[Cite as *Egbert v. Shamrock Towing, Inc.*, 2022-Ohio-474.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Haelie Egbert et al.,	:	
Plaintiffs-Appellants,	:	
		No. 20AP-266
v.	:	(C.P.C. No. 19CV-6391)
Shamrock Towing, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on February 17, 2022

On brief: *Hilton Parker L.L.C.*, *Geoffrey C. Parker*, and *Jonathan L. Hilton*, for appellants. **Argued:** *Geoffrey C. Parker*.

On brief: *Kemp, Schaeffer & Rowe Co., L.P.A.*, and *Erica Ann Probst*, for appellee. **Argued:** *Erica Ann Probst*.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiffs-appellants Haelie Egbert, Travis Ellis, and Justin Shanahan (collectively "appellants") appeal an April 20, 2020 opinion of the Franklin County Court of Common Pleas denying appellants' motion for class certification on grounds that the criteria set forth in Civ.R. 23(B)(3) was not met. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} Appellants filed a class action complaint against defendant-appellee, Shamrock Towing, Inc. ("Shamrock"), for common-law conversion on August 7, 2019, which was amended on September 19, 2019, seeking damages both individually and on behalf of a putative class, arising out of Shamrock's alleged violations of R.C. 4513.601. More specifically, appellants alleged every tow by Shamrock from a purported "private tow-

away zone" was conducted without statutory authorization, at least since the 2015 amendment to R.C. 4513.601 was enacted, because Shamrock's signs fail to create "private tow-away zone[s]." *See* R.C. 4513.601(A). (Am. Compl. at ¶ 5.) Appellants further alleged every tow conducted by Shamrock since 2017, pursuant to Shamrock's "Private Property Impound Authorization Form" ("authorization form"), has also been conducted without statutory authorization due to lack of a written contract with the property owner. *See* R.C. 4513.601(B)(3). (Am. Compl. at ¶ 5.)

{¶ 3} Regarding their claim of conversion, appellants assert they owned, or had the current right of possession of, vehicles that were taken by Shamrock without their consent, and they suffered damages in the form of a "fee" paid to Shamrock to reclaim their vehicles. (Am. Compl. at ¶ 42.) Appellants further assert the taking of appellants' vehicles was wrongful because Shamrock's removal was not authorized by R.C. 4513.601, the statute permitting the creation of a "private tow-away zone," or by any other law. Appellants were deposed by Shamrock and provided the testimony summarized below.

{¶ 4} Ellis testified he parked in the "Fireproof lot" located at 1020 North High Street, Columbus, Ohio on June 28, 2019 and became aware the next morning that his vehicle had been towed. (Ellis Depo. at 17, 24.) Ellis' testimony reflects the Fireproof lot has two entrances and has an L-shape. Ellis testified he could not recall if signs were posted regarding a private tow-away zone when he entered the Fireproof lot to park. Ellis asserted he was given permission to park in the lot from the friend he was visiting who lived in the Fireproof apartments. Ellis further asserted he had previously parked in this same parking space in the Fireproof lot with the permission of employees who worked in the leasing office, however, he did not talk to anyone from the leasing office prior to parking in the Fireproof lot on June 28, 2019. Ellis testified he knew Fireproof owned the lot, that residents of the Fireproof building were assigned spaces for parking, and that the Fireproof lot contained signage indicating resident and customer parking. Ellis also testified the Fireproof lot had designated guest parking, but was not able to recall the wording of the signs. Prior to being towed, and thereafter, Ellis testified he parked, and continued to park, in the same parking space in the Fireproof lot as a guest without being towed. Upon realizing he had been towed, Ellis called the non-emergency police phone number and with

the information provided to him, walked to Shamrock's lot. Ellis paid $156.95 to Shamrock for the tow.

{¶ 5} Egbert's vehicle was towed from a lot located at 45 East Norwich Avenue, Columbus, Ohio on July 23, 2019 (the "Norwich lot"). Egbert testified she moved into an apartment at 45 East Norwich in June 2019, and that the lease she signed made her aware that Oxford Realty owned the property and further that she would need to purchase a parking pass to park in the property's lot. The previous tenant had purchased a parking pass that was left for Egbert, however, Egbert forgot to use the pass on July 23, 2019. Prior to moving in, Egbert purchased a street parking pass and explained through her testimony that the Norwich lot oriented parking spaces in the lot in rows, creating a lot in which vehicles blocked other vehicles, which was how Egbert's car was parked on the day she was towed. Egbert testified she chose to purchase a street permit to park rather than a parking pass for the Norwich lot due to the less than satisfactory design of the parking lot and cost of the pass. When Egbert parked in the Norwich lot on July 23, 2019 she knew she did not have a parking pass for the lot and further that she did not have permission to park in the lot. Egbert acknowledged that a sign was visible when she exited her vehicle after parking on the day in question, and further that she walked by a sign that stated "private tow-away zone unauthorized vehicles will be towed away." (Egbert Depo. at 29.) Egbert recalled the sign posted in the lot stated the cost of the tow was $90.00.[1] Egbert's testimony reflects that the sign posted at the Norwich lot has been modified since she was towed, as the sign now includes an address, whereas an address was not reflected on the sign the day Egbert was towed. (*See* Egbert Depo., Exs. D and F.) Egbert paid $109.65 to Shamrock for the tow.

{¶ 6} Shanahan's vehicle was towed from a lot located at 253 East 19th Avenue, Columbus, Ohio on June 27, 2017. Shanahan was in Columbus on June 27, 2017 for an event and parked at a friend's apartment located at 253 East 19th Avenue. Shanahan parked in his friend's roommate's parking space with the permission of his friend who lived at the property; however, he did not have permission from the property owner. According to Shanahan, his friend's roommate had either a parking pass or sticker, however Shanahan

[1] According to testimony from Shamrock, this sign stated the amount of charges applicable to a tow, which is a sign that was used prior to the change made to R.C. 4513.601.

was not provided with either and did not display from his vehicle anything indicating he had authorization to park in the lot. Shanahan acknowledged that when he exited his vehicle after parking in the lot, he was able to observe a sign indicating the property owner with a towing sign underneath but was not able to confirm the signs presented to him via exhibits by Shamrock were the same signs that were posted in the lot on the day he was towed. Shanahan was able to pick up his vehicle the same day he was towed, and testified he knew where to go from either the phone number on a sign located at the lot or the non-emergency number for police. Shanahan paid $109.65 to Shamrock for the tow.

{¶ 7} Appellants filed a motion for class certification on January 31, 2020. In their motion for class certification, appellants defined the proposed class as: "All individuals (1) who owned or had the current right to possess a vehicle, (2) which vehicle Shamrock towed from a purported 'private tow-away zone,' (3) where that tow took place under the purported authority of R.C. 4513.601, and (4) where that tow took place on or after August 7, 2015." (Mot. for Class Certification at 1.) In addition to the aforementioned proposed class, appellants sought certification of four overlapping subclasses. Relevant to the issues before this court, appellants' proposed contract subclass was defined as: "All individuals who are members of the proposed Class [sic] and whose vehicles were towed by Shamrock on or after April 6, 2017." (Mot. for Class Certification at 2.)

{¶ 8} On February 28, 2020, the trial court conducted a hearing on appellants' motion for class certification. Counsel presented oral arguments in support of their respective positions related to appellants' motion for class certification. In addition to oral arguments, the trial court considered deposition testimony by appellants filed February 18, 2020 and deposition testimony from David Timothy Duffy ("Tim") current president of Shamrock, and James Michael Duffy ("Mike") Tim's brother and another employee of Shamrock, filed January 31, 2020.

{¶ 9} During the hearing before the trial court, appellants withdrew their request for three of the proposed subclasses, which was memorialized further in appellants' post-hearing notice filed March 2, 2020. Appellants' request to certify the proposed class and the remaining proposed contract subclass pursuant to Civ.R. 23(B)(3) remained.

{¶ 10} Appellants' post-hearing notice provided the following definitions for appellants' proposed class and subclass:

> **Proposed Class** (*defined by the 4-year statute of limitations for conversion*):
>
> All individuals (1) who owned or had the current right to possess a vehicle, (2) which vehicle Shamrock towed from a purported "private tow-away zone," (3) where that tow took place under the purported authority of R.C. 4513.601; and (4) where that tow took place on or after August 7, 2015.
>
> **Proposed Contract Subclass** (*defined by effective date of the contract requirement*):
>
> All individuals (1) who owned or had the current right to possess a vehicle, (2) which vehicle Shamrock towed from a purported "private tow-away zone," (3) where that tow took place under the purported authority of R.C. 4513.601; and (4) where that tow took place on or after April 6, 2017.

(Emphasis sic.) (Appellants' Post-Hearing Notice at 1.)

{¶ 11} On April 20, 2020, the trial court denied appellants' motion for class certification finding appellants failed to satisfy the requirements of Civ.R. 23(B)(3). Specifically, the trial court determined the proposed classes were not readily ascertainable, common questions did not predominate over questions affecting only individual members; the existence and/or terms of contracts were not shown to be a common issue that predominates; and because no identifiable class existed, a class action was not a superior way to address appellants' claims.

{¶ 12} It is from the denial of appellants' motion for class certification that appellants appeal.

II. Assignments of Error

{¶ 13} Appellants appeal and assign the following four assignments of error for our review:

> [I.] The trial court abused its discretion by declining to certify both the proposed Class and the proposed Contract Subclass based on a purported lack of ascertainability.

> [II.] The trial court abused its discretion by declining to certify both the proposed Class and the proposed Contract Subclass based on a purported lack of superiority.
>
> [III.] The trial court abused its discretion by declining to certify the proposed Contract Subclass based on a purported lack of predominance.
>
> [IV.] The trial court abused its discretion by declining to certify the proposed overarching Class based on a purported lack of predominance.

III. Analysis

A. Standard of Review as to Civ.R. 23 Class Certification

{¶ 14} A trial court has broad discretion in deciding whether a class action may be maintained, and that conclusion will not be disturbed absent a showing of an abuse of discretion. *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200 (1987), syllabus. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1987). In applying this standard, due deference is given the trial court's decision, as it is in the best position to understand its docket management and analyze the inherent complexities that arise from class action litigation. *Marks* at 201. "A finding of abuse of discretion, particularly if the trial court has refused to certify, should be made cautiously." *Frisch's Restaurant, Inc. v. Kielmeyer*, 10th Dist. No. 05AP-412, 2005-Ohio-5426, ¶ 13, quoting *Marks* at 201.

{¶ 15} However, the Supreme Court of Ohio has instructed that a trial court's discretion in deciding whether to certify a class action is not without limits and must be exercised within the framework of Civ.R. 23. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70 (1998). The trial court must carefully apply the requirements of Civ.R. 23 and conduct a rigorous analysis into whether those requirements have been satisfied. *Id.* As described by the Supreme Court in *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, ¶ 26, a trial court's "rigorous analysis" often requires the trial court to "look[] into enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims." In determining whether the criteria for Civ.R. 23 class certification has

been met by the plaintiff, a trial court must "consider what will have to be proved at trial and whether those matters can be presented by common proof." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, ¶ 17, citing 7AA Wright, Miller & Kane, Federal Practice and Procedure, Section 1785 (3d Ed.2005). However, a trial court may only consider the underlying merits of plaintiff's claims only to the extent necessary to determine whether the plaintiff has satisfied the requirements of Civ.R. 23. *Felix* at ¶ 26; *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 44. Although it is the preferred course, Civ.R. 23 does not mandate that the trial court make specific findings on each of the seven prerequisites for class certification, nor that it articulate its reasoning for such findings as part of its rigorous analysis. *Hamilton* at 70-71.

B. Requirements for Civ.R. 23 Class Certification

{¶ 16} The Supreme Court articulated the following seven prerequisites for certification of a class action pursuant to Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous, (2) the named plaintiff representatives must be members of the class, (3) the class must be so numerous that joinder of all the members is impracticable, (4) there must be questions of law or fact common to the class, (5) the claims or defenses of the representatives must be typical of the claims or defenses of the class, (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three requirements for certification set forth in Civ.R. 23(B) must be met. *Hamilton* at 71, citing *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 96 (1988); Civ.R. 23. The first two prerequisites are implicitly required while the remaining five are explicitly set forth in the rule. *Warner* at 94.

{¶ 17} The party seeking class action certification pursuant to Civ.R. 23 must prove, by a preponderance of the evidence, that the proposed class meets each of the requirements set forth in the rule. *Id.* The burden of proof is satisfied when all the prerequisites of Civ.R. 23(A) are met and, further, that at least one of the requirements as set forth in Civ.R. 23(B) are met. *Hamilton* at 71.

{¶ 18} Civ.R. 23 states:

> (A) Prerequisites.

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and class,
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (B) Types of class actions.
>
> A class action may be maintained Civ.R. 23(A) is satisfied [sic], and if:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (a) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (b) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (d) the likely difficulties in managing a class action.

C. Criteria of Predominance per Civ.R. 23(B)(3) – Fourth and Third Assignments of Error

{¶ 19} Here, appellants sought certification of their proposed class and proposed contract subclass under Civ.R. 23(B)(3).

{¶ 20} The first requirement for maintaining a class action under Civ.R. 23(B)(3) provides that common questions of law or fact predominate over questions concerning only individual members of the class. *Assn. for Hosps. & Health Sys. v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 04AP-762, 2006-Ohio-67, ¶ 25. And therefore "a key purpose of the predominance requirement is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Felix* at ¶ 35, citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

{¶ 21} For common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, they must also represent a significant aspect of the case and they must be capable of resolution for all members in a single adjudication. *Marks* at 204. " ' "To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." ' " *Cullen* at ¶ 30, quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 544 (6th Cir.2012), quoting *Randleman v. Fidelity Natl. Title Ins. Co.*, 646 F.3d 347, 352-53 (6th Cir.2011).

{¶ 22} Appellants' third and fourth assignments of error argue the trial court abused its discretion by declining to certify appellants' proposed class and subclass based on a purported lack of predominance. We will begin by discussing appellants' fourth assignment of error regarding appellants' proposed class, which is the main class, and thereafter we will discuss appellants' proposed contract subclass as addressed in appellants' third assignment of error. Both assignments of error address R.C. 4513.601 which appellants refer to as a "safe harbor" for appellee.

1. Fourth Assignment of Error

{¶ 23} In their fourth assignment of error, appellants argue the trial court abused its discretion by declining to certify their proposed class based on a purported lack of predominance.

{¶ 24} In support, appellants raise the following issues: (1) R.C. 4513.601's safe harbor is an affirmative defense for which Shamrock bears the burden of proof, and (2) at the class certification stage, Shamrock must present evidence that an affirmative defense applies to a significant percentage of the proposed class.

{¶ 25} As to the first issue raised by appellants in support of their fourth assignment of error, appellants argue that Shamrock bears the burden to produce evidence as an affirmative defense that Shamrock conducted tows in accord with R.C. 4513.601.[2] Appellants aver this burden shift is appropriate because often the tow company will have actual knowledge of, and ability to prove, contents of the signage on the relevant lot at the time of the tow; and further, that Shamrock is better situated to bring forth evidence as to the contents of the signs on the lots from which it has conducted tows. Appellants cite R.C. 4513.601(D)(1) in support of their proposition.

{¶ 26} In its decision denying appellants' motion for class certification, the trial court found Shamrock did not bear the burden of proof to raise an affirmative defense as to liability because appellants' argument was not supported by Ohio law. In addition to the trial court's finding, the trial court considered, assuming arguendo, that if Shamrock was required to present proof of an affirmative defense, the difficulties meeting predominance remained. *See* Civ.R. 23(B)(3). The trial court stated that important, individualized issues with R.C. 4513.601(A)(1) impact this case. More specifically, the trial court noted "the

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[2] In support of their argument, appellants cite this court's decision in *Bugoni v. C & M Towing*, 10th Dist. No. 12AP-62, 2012-Ohio-4508. However, the posture of the case in *Bugoni* and in the case before us differ. In *Bugoni*, the issue before this court was whether the trial court abused its discretion by granting the appellee's Civ.R. 12(B) motion to dismiss for the appellant's failure to state a claim. *Id*. at ¶ 3. The appellant's underlying cause of action was a complaint alleging conversion of his personal vehicle when the appellee towed his vehicle without his consent. *Id*. at ¶ 9. Citing to the former version of the private tow-away zone statute, R.C. 4513.60(B), the appellee argued the claim of conversion failed because the appellant parked his vehicle in a marked private tow-away zone. *Id*. at ¶ 10. This court held because the complaint did not contain allegations related to R.C. 4513.60(B), the appellee's argument was not a basis on which the trial court could grant a motion to dismiss for failure to state a claim. *Id*. This court further stated, because the appellant stated a claim for conversion, the trial court abused its discretion by dismissing the appellant's complaint for failure to state a claim. *Id*. at ¶ 11.

In further support, appellants also cite *Stanley v. Auto Tow & Bradley Motors*, 9th Dist. No. 92CA005441 (Feb. 17, 1993). In *Stanley*, the appellant filed a complaint against Auto Tow & Bradley Motors ("Auto Tow") alleging conversion of his vehicle and Auto Tow raised, as an affirmative defense pursuant to R.C. 4513.60, the former version of the private tow-away zone statute. The Ninth District affirmed the trial court's finding that at one time the appellant was authorized as a tenant to park in the apartment complex and that Auto Tow failed to prove that the property owner had notified the appellant that he was no longer permitted to park in the lot in question or that the appellant parked in violation of the posted conditions, therefore Auto Tow did not have authority to hold the appellant's truck until tow and storage charges were paid. *Id*.

Because the authority cited by appellants does not address class certification, and more specifically, the issue of predominance, we do not find the argument as presented by appellants to apply to the matter before us. We also agree with the trial court that, assuming arguendo, appellants are correct that the obligation to show signage as to each tow is an affirmative defense, that would still not avoid the need for individual trials.

legality of each tow based upon signs posted in individual lots on specific dates – is highly individualized." (Opinion at 8.) In finding appellants did not meet the predominance requirement, the trial court denied certification of the proposed class because common questions as required by Civ.R. 23(B)(3) were not met. The trial court's analysis pointed to the need to examine questions about the location from which each proposed class member was towed in addition to examination of the specific signage present on the relevant day from each tow location for the thousands of tows of the purported class which would require "[m]ini-trials, focused on each tow from each lot, with a specific determination of the signage present when Shamrock towed a vehicle, would be essential to determine whether vehicles actually were illegally towed or wrongfully converted." (Fn. omitted; Opinion at 15-16.)

{¶ 27} Appellants' arguments asserting Shamrock bears the burden to prove an affirmative defense disregards the inquiry as to whether appellants' proposed class has met the requirement of predominance. This is likewise true with respect to appellants' second argument in support of their fourth assignment of error, wherein appellants assert Shamrock must present evidence that the affirmative defense applies to a significant percentage of the proposed class.

{¶ 28} Appellants further support their fourth assignment of error that the trial court abused its discretion when it found a lack of predominance as to the proposed class, by arguing that the trial court: (1) accepted bald legal conclusions over evidence in the record, or (2) incorrectly interpreted a statute not before it.

{¶ 29} Specifically, as to the first argument, appellants assert the trial court's finding that "[b]ased upon the testimony by Shamrock witnesses currently of record, proper signs were in place containing appropriate 'legal' language for at least some tows and some locations," is a bald assertion only supported by Shamrock witnesses. (Appellants' Am. Brief at 59-60; Opinion at 16.)

{¶ 30} Appellants contend Shamrock's signs do not contain all the language set forth in R.C. 4513.601(A)(1), therefore there is not a single sign on any lot from which Shamrock conducted a tow on a member of the proposed class that has been in compliance with R.C. 4513.601. In making this argument, appellants interpret R.C. 4513.601 to require all

language set forth in R.C. 4513.601(A)(1) must be contained in one sign. Pointing to the record, appellants claim Shamrock's signs do not contain a "description of persons authorized to park on the property." R.C. 4513.601(A)(1)(b). Appellants support their claim by referring to testimony presented by Shamrock that states Shamrock adds addresses of the property to Shamrock's standard signs. Ultimately, appellants contend that if their interpretation of the statute is correct, then none of Shamrock's signs comply.[3]

{¶ 31} Under R.C. 4513.601(A), "[t]he owner of a private property may establish a private tow-away zone, but may do so only if all of the following conditions are satisfied":

> (1) The owner of the private property posts on the property a sign, that is at least eighteen inches by twenty-four inches in size, that is visible from all entrances to the property, and that includes all of the following information:
>
> (a) A statement that the property is a tow-away zone;
>
> (b) A description of persons authorized to park on the property. If the property is a residential property, the owner of the private property may include on the sign a statement that only tenants and guests may park in the private tow-away zone, subject to the terms of the property owner. If the property is a commercial property, the owner of the private property may include on the sign a statement that only customers may park in the private tow-away zone. In all cases, if it is not apparent which persons may park in the private tow-away zone, the owner of the private property shall include on the sign the address of the property on which the private tow-away zone is located or the name of the business that is located on the property designated as a private tow-away zone[;]
>
> (c) If the private tow-away zone is not enforceable at all times, the times during which the parking restrictions are enforced;

[3] However, as asserted before the trial court, appellants believe one question will resolve the legal issue of the proposed class, "[i]f it is necessary for the signage to be copies of a single sign that includes all of the information required under the statute, then that is sufficient, because Shamrock has no evidence that has ever occurred for any class member." (Feb. 28, 2020 Tr. at 17; Opinion at 14.) Appellants argument asked for consideration of the plain language of the statute as to provision (A) in R.C. 4513.601. R.C. 4513.601(A) explicitly provides for the way in which a *property owner* may establish a private tow-away zone.

> (d) The telephone number and the address of the place from which a towed vehicle may be recovered at any time during the day or night;
>
> (e) A statement that the failure to recover a towed vehicle may result in the loss of title to the vehicle as provided in division (B) of section 4505.101 of the Revised Code.
>
> In order to comply with the requirements of division (A)(1) of this section, the owner of a private property may modify an existing sign by affixing to the existing sign stickers or an addendum in lieu of replacing the sign.

{¶ 32} Tim Duffy testified he is the current president of Shamrock and that he took over the family towing business from his father 30 years ago. Tim estimated Shamrock currently has 6,000 accounts and he further estimated the total number of lots within each account to be 10,000. Tim opined Shamrock tows approximately 12,000 vehicles per year; one-third of that total, around 4,000, consists of tows from private tow-away zones. Shamrock offers towing service on a patrol basis or on-demand. Drivers of the tow trucks conduct patrols of the lots as initiated by the property owner.

{¶ 33} Mike Duffy testified that his current job title could be "[t]he sign man," and he does a bit of everything at Shamrock. (Mike Duffy Depo. at 10.) According to the testimony given by Tim and Mike, Shamrock has its own standard signs printed by a supplier, which Shamrock provides to property owners. Further testimony reflects the appearance of the signs may be customized depending on the needs of the specific property and it is unknown how many signs currently in use have been customized. Shamrock has used two to three versions of signs over the past 20 years. Mike explained that although property owners generally use the signs provided by Shamrock, some property owners post signs that are purchased from print shops in Columbus, Ohio. Mike did not know how many current property owners employing Shamrock's towing services use signs printed by other vendors.

{¶ 34} Mike testified that Shamrock's current sign utilizes language from parameters given by the Towing and Recovery Association, however, the appearance of the signs can be customized at the request of a property owner. The language exhibited on Shamrock's signs reflects:

PRIVATE
TOW-AWAY ZONE
UNAUTHORIZED VEHICLES
WILL BE TOWED AWAY.
PUCO 138816T
CALL NUMBER BELOW FOR LOCATION &
IMPOUND FEES. FAILURE TO RECOVER
A TOWED VEHICLE MAY RESULT IN THE
LOSS OF TITLE TO VEHICLE.
ORC 4505.101
TOWING ENFORCED 24/7

1145 HAMLET ST., COLS., OH 43201
6333 FROST RD., WESTERVILLE, OH 43082
ORC 4513.60 [sic]

(Mike Duffy Depo., Ex. C; Tim Duffy Depo., Ex. C.)

{¶ 35} Both Tim and Mike acknowledged a change in the private towing law that resulted in changes as to what appears on Shamrock's signs, reflected above. Specifically, language was added to the sign in 2015 that provided notice that failure to recover a towed vehicle may result in loss of title, in addition to noting the Public Utilities Commission of Ohio ("PUCO") number. Although updating signs began immediately after the change in the law, not all lots were updated in the same manner. Mike testified lots with heavy traffic, for example lots located on campus, were updated first, otherwise Mike would update signs himself when he happened on an outdated sign or on notification received from tow truck drivers or property owners. As for updated signs that do not reflect who is permitted to park in the lot or who owns the lot, Mike also updates those signs using either a sticker or paint pen.[4] Mike did not know how many signs have been updated since August 7, 2019, the date on which appellants filed a cause of action against Shamrock.

{¶ 36} Tim testified that at the time a vehicle is to be towed, Shamrock employees are instructed to take a photograph of only Shamrock's signs. Shamrock's policy regarding

[4] Mike testified: "Well, to put the -- if the owner wasn't going to put the address on there or put their sticker or their logo or whatever in there or any instructions, then if it was an open kind of a lot that wasn't apparent who could park there, or it was a parking lot belonged [sic] to them, then I put the address on there." (Mike Duffy Depo. at 37.)

retention of those photographs was unclear. Shamrock had retained photographs of Egbert's vehicle at the time it was towed from the lot located at 45 East Norwich, which were introduced during the deposition of Tim. A photograph of what is purported to be Shamrock's sign was also introduced; however, the sign was difficult to decipher as photographed. Shamrock also retained photographs of Ellis' vehicle on the day it was towed by Shamrock from the Fireproof lot. Evidence was not provided of Shamrock's sign on the day Ellis' vehicle was towed. The photograph Shamrock did provide of its sign from the Fireproof lot was a photograph of the alley that adjoins the parking lot, however, Tim testified he did not think that the signs depicted in the photograph were the same signs that were posted on the day Ellis' vehicle was towed. Shamrock did not have photographs of Shanahan's vehicle on the day his vehicle was towed from 253 East 19th Avenue or photographs of Shamrock's sign on the day of the tow. However, photographs of the signs located at 253 East 19th Avenue were introduced and Tim testified that the first sign was an older version of a Shamrock sign and the second was Shamrock's sign taken several months after appellants filed their cause of action. Tim testified that the sign in the second picture had an orange overlay, but he did not know what it was. Mike testified that the orange overlay was a sticker he uses to update the signs. (*See* Mike Duffy Depo. at 37.) Tim did not know when the sign had been altered, however, he testified he had been told this particular property owner(s) had been in the process of updating signs themselves. Appellants represented on the record, without objection, that the overlay stated "permit only, 253 East 10th [sic]." (Tim Duffy Depo. at 82.)

{¶ 37} Mike testified that he installs Shamrock's signs according to the wishes of the property owner or at his discretion if the property owner has not stated a designation; however, signs will be posted where the sign is deemed to be visible from all entrances. Property owners are responsible for the installation of a pole if one is not in existence. Mike testified there are times property owners will move signs or add signs near to Shamrock's and Shamrock is not made aware of these changes. Further, Tim agreed there is not a lot in Franklin County that is identical to another lot, each lot has a different view from the entrance, and further, the number of entrances for a lot can vary from one to potentially three.

{¶ 38} In asserting that the trial court relied on bald legal conclusions, appellants maintain the record contains adequate evidence for the court to make an affirmative finding that it is more likely than not that no such sign has been in compliance with R.C. 4513.601(A), which appellants disclaim is their burden to prove. However, appellants' specific argument as to one of the trial court's findings regarding the purported legality of Shamrock's signs overlooks the larger question when assessing the requirement of predominance on the facts of this case.

{¶ 39} When reviewing the record, we must bear in mind that in order to meet the predominance requirement, appellants' claims must be substantiated by generalized proof applicable to the class as a whole that predominates over those issues that are subject to only individualized proof. *See Cullen* at ¶ 30.

{¶ 40} Appellants' proposed class was presented in simple terms, specifically, appellants defined the proposed class as "everyone towed by Shamrock under the authority of the statute, and they all share the claim that there were no comply[ing] signs." (Feb. 28, 2020 Tr. at 26-27.) The trial court clarified, "[t]hat's the essence of it, no compliance [sic] signs." (Tr. at 27.) Appellants answered, "[c]orrect." (Tr. at 27.) The proposed class appellants seek to certify is to be established as of August 7, 2015. In accord with R.C. 4513.601(A)(1), the following must be evaluated as to whether the lot has been established as a private tow-away zone: (1) the size of the sign, (2) the location of the lot from which their vehicle was towed, (3) the location of the signage posted at or in the lot, (4) the content posted on the signage, and (5) whether it was apparent to the person parking the vehicle who was permitted to park in the lot.

{¶ 41} As of the date of testimony provided by Tim, Shamrock tows from 10,000 lots per year and tows approximately 4,000 vehicles per year from private tow-away zones. Tim acknowledged that the lots in Franklin County are not identical to the others, the number of entrances to a lot can vary from one to three, and the view from each lot varies.

{¶ 42} Testimony given by Ellis, Egbert, and Shanahan establish that appellants' recollection lacks detail of the signs posted at the lot on the day their own vehicles were towed and regarding the lot itself; and further their testimony reveals it would be unlikely that class members would be able to provide details regarding any lot other than the one

from which they were towed. Egbert testified she used to live near 253 East 19th Avenue, the lot from which Shanahan was towed, however she could not recall the parking lot. Egbert was familiar with the Fireproof lot, the lot from which Ellis was towed, and she testified she was aware the lot had signs, but she believed the signs gave indication the lot was a shopping complex. Shanahan testified he was not familiar with the lots from which Egbert and Ellis' vehicles were towed. Ellis was not asked questions regarding his familiarity with any lots.

{¶ 43} Whether a sign provides a description of persons authorized to park on the property also requires individualized evaluation. R.C. 4513.601(A)(1)(b) states: "In all cases, if it is not apparent which persons may park in the private tow-away zone, the owner of the private property shall include on the sign the address of the property on which the private tow-away zone is located or the name of the business that is located on the property designated as a private tow-away zone."

{¶ 44} In 2015, Shamrock began the process of updating its signs to comply with a change in the law, however there is no record of what signs were updated and when. Testimony provided by Mike reflects that signs are updated by a full replacement of the sign, by a sticker or with a paint pen. The record also reflects that Shamrock believed one of the property owners of a lot from which an appellant was towed was in the process of making changes to its signs.

{¶ 45} According to the numbers provided by Shamrock, appellants' proposed class could include 4,000 members. Here, appellants presented testimony from three lots and each lot presents its own set of facts. Ellis believed he was permitted to park in the Fireproof lot and further that the Fireproof lot contained signs permitting guests, but he could not recall the wording. Photographs of Ellis' vehicle at the time of tow are in evidence, however photographs of the signs present on the day his vehicle was towed were not. When Egbert parked her vehicle, she knew she was not authorized to park her vehicle in the lot from which she was towed and testified that a sign was visible when she parked her car that stated the lot was a private towing zone and unauthorized vehicles would be towed. Evidence presented regarding signs posted in the lot from which Egbert was towed reflect that signs had been changed since the tow occurred. Shanahan testified he observed two signs when

he parked, one sign providing the name of the property owner and underneath a towing sign, however when presented with photographs purporting to depict signs posted at the lot in question, Shanahan could not confirm the photographs depicted the same signs as the day he was towed.

{¶ 46} As we noted above, "[f]or common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, they must present a significant aspect of the case. Furthermore, they must be capable of resolution for all members in a single adjudication." *Cullen* at ¶ 30, quoting *Marks* at 204. " ' "To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." ' " *Id.*, quoting *Young* at 544, quoting *Randleman* at 352-53, citing *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir.2007). Here, the record contains evidence that generalized proof cannot be applied in evaluating each tow conducted by Shamrock for each member of the proposed class; the location of the lot, where signage was posted on the day of the tow, the location of the vehicle prior to tow, what language was stated on the signage on the day of the tow, and the driver of the vehicle's understanding of who was authorized to park in the lot. *See* R.C. 4513.601(A)(1). Therefore, the trial court did not abuse its discretion in finding that individual questions of law and fact predominate over any commonalities of the proposed class.

{¶ 47} Although appellants assert the trial court relied on bald legal conclusions over record evidence to the contrary, we find that review of the record reflects individual questions overwhelm those questions common to the class.[5]

[5] Issues regarding class certification of towed vehicles have been addressed by Ohio courts, and as illustrated by caselaw cited by *Shamrock*, the First District found with regard to tows conducted from Central Parking lots "[f]our mini-trials would be necessary to determine whether any and how many parking violations had occurred." *Safi v. Cent. Parking Sys. Ohio, Inc.*, 1st Dist. No. C-150021, 2015-Ohio-5274, ¶ 35. The court declined to certify the proposed class holding, tort and equitable claims involving varying fact patterns along with defenses and damages result in the predominance of individual issues, rather than common. *Id.*

{¶ 48} Second, in addition to asserting the trial court relied on bald legal conclusions, appellants further support their fourth assignment of error by arguing the trial court incorrectly interpreted a statute when the question was not before the trial court. Specifically, whether the trial court improperly resolved a question of law on the merits in finding that the statutory requirement that signs must describe the persons authorized to park can be satisfied by the addition of the address of the lot on which the private tow-away zone is located.

{¶ 49} This court recognized at the class certification stage, a trial court must not determine questions as to the merits outside the parameters of the certification determination; to do so would be an abuse of discretion. *Assn. for Hosps. & Health Sys.* at ¶ 26. "A court may examine the underlying claims only for the purpose of determining whether common questions exist and predominate and not for the purpose of determining the validity of such claims." *Id*., citing *George v. Ohio Dept. of Human Servs.*, 145 Ohio App.3d 681, 687 (10th Dist.2001).

{¶ 50} Appellants' arguments in support of their fourth assignment of error assert the record reflects adequate evidence for the trial court to find no sign erected by Shamrock on any lot complied with R.C. 4513.601(A). Review of the trial court's decision does not reflect that this finding was made as a determination of the validity of appellants' claims. As discussed above, the trial court's consideration was part of the trial court's analysis as to the predominance requirement, specifically whether a common question existed. Therefore, we cannot find based on our review of the record that the trial court considered the merits outside of what common questions of law or fact predominate as to appellants' proposed class.

Shamrock also cites *Carlin v. Genie of Fairview Park*, 8th Dist. No. 48593 (Apr. 11, 1985), wherein the court found parking and towing were a basic nucleus of fact and law for the proposed class under Civ.R. 23(A)(2), however the court further held that the alleged offense of illegally parking on private property over an extended period of time would likely result in claims and defenses that would not be typical across the class in that "the nature of the case, serves to emphasize the differences among the claims of each class member." *Carlin*. In a footnote, the court further explained the nucleus of operative fact through an example of a class alleging breach of a printed contract and where each member's claim was based on the same printed contract, the nucleus of operative fact was the printed contract. *Id*. at fn. 3, citing *Hitzler v. Doraty Chevrolet*, 8th Dist. No. 46035 (Sept. 9, 1983).

{¶ 51} Therefore, we find the trial court did not abuse its discretion in finding the predominance requirement was not met as to appellants' proposed class.

{¶ 52} Accordingly, we overrule appellants' fourth assignment of error.

2. Third Assignment of Error

{¶ 53} In their third assignment of error, appellants argue the trial court abused its discretion by declining to certify the proposed contract subclass based on a lack of predominance. Relevant to appellants' proposed contract subclass, R.C. 4513.601(B)(3) states: "No towing service shall remove a vehicle from a private tow-away zone except pursuant to a *written contract* for the removal of vehicles entered into with the owner of the private property on which the private tow-away zone is located." (Emphasis added.) The amended complaint alleges that the authorization form which Shamrock has lot owners sign is not a written contract.

{¶ 54} Appellants allege the trial court gave "short shrift" to appellants' proposed contract subclass and with its five sentence analysis abused its discretion by declining to certify the proposed contract class. (Appellants' Am. Brief at 36.) (*See* Opinion at 17.)

{¶ 55} The trial court found:

> There is another statutory obligation, namely that the towing service removes vehicles only "pursuant to a written contract * * * with the owner of the private property on which the private tow-away zone is located." R.C. 4513.601(B)(3). Plaintiffs' post-hearing filing proposed a "Contract Subclass" focused not on lot signs, but on whether Shamrock operates under "a written contract for the removal of vehicles entered into with the owner of the private property on which the private tow-away zone is located."[6] It is unsettled in the law whether this statute creates a private cause of action in favor of a person whose vehicle is towed from a lot lacking a written contract. Reaching that conclusion essentially requires a determination that a vehicle owner is a third-party beneficiary of the statute. Aside from the need to consider common law

[6] The first two sentences of the trial court's analysis are not relevant to the matter before us; however, we will address appellants' arguments regarding the same. Appellants acknowledge the first sentence of the trial court's analysis is correct, however, appellants perceive that the trial court's second sentence suggests appellants first introduced their proposed contract subclass in the post-hearing notice filed by appellants on March 2, 2020. Although we do not find the trial court's second sentence to state what appellants perceive, we do agree that the proposed contract subclass was included in appellants' motion for class certification filed January 31, 2020, but note that the definition of the proposed contract subclass is defined in greater detail by appellants' post-hearing notice. (*Compare* Mot. for Class Certification at 2; Post-Hearing Notice at 1.)

> rules on third-party beneficiary status, it may be relevant here that another Ohio statute lists a dozen or more "major" and "minor" violations of law for which a civil action can be brought against a towing service, but does not list the absence of a written contract as a basis for such a civil claim. R.C. 4513.611. But, as with the signage issue, the existence and/or terms of contracts on some 10,000 lots from which Shamrock may make tows has not been shown to be a common issue that predominates under Rule 23(B)(3).

(Opinion at 17.)

{¶ 56} Appellants argue the trial court improperly considered the merits of appellants' claims as they relate to the proposed contract subclass in the third, fourth, and fifth sentences. More specifically, appellants assert the trial court considered whether appellants have a private right of action under R.C. 4513.601(B)(3), without linking its consideration to the predominance requirement.

{¶ 57} The Supreme Court has held a trial court's rigorous analysis in determining whether Civ.R. 23 has been met often considers enmeshed legal and factual issues, however, the merits of the underlying cause of action may only be examined in determining whether Civ.R. 23 has been met. *Felix* at ¶ 26.

{¶ 58} On review of the three sentences at issue in appellants' argument, we find the trial court's statements to reflect a process of thought by the court rather than dispositive findings. Furthermore, the trial court's statements do not reflect any determination on the merits. Most importantly, the last sentence of the trial court's analysis, finding the existence and/or terms of contracts on some 10,000 lots has not been shown to be a common issue that predominates, leads us to find the trial court did not base its decision on its consideration of the merits of appellants' claims. Because we find the trial court's decision was not based on its consideration of the merits, we do not find appellants' argument compelling. Therefore, we decline to further address appellants' arguments as to the merits of whether the statute creates a private right of action.

{¶ 59} Appellants also argue that the trial court abused its discretion in finding a lack of predominance as to the proposed contract subclass. Specifically, appellants argue the trial court's finding is not supported by the record and is contrary to Ohio Supreme Court precedent. Underlying these arguments is appellants' assertion that a document

which disclaims an intent to bind and or lacks consideration cannot constitute a written contract.

{¶ 60} Regarding the argument that the trial court's finding is not supported by the record, appellants argue the record supports that Shamrock property owners sign an authorization form prior to Shamrock towing from the property owner's lot and that the authorization forms do not materially differ from previous versions. Appellants argue that all versions of the authorization form disclaim any intent to bind, and further, do not purport to create any obligation by Shamrock to the property owner or require consideration on the part of Shamrock. Appellants further argue Shamrock does not permit property owners to modify the authorization form other than listing properties of the property owner from which Shamrock is to tow. Appellants contend the authorization form does not create any obligation on Shamrock's part to perform a tow. Appellants also infer from the record that the authorization forms presented govern nearly all of Shamrock's tows during the subclass period.

{¶ 61} The authorization forms for the tows conducted on the named appellants are found in the record. Each form includes the following statement: "NOTICE: This form serves only to provide Shamrock Towing, Inc. with written authorization to remove vehicles per your instructions in accordance with Ohio Revised Code §4513.60 from properties owned by you or your employer. It is NOT a binding contract of any sort." (Emphasis sic.) (Tim Duffy Depo., Ex. D.)

{¶ 62} Tim testified that Shamrock sends an authorization form to all potential customers. The authorization forms introduced in the record are all entitled the same, "Private Property Impound Authorization Form." Tim testified the authorization form has been used by Shamrock for about ten years and he believes most current property owners have signed Shamrock's newest form. The authorization form requires the signature of either the property owner or property manager, in addition to their respective address and phone number. A signed authorization form is required from every property owner before Shamrock will conduct a tow and authorization forms are retained by Shamrock either on paper or electronically. Shamrock does not charge property owners to tow from lots.

{¶ 63} The authorization form includes blank lines that require the name of the business or property owner to be inserted, with language stating that the business or property owner authorizes Shamrock to remove vehicles "**PER MY INSTRUCTIONS** from the properties listed below." (Emphasis sic.) (Tim Duffy Depo., Ex. A.) Tim testified that instructions from the business or property owner are written into the authorization form and are included as part of the agreement with Shamrock. Tim also testified that Shamrock's policy does not allow property owners to modify the authorization form. The record is not clear as to what would be considered a permissible instruction as opposed to an impermissible modification.

{¶ 64} Additionally, the authorization form allows property owners to select the following towing instructions: (1) at the discretion of the property owner using a Shamrock issued authorization code, (2) on a patrol basis removing vehicles parked without a displayed parking permit,[7] and (3) on a patrol basis according to criteria set by the property manager to be coordinated with Shamrock's office. Each selection has an open field for which the property owner may choose, presumably property owners may choose any or all available towing instructions.

{¶ 65} Tim further testified for those lots from which Shamrock has contracted to patrol, patrolling of lots is initiated by the property owner generally when an issue arises with parking in their lot, resulting in Shamrock increasing patrols of the lot. Shamrock monitors these patrols with GPS so that reports can be made to the property owners. Shamrock will discontinue regular patrols of the lot once the issues for which the property owner was concerned are no longer evident. Shamrock does not regularly patrol all lots on a daily, weekly or monthly basis. Tim testified that Shamrock always asks the property owner why a tow has been requested; explaining that the circumstances of the vehicle may have changed since the property owner requested the tow and this would require the property owner to decide whether a tow is still requested. Shamrock's initial response to a new lot involves a grace period of about 72 hours for Shamrock to set up in a lot. Shamrock

[7] The towing instructions further state the property owner shall provide a copy of the parking permit to Shamrock's office.

does not guarantee a response time to a tow, as Tim explained the response depends on Shamrock's workload, however industry custom is usually within a few days.

{¶ 66} The authorization form also contains dedicated blank lines for property owners to list properties from which Shamrock is authorized to tow. Tim explained that in addition to the authorization form, Shamrock maintains a code card for each property owner and on that card Shamrock lists names of the properties the property owner has authorized Shamrock to tow. Tim further explained property owner names and their properties may also be entered into Shamrock's computer system if the property list does not fit on the code card.

{¶ 67} While in deposition, appellants pointed out to Tim that Shamrock's authorization form states it is not a binding contract. Tim testified that if a property owner asked if the authorization form was a contract, Shamrock would respond: "[I]f this doesn't work for you, then we won't work for you." (Tim Duffy Depo. at 44.) Appellants inquired further, "Okay. But if somebody asks -- or if somebody says, I don't want to sign a contract, this isn't a contract, right, is the answer?" (Tim Duffy Depo. at 45.) Tim did not have an answer. However, Tim also testified that Shamrock has experienced some potential customers back out because they did not want to sign a contract.

{¶ 68} Tim estimated Shamrock currently has 6,000 accounts and that the total number of lots within each account is estimated to be 10,000. In 2018, approximately 100 new property owners signed an authorization form with Shamrock. Within the parameters of the authorization form, property owners are provided room to give instructions specific to their properties and also in accord with how the property owner wishes their lot to have tows conducted. In addition, property owners may choose any or all of the towing selections delineated on the form. Not all property owners have signed Shamrock's authorization form for the same service and each property owner would necessarily have properties that vary from other property owners who also sign the authorization form for towing services by Shamrock. Shamrock will not conduct tows from a property owner's lot

without a signature on the authorization form, and Shamrock does not exchange money with a property owner for tow services conducted.[8]

{¶ 69} On review of appellants' assertions with the record, we find that although the authorization form begins as a standardized form, the information with which the authorization form is completed creates a document that is individualized for each property owner. The authorization form explicitly permits a property owner to authorize Shamrock to tow pursuant to instructions as provided by the property owner, which according to testimony given by Tim, may be written into the authorization form and is included as part of the agreement. Therefore, we cannot conclude that a property owner cannot modify the authorization form. As the trial court suggests, we question whether the language to which appellants point in the authorization forms has the legal significance in this context to provide a relevant point of commonality sufficient to sustain a class. And if it might, and somehow could be said to relate to a cognizable claim around which a class theoretically could form, then the variations in those agreements that the record reflects would become material and undermine the agreements' value as a means for defining a subclass.

{¶ 70} Regarding the argument that the trial court's finding is contrary to Supreme Court case law, appellants cite two cases in further support of their position that where the claims of all members of a proposed class turn on a handful of common questions of

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[8] We note that R.C. 4513.612(A)(1) states: "No towing service shall knowingly offer or provide monetary compensation in exchange for the authorization to tow motor vehicles from a specified location or on behalf of the person to whom the towing service offered or provided the compensation." Furthermore, R.C. 4513.601(G)(1) states that the owner or lienholder of a vehicle that has been towed may reclaim it upon both: (1) presenting proof of ownership or lease agreement, and (2) payment of all applicable fees as established by the public utilities commission per R.C. 4921.25. R.C. 4921.25 provides that any company engaged in the towing of motor vehicles is subject to regulation of PUCO as a "for-hire motor carrier" under R.C. Chapter 4921. It further provides that PUCO shall "establish maximum fees that may be charged by a for-hire motor carrier engaged in the towing of motor vehicles or a storage facility that accepts such vehicles under sections [R.C.] 4513.60 and 4513.601." R.C. 4921.25(B)(4). Ohio Adm.Code 4901:2-24-03 outlines maximum fees which may be charged for towing of motor vehicles and storage of motor vehicles. Ohio Adm.Code 4901:2-22-06 outlines maximum fees for after-hours retrieval. Furthermore, pursuant to R.C. 4513.601(F), a towing service is required to send multiple notices to the owner of a towed motor vehicle and any known lienholder, and 60 days after any notice is received or delivery was not possible, the towing service may initiate the process for obtaining a certificate of title to a towed motor vehicle pursuant to R.C. 4505.101.

Tim testified that Shamrock has an impound lot and if a towed motor vehicle is abandoned, they sell it as scrap or remarket it according to the Ohio Revised Code.

statutory and contractual interpretation concerning similar form contracts, those common questions predominate.

{¶ 71} In the first case cited by appellants, *Hamilton*, 82 Ohio St.3d 67, 80, the Supreme Court held predominance was met by a class of mortgagors who had or still had mortgages with interest calculated by the same method. *Hamilton* at 77. In *Hamilton*, the proposed class member claims were a common legal claim of breach of contract resulting from the common fact of the application of the same method used to calculate the interest rates on their respective loans. *Id*. The Supreme Court found members of the classes retained common claims from the common fact that the monthly payment amount on their loans was established under the same method of interest calculation, resulting in the same failures regarding their loans. *Id*. The court held: "[T]he questions of law and fact which have already been shown to be common to each respective subclass arise from identical or similar form contracts." *Id*. at 80.

{¶ 72} In the second case cited by appellants, *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426 (1998), life insurance policy holders alleged the insurance company applied accumulated cash values, dividends, and interest from existing life insurance policies to fund the purchase of additional life insurance policies. *Cope* at 427, 430. The Supreme Court found that the claims of the proposed class members were not predicated on misrepresentation or actionable conduct, but, rather, the complaint asserted that a scheme was employed to collect larger commissions through the intentional omission of mandated written disclosure warnings when the life insurance policies were replaced. *Id.* at 432-33. *Cope* held "[c]ourts also generally find that a wide variety of claims may be established by common proof in cases involving similar form documents or the use of standardized procedures and practices." *Id*. at 430.

{¶ 73} The Supreme Court held in both *Hamilton* and *Cope*: "Class action treatment is appropriate where claims arise from standardized forms or routinized procedures, notwithstanding the need to prove reliance." *Hamilton* at 84, *Cope* at 435.

{¶ 74} Review of the record of the testimony of Tim reflects that although the authorization form may begin as a standardized form, the procedures imposed by Shamrock and the opportunity for property owners to provide instruction as to their

authorization for Shamrock to tow, leads this court to find the matter before us is distinguishable from *Hamilton* and *Cope*. Specifically, as articulated above, authorization forms utilized by Shamrock are not standardized as to each property owner with which Shamrock conducts a tow because not only may property owners provide their own instructions as to how tows may be conducted on their lots, property owners may also choose any or all of the towing instructions as provided by Shamrock on the authorization form. As reflected on the authorization form and through testimony presented by Shamrock, procedures employed by Shamrock to conduct tows are performed on a variety of bases, including discretionary, which will necessarily require an individualized determination as to whether the tow was authorized by the property owner. Each tow conducted will have issues subject to individualized proof as to the authorization form governing that particular property.

{¶ 75} Finally, we acknowledge appellants' argument that the trial court gave "short shrift" to the proposed contract subclass. Although the Supreme Court has held Civ.R. 23 does not require a trial court to make formal findings regarding its decision on a motion for class certification, the court did note that there are compelling reasons for findings to be made, specifically that articulated findings allow the appellate court to determine whether the trial court's discretion was within the framework of Civ.R. 23. *Hamilton* at 70-71. The Supreme Court further held that unarticulated findings relative to the trial court's analysis of Civ.R. 23 leaves a reviewing court less likely to find the trial court properly exercised its discretion. *Id*.

{¶ 76} Here, it is without question that the trial court made a one sentence conclusory finding regarding predominance as to appellants' proposed contract subclass. However, because the trial court is not mandated to make specific findings on the prerequisites for class certification, nor articulate its reasoning for its finding, we cannot on that basis alone find the trial court abused its discretion. *See Hamilton* at 70-71. Because the trial court references its extensive findings regarding appellants' proposed class and applies the same to the proposed contract subclass, we find the trial court left a framework from which we are able to review its analysis. Further, on our review of the record herein as to the need for individualized review of the facts and law as to each property owner's

authorization form, we cannot find that the record supports appellants' arguments in support of their third assignment of error.

{¶ 77} Therefore, we find the trial court did not abuse its discretion in finding the predominance requirement was not met as to appellants' proposed contract subclass.

{¶ 78} Accordingly, we overrule appellants' third assignment of error.

D. Criteria of Ascertainability and Superiority – First and Second Assignments of Error

{¶ 79} Because class certification pursuant to Civ.R. 23 requires all seven prerequisites to be met, failure to meet the predominance requirement as to appellants' proposed class and proposed contract subclass is dispositive, rendering appellants' first and second assignments of error moot. *See Frisch's Restaurant* at ¶ 18.

IV. Conclusion

{¶ 80} Having overruled appellants' third and fourth assignments of error as dispositive to appellants' appeal, we render appellants' first and second assignments of error moot, and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

MENTEL and NELSON, JJ., concur.

NELSON, J., retired, formerly of the Tenth Appellate District, Assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

[Cite as *Razavi v. Vasila*, 2022-Ohio-463.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MOHAMMAD RAZAVI	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
THOMAS VASILA, ET AL.	:	Case No. 21 CAE 06 0032
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 19 CVH 09 0518
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	February 15, 2022

APPEARANCES:

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Wise, Earle, J.

{¶ 1} Plaintiff-Appellant, Mohammad Razavi, appeals the May 28, 2021 judgment entry of the Court of Common Pleas of Delaware County, Ohio, granting summary judgment to Defendants-Appellees, Thomas Vasila and Rubbertec Industrial Products Company.

FACTS AND PROCEDURAL HISTORY

{¶ 2} At the outset, we note a majority of the filings and documents, including the trial court's judgment entry, are filed under seal. However, the complaint and answers are not. We are mindful of the parties' desire to keep this case confidential as we proceed with the opinion.

{¶ 3} Appellee Rubbertec is a privately held manufacturing company with three shareholders: appellant, appellee Vasila, and Mark Knore. Vasila is the majority shareholder, owning more than three times as many shares as each of the other two shareholders. He is the Chief Executive Officer and President of Rubbertec. Appellant is not employed by Rubbertec. Mr. Knore is Vice-President of Sales. Prior to 2014, all three individuals served as the directors of Rubbertec. In 2014, the three agreed to amend Rubbertec's Code of Regulations and elect Vasila as Rubbertec's sole director. In subsequent years, appellant continued electing Vasila as sole director up through and including the shareholders meeting held on September 26, 2019.

{¶ 4} On September 19, 2019, one week prior to that meeting, appellant had filed a complaint against Vasila claiming breach of fiduciary duty, alleging in part Vasila entered into a favorable employment agreement with himself, paid himself a disguised dividend in the form of an excessive salary, used Rubbertec funds for personal expenses, purchased a vehicle and a Florida condominium for his exclusive use, did not prepare

accurate financial statements, borrowed funds from Rubbertec, and has had Rubbertec hold on to excessive amounts of cash without distributing the earnings to all shareholders equally. The complaint also included a shareholder derivative action on behalf of Rubbertec seeking to remedy "breaches of fiduciary duties, conflict of interest, corporate waste, self-dealing, misuse of corporate assets, gross mismanagement of Rubbertec, and other improper conduct."

{¶ 5} On December 18, 2020, Vasila filed a motion for summary judgment. On same date, Rubbertec filed a motion to dismiss under Civ.R. 23.1. By judgment entry filed May 28, 2021, the trial court construed Rubbertec's motion as a motion for summary judgment and granted both motions. The trial court determined appellant's claims against Vasila were barred by the statute of limitations and waiver, and appellant failed to prove damages. As for the derivative claim, the trial court found appellant did not fairly and adequately represent the interests of the only other similarly situated shareholder.

{¶ 6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 7} "THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT BASED ON AN ERRONEOUS APPLICATION OF THE STATUTE OF LIMITATIONS TO CLAIMS WHICH WERE BROUGHT BEFORE THE STATUTE HAD RUN."

II

{¶ 8} "THE TRIAL COURT ERRED BY CONVERTING DEFENDANT RUBBERTEC'S MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT WITHOUT NOTICE TO PLAINTIFF RAZAVI."

III

{¶ 9} "THE TRIAL COURT ERRED BY HOLDING THAT PLAINTIFF RAZAVI DID NOT PROVIDE PROOF OF DAMAGES."

IV

{¶ 10} "THE TRIAL COURT ERRED BY ASSIGNING THE BURDEN OF PROOF TO PLAINTIFF RAZAVI INSTEAD OF DEFENDANT VASILA."

V

{¶ 11} THE TRIAL COURT ERRED IN FINDING THAT RAZAVI DID NOT FAIRLY AND ADEQUATELY REPRESENT THE INTEREST OF ALL SIMILARLY SITUATED SHAREHOLDERS."

{¶ 12} The assignments of error challenge the trial court's order granting summary judgment to appellees. Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 663 N.E.2d 639 (1996):

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379,

citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶ 13} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35, 506 N.E.2d 212 (1987).

{¶ 14} As explained by this court in *Leech v. Schumaker,* 5th Dist. Richland No. 15CA56, 2015-Ohio-4444, ¶ 13:

> It is well established the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The standard for granting summary judgment is delineated in *Dresher v. Burt* (1996), 75 Ohio St.3d 280 at 293: " * * * a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has

> no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150.

{¶ 15} It is with these standards in mind that we review the assignments of error.

I, III, IV

{¶ 16} In his first assignment of error, appellant claims the trial court erred in its application of the statute of limitations to claims which were brought before the statute had run.

{¶ 17} In his third assignment of error, appellant claims the trial court erred in finding he did not provide proof of damages.

{¶ 18} In his fourth assignment of error, appellant claims the trial court erred in assigning him the burden of proof instead of Vasila.

{¶ 19} In his complaint against Vasila, appellant alleged breach of fiduciary duties. The applicable statute of limitations is four years, and the discovery rule does not apply unless the claim is based on fraud. R.C. 2305.09(D); *Caghan v. Caghan,* 5th Dist. Stark No. 2014 CA 00094, 2015-Ohio-1787, ¶ 45-46; *Wells v. C.J. Mahan Construction Co.,*

10th Dist. Franklin Nos. 05AP-180 & 05AP-183, 2006-Ohio-1831, ¶ 26-29; *Cundall v. U.S. Bank,* 122 Ohio St.3d 188, 2009-Ohio-2523, 909 N.E.2d 1244, ¶ 24.

{¶ 20} In its May 28, 2021 judgment entry filed under seal, the trial court addressed each of appellant's claims and found them to be barred by the statute of limitations. The trial court also found appellant did not assert fraud in this case and in fact, was "aware of the actions he contends constitute breaches of fiduciary duty." We find the trial court's determination to be supported by the record. Razavi depo. at 16-18, 32-33, 44-56, 62-63, 75-76, 80-83, 162-179, 185-189, 194-195, 219, 225-228, 237-241, 253-254. Any claims prior to May 16, 2015, (pursuant to the parties' tolling agreement) are barred by the statute of limitations. The next issue is whether any claims arose after said date.

{¶ 21} Appellant argues the trial court erred in finding his claims of excessive compensation, excessive cash reserves, and the Florida condominium were barred by the statute of limitations and could not be rescued "by simply contending that the breach is ongoing." May 28, 2021 Judgment Entry at 7.

{¶ 22} Appellant was aware of Vasila's loan from Rubbertec for the condominium purchase in 2008, and was aware that Vasila was repaying the loan as he was privy to Rubbertec's financial statements. Razavi depo. at 169-179. We find the Florida condominium purchase is outside the statute of limitations and was not an "ongoing breach."

{¶ 23} Each year, Vasila receives a salary and Rubbertec holds funds for cash reserves. We find appellant's claims for excessive compensation and excessive cash reserves after May 16, 2015, survive the statute of limitations.

{¶ 24} However, in order to prove a claim for breach of fiduciary duty, appellant must establish: "(1) the existence of a duty arising from a fiduciary relationship; (2) a

failure to observe the duty; and (3) an injury resulting proximately therefrom." *Harwood v. Pappas & Associates, Inc.,* 8th Dist. Cuyahoga App. No. 84761, 2005-Ohio-2442, ¶ 26. *Accord Grossniklaus v. Waltman,* 5th Dist. Holmes No. 09 CA 15, 2010-Ohio-2937.

{¶ 25} In its judgment entry, the trial court found appellant failed to prove "he or Rubbertec suffered any harm." Appellant could not identify any damages and deferred the issue to an expert he intended to hire. Razavi depo. at 116-117, 121-122. Appellant agreed he could not identify any portion of Vasila's compensation that he believed to be excessive, could not identify any portion of the cash reserves that he believed to be excessive, could not identify any amount of dividends that he should have received, and could not identify any specific damages to Rubbertec. *Id.* at 122.

{¶ 26} Appellant presented the deposition testimony of Dino Lucarelli, CPA, who opined on the unreasonableness of Vasila's compensation and the high levels of cash reserves, but could not quantify damages, could not quantify the extent to which appellant was damaged due to the excessive compensation claim, was unable to provide an opinion concerning the amount of appellant's damages, and did not have enough information to opine on damages suffered by Rubbertec. Lucarelli depo. at 16-17, 84, 214, 230. When asked if the combined compensation of Vasila and Mr. Knore paid by Rubbertec over the years was reasonable, Mr. Lucarelli opined it was reasonable. Lucarelli depo. at 217.

{¶ 27} As noted by the trial court, "the record is bereft of any financial harm that has been caused to Razavi as a result of Vasila's alleged actions." May 28, 2021 Judgment Entry at 14. Based on his original investment, appellant has received an average annual return of over seventy percent since the mid-1990s. Mr. Lucarelli agreed appellant made a very good return on his investment, and wished he had invested in the

company. Lucarelli depo. at 76. When questioned on the issue of excessive cash reserves, appellant agreed "everybody can have a different opinion" on an appropriate range of cash reserves. Razavi depo. at 219. Appellant acknowledged if any portion of the cash reserves were actually distributed to shareholders, Vasila, as majority stockholder, would receive a substantial amount, and the value of all the shares would decrease, including his own. *Id.* at 220-221.

{¶ 28} We concur with the trial court appellant has failed to prove any harm, an essential element for a breach of fiduciary claim and therefore appellant's burden to prove. *Helfrich v. Strickland,* 5th Dist. Licking No. 008 CA 101, 2009-Ohio-4828, ¶ 41.

{¶ 29} Upon review, we find the trial court's determination to be supported by the record, and find no genuine issue of material fact to exist on the complained of issues.

{¶ 30} Assignment of Error I is granted in part, but does not affect the outcome of the case. Assignments of Error III and IV are denied.

II

{¶ 31} In his second assignment of error, appellant claims the trial court erred in converting Rubbertec's motion to dismiss to a motion for summary judgment without providing him notice. We disagree.

{¶ 32} In support of his argument, appellant cites the case of *Petrey v. Simon,* 4 Ohio St.3d 154, 447 N.E.2d 1285 (1983). At paragraph one of the syllabus, the *Petrey* court stated: "A court must notify all parties when it converts a motion to dismiss for failure to state a claim into a motion for summary judgment." The *Petrey* court followed and construed Civ.R. 12(B). However, Rubbertec filed its motion to dismiss under Civ.R. 23.1 which states in part: "The derivative action may not be maintained if it appears that the

plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation."

{¶ 33} In his complaint at ¶ 22, appellant alleged he "will adequately and fairly represent the shareholders similarly situated." After taking depositions, Rubbertec filed its Civ.R. 23.1 motion to dismiss, arguing appellant did not "fairly and adequately" represent the interests of Mr. Knore, the only "similarly situated" shareholder. In support, Rubbertec cited testimony from several depositions filed in the case. Appellant's reply to Rubbertec's motion also cited to deposition testimony. Clearly each party relied on evidence outside the four corners of the complaint. Appellant cannot cite to deposition testimony in support of his position and then complain the trial court treated Rubbertec's motion as a motion for summary judgment. Appellant does not proffer what additional evidence he would have presented on the issue had he had prior notification. We do not find any prejudice to appellant.

{¶ 34} Upon review, we find the trial court did not err in converting Rubbertec's motion to dismiss as a motion for summary judgment without providing appellant notice.

{¶ 35} Assignment of Error II is denied.

V

{¶ 36} In his fifth assignment of error, appellant claims the trial court erred in finding he did not fairly and adequately represent the interest of all similarly situated shareholders. We disagree.

{¶ 37} In its judgment entry, the trial court found "Vasila is plainly not similarly situated to Razavi since Vasila is the target of Razavi's claims." The only other shareholder is Mr. Knore. While both appellant and Mr. Knore are minority shareholders and are similarly situated, to quote the trial court in its judgment entry at 17, "[i]t appears

Knore shares quite literally none of the complaints made by Razavi." Knore depo. at 28, 31-32, 35, 38-39, 42-43, 53, 84. We agree with the trial court's finding, "Knore not only acquiesced in Vasila's actions, but believes they were appropriate and vital to Rubbertec's success." May 28, 2021 Judgment Entry at 18. The trial court concluded appellant "does not fairly and adequately represent the interests of the only other similarly situated shareholder." Based upon Mr. Knore's deposition testimony, we concur with the trial court's conclusion.

{¶ 38} Upon review, we find the trial court's determination to be supported by the record, and find no genuine issue of material fact exists on this issue.

{¶ 39} Assignment of Error V is denied.

{¶ 40} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Wise, Earle, J.

Hoffman, P.J. and

Wise, John, J. concur.

EEW/db

[Cite as *Durfor v. W. Mansfield Conservation Club*, 2022-Ohio-416.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

CRISTEN DURFOR, ET AL.,

CASE NO. 8-21-26

PLAINTIFFS-APPELLANTS,

v.

WEST MANSFIELD CONSERVATION CLUB, ET AL.,

O P I N I O N

DEFENDANTS-APPELLEES.

Appeal from Logan County Common Pleas Court
Trial Court No. CV 19 06 0201

Judgment Affirmed

Date of Decision: February 14, 2022

APPEARANCES:

Daniel N. Abraham **for Appellants**

Dalton J. Smith **for Appellee, West Mansfield Conservation Club**

WILLAMOWSKI, J.

{¶1} Plaintiff-appellant Cristen L. Durfor ("Durfor")—individually and as parent, natural guardian, and next friend of her minor child, J.S.—appeals the judgment of the Logan County Court of Common Pleas, alleging that the trial court erred in granting summary judgment for the Defendant-Appellee West Mansfield Conservation Club ("the WMCC"). For the reasons set forth below, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} For a number of years, the WMCC has allowed the community to use its property for an annual Fourth of July celebration. Kerns Depo. 13, 14, 19. Doc. 139. The WMCC does not charge a fee for members of the public to enter the premises; enter into a contract with the Village of West Mansfield; or receive compensation for opening their premises. Doc. 139. *See* Durfor Depo. 46. At the 2017 celebration, the WMCC made money from a fish fry but did not require attendees to purchase a meal to participate in the event. Doc. 139.

{¶3} The WMCC does not organize this event but describes this celebration as "a community effort." Doc. 139. Each year, members of the community bring and set up games and activities on the WMCC property for the attendees to enjoy. Kerns Depo. 14-15. For this reason, the event has had different activities every year. *Id*. at 16. On July 3, 2017, the mayor of West Mansfield, Kimberly K. Kerns

("Kimberly"), and her husband, Danny R. Kerns (collectively "the Kerns"), brought a dunk tank onto the WMCC's premises for use at the celebration. *Id*. at 42, 50.

{¶4} On July 4, 2017, Durfor and her daughter, J.S., went to this event. J.S. Depo. 17. Durfor Depo. 12. They had never attended one of the Fourth of July celebrations at the WMCC and had learned about this event through flyers that had been hung up around town. Durfor Depo. 14. In the morning, Durfor and J.S. participated in a softball game at the WMCC before returning to their home for a cookout. J.S. Depo. 37. Durfor Depo. 17.

{¶5} In the afternoon, J.S. returned to the WMCC with several other people. J.S. Depo. 38, 41. Durfor remained at her house to clean up after the cookout. Durfor Depo. 18. J.S. Depo. 54. At the WMCC, J.S. saw a number of kids using the dunk tank and decided to participate. J.S. Depo. 38, 41. She climbed up a ladder to the top of the tank and then got dunked. *Id*. at 44. She then got out of the dunk tank and got onto the ladder to climb down to the ground. *Id*. J.S. affirmed that she was "facing outward" as she went down the ladder. *Id*. at 45.

{¶6} As she climbed down, J.S. slipped and "landed on an exposed piece of metal believed to be a hitch or leveling crank handle and sustained perineal trauma * * *." Doc. 1. *See* J.S. Depo. 45, 49-50. After the fall, J.S. blacked out. J.S. Depo. 49. When she regained consciousness, she crawled over to someone and asked them to call 911. *Id*. at 50-51. An ambulance arrived at the WMCC and transported J.S.

to the hospital. Durfor Depo. 24-25. On July 5, 2017, J.S. underwent a surgical procedure to address the injury that she had sustained from the fall. Doc. 1.

{¶7} On June 27, 2019, Durfor filed a complaint that named the WMCC and the Kerns as defendants. Doc. 1. This complaint raised two claims of negligence and one claim of premises liability. Doc. 1. On November 23, 2020, the WMCC filed a motion for summary judgment. Doc. 139. The WMCC argued (1) that it only had a duty not to cause willful or wanton injury to J.S. because she was a licensee and (2) that it had recreational user immunity under R.C. 1533.181. Doc. 139.

{¶8} On February 1, 2021, the trial court granted the WMCC's motion for summary judgment, finding that J.S. was a licensee on the WMCC's premises and that the WMCC had immunity under R.C. 1533.181. Doc. 166. On May 3, 2021, a notice was filed that indicated that Durfor and the Kerns had reached a settlement agreement. Doc. 180. Durfor then filed a notice of voluntary dismissal for the Kerns. Doc. 186. On July 6, 2021, the trial court issued a judgment entry, stating that all claims against all parties had been resolved through the settlement agreement and the grant of the WMCC's motion for summary judgment. Doc. 187.

{¶9} On August 2, 2021, Durfor filed her notice of appeal. Doc. 195. On appeal, she raises the following two assignments of error:

First Assignment of Error

The trial court erred when it held that [J.S.] was a licensee on the premises owned by WMCC.

Second Assignment of Error

The trial court erred when it found WMCC immune from liability under R.C. 1533.181(A) when [J.S.] was not a recreational user.

First Assignment of Error

{¶10} Durfor argues J.S. was an invitee on the WMCC's premises and that the trial court erred in determining that she was a licensee. She then asserts that the trial court erred in granting summary judgment to the WMCC on this basis.

Legal Standard

{¶11} "Appellate courts consider a summary judgment order under a de novo standard of review." *Schmidt Machine Company v. Swetland*, 3d Dist. Wyandot No. 16-20-07, 2021-Ohio-1236, ¶ 23, citing *James B. Nutter & Co. v. Estate of Neifer*, 3d Dist. Hancock No. 5-16-20, 2016-Ohio-7641, ¶ 5. Under Civ.R. 56,

> **[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 of material fact and that the moving party is entitled to judgment as a matter of law * * *. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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 or stipulation construed most strongly in the party's favor.**

Civ.R. 56(C). Accordingly, summary judgment is to be granted

> **only when it is clear '(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor.'**

Beair v. Management & Training Corp., 3d Dist. Marion No. 9-21-07, 2021-Ohio-4110, ¶ 15, quoting *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47 (1978).

{¶12} Initially, "[t]he party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 370, 1998-Ohio-389, 696 N.E.2d 201, 204 (1998). "In doing so, the moving party is not required to produce any affirmative evidence, but must identify those portions of the record which affirmatively support his argument." *Neal v. Treglia*, 2019-Ohio-3609, 144 N.E.3d 1045, ¶ 12 (3d Dist.), quoting *Carnes v. Siferd*, 3d Dist. Allen No. 1-10-88, 2011-Ohio-4467, ¶ 13.

{¶13} If the moving party carries this initial burden, "[t]he burden then shifts to the party opposing the summary judgment." *Bates Recycling, Inc. v. Conaway*, 2018-Ohio-5056, 126 N.E.3d 341, ¶ 11 (3d Dist.), quoting *Middleton v. Holbrook*, 3d Dist. Marion No. 9-15-47, 2016-Ohio-3387, ¶ 8. "In order to defeat summary judgment, the nonmoving party may not rely on mere denials but 'must set forth

specific facts showing that there is a genuine issue for trial.'" *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, quoting Civ.R. 56(E).

{¶14} "[B]ecause summary judgment is a procedural device to terminate litigation, it must be awarded with caution." *Williams v. ALPLA, Inc.*, 2017-Ohio-4217, 92 N.E.3d 256 (3d Dist.), quoting *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138 (1992). "The court must thus construe all evidence and resolve all doubts in favor of the non-moving party * * *." *Webster v. Shaw*, 2016-Ohio-1484, 63 N.E.3d 677, ¶ 8 (3d Dist.).

{¶15} Further, "[t]o prevail in a negligence action, a plaintiff must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured." *Moyer v. McClelland J. Brown Living Trust*, 2019-Ohio-825, 124 N.E.3d 853, ¶ 6 (3d Dist.), quoting *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 10.

{¶16} In negligence cases alleging premises liability, "the status of the person who enters upon the land of another * * * define[s] the scope of the legal duty that the landowner owes the entrant." *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287, 292 (1996). "Under Ohio law, an owner's duty of care depends on whether the injured person is an invitee, a licensee, or a trespasser." *Heffern v. Univ. of Cincinnati Hosp.*, 142

Ohio App.3d 44, 52, 753 N.E.2d 951, 957 (10th Dist. 2001). *See Carnes, supra*, at ¶ 14.

{¶17} A trespasser is "[o]ne who enters upon the land of another without invitation or permission purely for his own purposes or convenience * * *." *Ard v. Fawley*, 135 Ohio App.3d 566, 571, 1999-Ohio-921, 735 N.E.2d 14, 17 (3d Dist.), citing *McKinney v. Hartz & Restle Realtors, Inc*., 31 Ohio St.3d 244, 246, 510 N.E.2d 386, 388-389 (1987). As a general matter, "a landowner owes no duty to a * * * trespasser except to refrain from willful, wanton, or reckless conduct that is likely to injure him." *Williams v. Cook*, 132 Ohio App.3d 444, 449, 725 N.E.2d 339, 343 (3d Dist. 1999), citing *Gladon*, *supra*, at 317.

{¶18} A licensee is one "who enters the premises of another by permission or acquiescence, for his own pleasure or benefit, and not by invitation." *Williams* at 449, quoting *Provencher v. Ohio Dept. of Transp*., 49 Ohio St.3d 265, 266, 551 N.E.2d 1257, 1258 (1990). "A licensee takes his license subject to its attendant perils and risks." *Light v. Ohio University*, 28 Ohio St.3d 66, 68 502 N.E.2d 611, 613 (1986). As with the trespasser, a landowner generally "owes the licensee no duty except to refrain from wantonly or willfully causing injury" and "is not liable for ordinary negligence * * *." *Id*.

{¶19} An invitee is one "who rightfully come[s] upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Moyer, supra*, at ¶ 6 quoting *Gladon, supra*, at 315. Thus, "[t]he

distinction between an invitee and a licensee is dependent on whether the guest enters the land for personal benefit or for the benefit of the owner." *Heffern, supra*, at 52. In contrast to the duty owed to a trespasser or a licensee, "[a] landowner owes a duty to an invitee to exercise ordinary care for the invitee's safety and protection." *Gladon, supra*, at 317.

{¶20} "The economic-or tangible-benefit test has long been recognized by the Supreme Court of Ohio to distinguish the status of an invitee from that of a licensee." *Bilodeau v. Jordan*, 1st Dist. Hamilton No. C-020496, 2003-Ohio-1540, ¶ 10. Under this test, "in order to prove that he is an invitee, a plaintiff must establish that the premises owner received a tangible or economic benefit from his visit." *Heffern, supra,* at 52. "[T]he type of benefit conferred by an invitee upon the owner or occupier of land must take *a tangible or economic form*." (Emphasis sic.) *Id*., citing *Provencher*, *supra*, at 1258-1260. Accordingly, "[a]n invitation alone does not bestow the status of an invitee." *Sutyak v. Warren-Trumbull County Public Library*, 11th Dist. Trumbull No. 92-T-4754, 1993 WL 150488, *2 (Mar. 26, 1993), citing *Provencher, supra,* at 1259 (rejecting the public invitee standard that does not "require[] that some type of benefit * * * be conferred on the owner or occupier before a visitor can be considered an invitee").

Legal Analysis

{¶21} In its judgment entry, the trial court determined that J.S. "was a licensee, not a business invitee." Doc. 166. Against this conclusion, Dufor argues

that J.S. was not a licensee because (1) the event at the WMCC was advertised by flyers that were posted around town; (2) the WMCC made some money from a fish fry that was held at the event; and (3) the WMCC stood to benefit from people seeing their premises. We will consider each of her three main arguments in turn.

{¶22} First, Durfor testified that she had become aware of the July Fourth Celebration from flyers that had been posted around the village. Durfor Depo. 14. Kimberly had also seen these flyers. Kerns Depo. 22. However, in an affidavit, the President of the WMCC, Jim Shelton ("Shelton"), affirmed that the WMCC did not "create flyers for the event." Doc. 139, Affidavit. Further, the record contains no information that establishes the source of these flyers as neither Durfor nor Kimberly were able to identify who had produced or circulated these flyers. Durfor Depo. 14. Kerns Depo. 142.

{¶23} Kimberly explained that she was the mayor of West Mansfield during the Fourth of July Celebration in 2017 and that she did not consult with anyone from the WMCC about logistics, such as the timing of or activities at the event. Kerns Depo. 11, 110-111. She was not aware of any "formal request" that had been made to use the WMCC's premises for the celebration and said that the event happens "just from reputation it's always been July 4th at the club." *Id*. at 108.

{¶24} Kimberly also stated that "[t]here's really no one in charge" of the celebration and that the community puts this event together. Kerns Depo. 108. She said that people in the community would mention the Fourth of July Celebration in

the different area organizations in which they were members. *Id*. at 110. For example, she mentioned seeing a member of her church stand up and invite the congregants. *Id*. Kimberly also observed a similar invitation at a Lions Club breakfast. *Id*.

{¶25} Durfor asserts that the flyers constituted an invitation from the WMCC to the public. Appellant's Brief, 9-10. However, she has not established any connection between the WMCC and the flyers. Further, we also note that, in *Honek v. Chidsey*, the Eighth District considered a situation in which an attendee was injured at a free, outdoor concert that was held on city property. *Honek v. Chidsey*, 2021-Ohio-3816, --- N.E.3d ---, ¶ 25, 45 (8th Dist.). Even though "the city promoted the event to the public to attend the city's summer concert series," the Eighth District concluded that the injured party was a licensee because there was "no evidence that the city obtained any economic or tangible benefit from the attendees." *Id*. at ¶ 25.

{¶26} Second, Durfor argues that the WMCC received an economic benefit from the celebration because they sold food at a fish fry during part of the event. Shelton's affidavit does state that the "only money made by the [WMCC] * * * on July 4, 2017 was from a fish fry." Doc. 139, Affidavit. However, he also affirmed that "[m]embers of the public were not required to purchase a meal at the * * * fish fry in order to gain access to the property * * *"; that the WMCC "had no written agreement with the village"; and that the WMCC "did not receive any form of

compensation in exchange for the use of its property." Doc. 139, Affidavit. *See Light, supra*, at 68.

{¶27} Kimberly confirmed that the village did not have a contract with the WMCC or pay the WMCC for use of its premises. Kerns Depo. 109. She also affirmed that the July Fourth Celebration "was not some event they [the WMCC] hosted because they made money off of it" and that she was not aware of "any revenue generating aspect of this" event for the WMCC. *Id*. at 109. *See Light, supra*, at 68. Kimberly and Durfor also testified that attendees did not need to purchase a ticket or pay an admission fee to enter the WMCC premises for the celebration. Kerns Depo. 109. Durfor Depo. 46. *See Light, supra*, at 68.

{¶28} Further, Shelton affirmed that the WMCC "held its grounds open to the public at large for a July 4th celebration" but "was not in charge of the July 4th celebration * * *" and "did not * * * arrange for activities or items to [be] brought to the event * * *." Doc. 139, Affidavit. Kimberly explained that "the community steps up" to organize the July Fourth Celebration. Kerns Depo. 107. She affirmed that, for this event, "people just bring things on an ad hoc basis and no planning, they just bring it." *Id*. at 26. She also stated that "whoever has games or activities * * * can take them" and "just lay them all across the yard." *Id*. at 15.

{¶29} Shelton and Kimberly both affirmed that the WMCC was not consulted before the dunk tank was brought onto its premises. Doc. 139, Affidavit. Kerns Depo. 111. J.S. testified that, at the time she used the dunk tank, no adult was

around for supervision and affirmed that "there was no organization in terms of who was going to throw the ball, who was going to get dunked[.]" J.S. Depo. 38-39, 41. Durfor also testified that she was not aware of any person affiliated with the WMCC who was supervising the dunk tank. Durfor Depo. 45.

{¶30} Further, the record indicates that the WMCC did not have a role in other, larger activities at the celebration. Kimberly indicated that the fire department pays for a company to stage a fireworks display at the celebration with funds that come from community "donations and fundraisers." Kerns Depo. 92-94. Similarly, J.S. testified that, on the morning of the celebration, she and Durfor participated in a softball event on the WMCC grounds. J.S. Depo. 31. She said that this game was organized by the coaches in her softball league and that she was not aware of any other person or entity that organized this event. *Id*. at 31-32. Thus, the record indicates that the fish fry was one of many activities that occurred at the celebration.

{¶31} However, there is no evidence that suggests that J.S. went to the fish fry, purchased a meal, or even entered the WMCC's premises to go to the fish fry. *See Lawson v. Scinto*, 10th Dist. Franklin No. 08AP-1125, 2009-Ohio-2659, ¶ 11 (holding a person was a licensee where "there [was] no evidence that she ever intended to patronize any of the businesses serviced by the parking lot where she fell"); *Mostyn v. CKE Restaurants, Inc*., 6th Dist. Williams No. WM-08-018, 2009-Ohio-2934, ¶ 5, 18 (holding that a person who slipped at a rest area with restaurants

was a licensee because she entered solely to use the restroom "and had not entered the area of the incident for any business purpose beneficial to appellee").

{¶32} Third, Durfor argues that the WMCC benefits from the celebration because members of the community are "familiarize[d] * * * with what [the] WMCC has to offer" and that this "*could* increase membership in [the] WMCC * * *." (Emphasis added.) Appellant's Brief, 9. *See Honek, supra*, at ¶ 25 (holding that "the focus on the duty owed is the relationship between the injured party and the property owner").

{¶33} However, in *Roesch v. Warren Distrib./Fleet Eng. Research*, the plaintiff went to a service station to fill his tires with an air pump that "was clearly marked with a sign stating 'Free Air.'" *Roesch v. Warren Distrib./Fleet Eng. Research*, 146 Ohio App.3d 648, 2000-Ohio-2694, 767 N.E.3d 1187, ¶ 2-3 (8th Dist.). The plaintiff was injured on the premises and sued the service station. *Id*. He argued

> **that the air pump was located on Clark Oil's premises for the purpose of attracting customers who would later purchase gas or sundries such as gum or cigarettes. He therefore claim[ed] that he qualifie[d] as a business invitee because he [was] a prospective paying customer.**

Id. at ¶ 11. But the plaintiff "admit[ed] * * * that he had never made any purchases of any kind at the Clark Oil station and that he never had any intention of making any purchases, including the day he was injured." *Id*. at ¶ 12, 22. He also did not produce any evidence that the service station "provided * * * a free air pump or

compressor * * * to attract customers in the hopes that the public would do business in connection with receiving free air." *Id*. at ¶ 24. Based on these facts, the Eighth District concluded that the plaintiff was a licensee. *Id*. at ¶ 28.

{¶34} In the case presently before this Court, Durfor has not offered any evidence that the WMCC opened its premises for the purported benefit alleged in her brief. More importantly, Durfor has not identified any evidence that would suggest that the WMCC "received a tangible or economic benefit from [J.S.'s] * * * visit." *Madison v. Woodlawn Cemetery Assn*., 6th Dist. Lucas No. L-10-1131, 2010-Ohio-5650, ¶ 13. *See Provencher, supra*, at 268 (emphasizing "the benefit received by the party" rather than "what purpose the land was held open for" in determining the entrant's legal status"); *Yonut v. Salemi*, 10th Dist. Franklin No. 05AP-1094, 2006-Ohio-2744, ¶ 11-12.

{¶35} However, when asked why she went to the celebration at the WMCC, J.S. said, "We were just going to go down there and *have fun*." (Emphasis added.) J.S. Depo. 17. Further, on the morning of the celebration, J.S. participated in a softball game at the WMCC. *Id*. at 31. When she returned to the celebration in the afternoon, she testified that she and her friends "seen [sic] the dunk tank and we said that looks fun." *Id*. at 38. These facts indicate that J.S. entered the WMCC's premises to enjoy the activities organized by the community "for [her] personal benefit * * *." *Heffern, supra*, at 52. *See Honek, supra*, at ¶ 25.

{¶36} In the absence of evidence that J.S. entered the WMCC's premises "for some purpose that [was] * * * beneficial to the owner[s]," Durfor cannot establish that J.S. was an invitee. *Heffern, supra*, at 52. Having examined the evidence in the record, we conclude that the trial court did not err in determining that J.S. was a licensee at the celebration. Doc. 166. Thus, in this case, the WMCC owed J.S. "no duty except to refrain from wantonly or willfully causing injury." *Light, supra,* at 68 ("A licensee takes his license subject to its attendant perils and risks.").

{¶37} However, Durfor has not alleged that the WMCC engaged in any willful or wanton conduct. *Light, supra*, at 68-69. Further, the record contains no evidence that indicates the WMCC acted in such a manner. *Id*. For this reason, the trial court did not err in granting the WMCC's motion for summary judgment. As such, Durfor's first assignment of error is overruled.

Second Assignment of Error

{¶38} Durfor argues that the trial court erred in determining that J.S. was a recreational user of the premises owned by the WMCC and that her claims were, therefore, barred under the recreational immunity statute in R.C. 1533.181(A).

Legal Standard

{¶39} Appellate courts are to "decide each assignment of error" raised on appeal "unless an assignment of error is made moot by a ruling on another assignment of error * * *." App.R. 12(A)(1)(c). An issue is moot when it

"involve[s] no actual genuine, live controversy, the decision of which can definitely affect existing legal relations." *Culver v. City of Warren*, 84 Ohio App. 373, 83 N.E.2d 82 (7th Dist. 1948), quoting Borchard, Declaratory Judgments, at 35 (2d Ed. 1941). "Put differently, an assignment of error is moot when an appellant presents issues that are no longer live as a result of some other decision rendered by the appellate court." *Sullinger v. Reed*, 2021-Ohio-2872, 178 N.E.3d 29, ¶ 52 (3d Dist.), quoting *State v. Gideon*, 165 Ohio St.3d 156, 2020-Ohio-6961, 176 N.E.3d 720, ¶ 26.

Legal Analysis

{¶40} In this case, the trial court offered two bases for its decision to grant summary judgment to the WMCC: (1) J.S. was a licensee on the WMCC property and (2) J.S. was a recreational user on the WMCC's property. Doc. 166. Either one of these two bases would provide sufficient grounds for a grant of summary judgment to the WMCC. *See Light, supra*, at 67-68, 69. Since we determined that the trial court did not err in concluding that J.S. was a licensee under the first assignment of error, we have already determined that the trial court had a sufficient legal basis to grant the WMCC's motion for summary judgment. Thus, the question of whether J.S. was also a recreational user is moot. As such, we decline to address the issues raised in Durfor's second assignment of error pursuant to App.R. 12(A)(1)(c).

Conclusion

{¶41} Having found no error prejudicial to the appellant in the particulars assigned and argued, the judgment of Logan County Court of Common Pleas is affirmed.

Judgment Affirmed

MILLER and SHAW, J.J., concur.

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