[Cite as *WesBanco Bank, Inc. v. Smoked Ribs, Inc.*, 2016-Ohio-177.]

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

WESBANCO BANK, INC.,	:	Case No. 15CA3689
Plaintiff-Appellant/Cross-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
SMOKED RIBS, INC.,	:	
Defendant-Appellee/Cross-Appellant.	:	RELEASED: 01/11/2016

APPEARANCES:

Stanley C. Bender, Portsmouth, Ohio, for appellant/cross-appellee.

Robert E. Dever, Bannon, Howland & Dever Co., L.P.A., Portsmouth, Ohio, for appellee/cross-appellant.

Hoover, P.J.

{¶1} Both parties, appellant/cross-appellee, WesBanco Bank, Inc., ("WesBanco") and cross-appellant/appellee, Smoked Ribs, Inc. ("Smoked Ribs"), appeal the judgment of the Scioto County Court of Common Pleas which granted partial summary judgment upon both parties' motions for summary judgment. We find that the trial court erred in its decision requiring Smoked Ribs to repay $103,419.73 to WesBanco. The trial court was correct in finding that Smoked Ribs changed its position to its detriment; however, we find that the trial court was inconsistent in its analysis and thus erred in its calculation of the amount of monies that Smoked Ribs had to repay to WesBanco. On the other hand, we find that the trial court properly permitted Smoked Ribs to retain the monies that it paid in taxes on the mistakenly paid monies. Thus, we reverse in part and affirm in part the trial court's decision; and we remand the case to the trial court in order to enter an appropriate judgment consistent with this decision.

I. Facts and Procedural Posture

{¶2} Although the trial court's decision states that the parties submitted an agreed statement of facts, the parties were actually unable to agree on a statement of facts to submit to the trial court. However, upon review of the record, it appears that the facts at issue were not controverted.

{¶3} WesBanco is a West Virginia corporation that does business in Ohio and operates banks in Scioto County. In 2008, it merged with Oak Hill Banks and converted Oak Hill's accounts to WesBanco accounts. Smoked Ribs is an Ohio corporation that operates the Scioto Ribber restaurant in Portsmouth. Smoked Ribs was a customer of Oak Hill Banks and became a customer of WesBanco. Smoked Ribs maintained a business checking account with the bank after the merger. Similarly, Comfort Inn was a customer of Oak Hill Banks and became a customer of WesBanco following the merger.

{¶4} As part of the conversion of the Oak Hill accounts to WesBanco, in May 2008, a WesBanco employee mistakenly used the incorrect code for American Express credit card transactions at the Comfort Inn. Because of this mistake, the payments that were supposed to be made to the hotel were instead credited to the account of Smoked Ribs. The mistaken payments continued until May 2010, when Comfort Inn questioned WesBanco about American Express credit card transactions at its hotel that were not being credited to its account. Comfort Inn informed WesBanco that it was missing what it initially thought was $60,000 in receipts for American Express transactions at its hotel. WesBanco advised Smoked Ribs of this estimated overpayment.

{¶5} The bank then undertook an investigation and determined that the amount that had been mistakenly paid to Smoked Ribs instead of to Comfort Inn over the period of two years was

$239,814.38. In May 2010, WesBanco notified Smoked Ribs of this revised amount it had been mistakenly paid. In late May 2010, WesBanco demanded that Smoked Ribs repay the money, but Smoked Ribs refused. Smoked Ribs was uncertain that it owed anything to WesBanco.

{¶6} In August 2010, WesBanco paid $239,814.38 from its own funds to Comfort Inn and was assigned any rights the hotel might have for the recovery of the miscredited funds.

{¶7} In December 2011, WesBanco filed a complaint in the Scioto County Court of Common Pleas seeking restitution of the $239,814.38 it mistakenly paid to Smoked Ribs based on "contract, common law and statute." Smoked Ribs answered and filed an initial motion for summary judgment. The trial court determined that the motion was premature because WesBanco's right to recover the overpayment might be impacted by whether Smoked Ribs had incurred a detrimental change in position because of the bank's mistake and that issue was dependent upon facts that had not been sufficiently developed in the case.

{¶8} The parties engaged in discovery. Then, the parties filed motions for summary judgment. The parties filed depositions, affidavits, and exhibits that provided the following additional evidence.

{¶9} During the period that Smoked Ribs received the overpayments, it did not notice the increase in its checking account. Smoked Ribs claimed that it thought that the monies represented profits generated by increased prices and the good business their restaurant experienced. Prior to receiving notice of the mistaken payments, Smoked Ribs spent $125,863.68 on various improvements from August 2008 to September 2009 to the premises it leased for its restaurant. The remodeling included adding a room in back with restrooms, a roof to cover a new cooler and smokers, and a patio. The kitchen was also remodeled; and the old restrooms were

removed. These improvements increased Smoked Ribs's restaurant business and made it more efficient.

{¶10} According to its president, Smoked Ribs would not have made these renovations to its restaurant if it had thought that the money in the company's WesBanco checking account was not the company's money. Smoked Ribs also made numerous other business decisions, including those related to employees, wages, and advertising based upon its cash flow and operating profits, which were in turn based in part on the overpayment.

{¶11} Finally, Smoked Ribs paid an additional $67,169.63 in federal, state, and city taxes on the amount of money that WesBanco mistakenly credited to its checking account. According to Smoked Ribs's accountant, when he was deposed in the case in 2013, it was too late to amend the company's tax returns to recover the taxes it paid. The accountant testified that amendments to the tax returns could not be made for the mistaken overpayments for 2008, 2009, and 2010 because these amendments were allowed only up to two years later. The accountant further concluded that if Smoked Ribs was ordered to reimburse WesBanco for the amount of the overpayment, it might be able to treat those payments as losses to offset future income for tax purposes; but he did not know because it would "depend[] on other factors."

{¶12} In February 2015, the trial court granted the parties' motions for summary judgment in part and ordered Smoked Ribs to repay $103,419.73 of the overpayment to WesBanco. The trial court determined that Smoked Ribs could retain $69,225.02 of the $125,863.68 it expended on improvements and the $67,169.63 it paid in additional taxes on the overpayment in years 2008 through 2010. The trial court concluded that these amounts constituted Smoked Ribs's justifiable change in position based on WesBanco's overpayment. The trial court calculated that 55% of the $125,863.68 in improvement expenditures

($69,225.02) were to the restaurant and premises owned by a separate corporation with many or all of the same owners as Smoked Ribs and could not be recouped by WesBanco. In contrast, the trial court found that the remaining 45% of these expenditures ($56,638.66) were to enhance the atmosphere of the business and did not constitute a change in position justifying Smoked Ribs retaining that money.

{¶13} The trial court further rejected Smoked Ribs's contention that Comfort Inn waived its right to reimbursement from WesBanco by waiting over two years to notify WesBanco of the bank's failure to properly credit American Express credit card transactions by its hotel customers. The trial court did not agree with Smoked Ribs with respect to its claim that WesBanco was precluded from seeking restitution from Smoked Ribs for money for which the bank was not obligated to reimburse Comfort Inn.

{¶14} This appeal and cross-appeal ensued.

II. Assignments of Error

{¶15} In its appeal, WesBanco asserts the following assignment of error for our review:

> THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT SUMMARY JUDGMENT FOR $239,814.38 WITH INTEREST.

{¶16} In its cross-appeal, Smoked Ribs asserts the following cross-assignments of error for our review:

> 1. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF PLAINTIFF-APPELLANT IN THE AMOUNT OF $103,419.73 AND IN NOT GRANTING SUMMARY JUDGMENT FOR DEFENDANT-APPELLEE/CROSS APPELLANT ON ALL ISSUES.
>
> 2. THE TRIAL COURT PROPERLY HELD THAT DEFENDANT-APPELLEE/CROSS APPELLANT CHANGED ITS POSITION BY PAYMENT OF TAXES AND MAKING IMPROVEMENTS TO THE RESTAURANT AND PREMISES OWNED BY A SEPARATE CORPORATION.

III. Standard of Review

{¶17} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013–Ohio–3020, 992 N.E.2d 1126, ¶ 19. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made and (3) the moving party is entitled to judgment as a matter of law. Civ .R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011–Ohio–2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014–Ohio–3484, ¶ 26.

{¶18} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying the parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Chase Home Finance* at ¶ 27. Once the moving party meets this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue remaining for trial. *Dresher* at 293.

IV. Law and Analysis

A. Appeal: Recovery of Funds Based on Mutual Mistake of Fact

{¶19} In its sole assignment of error, WesBanco asserts that the trial court erred in not granting it summary judgment in the full $239,814.38 amount of the overpayment with interest.

{¶20} In its decision and judgment entry, the trial court stated that "[b]oth case law and Ohio statutes provide that [Smoked Ribs] must return the money it received in error unless it can show a change in position." In a previous decision finding that Smoked Ribs's initial motion for

summary judgment was premature, the trial court cited R.C. 1303.58 as the applicable statute. That statute was also cited by Smoked Ribs in its motions for summary judgment.

{¶21} R.C. 1303.58 addresses the payment or acceptance by mistake of negotiable instruments and provides for the recovery of the erroneous payment by the payer unless the person who took the instrument in good faith and for value or in good faith changed position in reliance on the payment or acceptance:

> (A) Except as provided in division (C) of this section, if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that payment of the draft had not been stopped pursuant to section 1304.32 of the Revised Code, or that the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. The rights of the drawee under this division are not affected by a failure of the drawee to exercise ordinary care in paying or accepting the draft.
>
> (B) Except as provided in division (C) of this section, if an instrument has been paid or accepted by mistake and the case is not covered by division (A) of this section, the person paying or accepting, to the extent permitted by the law governing mistake and restitution, may recover the payment from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance.
>
> (C) The remedies provided by division (A) or (B) of this section may not be asserted against a person who took the instrument in good faith and for value

> or who in good faith changed position in reliance on the payment or acceptance. This division does not limit remedies provided by section 1303.57 or 1304.36 of the Revised Code.

{¶22} R.C. 1303.58(A) does not apply to this case so as to allow a R.C. 1303.58(C) "good faith changed position in reliance" defense to an action to recover the mistaken payment. The two most common cases for R.C. 1303.58(A) are "payment or acceptance of forged checks and checks on which the drawer has stopped payment." *See* 1990 Official Comment 1 to UCC 3-418, which is codified in Ohio as R.C. 1303.58. This case does not involve any check, much less forged checks or checks upon which the drawer stopped payment.

{¶23} Nor does R.C. 1303.58(B) apply because that subsection involves a negotiable instrument that is paid or accepted by mistake. *See* 1990 Official Comment 3 to UCC 3-418 ("Perhaps the most important class of cases that falls under subsection (b), because it is not covered by subsection (a), is that of payment by the drawee bank of a check with respect to which the bank has no duty to the drawer to pay either because the drawer has no account with the bank or because available funds in the drawer's account are not sufficient to cover the amount of the check"). This case involves a WesBanco employee's mistake in coding an incorrect account number for American Express credit card receipts of Comfort Inn customers so that they were routed to the account of Smoked Ribs instead. No negotiable instrument was involved.

{¶24} Therefore, insofar as the trial court and Smoked Ribs relied on R.C. 1303.58(C) to provide the applicable reliance defense to an action by WesBanco to recover the mistaken payment, their reliance was misplaced.

{¶25} Nevertheless, precedent authorizes a comparable analysis to the one provided by this inapplicable statutory provision. The Ohio Supreme Court has provided the general rule to be applied in instances of mistaken payments. "The general rule is that money paid under the mistaken supposition of the existence of a specific fact which would entitle the payee to the money, which money would not have been paid had it been known to the payer that the fact did not exist, may be recovered." *Firestone Tire & Rubber Co. v. Central Nat. Bank of Cleveland,* 159 Ohio St. 423, 112 N.E.2d 636 (1953), paragraph two of the syllabus.

{¶26} "However, this general rule is modified in certain cases to conform to equitable principles which must be applied." *Id.* at 434, 112 N.E.2d 636. " 'The generally accepted test which determines whether a recovery may be had is whether the defendant in equity and good conscience, is entitled to retain the money to which the plaintiff asserts [a] claim.' " *Id.* quoting *Smith v. Rubel*, 140 Or. 422, 13 P.2d 1079 (1932). Therefore, "[m]oney paid to another under the mistaken supposition of the existence of a specific fact which would entitle the other to the money, which money would not have been paid had it been known to the payer that the fact did not exist, may be recovered, *provided the payment does not result in such a change in the position of the payee that it would be unjust to require a refund*." (Emphasis added.) *Firestone* at paragraph four of the syllabus. "Where a payee accepting payment under a mistake of fact *changes his position or disburses the money in good faith to another before he has received notice from the payer of the mistake*, a recovery may not be had against such payee." (Emphasis added.) *Id.* at paragraph seven of the syllabus. "Where, after a payment under mistake of fact, the payee in good faith changes his position so that he *no longer has possession of the money or will be in a worse condition* if he is required to refund it than if the payer had refused to pay, to such

extent the payee is exonerated from repayment." (Emphasis added.) *Id.* at paragraph eight of the syllabus.

{¶27} In *Firestone,* the payer, Firestone, had mistakenly paid some monies to Stan Wood Products, Inc. ("Stan Wood") and the Central National Bank of Cleveland ("CNB"). *Id.* at 428. Firestone had ordered sleds from Stan Wood. *Id.* at 425. CNB had agreed to loan Stan Wood working-capital funds. *Id.* at 425. The loans were evidenced by notes, which were secured by the pledge of the accounts receivable of Stan Wood. *Id.* The accounts receivable were assigned to CNB. *Id.* CNB notified Firestone by letter of the assignments of the accounts receivable to it. *Id.* at 426. CNB wanted to be paid directly on Stan Wood's invoices by Firestone, rather than through Stan Wood. *Id.* at 426-427. Firestone received the letter from CNB and sent its response. *Id.* at 427. Firestone wanted a note from Stan Wood telling Firestone that it could pay CNB directly. *Id.* Unbeknownst to Firestone and CNB, Stan Wood produced false and fraudulent invoices. *Id.* at 428. Firestone paid a total of $25,979.66 towards the fraudulent invoices in November 1946. *Id.* at 427-428. $6,831 of that $25,979.66 was paid directly to Stan Wood, which then paid CNB those monies upon Stan Wood's indebtedness. *Id.* The remaining $19,148.55 was paid directly by Firestone to CNB. *Id.* After approximately five months had elapsed, and after Firestone had never received the sleds for which it had paid, Firestone notified the bank that it had not received the sleds. *Id.* at 428. Firestone never received the sleds; and Stan Wood was adjudicated bankrupt. *Id.* Firestone sued CNB for recovery of its funds that CNB received as a result of the fraudulent invoices. *Id.* at 424-425. Firestone and CNB waived a jury; and the trial court rendered a judgment in favor of CNB for the full $25,979.66. *Id.* at 428. The Eighth District Court of Appeals affirmed the judgment as to the $6,831 that was paid directly to Stan Wood but reversed the judgment as to the remaining monies. *Id.* The court of appeals

rendered final judgment for Firestone in the amount of $19,148.66. *Id.* This amount had been paid directly to CNB by Firestone. *Id.* This matter was accepted by the Ohio Supreme Court which then affirmed the decision of the court of appeals but modified it by reducing the amount that Firestone could recover to $15,473.66. *Id.* at 441.

{¶28} The *Firestone* decision first discusses the impact of negligence of the payer. " ' Recovery back of payments made under mistake of fact is not, as a matter of law, defeated by the failure of the payer to exercise ordinary care to avoid the mistake, but his negligence is a relevant factor in determining whether it is equitable to allow recovery.' " *Id.* at 434, quoting Annotation, 169 A.L.R. 1427; Restatement of the Law of Restitution, Sections 15 and 16. The Supreme Court analyzed the facts in Firestone by first inquiring as to what extent, if any, the payment of the payer Firestone was made as a result of its own negligence and whether such negligence, if any, would preclude recovery. The *Firestone* court found that "there was a duty upon both Firestone and the bank to avoid mistake in the payment, [but] the greater responsibility in this regard was upon the bank which dealt with Stan Wood as its financial customer and which delivered his forged bills of lading to Firestone * * *." *Id.* at 440. The Ohio Supreme Court found that the under these circumstances, "there [was] a clear basis for recovery of the money paid under mistake of fact." *Id.*

{¶29} After the Ohio Supreme Court determined that Firestone's negligence did not preclude it from recovery of the mistakenly paid monies, the court then asked "whether there was such change of position on the part of the bank [payee] as to preclude recovery of the money paid. Does the bank still enjoy the benefit of the payment or is it left in worse position than if payment had been refused?" *Id.* at 440. The Ohio Supreme Court found that out of the $19,148.66 payment to CNB, CNB "applied approximately 80 per cent of that amount or

$15,473.66 to its Stan Wood loans and the balance of $3,675 to the deposit account of Stan Wood in the bank, which money so deposited was withdrawn by Stan Wood December 7, 1946." *Id.* at 441. The Ohio Supreme Court then modified the judgment to allow Firestone to recover only $15,473.66 of the $19,148.66. *Id.* The court found that CNB had not detrimentally changed its position with respect to the $15,473.66 since it had merely converted the cash into a loan repayment. *Id.* The court further found that CNB was in no worse condition than it would have been if the payment had been refused. *Id.* However, the Court did find that CNB had changed its position before the discovery of the mistake to its detriment when it deposited $3,675 in Stan Wood's account; and the money was withdrawn by Stan Wood. *Id.*

{¶30} Since the *Firestone* decision, courts of appeals in Ohio have interpreted what constitutes a change in position differently. For example, in *Bank One Trust Co., N.A. v. LaCour*, 131 Ohio App.3d 48, 721 N.E.2d 491 (10th Dist.1999), the Tenth District Court of Appeals rejected a payee's claim that he changed his position to his detriment prior to being notified of mistaken payments. *Id.* at 53-54. Consequently, the court of appeals allowed the payer Bank to recover the mistakenly paid monies. In that case, Bank One Trust Company ("Bank One") mistakenly remitted $49,587.49 to LaCour, a lawyer. *Id.* at 50. After three years, Bank One discovered the mistake. *Id.* at 51. Then, after another year, Bank One sued LaCour to recover the mistakenly paid monies. *Id.* After a bench trial in the trial court, the trial court entered judgment against LaCour in favor of Bank One. *Id.* at 51-52. LaCour claimed that Bank One could not recover the funds because he had changed his position by spending the money on the debts and daily expenses of his law practice. *Id.* at 53. LaCour claimed that he had not retained the value of the overpayments in the form of concrete assets or other funds from which he could repay the funds to Bank One. *Id.* The Tenth District Court of Appeals affirmed the trial court and rejected

LaCour's claim. The appellate court reasoned that equitable considerations would be barred in most cases if a change of position could be shown simply by prior dissipation of mistakenly received funds. *Id.* at 54. The court further scrutinized LaCour's testimony that showed that he had spent the mistakenly paid funds to reduce his pre-existing financial liabilities and his personal debts of his law practice. *Id.* The court felt that LaCour's use of the funds did not rise to the level of detriment contemplated in *Firestone*. *Id.*

{¶31} In contrast, the Sixth District Court of Appeals, in *State ex rel. Steger v. Garber*, 6th Dist. No. L-79-031, 1979 WL 207282 (October 26, 1979) interpreted what constitutes a change of position more liberally than the Tenth District did in *LaCour*. In *Garber*, the payer Lucas County Welfare Department ("LCWD") sought recovery of mistakenly paid monies from the payee, Garber, a welfare recipient. *Id.* at *1. LCWD overpaid Garber for a period of three months from April 1975 through July 1975 in the amount of $1,136. *Id.* Garber was notified of the mistake; however, payments continued for another three months from August 1975 through November 1975 in the amount of $1,136 until a legal determination could be made. *Id.* The Toledo Municipal Court found in favor of the LCWD. *Id.* On appeal, the Sixth District Court of Appeals affirmed in part and reversed in part the trial court's decision. The court of appeals affirmed the trial court's decision and found that Garber did not change his position as to the August 1975 through November 1975 payments because he had already been put on notice of the overpayments prior to receipt of these payments. *Id.* at *3. On the other hand, the court of appeals found that the overpayments from April 1975 through July 1975 were "spent for rent, groceries, food, gas, electric, phone and other essentials by Garber; therefore, Garber has changed his position and has disbursed the money within the holding of Rubber Co. supra." *Id.* at *4. The court of appeals, thus, reversed the trial court's judgment as to the payments made from

April 1975 through July 1975. *Id.* The appellate court found that Garber had changed his position to his detriment by spending the overpayments on every day expenses. *Id.* "* * * [T]he recipient is not liable for return of the funds where he has materially changed his position by expending the funds for essential household maintenance." *Sheet Metal Workers Local 98, Pension Fund v. Whitehurst*, 5th Dist. Knox No. 03CA29, 2004-Ohio-191, at ¶ 43 quoting *Garber*. The decision of the court of appeals seemed to emphasize the importance of the timing of the notice of the overpayments instead of focusing upon on what the mistakenly paid monies were spent.

{¶32} The Fifth District Court of Appeals alluded to its view on what constitutes a change in position in *Whitehurst, supra*. In that case, the court stated that the appellant "may have materially changed his position by depositing and using the proceeds" from the mistakenly paid monies for living expenses for himself and his family. *Id.*, 2004-Ohio-191 at ¶ 45. However, the appellate court did not have to decide the issue of changed position because it found that the appellant had notice that he was not entitled to the mistakenly paid monies prior to using the monies. *Id.* Thus, the Fifth District Court seems to follow the Sixth District's view in *Garber* as to its analysis of change of position and the impact of the timing of the notice given as to the mistaken payments.

{¶33} The First District Court of Appeals addressed the change of position issue in *The Ohio Co. v. Rosemeier*, 32 Ohio App.2d 116, 288 N.E.2d 326 (1st Dist. 1972). After a trial in the Hamilton County Court of Common Pleas, a stockbrokerage corporation was granted judgment against one of its customers, Rosemeier, for a $17,851.30 payment that it had mistakenly paid to the customer. *Id.* at 118. Two months had elapsed between the time the mistaken payment was made and the time the customer was notified. *Id.* at 117-118 Prior to the notification, Rosemeier had spent the $17,851.30 by paying an existing mortgage on her house and other debts. *Id.* at

117. The First District Court of Appeals found that "the defendant merely changed the cash into a paid mortgage and retained the value originally represented by [The Ohio Co.'s] mistaken payment. *Id.* at 120. Since the value of the original payment was retained by [Rosemeier], she has not detrimentally changed her position by liquidating her mortgage." *Id.* at 120 citing *Smith v. Rubel*, 140 Or. 422, 13 P.2d 1078; *Donner & Childs v. Sackett*, 251 Pa. 524, 97 A. 89. The court noted that the "other amounts" that Rosemeier paid were not shown in detail in the record. Therefore, the court of appeals did not address these payments.

{¶34} The Eighth District Court of Appeals also has provided its interpretation on what constitutes a change of position to the detriment of the payee so as to preclude recovery of mistaken payments in *Rocky River Bd. of Edn. v. Fairview Park Bd. of Edn.,* 63 Ohio App.3d 385, 579 N.E.2d 217 (8th Dist.1989) In *Rocky River,* Fairview Park, the payee, had received a mistaken sum of $178,890.50 which should have been paid instead to Rocky River. *Id.* at 386. These funds had accrued over a period of three years. *Id.* After three years had elapsed, Fairview Park was notified of the mistake. *Id.* The trial court granted summary judgment in favor of Rocky River for the full amount. *Id.* Fairview Park filed an appeal claiming that it had detrimentally changed its position in reliance on the receipt of the mistaken payments. *Id.* at 387. Fairview Park contended that the detrimental changes were:

> (1) Fairview's reliance on the Auditor's revenue allocation figures in preparing its annual appropriation measures for the years 1980 through 1983, inclusive; (2) Fairview's reliance on the estimated resources received by the Auditor in asking the voters to approve a five-year renewal levy in November 1983, which was passed by the voters in May 1986; (3) Fairview's reliance on the Auditor's figures in preparing its long-range financial plan for fiscal year 1987; (4) Fairview's

> entrance into employee contracts through December 31, 1988 based on the Auditor's figures; and (5) if required to give back the tax proceeds, Fairview's expenditures would exceed its revenues in 1981 and perhaps the other years in question."

Id. The appellate court rejected Fairview Park's arguments. The court acknowledged that the funds were not recoverable, were commingled with non-mistaken funds, and were used on Fairview Park's day to day operations. *Id.* at 388. The appellate court instead looked at whether Fairview Park had retained the value of the original payments. *Id.*

> To the extent that the original payments were spent on school appropriations, Fairview Park was saved from using its own tax revenue in the continued operation of its schools. This offset is the value of the misapplied proceeds. Furthermore, the value of the mistaken tax proceeds is recoverable by way of the continuing annual funding provided to each school district by the taxpayers. Thus, as a matter of law, Fairview Park has not detrimentally changed its position so to preclude recovery of the money paid under a mistake of fact.

Id.

{¶35} Lastly, we will examine *Green Local Teachers Association v. Blevins*, 43 Ohio App.3d 71, 539 N.E.2d 653 (4th Dist.1987). The school board and its treasurer, Blevins, had mistakenly overpaid wages to some teachers in the Green Local School District. *Id.* at 71. The parties had agreed to submit the case upon stipulations (of fact and exhibits) and trial briefs to the trial court. *Id.* at 72. The trial court found in favor of Blevins and the school board. *Id.* at 73.

The amounts of recovery from each teacher ranged from $111.76 to $64.99. *Id.* at 72. This court affirmed the judgment of the trial court and found that

> although the [teachers'] complaint averred that its members "relied upon and planned around" the receipt of a set amount of pay, the evidence, i.e., the stipulated facts and exhibits, indicates no such reliance or prejudice except to the extent that such miscalculation "may or may not have affected" appellant's members' 1985 income tax liability.

Id. at 73-74. Therefore, it appears that the teachers did not present adequate evidence to support its defense of alleged detrimental reliance.

{¶36} We have carefully reviewed the precedent provided by the Ohio Supreme Court in *Firestone* regarding the recovery of mistakenly paid monies and the equitable defenses to recovery. We have also examined the various interpretations of what constitutes a change of position to a payee's detriment by our court and our sister appellate districts.

{¶37} In *Firestone*, the Ohio Supreme Court first inquired as to what extent, if any, the mistaken payment by the payer (Firestone) was made as a result of its own negligence and whether such negligence, if any, would preclude recovery. *Firestone* at 439. The Ohio Supreme Court analyzed the facts in *Firestone* and found that Firestone's negligence did not preclude it from recovery. *Id.* at 439-440. This analysis may have been futile as the Ohio Supreme Court ultimately held that "[a] payer, even if negligent in making payment under a mistake of fact, may recover if his act has not resulted in a change in the position of the innocent payee to his detriment." *Id.* at 439. Therefore, we must analyze this case by focusing on whether Smoked Ribs changed its position as to preclude recovery of the money paid.

{¶38} Reviewing this case de novo, we believe that Smoked Ribs did change its position to its detriment with respect to the total monies paid for the improvements expenditures. Smoked Ribs should be permitted to retain the full $125,863.68 in monies that it spent on improvement expenditures. We find that the trial court erred in determining that Smoked Ribs had to repay $56,638.66 of the $125,863.68 that it spent on improvements to WesBanco. We reverse this portion of the trial court's decision.

{¶39} We find that the trial court was incorrect in its analysis by dividing the expenses in the manner that it did. The trial court permitted Smoked Ribs to retain 55% ($69,225.02) because the expenditures were "improvements to the restaurant and premises owned by a separate corporation." The trial court found that Smoked Ribs had to repay WesBanco 45% (56,638.66) because these monies were expenditures that were made to "enhance the atmosphere of the business." The trial court's conclusions are not consistent with the case law interpreting a change of position of a payee.

{¶40} Some of the above cases stand for the proposition that if a payee retains the benefits of the payment, then that is not a change in position. *Rocky River*, *supra*, at 387. This is the exact opposite of what the trial court decided as to the $69,225.02. The trial court found that the $69,225.02 represented expenditures as improvements to the restaurant and that Smoked Ribs could retain these monies. On the other hand, the trial court found that Smoked Ribs had to return the $56,638.66 since those expenditures only enhanced the atmosphere of the business. Since retention of benefits seems to be the focus of the trial court, these two findings are in contravention with one another. The trial court was inconsistent in its analysis, and consequently, erred in its analysis.

{¶41} In addition, no evidence exists in the record to support the trial court's calculations of the percentages it allots for which expenses satisfy a change of position.

{¶42} Moreover, it appears that the trial court failed to consider (1) whether Smoked Ribs no longer had possession of the mistakenly paid monies; (2) whether Smoked Ribs had disbursed the monies in good faith to another before he had received notice from WesBanco of the mistake; or (3) whether Smoked Ribs would be left in a worse position if it was required to refund the mistakenly paid monies to WesBanco.

{¶43} Smoked Ribs provided undisputed evidence that it spent $125,863.68 in improvement expenses to the leasehold from August 2008 to September 2009 prior to being notified of the mistaken payments. Although Smoked Ribs received benefits from the $125,863.68 in expenditures—including the remodeled kitchen, new restrooms, patio, and new roof to covering a new cooler and smokers—Smoked Ribs's president testified that he would not have made the improvements had he not thought the mistaken payments were Smoked Ribs's funds.

{¶44} The president testified as follows:

> A. I would not have made those changes had I not thought that that was not my money.
>
> Q. Explain to me how that is.
>
> A. I, personally, like to have money in the account to feel comfortable. I don't like owing you. And if I have something I owe you, then I want to make sure I can pay you.
>
> Q. You are in the one percent, believe me.

> Q. Well, it's the way I was raised. And, I like I said, the monies that were deposited in there, I felt, were profits. If it's due to me being—you know, not reconciling everything, detail to detail, I assumed that the money was mine and I did make changes. I would never do it inadvertently. No, I can't say that I did it knowing—or would do it with Mr. Patel's money or the bank's money. I did it thinking that it was profits and I had tried to better the surroundings of our business.

Transcript of Darren Mault p. 52, lines 22-25; p. 53, lines 1-14.

{¶45} The case sub judice is distinguishable from the *LaCour* case where the Tenth District Court of Appeals allowed the payer to recover mistakenly paid monies. In *LaCour*, the payee spent the mistakenly paid monies on his pre-existing financial liabilities, debts, and daily expenses of his law practice. *Id.*, 131 Ohio App.3d at 53, 721 N.E.2d 491. LaCour would have had to pay the pre-existing financial liabilities, debts and daily expenses regardless of whether he had received the mistaken funds or not. On the other hand, in this case, Smoked Ribs's president testified that "I would not have made those changes had I thought that that was not my money." According to the uncontroverted evidence, the improvements expenditures that Smoked Ribs made would not have been made (1) had Smoked Ribs not received the mistaken funds and (2) had Smoked Ribs not believed that the monies belonged to Smoked Ribs. No evidence was presented that Smoked Ribs would have borrowed money to make the expenditures. No evidence exists in the record showing Smoked Ribs had any plans of making improvements prior to the receipt of the mistakenly paid monies.

{¶46} This case can also be distinguished from the *Rosemeier* case. Rosemeier had spent the mistakenly paid funds on her existing mortgage on her house and other debts. *Rosemeier*, 32

Ohio App.2d at 118, 288 N.E.2d 326. The First District Court of Appeals found that Rosemeier had not detrimentally changed her position. Like LaCour, Rosemeier would have had to pay her pre-existing obligations—her mortgage payment and other debts— regardless of whether or not she received the mistakenly paid monies. Once again, in the case sub judice, Smoked Ribs did not have a prior financial obligation for improvement expenditures.

{¶47} As for the *Rocky River* case in which the Eighth District Court of Appeals found that the payer could recover mistakenly paid monies, it can also be distinguished from the case at bar. In *Rocky River*, the court of appeals opined that Fairview Park was saved from using its own monies in the continued operation of the schools by instead using Rocky River's monies. *Id.*, 63 Ohio App.3d at 388, 579 N.E.2d 217. Also, the court of appeals believed that Fairview Park could recover the value of the mistaken payments that it had to pay back through the continuing annual funding provided by taxpayers. *Id.* In this case, again, the improvements expenditures of Smoked Ribs would not have been made but for the mistakenly paid monies received by Smoked Ribs. This is not a prior financial obligation that Smoked Ribs would have already had to pay even if it had not received the mistakenly paid monies. In addition, Smoked Ribs is not funded by taxpayers like a school district is funded; instead, it is a business serving the public. Smoked Ribs may or may not earn monies in the future in an amount equivalent to the value of the mistaken payments. If Smoked Ribs is forced to return the mistaken payments to WesBanco, it will be in a worse position than it was before the payments were made. Smoked Ribs, in essence, will have a debt for improvement expenses that it would not have had but for the receipt of the mistaken payments. The president of Smoked Ribs had explained that it would not have spent the monies to make the improvements if it did not think it had the monies to do so.

{¶48} We would be remiss if we did not distinguish this Fourth District's *Blevins* case from this case. In *Blevins*, the evidence indicated no actual change in position on the part of the teachers who received mistakenly paid monies. *Id.*, 43 Ohio App.3d at 73-74, 539 N.E.2d 653. The teachers' complaint had stated that they 'relied upon and planned around' the receipt of a set amount of pay; but no evidence was presented as to any actual detriment that they experienced. *Id.* Thus, the teachers did not present adequate evidence to support its defense of alleged detrimental reliance. In contrast, in this case, we believe that Smoked Ribs did indeed provide detailed evidence regarding how it spent $125,863.68. Smoked Ribs provided uncontroverted evidence that it would not have spent these monies if it knew that the monies did not belong to it. Smoked Ribs further provided undisputed evidence that it disbursed the monies for the improvement expenditures to third parties prior to receiving notice from WesBanco of its mistake.

{¶49} Therefore, we disagree with WesBanco that the trial court should have granted it judgment in the full amount of $239,814.38. Instead, we believe that Smoked Ribs should be permitted to retain the $125,863.68 that it disbursed to others on improvements in detrimental reliance upon the mistaken payments. Smoked Ribs will be in a worse condition if it is required to refund the mistaken payments to WesBanco because Smoked Ribs would then have a liability of $125,863.68 that it otherwise would not have had. Because of Smoked Ribs's change in position, it would be unjust to require a refund of the $125,863.68.

{¶50} As for the remainder of the mistaken payments of $113,950.70, Smoked Ribs provided evidence that $67,169.63 was paid in federal, state, and city taxes on the mistakenly paid monies. Smoked Ribs paid these additional taxes for tax years 2008, 2009, and 2010. In May 2010, WesBanco notified Smoked Ribs that it had made a mistake in paying Smoked Ribs

$239,814.38 from May 2008 through May 2010. At the time that Smoked Ribs was notified that it had been mistakenly overpaid, it had ample time to amend its 2008 and 2009 tax returns to receive a refund of the additional taxes it paid on income that it should not have received; and it was well before its 2010 tax return was due. However, at this time Smoked Ribs did not know, nor did WesBanco know, if WesBanco would be entitled to recover the mistakenly paid monies. A lawsuit had not even been filed.

{¶51} As far as the Internal Revenue Service is concerned, Smoked Ribs was liable to pay its taxes for 2008, 2009, and 2010. The taxes were, therefore, paid in the amount of $67,169.63 to a third party, the Internal Revenue Service. Under these circumstances, it is equitable to recognize a detrimental change in position by Smoked Ribs based on its tax payments on the $239,814.38 which it actually did receive.

{¶52} We find that the trial court was correct in ordering that Smoked Ribs could retain the $67,169.63. We affirm this portion of the trial court's decision.

{¶53} With respect to the remaining mistakenly paid funds, $46,781.07, Smoked Ribs provided no evidence regarding a change of position. Consequently, the general rule of recovery of mistakenly paid monies applies to the $46,781.07. WesBanco is entitled to recover $46,781.07 from Smoked Ribs.

{¶54} Thus, we overrule WesBanco's assignment of error. We find that Smoked Ribs may retain $193,033.31 ($125,863.68 in expenditures and $67,169.63 in taxes) while WesBanco may recover $46,781.07. We remand this matter to the trial court to enter an appropriate judgment.

B. Cross-Appeal: Customer Agreement and Change in Position

{¶55} In its first cross-assignment of error, Smoked Ribs asserts that the trial court erred in granting judgment in favor of WesBanco and in not granting summary judgment in Smoked Ribs's favor on all issues for the full amount of the overpayment. Smoked Ribs claims that WesBanco's customer agreement with Comfort Inn required Comfort Inn to notify WesBanco within 60 days of its account statements to assert a claim concerning the mistaken credit card payments; and by not doing so, Comfort Inn was not entitled to recovery of the overpayments. Thus, the bank's reimbursement of this money to Comfort Inn was gratuitous and did not constitute a loss that WesBanco could recover from Smoked Ribs.

{¶56} WesBanco's deposit account agreement with Comfort Inn provides:

> **STATEMENTS** – You must examine your statement of account with "reasonable promptness." If you discover (or reasonably should have discovered) any unauthorized payments or alterations, you must promptly notify us of the relevant facts. If you fail to do either of these duties, you will have to either share the loss with us, or bear the loss entirely yourself (depending on whether we exercised ordinary care and, if not, whether we substantially contributed to the loss). The loss could be not only with respect to items on the statement but other items forged or altered by the same wrongdoer. You agree that the time you have to examine your statement and report to us will depend on the circumstances, but that such time will not, in any circumstance, exceed a total of 30 days from when the statement is first made available to you.
>
> *You further agree that if you fail to report any unauthorized signatures, alterations, forgeries or any other errors in your account within 60 days of when*

> *we make the statement available, you cannot assert a claim against us on any items in that statement, and the loss will be entirely yours.* This 60 day limitation is without regard to whether we exercised ordinary care. * * *

(Emphasis added.)

{¶57} Smoked Ribs's contention lacks merit because it is based on the erroneous premise that Comfort Inn waived its claim against WesBanco when it failed to report that its account statements were erroneous because they did not include its American Express credit card receipts for the two-year period until more than 60 days after the statements covering most of the overpayments. The plain language of the agreement specifies that Comfort Inn's waiver in not timely reporting an error is limited to asserting a claim against WesBanco "on any items *in that statement*." (Emphasis added.) It does not purport to waive the hotel's claims against the bank for errors on items that are not included in the statements that should have been included in the statements—like the credit card receipts at issue here.

{¶58} Furthermore, the agreement controls only the legal rights between WesBanco and Comfort Inn. It does not suggest that a third party like Smoked Ribs can raise a claim based on the bank's rights to consider a claim waived under its agreement with another customer. In fact, it was the bank and not Smoked Ribs that was assigned Comfort Inn's rights under the agreement.

{¶59} Therefore, we overrule Smoked Ribs's first cross-assignment of error.

{¶60} In Smoked Ribs's second cross-assignment of error, it does not assert error on the part of the trial court—instead it claims that the trial court properly held that it changed its position as a result of the bank's mistaken payments of Comfort Inn's credit card receipts to it by paying taxes and making improvements to the restaurant and leasehold premises.

{¶61} For the reasons stated in our disposition of WesBanco's assignment of error, and because Smoked Ribs does not assert error in its second cross-assignment of error, we disregard Smoked Ribs's argument as an assignment of error. App.R. 12(A)(2).

V. Conclusion

{¶62} The trial court properly found that Smoked Ribs changed its position; however, we find that the trial court was inconsistent in its analysis and thus erred in its calculation of the amount of monies that Smoked Ribs had to repay to WesBanco. We find that Smoked Ribs changed its position to its detriment as to the $125,863.68 that it disbursed to others and expended for improvements that it otherwise would not have spent had it known the monies did not belong to Smoked Ribs. We also find that Smoked Ribs changed its position to its detriment with respect to the $67,169.63 that it paid in taxes. Therefore, Smoked Ribs is entitled to retain the total amount of $193,033.31.

{¶63} We find that WesBanco is entitled to recover the mistakenly paid monies of $46,781.07 from Smoked Ribs as Smoked Ribs failed to present any evidence that would preclude recovery.

{¶64} We reverse in part and affirm in part the trial court's judgment. We remand this cause to the trial court to enter an appropriate judgment consistent with this decision.

JUDGMENT REVERSED IN PART
AND AFFIRMED IN PART
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED IN PART AND AFFIRMED IN PART and the CAUSE IS REMANDED. Appellant and Appellee shall equally divide the costs.

The Court finds that reasonable grounds existed for this appeal.

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

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

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

Abele, J. and Luper Schuster, J.*: Concur in Judgment and Opinion.

For the Court

BY: _____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

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

*Judge Elizabeth Luper Schuster from the Tenth Appellate District, sitting by assignment of the Supreme Court of Ohio in the Fourth Appellate District.