[Cite as *WWSD, L.L.C. v. Woods*, 2022-Ohio-952.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

WWSD, LLC,	:	
Plaintiff-Appellee,	:	No. 20AP-403 (C.P.C. No. 17CV-5963)
v.	:	(REGULAR CALENDAR)
Brian K. Woods, et al.,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on March 24, 2022

On brief: *Law Office of Jeffrey B. Sams,* and *Jeffrey B. Sams*. for appellee. **Argued:** *Jeffrey B. Sams.*

On brief: *Brian K. Woods*, pro se.

On brief: *Percy Squire*, for appellant Metropolitan Community Services, Inc. **Argued:** *Percy Squire.*

APPEAL from the Franklin County Court of Common Pleas

JAMISON, J.

{¶ 1} Defendants-appellants, Brian K. Woods ("Woods") and Metropolitan Community Services, Inc. ("MCS"), appeal from judgments issued by the Franklin County Court of Common Pleas, in favor of plaintiff-appellee, WWSD, LLC, ("WWSD"). For the reasons that follow, we affirm.

I. Facts and Procedural History

{¶ 2} Woods is the Chief Executive Officer of MCS, and the parties will be treated as the same entity for purposes of this appeal. MCS is a nonprofit organization and operates transitional housing for individuals trying to improve their life. MCS partners with owners of dilapidated properties and restores the property to a livable condition to provide housing for MCS clients.

{¶ 3} WWSD is a real estate investment and management company, based in California, involved in buying, renovating, renting, and selling real property. WWSD retained a local real estate company, Realty Executive Decisions ("RED"), to acquire, repair and manage the property located in the Columbus, Ohio area.[1]

{¶ 4} On or about December 1, 2016, Woods entered into an agreement with Gregory and Karla Poole ("Pooles"), the owners of the real property located at 3774 Washburn Street in Whitehall, Ohio (the "Property").[2] Pursuant to the agreement, Woods paid for renovations to the property to bring it to a livable condition and in February 2017 placed MCS clients in the property.

{¶ 5} The Pooles had entered into a mortgage on the property with Huntington National Bank ("Huntington"), on or about July 30, 2007. On November 17, 2016, Huntington filed a foreclosure action in the Franklin County Court of Common Pleas, docketed as case No. 16-CV-10934, alleging the Pooles were in default for nonpayment of the mortgage. The Pooles were duly served but did not file an answer and a default judgment was entered in favor of Huntington on January 31, 2017. The property was sold at sheriff's sale on March 31, 2017, and appellee was the winning bidder. Pursuant to the sale, a sheriff's deed listing WWSD as the new owner was recorded on May 16, 2017. However, the deed contained the name of the prior sheriff[3] in the notary acknowledgment block, which was later corrected by filing an Affidavit of Matters Relating to Title, recorded on October 10, 2017.

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[1] The title to the properties are in the name of WWSD.
[2] The Pooles and Woods entered into a lease agreement commencing December 1, 2016, and an Option to Purchase, Donate, or Return Lease agreement on December 1, 2016.
[3] Dallas Baldwin, the Sheriff of Franklin County, Ohio assumed office on January 3, 2017.

{¶ 6} Woods avers he first became aware that the property was in foreclosure and had been sold when appellee posted a notice on the property informing any occupants that the property had been purchased at sheriff's sale on April 4, 2017. On April 10, 2017, Woods prepared and filed three affidavits for mechanic's lien against the property, stating that he had separate contracts with the Pooles, Huntington, and RED for work performed at the property. Woods subsequently admitted that he did not have a contract with Huntington or RED to perform work, but averred he had a contract with the Pooles.

{¶ 7} On July 6, 2017, appellee filed a four-count complaint against appellants that alleged fraud and slander of title, sought a determination as to the validity of the mechanic's liens, and requested the court quiet title in appellee's favor. Service was perfected on appellants on July 10, 2017, and on August 15, 2017, appellee filed a motion for default judgment, citing a failure of appellants to file an answer. Appellants filed an answer and counterclaim for unjust enrichment and conversion that same day. On August 16, 2017, appellee moved to strike appellants' answer and filed its answer to WWSD's counterclaim on August 22, 2017.

{¶ 8} On July 20, 2017, Woods filed an answer, a motion to intervene, and a motion for a temporary restraining order and preliminary injunction in Franklin County C.P. No. 16-CV-10934, the Huntington foreclosure case. In his pleadings, Woods asserted an interest in the property and requested injunctive relief in the form of a stay of the eviction of his client from the property. On August 21, 2017, Woods withdrew his motions without any action from the court.

{¶ 9} On August 30, 2017, appellee filed a motion for partial judgment on the pleadings, pursuant to Civ.R. 12(C), on its claims for declaratory relief and to quiet title. Appellants filed a response on September 20, 2017, asserting that there were issues of material fact that precluded judgment. The trial court issued a decision on July 17, 2019, denying appellee's motion to strike and for default judgment, but granting the motion for partial judgment on the pleadings as to declaratory judgment and quiet title. The trial court found that appellants' interest in the property was extinguished by the judgment for Huntington in case No. 16-CV-10934, and that "there is no set of facts under which Defendant could prevail on Plaintiff's complaints for declaratory judgment or to quiet title." (July 17, 2019 Decision & Entry on Pl's Mot. at 5.)

{¶ 10} On April 12, 2018, appellee filed a motion for summary judgment, pursuant to Civ.R. 56, on its remaining claims of fraud and slander of title, as well as appellants' counterclaim allegations of unjust enrichment and conversion. Appellant retained new counsel, and, after two requests for extensions of time to file a response, a response was ultimately filed on August 28, 2019.

{¶ 11} On September 17, 2019, the trial court denied both motions for an extension of time, ruled appellants' memorandum in opposition would not be considered, and granted appellee summary judgment on the claims of slander of title and fraud and on appellants' counterclaim of conversion. The trial court denied summary judgment on the counterclaim of unjust enrichment.

{¶ 12} On December 9, 2019, this matter proceeded to jury trial on appellants' single remaining claim of unjust enrichment and to determine appellee's damages for fraud and slander of title. On December 12, 2019, the jury found that appellee was not liable to appellant on the unjust enrichment claim, and the jury awarded appellee compensatory damages in the amount of $32,000 on the fraud and slander of title claims and an additional $11,300 in punitive damages. The parties agreed on the amount of $40,000 for attorney fees. (Aug. 24, 2020 Final Jgmt. Entry at 1.)

{¶ 13} On December 18, 2019, appellants filed a motion for judgment notwithstanding the verdict ("JNOV"), and for a new trial. The motion was denied on January 23, 2020.

{¶ 14} Appellants timely appealed to this court from the judgments issued by the trial court.

II. Assignments of Error

{¶ 15} Appellant, Brian K. Woods, assigns the following errors for our review:

> **1. The trial court erred by finding sufficient evidence for a slander of title claim.**
>
> **2. The trial court erred by finding sufficient evidence for a fraud claim.**
>
> **3. The trial court erred by ruling an invalid deed can be deemed a Scrivener's Error.**

4. The trial court erred by finding lis pendens applied to the Plaintiff.

5. The trial court erred by granting punitive damages.

{¶ 16} Appellant, Metropolitan Community Services, Inc., assigns the following errors for our review:

1. Whether appellee had standing to commence this action in the trial court.

2. Whether the trial court erred when it granted appellee judgment on the pleadings in relation to appellee's declaratory judgment and quiet title claims.

3. Whether the trial court erred when it granted Appellee summary judgment on appellee's fraud and slander of title claims.

4. The trial court erred in denying appellant's Motion for Judgment Notwithstanding the Verdict and for a New Trial.

5. Whether punitive damages should have been granted to appellee.

III. Legal Analysis

{¶ 17} In order to facilitate the analysis of this appeal, we shall consolidate the assignments of error and consider them out of order.

A. Woods' Third and MCS' First Assignments of Error

{¶ 18} Appellants allege that appellee lacked standing to bring this action because of an error in the sheriff's deed conveying title to appellee. Appellants assert that the deed cannot convey marketable title because of the defective acknowledgement and appellee is therefore deprived of standing. However, appellants are incorrect regarding this issue and the assignments of error must be overruled.

{¶ 19} Appellee's position as a purchaser for value grants him standing. A buyer at a sheriff's sale has an interest "limited to the property and possession." *LaSalle Bank Natl. Assn. v. Brown*, 2nd Dist. No. 25822, 2014-Ohio-3261, ¶ 17. A purchaser of real property at a sheriff's sale has "a vested interest in the property." *Ohio Sav. Bank v. Ambrose,* 56

Ohio St.3d 53, 54 (1990). A purchaser at a sheriff's sale was found to "have standing to appear and participate in the proceedings before the trial court to protect its newly acquired interest in the property." *New Residential Mtge. LLC v. Barnes,* 12th Dist. No. CA 2020-4-027, 2020-Ohio-6907, ¶ 17.

{¶ 20} When a sheriff's deed is recorded, "and is signed and acknowledged by a person with an interest in the real property described in the instrument," a rebuttable presumption is triggered that the deed is "valid, enforceable, and effective as if in all respects the instrument was legally made, executed, acknowledged, and recorded." R.C. 5301.07(B). This presumption "may be rebutted by clear and convincing evidence of fraud, undue influence, duress, forgery, incompetency, or incapacity." *Id.* The record below indicates appellants did not attempt to rebut the presumption and the deed is presumed valid as between the Franklin County Sheriff, the grantor, and WWSD, the grantee, sufficient to confer standing upon appellee to protect its title.

{¶ 21} There is no question that R.C. 5301.01 requires a deed to be signed by the grantor and that a notary properly acknowledge the grantor's signature. *Citizens Natl. Bank v. Denison,* 165 Ohio St. 89 (1956). A lien arising from a mortgage with a defective acknowledgement could not establish a superior lien to validly executed subsequent mortgages, and "[w]here the acknowledgment or execution of the deed is defective, it has been held ineffective as against subsequent creditors." *Id.* at *95. MCS argues that the decision in *Citizens* stands for the proposition that a defective acknowledgement does not protect a grantee from third-party claims or confer standing to sue. *Citizens* is completely silent on the issue of standing and provides no authority on that issue, and any reliance regarding standing is misplaced.

{¶ 22} The purpose of acknowledgment is to afford "proof of the due execution of the deed by the grantor, sufficient to authorize the register of deeds to record it." The acknowledgement of a deed is required solely to provide proof that the grantor executed the deed and is a prerequisite to recording the deed and making it constructive notice of all the facts set forth in it. *Fifth Third Bank v. Farrell,* 5th Dist. No. 09 CAE 11 0095, 2010-Ohio-4839, ¶ 30. The validity of a deed at common law did not depend on its acknowledgement. A failure to comply with the provisions of R.C. 5301.07 may result in the "inability to pass 'legal title' as that term is defined in the context of affording notice of

recordation of the conveyance of the property to creditors and subsequent purchasers." *Estate of Niemi v. Niemi,* 11th Dist. No. 2008-T-0082, 2009-Ohio-2090, ¶ 70. However, as between the grantor and grantee, the deed is valid, despite a defective acknowledgement. *Id.* "A deed without acknowledgement, or defectively acknowledged, passes the title equally with one acknowledged, as against the grantor and his heirs," in the absence of fraud. *Swallie v. Rousenberg,* 190 Ohio App.3d 473, 479, 2010-Ohio-4573.

{¶ 23} Courts have examined wrong and missing names in a certificate of acknowledgment. The Ohio Supreme Court of Ohio first held that an acknowledgment that completely omitted the name of the mortgagor was defective, and the purchaser "acquired no legal title." *Smith's Lessee v. Hunt,* 13 Ohio 260, 269 (1844). The space on the acknowledgment was left blank, and the court determined that there was no reasonable way to discern who the correct party should be. The court then took up the *Dodd* case, where the certificate of acknowledgment declared "the above named Charles B. Clark and Mary Clark, his wife," but the parties' actual names were Charles A. Clark and Sara Clark, and the actual names appeared elsewhere in the document. *Dodd v. Bartholomew,* 44 Ohio St. 171, 172 (1886). The *Dodd* court applied the concept of substantial compliance and found that a valid mortgage existed by stating "[w]here an error occurs in the name of a party to a written instrument, apparent upon its face, and from its contents, susceptible of correction, so as to identify the party with certainty, such error does not affect the validity of the instrument." *Id.* at *171. The *Dodd* Court did not expressly overrule *Smith's Lessee* but made a distinction here where there is an issue of construction rather than a failure to adhere to the formalities of execution and leave the grantor's name completely blank.

{¶ 24} The substantial compliance doctrine has been applied in a case where the certificate of acknowledgement listed the name of the corporation but was signed by its corporate officers, *Mid-American Natl. Bank & Trust Co. v. Gymnastics International Inc.*, 6 Ohio App.3d 11 (6th Dist.1982). In interpreting a certificate of acknowledgement, one may refer to any part of the accompanying document, and "[w]here an error occurs in the name of a party to a written instrument, apparent upon its face, and, from its contents, susceptible of correction, so as to identify the party with certainty, such error does not affect the validity of the instrument." *Id.* at *13. It appears that certificates of acknowledgment substantially comply when they in some way identify the person making the

acknowledgment. *Campbell v. Krupp*, 195 Ohio App.3d 573, 2011-Ohio-2694 (6th Dist.). In analyzing a trustee's petition to declare a mortgage invalid, the bankruptcy court examined a recorded mortgage where the certificate of acknowledgment read "[b]efore me, a notary public in and for said county, personally appeared the above-named Mortgagor, Steven R. Cummings." *Kellner v. City of Kettering*, S.D. Ohio No. 3:12-cv-00176, 2013 U.S. Dist. LEXIS 22473 (Feb. 9, 2013). The mortgagor's correct name is Linda Koogle, and the name Steven R. Cummings was not known to her or any other party, and it "is undisputed that Steven R. Cummings was not 'the above-named Mortgagor,' is not mentioned anywhere else in the Mortgage, and did not sign the Mortgage in question." *Id.* at *13. The court looked to *Dodd* and found that "[f]irst, and perhaps most significantly, the acknowledgment clause specifically refers to the 'above-named Mortgagor.' As the court found in *Dodd*, the inclusion of this language specifically invites, and allows the reader to look at the text of the document to determine who that person is." *Id.* at *14. "Where, as here, the acknowledgment clause provides additional information concerning the person acknowledging the signature, allowing that name to be compared to the text of the mortgage itself, one can determine the true identity of the person who appeared to acknowledge the signature." *Id.* at *17. The bankruptcy court held that "even though the name listed in the acknowledgement clause is completely wrong, the Court finds that the acknowledgment clause substantially complies with the statutory requirements. The nature of the error is obvious and * * * the Mortgage itself supplies the means of correcting the error." *Id.* at *19.

{¶ 25} R.C. 147.53 requires the notary public to certify that: "(A) The person acknowledging appeared before him and acknowledged that he executed the instrument; (B) The person acknowledging was known to the person taking the acknowledgment, or that the person taking the acknowledgement had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument." The recitals in the certificate of acknowledgment must comply with R.C. 5301.01 and therefore must identify the grantor. The revised code mandates that a grantor be named "within the acknowledgment clause so that the person whose signature was acknowledged can be identified" by reviewing the deed. *Farrell, supra* at ¶ 54. The certificate of acknowledgment in this action reads "the foregoing was acknowledged before me this 8 day of May, 2017, by Zachary Scott, Sheriff of Franklin County, Ohio." (May 16, 2017 Recorded Sheriff's Deed at

2.) The first paragraph of the deed begins with the language "I, Dallas L. Baldwin, Sheriff of Franklin County, Ohio" and goes on to "GRANT, SELL, AND CONVEY unto WWSD, LLC, all rights, title, and interest" regarding the Washburn property. *Id.* The grantor signed the deed over a signature block that reads "Dallas L. Baldwin, Sheriff of Franklin County, Ohio." *Id.* The name Zachary Scott appears on the certificate of acknowledgment but nowhere else. It is clear that the certificate of acknowledgment refers to the current sheriff, and that the inclusion of the former sheriff is an unfortunate typographical error. The deed refers to the Franklin County Sheriff as the grantor and is signed by the Sheriff; Dallas L. Baldwin is identified as the Sheriff in both sections.

{¶ 26} Applying the doctrine of substantial compliance, it is clear that the current Franklin County Sheriff, Dallas Baldwin, is the proper signatory for a sheriff's deed. Because we can deduce the proper party from the deed itself, it can be determined that the insertion of Zachary Scott in the acknowledgement is not fatal to the deed.

1. Scrivener's Error

{¶ 27} Woods asserts that the trial court erred by ruling that the deed falls under a scrivener's error, but the court has never issued such a ruling. The term "scrivener's error" was first used by appellee in a pleading to describe the mistake on the sheriff's deed and does not appear in any court orders. (Sept. 27, 2017 Reply Memo. to Pl's Mot. for Partial Jgmt. on the Pleadings at 2.) Appellant argues that appellee lacks standing because of the defective deed, but that argument has been rejected above.

{¶ 28} The exact degree to which appellee possessed legal or equitable title based on the sheriff's deed is not an issue before us today. However, appellee possessed at least some interest in the property sufficient to confer standing to bring the action in the trial court. Appellee has standing and Woods' third and MCS' first assignment of error is overruled.

B. Woods' Fourth and MCS' Second Assignments of Error

{¶ 29} The trial court granted appellee's judgment on the pleadings on the claims of quiet title and declaratory judgment. From this decision, MCS assigns as its second assignment of error that the trial court erred. This court overrules the assignments of error.

1. Judgment on the Pleadings

{¶ 30} A party may move for judgment on the pleadings pursuant to Civ.R. 12(C) any time after the pleadings are closed but not so close to a trial date as to cause delay.

Civ.R. 12(C). When determining a Civ.R. 12(C) motion, the trial court "is required to construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party." *Whaley v. Franklin Cty. Bd. Of Commrs.*, 92 Ohio St.3d 574 (2001). A court may grant a Civ.R. 12(C) motion only if the material facts are clear and undisputed, and the pleadings demonstrate that the moving party is entitled to judgment as a matter of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565 (1996).

{¶ 31} Civ.R. 12 (C) requires that the pleadings must be construed liberally and in a light most favorable to the nonmoving party. *Case Western Reserve Univ. v. Friedman*, 33 Ohio App.3d 347 (11th Dist.1986). A trial court is presented only with questions of law in a Civ.R. 12(C) and "may only consider the statements contained in the pleadings, and may not consider any evidentiary materials." *Burnside v. Leimbach*, 71 Ohio App.3d 399, 402 (10th Dist.1991)

2. Lis Pendens

{¶ 32} We look to Woods' fourth assignment of error, where he asserts that the trial court committed error by finding that lis pendens applied to appellee.

{¶ 33} The doctrine of lis pendens, codified at R.C. 2703.26, prevents a third person from acquiring rights that supersede or interfere with a litigant's rights, after that litigant has commenced an action in court. *Cincinnati ex rel. Ritter v. Cincinnati Reds LLC*, 150 Ohio App.3d 728, 2002-Ohio-7078 (1st Dist.). "The general intent and effect of the doctrine of lis pendens is to charge third persons with notice of the pendency of an action, and to make any interest acquired by such third persons subject to the outcome and judgment or decree of the pending lawsuit." *Bank of New York v. Barclay*, 10th Dist. No. 03AP-844, 2004-Ohio-1217, ¶ 10. The direct and most obvious intent of the lis pendens rule is "to prevent litigants from circumventing the rights of plaintiffs who have initiated litigation by transferring the subject property while an action is pending, thereby frustrating the eventual judgment of the court." *Huntington Natl. Bank v. R Kids Count Learning Ctr., LLC*, 10th Dist. No. 16AP-688, 2017-Ohio-7837, ¶ 19. Lis pendens does not require actual notice.

{¶ 34} On November 17, 2016, Huntington commenced a foreclosure action against the Pooles in case No. 16-CV-10934, and any claims or proceedings brought against the

property after that date are subject to the doctrine of lis pendens. *Wheeling Corp. v. Columbus*, 147 Ohio App.3d 460 (10th Dist.2001). Wood's property interest, based on the lease with the Pooles, "does not permit the lessee to encumber any interest greater than the leasehold." *10302 Madison Ave., LLC v. J.L.E.C., Inc.*, Cuyahoga C.P. No. CV 12 787831 (May 9, 2013). The leasehold was extinguished during the foreclosure action, and the foreclosure did not grant any property interest to defendants. "The rights of possession and quiet enjoyment conveyed through the lease are personal rights; their existence derives from the lessor's title, and they are extinguished upon the foreclosure of that title and the interest incident to it. Absent authorization or consent by the mortgagee to execute the lease, a purchaser at judicial sale will not take subject to it." *Hembree v. Mid-America Fed. S. & L. Assn.*, 64 Ohio App.3d 144, 154 (2d Dist.1989), citing *Cassilly v. Rhodes*, 12 Ohio 88 (1843).

{¶ 35} A mechanic's lien is created "at the time that the work was commenced, or the materials were begun to be furnished." *Schuholz v. Walker*, 111 Ohio St. 308, 314 (1924); *see* R.C. 1311.02. Woods stated that the first day of work performed at the property was December 1, 2016, and the mechanic's liens were created on December 1, 2016, which is after the foreclosure case was filed. Any interest Woods received was then subject to the final decree in the foreclosure case, and that decree did not vest any interest to Woods. Woods recorded the mechanic's liens on April 10, 2017, which was after the foreclosure sale. Because the sale extinguished Woods' rights, the mechanic's liens were invalid when recorded and appellants could not prevail under any set of facts. Therefore, the trial court properly entered judgment for appellee.

{¶ 36} It must be noted that after the foreclosure, appellants still retained a cause of action for unjust enrichment, and the proper forum was a lawsuit, not a lien. "The plaintiff's recourse in this matter was to file a civil lawsuit for damages and not a mechanic's lien." *McClure v. Fischer Attached Homes*, 145 Ohio Misc.2d 38, 2017-Ohio-7259 (C.P.). This was confirmed by the trial court, who allowed appellant's unjust enrichment claims to be submitted to a jury.

{¶ 37} The doctrine of lis pendens prohibited Woods from acquiring any rights superior to the Pooles in the property, and upon the foreclosure sale, a clear and

unencumbered title was conveyed to WWSD. Woods fourth assignment of error is without merit and overruled**.**

3. Declaratory Judgment

{¶ 38} Appellee requested a declaration in its complaint that the mechanic's liens recorded in the Franklin County Recorder's Office ("Recorder's"), are invalid. "A declaratory judgment is a civil action and provides a remedy in addition to all other legal and equitable remedies available." *Aust v. Ohio State Dental Bd.,* 136 Ohio App.3d 677 (10th Dist.2000). In order to succeed on a declaratory action, a party must establish that "(1) a real controversy exists between the parties; (2) a controversy is justiciable in character; and (3) speedy relief is necessary to preserve the rights of the parties * * * all three requirements must be met in order for the declaratory relief to be proper." *Id.* at *681. A justiciable controversy "requires the existence of a legal interest or right, and a 'real controversy' exists when there is a 'genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *JBK Ventures, Inc. v. Ohio Dept. of Pub. Safety,* 10th Dist. No. 20AP-184, 2021-Ohio-2046, ¶ 6. "Ohio's declaratory judgment statutes * * * were adopted to allow courts to address legal uncertainty in a timely way." *Ohio Democratic Party v. LaRose,* 2020 Ohio Misc. LEXIS 131. A declaratory judgment does not have to be the sole remedy available to a party, and does not need to be the final and complete remedy in a controversy. *State ex rel. Thernes v. United Local School. Bd. Dist. Of Edn.,* 7th Dist. No. 07 CO 45, 2008-Ohio-6922.

{¶ 39} R.C. 2721.03 allows any person whose rights are affected by a statute to present a question of validity regarding an action arising under that statute through a declaratory action. The mechanic's liens were filed pursuant to R.C. 1311.01, *et seq*., and the validity of a mechanic's lien is an appropriate subject for declaratory judgment.

{¶ 40} We have determined that the mechanic's liens are invalid based on the doctrine of lis pendens, and appellants' property interest based on the lease and agreement has been extinguished by the foreclosure and subsequent sale of the property. Considering the pleadings in a light most favorable to appellants, we find that appellant can not prove any set of facts that would allow them to prevail. The granting of a declaratory judgment was proper in this matter.

4. Quiet Title

{¶ 41} Appellee asserts that appellants placed a cloud on their title to the property when they recorded the liens. "A cloud on title is a defect in title 'that has a tendency even in the slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership.' " *Cupside Properties Ltd. v. Earl Mechanical Servs.*, 6th Dist. No. L-14-1253, 2015-Ohio-5019, ¶ 27. Invalid mechanic's liens recorded against another's property have been found to constitute clouds on title. "The invalid * * * mechanic's lien created the appearance of an encumbrance on Lawson's title where no encumbrance existed. Therefore, the trial court correctly found Lawson entitled to a decree of quiet title." *Walker v. Lawson*, 2nd Dist. No.28692, 2021-Ohio-1218, ¶ 23.

{¶ 42} An action to quiet title is a statutory cause of action under R.C. 5303.01, which reads "[a]n action may be brought by a person in possession of real property * * * against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest." "The burden of proof in a quiet title action * * * rests with the complainant as to all issues which arise upon essential allegations of his complaint." *Duramax, Inc. v. Geauga Cty Bd. Of Commrs.*, 106 Ohio App.3d 795, 799 (11th Dist.1995). "An action to quiet title is equitable in nature," and a "court may quiet title only when there is no adequate remedy at law." *McClure* at *47. Since a monetary award would not clear title, the only way to repair plaintiff's title would be to remove the cloud.

{¶ 43} MCS' argument is totally based on the defective deed precluding appellee from being in possession of the property. The deed, however, is not defective, and the trial court did not err when it entered judgment for appellee on its quiet title claim.

{¶ 44} Appellants have no interest in the property, and the mechanical liens are invalid. The liens constitute a cloud on appellee's title. MCS' second assignment of error is overruled.

C. Woods' First and Second, and MCS' Third Assignment of Error

{¶ 45} Appellant, Woods, first and second assignments of error and appellant, MCS', third assignment of error pertain to the trial court's granting of summary judgment, and we shall consider them jointly. Appellants argue that the trial court erred when it granted summary judgment as to the claims of slander of title and fraud against appellants. We will discuss each claim separately.

1. Summary Judgment

{¶ 46} "Pursuant to Civ.R. 56(C), summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party." *Grubach v. Univ. of Akron*, 10th Dist. No. 19AP-283, 2020-Ohio-3467, ¶ 20, citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrates the absence of a genuine issue of a fact on a material element of the nonmoving party's claim." *Dreshler v. Burt*, 75 Ohio St.3d 280, 292 (1996). "Once the moving party meets its initial burden, the nonmovant must set forth specific facts demonstrating a genuine issue for trial." *Dunlop v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 19AP-58, 2019-Ohio-3632, ¶ 6, citing *Dreshler. at* *293. "Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party." *Gabriel v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 14AP-870, 2015-Ohio-2661, ¶ 11, citing *Murphy v. City of Reynoldsburg*, 65 Ohio St.3d 356 (1992).

{¶ 47} Civ.R. 56(C) sets forth the evidence a party may use to support its motion for summary judgment. In considering a motion for summary judgment, the court will examine the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any." Civ.R. 56(C). In addition, the rule stipulates that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Civ.R. 56(E). While there is no requirement to submit affidavits, a moving party must "specifically point to something in the record that comports with the evidentiary materials set forth in Civ.R. 56(C)." *Dreshler* at *298.

{¶ 48} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dreshler* at *293. If the moving party can meet the initial burden, the burden then shifts to the nonmoving party to "set forth specific facts showing

that there is a genuine issue for trial." *Id.* "[T]he non-moving party then has a reciprocal burden, as set forth in Civ.R. 56(E), to set forth specific facts showing there is a genuine issue for trial." *Doe v. First Presbyterian Church*, 126 Ohio App.3d 358, 364 (5th Dist.1998); *see* Civ.R. 56(E). The nonmoving party may not rest on the mere allegations of its pleading. *State ex rel. Burnes v. Athens Cty. Clerk of Courts*, 83 Ohio St. 3d 523 (1998). The Supreme Court of Ohio has stated that "even where the nonmoving party fails completely to respond to the motion, summary judgment is improper unless reasonable minds can come to only one conclusion and that conclusion is adverse to the nonmoving party." *Morris v. Ohio Cas. Ins. Co.*, 35 Ohio St.3d 45, 47 (1988). Accordingly, the lack of a response by relator cannot, of itself, mandate the granting of summary judgment. "There is no 'default' summary judgment under Ohio law." *Maust v. Palmer*, 94 Ohio App.3d 764, 769 (10th Dist.1994).

{¶ 49} Appellate review of summary judgment is de novo. *Byrd v. Arbors E. Subacute & Rehab Ctr.*, 10th Dist. No. 14AP-232, 2014-Ohio-3935. "When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review." *Id.*, citing *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103 (10th Dist.1992). "We must affirm the trial court's judgment if any of the grounds raised by the movant in the trial court are found to support it, even if the trial court failed to consider those grounds." *Helfrich v. Allstate Ins. Co.*, 10th Dist. No. 12AP-559, 2013-Ohio-4335, ¶ 7.

{¶ 50} Civ.R. 6(B) allows the trial courts to have discretion in granting extensions of time to respond to pleadings. "Absent an abuse of that discretion, the decision of the trial court to grant or to deny an extension will not be disturbed." *Scaccia v. Lemmie*, 2d Dist. No. 21506, 2007-Ohio-1055, ¶ 13, citing *Marion Production Credit Assn. v. Cochran*, 5 Ohio St.3d 217 (1988).

{¶ 51} Appellee filed its motion for summary judgment on April 12, 2018. During a telephonic status conference, and over appellee's objection, the trial court set August 1, 2019 as the due date for appellants' responses to the summary judgment motion. On August 1, 2019, appellants requested an extension until August 11, 2019 to respond due to the "unanticipated workload" of appellant, MCS', counsel. (Aug. 1, 2019 Mot. to Extend Time at 1.) Then, on August 13, 2019, which was past the requested response date, counsel

requested additional time until August 27, 2019, again due to his busy schedule. The trial court did not immediately rule on the requests for extension, and appellee objected to the second extension.

{¶ 52} The trial court found that the "attorney's only explanation for his failure to meet the deadlines imposed by the Court is that he is too busy with other litigation." (Sept. 17, 2019 Decision & Entry at 3.) "The demands of being a busy lawyer or of being preoccupied with other litigation generally do not constitute excusable neglect." *Dispatch Printing Co. v. Recovery Ltd. Partnership*, 10th Dist. No. 14AP-640, 2015-Ohio-1368, ¶ 16. The trial court denied both requests for an extension of time and declared that "[d]efendant's memorandum in opposition, along with any exhibits or evidence, filed on August 28, 2019, will not be considered." (Sept. 17, 2019 Decision & Entry at 3.) The trial court granted summary judgment in favor of appellee on its fraud and slander of title claims and on appellants' counterclaim for unjust enrichment.

{¶ 53} The focal point of the summary judgment motion is the assertion that the mechanic's liens prepared and recorded by Woods are false and invalid. Mechanic liens are governed by R.C. 1311 and allows a provider of labor or material to place a lien against an interest in real property. R.C. 1311.06. To be a valid mechanic's lien, a court must establish that "(1) a contract existed between the plaintiff and defendant, (2) the contract provided for labor or supplies to be delivered, (3) the labor or supplies were in furtherance of improvements to the property, and (4) the parties contracted for payment to be made upon the improvements." *McClure* at *47.

{¶ 54} For appellants to succeed on its motions for summary judgment, the court must find that no express or implied contract existed regarding appellants' work on the Washburn property. In this case, Woods states in the three mechanic's liens "that the lien claimant furnished certain material or performed certain labor or work in furtherance of improvements located on or removed to the land hereinafter described, pursuant to a certain contract, with the owner, part-owner, lessee, original contractor, subcontractor, or other person, as the case may be." (Apr. 12, 2018 Pl.'s Ex. at 2.) Woods initially averred he had contracts with Huntington, RED, and the Pooles, but subsequently admitted that he did not have a contract with Huntington or RED and did not present any evidence regarding a contract with the Pooles whereby he was entitled to payment. The trial court found that

the mechanic's liens were false and invalid based on the absence of a contract between the parties. This court agrees and finds that the mechanic's liens are invalid. Because the first element required for a mechanic's lien has not been satisfied, and there is no need to discuss the remaining elements.

2. Slander of Title

{¶ 55} Appellee argues that Woods was deceptive in recording the invalid mechanic's liens, and the liens constitute a slander of title against the property.

{¶ 56} Ohio authorities recognize the claim of slander of title to real estate as a distinct tort from slander of a person. *Hahn's Elec. Co. v. Cochran*, 10th Dist. 01AP-1391, 2002-Ohio-5009. Slander of title is a tort issue which may be "brought against anyone who falsely and maliciously defames the property, either real or personal, of another, and thereby causes him some special pecuniary damage or loss." *Green v. Lemarr*, 139 Ohio App.3d 414, 430 (2d Dist.2000). A slander of title claim protects economic interests in real estate, and a slander of title claim is personal in nature and protects a person's reputation. *See Restatement of the Law 2d, Torts,* Section 623A Comment g, and Section 624 Comment a (1977).

{¶ 57} Typically, slander of title cases involves documents such as liens or mortgages "filed against a particular piece of property by parties who claim an interest in the property." *Green* at *431; *Gilson v. Windows & Doors Showcase L.L.C.*, 6th Dist. No. F-05-017, 2006-Ohio-2921. Documents filed against real property impact title by placing a cloud on the title. "The filing of mechanic's lien satisfies the publication element." *Prater v. Dashkovsky*, 10th Dist. No. 07AP-389, 2007-Ohio-6785, ¶ 13, citing W. Prosser, *The Law of Torts* Section 122 (3rd Ed. 1964).

{¶ 58} To succeed on a slander of title claim, a claimant must prove that "(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard for its falsity; and (4) the statement caused actual or special damages." *Green* at *430-31. As a general rule, wrongfully recording an unfounded claim to the property of another constitutes slander of title. This is true so long as the other elements are satisfied, namely malice and special damages.

{¶ 59} In the context of slander of title, a person acts with malice when they act with "reckless or wanton disregard of the rights of anothers." *Consun Food Indus. Inc. v. Fowkes,* 81 Ohio App.3d 63, 72 (9th Dist.1991). "The malice need not be that of a personal hatred." *Id.* One need not act with personal hatred or ill will for the action to amount to malice. It takes more than merely recording a false document to establish malice. Malice was found where a vendor placed a mechanic's lien on a property after they had received notice that the payment had been made in full and then failed to remove the lien after receiving a copy of the payment receipt marked paid in full. *Bradley v. B & G Awning*, 9th Dist. No. 13449, 1988 Ohio App. LEXIS 2686 (Jul. 6, 1988).

{¶ 60} In this matter, it is uncontroverted that Woods prepared and recorded affidavits for false mechanic liens. The question put to the trier of fact in a summary judgment motion is whether the filing of the mechanic's liens constitutes a reckless or wanton act in disregard of appellee. "If a party who records a document which casts a cloud upon another's real estate has reasonable grounds to believe that he has title or a claim to the property, he has not acted with 'malice' to be liable for 'slander of title.' " *Sylvania Bank v. Trala*, 6th Dist. No. L-86-283 (Mar. 20, 1987). "An action for slander of title will not lie where the statement made (affidavit for mechanic's lien in this case) was uttered in good faith with probable cause for believing it." *John Eastman Dev. Co. v. Harvest Dev. Co.*, 9th Dist. No. 1146, 1982 Ohio App. LEXIS 11532 (Sept. 1, 1982). A court found that filing a false mechanic's lien resulted in a slanderous statement disparaging a person's title, and that "a legitimate question of fact exists as to whether the plaintiffs acted with malice or reckless disregard when they recorded the mechanic's lien" because it was not shown that the plaintiffs had knowledge of the falsity of the lien. *McClure* at *22.

{¶ 61} "[M]alice may be understood as the lack of good faith belief in the right to publish the allegedly slanderous utterance." *Sylvania Bank v. Trala, supra* at *10. Appellant stated that "the sole purpose of the filed liens is for the Defendant to recover some of his cost" from working on the property. (May 10, 2018 Reply to Def's Requested Mediation at 2.) Woods admitted in discovery that he did not have a contract to perform work at the property with Huntington or RED. The court did not have any evidence before that Woods had a contract to perform work for payment with the Pooles. Woods avers that in spite of his false statements about the contracts he operated under a good faith belief that

he had a legitimate claim for his costs. However, Woods' good faith argument is also diminished by the fact that he had full knowledge of the foreclosure sale to appellee at the time he recorded the mechanic's liens. It is not reasonable to believe that absent an express agreement you would have interest in real property after a foreclosure sale to a new party. Even though he is a layman, Woods misunderstanding of the law is no excuse for his actions.

{¶ 62} Woods argues evidence of his good faith belief, but most of the evidence offered by Woods came later in the litigation of this matter and was not before the court when it ruled on the summary judgment motion. Woods states "[f]irst, substantial and very important, a full careful examination of Plaint's Trial Exb. #8, and T. Trans pgs. 315-318, is evidence Woods did everything possible to resolve the instant matter and avoid litigation short of permitting the Plaintiff of taking complete advantage of enriching themselves upon the labor of Woods' back." (Appellant Woods' Brief at 5-6.) Appellee met its burden to demonstrate there was no issue of genuine fact, and appellants set forth no facts to the contrary.

{¶ 63} The trial court focused on the false statements in the liens regarding the existence of a contract and held in its decision granting summary judgment that "the mechanic's liens involving RED and Huntington were filed with reckless disregard of their falsity." (Sept. 17, 2019 Decision & Entry at 5.)

{¶ 64} Appellee asserted in its motion for summary judgment that:

> Defendant's actions recklessly and wantonly disregarded Plaintiff's rights to title to the Property such that Defendant's actions are malicious. Their actions defamed Plaintiff's title to the Property. Plaintiff has suffered damages due to its inability to acquire clear title to the Property. Therefore, Defendants have slandered Plaintiff's title to the Property.

(April 12, 2018 Pl's Mot. for Summ. Jgmt. at 12.)

In *Walker*, the appellate court found that a plaintiff acted with reckless disregard when he knowingly recorded a false mechanic's lien to bring a foreclosure action against the defendant. *Walker v. Lawson, supra.* That reckless disregard for the property rights of others is apparent here.

{¶ 65} Woods published a slanderous statement that disparaged appellee's title when he recorded the mechanic's liens in the Recorder's office. The statements were false because no contract existed between Woods and the parties named in the mechanic liens and Woods had knowledge that the liens were false. Finally, appellee suffered damages, as evidenced by the jury award. The evidence offered by appellee is sufficient to sustain the granting of summary judgment on the slander of title question.

3. Fraud

{¶ 66} The mechanic's liens are alleged to have been fraudulently prepared by appellants. Fraud is defined as: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464 (1998). In order to establish a claim of fraud, it is necessary for the party to prove all of the above elements. Whether fraud exists is generally a question of fact. *Interstate Gas Supply, Inc. v. Calex Corp.*, 10th Dist. No. 04AP-980, 2006-Ohio-638.

{¶ 67} Appellants must prove that a false representation of fact was made with knowledge of its falsity or with reckless disregard. It is uncontroverted that the mechanic's liens were based on information that Woods knew was false, and this satisfies the first element of fraud. The second element of fraud is that the representation was material, and the representation stating there is a contract is material, so the second element is satisfied. The third element requires that the statement was made with the intent to mislead. Here, the false statement that appellants had contracts were made to mislead the Recorder's office into thinking it was a valid and enforceable mechanic's lien. The fourth element is that someone did in fact rely on the statement, and the Recorder relied on the misrepresentation to actually record the liens as if valid. Finally, appellee must suffer an injury as a direct result of appellants' misrepresentation, and that was demonstrated at trial. Summary judgment was proper when looking at fraud. A bare case of fraud was substantiated.

{¶ 68} Woods' first and second and MCS' third assignment of error should be overruled.

D. Woods' and MCS' Fifth Assignment of Error

{¶ 69} Appellants challenge the award of punitive damages to appellee in their fifth assignment of error. "Punitive damages are intended to deter conduct resulting from a mental state that is 'so callous in its disregard for the rights and safety of others that society deems it intolerable.' " *Ward v. Hengle*, 124 Ohio App.3d 396, 405 (9th Dist.1997). The burden is on the party seeking punitive damages to prove by clear and convincing evidence that it is entitled to them. *Cabe v. Lunich*, 70 Ohio St.3d 598 (1994). Punitive damages are proper when a party's actions "demonstrate malice or aggravated or egregious fraud." *Gold Craft Co. v. Ebert's Contr. & Remodeling LLC*, 10th Dist. No. 09AP-448, 2010-Ohio-3741, ¶ 12. An appellate court reviews a civil judgment to determine if an award of punitive damages is an abuse of discretion and against the legal sufficiency of the evidence and must review the record to see if the damage award is supported by "some competent, credible evidence." *Id* at ¶ 11.

{¶ 70} The required malice to support an award of punitive damages is either "(1) that state of mind under which person's conduct is characterized by hatred, ill will, or spirit of revenge, or (2) a conscious disregard for rights and safety of other persons that has great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St.3d 334, 336 (1987). Absent an admission of malice, "a finding of malice may be inferred from conduct and surrounding circumstances." *Gold Croft Co.* at ¶ 13.

{¶ 71} "Since punitive damages are assessed for punishment and not compensation, a positive element of conscious wrongdoing is always required. This element has been termed conscious, deliberate, or intentional. It requires the party to possess knowledge of the harm that might be caused by the behavior." *Preston* at *335. "Actual malice requires consciousness of the near certainty (or otherwise stated 'great probability') that substantial harm will be caused by the tortious behavior. Any less callous mental state is insufficient to incur that level of societal outrage necessary to justify an award of punitive damages." *Estate of Schmidt v. Derenia*, 10th Dist. No. 03AP-335, 2004-Ohio-5431, ¶ 11.

{¶ 72} Before punitive damages can even be considered, a party must first prove the basic elements of fraud, and then demonstrate either "that the fraud is aggravated by the existence of malice or ill will," or that it is "particularly gross or egregious." *Charles R. Combs Trucking Inc. v. International. Harvester Co.*, 12 Ohio St.3d 241, 245 (1984). We

must therefore find that plaintiff's actions were either "characterized by hatred, ill will, or a spirit of revenge," or "extremely reckless behavior revealing a conscious disregard for a great and obvious harm" *Preston* at *335. "[A] bare case of fraud" is insufficient to support an award of punitive damages. *Logsdon v. Graham Ford Co.*, 54 Ohio St.2d 336, 339 (1978); *see*, 25 Ohio Jurisprudence 2d, Fraud & Deceit, Section 205. Actual damages, an element of fraud, is necessary even in a bare case of fraud, so punitive damages require a far greater showing. *Epicor Software Corp. v. Sample Machining Co.*, 2d Dist. No. 20390, 2005-Ohio-2234.

{¶ 73} The record reflects that the fraud in this case is not characterized by hatred, ill will or revenge, and the only basis for punitive damages would be extreme reckless behavior by appellants. Woods recorded the mechanic's liens on April 10, 2017. At this date, Woods had knowledge that the property had been sold at a foreclosure sale. Although Woods emphasized his mistaken good faith belief that someone should reimburse him for his work on the property, there could be no such good faith after the sale of the property. The Pooles, the party to the lease and agreement, were no longer the owners. Huntington was no longer the mortgagee. Without placing any doubt on Woods' belief, the only proper recourse was to file a lawsuit, which would manifest itself as a counterclaim for unjust enrichment. Woods could not enforce a contract with a lien after a foreclosure sale, and this is indicative of bad faith and reckless behavior.

{¶ 74} Appellee also argues that it requested appellants to release the liens several times, and appellants refused to do so.

{¶ 75} Attorney fees are only awarded in fraud cases where punitive damages would be appropriate. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 35 (2000) "As such, an award of attorney fees will not be sustained either by the denial or reversal of an award of punitive damages." *Ferritto v. Olde & Co., Inc.*, 62 Ohio App.3d 582, 588 (1989).

{¶ 76} Punitive damages have been proven. Appellants' fifth assignment of error is overruled.

E. Motion for Judgment Notwithstanding the Verdict and For a New Trial

{¶ 77} MCS assigns as its fourth assignment of error that it is entitled JNOV and for a new trial. After a judgment is entered from a jury verdict, the losing party may move to have the judgment set aside pursuant to Civ.R. 50(B). A motion for JNOV will be sustained

when the evidence, "construed most strongly in favor of" the nonmoving party was "legally sufficient to sustain the verdict" rendered at trial. *Environmental Network Corp. v. Goodman Weiss Miller L.L.P.*, 119 Ohio St.3d 209, 214 (2008). If so, the trial court judgment must stand. *State Farm Fire & Cas. Co. v. Capital Roofing, LLC.*, 10th Dist. No. 18AP-689, 2020-Ohio-642. A motion for JNOV "is used to determine only one issue: whether the evidence is totally insufficient to support the verdict." *Jeffrey v. Marietta Mem. Hosp.* 10th Dist. No. 11AP-492, 2013-Ohio-1055, ¶ 23. Because the motion necessarily presents a question of law, a de novo standard of review is required.

{¶ 78} In a claim where the jury's verdict in favor of appellee was against the manifest weight of the evidence, we are required to consider the entire record and "weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that [the judgment] must be reversed and a new trial ordered." *Wheatley v. Howard Hanna Real Estate Servs.*, 9th Dist. No. 13CA10505, 2015-Ohio-2196, ¶ 11. As with criminal cases, a reversal on manifest weight grounds in civil cases is likewise "reserved for the exceptional case in which the evidence weighs heavily against the judgment." *Id.*

{¶ 79} On its face, appellants' arguments on appeal deal with the perceived prejudice arising from the trial court informing the jury that defendants had committed fraud. Appellants concede that the motion is based "upon the irregularity in the trial court caused by the Court's pretrial summary judgment decision that held Defendants had committed fraud and slandered Plaintiff's title," and continue to assert the summary judgment decision was erroneous and incorrect. (Jan. 7, 2020 Memo. in Opp. to Mot. for JNOV & New Trial at 1.) Appellants do not argue that anything that happened during the trial – other than a reference to the summary judgment decision – supports the motions for JNOV and for a new trial.

{¶ 80} "[A] summary judgment proceeding is not a trial but, rather is a hearing upon a motion." *Amare v. Chellena Food Express*, 10th Dist. No. 08AP-678, 2009-Ohio-147, ¶ 14. "Therefore, where an appellant files a post-judgment motion listed in App.R. 4(B)(2) but where the motion is inapplicable to the type of judgment issued by the trial court, the motion is a nullity for purposes of the Appellate Rule." *Davis v. Barton*, 7th Dist. No. 20

MA 0064, 2021-Ohio-2359, ¶ 30. Accordingly, because appellants' motion for a new trial does not apply to a judgment entry granting summary judgment, the motion is rendered moot.

{¶ 81} A party may move for a new trial pursuant to Civ.R. 59, which states the following:

> (A) Grounds for new trial. A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
> (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> * * *
>
> (9) Error or law occurring at the trial and brought to the attention of the trial court by the party making the application.

This court reviews a trial court's ruling on a motion for a new trial applying an abuse of discretion review. *Catalanotto v. Byrd,* 9th Dist. C.A. No. 27824, 2016-Ohio-2815. An abuse of discretion implies that the court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983). A motion for a new trial test whether the judgment is sustained by the weight of the evidence. *C.E. Morris Co. v. Fooley Cosntr. Co.*, 54 Ohio St.2d 279 (1978). A judgment is not against the manifest weight of the evidence when there is competent, credible evidence going to all the essential elements of the case.

{¶ 82} Sufficient evidence supports the jury's verdict regarding the unjust enrichment claim. For the reasons discussed above, the awarding of punitive damages was incorrect. The assignments of error are overruled regarding the unjust enrichment claim and the awarding of punitive damages.

V. Conclusion

{¶ 83} For reasons stated above, appellant, Woods', first, second, third, fourth, and fifth assignments of error are overruled. Appellant, MCS', first, second, third, fourth, and fifth assignments of error are overruled and the judgment of the trial court is affirmed.

Judgments affirmed

LUPER SCHUSTER, P.J., concurring in part and dissenting in part.
KLATT, J. concurs.

LUPER SCHUSTER, P.J., concurring in part and dissenting in part.

{¶ 84} I agree with the majority's resolution of MCS's first and second assignments of error, the portion of MCS's fourth assignment of error related to the unjust enrichment claim, and Woods's third and fourth assignments of error. Additionally, while I would agree with the majority's resolution of Woods's first assignment of error and the portion of MCS's third assignment of error related to the slander of title claim, I reach that conclusion for different reasons than expressed by the majority. Unlike the majority, I would sustain Woods's second assignment of error and the portion of MCS's third assignment of error related to the fraud claim, and would find moot Woods's and MCS's fifth assignments of error, and the portion of MCS's fourth assignment of error related to the fraud claim and punitive damages. Therefore, I respectfully concur in part and dissent in part.

{¶ 85} In Woods's first and MCS's third assignments of error, appellants argue the trial court erred in granting appellee's motion for summary judgment on the claim of slander of title. "A claim for slander of title arises when a person falsely and maliciously defames a title to property and causes some special pecuniary damages or loss." *Metzler v. Fifth Third Bank*, 10th Dist. No. 16AP-638, 2017-Ohio-7088, ¶ 14, citing *Prater v. Dashkovsky*, 10th Dist. No. 07AP-389, 2007-Ohio-6785, ¶ 11. As the majority notes, to prevail on a claim of slander of title, a claimant must prove actual or special damages. *Prater* at ¶ 12, citing *Green v. Lemarr*, 139 Ohio App.3d 414, 430-31 (2d Dist.2000).

{¶ 86} The trial court, in its decision and entry granting appellee's motion for summary judgment on the claim of slander of title, does not specify the evidence demonstrating there is no genuine issue of material fact that appellee suffered actual or special damages but concludes, more generally, that appellee has demonstrated all the elements of a claim of slander of title. In finding the trial court did not err in granting appellee's motion for summary judgment on its claim of slander of title, the majority concludes "appellee suffered damages, as evidenced by the jury award." (Majority at ¶ 65.) I would not find, as the majority does, that a jury award of damages constitutes proof, at the summary judgment stage, that a claimant suffered actual or special damages. Instead,

I would note that because appellee put forth Civ.R. 56 evidence that it engaged in litigation to quiet title, and the trial court granted partial judgment on the pleadings with respect to appellee's claim for declaratory judgment and to quiet title, the trial court did not err in concluding there remained no genuine issue of material fact that appellee suffered actual or special damages related to the slander of title claim. *See Green* at 434-36 (noting in the context of slander of title, "recoverable pecuniary loss" includes both "the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement" and "the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement," and holding that "in a proper case, a party could recover the attorney fees incurred in removing a cloud on title, as 'special damages,' and could also recover attorney fees for prosecuting a slander of title action"). *See also Silberhorn v. Flemco, L.L.C.*, 8th Dist. No. 108346, 2020-Ohio-913, ¶ 16 ("[a]ttorney fees incurred in litigation to quiet title satisfy the damages element for slander of title"). Thus, I would overrule Woods's first assignment of error and overrule in part MCS's third assignment of error with respect to the trial court granting appellee's motion for summary judgment on the claim of slander of title, but I would reach that conclusion for different reasons than the majority.

{¶ 87} Additionally, under Woods's second and MCS's third assignments of error, appellants argue the trial court erred in granting appellee's motion for summary judgment with respect to the fraud claim. As the majority states, to prevail on a fraud claim, a plaintiff must prove: (1) a representation, or if a duty to disclose exists, concealment of a fact, (2) that is material to the transaction at issue, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent to mislead another into relying on it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Santagate v. Pennsylvania Higher Edn. Assistance Agency (PHEAA)*, 10th Dist. No. 19AP-705, 2020-Ohio-3153, ¶ 37. With respect to the sixth element, resulting injury, I do not agree with the majority's conclusion that appellee's injury "was demonstrated at trial." (Majority at ¶ 67.) Again, because the trial court disposed of the fraud claim, though not the amount of damages, through summary judgment, I would not

find the jury's award of damages at trial constituted proof of injury for purposes of summary judgment and would instead focus on whether the trial court erred in finding appellee put forth sufficient Civ.R. 56 evidence with its motion for summary judgment to support the conclusion that there remained no genuine issue of material fact that appellee suffered an injury proximately caused by the reliance upon the representation.

{¶ 88} Here, appellee did not, in its motion for summary judgment, point to any specific portions of the record demonstrating that it suffered a resulting injury proximately caused by reliance on the representation. *See Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996) (the party moving for summary judgment 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). Instead, appellee alleged more generally in its motion for summary judgment that the injury it suffered "include[ed] not receiving clear title to the Property." (Pl.'s Mot. for Summ. Jgmt. at 13.) Appellee did not point to any Civ.R. 56 evidence demonstrating how the alleged injury was proximately caused by reliance on the representation. Nonetheless, in granting appellee's motion for summary judgment as to the fraud claim, the trial court stated "[t]hough [appellee] has not supplied any specific information as to what other parties have relied on this information, it is reasonable to infer that any potential purchaser of the property would rely on these liens as a basis to decline purchasing the property, resulting in injury to [appellee] in not being able to sell the property." (Decision & Entry on Pl.'s Mot. for Summ. Jgmt. at 6.) Being mindful that, in a motion for summary judgment, the burden is on the moving party to affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that there are no genuine issues of material fact, I would find the trial court erred both in finding appellee satisfied its Civ.R. 56 burden through the conclusory allegations in its motion for summary judgment related to injury and in expanding upon appellee's allegations to make inferences of possible injury without specific Civ.R. 56 evidence demonstrating the same. *Dresher* at 293; *Long v. Mt. Carmel Health Sys.*, 10th Dist. No. 16AP-511, 2017-Ohio-5522, ¶ 13 ("[t]he moving party does not discharge [its] initial burden under Civ.R. 56 by simply making conclusory allegations"). Therefore, I would sustain Woods's second assignment of error and sustain in part MCS's third assignment of error with respect to the trial court's

granting of summary judgment on appellee's claim of fraud and would direct the issue of liability on the fraud claim to be determined at trial.

{¶ 89} In Woods's and MCS's fifth assignments of error, appellants argue the trial court erred in awarding punitive damages. Because I would conclude the trial court erred in granting appellee's motion for summary judgment with respect to the fraud claim, I would additionally find Woods's and MCS's fifth assignments of error to be moot as a determination of punitive damages is premature until resolution of appellants' liability on the fraud claim.

{¶ 90} Finally, in its fourth assignment of error, MCS argues the trial court erred in denying its motion for judgment notwithstanding the verdict. Because I would find the trial court erred in granting appellee's motion for summary judgment with respect to the fraud claim, my resolution of that issue would render moot the portion of this assignment of error related to the fraud claim and the punitive damages.

{¶ 91} Based on these reasons, I respectfully concur in part and dissent in part.

[Cite as *Gingrich v. G & G Feed & Supply, L.L.C.*, 2022-Ohio-982.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LORI J. GINGRICH Plaintiff-Appellant -vs- G & G FEED & SUPPLY, LLC, ET AL., Defendants-Appellees	JUDGES: Hon. Earle E. Wise, Jr., P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2021 CA 00060 O P I N I O N
CHARACTER OF PROCEEDINGS:	Appeal from the Licking County Court of Common Pleas, Case No. 2018 CV 00410
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	March 25, 2022

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
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Hoffman, J.

{¶1} Plaintiff-appellant Lori J. Gingrich appeals the July 8, 2021 Order entered by the Licking Court of Common Pleas, which denied her motion to correct the record. Defendant-appellee is IronGate Equestrian Center ("IronGate").

STATEMENT OF THE CASE

{¶2} On April 11, 2018, Appellant filed a complaint for intentional tort, naming G & G Feed & Supply as defendant. Appellant worked for G & G Feed, which was owned and operated by Tera Gore. The complaint alleged, on April 15, 2016, Gore intentionally struck Appellant with a heavy metal clipboard, causing Appellant to sustain serious injuries. At the time of the incident, Appellant was working at an equestrian event and Gore was her boss. Appellant filed an amended complaint on April 13, 2018, adding Gore, Global Vision Alliance, Inc., and IronGate as defendants ("Defendants," collectively).

{¶3} After Defendants failed to answer, Appellant filed a motion for default judgment on June 26, 2018. Via Entry filed July 26, 2018, the trial court granted the motion. The trial court conducted a hearing on damages on August 27, 2018. Defendants did not appear. Via Entry filed September 7, 2018, the trial court awarded Appellant damages in the amount of $953,578.75. On September 27, 2018, Defendants filed a Civ.R. 60(B) motion for relief from judgment. Appellant filed a response in opposition on December 3, 2018. Defendants filed a reply in support of their motion for relief from judgment on December 20, 2018. Via Decision and Entry filed January 15, 2019, the trial court granted the motion and vacated the July 26, 2018 Entry granting default judgment against Defendants and the September 7, 2018 Entry awarding damages to Appellant.

{¶4} Appellant appealed the decision to this Court, arguing the trial court abused its discretion in granting defendants' Civ. R. 60(B) motion for relief from judgment. This Court agreed and reversed the trial court's judgment and remanded the matter to the trial court to reinstate the default judgment and the damages award. *Gingrich v. G & G Feed*, 5th Dist. Licking No. 2019 CA 00008, 2019-Ohio-4779. Upon remand, Appellant filed a motion for post-judgment interest. The trial court scheduled an evidentiary hearing on January 30, 2021. Via Judgment Entry filed January 30, 2021, the trial court reinstated the default judgment and damages award, and granted post-judgment interest.

{¶5} At some point in her collection efforts, Appellant learned IronGate was the registered tradename for Otter Fork Equestrian Complex, LLC. ("Otter Fork"). Appellant filed a Praecipe for a Certificate of Judgment in the name of "Otter Fork Equestrian Complex, LLC T/A IronGate Equestrian Center" with the Licking County Clerk of Courts on March 27, 2020. The Clerk issued the Certificate of Judgment listing Otter Fork as a judgment debtor. Thereafter, the attorney for Otter Fork contacted the Licking County Clerk's Office and instructed the Clerk to amend the Certificate of Judgment to remove Otter Fork as a judgment debtor.

{¶6} On February 22, 2021, Appellant filed a Motion to Correct the Record, requesting the trial court amend and correct the record, including the judgment entry, docket, and certificate of judgment, to reflect the legal name of IronGate, to wit: Otter Fork. IronGate filed a memorandum contra, arguing Appellant should not be permitted to amend the complaint and judgment to add a new defendant. Appellant filed a reply in support of her motion. Via Order filed July 8, 2021, the trial court denied Appellant's motion. The trial court found:

> The motion has not identified any errors in the record that need to be corrected. In fact, the Court has given [Appellant] precisely what she asked for – a judgment against IronGate.
>
> * * *
>
> While it is true that a Plaintiff can commence and maintain an action against a trade name, the Court is unaware of any case law that suggests or holds that a judgment against a trade name is automatically a judgment against a legal entity that registered the trade name.
>
> [Appellant] commenced and maintained her lawsuit against IronGate and a judgment has been rendered against IronGate.
>
> July 8, 2021 Order Denying Plaintiff's Motion to Correct the Record at 2-3, unpaginated.

{¶7} It is from this order Appellant appeals, raising the following assignments of error:

> I. THE TRIAL COURT ERRED IN HOLDING A JUDGMENT AGAINST A PARTY NAMED BY ITS TRADE NAME IS NOT ENFORCEABLE AGAINST THE LEGAL ENTITY THAT REGISTERS THE NAME PURSUANT TO R.C. 1329, THEREBY DENYING EXECUTION THEREON AND EFFECTIVELY VACATING PLAINTIFF'S JUDGMENT.

II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION TO CORRECT THE RECORD TO AMEND THE JUDGMENT AND CERTIFICATE OF JUDGMENT TO INCLUDE THE LEGAL NAME OF THE JUDGMENT DEBTOR, THEREBY DENYING EXECUTION THEREON AND EFFECTIVELY VACATING PLAINTIFF'S JUDGMENT.

I

{¶8} In her first assignment of error, Appellant asserts the trial court erred in finding a judgment against a trade name is not enforceable against the entity behind the trade name.

{¶9} In support of her position, Appellant relies upon *Family Medicine Found., Inc. v. Bright,* 96 Ohio St.3d 183, 2002–Ohio–4034, in which the Ohio Supreme Court held "R.C. 1329.10(C) permits a plaintiff to bring suit against a party named only by its fictitious name." *Id.* at ¶15; See, also R.C. 1329.10(C) ("An action may be commenced or maintained against the user of a trade name or fictitious name whether or not the name had been registered or reported in compliance with section 1329.01 of the Revised Code."). Appellant submits the *Bright* Court implicitly held "a judgment against a fictious name is automatically enforceable against the legal entity using the name." Brief of Appellant at 9.

{¶10} In *Bright*, Bright filed a medical malpractice action against the Thomas E. Rardin Family Practice Center ("the Practice Center"). *Id*. at ¶1. Prior to filing the action, Bright's attorneys made repeated, yet unsuccessful, attempts to identify the legal entity behind the Practice Center. *Id*. at 13. The trial court granted Bright's motion for default

judgment against the Practice Center, which neither filed an answer nor appeared. *Id*. at ¶1. The trial court conducted a damages hearing and entered judgment against the Practice Center in the amount of $978,840.41. *Id*.

{¶11} Bright subsequently learned the Practice Center was the fictitious name of Family Medicine Foundation, Inc. ("FMF"). *Id*. at ¶2. Bright filed a motion for judgment debtor examination to determine FMF's ability to satisfy the default judgment against the Practice Center. *Id*. at ¶3. In response, FMF filed a motion to intervene and a motion to vacate the judgment, arguing the default judgment was void as such was rendered against a nonentity. *Id*. The trial court denied both motions. *Id*.

{¶12} Thereafter, FMF filed an action against Bright and her attorneys, seeking an injunction to prohibit Bright from executing upon FMF's assets to satisfy the default judgment against the Practice Center. *Id*. at ¶4. The trial court denied the requested relief, finding the judgment was enforceable against FMF. *Id*. The court of appeals reversed, holding, under R.C. 1329.10(C), a suit could not be commenced or maintained against a party named only by its fictitious name. *Id*. The Ohio Supreme Court reversed the judgment of the court of appeals, holding "R.C. 1329.10(C) permits a plaintiff to bring suit against a party named only by its fictitious name." *Id.* at ¶15. The *Bright* Court concluded "FMF's request for injunctive relief was properly denied by the trial court." *Id.*

{¶13} IronGate argues *Bright* is factually distinguishable from the instant action, explaining, unlike the plaintiff in *Bright*, Appellant herein "failed to do even the most basic due diligence with the Ohio Secretary of State, as the identification of the registrant of the trade name is literally four clicks away from the home page for the Ohio Secretary of State." Brief of Appellee at 16. We shall discuss this argument in detail, infra. IronGate

submits the instant action is more analogous to *Bailey v. E. Liverpool City Hosp.*, No. 4:14–cv–2809, 2015 WL 5102768 (N.D. Ohio Aug. 31, 2015).

{¶14} In *Bailey*, Plaintiff brought a lawsuit against East Liverpool City Hospital and East Liverpool City Hospital, Growing for Tomorrow and Today ("Trade Name Defendants") as well as the user of the trade name, The City Hospital Association, alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). *Id*. at *1. The Trade Name Defendants filed a Rule 12(b)(6) motion to dismiss, arguing they are trade names registered with the State of Ohio and do not employ any employees; therefore, could not be held liable under the ADEA. *Id*. at *4. Plaintiff, relying on *Bright*, maintained the Trade Name Defendants were proper parties to her lawsuit. *Id*.

{¶15} The *Bailey* Court distinguished *Bright*, stating:

> Appellants in *Bright* only named the Practice Center in the complaint because they were unable to determine the legal entity behind the fictitious name. *Bright,* 772 N.E.2d at 11. In this case, the two Trade Name Defendants are registered with the State of Ohio, and their holder, The City Hospital Association, is readily ascertainable and part of the lawsuit. Bailey could have reasonably determined The City Hospital Association is the legal entity behind the trade names. Bailey's failure to utilize public records does not permit her to maintain an action against the Trade Name Defendants. (Citation omitted). *Id*.

{¶16} We note "the decisions of federal courts constitute persuasive authority only and are not binding on this court." *State v. Prom*, 12th Dist. Butler No. CA2004-07-174, 2005-Ohio-2272, ¶ 22. Nevertheless, we find IronGate's reliance on *Bailey* misplaced.

{¶17} The procedural posture of the case before us is significantly different from the procedural posture of *Bailey*. *Bailey* is the ruling by a federal district court on a Rule 12(b)(6) motion to dismiss. The *Bailey* Plaintiff named the Trade Name Defendants and the user of the trade name as defendants in her original complaint. The Trade Name Defendants appeared and filed a motion to dismiss. Here, IronGate neither answered the complaint nor appeared. IronGate did not take any steps to disclose itself as a trade name or identify Otter Fork as the holder of the trade name prior to filing its Civ. R. 60(B) motion for relief from judgment. Due to these differences, we find *Bailey* not only inapplicable, but also unpersuasive so as to alter the applicability of *Bright* in this case.

{¶18} The *Bailey* Court also found it lacked "jurisdiction to entertain a suit against trade names." *Bailey*, supra at *4, citing *Rachells v. Cingular Wireless*, 483 F.Supp.2d 583, 587 (N.D. Ohio 2007). In the instant action, the trial court had jurisdiction to entertain Appellant's suit against IronGate because, pursuant to R.C. 1329.10(C), a plaintiff may commence or maintain an action against a party named only by its fictitious name.

{¶19} In *Ginn v. Stonecreek Dental Care*, 12th Dist. Fayette Nos. CA2018-09-018, CA2018-09-019, and CA2018-11-022, 2019-Ohio-3229, the Twelfth District Court of Appeals addressed the question of "whether 'maintained' could be interpreted to empower a plaintiff to sue a trade name only and ultimately receive a judgment against the trade name." *Id*. at ¶53. Because the statute does not define "maintained," the *Ginn* Court looked to the plain and ordinary meaning of the word:

Webster's Dictionary provides the following definitions for “maintain”: **1** : to keep in a state of repair, efficiency, or validity : preserve from failure or decline * * * **2 a** : to sustain against opposition or danger : back up : DEFEND, UPHOLD * * * **b** : to uphold in argument : contend for * * * **3** : to persevere in : carry on : keep up : CONTINUE * * * **4** : to provide for : bear the expense of : SUPPORT * * * **5** : to affirm in or as if in argument: ASSERT, DECLARE * * * **6** : to assist (a party to legal action) so as to commit maintenance.

Webster's Third New International Dictionary 1362 (1993). *Id*. at ¶54.

{¶20} The *Ginn* Court concluded:

In general, most of these definitions fall within the concept of “ensuring the survival of.” Thus, an ordinary and plain interpretation of “maintained” as used in R.C. 1329.10(C) would support the conclusion that the Revised Code permits suit to be filed solely against a trade name and for such suit to be “maintained” through the entire course of an action and that a judgment ultimately rendered in such a suit is not void. Additionally, this court's interpretation is buttressed by R.C. 1329.10(B), which expressly permits suit to be brought and maintained by a registered trade name, but not a fictitious name. It would be inconsistent to conclude that, on one hand, the Revised Code recognizes a registered trade name as an entity that can

> bring an action and be awarded a judgment but, on the other hand, a registered trade name is not an entity that can be sued to a judgment. *Id*.

{¶21} In *Ginn*, following a jury trial and after the trial court entered final judgment on the verdict, Stonecreek Dental Care ("Stonecreek Dental") moved the trial court to correct the judgment entry to reflect "Stonecreek Dental Care Chillicothe – J. Clarke Sanders, D.D.S., LLC" as the defendant's legal name. *Id*. at ¶9. "Stonecreek Dental Care Chillicothe – J. Clarke Sanders, D.D.S., LLC" was the limited liability company which operated the Stonecreek Dental's office in Chillicothe. *Id*. Stonecreek Dental argued "Stonecreek Dental Care" was merely a trade name and any judgment against the trade name was void. *Id*. The trial court denied Stonecreek Dental's motion to correct the judgment entry. *Id*. Stonecreek Dental appealed. *Id*. at ¶10.

{¶22} On appeal, Stonecreek Dental argued the judgment against the trade name "Stonecreek Dental Care" was void as being rendered against a nonentity. *Id*. at ¶50. Although Stonecreek Dental acknowledged the Revised Code permits an action to be brought against a fictitious business name, it argued Plaintiff Ginn, after bringing the action, had a duty to substitute the legal entity behind the trade name, and failed to do so. *Id*.

{¶23} After analyzing *Bright*, the *Ginn* Court noted Stonecreek Dental clearly had knowledge the suit had been filed against the trade name, yet took no formal action to bring this issue to the court until after the judgment had been rendered against it following the jury trial. *Id*. at ¶59. The Court continued, "While Stonecreek Dental did not ignore the complaint and defended the suit, its implied acquiescence to have the case tried

against its trade name also supports the conclusion that the judgment against "Stonecreek Dental Care" is not void." *Id*. The Twelfth District concluded "R.C. 1329.10(C) does not indicate that a plaintiff must take any further action, such as substituting the legal entity behind the trade name, in order to 'maintain' the action against the trade name." *Id*. at ¶61. The *Ginn* Court did not address whether the judgment would allow Plaintiff Ginn to institute collection proceedings against all "owners and users" of the trade name, finding "[t]hat issue is not before the court in this appeal." *Id*. at ¶63.

{¶24} In accordance with *Ginn*, we find Appellant was not required to take any further action in order to maintain the action against IronGate. Otter Fork allowed the action to proceed with IronGate as a named defendant. After revealing Otter Fork as the legal entity behind the trade name in Defendants' Civ R. 60(B) motion, the matter was defended using only the trade name "IronGate." Otter Fork persisted in using the trade name to protect the sui juris entity. In light of the fact Otter Fork knew its rights could be affected by the action, "we find it difficult to understand how it can now cry foul and allege…" Appellant should not be able to collect on her judgment. See, *Bright* at ¶14. Under these circumstances, we find "an entity should not be permitted to dodge liability." *Id*.

{¶25} We disagree with IronGate's assertion Appellant's failure "to do even the most basic due diligence with the Ohio Secretary of State" is somehow fatal to her claim. Brief of Appellee at 16. If the legislature had intended for a plaintiff to determine the legal entity behind the trade name before commencing or maintaining "an action against a party named only by its fictitious name" pursuant to R.C. 1329.10(C), the legislature would have included such language in the statute. The legislature did not include such language;

therefore, we find no such burden exists. A legal entity's decision to register a trade name does not create a separate duty on a private party seeking to bring suit against that entity, although such practice should be encouraged to avoid the issue raised in the case sub judice.

{¶26} In *Bright*, while the Supreme Court noted Bright and her attorneys made attempts to identify the legal entity behind the Practice Center, the High Court focused on the fact FMF, despite having knowledge of the lawsuit filed against its fictitious name, did not take any action to defend the suit or "take adequate steps to apprise appellants of FMF's connection to the Practice Center." *Id*. at ¶13-14. In the instant action, Appellant's Amended Complaint was sent via certified mail to IronGate at 12298 Croton Road, Croton, OH 43013, its primary location. Deposition of Tera Gore at 17. The return receipt for the certified mail was signed by Tera Gore on April 17, 2018. Trial Docket #4. After Defendants failed to answer or appear, Appellant filed a motion for default judgment, which the trial court granted. The trial court subsequently awarded damages to Appellant.

{¶27} On September 27, 2018, Attorney Angela Paul Whitfield as "Counsel for Defendants G & G Feed & Supply LLC, Tera Gore, Global Vision Alliance, Inc., and IronGate Equestrian Center" filed a Civ. R. 60(B) Motion for Relief from Judgment. Therein, Defendants asserted excusable neglect as grounds for relief under Civ. R. 60(B)(1). Defendants also argued they had "several meritorious defenses to Plaintiff's complaint," including, inter alia, "IronGate Equestrian Center is not a legal entity, but rather a trade name, and was not the employer of [Appellant] and not related to the incident." Defendants' Motion for Relief from Judgment at 11, 13. Attached to Defendants' Civ. R. 60(B) motion is the Affidavit of Tera Gore, in which Gore averred,

"IronGate Equestrian Center is a trade name and was not an employer, nor was it owned by any of the Defendants on April 15, 2016. A true and correct copy of the State of Ohio certificate for the original filing of the trade name is attached hereto as Exhibit 1." Defendants' Motion for Relief from Judgment, Exhibit B, Affidavit of Tera Gore at ¶4. Exhibit 1 of Gore's Affidavit is a copy of the Certificate from the Ohio Secretary of State registering the tradename "IronGate Equestrian Center" to Otter Fork.

{¶28} As stated, supra, Otter Fork allowed the action to proceed with IronGate as the named defendant. The matter was defended using only the trade name "IronGate." Although Otter Fork's identity was disclosed in Defendants' motion for relief from judgment, Otter Fork has persisted in using the trade name throughout all subsequent filings, including this Appeal. Similar to the Ohio Supreme Court's finding in *Bright*, we find Otter Fork cannot hide behind its trade name to avoid liability.

{¶29} In *Bright*, the Ohio Supreme Court declined to apply *Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 589 N.E.2d 1306 (1992), finding the *Patterson* decision did not mention R.C. 1329.10(C), which was the basis of its holding in the matter before it. *Bright*, supra at ¶13. The High Court explained *Patterson* "held that a plaintiff may not maintain an action against a defendant solely under a fictitious name where the plaintiff knows that the defendant does business as a sole proprietor." *Id*. at ¶12. In *Patterson,* the plaintiff named a sole proprietorship as the defendant. *Patterson*, supra at 574. The owner of the sole proprietorship notified the plaintiff on three occasions the plaintiff had sued an entity without the capacity to be sued. *Id*. at 575. However, the plaintiff did not amend his complaint, and over the defendant's objections, the case proceeded to trial, resulting in judgment in favor of the plaintiff. *Id*. at 575–576. We find *Bright* limited the

holding of *Patterson* to matters involving sole proprietorships. Because the case sub judice does not involve a sole proprietorship, we find *Patterson* inapplicable.

{¶30} *Bright* was before the Ohio Supreme Court on review of the Tenth District Court of Appeals' reversal of the trial court's denial of FMF's request for injunctive relief and the trial court's determination the judgment against the Practice Center was enforceable against FMF. The *Bright* Court, concluding "FMF's request for injunctive relief was properly denied by the trial court," reversed the judgment of the court of appeals. In doing so, the Ohio Supreme Court implicitly reinstated the trial court's judgment entry denying injunctive relief and allowing Bright to enforce her judgment against FMF.

{¶31} Based upon the foregoing and in accordance with *Bright*, we find the judgment against IronGate is enforceable against Otter Fork.

{¶32} Appellant's first assignment of error is sustained.

II

{¶33} In her second assignment of error, Appellant contends the trial court erred in denying her motion to correct the record to amend the judgment and certificate of judgment. We agree.

{¶34} Civ. R. 15(A) provides, in part:

> **(A) Amendments.** A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a

> motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires.

{¶35} "Amendments to name the real party being sued under a trade name, whether individual or corporation, should be allowed upon the theory that a trade name is really the name of the person using it." *Zak v. J.R. Chapman Trucking*, 6th Dist. Huron App. No. H-78-9, 1978 WL 214971 (Citations omitted). "The liberal provisions of Civ. R. 15(A) . . . created a comprehensive grant of power to the courts to permit amendments so that a court could, *either before or after judgment*, in furtherance of justice and on such terms as it deems proper, amend any pleading or process by correcting a mistake in the name of a party or a mistake in any other respect." *Id*. (Citations and footnotes omitted). (Emphasis added). Because the language of Civ.R. 15(A) favors a liberal amendment policy, "a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Gasper v. Bank of Am., N.A.*, 9th Dist. Medina No. 17CA0091-M, 2019-Ohio-1150, ¶16, quoting *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984).

{¶36} Upon review of the record in this matter, we find nothing therein to establish Appellant acted in bad faith. Nor do we find anything which shows a correction of the record would cause undue delay or undue prejudice to Otter Fork. Accordingly, we find the trial court erred in failing to grant Appellant's motion to correct the record under Civ. R. 15(A).

{¶37} We also find a correction of the record would have been appropriate under Civ. R. 15(C).

{¶38} Civ. R. 15(C) provides:

> **(C) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

{¶39} Thus, a party must meet three requirements before an amendment "changing the party" can relate back to the original pleading pursuant to Civ. R. 15(C). *Caterpillar Financial Services Corp. v. Tatman*, 4th Dist. Ross, 2019-Ohio-2110, 137 N.E.3d 512, ¶ 49. "First, the claim in the amended complaint must arise 'out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.' Second, the party sought to be substituted by the amendment must have received notice of the action 'within the period provided by law for commencing the action,'

so that the party is not prejudiced in maintaining a defense. Third, the new party, 'within the period provided by law for commencing the action,' knew or should have known that, but for a mistake concerning the proper party's identity, the action would have been brought against the new party." *Id.* "The primary purpose of Civ.R. 15(C) is to preserve actions that, through mistaken identity or misnomer, have been filed against the wrong person." *Id.* at ¶ 50 quoting *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 101, 529 N.E.2d 449 (1988).

{¶40} We find the three requirements have been met here. The claims against Otter Fork would be identical to the claims originally asserted against IronGate. Otter Fork had notice of the action against its trade name.[1] Finally, Otter Fork knew or should have known Appellant's designation of IronGate, its registered trade name, as a named defendant exposed it to liability.

{¶41} Appellant's second assignment of error is sustained.

[1] We are aware Otter Fork has filed another Civ. R. 60(B) motion, which is presently pending in the trial court. Therein, Otter Fork asserts improper service on IronGate. Because the motion for relief from judgment was not before the trial court at the time of the judgment entry under review in this Appeal, we have not considered it in reaching our decision.

{¶42} The judgment of the Licking County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with this Opinion and the law.

By: Hoffman, J.
Wise, Earle, P.J. and
Delaney, J. concur

[Cite as *NWO Holdco, L.L.C. v. Hilliard Energy, Ltd.*, 2022-Ohio-881.]

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

NWO HOLDCO, L.L.C.,

PLAINTIFF-APPELLEE,

CASE NO. 11-21-03

v.

HILLIARD ENERGY, LTD.,

DEFENDANT-APPELLANT,
-and-

O P I N I O N

TRISHE RESOURCES, INC., ET AL.,

DEFENDANTS-APPELLEES.

Appeal from Paulding County Common Pleas Court
Trial Court No. CI 17 144

Judgment Affirmed

Date of Decision: March 21, 2022

APPEARANCES:

Kimberly A. Conklin **for Appellant**

Andrew R. Mayle and Joseph Czerniawski **for Appellee, Punjab National Bank (International) Ltd.**

MILLER, J.

{¶1} Appellant, Hilliard Energy, Ltd. ("Hilliard"), appeals the April 7, 2021 judgment of the Paulding County Court of Common Pleas denying its motion for summary judgment and granting the motion for summary judgment of appellee, Punjab National Bank (International) Ltd. ("Punjab"). For the reasons that follow, we affirm.

I. Facts & Procedural History

{¶2} This matter arises out of the development and eventual sale of a wind farm project (the "Project") in Paulding and Van Wert Counties. The Project was originally owned and developed by Trishe Wind Energy, Inc. ("TWE"). Punjab financed the Project as TWE's lender.

{¶3} By July 2014, TWE was indebted to Punjab in the amount of $11,029,361.50. Around that time, TWE and Punjab "determined that the best way for [Punjab] to recover its outstanding indebtedness was for [Trishe Resources, Inc. ("TRI")] to purchase the Project and assume the indebtedness to Punjab and sell off the Project at a market rate to achieve the best possible recovery for Punjab." (May 4, 2020 Aff. of Pramod Kumar at ¶ 6). To that end, Punjab and TRI executed a Facility Agreement on July 21, 2014, whereby Punjab agreed to provide TRI with a short-term loan facility of $3,000,000 and TRI agreed to assume TWE's debt to Punjab.

{¶4} After acquiring TWE's interests in the Project, TRI began the process of finding a buyer. TRI enlisted Hilliard, a consulting firm, to assist in that effort. In August 2014, Hilliard entered into a Consulting Services Agreement ("CSA") with TRI and three of TRI's wholly-owned subsidiaries, including Trishe Wind Ohio, LLC ("TWO")—the entity responsible for operating the Project. Under the CSA, Hilliard agreed to help TRI locate a buyer and consummate a sale of the Project. TRI agreed that, should the Project be sold during the term of the CSA, it would pay Hilliard a "Success Fee," defined as 12 percent of the "value, whether cash or other valuable assets, paid or otherwise awarded to [TRI] as compensation for the sale of the [Project] to a buyer or investor."

{¶5} Shortly thereafter, TRI agreed to sell the Project to Starwood Energy Group Global ("Starwood"). To facilitate its purchase and completion of the Project, Starwood created a special-purpose entity, NWO Holdco, L.L.C. ("NWO").

{¶6} In October 2014, TRI, TWO, NWO, Punjab, and Hilliard executed (in various combinations) a series of documents respecting the sale of the Project. Three agreements formed the core of these documents: the Assignment and Assumption of Land Lease and Wind Easements ("AALLWE"), the Membership Interests Assignment Agreement ("MIAA"), and the Membership Interest Purchase and Sale Agreement ("MIPSA"). Under the AALLWE, all of TRI's rights in "certain lease, easement, participation and purchase option agreements" underlying

the Project were assigned to TWO. Via the MIAA, TRI irrevocably assigned 100 percent of its membership interests in TWO to NWO. Finally, pursuant to the MIPSA, NWO agreed that, "[i]n consideration for the sale, assignment, conveyance, transfer and delivery" of all of TRI's membership interests in TWO, NWO would "provide the following consideration to [TRI]." This provision was followed by a series of formulas establishing the amount NWO would be required to pay under the MIPSA ("Purchase Price") and a list of milestones that would trigger NWO's obligation to make installment payments of the Purchase Price. The MIPSA further provided that NWO "shall make all payments of the Purchase Price to the account designated in the Payment Instruction Letter and any instruction regarding the payment of the Purchase Price shall be subject to the terms thereof."

{¶7} The Payment Instruction Letter ("PIL") in turn provided:

> [TRI] hereby irrevocably authorizes and directs that any payments which are due and payable to [TRI] under the [MIPSA], including without limitation all payments of the Purchase Price, shall be made directly to [sic] in accordance with the following payment instructions:
>
> CITIBANK, NEW YORK
> SWIFT CODE: * * *
> A/c Name: PUNJAB NATIONAL BANK (INTERNATIONAL) LTD
> A/c NUMBER: * * *
> SWIFT CODE: * * *
> Routing number: * * *
> Beneficiary A/c no: * * *
> IBAN No: * * *
> Beneficiary A/c Name: Trishe Resources Inc.

> [TRI] hereby agrees that [NWO] may rely on the instructions set forth above and each of [TRI] and [Punjab] hereby expressly releases [NWO] from all liability for making payments in accordance with such instructions. [TRI] agrees that it shall not submit any change to the above payment instructions, and [NWO] shall not accept any change to the above payment instructions, absent the prior written consent of [Punjab].

Whereas the MIPSA was executed by TRI, TWO, and NWO, the PIL was signed by TRI, NWO, and Punjab. Both the MIPSA and the PIL gave NWO the right to institute an interpleader action if any controversy arose between TRI and any other person "with regard to rights to or with respect to any payment of the Purchase Price."

{¶8} In another agreement, TRI, Punjab, and Hilliard reached an understanding regarding the funds deposited in the bank account specified in the PIL. This agreement, fittingly labelled the "Tri-Party Agreement," extensively cross-referenced the other agreements entered into between the parties. For example, the Tri-Party Agreement contained an acknowledgement that "[Punjab] will receive payments in to the TRI Account held with [Punjab] pursuant to the [MIPSA] and as directed pursuant to the [PIL]." It also stated that "pursuant to [the CSA], * * * Hilliard is entitled to receive twelve percent (12%) of all Purchase Price payments made by [NWO]." In furtherance of these other arrangements, the Tri-Party Agreement provided:

> For value received, [Punjab] hereby irrevocably, absolutely and unconditionally (subject to the terms and conditions hereof), agrees to pay to Hilliard by same day wire transfer, without set off or counterclaim and without deduction or withholding for or on account of taxes, an amount in US Dollars equal to twelve percent (12%) of all Purchase Price payments paid by [NWO] into the TRI Account or that are otherwise received by [Punjab] * * *. [Punjab] shall pay such amounts to Hilliard within one (1) Business Day following the date such amounts are deposited in the TRI Account, provided that, for the avoidance of doubt, it is hereby agreed that twelve percent (12%) of the first payment of Two Hundred and Fifty Thousand Dollars ($250,000), payable on the Closing Date, as defined in the [MIPSA], shall not be payable to Hilliard by [Punjab] hereunder and shall belong absolutely to [Punjab].

The "TRI-Account" was identified as the same bank account listed in the PIL. In addition, Punjab agreed that "its obligations under [the Tri-Party Agreement] are primary and shall continue even if all indebtedness and other amounts owing to [Punjab] in respect of TRI and/or TWO have been fully paid or otherwise satisfied * * *."

{¶9} After these agreements were concluded, TRI and Hilliard continued to work together to find buyers for other wind energy projects that TRI was developing. However, the relationship between TRI and Hilliard soured. In January 2015, Hilliard sued TRI, as well as two of TRI's wholly-owned subsidiaries,[1] for breach of contract in the 385th District Court in Midland County, Texas. In connection with the Texas lawsuit, Hilliard filed a notice of lis pendens with the

[1] Hilliard did not file suit against TWO, which had been released from its obligations under the CSA in connection with the sale to NWO.

Paulding County Recorder on February 23, 2015. The lis pendens purported to apply to the real estate interests formerly controlled by TRI but transferred to TWO (and NWO) as part of the sale of the Project.

{¶10} On May 19, 2017, the 385th District Court granted Hilliard a default judgment against TRI and its subsidiaries for "flagrant bad faith discovery abuses" and awarded Hilliard $2,498,119.37. On August 15, 2017, Hilliard filed an application to register the Texas judgment in the Paulding County Court of Common Pleas. Hilliard also filed a copy of the Texas judgment with the Paulding County Recorder.

{¶11} Around this time, Hilliard—apparently intending to tap into the Purchase Price payments owed by NWO under the MIPSA to obtain satisfaction of the Texas judgment—notified Starwood of its outstanding $2,498,119.37 claim against TRI. On September 12, 2017, Hilliard, Starwood, NWO, and TWO entered into an agreement whereby NWO agreed to invoke its right under the MIPSA to initiate an interpleader action. In exchange, Hilliard agreed to release its previously filed lis pendens, which it did on September 21, 2017.

{¶12} On October 19, 2017, NWO filed a complaint for interpleader pursuant to Civ.R. 22, naming TRI and Hilliard as defendants. NWO requested that it be permitted to deposit "up to $2,498,119.37, together with applicable post-judgment interest thereon," with the court for distribution by the court after a

determination of the "true and rightful recipient" of the funds. NWO further asked that the court issue an order discharging it "from any liability related to the [funds] * * * [and] from participation in this action * * *." On November 14, 2017, NWO filed a motion specifically requesting an order directing it to interplead the funds with the Paulding County Clerk of Courts. The trial court granted NWO's request on November 30, 2017, ordering NWO to deposit $2,498,119.37 with the court within 30 days. NWO subsequently deposited that amount with the court.

{¶13} On November 17, 2017, Hilliard filed its answer to NWO's complaint. Hilliard also filed a counterclaim against NWO, which was timely answered by NWO, as well as a cross-claim against TRI. On December 19, 2017, TRI answered NWO's complaint and Hilliard's cross-claim. TRI also filed a counterclaim against NWO and a cross-claim against Hilliard, both of which were timely answered.

{¶14} On February 22, 2018, Punjab filed a motion to intervene, which was granted by the trial court on March 21, 2018. Punjab then filed its answer to NWO's complaint, as well as cross-claims against TRI and Hilliard. TRI and Hilliard both timely answered Punjab's cross-claims.

{¶15} On June 2, 2020, Punjab filed a motion for summary judgment. In its motion for summary judgment, Punjab argued that neither Hilliard nor TRI were entitled to receive the funds on deposit with the court because those funds

constituted Purchase Price payments, which Punjab had sole right to possess under the various agreements concluded in October 2014.

{¶16} On June 25, 2020, NWO filed a memorandum in response to Punjab's motion for summary judgment, in which it represented that it did not oppose Punjab's motion. In addition, NWO filed its own motion for summary judgment requesting that it be granted the relief prayed for in its complaint, namely that it be dismissed from the interpleader action and discharged from liability with respect to the deposited funds. Finally, NWO moved for summary judgment on TRI's counterclaim, in which TRI claimed that NWO had breached the MIPSA by instituting the interpleader action, and on Hilliard's counterclaim, in which Hilliard claimed little more than that it was entitled to the funds deposited by NWO.

{¶17} On July 22, 2020, TRI filed a memorandum in opposition to NWO's motion for summary judgment on TRI's counterclaim. In its memorandum, TRI indicated that it too did not oppose Punjab's motion for summary judgment. NWO then filed a reply in support of its motion for summary judgment against TRI.

{¶18} On August 28, 2020, Hilliard filed a memorandum in opposition to Punjab's motion for summary judgment. Hilliard also filed its own motion for summary judgment, maintaining that it was the sole party entitled to the deposited funds by virtue of the "valid and subsisting" Texas default judgment as well as "the contracts between the parties to this case." Hilliard asserted that it had perfected a

lien on the deposited funds when it domesticated the Texas judgment in August 2017.

{¶19} On September 14, 2020, NWO filed a memorandum in response to Hilliard's motion for summary judgment. As with Punjab's motion for summary judgment, NWO indicated that it did not oppose Hilliard's motion.

{¶20} On October 1, 2020, Punjab filed a combined reply in support of its motion for summary judgment and memorandum in opposition to Hilliard's motion for summary judgment. Hilliard then filed a reply in support of its motion for summary judgment on October 26, 2020.

{¶21} On April 7, 2021, the trial court issued a judgment entry disposing of all motions then pending before the court. In its judgment entry, the trial court found as follows: (1) that "all of the relevant agreements are clear and unambiguous" and "Punjab is the only party with a legal right" to the deposited funds; (2) that "NWO properly instituted the interpleader action" as it was "specifically authorized to do so by the MIPSA"; and (3) that Hilliard was too "vague in what relief it [was] seeking from NWO apart from disposition of the funds deposited with the court" and never "provided additional clarification." Based on these findings, the trial court granted Punjab's and NWO's motions for summary judgment, but denied Hilliard's motion for summary judgment. Accordingly, the trial court dismissed NWO from the interpleader action, discharged it from liability with respect to the

deposited funds, and entered judgment in favor of NWO as to TRI's and Hilliard's counterclaims.[2] The trial court also ordered that Punjab was entitled to receive the deposited funds.

II. Assignments of Error

{¶22} On April 30, 2021, Hilliard timely filed a notice of appeal.[3] It raises the following two assignments of error for our review:

> **1. The trial court erred in granting summary judgment for intervening defendant Punjab National Bank (International) Ltd.**
>
> **2. The trial court erred in denying summary judgment for Hilliard Energy, Ltd.**

Because Hilliard's assignments of error concern interrelated issues, we address them together.

III. Discussion

{¶23} In its assignments of error, Hilliard argues that the trial court erred by denying its motion for summary judgment while simultaneously granting Punjab's motion for summary judgment. Hilliard maintains that the trial court's decision was

[2] The parties to this appeal do not challenge these orders or the trial court's resolution of NWO's motion for summary judgment.

[3] The trial court's April 7, 2021 judgment entry did not expressly dispose of TRI's cross-claim against Hilliard or Hilliard's cross-claim against TRI. However, Hilliard's cross-claim against TRI was identical to its counterclaim against NWO and thus was effectively resolved when the trial court granted Punjab's and NWO's motions for summary judgment. Likewise, TRI's cross-claim against Hilliard, in which TRI asked for a "declaratory ruling" that Hilliard had no right to the deposited funds, was effectively resolved through the trial court's ruling on Punjab's motion for summary judgment. In any event, even if TRI's and Hilliard's cross-claims had not been mooted, the trial court's judgment entry contains Civ.R. 54(B) language, which allows this court to review the trial court's April 7, 2021 judgment as a final, appealable order. *See Santomieri v. Mangen*, 3d Dist. Auglaize No. 2-17-05, 2018-Ohio-1443, ¶ 7-9.

erroneous because under the various agreements concluded in October 2014, the interpleaded funds, which represent Purchase Price payments, are the property of TRI rather than Punjab. Hilliard contends that because the funds are TRI's property, Hilliard has the superior claim to the funds as TRI's judgment creditor with a valid judgment lien on the funds.

A. Summary-Judgment Standard of Review

{¶24} We review a decision to grant summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000). "De novo review is independent and without deference to the trial court's determination." *ISHA, Inc. v. Risser*, 3d Dist. Allen No. 1-12-47, 2013-Ohio-2149, ¶ 25.

{¶25} Summary judgment is proper where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219 (1994). Material facts are those facts "'that might affect the outcome of the suit under the governing law.'" *Turner v. Turner*, 67 Ohio St.3d 337, 340 (1993), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). "Whether a genuine issue exists is answered by the following inquiry: [d]oes the evidence present 'a sufficient disagreement to require submission to a

jury' or is it 'so one-sided that one party must prevail as a matter of law[?]'" *Id.*, quoting *Anderson* at 251-252.

{¶26} "The party moving for summary judgment has the initial burden of producing some evidence which demonstrates the lack of a genuine issue of material fact." *Carnes v. Siferd*, 3d Dist. Allen No. 1-10-88, 2011-Ohio-4467, ¶ 13, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). "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." *Id.*, citing *Dresher* at 292. "The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; he may not rest on the mere allegations or denials of his pleadings." *Id.*, citing *Dresher* at 292 and Civ.R. 56(E).

B. Civ.R. 22 & Interpleader Procedure

{¶27} In Ohio, interpleader is governed by Civ.R. 22, which provides as follows:

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

> In such an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party may deposit all or any part of such sum or thing with the court upon notice to every other party and leave of court. The court may make an order for the safekeeping, payment or disposition of such sum or thing.

"[T]he purpose of Civ.R. 22 regarding interpleader is 'to expedite the settlement of claims to the same subject matter, prevent multiplicity of suits, with the attendant delay and added expense, and to provide for the prompt administration of justice.'" *John Hancock Mut. Life Ins. Co. v. Bird*, 69 Ohio App.3d 206, 208 (3d Dist.1990), quoting *Sharp v. Shelby Mut. Ins. Co.*, 15 Ohio St.2d 134, 144 (1968).

{¶28} Interpleader is "a two-stage action" involving a stakeholder who "controls a fund [that] is subjected to the claims of two or more claimants" and "does not know who is the proper claimant." 1970 Staff Note, Civ.R. 22. "In the first stage, the stakeholder, in order to avoid a multiplicity of suits and possible multiple liability, interpleads the claimants." *Id.* If the trial court determines that interpleader is appropriate and that the claimants should be made to litigate their respective claims to the contested fund, the stakeholder is usually dismissed upon deposit of the fund with the court. *See id.* (noting that, by the end of the first stage, the stakeholder "ordinarily * * * drops out, leaving the claimants to establish the validity of one of the claims"); *see also Aetna Life Ins. Co. v. Schilling*, 67 Ohio St.3d 164, 165 (1993) (life insurer filed an action for interpleader and "was

dismissed from the lawsuit upon depositing the insurance proceeds into an interest-bearing account").

{¶29} The action then moves to stage two, where the court must "decide the claimants' relative rights and priority to the interpled funds." *Insura Property & Cas. Co. v. Bird Feeders of Am., Inc.*, 10th Dist. Franklin No. 98AP-1506, 1999 WL 771066, *2 (Sept. 30, 1999), citing *Kabbaz v. Prudential Ins. Co. of Am.*, 27 Ohio App.3d 254 (3d Dist.1985). Stage two proceeds "via normal litigation processes, including pleading, discovery, motions, and trial." *United States v. High Technology Prods., Inc.*, 497 F.3d 637, 641 (6th Cir.2007) (discussing analogous Fed.R.Civ.P. 22). "As in other cases, when there is no genuine issue of material fact, the second stage may be adjudicated on summary judgment motions." *C&C North Am. Inc. v. Natural Stone Distribs., LLC*, 571 S.W.3d 254, 265 (Tenn.App.2018) (dealing with Tennessee Civil Rule 22.01, which is comparable to Civ.R. 22).

{¶30} In stage two, each claimant must "establish the validity of his claim by a preponderance of the evidence." *Am. Gen. Life & Acc. Ins. Co. v. Harris*, 3d Dist. Allen No. 1-90-35, 1991 WL 54827, *2 (Apr. 4, 1991). "To entitle a claimant to a decree, he must have a title or lien, legal or equitable, with respect to the fund deposited." 48 Corpus Juris Secundum, Interpleader, Section 45. The claimant "must recover on the strength of his own title rather than on the weakness of that of

the adversary." 48 Corpus Juris Secundum, Interpleader, Section 41. "Before an issue of priority among claimants is properly presented, it must be determined whether each of the claimants has a cognizable interest in the fund." 44B American Jurisprudence 2d, Interpleader, Section 62.

C. The trial court did not err in its resolution of the motions for summary judgment because Punjab demonstrated its entitlement to the interpleaded funds, whereas Hilliard did not.

{¶31} In the case sub judice, there is no dispute that the specific funds interpleaded by NWO represent Purchase Price payments. As the identity of the funds is not at issue, this case turns on whether contract-interpretation principles or priority-of-liens principles, or some combination of the two, should be applied to determine which of Punjab or Hilliard is entitled to the funds. After reviewing all of the evidence submitted in support of the parties' motions for summary judgment and examining the underlying transaction, it is clear that the issues in this case are primarily issues of contract interpretation.

i. Punjab demonstrated that there is no genuine issue of material fact that, under the agreements executed in October 2014, it has a right to the interpleaded funds.

{¶32} In support of its motion for summary judgment, Punjab submitted copies of the various contracts executed in October 2014 that pertain to the sale of the Project. Of these contracts, the MIPSA and the PIL are the most significant because together they create the right to receive Purchase Price payments and direct

how, and to whom, Purchase Price payments are to be made. The MIPSA and the PIL each provide that they are governed by, and are to be construed in accordance with, the laws of the State of New York. Accordingly, New York law guides our interpretation of these agreements.

{¶33} In New York, as in Ohio, "[w]hen engaging in contract interpretation, 'the standard of review is for this Court to examine the contract's language de novo.'" *MPEG LA, LLC v. Samsung Electronics Co., Ltd.*, 166 A.D.3d 13, 17 (2018), quoting *Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 140 (2008). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). "'The best evidence of what parties to a written agreement intend is what they say in their writing.'" *Id.*, quoting *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.*

{¶34} Furthermore, "[i]t is well settled that a contract must be read as a whole to give effect and meaning to every term." *New York State Thruway Auth. v. KTA-Tator Eng. Servs., P.C.*, 78 A.D.3d 1566, 1567 (2010). "Indeed, '[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible.'" *Id.*, quoting *Green Harbour Homeowners' Assn., Inc. v. G.H. Dev. & Constr., Inc.*, 14

A.D.3d 963, 965 (2005). "'[T]he court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized.'" *NRT New York, LLC v. Harding*, 131 A.D.3d 952, 954 (2015), quoting *G3-Purves St., LLC v. Thomson Purves, LLC*, 101 A.D.3d 37, 40 (2012).

{¶35} "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide." *Greenfield* at 569; *see NRT New York* at 954 ("Extrinsic and parol evidence of the parties' intent may not be admitted to create ambiguity in a contract that is unambiguous on its face * * *."). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Greenfield* at 569, quoting *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978). "Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Id.* at 569-570.

{¶36} The ultimate question here is whether there is a genuine issue of material fact that the parties to the MIPSA (i.e., NWO, TRI, and TWO) and the PIL (i.e., NWO, TRI, and Punjab) intended for Punjab, rather than TRI, to possess the right to receive Purchase Price payments from NWO. We conclude no triable issue

of material fact exists and Punjab possesses the right to receive payments from NWO.

{¶37} As Hilliard notes, the MIPSA states that NWO "shall provide * * * consideration *to the Seller*," which, by itself, would suggest that the right to receive Purchase Price payments belongs to TRI. Unfortunately for Hilliard, this provision does not stand alone. Instead, the MIPSA expressly provides that payments of the Purchase Price are subject to the terms of the PIL, which contains language supporting that Punjab owns the right to receive Purchase Price payments. While the PIL acknowledges that Purchase Price payments "are due and payable *to Seller* under the [MIPSA]," the PIL contains language indicating that the right to receive Purchase Price payments belongs to Punjab. First, the PIL states that TRI has "irrevocably authorize[d] and direct[ed]" that Purchase Price payments owing under the MIPSA be deposited in a bank account bearing the name "PUNJAB NATIONAL BANK (INTERNATIONAL) LTD." Furthermore, in the PIL, TRI and NWO both agreed that Punjab's prior written consent would be required before Purchase Price payments could be directed to a bank account other than the one listed in the PIL. Taken together, these provisions are suggestive of an intent to divest TRI of the right to receive Purchase Price payments and invest Punjab with that same right.

{¶38} Insofar as there is any doubt regarding Punjab's rights under the PIL, it is appropriate to look to the other agreements executed in October 2014, specifically the Tri-Party Agreement, for clarification. The Tri-Party Agreement, which was executed on the same day as the MIPSA and PIL and which explicitly contemplates both the MIPSA and the PIL, was clearly executed in connection with the sale of the Project and in furtherance of that transaction. "Under New York law, 'all writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together, even [if] they were executed on different dates and were not all between the same parties.'"[4] *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82, 89 (2d Cir.2005), quoting *This is Me, Inc. v. Taylor*, 157 F.3d 139, 143 (2d Cir.1998). Therefore, the Tri-Party Agreement illuminates the meaning of the language used in the PIL and helps to explain the scope of the rights created under the PIL.

{¶39} Upon reading the PIL in conjunction with the Tri-Party Agreement, two things come into focus. First, the Tri-Party Agreement states that "[Punjab] will receive payments in to the TRI Account held with [Punjab]," and it repeatedly refers to the "Purchase Price payments received by [Punjab]." Thus, the Tri-Party Agreement makes clear that, under the PIL, Punjab is to be the direct recipient of Purchase Price payments.

[4] We note that, like the MIPSA and PIL, the Tri-Party Agreement provides that it is governed by, and is to be construed in accordance with, the laws of the State of New York.

{¶40} Second, the Tri-Party Agreement provides insight into Punjab's and TRI's respective rights in the bank account listed in the PIL, which is called the "TRI Account" in the Tri-Party Agreement. The Tri-Party Agreement leaves no room for a conclusion that TRI owns or has any rights in the TRI Account. To begin, the Tri-Party Agreement spells out that the first $250,000 deposited in the TRI Account "belong[s] absolutely" to Punjab. Furthermore, the Tri-Party Agreement provides that, other than the first $250,000 deposited in the TRI Account, Punjab is obligated to pay Hilliard 12 percent of all Purchase Price payments it receives from NWO. This latter provision, by which Punjab effectively took on TRI's obligations under the CSA to pay Hilliard its 12 percent Success Fee, is especially important because it indicates that Punjab, rather than TRI, owns and has control over the Purchase Price payments made by NWO and deposited into the TRI Account. That is, if TRI has the right to receive Purchase Price payments from NWO, an ownership interest in the TRI Account, and the right to control disposition of the Purchase Price payments deposited in the TRI Account, then Punjab's agreement to pay Hilliard is unnecessary; TRI could simply pay Hilliard directly. In our view, reading the PIL together with the Tri-Party Agreement resolves any doubts concerning Punjab's right to directly receive Purchase Price payments and Punjab's and TRI's respective rights in the TRI Account.

{¶41} To further support our conclusion that the agreements leave no doubt regarding Punjab's possessory interest in the Purchase Price payments, we also review the affidavits Punjab submitted in support of its motion for summary judgment. Two of these affidavits—the September 28, 2020 affidavit of Pramod Kumar and the September 29, 2020 affidavit of Randall Washington—are particularly notable, and we acknowledge them only as confirmation of our interpretation of the various contracts. In his affidavit, Washington, the Chief Financial Officer and a Director of TRI, averred that "to effectuate the Purchase Price Payments from [NWO] for the sale of the [Project], TRI executed a Payment Instruction Letter on October 20, 2014 by which it irrevocably directed that all payments under the [MIPSA] be remitted to Punjab's Citibank account, which is defined as the 'TRI Account' in the sale agreements." (Washington Aff. at ¶ 2). Washington further stated that "TRI had no control, access to or ownership interest in the TRI Account" and that "TRI had no right to withdraw or otherwise exercise control over any money deposited in the TRI Account." (Washington Aff. at ¶ 3). Finally, Washington said that the bank codes "associated with the TRI Account," including the SWIFT code and the IBAN,[5] "are not registered to TRI." (Washington Aff. at ¶ 5).

[5] "SWIFT" stands for Society for Worldwide Interbank Financial Telecommunication. "IBAN" stands for International Bank Account Number.

{¶42} In his September 28, 2020 affidavit, Kumar, Punjab's Assistant General Manager, corroborated many of the details of Washington's affidavit. Kumar averred that "Punjab owns and controls the TRI Account" and that "[n]o other party herein, including TRI, has any ownership or other interest in the TRI Account." (Sept. 28, 2020 Kumar Aff. at ¶ 9). He further stated that "TRI may not withdraw money from the TRI Account," that "TRI has no control over any money inside the TRI Account," and that "TRI cannot direct what Punjab does with the money in the TRI Account." (Sept. 28, 2020 Kumar Aff. at ¶ 10-11). Finally, Kumar averred that the bank codes "associated with the TRI Account are all registered to Punjab." (Sept. 28, 2020 Kumar Aff. at ¶ 13). Indeed, documentation attached to the affidavit shows that the IBAN associated with the TRI Account is registered to Punjab's Southall branch in London, England. (Sept. 28, 2020 Kumar Aff., Ex. A). Thus, the Washington and Kumar affidavits confirm what is already clear from the PIL and Tri-Party Agreement: Purchase Price payments are to be paid to Punjab and deposited into a bank account controlled by Punjab to the exclusion of TRI.

{¶43} In summary, to support its motion for summary judgment, Punjab submitted copies of the MIPSA, PIL, and Tri-Party Agreement. Under the plain language of the MIPSA, payments of the Purchase Price are subject to the terms of the PIL. In the PIL (as clarified by the Tri-Party Agreement), TRI irrevocably

instructed NWO to make payments of the Purchase Price directly to Punjab by depositing Purchase Price payments into a bank account owned and controlled by Punjab. Furthermore, in the PIL, TRI relinquished its right to unilaterally channel Purchase Price payments into a different bank account.

{¶44} At the conclusion of these agreements in October 2014, TRI was effectively left with no rights to the Purchase Price payments. TRI could not control the direction of Purchase Price payments or their ultimate disposition. Instead, these agreements vested Punjab with these rights. Therefore, Punjab has demonstrated that there is no genuine issue of material fact that, under the agreements executed in October 2014, the parties intended for Punjab to own the right to receive Purchase Price payments. Furthermore, because the funds interpleaded by NWO are Purchase Price payments, Punjab has also demonstrated that there is no genuine issue of material fact that it has a right to the interpleaded funds.

ii. As a matter of law, Hilliard has no right to the specific funds interpleaded with the trial court.

{¶45} Although Punjab established it has a right to the interpleaded funds, Hilliard could, in theory, also demonstrate that it has a right to the interpleaded funds, in which case it would only be entitled to receive the funds if it demonstrated that its right to the funds is superior to Punjab's. However, Hilliard cannot demonstrate that it has a right to the interpleaded funds, let alone a superior right.

{¶46} Hilliard claims it has a right to the interpleaded funds as TRI's judgment creditor with a valid judgment lien on the funds. However, we have already determined that, under the agreements concluded in October 2014, TRI does not own the right to receive Purchase Price payments. Consequently, because the interpleaded funds constitute Purchase Price payments, TRI has no right to the interpleaded funds. And because TRI itself has no right to the interpleaded funds, Hilliard likewise can have no right to those funds. *See Toledo Trust Co. v. Niedzwiecki*, 89 Ohio App.3d 754, 757 (6th Dist.1993) ("[W]here the judgment debtor himself has no present right to obtain the money or property from the garnishee, then the judgment creditor likewise has no right to the property.").

{¶47} What is more, even if TRI had a right to the interpleaded funds as the possessor of the right to receive Purchase Price payments, Hilliard's judgment lien would not even be capable of attaching to that right. In Hilliard's view, TRI has "an equitable interest in the Purchase Price payments due under the MIPSA for lands and leases located in Paulding and Van Wert Counties." Hilliard maintains that "TRI retained an equitable interest in the proceeds from the sale [of] assets located in Paulding County" and that its "judgment attached to any property or interest TRI held in Paulding County, including its right to receive purchase price payments." However, where a judgment creditor files a certificate of judgment in accordance with R.C. 2329.02, as Hilliard did in this case, "said filing does not cause such

judgment to attach as a lien on the *equitable* interest of a judgment debtor." (Emphasis sic.) *Staskey v. Staskey*, 7th Dist. Jefferson No. 97-JE-69, 2000 WL 1902212, *4 (Dec. 29, 2000), citing *Bank of Ohio v. Lawrence*, 161 Ohio St. 543 (1954), paragraph one of the syllabus. Therefore, even if TRI had a right to receive Purchase Price payments and that right could be properly categorized as an equitable interest in real estate located in Paulding County, which we question, Hilliard's judgment lien would not attach.

{¶48} In sum, we conclude that there is no genuine issue of material fact that, under the agreements executed in October 2014, Punjab owns the right to receive Purchase Price payments. Moreover, because the interpleaded funds represent Purchase Price payments, we conclude that Punjab has a valid claim to the funds. In contrast, we conclude that Hilliard did not demonstrate that it has a valid claim to the interpleaded funds. Therefore, we conclude that, as a matter of law, Punjab is entitled to the interpleaded funds. Accordingly, the trial court did not err by granting Punjab's motion for summary judgment, denying Hilliard's motion for summary judgment, and awarding Punjab the interpleaded funds.

{¶49} Hilliard's assignments of error are overruled.

IV. Conclusion

{¶50} For the foregoing reasons, Hilliard's assignments of error are overruled. Having found no error prejudicial to the appellant herein in the

particulars assigned and argued, we affirm the judgment of the Paulding County Court of Common Pleas.

Judgment Affirmed

ZIMMERMAN, P.J. and SHAW, J., concur.

/jlr

SLIP OPINION NO. 2022-OHIO-869

FRENCH ET AL., APPELLANTS, *v.* ASCENT RESOURCES-UTICA, L.L.C., APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *French v. Ascent Resources-Utica, L.L.C.*, Slip Opinion No. 2022-Ohio-869.]

Property law—Contracts—R.C. 2711.01(B)(1)—An action seeking a determination that an oil and gas lease has expired by its own terms is a controversy involving the title to or the possession of real estate and, under R.C. 2711.01(B)(1), is not subject to arbitration—Court of appeals' judgment reversed and cause remanded.

(No. 2021-0166—Submitted January 26, 2022—Decided March 24, 2022.)

APPEAL from the Court of Appeals for Jefferson County,
No. 19 JE 0015, 2020-Ohio-4719.

KENNEDY, J.

{¶ 1} This discretionary appeal from a judgment of the Seventh District Court of Appeals presents a single question: is an action seeking a determination that an oil and gas lease has expired by its own terms a controversy "involving the title to or the possession of real estate" so that the action is exempt from arbitration under R.C. 2711.01(B)(1)?

{¶ 2} The answer to that question is yes. An oil and gas lease grants the lessee a property interest in real estate that affects the title to the land and permits the lessee to physically occupy the land to the extent reasonably necessary to the production of oil and gas—i.e., the lessee acquires the right to enter the property and construct wells, buildings, telephone lines, pipelines, powerlines, and roads. And once an oil and gas lease expires under its own terms, the property interest granted under the lease reverts to the lessor by operation of law and the lessee no longer has any right to occupy the land. Consequently, an action seeking a determination that an oil and gas lease has expired is a controversy involving the title to or the possession of real estate and, under R.C. 2711.01(B)(1), the action is not subject to arbitration.

{¶ 3} Because the trial court correctly declined to stay the action at issue in this case pending arbitration, we reverse the contrary judgment of the court of appeals and remand the matter to the trial court for further proceedings consistent with this opinion.

I. Facts and Procedural History

{¶ 4} Appellants, Michael P. French, Karen L. French, Thomas E. Sutherland, Cynthia L. Sutherland, John D. Sutherland (trustee of the Sutherland Family Revocable Trust), and Lloyd D. and Mary Ann Boyd (trustees of the Lloyd and Mary Ann Boyd Irrevocable Trust) (collectively, "French"), are the joint owners of a tract of land in Smithfield Township known as the "Sutherland Farm." Appellee, Ascent Resources-Utica, L.L.C., acquired leases to the oil and gas rights

to the property. The leases permitted the lessee to physically occupy the land and granted it the rights to construct wells and buildings, to erect telephone lines, pipelines, and powerlines, and to build roads. The leases had a primary term of five years and a secondary term for "as long thereafter as oil or gas * * * or either of them, is produced from said land by the Lessee, its successors and assigns." They also provided that the primary term could be extended under the following circumstances:

> If at the expiration of the primary term, oil or gas is not being produced on the leased premises or on acreage pooled therewith, but Lessee is engaged in drilling, deepening, plugging back or reworking operations thereon or shall have completed a dry hole thereon within ninety (90) days prior to the end of the primary term, this lease shall remain in force so long as operations on said well, or for the drilling, deepening, plugging back, or reworking of any additional well, are prosecuted with no cessation of more than ninety (90) consecutive days and, if they result in the production of oil or gas, so long thereafter as oil or gas is produced from the leased premises, or upon acreage pooled therewith.

As subsequently amended, the leases further stated:

> Commencement of operations shall be defined as Lessee having secured a drilling permit from the State and further entering upon the herein described premises with equipment necessary to build any access road(s) for drilling of a well subsequently followed by a drilling rig for the spudding of the well to be drilled, and the commencement and completion of the drilling of a well.

{¶ 5} The amended leases also purported to require arbitration: "Any questions concerning th[e] lease or performance there under shall be ascertained and determined by three disinterested arbitrators * * * and the award of such collective group shall be final and conclusive."

{¶ 6} French brought an action for declaratory judgment in the Jefferson County Court of Common Pleas, alleging that the oil and gas leases had terminated because Ascent failed to produce oil or gas or to commence drilling operations within the terms of the lease. Ascent answered French's complaint and counterclaimed for a declaration that the leases had not expired. It alleged that it had obtained permits to drill wells on the land and had begun constructing them before the expiration of the leases, and it alleged that it began drilling and producing oil or gas thereafter.

{¶ 7} Ascent subsequently moved to stay the action pending arbitration. The trial court denied the request for a stay, concluding that French's claims involved the title to or the possession of real property and therefore were exempt from arbitration pursuant to R.C. 2711.01(B)(1).

{¶ 8} The Seventh District reversed, reasoning that "even though oil and gas leases create an interest in real estate, they are not issues concerning title to or possession of real estate. There is no dispute that [French holds] title to the Sutherland Farm. There is also no indication that [French's] title to or possession of the Sutherland Farm is at stake regardless of how this action is resolved." 2020-Ohio-4719, ¶ 24. The appellate court concluded that R.C. 2711.01(B)(1) did not preclude arbitration of the controversy, and it remanded the matter to the trial court for it to decide whether Ascent had lost its right to arbitrate the controversy by failing to timely assert that right. *Id.* at ¶ 26-29.

{¶ 9} We accepted French's appeal to review a single proposition of law:

> Whether R.C. 2711.01(B)(1), which excepts controversies involving title to or possession of real estate from arbitration, is applicable to declaratory judgment actions in which a landowner seeks a declaration that title in the landowner's oil and gas estate has reverted to said landowner because an oil and gas lease has expired by its own terms due to the lessee's failure to satisfy certain conditions in the lease.

See 162 Ohio St.3d 1437, 2021-Ohio-1399, 166 N.E.3d 1254.

{¶ 10} The sole issue in this appeal, then, is whether an action seeking a determination that an oil and gas lease has expired involves "the title to or the possession of real estate" within the meaning of R.C. 2711.01(B)(1).

II. Law and Analysis

A. Standard of Review

{¶ 11} "The interpretation of a statute is a question of law that [this court] reviews de novo." *Stewart v. Vivian*, 151 Ohio St.3d 574, 2017-Ohio-7526, 91 N.E.3d 716, ¶ 23.

B. Statutory Construction

{¶ 12} In order to resolve the issue before this court, we return to a familiar place: statutory interpretation. As we explained long ago, "[t]he question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact." *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus. Moreover, "[a]n unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus.

C. R.C. 2711.01

{¶ 13} R.C. 2711.01(A) states, "A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that

subsequently arises out of the contract * * * shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." In turn, R.C. 2711.01(B)(1) provides that R.C. 2711.01 through 2711.16—a statutory scheme that includes the authority for a court to stay proceedings pending arbitration, *see* R.C. 2911.02(B)—"do not apply to controversies involving the title to or the possession of real estate."

{¶ 14} This court has explained that "the natural meaning of the word 'involving' is 'to relate closely' or 'connect.' " *State ex rel. Suwalski v. Peeler*, ___ Ohio St.3d ___, 2021-Ohio-4061, ___ N.E.3d ___, ¶ 21, quoting *Webster's Third New International Dictionary* 1191 (1993). The word "title" means " '[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property.' " *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 59, quoting *Black's Law Dictionary* 1712 (10th Ed.2014). And the word "possession" means "the exercise of dominion over property." *Black's Law Dictionary* at 1351.

D. The Nature of Oil and Gas Leases

{¶ 15} It is well settled in our caselaw that an oil and gas lease grants the lessee a property interest in the land. *Bohlen v. Anadarko E & P Onshore, L.L.C.*, 150 Ohio St.3d 197, 2017-Ohio-4025, 80 N.E.3d 468, ¶ 12; *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129-130, 48 N.E. 502 (1897). Notably, R.C. 5301.09 provides that all oil and gas leases must be recorded in the applicable county's land records, "[i]n recognition that such leases and licenses create an interest in real estate." *See also* R.C. 317.08(A)(25). This is consistent with our prior determination that when an oil and gas lease burdens property, it prevents the landowner from passing "title free and clear of all liens and encumbrances." *Karas v. Brogan*, 55 Ohio St.2d 128, 129, 378 N.E.2d 470 (1978). And our decision in *Buell* made clear that an "oil and gas lease constitutes *a title transaction* because it *affects title*" to real estate.

(Emphasis added.) *Id.* at ¶ 66; *see also* R.C. 5301.47(F) (defining "title transaction" for purposes of Ohio's Marketable Title Act, R.C. 5301.47 et seq.).

{¶ 16} In addition, an oil and gas lease affects the possession of the land. As this court said long ago in *Harris*, an oil and gas lease "is a lease of the land for the purpose and period limited therein, and *the lessee has a vested right to the possession of the land to the extent reasonably necessary to perform the terms of the instrument* on his part." (Emphasis added.) *Id.* at 129-130. Similarly and more recently, this court explained in *Buell* that an oil and gas lease affects the possession of the land "[b]ecause the lessee also enjoys reasonable use of the surface estate to accomplish the purposes of the lease." *Id.* at ¶ 60. That is, the lessee may exercise dominion over the part of the real estate that is subject to the lease, sometimes to the exclusion of the lessor.

{¶ 17} What happens, then, when an oil and gas lease expires under its own terms? Our precedent also supplies the answer to that question.

{¶ 18} "Generally, a contemporary oil and gas lease sets forth the duration of the lease in a habendum clause that contains two tiers: a 'primary term' and a 'secondary term.' " *Bohlen*, 150 Ohio St.3d 197, 2017-Ohio-4025, 80 N.E.3d 468, at ¶ 16. "The primary term sets forth a period of definite duration, and the secondary term then sets forth a period of indefinite duration, permitting extension of the lease as long as certain conditions are met, typically, when oil and gas are produced in paying quantities." *Id.* If the conditions of the primary term or the secondary term are not met, then the lease terminates by its express terms and the property interest that it created is revested to the lessor by operation of law. *State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals*, 145 Ohio St.3d 180, 2016-Ohio-178, 47 N.E.3d 836, ¶ 20. The expiration or termination of an oil and gas lease returns the lessor and the lessee to the status quo prior to the execution of the lease: the lease no longer encumbers the land or affects title to it,

and the lessee has no right to possess it. *See Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, at ¶ 73.

E. Application of Law to the Leases in this Case

{¶ 19} The oil and gas leases at issue in this case are no different from the typical lease discussed above. The leases grant rights to Ascent to explore the land for oil and gas and to produce it, and they permit Ascent to physically occupy the land, which includes the rights to construct wells and other facilities, to erect telephone lines, pipelines, and powerlines, and to build roads. The leases also include a primary term and a secondary term, and they state that the leases terminate unless a well is producing oil or gas or unless Ascent has commenced drilling operations within 90 days of the expiration of the primary term. Therefore, the oil and gas leases may terminate by operation of law if certain conditions stated in their terms are not met.

{¶ 20} The action in this case is therefore a controversy involving the title to or the possession of real property. If the action is successful, it will quiet title to the property, remove the leases as encumbrances to the property, and restore the possession of the land to the lessors. If the action is unsuccessful, however, title to the land will remain subject to the leases, affecting the transferability of the property. *See Buell* at ¶ 64. Also, Ascent would have the continued right to possess and occupy the land, as permitted by the leases, denying French the right to use the property without restriction. *See id*. Either way, the action closely involves the title to or the possession of real property and, under R.C. 2711.01(B)(1), the action is not subject to arbitration.

III. Conclusion

{¶ 21} An action seeking a determination that an oil and gas lease has expired by its own terms is a controversy involving the title to or the possession of real estate and, under R.C. 2711.01(B)(1), the action is not subject to arbitration. The Seventh District Court of Appeals therefore erred in reversing the trial court's

judgment declining to stay the action in this case pending arbitration. Consequently, we reverse the judgment of the Seventh District and remand the matter to the trial court for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

O'CONNOR, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, and BRUNNER, JJ., concur.

Buckingham, Doolittle & Burroughs, L.L.C., Joshua E. O'Farrell, and Jude B. Streb, for appellants.

Frost Brown Todd, L.L.C., Matthew C. Blickensderfer, Kevin L. Colosimo, and Christopher W. Rogers, for appellee.

Thomas A. Hill and Joseph N. Spano, urging reversal for amicus curiae, Eric Petroleum Corporation.
