The Bullet Point: Ohio Commercial Law Bulletin

Does the Savings Statute Save My Claim?

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Savings Statute

***Moore v. Mt. Carmel Health Sys.*, Slip Opinion No. 2020-Ohio-4113**

In this case, the Ohio Supreme Court held that when a plaintiff fails to obtain service within the one-year period to do so, and the action has neither failed (other than on its merits) nor been refiled, Ohio's savings statute does not apply.

- **The Bullet Point:** An action is barred by the statute of limitations unless it is "commenced" prior to the expiration of the statute of limitations for a claim. Pursuant to Civ.R. 3(A), a civil action is "commenced" at the time the complaint is filed if service is obtained within one year of filing. In addition to this one-year commencement period, Ohio's savings statute provides that when an action is dismissed other than on the merits, and the statute of limitations has run on the claim during the lawsuit, the plaintiff may refile the action within one year. R.C. 2305.19(A).

  The savings statute does not apply automatically to extend the one-year commencement requirement. Rather, Ohio's savings statute "applies only when its terms are met: when an action is commenced or attempted to be commenced; when a judgment is reversed or an action fails other than on the merits, that is, when there is either a voluntary dismissal without prejudice under Civ.R. 41(A) or an involuntary dismissal without prejudice under Civ.R. 41(B); and when the complaint is refiled within one year." Therefore, a plaintiff who fails to obtain service within Civ.R. 3(A)'s one-year commencement period and whose action was neither dismissed without prejudice nor refiled will not be able to use Ohio's savings statute to revive its action outside the statute of limitations period.

Jurisdictional Priority Rule

***Kinzel v. Ebner*, 6th Dist. Erie Nos. E-19-033, E-19-034, 2020-Ohio-4165**

In this appeal, the Sixth Appellate District affirmed in part and reversed in part the trial court's decision, deciding that the jurisdictional priority rule did not apply as the municipal court and common pleas court were not courts of concurrent jurisdiction over the defendant's equitable counterclaim.

- **The Bullet Point:** Under the jurisdictional priority rule, "as between state courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." Essentially, this rule applies to give jurisdictional priority to the court presiding over the first lawsuit when there are two courts of equal jurisdiction presiding over separate lawsuits involving the same issue. Ohio courts apply the jurisdictional priority rule even when the separate lawsuits are not exactly the same so long as the causes of action are part of the same 'whole issue.'

  Concurrent jurisdiction exists when, as with courts of common pleas and municipal courts, different courts are authorized to deal with the same subject matter. However, concurrent jurisdiction does not exist between a court of general jurisdiction and one whose limited powers are inadequate to afford full relief to the parties under the circumstances. Since Ohio municipal courts do not generally have subject matter jurisdiction over an action that is principally equitable in nature and the defendant's counterclaim sought principally equitable relief, the municipal court did not have concurrent jurisdiction with the common pleas court in this case.

Merger by Deed

***Olenchick v. Scramling,* 11th Dist. Lake No. 2020-L-018, 2020-Ohio-4111**

In this appeal, the Eleventh Appellate District affirmed the lower court's decision and found that the doctrine of merger by deed was inapplicable, as there was no evidence the rerecorded deed was a valid final contract into which the purchase agreement merged.

- **The Bullet Point:** Under Ohio law, the doctrine of merger by deed dictates that where a deed is delivered and accepted without qualification pursuant to the parties' agreement, there are no remaining causes of action based upon the parties' prior agreement. Instead, the rights of the parties must be determined by the deed itself unless there is evidence of fraud, mistake, or when the parties' agreement creates rights collateral to the conveyance. In other words, the parties' prior agreement is merged into the deed and the deed becomes the final, controlling agreement between the parties.

  The doctrine of merger by deed is similar to the contract doctrine of integration. Under the doctrine of integration, all prior documents are considered "integrated" into the final contract, so only the provisions in the final contract are part of the agreement. The doctrine of integration is the combination of the parol evidence rule and the rule of interpretation, which seeks to determine the parties' intentions. Likewise, "the merger doctrine should only be applied as a canon of construction that attempts to arrive at the true intention of the parties to a deed." Regardless, Ohio law mandates that all deeds must be signed by the grantor. R.C. 5301.01(A). Without the grantor's signature on the deed, there is no evidence that said deed is a valid final contract into which the parties' agreement must merge. Therefore, the doctrine of merger by deed cannot apply to an unsigned rerecorded deed.

Shareholder Appraisal Statute

***Zalvin v. Ayers,* 1st Dist. Hamilton No. C-190285, 2020-Ohio-4021**

In this appeal, the First Appellate District affirmed the lower court's decision, finding that although the plaintiff's allegations were not barred by the appraisal statute, the shareholder failed to make a prima facie case that the directors breached their fiduciary duties.

- **The Bullet Point:** A shareholder may challenge the value paid for his or her shares in a cash-out merger under Ohio's appraisal statute. Specifically, Ohio's appraisal statute is designed to provide compensation to shareholders who dissent from a merger by providing for the payment of fair cash value for his or her shares as of the day prior to the vote of the shareholders. R.C. 1701.85. Notwithstanding the appraisal statute, an action for breach of fiduciary duty may also be maintained but such an action "may not seek to overturn or modify the fair cash value determined in a cash-out merger." Stated differently, the appraisal statute is the sole remedy available when the shareholder's objection is essentially a complaint regarding the price he received for his shares of stock.

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SLIP OPINION NO. 2020-OHIO-4113

MOORE, CONSERVATOR, APPELLEE, *v.* MOUNT CARMEL HEALTH SYSTEM D.B.A. MOUNT CARMEL ST. ANN'S HOSPITAL ET AL., APPELLANTS.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Moore v. Mt. Carmel Health Sys.*, Slip Opinion No. 2020-Ohio-4113.]

Civil law—Savings statute—R.C. 2305.19(A)—The savings statute may be applied only when its terms have been met—Court of appeals' judgment reversed and cause remanded.

(Nos. 2018-1233 and 2018-1479—Submitted November 13, 2019—Decided August 20, 2020.)

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, No. 2017APE-10-754, 2018-Ohio-2831.

DEWINE, J.

{¶ 1} This case requires us to examine the interplay between Ohio's savings statute, R.C. 2305.19(A), and the provisions of Civ.R. 3(A) to determine whether

an action is barred by the statute of limitations. The statute of limitations prohibits an action unless it is "commenced" prior to the expiration of the statute. Civ.R. 3(A) says that an action is "commenced" at the time it is filed *if* service is obtained within one year. The savings statute provides that when an action is dismissed other than on the merits, the plaintiff may refile the action within one year.

{¶ 2} Here, the plaintiff filed the action just before the expiration of the statute of limitations. The plaintiff did not obtain service within one year, however. Nor did he dismiss the action during that period. The question is whether the plaintiff can nevertheless rely upon the savings statute. We hold that he may not. Because the action was not commenced within the statute-of-limitations period, it fails. The savings statute cannot be used to revive the action.

Moore Files Suit One Day Prior to the Expiration of the Statute of Limitations

{¶ 3} Michael Moore filed a complaint alleging medical malpractice for injuries suffered by his son during a medical procedure that was performed on January 20, 2014. Moore sued multiple defendants, including Dr. Eric Humphreys, the anesthesiologist who treated his son; Mount Carmel St. Ann's Hospital ("Mount Carmel"), where the procedure was performed; and Central Ohio Anesthesia, Inc., the practice group with which Dr. Humphreys worked.

{¶ 4} The statute of limitations for medical claims is one year. R.C. 2305.113(A). That period may be extended if, before the expiration of the limitations period, the plaintiff gives written notice to the defendant that he intends to bring a claim. R.C. 2305.113(B)(1). In such event, the action may be commenced at any time within 180 days after the notice was given. Moore took advantage of this provision, extending his deadline to commence the action to July 7, 2015. He filed his complaint one day prior to this deadline, on July 6, 2015. Simultaneously, Moore requested service of the complaint and summons on all three defendants.

{¶ 5} Timely service was obtained on Central Ohio Anesthesia and Mount Carmel, but Moore failed to obtain service on Dr. Humphreys during the year following the filing of the complaint as required by Civ.R. 3(A). An attempt to serve Dr. Humphreys by certified mail at Mount Carmel was unsuccessful; Dr. Humphreys had retired and was no longer seeing patients at Mount Carmel or elsewhere.

{¶ 6} Mount Carmel filed an answer to the complaint and raised a statute-of-limitations defense and an insufficiency-of-service-of-process defense. Central Ohio Anesthesia and Dr. Humphreys jointly filed an answer and also raised those defenses.

Moore Serves Dr. Humphreys More Than One and a Half Years after Filing

{¶ 7} In February 2017, Central Ohio Anesthesia, Dr. Humphreys, and Mount Carmel all moved for summary judgment. They argued that Moore's claim against Dr. Humphreys was time-barred because Moore failed to serve him within Civ.R. 3(A)'s one-year commencement period. Mount Carmel and Central Ohio Anesthesia further asserted that because the claim against Dr. Humphreys was time-barred, they could not be vicariously liable. On March 2, 2017, Moore again issued instructions to the clerk to attempt personal service on Dr. Humphreys. Service was finally perfected on Dr. Humphreys at his residence on March 10, 2017.

{¶ 8} The trial court granted summary judgment in favor of all three defendants. The court found that the lawsuit against Dr. Humphreys was barred by the statute of limitations. It noted that under our precedent, Dr. Humphreys's participation in the case did not prevent him from raising the defense of insufficient service of process, citing *Gliozzo v. Univ. Urologists*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 18. Although Moore had initially filed the lawsuit within the limitations period, he neither obtained service on Dr. Humphreys within one year as required by Civ.R. 3(A), nor did he dismiss his lawsuit during that time. Thus, the claim against Dr. Humphreys was not commenced prior to the expiration

of the statute of limitations and was barred. As a consequence, the court ruled, "Dr. Humphreys is dismissed with prejudice from this lawsuit because plaintiff's claims against him are barred by the statute of limitations." And, concluding that Mount Carmel and Central Ohio Anesthesia could only be vicariously liable, the court found that any liability of both parties was "extinguished." The court thus granted summary judgment and entered final judgment in favor of Dr. Humphreys, Central Ohio Anesthesia, and Mount Carmel and against Moore "on the merits."

{¶ 9} Moore appealed. The Tenth District Court of Appeals reversed and held that the savings statute applied to Moore's claim against Dr. Humphreys. For the savings statute to apply, an action must fail other than on the merits and then the plaintiff must commence a new action within one year of that failure. R.C. 2305.19(A). Relying on *Goolsby v. Anderson Concrete Corp.*, 61 Ohio St.3d 549, 575 N.E.2d 801 (1991), the court of appeals construed Moore's instructions for service of process on March 2, 2017, as a voluntary dismissal of his action and a refiling of a new action against Dr. Humphreys by operation of law. The court further concluded that this dismissal by operation of law was a failure "otherwise than on the merits," even though the statute of limitations had expired. 2018-Ohio-2831, 117 N.E.3d 89, ¶ 2. Thus, it concluded that the savings statute allowed Moore an additional year to perfect service of his complaint, which was accomplished on March 10, 2017. Having determined that the claim against Dr. Humphreys was not time-barred, the court of appeals dismissed as moot Moore's remaining assignment of error, which argued that his claim against Central Ohio Anesthesia survived even if the claim against Dr. Humphreys was barred by the statute of limitations.

{¶ 10} The court of appeals acknowledged that several other courts of appeals have held *Goolsby* to be inapplicable in similar situations. *See, e.g.*, *Anderson v. Borg-Warner Corp.*, 8th Dist. Cuyahoga Nos. 80551 and 80926, 2003-Ohio-1500; *Bentley v. Miller*, 9th Dist. Summit No. 25039, 2010-Ohio-2735; *Gibson v. Summers*, 11th Dist. Portage No. 2008-P-0032, 2008-Ohio-6995.

Finding its decision to be in conflict with these cases, the court of appeals certified the following question to this court:

> "Does the Ohio savings statute, R.C. 2305.19(A), apply to an action in which a plaintiff attempts, but fails to perfect service on the original complaint within one year pursuant to Civ.R. 3(A)? If so, when a plaintiff files instructions for service after the Civ.R. 3(A) one-year period, does the request act as a dismissal by operation of law and also act as the refiling of an identical cause of action so as to allow the action to continue?"

154 Ohio St.3d 1436, 2018-Ohio-4732, 112 N.E.3d 922.

{¶ 11} Mount Carmel filed a discretionary appeal to this court, as did Dr. Humphreys and Central Ohio Anesthesia. They raised similar propositions of law, essentially asserting that once the applicable statute-of-limitations period expires, the savings statute cannot be used to revive a cause of action that was not timely commenced under Civ.R. 3(A). This court accepted both discretionary appeals and consolidated them with the certified-conflict case. 154 Ohio St.3d 1437, 2018-Ohio-4732, 112 N.E.3d 922.

{¶ 12} Before we begin our analysis, and to make all this easier to follow, we restate the pertinent dates below:

01/20/2014	Date of alleged injury
07/06/2015	Complaint filed
07/07/2015	Expiration of the statute of limitations
07/06/2016	Date by which service must be obtained to commence action under Civ.R. 3(A)
02/2017	Summary-judgment motions filed
03/02/2017	Instructions for service on Dr. Humphreys

03/10/2017	Service on Dr. Humphreys obtained

By Its Plain Terms, the Savings Statute Does Not Save Moore

{¶ 13} To resolve the question in front of us, we need to examine the statute of limitations, the commencement requirement in Civ.R. 3(A), and the savings statute, R.C. 2305.19(A).

{¶ 14} The applicable statute of limitations is R.C. 2305.113, which states that "an action upon a medical * * * claim shall be *commenced* within one year after the cause of action accrued." (Emphasis added.) R.C. 2305.113(A). Here, because Moore took advantage of the 180-day extension provided for in R.C. 2305.113(B)(1), he was required to "commence" his action by July 7, 2015.

{¶ 15} Civ.R. 3(A) determines when an action is commenced:

> A civil action is *commenced* by filing a complaint with the court, *if service is obtained within one year* from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).

(Emphasis added.) *See also* R.C. 2305.17.

{¶ 16} The upshot of the aforementioned provisions is that to comply with the statute of limitations, an action must be "commenced" within the limitations period. Under Civ.R. 3(A), this occurs when the action is filed within the limitations period and service is obtained within one year of that filing.

{¶ 17} That brings us to Ohio's savings statute. It provides:

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

R.C. 2305.19(A).

{¶ 18} Under the plain language of these three provisions, Moore's claim is barred by the statute of limitations. Moore filed his action within the limitations period but did not obtain service on Dr. Humphreys during the one-year commencement period pursuant to Civ.R. 3(A). Thus, he did not commence his action within the statute-of-limitations period. As a result, as of July 7, 2016, his claim was time-barred.

{¶ 19} By its terms, the savings statute cannot save Moore's claim. In order for the statute to apply, the claim must have failed "otherwise than upon the merits" and then Moore must have filed a new claim within one year thereafter. Here, when Moore issued instructions to the clerk to serve the complaint in March 2017, Moore's claim hadn't failed other than on the merits. The case remained on the court's docket—it was subject to dismissal, to be sure, both because Moore had failed to accomplish service and because the statute of limitations had run. But no such dismissal had been entered, and if such dismissal had been entered, the expiration of the statute of limitations would have made the failure on the merits. *See LaBarbera v. Batsch*, 10 Ohio St.2d 106, 114-115, 227 N.E.2d 55 (1967) ("a judgment based upon the statute of limitations is generally regarded as on the merits and bars another action for the same cause"). Further, Moore did not file a "new action." The only thing he did was ask the clerk to serve the original complaint that

remained on the court's docket. Thus, if the savings statute means what it says, it does not apply.

{¶ 20} This would be a relatively simple case if all we had to grapple with was the language of the applicable rule and statutes; under a plain reading, the trial court properly found that Moore's claim was barred by the statute of limitations. But the court of appeals concluded that our decision in *Goolsby*, 61 Ohio St.3d 549, 575 N.E.2d 801, dictated a different result—a contention that Moore echoes in his briefing. So we take up *Goolsby*.

***Goolsby* Does Not Save Moore, Either**

{¶ 21} *Goolsby* involved the two-year statute of limitations for personal-injury claims. *See* R.C. 2305.10. Goolsby filed her complaint less than seven months after the date of her automobile accident (more than one year before the statute of limitations was set to expire). *Goolsby* at 549. Goolsby did not seek to serve her complaint within one year of filing. Instead, two days before the statute of limitations was set to expire, Goolsby instructed the clerk to execute service, which was obtained shortly thereafter. *Id.* The defendant argued that because Goolsby's complaint was not served for more than one year after it was filed, she had never commenced an action. *Id.* at 550. This court recognized that a "technical application" of Civ.R. (3)(A) would lead to the conclusion that Goolsby never commenced her action. *Id.* at 550. On the other hand, "had Goolsby dismissed her complaint and again filed it at the time instructions for service were given, the action would have been commenced according to Civ.R. 3(A)." *Id.* at 550-551. But the court worried that to require her to do so would lead to delay, unnecessary expense, and other impediments to the "expeditious administration of justice." *Id.* at 551. "Under these circumstances," the court explained, a strict application of Civ.R. 3(A) "would not comport with the spirit of the Civil Rules." *Id.* Thus, the court held that "[w]hen service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint *within rule* would

provide an additional year within which to obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint." (Emphasis added.) *Id.* at syllabus.

{¶ 22} The facts of the present case are quite different from the facts in *Goolsby*. When Goolsby issued her instruction to the clerk to attempt service of the complaint, she was still within the limitations period. Because the limitations period had not yet run, she could have simply dismissed her complaint without prejudice and refiled it. In contrast, when Moore issued his instructions to the clerk in March 2017, the statute of limitations period had already expired.

{¶ 23} This court applied *Goolsby*'s holding in a somewhat different context in *Sisk & Assocs., Inc. v. Commt. to Elect Timothy Grendell*, 123 Ohio St.3d 447, 2009-Ohio-5591, 917 N.E.2d 271. There, Sisk filed a complaint for breach of contract in September 2004, failed to obtain service within one year, and voluntarily dismissed the action. *Id.* at ¶ 2. Sisk refiled the complaint in 2005 but did not obtain service within one year of the 2005 complaint; instead, Sisk instructed the clerk to serve the defendant in 2007. *Id.* Service failed again, so the trial court dismissed the refiled action without prejudice. *Id.* The court of appeals affirmed, but we reversed. "To allow Sisk to proceed with its case, after twice failing to perfect service within a year," this court said, "would be a perversion of justice." *Id.* at ¶ 7. To avoid this result, the court applied *Goolsby*, 61 Ohio St.3d 549, 575 N.E.2d 801, and held that Sisk's instruction to serve process in 2007 should be construed as a dismissal and a refiling. *Sisk* at ¶ 8. Since Sisk had already dismissed the original complaint once, the second dismissal was with prejudice under Civ.R. 41(A)(1)(a). *Id.*

{¶ 24} The opinion in *Sisk* does not detail whether the statute of limitations had expired at the time the clerk was instructed to serve process in 2007. It appears

from the record, however, that it had not.[1] Thus, *Sisk*, like *Goolsby*, is best understood as dealing with a situation where the original statute of limitations had not expired.

{¶ 25} The rationale underlying the rule announced in *Goolsby* (and applied in *Sisk*) is that in the circumstances of that case—where the statute of limitations had not run—it was an unnecessary and onerous procedural hurdle to force a plaintiff to dismiss and refile an identical complaint. The key distinction between *Goolsby* and our case is that here, the statute of limitations had run when Moore requested that the clerk make a renewed attempt at service. To apply the savings statute to revive the action in our case, despite the plain terms of Civ.R. 3(A), has the effect not of avoiding unnecessary procedural hoop jumping, but of extending the statute of limitations beyond the term set by the legislature.

{¶ 26} We have little difficulty in concluding that the rule announced in *Goolsby*, 61 Ohio St.3d 549, 575 N.E.2d 801, does not apply in this case. But that leaves us with the question of the continued viability of our holding in *Goolsby*. Had we simply applied the plain language of the statutory scheme in *Goolsby*, we would have reached a different result. Our decision in that case, however, was driven by an interest in judicial economy and avoiding unnecessary procedural hurdles. As today's case demonstrates, however, some courts have extended *Goolsby* well beyond the facts of that case, and in so doing, have extended the statute of limitations beyond what was ordained by the legislature. To prevent any further confusion, we make clear today that *Goolsby* is limited to the factual circumstance that motivated its holding. Thus, the rule announced in *Goolsby*—that a new instruction to the clerk to serve a complaint that is made after Civ.R.

1. *See, e.g.,* Supreme Court of Ohio Case Information, case No. 2008-1265, https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2008/1265 (accessed Apr. 2, 2020) [https://perma.cc/FA9J-GZVY].

3(A)'s commencement period has expired may be treated as a dismissal and refiling for purposes of the savings statute—applies only when the statute of limitations has not yet expired.

Nor Does the "Attempt to Commence" Language Save Moore

{¶ 27} Moore also argues that the failure to serve a complaint within Civ.R. 3(A)'s one-year commencement period is not determinative because the savings statute applies to "any action that is commenced *or attempted* to be commenced." (Emphasis added.) R.C. 2305.19(A). His argument goes like this: (1) he attempted to commence the action when he filed the complaint and made the initial request for service on Dr. Humphreys, (2) his claim failed "otherwise than upon the merits" on July 6, 2016, when he failed to obtain service during Civ.R. 3(A)'s one-year commencement period, but (3) the savings statute provided him an additional year (until July 5, 2017) to commence a new action, (4) which he accomplished when he issued instructions to the clerk and obtained service in March 2017.

{¶ 28} It is true that we have applied the savings statute when an action has not been commenced. In *Thomas v. Freeman*, 79 Ohio St.3d 221, 680 N.E.2d 997 (1997), we dealt with an action in which the plaintiff had filed a lawsuit and requested service within the statute-of-limitations period. *Id.* at 227. After the limitations period had run, but within Civ.R. 3(A)'s commencement period, the action was dismissed without prejudice without the plaintiff having obtained service. *Id.* Under these facts, we held that the plaintiff could use the savings statute to commence a new action within one year of the dismissal without prejudice. *Id.* at 227-228.

{¶ 29} *Thomas* dealt with a situation in which the terms of the savings statute had been complied with. There was an attempt to commence the action (the filing of the complaint and a request for service), the action was dismissed other than on the merits prior to the running of Civ. R. 3(A)'s commencement period, and a new action was filed. In contrast, here, the requirements of the savings statute

have not been met: there was no failure other than on the merits and there has been no filing of a new action.

{¶ 30} Moore would have us ignore these statutory requirements and ordain that the requirements of the savings statute were met by operation of law when Civ.R. 3(A)'s one-year commencement period passed without service of the complaint. In other words, Moore posits that when a plaintiff does not obtain service during the one-year commencement timeframe, the savings statute automatically gives him another year to perfect service. Moore's argument would essentially change Civ.R. 3(A)'s one-year commencement rule to a two-year commencement rule. We decline to adopt such a construction in the face of the explicit language of Civ.R. 3(A). The savings statute does not apply *automatically* to extend the one-year commencement requirement. It applies only when its terms are met: when an action is commenced or attempted to be commenced; when a judgment is reversed or an action fails other than on the merits, that is, when there is either a voluntary dismissal without prejudice under Civ.R. 41(A) or an involuntary dismissal without prejudice under Civ.R. 41(B); and when the complaint is refiled within one year.

We Cannot Save Moore by Modifying the Trial Court's Judgment

{¶ 31} The dissent agrees that we should not engage in the legal fiction of treating Moore's second request for service as a dismissal and refiling, but it would have us do something similar. It urges that we adopt what it terms the "alternative rationale" of the court of appeals and " 'modify the [trial court's] judgment [granting summary judgment] so that the dismissal would be without prejudice.' " Dissenting opinion at ¶ 38, quoting 2018-Ohio-2831, 117 N.E.3d 89, at ¶ 94. It says that upon remand from this court, Moore would have yet another year in which he could file his claim against Dr. Humphreys. Dissenting opinion at ¶ 39. (And then, of course, another year in which to serve the complaint under Civ. R. 3(A).) In other words, even though the statute of limitations indisputably expired on July

7, 2015 (and the deadline to commence on July 6, 2016), the dissent would allow Moore until at least late 2022 to "commence" his action against Dr. Humphreys. As far as the claims against the other parties, the dissent postulates that these would continue in the trial court, despite the fact that the trial court already entered summary judgment in favor of the defendants.

{¶ 32} But the imaginative fiction engaged in by the dissent fares no better than the one employed by the Tenth District. Remember, Moore filed his action on July 6, 2015. To avoid the running of the statute of limitations, he had to commence under Civ.R. 3(A) by obtaining service by July 6, 2016, or voluntarily dismiss his action within this time period to obtain the benefit of the savings statute. He failed to do so and thus, his action is time-barred. Thus, even if the dissent were to have its way and the grant of summary judgment in favor of Dr. Humphreys were somehow converted to a dismissal without prejudice, it wouldn't matter. Moore still couldn't refile because the statute of limitations has expired.

{¶ 33} For this reason, the dissent's extensive argument that the trial court erred in granting judgment on the merits while Dr. Humphreys was contesting the lack of service is an unnecessary tangent. However the judgment is characterized, Moore can't refile; the statute of limitations has expired. Nonetheless, to avoid reader confusion, it is worth pointing out that the dissent is simply wrong in its premise.

{¶ 34} Nothing in the Rules of Civil Procedure prevents a defendant from simultaneously asserting a statute-of-limitations defense and a defense of lack of service of process. The service requirement protects the defendant's right to due process. *See Wainscott v. St. Louis-San Francisco Ry. Co.*, 47 Ohio St.2d 133, 137, 351 N.E.2d 466 (1976). A court may enter judgment against *a plaintiff* even when it has not acquired jurisdiction over the defendant, because in such a case the plaintiff has submitted to the court's jurisdiction by filing the complaint. Thus, we have explained that a party may participate in a case—and thereby assert

affirmative defenses—and at the same time continue to maintain the defense of insufficiency of process as long as the defense was properly raised in the answer and properly preserved. *Gliozzo*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, at syllabus. In this vein, in *Maryhew v. Yova*, 11 Ohio St.3d 154, 464 N.E.2d 538 (1984), we affirmed a trial court's dismissal of an action with prejudice in which a defendant had simultaneously asserted both failure-of-service and statute-of-limitations defenses. *See Maryhew v. Yova*, 11th Dist. Trumbull No. 3138, 1982 WL 5690, *1 (Nov. 26, 1982), *aff'd*, 11 Ohio St.3d 154, 464 N.E.2d 538 (1984); *see also Sisk,* 123 Ohio St.3d 447, 2009-Ohio-5591, 917 N.E.2d 271 (instructing that the plaintiff's second dismissal was with prejudice, even though the plaintiff had never obtained service over the defendant); *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, 909 N.E.2d 1244, ¶ 21, fn. 1 (deciding the case based on the defendants' statute-of-limitations defense without reaching the defense of lack of personal jurisdiction).

{¶ 35} The dissent cites broad statements from a number of federal courts dealing with personal jurisdiction generally, and claims these statements support its view that a court is powerless to enter a dismissal with prejudice when service has not been obtained. But none of these cases deal with a dismissal for failure of service following the expiration of the statute of limitations. Indeed, even though Fed.R.Civ.P. 4(m) provides for a dismissal without prejudice for a lack of timely service, a federal court may enter a dismissal with prejudice for failure of service when the expiration of the statute of limitations would prevent the filing of a new complaint. *See, e.g., Cardenas v. Chicago*, 646 F.3d 1001 (7th Cir.2011) (dismissal with prejudice was appropriate when service requirements were not met properly and the statute of limitations had expired); *Zapata v. New York City*, 502 F.3d 192 (2d Cir.2007) (upholding dismissal of claim as "time barred" where plaintiff failed to obtain service within limitations period); *see also* 1 Moore, *Moore's Federal Practice*, Section 4.82[2], 4-150 to 4-151 (3d Ed.1997) ("any dismissal ordered

after expiration of the statute of limitations for failure to establish good cause [to extend service date] will be, in effect, with prejudice because plaintiff will be precluded from commencing a new action"). But again, this is all largely beside the point. Moore can't file a new action because the action became time-barred when he failed to commence his action within the limitations period.

{¶ 36} We resolve the certified-conflict question by stating that the savings statute may be applied only when its terms have been met. Thus, when, as here, (1) a plaintiff attempts to commence an action but fails to obtain service within Civ.R. 3(A)'s one-year commencement period and (2) the action has neither failed other than on the merits during that one-year period (i.e., been dismissed without prejudice) nor been refiled, (3) the plaintiff cannot use the savings statute to revive the action outside the limitations period.

Conclusion

{¶ 37} Moore's instructions for service of process, filed after the statute of limitations had expired, cannot be treated as a voluntary dismissal and a refiling of his complaint. Because there was neither a dismissal otherwise than on the merits nor the filing of a new action, the savings statute does not apply. The court of appeals erred in concluding otherwise. We reinstate the trial court's grant of summary judgment in favor of Dr. Humphreys and Mount Carmel. In the proceeding below, the court of appeals did not reach Moore's final assignment of error, which asserted that Central Ohio Anesthesia could be liable even if the claim against Dr. Humphreys was barred by the statute of limitations. In light of our decision today, we remand to the court of appeals for consideration of Moore's final assignment of error and for other proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

O'CONNOR, C.J., and KENNEDY, FRENCH, and FISCHER, JJ., concur.

STEWART, J., dissents, with an opinion joined by DONNELLY, J.

STEWART, J., dissenting.

{¶ 38} I agree with the majority opinion's decision to limit *Goolsby v. Anderson Concrete Corp.*, 61 Ohio St.3d 549, 575 N.E.2d 801 (1991), to the facts of that case and with the majority opinion's holding that appellee Michael Moore's second request for service did not amount to dismissing and refiling the action against appellant Dr. Eric Humphreys. I would nevertheless affirm the Tenth District Court of Appeals' judgment based on its alternative rationale, which states:

> However, even if we concluded that the trial court should have dismissed the complaint because service was not obtained within one year, we would modify the judgment so that the dismissal would be without prejudice. This is abundantly clear, and if that occurred, Moore would be able to refile his complaint under the savings statute.

2018-Ohio-2831, 117 N.E.3d 89, ¶ 94.

{¶ 39} I agree with the appellate court that since Moore's action against Dr. Humphreys was dismissed for lack of service, it should be viewed as a dismissal without prejudice and thus a failure otherwise than on the merits. Moore should have an additional year to refile his complaint and serve it on Dr. Humphreys. Accordingly, I respectfully dissent from the majority's conclusion that the savings statute does not apply to save Moore's claims.

Commencement of a Civil Action, the Statute of Limitations, and the Savings Statute

{¶ 40} Pursuant to Civ.R. 3(A), a civil action is commenced when a plaintiff files a complaint and obtains service on a named defendant within one year of that filing. Although Civ.R. 3(A) dictates how an action is commenced, it does not bar

an action from being commenced outside the time period prescribed by a statute of limitations.

{¶ 41} Suppose, for instance, that a plaintiff has a cause of action for an injury that occurred on January 1, 2018. Because the statute of limitations for such a claim is two years, *see* R.C. 2305.10(A), the limitations period for commencing the action would be January 1, 2020. *Id.* Suppose further that the plaintiff files suit on February 1, 2020—one month after the statute of limitations expired. The action would nevertheless be deemed "commenced," for purposes of Civ.R. 3(A), so long as the named defendant is served with the complaint within one year of filing. Of course, the defendant may raise the statute of limitations as a defense to the action by asserting it in the first responsive pleading. *See Mills v. Whitehouse Trucking Co.*, 40 Ohio St.2d 55, 59-60, 320 N.E.2d 668 (1974). But if the defendant fails to assert a statute-of-limitations defense, the defense is waived and the action will proceed in the ordinary course. *Id.*; *see also* R.C. 2305.03(A) (providing that when "interposed by proper plea by a party to an action * * *, lapse of time shall be a bar to the action"); Civ.R. 8(C) (requiring a defendant to timely assert a statute-of-limitations defense).

{¶ 42} Civ.R. 3(A) establishes when an action is commenced and therefore is naturally an important part of a statute-of-limitations analysis. Nevertheless, Civ.R. 3(A) and the statutory timing provisions for commencement of civil actions involve different concepts.

{¶ 43} R.C. 2305.19, the savings statute, insulates a plaintiff's claim from a statute-of-limitations defense when a complaint is filed, dismissed, and then refiled after the statute-of-limitations period has run. But R.C. 2305.19(A) will not save a refiled action unless three prerequisites are met: (1) the plaintiff either commences or at least attempts to commence the action, (2) a judgment for the plaintiff is reversed or the action fails otherwise than on the merits, and (3) within one year of the dismissal or failure, the plaintiff commences a new action against

the defendant. If the plaintiff satisfies these prerequisites, the newly commenced action relates back to the date on which the complaint had been filed in the original action. *See Frysinger v. Leech*, 32 Ohio St.3d 38, 42, 512 N.E.2d 337 (1987). If the complaint in the original action was filed outside the statute-of-limitations period, the defendant may assert a statute-of-limitations defense in the event that the original action is dismissed and a new one is commenced within one year, just as he could have done in the original action. But if, in the original action, the plaintiff filed the complaint within the statutory time limit, the defendant will have no viable statute-of-limitations defense if that action is dismissed without prejudice and a new one is commenced within one year because of the concept of relation back. *See id.*

{¶ 44} The majority seems to take the position that the statute of limitations operates as a jurisdictional bar to a lawsuit as a matter of course. This is not true. The statute of limitations is an affirmative defense in an action; the defense is waived when it is not properly asserted.

A Dismissal for Failure of Service is Not a Dismissal on the Merits

{¶ 45} Dr. Humphreys and appellants Mount Carmel Health, d.b.a. Mount Carmel St. Ann's Hospital, and Central Ohio Anesthesia, Inc. (collectively, "appellants") argue that Moore's action against Dr. Humphreys fails on the merits because Dr. Humphreys was not served within one year of Moore's filing of the complaint and therefore the action was never commenced before the statute of limitations expired. Although this argument might appear to be sound on its face, it presents a couple of procedural problems that the majority fails to adequately address.

{¶ 46} In Dr. Humphreys's motion for summary judgment, he asserted an insufficiency-of-service defense together with a statute-of-limitations defense as part of an overall claim that the action filed against him should be dismissed with prejudice because Moore failed to commence the action against Dr. Humphreys

within the statute of limitations. By pursuing an insufficiency-of-service defense, Dr. Humphreys in effect maintains that the trial court never acquired personal jurisdiction over him. *See Laneve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25, ¶ 22 (failure to perfect service ultimately affects whether a court has personal jurisdiction over defendant); *see also Thomas v. Freeman*, 79 Ohio St.3d 221, 225, 680 N.E.2d 997 (1997) ("where a case is dismissed because the court did not have jurisdiction, such as in this case where service has not been perfected, the dismissal is always otherwise than on the merits"). Yet, while not submitting to the trial court's jurisdiction, Dr. Humphreys simultaneously asked the trial court to entertain his statute-of-limitations defense and enter judgment in his favor *on the merits of the claim.*

{¶ 47} Dr. Humphreys wants to have it both ways: he wants to maintain that the trial court does not have jurisdiction over him as a defendant while also relying on the jurisdictional authority of the court to grant judgment in his favor on a substantive and personal defense to an action. This court should not countenance these conflicting arguments. *Sinochem Intl. Co. Ltd. v. Malaysia Intl. Shipping Corp.*, 549 U.S. 422, 430-431, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007) (In the federal system, a court "generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)"); *Lampe v. Xouth, Inc.*, 952 F.2d 697, 700 (3d Cir.1991) ("It is an elementary requirement that personal jurisdiction must be established in every case before a court has power to render any judgment"); *Sutton v. Stolt-Nielsen Transp. Group, Ltd.*, Tenn.App. No. E2008-01033-COA-R3-CV, 2009 WL 499521, *5 (Feb. 27, 2009) ("Generally, a court must have both personal and subject matter jurisdiction in order to adjudicate a claim on the merits"); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (a defendant must timely assert a lack-of-personal-jurisdiction defense "or he may forgo that right, effectively

consenting to the court's exercise of adjudicatory authority"); *Norris v. Six Flags Theme Parks, Inc.*, 102 Haw. 203, 74 P.3d 26 (2003) ("trial courts must determine the question of jurisdiction before deciding other dispositional matters such as a statute of limitations defense"); *Brooks v. Bacardi Rum Corp.*, 943 F.Supp. 559, 562-563 (E.D.Pa.1996) (after the district court granted the defendant's motion to dismiss the complaint for lack of personal jurisdiction, the district court declined to review the defendant's statute-of-limitations defense); *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.,* 512 F.3d 137, 141 (5th Cir.2007), fn. 1 (when a defendant asserted a statute-of-limitations defense, it conceded that the court had personal jurisdiction).

{¶ 48} Of course, no rule prevents a defendant from presenting a statute-of-limitations defense in addition to an insufficiency-of-service defense, but these arguments are designed to be offered in the alternative. After all, the two defenses are at odds with each other. The defense of insufficient service challenges a trial court's personal jurisdiction over a defendant and a dismissal on this ground results in a dismissal without prejudice. On the other hand, a statute-of-limitations defense is a substantive defense that challenges the merits of a claim; a dismissal on such grounds is a dismissal with prejudice. *LaBarbera v. Batsch*, 10 Ohio St.2d 106, 115-116, 227 N.E.2d 55 (1967). In this case, however, maintaining an insufficiency-of-service defense and a statute-of-limitations defense in the alternative does nothing to help the defendants' position. If Dr. Humphreys asserted and prevailed on his insufficiency-of-service defense, then the case against him should be dismissed without prejudice. On the other hand, if Dr. Humphreys asked the court to rule on his statute-of-limitations defense, then he would be conceding to the trial court's jurisdiction over him as a defendant and any insufficiency-of-service claim would no longer matter. The problem with doing

this, however, is that if Dr. Humphreys were to concede that the trial court has personal jurisdiction over him, then the action would be deemed commenced.[2]

{¶ 49} The majority maintains that there is nothing wrong with a trial court proceeding to rule on a defendant's merits defense after determining that personal jurisdiction over the defendant does not exist. As support for this position, the majority explains that the service requirement is meant to protect a defendant's right to due process and that a court may enter a judgment against a plaintiff even when it has not acquired jurisdiction over the defendant because the plaintiff has submitted to the trial court's jurisdiction by filing the complaint. It further notes that in one of our previous cases, *Maryhew v. Yova*, 11 Ohio St.3d 154, 464 N.E.2d 538 (1984), this court affirmed a trial court's dismissal of an action with prejudice when the defendant asserted both a failure-of-service defense and statute-of-limitations defense. Lastly, the majority cites certain federal circuit-court decisions upholding dismissals with prejudice when service was not perfected within the time frame set forth in Fed.R.Civ.P. 4(m) and the statute of limitations had run on the claims. Although at first glance these arguments may seem persuasive, they disintegrate under even the mildest scrutiny.

{¶ 50} In discussing *Yova*, the majority leaves out the fact that the issue in that case had nothing to do with whether the trial court could rule on a defendant's statute-of-limitations defense after determining that service had failed and that it lacked personal jurisdiction over the defendant. Rather, the main issue in *Yova* was whether the defendant's request for additional time to respond to the complaint

2. Although Civ.R. 3(A) states that an action "is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant," serving the defendant should not be viewed as a strict requirement to commencement of an action. If that were the case, a trial court should hold that an action was never commenced when a defendant waives service under Civ.R. 4(D). The same should also be true for any action in which the defendant is not served but still makes an appearance and does not raise a failure-of-service defense. Ultimately, Civ.R. 3(A)'s service rule requires that the court obtain personal jurisdiction over any defendant within one year of the complaint being filed, otherwise the action may be dismissed for insufficiency of service or for failure to commence.

counted as a waiver of an insufficiency-of-service defense. We answered that question in the negative and affirmed the decision of the appellate court on that ground only. *Yova* was not concerned with whether a trial court may grant a defendant's statute-of-limitations defense while the defendant is simultaneously asserting that the trial court does not have jurisdiction over him. That issue is squarely before us now in this case. The majority's argument regarding this issue boils down to nothing more than the following: because we never said anything about it before in a case we decided over 35 years ago, it must be okay. I, however, am not persuaded by that faulty reasoning.

{¶ 51} Nor am I persuaded by the federal cases that the majority cites or its reference to statements in *Moore's Federal Practice* (3d Ed.1997) synthesizing those cases. Under the Federal Rules of Civil Procedure, a civil action is commenced at the moment a plaintiff files a complaint. *See* Fed.R.Civ.P. 3. Fed.R.Civ.P. 4(m) states that if the plaintiff fails to serve the defendant within 90 days after the complaint is filed, then the court must dismiss the action *without prejudice* or order that service be made within a specified time. The rule also states that for good cause shown, the court must extend the time for service for an appropriate amount of time. *Id.* A federal court often considers the relative hardships a party is facing when exercising its discretion to extend the time or to dismiss the action. *See Coleman v. Milwaukee Bd. of School Dirs.*, 290 F.3d 932, 933-934 (7th Cir.2002). Importantly, there is no savings statute similar to R.C. 2305.19 that applies to save a federal action that has been filed after the statute of limitations has run. *See Logan v. Music*, C.D.Cal. No. CV 16-6364-SJO(E), 2017 WL 1369001 (Feb. 17, 2017), *aff'd*, C.D.Cal. No. CV 16-6364-SJO(E), 2017 WL 1393029 (Feb. 17, 2017).

{¶ 52} In *Cardenas v. Chicago*, 646 F.3d 1001 (7th Cir.2011), and *Zapata v. New York City*, 502 F.3d 192 (2d Cir.2007), the issue before each circuit court was whether a district court had abused its discretion when it dismissed the action

with prejudice for failure to serve a defendant within Fed.R.Civ.P. 4(m)'s specified timeframe. In each case, the respective circuit court held that the district court had not abused its discretion in declining to extend the time for service and dismissing the action, because there was no good cause for an extension. In each case, the circuit court upheld the decision to dismiss the action with prejudice when the statute of limitations had expired during the pendency of the suit. But in affirming the district courts' dismissals, the circuit courts made clear that pursuant to Fed.R.Civ.P. 4(m), a dismissal for failure of service is supposed to be without prejudice.

{¶ 53} In *Zapata*, the Second Circuit noted that the plaintiff had not challenged the district court's decision to dismiss the action with prejudice. *Id.* at 197, fn. 6. The Second Circuit further stated:

> Where, as here, good cause is lacking [for an extension], but the dismissal without prejudice in combination with the statute of limitations would result in a dismissal *with* prejudice, we will not find an abuse of discretion in the procedure used by the district court, so long as there are sufficient indications on the record that the district court weighed the impact that a dismissal or extension would have on the parties.

(Footnote omitted.) *Id.* at 197.

{¶ 54} Similarly, in upholding the district court's decision in *Cardenas*, the Seventh Circuit stated:

> A dismissal pursuant to a Rule 12(b)(5) motion ordinarily should be entered without prejudice. *See* Fed.R.Civ.P. 4(m); [*United States v.*] *Ligas*, 549 F.3d [497,] 501 [7th Cir.2008]. The district court,

> however, dismissed the claims against [the defendant] with prejudice based on the fact that the applicable statute of limitations had expired while the case was pending. *Cardenas*, 2010 U.S. Dist. LEXIS 15253, 2010 WL 610621, at *5. The Plaintiffs argued for the first time at oral argument that its order was inconsistent with Rule 4(m)'s clear "without prejudice" requirement.
>
> Both the district court and the Plaintiffs correctly recognize that any refiled suit would be time-barred. That bar effects a result similar to a dismissal with prejudice: "[I]f the statute of limitations has meanwhile expired it will be the limitations defense that greets [any] new action, which will make the case just as dead as a disposition on the merits * * *." David Siegel, *Practice Commentary on Fed.R.Civ.P. 4*, C4-38, reprinted at 28 U.S.C.A. Fed.R.Civ.P. 4 at 211 (West 2008).

(Fifth and sixth brackets and ellipsis sic.) *Id.* at 1007-1008.

{¶ 55} When citing to *Cardenas*, 646 F.3d 1001, and *Zapata*, 502 F.3d 192, the majority fails to discuss that before those circuit courts allowed the district courts' decisions to stand, the circuit courts made sure that the procedural irregularity would have no actual effect on the plaintiffs' right to proceed with refiling. Indeed, in *Cardenas*, the Seventh Circuit noted that when deciding whether to extend the time for service, federal courts should consider whether the plaintiff would be time-barred by the statute of limitations if the court were to dismiss the action and plaintiffs were to refile. *Id*. at 1007. But in each case, the circuit courts found that the district courts had considered the plaintiffs' inability to refile the action because the statute of limitations had expired and that the district courts had not abused their discretion in finding a lack of good cause shown for an extension of the service deadline. Accordingly, the circuit courts upheld the

dismissals with prejudice. Since no federal rule or statute would have saved the actions from a statute-of-limitations defense, dismissal with prejudice accomplished the inescapable outcome.

{¶ 56} The rationale that the courts used in *Cardenas* and *Zapata* does not apply here, however, because Ohio has a savings statute. By allowing the trial court to entertain Dr. Humphreys's merits defense after determining that it did not have jurisdiction over Dr. Humphreys, the majority forecloses Moore from refiling his claim and taking shelter from a statute-of-limitations defense under the savings statute—which applies to actions that are attempted to be commenced and dismissed without prejudice. Accordingly, a plaintiff's right to due process is at stake in situations like this one in which a trial court lacking jurisdiction over a defendant improperly entertains that defendant's merits defense.

{¶ 57} Another procedural problem in this matter is the fact that Dr. Humphreys is asking this court to uphold a merits judgment in his favor in an action that he maintains was never even commenced against him. How the majority squares this irregularity is unclear, because it chooses to say nothing about it. But what should be clear to the majority is that by asking for summary judgment in his favor, Dr. Humphreys takes a position that is wholly inconsistent with his claim that the action fails for lack of commencement; if no action was ever commenced, then there is no commenced action under which the court may enter a merits judgment. If Dr. Humphreys wanted to maintain a lack-of-commencement defense, he should have raised it in a responsive pleading and then asked the court to strike the complaint from the record once a year had passed and he had still not been served. By asking to strike the complaint, Dr. Humphreys would have been asking the court to take an action consistent with his theory that the complaint filed against him is a nullity. If the majority is going to uphold the dismissal with prejudice in this case, then it might want to take some time to explain why Dr. Humphreys's actions do not amount to a waiver of the lack-of-commencement defense.

Other Problems with the Majority Opinion

{¶ 58} Even if this court were to look beyond the procedural problems addressed above, the majority's explanation for why Moore's action must be deemed dismissed on the merits is still unsound. The majority takes the position that to "avoid the running of the statute of limitations, [Moore] had to commence under Civ.R. 3(A) by obtaining service by July 6, 2016, or voluntarily dismiss his action within this time period to obtain the benefit of the savings statute." Majority opinion at ¶ 32. Noticeably, the majority offers no support for the latter half of this sentence, whether that be a citation to a civil rule, statute, or even some parsing of potentially applicable cases.

{¶ 59} Although Civ.R. 3(A) provides the requirements for the commencement of an action, it does not say what the consequences are when a plaintiff fails to meet those requirements. The action may be dismissed, but whether that dismissal should be with or without prejudice is unclear. Our ruling in *Goolsby*, 61 Ohio St.3d 549, 575 N.E.2d 801, indicates that as long as a case may be refiled within the statute-of-limitations period, a dismissal before that period expires is a dismissal without prejudice, even if the plaintiff fails to perfect service on the defendant within one year of filing. And our ruling in *Thomas*, 79 Ohio St.3d 221, 680 N.E.2d 997, provides that even when a statute-of-limitations period has run and a case has been dismissed, the savings statute may still apply to save the action when the dismissal was without prejudice and occurred within the one-year Civ.R. 3(A) service timeframe. In this case, the majority opinion takes the position that an action must be dismissed *with prejudice* if it is dismissed on insufficiency-of-service grounds following the Civ.R. 3(A) one-year service period, and the statute-of-limitations period has expired. But neither the Civil Rules nor the Revised Code requires this outcome.

{¶ 60} Although Civ.R. 3(A) establishes when an action is commenced, it is not a timing provision. Instead, it is a housekeeping measure. *See* 1970 Staff

Note, Civ.R. 3 ("service within [the] one year requirement is retained from §2305.17, R.C., as amended in 1965, and *is based on the philosophy that dockets should be cleared if, within the reasonable time of one year, service has not been obtained*" [emphasis added]). Furthermore, Ohio's savings statute, R.C. 2305.19, applies to actions "attempted to be commenced," R.C. 2305.19(A). Presently, nothing says that an action meets the definition of an "action that is * * * attempted to be commenced," *id*., only if that action is dismissed within the confines of Civ.R. 3(A)'s one-year service period. In situations like this, in which there is no authority or reason that warrants a dismissal with prejudice, the court should err in favor of preserving the claim for a resolution on its merits. *See Thomas* at 226 ("Dismissal with prejudice is a very severe and permanent sanction, to be applied with great caution"); *see also* Civ.R. 1(B) (Ohio's Rules of Civil Procedure "shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice").

Moore Still Has a Viable Cause of Action Against Dr. Humphreys

{¶ 61} For the reasons discussed above, I would treat the trial court's dismissal of the complaint against Dr. Humphreys as a dismissal without prejudice on insufficiency-of-service grounds and hold that Moore may still take advantage of the savings statute by commencing a new action against Dr. Humphreys within one year of this court's decision.

{¶ 62} Although Moore's legal action against Dr. Humphreys was never "commenced" within the meaning of Civ.R. 3(A)—because service was unsuccessful within the one-year timeframe following the filing of the complaint—I find that Moore nevertheless attempted to commence the action against Dr. Humphreys by filing the complaint on July 6, 2015, and attempting service within one year. *See Thomas*, 79 Ohio St.3d at 225, 680 N.E.2d 997; *see also Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St.3d 391, 396, 653 N.E.2d 235 (1995).

{¶ 63} The action remained pending on the trial court's docket as an action attempted to be commenced against Dr. Humphreys until Dr. Humphreys sought and was granted dismissal for insufficiency of service. Because a dismissal for insufficiency of service should not be treated as a dismissal with prejudice, even if the statute-of-limitations period for commencing an action has expired at the time of dismissal, I would find that Moore meets the first two prerequisites of the savings statute. Thus, if Moore were to refile his lawsuit against Dr. Humphreys and successfully commence the lawsuit by obtaining service within the year, then the savings statute should apply to preserve his claim.

{¶ 64} What this means for the case going forward is that the complaint against Dr. Humphreys is dismissed without prejudice, and the trial court's granting of summary judgment in favor of Central Ohio Anesthesia and Mount Carmel is reversed, because the basis on which those defendants sought relief—the statute-of-limitations bar—is not yet ripe for review. The action remains pending against Central Ohio Anesthesia and Mount Carmel because those parties were properly served. If Moore wishes to take advantage of the savings statute by refiling his claim against Dr. Humphreys and perfecting service, and if Moore wants to keep all three parties as defendants in the same lawsuit, then he could voluntarily dismiss his claims against Central Ohio Anesthesia and Mount Carmel on remand under Civ.R. 41(A)(1)(a). He could then refile and assert his claims against all parties.

Practical Effects

{¶ 65} The majority accuses this dissent and a unanimous panel of the Tenth District of engaging in an "imaginative fiction," majority opinion at ¶ 32, by construing the trial court's dismissal of the complaint against Dr. Humphreys as a dismissal without prejudice. However, the majority might want to take a look at the practical effects of its own holding.

{¶ 66} Moore filed his complaint against Dr. Humphreys, Central Ohio Anesthesia, and Mount Carmel on July 6, 2015. Dr. Humphreys became aware of

Moore's pending lawsuit on July 14, 2015, when an electronic copy of the summons and complaint addressed to Central Ohio Anesthesia was e-mailed to Dr. Humphreys from his liability insurer. The common-pleas case docket indicates that service on Dr. Humphreys was complete on July 16, 2015, something Dr. Humphreys would first contest in his motion for summary judgment, which was filed on February 27, 2017. Through their attorneys, Dr. Humphreys and Central Ohio Anesthesia answered the complaint on July 30, 2015, and participated in the litigation for over a year and a half. Dr. Humphreys did not seek dismissal for insufficiency of service under Civ.R. 4(E) after six months.[3] And the trial court also took no action to dismiss the complaint under Civ.R. 4(E) or 3(A)—perhaps because it was relying on Dr. Humphreys to assert that argument if it applied or on its own docket as evidence of commencement. When Dr. Humphreys finally did ask the court to dismiss the action, he took the unorthodox step of asking the court to rule on his insufficiency-of-service defense and his statute-of-limitations defense together.

{¶ 67} What Dr. Humphreys and the other appellants want from this court, and what the majority opinion gives them, is a clear declaration that a defendant may maintain an insufficiency-of-service defense simultaneously with a statute-of-limitations defense in order to secure the dismissal of an action with prejudice on insufficiency-of-service grounds, when that dismissal would otherwise normally be without prejudice. This decision prevents a plaintiff from taking shelter under the

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3. Civ.R. 4(E) states:

> If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice *upon the court's own initiative with notice to such party or upon motion.*

(Emphasis added.)

savings statute if the plaintiff were to refile and attempt service within one year of the dismissal. In order to craft this outcome, the majority must necessarily overlook the fact that a court lacking jurisdiction over the defendant is nevertheless adjudicating a merits defense. Indeed, it must overlook the fact that the defendant is asking for an adjudication on the merits of an action that was never commenced. And it must also overlook the logical inconsistency that arises from this court's determination that a dismissal within the Civ.R. 3(A) service timeframe is a dismissal without prejudice but that a dismissal outside the Civ.R. 3(A) timeframe is a dismissal with prejudice, when under both scenarios the dismissal may have occurred after the statute of limitations expired.

{¶ 68} Furthermore, the end result that the majority comes to—that dismissal for insufficiency of service is a dismissal with prejudice when Civ.R. 3(A)'s timeline has passed—contravenes both the Rules of Civil Procedure and the savings statute. The Rules of Civil Procedure are to be applied to "effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Civ.R. 1(B). And R.C. 2305.19, "being a remedial statute, should be given a liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure." *Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 85, 167 N.E.2d 774 (1960); *accord Motorists Mut. Ins. Co.*, 73 Ohio St.3d at 396, 653 N.E.2d 235 ("Savings statutes have been created to afford plaintiffs an opportunity to bring a new action after the running of the limitations period when an effort to bring the original action in a timely manner fails otherwise than on its merits"). Here, the majority is allowing a defendant, who has had notice of and participated in an action from the beginning, to wait a year and a half before seeking a dismissal of the action in order to secure a dismissal with prejudice for failure of service under Civ.R. 3(A)'s one-year service timeframe—a docket-clearing provision—in order to prevent the plaintiff from taking shelter under the savings statute, which is a

remedial provision intended to preserve actions "attempted to be commenced." If it is true that this dissent and the Tenth District's position amounts to an "imaginative fiction," majority opinion at ¶ 32, then the majority's position in comparison is a fever dream that turns Ohio's procedural rules and the savings statute on their heads.

Conclusion

{¶ 69} For these reasons, I dissent from the majority opinion's conclusion that the savings statute does not apply to Moore's claim. I would affirm the Tenth District's judgment on the alternative grounds stated in its opinion. 2018-Ohio-2831, 117 N.E.3d 89, at ¶ 94.

DONNELLY, J., concurs in the foregoing opinion.

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Arnold Todaro & Welch Co., L.P.A., and Grier D. Schaffer, for appellant Mount Carmel Health d.b.a. Mount Carmel St. Ann's Hospital.

Carpenter Lipps & Leland, L.L.P., Theodore M. Munsell, Joel E. Sechler, Emily M. Vincent, and Michael H. Carpenter, for appellants Eric Humphreys, M.D., and Central Ohio Anesthesia, Inc.

[Cite as *Kinzel v. Ebner*, 2020-Ohio-4165.]

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

Judith A. Kinzel, Trustee

Appellee/Cross-Appellant

v.

Douglass Ebner aka Douglas Ebner and 2253 Cedar Point, LLC and 2243 Cedar Point, LLC

Appellants/Cross-Appellees

v.

Richard L. Kinzel and City of Sandusky

Appellees

Court of Appeals Nos. E-19-033
E-19-034

Trial Court No. 2017 CV 0554

DECISION AND JUDGMENT

Decided: August 21, 2020

* * * * *

Michael Braunstein, Clinton P. Stahler, Aaron E. Kenter and Matthew L. Strayer, for appellee/cross-appellant.

Charles A. Bowers, Stephen M. O'Bryan, Cary M. Snyder and Matthew B. Barbara, for appellants/cross-appellees.

Frank H. Scialdone, for appellee city of Sandusky.

John H. Burtch and Robert J. Tucker, for amicus curiae The Ohio Realtors®.

Christina Sandefur and Christopher A. Holecek, for amicus Curiae Goldwater Institute.

* * * * *

MAYLE, J.

{¶ 1} This case is before the court upon consolidated cross-appeals from the April 22, 2019 judgment of the Erie County Court of Common Pleas. Defendants-appellants/cross-appellees are Douglass Ebner, aka Douglas Ebner, 2253 Cedar Point, LLC, and 2243 Cedar Point, LLC (collectively, "Ebner"). Plaintiff-appellee/cross-appellant is Judith Kinzel ("Kinzel"), Trustee under the Judith A. Kinzel Trust Agreement (dated August 13, 1989, amended on June 25, 1997, amended on January 5, 1999, restated on January 17, 2002 and amended and restated on September 1, 2006 and amended on the 23rd day of October 2015) ("the Kinzel Trust"). Counterclaim defendants-appellees are Kinzel's husband, Richard Kinzel, and the city of Sandusky. Ohio Realtors and Goldwater Institute have filed briefs of amicus curiae in support of Ebner.

{¶ 2} For the reasons that follow, we affirm the trial court judgment, in part, and reverse, in part.

I. Background

{¶ 3} Kinzel is the trustee of the Kinzel Trust, which owns property located at 2267 Cedar Point Road in Sandusky, Ohio—Lots 14 and 15 of the Laguna Subdivision ("the Kinzel property"). Ebner is the sole member of limited liability companies that own 2253 Cedar Point Road—Lot 12 of the Laguna Subdivision ("Lot 12")—and 2243 Cedar Point Road—Lot 13 of the Laguna Subdivision ("Lot 13"). All three homes are

beachfront properties, situated along the shore of Lake Erie, and are located on the Cedar Point Chaussee, a narrow strip of land that connects Cedar Point Amusement Park peninsula to the city of Sandusky. The Kinzel property is directly adjacent to the amusement park.

{¶ 4} Kinzel acquired her property in 1987. Ebner acquired his properties in 2013 and 2015. He and his family reside in the home on Lot 12, but he offers it for short-term vacation rentals when he is out of town. Lot 13—which is located next door to the Kinzel property—is used almost exclusively for short-term vacation rentals.

{¶ 5} Kinzel filed a complaint for injunctive relief and damages against Ebner, alleging that Ebner's use of Lots 12 and 13 for short-term vacation rentals violates deed restrictions and Sandusky Municipal Ordinance Nos. 12-107 and 17-088. Her seven-count complaint against Ebner alleged: (1) breach of restrictive covenants (Count I); (2) violation of Sandusky Municipal Ordinance Nos. 12-107 and 17-088 (Count II); (3) absolute nuisance—ordinance violations (Count III); (4) absolute nuisance—intentional acts (Count IV); (5) qualified nuisance (Count V); (6) preliminary and permanent injunction (Count VI); and (7) punitive damages (Count VII).

{¶ 6} The city issued Ebner formal notices of violations of Sandusky Municipal Ordinance Nos. 12-107 and 17-088. In August and October of 2017, it filed criminal complaints against him in Sandusky Municipal Court under Ordinance No. 17-088. After receiving notice of Kinzel's complaint against him, Ebner counterclaimed against Kinzel, Kinzel's husband, and the city, challenging the validity and constitutionality of the city

ordinances and alleging (1) declaratory judgment—Ordinance No. 12-107 (Count I); (2) declaratory judgment—Ordinance No. 17-088 (Count II); (3) declaratory judgment—taking (Count III); (4) mandamus (Count IV); (5) tortious interference (Count V); (6) conspiracy (Count VI); (7) punitive damages (Count VII); (8) attorney's fees and costs—Ordinance No. 17-088 (Count VIII); (9) equal protection—Class of One—42 U.S.C. 1983 (Count IX); (10) due process—42 U.S.C. 1983 (Count X); (11) freedom of speech—42 U.S.C. 1983 (Count XI); and (12) taxpayer action—R.C. 733.59 (Count XII). Ebner maintains that if Ordinance No. 12-107 is invalid and unconstitutional, then his use of the properties from 2013 to 2017 for short-term rentals will constitute a legal non-conforming use not subject to Ordinance No. 17-088.

A. The Ordinances

{¶ 7} The properties at issue are located in an area zoned R1-75. Ebner owns or has owned other properties on the Chaussee that he offers for short-term rentals. The city has taken the position that short-term rentals are not allowed in areas zoned R1-75, where only "one family dwellings" are permitted. Sandusky Codified Ordinances 1129.03. "Dwelling," as it was defined in the Sandusky Codified Ordinances before December 12, 2012, is "a building designed or occupied exclusively for *non-transient* residential use, including one family, two family, or multi-family buildings." (Emphasis added.) Sandusky Codified Ordinances 1107.01(G)(2).

{¶ 8} In 2011, the city issued Ebner cease and desist orders seeking to prohibit him from offering his other properties for short-term rentals. Ebner challenged the city's

position before the zoning board, which ruled for the city. Ebner appealed to the Erie County Court of Common Pleas, which ruled in his favor. The city appealed to this court. In *Ebner v. Sandusky*, 6th Dist. Erie No. E-12-057, 2013-Ohio-2475, ¶ 10, we concluded that "non-transient," as used in Sandusky Codified Ordinances 1107.01(G)(2), is unconstitutionally vague, and, therefore, void. We also found that use of the disjunctive "or" in the definition of "dwelling" signified the presence of alternatives—i.e., that a building is a "dwelling" if it is *designed* for non-transient residential use "or" if it is *occupied* for non-transient residential use. *Id.* at ¶ 11. Because the properties at issue were designed for single-family use, we concluded that Ebner was not in violation of the zoning ordinances.

{¶ 9} While *Ebner* was pending, the city sought to correct the infirmities that rendered the ordinance vague. It ultimately enacted Ordinance No. 12-107, passed on November 12, 2012, which amended Sandusky Codified Ordinances 1107.01(g)(2) by deleting "designed or" from the definition of "dwelling," and by adding the following definitions:

> (11) "Non-transient" means a period of not less than 365 days.
>
> (12) "Transient occupancy" means occupancy when it is the intention of the parties that the occupancy will be temporary. There is a rebuttable presumption that, when the dwelling unit occupied is not the sole residence of the guest, the occupancy is transient.

{¶ 10} Internally, however, the city recognized that Ordinance No. 12-107, too, was likely flawed, and set out to correct it. The result was Ordinance No. 17-088, passed on May 8, 2017. This amendment deleted the term "non-transient" and re-defined "transient occupancy" to mean "to use, occupy, or possess, or the use, occupancy, or possession of a dwelling or other living accommodations for a period of 30 consecutive calendar days or less." Sandusky Codified Ordinances 1107.01(h)(11) and 1341.32(b)(1). It also defined "transient rental" to mean "the renting, letting, subletting, leasing or subleasing of a dwelling for a period of 30 consecutive calendar days or less." Sandusky Codified Ordinances 1341.32(b)(2).

{¶ 11} Ordinance No. 17-088 established a "transient occupancy overlay district." Sandusky Codified Ordinances 1129.06(g). It expanded the permitted uses in certain zoning districts—including the roadside business district, downtown business district, commercial recreation district, and commercial amusement district—to allow "transient occupancy." Sandusky Codified Ordinances 1133.05(a)(4), 1133.08(a)(4), 1137.03(a)(2)(I), and 1137.04(a)(4). It added a procedure for annually proving legal nonconforming transient occupancy use. Sandusky Codified Ordinances 1151.08. And it created an entirely new regulatory scheme applicable to transient rental property, requiring property owners to obtain permits and undergo inspections. Sandusky Codified Ordinances 1341.32.

{¶ 12} It was under this new scheme created by Ordinance No. 17-088 that the city cited Ebner criminally in Sandusky Municipal Court. Kinzel's complaint alleged ordinance violations under both Ordinance Nos. 12-107 and 17-088.

B. The June 18, 2018 Judgment

{¶ 13} Kinzel moved for partial dismissal of Counts V (tortious interference), VI (conspiracy), and VII (punitive damages) of Ebner's counterclaim. The city moved for partial judgment on the pleadings with respect to Counts III (declaratory judgment—taking), V, VI, VII, and XII (taxpayer action—R.C. 733.59) of Ebner's counterclaim.

{¶ 14} On June 18, 2018, the trial court granted Kinzel's motion and dismissed without prejudice Ebner's claims for tortious interference, civil conspiracy, and punitive damages. The court granted the city's motion, in part, dismissing without prejudice those same claims. As to Counts III and XII—and with respect to all other claims requiring it to determine the constitutionality of the ordinances (i.e., Counts I, II, IX, X, and XI)—the trial court expressed skepticism about its jurisdiction to rule on those claims. It explained that it had been informed by the parties that the validity and constitutionality of the ordinances were being challenged by Ebner in the criminal cases pending in Sandusky Municipal Court. The trial court questioned whether it was permissible for it to rule on these claims while the same argument was pending before the municipal court in the criminal action. It ordered the parties to brief the issue.

C. The April 22, 2019 Judgment

{¶ 15} Ebner moved for summary judgment on all of Kinzel's claims. He also moved for summary judgment on Count I (declaratory judgment—Ordinance No. 12-107), Count II (declaratory judgment—Ordinance No. 17-088), Count VIII (attorney's fees and costs—Ordinance No. 17-088), and Count XII (taxpayer action—R.C. 733.59) of his counterclaims. The city moved for summary judgment on all of Ebner's counterclaims. And Kinzel moved for summary judgment on Counts I (breach of restrictive covenants), II (ordinance violation claim), and VI (claim for injunctive relief) of her complaint.

{¶ 16} On April 22, 2019, the court granted summary judgment to Ebner on Kinzel's claim for breach of restrictive covenants; granted partial summary judgment to Kinzel on her ordinance violation claim as to liability, leaving for the jury the issue of causation and damages; and granted summary judgment to Kinzel on her claim for injunctive relief based on violations of Ordinance No. 17-088, but granted summary judgment to Ebner on Kinzel's claim for injunctive relief based on breach of the restrictive covenants. It granted summary judgment to the city on all of Ebner's remaining counterclaims (Counts I, II, III, IV, VIII, IX, X, XI, XII).

{¶ 17} The court found that genuine issues of material fact existed with respect to Kinzel's claims for nuisance (Count III, IV and V); punitive damages (Count VII); and attorney fees (as requested in Counts II, III, IV, V, and VII).

1. Kinzel's Claim for Breach of Restrictive Covenants and Related Request for Injunctive Relief

{¶ 18} Ebner purchased Lots 12 and 13 subject to deed restrictions. Those restrictions provide that "[t]here shall not be erected or suffered to remain on said premises any building or structure whatever other than a single, private, dwelling house, designed and intended for the occupancy of one family only, with garage and/or other outbuildings appurtenant thereto, necessary for the full enjoyment of one single, private, residential unit * * *." The deed also prohibits "commercial use" of the sand beach and permits use of the Chaussee "for the purposes of ingress and egress and for such other uses as are incident to and consistent with the full enjoyment of the premises for one single, private, residence unit * * *."

{¶ 19} Kinzel argued that Ebner violated these restrictions by using his properties for short-term vacation rentals, and she sought to enjoin Ebner from continuing to enter into short-term rentals of the properties. The trial court concluded that there was "no clear and unambiguous provision prohibiting the rental of the property," and "short-term vacation rentals do not violate restrictive covenants limiting the use of property to single family residential purposes." It granted summary judgment in favor of Ebner on Count I of Kinzel's complaint and denied Kinzel's request for injunctive relief relating to her claim for breach of the restrictive covenants.

2. Kinzel's Claim for Ordinance Violations and Related Request for Injunctive Relief

{¶ 20} In Count II of her complaint, Kinzel alleged that Ebner violated Ordinance Nos. 12-107 and 17-088 by using Lots 12 and 13 for short-term rentals. She sought compensatory and punitive damages, attorney's fees, and injunctive relief. Ebner argued as an affirmative defense that these ordinances were not validly enacted and are unconstitutional.

a. Enactment

{¶ 21} With respect to Ordinance No. 12-107, Ebner argued that the ordinance was not validly enacted because the city failed to provide the required notice and public hearing, thereby violating R.C. 713.12 and Sandusky Codified Ordinances 1113.03 and 1103.04. Kinzel and the city argued that Ordinance No. 12-107 was validly enacted as an emergency measure.

{¶ 22} The trial court pointed out that as a charter city under the Ohio Constitution, the city's charter takes precedence over state statutes and municipal ordinances. It recognized that section 14 of the Sandusky Charter provides:

> All ordinances and resolutions passed by the City Commission shall be in effect from and after 30 days from the date of their passage, except that the City Commission may, by an affirmative vote of 5 of its members, pass emergency measures to take effect at the time indicated therein.

> Any emergency measure is an ordinance or resolution for the immediate preservation of the public peace, property, health, or safety, or providing for the usual daily operation of a municipal department, in which the emergency is set forth and defined in a preamble thereto. Ordinances appropriating money may be passed as emergency measures, but no measure making a grant, renewal or extension of a franchise or other special privilege, or regulating the rate to be charged for its service by any public utility, shall ever be so passed.

{¶ 23} Citing our decision in *Snyder v. City of Bowling Green,* 6th Dist. Wood No. WD-96-036, 1996 WL 715426 (Dec. 13, 1996), the trial court observed that "where an ordinance, passed by a council is declared to b[e] an emergency in accordance with the municipality's laws and sets forth the reasons for the immediate necessity for the ordinance, the legislative determination of the existence of an emergency is not reviewable by the Court." The court explained that an emergency ordinance that does not set forth the reasons for its enactment would go into effect in the same manner as a non-emergency ordinance; that is, it would go into effect 30 days after the date of adoption.

{¶ 24} The court observed that Ordinance No. 12-107 did not set forth a reason for the necessity of an emergency amendment to the zoning code. But rather than rendering the ordinance invalid, the trial court held that this omission merely postponed the ordinance's effective date by 30 days, rendering it effective 30 days after its passage on

November 12, 2012. The court concluded that Ordinance No. 12-107 was properly enacted and remained in effect until it was amended by Ordinance No. 17-088.

{¶ 25} As to Ordinance No. 17-088, the court explained the procedure for amending the zoning code. It explained that an amendment may be initiated by a property owner, the Planning Commission, or the City Commission and is governed by Sandusky Codified Ordinances Chapter 1113. Under Sandusky Codified Ordinances 1113.02, the Planning Commission may, at its discretion, hold a public hearing, and if it does, public notice of the hearing is required. Under Sandusky Codified Ordinances 1113.03, the Planning Commission is required to make a recommendation and report to the City Commission on the proposed change, and the City Commission is required to set a date for a public hearing, providing 30 days' notice of the time and place of the hearing. The City Commission can approve or disapprove the Planning Commission recommendation.

{¶ 26} The court found the following facts leading up to the passage of Ordinance No. 17-088:

- May 17, 2016: the city held a public information meeting to gather input about proposed changes to its regulation of short-term or transient rentals. Ebner attended.
- February 15, 2017: the city held another public information meeting to provide an update on legislation that would be presented to the Planning

Commission that would continue to make transient rentals in residential areas illegal. Ebner attended.

- February 17, 2017: the Planning Commission sent notice that it would conduct a public meeting on March 8, 2017, to consider an amendment to the Zoning Code regarding transient rentals.
- February 28, 2017: the city submitted an application to the Planning Commission to amend the City Code.
- March 8, 2017: the Planning Commission held a public meeting and approved the proposed changes, which did not change the basic rule that transient rentals in residential areas would continue to be illegal. Ebner attended and participated in the meeting.
- March 13, 2017: the City Commission voted to set a public hearing on the changes for April 24, 2017.
- March 20, 2017: notice of the hearing was published in a local newspaper. It stated that further details and information about the proposed changes could be obtained from the Assistant Planner.
- April 12, 2017: the final text of the proposed ordinance and the Planning Commission's recommendation were prepared.
- April 19, 2017: the proposed ordinance and recommendation were transmitted to the City Commission.

- April 24, 2017: the City Commission held a public hearing on the proposed change. Ebner attended.
- May 8, 2017: the City Commission unanimously passed Ordinance. No. 17-088 and it became effective 30 days later.

{¶ 27} Ebner argued that Ordinance No. 17-088 was not properly enacted because the text of the proposed ordinance and Planning Commission report and recommendation was not on file for public review and comment for 30 days as required by Sandusky Codified Ordinances 1113.04. Kinzel maintained that there was substantial compliance with procedural rules and the purpose of the notice requirement was satisfied because Ebner attended the public meetings and had an opportunity to be heard. The city urged that the procedural requirements were met because tape recordings and notes of the Clerk of the Planning Commission were available for review by the public.

{¶ 28} The trial court held that there was a presumption of validity of the ordinances that Ebner failed to overcome. It concluded that the city substantially complied with Sandusky Codified Ordinances 1113.04 because (1) Ebner was present at the May 2016 meeting regarding the proposed continuation of the city's ban on short-term rentals; (2) he attended the February 15, 2017 public information meeting and the March 8, 2017 Planning Commission meeting; (3) he had access to the tape recordings and notes of the meetings; (4) he attended the April 24, 2017 meeting where the changes encompassed by Ordinance No. 17-088 were discussed; and (5) the purposes of Sandusky Codified Ordinances 1113.04 were satisfied and Ebner was not prejudiced by any

deviation from those procedures. The court held that Ordinance No. 17-088 was properly enacted, thereby amending Ordinance No. 12-107.

b. Constitutionality

{¶ 29} In addition to challenging the validity of the ordinances, Ebner also challenged their constitutionality. He argued that they were void for vagueness and unconstitutional as applied.

(1) Void for Vagueness

{¶ 30} Ebner argued that Ordinance No. 12-107 failed to clarify the terms of the provision that we found unconstitutional in *Ebner*, 6th Dist. Erie No. E-12-057, 2013-Ohio-2475. He complained that "temporary" as used in the definition of "transient occupancy" is undefined, and he pointed out that the City Planning Director testified that 365 days—the time frame used in the definition of "non-transient"—needed to be refined to distinguish between yearly rental and transient use. The trial court applied the three-part test set forth in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), for determining whether a law is void for vagueness: (1) whether the ordinance provides fair warning to the ordinary citizen of what conduct is proscribed; (2) whether the ordinance precludes arbitrary, capricious, and discriminatory enforcement; and (3) whether the ordinance impinges on constitutionally-protected rights.

{¶ 31} The court concluded that Ordinance No. 12-107 was not void for vagueness. It found that the ordinance eliminated the "designed *or* occupied" provision that we found problematic in *Ebner*, and established a clearly-defined time reference for

"non-transient"—365 days—such that the term is not open to interpretation. The court concluded that the third element of the test did not come into play because Ebner did not assert that the ordinance impinged upon a constitutionally-protected right. In sum, it found that Ordinance No. 12-107 was not void for vagueness.

{¶ 32} With respect to Ordinance No. 17-088, Ebner argued that the ordinance does not prohibit short-term or transient rental and is vague. The trial court found that short-term transient rental is permitted in several zoning districts—such as the roadside business district, downtown business district, commercial recreation district, and commercial amusement district—but is clearly prohibited in areas zoned R1-75 because it is not listed as a permitted use. Rather, the court pointed out, Sandusky Codified Ordinances 1129.03 limits R1-75 to "one-family dwellings," and "dwelling" is defined as "a building occupied exclusively for non-transient residential use." Sandusky Codified Ordinances 1107.01(h)(2). The court determined that when read in pari materia with the new definition of "transient occupancy" (30 days or less under Sandusky Codified Ordinances 1107.01(h)(12)), these provisions make clear that Ebner is prohibited from offering his properties for rentals less than 30 days.

{¶ 33} Ebner argued that "transient occupancy" is defined as "to use, occupy or possess, or the use, occupancy or possession of a dwelling * * *," and there are multiple ways one can "use, occupy or possess" a dwelling. But the trial court, citing *Viviano v. City of Sandusky*, 6th Dist. Erie No. E-12-058, 2013-Ohio-2813, ¶ 14, explained that "the fact that the fertile legal imagination can conjure up hypothetical cases in which the

meaning of disputed terms could be questioned does not render the provision unconstitutionally vague." It concluded that Ebner failed to establish beyond a reasonable doubt that Ordinance No. 17-088 is unconstitutionally vague.

(2) As Applied

{¶ 34} Ebner argued that Ordinance Nos. 12-107 and 17-088 are unconstitutional as applied because they bear no relation to the public health, safety, morals, or general welfare of the community. He emphasized that the properties neighbor Cedar Point Amusement Park—an establishment that produces a high amount of traffic, noise, and transient residents and guests. Kinzel responded that the amusement park has existed there for 150 years and the properties have been classified as residential since at least 1965. She argued that the fact that the adjacent property is commercial does not destroy the residential character of the properties on the Chaussee, and she contended that there was substantial evidence in the record to support the City Commission's decision to ban short-term rentals in residential areas. The city, for its part, pointed out that while Cedar Point generates noise and traffic, allowing transient rentals on the Chaussee would lead to additional issues, such as late night noise and partying, trespassing, traffic congestion, trash and litter, and safety concerns for older residents.

{¶ 35} The court explained that in an "as applied" challenge to a zoning ordinance, the landowner questions the validity of the ordinance only as it applies to a particular parcel of property. In such a situation, the ordinance will be presumed to be constitutional unless it is determined "beyond fair debate" to be "clearly arbitrary and

unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Jaylin Invs., Inc. v. Village of Moreland Hills*, 107 Ohio St.3d 339, 2004-Ohio-4, 839 N.E.2d 903, ¶ 13. The court noted that it cannot merely replace its judgment for that of the City Commission, and it recognized that the existence of "some adjacent properties devoted to other uses does not destroy the character of the restricted property for residential purposes or render the restrictions arbitrary." *Leslie v. Toledo*, 66 Ohio St.2d 488, 490, 423 N.E.2d 123 (1981).

{¶ 36} With these principles in mind, the trial court held that Ebner failed to establish beyond fair debate that the actions of the City Commission in passing the ordinances were clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals or general welfare of the community. It found that there was ample evidence in the record to support the Committee's action in passing the ordinances. And it specifically acknowledged that there are no other commercial establishments in the vicinity other than Cedar Point, the property has been zoned residential since 1965, and Cedar Point has existed there since 1870.

3. Kinzel's Claims for Nuisance and Punitive Damages

{¶ 37} Ebner argued that Kinzel's nuisance claims should be dismissed because (1) she failed to establish a real, material, and substantial injury; (2) her claims rely on the premise that Ebner's rentals were unlawful under the deed restrictions and the ordinances; and (3) Ebner has not unreasonably interfered with Kinzel's use or enjoyment of her property.

{¶ 38} Kinzel responded that she provided expert testimony establishing the diminution of her property value, Ebner's use of the properties for short-term rentals prompted her to incur the expense of building a privacy fence and installing security cameras, and her quality of life and use and enjoyment of her property has been impaired.

{¶ 39} The trial court found that given its conclusions regarding the validity and constitutionality of the ordinances, the evidence presented by Kinzel sufficed to create a question of fact precluding summary judgment. And because Ebner was aware of the city's position on short-term rentals when he purchased the properties, yet continued to rent his properties even after receiving notices of violations, there existed a genuine issue of material fact on Kinzel's claim for punitive damages.

4. Ebner's Remaining Counterclaims Against the City

{¶ 40} For his claims against the city, Ebner sought a declaratory judgment that Ordinance Nos. 12-107 and 17-088 were not validly enacted and were not constitutional (Counts I and II); that the city's enforcement of the ordinances constituted a taking of his property without just compensation (Count III); that because of the taking, the value of his property has been diminished and the city is under a clear legal duty to commence appropriation proceedings to determine the amount of compensation for the taking (Count IV); that he is entitled to attorney's fees as a prevailing party under the ordinance as to both the city and Kinzel (Count VIII); that while the city has taken action to enforce the ordinances against him, it has not enforced them against similarly-situated individuals in violation of his right to equal protection under the law (Count IX); that despite

knowing that the ordinances were invalid, the city enforced them against him in order to discourage Ebner's exercise of his constitutionally-protected property rights, violating due process (Count X); that Ordinance No. 17-088 prohibits advertising short-term rentals, depriving Ebner of his right to free speech (Count XI); and that the city's enactment and enforcement of the ordinances constitutes an abuse of power, and as a taxpayer, he seeks to have them declared null and void (Count XII).

{¶ 41} The trial court concluded that under the jurisdictional priority rule, it lacked jurisdiction to consider Counts II, III, IV, IX, X, XI, XII. This is because the city filed criminal complaints against Ebner in Sandusky Municipal Court on August 30, 2017, and October 31, 2017—before Ebner filed his counterclaim—alleging violations of Ordinance No. 17-088. The trial court stated that the constitutionality of Ordinance No. 17-088 is at issue in the criminal cases. The court found that it and the Sandusky Municipal Court have concurrent jurisdiction to consider the constitutionality of Ordinance No. 17-088, but because the jurisdiction of the Sandusky Municipal Court was first invoked, it would interfere with those proceedings were the trial court to consider them in the present case. It held that the city was entitled to dismissal of these counts under the jurisdictional priority rule.

{¶ 42} Alternatively, assuming that the jurisdictional priority rule did not apply, the court concluded that the city is still entitled to dismissal of Counts I, II, III, IV, X, XI, and XII of Ebner's counterclaims because the statutes are valid and constitutional for the reasons discussed in the court's analysis of Kinzel's claims. Because Ebner did not

prevail on his counterclaims, the court held that the city was entitled to summary judgment on Count VIII. But the court held that a question of fact remained as to Ebner's equal protection claim (Count IX).

{¶ 43} Ebner appealed. He assigns the following errors for our review:

I. The trial court erred when it dismissed all of the Defendants-Appellants/Cross-Appellees' (the "Ebners") claims against Appellee the City of Sandusky (the "City"), based upon the jurisdictional priority rule, since the criminal action pending in the City's Municipal Court did not involve the same parties or causes of action, and the Court of Common Pleas and the Municipal Court are not courts of concurrent jurisdiction.

II. The trial court erred when it dismissed the Ebners' counterclaims against the City and denied the Ebners' motion for summary judgment based upon the alternate ground that the City Ords. 12-107 and 17-088 were validly enacted and otherwise constitutional.

III. The trial court erred in granting Plaintiff-Appellee/Cross-Appellant Kinzel Family Trust (the "Kinzels") a permanent injunction against the Ebners from using and advertising property at 2253 and 2243 Cedar Point Road in violation of Ord. 17-088 based on its finding that Ord. 17-088 was properly enacted and otherwise constitutional and that the Ebners had violated same, and in denying the Ebners' motion for summary judgment.

{¶ 44} Kinzel cross-appealed. She assigns the following errors for our review:

> I. The Trial Court Erred to the Material Prejudice of Appellee/Cross-Appellant Judith A. Kinzel, Trustee, By Granting Summary Judgment in the Ebner Parties' Favor and Dismissing With Prejudice Count I (Breach Of Restrictive Covenants) of the Verified Complaint for Injunctive Relief and Damages, and Denying Ms. Kinzel's Motion for Summary Judgment With Respect to the Same Claim.
>
> II. The Trial Court Erred to the Material Prejudice of Appellee/Cross-Appellant Judith A. Kinzel, Trustee, By Denying Her Request for a Permanent Injunction on Grounds That the Ebner Parties' Use of the Properties Is a Breach of Restrictive Covenants.

II. Standard of Review

{¶ 45} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor.

Harless v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 46} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

III. Law and Analysis

{¶ 47} The trial court dismissed all of Ebner's counterclaims, Kinzel's claim against Ebner for breach of restrictive covenants, and Kinzel's claim for injunctive relief based on breach of the restrictive covenants. It entered judgment in favor of Kinzel on

her claim for injunctive relief based on violations of Ordinance No. 17-088 (Count VI). And it left for resolution by a jury the issue of causation and damages with respect to Kinzel's ordinance violation claim (Count II), her claims for nuisance (Count III, IV, and V), and her claims for punitive damages (Count VII) and attorney fees (requested in Counts II, III, IV, V, and VII).

{¶ 48} Ebner argues in his first assignment of error that the trial court erred in concluding that the jurisdictional priority rule prevented it from considering his claims against the city. In his second assignment of error, he argues that the trial court erred in its alternate finding that Ordinance Nos. 12-107 and 17-088 were validly enacted and otherwise constitutional. And in his third assignment of error, Ebner argues that the trial court erred in granting injunctive relief to Kinzel based on its finding that Ordinance No. 17-088 was properly enacted and otherwise constitutional and that Ebner had violated that ordinance by offering his properties for short-term rentals.

{¶ 49} In her cross-appeal, Kinzel challenges the court's dismissal of her breach-of-restrictive-covenants claim and her accompanying claim for injunctive relief based on the alleged breach of the covenants.

{¶ 50} We begin by addressing Kinzel's cross-appeal. We then move to Ebner's assignments of error.

A. Kinzel's Claim for Damages and Injunctive Relief for Breach of Restrictive Covenants

{¶ 51} In her first assignment of error, Kinzel argues that the trial court erred in granting summary judgment to Ebner and dismissing her claim for breach of restrictive covenants. In her second assignment of error, Kinzel argues that the trial court erred in denying her claim for permanent injunction, which was premised on her claim for breach of restrictive covenants.

{¶ 52} Ebner purchased Lots 12 and 13 subject to certain deed restrictions. Kinzel maintains that those deed restrictions permit the properties to be used "solely as single-family residences" and that Ebner's use of the properties as "systematic, short-term vacation rentals" violates the properties' deed restrictions. She insists that Ebner breached the following restrictive covenants contained in the deeds:

> II. There shall not be erected or suffered to remain on said premises any building or structure whatever other than a single, private, dwelling house, designed and intended for the occupancy of one family only, with garage and/or other outbuildings appurtenant thereto, necessary for the full enjoyment of one single, private, residential unit, and such single, private, dwelling house, garage and/or other outbuildings shall be constructed, erected, located and/or maintained only pursuant to, and in accordance with, all and singular the covenants and agreements of the Grantees herein contained and not otherwise.

VIII. Commercial use of the "Sand Beach" is prohibited.

IX. The Chaussee shall be used for the purposes of ingress and egress and for such other uses as are incident to and consistent with the full enjoyment of the premises for one single, private, residence unit. * * * Neither the Grantor, the Grantee, nor any one claiming under them or either of them, shall in any manner obstruct any portion of said Chaussee or use the same for the parking or storage of vehicles or materials or otherwise, or in any manner prevent the free and unobstructed use of the traveled portion thereof by all parties entitled to use the same.

{¶ 53} The trial court concluded that Ebner's use of the properties for short-term vacation rentals did not violate the deed restrictions. It held that the provisions were subject to varying interpretations, but it emphasized that there was no clear and unambiguous restriction prohibiting rental of the property. It declined to construe the provisions as containing an implied term precluding rental of the properties because that interpretation would be contrary to the rule of construction favoring the free use of land. In so holding, it relied on our decision in *Catawba Orchard Beach Assn., Inc. v. Basinger*, 115 Ohio App.3d 402, 685 N.E.2d 584 (6th Dist.1996), where we found that a property owner who rented out his property did not violate deed restrictions that specified that the property was for "private residences only" and that only "a single residence, designed for the use of one family" could be built or maintained.

{¶ 54} Because the trial court concluded that the short term rental of the properties did not violate the deed restrictions, it further held that short-term renters of the properties could use the sand beach and could use the Chaussee to access the properties.

{¶ 55} Kinzel argues that the trial court's conclusion is wrong. She maintains that there are two questions that must be answered: (1) whether the deed restrictions restrict use of the property to single-family residences, and (2) whether use of the properties for systematic, short-term rentals complies with the deed restrictions. She contends that the trial court incorrectly focused on whether the deed restrictions clearly and unambiguously prohibit rentals. Kinzel argues that the terms used in the deed restrictions demonstrate the parties' intent that the properties be used as single-family residences only and Ebner's systematic, short-term rentals of the properties violates those restrictions and constitutes a commercial use of the properties.

{¶ 56} Ebner insists that the deeds restrict the *design* of any structures to be erected on the properties—not the *use* of the properties—and does not bar rental activities. He maintains that the terms of the deed restrictions themselves do not restrict the length of occupancy and do not prohibit short-term rentals, and he contends that use of the lots as rental properties is not a commercial use. He also challenges Kinzel's standing to assert the deed restrictions.

1. Standing

{¶ 57} Ebner argues that Kinzel lacks standing to enforce the deed restrictions. He maintains that a property owner may enforce deed restrictions against another property

owner only where the covenants are for their mutual benefit. He insists that because Kinzel acquired her property without the restrictions applicable to Ebner's properties, and because the deeds contain no language indicating that Kinzel is an intended beneficiary or has an equitable interest in enforcing the restrictions, she has no standing to do so.

{¶ 58} Kinzel responds—and the trial court concluded—that Kinzel has standing to enforce the restrictions because (1) Kinzel and Ebner's properties are all located within the Laguna subdivision and both derived their deeds from a common grantor—Cedar Point; (2) the language of the Ebner deeds expresses that the restrictions are for the benefit of persons like Kinzel; and (3) Kinzel has an equitable interest in enforcing the deed restrictions.

{¶ 59} "The owner of one property may enforce restrictive covenants against another property owner only where the covenants are for their mutual benefit." *Nutis v. Schottenstein Trustees*, 41 Ohio App.3d 63, 65-66, 534 N.E.2d 380 (10th Dist.1987). Courts have held that a restrictive covenant is for the mutual benefit of other property owners "when there is a uniform general plan of improvement for the development." *Id.* In the absence of a uniform general plan for improvement for the development, the person seeking to enforce a restrictive covenant must show that the restrictions were intended for his or her benefit and he or she has an equitable interest in enforcing the restriction. *Berger v. Van Sweringen Co.*, 6 Ohio St.2d 100, 102, 216 N.E.2d 54 (1966). The intent of the parties may be ascertained from the language used in the restriction and by the surrounding circumstances. *Id.* The determination of a party's standing is a

question of law. *Holiday Haven Members Assn. v. Paulson*, 4th Dist. Hocking No. 13CA13, 2014-Ohio-3902, ¶ 13.

{¶ 60} Ebner argues that Cedar Point abandoned any uniform plan to develop Laguna Subdivision when it deeded lots to Kinzel without incorporating the same restrictions contained in the deeds to Lots 14 and 15. He further maintains that Kinzel cannot show that she was an intended beneficiary of the deeds—or that she has an equitable interest in enforcing them—because under the language of the deed itself (emphasized in bold below), a person has standing to enforce the restrictions only if his or her property is burdened with the same restrictions sought to be enforced:

> As a part of the consideration of this conveyance and in accepting this conveyance, and **in consideration of the incorporation of like covenants**, save as to the value of the residence to be erected on each parcel, **in conveyance of other parcels**, except in conveyance of parcels located within the Resort Grounds as herein defined, the Grantees hereby covenant and agree to and with the Grantor for the *use and benefit* of the Grantor and of *every other person who shall or may become the owner of, or have title derived immediately or remotely from, through or under the Grantor*, to any parcel of land, this conveyance is made subject to the following conditions, covenants, rights, terms, reservations, limitations, agreements, restrictions and easements * * *[.] (Emphasis added.)

{¶ 61} Kinzel relies on the italicized portion of this same provision as demonstrating her standing—as a person whose "title derived immediately or remotely from" the Grantor, Cedar Point—to enforce the deed restrictions.

{¶ 62} The provision cited above explicitly states that the covenants are for the "use and benefit" of "every other person" whose title is derived immediately or remotely from Cedar Point. We acknowledge that the provision contemplates that the deeds to other properties located within the subdivision would incorporate "like covenants." Nevertheless, it does not restrict the "use and benefit" to only persons whose deeds contain identical covenants. Because Kinzel—like Ebner—derived title to Laguna Lots 14 and 15 immediately or remotely from Cedar Point, we conclude that she was intended to benefit from the deed restrictions and, therefore, has standing to enforce them.

2. The Deed Restrictions

{¶ 63} We now turn to Kinzel's claim that Ebner's use of the properties for short-term vacation rentals violates the restrictive covenants contained in the deeds. Under the rules of construction applicable to restrictive covenants, "[w]here the language contained in a deed restriction is indefinite, doubtful and capable of contradictory interpretation, that construction must be adopted which least restricts the free use of the land." *Houk v. Ross*, 34 Ohio St.2d 77, 296 N.E.2d 266 (1973), paragraph two of the syllabus. Where, the language in a restriction is clear, however, a court must enforce the restriction. *Farrell v. Deuble*, 175 Ohio App.3d 646, 2008-Ohio-1124, 888 N.E.2d 514, ¶ 11 (9th Dist.). In interpreting a restrictive covenant, "common, undefined words appearing in the

written instrument 'will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.'" *Id.*, quoting *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus.

{¶ 64} Kinzel maintains that the deed's use of the terms "residential," "enjoyment," and "occupancy" and its limits on the types of structures that may be "erected" reflect the parties' intent "to restrict the use or mode of occupancy to which the building may be put." She insists that the terms "private residence" and "single dwelling house" have even narrower meanings, "indicating an intent for the property to be used by one family only." Kinzel argues that the short-term rental of properties is a "non-residential use" prohibited under the deed restrictions because short-term renters do not reside at the properties. She characterizes the use of the properties as "commercial" because they are used in connection with Ebner's vacation rental business. She maintains that renting a house for use as a single family's primary residence does not violate a residential use restriction, but systematically renting a house to short-term occupants does.

{¶ 65} Ebner argues that the plain language of the deed restriction limits only the design and construction to a single-family house and does not restrict who may occupy the house and for how long. He points out that the deed restriction does not contain the terms "purpose" or "residence"—it uses the term "residential unit," making clear that it limits only the type of *structure* that may be erected on the property. He also points out

that the terms "rent," "rental," "use," or "occupy," do not appear in this provision of the deed, nor does it provide that the premises may be used only as a permanent or semi-permanent residence—terms defined in the deed. Ebner contends that a race restriction contained within the deed demonstrates that the drafters did not intend to prohibit rentals and contemplated that one may "use," "occupy," or hold an "interest" in the premises—e.g., rent it—without holding title to it. He urges that Kinzel's interpretation of the deed restrictions requires the court to rewrite the deed.

{¶ 66} Kinzel claims that *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N.E. 576 (1900), and *Catawba Orchard Beach*, 115 Ohio App.3d 402, 685 N.E.2d 584, "establish the rule that renting a house for use as a single family's primary residence does not violate a residential use restriction, but systematically renting a house to short-term occupants is a prohibited non-residential use."

{¶ 67} In *Linwood Park*, the defendant entered into a lease that contained a covenant obligating him to use the premises "for the purpose of a private dwelling or residence only * * *." *Id.* at 197. Instead, the defendant built a tenement house on the property with 17 rooms. The defendant argued that each tenant used his or her apartment for the purposes of a private dwelling. The court observed, however, that "the plain provision of the covenant is that the leased premises shall be used for the purposes of *a* dwelling or residence only, not for a number of dwellings." (Emphasis added.) *Id.* at 200. It held that the defendant's use of the property violated the lease.

{¶ 68} In *Catawba Orchard Beach*, the defendants purchased lots in Catawba Orchard Beach with the express purpose of leasing the property to renters. The deeds to the properties contained the following restriction: "The lots in said The Catawba Orchard Beach shall be used for private residences only. No building or other structures shall be erected or maintained on any lot other that [*sic*] a single residence, designed for the use of one family, and a private garage for the use of the owner of said lot." *Id.* at 406. It further provided that "[s]aid premises shall never be used for commercial purposes of any kind." *Id.* The plaintiffs argued that by offering their properties for lease, the defendants were not using the properties as a single private residence and were instead using the properties for commercial purposes.

{¶ 69} We observed that the terms "residence" or "residential" in restrictive covenants are "used in contradiction to the word 'business.'" *Id.* at 409, quoting *Hunt v. Held*, 90 Ohio St. 280, 283, 107 N.E. 765 (1914). "Use," we explained, is the "'means that one is to enjoy, hold, occupy or have some manner of benefit thereof.'" *Id.*, quoting *Black's Law Dictionary* 1382 (5th Ed.1979). We concluded that the defendant's use of their homes as rental properties did not violate the terms of the restrictive covenants. We reasoned that "[w]hile the rental of the homes did earn [the defendants] an income, no business was being conducted on the property as in *Linwood*, where the defendants were running a tenement house. Rather, the rental properties in the case at bar were used as single residences for one family each." *Id.* at 409.

{¶ 70} We do not agree with Kinzel that *Linwood Park* and *Catawba Orchard Beach* stand for the proposition that systematically renting a house to short-term occupants is a prohibited non-residential use. And as we did in *Catawba Orchard Beach*, we find *Linwood Park* distinguishable. The property at issue in *Linwood Park* consisted of 17 apartments when the lease required that the premises be used for a single dwelling. Here, the houses on Lots 12 and 13 were "designed and intended for the occupancy of one family only"—according to the record, they contain "a normal complement of bedrooms, bathrooms, and only one kitchen" consistent with a single-family home. *Linwood Park* is, therefore, inapplicable.

{¶ 71} As for our decision in *Catawba Orchard Beach*, that case supports Ebner's position—not Kinzel's. For one, we found that the defendants' rental of the single-family homes was not a "commercial use" of the property. Additionally, we did not draw any distinctions between long-term and short-term rentals. Regardless of how many families or unrelated guests may occupy Ebner's properties at any given time, the dwellings themselves consist of only one residential unit.

{¶ 72} To that end, we find covenant II unambiguous. The provision speaks only to the design of the buildings or structures to be erected or maintained on the premises. It permits only single residential units. In other words, multi-family dwellings—such as duplexes, condominiums, or apartment buildings—are not permitted. *See, e.g., Upper Arlington Co. v. Lawwell*, 20 Ohio App. 362, 363, 152 N.E. 203 (2d Dist.1925) (owner violated deed restriction that permitted only "single, private dwelling house" to be

"erected or maintained" on property when he remodeled home to add new entrance and second kitchenette, transforming it into duplex); *Wilson v. Tuttle & Son Construction, Inc.*, 3d Dist. Auglaize No. 2-81-14, 1982 WL 6736, *2 (Feb. 18, 1982) (examining standing and notice arguments after developer was enjoined from constructing two-story multi-family dwellings on property in violation of deed restriction allowing only "single, private dwelling house" to be erected or maintained).

{¶ 73} Additionally, covenant II does not mandate that one family "reside" in the house —it specifies that the dwelling house be designed or intended for the "occupancy" of one family. "Occupancy" is defined in *Black's Law Dictionary* as "[t]he act, state, or condition of holding, possessing, or residing in or on something." *Black's Law Dictionary* (11th Ed. 2019). "Occupy" is defined in *Black's* as "[t]o live *or stay* in (a place)." (Emphasis added.) *Id.* One may occupy (*stay in*) a place without residing in it. And the covenant does not require that one's occupancy of the properties be for any particular length of time.

{¶ 74} In *Northwest Civic Group v. Bernstein*, 91 Ohio App.3d 18, 631 N.E.2d 671 (2d Dist.1993), real estate agents purchased a lot in a subdivision with the purpose of converting it into a real estate sales office. There was a restrictive covenant providing: "All lots in this tract shall be known as described as residential lots [sic]. No structures shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single family dwelling, not to exceed two and one-half stories in height and a private garage for not more than two (2) cars." *Id.* at 19. The court

concluded that this covenant "limit[ed] the type and location of structure on the lots," but "[s]trictly construed, they do not specifically limit the use of the lots." *Id.* at 20.

{¶ 75} Like the covenant in *Bernstein,* covenant II places limits on the structures that may be erected on the lots but does not specifically limit the use of the lots. Had the grantor intended to prevent the properties from being rented on a short-term basis, it could easily have provided for this in the deed. *See, e.g., Houk*, 34 Ohio St.2d at 91, 296 N.E.2d 266 ("If it had been the intent of the sellers to limit construction to single-family residences or dwellings, that restriction should have been specifically stated."); *Dunkirk Realty v. Collette*, 6th Dist. Wood No. WD-98-070, 1999 WL 252752, *4 (Apr. 30, 1999) ("If the developers had the intent to prohibit the use of free standing storage sheds, they could have easily included them in their list of restrictions."). We decline to write this restriction into the deed.

{¶ 76} As for use of the sand beach, consistent with our decision in *Catawba Orchard Beach,* we find that the use of this amenity incidental to the rental of the properties themselves is non-commercial. The same is true with respect to use of the Chaussee.

{¶ 77} Accordingly, we find Kinzel's first assignment of error not well-taken. And because we find that the trial court properly granted summary judgment in favor of Ebner on this claim, we find no error in the trial court's dismissal of Kinzel's claim for permanent injunction relative to the alleged breach of deed restrictions. We, therefore, also find her second assignment of error not well-taken.

B. Jurisdictional Priority Rule

{¶ 78} As its primary rationale, the trial court dismissed Counts II, III, IV, IX, X, XI, and XII of Ebner's counterclaims against the city under the jurisdictional priority rule. It explained that criminal complaints were filed against Ebner in municipal court for ordinance violations before Ebner filed his counterclaims against the city in the present case. The court reasoned that because the constitutionality of Ordinance No. 17-088 is at issue in both cases, and because the jurisdiction of the municipal court was first invoked, it lacked jurisdiction to consider these counts of Ebner's counterclaims. In reaching this conclusion, the trial court stated that it and the municipal court had concurrent jurisdiction to determine the constitutionality of the ordinance. In his first assignment of error, Ebner argues that the trial court erred in relying on the jurisdictional priority rule in dismissing his counterclaims.

{¶ 79} "The jurisdictional priority rule provides that [a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." (Internal quotations and citations omitted.) *State ex rel. Red Head Brass, Inc. v. Holmes Cty. Court of Common Pleas*, 80 Ohio St.3d 149, 684 N.E.2d 1234 (1997). Generally, "if the second case does not involve the same cause of action or the same parties, the first suit will normally not prevent the second case." *Id.*

{¶ 80} Having said this, courts will apply the jurisdictional priority rule "when the causes of action, relief requested, and the parties are not exactly the same so long as the actions are part of the same 'whole issue.'" *Triton Servs., Inc. v. Reed*, 12th Dist. Butler No. CA2016-04-028, 2016-Ohio-7838, ¶ 8. "Actions comprise part of the 'whole issue' when: (1) there are cases pending in two different courts of concurrent jurisdiction involving substantially the same parties; and (2) the 'ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where the suit originally commenced.'" *Instant Win, Ltd. v. Summit Cty. Sheriff*, 9th Dist. Summit No. 20762, 2002-Ohio-1633, ¶ 6, quoting *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank*, 54 Ohio App.3d 180, 183, 561 N.E.2d 1015 (8th Dist.1988).

{¶ 81} Courts have recognized, however, that "'the [jurisdictional-priority] rule does not apply where the conflict of jurisdiction is between a court of general jurisdiction and one whose limited powers are inadequate to afford full relief to the parties.'" (Internal citations omitted.) *Duckworth v. Burger King Corp.*, 159 Ohio App.3d 540, 2005-Ohio-294, 824 N.E.2d 592, ¶ 15 (10th Dist.). For instance, in *Duckworth*, an action was filed in municipal court and a second action was filed in common pleas court. The plaintiff then amended her complaint in municipal court and sought damages exceeding the court's jurisdictional limits. The appellate court concluded that the jurisdictional priority rule could not apply because "the limited powers of the municipal court were inadequate to afford full relief to appellants[,] * * * there could be no conflict of jurisdiction, and the common pleas court could properly exercise jurisdiction * * *." *Id.*

{¶ 82} Ebner argues that the jurisdictional priority rule is inapplicable here for numerous reasons. First, the Kinzels are not parties to the misdemeanor case. Second, the Sandusky Municipal Court and the Court of Common Pleas are not courts of concurrent jurisdiction—the common pleas court is a court of general jurisdiction that can adjudicate the claims raised by Kinzel and the defenses and counterclaims raised by Ebner, whereas the municipal court is a court of limited jurisdiction that has no authority to adjudicate all of Kinzel's claims and Ebner's counterclaims. Third, the causes of action are not the same or even similar—the municipal court case is a criminal case employing a different burden of proof than a civil case, and before that court is the limited issue of whether Ebner violated Ordinance No. 17-088; the issue of the ordinance's validity and constitutionality is not before that court despite the trial court's statements to the contrary. Fourth, the trial court's application of the doctrine contradicts the purpose of the rule, does not promote judicial economy, and requires a multiplicity of suits with possible inconsistent results. Finally, a court is authorized to enjoin enforcement of a criminal law when public authorities or private citizens seek to enforce invalid legislation that interferes with and irreparably harms vested property rights.

{¶ 83} The city insists that even though the causes of action are not the same, the "whole-issue rule" applies here. It maintains that the suits present part of the same "whole issue" because the two cases involve substantially the same parties, and the criminal proceedings—like the present case—involve application of Ordinance No.

17-088. If the common pleas court were to determine the constitutionality of Ordinance No. 17-088, the city contends, it would affect or interfere with the resolution of the issues pending in municipal court.

{¶ 84} We agree with Ebner that the jurisdictional priority rule is inapplicable here. First, there is nothing in the record—no citations to deposition transcripts, no copies of pleadings, no exhibits—demonstrating that the validity and constitutionality of the ordinances are at issue in both actions. While it is clear from Ebner's deposition that he believes that the ordinances cannot be enforced against him because they are invalid and unconstitutional, there are no records that have been brought to our attention demonstrating that he has raised this issue in municipal court.[1] The criminal claims, in fact, could be resolved without the municipal court ever reaching the issue or passing upon the validity or constitutionality of the ordinance.

{¶ 85} Second, the parties and causes of action are not the same. The Kinzels are not parties to the municipal court cases, and in the municipal court cases, Ebner is

[1] Generally, "a trial court may not take judicial notice of earlier proceedings, either in its own court or another court, except for proceedings in the immediate case under consideration." *Dombelek v. Ohio Bur. of Workers' Comp.*, 154 Ohio App.3d 338, 2003-Ohio-5151, 797 N.E.2d 144, ¶ 26 (7th). Even if the trial court could take judicial notice of the municipal court proceedings, (1) the municipal court docket indicates that motions to dismiss were filed in Sandusky Municipal Court case Nos. CRB1703537 and CRB1702912A/B on July 24 and 25, 2019—three months *after* the trial court issued its April 22, 2019 judgment; and (2) the online docket simply lists the docket entries—the documents themselves are not available on the Sandusky Municipal Court website, therefore, it is not possible to determine what defenses Ebner raised.

charged with *criminal* violations of Ordinance No. 17-088; only *civil* claims are pending before the common pleas court.

{¶ 86} Third, Ebner's counterclaim seeks principally equitable relief and damages in excess of $25,000. "Although there are statutory exceptions, it is well-established that a municipal court does not have subject matter jurisdiction over an action that is *principally equitable* in nature." *Hull v. Charter One Bank*, 8th Dist. Cuyahoga No. 99308, 2013-Ohio-2101, ¶ 11. It also does not have jurisdiction over claims seeking monetary damages exceeding $15,000. R.C. 1901.17. As previously explained, the jurisdictional priority rule does not apply when "'the conflict of jurisdiction is between a court of general jurisdiction and one whose limited powers are inadequate to afford full relief to the parties'" because under such circumstances, the municipal court and common pleas court are not courts of concurrent jurisdiction. (Citations omitted.) *Scott v. Dohse*, 194 Ohio App.3d 364, 2011-Ohio-2190, 956 N.E.2d 363, ¶ 6 (2d Dist.); *Adams Robinson Ent. v. Envirologix Corp.*, 111 Ohio App.3d 426, 429-30, 676 N.E.2d 560 (2d Dist.1996) ("Concurrent jurisdiction exists when several different courts or tribunals are authorized to deal with the same subject matter * * *. [I]t is syllogistic that if one of two conflicting courts does not have subject matter jurisdiction, there is no concurrent jurisdiction * * *.").

{¶ 87} Accordingly, we agree with Ebner that the trial court erred in applying the jurisdictional priority rule. We find his first assignment of error well-taken.

C. Ebner's Second and Third Assignments of Error

{¶ 88} The trial court held that even if the jurisdictional priority rule is inapplicable, Counts I, II, III, IV, X, XI, and XII of Ebner's counterclaim are nevertheless subject to dismissal because of the court's finding (respecting Kinzel's claim) that Ordinance Nos. 12-107 and 17-088 were validly enacted and constitutional. The trial court held that if its alternate basis for granting summary judgment becomes applicable, Count IX of Ebner's counterclaim—equal protection, class of one—would survive and must be tried to a jury.

{¶ 89} In his second assignment of error, Ebner argues that the trial court erred in its alternate finding that Ordinance Nos. 12-107 and 17-088 were validly enacted and otherwise constitutional. In his third assignment of error, Ebner argues that the trial court erred in granting injunctive relief to Kinzel based on its finding that Ordinance No. 17-088 was properly enacted and otherwise constitutional and that Ebner violated that ordinance by offering his properties for short-term rentals.

{¶ 90} We find that the trial court's judgment is not yet final and appealable with respect to the issues raised in these two assignments of error. This court has jurisdiction to hear appeals only from final orders. Ohio Constitution, Article IV, Section 3(B)(2). Whether an order is final and appealable is a jurisdictional question that this court can—and must—raise sua sponte. *Turner & Son Funeral Home v. Hillsboro*, 2015-Ohio-1138, 28 N.E.3d 1279, ¶ 8 (4th Dist.). The Ohio Supreme Court has itself acknowledged that determining whether an order is final and appealable can be difficult in litigation

involving multiple parties and multiple claims. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266, 270 (1989).

{¶ 91} "An order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B) in order to be final and appealable." *Noble v. Colwell*, 44 Ohio St.3d 92, 540 N.E.2d 1381 (1989), syllabus. Under R.C. 2505.02(B), an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
>
> * * *
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶ 92} Under Civ.R. 54(B), "[w]hen more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. * * *." But Civ.R. 54(B) "is merely a procedural device." *Gen. Acc. Ins. Co.* at 21. It "cannot transform a nonfinal order into an appealable order." *Internatl. Managed Care Strategies v. Franciscan Health Partnership,* 1st Dist. Hamilton No. C-010634, 2002-Ohio-4801, ¶ 8.

{¶ 93} We first explain our conclusion respecting Ebner's third assignment of error. We then turn to his second assignment of error.

1. Injunctive Relief in Favor of Kinzel

{¶ 94} The trial court found Ebner liable for violations of the ordinances and granted summary judgment in favor of Kinzel on Counts II and VI of her complaint. It reserved the issue of damages for a jury trial, however. "A determination of liability without a determination of damages is not a final appealable order because damages are part of a claim for relief, rather than a separate claim in and of themselves." *Miller v. First Internatl. Fid. & Tr. Bldg., Ltd.*, 165 Ohio App.3d 281, 2006-Ohio-187, 846 N.E.2d 87, ¶ 25 (6th Dist.), *aff'd,* 113 Ohio St.3d 474, 2007-Ohio-2457, 866 N.E.2d 1059, ¶ 25. *See also Mayfred Co. v. City of Bedford Hts.*, 70 Ohio App.2d 1, 3, 433 N.E.2d 620 (8th Dist.1980) ("[A] summary judgment for plaintiff

holding a defendant liable on the claim and leaving the question of damages for a further proceeding is not a final order from which an appeal may be taken.").

{¶ 95} Kinzel's claim for injunctive relief was asserted as a separate claim, but it was based on the same facts giving rise to Kinzel's claim for money damages for violations of those same ordinances. In *State ex rel. v. Big Sky Energy*, 11th Dist. Ashtabula No. 2012-A-0042, 2013-Ohio-437, ¶ 14, the appellate court dismissed an appeal for lack of a final, appealable order where the trial court granted a permanent injunction to the appellee but had not yet determined damages. The court rejected the appellant's claim that the order was final and subject to appellate review "because the part of the order that granted a permanent injunction affected a substantial right and was done in a special proceeding." *Id.* It found that absent a determination of damages, the trial court's judgment was not final under R.C. 2505.02 and Civ.R. 54(B), and it lacked jurisdiction to review it. *Id.* at ¶ 15. *See also Saint-Gobain/Norton Indus. Ceramics Corp. v. Parkhurst*, 11th Dist. Geauga No. 94-G-1871, 1994 WL 738730, *2 (Dec. 30, 1994) (dismissing appeal as not final where trial court's order resolved the issue of liability and granted permanent injunction to appellee but did not determine compensatory damages).

{¶ 96} Here, while the trial court judgment granted permanent injunctive relief to Kinzel, the matter of compensatory damages has not been resolved. We, therefore, find that we lack jurisdiction to consider Ebner's third assignment of error. We reach this

conclusion despite the trial court's finding under Civ.R. 54(B) that there is no just cause for delay. *See id*.

2. Ebner's Counterclaims Against the City

{¶ 97} Because of our resolution of Ebner's first assignment of error, we are left with the trial court's alternate basis for granting summary judgment against Ebner and in favor of the city—i.e., its conclusion that the ordinances are valid and constitutional. Under the court's alternate basis, Count IX of Ebner's counterclaim—equal protection, class of one—remains viable. Moreover, as explained above, Kinzel's claim for ordinance violations has not been fully resolved because her damages have not yet been determined. Nevertheless, Ebner in his second assignment of error asks that we review the trial court's finding that Ordinance Nos. 12-107 and 17-088 were validly enacted and otherwise constitutional.

{¶ 98} Count II of Kinzel's complaint, Ebner's defenses to that claim, and Ebner's counterclaims against the city all arise from the same facts and circumstances and involve the same legal issues. A judgment is not appealable under Civ.R. 54(B) "if pending unresolved claims 'touch upon the very same facts, legal issues and circumstances' as the resolved claims." *Rae-Ann Suburban, Inc. v. Wolfe*, 8th Dist. Cuyahoga No. 107536, 2019-Ohio-1451, ¶ 16, quoting *Altenheim v. Januszewski*, 8th Dist. Cuyahoga No. 105860, 2018-Ohio-1395, ¶ 3-7, 10-13. In that situation, "[w]here claims arise from the same alleged conduct, they are inextricably intertwined and not appealable despite

Civ.R. 54(B) certification." *Internatl. Managed Care Strategies*, 1st Dist. Hamilton No. C-010634, 2002-Ohio-4801, at ¶ 9.

{¶ 99} In *Walker v. Firelands Community Hosp.*, 6th Dist. Erie No. E-06-023, 2006-Ohio-2930, ¶ 23, we held that "an order that disposes of fewer than all of the claims in an action, and contains a Civ.R. 54(B) determination that there is no just reason for delay, is appealable if the claim or claims disposed of are entirely disposed of and either of the following applies": (1) the disposed of claims are factually separate and independent from the remaining claim, or (2) the claims are not factually separate and independent, but the legal theories presented in the disposed of claims require proof of substantially different facts or provide for different relief from the remaining claims.

{¶ 100} Here, the remaining claims and the disposed of claims involve the same facts and require application of the same legal theories. Kinzel's claim for ordinance violations, Ebner's defenses to that claim, and Ebner's counterclaims against the city all require resolution of the same legal issue: the validity and constitutionality of the ordinances. The claims are inextricably intertwined. *See, e.g., Glenmoore Builders, Inc. v. Smith Family Tr.*, 9th Dist. Summit No. 23879, 2008-Ohio-1379, ¶ 16 ("This claim is so inextricably intertwined with the other claims and issues on appeal that the trial court's attempt to make Judgment Entry Eight final and appealable by simply inserting Civ.R. 54(B) language is ineffective.").

{¶ 101} We, therefore, find that we lack jurisdiction to consider Ebner's second assignment of error.

IV. Conclusion

{¶ 102} With respect to Ebner's assignments of error, we find his first assignment of error well-taken. We agree with him that the trial court erred in applying the jurisdictional priority rule as a basis for dismissing Counts II, III, IV, VIII, IX, X, XI, and XII of his counterclaim.

{¶ 103} We dismiss Ebner's second assignment of error for lack of jurisdiction. The claims he asks us to review in this assignment are inextricably intertwined with claims that remain pending in the trial court. The trial court's judgment, therefore, is not yet final and appealable as it relates to this assignment.

{¶ 104} We also dismiss Ebner's third assignment of error for lack of jurisdiction. The trial court's judgment is not yet final and appealable with respect to this assignment because Kinzel's damages for Ebner's ordinance violations have not yet been determined.

{¶ 105} With respect to Kinzel's cross-appeal, we find both of her assignments of error not well-taken. We agree with the trial court that Ebner did not violate deed restrictions by offering his properties for short-term rentals. The trial court properly denied Kinzel's claim for injunctive relief in connection with this claim.

{¶ 106} We affirm the April 22, 2019 judgment of the Erie County Court of Common Pleas, in part, and reverse, in part, and we remand the matter for further proceedings consistent with this decision. The parties are ordered to share the costs of this appeal under App.R. 24.

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

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

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, P.J. _____
CONCUR.
JUDGE

[Cite as *Olenchick v. Scramling*, 2020-Ohio-4111.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

RODNEY P. OLENCHICK, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2020-L-018**
- vs -	:	
JOHN SCRAMLING, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2018 CV 000553.

Judgment: Affirmed.

Marc L. Stolarsky, Marc L. Stolarsky Law, LLC, P.O. Box 24221, Cleveland, OH 44124 (For Plaintiffs-Appellees).

Thomas J. Connick, Connick Law, LLC, 25550 Chagrin Boulevard, Suite 101, Cleveland, OH 44122 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} This case involves a dispute over the ownership of a garage unit at Bayridge Condominiums ("Bayridge") located in Willowick, Lake County, Ohio. Two appeals were taken from the trial court's final order in the matter. The instant appeal was brought by Defendant-Appellant John Scramling against Plaintiffs-Appellees Rodney P. Olenchick and Randy (*né* Ranold) D. Olenchick. The judgment is affirmed.

{¶2} In 1978, Randy D. Olenchick ("Randy") purchased a condominium and garage at Bayridge. The deed for this transaction indicates Randy purchased Condominium Unit No. 30 and Garage Unit No. 41.

{¶3} In 1980, his brother Rodney P. Olenchick ("Rodney") purchased Garage Unit No. 60 from Mary Manning, a condominium owner at Bayridge. In 1981, Randy received Garage Unit No. 59 in exchange for conveying Garage Unit No. 41 to Mary Manning. In 1982, Mary Manning sold her condominium unit and Garage Unit No. 41 to a third party. These transactions were all recorded. Neither Mary Manning nor her grantee are parties to this dispute.

{¶4} In 1989, Rodney transferred title of Garage Unit No. 60 to Randy by quit claim deed. A copy of the recorded deed was introduced by defense counsel during depositions, but neither brother recalled the transaction. It was also alleged by the Olenchicks, however, that Rodney subsequently purchased rights to Garage Unit Nos. 59 and 60 from Randy. No documentation was produced evidencing this transaction. Rodney testified that documentation might have existed at one point but could not be located; Randy testified it was an oral agreement. The issue of which brother owned legal title for either or both units was a source of confusion throughout the litigation.[1] It is undisputed, however, that regardless of which Olenchick held legal title, Garage Unit Nos. 59 and 60 were used exclusively by Rodney pursuant to an oral agreement between the two brothers. Rodney does not own, and has never owned, a condominium unit at Bayridge.

1. This confusion was seemingly caused by a combination of poor drafting and the Olenchicks' lack of understanding of legal terminology. Prior to the transaction between Randy and Scramling, one of the brothers held legal title to each of the two garage units, and Rodney undisputedly possessed the right to use both garage units.

{¶5} On February 16, 2016, Randy sold his Bayridge condominium to John Scramling ("Scramling"). The first page of the Purchase Agreement describes the property as a "1bdrm condominium, no garage space." However, the General Warranty Deed purportedly conveyed to Scramling both Condominium Unit No. 30 and Garage Unit No. 41. The deed was drafted by an attorney who is not a party to this action. The deed was admittedly signed by Randy and his spouse and was recorded on March 4, 2016.

{¶6} Subsequently, someone changed the deed by replacing "41" with "59" and adding a note that states, "deed rerecorded to show correct garage unit." The changes were handwritten on the original deed and were not initialed. The original time stamp of the Lake County Recorder was crossed out. A new stamp from the Deputy County Auditor on August 3, 2017, indicated a second transfer was not necessary. The deed was then rerecorded by the Lake County Recorder on or about August 3, 2017, and purportedly conveyed Condominium Unit No. 30 and Garage Unit No. 59 from Randy to Scramling.

{¶7} The specifics are not unveiled in the record, but this conflict subsequently ensued because Scramling asserted ownership of Garage Unit No. 59, and Rodney refused to vacate.

{¶8} On April 4, 2018, the Olenchick brothers filed a complaint against Scramling, the Lake County Recorder ("the Recorder"), Ohio Real Title Agency, LLC ("Real Title"), and Bayridge Condominium Owners Association, Inc. The trial court subsequently dismissed the Owners Association as a defendant upon granting its Civ.R. 12(B)(6) motion to dismiss.

{¶9} The Olenchicks requested the trial court issue an order to the Recorder and Real Title to correct the deed so that Garage Unit No. 59 is not in Scramling's name. The Olenchicks additionally requested reimbursement for attorney's fees, court costs, and "damages for this travesty taking his rights to garage number 59, ignoring his pleas to fix the error and refusal to correct it in a timely manner."

{¶10} The Recorder answered the complaint on May 29, 2018. Real Title answered the complaint on July 9, 2018, following the denial of its Civ.R. 12(B)(6) motion to dismiss.

{¶11} On June 8, 2018, Scramling filed an answer to the complaint and a nine-count counterclaim against the Olenchicks for quiet title, forcible entry and detainer, trespass, conversion, declaratory judgment and injunctive relief, specific performance, ejectment, rent, and unjust enrichment.

{¶12} The Olenchicks answered Scramling's counterclaim on June 20, 2018. Their Civ.R. 12(B)(6) motion to dismiss the counterclaim was denied.

{¶13} On December 3, 2018, prior to the taking of any depositions, the Recorder filed a motion for summary judgment. The Recorder asserted it was entitled to judgment as a matter of law because it did not change the deed, it had no duty to inspect or investigate the changed deed, and it properly recorded the changed deed. The motion was supported by an affidavit of Lake County Recorder Becky Lynch, averring that no one at the Recorder's office made any changes to the deed and that the changed deed was submitted for rerecording by Real Title.

{¶14} In rebuttal, filed December 19, 2018, the Olenchicks argued that Recorder Lynch's affidavit could be wrong; the Recorder's office has a duty to reject documents it

has reasonable cause to believe are false or fraudulent, citing R.C. 317.13; and the Recorder's office is culpable for recording a deed that was altered by a non-attorney.

{¶15} On December 11, 2018, the Olenchick brothers were deposed by counsel for the Recorder, Real Title, and Scramling. The parties never reached an agreement as to date and time for any of the defendants to be deposed, and the trial court denied motions to compel.

{¶16} On December 26, 2018, prior to the transcription of any depositions, the Olenchicks moved for summary judgment on Scramling's counterclaim. They argued that Scramling has no legal right to quiet title of Garage Unit No. 59 because no contract exists for the sale of a garage unit to Scramling. Because Scramling cannot prove ownership of Garage Unit No. 59, the Olenchicks asserted the rest of his allegations must fail.

{¶17} Transcripts of the Olenchick brothers' depositions were filed with the court on January 4, 2019.

{¶18} That day, Scramling filed a brief in opposition to the Olenchicks' motion for summary judgment and moved for summary judgment on his counterclaim. Scramling asserted that (1) Rodney has no ownership interest in Garage Unit No. 59 because there is no documentary evidence that he ever purchased it from Randy, and (2) Randy has no ownership interest because the rerecorded deed demonstrates that Scramling is the legal owner. Scramling also asserted that Randy had not paid taxes or homeowner fees on Garage Unit No. 59 since he sold the condominium to Scramling. Further, Scramling contended the Olenchicks' argument that the Purchase Agreement stated "no garage space" is precluded under the doctrine of merger by deed. Finally, Scramling argued that the "deed restrictions and the condominium by-laws" require that a garage

unit must be sold with a condominium unit. The document upon which Scramling relies is the "Declaration of Condominium Ownership for Bayridge Condominium." Scramling continuously argues these are deed restrictions. They are more accurately characterized as the recorded condominium bylaws, enforceable by the Owners Association.

{¶19} The Olenchicks filed their rebuttal to Scramling's motion on January 24, 2019. They asserted the doctrine of merger by deed does not preclude reformation of the deed, because the original deed contained a mistake that did not reflect the parties' agreement and the rerecorded deed was covertly altered after it was signed. Attached to their rebuttal was, inter alia, (1) the residential listing input sheet, which indicates "none" for the garage; (2) the property listing, which indicates, "Garage Feat: None"; and (3) the Purchase Agreement, which describes the property as a "1bdrm condominium, no garage space."

{¶20} On February 1, 2019, Real Title moved for summary judgment on the Olenchicks' complaint, raising several arguments that rely on the merger by deed doctrine, the condominium bylaws, and Rodney's alleged lack of standing to sue. The Olenchicks filed a brief in opposition on February 20, 2019, arguing, inter alia, that merger by deed does not apply to this matter, the rerecorded deed was fraudulent, and Real Title does not have standing to assert a legal claim as to the condominium bylaws.

{¶21} On May 16, 2019, the trial court issued an order ruling on the parties' competing motions for summary judgment. The trial court (1) granted the Recorder's motion and Real Title's motion, and dismissed them as parties to the action; (2) granted summary judgment in favor of the Olenchicks' on their claim against Scramling; (3) denied Scramling's motion as to his counterclaim; (4) granted the Olenchicks' motion as

to Scramling's claims for quiet title, forcible entry and detainer, trespass, conversion, declaratory judgment and injunctive relief, specific performance, ejectment, and rent; and (4) denied the Olenchicks' motion as to Scramling's claim for unjust enrichment, to the extent it sought damages for any payments Scramling made of condominium unit owners association fees and taxes attributable to Garage Unit Nos. 59 and 60.

{¶22} The trial court determined that the merger by deed doctrine (1) does not apply to the purported conveyance of Garage Unit No. 41 because it was clearly a mistake; and (2) does not apply to the purported conveyance of Garage Unit No. 59 because Randy did not sign a deed that conveyed Garage Unit No. 59 to Scramling. Thus, the court looked to parol evidence to determine the intent of the parties to the deed and held:

> The only evidence before the court as to the intent of the parties regarding the sale of a garage unit is the purchase agreement, which clearly and unambiguously states that the sale does not include a garage unit, and Randy's testimony that the sale only included the condominium unit and did not include a garage unit.

The trial court further held that the condominium bylaws do not require a garage unit to be sold with a condominium and thus rejected Scramling's argument of illegality of contract.

{¶23} The trial court concluded as follows:

> Randy did not agree to sell, and Scramling did not agree to buy, a garage unit. Further, the court finds that Randy did not convey his interest in any garage units to Scramling. Therefore, the court finds that Scramling is not the rightful owner of Garage Unit No. 59 and reformation of the deed is appropriate. Accordingly, as to the plaintiffs' claims, Scramling's motion for summary judgment is not well-taken and is hereby denied, and the plaintiffs' motion for summary judgment is well-taken and is hereby granted.
>
> Further, the court finds that there is no genuine issue of material fact and the plaintiffs are entitled to judgment as a matter of law on

> Scramling's counterclaims for quiet title, forcible entry and detainer, trespass, conversion, declaratory judgment and injunctive relief, specific performance, ejectment, and rent and the plaintiffs' motion for summary judgment is hereby granted as to those counterclaims. Further, the plaintiffs' motion for summary judgment is hereby granted on Scramling's counterclaim for unjust enrichment as it relates to any claim for damages related to the use or possession of Garage Unit No. 59.
>
> However, Scramling's counterclaim for unjust enrichment also seeks damages for any payments he made of condominium unit owners association fees and taxes that are attributable to Garage Unit Nos. 59 and 60. Accordingly, the plaintiffs' motion for summary judgment is hereby denied as to the counterclaim for unjust enrichment as it relates to any claim for reimbursement of taxes or fees paid relative to Garage Unit No. 59 or Garage Unit No. 60.

{¶24} The trial court issued the following instructions:

> The parties are hereby ordered to take the steps necessary to reform the deed to reflect that no garage unit was transferred to Scramling. If the parties fail to take such action within 90 days, any party may file this entry with the Lake County Recorder and the Lake County Recorder and Lake County Auditor shall take the steps necessary to correct the ownership of Bayridge Condominium Garage Unit No. 59 to Randy Olenchick.

{¶25} Following summary judgment, the only issue that remained before the trial court was Scramling's claim for unjust enrichment. Scramling subsequently filed a motion for a nunc pro tunc order, requesting the trial court add Civ.R. 54(B) language that there is "no just reason for delay," so as to permit an immediate appeal of the interlocutory order. The Olenchicks opposed, and the trial court denied the motion. Scramling then filed a motion to stay enforcement of the summary judgment order pending resolution of his counterclaim, which the trial court also denied.

{¶26} On June 3, 2019, the Olenchicks filed a motion for attorney's fees, pursuant to R.C. 2323.51, with a "demand that all Defendants be held jointly and

severally liable for all of the Olenchicks' fees and costs." The motion was duly opposed by each defendant and summarily denied by the trial court on July 8, 2019.

{¶27} Finally, on January 13, 2020, an agreed judgment entry was issued by the trial court, cancelling the bench trial and dismissing with prejudice Scramling's unjust enrichment claim. The trial court incorporated by reference its summary judgment order, rendering it a final appealable order with "no just reason for delay."

{¶28} This appeal followed. Scramling raises two assignments of error from the summary judgment order, which we will review in reverse order:

> [1.] The trial court committed prejudicial error in granting Plaintiffs-Appellees' motion for summary judgment, in part, and denying Defendant-Appellant's motion for summary judgment and, therefore, ordering reformation of the deed, based upon the inapplicability of the Merger by Deed Doctrine due to mutual mistake.
>
> [2.] The trial court erred by failing to enforce the applicable Condominium Declarations, which require the conveyance of a garage unit with the conveyance of a condominium unit.

{¶29} An appellate court reviews a trial court's decision to grant summary judgment under a de novo standard of review, i.e., "independently and without deference to the trial court's determination." *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993) (citation omitted); *see also Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Therefore, we apply the same test as the trial court in determining whether summary judgment is appropriate.

{¶30} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that:

> (1) [n]o genuine issue as to any material fact remains to be litigated;
> (2) the moving party is entitled to judgment as a matter of law; and

> (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977); *see also Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 (1992) ("Doubts must be resolved in favor of the non-moving party.").

{¶31} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶32} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Id.* If this initial burden is met, the burden shifts to the nonmoving party to set forth specific facts demonstrating there is a genuine issue for trial. *Id.*, citing Civ.R. 56(E). If the nonmovant fails to do so, summary judgment will be entered against the nonmoving party. *Id.*

The Condominium Bylaws

{¶33} Under his second assignment of error, Scramling argues the trial court erred by failing to enforce the Declaration of Condominium Ownership for Bayridge

Condominium ("the Bylaws"). Scramling contends the Bylaws require the conveyance of a garage unit with the conveyance of a condominium unit, thus the portion of the Purchase Agreement that conveyed a condominium without a garage should have been severed under illegality of contract.

{¶34} The relevant portion of the Bylaws provided to the trial court states, "No garage unit shall be available for purchase except to a family unit owner or in conjunction with the ownership of a family unit." This language is unambiguous. It does not require a condominium owner to sell a garage when selling a condominium. Rather, it restricts the sale of a garage to a condominium owner (or in conjunction with the ownership of a condominium). On its face, this provision also does not preclude an owner from continuing to own a garage after selling a condominium. However, as the trial court noted: "Even assuming that the declaration precludes Randy from continuing to own a garage unit without being a family unit owner, he presumably can sell the garage unit to any owner of a condominium unit. Moreover, this provision would certainly not require Randy to convey his garage unit without any compensation therefor."

{¶35} As the language of the Bylaws does not lend itself to the construction to which Scramling subscribes, his argument must fail as a matter of law.

{¶36} Scramling's second assignment of error is without merit.

The Doctrine of Merger by Deed

{¶37} Under his first assignment of error, Scramling argues the trial court erred in its summary judgment order by determining the merger by deed doctrine was inapplicable due to mutual mistake and, therefore, by ordering reformation of the deed. He raises three issues for review under this assignment of error:

(1) Did the trial court err in determining that the Merger by Deed Doctrine did not apply to the conveyance of Garage Unit No. 59 to Defendant Appellant?

(2) Did the trial court err in determining that mutual mistake applied where Plaintiffs-Appellees failed to properly plead mutual mistake with the required particularity pursuant to Ohio Civ. R. 9?

(3) Did the trial court err in ordering reformation of the Deed?

{¶38} The doctrine of "merger by deed" denotes that, "[w]here a deed is delivered and accepted without qualification pursuant to agreement, no cause of action upon the prior agreement thereafter exists." *Fuller v. Drenberg*, 3 Ohio St.2d 109 (1965), paragraph one of the syllabus; *Westwinds Dev. Corp. v. Outcalt*, 11th Dist. Geauga No. 2008-G-2863, 2009-Ohio-2948, ¶79 (citation omitted). "'The rights of the parties must be determined by the deed so given in execution of the prior agreement[.]'" *Mayer v. Sumergrade*, 111 Ohio App. 237, 239 (8th Dist.1960), quoting 40 Ohio Jurisprudence, Section 90, at 1001. There are recognized exceptions to merger, such as fraud or mistake, or when the prior agreement creates rights collateral to the conveyance. *Id.*; *Mong v. Kovach Holdings, LLC*, 11th Dist. Trumbull No. 2012-T-0063, 2013-Ohio-882, ¶22.

The Rerecorded Deed

{¶39} Scramling first asserts that the trial court erred in determining the merger by deed doctrine did not apply to the conveyance of Garage Unit No. 59.

{¶40} The purported conveyance of Garage Unit No. 59 is included in the rerecorded deed. Crucially, the trial court did not rely on an exception to the rule when it held the merger doctrine did not apply to the rerecorded deed. Rather, the trial court held that Scramling could not rely on the doctrine because Randy did not sign the rerecorded deed, or any deed that conveyed Garage Unit No. 59 to Scramling.

{¶41} R.C. 5301.01(A) provides that "[a] deed * * * shall be signed by the grantor * * *. The signing shall be acknowledged by the grantor * * * before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement."

{¶42} While the signatures of Randy and his spouse appear on the document, those signatures were affixed to the deed prior to the alterations and prior to the first recording. Further, neither Randy nor Scramling initialed or otherwise acknowledged the alterations. Randy testified that he does not know who made the change, he does not know who presented the deed for rerecording, and he did not authorize the changes. There is no testimony from Scramling or any other defendant. Accordingly, the record contains no evidence that the rerecorded deed was valid.

{¶43} Moreover, the record contains no evidence that a valid contract existed for the conveyance of Garage Unit No. 59. "[As] the author of a prominent treatise notes:

> In reality, this doctrine [of merger by deed] is merely an application of the contract doctrine of integration. Under this doctrine, all prior documents are considered to be integrated into the final contract, and only the provisions contained in the final contract are part of the agreement. This doctrine is the combined result of the parol evidence rule and the rule of interpretation which seeks to determine the intentions of the parties. Thus, if it can be shown that the parties actually intended that the provisions of a prior agreement continue in force, then the provisions do so continue. Similarly, the merger doctrine should only be applied as a canon of construction that attempts to arrive at the true intention of the parties to a deed.

14 Powell on Real Property (1995) 81A–136, Section 81A.07[1][d]." *Judy Newman v. Group One*, 4th Dist. Highland No. 04CA18, 2005-Ohio-1582, ¶13.

{¶44} There is no evidence that Randy signed a deed conveying Garage Unit No. 59 to Scramling. Thus, there is no evidence that the rerecorded deed is a valid final contract into which the Purchase Agreement must merge. Accordingly, the trial court did not err in concluding that the doctrine of merger by deed cannot apply to the rerecorded deed.

{¶45} Scramling's first issue presented for review is not well taken.

The Original Deed

{¶46} Scramling next asserts the trial court erred in determining the mutual mistake exception applied because the Olenchicks failed to properly plead mistake with particularity, as required by Civil Rule 9(B).

{¶47} Civil Rule 9(B) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

{¶48} Civil Rule 9(B) must be read and applied in conjunction with the other rules of civil procedure. For instance, a pleading states a claim for relief when it contains "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Civ.R. 8(A). Additionally, "[a] copy of any written instrument attached to a pleading is a part of the pleading for all purposes." Civ.R. 10(C).

{¶49} The underlying determination of whether a short and plain statement complies with the particularity requirement is "'whether the allegation is specific enough to inform the defendant of the act of which the plaintiff complains, and to enable the defendant to prepare an effective response and defense.'" *Meehan v. Mardis*, 1st Dist. Hamilton No. C-180406, 2019-Ohio-4075, ¶22, quoting *Baker v. Conlan*, 66 Ohio

App.3d 454, 458 (1st Dist.1990), citing *Haddon View Invest. Co. v. Coopers & Lybrand*, 70 Ohio St.2d 154, 159 (1982); *see also Butler Cty. Bd. of Commrs. v. Hamilton*, 145 Ohio App.3d 454, 471 (12th Dist.2001) ("some cases hold that Civ.R. 9(B) should not be strictly applied, even where pleadings are vague, as long as the defendant has notice of the matters about which the plaintiff complains").

{¶50} We note that the trial court found a mutual mistake occurred, but only with regard to the original deed, which purports to convey Garage Unit No. 41. The Olenchicks' complaint alleges the following facts, summarized by this court for the sake of clarity and relevance:

- In 1978, Randy purchased Condominium Unit No. 30 and Garage Unit No. 41.
- In 1981, Randy transferred Garage Unit No. 41 to a third party in exchange for Garage Unit No. 59.
- Subsequently, Randy sold to Rodney the rights to Garage Unit No. 59.
- In February 2016, Randy sold to Scramling Condominium Unit No. 30.
- The Purchase Agreement stated: "1bdrm condominium, no garage space."
- On March 4, 2016, the Lake County Recorder recorded a deed conveying Condominium Unit No. 30 and Garage Unit No. 41 to Scramling.
- On August 3, 2017, someone in the Lake County Recorder's office changed the deed to reflect Garage Unit No. 59 was instead conveyed to Scramling.
- Garage Unit No. 59 is not owned by Scramling because it was not included in the Purchase Agreement or in the original deed.
- Rodney has tried to resolve the matter with Scramling and Real Title, but they refuse to correct the deed.
- Rodney requests Real Title and the Lake County Recorder do whatever is necessary to correct the deed.

{¶51} The Olenchicks attached to their complaint a copy of the Purchase Agreement, the original deed, and the rerecorded deed. The Purchase Agreement states the contract between Randy and Scramling was for the purchase of a "1 bdrm condominium, no garage space." The original deed conveys Garage Unit No. 41 to

Scramling. The rerecorded deed shows a handwritten and uninitialed alteration that instead conveys Garage Unit No. 59 to Scramling.

{¶52} We conclude the Olenchicks' allegations, when read in conjunction with the written instruments attached to the complaint and incorporated therein, sufficiently pled a claim requesting reformation of the deed based on a mutual mistake of fact. It alleges the existence of a contract, but that the original deed did not reflect what the parties agreed to in that contract. It further alleges the original deed was altered by neither party to the agreement. In addition, Scramling has never argued, nor could he genuinely do so, that he was confused as to the nature of the Olenchicks' claim or the relief they requested.

{¶53} We reject Scramling's argument that the Olenchicks did not plead their claim with sufficient particularity.

Reformation of the Deed

{¶54} Finally, Scramling asserts the trial court erred in ordering reformation of the deed after determining he was not entitled to quiet title due to a mutual mistake of the parties to the original deed.

{¶55} "It is well-established that '[r]eformation of an instrument is an equitable remedy whereby a court modifies the instrument which, due to mutual mistake on the part of the original parties to the instrument, does not evince the actual intention of those parties.'" *Zwaryz v. Wiley*, 11th Dist. Ashtabula No. 98-A-0073, 1999 WL 689940, *2 (Aug. 20, 1999), quoting *Mason v. Swartz*, 76 Ohio App.3d 43, 50 (6th Dist.1991).

{¶56} "'Reformation is available where it is shown that the written instrument does not express the true agreement entered into between the contracting parties by reason of mistake common to them; in such a case equity affords the restorative

remedy of reformation in order to make the writing conform to the real intention of the parties.'" *Mong*, *supra*, at ¶21, quoting *Wagner v. Natl. Fire Ins. Co.*, 132 Ohio St. 405, 412 (1937).

{¶57} "In a suit to correct the description in a deed on the ground that, by the mutual mistake of the parties, it includes land not intended to be sold and conveyed, the proof of the mutuality of the mistake must be clear and convincing; a mere preponderance is not sufficient. No reformation of an instrument can be made that does not conform to the intention of both parties; the court cannot, by reformation, make a new contract." *Stewart v. Gordon*, 60 Ohio St. 170 (1899), paragraphs one and two of the syllabus; *accord Mong*, *supra*, at ¶21 *see also Miller v. Cloud*, 7th Dist. Columbiana No. 15 CO 0018, 2016-Ohio-5390, ¶26 (citation omitted) ("the clear and convincing standard of proof is used not only at trial to determine whether the party met their burden of proof, but it is also used to determine whether summary judgment is appropriate").

{¶58} "Clear and convincing evidence is the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *In re Haynes*, 25 Ohio St.3d 101, 104 (1986); *Miller*, *supra*, at ¶25. Once mutual mistake is established with the requisite level of proof, parol evidence is admissible to show the parties' true agreement. *See Mong*, *supra*, at ¶21.

{¶59} Here, the trial court determined that the conveyance of Garage Unit No. 41 was a mutual mistake because the parties agreed that Randy did not own that

garage unit at the time of sale. Scramling contends the parties intended to convey a garage unit owned by Randy, such that the only mistake in the deed was unilateral, conveying Garage 41 instead of Garage 59. However, he provided no evidence to support this argument. As the trial court noted, "this would require the court to find that the mistaken portion of the deed itself demonstrated an intent between the parties to convey a garage unit to Scramling." Regardless, because that portion of the deed was clearly a mistake, the parties' intention regarding a garage unit must be determined by parol evidence.

{¶60} There is clear and convincing evidence in the record of the parties' true intent. The signed Purchase Agreement convincingly establishes that the parties did not intend to convey a garage unit with the condominium, as it clearly states: "1bdrm condominium, no garage space." Additional record evidence further supports a mutual mistake. Randy testified that he did not intend to convey a garage unit, he did not include a garage unit in the real estate listing, he and Scramling did not negotiate the sale of a garage unit, and his realtor assured him the sale did not include a garage unit, despite the language in the deed. There is no testimony from Scramling to dispute Randy on these matters.

{¶61} Thus, the record evidence establishes that both parties to the Purchase Agreement were fully aware that a garage unit would not be included in the transfer of property. Randy was mistaken about the terms of the conveyance when he executed the deed, and Scramling was mistaken about the terms of the conveyance in the recorded deed. The inclusion of Garage Unit No. 41 in the deed was, therefore, a mutual mistake.

{¶62} Scramling further argues that the deed should not be reformed because Randy admitted that he read the deed, knew it listed Garage Unit No. 41, knew he did not own Garage Unit No. 41, and signed the instrument anyway. However, reformation is permissible even when a party is not "'wholly free from fault,'" so long as that party's negligence is "'excusable'" and did not violate a "'positive legal duty.'" *Hartman v. Tillett*, 86 Ohio App. 20, 23 (1st Dist.1948), quoting 45 American Jurisprudence, Section 78, at 632; *accord Natl. City Real Estate Servs. LLC v. Frazier*, 4th Dist. Ross No. 17CA3585, 2018-Ohio-982, ¶30. Randy testified that his realtor had assured him the Purchase Agreement controlled the transaction, not the language in the deed, because he did not agree to sell Scramling a garage unit. Additionally, the legal duty to ensure the terms of the deed were correct belonged to the attorney that drafted the deed—not to Randy. *See Disciplinary Counsel v. Jones,* 138 Ohio St.3d 330, 2014-Ohio-809, ¶9 (citations omitted) ("The preparation of deeds for another constitutes the practice of law.").

{¶63} In sum, we conclude there is no genuine issue of fact as to the mutual mistake that occurred, and that reformation of the deed is appropriate as a matter of law. The trial court did not err in ordering reformation of the deed.

{¶64} Scramling's first assignment of error is without merit.

{¶65} The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.

[Cite as *Zalvin v. Ayers*, 2020-Ohio-4021.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JOEL ZALVIN,	:	APPEAL NO. C-190285 TRIAL NO. A-1804888
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N.*
ANDREA J. AYERS,	:	
CHERYL K. BEEBE,	:	
RICHARD R. DEVENUTI,	:	
JEFFREY H. FOX,	:	
JOSEPH E. GIBBS,	:	
JOAN E. HERMAN,	:	
ROBERT E. KNOWLING, JR.,	:	
THOMAS L. MONAHAN, III,	:	
ROBERT L. NELSON,	:	
and		
CONVERGYS CORP.,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 10, 2020

The Brualdi Law Firm, P.C., Richard B. Brualdi and *John F. Keating, Jr.*, and *Altick & Corwin Co. L.P.A.* and *Steven E. Bacon*, for Plaintiff-Appellant,

Dinsmore & Shohl LLP and *Mark A. Vander Laan*, and *Pillsbury Winthrop Shaw Pittman LLP* and *Bruce A. Ericson*, for Defendants-Appellees.

ZAYAS, Judge.

{¶1} Plaintiff-appellant Joel Zalvin appeals from the judgment of the Hamilton County Court of Common Pleas, which dismissed his second amended complaint. Defendants-appellees in this case are Convergys Corporation ("Convergys") and nine of its directors ("defendant directors"): Andrea J. Ayers, Cheryl K. Beebe, Richard R. Devenuti, Jeffrey H. Fox, Joseph E. Gibbs, Joan E. Herman, Robert E. Knowling, Jr., Thomas L. Monahan, III, and Robert L. Nelson. Zalvin, on behalf of a class of nominal shareholders, filed a shareholder derivative class action against Convergys and the defendant directors alleging improprieties in the sale of Convergys to Synnex Corporation. For the following reasons, we affirm the trial court's judgment.

I. Facts and Procedural History

{¶2} In June 2018, the Cincinnati-based Convergys publicly announced its decision to merge with Synnex. In August 2018, Convergys and Synnex filed with the Securities and Exchange Commission ("SEC") a proxy statement, which was over 300-pages, explaining the merger, and asked their respective shareholders to vote on it. In September 2018, Zalvin, who owned shares of Convergys' common stock continuously since May 2016, sued for breach of fiduciary duty and failure to disclose. Zalvin alleged that the defendant directors had conflicts of interest in favor of the transaction and that Convergys's proxy statement was materially deficient. Zalvin moved to enjoin the shareholder vote.

{¶3} Following a hearing on Zalvin's motion for a preliminary injunction, the motion was denied. The sale of Convergys to Synnex closed in early October 2018. For each share they owned, Convergys shareholders received $13.25 cash and 0.1263 shares of Synnex common stock, for a total value of $24.51 at closing.

{¶4} In November 2018, Zalvin filed his second amended complaint, adding additional claims regarding the defendant directors' alleged self-dealing and omissions from the proxy statement. Zalvin also complained that the shareholders were deprived of over $2 per share (as they received $24.51 per share rather than $26.66, the high closing price of Convergys stock in 2017), or $600 million collectively, because the defendant directors failed to include a floating exchange ratio in the sale agreement. Zalvin asked the court to, among other things, rescind the sale, award compensatory damages, and order the defendant directors to disgorge the sums paid to them as a result of the sale.

{¶5} Convergys and the defendant directors (collectively, "appellees") filed a motion to dismiss Zalvin's second amended complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Appellees argued that the court did not have jurisdiction because Zalvin had failed to bring a claim under R.C. 1701.85, Ohio's appraisal statute, which appellees contended provided the sole relief available to Zalvin for his complaint over an "inadequate price." Appellees argued that Zalvin did not state a claim upon which relief can be granted because the conclusions in Zalvin's second amended complaint were unsupported. And, appellees argued that Zalvin had not properly pleaded all of the requirements of Civ.R. 23.1 (governing shareholder derivative actions) because he did not adequately establish demand futility—a requirement that a shareholder exhaust his intra-corporate remedies before filing a derivative suit. *See In re Lubrizol Shareholders Litigation*, 2017-Ohio-622, 79 N.E.3d 579, ¶ 33 (11th Dist.).

{¶6} In April 2019, the trial court granted appellees' motion to dismiss on all three bases put forth in the motion. Zalvin now appeals, asserting two assignments of error.

II. Analysis

{¶7} In his first assignment of error, Zalvin argues that the trial court erred in dismissing the complaint with prejudice. Zalvin contends that the trial court's ruling was a decision otherwise than on the merits and thus the trial court should have indicated that it was a dismissal without prejudice. In his second assignment of error, Zalvin argues that the trial court erred in granting appellees' motion to dismiss pursuant to Civ.R. 12(B)(1) and 12(B)(6). We address Zalvin's assignments of error out of order.

Ohio's Appraisal Statute – R.C. 1701.85

{¶8} We first consider the trial court's dismissal of Zalvin's complaint for lack of subject-matter jurisdiction pursuant to Civ.R. 12(B)(1). The trial court concluded that Zalvin did not act in accordance with Ohio's appraisal statute, R.C. 1701.85, and thus the court was without jurisdiction over the subject matter. Appellees maintain, and the trial court agreed, that Zalvin's complaint was in essence a challenge to the value paid for his shares in the cash-out merger and was merely disguised as a complaint for breach of fiduciary duty and failure to disclose. Such an action must be brought under the appraisal statute. *See Stepak v. Schey*, 51 Ohio St.3d 8, 553 N.E.2d 1072, 1075 (1990).

{¶9} "R.C. 1701.85, is designed to provide compensation for those shareholders who dissented from the merger." *Stepak* at 11, citing *Armstrong v. Marathon Oil Co.*, 32 Ohio St.3d 397, 513 N.E.2d 776 (1987). "It provides for the payment of fair cash value to a shareholder for his or her shares as of the day prior to the vote of the shareholders." *Id.* "[A]n action for breach of fiduciary duty may be maintained notwithstanding R.C. 1701.85; however, such action may not seek to overturn or modify the fair cash value determined in a cash-out merger." *Stepak* at 10. "A cause of action outside of the appraisal statute will not be recognized 'where

the shareholder's objection is essentially a complaint regarding the price which he received for his shares.' " *Smith v. Robbins & Myers, Inc.*, 969 F.Supp.2d 850, 861-862 (S.D.Ohio 2013), quoting *Stepak* at 11. The plaintiff in *Stepak* "did not allege that his shares were undervalued—rather he alleged that he should have received more money for his shares—thus '[s]uch action, merely asking for more money, per *Armstrong* must be brought under the appraisal statute.' " *Smith* at 862, quoting *Stepak* at 11.

{¶10} Here, Zalvin alleges that the shares were in fact undervalued. The direct and derivative breach-of-fiduciary-duty claims challenge the defendant directors' fair dealing and the substantive fairness of the merger process. The second amended complaint alleges that defendant directors breached their fiduciary duties by approving the merger in order to secure personal benefits unrelated to the merits of the transaction. Additionally, the second amended complaint alleges that the defendant directors secured the unfair merger by soliciting shareholder votes with a misleading and materially deficient proxy statement. *See Smith* at 862, citing *Terry v. Carney*, 6th Dist. Ottawa No. OT-94-054, 1995 WL 763971, *6.

{¶11} Accordingly, considering the second amended complaint in the light most favorable to Zalvin, we find that his allegations are not simply disguised attempts to modify the cash value received, and therefore the appraisal statute does not bar this action.[1]

Dismissal for Failure to State a Claim

{¶12} We next consider the trial court's decision to dismiss Zalvin's second

[1] While we acknowledge that the second amended complaint repeatedly refers to complaints of a lower than implied share price and that Convergys shareholders received $2 less per share from the merger, Zalvin also alleges claims that are not based on the cash value of the merger.

amended complaint for the failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6).

{¶13} The standard of review applied to dismissals for failure to state a claim is de novo. *Corrado v. Lowe*, 11th Dist. Geauga No. 2014-G-3239, 2015-Ohio-1993, ¶ 22. When considering a Civ.R. 12(B)(6) dismissal, the court must presume that all factual allegations of the complaint are true, and it must make all reasonable inferences in favor of the nonmoving party. It must then appear beyond doubt that the nonmoving party can prove no set of facts entitling it to the requested relief in the complaint. *Avery v. Rossford, Ohio Transp. Improvement Dist.*, 145 Ohio App.3d 155, 164, 762 N.E.2d 388 (6th Dist.2001), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). However, the court is not required to presume the truth of conclusions in the complaint unsupported by factual allegations. *Guess v. Wilkinson*, 123 Ohio App.3d 430, 434, 704 N.E.2d 328 (10th Dist.1997); *Swint v. Auld*, 1st Dist. Hamilton No. C-080067, 2009-Ohio-6799, ¶ 3; *Maternal Grandmother v. Hamilton Cty. Dept. of Job & Family Services*, 1st Dist. Hamilton No. C-180662, 2020-Ohio-1580, ¶ 21. Additionally, the court may not rely upon evidence outside of the complaint when considering a Civ.R. 12(B)(6) motion, but "[m]aterial incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss." *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997), fn. 1, citing *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 109, 647 N.E.2d 799 (1995); *see Henkel v. Aschinger*, 167 Ohio Misc.2d 4, 2012-Ohio-423, 962 N.E.2d 395, ¶ 8 (C.P.) (considering proxy statement

referred to in plaintiff's complaint and publicly filed with the SEC in ruling on a motion to dismiss).[2]

{¶14} Zalvin's second amended complaint alleges four causes of action: two direct claims against the defendant directors individually for breach of fiduciary duty (Count I) and failure to disclose (Count II), and two derivative claims on behalf of Convergys against the defendant directors for breach of fiduciary duty (Count III) and failure to disclose (Count IV). We will address Counts I and III together and Counts II and IV together, as the same operative facts apply to these respective causes of action.

Counts I and III – Breach of Fiduciary Duty

{¶15} Directors of a corporation owe a fiduciary duty to the corporation and to the corporation's shareholders. R.C. 1701.59(E). R.C. 1701.59(B) defines a director's fiduciary duties as follows:

> A director shall perform his duties as a director, including his duties as a member of any committee of the directors upon which he may serve, in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances.

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[2] The allegations in Zalvin's second amended complaint regarding the defendant directors' actions explicitly refer to Convergys's proxy statement and characterizes the contents of that document. Elsewhere in the complaint, Zalvin directly quotes from the proxy statement. Accordingly, the court takes judicial notice of that public disclosure, which the defendants filed with their motion to dismiss. *See In re Alloy, Inc.*, No. 5626-VCP, 2011 WL 4863716, *3 (Del.Ch. Oct. 13, 2011) (taking judicial notice of a publicly-disclosed preliminary proxy statement when ruling on motions to dismiss plaintiffs' complaint); *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del.2006) ("When a complaint partially quotes or characterizes what a disclosure document says, a defendant is entitled to show the trial court the actual language or the complete context in which it was used [on a motion to dismiss]."); *Solomon v. Armstrong*, 747 A.2d 1098, 1122 (Del.Ch.1999), fn. 72 (taking judicial notice of facts publicly available in SEC disclosures and documents incorporated by reference into the complaint when considering a motion to dismiss).

"The fiduciary relationship between a corporation's directors and the corporation and its shareholders has also been described to include 'a duty of good faith, a duty of loyalty, a duty to refrain from self-dealing and a duty to disclosure.' " *Thompson v. Cent. Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 540-541, 639 N.E.2d 462 (8th Dist.1994), quoting *Wing Leasing, Inc. v. M & B Aviation, Inc.*, 44 Ohio App.3d 178, 181, 542 N.E.2d 671 (1988).

{¶16} "In shareholder actions alleging the breach of fiduciary duties, 'the general rule * * * [is] that directors carry the burden of showing that a transaction is fair and in the best interests of shareholders only after the plaintiff [or aggrieved shareholder] has made a prima facie case showing that the directors have acted in bad faith or without the requisite objectivity.' " *Stepak*, 51 Ohio St.3d at 14, 553 N.E.2d 1072, quoting *Radol v. Thomas*, 772 F.2d 244, 257 (6th Cir.1985); citing *American Law Institute, Principles of Corporate Governance*, Section 4.01, at 6 (protections of the business judgment rule removed only if a challenging party can sustain his burden of showing the director was not acting in good faith or with disinterest, or was not informed as to the subject of his business judgment).

{¶17} Accordingly, directors may not, in breach of their fiduciary duties, act unfairly to the disadvantage of their corporation or its shareholders. For example, "within the bidding process of a corporate takeover or merger, the directors may not rig, control or stifle such bidding to their own advantage." *Stepak* at 14. However, "the directors are not held to a duty to the shareholders to obtain, like an auctioneer, the highest price possible for their shares of the corporation." *Id.*

{¶18} Zalvin's second amended complaint contains three principle arguments for breaches of fiduciary duty. First, he alleges that director and chief executive officer, Andrea J. Ayers, secretly and unilaterally—without board of directors' authorization—pursued a merger to prevent the forfeiture of

approximately $10.1 million of unvested stock upon her planned departure from Convergys. Second, he alleges that the defendant directors "promoted an undervalued transaction to secure personal benefits" as they were "motivated to complete a sale, any sale, no matter how unfavorable to Convergys shareholders and even after Synnex reduced its offer price, to prevent the forfeiture of over $1 million in unvested equity compensation, collectively." And, third, Zalvin alleges that "[t]he decision to enter into the Sale Agreement was also driven by Convergys' directors desire to appease an activist investor and New York based hedge fund, Elliott Management."

{¶19} In regard to his first two arguments, Zalvin's second amended complaint contains conflicting allegations. Zalvin alleges that Ayers's pursuit of a merger was done in secret but concedes in later paragraphs that the proxy statement discloses her initial meetings regarding a possible merger. Zalvin alleges that Ayers's pursuit was unilateral, but the proxy statement reveals that Ayers was accompanied by Convergys's chief financial officer, Andre Valentine, at her first meeting with a potential bidder. The proxy statement also contains a chronological timeline of Ayers's and Convergys's contacts with potential bidders, beginning in early 2017. Zalvin alleges that the vesting of unvested stock upon the sale of Convergys demonstrates a conflict of interest, but concedes in later paragraphs that Ayers's and the other defendant directors' compensation was stock-based compensation, in which their interests were generally aligned with the shareholders. *See In re Micromet, Inc. S'holders Litig.*, C.A. No. 7197-VCP2, 2012 WL 681785, * 13 fn. 64 (Del.Ch. Feb. 29, 2012) (rejecting argument that directors were interested due to vesting of stock options because "the directors' interests would be aligned with the shareholders in seeking the highest price for their shares reasonably available"). Furthermore, the defendant directors' compensation was revealed in detail to the

shareholders in the proxy statement and was subject to a separate shareholder vote—i.e., a vote separate and apart from the vote on the merger such that the shareholders could have approved the merger and rejected the defendant directors' compensation. The proxy statement describes in a section entitled, "Interests of Convergys' Directors and Executive Officers in the Mergers," the directors' compensation and their interests in the merger that might differ from the shareholders, and describes their equity compensation over several pages.

{¶20} In regard to Zalvin's third argument, that the decision to proceed with the sale was based on threats from "activist investor" Elliott Management, there are no set of facts to indicate that Elliott Management's role in the merger, regardless of his purported motivations or modus operandi, led to a breach of the defendant directors' fiduciary duties. Allegations that Elliott Management actually threatened a proxy fight, leading the defendant directors to take action adverse to the shareholders, are not within the second amended complaint.

{¶21} In sum, Zalvin's claims against the defendant directors for breaches of fiduciary duty fail to state a claim upon which relief could be granted. Even drawing all reasonable inferences on behalf of Zalvin, he has failed to plead facts under which it is reasonably conceivable that he could recover.

Counts II and IV – Failure to Disclose

{¶22} The duty of disclosure applies when a corporation seeks shareholder approval of fundamental corporate changes, such as a merger, "but the adequacy of disclosure is captured under the well-defined concept of materiality." *Henkel*, 167 Ohio Misc.2d 4, 2012-Ohio-423, 962 N.E.2d 395, at ¶ 33.

{¶23} "Securities law regards a fact as material when there is a substantial likelihood that it would have been viewed by a reasonable investor as having significantly altered the total mix of information available." *Id.* at ¶ 34; *see Basic Inc.*

v. Levinson, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). "In setting this standard, the [United States] Supreme Court acknowledged a concern that a lesser standard might bury shareholders in an avalanche of trivial information." *Henkel* at ¶ 34, citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38, 131 S.Ct. 1309, 179 L.Ed.2d 398 (2011), and *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976). In addition, federal securities law "do[es] not create an affirmative duty to disclose any and all material information. Disclosure is required * * * only when necessary to make statements made, in the light of the circumstances under which they were made, not misleading." *Matrixx* at 44 ("Silence, absent a duty to disclose, is not misleading [under federal securities law]").

{¶24} Ohio uses the same approach to materiality in a fraud or breach-of-fiduciary-duty claim. *See Henkel* at ¶ 35, citing *Saxe v. Dlusky*, 10th Dist. Franklin No. 09AP-673, 2010-Ohio-5323, ¶ 51 ("materiality in a fraud claim is essentially the same as the definition used for materiality in a federal securities claim").

{¶25} Accordingly, Convergys and its defendant directors were obligated to convey only material information in connection with the proposed transaction. There was no requirement that it "overload shareholders with meaningless detail or offer all available information that might be deemed helpful by some hypothetical reader." *Henkel* at ¶ 33. For instance, a board of directors is ordinarily not obligated to disclose "the panoply of possible alternatives to a course of action it is proposing, because too much information can be as misleading as too little." *Id.*, citing *In re 3Com Shareholders Litigation*, No. 5067-CC, 2009 WL 5173804, *6 (Del.Ch. Dec. 18, 2009). "Omitted facts are not material simply because they might be helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del.2000). "So long as the proxy statement, viewed in its entirety, sufficiently discloses and explains the matter to be

voted on, the omission or inclusion of a particular fact is generally left to management's business judgment." *In re 3Com* at *1. Furthermore, the law "does not require that a fiduciary disclose its underlying reasons for acting." *In re Sauer-Danfoss, Inc. Shareholders Litigation*, No. 5162-VCL, 2011 WL 2519210, *12 (Del.Ch. May 3, 2011).

{¶26} Zalvin's second amended complaint contains five principle arguments for the failures to disclose, basing his claims on material misrepresentations and omissions. First, he alleges that Ayers "shopped Convergys to Synnex and others without the knowledge or authorization of the Board," which he alleges was not disclosed to shareholders. It is clear from the proxy statement that Ayers did in fact disclose her meetings with potential bidders, but it is omitted whether she first had specific board approval. The proxy statement only describes that around the same time as Ayers's first meeting with potential bidders, "Convergys' board of directors discussed Convergys' near- and long-term strategy and, as part of its ongoing strategic planning, engaged a management consultant to conduct a strategic review of Convergys' business." However, Zalvin does not allege facts to demonstrate the materiality of this omission to the shareholder vote, and we do not see how this omission "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976). Zalvin merely speculates in a series of questions that allegedly unauthorized discussions affected negotiations in the sale agreement in a way that was not mentioned in an over 300-page, remarkably thorough proxy statement.

{¶27} Second, Zalvin alleges that the proxy statement is silent as to the steps the defendant directors "took to obtain a floating exchange rate for the stock portion of the Sale consideration." But again, the proxy statement does disclose in over ten

pages the negotiations between Convergys and Synnex regarding the steps the defendant directors took to obtain the ratio for the stock. And, Zalvin admits in his complaint that this information was disclosed, he just wants the reasoning for not having a fixed ratio (instead of the floating exchange ratio). While a fiduciary is not required to disclose its underlying reasons for acting, the proxy statement nonetheless discloses the underlying reasoning—in a section entitled, "Convergys' Reasons for the Mergers," stating:

> the collar structure of the consideration, which balances protection of the value of the stock component of the merger consideration in the event of a decline in SYNNEX's stock price during the pendency of the transaction while providing for a fixed exchange ratio in the event of significant increases in SYNNEX's stock price that will not be adjusted for fluctuations in the market price of shares of SYNNEX common stock or Convergys common shares, and will give Convergys shareholders greater certainty as to the number of shares of SYNNEX common stock to be issued to them in the transaction.

Thus, the floating exchange ratio was perceived to be the less risky option through the pending merger.

{¶28} Third, Zalvin alleges that the substance of the defendant directors' interactions with Elliott Management was omitted from the proxy statement, but the proxy statement summarizes a continued dialogue with Elliott Management over the course of three pages. And, as discussed in the preceding section, Zalvin's complaint does not allege that Elliott Management threatened a proxy fight. Zalvin does allege that Convergys entered into a standstill agreement with Elliott Management, but provided no other allegations to demonstrate that further disclosures regarding the standstill agreement would be useful to shareholders for considering the merger. We

agree with the court in *In re Novell, Inc. Shareholder Litigation*, 2013 WL 322560, No. 6032-VCN, *13 (Del.Ch. Jan. 3, 2013), which dismissed similar disclosure claims in a complaint regarding Elliott Management, holding:

> As a minority shareholder, Elliott [Management's] conduct does not rise to the level of assuming "actual significance in the deliberations of the reasonable shareholder." The actions of a minority (less than ten percent) holder with no representative on the board simply do not require the disclosures that the Plaintiffs argue would have been material. * * * [T]he Board had no effective control over what Elliott did and, as set forth above, how a perceived fear of Elliott may have influenced the sales process, once initiated, is not backed by any specific factual allegations.

{¶29} Fourth, Zalvin alleges that the proxy statement failed to disclose a conflict of interest regarding a financial advisor and investment bank called Centerview Partners, which was advising Convergys with respect to the fairness of the price to be paid by Synnex. Zalvin alleges that Centerview Partners' employees *might* own Synnex stock, and also that the proxy statement was misleading because it said that Centerview Partners' employees *might* own Synnex stock. In other words, Zalvin's allegations here are speculative. Moreover, it is unclear how the disclosure of more information than already disclosed in the proxy statement regarding the potential conflict of interest of Centerview Partners' employees would have had practical value for a shareholder vote.

{¶30} Finally, Zalvin alleges that the proxy statement does not disclose the Synnex management financial projections and analyst estimates used by Centerview Partners to generate its "fairness opinion"—i.e., the investment bank's endorsement of the fairness of the transaction. However, the proxy statement provided a

summary of the financial projections of the merger over the course of three pages. When the board of directors relies on the advice of a financial advisor in making a decision that requires shareholder action, those shareholders "are entitled to receive in the proxy statement a fair *summary* of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely." (Emphasis added.) *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 900 (Del.Ch.2016). There was no requirement that the defendant directors "overload shareholders with meaningless detail or offer all available information that might be deemed helpful by some hypothetical reader." *Henkel*, 167 Ohio Misc.2d 4, 2012-Ohio-423, 962 N.E.2d 395, at ¶ 33.

{¶31} Zalvin therefore failed to plead the materiality of any of the purported disclosure violations. Accordingly, Zalvin's claims against the defendant directors for failure to disclose fail to state a claim upon which relief could be granted.

{¶32} Convergys's proxy statement set out a thorough but straightforward narrative of how the corporation initiated negotiations with Synnex during 2017 and planned to effectuate a merger. Zalvin essentially ignored that detailed background in mounting his case. The merger went forward with a majority of shareholders voting for both the merger and the defendant directors' compensation. That, and similarly important facts, cannot be trumped by unsupported allegations such as the claim that the defendant directors acted in breach of their obligations.

Dismissal with Prejudice

{¶33} In his first assignment of error, Zalvin argues that the trial court's ruling was a decision otherwise than on the merits and therefore the dismissal should have been *without* prejudice. We disagree.

{¶34} A determination as to whether a dismissal is with or without prejudice rests within the discretion of the trial court. *Quonset Hut, Inc. v. Ford Motor Co.*, 80

Ohio St.3d 46, 47, 684 N.E.2d 319 (1997). However, "[b]ecause a dismissal with prejudice forever bars a plaintiff review of the merits of his claim, appellate 'abuse of discretion' review is heightened when reviewing decisions that forever deny a review of a claim's merits." *Grippi v. Cantagallo*, 11th Dist. Ashtabula No. 2011-A-0054, 2012-Ohio-5589, ¶ 11.

{¶35} Civ.R. 41(B)(1), which governs involuntary dismissals, provides that when a plaintiff fails to comply with the civil rules, the court may dismiss the action, either on the motion of a defendant or on its own motion. Civ.R. 41(B)(3) provides that "any dismissal not provided for in this rule * * * operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." A dismissal under Civ.R. 12(B)(6) for failure to state a claim is a dismissal under Civ.R. 41(B)(1) for failure to comply with the civil rules. *See Customized Solutions, Inc. v. Yurchyk & Davis, CPA's, Inc.*, 7th Dist. Mahoning No. 03MA38, 2003-Ohio-4881, ¶ 23. Therefore, a dismissal under Civ.R. 12(B)(6) operates as an adjudication on the merits and properly results in a dismissal with prejudice. *See Reasoner v. City of Columbus*, 10th Dist. Franklin No. 04AP-800, 2005-Ohio-468, ¶ 8-10.

{¶36} The trial court's order dismissing Zalvin's second amended complaint under Civ.R. 12(B)(1) and 12(B)(6) did not specify that it was not an adjudication on the merits, but nonetheless pursuant to Civ.R. 41(B)(1) and 41(B)(3), it was an adjudication on the merits. Accordingly, dismissal with prejudice was appropriate.

Conclusion

{¶37} Based on the foregoing, we conclude that Zalvin's complaint was properly dismissed with prejudice under Civ.R. 12(B)(6) and decline to consider the remaining basis for dismissal. Therefore, we overrule Zalvin's first and second assignments of error and affirm the judgment of the trial court.

Judgment affirmed.

MOCK, P.J., and **CROUSE, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.