IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| NATIONAL CITY COMMERCIAL CAPITAL CORP. fka Information Leasing Corp., | : | |
| Plaintiff-Appellant, | : | CASE NO. CA2010-10-276 thru CA2010-10-296 |
| | : | O P I N I O N |
| - vs - | : | 11/7/2011 |
| | : | |
| JERRY BULLARD dba Jerry Bullard Agency, et al., | : | |
| Defendants-Appellees. | : | |

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS

Case Nos. CC2004-10-3026, CV2004-11-3491, CV2004-11-3496, CV2004-09-2742, CV2005-03-0738, CV2004-11-3430, CV2004-11-3492, CV2005-01-0057, CV2004-11-3525, CV2004-08-2542, CV2004-11-3526, CV2004-11-3508, CV2004-10-2964, CV2005-11-0124, CV2004-08-2548, CV2005-03-0703, CV2004-11-3528, CV2004-12-3520, CV2004-12-3716, CV2004-11-3531, CV2004-08-2478, CV2004-12-3707

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**PIPER, J.**

**{¶1}** Plaintiff-appellant, National City Commercial Capital Corporation[1] appeals from the Butler County Common Pleas Court's decision on remand from this court to dismiss for lack of personal jurisdiction appellant's breach-of-contract claims against defendants-appellees, Jerry Bullard d.b.a. Jerry Bullard Agency and several others. We affirm.

**{¶2}** Appellees are 22 out-of-state commercial entities that entered into lease agreements for telecommunications equipment with NorVergence, Inc., a New Jersey corporation. The lease agreements were virtually identical and required appellees to make payments for 60 months. The lease agreements included a "floating forum-selection" clause that stated: "This agreement shall be governed by * * * the laws of the State in which the Rentor's principal offices are located or, if this Lease is assigned by the Rentor, the State in which the assignee's principal offices are located * * * and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State[.]"

**{¶3}** Before appellees signed the lease agreements, NorVergence executed with appellant a "Master ILC/Vendor Operating Agreement" that allowed NorVergence to assign its interest in the lease agreements to appellant, whose principal offices are in Ohio. After

1. National City was formerly known as "Information Leasing Company" and is now known as "PNC Equipment Finance." We will refer to this company simply as "appellant" to avoid any confusion.

appellees executed the lease agreements, NorVergence assigned its interest in appellees' lease payments to appellant, thereby requiring appellees to send their lease payments to appellant's principal offices in Ohio rather than to NorVergence's principal offices in New Jersey.

**{¶4}** Appellees subsequently stopped making their lease payments to appellant after certain representations that Norvergence had made to them failed to materialize. As a result, appellant filed suit against appellees in the Butler County Common Pleas Court, alleging breach of contract and seeking payments owed to it under the lease agreements. Appellant also alleged that the trial court had personal jurisdiction over appellees by virtue of the forum selection clause in the lease agreements. Appellees moved to dismiss appellant's complaints against them on the basis that the trial court lacked personal jurisdiction over them. The trial court granted appellees' motions to dismiss for lack of personal jurisdiction on the basis that the lease agreements' forum-selection clause was against public policy, and its enforcement would be unreasonable and unjust.

**{¶5}** Appellant appealed the trial court's decision to this court in *Natl. City Commercial Capital Corp. v. All About Limousines Corp.*[2] While this matter was pending on direct appeal, *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, was released. In that case, which involved NorVergence and Preferred Capital, Inc., a financing entity similar to appellant, the Ohio Supreme Court refused to enforce a floating forum-selection clause that was similar to, if not the same, as the one in this case. The court based its decision on the fact that NorVergence and Preferred Capital

2. Butler App. Nos. CA2005-08-226, CA2005-08-232, CA2005-08-239, CA2005-08-253, CA2005-08-259, CA2005-08-270, CA2005-08-277, CA2005-08-280, CA2005-08-283, CA2005-08-295, CA2005-08-314 CA2005-08-317, CA2005-08-327, CA2005-08-335, CA2005-08-336, CA2005-08-337, CA2005-08-341, CA2005-08-345, CA2005-08-352, CA2005-10-448, CA2005-10-459, CA2005-10-460, 2009-Ohio-1159, appeal not allowed, 122 Ohio St. 3d 1480, 2009-Ohio-3625.

possessed "superior knowledge" than that possessed by the appellants in that case on the assignment of the leases, as "NorVergence knew that it would likely assign its interest in appellants' leases to Preferred Capital or some other entity, but withheld that information from appellants." Id. at ¶13. The court held that based upon "the superior knowledge and position of NorVergence and Preferred Capital," and "the strong public policy of not haling individuals into foreign jurisdictions without their knowing waiver," the forum-selection clause in that case was "unreasonable, and it would be unjust enforce it." Id. at ¶14.

**{¶6}** In its direct appeal to this court, appellant argued in its first and second assignments of error that the trial court erred in granting appellees' motion to dismiss appellant's claims against them for lack of personal jurisdiction, because the forum selection clause in the lease agreements did not violate Ohio law per se, and was enforceable since it was not the product of fraud or overreaching, and was not unjust or unreasonable. *Natl. City Commercial Capital Corp.*, 2009-Ohio-1159 at ¶6. This court sustained appellant's first and second assignments of error to the extent that the trial court had determined that the forum-selection clause was against public policy and unreasonable "without exploring the 'superior knowledge' if any, on the assignment of lease payments" that NorVergence and appellant possessed in comparison to appellees, as called for in *Preferred Capital*. *Natl. City Commercial Capital Corp.* at ¶25. Consequently, this court remanded the matter to the trial court, advising it to consider "the existence of and execution date for a Master Program Agreement between NorVergence and National City or Information Leasing Corporation, the circumstances related to the assignment of lease payments, appellees' knowledge, if any, of the Master Program Agreement and their assent to litigate in any forum, and the burden, if any, to those appellees with offices in New Jersey." Id. at ¶26.

**{¶7}** On remand, the trial court found that appellant "had undisclosed, superior knowledge similar to, if not the same," as the plaintiff in *Preferred Capital*, and therefore

concluded that "[a]s in *Preferred Capital*, * * * the floating forum selection clause in all the [lease agreements between NorVergence and appellees was] unreasonable and it would be unjust to enforce" it. Consequently, the trial court, once again, dismissed appellant's actions against appellees.

**{¶8}** Appellant now appeals, assigning the following as error:

**{¶9}** Assignment of Error No. 1:

**{¶10}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ALLOW APPELLANT TO CONDUCT DISCOVERY INTO WHETHER APPELLEES WERE SUBJECT TO JURISDICTION PURSUANT TO ORC 2307.03(A)(2) [sic] AND OHIO CIVIL RULE 4.3(A)(1)."

**{¶11}** Appellant acknowledges that in *Natl. City Commercial Capital Corp.*, 2009-Ohio-1159 at ¶27-40, this court rejected its third assignment of error on direct appeal, in which it had argued the trial court erred in dismissing its actions against appellees for lack of personal jurisdiction, because appellees had transacted business in Ohio for purposes of the complementary provisions in Ohio's long-arm statute in R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) by mailing one or more lease payments to appellant's principal office in Ohio. Appellant is also aware, of course, that during the remand proceedings, the trial court allowed it to engage in discovery on the issues that this court instructed the trial court to consider. See id. at ¶25-26. Nevertheless, appellant argues the trial court erred in refusing to permit it to conduct additional discovery on remand that might have allowed it to discover evidence that would have established that the trial court had personal jurisdiction over some or all of appellees under R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) *on some basis other than the fact that appellees mailed some of their lease payments to appellant's principal office in Ohio* – an argument that the trial court and this court have already rejected in appellant's direct appeal. See id. at ¶27-40. We find appellant's argument unpersuasive.

**{¶12}** Generally, a trial court has broad discretion in discovery matters, and therefore an appellate court must review any claimed error relating to the trial court's ruling on a discovery matter under an abuse-of-discretion standard. See *Silver v. Jewish Home of Cincinnati*, 190 Ohio App.3d 549, 560, 2010-Ohio-5314, appeal not allowed, 128 Ohio St.3d 1414, 2011-Ohio-828. However, the issue on which appellant wanted to conduct additional discovery on remand was clearly beyond the scope of this court's instructions. *Natl. City Commercial Capital Corp.* at ¶25-26.

**{¶13}** This court partially sustained appellant's first and second assignments of error in its direct appeal relating to the "superior knowledge" issue discussed in *Preferred Capital*, as it relates to the enforceability of the floating forum-selection clause in the lease agreements in this case, and remanded the matter to the trial court with specific instructions regarding those assignments of error. *Natl. City Commercial Capital Corp.* at ¶25-26. However, nothing in our remand instructions on appellant's direct appeal directed the trial court to consider whether it had personal jurisdiction over all or some of appellees pursuant to R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) on some basis other than appellees' sending one or more lease payments to appellant in Ohio.

**{¶14}** Therefore, we conclude that the trial court did not err in refusing appellant's request to engage in additional discovery on the issue of whether the trial court had personal jurisdiction over all or some of the appellees under R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) on some basis other than appellees' mailing some of their lease payments to appellant's principal office in Ohio. Id.

**{¶15}** Consequently, appellant's first assignment of error is overruled.

**{¶16}** Assignment of Error No. 2:

**{¶17}** "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND

THAT APPELLANTS [sic] HAD UNDISCLOSED, SUPERIOR KNOWLEDGE THAT WAS SIMILAR TO, IF NOT THE SAME, AS [sic] THE PLAINTIFF IN *PREFERRED CAPITAL*."

**{¶18}** Appellant argues the trial court erred in determining that it had undisclosed, superior knowledge that was similar to, if not the same as, the plaintiffs in *Preferred Capital*, because the facts in that case are very different from those present here. However, we find that the facts in this case are closely analogous to the facts in *Preferred Capital* and that any factual differences that do exist are not significant enough to preclude the decision in *Preferred Capital* from controlling here.

**{¶19}** Courts review questions of law de novo, according no deference to the trial court's decision on the matter. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶35. An appellate court's decision granting a motion to dismiss is a question of law, to be reviewed de novo, *Bohl v. Hauke*, 180 Ohio App.3d 526, 2009-Ohio-150, ¶9, as is the interpretation and enforceability of a contract or a provision therein. *Benfield* at ¶35. Therefore, our standard of review on the questions presented in this assignment of error is de novo, i.e., we owe no deference to the trial court's finding on the "superior knowledge" issue. Nevertheless, we agree with the trial court's ruling that appellant and NorVergence had superior knowledge to appellees, regarding the assignment of the leases, and therefore the floating forum-selection clause in the lease agreements in this case is unenforceable.

**{¶20}** In *Preferred Capital*, the 12 out-of-state appellants entered into lease agreements for telecommunications equipment with NorVergence that contained the same floating forum-selection clause used in the lease agreements in this case. See *Preferred Capital*, 2007-Ohio-257, ¶2. Before the appellants in *Preferred Capital* signed the lease agreements with NorVergence, NorVergence entered into a "Master Program Agreement" with Preferred Capital, Inc. that allowed NorVergence "from time to time" to assign its interest

in the lease agreements to Preferred Capital. Id. at ¶3. NorVergence subsequently assigned its interest in the appellants' lease payments to Preferred Capital, "in most cases[,] the day after the leases were executed." Id. at ¶4.

**{¶21}** Appellants stopped making lease payments to Preferred Capital after appellants failed to receive the savings that NorVergence had promised them. Preferred Capital brought suit against appellants in the common pleas court, which dismissed Preferred Capital's action against each of the appellants for lack of personal jurisdiction. Id. at ¶5. The court of appeals reversed the trial court's decision, holding that the forum-selection clause in the lease agreements was valid and enforceable. Id. Appellants appealed to the Ohio Supreme Court, which reversed the court of appeal's judgment and reinstated the trial court's decision dismissing Preferred Capital's actions against appellants. The court held in *Preferred* Capital at ¶15-16 as follows:

**{¶22}** "In a contract between two commercial entities, a forum-selection clause with no reference to a specific jurisdiction or jurisdictions [i.e., a "floating forum-selection clause"] is valid absent a finding of fraud or overreaching or a finding that enforcement of the clause would be unreasonable and unjust. A forum-selection clause may be held to be unreasonable if it would be against public policy to enforce it.

**{¶23}** "We hold that when one party to a contract containing a floating forum-selection clause possesses undisclosed information of its intent to assign its interest in the contract almost immediately to a company in a foreign jurisdiction, the forum-selection clause is unreasonable and against public policy absent a clear showing that the second party knowingly waived personal jurisdiction and assented to litigate in any forum."

**{¶24}** The court in *Preferred Capital* explained its rationale for finding the floating forum-selection clause in that case to be unreasonable, as follows:

**{¶25}** "Although it does not appear in this case that enforcing the floating forum

clause would deprive any appellant of its day in court, we hold that the clause is unreasonable because even a careful reading of the clause by a signatory would not answer the question of where he may be forced to defend or assert his contractual rights. At the time the contract was entered into, the appropriate forum would have been New Jersey; the very next day, in most cases, the lease was assigned to Preferred Capital and the appropriate forum became Ohio. Nothing prevented Preferred Capital from assigning its interest and changing the forum yet again. It is one thing for a contract to include a waiver of personal jurisdiction and an agreement to litigate in a foreign jurisdiction. It is quite another to contract to litigate the same contract in any number of different jurisdictions, located virtually anywhere. Nothing in the record indicates that appellants were fully apprised of the potential for a truly floating forum. The record indicates that NorVergence knew that it intended to assign these leases and that no matter how carefully appellants read the contract, they could never have anticipated the appropriate forum for litigating issues relating to their leases.

**{¶26}** "Preferred Capital and NorVergence had superior information. Before the leases were signed, NorVergence had entered into the Master Program Agreement with Preferred Capital. NorVergence knew that it would likely assign its interest in appellants' leases to Preferred Capital or some other entity, but withheld that information from appellants.

**{¶27}** "Presumably, Preferred Capital reviewed the leases before it accepted assignment. Preferred Capital was in a better position than appellants to evaluate the risk and costs of litigating in a foreign jurisdiction. Based upon the strong public policy of not haling individuals into foreign jurisdictions without their knowing waiver, and the superior knowledge and position of NorVergence and Preferred Capital in comparison to appellants, we hold this forum-selection clause unreasonable, and it would be unjust to enforce it." Id. at ¶12-14.

**{¶28}** The dissent in *Preferred Capital* (Justice Lundberg Stratton, joined by Justice Lanzinger) contended that the majority's holding "invalidates all floating forum-selection clauses, for that is their very essence; the forum may change[,]" and that this fact "is part of the bargain agreed to by the parties." Id. The dissent agreed with the majority that "haling individuals into foreign jurisdictions without their knowing waiver" is against public policy, but found that the appellants in that case had clearly made a knowing waiver, because (1) the parties to the contract were commercial entities; (2) there was no fraud or overreaching; (3) the contract language was plain; and (4) there are legitimate business reasons for including a forum-selection clause in the lease agreements at issue, such as protecting the lease agreements' marketability as commercial paper. Id. at ¶27-28.

**{¶29}** Noting that "[t]he marketability of commercial paper is dependent on financial institutions being able to sell commercial paper freely[,]" the dissent asserted that "[t]he majority's decision makes no sense in the modern market and will seriously undermine countless contracts with floating forum-selection clauses that have been entered into in Ohio and will reduce the value of commercial paper with such clauses that have been purchased by Ohio institutions." Id. at ¶28.

**{¶30}** Applying *Preferred Capital* to the facts in this case, we note that while it does not appear that enforcing the floating forum-selection clause would deprive any appellee of its day in court, the clause is nevertheless unreasonable "because even a careful reading of the clause by a signatory would not answer the question of where he may be forced to defend or assert his contractual rights." Id. at ¶12. For instance, at the time the contract was entered into, the appropriate forum would have been New Jersey; however, in about one month, on average, the lease was assigned to appellant and the appropriate forum became Ohio. Id. Nothing prevented appellant "from assigning its interest and changing the forum yet again[,]" and nothing in the record indicates that appellees "were fully apprised of the

potential for a truly floating forum." Id. As was the case in *Preferred Capital*, "[t]he record indicates that NorVergence knew that it intended to assign these leases and that no matter how carefully [appellees] read the contract, they could never have anticipated the appropriate forum for litigating issues relating to their leases." Id.

**{¶31}** Furthermore, as was found in *Preferred Capital*, appellant and NorVergence "had superior information." Id. at ¶13. Before the leases were signed, NorVergence had entered into the Master ILC/Vendor Operating Agreement with appellant. NorVergence knew that it would likely assign its interest in appellees' leases to appellant or some other entity, on average, within 30 days of the execution of the lease, but withheld that information from appellees. See id. "Presumably, [appellant] reviewed the leases before it accepted assignment, and was in a better position than [appellees] to evaluate the risk and costs of litigating in a foreign jurisdiction." Id. at ¶14. Therefore, as the court in *Preferred Capital* concluded: "Based upon the strong public policy of not haling individuals into foreign jurisdictions without their knowing waiver, and the superior knowledge and position of NorVergence and [appellant] in comparison to [appellees]," the floating forum-selection clause contained in the lease agreements between NorVergence and appellees that were subsequently assigned to appellant was "unreasonable, and it would be unjust to enforce it." Id.

**{¶32}** Appellant argues this case is "very different" from the facts in *Preferred Capital*. First, appellant contends that "there is no proof that these agreements were to be assigned." However, this assertion is disproved by the existence of the Master ILC/Vendor Operating Agreement between NorVergence and appellant that permitted NorVergence to assign its interests in the lease agreements to appellant, as well as the fact that NorVergence and appellant entered into their master agreement *before* NorVergence entered into any of its lease agreements with appellees.

**{¶33}** Appellant next asserts that "there is no proof that these [lease] agreements were to be assigned[,]" as its employee, Tina Bowling, testified that "NorVergence kept a number of [lease] agreements in its own portfolio." However, the existence of the Master ILC/Vendor Operating Agreement between NorVergence and appellant provides strong proof that the lease agreements were to be assigned. Moreover, Bowling did not actually testify that NorVergence kept, for its own portfolio, a number of lease agreements that it made with its customers. Instead, she testified that based on her knowledge of the industry, vendors like NorVergence do not always assign their right to receive lease payments to a financing entity, but sometimes keep the lease agreement and collect payments therefrom for themselves. However, there is nothing in *Preferred Capital* to indicate that the outcome of that case would have been different if NorVergence actually kept for its own portfolio some of the lease agreements it had made with its customers.

**{¶34}** Appellant also asserts "there is no proof that these [lease] agreements were to be assigned outside the State of New Jersey." However, the evidence showed that NorVergence assigned lease agreements to 20-25 different financing entities, only three or five of which were located in New Jersey. It was reasonable to infer from this evidence that NorVergence intended to assign most of its leases outside New Jersey.

**{¶35}** Appellant also argues that because "there is no proof that [it] had any information about either the [a]ppellees or the agreements that were to be assigned[,]" the "superior knowledge" found to be present in *Preferred Capital* was not present in this case, and therefore the floating forum-selection clause should be enforced in this case. However, the "superior knowledge" referenced in *Preferred Capital is* present in this case, as prior to the time the lease agreements between NorVergence and appellees were signed, NorVergence had entered into the Master ILC/Vendor Operating Agreement with appellant, and NorVergence knew that it would likely assign its interest in appellees' leases to appellant

or some other entity, but withheld that information from appellees. Id. at ¶13.

**{¶36}** Appellant also argues this case is distinguishable from *Preferred Capital* because in that case, NorVergence assigned its interest in the lease payments "in most cases the day after the leases were executed[,]" id. at ¶4, while in this case, NorVergence did not assign the leases to appellant "for days, weeks or months after they were signed by [a]ppellees." Appellant contends that "[t]he key determination in *Preferred Capital* was whether one party possesses undisclosed information of its intent to assign its interest in the contract *almost immediately* to a company in a foreign jurisdiction[.]" (Emphasis added.) Appellant further contends that the evidence in this case "does not support a finding that the [lease agreements] were to be assigned[,]" and "[i]f NorVergence decided to assign [the contracts], the evidence does not support a finding that the contracts were to be assigned to a foreign jurisdiction." We find these arguments unpersuasive.

**{¶37}** In *Preferred Capital*, the court noted that "NorVergence assigned its interest in the appellants' lease payments to Preferred Capital—in most cases the day after the leases were executed." Id. at ¶4. The court also referred to this fact in discussing its rationale for finding the floating forum-selection clause to be unreasonable and thus unenforceable in that case, when it noted that "[a]t the time the contract was entered into, the appropriate forum would have been New Jersey[,]" but "the very next day, in most cases, the lease was assigned to Preferred Capital and the appropriate forum became Ohio." Id. at ¶12. Even more notably, the court stated in its holding that "when one party to a contract containing a floating forum-selection clause possesses undisclosed information of its intent to assign its interest in the contract almost immediately to a company in a foreign jurisdiction, the forum-selection clause is unreasonable and against public policy[.]" Id. at ¶16.

**{¶38}** Appellant's emphasis on the fact that NorVergence assigned its interest in the lease payments to a company in a foreign jurisdiction "in most cases" the day after the

leases were executed or "almost immediately" is misplaced. The key determination in *Preferred Capital* is whether parties like NorVergence and appellant had "superior knowledge" in comparison to parties like appellees regarding the assignment of the lease payments. See id. at ¶12-14; and *Natl. City Commercial Capital Corp.*, 2009-Ohio-1159 at ¶25-26. The fact that NorVergence assigned the lease agreements to Preferred Capital, in most cases, the day after the lease agreements were executed was evidence of NorVergence's and Preferred Capital's predetermined intent to assign the right to receive the lease payments after the leases were executed, and thus evidence of their superior knowledge. Waiting, on average, 30 days does no less to reveal NorVergence's predetermined intention to exercise its right under the master agreement to assign the lease to a finance company like appellant, whose principal office is in a foreign jurisdiction. See id. at ¶12. Thus, the trial court, in following the rationale of *Preferred Capital*, correctly determined that the difference between a couple of days or 30 days, was of little significance.

**{¶39}** As in *Preferred Capital*, at the commencement of the lease agreements in this case, the appropriate forum for any action between NorVergence and appellees regarding the lease was New Jersey. Id. However, the appropriate forum routinely became Ohio in a short period of time. Moreover, at any point in the future, the appropriate forum would have become another state if the right to receive payments under the lease was assigned to yet another party. *Preferred Capital*, 2007-Ohio-257 at ¶12. The fact that NorVergence and appellant had knowledge superior to appellees' regarding the assignment of the right to receive payments under the lease agreements was established by the evidence showing that (1) NorVergence and appellant entered into a Master ILC/Vendor Operating Agreement *before* NorVergence and appellees entered into their lease agreements, and (2) NorVergence knew that it would likely assign its interest in appellees' leases to appellant or some other entity, but withheld this information from appellees. Id. at ¶13.

**{¶40}** While the evidence in this case showed that NorVergence assigned its interest in appellees' lease payments to appellant, on average, about one month after the lease agreements were executed rather than "in most cases the day after the leases were executed[,]" as in *Preferred Capital*, id. at ¶4, there is nothing in that decision indicating that such a factual difference necessitates a different result in this case. Although some might prefer the position taken by the dissent in *Preferred Capital* on the issue of the enforceability of floating forum-selection clauses, both this court and the trial court are obligated to follow the majority decision in *Preferred Capital*. See *Schlachet v. Cleveland Clinic Found.* (1995), 104 Ohio App.3d 160, 168 (a court of appeals is bound by and must follow a decision of the Ohio Supreme Court unless and until the decision is reversed or overruled). Appellant has failed to convince us the slight difference in facts changes the analysis regarding "superior knowledge." Having engaged in a de novo review of the trial court's determination on the "superior knowledge" issue, we conclude that the trial court did not err in applying *Preferred Capital* to the facts of this case.

**{¶41}** Accordingly, appellant's second assignment of error is overruled.

**{¶42}** Judgment affirmed.

POWELL, P.J., concurs.

HUTZEL, J., dissents.

**HUTZEL, J., dissenting.**

**{¶43}** Because I believe that the majority's decision further invalidates forum selection clauses in this state, I respectfully dissent.

**{¶44}** As noted by the majority in *Preferred Capital*, "'a forum selection clause in a commercial contract should control, absent a strong showing that it should be set aside.'" Id.

at ¶6, quoting *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc*., 66 Ohio St.3d 173, 175, 1993-Ohio-203. In determining the validity of such a clause, a court must consider (1) whether both parties to the contract are commercial entities, (2) whether there is evidence of fraud or overreaching, and (3) whether enforcement of the clause would be unreasonable and unjust. *Preferred Capital* at ¶7, citing *Kennecorp*, syllabus.

**{¶45}** Appellant and 20 of the 22 appellees in this case are for-profit commercial entities, and there is no evidence of fraud or overreaching. Thus, as a practical matter, the only question remaining before us is whether enforcement of the floating forum-selection clause in the lease agreements in question would be unreasonable and unjust. The majority in *Preferred Capital* concluded that enforcement of the floating forum selection clause would be unjust in that case "because even a careful reading of the clause by a signatory would not answer the question of where he may be forced to defend or assert his contractual rights." Id. at ¶12. However, as the dissent in *Preferred Capital* pointed out, "[s]uch a holding invalidates all floating forum-selection clauses, for that is their very essence; the forum may change. That is part of the bargain agreed to by the parties." Id. at ¶26. The dissent also noted that the majority acknowledged that there is a valid business reason for including a floating forum-selection provision in the lease agreements involved in that case, to wit:

**{¶46}** "Such a clause is a reflection of the realities of the modern-day leasing industry, where negotiable paper involving equipment leasing is bought and sold with regularity. This reality favors a clause that permits an assignee to bring suit in its home forum, thereby enhancing the marketability of the lease. 'Parties to contracts are not benefited by rules that make assignment burdensome. If assignors have to compensate their assignees for having to litigate in an inconvenient forum, they will have to charge a higher price to their customers[.]'" Id. at ¶24, quoting *IFC Credit Corp. v. Aliano Bros. Gen. Contrs., Inc.* (C.A.7,

2006), 437 F.3d 606, 612-613.

**{¶47}** This court is, of course, obligated to follow the majority opinions in the decisions of the Ohio Supreme Court. However, I believe the facts in this case are sufficiently distinguishable from those in *Preferred Capital* that the decision in that case should not be controlling in this one. The majority opinion in *Preferred Capital* held that "when one party to a contract containing a floating forum-selection clause possesses undisclosed information of its intent to assign its interest in the contract *almost immediately* to a company in a foreign jurisdiction, the forum-selection clause is unreasonable and against public policy absent a clear showing that the second party knowingly waived personal jurisdiction and assented to litigate in any forum." (Emphasis added.) *Preferred Capital* at ¶16.

**{¶48}** In this case, appellant did not assign its interest in the lease agreements "almost immediately." Instead, appellant assigned its interest in the lease agreements, on average, almost 33 days after the lease agreements were executed. The majority in *Preferred Capital* also focused on the fact that NorVergence and Preferred Capital, by virtue of their master agreement, had "superior knowledge" than their out-of-state customers regarding the assignment of the lease agreements. Id. at ¶13. However, while the master agreement provided that the leases *could* be assigned, the agreement did not state that the leases *would* be assigned, and as we have just pointed out, unlike the case in *Preferred Capital*, appellant did not assign its interest in the lease agreements *almost immediately* to a company in a foreign jurisdiction.

**{¶49}** In light of the foregoing, I would limit *Preferred Capital* to its facts, and uphold the validity of the forum-selection clause in the lease agreements at issue, since "'a forum selection clause in a commercial contract should control, absent a strong showing that it should be set aside.'" Id. at ¶6, quoting *Kennecorp* at 175. As the dissent in *Preferred*

*Capital* pointed out, "The majority's decision makes no sense in the modern market and will seriously undermine countless contracts with floating forum-selection clauses that have been entered into in Ohio and will reduce the value of commercial paper with such clauses that have been purchased by Ohio institutions." Id. at ¶28. Because I believe that our decision further invalidates forum selection clauses in this state, I respectfully dissent.