The Bullet Point: Ohio Commercial Law Bulletin

Is my interest in a deed subject to the *Stranger Rule*?

Volume 4, Issue 19
October 15, 2020
Jim Sandy and Stephanie Hand-Cannane

Compulsory Counterclaims to foreclosure

***Helfinstine v. Wells Fargo Bank, NA,* 9th Dist. Summit No. 29551, 2020-Ohio-4675**

In this appeal, the Ninth Appellate District affirmed the trial court's decision, agreeing that the borrower's counterclaims were compulsory as they were logically related to the lender's claim in the foreclosure action and were required to have been raised in the prior foreclosure.

- **The Bullet Point:** Compulsory counterclaims are claims that exist at the time the defendant was served and that arise out of the "same transaction or occurrence that is the subject matter of the opposing claim." Ohio courts apply a broad and flexible meaning to the phrase "same transaction or occurrence" to determine whether claims are compulsory counterclaims. Using the "logical relation" test, counterclaims arise out of the same occurrence and are compulsory if litigating each of the claims separately would involve a substantial duplication of effort and time. This logical relation test does not require the claims to be identical, and does not exclude counterclaims that include additional allegations. On the contrary, claims are compulsory under this test if they involve many of the same factual or legal issues, or where they are "offshoots of the same basic controversy." A clear example is a borrower's breach of contract counterclaim to a foreclosure action, as both claims involve the alleged breach of the same note and mortgage. Even further, although a borrower's trespass and conversion claims sound in tort, these counterclaims are also compulsory as they involve the same note and mortgage that are the subject of the foreclosure. Under Civ.R. 13(A), compulsory counterclaims must be asserted or forever barred. As such, a borrower who fails to assert his compulsory counterclaims in a foreclosure action will be prevented from later asserting those claims.

The "Stranger Rule"

***Smith v. Collectors Triangle, Ltd.,* 7th Dist. Harrison No. 19 HA 0010, 2020-Ohio-4823**

In this appeal, the Seventh Appellate District reversed and remanded the trial court's decision finding that the plaintiffs were not strangers to a deed, and were therefore bound by it and not exempt under the *Stranger Rule*.

- **The Bullet Point:** Pursuant to Ohio's *Stranger Rule*, third parties who are neither the grantor nor the grantee in a deed are considered 'strangers' to the deed. Under this long-standing rule, a reservation in a deed is something "issuing from or coming out of the thing granted," and must be to the grantor and not to a stranger. Simply stated, deeds cannot create title or reserve interests in a stranger's favor. That

being said, there is an exception to the *Stranger Rule* that occurs when an interest is conveyed to a third party before a deed is executed. As the court explained, if the grantor conveys an interest to a third party and subsequently executes a deed to the grantee, the third party is not a stranger because its interest was conveyed prior to the deed. As the third party is not a stranger to the deed, its pre-existing rights are not subject to the *Stranger Rule*.

Adverse Possession

***Hampton v. Lively,* 4th Dist. Lawrence No. 19CA9, 2020-Ohio-4713**

In this case, the Fourth Appellate District reversed and remanded the trial court's decision, determining that the buyers adversely possessed the property, even though they initially took possession pursuant to a sales contract after paying the purchase price and treating it as their own.

- **The Bullet Point:** It has long been held in Ohio that to acquire title to real property by adverse possession, "a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years." Adverse use is non-permissive use, and this element is satisfied with evidence that the claimant possessed the property and treated it as her own. Notably, a claimant-buyer may prove adverse use even when the owner initially gave her permission to possess the property pursuant to a sales contract. As the court explained, permissive use pursuant to a sales contract may be considered adverse once the buyer takes possession after paying the purchase price but the seller fails to convey title. This is because the buyer manifests an intent to treat the property as her own and the buyer's performance of paying the purchase price and taking possession triggers the seller's duty to convey legal title.

Business Records Authentication

***HS Fin. Group, LLC v. Hinchee*, 2d Dist. Greene No. 2019-CA-67, 2020-Ohio-4765**

In this appeal, the Second Appellate District reversed and remanded the trial court's decision, finding that the debt collector failed to properly authenticate the records used to obtain summary judgment in the case.

- **The Bullet Point:** Prior to admitting documents under Evid.R. 803(6)'s business records exception, the testifying witness must first properly authenticate them. Specifically, the testifying witness must "possess a working knowledge of the specific record-keeping system that produced the documents and be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business." In addition, the witness must testify as to the "regularity and reliability of the business activity involved in the creation of the record."

  Ohio courts utilize different authentication requirements for admitting "adoptive" business records, that is, business records created by a third party, such as a predecessor-in-interest, that have been incorporated into the business records of the assignee and relied upon in its own business dealings. In mortgage-foreclosure cases, Ohio courts admit adopted business records "even when the proffering party is not the maker of the document, if the other requirements of Evid.R. 803(6) are met and the circumstances suggest that the record is trustworthy." This less stringent authentication requirement is utilized due to the fact that the assignee relied on the accuracy of the third-party records and incorporated them into its own business dealings. As such, the circumstances surrounding the third-party records indicate their trustworthiness.

  On the other hand, Ohio courts have begun to employ a stricter authentication requirement for admitting adopted business records in debt-collection cases. In such cases, the assignee must prove that the adopted business records on which it seeks to rely as its business records were first business records

created and maintained by its predecessor in the course of its predecessor's regularly conducted business. As the court noted, this stricter authentication requirement is justified in debt-collection cases due to the nature of the business. As it is the business of debt collectors to collect on a debt, the predecessor's business records are not relied upon by debt collectors in their own business endeavors.

contact

James Sandy
member > cleveland

T (216) 378-9911
jsandy@mcglinchey.com

Stephanie Hand-Cannane
associate > cleveland

T (216) 378-4989
shandcannane@mcglinchey.com

[Cite as *Helfinstine v. Wells Fargo Bank, NA*, 2020-Ohio-4675.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
MICHAEL L. HELFINSTINE Appellant v. WELLS FARGO BANK, NA., et al. Appellees	C.A. No. 29551 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2017-06-2345

DECISION AND JOURNAL ENTRY

Dated: September 30, 2020

CALLAHAN, Presiding Judge.

{¶1} Michael Helfinstine appeals a judgment of the Summit County Court of Common Pleas that granted summary judgment to Wells Fargo Bank ("Wells Fargo") and Mortgage Specialist International, LLC ("MSI") on his trespass, conversion, and breach of contract claims. For the following reasons, this Court affirms.

I.

{¶2} Mr. Helfinstine obtained a loan from Wells Fargo that he secured with a mortgage on his house. In 2011, Mr. Helfinstine's wife became terminally ill and, over the course of her treatment, Mr. Helfinstine fell behind on his mortgage payments. He also stopped living at the house to be closer to the hospitals where his wife was receiving treatment.

{¶3} In February 2014, Wells Fargo sent Mr. Helfinstine a notice that, because it appeared that the house was vacant, it was going to take action to secure the property. Mr.

Helfinstine contacted Wells Fargo and told it that he still resided at the property and that it was not abandoned. Wells Fargo, therefore, informed him that it would not enter the property.

{¶4} A few weeks later, Mr. Helfinstine's brother notified Mr. Helfinstine that someone had entered the property, changed the locks, and taken many of Mr. Helfinstine's personal possessions. Mr. Helfinstine believed that the entry was done by MSI at the direction of Wells Fargo. A month later, Wells Fargo initiated a foreclosure action against Mr. Helfinstine. Mr. Helfinstine counterclaimed, alleging that Wells Fargo was liable for trespass, conversion, and breach of contract. He also filed a third-party complaint against multiple other companies, including MSI. After the trial court granted judgment to Wells Fargo on its foreclosure claim, Mr. Helfinstine dismissed his counterclaims and third-party complaint. He later refiled his claims against Wells Fargo in the common pleas court. Mr. Helfinstine also sued MSI and Maxim Enterprises, Inc. for trespass and conversion. Wells Fargo and MSI moved for summary judgment, arguing that Mr. Helfinstine's claims were barred by res judicata because they were compulsory counterclaims to Wells Fargo's foreclosure action. They later supplemented their motions. The trial court granted summary judgment to Wells Fargo and MSI over Mr. Helfinstine's opposition. Mr. Helfinstine has appealed, assigning as error that the trial court incorrectly granted summary judgment to Wells Fargo and MSI.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT[.]

{¶5} In his single assignment of error, Mr. Helfinstine argues that the trial court incorrectly determined that his claims were compulsory counterclaims to the foreclosure action, leading it to grant summary judgment to Wells Fargo and MSI. This Court does not agree.

{¶6} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Under Civ.R. 56(C), "[s]ummary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10. The substantive law underlying the claims provides the framework for reviewing motions for summary judgment, both with respect to whether there are genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Burkes v. Stidham*, 107 Ohio App.3d 363, 371 (8th Dist.1995).

{¶7} Civ.R. 13(A) requires that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The Rule requires that "[a]ll existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit * * * no matter which party initiates the action." *Retting Ents., Inc. v. Koehler*, 68 Ohio St.3d 274 (1994), paragraph one of the syllabus.

{¶8} When Civ.R. 13(A) requires the assertion of a counterclaim in an action, the effect of the Rule is to make the action one based not only upon the claims asserted, but upon those counterclaims that should have been asserted. *See Horne v. Woolever*, 170 Ohio St. 178 (1959), paragraph two of the syllabus (interpreting Fed.R.Civ.P. 13). *See also Broadway Mgt., Inc. v. Godale*, 55 Ohio App.2d 49, 50 (9th Dist.1977) (applying *Horne* to cases involving Civ.R. 13(A)).

When a defendant fails to assert a compulsory counterclaim under Civ.R. 13(A) in an action, a final judgment on the merits in that action will bar those claims in any subsequent action under the doctrine of res judicata. *See Horne* at 181 and paragraph three of the syllabus. *Compare Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995), syllabus ("A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.").

{¶9} A claim must be brought as a counterclaim if it existed at the time the pleading was served and arose "'out of the transaction or occurrence that is the subject matter of the opposing claim.'" *Rettig Ents., Inc.* at 277, quoting *Geauga Truck & Implement Co. v. Juskiewicz*, 9 Ohio St.3d 12, 14 (1984). To determine whether claims arise out of the same transaction or occurrence, courts employ the "'logical relation'" test, which provides that claims are logically related when "separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts[.]" *Retting Ents., Inc.* at paragraph two of the syllabus.

{¶10} The Ohio Supreme Court has, therefore, emphasized the broad meaning and flexibility inherent in the phrase "same transaction or occurrence." *See id*. at 278, quoting *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926) ("'Transaction' is a word of flexible meaning" which may include "a series of many occurrences, depending * * * upon their logical relationship."). The test does not require that the respective claims be "precisely identical," nor does it exclude counterclaims that "embrace[ ] additional allegations." *Rettig Ents., Inc.* at 278, quoting *Moore* at 610. Opposing claims are compulsory counterclaims if they "'involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties.'" *Rettig Ents., Inc.* at 279, quoting *Great Lakes Rubber Corp. v. Herbert Cooper Co., Inc.*, 286 F.2d 631, 634 (3d Cir.1961).

{¶11} According to Mr. Helfinstine, the foreclosure action that Wells Fargo filed against him was a contract dispute over whether he failed to perform his obligations under the note and mortgage. He asserts that his tort claims involve an entirely different set of occurrences and do not involve any of the same evidence as Wells Fargo's foreclosure action. Consequently, Mr. Helfinstine argues that his claims do not arise out of the same transaction or occurrence as Wells Fargo's foreclosure action.

{¶12} This Court does not agree. One of Mr. Helfinstine's claims alleged breach of contract—specifically, breach of the same note and mortgage that were the subject of the foreclosure action. According to Mr. Helfinstine's complaint, the mortgage provided Wells Fargo with limited rights of entry and inspection of the premises. It also required Wells Fargo to provide reasonable notice to him. Mr. Helfinstine alleged in his complaint that Wells Fargo acted beyond its authority to preserve and maintain the premises and did not provide reasonable notice to him.

{¶13} Although Mr. Helfinstine's trespass and conversion claims sound in tort, they also necessarily involve the note and mortgage that was the subject of the foreclosure action. Whether Wells Fargo or its agents trespassed on the premises and converted Mr. Helfinstine's property depends on the construction and applicability of the mortgage provision pertaining to the preservation, maintenance, and protection of the property and the provision pertaining to protection of the lender's interest in the property. Upon review of the record, we conclude that because all of Mr. Helfinstine's claims involve the same note and mortgage that was at issue in the foreclosure action, they are logically related to Wells Fargo's claim from that action. *See Countrywide Home Loans Servicing, L.P. v. Stultz*, 161 Ohio App.3d 829, 2005-Ohio-3282, ¶ 20-21 (10th Dist.).

{¶14} Mr. Helfinstine's breach of contract, trespass, and conversion claims existed at the time of the foreclosure action, and the trial court did not err by concluding that they were compulsory counterclaims to Wells Fargo's foreclosure action. It follows that the trial court did not err by granting summary judgment to Wells Fargo based on res judicata. *See Horne*, 170 Ohio St. at 181 and paragraph three of the syllabus.

{¶15} Regarding MSI, Mr. Helfinstine argues that his claims against the company cannot be barred as compulsory counterclaims because MSI was not a party to the note and mortgage and was not a party in the foreclosure action, except as a third-party defendant to his claims. Upon review of Mr. Helfinstine's opposition to MSI's motion for summary judgment, however, we note that he did not advance this argument to the trial court. Although Wells Fargo and MSI submitted separate motions for summary judgment, Mr. Helfinstine submitted a combined response, which opposed both motions. He later submitted a combined supplement to his opposition after Wells Fargo and MSI supplemented their motions for summary judgment. In his initial opposition, Mr. Helfinstine argued that the counterclaims he had raised against Wells Fargo were permissive because the invasion of his home without authority was unrelated to the foreclosure complaint and because his right to privacy and security in his home did not arise from the note and mortgage. He argued that MSI misrepresented that all his claims were resolved in the prior action, noting that his counterclaims and third-party claims were bifurcated from the foreclosure claim and that he later voluntarily dismissed them. In his supplemental opposition, Mr. Helfinstine argued that the counterclaims he filed in the foreclosure action were permissive, that they were unrelated to the foreclosure action under the logical relation test, and that a trial on his claims would not involve a substantial duplication of time and effort. Mr. Helfinstine did not argue that his claims against MSI were not barred by res judicata because MSI "has no relationship to the contract underlying

the foreclosure action and was not a party plaintiff to the foreclosure" and because "[f]ellow tortfeasors are not compulsory parties to an action" or anything resembling those arguments.

{¶16} "Arguments that were not raised in the trial court cannot be raised for the first time on appeal." *JPMorgan Chase Bank, Natl. Assn. v. Burden*, 9th Dist. Summit No. 27104, 2014-Ohio-2746, ¶ 12. Because we cannot consider Mr. Helfinstine's argument that his claims against MSI were not compulsory counterclaims in the foreclosure action because MSI was not a party to that action and was only a fellow tortfeasor, we conclude that Mr. Helfinstine has failed to establish that the trial court incorrectly granted summary judgment to MSI. Mr. Helfinstine's assignment of error is overruled.

III.

{¶17} Mr. Helfinstine's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to

mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNNE S. CALLAHAN
FOR THE COURT

TEODOSIO, J.
CONCURS.

HENSAL, J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶18} Wells Fargo asserted that an agent of MSI was not in Mr. Helfinstine's house at its behest, acknowledging that it had cancelled its request for an inspection when it learned from Mr. Helfinstine that the house was not vacant. The entry of the house, therefore, had nothing to do with the note and mortgage. It was, if as alleged, a separate tort committed against Mr. Helfinstine. Thus, I do not agree that Mr. Helfinstine's claims were compulsory counterclaims in the foreclosure action. Regarding MSI, however, I agree that Mr. Helfinstine failed to preserve his argument because he did not advance it to the trial court. I, therefore, respectfully concur in the judgment as to MSI but dissent as to Wells Fargo.

APPEARANCES:

BRIAN M. ASHTON, Attorney at Law, for Appellant.

SCOTT A. KING, Attorney at Law, for Appellee.

TIMOTHY S. RANKIN and JOHN P. MILLER, Attorneys at Law, for Appellee.

[Cite as *Smith v. Collectors Triangle, Ltd.*, 2020-Ohio-4823.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

PATRICIA CAROL SMITH, et al.,

Plaintiffs-Appellants,

v.

COLLECTORS TRIANGLE, LTD., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 HA 0010

Civil Appeal from the
Court of Common Pleas of Harrison County, Ohio
Case No. CVH-2019-0039

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Sara E. Fanning, Roetzel & Andress, LPA, 41 South High Street, Huntington Center, 21st Floor, Columbus, Ohio 43215 and *Atty. Richard S. Mitchell*, Roetzel & Andress, LPA, 1375 East Ninth Street, One Cleveland Center, 10th Floor, Cleveland, Ohio 44114 and *Atty. David J. Wigham* and *Atty. Emily K. Anglewicz*, Roetzel & Andress, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308, for Plaintiffs-Appellants

Atty. Andrew P. Lycans and *Atty. Eric T. Michener*, Critchfield, Critchfield & Johnston, LTD, 225 North Market Street, P. O. Box 599, Wooster, Ohio 44691, for Defendants-Appellees Collectors Triangle, Ltd.

Atty. Nathan D. Vaughn and *Atty. Giuseppe Ionno*, Kimble Company, 3596 S.R. 39 NW, Dover, Ohio 44622, for Defendants-Appellees ESK ORI, LLC, GDK ORI, LLC, GWK ORI, LLC, JEM ORI, LLC, KBK ORI, LLC, and RHDK Oil & Gas, LLC.

Atty. Kevin Colosimo, *Atty. Christopher Rogers*, and *Atty. Daniel P. Craig*, Frost Brown Todd, LLC, Union Trust Building, 501 Grant street, Suite 800, Pittsburgh, Pennsylvania 15219, for Defendant-Appellee Ascent Resources-Utica, LLC.

Dated: September 28, 2020

WAITE, P.J.

{¶1} Appellants Patricia Carol Smith, Catherine Finney, Agnes Worrell, and Doug Worrell appeal an August 27, 2019 Harrison County Court of Common Pleas judgment entry which granted a Civ.R. 12(B)(6) motion to dismiss the complaint filed by Appellees Ascent Resources Utica LLC, "Collectors Triangle" aka "Collector's Triangle," ESK ORI LLC, GDK ORI LLC, GWK ORI LLC, KBK ORI LLC, JEM ORI LLC, RHDK ORI LLC. Appellants argue that the court's decision is erroneous for three reasons. First, Appellants contend that Appellees' arguments as to the 1998 Sheriff's Deed amount to an improper collateral attack on the trial court's partition order. Second, the Stranger Rule to a deed does not apply where the so-called stranger owns an interest before the conveying deed is executed. Third, the 2006 General Warranty Deed conveyed only a portion of what Appellants obtained through the 1998 Sheriff's Deed to Collector's Triangle. For the reasons provided, Appellants' arguments have merit and the judgment of the trial court is reversed and the matter is remanded for further proceedings consistent with this Opinion.

Factual and Procedural History

{¶2} The instant action involves property that was initially owned by Ross Harris. The property includes two tracts of land: 103.75 acres and 63.7 acres. It appears that this appeal involves only the 63.7 acre tract. On February 2, 1984, Harris entered into an oil and gas lease with Floyd Kimble. Kimble drilled a well referred to as the "Harris Well" which began producing in 1987. In addition to the royalties associated with the well, Kimble agreed to provide the Harris house with free gas.

{¶3} On January 21, 1988, Harris died intestate and his estate was divided equally between his two children, Catherine Finney and Mildred I. Worrell. According to Appellants, the parties orally agreed that Mildred and her husband, Adrian, would receive the oil and gas royalties from the 63.7 acre tract. It is unclear whether there was any agreement as to the remaining 103.75 acre tract.

{¶4} On November 24, 1992, Mildred and Adrian conveyed their one-half interest in the property to their three children (Robert, Ross, and Patricia) in equal shares, retaining a life estate in a one-acre residence located on the 63.7 acre property. After these conveyances, Catherine owned a one-half interest in the property, Robert Worrell owned a one-sixth interest, Ross Worrell owned a one-sixth interest, and Patricia Smith owned a one-sixth interest.

{¶5} Sometime in 1997 a dispute arose between Catherine and the Worrell children regarding who was responsible for the farming and maintenance of the property. The dispute led to a partition complaint filed on November 26, 1997.

1997 Partition Action

{¶6} The partition complaint sought a division of the property among Catherine and the Worrell children. The complaint also sought reservation of a life estate in favor of Mildred and Adrian for a one-acre section of the property where their existing house was situated. However, on February 6, 1998, a motion for default judgment was filed against Mildred and Adrian, as they had not filed an answer. The trial court granted this motion and entered default judgment against Mildred and Adrian.

{¶7} The court ultimately determined that the property could not be fairly divided and ordered a sale of the property. On May 14, 1998, a Sheriff's Deed pertaining to the 63.7 acre tract was executed. Despite the fact that default had been entered against Mildred and Adrian, the deed provided, in relevant part:

> EXCEPTING AND RESERVING UNTO Adrian Worrell and Mildred I. Worrell a life estate in the residence situate on the above described premises, being the tract consisting of 63 acres, 2 rods, and 37 perches, an unsurveyed one (1) acre square surrounding the said residence, and ingress to and egress from the said residence for and during the natural lifetimes of Adrian Worrell and Mildred I. Worrell.
>
> FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive all royalties payable under a certain oil and gas lease and any extension or modification thereof, said lease being recorded in Lease Volume 69, Page 79, Records of Harrison County, Ohio.

> FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive such gas as produced by the existing well free of charge for use at their residence.

(6/13/19 Motion to Dismiss, Exh. A.)

{¶8} The 63.7 acre property was sold to Appellee Collector's Triangle in accordance with the Sheriff's Deed, and the deed was recorded by Appellee.

2006 General Warranty Deed

{¶9} On March 4, 2005, Mildred died. Shortly thereafter, Adrian moved into an assisted living facility. Collector's Triangle approached Patricia Worrell and inquired whether the family would consider terminating Adrian's life estate in the one-acre property. On March 24, 2006, the life estate was terminated through a general warranty deed. In relevant part, the deed stated:

> **KNOW ALL MEN BY THESE PRESENTS, Adrian Worrell**, an unmarried person, (the "Grantor"), for valuable consideration paid, grants, with general warranty covenants, to Collector's Triangle, Ltd., an Ohio limited liability company, whose tax mailing address is P.O. Box 473, Sugarcreek, Ohio 44681 (the "Grantee"), all of his interest in the real property described on Exhibit A (the "Property"), being an estate for life in the residence located on the Property as set forth in a certain Sheriff's Deed in Partition recorded in Official Record Volume 52, Page 163.
>
> * * *

> The Property is conveyed subject to, and there are excepted from the general warranty covenants, the following:
>
> 1. All easements, leases, covenants, conditions and restrictions of record
>
> * * *
>
> GRANTOR ALSO CONVEYS TO GRANTEE, ITS SUCCESSORS AND ASSIGNS, ALL OF GRANTOR'S RIGHT TO RECEIVE ROYALTIES AND FREE GAS IN CONNECTION WITH A CERTAIN OIL AND GAS WELL LOCATED ON THE PROPERTY AND DRILLED PURSUANT TO THE LEASE RECORDED IN LEASE VOLUME 69, PAGE 79, IN THE RECORDER'S OFFICE, HARRISON COUNTY, OHIO.

{¶10} Sometime thereafter, Ascent began horizontal drilling, which resulted in new production. Ascent paid royalties resulting from the new drilling to Collector's Triangle, and not to Appellants, which led to the instant action.

2019 Complaint

{¶11} On May 13, 2019, Appellants filed a complaint against Doug Worrell, Agnes Worrell, Collector's Triangle, ESK ORI LLC, GDK ORI LLC, KBK ORI LLC, JEM ORI LLC, RHDK Oil and Gas LLC, and Ascent Resources - Utica LLC. The complaint sought the following: a declaratory judgment that Appellants own the royalty interests at issue and are entitled to receive those royalties; quiet title; breach of contract (solely against Ascent); and conversion and accounting (solely against Ascent.) On June 3, 2010, an answer was filed on behalf of all defendants except Collector's Triangle.

{¶12} On June 13, 2019, Ascent filed a Civ.R. 12(B)(6) motion to dismiss the complaint in its entirety. In this motion Ascent argued that any claim that the Sheriff's Deed vested certain rights in Mildred and Adrian is barred by *res judicata.* Ascent also argued that Mildred and Adrian were strangers to the Sheriff's Deed, thus the deed could not reserve any interests in their favor. Finally, Ascent argued that Adrian conveyed all of his interests in the property through the 2006 General Warranty Deed. Collector's Triangle filed a motion to join the motion to dismiss.

{¶13} On June 26, 2019, Appellants filed an amended complaint. The amended complaint contained additional facts surrounding the oral agreement as to a division of royalties between Mildred and Patricia, but did not add any new legal claims.

{¶14} On August 27, 2019, the trial court granted Ascent's Civ.R. 12(B)(6) motion to dismiss. The court determined that even if the 1998 Sheriff's Deed properly reserved property and royalty interests in favor of Mildred and Adrian, any claim to those interests was extinguished by the 2006 General Warranty Deed. This timely appeal followed.

Civ.R. 12(B)(6)

{¶15} This action was dismissed pursuant to Civ.R. 12(B)(6). "A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint." *Youngstown Edn. Assn. v. Kimble*, 2016-Ohio-1481, 63 N.E.3d 649, ¶ 11 (7th Dist.), citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992).

{¶16} When reviewing a Civ.R. 12(B)(6) motion, "the court must accept the factual allegations contained in the complaint as true and draw all reasonable inferences from these facts in favor of the plaintiff." *Kimble, supra*, at ¶ 11, citing *Mitchell v. Lawson Milk*

Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). In order to grant a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. However, "[i]f there is a set of facts consistent with the complaint that would allow for recovery, the court must not grant the motion to dismiss." *Kimble, supra*, at ¶ 11, citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991).

{¶17} A Civ.R. 12(B)(6) claim is reviewed *de novo*. *Ford v. Baska*, 2017-Ohio-4424, 93 N.E.3d 195, ¶ 6 (7th Dist.), citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DISMISSING APPELLANTS' FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

{¶18} Appellants contend that Appellees' arguments regarding the Sheriff's Deed are improper as they attempt to attack the earlier partition order. As the Sherriff's Deed was accepted by the trial court at the time, they argue that it inherently became part of the court's order. Because Appellees not only had notice of the existence and contents of the Sherriff's Deed but possessed and recorded the deed without ever attempting to attack its provisions, any argument pertaining to the validity of the Sheriff's Deed constitutes an improper collateral attack on the trial court's order.

{¶19} In response, Appellees contend that the Sherriff's Deed was not part of the trial court's order in the partition action. Even so, Appellees argue that they could not appeal the order because they were not a party to the partition action. Appellees also argue that it is Appellants who are barred by *res judicata* from seeking to relitigate the issue of Mildred and Adrian's interests in the property.

{¶20} Again, this matter was dismissed as a result of a Civ.R. 12(B)(6) motion. There are certain defenses that cannot be raised in a motion to dismiss. Relevant to this matter, the Ohio Supreme Court has held that "the defense of *res judicata* may not be raised by motion to dismiss under Civ.R. 12(B)." *State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109, 579 N.E.2d 702, 703 (1991). Thus, Appellees' reliance on *res judicata* within their Civ.R. 12(B)(6) motion is misplaced. However, as to Appellants' argument regarding collateral estoppel, these arguments may properly be raised in defense of a Civ.R. 12(B)(6) motion. See *Ohio Pyro, Inc. v. Ohio Dept. of Commerc*e, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550.

{¶21} This matter is governed by Civ.R. 12(B)(6). We are limited to a review of the complaint and the amended complaint. All facts asserted within the complaint and amended complaint must be accepted as true. With that understanding, resolution of this matter involves the analysis of three issues: whether the 1998 Sheriff's Deed properly reserved oil and gas interests in favor of Mildred and Adrian, whether Appellee Collector's Triangle waived their ability to contest the rights granted in the 1998 Sheriff's Deed, and whether the 2006 General Warranty Deed conveyed all of the rights obtained through the 1998 Sheriff's Deed.

{¶22} Beginning with the 1998 Sheriff's Deed, a question remains as to what rights were conferred. Appellants allege within their amended complaint that Mildred and Patricia had orally agreed at some point before the partition action was filed that Mildred and Adrian were to receive the oil and gas royalties stemming from the 63.7 acre tract. Although the record before us is limited, it does appear that Mildred and Adrian received these oil and gas royalties during the relevant time period.

{¶23} Appellee Collector's Triangle does not dispute that it was Appellants who received the royalties from the time the Sheriff's Deed was executed until the dispute over payment of royalties following the execution of the General Warranty Deed terminating Adrian's life estate. This dispute appears to have begun in 2008. Thus, in addition to having actual knowledge of this reservation through the recorded deed, Collector's Triangle knew that Appellants had been receiving any and all royalties. Collector's Triangle made no effort whatsoever to dispute the provision nor did it seek to obtain any portion of the royalties.

{¶24} Appellees contend that if an oral agreement existed vesting all royalty payments to Mildred and Adrian, it would be barred by the statute of frauds. The Ohio Supreme Court addressed this issue in *Nonamaker v. Amos,* 73 Ohio St. 163, 76 N.E. 949 (1905). The *Nonamaker* Court reviewed whether an oral agreement regarding royalty interests raises a statute of frauds issue. The Court held that an agreement to increase or decrease a royalty division stemming from an oil lease is not within the statute of frauds because "when the parties entered into the parol contract, * * * they were not contracting for an interest in or concerning real estate, but for a division of personal property in proportions different from those named in the written lease." *Id.* at 171.

{¶25} Taking all of the allegations in the complaint as true, the limited evidence suggests that the oral agreement at issue was not a contract dealing with a new interest in the royalties, but modified the existing proportions already reserved. The exact parameters of the agreement are unknown, particularly whether the agreement pertained only to the tract at issue or the property as a whole. However, it is clear that Catherine and Mildred jointly inherited all royalty interests from Ross Harris. Thus, the oral agreement did not create a new interest in favor of Mildred, it merely changed the royalty proportions as between Mildred and Patricia. This oral agreement does not fall within the prohibition of the statute of frauds.

{¶26} Appellees argue that Mildred and Adrian were strangers to the 1998 Sheriff's Deed, meaning they were not a grantor or grantee in the deed and so, the deed could not reserve interests in their favor.

{¶27} The Stranger Rule was first announced in *The Akron Cold Spring Co. v. Ely,* 18 Ohio App. 74 (9th Dist.1923). The *Ely* court stated "a reservation in a deed is ineffectual to create title in a stranger to the conveyance; a reservation is something issuing from or coming out of the thing granted, and must be to the grantor or party executing the conveyance and not to a stranger." *Id.* at 80. However, *Ely* acknowledged an exception existed where an interest was conveyed to a party before the deed was executed. *Id.* at 78-79. In other words, if the grantor conveys an interest to a third party and then executes a deed concerning the property to the grantee, the third party is not a stranger to the deed because the conveyed interest predates the deed.

{¶28} Appellees contend that this case is analogous to *In re Allen*, 415 B.R. 310 (Bankr. N.D. Ohio 2009). *In re Allen* involved a conveyance of land to a trust where

grantor reserved a life estate in favor of a third party before grantor filed for bankruptcy. *Id.* at 313. The *Allen* court determined that the third party was a stranger to the deed because there was no evidence that his rights existed before the deed containing the reservation. *Id.* at 317. Contrary to Appellees' arguments, however, this case actually supports Appellants' position, as the court acknowledged that pre-existing rights were not subject to the Stranger Rule. Unlike *Allen,* in the instant matter reveals evidence that Mildred and Adrian had pre-existing rights in the disputed royalty interests.

{¶29} Because we must accept as true the existence of the oral agreement, we must also deal with the question of whether Appellee waived its rights to attack the 1998 Sheriff's Deed. This record establishes that Collector's Triangle was indirectly a party to the partition action. While Collector's Triangle is not a third-party beneficiary, it was clearly the party who benefitted from the partition and sale. Importantly, Collector's Triangle signed the deed and recorded it on June 1, 1998.

{¶30} In *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio- 5024, 875 N.E.2d 550, the Ohio Supreme Court held that a prior judgment may only be collaterally attacked if the trial court lacked jurisdiction in the original action or if the judgment was the result of fraud. The *Ohio Pyro* Court noted that the ability to collaterally attack a judgment is limited and disfavored, because judgments are meant to be final. *Id.* at ¶ 22, citing *Coe v. Erb,* 59 Ohio St. 259, 267-268, 52 N.E. 640 (1898).

{¶31} The Court held that "[a]lthough res judicata principles apply only to parties and those in privity with them, the collateral-attack doctrine applies to both parties and nonparties, contrary to Ohio Pyro's position that the collateral-attack doctrine cannot

apply to a nonparty." *Id*. at ¶ 35, citing *Moor v. Parsons*, 98 Ohio St. 233, 243, 120 N.E. 305 (1918); *Plater v. Jefferson*, 136 N.E.2d 111 (8th Dist.1956).

{¶32} In *Jefferson,* an exception to this principle was announced. Strangers to the court order who, "if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, * * * are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to effect rights or interests acquired prior to its rendition." *Id.* at 113.

{¶33} Appellees were not parties to the partition action in the instant case. Regardless, they are prohibited from attacking the original court order unless they can demonstrate that that they have pre-existing rights that would be prejudiced by enforcement of that order. Collector's Triangle arguably may be prejudiced by the inability to receive royalties. However, to the extent they argue entitlement to that right, it did not pre-exist the court's partition order in this case. Thus, they cannot collaterally attack the partition order.

{¶34} Additionally, Appellees did not argue at any point during this action that the trial court lacked jurisdiction or that the judgment was procured through fraud. Instead, they contend the Sheriff's Deed does not form part of the trial court's judgment, and even if it is part and parcel of the judgment, it was erroneous, because the sheriff lacked the authority to grant Mildred and Adrian any rights to the royalty interests. Due to the limited nature of the record before us, we are unable to fully determine whether the Sheriff's Deed forms part of the trial court's order in the partition. On May 7, 1998, the trial court entered an order confirming the sale and proceeds which stated, in relevant part, "[t]he

court having examined the return of the sheriff and the sales having been made to James C. Lottes and Eddie Yoder as to Sale 1 and [Collector's Triangle] as to Sale 2. The sales are hereby confirmed and approved in all respects by this court." (5/7/98 J.E.). The court then ordered the Sheriff to execute and deliver the deeds. This property concerns "sale 2."

{¶35} From the court's language, it appears that all aspects of the sale known by the court were approved at confirmation. However, it is unclear whether the royalty reservation to Mildred and Adrian was known and approved by the trial court at the time it accepted the sale and ordered the Sheriff's Deed. The Sheriff's Deed was executed one week later on May 14, 1998. Accepting the allegations of the complaint as true, it should have been known by the trial court when it approved "all aspects of the sale." If so, then the royalty reservation is part of the trial court's order, which cannot be collaterally attacked.

{¶36} Instead of analyzing critical issues surrounding the execution and recording of the 1998 Sheriff's Deed, the trial court focused its analysis on the 2006 General Warranty Deed, finding that it conveyed all royalties to Collector's Triangle. However, a review of the 2006 General Warranty Deed reveals that Adrian conveyed less than what was reserved to him in the 1998 Sheriff's Deed.

{¶37} In relevant part, the 1998 Sheriff's Deed specifically stated:

> FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive *all royalties payable under a certain oil and gas lease and any extension or modification thereof*, said lease being

> recorded in Lease Volume 69, Page 79, Records of Harrison County, Ohio. (Emphasis added.)

(6/26/19 Amended Complaint, Exh. 1.) This language clearly reserved all royalty interests in the lease, as well as future modifications and extensions of the lease.

{¶38} In comparison, the 2006 General Warranty Deed stated, in relevant part,

> GRANTOR ALSO CONVEYS TO GRANTEE, ITS SUCCESSORS AND ASSIGNS, ALL OF GRANTOR'S RIGHT TO RECEIVE *ROYALTIES AND FREE GAS IN CONNECTION WITH A CERTAIN OIL AND GAS WELL LOCATED ON THE PROPERTY AND DRILLED PURSUANT TO THE LEASE* RECORDED IN LEASE VOLUME 69, PAGE 79, IN THE RECORDER'S OFFICE, HARRISON COUNTY, OHIO. (Emphasis added)

{¶39} The language used in the 2006 General Warranty Deed specifically limited the conveyance to those royalties in connection with the Harris Well. In contrast, the 1998 Sheriff's Deed used broad language reserving royalties from any well drilled pursuant to the lease. Thus, the plain and unambiguous language of the 2006 General Warranty Deed conveyed only the oil and gas that is produced by the Harris Well, and not the subsequent drilling that is at issue in this action.

{¶40} Although Appellees encourage this Court to construe the 2006 conveyance broadly, the language is clear and unambiguous. The express language of the 1998 Sheriff's Deed clearly reserved all royalty rights deriving from the lease and any extension or modification, whereas the 2006 General Warranty Deed conveyed only the oil and gas in connection with the Harris Well, without extension or modification.

{¶41} This matter was dismissed on the pleadings, based on the determination that Appellants have failed to raise any set of facts on which to base a valid claim. However, our review of the filings reveals that Appellants have raised allegations, which must be accepted as true, that could establish a viable claim for relief. The 2006 General Warranty Deed does not appear to convey all rights obtained through the 1998 Sheriff's Deed. There remains a question as to whether the Sheriff's Deed may now be attacked. Hence, Appellants have presented a claim upon which relief can be granted,

{¶42} As such, Appellants' sole assignment of error has merit and is sustained.

Conclusion

{¶43} Appellants argue that the court's decision to grant Appellees' Civ.R. 12(B)(6) motion is erroneous as their mother and father obtained a reservation of all royalty rights in the 1998 Sheriff's Deed and conveyed only a portion of those interests in a 2006 General Warranty Deed. For the reasons provided, Appellants' arguments have merit and are sustained. The judgment of the trial court is reversed and the matter is remanded for further proceedings consistent with this Opinion.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Harrison County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *Hampton v. Lively*, 2020-Ohio-4713.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

CAROL JEAN HAMPTON,	:	Case No. 19CA9
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
CHAD LIVELY,	:	
Defendant-Appellee.	:	**RELEASED 9/28/2020**

APPEARANCES:

Brigham M. Anderson, Ironton, Ohio, for appellant.

Randall L. Lambert, Ironton, Ohio, for appellee.

Hess, J.

{¶1} The Estate of Carol Jean Hampton (the "Estate") appeals from a judgment of the Lawrence County Common Pleas Court denying its adverse possession claim regarding certain real property in Lawrence County. The Estate contends that the court misapplied the law and erred when it found that the Estate failed to prove adverse use of the property for the requisite 21-year period. The evidence shows that in 1980, Carol Jean Hampton and her family took possession of the property pursuant to a sales contract after payment of the purchase price, and for over 21 years, they possessed the property and treated it as their own even though no change in record ownership occurred. This use was adverse, not permissive, because it was not accompanied by an express or implied recognition of a right of the sellers to terminate it. The trial court misapplied the law to the extent it suggested otherwise, and its related conclusion that the Estate failed in its burden to show adverse use for 21 years is against the manifest

weight of the evidence. Accordingly, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

{¶2} In October 2016, Carol Jean Hampton filed a complaint against Chad Lively, the record owner of 1606 Charlotte Street, Ironton, Ohio, located in the Green Valley Estates subdivision, alleging she had obtained legal ownership of the property by adverse possession and asking the court to, among other things, quiet title. Subsequently, she died, and the trial court substituted her estate as plaintiff.

{¶3} A magistrate conducted a bench trial and heard evidence that Chad Lively's grandparents, Thomas and Louise Lively, acquired the property in 1960 and remained the record owners until 2016, when Chad Lively probated the estates of his grandparents and his father, James Lively, and became the record owner. However, from 1980 to 2012, Carol Jean Hampton lived on the property, which she shared for many years with her husband, Paul Destocki, and their sons, Paul Eddie and Chris (the "Hampton/Destocki family").

{¶4} Beverly Nance ("Nance"), Carol Jean Hampton's sister, testified that one day in 1980, Nance and her mother, Leona Hampton, went to Green Valley Estates to look for a house for the Hampton/Destocki family. They toured two homes on Charlotte Street with "for sale" signs outside. They liked the property at issue, and her mother decided to buy it. The next day, Nance saw her mother write a check but did not see the face of it. They drove to the property, where her mother talked to Louise Lively and gave her the check. Nance did not see or converse with the Lively family after that day. She testified that the Hampton/Destocki family moved to the property about 30 to 45 days

later and lived there for at least 30 years. Nance testified that from 1980 until 2016, tax bills for the property, which had the names of Thomas and Louise Lively on them, came to her home. Her family paid the property taxes from 1980 through 2015.

{¶5} Chris Hampton Destocki ("Destocki") testified that shortly after his birth in 1980, his family moved onto the property. His brother moved out around 1992 or 1993, and Destocki moved out in 1998. His parents remained on the property until 2012. His father had a stroke and spent four months at a physical therapy facility. After his father was discharged in May 2012, his parents moved in with him. Destocki testified that after his father died in December 2013, his mother wanted to move back to the house, so they began to remodel it. However, the last time Destocki was in the house was in 2015, and his mother never moved back before her death. Destocki admitted that he could not locate any documentation regarding the check his grandmother gave Louise Lively in 1980 and that he had never seen a deed to the property. However, he testified that everything his grandmother bought was "always bought and paid for right there" with cash or check. He was unaware of any other payments on the property, never witnessed any interaction between his mother and the Lively family, and was unaware of any agreement between them. He explained that it was not unusual for his family to not record a deed because "they were afraid of law suits [sic]" and that his mother was a hoarder who "put everything off" and "always thought she had tomorrow." He testified that a deed could have been in the house with other important documents, but he had no reason to look for one prior to 2016 and did not have access to the house after 2016, so "that stuff is gone forever." Destocki testified that his grandmother added a garage to the

house in 1992 or 1993, that his father had maintained homeowners' insurance on the property, and that his family had paid property taxes on it.

{¶6} Sara Francis Salisbury testified that she has lived next door to the property for 61 years. She believed Carol Jean Hampton and her husband owned the property because "[a]ccording to * * * Louise Lively they sold the house to them."

{¶7} Chad Lively ("Lively") testified that he was born in 1973 and lived on the property with his grandparents and father from 1973 until 1980. Lively testified that in late 1979 or early 1980, he witnessed a conversation between his grandmother, Carol Jean Hampton, and Paul Destocki but did know the subject of it. In 1980, his grandparents purchased a house in Florida because his grandfather had health issues and needed to live in a warmer climate, and the family moved there. Lively acknowledged the Hampton/Destocki family possessed the property between 1980 and 2012 and testified that "[t]here must have been some kind of an arrangement" between them and his grandparents even though he did not know the details of it. Lively testified that after moving to Florida, he observed his grandparents continue to hold themselves out as the owners of the property, and he thought they owned it based on conversations with them and his father. However, he had no knowledge of his grandparents or father going back to the property, conversing with the Hampton/Destocki family, receiving rent payments, maintaining the property, or expending money on it between 1980 and their deaths. His grandfather died in 1989, and his grandmother sold the Florida house in 1992, moved to an apartment, and died in 1997. Lively's father moved back to Ohio in 2004 and lived in Ironton for a year before his death in 2007. From 1980 until 2016, Lively went to Lawrence County four or five times but went to the property only once

around 2003 or 2004 and knocked on the door. Lively admitted that he never received rent for the property, and prior to 2016, he did not converse with the Hampton/Destocki family, maintain the property, or expend money on it. Lively lived in Florida until 2016 when he became the record owner of the property and moved onto it. Lively testified that at that time, the house was in poor condition, contained a lot of garbage, and showed no signs of a recent remodel.

{¶8} Brandy Lively testified that she met Lively around 1999 or 2000 and married him in 2005. She witnessed conversations between Lively and his father about the property in which Lively indicated that "the house was his," that his family had "left the house with people," and that he "intended on one day coming back." In 2007 and 2010, she and Lively came to Lawrence County for the funerals of his father and step-father respectively, but she did not go to the property. Around 2010 or 2011, she unsuccessfully tried to contact Carol Jean Hampton after getting a report that the property "wasn't in good condition." In 2016, she obtained information about the local health department possibly condemning the property. She sent Destocki a message expressing interest in purchasing the property from his family to "bait" him into responding because she wanted to get in touch with his mother to discuss the condition of the property. She "had no intention of purchasing a house that we already owned."

{¶9} The magistrate found that from 1980 to 2012, the Hampton/Destocki family continuously, exclusively, openly, and notoriously possessed the property but that the Estate failed to establish adverse use of the property for 21 years. The Estate filed objections to the magistrate's decision, which the trial court overruled. The court agreed with the magistrate that the Estate established the elements of its adverse possession

claim by clear and convincing evidence except adverse use for 21 years. The court found that "[t]he evidence proffered by [the Estate] at trial indicated that some form of financial transaction occurred in or around 1980 between Leona Hampton and Thomas and Louise Lively, after which the Livelys vacated the house and moved to Florida and Carol Jean Hampton and her family took up residency at 1606 Charlotte Street, but no deed or written evidence regarding the transaction was produced at trial." The court stated that "[r]egardless of whether there was an alleged sale, lease or advanced rent paid, the obvious conclusion is that the Hampton/Destocki family initially moved into the property with the permission and consent of the Livelys." The court explained that possession is not adverse if it is with the owner's permission, that the permission did not terminate until Louise Lively died in 1997, and that two events—abandonment of the property in 2012 and Chad Lively obtaining record title in 2016—"terminated the Plaintiff's consecutive years short of the 21-year requirement."

II. ASSIGNMENT OF ERROR

{¶10} The Estate presents one assignment of error:

> The Trial Court erred when it failed to find that the Plaintiff had adversely possessed 1606 Charlotte Street, Ironton, Ohio 45638 and misapplied the law and meaning of "adverse," as it relates to an Adverse Possession Claim.

III. LAW AND ANALYSIS

{¶11} The Estate maintains that the trial court erred when it held that the Estate failed to prove adverse use of the property for 21 years. The Estate asserts that the court misapplied the law and the meaning of "adverse" when it concluded that Carol Jean Hampton's initial possession of the property was not adverse "due to the fact that

she purchased the property and a deed was never recorded." The Estate contends that "[t]here is no question that the facts at trial in this case established that Carol Jean Hampton occupied what she believed to be her own property" and that the Estate proved adverse use under *Evanich v. Bridge*, 119 Ohio St.3d 260, 2008-Ohio-3820, 893 N.E.2d 481, because Carol Jean Hampton possessed the property and treated it as her own for more than 21 years.

{¶12} Lively maintains that without documentary evidence of a sale, "it is impossible to ascertain the arrangement" between his grandparents and the Hampton/Destocki family, and the check Louise Lively accepted could have been a down payment or rent. Lively claims that his grandparents believed they still owned the property and notes that until 2016, they were the record owners, and the property tax bills listed them as such. He also asserts that regardless of what the agreement was, it is "obvious" the Hampton/Destocki family "moved in with permission."

{¶13} In *Turner v. Robinson*, 4th Dist. Highland No. 16CA21, 2017-Ohio-7228, ¶ 29, we explained:

> "An appeal of a ruling on an adverse possession claim is usually reviewed under a 'manifest weight of the evidence' standard of review." *Nolen v. Rase*, 4th Dist. Scioto No. 13CA3536, 2013-Ohio-5680, ¶ 9. "In other words, an appellate court will not reverse a trial court's decision on this issue if it is supported by some competent, credible evidence." *Id.* "This standard of review is highly deferential and even the existence of 'some' evidence is sufficient to support a court's judgment and to prevent a reversal." *Id.* However, where the appellant challenges the trial court's choice or application of law, our review is de novo. *Pottmeyer v. Douglas*, 4th Dist. Washington No. 10CA7, 2010-Ohio-5293, ¶ 21.

{¶14} "To acquire title by adverse possession, a party must prove, by clear and convincing evidence, exclusive possession and open, notorious, continuous, and adverse use for a period of twenty-one years." *Grace v. Koch*, 81 Ohio St.3d 577, 692

N.E.2d 1009 (1998), syllabus. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶15} The trial court determined that the Estate proved exclusive possession and open, notorious, and continuous use of the property for a 21-year period; the dispute on appeal centers on whether the Estate proved adverse use for the requisite period. "[I]ntent is objective rather than subjective in determining whether the adversity element of adverse possession has been established, and the legal requirement that possession be adverse is satisfied by clear and convincing evidence that for 21 years the claimant possessed property and treated it as the claimant's own." *Evanich*, 119 Ohio St.3d 260, 2008-Ohio-3820, 893 N.E.2d 481, at ¶ 13. Adverse use is "non-permissive use." *Turner* at ¶ 37.

{¶16} The trial court misapplied the law when it suggested that possession pursuant to a sales contract is never adverse use, and its related conclusion that the Estate failed to prove adverse use for 21 years by clear and convincing evidence is against the manifest weight of the evidence. If a buyer takes possession of property after paying the purchase price, the buyer manifests an intent to treat the property as his or her own because the buyer's performance triggers the seller's duty to convey legal title to the buyer. *See generally Coggshal v. Marine Bank Co.*, 63 Ohio St. 88, 57 N.E. 1086 (1900), paragraph one of the syllabus ("The interest of the vendee of land before

conveyance is an equitable estate in the land, equal to the amount of the purchase money paid, and which, upon full payment, may ripen into a complete equity, entitling him to a conveyance of the legal title according to the terms of the contract * * *"); *Adams v. Wright*, 353 Mo. 1226, 1232, 187 S.W.2d 216 (1945) ("One rule of real property law is that where the vendor has delivered possession to the vendee, but retains the legal title under a contract to deliver a deed when the purchase money is fully paid * * *, the holding of the vendee will not be deemed adverse * * * *until the purchase price is paid*" (Emphasis added.)). The buyer's use is not permissive because it is not accompanied by an express or implied recognition of a right of the seller to terminate the use. *See Cadwallader v. Scovanner*, 178 Ohio App.3d 26, 2008-Ohio-4166, 896 N.E.2d 748, ¶ 57 (12th Dist.), quoting *Manos v. Day Cleaners & Dyers, Inc.*, 91 Ohio App. 361, 363, 108 N.E.2d 347 (9th Dist.1952) (a use is not adverse if it is accompanied by " 'an express or implied recognition of the landowner's right to put an end to the use' "); *Tenney v. Luplow*, 103 Ariz. 363, 369, 442 P.2d 107 (1968), quoting *Miller v. Conley*, 96 Or. 413, 419, 190 P. 301 (1920) (permissive use exists when there is " 'permission merely to occupy land in subordination to the legal title of the one granting the permission' " and " 'does not include possession given with design to confer the legal title upon the one who assumes the occupancy' "); *see generally Fountain v. Lewiston Natl. Bank*, 11 Idaho 451, 509-510, 83 P. 505 (1905) ("It is clear, * * * upon principle, that one who purchases a tract of land and pays the purchase price and enters into the possession thereof, believing he has title whether he receives a good deed of conveyance, an imperfect one, or no deed at all, nevertheless enters into a possession adversely to the vendor and all the rest of the world; and, while the entry is made with the permission of the owner, it is

from that moment adverse to him, and an adverse and hostile possession is the real intent of the party to such a contract").

{¶17} Although the trial court did not specifically resolve whether the 1980 transaction was a sale or lease, there is no competent, credible evidence that would support the conclusion that the Hampton/Destocki family took possession pursuant to a lease agreement. Rather, the evidence shows that the family took possession pursuant to a sales contract after having paid the purchase price and that for over 21 years, the family possessed the property and treated it as their own. Nance testified about how in 1980, she went with her mother to Green Valley Estates to look for a house for the Hampton/Destocki family, they toured the property at issue because it had a "for sale" sign in the yard, and her mother decided to buy it and gave Louise Lively a check the next day. Even though Nance did not see the face of the check, Destocki testified that his grandmother always purchased things outright with cash or check; it was "how she operated." *See* Evid.R. 406 ("Evidence of the habit of a person * * * is relevant to prove that the conduct of the person * * * on a particular occasion was in conformity with the habit * * *"). And even though Thomas and Louise Lively remained the record owners of the property until 2016, Destocki explained that it was possible that his family had a deed to the property that was not recorded out of a desire to protect the property from potential creditors and that was lost because his mother was a hoarder, and Destocki did not have access to the property once Lively became the record owner in 2016.

{¶18} After Louise Lively accepted the check from Leona Hampton, there is no evidence that the Lively family ever sought or received additional payments for the property or of any other interaction between the families during the 32 years Carol Jean

Hampton and her husband resided there. There is no evidence that any member of the Lively family maintained the property or made expenditures on it between 1980 and 2016. There is no evidence Thomas, Louise, or James Lively even returned to the property prior to their deaths. Notably, James Lively moved back to Ohio in 2004 and lived in Ironton for a year before he died in 2007. There is evidence that Louise Lively told a neighboring property owner, Salisbury, that the Livelys had sold the house to Carol Jean Hampton and her husband.[1] There is also evidence that the Hampton/Destocki family treated the property as their own during the time they lived there. They added a garage to the property with the help of Leona Hampton, ensured payment of the property taxes from 1980 through 2015, and had homeowners' insurance on the property.

{¶19} Lively directs our attention to his testimony that he observed his grandparents holding themselves out as owners of the property after they moved to Florida and asserts that his grandparents discussed him moving back to the property. However, Lively did not articulate what his observations were and admitted that he had no evidence that his grandparents went to the property, received rent, maintained the property, expended money on it, or communicated with the Hampton/Destocki family after moving to Florida—actions one would expect a property owner to take if there had

[1] We recognize that to the extent the Estate relies on this testimony to prove a sale had occurred, the testimony is hearsay, i.e., "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Even though Lively did not object to this testimony, "when the trial court is the trier of fact, we presume that the judge disregards improper hearsay evidence unless there is affirmative evidence in the record to the contrary." *State v. Campbell*, 8th Dist. Cuyahoga Nos. 100246 & 100247, 2014-Ohio-2181, ¶ 16. However, because Lively did not object at trial or respond to the Estate's reliance on Salisbury's testimony on appeal, we are without the benefit of arguments from the parties as to whether a hearsay exception applies. *See generally* Evid.R. 804(B)(3) ("A statement that was at the time of its making so far contrary to the declarant's * * * proprietary interest * * * that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true" is "not excluded by the hearsay rule if the declarant is unavailable as a witness"); Evid.R. 804(A)(4) (a declarant is unavailable as a witness if the declarant "is unable to be present or to testify at the hearing because of death"). However, even if the testimony was inadmissible hearsay, our conclusion in this case would be the same.

been a landlord/tenant relationship or a sale with unpaid purchase money. Although Lively testified that he believed his grandparents owned the property based on conversations with them and his father, the court indicated that Lively could not testify about what they said, presumably because it would have been inadmissible hearsay. In addition, the testimony Lively cites for the position that his grandparents discussed him moving back to the property is testimony of his wife—who never met his grandparents—about statements that Lively made. Lively had no personal knowledge of the arrangement between his grandparents and the Hampton/Destocki family.

{¶20} The Estate established the elements of its adverse possession claim by clear and convincing evidence. We sustain the sole assignment of error, reverse the trial court's judgment, and remand for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND
CAUSE REMANDED.

Abele, J., dissenting:

{¶21} I respectfully dissent. The trial court determined that appellant did not prove the adversity element of the adverse possession claim. I agree with the trial court's conclusion. When the original entry onto another's property is permissive or conferred by grant, any use consistent with such grant or permission is not adverse. *Rodgers v. Pahoundis*, 178 Ohio App.3d 229, 2008-Ohio-4468. Thus, a person who initially occupies or possesses land with the owner's permission cannot thereafter obtain title by adverse possession unless the owner revokes permission, dies, sells his estate, or the claimant makes an obvious change in the use or other distinct assertion of a right hostile to the owner. *Remund v. Stroud*, Wash. App. No. 23264-2-11, 1999 WL 512505 (July 16, 1999). Consequently, I agree with the trial court's conclusion that appellant's adverse possession claim should fail. Appellant, however, may have had a viable claim to establish title and ownership through an action to quiet title. If appellant could establish that a lost deed did, in fact, convey title to the real estate and the 1980 transaction involved the exchange of purchase money for a deed, appellant should be the title holder, at least as against all others except for any subsequent purchaser without notice. A grantor's execution of a deed vests title in the grantee, whether or not the deed is recorded, and is good against all the world except subsequent purchasers without notice. Thus, a deed need not be recorded to pass title. Whether or not recorded, an Ohio deed passes title upon proper execution and delivery, so far as the grantor is able to convey it. See, generally, *Wayne Bldg. & Loan of Wooster v. Yarborough*, 11 Ohio St. 2d 195, 228 N.E.2d 841 (1967). Thus, a purchaser can

establish the execution and existence of a deed and its contents to enable a court to determine the character of the instrument.

{¶22} In the case sub judice, it appears that some type of transaction occurred in 1980. Also, it appears that no other transactions occurred after 1980 (e.g. subsequent sale to a purchaser without notice). Thus, it is conceivable that appellant could have adduced evidence sufficient to establish the true nature of the original transaction.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Smith, P.J.: Concurs in Judgment and Opinion.
Abele, J.: Dissents with Dissenting Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *HS Fin. Group, L.L.C. v. Hinchee*, 2020-Ohio-4765.]

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

HS FINANCIAL GROUP, LLC	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2019-CA-67
	:	
v.	:	Trial Court Case No. CVF1900600
	:	
TERRI HINCHEE	:	(Civil Appeal from Municipal Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 2nd day of October, 2020.

. . . . . .

JEFFREY L. KOBERG, Atty. Reg. No. 0047386, 25651 Detroit Road, Suite 203, Westlake, Ohio 44145
Attorney for Plaintiff-Appellee

ANDREW J. ZEIGLER, Atty. Reg. No. 0081417, 1340 Woodman Drive, Dayton, Ohio 45432
Attorney for Defendant-Appellant

. . . . . .

WELBAUM, J.

{¶ 1} Defendant-Appellant, Terri Hinchee, appeals from a summary judgment rendered in favor of Plaintiff-Appellee, HS Financial Group, LLC ("HSFG"). According to Hinchee, the trial court erred in granting summary judgment because the affidavit that HSFG submitted was unauthenticated and inadmissible as evidence.

{¶ 2} We conclude that the trial court erred in awarding summary judgment to HSFG. The affidavit that was submitted failed to comply with the requirements of Evid.R. 803(6), was not properly authenticated, and was inadmissible. Accordingly, the judgment of the trial court will be reversed, and this cause will be remanded for further proceedings.

I. Facts and Course of Proceedings

{¶ 3} On April 19, 2019, HSFG filed a complaint in the Fairborn Municipal Court, alleging that Hinchee had failed to pay $12,113.83 on a retail installment contract. HSFG further alleged that it had been assigned all rights from Lending Point, LLC, and attached the Bill of Sale and Assignment to the complaint as Exhibit A. In the complaint, HSFG asserted claims for breach of contract, for "stated account," and for unjust enrichment.

{¶ 4} Hinchee filed an answer to the complaint on May 1, 2019, denying the allegations in the complaint. She also asserted several defenses, including that HSFG had not proven it owned the claim. On June 27, 2019, HSFG asked the trial court for leave to file a motion for summary judgment, and Hinchee opposed the motion. After being given leave to file the motion, HSFG filed it on July 2, 2019. Hinchee's prior memorandum was then considered as a response to the summary judgment motion.

{¶ 5} On October 9, 2019, the trial court filed a judgment entry granting HSFG's

motion for summary judgment. Hinchee filed a timely notice of appeal.

II. Was Summary Judgment in HSFG's Favor Appropriate?

{¶ 6} Hinchee's sole assignment of error states that:

> The Trial Court Erred by Granting Summary Judgment to Appellee as the Affidavit Relied Upon by the Trial Court in Granting Summary Judgment Contains Hearsay, Is Unauthenticated and Is Inadmissible as Evidence.

{¶ 7} Hinchee contends that the affidavit of the person signing the affidavit in support of summary judgment (Brenda Watchorn) did not indicate that she knew or was in a position to know how Lending Point, LLC created and archived the records on which the summary judgment motion was based. In addition, Hinchee argues that there was no tabulation based on personal knowledge or properly authenticated business records of the principal and interest amounts owed.

{¶ 8} In response, HSFG contends that Watchorn's affidavit set forth that she was employed by HSFG, that she was familiar with the facts and circumstances of the account HSFG owned, and that the exhibits attached to the complaint were accurate copies of the originals and were kept in the ordinary course of business. According to HSFG, the exhibits included the account's complete bill of sale history, which portrayed the transfer record showing a balance transfer of $12,113.83. HSFG further asserts that Hinchee had the burden to show genuine issues of material fact, but failed to even file an affidavit or other supporting evidence.

{¶ 9} In rendering summary judgment in HSFG's favor, the trial court relied on

Watchorn's affidavit and also noted that Hinchee failed to submit any affidavit or supporting evidence.

{¶ 10} Under settled law, "[a] trial court may grant a moving party summary judgment pursuant to Civ.R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks*, 134 Ohio App.3d 754, 760, 732 N.E.2d 422 (2d Dist.1999), citing *Harless v. Willis Day Warehousing Co*., 54 Ohio St.2d 64, 375 N.E.2d 46 (1978).

{¶ 11} A party seeking summary judgment has the initial " 'burden of affirmatively demonstrating that, with respect to every essential issue of each count in the complaint, there is no genuine issue of fact.' " *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988), quoting *Massaro v. Vernitron Corp*., 559 F.Supp. 1068, 1073 (D.Mass.1983). "To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. The evidentiary materials listed in Civ.R. 56(C) include 'the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.' These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).

{¶ 12} The party opposing summary judgment then has a corresponding burden. That party "may not rest upon its pleadings, but must set forth specific facts showing that

there is a genuine issue for trial." *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 14, citing Civ.R. 56(E).

{¶ 13} "We review decisions granting summary judgment de novo, which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 2007-Ohio-2722, 873 N.E.2d 345, ¶ 16 (2d Dist.). Consequently, appellate courts do not defer to trial courts during summary judgment review. *Powell v. Rion*, 2012-Ohio-2665, 972 N.E.2d 159, ¶ 6 (2d Dist.), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 14} In arguing that summary judgment was improper, Hinchee relies on our prior decision in *TPI Asset Mgt. v. Conrad-Eiford*, 193 Ohio App.3d 38, 2011-Ohio-1405, 950 N.E.2d 1018, which allegedly contains affidavits similar to Watchorn's. In *TPI*, which involved credit card debt, we considered the " 'business records' exception in Evid.R. 803(6)," which permits hearsay evidence to be admitted as an exception to the hearsay rule. *Id*. at ¶ 8.

{¶ 15} " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). As a general rule, hearsay is not admissible unless specially allowed by statute, by the Ohio or United States Constitutions, by the Ohio Rules of Evidence, or by other rules that the Supreme Court of Ohio prescribes. Evid.R. 802. As pertinent here, Evid.R. 803 provides that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *

> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

{¶ 16} " 'To be admissible under Evid.R. 803(6), a business record must display four essential elements: (1) it must have been kept in the regular course of business; (2) it must stem from a source who had personal knowledge of the acts, events, or conditions; (3) it must have been recorded at or near the time of the transaction; and (4) a foundation must be established by the testimony of either the custodian of the record or some other qualified person.' " *Royse v. Dayton*, 195 Ohio App.3d 81, 2011-Ohio-3509, 958 N.E.2d 994, ¶ 25 (2d. Dist.), quoting *State v. Comstock*, 11th Dist. Ashtabula No. 96-A-0058, 1997 WL 531304, *6 (Aug. 29, 1997).

{¶ 17} In *TPI*, we concluded that the evidence did not comply with authentication requirements in Evid.R. 901 and Civ.R. 56(E). First, one affiant's statement that he was authorized to act on the bank's behalf insufficiently demonstrated that he had personal

knowledge of the facts the affidavit contained. Second, his identification as a bank "team leader" did not, standing alone, "portray a basis to find that through that position he gained the required personal knowledge." *TPI*, 193 Ohio App.3d 38, 2011-Ohio-1405, 950 N.E.2d 1018, at ¶ 22. Regarding a second affiant, we concluded that his "assertion that from his own personal knowledge the facts contained in the affidavit were true as he 'verily believe[d],' and that he was 'competent to testify to same,' likewise fails to portray any basis other than [his] own assertion, that he has the required personal knowledge." *Id*. at ¶ 23.

{¶ 18} In the case before us, HSFG attached several documents to the complaint. Exhibit B was a May 24, 2016 consumer loan agreement between Lending Point, LLC d/b/a Lending Point, and Terri Hinchee. The loan number was mostly blackened out, but the last three digits were "264." The loan amount was for $15,000, it provided for an annual percentage rate of 25.4206%, and it specified that 36 monthly payments of $602.28 would be made beginning on 7/1/2016. Ex. B, p. 2.

{¶ 19} Ex. C to the Complaint contained a list of transactions beginning on June 30, 2016 for a loan named "XXXX5689." The beginning loan balance was $15,034.04 and the ending balance on May 31, 2017, was $11,544.51. A "pre charge off int" of $569.32 was added to that balance for a total "charge off bal" of $12,113.83.

{¶ 20} Exhibit A to the complaint contained four pages. In reverse order, the last two pages consisted of a "Bill of Sale" and a document with no title. The Bill of Sale stated that:

> For value received and in further consideration of the mutual covenants and conditions set forth in the Forward Flow Account Purchase

> Agreement ("the Agreement") dated June 28, 2017, by and between Lending Point LLC ("Seller") and Argent Holdings, LLC ("Buyer"), Seller hereby transfers, sells, conveys, grants, and delivers to Buyer, its successors and assigns, without recourse except as set forth in the Agreement, to the extent of its ownership, the Accounts as set forth in the Account Schedule attached hereto as Exhibit I delivered by Seller to Buyer on each Closing date, and as further described in the Agreement.
>
> Lot Number:
>
> Aggregate Unpaid Balance:
>
> Number of Accounts:
>
> Dated October 27, 2017.

Ex. A, p. 3.

{¶ 21} As noted, the Seller was listed as Lending Tree, LLC. The name of the individual who signed on behalf of Lending Tree was undecipherable (other than the first name of "Greg"), and the title given ("C.L.O.") was unexplained. Furthermore, the document located behind this Bill of Sale was not labeled Exhibit I; instead, it had no title. The document lists an "acct id" as XXX8148, a "CLTREF" of "XXXXXXX5989," and a first and last name of Terri Hinchee. Ex. A at p. 4.

{¶ 22} The next page of Ex. A was labeled "Exhibit II Bill of Sale." This document stated that:

> For value received and in further consideration of the mutual covenants and conditions set forth in the Account Purchase Agreement ("the Agreement") dated May 11, 2018, by and between Argent Holdings,

> LLC ("Seller") and Security Credit Services, LLC ("Buyer"), Seller hereby transfers, sells, conveys, grants, and delivers to Buyer, its successors and assigns, without recourse except as set forth in the Agreement, to the extent of its ownership, the Accounts as set forth in the Account Schedule attached hereto as Exhibit I delivered by Seller to Buyer on each Closing Date, and as further described in the Agreement.

Exhibit A at p. 2.

{¶ 23} On this bill of sale, the Lot Number, Aggregate Unpaid Balance, and Number of Accounts were blackened out. In addition, no "Exhibit I" or any account schedule was attached. The name of the signer was Mark Hedge, "President." *Id*.

{¶ 24} The final document in Exhibit A was an "Assignment and Bill of Sale, SCS-HSF LNP 1MM 9.25.2018." *Id*. at p. 1. This document stated as follows:

> Security Credit Services, LLC ("Seller") has entered into an Accounts Purchase Agreement, dated September 25, 2018 ("Agreement") for the sale of Accounts described in Agreement thereof to HS Financial Group, LLC ("Purchaser"), upon terms and conditions set forth in that Agreement.
>
> NOW, THEREFORE, for good and valuable consideration, Seller hereby sells, assigns, and transfers to Purchaser all of Seller's rights, title, and interest in each and every one of the Accounts described in the Agreement, provided however such transfer is made without any representations, warranties, or recourse.
>
> IN WITNESS WHEREOF, Seller has signed and delivered this instrument on the 26th day of September, 2018.

Ex. A at p. 1.

{¶ 25} The signature on this document was illegible, but the designation of the individual signing was "President." *Id.* No copy of the "Agreement" was attached, nor were any accounts attached or described other than by the general reference above to "Accounts."

{¶ 26} As indicated, HSFG provided the affidavit of Brenda Watchorn in support of its summary judgment motion. Her affidavit provided, in pertinent part, that:

> 1. That I, Brenda Watchorn, Affiant, am an employee of HS Financial Group, LLC ("HSF"), the Plaintiff herein, and am competent to testify to the matters stated herein:
>
> 2. That I have reviewed the facts and circumstances regarding Defendant's account that is the subject matter of this Complaint.
>
> 3. That there is justly an amount due and owing by the Defendant to HSF, the sum of money amounting to $12,113.83, representing the charged off amount and interest, less payments received, if any.
>
> 4. That the said indebtedness represents the amount due and originating on an account of which HSF is the assignee of Lending Point, LLC, and that HSF, the within Plaintiff, having purchased said account from said assignor, is the owner and the proper party to bring this action.
>
> 5. That the Exhibits attached to the Motion for Summary Judgment are true and accurate copies of the originals which are kept in the ordinary course of the Plaintiff's business and under Affiant's control and supervision, that the records have not been altered, and Affiant is the

custodian of these records.

Plaintiff's Motion for Summary Judgment Instanter, Ex. 1, p. 1.

{¶ 27} On review, we agree that the affidavit and documents were insufficient. While *TIP* is relevant, we are also unable to distinguish the evidence here from what was submitted in support of summary judgment in *Ohio Receivables, L.L.C. v. Williams*, 2d Dist. Montgomery No. 25427, 2013-Ohio-960. Although some slight differences exist, both *Williams* and the case before us involve plaintiffs who were not the original creditor, but who purportedly were the last assignee in a chain of assignments. *Williams* involved two assignments, while this case involves three. *Id*. at ¶ 3. Furthermore, both cases also involve an attempt by the last assignee (here, HSFG) to authenticate documents of the original creditor.

{¶ 28} In considering this issue, we commented in *Williams* that "[t]he business records exception has an authentication requirement which must be met before [Evid.R. 803(6)] applies. * * * '[T]he testifying witness must possess a working knowledge of the specific record-keeping system that produced the document * * * [and] "be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business." ' " *Id*. at ¶ 14, quoting *State v. Davis*, 62 Ohio St.3d 326, 343, 581 N.E.2d 1362 (1991). We further observed that "[g]enerally, the business record exception requires that some person testify as to the regularity and reliability of the business activity involved in the creation of the record." *Id*., citing *State v. Hirtzinger*, 124 Ohio App.3d 40, 49, 705 N.E.2d 395 (2d Dist.1997).

{¶ 29} Based on the above authority, *Williams* rejected the documents attached to the plaintiff's affidavits because the affidavits were not properly authenticated and, "as

business records of a separate entity," were not properly considered in support of the plaintiff's motion for summary judgment. *Id.* at ¶ 15. In this vein, we stressed that:

> Although employees of [the plaintiff] were permitted to state, via affidavit or otherwise, that they had obtained these records in the course of the purchase, they could not attest to the facts that the contract documents between Williams [the debtor] and Chase [the original creditor] reflected the terms of the credit card agreement, that the documents were made at or near the time that the account was opened by someone with knowledge of that transaction, or that the billing statements and spreadsheets were generated in the regular practice of Chase's business activity.
>
> It was not necessary that an employee or agent of Ohio Receivables possess personal knowledge of these facts, but it was necessary for Ohio Receivables to prove, by some means, that the documents on which Ohio Receivables sought to rely as its business records were first business records created and maintained by Chase in the course of its (Chase's) regularly conducted business.

Id. at ¶ 18-19.

{¶ 30} The same defects exist in the case before us. Although Watchorn could have testified that HSFG obtained the documents in the course of a purchase (although that purchase would not have been from Lending Point, as implied by her affidavit), she could not have attested to Lending Point's business activities in connection with the account.

{¶ 31} Furthermore, additional defects exist with regard to the documents attached

to the complaint. For example, the alleged assignment from Security Credit Services to HSFG refers only generally to accounts described in an agreement and has no evident connection with Hinchee's account. The bill of sale from Argent Holdings also refers to accounts listed in "Exhibit I," but contains no such exhibit identifying any accounts. Likewise, the bill of sale from Lending Point refers to accounts set forth in Exhibit I, but lacks such an exhibit.

{¶ 32} In *Williams*, we also rejected the plaintiff's contention that the original creditor's records were admissible as business records because the plaintiff had incorporated those records and relied on them in its own business dealings. *Williams*, 2d Dist. Montgomery No. 25427, 2013-Ohio-960, at ¶ 28-29. We stressed that "although Ohio Receivables argues that it has incorporated and relied on Chase's and Global Credit's documents in its business endeavors, its business endeavor is merely to collect on the debt, not to receive or process payments, send bills, record charges, and the like. In other words, it does not appear that Ohio Receivables does, in fact, rely on these records in its business, except to the extent that it uses them as a basis for this and other lawsuits." *Id*. at ¶ 29.

{¶ 33} As in *Williams*, HSFG has presented no evidence that it is anything other than a debt collector. Moreover, Watchorn's affidavit did not even attempt to indicate that it relied on the documents from other entities in its own business dealings.

{¶ 34} In a subsequent case, we distinguished *Williams*, stating that:

> The rule for admitting adopted business records that we applied in *Williams* does not apply here. This is also a mortgage-foreclosure case not a debt-collection case. And in mortgage-foreclosure cases, we have

> applied a different rule: "a court may admit a document as a business record even when the proffering party is not the maker of the document, if the other requirements of Evid.R. 803(6) are met and the circumstances suggest that the record is trustworthy."

Ocwen Loan Servicing, LLC v. Malish, 2018-Ohio-1056, 109 N.E.3d 659, ¶ 23 (2d Dist.).

{¶ 35} Unlike *Malish*, the case before us is a debt-collection case, and there is no basis for distinguishing *Williams*. Even if this were otherwise, the evidence presented was deficient for the reasons we mentioned and was untrustworthy.

{¶ 36} The trial court did not address this issue, even though Hinchee raised it in responding to summary judgment. Instead, the court summarily relied on Watchorn's affidavit, while noting that Hinchee did not file an affidavit or documentation under Civ.R. 56(C). Judgment, p. 2. However, "there is no *requirement* in Civ.R. 56 that *any* party submit affidavits to support a motion for summary judgment." (Emphasis sic.) *Dresher*, 75 Ohio St.3d at 298, 662 N.E.2d 264. *See also Smith v. Bauknecht*, 6th Dist. Lucas No. L-10-1286, 2011-Ohio-4046, ¶ 25 ("Civ.R. 56(E) does not require the parties to submit affidavits in support of their summary judgment motions. Rather, Civ.R. 56(E) provides guidelines for the submission of affidavits should affidavits be submitted in support of a summary judgment motion.")

{¶ 37} Civ.R. 56(E) provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, *by affidavit or as otherwise provided in this rule*, must set forth specific facts showing that there is a genuine issue for trial." (Emphasis added.) A movant's failure to provide admissible evidence is

certainly an appropriate basis on which the nonmovant can oppose summary judgment.

{¶ 38} Courts have also held that “”[e]ven if the nonmoving party fails completely to respond to the motion, summary judgment will only be proper where reasonable minds can come to only one conclusion and that conclusion is adverse to the nonmoving party.” *Swedlow, Butler, Inman, Levine & Lewis Co. v. Gabelman*, 10th Dist. Franklin No. 97APG12-1578, 1998 WL 400743, *3 (July 14, 1998), citing *Toledo's Great E. Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc*., 24 Ohio St.3d 198, 202, 494 N.E.2d 1101 (1986). *Accord State ex rel. Dayton Legal News, Inc. v. Drubert*, 2d Dist. Montgomery No. 24825, 2012-Ohio-564, ¶ 7. Here, based on the lack of admissible evidence, HSFG was not entitled to summary judgment.

{¶ 39} Accordingly, Hinchee’s sole assignment of error is sustained.

III. Conclusion

{¶ 40} Hinchee’s assignment of error having been sustained, the judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

. . . . . .

TUCKER, P.J. and HALL, J., concur.

Copies sent to:

Jeffrey L. Koberg
Andrew J. Zeigler
Hon. Beth W. Cappelli