The Bullet Point: Ohio Commercial Law Bulletin

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of in the area of commercial law and business practices. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of commercial intelligence to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

To further our goal of providing bullet points of commercial intelligence to help people do business better and better monitor the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs, the Bullet Point will provide previews of cases before the United States Supreme Court (SCOTUS) and the U.S. Sixth Circuit Court of Appeal. When appropriate, *The Bullet Point* will highlight industry issues that would benefit from amicus brief support. If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

The Bullet Point

Individual Responsibility for Company Payroll Taxes

***U.S. v. Hartman*, 6th Cir. No. 17-2273 (July 25, 2018).**

In this appeal, the Sixth Circuit Court of Appeals affirmed a district court's decision granting the government summary judgment in an action to collect unpaid taxes from the owner of a business.

Defendant co-owned a tool company. He initially relied on an automated payment company to manage the company's payroll. He would tell the payment company the number of hours his employees worked and their wages, and the company in turn would tell him how much to withhold for payroll taxes and then issue checks for signature. At some point, the business was unable to pay its employees, and when the automated payment company found out, it dropped the company as a client. The defendant then made alternative arrangements to pay his employees, but no arrangement was made to withhold payroll taxes. Defendant, at various points, was aware, or should have been aware, that payroll taxes were not being paid, but he made no arrangement to fix the issue. Eventually, defendant filed for Chapter 11 bankruptcy petition. The IRS ultimately objected to the plan and the plan was converted into a Chapter 7 liquidation.

The government then filed suit against defendant personally to recover the unpaid payroll taxes. The district court ultimately granted the government's summary judgment motion and the defendant appealed. The Sixth Circuit affirmed on appeal, finding that he was a "responsible person" for the payment of the taxes.

The Bullet Point: The government may recover outstanding payroll taxes from anyone who (1) was "required to" remit payroll taxes and (2) "willfully" failed to pay them to the Internal Revenue Service; 26 U.S.C. § 6672(a). A responsible person may willfully fail to pay taxes in one of two ways: he may know that the company did not pay the taxes, or he may "deliberately or recklessly disregard facts and known risks that the taxes were not being paid." A responsible person thus cannot act recklessly (and therefore willfully) if "he believed that the taxes were in fact being paid, so long as that belief was, in the circumstances, a reasonable one."

Statute of Limitation on Claims Related to Mortgage and Note

***Baker v. Nationstar Mortgage LLC, et. al.*, S.D. Ohio No. 15-cv-2917 (July 20, 2018).**

In this affirmative lawsuit brought by a mortgage borrower, the United States District Court for the Southern District of Ohio found that a mortgage lender's inability to bring an action on a promissory note due to the statute of limitations running also precluded it from foreclosing on the corresponding mortgage and that its attempt to do so violated the Fair Debt Collection Practices Act (FDCPA).

Borrowers obtained a residential mortgage loan in September 1995. In May 2008, a foreclosure action was filed against them, and in September 2009, judgment was entered against them in the foreclosure. Eventually the property was sold at sheriff's sale and purchased by the lender in 2012. The foreclosure sale was eventually vacated. After that, borrowers started receiving mortgage statements asking for payment from the lender. They eventually filed suit, raising various claims including a claim under the FDCPA that the lender sought to collect on a time-barred debt.

Both parties moved for summary judgment, and the court eventually granted the borrower's motion in part, finding, among other things, that the lender violated the FDCPA and that the borrowers were entitled to declaratory relief regarding the lender's ability to foreclose on the mortgage due to the statute of limitations running on the promissory note.

The Bullet Point: The *Baker* opinion highlights an emerging split between courts on whether a claim related to a residential mortgage is time-barred if the corresponding promissory note is also time-barred. Promissory notes are governed by a six year statute of limitations found at R.C. 1303.16. Conversely, residential mortgages are governed by the eight year statute of limitation found at R.C. 2305.06. Relying on the distinction between notes and mortgages, the Court of Appeals for the Eighth District of Ohio has held that, "[a]s a matter of law, R.C. 1303.16(A) does not apply to actions to enforce the mortgage lien on the property after the payment on the note becomes unenforceable through the running of the statute of limitations." *U.S. Bank Nat'l Ass'n v. Robinson*, 2017-Ohio-5585, ¶ 11 (Ohio Ct. App. 8th Dist. 2017), *appeal not allowed sub nom. U.S. Bank Natl. Assn. v. Robinson*, 2018-Ohio-723, ¶ 11, 92 N.E.3d 879; *see also Bank of New York Mellon v. Walker*, 78 N.E.3d 930, 938 (Ohio Ct. App. 8th Dis. 2017). Despite this, the *Baker* court reached the opposite conclusion. Instead, the *Baker* court relied on a Supreme Court case from 1895 to hold that "when a note is secured by the mortgage, the statute of limitations as to both is the same."

Assumption of the Risk

***Peterson v. National Security Associates, Inc.*, 10th Dist. Franklin No. 17AP-39, 2018-Ohio-2905.**

This was an appeal of a summary judgment decision in favor of a police department regarding claims for negligence. The plaintiff was an Ohio highway patrol officer and a member of the special response team. The special response team was trained in explosive breaching, which involves detonating an explosive device on the door or window of a building to breach the structure so officers can enter the building. The plaintiff, who had experience in explosive breaching while in the army, was asked to teach a course on it to other highway patrol officers. He agreed, and was injured during a training session when a student detonated an explosive device while he was in the way. He eventually filed suit and the defendants all moved for summary judgment, arguing, among other things, that the plaintiff assumed the risk. The trial court agreed and granted the defendants' summary judgment motions. Plaintiff appealed, and on appeal the Tenth Appellate District reversed, finding that while explosive trainings could be dangerous, there were safeguards in place along with other attendant circumstances as to whether other elements existed to elevate the risks at issue beyond the ordinary risk of explosive breaching training.

The Bullet Point: Traditionally, negligence requires a showing of three things: (1) a duty, (2) a breach of that duty, and (3) an injury proximately caused by the breach. "Ohio law recognizes three categories of assumption of the risk as defenses to a negligence claim: express, primary, and implied or secondary." "Under the doctrine of primary assumption of the risk, a plaintiff who voluntarily engages in a recreational activity or sporting event assumes the inherent risks of that activity and cannot recover for injuries sustained in engaging in the activity unless the defendant acted recklessly or intentionally in causing the injuries." The rationale behind the doctrine is that certain risks are so intrinsic in some activities that the risk of injury is unavoidable. "[A] successful primary assumption of risk defense means that the duty element of negligence is not established as a matter of law." To succeed on a primary assumption of risk defense, it must be shown that (1) the danger is ordinary to the activity, (2) it is common knowledge that the danger exists, and (3) the injury occurs as a result of the danger during the course of the activity.

Implied assumption of risk is defined as the "plaintiff's consent to or acquiescence in an appreciated, known or obvious risk to plaintiff's safety." "Implied assumption of the risk does not relieve defendant of his duty to plaintiff." Thus, implied assumption of risk "exists when a plaintiff, who fully understands the risk of harm to himself, nevertheless voluntarily chooses to subject himself to it, under circumstances that manifest his willingness to accept the risk."

Statutory Construction

***Citizens Bank, N.A. v. Leek*, 7th Dist. Columbiana No. 17 CO 0031, 2018-Ohio-2813.**

This appeal revolves around the language in R.C. 2329.311(A), which allows the judgment creditor and first lienholder to redeem the residential property taken by an order of sale by paying the purchase price within fourteen days after a sale "at an auction with the minimum bid pursuant to division (B) or section 2329.52 * * *." The trial court found that the foreclosing bank had no right to redeem the property. The Seventh Appellate District disagreed and, utilizing the rules of statutory interpretation and construction, found that a foreclosing bank does in fact have a right to redeem the residential property. Under Ohio law, property subject of a foreclosure action is supposed to sell for no less than 2/3 the appraised value. If it does not sell at the first auction, a second auction is set where the property is to be sold to the highest bidder. Under R.C. 2329.11(A), when property is sold under the second scenario, the judgment creditor and first lienholder "each have the right to redeem the property within fourteen days after the sale by paying the purchase price."

The Bullet Point: "Rules for construing the language * * * may be employed only if the statute is ambiguous." Ambiguity means the statutory provision is "capable of bearing more than one meaning." The "in pari materia" rule of statutory construction (where statutes relate to the same general subject matter)

can only be applied "where some doubt or ambiguity exists in the wording of a statute." Likewise, the legislative history of a statute and former statutory provisions are used to determine legislative intent only if a court finds the statute ambiguous.

Reformation of a Contract

***LRC Realty, Inc. v. BEB Properties*, 11th Dist. Geauga No. 2016-G-0076, 2018-Ohio-2887.**

This appeal involved, in part, the trial court's decision to deny a request to reform a deed. The case began as a declaratory judgment between plaintiff and defendant seeking a declaration as to the parties' legal rights under an Option to Lease and Lease Agreement. Thereafter, Bruce and Sheila Bird appeared and filed a third party complaint against defendant, raising claims for anticipatory breach regarding annual rental payments for use of their property for a cell phone tower. They also sought to reform a warranty deed between two other parties to make clear that the property was not transferred in a manner that would allow the plaintiff to receive the rental payments. The trial court ultimately denied summary judgment on the reformation count and the Birds appealed. On appeal the Eleventh Appellate District affirmed the trial court's decision, finding that the Birds were not parties to the warranty deed and were not in privity to the transaction and thus could not seek reformation of the deed as a result.

The Bullet Point: It is well-established that "reformation of an instrument is an equitable remedy whereby a court modifies the instrument which, due to mutual mistake on the part of the original parties to the instrument, does not evince the actual intention of those parties." "'[R]eformation' is defined as the remedy afforded by courts possessing equitable jurisdiction to the parties and the privies of parties, to written instruments which import a legal obligation to reform or rectify such instruments whenever they fail, through fraud or mutual mistake, to express the real agreement or intention of the parties." "Equity will permit the reformation of a written instrument not only as between the original parties but also as to parties in privity with them." "[O]ne who is in privity with another because of the transfer of property 'stands in the same shoes' as to the rights of the prior owner in the same property, thereby giving the subsequent owner the same rights and obligation as the original owner had in regard to the property[,]" including "the right to reformation of a deed if the necessary elements are present, that is, fraud, error, omission or mutual mistake."

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0152p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JON R. HARTMAN,

Defendant-Appellant.

No. 17-2273

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
2:16-cv-11002—Mark A. Goldsmith, District Judge.

Decided and Filed: July 25, 2018

Before: SUTTON, McKEAGUE, and KETHLEDGE, Circuit Judges.

COUNSEL

ON BRIEF: Thomas A. Klug, KLUG LAW FIRM, Okemos, Michigan, for Appellant. Teresa E. McLaughlin, Marion E.M. Erickson, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

SUTTON, Circuit Judge. After Jon Hartman and Dan Ott co-founded Spectrum Tool & Design, they divvied up management responsibilities. Ott was supposed to handle the company's payroll taxes, a task that required him to withhold federal taxes from employees' wages and send the money to the Internal Revenue Service on a regular basis. When Spectrum encountered financial difficulties, however, Ott failed to pay the taxes several times in 2004 and 2005. After Spectrum went bankrupt, the government sued Hartman to recover the unpaid taxes,

and the district court granted the government's motion for summary judgment. Because Hartman "willfully" failed to pay Spectrum's taxes, we affirm.

I.

This case revolves around a facet of life familiar to any American who receives a paycheck: tax withholding. Federal law requires employers to withhold taxes from their employees' wages to account for the income, Social Security, and Medicare taxes each individual owes. Known as "payroll taxes" or "trust fund taxes," they represent an essential means by which the federal government collects taxes from its citizens. *See Slodov v. United States*, 436 U.S. 238, 243 (1978). So essential, the federal government imposes personal liability for outstanding payroll taxes on anyone who (1) was "required to" pay these taxes and (2) "willfully" failed to pay the funds to the Internal Revenue Service. 26 U.S.C. § 6672(a).

After co-founding their business, Hartman and Ott initially relied on an outside automated payment company to manage Spectrum's payroll. Hartman told the company the number of hours his employees worked and their wages. And the company told him the amount Spectrum owed (including corresponding payroll taxes) and issued checks for his signature.

In December 2003, Spectrum could not afford to pay its employees' wages and the appropriate payroll taxes. When the automated payment company learned about the shortfall, it dropped Spectrum as a client. Hartman and Ott made arrangements to pay their employees' wages but not the payroll taxes. Hartman delegated responsibility for managing future payroll taxes to Ott, who chose to handle the task himself with the help of a software program called Peachtree. Hartman continued to sign the company's other checks, including employees' wages.

Hartman realized something was amiss when he found unmailed checks made payable to the Internal Revenue Service on Ott's desk in July 2004. Hartman confirmed that Ott had not been paying Spectrum's payroll taxes. Hartman phoned the Internal Revenue Service and met with an agent, who informed him that Spectrum should pay its current taxes going forward and make up the shortfall over time. In October, the Revenue agent told Hartman that Spectrum still was not paying its current taxes.

Hartman nonetheless left Ott in charge of the company's payroll obligations, convinced his partner had paid the payroll taxes after seeing notations to that effect when he reviewed entries in Peachtree, the company's accounting software. Hartman's "best guess" was that Ott paid the older back taxes instead of Spectrum's ongoing payroll obligations, perhaps misapprehending the agent's instructions. R. 21–2 at 34. When Hartman and Ott met with the Internal Revenue Service agent again in October 2004, Hartman signed tax forms under penalty of perjury that spelled out Spectrum's delinquencies, though Hartman claims that he did not prepare or review the forms.

After Hartman met with the Revenue agent a second time, he realized the company could not pay the government what it owed. Hartman sought the advice of a tax attorney, who advised Spectrum to seek protection under Chapter 11 of the Bankruptcy Code. Hartman did just that in January 2005. After the filing, Hartman continued to rely on Ott to remit Spectrum's taxes.

Through subsequent disclosures to the bankruptcy court, Hartman acknowledged that Spectrum had not paid some of its post-bankruptcy payroll taxes. By March 2005, Hartman and Ott agreed to stop remitting payroll taxes. Hartman did not replace Ott for another five months or independently review the company's payroll obligations. Even after Hartman fired Ott in August 2005, Hartman still kept Ott in charge of their company's payroll.

In July 2005, Spectrum hired a company to handle its invoices and to earmark ten percent of every invoice to pay outstanding taxes. The arrangement was too little too late. After the Internal Revenue Service objected to Spectrum's Chapter 11 plan, the company converted its Chapter 11 bankruptcy into a Chapter 7 liquidation in October 2005.

The government filed this lawsuit against Hartman to recover Spectrum's unpaid payroll taxes for two periods: the quarterly period ending December 2004 (before Spectrum filed its bankruptcy petition) and the quarterly periods ending March, June, September, and December 2005 (after Spectrum filed its bankruptcy petition).

The district court granted the government's motion for summary judgment, ruling as a matter of law that Hartman was responsible for remitting Spectrum's payroll taxes and that he recklessly disregarded an "obvious risk" that his company was not paying those taxes. Because

the district court held that Hartman acted recklessly, it declined to determine whether Hartman actually knew that the taxes had gone unpaid.

II.

The government may recover outstanding payroll taxes from anyone who (1) was "required to" remit payroll taxes and (2) "willfully" failed to pay them to the Internal Revenue Service. 26 U.S.C. § 6672(a). Hartman acknowledges that he was required to pay the taxes, making him what case law refers to as a "responsible person." *See Kinnie v. United States*, 994 F.2d 279, 283 (6th Cir. 1993). But did he "willfully" fail to pay those taxes?

A responsible person may willfully fail to pay taxes in one of two ways. He may know that the company did not pay the taxes. Or he may "deliberately or recklessly disregard[] facts and known risks that the taxes were not being paid." *Calderone v. United States*, 799 F.2d 254, 260 (6th Cir. 1986). Negligence, even gross negligence, does not establish willfulness. *Byrne v. United States*, 857 F.3d 319, 327–28 (6th Cir. 2017). A responsible person thus cannot act recklessly (and therefore willfully) if "he believed that the taxes were in fact being paid, so long as that belief was, in the circumstances, a reasonable one." *Id.* at 329 (quotation omitted).

Hartman acted willfully in this instance by repeatedly claiming to believe that Ott paid the taxes when he no longer had any plausible basis for thinking that was so. He knew of Ott's past failures and had ample means to identify and remedy Ott's misconduct.

Think about the uncontested chain of events that preceded the failure to pay the taxes in December 2004, before the company filed its bankruptcy petition. In December 2003, Hartman knew that Spectrum missed a payroll payment. In July 2004, Hartman found the undelivered checks on Ott's desk and learned about Spectrum's delinquency from the Internal Revenue Service agent. In October 2004, Hartman learned again that Ott had not been paying the taxes properly. Faced with Ott's extensive track record of misconduct, Hartman had no plausible basis for continuing to trust Ott to remit the payroll taxes.

Hartman faces similar problems with respect to Spectrum's failure to pay payroll taxes after the bankruptcy filing. By then, Hartman knew of Ott's past intentional failings. But even

as Hartman learned about Spectrum's mounting delinquencies, he still asked Ott to maintain responsibility for the company's taxes. By March 2005, Hartman and Ott agreed to stop paying payroll taxes altogether. Viewed in its most charitable light, Hartman's faith in his partner was hope against reason or, worse, hope based on the assumption that Ott would relieve the company's cash crunch by stiffing the government. Either way, Hartman acted (at least) recklessly as a matter of law.

Byrne v. United States does not fix these problems. After two responsible persons learned about their controller's failure to remit payroll taxes, the *Byrne* officers took meaningful steps to identify outstanding debts and remedy their accounting practices. They hired "an independent, professional accounting firm," which "performed a full-scope audit" and failed to uncover the controller's widespread misconduct. *Byrne*, 857 F.3d at 332–33. Then they hired an in-house accountant to assist the controller and a chief financial officer to oversee the controller. *Id.* at 332.

To Hartman's way of thinking, he acted the same way by contacting the Internal Revenue Service for advice in July 2004. But that is a far cry from hiring an in-house accountant and a chief financial officer to answer the government's dunning requests. Revenue agents at best can inform taxpayers about the extent of their past liabilities and a path forward. But they cannot monitor a company's ongoing compliance with the diligence of a full-time employee. And that it is not what Hartman asked the agent to do anyway.

In a similar vein, Hartman argues that his continued trust of Ott mirrored the *Byrne* taxpayers' reliance on their controller, even after learning of some of the controller's mistakes. But the *Byrne* taxpayers did not blindly trust their controller. They hired additional staff and an outside independent accounting firm. Night and day separate the two approaches. *Id*. at 332–33.

Hartman compares Spectrum's bankruptcy filing to the *Byrne* taxpayers' bankruptcy filing. But the *Byrne* taxpayers established a lack of willfulness by hiring two employees to supervise their deficient controller and by relying on a clean bill of health from a professional accounting firm. Declaring bankruptcy had nothing to do with it.

After October 2004, Hartman insists, he "carefully monitored the financial reports . . . within the company's software." Appellant Br. at 7. But given Ott's serial instances of misconduct from July 2004 onward, that does not suffice to show a lack of recklessness. By that point, Hartman needed to reconcile the electronic ledger with proof that Ott paid Spectrum's taxes—not with proof that the software program had identified the amount due.

We affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KIMBERLY BAKER, *et al.*,	:	
	:	**Case No. 2:15-cv-2917**
Plaintiffs,	:	
	:	**JUDGE ALGENON L. MARBLEY**
v.	:	
	:	**Magistrate Judge Vascura**
NATIONSTAR MORTGAGE LLC, *et al.*,	:	
	:	
	:	
Defendants.	:	

OPINION & ORDER

This matter is before the Court on Cross-Motions for Summary Judgment – Defendants' Motion for Summary Judgment (ECF No. 36) and Plaintiffs' Motion for Summary Judgment (ECF No. 37). For the reasons set forth below, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion and **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion.

I. BACKGROUND

A. Factual Background

In September of 1995, Plaintiffs Kimberly Baker and Dennis Baker executed a promissory note and mortgage to finance the purchase of their home, located at 4500 Edler Court, Hilliard Ohio (the "Property"). (ECF No. 37-1 at ¶¶ 3, 4). On May 22, 2008, Countrywide Home Loans, Inc. ("Countrywide") filed a foreclosure action against the Bakers in the Franklin County Common Pleas Court. (ECF No. 36-4). The Bakers allege that the foreclosure action was the first notification they received from Countrywide that they were in default on their mortgage. (ECF No. 37-1 at ¶ 8).

On September 21, 2009, the Common Pleas Court entered a judgment and decree of foreclosure for Countrywide (the "Foreclosure Judgement"). (ECF No. 36-1). The Court of Appeals affirmed the judgment on appeal. *Countrywide Home Loans, Inc. v. Baker*, 10th Dist. Franklin App. No. 09AP-968, 2010-Ohio-1329. Countrywide then assigned the mortgage to Defendant Aurora Loan Services LLC ("Aurora"), who was substituted as the plaintiff in the foreclosure action in place of Countrywide. (ECF No. 37-1 at ¶ 10).

In May of 2012, the Property was auctioned off at a sheriff's sale. (*Id.* at ¶ 11). In July of 2012, Aurora transferred the servicing of the Bakers' mortgage loan to Defendant Nationstar Mortgage LLC ("Nationstar"). (*Id.* at ¶ 12). On August 9, 2012, Aurora assigned its auction bid to Nationstar. (ECF No. 36-2). A few days later, on August 13, 2012, the Common Pleas Court entered an order confirming the auction and ordering the sheriff to deed the Property to Nationstar (the "Confirmation Judgment"). (ECF No. 36-3). The sheriff did so, and the deed was recorded on September 11, 2012. (ECF No. 36-5). Nationstar then executed a deed to Defendant Secretary of Veterans Affairs (the "VA"), which was recorded on November 29, 2012. (ECF No. 36-6). The VA later recorded a deed that conveyed the Property back to Nationstar. (ECF No. 36-9).

On February 28, 2013, the Common Pleas Court docketed an Agreed Entry Vacating Plaintiff's Judgment Entry & Decree of Foreclosure and Dismissing Its Complaint (ECF No. 37-5). The Agreed Entry stated that the Foreclosure Judgment "should be vacated on the grounds that Plaintiff's post-sale title investigation revealed multiple tax liens neither identified nor extinguished in the foreclosure." (*Id.*). The parties agreed to dismiss the action without prejudice pursuant to Federal Rule of Civil Procedure 41(a). (*Id.*).

After the Foreclosure Judgment was vacated, Nationstar began sending the Bakers mortgage statements and other correspondence. (ECF No. 37-1 at ¶ 14). The Bakers then hired

counsel to address Nationstar's collection activity. (*Id.* at ¶ 15). The Bakers' counsel sent Nationstar a letter dated February 28, 2014 (the "Letter"). (ECF No. 37-6). The Letter states that the Bakers "dispute all late fees, charges, inspection fees, property appraisal fees, forced placed insurance charges, legal fees, and corporate advances charged" to the Bakers' account. (*Id.*). The Letter represents that the Bakers believe their account with Nationstar was "in error for the following reasons: the balance due is erroneous due to excessive fees and interest." (*Id.*). The Letter then requested eight categories of information:

1. The name, address, and telephone number of the owner of the note, plus the name of the master servicer of the note.
2. The date that the current note holder acquired this mortgage note, and from whom it was acquired.
3. The date your firm began servicing the loan.
4. A complete payment history of how payments and charges were applied, including the amounts applied to principal, interest, escrow, and other charges.
5. The current interest rate on this loan and an accounting of any adjustments.
6. A statement of the amount necessary to reinstate this loan.
7. A complete copy of the loan closing documents, including a copy of the note and mortgage.
8. A copy of all appraisals, property inspections, and risk assessments completed for this account.

(*Id.*).

Nationstar received the Letter on March 4, 2014, and sent a correspondence to the Bakers' counsel on March 6, 2014, acknowledging receipt of the Letter and stating that Nationstar was in the process of reviewing the Bakers' concerns. (ECF No. 1 at ¶ 85; ECF No. 36-8). Nationstar subsequently sent a response letter dated March 21, 2014 (the "Response"). (ECF No. 37-7). The Response stated that the owner of the note was Defendant Lehman Brothers Holdings, Inc.

("Lehman Brothers") and that Nationstar was the servicer. (*Id.*). The Response included an address for Lehman Brothers and instructed the Bakers to contact Nationstar directly with any questions. (*Id.*). The Response stated that the "loan and related documents were reviewed and found to comply with all state and federal guidelines that regulate them." (*Id.*). It further stated:

> You asked us to provide Appraisal, property inspections, risk assessments, the current interest rate, which is 6%, and an accounting of any adjustments. Additionally, we normally provide Nationstar's Welcome letter and most recent Billing Statement, but after conducting an investigation, Nationstar is unable to locate the information you requested. This information is unavailable. However, we did review the account, and all transactions appear to be correct from our records review. If you think this is an error in the servicing of the account, please let us know so that we can investigate and resolve any potential servicing error.

(*Id.*).

B. Procedural Background

Plaintiffs Kimberly Baker and Dennis Baker initiated this action against Defendants Nationstar, Aurora, Lehman Brothers, and the VA on October 15, 2015, alleging violations of the Real Estate Settlement Procedures Act ("RESPA") (Count I) and the Fair Debt Collection Practices Act ("FDCPA") (Count V). (ECF No. 1). The Complaint seeks declaratory judgment and injunctive relief extinguishing any rights of Defendants to enforce the mortgage loan and prohibiting them from doing so (Counts II and IV). (*Id.*). The Complaint further seeks to quiet title to the Property in Plaintiffs' favor (Count III). (*Id.*).

The VA filed an Answer on December 18, 2015, stating that the United States has no interest in the Property and requesting to be dismissed from the action. (ECF No. 7). Aurora, Lehman Brothers, and Nationstar ("Defendants") filed an Answer to the Complaint on December 14, 2015. (ECF No. 5). Defendants filed a Motion for Summary Judgment on September 29, 2017. (ECF Nos. 36). On the same day, the Bakers filed a Motion for Summary Judgment as to

liability only, seeking to schedule a trial to determine the amount of their damages. (ECF No. 37). The Motions for Summary Judgment are now ripe for decision.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) provides, in relevant part, that summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." In evaluating such a motion, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in the non-moving party's favor. *United States Sec. & Exch. Comm'n v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013) (citing *Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006)). This Court then asks "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986)). "[S]ummary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

III. ANALYSIS

As an initial matter, the Court notes that Plaintiffs have never objected to the VA's request to be dismissed from this action (ECF No. 7), and the VA has not participated any further in this matter. The Court hereby **DISMISSES** the VA from the above-captioned matter. The claims alleged against the remaining Defendants are discussed in turn below.

A. RESPA

Congress enacted RESPA "to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are

protected from unnecessarily high settlement charges caused by certain abusive practices." *Vega v. First Fed. Sav. & Loan Ass'n of Detroit*, 622 F.2d 918, 923 (6th Cir. 1980) (quoting 12 U.S.C. § 2601(a)). The "settlement process" contemplated by the statute was originally intended to be the negotiation and execution of mortgage contracts, but the scope was expanded in 1990 to encompass loan servicing. *Marais v. Chase Home Fin. LLC*, 736 F.3d 711, 719 (6th Cir. 2013) (internal citations omitted). RESPA is a remedial statute and is construed broadly to effectuate its purposes. *Carter v. Welles–Bowen Realty, Inc.*, 553 F.3d 979, 985-86, n. 5 (6th Cir. 2009).

The relevant statutory provisions of RESPA can be broken down into three parts. First, the statute provides a mechanism for borrowers to request information relating to the servicing of a loan, by submitting a written correspondence to the servicer known as a "Qualified Written Request" ("QWR"). RESPA provides requirements that a consumer's correspondence must meet to constitute a QWR:

> For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that—
>
> > **(i)** includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
> >
> > **(ii)** includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C.A. § 2605(e)(1)(B).

Second, upon receiving a QWR, RESPA places an obligation on the servicer to acknowledge receipt of the QWR within five days, and do any one of the following within thirty days:

> **(A)** make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such

> correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);
>
> **(B)** after conducting an investigation, provide the borrower with a written explanation or clarification that includes—
>
> > **(i)** to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and
> >
> > **(ii)** the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or
>
> **(C)** after conducting an investigation, provide the borrower with a written explanation or clarification that includes—
>
> > **(i)** information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and
> >
> > **(ii)** the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

12 U.S.C.A. § 2605(e)(1)(A); (e)(2).

Third, once a servicer receives a QWR, RESPA prohibits the servicer from reporting on the borrower's credit during a limited period of time:

> During the 60–day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 603 of the Fair Reporting Act [15 U.S.C.S. § 1681a]).

12 U.S.C. § 2605(e)(3).

Here, there is no reasonable dispute that the February Letter is a QWR. On its face, the Letter purports to be a QWR. (ECF No. 37-6) ("This letter is a qualified written request ("QWR"), pursuant to the Real Estate Settlement and Procedures Act."). The Letter includes the Bakers' name and account, and details a list of information sought in numbered paragraphs. (*Id.*). This Court has analyzed a letter seeking the exact same information on at least two previous occasions

and found "no reasonable dispute" that the letter is a valid QWR. *See McMillen v. Resurgent Capital Servs., L.P.*, No. 2:13-CV-00738, 2015 WL 5308236, at *5 (S.D. Ohio Sept. 11, 2015) (Marbley, J.) ("[T]here is no reasonable dispute that the June letter is a QWR: it designated itself as a QWR; stated the name and account of the borrower, thereby enabling the servicer to identify the same; and satisfied the disjunctive option of § 2605(e)(1)(B)(ii) by sufficiently detailing for the servicer eight types of information sought in its numbered paragraphs."); *Hittle v. Residential Funding Corp.*, No. 2:13-CV-353, 2014 WL 3845802, at *5 (S.D. Ohio Aug. 5, 2014) ("In this case, the purported QWR sufficiently detailed eight types of information sought by numbered paragraphs. . . . Thus, having satisfied one of the disjunctive options, there is no reasonable dispute that the Hittles sent Ocwen a valid QWR."). The only remaining questions, then, are whether Nationstar's Response satisfied its obligations under RESPA and whether Nationstar is liable for reporting on the Bakers' credit history after receiving the QWR.[1]

1. Whether Nationstar's Response was Sufficient under RESPA

Under RESPA, a servicer can validly respond to a QWR in one of three ways: "A servicer can make corrections to the account. 12 U.S.C. § 2605(e)(2)(A). A servicer, following an investigation, can clarify why the account is already correct. 12 U.S.C. § 2605(e)(2)(B). Or a servicer can, after an investigation, provide the borrower with a written explanation or clarification that includes information requested and explains why information not provided cannot be obtained or provided by the servicer. 12 U.S.C. § 2605(e)(2)(C)." *Bucy v. Pennymac Loan Servs., LLC*, No. 2:15-CV-2909, 2016 WL 5719804, at *8 (S.D. Ohio Sept. 30, 2016) (internal citations omitted).

[1] The Bakers also alleged in the Complaint that Nationstar failed to acknowledge receipt of the Letter within five business days, as required by 12 U.S.C. § 2605(e)(1)(A). (ECF No. 1 at ¶ 87). Defendants, however, presented evidence that they did acknowledge receipt within five days of receiving the letter. (ECF No. 36-8). The Bakers did not dispute this through briefing or at oral argument. The Court, therefore, will not consider this argument.

RESPA is written in the disjunctive, meaning a servicer need not complete all three options to satisfy its obligation, but this Court has held that "a servicer does not have unfettered discretion about which of the three options to choose." *Hittle*, 2014 WL 384502, at *8. Instead, "common sense, plain language, and liberal construction dictate that it must choose the appropriate option under the circumstances." *Marais v. Chase Home Fin., LLC*, No.: 2:11–cv–314, 2014 WL 2515474 (S.D. Ohio, June 4, 2014). Here, it is undisputed that Nationstar did not make corrections to the account, and the Bakers do not argue that it should have. Thus, the first option is not at issue, and the Court will focus on the sufficiency of Nationstar's Response under 12 U.S.C. § 2605(e)(2)(B) and (C).

Without specifying which option they believe was appropriate, the Bakers make two arguments as to why Nationstar's March 24 Response did not comport with the requirements of RESPA. (ECF No. 37 at 8). First, they point out that the Letter requested copies of appraisals and property inspections, and Nationstar's Response does not provide any information regarding these charges or a single copy of the inspection reports. (*Id.* at 8-9). The mortgage statement included as part of the Response shows that a total of $12,951.55 was charged for property inspections, and the Bakers argue this would suggest that 865 inspections of the Property have been conducted, based on the cost of $15.00 per inspection noted for two inspections conducted in March of 2014. (*Id.*). Second, the Bakers argue generally that Nationstar did not conduct a meaningful investigation into the errors alleged in the Letter. (*Id.* at 9-10).

In response to the Bakers' first argument, the Defendants contend that they cannot violate RESPA by failing to respond to inquiries regarding appraisals and property inspections, because such inquiries do not relate to "servicing" under RESPA. As Defendants point out, some courts have made a distinction between requests relating to servicing and those that do not relate to

servicing, finding RESPA liability can only result for failing to respond to requests related to servicing. *See, e.g.*, *Minson v. CitiMortgage, Inc.*, No. CIV.A. DKC 12-2233, 2013 WL 2383658, at *4 (D. Md. May 29, 2013) ("[C]ourts have drawn a distinction between communications related to the servicing of the loan, which are covered under RESPA, and those challenging the validity of a loan, which are not."). Under this view of RESPA, courts have held that failing to respond to inquiries concerning appraisals and property inspections cannot create RESPA liability because such information does not relate to servicing. *See, e.g.*, *Lohman v. Beneficial Fin. I, Inc.*, No. 1:17CV342, 2018 WL 1562021, at *3 (S.D. Ohio Mar. 30, 2018) (Barrett, J.) ("[A]ppraisals and property inspections fall outside the scope of RESPA because such documents do not relate to the servicing of the loan.").

This Court, however, disagrees with the district courts that have held that inquiries regarding appraisals and property inspection fees cannot create RESPA liability. Under the plain language of 12 U.S.C. § 2605(e), the only subsection that explicitly requires a borrower's inquiry to relate to the servicing of a loan is 12 U.S.C. § 2605(e)(1)(A), requiring the servicer to acknowledge receipt of a "qualified written request from the borrower . . . for information *relating to the servicing* of such loan . . . within 5 days." 12 U.S.C. § 2605(e)(1)(A) (emphasis added). The statutory text does not limit the definition of QWR, found in the next subsection, to correspondences related to servicing. Nor does the text mention the word "servicing" in the section at issue here—12 U.S.C. § 2605(e)(2). Where, as here, "Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Congress could have, but did not, include the word "servicing" in the definition of QWR or in explaining

the options a servicer who receives a QWR must take within thirty days to fulfill its obligations under RESPA. This Court will not read the word "servicing" into the statute where it is not, and thus holds that the information sought by the borrower need not relate to servicing to constitute a QWR, and a servicer must fulfill its obligations under 12 U.S.C. § 2605(e)(2) regardless of whether such information relates to the statutory definition of "servicing." Any other reading of the statute would render the words "relating to the servicing of such loan" in 12 U.S.C. § 2605(e)(1)(A) a mere surplusage. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal citations omitted).

The Seventh Circuit's reasoning in *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676 (7th Cir. 2011) is persuasive. In *Catalan*, the mortgage servicer argued that if a borrower "merely dispute[s] a debt or request[s] information" the servicer's "obligations under section 2605" are not triggered. 629 F.3d at 686. In making its argument, the defendant-servicer relied on numerous district court cases finding such requests do not relate to "servicing." *Id*. The Seventh Circuit rejected that argument, finding that if it accepted the servicer's argument, "a lender would have no obligation to respond to a borrower who expressed her belief that her account was in error but was unable to provide specific reasons for that belief, an untenable result under the language of the statute." *Id.* The court thus held that "any request for information made with sufficient detail is enough under RESPA to be a qualified written request and thus to trigger the servicer's obligations to respond." *Id.* at 787. This Court agrees. The Bakers' request seeking information about appraisals and property values triggered Nationstar's obligation to respond, regardless of whether such inquiry relates to "servicing."

Further, the Court finds that even if the information sought in the QWR must pertain to servicing, the statutory definition of "servicing" is broad enough to encompass appraisals and inspection charges. RESPA defines "servicing" to mean:

> receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

12 U.S.C.A. § 2605 (i). Defendants argue that the definition is limited to the receipt and application of a borrower's payments. (ECF No. 36 at 7). While it is undisputed that Nationstar did not actually receive any payments for inspection or appraisal fees from the Bakers, the Court does not read the definition of servicing to be so limited. Whether a payment has been in fact received does not cabin the definition of "receiving." Rather, receiving is a process—implicit in the idea of receiving a payment is the idea that such a charge must first be made. It makes little sense for the RESPA analysis to turn on whether a servicer actually has a payment in hand. Borrowers must first be able to challenge the validity of the requested payment and seek information relating to the same. *See Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1245 (11th Cir. 2016) (finding borrower stated a claim for RESPA violation based on dispute over why mortgage payments increased, not based on any specific payments received by the lender). For these reasons, the Court finds Nationstar's arguments that it is not liable for failing to provide information regarding appraisals and inspection fees unpersuasive.

Turning to the Bakers' second argument, that Nationstar did not conduct a meaningful investigation into the errors alleged in the Letter, Defendants point to the language in their Response stating that Nationstar, "did review the account, and all transactions appear to be correct from our records review." (ECF No. 37-7). The Bakers counter that this is cursory and does not meet Nationstar's responsibility under RESPA. This Court agrees. RESPA requires a servicer to

take certain actions "after conducting an investigation." 12 U.S.C.A. § 2605(e)(2)(B), (C). As the Eighth Circuit noted in *Wirtz v. Specialized Loan Servicing, LLC*, the "ordinary meaning of investigation is the action of investigating; the making of a search or inquiry; systematic examination; careful and minute research." 886 F.3d 713, 717 (8th Cir. 2018), *reh'g denied* (May 29, 2018) (quoting 8 *Oxford English Dictionary* 47 (2d ed. 1989)). In legal terminology, the verb "investigate" means "to inquire into (a matter) systematically." *Id.* (quoting *Black's Law Dictionary* 953 (10th ed. 2014)). These meanings are "inconsistent with an interpretation of § 2605(e)(2)(B)-(C) that would allow a servicer to satisfy the statute with a cursory or superficial inquiry." *Id.* Relying on the ordinary meaning and the remedial purpose of RESPA, the Eighth Circuit held "that § 2605(e)(2)(B)-(C) imposes a substantive obligation on mortgage loan servicers to conduct a reasonably thorough examination before responding to a borrower's qualified written request." The court then found that the servicer failed to comply with its obligations under RESPA when it failed to provide the borrower with loan payment history. *Id.* at 718.

Here, Nationstar has pointed to no evidence in the record that it conducted a "reasonably thorough" examination. It relies only on the language in the Response that an investigation was conducted, with no further evidence to inform the Court whether the investigation was reasonable. Even if Nationstar could point to any testimony showing that the investigation was reasonable (which it does not), it faces a further hurdle—it does not meet the substantive requirements of either 12 U.S.C.A. § 2605(e)(2)(B) or (C). Under (B), Nationstar could have explained why the account was correct, but it did not do so. Nationstar points to this Court's decision in *Hittle v. Residential Funding Corp.*, where the Court analyzed an identical QWR and found that the servicer had no obligation to explain why the account was correct because plaintiffs "gave no coherent reasons for believing that their account was incorrect or even identifying what about the account

was incorrect." No. 2:13-CV-353, 2014 WL 3845802, at *10 (S.D. Ohio Aug. 5, 2014) (Smith, J.). Even if this Court agrees with the analysis in *Hittle*, an issue which this Court need not decide, Defendants fail to acknowledge this Court's decision in *McMillen v. Resurgent Capital Servs., L.P.*, explaining that the *Hittle* Court "found it of crucial importance that [the servicer] fairly met the substance of [each of the eight] requests and explained why it could offer no more than it did." No. 2:13-CV-00738, 2015 WL 5308236, at *8 (S.D. Ohio Sept. 11, 2015) (Marbley, J.). Nationstar did not do so here.

This brings the Court to the analysis under (C), which requires the servicer to provide the borrower with the "information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer." 12 U.S.C.A. § 2605(e)(2)(C). Nationstar satisfied neither of these disjunctive options: it did not include the requested information in its Response nor did it explain why it was unavailable. It is undisputed that Nationstar did not provide the Bakers with some of the information requested, specifically information regarding appraisals and property inspections, an accounting of any adjustments, information about when the note holder acquired the mortgage and from who it was acquired, or a statement of the amount necessary to reinstate the loan. (ECF No. 36 at 9-10). The Response indicates that, "after conducting an investigation, Nationstar is unable to locate" such information and it is "unavailable," (ECF No. 37-7) but there is no explanation of *why* it is unavailable. Nationstar responds only that it need not produce such information because none of the categories relates to servicing. (ECF No. 36 at 9-10). For the reasons discussed above, that argument is not well taken. The Court, therefore, finds that Nationstar failed to meet its obligations under RESPA.

2. Whether Nationstar is Liable for Credit Reporting

The Bakers also indicated in their Complaint that Nationstar should be liable for violating RESPA's sixty-day prohibition on credit reporting. *See* 12 U.S.C. § 2605(e)(3). The Bakers do not, however, address this argument at all in their own Motion for Summary Judgment. The Bakers do attempt to argue that Defendants violated this provision in their Response in Opposition to Defendants' Motion for Summary Judgment (ECF No. 41) but point to no record evidence whatsoever that Defendants even reported to any credit agencies. Plaintiffs' counsel conceded during oral argument that there is no evidence in the record that would show the Court that Nationstar even reported anything to a credit agency during the prohibited period. *See* Transcript of July 3, 2018 Oral Argument ("Transcript"). Without any evidence, this argument must fail. *See* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by ... citing to particular parts of materials in the record ... or showing that the materials cited do not establish the absence or presence of a genuine dispute.").

3. Liability of Defendants Lehman Brothers and Aurora

The Bakers purport to bring the RESPA claim against all Defendants. In their Motion for Summary Judgment, Defendants argue that Lehman Brothers and Aurora cannot be vicariously liable for Nationstar's Response. (ECF No. 36 at 11). Plaintiffs do not respond to this argument in their opposition. Therefore, it is deemed abandoned. *Miller v. Food Concepts Int'l, LP*, No. 2:13-CV-00124, 2017 WL 1163850, at *18 (S.D. Ohio Mar. 29, 2017) (Marbley, J.) ("A plaintiff abandons a claim when failing to respond to a defendant's motion for summary judgment on the claim."). Even if not abandoned, case law supports the conclusion that Lehman Brothers and Aurora should not be liable. *See Hawk v. Carrington Mortg. Servs., LLC*, No. 3:14-CV-1044, 2016 WL 4433665, at *1 (M.D. Pa. Aug. 17, 2016) (agreeing with the majority of courts in finding that "mortgage holders, who are not servicing loans, are not liable

under RESPA for the alleged conduct of loan servicers"). The Court therefore **GRANTS** Defendants' Motion for Summary Judgment on the RESPA claim as to Lehman Brothers and Aurora only, and for the reasons discussed above, **GRANTS** Plaintiffs' Motion on the RESPA claim as to Nationstar.

B. Claims to Quiet Title and for Declaratory and Injunctive Relief

The Bakers also bring a claim to quiet title to the Property under O.R.C. § 5303.01, which provides that "[a]n action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest." O.R.C. § 5303.01. The Bakers seek declaratory judgment extinguishing any interest of Defendants in the Property and any right to enforce the mortgage loan. Finally, the Bakers seek an injunction prohibiting enforcement of the mortgage, premised upon the same allegations. These claims all turn on the same two issues: (1) whether vacating the Foreclosure Judgment also vacated the Confirmation Judgment; and (2) whether Defendants are time-barred from enforcing the mortgage.

1. Whether the Confirmation Judgment is Valid

The Bakers contend that the Agreed Entry Vacating Plaintiff's Judgment Entry & Decree of Foreclosure and Dismissing its Complaint also vacated the Confirmation Order, because the sheriff sale and confirmation cannot be valid without a valid foreclosure underlying the sale. Therefore, they argue, title did not validly transfer to Nationstar or the VA, and instead, still remains with them. Defendants, on the other hand, argue that the Foreclosure Order and Confirmation Order are separate and distinct, and only the Foreclosure Order was vacated by the plain language of the Joint Entry.

As Plaintiffs admitted during oral argument, Defendants correctly state the law with

regards to the distinction between foreclosure orders and confirmation orders. *See* Transcript (Plaintiffs' counsel agrees that there is a legal distinction between the two). In Ohio, "the decree of foreclosure and the order confirming sale are separate and distinct actions, both of which constitute final appealable orders once entered." *Emerson Tool, L.L.C. v. Emerson Family Ltd. P'ship*, 2009-Ohio-6617, ¶ 13; *see also WBCMT 2007-C33 Office 7870, LLC v. Bar J Ranch-Kemper Pointe LLC*, No. A-13-04126, 2018 WL 1998515, at *10 (Ohio Com. Pl. Feb. 21, 2018) ("The issues appealed from confirmation are wholly distinct from the issues appealed from the order of foreclosure."). The distinction between the foreclosure and confirmation "is not merely academic, but has important procedural implications." *Sky Bank v. Mamone*, 2009-Ohio-2265, ¶¶ 25-26, 182 Ohio App. 3d 323, 328–29, 912 N.E.2d 668, 672. An order of confirmation "thus becomes dispositive *as to the propriety of the sale* and the sale confirmation procedures *unless properly vacated by the trial court pursuant to Civ. R. 60(B).*" *Id.* (emphasis in original) (internal citations omitted); *see also Fifth Third Mortg., Co. v. Rankin*, 2012-Ohio-2804, ¶¶ 11-12 (quoting same and finding that trial court retained jurisdiction to confirm sheriff's sale pending appeal of judgment of foreclosure, but did not have jurisdiction to vacate sheriff's sale pending appeal from the order confirming it).

Given the distinction between foreclosure orders and confirmation orders, the Bakers should have appealed the Confirmation Order, but they did not do so. Nor did they move for a stay of the Confirmation Order. The plain language of the Agreed Entry applies only to the Foreclosure Judgment. (ECF No. 37-5) ("Aurora . . . and [the Bakers] hereby agree that Plaintiff's Judgment Entry & Decree of Foreclosure entered September 21, 2009 . . . should be vacated"). Plaintiffs have cited to no analogous cases in briefing or during oral argument where an underlying foreclosure has been vacated and the court also vacated the confirmation order.

Defendants, on the other hand, have cited cases showing that the orders are distinct as discussed above, and further, cite to cases suggesting that this Court cannot afford any relief because the Confirmation Judgment has already been satisfied. In Ohio, once "the property has been sold and the deed has been recorded," the "order of confirmation has been carried out to its fullest extent," the court cannot afford relief, even if the court reversed the order of confirmation. *Blisswood Vill. Home Owners Ass'n v. Genesis Real Estate Holdings Grp., L.L.C.*, 2018-Ohio-1090, ¶¶ 17-18. Here, the Confirmation Order has not been vacated and it is therefore dispositive as to the propriety of the sale. *See Fifth Third Mortg., Co. v. Rankin*, 2012-Ohio-2804, ¶¶ 11-12. This Court, therefore, cannot afford relief. *See Saxon Mortg. Servs. v. Whitely, Ninth Dist. Summit Cty*. App. No. 26739, 2013-Ohio-3221, ¶ 7 ("[I]n foreclosure cases, as in all other civil actions, after the matter has been extinguished through satisfaction of the judgment, the individual subject matter of the case is no longer under control of the court and the court cannot afforded relief to the parties of the action.").

For these, reasons, the Confirmation Order is valid and title legally remains with Nationstar, rather than the Bakers. Thus, the Bakers' Motion is **DENIED** in so far as it seeks to quiet title in their favor or declaratory judgment/injunctive relief relating to Defendants' interest in the Property. Defendants' Motion for Summary Judgment as to the quiet title claim and related requests for declaratory and injunctive relief is **GRANTED**.

2. Whether Defendants are Time Barred from Enforcing the Mortgage

The Bakers argue that Defendants are time barred from enforcing the mortgage. Specifically, they contend that O.R.C. § 1303.16(A) applies to the mortgage action. Section 1303.16(A) provides:

> [A]n action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due

date is accelerated, within six years after the accelerated due date.

Ohio Rev. Code Ann. § 1303.16 (West). Thus, the Bakers argue that an entity with an interest in the mortgage has six years form the accelerated due date of the mortgage to bring a foreclosure action. The Bakers state (and Defendants do not dispute) that the mortgage was accelerated on May 22, 2008, when the foreclosure action was filed in state court. Thus, they argue, Defendants had until May 22, 2014 to bring a foreclosure action and they are now time barred from doing so or enforcing the mortgage in any way.

Defendants argue that the governing statute of limitations is found in O.R.C. § 2305.06, which applies to "an action upon a specialty or an agreement, contract, or promise in writing" because a mortgage is a specialty. *See Kerr v. Lydecker*, 51 Ohio St. 240, 253, 37 N.E. 267, 270 (1894) (finding that a mortgage is a "specialty" under Ohio law). Section 2305.06 was amended, effective September 28, 2012, to reduce the limitations period from 15 years to 8 years, and for causes of action that accrued prior to the effective date, the limitations period is the earlier of 8 years from the effective date of the act or the expiration of the period of limitations in effect prior to the effective date. 129th General Assembly S.B. 224. Thus, under the amended statute, Defendants argue that they have until September 28, 2020 to enforce the mortgage (eight years from the effective date of the act).

In support of their contention that notes and mortgages have separate statutes of limitations, Defendants cite cases that stand for the proposition that notes and mortgages are separate contracts that can be enforced independently. *See e.g.*, *Fifth Third Bank v. Hopkins*, 2008-Ohio-2959, ¶ 16, 177 Ohio App. 3d 114, 119, 894 N.E.2d 65, 69–70 ("[E]ven when a mortgage is incorporated into a promissory note, the note remains independent of the mortgage and is a separate, enforceable contract between the parties."). Relying on the distinction between notes and mortgages, the Court of Appeals for the Eighth District of Ohio has held that, "[a]s a matter

of law, R.C. 1303.16(A) does not apply to actions to enforce the mortgage lien on the property after the payment on the note becomes unenforceable through the running of the statute of limitations." *U.S. Bank Nat'l Ass'n v. Robinson*, 2017-Ohio-5585, ¶ 11 (Ohio Ct. App. 8th Dist. 2017), *appeal not allowed sub nom. U.S. Bank Natl. Assn. v. Robinson*, 2018-Ohio-723, ¶ 11, 92 N.E.3d 879; *see also Bank of New York Mellon v. Walker*, 78 N.E.3d 930, 938 (Ohio Ct. App. 8th Dis. 2017).

The Bakers, however, correctly point out that the Court of Appeals for the Eighth District is the only Ohio court to have held that the statute of limitations for foreclosure can extend beyond the statute of limitations for the note secured by the mortgage. The Bakers contend that under long settled Ohio law, because the note securing the mortgage is time barred here, any action on the mortgage is also time barred.

Ohio courts have long held that the same statue of limitations governs enforcement of a note and a mortgage. A recent decision from the Bankruptcy Court in the Northern District of Ohio aptly shows the "well-settled law in Ohio" in this regard:

> *Kernohan v. Manss*, 53 Ohio St. 118, 134, 41 N.E. 258 (Ohio 1895) ("Where a promissory note is secured by mortgage, the note, not the mortgage, represents the debt. The mortgage is, therefore, a mere incident...."); *Kerr v. Lydecker*, 51 Ohio St. 240, 254–55, 37 N.E. 267 (Ohio 1894) ("[W]hen a note is secured by the mortgage, the statute of limitations as to both is the same, and therefore the mortgage will be available as a security to the note in an action for foreclosure and sale until the note shall be either paid or barred by the statute; but in such case an action for foreclosure and sale cannot be maintained on the mortgage after an action on the note shall be barred by the statute of limitations."); *Hopkins v. Clyde*, 71 Ohio St. 141, 149, 72 N.E. 846 (Ohio 1904) ("Again, when the note is barred, the mortgage is also barred, and a grantee of the mortgagor may interpose this defense to an action to foreclose the mortgage whether the mortgagor does or does not."); *Bruml v. Herold*, 14 Ohio Supp. 123, 125 (Ohio C.P. Geauga Cty. June 29, 1944) ("The note being barred by the operation of the statute of limitations, the mortgage securing the same is relieved and discharged, the same as though the note had been paid during its lifetime in full[.]").

In re Fisher, 584 B.R. 185, 198 (Bankr. N.D. Ohio 2018).

In *Fisher*, the court was faced with nearly identical arguments as the parties set forth here: one party argued that the six-year statute of limitations that controlled the note controlled a cause of action to enforce the mortgage (as the Bakers do), while the other party insisted, relying on the same Eighth District Court of Appeals cases cited by Defendants, that while collection on the note may be time barred, enforcement on the mortgage is not given the longer statute of limitations found in O.R.C. § 2305.06. *Id.* The *Fisher* Court analyzed the Eighth District cases and found that they relied on an inaccurate interpretation of an Ohio Supreme Court case, *Deutsche Bank Natl. Tr. Co. v. Holden*, which found that a bank that owned a mortgage had standing to foreclose on the property, even after the debt on the promissory note secured by the mortgage had been discharged by a bankruptcy court. 2016-Ohio-4603, ¶ 8, 147 Ohio St. 3d 85, 87, 60 N.E.3d 1243, 1246, *reconsideration denie*d, 2016-Ohio-5585, ¶ 8, 146 Ohio St. 3d 1493, 57 N.E.3d 1172. The *Fisher* Court correctly noted that *Holden* did not address the applicable statute of limitations because the action was brought within O.R.C. § 1303.16(A)'s six-year period. 584 B.R. 185 at 200. Further, the *Fisher* Court found it significant that the *Holden* Court did not expressly overrule any of the long-standing precedent in Ohio cited above, and indeed, cited the continued viability of *Kerr*, which held that the statue of limitations for enforcing a note and a mortgage were the same. 584 B.R. 185 at 200.

At oral argument, Defendants argued that *Fisher* was wrongly decided. (*See* Transcript). Subsequently, Defendants filed a Notice of Supplemental Authority to draw the Court's attention to *SRB Servicing, LLC v. McIntyre*, No. 1:17-cv-665, 2018 WL 2738839 (N.D. Ohio May 5, 2018). In *SRB Servicing*, the Northern District of Ohio found that *Holden* overruled the longstanding rule in Ohio that when a note is secured by a mortgage, the statute of limitations as to both is the same. 2018 WL 2738839, at *3-4. The *SRB Servicing* Court relied on one of the Eighth District Court

of Appeals cases cited by Defendants here and discussed in *Fisher*. *Id.* at 3 (discussing *Bank of New York Mellon v. Walker*, 78 N.E.3d 930, 938 (Ohio Ct. App. 8th Dis. 2017)). *SRB Servicing* and the Eighth District Court of Appeals cases rely on an interpretation of *Holden* that overrules years of settled precedent in Ohio. In Ohio, the Supreme Court established a tripartite test for considering whether a previous decision of the Ohio Supreme Court should be overruled:

> A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Groch v. Gen. Motors Corp., 2008-Ohio-546, ¶ 134, 117 Ohio St. 3d 192, 215, 883 N.E.2d 377, 401 (quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216 (Ohio 2003)). In *Holden*, the Ohio Supreme Court did not go through this three-step analysis at all, suggesting that the court did not intend to overrule years of settled precedent. The line of Ohio Supreme Court cases holding that when a note is secured by a mortgage, the statute of limitations as to both is the same is directly on point. Even if these cases "appear to rest on reasons rejected in" *Holden*, this Court will apply the line of cases directly on point and leave to the Ohio Supreme Court "the prerogative of overruling its own decisions." *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (holding that if a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, other courts should follow the case which directly controls, and leave to the Supreme Court the prerogative of overruling its own decisions).

The Court therefore finds the reasoning in *Fisher* to be more persuasive than the reasoning in *SRB Servicing* and holds that Defendants are time-barred from any action to enforce the mortgage. Plaintiffs' Motion seeking declaratory judgment and injunctive relief on this point is therefore **GRANTED**, and Defendants' is **DENIED**.

C. FDCPA

The Bakers' last claim is that Defendants violated the FDCPA. The FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). When analyzing claims under the FDCPA, courts employ the "least sophisticated consumer test" which protects "the gullible as well as the shrewd" while still preventing "liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 611-612 (6th Cir. 2009) (quoting *Barany-Snyder v. Weiner*, 539 F.3d 327, 332-33 (6th Cir. 2008)). The Bakers bring their claim under 15 U.S.C. § 1692e, which prohibits debt collectors from making "false, deceptive, or misleading communications in connection with the collection of any debt." 15 U.S.C. § 1692e. This provision provides an illustrative (non-exhaustive) list of violations, including prohibiting a false representation of "the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). To violate § 1692e, a statement must be "materially false or misleading, that is, the statement must be technically false, and one which would tend to mislead or confuse the reasonable unsophisticated consumer." *Newton v. Portfolio Recovery Assocs., LLC*, No. 2:12-CV-698, 2014 WL 340414, at *6 (S.D. Ohio Jan. 30, 2014).

The Bakers contend that Defendants violated § 1692 when they sent mortgage statements to the Bakers in attempt to collect on a debt that was no longer valid and enforceable. (ECF No. 37 at 15). Defendants first argue that the mortgage is not time-barred. For the reasons discussed above, this Court finds the mortgage is, in fact, time-barred. Defendants next contend that even if the mortgage is time barred, sending statements that reflect amounts unpaid on a time-barred debt does not violate the FDCPA. On a broad level, Defendants may be correct—the FDCPA does not

place "an affirmative duty on a debt collector to disclose to the consumer the applicability of the statue of limitations." *Newton v. Portfolio Recovery Assocs., LLC*, No. 2:12-CV-698, 2014 WL 340414, at *10 (S.D. Ohio Jan. 30, 2014). The Sixth Circuit has held that there is "nothing wrong with informing debtors that a debt remains unpaid" even if the debt is time-barred. *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015).

This does not end the inquiry, however, as Defendants would like this Court to believe—the Sixth Circuit has held that a communication about a time-barred debt can violate the FDCPA in certain circumstances. In *Buchanan*, the Sixth Circuit held that whether a debt is legally enforceable relates to the character and legal status of the debt, and "a misrepresentation about the limitations period amounts to a 'straightforward' violation of § 1692e(2)(A)." 776 F.3d at 399. The *Buchanan* Court analyzed a letter attempting to collect on an account that was time-barred under the relevant statute of limitations. The letter stated the total amount due under the loan and then provided a lower "settlement offer." *Id.* at 395. The court took issue with the fact that the letter did not disclose that the statute of limitations had run on the debt, or that a partial payment of a time-barred debt restarts the statute of limitations under the relevant state law. *Id.* at 396. The Sixth Circuit reversed the district court's dismissal of the FDCPA claim, finding that a consumer could find that a "settlement offer" falsely implies that the underlying debt is enforceable in court. *Id.* at 399.

Of the courts to consider the issue, "the majority of courts have held that when the expiration of the statute of limitations does not invalidate a debt, but merely renders it unenforceable, the FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt *so long as the debt collector does not initiate or threaten legal action in connection with its debt collection efforts*." *Scheiner v. Portfolio Recovery Assocs., LLC*, No. CV 12-518-JGW, 2013

WL 12103069, at *7 (S.D. Ohio Nov. 5, 2013) (internal citations omitted) (emphasis added). The FDCPA claim, then, "hinges on whether" the mortgage statements "threatened litigation." *Id.* (quoting *Huertas v. Galaxy Asset Management*, 641 F.3d 28 (3d Cir. 2011); *see also Canterbury v. Columbia Gas of Ohio*, No. C2-99-1212, 2001 WL 1681132, at *6 (S.D. Ohio Sept. 25, 2001) (Sargus, J.) ("Thus, the only issue this court must decide is whether the representations allegedly made by Columbia could be viewed by the least sophisticated consumer as a threat of legal action.").

The Court finds that the letters at issue here threatened legal action. Nationstar sent the Bakers at least three letters after the statute of limitations expired on May 22, 2014: the mortgage statements of June 19, 2015, July 21, 2015, and August 19, 2015. (ECF No. 37-7 at 24, 29, 33). Each of these letters stated, "Failure to bring your loan current may result in fees, possibly even foreclosure and the loss of your home." (*Id.*). The reference to Nationstar's ability to bring foreclosure proceedings and precipitate the Bakers losing their home would be read by the least sophisticated consumer to threaten legal action—in Ohio, foreclosure cannot occur without legal proceedings. Therefore, Plaintiffs' Motion for Summary Judgment as to the FDCPA claim is **GRANTED**, and Defendants' Motion as to the same is hereby **DENIED**.

D. CONCLUSION

For the reasons stated above, each party's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. Specifically, Defendants' Motion (ECF No. 36) is **GRANTED** as to the quiet title claim, the declaratory judgment and injunctive relief claims relating to their ownership interest in the Property, and the RESPA claim as to Defendants Aurora and Lehman Brothers only. Defendants' Motion is **DENIED** as to the RESPA claim against Nationstar, the declaratory judgment and injunctive relief claims related to the enforceability of

the mortgage, and the FDCPA claim. Plaintiffs' Motion (ECF No. 37) is **GRANTED** as to the RESPA claim against Nationstar, the declaratory judgment and injunctive relief claims seeking to declare the mortgage time-barred and therefore unenforceable, and the FDCPA claim. Plaintiffs' Motion is **DENIED** as to the quiet title claim, the declaratory judgment and injunctive relief claims relating to Defendants' interest in the Property, and the RESPA claim as to Lehman Brothers and Aurora. The issue of damages will be determined at a trial to be set at a later date. The VA is hereby **DISMISSED** as a party.

IT IS SO ORDERED.

/s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: July 20, 2018

[Cite as *Peterson v. Natl. Sec. Assoc., Inc.*, 2018-Ohio-2905.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert J. Peterson et al.,	:	
Plaintiffs-Appellants	:	
v.	:	No. 17AP-39 (C.P.C. No. 10CV-12611)
Randy Martyn,	:	(REGULAR CALENDAR)
Defendant-Appellee	:	
National Security Associates, Inc. et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 24, 2018

On brief: *J.C. Ratliff, Jeff Ratliff,* and *Rocky Ratliff*, for appellants. **Argued**: *Jeff Ratliff*.

On brief: *Michael R. Szolosi, Jr., LLC,* and *Michael R. Szolosi, Jr.*, for Randy Martyn. **Argued**: *Michael R. Szolosi, Jr*.

On brief: *Isaac Wiles Burkholder & Teetor, LLC, Brian M. Zets*, and *Dale D. Cook*, for defendants-appellees Gahanna Police Department and Sergeant James Graham. **Argued**: *Brian M. Zets*.

APPEAL from the Franklin County Court of Common Pleas

BROWN, P.J.

{¶ 1} Plaintiffs-appellants, Robert J. Peterson ("Peterson"), and his wife Heidi Peterson, appeal from a judgment of the Franklin County Court of Common Pleas, granting the motions for summary judgment of defendants-appellees, the Gahanna Police

Department ("GPD"), Sergeant James Graham, and Randy Martyn. For the following reasons, we reverse.

{¶ 2} On August 26, 2010, appellants filed a complaint against National Security Associates, Inc., Martyn, GPD, Graham, and the city of Columbus. The complaint asserted claims of negligence, recklessness, negligent training, negligent supervision, negligent hiring, respondeat superior, and loss of consortium. Appellants later dismissed National Security Associates, Inc. and the city of Columbus from the action. The events giving rise to the complaint occurred on August 26, 2008, when Peterson was injured during an explosive breaching training at the Columbus bomb range.

{¶ 3} At the time of his injury, Peterson was an Ohio State Highway Patrol ("OSHP") state trooper, and a member of OSHP's special response team. OSHP's special response team trained in explosive breaching, which involves detonating an explosive device on the door or window of a building to breach the structure so officers can enter the building.

{¶ 4} In 2008, OSHP asked Martyn if he would teach a week-long explosive breaching seminar to members of OSHP's special response team. Martyn was a certified master breacher for the United States Army and had "taught explosive breaching to over 1,000 military and law enforcement personnel." (Martyn Depo. at 12.) In his civilian capacity, Martyn worked as an officer for GPD.

{¶ 5} Martyn agreed to teach the course, and OSHP agreed to pay Martyn $500 per student for the following OSHP members to attend the course: Sergeant Mike Kemmer, Trooper Eli Rivera, Trooper Robert Peterson, Trooper Seth Douthitt, Trooper Erik Lofland, and Trooper Rick Tocash. Although Peterson was already certified in advanced explosive breaching, some of the other OSHP members had not received any formal training in explosive breaching before the 2008 course.

{¶ 6} Two members of GPD, Graham, and Detective John Power, attended the course for free. Graham had never detonated an explosive before the 2008 seminar, but had attended a training where Martyn showed members of GPD's SWAT team "some of the tactics and things that went along with explosive breaching." (Graham Depo. at 10.)

{¶ 7} The first day of the seminar, August 25, 2008, consisted of eight hours of classroom instruction at OSHP's academy. On the second day of the seminar, the class went

to the Columbus bomb range to practice constructing and detonating explosives. The bomb range had a pavilion area where students would construct the charges, and a separate area with a structure where the explosives would be detonated.

{¶ 8} Peterson and Graham were both back in the pavilion constructing charges during the first two detonations of the August 26, 2008 training. Although Graham stated that he "did not hear the sequence on the first two shots," Peterson testified he heard the "highway patrol procedure for the shot, the command to detonate" utilized during the first two shots. (Graham Depo. at 23; Peterson Depo. at 49.) OSHP's shot sequence consists of "three fire in the hole announcements," followed by the commands "this is the commander, I have control, stand by, stand by, go." (Peterson Depo. at 57.)

{¶ 9} The third shot of the day was a 300 grain flex linear charge. Martyn approved the construction of this charge, and informed the class it was "a fragmentation producing type charge" and "a dangerous shot." (Martyn Depo. at 86; Douthitt Depo. at 70.) After constructing the charge, a group consisting of Douthitt, Lofland, Tocash, Power, Peterson, and Graham took the charge up to a door on the breaching structure. Graham was chosen to be the person who would detonate the charge, known as the primary breacher. The primary breacher had the duty of checking the open area to ensure it was clear before detonating the charge. (*See* Kemmer Depo. at 71-72; Martyn Depo. at 73; Peterson Depo. at 174; and Douthitt Depo. at 29-30.)

{¶ 10} After placing the charge, the group retreated "behind the corner of the facade" of the breaching structure. (Peterson Depo. at 74, 76.) Once behind the facade, Peterson became concerned about the whereabouts of those not in the group. Peterson stated that he touched Graham, and said "hang on a second. Show me the detonator, which is - - which is a two piece plunger-type detonator." (Peterson Depo. at 80.) Graham showed him "the two pieces. [Peterson] said, keep it like that. I'm going to go out here and make sure everybody is behind cover." (Peterson Depo. at 81.) Graham, however, testified that Peterson never said anything to him after they had retreated behind the facade.

{¶ 11} Peterson walked out into the open area and called out to let the others know "we're getting ready to blow this." (Peterson Depo. at 81.) Peterson stated that "Randy and Mike and Jim moved to cover. Ely assured me he was behind cover." (Peterson Depo. at 81.) As Peterson was walking back to the facade, he started yelling out the fire in the hole

announcements. Peterson explained that it was common to yell the fire in the hole commands out before reaching cover "[b]ecause you're yelling it to the area" to alert others that an explosion is about to occur and, thus, want to be "in a position that" others "see [you] and hear [you]." (Peterson Depo. at 191-92.) As Peterson "started to say the third fire in the hole, the blast [was] detonated." (Peterson Depo. at 82.)

{¶ 12} Graham recalled the incident differently. Graham testified that, after the group retreated behind the facade, he looked out into the open area and made a 180 degree view, panning from left to right, and saw "no one in the open area." (Graham Depo. at 48.) Lofland did not "believe" Graham looked out into the open area before detonating the charge, as Lofland saw Graham crouched "behind the wall kind of locked in on the initiator." (Lofland Depo. at 37.)

{¶ 13} Graham testified that he, not Peterson, yelled out the fire in the hole commands, and that he initiated the charge after yelling out the third fire in the hole command. Graham explained GPD's shot sequence was simply "fire in the hole, fire in the hole, fire in the hole." (Graham Depo. at 14.)

{¶ 14} Peterson was "[a] couple of steps out" from the facade when the blast occurred. (Peterson Depo. at 88.) Fragmentation from the charge hit Peterson's left leg. Immediately after the explosion, Peterson "looked at Graham" and said "what the hell? And [Graham] said, we go on the third fire in the hole." (Peterson Depo. at 98.) The other class participants applied pressure to Peterson's leg until an ambulance arrived.

{¶ 15} Every student of the August 2008 explosive breaching seminar testified that Martyn never discussed a shot sequence with the class before Peterson's injury. (*See* Peterson Depo. at 60-62; Graham Depo. at 15; Tocash Depo. at 26; Douthitt Depo. at 27; Kemmer Depo. at 33; Rivera Depo. at 50; Lofland Depo. at 24; and Power Depo. at 18.) The participants who had attended other explosive breaching training seminars in the past testified that, at those previous courses, the course instructor would inform the class of the shot sequence the participants were to utilize during the class. (*See* Peterson Depo. 59-60; Douthitt Depo. at 15; Kemmer Depo. at 33-34.) Rivera testified that, if Martyn "would have gone over this - - the shot protocol, this [accident] wouldn't have happened." (Rivera Depo. at 85.)

{¶ 16} Martyn, however, testified he did discuss a shot sequence with the class. Martyn stated he went over the shot sequence "twice" during the first day of the seminar, noting it was on a powerpoint slide and "was also in a video." (Martyn Depo. at 84.) The shot sequence Martyn told the students to use was "I have control, I have control, I have control and then stand by," and then a count down of five, four, three, two, one, and on the "wh" of one, the charge was to be detonated. (Martyn Depo. at 29-30.)

{¶ 17} On February 15, 2013, Martyn filed a Civ.R. 56 motion for summary judgment. Martyn asserted that appellants had failed to establish he breached any standard of care, and Martyn filed his affidavit with the motion averring that he met his duty of care to the training participants. Martyn further asserted that primary assumption of risk barred appellants' negligence claims, as Peterson had voluntarily participated in the inherently dangerous activity of explosive breaching.

{¶ 18} GPD and Graham filed a joint Civ.R. 56 motion for summary judgment on February 15, 2013. GPD argued it was not capable of being sued, as it was not a political subdivision. Graham argued he was immune from Peterson's negligence claims, pursuant to R.C. 2744.03(A)(6), and that he had not acted recklessly.

{¶ 19} On March 19, 2013, appellants filed memoranda contra appellees' motions for summary judgment. Appellants argued that Martyn owed Peterson "the duty imposed upon a teacher or instructor [which] is one of ordinary and reasonable care for the safety of his students," and that Martyn breached this duty by failing to instruct the students regarding the shot sequence they were to use during his class. (Appellants' Memo Contra to Martyn's Mot. for Summ. Jgmt. at 12.) Appellants asserted that primary assumption of risk did not apply to the facts of the case, as "the risks associated with being a student in a controlled training exercise for the Ohio State Highway Patrol [were] not readily foreseeable as a matter of law." (Appellants' Memo Contra to Martyn's Mot. for Summ. Jgmt. at 23.)

{¶ 20} Appellants argued that GPD was capable of being sued, and that Graham was not entitled to immunity. Appellants asserted that Graham "owed Peterson a duty as the primary breacher," and that Graham had "failed to look and see if anyone was in the detonation area" before detonating the charge. (Appellants' Memo Contra to GPD and Graham's Mot. for Summ. Jgmt. at 22.)

{¶ 21} On November 29, 2016, GPD and Graham filed a motion for a status conference noting that dispositive motions had been pending in the action since 2013.

{¶ 22} On December 14, 2016, the trial court issued a decision and entry granting appellees' motions for summary judgment. The court concluded that, because "detonating explosives [is] a dangerous activity" and Peterson "was aware of the risk of injury" from a blast, "primary assumption of risk completely bar[red] any negligence claim." (Decision at 4.) The court further held that neither Martyn nor Graham had acted recklessly.

{¶ 23} Appellants appeal, assigning the following errors for our review:

> [I.] The Trial Court committed reversible error when it misapplied the Primary Assumption of the Risk Doctrine to the facts and circumstances of this case and granted Summary Judgment to Defendant[s]-Appellees.
>
> [II.] The Trial Court committed reversible error by granting Summary Judgment when it found that Appellee Randy Martyn did not engage in reckless conduct.
>
> [III.] The Trial Court committed reversible error by granting Summary Judgment when it found that Appellee James Graham did not engage in reckless conduct.
>
> [IV.] The Trial Court committed reversible error when the trial court found that Appellee Gahanna Police Department and Appellee James Graham were immune from liability.

{¶ 24} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 25} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for

summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 26} When seeking summary judgment on grounds that the non-moving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Id*. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the non-moving party has no evidence to support its claims. *Id*. If the moving party meets its burden, then the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id*.

{¶ 27} Appellants' first assignment of error asserts the trial court erred by applying primary assumption of risk to the facts of the case. Appellants contend that implied assumption of risk, rather than primary assumption of risk, applies herein.

{¶ 28} To establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom. *Menifee v. Ohio Welding Prods. Inc.*, 15 Ohio St.3d 75, 77 (1984); *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). A defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 645 (1992). If a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680 (1998).

{¶ 29} "Ohio law recognizes three categories of assumption of the risk as defenses to a negligence claim: express, primary, and implied or secondary." *Schnetz v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 207, 2011-Ohio-3927, ¶ 21 (10th Dist.), citing *Crace*

v. Kent State Univ., 185 Ohio App.3d 534, 2009-Ohio-6898, ¶ 10 (10th Dist.). Express assumption of a risk occurs when parties to a contract agree to a release of liability. *Ballinger v. Leaniz Roofing, Ltd.*, 10th Dist. No. 07AP-696, 2008-Ohio-1421, ¶ 7.

{¶ 30} "Under the doctrine of primary assumption of the risk, a plaintiff who voluntarily engages in a recreational activity or sporting event assumes the inherent risks of that activity and cannot recover for injuries sustained in engaging in the activity unless the defendant acted recklessly or intentionally in causing the injuries." *Morgan v. Ohio Conference of the United Church of Christ*, 10th Dist. No. 11AP-405, 2012-Ohio-453, ¶ 13, citing *Crace* at ¶ 13, citing *Santho v. Boy Scouts of Am.*, 168 Ohio App.3d 27, 2006-Ohio-3656, ¶ 12 (10th Dist.). "The rationale behind the doctrine is that certain risks are so intrinsic in some activities that the risk of injury is unavoidable." *Id*. Thus, by participating in the activity, the plaintiff "tacitly consent[s]" to the risk of injury inherent in the activity. *Collier v. Northland Swim Club*, 35 Ohio App.3d 35, 37 (10th Dist.1987). The doctrine applies to both spectators and participants alike. *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, ¶ 10. *See Cincinnati Base Ball Club Co. v. Eno*, 112 Ohio St. 175, 180-81 (1925) (explaining that, as it is "common knowledge that in baseball games hard balls are thrown and batted with great swiftness, that they are liable to be thrown or batted outside the lines of the diamond, and that spectators in positions which may be reached by such balls assume the risk thereof").

{¶ 31} "[A] successful primary assumption of risk defense means that the duty element of negligence is not established as a matter of law." *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 431-32 (1996). The defense thus prevents a plaintiff from making a prima facie negligence case, and is perhaps "more appropriately called the no-duty rule." *Wolfe v. Bison Baseball, Inc.*, 10th Dist. No. 09AP-905, 2010-Ohio-1390, ¶ 18. Whether to apply the defense of primary assumption of the risk presents an issue of law for the court to determine. *Crace* at ¶ 12, citing *Gallagher* at 435.

{¶ 32} To succeed on a primary assumption of risk defense, it must be shown that (1) the danger is ordinary to the activity, (2) it is common knowledge that the danger exists, and (3) the injury occurs as a result of the danger during the course of the activity. *Santho* at ¶ 12. *See also Gentry* at ¶ 10, citing *Thompson v. McNeill*, 53 Ohio St.3d 102, 104 (1990).

{¶ 33} To determine the ordinary or inherent risks of an activity, a court must "focus[] exclusively upon the activity itself." *Schnetz* at ¶ 28. "The types of risks associated with the activity are those that are foreseeable and customary risks of the activity." *Foggin v. Fire Protection Specialists, Inc.*, 10th Dist. No. 12AP-1078, 2013-Ohio-5541, ¶ 9. Thus, "primary assumption of risk requires an examination of the activity itself and not plaintiff's conduct. If the activity is one that is inherently dangerous and from which the risks cannot be eliminated, then a finding of primary assumption of risk is appropriate." *Gehri v. Capital Racing Club, Inc.*, 10th Dist. No. 96APE10-1307 (June 12, 1997). *See also Gallagher* at 432 (noting that "only those risks directly associated with the activity in question are within the scope of primary assumption of risk"); *Crace* at ¶ 16 (noting that the injured plaintiff's "subjective consent to and appreciation for the inherent risks are immaterial to the [primary assumption of risk] analysis").

{¶ 34} For example, in *Ochall v. McNamer*, 10th Dist. No. 15AP-772, 2016-Ohio-8493, this court held that the inherent risks of go-karting included "running into other go-karts on the track, or deviating from the track and running into any object present around the track." *Id.* at ¶ 49. As such, the plaintiff in *Ochall* primarily assumed the risk of injury "when she stood 10 to 12 feet away from the [appellees'] go-kart track while a go-kart race was in process." *Id.* at ¶ 50. *See also Morgan* at ¶ 17 (holding that primary assumption of risk barred the plaintiff's negligence action, as hiking involved "the risk of tripping, slipping and falling," and the plaintiff was injured when he fell while hiking); *Thompson* at 106 (holding that, as "[s]hanking the ball is a foreseeable and not uncommon occurrence in the game of golf," the plaintiff primarily assumed the risk of being hit by a golf ball by playing the game of golf); *Brumage v. Green*, 2d Dist. No. 2014-CA-7, 2014-Ohio-2552, ¶ 14; *Blankenship v. CRT Tree*, 8th Dist. No. 80907, 2002-Ohio-5354, ¶ 44.

{¶ 35} Primary assumption of risk has been applied to activities which are not typically considered recreational activities, when the risk of injury is inherent to the activity and cannot be eliminated. *See Foggin* at ¶ 13 (holding that primary assumption of risk applied to the activity of climbing a ladder); *Cave v. Burt*, 4th Dist. No. 03CA2730, 2004-Ohio-3442, ¶ 19 (holding that primary assumption of risk applied to "[r]iding on a car's trunk lid," because "the risks associated with it cannot be eliminated"); *Miljkovic v.*

Greater Cleveland Regional Transit Auth., 8th Dist. No. 77214 (Oct. 12, 2000) (applying primary assumption of risk when the plaintiff "voluntarily chose to cross the railroad tracks as a matter of convenience"); *Wagner v. Kretz*, 3d Dist. No. 1-17-24, 2017-Ohio-8517, ¶ 20 (applying primary assumption of risk to the activity riding on a parade float).

{¶ 36} The remaining category of assumption of risk, implied assumption of risk, is defined as the "plaintiff's consent to or acquiescence in an appreciated, known or obvious risk to plaintiff's safety." *Collier* at 37. "Implied assumption of the risk does not relieve defendant of his duty to plaintiff." *Id.* at paragraph two of the syllabus. Thus, implied assumption of risk "exists when a plaintiff, who fully understands the risk of harm to himself, nevertheless voluntarily chooses to subject himself to it, under circumstances that manifest his willingness to accept the risk." *Cappelli v. Youngstown Area Community Action Council*, 7th Dist. No. 05 MA 175, 2006-Ohio-4952, ¶ 16.

{¶ 37} Implied assumption of risk has been merged into Ohio's comparative negligence statute, R.C. 2315.33. *Anderson v. Ceccardi*, 6 Ohio St.3d 110 (1983), paragraph one of the syllabus. *See also Cave* at ¶ 17 (noting that it is "because the plaintiff knew of the danger involved and acquiesced to it" that the plaintiff's "claim may be barred under comparative negligence principles"). Pursuant to the comparative negligence statute, the trier of fact must apportion relative degrees of fault between the plaintiff and the defendant in deciding the issue of negligence. *Collier* at 39. Thus, implied assumption of risk "ordinarily involves questions of fact that generally are to be decided by the fact finder." *Durnell v. Raymond Corp.*, 10th Dist. No. 98AP-1577 (Nov. 16, 1999).

{¶ 38} The distinction between primary and implied assumption of risk rests on the risk at issue in the case. "[O]nly those risks directly associated with the activity in question are within the scope of primary assumption of risk, so that no jury question would arise when an injury resulting from such a direct risk is at issue." *Gallagher* at 432, citing *Eno*. However, when a case presents "attendant circumstances that raise questions of fact whether an injured party assumed the risk in a particular situation," the doctrine of "implied assumption of risk, not primary assumption of risk, would be applicable." *Id.*

{¶ 39} For example, in *Aber v. Zurz*, 175 Ohio App.3d 385, 2008-Ohio-778 (9th Dist.), the court observed that although "falling off a tube and sustaining facial injuries [was] a foreseeable risk of tubing at a typical, reasonable, speed," the "specific facts" of the

case demonstrated that the "risk was elevated by the speed of the boat and other conditions solely under [the defendant's] control." *Id*. at ¶ 14. In *Aber*, the defendant admitted he was driving the boat " 'too fast for the conditions that day,' " and other boat passengers testified that "they had never seen [defendant] go as fast as he did" on the day of the plaintiff's injury. *Id*. at ¶ 13. The court found primary assumption of risk inapplicable, as the injury occurred "after falling off the tube at a *high rate of speed*," and the plaintiff "could not have foreseen this elevated risk." (Emphasis sic.) *Id*. at ¶ 14.

{¶ 40} In *Byer v. Lucas*, 7th Dist. No. 08-NO-351, 2009-Ohio-1022, the plaintiff was injured while participating in a hayride. The court observed that, although the "inherent risks of a hayride might include getting scratched by tree branches, being bounced around on the wagon, and even losing one's balance and falling off the wagon," the specific risks which resulted in the plaintiff's injury were "risks that extended well beyond the ordinary" risks "associated with a hayride." *Id*. at ¶ 30. The evidence demonstrated that the driver "chose to take the hayride down * * * a steep hill," resulting in the "tractor and its wagon cascading down a steep hill out of control and jackknifing to a stop throwing passengers from it." *Id*. at ¶ 30, 39. As these were not "inherent risk[s] of a hayride," the court concluded that primary assumption of risk did not apply to the facts of the case. *Id*. at ¶ 39.

{¶ 41} The activity at issue in the present case is an explosive breaching training seminar involving students from OSHP and GPD, with Martyn as the course instructor. Under the first element of a primary assumption of risk analysis, we must determine whether the danger or risk at issue was ordinary to the activity. *Santho* at ¶ 12.

{¶ 42} The present activity did not involve individuals detonating explosives at random with no set procedure. To the contrary, this was a class for law enforcement personnel to learn how to properly and effectively detonate explosives in order to breach a structure. OSHP used a particular shot sequence to signal when a detonation was to occur. GPD used a different shot sequence to signal when a detonation was to occur. Although this fact is in dispute, Martyn testified he instructed the class participants regarding the particular shot sequence they were to utilize during his class. Accordingly, the evidence demonstrates that, at an explosive breaching training, a shot sequence precedes the

detonation of the explosive and signals to the primary breacher when to detonate the charge.

{¶ 43} Explosive breaching training carries certain inherent risks, including the risk of being struck by fragmentation from an explosive. Even when all participants utilize the same shot sequence, accidents can occur and injury from an explosion may result. However, the present case presents an issue of fact regarding attendant circumstances which would elevate the risks at issue beyond the ordinary risks of an explosive breaching training. Viewing the evidence in a light most favorable to Peterson, Martyn never instructed the August 2008 course participants regarding the shot sequence they were to utilize during his class. The likelihood of injury from an explosion at an explosive breaching training is greatly increased beyond the general, ordinary risk of an injury from an explosion when class participants utilize different shot sequences because they were not instructed as to a cohesive shot sequence.

{¶ 44} The risk that explosive breaching training class participants would utilize different shot sequences because they were not instructed regarding the shot sequence they were to use during the class would not be an ordinary risk of an explosive breaching training. Therefore, there is an issue of fact to be resolved by the trial court to determine whether primary assumption of risk would be applicable in this case.

{¶ 45} Accordingly, the trial court erred in granting appellees' motions for summary judgment on the basis of primary assumption of risk. The record presents genuine issues of material fact regarding whether Martyn instructed the August 2008 class participants, prior to Peterson's injury, as to the shot sequence they were to utilize during his class. On remand, if the trier of fact concludes Martyn did not instruct the class as to the shot sequence, the court should analyze the case under the doctrine of implied assumption of risk which is subsumed under Ohio's comparative negligence scheme. *See* R.C. 2315.33.

{¶ 46} Based on the foregoing, appellants' first assignment of error is sustained. The trial court's award of summary judgment is reversed, and the case is remanded for proceedings consistent with this decision. Our ruling on the first assignment of error renders the second and third assignments of error, regarding Martyn's and Graham's recklessness, moot. *See Thomas v. Strba,* 9th Dist. No. 12CA0080-M, 2013-Ohio-3869, ¶ 19; App.R. 12(A)(1)(c).

{¶ 47} Appellants' fourth assignment of error asserts the trial court erred in finding GPD and Graham were immune from liability. In moving for summary judgment, GPD argued that it was not an entity or political subdivision capable of being sued. Graham argued that he was immune from appellants' negligence claims pursuant to R.C. 2744.03(A)(6).

{¶ 48} As relevant herein, R.C. 2744.03(A)(6) provides a political subdivision employee with immunity unless one of the following apply: (a) the employees acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities, or (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A)(6)(a) and (b). In their motion for summary judgment, GPD and Graham asserted that the only "relevant exception to immunity in the case at bar, [was] whether Graham's acts or omissions were done in a wanton or reckless manner," which they argued were not. (Appellees' Mot. for Summ. Jgmt. at 10.) GPD and Graham noted that Peterson had alleged in his complaint that Graham was acting within the scope of his employment at the time of Peterson's injury, but GPD and Graham did not further discuss the issue. (*See* Appellees' Mot. for Summ. Jgmt. at 12.) GPD and Graham never addressed the fact that Graham was on vacation during the August 2008 seminar in their motion for summary judgment.

{¶ 49} In appellants' memorandum contra GPD and Graham's motion for summary judgment, appellants argued GPD was capable of being sued, and that the R.C. 2744.03(A)(6)(a) exception to immunity applied as Graham was on vacation during the August 2008 seminar. Appellants noted that Graham's deposition testimony demonstrated he "took vacation time from the GPD in order to attend this training," and argued that "[b]y being on vacation, Graham [could not] be said to be acting within his employment or official responsibilities." (Appellants' Memo Contra to GPD and Graham's Mot. for Summ. Jgmt. at 18.) Indeed, Graham testified he used his "own personal vacation" time to attend the seminar, as his "patrol lieutenant said that [he] wasn't authorized to take - - to be paid on duty for it." (Graham Depo. at 41.) Appellants noted that GPD and Graham's motion for summary judgment did "not provide any analysis under [R.C. 2744.03] subsection (a) for this Court's consideration, and relie[d] solely on Plaintiffs' Complaint." (Appellants' Memo Contra to GPD and Graham's Mot. for Summ. Jgmt. at 19.) Appellants pointed out that

Graham's deposition had not yet taken place at the time they drafted their complaint, and that it was "Graham's own deposition testimony that ha[d] placed him outside the scope of his employment." (Appellants' Memo Contra to GPD and Graham's Mot. for Summ. Jgmt. at 19.)

{¶ 50} In granting GPD and Graham's motion for summary judgment, the trial court stated that "[e]ven if suit was brought against the proper governmental entity, for all of the reasons set forth in the Gahanna Defendants' Motion, the Court agrees that Defendant [Graham] is entitled to immunity and there is no vicarious liability." (Decision at 8.) Thus, the court concluded that Graham was entitled to immunity based solely on the arguments set forth in GPD and Graham's motion for summary judgment.

{¶ 51} "It is well-established that questions not considered by a trial court will not be ruled upon by [the appellate] court." *Ochsmann v. Great Am. Ins. Co.*, 10th Dist. No. 02AP-1265, 2003-Ohio-4679, ¶ 21, citing *Mills-Jennings, Inc. v. Dept. of Liquor Control*, 70 Ohio St.2d 95, 99 (1982) (refusing to consider on appeal issues raised in the party's motion for summary judgment which the trial court had not addressed). "While it is true that an appellate court reviews a trial court's summary judgment decision de novo, [an appellate court must] not consider issues raised in summary judgment proceedings that the trial court failed to rule on." *Tree of Life Church, FWC v. Agnew*, 7th Dist. No. 12 BE 42, 2014-Ohio-878, ¶ 27, citing *Conny Farms, Ltd. v. Ball Resources, Inc.*, 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶ 15. *See Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360 (1992) (holding that "even though" an appellate court reviewing an award of summary judgment "must conduct its own examination of the record," if the "trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court," and accordingly the failure of the "trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment * * * constitutes reversible error"); *Yoskey v. Eric Petroleum Corp.*, 7th Dist. No. 13 CO 42, 2014-Ohio-3790, ¶ 40, citing *Murphy* at 360 (noting that "de novo review still entails a *review* of what the trial court decided") (Emphasis sic.); *State ex rel. Deem v. Village of Pomeroy*, 4th Dist. No. 17CA3, 2018-Ohio-1120, ¶ 42 (holding that, as the trial court never addressed the defendants' summary judgment argument that Spaun was

entitled to "immunity under R.C. 2744.03(A)(6)," the appellate court "decline[d] to do so for the first time on appeal").

{¶ 52} In granting GPD and Graham's motion for summary judgment, the trial court never ruled on GPD's argument that it was not capable of being sued. Although the court stated that Graham was entitled to immunity for the reasons contained in GPD and Graham's motion for summary judgment, that motion never addressed the fact Graham was on vacation while attending the seminar. In their memorandum contra, appellants presented the court with Graham's deposition testimony demonstrating he was on vacation during the training. Yet, the trial court did not review or consider this evidence before granting GPD and Graham's motion. Accordingly, as the trial court failed to rule on these issues, they are not properly before us at this time.

{¶ 53} Having sustained appellants' first assignment of error, rendering appellants' second and third assignments of error moot, and having declined to address appellants' fourth assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas, and remand the case to that court for further proceedings consistent with law and this decision.

Judgment reversed and cause remanded.

KLATT, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 54} Because I believe explosive breaching training is an inherently dangerous activity and would not focus on the actions of the defendant in determining this issue, I disagree with the majority opinion that the first assignment of error should be sustained. As a result, I respectfully dissent.

{¶ 55} As provided in the majority opinion, under the doctrine of primary assumption of risk, a plaintiff who voluntarily engages in an activity assumes the inherent risks of that activity and cannot recover for injuries sustained in the activity unless the defendant acted recklessly or intentionally in causing the injuries. *Ochall v. McNamer,* 10th Dist. No. 15AP-772, 2016-Ohio-8493; *Morgan v. Ohio Conference of the United Church of Christ*, 10th Dist. No. 11AP-405, 2012-Ohio-453, ¶ 13.

{¶ 56} Under the first assignment error, the majority opinion focuses on the actions of a defendant (Martyn's alleged failure to instruct the class on the shot sequence) to conclude that the defendant elevated the risk beyond the inherent risks of explosive breaching training. As a result, the majority opinion holds that the trial court erred in granting summary judgment on the basis of determining explosive breaching training is an inherently dangerous activity. In other words, the majority opinion uses the defendant's actions to define the risks inherent in the activity.

{¶ 57} In my view, in determining whether explosive breaching training is an inherently dangerous activity, the activity itself is the focus, reserving the defendant's actions as a next-step issue of whether the defendant was reckless. *See*, *e.g.*, *Ochall* at ¶ 44-47, 52, 62, 79, 105, fn. 2 (finding that "in analyzing the risks inherent to [the activity], we must focus exclusively on the activity * * *, and not on the actions or omissions of the defendants in this case" and that the actions of the defendant—whether they "enhanced" the risk—"would be appropriately addressed when considering whether the exception of recklessness or willfull or wanton conduct applies to application of primary assumption of the risk"); *Foggin v. Fire Protection Specialists, Inc.*, 10th Dist. No. 12AP-1078, 2013-Ohio-5541, ¶ 10 ("The defendant's conduct is relevant only if it rises to reckless or intentional conduct."); *Morgan v. Kent State Univ.*, 10th Dist. No. 15AP-685, 2016-Ohio-3303, ¶ 21-23 (declining to address, in its determination of whether primary assumption of risk applied to a karate class, the plaintiff-appellant's contentions regarding the karate instructor's actions and instead finding this argument to be essentially "a claim that the instructor was reckless" that had not been pled); *Morgan*, 2012-Ohio-453, ¶ 16-26 (finding, in its determination of whether primary assumption of risk applied to night-hiking, appellant's argument that risks which led to the injury could have been eliminated if the hike leader had chosen a different trail "is essentially a claim that [hike leader's] conduct was reckless," which had not been pled); *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, 2009-Ohio-6898 (10th Dist.) (determining that trial court did not err in applying the primary assumption of risk defense to an injury plaintiff incurred while practicing a cheerleading stunt and then analyzing, as a separate consideration, whether the cheerleading instructor acted recklessly or intentionally to nonetheless permit recovery).

{¶ 58} When focused on the activity itself rather than the conduct of the defendant, common sense directs explosive breaching training is an inherently dangerous activity. *See Foggin* at ¶ 9 (inherent risks "associated with the activity are those that are foreseeable and customary risks of the activity"); *Collova v. Matousek*, 85 Ohio App.3d 440, 447 (8th Dist.1993) (citing *Taylor v. Cincinnati*, 143 Ohio St. 426 (1944), for the proposition that in an absolute nuisance case, "handling of explosives; the explosion of an unguarded, unexploded bomb in a public park and several instances of blasting operations" are inherently dangerous). I would find the danger of an injury due to an errant explosion during field training as occurred in this case to be the foreseeable and "customary" risk of explosive breaching training. *Foggin* at ¶ 9. While this risk may be reduced through procedures and precautions, I do not believe the risks of explosive breaching training could ever be "completely eliminated." *Crace* at ¶ 42.

{¶ 59} Therefore, I would find that explosive breaching training is a type of inherently dangerous activity that is subject to the doctrine of primary assumption of risk. As a result, I would overrule appellants' first assignment of error and proceed to the remaining assignments of error to consider whether summary judgment is appropriate on the issue of allegedly reckless conduct by Martyn and/or Graham, which would negate the primary assumption of risk doctrine, and any resulting consequence on the fourth assignment of error.[1] *Ochall* at ¶ 34. Because the majority opinion does otherwise, I respectfully dissent.

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[1] I note that if the third assignment of error addressing Graham's alleged reckless conduct is overruled, I believe the fourth assignment of error would be rendered moot by application of the primary assumption of risk doctrine.

[Cite as *Citizen's Bank v. Leek*, 2018-Ohio-2813.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

CITIZENS BANK, NA,

Plaintiff-Appellant,

v.

KIRK A. LEEK et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0031

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2014 CV 466

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Reversed and Remanded

Atty. Christopher F. Parker, Goranson, Parker & Bella, Co., LPA, 405 Madison Ave., Suite 2200, Toledo, Ohio 43604, for Plaintiff-Appellant and

Atty. Andrew R. Zellers, Richard G. Zellers & Associates, Inc., 3810 Starrs Centre Dr., Canfield, Ohio 44406 for Defendants-Appellees.

Dated: June 28, 2018

Robb, P.J.

{¶1} Plaintiff-Appellant Citizens Bank, N.A. appeals the decision of the Columbiana County Common Pleas Court confirming a foreclosure sale to a third-party purchaser after finding the bank had no right to redeem the property. The appeal revolves around the language in R.C. 2329.311(A), which allows the judgment creditor and first lienholder to redeem the residential property taken by an order of sale by paying the purchase price within fourteen days after a sale "at an auction with the minimum bid pursuant to division (B) or section 2329.52 * * *." Contrary to the trial court's holding, this language does not mean the right to redeem does not exist unless the sale had a minimum bid. A minimum bid set in R.C. 2329.20, applies to the first attempted sale and expressly excludes sales under 2329.52 The cited R.C. 2329.52(B) deals solely with subsequent sales where the minimum bid requirements (of R.C. 2329.20) are not applicable, as occurred here where the property failed to sell at the first residential mortgage loan foreclosure auction.

{¶2} For the following reasons, this court concludes R.C. 2329.311(A) provided the bank the right to redeem the residential property. In accordance, the bank's argument is sustained. The trial court's judgment is reversed, and the case is remanded with instructions to proceed by considering the bank as the redeeming party and the successful purchaser at the sale as instructed by R.C. 2329.311(A).

STATEMENT OF THE CASE

{¶3} In 2014, the bank filed a complaint in foreclosure against Kirk Lee as he defaulted on a promissory note with $157,549 remaining due. The note was secured by the property at 25823 State Route 62 in Beloit. A decree in foreclosure was entered on March 21, 2017. A notice of sheriff's sale was filed in March 2017, but the sale was canceled at the bank's request. In May 2017, the bank reinitiated the order of sale. A June 15, 2017 notice of sheriff's sale was filed stating: the property was appraised at $90,000; the sale would be conducted on July 11, 2017 at 10:00 a.m.; and if the property was not sold at the first sale, a second sale would be held on July 25, 2017 at 10:00 a.m. with no minimum bid. The advertised notice recited the same. As to the

second sale, this notice also stated: "The property shall be sold to the highest bidder without regard to the minimum bid but subject to all relating costs, allowances, and real estate taxes."

{¶4} There were no bids at the first sale. At the second sale on July 25, 2017, the property was sold for $5,000 to a third-party purchaser Lorie Applegate (who filed the Appellee's Brief in this appeal). That same day, Attorney Grimm filed a motion to set aside the sale on behalf of the bank stating he failed to appear at the sale as the bank's independent contractor due to a scheduling error; he also stated the sale price was inadequate. The next day, he filed a supplemental brief in support stating if the court rejected the motion to set aside the sale, the court should permit the bank to exercise its statutory right of redemption (and initially sought permission to do so by credit bid).

{¶5} On August 7, 2017, the bank filed a notice of redemption pursuant to R.C. 2329.311, declaring the bank redeemed the property by depositing the purchase price of $5,000 plus additional costs to the Columbiana County Clerk of Courts in a timely manner (within fourteen days of the sale). Quoting the statute, the bank stated the court shall proceed to confirm the sale with the redeeming party considered the successful purchaser at the sale.

{¶6} On August 22, 2017, the trial court denied the motion to set aside the sale, finding the sale was made in conformity with RC. 2329.01 through 2329.61. As for the redemption notice, the court concluded: "Because there was no mandatory minimum bid at the sale, the Plaintiff cannot take advantage of R.C. § 2329.311." The court found the right of redemption for the judgment creditor and first lienholder existed "only when the sale of property occurs at an auction with the minimum bid pursuant to R.C. § 2329.52(B)." The court confirmed the sale to the third-party purchaser and ordered the sheriff to deliver the deed to this purchaser. The court also ordered the clerk to return the $5,141.50 deposited by the bank on August 7, 2017.

{¶7} The bank filed a timely notice of appeal. The trial court granted a stay of execution of its August 22, 2017 judgment pending appeal. Before setting forth the arguments presented on appeal, we set forth the pertinent statutes and how they relate to the case at bar.

RESIDENTIAL FORECLOSURE SALE STATUTES

{¶8} "Except as otherwise provided in this section or sections 2329.51 and 2329.52 of the Revised Code, no tract of land shall be sold for less than two-thirds the amount of the appraised value as determined pursuant to section 2329.17 of the Revised Code." R.C. 2329.20.[1] The first auction occurred in accordance with this requirement as the minimum bid was set at $60,000, which is 2/3 of the $90,000 appraised value. The property did not sell at the first auction, which leads to the application of division (B) of R.C. 2329.52. This statutory section provides in pertinent part:

> When a residential property is ordered to be sold pursuant to a residential mortgage loan foreclosure action, and the sale will be held at a physical location and not online, and if the property remains unsold after the first auction, *then a second auction shall be held and the property shall be sold to the highest bidder without regard to the minimum bid requirement in section 2329.20 of the Revised Code*, *but subject to section 2329.21 of the Revised Code relating to costs, allowances, and real estate taxes*.

(Emphasis added.) R.C. 2329.52(B) (version effective April 6, 2017). This division also states: "This second auction shall be held not earlier than seven days and not later than thirty days after the first auction." *Id.* If the property remains unsold after two auctions, it "may be subsequently offered for sale without regard to the minimum bid requirement in section 2329.20 of the Revised Code, but subject to section 2329.21 of the Revised Code relating to costs, allowances, and real estate taxes, or disposed of in any other manner pursuant to this chapter or any other provision of the Revised Code." *Id.*

{¶9} A second auction was held here without regard to the minimum bid requirement in R.C. 2329.20, as instructed by R.C. 2329.52(B). The redemption statute provides in pertinent part:

> In sales of residential properties taken in execution or order of sale that are sold *at an auction with the minimum bid pursuant to division (B) of section 2329.52 of the Revised Code*, the judgment creditor and the first

[1] R.C. 2329.20 also contains instructions for determining the minimum amount where a junior mortgage or lien is sought to be enforced and a prior lien is unaffected by the court order.

> lienholder each have the right to redeem the property within fourteen days after the sale by paying the purchase price. The redeeming party shall pay the purchase price to the clerk of the court in which the judgment was rendered or the order of sale was made. Upon timely payment, the court shall proceed as described in section 2329.31 of the Revised Code, with the redeeming party considered the successful purchaser at the sale.

(Emphasis added to disputed language.) R.C. 2329.311(A) (version effective April 6, 2017). The next division provides: "If the judgment creditor and the first lienholder each seek to redeem the property, pursuant to division (A) of this section, the court shall resolve the conflict in favor of the first lienholder." R.C. 2329.311(B). There is no dispute the bank is the judgment creditor and the first lienholder.

ASSIGNMENT OF ERROR

{¶10} The bank's sole assignment of error provides:

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS INTERPRETATION OF R.C. 2329.311 AND R.C. 2329.52(B) FINDING THAT PLAINTIFF, THE FIRST SECURED CREDITOR, COULD NOT EXERICSE ITS STATUTORY RIGHT OF REDEMPTION AND THEREAFTER CONFIRMING A SALE TO A THIRD PARTY IN VIOLATION OF THE STATUTORY RIGHT OF REDEMPTION."

{¶11} The bank asks this court to conduct a de novo review of the legal issue of statutory interpretation. The bank asserts an absolute right of redemption under R.C. 2329.311(A) and urges the language (referring to "the auction with the minimum bid pursuant to division (B) of section 2329.52") does not mean an auction with a set minimum bid but means an auction with a minimum bid governed by R.C. 2329.52(B), the successful bid at second auction. The bank then reviews the latter statute, pointing out R.C. 2329.52(B) allows for subsequent sales with no minimum bid but subject to costs, allowances, and real estate taxes. A set minimum bid of 2/3 the appraised value is required under R.C. 2329.20, but R.C. 2329.52(B) removes this requirement for a second sale at auction; so, the language referring to property "sold at an auction with the minimum bid pursuant to division (B) of section 2329.52" is the second auction as occurred here where a bid was made The bank asserts the language is clear and

should be applied as written. The bank alternatively points to a Final Bill Analysis for H.B. 390, which stated the judgment creditor had the right to redeem within fourteen days of the sale at an auction "with no set minimum bid * * *."

{¶12} The third-party purchaser filed an Appellee's Brief. Initially, we note her brief addresses two issues: the statutory issue regarding redemption and the trial court's decision denying the motion to set aside the sale. The bank asked to exercise its right of redemption if the court overruled the motion to set aside the sale. The court overruled the motion and also refused to allow the bank to redeem the property as the court found the statutory right did not exist in this case. The bank only appeals the decision denying redemption. The bank does not appeal the trial court's denial of its motion to set aside the sale, which motion was filed on the day of sale and raised as grounds a scheduling error of the bank's independent contractor and an insufficient sale price. The subject of the appeal is clear from the bank's brief, and the bank's reply confirms it is not contesting the trial court's decision denying the motion to set aside the sale but is only contesting the refusal to permit the bank to redeem the property under R.C. 2329.311. In accordance, the propriety of denying the bank's July 25, 2017 motion to set aside the sale is not before this court.

{¶13} As to the issue presented by the bank on appeal, the third-party purchaser agrees we are to conduct a de novo review and contends the plain language of R.C. 2329.311 means the redemption right applies only when the sale occurs with a set minimum bid (above zero) and does not apply to a sale with no minimum bid (but subject to costs, allowances, and real estate taxes). The third-party purchaser also points out the Final Bill Analysis quoted by the bank was for the prior version of R.C. 2329.311 which contained the following statutory language: "at an auction with no set minimum bid pursuant to division (B) of section 2329.22 * * *." That statute first went into effect on September 28, 2016, but on April 6, 2017, this language changed to "auction with the minimum bid pursuant to division (B) of section 2329.52."[2]

[2] The Final Bill Analysis for the bill that made this change (H.B. 463) referred to the prioritizing procedure in division (B) of R.C. 2329.311 for when the judgment creditor and first lienholder each seek to redeem and also explained that the change to R.C. 2329.52(B) was to ensure costs, allowances, and real estate taxes were required for sales subsequent to the second auction (similar to pre-existing language for the second auction).

{¶14} The parties agree the interpretation of the statute is a question of law to be reviewed de novo. *See State v. Pountney*, __ Ohio St.3d __, 2018-Ohio-22, __ N.E.3d __, ¶ 20. Under a de novo standard of review, we review the case independently and give no deference to the trial court's decision. *See, e.g., Diley Ridge Med. Ctr. v. Fairfield Cty. Bd. of Revision*, 141 Ohio St.3d 149, 2014-Ohio-5030, 22 N.E.3d 1072, ¶ 10. When analyzing a statute, the court must apply the legislative intent as manifested in the words of the statute. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12. "Statutes that are plain and unambiguous must be applied as written without further interpretation." *Id.* "

{¶15} "Rules for construing the language * * * may be employed only if the statute is ambiguous." *Proctor*, 115 Ohio St.3d 71 at ¶ 12 (such as "expressio unius"). Ambiguity means the statutory provision is "capable of bearing more than one meaning." *State ex rel. Clay v. Cuyahoga Cty. Med. Examiner's Office*, __ Ohio St.3d __, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 17. The "in pari materia" rule of statutory construction (where statutes relate to the same general subject matter) can only be applied "where some doubt or ambiguity exists in the wording of a statute." *Id.* at ¶ 17, 20 (analyzing a statutory division that did not cite the statute which the party asked to be considered "in pari materia"). *See also* R.C. 1.49(D). Likewise, the legislative history of a statute and former statutory provisions are used to determine legislative intent only if a court finds the statute ambiguous. R.C. 1.49(C)-(D).

{¶16} Where the statutory division at issue specifically cites another statute, it is "incorporating by reference" the other statute, and the other statute must be considered in determining plain language. *See, e.g., General Motors Corp. v. Kosydar*, 37 Ohio St.2d 138, 146, 310 N.E.2d 154 (1974) ("use tax statute, incorporates by reference the sales tax exceptions" in a different statute). Otherwise, words would be improperly eliminated from the text of the statute. *See generally State ex rel. Carna v. Teays Valley Loc. Sch. Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18 (accord significance and effect to every word, phrase, sentence, and part of the statute).

{¶17} "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a

technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42. "No part [of the statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *Carna*, 131 Ohio St.3d 478 at ¶ 19. "Statutes must be construed, if possible, to operate sensibly and not to accomplish foolish results." *Id. See also Clay*, __ Ohio St.3d __ at ¶ 22 ("The absurd result principle in statutory interpretation provides an exception to the rule that a statute should be interpreted according to its plain meaning.").

{¶18} Under the plain language of R.C. 2329.311(A), the redemption right applies to this case. The property was "sold at an auction with the minimum bid pursuant to division (B) of section 2329.52 * * *."; there was a successful bidder. Determination of the minimum bid was pursuant to R.C. 2329.52(B), which was the very authority for selling "to the highest bidder without regard to the minimum bid requirement in section 2329.20 of the Revised Code, but subject to section 2329.21 of the Revised Code relating to costs, allowances, and real estate taxes." R.C. 2329.311 unambiguously provides the judgment creditor and first lienholder the right to redemption for a sale at an auction where the minimum bid is prescribed by R.C. 2329.52(B) (as opposed to a minimum bid prescribed by R.C. 2329.20).

{¶19} The meaning attributed to R.C. 2329.311 by the third-party purchaser requires the court to ignore the statute's direct citation to R.C. 2329.52(B) and the contents of that statute. The plain and clear language of R.C. 2329.311(A) incorporates R.C. 2329.52(B). Division (B) of R.C. 2329.52 only deals with sales involving no set minimum bid (but subject to costs, allowances, and real estate taxes). It has no relevance to sales with a set minimum bid. Rather, it provides an exception to the set minimum bid in R.C. 2329.20 (of 2/3 of the appraisal value) for the second sale at auction.[3]

{¶20} If R.C. 2329.311 was not applicable to sales required by R.C. 2329.52(B) to be conducted "without regard to the minimum bid requirement," then R.C. 2329.311

[3] R.C. 2329.52(B) also provides a sale occurring after two unsuccessful auctions can be offered without regard to the minimum bid requirement in R.C. 2329.20 but will be subject to costs, allowances, and real estate taxes.

would have no meaning. The statute would not function in any manner. A statute is presumed to have a meaning.

{¶21} The trial court believed the statute provided a right of redemption only when the sale occurred at an auction with a set minimum bid above zero dollars under R.C. 2329.52(B). However, R.C. 2329.52(B) has no set minimum bid; again, it is the exception to minimum bid requirements contained in R.C. 2329.20. In other words, R.C. 2329.311 does not create a right of the judgment creditor or first lienholder to redeem the property after the first sale (the sale with the minimum bid under R.C. 2329.21). Rather, the statute creates a right of the judgment creditor or first lienholder to redeem the property after the property is sold at a second auction.

{¶22} In summary, the statutory redemption right in R.C 2329.311 clearly applies when the method of determining the minimum bid was pursuant to R.C. 2329.52(B), a successful bid at the second auction. The incorporated statute provides the property at the second auction shall be sold to the highest bidder without regard to the minimum bid but subject to costs, allowances, and real estate taxes. R.C. 2329.52(B). The property here was sold at the second auction with a minimum bid determined pursuant to R.C. 2329.52(B). Therefore, the judgment creditor and first lienholder had the right to redeem under R.C. 2329.311 which was utilized here. The bank's argument has merit.

{¶23} In accordance, the trial court's judgment is reversed, and the case is remanded with instructions to proceed in accordance with this opinion and as instructed by R.C. 2329.311(A).

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed. We hereby remand this matter to the trial court with instructions to proceed in accordance with this opinion and as instructed by R.C. 2329.311 (A). Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *LRC Realty, Inc. v. B.E.B. Properties*, 2018-Ohio-2887.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

LRC REALTY, INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2016-G-0076**
- vs -	:	
B.E.B. PROPERTIES,	:	
Defendant,	:	
NEW PAR, d.b.a. VERIZON WIRELESS, et al.,	:	
Defendants-Appellees,	:	
- vs -	:	
BRUCE BIRD, et al.,	:	
Plaintiffs-Appellants.		

Civil Appeal from the Geauga County Court of Common Pleas.
Case No. 2014 M 000690.

Judgment: Affirmed in part; reversed in part; remanded.

James F. Koehler and *Timothy J. Fitzgerald*, Koehler Fitzgerald LLC, 1301 East Ninth Street, Suite 3330, Cleveland, OH 44114 (For Plaintiff-Appellee).

James P. Schuck, Bricker & Eckler, LLP, 100 South Third Street, Columbus, OH 43215-4291; and *Christopher M. Ernst*, Bricker & Eckler, LLP, 1001 Lakeside Avenue, East, Suite 1350, Cleveland, OH 44114-1718 (For Defendant-Appellee New Par, d.b.a. Verizon Wireless).

Robert T. Dove and *Robert A. Franco*, 1007 Lexington Avenue, Mansfield, OH 44907 (For Defendant-Appellee 112 Parker Court LLC).

James B. Rosenthal and *Ellen M. Kramer*, Cohen Rosenthal & Kramer LLP, 3208 Clinton Avenue, Cleveland, OH 44113 (For Plaintiffs-Appellants).

TIMOTHY P. CANNON, J.

{¶1} Appellants, Bruce and Sheila Bird ("the Birds"), appeal the decision of the Geauga County Court of Common Pleas, granting summary judgment in favor of appellees, 112 Parker Court LLC ("Parker Court") and LRC Realty, Inc. ("LRC Realty"). The trial court's judgment is affirmed in part and reversed in part, and the matter is remanded.

{¶2} On August 27, 2014, LRC Realty filed a complaint (case No. 14M000690) against B.E.B. Properties, Parker Court, and New Par d.b.a. Verizon Wireless ("New Par") "in order to settle and declare the legal rights of the parties hereto to the past and future rental payments owed and to be paid pursuant to the terms of a certain Option to Lease and Lease Agreement dated March 14, 1994 and recorded on April 21, 1994 * * * involving a portion of the real property located at 112 Parker Court, Chardon, OH 44024[.]" LRC Realty sought a declaratory judgment that it "is and will be entitled to be paid the annual installments of rental [sic] owed pursuant to the Lease Agreement for the time period following LRC Realty's acquisition of legal title to the Parker Court Property on January 18, 2013." LRC Realty also sought a money only judgment against B.E.B. Properties and New Par "to recover the annual rental payment to which Plaintiff was entitled in the amount of $23,688.00 which was due and payable on April 1, 2013 pursuant to the Lease Agreement[.]"

{¶3} On September 5, 2014, the Birds filed a complaint (case No. 14M000717) against New Par and LRC Realty. The Birds brought a claim for breach of contract

against New Par, alleging the anticipatory breach of a lease agreement whereby New Par was required to make annual payments of rent for the use of a portion of the property located at 112 Parker Court to build and maintain a cellphone tower. The Birds brought a claim for tortious interference with contract against LRC Realty, alleging LRC Realty had "interfered with the contract between the Birds and New Par by instructing New Par to make the April 2014 lease payment, and future payments, to LRC." The Birds sought a declaratory judgment that, "as assignees of the original lessor, B.E.B. Properties," they "are entitled to receive the lease payments throughout the duration of the lease[.]"

{¶4} New Par filed an answer, counterclaim, and cross-claim in both cases. In case No. 14M000690, New Par cross-claimed against the Birds for indemnification in the event New Par was found liable for rental payments made to the Birds. In case No. 14M000717, New Par cross-claimed against LRC Realty for indemnification in the event New Par was found liable for rental payments made to LRC Realty. In both cases, New Par made a counterclaim and cross-claim for interpleader, "so that the Court can fairly adjudicate the rights and obligations of the Birds and LRC and determine who among them is entitled to future rental payments from New Par."

{¶5} The Birds filed answers to New Par's cross-claim and to LRC Realty's complaint. The Birds also raised a combined counterclaim against LRC Realty and cross-claim against Parker Court for reformation of deed, seeking to reform a warranty deed for the transfer of the subject property "to clarify that grantor [Parker Court] did not grant, and grantee [LRC Realty] did not receive, the right to receive the rental payments from the New Par Lease, which rights rest with Bruce and Sheila Bird, as assignees of B.E.B. Properties * * * until the termination of the lease."

{¶6} Parker Court filed an answer to LRC Realty's complaint and an answer to the Birds' cross-claim. Parker Court also raised cross-claims against New Par and the Birds. The first claim was for a declaratory judgment that "112 Parker Court LLC [was] entitled to receive the annual rental payments owed pursuant to the Lease Agreement for the time period covering each full year 112 Parker Court LLC held title to the Parker Court Property, January 2004 until January 2013." The other claim was for a money only judgment in an amount of "no less than $170,682, which was due and payable over the period of January 2004 until January 2013, pursuant to the Lease Agreement[.]"

{¶7} The Birds and New Par each filed an answer to Parker Court's cross-claims.

{¶8} LRC Realty filed an answer to the Birds' complaint, an answer to New Par's cross-claim, and a reply to New Par's and the Birds' counterclaims.

{¶9} On December 23, 2014, both cases were consolidated under case No. 14M000690.

{¶10} On March 6, 2015, the trial court granted New Par's unopposed motion to deposit funds in interpleader, representing the 2015 lease payment of $23,688.00.[1]

{¶11} New Par, Parker Court, and LRC Realty, each filed a motion for summary judgment, and the Birds filed a motion for partial summary judgment. All motions were duly opposed. The parties also filed a "Stipulation" with the trial court, by which they stipulated to the authenticity and admissibility of thirteen documents attached thereto, listed below in chronological order:

> 1. Warranty Deed from Geauga Properties, Ltd. to B.E.B. Properties (recorded July 23, 1980)
>
> 2. Option to Lease & Lease Agreement between B.E.B. Properties and Northern Ohio Cellular Telephone Company ["Northern"] (recorded April 21, 1994)

1. New Par has also interpleaded the 2016, 2017, and 2018 lease payments.

3. Letter from Northern to B.E.B. Properties accepting the option to lease (dated February 28, 1995)

4. Non-exclusive Easement Agreement between B.E.B. Properties and Northern (recorded March 3, 1995)

5. Memorandum of Lease between B.E.B. Properties and Northern (recorded March 3, 1995)

6. Warranty Deed from B.E.B. Properties to Keith R. Baker and Joseph E. Cyvas (recorded April 4, 1995)

7. Assignment from David J. Eardley and Robert Bosler to the Birds of their interest in the lease agreement between B.E.B. Properties and Northern (signed June 22, 1995)

8. Memorandum of Assignment from David J. Eardley and Robert Bosler of their "right, title and interest" in B.E.B. Properties to the Birds (recorded July 12, 1995)

9. Assignment of Lease and Easement Documents from Northern to New Par (recorded January 19, 1999)

10. Warranty Deed from Baker and Cyvas to Magnum Machine Co. (recorded June 7, 1999)

11. Warranty Deed from Magnum Machine Co. to Parker Court (recorded October 31, 2003)

12. Offer to Purchase and Acceptance Agreement between Parker Court and LRC Realty (signed December 14, 2012)

13. Warranty Deed from Parker Court to LRC Realty (recorded January 24, 2013)

{¶12} On May 10, 2016, the trial court rendered its decision in summary judgment, making the following findings, which represent undisputed facts:

> Under a recorded 35 year lease, New Par rents space at 112 Parker Court, Chardon, Ohio (the 'property'). The lease requires a single yearly rental payment, made to the property owner on or before the first of April. New Par has never missed a payment and has paid each installment as instructed or ordered. The Birds, LRC, and Parker Court LLC all claim entitlement to rent paid and payable by New Par.

> On March 3, 1995, a lease and easement between defendant then property owner B.E.B. Properties ('BEB') and New Par's predecessor, Northern Ohio Cellular Telephone Company ('Northern') were recorded.
>
> On March 22, 1995, BEB deeded the property to non-parties Keith Baker and Joseph Cyvas ('Baker and Cyvas') 'free from all encumbrances whatsoever excepting restrictions of record…zoning ordinances…and taxes.' The Northern easement and lease were described in the deed; the right to receive rent was not.
>
> On April 1, 1995, the lease between BEB and Northern commenced.
>
> In June, 1995, two of BEB's three partners assigned all of their partnership interests to the remaining partner and his wife, the Birds. Beginning in 1995 or 1996, Northern paid rent to the Birds. Baker and Cyvas did not complain.
>
> Effective January 1, 1997, Northern assigned its rights to its affiliate, defendant partnership New Par.
>
> On June 2, 1999, Baker and Cyvas deeded the property to their company, non-party Magnum Machine Co. ('Magnum').
>
> On October 31, 1999, Magnum deeded the property to Parker Court LLC.
>
> On January 24, 2013, Parker Court LLC deeded the property to LRC.
>
> On March 15, 2013, New Par paid $23,688.00 in rent for the period from April 1, 2013 through March 31, 2014 to the Birds.
>
> On March 28, 2014, New Par [paid] $23,688.00 in rent for the period from April 1, 201[4] through March 31, 201[5] to LRC.

{¶13} The trial court denied the Birds' motion for partial summary judgment and granted New Par's motion for summary judgment. The court granted in part and denied in part the motions for summary judgment filed by Parker Court and LRC Realty: with respect to New Par, the motions were denied; with respect to the Birds, the motions were granted.

{¶14} The trial court denied the Birds' requested reformation of the deed between Parker Court and LRC Realty on the grounds that they "were never a granting or

contracting party." The court stated it was B.E.B. Properties that "owned the property, was the granting party under the deed, and the contracting party under the lease" and that when B.E.B. Properties sold the property to Baker and Cyvas, it did not reserve the right to receive rent under the lease.

{¶15} The trial court ordered the Birds to pay Parker Court the rent they received from New Par ($120,102.00) for the rental periods beginning on April 1, 2007, and ending on March 31, 2013. The court stated the lease required payment to the "landlord," which was described as the owner of the property; the Birds "never owned the property and never improved the property after it was sold to Baker and Cyvas"; and the "recorded deeds and lease unambiguously conveyed the right to receive rent to the property owner." The court did not require the Birds to pay Parker Court for the rent received for the rental periods beginning on April 1, 1995, and ending on March 31, 2007, based on the eight-year statute of limitations for actions brought upon written contracts.

{¶16} For similar reasons, the trial court ordered the Birds to pay LRC Realty the rent they received from New Par ($23,688.00) for the rental period beginning April 1, 2013, and ending on March 31, 2014. LRC Realty was also awarded the money interpleaded by New Par with the clerk of courts for the rental periods beginning on April 1, 2015, and April 1, 2016.

{¶17} Finally, the trial court determined that New Par had paid rent as instructed by the property owner (as had Northern, its predecessor) and, for the future, would pay rent "according to instructions received from the property owner."

{¶18} The Birds filed a notice of appeal from this decision and raise the following four assignments of error, which are consolidated for the purpose of analysis:

> [1.] The trial court committed prejudicial error in granting summary judgment and awarding damages in favor of Appellees 112 Parker

> Court and LRC Realty, and denying Appellants Bruce and Sheila Bird's motion for summary judgment, holding that Bruce and Sheila Bird, individually and as successors and assigns of B.E.B. Properties, never had any right to receive rent from the cellphone tower lease and must pay all rent received within 8 years of filing the Complaints to past and current owners of the property.
>
> [2.] The trial court committed prejudicial error in granting judgment and awarding damages to Appellees 112 Parker Court and LRC Realty, when the Appellees' direct claims against Appellants Bruce and Sheila Bird for money were equitable in nature, and when derivative liability was not briefed on summary judgment.
>
> [3.] The trial court committed prejudicial error in granting judgment to Appellee 112 Parker Court, and requiring Appellants Bruce and Sheila Bird to pay to Appellee all rent they received from 2007 through 2012, when undisputed evidence established that 112 Parker Court had actual knowledge of the reservation of rent to a prior owner.
>
> [4.] The trial court committed prejudicial error in granting judgment to Appellee 112 Parker Court, and requiring Appellants Bruce and Sheila Bird to pay to Appellee all rent they received from 2007 through 2012, based on R.C. 2305.06, the statute of limitations for written contracts, when the undisputed evidence established no contract between the Birds and 112 Parker Court, written or otherwise.

{¶19} Pursuant to Civ.R. 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor."

{¶20} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "Under this standard, the reviewing court conducts an independent review of the evidence before the trial court and renders a decision de novo,

i.e., as a matter of law and without deference to the conclusions of the lower court." *Jackson v. Moissis*, 11th Dist. Geauga No. 2012-G-3070, 2012-Ohio-5599, ¶20 (citation omitted).

Reformation of the Deed

{¶21} The Birds argue the trial court erred in denying their claim for reformation. LRC Realty and Parker Court contend the Birds do not have standing to seek reformation of any of the transferring instruments because they never owned the property and because they were not a party to the deed at issue and, therefore, do not have privity of contract.

{¶22} "'It is well-established that "reformation of an instrument is an equitable remedy whereby a court modifies the instrument which, due to mutual mistake on the part of the original parties to the instrument, does not evince the actual intention of those parties."'" *Mong v. Kovach Holdings, LLC*, 11th Dist. Trumbull No. 2012-T-0063, 2013-Ohio-882, ¶20, quoting *Zwaryz v. Wiley*, 11th Dist. Ashtabula No. 98-A-0073, 1999 WL 689940, *2 (Aug. 20, 1999), quoting *Mason v. Swartz*, 76 Ohio App.3d 43, 50 (6th Dist.1991); *see also Greenfield v. Aetna Cas. & Sur. Co.*, 75 Ohio App. 122, 127-128 (12th Dist.1944), citing 35 Ohio Jurisprudence, Section 2, at 145 ("'reformation' is defined as the remedy afforded by courts possessing equitable jurisdiction to the parties and the privies of parties, to written instruments which import a legal obligation to reform or rectify such instruments whenever they fail, through fraud or mutual mistake, to express the real agreement or intention of the parties").

{¶23} "Equity will permit the reformation of a written instrument not only as between the original parties but also as to parties in privity with them." *Mason*, *supra*, at 49 (citations omitted). "Generally, one is in privity with another if he succeeds to an estate

or an interest formerly held by the other * * *, because privity is a succession of interest or relationship to the same thing." *Columbus v. Union Cemetery Assn.*, 45 Ohio St.2d 47, 51 (1976) (citations omitted); *see also Black's Law Dictionary* (10th Ed.2014) (privity of estate: "[a] mutual or successive relationship to the same right in property, as between grantor and grantee or landlord and tenant").

{¶24} "[O]ne who is in privity with another because of the transfer of property 'stands in the same shoes' as to the rights of the prior owner in the same property, thereby giving the subsequent owner the same rights and obligation as the original owner had in regard to the property[,]" including "the right to reformation of a deed if the necessary elements are present, that is, fraud, error, omission or mutual mistake." *Berardi v. Ohio Turnpike Comm.*, 1 Ohio App.2d 365, 370-371 (8th Dist.1965).

{¶25} The initial relevant transfer of the subject property occurred on March 22, 1995, when B.E.B. Properties sold the property to Baker and Cyvas. That deed, which was recorded on April 4, 1995, transferred the real estate in fee simple. Baker and Cyvas subsequently sold the property to Magnum, which sold it to Parker Court, which sold it to LRC Realty.

{¶26} The Birds seek to reform the warranty deed transferring the property from Parker Court to LRC Realty.[2] The Birds lack privity with respect to that transaction, as they do not stand in a mutual or successive relationship to the same rights of property as

2. *See* Answer, Counterclaim, and Cross-Claim of Bruce and Sheila Bird as Assignees of Defendant B.E.B. Properties, at ¶18 ("[t]he deed attached hereto as Exhibit 1 [Warranty Deed between Parker Court and LRC Realty] should be reformed to reflect the true intention of the parties and the true state of affairs that existed among the parties at the time of transfer to LRC Realty, Inc."); Motion for Partial Summary Judgment of Bruce and Sheila Bird, Individually and as Successors to B.E.B. Properties, at p. 16 ("the Court should still enter judgment in favor of Bruce and Sheila Bird by reforming the current deed to reflect the clear and unmistakable intent and understanding of 112 Parker Court LLC and LRC Realty, Inc. that their transaction did not include any right to receive the cellphone tower lease payments, which were assigned to Bruce and Sheila Bird").

either Parker Court or LRC Realty. The Birds claim they are predecessors in interest to Parker Court and LRC Realty, but that claim is untenable.

{¶27} Because the Birds were not in privity with either Parker Court or LRC Realty, the remedy of reformation was not available to them with respect to the deed transferring the property between these parties. The trial court properly granted summary judgment against the Birds on their claim for reformation.

Right to Receive Rent

{¶28} The trial court granted New Par's motion for summary judgment and denied Parker Court's and LRC Realty's motions for summary judgment with respect to their claims against New Par. The trial court held that "Northern/New Par fulfilled its duty to pay rent as instructed" and was "not required to pay past rental installments to property owners who failed to provide payment instructions." The judgment in favor of New Par has not been challenged on appeal.

{¶29} The trial court further rendered summary judgment against the Birds and in favor of Parker Court and LRC Realty. The trial court ordered the Birds to pay $120,102.00 to Parker Court for rent received from New Par during the years 2007 through 2013 and to pay $23,688.00 to LRC Realty for rent received from New Par in the year 2014. The trial court further held that the Birds were not entitled to future rent payments from New Par. The trial court stated:

> 'The right to receive rent…arises by privity of estate rather than by contract. A contract fixes the amount of land, the terms of payment and the manner of the use of the estate, but the right to recover the rent depends upon the ownership of the reversion.' *See Loveless v. Erie R. Co.*, 2 Ohio App. 404, 407 [11th Dist.1914].
>
> Northern leased the property from its owner, BEB. The lease describes 'landlord' as the property owner and requires rent to be paid to the landlord.

> After BEB sold the property, Baker and Cyvas, (and then their company Magnum), owned the property, were the landlords, and were entitled to the rent. Baker and Cyvas agreed with BEB and the Birds not to collect the rent. Baker and Cyvas allowed Northern/New Par to pay rent as instructed by BEB and the Birds. These agreements, however, do not override the right of the succeeding property owners to rely on recorded documents and to receive rent according to the recorded lease and deeds.

{¶30} For the following reasons, we disagree with the trial court's holding and its decision to grant summary judgment in favor of Parker Court and LRC Realty on the right to receive the past rent payments.

{¶31} The trial court indicates "the lease describes 'landlord' as the property owner and requires rent to be paid to the landlord." The lease does describe the Landlord as the property owner (therefore, the Landlord had authority to enter into the lease), but it also provides that B.E.B. Properties is "hereinafter referred to as 'Landlord[.]'" Thus, while the "landlord" was also the "property owner" at the time the lease was executed, that designation does not define the "property owner" as a party to the lease. The lease is a contract between B.E.B. Properties and Northern—not between Northern and whomever the property owner happens to be at a given time. Therefore, the trial court is incorrect in concluding that Baker and Cyvas (and then Magnum Machine Co.) became the "landlords" by virtue of becoming the "property owners."

{¶32} The trial court also relies on a case that is entirely distinguishable from the case sub judice, to wit: *Loveless v. Erie Ry.*, 35 Ohio C.C. 87 (11th Dist.1914). *Loveless* involved a dispute between the executor of an estate and the devisee of real estate regarding who was entitled to the rent generated from the property. The issue in *Loveless* was "whether rent paid as consideration for a grant or lease of real estate made in the life time of the testator, but which accrues after the death of the testator, goes to the devisee of the leased premises, or is an asset of the testator's estate." *Id.* at 89. The *Loveless*

Court cited the following case law, which the trial court adopted: "The right to receive rent by one from another arises by privity of estate rather than by contract. A contract fixes the amount of land, and the terms of payment, and the manner of the use of the estate, but the right to recover the rent depends upon the ownership of the reversion." *Id.* at 89-90, citing *West Shore Mills Co. v. Edwards*, 24 Ore. 475, 33 P. 987 (1893). Contrary to *Loveless* and *West Shore Mills,* the dispute at issue here does not involve ownership of a reversion, nor is there a dispute about the accrual of rent after the death of a testator. This case law is not applicable here.

{¶33} In their partial motion for summary judgment, the Birds argue that, "[a]t a minimum, the recorded documents indicate that after Baker and Cyvas acquired the property, B.E.B. Properties still retained some interest in the lease, which it assigned to [the Birds], that it involved 'rental payments,' and that the reference to rental payments 'refers to Lease Agreement recorded on April 21, 1994 at Volume 979, Page 1 of the Geauga County Records.'" On this basis, we agree the trial court erred in granting summary judgment in favor of Parker Court and LRC Realty.

{¶34} A recorded leasehold is an encumbrance of land governed by the recording statutes. *See* R.C. 317.08(A)(25) (stating the county recorder shall record in the official records all of the following instruments that are presented for recording, upon payment of the fees prescribed by law: leases, memoranda of leases, and supplements, modifications, and amendments thereto); *see also Tenbusch v. L.K.N. Realty Co.*, 107 Ohio App. 133, 137 (8th Dist.1958) (holding that unexpired leases constitute encumbrances of record). The benefit of a leasehold may be reserved by the grantor when conveying title to a grantee. "It is undisputed that, generally, in the case of a reservation, the whole title to the property conveyed passes to the grantee, but the grantor

reserves to himself some benefit of the real estate." *Campbell v. Johnson*, 87 Ohio App.3d 543, 547 (2d Dist.1993).

{¶35} R.C. 5301.25(A) provides:

> All deeds * * * and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in division (C) of this section and section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.

{¶36} "Pursuant to this statutory provision, a bona fide purchaser for value is bound by an encumbrance upon land only if he has constructive or actual knowledge of the encumbrance." *Tiller v. Hinton*, 19 Ohio St.3d 66, 68 (1985). "[T]he proper recording of those instruments referenced in R.C. 5301.25(A) serves as 'constructive' notice of that interest or encumbrance to all who claim through or under the grantor by whom such deed was executed." *Thames v. Asia's Janitorial Serv., Inc.*, 81 Ohio App.3d 579, 587 (1992). "Statements and references contained in instruments in his chain of title bind the owner and he is charged with knowledge he would have obtained from reasonable inquiry." *Ferguson v. Zimmerman*, 2d Dist. Montgomery No. 9426, 1986 WL 878, *5 (Jan. 16, 1986), citing *Arnoff v. Williams*, 94 Ohio St. 145 (1916). "These rules rest on the obvious reason, that a searcher can be fairly supposed to be made acquainted with the contents of such deeds only as, in the process of tracing, link by link, his chain of title on the record, necessarily pass under his inspection." *Blake v. Graham*, 6 Ohio St. 580, 584 (1856).

{¶37} There is no dispute between the parties that the warranty deeds at issue, as well as the lease, memorandum of lease and easement agreement, were all recorded. It is also without dispute that these instruments are within LRC Realty's chain of title on

the record as they can all be traced, link by link, from B.E.B. Properties to Baker and Cyvas to Magnum to Parker Court and, finally, to LRC Realty.

{¶38} The option to lease and lease agreement between B.E.B. Properties and Northern was recorded on April 1, 1994. The easement agreement and the memorandum of lease agreement between B.E.B. Properties and Northern were recorded on March 3, 1995.

{¶39} The warranty deed from B.E.B. Properties to Baker and Cyvas was subsequently recorded on April 4, 1995, and provides:

> Said premises being subject to the same restriction as recorded in Volume 537, Page 523, Geauga County Records of Deeds which are hereby incorporated and made a part of this deed as if fully written herein.
>
> Further subject to an Option to Lease and Lease Agreement dated March 14, 1994 and recorded April 21, 1994 at Volume 979, Page 1, of the Geauga County Records;
>
> Further subject to a Non-Exclusive Easement filed March 3, 1995 referred to in Volume 1009, Page 56 of Geauga County Records;
>
> Further subject to a Memorandum of Lease filed March 3, 1995, referred to in Volume 1009, Page 50 of Geauga County Records.
>
> And B.E.B. Properties, an Ohio Partnership, the said Grantor, does for its self and its successors and assigns, covenant with the said Grantees, Keith R. Baker and Joseph K. Cyvas, their heirs and assigns, * * * that it will warrant and defend said premises, with the appurtenances thereunto belonging, to the said Grantees, their heirs and assigns, against all lawful claims and demands whatsoever, *such premises further to be subject to the specific encumbrances on the premises as set forth above*.

{¶40} The warranty deed from Baker and Cyvas to Magnum was later recorded on June 7, 1999, and sets forth the same "subject to" language. It warrants and defends said premises "against all lawful claims and demands whatsoever *except as hereinbefore provided*."

{¶41} The fact that the language in the deed does not expressly state B.E.B. Properties "reserved the right to receive rent" is not dispositive. "The first rule of deed construction in Ohio is that when the parties' intentions are clear from the four corners of the deed, we will give effect to that intention." *Koprivec v. Rails-to-Trails of Wayne Cty.*, Slip Opinion No. 2018-Ohio-465, ¶29, citing *Hinman v. Barnes*, 146 Ohio St. 497, 508 (1946). The "subject to" language contained within the deed, which is repeated in the deed from Baker and Cyvas to Magnum, clearly indicates that the parties' intention was to reserve the right to receive rent for the benefit of B.E.B. Properties.

{¶42} Pursuant to the language in these deeds, both Parker Court and LRC Realty are charged with constructive knowledge of the easement and leasehold encumbrance that was reserved by B.E.B. Properties and properly recorded within their chain of title. An examination of the recorded lease agreement and memorandum of lease would have revealed that B.E.B. Properties was entitled to the rent payments from Northern/New Par. Therefore, Parker Court and LRC Realty took title subject to the specific reservations and were bound by the easement and leasehold encumbrance. Further, no party who subsequently received the property within this chain of title could transfer the right to receive rent, the same being reserved to B.E.B. Properties for the length of the lease with Northern/New Par. The trial court erred in concluding Parker Court and LRC Realty are entitled to claim the past rent profits from that encumbrance.

{¶43} The issue that remains is whether the trial court erred in denying summary judgment in favor of the Birds on their claim of the right to receive past and future rent profits. Included within the "Stipulation" exhibits filed by the parties is a copy of the Assignment from Eardley and Bosler, two of the original partners in B.E.B. Properties, to the third partner and his wife, the Birds. The Assignment was signed by all partners on

June 22, 1995, in the presence of two witnesses and notarized. The document provides the following, in relevant part:

> WHEREAS, said Partnership has entered into a certain Option and Lease Agreement with Tenant for approximately 2.983 acres of land located on B.E.B. Properties' premises for the construction of a transmission and receiving tower and related facilities; and
>
> WHEREAS, said Option to Lease and Lease Agreement between B.E.B. Properties and Tenant dated March 14, 1994 was recorded on April 21, 1994 at Volume 979, Page 1 of the Geauga County Records along with a Memorandum of Lease filed March 3, 1995 at Volume 1009, Page 50 of Geauga County Records; and
>
> WHEREAS, B.E.B. Properties has granted unto Tenant a Non-Exclusive Easement for ingress and egress to the Tower site, as referred to above, filed March 3, 1995 at Volume 1009, Page 56 of Geauga County Records; and
>
> WHEREAS, Assignees are desirous of acquiring Assignor's rights, title and interest in and to said partnership interests as referred to above; and
>
> WHEREAS, Assignors are desirous of assigning their rights, title and interest in and to said general partnership to Assignees.
>
> WHEREFORE, in consideration of Assignees paying to Assignors the sum of [$33,333.33] each, said Assignors hereby assign, jointly and to the survivor of the Assignees, all of their rights, title and interest in and to said partnership interests,
>
> IT IS FURTHER understood and agreed that this assignment shall be reflected in a Memorandum of Assignment to be filed of record on the completion of this transaction.
>
> FURTHER, this instrument along with the Memorandum of Assignment shall constitute notice to the Tenant that any and all rentals and/or payments, obligations, notices, communications and/or rights or claims which may accrue between Tenant and the Assignees shall henceforth be submitted to the Assignees effective this 6th day of May, 1995. It is further understood that this instrument shall be evidence of the transfer of any and all claims or rights Assignors may have in and to said partnership interest.

{¶44} The Memorandum of Assignment was signed, witnessed, and notarized in conjunction therewith and was duly recorded on July 12, 1995. It provides, in relevant

part, that the purpose of recording the Memorandum "is to give notice to the existence of said assignment and the rights granted therein by the Assignors to the Assignees."

> This instrument shall be further evidence of the transfer of any and all claims or rights Assignors may have in B.E.B. Properties, an Ohio General Partnership, and that all rental payments, notices and/or any type of communication pertaining to said partnership shall henceforth be forwarded to Assignees at the address set forth herein."

Handwritten below this provision is an instruction to "Refer to Lease Agreement recorded on April 21, 1994 at Volume 979, Page 1 of the Geauga County Records."

{¶45} LRC Realty challenged the effectiveness of this assignment in its motion for summary judgment. Because, however, LRC Realty is not entitled to the rent payments, it does not have standing to challenge the assignment between B.E.B. Properties and the Birds. B.E.B. Properties did not raise a challenge to the assignment in the trial court, and the document was included in the Stipulated exhibits submitted to the court. Therefore, the trial court erred in concluding the Birds are not entitled to the past and future rent payments.

{¶46} We further note that the record includes a copy of the Offer to Purchase and Acceptance Agreement that established the terms of LRC Realty's acquisition of the property, which indicates it agreed to take title with such exceptions to title as are approved in writing by LRC Realty. The agreement also provided for remedies if a defect in title was found in the Title Commitment or Survey, to wit: LRC Realty could either accept the title subject to the defect or terminate the agreement. While the answer to this entire conflict is likely contained in those documents, they are not a part of this record and are not necessary for resolution of this appeal.

{¶47} The Birds' assignments of error have merit to the extent indicated.

{¶48} The judgment of the Geauga County Court of Common Pleas is affirmed with respect to the Birds' claim for reformation and with respect to all claims against New Par. The judgment is reversed with respect to the damages claim against the Birds in favor of Parker Court and LRC Realty; the trial court erred in granting summary judgment against the Birds.

{¶49} This matter is remanded for the trial court to enter judgment in favor of the Birds, as assignees of the interest in B.E.B. Properties, consistent with this opinion.

THOMAS R. WRIGHT, P.J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶50} To a very limited degree, I concur in the judgment of the majority. I concur that remedy of reformation is not available to the Birds. I would also reverse and remand the grant of summary judgment, but for reasons and purposes wholly different from those of the majority.

{¶51} The issue that is before this court is whether the Birds/B.E.B. Properties retained the right to receive rent under the lease with New Par following the sale of the property to Baker and Cyvas. Every participant in this litigation, from the Birds to 112 Parker Court to LRC Realty to the trial court and their respective attorneys, has understood that resolution of this issue turns on the following propositions of law: A "covenant to pay rent * * * runs with the land and vests in the assignee of the reversion the right to receive the rents accruing during his ownership of the fee." *Smith v. Harrison*,

42 Ohio St. 180, 185 (1884); *Commercial Bank & Sav. Co. v. Woodville Sav. Bank Co.*, 126 Ohio St. 587, 186 N.E. 444 (1933), paragraph one of the syllabus ("[t]he right to rents and profits of real estate follows the legal title"). The right to receive rent, however, may be preserved in the grantor by a "reservation of rent" in the transferring instrument. *Liberal S. & L. Co. v Frankel Realty Co.*, 137 Ohio St. 489, 501, 30 N.E.2d 1012 (1940).[3]

{¶52} No party to this litigation has maintained that the deed transferring the property to Baker and Cyvas contained a reservation of the right to receive rent.

{¶53} Incredibly, i.e., without citation to authority or precedent, the majority concludes: "The fact that the language in the deed does not expressly state B.E.B. Properties 'reserved the right to receive rent' is not dispositive." *Supra* at ¶ 41. Instead of an actual reservation of the right to receive rent, the majority holds that "[t]he 'subject to' language contained within the deed [transferring the property to Baker and Cyvas] * * * clearly indicates that the parties' intention was to reserve the right to receive rent for the benefit of B.E.B. Properties." *Supra* at ¶ 41.

{¶54} The "subject to" language in question provides that: "B.E.B. Properties * * * does * * * covenant with the said Grantees [Baker and Cyvas] * * * that it will warrant and defend said premises * * * against all lawful claims and demands whatsoever, such premises further to be subject to the specific encumbrances on the premises set forth above [an Option to lease and Lease Agreement dated March 14, 1994 and recorded April 21, 1994 at Volume 979, Page 1, of the Geauga County Records]."

3. *See* the trial court's May 10, 2016 Decision ("[a]fter BEB sold the property, Baker and Cyvas, (and then their company Magnum), owned the property * * * and were entitled to the rent"); the Byrds' Assignments of Error and Brief, at 12 ("**The Law is Not in Dispute** / The law holds that rent runs with the land unless it is expressly reserved in a deed."); and LRC Realty's Answer Brief, at 17 ("In Ohio, the long-standing general rule is that a covenant to pay rent runs with the land.").

{¶55} That this boilerplate language should amount to an express reservation of the right to receive rent was certainly not clear to the lower court judge or the litigants in the present case, is not clear to this judge, and, as far as this judge has been able to determine, has not been clear to any court that has considered the significance of language in a warranty deed that the premises are "subject to * * * specific encumbrances." Rather, the plain and ordinary meaning of this language is that B.E.B. Properties' covenant with Baker and Cyvas to warrant the premises against third-party claims acknowledges the existence of certain pre-existing encumbrances.[4] In no way may this language be reasonably construed to mean that B.E.B. Properties was limiting Baker and Cyvas' rights in the subject premises by excepting the right to receive under the lease with New Par. *Thames v. Asia's Janitorial Serv., Inc.*, 81 Ohio App.3d 579, 590, 611 N.E.2d 948 (6th Dist.1992) ("the statement in the deed following the description of the land, that the 'above premises are conveyed subject to' the mortgage, qualifies the estate granted, and that it is to that estate, so qualified, that the warranties apply") (citation omitted); *Davidson Land Co., LLC v. Davidson*, 2011 WY 29, 247 P.3d 67, 74, ¶ 25 (Wy.2011) ("[t]he 'subject to' language simply put the grantee on notice that the warranty was limited by any recorded encumbrances"); *Birdwood Subdivision Homeowners' Assn., Inc. v. Bulotti Constr., Inc.*, 175 P.3d 179, 183 (Id.2007) ("[t]he warranty deed * * * stated that the grant was subject to 'Taxes, easements, restrictions, reservations, assessments and encumbrances as shown of record, if any,'" which "language simply creates exceptions to the covenants in the warranty deed").

4. This conclusion is even more evident when the "subject to" language relied upon by the majority is considered in connection with the immediately preceding language defining the nature of the estate transferred: "B.E.B. Properties * * * does * * * covenant with the said Grantees [Baker and Cyvas] * * * that * * * Grantor is well seized of the above described premises, and it has a good and indefeasible estate in fee simple, * * * and that the same are free from all encumbrances whatsoever, excepting restrictions of record * * *, and that it will warrant and defend said premises * * * [quotation continues as above]."

{¶56} Yet the majority construes this language, which merely qualifies B.E.B. Properties' warranty that it was conveying a good and indefeasible estate in fee simple, to hold that "no party who subsequently received the property within this chain of title could transfer the right to receive rent, the same being reserved to B.E.B. Properties for the length of the lease with Northern/New Par." *Supra* at ¶ 42. This conclusion cannot, as demonstrated above, rely on the plain and ordinary meaning of the phrase "subject to" but, rather, appears to rest on such language "indicat[ing] that the parties' intention was to reserve the right to receive rent for the benefit of B.E.B. Properties." *Supra* at ¶ 41. The majority thus equates "constructive knowledge of the easement and leasehold encumbrance" with the expressed intent to reserve the right to receive rent.[5] Constructive or actual knowledge of the lease's existence, however, does not imply an intent to retain rights thereunder. "[A] court must analyze the language used in the deed, 'the question being not what the parties meant to say, but the meaning of what they did say, as courts can not [sic] put words into an instrument which the parties themselves failed to do.'" (Citation omitted.) *Am. Energy Corp. v. Datkuliak*, 174 Ohio App.3d 398, 2007-Ohio-7199, 882 N.E.2d 463, ¶ 50 (7th Dist.); *McCoy v. AFTI Props., Inc.*, 10th Dist. Franklin No. 07AP-713, 2008-Ohio-2304, ¶ 8.[6] In the present case, even the majority acknowledges that the deed does not contain an express reservation of rights. Recourse

5. Although invariably referred to as a "reservation" of the right to receive rent, "exception" would be the proper term: "A reservation by definition is a 'creation of a new right or interest (such as an easement) by and for the grantor, in real property being granted to another.' * * * An exception is the 'retention of an existing right or interest, by and for the grantor, in real property being granted to another.'" *Am. Energy Corp. v. Datkuliak*, 174 Ohio App.3d 398, 2007-Ohio-7199, 882 N.E.2d 463, ¶ 74 (7th Dist.), quoting Black's Law Dictionary 1333 and 604 (8th Ed.2004) respectively. In practice, "the two terms are often employed 'indiscriminately.'" (Citation omitted.) *Id.* at ¶ 75.

6. *Compare Palmer v. Campbell*, 333 P.2d 957, 959 (Okl.1958) ("there must be, somewhere in the deed, appropriate language expressly reserving some interest in and to the grantor, or the grantor's entire interest passes by a warranty deed to real estate"); *Lipschultz v. Robertson*, 95 N.E.2d 357, 359 (Ill.1950) ("[w]hen the appellees conveyed the property to the city of Chicago by their warranty deed * * *, reserving nothing to themselves, they conveyed the lease and the right to receive unaccrued rentals").

to what the majority believes the language of the deed indicates is insufficient to create a reservation of rights where none exists in the deed.

{¶57} Although the majority states its conclusion that B.E.B. Properties reserved the right to receive rent as a matter of law, one suspects the majority actually considers the deed to be ambiguous on this point, as evidenced by speculation elsewhere in the opinion that "the answer to this entire conflict is likely contained in [parol] documents [which] are not a part of this record." *Supra* at ¶ 46. Two points should be made. First, any perceived ambiguity in the language of the deed should be construed in favor of Baker and Cyvas as grantees. *Mong v. Kovach Holding, L.L.C.*, 11th Dist. Trumbull No. 2012-T-0063, 2013-Ohio-882, ¶ 27 (the rule that "an exception or reservation in a conveyance is construed in favor of the grantee rather than of the grantor * * * is so elementary that citation is unnecessary") (citation omitted). Second, if the "subject to" language in the present warranty deed is deemed ambiguous or otherwise subject to novel interpretation, inasmuch as the parties and their attorneys failed to grasp its significance, then the construction of virtually every warranty deed or property transfer in the State of Ohio is vulnerable to judicial reinterpretation.

{¶58} There are legitimate equitable issues regarding 112 Parker Court's and LRC Realty's entitlement to recover damages for the rental payments received by the Birds from New Par which ought to have precluded the granting of summary judgment in the present case. However, to reverse and remand the trial court's grant of summary judgment on the grounds that B.E.B. Properties' warranty of title being subject to specific encumbrances is the functional equivalent of an express reservation of the right to receive rents is not a result in which I can join.

{¶59} For the foregoing reasons, I respectfully dissent.