

[Cite as *Gator Dev. Corp. v. VHH, Ltd.*, 2009-Ohio-1802.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

GATOR DEVELOPMENT
CORPORATION,

:

APPEAL NO. C-080193
TRIAL NO. A-0610424

:

Plaintiff-Appellant,

:

DECISION.

vs.

:

VHH, LTD.,

:

MR ASSOCIATES HOLDING , LTD.,

:

NKB ASSOCIATES HOLDINGS, LTD.,

:

SHOPS AT HARPER'S POINT, LLC.,

:

ORIGINAL PARTNERS LIMITED
PARTNERSHIP,

:

NEIL K. BORTZ,

:

and

:

VANCE H. HARPER,

Defendants-Appellees.

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause
Remanded

Date of Judgment Entry on Appeal: April 17, 2009

William E. Santen, Jr., Deepak K. Desai, and Santen & Hughes, LPA, for Plaintiff-Appellant,

OHIO FIRST DISTRICT COURT OF APPEALS

Brian G. Dershaw, Kristen M. Myers, and Beckham Weil Shepardson, LLC, for Defendants-Appellees VHH, Ltd., and Vance H. Harper,

Joseph L. Trauth, Jr., Brian P. Muething, and Keating Muething & Klekamp PLL, for Defendants-Appellees MR Associates Holding, Ltd., NKB Associates Holding, Ltd., Shops at Harper's Point, LLC, Original Partners Limited Partnership, and Neil K. Bortz.

Note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Plaintiff-appellant the Gator Development Company (“Gator”) appeals the Hamilton County Common Pleas Court’s judgment dismissing several claims and two individual defendants who had been sued in their personal capacity in a multi-claim and multi-party lawsuit involving an agreement for the sale of real property commonly known as Harper’s Point. We conclude that the trial court erred by dismissing defendant-appellee Neil K. Bortz, who had been sued in his personal capacity for tortious interference, and we therefore reverse the trial court’s judgment in part. In all other respects, we affirm.

Procedural History

{¶2} Initially, Gator had filed only a breach-of-contract and promissory-estoppel action for specific performance against defendant-appellee VHH, Ltd. (“VHH”), alleging that VHH had breached the Harper’s Point sale agreement. VHH answered and acknowledged the existence of the sale agreement. Gator amended its complaint after VHH allegedly sold the property to defendants-appellees MR Associates Holding, Ltd., (“MR”) and NKB Associates Holdings, Ltd. (“NKB”). Gator added six new defendants and several new claims, including tortious interference, fraud, civil conspiracy, and declaratory judgment; Gator omitted the promissory-estoppel claim against VHH.

{¶3} In addition to VHH, MR, and NKB, the other defendants-appellees include Vance H. Harper, the alleged president of VHH; Shops at Harper’s Point, LLC, and Original Partners Limited Partnership (together, “the Ground Lessees”), the ground lessees that allegedly assigned to MR and NKB their options to purchase the property; and Neil K. Bortz, the alleged “principal” of Shops at Harper’s Point and Original Partners and the sole member of NKB. None of the defendants answered the amended complaint;

instead, they moved to dismiss some of the claims and to extend the time to answer. The trial court granted these motions.

{¶4} Despite the dismissals, Gator's claims for breach of contract and for specific performance against VHH remain in the action, as do Gator's tortious-interference claims against MR, NKB, and the Ground Lessees. The trial court certified that its judgment is subject to appellate review in accordance with Civ.R. 54(B).

Civ.R. 12(B)(6) Standard

{¶5} The trial court dismissed the claims upon a Civ.R. 12(B)(6) motion to dismiss. We therefore rely upon Gator's allegations in its amended complaint and the sale agreement attached to the complaint to establish the material facts for our review on appeal. "A motion to dismiss can be granted only where the party opposing the motion is unable to prove any set of facts which would entitle him to the relief requested. When reviewing a complaint under this standard, the factual allegations contained in the complaint are taken as true. * * * [We] must construe all material allegations in the complaint and all reasonable inferences drawn therefrom in favor of the nonmoving party."¹

Gator's Allegations

{¶6} In April 2006, Gator and VHH entered into a Sale and Purchase Agreement concerning real property in Hamilton County that has been improved with a development commonly known as "Harper's Point." The agreement provided for the purchase of the property by Gator for \$5,125,000 on or about September 30, 2006. The agreement contained certain conditions precedent, including that VHH find a suitable

¹ *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 418, 1995-Ohio-61, 650 N.E.2d 863 (internal citations omitted).

like-kind exchange property. This condition was set out in paragraph 8.1.3 of the agreement.

{¶7} The agreement recognized that Harper's Point was subject to ground leases and that the Ground Lessees had options to purchase the property under certain conditions. Section 8.3 of the agreement provided that "[i]n the event the tenant under the Ground Leases should exercise any of the Options * * *, Seller shall notify Buyer * * * within five (5) business days of the receipt of the notice of exercise. Thereupon, Buyer shall have thirty (30) calendar days thereafter from the date of the notice to notify Seller that either: a) Buyer will complete the purchase of the Property in accordance with the terms hereof, or b) Buyer may elect to terminate, in which event this Agreement shall be null and void and the Earnest Money shall be released to Buyer. In the event Tenant under the Ground Leases should exercise any of the Options, and purchase all or part of the Property, Seller's contingency set forth in Section 8.1.3 hereof shall be deemed waived." The Ground Lessees' purchase price under the options would be based on an appraised value of the property, which Gator alleged would be much higher than the amount that it had agreed to pay VHH. If Gator had proceeded with the purchase from VHH after the exercise of the options, Gator would have then sold the property to the Ground Lessees and would have been entitled to this excess.

{¶8} Prior to June 15, 2006, Gator's President, James A. Goldsmith, informed Bortz that Gator had a contract to purchase the property and asked Bortz if the Ground Lessees were interested in selling their leasehold interests. Bortz told Goldsmith that the Ground Lessees were content with their position and not interested. At about that time, VHH, the Ground Lessees, Bortz, and Harper agreed that VHH would sell the property to the Ground Lessees at a price higher than Gator's purchase price. This June

“understanding” was confirmed in two letters from Bortz to Harper dated June 15 and June 23, 2006.

{¶9} Gator was not informed of the June understanding. VHH pretended to seek a like-kind exchange property and then informed Gator in September that it was terminating the sale contract on its purported failure to find a suitable like-kind exchange property. VHH directed the escrow agent to return an escrow deposit to Gator, which Gator rejected.

{¶10} The Ground Lessees waited until mid-November 2006, after the September 30 closing date in the Gator-VHH agreement, to “attempt to exercise the Options in the Ground Leases.” At that time, VHH “was getting cold feet” about selling to the Ground Lessees instead of to Gator. Thus, to further induce VHH, the Ground Lessees entered into an agreement for the sale of the property that required the Ground Lessees to indemnify VHH against any claims by Gator arising out of VHH’s agreement with Gator. VHH and the Ground Lessees entered into the sale and indemnification agreement “with the knowledge, participation, and consent of Bortz and Harper.”

{¶11} On November 30, 2006, Gator filed a complaint for breach of contract and specific performance. VHH, the Ground Lessees, Harper, and Bortz had knowledge of the lawsuit and “actual knowledge of Gator’s continuing rights under the Agreement.”

{¶12} VHH’s “purported sale” of its interest in the Harper’s Point property occurred on January 3, 2007. On that date, the Ground Lessees executed “Assignments of Right to Purchase” to MR and NKB, which were owned and controlled by the “principals” of the Ground Lessees. VHH purported to assign its interest under the ground leases to MR and NKB and then executed warranty deeds to MR and NKB for Harper’s Point.

VHH's Affidavit of Title disclosed Gator's pending lawsuit. At the closing, MR and NKB, at the direction of the Ground Lessees, paid VHH \$5,700,000.

Causes of Action

{¶13} Gator learned of VHH's sale of the property to MR and NKB through discovery in the breach-of-contract action and amended its complaint to include new parties and allegations. The first claim was for specific performance due to "VHH's multiple and substantial breaches and anticipatory breaches of the Agreement, and its refusal to close by September 30, 2006." The second and third claims alleged tortious interference against MR, NKB, the Ground Lessees, and Bortz. The fourth claim alleged fraud against VHH and Harper. The fifth and sixth claims alleged fraud, conspiracy to defraud, and aiding and abetting fraud against the Ground Lessees and Bortz. The seventh claim was for breach of contract against VHH, and it requested specific performance or, in the alternative, compensatory damages. The eighth claim was captioned "Breach of Duty of Good Faith and Fair Dealing—as to Defendant VHH (including invalidity of damage limitation provision.)" The final claim asked the court to "declare the [g]round [l]essees void."

{¶14} The trial court dismissed (1) Bortz and Harper in their personal capacities from the lawsuit entirely, (2) the fraud claim against VHH, (3) the fraud, conspiracy to defraud, and aiding-and-abetting fraud claims against the Ground Lessees, and (4) the claim for declaratory relief. Gator challenges all of these dismissals in this appeal.

Claim Four: Fraud against VHH and Harper

{¶15} Gator alleged fraud against VHH and Harper for omissions and affirmative misrepresentations. Gator asserted that these parties had a duty to disclose, arising by contract and under the common law, the "negotiations and agreements" with the Ground

Lessees, including the June “understanding,” the November sale-and-indemnification agreement, and the closing. Additionally, Gator charged that these parties had made affirmative misrepresentations after June 15, 2006, suggesting that VHH was trying to complete a Section 1031 like-kind exchange, and that VHH had terminated the agreement based on its inability to do so. Gator alleged in conclusory fashion that it had justifiably relied upon these misrepresentations and omissions to its detriment, resulting in at least \$5,000,000 of damages. Gator requested these damages as well as punitive damages.

{¶16} VHH and Harper argue that the trial court properly dismissed the fraud claims against them because they were nothing more than breach-of-contract claims. In support, they cite the Ohio Supreme Court’s decision in *Ketcham v. Miller*.² In *Ketcham*, two lessees of a building, Miller and Williams, had sued Ketcham, their lessor, for “unlawfully, willfully, wantonly and maliciously” breaching the lease and evicting the lessees. The lessees sought the value of the lease as damages. At trial, evidence was adduced tending to establish that Ketcham had waived the breach of the conditions that she had relied upon for the forfeiture, and that she had leased the premises to others at a “greatly increased rental” and had covenanted to give possession to such parties at a time before the expiration of the Miller and Williams leases. Moreover, Ketcham had “connived” against the lessees “to bring about a forfeiture of the lease” and “to regain possession.”

{¶17} The trial court in *Ketcham* treated the case as a tort action and allowed the jury to award punitive damages. The supreme court held that this was error, after determining that the “gravamen of the complaint” was for breach of a contract.³ In arriving at this conclusion, the supreme court focused on the language the lessees had

² (1922), 104 Ohio St. 372, 136 N.E. 145.

³ *Id.* at paragraphs one and two of the syllabus.

used to state their claim, including their request for damages to provide them with the benefit of their bargain. Absent from the pleading was any request for personal or property damage. The court held under these circumstances that the words “willfully, wantonly, and maliciously” were not enough to transform that action from one in contract to one in tort.⁴ The court recognized, however, that the ultimate facts of the case might justify pleading a claim in tort, but that the gravamen of the complaint as pleaded was for breach of a contract.⁵

{¶18} This case is similar to *Ketcham*. The gist of Gator’s complaint was that it had been deprived of the benefit of its bargain. And Gator sought to recover the real estate or, in the alternative, a monetary figure equal to the difference between its offer for the property and either the appraisal-based price or the negotiated price the Ground Lessees were required to pay in exercising their options. The fraud claim was a recapitulation of the breach-of-contract claim, seeking recovery of the same economic loss contemplated by the contract. Thus, Gator was merely alleging a cause of action for the fraudulent breach of a contract, which is not recognized under such circumstances as a tort in Ohio.⁶

{¶19} Any duty to disclose arose only by contract, and Gator did not allege any detrimental reliance on a positive misrepresentation to establish a fraud claim. Our facts are distinguishable from this court’s recent case of *Curran v. Vincent*,⁷ which allowed a fraud claim to proceed against parties who had entered into a contract for the sale of real estate. In *Curran*, the sellers of a home were told that their buyer, who had signed a contract and had paid earnest money, had a medical emergency in his family and could no

⁴ Id. at 377.

⁵ Id.

⁶ See id.; *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151-154, 684 N.E.2d 1261.

⁷ 175 Ohio App.3d 146, 2007-Ohio-3680, 885 N.E.2d 964.

longer afford to purchase the property.⁸ The sellers released the buyer from the contract and returned his earnest money, relying on the family emergency.⁹ The same day that the buyer signed the release, the buyer agreed to purchase another, more expensive home on the sellers' street.¹⁰

{¶20} After learning of the purchase, the sellers sued the buyer for fraudulently inducing them to release him from their sales contract and requested actual and punitive damages, plus attorney fees and costs.¹¹ The sellers did not make any contract claims.¹² The buyer moved for summary judgment on the grounds that fraud was a tort that could not be asserted in a contract action, and that punitive damages were not available in a contract action.¹³ The trial court granted summary judgment for the buyer.¹⁴ On appeal, we reversed, holding, in part, that the action had been for fraud, not for breach of contract, because the sellers had released the buyer from the contract.¹⁵

{¶21} Significantly, Gator did not release VHH from the contract for the sale of Harper's Point. According to the complaint, Gator rejected the return of its earnest money and initiated proceedings to enforce its rights under the contract, even before learning of the sale of the property to the assignees of the ground leases. Thus, Gator did not allege any unique, fraud-based injury, one that had resulted from inducement or reliance.

{¶22} VHH and Harper have presented additional arguments to support the dismissal, but we decline to address them in light of this analysis. We conclude that Gator

⁸ Id. at ¶7.

⁹ Id.

¹⁰ Id. at ¶9.

¹¹ Id. at ¶10.

¹² Id. at ¶17.

¹³ Id. at ¶11.

¹⁴ Id.

¹⁵ Id. at ¶15.

failed to state a claim for fraud against VHH and Harper. Accordingly, we affirm the trial court's dismissal of the fourth claim.

Claim Eight: Breach of the Implied Duty of Good Faith and Fair Dealing

{¶23} Gator alleged that the various acts or omissions of VHH constituted a breach of the duty of good faith and fair dealing. VHH characterized this claim as a contract claim “clothed in the garb of tort” and argued that it should be dismissed on this basis. Gator concedes on appeal that it is a contract claim.

{¶24} In Ohio, “public policy dictates that every contract contain an implied duty for parties to act in good faith and to deal fairly with each other.”¹⁶ This implied duty does not supplant express contract terms.¹⁷ To the extent that Gator's claim seeks to supplement the pending breach-of-contract claim against VHH, it survives. Ohio, however, does not recognize the bad-faith breach of a contract as a tort claim, outside the context of an insurance dispute.¹⁸ To the extent that Gator is attempting to recover in tort under this claim, the trial court properly dismissed it.

**Claims Five and Six: Fraud-Based Claims
against Ground Lessees and Bortz**

{¶25} Gator advanced several fraud-based claims against the Ground Lessees and Bortz in the amended complaint, but has clarified on appeal that it is only pursuing claims for fraud and conspiracy to defraud against these defendants. We first address the fraud claim.

{¶26} Under Ohio law, the elements of common-law fraud are “(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is

¹⁶ *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49, ¶27.

¹⁷ See *Ed Schory & Sons, Inc., v. Francis*, 75 Ohio St.3d 433, 443-444, 1996-Ohio-194, 662 N.E.2d 1074.

¹⁸ See *Hoskins v. Aetna Life Inc. Co.* (1983) 6 Ohio St.3d 272, 452 N.E.2d 1315, paragraph one of the syllabus.

material to the transaction at hand, (c) made falsely, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.”¹⁹

{¶27} The fraud claim was based on Bortz’s and the Ground Lessees’ failure to disclose to Gator certain information, including the June understanding, the exercise of the options in November and the indemnification agreement, and MR and NKB’s purchase of the real estate. Bortz and the Ground Lessees maintain that the fraud claim failed because they were under no duty to disclose any information to Gator. We agree.

{¶28} In alleging fraud by omission, Gator had to show that Bortz or the Ground Lessees owed Gator a duty to disclose the information. Generally, under Ohio law, this duty arises in business transactions only where (1) the parties are in a fiduciary relationship; (2) both parties to the transaction understand that a special trust or confidence has been reposed; or (3) full disclosure is necessary to dispel misleading impressions that are or might have been created by partial revelation of the facts.²⁰ Gator argues that these parties acted fraudulently without alleging the source of a duty to disclose. And Gator fails to state grounds upon which it can subject these defendants to a duty to disclose this information.

{¶29} Moreover, even if there had been a duty to disclose, Gator did not allege any change in position and resulting injury from the omission, both necessary elements of a fraud claim. Thus, Gator failed to state a claim against these defendants for fraud.

¹⁹ *Burr v. Stark County Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101, paragraph two of the syllabus.

²⁰ See *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St.3d 98, 101, 519 N.E.2d 363.

{¶30} Gator’s conspiracy-to-defraud claim against these defendants fails also. The tort of civil conspiracy is “a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.”²¹ The acts of coconspirators are attributable to each other as a result of the agreement.²²

{¶31} A civil conspiracy claim requires an underlying tortious act that causes an injury.²³ Thus, if there is no underlying tortious act, there is no actionable civil conspiracy claim.²⁴ Gator argues that the underlying tortious act in this case was VHH’s and Harper’s fraud.

{¶32} We have already held that Gator failed to state a claim of fraud against VHH and Harper. Gator could not establish a civil conspiracy without an underlying tort, and therefore Gator failed to state a claim for conspiracy to defraud against the Ground Leasees and Bortz.

{¶33} Accordingly, we affirm the trial court’s dismissal of claims five and six of the complaint.²⁵

Dismissal of Tortious-Interference Claims Against Bortz

{¶34} First, we address Bortz’s argument that Gator has waived its right to challenge the dismissal of the tortious-interference claims against Bortz. A waiver is appropriate, according to Bortz, because Gator has failed to specifically identify these claims in the caption of the assignment of error challenging the dismissal of claims against Bortz. But Gator has specifically addressed the dismissal of these claims in its

²¹ *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 1998-Ohio-294, 700 N.E.2d 859 (internal citations omitted).

²² *Id.* at 476.

²³ *Id.*

²⁴ *Wolfer Ent., Inc. v. Overbrook Dev. Corp.* (1999), 132 Ohio App.3d 353, 359, 724 N.E.2d 1251.

²⁵ Gator has not appealed the trial court’s dismissal of the “aiding and abetting” fraud claim against the Ground Lessees and Bortz.

presentation of issues under the assignment of error. Although we do not condone the manner of Gator’s briefing, we conclude that Gator has provided sufficient notice to the other parties and to this court that it is also challenging the dismissal of the tortious-interference claims against Bortz. Thus, we reject Bortz’s waiver argument.

{¶35} Bortz argues that Gator failed to state a claim against him in his personal capacity for tortious interference. Bortz relies upon the Ohio Supreme Court’s decision in *Miller v. Wikel Mfg. Co, Inc.*²⁶ to support this argument. But Bortz applies the holding in *Miller* out of its appropriate context.

{¶36} The wrongdoer in a tortious-interference claim must be a nonparty to the contract.²⁷ Generally, an officer of a corporation is considered to be the same party as his principal—the corporation.²⁸ The issue in *Miller* was whether David Wikel, the president and majority stockholder of Wikel Manufacturing, could be liable for tortiously interfering with a contract between the plaintiff Miller and Wikel Manufacturing.²⁹ The *Miller* court held that Wikel could be considered a third-party outsider only “where his actions benefited him solely in a personal capacity.”³⁰

{¶37} In this case, there is no allegation that Bortz had a relationship with VHH that would have made him something other than a “third party” to the Gator-VHH agreement that he had allegedly interfered with. Thus, the holding of *Wikel* does not apply in this case for purposes of determining Bortz’s personal liability.

{¶38} Further, although Bortz cannot be held personally liable for an obligation of the limited-liability companies or the limited-liability partnership merely due to his

²⁶ *Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St.3d 76, 545 N.E.2d 76.

²⁷ *Castle Hill Holdings, LLC v. Al Hut, Inc.*, 8th Dist. No. 86442, 2006-Ohio-1353, ¶47, internal citations omitted.

²⁸ *Id.*; see, also, *Miller v. Wikel Mfg. Co.* (June 17, 1988), 6th Dist. No. E-86-66, affirmed in relevant part (1989), 46 Ohio St.3d 76, 545 N.E.2d 76.

²⁹ *Miller*, 46 Ohio St.3d at 79.

³⁰ *Id.*; see, also, *Smiddy v. Kinko’s Inc.*, 1st Dist. No. C-020222, 2003-Ohio-446, ¶9.

status as a member, manager, or partner,³¹ he can be held liable for his own tortious acts or omissions. Thus, the shield of limited liability does not insulate a wrongdoer from liability for his own tortious acts.³²

{¶39} In the complaint, Gator alleged that Bortz had directly “participated” in the improper and intentional interference. Because the complaint contains allegations against Bortz based on his own conduct, the trial court erred by determining that Gator had failed to properly plead a claim against Bortz in his personal capacity. If we were reviewing the claimed error under a summary-judgment standard, we might hold differently. But we are governed by the lenient rules of notice pleading. Accordingly, we reverse the trial court’s dismissal of Bortz from the tortious-interference claims.

Claim 10: Declaratory Judgment

{¶40} Gator also sought declaratory relief in this action, requesting the court to declare the ground leases invalid because (1) it “suspect[ed]” that the Ground Lessees had made improper lease payments in the past, and (2) the Ground Lessees had breached the terms of the ground leases by failing to pay rent to the equitable owner of the property (Gator) and by tortiously interfering with the sale of the property.

{¶41} Under R.C. 2721.02, courts “may declare rights, status, and other legal relations.” A declaratory judgment is not precluded by the existence of another adequate remedy in appropriate cases.³³

{¶42} A court may dismiss a claim for declaratory judgment and, therefore, not declare the rights of the parties, where there is no real justiciable controversy between the

³¹ R.C. 1775.14(B); R.C. 1705.48(A) and (B).

³² R.C. 1775.14(C)(1); R.C. 1705.48(C); 2002, Ltd. v. JRM Ltd., 5th Dist. No. 2006-CA-00247, 2007-Ohio-2464, ¶54-60. See, also, *Artam v. Star Tool & Die Corp.* (1989), 64 Ohio App.3d 388, 393, 581 N.E.2d 1110; *Young v. Featherstone Motors, Inc.* (1954), 97 Ohio App. 158, 171, 124 N.E.2d 158.

³³ R.C. 2721.02(A); Civ.R. 57.

parties, or where a declaratory judgment will not resolve the uncertainty or controversy.³⁴ The question whether to entertain a declaratory-judgment claim is committed to the discretion of the trial court.³⁵ Thus, “where a court determines that a controversy is so contingent that declaratory relief does not lie,” an appellate court will not reverse unless that decision “is clearly unreasonable.”³⁶

{¶43} Gator’s request for declaratory relief assumed that it was the equitable owner of the property and relied upon mere “suspicion.” We hold that Gator’s claim was so remote that it did not state a real justiciable controversy, and that the trial court was within its discretion in dismissing the declaratory-judgment claim.

Conclusion

{¶44} The trial court erred by dismissing Bortz from the lawsuit on the basis that Gator failed to state a claim against him in his personal capacity. Thus, we reverse that part of the trial court’s judgment and remand the case for further proceedings consistent with this decision. In all other respects, we affirm the judgment.

Judgment affirmed in part and reversed in part, and cause remanded.

SUNDERMANN, P.J., HENDON and CUNNINGHAM, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

³⁴ *Bilyeu v. Motorist Mut. Ins. Co.* (1973), 36 Ohio St.2d 35, 37, 303 N.E.2d 871.

³⁵ *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, paragraph two of the syllabus.

³⁶ *Bilyeu*, 36 Ohio St.2d 35, syllabus, followed by *Mid-American Fire & Cas. Co.*, supra.