[Cite as *Stumpff v. Harris*, 2015-Ohio-1329.]

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

KENNETH M. STUMPFF, et al.	:	
	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 26214
	:	
v.	:	T.C. NO. 03CV5624
	:	
RICHARD L. HARRIS, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the __3rd__ day of ____April____, 2015.

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FROELICH, P.J.

{¶ 1} Kenneth M. Stumpff and Mahaffey's Auto Salvage, Inc. appeal from the trial court's May 7, 2014 order for judicial dissolution of Mahaffey's Auto Salvage. The May 7, 2014 judgment made final the trial court's February 4, 2014 decision following a hearing on Mahaffey's Auto Salvage's claim for additional funds under a 2008 Notice of Claims.

The February 4, 2014 decision sustained Richard Harris's objections to the admissibility of certain documents at the hearing due to lack of authentication, to the testimony of Mahaffey's Auto Salvage's expert (who relied in part on those documents), and to the testimony of the receiver, who was called to authenticate those documents.

{¶ 2} On appeal, Mahaffey's Auto Salvage and Stumpff claim that the trial court abused its discretion in disallowing the expert's testimony and, alternatively, that the trial court erred in failing to grant a continuance to allow them to successfully subpoena Harris and his accountant to appear for the hearing. For the following reasons, the trial court's judgment will be reversed, and the case will be remanded for further proceedings.

I. Factual and Procedural History

{¶ 3} Mahaffey's Auto Salvage was an automobile wrecking yard, located at 1801 Valley Street in Dayton. Harris and Stumpff each owed 50% of the shares in Mahaffey's Auto Salvage.

{¶ 4} The litigation between the parties began in August 2003, when Stumpff and Mahaffey's Auto Salvage brought suit against Harris, claiming that Harris used assets of Mahaffey's Auto Salvage to enrich himself and another business Harris owned (Valley Auto Parts) and excluded Stumpff from participation in Mahaffey's Auto Salvage's business operations. Stumpff claimed that Harris's actions constituted a breach of Harris's fiduciary duties. Harris denied the claims and filed a counterclaim seeking an order of judicial dissolution of the corporation.

{¶ 5} Hearings on the claims were held before a magistrate, who filed a decision dismissing Stumpff's claims against Harris for breach of fiduciary duty and ordered judicial dissolution of the corporation. Stumpff objected, but the trial court overruled his

objections and adopted the magistrate's decision. We affirmed the trial court's judgment on September 15, 2006. *Stumpff v. Harris*, 2d Dist. Montgomery No. 21407, 2006-Ohio-4796 (*Stumpff I*).

{¶ 6} A receiver was ultimately appointed to "continue, manage, inventory, operate, and liquidate" the corporation, and hearings were held to determine the corporate assets and liabilities. On July 2, 2008, based on information discovered in the course of those hearings, Mahaffey's Auto Salvage filed a Notice of Claims, alleging that Harris had appropriated money from Mahaffey's Auto Salvage for use by Valley Auto Parts, L.L.C., an auto salvage business that Harris had started across the street.

{¶ 7} We detailed the course of the litigation regarding the Notice of Claims in a prior appeal from this case, *Stumpff v. Harris*, 2d Dist. Montgomery No. 24562, 2012-Ohio-1239 (*Stumpff III*), as follows:

> The receiver filed a report, inventorying the assets of the corporation. The report made no mention of the additional claims totaling $233,536 against Harris made by the corporation [Mahaffey's Auto Salvage]. Plaintiffs requested a hearing on their new claims. The court denied that request. The court entered an order identifying the assets of the corporation and ordering the receiver to take possession of those assets and prepare a plan for liquidation of the corporation. Harris filed a notice of appeal from that order. Harris subsequently dismissed his appeal voluntarily on August 19, 2008. *Stumpff v. Harris,* 2d Dist. Montgomery No. 22651 (Sept. 29, 2008).
>
> On March 13, 2008, the receiver filed a liquidation plan that again

took no account of the claims against Harris in the corporation's July 2, 2008 Notice of Claims. The corporation and Stumpff filed objections to the report's failure to take account of those matters. The trial court overruled the objection and adopted the liquidation plan, ordering a full disbursement of monies obtained by the receiver pursuant to the court's order of liquidation. The court also discharged the receiver.

Stumpff and the corporation took no appeal from the order denying their objections and adopting the liquidation plan of the receiver in the 2003 action. Instead, on October 23, 2008, Stumpff and the corporation commenced a new action against Harris on the claims which were the subject of their July 2, 2008 Notice of Claims.

Harris moved for summary judgment in the 2008 action. The trial court granted the motion, reasoning that Stumpff and the corporation should have filed a motion in the 2003 action to amend their complaint to include their new claims against Harris. The court further concluded that because Stumpff and the corporation took no appeal from the court's order adopting the report of the receiver in the 2003 action, their claims in the 2008 action are barred by res judicata. Stumpff and the corporation appealed.

On review, we agreed with the trial court's res judicata analysis, to the extent that the claims in the 2008 action involve the same funds that were asserted in the Notice of Claims the corporation filed in the 2003 action. We further held that such claims against a party to a dissolution

proceeding are properly brought as part of that action, and that there was no need for the Plaintiffs to amend their complaint in order to do that because their Notice of Claims had put the matters before the court. When the receiver and the trial court failed to act on those claims, Plaintiffs' proper course of action was an appeal challenging the order overruling their objections and adopting the receiver's report and liquidation plan, which they failed to pursue.

Nevertheless, we further held that the res judicata bar could not apply to the claims in the 2008 action for lack of an R.C. 1701.91(D) order of dissolution, the final order in such an action from which an appeal lies. We added: "Given that finality has not attached in (the 2003 action on the issue of dissolution), the Appellant's claims against Harris in that case may be pursued further on appeal whenever final judgment is entered. But, the appellants cannot simultaneously pursue their claims in the (2008 action) while the same claims remain part of a pending dissolution action in the same court." We therefore overruled the error Stumpff and the corporation assigned in the 2008 action. *Stumpff v. Harris*, 2d Dist. Montgomery No. 23354, 2010-Ohio-1241, ¶ 32. [(*Stumpff II*.)]

Following our decision in Case No. 23354, Stumpff and the corporation requested a hearing in the 2003 action to prove the corporation's claims against Harris. Plaintiffs argued that the court could not enter the final order of dissolution that R.C. 1701.91(D) requires without first complying with R.C. 1701.91(C), which authorizes the court, after a

> complaint for judicial dissolution is filed, to "require the parties to the proceeding to present and prove their claims, demands, rights, interests, or liens, at the time in the manner required of creditors or others." Plaintiffs argued that an R.C. 1701.91(D) order of dissolution that left the issues of their claims against Harris unresolved would not be a final order.
>
> Prior to entering the order of March 8, 2011, from which this appeal was taken, the trial court on February 24, 2011, entered a Decision, Order and Entry Granting Defendant's Motion For Judicial Dissolution. [Dkt. 2]. After discussing the history of the litigation, the court concluded that Plaintiffs are not entitled to a hearing on the Notice of Claims they filed on July 2, 2008, because those claims were previously rejected by the court in 2005, when the court dismissed the claims for breach of fiduciary duty in the complaint Defendant filed in 2003, a decision which this court affirmed in Case No. 21407 on September 16, 2006.
>
> On March 8, 2011, the court entered an order of dissolution pursuant to R.C. 1701.91(D). * * *

Stumpff, 2d Dist. Montgomery No. 24562, 2012-Ohio-1239, at ¶ 8-16.

{¶ 8} On March 23, 2012, we reversed the trial court's order of dissolution, holding that the trial court erred in entering that order without first affording Mahaffey's Auto Salvage a hearing, pursuant to R.C. 1701.91(C), to determine Mahaffey's Auto Salvage's claims against Harris relating to assets of the corporation that Harris allegedly appropriated. *Id.* at ¶ 23. We remanded the matter to the trial court "to conduct a hearing pursuant to R.C. 1701.91(C) on Plaintiffs' July 2, 2008 Notice of Claims, and to

thereafter enter an order of dissolution pursuant to R.C. 1701.91(D) 'upon the evidence' and containing, in addition to the provisions that section expressly requires, 'such other provisions with respect to the judicial dissolution and winding up as are considered necessary or desirable,' *Id*." *Stumpff*, 2d Dist. Montgomery No. 24562, 2012-Ohio-1239, at ¶ 24.

{¶ 9} In May 2013, following our remand, the trial court conducted a hearing on the claims raised in Mahaffey's Auto Salvage's 2008 Notice of Claims. On May 1, 2013, Stumpff and Mahaffey's Auto Salvage presented the testimony of David Cook, a certified public accountant, who had performed accounting work for Mahaffey's Auto Salvage. Cook relied, in part, on several documents that Harris's counsel had provided to plaintiffs' counsel during discovery. When Harris objected to Cook's testimony on the ground that several documents on which Cook relied had not been authenticated and admitted as evidence, the court indicated that it would allow Cook to testify and for plaintiffs to present a witness out of order (after Harris's witnesses) to authenticate the documents. The trial court heard Cook's testimony, and the defense presented three witnesses: Robert Smith, Robert Bishop, and David Philpot, all employees of Mahaffey's Auto Salvage who performed work for Valley Auto Parts. That day, plaintiffs' counsel arranged for subpoenas for Harris and his accountant, neither of whom had attended the hearing.

{¶ 10} On May 3, 2013, when the hearing was scheduled to resume, Mahaffey's Auto Salvage and Stumpff were unable to call Harris or his accountant, as neither had been served with a subpoena or appeared voluntarily. Instead, they called Matthew Sorg, the former receiver in the case, to authenticate the documents. Harris objected to Sorg's testimony for lack of personal knowledge and because he had not been named as

a potential witness in plaintiffs' pretrial statement.

{¶ 11} At the conclusion of the hearing, the trial court indicated that it would take the evidentiary issues under advisement and entertain post-hearing motions after the evidentiary issues were resolved. Mahaffey's Auto Salvage and Stumpff indicated that they would rest their case, subject to a motion to continue in order to call Harris and his accountant to testify, if needed. The trial court overruled their request to "hold open the evidentiary record" and stated that it would "make the rulings on the basis of the evidence as it has been presented."

{¶ 12} On February 4, 2014, in a written decision, the trial court sustained Harris's evidentiary objections to Cook's testimony and denied Mahaffey's Auto Salvage's claims. The trial court ruled that Cook's expert testimony had relied upon several documents that were not authenticated or admitted into evidence, including (1) Valley Auto Parts's QuickBooks accounting records dating from inception through 2013, (2) Valley Auto Parts's federal tax returns from 2005-2008, and (3) Harris's personal tax returns from 2003-2009. The trial court did not allow Sorg's testimony on the ground that Sorg was not timely identified as a witness, and it rejected Stumpff's argument that Sorg was a rebuttal witness. Because Cook had no "firsthand personal knowledge of the detailed financial data used for his analysis that is contained in the documents he reviewed and relied upon, some of which are not in evidence," the trial court found that Cook's testimony fell "outside the parameters of Evid.R. 703 and must be excluded."

{¶ 13} In holding that Cook's testimony was inadmissible, the trial court rejected Stumpff's and Mahaffey's Auto Salvage's argument that the production of the documents in discovery "constitutes an authentication making the documents admissible without a

sponsoring witness possessing some knowledge pertinent to authentication." The court stated: "The documents at issue are not self-authenticating as presented and the Ohio Rules of Evidence do not contain an exception to Rule 703 for documents acquired in discovery."

{¶ 14} Because Cook's testimony was excluded, the trial court found that Mahaffey's Auto Salvage's claim for additional funds failed for lack of proof. On May 7, 2014, the trial court entered an order of dissolution, pursuant to R.C. 1701.91(D), denying the claims stated in the July 2, 2008 Notice of Claims.

{¶ 15} Stumpff and Mahaffey's Auto Salvage appeal from the trial court's judgment, claiming that the trial court erred in excluding all of Cook's testimony.

II. Expert's Opinion Based on Documents in the Record

Stumpff and Mahaffey's Auto Salvage's first assignment of error states:

> **The Trial Court Abused its Discretion in Disallowing the Expert Testimony of David L. Cook, C.P.A., as to $129,685.47 and which Cook determined was owed to Stumpff.**

{¶ 16} In their first assignment of error, Stumpff and Mahaffey's Auto Salvage argue that the trial court erred in not finding that they had proven their claims in the amount of $129,685.47, which were based on Cook's review of documents that had already been admitted. In short, Stumpff and Mahaffey's Auto Salvage argue that the exclusion of Cook's opinions that were based on the tax returns and Valley Auto Parts's business records should not have resulted in the exclusion of *all* of Cook's opinions. Harris's appellate brief does not respond to this argument.

{¶ 17} Evid.R. 703 states that "[t]he facts or data in the particular case upon which

an expert bases an opinion or inference may be those perceived by the expert or admitted into evidence at the hearing." Facts or data perceived by an expert are those gathered through the expert's "firsthand perceptions." *State v. Johnson*, 2d Dist. Montgomery No. 23508, 2011-Ohio-1133, ¶ 39, citing Weissenberger's Ohio Evidence Treatise (2010 Ed.) § 703.1. "The expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise." Evid.R. 705.

{¶ 18} A trial court has considerable discretion in admitting opinion testimony. *State ex rel. Atty. Gen. of Ohio v. State Line Agri, Inc.*, 2d Dist. Darke No. 2010 CA11, 2011-Ohio-2191, ¶ 42.

{¶ 19} At the beginning of Cook's testimony, Cook identified the documents that he had reviewed at plaintiffs' counsel's request. Those documents included Valley Auto Parts's business records, Valley Auto Parts's tax returns, and Harris's personal tax returns. (Tr. 27). Cook referenced those documents in his testimony regarding whether Valley Auto Parts's 2005 tax returns were consistent with that company's business records as to the source of its start-up funds.

{¶ 20} Based on the information contained in those documents, Cook opined that Mahaffey's Auto Salvage and Valley Auto Parts were operating as "one in [sic] the same company, a joint venture." (sic) (Tr. 54). Cook stated that he agreed with the trial court's earlier-stated conclusion that Mahaffey's Auto Salvage actually funded Valley Auto Parts when it went into business. (Tr. 55; see Ex. 17, Trial Court's Decision regarding Receivers' Determination of Assets, Feb. 8, 2008). Cook opined that Valley Auto Parts's start up capital, including inventory that was sold during the first two days,

amounted to $35,395.14, half of which was owed to Stumpff personally. Cook further stated that, as a joint venture, Mahaffey's Auto Salvage's expenses related to its employees should have been split evenly with Valley Auto Parts.

{¶ 21} The remaining portion of Cook's testimony addressed the total expenses incurred by Mahaffey's Auto Salvage for employees that were utilized by both Mahaffey's Auto Salvage and Valley Auto Parts between June 2005 and January 20, 2008, when the receiver closed Mahaffey's Auto Salvage. Cook calculated wages, health insurance premiums, employee welfare expenses, the employer's share of FICA and Medicare, federal unemployment (FUTA) premiums, worker's compensation premiums, and state unemployment (SUTA) premiums; these amounts totaled $435,859.91. Cook subtracted $10,000 that had been paid by Valley Auto Parts to Mahaffey's Auto Salvage for "leased employees," resulting in a total employee cost of $425,859.91. Cook opined that Valley Auto Parts owed Mahaffey's Auto Salvage for half of those employee expenses ($212,929.96). Cook's opinions regarding employee costs were based on Mahaffey's Auto Salvage's QuickBooks records (Ex. 30) and Mahaffey's Auto Salvage's tax returns (Ex. 20-25), which had been admitted into evidence at a prior hearing, and documents derived from Exhibit 30 (Ex. 3-16).

{¶ 22} Cook also calculated the amount that Harris owed due to the construction of a fence at Mahaffey's Auto Salvage; Harris personally owned the real estate on which Mahaffey's Auto Salvage operated. Mahaffey's Auto Salvage paid the cost for the fence materials and Mahaffey's Auto Salvage employees provided the labor for the fence's construction. Cook concluded that Harris owed Mahaffey's Auto Salvage an additional $10,866.05 related to fence material costs and owed Stumpff personally $4,566.98 for

labor supplied by Mahaffey's Auto Salvage employees. Cook's calculation of the amount owed related to the fence materials was based on Harris's prior testimony, which was of record, and Mahaffey's Auto Salvage's QuickBooks records. Cook calculated that Mahaffey's Auto Salvage was owed a total of $218,362.98 (($425,859.91+$10,866.05) ÷ 2).

{¶ 23} Because the amount owed to Mahaffey's Auto Salvage would be split evenly between Harris and Stumpff, Cook stated that Stumpff should receive $109,181.49, plus $8,000 related to the prior treatment of the $16,000 that was loaned to Stumpff. Added to this was $4,566.98 for the fence labor. Excluding Stumpff's portion of the start-up capital for Valley Auto Sales ($17,697.57), which was based in part on Valley Auto Part's financial records, the total amount that Cook indicated was owed to Stumpff was $121,748.47.[1]

{¶ 24} Although Cook indicated that he had looked at Valley Auto Parts's QuickBooks records, Valley Auto Parts's tax returns, and Harris's personal tax returns as part of his review, Cook identified in his testimony which documents he considered in conducting specific calculations and reaching specific conclusions. For example, Cook testified that he based his calculations of the amount of Mahaffey's Auto Salvage's employee-related expenses and the fence-related costs on Mahaffey's Auto Salvage's financial records, not the records that the court deemed to be unauthenticated and excluded. Each of these calculations was a free-standing opinion, which could have

[1] Stumpff and Mahaffey's claim that the total amount owed, excluding the amounts for start up capital, is $129,685.47, not $121,748.47. Plaintiffs did not show their calculations in their brief, and we are unable to explain the $7,937 discrepancy in our numbers. Upon remand, the trial court may evaluate the evidence and reach its own conclusions.

been evaluated by the trial court without reference to the excluded documents. Accordingly, given that Cook rendered a series of opinions based on different documents, the trial court erred in excluding *all* of Cook's expert testimony due to the fact that some of the opinions were based on documents that had been excluded.

{¶ 25} In reaching this determination, we do not hold that the trial court was required to award Mahaffey's Auto Salvage and Stumpff the amount they sought, or any amount, for employee-related and fence-related expenses. The trial court did not reach whether Cook's testimony in this regard was credible and/or persuasive. Moreover, even if the trial court were to accept Cook's calculations of expenses that were owed to Mahaffey's Auto Salvage and Stumpff, the trial court did not determine whether Mahaffey and Stumpff proved the percentage of those expenses for which Valley Auto Parts and/or Harris was responsible.

{¶ 26} Mahaffey's Auto Salvage's and Stumpff's first assignment of error is sustained.

III. Authentication by Production in Discovery

Stumpff and Mahaffey's Auto Salvage's second assignment of error states:

> **The Trial Court committed prejudicial error by excluding the opinion of David L. Cook, C.P.A., as to the value of Mahaffey's capital which Harris appropriated to found Valley Auto Parts, L.L.C.**

{¶ 27} In their second assignment of error, Stumpff and Mahaffey's Auto Salvage claim that the trial court should have not excluded Cook's opinion as to the start-up capital provided to Valley Auto Parts, which was based in part on Valley Auto Parts's QuickBooks accounting records dating from inception through 2013, Valley Auto Parts's federal tax

returns from 2005-2008, and Harris's personal tax returns from 2003-2009, which the trial court held had not been properly authenticated. Stumpff and Mahaffey's Auto Salvage assert that these documents were implicitly authenticated (or, alternatively, "self-authenticated") when Harris provided them in response to a specific discovery request for these documents.

{¶ 28} Harris responds that the trial court properly excluded these documents and any opinions by Cook which were based on the documents. Harris states that the documents were not authenticated under Evid.R. 901, because Cook had no personal knowledge of the financial records upon which he relied and the documents were not self-authenticating. Harris further states that, because the documents upon which Cook relied were not authenticated and admitted into evidence, the trial court properly excluded his testimony, in accordance with Evid.R. 703.

{¶ 29} "Evid.R. 901(A) requires, as a condition precedent to the admissibility of evidence, a showing that the matter in question is what it purports to be." *State v. Simmons*, 2d Dist. Montgomery No. 24009, 2011-Ohio-2068, ¶ 12. The threshold standard for authenticating evidence is low, *State v. Wiley,* 2d Dist. Darke No. 2011 CA 8, 2012-Ohio-512, ¶ 11, and Evid.R. 901(B) provides examples of numerous ways that the authentication requirement may be satisfied. The most commonly used method is testimony that a matter is what it is claimed to be under Evid.R. 901(B)(1). *State v. Renner*, 2d Dist. Montgomery No. 25514, 2013-Ohio-5463, ¶ 30.

{¶ 30} Evid.R. 902 addresses documents that are self-authenticating. Self-authenticating documents do not require extrinsic evidence of authenticity as a condition precedent to their admissibility. Evid.R. 902. The Rule identifies ten

self-authenticating documents, including, for example, domestic public documents bearing a government seal, certified copies of public records, official publications, newspapers, and acknowledged documents. *Id*.

{¶ 31} In ruling that Harris's personal tax returns and Valley Auto Parts's financial records and tax returns were not properly authenticated, the trial court found that the documents were not self-authenticating as presented and that the Ohio Rules of Evidence do not contain an exception to Rule 703 for documents acquired in discovery. The trial court expressly rejected Mahaffey's Auto Salvage's and Stumpff's argument that the "mere production of documents in discovery constitutes an authentication making the documents admissible without a sponsoring witness possessing some knowledge pertinent to authentication."

{¶ 32} We agree with the trial court that Valley Auto Parts's financial records and tax returns, as well as Harris's tax returns, are not self-authenticating, within the meaning of Evid.R. 902. By this we mean that a party is not excused from providing evidence of authenticity for items that it received in discovery. Nevertheless, we find that that trial court erred in excluding these documents for lack of proof of authentication, because these documents could be, and were, properly authenticated by testimony that they were documents that had been specifically requested from and provided by the opposing party (Harris) during discovery.

{¶ 33} Evid.R. 901 does not provide an exhaustive list of the means of authentication. Indeed, Evid.R. 901(B) expressly states, "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule[.]" In our view, testimony regarding the

production of a document during discovery may provide sufficient indicia of authenticity to satisfy Evid.R. 901.

{¶ 34} Implied authentication by production in discovery is not a new concept. In the context of subpoenas, the United States Supreme Court has recognized that "the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information." *Andresen v. Maryland*, 427 U.S. 463, 473-474, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), citing *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).

{¶ 35} Numerous courts, both state and federal, have held that items produced in discovery are implicitly authenticated by the act of production by the opposing party. *See, e.g., Welch v. Bissell*, N.D.Ohio No. 1:12CV3108, 2013 WL 6504679, *4 (Dec. 11, 2013) (video was properly authenticated by affidavit from counsel that the video was produced by the opposing party during discovery); *Churches of Christ in Christian Union v. Evangelical Ben. Trust,* S.D.Ohio No. C2:07CV1186, 2009 WL 2146095, *5 (July 15, 2009) ("Where a document is produced in discovery, 'there [is] sufficient circumstantial evidence to support its authenticity' at trial."); *Hampton v. Bruno's, Inc.,* 646 So.2d 597, 600 (Ala.1994) ("when a document is produced by a party during discovery, that party waives the right to object to the admission of the document on the basis of its genuineness or authenticity") (interpreting *Alabama Power Co. v. Tatum*, 293 Ala. 500, 306 So.2d 251 (1975)); *Denison v. Swaco Geolograph Co.***,** 941 F.2d 1416, 1423 (10th Cir.1991); *McQueeney v. Wilmington Trust Co.,* 779 F.2d 916, 928 (3d Cir.1985) (fact that documents were produced in discovery was probative of authenticity); *United States v.*

Brown, 688 F.2d 1112 (7th Cir.1982) ("Brown produced the documents voluntarily and, as an officer of the corporation, he was in a position to vouch for their authenticity. Just as he could have identified the records by oral testimony, his very act of production was implicit authentication.").

{¶ 36} In *State v. Sanders***,** 92 Ohio St.3d 245, 750 N.E.2d 90 (2001), the Supreme Court of Ohio suggested that Evid.R. 901 could be satisfied by evidence that the party attempting to introduce an exhibit (the defense) had received the exhibit from the opposing party (the State). In *Sanders*, the defendant was alleged to have planned and led an uprising at the Southern Ohio Correctional Facility at Lucasville; a prison guard was murdered, on Sanders's orders, during the riot. During his trial on charges of aggravated murder, Sanders's counsel sought to introduce a tape recording that the FBI had made from tunnels underneath cellblock L, a "tunnel tape." Sanders wanted to play the tape to show that it had been altered to frame him.

{¶ 37} On appeal, Sanders claimed that the trial court wrongfully excluded the tape. The Ohio Supreme Court noted that the trial court did not prevent Sanders from playing the tape or from commenting on whether the voices were those of Sanders and others. However, Sanders could not comment on whether the tape was "fake," because he was not an expert. Regarding authentication of the tape, the court noted,

> Furthermore, Sanders did not attempt to authenticate the tape by proffering "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A); see, also, Evid.R. 901(B)(1). Sanders did not show that the tape he wanted to play was either the original tape *or the same copy of that tape that the state had given him in discovery.*

> Thus, he laid no foundation from which the jury could find that the state was responsible for any alleged alterations of the recording.

(Emphasis added.) *Sanders*, 92 Ohio St.3d at 258. The fact that Sanders had received the tape from the prosecution did not excuse Sanders from authenticating the tape (*see also Hasan v. Ishee*, S.D.Ohio No. 1:03-CV-288, 2006 WL 3253081, *29 (Aug. 14, 2006)), but the Ohio Supreme Court indicated that Sanders could have properly authenticated the tunnel tape with evidence that it was the tape he had received in discovery.

{¶ 38} This is not to say that everything produced in discovery should automatically be deemed authenticated. *See, e.g., Cramer v. NEC Corp. of America*, 5th Cir. No. 12-10236, 2012 WL 5489395, *2 (Nov. 13, 2012) (document purporting to be job description was not authenticated by production in discovery where the discovery request was too broad to provide evidence of authenticity, the document itself bore no indication of authenticity, and deposition testimony regarding the document was noncommittal). As explained by the Supreme Court of Kentucky:

> Other courts have applied this notion of implied authentication in the context of civil discovery, sometimes stating the rule quite broadly. *See, e.g., South Central Bank and Trust Company v. Citicorp Credit Services, Inc.,* 863 F.Supp. 635, 645 (N.D.Ill.1994) ("[P]roduction of a document amounts to an implicit authentication of the document.") (*citing United States v. Brown,* 688 F.2d 1112 (7th Cir.1982)); *In re Greenwood Air Crash,* 924 F.Supp. 1511, 1514 (S.D.Ind.1995). ("Production of a document by a party constitutes an implicit authentication of that document.") (also *citing*

> *Brown*). In most of these cases, however, the person producing the document is competent to authenticate it -- a private individual producing his own papers, say, or a business's records custodian producing the business's documents -- and in those cases production can indeed be said to imply the document's authenticity. * * * [H]owever, parties may have in their possession or control documents from other sources and even documents of unknown origin, which they would not be competent to authenticate directly. It is hard to see in those circumstances how the mere production of the document -- in response, say, to a very broad request for "everything in your possession or control having to do with X" -- implies anything about the extraneous document's authenticity.

Thrasher v. Durham, 313 S.W.3d 545, 548 (Ky.2010). The Supreme Court of Kentucky thus held that "the fact that the document was produced in discovery may give rise to an inference of authenticity where production was made by someone competent to provide authentication, but the mere fact of production does not suffice where that competence is lacking." *Thrasher* at 549.

{¶ 39} We need not decide, in this case, the various circumstances when the production of documents in response to a discovery request might fail to satisfy Evid.R. 901. Suffice it to say, a trial court should consider the totality of the circumstances surrounding the documents' production, including, but not limited to, the specificity of the discovery request, the nature of the documents, and the party responding to the discovery request.

{¶ 40} In this case, we find that the trial court erred in excluding Valley Auto

Parts's financial records, its tax returns, and Harris's personal tax returns, because (1) the circumstances of the documents' production provided strong evidence that the documents were authentic, and (2) Stumpff and Mahaffey's Auto Salvage presented evidence at the May 1, 2013 hearing that the documents at issue were produced to them by Harris.

{¶ 41} The record reflects that, in April 2012, following our remand, Mahaffey's Auto Salvage and Stumpff served a request for production of documents to Harris's counsel. On June 5, 2012, plaintiffs moved to compel discovery, including the following documents:

> 2. A copy of the "Quick Books" data disk or disks for Valley Auto Parts, LLC., showing any and all transactions from January 1, 2005, to date or other media upon which the check register, general journal, profit and loss statement and the financial statements of Mahaffey's Auto Salvage have been stored.
>
> 3. Copies of any and all federal, state, and municipal income tax returns designating Mahaffey's Auto Salvage, Inc, Valley Auto Parts, LLC., and/or Richard L. Harris as a taxpayer for the calendar years 2003 to date.

The trial court granted the motion to compel; Harris did not comply.

{¶ 42} In August 2012, Stumpff and Mahaffey's Auto Salvage filed a motion for discovery sanctions. On September 10, 2012, the trial court granted that motion and ordered Harris to respond to the discovery request within seven days. When Harris did not comply with that order, the trial court held a telephone conference with the parties. In January 10, 2013, the court awarded attorney fees as a discovery sanction.

{¶ 43} On January 25, 2013, the trial court conducted another telephone conference to discuss discovery issues. Following that conference, the trial court ordered that (1) within ten days, Harris's accountant would deliver to plaintiffs' counsel the QuickBooks discs, (2) on Thursday, February 14, 2013, at 1:30 p.m., Harris's counsel would bring to courtroom No. 8 all paper files containing discovery for review, inspection and copying by plaintiffs' counsel, and (3) the materials at issue pertain to the years 2005, 2006, 2007 and 2008. It appears that Harris complied with this order.

{¶ 44} The record establishes that Stumpff and Mahaffey's Auto Salvage specifically requested Harris's tax returns and Valley Auto Parts's QuickBooks records and tax returns. On several occasions, the court ordered Harris to produce those specific documents, and it ordered sanctions against Harris for his failure to comply with those discovery orders. The documents upon which Cook relied, on their face, appear to be tax returns and printouts of the financial records for Valley Auto Parts and Harris. Harris produced the documents to Stumpff and Mahaffey's Auto Salvage in compliance with the explicit January 25, 2013 order.

{¶ 45} After Harris objected to Cook's testimony due to the failure to authenticate Valley Auto Parts' financial records and tax returns and Harris's tax returns, plaintiffs' counsel elicited the following testimony from Cook:

> Q: Exhibit 31, is this a copy of the accounting records – well, I'll just ask this generally. Exhibits 31, 2, 3 -- Exhibit 1, 2 and 3, are those copies of accounting records of Valley Auto Parts, LLC, which were provided at a hearing here by [defense counsel] and represented to be the accounting records for Valley?

A: Yes, yes.

Q: Exhibits 34 through 37, are those Mr. Harris's personal tax returns that were represented by [defense counsel] to be the authentic copies of his tax returns for the relevant years?

A: Got a W-2 for 2003 and (Pause) yes.

Q: And Exhibits –

A: 35?

Q: I ask -- I asked you 37.

A: Oh, 37.

Q: 33 -- well, let me do the question again.

A: Yeah, 33, 34, 35, 36, are all copies of Mr. Harris's tax returns.

Q: Okay. 34, 35, 36 and 37 are copies of his personal returns, correct?

A: Yes, 37, also, yes, personal returns.

Q: And Exhibits 26, 27 and 28, are those copies of Valley's corporate tax returns that were represented by [defense counsel] to be accurate and authentic at the hearing?

A: 26, 27 – yes.

(Tr. 77-78).

{¶ 46} During redirect examination, Cook testified that he had no reason to believe that Valley Auto Parts's QuickBooks records, Valley Auto Parts's tax returns, and Harris's tax returns were not authentic. He further testified:

Q: And were you in the courtroom with me when [defense counsel] represented those to be the records?

A: Yes.

Q: Here at a hearing and he gave them to us?

A: Yes.

{¶ 47} Cook thus testified that he was present in the courtroom when Harris's counsel provided Valley Auto Parts's QuickBooks records, Valley Auto Parts's tax returns, and Harris's tax returns to counsel for Stumpff and Mahaffey's Auto Salvage. He testified that Harris's counsel represented that the documents were the documents requested by plaintiffs' counsel (and ordered by the trial court), and that, on their face, Cook had no basis to believe that the documents were not authentic.

{¶ 48} Based on the evidence at the May 2014 hearing, we conclude that Stumpff and Mahaffey's Auto Salvage presented sufficient evidence to authenticate Valley Auto Parts's QuickBooks records, Valley Auto Parts's tax returns, and Harris's tax returns, for purposes of Evid.R. 901. The circumstances of the documents' production strongly indicated that the documents were authentic, and Stumpff and Mahaffey's Auto Salvage provided evidence at the hearing that the documents were provided to them by Harris in response to a specific discovery request for those documents. Accordingly, the trial court erred in excluding those documents for lack of authentication. And, in light of that ruling, the trial court further erred in excluding the portion of Cook's expert testimony that relied on those documents.

{¶ 49} Stumpff's and Mahaffey's Auto Salvage's second assignment of error is sustained.

IV. Conclusion

{¶ 50} We are not unsympathetic to the dissatisfaction of both counsel with the

course of this litigation, but caution against personalization of the legal disputes. We also appreciate the frustration of the trial court with any remand, perhaps particularly in this case. Nevertheless, we conclude that all of the evidence upon which Cook relied was properly authenticated, and the trial court erred in excluding Cook's expert testimony. Accordingly, the trial court's judgment will be reversed, and the matter will be remanded to the trial court for further proceedings consistent with this opinion.

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WELBAUM, J., concurs.

HALL, J., concurring:

{¶ 51} I reach the result that this cause should be remanded for further proceedings but for a reason different than that expressed by my colleagues.

{¶ 52} In my opinion, the testimony of accountant David Cook was not sufficiently clear to discern which opinions were based on financial documents that had been admitted in a previous hearing, hence admissible, and which opinions were based on documents that had not been admitted, making the opinions also inadmissible. The trial court specifically referred to three sets of documents upon which Cook's testimony was based that were not admitted into evidence: "(1) Valley Auto Parts Quickbook accounting records dating from inception through 2013; (2) Valley Auto Parts federal tax returns from 2005-2008; and (3) Mr. Harris's personal tax returns from 2003-2009 (Exs. 34-37)." (Decision, etc., February 4, 2014 at 2).

{¶ 53} With respect to these disputed records, no custodian or other qualified witness testified that the records were in fact what they were purported to be, and no one testified that they contain records of events of the respective companies, made by a

person with knowledge, kept in the ordinary course of business as part of regularly-conducted business activity. I recognize that counsel's objection to the records, and the court's decision, refer to the absence of a sponsoring witness for "authentication" and admissibility of the records into evidence at the hearing. A narrow view of authentication could mean only that an item is what it is said to be. But in the context of this case, and in light of the court's determination that Cook's opinions were rejected because records upon which he relied were not introduced into evidence at the hearing, I believe "authentication" here required more than an inference that these are a party's records. *See*, e.g., *State v. Hirtzinger*, 124 Ohio App.3d 40, 49-50, 705 N.E.2d 395 (2d Dist.1997) (referring to the need for admission of business records into evidence to be supported by a knowledgeable witness to testify about the business-records requirements of Evid.R. 803(6) as part of the "authentication requirement"). Accordingly, it was within the sound discretion of the trial court to exclude the records and, therefore, the testimony of accountant Cook.

{¶ 54} Nonetheless, that does not end the inquiry. The records in question were produced in discovery, after court intervention, by the defendant, who then objected to the admission of its own records. Plaintiff's counsel requested a reasonable continuance. The hearing being conducted was a hearing to the court scheduled for May 1 and 3, 2013. This case has been pending since 2003. The court's decision on the evidentiary issue was not released until February 4, 2014. In my view, it was unreasonable to deny the plaintiff a continuance to produce the defendant, or his accountant, neither of whom was present at the hearing but both of whom had been listed as witnesses the defense intended to call. Therefore, for this reason I would have reversed the decision of the trial

court and remanded the matter for further proceedings. Given the opinion of my colleagues, the questioned records are authentic, so further testimony about them is unnecessary, and Cook's opinions meet the threshold of admissibility. But after reading Cook's testimony and the remainder of the presented evidence, I reiterate from my concurring opinion from the last sortie: "Needless to say, granting a hearing does not grant the claims alleged. The record reveals that when appellant Stumpff took $16,000.00 out of the corporate accounts, there was little if any money left. Therefore, the after-trial payroll expenses about which appellant complains were likely paid with after-acquired income, which Stumpff, who was excluded from the premises, did not assist to produce. But, the viability of appellant's claims is best left for the trial court to determine." *Stumpff v. Harris*, 2d Dist. Montgomery No. 24562, 2012-Ohio-1239, ¶ 30 (Hall, J., concurring).

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