The Bullet Point: Ohio Commercial Law Bulletin

Volume III, Issue 20
October 10, 2019
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Can My Corporate Veil Be Pierced?

Ohio Business Opportunity Act (BOPA)

***Burger Dynasty, Inc. v. Bar 145 Franchising, LLC,* 6th Dist. Lucas No. L-19-1027, 2019-Ohio-4006.**

This appeal involved various claims, including those under the Ohio Business Opportunity Act (BOPA) related to the purchase of a restaurant franchise and the failure to provide a "notice of cancellation in a franchise agreement."

The Bullet Point: The legislature enacted BOPA to "protect purchasers of business opportunity plans by requiring that sellers provide the purchasers with the information necessary to make an intelligent decision about the business plan being offered * * *" The purpose of the statute is to regulate the sale of business opportunity plans and to provide significant remedies "to those who have been misled by dishonest or negligent franchisors." The plan must meet several conditions, including a requirement that the goods and services are supplied by the seller or a third party seller, and the purchaser is required to make an initial payment between $500 and $100,000 to the seller or an affiliate.

Further, in order to be beholden to BOPA's requirements, the seller must make the following representations to the purchaser: (1) that the purchaser will be provided outlets, accounts, or assistance in finding those accounts for the distribution of the goods and services; (2) that the purchaser will be provided locations or assistance in finding locations for use in the distribution of goods or services; (3) that the purchaser can make a profit in excess of the initial payment; (4) that a market exists for the goods and services; and (5) that there is a buy-back agreement.

Piercing the Corporate Veil Theory

***BINSARA, LLC v. Bolog, et. al.,* 5th Dist. Stark No. 2019CA00013, 2019-Ohio-4040.**

In this appeal, the Fifth Appellate District found that the trial court did not err in considering a piercing the corporate veil theory against the defendants, despite dismissing a claim for fraud as a matter of law.

The Bullet Point: It is well-settled that shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation. This principal is not absolute. When a shareholder misuses the corporate form as a shield from liability for their own misdeeds, Ohio law will permit the piercing of the corporate veil as a rare exception to the guiding principles of limited shareholder liability. Thus, piercing the corporate veil is a judicial act that imposes personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts. To determine whether to pierce the corporate veil, courts consider the following factors: (1) whether control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) whether control over the corporation by those to be held liable was exercised in such a manner as to commit fraud, an illegal act, or a similarly unlawful act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Ohio's Savings Statute

***U.S. Bank Trust N.A. v. Collins*, 8th Dist. Cuyahoga No. 108344, 2019-Ohio-4067.**

In this appeal, the Eighth Appellate District found that a lawsuit that might have been barred by the statute of limitations was saved from dismissal by Ohio's savings statute.

The Bullet Point: Ohio Savings Statute, R.C. 2305.19, affords a plaintiff a limited period of time to refile a dismissed claim that would otherwise be time barred. Thus, "[i]n certain instances, [R.C. 2305.19] operates to save timely filed actions by permitting a party to refile its complaint or file a new action within one year of a dismissal otherwise than on the merits."

Court Compelled Forensic Imaging

***Allied Debt Collection of Virginia, LLC, v. Nautica Entertainment, LLC,* 8th Dist. Cuyahoga No. 107678, 2019-Ohio-4055.**

In this appeal, the Eighth Appellate District found that while the trial court's decision to order a "mirror image" of a computer belonging to an employee of the defendant was proper, it found that the trial court failed to provide adequate safeguards to protect the confidentiality of information on the computer to be imaged.

The Bullet Point: A forensic image, also known as a "mirror image," will "'replicate bit for bit, sector for sector'" all allocated and unallocated space on a computer's hard drive, including any embedded, residual, and deleted data. Courts are generally reluctant to compel forensic imaging "largely due to the risk that the imaging will improperly

expose privileged and confidential material contained on the hard drive." To determine whether forensic imaging is warranted, as opposed to standard discovery procedures, the trial court must (1) weigh the parties' interest in obtaining discovery against privacy concerns; and (2) institute a protective protocol to ensure that forensic imaging is not unduly intrusive.

[Cite as *Burger Dynasty, Inc. v. Bar 145 Franchising, L.L.C.*, 2019-Ohio-4006.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Burger Dynasty, Inc	Court of Appeals No. L-19-1027
Appellant	Trial Court No. CI0201703567
v.	
Bar 145 Franchising, LLC, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: September 30, 2019

* * * * *

James L. Miller, Hunter G. Cavell, and Michael J. Stewart, for appellant.

John A. Borell, Jr., Henry J. Geha, III, and Anthony L. Hunter, for appellees.

* * * * *

SINGER, J.

{¶ 1} Appellant, Burger Dynasty, Inc., appeals from the judgments of the Lucas County Court of Common Pleas granting in part appellees' motion to dismiss and granting appellees' motion for summary judgment. For the following reasons, we reverse in part and affirm in part.

Assignments of Error

Assignment of Error One: The Trial Court Erred When It Denied Plaintiff-Appellant's Motion for Summary Judgment

Assignment of Error Two: The Trial Court Erred When It Granted Corporate Defendants-Appellees' Motion for Summary Judgment

Assignment of Error Three: The Trial Court Erred When It Granted Individual Defendants-Appellees' Motion to Dismiss

Background

{¶ 2} In August 2014, appellant purchased a restaurant franchise from appellee Bar 145 Franchising, Inc. ("Bar 145") by executing a franchise agreement. Bar 145 Franchising sells franchisees of its restaurant concept called Bar 145. Bar 145 restaurants are gastropubs provided live music and gourmet burgers to its patrons.

{¶ 3} Prior to the purchase, Bar 145 Franchising provided appellant a Financial Disclosure Document ("FDD") which disclosed certain financial information about Bar 145 Franchising's owner and manager, appellee JGCBlock, Inc. ("JGCBlock").

{¶ 4} Prior to the purchase, appellant was also provided a franchise agreement which served as the contract for the relationship between the parties. The franchise agreement required appellant to purchase materials exclusively from Bar 145 Franchising, to make an initial payment in the amount of $36,000, Bar 145 would provide some amounts of training and assistance, and that Bar 145 Franchising would assist in finding a location for the future restaurant.

{¶ 5} Following the signing of the franchise agreement, appellant opened a Bar 145 restaurant in Avon, Ohio. The restaurant would eventually fail and close in 2017. Following the closure of the restaurant, appellant discovered Bar 145 Franchising violated the Ohio Business Opportunity Act ("BOPA") by failing to include a notice of cancellation in the franchise agreement.

{¶ 6} On August 2, 2017, appellant brought a complaint alleging Bar 145 Franchising failed to comply with BOPA and for declaratory judgment. Bar 145 Franchising filed an answer and counterclaim which alleged breach of contract and loss of bargain damages.

{¶ 7} Appellees Jeremy Fitzgerald and George Simon filed a motion to dismiss in response to the complaint arguing that they did not meet the definitions of "seller" or "broker" under BOPA. The trial court agreed and found that neither officer met the definition of a seller or broker under BOPA because they were acting as individual corporate officers when marketing the franchise to appellant.

{¶ 8} JGCBlock also made a similar motion claiming it was an "affiliated person" and also not subject to the requirements of BOPA. The trial court found that there was not sufficient information to determine if JGCBlock retained any value from the sale and found more information was needed.

{¶ 9} On June 14, 2018, appellant filed its motion for summary judgment where it argued that BOPA applied to the transaction, that because JGCBlock and Bar 145 Franchising failed to comply in all material respects with federal disclosure requirements, appellees were not exempt from BOPA, and that appellees violated BOPA. The trial

court denied this motion on October 5, 2018 after finding the omission of the guarantee was not a material violation of federal disclosure requirements.

{¶ 10} JGCBlock and Bar 145 Franchising filed their motion for summary judgment seeking judgment on its breach of contract claims and its loss of bargain damages on the following day. The court granted this motion on October 5, 2018. This timely appeal followed.

Standard of Review

{¶ 11} An appellate court reviews a trial court's summary judgment decision de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment will be granted when no genuine issues of material fact exist when after, construing all the evidence in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). *Accord Lopez v. Home Depot, USA, Inc.*, 6th Dist. Lucas No. L-02-1248, 2003-Ohio-2132, ¶ 7. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984).

Legal Analysis

BOPA Violation

{¶ 12} Appellant argues the trial court erred in granting summary judgment because JGCBlock and Bar 145 Franchising did not materially comply with the federal disclosure deadlines found in 16 C.F.R. 436, also known as the "FTC rule." Appellant

argues that because JGCBlock's failure to attach its guarantee to the FDD, appellees did not materially comply with the FTC rule and therefore are beholden to regulations under BOPA. Appellant further argues that appellees violated BOPA's provisions regarding including a notice of cancellation and that they are entitled to statutory damages based on these omissions.

{¶ 13} Appellees admit that although they intended to include the guarantee, they failed to do so. Appellees argue that they materially complied with the FTC rule and though they failed to attach the guarantee, the guarantee was not material to the transaction. Appellees further argue that appellant is unable to prove its damages and that appellant waived its right to rescission when it opened additional franchises with Bar 145 Franchising.

BOPA and its Requirements

{¶ 14} The legislature enacted BOPA to "protect purchasers of business opportunity plans by requiring that sellers provide the purchasers of business opportunity plans by requiring that sellers provide the purchasers with the information necessary to make an intelligent decision about the business plan being offered * * *" R.C. 1334.15(A). The purpose of the statute is to regulate the sale of business opportunity plans and to provide significant remedies "'to those who have been misled by dishonest or negligent franchisors.'" *Peltier v. Spaghetti Tree, Inc.*, 6 Ohio St.3d 194, 196, 452 N.E.2d 1219 (1983), quoting 41 Ohio St.L.J. 477 (1980).

{¶ 15} A business opportunity plan is an agreement between parties in which the purchaser obtains the right to offer, sell, or distribute goods or services. R.C. 1334.15(D). A seller is a "person who sells or leases a business opportunity plan." R.C. 1334.01(A). A purchaser is a "person to whom a business opportunity plan is sold or leased." R.C. 1334.01(B).

{¶ 16} The plan must meet the several conditions, including the requirement that the goods and services are supplied by the seller or a third party seller requires, and the purchaser is required to make an initial payment between $500 and $100,000 to the seller or an affiliate. R.C. 1334.15(D)(1-2).

{¶ 17} Further, in order to be beholden to BOPA's requirements, the seller must make the following representations to the purchaser: (1) that the purchaser will be provided outlets or accounts or assistance in finding those accounts for the distribution of the goods and services; (2) that the purchaser will be provided locations or assistance in finding locations for use in the distribution of goods or services; (3) that the purchaser can make a profit in excess of the initial payment; (4) that a market exists for the goods and services; and (5) that there is a buy-back agreement. R.C. 1334.15(D)(3).

{¶ 18} Here, we find that the franchise agreement meets the definition of a business opportunity agreement under BOPA. The franchise agreement was an agreement between two parties in which appellant obtained the right to offer and sell services as a franchisee of Bar 145 Franchising. Appellant was required to purchase goods and services from appellees and made an initial payment of $36,000. Further, appellees made the required representations to appellant including the promise of

assistance in obtaining a location and the possible profit from the franchise. Therefore, as the FDD qualifies as a business opportunity plan appellees were required to meet the requirements of BOPA or meet an exemption.

Exemption from BOPA's Requirements

{¶ 19} A business opportunity plan can be exempt from many of the requirements of BOPA if the transaction "complies in all material respects" with the federal disclosure requirements found in 16 C.F.R. 436.1 *et seq.* R.C. 1334.13. The FTC rule requires a franchisor to disclose twenty-three items in the FDD it provides to the prospective franchisee. 16 C.F.R. 436.5. The rule is detailed in terms of its requirements and includes sample tables for reference. 16 C.F.R. 436.5. Item twenty-one requires the disclosure of financial statements of either the seller or an affiliate of the seller in order to inform the franchisee of the fiscal status of the franchisor. 16 C.F.R. 436.5(u). The rule requires financial statements to be prepared according to the generally accepted accounting principles for the past two fiscal years. 16 C.F.R. 436.5(u)(1).

{¶ 20} An "affiliate" is an "entity controlled by, controlling, or under common control with, another entity." 16 C.F.R. 436.1(b). A franchisor is permitted to include the financial statements of its affiliate instead of its own statements if the affiliate "absolutely and unconditionally guarantees to assume the duties and obligations of the franchisor under the franchise agreement." 16 C.F.R. 436.5(u)(1)(iii). "If this alternative is used, attach a copy of the guarantee to the [FDD]." 16 C.F.R. 436.5(u)(1)(iii).

{¶ 21} Should a franchisor comply with this exemption and its requirements in all material respects, the franchise agreement does not need to meet many of the

requirements under BOPA. The question then becomes whether appellee materially complied with the requirements of the FTC rule when it failed to attach the guarantee to the FDD.

{¶ 22} 16 C.F.R. 436.5(u)(1)(iii) clearly states that there are two alternatives for parties to follow when supplying a FDD to a potential franchisee. The first option is to have the financial statements of the franchisor audited according to GAAP principles for the previous two years. 16 C.F.R. 436.5(u)(1)(i-ii). The second option is to include the financial statements of an affiliate if the affiliate absolutely and unconditionally guarantees the franchisor's performance and obligations to the franchisee. 16 C.F.R. 436.5 (u)(1)(iii). The section clearly states that the ability to provide the financial statements of an affiliate is an "alternative" and that the guarantee must be attached to the disclosure document. *Id.*

{¶ 23} Here, appellees decided that they would choose the alternative provided for in the FTC rule and provided the financial statements of their affiliate, JGCBlock. *Cmplt*., Ex. A. The financial statements are clearly labelled as JGCBlock's and include statements about their financial status as well as their relationship with Bar 145 Franchising. They do not however make any guarantee of performance of Bar 145 Franchising's obligations to a future franchisee. Appellees therefore did not meet the technical requirements of the FTC rule as they neither attached the financial statements of Bar 145 Franchising or a guarantee from JGCBlock.

Materiality

{¶ 24} The next question then becomes whether their failure to attach a guarantee from JGCBlock can permit the court to find that they complied with the FTC rule in all material respects.

Utilizing JGCBlock's Financial Statements

{¶ 25} Appellant first argues that appellees failed to comply with the FTC rule in all material respects because they misled appellant into believing that the financial statements related to Bar 145 Franchising rather than JGCBlock. Appellants point to the first paragraph of the FDD which states that words such as "we" or "our" relate to Bar 145 Franchising rather than JGCBlock.

{¶ 26} However, the court is not persuaded. The very next paragraph in the FDD states that JGCBlock is Bar 145 Franchising's affiliate who is the "owner and manager of Bar 145 Toledo and Bar 145 Franchising, LLC." *Cmplt*., Ex. A, 1. The financial statements also clearly state that the financial statements are for "JGCBLOCK LLC dba Bar 145." *Cmplt*., Ex. A, Financial Statements. The last three years of audited financial statements are then attached to the FDD. The only reference within those financial statements to Bar 145 Franchising is the relationship between JGCBlock and Bar 145 Franchising. Upon a cursory glance at the FDD, Bar 145 Franchising clearly determined it would use the alternative available to it by utilizing the financial statements of its affiliate. This is not a reason for appellees to be found not in compliance with the FTC rule.

Failure to Attach Guarantee

{¶ 27} Next, appellant argues that appellees failed to attach the guarantee that is required when a franchisor attaches the financial statements of an affiliate rather than their own financial statements. The FTC rule clearly states that such a guarantee is required to be attached. Appellees admit that the guarantee was not attached, but that they had intended to attach the guarantee.

{¶ 28} Appellant argues that the omission of the guarantee was a material omission. It argues that a reasonable person in a prospective franchisee's shoes would seek a guarantee to be included in the FDD. Appellant contends that such an objective standard should be utilized because it would lead to consistent results in the interpretation of the statute.

{¶ 29} Appellees argue that it was not material in this specific instance to appellant's decision to purchase the franchise because appellant bought an additional two franchises and attempted to buy all of the franchising rights of Bar 145 Franchising. Appellee points out that appellant is unable to articulate how the omission of the guarantee affected its decision making or led to the closing of the franchise. Appellee also argues that the omission was just a technical error and therefore was not material.

{¶ 30} Little case law exists as to how "material" is to be interpreted and applied by this court in this context. "Material" is not defined in R.C. 1334.01 *et seq.*, but the court notes that the previous version of R.C. 1334.13 required a party to "fully comply" with the federal statute to be exempted from BOPA. Am.Sub.S.B. No. 196, 2012 Ohio Laws File 130. This serves a clear indication from the legislature that a franchisor does

not need to comply with every detail of the FTC rule, but rather only the material aspects of the FTC rule.

{¶ 31} Black's law dictionary defines "material" as "[h]aving some logical connection with the consequential facts or "[o]f some nature that knowledge of the item would affect a person's decision-making; significant; essential." *Black's Law Dictionary* (11th Ed.2019).

{¶ 32} In its *Final Guidelines* released when the original FTC rule was enacted, the Federal Trade Commission defined a "material fact" as "any fact, circumstance, or set of conditions which has a substantial likelihood of influencing a reasonable franchisee or a reasonable prospective franchisee in the making of a significant decision relating to a named franchise business or which has any significant impact on a franchisee or prospective franchisee." 44 F.R. 49972. This definition lends some understanding as to what information the FTC considered material to these types of transactions. It also demonstrates their tendency to view what was material in an objective light.

{¶ 33} When the FTC rule was revised in 2007, the FTC found that including a parent company's financial statements and an accompanying guarantee was appropriate in certain circumstances "[t]o the extent that a prospective franchisee is asked to rely on a parent to perform post-sale contractual obligations, or relies on a parent's guarantee, the financial stability of the parent becomes a material fact that should be disclosed." 72 F.R. 15444-01. They further found that the requirement that the guarantee be attached is a

"sound policy" and that "[b]efore a prospective franchisee is asked to invest in a franchise, he or she should be able to assess the extent of any performance or financial guarantees." *Id*. at 15511 fn. 668.

{¶ 34} A "parent" is defined as "an entity that control another entity directly, or indirectly through one or more subsidiaries." 16 C.F.R. 436.1(m). It is important to note that a parent is only required to disclose its financial statements when it has ongoing responsibilities to the franchisee following the sale of the franchise. 16 C.F.R. 436.5(u)(1)(v)(parent must include its financial statements and a similar guarantee when it commits to "perform post-sale obligations"). Nevertheless, they are still required to provide a guarantee of the franchisor's performance in specific instances and the FTC's guidelines clearly find that guarantee to be important when fully disclosing important information to future franchisees. The court finds this illustrative of the importance of the guarantees when the guarantee relates to an entity that is guaranteeing the performance of the franchisor in the future and the effect of that information on the franchisee.

{¶ 35} The trial court and appellees point to cases from other jurisdictions in an attempt to give guidance on how this court should interpret what is "material" and what is a "technical violation" of the FTC rule. Appellees point out these cases to make the argument that a technical violation is not enough to permit appellant to rescind the franchise agreement. *BMW Co., Inc. v. Workbench, Inc.*, N.Y. S.D. No. 86 CIV. 4200, 1988 WL 45594 (Apr. 29, 1988)(finding the failure to enclose information about the exclusivity of products was not sufficient to find a violation of the FTC rule because

other factors led to the venture's demise); *Dunkin' Donuts v. HWT Assoc.*, 181 A.D.2d 711, (N.Y. App. 1992)(finding the misrepresentation about competing stores nearby had a negligible effect on the business decision); *Burgers Bar Five Towns, LLC v. Burger Holdings Corp.*, 71 A.D.3d 939, (N.Y. App. 2010)(finding the failure to register the prospectus as required will not permit relief unless can prove damages); *Long John Silver's Inc. and A & W Restaurants, Inc. v. Nickleson*, 923 F.Supp.2d 1004 (W.D. Ky.2013)(summary judgment inappropriate when genuine issues of material facts surrounding causation and damages still exist as to franchisor's failure to present FDD seven days prior to signing franchise agreement); *Clapp v. Peterson*, 327 N.W.2d 585 (Ct. 1982)(providing FDD same day as signing franchise agreement was a technical violation with no harm to franchisees); *Two Men and a Truck/International Inc. v. Two men and a Truck/Kalamazoo, Inc.*, 949 F.Supp. 500 (W.D. Mich.1996) (providing FDD seven days before singing franchise agreement instead of the required ten days was a mere technical violation that was in spirit with the law).

{¶ 36} Appellant distinguishes these cases based on those specific state's laws. For example, Florida permits a private cause of action for violating the FTC rule as it is a deceptive practice. The other courts interpreting that a technical violation of the FTC rule found the violation must be accompanied by a an intent to deceive, the violation in some way led to the demise of the franchise, or the violation led to damages for the franchisee. None of the above cited cases dealt with a failure to attach a guarantee to the FDD. Most of these cases dealt with missed deadlines or the failure to include information that could have been ascertained by the franchisee. Therefore, unlike the

trial court, this court finds these cases distinguishable. The cases from other jurisdictions are different from the case at hand because those jurisdictions did not have to determine whether a violation was material or if the violation meant the franchisor complied with the FTC rule in all material respects. Those jurisdictions also dealt with what can be described as technical violations such as failures to follow deadlines and whether those technical violations affected the franchisee's decision to sign the franchise agreement. This is not the inquiry for this court. Rather, this court is required to determine if by failing to attach the guarantee from JGCBlock, appellees complied in all material aspects of the FTC rule.

{¶ 37} For example, in *Braatz, LLC v. Red Mango, LLC*, N.D. Texas No.3:14-CV-4516-G, 2015 WL 1893194 (Apr. 27, 2015), the district court relied on Wisconsin law to determine that the omission of a document was not material to the transaction and therefore did not violate the Wisconsin law regarding franchises. Specifically, a franchisor is required to register a copy of the franchise agreement and FDD with the state. *Id* at *4, citing Wis. Stat. § 553.27(4). If the franchisor fails to register the information and that *omission was material in the decision to purchase the franchise*, the franchisee may rescind the agreement. *Id.*, citing Wis. Stat. § 553.51(1)(Emphasis added). So although appellees attempt to argue that *Braatz* applies to the case at hand, the analysis is very different. The Wisconsin law specifically required the omission or violation to be material to the franchisee when making its decision to buy a franchise. *Id.* Ohio law does not make any such requirements. *See* R.C. 1334.13. The Revised Code section at issue merely states that the franchisor must comply with the FTC rule in all

material respects. R.C. 1334.13. The district court in *Braatz* found that the materiality requirement of the Wisconsin statute requires a subjective view of the word material and a court must look at how a violation of the rule affected the specific franchisee at issue. *Braatz* at *4 ("the statutory text instructs the court to assess the 'materiality' requirement by examining the [franchisee's] actions specifically, not the hypothetical actions of an objectively reasonable person"). No such indication is given the Ohio law, which in this court's opinion, lends itself more towards an objective view of the word material and that a court must determine what a reasonable person in the shoes of the franchisee would require when deciding to make the purchase of the franchise.

{¶ 38} Moreover, the court does not find that the failure to attach the guarantee of JGCBlock was a mere technical violation as appellees attempt to argue. It is not as if the FDD was provided to appellant a day or two after the actual deadline had passed, this was a failure to attach the guarantee of the financial responsibilities of JGCBlock. Despite the intent of JGCBlock and the failure of appellant to recognize the omission, the omission still serves as a violation of the FTC rule and a material violation at that.

{¶ 39} The court finds that for a party to comply with all material respects of the FTC rule, the party must follow the plain language of the FTC rule. The rule clearly states a franchisor has one of two options available to them to comply with the rule: attach two years of their own audited financial statements or attach two years of audited financial statements of their affiliate who guarantees the financial obligations of the franchisor. 16 C.F.R. 436.5.

{¶ 40} The court also finds that employing an objective view of what is material is necessary in order to have consistency in the interpretation of the statute. The purpose of the exemption under BOPA is to permit franchisors to supply the same information across state borders with little extra costs and requirements, otherwise the franchisors would always be subject to the stricter requirements in BOPA.

{¶ 41} Therefore, the court finds the trial court erred in denying appellant's motion for summary judgment. The failure to attach the guarantee of JGCBlock cannot mean the appellees complied with the FTC rule in all "material respects."

Violation of BOPA's Required Notices

{¶ 42} Having found that appellees were not exempt from BOPA's requirements, the question then becomes whether they violated BOPA.

{¶ 43} Appellant argues in its motion for summary judgment that appellees violated BOPA by failing to provide appellant notice of its right to cancel the transaction within five days, failed to provide a notice of appellant's right to cancel on the signature page, and failed to provide a detachable form of cancellation to the franchise agreement in violation of R.C. 1334.05. Appellees do not appear to contest these allegations, but rather make other arguments surrounding their exemption and whether damages can be proven.

{¶ 44} R.C. 1334.05 provides a purchaser has the right to cancel a business opportunity plan within five days and that written notice of this right be given in writing "at the address stated in the agreement." The franchise agreement is required to provide "[n]otice of the purchaser's right to cancel the agreement in at least ten-point boldface

type" near the space where the purchaser signs the agreement. *Id*. This notice must state "'You the purchaser, may cancel this transaction at any time prior to midnight of the fifth business day after the date you sign this agreement. See the attached notice of cancellation for an explanation of this right.'" R.C. 1334.05(7). A form captioned "notice of cancellation" must be attached and contain the specific language contained in R.C. 1334.05(7)(B). The form must be easily detachable and be in ten-point boldface type. *Id*.

{¶ 45} Upon review of the franchise agreement, Bar 145 Franchising did not meet the requirements under the Revised Code. There is no notice of appellant's right to cancel the agreement and the required detachable form is not attached to the agreement. *Cmplt*., Ex. A. Therefore, appellees clearly violated BOPA and is subject to penalties for that violation.

Written Notice of Rescission

{¶ 46} Appellees then argue that appellant has failed to provide them written notice to rescind the franchise agreement within three years. Appellant argues that the lawsuit that was filed served as their written notice and that the lawsuit was filed within three years of the franchise agreement being signed.

{¶ 47} R.C. 1334.09(A) provides that as a result of a violation of BOPA, a purchaser may rescind the franchise agreement by giving written notice within three years of the date of the agreement. Following the written notice, the purchaser may

recover all sums paid to the seller, minus the fair market value at the time of delivery and the value of any goods supplied by the seller that were not returned. *Id*. No manner for providing the written notice is provided in the statute.

{¶ 48} The franchise agreement was signed on November 26, 2014. The complaint in this matter was filed on August 2, 2017. The complaint plainly seeks the rescission of the agreement. Appellees responded to the complaint in November 2017. Thus, appellees had been provided written notice, in the form of a complaint, that appellant was seeking to rescind the franchise agreement between the parties.

{¶ 49} Appellees provide no legal support that a complaint would not serve as written notice of a party's intent to rescind the agreement. The only other Ohio case interpreting this statute permitted the filing of a lawsuit to serve as written notice under R.C. 1334.06(A). In *RH/EY, Inc. v. Treachers*, 115 Ohio App.3d 332, 685 N.E.3d 332 (7th Dist.1996), the appellate court found that the five year statute of limitations found in R.C. 1334.10(C) did not apply because the seller had failed to include the right of cancellation notice in the franchise agreement.

{¶ 50} The court finds that appellant provided written notice of its intent to rescind the franchise within the three year time period by filing the complaint in this matter. Therefore, no genuine issues of material fact exist that appellant provided written notice of its intent to rescind the agreement within three years under R.C. 1334.06(A).

Waiver of Rescission

{¶ 51} Appellees further argue that appellant waived its right to rescind the franchise agreement by opening two additional franchises after the omission of the

guarantee. In support, appellees cite *Petland, Inc. v. Hendrix*, S.D. Ohio No. 2:04-CV-224, 2005 WL 1651723 (July 13, 2005). The court found that a franchisee had waived its argument that the franchise agreement was signed despite an unfair or deceptive practice of the franchisor. The franchisee found an impropriety and despite its existence, the franchisee did not seek rescission of the franchise agreement and continued to open a second franchise. The court found that because the franchisee discovered the violation and decided to open a second franchise anyway, they waived the ability to make a claim for unfair practice under 16 C.F.R. 436.1 and R.C. 1334.13.

{¶ 52} This is dissimilar to the case at hand as appellant alleges that it did not discover the violation until after the close of the franchise. Appellant is not claiming an unfair or deceptive practice took place on the part of appellees, but rather that appellees failed to follow a statute and statutory damages flow from that violation. Appellant has presented information that it did not discover the BOPA violation until after the closure of the restaurant and appellees have failed to create a genuine issue of material fact that appellant was aware there was a violation before that date. The court concurs with appellant and does not find that appellant waived the claim of rescission. Therefore, appellant is entitled to rescission of the franchise agreement under BOPA.

Damages

{¶ 53} Appellees next argue that appellant cannot prove they suffered damages as a result of the BOPA violation.

> In any case arising under section 1334.08 or 1334.09 of the Revised Code, if a seller or broker shows by a preponderance of the

> evidence that a violation, or failure to meet the requirements of the exemption provided for in section 1334.13 of the Revised Code, resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed against the seller or broker under division (D) of section1334.08 of the Revised Code, no party shall be awarded attorney's fees under division (B) of section 1334.09 of the Revised Code, and monetary recovery shall not exceed the amount of actual damages resulting from the violation. R.C. 1334.10(D).

{¶ 54} The court finds that there are genuine issues of material fact that exists in relation to whether the failure to meet the requirements under R.C. 1334.13 was due to a bona fide error. Appellees have the burden of establishing that the omission was due to such an error by a preponderance of the evidence. Therefore, appellant's motion for summary judgment must be denied on this basis.

Appellee's Counterclaims

{¶ 55} As the court ruled that summary judgment was proper on appellant's claims for rescission, the contract is treated as it never existed and therefore appellees cannot recover under the contract. Therefore, the summary judgment of appellees must be denied and the judgment of the Lucas County Court of Common Pleas reversed.

Motion to Dismiss Individual Appellees

{¶ 56} Appellees Jeremy Fitzgerald and George Simon moved to dismiss appellant's complaint against them on September 15, 2017 claiming that they were acting

as officers of a corporation at the time the franchise was being negotiated and therefore cannot be held liable. Fitzgerald and Greene argued that they could not be held liable under BOPA because they did not meet the definition of a seller or a broker under BOPA. Fitzgerald and Simon alleged that there were no allegations in the complaint that they acted in any capacity other than as representatives of Bar 145 Franchising.

{¶ 57} Appellant argues that because Ohio is a notice pleading statute, they have alleged a set of facts which would entitle them to relief. Appellant also argues that because no discovery has taken place, appellant is unaware whether Fitzgerald and Simon are equity holders in Bar 145 Franchising. Appellant argues this matter is important because if Simon and Fitzgerald were equity holders in Bar 145 Franchising, they would receive something of value by selling the franchise and therefore meet the definition of a broker.

{¶ 58} An appellate court reviews a motion to dismiss under Civ.R. 12(B) de novo. *Greely v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545, 548 605 N.E.2d 378 (1992). This court must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. Under Civ.R. 12(B)(6), it must appear beyond a

reasonable doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 573 N.E.2d 1063 (1991).

{¶ 59} A "seller" is defined under BOPA as "a person who sells or leases a business opportunity plan." R.C. 1334.01(A). A broker is defined as "a person, other than a seller, who sells or leases, offers for sale or lease, or arranges for the sale or lease of a business opportunity plan for a commission, fee, or anything of value." R.C. 1334.01(C). "Person" is defined as "an individual, corporation, business trust, estate, trust, limited or general partnership, association, or other business entity." R.C. 1334.01(E).

{¶ 60} The Seventh District found when presented with a similar situation that officers of a corporation do not meet the definition of broker or seller under BOPA. *Yo-Can, Inc. v. The Yogurt Exchange, Inc.*, 7th Dist. Mahoning, 149 Ohio App.3d 513, 2002-Ohio-5194, 778 N.E2d 80, ¶ 32. "'An officer of a corporation is not commonly considered a broker merely because the corporation does not hire a broker and rather has its officers to act on its behalf.'" *Id*.

{¶ 61} In *Yo-Can*, the Seventh District found corporate officer and directors of a franchisor were not liable under BOPA because there was no intent by the legislature to hold such officer responsible under BOPA. *Id*. The court found that only one type of agent could be held liable under BOPA, a broker. *Id*. Further, "a statute creating a new right of redress must express its intent to hold officers personally liable in the area of regulation. Ohio's BOPA does not express this intent facially * * *" *Id*.

{¶ 62} The court agrees with the Seventh District and finds that the legislature did not manifest an intent to include the corporate officers or directors of a franchisor in the definitions of seller or broker.

{¶ 63} Appellant attempts to argue that additional discovery should take place to determine whether Fitzgerald and Simon are actually brokers because they received something of value in return for selling a franchise. However, the court is limited to review of the complaint and its allegations on a motion to dismiss. Civ.R.12(B); *Crane Serv. & Inspections, LLC v. Cincinnati Specialty Underwriters Ins. Co.*, 12th Dist. Butler No. CA2018-01-003, 2018-Ohio-3622, ¶ 33, citing *Lindow v. N. Royalton*, 104 Ohio App.3d 152, 661 N.E.2d 253 (8th Dist.1995) ("completion of discovery is therefore not relevant to the granting of a motion to dismiss"). Therefore, without seeking to have the motion converted to a motion for summary judgment, the court is not permitted to consider any information outside of the complaint.

{¶ 64} The court has reviewed the complaint and the exhibits and finds no facts or allegations by appellant that Fitzgerald and Simon were acting in any capacity other than in their capacities as officers of Bar 145 Franchising. Appellant alleges that Fitzgerald and Simon communicated with appellant directly, but fails to make any further allegations against either of the corporation's officers. *Cmplt.* At ¶ 8.

{¶ 65} The court cannot find a set of facts which entitled appellant to relief because appellant has failed to make any allegations which would permit a reasonable inference that Fitzgerald and Simon were a seller or a broker under BOPA. Appellant

failed to include any allegation outside the fact that the men worked with appellant directly which would permit the court to find that they are liable under BOPA.

{¶ 66} This court must agree with appellees. Appellant failed in its complaint to allege a set of facts upon which this court could find that Fitzgerald and Simon met the definitions of seller or broker under BOPA. Therefore, the judgment of the Lucas County Court of Common Pleas is affirmed in this regard.

Conclusion

{¶ 67} On consideration thereof, the judgment of the Lucas County Court of Common Pleas is reversed in part and affirmed in part. The judgment granting appellees' motion for summary judgment and denying appellant's motion for summary judgment are reversed. The judgment granting appellees' motion to dismiss is affirmed. The matter is remanded for proceedings consistent with this opinion. The parties are ordered to split the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Christine E. Mayle, P.J. _____
CONCUR.
JUDGE

[Cite as *Binsara, L.L.C. v. Bolog*, 2019-Ohio-4040.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BINSARA, LLC	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2019CA00013
	:	
FRANK A. BOLOG, ET AL.	:	
	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2017CV01748
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 30, 2019

APPEARANCES:

For Plaintiff-Appellee:	For Defendants-Appellants:
LAURA L. MILLS PIERCE C. WALKER 101 Central Plaza South Suite 1200 Canton, OH 44702	JEFFREY JAKMIDES 325 East Main Street Alliance, OH 44601

Delaney, J.

{¶1} Defendants-Appellants Frank A. Bolog, Frank B. Bolog, Brad B. Bolog, Ben Bolog, and Davis Motor Coach, Ltd. appeal the December 28, 2018 judgment entry of the Stark County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

Ramjay, Inc. v. US Coach, Ltd., Case Nos. 2013CV01325 and 2014CV01244

{¶2} On May 15, 2013, Ramjay, Inc. filed a complaint against US Coach, Ltd. in the Stark County Court of Common Pleas, Case No. 2013CV01325. The complaint alleged a breach of contract for the repair of a passenger bus delivered to US Coach, Ltd. on June 25, 2012. On September 11, 2013, the parties reached a partial settlement through mediation. Ramjay was to deposit $69,744 with the trial court to be held in escrow. US Coach was to return the bus to Ramjay, pending an inspection by an independent inspector. On May 1, 2014, the parties filed a joint stipulation of dismissal without prejudice.

{¶3} On May 23, 2014, Ramjay filed a complaint for breach of contract as to the passenger bus against US Coach in the Stark County Court of Common Pleas, Case No. 2014CV01244. Upon US Coach's motion to dismiss, the trial court dismissed the complaint on October 15, 2014, without prejudice.

Binsara, LLC v. US Coach, Ltd., Case No. 2014CV02878

{¶4} On December 16, 2014, Plaintiff-Appellee Binsara, LLC filed a complaint in the Stark County Court of Common Pleas, Case No. 2014CV02878 against US Coach, Ltd. alleging claims of breach of contract, unjust enrichment, and fraud. The president of Binsara is the owner of Ramjay, Inc. Binsara stated in its complaint that on June 25, 2012,

it delivered a passenger bus to US Coach for repairs. US Coach estimated it would cost $63,431.64 for it to repair the vehicle and the repairs would be completed by July 31, 2012. In January 2013, Binsara inspected the bus and determined US Coach had not made the appropriate repairs, rendering the bus inoperable. Binsara claimed US Coach's failure to timely and appropriately repair the bus caused it to incur expenses for alternate transportation and lost profits.

{¶5} US Coach filed an answer, counterclaim, and third-party complaint. In its third-party complaint, US Coach named Fleet Priority Services, LLC, CNA Insurance, and Advantage Funding as third-party defendants.

{¶6} On December 15, 2016, the trial court issued a judgment entry stating the case was settled by agreement of the parties. The trial court dismissed the case but retained jurisdiction to enforce the settlement agreement. The Settlement Agreement, which was never filed with the trial court, stated in pertinent part:

> 1. Settlement Terms
>
> **A. Discharge of Lien**. The Parties agree that Coach shall discharge the lien on the Bus owned by Binsara's financer, Advantage Funding ("Advantage"). The value of said lien is $70,000.00. Coach shall either 1.) deliver to Binsara the sum of $70,000.00 to discharge said lien, or 2.) obtain financing from Advantage sufficient to satisfy and discharge Binsara's liability on the Bus. The Parties further agree that upon discharge of the lien or Coach obtaining financing, Binsara shall transfer title to the Bus to Coach free and clear of all liens. For the purpose of such transfer, Binsara agrees

that it will cooperate in good faith and take any and all steps necessary to effectuate the Bus's transfer to Coach.

B. **Settlement payment**. The parties agree that Coach shall deliver to Binsara the sum of Forty Thousand and No/100 Dollars ($40,000.00) (the "Payment") as additional consideration for this Agreement and the covenants herein contained.

C. Contingencies. The Parties agree and Binsara acknowledges that Coach's ability to satisfy its obligations detailed in Paragraphs 1(A) and 1(B) is dependent on Coach obtaining financing for the same. Notwithstanding anything to the contrary herein, this Agreement shall be strictly contingent on Coach obtaining financing to satisfy Paragraphs 1(A) and 1(B) hereof. Coach shall have ___ days from the execution of this Agreement to obtain said financing. In the event Coach is unable to secure said financing, this Agreement shall be void.

{¶7} On May 24, 2017, the parties filed a Stipulated and Agreed Final Judgment Entry. The entry stated Binsara was awarded judgment against US Coach in the amount of $110,000. The parties agreed Binsara would not execute on the judgment until the expiration of 21 days following the filing of the judgment entry. The basis for the 21 day grace period was to allow US Coach to obtain financing.

{¶8} US Coach failed to pay the judgment and its representatives did not appear at the debtor's examination.

***Binsara, LLC v. Frank K. Bolog, et al*., Case No. 2017CV01748**

{¶9} On August 28, 2017, Binsara filed a complaint against Defendants-Appellants Frank K. Bolog, Frank A. Bolog, Frank B. Bolog, Brad A. Bolog, Ben Bolog, and Davis Motor Coach, Ltd.[1] In the complaint, Binsara brought three claims: constructive fraud, piercing the corporate veil, and punitive damages. The complaint alleged that at the time the parties entered into the Stipulated and Agreed Final Judgment Entry on May 24, 2017, US Coach was defunct and/or not operating any business. The Bologs filed their amended answer on November 9, 2017.

{¶10} Binsara filed a partial motion for summary judgment on January 26, 2018. It argued it was entitled to judgment as a matter of law on its claims for constructive fraud and piercing the corporate veil. In its motion, Binsara stated it had submitted written discovery to the Bologs on December 8, 2017, with responses due on January 15, 2018. As of the date of the motion for partial summary judgment, the Bologs had not responded to its Requests for Admissions; therefore, those Admissions should be deemed admitted as a matter of law.

{¶11} On January 30, 2018, the Bologs filed a motion for summary judgment and request for sanctions. In their motion, they argued Binsara's claims for constructive fraud and piercing the corporate veil were barred by the doctrine of res judicata, specifically issue preclusion. The Bologs stated the issue between the parties as to damages for repair of the passenger bus had been litigated multiple times, resulting in a final judgment on May 24, 2017. Based on the final judgment, Binsara was precluded from raising new claims.

[1] Frank K. Bolog was dismissed as a party defendant on October 31, 2017.

{¶12} On March 2, 2018, the trial court issued a judgment entry denying both parties' motions for summary judgment.

{¶13} On May 21, 2018, the trial court granted Binsara's motion to amend its complaint to add the claim of successor liability against Davis Motor Coach, Ltd. The Bologs filed a motion to dismiss the successor liability claim.

{¶14} On June 4, 2018, the Bologs filed Motion for Leave and Second Motion for Summary Judgment. The trial court granted the Bologs' motion for leave to file a second motion for summary judgment. In their second motion for summary judgment, the Bologs argued that pursuant to *Berry v. Javitch*, *Block & Rathbone, L.L.P*., 127 Ohio St.3d 480, 2010-Ohio-5772, 940 N.E.2d 1265, Binsara's claim for constructive fraud was barred. In *Berry*, the Ohio Supreme Court held that when parties to a claim have executed a settlement agreement and consent judgment entry, a party cannot subsequently institute a separate cause of action for fraud in the inducement of the settlement agreement without seeking relief from the consent judgment and rescinding the settlement agreement. The Bologs stated Binsara never sought relief from the May 24, 2017 Stipulated and Agreed Final Judgment Entry before filing its claim for constructive fraud against the Bologs.

{¶15} On August 7, 2018, the trial court issued its judgment entry on the Bologs' motion to dismiss and second motion for summary judgment. The trial court denied the Bologs' motion to dismiss Binsara's successor liability claim. The trial court, however, granted the Bologs' motion for summary judgment as to Binsara's claim for constructive fraud. The trial court found pursuant to *Berry, supra*, Binsara could not seek both to enforce the settlement agreement and pursue a fraud claim because the remedies were

inconsistent: “one which seeks to enforce the terms of the settlement by recovering the agreed-upon amount, and the other which seeks to gain more compensation than what was agreed-upon on the theory that they entered into a settlement due to a fraudulent misrepresentation.” (Judgment Entry, August 7, 2018).

{¶16} The matter proceeded to a bench trial on September 5, 2018. The only claims before the trial court were Binsara’s claims for piercing the corporate veil, successor liability against Davis Motor Coach, Ltd., and punitive damages. On December 28, 2018, the trial court issued its Findings of Fact and Conclusions of Law. The trial court made the following relevant findings of fact:

{¶17} US Coach was formed on December 1, 2008, by Frank A. Bolog and Ben Bolog was later added as an agent for US Coach; the current officers and directors of US Coach are Frank A. Bolog and Ben Bolog. The address for US Coach was listed at 170 Prospect Street in Alliance, Ohio. US Coach kept no meeting minutes, corporate appointments, or board records. Ben Bolog testified “US Coach” was a trade name for multiple companies, including A & M Transit Lines and Davis Motor Coach. On October 27, 2010, US Coach filed for bankruptcy and was discharged from bankruptcy on January 20, 2010. The last financial transaction for US Coach was a transfer of $52.00 to Davis Bus Tours, Ltd. US Coach entered into a contract with Binsara on June 14, 2012 to repair a passenger bus. After US Coach and Binsara entered into the Settlement Agreement regarding the repair of the passenger bus, US Coach was unable to secure financing to pay the funds required by the Stipulated and Agreed Final Judgment Entry.

{¶18} The bankruptcy proceedings showed that US Coach was wholly owned by Fidelity US Coach. Ben Bolog was listed as the agent for Fidelity US Coach. Fidelity US

Coach filed for bankruptcy on the same day as US Coach, but the bankruptcy records showed that Fidelity US Coach was wholly owned by A & M Transit Lines.

{¶19} A & M Transit Lines was formed on January 26, 1968 by Frank A. Bolog. Its business address was also listed at 170 Prospect Street in Alliance, Ohio. The officers and directors of A & M Transit Lines are Frank K. Bolog, Frank A. Bolog, and Ben Bolog.

{¶20} Davis Motor Coach was incorporated on November 7, 2011, by Ben Bolog. There are no corporate records, meeting minutes, or board appointments for Davis Motor Coach. The original business address for Davis Motor Coach was 170 Prospect Street in Alliance, Ohio. Davis Motor Coach maintains three bank accounts, for which the address is listed as 170 Prospect Street in Alliance, Ohio. US Coach Sales & Leasing, Ltd. was formed on December 22, 2008, by Frank A. Bolog. US Coach Tours, Ltd. was formed on January 5, 2011, by Brad A. Bolog. Both corporations' addresses were 170 Prospect Street in Alliance, Ohio. Bank records showed transfers of money between all the business entities incorporated by the Bologs.

{¶21} Based on the findings of fact, the trial court made the following conclusions of law:

{¶22} The trial court considered the three-pronged test to determine whether to pierce the corporate veil so that the Bologs as individual shareholders should be liable for wrongs allegedly committed against Binsara: (1) control over the corporation by those held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud, an illegal act, or a similarly unlawful act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to

the plaintiff from such control and wrong. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc*., 67 Ohio St.3d 274, 617 N.E.2d 1075 (1963); *Dombroski v. Wellpoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538.

{¶23} The trial court found the corporate form of US Coach was used to commit a fraud on Binsara. Specifically, US Coach fraudulently entered into a contract with Binsara for repairs to its bus when in fact, US Coach was not a valid legal entity at the time of the contract and had filed bankruptcy in 2010. In doing so, the Bologs used a sham entity to insulate themselves or their other non-defunct entities for liability. Based on the fraudulent act by the Bologs and US Coach, Binsara suffered injury and unjust loss when US Coach was unable to satisfy its obligations.

{¶24} While the trial court acknowledged that piercing the corporate veil is a remedy, not an independent cause of action, the trial court concluded that US Coach's liability was previously determined in Case No. 2014CV02878 pursuant to the Stipulated and Agreed Final Judgment Entry. Further, the trial court found sufficient evidence to demonstrate the Bologs used their control over US Coach to perpetrate a fraud on Binsara.

{¶25} The trial court next found that Binsara's claims were not barred by res judicata. The previous litigation between Binsara and US Coach did not consider the personal liability or corporate status of US Coach.

{¶26} The trial court finally found that Binsara did not establish successor liability as to Davis Motor Coach.

{¶27} The trial court, finding that the corporate veil should be pierced, ordered that Frank A. Bolog and Ben Bolog should be held individually liable for the $110,000 judgment

entered against US Coach, Ltd. in *Binsara, LLC v. US Coach, Ltd*., Case No. 2014CV02878. It did not award punitive damages.

{¶28} It is from this judgment the Bologs now appeal.

ASSIGNMENTS OF ERROR

{¶29} The Bologs raise two Assignments of Error:

{¶30} "I. AS THE TRIAL COURT HELD, THE CORPORATE VEIL CAN BE PIERCED AND INDIVIDUAL LIABILITY EXISTS WHEN A CORPORATION IS USED FOR CRIMINAL OR FRAUDULENT PURPOSES TO THE DETRIMENT OF A THIRD PARTY. THE TRIAL COURT DISMISSED THE FRAUD CLAIM AGAINST THE APPELLANTS, AND THUS ITS RULING PIERCED THE CORPORATE VEIL WAS CONTRADICTORY AND CONTRARY TO OHIO LAW.

{¶31} "II. THE TRIAL COURT FOUND THAT US COACH, LTD. WAS UNABLE TO SECURE FINANCING TO PAY THE FUNDS REQUIRED BY THE STIPULATED AND AGREED FINAL JUDGMENT ENTRY. PURSUANT TO THE EXPLICIT WORDING OF SAID JUDGMENT ENTRY, THIS FAILURE TO SECURE FINANCING RENDERED THE AGREEMENT VOID. DESPITE THIS FACT, THE TRIAL COURT RULED THAT THIS CLEARLY VOIDED THE AGREEMENT WAS ENFORCEABLE AGAINST THE APPELLANTS."

ANALYSIS

Standard of Review

{¶32} The trial court conducted a bench trial in this case. In *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, the Ohio Supreme Court clarified the standard of review appellate courts should apply when assessing the manifest weight

of the evidence in a civil case. The Ohio Supreme Court held the standard of review for manifest weight of the evidence for criminal cases stated in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E. 2d 541 (1997), is also applicable in civil cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517. A reviewing court is to examine the entire record and determine "whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Id*.; *see also Sheet Metal Workers Local Union No. 33 v. Sutton*, 5th Dist. Stark No. 2011 CA 00262, 2012–Ohio–3549. "In a civil case, in which the burden of persuasion is only by a preponderance of the evidence, rather than beyond a reasonable doubt, evidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight)." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517.

{¶33} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. *Markel v. Wright*, 5th Dist. Coshocton No. 2013CA0004, 2013–Ohio–5274. Further, "an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusion of law." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The underlying rationale for giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Id*. Accordingly, a trial court may believe all, part, or none of the testimony of any witness who appears before it. *Rogers v. Hill*, 124 Ohio App.3d 468, 706 N.E.2d 438 (4th Dist. 1998).

{¶34} As to questions of law, an appellate court applies a de novo review to the trial court's legal findings. *Hayward v. Summa Health Sys./Akron City Hosp*., 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶23; *Office of Consumers' Counsel v. Pub. Util. Comm*., 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979) ("[a]s to questions of law, [a reviewing] court has complete, independent power of review[;] [l]egal issues are accordingly subject to more intensive examination than are factual questions").

{¶35} Pursuant to this standard of review, we consider the Bologs' first and second Assignments of Errors.

Piercing the Corporate Veil

{¶36} The Bologs contend in their first Assignment of Error that the trial court erred when it considered Binsara's claim for piercing the corporate veil after it found Binsara's claim for constructive fraud failed as a matter of law. The Bologs argue that without a claim of fraud, Binsara could not fulfill the second prong under the *Belvedere* test for piercing the corporate veil. We disagree.

{¶37} It is a well-settled principle in Ohio law that shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation. *Dombroski v. WellPoint, Inc*., 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, ¶ 16 citing Section 3, Article XIII, Ohio Constitution; *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc*., 67 Ohio St.3d 274, 287, 617 N.E.2d 1075 (1963). Shareholders, however, do not hold an absolute immunity from liability for the actions of their corporations. *Id*. at ¶ 17. The legal fiction of the corporate form cannot stand if used for a purpose or intent not within its reason and policy. *Id*. citing *State ex rel. Atty. Gen. v. Std. Oil Co*., 49 Ohio St. 137, 30 N.E. 279, paragraph one of the syllabus. When a

shareholder misuses the corporate form as a shield from liability for their own misdeeds, Ohio law will permit the piercing of the corporate veil as a rare exception to the guiding principles of limited shareholder liability. *Id*. at ¶ 17, 26 citing *Belvedere*, 67 Ohio St.3d at 287; *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475, 123 S.Ct. 1655, 155 L.E.2d 643 (2003). Piercing the corporate veil is a judicial act that imposes personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts. *Denny v. Breawick, LLC*, 2019-Ohio-2066, -- N.E.3d –, ¶ 15 (3rd Dist.) citing *Minno v. Pro-Fab, Inc*., 121 Ohio St.3d 464, 2009-Ohio-1247, 905 N.E.2d 613, ¶ 8.

{¶38} To decide whether to pierce the corporate veil, the courts must apply a three-pronged test established in *Belvedere, supra* and clarified in *Dombroski, supra*. The focus of the test is the extent to which the shareholder controlled the corporation and whether the shareholder misused his or her control to commit specific egregious acts that injured the plaintiff: (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud, an illegal act, or a similarly unlawful act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Belvedere, supra*, at paragraph three of the syllabus; *Dombroski, supra*, at ¶ 29.

{¶39} All three prongs of the test must be met for the court to pierce the corporate veil. *Denny v. Breawick, LLC,* 2019-Ohio-2066, -- N.E.3d --, ¶ 19 (3rd Dist.). Because piercing the corporate veil is primarily a matter for the trier of fact, an appellate court will not reverse a decision to pierce the corporate veil if some competent, credible evidence

supports the determination. *Id*. at ¶ 20 citing *Snapp v. Castlebrook Builders, Inc*., 2014-Ohio-163, 7 N.E.3d 574, ¶ 85 (3rd Dist.) quoting *State ex rel. DeWine v. S & R Recycling, Inc.*, 195 Ohio App.3d 744, 2011-Ohio-3371, 961 N.E.2d 1153, ¶ 29 (7th Dist.). *Bates v. Rose*, 6th Dist. Wood No. WD-16-068, 2017-Ohio-7977, 2017 WL 4334178, ¶ 26; *Longo Constr., Inc. v. ASAP Tech. Serv., Inc*., 140 Ohio App.3d 665, 748 N.E.2d 1164 (8th Dist. 2000); *Clinical Components, Inc. v. Leffler Industries, Inc*., 9th Dist. No. 95CA0085, 1997 WL 28246, *3 (Jan. 22, 1997).

{¶40} The Bologs contend in their appeal that the trial court erred as to the second prong of the *Belvedere* test; they raise no argument challenging the trial court's findings as to the first or third prongs. As such, our analysis will be limited to whether the plaintiff demonstrated that the Bologs as corporate officers, directors, or shareholders exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act. *Dombroski, supra* at ¶ 29.

{¶41} In *Belvedere*, the second prong originally stated that corporate control was exercised in such a manner as to "commit fraud or an illegal act." *Belvedere, supra* at paragraph three of the syllabus. After *Belvedere*, the Ohio appellate districts were split on the interpretation of "fraud or illegal act." *Dombroski, supra* at ¶ 20-21. Some courts liberally construed the language of the second prong because piercing the corporate veil is an equitable remedy. *Id*. at ¶ 21. The courts allowed additional forms of misconduct to qualify as "fraud or illegal act" where it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity. *Id*. at ¶ 21-22. Other courts strictly interpreted the second prong to find that a plaintiff must allege the corporate officer, director, or

shareholder must use their control over a corporation to commit a fraudulent or illegal act in order to pierce the corporate veil. *Id*. at ¶ 23-24.

{¶42} In *Dombroski*, the Court acknowledged there were "compelling reasons" for expanding the fraud or illegal act test in *Belvedere* because individuals are normally liable for their actions. *Id*. at ¶ 25. The Court struck a balance between the principle of limited shareholder liability and that shareholders occasionally use the corporate form as a shield from liability for their own misdeeds. *Id*. at ¶ 26. The Court therefore clarified the *Belvedere* test to include "fraud, an illegal act, or a similarly unlawful act" in order to address shareholders that abuse the corporate form to commit acts that are as objectionable as fraud or illegality. *Id*. at ¶ 28.

{¶43} In the present case, the trial court found the second prong of the *Belvedere* test was met because the Bologs engaged in fraud when they, as the corporate officers of US Coach, entered into the contract with Binsara for the repair of the passenger bus when in fact US Coach was not a legal entity at the time of the contract. By doing so, the Bologs used a sham entity to insulate themselves from liability.

{¶44} Upon review of the record, we find there is competent, credible evidence to support the trial court's findings that the Bologs engaged in a fraudulent, illegal act, or similarly unlawful act when they entered into the contract to repair the passenger bus through the defunct US Coach. The facts of this case demonstrate the rare exception where the principle of limited shareholder liability must be balanced against corporate officers who use the corporate form as a shield to protect against their misdeeds.

{¶45} The Bologs argue there must be a pending claim of fraud in order for the trial court to pierce the corporate veil. As the trial court dismissed Binsara's claim for

constructive fraud, the Bologs argue the trial court could not determine the facts established the Bologs engaged in fraud. The Bologs do not cite to any case law to support their argument on this issue. Nor do the Bologs challenge the trial court's findings of fact as to the bankruptcy status of US Coach at the time it entered into the contract with Binsara for the repair of the passenger bus.

{¶46} The trial court acknowledged the Bologs' argument that without a pending cause of action for constructive fraud, the trial court could not reach the issue of piercing the corporate veil as it is an equitable remedy. The trial court concluded that the underlying liability of US Coach was already litigated and determined in *Binsara, LLC v. US Coach, Ltd.*, Stark County No. 2014CV02878 pursuant to a Stipulated and Agreed Judgment Entry. The Settlement Agreement between US Coach and Binsara was not filed with the Stipulated and Agreed Judgment Entry. Further, there was no dispute of fact that US Coach did not meet its obligations under the Settlement Agreement. In this case, there was competent, credible evidence to support the trial court's finding there was a valid and enforceable judgment against US Coach, the genesis of which arose from the fraud by the Bologs, as established by Binsara and factually unchallenged by the Bologs on appeal.

{¶47} We find the judgment of the trial court that Binsara established the three elements of *Belvedere* test to pierce the corporate veil is supported by the competent, credible evidence and law.

{¶48} The Bologs' first Assignment of Error is overruled.

Enforceability of the Underlying Settlement Agreement

{¶49} In their second Assignment of Error, the Bologs argue that pursuant to the terms of the Settlement Agreement, US Coach did not meet its obligations to secure financing and the Settlement Agreement is therefore void, precluding Binsara from enforcing the terms of the Settlement Agreement.

{¶50} Upon review of the Bologs' second Assignment of Error, we cannot find a reference to the record where the Bologs raised this argument that the Settlement Agreement was void and the trial court ruled against the Bologs on the issue. The trial court's December 28, 2018 judgment states only that "[t]he Settlement Agreement did not contain the number of days US Coach, Ltd. had to obtain the financing required."

{¶51} This Court has previously stated in *Hadley v. Figley*, 2015-Ohio-4600, 46 N.E.3d 1129, ¶ 22 quoting *Snyder v. Snyder*, 5th Dist. Richland No. 2006 CA 0022, 2006-Ohio-4795, ¶ 19–20:

> "It is well established that a party cannot raise any new issues or legal theories for the first time on appeal." *Dolan v. Dolan*, 11th Dist. Nos. 2000–T–0154 and Nos. 2001-T-2003, 2002-Ohio-2440, [2002 WL 1012575] , at ¶ 7, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. "Litigants must not be permitted to hold their argument in reserve for appeal, thus evading the trial court process." *Nozik v. Kanaga* (Dec. 1, 2000), 11th Dist. No. 99-L-193, [2000 WL 1774136], 2000 Ohio App. LEXIS 5615.
>
> Failure to raise this issues before the trial court operates as a waiver of Appellant's right to assert such for the first time on appeal. *See Hypabyssal,*

Ltd. v. City of Akron Hous. Appeals Bd. (Nov. 22, 2000), 9th Dist. No. 20000 [2000 WL 1729471], citing *State ex rel. Zollner v. Indus. Comm*. (1993), 66 Ohio St.3d 276, 278, 611 N.E.2d 830.

{¶52} Assuming this matter was raised before the trial court, we find there was competent, credible evidence to support the trial court's determination that the Bologs were liable for the May 24, 2017 judgment. On an unknown date, Binsara and US Coach entered into a Settlement Agreement where US Coach agreed to pay Binsara $110,000 and it was acknowledged that US Coach needed to obtain financing to satisfy the payment agreement. The time period for which US Coach was to obtain financing was left blank on the Settlement Agreement. On May 24, 2017, Binsara and US Coach filed a Stipulated and Agreed Final Judgment Entry where Binsara was awarded judgment against US Coach in the amount of $110,000.00. The parties further agreed Binsara would not execute on the judgment for 21 days so that US Coach could obtain financing, pursuant to the trial testimony of Matthew Mohr, the attorney involved in the litigation between Binsara and US Coach.

{¶53} The Bologs argue that pursuant to the terms of the Settlement Agreement, it is void if US Coach did not obtain financing. The evidence in this case shows, however, that the parties agreed that Binsara was permitted to execute on the judgment after 21 days as of the date of the judgment entry. The 21 day period was to allow US Coach to obtain financing. After the 21 day period expired, Binsara was permitted to execute upon the judgment per the terms of the Stipulated and Agreed Judgment Entry.

{¶54} We find the Bologs' argument as to the enforceability of the Settlement Agreement is not supported by the evidence. We therefore overrule their second Assignment of Error.

CONCLUSION

{¶55} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Hoffman, J., concur.

[Cite as *U.S. Bank Trust Natl. Assn. v. Collins*, 2019-Ohio-4067.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

U.S. BANK TRUST NATIONAL ASSOCIATION, AS TRUSTEE,	:	
Plaintiff-Appellee,	:	No. 108344
v.	:	
DERA J. COLLINS, A.K.A., DERA J. COLLINS-EWING, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 3, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-884785

Appearances:

The Law Office of Sarah A. Okrzynski, L.L.C., Sarah A. Okrzynski, and Pamela S. Petas, *for appellee*.

The Law Office of Barbara Quinn Smith, and Barbara Quinn Smith, *for appellant*.

MARY EILEEN KILBANE, A.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1, the trial court records and briefs of counsel. Defendant-appellant, Dera J. Collins ("Collins"), appeals from the trial court's

judgment granting foreclosure in favor of plaintiff-appellee, U.S. Bank National Association, as trustee of American Homeowners Preservation Trust Series 2014A ("U.S. Bank"). For the reasons set forth below, we affirm.

{¶ 2} In September 2005, Collins executed a promissory note in the amount of $125,100 to Accredited Home Lenders. The note was secured by a mortgage on a property located at 19200 Upper Valley Drive in Euclid, Ohio. In October 2005, the mortgage was filed with the Cuyahoga County Recorder. In November 2006, Collins's personal liability on the note was discharged in Chapter 7 bankruptcy.

{¶ 3} In July 2009, the note and mortgage were transferred and assigned to Deutsche Bank National Trust Company as trustee on behalf of Vericrest Financial, Inc. In October 2009, the assignment was filed with the Cuyahoga County Recorder. In October 2014, the note and mortgage were transferred and assigned to U.S. Bank National Association as trustee on behalf of American Homeowners Preservation Trust Series 2014 A. U.S. Bank filed the assignment with the Cuyahoga County Recorder in the same month.

{¶ 4} In August 2017, U.S. Bank filed a complaint for in rem judgment against Collins on the note and the mortgage securing the note. U.S. Bank alleges that Collins defaulted on the note and mortgage by failing to make the payment due May 1, 2009. U.S. Bank alleges that as a result of Collins's default, she now owes a principal balance of $124,399.87, plus interest at the rate of 8.999 percent per year

from April 1, 2009. U.S. Bank further alleges that it is entitled to enforce the note and mortgage.

{¶ 5} In January 2018, Collins filed a motion to dismiss, alleging that U.S. Bank lacked standing to foreclose on the property and that the statute of limitations had expired on the collection of the debt. The trial court denied Collins's motion to dismiss. Thereafter, Collins filed an answer and counterclaim.

{¶ 6} In March 2018, U.S. Bank filed a motion for summary judgment. U.S. Bank attached a copy of the promissory note to Accredited Home Lender, along with copies of allonges indicating the note had been transferred to U.S. Bank. Also attached were copies of the recorded assignments of the mortgage evincing a chain of assignments eventually leading to the assignment of the mortgage to U.S. Bank.

{¶ 7} In addition, U.S. Bank attached the affidavit of Jorge Newberry ("Newberry"), manager of the Administrator for U.S. Bank, as trustee of American Homeowner Preservation Trust Series 2014A. His averments were based on his personal knowledge of the business records of U.S. Bank. Newberry averred that the loan records contained the $125,100 promissory note and mortgage Collins executed on the subject property and that true and accurate copies of the note and mortgage are attached as Exhibits A and B. Newberry averred that the note and mortgage were transferred and assigned to U.S. Bank and that true and accurate copies of the chain of assignments were attached as Exhibits C, D, and E.

{¶ 8} In April 2018, Collins filed a motion in opposition to summary judgment, arguing that U.S. Bank (1) failed to provide an unbroken chain of title,

(2) failed to prove standing to maintain this action, (3) failed to provide evidence that it possessed the original note, and (4) that the note had been discharged in bankruptcy. Collins also filed a motion in opposition to summary judgment affidavit, a motion in opposition to attorney affidavit, and a motion to enforce UCC Notorial Protest Default and Affidavit.

{¶ 9} In response, U.S. Bank filed a supplemental affidavit of DeAnn Donovan ("Donovan"), manager of American Homeowner Preservation, L.L.C., attesting that U.S. Bank was in possession of the original note prior to commencing the action. Donovan specifically averred that:

> Plaintiff's custodian of record, K.C. Wilson Associates, 23041 Avenida de la Carlota, #230, Laguna Hills, CA 92653 currently has possession of the original Promissory Note. Plaintiff has had continuous possession of the original Promissory Note (through its custodian and at times with former foreclosure counsel) since at least May 2014.

{¶ 10} In November 2018, the magistrate issued a decision granting U.S. Bank's motion for summary judgment. Collins filed objections to the magistrate's decision. In February 2019, the trial court overruled Collins's objections and adopted the magistrate's decision. The trial court also ordered the foreclosure and sale of the property. Subsequently, a sheriff's sale was scheduled for June 3, 2019.

{¶ 11} In the interim, on March 25, 2019, Collins filed her notice of appeal with this court. On May 6, 2019, Collins also filed a motion in the trial court to stay the proceedings and to dispense with the supersedeas bond. On May 29, 2019, the trial court granted Collins's motion and ordered the sheriff to return the order of sale without execution.

{¶ 12} Collins now appeals, assigning the following errors for review:

Assignment of Error No. 1

> The trial court erred in granting summary judgment to U.S. Bank because there is a genuine issue of material fact as to whether U.S. Bank is entitled to enforce the promissory note at issue herein.

Assignment of Error No. 2

> The trial court erred in failing to dismiss the Complaint on statute of limitations grounds.

Summary Judgment

{¶ 13} In the first assignment of error, Collins argues the trial court erred in granting summary judgment in favor of U.S. Bank because there is a genuine issue of material fact whether the bank was entitled to enforce the promissory note.

{¶ 14} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows:

> Pursuant to Civ.R. 56, 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, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶ 15} 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." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 16} A motion for summary judgment in a foreclosure action must be supported by evidentiary materials that establish: (1) that the plaintiff is the holder of the note and mortgage or is a party entitled to enforce the instrument; (2) the relevant chain of assignments and transfers if the plaintiff bank is not the original mortgagee; (3) that the mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due. *Citizens Bank, N.A. v. Conway*, 8th Dist. Cuyahoga No. 106316, 2018-Ohio-2229, citing *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17.

{¶ 17} In the instant case, Collins contends U.S. Bank lacked standing because it did not demonstrate that it was in possession of the note, did not demonstrate that it acquired the note through assignment, and did not demonstrate that the allonges were valid. We disagree.

{¶ 18} In a foreclosure action, a party has standing when it has either the mortgage assigned to it, or it is the holder of the note that is secured by the mortgage. *Nationstar Mtge., L.L.C. v. Wagener*, 8th Dist. Cuyahoga No. 101280,

2015-Ohio-1289, citing *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, 984 N.E.2d 392, ¶ 21 (8th Dist.) (where plaintiff failed to establish an interest in the note or mortgage at the time it filed its foreclosure action, it had no standing to invoke the jurisdiction of the common pleas court).

{¶ 19} A note secured by a mortgage is a negotiable instrument that is governed by R.C. Chapter 1303. *Wells Fargo Bank, N.A. v. Carver*, 2016-Ohio-589, 60 N.E.3d 473, ¶ 14 (8th Dist.). Under R.C. 1303.31(A), three "persons" are entitled to enforce an instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce the instrument under R.C. 1303.38 or 1303.58(D).

{¶ 20} Here, U.S. Bank attached a copy of the note and its allonges to the complaint and to its motion for summary judgment. Also attached were copies of the recorded assignments of the mortgage, which established a chain of assignments eventually leading to the assignment of the mortgage to U.S. Bank. In addition, to reinforce its standing to file the foreclosure action, U.S. Bank attached the affidavits of Newberry, who averred that his averments were based on his personal knowledge, and of Donovan, who expressly stated U.S. Bank was in possession of the original note prior to the filing of the instant action.

{¶ 21} We find the materials attached to U.S. Bank's complaint and to its motion for summary judgment establish that it was both the holder of the note and

the assignee of the mortgage at the time this action commenced. As a result, U.S. Bank had standing to bring this foreclosure action.

{¶ 22} Nonetheless, Collins argues that the copy of the note attached to Newberry's affidavit was time stamped as having been filed in a prior foreclosure action against her and as such is insufficient to demonstrate that U.S. Bank possessed the note. Collins also argues that copies of the three separate assignments attached to Newberry's affidavit are largely illegible, thus it is not possible to determine the precise nature of these assignments. In addition, Collins argues the copies of the attached assignments are out of date order, thus it is unclear which allonges the assignments are supposed to match.

{¶ 23} However, the fact that the copy of the note was time stamped as having been filed in a prior foreclosure action U.S. Bank filed against Collins does not negate Donovan's averment that the bank has been in possession of the original since May 2014. At a minimum, producing the same copy of the note used in a prior action, established that U.S. Bank was in possession of the note before this complaint was filed. That the copies of the assignments are largely illegible and out of date order does not negate that the assignments occurred.

{¶ 24} Based on the foregoing, the evidence established that U.S. Bank was both the holder of the note and the assignee of the mortgage at the time it filed its complaint. As a result, U.S. Bank had standing to bring this foreclosure action and the trial court properly granted summary judgment in its favor.

{¶ 25} Accordingly, the first assignment of error is overruled.

Statute of Limitations

{¶ 26} In the second assignment of error, Collins argues the trial court should have granted her motion to dismiss because the statute of limitations had expired. We disagree.

{¶ 27} R.C. 1303.16(A) provides that "an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date."

{¶ 28} In the instant case, Collins does not dispute that her last payment on the note was April 1, 2009. Thus, Collins defaulted when she failed to make the payment due on May 1, 2009. The record reveals that U.S. Bank filed its first foreclosure action against Collins in March 2015, which was within six years of Collins defaulting on the note and before the statute of limitations had expired.

{¶ 29} On January 28, 2016, the trial court issued a journal entry dismissing U.S. Bank's complaint, without prejudice, for failing to name all necessary parties. In March 2016, U.S. Bank filed a second foreclosure action against Collins. In May 2017, the trial court issued a journal entry dismissing U.S. Bank's second complaint, without prejudice, for "failure to comply with previous court order of 01/23/2017 requiring all parties to file a motion for default judgment, etc." As previously mentioned, U.S. Bank filed the instant action in August 2017.

{¶ 30} After U.S. Bank's first foreclosure action was dismissed without prejudice, U.S. Bank availed itself of the Ohio Savings Statute, R.C. 2305.19, which

affords a plaintiff a limited period of time to refile a dismissed claim that would otherwise be time barred. The statute provides, in relevant part:

> In any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

R.C. 2305.19(A).

{¶ 31} Thus, ""[i]n certain instances, [R.C. 2305.19] operates to save timely filed actions by permitting a party to refile its complaint or file a new action * * *' within one year of a failure otherwise than on the merits."" *Agaj v. Univ. Hosps. Health Sys.*, 8th Dist. Cuyahoga No. 105988, 2018-Ohio-2193, quoting *Vaught v. Pollack*, 8th Dist. Cuyahoga No. 103819, 2016-Ohio-4963, ¶ 12, quoting *Allegretti v. York*, 8th Dist. Cuyahoga No. 101231, 2014-Ohio-4480, ¶ 15.

{¶ 32} Because U.S. Bank filed the first foreclosure action against Collins prior to the expiration of the statute of limitations and refiled the dismissed complaints within one year of the trial court's dismissal, its claims were preserved.

{¶ 33} Moreover, based on the property interest created by Collins's default on the mortgage, U.S. Bank may bring a foreclosure action to cut off the Collins's right of redemption, determine the existence and extent of the mortgage lien, and have the mortgaged property sold for its satisfaction. *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 24, citing *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 17; *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 1995-Ohio-277, 653 N.E.2d 1190; *Carr*

v. Home Owners Loan Corp., 148 Ohio St. 533, 540, 76 N.E.2d 389 (1947). This action is governed by a 21-year limitations period as set forth in R.C. 2305.04. *See Bank of N.Y. Mellon v. Walker*, 8th Dist. Cuyahoga No. 104430, 2017-Ohio-535.

{¶ 34} Based on the foregoing, the trial court properly denied Collins's motion to dismiss the foreclosure complaint.

{¶ 35} Accordingly, the second assignment of error is overruled.

{¶ 36} Judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

_____

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
EILEEN A. GALLAGHER, J., CONCUR

[Cite as *Allied Debt Collection of Virginia, L.L.C. v. Nautica Entertainment, L.L.C.*, 2019-Ohio-4055.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ALLIED DEBT COLLECTION OF VIRGINIA, L.L.C.,	:	
	:	
Plaintiff-Appellee,	:	No. 107678
v.	:	
NAUTICA ENTERTAINMENT, L.L.C., ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: October 3, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-880787

Appearances:

Patrick J. Milligan Co., L.P.A., and Patrick J. Milligan, *for appellees*.

Hahn Loeser & Parks, L.L.P., Eric B. Levasseur, Anna Leigh Gecht, and Dennis R. Rose, *for appellants*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Defendants-appellants Nautica Entertainment, L.L.C., Jacobs Entertainment, Inc., Jacobs Investments, Inc., and Mary Horoszko (collectively

"Nautica" or "Nautica Defendants") appeal from the trial court's order compelling the production of the electronically stored information ("ESI"), or "mirror image," of "all Nautica's computers used by Mary Horoszko." Because we find the trial court's order was warranted under the circumstances, yet failed to establish adequate protections to safeguard the confidentiality of the information contained on the computer systems to be imaged, we affirm in part, reverse in part, and remand.

Procedural History and Substantive Facts

{¶ 2} On May 23, 2017, plaintiff-appellee Allied Debt Collection of Virginia, L.L.C. ("Allied") filed a complaint against the Nautica Defendants, Jeffrey Livingston, and Chad Barth for actions stemming from a Kid Rock concert held at the Jacobs Pavilion in the Nautica Entertainment Complex during the 2016 Republican National Convention. Allied states that it is a Virginia limited liability company and assignee of any tort claims belonging to Blue Star Productions, L.L.C. ("Blue Star"). The complaint alleged tortious interference with a contract between Concerts for a Cause, Inc. ("CFAC") and Blue Star, Virginia statutory business conspiracy, fraud, theft in violation of R.C. 2307.61, and civil conspiracy. Barth is President and a director of CFAC. Livingston is allegedly the fundraiser who handled all negotiations on behalf of CFAC and Barth.

{¶ 3} According to Allied, Blue Star had contracted Kid Rock, among other acts, to perform concerts during the convention, and Blue Star searched for a venue in Cleveland for its concerts. Blue Star ultimately rented Jacobs Pavilion, which is

owned and operated by Nautica Entertainment, through CFAC, under a shared-use arrangement whereby Blue Star agreed to promote and produce its music concerts at Jacobs Pavilion in exchange for providing CFAC with 1,200 Blue Star issued tickets to the Kid Rock concert. CFAC could in turn allocate the tickets to sponsors and guests. Allied claims that Nautica Defendants tortiously interfered with Blue Star's arrangement with CFAC and conspired with CFAC to circumvent Blue Star's ticketing process by issuing unauthorized wristbands to third parties for entry to the concert. Allied maintains that this scheme resulted in thousands of people accessing the Kid Rock concert without a Blue Star ticket, in contravention of the Blue Star/CFAC arrangement.

Discovery

{¶ 4} On September 6, 2017, the court held a case management conference during which the court scheduled a paper discovery cutoff of November 6, 2017. During the conference, the parties agreed to forego electronic discovery and would exchange paper discovery only.

{¶ 5} The parties exchanged written discovery. Discovery disputes ensued, with both sides claiming discovery abuses. On April 5, 2018, Allied filed a motion to compel Nautica Defendants and Jeffrey Livingston to respond to Allied's request for interrogatories and requests for production of documents. Regarding Nautica Defendants, Allied claimed that Nautica failed to fully answer several interrogatories and failed to produce numerous requested documents. Both Nautica Defendants and Livingston opposed the motion. Thereafter, the parties entered into a stipulated

protective order. On June 11, 2018, the trial court granted Allied's motion to compel, ordering Nautica and Livingston to respond to discovery within five days from the date of the order or face sanctions. Nautica Defendants served amended and supplemental discovery responses, which included 2,495 additional pages of documents.

{¶ 6} Claiming Nautica's amended and supplemental discovery responses were still deficient, Allied filed a motion to show cause on July 25, 2018. Within this motion, Allied requested ESI for the first time. In its motion to show cause concerning Nautica Defendants' paper discovery, Allied claimed that Nautica Defendants "habitually engaged in dilatory tactics, failed to meet their discovery obligations, and engaged in a rolling document production." In referencing the documents it had received in response to its requests, Allied noted that it had received a purportedly "altered email chain" between Horoszko and Chad Barth of CFAC. In a footnote to this reference, Allied explained that Barth's email production included an email that contained the word "wristbands" in two locations, while Horoszko's production of that same email exchange did not:

> Barth's email production: Wire I'm working on as we speak...will let you know amount and confirmation # shortly. *Wristbands* we're working on a plan and executing it within the next hour. * * * How many of those 4,450 do you have? How many are committed to sponsors? I need the *wristbands* and info about today's wire. Please and thank you.

(Emphasis added.)

> Horoszko's email production: Wire I'm working on as we speak...will let you know amount and confirmation # shortly. * * * How many of

> those 4,450 do you have? How many are committed to sponsors? I need info about today's wire. Please and thank you.

{¶ 7} Allied had therefore surmised that Horoszko had altered her email to delete all references to "wristbands." Consequently, within this footnote, Allied "request[ed] the court order Nautica to produce the doctored email in native format." Nautica Defendants opposed Allied's motion, along with this new request. On August 14, 2018, Nautica Defendants also filed a motion to compel responses to its written discovery requests propounded upon Allied, which the court ultimately held in abeyance.

August Hearing

{¶ 8} The court held a hearing on August 15, 2018, during which the parties were scheduled to address Allied's motion to show cause on the alleged discovery issues. At the hearing, however, the court informed the parties that the hearing would instead address "some emails that were exchanged that caused concern to [Allied], who is now asking for further information from [Nautica Defendants]." And the parties proceeded to address the purportedly altered email.

{¶ 9} During the hearing, Allied expanded its initial footnote request for "the doctored email in native format" to include all email communications, requesting "e-discovery with respect to *Nautica's emails*" and "an order * * * requiring Nautica to produce the electronic email communications in their native e-discovery format." (Emphasis added.) Allied argued that ESI discovery is inherent in its document request and that one altered email suggests there may be more, thus justifying the

need for ESI. Nautica opposed Allied's new request, arguing that the parties agreed at the case management conference that the parties would exchange paper discovery due to the timing and cost concerns associated with electronic discovery, the parties had not been previously subjected to produce any ESI, there had been no discussions concerning the proper ESI protocols, Allied had the opportunity to depose Horoszko on the altered email, and ordering ESI now would result in an undue burden and unfair cost to Nautica Defendants. Without offering any explanation concerning the conflicting emails, Nautica's counsel stated only that Nautica Defendants "dispute that there was something inappropriate done with that email."

{¶ 10} Acknowledging that this hearing pertained only to the allegedly altered email, the court inquired of Nautica whether there were any other reasons the court should not order ESI discovery in this matter, to which Nautica Defendants replied that they have abided by the previously agreed upon discovery procedure, discovery in the case has become extremely costly, and they believe ESI discovery would be unduly burdensome and inappropriate. The court then ordered ESI discovery "with respect to [Allied's] request motion," noting that it had not heard "any specific reasons why it's too burdensome despite the normal, you know, costs of litigation that this is, according to Plaintiff seeking a $4.5 million verdict, that would require me to not order this." After ordering the ESI discovery of "all the emails," the court instructed the parties' two IT experts to confer on the issue. Thereafter, the court advised the parties that its order would be journalized. A review of the record, however, reveals that no journal entry was entered.

September Hearing

{¶ 11} On September 5, 2018, the court held a hearing on Allied's motion to show cause regarding Nautica's responses to Interrogatory Nos. 7 and 12-14 and Document Request Nos. 4, 30, and 36. During the hearing, the court found Nautica Defendants in contempt for their failure to sufficiently respond to Allied's discovery requests, stating "It's been admitted by both parties that they didn't provide documents. They refer to someone else's production of documents and that they didn't understand what the word 'communication' meant and that — this has been going on long enough, and it needs to stop." The court then instructed Allied to produce information pertinent to sanctions against Nautica, such as attorney fees. The court also discussed scheduling a hearing on Nautica Defendants' motion to compel.

{¶ 12} Additionally, at the September hearing, the court addressed "the altered email issue." In its opening statement, Allied's counsel argued that there are two main issues the court should consider in granting its motion to show cause — the financial issues or records concerning Livingston that had not been fully produced and the communications between the parties that revealed a discrepancy in emails between Barth and Horoszko that referenced wristbands. Livingston's counsel asserted that Allied indeed obtained all the requested records. Counsel for Nautica Defendants asserted that Nautica had fully responded to all discovery requests, including "thousands of emails."

{¶ 13} In addressing Allied's second issue, the altered email issue, Nautica's counsel represented that the parties had numerous "productive discussions," presumably off the record, regarding how to go about conducting the search, electronically, but the parties disagreed on the scope of the search. Counsel also informed the court that Allied apparently expanded its request for ESI once again, now seeking more than the emails associated with Horoszko:

> Your Honor, as I believe the court will hear, what the plaintiffs have proposed is effectively to have a third-party outside vendor come in and do a complete image of Ms. Horoszko's computer. And it's unclear to me whether they've suggested that the servers should also somehow be included. But they've at least I believe said Ms. Horoszko's computer.

{¶ 14} Counsel then noted his concerns regarding potential attorney-client privilege and other confidential or proprietary information and the risk of placing this information in the hands of a third-party vendor with no restrictions. Counsel further argued that "anything beyond the email-related data would be wholly irrelevant, [] overbroad, and beyond what this court had ordered at the last hearing." In response, the court stated:

> Okay. So I see a very simple and easy solution to solve these things. That is a confidentiality protective agreement with the third-party vendor which is done pretty routinely whenever there's a third-party vendor who images a computer and also an opportunity for your IT person to identify as — in conjunction with the mirror image exactly what communications came from your firm. It's not that hard to do. * * * Write up an agreement, and you're done.

{¶ 15} Nautica's counsel indicated that he would be willing to propose an order that would provide "strict limitations on what [the] third-party vendor could

do with this information," because the parties had yet to agree on the parameters for the ESI search. In response, Allied's counsel once again linked the ESI issue with its original motion to compel interrogatories, noting that the altered email was revealed during the initial discovery exchange, and counsel agreed that there should be an order in place concerning the ESI.

{¶ 16} After the majority of the September hearing was spent discussing specific interrogatories and document requests and the court found Allied's motion well taken and found Nautica in contempt concerning "document dumps" and "misunderstanding communications," Allied's counsel raised the ESI issue. The court asked Nautica Defendants if there was any reason they could not create a confidentiality agreement concerning the ESI. Nautica objected on the grounds that the request for ESI was overbroad and not consistent with what had been discussed at the August hearing; however, counsel indicated that he would work with opposing counsel to craft an order that would ensure the necessary confidentiality safeguards. At this point, the court stated, "You had this opportunity for all this time, and now we're down to this where I have to order a mirror image of a computer to get this information to Plaintiffs. I'm not going to take it anymore. Write an order, protective order. I'll sign it, and we'll just get it done." The court then noted that "[w]e'll sort out attorney-client privileges, in camera inspections. Just bring them to me."

{¶ 17} According to Nautica Defendants, they attempted in good faith to reach an agreement with Allied on a joint stipulated ESI order but were ultimately

unable to agree on the terms, including the time in which Nautica could conduct a privilege review and the search methodology utilized to protect against the disclosure of proprietary and confidential information. Thereafter, the parties each filed a proposed ESI order. Nautica objected to Allied's proposed order.

The Trial Court's Discovery Order

{¶ 18} On September 12, 2018, the court issued the following order:

> Hearing held for plaintiff's motion to show cause why defendants should not be held in contempt for violating this court's order compelling discovery. Defendants found in contempt of court for their failure to respond with particularity to interrogatories and requests for documents. Plaintiff to propose any adverse inference of fact relative to documents/information not produced to be considered by the jury and provide defense counsel with affidavit detailing attorney fees and expenses related to the efforts to compel discovery, preparation of the motion, and prosecuting the show cause hearing. Attorney fees hearing to be set. Defendant's duty to comply with all discovery continues and is ongoing.
>
> Defendants ordered to provide mirror image of all Nautica's computers used by Mary Horoszko through third-party vendor. See ESI order adopted and incorporated herein and entered under separate entry.

{¶ 19} Expanding Allied's request for "e-discovery with respect to Nautica's emails," the trial court ordered Nautica Defendants to produce a "mirror image of all Nautica's computers used by Mary Horoszko." In so doing, the trial court adopted and incorporated into its order Allied's entire proposed ESI order verbatim. That order compelled ESI, utilizing the third-party vendor engaged by Allied, Vestige, with the following limitations and conditions:

> 1. Vestige shall collect the requested ESI from Nautica and Horoszko by imaging and inventorying (i) the Nautica computer regularly used

by Horoszko and (ii) any production/non-backup server where e-mails associated with her e-mail account * * * (or any other e-mail account she has used to conduct business on behalf of Nautica, if any) (collectively, the "Horoszko Accounts") might otherwise be electronically stored (collectively, the "Imaged ESI"). With respect to the imaging of any server, such imaging shall be limited to those ESI files associated with the Horoszko Accounts or where such ESI might be electronically stored. Vestige shall be responsible for collecting the ESI within five (5) days of the entry of this Order at a place, date and time mutually agreeable between Vestige and Nautica's information technology ("IT") personnel. Nautica and/or Nautica and Horoszko's counsel's IT personnel shall have the right to be present and supervise the imaging and inventorying of any ESI collected by Vestige, and shall be provided an exact copy of any ESI forensically imaged by Vestige prior to departing the collection locale.

2. Nautica and Horoszko's counsel shall have the right to review the Imaged ESI for any information protected by the attorney-client privilege (The "Protected Information") and shall create and produce a log of any such Protected Information for delivery to Vestige and Allied's counsel within three (3) day thereof. Upon receipt of the log identifying Protected Information, Vestige shall separate the Protected Information from the Imaged ESI for purpose of production and promptly produce to Allied all other ESI for the period October 1, 2014 through the present date. Allied's counsel may request any information withheld from production by Nautica and Horoszko to be submitted by Vestige to the Court for determination of whether the Protected Information is attorney-client privileged.

3. All ESI (i) collected by Vestige, and (ii) provided to Allied as part of the Production Image, shall be deemed and treated as "confidential Information" under the Court's previously entered Stipulated Protective Order ("SPO"). At all times while in possession of the ESI, Vestige and Allied shall be bound by the SPO, a copy of which shall be provided by Allied's counsel to Vestige before it collects any ESI. Vestige shall review and execute Exhibit A to the SPO and provide an original executed copy of the same to Nautica and Horoszko's counsel and/or IT personnel prior to the collection of any ESI.

4. Within five (5) days of the final disposition of this action, whether by entry of judgment or settlement, Vestige shall destroy (and attest by affidavit to the destruction) or return to Nautica and Horoszko's counsel any ESI.

> 5. Although all ESI produced to Allied by Vestige shall be deemed and treated as Confidential Information under the SPO, Allied may petition the Court to deem some of the ESI collected by Vestige and produced to Allied non-confidential, if necessary, pursuant to Section 15 of the SPO.

{¶ 20} On September 13, 2018, Nautica Defendants appealed the trial court's order pertaining to the ESI.[1]

Assignments of Error

{¶ 21} On appeal, Nautica Defendants assign three errors for our review, which we will address together:

> I. The trial court abused its discretion in ordering the Nautica Defendants to produce forensic mirror images of their computers and servers to Allied without satisfying the first step of the Bennett test.
>
> II. The trial court abused its discretion in ordering the Nautica Defendants to produce forensic mirror images of their computers and servers to Allied without instituting adequate procedural safeguards to protect their privileged, proprietary, personal, and confidential electronically stored information ("ESI").
>
> III. The trial court abused its discretion in ordering the Nautica Defendants to produce forensic mirror images of their computers and servers to Allied without limiting the scope of the production to only

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[1] On September 20, 2018, this court sua sponte dismissed Nautica's appeal for lack of final appealable order, finding that "the mere adjudication of contempt of court is not a final appealable order until a sanction or penalty is imposed." Nautica Defendants filed a motion for reconsideration of the dismissal. The motion clarified that Nautica's appeal concerns only the second part of the trial court's order that compelled the production of a "mirror image of all Nautica's computers * * *," which is a final appealable order because the order compels the production of forensic imaging of a computer hard drive and the disclosure of privileged and/or confidential material. In support, Nautica cited *Fasteners for Retail, Inc. v. Dejohn*, 8th Dist. Cuyahoga No. 100333, 2014-Ohio-1729, and *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763 (10th Dist.). Nautica's motion was unopposed. Upon reconsideration, we reinstated Nautica's appeal.

the ESI reasonably calculated to lead to the discovery of admissible evidence.

Law and Analysis

{¶ 22} Nautica Defendants contend that the trial court abused its discretion in compelling the forensic mirror imaging of "all Nautica's computers used by Mary Horoszko." They argue that the trial court failed to conduct the appropriate balancing test, which includes weighing the parties' interest in discovery against Nautica Defendants' competing interests in privacy and confidentiality; the court failed to institute adequate procedural safeguards for the protection of Nautica's privileged, proprietary, and confidential information; and the court's order was overbroad and unduly burdensome.

Civ.R. 26

{¶ 23} The Ohio Rules of Civil Procedure provide a right to the "liberal discovery of information." *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 9, citing *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 661-662, 635 N.E.2d 331 (1994). This discovery may be obtained through "deposition upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission." Civ.R. 26(A).

{¶ 24} Civ.R. 26(B) governs the scope of the information that a party may obtain through discovery:

> [A]ny matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Civ.R. 26(B)(1). Additionally, the information sought must "appear[] reasonably calculated to lead to the discovery of admissible evidence." *Id.*

{¶ 25} Specifically regarding electronically stored information, Civ.R. 26(B)(4) provides as follows:

> A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the following factors when determining if good cause exists:
>
> > (a) whether the discovery sought is unreasonably cumulative or duplicative;
> >
> > (b) whether the information sought can be obtained from some other source that is less burdensome, or less expensive;
> >
> > (c) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and
> >
> > (d) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.

> In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

Civ.R. 26(B)(4); *Townsend v. Ohio DOT*, 10th Dist. Franklin No. 11AP-672, 2012-Ohio-2945, ¶ 15; Loc.R. 21.3(F)(2)(c) of the Court of Common Pleas of Cuyahoga County, General Division (detailing similar factors for the court to consider when determining if good cause exists for the production of ESI).

{¶ 26} An appellate court generally reviews a discovery dispute for an abuse of discretion. *Ward*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, at ¶ 13; *Fasteners for Retail, Inc.*, 8th Dist. Cuyahoga No. 100333, 2014-Ohio-1729, at ¶ 19 (reviewing the trial court's order of forensic imaging of a computer's hard drive under the abuse of discretion standard). An "abuse of discretion 'connotes more than an error of law or judgment; it 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), quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). And absent an abuse of discretion, we must affirm the trial court's disposition on discovery matters. *Lightbody v. Rust*, 137 Ohio App.3d 658, 663, 739 N.E.2d 840 (8th Dist.2000).

Forensic Imaging

{¶ 27} The trial court ordered Nautica Defendants to produce "all Nautica's computers used by Mary Horoszko" for a forensic examination. A forensic image, also known as a "mirror image," will "'replicate bit for bit, sector for sector'" all

allocated and unallocated space on a computer's hard drive, including any embedded, residual, and deleted data. *Bennett*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, at ¶ 40, quoting *Balboa Threadworks, Inc. v. Stucky*, D.Kan. No. 05-1157-JTM-DWB, 2006 U.S. Dist. LEXIS 29265, 7 (Mar. 24, 2006); *Ferron v. Search Cactus, L.L.C.*, S.D.Ohio No. 2:06-CV-327, 2008 U.S. Dist. LEXIS 34599, 10, fn. 5 (Apr. 28, 2008) ("A mirror image copy represents a snapshot of the computer's records. * * * It contains all the information in the computer, including embedded, residual, and deleted data.").

{¶ 28} Courts are generally reluctant to compel forensic imaging "largely due to the risk that the imaging will improperly expose privileged and confidential material contained on the hard drive." *Bennett* at ¶ 40. To determine whether forensic imaging is warranted, as opposed to standard discovery procedures, the trial court must (1) weigh the parties' interest in obtaining discovery against privacy concerns; and (2) institute a protective protocol to ensure that forensic imaging is not unduly intrusive. *Bennett* at ¶ 41, 47. This court has adopted the *Bennett* two-part test utilized by the Tenth District Court of Appeals in *Fasteners for Retail, Inc.* at ¶ 21.

Weighing of Interests

{¶ 29} Before compelling forensic imaging, a trial court must first weigh the necessity of obtaining the electronic discovery against any privacy concerns:

> "[A] court must weigh 'the significant privacy and confidentiality concerns' inherent in imaging against the utility or necessity of the imaging. * * * In determining whether the particular circumstances

> justify forensic imaging, a court must consider whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for the requested information, and the extent to which the responding party has complied with discovery requests. * * * When a requesting party demonstrates either discrepancies in a response to a discovery request or the responding party's failure to produce requested information, the scales tip in favor of compelling forensic imaging."

(Citations omitted.) *Fasteners for Retail,* 8th Dist. Cuyahoga No. 100333, 2014-Ohio-1729, at ¶ 24, quoting *Bennett* at ¶ 41; *see also Scott Process Sys. v. Mitchell*, 5th Dist. Stark No. 2012CA00021, 2012-Ohio-5971, ¶ 37-38 (finding the order for forensic imaging in error where the requesting party failed to demonstrate that paper production of records was insufficient or that the requesting party's need for forensic imaging outweighed the party's privacy interests); *Nithiananthan v. Toirac*, 12th Dist. Warren No. CA2011-09-098, 2012-Ohio-431, ¶ 9 (the party requesting forensic imaging must demonstrate a "background of noncompliance" with discovery under part one of the *Bennett* framework); *Scotts Co., L.L.C. v. Liberty Mut. Ins. Co.*, S.D.Ohio No. 3:06-CV-899, 2007 U.S. Dist. LEXIS 43005, 4-5 (June 12, 2007), quoting *Diepenhorst v. Battle Creek*, W.D. Mich. No. 1:05-CV-734, 2006 U.S. Dist. LEXIS 48551, 10-11 (June 30, 2006) (expressing reluctance to permit intrusive forensic imaging as a matter of course on a requesting party's "mere suspicion" the opponent is withholding information or to "address the bare possibility of discovery misconduct").

Step One: Necessity of the Imaging vs. Privacy Concerns

{¶ 30} In *Bennett*, the court found that the defendants repeatedly represented that they had disclosed all responsive documents when they had not. *Bennett*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, at ¶ 42. Additionally, the court noted that the defendants had a "lackadaisical and dilatory approach to providing discovery" when they engaged in last-minute discovery practice. *Id.* Thus, after applying the balancing factors, the court determined that the defendants demonstrated a "willful disregard of the discovery rules," and given their "background of noncompliance," the trial court properly ordered forensic imaging. *Id.*

{¶ 31} In *Fasteners*, we determined that the record concerning discovery did not demonstrate the requisite showing of the defendants' noncompliance with discovery under the first prong of the *Bennett* test. Specifically, we noted that the record did not demonstrate that the documents sought by the plaintiff "were being unlawfully withheld and not available from [Plaintiff's] own information or other sources." *Fasteners for Retail* at ¶ 29.

{¶ 32} Nautica Defendants contend that the trial court failed to satisfy the first step of the *Bennett* analysis. In support, they claim that their conduct concerning Allied's request for ESI was not improper and therefore forensic imaging was not warranted and the court "ignored" their privacy concerns. We find Nautica Defendants' argument unpersuasive.

{¶ 33} Here, the record shows that in the course of Nautica Defendants' document production, Allied discovered two conflicting emails between Horoszko

and Barth. Barth's copy of the email included references to wristbands, while Horoszko's copy contained no references to wristbands. This discovery, Allied contends, led to its belief that the email chain had been altered, and Allied became concerned that there were other "altered" emails of which Allied was unaware. In response to this discovery, Allied made a new motion (within its motion for sanctions regarding the paper discovery, albeit in a footnote) requesting the court compel forensic imaging of Nautica computers used by Horoszko. In addition, the record shows that following a hearing on Allied's motion to show cause regarding certain paper discovery, the trial court found Nautica Defendants in contempt for failing to fully and properly answer several interrogatories and failing to produce numerous requested documents, namely Interrogatory Nos. 7 and 12-14 and Document Request Nos. 4, 30, and 36.

{¶ 34} Nautica Defendants argue that the court's sanctions applied only to Nautica's paper discovery and their conduct relating to this new request for ESI was not improper. We agree that the court's sanctions appear to pertain to Nautica's conduct in responding to Allied's paper discovery requests. The trial court's order at issue here, rather, is an ESI order in response to the alleged "altered email chain."

{¶ 35} The newly discovered "altered email chain," however, demonstrates a discrepancy in discovery that weighs in favor of compelling forensic imaging. *Bennett*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, at ¶ 41 (finding "the scales tip in favor of compelling forensic imaging" when a requesting party demonstrates discrepancies in a response to a discovery request); *see also Simon*

Property Group L.P. v. MySimon, Inc., 194 F.R.D. 639, 641 (S.D.Ind.2000) (permitting the plaintiff to inspect the defendant's deleted computer files where the plaintiff demonstrated "troubling discrepancies" concerning the defendant's document production); *Playboy Ents., Inc. v. Welles*, 60 F.Supp.2d 1050, 1054-55 (S.D. Cal. 1999) (permitting forensic imaging of a defendant's computer where the parties, pursuant to a document request, discovered an email chain produced by one defendant that was not produced by a codefendant and where the parties later learned that the defendant customarily deleted emails after litigation had commenced). Nautica Defendants do not dispute the existence of the discrepancy, yet they offer no explanation for the apparent conflict. And forensic imaging may reveal other deleted emails or altered emails on the Nautica computers used by Horoszko. When the court considered the Barth/Horoszko email discrepancy along with the history of Nautica Defendants' discovery violations concerning paper discovery, where in fact the court found that Nautica Defendants repeatedly failed to produce documents, an order compelling forensic imaging was not unreasonable.

{¶ 36} Regarding Nautica Defendants' privacy concerns, as discussed below, the record reflects the court considered Nautica Defendants' privacy and confidentiality concerns and instituted certain protective protocols. But the unique discrepancy in discovery and the history of discovery violations weighed in favor of forensic imaging.

{¶ 37} In light of the foregoing, we cannot find the trial court abused its discretion in ordering forensic imaging under the circumstances. Viewing the

record in its entirety, the showing required under the first prong of the *Bennett* analysis has been satisfied.

Step Two: Protective Protocol

{¶ 38} "Even when a defendant's misconduct in discovery makes forensic imaging appropriate, a court must protect the defendant's confidential information as well as preserve any private and privileged information." *Bennett*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, at ¶ 47. A party's purported failure to produce discovery as requested or ordered "will rarely warrant unfettered access to a party's computer system." *Id.* A trial court abuses its discretion when "its judgment entry permits unfettered forensic imaging of a party's electronic devices and contains none of the *Bennett* protections required to conduct such forensic analysis. *Fasteners for Retail*, 8th Dist. Cuyahoga No. 100333, 2014-Ohio-1729, at ¶ 33, citing *Scott Process Sys.*, 5th Dist. Stark No. 2012CA00021, 2012-Ohio-5971, at ¶ 36.

{¶ 39} The *Bennett* court suggested, and this court followed, a protocol for forensic imaging:

> "[A]n independent computer expert, subject to a confidentiality order, creates a forensic image of the computer system. The expert then retrieves any responsive files (including deleted files) from the forensic image, normally using search terms submitted by the plaintiff. The defendant's counsel reviews the responsive files for privilege, creates a privilege log, and turns over the nonprivileged files and privilege log to the plaintiff."

Fasteners for Retail at ¶ 32, quoting *Bennett* at ¶ 47; *Nithiananthan*, 12th Dist. Warren No. CA2011-09-098, 2012-Ohio-431, at ¶ 19 (adopting the protocol

suggested in *Bennett* and holding that "at minimum, several protective measures must be enforced when ordering forensic imaging"); *Scott Process Sys.*, *supra* (adopting the *Bennett* protocol and reversing the trial court's order for forensic imaging where the order contained "none of the *Bennett* protections").

{¶ 40} In *Bennett*, the appellate court found that the trial court did not abuse its discretion in ordering forensic imaging as a sanction for the defendants' noncompliance with the trial court's orders. *Bennett* at ¶ 49. The appellate court determined, however, that the trial court erred "in not providing adequate protections to safeguard the confidentiality of the information contained on the computer systems to be imaged." *Id*. Finding insufficient the trial court's safeguards for privileged and confidential information, which included permitting the party to redact privileged information and designating certain confidential and personal information "for attorneys' eyes only," the appellate court stressed the importance of a proper protocol where forensic imaging is ordered, even where a party engages in misconduct:

> [W]e believe that more comprehensive protection is necessary, particularly given the sensitivity of the information at issue here. Bennett deserves a remedy for the prejudice caused by defendants' misconduct, but that remedy should not require defendants to sacrifice highly-sensitive, confidential information that has no bearing on Bennett's claims. Additionally, private information of the computers' users — such as personal financial information and communications with friends and family — should not be subject to disclosure. Therefore, we conclude that the trial court abused its discretion in devising the procedure for the forensic imaging. We urge the trial court to adopt a protocol similar to the one described above. We believe that such a protocol would allow Bennett sufficient access to the computer systems to recover useful information, while also

> providing defendants with an opportunity to identify and protect privileged and confidential matter.

Id. at ¶ 48.

{¶ 41} Mindful of the "potential intrusiveness" of a forensic examination, federal courts likewise utilize a "collection and review protocol" when compelling a forensic examination, such as the following:

> 1. An independent computer expert shall be appointed by the Court and shall mirror image [the party's] computer system.
>
> 2. The parties have [a designated time in which to] meet and confer regarding their designation of an independent computer expert. If the parties cannot agree, on or before [a set date], each party shall submit its recommendation to the Court, and the Court will select the expert.
>
> 3. The appointed expert shall serve as an Officer of the Court. Thus, to the extent that this computer expert has direct or indirect access to information protected by attorney-client privilege, such disclosure will not result in any waiver of the [party's] privilege.
>
> 4. The independent expert shall sign a confidentiality order. Additionally, the expert shall be allowed to hire other outside support if necessary in order to mirror image the [party's] computer system. Any outside support shall be required to sign the same confidentiality order.
>
> 5. The expert shall mirror image the [party's] computer system.
>
> 6. The [requesting party] shall provide a list of search terms to the Court to identify responsive documents to its document requests on or before [a set date]. After [the requesting party] has submitted the search terms to the Court, [the party] shall have 5 days to submit their objections to the Court regarding any of the search terms, which the court will rule upon. The Court will provide the search terms to the independent expert.
>
> 7. Once the expert has mirror imaged the [party's] computer system, the expert shall search the mirror image results using the search terms. The results of the search terms and an electronic copy of all

> responsive documents shall be provided to the [party] and to the Court.
>
> 8. The [party] shall review the search term results provided by the independent expert and identify all responsive documents. The [party] shall either produce all responsive documents to the [requesting party] or identify those responsive documents not produced on a privilege log to the [requesting party] within 20 days of the date that the [party] receives the search term results from the independent expert. Any privilege log produced shall comply strictly with the [the rules of court].
>
> 9. [The requesting party] shall pay for all fees and costs of hiring the independent expert at this time. However, if at a later time there is evidence of the [party's] improper deletion of electronic documents or any other associated improper conduct, the Court will revisit this issue and consider charging [that party] for the fees and costs of the independent expert or imposing the fees and costs on the parties in a duly appropriate apportioned manner.
>
> 10. The independent expert shall provide a signed affidavit detailing the steps he or she took in mirror imaging the [party's] computer system and searching the mirror image for the search terms within 5 days of providing the [party] and the Court with the results of the search for search terms in the mirror image.

Wynmoor Community Council, Inc. v. QBE Ins. Corp., 280 F.R.D. 681, 687-688 (S.D.Fla.2012); *Bank of Mongolia v. M&P Global Fin. Servs.*, 258 F.R.D. 514 (S.D.Fla.2009).

{¶ 42} Nautica Defendants contend that the trial court's discovery order lacks adequate protective protocols to safeguard its privileged and confidential ESI. In support, Nautica argues that the court's order contains no search methodology or search terms; the order does not exclude from the search information that is not privileged but is otherwise confidential, such as personal or proprietary information irrelevant to the underlying action; and the order's provision of three days in which

to conduct a privilege review of potentially hundreds of gigabytes of data is insufficient and unreasonable. Nautica Defendants also contend that the trial court's order is overbroad and permits the production of irrelevant and confidential information that is not reasonably calculated to the discovery of admissible evidence. Thus, according to Nautica, the order exceeds the scope of discoverable information.

{¶ 43} Upon review, we find the trial court included some safeguards for Nautica Defendants' privileged and confidential matter. The record shows that the court addressed Nautica Defendants' privacy concerns, at least to some degree. During the September hearing, the court engaged in a colloquy with counsel for Nautica, during which counsel advised the court of his concern regarding protecting confidential information, attorney-client privilege, and other personal and private information arguably contained on Nautica's computers. The court then instructed the parties to fashion a protective order and the court would sign it. The court further stated that the parties could address any issues concerning attorney-client privileges through in camera inspections, instructing, "Just bring them to me." The court also executed an ESI order deeming all ESI produced to Allied as "Confidential Information" under the court's previously entered Stipulated Protective Order.

{¶ 44} However, the trial court's ESI order lacks sufficient protective protocols intended by *Bennett* and numerous other courts to safeguard Nautica Defendants' confidential information. For example, the trial court's order in this case failed to include a list of search terms in its order to narrow the production of

documents. The court's order also failed to outline a process by which the parties could submit search terms to identify responsive documents, provide objections to proposed search terms, and provide the search terms to an independent third-party computer expert. Allied suggests that a search term protocol using the term "wristbands" would not have exposed the "altered email chain" or any others from which Nautica deleted the term "wristbands" and therefore would not have been fruitful. We find no reason the parties are limited to one relevant search term. Given the opportunity, the parties could agree upon other equally availing search terms that would likely produce responsive documents. And having a procedure in place by which the parties can object to proposed search terms ensures that the parties' interests are protected.

{¶ 45} Moreover, we find the lack of search terms and search protocol has resulted in an overbroad order that risks including information irrelevant to the underlying claims and information that may be personal, private, proprietary, or otherwise confidential. "Courts have been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature." *Balboa Threadworks, Inc.*, D.Kan.No. 05-1157-JTM-DWB, 2006 U.S. Dist. LEXIS 29265, at 3. Likewise, where courts do compel forensic imaging, courts must utilize a protective protocol "to ensure that the forensic imaging is not unduly intrusive," which protocol serves to protect the defendant's

confidential, private, and privileged information. *Nithiananthan*, 12th Dist. Warren No. CA2011-09-098, 2012-Ohio-431, at ¶ 19, 20.

{¶ 46} Here, the record shows that Allied's initial request for "the doctored email in native format" (noted within a footnote in Allied's motion for sanctions regarding paper discovery) developed into a request for "e-discovery with respect to Nautica's emails" (at the August hearing) and ultimately resulted in the court's order of "a mirror image of all Nautica's computers used by Mary Horoszko." Although the court's ESI order provided a protocol in which the parties could arguably prevent the disclosure of attorney-client privilege (i.e. the creation of a privilege log), there is nothing in the order — through search terms or other instructions — that expressly required the third-party vendor or expert to limit its search to information relevant to Allied/Blue Star's claims against Nautica Defendants or to exclude personal or confidential information, such as Horoszko's personal or financial information or Nautica's proprietary information. Rather, the order broadly states that the expert shall collect "ESI files associated with the Horoszko accounts or where such ESI might be electronically stored." Without relevant search terms, or other limiting instructions, the court is essentially permitting unfettered access to irrelevant and confidential information contained in the Nautica computers used by Horoszko.

{¶ 47} Additionally, we find the trial court's order failed to provide Nautica Defendants sufficient time in which to review responsive documents for privileged information. The court's order provides that "counsel shall have the right to review the Imaged ESI for any information protected by the attorney-client privilege (The

'Protected Information') and shall create and produce a log of any such Protected Information for delivery to Vestige and Allied's counsel within three (3) days thereof." The record shows that thousands of documents have been produced in the course of paper discovery, and Nautica Defendants assert that forensic imaging could access hundreds of gigabytes of data. Given this large amount of data, the court's allowance of only three days to review the records for privilege and responsiveness, appropriately supplement Nautica's responses to discovery requests, and create a privilege log that expressly describes the nature of the documents or communications that are protected is unreasonable. *See Ameriwood Industries v. Liberman*, E.D.Mo. No. 4:06CV524-DJS, 2006 U.S. Dist. LEXIS 93380 (Dec. 27, 2006) (outlining a three-step procedure for forensic imaging and including in its "disclosure step" a period of 20 days for review and creation of privilege log); *see also Wynmoor*, 280 F.R.D. 681 (S.D.Fla.2012) (20 days for review and creation of privilege log); *Bank of Mongolia*, 258 F.R.D. 514 (20 days for review and creation of privilege log).

Conclusion

{¶ 48} Based upon the discovery of a purportedly altered email chain and Nautica Defendants' history of noncompliance with the trial court's previous discovery orders, we find the trial court did not abuse its discretion in compelling forensic imaging of Nautica computers. We find, however, that the trial court abused its discretion in failing to establish the proper protective protocols that would allow Allied sufficient access to recover useful, relevant information, while

also providing Nautica Defendants an opportunity to identify and protect privileged and/or confidential matter.

{¶ 49} We therefore affirm in part and reverse in part, and we remand to the trial court for further proceedings consistent with this opinion. In remanding, we urge the trial court to adopt a protocol similar to the protocols utilized by the cases referenced in this opinion.

It is ordered that appellants and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

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MICHELLE J. SHEEHAN, JUDGE

EILEEN T. GALLAGHER, P.J., and
RAYMOND C. HEADEN, J., CONCUR