[Cite as *Besch v. Williams*, 2021-Ohio-4316.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

R. TODD BESCH, :

Plaintiff-Appellant, :

No. 110470

v. :

JOHN PHILLIP WILLIAMS, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 9, 2021

Civil Appeal from the Rocky River Municipal Court
Case No. 19 CVF 2869

Appearances:

J.W. Krueger Law, L.L.C., and Jeffrey W. Krueger, *for appellant*.

Ronald A. Skingle, *for appellee* Floyd Williams III.

ANITA LASTER MAYS, P.J.:

I. Introduction

{¶ 1} Plaintiff-appellant R. Todd Besch ("Besch") appeals the trial court's denial of summary judgment in favor of defendants-appellees John Phillip Williams

("JW") and Floyd Williams III ("FW"). JW was represented by counsel, and FW appeared pro se below. On appeal, FW is represented by counsel.[1] We affirm.

II. Background and Facts

{¶ 2} For ease of reference, we extract a portion of the background from the magistrate decision adopted by the trial court as its final judgment in this matter:

> Plaintiff has brought this case to recover an alleged cash down payment of $8,500 to defendants for a siding job on the grounds of breach of contract and violation of the Consumer Sales Practices Act. Defendants maintain they never received the cash deposit and that they never entered into a contract with Plaintiff for the pertinent job.
>
> Upon testimony [the] parties agree to the fact that two siding jobs for Plaintiff were quoted by Defendant JPW with JPW's nephew Defendant Floyd as the go between. One job, which is not part of this lawsuit, was in Olmsted Falls and for which deposit of $7,200 by check was paid by Plaintiff, was started by JPW and then due to illness became delayed and led to a rift between the parties. The other job in Fairview which is the subject of this lawsuit, was negotiated around the same time but the deposit of $8,500 was allegedly made in cash and JPW alleges to never have agreed to the contract and never started the job and no materials [were] purchased. Plaintiff alleges that both the $7,200 check for the earlier job and the $8,500 cash for the later job and proposals were all in the envelope given to Floyd to take to his uncle, Defendant JPW.
>
> Plaintiff has no checks or receipts to show the alleged $8,500 payment although there is a notation on one proposal of that as an amount but it is not marked "received" or "paid." Defendants both deny any knowledge or receipt of the $8,500. Plaintiff also offers evidence of going to his safety deposit box around the date in question and the deposition of an associate who knew he went to the bank that day however there is no evidence [of] the transaction at the bank. Finally, Plaintiff relies on Defendant Floyd Williams failure or late response to Plaintiff's Requests for Admissions. However, in this case the Motion for Summary Judgment was denied and the Defendant Floyd has now testified and been cross-examined at trial. Said contradictory

[1] Though both JW and FW are named as appellees, appellant's sole challenge is to the grant of summary judgment in favor of FW.

> testimony has been considered in case law as an implicit motion to withdraw admissions, especially if it allows a case to be decided on its merits instead of a Rules of Civil Procedure technicality. *C.S.J. v. S.E.J.*, 2020-Ohio-492, 8th Dist. [Cuyahoga No. 108390].
>
> In summary, based on the evidence and testimony presented, this is a case of "he said, he said" and Plaintiff has not established his burden of proof by a preponderance of the evidence.
>
> Therefore judgment is recommended for the Defendants at Plaintiff's costs.

Magistrate decision, p.1 (Mar. 25, 2021), adopted by the judge and journalized same date, Journal book No. 2019, Journal page No. 2869.

III. Assignment of Error

{¶ 3} The single assigned error posed by Besch is "the trial court erred in denying Appellant's motion for summary judgment on his claims against Appellee."

IV. Reviewability

{¶ 4} As a preliminary matter, we sua sponte consider whether the denial of summary judgment may be reviewed on appeal after a trial and judgment on the merits.

> [T]he Ohio Supreme Court has held that a trial court's denial of a motion for summary judgment is reviewable on appeal by the movant from a subsequent adverse final judgment. *Balson v. Dodds*, 62 Ohio St.2d 287, 289, 405 N.E.2d 293 (1980). Furthermore, any error in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was raised. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156, 642 N.E.2d 615 (1994). Accordingly, Ohio courts have reviewed denials of summary judgment motions when a judgment has been entered in favor of the nonmoving party. *Id.*

Eberhard Architects, L.L.C. v. Schottenstein, Zox & Dunn Co., L.P.A., 8th Dist. Cuyahoga No. 102088, 2015-Ohio-2519, ¶ 10.

{¶ 5} In this case, a judgment has been entered in favor of the nonmoving party. Thus, the issue is reviewable.

V. Standard of Review

{¶ 6} "We review an appeal from summary judgment under a de novo standard." *Nationstar Mtge. L.L.C. v. Jessie*, 8th Dist. Cuyahoga No. 109394, 2021-Ohio-439, ¶ 14, citing *Baiko v. Mays*, 140 Ohio App.3d 1, 10, 746 N.E.2d 618 (8th Dist.2000). "Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Id.*, citing N.*E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 192, 699 N.E.2d 534 (8th Dist.1997).

{¶ 7} Additionally,

> [u]nder Civ.R. 56, summary judgment is appropriate when no genuine issue exists as to any material fact and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law. On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

Maddy v. Honeywell Internatl. Inc., 8th Dist. Cuyahoga Nos. 108698 and 109066, 2020-Ohio-3969, ¶ 70.

VI. Analysis

{¶ 8} Besch challenges the trial court's denial of summary judgment solely as to FW. Though there is no notice of service of discovery in the record, Besch states that the discovery requests were served on appellees on March 2, 2020, and that the responses were due on April 1, 2020. According to Besch, seven days elapsed prior to implementation of the Covid tolling statute that ended on July 30, 2020.[2] Besch calculates that the responses were due on August 24, 2020. FW delivered responses to the office of Besch's counsel on October 23, 2020.[3] On November 1, 2020, FW filed notice in the form of correspondence with the court advising that the discovery responses were delivered on October 23, 2020, and denying Besch's claims. A copy of the responses was attached.

{¶ 9} Civ.R. 36 governs requests for admissions and provides in pertinent part:

(A) Availability; procedures for use * * *

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[2] *In re Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court & Use of Technology*, 158 Ohio St.3d 1447, 2020-Ohio-1166, 141 N.E.3d 974.

[3] According to the record, on March 2, 2020, the trial court granted 60 days for the parties to complete discovery. On August 17, 2020, the trial court granted an additional 60 days to complete discovery with dispositive motions due by November 30, 2020. Sixty days from August 17, 2020, beginning the count on the next day, was Saturday, October 17, 2020, which would make the discovery due Monday, October 19, 2020, four days prior to FW's delivery. The motion for summary judgment was filed November 3, 2020.

> (1) Each matter of which an admission is requested shall be separately set forth. The party to whom the requests for admissions have been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

Civ.R. 36(A)(1).

{¶ 10} Civ.R. 36(B) adds that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." *Id*.

> "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Subject to the provisions of Rule 16 governing modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against the party in any other proceeding.

Id.

{¶ 11} Besch offers that FW's failure to timely respond to the request for admissions constitutes "'written admissions' for summary judgment purposes and may be relied upon to demonstrate the absence of a genuine issue of material fact for trial under Civ.R. 56(C)." *Garfield Estates, L.L.C. v. Whittington*, 2021-Ohio-211, 167 N.E.3d 113, ¶ 23 (8th Dist.), quoting Civ.R. 56(C).

{¶ 12} Besch further adds that FW is not excused from compliance with the Rules of Civil Procedure because "'pro se litigants are presumed to have knowledge of the law and legal procedures and * * * they are held to the same standard as litigants who are represented by counsel.'" *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, 800 N.E.2d 25, at ¶ 10, quoting *Sabouri v. Ohio Dept. of Job & Family Servs.*, 145 Ohio App.3d 651, 654, 763 N.E.2d 1238 (8th Dist.2001).

{¶ 13} Thus, Besch argues that FW's failure to respond established that: (1) the proposal attached to the complaint was a true and accurate copy of the services to be performed by JW or one of his businesses, (2) FW served as the contact person between JW and Besch regarding the project, (3) JW authorized FW to modify the proposal, and (4) FW received $8,500 from Besch for the work that JW was to perform pursuant to the proposal.

{¶ 14} The magistrate determined on summary judgment:

> Plaintiff's Motion for Summary Judgment and Defendants' opposition thereto came on for consideration on this day. The Court finds that summary judgment is not appropriate in this case because the parties strongly disagree as to genuine issues of material fact and Plaintiff has failed to provide evidence either by cancelled check or bank statement of the alleged payment of $8500 to Defendants that is the primary claim of the case. Therefore, Plaintiff's Motion for Summary Judgment is denied.

Journal entry (Jan. 15, 2021), issued by the magistrate.

{¶ 15} At the oral argument of this case, Besch emphasized the trial court's failure to specifically address the request-for-admissions issue in the entry denying summary judgment. The record does not indicate that Besch pursued relief from or

reconsideration of the decision below. Besch has not acknowledged the failure, invoked the plain-error doctrine on appeal, or advanced the same in Besch's appellate briefs. In fact, an appellant is prevented from arguing plain error on appeal where appellant failed to advance the argument in the brief. *Ohio Valley Business Advisors, L.L.C. v. AER Invest. Corp.*, 8th Dist. Cuyahoga No. 104771, 2017-Ohio-1283, ¶ 19, citing *Coleman v. Coleman*, 9th Dist. Summit No. 27592, 2015-Ohio-2500, ¶ 9.

{¶ 16} Also,

> [i]n appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

Id. at ¶ 20, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus. We do not find that to be the case here.

{¶ 17} JW timely responded to the discovery requests on July 23, 2020, and supplemented the responses on September 10, 2020. JW's answer, discovery responses contained in the record, brief in opposition to summary judgment, and supporting affidavit echoed the position JW has advanced throughout the proceedings. JW explained that Besch and JW concurrently negotiated for JW to perform work on the Olmsted Falls and the Fairview Park properties owned by Besch. The omission of that information by Besch, JW argued, painted an inaccurate picture.

{¶ 18} Both FW and JW filed answers that deny FW's involvement with the Fairview Park project except for the retrieval and delivery of an envelope that JW states contained the proposals for each property and a check for $7,200 from Besch for the Olmsted Falls project deposit. FW and JW confirm this in subsequent filings. FW denied knowledge of the contents of the envelope. JW also maintains he did not agree to or receive the $8,500 cash deposit for Fairview Park that Besch allegedly delivered to FW in an envelope that contained two proposals, a check and $8,500 in cash without receipt or other evidence of payment.

{¶ 19} The trial court denied summary judgment due to genuine issues of material facts in the case and the inability of Besch to demonstrate the $8,500 payment. Thus, Besch seeks to have his facts admitted by FW's untimely submission to pursue the breach of contract and consumer protection claims under joint and several liability since the judgment at trial was in favor of both.

{¶ 20} We explained in *C.S.J.*, 8th Dist. Cuyahoga No. 108390, 2020-Ohio-492, that a "trial court has discretion — upon motion by a party — to permit the withdrawal or amendment of Civ.R. 36(A) admissions." *Id*. at ¶ 12, citing *6750 BMS, L.L.C. v. Drentlau*, 2016-Ohio-1385, 62 N.E.3d 928, ¶ 15 (8th Dist.). The rule "does not specify that a formal motion is required nor does the rule identify a time when the motion must be filed." *Id*., citing *Balson v. Dodds*, 62 Ohio St.2d 287, 290, 405 N.E. 2d 293 (1980), fn. 2.

{¶ 21} In fact,

> [c]ourts have accepted — absent a written or oral motion to withdraw — various challenges to the truth of an admission as implicit motions to withdraw. *Ezzo v. Ezzo*, 11th Dist. Ashtabula No. 2018-A-0059, 2019-Ohio-2395, ¶ 29. *See Balson* [*v. Dodds*, 62 Ohio St.2d 287, 290, 405 N.E. 2d 293 (1980),] at fn. 2 (contesting the truth of admissions for purposes of a summary judgment motion serves as evidence of a motion to withdraw the admissions); *see also 6750 BMS* [2016-Ohio-1385, 62 N.E.3d 928], at ¶ 17 (a party's response to a motion to declare admissions admitted and simultaneously filing an answer to the requests for admissions act as a motion to withdraw); and *Haskett v. Haskett*, 11th Dist. Lake No. 2011-L-155, 2013-Ohio-145, ¶ 25 (challenging the truth of the admissions during trial proceedings represents a motion to withdraw).

Id. at ¶ 12.

{¶ 22} As we emphasized in *C.S.J.*,

> [t]he court may permit the withdrawal if it will aid in presenting the merits of the case and the party who obtained the admission fails to satisfy the court that withdrawal will prejudice him in maintaining his action. *Balson v. Dodds*, 62 Ohio St.2d 287 [405 N.E.2d 293 (1980)], paragraph two of the syllabus. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.

Id. at ¶ 13, quoting *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d 66, 67, 485 N.E.2d 1052 (1985).

{¶ 23} Also, "[a] trial court has complete discretion concerning discovery matters." *C.S.J.* at ¶ 17, citing *JP Morgan Chase Bank v. Stevens*, 8th Dist. Cuyahoga No. 104835, 2017-Ohio-7165, ¶ 17. "A trial court's discovery decisions — including the acceptance of a party's withdrawal of Civ.R. 36(A) admissions — will not be disturbed on appeal unless there is an abuse of discretion." *Id*., citing *Bayview Loan Serv. v. St. Cyr*, 2017-Ohio-2758, 90 N.E.3d 321, ¶ 20, 26 (8th Dist.).

{¶ 24} Thus, Besch "must establish that the trial court's decision was 'more than an error in judgment' and that it was 'unreasonable, arbitrary, or unconscionable.'" *Beegle v. S. Pointe Hosp.*, 8th Dist. Cuyahoga No. 96017, 2011-Ohio-3591, ¶ 15, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Besch has failed to meet this threshold.

{¶ 25} We reiterate that in the final judgment entry, the trial court determined that Besch may not rely on the failure of FW to timely respond to the request for admissions to support entitlement to summary judgment. The trial court emphasized that FW's trial testimony contradicted the admissions and was determined by the trial court to constitute an "implicit motion to withdraw admissions" particularly because "it allows a case to be decided on the merits instead of a Rules of Civil Procedure technicality. *C.S.J.*, [8th Dist. Cuyahoga No. 108390,] 2020-Ohio-492." Magistrate decision, p.1 (Mar. 25, 2021), adopted by the judge and journalized same date, Journal book No. 2019, Journal page No. 2869.

{¶ 26} Based on a review of the record, we do not find that the trial court's decision to consider FW's testimony as an effective withdrawal of admissions constitutes an abuse of discretion. Besch has not demonstrated that he was prejudiced thereby, other than the apparent inability to prove the facts at trial by a preponderance of the evidence without invocation of the procedural technicality. We do not find that the trial court erred in denying Besch's motion for summary judgment.

{¶ 27} The assignment of error lacks merit.

VII. Conclusion

{¶ 28} The trial court's judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal 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.

ANITA LASTER MAYS, PRESIDING JUDGE

LISA B. FORBES, J., and
EILEEN T. GALLAGHER, J., CONCUR