed.

testimony in any affidavit averring that any of the default letters were on a form supplied by HUD or on a form approved by HUD.[6]

{¶ 30} The Ninth District Court of Appeals has considered an argument similar to Salahuddin's in defending against summary judgment when a mortgagee did not respond with Civ.R. 56(C) evidentiary quality material that it had complied with 24 C.F.R. 203.602, leaving unsettled a genuine issue of material fact on a motion for summary judgment. In *Lakeview Loan Servicing, LLC v. Dancy*, 9th Dist. No. 27889, 2016-Ohio-7106, the Ninth District concluded that a mortgagee did not satisfy its burden under Civ.R. 56 when the borrower argued that the delinquency letter was lacking several mandatory components and supported his assertion by attaching a HUD memorandum setting forth the minimum requirements that must be in the written notification of delinquency. When the movant/ mortgagee did not respond by demonstrating that the default letter was on a form supplied by HUD or on a form approved by HUD, the Ninth District concluded it was improper for the trial court to grant summary judgment in favor of the mortgagee. *Lakeview Loan Servicing, LLC* at ¶16-18.

{¶ 31} The reasoning of the Ninth District in *Lakeview Loan Servicing, LLC* is compelling and applies to the facts of the matter before us. Although Wilmington and its predecessors in interest sent several letters to Salahuddin over a number of years intended to notify her that she was in default, including the January 28, 2013 letter from Chase and the February 23, 2016 letter from Shellpoint Mortgage Servicing, Wilmington did not respond with Civ.R. 56 materials establishing that any of these letters satisfied all the HUD requirements for adequate delinquency notice under 24 C.F.R. 203.602. We conclude that Wilmington has not satisfied its burden under Civ.R. 56 to dispel all genuine issues of material fact to entitle it to summary judgment. More specifically, Wilmington has not provided to the trial court Civ.R. 56(C) evidentiary quality material to settle as a matter of law whether it or any of its predecessors in interest provided written notification of delinquency to Salahuddin in the manner required by 24 C.F.R. 203.602.

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[6] Wilmington also did not respond to or provide compliance evidence in response to Salahuddin's argument that HUD requires a specific publication, the HUD-PA-426 brochure, *How to Avoid Foreclosure*, https://www.hud.gov/sites/documents/22775_PA426H.PDF (accessed Dec. 28, 2020), to accompany any default letter sent before January 10, 2014 in order to satisfy 24 C.F.R. 203.602; and for a default letter sent after January 10, 2014, an updated publication, the HUD-2008-5-FHA brochure, *Save Your Home: Tips to Avoid Foreclosure*, https://www.hud.gov/sites/documents/2008-5FHA.PDF (accessed Dec. 28, 2020).

{¶ 32} Salahuddin also argues Wilmington failed to comply with the face-to-face meeting requirement of 24 C.F.R. 203.604. Salahuddin challenges factual elements of Surowiec's supplemental affidavit, specifically the averments concerning the purported visit of a representative to her home.

{¶ 33} The plain language of 24 C.F.R. 203.604 provides that a face-to-face meeting is not required if "[t]he mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either." 24 C.F.R. 203.604(c)(2). The Surowiec affidavit contained an averment that neither Wilmington nor the servicer AMIP has an office or branch within 200 miles of the mortgaged property. Salahuddin provided no evidence to create a material issue of fact as to Wilmington's averment by affidavit on this fact. Thus, the trial court correctly considered this exception in disregarding Salahuddin's arguments about lack of compliance by Wilmington with 24 C.F.R. 203.604(b) that requires a face-to-face meeting with the mortgagor. Wilmington has factually established that is not required to make reasonable efforts to arrange a face-to-face meeting under 24 C.F.R. 203.604.

{¶ 34} For the foregoing reasons, Salahuddin's first assignment of error is sustained in part and overruled in part.

2. Second, Fourth, and Fifth Assignments of Error

{¶ 35} In her second assignment of error, Salahuddin argues the trial court erred in granting summary judgment to Wilmington on the additional defenses and claims Salahuddin asserted in her October 22, 2018 combined memorandum in opposition to Wilmington's motion for summary judgment and her separate cross-motion for summary judgment. We simultaneously address Salahuddin's fourth and fifth assignments of error, in that many of the issues raised in these assignments of error are subsumed in our analysis of her second assignment of error.

{¶ 36} In her fourth assignment of error, Salahuddin argues the trial court erred in granting summary judgment to Wilmington despite her argument that there remains uncertainty as to the accounting of the amount owed. Similarly, in her fifth assignment of error, Salahuddin argues the trial court erred in granting summary judgment despite her argument that there remains a genuine issue of material fact with respect to her claim of common law fraud.

{¶ 37} Despite the wording of her second assignment of error, Salahuddin's arguments in her appellate brief are limited to her argument that there remain genuine issues of material fact related to whether Wilmington violated RESPA as codified at 12 U.S.C. 2601, whether Wilmington violated the TILA as codified at 15 U.S.C. 1601, and whether Wilmington or any of its predecessors in interest committed common law fraud.

{¶ 38} The trial court considered and rejected Salahuddin's arguments and entered judgment in favor of Wilmington on Salahuddin's additional defenses. We review the trial court's determination as to each of those defenses, limiting our analysis to only those arguments Salahuddin addresses in the body of her appellate brief, pursuant to App.R. 12(A)(2). *Taneff v. Lipka*, 10th Dist. No. 18AP-291, 2019-Ohio-887, ¶ 30 (noting "[a]n appellate court has discretion to disregard an assignment of error presented for review if the party raising it 'fails to argue the assignment separately in the brief, as required under App.R. 16(A)' "), quoting App.R. 12(A), citing *State v. Brown*, 10th Dist. No. 16AP-753, 2017-Ohio-7134, ¶ 14 (declining to address part of an assignment of error not argued separately in the body of the brief).

{¶ 39} Salahuddin's alleged RESPA violation has a statute of limitations of three years from the date of the alleged violation. 12 U.S.C. 2605; 12 U.S.C. 2614; *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 24 (10th Dist.) (noting the three-year statute of limitations applicable to RESPA claims under 12 U.S.C. 2605). Because Salahuddin alleged Wilmington's predecessor in interest failed to respond to her July 2012 and January 2014 qualified written requests, the statute of limitations for those RESPA claims would have run by July 2015 and January 2017, respectively. Salahuddin did not file her RESPA counterclaim until February 12, 2018, outside the three-year statute of limitations for either one of the alleged violations.

{¶ 40} As to Salahuddin's alleged TILA violation, Salahuddin relies on the same alleged failure of Wilmington's predecessors in interest to respond to her request for information for the qualified written requests. A claim alleging a violation of TILA pursuant to 15 U.S.C. 1641(f)(2) has a statute of limitations of one year. *Sessley* at ¶ 24, citing 15 U.S.C. 1640(e).

{¶ 41} Summary judgment is warranted in favor of Wilmington on Salahuddin's RESPA and TILA claims, because, even if those statutes apply, her claims are barred by the statute of limitations.

{¶ 42} Salahuddin's last argument under her second assignment of error is that she presented sufficient evidence of fraud to overcome Wilmington's motion for summary judgment. Specifically, Salahuddin asserts she demonstrated that, from January 2010 to December 2012, she submitted a total of $5,934.96 in overpayment of her monthly mortgage payments but that Wilmington or its predecessors in interest did not credit her principal balance with those payments.

{¶ 43} Civ.R. 56(C) requires, "[s]ummary judgment shall be rendered forthwith if the *pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action*, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added.)

{¶ 44} Salahuddin's counterclaim states only a RESPA claim ("FIRST COUNT: RESPA"); no other count is set forth. Additionally, the counterclaim does not allege fraudulent intent on the part of Wilmington. A plaintiff cannot prevail on a claim that is not pled. *See Morrison v. Skestos*, 10th Dist. No. 04AP-244, 2004-Ohio-6985, ¶ 15-18 (finding that the trial court did not err in dismissing claims purportedly based on fraud where the plaintiff failed to plead that claim with particularity pursuant to Civ.R. 9(B)); *Sutton Funding, LLC v. Herres*, 188 Ohio App.3d 686, 2010-Ohio-3645, ¶ 53-54 (2d Dist.) (finding the trial court properly dismissed a counterclaim where the claimant failed to state a claim for fraud under Civ.R. 9(B)); *Hanick v. Ferrara*, 7th Dist. No. 19 MA 0074, 2020-Ohio-5019, ¶ 125 ("[W]here a plaintiff must plead the fraud claim with particularity, a broad reference to the prior seven pages of the complaint (some of which contain the negligent misrepresentation allegations) will not satisfy the Civ.R. 9(B) obligation. The court is not required to comb the factual recitations for arguable fraud claims.").

{¶ 45} Even assuming Salahuddin's counterclaim stated a fraud claim, we find that she did not meet her burden of proof in responding to Wilmington's summary judgment motion or in identifying specific parts of the evidentiary record that show a genuine issue of material fact regarding a claim of "fraud." Also, as we previously observed, her pleading

does not say anything about Wilmington's intent. Additionally, Salahuddin's contemporaneously filed affidavit does not address most aspects of her answer or counterclaim, stating only that she made payments totaling $75.040.48, including payments of "Taxes, Insurance, etc." That in itself does not state fraud, with or without the required particularity.

{¶ 46} Viewing the evidence in the record in a light most favorable to Salahuddin, we conclude that Salahuddin's claim of common law fraud is not supported. She neither pled a claim of fraud nor submitted sufficient evidence supporting a claim of fraud. We conclude the trial court did not err in granting summary judgment in favor of Wilmington on Salahuddin's claim of common law fraud. Consequently, we overrule Salahuddin's second assignment of error.

{¶ 47} In her fourth assignment of error, Salahuddin contends the trial court erred in granting summary judgment to Wilmington despite Salahuddin's argument that there remains uncertainty of the amount she owed under the loan. Similarly, Salahuddin asserts in the fifth assignment of error that the trial court erred in granting summary judgment on her claim of common law fraud. Salahuddin's arguments under her fourth and fifth assignments of error both rely on her assertion that she submitted overpayments on her monthly mortgage payments totaling $5,934.96 from January 2010 to December 2012, but neither Wilmington nor its predecessors in interest credited those payments toward the principal amount she owed. However, as we observed with respect to Salahuddin's second assignment of error, despite Salahuddin arguing her overpayment in her answer and counterclaim and her motion for summary judgment, she did not submit to the trial court sufficient evidence demonstrating she actually made these payments. Moreover, Salahuddin also did not address her alleged overpayment or her common law fraud claim in the affidavit she submitted in support of her motion for summary judgment. By contrast, Wilmington provided the payment history listing the record of payments received on Salahuddin's account. The documents Wilmington submitted show a principal balance of $124,902.53 plus interest at the rate of 6.25 percent per annum from November 1, 2012. Salahuddin maintains this amount is inaccurate, but she provides no documentation establishing the excess payments she claims to have made.

{¶ 48} Reviewing the evidence in a light most favorable to Salahuddin, we conclude there remains no genuine issue of material fact as to the amount Salahuddin owes under the loan. Accordingly, the trial court did not err in granting summary judgment in favor of Wilmington on Salahuddin's claim of common law fraud.

{¶ 49} For the foregoing reasons, Salahuddin's fourth and fifth assignments of error are overruled.

3. Third Assignment of Error

{¶ 50} In her third assignment of error, Salahuddin argues the trial court erred when it denied her motion for reconsideration to file her reply brief. The trial court acknowledged that, with respect to the page limitation on reply briefs, its December 28, 2018 entry erroneously cited Loc.R. 12.01 rather than Loc.R. 12.02 of the Franklin County Court of Common Pleas, General Division. The trial court observed, however, that its December 28, 2018 entry "also clearly states that the previously non-conforming reply brief filed 'exceeds the page limitation for a reply brief . . . by more than sixteen pages. . .' and notes that [Salahuddin] filed a 23-plus page brief. The Court is not persuaded that [Salahuddin] believed she could file a 15-page reply brief under these circumstances." (Feb. 19, 2019 Decision and Entry at 2.) Additionally, the trial court stated that, under Ohio law, Salahuddin, who was acting pro se, was bound by the same rules and procedures as litigants who retain counsel. *Lias v. Beekman*, 10th Dist. No. 06AP-1134, 2007-Ohio-5737, ¶ 7. The trial court concluded, therefore, "that [Salahuddin] knows the Rules applicable to her filings." (Feb. 19, 2019 Decision and Entry at 2.)

{¶ 51} The trial court further explained that it had not denied Salahuddin's motion for leave to file her reply, instanter, solely because it exceeded the applicable page limit under Loc.R. 12. Rather, the trial court's December 28, 2018 order clearly stated that Salahuddin could file a conforming amended reply brief within seven days from the date of the order; that is, not later than January 4, 2019. Salahuddin admits she received notice of that order from the trial court's e-filing system on January 3, 2019. Consequently, as the trial court noted in its decision, Salahuddin could have timely filed an amended reply brief on that day or the next (January 4, 2019) and complied with the trial court's orders in its December 28, 2018 Decision and Entry. The trial court further noted that Salahuddin had not made any argument of excusable neglect, other than to state she did not receive notice until January 3, 2019. Under the circumstances, the trial court found no excusable neglect

on Salahuddin's part, because Salahuddin did not assert it or provide an explanation amounting to it.

{¶ 52} It is undisputed that the trial court posted the order granting Salahuddin leave to file a reply to the electronic docket on December 28, 2018, which would have generated an email to Salahuddin's supplied email address notifying her of the same. Salahuddin's claim at oral argument concerning her ability to check her email is not a sufficient defense to not complying with the trial court's time limits for filing.

{¶ 53} We overrule Salahuddin's third assignment of error.

4. Sixth Assignment of Error

{¶ 54} Salahuddin argues in her sixth and final assignment of error that the trial court erred when it granted summary judgment to Wilmington despite her request for a jury trial. That a party defending against summary judgment requested a jury trial is not a defense, taken by itself, that defeats summary judgment.

{¶ 55} We overrule Salahuddin's sixth assignment of error.

IV. CONCLUSION

{¶ 56} Having independently examined the record, considered the briefs and arguments of the parties, and reviewed the evidence in a light most favorable to Salahuddin, we sustain in part and overrule in part Salahuddin's first assignment of error. Additionally, we overrule her second, third, fourth, fifth, and sixth assignments of error. Accordingly, the decision of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this decision regarding Wilmington's satisfaction of the requirements in 24 C.F.R. 203.602.

Judgment affirmed in part and reversed in part; remanded to the trial court for further proceedings.

LUPER SCHUSTER and NELSON, JJ., concur.