The Bullet Point: Ohio Commercial Law Bulletin

Have my Trade Secrets Been Misappropriated?

Volume 5, Issue 2
January 28, 2021
Jim Sandy and Stephanie Hand-Cannane

Unconsionability Defense to Arbitration

Sebold v. Latina Design Build Group, L.L.C., **8th Dist. Cuyahoga No. 109362, 2021-Ohio-124**

In this appeal, the Eighth Appellate District affirmed the trial court's decision agreeing that the arbitration provision was not procedurally unconscionable.

- **The Bullet Point:** Ohio has a strong public policy favoring arbitration of disputes. As such, Ohio courts will not deem an arbitration agreement unconscionable simply because there was an unequal bargaining power between contracting parties. Instead, a party asserting that an arbitration agreement is unconscionable must prove that the agreement is both procedurally and substantively unconscionable. To meet its burden under this two-prong test, a party demonstrates substantive unconscionability if there are unfair and unreasonable contract terms. To prove procedural unconscionability, a party must demonstrate that there was an absence of meaningful choice on the part of one of the parties. While a determination of unconscionability is a fact-sensitive question based upon a totality of the circumstances, there are several important factors to consider. As explained in this case, Ohio courts analyze an arbitration agreement for procedural unconscionability by looking at the relative bargaining positions of the contracting parties and considering factors such as "each party's age, education, intelligence, experience, and who drafted the contract." Other factors considered by the court include whether the stronger party knew that the weaker party would not be able to receive substantial benefits from the contract or whether the stronger party knew the weaker party was unable to protect its interests due to an infirmity or illiteracy. Here, the plaintiffs negotiated and renegotiated the contract with the defendant. The court also noted that there was no evidence the parties were rushed or pressured to sign the contract, and the plaintiffs had the opportunity to hire an attorney to review the contract. Consequently, the court determined the contract was not procedurally unconscionable.

Fraudulent Conveyance

Mancz v. McHenry, **2d Dist. Greene No. 2019-CA-74, 2021-Ohio-82**

In this appeal, the Second Appellate District affirmed the trial court's decision, finding evidence of multiple badges of fraud and agreeing that the debtor fraudulently conveyed assets to her husband.

- **The Bullet Point:** Under the Ohio Uniform Fraudulent Transfer Act, a transfer made by a debtor is fraudulent as to a creditor if the transfer is made (1) "with actual intent to hinder, delay, or defraud any creditor of the debtor" or (2) without receiving a "reasonably equivalent value" where additional

circumstances exist. R.C. 1334.06(A). Under R.C. 1336.04(B), there are 11 so-called "badges of fraud" that are considered when determining a debtor's actual intent. However, a creditor does not need to prove the existence of all 11 badges of fraud to have the transfer voided as fraudulent. Instead, a debtor's intent is established circumstantially by considering all of the badges of fraud. In fact, Ohio courts have found evidence of fraudulent intent even when only three badges of fraud were present. In this case, the court found evidence of multiple badges of fraud and determined the debtor fraudulently conveyed real estate and financial assets. As the court noted, the debtor's transfer of the real estate was to an insider as she conveyed her interests to her husband, and she did not receive value in exchange for her interests. In addition, the debtor retained possession or control of the real estate, the transfers were of substantially all of her assets, and the debtor had been sued and threated with suit before and during the transfer. Consequently, the court declared void the debtor's deed transferring her interests to her husband.

Misappropriation of Trade Secrets

***Key Realty, Ltd. v. Hall,* 6th Dist. Lucas No. L-19-1237, 2021-Ohio-26**

In this appeal, the Sixth Appellate District affirmed in part and reversed in part the trial court's decision, finding that the plaintiff's materials and business structure were publicly available, routine in the industry, and therefore not protected trade secrets.

- **The Bullet Point:** Under Ohio law, an entity alleging misappropriation of a trade secret must prove: "(1) the existence of a trade secret; (2) the acquisition of a trade secret as a result of a confidential relationship; and (3) the unauthorized use of a trade secret." The Ohio Supreme Court developed a six-factor test to analyze claims for misappropriation of a trade secret. Under this test, courts consider: "(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information." In this case, the court utilized the six-factor test and noted that each document the plaintiff claimed to be a trade secret was stored or located on a publicly available website. Further, substantial parts of the plaintiff's business model were not proprietary but were instead used by many businesses in the industry. As the court explained, information that is known generally in the industry is not a secret and cannot be afforded trade secret protection. Regardless, even if the plaintiff's materials fell within a category of protected trade secrets, the plaintiff did not demonstrate that it actively took steps to maintain the information's secrecy. As the court warned, once material is publicly disclosed, it loses any status it ever had as a trade secret.

Consideration Needed to Contract

***Bakhshi v. Baarlaer,* 2d Dist. Montgomery Nos. 28767, 28768, 2021-Ohio-13**

In this appeal, the Second Appellate District affirmed in part the trial court's decision agreeing that as the plaintiff failed to provide any consideration for the promissory note, he was not entitled to foreclose on his mortgage.

- **The Bullet Point:** In an action for failure to pay under a promissory note, a party may defend itself by arguing failure or want of consideration. As explained by the court, these are two different defenses. The defense of want of consideration applies in instances where there is a total lack of any valid consideration for the contract. On the other hand, the defense of failure of consideration "is the neglect, refusal and failure of one of the contracting parties to do, perform or furnish, after making and entering into the

contract, the consideration in substance and in fact agreed upon." Simply stated, failure of consideration exists when the contracting parties intended and agreed upon the consideration, but the consideration was not provided or satisfied. In this case, the defendant signed a promissory note and mortgage to the plaintiff as part of a construction contract. After execution, the plaintiff failed to either give the defendant the funds or to credit the amount of the promissory note against the final construction price. Consequently, there was a failure of consideration for the promissory note and the plaintiff was not entitled to foreclosure judgment on the defendant's property.

contact

James Sandy
member > cleveland

T (216) 378-9911
jsandy@mcglinchey.com

Stephanie Hand-Cannane
associate > cleveland

T (216) 378-4989
shandcannane@mcglinchey.com

[Cite as *Sebold v. Latina Design Build Group, L.L.C.* , 2021-Ohio-124.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MIKKI SEBOLD, ET AL., :

Plaintiffs-Appellants, :

No. 109362

v. :

LATINA DESIGN BUILD GROUP, L.L.C., ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: January 21, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-918180

Appearances:

The Gareau Law Firm Co., L.P.A., and David M.Gareau, *for appellants*.

McCarthy, Lebit, Crystal & Liffman Co., L.P.A., David M. Cuppage, and Nicholas R. Oleski, *for appellees*.

LARRY A. JONES, SR., P.J.:

{¶ 1} Plaintiffs-appellants Mikki and Mark Sebold ("the Sebolds") appeal from the trial court's order granting a stay and compelling arbitration. For the reasons that follow, we affirm.

Substantive Facts and Procedural History

{¶ 2} In 2016, the Sebolds contacted defendants-appellees Latina Design Build Group, L.L.C., Anthony Latina, and Darla Kurtz ("collectively referred to as Latina") to inquire about a large scale remodel of their home. The parties entered into an initial contract to construct an addition to the Sebolds' home for $239,909.46. The Sebolds' lender would not underwrite the contract so the parties amended the contract to $212,322.45, and Latina began work on the house.

{¶ 3} The contract contained an arbitration clause that stated:

> 14. Arbitration
>
> Disagreements arising out of contract or from breach thereof shall be subject to arbitration and this agreement shall be enforceable under prevailing arbitration law. Parties may agree on one arbitrator, otherwise there shall be three, one named in writing by each of the parties within five days after notice of arbitration by either party upon the other, a third would be selected by these two arbitrators within five days thereafter. No arbiter shall be financially interested in contract or affairs of either party. Costs incurred to be divided equally between contractor and owner.

{¶ 4} According to Latina, it completed the work in the fall of 2017 but the Sebolds paid less than the amount due on the contract. The Sebolds contend that Latina did not complete construction and they paid almost all of what was due, $205,952.24 of the $212,322.45 contract price. Latina filed a mechanic's lien on the Sebolds' house in December 2017, demanding $58,042.76.

{¶ 5} In January 2019, the Sebolds decided to cancel their contract with Latina, purportedly under the Ohio Home Solicitation Sales Act ("HSSA"), by sending a letter to Latina cancelling the contract and asking for a return of their

money. The Sebolds filed the instant lawsuit, seeking damages and equitable relief arising from claims for violations of the Ohio Home Construction Services Supplier Act; breach of contract; breach of implied duty to perform in a workmanlike manner; violations of the Ohio Consumer Sales Practices Act ("CSPA"); personal liability against Latina's owner Anthony Latina and employee Darla Kurtz; declaratory relief as to the validity of the mechanic's lien filed against the property; declaratory relief as to the terms of the parties' agreement; violations of HSSA; and a declaration that the cancellation of the parties' contract by the Sebolds pursuant to the HSSA rendered the arbitration clause void.

{¶ 6} Latina moved to stay the case and compel arbitration, which the Sebolds opposed. The Sebolds moved to compel responses to interrogatories and to conduct limited discovery, which Latina opposed. The trial court denied the Sebolds' motions and granted Latina's motion to stay and compel arbitration.

{¶ 7} The Sebolds filed a notice of appeal and raise two assignments of error for our review.

Assignments of Error

> I. The trial court erred in granting Appellees' Motion to Stay and to Compel Arbitration because (a) the arbitration clause's scope did not allow referral for all matters contained in the Complaint; (b) the arbitration clause is so deficient that it is not enforceable; and (c) the arbitration clause is procedurally and substantively unconscionable.
>
> II. The trial court erred in enforcing the arbitration clause when there was unrebutted evidence that Appellees had violated the Home Solicitation Sales Act and that Appellants had validly cancelled the contract under the Home Solicitation Sales Act, in contravention of

this Court's holding in *Wisniewski v. Marek Builders, Inc.* (2017-Ohio-1035, 87 N.E.3d 696 (8th Dist.)).

Arbitration Generally and Standard of Review

{¶ 8} In Ohio, there is a strong public policy favoring arbitration of disputes. Ohio courts have recognized a "presumption favoring arbitration" that arises "when the claim in dispute falls within the scope of the arbitration provision." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 27, citing *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859 (1998).

{¶ 9} Under R.C. 2711.02, a court may stay trial of an action upon application of a party if "(1) the action is brought upon any issue referable to arbitration under a written agreement for arbitration, and (2) the court is satisfied the issue is referable to arbitration under the written agreement." *Seyfried v. O'Brien*, 2017-Ohio-286, 81 N.E.3d 961, ¶ 17 (8th Dist.), citing *Austin v. Squire*, 118 Ohio App.3d 35, 37, 691 N.E.2d 1085 (9th Dist.1997).

{¶ 10} This court applies an abuse of discretion standard when addressing whether a trial court has properly granted a motion to stay litigation pending arbitration. *Seyfried* at ¶ 18, citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7. This court applies a de novo standard of review, however, when reviewing the scope of an arbitration agreement, that is, whether a party has agreed to submit a certain issue to arbitration. *Seyfried* at *id.*, citing *McCaskey* at *id.* This court also applies a de novo standard of review over a

trial court's decision on unconscionability of an arbitration clause. *Seyfried* at *id.*, citing *McCaskey* at ¶ 8, citing *Taylor Bldg.* Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Arbitration Clause

{¶ 11} In the first assignment of error, the Sebolds contend that the trial court erred in granting Latina's motion to stay and compel arbitration.

Whether the Sebolds Agreed to Arbitrate

{¶ 12} In *Seyfried*, this court noted:

> To determine whether a party has agreed to arbitrate, the courts apply ordinary principles that govern the formation of contracts. In order for a valid contract to exist, there must be mutual assent on the essential terms of the agreement, which is usually demonstrated by an offer, acceptance of the offer, and consideration. "[Q]uestions of contract formation and intent remain factual issues to be resolved by the fact finder after careful review of the evidence." Specifically, the question of whether the parties agreed to arbitrate their disputes is a matter of contract and the terms of a contract are a question of fact.

(Citations omitted). *Id.* at ¶ 19.

{¶ 13} The Sebolds signed an agreement to arbitrate any "disagreements arising out of contract or breach thereof" with Latina when they executed the contract with Latina to remodel their home. The Sebolds claim that because the arbitration clause was so narrowly drafted, they never agreed to arbitrate any claims unrelated to a breach of contract, such as their claims relating to rescission

or cancellation of their contract, tort claims, other statutory claims, and claims relating to the invalid mechanic's lien.

{¶ 14} For every claim, including statutory claims, courts must consider whether the parties agreed to arbitrate the issue. *Academy of Medicine v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 20. Courts look at whether "'an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.'" *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 122 Ohio St.3d 341, 2009-Ohio-2962, 911 N.E.2d 286, ¶ 24, quoting *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6th Cir.2003); *see also Park Bldg. Condominium Assn. v. Howells & Howells Ents., L.L.C.*, 2017-Ohio-1561, 90 N.E.3d 131, ¶ 16 (8th Dist.); *Ohio Plumbing, Ltd. v. Fiorilli Constr., Inc.*, 2018-Ohio-1748, 111 N.E.3d 763, ¶ 15 (8th Dist.). Thus, in this case, the trial court had to consider whether the Sebolds' claims stemmed from their contractual relationship with Latina.

{¶ 15} We are not persuaded by the Sebolds' argument that their claims fall outside of their agreement to arbitrate — none of their claims could be maintained without reference to the contract and none of the claims preclude arbitration. *See generally Zubek v. Dearborn*, 8th Dist. Cuyahoga No. 107833, 2019-Ohio-3765, ¶ 24 (noting that Ohio courts have consistently held that claims under the CSPA do not preclude arbitration) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (recognizing that statutory claims may be arbitrated and holding that while a party may exclude

statutory claims from the scope of an agreement to arbitrate, a party does not forgo substantive rights afforded by a statute by agreeing to arbitrate a statutory claim).

{¶ 16} In their complaint, the Sebolds allege that Latina violated the Home Construction Service Suppliers Act because the amended contract was not in writing and the arbitration clause was missing essential terms; Latina violated the CSPA by breaching the contract; and Latina violated the HSSA because Latina did not recognize the Sebolds' attempt to cancel the contract under the HSSA. These are all disputes that emanate from the parties' contractual relationship; in other words, they are "[d]isagreements arising out of contract," and fall squarely under the arbitration provision.

Essential Terms of the Agreement

{¶ 17} The Sebolds also contend that the arbitration clause is missing essential terms. According to the Sebolds, the arbitration clause (1) must expressly state that the arbitration is binding and (2) fails to set forth the rules in arbitration. The Sebolds cite to no authority to support this claim.

{¶ 18} R.C. Chapter 2711 governs arbitration in Ohio. R.C. 2711.01 states:

> A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

{¶ 19} R.C. 2711.01 does not require that an agreement to arbitrate expressly state that the parties shall proceed to "binding" arbitration in order for the agreement to be enforceable. Rather, the statute provides that if the parties enter into an agreement, the agreement, subject to a few exceptions, shall be valid, irrevocable, and enforceable.

{¶ 20} R.C. 2711.08 states that the award made in an arbitration proceeding must be in writing and signed by a majority of the arbitrators. Either party can, within a year after the award is issued, "apply to the court of common pleas for an order confirming the award." R.C. 2711.09. Thereafter, the court of common pleas can, assuming the parties comply with the procedural requirements in R.C. 2711.14, enter a judgment confirming the award. R.C. 2711.12.

{¶ 21} This court has noted that "[t]he very definition of arbitration requires a 'final and binding award.'" *Delvito v. Autos Direct Online, Inc.*, 2015-Ohio-3336, 37 N.E.3d 194, ¶ 41 (8th Dist.), fn. 8. We find (and the Sebolds cite no authority that states otherwise) no requirement that the contract explicitly state that the arbitration is binding.

{¶ 22} The Sebolds also fail to cite any authority to support their argument that the arbitration clause is missing an essential term because the agreement does not state the rules of arbitration. There is no requirement under Ohio law that the arbitration clause include the rules of arbitration. *See Sikes v. Ganley Pontiac Honda, Inc.*, 8th Dist. Cuyahoga No. 82889, 2004-Ohio-155, ¶ 18 ("[Plaintiff] cites no authority supporting her proposition that the arbitration clause is required to

relay * * * an explanation of arbitration, the designated arbitration program, the costs of arbitration, the party responsible for paying, the applicable law governing arbitration, the discovery process, the right to bring an attorney, the right to punitive damages, and the appeal process.").

Unconscionability

{¶ 23} Next, the Sebolds claim the arbitration clause is both procedurally and substantively unconscionable.

{¶ 24} Unconscionability embodies two separate concepts: (1) unfair and unreasonable contract terms, i.e., substantive unconscionability; and (2) an absence of meaningful choice on the part of one of the parties, i.e., procedural unconscionability. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 34. A party asserting the unconscionability of a contract "must prove a quantum of both substantive and procedural unconscionability." *Hayes v. Oakridge Home,* 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 30; *Taylor Bldg.* at *id.* These two concepts create a two-prong conjunctive test for unconscionability. *Gates v. Ohio Savs. Assn.*, 11th Dist. Geauga No. 2009-G-2881, 2009-Ohio-6230, ¶ 47; *Strack v. Pelton*, 70 Ohio St.3d 172, 637 N.E.2d 914 (1994). Again, we review whether an arbitration agreement is enforceable in light of a claim of unconscionability using a de novo standard of review. *Hayes* at ¶ 21, citing *Taylor Bldg.* at ¶ 37.

{¶ 25} In determining whether an agreement is procedurally unconscionable, courts consider the relative bargaining positions of the parties

including each party's age, education, intelligence, experience, and who drafted the contract. *Taylor Bldg.* at ¶ 44. Additional factors that may contribute to a finding of procedural unconscionability include the following:

> "belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his [or her] interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors."

Id., quoting Restatement of the Law 2d, Contracts, Section 208, Comment d (1981).

{¶ 26} We note, however, that "[i]nequality of bargaining power alone is insufficient to invalidate an otherwise enforceable arbitration contract." *Neel v. A. Perrino Constr., Inc.*, 2018-Ohio-1826, 113 N.E.3d 70, ¶ 24 (8th Dist.), citing *Taylor Bldg.* at *id.*

{¶ 27} "'A determination of unconscionability is a fact-sensitive question that requires a case-by-case review of the surrounding circumstances.'" *Brunke v. Ohio State Home Servs., Inc.*, 9th Dist. Lorain No. 08CA009320, 2008-Ohio-5394, ¶ 8, quoting *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, 822 N.E.2d 841 (9th Dist.); *Wallace v. Ganley Auto Group*, 8th Dist. Cuyahoga No. 95081, 2011-Ohio-2909, ¶ 44.

{¶ 28} The Sebolds argue that the arbitration provision was procedurally unconscionable because Latina drafted the contract without their input; the

arbitration clause was buried in the contract, and there were essential terms missing from the arbitration clause. The Sebolds further claim they were not familiar with arbitration, were not sophisticated consumers or represented by an attorney during contract negotiation, and no one from Latina ever explained the process of arbitration to them. The Sebolds argue that Latina had unequal bargaining power over them because Latina had decades of experience building homes and Anthony Latina was the president of both local and statewide home builder associations.

{¶ 29} This court has previously rejected similar arguments made by consumers in a similar context. *See Conte v. Blossom Homes L.L.C.*, 2016-Ohio-7480, 63 N.E.3d 1245, ¶ 23 (8th Dist.), and *Neel* at ¶ 26. In *Conte*, this court found that the consumer was unable to establish procedural unconscionability where he alleged that his meeting with a builder was hurried, he had no knowledge of construction contracts or regulations, he did not understand what arbitration was, he was otherwise unable to understand the terms of the agreement, and he was pressured to sign the contract. *Id.* at ¶ 20-23. Similarly in *Neel*, the consumers claimed that the home builder was more knowledgeable regarding arbitration and they were rushed through the signing of the contract. *Id.*

{¶ 30} In both cases, this court found that the consumers could not establish procedural unconscionability:

> While the Neels claim they were rushed through the signing of the contract, the record shows that they met with Perrino several times before ultimately signing the contract. The Neels did not ask for more

> time to review the contract, and nothing in the record indicates that they could not have done so. Similarly, the Neels argue that Perrino failed to explain the arbitration clause to them. Although they concede that they had the opportunity to ask questions, they apparently did not do so. Additionally, nothing in the record indicates that the Neels were pressured to sign the contract, or that Perrino was the only builder with whom they could have contracted. Finally, the Neels' claim that no one pointed out the arbitration clause to them is not persuasive to establish procedural unconscionability. The Neels were entering into a contract for a custom-built home worth over $300,000. Their status as consumers does not free them of their duty to read the contract they signed.

Id.

{¶ 31} In this case, the Sebolds met with Latina several times before entering into the contract to remodel their home. They negotiated the contract and then renegotiated it when the bank would not undersign the first contract. There is no evidence they were rushed through the negotiations, pressured to sign the contract, or did not understand the process. The Sebolds also could have hired an attorney to review the contract had they so chosen.

{¶ 32} Thus, under the totality of the circumstances of this case, the arbitration provision is not procedurally unconscionable. Because the Sebolds bore the burden of proving that the arbitration agreement was both procedurally and substantively unconscionable, and we have found that the agreement was not procedurally unconscionable, we need not consider whether it was also substantively unconscionable.

{¶ 33} In light of the above, the first assignment of error is overruled.

Ohio Home Solicitation Sales Act

{¶ 34} In the second assignment of error, the Sebolds argue that the trial court erred in enforcing the arbitration clause when there was unrebutted evidence that Latina had violated the HSSA and the Sebolds had validly cancelled the contract under the Act. The Sebolds contend that not only was the arbitration clause unenforceable but the entire contract should be cancelled under the HSSA. For the following reasons, we find this issue premature.

{¶ 35} The Act was enacted to decrease high-pressure sales tactics that are sometimes employed during in-home solicitations by providing consumers with a cooling-off period within which the transaction may be cancelled. *Wisniewski v. Marek Builders, Inc.*, 2017-Ohio-1035, 87 N.E.3d 696, ¶ 7 (8th Dist.), citing *Garber v. STS Concrete Co., L.L.C.*, 2013-Ohio-2700, 991 N.E.2d 1225, ¶ 12 (8th Dist.). Under the HSSA, a home solicitation sale must include a written agreement that contains a statement of the buyer's right to cancel the contract until midnight of the third business day after the day on which the buyer signs the contract. R.C. 1345.22 and 1345.23. Where no such provision is contained in the agreement, the buyer's right to cancel the contract does not expire. R.C. 1345.23(C).

{¶ 36} In *Wisniewski*, a divided panel of this court found that the HSSA applied to a contract that contained an arbitration clause where the homeowner sought to cancel the contact under the HSSA. This court found that because the defendant-builder did not dispute that the contract violated the HSSA and the

homeowner exercised his right to cancel the contract, the trial court erred in granting the builder's motion to stay the case pending arbitration. *Id.* at ¶ 21.

{¶ 37} This case is easily distinguishable. Latina disputes that its contract violates the HSSA and disputes that the Sebolds have the right to cancel their contract with Latina under the HSSA.

{¶ 38} Perhaps more importantly, claims that the contract itself is void or invalid based on an alleged HSSA violation are decisions that are best left for the arbitrator to decide. *See Taylor Bldg. Corp.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 41 (claims that relate to the contract generally, rather than the arbitration clause specifically, are properly left to the arbitrator); *see also Wisniewski* at ¶ 36 (Keough, J., dissenting).

{¶ 39} "This court has repeatedly held that 'in the face of a valid arbitration clause, questions regarding the validity of the entire contract must be decided in arbitration.'" *Wisniewski* at ¶ 37 (Keough, J., dissenting), citing *Coble v. Toyota of Bedford*, 8th Dist. Cuyahoga No. 83089, 2004-Ohio-238, ¶ 20, quoting *Weiss v. Voice/Fax Corp.*, 94 Ohio App.3d 309, 313, 640 N.E.2d 875 (1st Dist.1994); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

{¶ 40} We have already determined that the trial court did not err when it determined that the arbitration clause in the contract was valid; thus, a determination whether the HSSA applies to the subject contract and issues

surrounding whether the Sebolds could cancel the contract under the HSSA would be premature for this court to determine at this time.

{¶ 41} The second assignment of error is overruled.

{¶ 42} Judgment affirmed.

It is ordered that appellees recover from appellants 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.

_____

LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MICHELLE J. SHEEHAN, J., CONCUR

[Cite as *Mancz v. McHenry*, 2021-Ohio-82.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

BARRY W. MANCZ, FIDUCIARY OF THE ESTATE OF AUDREY KIRBY	:	
	:	Appellate Case No. 2019-CA-74
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2015-CV-183
v.	:	
	:	(Civil Appeal from
CALLISTA McHENRY, et al.	:	Common Pleas Court)
	:	
Defendants-Appellants	:	

. . . . . .

O P I N I O N

Rendered on the 15th day of January, 2021.

. . . . . .

HARRY G. BEYOGLIDES, JR., Atty. Reg. No. 0018959, 130 West Second Street, Suite 1900, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

RICHARD A. BOUCHER, Atty. Reg. No. 0033614 and JULIA C. KOLBER, Atty. Reg. No. 0078855, 12 West Monument Avenue, Suite 200, Dayton, Ohio 45402
Attorneys for Defendants-Appellants

. . . . . .

HALL, J.

{¶ 1} Callista and Robert McHenry appeal from the trial court's decision and judgment entry overruling their objections to a magistrate's decision and entering judgment against them for fraudulently conveying real estate and $127,133 in financial assets.

Factual and Procedural Background

{¶ 2} The trial court's judgment involves assets that Callista fraudulently conveyed to Robert, her husband, after taking money from her elderly mother for personal use. The record reflects that Callista began serving as attorney-in-fact for her mother, Audrey Kirby, in October 2000. Nearly two years later, Kirby executed a will that provided for her assets to be divided equally among her children, subject to deductions for advances to two children. Kirby also executed a revocable trust agreement. Kirby died in April 2007, leaving 13 surviving children. After one of Kirby's sons resigned as executor of the estate, attorney Barry Mancz was appointed as successor fiduciary.

{¶ 3} In December 2009, Mancz filed a lawsuit in Montgomery County Probate Court, claiming that Callista had breached her fiduciary duties to Kirby's estate by concealing, embezzling, or conveying away estate assets in violation of R.C. 2109.50. Following a hearing, the probate court found Callista guilty of concealing, embezzling, or conveying away estate assets in the amount of $290,975.46. After assessing a 10-percent penalty, the probate court entered judgment against Callista for $320,073.01. On appeal, this court reviewed evidence establishing that while acting as her mother's attorney-in-fact, Callista improperly had moved money from her mother's bank account and certificates of deposit into numerous accounts that were titled in Callista's name or

that were held jointly by Callista and Robert. Callista also obtained certificates of deposit in her own name using her mother's assets. The evidence further established that Callista had written hundreds of checks on these accounts apparently for her personal benefit. Although Callista frequently moved the money she took from her mother, this court's examination of the evidence suggested that she in fact had taken *more* than the amount found by the probate court. This court also rejected an argument that the assets taken by Callista were "gifts" from her mother. Therefore, we affirmed the probate court's judgment against Callista for concealing, embezzling, or conveying away her mother's assets. *See Mancz v. McHenry*, 2012-Ohio-3285, 974 N.E.2d 784 (2d Dist.).

{¶ 4} In his capacity as fiduciary of Kirby's estate, attorney Mancz filed the present lawsuit against Callista and Robert in March 2015. The complaint alleged that Callista had neither satisfied the judgment in the probate-court case nor returned any of the estate property. The complaint further alleged that Callista had transferred her ownership interest in real estate to her husband Robert while litigation was pending against her by her siblings and prior to the probate-court lawsuit brought by Mancz. The complaint alleged that this transfer was made with actual intent to hinder, delay, or defraud Mancz and other creditors and that the transfer was made without Callista receiving reasonably equivalent value in exchange.

{¶ 5} With regard to personal property, the complaint alleged that Callista had transferred, converted, or concealed bank accounts and other financial interests that were recoverable in furtherance of the judgment in the probate-court case. The complaint alleged that these transfers were made with the intent to avoid the purpose of proceedings under R.C. 2109.50 to R.C. 2109.55 (which was the subject of the probate-court action)

"or in contemplation of an examination or complaint provided for by those sections." The complaint alleged that the financial transfers from Callista to Robert were fraudulent and void and that Mancz was entitled to an order compelling the return of any and all such proceeds or the value thereof. The complaint specifically requested a judgment ordering the return of property of Kirby's estate that had been conveyed by Callista to herself, to Robert, or to others. The complaint also sought punitive damages.

{¶ 6} The case proceeded to a January 2019 jury trial presided over by a magistrate. Based on the evidence presented, the jury returned a verdict finding that Callista fraudulently had conveyed her interest in real estate to Robert. The jury also returned verdicts against both Callista and Robert for the fraudulent transfer of Kirby's financial assets. The verdicts were accompanied by numerous interrogatory responses, including interrogatories addressing statutory "badges of fraud." With regard to the fraudulent transfer of financial assets, the jury's verdicts found actual damages of $127,133.

{¶ 7} On January 15, 2019, the magistrate entered a decision on the jury verdicts. The magistrate declared void the deed transferring Callista's interest in real estate to Robert. The magistrate also entered judgment against Callista in the amount of $127,133 and against Robert in the same amount. After holding a hearing, the magistrate declined to impose punitive damages on Callista or Robert.

{¶ 8} The McHenrys subsequently raised five objections to the magistrate's decision on the jury verdicts. In a November 13, 2019 decision and judgment entry, the trial court rejected all but one of the objections. With respect to one objection, the trial court found that the magistrate's decision was unclear as to whether judgment had been

entered against Callista and Robert for $127,133 each. To avoid "double recovery," the trial court clarified that judgment was entered against Callista and Robert jointly and severally for $127,133. The trial court also declared void the deed transferring Callista's interest in the real estate to her husband. Callista and Robert McHenry timely appealed the trial court's judgment, advancing 13 assignments of error.

Preliminary Issues

{¶ 9} In his appellee's brief, Mancz responds to some of the McHenrys' assignments of error by simply "incorporating by reference" arguments he raised in memoranda and pleadings filed below. In their reply brief, the McHenrys argue that Mancz's extensive reliance on "incorporation by reference" of documents filed in the trial court is inappropriate. Therefore, they urge us not to consider Mancz's arguments that rely on incorporation by reference. Upon review, we agree that wholesale incorporation by reference of arguments raised below is inappropriate and not particularly helpful.[1] We note, however, that the McHenrys' own eleventh assignment of error relies *exclusively* on incorporation by reference of 50 pages of summary-judgment papers they filed in the trial court. Under these circumstances, we will consider the McHenrys' eleventh assignment of error and Mancz's incorporated arguments notwithstanding our disfavor of such an approach.

{¶ 10} For his part, Mancz argues that some of the McHenrys' assignments of error are not properly before us because they are not "addressed by" or "asserted in" the McHenrys' notice of appeal. We find this argument to be unpersuasive. The McHenrys

[1] We will address this issue more fully in our analysis of the McHenrys' eleventh assignment of error.

appealed from the trial court's November 13, 2019 Decision and Judgment Entry, which overruled their objections to a magistrate's post-verdict decision and entered final judgment on the jury's verdicts. In our view, the notice of appeal reasonably encompassed the numerous issues and rulings that preceded the trial court's final judgment entry. It was not necessary for the McHenrys to enumerate each of the preceding issues and rulings in their notice of appeal. Having resolved these threshold matters, we turn now to the McHenrys' 13 assignments of error.

Assignments of Error

{¶ 11} In their first assignment of error, the McHenrys contend the trial court erred in failing to address their objection to the jury's use of inadmissible evidence to determine damages and to the jury's verdict for the fraudulent transfer of financial assets being against the weight of the evidence.

{¶ 12} This assignment of error concerns the McHenrys fifth objection to the magistrate's decision. Therein, the McHenrys argued that the magistrate had erred in entering judgment on the jury's verdicts with respect to the fraudulent transfer of financial assets. In support, the McHenrys asserted that Mancz (who testified as a witness at trial) never identified a certain dollar amount being transferred from any of the accounts at issue. They claimed that Mancz's only effort to establish a specific dollar amount was through the use of improper demonstrative exhibits during closing arguments. The McHenrys further claimed that Mancz failed to identify any money that Robert spent or withdrew from any of the accounts at issue. In fact, the McHenrys argued that Mancz failed to establish that the money was not still in the accounts to which it was transferred. Without evidence that Robert spent the money or that the accounts had a zero balance,

the McHenrys questioned how the jury could have found a fraudulent transfer. Therefore, they argued in their fifth objection that the jury's verdicts regarding the fraudulent transfer of financial assets were against the manifest weight of the evidence.

{¶ 13} The trial court rejected the fifth objection, reasoning:

> In their fifth and final objection, the McHenrys claim there was insufficient evidence to establish a damages award of $127,133 against each of the McHenrys. The McHenrys claim that the jury improperly relied upon a demonstrative exhibit and Mancz's closing argument to come up with the amount of damages awarded.
>
> The Court notes that the jury was instructed that their verdicts must be based upon the evidence. The jury was further instructed that the statements of counsel and closing arguments made by counsel are not evidence. It is well settled that a trial jury is presumed to follow the instructions given to it by the Court. [Citation omitted.]
>
> The McHenrys' fifth objection is not related to any decision made by the Magistrate, but rather a general argument about the jury's verdict that is not appropriate for review on objections. Moreover, the Court presumes the jury followed the instructions given to it by the Magistrate. Therefore, the McHenrys' fifth and final objection is overruled.

(November 13, 2019 Decision and Judgment Entry at 4-5.)

{¶ 14} Upon review, we find the McHenrys' first assignment of error to be without merit. Insofar as they challenged Mancz's use of demonstrative exhibits (which were not introduced into evidence) during his closing argument, the trial court addressed their

objection. The jury was instructed that the demonstrative exhibits were not evidence. Moreover, the trial court noted that the jury was instructed about counsel's statements and closing arguments in general not being evidence. Therefore, regardless of the propriety of the demonstrative exhibits and counsel's related argument, the trial court presumed that the jury followed the instructions given to it and based its verdicts on actual evidence. Regardless of whether the McHenrys agree with the trial court's analysis, the trial court did address that aspect of their fifth objection. Therefore, we do not find that the trial court adopted the magistrate's decision without considering the objection, which is the McHenrys' argument on appeal.

{¶ 15} Insofar as the McHenrys objected to the verdict being against the weight of the evidence, we agree with the trial court that, strictly speaking, "the objection is not related to any decision made by the Magistrate, but rather a general argument about the jury's verdict that is not appropriate for review on objection." If the McHenrys had objected to the magistrate's denying a new-trial motion or denying a motion for judgment notwithstanding the verdict based on the weight of the evidence, then the trial court would have had something to review. But the McHenrys objected to the magistrate *entering judgment* on verdicts that the McHenrys believed were against the weight of the evidence. (June 5, 2019 Supplemental Objections at 13.) The magistrate did not err in simply entering judgment on the verdicts, which were not defective or irregular in any way. In any event, we will address the demonstrative exhibits and the weight of the evidence in our analysis of the McHenrys' sixth assignment of error, where they raise those same issues again. The first assignment of error is overruled.

{¶ 16} In their second assignment of error, the McHenrys contend the trial court

erred in adopting the magistrate's decision where Mancz's fraudulent-transfer claim was barred by res judicata.

{¶ 17} The record reflects that the McHenrys moved for summary judgment, raising issues including res judicata. In particular, they argued that the allegedly fraudulent transfers of the real estate and the money into bank accounts occurred prior to the probate-court lawsuit. Therefore, the McHenrys argued that the fraudulent-transfer claims were required to be brought as part of the probate-court action. The magistrate found res judicata inapplicable, and the McHenrys filed objections. In a September 28, 2018, ruling, the trial court overruled the objection arguing the applicability of res judicata. The trial court reasoned in part:

> While the McHenrys are correct in stating that the present litigation derives from the underlying Montgomery County Probate Court litigation wherein Mancz obtained judgment, the gravamen of the present litigation is based on actions taken by the McHenrys which Mancz maintains were undertaken with "actual intent to hinder, delay or defraud the Plaintiff and other creditors . . ." of Callista McHenry.
>
> Accordingly, the current action is not an attempt to re-litigate a claim or issue litigated and decided in the Montgomery County Probate Court action. Rather, it appears this action has been instituted in an attempt to gain compliance with the Probate Court's order of judgment, which could not have been undertaken prior to the judgment being entered.

(September 28, 2018 Decision and Judgment Entry at 3.)

{¶ 18} In reaching its conclusion, the trial court relied largely on *Blood v. Nofzinge*r,

162 Ohio App.3d 545, 2005-Ohio-3859, 834 N.E.2d 358 (6th Dist.). In *Blood*, the Sixth District held that res judicata did not bar a fraudulent-transfer claim brought after the underlying litigation that created a debtor-creditor relationship. Using language that is directly applicable in the present case, the *Blood* court stated: "Litigation that resulted in a judgment and created a judgment-creditor/judgment-debtor relationship is not res judicata as to a subsequent claim that the debtor fraudulently transferred property to avoid paying the judgment. In other words, appellant was not required to add her claim for fraudulent conveyance to litigation that had not yet resulted in a judgment." *Id*. at ¶ 22.

{¶ 19} In their objections to the magistrate's decision, the McHenrys argued that *Blood* was distinguishable because the allegedly fraudulent transfer there did not occur until several years *after* the entry of judgment in the underlying case. (August 21, 2018 Supplemental Objections at 6-7.) The trial court rejected this attempt to distinguish *Blood*. The trial court noted that the McHenrys had misread *Blood*, as the transfer of property at issue in that case had occurred two years *before* the entry of judgment in the underlying litigation. *See Blood* at ¶ 19.

{¶ 20} On appeal, the McHenrys now fail to cite *Blood* under their second assignment of error or even to attempt to address the trial court's reliance on it. Regardless, we find *Blood* to be persuasive and see no error in the trial court's ruling regarding the inapplicability of res judicata. The question is whether the claims in the present case arose from the same transaction, or "common nucleus of operative facts," as the claims in the probate-court case. *Miami Valley Hosp. v. Purvis*, 2d Dist. Montgomery No. 21740, 2007-Ohio-4721, ¶ 11. We agree with the trial court that they did not. The claims in the probate action involved Callista unlawfully removing assets from

her mother's estate. The claims in the present case involve Callista fraudulently conveying those assets to Robert with the intent to hinder, delay, or defraud creditors such as Mancz. Although the two cases are related, they do not share a common nucleus of operative facts such that res judicata precludes the present lawsuit. The second assignment of error is overruled.

{¶ 21} In their third assignment of error, the McHenrys claim the trial court erred in adopting the magistrate's decision permitting testimony from their former attorney, Brian Roberts, despite the fact that his testimony was disclosed without a waiver of the attorney-client privilege.

{¶ 22} This assignment of error concerns attorney Roberts' testimony about the circumstances surrounding his preparation of the deed conveying Callista's interest in the McHenrys' home to her husband Robert. The trial court found that Callista had not waived her attorney-client privilege with regard to this issue. The trial court found that Robert had waived his attorney-client privilege, however, by testifying on cross-examination that the conveyance was done on the "advice of counsel." Although Callista and Robert had met with the attorney together, the trial court allowed attorney Roberts to testify only about his discussion with Robert. Attorney Roberts proceeded to testify among other things that one of the reasons Robert wanted the deed put in his name was "asset protection." (Trial Tr. at 271-272.) According to the attorney, Robert expressed concern about keeping the house out of the reach of creditors in litigation against Callista. (*Id*. at 272-273.) Attorney Roberts explained to Robert that conveying Callista's interest to him would not provide "bullet proof" protection "and that creditors of Callista could claim that that conveyance was inappropriate in an attempt to put assets beyond the reach of her creditors." (*Id*. at

272.) On appeal, the McHenrys argue that Robert's reference to relying on the "advice of counsel" did not waive the attorney-client privilege and, therefore, that attorney Roberts should not have been allowed to testify.

{¶ 23} "The burden of showing that evidence ought to be excluded under the attorney-client privilege rests upon the party asserting the privilege." (Citations omitted) *MA Equip. Leasing I, L.L.C. v. Tilton*, 2012-Ohio-4668, 980 N.E.2d 1072, ¶ 21 (10th Dist.). " 'In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law.' " *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 7, quoting *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 18. Where the statute applies, the *Jackson* court opined that common-law doctrines involving implied waiver of the privilege are inapplicable. *Id*. at ¶ 11-12. In such a case, the statute provides the only two means by which the privilege may be waived: (1) express consent of the client or (2) the client's voluntary testimony on the same subject. *Id*. at ¶ 12.

{¶ 24} In the present case, Callista explained, as on cross-examination, that she conveyed her interest in the real estate to her husband for privacy and estate-planning purposes. (Trial Tr. at 152-153.) In the course of her explanation, Callista volunteered that she and her husband had consulted a lawyer at the recommendation of a friend. (*Id*.) Mancz then asked what estate-planning purpose Callista believed she would accomplish by conveying her interest to Robert. (*Id*. at 154-155.) In her response, Callista voluntarily referenced her meeting with an attorney. The following exchange then occurred:

> MRS. McHENRY: Okay, I believed, as a result of the meeting with the lawyer that now if Bob were to die before me, then I wouldn't have to go

to Probate. If I were to die before him, he wouldn't have to go to Probate to get his half of the house back. Oh, he wouldn't have to do it because it was in his name. It was me. See, so much has happened, I have to get this straight. That's what I believe.

MR. MANCZ: Did you also believe that by doing this if someone got a judgment against you they wouldn't be able to attach any interest in the property because it was now in your husband's name? Did you believe that?

MRS. McHENRY: I never—that never came up that I recall.

MR. MANCZ: That never came up?

MRS. McHENRY: I don't know. I don't know. As a result of the meeting with the lawyer that's what we did.

MR. MANCZ: Okay. I just want to be clear. Did you believe when the deed was made that you could not get a judgment that would attach anything to your real estate because you gave it to your husband? Did you believe that?

MRS. McHENRY: I didn't do it for that reason.

MR. MANCZ: Did—

MRS. McHENRY: I never thought about it. I never thought about it.

(*Id*. at 155-156.)

{¶ 25} Following Callista's testimony, Mancz asserted during a bench conference that she had perjured herself. (*Id*. at 161.) Specifically, Mancz claimed Callista had lied when she testified that the possibility of someone attaching her assets was not a reason for conveying her interest in the real estate to her husband. Mancz argued that evading

creditors was her primary purpose, and he sought to call attorney Roberts to prove it. (*Id*. at 161.) The McHenrys' counsel objected, arguing that Callista's attorney-client privilege precluded Mancz from calling attorney Roberts to prove perjury. (*Id*.) The trial court responded that the matter was "an issue that we'll have to look into." (*Id*. at 162.) Mancz agreed to call Callista's husband Robert first, and the trial court indicated that "we'll talk about [the alleged perjury] during the break."[2] (*Id*.)

{¶ 26} Robert then testified as on cross-examination. Mancz first asked whether Robert gave Callista anything in exchange for her interest in the real estate. Robert responded that he did give Callista something. Citing attorney-client privilege, however, Robert refused to identify what consideration he gave Callista. (*Id*. at 233-236.) Mancz then asked whether Robert signed any other documents at the time of the deed conveyance. Robert refused to answer, citing attorney-client privilege. (*Id*. at 237.) Robert also denied having heard Callista testify the previous day that she never considered attempting to protect the house from attachment by creditors. (*Id*. at 238.)

{¶ 27} Mancz then asked Robert whether part of the reason he consulted an attorney was because of the pending claims against Callista. Defense counsel objected on the basis of attorney-client privilege. (*Id*. at 239.) The trial court overruled the objection, finding that the reason why Robert went to see an attorney was not protected. (*Id*. at 239-240.) Mancz then asked again whether part of Robert's reason for seeing an attorney and having the deed conveyed "was to keep creditors of your wife from attaching the property should they get a judgment on their claim[.]" (*Id*. at 240.) Robert responded that it was

---

[2] The record contains no other discussion of the perjury issue. If it was addressed again, the trial court dealt with it off the record.

not. (*Id*.) Mancz then asked what did prompt Robert to see the attorney. Robert responded: "Without violating my attorney client privilege there were several reasons." Robert proceeded to cite privacy concerns related to the lawsuit against his wife and various pieces of personal information being disseminated on the internet. (*Id*. at 240-241.) In response, Mancz asked what that had to do with Callista conveying away her interest in the real estate. Robert initially refused to answer, citing attorney-client privilege. (*Id*. at 241.) When Mancz persisted and asked again, Robert responded, "We consulted a lawyer and followed his advice." (*Id*. at 242.)

{¶ 28} Following Robert's testimony, Mancz sought to call attorney Roberts as a witness. (*Id*. at 243.) The McHenrys' counsel objected on the basis of attorney-client privilege. (*Id*. at 244.) Counsel also argued that Robert's reason for consulting counsel and wanting the property conveyed to him was irrelevant because it was Callista's intent in conveying away her interest in the property that was critical. (*Id*. at 245.) Mancz responded that Robert's intent was relevant because he too signed the deed conveying the property from both of the McHenrys to him alone and Mancz sought to hold him responsible for the fraud too. (*Id*. at 249.)

{¶ 29} The trial court held the relevance objection in abeyance because it did not know what attorney Roberts would say. As for the attorney-client privilege, the trial court held that Robert had waived it based on his testimony about relying on the advice of counsel. (*Id*. at 250.) In support, the trial court cited *Maddox v. Greene Cty. Bd. of Commrs*., 2d Dist. Greene No. 2013-CA-71, 2014-Ohio-1541. (*Id*.) Based on its finding that Callista did not waive her attorney-client privilege, the trial court limited attorney Roberts to testifying only about his communication with Robert. (*Id*. at 250-251.) As set

forth above, attorney Roberts then testified that Robert expressed concern about asset protection and shielding the house from creditors in the litigation against Callista.

{¶ 30} Following the jury's verdict in favor of Mancz on behalf of the estate, the trial court overruled the McHenrys' objection to the magistrate's decision allowing attorney Roberts to testify. In support of its decision, the trial court reasoned:

> Under R.C. section 2317.02(A), if a client voluntarily testifies about communications made to his or her attorney, then that attorney can be compelled to testify about the same subject. Courts have interpreted "the same subject" broadly. *Walsh v. Barcelona Associates, Inc*., 16 Ohio App.3d 470 (1984). Voluntarily testifying that one acted on the advice of counsel constitutes an implied waiver of the attorney-client privilege. *Meyers Roman Friedberg & Lewis* [*v. Malm*], 183 Ohio App.3d 195, 2009 Ohio 2577. Indeed, one "cannot manipulate the attorney-client privilege by unilaterally choosing to disclose information favorable to him, while concurrently seeking to bar the search for potentially unfavorable information." *Id*. at ¶ 61.
>
> In this case and without objection, the question was posed, "[w]hat was the reason that you had your wife convey her interest—or, your wife convey her interest to you with a transfer on death back to you? . . . Or back to her—excuse me." Robert McHenry testified, "[w]e consulted a lawyer and followed his advice." (TR Volume IV, p. 242). He voluntarily asserted that the deed transfer was done on the advice of counsel as the answer to the question. Given the authority cited above, this Court finds an implied waiver

> of the attorney-client privilege, and given the broad interpretation of "the same subject," this Court finds that Brian Roberts's testimony was on the same subject as that of Robert McHenry. The Magistrate did not err in allowing the testimony of Brian Roberts as a result of that implied waiver. Moreover, the Magistrate properly limited Roberts's testimony to exclude any references to communications with or by Callista McHenry. The McHenrys' first objection is overruled.

(November 13, 2019 Decision on Objections at 2.)

{¶ 31} Upon review, we disagree with the trial court's determination that Robert voluntarily waived his attorney-client privilege. The trial court found the statutory privilege under R.C. 2317.02(A) applicable but concluded that Robert implicitly had waived it by relying on an advice-of-counsel defense. A voluntary assertion of an advice-of-counsel defense can be deemed as a voluntary waiver, although in *Matter of Estate of Weiner*, 2019-Ohio-2354, 138 N.E.3d 604, ¶ 65 (2d Dist.), we recently stated, without analysis, that "[t]he statutory attorney-client privilege may be waived only expressly, and not by implication[.]" Here though we conclude the record does not support the trial court's conclusion that Robert "voluntarily" waived the privilege "without objection." Just before answering the question at issue, Robert *explicitly* objected by invoking his attorney-client privilege and refused to answer. (Trial Tr. at 241-242.) Only after opposing counsel persisted did Robert answer. (*Id*.) In fact, we note that Robert attempted to invoke his attorney-client privilege at virtually every turn when discussing the deed conveying the real estate and the meeting with an attorney even though we believe the privilege did not apply to questions about what his own intentions were in transferring the real estate to

Callista. We note too that Robert answered the specific question at issue as on cross-examination. Under Ohio law, "there is at least a presumption that statements made during cross-examination are not voluntarily." *Avis Rent A Car Sys., LLC v. City of Dayton*, No. 3:12-CV-399, 2013 WL 3778922, at *7-8 (S.D. Ohio July 18, 2013) (Citing cases.) "[A] party claiming that the attorney-client privilege has been waived may overcome that presumption by pointing to the cross-examined party's unprompted disclosure of privileged communications, affirmatively offered, to which the examined party or their counsel did not object." *Id*. Here Robert did not make an unprompted disclosure of his communications with his attorney. He mentioned acting on the advice of counsel in response to repeated questioning by opposing counsel and only after invoking his attorney-client privilege and initially refusing to answer. Under these circumstances, we believe Robert did not voluntarily waive his attorney-client privilege.

{¶ 32} This court's decision in *Maddox*, on which the magistrate relied at trial, is not to the contrary. In *Maddox*, we found a waiver of the attorney-client privilege where the party seeking to invoke the privilege voluntarily had raised "advice of counsel" as an affirmative defense in its answer. Under Ohio law, acting on the "advice of counsel" is a recognized affirmative defense to certain civil claims. *See*, *e.g*., *Kleemann v. Carriage Trace, Inc*., 2d Dist. Montgomery No. 21873, 2007-Ohio-4209, ¶ 63. To establish the advice-of-counsel defense, a defendant is required to prove that he sought the advice of counsel, that he fairly and impartially informed his attorney of all material facts, and that he followed his attorney's advice in good faith. *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 168, 499 N.E.2d 1291 (10th Dist.1985). In *Maddox*, we found that the defendant had chosen to make a voluntary assertion in its answer that it had acted on the

advice of counsel. *Maddox* at ¶ 11. Therefore, the attorney-client privilege was waived with respect to that advice. One should not be able to claim they acted on advice of counsel without exposing what that advice entailed.

{¶ 33} Here the McHenrys did not assert an advice-of-counsel affirmative defense, which would have meant that they admitted conveying the real estate with fraudulent intent but did so in good faith because their attorney recommended that course of action. *See State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 75 Ohio St.3d 31, 33, 661 N.E.2d 187 (1996) (recognizing that an affirmative defense is "a new matter [that], assuming the complaint to be true, constitutes a defense to it"). Nor did Robert McHenry *voluntarily* choose to assert that he had acted on the advice of counsel. Unlike the defendant in *Maddox*, he made that disclosure as on cross-examination and after repeatedly invoking his attorney-client privilege. Therefore, we find *Maddox* to be distinguishable.

{¶ 34} Despite the foregoing conclusion, we see no grounds for reversing the trial court's judgment on the attorney-client privilege issue. Although Mancz has not raised the issue on appeal, we note that Callista very well may have waived her own attorney-client privilege notwithstanding the trial court's conclusion to the contrary. When asked about an affidavit in which she claimed to have conveyed the real estate to Robert for privacy and estate-planning purposes, Callista voluntarily mentioned going with Robert to see a lawyer. (Trial Tr. at 152-153.) When asked what estate-planning purpose she was accomplishing, Callista again voluntarily referenced her attorney reviewing the deed. (*Id*. at 154.) When asked again about what estate-planning purpose she was accomplishing by conveying her interest to Robert, Callista responded that, as result of her meeting with

an attorney, she believed neither she nor Robert would have to go through probate if the other died. (*Id*. at 155.) When asked whether she also believed as a result of the meeting that putting the house in her husband's name would shield it from creditors, Callista responded without objection that she did not believe that issue ever came up, that she did not convey the real estate for that reason, and that she never thought about protecting the house from creditors. (*Id*. at 156.) By asserting without objection that protecting the real estate from potential claims from creditors never came up during the meeting with an attorney, Callista likely waived her attorney-client privilege regarding the substance of the meeting. *Compare Selby v. O'Dea*, 2020 Ill.App. (1st) 181951, __ N.E.3d __, 2020 WL 1548471, ¶ 185-191 (holding that a client waived the attorney-client privilege when discussing the content of attorney-client communications by disclosing what such communications *did not* contain); *Terry v. Bacon*, 2011 Utah App. 432, 269 P.3d 188, ¶ 19 ("[T]he Terrys should not be permitted to use the [attorney-client] privilege as a sword by relying on their statements about what was not said during the communications with former counsel, while also asserting the attorney-client privilege as a shield when the defendants attempt to refute those assertions."). Allowing a party to testify concerning the substance of an attorney-client communication without allowing the attorney to respond would violate the principle that "the attorney-client privilege is a shield, to protect the confidentiality of a client's consultation with her attorney, not a sword to facilitate perjury concerning the substance of counsel's advice." *State v. Houck*, 2d Dist. Miami No. 09-CA-08, 2010-Ohio-743, ¶ 38. But even setting aside the issue of Callista's potential waiver, we see no basis for reversing the trial court's judgment with regard to the attorney-client privilege issue.

{¶ 35} It is apparent to us that the attorney-client privilege never attached to Robert's conversation with attorney Roberts in the first place. "[I]t is beyond contradiction that the privilege does not attach in a situation where the advice sought by the client and conveyed by the attorney relates to some future unlawful or fraudulent transaction. Advice sought and rendered in this regard is not worthy of protection, and the principles upon which the attorney-client privilege is founded do not dictate otherwise." (Citations omitted.) *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 661, 1994-Ohio-324, 635 N.E.2d 331 (1994). "[T]he attorney-client privilege exists to aid in the administration of justice and must yield in circumstances where justice so requires." *Id*; *see also Hayes v. Lindquist*, 22 Ohio App. 58, 63, 153 N.E. 269 (6th Dist.1926) (finding that testimony about a conversation between a client and his attorney was not protected by the attorney-client privilege where it concerned a discussion of the client fraudulently conveying stock to his sister, as the testimony "related to proposed future wrongdoing on the part of the client").

{¶ 36} Here attorney Roberts' testimony indisputably supported a finding that Robert McHenry sought and obtained legal advice related to a fraudulent transaction, namely the fraudulent conveyance of Callista's interest in their home to shield it from creditors in the litigation against her. Under these circumstances, no attorney-client privilege attached to Robert's conversation with his attorney. Although the trial court did not rely on this rationale, "[r]eviewing courts affirm and reverse judgments, not reasons." *State v. Rubes*, 2012-Ohio-4100, 975 N.E.2d 1054, ¶ 33 (11th Dist.); *see also Joyce v. Gen. Motors Corp.*, 49 Ohio St. 3d 93, 96, 551 N.E.2d 172 (1990) (noting that "a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof"). For the foregoing reasons, we overrule the

McHenrys' third assignment of error.

{¶ 37} In their fourth assignment of error, the McHenrys assert that the trial court erred in adopting the magistrate's decision overruling their motion for a mistrial. This assignment of error is predicated on an assumption that the testimony of attorney Roberts was inadmissible. Based on our resolution of the third assignment of error, however, we conclude that attorney Roberts properly was allowed to testify. We note too that the motion for a mistrial itself was prompted by the McHenrys' counsel's own questioning of attorney Roberts. Before allowing Roberts to testify, the trial court carefully limited him to discussing his conversations with Robert without mentioning anything about Callista. When the McHenrys' counsel subsequently questioned attorney Roberts, the following exchange occurred:

> MR. BOUCHER: Okay. And, just so I'm clear, did you ever meet independently with Mr. McHenry?
>
> MR. ROBERTS: Not that I recall.
>
> MR. BOUCHER: Okay. So, everything you've just testified to you did with both Mr. and Mrs. McHenry, correct?
>
> MR. MANCZ: Objection.
>
> THE COURT: Approach.
>
> (BENCH CONFERENCE)
>
> Mr. BOUCHER: We're going for a mistrial. This is—this is way over the line. It's absolutely a mistrial. She was going to . . .
>
> (CROSS TALK)
>
> THE COURT: It's not appropriate for you to ask that question.

MR. MANCZ: That's correct.

MR. BOUCHER: Well, we're having a mistrial because there's an inference to the jury now: Did he ever meet independently with Bob? Not to my recollection. So, now the jury knows that he met with both of them and that the conversations that Bob had with him were in front of Callista. We have a mistrial. * * *

(Trial Tr. at 276-277.)

{¶ 38} Although the jury perhaps may have been able to infer that Callista was present when her husband Robert spoke with attorney Roberts, that fact had not been highlighted or clearly established prior to the McHenrys' counsel's own questioning. By directly asking attorney Roberts whether Callista and Robert were both present—a question the trial court correctly found inappropriate under the circumstances—the McHenrys' counsel magnified the potential for the prejudice about which he now complains. Under these circumstances, the trial court did not abuse its discretion in declining to declare a mistrial. The fourth assignment of error is overruled.

{¶ 39} In their fifth assignment of error, the McHenrys argue that the trial court erred in adopting the magistrate's decision overruling their motion for a directed verdict. The record reflects that the McHenrys orally moved for a directed verdict at the conclusion of Mancz's case, raising numerous arguments. (Trial Tr. at 493-513.) On appeal, the McHenrys argue that the trial court erred in overruling their motion with respect to several of those arguments.

{¶ 40} The McHenrys first contend they were entitled to a directed verdict with regard to the allegedly fraudulent transfer of real estate because Mancz "never

established through testimony that there was a transfer of real estate, what the date of the alleged transfer of real estate was, whether any deed was recorded, whether both parties were aware of the deed, executed the deed, etc." (Appellants' Brief at 14-15.) The McHenrys assert that the only testimony about the real estate came from their former attorney, Brian Roberts. In addition to arguing that his testimony should have been disallowed on the basis of privilege, the McHenrys contend that Roberts "did not testify as to the validity of the deed, whether it was recorded, whether it was executed, etc." (*Id*. at 15.)

{¶ 41} The McHenrys also argue that a directed verdict was appropriate based on Callista's testimony that the real estate was not transferred until after she heard that a 2007 Greene County case against her by her siblings was going to be dismissed. Although the trial court found an inference of fraudulent intent based in part on the 2007 case remaining pending when the real estate was transferred on June 2, 2008, the McHenrys claim there was no testimony about June 2, 2008 being the date of transfer.

{¶ 42} The McHenrys further assert that Callista's siblings in the 2007 case never became her "creditors" for purposes of a fraudulent transfer because the 2007 case ultimately was dismissed. The McHenrys also suggest that Mancz was not a "creditor" in the 2007 lawsuit in which he did not participate. Therefore, they contend the real estate transfer could not have been fraudulent as to him.

{¶ 43} The McHenrys next assert that they were entitled to a directed verdict based on their belief that some of the statutory "badges of fraud" did not apply. In particular, they assert (1) that Callista was not insolvent at the time of the real-estate transfer, (2) that she received "value" from Robert for the real-estate transfer, and (3) that there was no

concealment of any transfer of real estate or money. The McHenrys also argue that Callista remained in control of all of the money at issue and made all withdrawals. They argue that Robert never spent any of the money or made any withdrawals despite the fact that some of the disputed funds were placed in joint accounts in his and Callista's name.

{¶ 44} Because a motion for a directed verdict presents a question of law, we apply de novo review. *Goodyear Tire Co. v. Aetna Casualty & Surety Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4. A directed verdict is proper if, construing the evidence most strongly in favor of the non-moving party, the trial court "finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." Civ.R. 50(A)(4). This test "requires the court to discern only whether there exists any evidence of substantive probative value that favors the position of the nonmoving party." *Goodyear* at ¶ 3.

{¶ 45} With the foregoing standards in mind, we conclude that the McHenrys have not demonstrated error in the ruling on their directed-verdict motion. Their first argument about a lack of evidence establishing any transfer of real estate is arguably frivolous. Counsel for the McHenrys began his directed-verdict argument by *admitting* "the fact" that Callista signed the deed conveying her interest in the real estate to Robert on June 2, 2008. (Trial Tr. at 493-494.) The McHenrys also ignore Planitiff's Exhibit 3, a copy of the June 2, 2008 warranty deed transferring the real estate from Callista and Robert jointly to Robert alone. The recorded deed signed by the McHenrys was referenced multiple times during Mancz's case-in-chief, and it was admitted into evidence *without objection* by the McHenrys' counsel. (Trial Tr. at 435.) Finally, Robert testified and acknowledged that he and his wife executed the deed on June 2, 2008 conveying the marital residence from

them jointly to him. (*Id*. at 164.) In short, the existence of the real-estate conveyance was not disputed below. The McHenrys' current argument to the contrary is devoid of any factual support.

{¶ 46} We also reject the McHenrys' argument that they were entitled to a directed verdict based on Callista's testimony that the real estate was not transferred until after she heard that the 2007 Greene County lawsuit brought by her siblings was going to be dismissed. The fact remains that the Greene County lawsuit had not been dismissed when Callista and Robert conveyed their home to Robert alone. Callista admitted that claims were pending against her when the transfer occurred. (*See*, *e.g*., Trial Tr. at 150.) Moreover, the expectation was that the 2007 case brought by the siblings, as individuals, would be dismissed because it was anticipated that Mancz would pursue a separate lawsuit acting as a fiduciary on behalf of the estate, to recover the same assets of Audrey Kirby that Callista had taken, which is exactly what occurred. Construing the evidence in a light most favorable to Mancz, we are unpersuaded that Callista's testimony about the anticipated dismissal of her siblings' lawsuit supported a directed verdict in the McHenrys' favor.

{¶ 47} We are equally unpersuaded by the McHenrys' argument that there could not have been a fraudulent transfer because neither Callista's siblings nor Mancz qualified as a "creditor" when the real estate was transferred. Under R.C. 1336.04(A)(1), a transfer made by a "debtor" may be fraudulent as to a "creditor" whether the creditor's claim arose before or within a reasonable time not to exceed four years after the transfer. A "claim" means a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal,

equitable, secured, or unsecured." R.C. 1336.01(C). A "creditor" means a person who has a claim, R.C. 1336.01(D), and a "debtor" is a person who is liable on a claim. R.C. 1336.01(F).

{¶ 48} At the time of the real estate transfer, Callista's siblings and Audrey Kirby's estate had a disputed right to payment that had not been reduced to judgment. In fact, the Greene County case brought against Callista by the siblings was pending at that time. Therefore, they had a "claim" against Callista. Perhaps more importantly for present purposes, when he initially became involved as a fiduciary on behalf of Audrey Kirby's estate, Mancz also had a "claim" because he had at least a disputed right to payment. Following the June 28, 2011 probate-court judgment that Mancz obtained on behalf of the estate, he also had a right to payment that had been reduced to judgment. We note too that he filed his original complaint in this case in May 2012, which was less than four years after the allegedly fraudulent real-estate transfer at issue. In any event, contrary to the implication of the McHenrys' appellate brief, it matters not whether Mancz qualified as a "creditor" when the real-estate transfer was done. *Prouse, Dash & Crouch, L.L.P. v. DiMarco*, 175 Ohio App.3d 467, 2008-Ohio-919, 887 N.E.2d 1211, ¶ 48 (8th Dist.). "Rather, anyone who now has a claim against a party and alleges that the transfer was done fraudulently to elude other creditors or obligations may step in and declare that the transfer was done fraudulently. The plain language of R.C. 1336.04 clearly provides that the claim of the creditor can arise after the transfer of the property." *Id*.

{¶ 49} We also find no merit in the McHenrys' argument that they were entitled to a directed verdict because a few of the statutory "badges of fraud" did not apply here. Specifically, the McHenrys claim Callista was not insolvent at the time of the real-estate

transfer, she received "value" from Robert for the real-estate transfer, and there was no concealment of any transfer of real estate or money.

{¶ 50} Under R.C. 1334.06(A), a transfer made by a debtor is fraudulent if the transfer is made (1) "with actual intent to hinder, delay, or defraud any creditor of the debtor" or (2) without receiving a "reasonably equivalent value" where additional circumstances exist. To determine actual intent, R.C. 1334.06(B) identifies 11 non-exclusive factors or "badges of fraud" to consider. Three of those actual-intent factors are whether the value received by the debtor was reasonably equivalent to the value of the asset transferred, whether the debtor was insolvent or became insolvent shortly after the transfer, and whether debtor removed or concealed assets. The McHenrys argue that these factors do not apply here.

{¶ 51} Having reviewed the record, we do not agree that Callista received "value" (and certainly not "reasonably equivalent value") from Robert in exchange for transferring her interest in their home to him. The McHenrys argue that this "value" consisted of Robert making the mortgage payments. Construing the evidence most strongly in favor of Mancz, however, Robert made these payments both before and after the real-estate transfer using money that he earned while married to Callista, who was not employed outside the home. The record does not compel a finding that Robert made the mortgage payments in exchange for Callista's conveying her interest in the real estate to him. We note too that jury interrogatories establish the jury's finding that Callista did not receive reasonably equivalent value in exchange for the transfer.

{¶ 52} Whether Callista concealed or removed assets is a closer question, as is the question of whether the transfers at issue rendered her insolvent. In answers to

interrogatories, the jury found with regard to the real estate that Callista did not remove or conceal assets, perhaps because the recorded deed was a matter of public record, but they did conclude the transfer rendered her insolvent. (*See* January 11, 2019 Jury Interrogatories.) With regard to financial assets, the jury found that Callista did conceal her transfers, that she concealed or removed assets, and that the transfers rendered her insolvent. (*Id*.) But even if we assume, arguendo, that the two badges of fraud pertaining to concealing or removing assets and insolvency do not apply, the McHenrys' argument fails to establish their entitlement to a directed verdict.

{¶ 53} In their assignment of error, the McHenrys fail to address the other badges of fraud, a number of which Mancz's evidence supported. The existence of as few as three of the badges of fraud has been held to constitute clear and convincing evidence of fraudulent intent. *William E. Weaner & Assocs., LLC v. 369 West First, LLC*, 2d Dist. Montgomery No. 28399, 2020-Ohio-48, ¶ 60. With regard to the real estate, the jury found among other things, and Mancz's evidence supported, that Callista's transfer was to an insider, she retained possession or control of the real estate, she had been sued or threatened with suit before the transfer, and she did not receive reasonably equivalent value. With regard to financial assets, the jury found, among other things, and Mancz's evidence supported, that Callista's transfer(s) were to an insider, she had been sued or threatened with suit before the transfer(s), the transfer(s) were of substantially all of her assets, she did not receive reasonably equivalent value, and the transfer(s) occurred before or shortly after a substantial debt was incurred. Mancz's evidence on all of the foregoing issues under R.C. 1334.06(A) was enough to overcome the McHenrys' directed-verdict motion.

{¶ 54} In their final argument, the McHenrys suggest that Callista remained in control of all of the financial assets at issue despite Robert's name being on accounts. They argue that Robert never spent any of the money or made any withdrawals. The issue, however, was whether Callista fraudulently *transferred* the money, not whether Robert actually used it. In fact, Callista's claim that she retained control over all of the money despite Robert's name being on accounts was another badge of fraud against her under R.C. 1336.04(B)(2), which the jury also found applicable. For the foregoing reasons, we overrule the fifth assignment of error.

{¶ 55} In their sixth assignment of error, the McHenrys contend the trial court erred in adopting the magistrate's decision entering judgment on verdicts that were against the weight of the evidence, based on inadmissible statements and demonstrative evidence presented during closing arguments, and based on speculative damages.

{¶ 56} More specifically, the McHenrys assert that Mancz never testified as to a specific dollar amount he believed was fraudulently transferred. They also claim Mancz failed to establish that Robert spent or withdrew any of the money Callista transferred to him. In fact, the McHenrys claim Mancz failed to establish that the transferred money no longer remained in the accounts at issue. They further argue that the jury was forced to speculate about what amounts were transferred, what Robert may have spent, what remained in the accounts, and whether any transfers were fraudulent. To support their argument, the McHenrys cite testimony about Callista transferring $22,085.15 into a Huntington Bank account. They contend that Robert was not asked anything about this transfer other than the fact of its existence. In particular, they argue that Mancz failed to "ask about anything else, including withdrawals, joint owners, signature cards, remaining

balances, expenditures, current balance, etc." (Appellants' Brief at 19.) They further argue that Mancz failed to establish "a single badge of fraud" with regard to the Huntington Bank account. They also claim Mancz "never contested" Robert's claim that he gave the money in the Huntington Bank account "back to Mrs. McHenry." (*Id*.) Finally, with regard to the damages calculation, the McHenrys argue as follows:

> * * * In addition to the $22,085.00 mentioned above, the remainder of the award by the jury was made up of the following figures: $35,000.00, $59,025.00 and $11,023.00. A review of the transcript will demonstrate that there was no actual evidence represented or elicited that established anything fraudulent about those figures/accounts or that established who utilized the money, where the money sits currently, or that refuted the return of the funds to Mrs. McHenry. Appellee did not meet his burden, plain and simple. In an effort to make up for that, Appellee provided the jury a list of the amounts that he wanted to be awarded, an exact match to the four mentioned above. The jury appears to have lost their way and instead of stating that Appellee failed to meet his burden, they rather took his "testimony" made during closing arguments and awarded judgment without actually having seen or heard any evidence to support the numbers he recited to them.

(*Id*. at 19-20.)[3]

[3] The jury's award of $127,133 consists of the balances at various times from four accounts: 1) $22,085 (precisely $22,085.15) resulting from a transfer from Callista's Liberty Savings CD #3780 to a Huntington account #9184 in Robert's name only on May 19, 2009. (Trial Tr.143-144, 200-201 & Exhibits 25 and 32); 2) $35,000 in Callista's Chase Bank account #1411 which was transferred to her and Robert's joint names on July 9, 2008, (Trial Tr. 100, 105, 119, 187 & Exhibit 17); 3) $11,023 [precisely $11,023.56] that

{¶ 57} In civil and criminal cases alike, a judgment will be reversed as being against the manifest weight of the evidence only in an exceptional case in which the evidence weighs heavily against the judgment. *Amesse v. Wright State Physicians, Inc.*, 2018-Ohio-416, 105 N.E.3d 612, ¶ 46 (2d Dist.) (noting that the same manifest-weight standard of review applies in civil and criminal cases). Here we conclude that the weight of the evidence was not contrary to the jury's verdict.

{¶ 58} Although Mancz did not testify as to a specific dollar amount that he believed was fraudulently transferred, he presented the jury with bank records and other evidence from which it was able make that determination on its own. We are equally unpersuaded by the McHenrys' repeated argument about a lack of evidence that Robert ever withdrew or spent any of the money Callista transferred to him. The McHenrys fail to explain how or why this made any difference to the fraudulent-conveyance claims. The trial court correctly instructed the jury that a fraudulent conveyance required proof that "Callista McHenry fraudulently transferred assets to Robert McHenry[.] (Trial Tr. at 647.) Under R.C. 1336.04, Mancz was not required to prove that Robert, the transferee, did anything in particular with the transferred assets. Rather, upon proof of a fraudulent transfer, a creditor is entitled, among other things, to a judgment against the transferee for the value of the asset transferred or the amount of the creditor's claim. R.C.

---

was the balance after Callista deposited $11,000 on November 20, 2008 into Chase Bank account #1034, a joint checking account held by Robert and Callista. (Trial Tr. 190-192, Exhibit 17.); and 4) $59,025 (precisely $59,025.42) representing the closing balance of PNC account 0500. A National City(4833)/PNC(0500) account had been funded from the closing of Liberty Savings account #3705 that was opened solely in Callista's name. (Trial Tr. 90, 93, 97,197-198, and Exhibits 10 and 15.) We provide more detail for this last account in resolution of the Seventh Assignment of error. The rounded total of the four accounts is $127,133.

1336.08(B)(1)(a).

{¶ 59} We also reject the McHenrys' argument that "the jury was forced to speculate about what amounts were transferred, what Robert may have spent, what remained in the accounts, and whether any transfers were fraudulent." Again, Mancz was required to prove only that Callista made fraudulent transfers to Robert. Mancz presented numerous bank documents establishing the existence of transfers, and the record was replete with circumstantial evidence from which the jury reasonably could have inferred that Callista made the transfers with fraudulent intent.

{¶ 60} Under their assignment of error, the only specific transfer the McHenrys address involves the $22,085.15 balance in the Huntington Bank CD account.[4] The record reflects that Callista had multiple Liberty Savings Bank CDs that she had funded with money wrongfully obtained from her mother's estate. (Trial Tr. at 143-145.) Robert testified that the Huntington Bank account was funded when Callista closed one of the Liberty Savings Bank CDs and deposited that money into the Huntington Bank CD account, which was in Robert's name alone. This testimony from Robert established a "transfer" from Callista to him. Plaintiff's Exhibit 25, which was admitted into evidence without objection (*Id*. at 454-457.), further demonstrated that the Huntington Bank CD account had been opened in May 2009 with Robert's name alone appearing on a signature card. Given the timing and other circumstances of this transfer from Callista to Robert involving money obtained from her mother's estate, the jury could have reasonably inferred the existence of fraudulent intent by Callista.

---

[4] The McHenrys refer to the transfer being $22,085.00, but the record reflects that it more precisely was $22,085.15. (*See* Plaintiff's Exhibit 25.)

{¶ 61} Despite the McHenrys' argument, we see nothing significant in Mancz's failure to inquire about "withdrawals, joint owners, signature cards, remaining balances, expenditures, [or] current balance" with regard to the Huntington Bank account. Once again, Plaintiff's Exhibit 25 was admitted into evidence without objection from the McHenrys. That exhibit showed deposits, withdrawals, and the remaining balance. It also included a signature card bearing Robert's name alone, indicating that it was not a joint account, which Robert himself confirmed. The bottom line is that Mancz proved a transfer from Callista to Robert into the Huntington Bank CD account, and the jury reasonably inferred the existence of fraudulent intent. As for Robert's unsubstantiated claim that he gave the money at issue "back" to Callista, the jury was free to disbelieve him when assessing witness credibility. Therefore, that aspect of its verdict was not against the manifest weight of the evidence.

{¶ 62} The McHenrys' final argument of this assignment challenges other aspects of the jury's damages award. Specifically, they address other transfers involving the $35,000, $59,025, and $11,023 and assert "that there was no actual evidence represented or elicited that established anything fraudulent about those figures/accounts or that established who utilized the money, where the money sits currently, or that refuted the return of funds to Mrs. McHenry." (Appellants' Brief at 20.)

{¶ 63} In our view, the record supported a finding that the disputed accounts were funded with money Callista improperly obtained from her mother's estate. In July 2008, the $35,000 was transferred from an account solely in Callista's name into a joint Chase Bank CD account with Robert. (Trial Tr. at 119-123, 187.) In November 2008, the $11,000 was deposited by Callista into a joint Chase Bank checking account held jointly by Robert

and Callista. (Plaintiff's Exhibit 17.) The probate court determined that Callista opened a Liberty Savings CD in her sole name on May 3, 2007, shortly after Kirby's death, with $54,188.96 that was the remaining balance of a Bank One CD that had been purchased years earlier with Kirby's money. (Plaintiff's Exhibit 10, pg. 16-17.) The proceeds were eventually deposited or converted to joint accounts in both of the McHenry's names. The record supported a finding that Callista lacked sufficient assets to make such deposits with her own money. Aside from the assets that she took from her mother's estate, she had an IRA account, but she never moved the IRA money anywhere. (*Id*. at 190-192.) Callista was not employed at the time, and she actually *admitted* transferring money to Robert, either jointly or individually, from her mother's estate through the end of 2008. (*Id*. at 110, 112-113, 141-142.) Under these circumstances, the jury reasonably could have inferred that the $35,000 transfer, the $11,000 deposit, and the changing into their joint names the account that became $59,025 were fraudulent transfers. Accordingly, the sixth assignment of error is overruled.

{¶ 64} In their seventh assignment of error, the McHenrys more specifically argue that the funds with regard to the $59,025 portion of the judgment appear to have been transferred from a joint account belonging to Callista and Robert into another joint account belonging to Callista and Robert. They contend the trial court erred in upholding a jury verdict finding that a transfer of assets from one joint bank account to another joint bank account, with the same owners, can be a fraudulent transfer of funds.

{¶ 65} This assignment of error concerns money that Callista took belonging to her mother's estate and deposited in a Liberty Savings Bank certificate of deposit on May 3, 2007. The initial complaint in this case was filed May 3, 2012 and the four-year statute of

limitations for a fraudulent transfer claim means a transfer from Callista to Robert would have had to occur after May 3, 2008 to be within the statute of limitations. Central to the McHenry's argument is their conclusion that "Liberty CD 3705 was opened by Mrs. McHenry on May 4, 2007[5] as a joint certificate of deposit between Mrs. McHenry and Mr. McHenry. (Tr. P. 144, 197)." Appellant's Brief at 20. But the McHenry's are s incorrect. Our concerns about their representations regarding this account are twofold: first, the pages cited by the McHenrys do not support the argument that account 3705 was a joint account when first opened in May 2007, and second, the evidence reasonably supported a conclusion that account 3705 was opened solely in Callista's name and was "transferred" by being made into a joint account with Robert sometime after June 23, 2008. That timing of the transfer would place the transfer from Callista to a jointly-held account with Robert within the four-year statute of limitations.

{¶ 66} With respect to the McHenrys' citations to pages 144 and 197 of the transcript for the proposition that Callista opened the Liberty account 3705 in May 2007 as a joint account, neither cited page supports that conclusion. The evidence showed that when account 3705 matured in November 2008, the proceeds were used to open a jointly-held CD, first at National City Bank, account 4833, and when National City was acquired by PNC it apparently became PNC account 0500. On page 144, Mancz's attorney asked Callista, "we know 3705 is an account that *became* a joint account with your husband - at least a joint account with your husband - as 4833 with PNC, correct?" (Emphasis added.)

---

[5] The probate court judgment refers to Callista's opening a Liberty Bank CD with $54,188.96 on May 3, 2007. We are unable to reconcile the one-day date difference between the probate court's judgemnt and the McHenrys' reference to May 4, 2007. However, after reviewing all the testimony and exhibits, we are convinced they are referring to the same account, Liberty Account 3705.

Her response was affirmative. But nothing in that exchange or on that page reveals that Liberty account 3705 was joint when it was opened at Liberty Bank. On page 197, during the questioning of Robert, one can only discern that the available electronically-archived records from PNC account 0500 are "confusing," and that the money for that PNC account came from Robert's wife and from Liberty account 3705. Whether 3705 was initiated as a joint account is not addressed on page 197.

{¶ 67} At trial, Mancz argued that PNC CD account 0500 was an account solely in Robert's name. (*Id*. at 92-94.) Therefore, Mancz asserted the existence of a subsequent fraudulent transfer by Callista and Robert jointly from account number 4833 to Robert alone in PNC CD account number 0500. In support of his claim that the PNC Bank CD was only in Robert's name, Mancz cited a letter he obtained from opposing counsel in discovery. (*Id*. at 89-90.) Mancz claimed the letter identified the account as being Robert's alone. Mancz also cited bank records he had obtained pertaining to the account. (*Id*. at 90-95.) At the top of one of the pages was the PNC CD account number and the name "Robert L. McHenry." (Plaintiff's Exhibit 15.)

{¶ 68} In opposition to Mancz's argument, Callista denied that the PNC Bank CD was Robert's alone. (*Id*. at 91-96.) She maintained that it was a joint account. (*Id*.) Robert also testified that the PNC Bank CD remained a joint account that came into being as a result of National City Bank being acquired by PNC Bank. (*Id*. at 196-197.)

{¶ 69} For purposes of the fraudulent-transfer statute, a "transfer" includes "every direct or indirect, absolute or conditional, and voluntary or involuntary method of *disposing of or parting with an asset or an interest in an asset*[.]" (Emphasis added.) R.C. 1336.01(L). In light of this definition, we agree with the McHenrys that a transfer of money

from a National City joint account between Callista and Robert into a PNC joint account between Callista and Robert would not qualify as a potentially fraudulent transfer under the statute. Based on the evidence before us, we believe the weight of the evidence did not prove that PNC CD account number 0500 was in Robert's name alone. Nevertheless, the evidence was that Callista closed Liberty account 3705 on November 4, 2008 and deposited the proceeds of $56,465.68 in a National City Bank or PNC Bank joint certificate of deposit with Robert, originally bearing account number 4833. At some point, that account became PNC Bank CD account number 0500, which grew to have a balance of $59,025.

{¶ 70} The foregoing analysis does not end the inquiry about Liberty account 3705 because the evidence reveals that account 3705 was not a joint account with Robert when it was opened. It was in Callista's name alone. The jury reasonably could have concluded the evidence established a fraudulent transaction with regard to Liberty account 3705 sometime after June 23, 2008. The genesis of the Liberty 3705 account was a Bank One CD purchased with Audrey Kirby's funds. How the account was held at that time is undetermined but that Bank One CD matured January 9, 2007. The probate court determined:

> When the CD matured, its value was $78,411.57. Callista withdrew $16,000 on January 10, 2007, and she deposited $8,000 in Mrs. Kirby's Charter account and $8,000 in Callista's Liberty account #6925. On April 11, 2007, the day after her mother's death, Callista withdrew $8,500. Callista used the balance, $54,188.96 to purchase a 9 month CD *in her sole name* at Liberty Savings Bank on May 3, 2007.

(Emphasis added.) Probate Court Judgment, Exhibit 10 at 16. From this evidence, the jury could have found the Liberty 3705 account was in Callista's name only when it was opened.

{¶ 71} The jury also had a copy of Callista McHenry's sworn affidavit signed January 9, 2017 and submitted by her in this litigation. In an attempt to demonstrate that she was not insolvent when she made the June 2, 2008 real estate transfer, she said:

> 13. "At the time of the transfer of the Real Estate I held the following assets *in my name*:
>
> * * *
>
> b. Liberty Savings CD [XX-XXXX]3705 had a June 23, 2008 balance of approximately $56,891.94."

(Emphasis added.) (Probate Court Judgment Exhibit 12.) Callista was careful in describing eight other assets in the affidavit to include only a "one-half interest" when she held something jointly with her husband. She did not do that for the Liberty account, reflecting that the 3705 account was hers alone as of June 23, 2008. Furthermore, in the probate litigation, Mancz had taken Callista's deposition in October 2010, and Callista then denied that Robert had received any of the money from her mother's estate, claiming that "it was my money." (Trial Tr. 76, 78.)

{¶ 72} To be complete, there was a page at the end of numerous attachments to Exhibit 38, the letter from the McHenry's counsel to Mancz revealing previously undisclosed accounts, which was a printout of an electronically-archived summary of 2008 activity for Liberty Account 3705. The heading of that summary listed both Callista and Robert, but that record did not say the account was jointly-held or, if so, when it

became jointly-held. No one was asked about, and no one referred to this attachment during the trial. And, when questioned about the Liberty to National City to PNC series of accounts, Robert was asked when it became a joint account; he replied "I don't recall the date." (Trial Tr. 196.)

{¶ 73} Given the evidence of the transfer of real estate on June 2, 2008, the transfer of $35,000 from one of Callista's Chase Bank accounts to a Huntington Bank account in Robert's name on July 9, 2008, and the deposit of $11,000 from Callista into a joint Chase account with Robert on November 20, 2008, the jury could have reasonably concluded that Callista's plan of transferring assets began with the real estate transfer of June 2, 2008. These transfers continued by her transferring financial accounts to Robert, including the Liberty account 3705, sometime after June 23, 2008, when she said the account was in her name, either before the account was closed at Liberty or when the proceeds were placed into a joint account in National City Bank, which later became a joint PNC account.

{¶ 74} Because the evidence supported the jurys conclusion that Callista opened Liberty account 3705 in her sole name and it was in her sole name until at least June 23, 2008, the transfer by making the account, or its proceeds, a joint account with Robert was a transfer within the four-year statute of limitations.[6] The seventh assignment of error is overruled.

---

[6] Given our conclusion that the jury could reasonably have found that there was a fraudulent transfer related to Liberty account 3705, or its proceeds, within the four-year statute of limitations, we need not address whether any earlier transfer could also have been within the statute of limitations based on justifiable late discovery of the transfer. There was evidence of failure to timely disclose transfers of funds and of late discovery of transfers. The jury was also instructed about these circumstances as a potential extension of the statute of limitations. Resolution of those issues is unnecessary.

{¶ 75} In their eighth assignment of error, the McHenrys contend the trial court erred in finding that Callista transferred any asset with actual intent to hinder, delay, or defraud any creditor of the debtor.

{¶ 76} In support of their argument, the McHenrys correctly note that intent to hinder, delay, or defraud can be established circumstantially by considering the 11 "badges of fraud" found in R.C. 1336.04(B). Under this assignment of error, the McHenrys do not address the evidence as it relates to each badge of fraud. Instead, they simply assert that Mancz failed to examine or inquire about any of the badges at trial. They argue that transferring assets was not enough to establish fraud and that Mancz "completely neglected" to address the badges of fraud that can establish fraud. With regard to Callista's conveyance of her interest in real estate to Robert, they also cite Robert's testimony that the conveyance was done on the advice of a lawyer. The McHenrys suggest that acting on the advice of counsel necessarily negates any inference of fraud that otherwise might exist.

{¶ 77} Upon review, we find the eighth assignment of error to be without merit. Although the badges of fraud were not identified as such and specifically discussed with witnesses at trial, a large part of Mancz's case involved attempting to establish their existence through the testimony and other evidence presented. We note too that jury interrogatories specifically addressed each of the badges of fraud. The jury responded to the interrogatories by making a finding that each badge had or had not been established. Whether Mancz's evidence supported a finding of fraudulent intent was an issue that was raised under the McHenrys' fifth and sixth assignments of error. For purposes of the eighth assignment of error, we reject the McHenrys' suggestion that Mancz attempted to

establish fraudulent intent by proving nothing more than a mere transfer of assets.

{¶ 78} We also find no merit in the McHenrys' claim that acting on the advice of counsel necessarily negated any inference of fraud with respect to Callista's transfer of her interest in real estate to Robert. Without more, the mere assertion that the McHenrys acted on the advice of counsel did nothing to dispel an inference of fraud. If counsel's "advice" was in response to a question from Callista or Robert about how to shield the McHenrys' home from potential creditors, then such advice would do nothing defeat an inference of fraudulent intent. The eighth assignment of error is overruled.

{¶ 79} In their ninth assignment of error, the McHenrys claim the trial court erred in finding that funds returned by Robert to Callista should be counted as a fraudulent transfer.

{¶ 80} In particular, the McHenrys contend the record contains "uncontroverted" evidence that Robert returned to Callista $22,085 that she had transferred into a Huntington Bank account in his name alone. Based on testimony that he had "returned" this money to Callista, the McHenrys assert that it was error for the jury to include those funds as part of its fraudulent-transfer verdict.

{¶ 81} We find the McHenrys' argument to be unpersuasive for at least two reasons. First, the testimony about Robert "returning" money to Callista involved $22,000 that she had placed in Chase bank accounts in his name. (Trial Tr. at 174-183.) It does not appear to have involved a separate $22,085.15 that Callista had placed in a Huntington bank account in his name. (*Id*. at 200-201.) Second, the jury was not obligated to believe Robert's self-serving testimony that he returned money to Callista. When Robert professed to have returned $22,000 from the Chase accounts to Callista, Mancz

asked what evidence Robert had to support his claim. Robert responded that "it" was in Mancz's discovery "some place." (*Id*. at 177.) When Mancz later accused Robert of having no documentary evidence to support his claim about returning $22,000 to Callista, Robert responded that Mancz "should have the evidence." (*Id*. at 183.) But Mancz apparently did not have any such evidence, the McHenrys have not cited any such evidence, and we have not seen any such documentary evidence.

{¶ 82} On appeal, the McHenrys correctly observe that Robert had no legal burden to produce evidence to support his testimony about returning money to Callista. It is equally true, however, that the jury was free to disbelieve Robert's testimony. Indeed, it is well settled that a jury, as the trier of fact, is responsible for assessing witness credibility and may believe some, all, or none of what a witness says. *Bailey v. Wilson*, 2d Dist. Champaign No. 2015-CA-19, 2016-Ohio-3352, ¶ 15. Accordingly, the ninth assignment of error is overruled.

{¶ 83} In their tenth assignment of error, the McHenrys assert that the trial court erred in finding that Kirby's estate suffered any damage by virtue of a single transfer of assets.

{¶ 84} The McHenrys' entire substantive argument is as follows:

> The evidence in this case never established that Appellee [Mancz] could not collect on its judgment [in the underlying probate-court case]. Appellee failed to prove any harm flowing from the alleged fraudulent transfers. Appellee never established that the accounts made joint somehow became out of his reach for collection. Shockingly, since 2011, Appellee has never even attempted to collect on the judgment from the

> [probate court], which he certainly would have been successful in doing if he had filed a bank account attachment.
>
> How can one be awarded damages for their own lack of due diligence? There was no harm to Appellee because there was no attempt to recover and the accounts were not placed out of his reach for collection. Appellee again bore the burden of proof to establish his harm and failed to do so.

(Appellants' Brief at 26.)

{¶ 85} Upon review, we find the foregoing argument to be unpersuasive. As an initial matter, not all of the bank accounts involved in allegedly fraudulent transfers were joint accounts. Nor were they all in existence at the time of the probate court judgment. In any event, the McHenrys have not cited any requirement for Mancz to pursue a collection action in probate court before seeking to establish the existence of fraudulent transfers involving Callista and Robert. We note too that Mancz testified below and addressed the issue of collecting on the judgment in the probate-court case. He recalled deposing Callista and testified that "in the execution deposition of Callista McHenry, she claimed as she has claimed that she has nothing." (Trial Tr. at 328.) Mancz further testified that he contacted the McHenrys' counsel and the response he received about the funds at issue "was that they were all gone somewhere." (*Id*. at 330.) Mancz also testified that he had contacted the McHenrys about returning the funds at issue, but they did not offer him any money. (*Id*. at 333.) We note too that Mancz could not have attempted to satisfy the probate-court judgment against Callista by executing against the McHenrys' residence, as it had been transferred to Robert. For these reasons, we see nothing

inappropriate about Mancz initiating the present lawsuit. The tenth assignment of error is overruled.

{¶ 86} In their eleventh assignment of error, the McHenrys challenge the trial court's overruling of their motion for summary judgment. In particular, they note that they moved for summary judgment on the following eight grounds: "(1) There was not a fraudulent transfer of real property or personal property by Mrs. McHenry; (2) Appellants' interest in the Real Estate is exempt from collection by Appellee under ORC 2329.66, and, therefore, Appellee's claim is moot; (3) The remainder of Appellants' assets are exempt from collection by law and, therefore, Appellee's claim is moot; (4) Because there are no collectable assets belonging to Appellants, Appellee's suit for alleged fraudulent transfers serves merely to harass; (5) Appellee's second claim for relief against Mrs. McHenry is barred by the doctrine of res judicata; (6) Appellee's second claim for relief against Mr. McHenry is barred by the doctrine of res judicata; (7) Appellee's second clam for relief against Mr. McHenry is barred by the applicable statute of limitations; (8) Appellee is not entitled to punitive damages." (Appellants' Brief at 28.)

{¶ 87} Rather than arguing any of the foregoing issues in their appellate brief, the McHenrys merely refer us to the record below. They purport to "incorporate herein all arguments in their entirety contained in *Defendants' Amended and Supplemental Motion for Summary Judgment* filed on January 8, 2018, *Defendants' Reply to Plaintiffs' Response to Defendants' Amended and Supplemental Motion for Summary Judgment* filed on February 9, 2018, *Defendants' Supplemental Objections to Magistrate's Decision* filed August 21, 2018 and *Defendants' Reply to Plaintiff's Response to Defendants' Supplemental Objections to Magistrate's Decision* filed on September 18, 2018." (*Id*.) The

McHenrys then conclude their assignment of error with the following broad argument: "The trial court's decision was in error because Appellee did not provide the requisite evidence on any issue for which he bore the burden of production at trial. Appellee rested on allegations and suspicions, but not evidence. Summary Judgment should have been granted in Appellant's favor." (*Id*.)

{¶ 88} Upon review, we note that the first document the McHenrys incorporate by reference into their appellate brief is a 26-page "amended and supplemental" summary-judgment motion, which includes approximately 180 pages of supporting exhibits. The second document is another seven pages. The third document is 11 pages. And the final document they incorporate into their appellate brief by reference is six pages. Thus, not counting the 180 pages of summary-judgment exhibits, the four documents the McHenrys incorporate by reference into their 35-page appellate brief total 50 pages, effectively making their appellate brief 85 pages long. The practice of wholesale "incorporation by reference" cannot be used to circumvent page limits for briefs established by the appellate rules. Moreover, the practice of an appellant incorporating issues and arguments by reference to other documents is not authorized by the appellate rules. The Twelfth District Court of Appeals examined this issue in *Ebbing v. Lawhorn*, 12th Dist. Butler No. CA2011-07-125, 2012-Ohio-3200, reasoning:

> The appellate rules expressly provide what an appellant must include in an appellate brief and the resulting consequences if an appellant chooses to ignore the rules. App.R. 16(A)(7) states that an appellant shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support

of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary." Thus, pursuant to App.R. 16, arguments are to be presented within the body of the merit brief.

If an appellant fails to comply with App.R. 16(A), an appellate court may overrule the assignment of error as stated in App.R. 12(A)(2): "The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)."

It is well-established that "the Rules of Appellate Procedure do not permit parties to 'incorporate by reference' arguments from other sources." *Kulikowski v. State Farm Mut. Ins. Co*., 8th Dist. Nos. 80102 and 80103, 2002-Ohio-5460, ¶ 56; *Tripodi Family Trust v. Muskingum Watershed Conservancy Dist.,* 5th Dist. No. 2007AP 09 0056, 2008-Ohio-6902; *McNeilan v. Ohio State Univ. Med. Ctr*., 10th Dist. No. 10AP-472, 2011-Ohio-678. It is not the duty of an appellate court to search the record for evidence to support an appellant's argument as to an alleged error. *Cireddu v. Cireddu*, 8th Dist. No. 76784, 2000 WL 1281253, *9 (Sept. 7, 2000). An appellate court is not a "performing bear," required to dance to each and every tune played on appeal. *Id*.

Consequently, and pursuant to App.R. 12 and 16, we decline to consider appellant's second and third assignments of error.

Id. at ¶ 29-32.

{¶ 89} In *Ebbing*, the Twelfth District declined to consider assignments of error related to the trial court's ruling on a motion to strike and a motion for default judgment where the appellant simply incorporated those motions into his appellate brief "by reference." Admittedly, this court at times has overlooked *limited* incorporation by reference in the interest of justice. Here, however, the McHenrys' eleventh assignment of error abuses that process, adding 50 pages and eight issues that are not properly argued to their already-lengthy appellate brief.

{¶ 90} In any event, we find the McHenrys' summary-judgment arguments to be unpersuasive on the merits. Two of the eight issues the McHenrys incorporate by reference require no discussion. The first summary-judgment argument incorporated by the McHenrys is that "[t]here was not a fraudulent transfer of real property or personal property by Mrs. McHenry." This issue involves questions of fact that were resolved in Mancz's favor by the jury. "Any error by a trial court 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 made." *Cont'l Ins. Co. v. Whittington*, 71 Ohio St. 3d 150, 642 N.E.2d 615 (1994), syllabus. The eighth summary-judgment argument incorporated into the McHenrys' appellate brief is even more patently meritless. The eighth argument asks us to find that Mancz was not entitled to punitive damages. But neither the magistrate nor the trial court awarded Mancz any punitive damages. His motion for punitive damages was denied. We note too that the fifth and sixth summary-judgment arguments address the applicability of res judicata, an issue we

resolved above in our analysis of the second assignment of error.

{¶ 91} As for the McHenrys' remaining four summary-judgment arguments, we find them to be unpersuasive. In their second argument, the McHenrys contend their interest in the real estate is exempt from collection under R.C. 2329.66. In their third argument, they assert that the other assets at issue are exempt from collection "by law." In their fourth argument, they reason that in the absence of any non-exempt assets demonstrates that Mancz's fraudulent-transfer lawsuit was intended merely to harass.

{¶ 92} Upon review, we find the McHenry's three exemption-related arguments unpersuasive. In their summary-judgment motion, they argued that their real estate and other assets were exempt from "collection" by Mancz, making the entire fraudulent-transfer action moot. The trial court rejected this argument, reasoning:

> The McHenrys next claim the magistrate erred in her decision wherein she determined this matter is not moot as a result of asset exemption.
>
> As the McHenrys point out, certain assets held by individuals domiciled in the State of Ohio are exempt from execution. *See* R.C. 2329.66. When interpreting the right to an exemption as provided by this statute, Ohio courts have ruled that exemption may be claimed in an answer or even claimed after a judgment has of been issued, but in the case of the homestead exemption, have conclusively stated that the time for asserting the right is prior to the foreclosure sale*. Gledhill v. Walker* (1944), 143 Ohio St. 381; *Adkins v. Massie*, 4th Dist. App. No. 99CA18, 2001 Ohio 2448; *Gale v. Ficke*, 148 Ohio App.3d 657, 2002 Ohio 4030. "In other words, the

> debtor's right to exercise the homestead exemption is determined as of the date of execution, garnishment, attachment, or sale of the property." *Adkins*, *supra*. The logic of the timing of the assertion of an exemption is equally applicable to the other asset exemptions contained in the statute. Indeed, this is consistent with case law relating to the time for the assertion of the debtor's exemption claim, which is after judgment has been rendered. *Gale*, *supra*. Simply put, the McHenrys' claim of asset exemption is premature.
>
> Moreover, as the Magistrate pointed out, R.C. 1336.07 gives the trial court broad discretion in fashioning an appropriate remedy, depending upon the facts and circumstances proven at trial. Based upon the foregoing, the Court overrules the McHenrys' third objection to the Magistrate's decision.

(September 28, 2018 Decision and Judgment Entry on Defendants' Objections to Magistrate's Decision at 5.)

{¶ 93} In essence, the trial court found that the focus of Mancz's fraudulent-transfer action was on whether the conveyances and transfers at issue were fraudulent and should be set aside. Indeed, under R.C. 1336.07(A)(1), one of the available remedies when a fraudulent transfer is established is "avoidance of the transfer or obligation." The trial court reasoned that whether execution on a judgment or attachment of assets was proper was a separate question to be determined later. Notably, the asset-exemption statute cited by the McHenrys, R.C. 2329.66, identifies property that is "exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order[.]" *See also UBS Fin. Servs., Inc. v. Lacava*, 8th Dist. Cuyahoga No. 106461, 2018-Ohio-3055, ¶ 46 (finding argument regarding asset exemption under R.C. 2329.66(A) premature in a

fraudulent-transfer action where execution upon a judgment "has not yet occurred").

{¶ 94} In the present case, the trial court's final judgment entry did not order execution, garnishment, attachment, or sale of any assets. The trial court simply ordered the deed conveying Callista's interest in the real estate to Robert declared void and, with respect to the other fraudulently conveyed assets, entered judgment in favor of Mancz. (November 13, 2019 Decision and Judgment Entry at 5.)

{¶ 95} The summary-judgment motion that the McHenrys incorporate by reference on appeal asserts only that their assets are exempt from collection. The motion fails to address the trial court's finding that the present action is not a collection action and, therefore, that their exemption argument is premature. Because the McHenrys' appellate brief fails to recognize or address the basis for the trial court's ruling against them, it follows that they have failed to demonstrate error in that ruling.

{¶ 96} In their final argument, the McHenrys contend Mancz's second claim for relief against Robert was barred by the applicable statute of limitation. The McHenrys' entire summary-judgment argument, as incorporated into their appellate brief by reference, was as follows:

> To the extent that this case is an attempt by Plaintiff [Mancz] to remedy his failure to name Robert McHenry in the [probate court] case, that attempt must fail due to the statute of limitations. The applicable statute of limitations on an ORC 2109.50 claim is four years. RC 2305.09. *See*, *also*, *Gustafson v. Miller*, 5th Dist. Perry No. 15-CA-0008, 2015-Ohio-5515. Audrey Kirby died on April 10, 2007. Any claims Plaintiff had against Robert McHenry with regard to the assets of Audrey Kirby should have been

> brought within four years of her death or by April 10, 2011, and, as such, they are forever barred. Summary judgment in favor of Robert McHenry is an appropriate remedy for a violation of the statute of limitations as there is no genuine issue of material fact to be litigated.

(Defendants' January 8, 2018 Amended and Supplemental Motion for Summary Judgment at 24.)

{¶ 97} In rejecting the McHenrys' argument, the magistrate noted that Mancz's claims were fraudulent-transfer claims brought under R.C. 1336. They were not claims brought under R.C. 2109.50, which addresses discovery proceedings brought in probate court to examine individuals suspected of concealing or embezzling assets of an estate. Here, the probate court already had determined that Callista had concealed and embezzled assets from her mother's estate. The fraudulent-transfer action addressed her conveyance of those assets to Robert. The magistrate noted that the applicable statute of limitation for a fraudulent transfer begins to run when the transfer is made or, possibly later, when the transfer is discovered. Here at least some of the transfers at issue occurred well after the death Audrey Kirby. That being so, the magistrate correctly rejected the McHenrys' summary-judgment argument that the statute of limitation began to run when Callista's mother passed away. (July 10, 2018 Magistrate's Decision on Motion for Summary Judgment at 5.) We note too that the McHenrys' summary-judgment motion did not even address discovery of the transfers.

{¶ 98} In objections to the magistrate's decision, the McHenrys broadened their argument, asserting that Callista had spent money or written checks from various estate accounts prior to her mother's death. The McHenrys also argued that various accounts

had been opened by Callista prior to her mother's death. (August 21, 2018 Supplemental Objections at 8.) In response, Mancz asserted that Callista depositing and spending her mother's money was not shown to be improper until the probate court filed its decision in June 2011. Mancz also presented evidence that transfers from Callista to Robert from the accounts she had opened with her mother's money were unknown to him until March 2016 during discovery in this case and that some of the transfers occurred long after Audrey Kirby's death. (August 30, 2018 Plaintiff's Response in Opposition to Objections.)

{¶ 99} Ultimately, the trial court overruled the McHenrys' objections. With regard to the real-estate transfer, the trial court found that the conveyance had occurred on June 2, 2008 and that Mancz had filed his initial complaint in May 2012, within the applicable four-year statute of limitation. Mancz subsequently dismissed the complaint on March 25, 2014 and refiled it on March 11, 2015, within the time allowed by the one-year saving statute. As for the financial assets, the trial court concluded, based on the parties' filings and the evidence before it, that "whether Mancz discovered the transfers of proceeds * * * within either the four-year limitation period or, if later, within one year after the transfers reasonably could have been discovered by him or not is a question of fact for the jury to determine." (September 28, 2018 Decision and Judgment Entry at 4.) As a result, the trial court found no error in the magistrate's denial of summary judgment regarding the statute of limitation. (*Id*.)

{¶ 100} Upon review, we agree with the trial court's determination. The McHenrys' actual summary-judgment argument predicated on R.C. 2305.09 and the statute of limitation beginning to run on the death of Audrey Kirby lacks merit. Based on the record before us, we also see no error in the trial court's finding a genuine issue of material fact

as to whether Mancz timely filed suit after the fraudulent transfers at issue or after reasonably discovering them. The McHenrys failed to establish their entitlement to judgment as a matter of law on that issue. For all of the foregoing reasons, we overrule their eleventh assignment of error.

{¶ 101} In their twelfth assignment of error, the McHenrys contend the trial court erred in overruling a motion in limine and subsequent objections to the same evidence at trial. This assignment of error concerns a five-part October 19, 2018 motion in limine the McHenrys filed. Therein, they sought to exclude from trial: (1) the trial court's judgment in the probate-court case to the extent it contained inflammatory and prejudicial language; (2) any itemization of the plaintiff's damages, whether through testimony or an exhibit; (3) any testimony from Mancz on the basis that he could not act as both an advocate and a witness; (4) any records from financial institutions or related testimony on the basis of hearsay; and (5) any reference to a disciplinary complaint.

{¶ 102} In an October 26, 2018 decision, the magistrate overruled the first branch of the motion, finding that the probate-court judgment established Mancz as a "creditor," which was an issue in the present case. The magistrate also found that the question in the probate-court case was whether Callista was guilty of having concealed, embezzled, or conveyed away assets belonging to her mother. The probate judgment made this finding, and the magistrate saw no basis for excluding it.

{¶ 103} The magistrate deferred ruling on the second branch of the motion, finding no evidence that Mancz had failed to turn over an itemized list of damages or that such a list even existed. With regard to the third branch, the magistrate declined to preclude Mancz from testifying on the basis of Ohio Professional Conduct Rule 3.7, which limits

the ability of an attorney to act as both an advocate and a witness. The magistrate found that the rule did not apply when an attorney is a party to the case. With regard to the fourth branch, the magistrate noted that the financial records could be authenticated as business records, thereby overcoming a hearsay objection. As a result, the magistrate declined to exclude the records "at this time." Finally, the magistrate declined to rule on the request to exclude a disciplinary complaint without knowing the substance of the complaint or the context in which it might be used.

{¶ 104} The McHenrys objected to the magistrate's liminal ruling by filing a November 5, 2018 motion asking the trial court to set it aside. Notably, however, the McHenrys did not challenge or object to the magistrate's finding that Mancz could act as counsel and testify at trial because he was a party. On January 4, 2019, the trial court overruled the McHenrys' motion to vacate the magistrate's decision. The trial court noted that the probate proceeding was quasi-criminal and that the probate judge was required to determine whether Callista was guilty of concealing, embezzling, or conveying away assets. The trial court saw no error in the magistrate's resolution of the issue but noted that it could be revisited at trial. The trial court also saw no error in the magistrate's resolution of the other issues, noting that they could be resolved in context if and when they arose at trial. With regard to the financial records, the trial court specifically noted that they might be authenticated in various ways and that it remained to be seen how the plaintiff approached them at trial.

{¶ 105} A motion in limine is a pretrial request for a precautionary, tentative, and presumptive ruling on an evidentiary issue to avoid error or prejudice at trial. If a trial court resolves a motion in limine before trial, its ruling is effective only until the admissibility of

the evidence is determined in context at the appropriate time during trial. *Cranford v. Buehrer*, 2d Dist. Montgomery No. 26266, 2015-Ohio-192, ¶ 13, quoting *State v. Leslie*, 14 Ohio App.3d 343, 344, 471 N.E.2d 503 (2d Dist.1984). "An appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached during the trial." *Id*.

{¶ 106} On appeal, the McHenrys first challenge the admission of the language in the probate-court judgment stating that Callista had been found guilty of concealing, embezzling, or conveying away assets belonging to her mother. They have not identified anywhere in the 765-page trial transcript, however, where they objected when that issue arose at trial. Regardless, we see no abuse of discretion in allowing the jury to hear that information. The probate-court judgment was the predicate for the present lawsuit alleging the existence of fraudulent conveyances. Moreover, the fact that Callista had been found to have concealed, embezzled, or conveyed away her mother's assets provided necessary and relevant context for the present lawsuit. We note too that the challenged language from the probate-court judgment was referenced at times to refute the McHenrys' repeated suggestions that Callista had done nothing wrong and that the money at issue belonged to her. (*See*, *e.g*., Trial Tr. at 173.) The McHenrys also argue that no one authenticated Exhibit 10, which is a copy of the probate-court judgment, or identified Exhibit 10 as an accurate representation of that judgment. The McHenrys fail to mention the parties' *stipulation* at trial that Exhibit 10 was a copy of the probate-court decision and judgment. (*Id*. at 170-172.)

{¶ 107} The McHenrys next allege error with regard to their motion in limine insofar as it sought to preclude Mancz from presenting an itemization of damages. We note that

the McHenrys did renew this objection at trial when Mancz sought to use demonstrative exhibits for that purpose in his closing argument. (Trial Tr. at 562-565.) We addressed Mancz's use of the demonstrative exhibits to itemize damages and found no error in our resolution of the sixth assignment of error. We likewise see no error in overruling the motion in limine on that issue.

{¶ 108} The McHenrys also challenge the motion in limine insofar as it sought to preclude Mancz from acting as an advocate and testifying at trial. In support, they cite Ohio Prof.Cond.R. 3.7, which limits the circumstances under which an attorney may act as both an advocate and a witness at trial. They also assert in conclusory fashion that Mancz "had no personal knowledge of any transaction at issue in this case."

{¶ 109} With regard to the professional-conduct rule, the McHenrys have not even responded to the magistrate's finding that the rule did not apply because Mancz was a party to the case. Absent any argument from the McHenrys on this point, we have nothing to review. We note too that the McHenrys' objections to the magistrate's ruling on the motion in limine did not address this issue. Nor did they raise the issue in their post-trial objections to the magistrate's decision. Therefore, they failed to preserve the issue for appeal. As for Mancz's purportedly lacking "personal knowledge" of the transactions at issue, a cursory review of his trial testimony reveals that he provided relevant testimony despite the fact that he was not a party to the transactions. The McHenrys' one-sentence argument to the contrary is unpersuasive.

{¶ 110} Finally, the McHenrys contend their motion in limine should have been sustained insofar as they challenged the admissibility of bank records and related testimony. They argue that the records and any testimony about them constituted hearsay

and that Mancz failed to demonstrate applicability of the business-records exception under Evid.R. 803(6). The McHenrys argue that the records should have been authenticated through testimony of the custodian of records or other qualified witness.

{¶ 111} We find the McHenry's authentication argument to be without merit. At trial, Mancz sought and obtained the admission of three exhibits containing financial records, namely Plaintiff's Exhibits 15, 17, and 25. When Mancz moved for admission of these exhibits at trial, the McHenrys did not raise a hearsay objection to *any* of them. Indeed, their counsel acknowledged that the McHenrys themselves had "authenticated" portions of Exhibit 15, and the trial court admitted only those portions. (Trial Tr. at 439, 491.) Defense counsel also agreed that the McHenrys had been questioned about the portions of Exhibit 17 that were admitted into evidence and raised "no objection" as to those records. (*Id*. 480-481.) Defense counsel further affirmatively agreed to the admission of portions of Exhibit 25 concerning a signature card and "account activity," and these were the only portions of that exhibit admitted into evidence. (*Id*. at 457, 490.) We note too that the McHenrys lodged no hearsay objection when the foregoing exhibits were introduced and discussed at trial. (*Id*. at 91, 99-100, 200.) In light of the McHenrys' failure to preserve the hearsay issue raised in their motion in limine by renewing their challenge at trial (rather than agreeing to the admissibility of the exhibits), we find their argument unpersuasive. The twelfth assignment of error is overruled.

{¶ 112} In their thirteenth assignment of error, the McHenrys claim the trial court erred in overruling their motion for sanctions and motion to dismiss Mancz's complaint. This assignment of error concerns a motion the McHenrys filed alleging that Mancz had violated a local rule requiring him to prepare and submit a complete set of jury instructions

and interrogatories approved by opposing counsel. The McHenrys argued that Mancz filed proposed jury instructions and interrogatories by the required October 16, 2018 date *without* them having been seen or approved by opposing counsel. The McHenrys further asserted that Mancz did not serve their counsel with his filing until three days later. They also asserted that Mancz had done the same thing when the case previously had been set for trial. As a result, they sought sanctions and dismissal of the case with prejudice. Mancz responded to the motion, arguing that both parties previously had submitted proposed instructions and interrogatories before an earlier trial date had been vacated. Mancz suggested that his subsequent filing on October 16, 2018 was simply a "reformalization" of what previously had been filed.

{¶ 113} In a November 20, 2018 decision, the magistrate overruled the sanctions motion. The magistrate noted, among other things, that trial had been postponed yet again until January 7, 2019. The magistrate further noted that the parties would be required to submit jointly-proposed jury instructions by December 26, 2018. In light of that determination, the trial court found no prejudice to the McHenrys as a result of Mancz's filing on October 16, 2018. In the exercise of discretion, the magistrate declined to impose sanctions on Mancz or to dismiss his lawsuit. (November 20, 2018 Decision.) The McHenrys objected to the magistrate's decision. The trial court overruled the objection on December 5, 2018, and the parties subsequently filed joint proposed jury instructions, jury interrogatories, and verdict forms on December 26, 2018.

{¶ 114} It is axiomatic that whether to impose sanctions or to dismiss the complaint was a matter within the discretion of the trial court. Having reviewed the parties' arguments and the rulings by the magistrate and the trial court, we see no abuse of

discretion. The thirteenth assignment of error is overruled.

Conclusion

{¶ 115} The judgment of the trial court is hereby affirmed.

. . . . . .

TUCKER, P.J. and WELBAUM, J., concur.

Copies sent to:

Harry G. Beyoglides, Jr.
Richard A. Boucher
Julia C. Kolber
Hon. Michael A. Buckwalter

[Cite as *Key Realty, Ltd. v. Hall*, 2021-Ohio-26.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Key Realty, Ltd.

Appellant

v.

Michael Hall, et al.

Appellees

Court of Appeals No. L-19-1237

Trial Court No. CI0201901132

DECISION AND JUDGMENT

Decided: January 8, 2021

* * * * *

Gregory H. Wagoner and Nicholas T. Stack, for appellant.

David A. Nacht, for appellee Michael Hall.

Roman Arce, for appellees Heather Hall, Kenton Fairchild, and Red 1 Realty, LLC.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which granted, in part, and denied, in part, appellees' motions for summary judgment. For the reasons set forth below, this court affirms, in part, and reverses, in part, the judgment of the trial court.

{¶ 2} On January 15, 2019, as amended on March 8, 2019, plaintiff-appellant Key Realty, Ltd. filed a complaint against defendants-appellees Michael Hall; Red 1 Realty, LLC, an Ohio limited liability company; Heather Hall; Kenton Fairchild and Red 1 Realty, LLC, a Florida limited liability company, setting forth claims against Mr. Hall of breach of the non-competition agreement (Count 1) and extortion (Count 11), and claims against all defendants for trade secret misappropriation (Count 2), unfair competition (Count 3), tortious interference with business relations (Count 4), tortious interference with contract (Count 5), breach of fiduciary duty (Count 6), conversion (Count 7), unauthorized use of computer, cable or telecommunication property (Count 8), criminal mischief (Count 9), civil theft (Count 10), spoliation (Count 12), and civil conspiracy (Count 13). Appellant summarized this litigation as follows: "This is an action stemming from the brazen and deceptive actions of [the appellees] to steal [appellant's] information, paralyze [appellant's] operations and then extort [appellant] in an effort to seize [appellant's] business for their own personal benefit."

{¶ 3} Appellees generally denied the allegations and asserted various affirmative defenses. Discovery among the parties ensued. Mr. Hall filed a motion to dismiss on March 22, 2019, which appellant opposed. Mr. Hall and the remaining appellees[1] separately filed motions for summary judgment on June 21, 2019, which appellant

[1] Red 1 Realty, LLC, an Ohio limited liability company, and Red 1 Realty, LLC, a Florida limited liability company, were collectively referred to as Red 1 Realty, LLC for the remainder of the litigation.

opposed. At the parties' requests, significant portions of the record were sealed from public access by the trial court. The parties then agreed for the trial court to consolidate its opinion and order on all three pending motions.

{¶ 4} As journalized on October 15, 2019, the trial court stated "there being no just reason for delay" and granted Michael Hall's motion for summary judgment on all counts except Count 1, denied Michael Hall's motion to dismiss as moot, and granted the remaining appellees' motion for summary judgment on all counts applicable to them.

{¶ 5} Appellant filed its notice of appeal setting forth nine assignments of error.

I. The trial court committed reversible error when it dismissed Key Realty's claim that Michael Hall violated the confidentiality provision in his agreement.

II. The trial court committed reversible error when it dismissed Key Realty's trade secret claim.

III. The trial court committed reversible error when it dismissed Key Realty's unfair competition claim.

IV. The trial court committed reversible error when it dismissed Key Realty's tortious interference with business relations and contract claims.

V. The trial court committed reversible error when it dismissed Key Realty's conversion claim.

VI. The trial court committed reversible error when it dismissed Key Realty's unauthorized use of computer property, criminal mischief, civil theft and extortion claim.

VII. The trial court committed reversible error when it dismissed Key Realty's spoliation claim.

VIII. The trial court committed reversible error when it dismissed Key Realty's civil conspiracy claim.

IX. The trial court committed reversible error when it dismissed Key Realty's breach of fiduciary duty claim against Mike Hall.

I. Standard of Review

{¶ 6} Appellate review of trial court summary judgment determinations is de novo, employing the same Civ.R. 56 standard as trial courts. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 29.

{¶ 7} Summary judgment may be granted only:

> if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or

stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Civ.R. 56(C).

{¶ 8} When seeking summary judgment, the moving party must identify those portions of the record that affirmatively demonstrate the absence of a genuine issue of material fact regarding an essential element of the non-movant's case and not rely on conclusory assertions the non-movant has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact for trial in accordance with Civ.R. 56(E). *Id.* at 293. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Beckloff v. Amcor Rigid Plastics USA, LLC*, 2017-Ohio-4467, 93 N.E.3d 329, ¶ 14 (6th Dist.).

{¶ 9} We will address the assignments of error out of order.

II. Misappropriation of Trade Secrets

{¶ 10} In support of its second assignment of error, appellant argues the sealed evidence in the record showed how appellees accessed and used appellant's trade secret information to create a similar business model, and that circumstantial evidence of trade

secret misappropriation is sufficient to meet its burden under both common law and the Ohio Uniform Trade Secret Act, R.C. 1331.61, et seq. The sole owner of Key Realty, Ltd., Dennis Degnan, testified at his deposition that the trade secret misappropriated by the appellees is the "concept of Key," which is "pretty much everything." Mr. Degnan's wife, Amy Saylor, who has a membership interest in Key Realty, Ltd., testified at her deposition, "So to elaborate a little bit on what Dennis talked about, there is – the trade secret of Key is that the whole is greater than the sum of its parts."

{¶ 11} In response, appellees collectively argue that appellant's conclusory allegations are insufficient to create genuine issues of material fact. Appellees argue "each and every document and item of information that Appellant claims to be a 'trade secret' was stored or located on **publicly available websites**." (Emphasis sic.) They also obtained information from industry associations. Appellees further argue that appellant's vague notion of a trade secret, the "'concept of Key' is nothing more than limiting the amount of office space traditionally used and occupied by real estate companies." They argue that substantial parts of appellant's business model, the "concept of Key," were publicly known, used by many businesses, and were not proprietary.

{¶ 12} "In order to prevail on a misappropriation-of-trade-secret claim, a plaintiff must show by a preponderance of the evidence: (1) the existence of a trade secret; (2) the acquisition of a trade secret as a result of a confidential relationship; and (3) the unauthorized use of a trade secret." *Heartland Home Fin., Inc. v. Allied Home Mortg.*

Capital Corp., 258 Fed.Appx. 860, 861 (6th Cir.2008); *Tomaydo-Tomahhdo L.L.C. v. Vozary*, 8th Dist. Cuyahoga No. 104446, 2017-Ohio-4292, 82 N.E.3d 1180, ¶ 9.

{¶ 13} Misappropriation of a trade secret is also defined by R.C 1331.61(B) as any of the following:

> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;
>
> (2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:
>
> (a)Used improper means to acquire knowledge of the trade secret;
>
> (b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;
>
> (c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

{¶ 14} "The question whether a particular knowledge or process is a trade secret is a question of fact to be determined by the trier of fact upon the greater weight of the evidence." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 172-83, 181, 707 N.E.2d 853 (1999), paragraph six of the syllabus, *affirming and following Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 24 Ohio St.3d 41, 492 N.E.2d 814 (1986). "A reviewing court should not substitute its judgment for that of the trial court on these factual issues." *Valco Cincinnati* at 47.

{¶ 15} A "trade secret" is defined by R.C. 1331.61(D) as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use[; and]
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

{¶ 16} The Ohio Supreme Court guides us in analyzing a misappropriation of trade secret claim using a six-factor test.

> We * * * [adopt] the following factors in analyzing a trade secret claim: "(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information." (Citation omitted.)

State ex rel. Besser v. Ohio State Univ., 89 Ohio St.3d 396, 399-400, 732 N.E.2d 373 (2000).

{¶ 17} Appellant, as the "entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy." *Id.* at 400. "'[O]nce material is publicly disclosed, it loses any status it ever had as a trade secret.'" (Citation omitted.) *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 174, 724 N.E.2d 411 (2000).

{¶ 18} Appellant argues the following trade secrets are genuine issues of material fact to overcome summary judgment: (1) appellant's business structure, (2) appellant's

budget and business forecasts, (3) appellant's profitability numbers related to its agents and teams, (4) appellant's costs, (5) appellant's future business and growth plans, (6) appellant's vendor names, (7) future programs appellant intended to offer to its agents, (8) appellant's financial performance, (8) implementation of appellant's training program, and (9) appellant's business and marketing structure.

{¶ 19} The trial court was not convinced, and stated in its judgment entry, "While the record contains little to suggest that any of the above are properly characterized as trade secrets, this court need not conduct extensive analysis on the issue." The trial court determined that even if the foregoing were protected trade secrets, appellant failed to demonstrate in the record how appellees used any protected information. The trial court found that appellant misplaced its reliance on the presumption of appellees' possession and knowledge of appellant's trade secrets necessitating the conclusion that the appellees had an immense competitive advantage. "Such a statement is insufficient to establish [appellant's] claim. Absent a showing that [appellees] had in fact made unauthorized use of plaintiff' trade secrets, [appellant's] claim for trade secret misappropriation necessarily fails as a matter of law."

{¶ 20} We reviewed the record de novo and agree with the trial court. Mr. Hall, Mrs. Hall, and Mr. Fairchild each repeatedly testified at their depositions that only publicly available documents and information, plus "wild ass guesses," were used as resources to start the brokerage service known as Red 1 Realty, LLC on January 10, 2019. For example, appellees used Google applications to start and operate the new

brokerage. However, appellant argues that "everything" associated with Key Realty, Ltd. operations was a component part to a uniquely compiled trade secret operation, which Red 1 Realty, LLC "stole." The concepts of novelty, uniqueness, and obviousness may be considered by a court tasked with determining whether information is worthy of trade secret status. *R & R Plastics, Inc. v. F.E. Myers Co.*, 92 Ohio App.3d 789, 801, 637 N.E.2d 332 (6th Dist.1993). Appellant argues that it took ten years to develop the "concept of Key," but appellees respond that appellant's application to real estate concepts that exist in economics and in other industries is not novel or unique.

{¶ 21} Despite appellant's assertions of uniqueness, the speculated conclusions of trade secret misappropriation do not satisfy R.C. 1333.61(D)(1). *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 528, 687 N.E.2d 661 (1997). "The Uniform Trade Secrets Act does not apply to the use of memorized information that is not a trade secret pursuant to R.C. 1333.61(D)." *Al Minor & Assoc., Inc. v. Martin*, 117 Ohio St.3d 58, 2008-Ohio-292, 881 N.E.2d 850, ¶ 25.

{¶ 22} Appellant's speculations rest on an unsupported inference that appellees' reliance on publicly available information resulted only in misappropriating appellant's trade secrets to compete with Key Realty, Ltd., despite the sealed record identifying nearly a dozen other companies providing competing real estate brokerage services to Red 1 Realty, LLC. The evidence showed that the publicly available information about these competing real estate brokerages, including appellant, allowed Red 1 Realty, LLC to measure how to incentivize real estate agents to join their startup. It is routine in the

real estate industry for competing brokerage firms to contact each other's agents with recruitment incentives. The standard real estate brokerage company business model primarily makes its money through the real estate agents. "Information that is known generally in the industry is not 'secret' and cannot be afforded trade secret protection." *R & R Plastics, Inc.* at 801-802. For example, we find that appellant's business structure as a limited liability company is publicly available information and not a trade secret.

{¶ 23} As the trial court noted, there is no evidence of how appellees "made unauthorized use of plaintiff's trade secrets." The record shows that Mr. Hall, Mrs. Hall and Mr. Fairchild each testified that Mrs. Hall and Mr. Fairchild started Red 1 Realty, LLC without soliciting information or documents from Key Realty, Ltd. or from Mr. Hall. Mr. Degnan and Ms. Saylor could not testify as to how appellees made unauthorized use of any alleged trade secrets, leaving only speculation that they did. The "piling" of inference upon inference, which amounts to impermissible speculation, does not create a material issue of fact to defeat summary judgment. *Moore v. Ohio Valley Coal Co.*, 7th Dist. Belmont No. 05 BE 3, 2007-Ohio-1123, ¶ 45; *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988), citing Civ.R. 56(E).

{¶ 24} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and appellees, as the moving parties, are entitled to judgment as a matter of law on appellant's claim of misappropriation of trade secrets.

{¶ 25} Appellant's second assignment of error is not well-taken.

III. Breach of Contract – Nondisclosure Clause

{¶ 26} Appellant's breach of contract claim is not precluded by its misappropriation of trade secrets claim. R.C. 1333.67(B)(1). Although the trial court ultimately denied Mr. Hall summary judgment on appellant's claim of breach of other contract clauses, we find the trial court's determination of "no just reason for delay" was in the interests of sound judicial administration. *Bryant v. Scooter Store*, 6th Dist. Lucas No. L-08-1262, 2009-Ohio-3910, ¶ 18.

{¶ 27} In support of its first assignment of error, appellant argues Mr. Hall violated paragraph six, the nondisclosure clause, of his December 3, 2012 "Non-Competition, Non-Solicitation and Confidentiality Agreement" with appellant (hereafter, the "Agreement"), which was sealed by the trial court, and the trial court erred when it determined "there is insufficient evidence to show that Michael Hall disclosed to the other defendants information concerning Key's business." Paragraph six of the Agreement states:

> 6. INFORMATION. Unless in response to a subpoena or Court Order, Employee, during the term of the Agreement, will not, at any time, in any fashion, form or manner, either directly or indirectly, divulge, disclose, or communicate to any person, firm or corporation in any manner whatsoever any information of any kind, nature or description concerning any matters affecting or relating to the business of Employer, including, without limitation, the names of any of its customers, its prices or costs, or

any other information concerning the business of Employer, its manner of operation, its plans, processes, work in process, or any other data of any kind, nature or description, without regard to whether any or all of the foregoing matters would be deemed confidential, material or important.

{¶ 28} To establish a claim of breach of paragraph six of the Agreement, appellant must "establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the breach." *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 41. "Contract interpretation is a matter of law, and questions of law are subject to de novo review on appeal." *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶ 38.

{¶ 29} The essential elements of contract formation are "'offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.'" *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 14, quoting *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16. "A contract is not binding unless supported by consideration." *Id.* at ¶ 15. The existence of consideration is for the court to determine, but the adequacy of consideration is generally left to the parties to the contract to judge for themselves. *Id.* at ¶ 17. Consideration is not found where there is a gratuitous promise, including a conditional gratuitous promise. *Id.* No

action for breach of contract can be brought where the promise was gratuitous. *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶ 21.

{¶ 30} The Agreement defines Mr. Hall as "Employee" and appellant as "Employer." The term of the Agreement is stated in paragraph one as the duration of "Employee's employment and for a period of two (2) years following the termination of Employee's employment with Employee for any cause or reason." The Agreement is dated December 3, 2012, and Mr. Hall testified he voluntarily terminated his employment relationship with appellant effective January 10, 2019.

{¶ 31} The Agreement does not define the term "customer" used throughout it, including in paragraph six. The Agreement does not contain or use the terms "agent" or "independent contractor," which have been used throughout this litigation to describe how appellant hired its real estate agents, including Mr. Hall and Mr. Fairchild. However, we find appellant's amended complaint at paragraph 52 instructive to our understanding that the "customers" in the Agreement are distinguished from appellant's employees or real estate agents and are not interchangeable.

{¶ 32} The trial court determined the following regarding appellant's breach of contract claim against Mr. Hall:

> Looking to the facts of the instant case, it becomes immediately clear that – despite plaintiff's numerous and emphatic allegations to the contrary – there is insufficient evidence to show that Michel Hall disclosed to the other defendants information concerning Key's business. For

example, while there is evidence that former Key Columbus employees Heather Hall and Fairchild made CSS access and lead generation a part of their business plan immediately after receiving the results of a Key survey that indicated that those two benefits would be of particular interest to agents, and thus a factfinder could reasonably conclude that Heather Hall and Fairchild may have used Key data in formulating their business plan, there is nothing in the record to indicate that they got this information from Michael Hall. To conclude otherwise would be mere speculation of a kind that is insufficient to defeat a summary judgment motion. * * *

Accordingly, the record fails to support plaintiff's claim that Michael Hall used Key data in contravention of the express terms of the non-compete agreement.

{¶ 33} It is undisputed in the record that appellant hired Mr. Hall in 2010 as an independent contractor, and he provided real estate agent services for a negotiated fee. By 2012 Mr. Hall was managing agents. Mr. Hall obtained his real estate broker's license in 2014. In 2016, Mr. Degnan increased the percentage of each commission paid to Mr. Hall in exchange for reducing reimbursements to Mr. Hall for Key Realty, Ltd. business expenses.

{¶ 34} Mr. Hall testified at his deposition that Mr. Degnan asked him to sign the Agreement "on the future promise of ownership. * * * I don't recall the exact verbiage that was used in 2012, but something along the lines of you would have a tangible asset

that you would own, that you could also sell." The Agreement has a blank line where the description of the consideration should go. Mr. Hall testified that for six to nine months prior to signing the Agreement Mr. Degnan promised him that the tangible ownership would be "a brokerage firm in the future, that he would work out the details of what that looks like."

{¶ 35} Mr. Degnan testified he could not recall why the consideration statement in the Agreement was left blank: "It, maybe, was an oversight, I don't know." Mr. Degnan further testified:

> So for various business reasons, okay, we decided to head in the direction of what was called the master services agreement. I feel that the discussions we had with Mike in principal or in concept, such as ideas like ownership, ideas of security, ideas of protection against us arbitrarily coming in and saying oh, Mike, you made [certain money] a year, but you're fired, and I'm going to replace you with somebody else for [significantly less money]. We thought Mike was entitled to some protection against that possibility.
>
> * * *
>
> Q: Do you believe that you led Mike Hall to believe that he would receive some sort of ownership interest of saleable assets?
>
> A: Yes.

{¶ 36} Before we can interpret paragraph six of the Agreement, we must first resolve the issue of whether Mr. Hall, as an independent contractor, is subject to it. "'Generally, where the evidence is not in conflict or the facts are admitted, the question of whether a person is an employee or an independent contractor is a matter of law to be decided by the court.'" *Perron v. Hood Industries, Inc.*, 6th Dist. Lucas No. L-06-1396, 2007-Ohio-4478, ¶ 34, quoting *Bostic v. Connor*, 37 Ohio St.3d 144, 146, 524 N.E.2d 881 (1988).

{¶ 37} "Whether a person is an employee or an independent contractor depends on the character of the arrangement between the person and the employer." *Id.* at ¶ 29, citing *Gillum v. Indus. Comm.* (1943), 141 Ohio St. 373, paragraph two of the syllabus. "The key factual determination is who had the right to control the manner or means of doing the work." *Bostic* at paragraph one of the syllabus. "Where the manner and means of doing work is left to one who is responsible to the employer only for the result, the relationship is that of independent contractor." *Bauer v. Commercial Aluminum Cookware Co.*, 140 Ohio App.3d 193, 200, 746 N.E.2d 1173 (6th Dist.2000).

{¶ 38} Unfortunately, the parties' shared intent of Mr. Hall's independent contractor status is not reflected in the Agreement. Rather, paragraph ten of the Agreement states:

> 10. AT WILL EMPLOYEE. Employee acknowledges that he/she is an at will Employee. Nothing in this Agreement shall modify the at will

employment relationship between the parties. Nothing in this Agreement creates, nor is it intended to constitute a contract of employment.

Despite the Agreement stating Mr. Hall is an at-will employee when he was an independent contractor, "the parties' characterization of their relationship in the [Agreement] is not controlling." *Hope Academy Broadway Campus v. White Hat Mgt., L.L.C.*, 145 Ohio St.3d 29, 2015-Ohio-3716, 46 N.E.3d 665, ¶ 41.

{¶ 39} The First District Court of Appeals determined that an independent contractor who can be terminated without cause is comparable to an at-will employee, and continued employment constituted sufficient consideration for an independent contractor agreement containing a non-compete clause, among other restrictions. *Financial Dimensions, Inc. v. Zifer*, 1st Dist. Hamilton No. C-980960, 1999 WL 1127292, *4. However, the independent contractor agreement in that case contained a clear statement that, "[Company] or the Contractor may terminate this Agreement at any time for any reason, without notice." *Id.* at *1. No such statement is in the Agreement before us.

{¶ 40} The Tenth District Court of Appeals reached a similar determination that an independent contractor hired for an indefinite term gave rise to an at-will employment relationship, and continued employment constituted sufficient consideration for the non-compete and non-disclosure agreement. *Americare Healthcare Servs. v. Akabuaku*, 10th Dist. Franklin No. 10AP-777, 2010-Ohio-5631, ¶ 24. However, the non-compete and non-disclosure agreement in that case had a clear consideration clause of "continued and

future engagement of Contractor by Company." *Id.* at ¶ 29. Again, no such statement is in the Agreement before us.

{¶ 41} We find no evidence in the record as to why appellant presented Mr. Hall with the Agreement in late 2012 stating that Mr. Hall is an at-will employee of Key Realty, Ltd. when both Mr. Degnan and Mr. Hall testified Mr. Hall was never an employee. Paragraph 50 of appellant's amended complaint merely states, "As a condition and in consideration of his relationship with Key Realty, Michael Hall executed the * * * Agreement." The Agreement itself leaves the statement of consideration blank. The record gives various possible meanings for the "condition of his relationship" with appellant: independent contractor, future co-owner, and at-will employee.

{¶ 42} The record is clear that appellant's relationship with Mr. Hall did not change as a result of entering into the Agreement. Appellant continued to treat Mr. Hall as an independent contractor, and Mr. Hall continued to act as an independent contractor. We find Mr. Hall was never an at-will employee with an oral contract with appellant. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 103, 483 N.E.2d 150 (1985). Because Mr. Hall was never appellant's employee and was never appellant's co-owner, appellant did not provide Mr. Hall with proper consideration when he signed the Agreement. *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, ¶ 16. At most it appears appellant offered a gratuitous promise as consideration, which is not proper consideration to form a binding contract.

{¶ 43} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact with respect to Mr. Hall's alleged breach of paragraph six of the Agreement. Mr. Hall, as the moving party, is entitled to judgment on that issue as a matter of law, and we affirm the trial court's decision. However, we further find that because there was no binding contract between Mr. Hall and appellant, the trial court erred when it denied Mr. Hall summary judgment on the outstanding aspects of appellant's breach of contract claim, and we reverse the trial court's decision.

{¶ 44} Appellant's first assignment of error is not well-taken.

IV. Tortious Interference with Contract and Business Relations

{¶ 45} To succeed on its tortious interference with business relationships and contracts, appellant must prove "a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14, 651 N.E.2d 1283 (1995). The elements of these torts are similar: (1) the existence of a business or contractual relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship or contract without justification; and (4) damages resulting therefrom. *Firestone v. Galbreath*, 895 F.Supp. 917, 930 (S.D.Ohio 1995); *Wauseon Plaza Ltd. Partnership v. Wauseon Hardware Co.*, 156 Ohio App.3d 575, 2004-Ohio-1661, 807 N.E.2d 953, ¶ 57 (6th Dist.); *Fred Siegel*, 85 Ohio St.3d at 176, 707 N.E.2d 853.

{¶ 46} The Ohio Supreme Court adopted a seven-factor test for determining whether a defendant's conduct intentionally interfered with business relations or a contract: (1) the nature of the defendant's conduct; (2) the defendant's motive; (3) the interests of the plaintiff, the interfered upon party; (4) the interests sought to be advanced by the defendant; (5) the social interests in protecting the freedom of action of the defendant and the contractual or business relations interests of the plaintiff; (6) the proximity or remoteness of the defendant's conduct to the interference; and (7) the relations between the parties. *Id.* at 172, paragraph three of the syllabus; *Wauseon Plaza* at ¶ 62-69.

{¶ 47} For these intentional torts, appellant must provide clear and convincing proof that appellees acted maliciously. *A & B-Abell Elevator* at 14-15; *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 16, 552 N.E.2d 207 (1990). "Ohio does not recognize the tort of negligent interference with contract/business relations." *Bauer*, 140 Ohio App.3d at 200, 746 N.E.2d 1173.

{¶ 48} At the outset, appellant's fourth assignment of error for intentional interference with contract by appellees fails for three reasons. First, we previously found that the Agreement between Mr. Hall and appellant was not binding. Second, we agree with the trial court when it determined that the record contained "no evidence or allegation suggesting the existence of any kind of contract between Key and any of its 150-180 unnamed agents." Third, it is undisputed that appellant had no contracts with Mrs. Hall or Mr. Fairchild.

{¶ 49} The trial court determined that appellant's claim of tortious interference with its business relations and at least 150 real estate agents failed to survive summary judgment. Appellant alleged appellees removed Key Realty owners and managers from a Key Facebook group and used that platform to communicate directly to Key Realty agents in the Columbus area. After applying the *Wauseon Plaza* factors to the evidence in the record, the trial court determined that "the nature of the alleged conduct was minor, and involved nothing more than Facebook group activity of no importance to Key Realty business operations" and that appellees "consistently and repeatedly assert * * * their belief that the Key Facebook group belonged (and continues to belong) to defendant Michael Hall, as the owner of Key Columbus, and not to plaintiff Key." The trial court further determined that "the record is consistent in its showing that defendants' actions were motivated by a desire to promote the Red 1 business, rather than to harm the Key business" and that "there is nothing tortious about Heather Hall's or Fairchild's efforts to recruit Key agents."

{¶ 50} We also agree with the trial court that appellant is limited to an action for breach of contract against Mr. Hall, and may not also recover for tortious interference with business relations. Where a party asserts claims for tortious interference with business relations and with contract, and the alleged interference is with business resulting from the breach rather than with a motive to interfere with actual business relations, then the party is limited to the action for breach of contract and may not recover in tort for business interference. *Digital & Analog Design Corp. v. N. Supply Co.*,

44 Ohio St.3d 36, 46-47, 540 N.E.2d 1358 (1989); *Wauseon Plaza*, 156 Ohio App.3d 575, 2004-Ohio-1661, 807 N.E.2d 953, at ¶ 55.

{¶ 51} From our de novo review of appellant's claim for tortious interference with business relations, we do not find appellant provided clear and convincing evidence that appellees acted maliciously. We find that soliciting for real estate agents from other firms is a common industry practice and actively occurred on behalf of Red 1 Realty, LLC after each appellee severed his/her relationship with appellant. We further find that in 2016 Mr. Hall formed and owned Key Realty Columbus 1, LLC without objection from appellant. To the extent that appellant alleges appellees' tortious conduct arose from the same core facts as appellant's claim of misappropriation of trade secret by appellees, such tort claims are displaced by R.C. 1333.67(A). *Tomaydo-Tomahhdo,* 2017-Ohio-4292, 82 N.E.3d 1180, at ¶ 32; *Stolle Mach. Co., LLC v. RAM Precision Industries*, 605 Fed.Appx. 473, 485 (6th Cir.2015).

{¶ 52} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and appellees, as the moving parties, are entitled to judgment as a matter of law on appellant's claims of tortious interference with contracts and business relations.

{¶ 53} Appellant's fourth assignment of error is not well-taken.

V. Unfair Competition

{¶ 54} In support of its third assignment of error, appellant argues that appellees acted in an unfair and unethical commercial manner, and with actual malice, designed to

gain a business advantage and to harm Key Realty's business. Appellant further argues, "[A]ny disclosure or use of the Proprietary Information by Defendants would be unfair and an improper method of competition with Key Realty in violation of Ohio law. Any such disclosure, or use would cause irreparable injury to Key Realty and damage will result to Key Realty therefrom." "Proprietary Information" is defined in the amended complaint as "valuable commercial and practical information as trade secrets."

{¶ 55} "There is a functional difference between unfair competition and disclosure of trade secrets. Unfair competition ordinarily consists of representations by one person, for the purpose of deceiving the public, that his goods are those of another." *Water Mgt., Inc. v. Stayanchi*, 15 Ohio St.3d 83, 85, 472 N.E.2d 715 (1984). "The concept of unfair competition may also extend to unfair commercial practices such as malicious litigation, circulation of false rumors, or publication of statements, all designed to harm the business of another." *Id.* It is important to remember that not all competition is unfair.

{¶ 56} However, where, as here, appellant's unfair competition claim arose in some way from the same core facts as its misappropriation of trade secrets claim, such unfair competition claims are displaced pursuant to R.C. 1333.67(A). *Tomaydo-Tomahhdo*, 8th Dist. No. 104446, 2017-Ohio-4292, 82 N.E.3d 1180, at ¶ 32; *Stolle Mach.*, 605 Fed.Appx. 473 at 484. We find that appellant's unfair competition claim regarding "Proprietary Information" does not have independent facts from its trade secrets claim. *Id.* at 485. Having found appellant's misappropriation of trade secrets

claims failed to overcome summary judgment, this aspect of appellant's unfair competition claim also fails.

{¶ 57} Appellant also argues there are genuine issues of fact of appellees' unfair competition for the following: (1) "Circumventing Mike Hall's obligations under the Agreement but concealing his ownership while advising other entities that Mike Hall was a 'partner' in this business," by pointing to sealed emails in the record indicating Mr. Hall inquiring about potential health benefit coverage from an insurance provider after leaving Key Realty and to an email indicating Mr. Fairchild requesting a non-party to "friend request" all Columbus Board of Realtors agents in Facebook; (2) "Mike Hall's abuse of his position at Key Realty to recruit Key Realty's agents to Red One while he was still at Key Realty"; (3) "Appellees blocking Key Realty from its communication systems while they were recruiting Key Realty's agents"; (4) "Appellees advising Key Realty's agents alleging that Key Realty broke promises to agents, * * * but later acknowledging that it could not identify any broken promises," by pointing to a sealed Google Slide used by Mrs. Hall and Mr. Fairchild at their grand opening event for Red 1 Realty, LLC and pointing to Mrs. Hall's deposition explaining what she meant by the broken promises to management and agents; (5) "Appellees removing Key Realty's agents from the forums if they did not transfer to Red One"; (6) "Appellees extorting Key Realty to obtain a rescission of the Agreement by agreeing to return the property they took from Key Realty," by pointing to Mr. Hall's sealed email to Mr. Degnan requesting a rescission of the Agreement, which Mr. Hall did not believe was a bilateral contract, and offered to

negotiate a termination of the Agreement and release; (7) "Appellees creating confusion which resulted in several agents questioning whether Key Realty maintained an office in Columbus," by pointing to a sealed email from a non-party to a non-party asking about the Key Realty office locations in Columbus and in Marietta, which we find is inadmissible hearsay pursuant to Evid.R. 802; and (8) "Appellees canceling Key Realty's kick-off party and converting it to Red One's 'Grand Opening' Party."

{¶ 58} The trial court determined the evidence showed appellees desired to grow their own business, not to harm appellant. The competition appellees engaged in with appellant was not unfair because they were also simultaneously competing with all other real estate brokerage services companies. The record lacks evidence that anyone believed that Red 1 Realty, LLC was really just appellant or that Red 1 Realty, LLC held itself out to the public as appellant. There was no evidence that any agent or broker of Red 1 Realty, LLC claimed to be the agent or broker of appellant. The record shows that Red 1 Realty, LLC's name and logo, not appellant's, appeared on all of its publicly available information. The trial court acknowledged that the genuine issue of fact as to who owned a particular "Key Facebook group" did not arise to meet an expanded definition of unfair competition because of the lack of evidence in the record that appellees' actions were "designed to harm the business of another."

{¶ 59} We agree with the trial court. Appellant points to the record evidence for only four of its eight claims of genuine issues of material fact for its unfair competition claim. App.R. 12(A)(2). We find that the evidence appellant pointed to does not support

finding admissible facts in evidence that are both genuine and material. It is apparent from the record that appellant perceived all of appellees' actions, both direct and indirect, were hostile and designed to harm appellant. Yet appellant fails to show where in the record appellees designed the launch of Red 1 Realty, LLC with malice towards appellant to cause harm, other than appellant's own speculations.

{¶ 60} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact with respect to appellant's alleged unfair competition claim. Appellees, as the moving parties, are entitled to judgment on that issue as a matter of law.

{¶ 61} Appellant's third assignment of error is not well-taken.

VI. Conversion

{¶ 62} In support of its fifth assignment of error, appellant's amended complaint states as its conversion claim that appellees "converted Key Realty's property without any consent or authorization. Defendants' conduct was a wrongful interference with Key Realty's property rights." Appellant argues the property rights at issue included, "a Key Realty Central Ohio Facebook page maintained exclusively for Key Realty agents," Key Realty e-mail accounts and websites, "calendars, Google Drive resources, and other electronic and physical property and documents."

{¶ 63} The trial court determined:

> In analyzing plaintiff's claim, it is noted that the parties do not dispute that Michael Hall came into possession of the subject property

> lawfully, during his engagement with Key. Thus, plaintiff is required to show the following additional elements in order to establish its claim for conversion: 1) that plaintiff demanded the return of the property after defendants exercised dominion or control over it; and 2) that defendants refused to deliver the property to plaintiff. * * * Unfortunately for plaintiff, plaintiff fails to assert – and this court's review of the record has failed to reveal evidence of – any demand on the part of plaintiff for the return of the property in question, let alone any refusal on the part of defendants. Absent evidence to establish these additional elements of plaintiff's claim, summary judgment is properly entered in favor of defendants, and against plaintiff, with respect to plaintiff's claim of conversion.

{¶ 64} The Ohio Supreme Court has held "that conversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990); *Peirce v. Szymanski*, 6th Dist. Lucas No. L-11-1298, 2013-Ohio-205, ¶ 19. "To prevail on a conversion claim, a plaintiff must demonstrate: (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of the plaintiff's property right; and (3) damages." *Id.* "If the defendant came into possession of the property lawfully, the plaintiff must prove two additional elements to establish conversion: (1) that the plaintiff demanded the return of the property after the defendant

exercised dominion or control over the property; and (2) that the defendant refused to deliver the property to the plaintiff." *Id.*; *Brown Motor Sales, Inc. v. Keeley*, 6th Dist. Lucas No. L-95-330, 1996 WL 549231, *9 (Sept. 30, 1996); *Elling v. Witt*, 6th Dist. Ottawa No. 94OT032, 1995 WL 54127, *2 (Feb. 10, 1995); *College Station v. Knowles*, 6th Dist. Lucas No. L-93-060, 1993 WL 496687, *6 (Dec. 3, 1993). The lack of evidence in the record that appellant demanded appellees return of the allegedly converted property is fatal to appellant maintaining a cause of action for conversion. *Id.* Appellant must provide competent, credible evidence in the record to support its conversion claim. *Elling* at *3.

{¶ 65} Appellant alleges it "made an effort to resolve this matter and obtain its property from Mike Hall and Red One prior to filing the Complaint and moving for a temporary restraining order. (Appx. 39, 3:1-22.)" However, the record does not contain the enumerated appendix cited by appellant, nor the transcript of the temporary restraining order proceedings. The record does not contain the alleged evidence of appellant demanding from each appellee the return of Key Realty, Ltd. property and each appellee's refusal to do so, even though appellees came into possession of the disputed property lawfully.

{¶ 66} It is undisputed that Mr. Hall owned Key Realty Columbus 1, LLC. We find the disputed property, such as Facebook groups and a Google Drive associated with keyrealtycolumbus@gmail.com, not, for example, columbus@keyrealtyagent.com, were created specifically for Key Realty Columbus 1, LLC, and not Key Realty, Ltd. Pursuant

to how Google Drive works, Mr. Hall was only able to "unshare" the Google Drive documents he "owned." Mrs. Hall worked unpaid for Key Realty Columbus 1, LLC, and not Key Realty, Ltd. Mr. Fairchild was an independent contractor agent for Key Realty, Ltd. and worked for Key Realty Columbus 1, LLC as a broker. In these roles, each appellee had Mr. Hall's consent to access to the property created for Key Realty Columbus 1, LLC. In addition, the undisputed evidence is that Mr. Hall owned Key Realty Columbus 1, LLC, Key Realty Cincinnati 1, LLC, Key Realty Cleveland 1, LLC, and other entities, and owned the electronic resources created for them.

{¶ 67} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact with respect to appellant's alleged conversion claim, and appellees, as the moving parties, are entitled to judgment on that issue as a matter of law.

{¶ 68} Appellant's fifth assignment of error is not well-taken.

VII. Unauthorized Use of Computer Property, Criminal Mischief, Civil Theft, Extortion

{¶ 69} In support of its sixth assignment of error, appellant alleges it may recover damages in a civil action pursuant to R.C. 2307.60 for claims that appellees violated four criminal statutes: R.C. 2913.04(B) (unauthorized use of computer, cable or telecommunication property), R.C. 2909.07(A)(6)(a) (criminal mischief), R.C. 2307.61 (civil theft), and R.C. 2905.11 (extortion).

{¶ 70} Appellant alleges the trial court erred by concluding that as a matter of law, "Appellees did not intend to commit any of the alleged criminal acts because they believed the various e-mail and social media accounts, websites, electronic resources, leases, and other related property did not belong to Key Realty." Appellant further argues that the trial court ignored Mr. Hall's "admission that his Agreement made it 'very clear' that the materials and accounts in question belonged to Key Realty and Fairchild and Heather's admission that they were aware of the (sic) Mike Hall's Agreement."

{¶ 71} R.C. 2307.60(A)(1) authorizes a civil action for damages caused by criminal acts, unless otherwise prohibited by law. *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 10. However, the Ohio Supreme Court provided no guidance "regarding how the statute operates or what a plaintiff must do to prove a claim under R.C. 2307.60(A)(1) * * *." *Id.* at ¶ 11. Since then, the Ohio Supreme Court has clarified that a plaintiff is not required to prove the existence of an underlying criminal conviction to support the plaintiff's claim for civil liability under R.C. 2307.60. *Buddenberg v. Weisdack*, Slip Opinion No. 2020-Ohio-3832, ¶ 11.

A. Unauthorized Use of Computer Property

{¶ 72} Appellant alleges appellees violated R.C. 2913.04(A)-(B), a criminal statute that states:

> (A) No person shall knowingly use or operate the property of another without the consent of the owner or person authorized to give consent.

(B) No person, in any manner and by any means * * * shall knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network, * * *, or information service without the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, computer network, * * *, or information service or other person authorized to give consent.

{¶ 73} "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). R.C. 2913.01(D) defines "owner" as "any person, other than the actor * * *." R.C. 2913.01(T) defines "gain access" as "to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network * * *."

{¶ 74} The trial court determined that appellees held "an unwavering position" that any disputed electronic resources used or accessed by them, if any, were the property of Key Realty Columbus 1, LLC, undisputedly owned by Mr. Hall. Although appellant claimed that all resources were Key Realty, Ltd. resources, it failed to provide evidence that appellees "'knowingly' used and operated the electronic resources without proper consent."

{¶ 75} We agree with the trial court that appellant failed to establish key elements of the alleged crime. It is undisputed that Mr. Hall owned Key Realty Columbus 1, LLC,

and as the owner, he cannot also be the actor allegedly violating R.C. 2913.04(A)-(B) with the disputed electronic records he specifically created for Key Realty Columbus 1, LLC, and not Key Realty, Ltd. Mrs. Hall and Mr. Fairchild had Mr. Hall's consent to access to the computer-related resources created for Key Realty Columbus 1, LLC.

{¶ 76} Despite appellant insisting that under the Agreement Key Realty, Ltd. owned "everything," we have already found Mr. Hall is not subject to the Agreement. We find that the admission Mr. Hall made during his sealed deposition was that, under the Agreement, materials and accounts created for Key Realty, Ltd. were owned by Key Realty Ltd.

{¶ 77} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and appellees, as the moving parties, are entitled to judgment as a matter of law on appellant's claim of unauthorized use of computer property.

B. Civil Theft

{¶ 78} Appellant alleges that appellees violated R.C. 2307.61(A), which states:

> If a property owner brings a civil action pursuant to [R.C. 2307.60(A)] to recover damages from any person who willfully damages the owner's property or who commits a theft offense, as defined in [R.C. 2913.01], involving the owner's property, the property owner may recover [damages] * * *.

{¶ 79} Appellant does not specify which theft offense it alleges appellees violated. R.C. 2913.01(K)(1) defines "theft offense" as including a violation of R.C. 2913.04. Having already determined that appellant failed to support its claim appellees violated R.C. 2913.04, we find appellant also fails to support its claim for damages pursuant to R.C. 2307.61(A).

{¶ 80} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and appellees, as the moving parties, are entitled to judgment as a matter of law on appellant's claim of civil theft.

C. Extortion

{¶ 81} Appellant alleges appellees violated R.C. 2905.11(A)(1), which states: "No person, with purpose to obtain any valuable thing or valuable benefit or to induce another to do an unlawful act, shall do any of the following: (1) Threaten to commit any felony."

{¶ 82} Appellant argues the trial court ignored the evidence that "Appellees attempted to use their theft of Key Realty's property to obtain a rescission of Hall's Agreement with Red One. This demonstrates that Appellees' engaged in knowing and intentional conduct." Appellant alleges Mr. Hall threatened to violate R.C. 2913.04, which we previously determined did not survive summary judgment. Appellant further alleges Mr. Hall threatened to violate R.C. 2913.02(A)(1)-(4), which states, "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) without the

consent of the owner * * *; (2) beyond the scope of the express or implied consent of the owner * * *"; (3) by deception; (4) by threat * * *."

{¶ 83} The trial court determined that appellant's evidence to support this claim "reveals no threat by Michael Hall to commit any theft offense, whatsoever. * * * Thus, there is nothing in the record to suggest that Michael Hall either 1) threatened to knowingly obtain or exert control over Key property or services; or 2) engaged in the unauthorized use of computer or telecommunication property * * *." The specific moment of extortion provided by appellant is an email from Mr. Hall to Mr. Degnan showing "nothing more than an intent on the part of Michael Hall to negotiate with his former employer [to rescind the Agreement], using items he 'owned' as leverage to assist with his negotiations." We agree with the trial court. Appellant failed to provide evidence of necessary elements of the criminal offense of extortion.

{¶ 84} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and appellees, as the moving parties, are entitled to judgment as a matter of law on appellant's claim of extortion.

D. Criminal Mischief

{¶ 85} Appellant alleges appellees violated R.C. 2909.07(A)(6)(a), which states:

> No person shall: * * * [W]ithout privilege to do so, and with intent to impair the functioning of any computer, computer system, computer network, computer software, or computer program, knowingly do any of the following: (a) In any manner or by any means, including, but not

limited to, computer hacking, alter, damage, destroy, or modify a computer, computer system, computer network, computer software, or computer program or data contained in a computer, computer system, computer network, computer software, or computer program.

{¶ 86} The trial court determined that appellant's claims of impaired functioning of Key Realty, Ltd. computer systems and electronic resources failed because the evidence showed appellees, if proven they did so act, acted with the intent to benefit Red 1 Realty, LLC, and not to impair the functioning of any Key Realty, Ltd. computer systems.

{¶ 87} We agree with the trial court. The record shows that appellees' actions to, for example, unshare Mr. Degnan and Ms. Saylor from Facebook groups and Google Drives were because those electronic resources were associated with keyrealtycolumbus@gmail.com, which Mr. Hall created for Key Realty Columbus 1, LLC, the Ohio limited liability company Mr. Hall owned and continues to own. Although appellant alleges the trial court engaged in impermissible credibility determinations on summary judgment, we disagree. We, like the trial court, find the record lacks evidence from appellant that appellees, who had access privileges to the disputed electronic resources, intended to impair the functioning of Key Realty, Ltd. computers and computer systems.

{¶ 88} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and appellees, as the moving parties, are entitled to judgment as a matter of law on appellant's claim of criminal mischief.

{¶ 89} Appellant's sixth assignment of error is not well-taken.

VIII. Spoliation

{¶ 90} In support of its seventh assignment of error, appellant alleges appellees "knew that as a result of their actions there would be probable litigation involving Key Realty, yet upon information and belief Defendants willfully destroyed evidence by deleting emails, computer files, online posts, and other electronic information as well as discarding physical documents into the trash" with the intent to disrupt appellant's case. Appellant alleges that on the same day the trial court granted a temporary restraining order and ordered appellees to transfer access to appellant's social media accounts back to appellant, Mrs. Hall, without explanation, "deleted several posts and removed several group members from the Key Realty Facebook platform." Appellant further alleges that Mr. Hall "deleted items from the same Facebook platform and, additionally, certain items were 'removed' from Hall's calendar."

{¶ 91} To prevail on a tort of intentional spoliation of evidence, appellant must prove the following elements: "'(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the

defendant's acts.'" *Elliott-Thomas v. Smith*, 154 Ohio St.3d 11, 2018-Ohio-1783, 110 N.E.3d 1231, ¶ 10, quoting *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993).

{¶ 92} The trial court determined that, "Even accepting, arguendo, that defendants may have willfully destroyed evidence in an attempt to disrupt plaintiff's case, there is simply no evidence or allegation to suggest that any disruption to plaintiff's case occurred." The trial court further determined, "Nor is there any evidence or allegation concerning any damages that may have been proximately caused by defendants' acts." We agree with the trial court. No willful destruction of evidence by appellees and actual disruption to appellant's case is found in the record to support appellant's allegation of this intentional tort.

{¶ 93} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and appellees, as the moving parties, are entitled to judgment as a matter of law for appellant's claim of intentional spoliation of evidence.

{¶ 94} Appellant's seventh assignment of error is not well-taken.

IX. Civil Conspiracy

{¶ 95} To support its eighth assignment of error, appellant alleges appellees "combined to maliciously commit one or more of the unlawful acts described above, which resulted in actual damages to Key Realty." Appellant further alleges "there is significant evidence to demonstrate that Appellees, in concert, engaged in intentional conduct to unfairly compete against Key Realty, convert Key Realty's property,

intentionally interfere with Key Realty's business relationship with its agents, and intentionally interfere with Mike Hall's Agreement with Key Realty."

{¶ 96} To prevail on a tort of civil conspiracy, appellant must prove the following elements: "'(1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself.'" *Peirce*, 6th Dist. Lucas No. L-11-1298, 2013-Ohio-205, at ¶ 21, quoting *State ex rel. Fatur v. Eastlake,* 11th Dist. No. 2009-L-037, 2010-Ohio-1448, ¶ 45. "The conspiracy claim must be pled with some degree of specificity, and vague or conclusory allegations that are unsupported by material facts will not be sufficient to state a claim." *Avery v. Rossford, Ohio Transp. Improvement Dist.*, 145 Ohio App.3d 155, 165, 762 N.E.2d 388 (6th Dist.2001). Appellant "must allege actual damages attributable to the conspiracy in addition to those damages caused by the underlying tort." *Id.* at 165.

{¶ 97} The trial court determined, "Because summary judgment has been granted on every count, except the first, against Michael Hall, for breach of contract, plaintiff cannot, as a matter of law, establish that there was a 'malicious combination of two or more persons' to injure it." We agree with the trial court. We find that appellant fails to make viable claims for an unlawful underlying action to support its claim of civil conspiracy. *Peirce* at ¶ 22.

{¶ 98} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and appellees, as the moving parties, are entitled to judgment as a matter of law on appellant's claim of civil conspiracy.

{¶ 99} Appellant's eighth assignment of error is not well-taken.

X. Breach of Fiduciary Duty

{¶ 100} To support its ninth assignment of error, appellant alleges that Mr. Hall "had a fiduciary relationship with Key Realty. It was clearly established in the Agreement" and by his regular participation "in management meetings where Key Realty's confidential business information was discussed and Mike Hall supervised Key Realty's agents in the Columbus are." Appellant argues Mr. Hall's breaches are: (1) concealing his ownership interest in Red 1 Realty, LLC; (2) recruiting Key Realty, Ltd. agents to Red 1 Realty, LLC while he was still at Key Realty, Ltd.; (3) changing passwords on Key Realty, Ltd. communication platforms to deny access; (4) blocking Key Realty, Ltd. from its communication systems while recruiting Key Realty, Ltd. agents; and (5) extorting Key Realty, Ltd. to obtain a rescission of his Agreement.

{¶ 101} The trial court determined, "Even accepting all of plaintiff's assertions as true, plaintiff fails to demonstrate how Michael Hall 'agreed to act primarily for the benefit of [Key] in matters connected with its [business].'" The trial court continued, "to the contrary, Michael Hall repeatedly asserts that, as the owner of Key Columbus, he was responsible for his own companies and his own costs. Thus, plaintiff fails to establish the existence of a fiduciary relationship between itself and Michael Hall." The trial court found, "Even, assuming arguendo, the existence of a fiduciary relationship, plaintiff fails to articulate the specific duty that was owed to Key and/or how Michael Hall may have

breached it. As either failure is fatal to plaintiff's claim, summary judgment is properly entered in favor of Michael Hall, and against plaintiff with respect to this issue."

{¶ 102} It is undisputed in the record that Mr. Hall was an independent contractor of Key Realty, Ltd. An independent contractor generally has no fiduciary relationship to his or her employer unless both parties understand that the relationship is one of special trust and confidence. *Hope Academy*, 145 Ohio St.3d 29, 2015-Ohio-3716, 46 N.E.3d 665, at ¶ 73. Appellant points to the preamble statement in the Agreement with Mr. Hall that, "Employee is employed by Employer in a position of trust and confidence, requiring a high degree of loyalty, honesty and integrity." However, we have already determined that Mr. Hall was not subject to the Agreement. We further find that appellant fails to establish by clear and convincing evidence that Mr. Hall owed appellant a duty arising out of a fiduciary relationship that was not based on the Agreement.

{¶ 103} "A claim of breach of a fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care." *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (1988). "In order to succeed on a breach-of-fiduciary-duty claim, a plaintiff must prove the existence of a duty arising out of a fiduciary relationship, failure to observe that duty, and injury resulting proximately therefrom." *Burns v. Burns Iron & Metal Co.*, 6th Dist. Sandusky No. S-12-024, 2013-Ohio-2024, ¶ 17; *Newcomer v. Natl. City Bank*, 6th Dist. No. WM-12-007, 2014-Ohio-3619, 19 N.E.3d 492, ¶ 9. Appellant's burden of proof is clear and convincing evidence of each element for a breach of fiduciary duty claim. *Id.* at ¶ 48.

{¶ 104} The existence of a duty arising out of a fiduciary relationship is a question of law to be initially determined by the court. *Driftmeyer v. Carlton*, 6th Dist. Lucas No. L-06-1029, 2007-Ohio-2036, ¶ 50-52. "'A "fiduciary relationship" is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.'" (Citations omitted.) *Hope Academy* at ¶ 82. "A 'fiduciary' has been defined as '"a person having a duty, created by his undertaking, to act *primarily for the benefit of another* in matters connected with his undertaking."' (Emphasis sic.)" (Citation omitted.) *Strock* at 216.

{¶ 105} Upon de novo review of the record pursuant to Civ.R. 56, we find there is no genuine issue as to any material fact, and Mr. Hall, as the moving party, is entitled to judgment as a matter of law. We leave undisturbed the trial court's determination granting Mrs. Hall and Mr. Fairchild summary judgment on appellant's claim of breach of fiduciary duty. App.R. 12(A)(2).

{¶ 106} Appellant's ninth assignment of error is not well-taken.

XI. Conclusion

{¶ 107} On consideration whereof, this court finds that there remain no genuine issues of material fact and, after construing all the evidence most strongly in favor of appellant, reasonable minds can come to but one conclusion that appellees are entitled to summary judgment as a matter of law. The judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed with respect to the trial court's denial of

summary judgment to Mr. Hall on the outstanding aspects of appellant's breach of contract claim. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE

Christine E. Mayle, J. _____
CONCURS IN PART, DISSENTS IN PART, AND WRITES SEPARATELY. JUDGE

MAYLE, J.

{¶ 108} Respectfully, I concur, in part, and dissent, in part.

{¶ 109} I agree with the majority's decision to affirm summary judgment with respect to (1) that part of Key Realty's claim for tortious interference with contract that relates to interference with alleged contracts between Key Realty and its agents, (2) Key Realty's spoliation claim against Hall and Fairchild (but not against Heather), and

(3) Key Realty's claim for criminal mischief. I also agree with the majority's ultimate conclusion to affirm summary judgment on the claim for misappropriation of trade secrets, but for different reasons.

{¶ 110} I disagree with the majority on the remainder of its decision. In my view, the majority's decision is based upon an improper and wholesale acceptance of appellees' version of events despite conflicting testimony and evidence relating to material questions of fact. So much of this case requires an evaluation of witness credibility, which is inappropriate at the summary judgment phase. The ultimate fact finder—not this court—should determine which witnesses should be believed, and which witnesses should not.

{¶ 111} In order to properly analyze the various claims and my points of disagreement with the majority, it is necessary to lay out an overview of the facts of this case—which, under Civ.R. 56, must be viewed in a light most favorable to Key Realty.[2]

---

[2] On April 19, 2019, the trial court signed a Stipulated Protective Order, presumably because this case involves a claim by Key Realty against appellees for misappropriation of trade secrets. The order, among other things, allowed the parties to designate certain discovery materials as "confidential" so that they cannot be used for any purposes outside this litigation—which is not uncommon—and highly confidential and proprietary information as "attorneys eyes only." Before the parties filed their respective briefs and evidence related to the summary judgment proceeding, the trial court granted their motions to file *all* of the supporting deposition transcripts, exhibits, and briefing under seal—without any argument or analysis of why such a drastic restriction of public access was necessary when many less-restrictive options (redaction, etc.) are available. Under the Rules of Superintendence for the Courts of Ohio, the trial court should have undertaken an analysis to determine whether the moving party demonstrated by "clear and convincing evidence that the presumption of allowing public access is outweighed by

I. Factual Background of this Dispute

{¶ 112} Mike Hall began his real estate career as an agent working for Golden Gate Real Estate as an independent contractor, where he worked for approximately four years. During that time, he was also employed by Old Republic Home Warranty as a home warranty representative. In 2010, Hall left Golden Gate and became a real estate agent for Key Realty, which was owned by Dennis Degnan and his wife, Amy Saylor. At that time, Hall continued in his employment with Old Republic while working as a realtor for Key Realty as an independent contractor.

{¶ 113} Hall terminated his employment with Old Republic in "2011 or '12" because he "was moving into a different role within Key Realty" at that time. That is, "sometime around 2012," Hall transitioned into a management role at Key Realty and began overseeing agents. Over the years that followed, Hall's work for Key Realty continued to grow, and he was eventually promoted to director.

---

a higher interest" after considering certain enumerated factors. Sup.R. 45(E)(2). Moreover, the trial court was required to use the "least restrictive means available" when restricting public access. Sup.R. 45(E)(3). Here, no such analysis was undertaken before the trial court sealed the records, and a blanket sealing order is certainly not the "least restrictive means available." For these reasons, I believe that the trial court's sealing of the summary judgment records does not impact the work that must be done by this court on appeal. Perhaps more importantly, the parties filed their appellate briefs—including voluminous exhibits containing lengthy deposition excerpts and the key evidentiary material relating to summary judgment—on the public docket.

{¶ 114} At all times, Hall worked for Key Realty as an independent contractor. As an independent contractor, he did his work for Key Realty through Key Realty Columbus 1, LLC ("Key Columbus"), a limited liability company that he owned.

A. The Non-Competition, Non-Solicitation, and Confidentiality Agreement

{¶ 115} It is undisputed that on December 12, 2012, Hall signed a Non-Competition, Non-Solicitation, and Confidentiality Agreement with Key Realty. But, the parties dispute the circumstances surrounding the execution of the non-compete agreement.

{¶ 116} Hall claims that he signed the non-compete agreement because Degnan had promised him a "future ownership" interest in Key Realty over the course of "two to three" conversations in 2012. Degnan, however, flatly denied this. He testified:

> That's ridiculous, okay? Why would – this is someone who had no track record as manager, whatsoever. * * * Why would I give somebody an offer of ownership in a company? He was untested as a manager. He had no track record, whatsoever, in real estate management. So the idea that I had conversations with him about ownership in 2012 are simply not true.[3]

[3] The majority quotes a different portion of Degnan's deposition testimony, in which he confirms that he "led Mike Hall to believe that he would receive some sort of ownership interest of saleable assets." That line of questioning, however, concerned conversations between Hall and Degnan *in 2018*—more than five years after Hall signed the agreement and assumed a management role at Key Realty. At that time, Degnan presented Hall with a master services agreement under which Hall would have had an ownership of a separate LLC and a management agreement with Key Realty—which is the "saleable asset" that Degnan was referring to.

{¶ 117} The written agreement does not contain any promises of "future ownership" in Key Realty. The agreement is a form contract, and it is couched in terms of an employer/employee relationship—referring to Hall as "Employee" and Key Realty as "Employer"—even though Hall always worked for Key Realty as an independent contractor. The relevant provisions of the agreement can be summarized as follows:

- *WHEREAS clause*: Hall is employed "in a position of trust and confidence, requiring a high degree of loyalty, honesty and integrity" and he "has gained and will continue to gain valuable information and insights on the lines of business in which Employer is engaged; access to Employer's confidential and proprietary information; and exposure to its existing and potential business opportunities";
- *WHEREAS clause*: Hall has accepted his "present position" with the understanding that he "is not to use or divulge any such matters" for his own "personal gain or to the detriment of Employer";
- *Paragraph 1, "TERM"*: The agreement is effective during his employment and for two years after the termination of his employment with Key Realty "for any cause or reason";
- *Paragraph 2, "COVENANT NOT TO COMPETE"*: During his employment, Hall could not, directly or indirectly, compete with Key Realty or "be connected in any like manner with any other business" similar to Key Realty within a thirty-mile radius of his principal place of employment;

- *Paragraph 3, untitled*: After the termination of his employment, Hall could not, directly or indirectly, compete with Key Realty within a fifty-mile radius of his principal place of employment or "be connected in any like manner with any other business" similar to Key Realty;
- *Paragraph 4, NO DISCLOSURE OR SOLICITATION OF CUSTOMERS*: Hall could not, directly or indirectly, divulge the names or addresses of any customers of Key Realty unless in response to a subpoena or court order
- *Paragraph 5, NO SOLICITATION OF EMPLOYEES*: Hall could not, directly or indirectly, "solicit or cause any person under his/her control to solicit any employee of Employer, to terminate his/her employment relationship with Employer."
- *Paragraph 6, INFORMATION*: Hall could not, during the term of the agreement, "in any fashion, form or manner, either directly or indirectly, divulge, disclose or communicate to any person, firm, or corporation in any manner whatsoever any information of any kind, nature or description concerning any matters affecting or relating to the business of Employer"; and
- *Paragraph 7, RECORDS BELONG TO THE CORPORATION*: "All books, records, files, forms, reports, accounts and documents relating in any manner to Employers [sic] business or customers, whether prepared by Employee or otherwise coming into Employee's possession, shall be the exclusive property

of Employer and shall be returned immediately to Employer upon termination of employment or upon Employer's request at any time."

{¶ 118} It is undisputed that after Hall signed this agreement with Key Realty in 2012, his responsibilities and business with Key Realty grew exponentially over the years that followed. Degnan testified that from the end of 2012 until Hall left Key Realty, Hall had four main responsibilities: (1) he recruited real estate agents for Key Realty and hired them into the company; (2) he educated and trained Key Realty agents; (3) he "respond[ed] to day-to-day questions, problems, [and] management intervention situations"; and (4) he was responsible for holding people accountable for inappropriate behavior and "dehiring" them, if necessary.

{¶ 119} By the time he left the company in 2019, Hall had multiple Key Realty managers and brokers reporting directly to him, and those managers and brokers oversaw approximately 380 real estate agents. At that time, Key Realty had approximately 1100 agents in total. Hall received a percentage of the revenue that was generated by his group, and he was responsible for paying many of the expenses that were related to his group's business (including paying the managers and brokers who reported to him).

B. The Formation of Red 1 Realty, LLC

{¶ 120} Although the parties dispute whether Hall and Degnan had any discussions regarding Hall's potential ownership in Key Realty in 2012—i.e., before the non-compete agreement was executed, and before he assumed management responsibilities for Key

Realty—it is undisputed that they had ownership-related discussions after Hall became a manager.

{¶ 121} Hall testified that in "2014-ish," Degnan suggested that they start working on a franchising agreement for him. Degnan testified that these franchise discussions began in 2015. According to Hall, the discussions dragged on for several years, and Degnan changed the form of the would-be ownership arrangement "multiple times." In 2016, Degnan decided against offering Hall a franchise agreement—which, he said, was because of the costs involved with expanding a franchise—and began working on the concept of a "master services agreement" whereby Hall would set up a new LLC, and that new LLC would enter into a management agreement with Key Realty. Degnan testified that he offered this "master services agreement" to Hall in 2018—which, to Degnan, represented "an opportunity to acquire business that I thought was worth millions of dollars"—but Hall declined.

{¶ 122} At that time, Degnan was unaware that Hall had formed a new company—Red 1 Realty, LLC ("Red 1")—two years before Degnan offered the master services agreement. Hall testified that he formed that new LLC in 2016 because he was "unhappy and angry" when Degnan changed his mind about offering a franchising agreement. In his own words, Hall explained that he formed Red 1 because:

> I was promised ownership for years, and that ownership had then turned into an offer of a franchise agreement, and then that franchise agreement, after years of working on it and getting the circular sent and the

franchise agreement sent, the company decided to move in a different direction and not offer a franchise.

{¶ 123} Hall testified, however, that he was "uncertain if [he] wanted to form a brokerage" when he formed Red 1 in 2016, and just "loved the name Red 1 and [he] wanted to reserve that name." Hall also formed a Red 1 entity in Florida to reserve the name there as well.

C. Pre-Launch Activities in 2018 and Early 2019 Relating to Red 1

{¶ 124} It is undisputed that the two other individual appellees—Heather Hall and Kenton Fairchild—began activities in 2018 to launch Red 1 as a competing real estate brokerage. Hall denies that he was involved in these activities.

{¶ 125} Heather is Hall's wife. She provided day-to-day administrative support for Hall's Key Realty business—for no compensation—starting in 2015 or 2016. Heather is not, and never has been, a licensed real estate broker or real estate agent.

{¶ 126} On or about October 15, 2018, Hall transferred ownership of Red 1 to Heather. Hall testified that he transferred ownership of Red 1 to his wife because "[s]he asked me to." Hall maintained that the transfer of ownership from him to his wife did not have anything to do with the non-compete contract that he executed in December 2012 with Key Realty. He testified, "I transferred that because my wife said transfer it to me. * * * [W]hen your wife tells you to do something, then sometimes you just do it." When asked whether Heather was aware of his 2012 contract with Key Realty, he answered "[y]ou'd have to ask Ms. Hall."

{¶ 127} Heather testified that she decided to form Red 1 after she "tagged along" with Hall to the Key Realty regional manager meeting in October 2018. She stated that Degnan promised all of the regional managers at that meeting that "he was going to make them owners of Key Realty. He was going to make them millionaires." When he said that, Heather thought to herself "oh my God, he lied. He's not going to do anything. He's breaking every single promise that he promised my husband." She said that made her "think I should start my own brokerage firm." Heather stated she asked Hall if he wanted to start the business with her, and "[h]e said he was unsure if there was a noncompete or whatever." When asked whether Hall transferred ownership of Red 1 to her to avoid the non-compete agreement, she responded, "I asked him to transfer it. But no, I mean, the noncompete that I saw I did not believe was valid. I just wanted to take precautions and keep my family safe." Heather testified that she did not think the agreement was valid because it refers to Hall as an "employee" and because the signature line for Key Realty was blank.

{¶ 128} Kenton Fairchild was an associate broker with Key Realty, where he worked "hand in hand" with Hall. Unlike Hall, Fairchild did not have a non-compete agreement with Key Realty. Degnan testified that in December 2018, he told Hall to "get a noncompete and an intellectual property agreement from Ken Fairchild" but he did not. Hall testified that he actually followed Degnan's instructions: he sent the non-compete agreement to Fairchild on December 14, 2018, and told him to consult with an attorney. Hall denied that he ever told Fairchild that he should not execute the agreement.

{¶ 129} Just a few weeks before that December 14 discussion—on November 28, 2018—Heather and Fairchild met for the first time to discuss the launch of Red 1 as a competing brokerage. Hall was not present for that meeting. At that time, Heather told Fairchild that she was "starting" Red 1, she asked him if he would be interested in being the broker of record for her brokerage, and she offered him an ownership interest in the new company. According to Fairchild, at this initial meeting, Heather told him that "Mike has signed some form of noncompete but neither of them thought it was valid." At his deposition, Fairchild would not say whether the agreement prevented Hall from having an ownership interest in Red 1, and he testified that he "didn't know" why Hall was not an owner. Ultimately, Heather and Fairchild agreed that Heather would own 67 percent of Red 1 and Fairchild would own 33 percent.

{¶ 130} For his part, Hall testified that he merely formed Red 1 as an LLC in 2016—with no specific plans to operate it as a real estate brokerage—and he had "no involvement" in starting or running the brokerage firm. He claimed that "[o]nce it came time to start it, Ken and Heather started running it." There is, however, evidence in the record to the contrary. For example,

- Beth Bick, a Key Realty agent in Florida who reported to Hall, testified that in May or June of 2018, Hall asked her if she "wanted to change the name of the company [in Florida] to Red 1 Realty." She told him no, and there were no further discussions.

- On October 25, 2018—i.e., 10 days after Hall transferred ownership of Red 1 to Heather—Hall emailed Insperity Insurance Services LLC stating "We are looking to add insurance for several dozen to several hundred independent contractors. We are starting a new real estate brokerage firm and would like to differentiate ourselves by offering some type of insurance package."
- In November 2018, a bank account was opened for Red 1 with Heather and Hall as signatories.
- On December 20, 2018, Heather met with Fairchild (their second meeting regarding Red 1), and she provided him with "onboarding documents," including preliminary financial projections. Heather testified that "[she] had created" the documents, but later testified that Hall assisted her in creating the financial projections, stating that "I asked my husband to help me put some numbers on a spreadsheet. Just mainly it was if this scenario, here's some possible expenses that we may incur." Notably, Heather also testified elsewhere that "the bulk of my expertise was primarily supporting the branches with, you know, training, policies and procedures, not doing accounting." And Fairchild testified that he did not review the projected financials for Red 1 to determine if they were reasonable because, he said, "[Heather] knew better than I did"—even though, unlike him, Heather had no real estate experience.

- On January 2, 2019, in another email to Insperity Insurance Services regarding insurance benefits for agents, Hall states, "I am leaving Key Realty on January 10th. I am hoping 100 agents follow me in the first 3 months and another 100 within the first 6 months."
- In January 2019—shortly before his departure from Key Realty—Hall sent out a survey through the Key Realty Columbus Facebook group (over which the parties dispute ownership) asking Key Realty agents what "additional features and benefits" they would like to see in their brokerage. Key Realty agents provided various responses, including free company-provided leads and free centralized showing services. Shortly after the launch of Red 1, those same benefits would be offered as incentives to Key Realty agents as reasons to switch to Red 1.
- On January 9, 2019, Hall discussed Red 1 with two Key Realty agents, Angela Perez and Daniel Perez, and provided draft marketing materials. Hall testified that he discussed Red 1 with these agents because Degnan had instructed him to terminate Key Realty's relationship with them, so he simply "let them know that Key Realty was sending their license back and there would be another option available to them"—i.e., Red 1.
- Hall testified that he left Key Realty on January 10, 2019, because "Heather said she was starting Red 1 Realty that day." According to Heather, she

picked January 10 to start Red 1 because, she said, "I wanted to wait for my husband to get paid out for his December numbers."

{¶ 131} According to Fairchild, he discussed Red 1 with two Key Realty individuals before he left the company. In late December 2018, and early January 2019, he had discussions with Mark Hutchinson, a Key Realty agent and his best friend, about Red 1. At that time, Hutchinson indicated that he would follow Fairchild to Red 1. In addition, on January 8, 2019, he told Carol Sommer, a trainer for Key Realty, that he was going to start a new company that he would like her to join.

D. The Launch of Red 1

{¶ 132} On January 10, 2019, Red 1 officially launched, and Hall and Fairchild separately resigned from Key Realty. On that date, Hall and Fairchild drove together to the Division of Real Estate, and hand-delivered their applications to transfer their licenses to Red 1. Fairchild became the broker of record for Red 1.

{¶ 133} When he left Key Realty on January 10, Hall "unshared" the Key Realty Columbus Facebook group (an online platform used by Key Realty agents for business-related communication) from Key Realty management—which blocked Key Realty's access to that platform as a means to communicate with its agents. Heather then changed the banner in the Facebook group from Key Realty to Red 1. On that same date, Hall also blocked, or "unshared," various Google drive accounts from Key Realty management, blocking access to any documents that he created while performing work for Key Realty, including "[p]resentations, spreadsheets, Google Drive docs, Exel [sic] sheets, lots of

different types of documents." He also blocked Key Realty management from access to the general email for his Key Realty office, keyrealtycolumbus@gmail.com, and similar gmail accounts for Key Realty Cincinnati, Dayton, Cleveland, Akron, and Sarasota. Hall maintains that all of these actions are justified because he created these online platforms, documents, accounts, and information for his own independent company—Key Realty Columbus 1, LLC—through which he performed his work for Key Realty as an independent contractor, not an employee.

{¶ 134} At 2:32 pm on January 10, 2019, Hall emailed Degnan and Saylor stating:

> I wish to rescind any noncompete that I may have signed in the past. If I did sign a non-compete, I never received a signed copy from you. Due to contract law, dispatch and delivery did not occur regarding a bilateral contract.
>
> In addition, I would like to offer many items of consideration in an effort to reach a written mutual release of agreement. Please see the attached termination agreement and release for consideration.

{¶ 135} Attached to his email was a draft "Termination of Agreement and Release," through which Hall proposed that Key Realty terminate the non-compete and fully release all claims that it may have against Hall arising out of the non-compete agreement. As consideration, Hall offered to (1) transfer ownership of Key Realty One Florida to Degnan; (2) transfer ownership of JoinKeyRealty.com to Degnan; (3) sign an agreement stating that neither he nor any family members would operate a brokerage firm

in Toledo; (4) turn over ownership of the various gmail accounts, (5) turn over ownership of Facebook groups, (6) turn over leases, and (7) "work with Key Realty through transition."

{¶ 136} At 8:55 p.m. on January 10, 2019, Fairchild posted in the former Key Realty Columbus Facebook group—which had been unshared with Key Realty management and renamed the "Red 1 Realty" group—in which he stated the following:

> * * * Effective immediately, Heather Hall and I have started a new brokerage, Red 1 Realty, and Mike has also joined us. We will offer the same commission plan you are accustomed to as well as a new option. In addition to the tools you already have, we will also provide Company Leads and CSS at no cost to our agents, Commercial Training, online options for weekly training, additional assistance with KV Core and more. * * * [W]e will be having a Grand Opening at the office on Saturday from 6-9p with food & drinks if you would like to attend. * * *

{¶ 137} On January 12, 2019, appellees hosted the Red 1 grand opening event at the former Key Realty Columbus office. Appellees invited only Key Realty agents to this event. At the event, Hall presented to the Key Realty agents using a power point presentation that he and Fairchild created. The power point states that appellees left Key Realty due to, among other things, "[b]roken promises to management and agents." The document also highlights differences between Red 1 and Key Realty, including company-provided leads, easier Dotloop approval/shorter checklist, free CSS, commercial training

and assistance, and "more to follow – health benefits, credit cards." Key Realty maintains that many of these items were identified in the January 2019 survey that Hall sent to Key Realty agents in the days before his departure. The Red 1 power point also includes an "easy transition offer," which would end on February 15, in which Red 1 offered to pay transfer fees and take transfer applications to the Division of Real Estate for Key Realty agents, replace their business cards, replace two signs, and honor their anniversary dates.

{¶ 138} At Red 1, Hall provided commercial real estate training for Red 1 agents, and Fairchild provided residential real estate training. Hall testified, however, that he has not received any payments from Red 1 whatsoever, and there is no "formalized plan" for him to be paid for any work that he does for the company as an independent contractor.

{¶ 139} According to Degnan, Key Realty lost approximately 200 agents in the Columbus area and suffered other damages due to appellees' conduct.

E. The Current Litigation

{¶ 140} On January 15, 2019, Key Realty filed this case against Hall, Heather, Fairchild, and Red 1, along with a motion for temporary restraining order and preliminary injunction. The next day, the trial court held a hearing on Key Realty's motion for temporary restraining order. At the conclusion of the hearing, the trial court ordered Hall, among other things, to return various documents and online platforms—including the Key Realty Columbus Facebook page—to Key Realty.

{¶ 141} The very same day, between 4:30 p.m. and 5:21 p.m., Heather deleted many posts from the Facebook page. When asked in her deposition why she removed these posts on January 16, 2019, she responded "I really can't recall," "I don't know," and "I can't remember."

II. Breach of Contract (against Hall)

{¶ 142} In the amended complaint, Key Realty alleges that Hall breached the non-compete agreement by (1) directly competing with Key Realty, (2) soliciting Key Realty agents and customers, (3) using and disclosing Key Realty's confidential information, and (4) failing to return all books, records, and other materials that relate to Key Realty's business or customers upon his termination. The trial court concluded that there are genuine issues of material fact regarding whether Hall violated the agreement by competing with Key Realty, soliciting Key Realty agents and customers, and failing to return all Key Realty-related materials upon his termination—thereby precluding summary judgment on those parts of Key Realty's contract claim. The trial court granted summary judgment to Hall on the remaining aspect of Key Realty's breach-of-contract claim—i.e., Hall's alleged use and disclosure of confidential information. On appeal, Key Realty argues that part of the trial court's order was error. I agree.

{¶ 143} The majority, however, does not reach the merits of Key Realty's argument. Instead, it declares the entire non-compete agreement void for lack of consideration and, on that basis, reverses in part, affirms in part, and grants summary judgment to Hall on the entire breach-of-contract claim. The majority concludes that Key

Realty failed to "provide Mr. Hall with proper consideration" when he signed the non-compete agreement because he "was never appellant's employee and was never appellant's co-owner" and, therefore, "[a]t most it appears appellant offered a gratuitous promise as consideration." In my view, the majority's analysis turns well-established contract law on its head—in several respects.

{¶ 144} First, it is irrelevant that Hall was "never appellant's employee." As the Supreme Court of Ohio has recognized, non-compete agreements may be executed outside the employer-employee relationship and non-competes that are executed by independent contractors can be enforceable. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 714 N.E.2d 898 (1999) (enforcing a non-compete clause in a corporate agency agreement between Nationwide and an independent contractor). Moreover, although the parties used the terms "Employee" and "Employer" to refer to themselves in the non-compete agreement—i.e., the contract provides that it is by and between "Mike Hall * * * (hereinafter 'Employee') and Key Realty, Ltd. (hereinafter referred to as 'Employer')"—those are merely defined terms for purposes of the contract and, therefore, have no legal significance.

{¶ 145} Second, the record contains no evidence that Hall's independent-contractor relationship with Key Realty had a specific term of duration, and "employment with no specific term of duration gives rise to an employment-at-will relationship, regardless of whether the underlying relationship is one of employer-employee or employer-independent contractor." *Americare Healthcare Servs. LLC v. Akabuaku*,

10th Dist. Franklin No. 10AP-777, 2010-Ohio-5631, ¶ 24. Hall's relationship with Key Realty was therefore an employment-at-will relationship, even though the underlying relationship was employer-independent contractor.

{¶ 146} Third, "[c]onsideration exists to support a noncompetition agreement when, in exchange for the assent of an at-will employee to a proffered noncompetition agreement, the employer continues an at-will employment relationship that could legally be terminated without cause." *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, ¶ 20. Given that "[t]he record contains no evidence of any contract, written or oral, setting forth * * * a term of duration for appellant's services[,] * * * the parties' relationship was at-will. Thus, appellant's independent contractor status does not diminish the applicability of the *Lake Land* holding." *Americare* at ¶ 24 (finding that non-compete between employer and independent contractor was supported by consideration because the contractor "continued to perform services" for the employer after the execution of the agreement); *see also Financial Dimensions, Inc. v. Zifer*, 1st Dist. Hamilton No. C-980960, 1999 WL 1127292, *4 (Dec. 10, 1999) (finding that the employer's "continuation of the parties' relationship was sufficient consideration to support Zifer's agreement to the provisions in the covenant not to compete" and Zifer's status as an independent contractor, rather than an at-will employee, was "not relevant to the issue under consideration").

{¶ 147} Here, it is undisputed that Hall and Key Realty continued their at-will relationship for six years after Hall executed the non-compete agreement in 2012.

Because there is no evidence in the record to suggest that either party was required to continue their relationship for any period of time, the continuation of their employer-independent contractor relationship went beyond what either party was otherwise obligated to do, and therefore constituted sufficient consideration for the non-compete agreement that Hall signed.

{¶ 148} The majority concludes differently, relying upon Hall's testimony that he signed the non-compete agreement "on the future promise of ownership," which never occurred. But, even if this "future promise" is assumed to be true, it is not relevant to the enforceability of the agreement. As discussed, the contract is nonetheless supported by consideration under Ohio law given the continuation of their at-will relationship.

{¶ 149} Moreover, the written contract does not include a "future promise of ownership." Instead, the contract expressly provides that the parties' agreement is "in consideration of *the mutual promises contained herein*, and for other good and valuable consideration, including _____, the receipt of which and the sufficiency of which are hereby acknowledged." (Emphasis added.) The majority states that the agreement has "a blank line where the description of the consideration should go," but ignores the preceding language stating that the agreement is "in consideration of the mutual promises contained herein." Although not specifically labeled as a "promise" from Key Realty in the agreement, the contract specifically states that Hall will "gain valuable information and insights on the lines of business in which Employer is engaged; access to Employer's confidential and proprietary information; and exposure to its existing and potential

business opportunities." In exchange, Hall promised that he would not compete against Key Realty, solicit its customers or employees, or use its business information. Accordingly, the written contract contains a bargained-for benefit and detriment, fully satisfying the general definition of consideration in Ohio. *Kostelnick v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976) (stating that consideration is "the bargained for legal benefit and/or detriment").

{¶ 150} Finally, even though Hall denied that he signed the non-compete in 2012 because he was being promoted to manager (and claimed that the agreement was signed "on the future promise of ownership" instead) there is plenty of evidence in the record to create a genuine dispute of fact on that issue, to the extent that it is relevant. That is, the record shows that Hall's execution of the non-compete agreement in 2012 coincided with the termination of his employment with Old Republic Home Warranty and promotion into a management position with Key Realty. As Degnan testified, Hall was "untested as a manager" in 2012. For that reason, Degnan maintains that it would have been "ridiculous" to have offered an ownership interest to Hall at that time. In my view, the ultimate factfinder should determine the respective credibility of Degnan and Hall on this issue.

{¶ 151} For all these reasons, I believe that the non-compete agreement is supported by consideration and fully enforceable.

{¶ 152} Turning to the merits of Key Realty's argument on appeal, it argues that there is a genuine dispute of material fact regarding whether Hall breached his obligations under paragraph 6 of the agreement, which provides that Hall cannot directly or indirectly disclose "any information of any kind * * * concerning any matters affecting or relating to the business of Employer" including, without limitation, any information regarding "its plans, processes, work in process or any other data of any kind * * * without regard to whether any or all of the foregoing matters would be deemed confidential, material, or important."

{¶ 153} The trial court concluded that although there is evidence that Red 1 had information regarding Key Realty—most notably, the results of the survey that Hall sent to Key Realty agents in January 2019, which were later offered by Red 1 as incentives to Key Realty agents to get them to switch companies—"there is nothing in the record to indicate that they got this information from Michael Hall." To the contrary, there is evidence in the record that could lead a reasonable factfinder to conclude that Hall sent the survey to Key Realty agents in January 2019 *precisely because* he intended to gather information for Red 1 to use to solicit Key Realty agents. Indeed, the timing and content of the survey itself is circumstantial evidence of this. That is, just a few days before he departed Key Realty for Red 1, Hall sent a survey to Key Realty agents to determine "[w]hat additional features and benefits" those agents would "like from [their] brokerage." And, two days after he left Key Realty, the information gathered through those survey responses appears in a power point presentation—jointly prepared by Hall

and Fairchild—that was used at the Red 1 grand opening to convince Key Realty agents to switch to Red 1. This evidence is sufficient to create a genuine dispute of material fact regarding Hall's breach of paragraph 6 of the non-compete agreement.

{¶ 154} I would, therefore, reverse the trial court's decision to the extent that it grants summary judgment to Hall on Key Realty's claim that Hall used and/or disclosed information related to its business in contravention of the non-compete agreement. In addition, I would affirm that portion of the trial court's judgment that found genuine issues of material fact relating to the remainder of Key Realty's breach-of-contract claim against Hall. In my view, the record—as outlined in my fact section above—demonstrates the existence of questions of fact relating to this entire claim.

III. Tortious Interference with Contract (against Red 1, Heather, and Fairchild)

{¶ 155} Key Realty asserted a claim against Red 1, Heather, and Fairchild for tortious interference with contract, alleging that those appellees permitted, caused, encouraged and/or induced Hall's breach of his non-compete agreement. The trial court granted summary judgment to appellees on this claim because "Michael Hall made his own decision to stop working for plaintiff as an independent contractor." The majority concludes that this claim fails as a matter of law because the underlying contract is void for lack of consideration. In my view, there are genuine disputes of material fact regarding whether appellees tortiously interfered with Hall's non-compete agreement—which, as I explain above, is valid and enforceable.

{¶ 156} The elements of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoers' knowledge of the contract, (3) the wrongdoers' intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E.2d 853 (1999), paragraph one of the syllabus.

{¶ 157} Here, a non-compete agreement exists between Hall and Key Realty. Heather and Fairchild both testified that they were aware of the agreement, and that they discussed the agreement to some degree at their initial meeting regarding Red 1. Although Heather testified that she did not think the agreement was valid, and Fairchild would not say whether the agreement prevented Hall from having an ownership interest in Red 1 and testified that he "didn't know" why Hall was not an owner of Red 1, their credibility on those issues should be weighed by the ultimate factfinder. Indeed, a reasonable factfinder could conclude that the circumstances surrounding the inception and structure of Red 1—i.e., that it was transferred from Hall to Heather in October 2018, and that Fairchild owns only one-third of the company while Heather owns two-thirds of the company despite her lack of real estate experience—demonstrates that they were attempting to end run Hall's obligations to Key Realty under his non-compete from the beginning.

{¶ 158} This evidence could also be interpreted by a reasonable factfinder as tending to show that the appellees intentionally procured Hall's breach. Although the trial court found it to be dispositive that Hall made "his own decision" to leave Key

Realty, that fact is immaterial for purposes of this claim. Key Realty does not allege that Hall breached his agreement by leaving Key Realty—it alleges that Hall breached his agreement by competing with Key Realty by, among other things, soliciting its agents to Red 1, sharing its confidential information with Red 1, and training Red 1 agents. There is testimony and evidence in the record that, if believed (or not believed, as the case may be), demonstrates that these appellees worked with Hall to establish Red 1 as a competing brokerage, and that they carefully and deliberately structured Red 1 in a manner that was designed to avoid Hall's non-compete agreement with Key Realty.

{¶ 159} For these reasons, I would reverse summary judgment on Key Realty's claim against Red 1, Heather, and Fairchild for tortious interference with contract, and remand that claim to the trial court for further proceedings.

{¶ 160} But, to the extent that Key Realty's claim for tortious interference with contract includes an allegation that all appellees interfered with "Key Realty's contractual relationships with its agents and other contractual partners," I agree with the majority that summary judgment is warranted on that part of the claim. As the majority recognizes, there is no evidence regarding the existence of any binding contracts between Key Realty and those agents that were solicited to join Red 1.

IV. Tortious Interference with Business Relations (against all appellees)

{¶ 161} Key Realty alleges that appellees tortiously interfered with Key Realty's business relationships with its agents. The majority affirms summary judgment on this claim, finding (1) "appellant is limited to an action for breach of contract against Mr.

Hall, and may not also recover for tortious interference with business relations," and (2) Key Realty failed to put forth clear and convincing evidence that appellees acted with malice, and noting that "soliciting for real estate agents from other firms is a common industry practice and actively occurred on behalf of Red 1 Realty, LLC after each appellee severed his/her relationship with appellant." I disagree with both findings.

{¶ 162} First, it is true that where the defendant's breach of contract "necessarily interferes with the injured party's business relations with third parties," the injured party is generally limited to an action for breach of contract. *Digital & Analog Design Corp. v. North Supply Co.*, 44 Ohio St.3d 36, 46, 540 N.E.2d 1358 (1989). But, "[a]n exception exists, and a tort action may lie, only where the breaching party indicates, by his breach, *a motive to interfere with the adverse party's business relations* rather than an interference with business as a mere consequence of the breach." *Id.*; *see also Universal Windows & Doors, Inc. v. Eagle Window & Door, Inc.*, 116 Ohio App.3d 692, 700, 689 N.E. 2d 56 (1st Dist.) (recognizing that a party can maintain both a breach of contract claim and a tortious interference with business relations claim if (1) there is a motive to interfere with the injured party's business relations and (2) the interference is not "merely incidental to the breach.").

{¶ 163} Here, there is enough evidence in the record to create a genuine dispute as to whether Hall had a "motive to interfere with the adverse party's business relations." For example, Hall stated, just a few days before he left Key Realty, that "I am hoping 100 agents follow me in the first 3 months and another 100 within the first 6 months." That

statement could be viewed by a reasonable factfinder as evidence that Hall had a distinct motive to raid Key Realty's agents in the Columbus area for the benefit of Red 1 and, therefore, any interference with Key Realty's agent relationships was not merely incidental to any breach of his non-compete agreement.

{¶ 164} Moreover, considering the general elements of this tort, I believe there is a question of fact regarding whether all appellees tortiously interfered with Key Realty's agent relationships. This tort requires (1) the existence of a business relationship, (2) the wrongdoer's knowledge thereof, (3) an intentional interference causing a termination of that relationship, and (4) resulting damages. *Wauseon Plaza Ltd. Partnership v. Wauseon Hardware Co.*, 156 Ohio App.3d 575, 2004-Ohio-1661, 807 N.E.2d 953, ¶ 57 (6th Dist.). Although the interference must be done with actual malice, "[a]ctual malice in a tortious interference claim is not ill-will, spite, or hatred; rather, it denotes an unjustified or improper interference with the business relationship." *Chandler & Assocs., Inc. v. Am.'s Healthcare Alliance, Inc.*, 125 Ohio App.3d 572, 583, 709 N.E.2d 190 (8th Dist.1997). Where the alleged wrongdoer and the injured party are competitors, any interference is privileged (and therefore not actionable) if (1) the relation concerns a matter of competition between them, (2) the actor does not use "improper means" to interfere, (3) the actor does not intend to create or continue an illegal restraint of competition, and (4) the actor's purpose is at least in part to advance his own competitive interests. *MedCorp., Inc. v. Mercy Health Partners*, 6th Dist. Lucas No. L-08-1227, 2009-Ohio-988, ¶ 43-48.

{¶ 165} Here, the record demonstrates that appellees intentionally interfered with Key Realty's business relationships by soliciting its agents to join Red 1, and that Key Realty suffered damages as a result. The only question is whether appellees used "improper means" to intentionally interfere with these relationships—if so, their conduct was not privileged competition.

{¶ 166} In my view, based on all the evidence in the record, a reasonable factfinder could conclude that appellees used "improper means" to interfere with Key Realty's agent relationships. For example, a factfinder could conclude that, pursuant to the terms of Hall's non-compete agreement, Key Realty owned the Facebook group and the other online platforms that appellees commandeered to directly solicit Key Realty's agents. Indeed, Hall agreed in the non-compete agreement that "*all* books, *records, files,* forms, reports, *accounts* and documents" relating to Key Realty's business—including any such items that were "prepared by" Hall himself—are "the exclusive property" of Key Realty. If these items are found to be Key Realty's "exclusive property," then a factfinder could also conclude that it was improper for appellees to use the Facebook account and other online platforms—to the complete exclusion of Key Realty management—to communicate with and solicit Key Realty agents. For that reason alone, I believe that summary judgment on this claim should be reversed.

V. Misappropriation of Trade Secrets (against all appellees)

{¶ 167} "To maintain a cause of action for disclosure of trade secrets, plaintiffs must establish: (1) ownership of an existing trade secret, (2) acquisition by defendants of

the trade secret through a confidential relationship and (3) unauthorized use or disclosure of the trade secret." *Inergystics, Inc. v. Fairbairn*, 6th Dist. No. L-80-029, 1981 WL 5578, * 4 (May 15, 1981). Like the trial court, the majority concludes that even if Key Realty could establish that its information is a trade secret as defined by R.C. 1331.61(D), Key Realty failed to establish the third element of this claim—unauthorized use or disclosure of the alleged trade secrets. I disagree with that reasoning. In my view, there is plenty of evidence in the record to create a genuine issue of material of fact regarding whether the appellees used or disclosed Key Realty's information.

{¶ 168} To me, the real problem is that the record lacks evidence that the Key Realty information that appellees may have used or disclosed was truly a "trade secret." Under R.C. 1331.61(D), a "trade secret" must (1) derive independent economic value from not being known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) be the subject of reasonable efforts to maintain its secrecy. Here, there is very little evidence that Key Realty made any reasonable efforts to maintain the secrecy of its purported trade secret information.

{¶ 169} In their summary judgment motion, appellees argued that most of Key Realty's purported "trade secrets" are publicly available on the internet, and Key Realty did not adequately refute this contention. Although Degnan testified that at least some of Key Realty's training information is contained on "protected areas" of the website, he did not provide any specifics regarding *how* such training materials are "protected" in those

"areas." Degnan also testified that, in his view, even publicly-available Key Realty material—including information on Key Realty's website and YouTube videos—should be protected as a trade secret. This position is not supported by Ohio law.

{¶ 170} For this reason, I agree with the majority's ultimate conclusion that summary judgment on Key Realty's claim for misappropriation of trade secrets should be affirmed.

VI. Unfair Competition (against all appellees)

{¶ 171} The majority affirms summary judgment to appellees on the unfair competition claim, finding that Key Realty "fails to show where in the record appellees designed the launch of Red 1 Realty, LLC with malice towards appellant to cause harm, other than appellant's own speculations." In my view, the issue of whether appellees acted with malice to harm Key Realty is a disputed issue of material fact, and there is more than enough evidence in the record—when viewed in a light most favorable to Key Realty—that is sufficient to survive summary judgment.

{¶ 172} "Unfair competition ordinarily consists of representations by one person, for the purpose of deceiving the public, that his goods are those of another. * * * The concept of unfair competition may also extend to unfair commercial practices such as malicious litigation, circulation of false rumors, or publication of statements, all designed to harm the business of another." *Water Mgmt., Inc. v. Stayanchi*, 15 Ohio St.3d 83, 85, 472 N.E.2d 715 (1984); *see also Microsoft Corp. v. Action Software*, 136 F.Supp.2d 735, 740 (N.D.Ohio 2001), quoting Ohio Jurisprudence 3d, Trade Regulations, Section 66

(1989) (recognizing that unfair competition "has come to develop a broader connotation in recent years"). To the extent that the "circulation of false rumors" may form the basis of the claim, summary judgment is appropriate where "no competent evidence has been presented which creates a question of fact as to whether [defendants] circulated false rumors, or published statements designed to harm [plaintiff's] business." *Molten Metal Equip. v. Metaullics Systems Co.*, 8th Dist. Cuyahoga No. 76407, 2000 WL 739470, *5 (June 8, 2000).

{¶ 173} Here, at a minimum, Key Realty has presented competent evidence that creates a question of fact as to whether appellees circulated false rumors and published statements that were designed to harm Key Realty's business. That is, the power point presentation that was used at the Red 1 grand opening event to solicit Key Realty agents to join Red 1, states that Key Realty had made "broken promises" to agents. Heather was asked at her deposition to identify any of these "broken promises," but she could not:

> Q: So can you identify any specific broken promise that was made to a specific agent?
>
> A: I can't per se.

{¶ 174} Moreover, in my view, all of the evidence—as summarized above—should be weighed by the ultimate factfinder to assess witness credibility and thereby determine appellees' true intentions. The trial court and the majority conclude that appellees were not engaged in unfair competition, as a matter of law, because "they were also simultaneously competing with all other real estate brokerage services companies."

But the factfinder should have the opportunity to weigh that fact against the other evidence in the record—for example, Hall's statement that he hoped that "100 agents" from Key Realty would follow him to Red 1 "within 3 months" and "another 100 within the first 6 months"—to determine whether appellees engaged in unfair competition by soliciting Key Realty agents through the use of any false rumors or published statements that were intended to harm Key Realty.

{¶ 175} For these reasons, I would reverse summary judgment on the claim for unfair competition and remand for further proceedings.

VII. Breach of Fiduciary Duty (against Hall)

{¶ 176} In the amended complaint, Key Realty asserted a breach of fiduciary duty claim against all appellees. The trial court granted summary judgment on this claim to appellees. On appeal, Key Realty argues that it was error for the court to dismiss its claim against Hall, specifically, for breach of fiduciary duty. I agree.

{¶ 177} A "fiduciary relationship" is one "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Hope Academy Broadway Campus v. White Hat Mgt., LLC*, 145 Ohio St.3d 29, 2015-Ohio-3716, 46 N.E.3d 665, ¶ 43, quoting *In re Termination of Emp. of Pratt*, 40 Ohio St.3d 107, 115, 321 N.E.2d 603 (1974). "The determination concerning what constitutes a confidential (fiduciary) relationship is a question of fact dependent upon the circumstances of each case." *B-G Leasing Co. v. First Nat'l Bank*, 6th Dist. Huron

No. H-89-56, 1991 WL 87113, * 3 (May 4, 1999), quoting *Indermill v. United Savings*, 5 Ohio App.3d 243, 245, 451 N.E.2d 538 (9th Dist.1982). Generally, there is no fiduciary relationship between an employer and an independent contractor "unless both parties understand that that relationship is one of special trust and confidence." *Northeast Ohio College of Massotherapy v. Burek*, 144 Ohio App.3d 196, 204, 759 N.E.2d 869, 875 (7th Dist.2001). "A fiduciary duty may arise out of a contract or an informal relationship," so long as both parties "understand that a special trust of confidence has been reposed." *M.S. v. Toth*, 2017-Ohio-7791, 97 N.E.3d 1206, ¶ 27 (9th Dist.), quoting *RPM, Inc. v. Oatey Co.*, 9th Dist. Medina Nos. 3282-M, 2005-Ohio-1280, ¶ 19.

{¶ 178} In my view, whether Hall owed any fiduciary duties to Key Realty is a question of fact that cannot be resolved on summary judgment. Although Hall worked for Key Realty as an independent contractor, he signed a contract acknowledging that Key Realty was placing him "in a position of trust and confidence, requiring a high degree of loyalty, honesty, and integrity," and he agreed that he would not "use or divulge" any of Key Realty's business-related information for his own "personal gain" or "to the detriment of" Key Realty. According to Degnan, the realities of their relationship demonstrated that Hall maintained a position of trust and confidence. Hall, on the other hand, when asked whether he was placed within a position of trust and confidence at Key Realty, responded "[s]ometimes yes and sometimes no."

{¶ 179} Given the evidence in the record, especially the explicit language of the contract that Hall signed, I believe a genuine dispute of material fact exists regarding

whether Hall owed any fiduciary duties to Key Realty that he breached through his conduct related to Red 1.

VIII. Spoliation (against all appellees)

{¶ 180} Key Realty contends that appellees spoliated evidence when they deleted posts and removed group members from the Key Realty Columbus Facebook page. In support of their spoliation claim, Key Realty offered as an exhibit a log printed from the Facebook page. It shows that on the day the trial court ordered Hall to return control of the page to Key Realty (the day after the action was filed), Heather—before returning control to Key Realty—deleted 19 posts (including posts by Hall and Fairchild) and removed numerous individuals from the group.

{¶ 181} Heather described the Facebook page as a forum for agents to ask questions and she conceded that she, Fairchild, and her husband had responded to questions posed by agents on the page. Heather denied that she deleted the posts to conceal the fact that they had recruited Key Realty agents to work for Red 1, but she claimed that she could not remember the content of the posts she deleted or why she deleted them. She acknowledged that she was aware that the lawsuit, including the TRO, had been filed.[4]

[4] Heather claimed in a September 10, 2019 affidavit that she first learned that a TRO had been granted sometime after 5:30 p.m. on January 16, 2019—after she finished purging Facebook posts—and she was not initially named in the suit. Significantly, she does not deny that she was aware that the litigation had been initiated against her husband and Red 1 (which she co-owned) and that control of the Key Realty Facebook page was at issue in the litigation.

{¶ 182} The majority concludes that appellees are entitled to summary judgment on Key Realty's spoliation claim because Key Realty failed to show that appellees engaged in willful destruction of evidence designed to disrupt Key Realty's case, that the destruction of evidence disrupted Key Realty's case, or that Key Realty suffered damages as a result of the destruction of evidence.

{¶ 183} As the majority correctly states, under Ohio law, "[a] cause of action exists in tort for interference with or destruction of evidence." *Smith v. Howard Johnson Co.*, 67 Ohio St.3d 28, 615 N.E.2d 1037 (1993). "The elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." *Id.*

{¶ 184} Here, litigation had been initiated against Hall and Red 1—a company that Heather co-owned. Heather was aware of the litigation—she was the statutory agent for Red 1 and her husband was a defendant. Thus, the first two elements of the claim are easily satisfied. It is primarily the third, fourth, and fifth elements at issue here.

{¶ 185} As to the third element, willful destruction designed to disrupt the plaintiff's case, to prove this element, a plaintiff must show that a defendant willfully destroyed evidence. *See, generally, Elliott-Thomas v. Smith*, 154 Ohio St.3d 11, 2018-Ohio-1783, 110 N.E.3d 1231. Willfulness "'reflects an intentional and wrongful

commission of the act.'" *Heimberger v. Zeal Hotel Group, Ltd.*, 2015-Ohio-3845, 42 N.E.3d 323, ¶ 37 (10th Dist.), quoting *White v. Ford Motor Co.*, 142 Ohio App.3d 384, 387, 755 N.E.2d 954 (10th Dist.2001).

{¶ 186} Here, Heather testified that to remove the Facebook posts and group members, she pressed the "delete" button; she believes that once deleted, a post cannot be retrieved. While she denied that her purpose was to conceal evidence that she or her husband solicited Key Realty agents to work for Red 1, she said that she does not know why she did it. I would conclude that this testimony creates a genuine issue of material fact as to whether Heather willfully destroyed evidence. *See Abbott v. Marshalls of MA, Inc.*, 8th Dist. Cuyahoga No. 87860, 2007-Ohio-1146, ¶ 25 (finding "willful destruction" element met where employee taped over video footage depicting purported shoplifting incident in violation of store policy, noting that such conduct did not appear to be "merely coincidental"). I agree with the majority, however, that no evidence was offered that Hall or Fairchild destroyed evidence and summary judgment was properly granted in their favor.

{¶ 187} As to the elements of disruption and damages, I agree with Key Realty that Heather failed to meet her burden of establishing that no genuine issue of material fact exists. Heather's summary-judgment motion stated only as follows:

> The evidence now before this court establishes beyond genuine dispute that none of the Red 1 Defendants can be held liable for the tort of spoliation of evidence. Heather Hall and Ken Fairchild testified in their

depositions that they did nothing that constitutes the tort of spoliation of evidence. And there is no evidence to the contrary.

{¶ 188} The Ohio Supreme Court in *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996) held that "a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." The court explained that "[t]he moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." (Emphasis in original.) *Id.* "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied."

{¶ 189} Here, there is evidence that Heather willfully destroyed evidence, and she offered only conclusory assertions to dispute the remaining elements of Key Realty's spoliation claim. I would find that these conclusory assertions are insufficient to entitle her to summary judgment.

IX. Conversion (against all appellees)

{¶ 190} In its amended complaint, Key Realty asserted a claim for conversion of its Facebook page, email accounts, websites, calendars, and Google Drive resources.

This claim is premised on appellees' conduct in altering administrative privileges, expelling Key Realty owners from Key Realty's central Ohio forums, and blocking owners and directors from those materials and accounts. The trial court granted summary judgment to appellees on this claim, reasoning that Key Realty failed to demand that appellees return the property. The majority affirms on this basis.

{¶ 191} To prevail on a claim for conversion, a plaintiff must prove "(1) plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages." *6750 BMS, L.L.C. v. Drentlau*, 2016-Ohio-1385, 62 N.E.3d 928, ¶ 28 (8th Dist.). If the defendant came into possession of the property lawfully, the plaintiff must also prove "(1) that the plaintiff demanded the return of the property after the defendant exercised dominion or control over the property; and (2) that the defendant refused to deliver the property to the plaintiff." *Id.* Because appellees came into possession of the property lawfully, the trial court concluded that Key Realty was required—but failed—to prove these additional elements.

{¶ 192} Key Realty argues that this was error because a trial court may not award summary judgment on a ground not specified in the motion for summary judgment. It cites *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.2d 1192, ¶ 27 (2009). There, the Ohio Supreme Court recognized that "'[i]t is reversible error to award summary judgment on grounds not specified in the motion for summary judgment.'" *Id.*, citing *Patterson v. Ahmed*, 176

Ohio App.3d 596, 2008-Ohio-362, 893 N.E.2d 198, ¶ 14 (6th Dist.). The court explained that by relying on an unargued ground for granting summary judgment, the non-movant is denied a meaningful opportunity to respond. *Id. See Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus ("A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond").

{¶ 193} I agree with Key Realty. Appellees in their motions argued that they were entitled to summary judgment on Key Realty's conversion claim because the property at issue belonged to Key Realty Columbus 1, LLC, owned solely by Hall. Appellees did not argue that Key Realty failed to establish that it had demanded return of the property. As such, Key Realty was denied a meaningful opportunity to refute the conclusion reached by the court.

{¶ 194} Additionally, as to the arguments that were raised by appellees, I would find that paragraph 7 of the non-compete agreement—which provides that "all books, records, files, forms, reports, accounts and documents relating in any manner to [Key Realty's] business or customers, whether prepared by [Hall] or otherwise coming into [Hall's] possession, shall be the exclusive property of [Key Realty] and shall be returned immediately to [Key Realty] upon termination of employment * * *"—belies Hall's claim of ownership and, at the very least, creates a genuine issue of material fact precluding summary judgment. I would, therefore, reverse the trial court judgment granting summary judgment to appellees on Key Realty's conversion claim.

X. Alleged Criminal Acts

{¶ 195} R.C. 2307.60(A)(1) provides that "[a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law * * *." *See Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 10 ("R.C. 2307.60(A)(1), by its plain and unambiguous terms, creates a statutory cause of action for damages resulting from any criminal act."). Proof of an underlying criminal conviction is not required to maintain an action under R.C. 2307.60. *Buddenberg v. Weisdack*, Slip Opinion No. 2020-Ohio-3832.

{¶ 196} Key Realty asserts civil claims for the following criminal conduct that it claims appellees committed: (1) unauthorized use of computer, cable, or telecommunication property, a violation of R.C. 2913.04(A) or (B); (2) criminal mischief, a violation of R.C. 2909.07(A)(6)(a); (3) theft; and (4) extortion, a violation of R.C. 2905.11(A)(1). The majority affirms the trial court judgment granting summary judgment in favor of appellees on all of Key Realty's claims premised on violations of criminal statutes. As explained below, I disagree, in part.

A. Unauthorized Use of Computer Property (against all appellees)

{¶ 197} Under R.C. 2913.04 (A), "[n]o person shall knowingly use or operate the property of another without the consent of the owner or person authorized to give consent." Under R.C. 2913.04(B), "[n]o person, in any manner and by any means * * * shall knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network, * * * or information service without

the consent of, or beyond the scope of the express or implied consent of, the owner of the computer, computer system, computer network, * * * or information service or other person authorized to give consent."

{¶ 198} The trial court held—and the majority agrees—that because appellees purportedly believed that Hall's LLC owned the electronic resources at issue, Key Realty is unable to establish the "knowingly" element of the offense, thus precluding its claim. The majority further reasons that even though Hall testified at deposition that "under the Agreement, materials and resources created for Key Realty, Ltd. were owned by Key Realty Ltd.," this concession is of no matter because the agreement is unenforceable.

{¶ 199} For the reasons already explained, I would find that the agreement is enforceable. So I disagree with the majority that the terms of that agreement relating to the ownership of records and accounts—which would include electronically created and stored records and accounts—are unenforceable.

{¶ 200} As to the trial court's finding that Key Realty cannot prove that appellees acted "knowingly," it is an affirmative defense to R.C. 2913.04 that "[a]t the time of the alleged offense, the actor, though mistaken, reasonably believed that the actor was authorized to use or operate the property." *See* R.C. 2913.04(E) and 2913.03(C)(1) (the affirmative defenses listed in R.C. 2913.03(C) are applicable to a charge under R.C. 2913.04). Despite the trial court's conclusion that appellees were "unwavering" in their position that Hall owned the records, the agreement that Hall signed specifically provided otherwise. And Hall's deposition testimony on this point was equivocal (he first

conceded that the agreement was "very clear" that the records belonged to Key Realty, but then said he misspoke.).

{¶ 201} But even setting that aside, Hall's position—that he believed Hall's LLC owned the property—is itself a credibility issue. "If an issue is raised on summary judgment, which manifestly turns on the credibility of the witness because his testimony must be believed in order to resolve the issue, and the surrounding circumstances place the credibility of the witness in question—for example, where the potential for bias and interest is evident—then, the matter should be resolved at trial, where the trier of facts has an opportunity to observe the demeanor of the witness." *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 167, 499 N.E.2d 1291 (10th Dist.1985). A jury should determine whether Hall's position is credible and, if so, whether his belief was reasonable under the circumstances.

{¶ 202} I would find that a genuine issue of material fact exists concerning Key Realty's claim for unauthorized use of computer, cable, or telecommunication property.

B. Criminal Mischief (against all appellees)

{¶ 203} Under R.C. 2909.07(A)(6)(a), "[n]o person shall * * * [w]ithout privilege to do so, and with intent to impair the functioning of any computer, computer system, computer network, computer software, or computer program, knowingly * * * [i]n any manner or by any means, including, but not limited to, computer hacking, alter, damage, destroy, or modify a computer, computer system, computer network, computer software, or computer program or data contained in a computer, computer system, computer

network, computer software, or computer program." I agree with the trial court and the majority that this claim fails because Key Realty has failed to create a genuine issue of material fact that Hall intended to "impair" the functioning of any Key Realty computer, computer system, computer network, computer software, or computer program. While Hall may have intended to assert ownership or control of systems belonging to Key Realty, there is no evidence that he intended to impair its functioning.

C. Civil Theft (against all appellees)

{¶ 204} Under R.C. 2307.61(A), a property owner may recover damages in a civil action from a person who commits a theft offense. A "theft offense" is defined in R.C. 2913.01(K)(1) to include a violation of R.C. 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2911.32, 2913.02, 2913.03, 2913.04, 2913.041, 2913.05, 2913.06, 2913.11, 2913.21, 2913.31, 2913.32, 2913.33, 2913.34, 2913.40, 2913.42, 2913.43, 2913.44, 2913.45, 2913.47, 2913.48, 2913.51, 2915.05, or 2921.41. Key Realty does not specify in its complaint which theft statute appellees allegedly violated, but the majority assumes that the theft offense alleged here is R.C. 2913.04 (unauthorized use of computer, cable, or telecommunication property) and, therefore, finds that the trial court properly granted summary judgment in favor of appellees for the same reason it rejected Key Realty's claim under that statute. I would hold otherwise for the reasons explained above.

D. Extortion (against Hall)

{¶ 205} Under R.C. 2905.11(A)(1), "[n]o person, with purpose to obtain any valuable thing or valuable benefit * * * shall * * * [t]hreaten to commit any felony." The trial court and the majority reject this claim by characterizing Hall's conduct—agreeing to return Key Realty's property in exchange for its agreement to rescind the non-compete agreement—as merely an intent to negotiate with his former employer, using items he owned as leverage. To the extent that Hall threatened to continue to deprive Key Realty of property that belonged to it (i.e., engage in a theft offense) if Key Realty would not agree to release him from his non-compete agreement (i.e., a valuable benefit), I would find that a question of fact exists whether Hall's conduct rose to the level of extortion.

XI. Civil Conspiracy (against all appellees)

{¶ 206} Finally, I believe that there are genuine disputes of material fact relating to Key Realty's civil conspiracy claim. The tort of civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 650 N.E.2d 863 (1995). An underlying unlawful act is required before a party can prevail on a civil conspiracy claim. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998).

{¶ 207} Here, the ultimate factfinder should have the opportunity to determine whether appellees (despite their protestations to the contrary) acted in concert to injure Key Realty through such unlawful acts as tortious interference with contract and business

relations, unfair competition, unauthorized use of computer, cable, or telecommunication property, theft, and extortion—all of which claims, in my opinion, should be resolved at trial. Consequently, in my view, summary judgment on the civil conspiracy claim is also inappropriate.

{¶ 208} For all these reasons, I concur, in part, and dissent, in part, from the decision of the majority.

[Cite as *Bakhshi v. Baarlaer*, 2021-Ohio-13.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JAY BAKHSHI	:	
	:	
Plaintiff-Appellant/Cross-Appellee	:	Appellate Case Nos. 28767 and 28768
	:	
v.	:	Trial Court Case No. 2017-CV-2917
	:	
RICHARD BAARLAER, et al.	:	(Civil Appeal from Common Pleas Court)
	:	
Defendants-Appellees/Cross-Appellants	:	

. . . . . .

O P I N I O N

Rendered on the 8th day of January, 2021.

. . . . . .

MICHAEL T. COLUMBUS, Atty. Reg. No. 0076799, 130 West Second Street, Suite 2103, Dayton, Ohio 45402
Attorney for Plaintiff-Appellant/Cross-Appellee

SCOTT G. OXLEY, Atty. Reg. No. 0039285, 325 North Main Street, Suite 204, Springboro, Ohio 45066
Attorney for Defendants-Appellees/Cross-Appellants

. . . . . .

WELBAUM, J.

{¶ 1} This case involves separate appeals filed by Plaintiff-Appellant/Cross-Appellee Jay Bakhshi and Third-Party Defendant-Appellant/Cross-Appellee Miami Valley Construction Group, LLC, from a trial court judgment filed on February 25, 2020. Defendants-Appellees/Cross-Appellants, Rick Baarlaer and Marick, LLC, also cross-appealed in both appeals.[1] We consolidated the appeals in April 2020.

{¶ 2} Jay has submitted one assignment of error directed to the trial court's rejection of his claims based on a promissory note and mortgage that Rick signed. In addition, MVCG has asserted four assignments of error relating to the trial court's findings concerning the construction contract, a quantum meruit claim, and a damages award. Rick and Marick, while filing notices of cross-appeal, have not presented any specific assignments of error; instead, they ask that the trial court judgment be affirmed.

{¶ 3} After considering the assignments of error and the record, we find the assignments of error without merit, except for a minor matter regarding computation of damages. Accordingly, the judgment of the trial court will be affirmed in part and reversed in part, and the matter will be remanded for correction of the judgment entry.

I. Facts and Course of Proceedings

{¶ 4} This case arose from a remodeling project for a bar named Mr. Boro's Tavern, which is located in Springboro, Ohio. After selling a taxi-cab business, Rick and his live-in girlfriend, Marci, began looking for property to lease for a bar. Rick had always dreamed of owning a bar, and Marci had been involved in bartending and in owning and

[1] For clarity and convenience, we will refer to the parties as "Jay," "MVCG," "Rick," and "Marick."

operating bars for many years. Transcript of Proceedings ("Tr.") p. 435 and 494.

{¶ 5} To this end, Rick formed Marick in December 2015, and he and Marci then found a property for the bar in Springboro, Ohio, that was the perfect location and size, but would have to be gutted and remodeled. Tr. 443 and 495. The concept they were pursuing was that of a friendly neighborhood tavern, which was Marci's area of expertise. Tr. 442. Marci had also lived in Springboro for ten years and knew it as a tight, close-knit community. She had also researched Springboro's demographics, which revealed that the city had around 18,000 residents, a higher median income, and no neighborhood tavern. *Id*.

{¶ 6} After signing a lease in late December 2015, Rick hired an architect, Rob Fields, to provide an expert opinion on the remodeling needed to fit the theme and to make preliminary drawings to be used for bidding with general contractors. Tr. 495-496. Fields prepared drawings in about two weeks and then contracted some general contractors to provide bids. One backed out because the scope was too big, one was unreasonably priced, and another wanted the job but could not start until May or June 2016 due to the timing of other jobs. Tr. 496.

{¶ 7} Someone in the neighborhood was a former employee or salesman for Jay and suggested that Rick contact him. Tr. 497. At the time, Jay was the sole owner of MVCG. The first meeting occurred around March 25, 2016, at the proposed location of Mr. Boro's. Jay brought Mike Kennedy (the eventual project foreman), Mitch Perry (an interior designer), and Demetrice Minnifield (an electrician) to the meeting. Tr. 27, 106, 229, and 498. According to Jay, Rick was in a hurry to start right away. Tr. 27.

{¶ 8} Rick showed Jay the preliminary drawings and the concept for the bar. Tr.

499. Based on the preliminary drawings, Jay gave Rick an estimated price from MVCG of about $156,995 on April 7, 2016. Tr. 500-501. After Jay gave the drawings to his architect, Jeanne Cabral, she said they were insufficient for a permit and would have to be redone. Tr. 503. Consequently, on May 11, 2016, Rick gave MVCG a $6,000 check for payment of Cabral's architect fees and Perry's design fees. Tr. p, 504. At that time, Jay promised that Cabral would provide a workable set of plans within three to four weeks. Tr. 504 and 511.

{¶ 9} About a week after Rick gave Jay the $6,000 check, Rick and Jay met with Rick's landlord, Scott Duro. Duro was concerned that nothing had been happening and wanted to meet with Rick's contractor. Tr. 511. Jay told Duro and Rick that the drawings would be done in three to four weeks, and that he would then need 11 to 12 weeks to complete the project. Under this projection, the project would have been done by September 2016. Tr. 512. Based on Jay's comments, Duro gave Rick a rent reprieve for June, July, and August, with rent to resume in September. Tr. 513.

{¶ 10} During the summer of 2016, Marci and Rick met with Jay a number of times. Among other things, they discussed the timeframe, which was "huge" for them because there was a small window before fall and the holidays. Tr. 445. They thought a September opening was perfect, because that would give them October, November, and December, during the football season and the holidays, when a lot of restaurants and bars, especially neighborhood bars like theirs, really got business going. Tr. 445-446. Jay's response to opening in early September was that he could get it done. Tr. 446. During the meetings, Rick conveyed a sense of urgency to get the project moving. Tr. 511.

{¶ 11} Cabral did not provide plans until late July 2016, and the plans then were taken to the authorities for approval. Tr. 504 and 513. On July 30, 2016, Rick gave Jay a check for $36,000, before a written contract had been signed. However, Rick did this to facilitate the project while the plans were being approved, as demolition did not need approval and could be started. Jay was also going on vacation and wanted money to pay his demolition people. Tr. 514. On August 2, 2016, Rick wrote another check for $22,000 to MVCG, for supplies and to hire subcontractors and get them ready to move after permit approval. Tr. 514-515. Thus, even before the contract was signed, Rick had given Jay $58,000.

{¶ 12} By the end of August, the ceiling grids were demolished, a humidor was removed, and walls were torn down. Tr. 506. To save money, Rick performed some tasks himself and paid directly for other tasks and supplies. While Jay was on vacation, Rick demolished the tile floor, which had to be removed to proceed with demolition and construction. He finished that by the Friday before Labor Day, except for a few piles of tiles that could not fit in the dumpster Jay had provided. Tr. 506.

{¶ 13} By the time Jay returned from vacation, the health department had approved the plan with one minor change and had sent the plans to the plumbing department, which was in the same building. Rick kept asking Jay if he had heard anything and Jay kept saying no. Eventually, Rick learned that the flow of the hot water heater needed to improve and that the plans would not be released until a licensed plumber came to pick up the plans. However, Jay did not have a licensed plumber, although he had earlier said he had one. Tr. 515-516.

{¶ 14} No work was done between September 2 and September 9, 2016. On

September 9, 2016, Rick entered into a contract with MVCG, for a price of $193,805.41 and an estimated completion date of October 17, 2016. Tr. 509-510 and Joint Ex. III, p. 1. The contract was signed by Rick as owner of Marick and by Jay as President of MVCG. Joint Ex. III at p. 5. At the same time, Rick signed a cognovit promissory note and security agreement, agreeing to pay Jay $40,000 for "value received." Joint Ex. 1, p. 1. Monthly payments of $1,809.09 were to be made on the note beginning January 1, 2017, and continuing for 23 more months. *Id*. The note also had a provision allowing Rick to defer the initial payment for up to four months by paying $350 per month. *Id*. In addition, Rick executed a mortgage, giving Jay a mortgage on Rick's personal residence in Centerville, Ohio, as security for payment of the note. Tr. 42 and Joint Ex. II.

{¶ 15} Jay never paid Rick or Marick $40,000, nor was their contractual liability with MVCG ever decreased by $40,000. According to Jay, his intent in obtaining the note was to protect himself "personally," and it was not a construction loan. Tr. 37. Jay testified that Rick's understanding was that Jay was giving money to MVCG so it would have "working capital" to get the job done. Tr. 343-344.

{¶ 16} As to where this was stated in the document, Jay stated: "That is what was done. That was what was understood. That's what was known. He [Rick] knew that – he knew that even when we discussed it, he wasn't going to get $40,000 from me in turn to just give it right back to my company. He knew I was going to give it to my company as working capital on his behalf to execute the contract. Without it, we wouldn't have executed the contract." Tr. 344. At trial, Jay defined "working capital" as "money that's needed to do the work and finance the actual work that's being done." Tr. 344.

{¶ 17} Rick's testimony concerning the note differed. He stated that the $40,000

represented the final payment on the contract, which was basically overhead and profit. Rick was to provide money up front and also on 75% completion of the project, in order to provide Jay's working capital, or what Jay was going to use to pay subcontractors. There would be a final payment though the promissory note, such that Jay would get his profit; Rick would then make payment on the note for the next two years. Tr. 517 and 616. Payment was to start in January 2017 because, by that time (based on the anticipated completion date), Rick would have operated the bar for a few months and would have capital. Tr. 559 and 615. Additionally, Rick had the option, as noted, to defer the initial payment for several months by paying a fee. Tr. 615.

{¶ 18} On September 9, 2016, Rick wrote a check to MVCG for another $33,852.71. Tr. 516. Consequently, by the time the contract was signed, Rick had already paid $91,852.71, or nearly half of the original contract price.[2] The project was not complete by October 17, 2016, however. As a result, on November 8, 2016, the parties signed a change order which included money for architectural and engineering drawings and the increased size of the water heater. These changes were necessitated because Warren County insisted on certain plumbing changes to push hot water throughout the building. Tr. 519-521, and Joint Ex. V. The contract price increased by a little over $4,600, resulting in a total contract price of $198,478.25. Tr. 109, 203, and 521; Joint Ex. V.

{¶ 19} When the change order was signed, Jay continued to assure Rick that he would be able to complete the project by December 8, 2016, which was the date listed for completion in the change order. Tr. 521 and Joint Ex. V. At that time, among things

[2] The actual percentage was around 47.4%.

that still needed to be done were: framing, sanding, drywalling, final electricity, rough plumbing in the floor, new plumbing going to the kitchen and to the bar area, and new rough electric for walls that were moved and recreated. Tr. 522 and 524.

{¶ 20} On November 16, 2016, Rick wrote MVCG a check for $30,000. This was based on a text he received from Jay the week before, stating that he should be prepared to write a check for more than $28,000 in order to reach the 75% completion amount. At that time, Jay said that the project would be 75% complete. Rick knew that was not the case, but wrote the check in order to keep the project moving. Tr. 518. This brought the total amount paid to $121,852.71, or about 63% of the original contract price (and around 61% of the increased price).

{¶ 21} The project was not completed by December 8, 2016. In fact, substantial work remained to be done. For example, Jay's subcontractors did not even finish putting up drywall until just before Christmas. Tr. 540-541. In addition, 30 to 40 fire-retardant panels going throughout the kitchen were not installed until around December 23, 2016. Tr. 542-543. Rick paid Jay another $20,125 on December 23, 2016, making $147,977.71, or almost 75% of the increased contract price having been paid directly at that point. Tr. 82, 220-222, and 545. Moreover, Rick also purchased $11,737.30 of products, for which he was to receive credit towards the contract price. Tr. 122 and 594. These payments and purchases totaled $159,715.01, or more than 80% of the increased contract price.

{¶ 22} During January and February, work continued on the project. Tr. 118-121, 232, 546, and 548.[3] A soft opening was held for family and friends on March 11, and

[3] In an email dated March 7, 2017, Jay sent Rick a notice stating that construction had

another was held on March 12 for community businesses and realtors. Finally, the business opened to the community on March 14, 2017. Tr. 490-491.

{¶ 23} Previously, in February 2017, Jay reached out to his sister, Shawna, about the project. Tr. 137, 388, and 555. Shawna was a marketing and business consultant who owned a restaurant in Alabama. Tr. 384. Between the beginning of March and around March 14, 2017, Shawna discussed the menu and some drink items with Marci. Neither Rick nor Marci contacted Shawna to ask for assistance, and there was no contract for her services. However, they did speak with Shawna on a few occasions. Tr. 471-472, 475, 476, 556, 558. On March 14, 2017, Shawna sent Jay an invoice for $6,500 (based on a half-price "friends and family" rate of $125 per hour). Tr. 154. According to Jay, he was expected to pay this invoice, and ultimately, Rick and Marci were to pay it. Tr. 156-157.

{¶ 24} As indicated, payments on the note were supposed to start in January 2017. However, Jay indicated that he would give Rick leeway because the bar was not yet open. Tr. 552 and 615. Nonetheless, on March 1, 2017, Jay sent a text to Rick stating that "I'm going to exercise my legal options at this point. You are in default of our agreement and in breach of our contracts, and I'm going to turn over all documentations to my attorneys tomorrow and decide which direction I'm going to go." Tr. 611.

{¶ 25} On March 2, 2017, Jay met with Rick and Marci at Mr. Boro's to discuss the

---

been completed on February 6, 2017. Tr. 122 and 13. However, Rick indicated that the partitions for the bathroom did not arrive until February 14, 2017 and took about four days for Jay to install. Tr. 548-549. According to Rick, the job was done on February 28, 2017. Tr. 122, 551, and 562. The evidence indicates that the fire department inspection on the project took place on February 22, 2017, and the health inspection occurred on February 28, 2017. Tr. 611 and 632.

final invoice, because changes were made after the November 8 change order. These changes were not in writing. Tr. 83, 210-211 and 612. At that time, Jay showed up with an invoice totaling $210,970.70, which had no deduction for the $40,000 promissory note and also did not credit the $30,000 payment Rick made in November 2016. Tr. 83, 123, 168, 203, and 612. *See also* Joint Ex. VII (generated by Jay after the meeting).

{¶ 26} Jay attended the soft opening, but things were becoming heated about completion of the payment issue and the promissory note. Jay was also approaching Rick with the idea that one option to make things "right" would be to give Jay a limited partnership. Tr. 652. However, that was never Rick's intention and he felt like he was being coerced. *Id*. The soft opening was the last time Rick and Marci had anything to do with Jay. *Id*.

{¶ 27} On March 15, 2017, Rick's attorney sent Jay a check for $1,050 to delay payment of the promissory note for three months. Tr. 49, and Plaintiff's Ex. 1 and 2. Another check was sent on April 1, 2017, to delay payment for another month. Tr. 51-53, and Plaintiff's Ex. 3 and 4. Jay cashed those checks. Tr. 587-588. In May 2017, Rick sent Jay the first two installments on the note, but Jay did not cash those checks (which were dated after May 1, 2017) and later returned them. Tr. 489-490.

{¶ 28} Shortly thereafter, on June 22, 2017, Jay filed a complaint for money damages and foreclosure against Rick and Marick.[4] Rick and Marick filed an answer and counterclaim on July 21, 2017, raising various defenses, including fraud, fraud in the inducement, lack of consideration, and unclean hands. The counterclaims further

[4] Other defendants like the Montgomery County Treasurer were also included, but are irrelevant, because they were dismissed or disclaimed any interest in the real property involved in the foreclosure.

alleged that Jay had failed to provide any consideration for the note and that, due to his actions, the note was void or voidable ab initio.

{¶ 29} Rick and Marick also filed a third-party complaint against MVCG, alleging that it had breached the construction contract by failing to complete the work in a timely manner. They also alleged fraud on the part of both Jay and MVCG. On August 24, 2017, MVCG filed an answer to the third-party complaint and included a counterclaim against Rick and Marick for breach of contract, fraud, and unjust enrichment. MVCG also included claims of breach of contract and unjust enrichment on behalf of Shawna's company ("Grit Marketing"), which had assigned its claims to MVCG.

{¶ 30} After Rick and Marick filed an answer to the third-party counterclaims, the court referred the case to a magistrate in September 2017. The case was then sent mediation, which was unsuccessful and terminated in November 2017. Jay filed a motion for summary judgment in February 2018, contending that the $40,000 promissory note had nothing to do with MVCG, and that he was entitled to judgment on the note and to foreclose.

{¶ 31} MVCG also filed a motion for summary judgment in February 2018, which was supported by Jay's affidavit. According to the affidavit, the construction contract was complete, and Rick and Marick owed MVCG $62,927.99 plus interest and attorney fees. In May 2018, Rick and Marick filed a motion for summary judgment against both Jay and MVCG, contending that the promissory note was void because Jay never paid any money to Jay and did not credit the note's amount against the construction contract. In addition, they claimed that MVCG had breached the contract.

{¶ 32} In July 2018, the magistrate issued a decision finding that the note and

mortgage were void and unenforceable due to lack of consideration. The magistrate further found that MVCG had breached the contract by failing to substantially complete the contract by December 8, 2016. Due to material issues of fact concerning the amount due under the contract, the magistrate denied the summary judgment motions of MVCG, Rick, and Marick.

{¶ 33} After Jay and MVCG objected to the magistrate's decision, the trial court sustained the objections in part. The court concluded that a distinction existed between failure of consideration and want of consideration, and that factual issues precluded summary judgment. Additionally, the court stated that factual issues existed as to the reason for the delay in performing the contract. The court, therefore, set a date for trial to the bench.

{¶ 34} The trial court then held a bench trial, during which it heard testimony from Jay, Marci, Rick, Shawna, Demetrius Minnifield (Jay's electrician), and Scott Hull (Mr. Boro's accountant). Following the trial, the court filed a judgment entry on February 25, 2020, finding in favor of Rick and Marick on any claims for breach of contract by Jay or MVCG, and finding in favor of MVCG on claims for unjust enrichment (based on work performed outside the written construction contract and the change order). The court also found against the parties on all remaining claims in the complaint, the counterclaim to the complaint, the third-party complaint, and the third-party counterclaim. *See* Verdict and Judgment Entry ("Judgment"), p. 1. After deducting the amount of Rick's damages from what he owed MVCG for work performed outside the contract, the court granted judgment in Jay and MVCG's favor in the amount of $21,875.33.

{¶ 35} Jay filed a notice of appeal on March 26, 2020, and the appeal was assigned

Case No. 28767. MVCG also appealed on the same day, and its appeal was assigned Case No. 28768. Finally, Rick and Marick filed cross-notices of appeal in both cases. For ease of discussion, we will first consider Jay's assignments of error and will then consider MVCG's assignments of error.

II. Jay's Assignment of Error

{¶ 36} Jay's sole assignment of error states that:

> The Trial Court Erred by Not Granting Judgment on the Cognovit Promissory Note and Security Agreement and Mortgage, and by Deciding the Contractor's Services and Materials Agreement, Cognovit Promissory Note and Security Agreement, and Mortgage Constituted the Original Contract.

{¶ 37} Under this assignment of error, Jay contends that the trial court erred in construing the contracts together because the contracts do not refer to each other and are not ambiguous. According to Jay, the purpose of the note and mortgage were to protect himself personally if the construction contract "went sideways." Jay further contends that he incurred a substantial detriment by loaning money so the project could go forward. The trial court disagreed, finding that the promissory note and the mortgage were "nothing more" than devices that in part financed the transaction. Judgment at p. 2, fn. 4. Although the trial court did not make a specific finding on this point, implicit in the court's decision is that there was a failure of consideration because Jay never paid Rick anything in relation to the promissory note, nor did he credit Marick or Rick with any amount in connection with the construction contract.

{¶ 38} When appellate courts review judgments following bench trials, a presumption applies that the trial court's findings are correct. *Fed. Ins. Co. v. Fredericks*, 2015-Ohio-694, 29 N.E.3d 313, ¶ 21 (2d Dist.), citing *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218, ¶ 81 (10th Dist.). As a result, appellate courts may not substitute their judgment for that of trial courts and must affirm judgments that are "supported by some competent, credible evidence going to the essential elements of the case." *Gold* at ¶ 81, citing *Reilley v. Richards*, 69 Ohio St.3d 352, 632 N.E.2d 507 (1994), and *Koch v. Ohio Dept. of Nat. Resources*, 95 Ohio App.3d 193, 642 N.E.2d 27 (10th Dist.1994). As to questions of law like contract interpretation, our review is de novo. *PNC Bank, N.A. v. Springboro Med. Arts, Inc*., 2015-Ohio-3386, 41 N.E.3d 145, ¶ 15 (2d Dist.).

{¶ 39} Appellate courts are also "mindful that in a bench trial, 'the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Emswiler v. Bodey*, 2d Dist. Champaign No. 2012-CA-3, 2012-Ohio-5533, ¶ 44, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Consequently, " '[i]f the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.' " *Seasons Coal Co*. at 80, fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191-192 (1978). *Accord Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 21; *Emswiler* at ¶ 44.

{¶ 40} Consistent with this focus on credibility, the trial court made a specific

finding after listing the witnesses who had testified at trial; it stated that it "***expressly finds Messrs. Baarlaer and Hull and Ms. [Marci] Johannes credible in every material respect***," suggesting that the court did not find Jay or his witnesses credible. (Emphasis sic.) Judgment at p. 2, fn. 3.

{¶ 41} After reviewing the record, we find that competent, credible evidence and legally appropriate analysis support the trial court's verdict on the promissory note. As a preliminary point, we note that while the note in question was labeled as a "cognovit promissory note and security agreement" and contains the language mandated by R.C. 2323.13(D), it does not contain a warrant of attorney. *E.g*., *Klosterman v. Turnkey-Ohio, L.L.C.*, 182 Ohio App.3d 515, 2009-Ohio-2508, 913 N.E.2d 993, ¶ 24 (10th Dist.); *Sutton Bank v. Progressive Polymers, L.L.C.,* Ohio Slip Opinion No. 2020-Ohio-5101, __ N.E.3d __, ¶ 12. *Compare BJ Bldg. Co. v. LBJ Linden Co.*, 2d Dist. Montgomery No. 21005, 2005-Ohio-6825, ¶ 3 (indicating content of warrant of attorney in cognovit note found to be enforceable). Jay also did not seek cognovit relief in his complaint or at any point in the trial court. *See Chattree v. Chattree*, 8th Dist. Cuyahoga No. 95051, 2011-Ohio-1925, ¶ 18. We, therefore, will consider this matter based on traditional principles that apply to promissory notes rather than considering the note as a cognovit note.

{¶ 42} Notably, promissory notes are contracts, and their interpretation is governed by rules of contract interpretation. *PHH Mtge. Corp. v. Ramsey*, 2014-Ohio-3519, 17 N.E.3d 629, ¶ 33 (10th Dist.), citing *Cranberry Fin., L.L.C. v. S & V Partnership*, 186 Ohio App.3d 275, 2010-Ohio-464, 927 N.E.2d 623, ¶ 9 (6th Dist.). (Other citations omitted.)

{¶ 43} " 'A contract is generally defined as a promise, or a set of promises,

actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc*., 436 F.Supp. 409, 414 (N.D.Ohio 1976).

{¶ 44} In the case before us, the dispute concerns consideration for the note. " 'Consideration for a contract can only be that which the parties intended to be the consideration.' " *Busch Bros. Elevator Co. v. Unit Bldg. Servs*., 190 Ohio App.3d 413, 2010-Ohio-5320, 942 N.E.2d 404, ¶ 7 (1st Dist.), quoting *Borgerding v. Ginocchio,* 69 Ohio App. 231, 237, 43 N.E.2d 308 (1st Dist. 1942). "Consideration, meaning that which is bargained for and given in exchange for a promise, is a necessary element of a binding contract, and the absence of consideration precludes the formation of a valid contract." *Harvest Land Co-Op, Inc. v. Hora*, 2d Dist. Montgomery No. 25068, 2012-Ohio-5915, ¶ 14, citing 17 Ohio Jurisprudence 3d, Contracts, Section 39. "The consideration for a contract need not necessarily be recited or expressed in writing; instead, the consideration may be proved by parol evidence or may be inferred from the terms and obvious import of the contract." *Id*. at Section 40.

{¶ 45} "A party may defend against having to pay under a promissory note by arguing failure or want of consideration for the note." *Santomieri v. Mangen*, 2018-Ohio-1443, 111 N.E.3d 483, ¶ 13 (3d Dist.). A want of consideration differs from a failure of consideration. "Want of consideration is a total lack of any valid consideration for the contract. Failure of consideration is the neglect, refusal and failure of one of the contracting parties to do, perform or furnish, after making and entering into the contract,

the consideration in substance and in fact agreed upon." *John P. Timmerman Co. v. Hare*, 3d Dist. Allen No. 1-03-14, 2003-Ohio-4622, ¶ 10, citing *Colonial Ins. Co. v. Graw*, 102 Ohio App. 430, 438, 129 N.E.2d 491 (8th Dist. 1955).

{¶ 46} Under the law, the existence of consideration for promissory notes is presumed. "[T]his presumption continues until it is shown that there was none; and the burden of showing this is on the party attacking the note for want of consideration." (Citations omitted.) *Santomieri* at ¶ 16, citing *Dalrymple v. Wyker*, 60 Ohio St. 108, 53 N.E. 713 (1899). The burden of proving either failure of consideration or want of consideration is on the party asserting it. *Ohio Loan & Discount Co. v. Tyarks*, 173 Ohio St. 564, 568, 184 N.E.2d 374 (1962).

{¶ 47} In the case before us, the consideration is not apparent from the note; it only says that Rick agreed to repay $40,000 to Jay in installments beginning in January 2017 "for value received." Joint Ex. I. Because the parties had no relationship other than the intended construction project, the obligation's meaning was ambiguous and the trial court correctly concluded that the note was intertwined with the other documents that were signed the same day.

{¶ 48} "Under established law, a promissory note 'may be modified or affected by another writing executed as part of the same transaction.' " *England v. O'Flynn*, 2d Dist. Montgomery No. 18952, 2002 WL 27314, *9 (Jan. 11, 2002), quoting *Edward A. Kemmler Memorial Found. v. 691/733 East Dublin Granville Road Co*., 62 Ohio St.3d 494, 499, 584 N.E.2d 695 (1992). " 'This follows from the general contract principle * * * that writings executed as part of the same transaction should be read together.' " *Id*.

{¶ 49} By way of comparison, the promissory note in *Harvest Land* "memorialized

a delinquent debt" that the maker (a farmer) had owed an agricultural cooperative. *Harvest Land*, 2d Dist. Montgomery No. 25068, 2012-Ohio-5915, at ¶ 2-3. Here, there was no such relationship and no apparent reason for the note to have been signed, other than in connection with the construction contract.

{¶ 50} As indicated, Jay's story was that he charged Rick $40,000 to "execute" the construction contract and to provide "working capital" for MVCG. However, by the time the note was signed, Rick had already paid almost 50% of the contract price. Furthermore, Jay never offered any evidence at trial to substantiate what his own expenses were at any time during the project. In fact, when questioned about the project, Jay testified that he did not have a construction schedule when the contract was signed and had not yet signed any subcontractors. Tr. 286. He also could not say how much he had paid subcontractors by the time more than $91,000 had been paid by November 8, 2016, or when more than $127,000 had been paid on November 16, 2018. Jay also testified that he could not state the total amount he paid to subcontractors without looking at the documentation (even though he was testifying at trial, when he presumably would have brought documents, if they existed). Tr. 289, 290, 294, and 320-321. However, Jay did not offer any such documentation at trial.

{¶ 51} Jay claimed that he had deposited $40,000 into MVCG after the contract was signed. He purportedly accomplished this by borrowing money from his father and brother, and by having MVCG sign promissory notes to himself and his brother. In these notes, MVCG promised to pay back $40,950 (more than was deposited).

{¶ 52} In addition, Jay signed promissory notes of his own to his father and brother, apparently for the money that Jay had deposited. However, Jay's testimony about these

matters outlined a series of inconsistent and convoluted transactions that did not add up and did not have dates that corresponded with each other. *See* Tr. 44-49, 58, and 62-65, and Plaintiff's Ex. 9 and 10. Jay attempted to explain the discrepancies by indicating that he often borrowed money from his father and brother. Later, he would go back and reconcile how much they lent him, and sign promissory notes. Tr. 65. Jay's testimony was so convoluted, however, that, in the midst of this discussion, his lawyer said, "We will forego the notes." Tr. 68.

{¶ 53} As indicated, the trial court did not find Jay's testimony credible. The court's view is well-supported by the evidence. In this vein, we also note that during the contract period, MVCG paid many, many thousands of dollars to various gambling establishments. As just one example, between September 12 and 14, 2016 (or right after the contract was signed), MVCG's Huntington Bank account showed $31,517 being spent on gambling transactions that were unrelated to the business. Tr. 310 and Defendant's Ex. O, MVCG442-445. According to Jay, his cousin, Katy, had access to the MVCG accounts and was stealing from him to gamble. Tr. 306.

{¶ 54} Although this went on for many months, and even before the contract was signed, Jay claimed that he did not really look at his accounts and was apparently unaware of what was going on. Tr. 307. Jay also did not fire Katy even though she had allegedly defrauded MVCG of many thousands of dollars. Instead, she left in February 2018 based on a medical issue. Tr. 304 and 310. The trial court correctly could have viewed Jay's financial accounting as less than credible.

{¶ 55} As indicated, the trial court did not find Jay credible, and it found Rick credible on all material issues. We agree. The fact is that Jay failed to provide any

value for the promissory note and failed to either give Rick or Marick $40,000 or to credit that amount against the final construction price, which had ballooned to more than $210,000. Instead, when Rick and Jay met after contract completion to discuss the contract overages, Jay presented Rick with an invoice that did not credit him with any amount attributable to the promissory note, and in fact, showed Rick as owing $30,000 that Rick had paid. Tr. 290-291, 517, 552-553, 563-564, 596, 605, and 612. Because there was a failure of consideration, Jay's sole assignment of error is overruled.

{¶ 56} Having resolved the issue of the promissory note and mortgage, we turn to consideration of MVCG's assignments of error, the first of which relates to the finding that MVCG breached the construction contract.

III. Breach of the Construction Contract

{¶ 57} MVCG's First Assignment of Error states that:

> The Trial Court Erred by Finding Miami Valley Construction Group, LLC Breached the Terms of the Construction Contract.

{¶ 58} Under this assignment of error, MVCG argues that it did not breach the contract because it had substantially completed its obligations by December 8, 2016, despite delay that Rick and Marick caused at the beginning of the project. As support for this claim of delay, MVCG articulates various items that Rick failed to do or did in an untimely manner, ranging from plumbing, floor demolition, painting, and installation of cabinetry and tile. In addition, MVCG also points to items outside the original scope of work that it was asked to do. *See* Merit Brief [of] Appellant/Cross-Appellee Miami Valley Construction Group, Inc., p. 4-8. The items cited in the brief were taken from Jay's trial

testimony.

{¶ 59} After considering the evidence, the trial court concluded that "finger-pointing" about initial delays was irrelevant, because the parties agreed to extend the date for substantial completion until December 8, 2016, and increased the contract price. Judgment at p. 2. The court then observed that the parties clearly understood that Rick was "desperate to open Mr. Boro's by the looming holiday season, * * * a time of year when neighborhood bars typically flourish." Tr. 3. The court then stated that:

> But Bakhshi/MVCG failed to substantially complete the work owing entirely to Bakhshi's cavalier and reckless failure to do so, thereby violating the contract's express provisions, including Paragraph VIII of Joint Ex. III – the Contractor's Services and Materials Agreement.

Judgment at p. 3.

{¶ 60} Again, because the trial court held a bench trial, we review the court's factual findings to see if they are "supported by some competent, credible evidence going to the essential elements of the case." *Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218, at ¶ 81. We also review contract interpretation de novo. *PNC Bank, N.A.*, 2015-Ohio-3386, 41 N.E.3d 145, at ¶ 15.

{¶ 61} "The elements of a breach of contract claim are 'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.' " *Becker v. Direct Energy, LP*, 2018-Ohio-4134, 112 N.E.3d 978, ¶ 38 (2d Dist.), quoting *Doner v. Snapp*, 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2d Dist.1994). Nonetheless, " 'a breach of one of several terms in a contract does not discharge the obligations of the parties to the contract, unless performance of that term is essential to

the purpose of the agreement * * *.' " *Id*., quoting *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 772 N.E.2d 138, ¶ 11 (10th Dist.).

{¶ 62} The fact that time was of the essence in this contract was quite obvious. From the beginning, in April 2016, when Marci and Rick first met with Jay, they told him that the timeframe was huge, due to the football and holiday season. Tr. 445. Jay assured them that the project would only take 8 to 12 weeks and that he could get the bar open in early September. Tr. 445 and 279.

{¶ 63} As noted above, both Jay and Rick also met with Rick's landlord, who was pressing about opening. Based on Jay's assurances, the landlord gave Rick a rent reprieve for three months, with rent to resume in September. Tr. 511-513 and 599-600. Delays then occurred during the summer, including the long wait for Jay's architect, and Marci and Rick continued to stress the necessity of getting the bar open. Tr. 453. 510, and 599-600.

{¶ 64} When the construction contract was signed, Jay promised he would complete the project by October 17, 2016, and that was the date used in the contract for estimated completion. Tr. 456 and 280, and Joint Ex. III, p. 1. Between then and October 17, 2016, Marci and Rick continued to stress to Jay the importance of opening the bar on time, and they received reassurances that it would happen. Tr. 456-457 and 519.

{¶ 65} In its brief, MVCG contends that the only evidence of the fact that time was of the essence came from the "self-serving testimony" of Rick and Marci. MVCG Brief at p. 10. However, the trial court explicitly found these witnesses credible. In addition, at trial, Rick provided text messages to Jay supporting his testimony. *See* Tr. 599-606.

{¶ 66} Between September 9 and October 17, 2016, further delays occurred. As the trial court stressed, the reasons are not particularly pertinent, because the parties agreed to a change order on November 8, 2016. Tr. 109 and 521, and Joint Ex. V. At that time, Jay assured Rick that he would be able to complete the project by December 8, 2016. Tr. 521. Jay himself testified that when he signed the change order, the understanding was that he would be substantially completed with his work on that date. Tr. 288.

{¶ 67} According to the original agreement, "All change orders need to be agreed upon in writing, including cost, approximate dates when the work will begin and be completed, * * * and signed by both parties. * * * Additional time needed to complete change orders shall be taken into consideration in the project completion date." Joint Ex. III, Section VIII, p. 3. The change order itself stated that "Date of substantial completion for this Change Order shall be December 8, 2016." Joint Ex. V, p. 1.

{¶ 68} "Whether a party has substantially performed under the terms of a contract is a question of fact." *Steen Elec. v. Homes of Elegance, Inc*., 9th Dist. Summit No. 21876, 2004-Ohio-6275, ¶ 9. The contract itself did not define substantial completion. However, this term has been statutorily defined in the context of the statute of limitations for suing on improvements to real property as "the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first." R.C. 2305.131(G).

{¶ 69} Courts have also interpreted "substantial performance of a contract" to

mean that "mere nominal, trifling, or technical departures are not sufficient to break a contract, and that slight departures, omissions and inadvertences should be disregarded." *Kichler's, Inc. v. Persinger*, 24 Ohio App.2d 124, 126, 265 N.E.2d 319 (1st Dist.1970), citing *Ashley v. Henahan*, 56 Ohio St. 559, 47 N.E. 573 (1897). "A party fails to substantially perform when its omissions are material to the essential duties it promised to perform." *Cad Cam, Inc. v. Adept Mfg. Corp*., 2d Dist. Montgomery No. 17687, 1999 WL 961374, *1 (June 25, 1999).

{¶ 70} After reviewing the evidence, we find no question about the fact that MVCG failed to substantially complete the project by December 8, 2018. As indicated in the Statement of Facts, above, the drywall and fire-retardant panels were not even installed or completed until just before Christmas. Tr. 540-543. Further, only the rough electrical and rough plumbing were done by December 8, 2016. Tr. 110-111. The final inspection for the electrical work also did not occur until late January 2017. Tr. 248. Other examples of unfinished work were detailed at trial, but we need not discuss them further, as the work clearly was not substantially completed by the due date.

{¶ 71} As for MVCG's contention that Rick caused substantial delays that prevented MVCG's performance, the trial court, again, found Rick and Marci credible on all material issues. We have reviewed the testimony and find that the court's conclusion was reasonable. Accordingly, the trial court did not err in concluding that MVCG breached the terms of the construction contract.

IV. Recklessness

{¶ 72} MVCG's Second Assignment of Error states that:

The Trial Court Erred by Finding MVCG Acted Recklessly in Its Performance of the Contract.

{¶ 73} Under this assignment of error, MVCG contends that it did not act recklessly, but instead acted diligently in its performance, which was hampered by Rick's delays. Further, MVCG again argues that there was no evidence that Rick and Marick were desperate to open by the 2016 holiday season.

{¶ 74} The Supreme Court of Ohio has defined recklessness as follows:

> Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.)

Anderson v. Massillon, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph three of the syllabus.

{¶ 75} The court also noted in *Anderson* that "reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the risk, but the actor does not desire harm." *Id*. at ¶ 34, citing Black's Law Dictionary 1298-1299 (8th Ed.2004). Thus, Rick did not have to prove that Jay desired to harm him or Marick.

{¶ 76} Applying these standards here, the trial court reasonably concluded that MVCG's conduct was both cavalier and reckless. As we have already said, Jay was aware of the pressing need to open the bar. He was aware that Rick's rent payments had been suspended for June, July, and August, based on the fact that the bar would

open in September. And he was also aware at the time of the change order that much work remained to allow the bar to open before the holidays.

{¶ 77} Notably, this was the only construction project that MVCG had at the time. MVCG had only one other project in 2016, which finished by the end of the first quarter. Tr. 270. In August 2016, when demolition was beginning, Jay took a vacation to Disneyland, but failed to either take plans for permits to the county or notify Rick that the plans needed to be filed. Rick found out later and had to take the plans to the county. Tr. 451-452.

{¶ 78} After the initial contract was signed, Rick and Marci showed up at the bar on many occasions, and no one was there working. Tr. 457. They repeatedly asked Jay where his people were, where he was, why the drywall was not going up, and why the project was not going forward. *Id*. Jay's response was that the bar would be open by October 17. Tr. 456. That did not occur, however.

{¶ 79} After the change order was signed, and knowing that he had only a month to complete the project, Jay took another vacation for 10 days, to spend Thanksgiving in Alabama. Tr. 457. Drywall had been delivered to the project by mid-November, but when Marci questioned Jay about it, he said that he had it under control and drywallers were coming. On the Tuesday before Thanksgiving, when Jay was getting ready to leave on vacation, Jay told Rick that he was meeting with the drywallers to explain what he wanted done. They were supposed to start Wednesday and work through Thanksgiving. However, when Rick went over Wednesday morning, no one was there, and neither Jay nor the person he left in charge during his absence responded to Rick's texts. Tr. 535-536.

{¶ 80} No one showed up on Thanksgiving Day, either, and Jay and Rick then had a heated conversation. Jay claimed the initial drywallers did not show up and stole tools. Tr. 536. Another group of drywallers was then hired from Craigslist, was unsupervised, and did poor work. After they were fired, yet another group was hired and began work on December 1. They were also fired after working for several days. Tr. 536-539 and 620. The next drywall person who was hired did not finish until around Christmas. Tr. 541.

{¶ 81} At a minimum, Jay's actions indicated complete indifference to the obvious risk that Rick and Marick would be harmed by MVCG's failure to perform the contract in a timely matter. Jay was aware well before signing the contract that opening the bar quickly was very significant, and he agreed to a time-frame that he then consciously disregarded by going on vacation and by failing to have competent personnel performing the work in his absence. Jay was also the sole owner and representative of MVCG, and his actions were binding on the company. *See Vienna Beauty Prods. Co. v. Cook*, 2015-Ohio-5017, 53 N.E.3d 808, ¶ 7 (2d Dist.) (holding that "[a]cts of an agent done within the discharge of her duties and within the scope of her authority, whether the authority is express, implied, or apparent, are binding on the principal").

{¶ 82} Based on the preceding discussion, the trial court did not err in concluding that MVCG acted recklessly with regard to its failure to substantially perform the work. Accordingly, MVCG's Second Assignment of Error is overruled.

V. Award of Consequential Damages

{¶ 83} MVCG's Third Assignment of Error states as follows:

The Trial Court Erred by Awarding Consequential Damages and Consequential Damages Presented Were Wholly Speculative.

{¶ 84} Under this assignment of error, MVCG argues that consequential damages were not appropriate under Section XII of the contract, which prohibited such damages except for liability that arose from a person's willful or reckless actions. Since we have already addressed the issue of MVCG's recklessness, we need not consider this point further.

{¶ 85} MVCG additionally contends that Rick's lost profits were speculative and not recoverable. In this regard, MVCG asserts that the testimony of Rick's expert, Scott Hull, was based on flawed methodology because Hull looked at profit for years after the bar opened. MVCG also criticizes Hull's reliance on the stock market, local demographics, and local demand. Finally, MVCG disagrees with Hull's conclusion that Rick would not become a better bar owner (and therefore have greater profit) over a period of years, than over the first year of operation.

{¶ 86} The trial court awarded Marick $27,278 in consequential damages, based on Hull's testimony and Defendant's Ex. N (Hull's analysis of net profit Marick would have realized if the contract had not been breached). Judgment at p. 5. Before discussing MVCG's claims, we note that Hull was one of the witnesses the trial court found credible in all material respects. *Id*. at p. 2, fn.3.

{¶ 87} Generally, "lost profits may be recovered by the plaintiff in a breach of contract action if: profits were within the contemplation of the parties at the time the contract was made, the loss of profits is the probable result of the breach of contract, and the profits are not remote and speculative and may be shown with reasonable certainty."

Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co., 12 Ohio St.3d 241, 244, 466 N.E.2d 883 (1984). The Supreme Court of Ohio later explained that "in a breach of contract action, the amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty." *City of Gahanna v. Eastgate Properties, Inc*., 36 Ohio St.3d 65, 521 N.E.2d 814 (1988), syllabus (explaining the third prong set forth in *Charles R. Combs)*.

{¶ 88} As noted, Rick and Marick presented testimony at trial from Scott Hull. Hull was the owner of a tax accounting service that did taxes and accounting for Mr. Boro's. Tr. 657 and 661. Besides being an accountant, Hull was well-experienced in the restaurant and bar business. Specifically, after graduating with an accounting degree in 1980, Hull worked as a controller for Sheraton Hotels, Westin Hotels, and Hilton Hotels between 1982 and 1993-1994. Tr. 656-659. These hotels had bars and restaurants within their premises, and as a controller, Hull handled the cash deposits, recorded sales and expenses, and created financial statements. Tr. 658

{¶ 89} Since 1994, Hull had operated Padgett Business Services, a franchised organization that specializes in servicing small retail businesses like restaurants and bars that are locally owned. Tr. 660-661. Prior to March 2017, Rick hired Hull, who provided tax and accounting services, as well as consulting services like cost analysis and what profit percentages should be so the bar could be successful. Tr. 661-662 and 676. Hull had done work for Mr. Boro's consistently for two-and-a-half years before he testified at trial. Tr. 676.

{¶ 90} For trial purposes, Hull calculated the net profit Mr. Boro's would have realized had the contract not been breached. That amount was $27,278. Tr. 668 and

Ex. N. In order to arrive at a figure, Hull compared the net profit from actual statements from December 2017 through March 2018, and reduced the March 2017 profit figure because Rick was open for half the month. Tr. 663, 665-667, and 668-669.

{¶ 91} We find no issue with the methodology used. Hull looked at actual expenses during comparative time periods and the profit generated. Furthermore, Hull also stated that economic circumstances had been very similar during the two years (essentially 2017 and 2018), and that, in fact, the monthly accounting figures for the entire two-and-a-half year span of the business had been "virtually identical." Tr. 677-678. According to Hull, the business profit was really good from the day the bar opened. Tr. 677.

{¶ 92} As to figuring in matters like the stock market, local demographics, and local market, there is no question that Hull had worked in the area for many years, was very experienced in finances and business consulting in the restaurant/bar area, and would have known what factors to take into consideration when evaluating profit. During trial, no evidence was presented to indicate that these factors were improper or that different factors should have been used.

{¶ 93} Regarding Rick's experience and the possibility that he would have done better in ensuing years, we note that the trial court questioned Hull at length on this point. Tr. 670-675. Rick's attorney also discussed this with Hull. According to Hull, the bar's performance from the beginning had been very consistent, was really good from "day one," and Rick's performance may have been only incrementally better later on. Tr. 672, 674, and 676-677. Consequently, we disagree that this factor was improperly considered.

{¶ 94} MVCG's final argument is that even if consequential damages were appropriate, the trial court should have prorated the amount to account for the fact that the contract expiration date was December 8 and the work was completed on February 22. The issue of when the bar was completed vis à vis damages was not raised during trial and therefore has been waived. *E.g., Orthopedic & Neurological Consultants, Inc. v. Cincinnati Ins. Co*., 2018-Ohio-185, 104 N.E.3d 133, ¶ 11 (10th Dist.) (arguments not raised in the trial court are waived); *Wright-Patt Credit Union, Inc. v. Danes*, 2d Dist. Montgomery No. 26433, 2015-Ohio-2184, ¶ 9 (same).

{¶ 95} However, at trial, MVCG did raise the fact that the contract was to be performed by December 8, and Hull indicated he was unaware of that. Tr. 682. During redirect examination, Rick's counsel asked how Hull would account for that, and Hull said he would simply divide $12,017 (the lost profit for December 2016) by 31 and multiply that number by eight. Tr. 684-685. The trial court agreed with that analysis but did not reduce its judgment by that amount. Tr. 685. Instead, the court used the loss reflected in Defendant's Ex. N, which was the entire amount.

{¶ 96} We conclude this was error. The amount in question is $3,101.16. Consequently, the Third Assignment of Error will be overruled in part and sustained in part, and this matter will be remanded to the trial court for correction of the judgment in that amount.

VI. Grit Marketing

{¶ 97} MVCG's final assignment of error states that:

> The Trial Court Erred by Failing to Award Damages for Baarlaer's

and Marick's Usurpation of Grit Marketing's Work.

{¶ 98} Under this assignment of error, MVCG contends that the trial court erred in failing to award it damages for work done by Jay's sister, Shawna, who operated Grit Marketing. According to Jay, Shawna developed a menu and drinks that Mr. Boro's used, and MVCG, due to the assignment of the claim, was entitled to recover either $6,500 or $15,000 for Shawna's services, on the basis of quasi-contract.

{¶ 99} The trial court rejected this claim, concluding first that there was "no meeting of the minds between Baarlaer/Marick and Shana Bakhsi/Grit Marketing for services,"[5] and therefore, Jay/MVCG's claims based on an assignment were "of no moment." Judgment at p. 6. The court also rejected the claim for quantum meruit/unjust enrichment because "whatever Shana Bakhshi and Shana Bakhshi/Grit Marketing did, provided Baarlaer/Marick nothing of value." *Id*.

{¶ 100} Admittedly, there was no written contract here, and the appropriate remedy would be in quasi-contract, which is an implied contract used to avoid injustice. *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged*, 15 Ohio St.3d 44, 46, 472 N.E.2d 704 (1984). This theory "is a legal fiction that does not rest upon the intention of the parties, but rather on equitable principles in order to provide a remedy. The two remedies most often associated with quasi-contracts are restitution and quantum meruit. Each of these remedies presupposes some type of unjust enrichment of the opposing party." *Id*. "In contracts implied in law there is no meeting of the minds, but civil liability arises out of the obligation cast by law upon a person in receipt of benefits which he is not justly entitled

[5] Shawna Bakhshi's name was spelled as both Shawna and Shana in the trial court. We have used the spelling found in the trial transcript.

to retain and for which he may be made to respond to another in an action in the nature of assumpsit." *Legros v. Tarr*, 44 Ohio St.3d 1, 7, 540 N.E.2d 257 (1989).

{¶ 101} "Unjust enrichment occurs when a person 'has and retains money or benefits which in justice and equity belong to another.' " *Johnson v. Microsoft Corp*., 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 20, quoting *Hummel v. Hummel,* 133 Ohio St. 520, 528, 14 N.E.2d 923 (1938). "A plaintiff seeking to recover under unjust enrichment or quantum meruit must establish that (1) the plaintiff conferred a benefit on the defendant, (2) the defendant knew of the benefit, and (3) it would be unjust to permit the defendant to retain the benefit without payment." *Meyer v. Chieffo*, 193 Ohio App.3d 51, 2011-Ohio-1670, 950 N.E.2d 1027, ¶ 37 (10th Dist.), citing *Maghie & Savage, Inc. v. P.J. Dick, Inc.*, 10th Franklin Dist. No. 08AP-487, 2009-Ohio-2164, ¶ 33. *Accord Schlaegel v. Howell*, 2015-Ohio-4296, 42 N.E.3d 771, ¶ 30 (2d Dist.).

{¶ 102} Before we address MVCG's arguments, we again note the trial court's emphasis on credibility. The court specifically found Marci and Rick credible on every material point, but did not similarly find Jay and Shawna credible.

{¶ 103} Notably, the evidence on which MVCG relies is taken primarily from the testimony of Jay and Shawna. The appropriate issue, therefore, is whether the court's factual findings were "supported by some competent, credible evidence going to the essential elements of the case." *Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218, at ¶ 81. MVCG has not suggested that the trial court erred in applying the law of quasi-contract.

{¶ 104} After reviewing the evidence, we find ample evidence to support the trial court's conclusion. As indicated above, Marci had extensive experience in operating

neighborhood bars and bartending. Tr. 435 and 442. In her previous experience, she began as a bartender and then became a general manager, where she was in charge of bartending training, hiring, firing, ordering, day-to-day logistics, and creating the food menu. Tr. 435. Marci was also very experienced in food cost analysis, as she had done it while working at bars. In addition, when designing the bar, Marci learned a great deal while working with food representatives from Sysco. Tr. 439.

{¶ 105} In the summer of 2016, Marci made several trips to Sysco to work on cost analysis and food preparation. Sysco had a huge kitchen and had chefs that helped her design and create her concept. Tr. 448-449. By August or September 2016, Marci had completed the food and drink menu. She had some craft cocktails on the menu, but most people who come to neighborhood taverns drink craft beers and standard items like vodka and tonic. Tr. 452. According to Marci, thousands and thousands of drinks are in the public domain. Tr. 438. As of late February 2017, Marci had all her menu items ready to go, through working with Chef Jennifer from Sysco, who had been with her throughout the whole process. Tr. 468-470. She also worked with a food representative from Sysco who wrote all the things that were on the menu. Tr. 470.

{¶ 106} Jay mentioned to Marci and Rick that his sister, Shawna, was a bigwig in corporate restaurants and offered, as a favor, to have her look at what they had and go over some cost analysis. Marci told Jay that she appreciated it but was already done and did not want help. She also stressed that corporate restaurants are very different from neighborhood taverns. Tr. 471-472 and 489. Shawna had some suggestions, and Marci did talk with her and liked one drink that Shawna suggested. However, everything concerning food and drinks was in the public domain. Tr. 472, 475, and 489.

{¶ 107} Neither Marci nor Jay ever contacted Shawna initially or asked her to get involved in the project, nor did they ever discuss how much Shawna charged for her services. They also did not tell Shawna that they agreed to pay her. Tr. 471, 554, 557, 558, and 612. At trial, Rick said he assumed that Jay got Shawna involved because Jay wanted them to succeed and to be able to pay back the promissory note. Tr. 558-559. In addition, throughout the process, Jay had some interest, and more seriously toward the end, in wanting to be a partner. Tr. 559. The first time money was ever discussed was when Shawna offered to fly up for the opening, and Jay told them how much it would cost. Tr. 558. Rick and Marci turned down that offer, as they already had everything set up and were ready to go. Tr. 474 and 558-559.

{¶ 108} In view of the above testimony, the trial court's rejection of the claim for Shawna's services was supported by competent, credible evidence. According, MVCG's Fourth Assignment of Error is overruled.

VI. Conclusion

{¶ 109} Based on the preceding discussion, Jay Bakhshi's sole assignment of error is overruled, and MVCG's First, Second, and Fourth Assignments of Error are also overruled. MVCG's Third Assignment of Error is overruled in part and is sustained in part, and this matter is remanded to the trial court for deduction of $3,101.16 from the amount awarded to Jay Bakhshi and MVCG.

. . . . . .

TUCKER, P.J. and HALL, J., concur.

Copies sent to:

Michael T. Columbus
Scott G. Oxley
Code Credit Union
Christine Kurilic
Michele Phipps
Hon. Steven K. Dankof