

ORIGINAL

IN THE SUPREME COURT OF OHIO

WILLIAM WILSON,

Plaintiffs-Appellee,

-vs.-

NICHOLAS E. WARD, et al.,

Defendants-Appellant.

Supreme Court Case No.

09-1090

On Appeal from the Ninth District  
Court of Appeals, Medina County,  
Case No. 08CA0071-M

Medina County Court of Common  
Pleas Case No. 06 CIV 1360

MEMEORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT HOWARD C. STABILE.

HARRY A. TIPPING (0011206)  
CHRISTOPHER A. TIPPING (0064914)  
**STARK & KNOLL CO., L.P.A.**  
3475 Ridgewood Road  
Akron, Ohio 44333-3163  
(330) 376-3300/ FAX (330) 376-6237  
[ctipping@stark-knoll.com](mailto:ctipping@stark-knoll.com)

*Counsel for Appellant, Howard Stabile*

JOHN M. MANOS  
**JOHN M. MANOS CO., L.P.A.**  
739 East 140th Street  
Cleveland, Ohio 44110

*Counsel for Appellee, William Wilson*

FILED  
JUN 15 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

	Page
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS .....	2
LAW AND ARGUMENTS.....	10
<u>Proposition of Law No. 1:</u>	
The plain language of Revised Code section 1707.43(A) requires tender of stock <b>to the seller</b> in open court in order for a plaintiff to be entitled to rescission of a stock purchase for securities fraud .....	10
<u>Proposition of Law No. 2</u>	
In determining the liability of a party in an action alleging securities fraud, the appropriate standard of proof is clear and convincing evidence. ....	11
CONCLUSION.....	13
CERTIFICATE OF SERVICE .....	14
APPENDICES	
Decision and Journal Entry, <i>Wilson v. Ward</i> , C.A. No. 08CA0071-M (May 4, 2009).....	A

## WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents the opportunity for the Supreme Court to determine the proper interpretation of Revised Code section 1707.43(A) regarding what constitutes proper tender of shares for rescission. Secondly, and of equal importance, the Court is asked to decide the appropriate standard of proof necessary to procure rescission pursuant to Revised Code section 1707.43(A)

The first issue is of great importance and in need of resolution by this Court. Despite the plain language of Revised Code section 1707.43(A), which requires tender to the seller, the Court of Appeals, relying on *Crane v. Courtright* (1964), 2 Ohio App.2d 125, incorrectly interpreted Revised Code section 1707.43(A) as permitting tender of the purchased shares **to a participant** in open court. Decision and Journal Entry, *Wilson v. Ward*, C.A. No. 08CA0071-M, ¶¶ 12-14 (May 4, 2009) (attached hereto as **Appendix “A”**). This interpretation creates an absurd result, which is directly contradictory to the plain language of the statute, whereby a plaintiff can seek rescission of a stock sale without a representative of the corporation having any knowledge of the rescission. This Court should not allow such an absurd result. *See State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, ¶ 28 (“We must construe the applicable statute and rule to avoid such unreasonable or absurd results.”)

Accordingly, this Court should exercise its discretionary review power to determine what is required to properly tender shares in order to entitle a plaintiff to rescission pursuant to Revised Code section 1707.43(A).

The second issue, and of equal importance, is whether a clear and convincing evidence standard of proof is required to procure rescission pursuant to Revised Code section 1707.43(A). This Court has long held that proof by clear and convincing evidence is required to establish

rescission. *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph 2 of the syllabus. However, in this case, the Court of Appeals determined that because Appellee sought rescission pursuant to a statute, preponderance of the evidence was the appropriate standard of proof for rescission. Decision and Journal Entry, *Wilson v. Ward*, C.A. No. 08CA0071-M, ¶¶ 9-11 (May 4, 2009)

As a result, an issue of public and great general interest is created. Other courts are faced with the uncertainty of which standard of proof applies. Are litigants required to follow this Court's precedent as set forth in *Cross, supra*, or does the lower preponderance of the evidence standard apply? Without guidance from this Court, lower courts can only speculate as to the appropriate standard. Moreover, clearly setting forth the proper standard of proof will aid litigants in properly evaluating the merits and likelihood of success for their cases. A definite standard of proof would also permit the more effective use of scarce judicial resources, allowing trial courts to effectively evaluate pre-trial motions, potentially disposing of more cases at the summary judgment stage.

Accordingly, this Court should exercise its discretionary review power to determine the appropriate standard of proof to procure rescission pursuant to Revised Code section 1707.43(A).

#### **STATEMENT OF THE CASE AND FACTS**

On October 10, 2006, Appellee, William Wilson (hereafter "Appellee" or "Wilson"), filed a complaint in the Medina County Court of Common Pleas (the "Trial Court") alleging, *inter alia*, that Appellant Howard C. Stabile (hereafter "Appellant" or "Stabile"), Nicholas Ward (hereafter "Ward"), and Skeye-ID committed fraud and violated Section 1707.44(B)(4) of the Ohio Revised Code.

On June 23, 2008, a four day trial was held before Judge Collier. At the close of the Appellee's case, Appellant's counsel moved for directed verdict on both of Appellee's claims for

common law fraud and securities fraud. See Transcript of Trial at 321:4-5 (June 23, 2008) (hereafter "Tr. at \_\_\_\_"). Counsel argued, *inter alia*, that (i) because Appellee, had sought rescission of the transaction, both on statutory and common law grounds, he needed to prove his case by clear and convincing evidence, which he failed to do, Tr. at 321:8-326:12, and (ii) Appellee had not properly tendered his shares for rescission pursuant to the R.C. § 1707.43. Tr. at 328:6-22. At that time the Trial Court withheld ruling on the issues surrounding the standard of proof and rescission. Tr. at 344:9-22.

Following the conclusion of Appellant's case, Stabile's counsel once again moved for directed verdict on the issues above. Judge Collier granted Appellant's directed verdict as to the common law fraud claim. Tr. at 474:2-475:11. However, the Trial Court allowed the securities fraud claim to go to the jury using a preponderance of the evidence standard of proof. Tr. at 475:6-11. Ultimately, on June 26, 2008, the jury came back with a verdict in favor of Appellee Wilson on the securities fraud claim, and awarded him rescission, entitling him to \$120,000, and judgment was entered on the verdict on July 2, 2008. See Final Judgment, *Wilson v. Ward*, Medina C. P. No. 06 CIV 1360 (July 2, 2008).

Thereafter, on July 16, 2008, Appellant Stabile timely filed a Motion for Judgment Notwithstanding the Verdict and/or Motion for a New Trial. In this motion, Stabile reiterated his objections, arguing, *inter alia*, that: (1) Wilson did not prove his securities fraud claim the requisite clear and convincing evidence to entitle him to rescission, and (2) Wilson did not properly tender his stock for rescission. See Def.'s Mot. for Dir. Verdict and/or Mot. for New Tr. (July 16, 2008), which was overruled by the Trial Court on August 28, 2008. See Judgment Entry *Wilson v. Ward*, Medina C. P. No. 06 CIV 1360 (Aug. 28, 2008). Appellant Stabile timely filed a notice of appeal. Appellant's Notice of Appeal (Sep. 25, 2008). On appeal the Ninth

District Court affirmed, holding that: (i) the proper standard of proof for rescission under Revised Code section 1707.43(A) is preponderance of the evidence, and (ii) a plaintiff can tender his shares to anyone in open court in order to comply with the tender requirement of Revised Code section 1707.43(A). Decision and Journal Entry, *Wilson v. Ward*, C.A. No. 08CA0071-M (May 4, 2009) Appellant now timely seeks jurisdiction in this Court.

This case stems from the alleged sale of securities in a Texas Corporation, Skeye-ID. Nicholas Ward is the founder and President of Skeye-ID. Tr. at 213:19-21. Wilson also participated in the formation of Skeye-ID. Tr. at 130:18-131:18. There were three shareholders in the Skeye-ID; Ward with 65%, Stabile with 20%, and Wilson with 15%. See Tr. at 108:21-23. While Skeye-ID was an upstart business, the shareholders were familiar with one another as they all had previously worked in the computer hardware business. In particular, Ward and Wilson were close friends. Tr. at 50:10-15, 102:14-22. In the late '80's and early '90's Wilson was in the business of selling used and refurbished computer hardware in Texas through a company called Newcorp. Tr. at 100:9-101:3. During this same time, Wilson owned a company called Black River Computer, which engaged in the same business. Tr. at 100:9-16. While with Black River and Newcorp, Wilson and Ward completed several successful deals together. Tr. at 134:22-24, 135:11-14.

In 1996, Ward went to work at NCSI to do essentially the same job. Tr. at 101:25-102:7. Thereafter, Wilson left Black River and went to work at NCSI under Ward. Tr. at 101:25-102:7. In 1998, Wilson left NCSI and formed Bay Pointe Technologies with his brother. Tr. at 103:21-25. Again, this company also engaged in the sale of used and refurbished computer hardware. Tr. at 104:1-6. Shortly after Wilson left NCSI, Ward also left and reestablished Newcorp. Tr. at 104:19-23. Ward and Wilson still remained close friends and worked together. Tr. at 104:25-

105:17. In fact, to this date, Ward helped Bay Pointe complete the biggest deal it has ever done. Tr. at 105:18-25, 135:1-7.

During his time at NCSI, Wilson first heard the name Chuck Stabile. Tr. at 102:23-103:2. Stabile was in New York at a company called New York Systems Exchange. Tr. at 103:2-8. Stabile would set up financing for customers who wanted to lease or purchase computer equipment. Tr. at 103:2-8. Although Wilson asserts he spoke on the phone with Stabile a couple times at NCSI, he had no significant involvement with Stabile. Tr. at 103:9-14.

In 2002, Ward formed a company called Skeye-ID. Tr. at 83:2-6. Skeye-ID was formed to produce and market a clear plastic pouch for travelers to store their ID's and tickets and items of that nature. Tr. at 111:1, 431:23-432:4. Ward conceived the idea. During the September 11, 2001 terrorist attacks, Ward was on an airplane which was grounded. Tr. at 106:1-19. While in the airport, he thought of the product that was all plastic, which could go through metal detectors, to store personal and travel information necessary at the airport. Tr. at 106:1-19, 430:7-14. To market and distribute this product, Ward started Skeye-ID.

Ward originally had the idea to start Skeye-ID, but needed additional capital to produce and market the product and in April or May of 2002, contacted Wilson to discuss the possibility of Wilson purchasing an ownership interest in Skeye-ID. Tr. at 107:11-13, 139:15-13. During negotiations, in July of 2002, Ward offered Wilson a 15% ownership interest in Skeye-ID in exchange for \$120,000. Tr. at 111:19-23. Although Wilson asserts that Stabile called him at this time to encourage him to invest in Skeye-ID, Stabile asserts he never spoke with Wilson. Tr. at 108:3-4, 436:23-437:5. At this time, a patent application was filed and the patent issued in January of 2003.

Ultimately, in July of 2002, Wilson decided to invest. Tr. at 111:4-6. Wilson was a knowledgeable and sophisticated investor. Tr. at 162:12-14, 257:3-7. Despite Wilson's investment experience and the size of the investment required, Wilson took no independent steps to investigate Skeye-ID. Tr. at 144:6-16, 147:11-13. Although Wilson admits he considered the investment a risk because the company was a start up, he did not ask to review the company's financial information, speak to the company's account or ask for security for his investment. Tr. at 144:6-16, 147:11-13. He knew it was possible he would lose his entire investment. Tr. at 147:22-24. Despite this lack of due diligence, Wilson freely decided to invest. Ultimately, Wilson decided to invest in Skeye-ID in July of 2002 and received his share certificate on August 8, 2002. Tr. at 138:18-21, 142:11-15.

At that point, Wilson knew that Stabile would be a 20% shareholder of the corporation. Tr. at 108:21-23. As stated, Wilson invested \$120,000 but could not pay the entire \$120,000 up front. Rather, Wilson initially paid \$75,000 and agreed to pay the remainder later. Tr. at 111:19-112:6. In December of 2002, Ward contacted Wilson to procure a note to evidence the remainder of Wilson's investment. Tr. at 115:24-116:11. Ward faxed Wilson a \$45,000 dollar note made payable to Skeye-ID, calling for payment in six months. Tr. at 115:24-116:11. Ward did not ask Stabile to procure the note. Tr. at 250:17-21. Wilson signed and returned the note.

Ward invested substantially in the company. In order to make the company viable, Ward mortgaged his house, borrowed money from his ex-wife, borrowed against his credit cards, and took money from his 401(k). *See* Tr. at 62:21-64:4, 150:11-151:2, 354:23-355:25. Ward also contacted Stabile about getting involved in Skeye-ID and offered Stabile a 20% interest in Skeye-ID if Stabile would actively market the Skeye-ID product. Tr. at 433:8-17. Although Stabile did not make a monetary contribution, Stabile's investment in the company consisted of

sweat equity in marketing Skeye-ID, which he did. Tr. at 433:8-19-434:17. Stabile was successful in marketing the product to one customer, Taylor Gifts. Tr. at 434:18-435:5. Stabile also marketed the product to Austin Travel, Citigroup, JetBlue, AAA, and MasterCard. Tr. at 435:9-22. Wilson unequivocally testified that it was more than appropriate to use sweat equity to pay for Stabile's stock. Tr. at 149:1-25. Stabile became a shareholder on August 4, 2002. Tr. at 432:23-24.

When Wilson made his investment in Skeye-ID he knew Ward needed funds for both survival and to jumpstart the business. In fact, later Wilson made a personal loan to Ward of approximately \$30,000. Tr. at 88:22-89:3. Despite Ward's best efforts, when Wilson invested in Skeye-ID, the company's outlook was rocky. Skeye-ID needed the funds represented by Wilson's note more quickly in order to continue its operations. Tr. at 251:19-252:9. Ward attempted to factor the note to investors in Texas, but no one was interested. Tr. at 252:10-18. As a result, in December of 2002, Ward contacted Stabile, who was familiar with people in the financial industry, to see if he could get the note factored. Tr. at 252:19-253:5.

To this point, other than marketing services, Stabile had no active role in the management of Skeye-ID. Tr. at 430:15-19. He had not spoken to Wilson in regard to Skeye-ID, he had not aided in procuring Wilson's investment and he was not paid to procure Wilson's investment. Tr. at 430:15-19. Ward simply asked Stabile to help factor the note. Tr. at 430:15-19.

Stabile began to investigate the possibility of factoring the note himself. Tr. at 438:23-439:9. In order to do so, he called Wilson to inquire about his ability to pay the note. Tr. at 441:1-8. Stabile understood that factoring the note was extremely risky and could result in a substantial loss if Wilson did not pay. *See* Tr. at 441:22-442:5. This telephone call was the first contact Stabile had had with Wilson regarding Skeye-ID. *See* Tr. at 430:15-19. After reviewing

the situation and speaking to Wilson, Stabile agreed to factor the note for Ward and Skeye-ID assigned the note to Stabile. Tr. at 439:10-14. Stabile took the note to JP Morgan Chase, and using the note and a certificate of deposit as collateral, obtained a \$45,000 dollar loan. Tr. at 439:15-440:25, 441:22-442:5. Stabile was required to personally guarantee payment of the loan. Tr. at 439:5-9. Wilson knew that Stabile had obligated himself to repay the bank. See Tr. at 441:1-8.

In order to compensate Stabile for the risk of accepting the note, Stabile paid Skeye-ID \$28,000 for the note and therefore, if the note was paid in full, Stabile would earn \$17,000 on his purchase of the note from Skeye-ID. Tr. at 439:10-14. Given the nature of the transaction, Mr. Riemenschneider, Stabile's financial expert, testified that he believed the fee charged by Stabile to factor the note was fair and reasonable and the factoring of the note was carried out appropriately in a prudent and business like fashion. Tr. at 409:25-411:25.

Following his purchase of the note, Stabile would call Wilson on a monthly basis to ensure he was making the proper payment. Tr. at 442:6-13. Although the note called for monthly payments of \$7,500, Wilson's first five payments to Stabile were only for \$5,000 each. Tr. at 441:11-17. Ultimately, Wilson did pay the full balance of the note.

Despite the parties' best efforts, Skeye-ID simply was not doing well. Wilson knew this because he had received no return on his investment at this time. Tr. at 117:13-19. It had obtained a patent on its design; but was unable to secure adequate sales. Ward contacted Wilson for ideas about better marketing the product. In January of 2003, Wilson put Ward in contact with Brett Smiley and Brad Keifer of Eclectic Technical Systems, Inc. dba Proforma. Tr. at 65:18-19. Smiley worked with Wilson's wife as a pharmaceutical rep. Tr. at 64:18-25. In January of 2003, the parties signed a patent license agreement. Tr. at 65:5-9, 78:1-23. The

agreement projected sales of 500,000 units in the first quarter of 2003, 1,000,000 in the second quarter, 2,000,000 in the third quarter, and 3,000,000 in the fourth quarter. Tr. at 78:24-79:15. However, things didn't materialize. Thereafter, in 2004, Skeye-ID signed a second agreement, this time with Saavant, LCC, an independent marketing company, which was also owned by Bret Smiley. Tr. at 80:10-17. Skeye-ID entered an agreement with Saavant whereby Saavant would be assigned Skeye-ID's patent in exchange for \$50,000 and a royalty on sales. Tr. at 80:18-81:11, 160:1-12. Ward paid Wilson \$22,000 of the \$50,000 received from the assignment of the patent as a return on his original investment. Tr. at 118:16-19. Stabile on the other hand, never received any amount of money from Skeye-ID except the fee from the purchased note. Although his expenses were paid, *see* Tr. at 369:11, he received no compensation for his marketing services other than his shares. *See* Tr. at 433:8-19-434:17. To date, Skeye-ID has received no royalties from Saavant for sales of the Skeye-ID pouch.

Wilson unequivocally testified that he knew something was wrong with Skeye-ID between May and September of 2004 when he hadn't received financial information or tax reporting documents for the company. Tr. at 119:8-21, 173:23-177:15. On October 6, 2006, Wilson filed suit against Stabile asserting, *inter alia*, claims for common law fraud and securities violations. The claim for common law fraud was dismissed by directed verdict and the jury found in favor of Wilson on his securities fraud claim and awarded rescission. Stabile timely appealed and the Court of Appeals affirmed. Stabile now timely files this Memorandum in Support of Jurisdiction to the Supreme Court.

## LAW AND ARGUMENT

### Proposition of Law No. 1

The plain language of Revised Code section 1707.43(A) requires tender of stock *to the seller in open court in order for a plaintiff to be entitled to rescission of a stock purchase for securities fraud.*

Revised Code section 1707.43(A) provides in pertinent part:

(A) . . . every sale or contract for sale made in violation of Chapter 1707. of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser, in an action at law in any court of competent jurisdiction, *upon tender to the seller in person or in open court of the securities sold or of the contract made*, for the full amount paid by the purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.

R. C. § 1707.43(A) (emphasis added).

The plain language of Section 1707.43(A) requires tender to the “seller”, either in person or in open court, not a person who participated in or aided the seller. *See id.* Statutes are required to be read in context and construed in accordance with the common rules of grammar and usage. R.C. § 1.42. Accordingly, “a court in interpreting a statute must give effect to the words utilized, *cannot ignore words of the statute*, and cannot supply words not included.” *E. Ohio Gas Co. v. Limbach* (1991), 61 Ohio St.3d 363, 365 (emphasis added); *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, paragraph 3 of the syllabus (“In matters of construction, it is the duty of this court to give effect to the words used, *not to delete words used* or to insert words not used.”)

In the present case, the Court of Appeals, relying on *Crane v. Courtright* (1964), 2 Ohio App. 2d 125, has deleted the term “Seller” from Revised Code section 1707.43(A). *Crane*, and as a result the Court of Appeals below, ignores the plain language of the statute, which requires

tender to the seller. To the extent they hold that tender to anyone other than the seller is sufficient to meet the mandates of Revised Code section 1707.43(A), they were wrongly decided and should be overruled.

Moreover, in the present case, Wilson unequivocally testified that he never tendered his stock to the Seller, i.e. Ward as a representative of Skeye-ID, for rescission of his stock purchase. Here, Plaintiff testified:

Q: In '04, did you call Nick Ward and say, "I want my money back.

Here's the stock."

A: No . . .

Tr. at 171:11-13. Rather, Plaintiff attempted to tender his stock to Defendant Stabile in open court. See Tr. at 129:19-22. However, Stabile was not the "seller" of the stock. Rather, he is at most a third party who allegedly "participated in or aided the seller".

Based upon the foregoing, an issue of public and great general interest exists regarding the proper procedure for tendering shares to obtain rescission pursuant to Revised Code section 1707.43(A). Accordingly, this Court should grant discretionary review in the present case.

### **Proposition of Law No. 2**

**In determining the liability of a party in an action alleging securities fraud, the appropriate standard of proof is clear and convincing evidence.**

This Court has never addressed the standard of proof required for rescission pursuant to Revised Code section 1707.43(A). However, this Court has long held that in order to be entitled to rescission of a transaction, the plaintiff is required to prove his case by clear and convincing evidence. *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph 2 of the syllabus. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a

reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id.* at paragraph 3 of the syllabus.

Courts have applied the "clear and convincing" evidence standard in the stock purchase context. In *Wannemacher v. Cavalier*, Hardin App. No. 6-03-12, 2004-Ohio-4020, the court reviewed the rescission of a stock purchase agreement based upon fraud. In holding in favor of the seller, the court opined ". . . we cannot find that the trial court erred in its conclusion that [plaintiff] failed to prove by clear and convincing evidence that any fraudulent misrepresentation or concealment occurred which would entitle him to rescission of the stock purchase agreement." *Id.* at ¶ 56. In affirming the trial court, the court of appeals expressly stressed the trial court's reliance on the fact that the plaintiff failed to undertake any due diligence before entering the investment transaction involving a substantial sum of money and that the plaintiff was a sophisticated investor. *Id.* at ¶ 49.

However, in the present case, the Court of Appeals determined the proper standard of proof for rescission under Revised Code section 1707.43(A) is a preponderance of the evidence. Decision and Journal Entry, *Wilson v. Ward*, C.A. No. 08CA0071-M at 5, ¶ 11 (May 4, 2009) (attached hereto as **Appendix "A"**). As a result, an issue of public and great general interest exists as to the proper standard of proof for rescission under Revised Code section 17707.43(A). Until this Court decides the issue, litigants and courts will be confused as to whether the standard set forth by this Court in *Cross, supra*, applies, or whether the lesser standard approved by the Court of Appeals in this case applies.

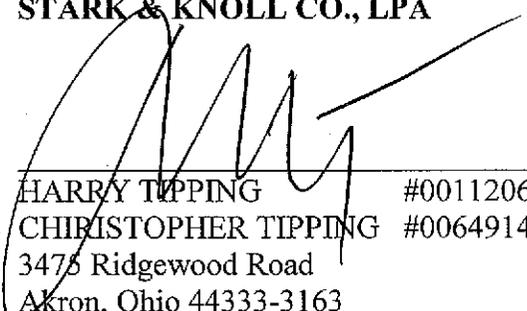
Accordingly, courts and litigants could greatly benefit from this Court's grant of discretionary review in the present case.

**CONCLUSION**

Appellant respectfully requests that this Court exercise its power of discretionary review to resolve the two great issues of public and great general interest in this case: first, whether Revised Code section 1707.43(A) required tender of the shares to be made to the **seller** in open court in order to entitle a plaintiff to rescission; and second, what is the appropriate standard of proof to procure rescission pursuant to Revised Code section 1707.43(A).

Respectfully submitted,

**STARK & KNOLL CO., LPA**



---

HARRY TIPPING #0011206  
CHRISTOPHER TIPPING #0064914  
3475 Ridgewood Road  
Akron, Ohio 44333-3163  
(330) 376-3300/ FAX (330) 376-6237  
[ctipping@stark-knoll.com](mailto:ctipping@stark-knoll.com)

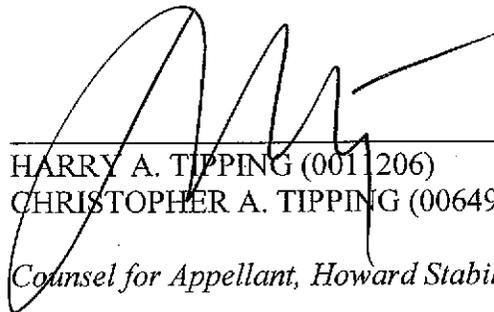
*Counsel for Appellant, Howard Stabile*

**CERTIFICATE OF SERVICE**

Counsel certifies that a true and accurate copy of the foregoing *Memorandum in Support of Jurisdiction of, Howard C. Stabile*, was sent via regular U.S. mail this 12<sup>th</sup> day of June, 2009 to:

JOHN M. MANOS  
**JOHN M. MANOS CO., L.P.A.**  
739 East 140th Street  
Cleveland, Ohio 44110

*Counsel for Appellee, William Wilson*



---

HARRY A. TIPPING (0011206)  
CHRISTOPHER A. TIPPING (0064914)  
*Counsel for Appellant, Howard Stabile*

STATE OF OHIO )  
 )ss:  
COUNTY OF MEDINA )

COURT OF APPEALS  
IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT  
09 MAY -4 AM 11:36

WILLIAM WILSON

Appellee

v.

NICHOLAS E. WARD, et al.

Appellants

FILED  
KATHY FORTICEA, No. 08CA0071-M  
MEDINA COUNTY  
CLERK OF COURTS

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE No. 06 CIV 1360

DECISION AND JOURNAL ENTRY

Dated: May 4, 2009

---

DICKINSON, Judge.

INTRODUCTION

{¶1} Nicholas Ward and Howard Stabile persuaded William and Sheryl Wilson to invest \$120,000 to produce and market a document holder that Mr. Ward had created to ease getting through airport security. According to the Wilsons, Mr. Ward and Mr. Stabile lied to them about the number of other investors, the number of orders that had been placed, and how their money would be used. They sued Mr. Ward and Mr. Stabile for fraudulent inducement and for violating state securities law. The trial court entered a default judgment against Mr. Ward. Following a jury trial on the claims against Mr. Stabile, the court granted Mr. Stabile a directed verdict on the fraudulent inducement claim. A jury found in favor of the Wilsons on their claim that Mr. Stabile aided and abetted Mr. Ward in selling securities to them in violation of Section 1707.44 of the Ohio Revised Code. Mr. Stabile has appealed, raising six assignments of error. This Court affirms because the trial court correctly instructed the jury on the burden of proof, the

Wilson's properly tendered their shares, Mr. Stabile forfeited his argument that the Wilsons' claim is barred by the statute of limitations or the doctrine of laches, the trial court correctly refused to give an instruction on mitigation of damages, the jury's verdict is not against the manifest weight of the evidence, and the trial court correctly denied Mr. Stabile's motions for judgment notwithstanding the verdict and for a new trial.

#### FACTS

{¶2} After Mr. Ward lost his driver's license going through airport security in 2001, he developed a clear plastic document holder that a person could wear on a lanyard that would not have to be removed while passing through a metal detector. He obtained a patent for his design and formed a company called Skeye-ID to produce it. He thought he could sell the document holders to companies for use as a promotional device because their names could be printed on the lanyards.

{¶3} Mr. Ward had worked for a number of years selling computers to businesses. To promote his idea, he contacted Mr. Stabile, who he knew had contacts with a number of large corporations. He asked Mr. Stabile to promote Skeye-ID in exchange for a twenty percent share in the company. For financing, Mr. Ward contacted the Wilsons. Mr. Wilson also sold computers to businesses, and he and Mr. Ward had become friends while working on several deals. Mr. Ward offered the Wilsons a fifteen percent share in Skeye-ID for \$120,000.

{¶4} According to the Wilsons, while they were deciding whether to invest in Skeye-ID, Mr. Stabile also called them and pressured them to invest. He allegedly told them that he and another person were invested at twenty percent and that there was over half a million dollars invested in Skeye-ID. He told them that the company was seeking additional investors so that they could increase production to meet the big orders that they had received. Mr. Stabile

allegedly told Mrs. Wilson that Skeye-ID had orders from Citigroup, Continental, Austin Travel, and Station Casinos.

{¶5} The Wilsons eventually agreed to invest \$120,000 in Skeye-ID, but they had only \$75,000 available. According to them, they paid \$75,000 to Mr. Ward, but he did not use their money to produce document-holders. Instead, he gave \$18,000 to Mr. Stabile and used most of the rest to pay his own personal expenses. After a few months, Mr. Ward and Mr. Stabile pressured the Wilsons for the other \$45,000 they had promised. Mr. Stabile allegedly told the Wilsons that Skeye-ID had a deal to produce items in China, but they needed \$45,000 upfront. After the Wilsons told Mr. Stabile that they did not have that much, Mr. Stabile offered to cover the start-up costs if the Wilsons executed a promissory note for the \$45,000. The Wilsons agreed and sent Mr. Stabile \$45,000 over the next six months.

{¶6} Although Mr. Stabile used his contacts to promote Skeye-ID, the company earned only a few thousand dollars in income. Mr. Ward entered into licensing agreements with a couple of companies, but those agreements failed to produce much income. He eventually sold his patent to another company for \$50,000 plus a percentage of whatever proceeds were earned from the patent. Skeye-ID, however, did not receive any additional income.

{¶7} The Wilsons received tax documents from Skeye-ID for 2002 indicating that it had a small loss. They did not receive any tax documents for 2003, but were told that it was because the company had not made a profit. The Wilsons received \$22,500 in 2004 after Mr. Ward sold the patent. According to Mr. Wilson, he started to become suspicious that something was wrong with Skeye-ID in September 2004. He, therefore, hired a lawyer to look into the company. In the spring of 2005, the Wilsons received Skeye-ID's financial statements and learned that they had been the only investors. In October 2005, the Wilsons wrote Mr. Ward and

Mr. Stabile asking for them to return their investment. In May 2006, the Wilsons sued Mr. Ward and Mr. Stabile. They dismissed their case after Mr. Ward agreed to repurchase their stock.

{¶8} In October 2006, the Wilsons sued Mr. Ward and Mr. Stabile again because Mr. Ward had not repaid them. They alleged that Mr. Ward breached their settlement agreement and that Mr. Ward and Mr. Stabile engaged in fraud and violated Section 1707.44 of the Ohio Revised Code. In January 2007, the Wilsons obtained a default judgment against Mr. Ward. Their claims against Mr. Stabile proceeded to trial, and a jury awarded them \$120,000 on their statutory claim. Mr. Stabile has appealed, assigning six errors.

#### BURDEN OF PROOF

{¶9} Mr. Stabile's first assignment of error is that the trial court incorrectly concluded that the Wilsons had to prove their statutory claim by only a preponderance of the evidence. He has argued that, to be entitled to rescission of their transaction, the Wilsons had to prove their claim by clear and convincing evidence. In support of his argument, Mr. Stabile has relied on *Cross v. Ledford*, 161 Ohio St. 469 (1954). In *Cross*, the Ohio Supreme Court held that, "[i]n order to maintain an action to rescind a contract on the ground that it was procured by fraudulent representations," plaintiffs must prove their claim "by clear and convincing evidence." *Id.* at paragraph two of the syllabus.

{¶10} Mr. Stabile's argument fails because the Wilsons' claim was under Section 1707.44(B)(4) of the Ohio Revised Code, not common law fraud as in *Cross*. See *id.* at 475. Section 1707.44(B)(4) provides that "[n]o person shall knowingly make . . . any false representation concerning a material and relevant fact, in any oral statement . . . for any of the following purposes: (4) Selling any securities in this state." Section 1707.43(A) provides that "every sale or contract for sale made in violation of Chapter 1707 of the Revised Code, is

voidable at the election of the purchaser. . . . [E]very person that has participated in or aided the seller in any way in making such sale or contract for sale, [is] jointly and severally liable to the purchaser, . . . for the full amount paid by the purchaser . . . .”

{¶11} “In civil cases . . . the burden of proof is ordinarily carried by a preponderance of the evidence.” *Cincinnati, H. & D. Ry. v. Frye*, 80 Ohio St. 289, paragraph two of the syllabus (1909); see also *Cincinnati Bar Ass’n v. Young*, 89 Ohio St. 3d 306, 314 (2000). When a statute is silent regarding the appropriate burden of proof, this Court infers that the common preponderance of the evidence standard applies. *Wilburn v. Wilburn*, 9th Dist. No. 05CA008740, 2006-Ohio-2553, at ¶9 (citing *Felton v. Felton*, 79 Ohio St. 3d 34, 41-42 (1997)). As this Court noted in *Wilburn*, “[h]ad the General Assembly intended that [an alternative] standard apply, it certainly knew how to specify [one.]” *Id.* (quoting *Felton*, 79 Ohio St. 3d at 42); see also *Walden v. State*, 47 Ohio St. 3d 47, 53 (1989) (concluding that “the General Assembly intended to apply the usual preponderance of the evidence standard” when it did not “specify a ‘clear and convincing’ standard.”). Mr. Stabile’s first assignment of error is overruled.

#### TENDER OF SHARES

{¶12} Mr. Stabile’s second assignment of error is that the trial court incorrectly concluded that the Wilsons properly tendered their shares. Section 1707.43(A) conditions liability “upon tender to the seller in person or in open court of the securities sold or of the contract made.” Mr. Stabile has argued that the Wilsons did not comply with that requirement because they did not tender their shares to Mr. Ward, either in person or in open court. The Wilsons have argued that they satisfied the requirement because they tendered their shares to Mr. Stabile at trial.

{¶13} In *Crane v. Courtright*, 2 Ohio App. 2d 125 (1964), the Tenth District considered the same issue. In that case, Mr. Crane alleged that Mr. Courtright assisted Mr. Richmond in selling him an interest in a lease. *Id.* at 128. Mr. Courtright argued that Section 1707.43(A) “requires tender to the seller in person or tender *to the seller* in open court.” *Id.* at 129. The court, however, rejected his interpretation of the statute. *Id.* It explained that, although Mr. Courtright’s interpretation was plausible, it was “equally grammatically correct to say that the antecedent of ‘in open court’ is the word ‘tender,’ i.e., ‘tender to the seller in person,’ or ‘tender . . . in open court.’” *Id.* The court noted that, under Section 1707.43, “liability is imposed individually or ‘severally’ upon a person who has participated in or aided in the sale.” *Id.* Under Mr. Courtright’s interpretation, “there would be very little significance left to this imposition of direct liability upon a participant.” *Id.* The court reasoned that, “if a participant is required to make restitution of the purchase price to the plaintiff, then he is a proper person to receive the corresponding restitution of the security.” *Id.* The court also noted that, “in the last paragraph of the statute it is explicitly provided that a *participant* may tender a refund to the purchaser and thereby avoid liability.” *Id.* The court concluded that, “[i]f a participant can tender to the purchaser, then the purchaser ought to be able to tender to the participant.” *Id.*

{¶14} This Court agrees with the Tenth District’s interpretation of Section 1707.43(A) and concludes that the Wilsons satisfied the tender requirement by tendering their shares in Skeye-ID to Mr. Stabile in open court. Mr. Stabile’s second assignment of error is overruled.

#### STATUTE OF LIMITATIONS

{¶15} Mr. Stabile’s third assignment of error is that the trial court incorrectly concluded that the Wilsons’ claim was not barred by the statute of limitations or the doctrine of laches. Section 1707.43(B) provides that “[n]o action for the recovery of the purchase price as provided

for in this section . . . shall be brought more than two years after the plaintiff knew, or had reason to know, of the facts by reason of which the actions of the person or director were unlawful . . . .”

{¶16} “The application of a statute of limitations presents a mixed question of law and fact. Determination of when a plaintiff’s cause of action accrues is to be decided by the factfinder. But, in the absence of such factual issues, the application of the limitation is a question of law.” *Cyrus v. Henes*, 89 Ohio App. 3d 172, 175 (1993), rev’d on other grounds by *Cyrus v. Henes*, 70 Ohio St. 3d 640 (1994).

{¶17} Mr. Stabile moved for a directed verdict on the Wilsons’ statutory claim, arguing, among other things, that it was not filed within the two-year statute of limitations. The trial court denied his motion. Although a question of fact existed regarding when the Wilsons “knew, or had reason to know” that Mr. Stabile’s actions were unlawful, Mr. Stabile did not ask for an instruction on that issue. R.C. 1707.43(B). Accordingly, he has forfeited his argument. See Civ. R. 51(a) (“a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection.”). He also failed to raise the doctrine of laches at trial. Mr. Stabile’s third assignment of error is overruled.

#### MITIGATION OF DAMAGES

{¶18} Mr. Stabile’s fourth assignment of error is that the trial court incorrectly failed to instruct the jury on mitigation of damages. “A court ordinarily should give requested jury instructions where they are correct statements of the law as applied to the facts in the case and where there is evidence from which reasonable minds might reach the conclusion sought by the instruction.” *Dunn v. Maxey*, 118 Ohio App. 3d 665, 668 (1997). Mr. Stabile has argued that a mitigation instruction was appropriate because the Wilsons did not do any due diligence before

deciding whether to invest in Skeye-ID and did not help to promote the document holders. He has also argued that they received \$22,500 from the sale of the patent.

{¶19} “The general rule is that an injured party has a duty to mitigate and may not recover for damages that could reasonably have been avoided.” *Chicago Title Ins. Co. v. Huntington Nat’l Bank*, 87 Ohio St. 3d 270, 276 (1999). The trial court, however, correctly refused to give a mitigation instruction in this case. Mr. Stabile’s argument that the Wilsons should have done more research before investing in Skeye-ID fails because the Wilsons did not have to prove justifiable reliance. Section 1707.44(B)(4) provides that “[n]o person shall knowingly make . . . any false representation concerning a material and relevant fact, in any oral statement or in any . . . written statement, for . . . [s]elling any securities in this state.” R.C. 1707.44(B)(4). Section 1707.43(A) provides that “every sale . . . made in violation of Chapter 1707 of the Revised Code, is voidable at the election of the purchaser.” Accordingly, unlike with a claim for common law fraud, the Wilsons did not have to prove that they were justified in relying on Mr. Stabile’s statements to them. See *Burr v. Stark County Bd. of Comm’rs*, 23 Ohio St. 3d 69, paragraph two of the syllabus (1986) (stating elements of common law fraud).

{¶20} Mr. Stabile’s argument that the Wilsons could have mitigated their damages by promoting the document holders themselves also fails. “Mitigation is an affirmative defense in Ohio.” *Young v. Frank’s Nursery & Crafts Inc.*, 58 Ohio St. 3d 242, 244 (1991). Mr. Stabile did not present any evidence that the Wilsons could have avoided their damages by promoting the document holders themselves. Furthermore, it appears from the record that, by the time the Wilsons learned the truth about Skeye-ID, Mr. Ward had sold the document holder patent to another company. The Wilsons, therefore, could not have promoted the document holders if they had wanted.

{¶21} Regarding Mr. Stabile's argument that the Wilsons' damages should have been reduced because they received \$22,500 from Mr. Ward, this Court has held that "[t]he fact that [an investor] received a return on her investment . . . does not . . . alter the operation of the statute." *Crater v. Int'l Res. Inc.*, 92 Ohio App. 3d 18, 25 (1993). In *Crater*, this Court rejected the argument that the purpose of Section 1707.43 is merely "to put the parties in the position they had been in prior to the investment." *Id.* It concluded that Ms. Crater could recover the "the full amount" that she paid for securities despite any income she had earned from them. *Id.* Similarly, the trial court correctly concluded that the Wilsons' damages should not be reduced just because they received \$22,500 from Mr. Ward. Mr. Stabile's fourth assignment of error is overruled.

#### MANIFEST WEIGHT

{¶22} Mr. Stabile's fifth assignment of error is that the jury's verdict was against the manifest weight of the evidence. He has argued that the Wilsons failed to establish that he knowingly made a false representation concerning a material and relevant fact. See *State v. Warner*, 55 Ohio St. 3d 31, paragraph two of the syllabus (1990) ("R.C. 1707.44(B)(4) and (J) prohibit only affirmative misrepresentation; they do not apply to fraudulent nondisclosure."). He has also argued that the Wilsons did not prove that he participated in or aided in the sale of securities.

{¶23} In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶26, the Ohio Supreme Court held that the test for whether a judgment is against the weight of the evidence in civil cases is different from the test applicable in criminal cases. According to the Supreme Court in *Wilson*, the standard applicable in civil cases "was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279." *Id.* at ¶24. The "explanation" in *C.E. Morris* was that

“[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *Id.* (quoting *C.E. Morris Co.*, 54 Ohio St. 2d at 279); but see *Huntington Nat’l Bank v. Chappell*, 9th Dist. No. 06CA008979, 2007-Ohio-4344, at ¶¶17-75 (Dickinson, J., concurring). This Court, therefore, must affirm if the jury’s verdict “is supported by some competent, credible evidence.” *Wilson*, 2007-Ohio-2202, at ¶32.

{¶24} Mrs. Wilson testified that, in April and May 2002, Mr. Stabile called her several times to ask if Mr. Wilson and she were going to invest in Skeye-ID. She said that Mr. Stabile told her that Mr. Ward, another person, and he had invested money in Skeye-ID and that the three of them had invested a total of over half a million dollars. He said that they needed the Wilsons to come in as second-level investors “because they had orders that were in place and being filled.” He told her that the biggest order was from CitiGroup for over a million units. He also told her that Skeye-ID had orders from Austin Travel, Continental, and Station Casinos. Mrs. Wilson said that she invested in Skeye-ID based on what Mr. Stabile told her.

{¶25} Mr. Wilson testified that Mr. Stabile also pressured him to invest in Skeye-ID. According to Mr. Wilson, Mr. Stabile “confirmed that the business was doing very well, they had ongoing orders with a company called Austin Travel, they were going to order fifty thousand a month.” Mr. Stabile told him that he had invested \$160,000 and that Mr. Ward had invested \$280,000 in Skeye-ID. He allegedly told Mr. Wilson that “they needed me to invest my hundred and twenty thousand so they could ramp up production for the CitiGroup order” because “they were going to sell tens of millions” of the document holders to CitiGroup.

{¶26} Mr. Wilson also testified that, after he sent \$75,000 to Skeye-ID, Mr. Stabile called him about the other \$45,000 he had promised. He said that Mr. Stabile told him the same

thing as Mr. Ward had “about ramping up the production in China and getting the product made and sending money up front to get the product actually started.” When Mr. Wilson told Mr. Stabile that he did not have \$45,000 at that time, Mr. Stabile offered “[to] front the money to Skeye-ID” if Mr. Wilson would pay him back in six months. Mr. Wilson further testified that, after he finally received financial information about Skeye-ID, he “realized that my wife and I were the only investors in the company . . . and that there were no profits or no sales.”

{¶27} This Court concludes that there was competent credible evidence that Mr. Stabile made false representations to the Wilsons about the number of other investors in Skeye-ID, about the number of customers Skeye-ID had, and about the number of document holders Skeye-ID was selling. There was also competent credible evidence that Mr. Stabile aided Mr. Ward in convincing the Wilsons to purchase shares of Skeye-ID. Mr. Stabile’s fifth assignment of error is overruled.

#### POST-JUDGMENT MOTIONS

{¶28} Mr. Stabile’s sixth assignment of error is that the trial court incorrectly denied his motions for judgment notwithstanding the verdict and for a new trial. He has not raised any new arguments, but has merely incorporated “the arguments listed above . . . by reference.” He has argued that, “[i]n committing the legal errors and abuses of discretion outlined [in his other assignments of error], the Trial Court abused its discretion in not granting [his] Motion for Judgment Notwithstanding the Verdict and/or Motion for New Trial.” This Court concludes that, since the arguments Mr. Stabile raised in his other assignments of error are without merit, the trial court properly denied his motions for judgment notwithstanding the verdict and for new trial. Mr. Stabile’s sixth assignment of error is overruled.

## CONCLUSION

{¶29} The trial court correctly instructed the jury on the burden of proof under Section 1707.44(B)(4), the Wilsons properly tendered their shares in Skeye-ID, Mr. Stabile forfeited his argument that the Wilsons' claim is barred by the statute of limitations or the doctrine of laches, the trial court correctly refused to instruct the jury on mitigation of damages, the jury's verdict is not against the manifest weight of the evidence, and the trial court properly denied Mr. Stabile's motions for judgment notwithstanding the verdict and for a new trial. The judgment of the Medina County Common Pleas Court is affirmed.

Judgment affirmed.

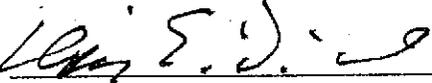
---

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

  
\_\_\_\_\_  
CLAIR E. DICKINSON  
FOR THE COURT

MOORE, P. J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

HARRY A. TIPPING, and CHRISTOPHER A. TIPPING, attorneys at law, for appellant.

JOHN M. MANOS, attorney at law, for appellee.