The Bullet Point: Ohio Commercial Law Bulletin

Do I have the Right of Set-Off?

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Objections to Foreign Subpoena

***Byrd v. Lindsay Corp.*, 7th Dist. Mahoning No. 19 MA 0116, 2020-Ohio-5461**

In this appeal, the Seventh Appellate District affirmed the trial court's decision and agreed that the documents requested in the foreign subpoena *duces tecum* would not reasonably lead to the discovery of admissible evidence and thus were not relevant to the underlying litigation.

- **The Bullet Point:** R.C. 2319.09 codifies the Uniform Interstate Depositions and Discovery Act (UIDDA) and describes the procedures for an Ohio court to issue a subpoena for discovery originating in a foreign jurisdiction. Under the UIDDA, a party seeking discovery in Ohio must submit a foreign subpoena to an Ohio clerk of court, who then issues a subpoena for service upon the person to whom the foreign subpoena is directed. R.C. 2319.09(C)(2). The Ohio Rules of Civil Procedure apply to responding to foreign subpoenas and while discovery is supposed to be liberal, Civ.R. 26 was recently amended to align the Ohio rule with the federal rule in many respects. As explained by the court, Civ.R. 26(B)(1) now includes "language bearing on proportionality, which contemplates greater judicial involvement in the discovery process, and, thus, acknowledges the reality that discovery cannot always operate on a self-regulating basis." As the court further explained, while the standard for relevancy during the discovery process "is much broader than the test for relevancy used at trial," materials that will not reasonably lead to the discovery of admissible evidence are not relevant. In this case, the information sought by the appellant would not reasonably lead to the discovery of admissible evidence in the subject lawsuit. Consequently, the information was not relevant and the appellant's subpoena was properly quashed.

Bank Set-Off

***Moyer v. Abbey Credit Union, Inc.*, 2d Dist. Montgomery No. 28759, 2020-Ohio-5410**

In this appeal, the Second Appellate District affirmed in part and reversed in part the trial court's decision, agreeing that the bank improperly exercised the right of set-off as there was no mutuality of obligation between the bank and the estate.

- **The Bullet Point:** Under Ohio law, bank set-off is an extrajudicial self-help remedy that allows a bank to "apply general deposits of a depositor against a depositor's matured debt." Stated differently, set-off allows a bank to use funds held in a customer's general bank account to satisfy a matured debt owed by the customer to the bank. For example, a bank may exercise set-off when a customer has defaulted on a promissory note or car loan. This right to set-off arises out of the contractual debtor-creditor relationship

that is created between a customer and a bank when an account is opened. Three conditions must be met before a bank obtains the right to set-off: "1) the existence of mutuality of obligation, 2) the debtor's ownership of the funds used for set-off, and 3) the ripeness of the existing indebtedness for collection at the time of the set-off." A bank proves mutuality of obligation by demonstrating that both the bank and customer are obligated to each other; that is, "the bank must hold funds on behalf of the customer which it is obligated to pay to the customer, and the customer must be obligated in some way to the bank, such as through a promissory note." Where, as in this case, the customer has no obligation to the bank, there is no mutuality of obligation and the bank has no right to exercise set-off.

Contract Formation

***Vogel v. Albi,* 1st Dist. Hamilton No. C-190746, 2020-Ohio-5242**

In this appeal, the First Appellate District affirmed the trial court's decision, finding that the parties did not intend to be bound by their emails and there was no binding agreement as the contract was never executed.

- **The Bullet Point:** A contract requires a meeting of the minds between the parties, which is evidenced by an offer, acceptance, and consideration. Further, the essential terms of the agreement must be definite and certain. In Ohio, a contract for the sale of real property is required to be in writing to satisfy the statute of frauds. A formal written document is not necessary, and an email or exchange of emails may satisfy the written contract requirement. Even when the parties contemplate, but never execute, a formal written document, an agreement may still be enforced "so long as the parties have manifested an intent to be bound and their intentions are sufficiently definite" in the exchanged emails. However, where the emails demonstrate that the parties do not intend to be bound until the execution of a written contract, a written contract must be executed. As the court noted in this case, each email from the seller's agent contained a bolded and boxed statement that acceptance of the offer was contingent upon a fully executed written contract. Consequently, the seller and buyer did not intend to be bound by their emails and a written contract was required to create a binding agreement.

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[Cite as *Byrd v. Lindsay Corp.*, 2020-Ohio-5461.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

MALCOM BYRD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILBERT BYRD, DECEASED,

Plaintiff-Appellee,

v.

LINDSAY CORPORATION ET AL.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0116

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018RP177

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Evan Palik, Collins, Roche, Utley & Garner, LLC, 520 South Main Street, Suite 2551, Akron, Ohio 44311, and *Atty. Margo Meola,* Bonezzi Switzer Polito & Hupp Co. L.P.A., 3701 Boardman-Canfield Road, Canfield, Ohio, for David Reese, Non Party and

Atty. Matthew Blair, Blair & Latell Co. L.P.A., 724 Youngstown Warren Road, Niles, Ohio 44446, and *Atty. Shelby Riney*, Cozen O'Connor, One Liberty Place, 1650 Market Street, Suite 2800 Philadelphia, PA 19103, for Defendants-Appellants.

Dated: November 19, 2020

D'Apolito, J.

{¶1} Appellant, Lindsay Corporation ("Lindsay"), appeals the judgment entry of the Mahoning County Court of Common Pleas sustaining Appellee, David A. Reese III's Motion to Quash and for Protective Order Regarding Non-Party Foreign Subpoena, and overruling Lindsay's corresponding Motion to Compel Response to Subpoena. The subpoena was issued in a product liability and negligence case in the Circuit Court of Hamilton County, Tennessee, captioned *Malcolm Byrd, Personal Representative of the Estate of Wilbert Byrd v. Valmont Industries, Inc., et al.*, Case No. 17 C 747, and served on Reese, a resident of Mahoning County, pursuant to R.C. 2319.09, which codifies the Uniform Interstate Depositions and Discovery Act. Reese is an employee of Lindsay's main business competitor.

{¶2} Lindsay alleges that Reese acted in concert with a private citizen and non-party to the Tennessee action, Steven Eimers, to successfully lobby state departments of transportation ("state DOTs") in twenty states to remove Lindsay's product, a guardrail end terminal, from their list of qualified products ("QPL"), and, in many states, to physically remove the product from their highway systems. Lindsay asserts the Estate will rely on the actions of the state DOTs to establish that Lindsay's product is defective.

{¶3} As a consequence, Lindsay seeks any information provided by Reese to Eimers and state DOT employees in order to establish that Reese and his employer armed Eimers and others with false technical information regarding Lindsay's product, with the sole intent of destroying a business competitor. Lindsay contends that the state DOTs did not remove Lindsay's product "based on any independent finding of a defect," but, instead, because "they were heavily influenced by pressure from false publicly provided information from, among others, [Eimers], who was covertly being coached by high-ranking officials of [Reese's employer]." (Reply Brf., p. 3.)

{¶4} Based on correspondence from Lindsay's national counsel, in which he observes that Reese's alleged conduct constitutes tortious interference with business relationships, trade libel, and unfair competition, Reese argues that the information is being sought for the purpose of a threatened litigation, but is not relevant to the current

litigation. Reese further argues that the subpoena places an undue burden upon him, and that it seeks proprietary and confidential information. Finally, Reese asserts that Lindsay failed to demonstrate a substantial need for information that could not be gathered through alternative means, as any information regarding the actions of the state DOTs is accessible from the states themselves through a public records request.

{¶5} For the following reasons, we find that the trial court did not abuse its discretion in concluding that the requested information is not relevant to the Tennessee action.

FACTS AND PROCEDURAL HISTORY

{¶6} On June 28, 2107, Malcolm Byrd filed a complaint in Hamilton County, Tennessee against Lindsay and other defendants, including the state of Tennessee, in his capacity as the personal representative of his father, Wilbert Byrd, who died in an automobile accident in Tennessee on July 2, 2016. The complaint alleges that Wilbert suffered fatal injuries as a result of Lindsay and its related corporate defendants' negligence in connection with "the design, development, manufacture, assembly, testing, inspection, marketing, promotion, training, distribution, advertising, sale or processing" of the X-LITE guardrail end terminal and related guardrail systems. The complaint also asserts a claim for products liability.

{¶7} End terminals are a part of the complete guardrail system and are connected to the footage of the standard guardrail. The purpose of the end terminal is to shield the blunt end of the guardrail, and prevent penetration of the guardrail into a vehicle in the event of a collision. (Reese Aff., ¶ 2.)

{¶8} Wilbert was a passenger in a Ford Explorer, which was traveling on I-75 in Tennessee and collided with an X-LITE end terminal ("X-LITE") and guardrail system manufactured by Lindsay. According to the complaint, the guardrail pierced the vehicle's frame and caused Wilbert's fatal injuries.

{¶9} Lindsay and Road Systems, Inc., a corporation with its central headquarters based in Big Spring, Texas ("RSI") are two of only three producers of end terminals. Reese is the Product Manager at RSI. (*Id.*) Neither Reese nor RSI are parties to the Tennessee action.

{¶10} During the discovery phase of the Tennessee action, Lindsay issued a subpoena *duces tecum* for documents to Eimers. Eimers has a separate case pending against Lindsay and the other defendants. Eimers' complaint alleges that his daughter's death on November 1, 2016 was the result of a collision with an X-LITE end terminal. Neither Reese nor RSI is a party to the Eimers' action, however Eimers and the Estate share the same counsel.

{¶11} Following his daughter's death, Eimers became a relentless and vocal critic of Lindsay and the X-LITE. He has participated extensively in the public discussion of alleged defects and danger associated with the product, having provided testimony before numerous committees, and he has written hundreds of electronic mails to various state and Federal authorities.

{¶12} However, it is important to note that Virginia and Tennessee removed the X-LITE from the state's QPL in early fall of 2016, prior to the death of Eimers' daughter. In the spring of 2017, the Tennessee legislature passed a bill to remove the X-LITE from the state's highway system. In 2018, Tennessee passed a resolution calling for the removal of the X-LITE from roads in the United States due to in-service performance of the devices resulting in unacceptable safety levels. The resolution mandated that certified copies be forwarded to all state DOTs.

{¶13} According to Lindsay, Eimers' document production in the Tennessee action (roughly 4,300 documents) included multiple text messages and communications exchanged between Eimers and Reese. Lindsay contends that the text messages reveal Reese's and RSI's participation in Eimers' campaign against Lindsay and the X-LITE.

{¶14} Reese concedes that the Eimers' document production contained communications between Eimers and another RSI employee and Ohio resident, John Durkos, but asserts that it contains no communications between Eimers and Reese. Because Eimers is a layman, Lindsay asserts that Eimers' criticism of the design and operation of the product was informed by Reese and Durkos.

{¶15} According to Reese's brief, twenty states have removed the X-LITE from their respective QPLs, and, further, many have removed them from their highway systems at great expense. Lindsay counters that the Federal Highway Commission examined the

X-LITE and concluded that it presents no safety concerns, and further, that the X-LITE performed as designed in the Eimers' collision.

{¶16} On November 26, 2018, Lindsay filed a foreign subpoena *duces tecum* issued in the Tennessee action with the Mahoning County Court of Common Pleas pursuant to the Uniform Interstate Deposition and Discovery Act, R.C. 2319.09. The subpoena directs Reese to produce all of the following dated from January 1, 2015 to the present:

(1) All documents (electronic and hard copy) and communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) that discuss, mention or relate in any way to Lindsay, X-Lite, X-Tension, or MAX-Tension. For e-mail communications, identify any individual(s) that are blind copied (BCC);

(2) All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports calendar appointments) between you and Stephen Eimers. For e-mail communications, identify any individual(s) that are blind copied (BCC);

(3) All documents (electronic and hard copy) that discuss, mention or relate in any way to Stephen Eimers;

(4) All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between you and Victor Childers [a former Michigan Department of Transportation road safety consultant]. For e-mail communications, identify any individual(s) that are blind copied (BCC);

(5) All documents (electronic and hard copy) that discuss, mention or relate in any way to Victor Childers;

(6) All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between you

and the Tennessee Department of Transportation. For e-mail communications, identify any individual(s) that are blind copied (BCC);

(7) All documents (electronic and hard copy) that discuss, mention or relate in any way to the Tennessee Department of Transportation;

(8) All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between and [sic] any member of the Tennessee General Assembly, past and present, including their legislative aides. For e-mail communications, identify any individual(s) that are blind copied (BCC);

(9) All documents (electronic and hard copy) that discuss, mention or relate in any way to any member of the Tennessee General Assembly, past and present, including their legislative aides;

(10) All communications (including, but not limited to, e-mail, memoranda, letter[s], notes, reports, draft reports, calendar appointments) between you and any official elected to the United States Congress, past and present, including their legislative aides. For e-mail communications, identify any individual(s) that are blind copied (BCC); [and]

(11) All documents (electronic and hard copy) that discuss, mention or relate in any way to any official elected to the United States Congress, past and present, including their legislative aides[.]

{¶17} A virtually identical subpoena was issued to Durkos in Stark County. The trial court in Stark County sustained a motion to quash predicated upon the same arguments presented in Mahoning County. At the hearing on the motion to quash, Durkos limited the motion to items one through five of the subpoena.

{¶18} The Ninth District affirmed the judgment entry of the trial court, based on the relevance of the requested information to the Tennessee action, and without regard to Durkos' assertions of undue burden or availability of the information through other means. The Ninth District opined:

Lindsay argued that the documents in requests numbers one through five were relevant in anticipation that Mr. Byrd would attempt to prove defects in the X-LITE system indirectly—namely, by presenting evidence that various state departments of transportation had removed or had considered removing the X-LITE system from their roadways. Lindsay reasoned that Mr. Eimers' advocacy in this regard—which Lindsay characterized as a "crusade to destroy X-LITE"—would provide an alternative to this narrative. Specifically, Lindsay maintained that the documents set forth in request numbers one through five would demonstrate that the governmental entities acted not based on an assessment of the safety of the X-LITE system, but in response to a concerted campaign by Mr. Eimers to discredit Lindsay while Mr. Durkos "worked surreptitiously to aid" his efforts.

The claims at issue in this case, however, allege negligence and products liability in connection with the death of Wilbert Byrd on July 2, 2016. As the trial court noted, the accident that took the life of Mr. Eimers' daughter occurred on November 1, 2016. Mr. Eimers' advocacy, and the relationship between Mr. Durkos and Mr. Eimers that forms the basis that Lindsay articulated for the relevance of the document requests, postdates the accident at issue in this case by at least four months. As the trial court also observed, correspondence between Lindsay and Mr. Durkos' employer on September 26, 2018, also calls into question Lindsay's purpose for seeking the documents at issue because in that correspondence, Lindsay suggested that the information purportedly contained in the documents could give rise to claims of " 'tortious interference with business relations, trade libel, and/or [u]nfair [c]ompetition.' "

This Court has observed that "discovery proceedings may not be used to conduct a mere fishing expedition for incriminating evidence." Martin, 128 Ohio App.3d at 119, citing *Manofsky v. Goodyear Tire & Rubber Co.*, 69 Ohio App.3d. 663, 668 (9th Dist.1990). Given that Lindsay characterized Mr. Durkos' alleged relationship with Mr. Eimers as tortious conduct and

> that document requests one through five pertain to events that occurred after the date of Wilbert Byrd's death, the trial court did not err by concluding that those documents were not relevant to the underlying litigation. It follows that the trial court did not abuse its discretion by quashing the subpoena pursuant to Civ.R. 45(C) or by granting Mr. Durkos' motion for a protective order pursuant to Civ.R. 26(C).

Byrd v. Lindsay Corp., 9th Dist. Summit No. 29491, 2020-Ohio-3870, ¶¶ 11-13.

{¶19} In the objections to the subpoena filed on December 14, 2018, Reese alleges that the subpoena is overbroad and unduly burdensome, and that it seeks confidential research information, proprietary materials, private internal business data, product development documents, protected commercial information, business strategy and contracts in the industry and in various state agencies from an employee of Lindsay's main competitor. Reese further argues that the information sought is irrelevant to the Tennessee case, in which Byrd asserts claims for negligence and products liability.

{¶20} In the motion to quash and for protective order filed on January 30, 2019, Reese similarly asserts that "[t]he requests made in the subpoena are disingenuous and are calculated to allow Lindsay to access otherwise unobtainable trade secrets, contact information and confidential business information held by RSI. There is no reasonable expectation that anything that is derived from the production of the documents will or could be utilized or admitted in the [Tennessee action]." (1/30/19 Memorandum in Support of Motion to Quash, p. 2.)

{¶21} Lindsay filed its omnibus response in opposition to Reese's motions, as well as a motion to compel, on February 8, 2019. According to the response brief, "the Tennessee Court overseeing this case granted, over [the Estate's] objection – Lindsay's request to issue a similar subpoena duces tecum to [RSI], when presented with facts regarding [Reese and Dukos'] involvement in efforts to undermine X-LITE." (Response, p. 2.)

{¶22} In order to establish the RSI employees' role in Eimer's various challenges to X-LITE product, Lindsay cites an October 2017 electronic mail sent to Eimers, Reese,

and Durkos by Childers, a former Michigan Department of Transportation road safety consultant, which reads, in pertinent part:

> [I]f you want me to kill the x-shit I need 200 minimum actual locations . . .I want it "dead' so it don't kill anymore . . . Get the locations, I will do my best to get that shit gone . . . Get the locations, we will kill it or I make a x-shit BBQ & buy the steak . . .

{¶23} Lindsay asserts that the electronic mail establishes that "[*Durkos*] worked surreptitiously to aid [Eimers] in his crusade to destroy X-LITE, including submissions for the Federal Highway Administration and state departments of transportation" * * *all with the obvious intent of sabotaging X-LITE sales to the benefit of RSI. (Emphasis added)(Response at p. 6.) The response brief contains excerpts from many other electronic mails and text that include Durkos, but do not include Reese.

{¶24} Lindsay concludes that any argument that actions taken by state transportation departments prove that the X-LITE is defective "conveniently ignores that these decisions were the likely result of the overwhelming pressure exerted on state DOTs by [Eimers], often relying on the assistance he obtained from [Durkos] behind the scenes." (*Id.*) As a consequence, Lindsay states, "[i]n light of such overwhelming evidence of the symbiotic relationship between [Durkos and Eimers], *and evidence suggesting [Reese] may have assisted in their endeavors against X-LITE,"* Lindsay served the subpoena at issue in this appeal on Reese. (Emphasis added)(*Id.* at 10.)

{¶25} In Reese's state court reply brief, filed on February 27, 2019, he argues that the subpoena seeks information relevant to a proposed suit that may be filed by Lindsay against Reese's employer, RSI. He cites a September 26, 2018 letter from Lindsay's National Counsel to RSI, which reads, in pertinent part, "[s]ome of the communications we have seen may constitute tortious interference with business relations, trade libel and/or Unfair Competition." (9/26/18 Correspondence, Exh. G attached to Reply Brief.)

{¶26} According to Reese's Supplemental Affidavit, he has "no documents or communications which would be responsive to items [six through eleven] as it relates to the X-LITE product." (Reese Supp. Aff., ¶ 4.) Lindsay interprets Reese's averment as an

admission that he has in his possession the communications described in items one through five of the subpoena.

{¶27} The parties attempted to resolve Reese's objections to the subpoena prior to the filing of the objections and motion to quash. According to Lindsay's appellate brief, Lindsay offered to modify the subpoena to reflect that no proprietary or confidential information or trade secrets were requested. Reese rejected Lindsay's offer to modify the subpoena.

{¶28} A hearing on the motion was conducted by the magistrate on April 11, 2019. The magistrate heard oral argument but no testimony was offered in support of the competing motions. On June 11, 2019, the magistrate issued his decision granting the motion to quash and for protective order and denying Lindsay's corresponding motion to compel. Lindsay filed timely objections to the magistrate's decision on July 3, 2019 and Reese filed his reply on July 11, 2019.

{¶29} In the September 18, 2019 judgment entry quashing the subpoena, the trial court characterized Lindsay's assertion that the Estate would argue in the Tennessee action that the state's removal of the X-LITE was proof that it is defective as speculation. The trial court opined that the information, requested from a direct competitor, sought private internal business data and other privileged material. Next, the trial court concluded that the requested information was not relevant to the Tennessee action. Finally, the trial court found that Lindsay failed to demonstrate a substantial need for the information from Reese, because the information was readily available through a Freedom of Information Act request with the respective states. The judgment entry reads, in pertinent part, "There being no just cause for delay, Judgment is entered as above specified." (9/18/19 J.E., p. 8.)

LAW

{¶30} R.C. 2319.09, which codifies the Uniform Interstate Depositions and Discovery Act, describes the procedures for an Ohio court to issue a subpoena for discovery originating in a foreign jurisdiction. Pursuant to the Act, a party seeking discovery in Ohio must submit a foreign subpoena to an Ohio clerk of court, which must in turn "promptly issue a subpoena for service upon the person to which the foreign

subpoena is directed." R.C. 2319.09(C)(2). The Ohio Rules of Civil Procedure apply to subpoenas issued under R.C. 2319.09, and "[a]n application to the court for a protective order or to enforce, quash, or modify a subpoena" may be filed by the person from whom discovery is sought. R.C. 2319.09(E) &(F).

{¶31} The Rules of Civil Procedure contain liberal discovery provisions. Civ.R. 26, which regulates discovery, provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" Previous Civ.R. 26(B)(1).

{¶32} Civ.R. 26 was amended on July 1, 2020 to align the Ohio rule with the federal rule in many respects. Civ.R. 26(B)(1) now includes language bearing on proportionality, which contemplates greater judicial involvement in the discovery process, and, thus, acknowledges the reality that discovery cannot always operate on a self-regulating basis. Neither party contends that the amendments are applicable in the above-captioned appeal.

{¶33} Ohio courts have observed that the standard for relevancy during discovery "is much broader than the test for relevancy used at trial." *Block Communications, Inc. v. Pounds*, 6th Dist. Lucas No. L-13-1224, 2015-Ohio 2679, ¶ 41, citing *Hope Academy Broadway Campus v. White Hat Mgmt., LLC*, 10th Dist. Franklin No. 12AP–116, 2013-Ohio-911, ¶ 42. Accordingly, "[m]atters are only irrelevant by the discovery test when the information sought will not reasonably lead to the discovery of admissible evidence." *Tschantz v. Ferguson*, 97 Ohio App.3d 693, 715, 647 N.E.2d 507 (8th Dist.1994). Moreover, " 'the concept of relevancy as it applies to discovery is not to limit it to the issues in the case, but to the subject matter of the action, which is a broader concept.' " *Dater v. Charles H. Dater Found.*, 1st Dist. Hamilton Nos. C–02675, C–02784, 2003-Ohio-7148, 2003 WL 23024026, ¶ 51, quoting *Dennis v. State Farm Ins. Co.*, 143 Ohio App.3d 196, 204, 757 N.E.2d 849 (7th Dist.2001).

{¶34} An individual subject to a request for discovery may seek relief under Civ.R. 26(C)(1) on the basis that the material sought is not relevant to the subject matter involved in the pending action. See, e.g., *Herrick-Hudson, L.L.C. v. Cleveland-Cuyahoga Cty. Port Auth.*, 8th Dist. Cuyahoga No. 104053, 2016-Ohio-7716, ¶ 22. Similarly, material

subpoenaed pursuant to Civ.R. 45 " 'must have some relevance to [the proceeding] and be reasonably necessary[.]' " *Martin v. The Budd Co*., 128 Ohio App.3d 115, 119 (9th Dist.1998), quoting *McMillan v. Ohio Civ. Rights Comm.*, 39 Ohio Misc. 83, 94 (C.P. 1974).

{¶35} Civ.R. 26(C), captioned "Protective Orders," and Civ.R. 45(C), captioned "Protection of Persons Subject to Subpoenas," provide protection for non-parties and their business information and trade secrets. On motion of a party or any other person from whom discovery is sought, a trial court "may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including orders that provide that the discovery will not be allowed. Civ.R. 26(C). In addition, Civ.R. 26(C)(7) specifically provides that a protective order is appropriate when a trade secret, or other confidential research, business development, or commercial information is sought.

{¶36} Civ.R. 45(C)(3), reads in relevant part:

> On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:
>
> * * *
>
> (b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;
>
> * * *
>
> (d) Subjects a person to undue burden.

{¶37} Civ.R. 45(C)(5) provides:

> If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the

person to whom the subpoena is addressed will be reasonably compensated.

{¶38} Under Civ.R. 45(C), a trial court may quash or modify a subpoena if it subjects a person to an "undue burden." Ohio courts interpreting the Civil Rule have found that the person seeking to quash the subpoena must demonstrate the undue burden. *Fisher v. Doe*, 1st Dist. Hamilton No. C-160226, 2016-Ohio-7383, 63 N.E.3d 1236, ¶ 8, *McDade v. Morris*, 9th Dist. Summit No. 27454, 2015-Ohio-4670, 2015 WL 7075344, ¶ 9. Once an undue burden is established, the burden of proof shifts to the party seeking the discovery, who must demonstrate a substantial need for the materials that cannot be met through alternate means without undue hardship. *Fisher* at ¶ 8, *McDade* at ¶ 9.

{¶39} Absent an abuse of discretion, a trial court's decision to quash a subpoena will not be overturned. *State v. Glasure*, 7th Dist. Carroll No. 652, 2001-Ohio-3319, *1., citing *Petro v. N. Coast Villas Ltd.*, 136 Ohio App.3d 93, 96 (9th Dist. 2000). An abuse of discretion constitutes more than an error of law or judgment, it implies the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). "It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Cmty. Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶40} While a discovery order is ordinarily examined for an abuse of discretion, the interpretation of a civil rule presents a question of law, which is reviewed de novo. *Estate of Brummitt v. Ohio Mut. Ins. Group*, 6th Dist. Erie No. E-17-014, 2017-Ohio-8507, ¶ 14, appeal not allowed sub nom. *Estate of Brummitt v. Ohio Mut. Ins. Group.*, 152 Ohio St.3d 1446, 2018-Ohio-1600, 96 N.E.3d 300, ¶ 14 citing *Gumins v. Ohio Dept. of Rehab. & Correction*, 10th Dist. Franklin No. 10AP-941, 2011-Ohio3314, ¶ 11. However, any question concerning the propriety of the trial court's decision as it relates to the facts of the matter is reviewed for an abuse of discretion. *Large v. Heartland-Lansing*, 7th Dist. Belmont No. 12 BE 7, 2013-Ohio-2877, 995 N.E.2d 872, ¶ 13.

ANALYSIS

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN GRANTING [REESE'S] MOTIONS TO QUASH AND FOR PROTECTIVE ORDER.

{¶41} Although Lindsay asserts a single assignment of error, it advances four issues presented for review. First, Lindsay contends that the information requested is relevant to the Tennessee action and, therefore, discoverable pursuant to Civ.R. 26. Second, Lindsay argues that Reese failed to meet his initial burden under the civil rules to show that the subpoena constituted an undue burden. Third, Lindsay asserts that it has demonstrated a substantial need for the information, which was not available through any other means. Finally, Lindsay contends that the trial court should have exercised its authority to modify the subpoena to the extent that it determined proprietary information or trade secrets were being sought, after an in-camera inspection.

{¶42} Reese counters that the information sought by Lindsay is not relevant to the Tennessee action and that the information is available through a public records request. Reese's appellate brief does challenge Lindsay's remaining assertions, but, instead, focuses on the abuse of discretion standard and argues that we are without authority to reverse the judgment entry based on our limited standard of review.

{¶43} Having reviewed the record in this case, we find that the information sought by Lindsay was not relevant to the Tennessee action. Tennessee's decision to remove the X-LITE from its QPL predated the Eimers' accident, and, as a consequence, predated Eimers' advocacy against the Lindsay and the X-LITE. We further find that the information sought by Lindsay, although arguably relevant to a tortious interference claim, will not reasonably lead to the discovery of admissible evidence in a negligence and product liability case.

{¶44} Finally, Reese's alleged relationship with Eimers is not born out by the record. Lindsay concedes as much when it argues "[i]n light of such overwhelming evidence of the symbiotic relationship between [Durkos and Eimers], and evidence

suggesting [Reese] *may* have assisted in their endeavors against X-LITE,*"* Lindsay served the subpoena at issue in this appeal on Reese. (Emphasis added)(Response at 10.) To the extent that Lindsay has failed to demonstrate that Reese played even a negligible role in Eimers' efforts against Lindsay and the X-LITE, we find that the subpoenaed information is not relevant.

{¶45} Even assuming arguendo that we disagreed with the trial court's conclusion that the information sought by Lindsay is not relevant, we do not find that conclusion "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985), citing *State v. Jenkins*, 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (1984). Accordingly, we find that Lindsay's sole assignment of error is meritless.

CONCLUSION

{¶46} In summary, we find that the trial court did not abuse its discretion in concluding that the requested information was not relevant to the Tennessee action. Accordingly, the judgment entry of the trial court is affirmed.

Waite, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *Moyer v. Abbey Credit Union, Inc.*, 2020-Ohio-5410.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JUDA MOYER	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 28759
	:	
v.	:	Trial Court Case No. 2019-MSC-127
	:	
ABBEY CREDIT UNION, INC.	:	(Appeal from Probate Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 25th day of November, 2020.

. . . . . .

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WELBAUM, J.

{¶ 1} Defendant-Appellant, Abbey Credit Union, Inc., ("Abbey") appeals from a judgment on the pleadings rendered in favor of Plaintiff-Appellee, Juda Moyer, executor of the Estate of Shirlee A. Garringer ("Moyer"). According to Abbey, the probate court erred in granting judgment on the pleadings because such a disposition was not permitted under Civ.R. 12(C). Abbey further contends that it was entitled to use the self-help right of setoff against an estate account upon discovering that it had mistakenly transferred funds to the estate, when the estate was not entitled to the funds. Abbey also contends that Moyer failed to sustain any damages and was not entitled to the money that was deposited into the estate account.

{¶ 2} We conclude that the probate court erred in rendering judgment on the pleadings because the damages were not supported by any evidence. Although Abbey incorrectly exercised the right of setoff, Moyer was not legally entitled to the money. Moyer, therefore, had to establish that she detrimentally relied on Abbey's actions and that damages resulted. Since no proof was presented on these points, the probate court had no basis for awarding Moyer the entire amount of money that had been mistakenly transmitted. Accordingly, the judgment of the probate court will be affirmed in part and reversed in part, and this cause will be remanded for further proceedings concerning damages.

I. Facts and Course of Proceedings

{¶ 3} This case arose from Abbey's mistaken payment of funds in a decedent's account to the executor of the decedent's estate. Specifically, the decedent's account designated a payable on death ("POD") beneficiary to whom the funds should have been

paid, rather than being paid to the executor.

{¶ 4} According to the facts in the complaint (which Abbey mostly admitted),[1] the decedent, Shirlee Garringer, owned a share savings account with Abbey at the time of her death. On June 25, 2018, an attorney representing Juda Moyer (Garringer's executor) sent Abbey a letter, requesting date of death balance for Garringer's account, as well as the " 'name of the beneficiary [listed on the account] if applicable.' " Complaint at ¶ 6.

{¶ 5} On June 29, 2018, Abbey responded, stating that it had closed Garringer's account on June 6, 2018, and had issued a check payable to the Estate of Shirlee A. Garringer. Subsequently, Moyer, as executor, opened a checking and savings accounts for the estate at an Abbey branch location on July 2, 2018; at that time, Moyer deposited Abbey's cashier's check in the amount of $26,239.97 into the estate's accounts. This check was the same one that Abbey had issued to the estate. When the check was deposited, Moyer told Abbey to deposit $10,000 into the estate's checking account, and the rest into the estate's savings account. *Id*. at ¶ 6-10.

{¶ 6} After the money was deposited, Moyer began administering the estate's financial affairs, including depositing funds received from other banks. She also began writing checks to pay estate expenses. At some point after the cashier's check was initially deposited, Abbey discovered that Garringer's account contained a POD designation. As a result, Abbey executed a "transfer" or "charge back" of $26,239.97 from the estate's checking and savings accounts. *Id*. at ¶ 11-13.

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[1] The only fact not admitted was the date of Garringer's death, which was alleged to have occurred on May 23, 2018. *See* Complaint at ¶ 4, and Answer at ¶ 2.

{¶ 7} On December 7, 2018, Moyer's attorney sent Abbey a demand letter requesting that Abbey return the funds it had debited. However, Abbey did not return the funds. *Id*. at ¶ 14-17. As a result, Moyer filed a complaint in the Montgomery County probate court in April 2019, seeking relief on four grounds: breach of contract, conversion, failure to exercise ordinary care under R.C. 1304.03, and failure to comply with R.C. 2117.06. Abbey filed an answer on May 5, 2019, denying liability and asserting affirmative defenses.

{¶ 8} On August 7, 2019, Moyer moved for judgment on the pleadings, and Abbey filed a response. In addition, Abbey filed a motion seeking leave to amend its answer to allege the affirmative defenses of extrajudicial setoff and self-help. The probate court granted Abbey's motion to amend on October 29, 2019. The following day, the court granted Moyer's motion for judgment on the pleadings. Abbey then filed a timely notice of appeal from the judgment, which was docketed as Montgomery App. No. 28620.

{¶ 9} In January 2020, we issued a show cause order which asked the parties to explain why the appeal should not be dismissed for lack of a final appealable order. We then dismissed the appeal on that basis, because the probate court's judgment had not addressed the issue of damages. *See Moyer v. Abbey Credit Union*, 2d Dist. Montgomery No. 28620, p. 2 (Decision and Final Judgment Entry, Feb. 13, 2020).

{¶ 10} After the appeal was dismissed, the probate court filed an entry and order on February 24, 2020, ordering Abbey to deposit and/or return the sum of $26,239.97 (the amount of the cashier's check made payable to the Estate of Shirlee Garringer) into the estate's checking and/or savings accounts at Abbey Credit Union within 30 days. Abbey then appealed from both judgments on March 19, 2020.

II. The Motion for Judgment on the Pleadings

{¶ 11} Abbey's sole assignment of error states that:

> The Trial Court Erred in Granting the Plaintiff's Motion for Judgment on the Pleadings.

{¶ 12} Abbey raises several issues under this assignment of error. For purposes of clarity, we will discuss the issues separately, beginning first with the procedural posture of the case.

A. Was the Probate Court's Procedure Appropriate?

{¶ 13} Abbey's first argument is that the probate court should not have decided this matter based on the pleadings because Civ.R. 12(C) motions are to be used offensively, not defensively. In response, Moyer argues that Abbey failed to raise this point below. Moyer further notes that Civ.R. 12(C) allows "any party" to move for judgment on the pleadings, not just defendants.

{¶ 14} As an initial point, we agree that Abbey failed to challenge the process used by the probate court. In responding to Moyer's Civ.R.12(C) motion, Abbey did note that Civ.R.12(C) is typically invoked by defendants. Memorandum Opposing Plaintiff's Motion for Judgment on the Pleadings ("Memo Opposing Judgment on the Pleadings"), p. 4. However, Abbey did not object to having the court consider the merits of the case; instead, Abbey argued that the standard (of construing the facts most favorably to the nonmovant) "cuts the other way" when the plaintiff is the movant. *Id*.

{¶ 15} The parties' agreement to a particular procedure does not mean that a court

is correct in following their lead if the parties' analysis is, in fact, incorrect. Therefore, we look to Civ.R. 12(C) and caselaw to decide this point. Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Although defendants typically file these motions, that is not always the case.

{¶ 16} In *Portfolio Recovery Assocs., L.L.C. v. VanLeeuwen*, 2d Dist. Montgomery No. 26692, 2016-Ohio-2962, we considered a situation in which the plaintiff, an assignee of a credit card issuer, brought suit against a defendant and was then granted judgment on the pleadings. *Id*. at ¶ 2. In discussing the plaintiff's motion, we commented that:

> "In the determination of a Civ.R. 12(C) motion, the nonmoving party is entitled to have all of the material allegations in the pleading, with all reasonable inferences to be drawn therefrom, construed in his favor as true." *Am. Tax Funding L.L.C. v. Miamisburg*, 2d Dist. Montgomery No. 24494, 2011-Ohio-4161, ¶ 31. In the review of a motion for judgment on the pleadings to dismiss a complaint, the Supreme Court of Ohio has declared that, "entry of judgment pursuant to Civ.R. 12(C) is only appropriate 'where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.' " *Hester v. Dwivedi*, 89 Ohio St.3d 575, 577-78, 733 N.E.2d 1161 (2000), citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996). This high burden is not lessened when

> a motion for a judgment on the pleadings is filed to obtain judgment, as the movant must prove, beyond a doubt, the absence of any genuine issue of fact and that it is entitled to judgment as a matter of law. We have held that a summary judgment "is to be awarded only with great caution, with all doubts resolved in favor of the nonmoving party, because it deprives the nonmoving party of his day in court." *Smith v. Five Rivers MetroParks*, 134 Ohio App.3d 754, 764, 732 N.E.2d 422 (2d Dist.1999), citing *Norris v. Ohio Std. Oil Co*. 70 Ohio St.2d 1, 2, 433 N.E.2d 615 (1982). The same degree of caution must be exercised when considering a motion for judgment on the pleadings.

Id. at ¶ 15.

{¶ 17} As Moyer notes, Civ.R. 12(C) refers to "any" party, not just to plaintiffs. Thus, while granting a plaintiff's motion for judgment on the pleadings is somewhat rare, it is not inappropriate. With that in mind, we will consider the next point that Abbey has raised.

B. Alleged Right of Setoff

{¶ 18} Abbey's second argument is that it was entitled to use its right of setoff to retrieve money from Moyer's account. The probate court rejected this contention, stating that no mutuality of obligation or debtor-creditor relationship existed between the bank and the estate. Entry Granting Plaintiff's Motion for Judgment on the Pleadings ("Entry"), p. 8-9.

{¶ 19} We review decisions on motions for judgment on the pleadings de novo,

because these motions present only questions of law. "De novo review mandates an independent decision, without deference to a trial court's determination." *Howard v. HCR ManorCare, Inc*., 2018-Ohio-1053, 99 N.E.3d 429, ¶ 23 (2d Dist.).

{¶ 20} "Bank setoff is an extrajudicial self-help remedy based on general principles of equity. It allows a bank to apply general deposits of a depositor against a depositor's matured debt. Courts have found that this right arises from the contractual debtor-creditor relationship created between depositor and bank when an account is opened." *Daugherty v. Cent. Tr. Co. of Northeastern Ohio*, 28 Ohio St.3d 441, 446, 504 N.E.2d 1100 (1986). "Setoff is not strictly limited by statute, and the courts can allow setoff upon equitable principles where necessary to prevent clear injustice." *Walter v. Natl. City Bank of Cleveland*, 42 Ohio St.2d 524, 330 N.E.2d 425 (1975), paragraph one of the syllabus.

{¶ 21} "[T]hree conditions must be satisfied before a bank may set off a customer's deposits against his indebtedness to the bank: (1) the existence of mutuality of obligation, (2) the debtor's ownership of the funds used for setoff, and (3) the ripeness of the existing indebtedness for collection at the time of the setoff." *Citizens Fed. Bank, FSB v. Zierolf*, 119 Ohio App.3d 46, 49, 694 N.E.2d 496 (2d Dist.1997).

{¶ 22} After considering the law and the record, we agree with the probate court that mutuality of obligation did not exist here. We explained in *Zierolf* that "[t]he mutuality of obligation which must be shown to entitle a bank to a setoff must exist as between the bank and its customer. As the term implies, the bank must hold funds on behalf of the customer which it is obligated to pay to the customer, and the customer must be obligated in some way to the bank, such as through a promissory note." *Id*. at 51.

{¶ 23} In *Zierolf*, the party to whom setoff was applied was a bank customer who had signed a $160,000 promissory note to the bank and had defaulted on the note. The bank then placed a hold on a CD of which the debtor was a co-owner. *Id*. at 48. Similarly, in *Walter*, a bank attempted to set off the amount of a promissory note that its customer had signed. However, in that case, the court rejected setoff because the loan had not yet matured. *Walter*, 42 Ohio St.2d at 527, 330 N.E.2d 425. Likewise, in *Kopp v. Bank One, NA*, 11th Dist. Lake No. 2002-L-025, 2003-Ohio-64, a bank set off the amount of a defaulted car loan that it held against a joint and survivorship account of which the debtor was a joint owner. *Id*. at ¶ 2-4.

{¶ 24} In the case before us, there was no such mutuality of obligation. Moyer did not borrow money from Abbey. Instead, Abbey mistakenly paid money from another account holder to Moyer. The fact that Moyer later deposited the money at Abbey was a mere coincidence. Accordingly, setoff did not apply to the situation in the case before us, and the probate court did not err in rejecting that theory.

B. Charge-Back

{¶ 25} Abbey also argues that the probate court erred in focusing on the issue of whether Abbey was entitled to take a "charge-back" of the funds in the account. According to Abbey, it never asserted that it was entitled to a charge-back under R.C. 1304.24(A). Instead, Abbey argues that its claim was one for money paid by mistake. Abbey also argues that Moyer was not entitled to the money, as it did below. Memo Opposing Judgment on the Pleadings at p. 4.

{¶ 26} One of the matters the probate court discussed was whether Abbey was

entitled to revoke or "charge-back" the credits it made to the estate's account. The court answered this negatively, concluding that because Abbey paid Moyer by cashier's check, this payment, being the equivalent of cash, was final when the check was given to Moyer, and Abbey was not entitled to a charge-back under R.C. 1304.24(A). Entry at p. 5-6.

{¶ 27} Again, due to the nature of a judgment on the pleadings, we review the probate court's decision on a de novo basis, which means that we do not defer to the lower court's decision. *Howard*, 2018-Ohio-1053, 99 N.E.3d 429, at ¶ 23.

{¶ 28} R.C. 1304.24(A) provides that:

> If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain a refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge-back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

{¶ 29} The settlement here was made by a cashier's check on which Abbey was

both the drawer and drawee. A cashier's check is defined as "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank." R.C. 1303.03(G). *See also* R.C. 1304.01(C) (which indicates that the definition of a cashier's check as used in R.C. 1304.01 to 1304.40 has the same meaning as in R.C. 1303.03).

{¶ 30} Concerning tender of cashier's checks, R.C. 1304.23(A)(2)(a) states that the time of settlement is "when the cash or check is sent or delivered."[2] The time of settlement, therefore, would have been on June 6, 2018, when Abbey closed the Garringer account and sent or delivered the certified check to Moyer.

{¶ 31} R.C. 1304.23(C) further provides that:

> If settlement for an item is made by cashier's check or teller's check, both of the following apply:
>
> (1) If the person receiving settlement, before its midnight deadline, presents or forwards the check for collection, settlement is final when the check is finally paid.
>
> (2) If the person receiving settlement, before its midnight deadline, fails to present or forward the check for collection, settlement is final at the midnight deadline of the person receiving settlement.

{¶ 32} And finally, R.C. 1304.25 states that:

> (A) An item is finally paid by a payor bank when the bank has done any of the following:
>
> (1) Paid the item in cash;

---

[2] This provision applies in the absence of prescription by "federal reserve regulations or circulars, clearing house rules, and similar rules and documents, or agreement." R.C. 1304.02(A). No evidence was presented to indicate that these prescriptions existed.

(2) Settled for the item without having a right to revoke the settlement under statute, clearing house rule, or agreement;

(3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule, or agreement.

{¶ 33} Again, the parties did not provide information below concerning whether any clearing house rules or agreements applied. However, reading the above statutes together, payment would have been final at the time of Abbey's midnight deadline for July 2, 2018, which is when the estate's accounts were opened and the cashier's check was deposited and was accepted by Abbey. The revocation of settlement did not occur until September 9, when Abbey debited the amount of the cashier's check from Moyer's account. Therefore, if R.C. 1304.24(A) had been the basis for debiting the account, Abbey's right to terminate ended when the payment was final.

{¶ 34} As noted, Abbey contends that R.C. 1304.24(A) does not apply because its claim was for "money paid in mistake," and was not for a "bounced check" as contemplated by R.C. 1304.24(A). In support of this argument, Abbey cites *Soc. Bank, NA v. Kuntz*, 2d Dist. Montgomery No. 12637, 1991 WL 213874 (Sept. 17, 1991). In *Kuntz*, we held that a bank was entitled to a constructive trust over a customer's account where the customer had been unlawfully and unjustly enriched by the bank's mistake. *Id*. at *3, citing R.C. 1303.28(A) and (B).

{¶ 35} As a preliminary point, it is not completely clear that R.C. 1304.24(A) applies only to "bounced checks." The statute references situations in which "a collecting bank has made provisional settlement with its customer for an item and fails by reason of

dishonor, suspension of payments by a bank, *or otherwise* to receive settlement * * *." (Emphasis added.) The statute does not define what "otherwise" means, and the situation here conceivably could have arisen under the statute, although it appears to apply primarily to situations in which a check is dishonored or refused after being presented for collection.

{¶ 36} We do agree that Abbey did not rely on R.C. 1304.24(A) in the probate court. This was an argument that Moyer raised and that the probate court used to conclude that Abbey did not have a statutory right under R.C. 1304.24(A) to "charge-back" the account.

{¶ 37} Concerning the application of a constructive trust and R.C. 1303.28, this statute was repealed in 1994 and was amended and recodified as R.C. 1303.23. *See* Amendment Note to R.C. 1303.23. After recodification, the statute no longer mentions "constructive trust." Furthermore, unlike the bank in *Kuntz*, Abbey elected to use self-help rather than to place a hold on the funds and file suit, or simply file suit against Moyer. Specifically, after making mistakes in paying a check presented by an unauthorized party, the bank in *Kuntz* paid the wronged party and filed suit against the party it had mistakenly paid. *Id*. at *1.

{¶ 38} Nonetheless, whether or not R.C. 1304.24(A) applies is essentially irrelevant, because the probate court failed to consider R.C. 1304.24(E), which states that "[a] failure to charge-back or claim refund does not affect other rights of the bank against the customer or any other party." R.C. 1301.103(B) also provides that "[u]nless displaced by the particular provisions of Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309. , and 1310. of the Revised Code, the principles of law and equity,

including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, *mistake*, bankruptcy, and other validating or invalidating cause supplement their provisions." (Emphasis added.)

{¶ 39} The Ohio Supreme Court has stressed that " 'the general assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly supports such intention.' " *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, ¶ 29, quoting *State ex rel. Hunt v. Fronizer*, 77 Ohio St. 7, 16, 82 N.E. 518 (1907). *Accord Cheatham I.R.A. v. Huntington Natl. Bank*, 157 Ohio St.3d 358, 2019-Ohio-3342, 137 N.E.3d 45, ¶ 21.

{¶ 40} Thus, even if Abbey was not entitled to remove the funds based on setoff or charge-back, that does not mean that common law principles cannot apply here. Before the probate court's decision was issued, Abbey amended its answer to include affirmative defenses, including the fact that the estate had no right to the funds and that a lack of consideration existed. In addition, Abbey previously had raised the issue of mistake, citing *Firestone Tire & Rubber Co. v. Cent. Nat. Bank of Cleveland*, 159 Ohio St. 423, 112 N.E.2d 636 (1953). Memo Opposing Judgment on the Pleadings at p. 2. And, as noted, Abbey further raised the fact that Moyer could not claim damages, as the estate was never entitled to the money.

{¶ 41} In the case before us, Moyer's complaint was based on breach of contract, conversion, failure to exercise ordinary care under R.C. 1304.03, and failure to comply with R.C. 2117.06. In its original decision, the probate court did not indicate the ground on which its judgment was issued; the court primarily discussed the remedies of setoff and charge-back and concluded that Abbey was not entitled to use these remedies to

deduct the money from Moyer's accounts. While this may be true, the issue of damages for Abbey's acts must be considered. However, the probate court did not specifically address the damages issue. Instead, after we remanded the case for lack of a final appealable order, the court simply ordered Abbey to pay Moyer the entire amount of the claim, without any discussion at all.

{¶ 42} "In a breach of contract claim, the plaintiff must prove the existence of a contract, the plaintiff's performance under the contract, the defendant's breach, and damages." *Meeker R & D, Inc. v. Evenflo Co.*, 2016-Ohio-2688, 52 N.E.3d 1207, ¶ 41 (11th Dist.), citing *Doner v. Snapp*, 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2d Dist.1994). There is no question that a contractual relationship existed here by virtue of the fact that Moyer opened up checking and savings accounts with Abbey. However, no contract terms were provided to the probate court, and as indicated, the court did not give any reasons for its decision on damages.

{¶ 43} "To recover on a breach-of-contract claim, the claimant must prove not only that the contract was breached, but that the claimant was thereby damaged." *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc.*, 97 Ohio App.3d 228, 235, 646 N.E.2d 528 (1st Dist.1994). *Accord Daniel v. Walder*, 2d Dist. Montgomery No. 27558, 2017-Ohio-8914, ¶ 13. " 'As a general rule, an injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty, and generally, courts have required greater certainty in the proof of damages for breach of contract than in tort.' " *Walder* at ¶ 13, quoting *Rhodes v. Rhodes Industries, Inc.*, 71 Ohio App.3d 797, 808-809, 595 N.E.2d 441 (8th Dist.1991). " 'The normal remedy for a breach of contract claim is to give the injured party such relief as will

put him in as good a position as if the contract had been performed.' " *Id*., quoting *Tucker v. Young*, 4th Dist. Highland No. 04CA10, 2006-Ohio-1126, ¶ 30.

{¶ 44} In the case before us, there is no dispute about the fact that Moyer was not legally entitled to the funds either when Abbey gave Moyer the check or when Moyer deposited the check in the bank. Consequently, it is difficult to see what, if any, damages Moyer sustained as a result of the breach.

{¶ 45} In *Firestone*, the Supreme Court of Ohio held that "[m]oney paid to another under the mistaken supposition of the existence of a specific fact which would entitle the other to the money, which money would not have been paid had it been known to the payer that the fact did not exist, may be recovered, provided the payment does not result in such a change in the position of the payee that it would be unjust to require a refund." *Firestone*, 159 Ohio St. 423, 112 N.E.2d 636, paragraph four of the syllabus. The ultimate summary of these principles, according to the court, is that "[a] payer, even if negligent in making payment under a mistake of fact, may recover if his act has not resulted in a change in the position of the innocent payee to his detriment." *Id*. at 439.

{¶ 46} Consistent with *Firestone*, Moyer alleged in the complaint that she had "detrimentally relied" on the funds to pay estate expenses. Complaint at ¶ 22. However, beyond this minimal statement in the pleadings, no evidence was ever offered to show what expenses were paid and why those expenses could not have been paid with the other funds deposited with the estate. For example, the probate court noted that Moyer had deposited funds from other institutions into the estate's account, including $23,623.67 that was received from Garringer's account with Wright-Patt Credit Union. Entry at p. 2. Because this figure was never mentioned in the pleadings (to which the

court was restricted), we assume the court obtained the figure from documents that were filed in the probate case involving Garringer's estate. *See Estate of Shirlee A. Garringer*, Montgomery P.C. No. 2018EST01173.[3]

{¶ 47} Even if the court were permitted to consider the probate court record, it appears there were no damages. The inventory filed in that case on August 9, 2018, indicated a $50,706.13 value for the estate. Therefore, the estate had that amount in assets at the time. The first and partial inventory, covering the period from June 18, 2018 through March 20, 2020, was filed on March 20, 2020. According to the inventory, Abbey took back its funds on September 9, 2018. Between July 18, 2018 and September 9, 2018, the estate paid only about $5,963 for expenses that it had incurred. Given the estate's value, it is hard to imagine how Moyer detrimentally relied on Abbey's funds before they were taken back.

{¶ 48} As an example of a situation in which a party was mistakenly paid and suffered detriment that prevented the payor from obtaining a full recovery of the money, see *WesBanco Bank, Inc. v. Smoked Ribs, Inc*., 2016-Ohio-177, 45 N.E.3d 1066, (4th Dist.). In that case, a bank employee had mistakenly used an incorrect key to code in American Express transactions at a Comfort Inn. As a result, a restaurant (Smoked Ribs, Inc.) was paid instead of the hotel, resulting in an overpayment of about $239,000 to Smoked Ribs. *Id*. at ¶ 4-5. Consistent with *Firestone*, the bank was allowed to

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[3] Although the pleadings in the estate case are not part of the current record, courts "may take judicial notice of judicial opinions and public records accessible through the Internet." *State v. Bevers*, 2d Dist. Montgomery No. 27651, 2018-Ohio-4135, ¶ 13. The probate records for the Montgomery County Probate Court are accessible over the Internet, and only one estate in the court's online records involves Shirlee Garringer's estate. However, here, while ruling on the Civ.R. 12(C) motion, the probate court was restricted to the pleadings.

recover the overpayments. However, the recovery was limited because Smoked Ribs was able to prove that it detrimentally relied on the money it had received by using some of it for property improvements that it otherwise would not have made. Furthermore, the restaurant made the improvements before receiving notice of the overpayments. *Id*. at ¶ 48-49.

{¶ 49} Here, Moyer had notice on September 9, 2018, that a dispute existed concerning the funds. Any actions that Moyer took after that date could not possibly have been the result of detrimental reliance. Moreover, as we said, Moyer failed to submit any proof with respect to her alleged detrimental reliance or payments that were made as a result of her reliance. Although Moyer was not required to include these matters in the pleadings, granting judgment on the pleadings as to damages was not appropriate, given this deficiency.

{¶ 50} The remaining claims that Moyer asserted do not provide any basis for damages. As to conversion, it is "an exercise of dominion or control wrongfully exerted over property in denial of or under a claim inconsistent with the rights of another." *Dice v. White Family Cos*., 173 Ohio App.3d 472, 2007-Ohio-5755, 878 N.E.2d 1105, ¶ 17 (2d Dist.). The elements of an action for conversion are: " '(1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages.' " *Id.*, quoting *Haul Transport of VA, Inc. v. Morgan*, 2d Dist. Montgomery No. 14859, 1995 WL 328995 (June 2, 1995).

{¶ 51} "The general rule for the measure of damages in a conversion claim is the value of the property at the time of the conversion." *Windward Ents., Inc. v. Valley City*

Dev. Group LLC, 2019-Ohio-3419, 142 N.E.3d 177, ¶ 16 (9th Dist.). However, in tort actions, "the measure of damages is that which will compensate and make the plaintiff whole." *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 11. Again, because Moyer was not entitled to the money that was erroneously deposited, there was no need to make her "whole."

{¶ 52} More importantly, in Ohio, "[t]he economic-loss rule generally prevents recovery in tort of damages for purely economic loss." *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc*., 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, ¶ 6. "This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that 'parties to a commercial transaction should remain free to govern their own affairs.' " *Id*., quoting *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co*., 42 Ohio St.3d 40, 42, 537 N.E.2d 624 (1989).

{¶ 53} There was no indication here that Moyer suffered anything other than alleged economic loss – which as we noted, she does not appear to have had. The economic loss restriction also disposes of any potential tort claim for breach of ordinary care under R.C. 1304.03, even if that statute applied.

{¶ 54} Finally, concerning R.C. 2117.06, which applies to claims of creditors of an estate and time limits for filing claims, the probate court concluded that Abbey was not acting as a creditor of the estate. Entry at p. 8. We agree. As a result, this statute was inapplicable.

{¶ 55} In summary, while Abbey was not justified in debiting Moyer's account, Moyer failed to present proof of damages that she sustained as a result. As a result, the

probate court erred in granting judgment on the pleadings with respect to damages, which were required to be proven. Although the outcome of the damages assessment appears clear, the procedural disposition of the case prevented the presentation of any evidence on this point. Accordingly, the case must be reversed and remanded in order to allow the parties to present evidence as to the damages, if any, to be awarded. Abbey's sole assignment of error, therefore, is sustained in part and is overruled in part.

III. Conclusion

{¶ 56} Abbey's assignment of error having been sustained in part and overruled in part, the judgment of the probate court is affirmed in part and reversed in part, and this cause is remanded for a hearing on damages.

. . . . . .

DONOVAN, J. concurs.

FROELICH, J., concurs:

{¶ 57} I concur in the judgment and note only that, on remand for consideration of damages, what the evidence will show and the amount of damages, if any, are matters for the trial court, notwithstanding comments in this opinion.

Copies sent to:

R. Michael Osborn
Stephen D. Miles
Vincent A. Lewis
Hon. Alice O. McCollum

[Cite as *Vogel v. Albi*, 2020-Ohio-5242.]

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

JOE VOGEL,	:	APPEAL NO. C-190746 TRIAL NO. A-1806867
Plaintiff-Appellant/Cross-Appellee,	:	*O P I N I O N.*
vs.	:	
FRANK J. ALBI,	:	
and	:	
THIRD STREET ASSOCIATES, LLC,	:	
Defendants-Appellees/Cross-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 10, 2020

Holzapfel Law, LLC, and *Eric C. Holzapfel*, for Plaintiff-Appellant/Cross-Appellee,

Eberly McMahon Copetas, LLC, and *Robert A. McMahon*, for Defendants-Appellees/Cross-Appellants.

MYERS, Presiding Judge.

{¶1} In this appeal, we are asked to determine whether a series of emails formed a binding contract between plaintiff-appellant/cross-appellee Joe Vogel and defendants-appellees/cross-appellants Frank Albi and Third Street Associates, LLC, ("Third Street") for the sale of a piece of real estate.

{¶2} Because the emails failed to demonstrate a meeting of the minds between the parties, and because any acceptance of an offer by seller was contingent upon execution of a written contract, we hold that the trial court did not err in granting judgment in favor of Albi and Third Street on Vogel's claim for breach of contract. We further find that the trial court did not err in granting judgment in favor of Vogel on the counterclaims asserted by Albi and Third Street for tortious interference with a contract and business relationship, slander of title, abuse of process, and frivolous conduct, and we affirm the trial court's judgment in its entirety.

Factual and Procedural Background

{¶3} Third Street owns the property located at 318 West Third Street in downtown Cincinnati. Albi is the manager of Third Street, which is owned by the Albi Family Trust. Albi hired Joe Janszen, a local real estate agent, to sell 318 West Third Street. Janszen was unable to sell the building, and Albi engaged Williams and Williams, an auction company located in Tulsa, Oklahoma, to sell the property at auction. The property failed to sell at an auction held in November of 2018.

{¶4} On December 3, 2018, Vogel emailed Williams and Williams to inquire about the property. Vicky Blackmon responded to Vogel on behalf of Williams and Williams, informing him that the property had not sold at auction and asking him if

he wanted to make an offer. Vogel and Blackmon proceeded to exchange the following emails:

- Vogel to Blackmon (December 3, 2018, at 4:49 p.m.): It didn't get a bid over $500K?
- Blackmon to Vogel (December 3, 2018, at 5:55 p.m.)[1]: No it did not. Would you like to make an offer over 500K?
- Vogel to Blackmon (December 4, 2018, at 8:37 a.m.): I don't have to contact the bank of my wife and can have you the money in 24 hours. $400,000[.]
- Blackmon to Vogel (December 4, 2018, at 12:47 p.m.): Will you be paying cash for the property? Will you be able to close in 30 days? Once I have this information I will present your offer and see if the seller will entertain the offer.
- Vogel to Blackmon (December 4, 2018, at 12:57 p.m.): Cash, close in 30 day[s]. I sent it to my lawyer, if nothing is wrong per him, it's a done deal[.]
- Blackmon to Vogel (December 4, 2018, at 1:58 p.m.): I will present your offer to the seller to see if this is something that he will entertain and get back to you. Below is a link to our website that has a copy of the contract, Disclosures, Terms of Sale.
- Vogel to Blackmon (December 4, 2018, at 5:30 p.m.): ok, let me know.
- Blackmon to Vogel (December 5, 2018, at 7:49 a.m.): The seller is considering your offer of $400,000.00 and will let me know

[1] Because Blackmon was located in Tulsa, Oklahoma, the time stamp on her emails reflects the Central Daylight Time Zone.

something by Friday. Please make arrangements to be prepared to sign the contract on Friday and wire down payment funds that day. The down payment will be $42,000.00 and I will provide wire instructions and a contract via email/docusign as soon as I hear from the seller. Please note that you will be responsible for the closing costs as listed in the contract. 400,000.00 Purchase Price[,] 20,000.00 Buyer's Premium[,] 420,000.00 Total Purchase Price[,] 42,000.00 Down payment. Let me know if you have any questions.

- Vogel to Blackmon (December 5, 2018, at 8:40 a.m.): ok, let me know.
- Blackmon to Vogel (December 5, 2018, at 8:52 a.m.): Will do[.]
- Blackmon to Vogel (December 6, 2018, at 3:03 p.m.): Below is the link to the Website as well as a link to the due diligence. I have also attached a copy of the title work for your convenience. Let me know if you have any questions. This should be everything your attorney needs to review the property.
- Blackmon to Vogel (December 7, 2018, at 9:40 a.m.): Good morning and Happy Friday! The seller has accepted your offer of 400K on the property. I will talk to you on Monday after you speak to your attorney. Please confirm that you received my email yesterday with the due diligence documents, link to the website and title commitment.

{¶5} At the bottom of each email from Blackmon below her signature was the following language, contained within a bold, black, box, as depicted below:

> Any written or verbal acceptance of an offer amount as relayed by Seller's agent is contingent upon receipt by Seller's agent of the required written contract and any Seller required addenda, fully executed by both Buyer and Seller.

{¶6} Following the unsuccessful auction, and during the same time period that Blackmon engaged in discussions with Vogel, Janszen also continued to look for a buyer for the property. One potential buyer that Janszen engaged in discussions with was the Loring Group, via its representative Ryan Dean. On December 6, 2018, Dean submitted an offer on the property, but Third Street rejected that offer because it included an inspection contingency and he did not want to accept an offer that contained a contingency.

{¶7} On December 7, 2018, Dean submitted a revised offer that did not include any contingencies. This offer was received subsequent to the email sent from Blackmon to Vogel conveying that the seller accepted his offer. After the offer from Dean was received, Janszen called Blackmon and asked her if the offer was received too late. Blackmon indicated that Vogel wanted to inspect the property. She suggested that Janszen wait to present Dean's offer to Albi until after Vogel had inspected the property and they knew if he was still interested in purchasing. Janszen was not in agreement with Blackmon's recommendation. A conference call was held between Albi, Blackmon, and Janszen on the afternoon of December 7. After that conference call, Albi emailed Blackmon at 4:45 p.m. and instructed her to tell Dean and the Loring Group that he was willing to accept the contingency-free offer.

{¶8} Blackmon then sent an email to Vogel on December 7, 2018, at 5:37 p.m. This email stated:

> While I confirmed verbally that the seller would accept your offer of 400,000.00 as previously email[ed] to you below: 400,000.00 Purchase Price[,] 20,000.00 Buyer's Premium[,] 420,000.00 Total Purchase Price[,] 42,000.00 Down payment. You and I both know that it is not done until I receive a written contract and funds from you that I can present to my seller to execute. I have had an additional verbal offer today and provided a contract to them. I would urge you to complete the contract with your highest and best as soon as possible. I will provide wire instructions in a separate email. Let me know if you have any questions.

{¶9} Vogel responded that his attorney had been in court all day and would "work on this tomorrow." Blackmon attempted to follow up with Vogel on his attorney's review of the contract over the course of several days. The following emails were exchanged between Blackmon and Vogel:

- Blackmon to Vogel (December 11, 2018, at 1:59 p.m.): Has your attorney reviewed the contract?
- Vogel to Blackmon (December 11, 2018, at 3:34 p.m.): I don't know? Have you talked to him?
- Blackmon to Vogel (December 11, 2018, at 3:37 p.m.): Please reach out to your attorney and let me know if you are interested in signing the contract and wiring funds[.]
- Vogel to Blackmon (December 11, 2018, at 5:21 p.m.): What is the total income on the billboard. It looks like the lease is #81774 but the accounting of the billboard revenue is on an I-75 at W. Hills Viaduct Lease #81678?

{¶10} On December 12, 2018, Vogel's attorney, Eric Holzapfel, reached out to Blackmon via email. Holzapfel wrote that "I represent Joe Vogel, who is interested

in purchasing the above referenced property subject to an inspection. Who do I contact to obtain access to the building so that our inspector can look at it?"

{¶11} At about the same time, Dean submitted a signed contract and the purchase amount of his offer. On December 17, 2018, Blackmon emailed Holzapfel and informed him that "I received your message on Friday that you would like to have an inspector visit the site on Tuesday of this week. The seller has signed another offer on this property. Thank you for your time." Holzapfel responded to Blackmon via email the following day, stating that the seller had contracted to sell the property to Vogel, and that any attempt to sell the property to another party would be met with a lawsuit. Vogel also emailed Blackmon, stating in relevant part that "I know we never signed the contract but I told you that as long as the title work and the inspection was o.k. then we would do the deal (i.e. a verbal commitment)."

{¶12} After Albi, on behalf of Third Street, signed the contract submitted by Dean, Vogel filed a complaint against Albi and Third Street. The complaint asserted a claim for breach of contract and sought injunctive relief. It specifically requested that Albi and Third Street be enjoined from selling the property to anyone but Vogel and be ordered to specifically perform the contract that he claimed had been entered into with Vogel. Vogel additionally filed a motion for a temporary restraining order to prevent Albi and Third Street from selling the property.

{¶13} Along with their answer to the complaint, Albi and Third Street filed counterclaims against Vogel for quiet title, tortious interference with a contract and business relationship, slander of title, abuse of process, and frivolous conduct in filing civil claims.

{¶14} The trial court granted the motion for a temporary restraining order. The preliminary-injunction hearing was consolidated with a bench trial on the merits of the case.

{¶15} Blackmon testified at trial regarding her email exchange with Vogel. She explained that her December 7, 2018 email stating that the seller would accept Vogel's offer did not result in a completed deal between the parties because there could not be a "done deal" until she received the signed contract she previously sent, along with the funds. Blackmon testified that only Albi, as a representative of Third Street, had authority to accept a written offer. Blackmon also discussed her multiple attempts to follow up with Vogel after sending the December 7, 2018 email to see if he intended to submit the required contract and funds. She acknowledged that Vogel's initial offer made no mention of an inspection or any other contingency.

{¶16} Vogel testified that his offer to purchase the property included a purchase price of $400,000, in cash, with a closing date in 30 days, subject to approval by his lawyer. He stated that his offer did not include an inspection contingency, a $20,000 buyer's premium, or a down payment. Vogel testified that he believed a valid contract had been formed when he received Blackmon's email stating that the seller had accepted his offer. He acknowledged that he had seen the language at the bottom of each of Blackmon's emails referencing the execution of a written contract, but testified that "I never read it. I read it after my attorney got in contact with their attorney and said, hey, this is our legal way out, and that's when I read it, but I never read it prior. * * * I never read those things, but maybe I'm wrong."

{¶17} Albi testified that he had hired Williams and Williams to find a buyer for the property and to engage in negotiations, but that only he had authority to sign a contract. Albi acknowledged that Vogel's offer did not contain an inspection contingency, but explained that Vogel and his attorney later indicated that he wanted an inspection after being told that Albi would accept his offer. This changed the offer that Albi had initially agreed to, as he refused to accept any offers containing

contingencies. Albi testified that, in his opinion, a contract was never formed with Vogel because Vogel never submitted the required contract or down payment.

{¶18} Following the bench trial, the trial court found in favor of Albi and Third Street on Vogel's claim for breach of contract. It additionally found in favor of Albi and Third Street on their counterclaim for quiet title, but found in favor of Vogel on all remaining counterclaims.

{¶19} Vogel and Albi and Third Street appeal the trial court's ruling.

Vogel's Appeal

{¶20} In two assignments of error, Vogel challenges the trial court's finding that there was no binding contract between the parties. We address these assignments together.

{¶21} The existence of a contract is a question of law that we review de novo. *North Side Bank & Trust Co. v. Trinity Aviation, LLC*, 1st Dist. Hamilton Nos. C-190021 and C-190023, 2020-Ohio-1470, ¶ 17. For a contract to exist, there must be a meeting of the minds between the parties, as evidenced by an offer, acceptance, and consideration. *Id.* at ¶ 15. The essential terms of the agreement must also be reflected in the contract with definiteness and certainty. *Id*. Typically, the essential terms of a contract "include the subject matter, identity of the parties bound, consideration, price, and quantity." *Id*.

{¶22} Because the alleged contract in this case was one for a sale of lands, it was required to be in writing to comply with the statute of frauds. R.C. 1335.05; *Mezher v. Schrand*, 1st Dist. Hamilton No. C-180071, 2018-Ohio-3787, ¶ 8. A writing is in compliance with the statute of frauds where it "(1) identifies the subject matter, (2) establishes that a contract has been made, and (3) states the essential terms with reasonable certainty." *Mezher* at ¶ 8.

{¶23} A written contract can be established through an email or a series of emails construed together. *See id.* at ¶ 10; *North Side Bank & Trust* at ¶ 18. In determining whether a contract was formed by an exchange of emails, we must evaluate the emails to "ascertain whether they 'connote[ ] an exchange of promises where the parties have communicated in some manner the terms to which they agree to be bound.' " *North Side Bank & Trust* at ¶ 18, quoting *Cuyahoga Cty. Hosp. v. Price*, 64 Ohio App.3d 410, 415, 581 N.E.2d 1125 (8th Dist.1989).

{¶24} Following our review of the record, we find that the emails did not form a binding contract because the record clearly demonstrates that the parties contemplated the execution of a formal contract and did not intend to be bound by the email exchange.

{¶25} As this court explained in *Mezher*:

> An agreement can be specifically enforced even where the parties contemplated execution of a formal written document, so long as the parties have manifested an intent to be bound and their intentions are sufficiently definite. *Normandy Place Assoc. v. Beyer*, 2 Ohio St.3d 102, 105-106, 443 N.E.2d 161 (1982). In determining whether the parties intended to be bound, courts can look at the circumstances surrounding the parties' discussion. *26901 Cannon Rd. LLC v. PSC Metals, Inc.*, 8th Dist. Cuyahoga No. 80986, 2002-Ohio-6050, ¶ 17. Moreover, the question of whether the parties intended a contract is a factual question for the finder of fact. *Normandy Place* at 105, citing *Arnold Palmer Golf Co. v. Fuqua Indus., Inc.*, 541 F.2d 584, 588 (6th Cir.1976) (applying Ohio law).

Mezher at ¶ 11.

{¶26} Here, the trial court specifically found that "the parties[']' intent to be bound was not present until the required contract form was initiated."

{¶27} Every email sent from Blackmon to Vogel contained the following clause, located inside a black box as depicted below, at the end of the email following the signature line:

> Any written or verbal acceptance of an offer amount as relayed by Seller's agent is contingent upon receipt by Seller's agent of the required written contract and any Seller required addenda, fully executed by both Buyer and Seller.

Vogel acknowledged that the emails contained this language.

{¶28} Before emailing Vogel to let him know that the seller had accepted his offer, Blackmon sent Vogel two separate emails referencing the execution of a formal contract. She first emailed him on December 4, 2018, to let him know that she would present his offer to the seller, and she included in that email a copy of the required written contract for Vogel to review. Blackmon then emailed Vogel on December 5, 2018, to let him know that, should the offer be accepted, he needed to be prepared to sign a contract that same day. Vogel received notice on December 7, 2018, that his offer had been accepted, and later that same day received an email from Blackmon stating that the deal would not be completed until she received a written contract and funds to present to the seller. Vogel sent neither. On December 11, 2018, Blackmon emailed Vogel to inquire about the execution of the written contract, which had not yet been submitted, stating "Please reach out to your attorney and let me know if you are interested in signing the contract and wiring funds[.]"

{¶29} The record clearly supports the trial court's factual finding that the parties' did not intend to be bound by the emails and contemplated the execution of a formal, written contract.

{¶30} We further find that the emails failed to demonstrate that the parties had reached a "meeting of the minds." As set forth in his email to Blackmon on

December 4, 2018, Vogel offered to purchase the property for $400,000 cash, with a closing date in 30 days, subject to approval by his lawyer. The following day, Blackmon informed Vogel that the seller was considering his offer, and that, should the offer be accepted, Vogel would be responsible for closing costs set forth in the contract and for a buyer's premium of $20,000, resulting in a total purchase price of $420,000. Vogel responded with an email stating "ok, let me know." This email from Blackmon to Vogel informing him of the buyer's premium was essentially a counter offer. And Vogel's response was not a definitive acceptance of that counter offer or acquiescence to a $420,000 purchase price. We cannot find that the emails reflect with definiteness and certainty the purchase price agreed upon by the parties. *See North Side Bank & Trust*, 1st Dist. Hamilton Nos. C-190021 and C-190023, 2020-Ohio-1470, at ¶ 15; *Mezher* at ¶ 8.

{¶31} The record further indicates that the parties contemplated an additional term that was not set forth in the email exchange, specifically an inspection of the property. Vogel's email on December 4, 2018, offering a $400,000 purchase price, did not mention an inspection. But after Blackmon emailed Vogel on December 7, 2018, to inform him that his offer had been accepted, she sent an email to Albi and Janszen stating that "The buyer also wants to schedule an inspection on the property. I will get back to you with a date and time." While the record is silent as to how or when the subject of an inspection was first raised, it is apparent that, despite his testimony at trial to the contrary, Vogel did want to inspect the property before purchasing. The record supports a reasonable inference that Vogel mentioned the inspection in a phone call to Blackmon after he received her acceptance email. Further supporting the fact that Vogel wanted an inspection is his attorney's email to Blackmon stating that Vogel was interested in purchasing the property "subject to an inspection." And after being informed that the seller had accepted a different offer,

Vogel sent Blackmon an email stating that he would have followed through with the deal "as long as the title work and the inspection was o.k."

{¶32} Because the series of emails containing the terms of the contract made no mention of an inspection and did not definitively establish a purchase price, we cannot find that the parties had reached a meeting of the minds. *See North Side Bank & Trust* at ¶ 15.

{¶33} We therefore hold that, because any agreement reached between the parties was contingent upon the execution of a written contract, and because the emails failed to demonstrate a meeting of the minds, the trial court did not err in finding that there was no binding contract between the parties and in granting judgment to Albi and Third Street on Vogel's claim for breach of contract.

{¶34} Vogel's first and second assignments of error are overruled.

Cross-Appeal

{¶35} In a single assignment of error, Albi and Third Street argue that the trial court's finding in favor of Vogel on their counterclaims for tortious interference with a contract and business relationship, slander of title, abuse of process, and frivolous conduct in filing civil claims was against the manifest weight of the evidence.

{¶36} When reviewing the manifest weight of the evidence of a trial court's judgment in a civil case, this court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed." *Battle Axe Constr., L.L.C. v. H. Hafner & Sons, Inc.*, 1st Dist. Hamilton No. C-180640, 2019-Ohio-4191, ¶ 11, quoting *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-

2179, 972 N.E.2d 517, ¶ 20. We must make all reasonable presumptions in favor of the trial court's finding of facts and judgment. *Id.* at ¶ 12. "If the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the trial court's verdict and judgment." *Id.*, quoting *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988).

1. Tortious Interference With Contract and Business Relationship

{¶37} To prove tortious interference with a business relationship, a plaintiff must establish "that the defendant intentionally and improperly interfered with the plaintiff's prospective business relations by either (1) inducing or otherwise causing a third person not to enter into or continue the prospective relation, or (2) preventing the plaintiff from acquiring or continuing the prospective relation." *Alexander v. Motorists Mut. Ins. Co.*, 1st Dist. Hamilton No. C-110836, 2012-Ohio-3911, ¶ 30. A plaintiff is not required to establish that the defendant acted with malice, but bears the burden of showing that the interference lacked justification or privilege. *Id.* at ¶ 30-31.

{¶38} To prove tortious interference with contract, a plaintiff must establish "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *See id.* at ¶ 33. As with the tort of tortious interference with a business relationship, the plaintiff bears the burden of establishing a lack of justification or privilege. *Id.* "[O]ne is privileged to purposely cause another not to perform a contract with a third person where he in good faith is asserting a legally protected interest of his own, which he believes will be impaired or destroyed by the performance of the contract." *Smith v. Natl. Western Life*, 2017-

Ohio-4184, 92 N.E.3d 169, ¶ 21 (8th Dist.), quoting *Pearse v. McDonald's Sys. of Ohio, Inc.*, 47 Ohio App.2d 20, 25, 351 N.E.2d 788 (10th Dist.1975).

{¶39} Albi and Third Street contend that the evidence presented at trial established that Vogel, with knowledge that he had not signed his own contract to purchase the property or tendered the required down payment, committed tortious interference with their contract or business relationship with Dean by creating a title problem to the property that could not be remedied, resulting in termination of that contract.

{¶40} Vogel testified that he believed a valid contract with Albi and Third Street had been formed when he received Blackmon's email on December 7, 2018, stating that the seller had accepted his offer. Interpreting this testimony and reasonable presumptions in favor of the trial court's judgment, *see Battle Axe Constr. L.L.C.*, 1st Dist. Hamilton No. C-180640, 2019-Ohio-4191, at ¶ 12, we find that the evidence could reasonably have established that Vogel's actions were privileged and were taken to protect his own business interests, which he believed would be impaired by performance of the seller's contract with Dean. *See Smith* at ¶ 21.

{¶41} Because Albi and Third Street failed to meet their burden to prove that Vogel acted without privilege, we find that the trial court's judgment in favor of Vogel on the counterclaim for tortious interference with a contract or business relationship was not against the manifest weight of the evidence.

2. Slander of Title

{¶42} To prove the tort of slander of title, a claimant must establish that "(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages."

Whitman v. Gerson, 1st Dist. Hamilton Nos. C-140592 and C-140595, 2016-Ohio-311, ¶ 27, quoting *Green v. Lemarr*, 139 Ohio App.3d 414, 430-431, 744 N.E.2d 212 (2d Dist.2000).

{¶43} Albi and Third Street argue that the evidence established that Vogel committed slander of title when his attorney, with knowledge that Vogel did not have a valid contract on the property, asserted in an email dated December 18, 2018, that Vogel had a valid contract to purchase the property and threatened to file suit if the property was sold to another buyer.

{¶44} Construing the evidence presented at trial in a manner consistent with the trial court's judgment, we find that Albi and Third Street failed to establish that Vogel acted with the requisite malice or reckless disregard for a statement's falsity that is necessary to prove slander of title. *See Battle Axe Constr. L.L.C.*, 1st Dist. Hamilton No. C-180640, 2019-Ohio-4191, at ¶ 12. Vogel testified that he believed a valid contract with Albi and Third Street had been formed when he received Blackmon's email on December 7, 2018, stating that the seller had accepted his offer. If the trial court found this testimony credible, it could reasonably have found that Vogel acted to protect his own business interest, and not with malice or with reckless disregard for the falsity of the statement that the property could not be sold to another buyer because Vogel had a contract to purchase it.

{¶45} The trial court's judgment in favor of Vogel on the counterclaim for slander of title was not against the manifest weight of the evidence.

3. Abuse of Process

{¶46} To establish abuse of process, a plaintiff must prove "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for

which it was not designed; and (3) that direct damage has resulted from that wrongful use of process." *City of Cincinnati v. Triton Servs., Inc.*, 2019-Ohio-3108, 140 N.E.3d 1249, ¶ 75 (1st Dist.).

{¶47} Albi and Third Street argue that the evidence presented at trial established that Vogel, with knowledge that he did not have a valid contract, used the lawsuit to force Third Street to sell him the property.

{¶48} Following our review of the record, we cannot find that the trial court's ruling in favor of Vogel on this counterclaim was against the manifest weight of the evidence. If the trial court found credible Vogel's testimony that he believed a valid contract had been formed when he received Blackmon's email on December 7, 2018, stating that the seller had accepted his offer, it could reasonably have found that Vogel initiated the lawsuit to protect what he believed to be his own legal interests and not to accomplish an ulterior purpose. *See Battle Axe Constr. L.L.C.*, 1st Dist. Hamilton No. C-180640, 2019-Ohio-4191, at ¶ 12.

R.C. 2323.51

{¶49} Albi and Third Street last challenge the trial court's finding in favor of Vogel on their counterclaim for frivolous conduct in filing civil claims pursuant to R.C. 2323.51. They contend that Vogel committed frivolous conduct under R.C. 2323.51(A)(2) by, among other things, using the lawsuit to harass them, asserting claims that were not warranted under existing law, and by making multiple allegations of fact that had no evidentiary support.

{¶50} R.C. 2323.51(B)(1) provides in relevant part that "at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs,

reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal."

{¶51} As this court recognized in *Triton*, "[a] split of authority exists as to the proper procedure to raise a claim of frivolous conduct. Some courts have held that a request for sanctions under R.C. 2323.51 must be made by motion after the trial and some have held that it may be made by counterclaim as well as by motion." *Triton*, 2019-Ohio-3108, 140 N.E.3d 1249, at ¶ 82. The *Triton* court ultimately concluded that the issue was moot because it had remanded the matter on other grounds and Triton was not foreclosed from raising the issue again in the trial court. *Id.* at ¶ 84. We resolve the issue now.

{¶52} R.C. 2323.51(B)(1) is not ambiguous. It clearly states that within 30 days of the entry of a final judgment, a party adversely affected by frivolous conduct "may file a *motion* for an award of court costs, reasonable attorney's fees, and other reasonable expenses." (Emphasis added.) R.C. 2323.51(B)(1). "[W]here the terms of a statute are clear and unambiguous, the statute should be applied without interpretation." *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶ 11, quoting *Wingate v. Hordge*, 60 Ohio St.2d 55, 58, 396 N.E.2d 770 (1979). In other words, an unambiguous statute is to be applied, not interpreted. *Id.* "When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said." *Id.*, quoting *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12.

{¶53} R.C. 2323.51(B)(1) clearly and unequivocally provides that a request for costs and fees based on frivolous conduct should be made by motion. If the General Assembly had intended for such an issue to be raised in a counterclaim, it could have so provided. We accordingly hold that a motion for fees and costs under R.C. 2323.51(B)(1) based on another party's frivolous conduct must be raised by

motion. *See Wochna v. Mancino*, 9th Dist. Medina No. 07CA0059-M, 2008-Ohio-996, ¶ 29 ("R.C. 2323.51 does not create a separate cause of action for frivolous conduct"); *Shaver v. Wolske & Blue*, 138 Ohio App.3d 653, 673, 752 N.E.2d 164 (10th Dist.2000); *Scrap Yard, LLC v. Cleveland*, 513 Fed.Appx. 500, 506 (6th Cir.2013) fn. 1; *contra Texler v. Papesch*, 9th Dist. Summit No. 18977, 1998 WL 597870, *2 (Sept. 2, 1998) ("Although the statute does not specify whether a party can make a claim for attorney's fees in the form of a counterclaim, the case law makes clear that it is an accepted method"); *Scheel v. Rock Ohio Caesars Cleveland, LLC*, 8th Dist. Cuyahoga No. 105037, 2017-Ohio-7174, ¶ 16.

{¶54} Because a request for fees and costs based on frivolous conduct pursuant to R.C. 2323.51(B)(1) cannot be raised in a counterclaim, we hold that the trial court did not err in granting judgment to Vogel, and we overrule Albi and Third Street's assignment of error.

Conclusion

{¶55} Having overruled all assignments of error raised in the appeal and cross-appeal, we accordingly affirm the trial court's judgment to Albi and Third Street on the claim for breach of contract and their counterclaim for quiet title, as well as its judgment in favor of Vogel on all remaining counterclaims.

Judgment affirmed.

BERGERON and **WINKLER, JJ.,** concur**.**

Please note:

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