Am I entitled to specific performance?

February 17, 2021

Specific Performance

***Jad Rentals of Youngstown, LLC v. Cox*, 7th Dist. Mahoning No. 19 MA 0096, 2021-Ohio-304**

In this appeal, the Seventh Appellate District affirmed the trial court's decision, agreeing that the buyer was entitled to an award of specific performance to purchase the seller's property.

The Bullet Point: Real estate is almost always considered unique. Consequently, specific performance is the common remedy in Ohio courts for breach of contract to purchase real estate. To be awarded specific performance, a buyer must first succeed on their claim for breach of contract. As such, a buyer must demonstrate that a contract existed, they fulfilled their obligations under the contract, the seller failed to fulfill their obligations, and damages resulted from the seller's failure. In this case, the seller failed to fulfill her obligations under the real estate contract with the buyer. The seller's property was unique, and the buyer entered into the contract to purchase the property because of the property's specific characteristics. However, although specific performance is the common remedy, it is not awarded for all breaches of a contract to purchase real estate. Specifically, specific performance is not awarded in Ohio where it will cause "unreasonable hardship, loss or injustice to the party in breach." Here, the seller failed to present any evidence that specific performance would cause her any hardship or injustice. As such, the buyer was entitled to an award of specific performance to purchase the seller's property.

Economic Loss Doctrine

***Windsor Med. Ctr., Inc. v. Time Warner Cable, Inc.*, 5th Dist. Stark No. 2020CA00085, 2021 Ohio App. LEXIS 159 (Jan. 20, 2021)**

In this appeal, the Fifth Appellate District affirmed the trial court's decision, agreeing that the economic loss rule did not bar the plaintiff's fraud claim as the defendant engaged in a pattern of misrepresentations, false promises, and threats.

The Bullet Point: Under the so-called "economic loss rule", a plaintiff who has suffered solely economic loss due to the defendant's negligence cannot recover damages under a tort claim. This rule is based upon the principle that there is generally no duty to exercise reasonable care to avoid economic harm to others that does not arise from a physical harm. Simply stated, in the absence of privity of contract, there is generally no duty to exercise reasonable care to avoid economic loss to others. That being said, the economic loss rule does not apply where the defendant commits an

intentional tort independent of, but in connection with, a breach of contract, and there are resulting damages that are separate and distinct from said breach of contract. For example, negligent misrepresentation, breach of fiduciary duty, fraud, and conversion are all exceptions to the economic loss rule.

In this case, the plaintiff's fraud claim went beyond the defendant's failure to abide by the terms of the parties' contract. The court found that the defendant engaged in a pattern of misrepresentations and deceptive and fraudulent billing practices. Perhaps most notably, the defendant fraudulently represented it would resolve a billing issue but instead disconnected service, forcing the plaintiff "to pay what amounts to a ransom." Likewise, the court found the damages sought by the plaintiff were the result of the defendant's deceptive and fraudulent billing, as opposed to amounts owed or disputed under the parties' contract. As such, the economic loss rule did not apply and the plaintiff was entitled to damages for its fraud claim against the defendant.

Judicial Estoppel

***SW Acquisition Co. v. Akzo Nobel Paints, L.L.C.*, 8th Dist. Cuyahoga No. 109236, 2021-Ohio-309**

In this appeal, the Eighth Appellate District reversed the trial court's decision and remanded the case, finding that the trial court exceeded its authority by prematurely addressing the issue of judicial estoppel, which was a matter to be resolved by the arbitrator.

The Bullet Point: In this case, the trial court exceeded its authority by looking through the plaintiff's petition to prematurely review whether judicial estoppel would prevent the plaintiff from successfully pursuing its claims against the defendant, instead of simply compelling the case to arbitration. Here, the defendant argued that the doctrine of judicial estoppel applied and asserted that the plaintiff, through its successor-in-interest, (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the bankruptcy court. As the appellate court noted, the doctrine of judicial estoppel is a merit-based defense that does not concern the validity or enforceability of an arbitration provision. As the sole issue to be decided was whether there was a valid and enforceable arbitration agreement, and, if so, whether the defendant failed to perform under the written agreement for arbitration, the trial court exceeded the scope of its jurisdiction by addressing the issue of judicial estoppel.

Related people

Stephanie Hand-Cannane
James W. Sandy

[Cite as *JAD Rentals of Youngstown, L.L.C. v. Cox*, 2021-Ohio-304.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

JAD RENTALS OF YOUNGSTOWN, LLC,

Plaintiff-Appellee,

v.

SHARON L. COX,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0096

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018 CV 878

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

JUDGMENT:
Affirmed.

Atty. Alden Chevlen , 5202 Nashua Drive, Youngstown, Ohio 44512, for Plaintiff-Appellee and

Atty. John Ams, 134 Westchester Drive, Youngstown, Ohio 44515, for Defendant-Appellant.

Dated: January 27, 2021

D'Apolito, J.

{¶1} Appellant, Sharon L. Cox, appeals from the judgment of the Mahoning County Court of Common Pleas overruling her objection and adopting the magistrate's decision awarding Appellee, JAD Rentals of Youngstown, LLC, specific performance on a breach of a real estate purchase contract. On appeal, Cox asserts the trial court abused its discretion in adopting the magistrate's decision. Cox specifically alleges the trial court's judgment applies the incorrect legal standard of "substantial hardship" for determining whether specific performance is the appropriate remedy and fails to cite case law to support its conclusion. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

{¶2} This matter involves a breach of contract based upon an executed, written agreement for the purchase and sale of property located at 324 North Fruit Street, Youngstown, Mahoning County, Ohio, 44506, Permanent Parcel No. 53-026-0-044-00.0. JAD Rentals (as buyer) and Cox (as seller) entered into and executed the written agreement on February 12, 2018 (Exhibit B; Plaintiff's Exhibit 1). Cox agreed to sell and JAD Rentals agreed to buy the subject premises for $41,000. JAD Rentals remitted and Cox accepted a $50 deposit in connection with and in consideration of the parties' execution of the purchase agreement. An agreed upon closing date was set for March 14, 2018.

{¶3} Specifically, the parties' agreement, dated February 12, 2018, states:

> On this day JAD Rentals of Youngstown LLC, Anita Dintino as Manager and Sharon Cox agree To a Sell (sic) of her properties at 324 Albert St Youngstown Ohio and Lot across the Street for the sale of the Properties a $50.00 Deposit was giving (sic) and the price of the sale of said Properties is $41,000.00[.] Sharon is to set up closing on property With a Title guarantee Within 30 days.

(2/12/2018 Purchase Agreement; Exhibit B; Plaintiff's Exhibit 1)

{¶4} The foregoing language is typed and both parties' signatures appear on the agreement. (*Id.*) In printed handwriting directly underneath the typed paragraph, which is initialed by Cox, it states: "properties taxes payed in full and water bill payed in full." (*Id.*) In addition, as the typed street name is incorrectly listed, the corrected address is contained in the agreement in printed handwriting, which is both initialed and signed by Cox, and states: "property address[,] property is listed as 324 North Fruit[,] Yo., Ohio 44506[.]" (*Id.*)

{¶5} JAD Rentals attempted to tender the purchase price to Cox. However, Cox has failed and refused to accept the tender, refused to make the conveyance, refused to proceed to closing, and refused to furnish a title guarantee for the subject premises to JAD Rentals in accordance with the terms of the purchase agreement.

{¶6} As a result, on April 4, 2018, JAD Rentals filed a "Complaint for Specific Performance and Damages" against Cox. JAD Rentals alleges that the subject property is unique and valuable and that monetary damages alone are inadequate. On April 27, 2018, Cox filed an answer. On May 23, 2018, Cox filed a motion for summary judgment, which the trial court denied on March 25, 2019.

{¶7} A trial was held before the magistrate on March 27, 2019.

{¶8} Anita Dintino is the manager of JAD Rentals. (3/27/2019 Trial T.p. 9). Dintino testified for JAD Rentals on direct examination that she has been a licensed cosmetologist for over 25 years and has owned two beauty salons. (*Id.* at 10). Dintino saw a "For Sale" sign at the subject property. (*Id.* at 9). Dintino made numerous attempts via telephone over a two-week period to express her interest. (*Id.*) Her calls were not returned. (*Id.* at 12). Dintino thereafter went to the property and directly expressed her interest in person to Cox. (*Id.* at 12-14). Dintino likes this particular property because JAD Rentals owns a concession trailer and she can operate the trailer outside of the beauty shop. (*Id.* at 22).

{¶9} Dintino and Cox later had a discussion regarding the sale of the property. (*Id.* at 13). Dintino offered $41,000 cash, "all inclusive[,]" including "[t]he real estate, the buildings, equipment, et cetera," and prepared the purchase agreement. (*Id.* at 15, 18, 20; Plaintiff's Exhibit 1). The contract stated 30 days for closing, there were no

contingencies, and the building was "as-is." (*Id.* at 15, 19; Plaintiff's Exhibit 1). Cox signed the contract agreeing to all terms. (*Id.* at 16; Plaintiff's Exhibit 1). After the execution of the agreement, and within the 30-day closing period, Dintino contacted Cox to check on the status of the sale after not hearing back from her. (*Id.* at 20).

{¶10} On cross-examination, Dintino testified that although the purchase agreement did not specifically state "buyer and seller," it was obvious who the buyer and seller of the property are. (*Id.* at 27-28; Plaintiff's Exhibit 1). Dintino stated the agreement includes the purchase price, the property address, and that a $50 deposit was given. (*Id.* at 28; Plaintiff's Exhibit 1). Dintino said there was a meeting of the minds. (*Id.* at 29). After signing the agreement, the parties discussed title work, which Dintino agreed to pay. (*Id.* at 29-32). A verbal argument subsequently ensued over the telephone and Cox stopped speaking to Dintino. (*Id.* at 36).

{¶11} On re-direct, Dintino testified that the language "On this day" in the agreement refers to February 12, 2018, the date the contract was executed by the parties. (*Id.* at 39; Plaintiff's Exhibit 1). The agreement was prepared that day and they met that afternoon to sign it. (*Id.*) Dintino indicated it is clear that Cox owns the property, thereby making her the "seller." (*Id.* at 40).

{¶12} Frank Naypaver also testified for JAD Rentals. Naypaver helps his friend, Dintino, on occasion. (*Id.* at 45). Naypaver accompanied Dintino to the beauty salon to inspect the building. (*Id.* at 45-46). Naypaver witnessed both Dintino and Cox sign the agreement but did not hear any discussion regarding its specific terms. (*Id.* at 47).

{¶13} Cox testified on direct examination that when Dintino came into her shop indicating that she wanted to purchase the building, Cox initially told her that it was not for sale. (*Id.* at 56). There was a "For Sale" sign in the front yard with a phone number listed for a Tracfone. (*Id.* at 57). Cox said the building was for sale about two or three months before Dintino's inquiry. (*Id.*) Cox did not remove the "For Sale" sign due to the snowy weather. (*Id.*) According to Cox, Dintino was persistent in her efforts to buy the property and offered cash. (*Id.* at 59). Cox felt "threatened." (*Id.* at 60). The two exchanged phone numbers and Dintino left. (*Id.* at 61).

{¶14} Dintino thereafter called Cox several times and ultimately offered her $41,000 cash. (*Id.* at 62, 64). Cox called Dintino back and said, "your offer is good." (*Id.*

at 64). Cox said Dintino asked her to write a little slip of paper stating that Cox wanted to sell the property to Dintino. (*Id.* at 66). Dintino also asked if she could see the basement. (*Id.* at 67).

{¶15} The parties met again in person in the afternoon on February 12, 2018. (*Id.* at 68). Naypaver accompanied Dintino to the salon and performed an inspection. (*Id.* at 69). Cox forgot to bring her paper. (*Id.* at 68). However, Dintino brought hers and she and Cox signed the purchase agreement. (*Id.* at 54-55; Plaintiff's Exhibit 1). Cox testified that the deal did not get done within 30 days due to her health issues. (*Id.* at 74). Cox claimed she did not know that the piece of paper she had signed was a contract. (*Id.* at 76).

{¶16} On cross-examination, Cox testified she received the building from her mother, Georgia Cox, in 1997. (*Id.* at 80; Exhibit A). Cox personally paid "nothing" for the building. (*Id.* at 81; Exhibit A). Cox said the property was not for sale at the time of Dintino's inquiry, although the "For Sale" sign was still outside. (*Id.*) Cox also said she had several open houses and some fliers printed with a listed asking price of $49,500, "Negotiable to $40,000." (*Id.* at 82-83). Cox stated she had taken two real estate classes in the past. (*Id.* at 85).

{¶17} There was no re-direct, and the parties proceeded to closing arguments. (*Id.* at 88-99).

{¶18} On June 4, 2019, the magistrate filed a decision awarding JAD Rentals specific performance and ordering Cox to arrange for closing on the property within 30 days. Cox filed an objection to the magistrate's decision on June 18, 2019. JAD Rentals filed an objection to Cox's objection to the magistrate's decision ten days later. On August 12, 2019, the trial court overruled Cox's objection and affirmed and adopted the magistrate's decision.

{¶19} Cox filed a timely notice of appeal and raises one assignment of error.[1]

[1] On October 30, 2019, this court determined that the trial court's August 12, 2019 judgment entry was not a final, appealable order because it adopted the magistrate's decision without ever stating the rights, duties, and obligations of the parties. As a result, this court held the premature appeal in abeyance for a period of 30 days and issued a limited remand to the trial court for the sole purpose of entering a final, appealable order. Pursuant to this court's limited remand, the trial court filed a final, appealable order on December 13, 2019, and Cox filed an amended notice of appeal ten days later.

ASSIGNMENT OF ERROR

THE TRIAL COURT'S DECISION APPLIES THE INCORRECT LEGAL STANDARD OF "SUBSTANTIAL HARDSHIP" FOR DETERMINING WHETHER SPECIFIC PERFORMANCE IS THE APPROPRIATE REMEDY AND CITES NO LAW TO SUPPORT ITS CONCLUSION.

{¶20} "An appellate court reviews the trial court's adoption of a magistrate's decision under an abuse of discretion standard. *Proctor v. Proctor*, 48 Ohio App.3d 55, 548 N.E.2d 287 (3d Dist.1988). The trial court's determination will only be reversed where it appears the trial court's action was unreasonable or arbitrary. *Id.*" *Kurilla v. Basista Holdings, LLC*, 7th Dist. Mahoning No. 16 MA 0101, 2017-Ohio-9370, ¶ 17.

> In order to establish a breach of contract claim, a plaintiff must demonstrate by a preponderance of the evidence that: (1) a contract existed, (2) the plaintiff fulfilled its obligations, (3) the defendants failed to fulfill their obligations, and (4) damages resulted from this failure. *Fed. Natl. Mtge. Assn. v. Brown*, 7th Dist. Columbiana No. 16 CO 0008, 2017-Ohio-9237, ¶ 26. A preponderance of the evidence "is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not (* * *) or evidence which is more credible and convincing to the mind." *Alazaus v. Haun*, 7th Dist. Carroll No. 740, 2001-Ohio-3230, quoting Black's Law Dictionary (6th Ed. Abr. 1991) 819.

Snyder v. Lawrence, 7th Dist. Carroll No. 19 CA 0938, 2020-Ohio-3358, ¶ 26.

{¶21} "'(R)eal estate is almost always unique, and specific performance of a written contract for its sale is a common remedy for a breach of that contract.'" *Shrock v. Mullet*, 7th Dist. Jefferson No. 18 JE 0018, 2019-Ohio-2707, ¶ 60, quoting *Holstein v. Crescent Communities, Inc.*, 10th Dist. Franklin No. 02AP-1241, 2003-Ohio-4760, ¶ 16.

{¶22} In its December 13, 2019 judgment, the trial court stated:

In the case at bar, the Court finds that a contract existed. The parties agree that Ms. Dintino made an offer of $41,000.00; Ms. Cox accepted the offer; there was a meeting of the minds with regard to the essential terms; Ms. Dintino gave Ms. Cox $50.00 as consideration for the sale of the property; and there was certainty as to the essential terms, including the description of the property. See *Walkana v. Hanna*, 1988 Ohio App. LEXIS 4357 (finding a property address was a sufficient description, and if further description was necessary parole evidence could be offered to better describe the property.)

Further, the Court finds that Defendant breached the contract. A contract existed; Plaintiff fulfilled her obligation by paying the agreed upon deposit to Defendant; Defendant failed to fulfill her obligations by scheduling the closing within 30 days of the date of the Agreement; and Plaintiff was damaged by said failure. Specifically, Plaintiff was out the deposit and the property she had chosen because of the beauty shop and vacant land that would accommodate her trailer.

In the action herein, Plaintiff seeks specific performance of the contract, or in the alternative, monetary damages. Ms. Dintino testified that she selected this particular property because it had both a hair salon (she is a cosmetologist) and an open area of land to accommodate her concession trailer. Thus, Plaintiff is desirous of acquiring this particular parcel that fits its needs. Defendant testified that she suffers from some physical ailments that have caused her ongoing issues and inconvenience; however, she presented no evidence that specific performance would present a substantial hardship to her. Essentially, she characterized Ms. Dintino as annoying and even harassing with her constant prodding with respect to the purchase of the property. Nonetheless, the evidence suggests that she voluntarily entered into the contract for the sale of the property. Further, the Court finds JAD is ready, willing and able to perform. Accordingly, this Court

> finds the only appropriate remedy in the case at bar is specific performance of the contract.

(12/13/2019 Judgment Entry, p. 2-3).

{¶23} Cox mainly argues that no contract exists because the written agreement is ambiguous. Dintino, on the other hand, stresses that the contract language is clear. Based on the record before us, this court does not find that the trial court abused its discretion in determining that a contract exists. Clearly, there was an offer, acceptance, and consideration. *See, e.g., Sugar v. Blum*, 7th Dist. Mahoning No. 02 CA 234, 2004-Ohio-1384, ¶ 14. There is nothing in the agreement which is uncertain, ambiguous, or fraudulent. Although the contract is very simple, it contains the necessary elements to be binding.

{¶24} Parole evidence was introduced merely in response to Cox's attack on the use of the pronouns and the legality of the contract. However, one can easily discern from the contract language that Cox is the seller, as "Cox agree[d] To a Sell (sic) of her properties[.]" (2/12/2018 Purchase Agreement; Exhibit B; Plaintiff's Exhibit 1). One can also easily discern that JAD Rentals is the buyer, as there are only two parties to the contract, Cox and JAD Rentals, and the contract language provides: "JAD Rentals of Youngstown LLC, Anita Dintino as Manager and Sharon Cox agree To a Sell (sic) of her properties[.]" (*Id.*) The testimony of Dintino, Naypaver, and Cox at the trial before the magistrate further corroborates that Cox is the seller and JAD Rentals is the buyer.

{¶25} Although the typed street name is incorrectly listed, the corrected address is contained in the agreement in printed handwriting, which is both initialed and signed by Cox, and states: "property address[,] property is listed as 324 North Fruit[,] Yo., Ohio 44506[.]" (*Id.*) The agreement clearly sets forth the purchase price, "$41,000.00" and a deposit amount of "$50.00." (*Id.*) The agreement also includes the time for performance: "Sharon is to set up closing on property With a Title guarantee Within 30 days." (*Id.*) Although Cox alleges there was no "meeting of the minds," she and Dintino both voluntarily signed the agreement on February 12, 2018. In fact, Cox initialed the agreement two times and also signed it two times. (*Id.*)

{¶26} In support of her position that the trial court erred in granting specific

performance to JAD Rentals, Cox cites to *Roth v. Habansky*, 8th Dist. Cuyahoga No. 82027, 2003-Ohio-5378. Our Sister Court indicated that a contract must be "free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant[.]" *Id.* at ¶ 16. *Roth* stressed that "[i]t is well established that specific performance will not be granted where it will cause unreasonable hardship, loss or injustice to the party in breach." *Id.* at ¶ 19. The court held that the purchasers were not entitled to specific performance of a real estate contract, concluding that enforcement of the contract would be "oppressive" because of "hardship" to the sellers. *Id.* at ¶ 19-20.

{¶27} Unlike *Roth*, there is no misrepresentation, fraud, surprise, or mistake regarding the agreement at issue in the case at bar. Although Cox found Dintino's demeanor to be annoying and overbearing at times, there is no evidence that Cox was coerced into signing the contract. There is also no evidence that Cox would incur any hardship by selling the property to JAD Rentals.

{¶28} The trial court relied on the plain language of the contract, which was closely examined during trial, and upheld the contract as written and understood by both parties. The property here is unique in that JAD Rentals seeks a beauty salon with additional land, zoned commercial, on which it may operate a second business, a food concession trailer. Dintino testified that she had been looking for a property with the foregoing, specific characteristics for quite some time and that Cox's property met that criteria. (3/27/2019 Trial T.p. 22). Dintino conducted the necessary due diligence and was willing to pay a premium for the property. (*Id.* at 22-23).

{¶29} This court does not find that the trial court committed error in determining that Cox's property is unique and, thus, subject to specific performance. *See Shrock, supra,* at ¶ 60. There is no evidence in the record that the "common remedy" of specific performance will cause Cox any hardship or injustice. *Id.* Upon consideration, the trial court did not abuse its discretion in overruling Cox's objection and adopting the magistrate's decision.

CONCLUSION

{¶30} For the foregoing reasons, Cox's sole assignment of error is not well-taken.

The judgment of the Mahoning County Court of Common Pleas adopting the magistrate's decision and awarding JAD Rentals specific performance on the real estate purchase contract is affirmed.

Waite, J., concurs.

Robb, J., concurs.

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

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 *Windsor Med. Ctr., Inc. v. Time Warner Cable, Inc.*, 2021-Ohio-158.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WINDSOR MEDICAL CENTER, INC. Plaintiff-Appellee -vs- TIME WARNER CABLE, INC. DBA SPECTRUM BUSINESS, ET AL Defendants-Appellants	JUDGES: Hon. William B. Hoffman, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 2020CA00085 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Stark County Court of Common Pleas, Case No. 2018CV02199
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 20, 2021

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
SCOTT P. SANDROCK ELIZABETH SHIVELY BOATWRIGHT Brennan, Manna & Diamond, LLC 75 E. Market Street Akron, Ohio 44308	ROBERT W. BURGER CAITLIN R. THOMAS Thompson Hine, LLP 3900 Key Center 127 Public Square Cleveland, Ohio 44114

Hoffman, P.J.

{¶1} Defendants-appellants Time Warner Cable, Inc, dba Spectrum Business, et al. ("Spectrum") appeal the February 12, 2020 Judgment Entry entered by the Stark County Court of Common Pleas, which denied their motion for judgment notwithstanding the verdict. Plaintiff-appellee is Windsor Medical Center, Inc. ("Windsor Medical").

STATEMENT OF THE FACTS AND CASE

{¶2} Windsor Medical is a family-owned business, which operates a skilled nursing and senior living center in North Canton, Stark County, Ohio. Spectrum is engaged in the business of providing telephone, internet, cable, and other technology services to individuals and businesses. Windsor Medical contracted with Spectrum to provide telephone, internet, and cable television services for its office and residents. The parties' business relationship dated back to at least 2012.

{¶3} Sometime in 2015, disputes arose between the parties over charges for international calls and double billing for internet service. Windsor Medical's attempts to resolve the disputes were unsuccessful.

{¶4} On November 14, 2018, Windsor Medical filed a complaint against Spectrum, asserting claims of fraud and violations of Ohio's Deceptive Trade Practices Act (R.C. Chapter 4165). Spectrum filed an answer on December 12, 2018. The parties participated in mediation, which proved unsuccessful. A second mediation was scheduled, but ultimately cancelled.

{¶5} On October 21, 2019, a week before trial, Spectrum filed a motion for leave to file a counterclaim as well as a motion to continue. The trial court denied both motions. The matter proceeded to jury trial on October 28, 2019.

International Service

{¶6} Seth Swallen, who worked in administration and information technology for Windsor Medical during the time period at issue, testified regarding the contract negotiations and discussions he had with Spectrum regarding international phone service. When Spectrum's sales representative Patrick Harrison asked if Windsor Medical wanted Spectrum, Time Warner at the time, to provide long distance and international calls, Swallen expressly declined international service. Harrison advised Swallen he would make sure international service was not available at Windsor Medical.

{¶7} Swallen recalled, in September, 2015, Windsor Medical received a bill from Spectrum which included a charge labeled "international usage" with a service date of August 5, 2015. Swallen immediately contacted Spectrum about the charge. At Spectrum's direction, Swallen verified Windsor Medical had taken the appropriate measures with its equipment to prevent international calls. The following month, Windsor Medical received a bill from Spectrum which still included the international service charge totaling $7,753.62, with taxes and fees. Swallen contacted Harrison as well as a risk management specialist at Spectrum regarding the bill. Swallen indicated his belief Windsor Medical was owed a credit for the international charges as it had requested the phone service not include an international component.

{¶8} Several months later, Spectrum acknowledged it owed Windsor Medical a credit for the international service charges and such would be forthcoming. Although Windsor Medical remained current on all undisputed charges, it continued to receive past due notices from Spectrum. Swallen made multiple calls to Spectrum, attempting to resolve the issue. He was repeatedly placed on hold and transferred from one

department to another, never speaking to anyone with authority to resolve the matter. On December 28, 2015, Swallen emailed Spectrum regarding the charges and requesting a manager with authority contact him. A month later, on January 28, 2016, Swallen received an email from Ar'Qua Welch, a collections agent with Spectrum, advising him Spectrum had issued a partial credit of $2,894.99, and a tax credit of $743.93.

{¶9} On February 4, 2016, Swallen emailed Welch, Harrison, and account representative Armand DiDonato, requesting the balance of the promised credit for the international charges. Welch responded, explaining she could not issue the credit and directed Swallen to another department. The other department was unable to resolve the issue. Windsor Medical continued to pay all undisputed charges on its accounts.

{¶10} On February 11, 2016, Windsor Medical received a notice from Spectrum, advising the phone system would be shut off if the remaining balance was not paid. Swallen contacted DiDonato, who advised Swallen to pay the balance if he did not want Windsor Medical's service shut off. Swallen paid the balance to avoid a disruption in phone service. Windsor Medical never received the full promised credit for the international service charges.

{¶11} Subsequently, in January, 2017, Windsor Medical received a bill from Spectrum which included a second international service charge, totaling $3,214.43, with taxes and fees. Windsor Medical contacted Spectrum regarding the charge. Spectrum advised Windsor Medical to check the security recommendations. Ultimately, Windsor Medical paid the charges to avoid termination of its phone service. Spectrum never credited Windsor Medical for the second international service charge.

Internet Accounts

{¶12} In the fall of 2015, Harrison approached Swallen about moving Windsor Medical's internet service from a regional account to a national account, promising better internet speed at a lower rate. Swallen accepted the offer and signed a new internet contract in December, 2015. Swallen understood Harrison would have the old service disconnected when the new service was up and running. Although the new service required updated equipment, Harrison promised the switch would be "turnkey" and he would handle everything.

{¶13} Harrison never notified Swallen the new service was ready. Windsor Medical began receiving separate bills for each of the internet accounts. When Swallen contacted Harrison about the double billing, Harrison informed Swallen he (Swallen) would need to cancel the old account as Harrison was not permitted to do so. Swallen attempted to cancel the account, but was unsuccessful. The Spectrum representative advised Swallen she could not locate the account with the account number Harrison had provided to Swallen. Meanwhile, Windsor Medical continued to receive separate bills for each of the internet accounts.

{¶14} On June 2, 2016, Harrison emailed Swallen, acknowledging there should only be one internet account and inquiring whether Swallen had cancelled the first account. Swallen advised Harrison he was getting the "runaround" and had been unable to cancel the account. Harrison put Swallen in touch with DiDonato. When Swallen and DiDonato met to discuss the situation, DiDonato informed Swallen Harrison was no longer working for Spectrum and Windsor Medical was not the only business Harrison had convinced to move from regional to national accounts in order to improve his sales

numbers. DiDonato apologized and promised to correct the situation. In addition, DiDonato, like Harrison, indicated the new service would require new equipment. Although Windsor Medical was billed for two internet services, Spectrum never installed the required equipment or updated the service in any manner.

{¶15} Almost a year later, in April, 2017, DiDonato emailed Swallen, inquiring whether Windsor Medical had two internet connections. DiDonato indicated he would have to engage a national account team to resolve the billing issue with the second internet account. DiDonato explained the original internet account would need to be disconnected to avoid double billing and he would get the paperwork completed. DiDonato added he "was never notified by anyone that the service needed disconnected to prevent double billing." Tr. Vol. I at 183.

{¶16} Despite ongoing discussions to resolve the issues, Windsor Medical received multiple threats of termination of phone service from Spectrum. At one point in 2017, a third-party collection agency came to Windsor Medical and advised the accounts payable individual the telephone service would be shut off that day if payment was not made. Windsor Medical paid Spectrum $2,165.96, to avoid disruption of its phone service.

{¶17} Nonetheless, on May 4, 2017, Spectrum shut off the phone system at Windsor Medical. When Swallen arrived at the facility, he was met with a nursing staff in a state of panic. Nurses were unable to send and receive medication and lab orders. Family members of the residents arrived, concerned they were unable to reach their loved ones on the phone. DiDonato eventually returned Swallen's calls and emails. He stated Windsor Medical's account was not in a non-pay status and suggested Swallen contact

fiber support. Fiber support indicated the phone system was disconnected for nonpayment. In a May 5, 2017 email, DiDonato, acknowledging the corrections which needed to be made on the account, advised Swallen the fastest way to restore service was to pay the past due amount. Windsor Medical paid the past due balance.

{¶18} Months passed without resolution. Then, in August, 2017, Swallen received an email from Spectrum's collections department, demanding Windsor Medical pay $1,129.48, to avoid another phone shut off.

{¶19} After hearing all the evidence and deliberating, the jury found in favor of Windsor Medical on its fraud claim. The jury awarded Windsor Medical $22,000.00, in compensatory damages and $225,000.00, in punitive damages. The jury also awarded Windsor Medical reasonable attorney fees. The jury found in favor of Spectrum on Windsor Medical's claim for deceptive trade practices.

{¶20} On November 25, 2019, Spectrum filed a Motion for Judgment Notwithstanding the Verdict, or, in the alternative, Remittitur. Therein, Spectrum asserted the economic loss doctrine barred Windsor Medical's fraud claim as such claim stemmed from Spectrum's alleged performance or non-performance under the parties' contract. Also, on November 25, 2019, Windsor Medical filed a Motion for Prejudgment Interest.

{¶21} Via Judgment Entry filed February 12, 2020, the trial court denied Spectrum's Motion for Judgment Notwithstanding the Verdict. The trial court found a reasonable juror could conclude Spectrum's conduct went beyond a mere breach of contract. The trial court further found the economic loss doctrine did not bar Windsor Medical's fraud claim. The trial court concluded Windsor Medical presented sufficient

evidence to support the jury's finding of fraud and to support the jury's award of punitive damages.

{¶22} It is from this judgment entry Spectrum appeals, raising the following assignment of error:

> THE TRIAL COURT ERRED IN DENYING SPECTRUM MID-AMERICA, LLC'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. (FEBRUARY 12, 2020 JUDGMENT ENTRY.)

STANDARD OF REVIEW

{¶23} Civil Rule 50(B) governs motions for judgment notwithstanding the verdict (JNOV). When ruling on a motion for JNOV, a trial court applies the same test as in reviewing a motion for a directed verdict. *Ronske v. Heil Co.*, 5th Dist. Stark No. 2006-CA-00168, 2007-Ohio-5417; *Pariseau v. Wedge Products, Inc.*, 36 Ohio St.3d 124, 522 N.E.2d 511 (1988). In reviewing a motion for JNOV, courts do not consider the weight of the evidence or the witness credibility; rather, courts consider the much narrower legal question of whether sufficient evidence exists to support the verdict. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 693 N.E.2d 271 (1998). In other words, if there is evidence to support the nonmoving party's side so that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Osler v. City of Lorain*, 28 Ohio St.3d 345, 504 N.E.2d 19 (1986). Appellate review of a ruling on a motion for JNOV is de novo. *Midwest Energy*

Consultants, L.L.C. v. Utility Pipeline, Ltd., 5th Dist. Stark No. 2006CA00048, 2006-Ohio-6232.

I.

{¶24} Spectrum sets forth three grounds upon which it predicates its assertion the trial court erred in denying its motion for judgment notwithstanding the verdict. First, Spectrum contends the economic loss doctrine barred Windsor Medical's fraud claim as such claim sounded in contract. Next, Spectrum argues, assuming the economic loss doctrine did not bar Windsor Medical's fraud claim, Windsor Medical failed to prove the essential elements of fraud. Third, Spectrum maintains the evidence did not support a finding Spectrum acted with actual malice; therefore, the award of punitive damages was not warranted. We disagree.

Fraud and the Economic Loss Doctrine

{¶25} To prevail on a fraud claim, "a plaintiff must prove: (1) a representation, or if a duty to disclose exists, concealment of a fact, (2) that is material to the transaction at issue, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent to mislead another into relying on it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance." *Andrew v. Power Marketing Direct, Inc.*, 10th Dist. No. 11AP-603, 978 N.E.2d 974, 2012-Ohio-4371, ¶ 49, citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986).

{¶26} The economic loss rule generally prevents recovery in tort of damages for purely economic loss. *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d

412, 2005-Ohio-5409, ¶ 6, 835 N.E.2d 701. That is, "a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Id*. (Citation omitted.) "The economic-loss rule stems from the principle that, '[i]n the absence of privity of contract between two disputing parties the general rule is "there is no * * * duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." ' " *Waverly City School Dist. Bd. of Edn. v. Triad Architects, Inc.*, 10th Dist. No. 08AP-329, 2008-Ohio-6917, ¶ 26, quoting *Floor Craft Covering, Inc. v. Parma Community Gen. Hosp. Assn.*, 54 Ohio St.3d 1, 3, 560 N.E.2d 206 (1990), quoting Prosser & Keeton, Law of Torts, Section 92, 657 (5th Ed.1984).

{¶27} There are exceptions, however, to the application of the economic loss rule to bar recovery in tort of purely economic loss. A plaintiff may pursue such a tort claim if it is "based exclusively upon [a] discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity." *Corporex*, supra at ¶ 9. These types of exempt claims may include negligent misrepresentation, breach of fiduciary duty, fraud, and conversion. *Potts v. Safeco Ins. Co.*, 5th Dist. No. 2009 CA 0083, 2010-Ohio-2042, ¶ 21; *Morgan v. Mikhail*, 10th Dist. No. 08AP-87, 2008-Ohio-4598, ¶ 69.

{¶28} Therefore, a tort claim can proceed where "the facts of the case show an intentional tort committed independently, but in connection with a breach of contract * * *." *Burns v. Prudential Securities, Inc.,* 167 Ohio App.3d 809, 2006–Ohio–3550, ¶ 99. Accordingly, where a tort claim alleges a duty was breached independent of the contract, the economic loss rule does not apply. See, *Campbell v. Krupp,* 195 Ohio App.3d 573,

961 N.E.2d 205, 2011–Ohio–2694, ¶ 16 (6th Dist.) See also, *Eysoldt v. ProScan Imaging,* 194 Ohio App.3d 630, 2011–Ohio–2359, ¶21 (1st Dist.) (finding the economic loss rule does not apply to intentional torts, as they are breaches of duties beyond those created by contract). Where the tort claim alleges a breach of an independent duty, it must also allege damages that are separate and distinct from the breach of contract. *Strategy Group for Media, Inc. v. Lowden,* 5th Dist. Delaware No. 12 CAE 03 0016, 2013–Ohio–1330, ¶ 30.

{¶29} Spectrum claims Windsor Medical failed to identify a duty separate from Spectrum's contractual obligations. We disagree. While the parties were in privity of contract, we find Spectrum breached duties which were independent of those contractual obligations. A review of the record, including a reading of the entire trial transcript, which is summarized below, reveals Spectrum, through its representatives, engaged in a pattern of misrepresentations, false promises, and threats.

{¶30} Despite assurances from Patrick Harrison Windsor Medical's telephones would not have international calling capabilities, Spectrum billed Windsor Medical for international calls in September, 2015. Swallen made exhaustive attempts to resolve the billing issue, but was repeatedly placed on hold or redirected to individuals who did not have authority to help him. Months later Spectrum acknowledged the error and indicated a credit would be forthcoming, however, Spectrum continued to send past due notices to Windsor Medical. Spectrum eventually issued a partial credit. Swallen's attempts to obtain the balance of the promised credit was met with the same runaround he previously experienced. Spectrum never fully credited Windsor Medical for the billing error and the amount remained "past due". In January, 2017, Spectrum again billed Windsor Medical

for international calls. Spectrum failed to resolve the billing issue and threatened to disconnect phone service if the disputed charge was not paid. Windsor Medical subsequently paid the un-owed past due charges to avoid disruptions to its phone service. Spectrum never credited Windsor Medical for these charges.

{¶31} In the fall of 2015, Harrison approached Swallen about replacing Windsor Medical's internet service, promising better internet speed at a lower rate. Swallen signed a new internet contract in December, 2015. Harrison represented he would have the old service disconnected when the new service was ready. Harrison never notified Swallen the new service was ready and never disconnected the old service. Nonetheless, Spectrum billed Windsor Medical for two separate internet accounts. When Swallen contacted Harrison about the double billing, Harrison informed Swallen he was not permitted to cancel the account and Swallen would need to do so. Swallen attempted to cancel the account, but the account number Harrison had provided to Swallen was incorrect. Spectrum continued to double bill Windsor Medical.

{¶32} Swallen met with account representative Armand DiDonato to discuss the situation. DiDonato promised to resolve the double billing. Although the new service required new equipment, and despite continuing to double bill Windsor Medical, Spectrum never installed the necessary equipment for the new service and never provided Windsor Medical with a new IP address.

{¶33} Inexplicably, almost a year later, DiDonato emailed Swallen, inquiring whether Windsor Medical had two internet connections. DiDonato represented he would contact a national account team to resolve the credit issue with the second internet account and complete any paperwork necessary to do so. Despite these ongoing

discussions to resolve the issues, Spectrum issued multiple threats of termination of phone service. At one point in 2017, a third-party collection agency came to the facility and advised the accounts payable individual the telephone service would be shut off that day if payment was not received. Windsor Medical paid Spectrum $2,165.96, to avoid any disruptions in its phone service. Spectrum applied the payment to the disputed internet account and not the phone service account.

{¶34} Subsequently, on May 4, 2017, Spectrum shut off the phone system at Windsor Medical due to nonpayment of the admittedly disputed internet charges. DiDonato informed Swallen Windsor Medical's account was not in a non-pay status, however, fiber support advised Swallen the phone system was, in fact, disconnected for nonpayment of the internet account. DiDonato acknowledged the erroneous double billing, but advised Swallen to pay the disputed internet charges as doing so was the fastest way to restore the phone service. Windsor Medical paid the disputed charges. Months passed without resolution. Then, in August, 2017, Spectrum's collection department emailed Swallen, demanding an additional $1,129.48, to avoid another phone shut off.

{¶35} The evidence presented establishes the fraud claim asserted by Windsor Medical did not arise out of the parties' contracts, but went beyond and were independent of those agreements. Windsor Medical's fraud claim went beyond Spectrum's failure to abide by the terms of the parties' contracts. Spectrum engaged in deceptive billing practices, charging Windsor Medical for international calls and a second internet service which did not exist. Spectrum fraudulently represented it would resolve the billing issues,

but instead of doing so, Spectrum disconnected phone service forcing Windsor Medical to pay what amounts to a ransom.

{¶36} Spectrum further contends the damages Windsor Medical alleged under its fraud claim were entirely dependent upon the terms of the parties' contracts. We disagree. The damages Windsor Medical sought were the result of Spectrum's deceptive and fraudulent billing. The damages were amounts Windsor Medical paid to prevent disruption to its phone service which was vital to its operations. These payments included charges for international calls, which Spectrum conceded were erroneously billed and for which Windsor Medical was owed a credit, and for a second internet account, which Spectrum never actually installed. The amounts Windsor Medical paid Spectrum were not owed under the contracts.

{¶37} Because there was sufficient evidence to support the jury's verdict, we find the trial court did not err in denying Spectrum's motion for judgment notwithstanding the verdict on the fraud claim and the economic loss doctrine.

Punitive Damages

{¶38} In cases alleging fraud, in order to be awarded punitive damages, the plaintiff must establish not only the elements of the tort itself, but must also show either the fraud is aggravated by the existence of malice or ill, or must demonstrate the wrongdoing is particularly gross or egregious. *Atram v. Star Tool & Die Corp.* (1989), 64 Ohio App.3d 388, 391–392, 581 N.E.2d 1110; *Mid–America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 602, 579 N.E.2d 721. There must be an element of malice, oppressive conduct, or outrage to sustain such an award. *Id*.

{¶39} The "actual malice" necessary for purposes of an award of punitive damages has been defined as (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 316, 736 N.E.2d 517, quoting *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus; *Kemp v. Kemp*, 5th Dist. No. 04CA011, 161 Ohio App.3d 671, 2005-Ohio-3120, 831 N.E.2d 1038, ¶ 73.

{¶40} Whether actual malice exists is a question for the trier of fact. *Spires v. Oxford Mining Co., LLC*, 7th Dist. Belmont No. 17 BE 0002, 2018-Ohio-2769, 116 N.E.3d 717, ¶ 32, citing *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999), 87 Ohio St.3d 280, 720 N.E.2d 495; R.C. 2315.21(C)(1). "The same standard of review is employed to assess the weight of evidence whether the finding is for compensatory damages or the elements necessary to justify an award of punitive damages." *Id.*, citing *Bosak v. Kalmer*, 7th Dist. Mahoning No. 01 CA 18, 2002-Ohio-3463, ¶ 36. Factual determinations will not be overturned as long as they are supported by some competent, credible evidence going to all the essential elements of the case. *Id.*, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

{¶41} The trial court properly instructed the jury on the standard for the imposition of punitive damages. A jury is presumed to follow the instructions of the trial court. *MCM Home Builders, LLC v. Sheehan*, 5th Dist. Delaware No. 18 CAE 09 0074, 2019-Ohio-3899, 2019 WL 4724682, ¶ 48 citing *Pang v. Minch*, 53 Ohio St.3d 186, 187, 559 N.E.2d 1313 (1990), paragraph four of the syllabus. This Court will not invade the province of a

properly instructed jury which reached a reasonable decision based upon the evidence presented to it. *Estate of Baxter v. Grange Mut. Cas. Co.*, 73 Ohio App.3d 512, 521 (1992).

{¶42} Upon review and as detailed, supra, we conclude the jurors could have reasonably determined Spectrum acted with actual malice which warranted an award of punitive damages. The evidence supports the jury's determination Spectrum's conduct was, indeed, egregious. Accordingly, we find the trial court did not abuse its discretion in confirming the award via its ruling on the motion for judgment notwithstanding the verdict on the issue of punitive damages.

{¶43} Spectrum's sole assignment of error is overruled.

{¶44} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P. J.
Delaney, J. and
Baldwin, J. concur

SW Acquisition Co. v. Akzo Nobel Paints, L.L.C.

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

February 4, 2021, Released; February 4, 2021, Journalized

No. 109236

Reporter
2021-Ohio-309 *; 2021 Ohio App. LEXIS 314 **; 2021 WL 395366

SW ACQUISITION CO., INC., Plaintiff-Appellant, v. AKZO NOBEL PAINTS, L.L.C., ET AL., Defendants-Appellees.

Prior History: [1]** Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-18-904917.

SW Acquisition Co. v. Akzo Nobel Paints LLC, 2014 U.S. Dist. LEXIS 56813 (S.D. Ohio, Apr. 23, 2014)

Disposition: REVERSED AND REMANDED.

Overview

ISSUE: Whether a trial court was to appoint an arbitrator pursuant to R.C. 2711.03(A) and the arbitration provision in a commercial contract. HOLDINGS: [1]-The trial court had subject-matter jurisdiction to adjudicate the petition to compel arbitration because the successor-in-interest to the buyer, as the assignee of the buyer's assets in bankruptcy, had standing to pursue the petition based on the rights and interests afforded to it under the commercial contract; [2]-The trial court erred in determining that the potential claims referenced in the complaint were not arbitrable under the provisions of the commercial contract because the court exceeded the scope of its discretion by looking through the petition to prematurely review whether the successor-in-interest to the buyer had standing to pursue claims that were not before the court and to address judicial estoppel.

Core Terms

arbitration, trial court, parties, arbitration provision, appoint, breach of contract, judicial estoppel, summary judgment, bankruptcy court, potential claim, contract claim, common pleas, compel arbitration, subject-matter, petition to compel arbitration, doctrine of judicial estoppel, arbitration agreement, amended complaint, proceedings, summary judgment motion, court's jurisdiction, scope of arbitration, binding arbitration, motion to dismiss, lack standing, disputed, estopped, invoke, merits

Outcome
Judgment reversed, and case remanded for trial court to enforce binding arbitration provisions contained in commercial contract.

LexisNexis® Headnotes

Case Summary

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1[] Standards of Review, De Novo Review

An appellate court reviews an appeal from summary judgment under a de novo standard of review.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] Entitlement as Matter of Law, Appropriateness

Pursuant to *Civ.R. 56*, summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN3[] Opposing Materials, Accompanying Documentation

Once the moving party satisfies its burden on summary judgment, the nonmoving 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. *Civ.R. 56(E)*; Doubts must be resolved in favor of the nonmoving party.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN4[] Arbitration, Arbitrability

The Ohio Arbitration Act provides that a provision in any written contract to settle by arbitration a controversy that subsequently arises out of the contract shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract. *R.C. 2711.01(A)*. Thus, Ohio recognizes a strong public policy in favor of arbitration and the enforcement of arbitration provisions. Although a party cannot be compelled to arbitrate a dispute the party has not agreed to submit to arbitration, any doubts regarding arbitrability should be resolved in favor of arbitration.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Orders to Compel Arbitration

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN5 **Arbitration, Arbitrability**

The Ohio Arbitration Act allows for either direct enforcement of arbitration agreements through an order to compel arbitration under R.C. 2711.03, or indirect enforcement through an order staying proceedings under R.C. 2711.02. A party may choose to move for a stay, petition for an order to proceed to arbitration, or seek both. However, these are separate and distinct procedures.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN6 **Arbitration, Arbitrability**

Pursuant to the plain language of R.C. 2711.03, when a defendant petitions a trial court for an order compelling arbitration, the trial court must determine that the arbitration agreement or failure to comply with the agreement is not an issue before compelling arbitration. When determining whether a trial is necessary under R.C. 2711.03, the relevant inquiry is whether a party has presented sufficient evidence challenging the validity or enforceability of an arbitration provision to require the trial court to proceed to trial before refusing to enforce the arbitration clause.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

Governments > Courts > Authority to Adjudicate

Governments > Courts > Creation & Organization

HN7 **Jurisdiction Over Actions, General Jurisdiction**

Ohio's common pleas courts are endowed with original jurisdiction over all justiciable matters as may be provided by law. Ohio Cons. art. IV, § 4(B). Pursuant to R.C. 2305.01, courts of common pleas have original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts. The court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to all matters at law and in equity that are not denied to it.

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

Governments > Courts > Authority to Adjudicate

HN8 **Jurisdiction, Subject Matter Jurisdiction**

Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases. A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case. A court's jurisdiction over a particular case refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction. This latter jurisdictional category involves consideration of the rights of the parties.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Governments > Courts > Authority to Adjudicate

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN9 **Justiciability, Standing**

Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court — even a court of

competent subject-matter jurisdiction — over the party's attempted action. But an inquiry into a party's ability to invoke a court's jurisdiction speaks to jurisdiction over a particular case, not subject-matter jurisdiction.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN10 **Standards of Review, De Novo Review**

A determination of standing necessarily looks to the rights of the individual parties to bring an action, as they must assert a personal stake in the outcome of the action to establish standing. Lack of standing is certainly a fundamental flaw that would require a court to dismiss the action. Standing is a question of law that an appellate court reviews de novo.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN11 **Standing, Personal Stake**

Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim. Traditional standing principles require the plaintiff to show that he or she has suffered (1) an injury that is; (2) fairly traceable to the defendant's allegedly unlawful conduct; and (3) likely to be redressed by the requested relief. To have standing, a plaintiff must have a personal stake in the outcome of the controversy and have suffered some concrete injury that is capable of resolution by the court.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN12 **Arbitration, Arbitrability**

Non-signatories to arbitration contracts may be contractually bound by ordinary contract and agency principles.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN13 **Estoppel, Judicial Estoppel**

Generally, the doctrine of judicial estoppel precludes a party from assuming a position in a legal proceeding inconsistent with a position taken in a prior action. To apply the doctrine of judicial estoppel, the proponent must show that his opponent (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court. The purpose of judicial estoppel is to preserve the integrity of the courts by preventing a party from abusing the judicial process.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN14 **Arbitration, Arbitrability**

The doctrine of judicial estoppel is a merit-based defense that does not concern the validity or enforceability of an arbitration provision.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts

Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN15 **Arbitration, Arbitrability**

The relevant inquiry under R.C. 2711.03(A) is whether there is a valid and enforceable arbitration agreement, and whether a party is aggrieved by the alleged failure of another to comply with the binding agreement.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN16 **Arbitration, Arbitrability**

The question of whether a controversy is arbitrable under the provisions of a contract is a question for a court to decide upon examination of the contract. Generally, an arbitration provision should not be denied effect unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. When determining whether the controversy falls within the scope of an arbitration clause, the proper method of analysis is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > Appeals > Standards of Review > De Novo Review

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > Second Level Review

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

HN17 **Arbitration, Arbitrability**

An appellate court will apply a de novo standard of review to determine whether a controversy is arbitrable under an arbitration provision of a contract.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN18 **Arbitration, Arbitrability**

An arbitration clause that contains the phrase "any claim or controversy arising out of or relating to the agreement" is considered the paradigm of a broad clause.

Counsel: Strauss Troy Co., L.P.A., and Philomena S. Ashdown, for appellant.

Thompson Hine, L.L.P., Timothy J. Coughlin, and Mark R. Butscha, Jr., for appellees.

Judges: EILEEN T. GALLAGHER, PRESIDING JUDGE. FRANK D. CELEBREZZE, JR., J., and MICHELLE J. SHEEHAN, J., CONCUR.

Opinion by: EILEEN T. GALLAGHER

Opinion

JOURNAL ENTRY AND OPINION

EILEEN T. GALLAGHER, P.J.:

[*P1] Plaintiff-appellant, SW Acquisition Co., Inc. ("***SWAC***"), appeals from the decision of the trial court granting summary judgment in favor of defendant-appellee, PPG Architectural Finishes, Inc. ("PPG"). ***SWAC*** raises the following assignments of error for review:

> 1. The trial court improperly reviewed the claims on the merits when the sole relief requested in the complaint was for the trial court to appoint an arbitrator.
> 2. The trial court improperly found that the previously disclosed contract claim was precluded by judicial estoppel purely because the claim was initially valued at $0 by the former owner/assignor.
>
> 3. The trial court incorrectly found that the fraud claim was precluded by judicial estoppel due to the failure of the prior owner to disclose this claim **[**2]** on its [bankruptcy] schedules.

[*P2] After careful review of the record and relevant case law, we reverse the trial court's judgment and remand the case for the trial court to enforce the binding arbitration provisions contained in the relevant commercial contract.

I. Procedural and Factual History

[*P3] In September 2009, Miller Brothers Wallpaper Company, Inc. ("Miller Bros.") purchased certain retail stores and assets from Akzo Nobel Paints, L.L.C. ("Akzo"), the predecessor-in-interest to PPG. Miller Bros. further agreed to be the "semi-exclusive dealer" of Akzo's paint products pursuant to an Authorized Dealer Agreement ("the ADA"). The ADA contains a broadly worded arbitration provision, which states, in relevant part:

> Any controversy or claim arising out of or relating to this Agreement or breach of this Agreement shall finally be settled by binding arbitration before single arbitrator who will be jointly appointed by the parties. * * * If the parties cannot agree on an arbitrator, either party may request, any judge located in Cuyahoga County, Ohio to appoint an arbitrator, which appointment shall be final. The arbitration will be held in Cleveland, Ohio.

ADA at ¶ 21.

[*P4] In October 2012, Miller **[**3]** Bros. filed for bankruptcy on the basis of a voluntary petition signed by its president and sole shareholder, Victor Wells. According to Miller Bros.'s bankruptcy petition, Akzo was its largest unsecured creditor, with an unsecured claim in the amount of $946,000. Schedule B of the bankruptcy filing required Miller Bros. to list all of its personal property, including "contingent and unliquidated claims of every nature," and the "estimated value of each." In compliance with this requirement, Miller Bros. listed a "potential claim against former supplier [Akzo] for breach of contract" with a stated value of "0.00." No other claims were listed in the schedules.

[*P5] During the bankruptcy proceedings, Miller Bros. moved to approve the sale of its assets to "an insider, ***SWAC***, whose sole shareholder is Steve Wells, son of debtor's sole shareholder Victor Wells." The bankruptcy court approved Miller Bros.'s sale of assets to ***SWAC*** in January 2013.

[*P6] Miller Bros.'s bankruptcy case was dismissed in July 2013. Thereafter, ***SWAC*** filed a complaint in the Hamilton County Court of Common Pleas, alleging causes of action for breach of contract and fraud against Akzo and John Does 1-10. ***SWAC*** alleged that **[**4]** Akzo fraudulently induced Miller Bros. to enter the asset purchase agreement by providing false financial information. ***SWAC*** further pursued a breach of contract claim that was premised on Akzo's failure to comply with its guarantee of a 28 percent profit percentage and its promise that Miller Bros. would have the exclusive right to sell Akzo products within a specific geographical region. In October 2013, the case was removed to the United States District Court for the Southern District of Ohio.

[*P7] In December 2013, PPG, successor-by-merger to PPG Architectural Coatings, L.L.C., f.k.a. Akzo Nobel Paints, L.L.C., filed a motion to dismiss and compel arbitration. PPG argued that arbitration was appropriate because (1) "the parties signed a broadly worded agreement providing for that method of dispute resolution," and (2) "[***SWAC***] is bound by its predecessor's agreement to arbitrate all related claims." The federal court granted the motion in April 2014, stating, in relevant part:

> In sum, a valid agreement to arbitrate exists between the parties and the specific disputes raised in the complaint fall within the substantive scope of that agreement to arbitrate. [***SWAC***]'s claims are all subject **[**5]** to binding arbitration.

[*P8] In October 2018, ***SWAC*** filed a complaint against Akzo, PPG, and John Does 1-10 in the Cuyahoga County Court of Common Pleas. The complaint, which was amended in December 2018, contained a single prayer for relief that sought to compel arbitration pursuant to *R.C. 2711.03*. Relevant to this appeal, the amended complaint alleged as follows:

> 12. That the parties or their predecessors in interest entered into the agreements attached hereto and marked exhibit A, [the ADA] and [asset purchase agreement], and the foregoing documents provide for any controversy or claim arising out of or relating to this agreement or beach of this agreement shall finally be settled by binding arbitration before single arbitrator who will be jointly appointed by the parties.
>
> 13. The parties have been unable to agree on an arbitrator as provided in the [ADA] and [***SWAC***] will be denied access to arbitration unless this Court appoints an arbitrator.
>
> 14. The [ADA] provides that if the parties are unable to agree on an arbitrator, either party may request any judge located in Cuyahoga County, Ohio, to appoint an arbitrator, and the selection of the arbitrator by judge located in Cuyahoga County, Ohio, shall **[**6]** be final and [***SWAC***] requests this court to implement this provision of the parties' agreements.
>
> 15. [***SWAC***] has valid claims against the defendants and [***SWAC***] desires to arbitrate the claims including but not limited to actions for fraud, breach of contract, request for damages, both compensatory and punitive.
> * * *
>
> 17. That the defendants have refused to acquiesce or participate in the selection of an arbitrator by judge located in Cuyahoga County, Ohio and thereby have denied [***SWAC***] the opportunity to resolve [its] claims pursuant to the agreements attached hereto.

[*P9] In February 2019, PPG moved to dismiss the amended complaint, arguing that ***SWAC*** lacks standing or, alternatively, should be judicially estopped from seeking the appointment of an arbitrator to resolve its purported claims. Following ***SWAC***'s filing of a brief in opposition, the trial court converted the motion to dismiss to a motion for summary judgment and ordered the parties to submit supplemental briefing.

[*P10] In April 2019, PPG filed a supplemental motion in support of the converted motion for summary judgment. In its motion, PPG reiterated its position that ***SWAC*** lacks standing to pursue an action against PPG because the purported **[**7]** fraud claim was not listed as an asset in the Miller Bros. bankruptcy schedules and the breach of contract claim had a listed monetary value of $0.00. Alternatively, PPG argued that ***SWAC*** is judicially estopped from bringing the asserted claims because they are predicated on facts that are inconsistent or contrary to Miller Bros.'s sworn representations during the bankruptcy proceedings. PPG supported its motion for summary judgment with a copy of ***SWAC***'s original complaint in the Hamilton County Court of Common Pleas and certified copies of the relevant pleadings in the federal bankruptcy court.

[*P11] ***SWAC*** filed a brief in opposition to summary judgment, arguing that there remained genuine issues of material fact regarding the scope and nature of the assets purchased from Miller Bros. ***SWAC*** asserted that PPG's motion for summary judgment essentially equated to an attempt to set aside the federal court's order compelling arbitration, and "to further set aside or modify the order of sale issued by the bankruptcy court." ***SWAC*** supported its brief in opposition with a copy of PPG's motion to dismiss and compel arbitration in the federal court, a copy of the federal court's order granting PPG's **[**8]** motion to dismiss and compel arbitration, copies of relevant pleadings in the bankruptcy court, and the affidavit of Steve Wells.

[*P12] A hearing was held to address PPG's motion for summary judgment in July 2019. At the hearing, PPG explained its standing and judicial estoppel arguments as follows:

> [T]he argument boils down to that the fraud was not disclosed [in the bankruptcy proceedings]. The contract claim was represented to be worthless and, therefore, [***SWAC***] has no standing to assert a fraud claim that was not disclosed or a worthless contract claim. And even if it has standing, it's judicially estopped because the claim was not disclosed. In other words, it did not exist under Sixth Circuit law or it was represented to have zero dollars and now [***SWAC***] cannot take a contrary position in this case.

[*P13] In contrast, ***SWAC*** maintained that the breach of contract claim was sufficiently disclosed and, although the claim was listed as having a value of zero, this characterization reflected that the value of the claim

was unknown as opposed to being worthless. ***SWAC*** further argued that because it purchased "*all* assets of the seller," it necessarily purchased an interest in the fraud claim. As explained **[**9]** by counsel for ***SWAC***, "if there's a fraud claim, that's one of the assets, Your Honor."

[*P14] In August 2019, the trial court issued an order and opinion granting summary judgment in favor of PPG, stating:

> This court finds that [***SWAC***] lacks standing to pursue its claim as the fraud cause of action was not disclosed in the bankruptcy petition and therefore could not have been part of the sale to [***SWAC***]. In addition, the contract claim at issue was included in the bankruptcy, however, its value was listed as $0. Thus, [***SWAC***] did not suffer a concrete and particularized injury in the first place, and there is no issue for which the court can provide redress.

[*P15] In addition, the trial court determined that the doctrine of judicial estoppel further warranted summary judgment in favor of PPG, stating:

> The position that [***SWAC***] took under oath in front of the bankruptcy court was that any breach of contract claim was worth $0, and that there was no fraud claim, a position which the bankruptcy court accepted. Consequently, this court finds that [***SWAC***] is judicially estopped from bringing its claims against [PPG], as they were either not disclosed or disclosed with a value of $0 in the previous bankruptcy **[**10]** action.

[*P16] Finally, the trial court determined that "the instant dispute is not arbitrable" because the potential claims against PPG were not within the scope of the relevant arbitration agreement.

[*P17] ***SWAC*** now appeals from the trial court's judgment.

II. Law and Analysis

[*P18] Collectively, ***SWAC***'s first, second, and third assignments of error challenge the trial court's decision to grant summary judgment in favor of PPG. In its first assignment of error, ***SWAC*** contends that the trial court exceeded its jurisdiction by addressing the underlying claims of breach of contract and fraud when assessing its petition to compel arbitration. Alternatively, ***SWAC*** argues in its second and third assignments of error that the trial court incorrectly applied the principles of standing and judicial estoppel.

A. Standard of Review

[*P19] *HN1*[↑] We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 1996- Ohio 336, 671 N.E.2d 241 (1996)*; *Zemcik v. LaPine Truck Sales & Equip. Co., 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998)*.

[*P20] *HN2*[↑] Pursuant to *Civ.R. 56*, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have **[**11]** the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp., 73 Ohio St.3d 679, 1995 Ohio 286, 653 N.E.2d 1196 (1995)*, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt, 75 Ohio St.3d 280, 292-293, 1996- Ohio 107, 662 N.E.2d 264 (1996)*.

[*P21] *HN3*[↑] Once the moving party satisfies its burden, the nonmoving 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." *Civ.R. 56(E)*; *Mootispaw v. Eckstein, 76 Ohio St.3d 383, 385, 1996- Ohio 389, 667 N.E.2d 1197 (1996)*. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg, 65 Ohio St.3d 356, 358-359, 1992- Ohio 95, 604 N.E.2d 138 (1992)*.

[*P22] With the foregoing standard in mind, we address ***SWAC***'s complaint to compel arbitration.

B. The Ohio Arbitration Act

[*P23] *HN4*[↑] The *Ohio Arbitration Act* provides: "A provision in any written contract * * * to settle by arbitration a controversy that subsequently arises out of the contract * * * shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in

equity for the revocation of any contract." R.C. 2711.01(A). Thus, Ohio recognizes a "strong public policy" in favor of arbitration and the enforcement of arbitration provisions. Hayes v. Oakridge Home, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15; Taylor Bldg. Corp. of Am. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 24. Although a party cannot be compelled to **[**12]** arbitrate a dispute the party has not agreed to submit to arbitration, Council of Smaller Ents. v. Gates, McDonald & Co., 80 Ohio St.3d 661, 665, 1998- Ohio 172, 687 N.E.2d 1352 (1998), "[a]ny doubts regarding arbitrability should be resolved in favor of arbitration." Natale v. Frantz Ward, L.L.P., 2018-Ohio-1412, 110 N.E.3d 829, ¶ 9 (8th Dist.), citing Academy of Medicine of Cincinnati v. Aetna Health, Inc., 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 14.

[*P24] HN5[↑] The Ohio Arbitration Act allows for either direct enforcement of such agreements through an order to compel arbitration under R.C. 2711.03, or indirect enforcement through an order staying proceedings under R.C. 2711.02. Maestle v. Best Buy Co., 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7, ¶ 14. A party may choose to move for a stay, petition for an order to proceed to arbitration, or seek both. Id. at ¶ 18. However, these are separate and distinct procedures. Id. at ¶ 14.

[*P25] In this case, ***SWAC*** sought to compel the appointment of an arbitrator pursuant to R.C. 2711.03. The statute provides, in relevant part:

> (A) The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. * * * The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties **[**13]** to proceed to arbitration in accordance with the agreement.
> (B) If the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court shall proceed summarily to the trial of that issue. * * *.

[*P26] HN6[↑] Pursuant to the plain language of the statute, when a defendant petitions the trial court for an order compelling arbitration, "the trial court must determine that the arbitration agreement or failure to comply with the agreement is not an issue before compelling arbitration." Cole v. Macy's, Inc., 8th Dist. Cuyahoga No. 99502, 2013-Ohio-4705, ¶ 7. "[W]hen determining whether a trial is necessary under R.C. 2711.03, the relevant inquiry is whether a party has presented sufficient evidence challenging the validity or enforceability of the arbitration provision to require the trial court to proceed to trial before refusing to enforce the arbitration clause." Garcia v. Wayne Homes, L.L.C., 2d Dist. Clark. No. 2001 CA 53, 2002-Ohio-1884, ¶ 29.

[*P27] Throughout these proceedings, PPG, as Akzo's successor-in-interest, has not disputed the validity of the arbitration provision contained in the ADA. In fact, the record reflects that PPG has previously argued in the federal court that "[***SWAC***'s] claims in this matter are arbitrable" **[**14]** because (1) ***SWAC*** stepped into the shoes of Miller Bros., (2) the parties agreed that all claims or controversies be resolved by binding arbitration, and (3) ***SWAC***'s claims are not statutorily exempt from arbitration.

[*P28] Yet, despite its prior position in the federal court, PPG now argues in state court that it would be "futile" to order the parties to arbitration because ***SWAC*** lacks standing to pursue claims for breach of contract and fraud, or, alternatively, is judicially estopped from seeking the appointment of the arbitrator. As previously stated, PPG's argument is predicated on the information disclosed to the bankruptcy court in the Miller Bros.'s summary of schedules.

[*P29] On appeal, ***SWAC*** counters that, pursuant to the plain language of R.C. 2711.03, the trial court exceeded the scope of its jurisdiction by addressing the issue of standing and judicial estoppel "when the sole issue before the court was to appoint an arbitrator." ***SWAC*** maintains that the underlying claims fell within the scope of the mandatory arbitration agreement and, therefore, the trial court had "no business weighing the merits of the grievance because the agreement is to submit all grievances to arbitration, not merely those **[**15]** which the court will deem meritorious."

1. Standing and Judicial Estoppel

[*P30] HN7[↑] Ohio's common pleas courts are endowed with "original jurisdiction over all justiciable matters * * * as may be provided by law." *Ohio Constitution, Article IV, Section 4(B)*. Pursuant to R.C. 2305.01, courts of common pleas have "original

jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts." This court has long held that the court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to "all matters at law and in equity that are not denied to it." *Saxton v. Seiberling, 48 Ohio St. 554, 558-559, 29 N.E. 179 (1891)*.

[*P31] ***HN8***[⬆] Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases. *Morrison v. Steiner, 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972)*. A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case. *State ex rel. Tubbs Jones v. Suster, 84 Ohio St.3d 70, 75, 1998-Ohio 275, 701 N.E.2d 1002 (1998)*; *Handy v. Ins. Co., 37 Ohio St. 366, 370 (1881)*. A court's jurisdiction over a particular case refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction. *Pratts v. Hurley, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 12*. This latter jurisdictional category involves consideration of the rights of the parties.

[*P32] ***HN9***[⬆] "Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's **[**16]** ability to invoke the jurisdiction of a court — even a court of competent subject-matter jurisdiction — over the party's attempted action." *Bank of Am., N.A. v. Kuchta, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 22*. "But an inquiry into a party's ability to invoke a court's jurisdiction speaks to jurisdiction over a particular case, not subject-matter jurisdiction." *Id.*

[*P33] ***HN10***[⬆] A determination of standing necessarily looks to the rights of the individual parties to bring the action, as they must assert a personal stake in the outcome of the action in order to establish standing. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27*; *see also CapitalSource Bank v. Hnatiuk, 8th Dist. Cuyahoga No. 103210, 2016-Ohio-3450, ¶ 22*, quoting *Davet v. Sheehan, 8th Dist. Cuyahoga No. 101452, 2014-Ohio-5694, ¶ 22* ("'It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court.'"). Lack of standing is certainly a fundamental flaw that would require a court to dismiss the action. *Fed. Home Loan Mtge. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 40*. Standing is a question of law that we review de novo. *In re $75,000.00 United States Currency (Katz), 2017-Ohio-9158, 101 N.E.3d 1209, ¶ 45 (8th Dist.)*, citing *State v. Jamison, 2d Dist. Montgomery No. 23211, 2010-Ohio-965, ¶ 10*.

[*P34] ***HN11***[⬆] Contrary to ***SWAC***'s contention that the trial court improperly delved into the merits of its potential claims, it is well established that "[s]tanding is a preliminary inquiry that must be made before a court may consider the merits of a legal claim." *Kincaid v. Erie Ins. Co., 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 9*. Traditional standing principles require the plaintiff to show **[**17]** that he or she has suffered (1) an injury that is, (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief. *Moore v. Middletown, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22*, citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)*. To have standing, a plaintiff must have a personal stake in the outcome of the controversy and have suffered some concrete injury that is capable of resolution by the court. *Middletown v. Ferguson, 25 Ohio St.3d 71, 75, 25 Ohio B. 125, 495 N.E.2d 380 (1986)*.

[*P35] In this case, PPG's standing argument focuses exclusively on the potential claims of breach of contract and fraud referenced in ***SWAC***'s amended complaint. However, ***SWAC***'s amended complaint did not expressly set forth causes of action for breach of contract or fraud. Rather, the amended complaint set forth a single prayer for relief, requesting the trial court to appoint an arbitrator pursuant to *R.C. 2711.03(A)* and the mandatory arbitration provisions contained in the ADA. Thus, the sole issue before the trial court was whether ***SWAC*** had standing to enforce the ADA's arbitration provision.

[*P36] In this regard, neither ***SWAC*** nor PPG have disputed that they are successors or assignees of, and in privity with, the original parties to the ADA. Thus, pursuant to the express terms of the ADA, they are bound by the terms of the agreement, including the arbitration **[**18]** provision. *See* ADA ¶ 12.1 ("This Agreement shall inure to the benefit of and be binding upon each of the parties hereto and their respective successors and assigns, except as otherwise set forth herein"); *see also I Sports v. IMG Worldwide, Inc., 8th Dist. Cuyahoga No. 83349, 2004-Ohio-3113, ¶ 12* (***HN12***[⬆] Nonsignatories to arbitration contracts may be contractually bound by ordinary contract and agency principles), citing *Thomson-CSF, S.A. v. Am. Arbitration Assn., 64 F.3d 773, 776 (2d Cir.1995)*.

[*P37] Under these circumstances, we find the trial court had subject-matter jurisdiction to entertain and adjudicate a petition to compel arbitration pursuant to R.C. 2711.03(A). In addition, the record support's ***SWAC***'s assertion that, as the assignee of Miller Bros.'s assets, it had standing to pursue the petition based on the rights and interests afforded to it under the ADA. Accordingly, ***SWAC*** properly invoked the trial court's jurisdiction to resolve the petition to compel arbitration filed in this particular case.

[*P38] With these jurisdictional thresholds being satisfied, the sole issue before the trial court was whether there was a valid and enforceable arbitration agreement, and, if so, whether PPG failed to perform under the written agreement for arbitration. The analysis is confined to the language of R.C. 2711.03(A) and is not concerned with procedural or equitable issues that may or **[**19]** may not impair ***SWAC***'s ability to successfully litigate claims before an arbitrator. In short, ***SWAC***'s amended complaint did not attempt to invoke the trial court's jurisdiction to address the justiciability of the potential claims that are related to the parties' contractual relationship under the ADA. Accordingly, we find the trial court exceeded the scope of the discretion afforded to it under R.C. 2711.03 by looking through the petition to compel arbitration to prematurely review whether ***SWAC*** had standing to pursue claims that were not before the court.

[*P39] Similarly, we are unpersuaded by the trial court's reliance on the doctrine of judicial estoppel. ***HN13***[↑] Generally, the doctrine of judicial estoppel "precludes a party from assuming a position in a legal proceeding inconsistent with a position taken in a prior action." *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A., 148 Ohio App.3d 440, 2002-Ohio-3328, 773 N.E.2d 1081, ¶ 37 (10th Dist.)*, citing *Bruck Mfg. Co. v. Mason, 84 Ohio App.3d 398, 616 N.E.2d 1168 (8th Dist.1992)*. In order to apply the doctrine of judicial estoppel, the proponent must show that his opponent "(1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." *Greer-Burger v. Temesi, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 25*. The purpose of judicial estoppel is to preserve the integrity of the courts by preventing a party from abusing the judicial process. *Id.*

[*P40] ***HN14***[↑] Relevant to this **[**20]** appeal, however, the doctrine of judicial estoppel is a merit-based defense that does not concern the validity or enforceability of the arbitration provision. PPG has not presented any precedent to suggest the doctrine impairs the trial court's jurisdiction to resolve the petition to compel arbitration pursuant to R.C. 2711.03. If ***SWAC***'s alleged claims fall within the scope of a valid and enforceable arbitration provision, the applicability of the doctrine of judicial estoppel is an issue that is appropriate for an arbitrator to resolve.

[*P41] Having determined that the trial court prematurely addressed the issue of standing and judicial estoppel, we turn to requirements of R.C. 2711.03 and the evidence supporting ***SWAC***'s petition to compel arbitration.

2. Scope of the Arbitration Provision

[*P42] ***HN15***[↑] As discussed, the relevant inquiry under R.C. 2711.03(A) is whether there is a valid and enforceable arbitration agreement, and whether a party is aggrieved by the alleged failure of another to comply with the binding agreement. In this case, ***SWAC*** and PPG have not disputed that they are bound by the ADA's arbitration provision that requires the parties to arbitrate "any controversy or claim arising out of or relating to [the ADA]." Moreover, **[**21]** PPG has not disputed that it has not complied with the arbitration provision's requirement to jointly appoint an arbitrator.

[*P43] Despite these concessions, however, the trial court ignored the broad language of the arbitration provision and concluded that "the instant dispute is not arbitrable." Noting that it was required to assess the parties' underlying contract when determining whether the arbitration provision is enforceable, the trial court inferred that the potential claims of breach of contract and fraud could not fall within the scope of the arbitration agreement where ***SWAC*** lacked standing to pursue said claims. Because the trial court reached a merit-based determination under R.C. 2711.03(A) that was alternative to its jurisdictional analysis, we must address the trial court's conclusion.

[*P44] ***HN16***[↑] The question of whether a controversy is arbitrable under the provisions of a contract is a question for a court to decide upon examination of the contract. *Gibbons-Grable Co. v. Gilbane Bldg. Co., 34 Ohio App.3d 170, 171, 517 N.E.2d 559 (8th Dist.1986)*. Generally, an arbitration provision should not be denied effect "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Technologies, Inc. v.*

Communications Workers of Am., 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)*. When determining whether **[**22]** the controversy falls within the scope of an arbitration clause, the "'proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.'" *Aetna, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶ 24*, quoting *Fazio v. Lehman Bros., Inc., 340 F.3d 386, 395 (6th Cir.2003)*.

[*P45] *HN17*[⬆] We apply a de novo standard of review to determine whether a controversy is arbitrable under an arbitration provision of a contract. *Pantages v. Becker, 8th Dist. Cuyahoga No. 106407, 2018-Ohio-3170, ¶ 7*.

[*P46] After careful consideration, we find the trial court erred in determining that the potential claims referenced in ***SWAC***'s complaint are not arbitrable under the provisions of the ADA. In our view, the standing and judicial estoppel arguments presented in this case were improperly considered by the trial court and had no bearing on whether the arbitration agreement was valid and enforceable. Here, it is clear from the record that ***SWAC***'s intention to pursue claims for breach of contract and/or fraud against PPG relate exclusively to its position that PPG's predecessor, Akzo, breached its obligations under the ADA. Undoubtedly, such claims could not be maintained without reference to the underlying contract or relationship at issue and, therefore, fall within the scope **[**23]** of the broad arbitration provision. *See Aetna at ¶ 18* (*HN18*[⬆] "An arbitration clause that contains the phrase 'any claim or controversy arising out of or relating to the agreement' is considered 'the paradigm of a broad clause.'"), quoting *Collins & Aikman Prods. Co. v. Bldg. Sys. Inc., 58 F.3d 16, 20 (2d Cir.1995)*. And, without addressing whether the information contained in the bankruptcy court filings may or may not impair ***SWAC***'s ability to successfully pursue claims for breach of contract and fraud before an arbitrator in the future, we find the relevant bankruptcy filings did not place the dispute outside the scope of the arbitration agreement. Our conclusion is consistent with the federal court's previous order granting PPG's motion to compel arbitration.

[*P47] This court recognizes the unique set of facts presented in this case given the validity of the arbitration provision and the implications of the information disclosed during bankruptcy proceedings. We reiterate that our decision takes no position on the merits of ***SWAC***'s potential claims or whether the principles of standing and judicial estoppel will ultimately warrant judgment in favor of PPG. However, these are issues that must be resolved by the appointed arbitrator.

[*P48] Following the express language set forth **[**24]** under *R.C. 2711.03(A)*, we sustain ***SWAC***'s first assignment of error. The second and third assignments of error are rendered moot.

[*P49] Judgment reversed and remanded. The trial court is instructed to (1) vacate its order granting summary judgment in favor of PPG; (2) "make an order directing the parties to proceed to arbitration" pursuant to *R.C. 2711.03(A)*; and (3) appoint an arbitrator based on the parties' failure to agree on a jointly-appointed arbitrator as required under the ADA.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

EILEEN T. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and

MICHELLE J. SHEEHAN, J., CONCUR

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