[Cite as *TLOA Acquisitions, L.L.C. v. Unknown Heirs of Wagner*, 2021-Ohio-3678.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

TLOA ACQUISITIONS, L.L.C.,	:	
Plaintiff-Appellant,	:	No. 110002
v.	:	
UNKNOWN HEIRS OF ROOSEVELT WAGNER SR., ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 14, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-15-854179

Appearances:

Sandhu Law Group, L.L.C., and David T. Brady, *for appellant*.

Law Office of Paul B. Bellamy, J.D., Ph.D., and Paul B. Bellamy, *for appellee*.

MARY EILEEN KILBANE, J.:

{¶ 1} Plaintiff-appellant TLOA Acquisitions L.L.C. ("TLOA") appeals the trial court's September 3, 2020 journal entry adopting the magistrate's July 17, 2020 decision finding there was an enforceable agreement between TLOA and appellee

Kathina Vauss ("Vauss"). For the reasons that follow, we affirm the court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} The facts of this case were established during the bench trial and are undisputed. This case centers around payments made to resolve an *in rem* tax certificate foreclosure for the premises located at 4832 East 135th Street, Garfield Heights, Ohio. The property was owned by Roosevelt Wagner, Sr., Vauss's deceased father. Because of protracted probate litigation after his death, the taxes for the property had been unpaid for several years. On November 11, 2015, TLOA's predecessor-in-interest, Woods Cove III, L.L.C. ("Woods") filed a tax certificate foreclosure action to enforce two tax certificates for the delinquent taxes it held against the premises.

{¶ 3} On August 22, 2016, Vauss negotiated a payment plan over the telephone with Woods's servicer, Davenport Financial, to pay off the delinquent taxes as well as costs, interests, and attorney fees for filing the foreclosure action. At that time, Vauss agreed to pay $2,000 in a down payment over the phone and to a 36-month payment plan of $755.42 a month to pay off the remaining balance. She also agreed at that time not to object to Woods getting a judgment in the foreclosure case, and Woods agreed to refrain from executing the judgment with a sheriff sale of the property as long as she continued to make timely payments. Vauss testified regarding her handwritten notes from that day that detailed these terms. No additional terms or narrative agreement were discussed.

{¶ 4} One month later, sometime in September 2016, Vauss received a redemption payment package from Woods in the mail containing a cover letter and a written agreement with an authorization agreement form for electronic ACH payment, which detailed the above payment schedule. The written agreement contained the terms they had discussed, but it also contained additional terms not discussed. Vauss did not sign nor return the written agreement; however, she did sign the ACH form and returned it. No payments were debited from her account for the first two months, so Vauss called Davenport Financial again. They told her they had not received the ACH form. They never mentioned not receiving the written agreement. They resent the ACH form that she signed and sent back with its payment schedule. At no point did anyone follow up with her regarding the unsigned written agreement or insist it had to be returned or there would not be an agreement.

{¶ 5} Vauss testified and presented evidence that from September 2016 to January 2018, payments were debited from her account from Davenport Financial pursuant to the oral agreement and the written payment schedule. She testified that as of January 2018, she had paid $14,848.14 and that she had a remaining balance of $10,400.60. In January 2018, Vauss received notice that the tax certificates for the property had been assigned to TLOA. At that time, she contacted Davenport Financial and Woods and was told that her December 2017 and her January 2018 payments had been forwarded to TLOA as they intended to honor her agreement with Woods/ Davenport Financial. Vauss called TLOA and corresponded via email

regarding her prior payment agreement for the tax certificates. TLOA's responses reflected that they were aware of the agreement.

{¶ 6} Vauss testified it was her intent to continue with the payment plan and to make a payment in February 2018. On February 1, 2018, she had a telephone conversation with TLOA. Subsequently, she received a letter from the Sandhu Law Firm with a pay-off letter quote effective through January 2018. The quote included a charge of $2,883.51 in attorney fees in addition to the outstanding payment plan balance. Vauss testified regarding subsequent pay-off quotes she received from the law firm that added additional attorney fees.

{¶ 7} On February 13, 2018, TLOA was substituted as the plaintiff in this matter. On June 22, 2018, Vauss retained counsel and filed a motion for leave to file supplemental claims, pursuant to Civ.R. 15(E), in which she requested the court enforce the agreement, but also alleged breach of contract, promissory estoppel, and conversion claims against TLOA. The trial court granted this motion. On November 14, 2018, Vauss filed a motion for leave to file summary judgment regarding her supplemental claims, which the court granted and deemed the motion filed the next day. The court subsequently denied the motion for summary judgment on September 4, 2019, finding that while it was undisputed there was an agreement between Vauss and Woods, there were still material issues of fact to be determined regarding the terms of the payment plan.

{¶ 8} Trial on Vauss's supplemental claims was conducted on October 28, 2019. Vauss testified regarding the terms of the oral agreements and her

performance under the agreement, and she submitted exhibits to support her testimony, which included the payment schedule. On July 17, 2020, the magistrate issued a decision with detailed findings of fact and law based on the testimony heard and the exhibits accepted at the trial. The magistrate held there was an enforceable oral contract between TLOA and Vauss and required Vauss to pay off the remaining balance under her initial agreement, which was $10,400.60. The court also ordered TLOA to provide Vauss with the tax certificates for the premises upon receipt of these funds. On July 31, 2020, TLOA filed objections to the magistrate's decision pursuant to Civ.R. 53(D)(3)(b)(i) and stated the following four objections:

> The Magistrate's Decision conflicts with previous final judgment entries entered within the case, which remain in effect and have not been vacated;
>
> No oral contract existed between the parties—the written, unsigned contract controlled the duties between the parties;
>
> The existence of the written payment plan should have defeated the Promissory Estoppel claim;
>
> Even if there were a contract, Defendant, [Vauss], was in breach of the contract and TLOA's claims should be allowed to proceed.

TLOA did not state any objections regarding the statute of frauds, the amount Vauss was ordered to pay, or that interest should be applied to Vauss's alleged remaining balance since her last payment. Vauss also filed an objection to the magistrate's decision on August 10, 2020, where she alleged the magistrate failed to consider her conversion claim.

{¶ 9} On September 3, 2020, the court overruled these objections and adopted the magistrate's July 17, 2020 decision finding there was an enforceable

contract between Vauss and TLOA and that her equitable claim for promissory estoppel had merit as well. The court adopted the magistrate's orders for Vauss to pay the remaining balance of $10,400.60 and for TLOA to provide the tax certificates upon receipt of the funds.

{¶ 10} TLOA now appeals the trial court's September 3, 2020 journal entry adopting the magistrate's decision and asserts the following two assignments of error:

> I. The Trial Court erred as a matter of law in finding that an oral contract existed between the parties — the written, unsigned contract controlled the duties between the parties as it was required to be in writing under the Statute of Frauds.
>
> II. The Trial Court erred as a matter of law in ceasing the accrual of interest in January 2018, when the debt was not redeemed pursuant to relevant statute and Appellee breached the agreement.

LAW AND ANALYSIS

{¶ 11} The standard of review for an appeal from a bench trial has been succinctly stated by this court in *3637 Green Rd. Co. v. Specialized Component Sales Co.*, 2016-Ohio-5324, 69 N.E.3d 1083, ¶ 19 (8th Dist.):

> In a civil appeal from a bench trial, we apply a manifest weight standard of review, guided by a presumption that the trial court's findings are correct. *Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273 (1984). A judgment supported by some competent, credible evidence going to all the material elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. Where, however, the trial court's decision is based upon a question of law, we review the trial court's determination of that issue de novo. *See, e.g., Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 34 ("Courts review questions of law de novo."). "A finding of an error of law is a legitimate

> ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal* at 81.

In support of its first assignment of error, TLOA asserts the oral agreement does not comply with the statute of frauds such that the terms of the Woods's written unexecuted agreement sent to Vauss should control. It further asserts that this unexecuted written agreement should bar Vauss's equitable claim for promissory estoppel and that the court should have found Vauss in breach of the written agreement. These are questions of law, and therefore, our review shall be de novo. *Id*.

{¶ 12} The statute of frauds states that no action can be brought upon certain agreements as listed in R.C. 1335.05 unless the agreement is reduced to writing. *Blain's Folding Serv. v. Cincinnati Ins. Co.*, 2018-Ohio-959, 109 N.E.3d 177, ¶ 3 (8th Dist.). TLOA is correct that one such type of agreement listed is "a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them * * *," which may apply to the specific agreement here regarding the tax certificates because it concern one's interest in land. However, we need not reach this issue because in this case, the statute is not applicable on separate grounds.

{¶ 13} TLOA failed to object to the magistrate's decision regarding its finding that the statute of frauds did not apply, as required by Civ.R. 53(D)(3)(b)(i), which "[] imposes an affirmative duty on parties to submit timely, specific, written objections to the trial court, identifying any error of fact or law in the magistrate's

decision." *U.S. Bank, N.A. v. Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, ¶ 13. Civ.R. 53(D)(3)(b)(iv) states that:

> Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

Id. Therefore, "'when a party fails to properly object to a magistrate's decision in accordance with Civ.R. 53(D)(3), the party has forfeited the right to assign those issues as error on appeal.'" *Id*. at ¶ 14, citing *Mayiras v. Sunrise Motors Inc.*, 9th Dist. Summit No. 27931, 2017-Ohio-279, ¶ 16, quoting *Adams v. Adams*, 9th Dist. Wayne No. 13CA0022, 2014-Ohio-1327, ¶ 6.

{¶ 14} In this case, TLOA detailed four specific objections to the magistrate's decision, none of which alleged the statute of frauds applied. Therefore, TLOA has forfeited the right to raise this issue as an error on appeal. *Id*. Further, TLOA has not claimed plain error regarding this issue. Plain errors are errors in the judicial process that are clearly apparent on the face of the record and are only found in extremely rare cases with exceptional circumstances requiring its application to avoid a manifest miscarriage of justice. *Macintosh Farms Community Assn. v. Baker*, 8th Dist. Cuyahoga No. 102820, 2015-Ohio-5263, ¶ 8, citing *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 223, 480 N.E.2d 802 (1985). Upon our review of the record, it was not plain error for the trial court to find the statute of frauds did not apply to this agreement.

{¶ 15} First, the statute of frauds is an affirmative defense for the party against whom the unwritten agreement is being enforced and if not pleaded in an answer to a responsive pleading, this defense is deemed waived. *Blain's Folding Serv. v. Cincinnati Ins. Co.*, 2018-Ohio-959, 109 N.E.3d 177, ¶ 3 (8th Dist.) ("The statute of frauds is an affirmative defense, *see* Civ.R. 8(C), that is waived if not pleaded in an answer to a responsive pleading."), citing *Houser v. Ohio Historical Soc.*, 62 Ohio St.2d 77, 79, 403 N.E.2d 965 (1980); *DG Indus., L.L.C. v. McClure*, 7th Dist. Mahoning Nos. 11 MA 59 and 11 MA 69, 2012-Ohio-4035, ¶ 18. There is no evidence in the record, nor is it asserted anywhere by TLOA, that it ever pled this affirmative defense, which means even if the defense was applicable and not forfeited on appeal, it had already been waived at the time of the magistrate's decision. *Id*.

{¶ 16} Second, even if not forfeited and waived, the statute of frauds would not apply here regardless because of the equitable doctrine of partial performance, an exception to the statute of frauds. The doctrine "is applied in situations where it would be inequitable to permit the statute of frauds to operate and where the acts done sufficiently establish the alleged agreement to provide a safeguard against fraud in lieu of the statutory requirements." *3637 Green Rd. Co.*, 2016-Ohio-5324, 69 N.E.3d 1083, at ¶ 33, *see, e.g.*, *Crilow v. Wright*, 5th Dist. Holmes No. 10 CA 10, 2011-Ohio-159, ¶ 47 (holding the part performance of an oral contract for the sale of real estate can be sufficient to remove the contract from the operation of the statute).

{¶ 17} Partial performance sufficient to remove an agreement from the operation of the statute of frauds ""must consist of unequivocal acts by the party relying upon the agreement which are exclusively referable to the agreement."" *Id*., quoting *U.S. Bank N.A. v. Stewart*, 7th Dist. Columbiana No. 12 CO 56, 2015-Ohio-5469, ¶ 27, quoting *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St.2d 282, 286-287, 209 N.E.2d 194 (1965). "The party asserting part[ial] performance must have undertaken acts that 'changed his position to his detriment and make it impossible or impractical to place the parties in status quo.'" *Bear v. Troyer*, 5th Dist. Guernsey Nos. 15 CA 17 and 15 CA 24, 2016-Ohio-3363, ¶ 33, quoting *Delfino* at 287; *see also LHPT Columbus The, L.L.C. v. Capitol City Cardiology, Inc.*, 2014-Ohio-5247, 24 N.E.3d 712, ¶ 35 (10th Dist.).

{¶ 18} The undisputed facts of this case, established during the bench trial, indicate that Vauss made unequivocal acts by making monthly payments pursuant to a payment schedule with Woods. These acts exclusively refer to the oral agreement and could not refer to anything else. *3637 Green Rd. Co.* at ¶ 33. Further, Vauss's partial performance in making these payments changed her position to her detriment as she has lost not only money but the opportunity to clear her deceased father's property of any unpaid tax issues. *Id*. Therefore, even if the statute of frauds defense was not forfeited or waived and applied to this case, the doctrine of partial performance would apply to prevent the agreement from being barred by the statute.

{¶ 19} Therefore, because TLOA forfeited this issue on appeal and there are several reasons for the statute of frauds not to apply in this case, we find no plain error in the magistrate's decision that the agreement was not barred by the statute of frauds. TLOA's first assignment of error is overruled.

{¶ 20} TLOA's second assignment of error alleges the trial court erred by determining the accrual of interest did not continue after January 2018. In support of this error, TLOA alleges R.C. 5721.38 requires the payment of interest to redeem tax certificates and that Vauss's failure to continue to make payments after TLOA denied her agreement with Woods makes her liable for interest accrued during the pendency of litigation. TLOA cites no legal authorities to support these arguments, nor does it address the fact that, just as with its first assignment of error, it failed to raise this issue in its objections to the magistrate's decision as required by Civ.R. 53(D)(3)(b)(i). TLOA therefore waived all but plain error on appeal. *U.S. Bank, N.A. v. Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, ¶ 14 (""when a party fails to properly object to a magistrate's decision in accordance with Civ.R. 53(D)(3), the party has forfeited the right to assign those issues as error on appeal."""), quoting *Mayiras v. Sunrise Motors Inc.*, 2017-Ohio-279, 81 N.E.3d 937, ¶ 16 (9th Dist.), quoting *Adams v. Adams*, 9th Dist. Wayne No. 13CA0022, 2014-Ohio-1327, ¶ 6.

{¶ 21} In our review of the record for this issue, we find no plain error in the magistrate's decision. "The general measure of damages for breach of contract is the amount necessary to place the non-breaching party in the position he or she would

have been had the breaching party fully performed under the contract." *W & W Dev. Co. v. Hedrick*, 8th Dist. Cuyahoga No. 73965, 1999 Ohio App. LEXIS 1679, 18-19 (Apr. 15, 1999), citing *F. Ents., Inc. v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154, 159, 351 N.E.2d 121 (1976). Therefore, it was not plain error for the court to order Vauss to only pay the agreed upon remaining balance.

{¶ 22} The revised code section cited by TLOA, R.C. 5721.38, governs the payments required to be made to the county treasurer to either initiate foreclosure proceedings or redeem a tax certificate from a certificate holder. Nothing in this statute requires or even suggests TLOA is entitled to payment of any outstanding additional interest accrued during litigation for its refusal to honor the agreement in this case.

{¶ 23} Therefore, because TLOA failed to object to the magistrate's decision regarding this issue and because there is no plain error found in the court's award, we overrule TLOA's second assignment of error.

{¶ 24} The judgment of the lower court is hereby affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR

[Cite as *Doczi v. Blake*, 2021-Ohio-3433.]

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

ADAM C. DOCZI,	:	
	:	
Plaintiff-Appellant,	:	Case No. 20CA3
	:	
v.	:	
	:	DECISION AND
JOHN J. BLAKE, EXECUTOR OF THE ESTATE OF JOHN E. BLAKE, et al.,	:	JUDGMENT ENTRY
	:	
	:	
Defendants-Appellees.	:	

APPEARANCES:

Michael P. Ferguson, Kemp, Schaeffer & Rowe Co., LPA, Columbus, Ohio, for Appellant.

Heather R. Zilka and Nicholas S. Bobb, Pelini, Campbell & Williams LLC, Dublin, Ohio, for Appellee.

Smith, P.J.

{¶1} Appellant, Adam Doczi, appeals the trial court's grant of summary judgment in favor of Appellee, John J. Blake, Executor of the Estate of John E. Blake, which was issued on January 10, 2020. Doczi and decedent were involved in an automobile accident on November 30, 2016, which caused the death of decedent and caused serious personal injuries to Doczi. On appeal, Doczi contends that the trial court erred by granting the executor's motion for summary judgment.

Because we find that the trial court properly granted summary judgment in favor of the executor of the estate on the limited issue of whether Doczi can collect any potential award in this case from the assets of the estate, we affirm that portion of the order granting summary judgment. However, to the extent the trial court went beyond the limited issue of collection from the estate and also found that Doczi was completely barred from bringing his negligence claims against the estate in order to obtain a judgment and collect any potential award from available insurance coverage decedent had at the time of the accident, the trial court erred, as insurance proceeds would not constitute assets of the estate. Unfortunately, the trial court's summary judgment decision and order is not completely clear regarding the extent of the relief granted. Thus, we must also conclude that in the event the trial court did not intend to make such a finding in its grant of summary judgment, it later erred when it subsequently dismissed all of Doczi's remaining claims in its "Entry Dismissing Case," which was filed on February 12, 2020, after Doczi filed a voluntary notice of partial dismissal of the case as to the John Doe individual and corporate defendants on January 27, 2020.

{¶2} Because, it appears that the trial court's grant of summary judgment may have exceeded the relief sought by the executor in the summary judgment motion, the summary judgment order is affirmed in part and reversed in part. Additionally, to the extent the trial court later dismissed all of Doczi's remaining

claims against the estate in its February 12, 2020 dismissal order, that order is also reversed. More specifically, the grant of summary judgment is affirmed on the issue of whether Doczi can collect any judgment awarded in his favor from the assets of the estate, but it is reversed to the extent the grant of summary judgment extended to Doczi's remaining negligence claims against the estate, to which he may be entitled to collect any judgment awarded to him from any available insurance coverage, as such proceeds would not constitute an asset of the estate. Furthermore, to the extent the trial court's subsequent dismissal order dismissed Doczi's negligence claims that sought a liability determination against the decedent and other parties, the trial court erred and that portion of the order is also reversed. Accordingly, the judgments of the trial court are affirmed in part, reversed in part, and this matter is remanded to the trial court for further proceedings consistent with this opinion— of importance—a liability determination as to the decedent's estate.

FACTS

{¶3} On November 30, 2016, Adam Doczi and decedent, John E. Blake, were involved in a motor vehicle accident on State Route 7 in Meigs County, Ohio. John E. Blake was killed as a result of the accident and Doczi sustained serious and allegedly permanent injuries. Although the probate records are not part of the record on appeal, it appears from the record before us that Doczi attempted to

present a claim against decedent's estate on February 17, 2017. Doczi sent correspondence, through his counsel, to John J. Blake, the executor of decedent's estate. The written correspondence did not contain Doczi's address, as the claimant, but rather it listed his attorney's address. The correspondence did not list an amount being claimed. It appears counsel for the estate contacted Doczi's counsel regarding the claim and requested additional information. The additional information that was requested was not provided until April 18, 2018, at which time Doczi's counsel sent the attorney for the estate a letter detailing Doczi's injuries and setting forth a demand for $3,000,000.

{¶4} Thereafter, on November 5, 2018, Doczi filed a complaint with a jury demand in the Meigs County Court of Common Pleas naming as defendants John J. Blake, executor, Geico Insurance Company, as well as four John Doe individuals and four John Doe corporations. In his complaint, Doczi alleged that the decedent "negligently operated his motor vehicle by driving the wrong way on the road and/or failing to yield the right of way, among other acts of negligence, which caused a collision between his vehicle and the vehicle being operated by [Doczi]." Doczi further alleged that he had suffered permanent bodily injury, had incurred medical expenses in excess of $118,000 and that he expected to incur additional medical expenses, had suffered intense pain and suffering, as well as impairment of his ability to enjoy life and engage in daily activities. He further alleged an

impairment of earning capacity, property damages, and other damages. Doczi's complaint alleged that the John Doe individual and corporate defendants were "contractually responsible through a policy of insurance" and "legally responsible, negligent, or in some other actionable manner, liable for the events and occurrences" described, or had proximately caused his injuries and damages by virtue of either employing decedent or insuring decedent at the time of the accident.[1] Doczi further alleged that the medical expenses he had incurred were a direct and proximate result of decedent's negligence. It also appears Doczi's complaint sought a "declaration" that he:

> [was] insured for purposes of medical payments and UM/UIM coverages afforded under the motor vehicle insurance policies issued by Defendants John Doe Corporations #1-4, for the damages * * * sustained as a result of the accident and fall within the policies' insuring agreements for medical payments and UM/UIM coverages, [and] has satisfied all coverage conditions, and the policies' exclusions do not preclude coverage[.]
>
> {¶5} He sought another declaration, as follows:
>
> Defendant Geico Insurance Company and/or Defendants John Doe Corporations #1-4 are not entitled to reimbursement/subrogation unless and until Plaintiff is made whole and Plaintiff's litigation fees and expenses are deducted from any recovery; [and] a declaration that Plaintiff is entitled to medical payments benefits pursuant to a contract of insurance with Defendants John Doe Corporations #1-4[.]

[1]It appears from the record that decedent was retired at the time of the accident. Doczi raises no argument on appeal that decedent was actually employed at the time of the accident or that his actions in causing the accident at issue were within the scope of his employment.

{¶6} The executor filed an answer, as did Geico, who also filed a cross-claim against the decedent's estate. Thereafter, on February 20, 2019, Doczi and Geico filed a joint stipulation of partial dismissal of all claims against Geico, with prejudice, which noted the parties had reached a settlement. Geico subsequently dismissed its cross-claim against the executor of the estate.

{¶7} The case proceeded through discovery and on September 19, 2019, the executor for the estate filed a motion for summary judgment. The motion was limited in nature to the extent it only sought summary judgment on the issue of financial recovery directly from the estate. In his motion, the executor argued that Doczi was precluded from attempting to seek financial recovery from the estate because he had failed to properly present a timely claim against estate in accordance with R.C. 2117.06.

{¶8} Doczi opposed the motion, arguing that his claim had been properly presented and had satisfied the requirements of R.C. 2117.06. He also argued that, even assuming he had failed to properly present a claim against the estate, he was still entitled to pursue collection from any insurance coverage of decedent because he had properly filed a complaint against the estate within the two-year statute of limitations. He argued that he was entitled to pursue insurance coverage of the deceased tortfeasor regardless of whether he had timely presented a claim to the estate. The executor responded by essentially arguing that the issue of insurance

coverage was premature as Doczi had not yet obtained a judgment against the decedent's estate, and that the issue of insurance coverage would be determined if or when Doczi obtained a judgment. The executor further responded by clarifying that the motion for summary judgment only requested a final determination as to whether Doczi could actually recover from the estate if he were ever to obtain a judgment, and that issues regarding insurance coverage were "for another day."

{¶9} Although a hearing was held on the summary judgment motion on October 23, 2019, it appears that a problem occurred which prevented the hearing from being recorded. Thus, there is no hearing transcript in the record.[2] The trial court issued an order granting summary judgment to the estate on January 10, 2020. In its order, the trial court found that Doczi's presentment of a claim to the estate failed because it did not list the claimant's address, as required by R.C. 2117.06. The trial court found that the claim further failed because it did not set forth the amount being claimed. As to the insurance coverage issue, the trial court stated as follows:

> The Court is not persuaded that there would still be the issue for trial of whether or not Plaintiff can collect from any of the decedent's auto insurance. The issue of what, if any, insurance may cover a loss only applies once there is finding of liability, causation and damages.

[2]The trial court did, however, attempt to reconstruct an outline of the hearing from its notes and that outline is included in the appellate record. The trial court filed an entry submitting a "Settled and Approved Statement of Proceedings of the Motion's Hearing on October 23, 2019" on January 21, 2021.

{¶10} The Court reiterated in its order that the executor was "seeking a Summary Judgment that the Plaintiff cannot collect anything from the Estate of John E. Blake, asserting that the Plaintiff failed to comply with Ohio Revised Code Section 2117.06 which mandates how a claimant must present a claim against an estate." Citing a recent decision of the Supreme Court of Ohio, which determined strict compliance with R.C. 2117.06 was required, the trial court concluded as follows: "Defendant, John J. Blake, as Executor of the Estate of John E. Blake, is entitled to Summary Judgment on the issue of whether the Plaintiff can collect any potential award in this case from the Estate of John E. Blake." However, the court went on to state as follows before concluding:

> Plaintiff did not meet the statutory requirements of Ohio Revised Code Section 2117.06. Those statutory requirements are clear and unambiguous. Having failed to meet those statutory requirements, *Plaintiff's claim is barred against the Estate of John E. Blake*. Therefore, Summary Judgment in favor of the Defendant, Estate of John E. Blake is hereby GRANTED. (Emphasis added).

{¶11} Thus, although the trial court initially appeared to limit the grant of summary judgment to the issue of whether Doczi could collect any potential judgment from the assets of the estate, it went on to grant summary judgment and to arguably bar all claims against the estate, not just collection from the estate.

{¶12} It appears that despite filing this order, the case remained open and on the docket. However, it also appears from the record that there was some

confusion between the parties regarding whether the case would continue or whether it should have been terminated. As a result, the executor filed a motion on January 23, 2020, requesting that the trial court terminate the case. The motion stated that the court's prior grant of summary judgment disposed "of all of Plaintiff's remaining claims[,]" and that Doczi's counsel also perceived the summary judgment order as disposing "of all Plaintiff's claims * * *." Subsequently, on January 27, 2020, Doczi filed a notice of partial dismissal without prejudice partially dismissing the complaint as to the John Doe individual and corporate defendants. Thus, Doczi dismissed his claims as to the John Doe defendants, but did not voluntarily dismiss his claims in their entirety. However, the trial court thereafter filed an entry dismissing the case on February 12, 2020, stating that because summary judgment had been granted in favor of the executor of the estate, and because Doczi had dismissed the John Doe defendants, that "said case is DISMISSED."[3]

{¶13} Doczi's timely appeal is now before this Court for consideration. On appeal, he raises a single assignment of error for our review, contending that the trial court erred in granting summary judgment in favor of the executor of the estate.

[3] Despite the fact that this order was filed after the notice of appeal was filed, this Court is permitted to take judicial notice of the trial court's online docket as pertains to the matters contained in this appeal. *State v. Kempton*, 4th Dist. Ross No. 15CA3489, 2018-Ohio-928.

ASSIGNMENT OF ERROR

I. "THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE JOHN J. BLAKE, EXECUTOR OF THE ESTATE OF JOHN E. BLAKE'S MOTION FOR SUMMARY JUDGMENT."

{¶14} In his sole assignment of error, Doczi contends that the trial court erred in granting the executor's motion for summary judgment. He presents two issues for review under this assignment of error. First, he contends there exists a question with respect to whether the presentment of his claim against the estate complied with R.C. 2117.06. More specifically, he questions whether listing the claimant's attorney's address constitutes listing the "claimant's address" for purposes of R.C. 2117.06. He also questions whether a claimant is required to provide a specific amount sought when presenting a claim against an estate when the amount of the claim is uncertain because it is grounded in tort rather than contract. Second, Doczi contends there exists a question as to whether he was barred from pursuing his claim against the estate to recover automobile liability insurance proceeds.

Standard of Review

{¶15} Appellate review of summary judgment decisions is de novo and is 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; *Citibank v. Hine*, 2019-Ohio-464, 130 N.E.3d 924, ¶ 27 (4th Dist.). 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. *Capital One Bank (USA) N.A. v. Rose*, 4th Dist. Ross No. 18CA3628, 2018-Ohio-2209, ¶ 23; 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.

{¶16} 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 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; *Hine* at ¶ 28. 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. *See also Capital One Bank, supra*, at ¶ 24. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in favor of the nonmoving party. Civ.R. 56(C). *State ex rel. Deem v. Pomeroy*, 2018-Ohio-1120, 109 N.E.3d 30, ¶ 19 (4th Dist.).

Legal Analysis

{¶17} As set forth above, Doczi first contends that the trial court erred in granting summary judgment in favor of the estate because he properly presented his claim to the estate in accordance with R.C. 2117.06. R.C. 2117.06, which governs the presentation of creditor's claims against estates, provides in section (A)(1)(a)-(c) as follows:

> (A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:
> (1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:
> (a) To the executor or administrator in a writing;
> (b) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;
> (c) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within the appropriate time specified in division (B) of this section. For purposes of this division, if an executor or administrator is not a natural person, the writing shall be considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within the appropriate time specified in division (B) of this section.

{¶18} Importantly, the statute further provides as follows in section (B):

> (B) Except as provided in section 2117.061 of the Revised Code, all claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator

> is appointed during that six-month period. *Every claim presented shall set forth the claimant's address*. (Emphasis added).

{¶19} Further, the statute provides in section (C) as follows:

> (C) Except as provided in section 2117.061 of the Revised Code, *a claim that is not presented within six months after the death of the decedent shall be forever barred as to all parties*, including, but not limited to, devisees, legatees, and distributees. No payment shall be made on the claim and no action shall be maintained on the claim, except as otherwise provided in sections 2117.37 to 2117.42 of the Revised Code with reference to contingent claims. (Emphasis added).

{¶20} Here, the trial court found that Doczi's attempt to present a claim against the estate failed because it did not comply with the requirements of R.C. 2117.06. Although Doczi served both the executor and the attorney for the executor with the purported claim, the claim listed the address of Doczi's attorney rather than his own address and it also failed to state the amount of the claim. Doczi argued below and also argues on appeal that listing his attorney's address on the claim was proper because he was represented by counsel, and that it was effective because the attorney for the estate communicated with Doczi's counsel regarding the claim. However, the trial court rejected these arguments based on a recent decision issued by the Supreme Court of Ohio which makes clear that strict compliance with R.C. 2117.06 is required.[4]

[4]*Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242.

{¶21} Nonetheless, Doczi maintains on appeal that listing his attorney's address on the purported claim sufficiently complied with the requirements of R.C. 2117.06. He cites two cases in support of his argument; *Bush v. Estate of O'Dell*, 5th Dist. Licking No. CA-3705, 1992 WL 61283 and *Wulftange Iron Works, Inc. v. Lakes*, 1st Dist. Butler Nos. CA77-01-0001 and CA77-01-0002, 1979 WL 208619. In *Bush*, the trial court stated that "[a] claim against an estate need not be in any particular form as long as it substantially complies with R.C. 2117.06, and is recognized by the fiduciary as a claim against the estate." *Bush* at *1, citing *Gladman v. Carns*, 9 Ohio App.2d 135, 223 N.E.2d 378 (1964). The *Bush* court ultimately found that listing a claimant's attorney's address on a claim presented against an estate substantially complied with R.C. 2117.06, especially where the record indicated that the estate recognized the claim by mailing a rejection letter to the address listed on the claim. *Bush* at *2.

{¶22} In *Wulftange*, although the court found that the claim at issue was "inexcusably sloppy" and "legally slovenly to the extreme," it determined that the claimant's designation of his attorney's address instead of his own address was sufficient. *Wulftange* at *5 ("Nothing in the statute precludes such an address, no case has been cited so holding, nor has any reason been given us why such an address should not be deemed sufficient.") In reaching its decision, the *Wulftange*

court noted that "it must be born in mind that the Ohio Supreme Court has not insisted upon the literal and rigid interpretation of R.C. 2117.06 * * *." *Id.* at *6.

{¶23} However, both *Bush* and *Wulftange* were decided well before the Supreme Court of Ohio's more recent decision in *Wilson v. Lawrence*, *supra*. In *Wilson*, the Court considered the following question:

> * * * [W]hether a claimant seeking to file a claim against an estate meets the requirement of R.C. 2117.06(A)(1)(a) to "present" a claim "[t]o the executor or administrator in writing" when the claimant delivers the claim to someone who has not been appointed by a probate court to serve as the executor or administrator of the estate.

Wilson at ¶ 1.

{¶24} The purported claim in *Wilson* was delivered to the decedent's personal secretary as well as his accountant, but not to the executor of the decedent's estate. *Id.* at ¶ 4. The *Wilson* Court held as follows, despite the fact that the executor was timely forwarded the claim by those individuals:

> A claim against an estate must be timely presented in writing to the executor or administrator of the estate in order to meet the mandatory requirements of R.C. 2117.06(A)(1)(a), and under that subdivision, delivery of the claim to a person not appointed by the probate court who gives it to the executor or administrator fails to present a claim against the estate.

Wilson at syllabus.

{¶25} In reaching its decision, the *Wilson* Court rejected what it described as a "softened" standard of presentment, instead finding that the plain language of the

statute requires that creditors "shall" present their claims "to the executor or administrator[,]" that " ' "shall" means must[,]' " and that " '[t]he word "must" is mandatory.' " *Id.* at ¶ 7, 12 and 13, quoting *Application of Braden*, 105 Ohio App. 285, 286, 148 N.E.2d 83 (1st Dist. 1957), in turn citing *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107, 271 N.E.2d 834 (1971) and *Cleveland Ry. Co. v. Brescia*, 100 Ohio St. 267, 126 N.E. 51 (1919); *Willis v. Seeley*, 68 N.E.2d 484, 485 (C.P.1946). The Court ultimately determined that "[t]he statute is not ambiguous[,]" and that "we assume the General Assembly's commands in the statutory scheme were intended to be met with strict compliance." *Wilson* at ¶ 12, 14. Thus, the Court rejected Wilson's contention that substantial compliance with the statute should be permitted, based upon its reasoning that " 'a statute or rule that uses the word "shall" in describing an act to be performed is not generally susceptible of a "substantial compliance" standard of interpretation.' " *Wilson* at ¶ 14, quoting *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 28.

{¶26} After *Wilson* was decided, the Eighth District Court of Appeals held that delivery of a claim to the attorney for the executor of an estate likewise failed to comply with the claim presentment requirements set forth in R.C. 2117.06, despite the fact that the attorney gave the claim to the executor. *Stafford Law Co., L.P.A. v. Estate of Coleman*, 2021-Ohio-1097, -- N.E.3d -- (8th Dist.2021). In

reaching its decision, the *Stafford* court rejected the claimant's argument that the case was distinguishable from *Wilson* because the claim in *Wilson* was not served on the attorney for the estate, but rather the decedent's personal secretary and accountant. *Id.* at ¶ 28. The *Stafford* court declined "to apply a more relaxed standard" and instead held that *Wilson* constituted "binding precedent from the Ohio Supreme Court."

{¶27} We conclude that we are also bound by the Supreme Court of Ohio's decision in *Wilson* to hold that listing a claimant's attorney's address on a purported claim against an estate, rather than the claimant's own address, likewise fails to strictly comply with the requirements contained in R.C. 2117.06. Thus, because Doczi failed to meet this requirement for the proper presentment of a claim against the estate under R.C. 2117.06, the trial court did not err in granting summary judgment in favor of the estate on the issue of whether any judgment obtained against the estate could be collected from the assets of the estate. Further, having determined that Doczi's claim failed to provide the claimant's address as required by R.C. 2117.06, we need not reach the additional question of whether the purported claim also failed based upon the fact that Doczi failed to set forth the amount being sought, as the question has been rendered moot.

{¶28} Our analysis, however, does not end here. As indicated above, Doczi sets forth a second issue for review under this assignment of error. Dozci contends

that he was entitled to assert a claim against the estate beyond the six-month limitation set forth in R.C. 2117.06, in order to pursue recovery against an insurance policy held by the decedent. More specifically, Doczi argues that although reference was made below to a denial of insurance coverage on the part of decedent at the time of the accident, he "is entitled to pursue his claim against the Estate, and if successful is similarly entitled to pursue a supplemental complaint to determine insurance coverage in place at the time of the accident, pursuant to R.C. 3929.06." He claims the trial court erred to the extent it denied him that opportunity. Based upon the following, we agree with Doczi's argument.

{¶29} The executor's motion for summary judgment simply asked the trial court for judgment as a matter of law on the issue of whether or not Doczi should be precluded from financial recovery directly from the estate. In his memorandum contra to the executor's motion for summary judgment, Doczi argued that regardless of whether he had met the claim presentment requirements contained in R.C. 2117.06, he was still entitled to pursue a claim against the estate and to pursue any insurance coverage decedent had because he had filed his complaint for personal injury within the two-year statute of limitations for the filing of those types of claims. Doczi further argued that material issues of fact remained regarding insurance coverage of the decedent and that he was entitled to pursue insurance coverage of the deceased tortfeasor regardless of whether he timely

presented a claim to the estate. The executor thereafter responded by arguing that the issue of insurance coverage would only be determined if or when Doczi were to obtain a judgment, and that currently Doczi had not obtained a judgment. The executor further clarified that its motion for summary judgment only addressed the issue of whether Doczi could actually recover from the assets of the estate, in the event Doczi was able to obtain a judgment against the estate.

{¶30} However, as noted above, the trial court's summary judgment decision was unclear as to the scope of the court's ruling. In one sentence, the trial court stated that "Defendant, John J. Blake, as Executor of the Estate of John E. Blake, is entitled to Summary Judgment on the issue of whether the Plaintiff can collect any potential award in this case from the Estate of John E. Blake." We agree with this finding of the trial court. However, in another section of the order the trial court stated as follows:

> Plaintiff did not meet the statutory requirements of Ohio Revised Code Section 2117.06. Those statutory requirements are clear and unambiguous. Having failed to meet those statutory requirements, Plaintiff's claim is barred against the Estate of John E. Blake. Therefore, Summary Judgment in favor of the Defendant, estate of John E. Blake is hereby GRANTED.

Thus, the trial court arguably went on to hold that all of Doczi's claims were barred against the estate, rather than just that collection from the assets of the estate was barred. The trial court's intent, however, is unclear.

{¶31} It must be remembered that questions regarding the validity of the claim presentment in this case arose in the larger context of a complaint alleging personal injuries based upon the decedent's negligence that was filed in the court of common pleas, and was not simply a challenge to a probate court's determination that Doczi failed to properly present a claim against the estate in accordance with R.C. 2117.06. Thus, aside from the question of whether the claim was properly presented against the estate, the complaint at issue also set forth claims for personal injury, negligence, medical expenses, pain and suffering, property damage, and impairment of earning capacity, and it sought a liability determination on those issues. Somehow, this case appears to have been completely concluded by a grant of summary judgment on the issue of whether a claim had been properly presented against the estate, without addressing any of the other claims to the extent a liability determination was sought for purposes of collecting from assets outside of the estate, such as insurance coverage available to decedent at the time of the accident.

{¶32} In fact, the trial court stated as follows regarding the issue of insurance coverage in its summary judgment order:

> The Court is also not persuaded that there would still be the issue for trial of whether or not Plaintiff can collect from any of the decedent's auto insurance. The issue of what, if any, insurance may cover a loss applies once there is a finding of liability, causation and damages.

Thus, the court acknowledged that issues regarding liability and potential insurance coverage remained to be determined. Yet, in its order, the trial court arguably found any and all claims barred against the estate, beyond simply the question of whether any judgment could be collected from the assets of the estate.

{¶33} Alternatively, if the trial court did not intend to grant summary judgment on the claims themselves, rather than just the manner of collection in the event the claims were successful, the trial court subsequently erred when it dismissed the entire case on February 12, 2020, in response to Doczi's notice of voluntary dismissal of the complaint as to the John Doe individual and corporate defendants. Instead of simply dismissing the case as to those defendants, the trial court went on to state that because summary judgment had been granted in favor of the estate, and because Doczi had dismissed the John Does, "said case is dismissed." We conclude that to the extent the trial court's summary judgment order or its subsequent dismissal entry dismissed all remaining claims against the estate, the court erred and the orders must be reversed.

{¶34} Importantly, in addition to setting forth the requirements for the presentation of claims against an estate that seek collection from assets of the estate, R.C. 2117.06 also provides in section (G) as follows:

(G) Nothing in this section or in section 2117.07 of the Revised

> Code shall be construed to reduce the periods of limitation or periods prior to repose in section 2125.02[5] or Chapter 2305.[6] of the Revised Code, provided that no portion of any recovery on a claim brought pursuant to that section or any section in that chapter shall come from the assets of an estate unless the claim has been presented against the estate in accordance with Chapter 2117. of the Revised Code.

As set forth above, R.C. 2117.06(A), (B) and (C) only address presentment of claims to the estate which seek collection from assets of the estate. R.C. 2117.06(G) contemplates there may be other claims made against the estate that seek recovery from assets outside of the estate.

{¶35} Moreover, R.C. 3929.06 is entitled "Liability insurance applied to satisfaction of final judgment; supplemental complaint; coverage defenses[]" and provides, in pertinent part, as follows:

> (A)(1) If a court in a civil action enters a final judgment that awards damages to a plaintiff for injury, death, or loss to the person or property of the plaintiff or another person for whom the plaintiff is a legal representative and if, at the time that the cause of action accrued against the judgment debtor, the judgment debtor was insured against liability for that injury, death, or loss, the plaintiff or the plaintiff's successor in interest is entitled as judgment creditor to have an amount up to the remaining limit of liability coverage provided in the judgment debtor's policy of liability insurance applied to the satisfaction of the final judgment.
> (2) If, within thirty days after the entry of the final judgment referred to in division (A)(1) of this section, the insurer that issued the policy of liability insurance has not paid the judgment creditor an amount equal to the remaining limit of liability

[5]R.C. 2125.02 of the Ohio Revised Code governs actions for wrongful death.
[6]Chapter 2305 of the Ohio Revised Code governs jurisdiction and limitation of actions in common pleas courts with respect to actions based upon contract, tort and other miscellaneous grounds.

> coverage provided in that policy, the judgment creditor may file in the court that entered the final judgment a supplemental complaint against the insurer seeking the entry of a judgment ordering the insurer to pay the judgment creditor the requisite amount. Subject to division (C) of this section, the civil action based on the supplemental complaint shall proceed against the insurer in the same manner as the original civil action against the judgment debtor.
> (B) Division (A)(2) of this section does not authorize the commencement of a civil action against an insurer until a court enters the final judgment described in division (A)(1) of this section in the distinct civil action for damages between the plaintiff and an insured tortfeasor and until the expiration of the thirty-day period referred to in division (A)(2) of this section.

Thus, R.C. 3929.06 provides, as argued by Doczi, that should Doczi obtain a civil judgment awarding him damages as against the decedent's estate, and should it be determined that decedent had liability insurance coverage for the loss, Doczi is entitled to have his judgment satisfied by that coverage and is entitled to file a supplemental complaint against the insurer at that time seeking the entry of a judgment ordering the insurer to pay the judgment.

{¶36} In *Heuser v. Crum*, the Supreme Court of Ohio held as follows on this particular issue:

> Where it is alleged in an action for bodily injuries that such injuries were proximately caused by the negligence of a decedent and that he had a policy of insurance insuring him against liability for such negligence, and it does not appear that any other claims covered by such insurance have been asserted, such action may be brought against the executor or administrator of such decedent, and decedent's liability insurer, at any time within the statute of limitations on such actions without presenting a claim

> against the estate within the time specified in R.C. 2117.06 or R.C. 2177.07 * * *.

Heuser v. Crum, 31 Ohio St.2d 90, 285 N.E.2d 340, paragraph two of the syllabus (1972).

{¶37} In *Heuser*, the Court noted that the appellants were barred from presenting claims against the assets of the estate because they failed to present their claims to the administrator within the time limit set forth in R.C. 2117.06. *Id.* at 92. The Court further noted that appellants "were precluded from the terms of R.C. 3929.06 from instituting any action directly against the decedent's liability insurer because they failed to first obtain a 'final judgment' against the adminstratrix 'for loss or damage on account of bodily injury.' " *Id.* However, the Court went on discuss the fact that a 1963 amendment to R.C. 2117.07 (which language now appears in R.C. 2117.06(G)) provided that " '[n]othing in this section or in section 2117.06 * * * shall reduce the time mentioned in section * * * 2305.10 * * * provided that no portion of any recovery on a claim brought pursuant to such section * * * shall come from the assets of an estate * * *." *Id.*

{¶38} The Court further observed that R.C. 2305.10 provided for a two-year statute of limitations for actions for bodily injury. *Id.* In issuing its decision, the Court explained that "the amendments of R.C. 2117.07 [now R.C. 2117.06(G)] * * * were intended to alleviate the inequity that R.C. 2117.06 and 2117.07 worked upon parties who suffered bodily injury in some instances where the defendant

died before the lawsuit was filed." *Id.* at 94, citing Kent, Notification of Tort Claims Against Decedent's Estates: A Trap for the Unwary Lawyer, 35 Ohio Bar (No. 50) 155 (1962)." Here, as set forth above, Doczi sustained injuries in an automobile accident which was also the proximate cause of decedent's death. Much like Heuser, Doczi is barred from seeking recovery directly from the estate, as he failed to properly present a claim against the estate in compliance with R.C. 2117.06. Likewise, he cannot yet seek recovery directly from any insurance carrier because he has to first obtain a judgment against decedent's estate. Having filed his complaint for personal injuries within the two-year statute of limitations for filing such claims, Doczi was entitled to pursue a judgment against the estate and to seek recovery from assets outside the estate, as contemplated by both R.C. 2117.06(G) and R.C. 3929.06.

{¶39} In light of the foregoing, we conclude that the trial court correctly granted summary judgment in favor of the estate on the issue of whether Doczi properly presented a claim to the estate in accordance with R.C. 2117.06 and whether Doczi could collect any potential judgment from the assets of the estate. However, we also conclude that the trial court erred to the extent that its order granting summary judgment, and/or its subsequent order issued on February 12, 2020, dismissed the case in its entirety which, in effect, dismissed all remaining claims against the estate which sought a liability determination against decedent's

estate for purposes of collection of the judgment from assets outside of the estate, such as insurance policies providing coverage to the decedent at the time of the accident. Accordingly, that portion of the summary judgment order, as well as the February 12, 2020, order are hereby reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

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

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

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

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

Hess, J., Concurs in Judgment and Opinion.
Wilkin, J. Concurs in Judgment Only.

For the Court,

_____
Jason P. Smith
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.

[Cite as *Rimby v. Heritage Union Title Co., Ltd.*, 2021-Ohio-3635.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

JODY M. RIMBY,

Plaintiff-Appellant,

v.

HERITAGE UNION TITLE
COMPANY LTD., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 21 CO 0002

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2020 CV 345

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Michael O. Kivlighan, 3685 Stutz Drive, Suite 100, Canfield, Ohio 44406 and *Atty. Nicholas S. Cerni,* The Law office of Nicholas S. Cerni, 755 Boardman Canfield Road, Suite M-1, Youngstown, Ohio 44512 for Plaintiff-Appellant and

Atty. Emily K. Pidgeon, Clunk Law Office, 2040 South Union Avenue, Alliance, Ohio, 44601 for Defendant-Appellee Heritage Union Title Co. and *Atty. Jason M. Rebraca,* Johnson and Johnson Law Firm, 12 West Main. Street, Canfield, Ohio 44406 for Defendant-Appellee David J. Davanzo.

Dated: September 29, 2021

Robb, J.

{¶1} Plaintiff-Appellant Jody M. Rimby appeals the decision of the Columbiana County Common Pleas Court granting the motion to dismiss filed by Defendants-Appellees Heritage Union Title Company, Ltd. and David J. Davanzo in her action seeking a declaration on the release of escrowed funds and asserting tort claims against the title company. Appellant contends: her complaint sufficiently alleged an actual and justiciable controversy seeking declaratory relief; the court improperly considered items outside of the complaint in granting dismissal under Civ.R. 12(B)(6); the court applied an inapplicable section of bankruptcy law when stating her debt to her former spouse was non-dischargeable support; and the court improperly granted relief not sought by the defense or available upon dismissal when it ruled on the merits and ordered one defendant (the title company) to release the escrowed funds to the other defendant (Davanzo).

{¶2} Appellees contend the court lacked subject matter jurisdiction to rule on the request for declaratory relief. We conclude the court had jurisdiction and the court's ruling of dismissal and release of escrowed funds was improper. For the following reasons, the trial court's judgment is reversed, and the case is remanded for further proceedings.

STATEMENT OF THE CASE

{¶3} On September 28, 2020, Appellant filed a complaint seeking declaratory relief against the title company and Davanzo. The complaint also contained tort claims for unjust enrichment and conversion against the title company. The factual section of the complaint said Appellant sold her home in Leetonia on February 27, 2020 and the title company retained part of the proceeds in escrow due to the mistaken belief her former spouse (Davanzo) had a lien in the amount of $12,000 against the residence due to an

obligation in a May 26, 1999 decree of dissolution with an incorporated separation agreement.

{¶4} Attached as Exhibit A was a page from the closing disclosure, which said the title company would hold $12,005 for the clearing of title. Exhibit B was a page from the separation agreement in Columbiana County Common Pleas Court Case No. 1999 DR 157, which starts in the middle of the relevant sentence: "after the parties' child * * * reaches the age of eighteen years, Wife shall pay to Husband TWELVE THOUSAND DOLLARS ($12,000.00) as and for his interest in said real estate. Husband shall immediately quit claim his interest to wife." Exhibit C to the complaint was an October 27, 2004 bankruptcy schedule in which she listed Davanzo as a creditor for $12,000 as a result of an "unsecured property claim from prior divorce action".

{¶5} Appellant's complaint said: Davanzo never "filed for record" the decree in order to create a lien on the residence; she filed for Chapter 7 bankruptcy on July 30, 2004 listing the equity in the residence as $15,000; the real property exemption was $5,000 at the time; the trustee resolved the unprotected equity claim by having Appellant pay $5,000 into the bankruptcy estate; all creditors were notified to file a proof of claim since assets were recovered; Davanzo never filed a claim; and her debts were discharged on November 17, 2004.

{¶6} After setting forth these facts, count one of the complaint sought a declaration Appellant was entitled to the release of the escrowed funds as there was no existing claim or lien for which the title company could justifiably hold the proceeds from the sale of her home as any claim Davanzo had was discharged in bankruptcy. Count two claimed the title company was unjustly enriched at Appellant's expense by accepting and retaining her money and refusing to turn it over; she claimed this was willful, wanton, and reckless and sought punitive damages. Count three claimed the title company was liable to her for conversion by exercising unauthorized and wrongful dominion over her property.

{¶7} The title company filed a motion to dismiss. First, the motion claimed: their title search revealed the decree ordering Appellant to pay Davanzo $12,000 for his interest in the residence (listed a marital asset) within a reasonable time of the child turning 18; Appellant informed the title company the debt was discharged in her 2004

bankruptcy; Davanzo claimed it was not discharged; and the title company placed the amount in escrow due to the dispute and in accordance with the closing documents as the title company "is without direction as to its disposition."

{¶8} As to the unjust enrichment and conversion counts, the title company sought dismissal for failure to state a claim under Civ.R. 12(B)(6), arguing: there was a valid dispute over the dischargeability of the obligation to Davanzo at the time of closing; Appellant's allegations on the tort were bare legal conclusions; she signed the escrow agreement appointing the title company and approved the settlement holding back the escrowed funds; there was no benefit conferred on the title company by holding the funds; the funds were in an escrow account and not comingled; and the title company was not wrongfully exercising dominion or control over the escrowed funds.

{¶9} The title company attached: a copy of the signed purchase agreement appointing the title company as the insurer of title; an escrow agent appointment executed by Appellant on February 27, 2020; and additional pages from the closing disclosure in Appellant's Exhibit A (which showed the funds would be held in escrow to clear title) to demonstrate Appellant signed the closing disclosure on February 27, 2020.

{¶10} As to the claim for declaratory relief, the title company acknowledged a dispute over whether Appellant's obligation to Davanzo was discharged in the 2004 Bankruptcy, but the title company moved to dismiss under Civ.R. 12(B)(1) for lack of subject matter jurisdiction. The title company alleged the general division of the common pleas court lacked subject matter jurisdiction to apply a domestic relations decree, believing there was a separate domestic relations division.

{¶11} The title company suggested it would (after dismissal) file a Civ.R. 75(J) post-decree motion in 1999 DR 147 seeking to reopen and interplead the escrowed funds. In the alternative to dismissal of the declaratory action, it was suggested the court could transfer the matter to the domestic relations court after which the title company would move to interplead the funds.

{¶12} In supporting its *jurisdictional* argument, the title company reviewed bankruptcy law, acknowledging Appellant's bankruptcy was governed by law prior to the 2005 amendments to 11 U.S.C. 523 and citing subdivision (a)(5) (providing a debt is not dischargeable in bankruptcy if it is owed to a former spouse in connection with a court

order *for alimony, maintenance, or support*). The title company also cited the *Loveday* case from this court holding a spouse's failure to appear in the bankruptcy did not waive the right to challenge the dischargeability of the marital debt in a subsequent domestic relations proceeding as a state court has concurrent jurisdiction with the federal court on the issue of whether the debt was in the nature of spousal support. It was also noted the court was not confined to the complaint in ruling *on a Civ.R. 12(B)(1) motion*.

{¶13} Davanzo's motion to dismiss the declaratory relief claim said: "under 12(B)(6), this Court lacks jurisdiction over the subject matter of the complaint." He claimed the controversy must be raised in the domestic relations court as the bankruptcy court did not specifically rule on the matter and Appellant's claim was governed by the separation agreement in 1999 DR 157.

{¶14} Within this discussion, Davanzo said Appellant's obligation to pay him $12,000 was non-dischargeable in bankruptcy, citing pre-2005 amendment 11 USC 523(a)(5). He attached Appellant's November 7, 2004 general bankruptcy discharge as an exhibit, noting she was informed any debt in the nature of alimony, maintenance, or support is not discharged. Although not named as a defendant in the unjust enrichment and conversion counts, Davanzo agreed with the title company's dismissal motion for failure to state a tort claim, arguing an escrow account is necessarily a separate holding account at a bank which is not commingled with the funds of the escrow agent.

{¶15} Appellant's response to the two motions to dismiss said her complaint satisfied Civ.R. 8 by containing a short and plain statement of the claim showing she was entitled to relief. As for the claim for declaratory relief, she said a declaratory judgment would terminate the uncertainty or controversy, there was a real controversy between the parties which was justiciable in character, and speedy relief was necessary to preserve the parties' rights. Appellant noted the dismissal motions essentially admitted the existence of a redressable controversy by stating there is a dispute over who is entitled to the escrowed funds in light of the bankruptcy action. She also observed the motions attempted to raise facts outside of the complaint.

{¶16} As to the jurisdictional argument, Appellant claimed the law cited in the dismissal motions merely said federal and state courts have concurrent jurisdiction over whether a debt was dischargeable and did not specify the court in the domestic relations

case alone can declare the effect of a bankruptcy on an obligation in a dissolution decree. Addressing jurisdictional priority, she noted after the domestic relations case was final, her current action invoked the trial court's jurisdiction, before any attempt was made to invoke the concurrent jurisdiction of the court in the domestic relations case.

{¶17} As to the tort claims, Appellant said the title company cited facts outside of the complaint and presented affirmative defenses which were not the proper subject of a motion to dismiss, claiming she was entitled to discovery to determine if the funds were properly retained. It was also pointed out the two tort claims against the title company would not have been heard in the domestic relations case.

{¶18} In addressing the cited bankruptcy law, Appellant's response pointed out the defense relied on (a)(5), which provided alimony, maintenance, and spousal support are not dischargeable, but the defense failed to disclose (a)(15), which governed the discharge of *non-support* obligations in connection with divorce proceedings. The latter section required the creditor to request exception of the debt from discharge and required the bankruptcy court, after notice and hearing, to find the debtor lacked the ability to pay the debt or find discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. Appellant noted the post-2005 amendment states non-support divorce obligations are not dischargeable (even without an adversarial action balancing the hardships), but the parties agreed that amendment was inapplicable to her pre-existing bankruptcy discharge.

{¶19} On January 13, 2021, the trial court granted the motions to dismiss based on Civ.R. 12(B)(6). The court recited: the property was encumbered by the 1999 dissolution decree with the attached separation agreement; Appellant claimed the obligation to Davanzo was discharged in bankruptcy; Davanzo claimed it remained outstanding; and the title company held $12,005 in escrow for clearing title. The court then said Appellant claimed the obligation was discharged in bankruptcy but only attached a list of unsecured creditors and failed to attach a certified copy showing those debts were discharged. The court concluded a debt to a former spouse for alimony, maintenance, or support in connection with a separation agreement or divorce decree is not discharged in bankruptcy and the obligation was still owed to Davanzo. The court ordered the title

company to release the escrowed funds to him to satisfy the dissolution decree and separation agreement.

{¶20} Appellant filed a timely notice of appeal. Her brief raises four assignments of error. But first, we address Appellees' argument that the trial court lacked subject matter jurisdiction over the declaratory action.

JURISDICTION IN DECLARATORY ACTION ON ESCROWED FUNDS

{¶21} The trial court's dismissal entry cited Civ.R. 12(B)(6) law and made decisions on entitlement to the escrowed funds. The court did not order dismissal based on the subject matter jurisdiction argument presented in the dismissal motions of both Appellees on the claim for declaratory relief. As the court declared Davanzo was entitled to the escrowed funds and ordered the title company to release them to him, the court implicitly ruled it had subject matter jurisdiction. Accordingly and because Appellant agreed the court had jurisdiction, Appellant's brief does not address the trial court's jurisdiction.

{¶22} Instead of defending the trial court's decision in the declaratory action, Appellees both argue the trial court's dismissal of the request for declaratory relief can be upheld on other grounds: lack of subject matter jurisdiction. *See* App.R. 3(C)(2) (the appellee need not file a cross-appeal or raise a cross-assignment of error if the appellee intends to defend the order appealed by the appellant on a ground other than that relied on by the trial court and the appellee does not seek to change the order). Appellees acknowledge their argument only applies to the claim for declaratory relief as the common pleas court had jurisdiction over the tort claims.

{¶23} Civ.R. 12(B)(1) provides for a motion to dismiss for lack of subject matter jurisdiction. The question in ruling on "a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641, 644 (1989). The standard of review is de novo. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12.

{¶24} Davanzo relies on our *Loveday* case. In the context of determining whether the state court had jurisdiction, we held: "when dischargeability of a marital debt is not raised in bankruptcy court, then it is an issue which may be ruled on by a court with

concurrent jurisdiction after the discharge in bankruptcy." *Loveday v. Loveday*, 7th Dist. Belmont No. 02 BA 13, 2003-Ohio-1431, ¶ 18. *See also Kassicieh v. Mascotti*, 10th Dist. Franklin No. 05AP-684, 2007-Ohio-5079, ¶ 22. *Markley v. Markley*, 9th Dist. Wayne No. 07CA0085, 2008-Ohio-3208, ¶ 17 ("state courts have concurrent jurisdiction with bankruptcy courts to determine whether a particular obligation was a support obligation and, therefore, whether it was dischargeable in bankruptcy").

{¶25} Here, the parties agreed a state court has jurisdiction over the specific dischargeability question after the discharge in bankruptcy. Davanzo's dismissal motion attached the discharge, showing it was a general discharge with notice that a debt for support is not discharged. This was not part of the complaint, but in deciding a question of subject matter jurisdiction, the court can view items outside of the complaint. *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211, 214, 358 N.E.2d 526 (1976).

{¶26} We further observed in *Loveday*: "When determining whether [the former husband's] obligation to pay the marital debt was in the nature of spousal support, the trial court is not acquiring jurisdiction over [the former husband's) bankruptcy action. Instead, it is merely exercising its jurisdiction over *this divorce action*." (Emphasis added). *Loveday*, 7th Dist. No. 02 BA 13 at ¶ 22. We remanded to the domestic relations court because that is where the case originated upon the wife's motion for contempt filed in the domestic case. *See id. See also Markley*, 9th Dist. Wayne No. 07CA0085 (also arising from a contempt motion filed in the domestic case). These cases did not address whether the trial court can rule on the dischargeability issue in a declaratory judgment action or hold the matter can *only* be addressed within a prior domestic relations case.

{¶27} Davanzo relies on the jurisdictional priority rule and says the domestic relations court first acquired jurisdiction in the 1999 divorce case. Appellant's response to dismissal argued: because the domestic case had been completely adjudicated, there was concurrent jurisdiction until her declaratory judgment action invoked the jurisdiction of the general division. She also pointed out her action *was not an attempt to attack or modify the prior decree*. There was also an underlying suggestion that if Appellees wished to ensure the matter proceeded in the domestic relations case, the title company should have filed the Civ.R. 75(J) motion in the domestic relations case and interpleaded

the funds (as the title company's brief voiced it wanted to do) or Davanzo should have filed a motion to enforce or for contempt in the domestic relations case. The title company asked the court to alternatively transfer the case to the domestic relations "division," but the court chose not to do so.

{¶28} A court has full power to enforce its divorce decree or decree of dissolution with attached separation agreement. R.C. 3105.65(B). Civ.R. 75(J) provides: "The continuing jurisdiction of the court shall be invoked by motion filed in the original action, notice of which shall be served in the manner provided for the service of process * * *." Yet, this procedure was not invoked before (or even after) Appellant filed her civil complaint.

{¶29} The jurisdictional priority rule provides: between courts of concurrent jurisdiction, the court who first acquires jurisdiction over an action acquires jurisdiction, to the exclusion of all tribunals, to adjudicate upon the whole action and to settle the rights of the parties. *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 393, 678 N.E.2d 549 (1997). Once a court acquires jurisdiction of a cause of action, its authority continues until the matter is "completely and finally disposed of" and a court of concurrent jurisdiction cannot interfere. *John Weenink & Sons Co. v. Court of Common Pleas of Cuyahoga Cty.*, 150 Ohio St. 349, 82 N.E.2d 730 (1948), paragraphs two and three of syllabus.

{¶30} "The jurisdictional-priority rule requires that both actions be currently pending" and *does not apply where a final judgment had been entered before the second action was filed*. *State ex rel. Consortium For Econ. & Cmty. Dev. v. Russo*, 151 Ohio St.3d 129, 2017-Ohio-8133, 86 N.E.3d 327, ¶ 11. We also note "the jurisdictional-priority rule has no applicability when the cases are pending in the same court." *Id.* at ¶ 14. "[I]f two actions are pending in the same court before different judges, the parties have a method for vindicating those interests that is not available when the cases are filed in different courts—a motion for consolidation." *Id.* at ¶ 10.

{¶31} Here, the final judgment in the domestic relations case was entered long ago. There was no pending domestic relations case when this case was filed in order to invoke the jurisdictional priority rule. *See Rossi v. Rossi*, 7th Dist. Mahoning No. 20 MA 0086, 2021-Ohio-2348, ¶ 26 (stating the domestic relations division was divested of jurisdiction after the final judgment until a new filing in the case; where a contempt action

was filed in the domestic relations division after a contract action was filed in the general division based on a stock redemption agreement, note, and personal guaranty underlying a separation agreement).

{¶32} We next point out, "the priority doctrine does not apply where two courts have exclusive jurisdiction over different issues." *In re B.N.S.*, 2020-Ohio-4413, 158 N.E.3d 712, ¶ 18 (12th Dist.). The general jurisdiction of courts of common pleas is provided in R.C. 2305.01, which provides "original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts." *Seventh Urban Inc. v. University Circle*, 67 Ohio St.2d 19, 22, 423 N.E.2d 1070 (1981) (the Ohio Constitution does not confer jurisdiction to the courts but simply grants the "capacity to receive jurisdiction" to a common pleas court in all cases once the legislature grants the court power to exercise jurisdiction).

{¶33} "The court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters." R.C. 3105.011. Notably, "R.C. 2301.03 establishes the jurisdiction of the state's domestic relations courts in separate subsections; their jurisdiction can vary by county." *Pula v. Pula-Branch*, 129 Ohio St.3d 196, 2011-Ohio-2896, 951 N.E.2d 72, ¶ 6. *If* the statute "grants all the power in marriage-related cases to the domestic relations division, [it is] thus limiting the ability of other common pleas judges to preside over those cases. *Id.* We shall address whether a statute grants such power to a domestic relations division in the pertinent locality in a moment.

{¶34} We first mention that *after* a final divorce decree is entered, proceedings that may include interpreting a domestic relations decree have been permitted to occur in a division other than the domestic relation division, especially when other parties are involved. In a case cited by Appellant below, the Eighth District said "[w]hen a division of the common pleas has completed the disposition of a matter that is within the division's special assignment and later a controversy arises implicating both matters within the specialty and other issues not peculiar to it," the general and domestic relations divisions have concurrent jurisdiction. *Price v. Price*, 16 Ohio App.3d 93, 95, 474 N.E.2d 662 (8th Dist.1984), citing *Wagner v. Wagner*, 6th Dist. Lucas No. L-83-072 (July 22, 1983). The court was not dissuaded by the argument that Cuyahoga County had a separate statutory

domestic relations division and judge with jurisdiction. *See* R.C. 2301.03 (L)(1) (designating domestic relations division judges who shall exercise the same powers and jurisdiction as other common pleas court judges of Cuyahoga County and have "all the powers relating to all" cases of divorce, dissolution, legal separation, and annulment, unless a case is assigned to a court of common pleas judge for a special reason).

{¶35} More on point, the Eighth District has applied the general holding to a case seeking to enforce the divorce decree: "Because the domestic relations court had issued a judgment granting the divorce and providing for the division of the property, the domestic relations court no longer had exclusive jurisdiction over the matter and the common pleas court, which has concurrent jurisdiction, had the power to enforce the order of the domestic relations court." *Khan v. Hughes*, 8th Dist. Cuyahoga No. 102651, 2015-Ohio-4502, ¶ 14

{¶36} The Eleventh District recently held the general division had subject matter jurisdiction in a declaratory judgment action to determine title to alleged estate assets, where the court was required to interpret a separation agreement incorporated into a divorce decree. *Szokan v. Stevens*, 11th Dist. Lake No. 2020-L-020, 2020-Ohio-7001, ¶ 16-27. The court pointed out the jurisdiction of the domestic relations court ended with the decree and was not then re-invoked by motion. *Id.* at ¶ 28.

{¶37} We need not further delve into an analysis on the particular subject of a general division interpreting a domestic relations division's decree as that is not the situation before this court. The above-reviewed cases (which allowed general division to exercise jurisdiction after the final decree) involved counties with separate statutory domestic relations divisions with a statutorily assigned domestic relations judge.

{¶38} Columbiana County does not have a separate statutory domestic relations division or judge. *See* R.C. 2301.02(B) (providing the terms for two common pleas court judges in Columbiana County); R.C. 2301.03 (not naming a domestic relations division judge for Columbiana County). In counties where R.C. 2301.03 does not create a separate domestic relations division, "the division of cases is for administrative purposes and consequently does not limit the court of common pleas' subject-matter jurisdiction." *Reimund v. Hanna*, 3d Dist. Hancock No. 5-06-09, 2006-Ohio-6848, ¶ 10, 14 ("the

administrative division of cases in Hancock County did not limit the court of common pleas' subject-matter jurisdiction").[1]

{¶39} "Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18. "[T]he court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to 'all matters at law and in equity that are not denied to it.' " *Id.* at ¶ 20. The prior domestic relations decree was filed in the same court as this complaint. Therefore, the same statutory division of the common pleas court presiding in this case would have presided over any motion which could have been filed under the domestic relations case. The court of common pleas in Columbiana County had the power to entertain and adjudicate the claim. The trial court implicitly and correctly found that its jurisdiction extended to the matters presented in Appellant's complaint. Accordingly, Appellees' argument on subject matter jurisdiction is overruled.

ASSIGNMENTS OF ERROR 1-2: DISMISSAL

{¶40} Appellant's first two assignments of error state:

"The Trial Court erred in granting Defendant's Motion to Dismiss."

"The Trial Court erred as a matter of law by failing to apply the correct standard of review when granting the defendant's motion to dismiss the plaintiff's complaint based upon allegations and assertions contained outside the pleadings."

{¶41} A Civ.R. 12(B)(6) dismissal for failure to state a claim upon which relief can be granted is a procedural motion that tests the legal sufficiency of the complaint and the trial court can therefore only view the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). "To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a pleader is ordinarily not required to allege in the complaint every fact he or she intends to prove;

[1] *See generally Centerburg RE LLC v. Centerburg Pointe Inc.*, 2014-Ohio-4846, 22 N.E.3d 296, ¶ 41 (5th Dist.) (rejecting the defendant's argument that the general division lacked subject matter jurisdiction in a civil action because the plaintiff's claims related to marital debt); *Cook v. Cook*, 6th Dist. Wood No. WD-89-21 (Jan. 26, 1990) (finding the trial court had jurisdiction over a partition action even though a dissolution decree ordered the husband to pay the wife one-half of the proceeds upon the sale of the marital property). We note there were no statutory domestic relations divisions in Knox or Wood Counties, the counties involved in those cases.

such facts may not be available until after discovery." *Id.* at 549. To dismiss a complaint on this ground, the court must find beyond doubt that the plaintiff can prove no set of facts warranting relief after it presumes all factual allegations in the complaint are true and construes all reasonable inferences in the plaintiff's favor. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994).

{¶42} "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Civ.R. 56." *Adlaka v. Giannini*, 7th Dist. Mahoning No. 05 MA 105, 2006-Ohio-4611, ¶ 29, citing Civ.R. 12(B). "This process requires conversion and notice thereof." *Id.*, citing *State ex rel. Boggs v. Springfield Loc. Sch. Dist.*, 72 Ohio St.3d 94, 96, 647 N.E.2d 788 (1995). "[W]here the motion to dismiss, which relies on evidence outside of the complaint, is granted without conversion and notification, the dismissal is reversible." *Scardina v. Ghannam*, 7th Dist. Mahoning No. 04-MA-81, 2005-Ohio-3315, ¶ 18.

{¶43} Appellant states the trial court improperly considered items outside of the face of the complaint and items "outside of this action" without converting the motion and providing notice. Appellees complain Appellant's brief does not specify exactly what items outside of the complaint she believes the court improperly considered. Yet, Appellant refers to the trial court's consideration of "separate, predecessor actions."

{¶44} Appellant's complaint contained various allegations about the domestic relations case and the bankruptcy case, and she attached related documents to her complaint: a bankruptcy schedule, one page from the separation agreement which was incorporated into the dissolution decree, and the first page of the closing disclosure. "Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss." *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997), fn. 1 (considering various articles and public health studies attached to the complaint). *See also State ex rel. GMS Mgt. Co. Inc. v. Vivo*, 7th Dist. Mahoning No. 10 MA 1, 2010-Ohio-4184, ¶ 14 (considering written correspondence attached to the complaint); *Adlaka v. Giannini*, 7th Dist. Mahoning No. 05 MA 105, 2006-Ohio-4611 ("Where documents are

attached or incorporated into the complaint, the face of the complaint to be evaluated includes those documents.").

{¶45} Hence, the court could properly consider the attachments to Appellant's complaint. Yet, this would not allow the court's perusal of the files in other cases, even cases in the same court. As discussed further infra, the trial court could not have considered attachments to the dismissal motions in ruling on a Civ.R. 12(B)(6) motion.

{¶46} On the opposite side of the coin, there is the issue of an item the trial court found lacking from the complaint. (Davanzo attached the general discharge to his dismissal motion while arguing only the domestic court could exercise jurisdiction to determine whether the obligation was in the nature of support and fell outside of the discharge.) The trial court's dismissal entry said: "The Plaintiff filed an action in bankruptcy court and claims the debt owed to Defendant, David J. Davanzo, was discharged. However, the only documentation attached to her complaint is a Schedule F form listing her unsecured creditors. There is no certified copy showing those debts were discharged."

{¶47} Nevertheless, a plaintiff need not prove their claim in the complaint. *See Pfalzgraf v. Miley*, 7th Dist. Monroe No. 19 MO 0006, 2019-Ohio-4920, ¶ 13. We note Civ.R. 10(D) states if a claim is based on an account or written instrument, a copy of the account or instrument must be attached to the complaint. Even if this could be construed as applying to the bankruptcy discharge, neither a dismissal motion nor the trial court cited this rule. A failure to attach a document under Civ.R. 10(D) is contested by Civ.R. 12(E) motion for a more definite statement: "a party can still plead a prima facie case in such circumstances even without attaching the account or written agreement to the complaint. Thus, the complaint will survive a motion to dismiss for failure to state a claim." *Fletcher v. University Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 11.

{¶48} Appellant states her complaint alleged sufficient facts to survive a motion to dismiss for failure to state a claim for a declaratory judgment. Pursuant to R.C. 2721.02(A), "courts of record may declare rights, status, and other legal relations whether

or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter."[2]

{¶49} Appellant emphasizes the complaint set forth facts as to the elements for declaratory relief: a real controversy between the parties, which is justiciable and ripe for speedy relief in order to preserve the rights of the parties which may be impaired. *See Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973). She points out a declaratory judgment would terminate the uncertainty or controversy as required by R.C. 2721.07. "[T]he abuse-of-discretion standard applies to the review of a trial court's holding regarding justiciability; once a trial court determines that a matter is appropriate for declaratory judgment, its holdings regarding questions of law are reviewed on a de novo basis." *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 13.

{¶50} Notably, the title company did not argue Appellant insufficiently stated a claim for declaratory relief as to the escrowed funds, raising only subject matter jurisdiction on this claim. Davanzo cited Civ.R. 12(B)(6) but said, "under 12(B)(6), this Court lacks subject matter jurisdiction" (and opined she failed to state a claim as to the torts against the title company). He mentioned his theory the debt was non-dischargeable support but did not say she failed to state a claim for which relief could be granted. On appeal, Appellees do not defend the court's use of Civ.R. 12(B)(6) as to the claim for declaratory relief.

{¶51} As Appellant points out, the complaint must merely contain a short and plain statement of the claim showing entitlement to relief and a demand for relief. Civ.R. 8(A). "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991) (some facts may not be available until discovery). Appellant's complaint stated her debt to Appellant was discharged in bankruptcy; if true, she was entitled to the escrowed funds.

[2] *See also* R.C. 2721.03 (a person who is interested under a written contract or whose rights, status, or other legal relations are affected by a statute or contract may have determined questions of construction or validity arising under the instrument or statute and obtain a declaration of rights, status, or other legal relations under it); R.C. 2721.06 (the general powers conferred by R.C. 2721.02(A) are not limited or restricted by R.C. 2721.03).

Her complaint did not review the entire bankruptcy case or cite bankruptcy law on support, which was mentioned in the dismissal motions to support the contention that the matter should be heard by a domestic relations court.

{¶52} In effect, the trial court found the complaint sufficiently set forth a claim that could be addressed via declaratory relief as it essentially granted declaratory relief to Davanzo, entering a negative declaration as to Appellant's right to the escrowed funds. *See* R.C. 2721.02(A) ("The declaration may be either affirmative or negative in form and effect."). The court entered a merit ruling on the complaint and declared rights while dismissing the complaint under Civ.R. 12(B)(6), which actions are contradictory.[3]

{¶53} Appellant complains the trial court erred in ruling on the merits of the case without converting the dismissal motion to a summary judgment motion. A Civ.R. 12(B)(6) "motion to dismiss is a procedural tool which tests the sufficiency of the complaint, not the sufficiency of the evidence. Tests of the sufficiency of the evidence are handled utilizing motions for summary judgment under Civ.R. 56." *Pfalzgraf*, 7th Dist. No. 19 MO 0006 at ¶ 13. The request for declaratory relief was a cause of action, not a motion. "The court may advance on the trial list the hearing of an action for a declaratory judgment," but the procedure for obtaining a declaratory judgment "shall be in accordance with" the Rules of Civil Procedure. Civ.R. 57.

{¶54} The trial court stated although many debts are discharged in bankruptcy, a debt for a former spouse for alimony, maintenance, or support of the former spouse in connection with a separation agreement or divorce decree is not discharged in bankruptcy. The court then concluded the obligation was still owed by Appellant to Davanzo (and ordered the title company to release the escrowed funds to him). Constrained to the face of the complaint, the trial court thus concluded Appellant's obligation in the decree to pay Davanzo $12,000 for his interest in the house after their child turned 18 was a debt for the support of Davanzo.

[3] A Civ.R. 12(B)(6) motion attacks the sufficiency of the complaint and is not to be utilized to summarily review the merits of a cause of action. *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 17. An exception exists in original actions on the merit issue of whether there is an adequate remedy at law; still, such dismissal based on the merits is "unusual" and to be granted with utmost caution. *Id.* at ¶ 18. A declaration for a defendant upon a dismissal is even more extreme than the denial of a writ (where a petitioner had an adequate remedy at law).

{¶55} However, the trial court's decision is unjustified. The portion of the record properly viewed in ruling on the dismissal motion does not include the entire dissolution decree with incorporated separation agreement but only one page from the separation agreement. This page does not even contain the complete sentence in the decree concerning the debt at issue; the page begins in the middle of the sentence establishing the debt at issue. We also note the record does not show the child's age, which appears to be the triggering event for the debt becoming due (rather than the date of the sale of the house). Likewise, the bankruptcy discharge was attached to the dismissal motion, not the complaint, and was viewable for 12(B)(1) but not for 12(B)(6).

{¶56} Furthermore, the court applied bankruptcy statutes in rendering a legal holding on the merits of the action where Appellant was only aware she was responding to a motion to dismiss on jurisdiction (and failure to state a claim on the torts). And, the court cited bankruptcy law on support which does not appear applicable from the face of the complaint. This leads to Appellant's next assignment of error.

ASSIGNMENT OF ERROR THREE: BANKRUPTCY LAW

{¶57} Even if the court could apply the bankruptcy law to the face of the complaint to ascertain if a debt was dischargeable at this earlier stage of the proceedings, Appellant states in her third assignment of error:

"The Trial Court erred in its interpretation of Bankruptcy Law."

{¶58} The parties agree to the bankruptcy law in effect during Appellant's 2004 bankruptcy applied. The motions to dismiss cited (a)(5) of 11 U.S.C. 523, while Appellant cited to (a)(15) and (c). The trial court cited (a)(5) in declaring Davanzo was entitled to the escrowed funds, suggesting the court was under the impression all monetary obligations in a domestic relations decree are support, maintenance, or alimony and not dischargeable.

{¶59} Pursuant to (a)(5), a discharge "does not discharge an individual debtor from any debt * * * to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record * * *." 11 U.S.C. 523(a)(5) ("but not to the extent that * * * such debt includes a liability designated as alimony,

maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support").

{¶60} At the time of Appellant's bankruptcy filing, 11 U.S.C. 523(a)(15) stated the discharge:

> does not discharge an individual debtor from any debt * * * not of the kind described in paragraph 5 that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—
>
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor * * *."

11 U.S.C. 523 (a)(15).

{¶61} Yet, 11 U.S.C 523(c)(1) provided: "the debtor shall be discharged from a debt of a kind specified in paragraph * * * (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph * * * (15) * * * of subsection (a) of this section."[4]

{¶62} In applying (a)(5), the trial court quoted from our *Loveday* case. In *Loveday*, the former wife filed a post-decree contempt action in a domestic relations case due to the husband's failure to pay the marital debts, including the mortgage on the marital

[4] We note (a)(15) was added to 11 U.S.C. 523 in October 22, 1994, long before Appellant's bankruptcy. We also note after Appellant's bankruptcy, Congress eliminated from (a)(15) "unless" and the subsequent provisions in (A) and (B); Congress also eliminated the reference to (15) from (c)(1). This meant property settlements and other decree obligations under (a)(15) became non-dischargeable in the same manner as domestic support obligations in (a)(5). *See* April 20, 2005 amendments (effective 180 days thereafter). The parties agree the 2005 amendments are inapplicable here.

residence (which was subjected to foreclosure after she was granted the right to possession until the children turned 21). The former husband argued his bankruptcy discharged the obligation he owed under the divorce decree to pay these marital debts. The trial court believed it lacked jurisdiction to determine if the obligation was in the nature of support so as to be non-dischargeable in bankruptcy.

{¶63} After citing 11 U.S.C. 523(a)(5), we said there was no rule requiring the former wife to raise dischargeability of support in bankruptcy court. *Loveday v. Loveday*, 7th Dist. Belmont No. 02 BA 13, 2003-Ohio-1431, ¶ 10, 15. The former wife did not waive the ability to argue the obligation was non-dischargeable merely because she did not appear in bankruptcy court as that court did not specifically rule the debt was dischargeable. *Id.* at ¶ 24-25 (the general discharge is not res judicata on dischargeability). We thus remanded, concluding the state court had jurisdiction to determine whether the obligation in the decree was non-dischargeable support. The case did not stand for the proposition that a property division obligation was dischargeable support. The debtor-husband in *Loveday* was obligated to pay the mortgage while the wife had the right to possess the residence, which is distinct from the debtor-Appellant obtaining the deed to the house and owing the other spouse his share years in the future.

{¶64} Appellant's complaint did not admit her debt to Davanzo was in the nature of support. She attached a page from the separation agreement incorporated into the 1999 dissolution decree, and this page gave no indication Appellant's obligation to pay Davanzo $12,000 for his quit-claimed interest in the residence after the child turned 18 was in the nature of *Appellant's support of* Davanzo. She was the debtor in the bankruptcy, and the question under (a)(5) would be whether her debt to her former spouse was for alimony to, maintenance for, or support *of her former spouse*.

{¶65} As to (a)(15), which was raised in response to the motions to dismiss and which was not addressed by the trial court, Appellant's complaint did not admit Davanzo filed a request under 11 USC 523(c) (which would have prompted the bankruptcy court to hold a hearing after notice to determine whether the debt should be specified as dischargeable). The complaint alleged: Davanzo was listed in her bankruptcy as an unsecured creditor who was owed $12,000 from a property claim in a prior divorce; he

received notice to file a proof of claim in the bankruptcy court as assets had been recovered; and he failed to do so.

{¶66} Davanzo does not address (a)(5) or (a)(15) on appeal, urging merely the general division of the common pleas court lacked jurisdiction to issue a declaratory judgment about the effect of a bankruptcy discharge on an obligation in a domestic relations decree. The title company cites (a)(5), suggesting if that issue should be determined in domestic relations court, then any issue of dischargeability of an obligation in the decree should be determined in domestic relations court as it is for the domestic relations court to ensure the obligation is not one in support in order to apply (a)(15). *See* 11 U.S.C. 523(a)(15) (referring to an obligation that is "not of the kind described in paragraph 5 that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree * * *"). As below, the title company does not argue Appellant failed to state a claim upon which relief could be granted under Civ.R. 12(B)(6) as to the claim for declaratory relief, and Davanzo only argues it in so far as he believes subject matter jurisdiction falls under Civ.R. 12(B)(6) as opposed to (B)(1) as cited by the title company.

{¶67} Davanzo would need to establish how a property distribution ordering Appellant to pay Davanzo for his share of the house in the future (when the child turns 18) could be considered her obligation to provide support or maintenance of Davanzo or alimony owed to him. From the face of the complaint (including its attachments) and the dismissal arguments, it was erroneous to conclude Appellant could prove no set of facts entitling her to the escrowed funds. In any event, this is another topic remaining for a summary judgment motion if Davanzo feels he can legally support making it.

{¶68} As an aside, Davanzo's brief mentions he would argue on remand that even if the personal debt to him was discharged, he had in rem debt (a lien) which would not have been discharged; he claims he will argue the debt created in the decree was a lien because it specifically related to property and Appellant did not affirmatively seek to discharge a lien in her bankruptcy. The latter fact is outside of the complaint and again the entire decree is not part of the record on a motion to dismiss.

{¶69} For a lien to be created in a divorce decree, it must contain sufficient indicators of an intention to make particular identified property a security for an obligation

(or the debtor's promise to transfer the property as security). *Michael v. Miller*, 8th Dist. Cuyahoga No. 109121, 2021-Ohio-307, ¶ 48 (where the decree said "Husband shall secure his obligations by assigning to Wife his interest in [a corporation] to secure the payments due to Wife. Husband shall execute a Cognovit Note and stock pledge to secure the payments"). *See also Farrey v. Sanderfoot*, 500 U.S. 291, 293, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991) (where the divorce decree specifically granted the creditor spouse a "lien" against the real property). *Compare* 5/26/99 Decree. The only relevant line we have from the parties decree states Davanzo shall immediately quit-claim his interest to Appellant and Appellant shall pay Davanzo $12,000 "as and for his interest in said real estate" after their child turns 18 (rather than upon the sale).

{¶70} Davanzo acknowledges this issue is not before this court. And, he did not raise the issue below (specifying the issue was whether the debt was support and urging the question could only be answered by the domestic relations court). Appellant was thus unable to respond to the topic in the trial court. This was another topic to be addressed in summary judgment motions, rather than through a dismissal, and it does not appear the court rendered a judgment on this unidentified ground.

TORT CLAIMS

{¶71} As for the unjust enrichment and conversion counts filed against only the title company, Appellant's brief does not mention the elements of either tort and does not specifically address the dismissal of those counts. Yet, this appears to be because the trial court's dismissal of the case seemed wholly based on the ruling that Davanzo was entitled to the escrowed funds; i.e., if she was not entitled to the escrowed funds, then she failed to state a claim against the title company for unjust enrichment or conversion.

{¶72} The title company asked for Civ.R. 12(B)(6) dismissal for failure to state a claim on unjust enrichment and conversion because: there was a valid dispute at the time of closing over the dischargeability of Appellant's obligation to Davanzo in the decree; her allegations were bare legal conclusions; she signed the escrow agreement appointing the title company; she approved the settlement holding back the escrowed funds; there was no benefit conferred on the title company by holding the funds; the funds were in an escrow account and not comingled; and the title company was not wrongfully exercising dominion or control over the escrowed funds.

{¶73} Appellant indicated she had no knowledge as to where the funds were located, pointing to the purpose of discovery. In any event, as her response to the dismissal motion pointed out, the title company relied on evidence outside of the complaint to support their authority to hold the funds. The title company attached evidence to the dismissal motion showing: she signed a purchase agreement naming the title company; she signed the closing statement which showed the $12,000 amount was being held to clear title; and she signed an escrow agent agreement.

{¶74} These items were not part of the face of the complaint and could not be considered at the Civ.R. 12(B)(6) stage. The items constituted evidence appropriate for incorporation into a summary judgment motion in the manner outlined in Civ.R. 56. *See Adlaka*, 7th Dist. No. 05 MA 105 at ¶ 29, citing Civ.R. 12(B). If the court had relied on this evidence, the dismissal would be reversible as there was no conversion to summary judgment or notice. *Id.*, citing *State ex rel. Boggs*, 72 Ohio St.3d at 96; *Scardina*, 7th Dist. No. 04-MA-81 at ¶ 18. Regardless, as the court's dismissal of the torts was based on its decision that Davanzo was entitled to the escrowed funds, the dismissal of tort claims must be reversed as we are reversing the dismissal of the action for declaratory relief.

ASSIGNMENT OF ERROR 4: ORDER TO RELEASE FUNDS

{¶75} Appellant's fourth and final assignment of error contends:

"The trial court improperly granted relief not prayed for by the litigants."

{¶76} Appellant observes a pleading, including a counterclaim or cross-claim, must contain a short and plain statement of the claim showing entitlement to relief and a demand for relief. Civ.R. 8(A). There was no counterclaim or cross-claim filed here as the stage of the case had not yet reached the stage for filing a responsive pleading due to the motions to dismiss under Civ.R. 12(B). As Appellant points out, neither dismissal motion asked for an order releasing the escrowed funds to Davanzo, and such order would be inconsistent with a dismissal for failure to state a claim.

{¶77} Davanzo concedes the trial court could not order the release of the funds to him, but this concession is based on his contention the common pleas court lacked jurisdiction to rule on Appellant's request for declaratory relief. The title company claims, if this appeal had not been filed, it would have filed a post-decree motion under

Civ.R.75(J), seeking to reopen 99 DR 157 and interplead the funds (regardless of the order to release the funds to Davanzo).

{¶78} As recognized supra, although the trial court granted motions to dismiss, the court essentially ruled on the merits of the declaratory judgment action and entered declaratory judgment in favor of Davanzo. We note a negative declaration is permitted in a declaratory judgment action. *See* R.C. 2721.02(A) ("The declaration may be either affirmative or negative in form and effect."). However, as explained above, the procedure for obtaining a declaratory judgment shall be in accordance with the Rules of Civil Procedure. Civ.R. 57. As we are reversing the dismissal of the case under the prior analysis finding further proceedings were necessary, the trial court's corresponding order to release the escrowed funds to Davanzo is reversed as well.

{¶79} In conclusion, the court had subject matter jurisdiction, but the dismissal of the complaint accompanied by a negative declaration was not appropriate. The trial court's judgment is reversed, and the case is remanded for further proceedings.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed. The court had subject matter jurisdiction, but the dismissal of the complaint accompanied by a negative declaration was not appropriate. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.