# 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: What is Tortious Interference?

### Libel

***Grubb & Associates LPA v. Brown*, 9th Dist. Lorain No. 17CA011201, 2018-Ohio-3526.**

This was an appeal of the trial court's decision to grant a motion to dismiss in a libel case. In July 2014, a local newspaper published an article entitled "Former client sues attorney". The article described the claims filed against the plaintiff, as well as the underlying facts in support of the claims. The article also included statements from the client's attorney, the defendant in this action.

The plaintiff then sued the newspaper and the former client's attorney alleging defamation per se (libel) and tortious interference with a business relationship. The defendants moved to dismiss, and the trial court granted the motion.

Plaintiffs appealed, and on appeal the Ninth Appellate District affirmed. In so ruling, the court found that the newspaper had only printed factual assertions and matters and therefore had not made a false statement of fact as required to state a claim for libel.

***The Bullet Point:*** To establish a claim for libel, a party must demonstrate five elements:

(1) that a false statement of fact was made,
(2) the statement was defamatory,
(3) the statement was published,
(4) the plaintiff suffered injury as a proximate result of the publication, and
(5) the defendant acted with the requisite degree of fault in publishing the statement.

Whether a statement is actionable for libel is a question for a court to decide. Written matter, such as the article at issue in this case, "is libelous per se if, on its face, it reflects upon a person's character in a manner that will cause him to be ridiculed, hated, or held in contempt; or in a manner that will injure him in his trade or profession."

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### Standing to Foreclose

***HSBC Bank USA v. Brinson*, 9th Dist. Summit No. 28783, 2018-Ohio-3467.**

This was an appeal of the trial court's decision to grant a mortgage lender summary judgment in a foreclosure action. The defendant claimed that the evidence established that the plaintiff lacked standing to foreclose. While the trial court disagreed, the Ninth Appellate District reversed, finding that a question of fact existed as to when the lender came into possession of the promissory note as required to establish its standing to foreclose.

***The Bullet Point:*** A plaintiff in a foreclosure action must have standing at the time it files the complaint in order to invoke the jurisdiction of the court. In the Ninth Appellate District, in order to have standing to foreclose a mortgage and to seek a judgment on a note, the plaintiff must hold both the note and the mortgage prior to filing the complaint. To establish one is the "holder" of a promissory note, it must be established that the note was indorsed in blank or to that person and that the holder had possession prior to the commencement of a lawsuit. This sometimes requires evidence of when and how the individual or entity came into possession of the note. While courts are split on the type of evidence needed to establish possession of a promissory note, in the Ninth Appellate District something more than a vague statement that the lender had possession "at the time of filing the complaint" is typically needed.

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## Law of the Case

***Keybank N.A. v. Thalman*, 8th Dist. Cuyahoga No. 106250, 2018-Ohio-3367.**

This case involved the application of the "law of the case doctrine." The underlying action involved various disputes over how a trust and its assets should be managed by the trustee, KeyBank. The dispute resulted in a lawsuit and various claims filed against the trustee and the beneficiaries of the trust. Eventually, KeyBank was awarded summary judgment and the beneficiaries appealed. On appeal the Eighth Appellate District reversed, and the case was remanded. A trial then occurred and again KeyBank was awarded judgment. The beneficiaries appealed a second time and for a second time the Eighth Appellate District reversed, this time on the basis of the law of the case doctrine.

***The Bullet Point:*** "The law-of-the-case doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." The law-of-the-case doctrine is a rule of practice that ensures consistency of results in a case, avoids endless litigation of settled issues, and preserves the structure of superior and inferior courts as designed by the Ohio Constitution.

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## Tortious Interference with a Business Relationship

***N. Chemical Blending Corp. v. Strib Industries, Inc.*, 8th Dist. Cuyahoga No. 105911, 2018-Ohio-3364.**

This was an appeal of the trial court's decision to grant the defendant summary judgment. Plaintiff operated a chemical blending company, and the defendant does similar work. For many years the plaintiff would subcontract with the defendant for customers who required smaller packaging. Defendant, in turn, was paid a certain percentage for the work it did. Eventually the parties entered into a confidentiality/non-disclosure agreement. Thereafter, plaintiff entered into a relationship with another company and had the defendant, pursuant to the subcontract, perform the work. A few years later, that company ceased doing work with the plaintiff and began to work directly with the

defendant. Plaintiff eventually sued the defendant for, among other things, tortious interference with business relations.

The trial court granted defendant's motion for summary judgment, and the plaintiff appealed. On appeal the Eighth Appellate District affirmed. Regarding the tortious interference claim, the court found that there was no evidence that the defendant used improper means to terminate the plaintiff's relationship with its client.

***The Bullet Point:*** "The elements of a tortious interference with a business relationship claim require

(1) a business relationship;
(2) the wrongdoer's knowledge of the relationship;
(3) the wrongdoer's intentional and improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship;
(4) a lack of privilege; and
(5) resulting damages."

Tortious interference with a business relation occurs when "a person, without privilege, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship, or perform a contract with another."

"Whether the business relationship is an at-will relationship does not in and of itself preclude a finding that the defendant tortiously interfered with the business relationship and, therefore, is not dispositive of the claim.[…] On the other hand, interference with the business relationship alone is insufficient to sustain a cause of action for tortious interference." Rather, courts look at a totality of the circumstances, including "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties."

**[Cite as *Grubb & Assocs., LPA v. Brown*, 2018-Ohio-3526.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF LORAIN | ) | |

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| GRUBB & ASSOCIATES LPA | C.A. No. 17CA011201 |
| Appellants | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| STEPHEN J. BROWN, ESQ. | COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO |
| Appellees | CASE No. 16CV191158 |

DECISION AND JOURNAL ENTRY

Dated: September 4, 2018

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SCHAFER, Presiding Judge.

**{¶1}** Plaintiffs-Appellants, Natalie F. Grubb, Esq. ("Attorney Grubb") and Grubb & Associates, L.P.A. (collectively "Grubb") appeal the decision of the Lorain County Court of Common Pleas granting a Civ.R. 12(B)(6) motion to dismiss in favor of Defendant-Appellee, Medina County Publications, Inc. (the "Medina Gazette"). We affirm.

I.

**{¶2}** On July 18, 2014, the Medina Gazette published an article entitled "Former client sues attorney[.]" According to the article, Grubb's former client, Amanda France, had filed a lawsuit accusing Grubb of fraud, breach of duty, and failure to provide competent services. The article went on to describe the allegations Amanda France made in her complaint against Grubb. The article also reported on statements made by Amanda France's attorney, Stephen Brown, regarding the claims alleged in Amanda France's action against Grubb.

**{¶3}** Thereafter, on December 13, 2016, Grubb filed suit against the Medina Gazette alleging claims of defamation per se and tortious interference with a business relationship.[1] Grubb filed her first amended complaint (the "complaint") on June 15, 2017, which asserted only two claims, counts two and three, against the Medina Gazette. In the complaint, Grubb claimed that the Medina Gazette published a defamatory article that "falsely accused [Grubb] by numerous allegations that on their face reflect upon Attorney Grubb's character in a manner that will cause her to be ridiculed, hated, held in contempt, or in a manner that will injure her in her trade or profession as an attorney." Further, Grubb claimed that the Medina Gazette tortiously interfered with Grubb's "existing business relationship" with Grubb's "then client, John France." Grubb explains in the complaint that John France was the husband of Amanda France—the former client who filed the lawsuit against Grubb prompting the article in the Medina Gazette.

**{¶4}** The Medina Gazette responded with a Civ.R. 12(B)(6) motion seeking dismissal of counts two and three of the complaint. Grubb opposed the motion. The trial court granted the motion, finding that Grubb failed to state claims, for defamation and tortious interference with a business relationship, upon which relief could be granted. By way of the August 29, 2017 journal entry, the trial court dismissed Grubb's claims against the Medina Gazette.

**{¶5}** Grubb timely appealed the trial court's decision, asserting three[2] assignments of error. For ease of analysis, we consider the assignments of error out of order.

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[1] Grubb also asserted claims against other named defendants, attorneys Stephen J. Brown and Jennifer Matyac, however, those parties and the associated claims are not relevant to this appeal.

[2] We note that the "statement of assignments of error" in Grubb's brief references a fourth assignment of error purporting to challenge the trial court's grant of a summary judgment motion. However, Grubb did not present that assignment of error or argue it in the brief. Moreover, our review of the record reflects that there has been no summary judgment ruling in this matter.

II.

**Assignment of Error II**

**The trial court erred in granting the [Medina] Gazette's motion to dismiss when Count II of the first amended complaint is sufficient to state a claim against the [Medina] Gazette for libel/defamation per se as a matter of law.**

**{¶6}** In the second assignment of error, Grubb submits that the trial court erred in dismissing the claim of libel—defamation per se—for failure to state a claim. The trial court determined that the Medina Gazette article reported the allegations actually made in Amanda France's complaint, but did not assert the truth of those allegations. The trial court concluded, inter alia, that the pleadings established that the article, as presented, was true, and therefore not actionable. Grubb challenges the trial court's determination and argues that the complaint sufficiently stated a claim. We disagree.

**{¶7}** This Court reviews an order granting a Civ.R. 12(B)(6) motion to dismiss de novo. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St. 3d 79, 2004-Ohio-4362, ¶5. A Civ.R. 12(B)(6) motion tests the sufficiency of the complaint, and dismissal is appropriate where the complaint "fail[s] to state a claim upon which relief can be granted." Regarding sufficiency, notice pleading only requires that the complaint "shall contain * * * a short and plain statement of the claim showing that the party is entitled to relief[.]" Civ.R. 8(A). However, "the complaint must still set forth operative facts to give the opposing party 'fair notice of the nature of the action.'" *Vagas v. City of Hudson*, 9th Dist. Summit No. 24713, 2009-Ohio-6794, ¶ 10, quoting *Mogus v. Scottsdale Ins. Co*., 9th Dist. Wayne Nos. 03CA0074, 04CA0002, 2004-Ohio-5177, ¶ 15. "Moreover, 'a complaint must be more than 'bare assertions of legal conclusions.'" *Id*. quoting *Copeland v. Summit Cty. Probate Court*, 9th Dist. Summit No. 24648, 2009-Ohio-4860, ¶ 10.

**{¶8}** In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). Before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling her to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. In determining a motion pursuant to Civ.R. 12(B)(6), the court cannot rely on evidence or allegations outside of the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 1997-Ohio-169. However, "[m]aterial incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss." *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, fn. 1 (1997)

**{¶9}** Grubb claims that the allegedly defamatory article published by the Medina Gazette is libelous per se. To establish a claim for libel, Grubb must demonstrate five elements: (1) that a false statement of fact was made, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff suffered injury as a proximate result of the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement. *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, ¶ 77. Whether or not certain statements alleged to be defamatory are actionable is a matter for the court to decide. *Id*. at ¶ 78, quoting *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 372 (1983). Written matter, such as the article at issue, "is libelous *per se* if, on its face, it reflects upon a person's character in a manner that will cause him to be ridiculed, hated, or held in contempt; or in a manner that will injure him in his trade or profession." *Gosden v. Louis*, 116 Ohio App.3d 195, 207 (9th Dist.1996).

**{¶10}** We begin our analysis by considering the first element of a claim of libel: whether the Medina Gazette made a false statement of fact. *Leadscope* at ¶ 77. The "Background" section of Grubb's complaint precedes the stated causes of action and includes a subsection entitled "The Defamatory Article in the Medina Gazette" which summarizes and quotes portions of the article. Those portions of the article that Grubb references either report statements made by Amanda France's attorney, Stephen Brown, or describe the allegations contained in Amanda France's lawsuit. Within this subsection there is no indication which, if any, of these quoted statements Grubb believes to be false.

**{¶11}** In count two of the complaint, Grubb asserts the claim of libel/defamation per se and, in addition to incorporating all preceding paragraphs by reference, states the following:

> 54. The [a]rticle was false and defamatory per se, as it falsely accused [Grubb] by numerous allegations that on their face reflect upon Attorney Grubb's character in a manner that will cause her to be ridiculed, hated, held in contempt, of in a manner that will injure her in her trade or profession as an attorney.
>
> 55. The [Medina] Gazette could have been [sic] easily verified that Amanda France had no standing to bring her action against [Grubb] and that the [m]ortgage [d]eed was signed by John France.
>
> 56. The [a]rticle is further false and defamatory per se because it accuses Attorney Grubb of mortgage fraud, which is a criminal offense of moral turpitude.
>
> 57. The [a]rticle was published without privilege in the [Medina] Gazette, a Medina County publication that is widely circulated to the general public.
>
> 58. The [Medina] Gazette was at least negligent in failing to make any attempt to ascertain the truth or veracity of the France Complaint or statements made to the [Medina] Gazette by Brown, which a casual search of public records would have revealed as false. Further, the [Medina] Gazette has published unverified and false statements regarding [Grubb] and their clients in the [a]rticle and numerous other articles over the past several years.
>
> 59. As a direct and proximate result of the published false statements in the [Medina] Gazette, [Grubb is] presumed as a matter of law to have suffered damages * * *.

Although Grubb refers to "numerous allegations" and makes passing reference to "unverified and false statements" in the article, Grubb only identifies one statement in the article that she claims is false and defamatory per se: an accusation that Attorney Grubb engaged in mortgage fraud, a criminal offense of moral turpitude. While Grubb alleges as a matter of fact that the article contains an accusation of mortgage fraud, such a claim is belied by the article itself, which is attached to the complaint as "Exhibit F" and incorporated into the pleading. We accept as true not only the factual allegation in the complaint, but also all items properly incorporated into the complaint. *Vagas*, 2009-Ohio-6794 at ¶ 11.

**{¶12}** The article stated, in pertinent part:

> A Medina attorney who pleaded guilty to a fraud charge last year now faces a lawsuit from a former client accusing her of fraud, breach of duty[,] and failure to provide competent services.
> Amanda France, of Tampa, Florida, filed a suit last week against attorney Natalie Grubb in Medina County Common Pleas Court. In the suit, France alleges Grubb failed to file a civil suit she was hired to prepare and accuses her of mortgage fraud.
>
> * * *
>
> The suit also alleges that Grubb acquired an open-end mortgage deed worth $130,000 on France's Florida home. According to the Hillsborough County auditor's website, the property Grubb secured the mortgage on is owned by France's husband, John France.
> Brown said Grubb took out the mortgage without notifying France or her husband.

It is clear based on a plain reading of the article attached to the complaint that the Medina Gazette does not accuse Grubb of mortgage fraud, but rather reports that Grubb's former client is suing Grubb for mortgage fraud. The article informs that Amanda France's lawsuit alleged that Grubb committed mortgage fraud by acquiring a mortgage on her home, and the reporter further notes that the home appeared to be in the name of John France only. Such statements are verifiably true because Grubb also attached a copy of Amanda France's lawsuit to the complaint

as "Exhibit E" and incorporated it into the pleading. Again without accusing Grubb, the article indicates that France's attorney, Brown, said that Grubb took out the mortgage without notifying France or her husband.

**{¶13}** The essence of Grubb's argument is that the Medina Gazette published an article reporting on Amanda France's lawsuit without first investigating the allegations of the lawsuit or considering the merit of the claims. However, the article did not report any of the allegations in Amanda France's lawsuit as matter of fact, but, rather, qualified them as having been alleged in Amanda France's complaint or stated by her attorney. Grubb has not pleaded the existence of any actionable statement in the article falsely accusing Attorney Grubb of any act, let alone an act reflecting upon her character in a manner that will cause her to be ridiculed, hated, or held in contempt; or in a manner that will injure her in her trade or profession. *See Gosden*, 116 Ohio App.3d at 207. Therefore, Grubb cannot establish any set of facts to support the first element for a defamation claim that the article is libelous per se. Accordingly, we conclude that the trial court did not err in dismissing the second count of the complaint for failure to state a claim upon which relief can be granted.

**{¶14}** Grubb's second assignment of error is overruled.

**Assignment of Error III**

> **The trial court erred in granting the [Medina] Gazette's motion to dismiss when Count II[I] of the first amended complaint is sufficient to state a claim against the [Medina] Gazette for tortious interference with business relationship.**

**{¶15}** The same de novo standard of review applies to Grubb's third assignment of error, arguing that the trial court erred by dismissing its claim of tortious interference with a business relationship pursuant to Civ.R. 12(B)(6). *Rossford*, 2004-Ohio-4362, at ¶5. In the brief, Grubb contends that "John France was an ongoing client of [Grubb's firm] for years * * *"

and claims that it is "clear from the [complaint] that the business relationship terminated and that [Grubb's firm] received no more work from Mr. France following the publication of the [a]rticle." Grubb fails to develop or support this argument. However, our de novo review permits this Court to analyze this contention upon Grubb's complaint.

**{¶16}** "The elements of 'tortious interference with a business relationship are: (1) a contractual or business relationship; (2) knowledge of the relationship by the tortfeasor; (3) an intentional and improper act by the tortfeasor preventing formation of a contract, procuring breach of a contract, or termination of a business relationship; (4) lack of privilege on the part of the tortfeasor; and (5) resulting damage.'" *Bindra v. Fuenning*, 9th Dist. Summit No. 26489, 2013-Ohio-5722, ¶ 14, quoting *Tripp v. Beverly Ent.-Ohio, Inc.*, 9th Dist. Summit No. 21506, 2003-Ohio-6821, ¶ 48. A claim for tortious interference with a business relationship is similar to claim of tortious interference with a contract, "'but occurs when the result of the interference is not breach of contract, but that a third party does not enter into or continue a business relationship with the plaintiff.'" *Deems v. Ecowater Sys.*, 9th Dist. Summit No. 27645, 2016-Ohio-5022, ¶ 26, quoting *Magnum Steel & Trading L.L.C. v. Mink*, 9th Dist. Summit Nos. 26127, 26231, 2013-Ohio-2431, ¶ 10.

**{¶17}** In count three of the complaint, Grubb alleges as follows:

> 61. There was an existing business relationship between [Grubb] and their then client, John France.
>
> 62. The Defendants knew of this business relationship.
>
> 63. The Defendants have [tortiously] interfered with said business relationship, causing Mr. France to cease to conduct business with [Grubb].
>
> 64. Defendants' interference with [Grubb]'s business relationship with Mr. France was undertaken knowingly, maliciously and without right, privilege or justification, for their own economic benefit and personal gain.

**{¶18}** Examining the first element of the claim, the existence of a contractual or business relationship, Grubb alleges that that there was an *existing* business relationship with John France. Grubb then makes the bald assertion that defendant tortiously interfered with this relationship and caused Mr. France to cease to conduct business with Grubb. As this claim relates to the Medina Gazette, it appears from the complaint that the allegedly tortious conduct is publication of the article on July 18, 2014. However, in the complaint, Grubb avers that the attorney-client relationship between Grubb and John France—the only relationship alleged in the complaint—ended on May 20, 2013, citing to a court order granting a motion to withdraw as counsel attached to the complaint and incorporated into the pleadings as "Exhibit D." Thus, the facts that Grubb has alleged in the complaint, taken together with the incorporated material, establish that the only alleged relationship between Grubb and John France was not "existing" when the Medina Gazette published the article at issue, but rather that it had terminated more than a year prior to any alleged action on the part of the Medina Gazette.

**{¶19}** Specific facts alleged in the complaint refute the vague assertion that a business relationship existed, and we conclude that Grubb has failed to plead the existence of a contractual or business relationship to satisfy the first element of the claim. Further, having failed to establish the existence of a business relationship, Grubb has not alleged any facts to support a claim that the article published by the Medina Gazette caused John France to terminate or discontinue a business relationship with Grubb. Accordingly, we determine that Grubb also failed to plead the third element of a claim of tortious interference with a business relationship, and we conclude that the trial court did not err in dismissing this claim for failure to state a claim upon which relief can be granted.

**{¶20}** Grubb's third assignment of error is overruled.

**Assignment of Error I**

**The trial court erred in granting the [Medina] Gazette's motion to dismiss when [Grubb]'s first amended complaint set forth such facts that could entitled appellants to recover for the claims asserted.**

**{¶21}** In the first assignment of error Grubb contends that the complaint set forth sufficient facts to recover on claims against the Medina Gazette. However, aside from setting forth the standard of review for a motion to dismiss, Grubb makes only a single conclusory claim that

> [t]he [t]rial [c]ourt erred in going beyond the sufficiency of the [complaint] to find in favor of the [Medina] Gazette on its motion to dismiss, despite the fact that there is a set of facts, when all factual allegations in the complaint are taken as true and all reasonable inferences are drawn in favor of [Grubb], consistent with the [complaint], which would allow [Grubb] to recover on their claims against the [Medina] Gazette.

Grubb has not cited to authorities, statutes, or parts of the record, and has not presented an argument supporting this contention as required by App.R. 16(A)(7).

**{¶22}** To the extent that Grubb intended to assign error to the manner in which the trial court applied Civ.R. 12(B)(6), we find the issue moot because the proper standard has been articulated and applied in our determination of the second and third assignments of error. In so far as this assignment of error was intended to present any argument distinguishable from the second and third assignments of error, Grubb has neither presented nor supported such an argument and so we decline to consider it. *See* App.R. 12(A)(2), App.R. 16(A). An appellant's assignment of error must "provide[] this Court with a roadmap to guide our review." *Taylor v. Hamlin-Scanlon*, 9th Dist. Summit No. 23873, 2008-Ohio-1912, ¶ 12, citing App.R. 16(A). This Court will not "chart its own course" when an appellant fails to provide guidance. *Young v. Slusser*, 9th Dist. Wayne No. 08CA0019, 2008-Ohio-4650, ¶ 7. "It is not this Court's duty to

create an appellant's argument for him." *Thomas v. Bauschlinger*, 9th Dist. Summit No. 27240, 2015-Ohio-281, ¶ 8.

**{¶23}** Grubb's first assignment of error is overruled.

III.

**{¶24}** Grubb's three assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgement affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

JULIE A. SCHAFER
FOR THE COURT

CARR, J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

NATALIE F. GRUBB and MARK E. OWENS, Attorneys at Law, for Appellants.

JOHN T. MURPHY and MAIA JERIN, Attorneys at Law, for Appellees.

MONICA L. DIAS, Attorney at Law, for Appellee.

**[Cite as *H.S.B.C. Bank U.S.A. v. Brinson*, 2018-Ohio-3467.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| HSBC BANK USA<br><br>Appellee<br><br>v.<br><br>EVIS BRINSON, et al.<br><br>Appellants | C.A. No. 28783<br><br><br><br>APPEAL FROM JUDGMENT<br>ENTERED IN THE<br>COURT OF COMMON PLEAS<br>COUNTY OF SUMMIT, OHIO<br>CASE No. CV-2015-10-4994 |

DECISION AND JOURNAL ENTRY

Dated: August 29, 2018

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CALLAHAN, Judge.

**{¶1}** Appellants, Evis and Alisha Brinson, appeal from the judgment of the Summit County Common Pleas Court in favor of Appellee, HSBC Bank USA ("HSBC Bank"). For the reasons set forth below, this Court reverses and remands.

I.

**{¶2}** HSBC Bank filed a complaint to foreclose on the Brinsons' residential mortgage and to obtain a personal judgment against Mr. Brinson on the note. HSBC Bank moved for summary judgment on the complaint. The Brinsons opposed the summary judgment motion by arguing that HSBC Bank lacked standing to bring the foreclosure action and HSBC Bank was estopped from obtaining a judgment against Mr. Brinson in the full amount due to a partial loan forgiveness. The trial court struck the Brinsons' cross-motion for summary judgment and supplement in support of their summary judgment. Additionally, the trial court denied the

Brinsons' motion for reconsideration as to its prior order and denied their motion to submit additional evidence.

**{¶3}** After a bankruptcy stay and a stay for a short sale review, the trial court granted HSBC Bank's motion for summary judgment. The Brinsons timely appeal from this judgment entry, asserting two assignments of error.

II.

**ASSIGNMENT OF ERROR NO. 1**

> THE TRIAL COURT ERRED IN GRANTING [HSBC BANK'S] MOTION FOR SUMMARY JUDGMENT WHEN [HSBC BANK] COULD NOT ESTABLISH STANDING.

**{¶4}** The Brinsons argue that the trial court erred in granting summary judgment to HSBC Bank because it could not establish standing due to a broken chain of title. This Court agrees.

**{¶5}** Appellate courts consider an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court uses the same standard that the trial court applies under Civ.R. 56(C), viewing the facts of the case in the light most favorable to the nonmoving party and resolving any doubt in favor of the nonmoving party. *See Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983). Accordingly, this Court stands in the shoes of the trial court and conducts an independent review of the record.

**{¶6}** Summary judgment is proper under Civ.R. 56 when: (1) no genuine issue as to any material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party,

reasonable minds can only reach one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

**{¶7}** Summary judgment consists of a burden-shifting framework. The movant bears the initial burden of demonstrating the absence of genuine issues of material fact concerning the essential elements of the nonmoving party's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* at 292-293. Once the moving party satisfies this burden, the nonmoving party has a reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial." *Id.* at 293, quoting Civ.R. 56(E). The nonmoving party "may not rest upon the mere allegations or denials of his pleadings," but instead must submit evidence as outlined in Civ.R. 56(C). *Id.*, quoting Civ.R. 56(E).

**{¶8}** The plaintiff moving for summary judgment in a foreclosure action must present

> evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due.

*The Bank of New York Mellon v. Bridge*, 9th Dist. Summit No. 28461, 2017-Ohio-7686, ¶ 10, quoting *Bank of Am., N.A. v. Edwards*, 9th Dist. Lorain Nos. 15CA010848, 15CA010851, 2017-Ohio-4343, ¶ 10. The Brinsons allege that HSBC Bank failed to meet its *Dresher* burden with regard to its "right to enforce the mortgage [and the note] via an unbroken series of transfers." To support their position, the Brinsons rely upon a 2010 Loan Modification which was not included in the documents relied upon by HSBC Bank to establish its standing to file the foreclosure complaint and the unbroken chain of title. The Brinsons' reliance upon the 2010 Loan Modification is appropriate for consideration once the *Dresher* burden shifts to them to

create a genuine issue of material fact. Because this Court must first determine whether HSBC Bank met its initial *Dresher* burden, we will initially limit out review to the documents produced by HSBC Bank in support of its motion for summary judgment.

**{¶9}** A plaintiff in a foreclosure action must have standing at the time it files the complaint in order to invoke the jurisdiction of the court. *See Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 41. In order to have standing to foreclose a mortgage and to seek a judgment on a note, the plaintiff must hold both the note and the mortgage prior to filing the complaint. *See Bridge* at ¶ 20, citing *Bank of Am., N.A. v. McCormick*, 9th Dist. Summit No. 26888, 2014-Ohio-1393, ¶ 8. *See also Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, ¶ 35.

**Note**

**{¶10}** R.C. 1303.31(A) identifies three classes of persons who are "'entitled to enforce' an instrument" such as a note. As pertinent to this matter, one of the classes is the "holder" of the note.[1] R.C. 1303.31(A)(1). Generally, a person is a holder of the note by having physical possession of the note, which is either indorsed to that person or indorsed in blank. R.C. 1301.201(B)(21)(a). "When an instrument is indorsed in blank," i.e., it does not identify the payee, "the instrument becomes payable to bearer and may be negotiated by transfer of possession alone * * *." R.C. 1303.25(B). Thus, "[t][he holder of a note [i]ndorsed in blank is the possessor of the note." *McCormick*, 2014-Ohio-1393, at ¶ 8.

**{¶11}** "Under Ohio law, the right to enforce a note cannot be assigned; rather, the note must be negotiated in conformity with Ohio's version of the Uniform Commercial Code." *Wells Fargo Bank, N.A. v. Byers*, 10th Dist. Franklin No. 13AP-767, 2014-Ohio-3303, ¶ 16, citing *In*

[1] HSBC Bank limits its argument to the context of it being a holder of the note.

*re Wells*, 407 B.R. 873, 880 (N.D.Ohio 2009). Generally, an assignment of a note creates a claim to ownership and not a transfer of the right to enforce the note. *Byers* at ¶ 16. However, it is possible for an assignment of the note to be made by negotiation under R.C. 1303.21(A) or transfer pursuant to R.C. 1303.22(A). *Id*. "Negotiation" is the transfer of possession of the note "to a person who by the transfer becomes the holder of the instrument." R.C. 1303.21(A). The "transfer" of an instrument occurs when the note is physically delivered "for the purpose of giving the person receiving delivery the right to enforce the instrument." R.C. 1303.22(A).

**{¶12}** In this matter, HSBC Bank asserted that it was entitled to enforce the note because the note was bearer paper and HSBC Bank was in possession of the note. HSBC Bank attached the note, which reflected the original payee as being Quicken Loans, Inc. The note contained two indorsements. The first indorsement was from Quicken Loans, Inc. to IndyMac Bank, F.S.B. and the second indorsement was in blank from IndyMac Bank, F.S.B. There were no dates on either of the indorsements.

**{¶13}** HSBC Bank also attached an "Assignment of Note and Mortgage" dated February 25, 2010. (Emphasis deleted.) In its summary judgment motion, HSBC Bank misstated the title of this document as being an "Assignment of Mortgage" and only presented this document in support of the chain of title as to the mortgage. HSBC Bank failed to address the application of the February 2010 assignment relative to the note.

**{¶14}** In this assignment, Mortgage Electronic Registration Systems, Inc. acting as nominee for Quicken Loans, Inc. ("Quicken Loans") "for valuable consideration" "s[old], assign[ed], transfer[red] and set over" to HSBC Bank USA, National Association as Trustee for DALT 2007-AR3 ("HSBC 1"), "the Mortgage Deed * * * together with the Promissory Note." Based on the language contained in the assignment, there was evidence that the assignment

included a negotiation or transfer of the note from Quicken Loans to HSBC 1. *Contra Byers*, 2014-Ohio-3303, at ¶ 17. However, there was no subsequent assignment of the note from HSBC 1 to HSBC Bank.

**{¶15}** Instead, HSBC Bank attached a second assignment titled "Assignment of Mortgage" dated July 30, 2015. (Emphasis deleted.) Unlike the 2010 assignment, the 2015 assignment between HSBC 1 and HSBC Bank did not explicitly reference the transfer of the note. However, HSBC Bank, in its motion for summary judgment regarding the mortgage, cited to *Bank of New York v. Dobbs*, 5th Dist. Knox No. 2009-CA-000002, 2009-Ohio-4742, for the proposition that "an [a]ssignment of [m]ortgage may serve to transfer both the note and the mortgage." Despite citing this case law, HSBC Bank did not apply this principle of law to argue that the July 2015 Assignment of Mortgage served to transfer the note to it and, thus, this Court cannot consider such an application of law now. *See Roberts v. Reyes*, 9th Dist. Lorain No. 10CA009821, 2011-Ohio-2608, ¶ 9, quoting *Owens v. French Village Co.*, 9th Dist. Wayne No. 98CA0038, 1999 Ohio App. LEXIS 3789, *3-4 (Aug. 18, 1999) ("'Although this Court conducts a *de novo* review of summary judgment, it is nonetheless a *review* that is confined to the trial court record. The parties are not given a second chance to raise arguments that they should have raised below.'" (Emphasis sic.)

**{¶16}** HSBC Bank also submitted an affidavit from a contract management coordinator at Ocwen Loan Servicing, LLC, the servicer for HSBC Bank. The affiant averred that based on the business records summarized in the affidavit, HSBC Bank was the holder of the promissory note. These business records included, but were not limited to, the note with indorsements, the mortgage, and the two assignments. These documents, however, contained conflicting chains of

title as to how and when HSBC Bank came into possession of the note. Yet, the affidavit did not address the contradictory evidence.

**{¶17}** Instead, the affiant averred that HSBC Bank had been in possession of the original promissory note "[f]rom at least the time of the filing of the [c]omplaint, and at all times continuously since." While the affidavit stated that HSBC Bank was in possession of and was the holder of the note at the time the complaint was filed, the affidavit did not specify when or how HSBC Bank obtained possession of the note, i.e., based on the blank indorsement or the two assignments. *See BAC Home Loans Serv., LP v. McFerren*, 9th Dist. Summit No. 26384, 2013-Ohio-3228, ¶9, citing *Everhome Mtge. Co. v. Rowland*, 10th Dist. Franklin No. 07AP-615, 2008-Ohio-1282, ¶ 15. Because the note was undated and indorsed in blank, the affiant could not have had personal knowledge of when HSBC Bank came into possession of the note based solely on the note and its indorsements. *See Bank of Am., N.A. v. Loya*, 9th Dist. Summit No. 26973, 2014-Ohio-2750, ¶ 14. Further, the conflicting business records identified in the affidavit do not support the affiant having personal knowledge regarding HSBC Bank's status as the holder of the note. *See id*.

**{¶18}** While HSBC Bank relied solely on the indorsements on the note to establish that it was the holder of the note and the chain of title of the note, HSBC Bank submitted two assignments that called into question its standing to enforce the note and the chain of title of the note. Accordingly, HSBC Bank has failed to meet its initial *Dresher* burden of demonstrating the absence of genuine issues of material fact as to the chain of title for the note and standing to enforce the note.

**Mortgage**

**{¶19}** In its summary judgment motion regarding its status as the current mortgagee, HSBC Bank cited case law regarding the principle of equitable assignment of mortgage. Despite citing this case law, HSBC Bank did not argue in the alternative that it was the current mortgagee based upon an equitable assignment of the mortgage. Instead, HSBC Bank concluded that it was the current mortgagee based strictly on the two assignments and an affidavit from its servicer authenticating the assignments. On appeal, HSBC Bank asserts, for the first time, the alternative argument of equitable assignment of mortgage. "Arguments that were not raised in the trial court cannot be raised for the first time on appeal." *JPMorgan Chase Bank, Natl. Assn. v. Burden*, 9th Dist. Summit No. 27104, 2014-Ohio-2746, ¶ 12. Accordingly, we will not consider HSBC Bank's equitable assignment of mortgage argument.

**{¶20}** As addressed above, HSBC Bank submitted the February 2010 Assignment of Note and Mortgage which transferred both the note and the mortgage from Quicken Loans to HSBC 1. Additionally, HSBC Bank filed the June 2015 Assignment of Mortgage which assigned the mortgage from HSBC 1 to HSBC Bank. HSBC Bank relied solely on these two assignments to argue that it had an unbroken chain of title as to the mortgage. However, this Court must also consider the other evidence submitted by HSBC Bank, namely the note with indorsements from Quicken Loans, Inc. to IndyMac Bank, F.S.B. and then in blank. The affidavit did not address why there was an indorsement from Quicken Loans, Inc. to IndyMac Bank, F.S.B., but no assignment of mortgage between those two entities and instead an Assignment of Note and Mortgage from Quicken Loans, Inc. to HSBC 1.

**{¶21}** Accordingly, the assignments of mortgage in the record do not track with the purported indorsements on the note. Because of the discrepancy between the assignments and the

indorsements, HSBC Bank has failed to meet its initial *Dresher* burden of demonstrating the absence of genuine issues of material fact as to the chain of title for the mortgage and standing to foreclose the mortgage.

**HSBC Bank's Other Arguments**

**{¶22}** On appeal, HSBC Bank argues that the Brinsons waived any defense regarding standing because they failed to timely raise the affirmative defense in their answer. Instead, the Brinsons raised the issue of standing in their response to HSBC Bank's summary judgment motion. "A lack of standing defense may be raised at any time during the proceedings, but it does not affect the subject-matter jurisdiction of a court nor can it be used to collaterally attack a judgment." *Church at Warren v. Warzala*, 11th Dist. Trumbull No. 2016-T-0073, 2017-Ohio-6947, ¶ 17, citing *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, paragraphs two and three of the syllabus. *See also McFerren*, 2013-Ohio-3228, at ¶ 6. Accordingly, HSBC Bank's waiver argument is not well-taken.

**{¶23}** Additionally, HSBC Bank contends that the Brinsons "lack standing to challenge the propriety of the assignments of the mortgage" because they were not parties to the assignments or indorsements and thus cannot challenge HSBC Bank's "status as the assignee and holder of the [n]ote and [m]ortgage." HSBC Bank misconstrues the Brinsons' argument. The Brinsons questioned the existence of assignments, not the validity of the assignments. The Brinsons challenged whether HSBC Bank could "establish chain of title" based on the assignments and transfers in the record. And chain of title was one of the essential elements HSBC Bank needed to establish in order to obtain summary judgment in this matter. *See Bridge*, 2017-Ohio-7686, at ¶ 10.

**Conclusion**

**{¶24}** After consideration of HSBC Bank's evidence, this Court concludes that HSBC Bank has failed to meet its initial *Dresher* burden of demonstrating the absence of genuine issues of material fact regarding the chain of title for the note and mortgage and its standing to enforce the note and foreclose the mortgage. Accordingly, the trial court erred in granting summary judgment in favor of HSBC Bank as against the Brinsons on the foreclosure claim and against Mr. Brinson on the personal judgment claim.

**{¶25}** The Brinsons' first assignment of error is sustained.

**ASSIGNMENT OF ERROR NO. 2**

> THE TRIAL COURT ERRED IN AWARDING THE FULL JUDGMENT AMOUNT DEMANDED BY [HSBC BANK] DESPITE EVIDENCE OF A PRIOR LOAN FORGIVENESS.

**{¶26}** Mr. Brinson contends that the trial court abused its discretion when it failed to fashion a remedy under its equitable powers as to the personal judgment. Mr. Brinson asserts that HSBC Bank was estopped from seeking a judgment for the full amount of the original loan because HSBC Bank had reported a loan forgiveness to the IRS. Based upon the resolution of the first assignment of error, this Court declines to address Mr. Brinson's second assignment of error as it has been rendered moot. *See* App.R. 12(A)(1)(c).

III.

**{¶27}** Evis and Alisha Brinson's first assignment of error is sustained and this Court declines to address Mr. Brinson's second assignment of error. The judgment of the Summit County Court of Common Pleas is reversed and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

LYNNE S. CALLAHAN
FOR THE COURT

TEODOSIO, P. J.
CARR, J.
CONCUR.

APPEARANCES:

COLIN G. SKINNER, Attorney at Law, for Appellants.

JOHN R. WIRTHLIN and CHRISSY DUNN DUTTON, Attorneys at Law, for Appellee.

**[Cite as *Keybank Natl. Assn. v. Thalman*, 2018-Ohio-3367.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 106250**

**KEYBANK NATIONAL ASSOCIATION, TRUSTEE**

PLAINTIFF-APPELLEE

vs.

**HEATHER THALMAN, ET AL.**

DEFENDANTS-APPELLANTS

**JUDGMENT:**
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Division
Case No. 2012 ADV 179748

**BEFORE:** Stewart, J., Kilbane, P.J., and Keough, J.

**RELEASED AND JOURNALIZED:** August 23, 2018

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MELODY J. STEWART, J.:

**{¶1}** This is an appeal from a declaratory judgment, issued after a bench trial in the probate court, that declared the rights of beneficiaries to a trust, as well as the responsibilities of the trustee in dividing the trust corpus.

## I. Background

**{¶2}** In 1935, Howard Couse established a trust (the "Couse Trust") that provided income for his two grandchildren, Jeanne Clough and Howard Schlitt. Upon the death of either Clough and Schlitt, their heirs would become trust beneficiaries. Upon the death of both Clough and Schlitt, the trust corpus would be divided into two, equal shares: one share payable to Clough's children and heirs Heather Thalman, DeWayne Richey III, Douglas Richey and Margaret Nelson — the "Clough heirs"; the other share payable to Schlitt's children and heirs Cynthia Desformes, Andrea Weaver, and Lorraine Schlitt — the "Schlitt heirs." The trust authorized the trustee to pay the beneficiaries any sum deemed necessary for their support, ease, and maintenance.

**{¶3}** By 2006, Clough and Schlitt had developed different ideas on how the trustee, KeyBank, should manage the trust investments. Clough wanted a conservative investment approach in order to maximize long-term growth of the trust corpus. Schlitt wanted a more aggressive investment approach in order to maximize monthly income. KeyBank was unsure if it had the authority to divide the Couse Trust. At the time, Clough and Schlitt were also the beneficiaries of a second trust — the Margaret Schlitt Trust — which specifically authorized division of the trust corpus. KeyBank told Clough and Schlitt that it could divide the Margaret Schlitt Trust, but because the Couse Trust lacked similar language specifically authorizing division, it was "working with our Internal Trust counsel to clarify the issues in protecting your respective family's [sic] interests in the Couse Trust if it were divided as well."

**{¶4}** KeyBank apparently took no action with regard to dividing the trust until late 2008, when Jeanne Clough died. Several weeks after her death, KeyBank divided the trust into two investment accounts: one for the benefit of Clough ("FBO JSC"); the other for the benefit of Schlitt ("FBO HHS"). Trust income would be paid to the Clough heirs from the Clough account, while trust income to Howard Schlitt would be paid from the Schlitt account. The beneficiaries were given account statements only from the respectively divided accounts. KeyBank informed the Clough heirs that they would be entitled to quarterly income distributions from the FBO JSC account until Schlitt's death. KeyBank also told one of the Clough heirs that following Schlitt's death, "the Couse Trust FBO JSC will terminate and the remaining proceeds will be distributed equally between you and your siblings." In a March 2009 letter sent after Jeanne Clough's death, KeyBank informed each of the four Clough heirs that the "Howard A. Couse Trust * * * will continue for the benefit of you and your siblings (emphasis sic)." KeyBank also informed the four Clough heirs that "[t]he current market value is $653,605 (including income cash). Your one-fourth share is approximately $163,401." (Emphasis sic.)

**{¶5}** In April 2008, Schlitt, through his long-time companion, made a request for additional income because his declining health required intensive medical care. Exercising its discretionary trust authority to provide for the "support, ease and maintenance" of the beneficiaries, KeyBank paid Schlitt $12,000 per month exclusively from the Schlitt account. KeyBank's internal documentation of the discretionary distributions to Schlitt specifically referenced the FBO HHS account and, under a heading called "Document Dispositive Provisions," stated "Upon the death of Howard H. Schlitt, the trust will distribute to his then living lineal descendants." The discretionary payments continued until Schlitt died in 2011. None of the Clough heirs were aware that KeyBank was making additional payments to Schlitt because they were not informed by KeyBank and they were not receiving any statements for the FBO HHS account.

**{¶6}** When Schlitt died, the Clough heirs notified KeyBank, seeking liquidation of the FBO JSC account. KeyBank replied to one of the Clough heirs, noting that the FBO JSC trust share had been segregated for the "equal benefit of you and your siblings" and that "[y]ou are correct in that pursuant to the terms of the Couse Trust FBO JSC, Dr. Schlitt's death will result in the termination of the Howard A. Couse Trust FBO JSC in equal shares to you and your siblings."

**{¶7}** In response to demands by the Schlitt heirs to liquidate the Couse Trust, KeyBank informed them that it could not yet act on liquidation "due to a difference of interpretation of the final dispositive provisions of the Howard A. Couse Trust." KeyBank told the Schlitt heirs that its trust counsel was reviewing the trust agreement and "[i]t may be that both of the Howard Couse Trusts, your father's and Jeanne Clough's portions, will be combined and then divided, per stirpes, amongst you and your siblings and Jeanne's four children as well." KeyBank told the Schlitt heirs that if the two accounts had to be recombined, it would need approval from the Clough heirs on complete liquidation. The Schlitt heirs responded by threatening KeyBank with legal action should it fail to put the trust assets into their account. The following day, KeyBank informed the Schlitt heirs that "our trust counsel has determined that *both* of the Howard Couse Trusts (the one for the benefit of your father and the other for the benefit of Jeanne Clough) are to be distributed 50% to the three of you and 50% to the four Clough children." (Emphasis sic.) KeyBank reaffirmed to the Schlitt heirs that "you and your sisters will split 50% of your father's trust and also split 50% of the Jeanne Clough Trust." At the time, the FBO JSC account was valued at $934,000; the additional distributions to Howard Schlitt

left $460,000 in the FBO HHS account.

**{¶8}** The Clough heirs objected to combining the two investment accounts. They maintained that KeyBank had actually split the trust corpus into two separate trusts and that merging them back into a single trust would substantially impair their rights as beneficiaries given the amounts paid to Schlitt. They believed that the Schlitt heirs should be solely affected by the income paid to Schlitt during his last years.

**{¶9}** KeyBank disagreed that it had split the Couse trust into two separate trusts, claiming that it had merely split the trust into two investment accounts that it recombined before liquidating the Couse Trust. It sought a declaratory judgment regarding the manner in which it should distribute the trust corpus. The Clough heirs filed counterclaims against KeyBank alleging that it committed a statutory breach of trust by failing to keep the current beneficiaries of the trust reasonably informed about the administration of the trust and breached its fiduciary duty in the manner in which it managed the Couse trust. On cross-motions for summary judgment, the court ruled that KeyBank had not, and could not, split the Couse trust into two separate trusts. The court granted summary judgment to KeyBank and ordered the Clough heirs to pay KeyBank's attorney fees.

**{¶10}** We reversed the summary judgment on appeal. *KeyBank Natl. Assn. v. Thalman*, 8th Dist. Cuyahoga No. 102624, 2016-Ohio-2832. As an overriding holding, we found the evidence showed that "KeyBank informed the Clough Heirs that the Couse Trust had been split into two different trusts; the Clough Trust and the Schlitt trust." *Id.* at ¶ 16. We reached this conclusion on evidence that the trusts were given different names, different account numbers, and had separate statements mailed to the beneficiaries of the respective accounts. *Id.* In addition, we cited evidence that KeyBank individually informed the Clough and Schlitt heirs that upon Schlitt's death, the respective FBO accounts would be liquidated and divided among the siblings. *Id*. at ¶ 17. We found an issue of material fact existed on whether KeyBank managed the trust in good faith. *Id*.

**{¶11}** With respect to the question of whether the court erred by finding that KeyBank should combine and equally distribute the trusts, we rejected KeyBank's assertion that R.C. 5804.17 required it to combine the two investment accounts. Noting that the statute allowed division of a trust "if the result does not substantially impair the rights of any beneficiary or have a materially adverse effect on the achievement of the purposes of the trust," we found that KeyBank could split the trust because doing so did not substantially impair the rights of either Jeanne Clough or Howard Schlitt. *Id*. at ¶ 18. We found that dividing the trust not only accommodated the separate investment goals of Clough and Schlitt, but that the aggressive investment approach desired by Schlitt worked to his benefit to finance his health and living expenses. *Id*. at ¶ 19. We found that recombining the trusts would have a materially adverse effect on Clough's investment goals and that a question of fact existed "regarding prejudice to the Clough Heirs to distribute the Couse Trust equally amongst the Clough Heirs and Schlitt Heirs." *Id.*

**{¶12}** Lastly, we considered the question of whether the court erred by finding that the Clough heirs did not make out a claim for breach of fiduciary duty because they did not sustain any damages. Reiterating that "the trusts had been in fact divided[,]" *id*. at ¶ 22, we found that by recombining the trusts, KeyBank took $237,000 from the FBO JSC account and placed it in the FBO HHS account. *Id*. at ¶ 23. We found that the $237,000 was a "potential injury to the Clough heirs." *Id*.

**{¶13}** On remand, the court conducted a trial on the issues over the Clough heirs' objection arguing that we had already determined that KeyBank split the Couse Trust into two separate trusts. In extensive findings of fact and conclusions of law, the court found that the trust had been created for the lifetime benefit of Clough and Schlitt, giving them the right to equal income distributions and discretionary distributions for their support, ease, and maintenance. The court characterized the trust as a "pot" trust, meaning that "all of the beneficiaries in the same beneficiary class share from one pot. A reduction of the assets of the trust for one beneficiary necessarily results in a reduction for all beneficiaries upon final distribution." The court found no trust language that would allow the trust to be divided.[1] It further found that KeyBank did not split the trust into two separate trusts, but created two investment sub-accounts for the single trust.

[1]Although there was no trust language authorizing dividing the trust, we found no language prohibiting division of the trust either.

**{¶14}** The court found that KeyBank did not breach its fiduciary duty to the Clough heirs by creating two investment sub-accounts. The court found that the trust instrument granted the trustee "unrestricted power to manage all property held by it hereunder as if the absolute owner itself," and that KeyBank did not require beneficiary approval to carry out transactions. It stated that "[a]lthough the money was divided into two sub-accounts for investment purposes and for current lifetime distributions, the Couse Trust itself was never divided into separate and distinct trusts." The court rejected assertions by the Clough heirs that KeyBank's trust officer sent letters to them indicating that the trust had been split. The court "was persuaded by [the trust officer's] explanation as to what the letters he authored meant and by the fact that [the trust officer] never thought that the Couse Trust had been permanently divided because the Couse Trust did not allow for permanent division."

**{¶15}** With respect to claims that KeyBank breached its fiduciary duty to the Clough heirs by making distributions to Schlitt, the court found KeyBank acted within the scope of its discretion by distributing additional funds to Schlitt to provide for his "ease." The court found that KeyBank acted reasonably upon information provided to it by Schlitt's long-time companion, whom the Clough heirs considered as their "aunt." The court also found no reason to believe that KeyBank would have exercised its discretion any differently had it required additional verification of Schlitt's medical expenses.

**{¶16}** The court also rejected assertions by the Clough heirs that KeyBank breached its fiduciary duty because letters sent by KeyBank to the beneficiaries led them to believe that the Couse trust had been permanently changed in a way that altered the manner in which the trust corpus would be distributed. Conceding that KeyBank's correspondence to the heirs "are not a model of clarity," the court found that the correspondence was "not false and did not promise the Clough Heirs that the dispositive portion of the Couse Trust had been changed." It found that the trust officer's communications to the Clough heirs used language consistent with the position that the trust had not been split, noting for example that the trust officer informed the Clough heirs that the trust had been divided "into two equal shares" with the creation of the two investment accounts designed to accommodate Schlitt's and the Clough heirs' investment goals. The court found that "[t]he word 'shares' in and of itself denoted that the Couse Trust remains as one trust with separate parts or shares." The court found that the Clough heirs "made an assumption regarding what the letters meant."

**{¶17}** The court found that the Clough heirs failed to prove that they suffered any damage as a result of any of their claims for breach of fiduciary duty. The court found that even if the Clough heirs justifiably relied on KeyBank's correspondence to arrive at the expectation of a greater share of the trust corpus, they failed to show detrimental reliance on that expectation by making any life decisions or altered investment patterns based on that expectation.

**{¶18}** Finally, the court ordered the Clough heirs to pay all of KeyBank's attorney fees incurred after the court granted the Schlitt heirs' first motion for summary judgment. The court did not actually determine the amount of attorney fees, other than to state that KeyBank's fees "shall be paid at the usual and customary hourly rates charged by KeyBank's lawyer to KeyBank and for all the hours approved for payment by KeyBank." The court certified no just reason for delay.

II. Law of the Case

**{¶19}** In their first assignment of error, the Clough heirs raise a question of law concerning the law-of-the-case doctrine. They claim that on appeal from the summary judgment granted to KeyBank and the Schlitt heirs, this court decided as a matter of law that "the trusts were in fact divided into two separate trust." *KeyBank*, 8th Dist. Cuyahoga No. 102624, 2016-Ohio-2832, at ¶ 22. They maintain that the court ignored this finding, thus erring when it decided at trial that KeyBank did not split the Couse trust into two separate trusts.

**{¶20}** "The law-of-the-case doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Huntington Natl. Bank v. Dixon*, 8th Dist. Cuyahoga No. 101273, 2015-Ohio-1735, ¶ 9 (citations and internal quotations omitted). The law-of-the-case doctrine is a rule of practice that ensures consistency of results in a case, avoids endless litigation of settled issues, and preserves the structure of superior and inferior courts as designed by the Ohio Constitution. *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 15; *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984).

**{¶21}** We emphasize at the outset that KeyBank initiated this case by seeking a declaratory judgment that the Couse Trust "is now distributable in two equal shares; one half (½) of the Couse Trust to the Clough Heirs and one half (½) to the Schlitt Heirs." Fundamental to the request was whether the Couse Trust existed as a single trust (as argued by KeyBank) or whether the Couse Trust had been split into two separate trusts (as argued by the Clough heirs).

**{¶22}** In *KeyBank*, this court determined the dispositive question posed by the request for a declaratory judgment by concluding that KeyBank split the Couse Trust. In fact, the opinion of the court twice stated that conclusion. It first stated that "KeyBank informed the Clough Heirs that the Couse Trust had been split into two different trusts[:]; the Clough Trust and the Schlitt [T]rust [sic]." *Keybank*, 8th Dist. Cuyahoga No. 102624, 2016-Ohio-2832, at ¶ 16. We restated that conclusion by finding that "the account statements reflected that the trusts [sic] had been in fact divided" and that "[t]he record reflects that the trusts [sic] were in fact divided into two separate trusts." *Id.* at ¶ 22.

**{¶23}** The panel's statements that the Couse Trust had been divided into two trusts fully resolved the declaratory judgment. Notably, KeyBank did not seek reconsideration of this court's decision under App.R. 26(A)(1) nor did it pursue a further appeal to the Ohio Supreme Court. The panel's conclusions were final and binding on the trial court. *Morton Internatl. v. Continental Ins. Co.*, 104 Ohio App.3d 315, 320, 662 N.E.2d 29 (1st Dist.1995). We therefore must conclude that statements in *Keybank* were the law of the case. With the determination that the Couse Trust had been divided, only the Clough heirs were entitled to share in the funds held in the FBO JSC Trust and the Schlitt heirs were entitled to share only in the funds held in the FBO HHS Trust.

**{¶24}** The resolution of the declaratory judgment action left only the counterclaims raised by the Clough heirs — that KeyBank breached the trust by refusing to divide it into two trusts or breached its fiduciary duty by making the Clough heirs believe that the Couse Trust had been split into two trusts.

**{¶25}** With respect to the breach of trust claim, the Clough heirs presented an either/or argument: either KeyBank split the trust, in which case it breached a fiduciary duty by merging the split trust into a single trust upon Schlitt's death, or, if it did not split the trust, it breached its fiduciary duty by only giving the Clough heirs information related to the investment account created for their benefit, despite their being beneficiaries of the entire trust.

**{¶26}** The Clough heirs' claim for breach of fiduciary duty was likewise framed as an either/or argument: either KeyBank split the trust and then violated its fiduciary duty to the Clough heirs by recombining the divided trusts, or it failed to act impartially in managing and distributing the trust by causing the Clough heirs to believe that the Clough trust had been split and existed for their sole benefit, and in addition failing to keep them advised of events occurring in the Schlitt account (the care and maintenance payments to Schlitt) to their detriment.

**{¶27}** Having found in the first appeal that the Couse Trust had been split and that the Clough and Schlitt heirs would take their share from the funds held in their respective trusts, we remanded because there were genuine issues of material fact remaining on the counterclaims.

**{¶28}** On remand, both parties raised questions about the holding in *KeyBank* at the start of trial. In its opening statement at trial, KeyBank stated that it did not split the Couse Trust. The Clough heirs responded in their opening statement by wondering why KeyBank was arguing that it never split the trusts given that this court stated in *KeyBank* that the Couse Trust had been divided into two separate trusts. During a break in trial testimony, the Clough heirs again reiterated that the Couse Trust had been split, whether by agreement between Jeanne Clough and Howard Schlitt or by KeyBank. The court stated that "I read [the *KeyBank* decision] 100 times and I thought it said that it was conducted a little differently. So we can agree to disagree but clearly that's still on the table."

**{¶29}** There was no room for the court to disagree with the panel's decision. Despite the panel having found that "[t]he record reflects that the trusts were in fact divided into two separate trusts[,]" the court conducted a trial and found as matter of fact that "although the money was divided into two sub-accounts for investment purposes and for current lifetime distributions, the Couse Trust itself was never divided into two separate and distinct trusts." This finding erroneously disregarded what had been established as a matter of law in *KeyBank*.

**{¶30}** The court's sole function on remand was to address the counterclaims. Although we stated that there were genuine issues of material fact on the counterclaims, a trial was not absolutely necessary. The counterclaims were derivative to the declaratory judgment action because they were viable only if the Couse Trust had not been split into two trusts or, having been split, were recombined into a single trust for distribution to the respective heirs. By necessary implication, our holding that the trust had been split vitiated the counterclaims for breach of trust and breach of fiduciary duty. Damages for a breach of trust are premised on the idea that "the trust should be restored to the position it would have been in had the harm not occurred." General Comment to R.C. 5810.01. Thus, the damages to be paid by a trustee who commits a breach of trust is "[t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred." *See* R.C. 5810.02(A). Damages for a trustee's breach of fiduciary duty are similar: "A trustee who commits a breach of trust is * * * chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement of the Law 3d, Trusts, Section 205(b) (1990). *See also Spalding v. Coulson*, 8th Dist. Cuyahoga Nos. 70524 and 70538, 1998 Ohio App. LEXIS 4105, 29-30 (Sept. 3, 1998) ("As in all other tort actions, losses incurred must be proximately caused by the breach[.]").

**{¶31}** The measure of damages available for breach of trust and breach of fiduciary duty were consistent with the prayer for damages contained in the Clough heirs' counterclaims. The Clough heirs asked the court to "compel Key Bank [sic] to return to the Trust the amounts it improperly and inequitably distributed to Howard Schlitt and the Schlitt Heirs." The procedural posture of the first appeal did not allow us to enter judgment as a matter of law on the counterclaims — it was left to the trial court to resolve those claims "consistent with" the opinion. *Keybank*, 8th Dist. Cuyahoga No. 102624, 2016-Ohio-2832, at ¶ 24. Nevertheless, resolution of the counterclaims should have been perfunctory given that the damages available to the Clough heirs on their counterclaims were identical to what had been ordered in the declaratory judgment portion of the *Keybank* opinion. A trial was therefore unnecessary.

**{¶32}** We therefore conclude that the decision in *KeyBank*, that the Couse Trust had been divided into two separate trusts, is the law of the case and is binding on all parties. KeyBank is required to disburse funds held in the FBO JSC Trust to the Clough heirs and disburse funds held in the FBO HHS Trust to the Schlitt heirs.

III. Attorney Fees

**{¶33}** In addition to finding that the trust had not been divided, the court found that (1) KeyBank's legal fees were properly charged to the trust; (2) that the Clough heirs should pay KeyBank's attorney fees from their share of the trust corpus; and (3) that both KeyBank and the Clough heirs be jointly and severally liable to pay the Schlitt heirs' legal fees. The Clough heirs contest all three orders.

**{¶34}** The court may, in a case involving the administration of a trust, "award costs, expenses, and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party's interest in the trust that is the subject of the controversy." R.C. 5810.04.

**{¶35}** The court awarded KeyBank its attorney fees "because of the Clough Heirs' unwillingness to accept that the terms of the Couse Trust control its ultimate distribution. The Clough Heirs refused to agree that KeyBank's proposed final distribution was proper." However, the decision in *Keybank* that the Couse Trust had been split into two separate trusts abrogates the rationale underlying the court's order for attorney fees. Therefore, the award of attorney fees must likewise be abrogated. We vacate the award of attorney fees to KeyBank. We likewise vacate the award of attorney fees to the Schlitt heirs, because the court's rationale for awarding those fees — that the Schlitt heirs would not have been forced to incur legal fees but for the Clough heirs litigating their claims against KeyBank — is no longer viable in light of our holding. The parties are to bear their own attorney fees.

**{¶36}** Judgment reversed and remanded to the trial court to enter judgment for the Clough heirs and vacate the award of attorney fees consistent with this opinion.

It is ordered that KeyBank pay the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court, probate division, 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR
KEYWORDS AND SUMMARY:

**[Cite as *N. Chem. Blending Corp., Inc. v. Strib Industries, Inc., D.B.A. Prod. Chem.*, 2018-Ohio-3364.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 105911**

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**NORTHERN CHEMICAL BLENDING CORP., INC.**

PLAINTIFF-APPELLANT

vs.

**STRIB INDUSTRIES, INC., D.B.A., PRODUCTS CHEMICAL, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**
AFFIRMED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-857980

**BEFORE:** E.T. Gallagher, P.J., S. Gallagher, J., and Jones, J.

**RELEASED AND JOURNALIZED:** August 23, 2018

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EILEEN T. GALLAGHER, P.J.:

**{¶1}** Plaintiff-appellant, Northern Chemical Blending Corp., Inc. ("Northern Chemical"), appeals from the trial court's judgment granting summary judgment in favor of defendants-appellees, Strib Industries, Inc., d.b.a. Products Chemical, and John Stibrick (collectively "Strib Industries"). Northern Chemical raises the following assignments of error for review:

> 1. The trial court erred as a matter of law in not considering all of the evidence before it in rendering judgment in appellees' favor.
>
> 2. The trial court erred as a matter of law in granting appellees' motion for summary judgment.

**{¶2}** After careful review of the record and relevant case law, we affirm the trial court's judgment.

## I. Procedural and Factual History

**{¶3}** Northern Chemical has operated a chemical blending company since 1983 and performs filling and blending services for customers. Northern Chemical is owned and operated by John Zemaitis. Strib Industries also performs chemical filling and blending services and is owned and operated by John Stibrick.

**{¶4}** For approximately 25 years, Northern Chemical subcontracted certain filling and blending orders to Strib Industries for customers who required smaller packaging. Pursuant to the parties' business arrangement, Strib Industries was paid a percentage of the revenue Northern Chemical received for the product Strib Industries filled or blended on Northern Chemical's behalf. On January 1, 2006, Northern Chemical and Strib Industries entered into a confidentiality, nondisclosure, and nonuse agreement (the "Strib NDA Agreement"). The NDA

Agreement covered all work Strib Industries performed for Northern Chemical and required Strib Industries to maintain Northern Chemical's confidential information.

**{¶5}** In January 2009, Northern Chemical entered into a business relationship with ChemMasters, Inc. ("ChemMasters"). Pursuant to their business arrangement, Northern Chemical agreed to blend and package certain concrete sealers and coatings for ChemMasters. ChemMasters and Northern Chemical also entered into a confidentiality, nondisclosure, and nonuse agreement (the "ChemMasters NDA Agreement"), wherein Northern Chemical agreed to maintain ChemMasters' confidential information.

**{¶6}** Upon securing ChemMasters' business, Northern Chemical subcontracted with Strib Industries to fill the orders it received from ChemMasters. Strib Industries was paid a percentage of the revenue Northern Chemical received from ChemMasters for the products Strib Industries filled and blended. Upon relinquishing the blended product to ChemMasters, Strib Industries would invoice Northern Chemical for the amount due, with the notation that payment was due within 30 days. It was understood and agreed that Northern Chemical was to pay Strib Industries the amount invoiced no later than 10 days after Northern Chemical received payment from ChemMasters.

**{¶7}** In April 2014, ChemMasters ceased doing business with Northern Chemical, and began doing business directly with Strib Industries. Believing that "[Strib Industries and ChemMasters] conspired to improperly cut-out Northern Chemical from the business relationship," Northern Chemical filed a complaint against Strib Industries and ChemMasters in January 2016. The complaint sought a declaratory judgment and asserted causes of action for breach of contract, tortious interference with business relations, tortious interference with contract, accounting and restitution, misappropriation of trade secrets, and civil conspiracy.

**{¶8}** In March 2016, Strib Industries filed an answer brief and asserted counterclaims for breach of contract and unjust enrichment. The counterclaim sought payment of overdue invoices in the amount of $8,992.50.

**{¶9}** In April 2016, Northern Chemical filed a notice of voluntary dismissal of its claims against ChemMasters. Northern Chemical also voluntarily dismissed its civil conspiracy claim against Strib Industries.

**{¶10}** In June 2016, Strib Industries filed a "motion to deem admissions as admitted." The motion alleged that Northern Chemical failed to respond to Strib Industries' requests for admissions, which asked Northern Chemical to admit that it failed to pay Strib Industries for certain invoices. Thus, Strib Industries requested the trial court to deem the relevant discovery requests as written admissions pursuant to Civ.R. 36(A)(1). The motion was unopposed and granted by the trial court.

**{¶11}** In December 2016, Strib Industries filed a motion for summary judgment on its counterclaims, arguing that it is entitled to judgment in the amount of $8,992.50. Strib Industries argued that judgment was appropriate because "Northern Chemical concedes the invoices are outstanding and due to Strib Industries as evidenced by the request for admissions propounded upon Northern Chemical and which [the trial court] deemed admitted."

**{¶12}** In February 2017, Strib Industries filed a separate motion for summary judgment as to Northern Chemical's claims, arguing that it was entitled to judgment as a matter of law because (1) there is no evidence of a valid contract between Northern Chemical and Strib Industries, (2) there is no evidence of an exclusivity contract between Northern Chemical and ChemMasters, (3) the blending and filling services provided to ChemMasters were products that ChemMaster developed and/or formulated, and (4) it was not unlawful or improper for Strib

Industries to conduct business directly with ChemMasters based on Northern Chemical's failure to pay Strib Industries for its services.

**{¶13}** In support of its motions for summary judgment, Strib Industries attached copies of the pleadings, a copy of the Strib NDA Agreement, a copy of the ChemMasters NDA Agreement, pertinent portions of John Zemaitis's deposition testimony, the affidavit of John Stibrick, and copies of Northern Chemical's unpaid invoices that were deemed by the court to be written admissions.

**{¶14}** After receiving a 30-day extension of time, Northern Chemical filed a brief in opposition to Strib Industries' motions for summary judgment on March 3, 2017. Northern Chemical argued that genuine issues of material fact remain on their claims against Strib Industries. In addition, Northern Chemical maintained that Strib Industries is not entitled to summary judgment on its counterclaim for the unpaid invoices because Strib Industries "materially breached [its] agreement to wait until Northern Chemical was paid by ChemMasters to receive payment [from Northern Chemical]."

**{¶15}** Northern Chemical's opposition brief attached a copy of the Strib NDA Agreement, emails from Northern Chemical to ChemMasters regarding past due invoices, and the deposition testimony of John Stibrick.[1]

**{¶16}** On March 13, 2017, Strib Industries filed a reply brief in support of its motions for summary judgment and contemporaneously filed a motion to strike the certain exhibits attached to Northern Chemical's brief in opposition. In the motion to strike, Strib Industries argued that

[1] Northern Chemical's brief in opposition references "Plaintiff's Affidavit attached as 'Exhibit 1.'" However, no affidavit was attached to the brief.

the email correspondences attached to Northern Chemical's brief in opposition did not constitute proper evidence under Civ.R. 56(C) and were not authenticated by a properly framed affidavit.

**{¶17}** On March 20, 2017, Northern Chemical filed a brief in opposition to the motion to strike and requested leave of court to supplement its opposition brief with the affidavit of John Zemaitis, which was notarized on March 20, 2017. Northern Chemical argued that the affidavit properly attests to the exhibits attached to the brief in opposition pursuant to Civ.R. 56(E), and "provides no additional information that is not already provided in the brief in opposition."

**{¶18}** Before the trial court ruled on Northern Chemical's attempt to supplement its brief with Zemaitis's affidavit, Strib Industries filed a motion to strike the affidavit. Strib Industries argued that it would be unjust to consider the untimely affidavit because it was not attached to the brief in opposition, and therefore, Strib Industries did not have the opportunity to address the contents of the affidavit at the time Strib Industries was required to file its reply brief. Strib Industries noted that the affidavit was notarized on March 20, 2017, thereby demonstrating that the affidavit did not exist at the time the brief in opposition was filed.

**{¶19}** On May 18, 2017, the trial court denied Northern Chemical's request to supplement its brief in opposition with Zemaitis's affidavit. In addition, the trial court granted Strib Industries' motion to strike the affidavit and copies of certain email correspondences attached to Northern Chemical's brief in opposition. On the same day, the trial court granted Strib Industries' separate motions for summary judgment, stating in relevant part:

> Pending before the court are (A) [Strib Industries'] motion for summary judgment with respect to Northern Chemical's claims; and (B) [Strib Industries'] motion for summary judgment on its counterclaim pursuant to Civ.R. 56. * * *.
>
> Upon review of the evidentiary materials, and viewing the evidence most strongly in favor of the non-moving party, the court finds and concludes that no genuine issues of material fact remain to be litigated in this case and that defendants are

> entitled to judgment as a matter of law. Defendants supported their motions with admissible evidence and concise, compelling legal arguments. Northern Chemical, by contrast, has not come forward with admissible evidence suggesting that there is a genuine issue for trial. Defendants' motions for summary judgment are therefore granted.
>
> Accordingly, Northern Chemical's claims are dismissed in their entirety, with prejudice. With respect to defendant Strib Industries' counterclaim, the court awards judgment to Strib Industries in the amount of $8,992.50, plus interest at the statutory rate from the date of judgment, as well as the costs of this action.

**{¶20}** Northern Chemical now appeals the trial court's judgment.

## II. Law and Analysis

### A. Evidentiary Rulings

**{¶21}** In its first assignment of error, Northern Chemical argues "the trial court erred as a matter of law in not considering all of the evidence before it in rendering judgment in [Strib Industries'] favor." Northern Chemical contends that the trial court erred by striking the affidavit of John Zemaitis and the email correspondences referred to in his supporting affidavit.

#### 1. Notice of Appeal

**{¶22}** Before addressing the merits of this assigned error, we must resolve Strib Industries' contention that Northern Chemical's first assignment of error fails as a matter of law because Northern Chemical's notice of appeal does not comply with App.R. 3(D) and Loc.App.R. 3(B).

**{¶23}** According to App.R. 3(D), the decision being appealed must be designated in the notice of appeal, and Loc.App.R. 3(B) requires attachment of that entry to the notice. In this case, Strib Industries correctly states that Northern Chemical's notice of appeal only attached the trial court's May 18, 2017 journal entry granting summary judgment in favor of Strib Industries. It did not identify or attach the trial court's separate May 18, 2017 judgment entries that granted

Strib Industries' motions to strike Zemaitis's affidavit and certain exhibits attached to Northern Chemical's brief in opposition to summary judgment.

**{¶24}** However, the failure to attach a copy of the order being appealed from is not a jurisdictional defect. Thus, "this court has discretion to entertain an appeal that does not comply with these rules." *Hubbard v. Charter One Bank*, 8th Dist. Cuyahoga No. 104146, 2017-Ohio-1033, ¶ 11, citing *Midland Funding L.L.C. v. Hottenroth*, 2014-Ohio-5680, 26 N.E.3d 269, ¶ 3 (8th Dist.) (en banc). The purpose of these rules is to appropriately notify other parties to the appeal of its scope.

**{¶25}** As stated, the trial court found that summary judgment in favor of Strib Industries was appropriate because Northern Chemical failed to "come forward with admissible evidence suggesting that there is a genuine issue for trial." The admissibility of the evidence attached to Northern Chemical's brief in opposition was highly contested and was the subject of multiple motions. Furthermore, the validity of the court's May 18, 2017 judgments have been fully briefed by both parties on appeal. Under these circumstances, we find Strib Industries was reasonably placed on notice that Northern Chemical would be challenging the trial court's decision to strike certain evidence attached to its brief in opposition. Accordingly, we exercise our discretion to consider Northern Chemical's first assignment of error.

**2. Motion to Strike Documentary Evidence**

**{¶26}** A trial court's determination of a motion to strike is reviewed for an abuse of discretion. *Squire v. Geer*, 117 Ohio St.3d 506, 2008-Ohio-1432, 885 N.E.2d 213, ¶ 10. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶27}** On appeal, Northern Chemical argues the trial court abused its discretion by striking Zemaitis's affidavit and the email correspondences attached to its brief in opposition to summary judgment. Northern Chemical asserts that the excluded "email [exhibits] were not a surprise to [Strib Industries] as they were attached to the brief in opposition and the affidavit was not a surprise to [Strib Industries] as it did not deviate or provide anything outside of the brief."

**{¶28}** Civ.R. 56(C) provides, in relevant part:

> Unless otherwise provided by local rule or by order of the court, the adverse party may serve responsive arguments and opposing affidavits within twenty-eight days after service of the motion, and the movant may serve reply arguments within fourteen days after service of the adverse party's response. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

**{¶29}** Civ.R. 56(E) provides, in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

**{¶30}** This court has previously recognized that "[u]nder Civ.R. 56(E), the proper procedure for introducing evidentiary matters not specifically authorized by Civ.R. 56(C) is to incorporate them by reference in a properly framed affidavit." *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 221, 515 N.E.2d 632 (8th Dist.1986).

**{¶31}** "Documents submitted in defense against a motion for summary judgment must be properly 'sworn, certified or authenticated by affidavit' or they may not be considered in determining whether there is a triable issue of fact." *Burkhart v. H.J. Heinz Co.*, 2013-Ohio-723, 989 N.E.2d 128, ¶ 12 (6th Dist.), quoting *Green v. B.F. Goodrich Co.*, 85 Ohio App.3d 223, 228, 619 N.E.2d 497 (9th Dist.1993); *see also Douglass v. Salem Comm. Hosp.*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107, ¶ 25 (7th Dist.). Ohio courts consistently apply this rule and recognize that "documents that have not been sworn, certified, or authenticated by way of affidavit 'have no evidentiary value.'" *Mitchell v. Internatl. Flavors & Fragrances, Inc.*, 179 Ohio App.3d 365, 2008-Ohio-3697, 902 N.E.2d 37, ¶ 17 (1st Dist.), quoting *Lance Acceptance Corp. v. Claudio*, 9th Dist. Lorain No. 02CA008201, 2003-Ohio-3503, ¶ 15.

**{¶32}** In this case, Northern Chemical's brief in opposition relied extensively on unauthenticated email communications that were not incorporated into a properly framed affidavit. Strib Industries moved to strike these exhibits on grounds that they did not constitute proper evidence under Civ.R. 56(C). Although Northern Chemical subsequently attempted to incorporate the unauthenticated documents through its submission of Zemaitis's affidavit, the trial court ultimately accepted Strib Industries' position that the affidavit was untimely pursuant to Civ.R. 56(C).

**{¶33}** Despite the language of Civ.R. 56(C), Northern Chemical maintains that its submission of Zemaitis's affidavit was not untimely because it was filed well before the trial court's judgment was rendered. In support of its position, Northern Chemical relies on this court's decision in *Paul v. Metrohealth*, 8th Dist. Cuyahoga No. 71195, 1998 Ohio App. LEXIS

4964 (Oct. 22, 1998). In *Paul*, this court reversed the trial court's exclusion of an opposing affidavit as untimely, stating:

> The trial court's determination * * * was inappropriate since the rule specifically permits the opposing party to file affidavits "prior to the day of hearing."

*Id*. at 18.

**{¶34}** After careful consideration, we are not persuaded by Northern Chemical's reliance on *Paul*. Significantly, *Paul* interpreted a version of Civ.R. 56(C) that has since been amended.[2] The statute no longer contains language permitting the opposing party to file affidavits "prior to the day of hearing." Rather, that language has been deleted and the statute now directs adverse parties to serve responsive arguments and opposing affidavits "within twenty-eight days after service" of the movant's motion for summary judgment.[3]

**{¶35}** In this case, Northern Chemical received a 30-day extension in time to respond to Strib Industries' motion for summary judgment and was ordered to "file its brief(s) in opposition to the two motions [for summary judgment] on or before Friday, March 3, 2017." Northern Chemical complied with the trial court's order and filed its opposition brief on March 3, 2017. However, Northern Chemical did not attach an affidavit to its opposition brief and, without

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[2] Civ.R. 56(C) was amended on July 1, 2015. The former version of Civ.R. 56(C) provided, in pertinent part:

> The motion shall be served at least fourteen days before the time fixed for hearing. *The adverse party, prior to the day of hearing, may serve and file opposing affidavits.* Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. (Emphasis added.)

[3] Loc.R. 11(I)(1) of the Court of Common Pleas of Cuyahoga County, General Division, provides an opposing party 30 days to file a brief in opposition with accompanying evidentiary materials.

explanation or justification, waited two additional weeks before attempting to supplement its brief with Zemaitis's affidavit. Significantly, the affidavit was filed well beyond the time period set forth under Civ.R. 56(C), beyond the dispositive motion deadline set forth by the trial court, and after Strib Industries filed its reply brief in support of its motion for summary judgment.

**{¶36}** Under the totality of these circumstances, we find the trial court did not abuse its discretion in striking the untimely affidavit of John Zemaitis. As such, the email correspondences attached to Northern Chemical's brief in opposition were not incorporated by reference in a properly framed affidavit as required by Civ.R. 56(E). Accordingly, the email exhibits were not properly before the court for consideration on summary judgment and we cannot say the trial court abused its discretion by striking them from the record.

**{¶37}** Northern Chemical's first assignment of error is overruled.

**B. Summary Judgment**

**{¶38}** In its second assignment of error, Northern Chemical argues the trial court erred as a matter of law in granting summary judgment in favor of Strib Industries.

**{¶39}** This court reviews a trial court's grant of summary judgment under the de novo standard. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Pursuant to Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of 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 nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 653 N.E.2d 1196 (1995), paragraph three of the syllabus; *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

**{¶40}** Summary judgment consists of a burden-shifting framework. The movant bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.*; *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996); Civ.R. 56(E). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

**{¶41}** On appeal, Northern Chemical argues the trial court improperly granted summary judgment in favor of Strib Industries on its counterclaim for unpaid invoices and on its claims against Strib Industries for tortious interference with a business relationship, tortious interference with a contract, breach of contract, and misappropriation of trade secrets. For the purposes of judicial clarity, we review each claim separately.

### 1. Tortious Interference with Business Relations

**{¶42}** The elements of a tortious interference with a business relationship claim require (1) a business relationship; (2) the wrongdoer's knowledge of the relationship; (3) the wrongdoer's intentional and improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of privilege; and (5) resulting damages. *Brookeside Ambulance, Inc. v. Walker Ambulance Serv.*, 112 Ohio App.3d 150, 155-156, 678 N.E.2d 248 (1996); *Spafford v. Cuyahoga Community College*, 8th Dist. Cuyahoga No. 84786, 2005-Ohio-1672.

**{¶43}** Tortious interference with a business relation occurs when "a person, without privilege, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship, or perform a contract with another." *Castle Hill Holdings, L.L.C. v. Al Hut, Inc*., 8th Dist. Cuyahoga No. 86442, 2006-Ohio-1353, ¶ 47, citing *Juhasz v. Quik Shops, Inc*., 55 Ohio App.2d 51, 379 N.E.2d 235 (9th Dist.1978), paragraph two of the syllabus.

**{¶44}** Whether the business relationship is an at-will relationship does not in and of itself preclude a finding that the defendant tortiously interfered with the business relationship and, therefore, is not dispositive of the claim. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 178, 707 N.E.2d 853 (1999). On the other hand, interference with the business relationship alone is insufficient to sustain a cause of action for tortious interference. *Id*. It is the improper nature of the conduct that establishes liability. *Baseball at Trotwood, L.L.C. v. Dayton Professional Baseball Club*, S.D.Ohio No. C-3-98-260, 2003 U.S. Dist. LEXIS 27460, *5 (Sept. 2, 2003).

**{¶45}** Courts must consider the following factors in determining whether the actor's means are improper:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

*Gracetech Inc. v. Perez*, 8th Dist. Cuyahoga No. 96913, 2012-Ohio-700, ¶ 19, quoting *Fred Siegel*, at paragraph three of the syllabus.

**{¶46}** It is undisputed that Northern Chemical and ChemMasters shared a business relationship and that Strib Industries was aware of their business relationship. However, Strib

Industries argued in its motion for summary judgment that it was not improper for John Stibrick to notify ChemMasters that it would "no longer provide services or products to Northern Chemical due to non-payment." Further, Strib Industries argued that there is no evidence to suggest Strib Industries or ChemMasters were bound to Northern Chemical under an exclusivity agreement. Thus, Strib Industries maintains that "it was not unlawful or improper for [it to conduct] business directly with ChemMasters at ChemMasters' request." Strib Industries supported its arguments with Northern Chemical's written admissions, the affidavit of John Stibrick, and the deposition testimony of John Zemaitis.

**{¶47}** In contrast, Northern Chemical argues that Strib Industries intentionally and without justification caused ChemMasters to end its business relationship with Northern Chemical. Specifically, Northern Chemical submits that the following factors create genuine issues of material fact regarding whether Strib Industries' intentional interference was improper:

> Defendants held a shipment of product hostage to cause the interference with the business relationship between Plaintiff and ChemMasters and left ChemMasters with the option of either finding a new supplier or doing business directly with Defendants. * * * Defendants left ChemMasters no option to do business with Defendants. * * * Defendants' motive was to force the shut out of Plaintiff and to take the entire business relationship and profits for themselves. Defendants' used the nature of their relationship with Plaintiff and the knowledge it acquired from Plaintiff of Plaintiff's processes, pricing, contacts and relationship with ChemMasters to steal the relationship.

**{¶48}** Our review of the relevant admissible evidence does not support Northern Chemical's position. While Northern Chemical suggests the Strib Industries' actions were unjustified, Stibrick testified that he ended his business relationship with Northern Chemical because he "wasn't being paid for my services, timely, as we had agreed." He acknowledged that Northern Chemical and Strib Industries agreed to a payment schedule where Strib Industries would not be paid by Northern Chemical until Northern Chemical was paid by ChemMasters.

However, Stibrick testified that he learned that ChemMasters "was very timely" with its payments to Northern Chemical based on conversations he had with Northern Chemical representatives.

**{¶49}** Stibrick explained that before Strib Industries held an order that was produced for ChemMasters, he contacted Zemaitis to determine why Northern Chemical was failing to pay outstanding invoices. According to Stibrick, Zemaitis claimed that "he was not being paid timely by ChemMasters." Thereafter, Stibrick met with ChemMasters to seek clarification. Stibrick testified that during this meeting, a representative for ChemMasters indicated that ChemMasters was paying Northern Chemical for its services in a timely fashion, despite what Zemaitis may have claimed. In light of this information, Stibrick testified that he informed ChemMasters as follows:

> I can't do business with [Northern Chemical] because [it] doesn't pay as we agreed. You can either find another vendor or supplier or we can continue to produce them, but you would have to send me, Products Chemical, the purchase orders, we would process your orders and * * * you would pay us directly.

**{¶50}** Stibrick testified that shortly after his meeting with ChemMasters, Strib Industries received its first purchase order from ChemMasters and, at ChemMasters' request, Strib Industries agreed to provide blending services to ChemMasters directly.

**{¶51}** Viewing the foregoing evidence in a light most favorable to Northern Chemical, we find there is no evidence that Strib Industries used improper means to terminate ChemMasters' business relationship with Northern Chemical.

**{¶52}** Collectively, the evidence attached to Strib Industries' motion for summary judgment demonstrates that Stibrick had a good faith basis to notify ChemMasters that it would no longer blend products on Northern Chemical's behalf due to Northern Chemical's failure to

pay outstanding invoices. Without competing admissible evidence regarding the status of ChemMasters' payment history with Northern Chemical, Strib Industries' communication to ChemMasters that it would no longer provide products on Northern Chemical's behalf was justified and, therefore, cannot be deemed improper. ChemMasters was free to continue its business relationship with Northern Chemical, and there is no factual or legal basis to conclude that Strib Industries improperly induced ChemMasters to end its relationship with Northern Chemical. In short, Northern Chemical cannot attempt to use the tortious interference doctrine "to thwart competition where it * * * had no reasonable expectation of exclusive dealings" with ChemMasters and there is no evidence of improper interference or inducement. *See Miller Bros. Excavating v. Stone Excavating*, 2d Dist. Greene No. 97-CA-69, 1998 Ohio App. LEXIS 104 (Jan.16, 1998).

**{¶53}** Moreover, Northern Chemical has not presented admissible evidence to support its assertion that Stibrick met with ChemMasters with the intention of "stealing" its business from Northern Chemical. Stibrick testified that the purpose of the meeting was to determine whether ChemMasters had been making timely payments to Northern Chemical. In addition, Zemaitis testified that he had no knowledge concerning the conversation between Stibrick and ChemMasters' representatives or how the relationship between ChemMasters and Strib Industries began.

**{¶54}** Accordingly, we find the trial court properly granted summary judgment in favor of Strib Industries on Northern Chemical's tortious interference with a business relationship claim.

**2. Tortious Interference with a Contract**

**{¶55}** The elements of a tortious interference with a contract claim include "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's

intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages." *Fred Siegel*, 85 Ohio St.3d 171, 707 N.E.2d 853 (1999), at paragraph one of the syllabus.

**{¶56}** In its motion for summary judgment, Strib Industries' argued that Northern Chemical's complaint merely set forth the elements of a tortious interference with a contract claim, without "factual allegations that go to each and every one of the recited legal elements." In support of this statement, Strib Industries attached the affidavit of John Stibrick and the deposition testimony of John Zemaitis. In relevant part, Stibrick averred that he was not aware of any contract between ChemMasters and Northern Chemical. Similarly, Zemaitis conceded that ChemMasters "was free to do business with anybody" and that he was not aware if Northern Chemical had a written contract with ChemMasters. Thus, while ChemMasters had sent purchase orders to Northern Chemical in the past, there is no evidence in the record to suggest Northern Chemical and ChemMasters shared an ongoing contractual relationship, or that Strib Industries was aware of such a contractual relationship. *See, e.g., Walter v. ADT Sec. Sys., Inc.*, 10th Dist. Franklin No. 06AP-115, 2007-Ohio-3324, ¶ 31 (noting that the "main difference between tortious interference with a contract and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract.").

**{¶57}** Collectively, this evidence demonstrates the absence of material facts on the essential elements of Northern Chemical's tortious interference with a contract claim. Furthermore, Northern Chemical's brief in opposition did not present evidence to create issues of material fact as to the existence of a valid contract with ChemMasters, or Strib Industries' knowledge of the contract if one existed. Accordingly, we find the trial court properly granted

summary judgment in favor of Strib Industries on Northern Chemical's tortious interference with a contract claim.

### 3. Breach of Contract

**{¶58}** To recover on a claim for breach of contract, a plaintiff must demonstrate (1) the existence of a binding contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damages resulting from the breach. *Corsaro v. ARC Westlake Village, Inc*., 8th Dist. Cuyahoga No. 84858, 2005-Ohio-1982, ¶ 20, citing *Am. Sales, Inc. v. Boffo*, 71 Ohio App.3d 168, 175, 593 N.E.2d 316 (2d Dist.1991).

**{¶59}** Throughout this litigation, Northern Chemical has alleged that Strib Industries breached the Strib NDA Agreement by using Northern Chemical's confidential information, including pricing and product formula information, to create a relationship with ChemMasters. In its motion for summary judgment, Strib Industries argued that assuming the Strib NDA Agreement was valid and applied to its dealings with ChemMasters, "there is no evidence to support Northern Chemical's claim that Strib Industries breached the agreement."

**{¶60}** The Strib NDA Agreement provides, in pertinent part:

> 1. Confidential Information. "Confidential Information," for purposes of this Agreement, shall include, without limitation, (a) the existence of the discussions with the Company regarding the Possible Transaction, and (b) all information, materials, documents, including, without limitation, technical information and data, product development information and data, and financial statements, projections and other information, furnished by the Company * * * Recipient hereby acknowledges the sensitive and confidential nature of the Confidential Information and the damage that may result to the Company in the event any of such confidential information is disclosed to third parties or otherwise used improperly.
>
> 2. Non-Use of Information. Recipient shall not [use] any Confidential Information furnished by or through the Company or its employees, affiliates, agents or representatives in any manner whatsoever, in whole or in part, for any purpose other than in connection with evaluating the Possible Transaction.

> 3. Non-Disclosure of Information. Recipient shall use its best efforts to keep secret and confidential all Confidential Information provided by the Company or any of its employees, affiliates, agents or representatives, and shall not reveal any Confidential Information to any third party.

**{¶61}** At his deposition, Zemaitis alleged that Strib Industries breached the Strib NDA Agreement by using Northern Chemical's confidential information to steal ChemMasters as a customer. However, Zemaitis's deposition testimony does not support this assertion. Relevant to Strib Industries' position that it did not breach the Strib NDA Agreement, Zemaitis provided the following testimony:

> Defense Counsel: The product you were developing or producing for ChemMasters, were those formulas Northern Chemical's or ChemMasters'?
>
> John Zemaitis: ChemMasters'.
>
> Defense Counsel: So they would tell you, "here is the formula. I want you to mix this for us?
>
> John Zemaitis: Correct.
>
> * * *
>
> Defense Counsel: Was there any information that belonged to Northern Chemical that you feel my client misued?
>
> John Zemaitis: I can't answer that. I don't know.
>
> * * *
>
> Defense Counsel: As you sit here today, are you aware of any information that Strib Industries, and when I say Strib Industries, I mean Products Chemical, Strib Industries, and John Stibrick, any information that they provided to ChemMasters that belonged to you?
>
> John Zemaitis: No.

**{¶62}** In light of the foregoing testimony, we find Strib Industries met its initial burden of pointing to evidence that established its entitlement to judgment as a matter of law on Northern

Chemical's breach of contract claim. In response, Northern Chemical failed to meet its reciprocal burden. The clear and unambiguous language of the Strib NDA Agreement demonstrates that Strib Industries was only restricted from using or disclosing Northern Chemical's confidential information to third parties. Here, Zemaitis acknowledged at his deposition that the formulas used to produce or develop chemical sealants for ChemMasters were owned by ChemMasters. Thus, the record reflects that any confidential or proprietary information received or used by Strib Industries belonged to ChemMasters.

**{¶63}** Furthermore, we find no merit to Northern Chemical's contention that there are issues of material fact remaining as to whether Strib Industries inappropriately used or disclosed confidential information regarding Northern Chemical's pricing structure. Stibrick testified at his deposition that he and ChemMasters discussed pricing and agreed the price would be the same as the price ChemMasters previously paid to Northern Chemical. However, there is no evidence in this record to suggest that Strib Industries provided ChemMasters with any confidential information regarding pricing that ChemMasters was not already aware of given its prior business relationship with Northern Chemical. Similarly, there is no testimony to suggest Stibrick used his knowledge of Northern Chemical's pricing information to facilitate or finalize Strib Industries' business relationship with ChemMasters. Rather, the evidence demonstrates that ChemMasters' business relationship with Strib Industries began at ChemMasters' request.

**{¶64}** Under these circumstances, reasonable minds can conclude that in formulating its business relationship with ChemMasters, Strib Industries did not breach the Strib NDA Agreement by using or disclosing confidential information that was furnished to Strib Industries by or through Northern Chemical or its employees. The admissible evidence attached to Northern Chemical's brief in opposition does not create a genuine issue of fact for trial.

Accordingly, we find the trial court properly granted summary judgment in favor of Strib Industries on Northern Chemical's breach of contract claim.

### 4. Misappropriation of Trade Secrets

**{¶65}** Ohio's Uniform Trade Secrets Act, R.C. 1333.61 through 1333.69, provides for a civil remedy for the misappropriation of trade secrets.

**{¶66}** In its complaint, Northern Chemical alleged that Strib Industries misappropriated Northern Chemical's trade secrets in an effort to facilitate its direct business relationship with ChemMasters. The trade secrets identified in Northern Chemical's complaint include, "business information and scientific and/or technical information regarding, amongst other things, the plaintiff's customers, pricing, designs, processes, methods, and techniques."

**{¶67}** The Ohio Uniform Trade Secret Act, R.C. 1333.61(D), defines a "trade secret" as:

> [I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

**{¶68}** R.C. 1333.63(B) defines "misappropriation" as any of the following:

> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;
>
> (2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:
>
> (a) Used improper means to acquire knowledge of the trade secret;

> (b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;
>
> (c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
>
> **{¶69}** When analyzing a trade secret claim, the court must consider:
>
> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information. (Citation omitted.)

*Salemi v. Cleveland Metroparks*, 145 Ohio St.3d 408, 2016-Ohio-1192, 49 N.E.3d 1296, ¶ 25.

**{¶70}** Northern Chemical's trade secret claim reiterates many of the same arguments supporting its breach of contract claim. In challenging the validity of Northern Chemical's trade secrets claim, Strib Industries argued in its motion for summary judgment that there cannot be a claim for misappropriation of trade secrets where (1) "the trade secrets belonged to ChemMasters not plaintiff," and (2) "there was no information provided from Strib Industries to ChemMasters for which ChemMasters did not already have knowledge." In support of these statements, Strib Industries relies on Zemaitis's testimony that (1) the formulas Strib Industries used to produce the concrete sealer for ChemMasters were owned and/or developed by ChemMasters, and (2) he was unaware of any information Strib Industries provided to ChemMasters that belonged to Northern Chemical.

**{¶71}** Viewing the evidence in a light most favorable to Northern Chemical, we find Strib Industries satisfied its burden of demonstrating the absence of genuine issues of material fact of the element of "misappropriation." Initially, we note that there is no evidence that Strib Industries used improper means to "acquire" Northern Chemical's alleged trade secrets. In this case, the "trade secrets" referenced in Northern Chemical's complaint contemplates information that would have been properly provided to Strib Industries during its business relationship with Northern Chemical. It is not information that was acquired through "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." *See* R.C. 1333.61(A). Moreover, Zemaitis's deposition testimony supports Strib Industries' position that the blending formulas Strib Industries used to fill ChemMasters purchase orders were owned or developed by ChemMasters. Thus, trade secrets relating to the scientific information involved in Strib Industries' production of the concrete sealant, including designs, processes, methods, and techniques, belonged to ChemMasters and not Northern Chemical.

**{¶72}** In addition, we find no evidence to support an allegation that Strib Industries disclosed trade secrets to ChemMasters without Northern Chemical's consent. Analogous to our resolution of Northern Chemical's breach of contract claim, we find no legal precedent to suggest Strib Industries "misappropriated trade secrets" where the record demonstrates that the "information," as defined under R.C. 1333.63(D), was already known by ChemMasters based on its prior business dealings with Northern Chemical. As stated, the record demonstrates that ChemMasters was aware of Northern Chemical's processes and/or pricing information through no act of Strib Industries. Thus, there is no evidence to suggest Strib Industries improperly disclosed information to ChemMasters that it had a duty to maintain its secrecy or limit its use.

**{¶73}** Northern Chemical's brief in opposition falls short of presenting genuine issues of material fact regarding the element of misappropriation as defined under the statute. Northern Chemical provided no evidence to support the mere accusations and assertions raised in its opposition brief. Accordingly, we find the trial court properly granted summary judgment in favor of Strib Industries on Northern Chemical's misappropriation of trade secrets claim.

### 5. Strib Industries' Counterclaims

**{¶74}** Strib Industries' raised counterclaims for breach of contract and unjust enrichment, alleging that "Northern Chemical failed to pay Strib Industries for product prepared at the request of Northern Chemical for ChemMasters and for which Northern Chemical received payment from ChemMasters."

**{¶75}** In its motion for summary judgment, Strib Industries' argued that Northern Chemical failed to pay outstanding invoices in the amount of $8,992.50. In support of this statement, Strib Industries attached copies of nine overdue invoices that were deemed by the trial court to be written admissions. Construing this evidence in a light most favorable to Northern Chemical, no genuine issues of material fact remain as to Strib Industries' counterclaims for unpaid invoices.

**{¶76}** In its brief in opposition and on appeal, Northern Chemical does not dispute that it failed to satisfy the unpaid invoices for services rendered by Strib Industries. Instead, Northern Chemical argues that it is excused from performing its obligation to pay the outstanding invoices because Strib Industries' "materially breached" the parties' agreement for Strib Industries to receive payment after Northern Chemical was paid by ChemMasters. However, Northern Chemical's opposition brief failed to set forth admissible evidence to support its allegation of

material breach. Accordingly, the trial court properly granted summary judgment in favor of Strib Industries for its claim for unpaid invoices in the amount of $8,992.50.

**{¶77}** Based on the foregoing, Northern Chemical's second assignment of error is overruled.

**{¶78}** Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
LARRY A. JONES, SR., J., CONCUR