[Cite as *Cintrifuse Landlord, L.L.C. v. Panino, L.L.C.*, 2022-Ohio-4104.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CINTRIFUSE LANDLORD, LLC,	:	APPEAL NOS. C-220050 C-220065
Plaintiff-Appellee/ Cross-Appellant,	:	TRIAL NO. A-2000757
vs.	:	*O P I N I O N.*
PANINO, LLC,	:	
and	:	
NINO LORETO,	:	
Defendants-Appellants/ Cross-Appellees/ Third-Party Plaintiffs,	:	
and	:	
REMO A. LORETO,	:	
and	:	
PATRICIA A. LORETO,	:	
Defendants,	:	
vs.	:	
CINCINNATI CENTER CITY DEVELOPMENT CORPORATION,	:	
Third-Party Defendant-Appellee.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded in C-220050; Appeal Dismissed in C-220065

Date of Judgment Entry on Appeal: November 18, 2022

Taft Stettinius & Hollister LLP, *Nicholas J. Pieczonka* and *Anna M. Greve,* for Plaintiff-Appellee/Cross-Appellant and Third-Party Defendant-Appellee,

Croskery Law Offices and *Robert F. Croskery,* for Defendants-Appellants/Cross-Appellees/Third-Party Plaintiffs.

CROUSE, Judge.

{¶1} Defendants-appellants Panino, LLC, ("Panino") and Nino Loreto appeal the trial court's decision to grant summary judgment to plaintiff-appellee Cintrifuse Landlord, LLC, ("Cintrifuse") and third-party defendant-appellee Cincinnati Center City Development Corporation ("3CDC"). Cintrifuse sued Panino and Loreto (collectively, "Appellants") for breach of contract, replevin, and conversion after Appellants failed to pay rent on Panino's restaurant space and removed personal property from the restaurant in which Cintrifuse claimed a security interest. Appellants countersued for breach of contract and fraud-related claims. For the reasons discussed below, we reverse the trial court's grant of summary judgment and remand for further proceedings.

Factual and Procedural History

{¶2} In April 2016, Panino, a restaurant owned and operated by Loreto, entered into a commercial lease agreement with Cintrifuse, a subsidiary of 3CDC.[1] The lease was for restaurant space located at 1313-1315 Vine Street in the Over-the-Rhine neighborhood of Cincinnati, Ohio.

{¶3} The parties discussed the construction of an outdoor dining/bar patio in the pocket park[2] called "Imagination Alley" next to Panino. However, patio space in

[1] Cintrifuse is a subsidiary of 3CDC, is represented by the same attorneys as 3CDC, and often acts through agents who are also 3CDC employees. For example, the Panino-Cintrifuse lease was signed for Cintrifuse by Adam Gelter, who is 3CDC's Executive Vice President. While we have attempted throughout this opinion to attribute acts of Cintrifuse and 3CDC to the correct entity, the record is not always clear as to which entity undertook certain acts. Where the record is unclear, we refer to Cintrifuse because it is the landlord and Panino's counterparty to the lease agreement, as well as the plaintiff in this action.

[2] A pocket park is a small, outdoor space, typically located in an urban area without many other opportunities for outdoor recreation. National Recreation and Park Association, *Creating Mini-Parks for Increased Physical Activity*, https://www.nrpa.org/contentassets/f768428a39aa4035ae55b2aaff372617/pocket-parks.pdf (accessed Nov. 1, 2022). Such parks may offer event spaces, playgrounds, or other means for the general public to enjoy the outdoors. *Id.*

the pocket park was not a part of the lease agreement because the park was not owned by Cintrifuse or 3CDC. The adjacent portion of Imagination Alley was and is owned by the city of Cincinnati, and the park was managed by the Cincinnati Recreation Commission ("CRC") at all relevant times.

{¶4} The lease agreement included the following provision regarding attempts to acquire the park:

> 3.8. Landlord and Tenant both desire that an outdoor service area/bar area shall be created and included within this Lease. Tenant and Landlord both recognize that Landlord does not currently own the land upon which an outdoor service area/bar can be created. Landlord and Tenant will mutually agree upon the size to the outdoor service area/bar area. *Landlord shall provide its best efforts in obtaining the approval of the any [sic] governmental and community entities to purchase the land* and manage the installation of the outdoor bar and additional service area contemplated by the Landlord and Tenant. Additional service area/ bar [sic] area will be constructed at the sole cost of the Tenant.

(Emphasis added.) The parties refer to the emphasized provision as the "best-efforts" provision.

{¶5} Panino opened in November 2016 and operated for three years, but struggled financially. It ultimately accrued $175,000 in overdue rent. In November 2019, Cintrifuse sent Appellants a notice to leave the premises. In the notice, Cintrifuse instructed Loreto to leave the liquor license and various fixtures and pieces of restaurant equipment behind because, per the lease, Cintrifuse had a security interest in those items. In December, Cintrifuse sent Appellants two additional letters

reminding Loreto to leave the collateral in the building. When Loreto vacated the building on December 15, 2019, he took the liquor license and some of the restaurant equipment with him.

{¶6} In February 2020, Cintrifuse sued Appellants for breach of contract, replevin, and conversion. Cintrifuse later amended its complaint to add as defendants Loreto's parents, Remo and Patricia Loreto, who had helped finance the restaurant. Appellants brought counterclaims for breach of contract, bad-faith breach of contract, and abuse of process. Appellants also asserted third-party claims against 3CDC for fraudulent inducement, fraud by omission and misrepresentation, and conspiracy to commit abuse of process.

{¶7} In July 2020, the court held a multiday replevin hearing to determine whether Cintrifuse was entitled to take immediate possession of the collateral it claimed under the lease pending a final judgment in this action. To be entitled to immediate possession, Cintrifuse was required to demonstrate probable cause of its right to permanent possession of the collateral. *See* R.C. 2737.03 and 2737.07(B). The court ruled that Cintrifuse had failed to carry its burden because it had failed to prove "best efforts to obtain ownership or control of the patio area."

{¶8} In September 2021, Cintrifuse and 3CDC moved for summary judgment. The trial court granted the motion, and, after a hearing on the matter, awarded Cintrifuse $197,161.41 in damages. This appeal timely followed.

{¶9} Appellants argue in three assignments of error that the trial court erred in granting summary judgment in favor of Cintrifuse and 3CDC because (1) Cintrifuse and 3CDC failed to satisfy their best-efforts obligation under the lease agreement; (2) Cintrifuse and 3CDC fraudulently induced Loreto into signing the lease agreement;

and (3) Cintrifuse and 3CDC committed fraud by telling Loreto that they were "planning to move forward with the patio construction" in June 2016.

{¶10} Cintrifuse has filed a cross-appeal, arguing that the trial court erred in failing to award it additional damages for build-out and liquor-license expenses and attorney fees.

{¶11} For the reasons discussed below, we sustain Appellants' first assignment of error and overrule their second and third assignments of error. Our disposition of the first assignment of error makes the cross-assignment of error moot. We reverse the trial court's judgment and remand the cause to the trial court.

The Notice of Appeal

{¶12} Cintrifuse and 3CDC argue that Appellants failed to appeal the grant of summary judgment in favor of 3CDC, and, therefore, this court should not entertain their arguments as they relate to 3CDC.

{¶13} App.R. 3(D) governs the contents of the notice of appeal. It states, "The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or *part thereof appealed from*; and shall name the court to which the appeal is taken." (Emphasis added.)

{¶14} Where the notice of appeal is "technically incorrect," but fulfills its "basic purpose of informing the parties and the court, in a timely manner, of appellant's intention of appealing a specified judgment," the notice of appeal is sufficient. *Natl. Mut. Ins. Co. v. Papenhagen,* 30 Ohio St.3d 14, 16, 505 N.E.2d 980 (1987). "[J]ustice is ultimately best served by an attitude of judicial tolerance toward minor errors, made in good faith, which pose no danger of prejudice to the opposing party or to the court's essential functions." *Id.*

{¶15} Cintrifuse is the plaintiff and 3CDC is a third-party defendant. Cintrifuse and 3CDC jointly moved for summary judgment. The trial court granted summary judgment as to both in an entry entitled "Order Granting Motion of Cintrifuse Landlord, LLC and Cincinnati Center City Development Corporation for Summary Judgment." Appellants' notice of appeal is entitled "Defendants' Notice of Appeal of the Order Granting *Defendant's* [sic] Motion for Summary Judgment and on the Final Order Awarding Damages." (Emphasis added.) In the notice, Appellants stated that they were appealing the "Attached Order and Entry Granting Plaintiff's Motion for Summary Judgment" and the "attached Final Order dated January 25, 2022, awarding Damages to Plaintiff." Attached to the notice of appeal are the trial court's order granting summary judgment and final order on damages. Appellants' appeal can be read as appealing the judgment as to both the third-party defendant and the plaintiff. And, despite the flaws, the notice of appeal informed the parties of Appellants' intention to appeal the trial court's order granting summary judgment in favor of both Cintrifuse and 3CDC. Cintrifuse is a subsidiary of 3CDC and both parties were represented by the same lawyers. Both parties were served with the notice of appeal. This court will entertain Appellants' arguments as they relate to 3CDC.

Cintrifuse's Waiver Arguments

{¶16} Cintrifuse alleged claims for breach of contract, replevin, and conversion. It claimed that Panino's failure to pay rent resulted in a breach of the lease agreement. It claimed conversion and replevin because Loreto took the liquor license and some of the restaurant equipment with him when he vacated the premises in December 2020.

{¶17} Cintrifuse argues that Appellants' failure to discuss the replevin and

conversion claims in their merit brief has resulted in a waiver of any argument on those claims. Appellants contend that they did not discuss the conversion and replevin claims because those claims are contingent on the breach-of-contract claim. Appellants argue that Cintrifuse would have no right to the collateral if not for Panino's failure to pay rent, and that Panino would not have failed to pay rent if not for Cintrifuse's failure to satisfy its best-efforts obligation. Because there are genuine issues of material fact as to whether Cintrifuse satisfied its best-efforts obligation, we cannot say at this point whether Cintrifuse has a right to possession of the collateral. Therefore, Appellants have not waived their arguments regarding Cintrifuse's conversion and replevin claims.

{¶18} Cintrifuse also argues that Appellants waived their abuse-of-process claim by not discussing it in their appellate brief. Appellants argue that they did not discuss the abuse-of-process claim because the court rendered a judgment on the merits in Cintrifuse's favor.

{¶19} Abuse of process consists of the attempt to "achieve through the use of the court that which the court is itself powerless to order." *Gemperline v. Franano,* 5th Dist. Delaware No. 21 CAE 01 0002, 2021-Ohio-2394, ¶ 19, quoting *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 271, 662 N.E.2d 9 (1996). In an abuse-of-process case, "the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Id.*

{¶20} Because the court granted Cintrifuse and 3CDC's motion for summary judgment, there simply was nothing for Appellants to discuss on appeal regarding

their abuse-of-process claim. Appellants have not waived their claim for abuse of process.

Summary Judgment

{¶21} This court reviews a trial court's decision on summary judgment de novo. *Amankwah v. Liberty Mut. Ins. Co.*, 2016-Ohio-1321, 62 N.E.3d 814, ¶ 9 (1st Dist.). Summary judgment is proper under Civ.R. 56(C) when no genuine issues as to any material fact remain; the moving party is entitled to judgment as a matter of law; and it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Id.*

Appellants' First Assignment of Error

{¶22} In their first assignment of error, Appellants argue that the trial court erred in holding that there was no genuine issue of material fact regarding whether Cintrifuse had used its "best efforts" to obtain the approval of governmental and community entities for the acquisition of the patio. Appellants contend that multiple facts demonstrate that Cintrifuse breached the lease agreement when it failed to satisfy its best-efforts obligation. To prevail on a breach-of-contract claim, a party must prove the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *White v. Pitman*, 2020-Ohio-3957, 156 N.E.3d 1026, ¶ 37 (1st Dist.).

I. Best Efforts Defined

{¶23} The phrase "best efforts" is not defined in the lease agreement. Therefore, it is up to the court to define the phrase while considering the circumstances

surrounding the agreement. *See Perma Research & Dev. Co. v. Singer Co.*, 308 F.Supp. 743, 748 (S.D.N.Y.1970) (" 'Best efforts' * * * is a term which necessarily takes its meaning from the circumstances."); *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 233 (3d Cir.2001) (" 'Best efforts' has been widely held to be an ambiguous contract term * * * [and] depends on the factual circumstances surrounding an agreement.").

{¶24} Definitions of "best efforts" vary among jurisdictions. A minority of courts have held that "best efforts" is equivalent to the duty of good faith. *See* Thau, *Is This Really the Best We Can Do? American Courts' Irrational Efforts Clause Jurisprudence and How We Can Start to Fix It*, 109 Geo.L.J. 665, 673 (2021); *Macksey v. Egan*, 36 Mass.App.Ct. 463, 471, 633 N.E.2d 408 (1994), fn. 16; *Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir.1987).

{¶25} However, a duty of good faith is implied in every contract. Therefore, equating best efforts with good faith would make best-efforts clauses meaningless.

{¶26} Other courts have distinguished best efforts from good faith by holding that diligence is central to best efforts, while fairness and honesty are central to good faith. *See Natl. Data Payment Sys. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir.2000) ("The duty of best efforts 'has diligence as its essence' and is 'more exacting' than the usual contractual duty of good faith."); *Triad Packaging, Inc. v. SupplyOne, Inc.*, 597 F.Appx. 734, 742 (4th Cir.2015) ("best efforts generally means 'diligent attempts to carry out an obligation.' "); Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U.Pitt.L.Rev. 1, 8 (1984) ("Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only

on those contracting parties that have undertaken such performance.").

{¶27} Other courts focus on the reasonableness of the efforts. *See, e.g., Doyle v. Jewell*, D.Utah No. 2:13-cv-861-CW, 2015 U.S. Dist. LEXIS 47766, *18 (Apr. 9, 2015) ("The very purpose of a best-efforts clause is to commit a party to undertake all reasonable actions in light of circumstances beyond its control."). In fact, some courts equate "reasonable efforts" with "best efforts." *See, e.g., Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 (6th Cir.1990), fn. 2 ("A more accurate description of the obligation owed would be the exercise of 'due diligence' or 'reasonable efforts.' "). A minority of courts have rejected this notion entirely and have held that a duty of best efforts requires *more* than reasonable efforts. Thau, 109 Geo.L.J. at 683.

{¶28} There is little case law in Ohio on the matter. The Eighth District, in interpreting a best-efforts obligation in a dissolution decree, utilized the *Black's Law Dictionary* definition of "best efforts." *Bridgeland v. Bridgeland*, 8th Dist. Cuyahoga No. 109831, 2021-Ohio-2587, ¶ 23. The court defined best efforts as:

> Diligent attempts to carry out an obligation; esp., all actions rationally calculated to achieve a stated objective, to the point of leaving no possible route to success untried. As a standard, a best-efforts obligation is stronger than a good-faith obligation. Best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take.

Id., quoting *Black's Law Dictionary* 196 (11th Ed.2019). The court also stated that "best efforts" are "marked by flexibility and reasonable breadth, rather than meticulous specificity." *Id.*

{¶29} Despite the disaccord among courts, there seems to be widespread

agreement that "best efforts" does not mean "every conceivable effort," nor does it guarantee a certain result. *See, e.g., Coady Corp. v. Toyota Motor Distribs.*, 361 F.3d 50, 59 (1st Cir.2004) (" 'Best efforts' is implicitly qualified by a reasonableness test–it cannot mean everything possible under the sun."); *Mark Technologies Corp. v. Utah Resources Internatl., Inc.*, 2006 UT App 418, 147 P.3d 509, ¶ 8 ("Neither success nor the single-minded pursuit of the objective is required."); *Doyle* at *18 ("A best-efforts clause does not assure that the goal will be accomplished."). Thus, we reject the Eighth District's inclusion of "all actions rationally calculated to achieve a stated objective, to the point of leaving no possible route to success untried" in a practical definition of "best efforts." *Bridgeland* at ¶ 23.

{¶30} Courts also commonly consider the responsible party's sophistication and skills, as well as the standards of the relevant industry when determining whether the party has made its best efforts. *See Bloor v. Falstaff Brewing Corp.*, 454 F.Supp. 258, 267 (S.D.N.Y.1978) (the promisor's actions should be judged in accordance with the "average, prudent, comparable" party); *First Union Natl. Bank v. Steele Software Sys. Corp.,* 154 Md.App. 97, 173, 838 A.2d 404 (2003) (in making its best-efforts determination, the jury was entitled to consider "the standard in the industry regarding similar contracts between banks and their settlement service vendors"); Farnsworth, 46 U.Pitt.L.Rev. at 9 ("[I]f the promisor is a person, such as an architect or lawyer, whose occupation is to make special skills available to those who do not possess those skills, courts commonly ask what efforts a person possessing those skills would use if that person were in the promisor's place.").

{¶31} As the facts of the present case demonstrate, commercial real estate cases often involve multiple parties and multiple factors that are outside of the

contracting parties' control. Contractual obligations may take years to fulfill, with the circumstances surrounding the obligations constantly changing. Adopting an overly onerous definition of best efforts would contradict this reality. Therefore, we choose to focus on the diligence of the responsible party and the reasonableness of its actions in light of the attendant circumstances.

{¶32} We therefore synthesize "best efforts" as follows: The duty of "best efforts" is more exacting than the duty of good faith. *Natl. Data Payment Sys., Inc.*, 212 F.3d at 854. It requires the promisor to pursue its contractual obligations diligently and with reasonable effort considering its ability, the means at its disposal, and the other party's justifiable expectations. *Triad Packaging, Inc.*, 597 F.Appx. at 742; *T.S.I. Holdings, Inc. v. Jenkins*, 260 Kan. 703, 720, 924 P.2d 1239 (1996). The duty of best efforts requires that the responsible party pursue all reasonable methods of satisfying its obligations in light of circumstances beyond its control. *Kroboth v. Brent*, 215 A.D.2d 813, 814, 625 N.Y.S.2d 748 (1995); *Doyle*, D.Utah No. 2:13-cv-861-CW, 2015 U.S. Dist. LEXIS 47766, at *18; *United Telecommunications, Inc. v. Am. Television & Communications Corp.*, 536 F.2d 1310, 1319 (10th Cir.1976), fn. 8. "Best efforts" does not mean leaving no stone unturned or making every conceivable effort.

II. Best Efforts and Summary Judgment

{¶33} Because best-efforts determinations are typically fact-intensive inquiries, courts often hold that the issue is inappropriate for summary judgment. *See First Union Natl. Bank*, 154 Md.App. at 139, 838 A.2d 404 ("although contract interpretation is generally a question of law, a factual determination may be required as to what is deemed to be 'best efforts.' "); *Cook v. Wal-Mart, Inc.*, 8th Dist. Cuyahoga

No. 79451, 2002 Ohio App. LEXIS 937, *9 (Mar. 7, 2002) ("The best efforts required by the contract is a highly individual standard. Whether appellant complied with it is an issue of fact."); *Toth Auto Lease, Inc. v. Palladina*, 8th Dist. Cuyahoga No. 44965, 1983 Ohio App. LEXIS 15287, *3 (Jan. 27, 1983) (holding that because the parties testified to different understandings of the term "best efforts," and the contract did not define that term or outline objective methods to determine "best efforts," the meaning of the phrase was a question of fact); *Clarke v. Hartley*, 7 Ohio App.3d 147, 151, 454 N.E.2d 1322 (8th Dist.1982) (holding that whether the buyer made a best effort at obtaining financing by applying for a loan at only one lending institution was a question of fact for the jury); *see also Weaver v. Romaniuk*, 1st Dist. Hamilton No. C-890642, 1990 Ohio App. LEXIS 4931, *4 (Nov. 14, 1990) (holding that whether the responsible party had made a "diligent effort" to obtain financing by submitting one loan application was an issue for the trier of fact).

{¶34} "The law interpreting the best efforts standard focuses on the factual nuances of the parties' dispute." *Marquardt Co. v. United States*, 101 Fed.Cl. 265, 273 (2011). "The best efforts standard 'cannot be defined in terms of a fixed formula; it varies with the facts and the field of law involved.' " *Id.*, quoting *Pinpoint Consumer Targeting Servs., Inc. v. United States*, 59 Fed.Cl. 74, 82 (2003), quoting *Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc.*, 832 F.2d 214, 225 (1st Cir.1987). "Whatever the variation in the exact terms used to express the legal standard for best efforts, courts largely agree that in many cases 'disputes as to the application of "best efforts" clauses present factual issues that preclude summary judgment.' " *Id.* at 237-274, quoting *Northrop Grumman Computing Sys., Inc. v. United States*, 93 Fed.Cl. 144, 151 (2010), fn. 7.

{¶35} In *Marquardt,* the court denied the government's motion for summary judgment because "neither party's interpretation of the clause can be sustained by looking only to the plain text of the Agreement." *Id.* at 272. "[R]esolution of the parties' dispute here requires resolution of disputed factual questions and, in particular, 'requires knowledge not only of what [the defendant] did, but could have done, to obtain this funding.' " *Id.* at 274, quoting *Northrop* at 150.

{¶36} Cintrifuse argues that summary judgment can be appropriate in cases involving best-efforts provisions and cites several cases from outside Ohio in support. *See, e.g., Kalenburg v. Klein*, 847 N.W.2d 34, 39 (Minn.App.2014) (affirming summary judgment in favor of residential homebuyer where the buyer had used best efforts to attempt to obtain financing after being denied financing by two separate lenders based on a low appraisal value of the property); *Stand Up Digital, Inc. v. Hart*, 838 Fed.Appx. 733, 735-736 (4th Cir.2020) (affirming summary judgment in favor of defendant-comedian where comedian obligated to use best efforts to promote a video game failed to appear at an in-store promotion, but participated in other promotional opportunities, such as social media posts, and made the game over $1 million); *Agrico Canada Ltd. v. Helm Fertilizer Corp.*, 385 Fed.Appx. 898, 899-900 (11th Cir.2010) (affirming summary judgment in favor of shipper of bulk fertilizer where the shipper was required to use "best efforts" to deliver fertilizer within a 15-day window and made delivery six hours after the window had expired). However, we note that these cases are either factually much simpler than the present case (*Kalenburg*, *Agrico*) or the courts did not analyze the best-efforts issue with much depth (*Hart*, *Agrico*).

{¶37} There may be rare cases in which summary judgment is appropriate to resolve the question of whether a contracting party has met its best-efforts obligation.

However, because there remain genuine issues of material fact discussed below, this is not such a case.

III. Efforts to acquire Imagination Alley

{¶38} Cintrifuse and 3CDC primarily interacted with two entities to acquire Imagination Alley: CRC and the Over-the-Rhine Community Council ("OTRCC").

{¶39} In September 2015, Loreto signed a letter of intent to lease the space at 1313-1315 Vine Street. At that time, Cintrifuse had a temporary lease with CRC to use Imagination Alley as a place to store construction equipment for construction work being done on the building at 1313-1315 Vine Street. On October 12, 2015, Adam Gelter of 3CDC attended a meeting of the OTRCC Board of Trustees and discussed the park. According to the meeting minutes, 3CDC proposed that Cintrifuse be granted a long-term, expanded lease to Imagination Alley "to maintain the art, the public use and manage the park." On October 15, 2015, Gelter sent an email to Markiea Carter of the city of Cincinnati. He informed Carter that 3CDC had "both CRC and OTR Community Council Board support for a long term lease for Imagination Alley," pursuant to three conditions. One of the conditions was that "a portion of the alley" would remain open to the public. Stephen Pacella of CRC, in an email to Carter dated October 20, 2015, confirmed CRC support, "based on community council approval and that as much of the art as possible could be utilized/incorporated into any new design."

{¶40} Gelter attended an OTRCC member's meeting on October 26, 2015. According to the meeting minutes, Gelter expressed that Cintrifuse was interested in a long-term master lease of the park. Cintrifuse would maintain the art and murals, "create a space near the sidewalk for public," and would reserve "the back half of the space for their own use," although Gelter did not clarify how Cintrifuse would use the

back half of the space. Imagination Alley was further discussed at the November 23, 2015 and January 25, 2016 meetings, where 3CDC presented OTRCC with an image of Imagination Alley that showed that a pedestrian walkway through the park would be preserved.

{¶41} Gelter testified at the July 28, 2020 replevin hearing that in early 2016, Cintrifuse had the support of the city manager and CRC director for its plan to either purchase or long-term lease Imagination Alley. But in May 2016, the director of CRC changed, and Daniel Betts came into the position. Gelter testified that Betts was more sensitive to the community's views and eventually made it a condition of the sale or lease of the park that the parties get the approval of OTRCC. Gelter testified that as a result, the strategy employed by Cintrifuse changed. The new strategy was to convince OTRCC that Cintrifuse would make improvements to Imagination Alley as a whole. If OTRCC approved of the idea, Betts would then present the plan to the CRC board of commissioners for final approval.

{¶42} As representative for Panino under Civ.R. 30(B)(5), Loreto testified in his deposition that before signing the lease on April 29, 2016, he had been assured many times by multiple people at 3CDC that he would have the patio. On May 3, 2016, the Business Courier published an article in which Loreto mentioned that his new restaurant would have a patio. Susan Tolentino of 3CDC called Loreto and told him that he should not have discussed the patio with the Business Courier reporter because the land had not yet been acquired. Loreto emailed Tolentino and apologized for mentioning the patio in the interview. He explained that he had told the reporter that the city still owned the land, "so it was still uncertain." Loreto stated, "I have been assured that we will have an outdoor patio, so I didn't think I had stepped on any

toes * * *." He explained, "no one told me not to talk about the patio until this morning." He further said, "I'll go to any meeting you need me to go to and plead my case!!!"

{¶43} Tolentino emailed Loreto back and explained that "anything regarding the patio need[s] to remain quiet to help us gain support from community council to purchase the alley. * * * We are doing everything we can to gain the alley and hope to have the community on our side. We hope to open in the early fall."

{¶44} Cintrifuse's efforts to acquire the park continued through June. Betts emailed Gelter on June 3, indicating that he wanted to lease the space to Cintrifuse, but needed to talk to the city manager and the CRC board first. Gelter sent Betts a draft of a proposed lease on June 9. Betts discussed the idea with Dan Jones of CRC and Jones provided him the appraisal value from three years prior and recommended that a new appraisal be done before the lease was discussed with the legal department.

{¶45} On June 17, 2016, Tolentino emailed Ron Novak and Alex Dever of Drawing Dept, an architectural firm. Tolentino copied Loreto on the email. The email said: "Ron/Alex we are planning to move forward with the patio construction. We will need information on the sizing of the pad etc. As well as something for the fence design. Please let me know what questions you may have."

{¶46} On July 5, Danny Lipson of 3CDC emailed Betts for an update on Imagination Alley. At a CRC meeting on July 19, Betts indicated that the proposed lease from Cintrifuse was with the legal department for review. On July 29, Lipson emailed Betts regarding the details of the lease/purchase. He told Betts that 3CDC was "happy to buy it [at] appraised value now or at that value in 5 years."

{¶47} On September 1, Betts sent an email to Dan Jones of CRC indicating that

he would place a call later that day to Martha Good, at that time the president of OTRCC, to discuss Imagination Alley. On September 20, Betts received the appraisal from the legal department. Lipson followed up multiple times, and on September 29, Betts sent Lipson two options: (1) sale of the park at the "fair market value" of $245,000 or (2) lease with an annual rate at the "fair market value" of $16,000.

{¶48} On October 18, Betts discussed Imagination Alley at a CRC meeting. According to the meeting minutes, Betts requested a one-year extension of the short-term lease to Cintrifuse and discussed the possible sale of Imagination Alley. On November 3, Betts emailed Sheila Hill-Christian of the city manager's office. He said that CRC was working with 3CDC and OTRCC on issues related to the displacement of community artwork in the park, and that once those issues were resolved CRC intended to sell the land to 3CDC at market value.

{¶49} On January 19, 2017, Gelter attended an OTRCC board of trustees meeting and presented an update on Imagination Alley. According to the minutes, 3CDC was interested in leasing or buying the park "with a commitment to keep it as a public space." On January 23, 2017, Gelter attended an OTRCC member's meeting to discuss Imagination Alley. A working group was created between CRC, OTRCC, 3CDC, and Cintrifuse to develop ideas for "improvement and solutions" for the park.

{¶50} By March 2017, Betts had reconsidered his willingness to sell the park. On March 17, 2017, Betts emailed Gelter to tell him, "We can come to an agreement on extended lease. Let's talk on Monday."

{¶51} OTRCC scheduled two public meetings on May 17 and May 24, 2017, to gather community input regarding Imagination Alley. By that point, 3CDC had indicated that it was okay with only acquiring a portion of the park. CRC presented the

attendees with four options to vote on: (1) CRC would maintain the site in its current condition; (2) CRC would sell or lease part of the site with the proceeds used to improve CRC property at Imagination Alley; (3) CRC would sell or lease the entire site, with the proceeds used to improve other CRC sites in Over-the-Rhine; (4) CRC would keep the site and redevelop the space for "requested uses." CRC tabulated the voting results from both meetings.

{¶52} Option one was supported by 11 people, option two was supported by 14 people, no one supported option three, and option four was supported by 16 people.

{¶53} CRC also sought community input using surveys. The surveys indicated a preference for keeping the space public, but there was some support for a mixed public/private option: 149 in favor of public, 11 in favor of private, and 79 in favor of a combination of public and private.

{¶54} Based on the results of the surveys and the votes cast at the May 17 and May 24 meetings, CRC decided to retain control of Imagination Alley and keep it as a public park.

{¶55} Things went relatively quiet for a while. On January 3, 2019, Gelter emailed Betts and attempted to reopen the discussion about Imagination Alley. This time, 3CDC sought only a "small patio area" for Panino. CRC was skeptical but recommended that the matter go back before OTRCC. Loreto testified that on May 20, 2019, he, his parents, and two local supporters attended an OTRCC meeting. Loreto testified that nobody from 3CDC was present. Loreto described the meeting as "verging on violent" resistance to any changes to Imagination Alley. A month after the meeting, OTRCC sent a letter to CRC. The letter stated, "Our community remains committed to the proposition that **all of Imagination Alley shall remain a public**

space open to all residents * * *." (Emphasis in original.)

IV. Disputes as to Best Efforts

{¶56} Appellants argue that there are several examples of Cintrifuse failing to use its best efforts. We will focus on two of their arguments.

{¶57} At the July 29, 2020 replevin hearing, Appellants offered into evidence an excerpt of a recording of a conversation that took place on December 18, 2018, between Gelter, Zurick, Loreto, Remo Loreto, and Loreto's business partner Joe Helm, where the parties discussed the status of the land for the patio. During that meeting, Gelter stated:

> I think it's probably a little more complicated than that because part of the issue is that in order to build the patio, one of us would have to invest a whole lot more money into it to build it. And I think, you know, our, going back and looking at it, you know, that was the bigger driver. Like, we still could, we still can and could plow through the city and get access to some space and I'm confident that we could do it, just like you said, it doesn't have to be exactly like what you're describing, but I can, yes, it's a fair point, if we needed to do that, we could. But at the time, you know, the budget came back, especially, you know, the money that we accumulated putting in, for the rent that we were getting back, you know, we, there wasn't any money, and you guys didn't have the money to do it, so we didn't have the money to build the patio.

{¶58} Gelter testified that the recording was taken out of context. He testified that he was referring to the fact that if Cintrifuse acquired the land, Panino would have to construct the patio at its own expense, and it did not have the money to do that. He

testified that Cintrifuse had the funds to acquire the land, but that it would not have mattered because Panino did not have the money to build the patio. Gelter testified that money was not the obstacle. The obstacle was that the city did not want to sell the park.

{¶59} This is a dispute of material fact. There are multiple ways to interpret what Gelter meant by "we still could, we still can and could plow through the city and get access to some space and I'm confident that we could do it, * * * but * * * there wasn't any money, and you guys didn't have the money to do it, so we didn't have the money to build the patio." Viewing the evidence in the light most favorable to Appellants, a reasonable person could interpret Gelter's statements as evidence that Cintrifuse had the ability to buy or lease the land, but chose not to do so, either because it did not want to spend the money or because it determined that even if it acquired the land, Panino would not have been able to build the patio. If the fact-finder adopted this view of Gelter's statements, it might conclude that by failing to carry through on that ability, Cintrifuse did not exercise its best efforts to acquire the land for the patio.

{¶60} Also, 3CDC indicated to OTRCC and representatives of the city several times throughout 2015-2017 that it was committed to keeping Imagination Alley open to the public. For example, such representations were recorded in the meeting minutes from the OTRCC meeting on October 12, 2015, in Gelter's email to Carter on October 15, 2015, and in the meeting minutes from the OTRCC meeting on January 19, 2017. It was also implied in the drawing of Imagination Alley discussed at the OTRCC meetings on November 23, 2015, and January 25, 2016. The trier of fact could conclude from 3CDC's repeated representations that the park would remain open to the public that neither 3CDC nor Cintrifuse was working diligently to acquire space in

the park for the private patio/bar of its lessee restaurant. Thus, there is genuine debate as to the reasonable efforts undertaken by Cintrifuse and 3CDC to push for private use of the park.

{¶61} Cintrifuse is a commercial landlord and subsidiary of 3CDC, a sophisticated development corporation that has handled many major development projects in Cincinnati. Whether Cintrifuse has met its best-efforts obligation is a question of fact as to whether Cintrifuse has put forth the diligence and reasonable effort to be expected of a corporation with its skills and resources, taking into account the standards of the commercial leasing industry. In evaluating such a question on summary judgment, we conclude there are genuine disputes of material fact both as to what efforts Cintrifuse and 3CDC actually expended, as well as what additional steps they might reasonably have taken under the circumstances.

{¶62} Given the nature of a dispute over whether a party has satisfied its best-efforts obligation and the disputes of material fact present in the record, the trial court erred in granting summary judgment in favor of Cintrifuse and 3CDC. Appellants' first assignment of error is sustained.

Appellants' Second Assignment of Error

{¶63} In their second assignment of error, Appellants contend that the trial court erred in granting summary judgment in favor of Cintrifuse and 3CDC on Appellants' claim for fraudulent inducement. Appellants argue that 3CDC fraudulently induced Loreto into signing the lease by not telling him about the OTRCC opposition to the patio before he signed the lease.

{¶64} The elements of a fraudulent-inducement claim are:

(1) an actual or implied false representation concerning a fact or, where

> there is a duty to disclose, concealment of a fact, material to the transaction; (2) knowledge of the falsity of the representation or such recklessness or utter disregard for its truthfulness that knowledge may be inferred; (3) intent to induce reliance on the representation; (4) justifiable reliance; and (5) injury proximately caused by the reliance.

Fannie Mae v. Hirschhaut, 1st Dist. Hamilton No. C-180473, 2019-Ohio-3636, ¶ 30.

{¶65} Appellants admit that 3CDC owed them no duty to disclose. But they argue that 3CDC was aware of substantial community opposition to the patio, and that by not disclosing that to Loreto, 3CDC implied that there was no substantial opposition. Appellants contend that this was an "implied false representation."

{¶66} Specifically, Appellants claim that Gelter's testimony shows that he was aware of community opposition to any alcohol sales in the park. However, Appellants did not provide a record citation for such testimony, and we have not found any evidence to support such a claim in either Gelter's deposition or his testimony at the replevin hearing.

{¶67} Appellants also argue that Palazzolo implied there was no strong community opposition when, in projecting Panino's financial prospects, he included revenue from the patio, which was higher than Loreto's own revenue projections. On February 1, 2016, Palazzolo emailed Loreto with information regarding current tenant sales at other Cintrifuse locations and his projection for Panino's possible sales. The email stated:

> Our current Tenant sales are as follows:
>
> The restaurants range from $600/square foot to $2,038/square foot. We believe that a conservative estimate would [be] $950/square foot.

> However, based on your concept being the only one of its kind in the neighborhood and the fast-casual set-up we think you can do upwards of $2,000/square foot in sales.

{¶68} Nowhere in the email does Palazzolo indicate that his numbers are based upon the patio being approved. Appellants argue that was implied where Palazzolo said that Panino was "the only one of its kind in the neighborhood." Gelter testified that other Cintrifuse/3CDC restaurants have patios. Moreover, even if Palazzolo assumed that the patio would be approved, he was making financial projections, not discussing the likelihood that the patio would be built.

{¶69} Finally, the lease that Loreto signed did not include the patio.

{¶70} Appellants have failed to demonstrate that any agent of 3CDC made an implied false representation about community opposition in order to mislead Loreto into signing the lease. In fact, the evidence shows that before the lease was signed, 3CDC believed a purchase of Imagination Alley would be approved by CRC. Therefore, the trial court did not err in granting summary judgment in favor of Cintrifuse and 3CDC on Appellants' fraudulent-inducement claim. The second assignment of error is overruled.

Appellants' Third Assignment of Error

{¶71} In their third assignment of error, Appellants argue that the trial court erred in granting summary judgment in favor of Cintrifuse and 3CDC on their fraud claim.

{¶72} The elements of fraud are:

> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) 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, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

Meehan v. Mardis, 2019-Ohio-4075, 146 N.E.3d 1266, ¶ 19 (1st Dist.).

{¶73} Appellants argue that 3CDC committed fraud when Susan Tolentino copied Loreto on an email to Drawing Dept on June 17, 2016, and stated, "we are planning to move forward with the patio construction." Appellants claim that Loreto relied on Tolentino's email as an assurance that the patio had been approved. Loreto testified in his deposition that Tolentino told him on May 3 not to discuss the patio until 3CDC had the support of the community to acquire the alley, and she told him that there was an OTRCC vote the next week. Therefore, Appellants claim that when Loreto received Tolentino's email stating that the planning for the patio construction was going forward, Loreto believed that the purchase of Imagination Alley had been approved.

{¶74} Loreto testified that he waited to pay the "construction contribution" until June 23, 2016, because he had been withholding that payment until he saw in writing that the patio construction was moving forward. That allegation was disputed in Tolentino's deposition when she averred that Cintrifuse received the check before sending the June 17 email in question.

{¶75} Regardless of the timing of the construction contribution check vis-à-vis Tolentino's email, Appellants' fraud claim fails on the third and fourth elements. Tolentino's email did not contain any false statements. 3CDC had not acquired

Imagination Alley at that point, but that would not prevent 3CDC from planning for the patio's construction. At that point in time, both parties were still optimistic that the land would be acquired.

{¶76} Appellants' third assignment of error is overruled.

Cintrifuse's Cross-Assignment of Error

{¶77} In Cintrifuse's cross-assignment of error, it argues that the trial court erred in declining to award it damages for "build-out" and the liquor license expenses and attorney fees. Cintrifuse's assignment of error is moot based on our disposition of Appellants' first assignment of error.

Conclusion

{¶78} Appellants' first assignment of error is sustained. Their second and third assignments of error are overruled. Cintrifuse's cross-assignment of error is mooted by our disposition of Appellants' first assignment of error. Cintrifuse's cross-appeal numbered C-220065 is dismissed as moot. In Appellants' appeal numbered C-220050, the judgment of the trial court is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion and the law.

Judgment accordingly.

BERGERON, P.J., and **BOCK, J.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.

[Cite as *Crutcher v. Oncology/Hematology Care, Inc.*, 2022-Ohio-4105.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JOHN T. CRUTCHER,	:	APPEAL NOS. C-220086 C-220106
Plaintiff-Appellant/Cross-Appellee,	:	TRIAL NO. A-1804358
	:	
vs.	:	*O P I N I O N.*
ONCOLOGY/HEMATOLOGY CARE, INC.,	:	
	:	
OHC REAL ESTATE, LLC,		
and		
RANDY BROUN		
Defendants-Appellees/Cross-Appellants.		

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded.

Date of Judgment Entry on Appeal: November 18, 2022

Freking Myers & Reul LLC, *Jon B. Allison*, *Jacobs Kleinman Seibel & McNally LPA,* and *Mark J. Byrne,* for Plaintiff-Appellant/Cross-Appellee,

Katz, Teller, Brant & Hild, LPA, Robert A. Pitcairn, Jr., and *Peter J. O'Shea,* for Defendants-Appellees/Cross-Appellants.

BERGERON, Presiding Judge.

{¶1} What began as a promising enterprise for plaintiff-appellant/cross-appellee John T. Crutcher as Chief Executive Officer and Chairman of the Board of Directors of Oncology/Hematology Care, Inc., ("OHC") dissolved into bitterness and his ouster from the corporation. Dismayed by this turn of events, Mr. Crutcher embarked on a decade-long odyssey of litigation against OHC and its affiliates. In the midst of this battle, however, Mr. Crutcher accepted 64 months' worth of payouts from OHC Real Estate, LLC ("OHCRE")—the entity OHC created to hold the real estate that enabled OHC to operate its medical practice—to reimburse him for his equity stake in OHCRE. After more than five years of pocketing these payments, Mr. Crutcher suddenly concluded that he was robbed, and commenced another front in the widening litigation skirmish.

{¶2} In this case, he sued the defendants-appellees/cross-appellants OHC, OHCRE, and Dr. Randy Broun (collectively "the OHCRE defendants"). Although the trial court ruled in his favor regarding his entitlement to an equity payout from OHCRE, Mr. Crutcher now disputes the amount on appeal. But the trial court found him bound, by virtue of waiver by estoppel, to OHCRE's calculations based on his acceptance of those amounts for more than five years. As we explain below, we agree with that conclusion. In fact, we agree with nearly all of the trial court's determinations, and therefore overrule both of OHCRE's cross-assignments of error, and the balance of Mr. Crutcher's assignments of error, save one. We find that the trial court improperly excluded prejudgment interest from its damage computation. Therefore, we remand the cause for that interested to be added but otherwise affirm the trial court's judgment.

I.

{¶3} After OHC formed OHCRE with Mr. Crutcher as a founding member, Mr. Crutcher took the reins as one of two managers of OHCRE in 2004, to "manage and control the business, affairs and properties" of OHCRE in conformity with its Operating Agreement ("Operating Agreement"). During his extensive involvement with OHC and OHCRE, Mr. Crutcher made a series of monetary investments in OHCRE, providing himself with an equity stake in the LLC.

{¶4} Upon the termination of a member of OHC, the Operating Agreement calls for the remaining members or the company to purchase the departing member's interest. As spelled out in the document, a member's "Financial Interest" is comprised of various accounts, including an account that accrues 15 percent interest annually. Mr. Crutcher, at the helm of OHCRE and conversant with the Operating Agreement, certainly should have understood how all of this worked.

{¶5} OHC terminated Mr. Crutcher in July 2010. Thereafter, OHCRE determined that his Financial Interest totaled $178,535—predicated on the investments he contributed into the LLC. Pursuant to section 6.5(c)(2) of the Operating Agreement, OHCRE elected to pay Mr. Crutcher this amount over ten years with interest beginning in September 2010. A few months after OHCRE began making these payments to Mr. Crutcher—payments that he gladly accepted—he launched his first lawsuit against OHC.

{¶6} As part of that lawsuit, Mr. Crutcher submitted an interrogatory requesting the valuation of his membership interest in OHCRE, and he received a schedule illustrating OHCRE's calculation. When Mr. Crutcher filed two motions to

compel discovery in 2010, he never claimed that OHC withheld information related to the calculation of his Financial Interest or the investments he made in OHCRE.

{¶7} After our court dismissed an appeal of the 2010 lawsuit, Mr. Crutcher filed two additional lawsuits against OHC and related parties in 2015. In the first complaint, Mr. Crutcher alleged that OHC owed him approximately $178,535.49, representing his shares in OHCRE. In other words, by this point, Mr. Crutcher had (1) requested and received information concerning the calculation of his Financial Interest, (2) moved to compel discovery on other issues but not anything pertaining to the calculation of his Financial Interest, and (3) confirmed OHCRE's calculation of his stake in OHCRE.

{¶8} With the parties embroiled in litigation, in December 2015, OHC and OHCRE went into forbearance with their senior lender, U.S. Bank. Based on this turn of events, Dr. Broun and OHC demanded that Mr. Crutcher sign a subordination agreement, as requested by U.S. Bank. Section 6.5(c)(2) of the Operating Agreement, a provision concerning a former member's payout of their Financial Interest, provides "as a precondition to receiving any payment from the Company * * * [Mr. Crutcher] shall execute any subordination agreement requested by any lenders or other credit providers to the Company or any of its subsidiaries." After fits and starts of negotiation over the subordination agreement, Mr. Crutcher never signed it, and OHCRE's monthly payments to him ceased. By this point, OHCRE had made 64 monthly payments to Mr. Crutcher, but it still owed him $91,968.57.

{¶9} As the litigation dragged on, the parties started discussing settlement. In December 2016, Mr. Crutcher and OHC entered into a settlement agreement (the "Settlement Agreement"). Although the settlement included a broad release against

OHC and its affiliates, the agreement included a carveout, allowing Mr. Crutcher to pursue "any sums that Crutcher is owed, or claims to be owed, from OHC Real Estate, LLC." In other words, this settlement did not resolve the dispute over the Financial Interest payouts that lies at the heart of the present litigation.

{¶10} Meanwhile, business conditions changed for OHCRE, and its board ultimately decided to liquidate its assets, setting in motion a process that would lead to the dissolution of OHCRE. That meant that assets would be sold, and debts (including Mr. Crutcher's) would need to be paid. Happily, OHCRE fetched more for the assets than it had in debt, and thus it began carving up the proceeds. OHCRE eventually determined that Mr. Crutcher's pro-rata share of the liquidation proceeds based off his remaining debt was $149,139. This calculation inured to his benefit because his Financial Interest (i.e., the debt owed to him) at that time totaled only $91,968.57.

{¶11} Nevertheless, that prompted the next salvo in the parties' battle. Mr. Crutcher insisted that the OHCRE defendants were hiding information from him about the relevant calculations, whereas they countered that they had divulged everything that was pertinent. With everyone at an impasse, Mr. Crutcher filed this suit in 2018 against the OHCRE defendants asserting 11 claims, including a breach of contract claim and a failure to pay liquidation proceeds claim. The OHCRE defendants responded with three counterclaims, asserting two separate breach of settlement agreements claims.

{¶12} Although Mr. Crutcher had previously calculated his Financial Interest in litigation as $178,535.49—and accepted five years of monthly payments based off that amount—he declared in the present complaint that he is owed a total "of

$3,422,000 to $5,658,000." Later in the litigation, after the trial court asked him to calculate his damages, he pivoted, alleging that "the amount owed Crutcher as of June 1, 2021 with prejudgment interest is $659,639."

{¶13} After both parties filed cross-motions for summary judgment and after the trial court asked the parties to submit calculations for damages, the court issued a series of rulings germane to this appeal: (1) it granted summary judgment for Mr. Crutcher for his breach of contract and liquidation proceeds claims, awarded him $149,573.09, and granted judgment in his favor for the OHCRE defendants' non-disparagement claim; (2) it granted summary judgment in favor of the OHCRE defendants for the remaining claims brought by Mr. Crutcher, and for their breach of settlement counterclaim, awarding them $70,000; and (3) it concluded that Mr. Crutcher was not a member of OHCRE after July 1, 2010. Those rulings triggered an appeal (by Mr. Crutcher) with six assignments of error, and a cross-appeal (by the OHCRE defendants) with two assignments of error.

II.

A.

{¶14} In his first assignment of error, Mr. Crutcher asserts that the trial court erred when it limited his damages to $149,573.09 on his breach of contract and liquidation proceeds claims. The trial court rejected the higher damage amounts that Mr. Crutcher advanced and invoked the waiver by estoppel doctrine to limit Mr. Crutcher's damages due to his acceptance of payments for over five years, his representations to the court in earlier litigation of a Financial Interest that comported with the OHCRE defendants' calculations, and his failure to contest these amounts

across years of litigation. For the reasons that follow, we agree with the trial court's conclusion.

{¶15} " '[W]aiver by estoppel' exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it." (Emphasis omitted.) *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, 834 N.E.2d 836, ¶ 24 (11th Dist.), quoting *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.,* 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, ¶ 57 (4th Dist.). Whether a party's conduct constituted a waiver generally presents a factual question. *Mark-It Place Foods, Inc.* at ¶ 58 ("If [plaintiff] knew of the breach * * * but represented to [defendant] that no breach had occurred * * * this could constitute a waiver of its rights. Again, this issue is best left for final determination by the trier of fact."). And, of course, we review a grant of summary judgment de novo. *Milatz v. City of Cincinnati*, 1st Dist. Hamilton No. C-180272, 2019-Ohio-3938, ¶ 6.

{¶16} The trial court determined that while Mr. Crutcher was in active dispute and litigation with the OHCRE defendants, he accepted 64 monthly payments from OHCRE between 2010 to 2015, totaling $114,778.24 (based on the aggregate $178,000 figure). Now Mr. Crutcher claims that OHCRE duped him by concealing relevant financial documents which should liberate him from his prior actions.

{¶17} Yet while allowing the OHCRE defendants to fill his bank account 64 times, he never once protested the value of those deposits. During his deposition, Mr. Crutcher maintained that the payments ran afoul of the mandates of the Operating Agreement. However, in response to questioning about OHCRE's failure to apply a 15 percent compounding interest rate to an account in his Financial Interest, Mr.

Crutcher admits he "had other issues that were more important * * * I'm not supposed to say this, I guess, but I consulted with my lawyer about whether it was okay to cash the check * * * this was an issue that would be dealt with later." In other words, he specifically knew that (according to him) OHCRE was paying him the wrong amount of money, but he sounded no alarm.

{¶18} We also must emphasize that Mr. Crutcher was a very sophisticated party—if anyone could detect aberrant calculations, he could. After all, he developed the idea to form OHCRE in the first place, he reviewed the iterations of the Operating Agreement multiple times before its finalization, and he was one of two managers of OHCRE at its inception—Mr. Crutcher was intimately familiar with the operations of OHCRE and knew exactly how to calculate his Financial Interest. Moreover, Mr. Crutcher's Financial Interest is predicated on *his own investments in OHCRE*, investments that he should certainly have knowledge of.

{¶19} And for years prior to this litigation, Mr. Crutcher saw eye to eye with the OHCRE defendants concerning the value of his Financial Interest. He claimed the amount to be $178,535.49 in his complaint in 2010, repeated that again in his complaint in 2015, during a deposition in 2015 declared he was owed "[s]omewhere in the ballpark of $100,000" (which corresponds to the about $90,000 outstanding at the time), and in a summary judgment briefing in 2016, he alleged that his debt was "originally approximately $180,000.00 and is currently approximately $100,000." These aren't accidental slips of the tongue—rather, they represent a consistent position he took in litigation that stands at odds with his present posture.

{¶20} In light of nearly six years of consistent actions and representations by Mr. Crutcher, the OHCRE defendants established clear, unequivocal and decisive

actions by him compelling the grant of summary judgment. *Pollard v. Elber*, 2018-Ohio-4538, 123 N.E.3d 359, ¶ 35 (6th Dist.) ("A party asserting waiver must prove it by establishing a clear, unequivocal, decisive act by the other party, demonstrating the intent to waive."); *Rayl v. East Ohio Gas Co.*, 46 Ohio App.2d 175, 179, 348 N.E.2d 390 (9th Dist.1975) ("[P]laintiffs accept[ed] quarterly payments from defendant for a period of fifteen months after this action was originally filed, * * * [and] they did act in a manner inconsistent with the attempted termination of the agreements. Because plaintiffs accepted the benefits of their agreement during the pendency of this litigation, they are estopped from pursuing this action at this time."); *Quadrant Exploration, Inc v. Greenwood*, 4th Dist. Washington No. 82 X 29, 1983 Ohio App. LEXIS 14550, *7 (Aug. 15, 1983) ("[A]ppellant, by knowingly accepting the delay rental payments for the years 1978, 1979 and 1980, has ratified the 1973 lease to [appellee] and is now estopped to deny the validity of such lease."); *Ultimate Salon & Spa, Inc. v. Legends Constr. Group*, 2019-Ohio-2506, 139 N.E.3d 445, ¶ 38 (11th Dist.) ("Here, it is clear that, due to the length of time that passed while [appellee] accepted the continuing rent without objection, an implied contract arose, and [appellee] accepted a new lease term governed by the provisions of the original lease.").

{¶21} Resisting this result, Mr. Crutcher claims that the Operating Agreement's non-waiver provision bars any waiver by estoppel claim, and the lack of "clean hands" should likewise preclude summary judgment. We consider the non-waiver provision: "the failure of any party to seek redress for violation of or to insist upon the strict performance of any covenant or condition of this Operating Agreement shall not prevent a subsequent act, which would have originally constituted a violation, from having the effect of an original violation."

{¶22} As the OHCRE defendants correctly highlight, this provision only applies to "passive waiver," or a "failure" to act, and not to the affirmative conduct that fills the record in this case. *State ex rel. Morrison v. Wiener*, 2017-Ohio-364, 83 N.E.3d 292, ¶ 30 (9th Dist.) ("[N]onwaiver clauses may not preclude a trial court from finding a waiver of rights where a party acts in an affirmative manner evincing an intent to waive contractual provisions."). Mr. Crutcher's affirmative acceptance of payments for 64 months while simultaneously agreeing with that amount in court does not implicate the non-waiver provision.

{¶23} Mr. Crutcher also accuses the OHCRE defendants of lacking "clean hands" due to their misrepresentations and refusal to provide him with information, featuring that as a barrier to the assertion of an equitable defense. But we fail to see where he raised this point below, and thus we find it waived. *See HSBC Bank USA, N.A. v. Banks*, 8th Dist. Cuyahoga No. 111241, 2022-Ohio-3044, ¶ 22 ("Appellant did not file an answer and assert [the doctrine of unclean hands] at the trial-court level. It is well established that arguments a party fails to raise in the trial-court cannot be considered for the first time on appeal."). Regardless, Mr. Crutcher presents this point in only a paragraph of his appellate brief, devoid of record citations. App.R. 16(A)(7). To establish the clarity of an unclean hands defense sufficient to defeat the waiver by estoppel claim, Mr. Crutcher must do more than that: " '[U]nclean hands are not to be lightly inferred. They must be established by clear, unequivocal and convincing evidence.' " *State ex rel. Doran v. Preble Cty. Bd. of Commrs*, 2013-Ohio-3579, 995 N.E.2d 239, ¶ 24 (12th Dist.), quoting *Hoover Transp. Servs, Inc. v. Frye*, 77 Fed.Appx. 776, 784 (6th Cir.2003).

{¶24} And while Mr. Crutcher asserts that waiver by estoppel typically poses a factual question, necessitating a trial, he fails to identify any material dispute of fact that would prevent the issuance of summary judgment on the state of this record. We accordingly agree with the trial court's decision to apply waiver by estoppel, and we overrule Mr. Crutcher's first assignment of error.

B.

{¶25} In his second assignment of error, Mr. Crutcher challenges the trial court's decision declaring him no longer a member of OHCRE effective July 2010 and granting summary judgment in favor of the OHCRE defendants for the other nine counts of his complaint. This assignment covers broad terrain, and necessarily implicates the third and sixth assignments of error, so we address Mr. Crutcher's second, third, and sixth assignments of error together in this section for analytical ease.

1.

{¶26} We begin with the court's resolution of Mr. Crutcher's membership status. On this issue, the trial court based its decision on the Operating Agreement's recognition of the concept of a "Departing Member." Under section 6.5(a), "Upon the termination of a Member's employment with OHC (the 'Departing Member') * * * the Members other than the Departing Member (the 'Remaining Members') or the Company * * * shall purchase from such Departing Member * * * all of the Departing Member's Membership Interest in the Company (the 'Departing Interest')." Further, section 6.7 prohibits a Departing Member from receiving any distributions under section 9.1, which covers general distributions. The Operating Agreement also enables

the Departing Member's interest to be paid over time, as OHCRE elected to do with respect to Mr. Crutcher.

{¶27} Sifting through these provisions, the trial court concluded that by becoming a "Departing Member," Mr. Crutcher was "no longer a member" because he no longer held an ownership interest—OHCRE had purchased that interest and would pay him over time consistent with the agreement. This maneuver effectively converted him from an equity holder to a creditor of the LLC. But Mr. Crutcher views his status as a "Departing Member" differently, claiming that he should still be entitled to liquidation proceeds under section 13.3(b)(4). The problem with this position is that the trial court seemed to agree with it.

{¶28} After all, the court granted him summary judgment on the failure to pay liquidation proceeds claim and denied OHCRE's cross-motion on this point. More importantly, the trial court awarded Mr. Crutcher an amount exceeding his Financial Interest—one that appears consistent with the liquidation proceeds provision under Article 13. Although section 6.7 confirms that Departing Members have no right to distributions under section 9.1, section 13.3(b)(4) (involving liquidation) draws no distinction between Departing Members and Remaining Members. We accordingly find nothing amiss with the trial court's decision regarding liquidation proceeds, nor with its interpretation of the "Departing Member" provisions.

2.

{¶29} Mr. Crutcher also takes issue with the trial court's grant of summary judgment on all of his claims against OHC and Dr. Broun based upon section 2 in the Settlement Agreement (referenced above). As he reads the Settlement Agreement, he remained free to pursue claims against Dr. Broun in his capacity as OHCRE manager,

as well as against OHC based on actions that occurred after the Settlement Agreement's execution. Further, Mr. Crutcher argues that the trial court erroneously rejected his claim against OHC under the alter ego doctrine.

{¶30} We begin with the Settlement Agreement. Section 2 of the Settlement Agreement sweeps broadly, releasing OHC and "any * * * employees * * * from any and all claims * * * which [Mr. Crutcher] has or could have against them arising, accruing or originating at any time whatsoever." It is undisputed that Dr. Broun is an employee of OHC, so the trial court correctly determined that this language in section 2 shielded him. And while section 2 contains a broad release, section 4 provides a narrow carveout: "the foregoing releases do not extend to any sums that Crutcher is owed, or claims to be owed, from OHC Real Estate, LLC, an Ohio limited liability company."

{¶31} We must effectuate the structure and purpose of the parties' release. "[T]he overriding consideration in interpreting a release is to ascertain the intent of the parties, which intent is presumed to reside in the language the parties chose to employ in the agreement." *McBroom v. Safford*, 10th Dist. Franklin No. 11AP-885, 2012-Ohio-1919, ¶ 12, citing *Whitt v. Hutchison*, 43 Ohio St.2d 53, 330 N.E.2d 678 (1975). Mr. Crutcher struggles to limit the scope of the release in such a manner as to permit other claims against Dr. Broun. But section 2 constitutes a broad release. "Under Ohio law * * * 'broadly-worded releases are generally construed to include all prior conduct between the parties, even if the scope of such conduct or its damage is unknown to the releasor.' " *State ex rel. Cty. Of Cuyahoga v. Jones Lang LaSalle Great Lakes Corporate Real Estate Partners*, Cuyahoga C.P. No. CV 14 827651, 2016

Ohio Misc. LEXIS 46, *31 (Jan. 26, 2016), quoting *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 606 F.Supp.2d 722, 734-735 (S.D.Ohio 2009).

{¶32} "Further Ohio courts will not read exceptions into a release unless the exclusion of those claims is explicit." *Jones Lang LaSalle* at *31, citing *Task v. Nat'l City Bank*, 8th Dist. App. No. 65617, 1994 Ohio App. LEXIS 5679, *11 (Dec. 7, 2000). If Mr. Crutcher wanted to carve any exceptions out of the broad release, he needed to do so expressly—precisely as he did in section 4. Although he could have sought other exceptions to pursue individuals like Dr. Broun in different capacities, no such provision appears in the agreement, and we will not rewrite the agreement after the fact.

{¶33} Similarly, his effort to insulate post-Settlement Agreement claims is unavailing. Section 2 protects OHC from claims "arising, accruing or originating at any time whatsoever." The crux of the post-agreement claims involves matters that originated pre-agreement, such as Mr. Crutcher's investments in OHCRE, the management of OHCRE's finances and affairs, and his belief that the OHCRE defendants mishandled funds owed to him. Given the broad language of the release, and the connection to pre-Agreement matters, we have no hesitation in deeming these claims subsumed within the ambit of the Settlement Agreement. To the extent that any post-agreement fiduciary claims against Dr. Broun fall beyond the scope of the agreement, however, we find that these claims fail as a matter of law.

{¶34} Such reasoning also spells the demise of Mr. Crutcher's third assignment of error. In that respect, Mr. Crutcher challenges the trial court's grant of summary judgment in favor of OHC and Dr. Broun on their first counterclaim (for breach of the Settlement Agreement) because the Settlement Agreement did not

accomplish a global release of claims. As we have already determined, however, section 2 of the Settlement Agreement contains a broad release that goes well beyond Mr. Crutcher's limited reading, so we see no error in the trial court's conclusion that he violated that provision by suing OHC and Dr. Broun. When a party releases claims, but then brings suit on them, he does so at his own peril.

{¶35} Mr. Crutcher insists that the Settlement Agreement preserves his right to pursue OHCRE for his Financial Interest. We agree with him on that point, but that was not the basis for the trial court's ruling. To the contrary, the court focused on his violation of section 2, rather than the permissible claims allowed by section 4 (that he pursued and prevailed upon). We accordingly overrule Mr. Crutcher's third assignment of error.

3.

{¶36} Mr. Crutcher further pursues an alter ego theory—positing that OHC disregarded OHCRE's separate legal entity and wielded its assets as if they were OHC's to meet its obligations to the detriment of OHCRE's Departing Members. This argument fails for two reasons: Ohio Supreme Court precedent prevents this claim from departing the starting gate, and as discussed above, the Settlement Agreement shields OHC from claims of this ilk.

{¶37} The basics of an alter ego claim are well-settled: "[w]hen a shareholder exercises such control over a corporation that the corporation becomes the shareholder's alter ego * * * it is unjust to allow the shareholder to use the corporate form as a shield to escape the consequences of those wrongful acts." *Minno v. Pro-Fab, Inc.*, 121 Ohio St.3d 464, 2009-Ohio-1247, 905 N.E.2d 613, ¶ 11, citing *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos.*, 67 Ohio St.3d 274, 287, 617

N.E.2d 1075 (1993). But these claims typically involve one corporate entity (or person) with ownership over the second. Such a situation does not describe OHC and OHCRE as neither has an ownership interest in the other. Confronted with that scenario in *Minno*, the Supreme Court held that one cannot pierce the corporate veil of one corporation despite sharing common shareholders with the other corporation without overlapping ownership: "sister corporations are separate corporations and are unable to exercise control over each other in the manner that a controlling shareholder can." *Id.* at ¶ 13.

{¶38} The situation at hand is no different: Mr. Crutcher alleges that OHC's control over OHCRE through "common ownership and management" allowed OHC to perpetrate its misdeeds against him. But "the common shareholder ownership of sister corporations does not provide one sister corporation with the inherent ability to exercise control over the other. Any wrongful act committed by one sister corporation might have been instigated by the corporation's owners, but it could not have been instigated by the corporation's sister." *Id.* at ¶ 12. Mr. Crutcher cannot circumvent the holding in *Minno* since neither OHC nor OHCRE has an ownership interest in the other, and as a testament to that point, he declines to cite or discuss *Minno* in his briefing before our court. Thus, the alter ego doctrine simply does not apply.

{¶39} Beyond the effect of *Minno*, Mr. Crutcher lacks an answer to the Settlement Agreement and why it would not bar any alter ego claim. The Settlement Agreement releases OHC, and this alter ego claim seems to fall squarely within the scope of the broad release. In summary, we conclude that the trial court did not err in its interpretation and application of the Settlement Agreement.

{¶40} Finally, Mr. Crutcher insists that the OHCRE defendants committed bad faith breach of contract, by ceasing to pay him sums owed to him under the Operating Agreement and trying to force him into a settlement agreement to avoid paying him more money. Along these lines, he also protests that the OHCRE defendants failed to provide him with his financial documents to appropriately calculate his Financial Interest. However, the record does not support these conjectures.

{¶41} OHCRE stopped sending Mr. Crutcher payments based on his refusal to sign a subordination agreement required by U.S. Bank. As the reader will recall, the Operating Agreement specifically obligated him to sign a subordination agreement in these circumstances. And it was not unreasonable, nor in bad faith, for OHCRE to insist on compliance with that provision. After OHCRE elected to liquidate its assets, it then took measures to satisfy Mr. Crutcher's debt obligation.

{¶42} Likewise, OHCRE did not wield a prospective settlement to his detriment, any more so than any party in civil litigation tries to exert pressure to encourage settlement. The OHCRE defendants likely hoped to put an end to a decade's worth of litigation between the parties. "The purpose of a settlement agreement is 'to terminate a claim by preventing or ending litigation and * * * such agreements are valid and enforceable by either party.' " *Brilla v. Mulhearn*, 168 Ohio App.3d 223, 2006-Ohio-3816, 859 N.E.2d 578, ¶ 15, quoting *Brown v. Dillinger*, 9th Dist. Medina No. 05CA0040-M, 2006-Ohio-1307, ¶ 10. "Settlement agreements are highly favored by the law." *Brilla* at ¶ 15. We simply see no evidence of bad faith in the available record.

{¶43} That leaves the question of whether the OHCRE defendants provided Mr. Crutcher with adequate financial information, which overlaps with his sixth assignment of error (related to the denial of his motion to compel discovery), so we will consider these issues together.

{¶44} The fundamental problem with both arguments is that Mr. Crutcher fails to identify what information, exactly, he lacked. Simply contending that he needs more financial information is difficult for us to evaluate, given the volume of financial records that the OHCRE defendants produced in the litigation (including annual balance sheets for OHCRE, documents related to OHCRE's liquidation, spreadsheets showing the distributions of OHCRE assets, and calculations of various Financial Interests, etc.). And, as we alluded to earlier, Mr. Crutcher—based on his intimate familiarity with OHCRE—should be able to pinpoint exactly what documents or categories of information the defendants were hiding. His failure to lend precision to this claim speaks volumes.

{¶45} In its denial of Mr. Crutcher's motion to compel, the trial court held that the OHCRE defendants had appropriately responded to Mr. Crutcher's discovery requests, and "simply because the documents do not reflect what Crutcher believes they should reflect does not mean that [the OHCRE defendants have] not provided the requested documents." We agree. We see nothing in the record to substantiate the improper withholding of financial data to which Mr. Crutcher should have been entitled. This establishes that the trial court did not abuse its discretion in denying the motion to compel (sixth assignment of error), nor did it err in the pertinent summary judgment rulings (second assignment of error) related to this point.

{¶46} For all of the aforementioned reasons, we overrule Mr. Crutcher's second, third, and sixth assignments of error.

C.

{¶47} In Mr. Crutcher's fourth assignment of error, he protests the trial court's failure to award pre and postjudgment interest as to his breach of contract claims, pointing to R.C. 1343.03. Although the OHCRE defendants insist that he waived this claim, when asked to calculate his damages before the trial court, Mr. Crutcher provided a calculation that included prejudgment interest. We find this measure sufficient for preservation's sake.

{¶48} First, we consider the postjudgment claim, governed by R.C. 1343.03(B): "interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct * * * shall be computed from the date the judgment, decree or ordered is rendered." Postjudgment interest is simply operative by statute, and nothing in the record indicates that the trial court denied Mr. Crutcher postjudgment interest. *See Non-Employees of Chateau Estate Resident Assn. v. Chateau Estates, Ltd.*, 2d Dist. Clark Nos. 2005-CA-75, 2005-CA-90, 2005-CA-91, 2005-CA-101, and 2005-CA-116, 2007-Ohio-319, ¶ 72 ("[B]ecause nothing in the record indicates that the trial court has denied post-judgment interest or that it will do so in the future, we overrule the * * * assignment of error."). Moreover, because postjudgment interest is necessarily added on top of the judgment amount, the trial court could not include a calculation for this in the judgment (because it does not know when the defendant will pay). Therefore, we see no error in the trial court's failure to include postjudgment interest in the damage award.

{¶49} With respect to prejudgment interest, Ohio law requires imposition of prejudgment interest on contract claims. R.C. 1343.03(A) ("[W]hen money becomes due and payable upon * * * all judgment, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code * * *."); *see Cantwell Mach. Co. v. Chicago Mach. Co.*, 184 Ohio App.3d 287, 2009-Ohio-4548, 920 N.E.2d 994, ¶ 30 (10th Dist.) ("1343.03(A) requires an award of prejudgment interest on contract claims. Once a plaintiff receives judgment on a contract claim and requests prejudgment interest, the trial court must award prejudgment interest under R.C.1343.03(A).").

{¶50} Although a party can certainly waive prejudgment interest by failing to request it (as the OHCRE defendants claim occurred here), in the relevant damage calculation, Mr. Crutcher specifically sought prejudgment interest, calculated based on the statutory interest rate. The trial court never specifically rejected this claim, and it might simply have been an oversight. Regardless, we cannot calculate the appropriate amount of prejudgment interest because the trial court will need to determine the appropriate starting date for interest to run. We accordingly sustain the fourth assignment of error in part, insofar as the court declined to award prejudgment interest, and we remand for the limited purpose of determining the date on which prejudgment interest began to run and the appropriate amount of interest, consistent with the statute.

D.

{¶51} In Mr. Crutcher's fifth assignment of error, he claims the trial court erred by excluding his expert's testimony for failure to provide an expert report. Specifically, he asserts that the relevant scheduling order instructed that "Plaintiff's experts and all affirmative experts to be identified and reports, if any" be submitted by December 13, 2019. Therefore, because the order did not require reports, so his reasoning goes, he should not be faulted for failing to provide one. The only problem is that Mr. Crutcher misquotes the scheduling order in question, which tellingly did not include the "if any" caveat. The order thus required the production of expert reports, and Mr. Crutcher fails to offer any explanation for his erroneous quotation.

{¶52} The scheduling order's directive also comports with the relevant local rules, which require that a party submit the "opinions" of experts prior to trial. *See* Loc.R. 15(A) of the Court of Common Pleas of Hamilton County ("At the conclusion of the case management conference, a case management order shall be prepared and entered. The order shall include * * * the identification of any expert witness and their opinions."); Loc.R. 15(B)(2)(f) of the Court of Common Pleas of Hamilton County (If a judge elects to have a pretrial conference before trial, "all trial attorneys shall file with the judge * * * copies of available opinions of all persons who may be called as expert witnesses."). About ten days after Mr. Crutcher failed to comply with this deadline, the OHCRE defendants moved to exclude his expert witnesses and expert testimony. Pursuant to Civ.R. 37(B)(1), a court may "issue further just orders" when a party "fails to obey an order to provide or permit discovery."

{¶53} In late March 2020 (i.e., three months after the deadline),[1] the trial court considered the matter, but did not immediately strike the expert testimony. Instead, it provided Mr. Crutcher five additional business days to produce an expert report, bending over backwards to give him another chance. Five days came and went without any expert report, but the court did not actually strike the expert testimony until the end of June 2020. Against this backdrop, Mr. Crutcher fails to explain why he could not have complied—at some point—with the requirement in the scheduling order and the local rules to submit an expert report. Nor can we evaluate any prejudicial impact by the exclusion of this expert testimony since we see no proffer or similar evidence in the record that would have elaborated on the nature of this expert testimony. Regardless, we see no abuse of discretion based upon the record at hand.

III.

{¶54} Turning to the OHCRE defendants' cross-appeal, they assert the trial court erred in granting summary judgment for Mr. Crutcher for his breach of contract and liquidation proceeds claims, and in finding that he had not breached the Settlement Agreement's non-disparagement provision.

A.

{¶55} In the OHCRE defendants' first assignment of error, they maintain that the trial court erred by granting judgment in favor of Mr. Crutcher for his breach of contract and liquidation proceeds claims. They base their claim on his failure to execute the subordination agreement requested by U.S. Bank as required under

[1] Needless to say, this deadline fell at the outset of the Covid-19 pandemic, but the Supreme Court's tolling order provides that specific court orders supersede the tolling provisions. *In re Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court & Use of Tech.*, 158 Ohio St.3d 1447, 1448, 2020-Ohio-1166, 141 N.E.3d 974. Also, we see no argument advanced by Mr. Crutcher that he simply needed some reasonable additional time to procure the report.

section 6.5(c)(2) of the Operating Agreement, essentially arguing that his breach of that provision of the Operating Agreement excused further performance by them. We review this question of law de novo. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4.

{¶56} To restate the sequence of events, in September of 2010, OHCRE began making monthly payments to Mr. Crutcher as part of his Financial Interest owed as a Departing Member. But those payments came to a halt in December 2015 when OHC and OHCRE went into forbearance with U.S. Bank, and Mr. Crutcher elected to not sign a subordination agreement. The Operating Agreement, in pertinent part, provides, "as a precondition to receiving any payment from the Company * * * [Mr. Crutcher] shall execute any subordination agreement requested by any lenders or other credit providers to the Company or any of its subsidiaries."

{¶57} But the OHCRE defendants' argument falters for two reasons. First, the OHCRE defendants demonstrate no evidence that Mr. Crutcher's failure to sign a subordination agreement prejudiced them in any way. In other words, at least as far as the record discloses, U.S. Bank took no adverse action against the OHCRE defendants based on the missing subordination agreement. "[N]ot all breaches are created equal. A failure to perform a promise that is nominal, trifling, technical, or slight does not excuse performance under the contract by the nonbreaching party." *H&H Glass, Inc. v. Empire Bldg. Co., LLC*, 1st Dist. Hamilton Nos. C-150059 and C-150227, 2016-Ohio-3029, ¶ 7. " '[A] breach of a portion of the terms of a contract does not discharge the obligations of the parties to the contract, unless performance of those terms is essential to the purpose of the agreement.' " *Id.*, quoting *Software*

Clearing House, Inc. v. Intrak, Inc., 66 Ohio App.3d 163, 170, 583 N.E.2d 1056 (1st Dist.1990).

{¶58} We, of course, understand the purpose of the subordination agreement requirement and could certainly envision circumstances when its breach would constitute a material breach that would excuse further performance. But on this record, the OHCRE defendants have failed to generate a material dispute of fact on this point, and the trial court correctly rejected their argument.

{¶59} Second, even if the breach could be considered material, OHCRE was still required to pay Mr. Crutcher his share of the liquidation proceeds pursuant to section 13.3(b)(4) of the Operating Agreement, and that provision did not impose any subordination agreement mandate. As we determined above, Mr. Crutcher was rightfully awarded liquidation proceeds pursuant the trial court's decision. Because the trial court correctly awarded Mr. Crutcher his share of liquidation proceeds, it essentially moots the subordination agreement debate. We accordingly overrule the OHCRE defendants' first cross-assignment of error.

B.

{¶60} In the OHCRE defendants' second cross-assignment of error, they maintain that the trial court should not have granted summary judgment on their breach of non-disparagement provision claim. Section 7 of the Settlement Agreement prohibits Mr. Crutcher from communicating in any way "that might be reasonably construed to be derogatory or critical of, or negative toward," OHC or any of its employees or representatives.

{¶61} The OHCRE defendants identify a handful of statements that allegedly run afoul of this provision, but most of these are statements directly made in litigation.

They seize upon various comments from the 2018 complaint, accusing OHC and Dr. Broun of "seek[ing] to mislead this court" through a series of "misrepresentations, omissions and false assertions" as well as subsequent pleadings accusing the OHCRE defendants "and/or their counsel" of "engaging in gamesmanship, mischaracterizations, selective and out of context quotations, misleading or false assertions, and unfounded arguments to try to define a false narrative."

{¶62} The trial court found that statements in this vein fell within the ambit of the litigation privilege, which "provides absolute immunity from civil suits for defamatory statements made during and relevant to judicial proceedings * * * * [it] is designed to protect 'the integrity of the judicial process' by affording participants in litigation with immunity from future lawsuits over relevant statements made during judicial proceedings." (Emphasis deleted.) *Reister v. Gardner*, 164 Ohio St.3d 546, 2020-Ohio-5484, 174 N.E.3d 713, ¶ 10,14, quoting *Willitzer v. McCloud*, 6 Ohio St.3d 447, 449, 453 N.E.2d 693 (1983). We agree with the trial court's assessment here—these challenged statements were all made in pleadings within the litigation, and we see no reason why the privilege should not apply.

{¶63} In an email to OHC's counsel and Dr. Broun, Mr. Crutcher accused the two of making "an affirmative misrepresentation" and "mere posturing" and speculated about what they were "trying to hide." The trial court aptly concluded that "no reasonable minds can find the alleged conduct by [Crutcher] * * * to violate the non-disparagement clause in the settlement agreement." Again, we agree, for two reasons. First, the provision in the Settlement Agreement was designed to protect each party from statements made to third parties, not statements made to each other. Second, an email to counsel about matters occurring in litigation strikes us as "relevant

to judicial proceedings." *Reister* at ¶ 10. Both reasons support the trial court's determination, and we accordingly overrule the OHCRE defendants' second cross-assignment of error.

* * *

{¶64} In light of the foregoing analysis, we overrule the two cross-assignments of error raised by the OHCRE defendants. We sustain Mr. Crutcher's fourth assignment of error concerning prejudgment interest, but overrule his remaining assignments of error. Accordingly, the judgment of the trial court is affirmed in part, reversed in part, and the cause is remanded to the trial court to determine the amount of prejudgment interest to be awarded to Mr. Crutcher and to enter judgment for that amount, and for further proceedings consistent with this opinion.

Judgment affirmed in part and reversed in part and cause remanded.

CROUSE and **WINKLER, JJ.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.

[Cite as *Morlatt v. Johnson*, 2022-Ohio-4155.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

Kenneth Morlatt, II, et al.,	:	Case No. 21CA1142
Plaintiffs-Appellees,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Steve Johnson, et al.,	:	
Defendants-Appellants.	:	**RELEASED 11/17/2022**

APPEARANCES:

Christopher J. Mulvaney, The Mulvaney Firm, LLC, Cincinnati, Ohio, for appellants Steve and Denise Johnson.

David E. Grimes, West Union, Ohio, for appellee Kenneth Morlatt II.[1]

Hess, J.

{¶1} Steve and Denise Johnson appeal from a judgment of the Adams County Common Pleas Court in favor of Kenneth Morlatt II and Tasha Morlatt on their claims against the Johnsons for invasion of privacy and absolute nuisance. In their first assignment of error, the Johnsons assert that the judgment on the invasion of privacy claim is against the manifest weight of the evidence. In their second assignment of error, the Johnsons assert that the judgment on the absolute nuisance claim is against the manifest weight of the evidence. And in what we will treat as their third assignment of error, the Johnsons assert that the trial court erred when it awarded attorney fees to the

[1] Attorney Grimes represented Kenneth Morlatt II and Tasha Morlatt at the trial level. On appeal, Attorney Grimes filed, on behalf of Mr. Morlatt, a notice of intent not to file an appellee's brief. Attorney Grimes did not file a similar notice on behalf of Mrs. Morlatt, and she did not file an appellee's brief.

Morlatts. For the reasons that follow, we sustain the assignments of error, reverse the trial court's judgment, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

{¶2} The Johnsons and Morlatts own abutting properties in Adams County. The Morlatt property is north of the Johnson property. The boundary between the properties was the subject of Adams County case number 2008CVH0225, which Sharon Rivers, the Morlatts' predecessor-in-interest, initiated against the Johnsons in 2008. Evidently, the Johnsons believed the boundary between the properties was in the same location as a fence north of Stoney Road, a public right-of-way.

{¶3} On April 16, 2009, the trial court issued a judgment entry finding that the Rivers property "is connected to Stoney Road as evidenced by the language of each parties' deed and the existence of a right-of-way," that the Johnsons failed to establish that the fence line was the property line under the doctrine of acquiescence, but that the "remaining fence west of Stoney Road between the parties' properties that does not parallel Stoney Road is the boundary line between the two properties." The court found that Rivers "shall not enter her property at any location where the road right-of-way does not extend beyond the survey pins. Specifically, [Rivers] shall not access her property at the gate located closest to the [Johnsons'] residence." On June 5, 2009, the Morlatts purchased the Rivers property.

{¶4} In September 2019, the Morlatts filed a complaint against the Johnsons, Stephanie Myers (the Johnsons' daughter), and Justin Myers (the Johnsons' son-in-law) which contained the following allegations. In 2007 and 2008, the Johnsons made false statements that they owned land north of Stoney Road and that Rivers's parcel was

landlocked. As a result, Rivers filed a lawsuit, and the trial court rejected the Johnsons' claims, including that a fence north of Stoney Road was the boundary between the properties of the Johnsons and Rivers. The Morlatts then bought Rivers's property. In 2019, the Johnsons "renewed" their claims that they owned property north of Stoney Road and drove metal fence posts onto the Morlatt property in the approximate location of the fence line at issue in the prior litigation. The Morlatts removed the posts and tried to return them to the defendants. The defendants "repeatedly threatened and harassed" the Morlatts and their guests.

{¶5} The Morlatts alleged a claim for invasion of privacy against all of the defendants asserting that they wrongfully and intentionally intruded, physically and otherwise, into the private activities, solitude, and seclusion of the Morlatts in a highly offensive manner. The Morlatts alleged a claim for malicious prosecution against Mr. Johnson asserting that he had signed an affidavit alleging that Mr. Morlatt deprived him of 12 "metal t-posts," that the affidavit resulted in criminal mischief charges being filed against Mr. Morlatt, that Mr. Johnson lacked probable cause to institute that criminal prosecution, and that the charges had been dismissed. The Morlatts alleged a claim for trespass against all of the defendants for putting the posts on the Morlatt property without permission. Finally, the Morlatts alleged a claim for absolute nuisance against all of the defendants asserting that they had intentionally and unreasonably made threats to the Morlatts and their guests and made false claims that the Morlatts were trespassing, which caused annoyance and inconvenience to and endangered the comfort, health, and safety of the Morlatts and their guests.

A. Bench Trial and Judgment

{¶6} The matter proceeded to a bench trial during which the attorneys orally agreed that on an aerial map of the Morlatt and Johnson properties, which we have included as an appendix to this decision, the solid line running roughly west to east represents the boundary between the Morlatt and Johnson properties. Stoney Road is depicted below this property line. On the map, the eastern part of Stoney Road appears to be parallel to the property line but the western part is not because at a certain point, the road curves southwest. Stoney Road is gravel, but there is a grassy area north of the road/gravel which includes a ditch and is part of the public's easement. The Johnsons own the property on which the easement is located. The attorneys orally agreed that the "Stoney Road easement runs up against the boundary line between the Morlatt property and the Johnson property." In response to questioning by the court during opening statements, the defendants' attorney acknowledged the southern edge of the Morlatt property abuts the northern edge of the Stoney Road easement until the road curves, at which point there is space between the Morlatt property and the easement. However, the attorney took the position that under the 2009 entry, the Morlatts could not access their property from Stoney Road because they had to show their property "doesn't just abut to the right-of-way easement, but extends into" it.

{¶7} Mr. Morlatt testified that in 2008, he and his wife were looking for property for a retreat for their family and began to consider the Rivers property. When they went to view the Rivers property, they had a problem entering it because Mr. Johnson accused them of trespassing. Mr. Morlatt told Rivers that he would not buy her property until the issue was resolved. After the court "settled the dispute," the Morlatts bought the Rivers

property. Mr. Morlatt testified that they bought the property with the intent of building their "future home" on it, but "that was all stopped when Mr. Johnson said he owns the property. And going through court with Sharon Rivers we wanted to build a home. Well, we didn't get to build our forever home there so we had a problem with this, so we had to build out in Bethel." Mr. Morlatt did not elaborate on how anything Mr. Johnson did after the Morlatts bought the property interfered with the Morlatts plans to build a home for themselves on it.

{¶8} Mr. Morlatt testified that the Morlatts only went to their property two or three times a year, "just enough to bush hog it down when we got high." Mr. Morlatt did not testify about any interactions with the Johnsons between the time the Morlatts bought their property in 2009 until 2018, when the Morlatts began to establish a home on the property for their daughter in order to shorten her commute to Shawnee State University. The Morlatts put a mobile home on the property, and Mr. Morlatt made efforts to get electric service on the property. Mr. Morlatt asked Mr. Johnson if he would let Mr. Morlatt get electricity via one of Mr. Johnson's poles. Mr. Johnson said no. Mr. Morlatt testified that another neighbor agreed to let him "tap off" the neighbor's pole, but Mr. Johnson "restrained" the electric company from accessing the Morlatt property. The trial court admitted into evidence a letter from the company's general manager which states that a crew went to the Morlatt property on November 28, 2018 "to begin the construction of [a] primary line for a new service." Mr. Johnson "confronted" the crew upon their arrival and said "they did not have permission to access the land and that he owned it." The crew removed their equipment and left. The next day, Mr. Johnson told the company's operations manager that he "owned the north side of Stoney Road," and the company

"could not access it to construct the lines for the new service for Mr. Morlatt." Mr. Morlatt testified that the electric company had to find an alternate route and that he got electricity to his property, but "it took a long while."[2]

{¶9} Mr. Morlatt testified that on May 8, 2019, he went to his property to pick a location to construct a driveway to Stoney Road. He knew that he could not place the driveway in the area where Stoney Road is not parallel to his property—which is where the gate referenced in the 2009 entry was—so he picked a spot east of where Stoney Road curves, between two oak trees. Evidently he left the property, and when he returned with a group to construct the driveway, Mr. Morlatt discovered that fence posts had been "driven down through the front" of his property. Mr. Morlatt decided to construct the driveway further east from the spot he had originally selected. The group began to clear and prepare the newly selected spot, and Mr. Morlatt directed his father and another man to remove the posts.

{¶10} Mr. Morlatt and another member of the group wore body cameras during the construction, and the Morlatts introduced two videos into evidence. One video depicts Mrs. Myers standing on the road while having a disagreement with members of the group about her belief that there is no access to the Morlatt property from Stoney Road and that the group is trespassing on her father's property. After that video was taken, Mrs. Myers left the road and contacted law enforcement at the request of Mr. Johnson.

[2] Some of the testimony about the incident with the electric company is confusing. However, it appears that the electric company was trying to use the Stoney Road easement to access the Morlatt property to set up electric service to the property from the unnamed neighbor's pole and was not trying to set up electric service from a pole on the Johnsons' property or install equipment on the Johnsons' property without their permission.

{¶11} In the second video, Mrs. Myers has returned to Stoney Road and is yelling at Mr. Morlatt's father, who is carrying about five posts down the road, and Mrs. Myers says they are "not his property to remove." Mr. Myers asks for the posts. Mr. Morlatt's father hands the posts to Mr. Myers, who throws them in the middle of the road and yells at Mr. Morlatt. Mr. Johnson walks down the road and accuses the group of pulling the fence posts out of his property line. A deputy arrives and has a discussion with Mr. Johnson and Mr. and Mrs. Myers. The deputy reviews a document, and Mr. Johnson can be heard saying the "road right-of-way is the property line." The deputy tells Mr. Morlatt's group, which is in the process of dumping gravel, to halt the driveway construction until the matter is resolved and says they are going to wait "about 30 minutes." There is further discussion about whether Mr. Morlatt can access his property in the vicinity of the driveway construction. The video ends before the deputy leaves, but Mr. Morlatt testified that law enforcement concluded the dispute was a civil matter and allowed the construction to recommence, and the driveway was completed. Mr. Morlatt testified that he also had footage of Mrs. Johnson from the driveway incident, which was not introduced at trial, and that she said "if anybody put one shovel in the dirt it would be a big mistake."

{¶12} On May 20, 2019, Mr. Morlatt was charged with criminal mischief based on an affidavit in which Mr. Johnson alleged that "Kenneth Morlatt" had taken 12 metal t-posts which belonged to Mr. Johnson. According to Mr. Morlatt, the only posts his group removed were the ones in the video footage, and they were not exactly on the property line but were rather "going in and out" of it. Evidently the Johnsons did not retrieve the posts from where Mr. Myers threw them on the road. Pursuant to an officer's instruction, Mr. Morlatt put them in the ditch, but he later moved them to his truck so "the county"

would not "run over them and bush hog and tear their equipment up." The criminal mischief charge was dismissed on the ground that the case involved "a property line dispute which is a civil matter."

{¶13} Mr. Morlatt testified that the Johnsons and Myerses had made it impossible for him to enjoy his property. Mr. Morlatt had not been there "in a long time" because he did not want problems with the Johnsons and feared additional criminal charges, which could jeopardize the Morlatts' license to be foster parents. There was still a mobile home on the Morlatt property, but no one was living in it. Mr. Morlatt did not want his daughter living there "with all the problems." He feared she would be treated like he was during the driveway incident. At one point, Mr. Morlatt implied that the decision to not let his daughter live on the Morlatt property resulted in her discontinuing her education at Shawnee State University. Mr. Morlatt testified that the issues with the Johnsons and Myerses impacted him financially because he has had to pay court costs and attorney fees.

{¶14} Mr. Johnson testified that the 2009 entry prohibits the Morlatts from using Stoney Road to access their property because they do "not own property into the right-of-way," so they must use State Route 73 to access their property. Mr. Johnson admitted that he made contact with an electric crew around November 28, 2018. Mr. Johnson testified that "[i]t was all muddy and they had the place all tore up. The ditch line tore up, the property line, getting those trucks in and out of there [sic]." He pointed the survey pins out to the crew. Stevie Hook, the crew leader, asked Mr. Johnson, "You own to

there?" and Johnson evidently responded, "Yes, I do."[3] Hook told the crew, "Shut it down. Get them trucks out of there [sic]." Hook asked Mr. Johnson whether he cared if the crew left via Stoney Road. Mr. Johnson said, "Absolutely not. I don't care if you boys bring those trucks back out here." Later, someone from the electric company told Mr. Johnson they were not going to cross his property line anymore and would "go down to the old man in the trailer below." On December 28, 2018, an attorney sent Mr. Morlatt a letter on behalf of the Johnsons stating that he was violating a court order by entering his property via Stoney Road and asking him to refrain from doing so. The letter led to further correspondence between the Johnsons' and Morlatts' attorneys which is not in evidence.

{¶15} Mr. Johnson testified that on the day of the driveway incident, he saw a group bringing in equipment and asked Mrs. Myers to investigate. The Johnsons went to Stoney Road when they saw the group dumping gravel. Mr. Johnson denied initiating a criminal charge against Mr. Morlatt. Mr. Johnson believed the affidavit he signed about the fence posts related to Mr. Morlatt's father, who has the same name as Mr. Morlatt but does not use the name suffix "II." Mr. Morlatt's father is the person Mr. Johnson saw removing his fence posts from the property line. The Johnsons introduced into evidence photographs of a metal post. Mr. Johnson testified that the post was in the same spot one of the removed posts had been, which was one or two inches south of a pin which marks the northern boundary of the easement and the Johnson property. Mr. Johnson testified that the fence at issue in the litigation with Rivers was about a foot and a half north of the pin. Mr. and Mrs. Myers also testified.

[3] While testifying about the conversation with Hook, Mr. Johnson stated: "And he says: 'You own to there?' And he said: 'Yes, I do.' " The testimony suggests Hook answered his own question even though that does not make sense under the circumstances. Thus, it appears there was either an error in the transcript or Mr. Johnson made a misstatement.

{¶16} On August 5, 2020, the trial court issued a judgment entry finding that the "Plaintiff's [sic] have a legal right to access the easement in question where Plaintiff's [sic] land meets/adjoins the easement boundary." The court ruled in favor of the Morlatts on their claims against the Johnsons for invasion of privacy and absolute nuisance. The court ruled against the Morlatts on their remaining claims. The court ordered the Johnsons to pay the Morlatts $5,265.00, i.e., the amount of attorney fees which the court orally told the parties it planned to award at the end of the trial. The court also ordered the Johnsons to pay all court costs.

B. Post-Judgment Proceedings

{¶17} The docket contains a notation of the following event on August 7, 2020: "COPY OF JUDGMENT ENTRY MAILED TO THE FOLLOWING BY REGULAR U.S. MAIL: R AARON MAUS," i.e., the defendants' attorney. However, on July 27, 2021, an affidavit of the clerk of courts was filed in which the clerk averred that "[t]he Adams County Clerk of Courts office [p]rocessed the [August 5, 2020 judgment] entry on August 7th, 2020 and same was noted in the docket," but "a Deputy Clerk held the mailing and it was not issued from this office until August 17th, 2020." The trial court scheduled a hearing "in regards to the appropriateness of reopening the appeal period."

{¶18} On August 25, 2021, the court issued an entry stating that it had conducted the hearing, that "[t]here were concerns that the parties were not afforded all appellate rights due to questions about timeliness of mailing an appealable entry from the Clerk of Courts to the parties and counsel involved," and that the clerk of courts had acknowledged "the inordinate delay in service of notice of the [August 5, 2020] judgment entry." The court ordered that the appeal period "be renewed for thirty (30) days upon the filing of" its

entry ordering the renewal. The Johnsons filed their notice of appeal from the August 5, 2020 entry on September 24, 2021.

II. ASSIGNMENTS OF ERROR

{¶19} The Johnsons present two assignments of error:

> I. The Trial Court's Decision granting Judgment in favor of Plaintiffs and against Defendants Steve and Denise Johnson on Count I, Invasion of Privacy, was against the manifest weight of the evidence.
>
> II. The Trial Court's Decision Granting Judgment in Favor of Plaintiffs and against Defendants Steve and Denise Johnson on Count 4—Absolute Nuisance, was against the manifest weight of the evidence.

{¶20} Under the second assignment, the Johnsons state that one of the issues presented for review is: "The Trial Court Erred in awarding attorney's fees to Plaintiffs/Appellees." This issue is beyond the scope of the topic specified in the second assignment of error. Therefore, it should have been characterized as a separate assignment of error, and we will treat it as the Johnsons' third assignment of error. *See Chase Bank, USA v. Curren*, 191 Ohio App.3d 507, 2010-Ohio-6596, 946 N.E.2d 810, ¶ 8 (4th Dist.) (treating issue within one of appellant's two assignments of error which bore "no relation to any of the topics specified in that assignment" and "should have been characterized as a separate assignment of error" as the appellant's third assignment of error).

III. TIMELINESS OF THE APPEAL

{¶21} Initially, we consider the timeliness of this appeal. "App.R. 4 governs the timing of appeals and must be carefully followed because failure to file a timely notice of appeal under App.R 4(A) is a jurisdictional defect." *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607, ¶ 17. App.R. 4(A)(1) states: "Subject to the provisions of

App.R. 4(A)(3), a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry." The Johnsons filed their notice of appeal from the August 5, 2020 entry on September 24, 2021, i.e., more than 30 days after the entry.

{¶22} Nothing in the appellate rules authorizes a trial court to enlarge the time for appeal in App.R. 4 based on a delay of clerk's service; however, App.R. 4(A)(1) is subject to App.R. 4(A)(3), which states: "In a civil case, if the clerk has not completed service of notice of the judgment within the three-day period prescribed in Civ.R. 58(B), the 30-day periods referenced in App.R. 4(A)(1) and 4(A)(2) begin to run on the date when the clerk actually completes service." Civ.R. 58(B) states:

> When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. *Within three days of entering the judgment upon the journal*, the clerk *shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket*. *Upon serving the notice and notation of the service in the appearance docket, the service is complete*. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal *except as provided in App.R. 4(A)*.

(Emphasis added.) " 'Pursuant to Civ.R. 58(B), the clerk must * * * indicate *on the docket* the names and addresses of the parties it is serving the judgment upon, the method of service, and the costs associated with the service. When these steps are followed, there is no question whether service was perfected according to rule.' " (Emphasis sic.) *In re E.S.*, 4th Dist. Pickaway Nos. 17CA16, 17CA17, 2018-Ohio-1902, ¶ 20, quoting *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, ¶ 3. "[T]he thirty-day time to appeal does not

begin to run until the clerk serves notice and notes service in the appearance docket in accordance with Civ.R. 58(B), as interpreted in *Gator Milford*." *Id.* at ¶ 21.

{¶23} In this case, there is a notation in the docket that the clerk sent a copy of a judgment entry—presumably the August 5, 2020 judgment entry—to the Johnsons' attorney by regular U.S. mail on August 7, 2020. The notation is incomplete because it does not include counsel's address or the costs associated with the service, and it is false because the clerk averred that a deputy clerk inexplicably "held the mailing," so the clerk's office did not in fact mail the August 5, 2020 entry until August 17, 2020. Because the clerk did not complete service of notice of the August 5, 2020 judgment within the three-day period prescribed in Civ.R. 58(B), App.R. 4(A)(3) applies, and the 30-day period in App.R. 4(A)(1) begins to run on the date the clerk actually completes service.

{¶24} The clerk has not yet completed service of the August 5, 2020 entry in accordance with Civ.R. 58(B). Although the clerk averred that the entry was mailed on August 17, 2020, the clerk made no notation of service on that date in the docket. Therefore, the 30-day period in App.R. 4(A)(1) has not yet begun to run, and we consider the Johnsons' appeal to be timely.

IV. MANIFEST WEIGHT OF THE EVIDENCE

A. Standard of Review

{¶25} In reviewing whether a trial court's decision is against the manifest weight of the evidence, an appellate court

> weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed.

> Moreover, when reviewing the evidence under this standard, we are aware that the weight and credibility of the evidence are to be determined by the trier of fact; we thus defer to the trier of fact on these issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. The trier of fact is free [to] believe all, part, or none of any witness's testimony.
>
> Ultimately, a reviewing court should find a trial court's decision is against the manifest weight of the evidence only in the exceptional case in which the evidence weighs heavily against the decision.

(Citations omitted.) *Wootten v. Culp*, 2017-Ohio-665, 85 N.E.3d 198, ¶ 19-21 (4th Dist.).

{¶26} App.R. 12(C)(1) provides that when a civil action is tried to the trial court and a majority of judges hearing the appeal

> find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and have not found any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and have not found that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings.

B. Invasion of Privacy

{¶27} In their first assignment of error, the Johnsons contend that the judgment against them on the invasion of privacy claim is against the manifest weight of the evidence. The Johnsons assert the Morlatts "failed to establish the necessary legal predicates for any of their claims" because "the core of each claim centered upon three key allegations that are either false, or unproven: 1) that the Defendants/Appellants Johnsons do not own the land upon which the entirety of Johnson/Stoney Road is located, 2) that the Morlatts have proven a road right of way to Stoney Road that abuts the entire southern border of their property, and that 3) via the right of way, they have unrestricted

ability to construct any improvement in the right of way that they choose to do." [*Id.*] The Johnsons claim that the Morlatts "made no attempt to establish * * * where their property actually ends and whether they in fact have access to any road right of way that may exist." [*Id.* at 14] The Johnsons also claim that the Morlatts presented no evidence "that they ever sought or obtained a permit to make the improvements they started May 8, 2019."

{¶28} In addition, the Johnsons contend that the denial of an electricity easement and the driveway incident do not support an invasion of privacy claim because "[e]very aspect of the matters testified to [was] in the public domain—and in fact occurred in actual public." The Johnsons also claim they were "entirely within their rights" to question the removal of the posts and driveway construction. They assert that the Morlatts removed posts within the Johnsons' property line without permission and that the Morlatts did not conduct "a survey to ensure their right of way abutted their property at the location where they placed the driveway," obtain a permit, or advise the Johnsons of their plan. The Johnsons also assert that Mr. Johnson's act of swearing out a criminal mischief complaint is not an invasion of privacy.

{¶29} "The right of privacy is the right of a person to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned." *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956), paragraph one of the syllabus. Relevant here, one actionable invasion of the right of privacy is "the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Id.* at paragraph two of the syllabus. This "has also been called

'intrusion upon seclusion.' " *Lunsford v. Sterilite of Ohio, L.L.C.*, 162 Ohio St.3d 231, 2020-Ohio-4193, 165 N.E.3d 245, ¶ 32. The Supreme Court of Ohio has stated:

> "Intrusion upon seclusion" is based on the "right to be left alone." *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630, 895 P.2d 1269 (1995). It is "akin to trespass in that it involves intrusion or prying into the plaintiff's private affairs." *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 166, 499 N.E.2d 1291 (10th Dist.1985). " 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.' " *Sustin v. Fee*, 69 Ohio St.2d 143, 145, 431 N.E.2d 992 (1982), quoting Restatement of the Law 2d, Torts, Section 652B (1977). Whether an invasion of privacy has occurred turns on the particular facts of the case. However, the right to privacy is not absolute.

(Citations omitted.) *Id.* at ¶ 33.

{¶30} In this case, there is no evidence that the Johnsons intruded upon the solitude or seclusion of the Morlatts or their private affairs or concerns. The activities intruded into—the electric crew's work and the driveway construction—were not private. The activities occurred on or within view of a public right-of-way located on the Johnsons' property. The Morlatts had no reasonable expectation of privacy in the area in which the intrusions occurred. Therefore, we conclude that the judgment on the invasion of privacy claim against the Johnsons is against the manifest weight of the evidence. The trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. We sustain the first assignment of error, and we reverse the trial court's judgment with respect to the invasion of privacy claim against the Johnsons.

C. Absolute Nuisance

{¶31} In their second assignment of error, the Johnsons contend that the judgment against them on the absolute nuisance claim is against the manifest weight of the evidence. The Johnsons maintain that there is no evidence they engaged in any

"unlawful/intentional" acts. The Johnsons assert that they had no duty to grant the Morlatts an electricity easement and that Mr. Morlatt admitted on cross-examination that Mr. Johnson did not prevent " 'Rural Electric from putting a utility easement, electricity to [the Morlatt] property.' " With respect to the driveway incident, the Johnsons assert that the Morlatts removed fence posts which "did not belong to them" and "began dumping gravel and constructing a driveway in land owned by the Johnsons." The Johnsons argue that "[i]f by reason of a right of way the Morlatts are permitted to construct a driveway from Stoney Road to their property, they neither provided evidence of this right of way or that their property abutted it." Therefore, the Johnsons maintain that "it was imminently reasonable for [them] to believe the Morlatts were trespassing, or at a minimum, that the Morlatts were making improvements in a right of way without appropriate permits." The Johnsons also suggest that the Morlatts did not suffer harm which would support a nuisance claim because they "could not and did not prove diminished property value," "they offered no evidence of physical harm," and their "purported evidence of 'emotional injury' consisted of having to defend their attempt to conduct un-permitted, unfettered improvements on property either owned by the Johnsons, or subject to the road right of way."

{¶32} " 'There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' " *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 712, 622 N.E.2d 1153 (1993), quoting Prosser & Keeton, *The Law of Torts*, Section 86, 616 (5th Ed.1984). " ' "Nuisance" is a term used to designate the wrongful invasion of a legal right or interest.' " *Banford v. Aldrich Chem. Co.*, 126 Ohio St.3d 210, 2010-Ohio-2470, 932 N.E.2d 313, ¶ 17, quoting *Taylor v. Cincinnati*, 143 Ohio St. 426,

431-432, 55 N.E.2d 724 (1944). " 'It comprehends not only the wrongful invasion of the use and enjoyment of property, but also the wrongful invasion of personal legal rights and privileges generally.' " *Id.*, quoting *Taylor* at 432. "However, such right or interest may be invaded by any one of several types of wrongful conduct, and the liability of a defendant, in any case, depends upon the type of his wrongful conduct with respect to the right or interest invaded." *Taylor* at 432.

{¶33} A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Brown* at 712, citing Restatement of the Law 2d, Torts, Section 821D, at 100 (1979). "Unlike a public nuisance, a private nuisance threatens only one or few persons." *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 2008-Ohio-7042, 903 N.E.2d 1284, ¶ 7, citing *Taylor* at 442. "A private nuisance may be categorized as either an absolute or a qualified nuisance." *Adkins v. Boetcher*, 4th Dist. Ross No. 08CA3060, 2010-Ohio-554, ¶ 16. "As distinguished from a qualified nuisance involving negligence, an absolute nuisance consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault." *Interstate Sash & Door Co. v. Cleveland*, 148 Ohio St. 325, 74 N.E.2d 239 (1947), paragraph one of the syllabus. In this case, the Morlatts alleged a claim for absolute nuisance against the Johnsons.

{¶34} "For there to be an action for nuisance, the injury must be real, material, and substantial." *Banford* at ¶ 17, citing *Eller v. Koehler*, 68 Ohio St. 51, 55, 67 N.E. 89 (1903). Moreover, "[i]t has long been recognized that a nuisance must materially interfere

with *physical comfort*." (Emphasis added.) *Id.* at ¶ 28. *See also id.* at ¶ 22, quoting *Antonik v. Chamberlain*, 81 Ohio App. 465, 476, 78 N.E. 752 (9th Dist.1947), quoting 39 American Jurisprudence, Nuisance, Section 30 (explaining that in *Antonik*, the court "stated that a private nuisance 'generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is "an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injure. It must be real and not fanciful or imaginary, or such as results merely in a trifling annoyance, inconvenience, or discomfort" ' "). " ' "The discomforts must be physical, not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance * * *." ' " *Banford* at ¶ 28, quoting *Weishann v. Kemper*, 27 Ohio N.P. (N.S.) 269, 278 (1928), quoting *Cleveland v. Citizens Gas Light Co.*, 20 N.J.Eq. 201, 205-206 (1869).

{¶35} "Damages for nuisance may include diminution in the value of the property, costs of repairs, loss of use of the property, and compensation for annoyance, discomfort, and inconvenience." *Id.* at ¶ 17. However, the Supreme Court of Ohio has stated: "If the existence of a nuisance depends upon 'an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort,' then it logically follows that the element of physical discomfort must be present for a plaintiff to have been damaged by the nuisance. The same standard must apply whether evaluating the existence of a nuisance or evidence of the damages caused by the nuisance." *Id.* at ¶ 25. Thus, in *Banford*, the court held that "in order to recover damages for annoyance and discomfort in a nuisance claim, a plaintiff must establish that the nuisance caused physical discomfort," *id.* at ¶ 28,

even though the defendant in that case had admitted the existence of a nuisance, *id.* at ¶ 24. In doing so, the court observed that " '[c]ases supporting recovery for personal discomfort or annoyance involve either excessive noise, dust, smoke, soot, noxious gases, or disagreeable odors as a premise for awarding compensation.' " *Id.* at ¶ 26, quoting *Widmer v. Fretti,* 95 Ohio App. 7, 18, 116 N.E.2d 728 (6th Dist.1952). "These conditions affect one's sight, sound, smell, hearing, or touch, which may cause a physical discomfort." *Id.*

{¶36} In this case, the Morlatts failed to present evidence that they suffered the requisite injury for the existence of a nuisance. There is evidence from which a trier of fact could conclude that the Johnsons' conduct annoyed and inconvenienced the Morlatts because it resulted in a delay of unspecified duration in the Morlatts getting electric service to their property and a brief delay in the driveway construction. However, there is no evidence that the Johnsons created conditions that were offensive physically to the senses and materially interfered with the Morlatts' physical comfort. Although there is evidence the Johnsons made Mr. Morlatt uncomfortable using his property and letting his daughter live on it, "it is important to distinguish uncomfortable as an emotion versus being physically uncomfortable." *Scott v. Nameth*, 10th Dist. Franklin No. 14AP-630, 2015-Ohio-1104, ¶ 15. "The Supreme Court of Ohio in *Banford* is clear that '[i]t has long been recognized that a nuisance must materially interfere with physical comfort.' " *Id.*, quoting *Banford* at ¶ 28.

{¶37} We observe that in *Banford*, despite holding that a plaintiff must establish a nuisance caused physical discomfort to get damages for annoyance and discomfort, the court later stated that

> a person may recover for annoyance and discomfort for a nuisance, including fear and other emotions, without a physical component if the annoyance or discomfort are connected to the person's loss of use or loss of enjoyment of property. In *Stoll v. Parrott & Strawser Properties, Inc.*, Warren App. No. CA2002-12-133, 2003-Ohio-5717, 2003 WL 22427815, ¶ 25, the jury awarded damages for annoyance and discomfort that the plaintiffs experienced in the use and enjoyment of their property. The plaintiffs testified that they had been unable to leave their property when it flooded due to work in a nearby development. After each flooding incident, they spent two to three days cleaning up debris in their yard.

Banford, 126 Ohio St.3d 210, 2010-Ohio-2470, 932 N.E.2d 313, at ¶ 30. However, *Stoll* is distinguishable from this case. "In *Stoll,* the loss of use caused by flooding of the property was a real, physical loss of use." *Scott* at ¶ 17, citing *Banford* at ¶ 30 (noting nuisance "involves a restriction or infringement upon the use and enjoyment of property" and "must cause damages that are real, material, and substantial"). In this case, Mr. Morlatt testified that he discontinued use of his property because he was afraid of having additional negative interactions with the Johnsons and being charged with another crime. There is no physical reason the Morlatts cannot use their property. Fear and emotional discomfort are "not enough under the controlling standard articulated in *Banford*." *Id.* (qualified nuisance claim failed as matter of law where plaintiffs alleged they were uncomfortable in their home and yard because of defendants' security cameras but failed to allege or demonstrate damages from physical discomfort, failed to allege any physical manifestation of discomfort, and there was no physical reason they could not use their property).

{¶38} For the foregoing reasons, we conclude the trial court's judgment on the absolute nuisance claim against the Johnsons is against the manifest weight of the evidence. The trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. We sustain the second assignment of error,

and we reverse the trial court's judgment with respect to the absolute nuisance claim against the Johnsons.

V. ATTORNEY FEES

{¶39} In what we are treating as their third assignment of error, the Johnsons contend that the trial court erred when it awarded the Morlatts attorney fees. The Johnsons assert that "Ohio follows the 'American Rule,' which provides that a prevailing party in a civil action may not generally recover its attorney fees as part of the 'costs of litigation.' " The Johnsons assert no exception to the rule applies in this case.

{¶40} "Ohio courts generally follow the 'American rule' with respect to attorney fees: each party is responsible for its own attorney fees." *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, 160 Ohio St.3d 32, 2020-Ohio-1056, 153 N.E.3d 30, ¶ 9. "[T]here are exceptions to this rule," *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7, but they "must be narrowly construed," *Dolan v. Glouster*, 4th Dist. Athens Nos. 11CA18, 12CA1, 11CA19, 12CA6, 11CA33, 2014-Ohio-2017, ¶ 113. "Attorney fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees, * * * or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant * * *." *Wilborn* at ¶ 7. Another exception "allows an award of attorney fees to the prevailing party as an element of compensatory damages when the [finder of fact] finds that punitive damages are warranted." *Phoenix* at ¶ 9. "[W]here a case presents a legal issue regarding the availability of attorney fees, our review is de novo." *Shamrock v. Cobra Resources, LLC*, 2022-Ohio-1998, 191 N.E.3d 1197, ¶ 114 (11th

Dist.), citing *2-J Supply, Inc. v. Garrett & Parker, LLC*, 4th Dist. Highland No. 13CA29, 2015-Ohio-2757, ¶ 9 (reviewing de novo "the legal issue of whether the trial court erred in refusing to apply a rule of law concerning the availability of attorney's fees).

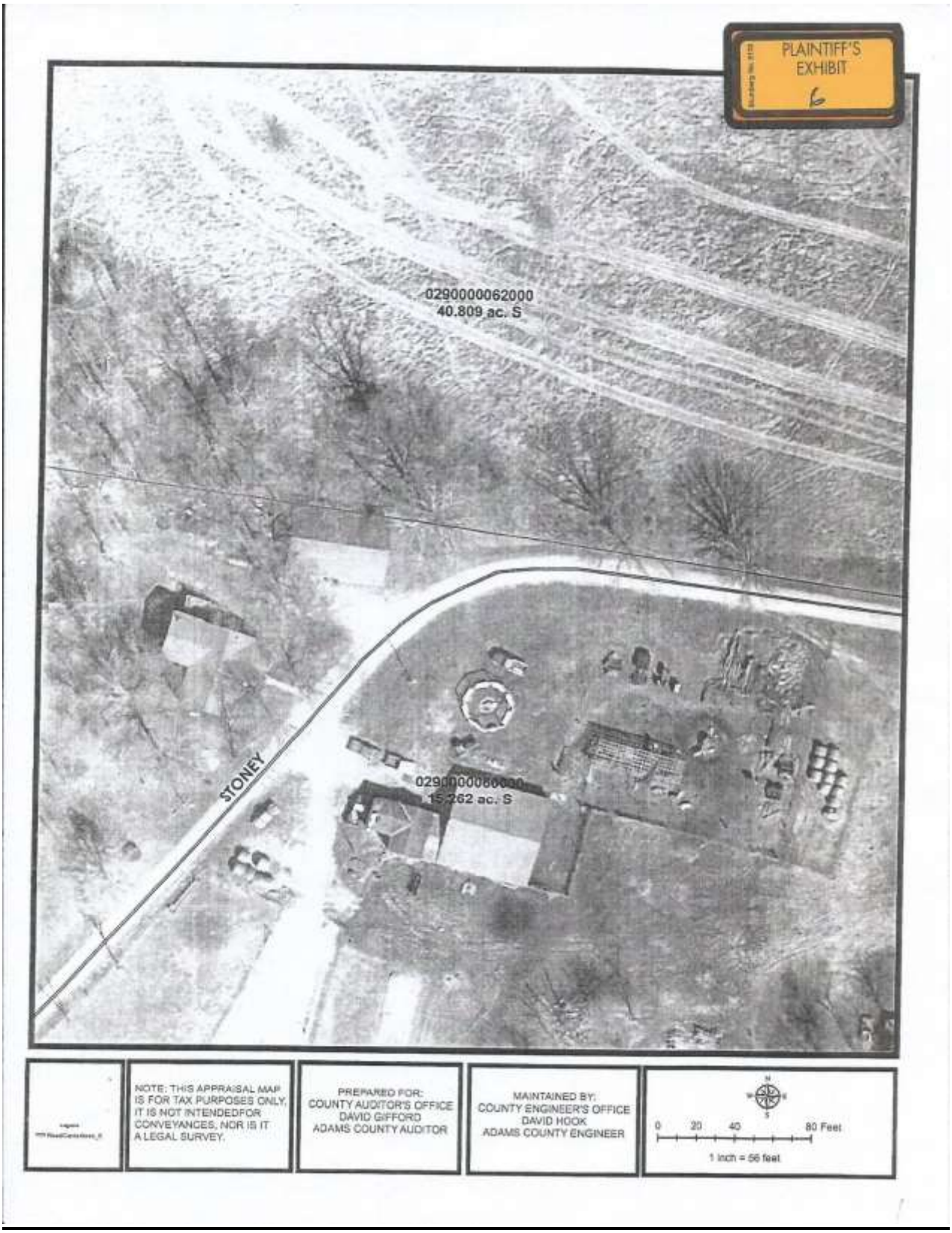
{¶41} The trial court did not articulate the basis for the attorney fee award in its August 5, 2020 entry. The Morlatts did not assert any statutory basis for such an award, there is no evidence of a contract between the Morlatts and Johnsons, and the trial court did not award any punitive damages. Even if the trial court concluded that the Morlatts demonstrated bad faith on the part of the Johnsons, in light of our rulings on the first and second assignment of error, the Morlatts are no longer the prevailing party with respect to any of their claims against the Johnsons. *See generally Black's Law Dictionary* (11th Ed.2019) (defining a "prevailing party" as one "in whose favor a judgment is rendered, regardless of the amount of damages awarded"). Therefore, we cannot discern any basis for deviation from the American Rule in this case, conclude the trial court erred when it awarded attorney fees, and sustain the third assignment of error.

VI. CONCLUSION

{¶42} For the foregoing reasons, we sustain the assignments of error, reverse the trial court's judgment, and remand for further proceedings consistent with this opinion.

JUDGMENT REVERSED
AND CAUSE REMANDED.

APPENDIX


PLAINTIFF'S EXHIBIT
6
0290000062000
40.809 ac. S
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NOTE: THIS APPRAISAL MAP IS FOR TAX PURPOSES ONLY. IT IS NOT INTENDEDFOR CONVEYANCES, NOR IS IT A LEGAL SURVEY.
PREPARED FOR:
COUNTY AUDITOR'S OFFICE
DAVID GIFFORD
ADAMS COUNTY AUDITOR
MAINTAINED BY:
COUNTY ENGINEER'S OFFICE
DAVID HOOK
ADAMS COUNTY ENGINEER
0 20 40 80 Feet
1 inch = 56 feet

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellees shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *McMullen v. Wyatt*, 2022-Ohio-4162.]

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

CHRISTINE MCMULLEN, Plaintiff-Appellee, - vs - JOHN A. WYATT, Defendant-Appellant.	**CASE NO. 2022-P-0023** Civil Appeal from the Court of Common Pleas Trial Court No. 2020 CV 00398

O P I N I O N

Decided: November 21, 2022
Judgment: Affirmed

Scott J. Flynn, Flynn Keith & Flynn, 214 South Water Street, P.O. Box 762, Kent, OH 44240 (For Plaintiff-Appellee).

Joel A. Holt, Ickes \ Holt, 4301 Darrow Road, Suite 1100, Stow, OH 44224 (For Defendant-Appellant).

MATT LYNCH, J.

{¶1} Defendant-appellant, John A. Wyatt, appeals the judgment of the Portage County Court of Common Pleas, finding in favor of plaintiff-appellee, Christine McMullen, on her claim for adverse possession. For the following reasons, we affirm the decision of the court below.

{¶2} On June 19, 2020, McMullen filed a Complaint against Wyatt for Adverse Possession, Implied and Prescriptive Easements, and Private Nuisance.

{¶3} On August 7, 2020, Wyatt filed an Answer and Counterclaim for Trespass.

{¶4} On July 13, 2021, the matter was tried before a magistrate.

{¶5} On July 20, 2021, a Magistrate's Decision was issued. The magistrate made the following relevant findings of fact:

> - Plaintiff Christine McMullen lives at 1804 Merrill Rd. Kent, OH with her husband.
>
> - Plaintiff purchased the property from her mother in 2015.
>
> - Plaintiff has lived at the property since November 1998.
>
> - Plaintiff's residence includes an unattached garage.
>
> - The garage is used daily as a separate living room for the McMullen family. The room contains a TV, wood-burner, furniture, and other accessories suitable for a recreation room/family room.
>
> - The garage was built in 1901. Its location has never moved.
>
> - Plaintiff has used the garage continuously for 21 years.
>
> - Defendant has not used the garage or demanded access to the garage.
>
> - Defendant did not institute a legal claim against Plaintiff in the 21 years from the time the garage was being used and possessed by the Plaintiff.
>
> - The history of which parcel the garage resides on has a complicated past.
>
> - At times, the property the garage has been deeded on resided at 1804 Merrill Rd.
>
> - At other times, and currently, the land the garage resides on has been included in the legal description/deed of the neighboring property owned by the Defendant.
>
> - In 1993, the property owned by Linda Dixon (which included the .102 acre parcel where the garage encroaches) was sold at sheriff's sale and deeded to the Wyatt family.
>
> - The .102 acre parcel's dimensions are roughly 17'x293.05'[.]
>
> - The McMullen family used the .102 parcel for outbuildings, gardens, and driveway access to the back of their property.

> - At some point, prior to the accumulation of 21 years, the Wyatt family revoked permission for the McMullen family to use the parcel as a driveway. They also demanded the outbuildings be removed.[1]
>
> - The McMullen family ceased using the parcel as a driveway. They also tore down/removed all of the outbuildings, except for the garage.
>
> - The McMullen family stopped caring for the back part of the .102 parcel behind their home as well.
>
> * * *
>
> - Defendant has been the owner of his parcel since 2007.
>
> - Defendant has had the property surveyed three times. Each survey showed the garage encroachment on his property.
>
> - Defendant's counsel sent a letter in 2008 informing the McMullen family about the encroachment.
>
> - Plaintiff's possession of the garage and garage curtilage has been open, continuous, notorious, and exclusive for more than 21 years.

{¶6} The magistrate found "by clear and convincing evidence that the Plaintiff has proved its adverse possession claim for the garage, but not the entire .102 acre strip of land." The plaintiff was awarded a 5' strip of land from Merrill Road to and around the part of the garage encroaching on Wyatt's parcel. All other claims were denied. The trial court adopted the Magistrate's Decision without modification on the day it was issued.

{¶7} On July 28, 2021, Wyatt filed Objections to Magistrate's Decision. Wyatt's stated objections were as follows: "Defendant hereby files his objections to the Magistrate's Decision filed herein on July 20, 2021, granting adverse possession to plaintiff."

1. According to Wyatt's testimony, his mother revoked her permission for the McMullens to use the property to access the rear of their property, i.e., as a driveway, in June of 2003. In a 2008 letter, referenced below, Wyatt (through counsel) advised the McMullens "to have any building on his Brady Lake property removed."

{¶8} On August 24, 2021, the trial court issued an Order and Journal Entry, advising Wyatt that, pursuant to Civil Rule 53(D)(3)(b)(ii), his "objection needs to be specific and state with particularity all grounds for objections," and that, pursuant to Civil Rule 53(D)(3)(a)(iii), "any objection to a factual finding * * * shall be supported by a transcript of all the evidence submitted to the magistrate." Wyatt would have 45 days from the date of the Order to file the transcript and could seek leave of court to supplement his objections.

{¶9} On September 22, 2021, Wyatt filed Amended Objections to Magistrate's Decision. The Amended Objections stated: "Defendant hereby files his amended objections to the Magistrate's Decision filed herein on July 20, 2021, in the following respect: The evidence failed to establish 21-years of open and notorious possession on the part of the plaintiff, and that said possession was adverse to the defendant."

{¶10} On October 8, 2021, the transcript of the hearing before the magistrate was filed.

{¶11} On March 30, 2022, the trial court issued a Journal Entry overruling Wyatt's Objections.

{¶12} On April 29, 2022, Wyatt filed a Notice of Appeal. On appeal, he raises the following assignment of error: "The final judgment is erroneous because it is against the manifest weight of the evidence, incorrectly applied the law of adverse possession, and failed to properly apply the clear and convincing evidence evidentiary standard."

{¶13} The usual standard of review for a trial court's adoption of a magistrate's decision is abuse of discretion. *Allen v. Allen*, 2022-Ohio-3198, __ N.E.3d __, ¶ 39 (11th Dist.). Under this deferential standard of review, the trial court's decision should be

affirmed "if there is some competent, credible evidence to support [it]," and regardless of whether "the reviewing court would have reached a different result." *Id.* at ¶ 40.

{¶14} Preliminarily, McMullen argues that Wyatt failed to comply with the requirement that "[a]n objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). Therefore, the adoption of the magistrate's decision should be reviewed for plain error. Civ.R. 53(D)(3)(b)(iv) ("[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)"). McMullen maintains that to hold that Wyatt complied with the rule that objections should be specific and stated with particularity by asserting that the "evidence failed to establish" the elements of an adverse possession claim "would render Civ. R. 53(D) worthless." Brief of Appellee at 8.

{¶15} There is no strong consensus regarding the degree of specificity or particularity with which objections must be stated to satisfy Civil Rule 53(D)(3). The Staff Notes to Rule 53 provide that the form of objections must "be specific; a general objection is insufficient to preserve an issue for judicial consideration." "In interpreting this provision of Civ.R. 53, it has been held that a mere blanket objection to the magistrate's decision is insufficient to preserve an objection." *Lambert v. Lambert*, 11th Dist. Portage No. 2004-P-0057, 2005-Ohio-2259, ¶ 16. "When a party submits general objections that fail to provide legal or factual support, 'the trial court may affirm the magistrate's decision without considering the merits of the objection.'" (Citation omitted.) *Id.*; *compare Gordon v. Gordon*, 98 Ohio St.3d 334, 2003-Ohio-1069, 784 N.E.2d 1175, ¶ 14 ("[a] party who files premature objections runs the risk of not complying with this rule and of having the

objections overruled because they are not responsive to the grounds ultimately relied on by the magistrate"). *See Lambert* at ¶ 17 ("appellant filed general objections to the magistrate's decision and did not specifically raise the objection that the trial court [sic] erred in determining his gross income," and so "is precluded from raising [on appeal] any claim not raised in his objections to the magistrate's decision"); *Bass-Fineberg Leasing, Inc. v. Modern Auto Sales, Inc.*, 9th Dist. Medina No. 13CA0098-M, 2015-Ohio-46, ¶ 24 ("[w]here a party fails to raise an issue in its objections to a magistrate's decision, that issue is forfeited on appeal"); *In re Ingles*, 11th Dist. Trumbull No. 2003-T-0037, 2004-Ohio-5462, ¶ 24 ("[a]lthough appellant set forth specific objections to the magistrate's decision, he failed to support such objections with any factual or legal grounds," and so "his objections fail to comply with Civ.R. 53([D])(3)(b)"); *Wallace v. Willoughby*, 3d Dist. Shelby No. 17-10-15, 2011-Ohio-3008, ¶ 14 and 21 (objections stating "that the findings of fact; conclusions of law; discussion; and decision regarding the allocation of the residential parent of the Minor Children are not supported by the record of the case and law" did "not meet the specificity requirement set forth in Civ.R. 53(D)(3)(b)(ii), as they baldly assert an objection to the magistrate's findings of fact and conclusions of law"). *Compare Smith v. Bank of Am.*, 7th Dist. Mahoning No. 11-MA-169, 2013-Ohio-4321, ¶ 18 ("[e]ach of the five objections took issue with each of the five specific legal conclusions reached by the magistrate" and, "[w]hile * * * brief and not supported with any further argument or case law citations, they were nonetheless specific and stated with particularity the *grounds* for objection").

{¶16} Here, Wyatt's Amended Objections stated that the "evidence failed to establish 21-years of open and notorious possession on the part of the plaintiff, and that

said possession was adverse to the defendant," without any citation to the magistrate's factual findings, the record, or case law. This is essentially a general objection stating the elements of an adverse possession claim. On appeal, ~~however,~~ Wyatt does raise specific arguments: he claims that the use of the garage, like the driveway, the outbuildings, and other uses of the disputed property, was permissive. Thus, McMullen's use of the garage was neither adverse nor continuous. Wyatt additionally argues that the evidence supporting McMullen's claim does not meet the clear and convincing evidence standard but rather, at most, satisfies a preponderance of the evidence standard. Although minimal, Wyatt's objections were sufficient to preserve the arguments he raises on appeal. *Ramsey v. Pellicioni*, 7th Dist. Mahoning Nos. 14 MA 134 and 14 MA 135, 2016-Ohio-558, ¶ 13 ("although objections may be brief and not supported with further argument or case law citations, as long as they are specific and state the grounds for the objections they are adequate to preserve the issue for appeal").

{¶17} McMullen also argues that Wyatt's objections were not properly supported by a transcript of the hearing before the magistrate because "[t]he trial court, *sua sponte*, filed the trial transcript 80 days after Wyatt filed his Objections, and 16 days after Wyatt filed his "Amended Objections." Brief of Appellee at 9-10. On October 8, 2021, the hearing transcript was filed with the trial court although it is not evident, from the face of the record, by whom it was filed. We find the issue immaterial. The transcript was timely filed pursuant to the trial court's August 24 Order, i.e., within 45 days of the Order, and the court duly reviewed the transcript when ruling on the Amended Objections. We find no issue with the filing of the transcript in support of the objections.

{¶18} "It is well established in Ohio that to succeed in acquiring title by adverse possession, the claimant must show exclusive possession that is open, notorious, continuous, and adverse for 21 years." *Evanich v. Bridge*, 119 Ohio St.3d 260, 2008-Ohio-3820, 893 N.E.2d 481, ¶ 7. "[T]he legal requirement that possession be adverse is satisfied by clear and convincing evidence that for 21 years the claimant possessed property and treated it as the claimant's own." *Id.* at syllabus.

{¶19} "It is well established that a possession is not hostile or adverse if the entry is by permission of the owner, or the possession is continued by agreement; such an occupancy, consequently, confers no right." (Citation omitted.) *Golubski v. U.S. Plastic Equip., L.L.C.*, 11th Dist. Portage No. 2015-P-0001, 2015-Ohio-4239, ¶ 18; *Rodgers v. Pahoundis*, 178 Ohio App.3d 229, 2008-Ohio-4468, 897 N.E.2d 680, ¶ 41 (5th Dist.) ("[i]f a claimant's use of the disputed property is either by permission or accommodation for the owner, then it is not 'adverse,' for purposes of establishing adverse possession") (citation omitted). Once the party claiming title by adverse possession establishes a prima facie case of adverse use, the owner of the property in question has the burden of proving that such use was permissive. *Rodgers* at ¶ 42; *Andrews v. Passmore*, 2015-Ohio-2681, 38 N.E.3d 450, ¶ 12 (7th Dist.) ("[o]nce the occupier has set forth a prima facie case that the use may be adverse, the landowner must then prove the use was permissive by a preponderance of the evidence").

{¶20} As noted above, Wyatt's argument on appeal is that McMullen's use of the garage was permissive for at least part of the 21-year period in question, or, alternatively, that the evidence for McMullen's use being truly adverse does not meet the preponderance of the evidence standard. We find neither argument convincing. On the

contrary, the trial court's judgment is readily supported by competent and credible evidence.

{¶21} The encroachment of the garage onto Wyatt's property predates both Wyatt's and McMullen's ownership of their respective properties. McMullen has used the garage as a recreation/living room since the time of her occupancy of the property in 1998. Wyatt was aware of the encroachment having had the property surveyed three times since 2007. Thus, a prima facie case of adverse possession is established. The evidence that the use was permissive is minimal. Wyatt did not testify that he, or his mother who owned the property before him, ever gave their consent to the encroachment of the garage onto their property. McMullen testified that she never received such consent from the Wyatts. Any suggestion that Wyatt suffered the garage to encroach on his property as a "neighborly accommodation" to McMullen cannot be seriously maintained in light of the relationship between the parties.

{¶22} Wyatt bases the claim that the use of the garage was permissive on the existence of evidence that other uses of his property by McMullen, such as for a driveway, outbuildings, flowerbeds and birdhouses, may have been permissive. When Wyatt objected to these uses McMullen discontinued them. The nature of the encroachment of the garage onto his property, however, is not comparable to these other uses, which only began after McMullen's occupancy of her property. The garage's existence predated both parties' occupancy of their properties and, in any event, its use by McMullen was never discontinued. There is no error in the trial court's award of title to the garage and the five-foot strip around the property to McMullen.

{¶23} Finally, Wyatt contends that the magistrate failed to apply the preponderance of the evidence standard despite the profession that it found "by clear and convincing evidence that the Plaintiff has proved its adverse possession claim for the garage." He "contends that equally credible contradictory testimony does not in and of itself qualify as clear and convincing evidence." Specifically, "Wyatt * * * produced documentary evidence in the form of the August 2008 letter and the Auditor's public records to support his testimony that he revoked permission for all of the buildings on the Disputed Property, including the garage, in 2006 and/or 2008. Wyatt's evidence at trial discredited and reduced the probative value of McMullen's testimony to perhaps even below the preponderance standard, to 'a basis for only a choice among different possibilities' as to the adversity requirement of adverse possession." Brief of Appellant at 12, quoting *Landon v. Lee Motors, Inc.*, 161 Ohio St. 82, 99, 118 N.E.2d 147 (1954).

{¶24} Wyatt's argument fails to convince. It presumes that his evidence of permissive use was equally credible, but the record does not support the presumption. McMullen testified directly that she had never been given permission by either Wyatt or his mother regarding the encroachment of the garage. Wyatt's evidence merely shows that it would be possible to infer, if the trier of fact were so inclined, that permission had been given at some point. More fundamentally, "[w]eight is not a question of mathematics, but depends on its *effect in inducing belief*." (Citation omitted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). It is not enough to say that there is evidence to support either side of an issue. Even if Wyatt had presented direct evidence of McMullen's use being permissive, the magistrate could still have found the

clear and convincing evidence standard satisfied if McMullen's testimony were deemed to be significantly more credible than Wyatt's testimony.

{¶25} The sole assignment of error is without merit.

{¶26} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is affirmed. Costs to be taxed against the appellant.

THOMAS R. WRIGHT, P.J.,

MARY JANE TRAPP, J.,

concur.