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

Ohio Securities Act Liability

***Boyd v. Kingdom Trust Co.*, 2018-Ohio-3156**

In this appeal of a certified question to the Ohio Supreme Court, the court found that R.C. 1707.43, a provision of the Ohio Securities Act, does not impose joint and several liability on persons who aided in the purchase of illegal securities but who did not participate or aid in the sale of the illegal securities.

The plaintiffs in the case were victims in a Ponzi scheme. The defendant allegedly convinced plaintiffs to open self-directed individual retirement accounts (IRAs) to invest in equity interests in companies he owned. The defendant then convinced plaintiffs to give him powers of attorney, giving him the ability to direct the companies' purchases of securities using the plaintiffs' IRA assets. He then used the money raised from the plaintiffs to pay off earlier investors or to fund his own personal expenses. Eventually, plaintiffs filed a class action against defendant and his companies for violating the Ohio Securities Act. The complaint does not allege that the companies themselves had any role in the Ponzi scheme or that they knew of the fraud committed by defendant. The companies moved to dismiss the lawsuit, and the district court granted the motion. Finding the absence of any allegation that the trust companies acted outside the scope of routine banking activities, the district court held that their mere involvement in the transactions is insufficient to impose liability on them under the Ohio Securities Act.

On appeal, the Sixth Circuit Court of Appeals certified a question to the Ohio Supreme Court on whether "R.C. 1707.43 impose[s] joint and several liability on a person who, acting as the custodian of a self-directed IRA, purchased—on behalf and at the direction of the owner of the self-directed IRA—illegal securities?"

The Ohio Supreme Court answered the question in the negative, finding that the statute at issue only imposes joint and several liability on three people: (1) the person making a sale or contract for sale of illegal securities, (2) "every person that has participated in * * * such sale or contract for sale," and (3) "every person that has * * * aided the seller in any way in making such sale or contract for sale." The Court applied normal rules of statutory construction and found that if the General Assembly had wanted to expand the potential individuals who could have been liable for a violation of R.C. 1707.43, it could have done so.

The Bullet Point: The Ohio Securities Act, R.C. 1707.01 et seq., governs the sale and purchase of securities in Ohio. The act requires securities to be registered (R.C. 1707.08 through 1707.13), imposes licensing requirements on dealers and salespersons (R.C. 1707.14 through 1707.19), and proscribes fraudulent conduct (R.C. 1707.44). R.C. 1707.43 states: "[t]he person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or

contract for sale, are jointly and severally liable to the purchaser * * * for the full amount paid by the purchaser and for all taxable court costs * * *."

Ohio courts have held that a financial institution's mere participation in a transaction, absent any aid or participation in the sale of illegal securities, does not give rise to liability under R.C. 1707.43(A). As one court noted, "the willingness of a bank to become the depository of funds does not amount to a personal participation or aid in the making of a sale." Despite this, the Ohio Supreme Court cautioned: "[n]othing in our holding today would insulate from liability a self-directed IRA custodian who colludes with the seller in an unlawful sale of securities or actively participates or aids in the sale of illegal securities."

Writ of Procedendo

***State ex rel. Sponaugle v. Hein*, Slip. Op. No. 2018-Ohio-3155.**

In this case, the Ohio Supreme Court affirmed the judgment of the court of appeals denying Appellant's complaint for writs of prohibition and procedendo against Darke County Court of Common Pleas Judge Jonathan P. Hein, holding that Appellant was not entitled to either writ. The petitioners were defendants in a foreclosure action before Judge Hein. He eventually granted the bank a judgment entry and decree in foreclosure, and the petitioners appealed. While the appeal was pending, they failed to post a bond to avoid the foreclosure sale, and the sale eventually happened, with the bank purchasing the property at sale. At the same time, the appellate court dismissed the appeal for lack of a final appealable order. Despite this, Judge Hein entered an order confirming the sale and the property was transferred to the bank. Petitioners then filed the various writs with the appellate court who denied both. On appeal the Ohio Supreme Court affirmed, finding that procedendo was inappropriate because Petitioners sought to undo a court order rather than to compel the judge to issue a ruling. Similarly, the court found that a writ of prohibition was improper because it was moot based on the appeals court vacating the confirmation of sale order.

The Bullet Point: "A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." It is not appropriate to undo a court ruling. Likewise, to be entitled to a writ of prohibition, a party must establish that the court exercised judicial power or is about to do so, that the court lacks authority to exercise that power, and that denying the writ would result in injury for which no adequate remedy exists in the ordinary course of the law. If a court patently and unambiguously lacks jurisdiction, then a petitioner does not need to establish the third element to be entitled to a writ of prohibition. However, when jurisdiction is not patently and obviously absent, " 'an appeal is generally considered an adequate remedy in the ordinary course of law sufficient to preclude a writ.' "

Cognovit Note

***1st Natl. Fin. Servs. v. Ashley*, 10th Dist. Franklin No. 17AP-638, 2018-Ohio-3134.**

In this case, the Tenth Appellate District reversed the trial court's decision denying a common law motion to vacate. Defendant had obtained a loan from the plaintiff and executed a loan repayment agreement. The plaintiff eventually filed suit, claiming the defendant failed to make payments as agreed under the loan. To resolve that issue, the parties entered into a payment arrangement, but again, the defendant breached the terms of the agreement. To remedy that breach, the plaintiff contended that the defendant agreed to sign a cognovit note. Defendant allegedly defaulted under that and the plaintiff initiated a new lawsuit under the cognovit note. In accordance with its terms, an answer was filed on behalf of the defendant confessing to judgment and the court entered judgment on the note and subsequently garnishment proceedings began.

Defendant filed a motion to vacate the judgment, arguing that the municipal court lacked subject-matter jurisdiction over the action. The trial court disagreed and defendant appealed. On appeal, the Tenth Appellate District reversed, finding that the underlying arrangement was a consumer transaction and, by law, the court lacked subject matter jurisdiction to enter judgment on a cognovit note when it involved such a transaction.

The Bullet Point: "The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder." Strict compliance with statutory requirements is required to obtain judgment on a cognovit note. "A cognovit judgment is valid if the warrant of attorney to confess judgment and all note terms are strictly construed against the person obtaining the judgment, and court proceedings, based upon such warrant, must conform to every essential detail with the statutory law governing the subject."

Notwithstanding the long legal recognition of cognovit notes in Ohio, the General Assembly has curtailed the use of cognovit notes in consumer transactions. R.C. 2323.13(E) provides that "[a] warrant of attorney to confess judgment contained in any instrument executed on or after January 1, 1974, arising out of a consumer loan or consumer transaction, is invalid and the court shall have no jurisdiction to render a judgment based upon such a warrant." A consumer loan is defined as "a loan to a natural person and the debt incurred is primarily for a personal, family, educational, or household purpose." R.C. 2323.13(E)(1). If a cognovit note arises out of a consumer loan or a consumer transaction, then a judgment entered based on that cognovit note is void and must be vacated for lack of subject-matter jurisdiction.

Jurisdictional Priority Between Probate and Common Pleas Courts

***Sosnoswsky v. Koscianski*, 8th Dist. Cuyahoga No. 106147, 2018-Ohio-3045.**

In this case, the Eighth Appellate District found that the "jurisdictional priority rule" did not apply to the concurrent pending lawsuits in both probate court and the common pleas court involving the same or similar claims. Specifically, the Eighth Appellate District noted that probate courts are courts of limited jurisdiction and only have concurrent jurisdiction with the common pleas in very specific, enumerate situations, none of which applied here.

The Bullet Point: "The jurisdictional priority rule prevents the prosecution of two actions involving the same controversy in two courts of concurrent jurisdiction at the same time." "The jurisdictional priority rule provides that 'as between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.'"

Ohio's Uniform Fraudulent Transfer Act

***UBS Fin. Servs., Inc. v. Lacava*, 8th Dist. Cuyahoga No. 106461, 2018-Ohio-3055.**

Defendant's husband used to work for the plaintiff. During the course of his employment, he received two loans from the plaintiff, secured through promissory notes. The husband was terminated in 2008 and as of the date of his termination, had not yet satisfied the full amount owed on the loans. The husband eventually commenced a Financial Industry Regulatory Authority (FINRA) claim against the plaintiff, raising various tort claims, and the plaintiff filed a counterclaim for the balances owed on the loans. Eventually, the FINRA panel denied the husband's claims and awarded judgment to the plaintiff.

While the FINRA proceedings were ongoing, defendant's husband formed his own investment management company and eventually gave defendant most of the ownership interest in the company. Plaintiff then began to try and collect on its judgment and uncovered the company and financial arrangement the defendant's husband had entered into to shield his assets. The plaintiff sought to unwind the transaction under a theory of fraudulent transfer, and eventually, the trial court granted the plaintiff judgment.

Defendant appealed but the Eighth Appellate District affirmed, finding that the plaintiff sufficiently established fraud under Ohio's Uniform Fraudulent Transfer Act, and the defendant failed to rebut the presumption of fraud by failing to establish that the transfer was made in good faith and/or that she paid "reasonably equivalent value" for the transfer of ownership in the company.

The Bullet Point: Ohio's Uniform Fraudulent Transfer Act (UFTA), set forth in R.C. Chapter 1336, creates a right of action for a creditor to set aside an allegedly fraudulent transfer of assets. A creditor seeking to vacate a fraudulent transfer must prove the essential elements of fraudulent conveyance by clear and convincing evidence. "If a transfer is fraudulent, then a creditor has the right to sue the original transferee and any subsequent transferee for the value of the transferred property."

To set forth a claim under R.C. 1336.04, a creditor must show (1) a conveyance or incurring of a debt, (2) made with actual intent to defraud, hinder, or delay, and (3) present or future creditors.

Since "intent to defraud" can be so hard to prove, the law outlines "badges of fraud" (i.e. factors) that courts consider in determining whether a transfer of assets was fraudulent:

1) Whether the transfer or obligation was to an insider;
2) Whether the debtor retained possession or control of the property transferred after the transfer;
3) Whether the transfer or obligation was disclosed or concealed;
4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
5) Whether the transfer was of substantially all of the assets of the debtor;
6) Whether the debtor absconded;
7) Whether the debtor removed or concealed assets;
8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;
11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

A creditor does not have to prove every "badge" in order to establish a fraudulent transfer.

SLIP OPINION NO. 2018-OHIO-3156

BOYD ET AL. *v.* KINGDOM TRUST COMPANY ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Boyd v. Kingdom Trust Co.*, Slip Opinion No. 2018-Ohio-3156.]

Certified question of state law—R.C. 1707.43 does not impose joint and several liability on custodian of a self-directed individual retirement account ("IRA") that purchased illegal securities on behalf and at direction of IRA account holders.

(No. 2017-1336—Submitted May 22, 2018—Decided August 9, 2018.)

ON ORDER from the United States Court of Appeals for the Sixth Circuit, Certifying a Question of State Law, No. 17-3026.

FRENCH, J.

{¶ 1} The United States Court of Appeals for the Sixth Circuit has certified a question of Ohio law that asks whether R.C. 1707.43, a provision of the Ohio Securities Act, imposes joint and several liability on persons who aided in the

purchase of illegal securities but did not participate or aid in the sale of the illegal securities. We answer the question in the negative.

FACTS AND PROCEDURAL HISTORY

{¶ 2} Ohio residents Cynthia Boyd and Thomas Flanders, the plaintiffs-petitioners in this matter, are the alleged victims of a Ponzi scheme operated by William Apostelos. According to petitioners, Apostelos and his associates formed Midwest Green Resources, L.L.C., and WMA Enterprises, L.L.C., as the vehicles for offering illegal securities to investors. Apostelos is not a party to this case.

{¶ 3} Apostelos allegedly persuaded Boyd, Flanders, and others to open self-directed individual retirement accounts ("IRAs") to invest in equity interests in Midwest Green Securities and promissory notes issued by WMA Enterprises. Boyd opened a self-directed IRA account with defendant-respondent Kingdom Trust Company. Flanders opened a self-directed IRA account with defendant-respondent PENSCO Trust Company, L.L.C. Once the accounts were established, Apostelos asked investors to direct the trust companies to purchase his securities or to execute powers-of-attorney giving him the ability to direct the trust companies to purchase his securities using the investors' IRA assets. Apostelos allegedly used the money raised from these investors to pay earlier investors and promoters and to fund his own personal expenses.

{¶ 4} After the Ponzi scheme unraveled, Boyd and Flanders filed a class-action lawsuit in the United States District Court for the Southern District of Ohio, Western Division, seeking to hold Kingdom Trust and PENSCO Trust liable under the Ohio Securities Act, R.C. 1707.01 et seq., for their alleged roles in the scheme. The complaint does not allege that the trust companies had any role in Apostelos's Ponzi scheme aside from purchasing the unlawful securities at the investors' direction. Nor does it allege that the trust companies knew or had reason to know that Apostelos was perpetrating a fraud.

{¶ 5} Kingdom Trust and PENSCO Trust filed motions to dismiss for failure to state a claim. The district court granted the motions. In the absence of any allegation that the trust companies acted outside the scope of routine banking activities, the district court held that their mere involvement in the transactions is insufficient to impose liability on them under the Ohio Securities Act. *Boyd v. Kingdom Trust Co.*, 221 F.Supp.3d 975, 979 (S.D.Ohio 2016).

{¶ 6} On appeal, the United States Court of Appeals for the Sixth Circuit noted that this court had not addressed whether the Ohio Securities Act extends joint and several liability to persons who aided in the purchase of illegal securities. We agreed to answer the following question, which the Sixth Circuit certified pursuant to S.Ct.Prac.R. 9.05:

> Does [R.C.] 1707.43 impose joint and several liability on a person who, acting as the custodian of a self-directed IRA, purchased—on behalf and at the direction of the owner of the self-directed IRA—illegal securities?

151 Ohio St.3d 1451, 2017-Ohio-8842, 87 N.E.3d 220.

ANALYSIS

{¶ 7} The Ohio Securities Act, R.C. 1707.01 et seq., governs the sale and purchase of securities in Ohio. The act requires securities to be registered (R.C. 1707.08 through 1707.13), imposes licensing requirements on dealers and salespersons (R.C. 1707.14 through 1707.19), and proscribes fraudulent conduct (R.C. 1707.44). R.C. 1707.43(A), the provision at issue here, allows the purchaser to void an unlawful sale or contract for sale made in violation of R.C. Chapter 1707. The statute also provides that

> [t]he person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser * * * for the full amount paid by the purchaser and for all taxable court costs * * *.

{¶ 8} R.C. 1707.43(A); *see also* R.C. 1707.01(D) (defining "person" for purposes of the Ohio Securities Act as including a limited-liability company).

{¶ 9} The certified question asks whether R.C. 1707.43(A) imposes joint and several liability on the custodian of a self-directed IRA—here, respondents, Kingdom Trust and PENSCO Trust—that purchased illegal securities on behalf and at the direction of the IRA account holders—here, petitioners, Boyd and Flanders. We hold that it does not.

{¶ 10} We start with the plain language of R.C. 1707.43(A) to determine legislative intent. *Christe v. GMS Mgt. Co.*, 88 Ohio St.3d 376, 377, 726 N.E.2d 497 (2000). The statute imposes joint and several liability on three types of "persons": (1) the person making a sale or contract for sale of illegal securities, (2) "every person that has participated in * * * such sale or contract for sale," and (3) "every person that has * * * aided the seller in any way in making such sale or contract for sale." R.C. 1707.43(A). The plain language of R.C. 1707.43(A) requires a person to have some nexus with the sale of illegal securities. The statute does not extend liability to persons whose only involvement in a transaction is the purchase of illegal securities.

{¶ 11} The General Assembly has demonstrated its intent to treat the "sale" and "purchase" of securities as two distinct acts by defining the two terms separately in the Ohio Securities Act. A "sale" includes "every disposition, or attempt to dispose, of a security." R.C. 1707.01(C)(1). A "purchase" includes "every acquisition of, or attempt to acquire, a security." R.C. 1707.01(GG)(1). At

the same time, when the General Assembly intended to include both purchases and sales in one of the act's prohibitions, it has expressly done so. For example, the act defines "fraud" as including "any fictitious or pretended purchase or sale of securities." R.C. 1707.01(J). R.C. 1707.44(N) prohibits misleading statements from being used in the "purchase or sale of securities." While there are various provisions in the Ohio Securities Act in which the General Assembly included both purchases and sales within the statute's ambit, R.C. 1707.43(A) is not one of them.

{¶ 12} Boyd and Flanders argue that R.C. 1707.43(A)'s use of the phrase "in any way" indicates the General Assembly's intent to impose liability on anyone participating in a transaction, even if the individual or entity was not involved in and did not induce the particular sale at issue. Their selective reading of the statute, however, omits the words that follow the phrase "in any way." The sentence in its entirety imposes liability on a person who "aided the seller in any way *in making such sale or contract for sale*." (Emphasis added.) R.C. 1707.43(A). The statute does not create liability absent some conduct that aided a seller in a sale of illegal securities.

{¶ 13} The weight of Ohio authority offers no support for petitioners' reading of the statute. To the contrary, Ohio courts have consistently construed R.C. 1707.43(A) as imposing liability only on persons who played a role in the sale of unlawful securities, such as acting in concert with the seller of an unlawful investment. *See, e.g., Federated Mgt. Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366, 392-393, 738 N.E.2d 842 (10th Dist.2000) (bank that directly participated in underwriting of investment and acted as financial adviser to issuer can be held liable under R.C. 1707.43); *Boland v. Hammond*, 144 Ohio App.3d 89, 94, 759 N.E.2d 789 (4th Dist.2001) (defendant who relayed proposed terms of sale to investors, arranged meetings between seller and investors, and distributed promissory notes to investors can be held liable under R.C. 1707.43).

{¶ 14} And Ohio courts have held that a financial institution's mere participation in a transaction, absent any aid or participation in the sale of illegal securities, does not give rise to liability under R.C. 1707.43(A). " '[T]he willingness of a bank to become the depository of funds does not amount to a personal participation or aid in the making of a sale.' " *Wells Fargo Bank v. Smith*, 12th Dist. Brown No. CA2012-04-006, 2013-Ohio-855, ¶ 29, quoting *Hild v. Woodcrest Assn.*, 59 Ohio Misc. 13, 30, 391 N.E.2d 1047 (C.P.1977); *see also Boomershine v. Lifetime Capital, Inc.*, 2d Dist. Montgomery No. 22179, 2008-Ohio-14, ¶ 15 (plaintiffs failed to show that bank serving as escrow agent aided in the sale of investments).

{¶ 15} Nevertheless, with the plain language of the statute and the weight of Ohio authority against them, petitioners argue that in any event, their complaint contains allegations that the trust companies worked in concert with Apostelos to effectuate the sale of his illegal securities. Nothing in our holding today would insulate from liability a self-directed IRA custodian who colludes with the seller in an unlawful sale of securities or actively participates or aids in the sale of illegal securities. But the certified question before us is limited to the liability of a self-directed IRA custodian whose only alleged participatory conduct was the *purchase* of illegal securities on behalf and at the direction of the owner of a self-directed IRA. We leave it for the Sixth Circuit to decide whether the facts as alleged in petitioners' complaint are sufficient to survive dismissal at the pleading stage under the legal standard we announce today.

CONCLUSION

{¶ 16} We answer the certified question in the negative and conclude that R.C. 1707.43 does not impose joint and several liability on a person who, acting as the custodian of a self-directed IRA, purchased—on behalf and at the direction of the owner of the self-directed IRA—illegal securities.

So answered.

O'CONNOR, C.J., and O'DONNELL, KENNEDY, FISCHER, DEWINE, and DEGENARO, JJ., concur.

Sebaly, Shillito & Dyer, Toby K. Henderson, and Scott S. Davies, for petitioners.

Ulmer & Berne, L.L.P., Frances Floriano Goins, and Daniela Paez, for respondent Kingdom Trust Company.

Porter, Wright, Morris & Arthur, L.L.P., and Caroline H. Gentry; and Shartsis Friese, L.L.P., Jahan P. Raissi, and Roey Z. Rahmil, for respondent PENSCO Trust Company, L.L.C.

Womble Bond Dickinson, L.L.P., Katrina L.S. Caseldine, Kevin A. Hall, and M. Todd Carroll, in support of respondents for amicus curiae Retirement Industry Trust Association.

Meyer Wilson Co., L.P.A., and David P. Meyer, in support of neither party for amicus curiae Public Investors Arbitration Bar Association.

SLIP OPINION NO. 2018-OHIO-3155

THE STATE EX REL. SPONAUGLE, APPELLANT, *v.* HEIN, JUDGE, APPELLEE, ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Stat ex rel. Sponaugle v. Hein,* Slip Opinion No. 2018-Ohio-3155.]

Procedendo—Prohibition—Court of appeals correctly dismissed procedendo claim because appellant sought to undo a court order, not to compel judge to issue a ruling—Appellant not entitled to writ of prohibition because he had an adequate remedy at law by way of appeal—Court of appeals' judgment affirmed.

(No. 2017-0607—Submitted February 13, 2018—Decided August 9, 2018.)

APPEAL from the Court of Appeals for Darke County,

No. 16 CA 00007, 2017-Ohio-1210.

Per Curiam.

{¶ 1} Appellant, Steven Sponaugle, appeals the judgment of the Second District Court of Appeals denying his complaint for writs of prohibition and procedendo against appellee, Darke County Court of Common Pleas Judge Jonathan P. Hein. For the reasons set forth below, we affirm the judgment of the court of appeals.

Background

The foreclosure action

{¶ 2} Sponaugle and his wife, Karen Sponaugle, were the defendants in *Farmers State Bank v. Sponaugle*, Darke C.P. No. 13-CV-00610, a residential foreclosure action assigned to Judge Hein. On January 12, 2016, Judge Hein issued a "Judgment Entry – Decree of Foreclosure." Sponaugle timely appealed the foreclosure decree to the Second District Court of Appeals.

{¶ 3} While the appeal was pending, the Sponaugles filed a Civ.R. 62 motion for a stay of execution. Judge Hein granted the motion, subject to the Sponaugles' posting a supersedeas bond. The Sponaugles failed to post the bond, so no stay went into effect.

{¶ 4} On February 26, 2016, Farmers State Bank purchased the property at a sheriff's sale. On March 10, after the auction but before confirmation of the sale, the court of appeals issued a show-cause order, questioning whether the judgment entry was a final, appealable order. Based on the show-cause order, the Sponaugles filed a motion asking Judge Hein to vacate the foreclosure sale.

{¶ 5} On April 18, 2016, the court of appeals dismissed the Sponaugles' appeal for lack of a final, appealable order. *Farmers State Bank v. Sponaugle*, 2d Dist. Darke No. 16 CA 000002. The court of appeals held that the foreclosure judgment was not final because it did not determine the amounts due on all liens.

{¶ 6} Three days later, on April 21, Judge Hein issued a judgment entry granting Farmers State Bank's motion for confirmation of the sale and denying the

Sponaugles' motion to vacate the sale. In a separate entry, dated the same day, Judge Hein issued an order confirming the sale and ordering distribution of the proceeds.

{¶ 7} The Sponaugles appealed the confirmation order and filed a motion in the trial court for a stay pending appeal. Judge Hein denied the stay motion on July 11, 2016. On the same day, Farmers State Bank submitted a praecipe to the clerk of courts requesting that a writ of possession be issued to the county sheriff. The clerk of courts issued the writ, and the sheriff executed it, thereby removing the Sponaugles from the property.

The prohibition action

{¶ 8} Based on these facts, Sponaugle filed a complaint in the Second District Court of Appeals, seeking writs of prohibition and procedendo against Judge Hein, Darke County Clerk of Courts Cindy Pike, and Darke County Sheriff Toby L. Spencer. Sponaugle later voluntarily dismissed his claims against Pike and Sheriff Spencer.

{¶ 9} On March 23, 2017, the court of appeals issued a decision and judgment entry sua sponte dismissing the procedendo claim for failure to state a claim. In the same decision, the court of appeals granted Judge Hein's motion to dismiss the prohibition claim on the grounds that Judge Hein did not patently and obviously lack jurisdiction to proceed in the foreclosure case and that Sponaugle had an adequate remedy in the ordinary course of law by way of appeal. The court denied Sponaugle's motion for summary judgment and denied Judge Hein's cross-motion for summary judgment as moot.

{¶ 10} On May 5, 2017, Sponaugle appealed to this court.

Appeal from the confirmation order

{¶ 11} On June 16, 2017, while Sponaugle's appeal in the prohibition action was being briefed in this court, the court of appeals issued its decision in the Sponaugles' appeal from the confirmation order. *Farmers State Bank v. Sponaugle*,

2017-Ohio-4322, 92 N.E.3d 355. The court of appeals "conclude[d] that the trial court erred when, in the absence of a final appealable decree of foreclosure, it denied the Sponaugles' motion to vacate the February 26 sale and confirmed the sale of the Sponaugles' property." *Id.* at ¶ 31. It remanded the case to the trial court with instructions to vacate the confirmation of sale and order that the deed be returned to the Sponaugles. *Id.* at ¶ 33. The bank appealed, and on February 28, 2018, this court accepted jurisdiction over two propositions of law. *Farmers State Bank v. Sponaugle*, 152 Ohio St.3d 1405, 2018-Ohio-723, 92 N.E.3d 878.

The parties' briefs in this action

{¶ 12} The court of appeals' June 2017 decision raised the prospect that Sponaugle's prohibition claim before this court had become moot. In his merit brief, Sponaugle specifically argues that that decision did not obviate his need for a writ of prohibition. He notes that enforcing the mandate would be difficult:

> At this point, although the Court of Appeals ordered that the "deed be returned" to Mr. Sponaugle, it is unclear how Judge Hein will accomplish that task without jurisdiction over the third-party purchaser. Mr. Sponaugle is left with the prospect of litigating his right to title to and possession of real estate that the Court of Appeals has declared is his.

{¶ 13} In response, Judge Hein argues that Sponaugle lacks standing and that a writ of prohibition should not issue because the judge does in fact have jurisdiction over the foreclosure case. But Judge Hein does not mention the court of appeals' June 2017 decision, much less consider its impact on this case.

{¶ 14} In his reply brief, Sponaugle indicates that the Second District has issued another decision in the appeal from the confirmation order, upon a motion for reconsideration. As Sponaugle explains, the court of appeals, recognizing the

problem caused by the subsequent sale of the property, has amended its order of relief:

> In its application for reconsideration, The Farmers State Bank indicates that it conveyed the property on October 3, 2016, to third parties. * * * Neither party informed us of this conveyance at oral argument.
>
> We recognize the legal quagmire that the parties and the trial court now face, particularly due to the October 2016 sale of the property. However, we find no obvious error in our ruling, based on the information that was before us when we rendered our Opinion and Judgment.
>
> Nevertheless, we find our remand language in paragraph 33 to be imprecise and that additional instruction is warranted. Accordingly, we modify paragraph 33 of our Opinion to read:
>
> > The trial court's judgment confirming the sale will be reversed, and the matter will be remanded for further proceedings. On remand, the trial court is instructed to vacate the confirmation of sale and, upon the entry of a final appealable judgment and decree of foreclosure, the trial court may again order the sale of the property. The trial court may determine the possessory interests of the parties pending the entry of a final appealable order, the sale of the property, and a new confirmation of sale.

Farmers State Bank v. Sponaugle, 2d Dist. Darke No. 2016-CA-4, 2017-Ohio-7744, 2017 WL 4220068, *4-5.

{¶ 15} Sponaugle attached to his reply brief two additional filings from the foreclosure case. On September 7, 2017, Judge Hein issued an order on his own motion to preserve the status quo by declaring that ownership and occupancy of the real estate "shall remain with the recent purchasers, Scott Stastny and Brandi Stastny," to the exclusion of all others. And on September 11, he issued a notice that he would wait to rule on all pending motions "until a more appropriate time vis a vis appellate procedures."

{¶ 16} Along with his reply brief, Sponaugle also filed a motion for oral argument.

Analysis

{¶ 17} Sponaugle seeks two forms of relief: a writ of procedendo and a writ of prohibition.

Procedendo

{¶ 18} In his complaint, Sponaugle identified Judge Hein by name in only one portion of his prayer for relief: he asked for a writ of procedendo directing Judge Hein to vacate the April 21, 2016 confirmation order. The court of appeals correctly dismissed the procedendo claim as seeking the wrong form of relief. "A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." *State ex rel. Miley v. Parrott*, 77 Ohio St.3d 64, 65, 671 N.E.2d 24 (1996). In this case, procedendo is inappropriate because Sponaugle seeks to undo a court order, not to compel Judge Hein to issue a ruling. *See, e.g., State ex rel. Utley v. Abruzzo*, 17 Ohio St.3d 203, 204, 478 N.E.2d 789 (1985) (noting that a writ of procedendo will issue to compel the issuance of a judgment but not to direct what the judgment should be). We affirm the dismissal of the procedendo claim.

Prohibition

{¶ 19} The complaint also requested a writ of prohibition to bar all three original respondents from (1) "taking any action to execute on" the January 12, 2016 judgment entry of foreclosure, (2) "taking any action to enforce" the confirmation order, and (3) "taking any action in furtherance of" the writ of possession.

{¶ 20} Sponaugle did not clearly request a writ of prohibition to vacate the confirmation order. But even if he had sought to undo the confirmation order through a writ of prohibition, that request would be moot, because the court of appeals has already vacated the confirmation order. *See State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶ 12 (holding that a suit to prevent the Public Utilities Commission from granting applications for rehearing became moot when the commission denied the applications).

{¶ 21} Notwithstanding the decisions of the court of appeals, Sponaugle contends that a live controversy continues to exist because he remains dispossessed from his home. Assuming this to be true, however, we hold that he has failed to state a claim in prohibition.

{¶ 22} Sponaugle cannot attack the writ of possession directly through a prohibition claim because Judge Hein did not issue the writ of possession, and a sheriff who executes such a writ is not exercising judicial authority. *See Novak v. McFaul*, 8th Dist. Cuyahoga No. 77132, 1999 WL 1000698, *2 (Oct. 26, 1999) ("Issuing an eviction notice or effecting a writ of possession is an administrative act and not a judicial act"). So instead, Sponaugle's present theory of the case is that the writ of possession was issued in reliance on the confirmation order and if Judge Hein lacked jurisdiction to confirm the sale, then he should be responsible for curing all the downstream harm caused thereby.

{¶ 23} In order for a writ of prohibition to issue against Judge Hein, Sponaugle must demonstrate that Judge Hein has exercised judicial power or is about to do so, that he lacks authority to exercise that power, and that denying the writ would result in injury for which no adequate remedy exists in the ordinary course of the law. *State ex rel. Elder v. Camplese*, 144 Ohio St.3d 89, 2015-Ohio-3628, 40 N.E.3d 1138, ¶ 13. However, if Judge Hein patently and unambiguously lacks jurisdiction, then Sponaugle need not satisfy the third requirement, the lack of an adequate remedy at law. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15.

{¶ 24} Typically, a court will deny relief in prohibition when a respondent judge has general subject-matter jurisdiction and will deem any error by the judge to be an error in the exercise of jurisdiction. *See, e.g., Salloum v. Falkowski*, 151 Ohio St.3d 531, 2017-Ohio-8722, 90 N.E.3d 918, ¶ 10 (affirming denial of writ of prohibition when judge had jurisdiction to rule on motion to modify child-support order); *State ex rel. Estate of Hards v. Klammer*, 110 Ohio St.3d 104, 2006-Ohio-3670, 850 N.E.2d 1197, ¶ 14 (failure to assess costs under Civ.R. 54(D) was, at most, error in exercise of jurisdiction). Sponaugle contends that a writ of prohibition is nevertheless available against judges who have general subject-matter jurisdiction if they, within the exercise of that jurisdiction, issue orders that exceed their power.

{¶ 25} A writ of prohibition *is* proper even when the respondent judge has general jurisdiction when the judge has taken an action that exceeds the bounds of the court's statutory authority. For example, R.C. 2743.02(F) vests the common pleas court with jurisdiction to hear suits against state officials alleging that they acted outside the scope of their employment but only *after* such a suit is first filed in the Court of Claims for a determination as to the official's immunity. Because an immunity determination is a statutory prerequisite to the common pleas court's jurisdiction, we have held that the common pleas court's exercise of jurisdiction

over the merits of a suit against a state official was unauthorized by law until the Court of Claims made an immunity determination. *State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas*, 60 Ohio St.3d 78, 79, 573 N.E.2d 606 (1991). Similarly, in *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 285 N.E.2d 22 (1972), the common pleas court was asked to appoint an arbitrator to enforce the terms of an arbitration agreement. But the dispute had already been heard by an arbitrator, and the agreement in question specified that the arbitrator's decision would be final. On those facts, we held that the common pleas court was "without jurisdiction to appoint a second arbitrator." *Id*. at 328.

{¶ 26} Most recently, we issued a writ of prohibition to block a common pleas court judge from taking any further action in a number of medical-malpractice cases that he had transferred from the dockets of other judges to his own, holding that he had transferred the cases in violation of the court rules governing case consolidation. *State ex rel. Durrani v. Ruehlman*, 147 Ohio St.3d 478, 2016-Ohio-7740, 67 N.E.3d 769. We held that the judge lacked jurisdiction to consolidate the cases because under the rules governing transfer and consolidation of cases, the administrative judge had exclusive authority to order transfers, the cases had to be transferred to the judge to whom the case with the lowest case number had been assigned, and the mandatory preconsolidation hearing had not been held. *Id*. at ¶ 17-26.

{¶ 27} Sponaugle relies on *Sanquily*, *Adams*, and *Durrani* to support his entitlement to the writ. But for these precedents to be relevant, Sponaugle would have to demonstrate that the statute vesting the common pleas court with jurisdiction to issue a confirmation of sale, R.C. 2329.31, makes the existence of a final foreclosure order a *jurisdictional* prerequisite thereto.

{¶ 28} R.C. 2329.31(A) requires the court, upon the return of the writ of execution for any relevant sale, to order an entry on the journal confirming the sale "if the court of common pleas finds that the sale was made, in all respects, in

conformity with sections 2329.01 to 2329.61 of the Revised Code." The requirements of those sections include, for example, public notice prior to a sale (R.C. 2329.26 and 2329.27), a minimum sale price of two-thirds the amount of the appraised value (R.C. 2329.20), and the submission of identifying information by the purchaser (R.C. 2329.271). Although the statutes logically *assume* the existence of a final foreclosure entry, they do not impose upon the trial court an affirmative duty to confirm the existence of an order prior to entering the confirmation of sale. The precedents relied on by Sponaugle are therefore not relevant.

{¶ 29} Sponaugle has not demonstrated that Judge Hein patently and obviously lacked jurisdiction. When jurisdiction is not patently and obviously absent, " 'an appeal is generally considered an adequate remedy in the ordinary course of law sufficient to preclude a writ.' " *State ex rel. Evans v. McGrath*, 151 Ohio St.3d 529, 2017-Ohio-8707, 90 N.E.3d 916, ¶ 7, quoting *Shoop v. State*, 144 Ohio St.3d 374, 2015-Ohio-2068, 43 N.E.3d 432, ¶ 8. Sponaugle contends that appeal was an inadequate remedy because the Sponaugles' appeal afforded them incomplete relief: the court of appeals could not restore the property because it did not have jurisdiction over the purchasers. But if the rights of the third-party purchasers were an impediment to the court of appeals restoring the house, they remain just as much an obstacle to complete relief in this court.

{¶ 30} Sponaugle is not entitled to a writ of prohibition because he had an adequate remedy at law.

The motion for oral argument

{¶ 31} We have discretion to grant oral argument, and in exercising that discretion, we will consider whether the case involves a matter of great public importance, complex issues of law or fact, a substantial constitutional issue, or a conflict among courts of appeals. *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶ 15. Oral argument is not

warranted here because most of the case is moot and the issues presented all turn on familiar principles of prohibition. Moreover, given that Judge Hein is refraining from taking any steps to comply with the orders of the court of appeals until this case is resolved, we believe that additional delay for oral argument would be a disservice to all the parties. We therefore deny the motion.

Judgment affirmed.

O'CONNOR, C.J., and O'DONNELL, FRENCH, FISCHER, DEWINE, and DEGENARO, JJ., concur.

KENNEDY, J., concurs in judgment only.

Andrew M. Engel Co., L.P.A., and Andrew M. Engel, for appellant.

R. Kelly Ormsby III, Darke County Prosecuting Attorney, and Margaret B. Hayes, Assistant Prosecuting Attorney, for appellee.

[Cite as *1st Natl. Fin. Servs. v. Ashley*, 2018-Ohio-3134.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

1st National Financial Services,	:	
Plaintiff-Appellee,	:	
		No. 17AP-638
v.	:	(M.C. No. 2015CVF-13668)
Stacia Ashley,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 7, 2018

On brief: *Jeffrey A. Catri Co., L.L.C.*, and *Jeffrey A. Catri*, for appellee. **Argued:** *Jeffrey A. Catri.*

On brief: *The Legal Aid Society of Columbus*, *Scott E. Torguson*, and *Catherine L. Beck*, for appellant. **Argued:** *Scott E. Torguson*.

APPEAL from the Franklin County Municipal Court

DORRIAN, J.

{¶ 1} Defendant-appellant, Stacia Ashley, appeals from a judgment of the Franklin County Municipal Court denying her motion to vacate the court's prior judgment in favor of plaintiff-appellee, 1st National Financial Services ("1st National"). For the reasons that follow, we reverse and remand.

I. Facts and Procedural History

{¶ 2} On September 13, 2013, Ashley obtained a loan from 1st National for $1,998.31 and executed a loan repayment agreement. On September 24, 2014, 1st National filed a complaint in Franklin County Municipal Court case No. M2014CVI-31681, alleging Ashley violated the loan repayment agreement by failing to make payments on the loan. In November 2014, Ashley entered into a payment arrangement with 1st National providing

for monthly payments and a lump sum payoff. 1st National asserts Ashley made three monthly payments pursuant to that arrangement but failed to make the lump sum payment. 1st National further asserts Ashley subsequently contacted its counsel and agreed to compromise and settle the case by signing a Cognovit Promissory Note ("cognovit note"). On February 28, 2015, Ashley signed a cognovit note in favor of 1st National for $1,423.70. On March 2, 2015, 1st National dismissed case No. M2014CVI-31681 without prejudice.

{¶ 3} On April 27, 2015, 1st National filed a complaint on the cognovit note in Franklin County Municipal Court case No. M2015CVI-13668, alleging an outstanding balance of $1,073.70. An answer was filed the same day on behalf of Ashley invoking the warrant of attorney in the cognovit note and confessing judgment against Ashley and in favor of 1st National. On April 30, 2015, the court entered a judgment entry against Ashley for $1,073.70 plus interest and costs. The court subsequently ordered garnishment of Ashley's wages to satisfy the judgment.

{¶ 4} Assisted by new counsel, Ashley filed a motion to vacate the judgment on September 9, 2015, arguing the court lacked subject-matter jurisdiction over the case pursuant to R.C. 2323.13(E)(1) because the underlying loan was a consumer loan. 1st National filed a memorandum in opposition asserting the terms of the cognovit note and the circumstances surrounding the signing of it established it did not arise out of a consumer loan. Because 1st National filed a satisfaction of judgment on November 23, 2015, the trial court denied all pending motions as moot. On appeal, this court held that because the parties disputed whether the loan was a consumer loan for purposes of R.C. 2323.13(E)(1), the proper procedure was to hold an evidentiary hearing and make a determination on that issue. *1st Natl. Fin. Servs. v. Ashley*, 10th Dist. No. 16AP-18, 2016-Ohio-5497, ¶ 27. This court reversed the trial court's dismissal of Ashley's motion as moot, remanded with instructions to hold an evidentiary hearing on the issue of whether the cognovit note arose out of a consumer loan as defined under R.C. 2323.13(E)(1), and whether the trial court had jurisdiction to enter judgment on it. *Id*. at ¶ 29.

{¶ 5} On remand, the trial court conducted an evidentiary hearing. Ashley testified on her own behalf, and 1st National presented testimony from its attorney, Kevin O'Brien, and the office manager of O'Brien's office. Following the hearing, the trial court issued a decision denying Ashley's motion to vacate. The court concluded it had subject-matter

jurisdiction over the case, holding that Ashley failed to meet her burden of proving by a preponderance of the evidence that the underlying loan was a consumer loan as defined by R.C. 2323.13(E)(1).

II. Assignment of Error

{¶ 6} Ashley appeals and assigns the following sole assignment of error for our review:

> The Trial Court Erred By Assigning The Burden Of Proving That The Transaction Was Not Commercial In Nature On Ms. Ashley, As It Should Have Required 1st National To Affirmatively Prove Each Element Of Its Case.

III. Discussion

{¶ 7} Generally, we review a trial court's decision on a motion to vacate for abuse of discretion. *Young v. Locke*, 10th Dist. No. 13AP-608, 2014-Ohio-2500, ¶ 20. In the present case, however, Ashley's motion to vacate implicated the trial court's subject-matter jurisdiction. We review questions of subject-matter jurisdiction de novo. *Klosterman v. Turnkey-Ohio, LLC*, 182 Ohio App.3d 515, 2009-Ohio-2508, ¶ 19 (10th Dist.).

{¶ 8} "The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder." *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 176 (1972). "The cognovit has long been recognized [in Ohio] by both statute and court decision." *Id*. at 178. Strict compliance with statutory requirements is required to obtain judgment on a cognovit note. "A cognovit judgment is valid if the warrant of attorney to confess judgment and all note terms are strictly construed against the person obtaining the judgment, and court proceedings, based upon such warrant, must conform to every essential detail with the statutory law governing the subject." *Fifth Third Bank v. Pezzo Constr., Inc.*, 10th Dist. No. 11AP-251, 2011-Ohio-5064, ¶ 11, citing *Lathrem v. Foreman*, 168 Ohio St. 186 (1958).

{¶ 9} Notwithstanding the long legal recognition of cognovit notes in Ohio, the General Assembly has curtailed the use of cognovit notes in consumer transactions. R.C. 2323.13(E) provides that "[a] warrant of attorney to confess judgment contained in any instrument executed on or after January 1, 1974, arising out of a consumer loan or consumer transaction, is invalid and the court shall have no jurisdiction to render a

judgment based upon such a warrant." The statute defines a consumer loan as "a loan to a natural person and the debt incurred is primarily for a personal, family, educational, or household purpose." R.C. 2323.13(E)(1). If a cognovit note arises out of a consumer loan or a consumer transaction, then a judgment entered based on that cognovit note is void and must be vacated for lack of subject-matter jurisdiction. *Shore W. Constr. Co. v. Sroka*, 61 Ohio St.3d 45, 48 (1991).

{¶ 10} "By its very terms, a cognovit note allows for judgment to be taken against the debtor-party without notice or hearing." *Dollar Bank v. Bernstein Group, Inc.*, 71 Ohio App.3d 530, 533 (10th Dist.1991). Thus, the issue of subject-matter jurisdiction or any other defenses available to a defendant may not be fully and fairly litigated by a trial court prior to entering judgment on a cognovit note. *Id*. In recognition of the unique circumstances presented by cognovit judgments, Ohio courts have held that when a party files a motion to vacate a cognovit judgment pursuant to Civ.R. 60(B), a modified test is appropriate. "Where the relief from judgment sought is on a cognovit note, '[t]he prevailing view is that relief from a judgment taken upon a cognovit note, without prior notice, is warranted by authority of Civ.R. 60(B)(5) when the movant (1) establishes a meritorious defense, (2) in a timely application.' " *Fifth Third Bank* at ¶ 8, quoting *Meyers v. McGuire*, 80 Ohio App.3d 644, 646 (9th Dist.1992). Further, "[u]nder Civ.R. 60(B), a movant's burden is only to *allege* a meritorious defense, not to prove that he will prevail on that defense." (Emphasis added.) *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶ 11} In the present case, Ashley filed a common law motion to vacate judgment rather than a motion for relief from judgment pursuant to Civ.R. 60(B); however, similar considerations arise because of the nature of a cognovit judgment. Ashley's motion challenged the trial court's subject-matter jurisdiction, which is an issue that can be raised at any time and renders a court's judgment void ab initio. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶ 17. Ashley asserted in her motion to vacate that the underlying loan was a consumer loan and, therefore, pursuant to R.C. 2323.13(E), the warrant to confess judgment contained in the cognovit note was invalid and the court lacked subject-matter jurisdiction to enter judgment on it. Ashley's motion to vacate was supported by an affidavit in which she averred she obtained the original loan to help pay personal bills and all funds she obtained from that loan were used for family and household

purposes. Ashley further averred she did not own a business and had never owned a business, and she did not understand the significance of the cognovit note when she signed it. Similarly, at the hearing Ashley testified regarding the nature of the underlying loan:

> Q. Okay. How did you first become involved with 1st National Financial Services?
>
> A. I went in to get a loan.
>
> Q. And when was that?
>
> A. 2013.
>
> Q. Why did you take the loan out?
>
> A. Just bills, personal stuff.
>
> Q. What did you use the money for?
>
> A. Bills and personal stuff.
>
> Q. Do you have an example? I know it was a while ago but ...
>
> A. I probably put something on maybe electric bill, probably bought some household supplies, cleaning, just things that you need around the house.

(Tr. at 9.)

{¶ 12} Ashley likewise testified about her lack of understanding of the details of the cognovit note:

> A. I talked to Mr. O'Brien, and I also talked to his secretary. They really didn't -- It was almost time for us to go back to court. And I called in to ask about the lump sum payment, and he basically said there will be no lump sum payment; I have to pay all of it. And, so, he was trying to force me to pay all of it at that time and said what he could do is this letter, a note.
>
> Q. And so you went into his office at some point, right?
>
> A. Right.
>
> Q. Did you know what a cognovit note was?
>
> A. No

Q. Did anyone in Mr. O'Brien's office explain to you what a cognovit note was?

A. No.

Q. Did you speak to Mr. O'Brien at all when you were in his office?

A. Yes, he came out of his office, shook my hand, came to speak to me very quickly, just a hello introducing his self; and he basically let his secretary do the rest.

Q. So you talked to his secretary about the document you signed?

A. Uh-huh.

Q. Did she explain what a cognovit note was to you?

A. No. She actually said there was no need for me to read it.

Q. Have you ever owned a business?

A. No.

Q. Did you ever tell anyone at 1st National you owned your own business?

A. No.

Q. Did you ever tell Mr. O'Brien that you owned your own business?

A. No.

Q. Did you ever tell anyone in Mr. O'Brien's office that you owned your own business?

A. No.

* * *

Q. Read the first sentence in the second paragraph [of the Cognovit Promissory Note] there.

A. "The parties further stipulate and agree that this note represents the settlement of a commercial matter and that the

> instant note is not given for a consumer loan transaction or debt."
>
> Q. Do you know what that means?
>
> A. I'm assuming -- I really don't.
>
> Q. Okay. Did you know what it meant at the time?
>
> A. No.
>
> Q. And nobody explained it to you?
>
> A. No.
>
> Q. And at all times during your dealings with 1st National and Mr. O'Brien, were you a consumer or were you acting as a business owner?
>
> A. Consumer.

(Tr. at 11-13.) Ashley's affidavit and testimony suggest that 1st National attempted to subvert R.C. 2323.13(E) and employ a cognovit note to collect on a debt arising from a consumer loan.

{¶ 13} 1st National supported its memorandum in opposition to Ashley's motion to vacate with an affidavit from O'Brien, who represented 1st National in both municipal court cases. In the affidavit, O'Brien averred he did not know why Ashley took out the underlying loan or what she used the loan proceeds for, but that he told Ashley she could only sign the cognovit note if the underlying loan proceeds were used for a business purpose. O'Brien further averred that Ashley did not indicate to him that the proceeds of the underlying loan had been used for family or household purposes. O'Brien testified at the hearing that he explained the terms of the cognovit note to Ashley when she came to his office to sign it and that Ashley indicated she did not have any questions. At the hearing, O'Brien testified about his conversation with Ashley when she came to his office to sign the cognovit note:

> Q. Okay. Well, I'm going to jump ahead here, 6, 7 and 8, Ms. Ashley's affidavit is basically saying this was for personal bills. She didn't own a business and never owned a business. Do you recall having any conversation with her about this?

> A. I did because I asked her. I said, you know -- and I think the way I put it is, I would feel more comfortable doing this, you know, knowing, you know, if you use this money for a business, great. You know, I had never done a cog before. But given the circumstances here, I thought, you know, it would be acceptable to do it and she certainly represented to me that she'd use the funds for business. I didn't ask her what her business was. She did not say to me that it was for -- to pay, you know, personal bills. She didn't tell me what she was using the money or what she used the money for at all.
>
> The Court: She didn't tell you at all? Is that what you said?
>
> [A.] She didn't tell me at all when she took the loan out in September of '13.

(Tr. at 64-65.)

{¶ 14} The trial court concluded that, as the moving party, Ashley bore the burden of proving by a preponderance of the evidence that the underlying loan was a consumer loan, and she failed to meet this burden. We conclude the court's analysis failed to account for the particular circumstances presented by a cognovit judgment. As explained above, a trial court has no jurisdiction to enter judgment on a cognovit note arising out of a consumer loan. Because of the summary nature of a cognovit judgment, the issue of subject-matter jurisdiction may not be fully litigated prior to entering judgment, as it was not in the present case. Ashley's motion to vacate raised the issue of subject-matter jurisdiction and she testified the underlying loan was a consumer loan, which would have prevented the court from having subject-matter jurisdiction pursuant to R.C. 2323.13(E). If Ashley had filed a motion for relief under Civ.R. 60(B), it would have been sufficient for her to allege a meritorious defense in a timely motion. *See Fifth Third Bank* at ¶ 8. Applying similar principles to her common law motion to vacate judgment, because Ashley alleged facts that would have precluded the court from exercising subject-matter jurisdiction, the court should have placed the burden on 1st National to prove that subject-matter jurisdiction existed, as the party seeking to invoke the court's jurisdiction.

{¶ 15} Accordingly, because the court improperly placed the burden in denying Ashley's motion to vacate, we reverse and remand for application of the proper analysis.

IV. Conclusion

{¶ 16} For the foregoing reasons, Ashley's assignment of error is sustained, we reverse the judgment of the Franklin County Municipal Court and remand the matter to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

TYACK, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 17} I do not believe the trial court committed reversible error when it denied Ashley's motion to vacate the judgment for lack of subject-matter jurisdiction. Accordingly, I would overrule Ashley's assignment of error and affirm the judgment of the trial court. Because the majority does not, I respectfully dissent.

{¶ 18} Under R.C. 2323.13(E) "[a] warrant of attorney to confess judgment contained in any instrument executed on or after January 1, 1974, arising out of a consumer loan or consumer transaction, is invalid and the court shall have no jurisdiction to render a judgment based upon such a warrant." In *1st Natl. Fin. Servs. v. Ashley*, 10th Dist. No. 16AP-18, 2016-Ohio-5497, ¶ 29, this court reversed the judgment of the trial court and remanded the case for the trial court to "determine whether the cognovit note arose out of a 'consumer loan,' as defined under R.C. 2323.13(E)(1) and, in turn, whether it had jurisdiction under R.C. 2323.13(E) to enter judgment on the cognovit note."

{¶ 19} The decision and entry of the trial court, on remand from this court, provides in relevant part as follows:

> Having weighed the evidence adduced at the hearing, and considered the credibility of the witnesses, the Court finds that Defendant has failed to meet its burden, as the movant, to prove by a preponderance of the evidence that the loan underlying this case was a "consumer loan" as defined by R.C. 2323.13(E)(1). In light of the lack of detail regarding what she used the loan money for, the Court finds *Defendant's various general assertions that the loan was for personal and household purposes to lack credibility*.

(Emphasis added.) (Aug. 15, 2017 Decision at 3.)

{¶ 20} The majority concludes the trial court erred when it determined Ashley, as the moving party, had the burden to prove that the loan underlying the cognovit note was

a "consumer loan" as defined in R.C. 2323.13(E)(1). I agree with the majority's conclusion on this point. Under Ohio law, "[o]nce the existence of subject-matter jurisdiction has been challenged, the burden of establishing jurisdiction rests on the party asserting it." *McDaniel v. Phelps*, 1st Dist. No. C-010744, 2003-Ohio-41, ¶ 6, citing *Collins v. Hamilton Cty. Dept. of Human Servs.*, 10th Dist. No. 01AP-1194 (Mar. 21, 2002), *jurisdictional motion overruled*, 96 Ohio St.3d 1440, 2002-Ohio-3344. This court, in *Collins,* noted that "[i]t has been consistently held that once the existence of subject matter jurisdiction has been challenged, the burden of establishing it always rests on the party asserting jurisdiction." *Id*, quoting *Linkous v. Mayfield,* 4th Dist. No. CA1894 (June 4, 1991).

{¶ 21} Though I agree with the majority that the trial court misapplied the burden of proof when it placed the burden on Ashley to establish the lack of trial court jurisdiction, I do not agree the trial court's error warrants reversal in this case given the trial court's express determination that Ashley's testimony was not credible. As set out above, the trial court made a determination that "[Ashley's] various general assertions that the loan was for personal or household purposes * * * lacks credibility." (Aug. 15, 2017 Decision at 3.)

{¶ 22} It is axiomatic that a reviewing court must be guided by the presumption that factual findings made by the trier of fact are correct. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77 (1984). The trier of fact is best able to view the witnesses and make observations as to their demeanor, gestures, and voice inflection and use these observations to judge the credibility of the testimony. *Id. See also Complete Gen. Constr. Co. v. Ohio Dept. of Transp.*, 94 Ohio St.3d 54, 62 (2002) (In a case tried to the court, without a jury, the reviewing court erred when it "rejected the trial court's characterization of [a] witness's testimony on this issue and inserted its own."); *J&H Reinforcing & Structural Erectors, Inc. v. Ohio School Facilities Comm.*, 10th Dist. No. 12AP-588, 2013-Ohio-3827, ¶ 95 ("Whether [appellant's] equipment remained on the job site because of [appellee's] delay was a question of fact, and such matters are best left to the trier of fact.").

{¶ 23} Given the trial court's credibility determination, the only credible evidence submitted to the trial court was that of appellee's counsel who testified that appellee informed him that the loan was for commercial purposes. Thus, the only credible evidence in the record supports the trial court's finding that the instrument executed on or after January 1, 1974 did not arise out of a consumer loan or consumer transaction. This being

the case, the only conclusion supported by the evidence presented at the hearing is that the trial court did have jurisdiction to render a judgment based upon the warrant of attorney to confess judgment contained in any instrument executed on or after January 1, 1974.

{¶ 24} Errors that do not affect substantial rights must be disregarded by a reviewing court. *Stanley v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 12AP-999, 2013-Ohio-5140, ¶ 91; Civ.R. 61; R.C. 2309.59. Because the only credible evidence in the record supports the trial court's denial of Ashley's common law motion to vacate the judgment, any trial court error with regard to the burden of proof could not have affected a substantial right of Ashley. On this record, it is not possible for Ashley to obtain a different result by remanding the matter for the trial court to correctly allocate the burden of proof as there was no credible evidence to support a finding that the underlying loan was a consumer loan or transaction.

{¶ 25} For the foregoing reasons, I would hold the trial court did not commit reversible error when it denied Ashley's motion to vacate judgment. Accordingly, I would overrule Ashley's assignment of error and affirm the judgment of the trial court. Because the majority does not, I respectfully dissent.

[Cite as *Sosnoswsky v. Koscianski*, 2018-Ohio-3045.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106147

SAMI SOSNOSWSKY

PLAINTIFF-APPELLANT

vs.

JOHN P. KOSCIANSKI, ET AL.

DEFENDANT-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-873745

BEFORE: Jones, J., Stewart, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: August 2, 2018

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ON RECONSIDERATION:

LARRY A. JONES, SR., J.:

{¶1} Upon review, this court sua sponte reconsiders its decision in this case. After reconsideration, the opinion as announced by this court on April 12, 2018, *Sosnoswsky v. Koscianski*, 8th Dist. Cuyahoga No. 106147, 2018-Ohio-1409, is hereby vacated and substituted with this opinion.[1]

{¶2} This matter involves the issue of whether the probate division or the general division of the Cuyahoga County Common Pleas Court had jurisdiction over a complaint alleging breach of fiduciary duty, negligence, fraud, conversion, and that sought a constructive trust and an accounting. Upon de novo review, we reverse and remand.

Procedural History and Facts

{¶3} Plaintiff-appellant, Sami Sosnoswsky ("Sosnoswsky"), was gifted money to be placed into a trust until she turned 18 years old. Judith Lieber, Sosnoswsky's mother, was custodian of the account. From 1973 – 1980, the following amounts were to be placed in the trust: $19,000 from Sosnoswsky's grandmother, $6,057.40 from her grandfather, and $50,000 from her father. Sosnoswsky has alleged that the trust is currently worth about $2,000,000.

{¶4} In February 2016, defendant-appellee John Koscianski ("Koscianski") was appointed the guardian of the estate and person of Lieber. On December 12, 2016, Sosnoswsky filed a complaint in the probate division of the Cuyahoga County Common Pleas Court (Probate Court Case No. 2016ADV221589). She filed a second complaint in the court's general division on

[1]"[B]y virtue of the jurisdiction conferred by Section 3(B), Article IV, Ohio Constitution, courts of appeals also have inherent authority in the furtherance of justice, to reconsider their judgments sua sponte." *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 1992-Ohio-20, 594 N.E.2d 616, citing *Tuck v. Chapple*, 114 Ohio St. 155, 151 N.E. 48 (1926).

December 29, 2016 (Common Pleas Case No. CV-16-873745). The complaints were virtually identical in that they named the same defendants and alleged that, due to Lieber's fraudulent conveyance of the funds, Sosnoswsky never received any of her trust money. The complaints named Koscianski as guardian of Lieber and several financial institutions as defendants. Importantly, the allegations dealt solely with the actions of Lieber, a ward, that took place prior to the guardianship being established.

{¶5} Koscianski filed a motion to dismiss the complaint in the general division pursuant to Civ.R. 12(B)(1), for lack of subject matter jurisdiction. The court stayed the case pending decision by the probate division court on the complaint Sosnoswsky had filed with that court. On April 28, 2017, Sosnoswsky voluntarily dismissed her complaint without prejudice in the probate court and moved to reinstate her general division case to the active docket. The general division trial court granted her motion to reinstate the case to the active docket. Sosnoswsky refiled her probate court complaint on May 18, 2017 and a Civ.R. 41 notice of dismissal of that complaint on October 31, 2017 (Cuyahoga Common Pleas Court, Probate Division Case No. 2017ADV225631).

{¶6} Koscianski moved to renew the original motion to dismiss in the general division. On July 31, 2017, prior to the October 31, 2017 dismissal of her probate court complaint, the general division trial court granted the motion to dismiss, holding, in part:

> Pursuant to R.C. 2101.24, it is well settled that the probate court has exclusive jurisdiction, unless otherwise provided by law, as to all matters set forth in R.C. 2101.24 and as to all matters pertaining directly to the administration of estates.
>
> [T]his instant matter involves a ward [Lieber] that is currently under guardianship in the Cuyahoga County Probate Court. The Court finds that Plaintiff's claims are controlled by Ohio Rev. Code 2109.50 through Ohio Rev. Code 2109.56 and the Probate Court has exclusive jurisdiction of this matter. As such, Defendant's Motion to Dismiss is granted for lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(l).

{¶7} Sosnoswsky filed a notice of appeal, raising one assignment of error for our review:

> The trial court erred in granting the defendant's motion to dismiss complaint on the ground that the Cuyahoga County Court of Common Pleas lacked subject matter jurisdiction in accordance with Civ.R. 12(B)(1).

Law and Analysis

{¶8} In her sole assignment of error, Sosnoswsky claims that the trial court erred in dismissing her complaint for lack of subject matter jurisdiction under Civ.R. 12(B)(1). The standard of review for a Civ.R. 12(B)(1) dismissal is whether any cause of action cognizable by the forum has been raised in the complaint. *Prosen v. Dimora*, 79 Ohio App.3d 120, 123, 606 N.E.2d 1050 (9th Dist.1992), citing *Avco Fin. Servs. Loan, Inc. v. Hale*, 36 Ohio App.3d 65, 67, 520 N.E.2d 1378 (10th Dist.1987); *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 537 N.E.2d 641 (1989). This determination involves a question of law that we review de novo. *Phillips v. Deskin*, 5th Dist. Richland No. 12CA119, 2013-Ohio-3025, ¶ 8, citing *Shockey v. Fouty*, 106 Ohio App.3d 420, 666 N.E.2d 304 (4th Dist.1995). In doing so, we accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Phillips* at *id.*, citing *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991).

Jurisdiction of Probate Court

{¶9} The probate court is a court of limited jurisdiction; it can exercise just such powers as are conferred on it by statute and the constitution of the state. *Goff v. Ameritrust Co., N.A.*, 8th Dist. Cuyahoga Nos. 65196 and 66016, 1994 Ohio App. LEXIS 1916, 10-11 (May 5, 1994), citing *Schucker v. Metcalf*, 22 Ohio St.3d 33, 488 N.E.2d 210 (1986).

{¶10} The Ohio Supreme Court has historically recognized that the probate division's jurisdiction includes "continuing and exclusive jurisdiction over both the ward and the guardian." *In re Clendenning*, 145 Ohio St. 82, 92, 60 N.E.2d 676 (1945).

> In this state the Probate Court does have continuing, exclusive jurisdiction over both the ward and the guardian, where no appeal has been perfected. * * * A guardian is an officer of the court appointing him. * * * A ward receives such status from a proceeding in rem in the Probate Court. The ward becomes the ward of the court. The control of the ward's person and property remains in the Probate Court with the discharge of the duties in respect thereof being delegated to a guardian as the agent of the court and subject to the orders of the court.
>
> *Id.*

{¶11} This jurisdiction is codified in R.C. 2101.24, which provides that a probate court has exclusive jurisdiction over the following matters:

> (A)(1) Except as otherwise provided by law, the probate court has exclusive jurisdiction:
>
> ***
>
> (e) To appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts;
>
> * * *
>
> (m) To direct and control the conduct of fiduciaries and settle their accounts;
>
> * * *
>
> (C) The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.

{¶12} In *Schucker v. Metcalf*, 22 Ohio St.3d 33, 488 N.E.2d 210 (1986), the Supreme Court of Ohio determined that "the probate division has no jurisdiction over claims for money damages arising from allegations of fraud." *Id.* at 35; *see also Dumas v. Estate of Dumas*, 68 Ohio St.3d 405, 408, 627 N.E.2d 978 (1994) ("Even though [plaintiff] seeks an order to rescind the transfer of assets of the trust * * * which order, if granted may affect the administration of [the] probate estate, her primary aim is still the recovery of monetary damages from the alleged

fraud * * * [and] the issues raised * * * were solely within the jurisdiction of the general division * * *."); *Dallas v. Childs*, 8th Dist. Cuyahoga No. 65150, 1994 Ohio App. LEXIS 2694, 4-5 (June 23, 1994) ("As a matter of law, a probate court has no jurisdiction over a claim for money damages resulting from fraud. *Alexander v. Compton* (1978), 57 Ohio App.2d 89, 385 N.E.2d 638. *See, also, DiPaolo v. DeVictor* (1988), 51 Ohio App.3d 166, 555 N.E.2d 969").

{¶13} In *Goff v. Ameritrust Co., N.A.*, 8th Dist. Cuyahoga Nos. 65196 and 66016, 1994 Ohio App. LEXIS 1916 (May 5, 1994), this court held that the probate court's jurisdiction over the guardianship extends to all matters "touching the guardianship" under R.C. 2101.24. *Id.*, citing R.C. 2111.13(A); *see also In re Rauscher*, 40 Ohio App.3d 106, 531 N.E.2d 745 (8th Dist. 1987). The *Goff* court found that a fiduciary may be liable for monetary damages for maladministration of a decedent's or a ward's estate in probate court. *Id.* at 23. "An action seeking monetary damages is within the probate court's plenary power at law and clearly affects the court's direction and control of the fiduciaries' conduct and affects the court's settlement of the fiduciaries' accounts." *Id.* at 22.

Broadening of Probate Court's Jurisdiction

{¶14} More recently, the Ohio Supreme Court has embraced a "broader view of the probate court's jurisdiction." *Keith v. Bringardner*, 10th Dist. Franklin No. 07AP-666, 2008-Ohio-950, ¶ 9-11. In *State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25, 29, 647 N.E.2d 155 (1995), the Ohio Supreme Court, in noting this court's opinion in *Goff*, found:

> In essence, the *Goff* court held that (1) the probate court's plenary jurisdiction at law and in equity under R.C. 2101.24(C) authorizes any relief required to fully adjudicate the subject matter within the probate court's exclusive jurisdiction, and (2) claims for breach of fiduciary duty, which inexorably implicate control over the

> conduct of fiduciaries, are within that subject-matter jurisdiction by virtue of R.C. 2101.24(A)(1)(c) and (l). The thoughtful discussion in *Goff* suggests a basis for reevaluating the holdings in *Kindt* [*v. Cleveland Trust Co.*, 26 Ohio Misc. 1, 266 N.E.2d 84 (C.P.1971)] and *Alexander*, supra, that probate courts cannot award monetary damages.

{¶15} In *Lewis*, the court rejected a challenge to the probate court's jurisdiction to decide a claim for breach of fiduciary duties even though the relators sought money damages against the estate's executor and attorney. "Since *Lewis*, other appellate courts have rejected the proposition that probate courts cannot award monetary damages for claims that are within the exclusive jurisdiction of the probate court, such as claims based upon the conduct of a guardian." *Keith* at ¶ 11.

{¶16} This court took note of Ohio courts' broadening of the probate court's jurisdiction in *Rowan v McLaughlin*, 8th Dist. Cuyahoga No. 85665, 2005-Ohio-3473, ¶ 9:

> Relying on *Kindt v. Cleveland Trust Co.* (1971), 26 Ohio Misc. 1, 266 N.E.2d 84, and *Alexander v. Compton* (1978), 57 Ohio App.2d 89, 385 N.E.2d 638, Rowan claims that the probate court lacks jurisdiction to award money damages on his claims. However, in *Goff v. Ameritrust Co.* (May 5, 1994), Cuyahoga App. Nos. 65196 and 66016, 1994 Ohio App. LEXIS 1916, this court found *Kindt* and *Alexander* to be unpersuasive and reasoned that the probate court has authority to award money damages pertaining to claims within its exclusive jurisdiction, such as claims relating to the conduct of a guardian.

The *Rowan* court further held: "The probate court has exclusive jurisdiction over the claims pertaining to McLaughlin [the guardian of Rowan's mother] and the ward." *Id.* at ¶ 11.

{¶17} In *Rheinhold v. Reichek*, 8th Dist. Cuyahoga No. 99973, 2014-Ohio-31, the plaintiff alleged conversion, fraud, negligence, and legal malpractice, civil liability, breach of fiduciary duty, and statutory liability against a former guardian, attorney, and financial institution. This court, relying on *Goff*, *Moser*, and *Lewis*, rejected the proposition that probate courts cannot award monetary damages for claims that are within the exclusive jurisdiction of the probate court, such as claims based upon the conduct of a guardian. *Rheinhold* at ¶ 12. All of the plaintiff's claims arose out of alleged conduct by her mother *as guardian*, the attorney for the guardian, and the bank's handling of the funds.

{¶18} Koscianski argues that the probate court has exclusive jurisdiction and control of a guardian and all things that "touch the guardianship"; therefore, Sosnoswsky's claim that the case belongs solely in the general division is incorrect. The cases mentioned above, as well as the other Ohio cases we have reviewed, concern actions against a fiduciary of an estate and/or ward. The issue in this case differs. We are called upon to determine whether a probate court has exclusive jurisdiction, to the exclusion of the common pleas court general division, to hear and determine a cause of action brought by a ward's child (or other beneficiary) against the ward's estate for actions of the *ward.*

{¶19} Sosnoswsky's complaint alleges that her mother, Lieber, a ward of the state, was the perpetrator of the offending acts — the complaint refers to improper acts that Lieber did and did not do with the money Sosnoswsky claims belonged to her and various financial institutions handling of the funds. Importantly, the complaint does not call into question the conduct of Koscianski as Lieber's guardian.

{¶20} The above cited case are all distinguishable because they involved claims relating to the actions of a fiduciary, and not a ward. In this case, the claims relate entirely to the conduct of

the ward.

{¶21} R.C. 2101.24 does not provide for jurisdiction over claims made against a ward. The majority of the cases we have reviewed have cited to R.C. 2101.24(A)(1)(c), (e), and (m) to prove statutory authority for fraud cases brought in probate court. These subsections provide that probate court has exclusive jurisdiction to direct and control the conduct and settle the accounts of (c) executors; (e) guardians, conservators, and testamentary trustees, and (m) fiduciaries.

{¶22} We recognize that, pursuant to R.C. 2111.13, the guardian of a ward has a duty to "protect and control the person of the ward." R.C. 2111.13(A)(1). We do not find that this is sufficient, however, to convey exclusive jurisdiction to the probate court over a ward's conduct, especially since, in this case, the allegations stem from actions that occurred *prior* to the guardianship being established.

{¶23} Therefore, the probate court did not have exclusive jurisdiction over Sosnoswsky's claims.

Jurisdictional Priority Rule Does Not Apply

{¶24} We have determined that the probate court does not have exclusive jurisdiction over the claims. We further find that the probate court did not have concurrent jurisdiction over Sosnoswsky's claims; therefore, even though Sosnoswsky first filed her complaint in probate court, the jurisdictional-priority rule does not apply.

{¶25} "The jurisdictional priority rule prevents the prosecution of two actions involving the same controversy in two courts of concurrent jurisdiction at the same time." *Davis v. Cowan Sys.*, 8th Dist. Cuyahoga No. 83155, 2004-Ohio-515, ¶ 11. "'The jurisdictional priority rule provides that 'as between [state] courts of concurrent jurisdiction, the tribunal whose power is

first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties."' *Id.*, quoting *State ex rel. Racing Guild of Ohio v. Morgan*, 17 Ohio St.3d 54, 56, 476 N.E.2d 1060 (1985), quoting *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279, 364 N.E.2d 33 (1977), syllabus.

{¶26} But, as stated, probate court is a court of limited jurisdiction. By statute, probate court only has concurrent jurisdiction with the general division if:

> (a) If jurisdiction relative to a particular subject matter is stated to be concurrent in a section of the Revised Code or has been construed by judicial decision to be concurrent, any action that involves that subject matter;
>
> (b) Any action that involves an inter vivos trust; a trust created pursuant to section 5815.28 of the Revised Code; a charitable trust or foundation; subject to divisions (A)(1)(t) and (y) of this section, a power of attorney, including, but not limited to, a durable power of attorney; the medical treatment of a competent adult; or a writ of habeas corpus;
>
> (c) Subject to section 2101.31 of the Revised Code, any action with respect to a probate estate, guardianship, trust, or post-death dispute that involves any of the following:
>
> (i) A designation or removal of a beneficiary of a life insurance policy, annuity contract, retirement plan, brokerage account, security account, bank account, real property, or tangible personal property;
>
> (ii) A designation or removal of a payable-on-death beneficiary or transfer-on-death beneficiary;
>
> (iii) A change in the title to any asset involving a joint and survivorship interest;
>
> (iv) An alleged gift;
>
> (v) The passing of assets upon the death of an individual otherwise than by will, intestate succession, or trust.

R.C. 2101.24(B)(1).

{¶27} None of the enumerated exceptions in 2101.24(B)(1) confer probate court

concurrent jurisdiction over this matter. Therefore, the jurisdictional- priority rule does not apply to the matter at hand.

{¶28} Based on this record, jurisdiction was proper in the general division of the common pleas court. Thus, the trial court erred when it dismissed Sosnoswsky's complaint for lack of subject matter jurisdiction. The sole assignment of error is sustained.

{¶29} The trial court's decision is vacated and Common Pleas Case No. CV-16-873745 is hereby reinstated. Case remanded for proceedings in accordance with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

LARRY A. JONES, SR., JUDGE

MELODY J. STEWART, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

[Cite as *UBS Fin. Servs.,Inc. v. Lacava,* 2018-Ohio-3055.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106461

UBS FINANCIAL SERVICES, INC.

PLAINTIFF-APPELLEE

vs.

ALBERT V. LACAVA, JR., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-868794

BEFORE: Boyle, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: August 2, 2018

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MARY J. BOYLE, P.J.:

{¶1} Defendant-appellant, Mary Ellen Lacava, appeals the trial court's order granting summary judgment to the plaintiff-appellee, UBS Financial Services, Inc. She raises nine assignments of error for our review:

> 1. Trial court erred by ignoring Appellant_Transferee's and Appellant_Debtor Mr. Lacava submitted evidence satisfying the necessary two elements listed in R.C. 1336.08(A) for a transfer to not be fraudulent under R.C. 1336.04 by a Transferee, irrespective of the outcome to the claims against the debtor.
>
> 2. Trial court erred by ignoring Appellant_Transferee's and Appellant_Debtor Mr. Lacava submitted evidence satisfying the necessary element listed in R.C. 1336.08(E)(1) for a transfer to not be fraudulent under 1336.05 by a Transferee, irrespective of the outcome to the claims against the debtor.
>
> 3. Trial court erred by ignoring Appellant_Transferee's and Appellant_Debtor Mr. Lacava submitted evidence satisfying the necessary element listed in R.C. 1336.08(E)(2) for a transfer to not be fraudulent under section R.C. 1336.05 by a Transferee, irrespective of the outcome to the claims against the debtor.

4. Trial court erred by ignoring Appellant_Transferee's submitted evidence satisfying the necessary element listed in R.C. 1336.08(C)(1) for her statutory law protected right to retain any interest in the asset transferred, irrespective of the outcome to the claims against the debtor.

5. Trial court erred by ignoring Appellant_Transferee's and Appellant_Debtor Mr. Lacava submitted evidence satisfying the necessary element listed in R.C. 1336.08(C)(2) for her statutory law protected right to retain any interest in the asset transferred, irrespective of the outcome to the claims against the debtor.

6. Trial court erred in not following the statutory language of R.C. 1336.01(A)(3), (G), (K) in regards to Appellant_Transferee Mrs. Lacava, irrespective of the outcome to the claims against the debtor.

7. Trial court erred in not applying the sections in R.C. 1336.08 detailed in Error #1, and either, #2 or #3, which nullifies R.C. 1336.08(B)(1)(a) in respect to Appellant_Transferee Mrs. Lacava, irrespective of the outcome to the claims against the debtor.

8. The trial court erred in violating the law under the Consumer Credit Protection Act ("CCPA") not allowing any income to the Transferee, Mrs. Lacava, and hence, the Lacava family.

9. Trial court erred in not following the statutory exemptions of R.C. 2329.66(A)(3) for Appellant_Transferee Mrs. Lacava and dependent 60 year old brother with mental health issues and unable to work.

{¶2} Finding no merit to her assignments of error, we affirm.

I. Procedural History and Factual Background

{¶3} Mrs. Lacava's husband, Albert Lacava, previously worked for UBS. During his employment, specifically on or around August 27, 2004, Mr. Lacava received two loans from UBS, secured through promissory notes. On July 17, 2008, UBS terminated Mr. Lacava's employment. As of his termination date, Mr. Lacava had not yet satisfied the full amount of the promissory notes.

{¶4} On December 26, 2009, Mr. Lacava filed a Statement of Claim with the Financial Industry Regulatory Authority ("FINRA") against UBS and certain UBS employees, asserting claims for breach of contract, breach of covenant of good faith and fair dealing, failure

to supervise, tortious interference, wrongful termination, libel, and slander. UBS filed an answer and a counterclaim, alleging that Mr. Lacava breached the promissory notes and still owed the outstanding and unforgiven balance on those notes. The FINRA panel held a six-day evidentiary hearing on the matter. On February 9, 2010, the FINRA panel denied and dismissed Mr. Lacava's claims and awarded UBS $196,953.89 ("the Award") for its counterclaim.

{¶5} Prior to the arbitration proceedings, on August 22, 2008, Mr. Lacava formed his own investment-management company, Assurance Investment Management, L.L.C. ("AIM"). According to the original operating agreement for AIM, AIM's principal place of business was his residential address.[1] Mr. Lacava was the sole member of AIM, had full management rights, and was entitled to all of the company's profits.

{¶6} On January 21, 2010, however, before the FINRA panel announced its decision in favor of UBS, Mr. Lacava amended the operating agreement for AIM, changing it to a multimember limited liability company. Under the new operating agreement, Mr. Lacava's wife, Mary Ellen Lacava, not only became a member of AIM but also obtained 94.8 percent ownership interest. According to the amended operating agreement, Mrs. Lacava made a capital contribution of $140,000 to AIM. Further, the operating agreement established Mr. Lacava as the president and treasurer of AIM and Mrs. Lacava as the secretary.

{¶7} After the FINRA panel released its decision, UBS requested confirmation of the award from the Cuyahoga County Court of Common Pleas on April 1, 2010. On June 17, 2010, the common pleas court entered default judgment against Mr. Lacava, who failed to respond or contest UBS's request.

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[1] The original operating agreement was amended and restated on February 28, 2009.

{¶8} Despite UBS's multiple attempts to collect on its judgment against Mr. Lacava, it was unable to recover. While pursuing satisfaction of its judgment, UBS discovered AIM's restated January 21, 2010 operating agreement, which gave Mrs. Lacava majority ownership interest in AIM and effectively shielded Mr. Lacava's assets in AIM from UBS.

{¶9} As a result, UBS filed a complaint in January 2012 against Mr. and Mrs. Lacava alleging that Mr. Lacava fraudulently transferred his ownership interest to his wife in an effort to defraud UBS. In June 2015, however, UBS voluntarily dismissed its complaint without prejudice.

{¶10} On September 9, 2016, UBS filed a second complaint against Mr. Lacava, Mrs. Lacava, and AIM. In its complaint, UBS set forth one count for a request for charging order under R.C. 1705.19, one count for a request for appointment of receiver under R.C. 2735.01, and one count to set aside the transfer of ownership of AIM as a fraudulent transfer under R.C. 1336.04(A). UBS also subsequently filed a motion for appointment of receiver that the court denied.

{¶11} All of the parties filed motions for summary judgment. The trial court granted UBS's motion for summary judgment, denied Mr. and Mrs. Lacava's motions for summary judgment, and granted AIM's motion for summary judgment on the issue of statute of limitations, but ordered AIM to "freeze any assets and accounts immediately[, which would] only be released to satisfy th[e] judgment." Additionally, in its order, the trial court stated:

> The court grants the following relief in favor of UBS and against Mr. Lacava and Mrs. Lacava, and against AIM so far as it holds assets which are recoverable to satisfy this judgment and the prior judgment obtained by UBS:
>
> 1. The charging order against the member interests of Mr. Lacava and Mrs. Lacava in AIM is granted;

2. The transfer of money to AIM in the amount of $140,000.00 is voided and the money is to be held for purposes of satisfying this judgment;

3. UBS is awarded attachment of all transferred assets in AIM, pursuant to R.C. 1336.07(A)(2);

4. AIM, Mr. Lacava, Mrs. Lacava, and any and all parties acting in concert with any of these parties are enjoined from any disposition of any assets of AIM, Mr. Lacava, or Mrs. Lacava;

5. Compensatory damages are granted in the amount of $196,963.89;

6. Interest at the legal rate is applied to the compensatory damages from January 21, 2010, the date of the fraudulent transfer[.]

The court also awarded $98,481.95 for punitive damages against Mr. Lacava and $50,155 and $480.33 for attorney fees and expenses against all of the defendants. The trial court assessed court costs to the Lacavas and AIM as well.

{¶12} It is from this judgment that Mrs. Lacava now appeals.[2]

II. Law and Analysis

{¶13} In her assignments of error, Mrs. Lacava contests the trial court's order granting summary judgment to UBS as well as the remedies the trial court awarded to UBS. Specifically, her first seven assignments of error argue that the trial court erred when it failed to apply R.C. 1336.08(A), (C), and (E), and her eighth and ninth assignments of error contest the remedies.

{¶14} An appellate court reviews a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). De novo review means that this court independently "examine[s] the evidence to determine if as a matter

[2] Mr. Lacava and AIM also separately appealed the trial court's order. Those appeals are currently pending before the court in 8th Dist. Cuyahoga Nos. 106260 and 106256. Mr. Lacava appeals the trial court's order granting UBS summary judgment. Even though it won on summary judgment, AIM appeals the trial court's order, arguing that the trial court's order requiring AIM to "freeze any assets and accounts immediately" was error.

of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). In other words, we review the trial court's decision without according the trial court any deference. *Smith v. Gold-Kaplan*, 8th Dist. Cuyahoga No. 100015, 2014-Ohio-1424, ¶ 9, citing *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 699 N.E.2d 534 (8th Dist.1997).

{¶15} Under Civ.R. 56(C), summary judgment is properly granted when (1) "there is no genuine issue as to any material fact"; (2) "the moving party is entitled to judgment as a matter of law"; and (3) "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[.]" *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Because it ends litigation, courts should carefully award summary judgment only after resolving all doubts in favor of the nonmoving party and finding that "reasonable minds can reach only an adverse conclusion" against the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

{¶16} "The burden of showing that no genuine issue exists as to any material fact falls upon the moving party. Once the moving party has met his burden, it is the non-moving party's obligation to present evidence on any issue for which that party bears the burden of production at trial." *Robinson v. J.C. Penney Co.*, 8th Dist. Cuyahoga Nos. 62389 and 63062, 1993 Ohio App. LEXIS 2633, 14 (May 20, 1993), citing *Harless* and *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). "The moving party is entitled to summary judgment if the nonmoving party fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Brandon/Wiant Co.*

v. Teamor, 125 Ohio App.3d 442, 446, 708 N.E.2d 1024 (8th Dist.1998), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

{¶17} Ohio's Uniform Fraudulent Transfer Act ("UFTA"), set forth in R.C. Chapter 1336, creates a right of action for a creditor to set aside an allegedly fraudulent transfer of assets. *Yoo v. Ahn*, 8th Dist. Cuyahoga No. 105406, 2018-Ohio-1291, ¶ 11. A creditor seeking to vacate a fraudulent transfer must prove the essential elements of fraudulent conveyance by clear and convincing evidence. *Huntington Natl. Bank v. Ginn*, 8th Dist. Cuyahoga No. 70392, 1996 Ohio App. LEXIS 5828, 13 (Dec. 26, 1996). Clear and convincing evidence is

> that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

Cross v. Ledford, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶18} "If a transfer is fraudulent, then a creditor has the right to sue the original transferee and any subsequent transferee for the value of the transferred property." *Yoo* at ¶ 12, citing R.C. 1336.08(B) and *Esteco, Inc. v. Kimpel*, 7th Dist. Columbiana No. 07 CO 3, 2007-Ohio-7201. The UFTA identifies certain transfers from a debtor to a transferee as fraudulent. Specifically, R.C. 1336.04 states,

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before, or within a reasonable time not to exceed four years after, the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:

> (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
>
> (b) The debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

{¶19} Put simply, to set forth a claim under R.C. 1336.04, a creditor must show (1) a conveyance or incurring of a debt, (2) made with actual intent to defraud, hinder, or delay, and (3) present or future creditors. *Saez Assocs. v. Global Reader Servs.*, 8th Dist. Cuyahoga No. 96555, 2011-Ohio-5185, ¶ 10.

{¶20} Because proof of actual intent is often impossible to acquire, creditors may establish a debtor's intent to defraud, hinder, or delay through "badges of fraud," which are set forth in R.C. 1336.04(B). *Saez Assocs.* at ¶ 12. The badges include:

> (1) Whether the transfer or obligation was to an insider;
>
> (2) Whether the debtor retained possession or control of the property transferred after the transfer;
>
> (3) Whether the transfer or obligation was disclosed or concealed;
>
> (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) Whether the transfer was of substantially all of the assets of the debtor;
> (6) Whether the debtor absconded;
>
> (7) Whether the debtor removed or concealed assets;
>
> (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;

> (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

R.C. 1336.04(B).

{¶21} "While the existence of one or more badges does not establish a per se fraudulent transfer, a creditor need not demonstrate the presence of all badges in order to carry its burden." *Seed Consultants, Inc. v. Schlichter*, 12th Dist. Fayette No. CA2011-02-002, 2012-Ohio-2256, ¶ 13, citing *Baker & Sons Equip. Co. v. GSO Equip. Leasing, Inc.*, 87 Ohio App.3d 644, 622 N.E.2d 1113 (10th Dist.1993).

{¶22} Even if a creditor cannot set forth a viable fraudulent-transfer claim requiring a showing of actual intent, that creditor may still succeed on a claim for constructive fraud, which "focuses on the effect of the transaction(s), and may exist even where the debtor has no actual intent to commit fraud." *Blood v. Nofzinger*, 162 Ohio App.3d 545, 2005-Ohio-3859, 834 N.E.2d 358, ¶ 52 (6th Dist.). "In contrast to claims involving an actual intent to commit fraud in an asset transfer, R.C. 1336.04(A)(2) permits claims for constructive fraud against future creditors." *Id.*, citing *Aristocrat Lakewood Nursing Home v. Mayne*, 133 Ohio App.3d 651, 729 N.E.2d 768 (8th Dist.1999). To set forth a claim for constructive fraud, a creditor must show that "no reasonably equivalent value was received in exchange for the transfer" and that one of the following applies:

"(a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction" or "(b) The debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." R.C. 1336.04(A)(2).

{¶23} Here, the trial court, in a written opinion, found that Mr. Lacava's transfer of his ownership interest in AIM to Mrs. Lacava constituted "the most blatant form of fraudulent conveyance this court has ever seen." The court found that nine badges of fraud existed, including those listed under R.C. 1336.04(B)(1), (2), (3), (4), (5), (7), (8), (9), and (10). The only badges the trial court found did not exist were 1336.04(B)(6) and (11), which include whether the debtor absconded and whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor. The trial court also found that the transfer constituted constructive fraud under R.C. 1336.05.

{¶24} Mrs. Lacava's assignments of error do not contest the trial court's grant of summary judgment based on its findings as to the badges of fraud or its finding of constructive fraud. As a result, we will not review the record to determine whether a genuine issue of material fact exists concerning the existence of those badges or of constructive fraud. Instead, we will move on to analyze Mrs. Lacava's arguments concerning R.C. 1336.08(A), (C), and (E).[3]

{¶25} "If the party alleging fraud is able to demonstrate a sufficient number of 'badges,' an inference of actual fraud arises and the burden then shifts to the defendant to prove that the transfer was not fraudulent." *Saez Assocs*., 8th Dist. Cuyahoga No. 96555, 2011-Ohio-5185, at ¶ 13. Once the burden shifts, the debtor may rebut the presumption of fraud if, pursuant to R.C. 1336.08(A), "he or she can demonstrate that the transfer was made in good faith and that 'reasonably equivalent value' was paid by the transferee[.]" *Blood*, 162 Ohio App.3d 545, 2005-Ohio-3859, 834 N.E.2d 358, at ¶ 50. "Where there is a lack of 'reasonably equivalent

[3] App.R. 12(A)(1)(b) states, "On an undismissed appeal from a trial court, a court of appeals shall * * * [d]etermine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16[.]" App.R. 16(A)(3) states, "The appellant shall include in its brief * * * [a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected."

value' given in exchange, the defendant fails to carry the burden of proof, and intent to defraud the creditor is established." *Id.*

{¶26} In her first and seventh assignments of error, Mrs. Lacava argues that summary judgment was improper because there is a genuine issue of material fact as to whether the transfer was made in good faith and whether she paid "reasonably equivalent value" for the ownership interest in AIM under R.C. 1336.08(A). Specifically, she argues that Mr. Lacava's transfer of the 94.8 percent ownership interest was made in good faith because Mr. Lacava expected to win in the arbitration proceedings and that her capital contributions of $140,000 to AIM constituted "reasonably equivalent value."

{¶27} "The determination of a lack of good faith does not rely solely on actual intent but can involve an inquiry into the party's motive and purpose. * * * [T]he court can consider evidence of what is reasonable [] and can evaluate any objective facts that contradict the suggestion of a subjectively honest purpose." *E. Sav. Bank v. Bucci*, 7th Dist. Mahoning No. 08 MA 28, 2008-Ohio-6363, ¶ 85, citing *Castle Properties v. Lowe's Home Ctrs., Inc.*, 7th Dist. Mahoning No. 98CA185, 2000 Ohio App. LEXIS 1229 (Mar. 20, 2000).

{¶28} As the Ohio Supreme Court noted,

> Good faith in law * * * is not to be measured always by a man's own standard of right, but by that which it has adopted and prescribed as a standard for the observance of all men in their dealings with each other. When one conveys all his property to another with the intention of hindering and delaying his creditors, or a part of them, in pursuing their legal remedies against him and his property, his conduct in law is deemed fraudulent however honestly he may have intended to deal with all his creditors, in the future. * * * The good faith of a party under such circumstances must be determined by the legal effect of what he deliberately does.

First Natl. Bank v. F.C. Trebein Co., 59 Ohio St. 316, 325, 52 N.E. 834 (1898).

{¶29} There is no genuine issue of material fact as to whether Mrs. Lacava accepted the transfer of ownership interest in AIM in good faith. Mrs. Lacava accepted 94.8 percent of the

ownership interest in AIM after paying capital contributions of $140,000 to AIM and giving no consideration to her husband despite knowing about the arbitration proceedings that her husband initiated and in which UBS filed counterclaims against her husband. That transfer occurred while the arbitration proceedings were pending and 19 days before the FINRA panel decided the arbitration proceedings in UBS's favor. Mrs. Lacava's claim that the transfer was in good faith because Mr. Lacava believed that the arbitration proceedings would come out in his favor does not create a genuine issue of material fact. *See Davis v. Cleveland*, 8th Dist. Cuyahoga No. 83665, 2004-Ohio-6621, ¶ 23 ("Generally, a party's unsupported and self-serving assertions, * * * standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. Otherwise, a party could avoid summary judgment under all circumstances solely by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party.").

{¶30} We also find that there is no genuine issue of material fact as to whether the parties exchanged "reasonably equivalent value" for the transfer of ownership interest in AIM. To satisfy R.C. 1336.08(A), the "reasonably equivalent value" must go to the debtor, who, in this case, is Mr. Lacava. Summary judgment is appropriate when the debtor is unable to show that he received consideration in exchange for the transfer. In *First Fin. Bank v. Combs,* 12th Dist. Butler No. CA2013-02-024, 2013-Ohio-4126, the court affirmed the trial court's grant of summary judgment because there was no genuine issue of material fact that the appellant-debtor "conveyed all of the assets held by the trust in return for no financial value[.]" *Id.* at ¶ 16. Similarly, in *Turner, May & Shepherd v. DeMattio*, 5th Dist. Tuscarawas No. 2005AP060038, 2006-Ohio-2050, the court affirmed the trial court's grant of summary judgment because the

appellant-debtor "admitted that she conveyed to her sister her share of the real estate that she inherited and no consideration was involved in the transfer." *Id.* at ¶ 38.

{¶31} Here, Mr. Lacava transferred 94.8 percent of his ownership interest in AIM to Mrs. Lacava for no consideration. While Mrs. Lacava argues that her capital contribution qualifies as reasonably equivalent value, that value went to AIM, not Mr. Lacava. Mrs. Lacava's argument that AIM allegedly benefitted from becoming a woman-owned company also does not prevent summary judgment on this issue because, once again, that benefit went to AIM, not Mr. Lacava, the debtor, and second, as UBS points out, Mrs. Lacava failed to offer any evidence that AIM actually benefitted from the change in ownership. As a result, we find that there is no genuine issue of material fact as to the applicability of R.C. 1336.08(A). Accordingly, we overrule Mrs. Lacava's first assignment of error.

{¶32} In her second and third assignments of error, Mrs. Lacava argues that the trial court's grant of summary judgment was improper because it ignored her evidence showing that her transfer was not fraudulent under R.C. 1336.08(E)(1) and (2).

{¶33} Mrs. Lacava did not raise this argument in the trial court below and she cannot do so for the first time on appeal. *See State ex rel. Zollner v. Indus. Comm. of Ohio*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993) ("A party who fails to raise an argument in the court below waives his or her right to raise it here.").

{¶34} Accordingly, we overrule Mrs. Lacava's second and third assignments of error. We also overrule Mrs. Lacava's seventh assignment of error, which depends on the viability of her first, second, and third assignments of error.

{¶35} In her fourth and fifth assignments of error, Mrs. Lacava argues that the trial court's order granting summary judgment was improper because it did not apply the elements

found in R.C. 1336.08(C)(1) and (2). Specifically, she argues that the trial court did not protect her rights to the interest in the assets transferred and to enforce the obligations she incurred as a result of the transfer.

{¶36} Again, Mrs. Lacava did not raise this argument in the trial court below, and she cannot do so for the first time on appeal. *See Zollner* at 278 ("A party who fails to raise an argument in the court below waives his or her right to raise it here."). Accordingly, we overrule Mrs. Lacava's fourth and fifth assignments of error.

{¶37} In her sixth assignment of error, Mrs. Lacava argues that the trial court failed to follow the statutory language of R.C. 1336.01(A)(3), (G), and (K) and failed to consider "the evidential elements of fraudulent conveyance." While not entirely clear, it seems that Mrs. Lacava's sixth assignment of error simply takes issue with the trial court's reliance on the definitions set forth in R.C. 1336.01 and then repeats the same arguments she made in her previous assignments of error concerning her alleged defenses under R.C. 1336.08(A) and (E).

{¶38} The pertinent subsections of R.C. 1336.01 identified by Mrs. Lacava define the terms "affiliate," "insider," and "relative." "A person who operates the business of the debtor under a lease or other agreement, or controls substantially all of the assets of the debtor" is an "affiliate." R.C. 1336.01(A)(3). If the debtor is an individual, an "insider" includes "[a] relative of the debtor." R.C. 1336.01(G). Finally, a "relative" is "an individual related by consanguinity within the third degree as determined by the common law [or] a spouse[.]" R.C. 1336.01(K).

{¶39} There are no genuine issues of material fact as to whether Mrs. Lacava is an "affiliate," an "insider," and a "relative" of Mr. Lacava. In fact, she admits to being an "insider" and "relative" in her appellate brief.

{¶40} As to Mrs. Lacava's repetitive arguments concerning her defenses under R.C. 1336.08(A) and (E), we already addressed and overruled those arguments in the previous sections. Accordingly, we overrule Mrs. Lacava's sixth assignment of error.

{¶41} In her eighth and ninth assignments of error, Mrs. Lacava argues that the trial court violated the Consumer Credit Protection Act ("CCPA") by not applying the statutory exemptions found in R.C. 2329.66(A)(3). She also summarily contests the trial court's remedies.

{¶42} The CCPA, set forth in Section 1601, et seq., Title 15 of the U.S. Code, restricts the garnishment of wages. "The [CCPA] affords debtors relief from creditors by ensuring that no more than fifty percent of a wage earner's disposable earnings can be garnished for payment of child support obligations and no more than twenty-five percent garnished for the payment of other debts." *Colwell v. Jones*, 9th Dist. Summit No. 14528, 1990 Ohio App. LEXIS 3189, 5 (Aug. 1, 1990).

{¶43} Here, the trial court's order granting relief to UBS stated:

> The court grants the following relief in favor of UBS and against Mr. Lacava and Mrs. Lacava, and against AIM so far as it holds assets which are recoverable to satisfy this judgment and the prior judgment obtained by UBS:
> 1. The charging order against the member interests of Mr. Lacava and Mrs. Lacava in AIM is granted;
>
> 2. The transfer of money to AIM in the amount of $140,000.00 is voided and the money is to be held for purposes of satisfying this judgment;
>
> 3. UBS is awarded attachment of all transferred assets in AIM, pursuant to R.C. 1336.07(A)(2);
>
> 4. AIM, Mr. Lacava, Mrs. Lacava, and any and all parties acting in concert with any of these parties are enjoined from any disposition of any assets of AIM, Mr. Lacava, or Mrs. Lacava;
>
> 5. Compensatory damages are granted in the amount of $196,963.89;
>
> 6. Interest at the legal rate is applied to the compensatory damages from January 21, 2010, the date of the fraudulent transfer[.]

The court also awarded $98,481.95 for punitive damages against Mr. Lacava and $50,155 and $480.33 for attorney fees and expenses against all of the defendants.

{¶44} After review, it is clear that the trial court did not violate the CCPA because it did not order a garnishment against Mrs. Lacava.

{¶45} Unlike the CCPA, R.C. 2329.66(A) allows individuals to "hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order" under certain circumstances. *See Daugherty v. Cent. Trust Co.*, 28 Ohio St.3d 441, 445, 504 N.E.2d 110 (1986) (explaining the difference between CCPA and R.C. 2329.66). Subsection (A)(3) allows exemption for a "person's interest, not to exceed four hundred dollars, in cash on hand, money due and payable, money to become due within ninety days, tax refunds, and money on deposit with a bank, savings and loan association, credit union, public utility, landlord, or other person, other than personal earnings." "The legislature's purpose, in exempting certain property from court action brought by creditors, was to protect funds intended primarily for maintenance and support of the debtor's family." *Daugherty*, citing *Dennis v. Smith*, 125 Ohio St. 120, 180 N.E. 638 (1932).

{¶46} Mrs. Lacava's argument regarding R.C. 2329.66(A) concerns exemptions that could possibly come into effect upon execution of a judgment. Execution in this case, however, has not yet occurred. Accordingly, we overrule Mrs. Lacava's eighth and ninth assignments of error.

{¶47} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, SR., J., CONCUR