

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

PATRICIA DUFF,

Plaintiff-Appellee,

- v -

THOMAS CHRISTOPHER,

Defendant-Appellant.

CASE NO. 2021-L-122

Civil Appeal from the
Court of Common Pleas

Trial Court No. 2021 CV 000780

OPINION

Decided: February 6, 2023

Judgment: Reversed and remanded

David L. Harvey, III, and Matthew B. Abens, Harvey, Abens, Iosue Co., LPA, 19250 Bagley Road, Suite 102, Middleburg Heights, OH 44130 (For Plaintiff-Appellee).

Erik L. Walter, Dworken & Bernstein Co., LPA, 60 South Park Place, Painesville, OH 44077 (For Defendant-Appellant).

MATT LYNCH, J.

{¶1} Defendant-appellant, Thomas Christopher, appeals from the judgment of the Lake County Court of Common Pleas, denying his motion to dismiss the matter and compel arbitration. For the following reasons, we reverse the decision of the lower court and remand for further proceedings consistent with this opinion.

{¶2} On July 2, 2021, plaintiff-appellee, Patricia Duff, filed a Complaint in the Lake County Court of Common Pleas, raising claims of Assault and Intentional Infliction of Emotional Distress in relation to an alleged incident in which Christopher threatened to shoot her in the head while holding his hand up mimicking a handgun.

{¶3} On October 11, 2021, Christopher filed a Motion to Dismiss to Compel Arbitration. Therein, and in his attached affidavit, he contended that the alleged incident occurred during employment hours at a work meeting at the Thomas Christopher Group (TCG), of which Christopher is president. The statements made related to her employment and the police report indicated that Christopher said “shoot” relates to terminating someone from a project. He contended that the matter was subject to an arbitration clause contained in Duff’s employment contract. The Employment Agreement, entered into between TCG and Duff, included an arbitration clause, which stated, in pertinent part:

In consideration of the mutual promises herein, TCG and the EMPLOYEE hereby waive all rights to adjudicate any dispute with the other in a court of law * * * and in lieu thereof agree to submit any and all disputes for binding resolution by arbitration. For the purpose of this agreement, TCG shall include its successors, agents, employees, officers, directors, subsidiaries, or affiliates. * * * This Arbitration Agreement shall apply to all claims of any kind against TCG or any of its officers, directors, managers or employees, or against Employee by TCG, including but not limited to: claims for any alleged contract violation by either party; any employment claim including claims brought based on the EEOC or similar state statute related to the enforcement of employment laws; employment termination issues; any claim for sexual or other harassment, claims for any form of discrimination, including any claims that come under the Policy Against Sexual Harassment And All Other Harassment, and any other harassment policy adopted by TCG * * *.

{¶4} It further states “EMPLOYEE agrees that no officer, director, agent or employee shall have any personal liability to EMPLOYEE for any action taken by such person(s) on behalf of TCG in the scope of his or her employment duties, and such person(s) shall not be joined in action taken by EMPLOYEE against TCG to enforce or interpret this Agreement.” It provided that arbitration will be conducted in Sarasota

County, Florida unless otherwise agreed upon by the parties in writing.

{¶5} On October 25, 2021, Duff filed a Brief in Opposition in which she argued that the arbitration clause did not apply because TCG, not Thomas Christopher individually, was party to the employment agreement with Duff and the actions taken by Christopher did not fall under that agreement.

{¶6} In a November 4, 2021 Judgment Entry, the trial court denied Christopher's Motion. It found that the claims raised by Duff, threats of physical violence, did not fall within the scope of Christopher's employment duties, were not in any of the categories of employment-related activities contained in the arbitration clause, and were not subject to the arbitration agreement.

{¶7} Christopher timely appeals and raises the following assignment of error:

{¶8} "The Trial Court's decision to deny Defendant-Appellant's Motion to Dismiss to Compel Arbitration was in error because the parties had a valid agreement to arbitrate and Plaintiff-Appellee's claims are in the scope of the arbitration agreement."

{¶9} "The scope of an arbitration clause, that is whether a controversy is arbitrable under the provisions of a contract, is a question for the court to decide upon examination of the contract." (Citations omitted.) *TN3 LLC v. Jones*, 2019-Ohio-2503, 139 N.E.3d 473, ¶ 14 (11th Dist.). "Therefore, this court reviews de novo a trial court's legal conclusion as to whether a party is contractually bound by an arbitration clause." (Citation omitted.) *Knight v. Altercare Post-Acute Rehab. Ctr., Inc.*, 2017-Ohio-6946, 94 N.E.3d 957, ¶ 9 (11th Dist.). While "[t]he standard of appellate review in determining the enforceability of an arbitration provision is de novo" the trial court's factual findings "must be accorded deference." *TN3* at ¶ 14, citing *Jamison v. LDA Builders, Inc.*,

11th Dist. Portage No. 2011-P-0072, 2013-Ohio-2037, ¶ 21.

{¶10} “Ohio public policy favors arbitration and, therefore, such provisions are ordinarily considered valid and enforceable.” *Alkenbrack v. Green Tree Servicing, L.L.C.*, 11th Dist. Geauga No. 2009-G-2889, 2009-Ohio-6512, ¶ 14. “[A]n arbitration provision must be enforced unless it is not susceptible of an interpretation that covers the asserted dispute, with any doubt being resolved in favor of arbitration.” *Id.*, citing *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 14.

{¶11} As an initial matter, Duff argues that since Christopher individually was not a party to the employment contract containing the arbitration clause, he cannot seek to enforce such a clause, citing *Corporate Floors, Inc. v. Lawrence Harris Const.*, 8th Dist. Cuyahoga No. 88464, 2007-Ohio-2631.

{¶12} In *Corporate Floors*, the court emphasized that generally “a party to an action cannot be required to arbitrate a dispute between itself and a second party unless those parties have previously agreed in writing to arbitration” and “[w]hen a complaint has been brought against both parties and nonparties to an arbitration agreement, arbitration can only be ordered as to the parties who agreed to the arbitration provision.” (Citation omitted.) *Id.* at ¶ 6. The court concluded that since the defendant had signed the contract in a corporate capacity, he was not personally a party to the contract and thus, the arbitration clause did not apply to him. *Id.* at ¶ 8. Other courts have reached similar conclusions. See *Cahill v. New Richmond Natl. Bank*, 12th Dist. Clermont No. CA2001-12-093, 2002-Ohio-3881, ¶ 7 (plaintiffs cannot be forced to submit their claims to arbitration against a defendant personally where that defendant signed the contract in his

corporate capacity only); *Kline v. Oak Ridge Builders, Inc.*, 102 Ohio App.3d 63, 67, 656 N.E.2d 992 (9th Dist.1995). This court has also held that, generally, “[a]n arbitration clause is only binding upon the specific parties to the agreement.” *Glenmoore Builders, Inc. v. Kennedy*, 11th Dist. Portage No. 2001-P-0007, 2001 WL 1561742, *5 (Dec. 7, 2001); *Owens Flooring Co. v. Hummel Constr. Co.*, 140 Ohio App.3d 825, 830, 749 N.E.2d 782 (11th Dist.2001).

{¶13} While it is accurate here that Christopher signed the contract in his capacity as president of TCG, the analysis on this issue does not end here. As this court has recognized, “under certain circumstances, non-signing third parties may enforce arbitration agreements.” *Knight*, 2017-Ohio-6946, at ¶ 21. “Ohio courts have recognized that a nonsignatory agent may enforce an arbitration agreement between a plaintiff and the agent’s principal when ordinary principles of contract and agency law require.” *Rivera v. Rent A Center, Inc.*, 8th Dist. Cuyahoga No. 101959, 2015-Ohio-3765, ¶ 20.

{¶14} In *Rivera*, the appellate court addressed a case involving similar facts as those present here. Rivera executed an agreement relating to his employment with Rent A Center, which included a provision agreeing to arbitrate claims against Rent A Center relating to his employment as well as such related claims that he “may have against any * * * officers, directors, employees, or agents in their capacity as such or otherwise.” (Emphasis omitted.) *Id.* at ¶ 16. The plaintiff filed a complaint against Rent A Center and Owens, plaintiff’s supervisor. Owens sought arbitration of the matter, although he was not a party to the contract containing the arbitration agreement. *Id.* at ¶ 2-3. The court concluded that since the arbitration clause covered employees in their individual capacity and was agreed to by the plaintiff, “the Agreement is enforceable as between Rivera and

Owens, even though Owens is a nonsignatory or nonparty.” *Id.* at ¶ 24. See also *Terry v. Bishop Homes of Copley, Inc.*, 9th Dist. Summit No. 21244, 2003-Ohio-1468, ¶ 29 (“[an employee], whose actions as an agent and employee * * * served as a basis for his potential liability, is entitled to enforce the arbitration agreement”) (citation omitted); *Owens Flooring* at 830 (distinguishing between enforcement of an arbitration clause by a non-party against a signatory and a nonsignatory).

{¶15} Similar facts to *Rivera* are present in this case. Although Christopher individually was not a party to the employment agreement, which was executed by Duff, the arbitration clause stated that it applied “to all claims of any kind against TCG or any of its officers, directors, managers or employees.” Thus, the agreement can be enforced between Duff and Christopher although he was a nonsignatory. That is, because Christopher is an agent, i.e., officer, covered by the agreement, and the allegations arise out of Christopher’s employment and agency relationship with TCG, the arbitration agreement can be invoked between the parties even though Christopher is a nonsignatory. Given the foregoing, we will proceed to consideration of whether the arbitration clause is otherwise enforceable.

{¶16} “[T]wo basic facts must be proven before a stay of the trial proceeding can be justified: (1) the existence of a valid written agreement to arbitrate disputes between the parties; and (2) the scope of the agreement is sufficiently broad to cover the specific issue which is the subject of the pending case.” *Scharf v. Manor Care of Willoughby, OH, LLC*, 11th Dist. Lake No. 2019-L-062, 2020-Ohio-1322, ¶ 22, citing *Dodeka, L.L.C. v. Keith*, 11th Dist. Portage No. 2011-P-0043, 2012-Ohio-6216, ¶ 25. “Both factual requirements are predicated upon the legal proposition that, while the arbitration of

disputes is strongly encouraged under the law, a party should not be forced to proceed to arbitration unless she expressly agreed to do so.” (Citation omitted.) *Id.*

{¶17} “To determine whether the claims asserted in the complaint fall within the scope of an arbitration clause, the Court must ‘classify the particular clause as either broad or narrow.’ (Citation omitted.) *Academy of Medicine*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶ 18. “[A]n arbitration clause that contains the phrase ‘any claim or controversy arising out of or relating to the agreement’ is considered the paradigm of a broad [arbitration] clause.” (Citation omitted.) *Hicks v. Cadle Co.*, 11th Dist. Trumbull No. 2013-T-0017, 2014-Ohio-872, ¶ 13, citing *Academy of Medicine* at ¶ 18.

{¶18} In the present matter, the arbitration clause is broad, as it states that the parties agreed to submit “any and all disputes for binding resolution by arbitration.” However, “[e]ven a broad arbitration clause * * * does not render all claims subject to arbitration.” *Hicks* at ¶ 13; see *Kennedy v. Stadlander*, 8th Dist. Cuyahoga No. 110416, 2021-Ohio-4167, ¶ 24, citing *McCourt Constr. Co. v. J.T.O., Inc.*, 11th Dist. Portage No. 96-P-0036, 1996 WL 586422, *2 (Sep. 20, 1996) (only the claims that arise from the contract which contains the clause can be submitted to arbitration). “The Ohio Supreme Court has held that whether a cause of action is within the scope of an arbitration agreement may be determined by applying the federal standard found in *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386 (6th Cir.2003).” *Hicks* at ¶ 14 and 4 (applying the *Fazio* standard in the case of an arbitration agreement including a clause that “[a]ny controversy or claim between or among the parties hereto including but not limited to those arising out of or relating to this instrument”); *Academy of Medicine* at ¶ 15.

{¶19} *Fazio* provides that, to determine “whether an issue is within the scope of an arbitration agreement * * * [a] proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.” *Id.* at 395. “Torts may often fall into this category,” but “[e]ven real torts can be covered by arbitration clauses ‘[i]f the allegations underlying the claims ‘touch matters’ covered by the [agreement].’” (Citation omitted.) *Id.* The Ohio Supreme Court has emphasized that “[t]he *Fazio* test * * * functions as a tool to determine a key question of arbitrability—whether the parties agreed to arbitrate the question at issue. It prevents the absurdity of an arbitration clause barring a party to the agreement from litigating *any* matter against the other party, regardless of how unrelated to the subject of the agreement.” *Academy of Medicine* at ¶ 29.

{¶20} While Christopher primarily relies upon his argument that the arbitration clause states that it applies to “any claims,” this fails to recognize the clear indication by the Ohio Supreme Court that allowing an arbitration clause to prevent all claims whatsoever, no matter how unrelated to the contract’s subject matter, is an “absurdity.” *Academy of Medicine* at ¶ 29. Even broad arbitration clauses do not automatically prevent every claim from being arbitrated. *Arnold v. Burger King*, 2015-Ohio-4485, 48 N.E.3d 69, ¶ 35 (8th Dist.), citing *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705 (2007) (“[b]ecause even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings”). To hold otherwise would allow a party to commit any criminal act or civil wrong at a place of employment or

during a work meeting, no matter how serious or unrelated to employment, and still seek enforcement of the arbitration clause, which is precisely what the Ohio Supreme Court sought to avoid when emphasizing the absurdity of an arbitration clause barring litigation of *any* matter against the other party. *Academy of Medicine* at ¶ 29. For example, it has been held that torts such as sexual assault are not foreseeable and fall outside of an employment agreement and its arbitration provision. *Arnold* at ¶ 65-67; *Crider v. GMRI, Inc.*, 2020-Ohio-3668, 154 N.E.3d 1250, ¶ 18 (8th Dist.) (“verbal and physical contact culminating in sexual assault as well as retaliation, harassment, or other detrimental acts against Crider based on the unlawful conduct is not a foreseeable result of the employment”).

{¶21} The problem in the present matter, however, is that there exists a factual dispute as to the exact circumstances of the incident that occurred between Christopher and Duff. Duff asserted claims that Christopher made a shooting motion with his hand and threatened to shoot her in the head, alleging Assault and Intentional Infliction of Emotional Distress. Christopher contended, through his Motion to Dismiss to Compel Arbitration, that his actions were not a threat but that the term “shoot” is used in HR to refer to firing someone, his actions took place during a meeting relating to Duff’s work performance, and they pertained to her employment with the company. Under these differing versions of the events, Christopher’s actions may be either a tort committed outside of the scope of the agreement or an action related, at least in part, to employment and which would arguably fall under the arbitration clause. In the absence of a hearing by the trial court below, the record is not sufficiently developed for this court to make a determination on this issue.

{¶22} “A party seeking to enforce an arbitration provision may choose to move for a stay of proceedings under R.C. 2711.02, or to petition for an order to compel the parties to proceed to arbitration under R.C. 2711.03, or to seek orders under both statutes.” (Emphasis omitted.) *Benson v. Spitzer Mgt., Inc.*, 8th Dist. Cuyahoga No. 83558, 2004-Ohio-4751, ¶ 19. It has been observed that “[a]rbitration does not normally require dismissal of the claims referable to arbitration; it warrants only a stay of those claims pending arbitration.” *Morgan Stanley Dean Witter Commercial Fin. Servs., Inc. v. Sutula*, 126 Ohio St.3d 19, 2010-Ohio-2468, 929 N.E.2d 1060, ¶ 3. While Christopher characterized his filing before the trial court seeking arbitration as a motion to dismiss and included citations to Civ.R. 12(B)(6), it is properly treated as a motion to stay or to compel arbitration under R.C. 2711.02 or .03. In either case, the trial court is permitted to hold a hearing to obtain further evidence necessary to determine the applicability of the arbitration provision. In the case of a request to compel arbitration under R.C. 2711.03, a hearing is required, since the statute directs that the court “shall hear the parties,” but only if a party has requested such a hearing, which was not the case here. *Liese v. Kent State Univ.*, 11th Dist. Portage No. 2003-P-0033, 2004-Ohio-5322, ¶ 43. Nonetheless, even where a hearing is not required, such as when filing a request to stay pending arbitration under R.C. 2711.02, the Ohio Supreme Court has held that “it is within a trial court’s discretion to hold a hearing” when considering a request that a matter be submitted to arbitration. *Maestle v. Best Buy Co.*, 100 Ohio St. 3d 330, 2003-Ohio-6465, 800 N.E.2d 7, ¶ 19.

{¶23} Courts have found that where there was not sufficient evidence present in the record to make a determination as to whether arbitration should be ordered, a remand

to the trial court to hold an evidentiary hearing is necessary. See *Sultaana v. Drummond Fin. Servs., L.L.C.*, 8th Dist. Cuyahoga No. 100424, 2014-Ohio-938, ¶ 10 (“[w]here disputed evidence existed in the record, appellate courts have reversed decisions staying or not staying cases pending arbitration when the trial court has failed to hold a hearing”). In *May v. Wachovia Secs., L.L.C.*, 9th Dist. Summit No. 24635, 2009-Ohio-4339, there was a question as to whether the arbitration provision in an account application for investments made through a securities company governed claims stemming from allegedly faulty investment advice. The appellate court observed that “it is unclear from the limited information in the record whether the arbitration provision in the Account Application, in fact, governs this suit,” noting that the limited record did not “outline the exact nature of the misrepresentations [appellee] alleges or the scope of his relationship with [appellant].” *Id.* at ¶ 10. It concluded that it was possible the suit fell within the scope of the broad arbitration provision but that, “[u]nder the circumstances in this case, the trial court should have held a hearing on” the motion to stay proceedings pending arbitration since it “could only determine whether the dispute arguably falls within the scope of the * * * arbitration provision through [such] hearing.” *Id.* at ¶ 11.

{¶24} Similarly, in *Ault v. Parkview Homes, Inc.*, 9th Dist. Summit No. 24375, 2009-Ohio-586, the court found that, where the parties disputed certain facts relative to arbitration, the court abused its discretion by failing to conduct an evidentiary hearing on the motion to stay pending arbitration. *Id.* at ¶ 13. See also *Taylor v. Squires Constr. Co.*, 196 Ohio App.3d 581, 2011-Ohio-5826, 964 N.E.2d 500, ¶ 31 (8th Dist.) (factual disputes that may support a determination that the arbitration clause applies should be resolved at a hearing on a motion to compel and to stay proceedings pending arbitration).

{¶25} There are conflicting versions of the events that occurred giving rise to the allegations of Assault and Intentional Infliction of Emotional Distress. In order for the court to determine whether the causes of action arose out of or related to the employment agreement or whether it would be an “absurdity” to proceed to arbitration on such claims, it is necessary to review the facts giving rise to the claims. In this instance, we determine that it was necessary for the trial court to hold a hearing to take evidence on this issue. For this reason, we reverse the decision of the lower court and remand with the order to hold an evidentiary hearing before ruling anew on whether the arbitration clause must be enforced.

{¶26} The sole assignment of error is with merit.

{¶27} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, denying Christopher’s Motion to Dismiss to Compel Arbitration, is reversed and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

THOMAS R. WRIGHT, J., concurs with a Concurring Opinion,
MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

THOMAS R. WRIGHT, J., concurs with a Concurring Opinion.

{¶28} I agree with the reasoning and conclusion of the lead opinion, but write separately to briefly respond to the Dissenting Opinion’s position.

{¶29} The dissent initially claims that the majority “needlessly chooses to apply agency principles in this case, resulting in a conflation of issues.” The determination of how a non-signatory of the underlying agreement, here, Christopher, may seek to enforce the arbitration clause is a threshold issue in this case. Agency theory is one legal basis that can be used to bind a non-signatory of an agreement to that agreement. Because Christopher is an agent of TCG and the matter at issue arose out of the parties’ employment, the arbitration clause may be invoked *if* the factual allegations are covered under the terms of the clause. We cannot simply assume that Christopher, as a non-signatory, can invoke the arbitration clause without a legal nexus. Here, agency theory is a necessary condition for Christopher to utilize the arbitration clause. Thus, I fail to see how the dissent asserts that the lead opinion and this opinion “needlessly chooses” to apply or discuss agency principles.

{¶30} Moreover, it is unclear what issues are being conflated. In order to determine whether Duff is asserting an independent tort not covered by the arbitration clause or whether the matter is within the scope of the clause, we first must determine the discrete issue of whether Christopher can invoke the clause. This analysis does not merge or conflate anything. To the contrary, it is simply a gateway issue that requires attention in order for the analysis to go forward. And, thus, the agency analysis is necessary to the conclusion that a hearing is required.

{¶31} The dissent also maintains that Duff’s “claims can be maintained without reference to the agreement and do not touch matters covered by it.” This conclusion assumes what needs to be established; namely, whether the alleged threat was indeed a “threat” thereby encompassed under the rubric of an intentional tort *or* merely corporate

parlance implying Duff may be fired, which would relate to a matter within the arbitration clause.

{¶32} Initially, the dissent observes that “there is no dispute that Mr. Christopher’s conduct may have related to an employment matter.” To the extent this is true, a hearing *is* necessary to determine whether the conduct is within the arbitration clause.

{¶33} Further, the dissent alleges the lead opinion “assumes what needs to be established” by assuming Christopher was acting within the scope of his employment. This is simply false. The lead opinion and this opinion merely underscore that the current record *does not* resolve whether the conduct at issue is within the scope of the arbitration clause or whether it is intentionally tortious and therefore outside the scope of the clause. Because of this, an evidentiary hearing is necessary.

{¶34} Christopher filed a motion to compel arbitration based upon the arbitration clause within the employment agreement. The dissent observes, as does the lead opinion, that the proper test is whether the action could be maintained without reference to the arbitration clause at issue or, alternatively, whether the claims touch on matters covered by the arbitration agreement. *See Fazio v. Lehman Bros., Inc.*, 340 F.3d 386 (6th Cir.2003). The dissent, in conclusory fashion, proclaims that assault and intentional infliction of emotional distress are obviously outside the arbitration clause. It is almost tautological that intentional torts are outside the scope of an employment agreement’s arbitration provisions. Still, it remains to be seen whether the alleged conduct relates to employment matters covered by the arbitration clause or bona fide intentional torts outside of the arbitration clause.

{¶35} “[W]hen deciding motions to compel arbitration the proper focus is whether the parties actually agreed to arbitrate the issue, i.e., the scope of the arbitration clause, not the general policies of the arbitration statutes.” (Citations omitted.) *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203, ¶ 20. Appellant moved the court to dismiss appellee’s complaint and compel arbitration. R.C. 2711.03, by its very terms, governs where a party has filed a motion to compel arbitration. *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7, ¶ 14. R.C. 2711.03 allows a party that claims to be aggrieved by another party’s alleged failure to comply with an arbitration agreement to petition a court of common pleas “for an order directing that the arbitration proceed” and states that the court “*shall hear the parties[.]*” (Emphasis added) R.C. 2711.03(A). When, as here, a factual issue exists that is determinative of the arbitrability of a claim, an evidentiary hearing is necessary.

{¶36} Further underscoring the need for an evidentiary hearing, “[a] party cannot avoid contractual arbitration simply by casting the claim as a tort.” (Citations omitted.) *Sumber Co. Pte. Ltd. v. Diversey Corp.*, 1st Dist. Hamilton No. C-950360, 1996 WL 365885, *4 (Feb. 28, 1996); *see also Combined Energies v. CCI, Inc.*, 514 F.3d 168, 172 (1st Cir.2008) (“it is true that CE cannot avoid arbitration by dint of artful pleading alone”) *Acevedo Maldonado v. PPG Industries, Inc.*, 514 F.2d 614, 616 (1st Cir.1975) (finding that arbitration clause covered “contract-generated or contract-related disputes between the parties however labeled: it is immaterial whether claims are in contract or in tort”); *Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 910 (7th Cir.1999) (noting that arbitrability of particular claim does not turn “on the label—‘tort’ or ‘contract’—a party chose to affix to the claim”).

{¶37} The dissent seems to maintain that Duff can avoid arbitration by simply “casting” her claims in terms of tortious conduct. This ignores, however, the crucial inquiry, to wit: is the manner in which Duff “labeled” her complaint, in light of the disputed denotation of the term “shoot,” dispositive of whether she is actually asserting a matter outside the arbitration clause. I maintain, along with the lead opinion, that it is not. And one cannot escape contractual obligations by selectively pleading. The trial court must conduct a hearing to resolve this point.

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

{¶38} I must respectfully dissent because the majority needlessly chooses to apply agency principles in this case, resulting in a conflation of issues.

{¶39} The majority’s reference to agency principles originates from cases in which federal courts have outlined “limited exceptions to the rule that a person cannot be compelled to arbitrate a dispute that he did not agree in writing to submit to arbitration.” / *Sports v. IMG Worldwide, Inc.*, 157 Ohio App.3d 593, 2004-Ohio-3113, 813 N.E.2d 4, ¶ 12. This analysis typically encompasses the scope of the relevant arbitration clause. See, e.g., *id.* at ¶ 15-35.

{¶40} However, in *Rivera v. Rent A Center, Inc.*, 8th Dist. Cuyahoga No. 101959, 2015-Ohio-3765, on which the majority relies, there was no serious dispute that the employee’s race discrimination claim fell within the scope of the arbitration clause; he agreed to arbitrate all claims and controversies relating to his employment and

termination, including claims for race discrimination. See *id.* at ¶ 14 (“In this case, there is no dispute over whether an Agreement exists * * * [and] what types of claims are covered by the Agreement”). The dispositive issue was whether the employee’s supervisor, who was the named defendant but not a signatory, could enforce the arbitration clause. See *id.* at ¶ 15 (“[T]he dispute arises as to who is subject to the Agreement”).

{¶41} Here, there can be no serious dispute that Mr. Christopher has a legal right to enforce the arbitration clause in applicable circumstances. The employment agreement states that it applies to “all claims of any kind against TCG or *any of its officers, directors, managers or employees* * * *.” (Emphasis added.) Rather, the dispositive issue presented in this case is whether Ms. Duff’s intentional tort claims for assault and intentional infliction of emotional distress fall within the scope of the employment agreement’s arbitration clause. The trial court correctly found that the claims raised by Ms. Duff, i.e., threats of physical violence, did not fall within the scope of her employment duties, did not fall within any of the categories of employment related activities contained in the arbitration clause, and, thus, were not subject to the arbitration agreement.

{¶42} There is no dispute that Mr. Christopher’s conduct may have related to an employment matter. However, Ms. Duff is not asking for an adverse employment action to be invalidated; she is seeking damages for tortious conduct. And despite the concurring opinion’s protestation, it is the lead opinion that “assumes what needs to be established” when it assumes Mr. Christopher was acting within the scope of his employment and, therefore, may enforce the arbitration agreement.

{¶43} The majority appropriately begins its analysis of whether Ms. Duff’s claims for relief fall within the scope of the arbitration agreement with the seminal case of *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, which incorporated the *Fazio* test from federal case law, i.e., “whether the action could be maintained without reference to the contract or relationship at issue.” *Id.* at ¶ 6. Stated another way, do the allegations underlying the claims touch matters covered by the arbitration agreement? See *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6th Cir.2003).

{¶44} But the majority then determines that since “there are conflicting versions of the events,” majority opinion at ¶ 25, there must be a mini trial to take evidence on the meaning of the alleged threats before the trial court may determine arbitrability. This is contrary to one of the key reasons why many employers insist on arbitration agreements—arbitration is private, and confidential information or embarrassing testimony is shielded from public view. This determination is also contrary to this court’s precedent. We have long recognized that “[t]he scope of an arbitration clause, that is whether a controversy is arbitrable under the provisions of a contract, *is a question for the court to decide upon examination of the contract.*” (Emphasis added.) *Owens Flooring Co. v. Hummel Constr. Co.*, 140 Ohio App.3d 825, 829, 749 N.E.2d 782 (11th Dist.2001), quoting *Divine Constr. Co. v. Ohio-Am. Water Co.*, 75 Ohio App.3d 311, 316, 599 N.E.2d 388 (10th Dist.1991); see also *TN3 LLC v. Jones*, 2019-Ohio-2503, 139 N.E.3d 473, ¶ 14 (11th Dist.).

{¶45} The cases that the majority cites in support of its determination that an evidentiary hearing is necessary are distinguishable, as none involved the *scope* of the

arbitration clause. The Eighth District's decision in *Sultaana v. Drummond Fin. Servs., L.L.C.*, 8th Dist. Cuyahoga No. 100424, 2014-Ohio-938, concerned an issue of fact as to whether the plaintiff opted out of the arbitration clause. See *id.* at ¶ 10. The Ninth District's decision in *May v. Wachovia Secs., L.L.C.*, 9th Dist. Summit No. 24635, 2009-Ohio-4339, focused on an issue of fact as to whether a particular document containing an arbitration clause in fact governed the plaintiff's claims against his investment advisor. See *id.* at ¶ 9. In *Ault v. Parkview Homes, Inc.*, 9th Dist. Summit No. 24375, 2009-Ohio-586, the Ninth District determined there was an issue of fact as to whether the arbitration clause "had failed of its essential purpose" because of delay in holding the arbitration. *Id.* at ¶ 10. Finally, in *Taylor v. Squires Constr. Co.*, 196 Ohio App.3d 581, 2011-Ohio-5826, 964 N.E.2d 500 (8th Dist.), the Eighth District determined there was insufficient evidence as to whether an estoppel theory applied to bind a nonsignatory to an arbitration clause. *Id.* at ¶ 31.

{¶46} In this case, there is no need for an evidentiary hearing to determine whether assault and intentional infliction of emotional distress touch matters covered by this arbitration agreement. Even assuming Mr. Christopher's comments to Ms. Duff occurred during a work meeting and in relation to her work performance, Ms. Duff's claims do not fall within the scope of the arbitration clause.

{¶47} While Mr. Christopher emphasizes that the arbitration clause expressly applies to "any claims," he ignores the Supreme Court of Ohio's observation that "[t]he *Fazio* test * * * functions as a tool to determine a key question of arbitrability—whether the parties agreed to arbitrate the question at issue. It prevents the absurdity of an arbitration clause barring a party to the agreement from litigating *any* matter against the

other party, regardless of how unrelated to the subject of the agreement.” (Emphasis sic.) *Academy of Medicine* at ¶ 29. The court emphasized the holding in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir.1995), where, although the arbitration clause provided for arbitration of all antitrust claims, this did not mean that antitrust claims arising outside of the agreement could also be arbitrated. Thus, in *Academy of Medicine*, the court noted that “[f]or example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship.” *Id.* at ¶ 23, quoting *Coors* at 1516.

{¶48} Similarly, in *Hicks v. Cadle Co.*, 11th Dist. Trumbull No. 2013-T-0017, 2014-Ohio-872, we determined the arbitration clause did not apply to claims for intentional infliction of emotional distress, tortious interference with business relations, and engaging in a pattern of corrupt activity. We explained that “[n]one of these claims require reference to the note, as none seek to enforce any right or obligation or derive any benefit from the note.” *Id.* at ¶ 19.

{¶49} Here, Ms. Duff’s claims can be maintained without reference to the agreement and do not touch matters covered by it. Ms. Duff has not alleged claims involving a breach of the agreement, wrongful termination, sexual or other harassment, discrimination, violations of state or federal employment statutes, or any other type of employment claim; she alleges that Mr. Christopher engaged in a very specific type of

tortious conduct—an alleged incident in which Mr. Christopher threatened to shoot her in the head while holding his hand up mimicking a handgun.

{¶50} Mr. Christopher’s argument—that his alleged conduct occurred during a meeting that related to Ms. Duff’s work performance—cannot be utilized to eliminate any tortious act from being litigated outside of the arbitration clause. Otherwise, a party could commit any criminal act or civil wrong at a place of employment or during a work meeting, no matter how serious or unrelated to employment, and still seek enforcement of the arbitration clause, which is precisely what the Supreme Court of Ohio sought to avoid when emphasizing the absurdity of an arbitration clause barring litigation of any matter against the other party. *See Academy of Medicine* at ¶ 29. Any person to whom Mr. Christopher had made the alleged threats could have maintained the same claims as Ms. Duff, regardless of whether they had an employment contract.

{¶51} If it turns out that Mr. Christopher used the word “shoot” in relation to termination from a work project, that speaks to the merits of Ms. Duff’s tort claims, i.e., it may be less likely that she can establish Mr. Christopher’s conduct was tortious. However, the merits of her claims are not relevant in determining arbitrability. *See Council of Smaller Ents. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666, 687 N.E.2d 1352 (1998), quoting *AT & T Technologies, Inc., v. Communications Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (“[I]n deciding whether the parties have agreed to submit a particular [claim] to arbitration, a court is not to rule on the potential merits of the underlying claims”).

{¶52} Mr. Christopher also contends that the arbitration clause expressly references claims of “harassment” and that the police report filed by Ms. Duff alleged

“harassing communication”; therefore, this claim falls directly under the agreement. The employment contract states that the arbitration agreement shall apply to all claims of any kind “including but not limited to: claims for any alleged contract violation by either party; any employment claim including claims brought based on the EEOC or similar state statute related to the enforcement of employment laws; employment termination issues; any claim for sexual or other harassment, claims for any form of discrimination, including any claims that come under the Policy Against Sexual Harassment And All Other Harassment, and any other harassment policy adopted by TCG * * *.” These listed items generally involve employment-related issues. The emphasis on sexual harassment in particular is of little value given that such a claim is generally maintained specifically where there is an employment relationship. See R.C. 4112.02. While the agreement does mention “other harassment,” the claims pleaded here relate to assault and infliction of emotional distress caused through an alleged act of a threat to shoot Ms. Duff, which is beyond an act of “harassment.” Critically, as noted above, we must consider whether the claims raised may be maintained outside of the agreement, which is the case here.

{¶53} Mr. Christopher also cites this court’s decision in *TN3, supra*, in support of the proposition that the employment contract was intertwined with the alleged acts, and, thus, the arbitration clause must be enforced. In *TN3*, this court held that the various claims, including fraud and conversion, could “not be maintained without reference to the parties’ contracts and are subject to arbitration.” *Id.* at ¶ 18. In that case, unlike Ms. Duff’s case, the claims related to allegations of a scheme to deceive TN3 rather than offer consulting services and to cause its interest in a company to be transferred through a securities agreement. We observed that each of the claims were related to the business

relationship between the parties and the claims were “derived from the contracts.” *Id.* We have similarly found arbitration clauses are enforceable in instances where the claims involved terms of matters related directly to the contract. *See Alkenbrack v. Green Tree Servicing, L.L.C.*, 11th Dist. Geauga No. 2009-G-2889, 2009-Ohio-6512, ¶ 22 (claims of misrepresentations made in monthly statements and conversion of payments were related to the enforcement of a security interest under the contract and, thus, were “intertwined with the contract”). Mr. Christopher fails to identify any portion of the employment contract with which claims of assault and intentional infliction of emotional distress are intertwined or must be referenced to resolve the dispute; merely being employed with the company again does not mean anything occurring at a place of employment is arbitrable.

{¶54} I also find the Eighth District’s decision in *Arnold v. Burger King*, 2015-Ohio-4485, 48 N.E.3d 69 (8th Dist.), to be instructive in this matter. In *Arnold*, the court held that although there was an employment contract provision requiring arbitration of “any and all disputes, claims or controversies for monetary or equitable relief arising out of or relating to [Arnold’s] employment,” as well as “claims or controversies relating to events outside the scope of [her] employment,” this provision was not enforceable. *Id.* at ¶ 4. In determining that sexual assault, occurring during work hours and work duties, falls outside of the scope of an employment agreement and an employee would not foresee that such a claim would be subject to arbitration, the court emphasized authority that outrageous torts can fall outside of the scope of broad arbitration agreements: “Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to

outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.” *Id.* at ¶ 35, quoting *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151-152, 644 S.E.2d 705 (2007); see also *Chun Choe v. T-Mobile USA, Inc.*, C.D. Cal. No. SA CV18-0648-DOC, 2018 WL 6131574, *6 (Aug. 1, 2018) (applying *Aiken* and finding fraud and larceny to be outrageous torts falling outside of the scope of the parties’ agreement).

{¶55} Similarly, in this case, I would find that the alleged torts are outside of the scope of the agreement and that it was not foreseeable that Ms. Duff would have to arbitrate in the State of Florida if she were assaulted during work in Ohio. See *Crider v. GMRI, Inc.*, 2020-Ohio-3668, 154 N.E.3d 1250, ¶ 18 (8th Dist.) (“verbal and physical contact culminating in sexual assault as well as retaliation, harassment, or other detrimental acts against Crider based on the unlawful conduct is not a foreseeable result of the employment”). Although the employment agreement addresses arbitration of “all claims,” the examples provided include matters that are generally employment and employment law related. This is distinguishable from matters where particular torts have been specifically included in the agreement, as it would be clearer to the plaintiff the consequences of entering into the arbitration clause. See, e.g., *McGuffey v. LensCrafters, Inc.*, 141 Ohio App.3d 44, 53, 749 N.E.2d 825 (12th Dist.2001) (assault found to be within the scope of the agreement where such claim was listed in the arbitration clause).

{¶56} Finally, Mr. Christopher argues that the party opposing arbitration needs to point to “explicit language” showing that the dispute is not subject to arbitration, citing *Niles Edn. Assn. v. Niles City School Dist. Bd. of Edn.*, 11th Dist. Trumbull No. 2019-T-

0081, 2020-Ohio-6804, ¶ 56. As applied in *Niles*, however, the requirement to point to explicit language comes into play in order to “overcome the presumption of arbitrability.” *Id.* According to the *Niles* analysis, the court first determines whether the grievance at issue is within the scope of the arbitration provision and, then, if it is, applies the presumption in favor of arbitrability. *Id.* at ¶ 57-58. Since I would determine Ms. Duff’s claims for relief were not within the scope of the arbitration provision, she was not required to point to explicit language showing the dispute is not subject to arbitration.

{¶57} For these reasons and upon the authorities cited, I respectfully dissent.

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

GENE HAGER,

Plaintiff-Appellee,

- vs -

DARLENE K. SWICKHEIMER,

Defendant-Appellant.

CASE NO. 2022-L-069

Civil Appeal from the
Court of Common Pleas

Trial Court No. 2022 CV 000466

OPINION

Decided: February 13, 2023
Judgment: Reversed and remanded

Daniel F. Lindner, The Lindner Law Firm, LLC, 2077 East 4th Street, Second Floor, Cleveland, OH 44115 (For Plaintiff-Appellee).

Matthew C. Rambo, Freeburg & Rambo, LLC, 8228 Mayfield Road, Suite 5B, Chesterland, OH 44026 (For Defendant-Appellant).

MATT LYNCH, J.

{¶1} Defendant-appellant, Darlene Swickheimer, appeals the Judgment of the Lake County Court of Common Pleas, denying her Motion for Relief from Judgment. For the following reasons, we reverse the decision of the lower court and remand for further proceedings consistent with this Opinion.

{¶2} On April 15, 2022, plaintiff-appellee, Gene Hager, filed a Complaint on Cognovit against Swickheimer.

{¶3} On April 28, 2022, the trial court entered the following Judgment in favor of Hager:

1. Plaintiff is the named Payee on a Cognovit Note dated January 18, 2008 that secured a debt from October 6, 2006.
2. Defendant is a named Maker of said Cognovit Note.
3. The Cognovit Note secured a business loan in the principal amount of \$45,000.00, accruing interest at 5% per annum compounded, payable on demand.
4. Plaintiff made demand for payment in full from Defendant, but Defendant never made any payment.
5. Defendant is in material default of her contractual obligations under the Cognovit Note.
6. As the direct and proximate result of Defendant's breach of the Cognovit Note contract, Plaintiff has incurred ~~ninety seven thousand six hundred sixty six 68/100 dollars~~ *\$97,114.86* [handwritten] (\$97,666.86 [sic]) in contract damages, together with future interest thereon a[t] a contract rate of five (5%) per annum.

{¶4} The findings in the Judgment were affirmed by an Affidavit of Gene Hager. Attached to the Affidavit was a printout from "The Calculator Site" demonstrating that compound interest at a rate of 5% on the principal of \$45,000.00 for 185 months amounts to \$52,114.86.

{¶5} On May 27, 2022, Swickheimer filed a Motion for Relief from Judgment pursuant to Civil Rule 60(B)(3) and (5) on the grounds that the April 28 Judgment "was based upon a note that does not appear to have been issued for a commercial purpose, for which payment was never demanded as due, and for an amount that was incorrectly calculated and prayed for by Plaintiff."

{¶6} On July 5, 2022, the trial court denied the Motion for Relief from Judgment. The court's Judgment provides as follows:

Defendant makes ambiguous statements that the Note "does not appear to have been issued for a commercial purpose"¹ [Fn. 1: There is no statutory requirement that a cognovit note state on its face that

it is for commercial purposes in order to be enforceable. See R.C. 2323.13.] and “vehemently denies” that demand for payment was made, both without providing an Affidavit and while ignoring Plaintiff’s Affidavit averring that the Note was made for a commercial purpose and that demand for payment was made. Because Defendant has not provided the court with an Affidavit or other evidence to support her allegations, the court finds that it is undisputed that the Note was for commercial purposes, and that there is no evidentiary dispute requiring a hearing.

{¶7} On August 1, 2022, Swickheimer filed a Notice of Appeal. On appeal, she raises the following assignments of error:

[1.] The trial court erred in denying Appellant’s unopposed Motion for Relief from Judgment.

[2.] The trial court erred in failing to conduct an evidentiary hearing on Appellant’s unopposed Motion for Relief from Judgment.

{¶8} The assignments of error will be addressed in a consolidated manner.

{¶9} “An appellate court reviews a decision on a Civ.R. 60(B) motion for abuse of discretion.” *State ex rel. Jackson v. Ohio Adult Parole Auth.*, 140 Ohio St.3d 23, 2014-Ohio-2353, 14 N.E.3d 1003, ¶ 21. “If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion.” (Citation omitted.) *Coulson v. Coulson*, 5 Ohio St.3d 12, 16, 448 N.E.2d 809 (1983). “Thus, the trial court abuses its discretion in denying a hearing where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment.” *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 19, 665 N.E.2d 1102 (1996).

{¶10} The test for determining when a party is entitled to relief from judgment as set forth in Civil Rule 60(B) and *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47

Ohio St.2d 146, 351 N.E.2d 113 (1976), “is modified when a party is seeking relief from a cognovit judgment.” *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, 834 N.E.2d 836, ¶ 18; *Huntington Natl. Bank v. D & G Ents., Inc.*, 7th Dist. Mahoning No. 12 MA 15, 2013-Ohio-1117, ¶ 20 (“[t]he movant’s burden is somewhat lessened when the judgment was taken by confession on warrant of attorney without prior notice”); *Home S. & L. of Youngstown v. Snowville Subdivision*, 8th Dist. Cuyahoga No. 97985, 2012-Ohio-4594, ¶ 17.

{¶11} “Because the judgment debtor is not afforded notice or the opportunity to answer the complaint prior to the entry of a cognovit judgment, the judgment debtor is not required to show entitlement to relief under one of the specific grounds listed under Civ.R. 60(B).” *Rini* at ¶ 18. “Therefore, a party seeking relief from a cognovit judgment is only required to demonstrate the existence of a meritorious defense and that the motion is made within a reasonable time.” (Citation omitted.) *Id.*; *SHJ Co. v. Avani Hospitality and Fin., L.L.C.*, 2022-Ohio-1173, 187 N.E.3d 1121, ¶ 16; *Cook Family Invests. v. Billings*, 9th Dist. Lorain No. 07CA009281, 2009-Ohio-73, ¶ 8.

{¶12} There is no dispute regarding the timeliness of Swickheimer’s Motion. Accordingly, the determinative issue is whether she demonstrated the existence of meritorious defenses.

{¶13} Swickheimer raised three purported meritorious defenses. She denied, despite the Affidavit to the contrary, that Hager ever made a demand for payment and argued that, “[w]ithout such demand, payment on the Note was never due.” We disagree. “If a note does not specify a maturity date, it will be due on demand.” *Fogg v. Friesner*, 55 Ohio App.3d 139, 140, 562 N.E.2d 937 (6th Dist.1988). “Furthermore, it has been held

that “* * * the filing of an action is in itself a sufficient demand against the maker of a note to sustain the action and no demand for payment is required prior thereto.” *Id.*, citing *Union Properties, Inc. v. McHenry*, 142 Ohio St. 136, 144, 50 N.E.2d 315 (1943).

{¶14} Swickheimer also argues that, despite the Affidavit to the contrary, “the Note is not clearly for a commercial or business loan.” See R.C. 2323.13(E) (“[a] warrant of attorney to confess judgment * * *, arising out of a consumer loan or consumer transaction, is invalid”). This is not a meritorious defense. Swickheimer does not claim that the Note arose out of a consumer loan or transaction, only that it “does not appear to have been issued for a commercial purpose.” As noted by the trial court, a promissory note is required to specify the underlying transaction. Hager’s Affidavit is evidence that the Note secured a business loan and this evidence is not challenged merely because the Note is silent with respect to its underlying purpose.

{¶15} Finally, Swickheimer challenges the calculation of interest on the Note.

With respect to interest, the Cognovit Note provides as follows:

* * * John G. Swickheimer and Darlene K. Swickheimer * * *
promise to pay to the order of Gene Hager * * * the principal sum of
Forty-Five Thousand and No/100 (\$45,000.00), together with interest
at the rate of Five (5%) per annum on the unpaid balance from the 6
day of October, 2006, until paid in full.

Said principal and interest shall be payable upon demand.

In the event said amount is not paid in full on the date due,
interest shall accrue at the rate of one and one-half percent (1.5%)
per month on the unpaid portion of principal, compounded monthly,
until the entire amount is paid, or, at the option of Payee [Hager],
may be withdrawn from the security deposit held by Payee or its
assignee.

{¶16} Swickheimer points out that, according to the printout attached to Hager’s Affidavit, the interest was calculated at a rate of “5% yearly” but compounded “monthly,”

contrary to the Note which provides for interest “at the rate of Five (5%) per annum.” She further notes that “[n]o effect has been given to [the] provision of the Note” providing for interest at the rate of 1.5% compounded monthly. The provision for interest at the rate of 1.5% compounded monthly was also referred to in Hager’s Affidavit in support of judgment (“[t]he Cognovit Note provided for a default interest rate of 1.5% per month, compounding monthly”).

{¶17} The trial court did not address this aspect of Swickheimer’s Motion for Relief from Judgment. Rather, the court ruled that “Defendant has not provided the court with an Affidavit or other evidence to support her allegations.” This court has held that, “[w]hile it is generally advisable and preferable to do so, Civ.R. 60(B) does not *require* a movant to submit evidence in the form of affidavits or alternative evidence produced under oath.” *Wells Fargo Fin. Leasing, Inc. v. Pero*, 11th Dist. Portage No. 2005-P-0053, 2006-Ohio-1459, ¶ 12; *Ohio Carpenters’ Fringe Benefit Fund v. Krulak*, 8th Dist. Cuyahoga No. 88872, 2008-Ohio-220, ¶ 32 (“Civ.R. 60(B) does not specifically impose a requirement on the movant to file evidence in the form of affidavits, * * * [h]owever, it may be necessary where the motion requires consideration of facts, which do not appear in the record”). In the present case, Swickheimer’s alleged defense, the miscalculation of interest, does not rely on evidence extrinsic to the record. The printout from The Calculator Site calculates interest that is compounded monthly. Inasmuch as this calculation is contrary to the terms of the Note that interest is to be calculated at 5% per annum and that interest at the rate of 1.5% compounded monthly shall accrue from the date of demand, Swickheimer has alleged facts presenting a meritorious defense.

{¶18} In the recalculation of interest, the date of demand will be significant for the application of the default interest rate. We note that Hager’s Affidavit states that he “made demand for payment in full from the Maker in November, 2017.” The trial court’s April 28, 2022 Judgment Entry acknowledges that “Plaintiff made demand for payment in full” but did not incorporate the date of demand. In seeking relief from judgment, Swickheimer could not be expected to challenge the demand date when that date was not part of the judgment. For the reasons stated above, merely contesting whether demand was made is not a meritorious defense inasmuch as the filing of the lawsuit constitutes demand for payment. On remand, Swickheimer will be able to contest what the proper date of demand should be for the purposes of calculating default interest.

{¶19} Swickheimer’s assignments of error are with merit.

{¶20} For the foregoing reasons, we reverse the Judgment of the lower court and remand for further proceedings consistent with this Opinion. Costs to be taxed against the appellee.

JOHN J. EKLUND, P.J.,
MARY JANE TRAPP, J.,
concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Cleveland Construction, Inc.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 18AP-480
	:	and
Ruscilli Construction Co., Inc. et al.,	:	No. 21AP-375
	:	(C.P.C. No. 16CV-798)
Defendant-Appellee.	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on February 8, 2023

On brief: *Daniel R. Wireman, Dinsmore & Shohl LLP, Peter J. Georgiton, and Joshua M. Cartee*, for appellant. **Argued:** *Peter J. Georgiton*.

On brief: *Ruscilli Construction Co., Inc., Andrew Fredelake, Porter Wright, Morris & Arthur LLP, J. Thomas Nocar, and Ryan Sherman*, for appellee. **Argued:** *J. Thomas Nocar*.

APPEAL from the Franklin County Court of Common Pleas

MENTEL, J.

{¶ 1} Plaintiff-appellant, Cleveland Construction, Inc. ("Cleveland"), appeals from the decisions of the Franklin County Court of Common Pleas denying Cleveland's motion to partially vacate an arbitration award and granting post-judgment attorneys' fees, costs and interests favor of defendant-appellee, Ruscilli Construction Co., Inc. ("Ruscilli"). For the reasons that follow, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} This appeal arises out of a subcontract for a construction project at the Goodale Landing Building in Columbus, Ohio. The structure is owned by Ohio Presbyterian Retirement Services Communities ("OPRS"). Ruscilli and Cleveland were hired as the project's general contractor and metal stud and drywall subcontractor, respectively. On February 17, 2014, Ruscilli and Cleveland entered into a subcontract for Cleveland's work. During the course of the project, disputes about performance under the agreement arose between Ruscilli and Cleveland.

{¶ 3} Eventually, Cleveland brought claims of breach of contract, violation of the Ohio Prompt Payment Act, foreclosure, and unjust enrichment against Ruscilli. (Jan. 25, 2016 Compl.) Cleveland alleged that Ruscilli required Cleveland to perform "additional work outside the scope" of the parties' agreement, "failed to properly manage the construction schedule," and caused delays and inefficiencies on the project. *Id.* at ¶ 9-13. Additionally, Cleveland alleged that Ruscilli did not pay Cleveland for all of its completed work. *Id.* at ¶ 15. Consequently, Cleveland filed a mechanic's lien on the construction project to protect its interests. *Id.* at ¶ 17.

{¶ 4} Pursuant to Article 6 of the parties' Subcontractor Agreement, which requires arbitration of "[a]ny claim arising out of or related to" it, the parties submitted their claims to binding arbitration before a three-arbitrator panel ("Panel"). *Id.*, Ex. A at 8. After a nine-day arbitration hearing from April 24 to May 5, 2017, the Panel issued an interim arbitration award, disposing of all of Cleveland's claims and Ruscilli's counterclaims. (Nov. 21, 2017 Mot. to Partially Vacate, Ex. 3 hereinafter "Interim Arbitration Award"). The Panel concluded that Cleveland was entitled to an award of \$102,271.59, inclusive of pre-judgment interest as of June 12, 2017, with interest accruing at \$10.82 per day thereafter

until payment. *Id.* at 18. Additionally, the Panel directed Cleveland to release its mechanic's lien and bond claim upon Ruscilli's payment of the interim award. *Id.*

{¶ 5} In addition to damages related to the contract balance, both Cleveland and Ruscilli made claims for attorneys' fees and costs. For several reasons, the Panel determined that Cleveland was not entitled to an award. The Panel noted that, based on its findings, Ruscilli "had a good-faith basis to withhold funds from" Cleveland. *Id.* at 16. The Panel also referenced its findings when rejecting Cleveland's assertion that Ruscilli had been "vexatious and unreasonable in prosecuting its claims," while nevertheless stating that:

the Panel acknowledges and agrees that some of the tactics employed by [Ruscilli] and its counsel, specifically the late detailing of its damages, caused problems for [Cleveland's] legal team. The Panel has determined [that Cleveland] had the ability and opportunity to ameliorate any problem created by this late identification through a request for a continuance but chose not to do so.

Id. at 16.

{¶ 6} Thus, the Panel concluded that Cleveland was "not entitled" to an attorney fee award. *Id.*

{¶ 7} Regarding Ruscilli's claim for attorneys' fees and costs, the Panel found that Section 4.6.3.2 of the parties' agreement supported an award. *Id.* at 17. The Panel stated that "[t]he Parties are two sophisticated commercial entities that entered into a negotiated, lengthy Subcontract agreement that included several specific provisions that shifted the risk of [Ruscilli's] attorneys' fees and costs onto [Cleveland] in any dispute between the Parties." *Id.* at 16. Accordingly, the Panel directed Ruscilli to file a petition for attorneys' fees and costs and allowed Cleveland the opportunity to respond. *Id.* at 17.

{¶ 8} After reviewing the parties' briefing on the issue, the Panel found that Ruscilli was entitled to recover from Cleveland \$624,087.45 in attorneys' fees, costs, and expenses. (Nov. 21, 2017 Mot. to Partially Vacate, Ex. 5.) The combined effect of the interim arbitration award and the final arbitration award was a net award to Ruscilli of \$521,885.34.

{¶ 9} On the same day the Panel issued the final arbitration award, Cleveland filed suit against OPRS, asserting a claim of tortious interference with a contractual relationship. Based on its finding that the "cases stem from the same construction project and involve substantially similar parties and related issues," the trial court ordered the cases to be consolidated. (Apr. 20, 2018 Decision & Entry.) The trial court also ordered "all future filings" to "be filed in both cases," based on its Local Rule 31.02(E)(2). *Id.*

{¶ 10} Cleveland also filed a motion under R.C. 2711.10 in the trial court to partially vacate the arbitration award, arguing that the Panel exceeded its authority by ignoring a notice provision under Article 3.3.2.2 of the parties' subcontract. (Nov. 21, 2017 Mot. to Partially Vacate Arbitration Award.) The trial court rejected Cleveland's argument and denied the motion, noting that the language Cleveland had cited to support its argument actually applied to the Panel's ruling on attorneys' fees. (May 15, 2018 Decision & Entry at 7.)

{¶ 11} As the litigation continued, Ruscilli filed several motions to increase its award of post-judgment attorney fees, costs and interest. (June 1, 2018 Petition for Post-Jgmt. Attorneys' Fees, Costs, and Interest; Oct. 14, 2019 Second Supp.; Mar. 18, 2020 Third Supp.) Because Cleveland had not released its mechanic's lien as the arbitrators ordered, Ruscilli claimed that it had incurred an additional \$12,223 in bond premium payments per

year. *Id.* at 3. Ruscilli also claimed additional attorneys' fees arising from Cleveland's filing of the case against OPRS. *Id.* at 5.

{¶ 12} After a hearing, a magistrate concluded that Ruscilli was entitled to recover the following from Cleveland: (1) post-judgment interest on the unpaid arbitration award in the amount of \$59,006.45 as of March 18, 2020; (2) post-judgment attorney fees in the amount of \$86,805.96 as of March 18, 2020; and (3) bond premium costs in the amount of \$36,669 for 2018, 2019, and 2020 on the unreleased mechanic's lien. (June 8, 2020 Mag.'s Decision at 27.) Cleveland filed objections to the decision, but the trial court overruled them and adopted the magistrate's decision. (June 30, 2021 Jgmt. Entry.)

{¶ 13} Cleveland has appealed and asserts the following assignments of error:

[I.] THE TRIAL COURT ERRED IN FAILING TO VACATE THE PORTION OF THE ARBITRATION AWARD IN FAVOR OF RUSCILLI CONSTRUCTION, INC.

[II.] THE TRIAL COURT ERRED IN CONCLUDING THAT RUSCILLI CONSTRUCTION IS ENTITLED TO ITS POST-ARBITRATION ATTORNEYS' FEES.

[III.] THE TRIAL COURT ERRED IN CONCLUDING THAT RUSCILLI CONSTRUCTION IS ENTITLED TO ATTORNEYS' FEES FOR MONITORING ACTIVITY IN A CASE TO WHICH IT WAS NOT A PARTY.

[IV.] THE TRIAL COURT ERRED IN CONCLUDING THAT RUSCILLI CONSTRUCTION IS ENTITLED TO ITS BOND PREMIUM PAYMENTS.

II. STANDARD OF REVIEW

{¶ 14} A mixed standard of review applies to appellate review of a trial court's decision review of an arbitration award under R.C. 2711.10: "when reviewing a decision of a common pleas court confirming, modifying, vacating, or correcting an arbitration award, an appellate court should accept findings of fact that are not clearly erroneous but decide

questions of law de novo." *Portage Cty. Bd. of Dev. Disabilities v. Portage Cty. Educators' Assn. for Dev. Disabilities*, 153 Ohio St.3d 219, 2018-Ohio-1590, ¶ 26. Furthermore, "[t]he question whether an arbitrator has exceeded his authority is a question of law." *Id.* at ¶ 25, quoting *Green v. Ameritech Corp.*, 200 F.3d 967, 974 (6th Cir.2000).

{¶ 15} The trial court's decision to award post-arbitration attorney fees will be reviewed under an abuse of discretion standard. *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146 (1991). However, its interpretation of the parties' contract as the basis for awarding fees and bond payments is reviewed de novo. *EAC Properties, L.L.C. v. Brightwell*, 10th Dist. No. 13AP-773, 2014-Ohio-2078, ¶ 9, citing *Long Beach Assn. v. Jones*, 82 Ohio St.3d 574, 576 (1998).

III. ANALYSIS

{¶ 16} "Because Ohio law favors and encourages arbitration, courts only have limited authority to vacate an arbitrator's award." *Fraternal Order of Police Capital City Lodge No. 9 v. Reynoldsburg*, 10th Dist. No. 12AP-451, 2013-Ohio-1057, ¶ 22, citing *Assn. of Cleveland Fire Fighters, Local 93 v. Cleveland*, 99 Ohio St.3d 476, 2003-Ohio-4278 ¶ 13. *See also Bd. of Trustees v. FOP, Ohio Labor Council*, 81 Ohio St.3d 269, 273 (1998) ("Once the arbitrator has made an award, that award will not be easily overturned or modified."). R.C. 2711.10 defines the limited authority courts have for vacating an arbitration award. *Goodyear Tire & Rubber Co. v. Local Union No. 220, United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 42 Ohio St.2d 516 (1975), paragraph two of the syllabus (stating that the statute "limits judicial review of arbitration to claims of fraud, corruption, misconduct, an imperfect award, or that the arbitrator exceeded his authority").

{¶ 17} Relevant here is the ground set forth in R.C. 2711.10(D), under which a court must vacate an arbitration award if "[t]he arbitrators exceeded their powers, or so

imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." "An arbitrator derives his power from the parties' contract." *Professionals Guild of Ohio v. Franklin Cty. Children Servs.*, 180 Ohio App.3d 91, 2008-Ohio-6682, ¶ 13 (10th Dist.). Thus, "an arbitrator exceeds his powers when the award conflicts with the express terms of the agreement or cannot be derived rationally from the terms of the agreement." *Summit Cty. Children Servs. Bd. v. Community Workers, Local 4546*, 113 Ohio St.3d 291, 2007-Ohio-1949, ¶ 13, citing *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emp. Assn., Local 11*, 59 Ohio St.3d 177 (1991), syllabus. On the other hand, where "there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful," the arbitrator's award draws its essence from the parties' agreement and will not be vacated under R.C. 2711.10(D). *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80 (1986), paragraph one of the syllabus.

A. First Assignment of Error

{¶ 18} In the first assignment of error, Cleveland contends that the arbitrators exceeded their authority by not recognizing the materiality of Article 3.3.2.2 of the parties' agreement, which required Ruscilli to provide "a written compilation -- in other words, backup documentation" to support any claim for costs arising from Cleveland's alleged failure to perform. (Brief of Plaintiff-Appellant at 28.) Article 3.3.2 states:

[Ruscilli's] claims for the costs of services or materials provided due to [Cleveland's] failure to execute the Work shall require:

1. seven days' written notice prior to [Ruscilli] providing services or materials, except in an emergency; and
2. written compilations to [Cleveland] of services and materials provided by [Ruscilli] and charges for such services and materials no later than the fifteenth day of the

month following [Ruscilli] providing such services or materials.

(Jan. 25, 2016 Compl., Ex. A at 5.)

{¶ 19} According to Cleveland, it is "undisputed" that Ruscilli did not comply with this provision, which Cleveland claims was "a material term" of the parties' agreement under *IPS Elec. Servs., LLC v. Univ. of Toledo*, 10th Dist. No. 15AP-207, 2016-Ohio-361. (Brief of Plaintiff-Appellant at 28.) Citing page 16 of the Panel's decision, Cleveland states: "The arbitration panel acknowledged that documentation detailing Ruscilli's alleged damages was not provided until just before the hearing – long after the time required under the subcontract." *Id.* at 28-29.

{¶ 20} The Panel's award provides no support for Cleveland's assertion that Ruscilli ignored any material notice provision of the parties' agreement. The Panel stated that Ruscilli "submitted documentation, including numerous notices of default, many of which detailed specific defective conditions." (Interim Arbitration Award at 4.) The Panel stated that Cleveland "provided little, if any, evidence addressing its responses to the various [Ruscilli] notices of default which would demonstrate why those contemporaneous notices were somehow incorrect." *Id.* With regard to Ruscilli's claim for nonconforming drywall, the Panel specifically found that Ruscilli "gave proper notice entitling it to repair defective work, complete incomplete work, and pay other trades for repairing their work caused by [Cleveland's] actions." *Id.* at 6. The Panel's findings flatly contradict Cleveland's assertion that it was "undisputed" that Ruscilli had ignored its obligation to provide notice. The findings also demonstrate that the Panel considered such notice requirements integral to Ruscilli's claims, thereby undermining Cleveland's argument that the Panel ignored a

material provision of the parties' agreement, which is the entire premise of its position that the Panel exceeded its authority under R.C. 2711.10.

{¶ 21} Moreover, the portion of the Panel's award cited by Cleveland to support its claim that the Panel had "acknowledged" that Ruscilli had failed to comply with the notice provision appears to refer to the activity of Ruscilli's counsel during discovery or in preparation for the hearing, well after the period of time when Ruscilli's claims and obligations of notice under the agreement had passed. The Panel recognized that "some of the tactics employed by [Ruscilli] and its counsel, specifically the late detailing of its damages, caused problems for [Cleveland's] legal team," but concluded that Cleveland nevertheless "had the ability and opportunity to ameliorate any problem created by this late identification through a request for a continuance but chose not to do so." (Interim Arbitration Award at 16.) The Panel also stated that it relied on the foregoing findings to reject Cleveland's argument that Ruscilli "was vexatious and unreasonable in prosecuting its claims." *Id.* The only plausible interpretation of these events is that they occurred during litigation, not during the construction project.

{¶ 22} Finally, as the trial court noted, this discussion appears in the context of the Panel's analysis of whether Ruscilli was entitled to attorneys' fees, not the substance of the parties' claims. (May 15, 2018 Decision & Entry at 7.) After its "review of the arbitrators' award," the trial court concluded that "it did not depart from the essence of the subcontract." *Id.* at 5. In this appeal, Cleveland has presented no compelling challenge to the trial court's conclusion that the award draws its essence from the parties' agreement. Furthermore, Cleveland has failed to identify the absence of a rational nexus between the agreement and the award or any basis to indicate that the award was arbitrary, capricious,

or unlawful. Accordingly, the trial court did not err by refusing to vacate the award under R.C. 2711.10(D). The first assignment of error is overruled.

B. Second & Third Assignments of Error

{¶ 23} In its second assignment of error, Cleveland contends that the trial court erred in concluding that Ruscilli is entitled to its post-arbitration attorneys' fees. When awarding post-arbitration attorneys' fees to Ruscilli, the trial court relied on Article 4.6.3.2 of the Supplementary Conditions to the parties' subcontract. Article 4.6.3.2 provides:

4.6.3 To the fullest extent permitted by law, [Cleveland] shall indemnify and hold harmless [Ruscilli] from and against claims, damages, losses and expenses, including but not limited to its actual attorneys' fees incurred, arising out of or resulting from performance of Subcontract. This indemnity shall include, but not be limited to the following:

* * *

4.6.3.2. The prosecution of any claim by [Ruscilli] against [Cleveland] or an[y] of its subcontractors or suppliers for breach of contract, negligence or defective work.

4.6.3.3. Any action, whether in prosecution or defense, relating to or arising from the filing or removal of any mechanic's lien filed by [Cleveland] or any of its subcontractors, suppliers, or laborers.

4.6.3.4. The defense of any claim asserted by [Cleveland] against [Ruscilli] whether for additional compensation, breach of contract, negligence, or any other cause.

(June 30, 2021 Jgmt. Entry at 5.)

{¶ 24} Cleveland argues that "post-arbitration proceedings do not 'arise out of or result from performance of the Subcontract' " as stated in Section 4.6.3, and that the provision does not specifically "provide for the recovery of fees in post-judgment proceedings." (Brief of Plaintiff-Appellant at 35.) Cleveland also argues that the description of "any claim * * * for breach of contract, negligence, or defective work" limits

the indemnification the fee-shifting clause otherwise provides. *Id.* at 37. Cleveland does not challenge the reasonableness of the fee amount as calculated, but whether the agreement itself authorizes them.

{¶ 25} The default "American Rule" requires each party to pay its own attorney fees in litigation, but three exceptions to the rule exist: a statute authorizing attorney fees, a finding of bad faith conduct by one party, or a fee-shifting provision in the parties' agreement. *Orth v. State*, 10th Dist. No. 14AP-937, 2015-Ohio-3977, ¶ 12. In this case, the parties' agreement contains a fee-shifting provision in favor of Ruscilli.

{¶ 26} When applying this provision, the trial court did not abuse its discretion by awarding Ruscilli attorney fees in post-arbitration proceedings challenging the arbitrator's award. The agreement broadly required Cleveland to indemnify Ruscilli "from and against claims, damages, losses and expenses, including but not limited to its actual attorneys' fees incurred, arising out of or resulting from performance of Subcontract." This language does not limit the indemnification to arbitration proceedings. Parties may expressly contract to limit attorney fees to arbitration, but that is not the case here. For example, in *Handel's Ent. v. Wood*, 7th Dist. No. 04 MA 238, 2005-Ohio-6922, ¶ 106, a party unsuccessfully moved the trial court for attorney fees incurred during the post-arbitration confirmation proceeding, citing a fee-shifting provision stating that the "costs and expenses of arbitration, including the fees of the arbitrators, shall be borne by the losing party or in such proportions as the arbitrators shall determine." The Seventh District affirmed the decision refusing to award attorney fees, noting that "the words 'costs and expenses of arbitration' only address the arbitration and not the confirming of that arbitration award." *Id.* at ¶ 107. Here, the parties' agreement placed no similar limitation on Cleveland's obligation to indemnify Ruscilli.

{¶ 27} Nor do the subsections following the main indemnification clause limit its scope, as Cleveland suggests. They are introduced by stating that Cleveland's "indemnity shall include, but not be limited to," the examples provided, which do not limit the scope of indemnity. Cleveland believes they should be limited, citing the "principle of construction known as ejusdem generis [that] requires that a general phrase following an enumeration of specific items includes only things of the same nature as those items which were specified." *Direct Carpet Mills Outlet, Inc. v. Amalgamated Realty Co.*, 10th Dist. No. 87AP-101, 1988 Ohio App. LEXIS 3349, *8 (Aug. 11, 1988). However, "while firmly established as an interpretive rule, the ejusdem generis rule 'is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.'" *Gabbard v. Madison Local School Dist. Bd. of Edn.*, 165 Ohio St.3d 390, 2021-Ohio-2067, ¶ 27, quoting *United States v. Powell*, 423 U.S. 87, 91 (1975). Cleveland does not argue that the language is ambiguous. Like the trial court, we consider it clear.

{¶ 28} In addition, the language of the indemnification does not contain a general phrase following an enumeration of specific items such as the language discussed in *Direct Carpet Mills Outlet, Inc.*, which concerned an insurance exclusion defined as "damages for water, fire, explosion, wind or accident of any kind" and limited the exclusion to " things similar in nature to fire, explosion, and wind," excluding negligence. *Direct Carpet Mills Outlet, Inc.* at *8. In contrast, the first paragraph of the parties' indemnification provision expressly states that "indemnity shall include, but not be limited to" the examples that follow. *Brown v. Creative Restaurants, Inc.*, W.D.Tenn. No. 11-2710-STA-cgc, 2013 U.S. Dist. LEXIS 189927, *15 (Feb. 19, 2013) (holding that esjudem generis did not apply where unambiguous statute prefaced examples with the phrase "including without limitation").

Thus, even if the agreement were ambiguous, we are not convinced that the canon of construction Cleveland points to would apply.

{¶ 29} As the trial court noted, once Cleveland filed the motion to vacate the arbitration award, "Ruscilli necessarily needed to defend the[] claims by Cleveland" to defend the award. (June 30, 2021 Jgmt. Entry at 6.) The trial court did not err when concluding that the provision required it to indemnify Ruscilli for attorneys' fees incurred in the post-arbitration proceeding.

{¶ 30} Finally, the trial court did not abuse its discretion when awarding attorney fees to Ruscilli's attorneys when performing work on the consolidated case. When arguing for consolidation of the cases, ORPS argued that both actions arose out of the parties' subcontract and Cleveland's "filing of a second action, even under a different legal theory, [was] improper claim splitting." (Sept. 20, 2017 Mot. to Consolidate Cases at 2.) Cleveland did not oppose the motion. When ordering consolidation, the trial court ruled that the cases "stem from the same construction project and involve substantially similar parties and related issues." (Apr. 20, 2018 Decision & Entry at 2.) Because of breadth of the indemnification provision, once the consolidation was in effect, Cleveland should have been aware that it was potentially liable for any of Ruscilli's attorney fees in the consolidated case. Even before initiating the ancillary litigation with OPRS, this potential liability was clear. The second and third assignments of error are overruled.

C. Fourth Assignment of Error

{¶ 31} In the final assignment of error, Cleveland contends the trial court erred in concluding that Ruscilli is entitled to its bond premium payments. Cleveland asserts that it has a right to file a lien to protect its interests, pursuant to R.C. 1311.01, et seq., Ohio's mechanic's lien law. (Brief of Plaintiff-Appellant at 42.) According to Cleveland, because

there is no "statutory authority for assessing bond premium payment as costs," the trial court erred by awarding them to Ruscilli.

{¶ 32} The trial court did not rely on any statutory authority when ordering the payment of Ruscilli's bond premium payments. Rather, it relied upon Section 4.6.3 of the parties' agreement, which required Cleveland to indemnify Ruscilli for any "claims, damages, losses and expenses" that included "[a]ny action, whether in prosecution or defense, relating to or arising from the filing or removal of any mechanic's lien filed by [Cleveland] or any of its subcontractors, suppliers, or laborers." (June 30, 2021 Jgmt. Entry at 5.)

{¶ 33} Cleveland's sole argument against the trial court's decision to enforce this language is that the Panel chose not to order it to reimburse Ruscilli for bond premium payments in the original arbitration award. (Brief of Plaintiff-Appellant at 41.) This argument does not address the language of the indemnification provision itself, which expressly recognizes Ruscilli's entitlement to compensation. Furthermore, it is doubtful that the Panel could have foreseen Cleveland's refusal to not comply with its order to release the lien for years after issuing its award. As the trial court noted, timely compliance with the Panel's order "would have prevented Ruscilli from continuing to incur the bond premium payments," but it made "the conscious choice not to release the mechanic's lien." (June 30, 2021 Jgmt. Entry at 7.) By choosing not to release the mechanic's lien, Cleveland caused Ruscilli to continue incurring bond claim premiums beyond September 6, 2017. The trial court's award limits Ruscilli's recovery to the bond premiums incurred after Cleveland consciously chose to ignore the arbitration panel's orders. These additional costs are a direct result of Cleveland's decision to ignore the Panel's orders. The fourth assignment of error is overruled.

IV. CONCLUSION

{¶ 34} Having overruled Cleveland's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BEATTY BLUNT, P.J. and KLATT, J., concur.
