Does an “As-Is” Clause in My Contract Preclude a Claim for Breach of an Express Warranty?

May 10, 2021

Easement by estoppel

***DeepRock Disposal Solutions, LLC v. Forté Prods., LLC,* 4th Dist. Washington No. 20CA15, 2021-Ohio-1436**
In this appeal, the Fourth Appellate District affirmed as modified the trial court’s decision, agreeing that the claimant did not have an easement by estoppel over the properties, as it failed to establish any misrepresentation by the landowners.

The Bullet Point: Although the Supreme Court of Ohio has yet to recognize easements by estoppel, Ohio appellate courts have long applied the equitable remedy of estoppel to create an easement. As with other equitable remedies, the purpose of equitable estoppel is to prevent actual or constructive fraud and to promote justice. Specifically, Ohio appellate courts have consistently held that, “[A] landowner cannot remain silent and permit another to spend money in reliance on a purported easement, when in justice and equity the landowner should have asserted his conflicting rights. If he fails to object, under these circumstances the landowner is estopped to deny the easement.” Therefore, in order to successfully establish the existence of an easement by estoppel, the claimant must show “1) a misrepresentation or fraudulent failure to speak, and 2) reasonable detrimental reliance.” A party claiming to own an easement by estoppel, known as the dominant estate, faces many challenges in proving the existence of such an easement over the so-called servient estate’s property. One of these challenges is that Ohio courts are reluctant to find an easement by estoppel on the basis of the servient estate’s passive acquiescence. Another challenge is that the claimant must demonstrate the servient estate made actual misrepresentations and that he relied upon said misrepresentations. For instance, the claimant cannot rely on an assertion made by the servient estate that may be easily verified by looking at public records or the claimant’s own documents. Lastly, the claimant himself must rely on said misrepresentations, as opposed to reliance by a third party. In this case, the plaintiff argued that it, through its predecessor, had a pipeline easement by estoppel and alleged the defendant landowners were aware of the efforts to build a pipeline, that they consented to its location and construction on their properties, and that they never objected to the same. The court disagreed and determined the landowners did not consent either verbally or in writing to the pipeline being constructed on their properties, nor was there any evidence of a misrepresentation made and, even if there had been, the plaintiff could have checked the county land records prior to commencing pipeline construction.

“As-Is” Warranties

***Cunningham v. Michael J. Auto Sales*, 1st Dist. Hamilton No. C-200087, 2021-Ohio-1390**
In this matter, the First Appellate District affirmed the lower court’s decision, agreeing that an “as is” clause does not protect a seller who should have known its product was defective and who failed to disclose the defect to the buyer.

The Bullet Point: In Ohio, “as is” clauses generally preclude claims of implied warranties. On the other hand, such clauses do not bar claims on express warranties or claims if the seller knew, or should have known, of a defect in the product. This is because a buyer may justifiably rely on a seller’s representation involving defects in the product being purchased. As such, a fraud claim may be maintained against a seller if the seller knew or should have known of a defect, even when the purchase agreement contains an “as is” clause. In this case, the buyer presented evidence that the used car dealer knew the vehicle’s transmission was defective prior to selling the vehicle. Despite having knowledge, the used car dealer failed to disclose the defect to the buyer. Therefore, the “as is” clause did not protect the dealer from liability under the buyer’s fraud claim.

***Crenshaw v. Michael J.’s Auto Sales*, 1st Dist. Hamilton No. C-200154, 2021-Ohio-1468**
In this appeal, the First Appellate District affirmed in part and reversed in part the trial court’s decision, agreeing that the “as is” clause did not negate the seller’s express promise to perform repairs on the used vehicle.

The Bullet Point: Under R.C. 1302.29(B), a seller impliedly warrants that its product is merchantable and fit for a particular use. These implied warranties may be expressly disclaimed with the use of a written “as is” clause in the purchase agreement. R.C. 1302.29(C)(1). Just as a seller is able to disclaim implied warranties with an “as is” clause, it can also create express warranties. An express warranty is “any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.” R.C. 1302.26(A)(1). In this case, the used car dealer disclaimed implied warranties in the vehicle by using an “as is” clause in the purchase agreement. Despite the “as is” clause, the dealer also expressly agreed to perform certain repair work to the vehicle in a separate agreement with the buyer. As noted by the court, an “as is” clause does not negate or cancel an express promise to perform repairs. Since the dealer failed to perform the promised repairs, it breached its express agreement with the buyer. That being said, a buyer whose complaint states a claim for breach of an express warranty or agreement is insufficient to succeed on a claim for violation of the Ohio Consumer Sales Practices Act (CSPA). As the court explained, a seller must be put on notice that the buyer alleges it violated the CSPA. Here, not only did the buyer’s complaint fail to mention the CSPA, but it was also void of any language regarding unfair, deceptive, or unconscionable consumer-sales practices. The buyer also failed to request treble damages. Moreover, neither the magistrate nor either of the parties mentioned the CSPA at trial. As such, the trial court erred in finding CSPA violations and awarding treble damages to the buyer.

Economic Loss Doctrine

***Navistar, Inc. v. Dutchmaid Logistics, Inc.*, 5th Dist. Licking No. 2020 CA 00003, 2021-Ohio-1425**
In this appeal, the Fifth Appellate District affirmed the trial court’s decision, agreeing that the economic loss rule did not bar the fraud claim, as the defendant breached duties that were independent of those under the warranty agreement when it purposefully failed to disclose material information to the plaintiff.

The Bullet Point: In Ohio, a breach of contract does not create a tort claim. In fact, under the economic loss rule, the existence of a breach of contract claim generally prevents a plaintiff from presenting the same case as a tort claim. When the claims are based upon the same actions or conduct, a tort claim can exist independently of the breach of contract claim only if the breaching party breached a duty owed to the plaintiff separately from the duties created under the contract. Simply stated, the breaching party must have breached a duty owed to the plaintiff, even if no contract existed. Moreover, the plaintiff must have suffered actual damages in addition to the damages caused by the breach of contract. As the court explained, Ohio’s economic loss rule attempts to balance recovery under tort law, which rectifies losses suffered by a breach of a duty imposed by law to protect societal interests, and recovery under contract law, which rectifies losses suffered pursuant to the terms of the breached contract. Notably, there are exceptions to the economic loss rule. The rule does not apply where the plaintiff’s tort claim is “based exclusively upon [a] discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity” and there are resulting damages that are separate and distinct from the breach of contract. In this case, the plaintiff brought a breach of warranty claim and a fraud claim against the defendant related to the purchase of heavy-duty commercial trucks and diesel engines. The defendant argued that the economic loss rule barred the fraud claim, but the court disagreed, finding that the fraud and breach of warranty claims were not based upon the same course of conduct. The court noted that the defendant breached duties that were independent of those which arose through the warranty provided to the plaintiff. Specifically, the defendant purposely failed to disclose material information about the trucks’ reliability despite the plaintiff’s inquiries, and these nondisclosures occurred prior to the sale. While the breach of warranty claim was based upon the limited warranty provided to the plaintiff subsequent to the purchase of the trucks, the fraud claim was based upon the distinct acts of the defendant’s failure to disclose and concealment of material information to the plaintiff, which the defendant knew was critical to the plaintiff’s decision to purchase the trucks. As such, the economic loss rule did not apply to bar the plaintiff’s fraud claim.

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[Cite as *DeepRock Disposal Solutions, L.L.C. v. Forté Prods., L.L.C.*, 2021-Ohio-1436.]

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

DeepRock Disposal Solutions, LLC,	:	Case No. 20CA15
Appellant and Cross-Appellee,	:	
	:	
v.		DECISION AND
	:	JUDGMENT ENTRY
Forté Productions, LLC, et al.,	:	
Appellees and Cross-Appellants.	:	**RELEASED 4/21/2021**

APPEARANCES:

Rick L. Ashton, James A. Coutinho, and Jeffrey R. Corcoran, Allen Stovall Neuman Fisher & Ashton LLP, Columbus, Ohio for Appellant and Cross-Appellee.

Craig E. Sweeney, Aaron M. Bruggeman, and Zachary Eddy, Bricker & Eckler LLP, Marietta, Ohio for Appellees and Cross-Appellants.

Hess, J.

{¶1} This appeal involves a pipeline and whether the pipeline owner trespasses across two properties along the pipeline's route. The original pipeline owner constructed the pipeline but was placed into a receivership and its pipeline was sold to the current pipeline owner. The parties agree that there are no recorded written easements allowing the pipeline owner to cross through these two properties. Generally, when a pipeline crosses another's property without written permission to do so, it constitutes trespass. Here, the pipeline owner contends that there are defenses to the trespass claims.

{¶2} The current pipeline owner is Appellant and Cross-Appellee DeepRock Disposal Solutions, LLC ("DeepRock"). DeepRock purchased the pipeline from the

original owner, Water Energy Services, LLC ("WES"), through the WES receivership in January 2017. DeepRock appeals the trial court's partial grant of summary judgment to appellees and cross-appellants, which dismissed DeepRock's claims for: (1) easement by estoppel, (2) a declaratory judgment on the validity of the Forté easements, (3) tortious interference with business relationship, (4) tortious interference with contract, and (5) civil conspiracy, and granted Forté and the Landowners' counterclaims against DeepRock for trespass. The appellees and cross-appellants in this matter are Forté Productions, LLC ("Forté"), Derow Enterprises, LLC ("Derow"), Ronald Deem ("Deem"), Bailey Homestead, LLC ("Bailey Homestead"), and Terry R. Johnson ("Johnson") (Bailey Homestead and Johnson are collectively "Landowners" and the properties they own that are relevant to this lawsuit are "Properties").

{¶3} Deem is a landman who, through his company, Derow, was retained by WES in early 2015 to obtain easements and rights-of-way for the construction of the pipeline. Deem approached property owners along the proposed construction route to obtain written easements for the pipeline to cross through. Bailey Homestead is an LLC for the Bailey family members who own property through which the pipeline crosses. Johnson owns property through which the pipeline crosses. Bailey Homestead and Johnson did not give written easements to allow DeepRock's pipeline to cross their Properties and they alleged that DeepRock is trespassing. However, Bailey Homestead and Johnson did eventually grant written easements to Forté. Forté is a business that, in November and December 2016, obtained and recorded written easements (the "Forté Easements") to place a pipeline on the subject Properties, but it does not own a pipeline.

In other words, DeepRock owns the pipeline, but no written easements for the Properties, and Forté has written easements for the Properties, but no pipeline.

{¶4} Appellees/Cross-appellants appeal the trial court's partial grant of summary judgment to DeepRock on DeepRock's claim for a declaratory judgment "that any claim of the Defendants as against the WES Assets[1] * * * were released upon the sale of the WES Assets * * *." The trial court also granted summary judgment to DeepRock when it dismissed Derow and Deem's counterclaims for breach of contract/quantum meruit and frivolous conduct, but these rulings are not challenged on appeal.

{¶5} DeepRock also appeals the trial court's order denying as moot its Civ.R. 56(G) motions to strike certain affidavits and a court-ordered as-built survey of the pipeline on the ground that the survey was not properly authenticated and that the testimony in the affidavits conflicted with the affiant's deposition testimony or that the affidavits were submitted as new evidence in a reply memorandum. The trial court issued its decision on the parties' cross motions for summary judgment, and then determined that this rendered moot DeepRock's motions to strike the survey and affidavits.

{¶6} DeepRock raises two assignments of error for our review. First, DeepRock contends that the trial court erred in granting partial summary judgment to appellees because: (1) it refused to apply the doctrine of easement by estoppel; (2) it granted appellees summary judgment on their trespass claims; (3) it declined to find Forté's easements invalid; and (4) it dismissed DeepRock's claims for tortious interference with business relationships, tortious interference with contracts and civil conspiracy. Second,

[1] In its amended complaint, DeepRock defined "WES Assets" as those assets acquired pursuant to and defined in section 1.1 of the Asset Purchase Agreement. The Asset Purchase Agreement was assigned to and assumed by DeepRock.

DeepRock contends that the trial court erred in denying its motion to strike the survey and certain affidavits under Civ.R. 56(G).

{¶7} Because it may affect our review of DeepRock's first assignment of error challenging the trial court's decision on the parties' summary judgment motions, we review DeepRock's second assignment of error first. We find that the trial court erred when it denied as moot DeepRock's motions to strike. The trial court should have determined whether the evidence and affidavits appellees submitted to support their summary judgment motions would be considered by it before ruling on those summary judgment motions. However, we find that the error was harmless because we find that the motions to strike were properly denied on substantive grounds. We overrule DeepRock's second assignment of error.

{¶8} As to DeepRock's first assignment of error, we find that the trial court did not err when it granted summary judgment to appellees on DeepRock's easement by estoppel claim (Count 5 of the First Amended Complaint). DeepRock failed to present any evidence to contradict the testimony of the Landowners and WES's own landman, Deem, all who testified that the Landowners did not make misrepresentations to WES about a pipeline easement. DeepRock also failed to present evidence to contradict the Landowners' and Deem's testimony that the Landowners voiced objections to WES when they discovered that the pipeline crossed their Properties.

{¶9} The trial court also ruled properly on appellees' trespass claims (Count 1 of Amended Counterclaims) because in DeepRock's reply to the amended counterclaims, DeepRock admitted its pipeline crossed the Properties. And, DeepRock failed to present any expert testimony or an alternative as-built survey of the pipeline to contradict the court

ordered as-built survey prepared by the expert surveyor the parties agreed to jointly retain to perform the survey.

{¶10} The trial court did not err when it dismissed DeepRock's claim that the Forté Easements were invalid (Count 2 of First Amended Complaint). Forté did not obtain the easements in violation of the doctrines of champerty and maintenance; the easements were obtained before DeepRock purchased the pipeline and well before DeepRock filed its action against the Landowners. Additionally, DeepRock named Forté as a defendant in the action. Therefore, Forté had both a bona fide interest in the case and was a party to it. Although WES was in a receivership, Forté did not violate the receivership stay order when it acquired the easements because the Landowners' Properties were not assets of the receivership estate. The Landowners were free to do as they wished with their Properties.

{¶11} Finally, we find that the trial court properly dismissed DeepRock's tortious interference with business relationships/contracts and civil conspiracy claims against Forté, Derow, and Deem (Counts 6, 7, and 8 of First Amended Complaint). DeepRock alleged that these three interfered with DeepRock's business relationships and contracts with the Landowners in late 2016 when Forté obtained its easements. Construing the evidence most strongly in DeepRock's favor we find that business relationships existed between WES and Bailey Homestead and Johnson. However, those relationships ended in late 2015 when WES constructed the pipeline on the Properties and failed to provide an appropriate and acceptable response when the Landowners objected. As for its tortious interference with contract claim, DeepRock failed to produce any evidence of any contractual agreement between WES and the Landowners. Because DeepRock failed to

provide any evidence that a business relationship between WES and the Landowners existed in late 2016, and no evidence of any contracts, its tortious interference claims were properly dismissed. And, without evidence of an underlying tort, the civil conspiracy claim fails.

{¶12} Appellees/Cross-Appellants raise one assignment of error challenging the trial court's grant of summary judgment in DeepRock's favor finding that DeepRock purchased the WES assets free and clear of all liens, claims, and encumbrances arising prior to or on the date of the confirmation of the receivership sale (Count 3 of First Amended Complaint).

{¶13} We acknowledge that a great deal of confusion exists among the parties concerning this claim. To the extent that the trial court's order might be read to dismiss all of the Landowners' and Forté's trespass claims, we agree it was in error. However, we find that the trial court correctly determined that WES's assets were sold free and clear of any lien, claim or encumbrances against the assets arising prior to the pipeline's sale – those liens attached to the pipeline sale proceeds and were handled in the receivership. This finding has little relevance in this litigation because none of the cross-appellants' counterclaims asserted any interest in WES's assets. We also find that the trial court properly found that the Landowners' and Forté's trespass claims against WES, which arose when the pipeline was constructed without permission on the Properties and ended when WES was no longer the pipeline owner, could not be brought against DeepRock. And, Deem and Derow's breach of contract/quantum meruit claims against WES could not be brought against DeepRock. DeepRock was not a successor of WES and had no successor liability for any of WES's obligations. However, the Landowners and Forté

could bring trespass claims against DeepRock for DeepRock's own trespass on the Properties, which commenced when DeepRock became owner of the pipeline and failed to remove the pipeline from the Properties, and continues until DeepRock either removes the pipeline or obtains the Landowners' permission to cross the Properties. The trial court allowed cross-appellants' trespass claims against DeepRock and will let a jury determine the merits of any defense DeepRock might have that has not already been rejected on summary judgment (i.e., the rejected defenses that the pipeline does not cross the Properties or that there are easements by estoppel). Due to the broad, somewhat ambiguous language used in the trial court's order, we sustain in part the cross-appellants' sole assignment of error.

{¶14} We affirm, in part, the trial court's judgment and modify it only to the extent that it barred cross-appellants' trespass claims against DeepRock that arose when DeepRock acquired the pipeline. Those claims are allowed to proceed.

I. FACTS AND PROCEDURAL BACKGROUND

{¶15} DeepRock filed a complaint against Forté, Derow, Deem, Bailey Homestead, and Johnson in July 2017 concerning whether DeepRock's wastewater disposal pipeline was trespassing upon Johnson's and Bailey Homestead's Properties and interfering with easements Johnson and Bailey Homestead had given to Forté. Appellees answered and asserted counterclaims for trespass, among other claims.

{¶16} In January 2018, at DeepRock's request, the trial court ordered an "as built" survey "to determine the precise location of the subject pipeline as it related to the Bailey Homestead Property and the Johnson Property." The trial court ordered: (1) Smith Land Surveying, Inc. to perform the survey, (2) Johnson and Bailey Homestead to allow Smith

Land Surveying access to their Properties to complete the survey, and (3) the costs of the survey to be split equally by the parties. The order stated that the parties agreed to its terms. After Smith Land Surveying completed the survey, appellees filed a motion for partial summary judgment in March 2018, but the motion was later withdrawn after DeepRock filed a first amended complaint and appellees filed answers and amended counterclaims.

{¶17} In its First Amended Complaint filed August 2018, DeepRock alleged that it had acquired the wastewater pipeline, along with easements and other assets from Water Energy Services, LLC ("WES") in a receivership case in January 2017. WES was a company that built and operated a wastewater disposal operation in Marietta, Ohio in 2015 but was placed under a receivership in July 2016. DeepRock alleged that in 2015, WES hired Deem and his company, Derow, to serve as the landman to acquire right-of-way easements for the construction of the wastewater pipeline. DeepRock alleged that WES disputed certain invoices Deem and Derow submitted for over $10,000 in services and that Deem never delivered any documentation of any easements from Bailey Homestead or Johnson[2] even though WES paid Bailey Homestead $6,000 for a right-of-way easement over its Property.

{¶18} DeepRock alleged that Bailey Homestead and Johnson conveyed easements to Forté in late 2016, which were recorded on November 30 and December 2, 2016, that conflicted with WES's right to maintain a pipeline through the Properties. The sale of WES assets occurred on December 6, 2016 and DeepRock contends that it was the successful bidder but did not discover the recorded Forté Easements until after

[2] It is undisputed that Johnson executed two options and rights-of-way with WES for properties that adjoin the Johnson Property at issue in this case. Those properties are not the subject of this litigation.

the sale. After DeepRock became owner of the pipeline, Forté, Johnson, and Bailey Homestead informed DeepRock that its pipeline was trespassing and demanded that it stop transporting liquids through the Properties, or alternatively, pay a total of $2.00 per barrel to Forté. DeepRock alleged that it asked to survey the Properties to determine the location of the pipeline but Forté, Johnson, and Bailey Homestead refused. DeepRock allegedly made repeated requests for documentation of the location of its pipeline, but its requests were denied.

{¶19} DeepRock contended that no post-installation survey was made of the pipeline and although it believed the pipeline did not travel through Bailey Homestead and Johnson's Properties, DeepRock claimed to have valid easements to do so. DeepRock sought: a declaratory judgment that the pipeline is not located on those Properties or on the Forté Easements (Count 1); a declaratory judgment that the Forté Easements were invalid (Count 2); a declaratory judgment as to whether any of the defendants' claims against WES assets, including trespass claims, survived the receivership sale (Count 3); damages under the doctrine of promissory estoppel because DeepRock contends that Bailey Homestead and Johnson made promises to provide right-of-way easements to WES for the pipeline (Count 4); easement by estoppel because DeepRock contends that Bailey Homestead and Johnson consented to the pipeline construction and allowed it to be constructed without objection (Count 5); tortious interference with WES's business relationship with Bailey Homestead and Johnson against Deem, Derow, and Forté based on Forté's acquisition of easements (Count 6); tortious interference with WES's contract with Johnson and Bailey Homestead by Deem, Derow, and Forté based on Forté's acquisition of easements (Count 7); civil conspiracy

against Deem, Derow, and Forté for the same allegedly tortious conduct (Count 8); breach of contract against Johnson and Bailey Homestead for failing to provide an easement for the pipeline (Count 9); breach of contract against Deem and Derow for failing to deliver the easements for the Bailey Homestead and Johnson Properties (Count 10).

{¶20} The defendants each filed amended counterclaims. Johnson, Bailey Homestead and Forté sought a declaratory judgment that the pipeline is trespassing on their Properties, claims for trespass and willful trespass-related damages against DeepRock, injunctive relief to prevent DeepRock's continued use of the pipeline, and a claim for frivolous conduct based on the fact that the court-ordered as-built survey prepared by Smith Land Surveying shows that DeepRock's pipeline encumbers 197 linear feet of the Johnson property and 1,103 feet of the Bailey Homestead property, yet DeepRock's First Amended Complaint still includes a claim for declaratory judgment that the pipeline does not trespass on the Properties.

{¶21} Deem and Derow brought breach of contract counterclaims alleging that DeepRock claimed to be the successor in interest to WES and claimed an interest in WES's contract rights with Deem and Derow and therefore Deem and Derow are entitled to counter with a claim for unpaid invoices against DeepRock. Deem and Derow also sought a declaratory judgment that their contract with WES terminated in April 2016 based on the disengagement letter and they owed no duty to WES or DeepRock. Deem and Derow also asserted a frivolous conduct claim on the same grounds as the other defendants.

{¶22} In its reply to Johnson and Bailey Homestead's counterclaim for trespass, DeepRock denied "that it is a successor-in-interest to WES" because that term was undefined.[3] However, DeepRock repeatedly admitted that its pipeline crossed the Johnson and Bailey Homestead Properties and that it transported brine through the pipeline. DeepRock contended that it lacked sufficient knowledge about the respective lengths of the pipeline on the Properties. DeepRock also admitted that it purchased the WES assets after the Forté Easements were publicly recorded.

{¶23} The parties then filed various motions for summary judgment or partial summary judgment. DeepRock filed two motions to strike evidence appellees' submitted in support of their summary judgment motions. In its first motion to strike, DeepRock sought to have the affidavits of Deem, Johnson, and Michael Bailey stricken because they allegedly contained false statements. DeepRock also asked to have the court-ordered as-built survey stricken because it lacked proper authentication and foundation under Evid.R. 702, governing testimony by experts. In its second motion to strike, DeepRock asked to have Deem's supplemental affidavit stricken because it was "ambush evidence."

{¶24} The trial court ruled on the various summary judgment motions. As to DeepRock's First Amended Complaint, the trial court dismissed the following: validity of Forté Easements (Count 2); easement by estoppel (Count 5); tortious interference with business relationships (Count 6); tortious interference with contracts (Count 7); and civil conspiracy (Count 8). The trial court allowed the following DeepRock claims to proceed forward: declaratory judgment of the pipeline location (Count 1); breach of contract claims

[3] In paragraph 1 of DeepRock's First Amended Complaint, it alleged "DeepRock is the successor in interest to all assets of [WES]," in its promissory estoppel count, DeepRock alleged that it was "successor-in-interest to the WES assets and claims," and in its tort claims DeepRock more broadly alleged it was WES's "successor."

against Forté, Johnson, and Bailey Homestead (Count 9); and breach of contract claims against Deem and Derow (Count 10).

{¶25} As to DeepRock's request for a declaration that it purchased the WES assets free and clear of any and all claims, liens and encumbrances of the appellees (Count 3 of First Amended Complaint) – the trial court granted judgment to DeepRock. The trial court's decision states:

> Johnson, Bailey and Forté's trespass claims ended at least as of the confirmation date of the sale. Their claims may have begun the day after the confirmation of the sale and continue to the present.
>
> However, the jury may find that these three defendants' claims should be denied until the date of this entry or another date because of defendants' inaction in filing proofs of claim or plaintiff incurring no successor liability for WES' debts. Johnson and Bailey could have submitted claims to the receiver prior to the sale, followed Confirmation Order, paragraph 10 procedures, or filed a lawsuit about their trespass claim instead of conveying easements to Forté.
>
> In sum, plaintiff's count against Bailey[,] Johnson and Forté is granted as of the date of the confirmation of the sale. However, it is an issue for the jury if Forté, Bailey and Johnson's claims continues to a date beyond the sale confirmation date.
>
> The Court denies defendants' motion and grants plaintiff's motion on Count III of the First Amended Complaint.

The trial court's analysis is ambiguous and the last sentence appears to broadly grant DeepRock's motion. However, when read in context, we construe it as follows: The Johnson, Bailey Homestead and Forté's trespass claims and trespass-related damages that existed up through the WES asset sale were barred. However, trespass claims brought against DeepRock that began when DeepRock acquired the pipeline could be pursued. DeepRock was not entitled to a declaration that DeepRock was not liable in trespass.

{¶26} On Forté, Johnson, and Bailey Homestead's claims, the trial court granted their claim for a declaratory judgment that DeepRock's pipeline is on their Properties (Count 1 of Amended Counterclaims) and allowed trespass and willful trespass claims to proceed forward (Counts 2 and 3 of Amended Counterclaims). The trial court also allowed Count 4 to proceed forward, which alleged frivolous conduct by DeepRock for asserting a claim that the pipeline is not on the Landowners' Properties after the court-ordered as-built survey shows that it is, and allowed Landowners and Forté's claim for an injunction against DeepRock's continued use of the pipeline.

{¶27} The trial court dismissed Deem and Derow's claim for unpaid invoices (Count 1) and claim for frivolous conduct (Count 3). The trial court determined that the claim for declaratory judgment that Deem and Derow owed no duty to DeepRock was not part of the summary judgment motion and did not address it (Count 2). Thus, Deem and Derow's declaratory judgment claim remains pending.

{¶28} The parties appealed various aspects of the trial court's decision.

II. ASSIGNMENTS OF ERROR

{¶29} DeepRock designates two assignments of error for review:

> I. The Trial Court erred in entering the May 1, 2020 *Entry: Motions for Summary Judgment.* [Summary Judgment Entry at pp. 637-647.] (Brackets sic.)
>
> II. The Trial Court erred in entering the May 1, 2020 *Entry Dismissing Two Motions as Moot.* [Entry on Motions to Strike at p. 636.] (Brackets sic.)

{¶30} Cross-appellants designate one assignment of error for review:

> I. The trial court erred in granting summary judgment in favor of Plaintiff as to Count III of Plaintiff's Amended Complaint.

III. Jurisdictional Issue

{¶31} Before addressing the merits of the errors assigned for our review, we must first consider a threshold jurisdictional issue. Ohio law provides that courts of appeals in this state have jurisdiction to review the final orders or judgments of inferior courts within their district. Section 3(B)(2), Article IV of the Ohio Constitution; R.C. 2501.02. In the event that a jurisdictional issue is not raised by the parties, then we must raise it sua sponte. *Whitaker–Merrell Co. v. Geupel Constr. Co.,* 29 Ohio St.2d 184, 186, 280 N.E.2d 922 (1972); *In re Murray*, 52 Ohio St.3d 155, 159-160, 556 N.E.2d 1169, fn. 2 (1990); *Kouns v. Pemberton,* 84 Ohio App.3d 499, 501, 617 N.E.2d 701 (4th Dist.1992).

{¶32} Here the trial court's judgment disposed of several, but not all, of Deeprock's claims and several of the appellees' counterclaims. In such instances under Civ.R. 54(B) the trial court may enter final judgment as to one or more but fewer than all of the claims or parties upon an express determination that there is no just reason for delay. Here the trial court's judgment includes the "no just reason for delay" language.

{¶33} The Supreme Court of Ohio has held that " '[f]or an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.' " *Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶ 7, quoting *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 153, 545 N.E.2d 1260 (1989). A decision dismissing some causes of action, while leaving some remaining does this:

> R.C. 2505.02(B)(1) provides that an order "that affects a substantial right in an action that in effect determines the action and prevents a judgment" is

> final and appealable. The portions of the trial court's order that granted summary judgment to several defendants on entire claims against them "determine[d] the action" as to those parties, and thus was a final order pursuant to R.C. 2505.02. Summary judgment precluded any recovery on those claims. Together with the appropriate "no just cause for delay" Civ. R. 54(B) language that the trial court added on June 3, 2005, those aspects of the order were final and appealable, even though other portions of the order were not immediately appealable. Therefore, the [order on appeal], with the later addition of the Civ.R. 54(B) language, is final and appealable, but only to the extent that it granted summary judgment on entire claims. (Citations omitted.)

Stuck v. Miami Valley Hosp., 2d Dist. Montgomery No. 28233, 2020-Ohio-305, ¶ 8, quoting *Interstate Properties v. Prasanna, Inc.*, 9th Dist. Summit No. 22734, 2006-Ohio-2686, ¶ 14.

{¶34} Therefore, the trial court's decision granting summary judgment on some of the claims in the case and dismissing them, and appending a Civ.R. 54(B) certification, is a final appealable order as to the claims that were granted and/or dismissed. The portion of the trial court's order that denies summary judgment on DeepRock's declaratory judgment claim (Count 1), promissory estoppel claim (Count 4), and breach of contract claims (Counts 9 and 10) and the portion that denies summary judgment on Forté and the Landowner's counterclaims for willful trespass and frivolous action (Counts 2, 3, and 4) are not final or reviewable.

{¶35} Additionally, as DeepRock concedes, a trial court's order denying a motion to strike an affidavit or other evidence supporting a summary judgment motion would not be a final appealable order. However, in the context of our review of the trial court's decision granting summary judgment on some of the claims, the trial court's denial of DeepRock's motions to strike is directly related and reviewable. *See Ceasor v. City of East Cleveland*, 2018-Ohio-2741, 112 N.E.3d 496 (8th Dist.) (finding that an order

denying summary judgment on city's claim of governmental immunity was a final appealable order and the related order denying city's motion to strike plaintiff's expert report filed in opposition to city's summary judgment motion was reviewable on appeal).

IV. DeepRock's Motions to Strike

{¶36} We will address DeepRock's second assignment of error first because the court-ordered as-built survey and affidavits it sought to have stricken supports the appellees' summary judgment motion. If the trial court erred in denying the motions to strike, it may substantively impact our review of DeepRock's first assignment of error and the cross-appellants' sole assignment of error, both which challenge the trial court's decision on the summary judgment motions.

{¶37} After DeepRock filed its complaint and the appellees filed their counterclaims, the appellees filed a combined motion for partial summary judgment accompanied by affidavits from Deem, Michael Bailey as the managing member of Bailey Homestead, and Johnson as well as the court-ordered as-built survey of the pipeline. Appellees eventually withdrew this summary judgment motion because, while it was pending, DeepRock filed a First Amended Complaint and the appellees filed Amended Counterclaims. Appellees then filed new summary judgment motions with new supporting affidavits, DeepRock filed a motion for partial summary judgment, and the parties filed their respective oppositions and replies.

{¶38} DeepRock filed two separate motions to strike. One pursuant to Civ.R. 56(G) that sought to: (1) strike the affidavits of Deem, Johnson, and Bailey on the ground that these affidavits conflicted with the affiant's deposition testimony, contained speculative statements, and mischaracterized documents; (2) strike the court-ordered as-

built survey of the pipeline because it lacked proper authentication and foundation; and (3) impose sanctions on the appellees. The second motion to strike argued that a supplemental Deem affidavit and accompanying exhibits should be stricken because it was submitted in support of a reply memorandum as speculative ambush evidence, and it contained testimony about lost or destroyed documents in violation of Evid.R. 1002 and 1004. Appellees opposed the motions to strike.

{¶39} The trial court did not rule on DeepRock's motions to strike until after it decided the parties' summary judgment motions and then it denied them as moot. We find that the trial court erred in denying the motions as moot because it should have first determined whether it would consider this evidence before rendering its decision on the summary judgment motions. However, we find this error harmless because, for alternative reasons, we affirm the trial court's decision to deny DeepRock's motions to strike.

A. Standard of Review

{¶40} DeepRock's motions to strike were based on two different legal theories. First, it argued that the survey should be stricken because it lacked proper authentication and foundation and that Deem's supplemental affidavit should be stricken because it was included with the reply memorandum and should be excluded under Evid.R. 1002, which are all evidentiary challenges. "Decisions involving the admissibility of evidence are reviewed under an abuse-of-discretion standard of review." *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶ 22, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032; *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 19 ("It is well established that a trial court's decision to admit evidence is an evidentiary determination within the broad discretion of

the trial court and subject to review on an abuse-of-discretion standard."). Thus, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence absent a clear showing of an abuse of discretion with attendant material prejudice to the complaining party. *State v. Green*, 184 Ohio App.3d 406, 2009-Ohio-5199, 921 N.E.2d 276, ¶ 14 (4th Dist.).

{¶41} When, however, an appellant alleges that a trial court's evidentiary ruling was " 'based on an erroneous standard or a misconstruction of the law,' " an appellate court reviews the trial court's evidentiary ruling using a de novo standard of review. *Wray v. Wessell*, 4th Dist. Scioto Nos. 15CA3724 and 15CA3725, 2016-Ohio-8584, ¶ 13, citing *Morris* at ¶ 16, quoting *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist.1992); *accord Estate of Johnson* at ¶ 22 (reviewing admissibility of evidence by first examining whether, as a matter of law, statute applied, and then once threshold question concerning applicability of statute resolved, reviewing whether trial court abused its discretion); *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13 (stating that "[w]hen a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate"); Painter and Pollis, *Ohio Appellate Practice*, Appendix G (2015) (stating that although trial court decisions involving the admission of evidence are generally reviewed as a discretionary matter, but they are subject to de novo review if a clear legal rule applies. "For example, a trial court does not have discretion to admit hearsay into evidence"). *State v. Wright,* 2017-Ohio-9041, 101 N.E.3d 496, ¶ 24-25 (4th Dist.).

{¶42} Second, DeepRock argued that the Deem, Johnson, and Bailey affidavits should be stricken as made in bad faith under Civ.R. 56(G). In reviewing the denial of a Civ.R. 56(G) motion, we apply an abuse of discretion standard. *Residential Funding Co. v. Thorne*, 2012-Ohio-2552, 973 N.E.2d 294, ¶ 41 (6th Dist.). " '[A]buse of discretion' [means] an 'unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.' " "An abuse of discretion includes a situation in which a trial court did not engage in a ' "sound reasoning process." ' " "The abuse-of-discretion standard is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." (Citations omitted.) *Gulbrandsen v. Summit Acres, Inc.*, 2016-Ohio-1550, 63 N.E.3d 566, ¶ 31 (4th Dist.).

B. Review of Court Ordered As-Built Survey

{¶43} DeepRock argued that the court-ordered as-built survey should be stricken because it was not properly authenticated and the appellees failed to lay the proper foundation. The trial court decided that this issue was made moot by its decision on the summary judgment motions and denied the motion to strike. However, we find that the trial court should have determined the admissibility of the survey prior to ruling on the summary judgment motions and its failure to do so was an error of law subject to de novo review. Nevertheless, we find the error harmless and affirm the trial court's denial on substantive grounds because the survey was properly authenticated and did not lack proper foundation.

{¶44} At DeepRock's request and with the parties' agreement, the trial court ordered Smith Land Surveying, Inc. to prepare an as-built survey of the pipeline. Smith Land Surveying completed the survey and DeepRock's attorney provided a copy of it to

appellees' attorneys via email. Appellees attached a copy of this email communication to its memorandum opposing the motion to strike showing that they obtained the survey from DeepRock's attorney. Appellees' attorney tried to obtain an affidavit from Smith Land Surveying to authenticate the survey as a true and accurate copy, but Smith Land Surveying responded that the project manager involved was no longer employed there.[4] Instead, Mr. Smith sent an email to appellees' attorney that contained a transmittal letter, a memo, and a copy of the as-built survey. In the memo, Mr. Smith stated, "We prepared an As-Built Brine Line Location Exhibit as requested by DeepRock Disposal Solutions, LLC on the 26th of January 2018." The as-built survey included the notation that it was prepared on January 26, 2018 for DeepRock by Smith Land Surveying as Job No. 8780. The transmittal letter was addressed to appellees' counsel, stated that it was from Smith Land Surveying for Job No. 8780, and stated, "We are sending you attached * * * 1 copy As-Built Brine Line Location Exhibit" and "1 copy Memo." The transmittal letter, memo, and as-built survey were attached to appellees' memorandum opposing the motion to strike.

{¶45} Appellees argued that these documents provided ample proof to establish that the as-built survey is what they claim it is under Evid.R. 901. We agree.

{¶46} Evid.R. 901(A) governs authentication, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Subpart (B) provides, "By way of illustration only, and not by way of limitation, the following are

[4] The project manager was not the only person who could have authenticated the survey. It could have been authenticated by a person at Smith Land Surveying with the ability to compare the version of the survey appellees submitted with their summary judgment motion to the version Smith Land Surveying prepared and verify that it was a true and accurate copy.

examples of authentication or identification * * *." "The threshold standard for authenticating evidence is low." *Stumpff v. Harris*, 2015-Ohio-1329, 31 N.E.3d 164 (2d Dist.).

> Evid.R. 901 does not provide an exhaustive list of the means of authentication. Indeed, Evid.R. 901(B) expressly states, "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule [.]" In our view, testimony regarding the production of a document during discovery may provide sufficient indicia of authenticity to satisfy Evid.R. 901.
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> * * *
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> Numerous courts, both state and federal, have held that items produced in discovery are implicitly authenticated by the act of production by the opposing party. *See, e.g., Welch v. Bissell*, N.D.Ohio No. 1:12CV3108, 2013 WL 6504679, *4 (Dec. 11, 2013) (video was properly authenticated by affidavit from counsel that the video was produced by the opposing party during discovery); *Churches of Christ in Christian Union v. Evangelical Ben. Trust*, S.D.Ohio No. C2:07CV1186, 2009 WL 2146095, *5 (July 15, 2009) ("Where a document is produced in discovery, 'there [is] sufficient circumstantial evidence to support its authenticity' at trial."); *Hampton v. Bruno's, Inc*., 646 So.2d 597, 600 (Ala.1994) ("when a document is produced by a party during discovery, that party waives the right to object to the admission of the document on the basis of its genuineness or authenticity") (interpreting *Alabama Power Co. v. Tatum,* 293 Ala. 500, 306 So.2d 251 (1975)); *Denison v. Swaco Geolograph Co*., 941 F.2d 1416, 1423 (10th Cir.1991); *McQueeney v. Wilmington Trust Co*., 779 F.2d 916, 928 (3d Cir.1985) (fact that documents were produced in discovery was probative of authenticity); *United States v. Brown*, 688 F.2d 1112 (7th Cir.1982) ("Brown produced the documents voluntarily and, as an officer of the corporation, he was in a position to vouch for their authenticity. Just as he could have identified the records by oral testimony, his very act of production was implicit authentication.").
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> This is not to say that everything produced in discovery should automatically be deemed authenticated. *See, e.g., Cramer v. NEC Corp. of America,* 5th Cir. No. 12–10236, 2012 WL 5489395, *2 (Nov. 13, 2012) (document purporting to be job description was not authenticated by production in discovery where the discovery request was too broad to provide evidence of authenticity, the document itself bore no indication of authenticity, and deposition testimony regarding the document was noncommittal). As explained by the Supreme Court of Kentucky:

> Other courts have applied this notion of implied authentication in the context of civil discovery, sometimes stating the rule quite broadly. *See, e.g., South Central Bank and Trust Company v. Citicorp Credit Services, Inc*., 863 F.Supp. 635, 645 (N.D.Ill.1994) ("[P]roduction of a document amounts to an implicit authentication of the document.") (citing *United States v. Brown*, 688 F.2d 1112 (7th Cir.1982)); *In re Greenwood Air Crash*, 924 F.Supp. 1511, 1514 (S.D.Ind.1995). ("Production of a document by a party constitutes an implicit authentication of that document.") (also citing *Brown*). In most of these cases, however, the person producing the document is competent to authenticate it—a private individual producing his own papers, say, or a business's records custodian producing the business's documents—and in those cases production can indeed be said to imply the document's authenticity. * * * [H]owever, parties may have in their possession or control documents from other sources and even documents of unknown origin, which they would not be competent to authenticate directly. It is hard to see in those circumstances how the mere production of the document—in response, say, to a very broad request for "everything in your possession or control having to do with X"—implies anything about the extraneous document's authenticity.
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> *Thrasher v. Durham,* 313 S.W.3d 545, 548 (Ky.2010). The Supreme Court of Kentucky thus held that "the fact that the document was produced in discovery may give rise to an inference of authenticity where production was made by someone competent to provide authentication, but the mere fact of production does not suffice where that competence is lacking." *Thrasher* at 549.

Stumpff at ¶ 33-38; *Nau v. Stonebridge Operation Co*., 7th Dist. Noble No. 19NO0466, 2019-Ohio-3647, ¶ 39 ("Ohio courts have held that items produced in discovery are implicitly authenticated by the act of production by the opposing party."); *Diller v. Miami Valley Hospital,* 2017-Ohio-9051, 102 N.E.3d 520 (2d Dist.). The Supreme Court of Ohio recently discussed the holdings in *Stumpff* and *Nau* and acknowledged that testimony of a witness with knowledge is not the only method by which documents may be authenticated. Under Evid.R. 901(B)(4), trial courts may take into consideration the distinctive characteristics of the document and the circumstances of the case. *Columbus*

City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision, 159 Ohio St.3d 283, 2020-Ohio-353, 150 N.E.3d 877, ¶ 20-22 ("Indeed, 'implied authentication by production in discovery' has been recognized as satisfying the requirement of Evid.R. 901" and finding that a purchase and sale agreement and a settlement statement were authenticated under Evid.R. 901(B)(4)).

{¶47} DeepRock does not challenge the authenticity of the survey on substantive grounds – it does not argue that the survey attached to the summary judgment motion differs in any material respect from the copy provided by DeepRock's counsel to appellees' counsel. Rather DeepRock contends that the trial court should strike the survey because it was not authenticated by the method set out in Evid.R. 901(B)(1) (testimony of witness with knowledge). Here, considering the totality of the circumstances, we find that the survey was authentic. The survey was performed pursuant to the trial court's order, the expert surveyor was agreed upon by the parties, a copy of the survey was produced by DeepRock's attorney during the course of the litigation and was responsive to document production requests, the survey was produced and identified in subsequent communications from the surveying company that prepared it, and the job number identified on the survey matches the one on the transmittal letter. These circumstances provide strong evidence that the survey was authentic and were sufficient to show that the survey is what appellees claimed it to be under Evid.R. 901(B)(4).[5]

{¶48} DeepRock also argued that the survey should have been stricken as inadmissible expert testimony under Evid.R. 702, which outlines the foundation for expert

[5] Given the circumstances, the parties could have readily stipulated to the survey's authenticity but this professional courtesy was not extended. Additionally, the trial court could order the surveyor to file a certified copy of the as-built survey with the court.

witness testimony, i.e., the expert's qualifications and methods. However, here the parties agreed to retain this expert surveyor. The trial court found the expert acceptable and ordered the parties to jointly share the costs. Any objection by DeepRock to Smith Land Surveying's expertise was waived when it agreed to use them as the expert – any error was invited.

{¶49} Although the trial court's rationale for denying DeepRock's motion to strike the court-ordered as-built survey was incorrect, the decision to deny it was not. Thus, the error was harmless. We will consider the survey in our review of the parties' assignments or error.

C. Review of Civ.R. 56(G) Sanctions

{¶50} " 'Unless a motion to strike has been properly granted pursuant to Civ.R. 56(G), all evidence presented is to be evaluated by the trial court pursuant to Civ.R. 56(C) before ruling.' " *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913, ¶ 24, quoting *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 26. Civ.R. 56(G) provides:

> (G) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

{¶51} DeepRock must show that the affidavits were made in "bad faith." "Bad faith" means "a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will. It partakes of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Slater v. Motorists Mut. Ins. Co.,*

174 Ohio St. 148, 151, 187 N.E.2d 45, 48 (1962), overruled on other grounds by *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461, 644 N.E.2d 397 (1994). In *Deutsche Bank Trust Co. v. Fox*, 5th Dist. No. 11CA0065, 2012-Ohio-2855, the appellate court affirmed the trial court's denial of Civ.R. 56(G) sanctions where the appellant argued that the affiant "robo-signed" his affidavit without reading every paragraph or inspecting the exhibits attached to it. The appellate court noted that there was "a dearth of Ohio case law" interpreting "bad faith" as used in Civ.R. 56(G), so the court relied on case law from Ohio federal district courts and held that "bad faith" is "where affidavits contained perjurious or blatantly false allegations or omitted facts concerning central issues to the resolution of the case." *Id* at ¶ 30-31 (internal quotations omitted). "Sanctions under Rule 56 are 'rare' and the conduct involved must be 'egregious.' " *TCF Inventory Finance, Inc. v. Northshore Outdoor, Inc.,* N.D. Ohio No. 1:11CV85, 2012 WL 2576367 (July 3, 2012); *Abdelkhaleq v. Precision Door of Akron,* 653 F.Supp.2d 773, 787 (N.D. Ohio 2009). "Additionally, courts have not awarded sanctions under Rule 56(g) 'where a litigant's actions, even though wrongful, did not affect the disposition of the summary judgment motion.' " *Abdelkhaleq* at 787.

{¶52} DeepRock's motions focus exclusively on the "bad faith" component of Civ.R. 56(G); there is no evidence in the record of "purposeful delay." DeepRock argued that Deem's affidavit should be stricken because Deem's affidavit states that Johnson refused to execute a written easement for the pipeline on his Property but in his deposition Deem testified that Johnson agreed to allow the pipeline to be built on his Property. However, our review of the deposition shows that Deem testified that it was his understanding that Johnson may have been in negotiations over a two-foot section of his

Property. We find no inconsistency between Deem's deposition testimony and his affidavit. Johnson could have engaged in preliminary negotiations about a possible easement across a small section of his Property and ultimately refused to execute a written easement for the pipeline to cross a larger or different section of his Property.

{¶53} DeepRock also argued that Deem's affidavit conflicted with Forté's deposition testimony concerning the level of Deem's involvement in the Forté easement transaction. In his affidavit, Deem testified that after he introduced Forté to Johnson and Bailey Homestead, he had no further involvement. However, DeepRock contends that this conflicts with Robin Forté's deposition, who testified that funding for the easement came from Deem and that an employee of Derow[6] notarized the easement. Without specific dates, this testimony is vague and imprecise concerning when Deem's involvement ended. Regardless, it cannot constitute bad faith by Deem. That Deem and Forté – two different witnesses – may have conflicting testimony is not a basis to strike Deem's affidavit on bad faith grounds. DeepRock points to no evidence that Deem was lying or intentionally deceptive. If a witness's deposition testimony actually conflicts with another witness's affidavit about a material fact, then it may be grounds to deny summary judgment. But it does not rise to the level of bad faith, which requires perjurious or blatantly false facts concerning *central issues* to the resolution of the case.

{¶54} DeepRock argued that Johnson's first affidavit contained false statements and that Johnson admitted to "scanning over" the affidavit. However, the first affidavit was submitted in support of the first summary judgment motion, which was withdrawn and not considered by the trial court. There is no evidence the trial court considered evidence

[6] Deem testified that Derow had no employees and instead used independent contractors to perform services.

supporting the withdrawn motion. Thus, there is no evidence that those affidavits affected the disposition of the second summary judgment motion, which had separate, different affidavits supporting it. *Abdelkhaleq* at 787 (courts have not awarded sanctions under Rule 56(g) "where a litigant's actions, even though wrongful, did not affect the disposition of the summary judgment motion"). And, "scanning over" an affidavit is not the same as providing perjurious and blatant false statements in it. *See Deutsche Bank Trust Co., supra* (robo-signing affidavit does not constitute bad faith).

{¶55} DeepRock argued that Johnson's second affidavit falsely states that he never agreed to the installation of the pipeline across the length of his property. It contends that this statement conflicts with Johnson and, as previously discussed, Deem's deposition testimony. However, Johnson's deposition testimony was that he had preliminary discussions about the possibility of the pipeline cutting across a 15-foot corner – not an installation across of the full length of his Property. We find no inconsistency in his affidavit and his deposition testimony.

{¶56} Finally, DeepRock argued that Michael Bailey's affidavit contained blatantly false and perjurious statements concerning if and when Bailey had written notice of the WES receivership. DeepRock contends that Bailey's affidavit stated that he had no knowledge of the WES receivership until after DeepRock filed its lawsuit in July 2017. However, in his deposition Bailey testified that Johnson told him about the WES receivership in December 2016, seven months earlier. In his deposition, Bailey testified that Johnson told him there was a receivership, but did not explain what a receivership was or what happens in one. Bailey testified that he did not do any research on his own to figure out what a receivership was or what happens in one. Thus, reading Bailey's

affidavit and deposition testimony together, it appears that Bailey knew of the existence of the WES receivership in December 2016, but did not have an understanding of the WES receivership until seven months later when DeepRock filed its lawsuit. Thus, Bailey's affidavit statement "I had no knowledge of any receivership action in association with WES until after the filing of the subject litigation" is inaccurate. A more accurate statement would be that Bailey had knowledge of the existence of the WES receivership, but no knowledge or understanding of the implications of the WES receivership until after DeepRock filed its lawsuit. Regardless, DeepRock provided no evidence that Bailey's inaccurate statement was made with the requisite bad faith intent or an ulterior motive to commit fraud, or that the timing of when Bailey learned of the WES receivership is a central issue in the case.

{¶57} DeepRock also argued that Bailey made blatant bad faith falsehoods when he testified that checks he received from WES in the sum of $6,000 and $300 were reimbursement for attorney fees in connection with the establishment of a limited liability company and the transfer of property to the limited liability company. DeepRock speculates that the $6000 and $300 payments could not have been for setting up a limited liability company and transferring the property because DeepRock contends that the attorney fees for this work was $2,253.50 plus $1,496 for total fees of $3,749.50.

{¶58} We have reviewed Bailey's deposition testimony and related exhibits and do not find any inconsistency in his testimony about the $6,000 and $300 payments. Bailey incurred expenses and attorney fees for two different legal services: (1) those associated with setting up the Bailey Homestead LLC and related property transfers to the Bailey Homestead –which appear to exceed $11,000 and (2) those associated with

probating his mother's estate – which may not have exceeded $2,253.50. In his affidavit, Bailey testified that "WES * * * issued checks in the amount of $6,000 and $300 to Bailey Homestead, which I understood to be reimbursement for attorney's fees incurred * * * in connection with the establishment of the limited liability company and the transfer of the Property to that limited liability company." In his deposition, Bailey testified that the $6,000 check was "paid for the LLC to get established and it reimbursed what was taken out that was supposed to be transferred in." DeepRock's counsel showed Bailey a letter from attorneys who were handling the probate estate of his mother, Hattie Grace Bailey, which stated that the probate court had approved their attorney fees and the total amount due is $2,253.50. The letter also discussed the final steps needed to finalize the estate. Bailey testified that he did not know if $2,253.50 was the total amount of attorney fees or if there were additional bills associated with handling her probate estate. Regardless, from the face of the letter, which is marked "RE: Estate of Hattie Grace Bailey" the $2,253.50 were fees associated with the probate of the Hattie Bailey estate. Bailey also testified that attorney fees in the sum of $1,496 were incurred to set up the Bailey Homestead LLC and that an additional $10,000 in expenses were incurred to purchase and transfer a sibling's interest in the Property, making these total costs in excess of $11,000.

{¶59} DeepRock argued that because the $2,253.50 in probate estate attorney fees and the $1,496 in the initial attorney fees associated with setting up the LLC did not add up to $6,000, then the $6,000 payment could not possibly have been for attorney fees. And because, in his deposition, Bailey agreed that mathematically the two attorney fee figures did not add up to $6,000, DeepRock claims he is blatantly lying about the purpose of the $6,000 payment. However, Bailey's affidavit states that the $6,300 was

reimbursement for attorney's fees to set up the limited liability company and also reimbursement for the transfer of the Property to the limited liability company, which appears to include a $10,000 expense associated with a sibling buyout.[7] And, in his deposition, he qualified his responses, stating that he did not know the total amount of attorney fees associated with his mother's estate or the total attorney fees associated with the Bailey Homestead LLC.

{¶60} Again, as with the others, we find Bailey's affidavit does not contain material inconsistencies; certainly not any inaccuracies that would constitute blatant falsehoods intended to perpetuate a fraud under Civ.R. 56(G). We have reviewed all the arguments DeepRock made in its first motion to strike, even those we have not discussed here in detail, and we find nothing that constitutes bad faith. We affirm the trial court's decision denying DeepRock's motion to strike the affidavits of Deem, Johnson, and Bailey. However, we do so on alterative substantive grounds, not for mootness. As with the as-built survey, we will consider the affidavits of Deem, Johnson and Bailey in determining the merits of the appeal and cross-appeal.

D. Deem's Supplemental Affidavit in Reply

{¶61} DeepRock's second motion to strike addressed Deem's supplemental affidavit submitted with appellees' reply brief. DeepRock argued that Civ.R. 56 does not permit a party to obtain summary judgment by "ambush" by introducing new arguments or evidence for the first time in a reply brief. DeepRock also argued that the affidavit

[7] Bailey's affidavit can be read two ways grammatically: (1) The $6,300 was to reimburse legal fees associated with setting up the LLC and legal fees associated with the transfer of Property to the LLC or (2) The $6,300 was to reimburse for legal fees associated with setting up the LLC and to reimburse for the transfer of the Property to the LLC. In light of his deposition testimony it would appear that the latter reading is the one intended.

should be stricken under Evid. R. 1002 and 1004 because Deem destroyed documents in bad faith. Appellees responded that Deem's supplemental affidavit did not raise any new grounds and was submitted to rebut arguments DeepRock raised in its memorandum in opposition and that there was no evidence Deem destroyed documents.

{¶62} In its appellate brief, DeepRock focuses its argument on its motion to strike affidavits on bad faith grounds under Civ.R. 56(G) and did not specifically address the supplemental Deem affidavit submitted with the reply memorandum. However, because its assignment of error broadly addressed both motions to strike, we will address it.

{¶63} Where the affidavit does not raise new grounds and is submitted to counter evidence in a memorandum in opposition, there "is no general prohibition against affidavits being timely submitted with reply briefs, but instead, is a practice that has been utilized in other cases." *Cashlink, L.L.C. v. Mosin, Inc.*, 10th Dist. Franklin No. 12AP-395, 2012-Ohio-5906, ¶ 11. Here Deem's supplemental affidavit addresses issues that were previously raised in the case. The parties had knowledge that Deem had recorded some right-of-way easements and retained 11 others after WES failed to pay some of Deem's invoices. The parties were also aware that Johnson and Bailey Homestead refused to execute easements on the Properties. Deem gave deposition testimony concerning the 11 rights-of-way and testified that none of them were from Johnson or Bailey Homestead. Deem also testified that he recorded memoranda of options with at the recorder's office. He submitted copies of those with his affidavit. These were public records directly related to DeepRock's pipeline, not "ambush evidence."

{¶64} Additionally, there is no evidence that Deem lost or destroyed documents in bad faith. Deem testified that he had turned them over to his attorney several years

earlier and had not seen them since that time. Therefore, under Evid.R. 1004(1), the original 11 rights-of-way are not required because they have been lost or destroyed without evidence of bad faith.

{¶65} Again, we find that the trial court erred as a matter of law when it waited to rule on, then denied as moot, DeepRock's motion to strike Deem's supplemental affidavit. However, we find the error harmless because the motion to strike was properly denied. The affidavit did not raise new grounds, was rebuttal evidence, and was not barred under Evid.R. 1004(1).

{¶66} In sum, we find that the trial court erred when it denied as moot DeepRock's motions to strike. However, it was harmless error because the motions were properly denied on substantive grounds. When reviewing the parties' remaining assignments of error, we will consider, as the trial court did, the court-ordered as-built survey, both Deem affidavits, and the Johnson and Bailey affidavits. *See Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 604 N.E.2d 138 (1992). We overrule DeepRock's second assignment of error.

V. DeepRock's Appeal of Summary Judgment

A. Standard of Review

{¶67} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. Accordingly, we afford no deference to the trial court's decision and independently review the record and the inferences that can be drawn from it to determine whether summary judgment is appropriate. *Harter v. Chillicothe Long–Term Care, Inc*., 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12; *Grimes v. Grimes*, 4th Dist. Washington No. 08CA35, 2009-Ohio-3126, ¶ 16.

{¶68} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the nonmoving party's favor. Civ.R. 56(C). The party moving for summary judgment bears the initial burden to demonstrate that no genuine issues of material fact exist and that they are entitled to judgment in their favor as a matter of law. *Dresher v. Burt,* 75 Ohio St.3d 280, 292–293, 662 N.E.2d 264 (1996). To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," that affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher* at 293, 662 N.E.2d 264. Moreover, the trial court may consider evidence not expressly mentioned in Civ.R. 56(C) if such evidence is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *Discover Bank v. Combs*, 4th Dist. Pickaway No. 11CA25, 2012-Ohio-3150, ¶ 17; *Wagner v. Young*, 4th Dist. Athens No. CA1435, 1990 WL 119247, *4 (Aug. 8, 1990). Once that burden is met, the nonmoving party then has a reciprocal burden to set forth specific facts to show that there is a genuine issue for trial. *Dresher* at 293, 662 N.E.2d 264; Civ.R. 56(E). *Am. Express Bank, FSB v. Olsman*, 2018-Ohio-481, 105 N.E.3d 369, ¶ 10-11 (4th Dist.).

{¶69} For its first assignment of error, DeepRock contends that the trial court erred in issuing its decision on the summary judgment motions. DeepRock identified four issues: (1) the dismissal of its easement by estoppel claim; (2) the granting of appellees' trespass claims; (3) the dismissal of its claim against the Forté Easements; and (4) the dismissal of its tortious interference with business relationships, tortious interference with contracts, and civil conspiracy claims.

B. Easement by Estoppel

{¶70} DeepRock alleged that Johnson and Bailey Homestead, the Landowners, were aware of WES's efforts to build a pipeline, consented to its location and construction on their Properties, and never objected. Therefore, DeepRock contended that it has an easement by estoppel. DeepRock did not seek summary judgment on its easement by estoppel claim; the Landowners and Forté sought summary judgment that this claim be dismissed.

{¶71} As an initial matter, DeepRock brought an easement by estoppel claim because of two important undisputed facts: (1) DeepRock's pipeline crosses the Landowners' Properties and (2) DeepRock (and the pipeline's prior owner, WES) did not have recorded written easements from the Landowners allowing the pipeline to cross the Properties.

{¶72} The Supreme Court of Ohio recognizes only three ways to create an easement: by deed, by prescription, or by implication. We recently discussed the existence of the equitable remedy of estoppel to create an easement:

> This court and other Ohio appellate courts have recognized easements by estoppel. *See Pinkerton*, 2015-Ohio-377, at ¶ 32-33; *Northwest Ohio Properties, Ltd. v. County of Lucas*, 6th Dist. Lucas No. L-17-1190, 2018-Ohio-4239, 2018 WL 5116596, ¶ 37-42; *Von Stein v. Phenicie*, 3d Dist. Crawford

> No. 3-13-18, 2014-Ohio-4872, 2014 WL 5510473, ¶ 74-77 (recognizing easements by estoppel but declining to find one under the circumstances); *Byham v. Pierce*, 2d Dist. Montgomery No. 13206, 1992 WL 127714, *2-3 (June 9, 1992). We have stated: "A landowner cannot remain silent and permit another to spend money *in reliance on a purported easement*, when in justice and equity the landowner should have asserted his conflicting rights. If he fails to object, under these circumstances the landowner is estopped to deny the easement." (Emphasis added.) *Pinkerton* at ¶ 32. This standard is consistent with *Yeager*, *Kallner*, and the purpose of equitable estoppel " 'to prevent actual or constructive fraud and to promote the ends of justice.' " *Doe*, 116 Ohio St.3d 538, 2008-Ohio-67, 880 N.E.2d 892, at ¶ 7, quoting *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145, 555 N.E.2d 630 (1990).

Fling v. Daniel, 2019-Ohio-1723, 130 N.E.3d 319, ¶ 23 (4th Dist.) ("our research has not revealed any cases in which the Supreme Court of Ohio has explicitly or implicitly recognized easements by estoppel, it has also not revealed any cases in which that court declined to recognize such an easement despite the presence of actual or constructive fraud"). "The party seeking to establish an equitable easement must show (1) a misrepresentation or fraudulent failure to speak, and (2) reasonable detrimental reliance. Courts are generally reluctant, however, to find an easement by estoppel on the basis of passive acquiescence." (Citations omitted.) *Arkes v. Gregg,* 10th Dist. Franklin No. 05AP-202, 2005-Ohio-6369, ¶ 27-28.

{¶73} The court in *Maloney, infra,* explained the challenges a claimant faces in proving easement by estoppel:

> Claimants alleging misrepresentation not only must prove that the alleged statements were made but also must establish that those statements were actually misrepresentations. Showing reliance presents additional problems. An easement by estoppel claimant cannot rely on an assertion that may be checked easily in the public records or that is contrary to information in the claimant's possession. Moreover, the claimant must change position personally; proof of reliance by third parties does not suffice. Finally, what constitutes reliance depends on the facts and the circumstances of the particular case. Locating improvements on the dominant estate in order to take advantage of the represented easement has been held to satisfy the reliance requirement. Expending money to repair or improve a servient estate also evinces reliance.

> "Courts are reluctant to find an easement by estoppel on the basis of 'mere passive acquiescence.' Nonetheless, under certain circumstances, equity imposes an obligation to disclose information regarding the existence or location of an easement. Such a duty may be found when the servient estate owner observes the claimant improving the servient estate, but not usually when the servient estate owner stands by while the claimant improves his own property, the alleged dominant estate. Furthermore, there is authority that an obligation to speak does not arise when a claimant is already in possession of the relevant information."

Maloney v. Patterson, 63 Ohio App.3d 405, 410, 579 N.E.2d 230, 233 (9th Dist.1989), quoting Bruce & Ely, The Law of Easements and Licenses in Land (1988), Section 6.01.

{¶74} Johnson and Bailey Homestead argued that they were entitled to a dismissal of DeepRock's easement by estoppel claim because it was undisputed that they never actively misled DeepRock's predecessor that easements existed or fraudulently failed to rebut WES's belief in the existence of easements. Michael Bailey, the managing member of Bailey Homestead, provided affidavit testimony that: (1) he did not agree verbally or in writing to the installation of the pipeline on the Property, (2) there was no written document between Bailey Homestead and WES that grants an easement to WES, and (3) he informed both Deem, WES's landman, and John Jack, WES's chief executive officer, that the pipeline's presence on his Property constituted a trespass. John Jack never returned Bailey's telephone calls.

{¶75} Johnson also provided affidavit testimony that, although he gave two right-of-way options to WES on two of his other properties, he never gave any verbal or written authorization to WES for the construction or installation of the pipeline on the subject Property. Johnson explained that his daughter lived on the Property and, due to the size of the Property, he did not want the pipeline to negatively interfere with her enjoyment of it. Johnson also testified that he notified Deem and John Jack that the pipeline

construction constituted a trespass and that John Jack did not return his calls. Johnson's daughter also provided affidavit testimony and photographic evidence that she witnessed and photographed the unauthorized pipeline construction in the fall of 2015 on her father's Property and telephoned her father and notified him of the activity.

{¶76} DeepRock argued in its memorandum in opposition that a genuine issue of material fact existed as to whether it was entitled to an easement by estoppel because, "aside from their self-serving testimony," "there is no evidence that Landowners [Johnson and Bailey Homestead] ever raised objections to the Pipeline" until a year after the pipeline was installed. DeepRock argued that the construction workers WES hired to clear, excavate and install the pipeline were not told by the Landowners that they were trespassing. DeepRock included affidavit testimony from three people who worked on the pipeline construction that stated that no landowner ever accused them of trespassing or otherwise told them that they had no authority to be on the lands during the pipeline construction.

{¶77} DeepRock also included an affidavit from Christyann Chavez, who testified that she was familiar with the books and records of DeepRock and the WES records DeepRock obtained through the receivership sale. Chavez testified that WES's landman, Deem, did not send any written correspondence to WES informing it that the landman had not obtained easements from Bailey Homestead or Johnson. DeepRock also argued that WES sent Bailey Homestead several checks that Bailey did not adequately explain, and that Johnson admitted to agreeing to allow the pipeline to cross a corner of his Property. Finally, DeepRock argued that statements or omissions made by WES's

landman, Deem, prevented the Landowners from denying the existence of easements on their Properties.

{¶78} In reply, as rebuttal to DeepRock's argument that statements or omissions by WES's own landman Deem estopped the Landowners from denying the existence of an easement, Bailey Homestead and Johnson submitted the affidavit testimony of Deem. Deem testified that he was contacted by John Jack of WES to serve as the professional landman to obtain easements for the pipeline project. However, WES stopped paying his invoices and Deem terminated his contract with WES for nonpayment. Deem testified that Johnson refused to negotiate an easement on his Property and Bailey Homestead never agreed to negotiate an easement on the Property. As a result, Deem did not have or provide documentation to WES for easements on either the Bailey Homestead or Johnson Properties.

{¶79} The trial court reviewed the evidence submitted by the parties in support of and against the dismissal of the easement by estoppel claim and found, "plaintiff does not have an easement by estoppel." "The court dismisses Count V [easement by estoppel] of the First Amended Complaint * * *." Though it is not clear from the decision the rationale for the trial court's determination, our review of the evidence supports the trial court's decision to dismiss DeepRock's easement by estoppel claim.

{¶80} The Landowners submitted evidence that they did not agree verbally or in writing to provide an easement to WES for the pipeline to cross their Properties. They also testified that they made timely objections to the pipeline construction by contacting WES's landman, Deem, and WES's Chief Executive Officer, John Jacks. DeepRock did not provide any evidence that Bailey Homestead or Johnson made a misrepresentation

to WES or its agents concerning a pipeline easement. To the contrary, Deem submitted an affidavit in which he affirmatively stated that he did not obtain easements from Bailey Homestead and Johnson. Deem also testified that he repeatedly told WES that the pipeline trespassed across the Bailey Homestead and Johnson Properties and Deem also informed the WES receiver of the trespass prior to the receivership sale.[8] DeepRock provided no testimony from either Deem or John Jack denying that they were contacted by Bailey Homestead or Johnson with objections or concerns about the pipeline construction on their Properties. The affidavit testimony DeepRock provided from the three construction workers does not conflict with Bailey or Johnson's testimony. The law does not require that Bailey Homestead and Johnson voice their objections to the construction workers. It is sufficient that they voiced them directly to WES's landman and CEO.

{¶81} DeepRock's affidavit from Chavez also fails to establish any misrepresentation by the Landowners. Chavez testified that Deem *did not* send a written correspondence that he *had not* obtained easements from the Landowners. First, Deem was WES's agent, not Bailey Homestead or Johnson's agent. Deem's statements or lack thereof do not constitute misrepresentations by the Landowners. That WES's files contain no letter from Deem about easements from Bailey Homestead and Johnson simply means Deem made no written representations upon which WES could reasonably rely – a fact which could only hurt, not help, DeepRock's estoppel claim.

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[8] The receivership order confirming the sale of WES assets, which DeepRock submitted in support of its summary judgment motion, shows that the parties to the receivership were aware of the easement dispute on the Bailey Homestead and Johnson Properties. Immediately after acquiring the pipeline, DeepRock was given an opportunity to conduct discovery on issues related to the easement dispute, i.e., issue a subpoena to Derow asking to inspect the 11 rights-of-way purportedly retained by Derow and/or request permission to perform an as-built survey. There is no evidence in the record that DeepRock undertook any such efforts at that time.

{¶82} Finally, as we addressed in reviewing DeepRock's second assignment of error, Michael Bailey explained in his deposition and in his affidavit that he understood that the payments he received from WES were reimbursements for fees and expenses associated with setting up and transferring land to the Bailey Homestead LLC. DeepRock speculates that these payments were actually for an easement, but DeepRock provided no affidavit or deposition testimony from anyone to support its speculation. "Mere speculation and unsupported conclusory assertions are not sufficient to meet the nonmovant's reciprocal burden under Civ.R. 56(E) to withstand summary judgment." *Bank of New York Mellon v. Bobo*, 2015-Ohio-4601, 50 N.E.3d 229, ¶ 13 (4th Dist.).

{¶83} Similarly, we addressed DeepRock's contention that Johnson gave inconsistent deposition testimony that he had verbal discussions about the pipeline possibly cutting across a 15-foot corner of his Property. This is neither an inconsistent statement nor a misrepresentation and cannot form the basis for DeepRock's estoppel defense. Even if we assume arguendo that Johnson's preliminary discussion was an actual misrepresentation, it strains reason to believe that a business entity engaged in wastewater disposal operations would rely on casual verbal discussions and word-of-mouth promises instead of properly executed easements to commence a multi-million-dollar pipeline project. The reliance must be "reasonable." "An easement by estoppel claimant cannot rely on an assertion that may be checked easily in the public records *or that is contrary to information in the claimant's possession.*" (Emphasis added.) *Maloney*, 63 Ohio App.3d at 410. WES had no written easements from Bailey Homestead or Johnson in its possession before constructing the pipeline across the Properties. If WES believed these Landowners had promised to grant easements, it could have checked its

own records and confirmed whether it had written easements from them prior to commencing pipeline construction across their Properties.

{¶84} We find that the trial court properly ruled in appellees' favor and against DeepRock on DeepRock's easement by estoppel claim. We affirm the dismissal of Count V (Easement by Estoppel) of DeepRock's First Amended Complaint.

C. Bailey Homestead & Johnson's Trespass Claims

{¶85} DeepRock contends that the trial court erred in granting Bailey Homestead and Johnson summary judgment in their favor on their counterclaim for trespass (Count 1, Amended Counterclaims). Bailey Homestead and Johnson's counterclaims seek a declaratory judgment that the pipeline trespasses on the Bailey Homestead Property and the Johnson Property. Forté sought a declaratory judgment that the pipeline "is located on real property whereby Forté owns a general, exclusive easement." We will address the trial court's ruling on the Forté Easement separately in subpart D.

{¶86} DeepRock argues that the trial court's declaratory judgment that the pipeline trespasses on the Properties is erroneous because the trial court relied on the as-built survey, which was not properly authenticated. DeepRock also argues that it has an easement by estoppel and therefore is authorized to have its pipeline on the Properties.

{¶87} "The essential elements necessary to state a cause of action in trespass are: (1) an unauthorized intentional act, and (2) entry upon land in the possession of another." *Brown v. Scioto Cty. Bd. of Commrs.,* 87 Ohio App.3d 704, 716, 622 N.E.2d 1153, 1161 (4th Dist.1993). The parties do not contest that Bailey Homestead and Johnson are the landowners of the Properties at issue. The material issue is whether DeepRock's pipeline crosses the Properties without permission.

{¶88} We have already determined that the trial court properly denied DeepRock's motion to strike the court-ordered as-built survey. The survey was properly authenticated and was considered by the trial court in reviewing the parties' summary judgment motions.[9] The survey shows that the pipeline crosses Bailey Homestead Property and crosses 1013 linear feet of that parcel and the pipeline crosses Johnson's Property and crosses 197 linear feet of that parcel. The survey also contains notes concerning the survey methods used.

{¶89} DeepRock submitted an affidavit from Mr. Smith, the owner of the court-ordered surveying company, that included a letter he sent explaining that he was not the person who performed the survey and he had only limited involvement in the project. Thus, he contended that the initial "authentication" affidavit sent by appellees' counsel, which named Mr. Smith as the surveyor, was false and misstated. Most importantly, Mr. Smith's affidavit testimony *does not* dispute the authenticity or accuracy of the survey, dispute the survey's findings, or criticize the methods set out in the survey notes. Thus, DeepRock provided no alternate survey or expert witness testimony that conflicted with, disputed, or provided alternative boundary lines to those set out in the survey. *See Viars v. Ironton,* 4th Dist. Lawrence No. 16CA8, 2016-Ohio-4912, ¶ 34 (summary judgment was appropriate where opponent "argued that there were genuine issues of material fact about his northern property line" but "did not hire a professional surveyor to survey his property and presented no alternative northern boundary line for the trial court's consideration").

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[9] The trial court found that the appellees did not present sufficient "verification of the accuracy of the survey." However, as we discussed in addressing the denial of the motion to strike the survey, the survey was properly authenticated and shows that the pipeline crosses the Properties. DeepRock produced no evidence to contradict the accuracy of the survey, nor did it propose alternate boundaries. Crucially, DeepRock admitted in its reply to the counterclaims that the pipeline crosses the Properties. Any dispute over the linear footage findings in the survey goes to the amount of trespass damages to which the Landowners might be entitled as requested in Count 2 of Amended Counterclaims.

{¶90} Moreover, DeepRock admitted in its reply to Bailey Homestead and Johnson's counterclaims that the pipeline crossed these properties: "Plaintiff admits that the Pipeline crosses into the Johnson Property * * * Plaintiff admits that the Pipeline crosses into the Bailey Homestead Property and that Plaintiff owns and operates the Pipeline * * *."

{¶91} DeepRock argues on appeal that Forté and the Landowners' trespass claims are "incompatible" because if DeepRock is trespassing and the Forté Easements are valid, "then the trespass claim belongs to Forté," not the Landowners. DeepRock cites no case law to support this novel argument that a property owner that has granted an easement loses its right to enforce trespass claims against other, unauthorized intruders. We reject it.

{¶92} The trial court properly issued a declaratory judgment that DeepRock, as the current owner of the pipeline, is trespassing on the Bailey Homestead and Johnson Properties (Count 1, Amended Counterclaim).

D. Forté Easements

{¶93} DeepRock brought a declaratory judgment claim to have the Forté Easements declared "null and void as a result of them being established in contravention of the Stay Order and Sales Procedure Injunction" (Count 2, First Amended Complaint). Forté brought a declaratory judgment claim that "the subject Pipeline is located on real property whereby Forté owns a general, exclusive easement (Count 1, Amended Counterclaim).

{¶94} DeepRock argued that it was entitled to summary judgment that the Forté Easements were invalid for three reasons: (1) the doctrines of champerty and/or

maintenance; (2) they violated the WES receivership stay order; and (3) they do not define with sufficient accuracy the location of the right-of-way.

{¶95} The trial court granted Forté's declaratory judgment and dismissed DeepRock's. The trial court rejected DeepRock's arguments that the Forté Easements were invalid: (1) as "champerty and maintenance" or (2) for violating the stay order issued in WES's receivership case. The trial court also rejected DeepRock's contention that the easements were invalid because they were not specifically described.

{¶96} The Supreme Court of Ohio defines champerty and maintenance as follows:

> "Maintenance" is assistance to a litigant in pursuing or defending a lawsuit provided by someone who does not have a bona fide interest in the case. "Champerty" is a form of maintenance in which a nonparty undertakes to further another's interest in a suit in exchange for a part of the litigated matter if a favorable result ensues. "The doctrines of champerty and maintenance were developed at common law to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law."
>
> The ancient practices of champerty and maintenance have been vilified in Ohio since the early years of our statehood. We stated in *Key* that maintenance "is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression." We have held the assignment of rights to a lawsuit to be void as champerty We have also said "that the law of Ohio will tolerate no lien in or out of the [legal] profession, as a general rule, which will prevent litigants from compromising, or settling their controversies, or which, in its tendencies, encourages, promotes, or extends litigation." (Citations omitted.)

Rancman v. Interim Settlement Funding Corp., 99 Ohio St.3d 121, 2003-Ohio-2721, 789 N.E.2d 217, ¶ 10-11.

{¶97} DeepRock argues that Forté is "an officious intermeddler with no bona fide interest in this dispute," is "funding the litigation," will "share recovery" with the

Landowners, and "is stirring up the type of strife that the doctrines of champerty and maintenance are designed to avoid."

{¶98} Yet, Forté obtained pipeline easements from Johnson and Bailey Homestead in late 2016 and publicly recorded them in 2016, before DeepRock purchased the pipeline in January 2017. Then in July 2017, DeepRock – not Forté – brought an action naming Forté as a defendant. Because Forté has valid easements on the relevant Properties, it has a bona fide interest in the case and because it was sued by DeepRock, it is a party to the litigation. The trial court's review of the applicable caselaw was correct and it soundly rejected this argument.

{¶99} Next DeepRock argued that the Forté Easements violated the WES receivership stay order because Forté acquired the easements "to advance potential claims against WES" and "diminish the value of WES' assets through a threat of litigation." DeepRock provided no evidence that any party filed a contempt motion against Bailey Homestead, Johnson, or Forté in the receivership case and no evidence that the receivership court issued any orders holding these parties in contempt for any stay violations. Moreover, according to DeepRock, the stay order was designed to protect WES assets. WES did not own the Bailey Homestead or Johnson Properties – those Properties were not WES's assets. WES did not have recorded easements across the Bailey Homestead and Johnson Properties. Bailey Homestead and Johnson were free to do as they wished with their properties and could sell them, lease them, or grant easements to Forté. In essence, DeepRock's argument is that because WES's pipeline crossed their Properties, the Landowners could not give valid easements to anyone else

as that might result in trespass litigation and a devaluation of the pipeline. The trial court properly rejected this argument.

{¶100} Last, DeepRock argues that the easements were invalid because they violated the statute of frauds for failing to identify the location of the rights-of-way. DeepRock is not a party to the Forté Easements and lacks standing to raise the statute of frauds. "As a matter of common law contract, 'a defense under the statute of frauds is personal to the parties to the transaction and cannot be availed of by third parties.' " *Blain's Folding Serv., Inc. v. Cincinnati Ins. Co.,* 2018-Ohio-959, 109 N.E.3d 177, ¶ 4-5 (8th Dist.), quoting *Texeramics v. United States*, 239 F.2d 762, 764 (5th Cir.1957); *Legros v. Tarr,* 44 Ohio St.3d 1, 8, 540 N.E.2d 257 (1989), quoting *Bradkin v. Leverton*, 26 N.Y.2d 192, 199, 309 N.Y.S.2d 192, 257 N.E.2d 643 (1970) (" 'where a third party is concerned, the Statute of Frauds provides no defense to him' "); *Edwards Mfg. Co. v. Bradford Co*., 294 F. 176, 181 (2d Cir.1923) ("the defense of the statute of frauds is personal to the contracting parties"); *see also Delaware Golf Club, LLC v. Dornoch Estates Homeowners Assn., Inc.,* 5th Dist. Delaware No. 19 CAE 04 0027, 2020-Ohio-880, ¶ 43 ("If there is no specific delineation of the easement, or if the document is ambiguous, the court must then look to the circumstances surrounding the transaction in order to determine the intent of the parties" – the court does not declare the easement invalid). The trial court properly rejected this argument.

{¶101} The trial court properly dismissed DeepRock's declaratory judgment claim that the Forté Easements were invalid (Count 2, First Amended Complaint) and granted Forté's declaratory judgment that DeepRock's pipeline is located on the Bailey

Homestead and Johnson Properties whereby Forté owns a general, exclusive easement (Count 1 – Amended Counterclaim).

E. Tortious Interference with Business Relationships, Tortious Interference with Contracts, and Civil Conspiracy

{¶102} DeepRock brought claims against Derow, Deem, and Forté alleging that WES, and DeepRock as its successor, held ongoing business relationships and contracts with Bailey Homestead and Johnson for easements through the Properties. DeepRock alleged that Deem, Derow and Forté contacted Bailey Homestead and Johnson and induced them to discontinue their relationships and contracts with DeepRock and, instead, provide easements to Forté. DeepRock alleged that this behavior constituted tortious interference with business relationships, tortious interference with contracts and a civil conspiracy (Counts 6, 7, and 8, First Amended Complaint).

{¶103} Deem, Derow, and Forté moved for summary judgment and sought the dismissal of these claims on the ground that there was no contract and/or business relationship between WES and the Landowners and the civil conspiracy claim requires the existence of an unlawful act independent from the actual conspiracy, which does not exist. DeepRock opposed the motion, arguing that the payments that WES made to the Landowners established the existence of a business relationship and there remained genuine issues concerning whether written easements existed between WES and the Landowners. DeepRock also argued that Forté engaged in extortion when it asked DeepRock to either move the pipeline or provide monetary compensation to Forté and the Landowners for the use of their Properties.

{¶104} The trial court found that the Landowners granted Forté easements on their Property in late 2016, a year after the pipeline construction was complete. During

that time WES did not have a business relationship with the Landowners, the parties did not have a contract at any time, and WES was a trespasser. For these reasons the trial court dismissed DeepRock's tortious interference with business relationships/contracts claims and the civil conspiracy claim.

{¶105} "The elements of the tort of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's 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, 1999-Ohio-260, 707 N.E.2d 853, paragraph one of the syllabus.

{¶106} DeepRock's claim for tortious interference with contract fails because it is undisputed that the Landowners did not grant easements to WES. Both Bailey Homestead and Johnson testified that they did not grant easements to WES. Deem testified that he did not obtain written easements from the Landowners for the WES pipeline. DeepRock has provided no written easements or testimony that written easements existed between the Landowners and WES. Because DeepRock has failed to prove the existence of a contract, the trial court properly dismissed its tortious interference with contract claim (Count 7) on the ground that the parties never had a contract at any time.

{¶107} "The elements of tortious interference with a business relationship are: (1) a business relationship; (2) the tortfeasor's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom." *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 63 (4th Dist.).

{¶108} Johnson testified that he agreed to allow WES to cross two other properties (not the subject of this lawsuit) and he received payments from WES. Johnson also testified that he allowed WES to park equipment on the disputed Property and in exchange received a $500 payment. However, Johnson testified that he discovered that WES constructed the pipeline on his Property without his permission. He contacted WES's landman, Deem, and objected. Johnson also testified that he had several conversations about WES's trespass with WES's CEO John Jack. Johnson testified that he became increasingly frustrated with WES as he could not get the situation resolved. He described his final discussion with WES, which occurred in late 2015 or early 2016:

> Johnson: * * * The last conversation that I had with Jack was one day he decided to answer the phone; and when he decided to answer the phone, I told him, I said, 'You trespassed on me. You need to do something about this.' And he said, 'It's my pipeline.' And I said, 'Stay the F off. You're trespassing.' From then on, I never talked to John Jack again.

{¶109} Construing the evidence most strongly in DeepRock's favor, we find that Johnson had a business relationship with WES during the construction of the pipeline beginning in May 2015 and through the fall of 2015, which ended in November or December 2015 when Johnson discovered the pipeline had been built on his Property, expressed his objections, and was unable to get a meaningful response from WES.

{¶110} Likewise, Bailey Homestead appeared to have a business relationship with WES in the summer and fall of 2015 as reflected by the testimony of Michael Bailey about WES giving him financial assistance with the estate, the establishment of the LLC, and related property transfer expenses. However, like the Johnson business relationship, WES's business relationship with Bailey Homestead

disintegrated after WES constructed the pipeline on the Property without permission and Bailey objected but could not get a satisfactory response from WES.

{¶111} Bailey testified that he was not contacted by Forté until December 2016, a year after their business relationship with WES ended and Johnson testified that he was first introduced to Forté sometime after WES was placed in receivership, which occurred in July 2016. Therefore, by the time both Johnson and Bailey Homestead were introduced to Forté, WES no longer had a business relationship with either of them. Because there was no business relationship at the time Forté became involved in late 2016, the trial court properly granted summary judgment dismissing DeepRock's tortious interference with business relationship claim (Count 6, First Amended Complaint).

{¶112} To prove a civil conspiracy claim, DeepRock must show: (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. A civil conspiracy claim is derivative and cannot be maintained absent an underlying tort that is actionable without the conspiracy. *Mender v. Chauncey,* 2015-Ohio-4105, 41 N.E.3d 1289, ¶ 29 (4th Dist.).

{¶113} DeepRock alleged that the underlying tortious interference claims constituted the unlawful acts independent from the conspiracy itself and provide the fourth element of its civil conspiracy claim. However, we affirmed the trial court's dismissal of the tortious interference with business relationship/contracts claims. Because those claims were properly dismissed, we find that the trial court did not err in granting summary judgment and dismissing DeepRock's dependent claim of civil conspiracy (Count 8). A civil action for civil conspiracy requires a viable claim distinct from the conspiracy in order

for the conspiracy claim to survive. Because the tortious interference claims were properly dismissed, there can be no surviving civil conspiracy claim.

{¶114} Additionally, we reject DeepRock's contention that its civil conspiracy claim is based on an alleged extortion by Forté. In our previous determinations, we found that: (1) the pipeline crosses the Properties; (2) DeepRock is a trespasser because it has no written easements and no easements by estoppel; and (3) the Forté Easements are not invalid. Forté and the Landowners asked DeepRock to either move the pipeline or provide monetary compensation for the use of their Properties. This is not extortion, but the lawful protection of their property rights and interests. *See* R.C. 2905.11 (Extortion).

{¶115} Construing the record and all inferences from it in DeepRock's favor, we find that no genuine issues of material fact exist and appellees are entitled to summary judgment in their favor and against DeepRock for the dismissal of DeepRock's easement by estoppel, tortious interference with business relationships, tortious interference with contract, and civil conspiracy claims – Counts 5, 6, 7, and 8 of First Amended Complaint. Appellees are entitled to summary judgment in their favor on their counterclaim for a declaratory judgment that DeepRock is a trespasser because its pipeline crosses the Properties on which Forté owns a general exclusive easement – Count 1 of the First Amended Counterclaims. And, appellees are entitled to summary judgment in their favor dismissing DeepRock's declaratory judgment claim seeking to invalidate the Forté Easements – Count 2 of First Amended Complaint. We affirm the trial court's judgment on these claims. DeepRock's first assignment of error is overruled.

VI. Cross-appellants' Appeal of Summary Judgment

{¶116} For their sole assignment of error, cross-appellants contend that the trial court erred in granting summary judgment to DeepRock on DeepRock's request for a declaratory judgment that WES assets were sold free and clear of any claims the cross-appellants had against WES assets, "including any claim for trespass and the Forté Easements" (Count 3, First Amended Complaint).

A. Standard of Review

{¶117} The de novo standard of review applicable to our review of DeepRock's first assignment of error set out in Part V, A, is also applicable to our review of the cross-appellants' sole assignment of error.

B. Declaratory Judgment that WES Assets were Sold Free and Clear of Liens, Claims and Encumbrances

{¶118} In its motion for partial summary judgment, DeepRock argued that it was entitled to summary judgment on its request for a declaratory judgment that it acquired WES's assets free and clear of any claims, liens or encumbrances because: (1) the Forté Easements are invalid (a claim we find was properly rejected and dismissed, the Forté Easements are not invalid) and (2) Deem, Derow and the Landowners "have asserted claims that are barred by * * * sales-related orders in the receivership proceeding." DeepRock argued that "the only manner for recovery by unsecured creditors of WES was through the receivership claims process that they [the cross-appellants] did not participate in."

{¶119} DeepRock submitted the affidavit of WES's receiver's attorney, Myron Terlecky, who explained the receivership claims approval process. According to Mr. Terlecky's testimony and documents and orders entered in the receivership case, the

receivership court approved a claim approval process so that creditors who had claims against WES could file them. Deem, Derow, Bailey Homestead, and Johnson did not file a claim in the WES receivership. Also, as part of the receivership case, the sale of WES assets occurred on December 6, 2106 to DeepRock.[10] Shortly after the sale, the receivership court issued an order confirming that WES assets "will be transferred to Buyer free and clear of all liens, claims and encumbrances arising either before or after the appointment of the Receiver. Any such liens shall attach to the proceeds of sale, in their respective amounts and priority." The order also provided that DeepRock "shall not be deemed a successor of [WES] and shall incur no successor liability for any obligation of [WES] as a result of the sale of the Acquired Assets to [DeepRock], other than those related to the Assumed Liabilities."

{¶120} DeepRock argued that the sale of the WES assets to it cut off all claims of WES's creditors against the assets. DeepRock cited *Park Natl. Bank v. Cattani,* 187 Ohio App.3d 186, 189, 2010-Ohio-1291, 931 N.E.2d 623 (12th Dist.). In *Cattani,* Park National Bank filed a complaint to foreclose on a mortgage on real property consisting of a gas station, convenience store and fast-food restaurant. A junior lienholder, Lykins Oil Company, filed an answer and cross-claim in the foreclosure action asserting an interest in the real property via its junior lien. A receiver was appointed and the trial court entered an order authorizing the receiver to sell the real property and personal property " 'free and clear of all liens and encumbrances,' whereby any claims by those with an interest in the property would be subsequently attached to the net proceeds in order of priority." *Id.* at ¶

[10] A company known as Funds Protection Investment, LLC was the successful bidder that eventually assigned its bid to DeepRock. This transaction is not relevant to this litigation and, for simplicity, we refer to DeepRock as the successful bidder and buyer.

6. Lykins Oil Company appealed arguing that the order to sell the real property free and clear of its lien was contrary to law. The appellate court disagreed:

> The Supreme Court of Ohio has interpreted R.C. 2735.04 " 'as enabling the trial court to exercise its sound judicial discretion to limit or expand a receiver's powers as it deems appropriate.' " *Norris v. Dudley,* Franklin App. No. 07AP–425, 2007-Ohio-6646, 2007 WL 4340263, ¶ 21, quoting *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 74, 573 N.E.2d 62. As a result, because R.C. Chapter 2735 "does not contain any restrictions on what the court may authorize when it issues orders regarding receivership property," we find that this includes the power to authorize a receiver, under certain circumstances, to sell property at a private sale free and clear of all liens and encumbrances. *Quill v. Troutman Ents., Inc.,* Montgomery App. No. 20536, 2005-Ohio-2020, 2005 WL 994676, ¶ 34; see also *Ohio Director of Transp. v. Eastlake Land Dev. Co.,* 177 Ohio App.3d 379, 2008-Ohio-3013, 894 N.E.2d 1255, ¶ 49–51 (Gallagher, P.J., dissenting); see, e.g., *Regions Bank v. Egyptian Concrete Co.* (E.D.Mo.2009), No. 4:09–CV–1260 CAS, 2009 WL 4431133 (stating that "it has long been recognized that under appropriate circumstances, a federal court presiding over a receivership may authorize the assets of the receivership to be sold free and clear of liens and related claims"); *John T. Callahan & Sons Inc. v. Dykeman Elec. Co. Inc.* (D.Mass.2003), 266 F.Supp.2d 208, 222 (noting that "notwithstanding the absence of an express power to sell assets free and clear of claims," the court had the implied power to sell assets free and clear of creditors' claims in a private sale); but see *Au v. Au Rustproofing Ctr., Inc.* (July 3, 1984), Richland App. No. CA–2227, 1984 WL 4959.

Cattani at ¶ 13 (footnote omitted). Like the receiver in *Cattani,* the WES receiver was authorized to sell the WES assets free and clear of all liens, claims, and encumbrances arising before or after the appointment of the receiver. Like *Cattani*, any claim by those with an interest in the assets would attach to the net proceeds in order of priority.

{¶121} Thus, if Deem, Derow, Bailey Homestead, or Johnson had any liens, claims or encumbrances against WES assets, those would have been removed from the assets and attached to the net proceeds from the sale. However, there was no evidence presented in this action by any of these parties that they had any lien, claim, or encumbrance against WES's assets. Deem, Derow, and the Landowners presented no

evidence of any security agreements, mechanic's liens, mortgages, judicial liens, or other claims to WES's assets. A lien is "a charge or security or encumbrance upon property. A claim or charge on property for payment of some debt, obligation or duty. Qualified right of property which a creditor has in or over specific property of the debtor, as security for the debt or charge or for performance of some act. * * *The word 'lien' is a generic term and, standing alone, includes liens acquired by contract or by operation of law." (Citations omitted.) Black's Law Dictionary (5th Ed.1979). A claim against an asset is an action *in rem*, i.e., an action against the property. *Guernsey Bank v. Milano Sports Ents. L.L.C.*, 177 Ohio App.3d 314, 2008-Ohio-2420, 894 N.E.2d 715, ¶ 68 (10th Dist.) (claim to enforce mechanic's lien is a claim against property). An encumbrance is " 'a claim, lien, charge, or liability attached to and binding real property; e.g. a mortgage * * *.' " *Griffin v. First Natl. Acceptance Co.*, 11th Dist. Trumbull No. 2012-T-0075, 2013-Ohio-4302, ¶ 25, quoting *Black's Law Dictionary* (6th Ed.1991).

{¶122} We find that although WES's assets were sold free and clear of liens, claims and encumbrances, this finding has no relevance to this action. Deem, Derow, and the Landowners are not asserting any liens, claims or encumbrances against the WES assets.

{¶123} However, Deem and Derow are seeking to recover monies owed them by WES for unpaid invoices in the sum of $10,716.85. We agree that those claims could have been filed in the receivership proceeding. The claims process described in Mr. Terlecky's affidavit testimony and related exhibits stated that the purpose of the receivership was to liquidate WES's assets in an attempt to maximize returns to creditors. Deem and Derow could have submitted a claim and attached the invoices as

documentation of the claim to be considered in any distribution of funds at the conclusion of the receivership case.

{¶124} DeepRock is not liable to Deem and Derow for the unpaid invoices, either as a successor-in-interest to WES or via the contract between WES and Derow. Derow and Deem alleged that they terminated the contract with WES in April/May 2016, after WES failed to pay the invoices within the 15-day time period set out in a demand letter by Derow's attorney. In the Asset Purchase Agreement attached to DeepRock's First Amended Complaint, DeepRock specifically identified the ongoing contractual obligations of WES, as well as the liabilities it was assuming under Schedule 1.1(a) and Schedule 1.1(b). Derow, Deem and WES's contract for services rendered during the pipeline's planning and construction phase was not identified as an Assumed Contract under Schedule1.1(a). And, the unpaid invoices were not listed as an Assumed Liability under Schedule 1.1(b). Therefore, DeepRock has no rights or obligations in the contract between Deem, Derow and WES.

{¶125} We also find that Bailey Homestead and Johnson had claims against WES for trespass that arose when WES constructed the pipeline across the Properties. WES continued to trespass until the pipeline was sold in the receivership and WES no longer owned it. Those claims for trespass and related damages caused by WES's clearing the land and constructing and maintaining the pipeline on the Properties up through the receivership sale of the pipeline cannot be brought against DeepRock as a successor to WES. The order confirming the sale specifically provided that DeepRock is not a successor of WES and shall incur no successor liability for any of WES's obligations. DeepRock argued that these pre-sale trespass claims against WES are barred in its

motion for partial summary judgment: "The Landowners claims for trespass by WES are also without merit, as such claims accrued prior to the sale of WES' assets to DeepRock."

{¶126} However, after DeepRock purchased the pipeline, DeepRock took no steps to remove the pipeline off the Bailey Homestead and Johnson Properties. DeepRock's trespass began when it acquired the pipeline and continues for as long as the pipeline crosses the Properties without permission. Bailey Homestead and Johnson have the right to bring trespass claims for damages against DeepRock commencing on the date DeepRock acquired the pipeline and up to the time that either DeepRock obtains permission for the pipeline to cross the Properties or removes the pipeline off the Properties.

{¶127} There is a great deal of confusion among the parties about the meaning of the trial court's decision on DeepRock's declaratory judgment claim that the assets were sold free and clear (Count 3, First Amended Complaint). The Landowners argue that the effect was to condemn and take possession of their Properties because they interpret it as barring all trespass claims against DeepRock. We understand the confusion because, after the somewhat confusing discussion of this claim, the trial court broadly states, "The Court denies defendants' motion and grants plaintiff's motion on Count III of the First Amended Complaint." This could be interpreted as barring all trespass claims against DeepRock – both pre-receivership sale and post-receivership sale of the pipeline. However, we believe the trial court intended to reach the same result that we have reached here. The trial court stated that Bailey Homestead, Johnson and Forté's pre-sale claims against WES cannot be asserted against DeepRock: "In sum, plaintiff's count against Bailey, Johnson and Forté is granted as of the date of the

confirmation of sale." The trial court allowed Bailey Homestead, Johnson and Forté to bring post-sale trespass claims against DeepRock and will allow the jury to decide whether DeepRock's continuing trespass is willful and the amount of trespass-related damages: "However, it is an issue for the jury if Forté, Bailey and Johnson's claims continues to a date beyond the sale confirmation date." Therefore, we affirm the portion of the trial court's judgment that is in accordance with our decision, and reverse the portion that might be read as a dismissal of the cross-appellants' post-sale trespass claims against DeepRock. We sustain, in part, the cross-appellants' sole assignment of error.

VII. CONCLUSION

{¶128} The trial court erred as a matter of law when it dismissed as moot DeepRock's motions to strike. However, we find the error harmless because the motions were properly denied on alternative grounds. We affirm the trial court's decision granting summary judgment to appellees/cross-appellants and dismissing appellant's/cross-appellee's claims for invalidity of the Forté Easements, easements by estoppel, tortious interference with business relationships, tortious interference with contracts, and civil conspiracy (Counts 2, 5, 6, 7, and 8 of the First Amended Complaint) and granting appellees/cross-appellants summary judgment in their favor on their declaratory judgment claim for trespass (Count 1, Amended Counterclaims). We affirm, with modification, the trial court's decision granting summary judgment to appellant/cross-appellee on its claim for declaratory judgment that it purchased WES assets free and clear of liens, claims, and encumbrances against the assets (Count 3, First Amended Complaint). The modification clarifies that the appellees/cross-appellants' trespass claims

against appellant/cross-appellee that arose after the receivership sale of the pipeline are allowed to proceed. We affirm, with modification, the judgment of the trial court.

JUDGMENT AFFIRMED, AS MODIFIED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED, AS MODIFIED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Smith, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *Cunningham v. Michael J. Auto Sales*, 2021-Ohio-1390.]

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

MICHAEL CUNNINGHAM,	:	APPEAL NO. C-200087 TRIAL NO. 19CV-24641
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
MICHAEL J. AUTO SALES,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Municipal Court:

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 21, 2021

Bradley R. Hoyt, for Appellant,

Michael Cunningham, pro se.

BOCK, Judge.

{¶1} Defendant-appellant Michael J. Auto Sales ("Auto Sales") appeals the trial court's judgment, which determined that Auto Sales sold a vehicle to plaintiff-appellee Michael Cunningham with prior knowledge of the vehicle's faulty transmission and failed to disclose the defect. For the reasons stated herein, we affirm.

I. Facts and Procedure

A. The Vehicle

{¶2} In February 2019, Auto Sales purchased a 2008 Ford Edge ("the vehicle") from an auction. About a month later, Cunningham purchased the vehicle from Auto Sales for $5,851.12. The purchase agreement, signed by both parties, contained a section entitled "WARRANTY INFORMATION." It stated, in part:

> Unless Seller provides a written warranty, or enters into a service contract within 90 days from the date of this contract, this vehicle is being sold "AS IS – WITH ALL FAULTS" and Seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose * * * .

{¶3} Cunningham made a $3,600 down payment and financed the remainder. Cunningham later made a $250 payment and a $280 payment.

{¶4} Approximately one month after purchase, Cunningham began to experience problems with the vehicle. Cunningham testified that while he was stopped in the vehicle at a traffic light, it felt like someone had hit him, but there

were no cars nearby. Between mid-April and mid-May 2019, Cunningham returned the vehicle to Auto Sales for repairs.

{¶5} Auto Sales performed tests on the vehicle and determined that the solenoid—the computer that "tells the transmission what to do"—needed to be replaced. Auto Sales offered to make the repairs if Cunningham paid for the parts. Cunningham paid an additional $450 for parts to repair the transmission. The vehicle remained in Auto Sales' possession for several months with little or no progress on repairs. The parties could have had the vehicle towed to a Ford dealership for further inspection, but neither party wished to pay for the tow.

{¶6} Due to the problems with the vehicle, Cunningham's girlfriend Felicia Linville lost her job. Auto Sales hired Linville in exchange for it paying for parts to repair the vehicle.

{¶7} Linville testified that at some point after she had been employed with Auto Sales, she suspected that Auto Sales had cheated Cunningham by failing to disclose defects. Linville testified that she had accessed Auto Sales' business computer and found a note referring to Cunningham's account stating "BAD TRANS AS IS W/CONDITIONS." Linville took photographs of that page and two other pages from Auto Sales' computer that involved Cunningham's vehicle.

{¶8} Cunningham refused to make any further payments for repairs or for the vehicle loan. In August 2019, Auto Sales issued a notice of repossession. Cunningham sued in small-claims court to recover the amounts that he had spent on and invested in the vehicle.

B. The Trial

{¶9} At trial, Cunningham offered Linville's photographs, which purportedly captured information involving the sale and financing of the vehicle. Auto Sales objected to the admission of the photographs, but the magistrate admitted them. The three pictures referenced "stock number B34556," which corresponded to the last digits of the VIN number on Cunningham's vehicle. The first photo showed "BAD TRANS AS IS W/CONDITIONS." The next two reflected Cunningham's payment history on the vehicle.

{¶10} Auto Sales denied knowledge of any transmission defects and asserted that the photographs did not reflect any software utilized by its business. But Auto Sales admitted that the financial information contained on the second and third photographs accurately reflected the financial transactions between the parties. Further, it admitted that this financial information is maintained on Auto Sales' computer. Auto Sales argued that Linville made up the information.

C. Magistrate's Decision

{¶11} The magistrate found that the "as is" provision in the purchase agreement did not bar a fraud claim. He determined that Cunningham had provided competent, credible evidence that Auto Sales knew, or should have known, that the vehicle had a faulty transmission and that Auto Sales failed to disclose that fact to Cunningham before the sale. The magistrate rendered a decision in favor of Cunningham in the amount of $4,400.

{¶12} Auto Sales objected to the magistrate's decision. The magistrate issued findings of fact and conclusions of law.

{¶13} The trial court filed two judgment entries, one of which overruled Auto Sales' objections, adopted the magistrate's decision, and rendered judgment in favor of Cunningham, awarding him $4,400. The other entry, which was attached to Auto Sales' brief, overruled the objections and adopted the magistrate's decision, but failed to include the court's own judgment.

{¶14} Auto Sales timely appealed.

II. Standard of Review

{¶15} In its sole assignment of error, Auto Sales asserts that the trial court erred by not granting its objection to the magistrate's decision and by adopting the decision. When reviewing a trial court's ruling on objections to a magistrate's decision, appellate courts must determine whether the trial court abused its discretion. *Kevin Eye v. Sal's Heating & Cooling, Inc.*, 8th Dist. Cuyahoga No. 109212, 2020-Ohio-6737, ¶ 22. A trial court does not abuse its discretion unless its decision was "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

III. Law

{¶16} "As-is" clauses do not overcome a buyer's ability to justifiably rely on a seller's representation involving defects. *Shannon v. Fischer*, 12th Dist. Clermont No. CA2020-05-022, 2020-Ohio-5567, ¶ 22 (summary judgment was inappropriate when some evidence suggested that sellers knew of a defect in a home). "[A] buyer can maintain a fraud claim against a used car dealer even if the vehicle is sold 'as is' if the dealer should have known of defects in the vehicle." *Perkins v. Land Rover*, 7th Dist. Mahoning No. 03 MA 33, 2003-Ohio-6722, ¶ 2.

{¶17} Small-claims proceedings are intended to be informal. *Weltin v. Collins*, 6th Dist. Sandusky No. S-19-019, 2020-Ohio-296, ¶ 16. As such, the Ohio Rules of Evidence do not apply to hearings in small claims court. *Cleveland Bar Assn. v. Pearlman*, 106 Ohio St.3d 136, 2005-Ohio-4107, 832 N.E.2d 1193, ¶ 15.

{¶18} Because the Ohio Rules of Evidence are not applicable to small-claims proceedings, "the reliability, credibility, and admissibility of evidence are determined by the trial court." *Karnofel v. Girard Police Dept.*, 11th Dist. Trumbull No. 2004-T-0145, 2005-Ohio-6154, ¶ 18.

IV. Analysis

{¶19} There is no dispute that the vehicle was purchased "as is" and that the vehicle was defective. The issue before the trial court was whether Auto Sales knew, or should have known, that the vehicle's transmission was defective prior to the sale.

{¶20} As proof of Auto Sales' prior knowledge of the defective transmission, Cunningham and his witness, Linville, submitted photographs of Auto Sales' computer screen, which depicted records related to Cunningham's account. Linville testified that she took the photographs while she was employed by Auto Sales. Auto Sales testified that Linville had access to the business computer.

{¶21} Small-claims matters are designed to be simplified. As such, the rules of evidence do not apply. Thus, the photographs were properly entered into the record.

{¶22} The trial court determined that Cunningham's evidence proved his claim. The evidence showed that Linville had direct access to Auto Sales' business records and discovered a note in Cunningham's account stating "BAD TRANS AS IS W/CONDITIONS." The photographs contained Cunningham's name, an account

number that corresponded to the VIN number of the vehicle, and the dates and amounts of payments that he made on the vehicle. Although Auto Sales denied the authenticity of the photographs, the magistrate chose to believe that the photographs were authentic. The magistrate was in the best position to judge the credibility of the witnesses.

{¶23} While an "as is" clause in a purchase agreement will typically bar claims of implied warranty, it does not bar all future claims if the seller knew, or should have known, of a defect in the product. *Perkins v. Land Rover*, 7th Dist. Mahoning No. 03 MA 33, 2003-Ohio-6722, ¶ 2. The evidence showed that Auto Sales knew or should have known that there was a defect with the vehicle's transmission and failed to disclose that fact to Cunningham.

{¶24} The trial court did not err in ruling in Cunningham's favor.

V. Conclusion

{¶25} The trial court did not abuse its discretion by admitting Cunningham's exhibits and finding in favor of Cunningham. The record supports Cunningham's claim that Auto Sales failed to disclose the defect prior to selling the vehicle to Cunningham. Auto Sales' sole assignment of error is overruled and the judgment of the trial court is affirmed.

Judgment Affirmed.

BERGERON, P.J., and **WINKLER, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion

[Cite as *Crenshaw v. Michael J.'s Auto Sales*, 2021-Ohio-1468.]

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

LETICIA CRENSHAW,	:	APPEAL NO. C-200154 TRIAL NO. 19CV00688
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
MICHAEL J.'S AUTO SALES,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Municipal Court

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

Date of Judgment Entry on Appeal: April 28, 2021

Bradley R. Hoyt, for Defendant-Appellant,

Russell & Ireland Law Group, LLC, and *Adam M. Russell*, for Plaintiff-Appellee.

WINKLER, Judge.

{¶1} Defendant-appellant Michael J.'s Auto Sales ("Michael J.'s") appeals the judgment of the trial court entered in favor of plaintiff-appellee Leticia Crenshaw. The trial court held that Michael J.'s breached its agreement to repair Crenshaw's vehicle, and that Michael J's violated the Ohio Consumer Sales Practices Act ("OCSPA"). For the reasons that follow, we affirm in part as to the trial court's judgment holding that Michael J.'s breached its agreement to repair, but we reverse as to the OCSPA violations.

Background

{¶2} Crenshaw purchased a used 2005 Nissan Murano from Michael J.'s in late July 2018. The bill of sale contained an "as-is" clause, disclaiming any implied warranties. Contemporaneously with Crenshaw's purchase, Michael J.'s and Crenshaw also entered into a separate agreement entitled the "we owe" agreement. The "we owe" agreement is a preprinted form prepared by Michael J.'s for work to be completed by its service department. In the "we owe" agreement, Michael J.'s agreed to perform repair work on the Nissan's exhaust, air conditioning, brake pads, hood latch release, and glove box.

{¶3} Crenshaw left the Nissan with Michael J.'s for repair, and she picked up the car a few days later. On her way home from Michael J.'s, however, Crenshaw's vehicle started making a terrible noise, and she had to pull over on the side of the highway. Believing the vehicle had not been repaired as promised, Crenshaw had the vehicle towed back to Michael J.'s. Crenshaw then returned a couple of days later to pick up the vehicle. Crenshaw quickly determined that the repairs still had not been made because the vehicle still made a strange noise and

had squeaky brakes. Once again, Crenshaw had the vehicle towed back to Michael J's.

{¶4} According to Crenshaw, she tried to call Michael J.'s, and she eventually spoke with employee Farrah Bragg. Bragg allegedly cursed at Crenshaw, and stated that Michael J.'s would not make any repairs. Crenshaw picked up the Nissan from Michael J.'s with the assistance of law enforcement, and she took it to a different mechanic, who made the repairs.

{¶5} Crenshaw filed a complaint in the small-claims division of the Hamilton County Municipal Court. Crenshaw alleged that Michael J.'s had failed to make the required repairs, and that Michael J.'s had listed an incorrect purchase price on the title. Crenshaw requested $5,500 in damages.

{¶6} The matter proceeded to trial in front of a magistrate. Crenshaw testified, as well as an employee of the Ohio Better Business Bureau, Charles Beavers. Beavers testified that he had received a call from Crenshaw in September 2018, and that he investigated Crenshaw's complaint. Beavers visited Michael J.'s and found no indication that the work had been completed on Crenshaw's vehicle as promised in the "we owe" agreement.

{¶7} Bragg testified for Michael J.'s that Michael J.'s had completed the repair work in the "we owe" agreement. Bragg introduced a copy of the "we owe" paperwork, which purported to show the repairs had been done. Bragg admitted that her copy of the "we owe" agreement had been made in preparation for trial.

{¶8} The magistrate found that Michael J.'s had breached the "we owe" agreement, and recommended awarding damages to Crenshaw. Michael J.'s filed objections with the trial court.

{¶9} The trial court agreed with the magistrate's decision finding that Michael J.'s had failed to complete the repairs under the "we owe" agreement. The trial court further determined that Michael J.'s had violated the OCSPA, and therefore awarded treble damages.

{¶10} Michael J.'s appeals. In its sole assignment of error, Michael J.'s argues that the trial court erred in granting judgment in favor of Crenshaw.

The "We Owe" Agreement

{¶11} In its appellate brief, Michael J.'s first takes issue with the trial court's finding and award for the failure to perform repairs to Crenshaw's vehicle.

{¶12} According to Michael J.'s, the trial court erred because Crenshaw agreed to accept the vehicle "as-is." As a general matter, a seller of goods impliedly warrants that a good is merchantable and fit for a particular use. R.C. 1302.29(B). However, a seller can expressly disclaim implied warranties in writing with the use of an "as is" clause. R.C. 1302.29(C)(1); *Ins. Co. of N. Am. v. Automatic Sprinkler Corp. of Am.*, 67 Ohio St.2d 91, 94, 423 N.E.2d 151 (1981).

{¶13} Despite the presence of an "as-is" clause, a seller can also create an express warranty, which is "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain * * *." R.C. 1302.26(A)(1). "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other * * *." R.C. 1302.29(A).

{¶14} In a case similar to the one at bar, a buyer purchased a used car from a Land Rover dealership. The sales contract contained an "as is" clause, disclaiming all implied warranties. Nevertheless, as a condition of the sale, Land Rover expressly agreed to fix the air-conditioning unit. The buyer later experienced problems with

the vehicle and sued Land Rover. Land Rover argued that the buyer's claims were precluded by the "as is" clause. The court disagreed, and determined that Land Rover had expressly warranted to repair the air-conditioning unit, and thus "[a]ny damage to the vehicle resulting from a faulty repair would not be precluded by the 'as is' exclusion of warranties." *Perkins v. Land Rover of Akron*, 7th Dist. Mahoning No. 03 MA 33, 2003-Ohio-6722, ¶ 20.

{¶15} Here, just like in the *Land Rover* case, even though the bill of sale for the car contained an "as-is," no-warranty clause, the dealer expressly agreed to perform certain repair work to the vehicle. The bill of sale and the "we owe" agreement for repairs are not inconsistent. In other words, Michael J.'s as-is sale of the car to Crenshaw does not cancel or negate the "we owe" agreement in which Michael J.'s expressly promised to perform repairs.

{¶16} Michael J.'s also argues that the trial court erred in determining that it had not made the repairs to the vehicle, and also erred in allowing Crenshaw to recover for repairs that Michael J.'s had never agreed to perform. Michael J.'s argument is, in essence, a challenge to the weight of the evidence. Under a weight-of-the-evidence challenge, this court weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that its judgment must be reversed and a new trial ordered. *See Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20.

{¶17} The trial court did not clearly lose its way in determining that Michael J.'s breached the agreement to make the vehicle repairs. Crenshaw and Beavers both testified that the promised repairs were not made. Crenshaw testified that she had a

mechanic make the repairs, and she provided an estimate from the repair shop. Nor did the trial court clearly lose its way in determining that the repairs listed on the estimate, such as "catalytic converter" and "disc rotors," fell within those repairs listed in Michael J.'s "we owe" agreement.

{¶18} Michael J.'s argues that Crenshaw accepted the vehicle after having a reasonable opportunity to inspect the car. *See* R.C. 1302.64(A)(1) ("after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity[.]"). The evidence belies Michael J.'s' assertions. Crenshaw returned the vehicle to Michael J.'s two separate times and requested that it make the repairs. Eventually, Crenshaw took the car elsewhere for repair.

{¶19} Thus, we determine that the trial court did not err in holding that Michael J.'s breached the "we owe" agreement by failing to repair Crenshaw's vehicle.

OCSPA Violations

{¶20} Michael J.'s next challenges the trial court's finding that it violated the OCSPA. Michael J.'s makes several arguments, one of which is that it did not have notice that Crenshaw claimed a violation under the OCSPA.

{¶21} Under R.C. 1925.04(A), a plaintiff commencing an action in small-claims court must state the amount and nature of the plaintiff's claim. Similarly, Civ.R. 8(A) provides that a claim "shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Civ.R. 8 is "designed to give the defendant fair notice of the claim and to give the defendant an opportunity to respond." *Gurry v. C.P.*, 2012-Ohio-2640, 972 N.E.2d 154, ¶ 17 (8th Dist.), citing

Allied Erecting & Dismantling Co., Inc. v. Youngstown, 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, ¶ 75 (7th Dist.).

{¶22} Even though Crenshaw filed this action in the small-claims division, Crenshaw must still set forth the nature of her claim and a request for damages in accordance with Civ.R. 8(A). *See Hudak v. Golubic*, 8th Dist. Cuyahoga No. 106819, 2018-Ohio-4874, ¶ 15, citing *Justice v. Lerner*, 7th Dist. Mahoning No. 03 MA 69, 2003-Ohio-7022, ¶ 12 (determining that Civ.R. 8(A) applies to small-claims matters, because Civ.R. 8(A) is not inapposite to R.C. 1925.04).

{¶23} Nothing in Crenshaw's pleading would have put Michael J.'s on notice that Crenshaw had claimed violations under the OCSPA. Not only was the OCSPA not mentioned, but the complaint was void of any language regarding unfair, deceptive, or unconscionable consumer-sales practices. Moreover, the complaint failed to request treble damages. *See* R.C. 1345.02 and 1305.43. Tellingly, neither the magistrate nor the parties mentioned OCSPA in any form at trial.

{¶24} Therefore, because Michael J.'s was never put on notice of any claimed OCSPA violations, the trial court erred in finding OCSPA violations as part of its independent review on objections from the magistrate's decision. It follows then that the trial court also erred in trebling Crenshaw's damages under the OCSPA.

Conclusion

{¶25} In conclusion, we overrule Michael J.'s assignment of error in so far as it challenges the trial court's judgment with respect to Michael J.'s breach of the "we owe" agreement and resultant damages. We sustain Michael J.'s assignment of error in so far as it challenges the trial court's judgment with respect to OCSPA violations and award of treble damages. We remand the matter to the trial court to enter judgment in favor of Crenshaw in the amount of $2,937.71, plus interest and costs.

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

MYERS, P.J., and **BERGERON, J.,** concur.

Please note:
The court has recorded its own entry this date.

[Cite as *Navistar, Inc. v. Dutchmaid Logistics, Inc.*, 2021-Ohio-1425.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NAVISTAR, INC. Defendant-Appellant -vs- DUTCHMAID LOGISTICS, INC. Plaintiff-Appellee	JUDGES: Hon. Craig R. Baldwin, P.J. Hon. William B. Hoffman, J. Hon. Earle E. Wise, Jr., J. Case No. 2020 CA 00003 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Licking County Court of Common Pleas, Case No. 15CV0129
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 22, 2021

APPEARANCES:

For Defendant-Appellant	For Plaintiff-Appellee
ROMAN MARTINEZ SHANNON GRAMMEL Latham & Watkins, LLP 555 Eleventh Street, NW, Suite #1000 Washington, DC 20004-1304	MARK KITRICK SEAN HARRIS Kitrick, Lewis & Harris Co., LPA 515 East Main Street, Suite #515 Columbus, OH 43215-5398
KEVIN M. JAKOPCHEK Latham & Watkins, LLP 330 N. Wabash, Suite #2800 Chicago, IL 60622	CLAY MILLER LAWRENCE R. LASSITER Miller Weisbrod, LLP 12750 Merit Drive, Suite #1100 Dallas, TX 75251

For Defendant-Appellant

JESSICA Z. BARGER
NATASHA N. TAYLOR
Wright Close & Barger, LLP
One Riverway, Suite #2200
Houston, TX 77056

For Defendant-Appellant

TIMOTHY C. AMMER
LINDSAY M. UPTON
Montgomery Jonson, LLP
600 Vine Street, Suite #2650
Cincinnati, OH 45202

Hoffman, J.

{¶1} Defendant-appellant Navistar, Inc. ("Navistar") appeals the July 29, 2019 Final Judgment entered by the Licking County Court of Common Pleas, memorializing the jury's verdict in favor of plaintiff-appellee Dutchmaid Logistics, Inc. ("Dutchmaid") on Dutchmaid's fraud claim and the jury's award of compensatory and punitive damages.

STATEMENT OF THE FACTS AND CASE

{¶2} Dutchmaid is a logistics company and the owner and operator of a commercial trucking fleet which is engaged in the business of hauling dry and refrigerated commodities across 48 states. Navistar manufacturers heavy-duty commercial trucks and diesel engines. Prior to 2008, Dutchmaid primarily operated CAT and Cummins-powered trucks. Between 2008, and 2009, Dutchmaid purchased nine Navistar trucks equipped with Navistar's first generation MaxxForce engines ("MaxxForce 1 trucks") and six Navistar trucks equipped with Cummins engines.

{¶3} The MaxxForce 1 trucks began experiencing significant mechanical issues after being driven approximately 100,000 miles. After the MaxxForce 1 trucks reached the 125,000 mile mark, the mechanical issues increased substantially, most often due to the failure of the Exhaust Gas Recirculation ("EGR") cooler. The EGR cooler is part of the EGR system which pumps engine exhaust back into the engine in order to lower emissions. All of Dutchmaid's MaxxForce 1 trucks lost their EGR coolers. Due to the ongoing issues, Dutchmaid moved the MaxxForce 1 trucks to its local fleet which hauled shorter distances. Dutchmaid also contemplated retiring the MaxxForce 1 trucks earlier than the company normally retires the trucks in its fleet.

{¶4} In late 2010, Dutchmaid began the process of purchasing additional trucks for its fleet. Navistar's sales representative, John Lasson, and his team met with Sam

Burrer, Dutchmaid's General Manager, to discuss the purchase of Navistar's second generation MaxxForce trucks ("MaxxForce 2 trucks"), which were designed to meet the EPA's 2010 lower emissions standards. Burrer informed Lasson Navistar would have to convince Dutchmaid the issues it had experienced with the MaxxForce 1 trucks were resolved and corrected before Dutchmaid would consider purchasing MaxxForce powered trucks again.

{¶5} After extensive discussions, visits to Navistar's manufacturing plant, and repeated assurances of the reliability of and the testing conducted on the MaxxForce 2 trucks, Dutchmaid purchased twenty MaxxForce 2 trucks between 2011, and 2012. Over the three years during which Dutchmaid owned and operated the MaxxForce 2 trucks, the vehicles were in the shop for warranted repairs on more than 100 separate occasions. The problems necessitating the repairs included EGR system failures.

{¶6} On February 11, 2015, Dutchmaid filed a complaint against Navistar, asserting, inter alia, claims of breach of express warranty and fraud by nondisclosure.

{¶7} At trial, Burrer testified regarding Dutchmaid's ongoing issues with the MaxxForce 1 trucks, the need to purchase new trucks, and how and why Dutchmaid ultimately decided to purchase the MaxxForce 2 trucks. Burrer explained, in 2010, the EPA established new standards for emissions and Dutchmaid had to purchase new trucks for its fleet. In January, 2011, Dutchmaid began to run three test trucks: a Freightliner truck with a Cummins engine, a Freightliner truck with a Detroit Diesel engine, and a MaxxForce 2 truck. Dutchmaid wanted to be assured Navistar had conducted sufficient field testing on the MaxxForce 2 trucks. Burrer noted, "[W]e want to see lots of trucks

with lots of miles and in real-world environments." Trial Transcript, Vol. III at p. 747. Burrer added running one test truck would not tell him enough about reliability.

{¶8} The Freightliner trucks were equipped with the newly developed Selective Catalytic Reduction ("SCR") system to meet the EPA's lower emission standards. Navistar continued to rely solely on the EGR system. During discussions with Freightliner, Burrer learned the EGR-only emissions system used in the MaxxForce 2 trucks pumped even more hot exhaust gases through the engines, resulting in excessive heat which could lead to EGR cooler cracking. Burrer expressed his concerns about this potential problem to Lasson, asking, "[W]hat are you guys doing to convince me that you've got this problem resolved, that it's going to be good from here forward?" Tr. at 749-750.

{¶9} Although the MaxxForce 2 test truck satisfied Dutchmaid's questions about fuel economy, the overall reliability of the MaxxForce 2 trucks remained a major concern for Dutchmaid. Between January and June, 2011, Lasson and his team visited Dutchmaid and Burer at least a half-dozen times and, each time, Burer raised concerns about reliability of the MaxxForce 2 trucks. Burrer "always talked to them about testing," explaining: "To me, that's the most important thing you can to do. And – and I mean field testing. For me, I think that's most critical. Some guys may disagree with it, but I think field testing is absolutely critical in that they run a lot of miles and they have two to three years, at least, of testing." Tr. at 754. Navistar repeatedly told Dutchmaid and Burrer it had field tested multiple trucks over the course of two to three years and some of the trucks had achieved 200-300 thousand test miles.

{¶10} At every meeting, Burrer also asked Navistar if the issues with the EGR coolers had been resolved. Each time, Navistar informed Burrer the EGR system had been reengineered, redesigned, and, as a result, the EGR cooler was more robust. Navistar indicated the EGR cooler would last the life of the truck's engine and the engine would be reliable for over a million miles. Anthony Greszler, Dutchmaid's expert witness, testified the standard engine life for trucks of this kind is 1.2 million miles.

{¶11} Burrer traveled to Navistar's Alabama manufacturing plant. Navistar engineers gave Burrer a tour of the plant, showed him a disassembled engine, and engaged in discussions with him regarding the testing conducted on and improvements made to the MaxxForce 2 engines. Navistar's repeated assurance the EGR system issues had been resolved was the main factor which convinced Dutchmaid to purchase the MaxxForce 2 trucks. Tr. Vol. IV at 1089. According to Burrer, Dutchmaid would not have purchased the trucks if Navistar had disclosed the information it had. *Id*. at 1092-1093.

{¶12} Burrer described the problems Dutchmaid had with the new MaxxForce 2 trucks. The MaxxForce 2 trucks were down for repairs 1,288 days during the time Dutchmaid operated the vehicles. This downtime resulted in lost profits of $298,271. In 2013, the MaxxForce 2 trucks achieved, on average, 13,000 less miles per truck than Dutchmaid's non-MaxxForce engine powered trucks. In 2014, the MaxxForce 2 trucks achieved, on average, 19,000 less miles per truck. After only 3 ½ years, Dutchmaid traded the MaxxForce 2 trucks out early because of the disruption to the company's operations. Based upon industry resale data, Dutchmaid's early and unexpected disposal of the Maxxforce 2 trucks resulted in a loss of $35,825/truck.

{¶13} Gerald Billinghurst, a sales representative for Truck Sales & Service[1], arranged Burrer's visit to the Navistar factory and traveled to Alabama with him. Billinghurst was well aware of the problems Dutchmaid was having with the MaxxForce 1 trucks. Billinghurst explained the biggest issue Dutchmaid had with the MaxxForce 1 trucks was reliability and the purpose of the trip to Alabama was for Burrer to gain confidence in the MaxxForce 2 engines. Over the course of the business relationship between Dutchmaid and Truck Sales & Services, Burrer and at least two other Dutchmaid employees expressed to Billinghurst their displeasure with the performance of the MaxxForce 1 trucks and the ongoing issues with the EGR coolers. Billinghurst was also aware Dutchmaid had concerns about buying new trucks equipped with MaxxForce 2 engines. He was present at a number of meetings with Burrer and different Navistar representatives. During the visit to Navistar's Alabama factory, Billinghurst heard Navistar representatives tell Burrer the issues Dutchmaid experienced with the EGR cooler and EGR system had been resolved.

{¶14} Billinghurst testified regarding his personal experience with the breakdowns of the MaxxForce 1 trucks. He described the downtime as "Not good. And to the point of terrible in some instances because they were down for two weeks to a month, in some instances." Tr. Vol. IV at 1128. Billinghurst recalled the trucks spent "a lot of time" in their shop. Truck Sales & Service "worked guys overtime to keep this fleet going because of the issues that were out there that we knew about." *Id*. Billinghurst added, "There was a part shortage because of the demand for...certain parts that were breaking." *Id*. Truck Sales & Service also experienced issues getting the trucks into the shop. Billinghurst

[1] Dutchmaid purchased the trucks in its fleet, including the Maxx Force 1 and MaxxForce 2 trucks, from Truck Sales & Service.

explained, “There were other customers’ trucks, other MaxxForces in the parking lot that needed repairs also. And we ran into that with…dealerships across the state.” *Id*. at 1129. It was not uncommon for Dutchmaid to have multiple trucks down at the same time.

{¶15} While conversations were ongoing between Dutchmaid and Navistar relative to Dutchmaid purchasing MaxxForce 2 trucks, Navistar, at its highest corporate levels, was aware of the issues with the MaxxForce 2 engines. Jim Hebe, Navistar’s Vice President of North American Sales and former CEO of Freightliner, indicated Navistar “did a very bad job testing this truck [MaxxForce 2] before launch.” Playback of Video Deposition of James Hebe Tr. at 2631. Hebe described the testing of the MaxxForce 2 engines as “not typical,” less than the usual three-year cycle. Hebe disputed the testimony of Navistar representatives who stated Navistar had more than 4.5 million miles of field testing on the final engine before the trucks went to market. *Id*. at 2634. In the final testing, issues remained with the EGR cooler, the EGR valve, and the bellows valve in the EGR system. *Id*. at 2637. In June or July, 2010, Navistar engineers advised Hebe the trucks were not ready to launch. *Id*. at 2638. Hebe opined Navistar “didn’t test the final product in its final form in a manner that would have been consistent with normal industry practice.” *Id*. at 2643.

{¶16} Dennis Mooney, who was the Senior Vice President of Product Development at the time of trial, testified he was involved in all aspects of engine engineering, including the testing and validation of the engines. Playback of Video Deposition of Dennis Mooney Tr. at 2656. In a December, 2012 email to Navistar CEO Troy Clarke, Mooney expressed “[s]ome thoughts on our current quality.” *Id*. at 2691. His intention was to provide Clarke with his “opinion of the background of what got us to

where we were," i.e., all the warranty expense Navistar was incurring on the MaxxForce 2 trucks. *Id*. at 2694. In the email, Mooney noted, "[t]he entire auto and heavy-duty truck industry standard is 48 months for a new – new engine/emission system development. * * * When I got here in January of 2010, we were still finalizing DV design[2] six months before start of production. We had no time to validate and get miles on trucks." *Id*. at 2692. Mooney acknowledged the "field test trucks were essentially engineering development trucks," not validation trucks. *Id*. Navistar was changing hardware "weekly as we were finding and trying to fix problems, many of which were infant mortality problems."[3] *Id*.

{¶17} During his trial testimony, Mooney explained he "learned a couple of things since [he] wrote the e-mail" and he discovered the engine had been in production three years prior to 2010. *Id*. at 2735-2736. Mooney stated the testing conducted on the MaxxForce 2 trucks was not compressed into a six-month period. *Id*. at 2741. Mooney added the majority of the testing on the engine and its components had been going on for several years. *Id*. at 2741-2742.

{¶18} Shane Spencer, Navistar's corporate representative, acknowledged when the MaxxForce 2 trucks were launched in 2010, the EGR cooler had a life of 225,000 miles. Spencer explained this information would not have been disclosed to Dutchmaid or other potential buyers unless specifically asked because it is not industry practice to talk about the life of a particular component in an engine. Tr. Vol. III at 498. Navistar launched the MaxxForce 2 based upon the overall reliability of the engine. *Id*. at 493.

[2] "DV" stands for design validation or verification.

[3] Infant mortality refers to low mileage trucks.

When questioned about why Navistar never disclosed the issue with the EGR cooler, Spencer repeatedly explained Navistar had completed its test plan and "we were meeting our reliability goals at the engine level." *Id*. at 509. Navistar made over a dozen design changes or quality improvements to the EGR cooler between the launch and Dutchmaid placing its first order of MaxxForce 2 trucks in July, 2011. *Id*. at 535- 536. Spencer explained changes and improvements are continuously rolled out over time with any component. *Id*. at 536.

{¶19} In an earnings call with investors after the first quarter of 2012, Jack Allen, Navistar's COO, indicated "an unusually high frequency of repair on a couple of significant components," to wit: the EGR cooler and the EGR valves, were the biggest warranty cost drivers. *Id*. at 685; Playback of Jack Allen Video Deposition Tr. at 2809. In a March 5, 2012 email, Mark Reiter, Navistar's Vice President of Product Support, recognized the EGR coolers, EGR valves, and EGR bellows were "significant contributing factors" to the $112 million in warranty costs, but cautioned Navistar needed "to be very careful of the analyst day messaging." Tr. at 1918-1920. Reiter was unaware of any disclosures made to Dutchmaid admitting Navistar's warranty issues were related to EGR coolers and EGR valves. At trial, Reiter conceded the EGR coolers and EGR valves were the two biggest drivers of Navistar's warranty costs. Tr. at 1927.

{¶20} After hearing all the evidence and deliberating, the jury found in favor of Dutchmaid on its fraudulent nondisclosure claim, and in favor of Navistar on Dutchmaid's breach of warranty claim. The jury awarded Dutchmaid compensatory damages in the amount of $75,000, for lost profits and $200,000, for diminished value. The jury also

awarded punitive damages in the amount of $1,025,000, finding Navistar committed aggravated or egregious fraud. The trial court journalized the verdict on July 29, 2019.

{¶21} It is from this judgment Navistar appeals, raising the following assignments of error:

I. THE TRIAL COURT ERRED BY FAILING TO GRANT JUDGMENT TO NAVISTAR ON DUTCHMAID'S FRAUDULENT NONDISCLOSURE CLAIM BECAUSE DUTCHMAID "FAILED TO ESTABLISH DAMAGES [FOR THE ALLEGED FRAUD] SEPARATE FROM THOSE IT ARGUED WERE ATTRIBUTABLE" TO NAVISTAR'S ALLEGED BREACH OF WARRANTY. *TEXTRON FIN. CORP. V. NATIONWIDE MUT. INS. CO.*, 115 OHIO APP. 3D 137, 153 (9TH DIST. 1996).

II. THE TRIAL COURT ERRED BY FAILING TO GRANT JUDGMENT TO NAVISTAR ON DUTCHMAID'S FRAUDULENT NONDISCLOSURE CLAIM BECAUSE THAT CLAIM IS BARRED BY THE EXPRESS DISCLAIMERS THE PARTIES AGREED TO IN THE LIMITED WARRANTY. *SEE GALMISH V. CICCHINI*, 90 OHIO ST. 3D 22, 27-29 (2000); *GOODYEAR TIRE & RUBBER CO. V. CHILES POWER SUPPLY, INC.*, 7 F. SUPP. 2D 954, 962-63 (N.D. OHIO 1998).

III. THE TRIAL COURT ERRED BY MISINSTRUCTING THE JURY ON THE BURDEN OF PROOF FOR DUTCHMAID'S FRAUDULENT NONDISCLOSURE CLAIM, *SEE CRAWFORD V. STAN*, 2012-OHIO-3624, PARAS. 20, 23 (5TH DIST.); *RAPPORT V. KOCHOVSKI*, 185 OHIO

APP. 3D 309, 313-15 (5TH DIST. 2009), AND BY FAILING TO INSTRUCT THE JURY AS TO THE LEGAL SIGNIFICANCE OF THE PARTIES' EXPRESS DISCLAIMERS.

IV. THE TRIAL COURT ERRED BY FAILING TO GRANT NAVISTAR A NEW TRIAL ON DUTCHMAID'S PUNITIVE DAMAGES BECAUSE THE JURY'S FINDING ON PUNITIVE DAMAGES CANNOT BE SUSTAINED. *SEE LOGSDON V. GRAHAM FORD CO.*, 54 OHIO ST. 2D 336, 339-40 (1978).

I

{¶22} In its first assignment of error, Navistar maintains the trial court erred in failing to grant judgment in favor of Navistar on Dutchmaid's fraudulent nondisclosure claim. Specifically, Navistar argues, because Dutchmaid sought "the exact same damages for Navistar's alleged fraud as it also sought for Navistar's alleged breach of warranty," the fraudulent nondisclosure claim fails as a matter of law. Brief of Appellant at 11.

{¶23} Navistar relies upon *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.,* 115 Ohio App.3d 137, 684 N.E.2d 1261 (1996), in support of its position. Therein, the Ninth District Court of Appeals stated:

In Ohio, a breach of contract does not create a tort claim. (Citation omitted). Generally, "the existence of a contract action * * * excludes the opportunity to present the same case as a tort claim." *Id.* (Citation omitted).

> A tort claim based upon the same actions as those upon which a claim of contract breach is based will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed. (Citation omitted). * * * In addition to containing a duty independent of that created by contract, an action arising out of contract which is also based upon tortious conduct must include actual damages attributable to the wrongful acts of the alleged tortfeasor which are *in addition* to those attributable to the breach of the contract. (Citations omitted). *Id*. at 151.

{¶24} Navistar focuses on the second requirement, i.e., "actual damages attributable to the wrongful acts of the alleged tortfeasor which are *in addition* to those attributable to the breach of the contract." Navistar explains the additional damages rule "distinguishes between contract and fraud claims by focusing on the nature of the claimed injury." Brief of Appellant at 13. Navistar submits, because "Dutchmaid asserted the exact same damages under its warranty and fraud theories – lost profits and diminished value – and submitted the exact same damages to the jury for each theory of liability: $1,248,851.00," Dutchmaid "thus 'failed to establish damages separate from those it argued were attributable' to Navistar's alleged breach of warranty, and its fraud claim fails." *Id*.

{¶25} Navistar cites a number of federal cases interpreting applicable state law in support of its position the additional damages requirement "invalidates" Dutchmaid's fraud claim. *Id*. These cases address the economic loss doctrine. In Ohio, "[t]he economic-

loss rule generally prevents recovery in tort of damages for purely economic loss." *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, ¶ 6. "This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that 'parties to a commercial transaction should remain free to govern their own affairs'." *Id.*, quoting *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 42, 537 N.E.2d 624 (1989).

{¶26} This Court recently addressed the application of the economic loss rule to a fraud claim in *Windsor Medical Center, Inc. v. Time Warner Cable, Inc.*, 5th Dist. Stark No. 2020CA00085, 2021-Ohio-158. In that case, Windsor Medical, a skilled nursing and senior living center, brought an action against Time Warner Cable, nka Spectrum, which provided the facility's telephone, internet, and cable service. *Id*. at ¶2. Windsor Medical sought damages for fraud and violations of Ohio's Deceptive Trade Practices Act. *Id*. at ¶4. The jury found in favor of Windsor Medical on the fraud claim, and awarded compensatory and punitive damages. *Id*. at ¶19. The jury found in favor of Spectrum on Windsor Medical's claim for deceptive trade practices. *Id*. Spectrum filed a motion for judgment notwithstanding the verdict, which the trial court denied. *Id*. at ¶20.

{¶27} On appeal, Spectrum argued the economic loss rule barred Windsor Medical's fraud claim as such claim sounded in contract. *Id*. at ¶24. We disagreed, finding:

> There are exceptions, however, to the application of the economic loss rule to bar recovery in tort of purely economic loss. A plaintiff may

pursue such a tort claim if it is "based exclusively upon [a] discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity." *Corporex*, supra at ¶ 9. These types of exempt claims may include negligent misrepresentation, breach of fiduciary duty, fraud, and conversion. *Potts v. Safeco Ins. Co.*, 5th Dist. No. 2009 CA 0083, 2010-Ohio-2042, 2010 WL 1839738, ¶ 21; *Morgan v. Mikhail*, 10th Dist. No. 08AP-87, 2008-Ohio-4598, 2008 WL 4174063, ¶ 69.

Therefore, a tort claim can proceed where "the facts of the case show an intentional tort committed independently, but in connection with a breach of contract * * *." *Burns v. Prudential Securities, Inc.,* 167 Ohio App.3d 809, 2006-Ohio-3550, 857 N.E.2d 621, ¶ 99. Accordingly, where a tort claim alleges a duty was breached independent of the contract, the economic loss rule does not apply. See, *Campbell v. Krupp,* 195 Ohio App.3d 573, 2011-Ohio-2694, 961 N.E.2d 205, ¶ 16 (6th Dist.) See also, *Eysoldt v. ProScan Imaging,* 194 Ohio App.3d 630, 2011-Ohio-2359, 957 N.E.2d 780, ¶21 (1st Dist.) (finding the economic loss rule does not apply to intentional torts, as they are breaches of duties beyond those created by contract). Where the tort claim alleges a breach of an independent duty, it must also allege damages that are separate and distinct from the breach of contract. *Strategy Group for Media, Inc. v. Lowden,* 5th Dist. Delaware No. 12 CAE 03 0016, 2013-Ohio-1330, 2013 WL 1343614, ¶ 30. *Id*. at ¶ 27-28

{¶28} In accordance with our decision in *Windsor* Medical, we find the economic loss rule does not apply to bar Dutchmaid's fraud claim. Navistar breached duties which were independent of those which arose through the warranty. Navistar, through its representatives, purposely failed to disclose material information about the EGR cooler system on the MaxxForce 2 trucks despite Dutchmaid's inquiries. These nondisclosures occurred prior to Dutchmaid's purchase of any MaxxForce 2 trucks.

{¶29} We also reject Navistar's assertion Dutchmaid's fraud claim must fail because Dutchmaid did not establish damages separate from those it argued were attributable to Navistar's alleged breach of warranty. The United States Court of Appeals for the Sixth Circuit addressed this identical argument in *Regal Cinemas, Inc. v. W & M Props.,* 90 Fed. App'x 824 (6th Cir. 2004). The facts relevant to the matter before us are as follows: Regal Cinemas brought an action for fraud and breach of contract against W & M Properties, a developer, arising out of a real estate transaction under which W & M Properties was to build a theater at a shopping center developed and owned by W & M Properties in Macedonia, Ohio. *Id*. at *827. At the conclusion of the trial, the jury found for Regal Cinemas on its fraud claim, and in favor of W & M Properties on Regal Cinema's breach of contract claim. *Id*. On appeal, W & M Properties argued it was entitled to judgment as a matter of law because Regal Cinemas failed to establish two elements of fraud under Ohio law: justifiable reliance and resulting damages. *Id*. at *826.

{¶30} W & M Properties argued, inter alia, Regal Cinemas "was required to present evidence of damages separate from the damages that it claimed to have suffered due to the breach of the lease claim that the jury rejected." *Id*. at *831. The Sixth Circuit found, because the jury did not find a breach of contract, "there is no concern that the

fraud damages duplicate the damages resulting from a breach." *Id*. W & M Properties also sought to apply the proposition set forth in *Textron*, supra, "[a] party cannot recover under theories of both fraud and negligence based upon the same course of conduct." *Id*. at *832. The Sixth Circuit refused to do so, explaining:

> Regal has not asked us to turn a mere breach of contract into a tort claim: rather, the fraud claim relates to distinct acts, especially since the jury found that there was no breach of contract in this case. Defendants' argument that, every time a party claims both breach of contract and fraud, the party cannot recover fraud damages that duplicate the damages that it claimed under breach of contract even where it has been determined there was no breach of contract, is flatly unreasonable. Not only does Ohio law not support this proposition, but reading it that way would result in a penalty for arguing in the alternative. *Id*.

{¶31} We agree with the rationale set forth in *Regal Cinemas*. In the instant action, the jury found Navistar did not breach the warranty. Because the jury so found, we find the damages the jury awarded for fraud were not duplicative of the damages sought by Dutchmaid on its breach of warranty claim. We further find the fraud and breach of warranty claims were not based upon the same course of conduct. The fraud claim was based upon distinct acts - Navistar's failure to disclose material information to Dutchmaid, effecting Dutchmaid's decision to purchase the MaxxForce 2 trucks. Navistar knew the issues with the EGR cooler system was the primary reason for Dutchmaid's

hesitancy in purchasing the trucks. The breach of warranty claim was based upon the limited warranty provided to Dutchmaid subsequent to the purchases.

{¶32} Based upon the foregoing, we find the trial court did not err in failing to grant judgment to Navistar on Dutchmaid's fraud claim.

{¶33} Navistar's first assignment of error is overruled.

II

{¶34} In its second assignment of error, Navistar contends the trial court erred in failing to grant judgment in favor of Navistar on Dutchmaid's fraudulent nondisclosure claim as said claim fails in light of the parties' express disclaimer. We disagree.

{¶35} The disclaimer incorporated into Navistar's limited warranty provides, in pertinent part:

> NO WARRANTIES ARE GIVEN BEYOND THOSE DESCRIBED HEREIN. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED. THE COMPANY SPECIFICALLY DISCLAIMS WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ALL OTHER REPRESENTATIONS TO THE USER/PURCHASER, AND ALL OTHER OBLIGATIONS OR LIABILITIES. THE COMPANY FURTHER EXCLUDES LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, ON THE PART OF THE COMPANY OR SELLER. No person is authorized to give any other warranties or to assume any liabilities on the Company's behalf unless made or assumed in writing by the Company, and no other person is authorized to give any warranties

or to assume any liabilities on the seller's behalf unless made or assumed in writing by the seller.

{¶36} Navistar submits Ohio law does not permit a fraud claim to override an express disclaimer in a contractual agreement based upon two interrelated principles: (1) a party to a contract may not claim fraud based upon an alleged "promise, the terms of which are directly contradicted by" the contract. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 29, 734 N.E.2d 782 (2000); and (2) "[n]o party to a contract can claim [justifiable] reliance upon any representation which is expressly disclaimed by another party." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 7 F. Supp. 2d 954, 962-963 (N.D. Ohio 1998).[4] We shall address each principle in turn.

{¶37} The parol evidence rule states "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish*, supra at 27, citing 11 Williston on Contracts (4 Ed.1999) 569–570, Section 33:4.

{¶38} The principal purpose of the parol evidence rule is to protect the integrity of written contracts. *Id*., citing *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 440, 662 N.E.2d 1074, 1080. "By prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and enforceability of finalized written instruments." *Id*. "It reflects and implements the legal preference, if not the talismanic legal primacy, historically given to writings. It effectuates a presumption that a subsequent

[4] The word "justifiable" was inserted by Navistar and replaced the word "such".

written contract is of a higher nature than earlier statements, negotiations, or oral agreements by deeming those earlier expressions to be merged into or superseded by the written document." *Id*. at 27-28, citing 11 Williston on Contracts, *supra,* at 541–548, Section 33:1 (Footnotes omitted in original).

{¶39} However, "a party may produce evidence of a contemporaneous oral agreement when that agreement was made in order to induce the party into entering the written contract." *Stormont v. Tenn–River Trading Co., Inc.,* 10th Dist. Franklin No. 94APG08–1272, *3 (Apr. 27, 1995), citing *Walters v. First National Bank of Newark* (1982), 69 Ohio St.2d 677, 681. There is a distinct difference between prohibiting prior or contemporaneous agreements to vary the terms of a written contract versus prohibiting prior or contemporaneous statements to induce a party into entering into the contract.

{¶40} Burrer testified Dutchmaid would not have purchased MaxxForce 2 trucks had it known Navistar had not conducted adequate field testing, the EGR system issues were still unresolved, and the EGR cooler would not last the life of the truck's engine. Because Navistar's representations to the contrary and nondisclosures induced Dutchmaid to purchase the MaxxForce 2 trucks, we find the evidence as to these nondisclosures is not prohibited by the parol evidence rule.

{¶41} In addition to its contention Ohio law does not permit a fraud claim to override an express disclaimer under the parol evidence rule, Navistar also argues a party to a contract cannot claim reliance upon any representation which is expressly disclaimed. Navistar cites two cases from the United States District Court for the Northern District of Ohio, *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, supra, and *Keller Logistics, Inc. v. Navistar, Inc.*, 2020 WL 4597283, in support.

{¶42} We find *Goodyear* to be factually distinguishable. Therein, Chiles Power Supply dba Heatway Systems ("Heatway"), a manufacturer of hydronic radiant heating systems, entered into negotiations with Goodyear for the supply of Entran II rubber hoses. *Id*. at 956. After approximately one year of negotiations, the parties reached an agreement, which included a set of ten performance specifications for any Entran II supplied by Goodyear as well as the warranty which would apply to thereto. *Id*. at 957. The warranty included not only a limited disclaimer of liability, but also a full disclaimer of reliance in its standard terms and conditions. *Id*. at 963. The warranty disclaimed most liability, expressly stating "[o]ther than those specifically set forth herein, there are no warranties which extend beyond the description of the products on the face hereof, either express or implied." *Id*.

{¶43} Goodyear filed a complaint against Heatway, seeking, inter alia, a declaration its express disclaimers limited the extent to which it could be held accountable for any problem arising from the Entran II hose. *Id*. at 961. The U.S. District Court granted summary judgment in favor of Goodyear, finding the terms of the disclaimers gave Heatway fair warning as to the reliability of any representation external to the terms. *Id*. at 963. The *Goodyear* Court concluded a reasonable jury could not find Heatway acted reasonably in relying upon any such representation. *Id*.

{¶44} Unlike the parties in *Goodyear*, the parties herein did not negotiate the terms of the warranty. The boilerplate language of the disclaimer incorporated into the limited warranty was drafted exclusively by Navistar. Dutchmaid did not have any bargaining power in this regard. Further, we find the terms of the disclaimer did not give Dutchmaid "fair warning" as to the reliability of Navistar's nondisclosures. The fraud

alleged by Dutchmaid was based upon Navistar's fraudulent concealment of material information. We hold a party cannot disclaim its fraudulent concealment of material information by incorporating boilerplate warranty language.

{¶45} Reviewing *Keller Logistics*, supra, we find a similar fact pattern to the instant action. Keller purchased thirty Navistar manufactured trucks from Defiance Truck Sales & Service in April 2011. *Id*. at *1. In July 2012, Keller leased another thirty-five Navistar manufactured trucks from GE CF Trust. *Id*. Navistar issued limited warranties, which state Navistar will "repair and replace" any covered components if necessary due to defective materials or workmanship. *Id.* "Not long after delivery, the trucks' EGR systems and related components began malfunctioning, resulting in repeated repairs." *Id*. Keller subsequently filed a complaint against Navistar in the United States District Court for the Northern District of Ohio, alleging, inter alia, fraud. *Id*. The fraud claims were based upon "'numerous misrepresentations [Navistar made] about the [t]rucks' in the months leading up to the two transactions." *Id*. at *2.

{¶46} In granting summary judgment in favor of Navistar, the *Keller* Court found Keller could not demonstrate Navistar owed a duty independent of the contract and Keller did not suffer any damages attributable only to the tortious conduct. *Id*. The *Keller* Court, relying on *Goodyear*, supra, also found the warranty language of the disclaimer precluded the fraud claims. *Id*.

{¶47} Although we recognize the warranty language is identical in *Keller* and the matter sub judice, we, nonetheless, find *Keller* to be distinguishable. The fraud claims asserted by Keller were based upon Navistar's misrepresentations. In the instant action, Dutchmaid's fraud claim was based, in large part, upon Navistar's concealment of

material information, information Navistar knew was critical to Dutchmaid's ultimate decision to purchase the MaxxForce 2 trucks. We find the warranty language of the disclaimer did not preclude Dutchmaid's fraud by nondisclosure claim. We further note there was no specific reference to the engine or EGR system in the warranty disclaimer.

{¶48} In a footnote, Navistar lists several Ohio cases: *Benko v. Smyk*, 11th Dist. Lake No. 2013–L–133, 2015-Ohio-1062; *Snider-Cannata Interests, LLC v. Ruper*, 8th Dist. Cuyahoga No. 93401, 2010-Ohio-1927; and *Abbott v. Loss Realty Group,* 6th Dist. Lucas No. L–05–1107, 2005-Ohio-5876, to further support its assertion there can be no justifiable reliance because of a disclaimer. These cases involved real estate transactions and do not provide guidance in the matter before this Court.

{¶49} We now address Navistar argument the contractual disclaimer conclusively bars Dutchmaid's fraudulent nondisclosure claim. Navistar contends because the "allegedly misleading partial disclosures here were not reflected in the Limited Warranty or in any other written agreement between the parties" and were "inherently inconsistent with the disclaimer," Dutchmaid's reliance on such statements was not justifiable. Brief of Appellant at 23-24.

{¶50} "[T]he presence of a disclaimer does not necessarily shield a defendant from liability or mean that a plaintiff will not be able to demonstrate justifiable reliance." *Northpoint Properties v. Charter One Bank,* 8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512, 2011 WL 2112666, ¶ 63. "Courts have long held that general disclaimers of accuracy do not shield sellers who knowingly make false statements." *In re Natl. Century Fin. Ent., Inc., Invest. Litigation*, 541 F.Supp.2d 986, 1005 (S.D.Ohio 2007).

{¶51} Dutchmaid asked questions and Navistar knowingly provided false answers. We find a party cannot escape liability for his own deliberate misrepresentations and/or omissions by inserting boilerplate disclaimers into a limited warranty. See, *Milman v. Box Hill Systems Corp.,* 72 F.Supp.2d 220, 231 (S.D.N.Y.1999) ("[N]o degree of cautionary language will protect material misrepresentations or omissions where defendants knew their statements were false when made.").

{¶52} Alternatively, Navistar claims, even if Dutchmaid's fraud claim is not barred as a matter of law, the claim still fails as Dutchmaid did not present sufficient evidence of justifiable reliance. As set forth in our Statement of the Facts and Case, supra we find there was ample evidence from which the jury could find Dutchmaid's reliance on Navistar's statements was justified.

{¶53} Navistar's second assignment of error is overruled.

III

{¶54} In its third assignment of error, Navistar asserts the trial court erred in failing to properly instruct the jury First, Navistar submits the trial court failed to instruct the jury on the correct burden of proof for a fraudulent nondisclosure claim. Next, Navistar claims the trial court erred in rejecting its proposed instructions regarding the legal import of the parties' express disclaimers.

{¶55} The determination of whether to give a jury instruction is a matter left to the sound discretion of the trial court. A trial court is obligated to provide jury instructions which correctly and completely state the law. *Cromer v. Children's Hospital Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921. The jury instructions also must be warranted by the evidence presented in the case. *Estate of Hall v. Akron Gen.*

Med. Ctr., 125 Ohio St.3d 300, 2010-Ohio-1041, 927 N.E.2d 1112. The question of whether a jury instruction is legally correct and factually warranted is subject to de novo review. *Id.* An inadequate instruction which misleads the jury constitutes reversible error. *Marshall v. Gibson*, 19 Ohio St.3d 10, 482 N.E.2d 583 (1985). Our standard of review when it is claimed improper jury instructions were given is to consider the jury charge as a whole and determine whether the charge misled the jury in a manner affecting the complaining party's substantial rights. *Lowder v. Domingo*, 5th Dist. Stark No. 2016CA00043, 2017-Ohio-1241, 2017 WL 1231724.

{¶56} The trial court instructed the jury, "Dutchmaid must prove by the greater weight of the evidence each of the . . . elements" of fraud by nondisclosure. Navistar objected, arguing Dutchmaid had to prove its fraud claims by clear and convincing evidence.

{¶57} In support of its position, Navistar cites numerous cases from this District in which we found fraud must be established by clear and convincing evidence. Upon review, we find, in the majority of those cases, the plaintiff was seeking an equitable remedy. "A party seeking an equitable remedy, such as declaratory judgment, reformation or rescission of a contract, must prove a fraud claim with clear and convincing evidence, while a party seeking a monetary remedy must prove fraud by the preponderance of the evidence." *Andrew v. Power Marketing Direct, Inc.*, 10th Dist. No. 11AP-603, 2012-Ohio-4371, 978 N.E.2d 974, ¶ 47, citing *Household Finance Corp. v. Altenberg,* 5 Ohio St.2d 190, syllabus, 214 N.E.2d 667 (1966).

{¶58} In the instant action, Dutchmaid did not seek equitable reformation or rescission of a contract, but rather compensatory and punitive damages resulting from

Navistar's fraudulent nondisclosures. Preponderance of the evidence thus was the required standard of proof, and the trial court did not err in so instructing the jury.

{¶59} Assuming, arguendo, the trial court erroneously instructed the jury on the burden of proof, we find such error to be harmless. The trial court properly instructed the jury, in order to award punitive damages, they must find Dutchmaid proved, by clear and convincing evidence, Navistar acted with malice, aggravated or egregious fraud, oppression, or insult. The jury awarded punitive damages; therefore, the jury necessarily found, by clear and convincing evidence, Navistar acted with malice, aggravated or egregious fraud, oppression, or insult. Because the trial court correctly instructed the jury with respect to punitive damages and the jury found clear and convincing evidence to award punitive damages, we find any error in the trial court's erroneous jury instruction as to the burden of proof for fraud did not affect the substantial rights of Navistar and was harmless.

{¶60} Within this assignment of error, Navistar also argues the trial court erred in failing to instruct the jury regarding the legal import of the parties' express disclaimer. For the reasons set forth in our analysis of Navistar's second assignment of error, supra, we find no error in the trial court's decision not to give the requested instructions.

{¶61} Navistar's third assignment of error is overruled.

IV.

{¶62} In its final assignment of error, Navistar challenges the jury's award of punitive damages, asserting there was no evidence of actual malice or that the fraud was "intentionally committed with the purpose of causing injury" to Dutchmaid.

{¶63} In cases alleging fraud, in order to be awarded punitive damages, the plaintiff must establish not only the elements of the tort itself, but must also show either the fraud is aggravated by the existence of malice or ill, or must demonstrate the wrongdoing is particularly gross or egregious. *Atram v. Star Tool & Die Corp.* (1989), 64 Ohio App.3d 388, 391–392, 581 N.E.2d 1110; *Mid–America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 602, 579 N.E.2d 721. There must be an element of malice, oppressive conduct, or outrage to sustain such an award. *Id.*

{¶64} The "actual malice" necessary for purposes of an award of punitive damages has been defined as (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 316, 736 N.E.2d 517, quoting *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus; *Kemp v. Kemp*, 5th Dist. No. 04CA011, 161 Ohio App.3d 671, 2005-Ohio-3120, 831 N.E.2d 1038, ¶ 73.

{¶65} Whether actual malice exists is a question for the trier of fact. *Spires v. Oxford Mining Co., LLC,* 7th Dist. Belmont App. No. 17 BE 0002, 2018-Ohio-2769, 116 N.E.3d 717, ¶ 32, citing *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999), 87 Ohio St.3d 280, 720 N.E.2d 495; R.C. 2315.21(C)(1). "The same standard of review is employed to assess the weight of evidence whether the finding is for compensatory damages or the elements necessary to justify an award of punitive damages." *Id.*, citing *Bosak v. Kalmer*, 7th Dist. Mahoning App. No. 01 CA 18, 2002-Ohio-3463, 2002 WL 1483884, ¶ 36. Factual determinations will not be overturned as long as they are

supported by some competent, credible evidence going to all the essential elements of the case. *Id.*, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

{¶66} Navistar explains the dispute herein "involves two sophisticated commercial entities, who negotiated and ultimately agreed to a detailed written contract." Brief of Appellant at 34.

{¶67} Navistar relies upon *Logsdon v. Graham Ford Co.* (1978), 54 Ohio St.2d 336, 8 O.O.3d 349, 376 N.E.2d 1333, 1336, in support of its contention Dutchmaid presented a "bare case" of intentional fraud and, without more, failed to establish actual malice; therefore, punitive damages were not warranted.

{¶68} In *Logsdon,* supra, the defendant, a vehicle dealership, was accused of selling a used garbage packer as a "new unit" to the plaintiff, the owner of a refuse company, and failing to indicate the correct model year of the packer. *Id*. at 336. At the close of the defendant's case, the trial court charged the jury relative to compensatory and punitive damages. *Id*. at 337. After deliberating, the jury found in favor of the plaintiff and awarded compensatory and punitive damages. Id. at 338. The Ohio Supreme Court reversed:

> After studied review of the evidence presented in the trial court, we are of the opinion that Tucci knowingly concealed from appellee a fact material to the transaction, *viz.,* that the garbage packer was approximately one year old, by referring to the new truck and the attached garbage packer as a 'new unit,' and by failing to indicate the model year of the garbage

> packer on the retail buyer's order form. However, we conclude that such actions on the part of appellant's salesman did not evince a malicious, wanton or gross fraud, and that therefore the trial court erred in giving the instruction on punitive damages. *Id.* at 340.

{¶69} We find *Logsdon*, supra, to be factually distinguishable. The testimony of Navistar's witnesses reveals Navistar's deliberate concealment of the ongoing issues with the MaxxForce 2 trucks. In June or July, 2010, Hebe, Navistar's Vice President of North American Sales, was warned by Navistar engineers the MaxxForce 2 trucks were not ready to launch. Navistar executives opined Navistar did not conduct adequate testing of the final product and the testing conducted was not done in a manner consistent with industry practices. These executives acknowledged their failure to disclose material information and the efforts they made to conceal such information, including the significant problems with the MaxxForce 2 trucks, the inadequate testing, and the short life of the EGR cooler system. Although Navistar's CEO Troy Clarke and COO Jack Allen knew the EGR cooler systems had significant problems and were a primary reason for increased warranty expenses, they concealed this information during an earnings call one month prior to Dutchmaid's purchased of the MaxxForce 2 trucks. Internal documents, including emails, admitted at trial corroborated the testimony.

{¶70} The trial court properly instructed the jury on the standard for the imposition of punitive damages. A jury is presumed to follow the instructions of the trial court. *MCM Home Builders, LLC v. Sheehan*, 5th Dist. Delaware No. 18 CAE 09 0074, 2019-Ohio-3899, 2019 WL 4724682, ¶ 48 citing *Pang v. Minch*, 53 Ohio St.3d 186, 187, 559 N.E.2d

1313 (1990), paragraph four of the syllabus. This Court will not invade the province of a properly instructed jury which reached a reasonable decision based upon the evidence presented to it. *Estate of Baxter v. Grange Mut. Cas. Co.*, 73 Ohio App.3d 512, 521, 597 N.E.2d 1157 (1992).

{¶71} We conclude the jury reasonably determined Navistar acted with actual malice which warranted an award of punitive damages. We find there was clear and convincing evidence to supports the jury's determination Navistar acted with actual malice and its conduct was, indeed, egregious.

{¶72} Appellant's fourth assignment of error is overruled.

{¶73} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.
Baldwin, P.J. and
Wise, Earle, J. concur