SLIP OPINION NO. 2022-OHIO-3990

THE STATE EX REL. AMES, APPELLANT, *v.* BAKER, DUBLIKAR, BECK, WILEY & MATHEWS ET AL., APPELLEES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Ames v. Dublikar, Beck, Wiley & Mathews*, Slip Opinion No. 2022-Ohio-3990.]

Mandamus—Public records—Private entities may be subject to public-records law under quasi-agency test—Under Civ.R. 12(B)(6), a court must presume that a complaint's factual allegations are truthful and draw all reasonable inferences in the nonmovant's favor—Court of appeals departed from the Civ.R. 12(B)(6) standard—Judgment reversed and cause remanded.

(No. 2022-0170—Submitted July 12, 2022—Decided November 10, 2022.)

APPEAL from the Court of Appeals for Portage County, No. 2021-P-0046.

Per Curiam.

{¶ 1} Appellant, Brian M. Ames, appeals the judgment of the Eleventh District Court of Appeals dismissing his petition for a writ of mandamus against

appellees, Baker, Dublikar, Beck, Wiley & Mathews ("the Baker firm"), Public Entity Risk Services of Ohio ("PERSO"), and the Ohio Township Association Risk Management Authority ("OTARMA"). Ames brought his action under Ohio's Public Records Act, R.C. 149.43, to obtain unredacted copies of invoices that the Baker firm had prepared for PERSO. The court of appeals dismissed Ames's petition, determining that he was not entitled to the writ, because the information the Baker firm had redacted was protected by the attorney-client privilege. We conclude that the court of appeals did not properly apply the standard of review in dismissing Ames's petition, and we therefore reverse the judgment and remand this cause to the court of appeals with instructions that it conduct an in camera inspection of the contested invoices.

I. BACKGROUND

{¶ 2} Ames set forth the following facts in his amended petition. Ames is a resident of Portage County, in which Rootstown Township is located. OTARMA is a governmental risk-sharing pool with Ohio townships, including Rootstown Township, as members. PERSO is an Ohio for-profit corporation that provides claim-handling services to OTARMA and its members. And the Baker firm provides legal services to PERSO, documenting the services it provides in invoices addressed to PERSO.

{¶ 3} Prior to making the public-records request that is the basis for this case, Ames had brought multiple actions against the Rootstown Township Board of Trustees ("Rootstown") alleging violations of Ohio's Open Meetings Act, R.C. 121.22. In response to those actions, Rootstown filed three claims with PERSO. In turn, the Baker firm provided legal services to PERSO related to those claims.

{¶ 4} In April 2021, Ames emailed a public-records request to James F. Mathews, an attorney at the Baker firm who had defended Rootstown against Ames's prior actions, and David P. McIntyre, the Rootstown Township Board of Trustees' chairman. Ames sought "copies of the invoices for legal services

provided to [Rootstown] by [OTARMA] and [PERSO] for [nine] cases." The Baker firm provided the invoices but redacted the narrative portions, citing legal authority holding that the narratives were protected from disclosure under the attorney-client privilege. After Ames received the redacted records, he emailed a second records request to the Baker firm and McIntyre specifying that he wanted unredacted copies of the records he had originally received. The Baker firm refused his request for unredacted records.

{¶ 5} Ames then filed a petition in the court of appeals, seeking a writ of mandamus ordering appellees to produce unredacted copies of the records he had requested. Each appellee moved for dismissal under Civ.R. 12(B)(6). The court of appeals determined that appellees were subject to the Public Records Act despite their private-party status, but it nevertheless dismissed Ames's petition on the ground that the narrative portions of itemized attorney-fee billing statements containing descriptions of legal services performed by counsel for a client are protected by the attorney-client privilege. *See* 2022-Ohio-171, ¶ 19, 39. This appeal followed.

II. ANALYSIS

A. PERSO is not immune from suit[1]

{¶ 6} As a threshold matter, PERSO argues that a private entity like itself should not be subject to the Public Records Act simply because it conducts business with a public entity. PERSO insists that in reaching a contrary conclusion, the court of appeals misread this court's decision in *State ex rel. Armatas v. Plain Twp. Bd. of Trustees*, 163 Ohio St.3d 304, 2021-Ohio-1176, 170 N.E.3d 19.[2]

1. OTARMA and the Baker firm do not argue, as PERSO does, that they are immune from suit under the Public Records Act.

2. PERSO also notes this court's citation in *Armatas* to *State ex rel. Bell v. Brooks*, 130 Ohio St.3d 87, 2011-Ohio-4897, 955 N.E.2d 987. In *Bell*, we determined that a joint self-insurance pool was not the functional equivalent of a public office. *Id.* at ¶ 26. But the court of appeals here rested its

{¶ 7} In *Armatas*, the relator brought a mandamus action against a township's trustees, seeking the production of invoices for legal services that had been performed on the township's behalf. *Armatas* involved the same entities that Ames has sued here: the Baker firm had been hired and supervised by PERSO on behalf of OTARMA, to which Plain Township belonged. In determining whether the township could be required to produce legal-services invoices, this court applied the quasi-agency test. *Armatas* at ¶ 14-22. Traditionally, that test required—in order for a relator in an R.C. 149.43 mandamus action to be entitled to relief—a determination that "(1) a private entity prepare[] records in order to carry out a public office's responsibilities, (2) the public office [be] able to monitor the private entity's performance, and (3) the public office ha[ve] access to the records for this purpose," *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 39, 550 N.E.2d 464 (1990). But based on our survey of the caselaw in *Armatas*, we applied a modified version of this test and concluded that "when a requester has adequately proved the first prong of the quasi-agency test, the requester has met his burden: proof of a delegated public duty establishes that the documents relating to the delegated functions are public records," *id.* at ¶ 16.

{¶ 8} In *Armatas*, we determined that the township's activities satisfied the modified test. *Id.* at ¶ 22-23 (intervening subheading) ("The invoice at issue comes under the township's jurisdiction and documents procedures and operations that the township delegated to OTARMA and PERSO"). We reasoned that PERSO's decision to hire attorneys for the township constituted a delegation of the township's duty to prosecute and defend itself against lawsuits, which necessarily involves hiring and supervising attorneys. *Id.* at ¶ 19-20. And the invoices were a means for the township, as the client of the lawyers hired by PERSO, to "protect the public interest by knowing what and how its lawyers [were] being paid, to

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decision on the quasi-agency test, not the functional-equivalency test. We accordingly limit our discussion to the quasi-agency test.

ensure the quality of the representation." *Id.* at ¶ 24. Although the township did not possess the invoices, we nevertheless found that the invoices were "under the township's jurisdiction," *id.*; *see* R.C. 149.011(G).

{¶ 9} It follows from *Armatas* that Rootstown has delegated a public duty to PERSO. Here, as in *Armatas*, PERSO provides claim handling for OTARMA and the Baker firm provides legal services to PERSO in connection with actions that Ames brought against Rootstown. And the records in question relate to the delegation of that duty.

{¶ 10} In *Armatas*, the relator sued the public body while here, Ames has sued PERSO, OTARMA, and the Baker firm—but that distinction does not matter. As this court recognized in *Armatas*, we have extended the quasi-agency test to private entities, requiring them to produce public records. *Id.*, 163 Ohio St.3d 304, 2021-Ohio-1176, 170 N.E.3d 19, at ¶ 15 (citing two prior decisions). Additionally, the Public Records Act authorizes a mandamus action against either "a public office or the person responsible for the public record," R.C. 149.43(C)(1)(b). This provision reflects the Public Records Act's "intent to afford access to public records, even when a private entity is responsible for the records." *Mazzaro*, 49 Ohio St.3d at 39, 550 N.E.2d 464.

{¶ 11} In *State ex rel. Toledo Blade Co. v. Ohio Bur. of Workers' Comp.*, 106 Ohio St.3d 113, 2005-Ohio-3549, 832 N.E.2d 711, this court concluded that a newspaper company properly brought a mandamus action against two private entities, reasoning that they were " 'person[s] responsible' " for the records in question because all elements of the traditional, tripartite quasi-agency test were met. (Brackets added.) *Id.* at ¶ 20-21, quoting R.C. 149.43(C). Under *Toledo Blade*, then, PERSO may be sued under the Public Records Act when, as here, the quasi-agency test is satisfied.

{¶ 12} It is true that PERSO did not prepare the records in question here; the Baker firm did. Even so, this does not cut in PERSO's favor. The relationships

in this case among Rootstown, OTARMA, PERSO, and the Baker firm present a more complicated picture than the paradigmatic case featuring records prepared and possessed by a sole private entity. *See, e.g.*, *Mazzaro* (private accounting firm prepared and possessed the records). Given that PERSO is the recipient of records relating to a public duty that Rootstown delegated to it, we conclude that it is a proper party to this suit.

{¶ 13} Further, we decline to entertain PERSO's request to revisit our opinion in *Armatas*. PERSO argues that by jettisoning the second and third prongs of the quasi-agency test, this court broke with precedent and opened the floodgates to litigation against private entities. PERSO misses the mark. In assigning primacy to the first prong in *Armatas*, we did not chart a new course; rather, as the opinion says, we simply followed the logic of this court's earlier decisions applying the quasi-agency test. For instance, *Armatas* cites *State ex rel. Gannett Satellite Information Network v. Shirey*, 78 Ohio St.3d 400, 403-404, 678 N.E.2d 557 (1997), in which we determined that a city's inability to either monitor a consultant's performance or access the consultant's records was not dispositive. *Armatas*, 163 Ohio St.3d 304, 2021-Ohio-1176, 170 N.E.3d 19, at ¶ 17. And as *Armatas* makes clear, this court has long permitted mandamus actions against private entities under the Public Records Act. Moreover, PERSO does not cite any cases to support its speculation that *Armatas* opened the floodgates. If that trickle eventually turns into a flood, then the General Assembly can address it. *See Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 44 (observing that the General Assembly may alter—and in the past has altered—the Public Records Act in response to a judicial interpretation it disagrees with).

{¶ 14} In summary, PERSO is not immune from a lawsuit brought under the Public Records Act.

B. The court of appeals departed from the Civ.R. 12(B)(6) standard

{¶ 15} Under existing caselaw, an invoice for a legal service provided to a public-office client is a public record, with the caveat that the narrative portion of the invoice describing the service is protected from disclosure by the attorney-client privilege. *See Armatas* at ¶ 13, citing *State ex rel. Anderson v. Vermilion*, 134 Ohio St.3d 120, 2012-Ohio-5320, 980 N.E.2d 975, ¶ 13, and *State ex rel. Dawson v. Bloom Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 26-28. Drawing on this precedent, the court of appeals concluded that Ames's request for unredacted invoices had failed to state any claim upon which relief could be granted and found appellees' motions to dismiss well-taken. 2022-Ohio-171 at ¶ 35-44. In reaching this conclusion, the court of appeals departed from the Civ.R. 12(B)(6) standard.

{¶ 16} As Ames correctly observes, a Civ.R. 12(B)(6) motion limits a court to testing the sufficiency of the complaint and the materials incorporated into it. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992); *State ex rel. Peoples v. Schneider*, 159 Ohio St.3d 360, 2020-Ohio-1071, 150 N.E.3d 946, ¶ 9. In this case, the materials incorporated into Ames's petition included *redacted* invoices sent to Ames by the Baker firm.

{¶ 17} In opposing appellees' motions to dismiss, Ames argued to the court of appeals that it was required to presume the truth of his allegation that "[t]here is no attorney-client privileged information reflected on the invoices." But the court of appeals did the opposite: it concluded that the invoices contained privileged information. 2022-Ohio-171 at ¶ 41, 53. That was error, because under Civ.R. 12(B)(6), a court must presume a complaint's factual allegations are truthful and draw all reasonable inferences in the nonmovant's favor. *See Clark v. Connor*, 82 Ohio St.3d 309, 311, 695 N.E.2d 751 (1998).

{¶ 18} Because the court of appeals misapplied the Civ.R. 12(B)(6) standard, we must reverse and remand for further proceedings. In doing so, we

instruct the court of appeals on remand to conduct an in camera inspection of the contested invoices. *See State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 22 ("the court has consistently required an in camera inspection of records before determining whether the records are excepted from disclosure"). Appellees' suggestion that no such inspection is warranted because Ames did not ask for one in his petition is not supported by apposite authority.

III. CONCLUSION

{¶ 19} We reverse the judgment of the court of appeals and remand the cause with instructions that the court of appeals conduct an in camera inspection of the contested invoices.

Judgment reversed
and cause remanded.

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

FISCHER, J., dissents.

Brian M. Ames, pro se.

Baker, Dublikar, Beck, Wiley & Mathews, James F. Mathews, and Andrea K. Ziarko, for appellee Baker, Dublikar, Beck, Wiley & Mathews.

Buechner, Haffer, Meyers & Koenig Co., L.P.A., Robert J. Gehring, and Saba N. Alam, for appellee Ohio Township Association Risk Management Authority.

Reminger Co., L.P.A., Patrick Kasson, and Thomas Spyker, for appellee Public Entity Risk Services of Ohio.

[Cite as *Antonious v. Selvaggio*, 2022-Ohio-4056.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY

NASHAAT ANTONIOUS, et al., Plaintiffs, - vs - BRANDON SELVAGGIO, et al., Defendant-Appellant, - vs - TAX EASE OHIO, LLC, US BANK AS CUSTODIAN, et al., Defendant-Appellee.	**CASE NO. 2022-L-047** Civil Appeal from the Court of Common Pleas Trial Court No. 2016 CF 001567

O P I N I O N

Decided: November 14, 2022
Judgment: Affirmed

Richard D. Eisenberg, P.O. Box 43083, Richmond Heights, OH 44143 (For Defendant-Appellant).

Daniel A. Friedlander, Weltman, Weinberg & Reis Co., LPA, 965 Keynote Circle, Cleveland, OH 44131 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Appellant, Brandon Selvaggio ("Mr. Selvaggio"), appeals the judgment of the Lake County Court of Common Pleas granting summary judgment to appellee, Tax Ease Ohio, LLC, US Bank as Custodian ("Tax Ease"), on its cross-claim for the foreclosure of tax liens.

{¶2} Mr. Selvaggio asserts one assignment of error, contending that the trial court erred by granting Tax Ease's motion for summary judgment because there were genuine issues of material fact. Specifically, Mr. Selvaggio contends that the tax certificates upon which Tax Ease sought to foreclose are void because the county treasurer failed to send him written notice of their sale pursuant to R.C. 5721.33(K).

{¶3} After a careful review of the record and pertinent law, we find that Mr. Selvaggio's assignment of error lacks merit. The county treasurer's compliance with R.C. 5721.33(K) was not an issue of "material fact" precluding summary judgment in favor of Tax Ease. Even if the county treasurer failed to comply with R.C. 5721.33(K), such noncompliance would not create a legal basis upon which to invalidate the tax certificates.

{¶4} Thus, we affirm the judgment of the Lake County Court of Common Pleas.

Substantive and Procedural History

{¶5} The underlying matter arose in 2016 when the plaintiffs, Nashaat Antonious and JERMC Management Corp., filed a complaint against Mr. Selvaggio and others in the Lake County Court of Common Pleas seeking to foreclose on a judgment lien encumbering three parcels of real property in Mentor, Ohio ("the Mentor properties").

{¶6} Tax Ease was a named defendant as the holder of recorded tax certificates on the Mentor properties. Tax Ease also held two recorded tax certificates in relation to Mr. Selvaggio's real property at 10640 Bayshire Trail, Willoughby, Ohio ("the Bayshire property"). Tax Ease purchased the tax certificates from the Lake County Treasurer in 2015 (certificate nos. 15-204 and 15-431). During the pendency of the plaintiffs' foreclosure action, Tax Ease purchased two additional tax certificates from the county treasurer in relation to the Bayshire property (certificate nos. 16-276 and 17-173).

{¶7} In 2018, with leave of court, Tax Ease filed cross-claims to foreclose on its tax certificates encumbering the Mentor properties and the Bayshire property. Following the litigation of issues not relevant to this appeal, Tax Ease voluntarily dismissed its cross-claim involving the Mentor properties. In 2022, with leave of court, Tax Ease filed a motion for summary judgment in relation to the Bayshire property.

{¶8} Mr. Selvaggio filed a brief in opposition, contending, in relevant part, that the county treasurer failed to comply with R.C. 5721.33(K), which required it to send written notice of the tax certificate sales to Tax Ease, rendering the tax certificates void and unenforceable. In support, he attached an affidavit averring that he resided at the Bayshire property at all relevant times; that he never received notice that the certificates had been sold; and that the case file at the clerk of court's office does not contain a signed return receipt card.

{¶9} The trial court filed a judgment entry and decree of foreclosure granting Tax Ease's motion for summary judgment. The trial court determined that Tax Ease was entitled to the foreclosure of its lien interests and was permitted to file a praecipe for an order of sale.

{¶10} Mr. Selvaggio appealed and presents the following assignment of error:

{¶11} "The Trial Court committed prejudicial error in granting Crossclaim Appellee, Tax Ease Ohio, LLC's Renewed Motion for Summary Judgment, when there remained material issues of fact to be tried."

Standard of Review

{¶12} We review a trial court's order granting summary judgment de novo. *Sabo v. Zimmerman*, 11th Dist. Ashtabula No. 2012-A-0005, 2012-Ohio-4763, ¶ 9. "A de novo review requires the appellate court to conduct an independent review of the evidence

before the trial court without deference to the trial court's decision." *Peer v. Sayers*, 11th Dist. Trumbull No. 2011-T-0014, 2011-Ohio-5439, ¶ 27.

{¶13} Summary judgment is proper when (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence, viewing that evidence most strongly in favor of the nonmoving party, that reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. Civ.R. 56(C). The initial burden is on the moving party to demonstrate that no issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the movant meets this burden, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id.* at 293.

{¶14} However, not every factual dispute precludes summary judgment. *Oliveri v. OsteoStrong*, 2021-Ohio-1694, 171 N.E.3d 386, ¶ 15 (11th Dist.). Rather, "'[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Turner v. Turner*, 67 Ohio St.3d 337, 340, 617 N.E.2d 1123 (1993), quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Law and Analysis

{¶15} In his sole assignment of error, Mr. Selvaggio contends that the trial court erred in granting summary judgment to Tax Ease because there were genuine issues of material fact for trial. Specifically, he argues that the tax certificates encumbering the Bayshire property are "void ab initio" because the county treasurer did not send him written notice of their sale pursuant to R.C. 5721.33(K).

{¶16} "'Ohio's tax certificate legislation, R.C. 5721.30 through 5721.43, allows a county government to sell tax certificates to private investors. A tax certificate entitles the certificate holder to the first lien on the real property. A property owner can redeem the certificate and remove the lien by paying the certificate holder the purchase price plus interest, penalties, and costs. If the property owner fails to redeem the certificates, the tax certificate holder may initiate foreclosure proceedings on the real property after complying with certain statutory requirements.'" (Citations omitted.) *PNC Bank Natl. Assn. v. Graham*, 11th Dist. Lake No. 2021-L-076, 2022-Ohio-888, ¶ 6, quoting *Woods Cove II, L.L.C. v. Am. Guaranteed Mgt. Co., L.L.C.*, 8th Dist. Cuyahoga No. 103652, 2016-Ohio-3177, ¶ 2.

{¶17} To demonstrate its entitlement to summary judgment, Tax Ease was required to submit evidence to show (1) the purchase of the tax liens, (2) the amounts due, (3) the statutory notice of intent to foreclose, and (4) documents indicating that Mr. Selvaggio is the owner of the Bayshire property. *See Tax Ease Ohio, LLC v. Blankenship*, 2d Dist. Montgomery No. 27168, 2017-Ohio-2786, ¶ 13.

{¶18} This case implicates the first element, i.e., Tax Ease's purchase of the tax liens. The record establishes that Tax Ease purchased the tax certificates pursuant to R.C. 5721.33, which provides that "[a] county treasurer may, in the treasurer's discretion, negotiate the sale or transfer of any number of tax certificates with one or more persons, including a county land reutilization corporation." R.C. 5721.33(A). The statutory sale process is as follows:

{¶19} First, "[t]he county treasurer shall adopt rules governing the eligibility of persons to purchase tax certificates or to otherwise participate in a negotiated sale under this section." R.C. 5721.33(E)(1).

{¶20} Second, "[a]ny person that intends to purchase a tax certificate in a negotiated sale shall submit an affidavit to the county treasurer that establishes compliance with the applicable eligibility criteria and includes any other information required by the treasurer." R.C. 5721.33(E)(2).

{¶21} Third, "[t]he purchaser in a negotiated sale under this section shall deliver the certificate purchase price or other consideration, plus any applicable premium and less any applicable discount and including any noncash consideration, to the county treasurer not later than the close of business on the date the tax certificates are delivered to the purchaser." R.C. 5721.33(F). "The purchaser also shall pay on the date the tax certificates are delivered to the purchaser the fee, if any, negotiated under division (J) of this section." *Id*.

{¶22} Fourth, "[u]pon receipt of the full payment from the purchaser of the certificate purchase price or other agreed-upon consideration, plus any applicable premium and less any applicable discount, and the negotiated fee, if any, the county treasurer * * * shall issue the tax certificate and record the tax certificate sale by entering into a tax certificate register the certificate purchase price, any premium paid or discount taken, the certificate rate of interest, the date the certificates were sold, the name and address of the certificate holder or, in the case of issuance of the tax certificates in a book-entry system, the name and address of the nominee, and any other information the county treasurer considers necessary." R.C. 5721.33(G). "The county treasurer also shall transfer the tax certificates to the certificate holder." *Id*. "Upon issuing the tax certificates, the delinquent taxes that make up the certificate purchase price are transferred, and the superior lien of the state and its taxing districts for those delinquent taxes is conveyed intact to the certificate holder or holders." *Id*.

{¶23} "Upon the sale and delivery of a tax certificate, the tax certificate vests in the certificate holder the first lien previously held by the state and its taxing districts under section 5721.10 of the Revised Code for the amount of taxes, assessments, interest, and penalty charged against a certificate parcel, superior to all other liens and encumbrances upon the parcel described in the tax certificate, in the amount of the certificate redemption price, except liens for delinquent taxes that attached to the certificate parcel prior to the attachment of the lien being conveyed by the sale of such tax certificate." R.C. 5721.35(A). In addition, "[t]he tax certificate purchased by the certificate holder is presumptive evidence in all courts and boards of revision and in all proceedings, including, without limitation, at the trial of the foreclosure action, of the amount and validity of the taxes, assessments, charges, penalties by the court and added to such principal amount, and interest appearing due and unpaid and of their nonpayment." R.C. 5721.37(F).

{¶24} Mr. Selvaggio's argument is based on R.C. 5721.33(K), which, at the time Tax Ease purchased the tax certificates, provided as follows:

{¶25} "*After selling tax certificates under this section*, the county treasurer shall send written notice by certified mail to the last known tax-mailing address of the owner of the certificate parcel. The notice shall inform the owner that a tax certificate with respect to such owner's parcel was sold or transferred and shall describe the owner's options to redeem the parcel, including entering into a redemption payment plan under division (C)(2) of section 5721.38 of the Revised Code. However, the county treasurer is not required to send a notice under this division if the treasurer previously has attempted to

send a notice to the owner of the parcel at the owner's last known tax-mailing address and the postal service has returned the notice as undeliverable." (Emphasis added.)[1]

{¶26} The parties dispute whether the county treasurer complied with R.C. 5721.33(K), although neither party issued discovery to the county treasurer. Tax Ease argues there is a presumption that a public official has discharged his or her official duties in accordance with law. Mr. Selvaggio argues that he raised an issue of material fact in his affidavit, where he averred that he never received written notice of the tax certificate sales.

{¶27} Based on our de novo review, we find that the county treasurer's compliance with R.C. 5721.33(K) was not an issue of "material fact" precluding summary judgment in favor of Tax Ease. Even if the county treasurer failed to comply with R.C. 5721.33(K), there is no legal basis upon which to invalidate the tax certificates.

{¶28} As an initial matter, there is no language in R.C. 5721.33(K) or elsewhere that supports Mr. Selvaggio's position. He also cites no case law in which a court has invalidated a tax lien on this or any similar basis.

{¶29} In addition, the statutory text expressly contradicts Mr. Selvaggio's assertion that the county treasurer's compliance with R.C. 5721.33(K) is a "condition precedent" to a valid tax certificate sale. The Supreme Court of Ohio has defined a "condition precedent" as "one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some

1. Effective November 2, 2018, the first sentence of R.C. 5721.33(K) was amended to state, "After selling tax certificates under this section, the county treasurer shall send written notice **to the owner of the certificate parcel** by **either** certified mail **or, if the treasurer has record of an internet identifier of record associated with the owner, by ordinary mail and by that internet identifier of record. A mailed notice shall be sent** to the **owner's** last known tax-mailing address ~~of the owner of the certificate parcel~~." (Bolding and redlining added.) The 2018 amendments do not affect the issues on appeal.

act after the terms of the contract have been agreed on, before the contract shall be binding on the parties." *Mumaw v. W. & S. Life Ins. Co.*, 97 Ohio St. 1, 119 N.E. 132 (1917), syllabus; *see Wroblesky v. Hughley*, 2021-Ohio-1063, 169 N.E.3d 709, ¶ 45 (11th Dist.), *appeal not accepted*, 164 Ohio St.3d 1421, 2021-Ohio-2923, 172 N.E.3d 1049. As indicated, a tax certificate becomes effective upon "sale and delivery." R.C. 5721.35(A). The county treasurer's written notice obligation under R.C. 5721.33(K) expressly arises "*[a]fter* selling tax certificates." (Emphasis added.)

{¶30} We further disagree with Mr. Selvaggio's suggestion that the alleged lack of written notice precluded him from exercising his right to redeem the Bayshire property pursuant to R.C. 5721.38(C)(2). That provision provides, "During the period *beginning on the date a tax certificate is sold* under section 5721.33 of the Revised Code and *ending on the date the decree is rendered on the foreclosure proceeding* under division (F) of section 5721.37 of the Revised Code, the owner of record of the certificate parcel, or any other person entitled to redeem that parcel, may enter into a redemption payment plan with the certificate holder and all secured parties of the certificate holder." (Emphasis added.)

{¶31} A property owner's redemption rights under R.C. 5721.38(C)(2) are not dependent on the issuance of written notice under R.C. 5721.33(K). Rather, the notice simply *describes* the property owner's existing redemption rights. *See id.* ("The notice * * * shall describe the owner's options to redeem the parcel, including entering into a redemption payment plan under division (C)(2) of section 5721.38 of the Revised Code"). Despite the fact that Tax Ease filed its cross-claims in 2018, there is no indication in the record that Mr. Selvaggio attempted to exercise his redemption rights at any time during the protracted litigation. *See Aurora Bank F.S.B. v. Gordon*, 8th Dist. Cuyahoga No.

103138, 2016-Ohio-938, ¶ 26 ("[Appellant]'s protracted litigation and failure to make any offer of payment belie her claim that timely notice of the purchaser's deposit would have prompted her to exercise her right to redemption"). Further, we note that Mr. Selvaggio is entitled to redeem the Bayshire property at any time before the confirmation of a sale. *See* R.C. 5721.38(B).

{¶32} On appeal, Mr. Selvaggio contends that the county treasurer's alleged failure to comply with R.C. 5721.33(K) violated his constitutional right to due process. Since Mr. Selvaggio did not raise this due process claim in the trial court, it is waived. *Atlantic Mtge. & Invest. Corp. v. Sayers*, 11th Dist. Ashtabula No. 2000-A-0081, 2002 WL 331734, *3 (Mar. 1, 2002). In any event, a party must demonstrate prejudice resulting from an alleged due process violation. *See State v. Nagle*, 11th Dist. Lake No. 99-L-089, 2000 WL 777835, *6 (June 16, 2000). Mr. Selvaggio has not alleged, much less demonstrated, the existence of prejudice. And, as explained above, his redemption rights were not prejudiced.

{¶33} In sum, the county treasurer's compliance with R.C. 5721.33(K) was not an issue of "material fact" precluding summary judgment in favor of Tax Ease. Accordingly, the trial court did not err in granting summary judgment to Tax Ease.

{¶34} Mr. Selvaggio's sole assignment of error is without merit.

{¶35} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

MATT LYNCH, J.,

JOHN J. EKLUND, J.,

concur.

[Cite as *Total Quality Logistics, L.L.C. v. JK & R Express, L.L.C.*, 2022-Ohio-3969.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

TOTAL QUALITY LOGISTICS, L.L.C.,	:	CASE NO. CA2022-02-005
Appellant,	:	O P I N I O N 11/7/2022
	:	
- vs -	:	
JK & R EXPRESS, L.L.C.,	:	
Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2016 CVH 01684

Bricker & Eckler LLP, and Jeffrey P. McSherry, for appellant.

Whitten Law Office, and Chad M. Sizemore, for appellee.

M. POWELL, P.J.

{¶ 1} Appellant, Total Quality Logistics, L.L.C. ("TQL"), appeals a decision of the Clermont County Court of Common Pleas granting judgment in favor of appellee, JK & R Express, L.L.C. ("JK & R"), on TQL's claim for indemnification.

{¶ 2} TQL is a freight broker. As such, TQL arranges for the transportation of its customers' freight and cargo from one location to another. A TQL customer contracts with TQL for the transportation of its cargo by a motor carrier and TQL contracts with the motor

carrier. JK & R is such a motor carrier. In January 2016, TQL and JK & R entered into a broker-carrier agreement for JK & R to provide transportation services to TQL's customers. As pertinent here, the parties' broker-carrier agreement includes the following provisions.

> 8. **CARGO LIABILITY AND CLAIMS**. * * * CARRIER is fully responsible and liable for the freight once in possession of it, and the trailer(s) is loaded, even partially, regardless of whether a bill of lading has been issued, signed, and/or delivered to CARRIER. CARRIER's responsibility/liability shall continue until proper and timely delivery of the shipment to the consignee and the consignee signs the bill of lading or delivery receipt evidencing successful delivery.
>
> 10. **INDEMNIFICATION**. CARRIER agrees to defend, indemnify, and hold BROKER and CUSTOMERS harmless from and against any and all claims or liability (including, without limitation, Workers' Compensation claims) arising out of or in any way related to CARRIER's negligence, willful misconduct, acts, omissions, or performance or failure to perform under this Agreement, including, without limitation, claims or liability for cargo loss and damage, theft, delay, damage to property, and bodily injury and/or death. Except for Workers' Compensation claims, CARRIER shall not be required to indemnify any party (including BROKER) for claims or liability that are directly and solely caused by the negligence or willful misconduct of that party.

{¶ 3} In June 2016, Contél Fresh, a TQL customer, contracted with TQL for the transportation of a load of Awe Sum Organics apples from Washington State to Missouri and New Jersey for $6,500. TQL arranged for JK & R to transport the apples for $5,900. JK & R picked up the apples in Washington State and signed the bill of lading for the load. The bill of lading identified Awe Sum Organics as the shipper; Contél Fresh was not listed on the bill of lading. While en route to Missouri, JK & R's trailer caught fire; the apples were destroyed. TQL communicated with JK & R and Contél Fresh about the lost load.

{¶ 4} Contél Fresh submitted an invoice to TQL for $86,240 and included the invoice from its supplier substantiating that value. On July 11, 2016, and September 30, 2016, TQL notified JK & R of the claim with a Standard Form for Presentation of Loss and

Damage Claim. However, before JK & R could respond, TQL paid Contél Fresh for the loss of the apples by offsetting $86,240 from its open invoices with Contél Fresh. Contél Fresh then released TQL and assigned all claims and causes of action it had against JK & R to TQL.

{¶ 5} In addition to the amount it paid for the lost apples, TQL also lost the $6,500 freight-brokerage fee Contél Fresh had agreed to pay for the shipment. On December 7, 2016, TQL filed a complaint against JK & R, alleging breach of contract or, in the alternative, unjust enrichment and promissory estoppel. The complaint sought $83,666 in damages. TQL calculated the damages by combining the $86,240 it paid Contél Fresh for the lost apples (the cargo loss claim) with the $6,500 freight-brokerage fee Contél Fresh would have paid TQL had the apples been successfully delivered, and subtracting $9,074, the amount TQL owed JK & R on open invoices. JK & R answered the complaint, denying TQL's claims and seeking an award of attorney fees, costs, and expenses.

{¶ 6} On January 17, 2018, TQL and JK & R both moved for summary judgment. TQL argued it was entitled to the balance owed under the broker-carrier agreement because JK & R had breached the contract. JK & R argued that TQL was not contractually compelled to pay Contél Fresh, nor was it compelled to pay Contél Fresh by a judgment of a court. JK & R asserted that because TQL had no obligation to pay for the lost apples, TQL voluntarily settled the claim merely as a business consideration and thus failed to satisfy the second indemnification requirement under *Globe Indemn. Co. v. Schmitt*, 142 Ohio St. 595 (1944). JK & R asserted it was therefore not required to pay TQL for the loss of the cargo. TQL responded that *Globe* does not apply because there is an express indemnification provision in the parties' broker-carrier agreement governing loss of cargo.

{¶ 7} TQL submitted the affidavit of Marc Bostwick, TQL's corporate representative, with its motion for summary judgment. Bostwick averred that TQL reimbursed Contél Fresh

for the loss of the apples. Bostwick did not aver that TQL was required to pay Contél Fresh for the lost apples. In his deposition, Bostwick denied knowledge of an agreement between TQL and Contél Fresh for TQL to reimburse Contél Fresh for cargo loss. Bostwick testified that TQL's reimbursement was a business decision to maintain TQL's business relationship with Contél Fresh. JK & R's owner acknowledged in his deposition that JK & R, not TQL, was responsible for the lost apples and that the parties' broker-carrier agreement imposes such a liability upon JK & R.

{¶ 8} The trial court found that JK & R was entitled to judgment as a matter of law on TQL's cargo-loss claim. The trial court determined that for TQL to prevail on its cargo-loss claim, TQL must satisfy the three common-law requirements for indemnification outlined in *Globe*. In that case, the Ohio Supreme Court held that when an indemnitee settles a claim instead of litigating it, the indemnitee is entitled to indemnification if the indemnitee proves that (1) he provided proper and timely notice to the indemnitor, (2) the indemnitee was legally liable to respond, and (3) the settlement was fair and reasonable. *Globe*, 142 Ohio St. at 604. The trial court found that TQL failed to show it was legally liable for the loss of the apples, and thus, did not satisfy the second *Globe* requirement. Accordingly, TQL was not entitled to indemnification from JK & R under *Globe* after it had voluntarily settled the claim with Contél Fresh.

{¶ 9} TQL appealed the trial court's decision to this court. TQL argued that *Globe* and its progeny did not apply because of the express indemnification provision in the broker-carrier agreement. On January 7, 2019, we upheld the trial court's grant of summary judgment to JK & R. *Total Quality Logistics, L.L.C. v. JK & R Express, L.L.C.*, 12th Dist. Clermont No. CA2018-05-034, 2019-Ohio-20. We found that *Globe* applies to cases in which there is an indemnification provision in the contract between the parties. *Id.* at ¶ 16. Accordingly, in order to prevail on its contractual-indemnity claim, TQL was required to

satisfy its burden under *Globe*. *Id.* Upon finding that TQL had failed to show it was legally liable to respond to Contél Fresh's claim, we concluded that TQL had failed to establish the second requirement in *Globe* and was therefore not entitled to indemnification from JK & R. *Id.* at ¶ 19-21.

{¶ 10} The Ohio Supreme Court accepted TQL's discretionary appeal to consider whether the common-law requirements for indemnification set out in *Globe* (hereinafter the "*Globe* requirements") apply when the rights of the parties are governed by a contract that includes an indemnification provision. *Total Quality Logistics, L.L.C. v. JK & R Express, L.L.C.*, 164 Ohio St.3d 495, 2020-Ohio-6816, ¶ 1. The supreme court held that the *Globe* requirements "do not apply when the parties express a clear intent to abrogate those common-law requirements in their contract." *Id.* "If the language used in the parties' contract evinces a clear intent to abrogate the common-law *Globe* requirements, the contract should be applied as written and the indemnitor is obligated to indemnify the indemnitee under the terms of the agreement." *Id.* at ¶ 16. Noting that both this court and the trial court applied the *Globe* requirements without considering whether the parties intended to abrogate those requirements pursuant to the indemnification provision in the broker-carrier agreement, the supreme court reversed this court's opinion and remanded the matter to the trial court to make that determination. *Id.* at ¶ 19.

{¶ 11} On remand, the parties filed competing memoranda on whether the parties intended to abrogate the *Globe* requirements in their broker-carrier agreement. On June 21, 2021, the trial court granted judgment in favor of JK & R and against TQL on TQL's indemnification claim. The trial court found that the broker-carrier agreement did not express a clear intent to abrogate the *Globe* requirements because "[n]owhere in the [Agreement] does it state that TQL has any right, obligation, or option to voluntarily pay a customer's claim, without legal liability on the part of TQL, and then seek reimbursement or

indemnity from JK & R[.] Nor does the Agreement, in any manner, refer or allude to the common-law indemnity requirements set forth in *Globe*."

{¶ 12} The following day, JK & R filed a notice of its intent to seek an award of attorney fees against TQL. By agreement of the parties, the trial court determined JK & R's motion for attorney fees based upon the parties' memoranda and affidavits. On February 1, 2022, the trial court awarded JK & R $87,002.80 in attorney fees.

{¶ 13} TQL now appeals the trial court's June 21, 2021, and February 1, 2022 decisions, raising two assignments of error.

{¶ 14} Assignment of Error No. 1:

{¶ 15} THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO JK & R ON TQL'S BREACH OF CONTRACT CLAIM AS TO CARGO LOSS.

{¶ 16} TQL argues the trial court erred in granting summary judgment in favor of JK & R on TQL's indemnification claim, raising three issues for review.

{¶ 17} An appellate court reviews a trial court's decision on a motion for summary judgment de novo, independently and without deference to the decision of the trial court. *Flagstar Bank, FSB v. Sellers,* 12th Dist. Butler No. CA2009-11-287, 2010-Ohio-3951, ¶ 7. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. *See* Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.,* 54 Ohio St.2d 64 (1978).

{¶ 18} On the same day the Ohio Supreme Court issued its decision in *JK & R*, the court issued *Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 164 Ohio St.3d 480, 2020-Ohio-6821. Both decisions considered whether the *Globe* requirements apply when the parties' contract includes an indemnification provision. In *JK & R*, the supreme court

was concerned with the second *Globe* requirement—whether TQL was legally liable to pay the loss. In *Wildcat Drilling*, the supreme court was concerned with the first *Globe* requirement—whether Discovery Oil was required to notify Wildcat of its intention to pay the loss. In both cases, the supreme court held that "the requirements set out in *Globe* for determining whether an indemnitee may recover against an indemnitor when the indemnitee has settled a claim without the indemnitor's involvement, do not apply when the parties express a clear intent to abrogate those common-law requirements in their contract." *JK & R*, 2020-Ohio-6816 at ¶ 14; *Wildcat Drilling* at ¶ 1. In both cases, the supreme court reversed and remanded the matter for the trial courts to determine whether the parties' contracts expressed a clear intent to abrogate the *Globe* requirements.

{¶ 19} In so holding, the supreme court observed, "In Ohio, parties have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced." *JK & R* at ¶ 16. "That includes the right to include contractual terms that abrogate the common law." *Id.* However, "the intent to do so must be clearly indicated. That intent must be reflected in the language the parties used in their contract. This principle applies to indemnification agreements." *Id.* Consequently, "[i]f the language used in the parties' contract evinces a clear intent to abrogate the common-law *Globe* requirements, the contract should be applied as written and the indemnitor is obligated to indemnify the indemnitee under the terms of the agreement." *Id.* In *Wildcat Drilling*, the supreme court further recognized that "the 'nature of an indemnity relationship is determined by the intent of the parties as expressed by the language used' in the agreement." *Wildcat Drilling* at ¶ 14, quoting *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238, 240 (1987).

{¶ 20} The supreme court recognized that the parties' broker-carrier agreement "does not expressly abrogate the *Globe* requirements. [However], no talismanic or magical

language is required in order for parties to abrogate the common law through contractual terms. We must look to the language that the parties used in their contract to determine their intent regarding an indemnification provision." *JK & R*, 2020-Ohio-6816 at ¶ 17. In light of the lead opinion's conclusion that a contract's failure to expressly abrogate *Globe* is not automatically outcome determinative and its declining to adopt Justice Donnelly's dissenting analysis below, the lead opinion's language above suggests that a clear intent to abrogate the *Globe* requirements may be implicitly expressed in the contract.

{¶ 21} Both supreme court decisions were plurality opinions. Justices French, O'Connor, and Stewart joined in the lead opinion, holding that the *Globe* requirements apply unless the parties' contract expresses a clear intent to abrogate those requirements. Justice Kennedy concurred in judgment only, concluding that *Globe* was an inapplicable tort opinion, its requirements were dicta, and the matter should be remanded to be decided based solely on the parties' contract. Justices Fisher and DeWine concurred in judgment only, stating that an express indemnification provision in a contract clearly indicates that the parties want to be governed by the indemnification provision, and not by *Globe*. These justices would have remanded the case for the trial court to resolve the matter based solely on the contract. Justice Donnelly dissented, stating that *Globe* always applies, regardless of whether there is an indemnification provision in a contract: "If the parties to a contract intend to override [the *Globe*'s requirements], they should do so expressly, not impliedly by merely including an indemnification clause." *Wildcat Drilling*, 2020-Ohio-6821 at ¶ 44. Thus, the lead opinion's three justices held that the *Globe* requirements may or may not apply depending upon the contract between the indemnitee and the indemnitor; one justice held that the *Globe* requirements always apply absent express abrogation; and three justices held that the *Globe* requirements never apply in cases involving a contractual indemnification provision.

{¶ 22} **Whether the Plain Language of the Broker-Carrier Agreement Demonstrates the Parties' Intent to Abrogate the Common-Law Indemnification Requirements of *Globe***

{¶ 23} In its first issue for review, TQL argues the trial court erred in holding that the parties' broker-carrier agreement does not abrogate the *Globe* requirements. TQL asserts that the agreement is "replete with language that demonstrates [the parties'] intent to abrogate the common law indemnity requirements," specifically Sections 8, 8(e), and 10. TQL also cites *Total Quality Logistics, L.L.C. v. New Vision Transp., Inc.*, Clermont C.P. No. 2016 CVH 00926 (Nov. 13, 2017), and *Total Quality Logistics, L.L.C. v. Dadir, L.L.C.*, Clermont C.P. No. 2016 CVH 00705 (May 21, 2019), in support of its argument that Section 10 is unambiguous and enforceable.

{¶ 24} We first address the applicability of *Dadir* and *New Vision*. Both cases involved similar cargo claims by TQL against its contracted carriers. In both cases, TQL paid its customer for the cargo loss and sought indemnification from its carrier under the same indemnification provision as here. In *Dadir*, the common pleas court found that Section 10 clearly and unambiguously provided that the carrier, Dadir, agreed to indemnify TQL for cargo loss. In *New Vision*, the common pleas court found that the claim TQL paid to settle with its customer was a claim within the meaning of Section 10, and that "the express terms" of Section 10 were an unconditional requirement for the carrier, New Vision, to indemnify TQL for cargo loss. However, the *Globe* requirements were not implicated in either case. As the issue of whether the broker-carrier agreement abrogates the *Globe* requirements was neither raised nor addressed in *Dadir* and *New Vision*, these cases are not applicable precedent here.

{¶ 25} We now turn to TQL's argument that Sections 8, 8(e), and 10 of the parties' broker-carrier agreement evinces a clear intent to abrogate the *Globe* requirements. The

pivotal question is whether the parties clearly intended to require JK & R to indemnify TQL for voluntary settlements by TQL of a customer's claim under Sections 8, 8(e), and 10 of the broker-carrier agreement.

{¶ 26} Legal issues involving contract interpretation are subject to a de novo standard of review. *Merritt v. Anderson*, 12th Dist. Fayette No. CA2008-04-010, 2009-Ohio-1730, ¶ 18. With the issue of contract interpretation, the intent of the parties is paramount. *Deerfield Twp. v. Mason*, 12th Dist. Warren No. CA2011-12-138, 2013-Ohio-779, ¶ 16. A court is to examine the contract as a whole and presume that the intent of the parties is reflected within the contract language itself. *Id.* In determining the parties' intent, courts must consider the meaning of the contract language "with reference to the object to be accomplished by the contracting parties." *McBride v. Prudential Ins. Co. of America*, 147 Ohio St. 461, 463 (1947).

{¶ 27} Pursuant to well-established principles of transportation law, cargo damage claims against interstate motor carriers are determined under the Carmack Amendment to the ICCTA (Interstate Commerce Commission Termination Act) whereas the amendment does not specifically govern brokers in the scheme of interstate cargo loss and damage liability. *Total Quality Logistics, L.L.C. v. Red Chamber Co.*, 12th Dist. Clermont No. CA2016-09-062, 2017-Ohio-4369, ¶ 11.

{¶ 28} Consistent with the Carmack Amendment, Section 8 of the broker-carrier agreement places the risk of cargo loss solely upon JK & R as the carrier. Pursuant to the Carmack Amendment, TQL was not liable to Contél Fresh for the cargo loss. The record does not include the contract between TQL and Contél Fresh to permit a determination of whether TQL was contractually liable to Contél Fresh for the cargo loss. However, Bostwick's affidavit and deposition suggest that TQL was not legally liable to Contél Fresh and instead voluntarily paid Contél Fresh for the loss to maintain their business relationship.

{¶ 29} Section 10 of the broker-carrier agreement, the indemnification provision, provides in pertinent part that JK & R agrees to indemnify TQL and its customers for "any and all claims or liability arising out of or in any way related to JK & R's performance or failure to perform under this Agreement, including, without limitation, claims or liability for cargo loss and damage." Thus, Section 10 explicitly provides that TQL is entitled to be indemnified by JK & R for any and all claims or liability for cargo loss. Contél Fresh invoiced TQL for the loss of its apples. Thus, ignoring whether TQL was legally liable for the loss, TQL was subject to a "claim" for cargo loss which arose out of JK & R's failure to perform under the broker-carrier agreement (failure to deliver the apples).

{¶ 30} Section 8(d) provides that

> Except as provided in this Agreement, all liability standards, time limitations, and burdens of proof regardless of whether CARRIER has common or contract Operating Authority shall be governed by common law applicable to common carriers and by the Carmack Amendment codified in 49 U.S.C. § 14706. CARRIER agrees to accept notice of a claim in the form issued by BROKER, including electronic or facsimile transmission.

{¶ 31} Section 8(e) provides that

> Notwithstanding the terms of 49 C.F.R. § 370.9, CARRIER shall acknowledge a claim within 30 days of receipt, and pay, decline, or make a settlement offer in writing on all cargo loss or damage claims within 60 days from the receipt of the claim. Failure of CARRIER to pay, decline, or offer settlement within this 60-day period shall be deemed an admission by CARRIER of full liability for the amount claimed and a breach of this Agreement. Notwithstanding any other provision in this Agreement, BROKER reserves the right to offset any claim(s) with CARRIER's pending invoices.

{¶ 32} Consistent with the Carmack Amendment, Sections 8(d) and 8(e) make JK & R, as carrier, exclusively liable for cargo loss. Section 8(e) defines how JK & R is to respond to a notice of a cargo loss claim. JK & R acknowledges that Section 8(e) allows TQL to offset cargo loss claims with JK & R's open invoices with TQL but argues it does not

authorize TQL to use its own funds to pay its customer for cargo loss claims. However, Section 8(e) relates to the carrier's liability for cargo loss and does not address the party to whom it may be ultimately responsible. The language of Section 8(e) allowing TQL to offset cargo loss claims with JK & R's open invoices with TQL indicates that JK & R is liable to TQL for cargo loss.

{¶ 33} The parties' broker-carrier agreement is designed to make TQL the single point of contact for its customers and contracted carriers, thereby preventing interaction and communication between the customers and contracted carriers. Section 4(b) illustrates such theme by providing that "CARRIER agrees that BROKER is the sole party responsible for payment of CARRIER's invoices related to the Services and that, under no circumstance, will CARRIER contact and/or seek payment from any shipper, consignee, CUSTOMER, or any other party responsible for any payment related to the Services."

{¶ 34} Section 10, which plainly and unconditionally entitles TQL to indemnification from JK & R for cargo loss claims, is part of that scheme. Section 10 plainly contemplates that TQL may pay the customer for cargo claims, as otherwise there would be nothing for the carrier to indemnify. The provision for indemnifying TQL for a cargo claim is consistent with TQL making a voluntary payment to its customer. In other words, TQL's voluntary payment to a customer qualifies as a "claim" under Section 10 because the broad "any and all claims" phrase of Section 10 is not limited or modified by an introductory clause and there is no language excluding voluntary payments or settlements by TQL. Moreover, JK & R is not prejudiced by TQL making voluntary payment of cargo claims to its customers, as JK & R's liability for the loss is unaffected. It is only a matter of whom JK & R pays for the loss.

{¶ 35} Inclusion of an unqualified duty of JK & R to indemnify TQL for cargo loss alone expresses a clear intent to abrogate *Globe* for two reasons. First, the Carmack

Amendment places lability for cargo loss exclusively upon the carrier listed on the bill of lading. Thus, TQL, as broker, has no liability for cargo loss and would have nothing to be indemnified for in the event of cargo loss under *Globe*. Inclusion of a provision for indemnification of TQL clearly expresses an intent that TQL has a right to be indemnified for payments it makes without legal obligation to do so. Second, if Section 10 of the broker-carrier agreement did not include the indemnification provision in TQL's favor, TQL would still have the right under *Globe* to seek indemnification from JK & R for payments for which it was otherwise legally liable. Thus, inclusion of the indemnification provision would be redundant unless it was intended to provide rights beyond those recognized by *Globe*.

{¶ 36} Notwithstanding the foregoing, we need not rely solely upon inclusion of the indemnification provision in TQL's favor to find an expressed clear intent to abrogate *Globe*. The duty of JK & R to indemnify TQL for cargo claims set forth in Section 10 of the broker-carrier agreement must also be read in the context of the entire agreement. The parties' broker-carrier agreement provides that: (1) the carrier is fully responsible and liable for the cargo once in possession of it and until it is properly and timely delivered; (2) the carrier looks only to TQL for payment and agrees to neither contact nor seek payment from TQL's customers; (3) the contact between the carrier and shipper is limited to "the minimum level of contact necessary to perform the services"; (4) in the event a claim arises, the carrier agrees to accept notice of the claim from TQL, as opposed to a shipper or customer, and agrees TQL has the right to offset any claim with JK & R's open invoices with TQL without any exception; (5) the carrier agrees to indemnify TQL and its customers for any and all claims for cargo loss and damage arising out of or relating to the carrier's performance or failure to perform; and (6) the only limitation on indemnification is when a claim or liability arises directly and solely from the negligence or willful misconduct of TQL or another party, not the carrier, which limitation is inapplicable here. The broker-carrier agreement,

considered as a whole, is intended to make TQL the single point of contact for its contracted carriers and responsible for the complete administration of the shipment, including resolving cargo claims without involvement of the shipper or customer.

{¶ 37} For the reasons expressed above, we find the trial court erred in finding that the parties' broker-carrier agreement does not evince a clear intent to abrogate the *Globe* requirements. TQL's first issue for review is well taken.

{¶ 38} **Whether the Trial Court Erred by Requiring Express Statements of Abrogation or Specific Language Relating to the *Globe*'s Second Requirement for There to Be a Clear Contractual Intent to Abrogate the *Globe*'s Indemnification Requirements**

{¶ 39} In its second issue for review, TQL argues the trial court erred in finding that the broker-carrier agreement does not evince a clear intent to abrogate the *Globe* requirements because the agreement lacks language explicitly abrogating the *Globe* requirements or permitting TQL to voluntarily pay its customer's claim without legal liability and then seek indemnification from JK & R. In support of its argument, TQL cites *Glaspell v. Ohio Edison Co.*, 29 Ohio St.3d 44 (1987), and *Worth v. Huntington Bancshares, Inc.*, 43 Ohio St.3d 192 (1989).

{¶ 40} *Glaspell* involved a license agreement pursuant to which a cable television company was granted a license to install its equipment upon a telephone company's utility poles. The agreement contained an indemnification provision that required the cable company to indemnify the telephone company for any loss it may suffer by reason of the installation, maintenance, or use of the cable company's equipment on the poles. A cable company employee sued the telephone company for injuries he sustained when he fell from an alleged negligently maintained pole. The telephone company impleaded the cable company into the litigation, claiming that the indemnification provision required the cable

company to indemnify the telephone company for damages resulting from the cable company's installation and maintenance of its equipment on the utility poles. The trial court and the court of appeals found that the telephone company was not entitled to indemnification because the license agreement "failed to express in clear and unequivocal terms" that the cable company was required to indemnify the telephone company for the latter's own negligence.

{¶ 41} The Ohio Supreme Court reversed, holding that the cable company was liable to indemnify the telephone company even though the agreement did not specifically state the telephone company could be indemnified for loss caused by its own negligence: "[T]he word 'negligence' need not be utilized where an intention to exclude liability predicated upon such is set forth by words excluding liability 'for any and all harms however caused.'" *Glaspell*, 29 Ohio St.3d at 47-48. "What was intended by the parties, as evidenced by the words utilized in the agreement at issue, was that in exchange for rights of access to [the telephone company's] facilities, the cable company was obligated to bear all risk of additional harm which might occur in connection with [the cable company's] right of access." *Id.* at 48. "Since the subject of liability was anticipated in the indemnity agreement, such indemnification must be provided to [the telephone company]." *Id.* Thus, the supreme court found that the public policy-based rule that an indemnitee may not recover for its own negligence was abrogated by the parties' contractual broad language providing for indemnification "for any loss" occasioned by the cable company's installation or maintenance of its equipment on the telephone company's property.

{¶ 42} *Worth* involved a bank executive's "golden parachute" agreement which provided certain benefits should he separate employment from the company after a hostile takeover. In particular, the agreement provided that the executive was entitled to employ legal counsel at the company's expense "in connection with the initiation or defense of any

litigation" relating to the "golden parachute" benefits. When the executive separated from employment and the acquiring company refused to pay the "golden parachute" benefits, the executive sued. The trial court found that the executive was not entitled to the benefits and thus to reimbursement of his legal fees because he had not prevailed in the litigation.

{¶ 43} The supreme court reversed on the executive's claim for indemnification of attorney fees, holding that

> The provision's clear intent is to guarantee full indemnification of Worth's legal expenses incurred in enforcing or defending the agreement regardless of his ultimate success. While Worth was not successful in this endeavor, his legal expenses were indisputably incurred in an attempt to enforce the agreement. Nothing in Section 5 suggests that successful enforcement or defense is a prerequisite to recovery of attorney fees, and we decline to read such a condition into the contract absent a showing that Worth acted in bad faith or that he prosecuted this action with no colorable claim of success.

Worth, 43 Ohio St.3d at 199. Thus, the supreme court found that the executive was entitled to be indemnified for his litigation expenses because the contract did not condition indemnity upon the indemnitee's success in the litigation.

{¶ 44} The supreme court cited *Glaspell* and *Worth* in *JK & R* as instances where "talismanic or magical language" was unnecessary for parties to abrogate common-law indemnity. *JK & R*, 2020-Ohio-6816 at ¶ 17-18 (finding that the indemnitee in *Worth* was entitled to recover his attorney fees because the indemnification provision in the contract did not condition the recovery of such fees on the indemnitee's success; and finding that the contractual language in *Glaspell* reflected a clear intent by the parties to permit indemnification for the indemnitee's own negligence, and that the contract was not required to expressly refer to the indemnitee's own negligence).

{¶ 45} JK & R correctly points out that following the supreme court's remand in *Wildcat Drilling*, the Seventh District Court of Appeals rejected *Worth* and *Glaspell* as

guiding precedent in its opinion because neither implicated a *Globe* requirement. *Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 7th Dist. Mahoning No. 21 MA 0070, 2022-Ohio-1125, ¶ 33-35. Nonetheless, as stated above, the supreme court cited *Worth* and *Glaspell* in *JK & R* as examples of how contractual abrogation of common-law indemnity requirements may be accomplished without "talismanic or magical language." *JK & R* at ¶ 17-18. Rather, "[w]e must look to the language that the parties used in their contract to determine their intent regarding an indemnification provision." *Id.* at ¶ 17. Despite there being no *Globe* issues in *Worth* or *Glaspell*, each serves as an example of the kind of contractual language that may be considered in determining if the parties to the contract intended to abrogate common-law indemnity.

{¶ 46} Much like the golden parachute agreement in *Worth* and the indemnity clause in *Glaspell*, the broker-carrier agreement provides unequivocally that JK & R, as carrier, is to indemnify TQL for cargo loss. The agreement does not except JK & R's duty to indemnify TQL in instances where TQL voluntarily pays its customer for cargo loss. Just as the supreme court declined to read into the *Worth* golden parachute agreement a condition that recovery of attorney fees was dependent upon prevailing in the litigation, and similarly refused to read into the *Glaspell* indemnity clause a condition that indemnity did not apply in cases of the indemnitee's own negligence, we decline to read into the parties' broker-carrier agreement a condition that JK & R's duty to indemnify TQL for cargo loss is excepted if TQL makes a voluntary payment.

{¶ 47} Furthermore, although the parties' broker-carrier agreement does not expressly abrogate the *Globe* requirements or specifically refer to *Globe*, the Ohio Supreme Court plainly found that such was not required and was not outcome determinative of the issue at bar. The trial court, therefore, erred in finding that the broker-carrier agreement does not evince a clear intent to abrogate the *Globe* requirements because the agreement

does not expressly abrogate the *Globe* requirements, the agreement does not specifically refer to *Globe*, and its language does not specifically waive the second *Globe* requirement. TQL's second issue for review is well taken.

{¶ 48} **Whether the Trial Court Erred by Construing the Broker-Carrier Agreement against TQL as the Drafter**

{¶ 49} In its third issue for review, TQL challenges the trial court's determination that any ambiguity in the parties' broker-carrier agreement must be strictly construed against TQL as the drafter of the agreement.

{¶ 50} In its June 21, 2021 decision, the trial court noted that TQL was the drafter of the broker-carrier agreement, stated that "any ambiguity in the Agreement must be strictly construed against TQL as the drafter," and cited our opinion in *Drone Consultants, L.L.C. v. Armstrong*, 12th Dist. Warren No. CA2015-11-107, 2016-Ohio-3222, where we stated, "'[W]here there is doubt or ambiguity in the language of a contract it will be construed strictly against the party who prepared it. * * * In other words, he who speaks must speak plainly or the other party may explain to his own advantage.'" *Id.* at ¶ 15, quoting *McKay Mach. Co. v. Rodman*, 11 Ohio St.2d 77, 80 (1967).

{¶ 51} Notwithstanding the trial court's foregoing statement and its citation to our *Drone* opinion, the trial court did not find that the provisions of the broker-carrier agreement were susceptible to two or more reasonable interpretations, did not identify the ambiguity in the agreement that it construed against TQL, and instead found that the parties' broker-carrier agreement did not express a clear intent to abrogate the *Globe* requirements. While the trial court noted that the agreement neither explicitly abrogates the *Globe* requirements nor permits TQL to voluntarily pay its customer's claim without legal liability and then seek reimbursement from JK & R, the absence of such language in the agreement does not render the agreement ambiguous. As the trial court never incorporated the legal principles

regarding ambiguous contracts in its analysis and ultimate decision, its statement above and citation to *Drone* were merely surplusage without legal significance. We find no merit to TQL's third issue for review.

{¶ 52} In light of the foregoing, we find that the trial court erred in finding that the parties' broker-carrier agreement does not evince a clear intent to abrogate the *Globe* requirements. Accordingly, we reverse the trial court's decision granting summary judgment in favor of JK & R and against TQL on TQL's indemnification claim and remand the case to the trial court for further proceedings. TQL's first assignment of error is sustained.

{¶ 53} Assignment of Error No. 2:

{¶ 54} THE TRIAL COURT ERRED BY AWARDING ATTORNEY FEES AND EXPENSES TO JK & R AS THE PREVAILING PARTY DESPITE FAILING TO TIMELY SEEK ATTORNEY FEES, NOT SUFFERING A LOSS, AND NOT PREVAILING.

{¶ 55} TQL argues that the trial court erred in awarding JK & R attorney fees because (1) JK & R waived its claim for attorney fees or was otherwise barred by res judicata, (2) JK & R incurred no attorney fees and costs in defending itself as all of its defense costs were paid by its insurer, (3) the trial court improperly relied on *State ex rel. Stricker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, and *Bell v. Nichols*, 10th Dist. Franklin No. 10AP-1036, 2013-Ohio-2559, two cases involving R.C. 2323.51, Ohio's frivolous conduct statute, and the policy behind it, which are not at issue here, and (4) TQL, not JK & R, is the prevailing party as it prevailed on its breach-of-contract claim (JK & R's failure to deliver the apples) and was awarded $600 by the trial court.[1]

{¶ 56} In light of our resolution of TQL's first assignment of error, TQL's second

1. In its original decision granting judgment in favor of JK & R on TQL's cargo-loss claim, the trial court granted summary judgment to TQL on its freight-brokerage-fee claim, determining that JK & R was fully liable for the losses associated with the freight once the freight had been in its possession under the terms of the broker-carrier agreement. The trial court determined that TQL was entitled to $600 on its freight-brokerage-fee claim.

assignment of error is moot and need not be addressed. *See* App.R. 12(A)(1)(c); *Poteet v. MacMillan*, 12th Dist. Warren No. CA2021-08-071, 2022-Ohio-876.

{¶ 57} Judgment reversed and remanded.

HENDRICKSON and BYRNE, JJ., concur.