The Bullet Point: Ohio Commercial Law Bulletin

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Does my company have to pay for "off the clock" activity?

Employer Liability for "Off the Clock" Activity

Heimbach v. Amazon.com, Sixth Circuit Court of Appeals, Docket: 18-5942, Opinion Date: November 4, 2019

In this Sixth Circuit appeal, Plaintiffs were hourly workers at an Amazon fulfillment center where they were required to undergo an anti-theft security screening after clocking out without compensation. The district court dismissed the purported class action under the Pennsylvania Minimum Wage Act (PMWA), citing the Supreme Court's 2014 decision in Integrity Staffing Solutions, Inc. v. Busk, which interpreted the Fair Labor Standards Act (FLSA) and the Portal-to-Portal Act to find post-shift security screening non-compensable.

The Sixth Circuit certified two questions to the Pennsylvania Supreme Court: Is the time spent on an employer's premises waiting to undergo and undergoing mandatory security screening compensable as "hours worked" under the PMWA; and, Does the doctrine of *de minimus non curat lex* ("judges will not sit in judgment of extremely minor transgressions of the law") bar claims brought under the PMWA?

The Bullet Point: Employers should be aware that "off the clock" procedures and processes will be scrutinized by the Courts. While the U.S. Supreme Court has applied the doctrine of *de minimus non curat lex* to the FLSA to hold that employers are not required to compensate employees for small amounts of time that are administratively difficult to track, what constitutes a "small amount of time" may vary by situation and reviewing court.

Standard of Review for Administrative Decisions

Shelly Materials v. City of Streetsboro Planning & Zoning Comm., Slip. Op. No. 2019-Ohio-4499.

In this appeal, the Ohio Supreme Court clarified the standard a court of appeals must apply to an administrative appeal pending before it.

The Bullet Point: Under Ohio law, the scope of review of an administrative appeal is not de novo but that the appeal " 'often in fact resembles a de novo proceeding." "The court weighs the evidence to determine whether a preponderance of reliable, probative, and substantial evidence supports the administrative decision, and if it does, the court may not substitute its judgment for that of" the administrative agency. Further, the court may not "blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise." Nevertheless, the court of common pleas has "the power to examine the whole record, make factual and legal determinations, and reverse the administrative agency's decision if it is not supported by a preponderance of substantial, reliable, and probative evidence."

Parol Evidence Rule

Autumn Health Care v. Peoples Bank, N.A., 5th Dist. Licking No. 19-CA-19, 2019-Ohio-4545.

In this appeal, the Fifth Appellate District affirmed in part and reversed in part the trial court's decision to exclude a writing related to a contract under the parol evidence rule.

The Bullet Point: The parol evidence rule provides that "absent fraud, mistake or other invalidating clause, the parties' final written integration of their agreement may not be varied, contradicted, or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." The parol evidence rule "effectuates a presumption that a subsequent written contract is of a higher nature than earlier statements, negotiations, or oral agreement by deeming those earlier expressions to be merged into or superseded by the written document." The parol evidence rule "is a rule of substantive law that prohibits a party who has entered into a written contract from contradicting * * * the terms of the contract with evidence of alleged or actual agreement." However, if a written contract does not contain the complete and exclusive statement of all the terms of the agreement, a factual determination of the parties' intent may be necessary to supply the missing term.

Settlement Agreements

Parker v. Smith, 8th Dist. Cuyahoga No. 107711, 2019-Ohio-4346.

In this appeal, the Eighth Appellate District affirmed the trial court's decision to strike a portion of a settlement agreement but enforce the remainder.

The Bullet Point: Settlement Agreements are considered contracts under Ohio law. To that end, when a contract contains a provision offensive to Ohio law or policy, "that provision is void while the remainder of the contract remains enforceable."

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

File Name: 19a0272p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION.

NEAL HEIMBACH; KAREN SALASKY,
Plaintiffs-Appellants,

v.

AMAZON.COM, INC.; AMAZON.COM.DEDC, LLC; INTEGRITY STAFFING SOLUTIONS, INC.,
Defendants-Appellees.

No. 18-5942

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
Nos. 3:14-cv-00204; 3:14-md-02504—David J. Hale, District Judge.

Decided and Filed: November 4, 2019

Before: MERRITT, DAUGHTREY, and GRIFFIN, Circuit Judges.

COUNSEL

ON BRIEF: Peter Winebrake, WINEBRAKE & SANTILLO, LLC, Dresher, Pennsylvania, for Appellants. Jay Inman, LITTLER MENDELSON P.C., Lexington, Kentucky, Richard G. Rosenblatt, MORGAN, LEWIS & BOCKIUS LLP, Princeton, New Jersey, David B. Salmons, Michael E. Kenneally, MORGAN, LEWIS & BOCKIUS LLP, Washington, D.C., for Appellees.

ORDER

GRIFFIN, Circuit Judge:

In *Integrity Staffing Solutions, Inc. v. Busk ("Busk I")*, 574 U.S. 27 (2014), the Supreme Court held that post-shift security screening is a noncompensable postliminary activity under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., as amended by the Portal-to-Portal Act ("Portal Act"), 29 U.S.C. § 251 et seq. *See id.* at 34–37. At issue in this appeal is whether *Busk I* resolves a similar claim under the Pennsylvania Minimum Wage Act ("PMWA"), 43 Pa. Cons. Stat. § 333.101 et seq. Previously, this court has considered similar appeals arising from multidistrict litigation and involving the wage-and-hour statutes of three other states: Nevada, Arizona, and Kentucky. *See Busk v. Integrity Staffing Sols. ("Busk II")*, 905 F.3d 387, 391 (6th Cir. 2018), *cert. denied*, No. 18-1154, 2019 WL 4921284, at *1 (U.S. Oct. 7, 2019); *Vance v. Amazon.com, Inc.*, 852 F.3d 601, 606 (6th Cir. 2017).

Now, plaintiffs move to certify a question of law to the Pennsylvania Supreme Court. We find that certification is warranted and hereby grant plaintiffs' motion. Additionally, we certify a second question regarding the issue of defendants' *de minimis* defense. Both questions are presented in Section IV of this order. For the reasons discussed below, we respectfully request the assistance of the Pennsylvania Supreme Court regarding these issues.

I.

The relevant facts are not in dispute. Plaintiffs worked at Amazon's[1] "logistics facility/fulfillment center" located in a large warehouse in Breinigsville, Pennsylvania. Plaintiff Heimbach worked for Amazon while Salasky worked for Integrity Staffing Solutions. Amazon and Integrity "separately employ[ed] hundreds of hourly workers at the Facility." The workers' duties included "receiving deliveries of merchandise, transporting merchandise to its appropriate

[1]Defendants Amazon.com, Inc. and Amazon.com.DEDC, LLC are collectively referred to as "Amazon."

location within the Facility, 'picking' merchandise from storage locations, and processing merchandise for shipping."

Hourly employees clocked in and out on time clocks at the beginning and end of their shifts, respectively. After clocking out at the end of their shifts, employees were required to undergo antitheft security screening, which included metal detectors, searches of bags and other personal items, and "a secondary screening process if the metal detector's alarm sound[ed]." While plaintiffs and defendants disagree as to the amount of time this screening took on average, no party disputes that defendants did not compensate their employees for the time it took to wait in line for and undergo these security screenings.

Plaintiff Heimbach filed a putative class action suit in the Philadelphia County Court of Common Pleas, pleading a single count under the PMWA. The first amended complaint in state court added Salasky as a plaintiff. Defendants removed the case to the United States District Court for the Eastern District of Pennsylvania because it satisfied the jurisdictional requirements of the Class Action Fairness Act. *See* 28 U.S.C. § 1332(d)(2). The United States Judicial Panel on Multidistrict Litigation eventually transferred the case to the Western District of Kentucky, where several cases bringing similar wage-and-hour claims based in other states' laws were pending.

Following discovery, plaintiffs moved for class certification and defendants moved for summary judgment. The district court granted summary judgment in favor of defendants and denied the class certification motion as moot. *Heimbach v. Amazon.com, Inc.*, No. 3:14-CV-204-DJH, 2018 WL 4148856, at *4 (W.D. Ky. Aug. 30, 2018). In *Busk I*, the Supreme Court held that "employees' time spent waiting to undergo and undergoing . . . security screenings" is not compensable under the FLSA, as amended by the Portal Act. 574 U.S. at 29. Here, the district court noted that "Pennsylvania and federal courts have used FLSA law for interpretative guidance" where its provisions have mirrored those in the PMWA, and that "the state and federal definitions of compensable time are similar to each other." *Heimbach*, 2018 WL 4148856, at *2 (citation omitted). The court "conclude[d] that it is proper to consider the Portal-to-Portal Act amendments, and the Supreme Court's interpretation thereof, in construing and applying the PMWA." *Id.* at *3 (footnote omitted). After doing so, the district court granted defendants'

motion for summary judgment. *Id.* at *3–4. Plaintiffs timely appealed and moved this court to certify a question of law to the Pennsylvania Supreme Court to resolve this issue.[2]

II.

Whether to certify a question of law is within this court's "sound discretion." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). "Resort to the certification procedure is most appropriate when the question is new and state law is unsettled." *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (citations omitted). We "generally will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks. When we see a reasonably clear and principled course, we will seek to follow it ourselves." *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (citation and internal quotation marks omitted). In appropriate cases, however, certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391 (footnote omitted).

In *Vance*, we denied the plaintiffs' motion to certify to the Kentucky Supreme Court the question of "whether the [Kentucky Wages and Hours Act] incorporates the Portal-to-Portal Act." 852 F.3d at 607–08. Two critical facts distinguish this case, however. First, the plaintiffs in *Vance* did not timely request certification. *Id.* at 608. Instead, they waited until they had already lost below. *Id.* at 607–08. "[T]he appropriate time to request certification of a state-law issue is before, not after, the district court has resolved [it]. [O]therwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision." *Id.* at 607 (second and third alteration in original) (citations and internal quotation marks omitted). Here, plaintiffs did not have the option of asking the district court to certify a question because the Pennsylvania Supreme Court accepts certified questions only from the Supreme Court of the United States and the federal courts of appeals. Pa. R. App. P. 3341(a).

[2]In their reply brief addressing the merits, plaintiffs state that if we grant their certification motion, we should "ask the [Pennsylvania] Supreme Court to also consider the *de minimis* defense's application to PMWA claims." Plaintiffs explain that they did not include this request in their motion to certify "because the defense was not addressed in the district court's opinion and it was unclear whether the defense would even be litigated on appeal." This is a valid reason for not making the request earlier. Moreover, we independently find it appropriate to certify the *de minimis* question.

Thus, plaintiffs did not delay their request by making it in this court; they did so at their earliest opportunity, even before briefing the merits.

Second, certification by a federal court of appeals may be particularly appropriate where the law at issue is from "a distant State" outside of the circuit presented with the question. *Lehman Bros.*, 416 U.S. at 391. For example, "[w]hen federal judges in New York attempt to predict uncertain Florida law, they act . . . as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Id.* Similarly, we are less familiar with Pennsylvania law than Kentucky law, which we encounter on a regular basis. These practical considerations militate in favor of certification.

III.

Pennsylvania Rule of Appellate Procedure 3341 governs certification of questions of law from federal courts. Three elements are required to warrant certification. First, "all facts material to the question of law to be determined" must be undisputed. Pa. R. App. P. 3341(c). Second, the question of law must be "one that the petitioning court has not previously decided." *Id.* Third, there must be "special and important reasons therefor, including, but not limited to, any of the following":

> (1) The question of law is one of first impression and is of such substantial public importance as to require prompt and definitive resolution by the Supreme Court;
>
> (2) The question of law is one with respect to which there are conflicting decisions in other courts; or
>
> (3) The question of law concerns an unsettled issue of the constitutionality, construction, or application of a statute of this Commonwealth.

Id.

A.

We begin by analyzing these elements with respect to the Portal Act issue. The first two are easily satisfied. The parties agree on the material facts of this case and this court has not previously decided whether the PMWA incorporated the Portal Act. As for the "special and important reasons," all three enumerated factors support certification.

First Impression and Substantial Public Importance. The Pennsylvania Supreme Court has adopted a lower-court decision approving the use of federal caselaw interpreting the FLSA to interpret the PMWA in some circumstances. *Commonwealth, Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003) (citation omitted), *aff'd sub nom. Commonwealth v. Stuber*, 859 A.2d 1253 (Pa. 2004) (per curiam). In another case, it stated that "Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees; and it is not mandated that state regulation be read identically to, or *in pari materia* with, the federal regulatory scheme." *Bayada Nurses, Inc. v. Commonwealth, Dep't of Labor & Indus.*, 8 A.3d 866, 883 (Pa. 2010). But the Court has never squarely addressed whether the PMWA incorporated the Portal Act. And defendants admit that "there is no evidence that the security-screening issue has ever arisen before under Pennsylvania law."

In *Caiarelli v. Sears, Roebuck & Co.*, 46 A.3d 643, 644 (Pa. 2012), the Pennsylvania Supreme Court dismissed without comment an appeal as having been improvidently granted, but two justices dissented from that dismissal. In a separate writing, Justice McCaffery (joined by Justice Todd) asserted that "[t]he Pennsylvania General Assembly has not in any way adopted the federal Portal to Portal Act." *Id.* at 648 (McCaffery, J., dissenting). But this dissent by two justices obviously does not constitute a precedential opinion of the Pennsylvania Supreme Court. *See Commonwealth v. Kyle*, 874 A.2d 12, 20 (Pa. 2005) (explaining that a previous holding "was not endorsed by a majority of the Court and lacks precedential status"). Thus, the issue raised here is one of first impression.[3]

Defendants argue that resolving this issue would be of little public importance because, "[a]ccording to Plaintiffs, 'almost no Pennsylvania employers . . . require their employers [sic] to go through an airport-style, anti-theft screening process at the end of every shift.'" But answering

[3]We also note our awareness of the appeal currently pending in the Pennsylvania Supreme Court in *Chevalier v. General Nutrition Centers, Inc.*, 189 A.3d 386 (Pa. 2018) (per curiam). That case raises the question of whether the PMWA permits an employer to use a particular "method of calculating a salaried employee's 'regular rate' and . . . resulting overtime payments" that the Supreme Court of the United States has authorized under the FLSA. *Chevalier v. Gen. Nutrition Ctrs., Inc.*, 177 A.3d 280, 286 (Pa. Super. Ct. 2017); *see Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942). While the Pennsylvania Supreme Court's opinion in that case will provide guidance for us, it will not resolve the question presented in this case and thus would not change our analysis under Rule 3341(c)(1).

the narrow security-screening question presented by this appeal necessarily requires answering the broader question of whether the Portal Act applies to PMWA claims. This question touches many more Pennsylvania workers and employers, as evidenced by the cases discussed below grappling with it.

Conflicting decisions in other courts. Plaintiffs argue that the district court's decision here "directly conflicts with a recent opinion issued by the Pennsylvania Court of Common Pleas." In *Bonds v. GMS Mine Repair & Maintenance, Inc.*, No. 2:13-CV-1217, 2015 WL 5602607, at *1–3 (W.D. Pa. Sept. 23, 2015), a group of mine workers sued their employer in federal district court, alleging FLSA and PMWA violations, among others. The district court granted summary judgment in favor of the employer with respect to the FLSA claims, relying on the Portal Act and *Busk I*. *Id.* at *9–12. It declined to exercise supplemental jurisdiction over the state-law claims, however, quoting the *Caiarelli* dissent's statement that "[t]he Pennsylvania General Assembly has not in any way adopted the federal Portal to Portal Act." *Id.* at *11 (citation omitted). The plaintiffs then brought their state-law claims in state court, where the employer reasserted its argument that the "pre- and post-shift activities outlined in the pleadings do not meet the standard of 'integral and indispensable duties'" described in *Busk I*. *Bonds v. GMS Mine Repair & Maint.*, No. 2015-6310, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622, at *10 (Pa. Com. Pl., Wash. Cty. Dec. 12, 2017). The court disagreed:

> [*Busk I*] ultimately has no impact on Plaintiffs' MWA claim. As previously stated, the law in Pennsylvania provides greater protection for employees than the federal law, and Pennsylvania has refused to adopt the FLSA. The standard set forth in [*Busk I*] is inapplicable to Plaintiffs' state law claims, therefore Defendant's Motion for Summary Judgement is DENIED.

Id. at *11.

Defendants are quick to point out that the plaintiffs in *Bonds* sought compensation for time spent in "pre- and post-shift safety meetings," not security screenings. *Id.* at *7. For this reason, defendants assert that "[p]laintiffs' argument misfires because '[t]he question of law' they want certified *was not decided in the Bonds case*." Given plaintiffs' narrow wording of the question they propose certifying in their motion, this is technically correct. But the two decisions are nevertheless irreconcilable in a broader respect: one holds that *Busk I* and the

Portal Act apply to PMWA claims, and the other holds that they do not. The district court here briefly noted that it considered *Bonds* "and f[ound] it unpersuasive." *Heimbach*, 2018 WL 4148856, at *3 n.3. Defendants also highlight that the decision is an unpublished, trial-court opinion with no precedential value. *See Fullerton v. W.C.A.B. (Gettysburg Foundry Specialties Co.)*, 761 A.2d 201, 202 (Pa. Commw. Ct. 2000) ("[C]ommon pleas court opinions are not precedential before this Court."); *Constanzo v. Yetzer*, No. 02-3424, 2007 WL 5731694 (Pa. Com. Pl., Berks Cty. Aug. 16, 2007) ("[A] court of common pleas decision . . . has limited precedential value."); *see also Commonwealth v. Nase*, 104 A.3d 528, 530 (Pa. Super. Ct. 2014) (discussing "an unpublished non-precedential Court of Common Pleas decision"). But Rule 3341(c)(2) makes no mention of precedential effect. It merely requires that there be "conflicting decisions in other courts"—which accurately describes *Bonds* and the district court's order here. These conflicting decisions illustrate the unsettled state of the law on this issue.

In *Smith v. Allegheny Technologies, Inc.*, the Third Circuit stated that "Pennsylvania has not enacted the Portal-to-Portal Act, and Pennsylvania law requires compensation for a broader range of activities, including travel time, than the FLSA." 754 F. App'x 136, 141 (3d Cir. 2018) (citations omitted). Accordingly, the court found that "[n]either the principal activity nor the integral or indispensable test applies here." *Id.* This decision, while not from a Pennsylvania court, does come from a court with much more expertise on Pennsylvania law than ours. And it conflicts with the district court's decision here in the same way as *Bonds*.

Unsettled Issue Involving a Pennsylvania Statute. This factor's application is more straightforward. The parties agree that the issue in this case concerns a Pennsylvania statute: the PMWA. And, as discussed above, the issue is unsettled. The PMWA's constitutionality is not questioned here, but its construction (whether it incorporates the Portal Act) and application (how it applies to plaintiffs' security-screening claims) are. Thus, this factor weighs in favor of certification as well.

B.

In both the district court and on appeal, defendants have advanced an alternative argument that the security screening time at issue is noncompensable under "the doctrine *de*

minimis non curat lex (the law does not take account of trifles)." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 233 (2014). In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Supreme Court "declared that because '[s]plit-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act,' such 'trifles' as 'a few seconds or minutes of work beyond the scheduled working hours' may be 'disregarded.'" *Sandifer*, 571 U.S. at 233 (quoting *Anderson*, 328 U.S. at 692).

Like the Portal Act issue discussed above, the material facts here are not in dispute and our court has never considered whether the *de minimis* doctrine may apply to PMWA claims. *See* Pa. R. App. P. 3341(c). And the state of the law on this issue seems to be similarly unsettled. Defendants admit that the PMWA "and regulations do not expressly endorse the doctrine", and Pennsylvania precedent addressing the *de minimis* doctrine in this context is sparse. The dissent of two justices in *Caiarelli* states that there is not "an established '*de minimis*' rule under the PMWA." 46 A.3d at 648 (McCaffery, J., dissenting). The Pennsylvania Superior Court in *Caiarelli* did not use the term "*de minimis*" in its unpublished decision affirming the trial court's grant of summary judgment in the defendant's favor. *Caiarelli v. Sears, Roebuck & Co.*, 988 A.2d 713 (Pa. Super. Ct. Sept. 21, 2009) (table). But it did state that one of its two reasons to affirm was "because any tasks associated with commuting from home to the service call were minimal." *Id.*, slip op. at 4. It appears to us that no Pennsylvania case other than *Caiarelli* addresses the *de minimis* doctrine in the context of the PMWA.[4]

This lack of precedent means that there are no "conflicting decisions in other courts" on this issue, Pa. R. App. 3341(c)(2), except to the extent that the two-justice dissent in *Caiarelli* conflicts with the Superior Court's opinion below. And, like the Portal Act question, this issue concerns the construction and application of the PMWA, and its resolution is likely to affect a

[4]The majority of other Pennsylvania cases mentioning the *de minimis* doctrine do so in the context of zoning and land use. *E.g., Nettleton v. Zoning Bd. of Adjustment of City of Pittsburgh*, 828 A.2d 1033, 1038 (Pa. 2003) ("The de minimis zoning doctrine authorizes a variance in the absence of a showing of the unnecessary hardship traditionally required to support such relief where the violation is insignificant and the public interest is protected by alternate means." (footnote omitted)); *see also Penn. Labor Relations Bd. v. Friedberg*, 148 A.2d 909, 911 (Pa. 1959) (discussing the labor-law *de minimis* doctrine limiting the application of the National Labor Relations Act to businesses that engage in a small "volume of commerce"). None of these cases provides guidance to us.

broad swath of workers and employers in Pennsylvania. *See* Pa. R. App. 3341(c)(1) & (3). We find that the factors of Rule 3341(c) support certification here as well.

IV.

For the reasons discussed above, we certify the following two questions to the Pennsylvania Supreme Court:

(1) Is time spent on an employer's premises waiting to undergo and undergoing mandatory security screening compensable as "hours worked" within the meaning of the Pennsylvania Minimum Wage Act, 43 Pa. Cons. Stat. § 333.101 et seq.?

(2) Does the doctrine of *de minimis non curat lex*, as described in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) and *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220 (2014), apply to bar claims brought under the Pennsylvania Minimum Wage Act, 43 Pa. Cons. Stat. § 333.101 et seq.?

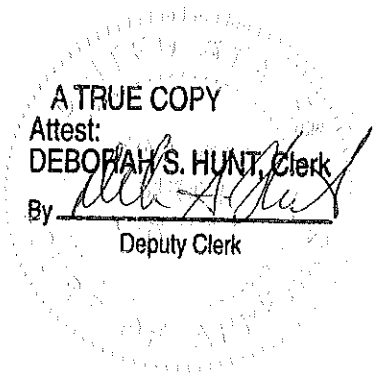
Our phrasing of the questions is not intended to restrict the Pennsylvania Supreme Court's consideration of the issues involved. For purposes of filing subsequent pleadings in the Pennsylvania Supreme Court, we recommend that Plaintiffs-Appellants Heimbach and Salasky be designated as Appellants and that Defendants-Appellees Amazon and Integrity be designated as Appellees. *See* Pa. R. App. P. 3341(b)(5).

The clerk is directed to attach to this order plaintiffs' motion to certify, defendants' response thereto, and the parties' merits briefs. *See* Pa. R. App. P. 3341(b).

We retain jurisdiction pending resolution of this certification.

It is so ordered.

BY THE COURT



/s/ Richard A. Griffin
Circuit Judge

SLIP OPINION NO. 2019-OHIO-4499

SHELLY MATERIALS, INC., APPELLANT, *v.* THE CITY OF STREETSBORO PLANNING AND ZONING COMMISSION ET AL., APPELLEES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Shelly Materials, Inc. v. Streetsboro Planning & Zoning Comm.*, Slip Opinion No. 2019-Ohio-4499.]

Zoning—Surface mining as a permitted conditional use—Administrative appeals—R.C. 2506.04—Standard of review applicable to court of appeals' review of decision of common pleas court in R.C. Chapter 2506 administrative appeal—Court of appeals in an administrative appeal may not reweigh the evidence.

(No. 2018-0237—Submitted March 26, 2019—Decided November 5, 2019)

APPEAL from the Court of Appeals for Portage County, No. 2017-P-0025, 2017-Ohio-9342.

STEWART, J.

{¶ 1} The questions raised in this appeal concern the scope of review conducted by a court of appeals in an R.C. Chapter 2506 administrative appeal. For the reasons that follow, we conclude that the Eleventh District Court of Appeals exceeded its scope of review in this case and we accordingly reverse the judgment of the court of appeals and remand the cause to that court for further consideration consistent with this opinion.

Facts and Procedural History

{¶ 2} Appellant, Shelly Materials, Inc. ("Shelly"), entered into a mineral-rights lease in 2015 for an approximately 225-acre horse-farm property, commonly called Sahbra Farms, located in the city of Streetsboro ("the city"). The property is zoned "R-R, Rural Residential District," and at the time, surface mining was allowed as a conditional use in a rural-residential district upon the approval of an application for a conditional-use permit. Shelly leased the mineral rights of the Sahbra Farms land to engage in surface mining of sand and gravel. When Shelly entered into the lease, surface mining had been conducted on an adjacent property by a different company for a number of years as a permitted conditional use.

{¶ 3} Some city residents became aware of Shelly's plan to convert the horse farm into a mining operation and, under the name "Stop Sahbra Dig," submitted an application to amend the city's zoning code to remove surface mining as a conditional use in all districts where it was permitted, including in a rural-residential district. The city's planning and zoning director, an appellee in this case,[1] agreed with the residents and recommended to appellee Streetsboro Planning and Zoning Commission that surface mining no longer be permitted as a conditional use in any district. The commission then recommended that Streetsboro City Council pass an ordinance to remove surface mining from the zoning code, and city council eventually voted to do so. But because Shelly filed its application for a

1. The third appellee in this case is the city's zoning inspector.

conditional-use permit to engage in surface mining before the ordinance took effect, the parties agree that the ordinance amending the zoning code may not be applied retroactively in this case.

{¶ 4} The commission conducted three hearings on Shelly's application, after which it unanimously issued written findings of fact and conclusions of law ultimately determining that "Shelly did not establish by clear and convincing evidence that Shelly's proposed conditional use met the relevant standards outlined in the Streetsboro Codified Ordinances necessary for the issuance of a conditional use permit." Streetsboro Codified Ordinance 1153.03 sets forth the requirements an applicant must meet to obtain a conditional-use permit:

> (a) The applicant shall be required to establish by clear and convincing evidence that the general standards of this Zoning Ordinance and this Chapter and the specific standards pertinent to each proposed use shall be met for the proposed use provided further that any requirements of this Zoning Ordinance for permitted use(s) within a district shall be applicable to any conditional use unless otherwise stated herein.
>
> (b) The Planning and Zoning Commission shall determine if the proposed use complies with these regulations and shall insure [sic] that the specific standards and requirements of this Zoning Ordinance pertinent to the proposed use shall be satisfied.
>
> (c) General Standards. The Planning and Zoning Commission shall review the particular facts and circumstances of each proposed use in terms of the following standards and shall find adequate evidence showing that such use of the proposed location:

> (1) Will be harmonious with and in accordance with the general objectives or with any specific objective of the Streetsboro Development Policy Plan of current adoption;
>
> (2) Will be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area;
>
> (3) Will not be hazardous or disturbing to existing or future neighboring uses;
>
> (4) Will not be detrimental to property in the immediate vicinity or to the community as a whole;
>
> (5) Will be served adequately by essential public facilities and services such as highways, streets, police and fire protection, drainage structures, refuse disposal, and school; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such service[;]
>
> (6) Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets or roads.

(Underlining sic.)

{¶ 5} Among other conclusions, the commission stated that "Shelly's proposed use would be detrimental to the properties in the immediate vicinity as a whole and, thus, constitute[s] a substantial negative effect on neighboring property values." In reaching this conclusion, the commission rejected an opinion offered by Shelly's certified real-estate appraiser that surface mining would not adversely affect the value of property located near the proposed surface mine, concluding that the appraiser's analysis was flawed because it contained "incongruent real estate

comparisons." The commission also stated that the appraiser's testimony "showed that the value of four out of five homes in Streetsboro would likely suffer if Shelly's proposed use were to operate in its proposed location."

{¶ 6} Shelly filed an R.C. Chapter 2506 appeal in the Portage County Court of Common Pleas. The court referred the case to a magistrate, who issued a decision that contained findings of fact and conclusions of law. The magistrate concluded that the commission had made its determinations under the provisions of the zoning code not based on admissible and probative evidence but on subjective public-opinion comments that property values near the proposed use would be adversely impacted. The magistrate concluded that Shelly had offered "evidence" in the form of the opinion and report of a certified real-estate appraiser, while the commission had relied only on what the magistrate characterized as "unsubstantiated speculation about detrimental impact on property values" from sources that included nonexpert testimony from the city's planning and zoning director. With the city having offered no "competent testimony from a witness qualified to render opinions about property values," the magistrate concluded that the city planning and zoning director's "unsubstantiated speculation is outweighed by the evidence from [Shelly's appraiser] as a matter of law." The magistrate further ultimately determined that Shelly had carried its burden of proof as to all six requirements in Streetsboro Codified Ordinance 1153.03(c).

{¶ 7} The court of common pleas adopted the magistrate's decision over the city's objections, concluding that the commission acted arbitrarily and capriciously by denying Shelly's application for a conditional-use permit. The court held that the commission's denial of the application "is unsupported by the preponderance of substantial, reliable, and probative evidence." The court also determined that the commission's denial of the application was "arbitrary and capricious," because the commission had reviewed it in light of the city's recent zoning change to prohibit surface mining. The court stated that it was "probable" that the application "would

not have ever been approved, given the prevailing position of the City and residents that surface mining is not in keeping with the Master Plan," even though the city "had the opportunity for nearly *two years*" prior to the filing of the application to amend the zoning code to remove surface mining as a conditional use. (Emphasis sic.) The court of common pleas thus determined that "[t]he underlying motivation to deny the conditional use application emerges as a desire to deny all surface mining as a conditional use, rather than because [Shelly] failed to satisfy the standards set forth in" the city's zoning code.

{¶ 8} A divided panel of the Eleventh District Court of Appeals reversed the judgment of the court of common pleas. The majority found the issue regarding the fourth of the city zoning code's six criteria for granting a conditional-use permit—whether Shelly's proposed use would be detrimental to property in the immediate vicinity or to the community as a whole, Streetsboro Codified Ordinance 1153.03(c)(4)—to be "dispositive," 2017-Ohio-9342, 104 N.E.3d 1, ¶ 32 (11th Dist.), and it accordingly did not address any other "separate issues" asserted in the appeal, *id.* at ¶ 15, including arguments that the commission had correctly determined that Shelly had failed to satisfy other provisions of Streetsboro Codified Ordinance 1153.03(c) and additional arguments that went to other matters.

{¶ 9} After acknowledging that Shelly's expert "had 30 years of experience as an appraiser and had submitted a 76-page report in support of his opinion," *id.* at ¶ 33, the majority nonetheless decided that the commission could have justifiably concluded that Shelly's expert lacked credibility, because he had "acknowledged that the comparison properties utilized to form his opinion were further away from the surface mine than the properties at issue," *id*. at ¶ 36. In addition, the majority stated that the expert had "acknowledged that some of the properties in the comparison group were probably separated from mining operations by natural buffers, such as woods, furthering [sic] distinguishing the comparison properties from the properties at issue." *Id*. After concluding that the commission had been

justifiably entitled to reject the expert's opinion, the majority held that Shelly had failed to carry its burden to obtain the conditional-use permit. *Id*. at ¶ 37.

{¶ 10} We accepted jurisdiction over Shelly's appeal, 152 Ohio St.3d 1478, 2018-Ohio-1990, 98 N.E.3d 294, to consider three propositions of law:

> 1. An administrative decision that is unconstitutional, illegal, arbitrary, capricious, or unreasonable, cannot be affirmed simply because it is supported by the preponderance of the evidence, nor can an unsupported decision be affirmed simply because it is not illegal or arbitrary; rather, a common pleas court must reverse if it finds any one of the statutory grounds for reversal of an administrative decision.
>
> 2. It is the proper function of the court of common pleas in an appeal under Ohio Revised Code 2506.01 to evaluate the character of evidence to determine if it was "substantial, reliable, and probative."
>
> 3. It is not the function of a court of appeals in an appeal under Ohio Revised Code 2506.01 to review the common pleas court's judgment de novo, but its review under R.C. 2506.04 is limited to "questions of law." R.C. 2506.04.

Analysis

{¶ 11} Shelly's principal argument is that the court of appeals exceeded the narrow scope of its review and conducted a de novo review of the commission's findings by substituting its judgment for that of the common pleas court with respect to the "dispositive" issue—whether the commission erred by finding that Shelly's expert lacked credibility.

{¶ 12} Decisions of administrative agencies are directly appealable to a court of common pleas. A common pleas court has jurisdiction to review final orders issued by "any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state." R.C. 2506.01(A). Acting as an appellate court, the common pleas court "may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. These grounds for reversal are set forth in a disjunctive list, so each ground must be read to have a distinct meaning. *See Freedom Rd. Found. v. Ohio Dept. of Liquor Control*, 80 Ohio St.3d 202, 205, 685 N.E.2d 522 (1997). The presence of any one of the six grounds listed in R.C. 2506.04 will therefore by itself justify a court of common pleas' reversal of an administrative order.

{¶ 13} We have said that the scope of review for a common pleas court in an R.C. Chapter 2506 administrative appeal is not de novo but that the appeal " 'often in fact resembles a *de novo* proceeding.' " *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984), quoting *Cincinnati Bell, Inc. v. Glendale*, 42 Ohio St.2d 368, 370, 328 N.E.2d 808 (1975). "The court weighs the evidence to determine whether a preponderance of reliable, probative, and substantial evidence supports the administrative decision, and if it does, the court may not substitute its judgment for that of" the administrative agency. *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 13. The court of common pleas may not "blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise." *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979). Nevertheless, the court of common pleas has "the power to examine the whole record, make factual and legal determinations, and reverse the [administrative agency's] decision if it is not supported by a preponderance of substantial, reliable,

and probative evidence." *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 24, citing *Dudukovich* at 207.

{¶ 14} When considering Shelly's application for a conditional-use permit, the commission reviewed the standards set forth in Streetsboro Codified Ordinance 1153.03(c), including that the conditional use "[w]ill not be detrimental to property in the immediate vicinity or to the community as a whole," Streetsboro Codified Ordinance 1153.03(c)(4). Addressing this standard, the commission determined that "[t]he appraisal data offered by Shelly's real estate appraiser did not reflect a valid comparison between the subject property and neighboring properties and the properties used in the appraiser's report." For this reason, the commission concluded that "Shelly's real estate appraiser's testimony was flawed and contained incongruent real estate comparisons" and that the "appraiser's testimony showed that the value of four out of five homes in Streetsboro would likely suffer if Shelly's proposed use were to operate in its proposed location."

{¶ 15} The court of common pleas determined that the commission had erroneously focused on the expert's sales data for particular houses, as opposed to his opinion that surface-mining operations would have no adverse effect on property values for the community as a whole. The court, quoting Streetsboro Codified Ordinance 1153.03(c)(4), stated that "the proper test is not the unsubstantiated speculation regarding the sale of any particular house; the test is whether the use will be 'detrimental to property in the immediate vicinity or to the community as a whole.' " In considering the impact that Shelly's mining operations would have on the community as a whole, Shelly's expert testified before the commission that he had found no recent sales that he could use for comparison that involved houses adjacent to property where mining operations were currently being conducted on land that had shortly before been used for a farm-type purpose. For that reason, he expanded his analysis to cover 12 house

sales that had occurred since 2014 in the city and two neighboring townships that also had active surface-mining operations, stating that all of the houses were in relatively "close proximity" to nearby mining operations. The expert testified that he had employed a methodology in which he "analyzed a distance from an existing ongoing gravel and sand operation to the actual property that sold and tried to analyze those particular sales to the average sales in the local neighborhood to see if there's any measurable effect." After comparing 24 indicators, the expert in his appraisal report concluded that "the majority of indicators show no effect for being near an active gravel quarry. It is possible that unique locations of a residential property could be impacted by gravel extraction activities, but as a whole general property values show limited effect based on close proximity." The expert thus concluded that there was "little to no conclusive evidence" to show that sales of property in close proximity to surface-mining operations were adversely affected.

{¶ 16} The city's planning and zoning director, who by his own admission was "not an appraiser," testified before the commission that Shelly's application should be denied, in part because of the proposed mining operation's effect on property values. The director stated his opinion that there were "shortcomings" in Shelly's expert appraiser's analysis and explained what he viewed those shortcomings to be. The court of common pleas concluded that the planning and zoning director was not qualified to render an opinion about property appraisals and that the director's "unsubstantiated speculation is outweighed by the evidence from [Shelly's expert] as a matter law."

{¶ 17} A party who disagrees with a decision of a court of common pleas in an R.C. Chapter 2506 administrative appeal may appeal that decision to the court of appeals but only on "questions of law." R.C. 2506.04. For this reason, we have stated that under R.C. 2506.04, an appeal to the court of appeals is "more limited in scope" than was the appeal to the court of common pleas. *Kisil*, 12 Ohio St.3d at 34, 465 N.E.2d 848; *see id.* at 34, fn. 4. While the court of common pleas is

required to examine the evidence, the court of appeals may not weigh the evidence. *Independence*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, at ¶ 14. Apart from deciding purely legal issues, the court of appeals can determine whether the court of common pleas abused its discretion, which in this context means reviewing whether the lower court abused its discretion in deciding that an administrative order was or was not supported by reliable, probative, and substantial evidence. *Boice v. Ottawa Hills*, 137 Ohio St.3d 412, 2013-Ohio-4769, 999 N.E.2d 649, ¶ 7, citing *Kisil* at 34.

{¶ 18} The Eleventh District reversed the judgment of the court of common pleas on the grounds that the commission had a justifiable reason to reject Shelly's expert's opinion, because "the comparison properties utilized to form his opinion were further away from the surface mine than the properties at issue." 2017-Ohio-9342, 104 N.E.3d 1, at ¶ 36. This was not a question of law for the court of appeals to decide in an administrative appeal under R.C. 2506.04; it was a question concerning the weight of the evidence to be given to the expert's opinion.

{¶ 19} The Eleventh District concluded that Shelly's expert's failure to use appropriate comparables when offering his opinion that Shelly's operations would not be detrimental to property in the immediate vicinity was, in essence, a complete failure of proof pursuant to Streetsboro Codified Ordinance 1153.03(c)(4). Experts are not required to give precise opinions, but an expert's opinion is normally offered to a reasonable degree of certainty within the expert's field. *See State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 162. To be sure, an expert's opinion may not be based on "mere possibility or speculation," *id.*, but when an expert's opinion on the value of real estate is based on "comparables" because there is no recent arms-length sale of the property in question, the appraisal will be based on a professional's judgment that the property will sell for a price consistent with prices for similar and similarly situated properties. Absolute certainty in land appraisals is not required, nor is it even possible, in most cases.

United States v. Glanat Realty Corp., 276 F.2d 264, 266 (2d Cir.1960) ("the decisions are full of expressions recognizing that land value almost always depends upon the hypothetical opinions of those generally familiar with transactions in the neighborhood").

{¶ 20} In fact, at least one commission member during one of the hearings before the commission acknowledged the difficulty of obtaining direct comparisons of houses for purposes of appraisal when he questioned Shelly's expert appraiser:

> [Commission member:] Did you find any comps at all—I grant you this would probably be very difficult—where you had property that was not already adjacent to a surface mine but rather was adjacent to a very pastoral, horse-farmish looking land and then became a surface mine and what would happen to the value of those farms?
>
> [Shelly's expert:] Unfortunately not. I could not find—
>
> [Commission member:] That's nearly impossible, I grant you.

{¶ 21} Given that the lack of comparable properties near the location of the proposed surface mine made it difficult to ascertain whether mining operations would be detrimental to property in the immediate vicinity, the opinion of an expert appraiser was important. No objections were made to Shelly's expert's qualifications to render an opinion, so the validity of his appraisal was ultimately a matter of credibility for the commission to determine. *See Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 92, 652 N.E.2d 671 (1995). The court of common pleas, acting within the scope of its review under R.C. Chapter 2506, weighed the expert's opinion differently than the commission. The court of appeals had no authority to second-guess the decision of the court of common pleas on questions going to the

weight of the evidence supporting the commission's findings. We accordingly reverse the judgment of the court of appeals on the only issue it addressed.

{¶ 22} The dissenting opinion criticizes us for not addressing the court of appeals' holding that that the trial court erred by putting the burden of proof on the wrong party. No additional discussion is necessary—in its decision adopting the magistrate's decision, the trial court stated:

> A review of the record indicates that [Shelly] presented clear and convincing evidence during the Commission hearings relative to the general standards, the specific standards as to surface mining, and the specific objectives of the Master Plan. The Court finds that the Commission's decision to deny the conditional use application is unsupported by the preponderance of substantial, reliable, and probative evidence.

{¶ 23} Without question, the trial court properly recognized that Shelly had the burden of proving its entitlement to the conditional-use permit by clear and convincing evidence and that it had met that burden of proof. Indeed, the court of appeals recognized the same thing, stating that "[t]he flaw is that the magistrate fails to recognize that [Shelly] has the burden, *and provided [the expert's] testimony lacks credibility*, [Shelly] fails" (emphasis added), 2017-Ohio-9342, 104 N.E.3d 1, at ¶ 34. The court of appeals thus recognized that if the expert's testimony was credible, Shelly would have carried its burden of proof.

{¶ 24} The dissent also asserts that the magistrate did not use the correct standard of review and that the trial court's "conclusory recitation of the zoning ordinance's requirements" cannot "magically turn the magistrate's obvious application of the wrong legal standard into something that passes legal muster." Dissenting opinion at ¶ 38. This assertion improperly elevates a magistrate's

decision over a judgment issued by a trial judge. "Civ.R. 53 places upon the *court* the ultimate authority and responsibility over the [magistrate's] findings and rulings." (Emphasis sic.) *Hartt v. Munobe*, 67 Ohio St.3d 3, 5, 615 N.E.2d 617 (1993). Thus, we have held that a trial court "has the responsibility to critically review and verify to its own satisfaction the correctness of [a magistrate's decision]." *Normandy Place Assocs. v. Beyer*, 2 Ohio St.3d 102, 105, 443 N.E.2d 161 (1982). It is for this reason that Civ.R. 53(D)(4)(b) gives the trial court the authority to "adopt or reject a magistrate's decision in whole or in part, with or without modification." And we emphasize that a magistrate's decision is not effective "unless adopted by the court." Civ.R. 53(D)(4)(a). To assert that the magistrate erred is to create a straw man: it makes no difference if the magistrate used the wrong standard of review; what is important is that the trial court used the correct standard of review.

{¶ 25} The Eleventh District determined that its resolution of the issue regarding Streetsboro Codified Ordinance 1153.03(c)(4) was dispositive of the appeal, obviating the need for it to consider any of the various other issues raised by the commission and the two city officials in their appeal from the decision of the court of common pleas. Because those issues that were not addressed should be resolved by the Eleventh District in the first instance, we remand this cause to the court of appeals for further consideration consistent with this opinion.

Judgment reversed
and cause remanded.

KENNEDY and DONNELLY, JJ., concur.

FISCHER, J., concurs in judgment only.

DEWINE, J., dissents, with an opinion joined by O'CONNOR, C.J., and ZIMMERMAN, J.

WILLIAM ZIMMERMAN, J., of the Third District Court of Appeals, sitting for FRENCH, J.

DEWINE, J., dissenting.

{¶ 26} Let's review what happened here. The City of Streetsboro passed an ordinance allowing surface mines if the mine operator can show by clear and convincing evidence that the mine will satisfy certain standards. Among those standards is that the mine "[w]ill not be detrimental to property in the immediate vicinity or to the community as a whole." The Streetsboro Planning and Zoning Commission reviewed an application for a conditional-use permit and found that the company failed to meet this burden. But the court of common pleas overturned the commission's decision on the grounds that *the commission* had not provided sufficient evidence justifying its rejection of the application. And the court of appeals reversed, rightly noting that this put the burden on the wrong party, and reinstated the commission's decision.

{¶ 27} Nevertheless, a majority of this court today reverses the court of appeals. In doing so, the lead opinion neither analyzes whether Shelly Materials provided clear and convincing evidence that it satisfied the ordinance's requirements nor addresses the failure of the trial court to actually apply that standard. Instead, the lead opinion asserts that the obvious error in the magistrate's analysis—which was adopted by the court of common pleas—can be ignored because of the trial court's conclusory recitation of the proper standard of review under the zoning ordinance. In short, the lead opinion disregards the evidentiary standard in the city ordinance that the commission was lawfully required to apply. It thereby effectively robs Streetsboro of the right to set the standards for granting a conditional-use permit.

The court of common pleas did not apply the right standard in reviewing the commission's decision

{¶ 28} The determinative question in this case is what standard the court of common pleas should have applied in reviewing the commission's decision. On

review of an administrative agency's decision under R.C. 2506.04, "the Court of Common Pleas must weigh the evidence in the record, and whatever additional evidence may be admitted pursuant to R.C. 2506.03, to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision." *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979).

{¶ 29} A complicating feature here is that the zoning ordinance imposes a "clear and convincing" evidentiary standard. That is, under the ordinance, an applicant must provide clear and convincing evidence that the proposed use will satisfy each of six requirements. Streetsboro Codified Ordinance 1153.03. The commission is legally bound to apply the terms of the zoning ordinance, including any evidentiary standard contained therein. Hence, if a reviewing court is to assess the commission's decision, as required by R.C. 2506.04, it must ask whether the commission applied the terms of the zoning ordinance, including the evidentiary burden. As a result, when the zoning ordinance imposes a clear-and-convincing-evidence requirement, the court of common pleas must, at a minimum, ask whether the petitioning entity provided evidence of that quality.

{¶ 30} Here, nothing in the court of common pleas' decision assesses whether Shelly Materials had provided clear and convincing evidence that the proposed use would not "be detrimental to property in the immediate vicinity or to the community as a whole" under Streetsboro Codified Ordinance 1153.03(c)(4). The magistrate's conclusions—adopted by the court of common pleas—first stated that the commission's findings were supported only by "unsubstantiated speculation about detrimental impact on property values, not by substantial probative evidence, and not by expert testimony." The magistrate reached this conclusion by entirely discounting the opinion of Streetsboro Planning and Zoning Director John Cieszkowski. Thus the magistrate concluded that the commission's positive evidence (Cieszkowski's opinion) was "outweighed by the evidence from

Mr. Bidwell [Shelly Materials' expert appraiser] as a matter of law." In essence, the magistrate reasoned that Shelly Materials provided some evidence and the commission provided no credible competing evidence and hence, Shelly Materials wins. That analysis might work if the burden was a preponderance of the evidence. But, as I've explained, if the evidentiary burden set forth in the zoning ordinance is not to be rendered a nullity, the court of common pleas should have asked whether Shelly Materials provided clear and convincing evidence.

{¶ 31} Clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). When a party must provide clear and convincing evidence, the other party need not provide any competing evidence at all. Weak evidence can fail to be clear and convincing even in the absence of competing evidence. By implying that the commission had to provide some competing evidence and by failing to assess the quality of the evidence in the record to determine whether it was clear and convincing, the magistrate applied the wrong standard and improperly placed a burden on the commission to present competing evidence. As the court of appeals correctly noted, "the magistrate fails to recognize that [Shelly Materials] has the burden, and provided Bidwell's testimony lacks credibility, [Shelly Materials] fails." 2017-Ohio-9342, 104 N.E.3d 1, ¶ 34. This is right, of course, because evidence that lacks credibility is, by definition, not clear and convincing.

The evidence presented to the commission

{¶ 32} The lead opinion claims that the court of appeals erred by second-guessing the court of common pleas' decision on questions regarding the weight of the evidence. But that mischaracterizes both what the court of appeals did and what the record here shows. To see why, let's review the record.

{¶ 33} Shelly Materials' evidence regarding detrimental effects on properties in the immediate vicinity came from its appraiser, Paul Bidwell. Bidwell provided an analysis based on the sales of 12 comparator properties that were chosen based on proximity to surface mines. He initially opined that there would be "no adverse effect" on property values in the immediate vicinity. But he almost immediately qualified this conclusion. First, he conceded that many of the comparator properties were much farther away from a mining site than the properties at issue here would be and that some of the comparators had natural buffers insulating them from the mine site. In other words, he admitted that many of the "comparables" weren't particularly useful in assessing the effect of a mine on properties adjacent to the site. And he later clarified that his evidence did not show that there would be no adverse effect. Rather, it only failed to show that there would be an adverse effect. As Bidwell put it, "based on the information I have, I can't conclude one way or another" about the effect of the mine on the value of the closest homes, "but I can say that there is not evidence to show a specific adverse effect based on what I studied." And he later further clarified that "even though the immediate properties in the area potentially could have or see some possible effect, the general area on which I'm concentrating for this conditional use permit * * * is not conclusive for an adverse effect."

{¶ 34} Note what's happened here. Bidwell first opined that there would be no adverse effect on nearby properties. This is the one line picked up by the magistrate. But when one reads on, it is clear that Bidwell thought only that his evidence failed to show an adverse effect. That's hardly a relevant result if one is tasked with assessing whether there is clear and convincing evidence that there will be no adverse effect. As the saying goes, the absence of evidence is not evidence of absence.

The lead opinion makes the same mistake as the court of common pleas

{¶ 35} The lead opinion claims that the court of appeals had "no authority to second-guess the decision of the court of common pleas on questions going to the weight of the evidence supporting the commission's findings." Lead opinion at ¶ 21. By framing the issue as one of "second-guessing" the decision of the court of common pleas regarding the weight of the evidence, the lead opinion commits two errors. First, based on the record, the court of appeals didn't have to reweigh Bidwell's testimony—it merely had to take Bidwell at his word. Bidwell admitted that his evidence failed to show that the mine would not have detrimental effects on neighboring properties.

{¶ 36} Second, when the evidentiary burden is clear and convincing evidence, a reviewing court must "examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *Ford v. Osborne*, 45 Ohio St. 1, 3, 12 N.E. 526 (1887). And it must assess whether the requisite quantum of evidence was produced, which, we have said, is " 'in essence' " a legal question. *Kisil v. Sandusky*, 12 Ohio St.3d 30, 35, 465 N.E.2d 848 (1984), quoting *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980). The lead opinion, like the court of common pleas, fails to assess whether Shelly Materials met the burden of providing clear and convincing evidence.

{¶ 37} The lead opinion goes to some length to explain that experts are "not required to give precise opinions" and to highlight the difficulty of finding good comparable properties that can be used to accurately assess the effect of a mine on property values. Lead opinion at ¶ 19. Fine, but the ordinance requires clear and convincing evidence, and we cannot ignore that requirement. The fact that it may be difficult to locate good comparable properties cannot excuse a party from meeting its evidentiary burden.

{¶ 38} The magistrate patently applied the wrong standard. The common pleas judge adopted the magistrate's reasoning without any independent analysis about the disputed provisions in the ordinance. The lead opinion seems to believe that the common pleas court's conclusory recitation of the zoning ordinance's requirements can magically turn the magistrate's obvious application of the wrong legal standard into something that passes legal muster. I disagree.

{¶ 39} The court of appeals would have reinstated the commission's decision. Because I believe that it is procedurally best to allow the court of common pleas to apply the correct standard in the first instance, I would remand this case to the trial court for it to apply the correct standard and determine whether Shelly Materials met its burden of providing clear and convincing evidence that the proposed use would satisfy all six standards under the zoning ordinance.[2] Because a majority of the court sees things differently, I respectfully dissent.

O'CONNOR, C.J., and ZIMMERMAN, J., concur in the foregoing opinion.

Eastman & Smith, Ltd., Reginald S. Jackson Jr., Brian P. Barger, and Barry W. Fissel, for appellant.

Sutter O'Connell Co., Robert E. Cahill, and Matthew C. O'Connell, for appellees.

Brady, Coyle & Schmidt, Ltd., and Margaret G. Beck, urging reversal for amici curiae Ohio Chamber of Commerce; NAIOP of Ohio, Inc.; National Federation of Independent Business; Ohio Chemistry Technology Council; Ohio Aggregates and Industrial Minerals Association; National Stone, Sand and Gravel

2. Shelly Materials claims that the commission's decision should also have been overturned on the grounds that the commission had an improper motive. But what Shelly Materials fails to realize is that even if the commission had an improper motive, that does not automatically mean that the permit should have been granted. Shelly Materials was required to provide clear and convincing evidence to obtain a conditional-use permit. Whether it did so is something that our law requires the court of common pleas to assess. It did not do so, and hence, we should remand for a proper assessment.

Association; Flexible Pavements of Ohio; Ohio Ready Mixed Concrete Association; Ohio Forestry Association; Ohio Home Builders Association; and Ohio Contractors Association.

[Cite as *Autumn Health Care v. Peoples Bank, NA*, 2019-Ohio-4545.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
AUTUMN HEALTH CARE, ET AL	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiffs-Appellants/Cross-appellees	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 19-CA-19
PEOPLES BANK, NA	:	
	:	
Defendant-Appellee/Cross-appellant	:	OPINION

CHARACTER OF PROCEEDING:	Civil appeal from the Licking County Court of Common Pleas, Case No.2018CV00615
JUDGMENT:	Affirmed in part; Reversed and Remanded in part
DATE OF JUDGMENT ENTRY:	October 30, 2019

APPEARANCES:

For Plaintiffs-Appellants/Cross-appellees	For Defendant-Appellee/Cross-appellant
MICHAEL J. KING 141 E. Broadway, P.O. Box 514 Columbus, OH 43202	BRIAN P. MCNALLY 200 Civic Center Drive Suite 800 Columbus, OH 43215

Gwin, P.J.

{¶1} Appellants and cross-appellants both appeal the March 6, 2019 judgment entry of the Licking County Court of Common Pleas.

Facts & Procedural History

{¶2} On June 15, 2018, appellants/cross-appellees Autumn Health Care ("Autumn") and Steven Hitchens ("Hitchens"), individually and as successor in interest to Autumn Health Care, filed a complaint against appellee/cross-appellant Peoples Bank N.A., formerly known as Ohio Heritage Bank, for breach of contract and declaratory judgment, seeking a declaration of rights regarding the legal obligations of Hitchens, Autumn, and Peoples Bank under a consumer security agreement.

{¶3} The facts, as alleged in the complaint, are as follows. In June of 2009, Jeff and Janie Thompson ("Thompsons") sought to purchase the residence located at 2297 Brownsville Road S.E. in Newark by obtaining a loan and a mortgage. Hitchens agreed to pledge collateral, in the form of a $50,000 certificate of deposit, to help the Thompsons obtain a loan and mortgage. On or about June 30, 2009, Ohio Heritage Bank agreed to loan $133,000 to the Thompsons. The transaction between Ohio Heritage and the Thompsons culminated on August 5, 2009, with the execution of an adjustable rate note and a mortgage by the Thompsons in favor of Ohio Heritage Bank. Concurrently with the transaction between the Thompsons and Ohio Heritage, Hitchens executed a consumer security agreement and an assignment of deposit or share account.

{¶4} On October 17, 2017, Peoples Bank sent written notice to Autumn that the Thompsons were in default, sufficient payment arrangements had not been made to cure the default, and that the Hitchens CD would be setoff in the amount of $50,000.

{¶5} Autumn and Hitchens alleged in their complaint that, pursuant to a written memorandum by Ohio Heritage Bank Assistant Vice President Marlise Hitchens, the Thompsons' loan would have an adjustable rate, subject to increase after five years, and the collateral pledged by Hitchens only secured the initial five-year period of the loan. Further, that because the security agreement did not include a merger or integration clause, the memorandum of Marlise Hitchens and security agreement together reflect that the CD was pledged as collateral security for the Thompsons' loan only until August 5, 2014, the end of the initial five-year term of the loan.

{¶6} Autumn and Hitchens attached the following exhibits to their complaint: the certificates from the State of Ohio demonstrating Ohio Heritage Bank was merged into Peoples Bank; the June 30, 2009 memorandum signed by Marlise Hitchens; the adjustable rate note signed by the Thompsons; the mortgage; the adjustable rate rider signed by the Thompsons; the consumer security agreement signed by Hitchens; and the letter from Peoples Bank to Autumn stating the bank is exercising its right of setoff and debiting the CD in the amount of $50,000.

{¶7} The adjustable rate rider provides the initial interest rate of 5.875% may change after the 60th payment and every 60th payment thereafter.

{¶8} The security agreement, dated August 5, 2009, provides it secures a note in the amount of $133,407 signed by the Thompsons and lists the property given as collateral to secure the debts as CD #38438813 in the amount of $50,000 held at Ohio Heritage Bank. The security agreement further states,

> To secure the payment and performance of the Secured Debts, I give you a security interest in all of the Property described in this Agreement that I

> own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located * * This Agreement remains in effect until terminated in writing, even if the Secured Debts are paid and you are no longer obligated to advance funds to me (or Borrower, if not the same) under any loan or credit agreement.

{¶9} The June 30, 2009 memorandum, with the signature of Marlise Hitchens at the bottom, states as follows:

> With additional approval from the lending committee, I agreed to lend Jeff and Janie Thompson approx. $133,000 to buy out their land contract. The land contract is held by the Catholic Church and the property is located at 2297 Brownsville Rd. SE, Newark. The original amount was $150,000 and they have paid $18,000. The land contract is actually for 0% interest and is due on August 1, 2009. We will be putting them into the 5/5 ARM beginning at 5.875%.
>
> Their D/I shows an exception of 12%. This is in part because Jeff is self employed as a heating and cooling person and has 'business' loans for vehicles on his personal credit bureau. He was sent to us by Steve Hitchens who is going to pledge additional collateral in the form of a $50,000 CD for 5 years on this loan. Janie is a homemaker.

{¶10} On August 20, 2018, Peoples Bank filed an answer to the complaint and a counterclaim. In the counterclaim, Peoples Bank alleged it was entitled to exercise its right to setoff and is entitled to complete indemnification from Hitchens for all claims asserted in the complaint, together with fees, costs, and attorney fees. Peoples Bank

attached the following exhibits to their complaint: the adjustable rate note signed by the Thompsons; the mortgage; the adjustable rater rider; the certificate of deposit dated July 6, 2009 issued to Hitchens; the consumer security agreement signed by Hitchens; and the assignment of deposit or share account signed by Hitchens.

{¶11} The certificate of deposit states it automatically renews after the initial five-year maturity date. It provides as follows with regard to setoff:

> We may (without prior notice and when permitted by law) set off the funds in the account against any due and payable debt you owe us now or in the future * * * You agree to hold us harmless from any claim arising as a result of our exercise of our right of setoff.

{¶12} The assignment signed by Hitchens states Hitchens gives Ohio Heritage Bank a security interest in the CD, and any renewals or substitutions, to secure payment of a note in the amount of $133,407 signed by the Thompsons. The assignment provides that the term "You" means the secured party name above (Ohio Heritage Bank) and "secured party" is defined as "the secured party named above, your successors and assigns." Further, the assignment states, "this agreement will last until You release it in writing, and You are not required to release it until the secured debts are paid in full."

{¶13} Hitchens filed an answer to the counterclaim on September 24, 2018.

{¶14} Peoples Bank filed a motion for judgment on the pleadings on October 29, 2018. Autumn and Hitchens filed a memorandum in opposition to Peoples Bank's motion for judgment on the pleadings and their own motion for summary judgment on December 17, 2018. Attached to the motion for summary judgment is the declaration of Michael King, attorney for Autumn and Hitchens. King avers that included in the documents

provided to him by the attorney for Peoples Bank on December 7, 2017 was the initial transaction summary signed by Marlise Hitchens, dated June 30, 2009. People's Bank filed a reply brief on January 14, 2019.

{¶15} The trial court issued a judgment entry on March 6, 2019. The trial court found that although Autumn and Hitchens attached the June 30, 2009 document signed by Marlise Hitchens to the complaint, it is not properly before the court pursuant to Civil Rule 56(E) and, even assuming its admissibility, it is excluded by the parol evidence rule. The trial court found as follows: the document was not made contemporaneously to the security agreement and assignment; the document was not directed to or signed by Mr. Hitchens; there is nothing ambiguous or uncertain about the security agreement or assignment; Autumn and Hitchens did not demonstrate any exception to the parol evidence rule; interpreting the documents as Autumn and Hitchens suggests would contradict the terms of the security and assignment; and the assignment clearly states it is in effect until the debts are paid in full, not five years. The trial court additionally found the assignment language disposes of Autumn and Hitchens' claim that Peoples Bank did not give them adequate notice of default or an opportunity to cure, as the assignment provides Hitchens had no right to notice of default or opportunity to cure.

{¶16} The trial court granted Peoples Bank's motion for judgment on the pleadings on Autumn and Hitchens' complaint. As to the bank's claim for indemnification, the trial court found the hold harmless clause does not include the claims in this case and contemplates third-party claims arising against an account holder for insufficient funds as a result of a setoff. Additionally, the trial court stated Autumn and Hitchens' claims arise from the security agreement and the assignment, and involve the interpretation of those

documents independent of the bank's right to a setoff. Thus, the trial court granted Autumn and Hitchens' summary judgment on the bank's claim for attorney fees and/or expenses.

{¶17} Autumn and Hitchens appeal the judgment entry of the Licking County Court of Common Pleas and assign the following as error:

{¶18} "I. THE TRIAL COURT ERRED BY MISAPPLYING THE PAROL EVIDENCE RULE, THEREBY FAILING TO GIVE PROPER LEGAL EFFECT TO THE COMPLETE AGREEMENT OF THE PARTIES AS EXPRESSED IN THEIR WRITTEN, SIGNED DOCUMENTS."

{¶19} Peoples Bank also appeals the judgment entry and assigns the following as error:

{¶20} "I. THE TRIAL COURT ERRED IN DISMISSING PEOPLE'S BANK'S COUNTERCLAIM FOR INDEMNIFICATION."

Summary Judgment Standard

{¶21} Civ.R. 56 states, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable

> minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶22} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶23} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

Motion for Judgment on the Pleadings

{¶24} Civil Rule 12(C) provides, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The standard of review of the grant of a motion for judgment on the pleadings is the same as

the standard of review for a Civil Rule 12(B)(6) motion. As the reviewing court, our review of a dismissal of a complaint based upon a judgment on the pleadings requires us to independently review the complaint and determine if the dismissal was appropriate. *Rich v. Erie County Dept. of Human Resources*, 106 Ohio App.3d 88, 665 N.E.2d 278 (6th Dist. Erie 1995). A reviewing court need not defer to the trial court's decision in such cases. *Id.*

{¶25} A motion for judgment on the pleadings, pursuant to Civil Rule 12(C), presents only questions of law. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 297 N.E.2d 113 (1973). The determination of a motion under Civil Rule 12(C) is restricted solely to the allegations in the pleadings and the nonmoving party is entitled to have all material allegations in the complaint, with reasonable inferences to be drawn therefrom, construed in its favor. *Id*.

I.

{¶26} In their assignment of error, Autumn and Hitchens contend the trial court erred by misapplying the parol evidence rule and in failing to give proper legal effect to the complete agreement of the parties, as expressed in their written and signed documents. Autumn and Hitchens argue the trial court failed to consider the June 30th memorandum and the parol evidence rule has no application in this case because the memorandum is not extrinsic evidence offered to contradict or vary the terms of the agreement, but instead is part of the parties' complete and final written agreement. They contend the language used by Marlise Hitchens in the June 30th memorandum is clear that the collateral was only pledged for a five-year period beginning on August 5, 2009.

{¶27} It is a well-settled principle of contract law that the parties' intentions be ascertained from the contract language. *Inland Refuse Transfer Co. v. Browning-Ferris Indus.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). If a contract is clear and unambiguous, then its interpretation is a matter of law and there are no issues of fact to be determined. *Id.* A court cannot in effect create a new contract "by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978).

{¶28} When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. *McDonald v. Canton Medical Edn. Found., Inc.*, 5th Dist. Stark No. 2012CA00240, 2013-Ohio-3659. We presume the intent of the parties is reflected in the language of the contract and we will look at the plain and ordinary meaning of the language used in the contract. *Id.* "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or the overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978). Parol evidence cannot be considered if no ambiguity appears on the face of the instrument. *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499 (1992). When terms of an agreement are ambiguous, parol evidence may be used to explain the understanding of the parties at the time the agreement was entered into. *Phillimore v. Butterbaugh*, 5th Dist. Richland No. 14CA32, 2014-Ohio-4641, citing *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 143 N.E. 388 (1924).

{¶29} The trial court excluded the June 30th memorandum based upon the parol evidence rule. The parol evidence rule provides that "absent fraud, mistake or other

invalidating clause, the parties' final written integration of their agreement may not be varied, contradicted, or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish v. Cicchini*, 90 Ohio St.3d 33, 734 N.E.2d 782 (2000), quoting 11 Williston on Contracts (4th Ed. 1999) 569-570, Section 33:4. The parol evidence rule "effectuates a presumption that a subsequent written contract is of a higher nature than earlier statements, negotiations, or oral agreement by deeming those earlier expressions to be merged into or superseded by the written document." *Id.*

{¶30} The purpose of the parol evidence rule "is to protect the integrity of written contracts." *Id.* The parol evidence rule "is a rule of substantive law that prohibits a party who has entered into a written contract from contradicting * * * the terms of the contract with evidence of alleged or actual agreement." *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410. However, if a written contract does not contain the complete and exclusive statement of all the terms of the agreement, a factual determination of the parties' intent may be necessary to supply the missing term. *Inland Refuse Transfer Co. v. Browning Ferris Indus.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984).

{¶31} Upon review, we find the June 30th memorandum violates the parol evidence rule and the trial court properly excluded it.

{¶32} The terms of the agreement are clear and unambiguous as both the security agreement and assignment state they last until they are terminated in writing. Any attempt to use the June 30th memorandum, a prior written agreement, to contradict the terms of the security agreement and the assignment that were both signed weeks later on August

5, 2009, is not permitted by the parol evidence rule. Though Autumn and Hitchens contend the documents other than the June 30th memorandum do not set out an end date and thus do not conflict with the June 30th memorandum, we disagree. The security agreement signed by Hitchens specifically states, "This Agreement remains in effect until terminated in writing, even if the Secured Debts are paid and you are no longer obligated to advance funds to me (or Borrower, if note the same) under any loan or credit agreement." The assignment signed by Hitchens provides, "this agreement will last until You [the secured party] release it in writing, and You are not required to release it until the secured debts are paid in full." Thus, Autumn and Hitchens' interpretation of the June 30th memorandum that limits the pledge of collateral to five years contradicts the terms of the security agreement and assignment.

{¶33} According to Autumn and Hitchens, the documents in this case, including the June 30th memorandum, are all part of the same transaction, and should be interpreted together as the parties' expression of their agreement. They cite *Edward A. Kemmler Memorial Foundation v. 691/733 East Dublin-Granville Road Co.*, in support of their argument. 62 Ohio St.3d 494, 584 N.E.2d 695 (1992). In *Kemmler*, the Ohio Supreme Court held that, under former R.C. 1303.18, the terms of a promissory note or other negotiable instrument, as between the immediate parties to the instrument, may be modified or affected by another writing executed as part of the same transaction. *Id.* Specifically, the court found the mortgage, deed, and statement of settlement, executed and delivered at the same time as the note, could be admitted into evidence to prove an agency relationship. *Id.*

{¶34} We first note that the statute cited by the Ohio Supreme Court in *Kemmler* is no longer in effect. A similar statute, R.C. 1303.15, was enacted in 1994. However, the plain language of the statute makes it clear that it is subject to and limited by the parol evidence rule. R.C. 1303.15 ("Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument * * * may be modified, supplemented, or nullified by a separate agreement * * * if the instrument is issued * * * as part of the same transaction giving rise to the agreement"). Thus, since the statute is limited by the parol evidence rule, our above analysis applying the parol evidence rule to exclude the June 30th memorandum is not altered by the application of *Kemmler* and R.C. 1303.15.

{¶35} Additionally, unlike the documents in *Kemmler* that were executed at the same time as the note, the June 30th memorandum was not executed and delivered as part of the same transaction as the security agreement and assignment. The June 30th memorandum was not signed by Steven Hitchens, was not directed to Hitchens, was not delivered to him during the transaction, and was not referenced or incorporated in either the security agreement or assignment.

{¶36} We find the June 30th memorandum is barred by the parol evidence rule as evidence of a purported prior agreement that contradicts the terms of the parties' signed and written agreement that this Court is precluded from considering as a matter of law. Autumn and Hitchens' first assignment of error is overruled.

Cross-Assignment of Error I.

{¶37} In its assignment of error, Peoples Bank contends the trial court committed error when it granted Autumn and Hitchens' motion for summary judgment on its

counterclaim for indemnification. The trial court found the hold harmless clause cited by Peoples Bank contemplates third-party claims arising against an account holder for insufficient funds as a result of a setoff and this case involved documents independent of Peoples Bank right to a setoff.

{¶38} As noted above, our role is to give effect to the intent of the parties and we presume the intent of the parties is reflected in the language of the contract; we will look at the plain and ordinary meaning of the language used in the contract. *McDonald v. Canton Medical Edn. Found, Inc.*, 5th Dist. Stark No. 2012CA00240, 2013-Ohio-3659.

{¶39} The specific language of the CD states, "you agree to hold us harmless from any claim arising as a result of our exercise of our right of setoff." There is no language contained in the hold harmless clause limiting indemnification to third party claims for insufficient funds and the final sentence of the provision does not limit the right of recovery only to third party claims for insufficient funds as a result of a setoff. The plain and unambiguous language of the parties' contract requires Autumn and Hitchens to hold Peoples Bank harmless for any claim arising from its rights of setoff.

{¶40} In their complaint, Autumn and Hitchens allege that the setoff by Peoples Bank was improper because the CD was only intended to be pledged for five years and not for the life of the mortgage loan. Thus, this case arises from Peoples Bank's exercise of its right of setoff as against the CD. Autumn and Hitchens' lawsuit would not exist but for Peoples Bank's exercising its right to setoff. Accordingly, we find the trial court committed error in granting summary judgment in favor of Autumn and Hitchens on Peoples Bank's indemnification claim. Peoples Bank's cross-assignment of error is sustained.

{¶41} Based on the foregoing, Autumn and Hitchens' assignment of error is overruled. Peoples Bank's cross-assignment of error is sustained.

{¶42} The March 6, 2019 judgment entry of the Licking County Court of Common Pleas is affirmed in part and reversed and remanded in part, for proceedings consistent with this opinion.

By Gwin, P.J.,

Wise, John, J., and

Delaney, J., concur

[Cite as *Parker v. Smith*, 2019-Ohio-4346.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

KATHY PARKER, ET AL., :

Plaintiffs-Appellees, :

No. 107711

v. :

ROBERT SMITH, III, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 24, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-12-787232

Appearances:

Alan I. Goodman, *for appellees*.

Gilbert W.R. Rucker, III, *for appellant*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Robert Smith, III, appeals a judgment in favor of plaintiffs-appellees, Kathy Parker and Deryl L. Gibson (collectively "appellees"), rendered as enforcement of a settlement agreement. Smith claims the following two errors:

1. The trial court erred in granting Plaintiff's Motion for Judgment, filed on May 17, 2018, in the amount of $68,500.00, where the court's entry found that consideration in paragraph 5 of the Supplemental Agreed Judgment was "unenforceable, void, and stricken from the record."

2. The trial court erred in granting Plaintiff's motion for judgment, filed on May 17, 2018, in the amount of $68,500.00 because the Supplemental Agreed Judgment was based upon coercion by the Plaintiffs and renders the August 23, 2018 judgment void.

{¶ 2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} Appellees filed a legal malpractice action against Smith after a judgment was rendered against them in federal court. Following a year and a half of pretrial litigation, the parties agreed to settle the case and signed an agreed judgment entry awarding appellees "$50,000 in compensatory damages and $50,000 in punitive damages plus interest" at a rate of six percent. The parties agreed that appellees would not enforce the judgment on punitive damages as long as Smith paid the judgment on compensatory damages, plus the six percent interest, in 50 equal installments within 50 months of February 1, 2014. The parties also agreed that "[t]he other terms of the settlement shall remain confidential so long as Defendant meets his obligations set out in the Supplemental Consent Judgment Entry." The agreed judgment entry further provided that "[i]f Defendant fails to meet those obligations, the parties agree and after Defendant is notified by Plaintiff's counsel of Defendant's breach, the Court shall enter a supplemental judgment entry incorporating all the terms of the settlement agreement."

{¶ 4} Smith breached the settlement agreement by failing to make some monthly payments, and appellees filed a motion to incorporate the confidential terms into a supplemental settlement agreement. Following mediation that resulted in a second settlement agreement, the court rendered a supplemental agreed judgment entry in favor of appellees in the amount $34,000, that represented the amount still owed on the compensatory damages, and $50,000 in punitive damages, plus six percent interest on both amounts. Punitive damages were no longer contingent since Smith defaulted on the original agreement.

{¶ 5} The supplemental agreed judgment further provided that Smith would pay appellees $1,000 per month until the total amount of the judgment was fully paid. To that end, the supplemental agreed judgment required Smith to pay appellees the sum of $7,500 by January 31, 2017, in conjunction with his regular monthly payment of $1,000. In addition to providing new terms governing default, including penalties for nonpayment, the supplemental agreed judgment stated, in relevant part in paragraph five:

> 5. In all other respects, the terms of the original judgment, including the terms of the original Settlement Agreement, shall remain in effect, however the terms of that Agreement shall no longer be confidential and are therefore incorporated herein except that the Plaintiffs agree not to bring this matter to the attention of the Supreme Court of Ohio unless the Defendant is more than Sixty days (60) in arrears on the payments set out herein. Those terms are set forth in Exhibit A attached hereto and incorporated herein.

{¶ 6} Smith again defaulted, and appellees filed another motion seeking a judgment for $18,500, the amount still owed in compensatory damages plus a

$5,000 penalty, and $50,000 in punitive damages. This time, the court entered judgment, dated August 23, 2018, in favor of appellees and against Smith "in the amount of $68,500 plus interest at rate of 6 percent." The court's judgment entry further provided, in relevant part:

> However, paragraph 5 of the supplemental agreed entry and the second full paragraph of Exhibit A to supplemental judgment are unenforceable, void, and stricken from the agreement and record.

{¶ 7} Smith now appeals the trial court's August 23, 2018 judgment.

II. Law and Analysis

A. Severed Provisions

{¶ 8} In the first assignment of error, Smith argues the parties' settlement agreements, and the court's supplemental judgment entry that were based on the parties' settlement agreements, are void and unenforceable because the trial court "found that the consideration in paragraph 5 of the Supplemental Agreed Judgment was 'unenforceable, void, and stricken from the record.'" (Appellant's brief p. 5.)

{¶ 9} However, the court never mentioned the word "consideration" in its judgment entry. The court's judgment entry states, in relevant part:

> However, paragraph 5 of the supplemental agreed entry and the second full paragraph of Exhibit A to supplemental judgment are unenforceable, void, and stricken from the agreement and record.

Therefore, the court never commented on the consideration given for the settlement agreement.

{¶ 10} Paragraph five of the supplemental judgment entry precluded appellees from reporting Smith's conduct as their attorney to the Ohio Supreme

Court unless Smith was more than 60 days in arrears on his monthly payments. Smith contends this provision was stricken because it violated public policy. When a contract contains a provision offensive to Ohio law or policy, "that provision is void while the remainder of the contract remains enforceable." *Ford Motor Credit Co. v. Jones*, 8th Dist. Cuyahoga No. 92428, 2009-Ohio-3298, ¶ 13; *see also DeVito v. Autos Direct Online, Inc.*, 8th Dist. Cuyahoga No. 100831, 2015-Ohio-3336, ¶ 2, 4 (Unconscionable provision in arbitration agreement was excised from contract as against public policy while the "non-offending terms of the arbitration agreement remain enforceable."). Therefore, the remaining terms of the parties' settlement agreement, as incorporated into the court's supplemental judgment entry, were enforceable even though paragraph five was stricken from it.

{¶ 11} Moreover, the remaining terms of the parties' settlement agreement constituted an enforceable contract. "A contract is generally defined as a promise, or a set of promises, actionable upon breach." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976). To be enforceable, a contract must have an offer, acceptance, consideration, and a manifestation of mutual assent. *Id*. Smith argues the consideration necessary for an enforceable contract was "eviscerated" when the court struck paragraph five of the supplemental judgment entry.

{¶ 12} "Consideration" is a promisor's promise to give something of value to the promisee in exchange for the promisee's promise to give something of value to

the promisor. *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 28.

> Valuable consideration consists of the acquisition of some legal right by the promisor, in return for which he or she makes the promise, or in the giving up of some legal right by the promisee, in return for which the promise is made to him or her.

17 Ohio Jurisprudence 3d, Contracts, Section 46, at 509 (2010). In other words, "[c]onsideration may consist of either a detriment to the promisee or a benefit to the promisor." *Lake Land Emp. Group of Akron, L.L.C. v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, ¶ 16, citing *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 19, 46 N.E. 63 (1897).

{¶ 13} Smith contends appellees' promise not to report him to the Ohio Supreme Court set forth in paragraph five of the parties' settlement agreement constituted the sole consideration for the contract and that without it, the contract was void. However, the Ohio Supreme Court has held that giving up a right to trial, in addition to the corresponding rights of that judicial process, is adequate consideration to enforce a contract. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 42-43. Thus, although the trial court struck appellees' promise not to report Smith to the Ohio Supreme Court, appellees' forbearance of their right to trial, which they gave in exchange for Smith's promise to pay them damages, remained to enforce the contract.

{¶ 14} Therefore, the first assignment of error is overruled.

B. Coercion

{¶ 15} In the second assignment of error, Smith argues the parties' settlement agreement is void because it was "based upon coercion."

{¶ 16} The Ohio Supreme Court considered the issue of coercion in avoidance of contract in *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 551 N.E.2d 1249 (1990):

> To avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party.

Id. at syllabus. The *Blodgett* court further held that to prove duress, the party seeking to avoid the contract must establish

> (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. * * * The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities. * * * " (Emphasis added.) (Citations omitted.)

Id. at 246.

{¶ 17} Smith does not make any argument or provide any evidence in the record to support his coercion claim. As far as we can tell, Smith could have gone to trial to prove he did not commit malpractice or if he thought the terms of the settlement agreement were unfair. The initial settlement agreement also allowed him to avoid punitive damages if he paid the full amount of the compensatory damages in monthly installments within a 50-month period. There is no evidence in the record that appellees made any threats or that Smith involuntarily accepted

the terms of the settlement agreement. Indeed, there were two settlement agreements, and Smith appears to have entered into both agreements willingly and voluntarily.

{¶ 18} Therefore, the second assignment of error is overruled.

{¶ 19} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to 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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
KATHLEEN ANN KEOUGH, J., CONCUR