The Bullet Point: Ohio Commercial Law Bulletin

Is My Cure Offer under the Consumer Sales Practices Act Timely?

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Timing of Cure Offer

***Norman v. Kellie Auto Sales, Inc.*, 10th Dist. Franklin No. 18AP-32, 2020-Ohio-4311**

On application for reconsideration, the Tenth Appellate District vacated its original decision and affirmed the trial court's decision, finding that a statutory cure offer under the Ohio Consumer Sales Practices Act (CSPA) that was made after arbitration ended could not be the basis for vacating or modifying an arbitration award.

- **The Bullet Point:** The CSPA permits a party to make a statutory cure offer only after a consumer has commenced an action alleging a violation of the statute. R.C. 1345.092(A). That being said, nothing in the CSPA prevents a supplier from making an offer to cure before an action formally begins or before arbitration occurs. The court's ruling highlights the importance of making an early offer to cure and underlines the dangers of waiting until after the parties engage in arbitration. Specifically, a supplier who waits to make a cure offer until after arbitration is completed will be prevented from using the CSPA cure provisions to later reduce the arbitrator's award. That is because a court's jurisdiction to review arbitration awards is statutorily restricted, narrow, and limited under both the Federal Arbitration Act and Ohio's Arbitration Act, R.C. Chapter 2711. Under R.C. 2711.11(A), a trial court is authorized to modify an arbitration award only if "there was an evident material miscalculation of figures ***." The court noted that an arbitrator's powers and authority end once its award is issued, so an arbitrator is unable to consider a supplier's cure offer that is made after arbitration ends. As such, a trial court cannot find that an arbitrator erred in failing to consider the CSPA cure provisions and reduce or modify the arbitration award if a supplier waits to make a cure offer until after the award is issued.

Valid Legal Tender

***Williams v. City of Dayton Water*, 2d Dist. Montgomery No. 28686, 2020-Ohio-4332**

In this appeal, the Second Appellate District affirmed the trial court's decision, agreeing that the plaintiff's self-prepared international bills of exchange drawn on the United States Treasury are not valid legal documents or tender.

- **The Bullet Point:** Ohio courts and courts throughout the country have uniformly rejected arguments that self-prepared bills of exchange created under the so-called 'Redemptionist' theory are valid legal tender to payoff debts. On the contrary, such documents are not negotiable instruments and are not

valid forms of payment. As the court succinctly summarized, such bills of exchange supposedly drawn on treasury accounts are no more than "worthless pieces of paper."

Excusable Neglect

***Russell v. McDonalds Inc.,* 8th Dist. Cuyahoga No. 109112, 2020-Ohio-4300**

In this appeal, the Eighth Appellate District affirmed the lower court's decision, finding that the corporation failed to demonstrate excusable neglect that the summons and complaint were not forwarded to the appropriate party.

- **The Bullet Point:** One way to obtain relief from judgment under Ohio law is to demonstrate an entitlement to relief due to mistake, inadvertence, surprise or excusable neglect. Civ.R. 60(B)(1). With regards to a corporation, relief from a default judgment may be granted on the basis of excusable neglect when service is properly made on a corporation but a corporate employee fails to forward the summons and complaint to the appropriate person and, in so doing, fails to follow company policy and procedures for handling service of process.

  A corporation can provide sufficient proof of excusable neglect with an affidavit that establishes the following: "(1) that there is a set procedure to be followed in the corporate hierarchy for dealing with legal process, and (2) that such procedure was, inadvertently, not followed until such time as a default judgment had already been entered against the corporate defendant." However, a corporation who lacks such a procedure in the first place will not be excused for its inaction and failure to respond when properly served.

Exceptions to Public Records Request

***McDougald v. Greene*, Slip Opinion No. 2020-Ohio-4268**

In this mandamus case, the Supreme Court of Ohio denied the petitioner's writ, finding that the requested documents fell under the security-records exception of the Public Records Act.

- **The Bullet Point:** Under Ohio's Public Records Act, a public office is required to make copies of public records available to any person on request and within a reasonable period of time. R.C. 149.43(B)(1). Nevertheless, not all public records are subject to disclosure and the Public Records Act contains several exceptions. One exception is infrastructure records, which include "any record that discloses the configuration of critical systems including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of a building." R.C. 149.433(A). Another exception to the Public Records Act is security records. Under R.C. 149.433(A)(1), security records include "[a]ny record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage." The Court analyzed the petitioner's request, and determined that it was clear from the face of the documents that the security-records exemption applied. Specifically, the Court noted that "one need not be too creative to see how this is information that could be used to plan an escape or an attack on the prison or to aid in the smuggling in of contraband."

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[Cite as *Norman v. Kellie Auto Sales, Inc.*, 2020-Ohio-4311.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Justin Norman,	:	
Plaintiff-Appellee,	:	
		No. 18AP-32
v.	:	(C.P.C. No. 17CV-5681)
Kellie Auto Sales, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 3, 2020

On brief: *Coffman Legal, LLC,* and *Matthew J.P. Coffman*; *Bryant Legal, LLC,* and *Daniel I. Bryant,* for appellee.

On brief: *Law Offices of Thomas Tootle Co., LPA,* and *Thomas Tootle*, for appellant.

ON APPLICATION FOR RECONSIDERATION

DORRIAN, J.

{¶ 1} Plaintiff-appellee, Justin Norman, has filed an application for reconsideration, pursuant to App.R. 26(A)(1), of this court's decision in *Norman v. Kellie Auto Sales, Inc.*, 10th Dist. No. 18AP-32, 2019-Ohio-360 ("*Norman*" or "original decision") filed February 5, 2019. For the reasons that follow, we grant Norman's application for reconsideration, vacate the original decision, and affirm the November 30, December 11, 2017, and January 9, 2018 judgments of the Franklin County Court of Common Pleas.

I. Facts and Procedural History

{¶ 2} The procedural history and facts of this case were summarized in the original decision.

{¶ 3} Norman purchased a vehicle from defendant-appellant, Kellie Auto Sales, Inc. ("Kellie Auto"). Neither party disputes that Kelli Auto did not inform Norman the

vehicle was a rebuilt salvage. The retail installment contract was executed between the parties for the purchase and financing of the vehicle. As part of the sale, the parties also executed an arbitration agreement authorizing either party to "choose to have any dispute between [the parties] decided by arbitration and not in court of [sic] by jury trial." (Emphasis omitted.) *Norman* at ¶ 3. The agreement also set forth the process for arbitration. Once Norman became aware the vehicle was rebuilt salvage, the parties attempted to negotiate a resolution. Negotiations were not successful and, ultimately, Kellie Auto informed Norman it was invoking the arbitration agreement. A demand for arbitration was completed and submitted. *Id.* at ¶ 7.

{¶ 4} Arbitration was conducted before an arbitrator from the American Arbitration Association. As summarized in the original decision, the arbitrator rendered an award as follows:

> On June 5, 2017, the arbitrator rendered an award in favor of Norman, having found that Kellie Auto had knowingly committed an unfair or deceptive act under the CSPA. Having heard and considered the parties' evidence, the arbitrator awarded $53,911.75 to Norman, a sum that included:
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> (1) Economic damages – the unrebutted testimony was that [Norman] incurred economic damages in the amount of $7,430. (Down payment, tag fee and loan payments)
>
> (2) Non-economic damages – while [Norman] testified he suffered non-economic damages of aggravation, frustration and humiliation, this testimony was not credible. *Long after [Norman] found out about the salvage title he continued to drive the car.* Early on, [Kellie Auto] offered to rescind the transaction which [Norman] refused. It appears to the Arbitrator that [Norman] held on to his remedy options for an extended period of time for the sole purpose of increasing his recovery. Non-economic damages will not be awarded;
>
> (3) Attorney's fees and costs – [Norman] is entitled to his reasonable attorney's fees and costs for this knowing violation of the CSPA. [Norman] has submitted the affidavits of his attorneys (Ex. 23 and 24) along with the affidavit of Attorney DeRose (Ex. 25) attesting to the reasonableness of the rates submitted. The Arbitrator finds that applying the lodestar approach set forth by the Ohio Supreme Court in *Bittner v. Tri-County Toyota* (1991), 58 Ohio St. 3d 143 an attorney's fees award of $31,494.50 (an extra $1,000 is awarded for post-

> hearing work) is appropriate. In addition, hearing fees of $127.25 will be imposed;
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> (4) The economic damage award shall be trebled to ($7,420 x 3) $22,290 pursuant to *Rev. Code* 1345.09. (See *Pep Boys v. Vaughn*, 2006-Ohio-698 (C.A. 10th 2006). While the Arbitrator may believe that treble damages are not factually justified he cannot apply his personal belief on an appropriate remedy that is not statutorily authorized. Treble damages are to be awarded. *Bierlein v. Alex's Continental Inn*, (1984) 16 Ohio App. 3d 301)
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> (Sic passim and emphasis added.) (Ex. A at 5-6, attached to Application.) The arbitrator also ordered Kellie Auto to pay $2,400 for the association's administrative fees and $1,500 for the arbitrator's compensation. The arbitrator's award constituted a full, final disposition of all claims submitted.

(Emphasis sic.) *Norman* at ¶ 9.

{¶ 5} After the arbitration, Norman requested and, according to Norman, Kellie Auto's counsel agreed to provide payment to Norman pursuant to the arbitrator's award. However, Kellie Auto retained new counsel and refused to provide payment. Norman then filed an application for judgment and to confirm the arbitration award pursuant to R.C. 2711.09. Kellie Auto was served with Norman's application on June 30, 2017.

{¶ 6} Construing Norman's application, pursuant to R.C. 2711.09, as an "action" under the Ohio's Consumer Sales Practices Act ("CSPA"), and R.C. 1345.092(B), on July 10, 2017 Kellie Auto filed a notice of cure offer with the court and an application to modify the arbitration award pursuant to R.C. 2711.11. Kellie Auto requested the trial court:

> "[I]ssue an order modifying and correcting the arbitration award at issue in this action," reducing the award to $9,930 (economic damages of $7,430 and attorney fees of $2,500), plus court costs or, alternatively, "remand this matter to the Arbitrator with instructions that he include an analysis of attorney's fees as required under *Bittner v. Tri-County Toyota*, 58 Ohio St.3d 143 (1991)." (Aug. 4, 2017 Mot. To Modify at 1, 10.)

Norman at ¶ 13.

{¶ 7} The trial court denied Kellie Auto's request to modify the arbitration award and granted Norman's application to confirm the award. Kellie Auto filed a motion for relief from judgment. The trial court denied the same. Kellie Auto appealed.

{¶ 8} On appeal, Kellie Auto raised as its first assignment of error that the trial court erred "when it refused to recognize the Defendant-Appellant's timely exercise of a 'right to cure' pursuant to R.C. 1345.092." *Id.* at ¶ 18. *Norman* sustained the assignment of error and concluded:

> R.C. 1345.092(A) is clear—a statutory cure offer can be made only after the consumer has commenced an *action* against an act or practice that violates R.C. Chapter 1345. R.C. 1345.092(A). But this statute does not prevent a supplier such as Kellie Auto from attempting to cure the problem with one or more offers to make the buyer whole before any such action, or even arbitration, occurs. That the first and only lawsuit filed by Norman was the action seeking to enforce the arbitration award premised on a CSPA claim does not change the operation of the statutory language of R.C. 1345.092(A) enabling Kellie Auto to make a statutory cure offer.
>
> * * *
>
> We find Kellie Auto's arguments well-taken. In harmonizing the CSPA with Ohio's arbitration statutes, a reviewing court may vacate or modify an arbitration award only as provided for in R.C. 2711.10 or 2711.11, respectively. In its brief, Kellie Auto states no error with the arbitrator's finding of liability, only with the damages awarded:
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> [Kellie Auto] asserts that the award of damages exceeds the amount allowable following a valid cure offer. R.C. § 2711.11 provides:
>
> "In any of the following cases, the court of common pleas * * * shall make an order modifying or correcting the award upon the application of any party to the arbitration if:
>
> (A) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award..." * * *
>
> A material miscalculation of figures and an evident material mistake exists. Norman's award must be limited to only that permitted following a timely exercise of the right to cure. Based upon the foregoing, Kellie [Auto] asks this Court to remand this matter to the trial court to order a modification of the award to $9,930 plus court costs. This represents actual damages (as determined by the arbitrator) of $7,430 and attorney fees of $2,500 – the maximum permitted by statute.

> (Kellie Auto's Brief at 20-21.) We find Kellie Auto's request for remand for modification appropriate.
>
> Based on the foregoing, we find as a matter of law that the provisions of R.C. 1345.092 were triggered in this matter when Kellie Auto timely filed a cure offer under R.C. 1345.092(A). Accordingly, the common pleas court erred when it refused to recognize as timely Kellie Auto's exercise of a right to cure pursuant to R.C. 1345.092 and to reduce the arbitrator's award in accordance with R.C. 1345.092(G). We remand this matter to the common pleas court to allow Kellie Auto to present to the court its cure offer and to modify the arbitrator's award consistent with this decision. Kellie Auto's first assignment of error is sustained.

Id. at ¶ 27, 34-35.

{¶ 9} Norman asks this court to reconsider the court's original decision to the extent it sustained the first assignment of error and reversed the trial court's decision on the same grounds.

II. Applicable Law for Reconsideration

{¶ 10} The test applied to an application for reconsideration is whether the motion calls to the attention of the court an obvious error in our prior determination or raises an issue that was not properly considered by the court in the first instance. *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981). We believe the grounds for reconsideration have been met.

III. Reconsideration and Overruling of the First Assignment of Error

{¶ 11} Norman makes several arguments in support of his objection to the court's original decision sustaining the first assignment of error. As relevant here, he argues the original decision "created what is tantamount to an appeal right for Appellant when it would otherwise not have any appealable rights under its own legally-binding arbitration agreement which prohibits either party from appealing the arbitrator's decision unless one of three specific events are triggered [and the parties' exclusive remedies] do not include modification of the Arbitrator's award under these circumstances." (Norman's App. for Reconsideration at 10-11.) In Norman's merit brief on appeal, he argued Kellie Auto did not seek vacation, modification, or correction through any of the means outlined in R.C.

2711.10 or 2711.11.[1] Norman argued this court "should summarily reject Appellant's radical position and affirm the trial court[,] [and] [t]his Court should not adopt Appellant's alternative, unsubstantiated interpretation to R.C. [2711.10 and 2711.11] by adding language from R.C. 1345.092." (Norman's Brief at 18.)

{¶ 12} We agree with Norman. Although Kellie Auto did not specifically request that the trial court vacate the arbitrator's award, we note that R.C. 2711.10 authorizes a trial court to vacate an award only if:

> (A) The award was procured by corruption, fraud, or undue means.
>
> (B) There was evident partiality or corruption on the part of the arbitrators, or any of them.
>
> (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

{¶ 13} Kellie Auto did not meet any of the grounds in R.C. 2711.10 for vacating an arbitrator's award.

{¶ 14} Kellie Auto did request the trial court modify the arbitrator's award. R.C. 2711.11 authorizes a trial court to modify an award only if:

> (A) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;
>
> (B) The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

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[1] We note the arbitration agreement states that "[a]ny arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. sec. 1 et seq.) and not by any state law concerning arbitration." (Arbitration Agreement.) It also reads that "[t]he arbitrator shall apply governing substantive law in making an award." Notwithstanding, both Norman and Kellie Auto support their arguments in their original merit briefs and their briefs regarding reconsideration with references to Ohio law only, not federal law.

> (C) The award is imperfect in matter of form not affecting the merits of the controversy.

{¶ 15} In *Norman*, this court found Kellie Auto's request for remand for modification appropriate; however, none of the grounds for modification outlined in R.C. 2711.11 were met. Kellie Auto's claim that modification was required for application of the CSPA cure provisions was not based on any flaw in the arbitrator's decision. Rather, the modification was based on something that happened after the arbitrator issued his decision and award and after Norman applied for confirmation. The Supreme Court of Ohio has stated:

> R.C. Chapter 2711 does not confer authority on an arbitration panel to reconsider its awards. Instead, R.C. Chapter 2711 confers jurisdiction only on the *trial court*, pursuant to R.C. 2711.10 and 2711.11, to vacate, modify or correct arbitration awards. Furthermore, "when the submitted issues are decided, the arbitrators' powers expire. Thus, a second award on a single, circumscribed submission is a nullity." *Lockhart v. Am. Res. Ins. Co.* (1981), 2 Ohio App. 3d 99, 102, citing *Bayne v. Morris* (1863), 68 U.S. 97, 99. *Lockhart* also relied on *Citizens Bldg. of W. Palm Beach, Inc. v. W. Union Tel. Co.* (C.A.5, 1941), 120 F.2d 982, 984, which held, "Arbitrators are appointees with but a single duty and * * * performance of that duty terminates their authority. When an arbitral board renders a final award, its powers and duties under the submission are terminated. Its authority is not a continuing one, and, after its final decision is announced, it is powerless to modify or revoke it or to make a new award upon the same issues." We find this analysis to be well crafted. Accordingly, the arbitration panel, once it entered the award, had no authority to reconsider its decision.

(Emphasis sic.) *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932, ¶ 23.

{¶ 16} Further, in *BIGResearch, L.L.C.*, [*Prosper Business Dev. Co.* Intervenor-appellant] *v. PENN, L.L.C.*, 10th Dist. No. 11AP-855, 2012-Ohio-2992, ¶ 37 ("*Prosper Business*"), we noted that "an arbitrator may not make factual findings with respect to events that occurred after the conclusion of arbitration." *Id.*, citing *Accu-Med Servs., Ltd. v. Omnicare, Inc.*, 1st Dist. No. C-020789, 2004-Ohio-655, ¶ 24.

{¶ 17} Here, no cure offer was made as arbitration proceeded and the arbitrator did not err—requiring vacation or modification—by failing to consider the cure provisions because no cure offer was made for him to assess. The cure offer was made after the

arbitrator's powers expired and he was powerless to modify or revoke his award at the time Kellie Auto made the cure offer. Kellie Auto did not meet any of the grounds for vacation or modification in R.C. 2711.10 or 2711.11. Therefore, we agree with Norman that reconsideration is warranted as application of the CSPA cure provisions in this instance did not meet the grounds for vacation or modification pursuant to R.C. 2711.10 or 2711.11.[2]

{¶ 18} Because we have determined that grounds for modification or vacation were not met, it is not necessary for us to address the merits of the question whether the CSPA cure provisions apply here.

{¶ 19} Accordingly, we grant Norman's application for reconsideration and vacate our decision in *Norman* to sustain the first assignment of error and reverse and remand the trial court decision on those grounds. We now overrule the first assignment of error.

IV. Affirmation of Original Determination to Overrule the Third Assignment of Error

{¶ 20} In *Norman,* we also addressed Kellie Auto's third assignment of error and determined the trial court did not err when it did not conduct a hearing on Kellie Auto's application to modify the arbitrator's award. We stated:

> Kellie Auto argues a mistake occurred when, on November 30, 2017, the trial court ruled on both Norman's July 11, 2017 application for judgment confirming the arbitration award and Kellie Auto's August 4, 2017 motion to modify the award without first conducting any hearing. Consequently, on December 15, 2017, Kellie Auto filed a motion for relief from judgment pursuant to Civ.R. 60(B) and a motion to stay the execution of judgment pursuant to Civ.R. 62(A).
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> On January 9, 2018, the trial court issued a decision and entry denying Kellie Auto's Civ.R. 60(B)(1) motion filed

[2] Kellie Auto also did not meet the grounds for vacation or modification pursuant to federal law. 9 U.S.C. 10 states an arbitration award may be vacated upon application of any party: "(a)(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. 11 states that an arbitration award may be modified upon the application of any party: "(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not affecting the merits of the controversy." As noted above, Kellie Auto did not argue that any of these grounds were met and we would also determine that none of these grounds were met.

December 15, 2017, and a decision entry and order denying Kellie Auto's motion to stay filed December 15, 2017. The trial court noted that "Civ.R. 60(B) is a remedial rule to be liberally construed so that the ends of justice may be served." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20 (1996), citing *Colley v. Bazell*, 64 Ohio St.2d 243, 249 (1980). The trial court continued:

To prevail on a Civ.R. 60(B) motion, "the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc., v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E. 2d 113, paragraph two of the syllabus. Furthermore, "Civ.R. 60(B) relief is improper if any one of the foregoing requirements is not satisfied." Boston v. Parks-Boston, 10th Dist. Franklin No. 02AP-1031, 2003-Ohio-4263, ¶ 12-13. Only the first two elements are at issue here.

(Jan. 9, 2018 Decision & Entry at 2.)

The trial court disagreed with Kellie Auto's argument that the language of R.C. 2711.09 and the holding of *Zingarelli v. Lord*, 10th Dist. No. 94APE05-699 (Nov. 17, 1994) required the trial court to hold a hearing on Kellie Auto's Civ.R. 60(B) motion. As we noted in the Facts and Procedural Background portion of this decision, the trial court determined that this Court's decision in [*Victoria's Secret Stores, Inc. v. Epstein Contracting, Inc.*, 10th Dist. No. 00AP-209 (Mar. 8, 2001)] was controlling, and that it obviated the need to conduct a hearing on the motion because Kellie Auto had not requested a hearing.

The trial court found *Epstein* to be controlling because Epstein considered the hearing requirement on motions to amend and/or modify pursuant to R.C. 2711.09 through 2711.11, while concurrently examining the provisions of R.C. 2711.05, Civ.R. 7(B)(2), and Loc.R. 21.01 of the Franklin County Court of Common Pleas, General Division. The trial court continued:

Having determined that Epstein controls, the Court notes that [Kellie Auto] did not request a hearing. *See* White v. Fitch, 2015-Ohio-4387, 2015 Ohio App. LEXIS 4332 (Ohio Ct. App.,

> Cuyahoga County 2015) (holding trial court was within its authority to deny the home owners' motion to modify or vacate the arbitration award without a hearing and noting the owner never requested a hearing, and could have made such a request in her initial motion to modify or vacate the arbitration award or in her reply brief). And, this Court did conduct a status conference and a non-oral hearing "utilizing the various memoranda filed in support and opposition to appellees' application to confirm the arbitration award and appellant's motion to vacate or modify the award." Epstein, 2001 Ohio App. LEXIS 827, at * 14. Accordingly, the Court holds under Epstein and Fitch that [Kellie Auto] fails to demonstrate both that [Kellie Auto] has a meritorious defense or claim to present if relief is granted and that [Kellie Auto] is entitled to relief under Civ.R. 60(B)(1). [Kellie Auto's] Motion to Vacate is therefore **DENIED** under Boston.
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> (Emphasis sic.) (Jan. 9, 2018 Decision & Entry at 4-5.)
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> We find the common pleas court's reasoning to be sound. Accordingly, the common pleas court did not err by not conducting a hearing on the Kellie Auto's motion to modify the arbitrator's award before denying the motion, especially when Kellie Auto did not specifically request a hearing on its Civ.R. 60(B) motion. Kellie Auto's third assignment of error is overruled.

Id. at ¶ 39-43.

{¶ 21} We again adopt these points from *Norman* with respect to Kellie Auto's third assignment of error.

{¶ 22} Accordingly, we overrule Kellie Auto's third assignment of error.

V. Overruling of the Second Assignment of Error

{¶ 23} Finally, in *Norman* we declined to address Kellie Auto's second assignment of error, determining it to be moot based on our original sustaining of the first assignment of error and reversal of the trial court on these grounds. Now that we have reconsidered and vacated our original decision, it is necessary for us to address Kellie Auto's second assignment of error.

{¶ 24} In its second assignment of error, Kellie Auto avers "[t]he lower Court erred when it affirmed [sic] the Arbitrator's award of attorney fees absent a discussion of the

required factors enumerated in *Bittner v. Tri-County Toyota, Inc.* 58 Ohio St.3d 143, 145, 569 N.E.2d 464 (1991)."[3]

{¶ 25} Specifically regarding attorney fees, *Norman* stated:

> On June 5, 2017, the arbitrator rendered an award in favor of Norman, having found that Kellie Auto had knowingly committed an unfair or deceptive act under the CSPA. Having heard and considered the parties' evidence, the arbitrator awarded $53,911.75 to Norman, a sum that included:
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> * * *
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> (3) Attorney's fees and costs – [Norman] is entitled to his reasonable attorney's fees and costs for this knowing violation of the CSPA. [Norman] has submitted the affidavits of his attorneys (Ex. 23 and 24) along with the affidavit of Attorney DeRose (Ex. 25) attesting to the reasonableness of the rates submitted. The Arbitrator finds that applying the lodestar approach set forth by the Ohio Supreme Court in *Bittner v. Tri-County Toyota* (1991), 58 Ohio St. 3d 143 an attorney's fees award of $31,494.50 (an extra $1,000 is awarded for post-hearing work) is appropriate. In addition, hearing fees of $127.25 will be imposed;
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> * * *
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> (Sic passim and emphasis added.) (Ex. A at 5-6, attached to Application.)

Id. at ¶ 9.

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[3] *Bittner*, at 145-46, stated: "When awarding reasonable attorney fees pursuant to R.C. 1345.09(F)(2), the trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B). These factors are: the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. All factors may not be applicable in all cases and the trial court has the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation.

Moreover, the trial court determination should not be reversed absent a showing that the court abused its discretion. 'It is well settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere. The trial judge which participated not only in the trial but also in many of the preliminary proceedings leading up to the trial has an infinitely better opportunity to determine the value of services rendered by lawyers who have tried a case before him than does an appellate court.' *Brooks* v. *Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App. 3d 85, 91, 23 OBR 150, 155, 491 N.E. 2d 345, 351-352."

{¶ 26} When Kellie Auto filed its application to modify the arbitration award, pursuant to R.C. 2711.11, he requested the trial court "issue an order modifying and correcting the arbitration award at issue in this action" by applying the CSPA cure provisions or, alternatively, "remand this matter to the Arbitrator with instructions that he include an analysis of attorney's fees as required under *Bittner v. Tri-County Toyota*, 58 Ohio St.3d 143 (1991)." *Norman* at ¶ 13. The trial court denied Kellie Auto's motion to modify on November 30, 2017, issuing a final appealable order on December 11, 2017. Regarding attorney fees, the trial court stated:

> The Award specifically states that the 'Arbitrator finds that applying the lodestar approach set forth by the Ohio Supreme Court in Bittner * * * an attorney's fee award of $31,494.50 (an extra $1,000 is awarded for post-hearing work) is appropriate.' (Award at 6.) Clearly, then, the Arbitrator considered and utilized the Bittner factors. This alternative ground is unavailing and Kellie has fallen short of its burden of proving 'the arbitrator committed an error so patent and grave as would have required him to change his award.' [*Warner v. CTL Eng., Inc.*], 9 Ohio App.3d 52, 55, 458 N.E.2d 399 (10th Dist. 1983). As such the Court **DENIES** Kellie's Motion to Modify.

(Emphasis sic.) (Nov. 30, 2017 Decision at 4.)

{¶ 27} Kellie Auto argues the trial court erred in not discussing the factors outlined in *Bittner* and, therefore, it is not possible to determine what factors the arbitrator considered or the weight, if any, it placed on those factors. Kellie Auto argues "[w]ithout such a statement, an *appellate court* cannot conduct a meaningful review * * * [and] '[a] court must give adequate reasoning as to how it arrived at the specific amount of the award.' " (Emphasis added.) (Kellie Auto's Brief at 23, citing *Pack v. Hilock Auto Sales*, 10th Dist. No. 12AP-48, 2012-Ohio-4076, ¶ 16, and quoting *Ridenour v. Dunn*, 10th Dist. No. 03AP-611, 2004-Ohio-3375, ¶ 10.) Kellie Auto further argues " 'in cases where the amount recovered is small compared to the attorney fees assessed, the *court* must give adequate reasoning as to how it arrived at the specific amount of the award.' " (Emphasis added.) (Kellie Auto's Brief at 23-24, quoting *Whitestone Co. v. Stittsworth*, 10th Dist. No. 06AP-371, 2007-Ohio-233, ¶ 60.)

{¶ 28} We overrule Kellie Auto's second assignment of error for several reasons.

{¶ 29} First, in the application to modify and reply brief to Norman's memorandum contra to the application, as well as in the brief before this court, Kellie Auto did not assert any grounds pursuant to R.C. 2711.10 or 2711.11 for a court to vacate or modify an arbitrator's award on the grounds asserted in the second assignment of error. Kellie Auto claims the error by the trial court was failure to discuss *Bittner* factors and failure to include an analysis of the factors required. Kellie Auto does not allege the fee amount was incorrect but, rather, that the procedure used to assess the fees was not proper. Nowhere does Kellie Auto assert: (1) there was an evident material miscalculation of figures or an evident material mistake;[4] (2) the award was upon a matter not submitted to the arbitrator; or (3) the award is imperfect in matter of form not affecting the merits of the controversy. It was not the job of the trial court, nor is it the job of this court, to discern the grounds for modification, if any. *See also Classic Bar & Billiards, Inc. v. Samaan*, 10th Dist. No. 08AP-210, 2008-Ohio-5759, ¶ 17 ("It is the duty of the appellant, not the appellate court, to construct the legal arguments necessary to support the appellant's assignments of error.").

{¶ 30} Second, as revealed in its argument in support of the second assignment of error quoted above, Kellie Auto ignores that the role of an arbitrator, trial court, and appellate court when parties pursue arbitration differs from the role of a trial court and an appellate court when parties pursue litigation.[5]

{¶ 31} In *Prosper Business*, we noted that "in agreeing to arbitration, the parties trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.*[6] at ¶ 52, citing *DePalmo v. Schumacher*

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[4] In the application to modify, Kellie Auto argued evident miscalculation of figures and evident material mistake as grounds for modification that the arbitrator's award must be limited to only that permitted following a timely exercise of the right to cure. However, in the next section of the application, Kellie Auto asserted no particular grounds, pursuant to R.C. 2711.11 or 2711.10, as the reason for modifying the award for failure to properly assess attorney fees.

[5] Indeed, the Arbitration Agreement drafted by Kellie Auto states "either you or we may choose to have any dispute between us decided by arbitration and not in court or by jury trial." (Emphasis omitted.) (Arbitration Agreement.) It further states "rights to appeal in arbitration are generally more limited than in a lawsuit, and other rights that you and we would have in court may not be available in arbitration." (Emphasis omitted.) (Arbitration Agreement.)

[6] Also relevant here, in *Prosper Business*, at ¶ 52, we recognized, referring to *Bittner*, that "in a civil action in an Ohio court of law, an award of attorney fees is dependent upon the completion of prescribed procedures and analyses, e.g., a lodestar analysis. [But the appellant] has not, however, cited any precedent extending those procedures to arbitrations." Likewise here, Kellie Auto did not cite any precedent extending those procedures to arbitrations.

Homes, Inc., 5th Dist. No. 2001CA272, 2002-Ohio-770, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985). The trial court's role on reviewing an arbitrator's award is limited. Arbitration awards are presumed valid, and a reviewing court may not merely substitute its judgment for that of the arbitrator. *Id*.

{¶ 32} " 'Once an arbitration is completed, a court has no jurisdiction except to confirm and enter judgment (R.C. 2711.09 and 2711.12), vacate (R.C. 2711.10 and 2711.13), modify (R.C. 2711.11 and 2711.13), correct (R.C. 2711.11 and 2711.13), or enforce the judgment (R.C. 2711.14).' " *Champion Chrysler v. Dimension Serv. Corp.*, 10th Dist. No. 17AP-860, 2018-Ohio-5248, ¶ 10, quoting *State ex rel. R.W. Sidley, Inc. v. Crawford*, 100 Ohio St.3d 113, 2003-Ohio-5101, ¶ 22. " 'A trial court may not evaluate the actual merits of an award and must limit its review to determining whether the appealing party has established that the award is defective within the confines of R.C. Chapter 2711.' " *Id.*, quoting *Telle v. Estate of William Soroka*, 10th Dist. No. 08AP-272, 2008-Ohio-4902, ¶ 9. Because R.C. Chapter 2711 is the method to challenge an arbitration award, "[t]he jurisdiction of the courts to review arbitration awards is thus statutorily restricted; it is narrow and it is limited." *Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 173 (1985).

{¶ 33} An appellate court's role when reviewing a trial court's determination regarding arbitration is even more limited. "An appeal may be taken from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award." R.C. 2711.15. However, because "[a] trial court is precluded from evaluating the actual merits of an award and must confine itself to determining whether the appealing party has established that the award is defective in a manner recognized by R.C. Chapter 2711," on appeal, "the standard of review is further restricted." *MBNA Am. Bank, N.A. v. Jones*, 10th Dist. No. 05AP-665, 2005-Ohio-6760, ¶ 10-11.

{¶ 34} "[W]hen a court of appeals reviews a trial court's judgment concerning an arbitration award, the appellate court must confine its review to evaluating the order issued by the trial court pursuant to R.C. Chapter 2711." *State v. Ohio Civ. Serv. Emps. Assn., Local 11 AFSCME AFL-CIO*, 10th Dist. No. 14AP-906, 2016-Ohio-5899, ¶ 13. Thus, when "an appeal is taken from an order confirming, modifying, correcting, or vacating an arbitration award, the review is confined to the order and the original arbitration

proceedings are not reviewable." *Robert W. Setterlin & Sons v. N. Mkt. Dev. Auth., Inc.*, 10th Dist. No. 99AP-141 (Dec. 30, 1999), citing *Lockhart v. Am. Reserve Ins. Co.*, 2 Ohio App.3d 99, 101 (8th Dist.1981). "[W]hen reviewing a decision of a common pleas court confirming, modifying, vacating, or correcting an arbitration award, an appellate court should accept findings of fact that are not clearly erroneous but decide questions of law de novo." *Portage Cty. Bd. of Dev. Disabilities v. Portage Cty. Educators' Assn. for Dev. Disabilities*, 153 Ohio St.3d 219, 2018-Ohio-1590, ¶ 26.

{¶ 35} The arbitration agreement here states that an "arbitrator shall apply governing substantive law in making an award." It further states that "[e]ach party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law." (Arbitration Agreement.) The trial court points out, the arbitrator cited *Bittner*—the Ohio applicable law—and considered and utilized the *Bittner* factors. We agree the arbitrator applied governing Ohio law in making the award of attorney fees.

{¶ 36} Third, notwithstanding that it was not the trial court's role to evaluate the merits of the arbitrator's award, and the original arbitration proceedings are not reviewable by the appellate court, we do note that Kellie Auto did not address the award of attorney fees in its post-hearing brief before the arbitrator when he had the opportunity to argue the merits of the arbitrator's award of attorney fees.

{¶ 37} Attached to Norman's memorandum contra to Kellie Auto's application to modify were Exhibits C and D. Exhibit C contained Norman's post-arbitration brief submitted to the arbitrator. Pages 27-32 of Norman's post-arbitration brief address his request for attorney fees and specifically addresses the *Bittner* factors.[7] Attached to

[7] In addition to the affidavits and time sheets, Norman also referred the arbitrator to an analysis of the reasonableness of fees. Norman stated in his brief, and we have confirmed in reviewing the record: "In addition to the time records and affidavits Plaintiff's attorneys submitted with the post-arbitration brief, Plaintiff extensively briefed his entitlement to attorneys' fees. (*See* **Exhibit C at 27-32**.) Plaintiff outlined the ten (10) factors used by courts (following *Bittner*) to analyze the reasonableness of attorney fees. *Id.* Additionally, Plaintiff's counsel submitted its well-documented and contemporaneous time reports detailing the amount of time as well as affidavits regarding the number of hours worked and their hourly rates of recompense and argued that, pursuant to *Bittner*, they constitute sufficient evidence of reasonableness to determine the basis of attorneys' fees. *See Bittner*, 58 Ohio St.3d at 145. Further support of Plaintiff's attorneys' rates was submitted using Judge Rubin's 1983 committee's determination of reasonable attorney fee rates that is still currently used by the Southern District of Ohio. Under Judge Rubin's rubric, the rates requested are comparable and Plaintiff included a chart to compare Plaintiff's attorneys' fee rates compared to Judge Rubin's rubric using 1983 rates calculated for 2016 rates and applied a 4% annual cost-of-living allowance to measure the reasonableness of the fees requested. Applying the Rubin Rate as of 2016, the rates for attorney Coffman was $352 per hour and the rate for attorney Bryant is $263 per hour." (Emphasis sic.) (Norman's Memo. Contra Mot. to Modify at 12-13.)

Norman's post-arbitration brief were exhibits 23, 24, and 25—affidavits and detailed time sheets of Norman's attorneys Coffman and Bryant, as well as the affidavit of Attorney DeRose opining on reasonableness of Coffman and Bryant's fees and quality of work; as well as detailed description and breakdown by hours spent of Norman's counsels' work on his behalf. Exhibit D contained Kellie Auto's post-arbitration brief. Kellie Auto's post-arbitration brief states simply that Norman is not entitled to attorney fees, but does not address the reasonableness of Norman's counsels' fees or work or any of the *Bittner* factors. Nor does it complain that the arbitrator did not analyze the request for attorney fees award pursuant to Bittner.

{¶ 38} In *Bittner*, the Supreme Court observed that " '[i]t is well settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere. The trial judge which participated not only in the trial but also in many of the preliminary proceedings leading up to the trial has an infinitely better opportunity to determine the value of services rendered by lawyers who have tried a case before him than does an appellate court.' " *Id.* at 146, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.*, 23 Ohio App.3d 85, 91 (12th Dist.1985). The same reasoning applies here to the arbitrator. The arbitrator, who participated in the arbitration and preliminary proceedings leading up to the arbitration, had an infinitely better opportunity to determine the value of services rendered by the lawyers who arbitrated before him than the trial court asked to modify the award and more so than the appellate court asked to review the trial court's confirming of the award and denial of the motion to modify the award.

{¶ 39} Taking all these factors into consideration, including the trial court's limited role in considering applications to confirm and modify an arbitrator's award, as well as our own limited role in reviewing the trial court's decisions, we cannot say the trial court clearly erred or abused its discretion in confirming the arbitrator's award and amount of attorney fees and denying Kellie Auto's application to modify the same.

{¶ 40} Accordingly, we overrule Kellie Auto's second assignment of error.

{¶ 41} Finally, we note that on December 12, 2018, Norman filed a motion for post-arbitration attorney fees and costs with the trial court. Norman requested the trial court provide an opportunity to request additional attorney fees and costs incurred as part of

post-judgment collection efforts given Kellie Auto's continued refusal to pay the amounts recovered in this dispute. On January 9, 2019, the trial court denied Kellie Auto's motion to vacate judgment, pursuant to Civ.R. 60, and motion to stay. Although the trial court did not expressly rule on Norman's motion in the January 9, 2019 entry, we construe the trial court's silence as a denial of the same. *See State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469 (1998) (holding that an appellate court ordinarily presumes that a trial court denied a motion when the trial court fails to explicitly rule on the motion). In his original merit brief, Norman requested the order remand to the trial court solely to determine the additional attorney fees and costs incurred resulting from Kellie Auto's unnecessary and avoidable conduct following its refusal to pay the award. Norman did not, however, raise this as an assignment of error.[8] Furthermore, the trial court did affirm the arbitrator's award of an extra $1,000 for post-arbitration work. Therefore, we decline to remand this case to the trial court to consider any additional post-arbitration attorney fees.

VI. Conclusion

{¶ 42} For the foregoing reasons, we grant Norman's application for reconsideration and vacate the original decision. We overrule the first assignment of error. Consistent with the original decision, we overrule the third assignment of error. Further, we overrule the second assignment of error. Norman's motion to supplement the record is moot. The judgments of the Franklin County Court of Common Pleas are affirmed.

Reconsideration granted;
original decision vacated; judgments affirmed.

NELSON, J., concurs.
BRUNNER, J., dissents.

NELSON, J., concurring.

{¶ 43} I concur fully in the decision of the court.

{¶ 44} Reconsideration is warranted particularly because the original panel decision, it seems to me, altered two important Ohio statutes: the Arbitration Act (by ruling that a court can and must modify an arbitrator's decision based on conduct a party undertakes after the arbitration award has issued) and the CSPA (by permitting what the

[8] Pursuant to App.R. 16, "[the court] do[es] not determine appeals based on mere arguments and may dismiss any arguments not specifically included in an assignment of error." *Curry v. Columbia Gas of Ohio, Inc.*, 10th Dist. No. 19AP-618, 2020-Ohio-2693, ¶ 14.

decision itself called "potential abuses" whereby a supplier can circumvent the result of its own arbitration contract and escape the treble damages and attorney fees the Act provides when no cure has been offered before final determination, *compare Norman,* 2019-Ohio-360, at ¶ 33). We should avoid starting down either path.

{¶ 45} As we now affirm, a common pleas court "shall grant" a timely application for confirmation of an arbitration award "unless the award is vacated, modified, or corrected as prescribed in" R.C. 2711.10 and 2711.11. R.C. 2711.09. The court can vacate the arbitration award only if it was procured by fraud, or the arbitrator displayed "evident partiality or corruption" or was guilty of procedural misconduct or exceeded his or her powers "or so imperfectly executed them that a mutual, final, and definite award" was not made. R.C. 2711.10. And a court may modify an arbitration award only if "[t]here was an evident material miscalculation of figures or an evident material mistake" in a description in the award, or the award was on a matter not submitted to arbitration or the award was "imperfect in matter of form not affecting the merits of the controversy." R.C. 2711.11.

{¶ 46} Here, our earlier decision found "Kellie Auto's request for remand for modification appropriate," 2019-Ohio-360, at ¶ 34, but not on the basis of any of the exclusive grounds for modification specified in R.C. 2711.11. Indeed, the basis for the ordered modification does not relate to any claimed flaw at all in the arbitrator's decision; the arbitrator apparently made no miscalculation of figures or mistake in describing the award, which was not imperfect in form, and the matter had been submitted to him. The modification was ordered on the strength of something that happened well after the award issued and after Mr. Norman had applied for confirmation. But the structure and text of Ohio's arbitration statutes do not countenance such after the fact tinkering. "For a dispute resolution procedure to be classified as 'arbitration,' the decision rendered must be final, binding and without any qualification or condition as to the finality of an award whether or not agreed to by the parties. The decision may only be questioned pursuant to the procedure set forth in R.C. 2711.13 [regarding a motion to vacate, modify, or correct an award] on grounds enumerated in R.C. 2711.10 and 2711.11." *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 711 (1992).

{¶ 47} Contrary to the suggestion of our earlier decision here, I do not think that we "harmoniz[e]" the arbitration statutes with the CSPA by ignoring or interpreting away the plain text of R.C. 2711.11 regarding the limited grounds for modifying an arbitration award.

Compare 2019-Ohio-360, at ¶ 34 (further positing that arbitrator made a "material miscalculation" in arbitration award by not prognosticating post-award cure offer). And observing the terms of the arbitration statutes as written does not strip suppliers of the protections provided by the "cure" provisions of the CSPA. For starters, arbitration in this context is available and binding only if both parties agree to it—just as Kellie Auto did here, through contract language it drafted and then agreed to and then invoked providing that " 'any claim * * * which arises out of or relates to * * * [the] purchase or condition of this vehicle * * * shall, at your or our election, be resolved by * * * binding arbitration and not by court action.' " *See* 2019-Ohio-360, at ¶ 3, quoting arbitration agreement. Kellie Auto acknowledges that it "was the first to raise the existence of an arbitration clause. The purpose of doing so was to remind the Plaintiff that this matter would ultimately be decided by arbitration. It was." Answer in Opposition to Motion for Reconsideration at 8. Just so.

{¶ 48} Moreover, there can be no argument here that the arbitrator ignored the law in failing to consider CSPA cure provisions, because Kellie Auto made no cure offer for him to assess. The parties proceeded through arbitration, an award was issued, and Mr. Norman had applied for confirmation before Kellie Auto advanced its offer. *Compare* 2019-Ohio-360, at ¶ 23 (quoting Kellie Auto on the "historical backdrop" of the CSPA as designed to provide " 'opportunity to cure violations before protracted litigation' "). Therefore, and as noted in the decision above, we need not reach and we decline to catalogue what hypothetical procedural permutations could permit a valid CSPA cure offer in the arbitration context; it would be for arbitrators in appropriate cases, and not for an advisory opinion of this court, to decide in the first instance whether a particular cure offer would have effect in a particular circumstance being arbitrated by agreement. In any event, the language of the CSPA indicates that any operative cure offer must precede any final award in binding arbitration. The notice that must accompany a cure offer for it to have effect, for example, is to recite in part that "[r]ejection of this cure offer could impact your ability to collect court costs and legal fees. *If* * * * [an] arbitrator finds in your favor, but does not *award* you an amount more than the value of the supplier's remedy, the supplier will not be responsible for treble damages, attorney's fees, [etc.]"; the statute also specifies that "*[i]f* * * * [an] arbitrator awards actual economic damages * * * that are not greater than the value of a supplier's remedy included in a cure offer made pursuant to this section, the consumer shall not be entitled to * * * *[a]n award* of treble damages * * *." R.C.

1345.092(D)(2) and (G)(1) (emphasis added). Both the word "if" and the references to an "award" (with all its attendant confirmation provisions) signal in this context that the arbitrator's ruling is envisioned prospectively, not retrospectively. To the same effect, I myself do not read the statutory predicate for a right to cure (requiring an "action seeking a private remedy *pursuant to section 1345.09* of the Revised Code," *see* R.C. 1345.092(A) (emphasis added)) to encompass an application made *pursuant to R.C. 2711.09* to confirm an arbitration award (an application that the court "shall grant" absent specified circumstances for vacating, modifying, or correcting it, *see* R.C. 2711.09).

{¶ 49} A proper understanding of both the Arbitration Act and of the CSPA, it seems to me, or of either one, avoids the "potential abuses" conceded by our initial decision that would come with judicially rewriting an arbitration award for "a supplier [who] could insist on arbitration, refuse to pay, force a court action, and [then] make a cure offer * * * that is the same as or just higher than the economic damage amount awarded by an arbitrator * * *." 2019-Ohio-360, at ¶ 33. The initial decision concluded that such rewriting "appears to be how the legislature intended for the CSPA to work," *id.*, but I find nothing in the legislative language to suggest that the General Assembly intended to reward such gamesmanship on the part of CSPA violators by amending the arbitration statutes. And while Kellie Auto hints that it considers selling rebuilt salvage to an unsuspecting buyer without notice to be "a merely technical violation of the CSPA," *see* Answer in Opposition to Motion for Reconsideration at 7, I do not believe that anything here turns on that questionable characterization.

{¶ 50} I entirely concur in granting reconsideration, in vacating our original decision, in overruling Kellie Auto's assignments of error, and in affirming the judgments of the Franklin County Court of Common Pleas.

BRUNNER, J., dissenting.

{¶ 51} I respectfully dissent from the majority decision and concurring decision on reconsideration of *Norman v. Kellie Auto Sales, Inc.*, 10th Dist. No. 18AP-32, 2019-Ohio-360 ("*Norman*" or "original decision"). The majority in its two decisions has not specifically pointed out under the standard for reconsideration of a prior appellate decision either that which is an obvious error under the law, or an issue that was not properly considered at all

by the court in the first instance. Instead, the majority states in only the majority decision, "[w]e believe the grounds for reconsideration have been met." (Majority decision at ¶ 10.)

{¶ 52} The majority decision contains a cite to the 1981 case of *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981), as authority for the standard of review on reconsideration. However, a more recent statement of that standard is:

> An application for reconsideration is not intended for cases in which a party simply disagrees with the reasoning and conclusions of the appellate court. *Drs. Kristal & Forche, D.D.S., Inc. v. Erkis*, 10th Dist. No. 09AP-06, 2009-Ohio-6478, ¶ 2, citing *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). An application for reconsideration will be denied where the moving party "simply seeks to 'rehash the arguments' " presented in the initial appeal. *Appenzeller v. Ohio Dept. of Rehab & Corr.*, 10th Dist. No. 17AP-747, 2018-Ohio-1698, ¶ 4, quoting *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117, 127, 619 N.E.2d 429 (10th Dist.1992). *Thus, if an application for reconsideration does not raise an issue that either was not considered at all or was not fully considered, nor demonstrates the court made an obvious error or rendered a decision unsupportable under the law, it should not be disturbed.* [*State v.*] *Harris*, [10th Dist. No. 13AP-1014, 2014-Ohio-672,] ¶ 8.

(Emphasis added.) *Hal v. State Dept. of Edn.*, 10th Dist. No. 18AP-301, 2020-Ohio-204, ¶ 2. My point here is that the majority decision should educate the reader (1) under what standard is it essentially reversing itself on reconsideration, especially with a new panel of judges, and (2) how it is applying such a standard, demonstrating that the previous decision was unsupportable under the law or that a particular issue was not at all considered in the earlier decision. I do not believe it has done that here, and thus, procedurally, reconsideration is not warranted.

{¶ 53} Second, in the interest of brevity and finality for the parties, I reiterate and incorporate the substantive holding in *Norman* as the substantive basis for my dissent, as that decision reviews an application, to the facts of this case, of the statutes in question—the Ohio Consumer Sales Practices Act and the state's statutes on arbitration. Our prior review of the application of those two statutes to the facts at hand in this case is one that is supportable under the law and thus not subject to reconsideration, according to *Hal*, whether or not it reaches a desirable result.

{¶ 54} In my view, the statement of the law in our original decision, is as the legislature intended for amendments to the Consumer Sales Practices Act to apply in conjunction with its arbitration statutes. If the result should be better, it is up to the legislature to repair its language. It is not for us to construe or re-construe it in an effort to improve it. To strain our analysis to reach a different conclusion on reconsideration knee caps predictability of case precedent in our district and takes us outside our jurisdiction as set forth in Ohio Constitution, Article IV, Section 3(B)(2), which provides that our jurisdiction is "as [is] provided by law."

{¶ 55} When interpreting statutes, we must first apply their plain meaning:

> Unambiguous statutes are to be applied according to the plain meaning of the words used, *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St. 3d 125, 127, 661 N.E.2d 1011, 1012, and courts are not free to delete or insert other words, *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St. 3d 217, 220, 631 N.E.2d 150, 153.

State ex rel. Burrows v. Indus. Comm., 78 Ohio St.3d 78, 81 (1997). Moreover, a court must read all statutes relating to the same general subject matter together to give proper force and effect to each one. *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, ¶ 27.

{¶ 56} I believe the first decision in this matter in *Norman*, based on the plain meaning of the Consumer Sales Practices Act and the state's arbitration statutes, gives effect to both. If the legislature did not intend such an outcome, it is incumbent on the legislature to modify its statutes and not on us to modify our decision on reconsideration, especially when the decision in the matter does not bear obvious error and is supportable under the law.

{¶ 57} Finally, I respectfully point out that both the majority and concurring decisions vacate this Court's prior decision in *Norman* via reconsideration. But such action is neither authorized nor supported under App.R. 26, because nowhere in the Rules of Appellate Procedure are we authorized to vacate our own decisions. Perhaps interlocutory, non-final orders may be vacated, but no such authorization appears in the appellate rules for applications for reconsideration.

{¶ 58} I submit that this Court has no authority under the Rules of Appellate Procedure to vacate its own decisions and judgments on reconsideration.[9] *And in the past, as noted in footnote 1, we have reconsidered decisions without having vacated them*. In civil cases, only language in the appellate rules relating to en banc consideration discusses the vacating of an earlier decision and that language is somewhat moot, since App.R. 26(B) does not now require a decision to be vacated "in the event of a sua sponte decision to consider a case en banc." App.R. 26, Staff Note (July 1, 2012 Amendment). This Court should have simply reconsidered its decision and not vacated the earlier decision, and to do this is error.

{¶ 59} It is for these reasons that I respectfully dissent from the majority decision and concurring decision, constituting a majority of the panel on reconsideration.

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[9] App.R. 26(A)(1) is silent about what an appellate court should do in the event it reconsiders a prior decision, and this district has been inconsistent in what it does. *See State v. Wade*, 10th Dist. No. 06AP-644, 2008-Ohio-1797, wherein we reconsidered our decision without vacating it, and *Grothaus v. Warner*, 10th Dist. No. 08AP-115, 2008-Ohio-6683, wherein we reversed part of an earlier decision without vacating it. *See also State v. Morris*, 10th Dist. No. 10AP-512, 2011-Ohio-5484, ¶ 8, wherein we stated, "[w]e find that reconsideration is proper because we admittedly relied, in part, upon a concession that was withdrawn. Accordingly, we grant appellee's application. This decision shall therefore replace the decision rendered in [*State v. Morris*, 10th Dist. No. 10AP-512, 2011-Ohio-2226]." *But compare Spitznagel v. State Bd. of Edn.*, 10th Dist. No. 07AP-757, 2008-Ohio-6080, ¶ 11, where we vacated an earlier decision that was no longer supportable by law because of a Supreme Court of Ohio decision that was decided the same day as the decision that was reconsidered.

[Cite as *Williams v. Dayton Water*, 2020-Ohio-4332.]

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

TRAVIS LANIER WILLIAMS	:	
	:	Appellate Case No. 28686
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2019-CV-4918
v.	:	
	:	(Civil Appeal from
CITY OF DAYTON WATER	:	Common Pleas Court)
	:	
Defendant-Appellee	:	

. . . . . .

O P I N I O N

Rendered on the 4th day of September, 2020.

. . . . . .

TRAVIS LANIER WILLIAMS, 1955 Kipling Drive, Dayton, Ohio 45406
Plaintiff-Appellant, Pro Se

MARTIN W. GEHRES, Atty. Reg. No. 96711, Assistant City Attorney, City of Dayton Attorney's Office, 101 West Third Street, P.O. Box 22, Dayton, Ohio 45401
Attorney for Defendant-Appellee

. . . . . .

FROELICH, J.

{¶ 1} Travis Lanier Williams appeals from the dismissal of his action against the City of Dayton, Department of Water, claiming that the City should have accepted his international bills of exchange as payment for his water bills. For the following reasons, the trial court's judgment will be affirmed.

I. Facts and Procedural History

{¶ 2} Williams's complaint consists of a short civil complaint form and several attachments. From these documents, we glean the following facts.

{¶ 3} Williams received a bill in the amount of $187.42 from the City of Dayton's Department of Water. On September 26, 2019, in response to that bill, Williams sent the Department a self-prepared international bill of exchange, drawn on the United States Department of Treasury, for that amount. The City did not accept the purported bill of exchange as payment.

{¶ 4} On October 22, 2019, Williams received a notice from the Department of Water that the bill for water service for June 11, 2019 to September 11, 2019 remained unpaid and that service would be discontinued if payment were not received. On October 23, 2019, Williams mailed a second self-prepared international bill of exchange in the amount of $194.18, again drawn on the United States Department of Treasury, to the Department. That purported bill of exchange also was not accepted as payment.

{¶ 5} The same day (October 23), Williams filed a complaint in the Montgomery Court of Common Pleas against the City, claiming that the City should have accepted his bills of exchange as legal tender and payment for his water bills. He cited to 12 U.S.C. 95a as support. Williams asserted that by not discharging his obligation (the water bill),

the City dishonored the bills of exchange in violation of his rights pursuant to R.C. 1.22 (change in judicial construction does not affect prior valid obligations), R.C. 1.03 (definition of "anything of value"), and R.C. 1303.61 (presentment of instruments).

{¶ 6} The City responded to the complaint with a motion to dismiss pursuant to Civ.R. 12(B)(6). The City argued that Williams's "hand drafted 'bill of exchange' [was] not a legitimate negotiable instrument" and that the documents were "nothing more than a meaningless piece of paper." The City noted that several courts have found similar claims to be frivolous and that the United States Department of Treasury has issued an alert about fraudulent bills of exchange.

{¶ 7} Williams did not respond to the motion to dismiss.

{¶ 8} On December 20, 2019, the trial court granted the City's motion to dismiss. First, the court noted that one Ohio court had held that a presented International "Bill of Exchange" was not a proper payment for a mortgage to prevent a foreclosure order. *Bank of N.Y. v. Markos*, 10th Dist. Franklin No. 05AP-906, 2006-Ohio-2073. Second, the court noted the numerous cases cited in the City's motion, all of which held that a dismissal of a case is proper under Fed.R.Civ.P. 12(b)(6) when a "bill of exchange" is at issue. The court quoted *Bryant v. Washington Mut. Bank*, 524 F.Supp 2d 753 (W.D. Va. 2007) for its summary of the "redemption theory" underlying the use of purported bills of exchange. The trial court further indicated that the *Bryant* court had dismissed this theory as "nonsense in almost every detail," *id*. at 760, and had warned the debtor that "people frequently end up in prison" for passing bills of exchange drawn against the U.S. Treasury. *Id*. at 763. Finally, the trial court noted that the United States Treasury Department had issued an alert about fraudulent bills of exchange. Based on the case law and "simple

common sense," the trial court concluded that Williams's self-created international bills of exchange were not valid legal documents or tender.

{¶ 9} Williams appeals from the trial court's dismissal of his action.

II. Standard of Review

{¶ 10} A motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Civ.R. 12(B)(6), "is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992); *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, 866 N.E.2d 547, ¶ 16 (2d Dist.). The court must construe the complaint in the light most favorable to the plaintiff, presume all of the factual allegations in the complaint are true, and make all reasonable inferences in favor of the plaintiff. *Grover* at ¶ 16, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). A motion to dismiss under Civ.R. 12(B)(6) should be granted only where the complaint, so construed, demonstrates that the plaintiff can prove no set of facts entitling him to relief. *Sherrod v. Haller*, 2017-Ohio-5614, 94 N.E.3d 148, ¶ 6 (2d Dist.). "The standard for dismissal under Civ.R. 12(B)(6) is consistent with Civ.R. 8(A), which requires that a complaint 'contain * * * a short and plain statement of the claim [or claims] showing that the [plaintiff] is entitled to relief.' " *Toney v. Dayton*, 2017-Ohio-5618, 94 N.E.3d 179, ¶ 36 (2d Dist.).

{¶ 11} "An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review." *Duer v. Henderson*, 2d Dist. Miami No. 2009 CA 15, 2009-Ohio-6815, ¶ 68, quoting *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. This means the appellate court "must independently review the complaint to determine whether dismissal is appropriate." *Boyd v. Archdiocese of Cincinnati*, 2d Dist.

Montgomery No. 25950, 2015-Ohio-1394, ¶ 13, quoting *Ament v. Reassure Am. Life Ins. Co*., 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246, ¶ 60 (8th Dist.).

{¶ 12} In conducting that review, we are "bound to assume that the facts pleaded in the complaint are true, but the same does not apply to conclusions of law that the pleader contends are proved by those facts." *Thomas v. Progressive Cas. Ins. Co., Inc*., 2011-Ohio-6712, 969 N.E.2d 1284, ¶ 8 (2d Dist.). We are not to consider "unsupported conclusions that may be included among, but not supported by, the factual allegations of the complaint." *Boyd* at ¶ 13, quoting *Wright v. Ghee*, 10th Dist. Franklin No. 01AP-1459, 2002-Ohio-5487, ¶ 19.

{¶ 13} Although the rule itself states that matters to be considered on a Civ.R. 12(B)(6) motion are limited to those that appear within the relevant pleading, material incorporated within a complaint is part of that pleading. *Boyd* at ¶ 14, citing *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281, fn. 1, (1997) ("Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss."). Such material includes not only exhibits to a complaint, but also written instruments "upon which a claim is predicated," regardless of whether such material actually is attached to the pleading. *Id.*

III. Williams's Claim Based on his "International Bill of Exchange"

{¶ 14} The trial court dismissed Williams's complaint, finding, as a matter of law, that Williams's purported international bills of exchange were not legal tender and, consequently, he did not state a viable claim that the City erred in failing to accept them. We agree with the trial court that Williams's self-prepared international bills of exchange were not legal tender and, as a matter of law, Williams did not state a viable claim that

the City erred in failing to accept them as payment.

{¶ 15} At the outset, 12 U.S.C. 95a does not provide a basis for Williams's claim. That section formerly granted, in time of war, authority for the president to regulate transactions in the foreign exchange of gold or silver coin or bullion, currency or securities, and transfers of property in which any foreign country or a foreign national has any interest. *See* former 12 U.S.C. 95a(1)(A) and (B). The section upon which Williams relies, former 12 U.S.C. 95a(2), provided:

> Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, * * * shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this section, or any rule, regulation, instruction, or direction issued hereunder.

{¶ 16} 12 U.S.C. 95a was in effect until November 30, 2015. As of December 1, 2015, that section has no content and is entitled "Omitted."[1] In short, Section 95a is no longer valid. Accordingly, Williams now cannot state a claim based on that statute, as a matter of law.

{¶ 17} Williams's international bills of exchange appear to be based on a

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[1] "Congress omitted § 95a from the United States Code effective December 1, 2015, because 'an identical section exists in 50 U.S.C. § 4305(b)(2) and has since 1941.' " *United States v. Nobrega*, 124 A.F.T.R.2d 2019-6942, 2019 WL 6619853, *6 (D.Me.Dec. 5, 2019), quoting *Walquist v. Commr. of Revenue*, No. 08890-R, 2016 WL 2989259, *2, n.28 (Minn. Tax Ct. May 11, 2016).

"Redemptionist" theory. As the Third Circuit summarized:

> [T]he "Redemptionist" theory * * * propounds that a person has a split personality: a real person and a fictional person called the "strawman." The "strawman" purportedly came into being when the United States went off the gold standard in 19[3]3, and, instead, pledged the strawman of its citizens as collateral for the country's national debt. Redemptionists claim that government has power only over the strawman and not over the live person, who remains free. Individuals can free themselves by filing UCC financing statements, thereby acquiring an interest in their strawman. Thereafter, the real person can demand that government officials pay enormous sums of money to use the strawman's name * * *.

Monroe v. Beard, 536 F.3d 198, 203, fn. 4 (3d Cir.2008).

{¶ 18} The federal district court in Connecticut further explained:

> Another tenet of the Redemptionist theory is that when the United States Government "pledged the strawman of its citizens as collateral for the country's national debt," it created an "exemption account" for each citizen, identified by each person's Social Security number. When citizens contract for debt, the theory goes, their debts are collateralized by their respective exemption accounts, essentially making the U.S. Government ultimately responsible for satisfaction of their debts. Moreover, each citizen's exemption account is virtually bottomless, meaning that those who understand this theory — and who file the appropriate UCC financing statements, and thereby become a free sovereign, a process known as

"redemption" — never have to actually pay for anything.

(Citations omitted.) *McLaughlin v. CitiMortgage, Inc*., 726 F.Supp.2d 201, 210 (D.Conn.2010).

{¶ 19} Courts have uniformly rejected arguments that self-prepared documents created under the Redemptionist theory or one of its corollaries are valid legal tender. *See, e.g*., *Bank of New York v. Markos*, 10th Dist. Franklin No. 05AP-906, 2006-Ohio-2073, ¶ 18 (self-prepared international bill of exchange was not a valid payment of mortgage debt); *Vachon v. Reverse Mtge. Sols., Inc.*, Case No. EDCV 16-02419-DMG (KES), 2017 WL 6628103, *6 (C.D.Cal. Aug. 11, 2017); *Bryant v. Washington Mut. Bank*, 524 F.Supp 2d 753 (W.D. Va. 2007); *In re Hill*, Case No. 1:14-bk-15544-SDR, 2015 WL 5575499, *3 (Bankr.E.D.Tenn. Sept. 18, 2015). Rather, they have consistently found that similar bills of exchange supposedly drawn on treasury accounts are no more than "worthless piece[s] of paper." *Bryant* at 760; *see also, e.g*., *U.S. Bank, N.A. v. Phillips*, 366 Ill.App.3d 593, 852 N.E.2d 380 (2006).

{¶ 20} Viewing Williams's complaint, including the attached documents, in the light most favorable to him, Williams presented two self-prepared international bills of exchange drawn on the United States Treasury to the City to pay his water bills. We find no law, including R.C. Chapter 1303 (Negotiable Instruments), indicating that Williams's documents constituted valid legal tender or negotiable instruments. Additionally, courts throughout the country have reached the same conclusions with similar documents. The trial court thus did not err in likewise determining, as a matter of law, that Williams's international bills of exchange were not valid legal documents or tender. We conclude that Williams thus failed to state a claim against the City for failing to accept his purported

international bills of exchange as payment for his water bills.

IV. Conclusion

{¶ 21} The trial court's judgment will be affirmed.

. . . . . .

HALL, J. and WELBAUM, J., concur.

Copies sent to:

Travis L. Williams
Martin W. Gehres
Hon. Steven K. Dankof

[Cite as *Russell v. McDonalds, Inc. #3737*, 2020-Ohio-4300.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

URSULA WASHINGTON RUSSELL, :

Plaintiff-Appellee, :

No. 109112

v. :

McDONALDS INC. #3737 :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 3, 2020

Civil Appeal from the Euclid Municipal Court
Case No. 18-CVI-03687

Appearances:

Manchester Newman & Bennett, L.P.A., and Karly B. Johnson, *for appellant.*

LARRY A. JONES, SR., J.:

{¶ 1} Plaintiff Ursula Washington Russell ("Russell") alleged she was assaulted by an employee of a McDonald's in Euclid, Ohio. The McDonald's was owned by defendant H.L.W. Fast Track, Inc. d.b.a. McDonald's ("Fast Track"). Russell filed a complaint at the Small Claims Division of the Euclid Municipal Court,

seeking $6,000 for the injury she sustained from the incident. Fast Track did not appear at the hearing set for the small claims matter. The trial court entered a judgment of $6,000 in favor of Russell. Fast Track subsequently filed a Civ.R. 60(B) motion to set aside judgment. The trial court denied the motion. Fast Track now appeals from the judgment. After a review of the record and the applicable law, we conclude that the trial court did not abuse its discretion in denying Fast Track's motion to set aside judgment.

Background

{¶ 2} Russell and Consuela Wilson had a prior dispute before the instant assault incident. Wilson believed Russell's husband was the father of Wilson's child, and both Russell and her husband had a restraining order against Wilson. Russell alleged that, on February 21, 2017, she went to the drive-through window at the McDonald's located at 22291 Euclid Avenue in Euclid. Unbeknown to her, Wilson was working at the drive-through window. When Wilson saw Russell, Wilson tried to pull Russell through the drive-through window, and then came out of the building to attack her. While running away from Wilson, Russell sprained her ankle. Russell later went through two surgical procedures to repair her ankle. Wilson was subsequently charged with assault and, because she was on probation for a prior unrelated criminal case, she violated her probation and was returned to prison.

{¶ 3} After the incident, Russell notified the Euclid McDonald's. She also called a McDonald's complaint hotline to report the incident. According to Fast Track, its insurance carrier determined that Wilson had been terminated several

days before the incident. On October 23, 2018, Russell, pro se, filed a complaint in the Small Claims Division of Euclid Municipal Court, naming "McDonald # 3737" as defendant. She sought $6,000 for her ankle injury.

{¶ 4} The trial court's docket reflects that the summons and complaint were sent by certified mail to 22291 Euclid Avenue, Euclid, Ohio. The certified mail was addressed to "McDonald's Inc. #3737 c/o Herbert Washington, 22291 Euclid Ave., Euclid, OH 44117." Herbert Washington ("Washington") is the owner and operator of the Euclid McDonald's. The court's docket reflects a signed receipt of the certified mail and also a notice to defendant for the hearing scheduled for this matter.

{¶ 5} On the scheduled date, the magistrate held a hearing on the matter. No one appeared on behalf of "McDonald's Inc. #3737." The magistrate took evidence from Russell at the hearing and later issued a decision awarding plaintiff a judgment of $6,000. The magistrate found Russell sustained a severe ankle fracture that required two surgical procedures as a result of being assaulted by Wilson, and she incurred significant medical expenses and was still receiving therapy. The magistrate's decision was sent to defendant at the Euclid address and it was not returned to the court. On December 26, 2018, the trial court entered judgment against "McDonald's Inc. #3737." The judgment was also sent to defendant at the same address and it was similarly not returned to the court.

Civ.R. 60(B) Motion to Set Aside Judgment

{¶ 6} On March 8, 2019, Fast Track, through counsel, filed a Civ.R. 60(B) motion to set aside judgment. It argued that it was not served with the summons

and complaint and, furthermore, even if it was aware of the lawsuit, its failure to take any action regarding this matter constituted excusable neglect.

{¶ 7} Attached to Fast Track's motion was an affidavit from Thomas Micco ("Micco"). He stated that Washington is the owner of H.L.W. Fast Track, Inc. that owned 23 McDonald's franchises at the time, including the Euclid McDonald's, and that Washington conducts his work primarily at the company's corporate office in Youngstown, Ohio. Micco, the company's controller, further averred that no one at Fast Track received the summons or the complaint in this case. Washington was unaware of the lawsuit until March 27, 2018, when a manager of the Euclid McDonald's forwarded a picture of the judgment to Washington.

{¶ 8} Micco stated that Fast Track's records show that Russell called McDonald's complaint hotline on February 22, 2017, to report that on February 20, 2017,[1] Wilson "spit on her and kicked her car." McDonald's hotline notified Fast Track and York Insurance ("York"), Fast Track's insurance carrier, of the alleged incident. York then contacted Fast Track and requested the employee time records. After an investigation, York determined that Wilson had been terminated on February 15, 2017, several days before the alleged incident. Micco also averred that its Employee Handbook prohibits any "discourtesy" towards customers and any unlawful acts toward customers are terminable offenses.

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[1]Russell's complaint did not specify the date of the incident. At the hearing before the magistrate, Russell stated the date of the incident was February 21, 2017.

{¶ 9} On May 7, 2019, the magistrate held a hearing on Fast Track's motion to set aside judgment. At the hearing, the magistrate inquired regarding the possibility of settlement and urged the parties to engage in settlement discussion. Before the hearing was concluded, the magistrate offered Fast Track's counsel an opportunity to present additional evidence. Counsel replied that the brief accompanying the motion had addressed all the issues and did not put on additional evidence beyond the exhibits attached to the motion.

{¶ 10} The settlement negotiations were unsuccessful. Subsequently, on June 4, 2019, the magistrate issued a decision denying Fast Track's motion to set aside judgment. The magistrate noted that Fast Track did not deny that the summons and complaint as well as the magistrate's decision were all served at the business location where the assault allegedly occurred, and that these legal documents were sent in care of Washington, the owner of the business. The magistrate found it difficult to comprehend why the management team at the Euclid McDonald's would sign for a certified letter from the municipal court in care of the business's owner and then ignore it. The magistrate noted that the mail from the court containing his decision was also ignored.

{¶ 11} Fast Track filed objections to the magistrate's decision. The trial court overruled the objections and adopted the magistrate's decision. This appeal follows. On appeal, Fast Track raises the following error for our review:

> The trial court erred in denying Defendant-Appellant's Motion to Set Aside Judgment.

{¶ 12} Fast Track first argues the trial court's judgment was void because Fast Track was not properly served with the complaint and summons. It claims that, without effective service of process, the court did not have jurisdiction over it.

Service

{¶ 13} Civ.R. 4.2(F) governs service of process on a corporation. It states that a corporation may be properly served in any of the three ways: "by serving the agent authorized by appointment or by law to receive service of process; or by serving the corporation at any of its usual places of business by a method authorized under Civ.R. 4.1 (A)(1); or by serving an officer or a managing or general agent of the corporation." Civ.R. 4.1(A)(1) provides for service by certified mail.

{¶ 14} "In general, the test for determining whether a party was properly served is whether service of process was 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Madorsky v. Radiant Telecom, Inc.*, 8th Dist. Cuyahoga No. 87231, 2006-Ohio-6409, ¶ 7, quoting *Akron-Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403, 406, 406 N.E.2d 811 (1980). "A determination of whether notice was reasonably calculated to reach the interested party requires a case-by-case examination of the particular facts." *Id.* citing *Nowak v. Nowak*, 8th Dist. Cuyahoga No. 80724, 2003-Ohio-1824, ¶10.

{¶ 15} Pursuant to Civ.R. 4.2(F), a corporation may be properly served at "any of its usual places of business." Here, Russell served the summons and complaint by certified mail in care of Washington — who owned Fast Track — at one

of its usual places of business, the Euclid McDonald's, where the subject incident occurred. The court's docket reflected the certified mail was signed.

{¶ 16} Fast Track, however, argues the service of process was not reasonably calculated to alert it of the lawsuit, claiming that Russell should have served the summons and complaint either through its statutory agent or at Fast Track's Youngstown corporate office. In support of its claim, Fast Track points to evidence suggesting that Russell had searched the company in the Ohio Secretary of State website and also points to the prelitigation communication Russell had with Fast Track's corporate office, which presumably reflected her awareness of its corporate location in Youngstown.

{¶ 17} We find no merit to Fast Track's claim. Regardless of whether Russell knew of Fast Track's corporate office or its statutory agent, the question was whether the service made at the Euclid McDonald's, where the incident occurred, was reasonably calculated to apprise Fast Track of pendency of the instant action. The record shows Fast Track was aware of the incident at the Euclid McDonald's. Its insurance carrier had also requested records of its employees at that location for an internal investigation. Under these circumstances, it defies common sense for Fast Track to claim that the service of process made at its place of business where the subject incident occurred was not reasonably calculated to alert it to the lawsuit.

Excusable Neglect

{¶ 18} Fast Track also claims that even if the service was proper, its failure to respond to the lawsuit constituted excusable neglect because the summons and complaint was never forwarded to "an appropriate party."

{¶ 19} "A motion for relief from judgment under Civ. R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987).

{¶ 20} To prevail on a motion for relief from judgment under Civ.R. 60(B), the moving party must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and, (3) the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. If any of these three requirements is not met, the motion should be overruled. *Svoboda v. Brunswick*, 6 Ohio St.3d 348, 351, 453 N.E.2d 648 (1983). Regarding the second requirement, Civ.R. 60(B) states that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect * * *."

{¶ 21} "[T]he concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed,

while bearing in mind that Civ.R. 60(B) constitutes an attempt to "'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.'" *Colley v. Bazell*, 64 Ohio St.2d 243, 248, 416 N.E.2d 605 (1980), quoting 11 Wright & Miller, *Federal Practice & Procedure* 140, Section 2851. In determining whether excusable or inexcusable neglect has occurred, a court "must of necessity take into consideration all the surrounding facts and circumstances." *Griffey v. Rajan*, 33 Ohio St.3d 75, 79, 514 N.E.2d 1122 (1987).

{¶ 22} A defendant's inaction is not "excusable neglect" if it can be characterized as a "complete disregard for the judicial system." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996). Neglect is not excusable when it is a result of the party's own "carelessness, inattention, or willful disregard of the process of the court" rather than a result of some "unexpected or unavoidable hindrance or accident." *Emery v. Smith*, 5th Dist. Stark Nos. 2005CA00051 and 2005CA00098, 2005-Ohio-5526, ¶ 16.

{¶ 23} "While unusual or special circumstances can justify neglect, if a party could have controlled or guarded against the happening or event he later seeks to excuse, the neglect is not excusable." *Natl. City Bank v. Kessler*, 10th Dist. Franklin No. 03AP-312, 2003-Ohio-6938, ¶ 14.

{¶ 24} In *Sycamore Messenger, Inc. v. Cattle Barons, Inc.*, 31 Ohio App.3d 196, 509 N.E.2d 977 (1st Dist.1986), the First District upheld the trial court's finding of excusable neglect where a bookkeeper failed to forward a complaint to the appropriate person and was later fired for the mishap. Subsequently, the appellate

courts have elaborated on *Sycamore*'s holding and explained that it is not essential that the specific identity of the person responsible for the mishap be revealed; rather, an affidavit to support proof of excusable neglect is sufficient if it establishes the following: "(1) that there is a set procedure to be followed in the corporate hierarchy for dealing with legal process, and (2) that such procedure was, inadvertently, not followed until such time as a default judgment had already been entered against the corporate defendant." *Hopkins v. Quality Chevrolet, Inc.*, 79 Ohio App.3d 578, 583, 607 N.E.2d 914 (4th Dist.1992). *See also, e.g., Perry v. Gen. Motors Corp.*, 113 Ohio App.3d 318, 324, 680 N.E.2d 1069 (10th Dist.1996); *Settlers Bank v. Burton*, 4th Dist. Washington Nos. 12CA36 and 12CA38, 2014-Ohio-335; *Replex Mirror Co. v. Solar Tracking Skylights, Inc.*, 5th Dist. Knox No. 10 CA 23, 2011-Ohio-2650; and *Cooperider v. OK Cafe & Catering, Inc.*, 3d Dist. Marion No. 9-09-28, 2009-Ohio-6715. There is no requirement that the affidavit actually describes the procedure in detail; it must merely state that a procedure exists and that it was not followed. *Kinter v. Giannaris*, 11th Dist. Geauga No. 93-G-1781, 1994 Ohio App. LEXIS 1245, 11 (Mar. 25, 1994).

{¶ 25} Here, Fast Track's controller Micco's affidavit stated that neither its statutory agent nor any employee at Fast Track's corporate office received the summons or complaint, and Fast Track did not know what happened to the summons and complaint. The affidavit further averred the following:

> The vast majority of the employees at the franchises owned by H.L.W. Fast Track, Inc. are trained only on how to handle day-to-day fast food

operations. Those same employees are not trained to handle summons, complaints, or other legal documents.

{¶ 26} Micco's affidavit, rather than establishing that there was a certain procedure to be followed in the corporate hierarchy for dealing with important court documents, actually acknowledged there was a lack of any such procedure. As the magistrate noted, subsequent mails containing legal documents from the court were similarly ignored. Having been made aware of the alleged incident at the Euclid McDonald's, Fast Track failed to respond to the action filed in the court regarding the incident. The neglect reflects its own carelessness, inattention, or willful disregard of the process of the court; it is not a result of some "unexpected or unavoidable hindrance or accident." *Emery*, *supra*.

{¶ 27} Fast Track relied on *Hopkins, supra,* that held that "relief from default judgment may be granted on the basis of excusable neglect when service is properly made on a corporation but a corporate employee fails to forward the summons and complaint to the appropriate person." *Id.* at 582. In *Hopkins*, however, the affidavit submitted by defendant averred that in the ordinary course of its business all legal matters were to be referred to the company's general manager or president. Here, Micco's affidavit did not establish any such corporate procedure; neither did it set forth any facts explaining why a certified letter from a court sent in care of the owner of the business failed to be reported up the chain of command.[2]

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[2]Fast Track also cites *Enhanced Sys., Inc. v. CBM Computer Ctr.*, 8th Dist. Cuyahoga No. 56978, 1989 Ohio App. LEXIS 2870 (July 20, 1989) to support its claim. There, defendant corporation submitted affidavits showing that its controller received the

{¶ 28} Because Fast Track fails to demonstrate excusable neglect, we do not reach the issue of whether it has a meritorious defense in the underlying case, or whether Fast Track's motion to set aside judgment, filed 72 days after the entry of the court's judgment, was made within a reasonable time.

{¶ 29} Having reviewed the record and the applicable case law precedents, we conclude the Euclid Municipal Court did not abuse its discretion in denying Fast Track's Civ.R. 60(B) motion to set aside judgment.

{¶ 30} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
RAYMOND C. HEADEN, J., CONCUR

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complaint and immediately forwarded it to its general counsel in the corporate office in Kentucky but somehow the corporate office did not receive it. This court determined that defendant sufficiently alleged grounds of excusable neglect: after the complaint was received, the corporation misplaced it during the process of sending the complaint to its general counsel. *Enhanced Sys.* is also distinguishable.

SLIP OPINION NO. 2020-OHIO-4268

MCDOUGALD *v.* GREENE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *McDougald v. Greene*, Slip Opinion No. 2020-Ohio-4268.]

Mandamus—Public Records Act—R.C. 149.43—Security records are exempt from disclosure under the Public Records Act—Writ denied.

(No. 2019-0677—Submitted February 11, 2020—Decided September 2, 2020.)

IN MANDAMUS.

DEWINE, J.

{¶ 1} In this mandamus case, Jerone McDougald, who was an inmate at the Southern Ohio Correctional Facility, requested copies of the prison's most recent shift-assignment duty rosters, documents that detailed the assignment of prison guards to various posts within the prison. Larry Greene, the prison's public-records custodian, turned over the records, but he redacted almost all the information, leaving only the page headings, dates, and shift-supervisor signature lines. We must decide whether, by redacting almost all of the information in the documents,

Greene violated his duties under Ohio's Public Records Act, R.C. 149.43. As we explain, the documents fall under the security-records exemption to the Public Records Act, and as such, Greene had no legal duty to turn them over. Thus, we deny McDougald's request for a writ of mandamus.

Background

{¶ 2} In February 2019, McDougald sent Greene a prison kite requesting the prison's "most current [shift-assignment] duty rosters" for the first, second, third, and fourth shifts at the prison. A few weeks later, Greene responded that he would provide copies of the records if McDougald paid 40 cents for the copies. But, Greene warned, the records would be heavily redacted, leaving only the "page headings, dates, and shift supervisor signature lines." Greene also wrote that "the legal basis for these redactions are 'security record,' per Ohio Revised Code (RC) 149.433 (A) and (B) and 'plans * * * for disturbance control,' per RC 5120.21(D)(2)."[1] (Ellipsis sic.) McDougald paid the cost and received the documents, which were highly redacted, just as Greene had warned. McDougald then filed the present mandamus action, arguing that the redactions were improper, that he is entitled to unredacted copies of the records, and that he should be awarded costs and statutory damages.

{¶ 3} We ordered Greene to submit unredacted copies of the shift-assignment duty rosters for in camera review. 156 Ohio St.3d 1469, 2019-Ohio-2953, 126 N.E.3d 1184. Each roster is a two-page form. The first page divulges the identity of the captain and lieutenant on duty, the names of officers assigned to

1. The dissent accuses this opinion of ignoring Greene's statutory obligation to explain the legal basis for the redaction of the requested records, *see* R.C. 149.43(B)(3). But this is an issue raised by the dissent, not McDougald. McDougald's complaint contains no such claim. Tellingly, the only support the dissent cites for its assertion that McDougald raised the issue is an out-of-context passage from McDougald's merit brief. On fair reading, however, that passage relates only to McDougald's argument that Greene cannot meet his burden of proving that the security-records exemption applies. Because McDougald has not raised any claim about the adequacy of Greene's explanation, we decline to address that issue.

various locations around the prison, and the names of officers assigned as "escorts." The first page also lists names under categories such as "good days" and "other absences." At the bottom of the page are handwritten notes, which include things like staff announcements, security reminders, or incident updates. The second page provides totals for the number of officers assigned to "permanent posts" and "additional posts." It also provides tallies related to various reasons for absences and indicates officer shortages or overages. The document is then signed by the shift supervisor.

Analysis

{¶ 4} Under R.C. 149.43(B)(1), a public office is required to make copies of public records available to any person on request and within a reasonable period of time. A "public record" is a record "kept by any public office." R.C. 149.43(A)(1). A party who believes that his request for a public record has been improperly denied may file a mandamus action in order to compel production of the record. R.C. 149.43(C)(1)(b). That is what McDougald has done here. For McDougald to succeed in his mandamus action, he must demonstrate that he has a clear legal right to the documents and that Greene has a clear legal duty to turn them over. *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 10.

{¶ 5} The parties do not dispute that the prison is a public office subject to the Public Records Act. But, relevant here, the Public Records Act contains several exemptions that exclude certain records from disclosure. In his briefing, Greene claims that two of those exemptions—the "infrastructure-records exemption," R.C. 149.433(B)(2), and the "security-records exemption," R.C. 149.433(B)(1), apply here. As we explain, the records at issue are not infrastructure records but they are security records. Because they are security records, they are exempt from disclosure under the Public Records Act and Greene has no legal duty to turn them over.

Infrastructure Records

{¶ 6} We begin with the infrastructure-records exemption. R.C. 149.433(A) defines an infrastructure record as "any record that discloses the configuration of critical systems including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of a building." But the definition goes on to explain that infrastructure records do not include "a simple floor plan that discloses only the spatial relationship of components of the building." *Id*.

{¶ 7} Greene does not meaningfully explain how the assignment of guards to specific areas of the prison satisfies this statutory definition. And it is hard to see how he could. It is not even facially plausible to think that guard assignments constitute the "configuration of a critical system," *id*. And guard locations have little similarity to the systems that the statute identifies as examples that fall under this exemption—communication, computer, electrical, mechanical, ventilation, water, and plumbing systems. Nor does the assignment of guards within a building count as relating to the "structural configuration *of a building*." Guards, after all, are not part of the building.

{¶ 8} Nevertheless, Greene insists that the documents showing the location of the guards are infrastructure records based on an isolated bit of dicta from *State ex rel. Rogers v. Dept. of Rehab. & Correction*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 12. *Rogers* addressed whether security-camera footage of a use-of-force incident was exempt under the infrastructure-records exemption. This court concluded that because the video showed no more than what could have been gleaned from a simple floor plan, the footage was not an infrastructure record. But this court went on to comment that the footage did not "show the location of any fire or other alarms, *correctional-officer posts*, or the configuration of any other critical system." (Emphasis added.) *Id.* From this isolated reference to

"correctional-officer posts," Greene would have us conclude that a document identifying the location of guards in a prison must be an infrastructure record. But *Rogers* provides no analysis of how or when correctional-officer posts constitute infrastructure records. And picking up isolated bits of dicta and running with them without returning to the statutory text can lead to legal gobbledygook, in much the same way that a game of telephone can lead to miscommunication. Because there is no basis in the statutory text for concluding that the duty rosters are infrastructure records, we reject Greene's argument.

Security Records

{¶ 9} Next, we turn to the security-records exemption. Among the items exempt from disclosure are "security records," which includes "[a]ny record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage." R.C. 149.433(A)(1). It is clear from the face of the documents that this exemption applies to the records at issue here. The shift-assignment duty rosters detail the identity and location of guards posted throughout the prison. One need not be too creative to see how this is information that could be used to plan an escape or an attack on the prison or to aid in the smuggling in of contraband. Where the guards are posted, which guards are assigned to a particular post, and how many there will be are almost certainly among the first things a person planning an attack or escape or trying to sneak something in would want to know. The information could reveal potential areas of lessened security. And the post-assignment information could be used to target individual guards who might be thought easier to overcome or susceptible to improper influence. The obvious correlative is that information about the movements of a prison's *guards* would be used by the prison to ensure the security of the facility. We thus have no problem concluding that the shift-assignment duty rosters are security records for purposes of the Public Records Act because they

contain information "directly used for protecting or maintaining the security" of the prison.

{¶ 10} To be sure, Greene's argument on this front is cursory, at best. Indeed, it consists of a single sentence asserting that the exemption applies. And his supporting affidavit doesn't do much to aid his argument. But for the fact that the relevance of the records to the security of the prison is apparent from the face of the documents, we might well reach a different result in this case. But as we have suggested in the past, a public-records custodian may meet his burden when the stated exemption upon which he relies is "based on risks that are * * * apparent within the records themselves," *Rogers* at ¶ 15.

{¶ 11} This court's decision in *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 732 N.E.2d 373 (2000), is illustrative. *Besser* dealt with a request submitted to a state university for records regarding the university's acquisition of a hospital. The university asserted that the records constituted trade secrets and were protected from disclosure. This court found that the conclusory statements in the affidavit presented by the university were insufficient to establish that the exemption applied, and the court ordered the university to disclose most of the requested records.

{¶ 12} The dissent relies on *Besser* for the proposition that a custodian's failure to provide additional evidentiary support for a claimed public-records exemption mandates the disclosure of the records. But what the dissent fails to mention is that the evidentiary deficiencies notwithstanding, the court in *Besser* found that a limited portion of the records constituted trade secrets and were therefore exempt from disclosure, *id.* at 402, 404. Contrary to the dissent's claims, the *Besser* court did not consider additional evidence regarding the applicability of the trade-secret exemption to these documents. The court simply concluded that the documents "constitute trade secrets and are therefore exempt from disclosure under R.C. 149.43," *id.* at 404; *see also id.* at 402 (finding that a portion of the

requested record "satisfie[d] the definition of a trade secret"). In other words, the applicability of the exemption was manifested by the documents themselves. *Id*. at 402; *see also Rogers*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, at ¶ 15, citing *Besser*.

{¶ 13} That rule makes sense, especially in this case. After all, the point of the security-records exemption is to protect other important public interests such as the safety and security of the public. And, at least when the applicability of the exemption is obvious from the face of the documents, this court will not sacrifice those interests simply because a party should have done a better job setting forth the obvious.

Conclusion

{¶ 14} For the foregoing reasons, we deny McDougald a writ of mandamus ordering Greene to disclose the records to him. Accordingly, we also deny McDougald's request for court costs and statutory damages. McDougald's motion to amend his complaint to correct the caption is denied as moot.

Writ denied.

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

STEWART, J., concurs in judgment only.

KENNEDY, J., dissents, with an opinion.

KENNEDY, J., dissenting.

{¶ 15} I dissent because I must. To meet its burden regarding the applicability of an exception to Ohio's Public Records Act, R.C. 149.43, a public office must prove that the requested records "fall squarely within [an] exception." *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10. Further, the plain and unambiguous language of R.C. 149.43 provides a specific process for a public office to follow when denying a

public-records request and when defending that denial in a requester's mandamus action.

{¶ 16} When a public-records request is denied, R.C. 149.43(B)(3) requires a public office to "provide the requester with an explanation, including legal authority, setting forth why the request was denied." If the requester subsequently files a petition for a writ of mandamus, the public office may "rely[] upon additional reasons or legal authority in defending" the mandamus action. *Id.* However, the public office may not rest on assertions in a brief or conclusory statements in an affidavit, but rather it bears the burden to affirmatively establish through specific, relevant evidence that an exception to disclosure applies. *See State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 398, 400-401, 732 N.E.2d 373 (2000).

{¶ 17} Here, respondent, Larry Greene, the public-records custodian at the Southern Ohio Correctional Facility ("SOCF"), denied the public-records request of relator, Jerone McDougald, but he failed to comply with the statutory process for explaining a refusal and ultimately failed to argue and present evidence to prove that the records sought by McDougald fit squarely within an exception to disclosure under R.C. 149.43.

{¶ 18} In this case, Greene gave an insufficient and imprecise response when he initially denied the request from McDougald. And when McDougald filed a petition for a writ of mandamus in this court, Greene abandoned his original legal theory—that the records are security records—for another theory—that the records are infrastructure records. Even the majority agrees that the new theory fails.

{¶ 19} But the majority, playing the roles of evidentiary witness, advocate, and judge, rescues Greene, resuscitating and expanding on his original legal theory, presenting its own evidence showing how information in the shift-assignment duty rosters might be used to jeopardize the prison's security, and declaring that Greene has no legal duty to turn over the unredacted records to McDougald. But how McDougald might use the information is beside the point. Whether the security-

record exception of R.C. 149.433(A)(1) applies depends on whether SOCF itself "directly use[s]" the information contained in the record to "protect * * * or maintain * * * [its] security * * * against attack, interference, or sabotage," *id.* Because Greene has failed to provide any evidence about how the information contained in the shift-assignment duty rosters fits within R.C. 149.433(A)(1) or to make a meaningful case for the applicability of the security-records exception in this court, we should limit our review to whether the records that McDougald requested fit squarely within the infrastructure-records exception. Since the records are not infrastructure records, I would grant McDougald a writ of mandamus and order Greene to provide McDougald with unredacted copies of the records. Therefore, I dissent.

Facts

{¶ 20} In this case, McDougald sought SOCF's shift-assignment duty rosters for the first, second, third, and fourth shifts; he made his request in February 2019 and asked for the "most current" shift-assignment duty rosters. Greene responded to the request with shift-assignment duty rosters from March 7, 2019, that were nearly completely redacted. Only the number of the shift, the date, and the shift supervisor's signature were visible on all four shift-assignment documents. In a letter sent as part of his response, Greene explained the redactions in one sentence: "The legal basis for these redactions are 'security record,' per Ohio Revised Code (RC) 149.433(A) and (B), and 'plans * * * for disturbance control,' per RC 5120.21(D)(2)." (Ellipsis sic.) In Greene's answer to McDougald's petition for a writ of mandamus, Greene did not mention R.C. 149.433 or 5120.21. Moreover, in his merit brief, Greene fails to mention R.C. 5120.21(D)(2), and he makes just a single, unfocused statement pertaining to the security-records exception: "Furthermore, by the very definition asserted by Relator in his Brief, the requested documents constitute a security record pursuant to R.C. 149.433."

Instead, Greene's only developed argument is that the shift-assignment duty rosters are infrastructure records.

The shift-assignment duty rosters are not infrastructure records

{¶ 21} I agree with the majority that the shift-assignment duty rosters are not infrastructure records. Greene cites *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, for the proposition that a list of correctional-officer posts qualifies as an infrastructure record and therefore is exempt from disclosure under R.C. 149.433(B)(2). In *Rogers*, we decided whether a prison's video footage of a use-of-force incident from a security camera was a public record. The Department of Rehabilitation and Correction argued that the video disclosed the configuration or network of security cameras and therefore qualified as an infrastructure record and was exempt from disclosure. We rejected that argument because the video footage did not "reveal the location of any video cameras other than the one that recorded the incident at issue." *Id*. at ¶ 12. We further stated, "Nor does it show the location of any fire or other alarms, correctional-officer posts, or the configuration of any other critical system." *Id*. That sentence should not be mistaken for this court holding that video footage depicting the location of correctional-officer posts qualifies as an infrastructure record. We were not facing the issue whether a video depiction of the layout of the entire system of correctional-officer posts constituted an infrastructure record; rather, the opinion pointed out how limited the area was that had been shown in the footage that the inmate was requesting. *Rogers* decided only that the video footage in that case was not an infrastructure record. Any suggestion in *Rogers* that video footage depicting the layout of every correctional-officer post qualifies as an infrastructure record was merely dicta. In *this* case, we must decide the specific issue preserved and argued: whether the shift-assignment duty rosters containing the names and locations of some correctional-officer posts qualify as infrastructure

records. Based on the plain and unambiguous language of R.C. 149.433(B)(2), they do not.

{¶ 22} An infrastructure record is defined as "any record that discloses the configuration of critical systems including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of a building." R.C. 149.433(A). The key word in that definition is configuration. To be exempt from disclosure as an "infrastructure record," the document sought must disclose a "configuration" of a critical system.

{¶ 23} The General Assembly did not define the term configuration, but it did say that an infrastructure record "does not mean a simple floor plan that discloses only the spatial relationship of components of the building." *Id*. Therefore, as used in R.C. 149.433(A), for a document to fall within the meaning of the infrastructure-record exception, a document must show an arrangement, layout, or design of a critical system beyond a simple floor plan. Indeed, the shift-assignment duty rosters at issue here do not.

{¶ 24} The rosters are just that—rosters. They are a list of names and correctional-officers posts, some stated in full and some labeled by abbreviations. There is no configuration of correctional-officer posts or the layout, design, or arrangement of correctional-officer posts within the structure of SOCF or its grounds. Therefore, the shift-assignment duty rosters at issue here are public records and not exempt from production as infrastructure records under R.C. 149.433(B)(2). Absent evidence that the redacted material falls within another exception, any redactions are improper. And here, because Greene fails to advance any other argument or submit any evidence to support the redactions he made, those redactions are improper.

Greene has not demonstrated that the shift-assignment duty rosters are security records or plans for disturbance control

{¶ 25} If a record "contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage," it qualifies as a security record under R.C. 149.433(A)(1) and therefore is not a public record under R.C 149.433(B)(1). Therefore, I agree with the majority that when a record meets the definition of a security record, it is not a public record and is exempt from production. But Greene has not demonstrated that the shift-assignment duty rosters meet the definition of "security records" under R.C. 149.433(A).

{¶ 26} In Greene's letter to McDougald stating his reasons for the redactions, Greene claimed that the redactions were permissible because the records are security records pursuant to R.C. 149.433(A) and (B) and also that the records are " 'plans * * * for disturbance control,' per RC 5120.21(D)(2)." (Ellipsis sic.) Greene's bald assertion contained no statutorily required explanation. In his brief to this court, Greene did not raise R.C. 5120.21(D)(2) at all; therefore, he waived any argument that the shift-assignment duty rosters are plans for disturbance control.

{¶ 27} As far as the security-records exception is concerned, Greene gave it a cursory mention in one line of his merit brief, concentrating instead on the infrastructure-records exception. As set forth above, Greene's sole argument was a single sentence: "Furthermore, by the very definition asserted by the Relator in his Brief, the requested documents constitute a security record pursuant to R.C. 149.433." But, because McDougald's brief contains no definition of security record, this statement is peculiar at best.

{¶ 28} While the majority acknowledges the deficiencies in Greene's brief, it nevertheless rescues him by relying on a "suggestion"—not a holding—from *Rogers*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208. The actual thrust

of this portion of the *Rogers* opinion is that when the government claims an exception to the release of public records, the government must prove the applicability of the exception. But the majority points to an aside that we made in *Rogers* to support its point. In *Rogers*, we said:

> In another recent public-records case, we held that records documenting direct threats against the governor kept by the Department of Public Safety met the definition of "security records" under R.C. 149.433(A). However, we cautioned that the exception must be proved in each case: "This is not to say that all records involving criminal activity in or near a public building or concerning a public office or official are automatically 'security records.' The department and other agencies of state government cannot simply label a criminal or safety record a 'security record' and preclude it from release under the public-records law, without showing that it falls within the definition in R.C. 149.433." [*State ex rel. Plunderbund Media, L.L.C. v. Born*, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988,] ¶ 29. And when a public office claims an exception based on risks that are not apparent within the records themselves, the office must provide more than conclusory statements in affidavits to support its claim. *See State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 400-401, 732 N.E.2d 373 (2000).

Rogers at ¶ 15.

{¶ 29} In *Rogers*, the point being made was that conclusory statements are not enough to prove an exception to disclosure of a public record. The majority first states that in *Rogers*, this court "suggested" that "a public-records custodian

may meet his burden when the stated exemption upon which he relies is 'based on risks that are * * * apparent within the records themselves,' *Rogers* at ¶ 15." (Ellipsis added in majority opinion.) Majority opinion at ¶ 10. But several paragraphs later, the majority opinion turns that suggestion into a rule. *Id*. at ¶ 13 ("That rule makes sense, especially in this case").

{¶ 30} But taking the "suggestion" language outside the context of *Besser* is disingenuous. The majority cites no case in which this court has ever held that the applicability of the security-records exception applies when risks are apparent from the face of the records. Certainly, *Besser* does not stand for that proposition. In *Besser*, the Ohio State University ("OSU") responded to a public-records request and provided some responsive records but withheld others due to the belief that the withheld records were exempt as trade secrets, intellectual-property records, and attorney-client privileged material—a security-records exception was not cited as a reason for withholding the records. *Id.* at 399. When the public-records requester challenged OSU's claimed exemptions, OSU made an argument before this court that the records could be withheld because they were either trade secrets or intellectual-property records. *Id*. at 377-381. We concluded that "OSU's reliance on conclusory affidavit statements is insufficient to satisfy its burden to identify and demonstrate that the records withheld and portions of records redacted are included in categories of protected information under R.C. 1333.61(D)." *Id*. at 404. This court found that of all the documents sought, just two lists of doctors' names were trade secrets. *Id*. at 402, 404. Citing a previous decision and a treatise, this court determined that due to the lists at issue in *Besser* being similar to a business' customer lists, the doctors' names were "presumptively" trade secrets, *id*. at 402, but OSU still had to show that it took "measures to prevent [the] disclosure [of the lists] in the ordinary course of business to persons other than those selected by the owner," *id*. at 402. That the lists were trade secrets was not apparent from the

documents themselves, but required additional evidence regarding OSU's treatment of the records.

{¶ 31} Our analysis in *Besser*, 89 Ohio St.3d 396, 732 N.E.2d 373, focused on OSU's failure to satisfy its burden to prove that an exception to disclosure applied. OSU bore the burden of proof, and it failed to carry its burden. But here, in contrast, the majority flips the burden of proof and relieves Greene of having to prove that the security-records exception applies. In *Besser*, OSU at least presented a full argument and an affidavit, albeit conclusory, to support its claim that specific exceptions applied. But that was not enough in that case. Here, Greene has neither made even a partial argument that the security-records exception applies nor has he submitted evidence supporting his single-sentence reference to the security-records exception.

{¶ 32} In his brief before this court, Greene fails to explain why the definition of a security record is applicable to the shift-assignment duty rosters beyond a single sentence. And as recognized by the majority, Greene's affidavit does nothing to further that "argument." Accordingly, this court has no evidence before it as to why the shift-assignment duty rosters are security records. Yet, in contrast to the decisions in *Rogers*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, and *Besser*, in which this court held the public offices to the burden of proof, the majority allows Greene to succeed in asserting a public-records exception, notwithstanding his failure to argue and prove with supporting evidence that the exception applies. The majority turns the burden of proof on its head.

{¶ 33} While the majority's ultimate decision may be well-intended, the unintended consequences of this case, especially its new rule, cannot be overstated. This case eviscerates Ohio's Public Records Act and the burden of proof placed on a public-records custodian to delineate the specific exception that applies and why. This case also holds that a public-records custodian need not specifically argue an

exception before us or produce evidence upon which we must rely to determine whether an exception applies.

{¶ 34} Inherent in the fundamental policy of Ohio's Public Records Act is the promotion of an open government, not a restriction of it. *State ex rel. The Miami Student v. Miami University*, 79 Ohio St.3d 168, 171, 680 N.E.2d 956 (1997). Consistent with this policy is this court's longstanding determination that "[e]xceptions to disclosure must be strictly construed against the public record custodian, and the burden to establish an exception is on the custodian." *State ex rel. McGowan v. Cuyahoga Metro. Hous. Auth.*, 78 Ohio St.3d 518, 519, 678 N.E.2d 1388 (1997).

{¶ 35} Greene needed to do more. A "department * * * of state government cannot simply label a criminal or safety record a 'security record' and preclude it from release under the public-records law, without showing that it falls within the definition of R.C. 149.433." *Plunderbund*, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988, at ¶ 29. Greene fails to provide any substantive reason or explanation why the security-records exception should apply. Greene did not even name which of the three categories of security records listed in R.C. 149.433(A) the redacted material fits into—i.e., security of a public office, R.C. 149.433(A)(1), preventing terrorism (which also includes three additional subcategories of security records), R.C. 149.433(A)(2)(a), (b), or (c), or emergency management, R.C. 149.433(A)(3).

{¶ 36} The majority selects a rationale for Greene, deciding that the records requested contained "information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage" under R.C. 149.433(A)(1), and it then presents its own evidence to support it. The majority says that the rosters have *relevance* to the security of the prison—however, the word "relevance," majority opinion at ¶ 10, does not appear in R.C. 149.433(A)(1) and therefore relevance to security does not establish that the security-records

exception applies. And although the majority focuses on how "this is information that could be used to plan an escape or an attack on the prison or to aid in the smuggling in of contraband," majority opinion at ¶ 9, the applicability of R.C. 149.433(A)(1) turns on a factual question regarding how the shift-assignment duty rosters are directly used *by the prison*, not on how the rosters could be put to use by third parties. We cannot assume that those records are *directly used* for maintaining security when Greene himself has not bothered to make that argument or submit any proof of it.

{¶ 37} The majority suggests that McDougald did not raise the issue of Greene's failure to meet his obligation under R.C. 149.43(B)(3) to "provide the requester with an explanation, including legal authority, setting forth why the request was denied." But McDougald sufficiently raised the issue when he argued that "a department of state government cannot simply lab[el] a record a security record within the meaning of R.C. 149.433 and R.C. 5120.21(D) without showing that it falls within an express provision of the statu[te]." In the end, the majority just ignores the language of R.C. 149.43(B)(3) requiring the public office or person responsible for the requested public record to provide an explanation for the denial of a public-records request. And the public-records custodian has the burden of proving that the requested records "fall squarely within [an] exception." *Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, at ¶ 10. Greene simply has not done that, and the Public Records Act does not give this court the authority to do it for him.

{¶ 38} Therefore, I would fully grant McDougald a writ of mandamus and order Greene to provide him with unredacted copies of the shift-assignment duty rosters from March 7, 2019.

Statutory damages

{¶ 39} I would hold that McDougald meets the initial statutory criteria for an award of statutory damages but that he should not ultimately receive any

statutory damages. To be eligible for an award of statutory damages, the requester must transmit the public-records request by "hand delivery, electronic submission, or certified mail." R.C. 149.43(C)(2).[2] "Hand delivery" is not defined in the statute. Greene admits that he received McDougald's request through the prison's kite system. "A 'kite' is written by an inmate to a member of the prison staff and is 'a means for inmates to contact staff members inside [an] institution.' " *State ex rel. Martin v. Greene*, 156 Ohio St.3d 482, 2019-Ohio-1827, 129 N.E.3d 419, ¶ 3, fn. 1, quoting *State v. Elmore*, 5th Dist. Richland No. 16CA52, 2017-Ohio-1472, ¶ 15. Because I would hold that a public-records request made by kite constitutes hand delivery, I would hold that McDougald is eligible to receive statutory damages. *See State ex rel. McDougald v. Greene*, ___ Ohio St.3d. ___, 2020-Ohio-3686, ___ N.E.3d ___, ¶ 60 (Kennedy, J., dissenting).

{¶ 40} Although McDougald is eligible to receive an award of statutory damages because he transmitted his request by hand delivery, that does not end the inquiry. Pursuant to R.C. 149.43(C)(2), a person who makes a public-records request "shall be entitled to recover * * * statutory damages * * * if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with" R.C. 149.43(B). R.C. 149.43(B)(3) provides that "[i]f a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied." A records custodian bears the burden of establishing the applicability of an exception to R.C. 149.43 and "must prove that the requested records 'fall squarely within the exception.' " *Rogers*, 155 Ohio St.3d 545, 2018-

2. Public-records requests are governed by the version of R.C. 149.43 that was in effect at the time that the request was made. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 11. The version of the Public Records Act that governs McDougald's requests, R.C. 149.43 as amended by 2018 Sub.H.B. No. 312, took effect in November 2018.

Ohio-5111, 122 N.E.3d 1208, at ¶ 7, quoting *Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, at ¶ 10.

{¶ 41} A redaction is considered a denial as to the redacted information. R.C. 149.43(B)(1). Here, Greene denied McDougald's public-records request by heavily redacting the shift-assignment duty rosters. After the redactions, the only information that remained was the page headings, date, and shift-supervisor signature lines. Because Greene fails to meet his burden of proving that the redacted material falls within any of the exceptions he relied upon to redact the information, he failed to comply with the requirements of R.C. 149.43(B)(3). Therefore, McDougald qualifies for an award of statutory damages.

{¶ 42} Statutory damages are calculated at the rate of $100 "for each business day during which the public office or person responsible for the requested public records failed" to comply with an obligation under R.C. 149.43(B), starting from the date on which the requester filed a complaint for a writ of mandamus, with a maximum award of $1,000. R.C. 149.43(C)(2).

{¶ 43} However, a court may reduce or decline to award statutory damages if it finds that based on the law as it existed at the time the public office allegedly failed to comply with R.C. 149.43, "a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct * * * did not constitute a failure to comply * * * with [R.C. 149.43(B)]," R.C. 149.43(C)(2)(a), and that a "well-informed public office or person responsible for the requested public records reasonably would believe that the [redaction] * * * would serve the public policy that underlies the authority that is asserted," R.C. 149.43(C)(2)(b).

{¶ 44} Based on those reduction factors, I would deny McDougald's request for statutory damages because a well-informed person responsible for the requested public records here could have reasonably believed that the shift-assignment duty rosters qualify as security records under R.C. 149.433(A)(1) and

are therefore not public records, satisfying R.C. 149.43(C)(2)(a). Further, a well-informed person responsible for the requested public records would believe that withholding the records would serve the public policy behind the security-records exception, satisfying R.C. 149.43(C)(2)(b).

Conclusion

{¶ 45} Through a linguistic sleight of hand, the majority creates a "suggestion" from one of our cases and converts it into a new "rule" not found in Ohio's Public Records Act that an exception to the disclosure of a public record might apply based on perceived risks of how a requester might use the information in the record. But that new "rule" runs contrary to the plain language of R.C. 149.43(B)(3), which places the burden on the public-records custodian to justify the denial of a public-records request in all cases. The majority's holding therefore encourages public offices to deny public-records requests without sufficient information explaining why a statutory exception applies, and Greene is permitted to prevail, even though he has not complied with his statutory obligation to "provide the requester with an explanation, including legal authority, setting forth why the request was denied," R.C. 149.43(B)(3).

{¶ 46} But more distressing, the majority abandons its "role of neutral arbiter of matters the parties present," *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008), by injecting new arguments into this case and relying on "evidence" that does not exist. " 'The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but [preside] essentially as arbiters of legal questions presented and argued by the parties before them.' " *Natl. Aeronautics & Space Administration v. Nelson*, 562 U.S. 134, 147, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011), fn. 10, quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983). As Judge Richard Posner once explained, "we cannot write a party's brief, pronounce ourselves convinced by it, and so rule in the party's favor. That's not how an

adversarial system of adjudication works." *Xue Juan Chen v. Holder*, 737 F.3d 1084, 1085 (7th Cir.2013).

{¶ 47} Yet here, the majority willingly accepts the roles of being an evidentiary witness, advocate, and judge in providing an explanation for Greene's redactions and purporting to prove the validity of those redactions using its own evidence to decide how McDougald could use the information in the shift-assignment duty rosters. That argument and evidence, by itself, is insufficient, because the security-record exception would apply in this case only if SOCF actually uses the information in the shift-assignment duty rosters to protect or maintain the security of its facilities. Because Greene failed to argue and present evidence to prove that shift-assignment duty rosters fit squarely within that exception or any other, I would order Greene to provide unredacted copies of the shift-assignment duty rosters to McDougald. But I would not award McDougald statutory damages.

Jerone McDougald, pro se.

Dave Yost, Attorney General, and Jared S. Yee, Assistant Attorney General, for respondent.
