The Bullet Point: Ohio Commercial Law Bulletin

Does my release bar a future claim?

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Jim Sandy and Stephanie Hand-Cannane

Waiver of personal jurisdiction

Caimona v. More Muscle Cars, LLC, 11th Dist. Trumbull No. 2019-T-0049, 2020-Ohio-2896

In this appeal, the Eleventh Appellate District affirmed the trial court's decision finding that the defendants did not waive the defense of lack of personal jurisdiction in a refiled lawsuit by failing to assert the defense in an initial lawsuit.

- **The Bullet Point**
  In Ohio, "personal jurisdiction is a 'waivable right,' and an individual may consent to a specific court exercising jurisdiction over him or her." An individual consents and waives personal jurisdiction by voluntarily appearing and submitting to the jurisdiction of the court. However, as noted by the court, lack of personal jurisdiction is a defense available in each separate lawsuit. If a plaintiff voluntarily dismisses their claim without prejudice and later refiles a subsequent lawsuit, the first voluntary dismissal "places the parties in the same position as if no suit had ever been filed." As such, the defendant is free to assert the defense of lack of personal jurisdiction in its answer to the refiled suit as participating in the first proceeding will not waive the defense.

Fraudulent Concealment

Solis v. Emery Fed. Credit Union, S.D.Ohio No. 1:19-cv-387, 2020 U.S. Dist. LEXIS 82366 (May 11, 2020)

In this case, the District Court granted the defendant's motion to dismiss the amended complaint, finding that the plaintiffs failed to adequately plead fraudulent concealment to toll the statute of limitations.

- **The Bullet Point**
  Generally, a statute of limitations (i.e. the time a party has to bring a claim) begins running either at the time an injury occurs, regardless of a plaintiff's awareness of the injury, or at the time that a plaintiff discovers or reasonably could have discovered that he has been injured. In limited circumstances, the equitable doctrine of fraudulent concealment serves as an extension to the limitations period. Pursuant to the doctrine of fraudulent concealment, "where the defendant takes steps to 'cover its tracks' and prevent the plaintiff from discovering the harm he has caused, the defendant should not be allowed to rely on the limitations period to escape liability for his conduct." To demonstrate fraudulent concealment, the plaintiff must show three elements: (1) the defendant actively concealed the conduct constituting the cause of action; (2) this concealment prevented the plaintiff from discovering the cause of action within the limitations period; and (3) until discovery, the plaintiff exercised due diligence

trying to learn about the cause of action. To satisfy the due diligence prong, the plaintiff must exercise reasonable diligence once having sufficient notice of a potential injury.

Release

Forbes v. Nationwide Mut. Ins. Co., 10th Dist. Franklin No. 19AP-220, 2020-Ohio-2802

In this appeal, the Tenth Appellate District affirmed the trial court's decision finding that although a prior release did not bar plaintiff's breach of contract claim, the defendant was nonetheless entitled to summary judgment.

- **The Bullet Point**
  A release of liability is a binding agreement between the parties under which at least one party relinquishes an existing claim or cause of action against the other party. Such a release of liability is an "absolute bar to a later action on any claim encompassed within it, absent a showing of fraud, duress, or other wrongful conduct in procuring" the release. In deciding whether a release operates upon a certain liability, Ohio courts analyze the language of the release and the state of then-existing facts to determine the intent of the parties in executing the release. That being said, releases from liability for future tortious conduct are not favored by Ohio courts and will be narrowly construed.

Lemon Law

Diguglielmo v. FCA US LLC, 6th Dist. Lucas No. L-19-1187, 2020-Ohio-2858

In this appeal, the Sixth Appellate District reversed in part and affirmed in part the trial court's decision, finding that genuine issues of material fact existed regarding whether the consumer's vehicle conformed to an express warranty.

- **The Bullet Point**
  In order for a consumer to succeed on a claim under Ohio's Lemon Law, R.C. 1345.71, et seq., the consumer must demonstrate: "(1) he was the owner of a vehicle covered by a written warranty, (2) the motor vehicle does not conform to the applicable expressed warranty, (3) he reported the nonconformity to the manufacturer or manufacturer's authorized dealer within one year following the original date of delivery or the first 18,000 miles of operation, whichever is earlier, and (4) the manufacturer or authorized dealer was unable to conform the motor vehicle to the express warranty by repairing or correcting a defect that substantially impaired the use, safety, or value of the motor vehicle, after a reasonable number of repair attempts." A consumer's inability to "specifically identify" the defective part of the vehicle does not bar recovery. While the consumer bears the burden of presenting evidence from which a reasonable inference can be made that a specific problem with the vehicle is due to a defective part, the consumer does not have the burden of eliminating all possible causes of the problem. That being said, the defect complained of must be "major" in that it substantially impairs the use, value, or safety of the vehicle to the consumer; Ohio's Lemon Law does not create remedies for buyers who have soured on their new vehicle for cosmetic or other trivial reasons.

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[Cite as *Caimona v. More Muscle Cars, L.L.C.*, 2020-Ohio-2896.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JOSEPH CAIMONA,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2019-T-0049**
- vs -	:	
MORE MUSCLE CARS, LLC, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2019 CV 00515.

Judgment: Affirmed.

Gregg A. Rossi and *James N. Melfi*, Rossi & Rossi Co., 26 Market Street, 8th Floor, P.O. Box 6045, Youngstown, OH 44501 (For Plaintiff-Appellant).

Thomas J. Wilson, Comstock, Springer & Wilson Co., LPA, 100 Federal Plaza East, Suite 926, Youngstown, OH 44503 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Joseph Caimona ("Caimona"), appeals a judgment in the Trumbull County Court of Common Pleas dismissing his complaint against appellees, More Muscle Cars, LLC, Certified Auto Brokers, LLC, and Stanley Volos. We affirm the judgment of the trial court.

{¶2} Initially, Caimona brought suit on August 23, 2016, against the named appellees for, inter alia, breach of contract, stemming from the online sale of a car. The parties engaged in discovery and litigation for nearly two years before Caimona

voluntarily dismissed the first suit on August 6, 2018. The record for the previously filed suit is not before this court; however, the parties do not dispute that personal jurisdiction was not at issue in the first suit.

{¶3} Caimona brought the suit subject to this appeal on March 18, 2019. The following limited facts are taken from the complaint and accepted as true for purposes of the present appeal:

{¶4} Caimona purchased a car from appellees through a website, www.classiccars.com ("the website"). Caimona alleges the transaction occurred in Trumbull County, Ohio; the contract was entered into in Trumbull County, Ohio; and the car was paid for, sold, and delivered in Ohio. After receiving the car on July 7, 2016, Caimona discovered various discrepancies between the car he negotiated to buy with appellees and the car he received. Further, he alleges that Appellee Stanley Volos ("Mr. Volos") failed to make repairs under an express warranty.

{¶5} On April 24, 2019, appellees filed an answer to the refiled complaint and asserted lack of personal jurisdiction as a defense to the claims. On May 1, 2019, appellees filed a motion to dismiss for lack of personal jurisdiction, claiming that none of the appellees has any ties or does any business in the state of Ohio. Certified Auto Brokers, LLC, is incorporated in Florida and operates a car dealership in Florida. More Muscle Cars, LLC is a marketing name for Certified Auto Brokers, LLC and was the seller name used when the car was listed on the website. Mr. Volos was the representative of Certified Auto Brokers, LLC, who handled the sale of the car to Caimona through the website. The matter was set for a hearing on the memorandums on May 23, 2019.

{¶6} On May 16, 2019, Caimona requested an extension of time until May 31, 2019, to file a response to the motion to dismiss. On May 28, 2019, the trial court granted the extension, and the hearing was reset for June 28, 2019. Despite the clear language of the judgment entry stating that the extension was granted "until May 31, 2019," counsel for Caimona contends that his brief was "due by 5:00pm on [the] date [of the hearing]." As a result, Caimona filed a brief in opposition to the motion to dismiss "[o]n June 28, 2019, at 12:45 p.m.," nearly one month after the extension deadline and without leave of court.

{¶7} On July 1, 2019, the trial court dismissed the claims after determining that the trial court lacked personal jurisdiction over appellees. The entry stated, "The Court notes that plaintiff failed to file a response to the Motion to Dismiss." Thereafter, Caimona filed a motion to vacate, or, in the alternative, a motion for reconsideration, which the trial court ultimately denied while on remand from this court. Regarding Caimona's untimely response in opposition to the motion to dismiss, the court stated, "In any case, the Court has subsequently reviewed the brief in opposition and does not find the Plaintiff's arguments with merit." The appeals of the motion to dismiss and the motion to vacate/reconsider were then consolidated.

{¶8} Caimona filed a timely notice of appeal in both instances and raises two assignments of error for our review.

{¶9} Caimona's first assignment of error states:

{¶10} "The Trial Court erred in granting Defendants/Appellees' Motion to Dismiss for lack of personal jurisdiction in the re-filed case because, pursuant to Civ.R. 12(H), Defendants/Appellees waived said defense when they did not raise it in a pre-

Answer Motion in the first action, appeared in the action through counsel, and fully engaged in discovery."

{¶11} This court reviews a trial court's determination on whether the court has personal jurisdiction over a party under the de novo standard of review. *84 Lumber Co., L.P. v. Houser*, 188 Ohio App.3d 581, 2010-Ohio-3683, ¶15 (11th Dist.), citing *Snyder Computer Sys., Inc. v. Stives*, 175 Ohio App.3d 653, 2008-Ohio-1192, ¶11 (7th Dist.). The Ohio Rules of Civil Procedure provide the following with regard to waiver of defenses:

> A defense of lack of jurisdiction over the person * * * is waived * * * (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

Civ.R. 12(H)(1).

{¶12} "[P]ersonal jurisdiction is a 'waivable right,' and an individual may consent to a specific court exercising jurisdiction over him or her." *84 Lumber*, *supra*, at ¶17, citing *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, ¶6. "One way for an individual to waive personal jurisdiction is to voluntarily appear and submit to the jurisdiction of the court." *Id.* at ¶18 (citations omitted).

{¶13} However, "[t]he first voluntary dismissal of a claim without prejudice places the parties in the same position as if no suit had ever been filed." *Garr v. Columbia Polymers, Inc.*, 11th Dist. Trumbull No. 2016-T-0076, 2016-Ohio-7555, ¶10, citing *Denman v. New Carlisle*, 86 Ohio St.3d 594, 596 (1999); *see also O'Stricker v. Robinson Mem. Hosp. Found.*, 11th Dist. Portage No. 2016-P-0042, 2017-Ohio-2600, ¶53.

{¶14} In the matter sub judice, Caimona's argument is that it is inequitable to allow appellees to assert a defense of lack of personal jurisdiction in the refiled case because they did not assert it in response to the previously filed, and voluntarily dismissed, complaint. Caimona cites no case law or other authority which supports this proposition; however, he did file a supplemental brief in which he asserts the holding in *Denman*, as well as our holding in *O'Stricker*, are factually distinguishable. Appellees argue that the refiling of the case renders all parties in a position as if the first complaint had never been filed, and they are therefore permitted to assert a personal jurisdiction defense despite participating in the previous proceedings.

{¶15} We find the position of appellees to be more persuasive and more consistent with established law in the state of Ohio, to wit: that appellees were placed in a position as if no suit was ever filed following Caimona's voluntary dismissal of his first complaint. Caimona's factual distinctions between the cases cited in his supplemental brief and the present matter have no bearing on the undisputed legal principle that a voluntary dismissal of a claim without prejudice places the parties in the same position as if no suit had ever been filed. We therefore hold that appellees properly asserted a defense of lack of personal jurisdiction in their answer to the refiled suit and did not waive the defense by participating in the first proceeding.

{¶16} Caimona's first assignment of error is without merit.

{¶17} Caimona's second assignment of error states:

{¶18} "Reviewing the Defendants/Appellees' Motion to Dismiss *de novo*, the Trial Court erred by dismissing the re-filed Complaint despite personal jurisdiction over the Defendants/Appellees."

{¶19} "Generally, when considering whether a court has personal jurisdiction over an out-of-state defendant, the court should determine '(1) whether the state's "long arm" statute and applicable rule of civil procedure confer personal jurisdiction, and if so, (2) whether granting jurisdiction under the statute and rule would deprive the defendant of the right to due process of law under the Fourteenth Amendment of the United States Constitution.'" *84 Lumber*, *supra*, at ¶17, quoting *Clark v. Connor*, 82 Ohio St.3d 309, 312 (1998), citing *U. S. Sprint Communications Co., Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 183-184 (1994).

{¶20} We previously discussed a challenge to personal jurisdiction in a motion to dismiss in *Kopas v. MTR Gaming Group*, 11th Dist. Portage No. 2013-P-0053, 2014-Ohio-1157, ¶8:

> Under Ohio's Civil Rules, a defendant may plead the "lack of jurisdiction over the person" by motion. Civ.R. 12(B)(2). Where a defendant moves to dismiss a complaint for lack of jurisdiction over the person, "the plaintiff has the burden of making a prima facie showing of personal jurisdiction." (Citation omitted.) *Arrow Machine Co., Ltd. v. Array Connector Corp.*, 11th Dist. Lake No. 2008-L-161, 2009-Ohio-1439, ¶32; *Fallang v. Hickey*, 40 Ohio St.3d 106, 107, 532 N.E.2d 117 (1988). In deciding a motion to dismiss based on a lack of personal jurisdiction, the trial court is not confined to the allegations contained in the complaint, but may "hear the matter on affidavits, depositions, interrogatories, or receive oral testimony." (Citation omitted.) *Arrow Machine* at ¶32. Where the motion is decided without hearing, the trial court is "to view allegations in the pleadings and the documentary evidence in a light most favorable to the plaintiffs, resolving all reasonable competing inferences in their favor." *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 638 N.E.2d 541 (1994).

{¶21} In the present matter, the trial court ruled, under the second prong of the jurisdictional analysis, that granting jurisdiction over appellees would deprive them of the right to due process of law, because their contacts with the state of Ohio in passively listing the car for sale "did not specifically target Ohio consumers or seek to

specifically conduct business in Ohio." Therefore, the court determined that appellees did not avail themselves of the Ohio marketplace in a manner sufficient to warrant personal jurisdiction. The trial court relied on appellees' motion to dismiss, as well as the affidavit of Mr. Volos and deposition testimony cited therein. The motion to dismiss cited the Tenth Appellate District case of *Malone v. Berry*, 174 Ohio App.3d 122, 2007-Ohio-6501 (10th Dist.), as well as *Shoptaw v. I & A Auto Sales, Inc*., 10th Dist. Franklin No. 12AP-453, 2012-Ohio-6259, which cites *Malone*, in concluding that the trial courts did not have personal jurisdiction over sellers of a vehicle on the online website eBay.

{¶22} In *Malone v. Berry*, a car buyer sued a nonresident seller for misrepresentation as to the condition of a vehicle the seller sold through an internet auction site ("Racingjunk.com"), just as in the matter sub judice. *Malone*, *supra*, at ¶2. In that case, the record included the advertisement from the internet auction website, as well as e-mail correspondence between the parties both before and after the transaction at issue. The buyer in *Malone* purchased a vehicle from the seller for $13,000.00 through the internet auction website, and the seller paid to have the vehicle shipped to Ohio. *Id.* at ¶12. Under those circumstances, the Court concluded as follows:

> In the instant case, the transaction at issue involved a one-time sale facilitated by the placement of an advertisement on an Internet auction site not operated by appellant; the facts indicate that appellee arranged to have the vehicle shipped to Ohio, and there is no evidence that appellant ever entered Ohio as part of the transaction. Based upon the pleadings and documentary evidence presented, we conclude that appellant did not purposefully avail himself of the privilege of conducting business within Ohio; rather, contrary to the trial court's determination, we find that appellant's contacts were too "random" and "attenuated" to create a substantial connection within the forum state to make personal jurisdiction over him reasonable.

Id. at ¶22.

{¶23} Further, appellees cite the Sixth District case of *Ashton Park Apts., Ltd. v. Carlton-Naumann Constr., Inc.*, 6th Dist. Lucas No. L-08-1395, 2009-Ohio-6335. There, the nonresident homebuilder advertised a construction business online through a website. The buyers were Ohio residents, and the homebuilder was a Florida corporation. The court stated: "Every aspect of the contract (their execution of the contract, payments, and communication) concerning the buyers involves Ohio. Every aspect of the contract (its execution of the contract, building of the home, and communication) involving the builder occurs in Florida." *Id.* at ¶16. Regardless, the Sixth Appellate District concluded:

> Upon consideration of all of the evidence, we find that appellant has failed to meet its burden to establish that appellee transacted business in Ohio with an interactive web site or that its web site was targeted to Ohio consumers. We have not considered the effect of the second web site as it was not involved in the contract at issue in this case. We conclude that while appellee maintained a national web site advertising its home construction business in Florida at the time the contract was executed, appellee did not target Ohio residents and was not "transacting business" in Ohio by entering into a single contract with two Ohio residents to build a home in Florida.

Id. at ¶18. That court also cited our holding in *Huskin v. Pappse*, 11th Dist. Trumbull No. 99-T-0069, 2000 WL 895598, *2 (June 30, 2000) ("Frequent mail and telephone communications between two companies in different states are considered commercial contacts and are not "'purposefully directed'" to Ohio in a way that would lead the foreign corporation to realize that it could be haled into an Ohio court. *Friedman v. Speiser*, 56 Ohio App.3d 11, 14 (1988).").

{¶24} Similarly, in *Kopas*, the appellant argued that the appellee's television and billboard advertising in Ohio constituted soliciting business and that his injuries arose out of the solicitation, in that, "[u]pon seeing this advertising, [he] traveled to West

Virginia and patronized Defendants' casino." *Kopas*, *supra*, at ¶13. Even with direct advertising within the state of Ohio, we affirmed the trial court's granting of a motion to dismiss after concluding that the appellant had "not asserted or documented the transaction of any business in Ohio by [the appellee] beyond the mere solicitation of business." *Id.* at ¶15.

{¶25} Here, the trial court initially did not consider Caimona's brief in opposition and attached exhibits, which were not timely filed. However, it indicated that it did consider the brief in opposition when addressing the motion to vacate or, in the alternative, for reconsideration. After consideration, the court rejected Caimona's argument attempting to distinguish *Malone*, *Shoptaw*, and *Ashton Park Apts.* and denied the motion.

{¶26} Caimona now relies on a recent Eighth Appellate District holding in *Mayfran Intern., Inc. v. Eco-Modity, L.L.C.*, 8th Dist. Cuyahoga No. 107959, 2019-Ohio-4350. While Caimona is correct that both *Mayfran* and the present matter were decided on the basis of personal jurisdiction without a hearing, *Mayfran* involved a state-based process engineering company bringing an action against a nonresident business that operates mattress recycling facilities. The plaintiff sued for breach of contract and unjust enrichment, alleging that the nonresident business failed to pay for the company's design, manufacture, and install of an automated recycling system. The case did not involve internet sales or advertising, and it is easily distinguishable from the present dispute. Overall, when considering the argument, evidence, record, and law submitted by the parties, we agree with the analysis of the above-cited opinions from the Tenth and Sixth Appellate District Courts.

{¶27} In this case, the facts are much more apposite to *Malone*. Just as in *Malone*, the record here includes the advertisement from the internet auction website, as well as e-mail correspondence between the parties both before and after the transaction at issue. The buyer, Caimona, purchased the vehicle from appellees through the website, and the vehicle was shipped to Ohio. The transaction was facilitated through the website, over which appellees had no control, and appellees could not control who potential buyers were or where the buyers were located. The website was not targeted to Ohio consumers. The transaction involved a single sale facilitated by the placement of an advertisement on the website, and there is no evidence that appellees ever entered Ohio as part of the transaction despite arranging to have the vehicle shipped to Caimona in Ohio. Therefore, we conclude that Caimona has failed to make a prima facie showing of personal jurisdiction over appellees by the Trumbull County Court of Common Pleas.

{¶28} Therefore, the trial court did not err in granting the motion to dismiss for lack of personal jurisdiction.

{¶29} Caimona's second assignment of error is without merit.

{¶30} The judgment of the Trumbull County Court of Common Pleas is affirmed.

MATT LYNCH, J.,

MARY JANE TRAPP, J.,

concur.

Date and Time: Friday, May 15, 2020 8:11:00 AM CDT

Job Number: 116912876

Document (1)

1. *Solis v. Emery Fed. Credit Union, 2020 U.S. Dist. LEXIS 82366*

Client/Matter: 010319.0120/16422

Search Terms: solis v. emory credit union ohio

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Sources: Jurisdiction

Solis v. Emery Fed. Credit Union

United States District Court for the Southern District of Ohio, Western Division

May 11, 2020, Decided; May 11, 2020, Filed

Case No. 1:19-cv-387

Reporter
2020 U.S. Dist. LEXIS 82366 *

EDWIN AND SHANNA SOLIS, et al., Plaintiffs, v. EMERY FEDERAL CREDIT UNION, Defendant.

Core Terms

fraudulent concealment, amended complaint, statute of limitations, diligence, prices, motion to dismiss, settlement, Plaintiffs', kickbacks, lack standing, allegations, cause of action, Sherman Act, justiciability, discovery, discover, Participating, borrowers, Lenders, federal court, market price, supracompetitive, limitations, mortgage, tolling, words, limitations period, subject-matter, fraudulent, Cartel

Counsel: **[*1]** For Edwin Solis, Shanna Solis, James Gilbert, Jeffrey Markle, Marta Chaney, Plaintiffs: Melissa Schaub Matthews, LEAD ATTORNEY, Keating Muething & Klekamp, PLL, Cincinnati, OH; Melissa L. English, PRO HAC VICE, Towson, MD; Michael Paul Smith, PRO HAC VICE, Smith Gildea and Schmidt LLC, Towson, MD; Gregory Michael Utter, Keating Muething & Klekamp - 1, Cincinnati, OH.

For Emery Federal Credit Union, Defendant: Carolyn Ann Taggart, LEAD ATTORNEY, Porter Wright Morris & Arthur, LLP, Cincinnati, OH; Joseph M. Katz, Michael Yaakov Kieval, PRO HAC VICE, Weiner Brodsky Kider PC, Washington, DC.

Judges: DOUGLAS R. COLE, UNITED STATES DISTRICT JUDGE.

Opinion by: DOUGLAS R. COLE

Opinion

OPINION AND ORDER

This cause comes before the Court on Emery Federal Credit Union's ("Emery" or "Defendant") Motion to Dismiss Plaintiffs' Amended Complaint (Doc. 20). For the following reasons, the Court **GRANTS** Emery's Motion (Doc. 20) and **DISMISSES** the Amended Complaint (Doc. 17) **WITHOUT PREJUDICE**.

BACKGROUND

According to the Plaintiffs, this case is about lies and deceit.[1] The Plaintiffs, a group including Edwin and Shanna Solis (the "Solises"), James Gilbert ("Gilbert"), Jeffrey Markle ("Markle"), and Marta Chaney ("Chaney"), accuse Emery, a **[*2]** mortgage loan brokerage bank, of scheming with All Star Title, Inc. ("All Star"), a title and settlement services company, to fraudulently fix the prices for All Star's title and settlement services at supracompetitive (i.e., above market) rates. This in turn harmed Plaintiffs, each of whom financed through Emery, and thus used All Star. Plaintiffs further allege that All Star shared its ill-gotten gains with Emery though a kickback scheme. (*See* Am. Compl., Doc. 17, ¶¶ 1-5, #548-49). Plaintiffs refer to this plan of exclusive dealing and supracompetitive pricing, accompanied by kickbacks from All Star to Emery, as

[1] For the purposes of this Motion, the Court accepts as true the following facts, which are taken from Plaintiffs' Amended Complaint filed on August 19, 2019. (*See* Doc. 17).

the "All Star Scheme." (*Id.* at ¶ 2, #548). They say it dates back to 2008, when All Star created the All Star Scheme with lenders and their branch managers, mortgage brokers, loan officers, and other employees (collectively, the "Participating Lenders") "to charge borrowers higher prices for title and settlement services and to defraud borrowers of their money through the use of U.S. Mail and interstate wires." (*Id.* at ¶ 18, #551).

Interestingly, though, while the Amended Complaint raises the specter of multiple different lenders joining the All Star Scheme, that never **[*3]** actually materializes in the allegations. Rather, the Amended Complaint includes (and identifies) only one lender who allegedly participated in that "scheme"—Emery. According to the Amended Complaint, Emery enters the equation in 2011, when it "agrees to accept and receive kickbacks paid by All Star" in exchange for Emery referring and assigning loans to All Star for title and settlement services. (*Id.* at ¶ 54, #559). Emery and All Star concealed these kickbacks by "laundering" them through third-party-marketing companies, "creating sham invoice and payment records," "making fraudulent misrepresentations in marketing materials," "falsely allocating title and settlement fees[,]" "manipulating the APR associated with Emery loans," and "making false and fraudulent representations and omissions in Emery borrowers' loan documents." (*Id.* at ¶ 7, #549).

Adding to the ominous overtones of their Amended Complaint, Plaintiffs claim that Emery participated in the "All Star Scheme" through joining the "Lender Cartel." (*See id.* at ¶ 4, #548). But once again, while the Amended Complaint suggests that the "Cartel" involves "various residential mortgage lenders" who entered into price-fixing agreements **[*4]** designed to charge borrowers a fixed price for title and settlement services on loans assigned and referred to All Star under the kickback agreement, (*see id.*), the only participants it actually alleges engaged in the Scheme are various different branch locations of Emery itself. Specifically, Plaintiffs claim Emery participated in this Scheme and Cartel at its White Marsh, Forest Hill, San Diego, and Townson branches, among several others, through approximately 2013, allegedly accepting thousands of dollars in kickbacks along the way. (*See id.* at ¶¶ 59-272, #559-605 (White Marsh); *id.* at ¶¶ 283-430, #608-43 (Forest Hill); *id.* at ¶¶ 437-530, #645-66 (San Diego); *id.* at ¶¶ 534-40, #666-68 (Townson); *id.* at ¶ 541, #668-69 (Others)).

Aside from the "Scheme" and "Cartel," Plaintiffs further allege that Emery and All Star formed an "association in fact enterprise" (the "Enterprise"). (*Id.* at ¶ 550, #671). They created this Enterprise to "defraud[] borrowers into paying All Star higher and supracompetitive prices[,]" to "reduc[e] competition in the market for title and settlement services," and "funnel[] illegal kickbacks to Participating Lenders including Emery." (*Id.*). Emery participated **[*5]** in the Enterprise by performing the kickback and cartel agreements and by performing predicate acts of mail and wire fraud. (*Id.* at ¶ 551). These predicate acts included "planning, directing, and controlling the mailing and content of borrower solicitations," including the fraudulent representations that were contained therein, "identifying and directing which consumers are mailed borrower solicitations," "identifying and directing" the third-party-marketing companies "used to launder the kickbacks[,]" and "directing and controlling the creation of sham invoices and payment records" to hide the kickbacks. (*Id.* at ¶ 553, #671-72).

Plaintiffs allege they all fell victim to the All Star Scheme when they obtained a residential mortgage loan through Emery. Specifically, Plaintiffs allege they were harmed in various, but closely related, ways: (1) they were charged and paid more for title and settlement services than they would have without the illegal conduct, as that illegal conduct resulted in them paying higher-than-market prices (due to the price fixing) and higher prices than All Star otherwise would have charged (as All Star needed to collect enough to cover the kickbacks in addition **[*6]** to its own profit); (2) they were defrauded into paying these supracompetitive prices; (3) they were stripped of their choice of title and settlement service providers, as well as their mortgage broker's impartial evaluation of All Star; and (4) they were deprived of kickback-free title and settlement services, along with the consumer benefits of fair competition among title and settlement service providers. (*See id.* at ¶ 563, #674-75 (Solises); *Id.* at ¶ 570, #676-77 (Gilbert); *Id.* at ¶ 578, #678-79 (Markle); *Id.* at ¶ 581, #680-81 (Chaney)).

Recognizing that statute of limitations issues were likely to arise, Plaintiffs also addressed in the Amended Complaint their delay in bringing suit. According to Plaintiffs, they were reasonably diligent in trying to uncover Emery's fraud, but nothing seemed amiss from the face of the documents at closing. (*See, e.g., id.* at ¶¶ 626-34, #690-92 (detailing how the Solises never noticed issues with the documents)). As a result, they did not discover the basis for their claim until attorneys contacted them around February 2019. (*See, e.g., id.* at

¶ 635, #692 (explaining the Solises did not discover the claim until counsel sent them a letter describing **[*7]** the investigation)). Plaintiffs note that, after the attorney contact, they promptly moved forward with their claims. (*See e.g., id.* (recounting how the Solises filed suit within months of being approached by the attorney)).

PROCEDURAL HISTORY

Plaintiffs filed suit on May 24, 2019. (*See* Compl., Doc. 1, #1-475). They allege Emery violated (1) the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(a); (2) the Sherman Anti-Trust Act, 15 U.S.C. § 1; and (3) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962. (*See* Compl. at ¶¶ 567-618, #121-32). Emery responded by moving to dismiss. That motion first argues that all of Plaintiffs' claims are time-barred. According to Emery, Plaintiffs failed to meet the statute of limitations (the longest of which is four years), and they failed to adequately plead fraudulent concealment as a basis for tolling. Second, Emery claims that the Plaintiffs failed to state a claim on the merits under any of their three theories of liability—RESPA, Sherman Act, or RICO. (*See* Emery's Mot. to Dismiss Pls.' Compl., Doc. 10, #493).

Plaintiffs countered the motion to dismiss by filing an amended complaint. (*See* Am. Compl., Doc. 17, #547-715). While the new pleading slightly **[*8]** modified some of the factual allegations, the basic causes of action against Emery remained unchanged. Not surprisingly, then, Emery again moved to dismiss Plaintiffs' Amended Complaint, largely on the same grounds. (*See* Emery's Mot. to Dismiss Pls.' Am. Compl. ("Mot. to Dismiss"), Doc. 20, #1072-1106). Now, though, in addition to maintaining Plaintiffs' claims are time-barred and that their Amended Complaint fails to state a claim, Emery also argues that Chaney lacks standing to bring any of the three claims, and that the Solises and Gilbert lack standing to bring the Sherman Act and RICO claims. (*See id.* at #1072). They do not make any standing argument as to Markle.

LAW AND ANALYSIS

A. Standard Of Review.

The Court lacks subject-matter jurisdiction over a claim—and thus the claim is subject to dismissal—if the plaintiff fails to show that he has standing to bring it. Fed. R. Civ. P. 12(b)(1); Ward v. Alt. Health Delivery Sys., Inc., 261 F.3d 624, 626 (6th Cir. 2001). The standard of review of a 12(b)(1) motion[2] to dismiss for lack of subject-matter jurisdiction depends on whether the defendant makes a factual or facial challenge to subject-matter jurisdiction. *See* Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co., 491 F.3d 320, 330 (6th Cir. 2007). A factual attack challenges the jurisdictional facts set forth in the complaint, and thus forces the district court **[*9]** to "weigh the conflicting evidence to arrive at the factual predicate that subject-matter [jurisdiction] does or does not exist." *Id.* A facial attack on subject-matter jurisdiction, by contrast, does not challenge the factual allegations, but challenges the jurisdictional sufficiency of the complaint given those facts. Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990). It appears Emery's motion lodges the latter—a facial attack. When reviewing a facial attack, a district court takes the allegations in the complaint as true, similar to the approach employed in reviewing a Rule 12(b)(6) motion to dismiss. *Id.* If those allegations establish standing, jurisdiction exists (subject, of course, to later challenge if the allegations prove false).

Under Federal Rule of Civil Procedure 12(b)(6), meanwhile, the Court may dismiss a cause of action for "failure to state a claim upon which relief can be granted." Such a motion "is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." Golden v. City of Columbus, 404 F.3d 950, 958-59 (6th Cir. 2005). Therefore, much like the standard for a facial challenge under Rule 12(b)(1), the Court must construe the complaint in the light most favorable to the non-moving party. Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 (6th Cir. 2008). But a pleading must offer more than mere "labels and conclusions," because "'a formulaic **[*10]** recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937,

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[2] Emery fails to identify the section of Rule 12(b) under which it moves to dismiss Plaintiffs' Amended Complaint. In fact, Emery neglects to cite Rule 12 even once in its Motion to Dismiss. Nevertheless, because Emery challenges standing (which goes to subject-matter jurisdiction) and the sufficiency of Plaintiffs' allegations (which goes to Plaintiffs' failure to state a claim), the Court assumes Emery moves under Rule 12(b)(1), as to the former, and under Rule 12(b)(6), as to the latter.

173 L. Ed. 2d 868 (2009)] (quoting [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)]).

Instead, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Iqbal, 556 U.S. at 678] (quoting [Twombly, 550 U.S. at 570]); *see also* [White v. Coventry Health & Life Ins. Co., 680 F. App'x 410, 413 (6th Cir. 2017)]. A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Iqbal, 556 U.S. at 678] (citing [Twombly, 550 U.S. at 556]). To survive a [Rule 12(b)(6)] motion, a complaint must "raise a right to relief above the speculative level" into the "realm of plausible liability." [Twombly, 550 U.S. at 555].

Because this case involves allegations of fraudulent concealment, an additional pleading standard also comes into play. Specifically, when alleging fraud, a plaintiff must comply with [Rule 9(b)], which requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake." [Fed. R. Civ. P. 9(b)]. Therefore, to establish fraudulent concealment that would toll the statute of limitations, a plaintiff must plausibly plead their allegations with particularity. *See* [Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 n.18 (6th Cir. 1988)] (noting the [Rule 9(b)] standard applies to pleading fraudulent concealment).

B. Emery's Motion To Dismiss Is Well Taken.

Emery's Motion to Dismiss raises several issues with Plaintiffs' **[*11]** Amended Complaint. Because two of those issues—standing and fraudulent concealment—cut across Plaintiffs' entire Amended Complaint, the Court focuses on those two arguments first. For the reasons that follow, on those issues, the Court finds that: (1) Chaney lacks standing to pursue any of the three claims; (2) the Solises and Gilbert lack standing to pursue Sherman Act and RICO claims; and (3) no Plaintiff is entitled to equitable tolling by fraudulent concealment because they failed to plead sufficient facts establishing they diligently attempted to uncover Emery's supposed fraud. As a result, the Court DISMISSES the Amended Complaint, but does so WITHOUT PREJUDICE.

1. Certain Plaintiffs Lack Standing To Bring Their Claims.

Article III courts are courts of limited jurisdiction. *See* [U.S. Const. art. III, § 2]. Those limits come in three forms: constitutional, statutory, and jurisprudential. As a constitutional matter, the judicial power extends only to "cases" or "controversies." *Id.* Standing doctrine—at least the constitutional contours of that doctrine, which is the form of standing that Emery contests here—is one of several mechanisms designed to ensure that federal courts do not exceed the scope of their **[*12]** constitutionally-granted power. *See* [Raines v. Byrd, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)] ("No principle is more fundamental to the judiciary's proper role in our system of government than the limitation of federal-court jurisdiction to actual cases or controversies."). And, because standing inquiries go to the Court's authority to hear a matter, where standing concerns are raised, the Court is required to address those concerns before considering the merits. [Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)].

As a general matter, the "irreducible constitutional minimum" of standing consists of three elements. [Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)] (quoting [Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)]). Standing requires the plaintiff to have (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant (3) that is likely to be redressed by a favorable judicial decision. *Id.* If a plaintiff lacks standing, the Court lacks the authority to decide the matter.

Here, Emery contends that certain Plaintiffs lack standing as to some or all of the claims. Specifically, they argue that Chaney lacks standing to bring any of the three claims asserted in the Amended Complaint—RESPA, Sherman Act, or RICO—because she suffered no injury in fact. (*See* Mot. to Dismiss at #1082-84). Because Chaney saved money on the title-related services (rather **[*13]** than over-paying, which is the alleged source of the harm here), she cannot establish she suffered an injury. (*See id.* at #1082). Emery further asserts that the Solises and Gilbert lack standing to bring Sherman Act and RICO claims. (*See id.* at #1084-85). Much like Emery's argument against Chaney, its basic argument is that the Solises and Gilbert lack standing to bring a Sherman Act claim because they did not actually pay the allegedly fixed prices that form the basis for their claims. (*See id.* at #1084). And, to the extent that the Solises' and Gilbert's RICO claim

depends on the same price-fixing allegation, they lack standing for the same reason—they never paid the supposedly fixed price. (*See id.*). In fact, they paid less. (*See id.* at #1084-85).

Once standing concerns arise—whether raised by defendants, or *sua sponte* by the Court in meeting its obligation to ensure its own jurisdiction—Plaintiffs carry the burden to establish that standing requirements are met. *Spokeo, Inc., 136 S. Ct. at 1547*. And, as further discussed below, this is a plaintiff-by-plaintiff inquiry. Each plaintiff must have standing for a court to consider that plaintiff's claims. *See Crawford v. U.S. Dep't of Treasury, 868 F.3d 438, 452 (6th Cir. 2017)* ("The 'irreducible constitutional minimum' of standing **[*14]** is that for each claim, each plaintiff must allege an actual or imminent injury that is traceable to the defendant and redressable by the court.") (citing *Lujan, 504 U.S. at 560-62 (1992)*).

Plaintiffs did not carry their burden here. That may be because they did not even really try. Rather than seeking to demonstrate standing, they instead argue that, as "Emery does not challenge that the Solis and Gilbert Plaintiffs have standing to bring their RESPA claims and Plaintiff Markle has standing to bring all of his claims[,]" the Court has "supplemental jurisdiction over all Plaintiffs and all claims." (Pls.' Memo. in Opp'n to Def. Emery's Mot. to Dismiss, Doc. 22, #1121 (first citing *28 U.S.C. § 1367(a)*; then citing *Aldrich v. Univ. of Phx., Inc., 661 F. App'x 384, 389-90 (6th Cir. 2016)*)). That is, Plaintiffs argue that because some of them have standing as to some or all claims, the existence of that standing, coupled with supplemental jurisdiction under *28 U.S.C. § 1367*, is enough to carry the day as to all Plaintiffs and all claims.

Wrong. To be sure, *28 U.S.C. § 1367* does allow a federal court to hear and decide claims that would otherwise fall outside the court's subject-matter jurisdiction if there is at least one claim that falls within such jurisdiction. *See 28 U.S.C. § 1367(a)*. So, for example, if a suit includes one federal claim, a district court can **[*15]** also hear any state law claims "that are so related ... that they form part of the same case or controversy under Article III of the United States Constitution." *Id.*; *see also, e.g., Packard v. Farmers Ins. Co. of Columbus Inc., 423 F. App'x 580, 583 (6th Cir. 2011)* (holding that *§ 1367* allowed the court to hear both federal and state law claims that stemmed from the same transaction because they "form[ed] part of the same case or controversy") (quoting *28 U.S.C. § 1367(a)*). That works as a constitutional matter because Article III affords federal courts jurisdiction over "cases ... arising under ... the laws of the United States." *See U.S. Const. art. III, § 2*. The federal claim meets that limitation, and as a result, constitutional jurisdiction extends to the whole "case," which the Supreme Court has interpreted to include all claims arising out of a "common nucleus of operative facts." *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. The language in *28 U.S.C. § 1367* thus merely provides statutory jurisdiction consistent with the scope of constitutional jurisdiction under *Gibbs*. And, as a result, federal question jurisdiction is not a claim-by-claim inquiry, but rather extends to the entirety of any "case" that includes a federal question claim.

The same is not true of standing. In the Supreme Court's words, "standing is not dispensed in gross." *Lewis v. Casey, 518 U.S. 343, 358 n.6, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)*. Rather, it is a claim-by-claim inquiry. That is because, unlike the question **[*16]** of "arising under," which merely turns on the source of the right at issue (i.e., whether the claim arises under state or federal law), standing goes to the very nature of justiciability itself. And, as the Supreme Court explained in *Flast v. Cohen*, not only are notions of justiciability embodied in the constitutional terms "case" or "controversy," but they also serve an important limiting function in defining the judiciary's role in our tripartite form of government:

> Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

392 U.S. 83, 94-95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).

Standing is one aspect of the justiciability inquiry. *Id.* And, because **[*17]** justiciability is a fundamental limitation on the scope of the judicial power, the inquiry as to justiciability must necessarily be on a claim-by-claim basis. In other words, a party cannot combine a

justiciable claim with a non-justiciable claim, and then argue that the court's power over the former likewise gives power over the latter. That is true even if the two claims meet the *Gibbs* common-nucleus-of-operative facts test. The Supreme Court explained that very point in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 350-53, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). The Court also explained *why* it would be inappropriate to rely on *Gibbs* when dealing with justiciability issues such as standing or mootness:

> Plaintiffs' reading of *Gibbs* to allow standing as to one claim to suffice for all claims arising from the same "nucleus of operative fact" would have remarkable implications. The doctrines of mootness, ripeness, and political question all originate in Article III's "case" or "controversy" language, no less than standing does. Yet if *Gibbs*' "common nucleus" formulation announced a new definition of "case" or "controversy" for all Article III purposes, a federal court would be free to entertain moot or unripe claims, or claims presenting a political question, if they "derived **[*18]** from" the same "operative fact[s]" as another federal claim suffering from none of these defects. Plaintiffs' reading of *Gibbs*, therefore, would amount to a significant revision of our precedent interpreting Article III. With federal courts thus deciding issues they would not otherwise be authorized to decide, the "tripartite allocation of power" that Article III is designed to maintain, would quickly erode; our emphasis on the standing requirement's role in maintaining this separation would be rendered hollow rhetoric.

Id. at 352-53 (quotations and citations omitted).

That forbidden approach is essentially the same argument that Plaintiffs press here. If anything, the current case may be worse. As to Gilbert and the Solises, Plaintiffs seek to use the standing on one claim (RESPA) to allow the Court to hear two others (Sherman Act and RICO) by those same parties—which was the very approach the Supreme Court rejected in *Cuno*. But as to Chaney, Plaintiffs are not seeking merely to couple a non-justiciable claim with a viable claim by the same party. Rather, they are asserting the right to add a party who has *no* justiciable claims, merely because a different party pressing related claims has standing. **[*19]** That doesn't work.

Aside from their standing-does-not-matter argument, Plaintiffs make no other arguments in support of standing. Accordingly, any such arguments are waived. *See* In re Anheuser-Busch Beer Labeling Mktg. & Sales Practices Litig., 644 F. App'x 515, 529 (6th Cir. 2016) (noting that when a litigant fails to raise an argument in the district court, the litigant forfeits such argument); *see also* Notredan, L.L.C. v. Old Republic Exch. Facilitator Co., 531 F. App'x 567, 569 (6th Cir. 2013) (holding that failing to respond to an argument that a claim is subject to dismissal "amounts to a forfeiture of [that] claim"); Bushong v. Del. City Sch. Dist., No. 2:19-cv-858, 2020 U.S. Dist. LEXIS 13447, 2020 WL 419754, at *7 (S.D. Ohio Jan. 27, 2020) ("Defendants argue Plaintiff fails to allege an independent constitutional violation. Plaintiff fails to respond to this argument, and as such, waives it.").

The Court therefore dismisses all of Chaney's claims and the Solises' and Gilbert's Sherman Act and RICO claims for lack of jurisdiction. Because this is a first dismissal, the Court grants the dismissal without prejudice to allow the Plaintiffs, if they can, to make the necessary showings to establish standing for each party. The Plaintiffs shall have twenty-eight days from the entry of this Order in which to do so.

2. Plaintiffs Failed To Adequately Plead Fraudulent Concealment To Toll The Statutes Of Limitations.

Emery does not dispute Markle's standing **[*20]** as to any of the three claims. Accordingly, even having dismissed Chaney (as to all claims) and the Solises and Gilbert (as to two of the three), the Court must still consider Emery's arguments as to the merits of the three claims. The Court need not proceed very far in that regard, though, due to another threshold issue that applies to each of the three claims—the statute of limitations.

The events alleged in the Amended Complaint occurred between approximately 2011 and 2013. (*See* Am. Compl. at #559 ("By 2011, Emery and All Star form an Association in Fact Enterprise and Emery Begins Participating in the All Star Scheme."); *see also id.* at ¶ 558, #673 (stating the last Plaintiffs' loan closing occurred on March 28, 2013)). And the longest statute of limitations for any of the three claims is four years. *See* 15 U.S.C. § 15b ("Any action to enforce any cause of action under [the Sherman Anti-Trust Act] shall be forever barred unless commenced within four years after the cause of action accrued."); *accord* Rotella v. Wood, 528 U.S. 549, 553, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) (stating the statute of limitations for a

civil RICO claim is four years). Emery asserts, and Plaintiffs do not contest,[3] that the statute of limitations clock started ticking at closing, which is **[*21]** when Plaintiffs allege their injury occurred. (*See* Mot. to Dismiss at #1085-86). If that is the case, and the statute of limitations was triggered at the last closing on March 28, 2013, then the statute of limitations has long expired—absent tolling. Likely aware of this difficulty, Plaintiffs allege in their Amended Complaint, and argue in response to the Motion to Dismiss, that fraudulent concealment tolled the statute of limitations. (*See* Am. Compl. at ¶¶ 681-84, #701-02). If they have not sufficiently pled fraudulent concealment, though, all their claims are time-barred as a matter of law. Thus, the Court will start with fraudulent concealment.

Statutes of limitations matter. Among other things, they represent legislative choices regarding the time period during which a plaintiff is expected to discover and bring a certain type of claim. As a matter of separation of powers, if nothing else, courts must be respectful of those legislative determinations. But beyond that, statutes of limitations also make practical sense, and serve important purposes within a system of justice. As time passes, memories and evidence both fade. *See* Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) ("Stale conflicts should be allowed to rest undisturbed **[*22]** after the passage of time has made their origins obscure and the evidence uncertain."). By forcing plaintiffs to bring claims sooner, rather than later, statutes of limitations result in witnesses who are more reliable and evidence that is fresher. As a result, expected judicial error costs go down. It is no surprise, then, that the Supreme Court itself has emphasized that "[s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Bd. of Regents of Univ. of State of N.Y. v. Tomanio, 446 U.S. 478, 487, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980).

Typically, the limitations period begins running either at the time that an injury occurs, regardless of whether a plaintiff is aware of the injury, or at the time that a plaintiff "discovers" he has been injured—i.e., the "discovery rule"—which is when a plaintiff discovers, or reasonably could have discovered, that he has been injured. For both the RESPA and Sherman Act statutes of limitations, the date of injury is the trigger. *See* Egerer v. Woodland Realty, Inc., 556 F.3d 415, 421 n.7 (6th Cir. 2009) (explaining the RESPA statute of limitations begins to run "from the date of the occurrence of the violation"); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) (explaining that generally a Sherman Act cause of action begins to run when the defendant injures the plaintiff's **[*23]** business). For a civil RICO claim, on the other hand, the statute of limitations incorporates the discovery rule. *See* Rotella, 528 U.S. at 553-55 (deciding that the RICO statute of limitations begins to run when a party knew, or through exercise of reasonable diligence should have discovered, that the party was injured by a RICO violation).

While the finality that statutes of limitations provide is an important aspect of our judicial system, courts have nonetheless created certain equitable doctrines that can serve to extend the limitations period in certain circumstances. Particularly relevant here is the doctrine of fraudulent concealment. Basically, this doctrine recognizes that, where the defendant takes steps to "cover its tracks" and prevent a plaintiff from discovering the harm he has caused, the defendant should not be allowed to rely on the limitations period to escape liability for his conduct. *See* Pinney Dock & Transp. Co. 838 F.2d at 1465 (explaining how "the authorities are without conflict" supporting the doctrine that "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery **[*24]** of the fraud") (citing Bailey v. Glover, 88 U.S. 342, 347-48, 22 L. Ed. 636 (1874)).

As a general matter, then, if a plaintiff can establish grounds for fraudulent concealment, the limitations period is tolled.[4] *Id.* To take advantage of this doctrine,

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[3] Even though Plaintiffs state in their Amended Complaint that their Sherman Act and RICO claims did not accrue "until such time as Plaintiffs, and Class Members, knew, or should have known, of their injury," which Plaintiffs claim is February 1, 2019, (Am. Compl. at ¶ 682, #701), Plaintiffs do not make this argument in their response to Emery's Motion to Dismiss. Because they did not make this argument, it is forfeited, *see* In re Anheuser-Busch, 644 F. App'x at 529, and the Court assumes their claims accrued at closing.

[4] The Sixth Circuit has yet to determine whether equitable tolling applies to RESPA claims, but it has noted that many district courts have already done so. *See* Egerer, 556 F.3d at 421 n.10 (listing cases that have held RESPA's statute of limitations is subject to equitable tolling). Several district courts in this Circuit have allowed equitable tolling. *See, e.g.,*

the plaintiff must show three elements: (1) the defendant actively concealed the conduct constituting the cause of action; (2) this concealment prevented the plaintiff from discovering the cause of action within the limitations period; and (3) until discovery, the plaintiff exercised due diligence trying to learn about the cause of action. *Egerer, 556 F.3d at 422*.

The Court approaches fraudulent concealment issues at the dismissal stage with two, somewhat competing, frameworks in mind. First, federal law is clear that, as fraudulent concealment sounds in fraud, the heightened pleading standards of *Rule 9(b)* apply to a plaintiff seeking to rely on fraudulent concealment to toll a limitations period. *Dayco Corp., 523 F.2d at 394*. Under *Rule 9(b)*, to escape dismissal, a plaintiff must plead the circumstances giving rise to fraudulent concealment with particularity. *Fed. R. Civ. P. 9(b)*. Conversely, however, the Sixth Circuit has also admonished that courts should be wary of dismissing complaints on fraudulent **[*25]** concealment grounds, as the plaintiff has not had the benefit of discovery. *See, e.g., Lutz v. Chesapeake Appalachia, L.L.C., 717 F.3d 459, 476 (6th Cir. 2013)* ("*Lutz I*") ("When there is 'some question as to the depth and scope of [the plaintiffs'] investigation, [the plaintiffs] should be allowed to proceed forward.'") (quoting *Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 448 (6th Cir. 2012)*).

A key issue in the current case is due diligence—the third prong of the fraudulent concealment framework. Under this prong, Plaintiffs must ultimately prove that they acted in a reasonably diligent fashion in seeking to discover and pursue their claim. *See id. at 475*. But that does not necessarily require the Plaintiffs to show they did anything to pursue their claims. Rather, due diligence requires action only once a plaintiff has sufficient notice of a potential injury. *See id.* ("The right to rely on fraudulent concealment never continues beyond the time that a plaintiff, by exercising reasonable diligence, should have discovered the facts at issue.") (quotation omitted); *see also Campbell v. Upjohn Co., 676 F.2d 1122, 1128 (6th Cir. 1982)* (explaining that "[a]ctions such as would deceive a reasonably diligent plaintiff will toll the statute," but "plaintiffs who delay unreasonably in investigating circumstances that should put them on notice will be foreclosed from filing, once the statute has **[*26]** run"). In other words, the question is whether a reasonable person in the Plaintiffs' position, with the information available to the Plaintiffs, would have been on inquiry notice that they should be investigating a potential claim.

Often, the diligence that is "due" turns on the nature of the claim. Some types of harm are more readily hidden than others. For example, if a plaintiff relies on what a defendant has said about a particular topic, and has no practical way of assessing the truthfulness of the statement, then no action may be necessary. *See, e.g., Lutz I, 717 F.3d at 476* (deciding the plaintiff alleged sufficient facts to overcome a motion to dismiss contesting their diligence because a reasonably prudent person would have had no way to know, absent discovery, that the defendant fraudulently miscalculated the royalty payments and misrepresented those calculations to the plaintiff). At the same time, a plaintiff cannot stick his or her head in the sand and fail to take steps to discover their claims when the information is readily available to them. *See, e.g., Campbell, 676 F.2d at 1127* (upholding the district court's decision granting summary judgment because the plaintiff had a copy of the contract and should have read **[*27]** the agreement and learned the terms were inconsistent with his expectations).

Here, the core allegation is that Plaintiffs paid an artificially high price for certain title services. At various points, the price is described as "supracompetitive" (i.e., above market), and at other points as a price higher than the price All Star otherwise would have charged (as All Star had to charge enough to pay the various "kickbacks" as well as its standard rate). (*Compare* Am. Compl. at ¶ 39, #555-56 (claiming the prices were "supracompetitive and higher than the prices that borrowers would otherwise be charged for title and settlement services in a competitive market and without the Cartel Agreements"), *with id.* at ¶ 281, #608 (alleging All Star and Emery fixed prices for title and

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*Palombaro v. Emery Fed. Credit Union, No. 1:15-cv-792, 2017 U.S. Dist. LEXIS 127022, 2017 WL 3437559, at *8-11 (S.D. Ohio Aug. 10, 2017)* (analyzing the plaintiffs' equitable tolling claim without first deciding whether RESPA allows for equitable tolling); *Piccirilli v. Wells Fargo Bank, N.A., No. 2:11-cv-10264, 2012 U.S. Dist. LEXIS 45934, 2012 WL 1094333, at *6 (E.D. Mich. Mar. 30, 2012)* (assuming equitable tolling applies to RESPA). Therefore, for purposes of deciding this Motion, the Court also assumes that equitable tolling applies to RESPA. In any event, it may not matter much. As already noted, RESPA includes a discovery rule, under which the limitations period is not triggered until a plaintiff reasonably should have discovered the violation. So, where a defendant fraudulently conceals the harm, that may merely prevent the trigger for the RESPA claim, rather than tolling a period already started. Either way, though, the end result is the same—sufficient allegations of fraud can extend the last date on which a RESPA claim may be filed.

settlement services associated with Emery loans that were "approximately $150 to $950 more than All Star has fixed with other Participating Lenders")). But, presumably, the two collapse in this sense—All Star operates in a competitive market, and thus its "normal" rates would presumably be "competitive" rates. So "supracompetitive" and "higher than All Star's normal rates" may simply be two different ways of saying roughly **[*28]** the same thing.

The allegations here—which claim above-market pricing—present a difficult issue from a fraudulent concealment standpoint, at least under current Sixth Circuit precedent. The claim of harm resulting from non-market rates is very similar to the claims at issue in *Lutz I*. There, the plaintiff-landowners claimed that Chesapeake had harmed them by underpaying royalties due according to their natural gas leases. *See* Lutz I, 717 F.3d at 462-63. The leases called for royalties based on market rates for natural gas. *See* id. at 463. Thus, there, like here, the alleged harm was the divergence between the actual payment that occurred and the payment that would have been called for at market rates.

But *Lutz I*, at least when read in light of the recent follow-on decision in the same case in Lutz v. Chesapeake Appalachia, L.L.C., --- F. App'x ----, No. 19-3315, 2020 U.S. App. LEXIS 10601, 2020 WL 1651625 (6th Cir. Apr. 3, 2020) ("*Lutz II*"), creates some confusion regarding how fraudulent concealment works in that setting. In particular, a key issue would seem to be this: where the alleged harm is a divergence from market rates, a plaintiff could presumably detect that harm by comparing the rate charged (or, in *Lutz*, the rate paid) to the market rates, at least if that information is publicly available **[*29]** (e.g., through public pricing information, or by calling a competitor). If that is the case, does the due diligence prong of fraudulent concealment require a plaintiff to undertake that inquiry? And, if so, do pleading standards—especially Rule 9(b)'s heightened pleading standard—require a plaintiff to plead that he or she took such steps?

Lutz I seems to suggest "no," at least to the second question. In *Lutz I*, the court assumed the plaintiffs' factual allegations were true, including the claim that plaintiffs had "no practical way to independently determine the amount of royalty payments due[.]" *See* Lutz I, 717 F.3d at 475. The plaintiffs claimed that "a reasonably prudent person would have had no way of knowing about the fraud due to the inaccuracies of the reports." Id. at 476. The Sixth Circuit concluded that was enough to move forward on a fraudulent concealment theory at the motion to dismiss stage. In short, *Lutz I* could be read as suggesting that, so long as a plaintiff is willing to allege that he or she had no way to detect the underpayment, and thus was forced to rely on the defendant's representation, that works.

But the Sixth Circuit's decision in *Lutz II* undercuts that reading of *Lutz I*. That is because, in *Lutz* ***[*30]*** *II*, the Sixth Circuit refused to give credit to the notion that a plaintiff could not detect the harm when that harm consisted of a failure to pay the promised market price. *See* Lutz II, 2020 U.S. App. LEXIS 10601, 2020 WL 1651625, at *3-4. In further discovery during *Lutz*, the plaintiffs "admitted they neither compared the pay rate column to the publicly available market prices for natural gas, nor examined the column that reflected deductions for production costs[,]" despite having public information regarding gas prices available to them. 2020 U.S. App. LEXIS 10601, [WL] at *2, 3. Pointing to that failure, the court observed that "[a]ny dispute about the payment was thus discoverable ... by seeking out public information easily accessible to them." 2020 U.S. App. LEXIS 10601, [WL] at *3. Accordingly, the plaintiffs failed to establish their diligence. *Id.* The court in *Lutz II* further observed that any other conclusion would undermine the statute of limitations itself, at least as to the claim for royalty payments. 2020 U.S. App. LEXIS 10601, [WL] at *4. "After all, a similarly idle lessor could always claim that she simply took a defendant at its word in computing royalties." *Id.*

At first glance, *Lutz I* and *Lutz II* seem difficult to square. To be sure, *Lutz II* involved the summary judgment stage. But, if the rule is that, in cases where fraud could be detected **[*31]** by simply comparing the payment at issue to the market price, a plaintiff must offer some explanation at summary judgment explaining his failure to make that comparison, then why at the motion to dismiss stage would a plaintiff not be required to plausibly plead such allegations? After all, *Twombly* requires "plausibility" at the pleading stage as to each of the substantive elements of a claim. *See* Twombly, 550 U.S. at 570. Thus, the substantive requirements that exist at the summary judgment stage necessarily must inform the plausibility inquiry at the pleading stage. That is, if a plaintiff seeking to take advantage of fraudulent concealment tolling must show at summary judgment that he or she checked market prices (or otherwise took some other active step to satisfy due diligence in cases where the price divergence could easily be discovered by market research), then presumably *Twombly*—especially given Rule 9(b)—requires the plaintiff to

plead some facts in that regard at the pleading stage.

As noted, *Lutz I* could be read as suggesting that is not so, but perhaps that is a misreading of *Lutz I*. After all, in *Lutz I* the Sixth Circuit highlighted the allegation in the complaint that "plaintiffs had no practical way **[*32]** to independently determine the amount of royalty payments due[.]" *717 F.3d at 475*. That, of course, is not true if the royalty payments depend solely on the market price of natural gas—publicly available information. So perhaps the *Lutz I* court based its decision on a belief that the nature of the injury at issue was not simply a divergence between market-price and the price actually paid, but rather some other harder-to-detect type of mis-payment issue.

In any event, whatever difficulties may arise in attempting to reconcile the teachings of *Lutz I* and *Lutz II*, it seems readily apparent that, in the end, to take advantage of fraudulent concealment, the Plaintiffs here will be required to prove that they took at least some steps to ascertain whether or not they were in fact receiving the promised below-market pricing. *See Lutz II, 2020 U.S. App. LEXIS 10601, 2020 WL 1651625, at *3-4*. Accordingly, given *Rule 9(b)* and *Twombly*, this Court determines that they must allege facts showing that they have a plausible likelihood of meeting that standard to move beyond the motion to dismiss stage.

That requirement also seems appropriate, as the entirety of information on this issue is exclusively within Plaintiffs' possession. In other words, given that the mandated inquiry focuses **[*33]** solely on the actions that *Plaintiffs themselves* took to compare their prices to market rates, discovery from Emery (or All Star) would offer Plaintiffs little assistance in rounding out that claim. And, as it appears clear that they will need to be able to prove this diligence at summary judgment, *see Lutz II, 2020 U.S. App. LEXIS 10601, 2020 WL 1651625, at *3-4*, there is no reason to provide them access to discovery—with all its attendant costs—if they are ultimately destined to fail as a matter of law. This is what the "plausibility" requirement is all about.

In sum, the Court holds that, where the claimed harm in a given case is a divergence between market prices and the price actually charged (or paid), the plaintiff must allege at the pleading stage facts regarding their efforts to compare the price charged (or paid) to market prices, or alternatively, plead facts showing why that comparison would not have revealed the harm. Plaintiffs have not done so here.

Indeed, if anything, the factual allegations in their Amended Complaint actually hurt the Plaintiffs in this regard. Perhaps most notably, the Plaintiffs contend that Emery and All Star conspired to allocate costs, such that a *higher* number appeared in block 4 of the good faith estimate **[*34]** that each Plaintiff received early on in their mortgage transaction. (*See* Am. Compl. at ¶ 608-10, #686). The number in block 4, according to Plaintiffs, should have been limited to the charge for title services, but here was grossed up to include the kickback amount. (*See id.* at ¶¶ 609-10). But the point of a good faith estimate, including block 4 of that estimate, is to allow a person to shop the mortgage transaction with competing settlement service providers. Had Plaintiffs done so, presumably they would have discovered whether the quoted price in block 4 was artificially high, as they now claim.

Having failed to include any allegations regarding their efforts to compare the price they were charged to the market price, their attempt at using fraudulent concealment to toll the statute of limitations fails as a matter of law. That being said, the Court will grant Plaintiffs leave to file a second amended complaint addressing, if they can, the shortcomings identified herein with appropriate allegations supporting tolling. Any such amended complaint shall be filed not later than twenty-eight days from the date of this Order.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Emery's Motion **[*35]** to Dismiss (Doc. 20) and **DISMISSES** the Amended Complaint (Doc. 17) **WITHOUT PREJUDICE**. The Court allows Plaintiffs twenty-eight days from the date of this Order to file an amended complaint addressing the deficiencies set forth above.

SO ORDERED.

May 11, 2020

DATE

/s/ Douglas R. Cole

DOUGLAS R. COLE

UNITED STATES DISTRICT JUDGE

[Cite as *Forbes v. Nationwide Mut. Ins. Co.*, 2020-Ohio-2802.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ruth Forbes,	:	
Plaintiff-Appellant,	:	
		No. 19AP-220
v.	:	(C.P.C. No. 14CV-4944)
Nationwide Mutual Insurance Company,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on May 5, 2020

On brief: *James R. Leickly* and *William P. Tedards, Jr.*, for appellant. **Argued:** *William P. Tedards, Jr.*

On brief: *Bricker & Eckler LLP, Quintin F. Lindsmith,* and *Ali I. Haque,* for appellees. **Argued:** *Ali I. Haque.*

APPEAL from the Franklin County Court of Common Pleas

NELSON, J.

{¶ 1} Plaintiff-appellant Ruth Forbes appeals from the decision of the Franklin County Court of Common Pleas granting summary judgment in favor of Nationwide Mutual Insurance Company ("Nationwide") on her breach of contract and conversion claims. We conclude after reviewing the matter afresh ("de novo") that Nationwide was entitled to summary judgment on each claim, and accordingly we affirm the judgment of the trial court.

{¶ 2} The trial court's March 13, 2019 Decision and Entry thoroughly lays out the relevant facts as reflected in the record. Ms. Forbes and Nationwide entered into two agreements in June of 2006 that governed her performance selling Nationwide insurance policies from her Virginia office. The first was the Independent Contractor Agent's

Agreement, or "IC Agreement," that appointed Ms. Forbes "as an agent to represent [Nationwide] in Virginia." *See* Third Amended Complaint, Ex. 2. Nationwide agreed to provide Ms. Forbes "with certain manuals, forms, records, and such other materials and supplies as are necessary in the conduct of an insurance business," but specified that "[a]ll such property * * * shall remain the property of [Nationwide] and shall be returned to [Nationwide] in good condition upon any cancellation of" the IC Agreement. *Id.* at ¶ 1. The agreement also stated: "Upon termination of this Agreement, you agree to return all Confidential Information, and all copies thereof, to [Nationwide] immediately." *Id.* at ¶ 7. Confidential Information included "customer policy information." *Id.*

{¶ 3} The second agreement was the Agency Executive Program Performance Agreement, or "AE Agreement," relating to the performance levels that Nationwide required Ms. Forbes to meet. *See* May 22, 2017 Third Amended Complaint, Ex 1. The sales marks were set forth in the "Minimum Production Plan" attached to the original AE Agreement (but not attached to this document in the record). The AE Agreement stated: "All requirements of the Minimum Production Plan must be met on a monthly basis throughout the term of this Agreement beginning on the effective date of the Minimum Production Plan, including DWP, Life Commissions, and Life Sales. Nationwide shall, in its sole discretion, measure the achievement of Agent. The Sales Results Report (1361) monthly data will be used to calculate DWP, Life Sales, and Life Commissions." *Id.* at 1-2. "DWP" referred to Total Direct Written Premium, defined as "[t]he sum of all of Agent's direct written premiums from Nationwide Property/Casualty policies." *Id.* at 1.

{¶ 4} In its original iteration, the AE Agreement provided a "Production Period" of 36 months that could be extended by Nationwide in its discretion for "up to three * * * months if Agent [Forbes] is not meeting the Minimum Production Plan during the final three (3) months of the original Production Period." *Id.* Ms. Forbes "further agree[d] * * * that failure to meet the requirements of the Minimum Production Plan may result in termination of Agent's Nationwide Agent's Agreement." *Id.* at 2. Ms. Forbes also agreed to "meet the requirements of a training and development program" consisting of "continuing education on the products, coverages, and regulations that govern [the insurance] industry." *Id.* at 5. Also pursuant to the agreement, Nationwide extended an interest-free loan to Ms. Forbes, and provided her the opportunity, conditioned on her attaining certain

sales goals in relation to the Minimum Production Plan, to have at least some of the loan balance forgiven. *Id.* at 3-5. Shortly after entering into the AE Agreement, Ms. Forbes executed a promissory note to Nationwide in the amount of $258,000. May 7, 2014 Complaint, Ex. 3.

{¶ 5} The parties formally modified that AE Agreement three times. They entered into the First Modification on April 24, 2008. *See* Third Amended Complaint, Ex. 3. The First Modification extended the Production Period to 72 months, provided a graduated Modified Minimum Production Plan that set a final DWP requirement of $1,749,880 (for month 72), provided for periodic "capital infusion" payments in lieu of "further Loan disbursements" upon meeting certain production goals, and specified the education and development courses that Ms. Forbes was required to complete. *Id.* at 2, 8, Ex. A, Ex. C, and Ex. D. In addition, the First Modification altered the language governing the calculation of DWP: "P&C DWP shall be defined herein as the sum of all of Agent's direct written premiums from Nationwide P&C policies during the previous 12 month period and shall be calculated on a 12 month moving basis as outlined in Exhibit A to this Modification. * * * Nationwide shall, in its sole discretion, measure the achievement of Agent. The monthly P&C DWP and Life Sales data shall be measured by use of the Sales Results Report (Form No. 1361), or other such form developed by Nationwide in its sole discretion for use in making such determination." *Id.* at 3.

{¶ 6} As so modified, the Agreement again specified that: "All requirements of the Modified Minimum Production Plan must be met on a monthly basis thr0ughout the term of this Agreement." *Id.* It set out increasing month-by-month DWP requirements through month 72. *Id.* at Attachment A. It also recited that "[i]n order to successfully complete the Modified AE Program, Agent understands and agrees that Agent must: (1) meet or exceed the Year 6 P&C DWP on or before the conclusion of the seventy-two (72) month production period; [and] (2) complete all education and development requirements * * *." *Id.* at 4. The First Modification also provided that Ms. Forbes would "release[] and discharge[] Nationwide * * * of any and all claims or causes of action * * * in any way relating to the AE Program, the AE Agreement, and the IC Agreement from the beginning of time to the present * * *." *Id.* at 11.

{¶ 7} "Somewhere around October of 2008," Ms. Forbes began to believe that there was a discrepancy between the DWP amounts with which she thought she should be credited and the amounts actually reflected in Nationwide's reports. *See, e.g.*, Forbes Deposition at 229. She communicated her concerns about Nationwide's calculations to her sales manager, Gary Edgerton, at that time, and continued to track the perceived differences and communicate with Nationwide about the issue until the end of her tenure as an agent. *Id.* at 71, 96-98.

{¶ 8} On June 17, 2010, the parties once again altered Ms. Forbes's production requirements. The Second Modification to the AE Agreement "canceled and replaced" the First Modification's Modified Minimum Production Plan attachment with a new one that specified new, lower monthly DWP requirements, ending with a month-72 figure of $1,537,428. Third Amended Complaint, Ex. 4 at 1, Ex. A. Like the First Modification, the Second Modification contained a release requiring Ms. Forbes to release and discharge "all claims or causes of action Agent has in any way relating to the AE Program, the AE Agreement, and the IC Agreement from the beginning of time to the present * * *." *Id.* at 2.

{¶ 9} Ms. Forbes says that she received a communication from Nationwide on March 30, 2012, confirmed by email of February 19, 2013, stating that while the Second Modification had changed her "minimum production requirements to $1,537,428 in Nationwide DWP at the end of Month 72," she "would be eligible to transition to career status if [she] met 95%" of that figure; specifically, she would qualify if she were to achieve "$1,460,556.60 in Nationwide DWP, [have] completed all of [her] Training and Development requirements and [have] passed [her] fiduciary audit." *See* October 27, 2017 Memorandum in Opposition to Summary Judgment, Ex. 2.

{¶ 10} On May 18, 2012, Nationwide sent Ms. Forbes a demand letter stating that her loan had been "deemed non-collectable" by the guarantor and that her "outstanding debt" owed was $183,481.82. Ms. Forbes had stopped making payments, believing that Nationwide was basing the payment amounts on "incorrect" calculations of DWP. Forbes Deposition at 13 (also noting at 18 that there was to have been some loan forgiveness for achieving DWP figures).

{¶ 11} The parties then executed their Third Modification to the AE Agreement in September 2012. *See* Forbes Deposition, Ex. 10 and Appellant's Brief at 10-11

(acknowledging joint agreement and execution). The Third Modification, acknowledged as supported by "good and valuable consideration," Third Modification at 1, again specified that the Production Period as contained in the AE Agreement as modified by the First Modification would "end at the conclusion of the sevent[y]-second (72nd) full month," but altered that period so as "to suspend Agent's seventy-two month production schedule for the six month period beginning February 1, 2012 and ending July 31, 2012." The agreed result was that Ms. Forbes's "production schedule * * * will conclude at the end of the seventy-second (72nd) month, which [accounting for the suspended period] is March 31, 2013." *Id.* Like the previous modifications, the Third Modification contained a release of claims, but Ms. Forbes crossed out the release language, initialed the crossed-out provision, and signed the document on September 10, 2012. *Id.* Nine days later, a Nationwide Regional Vice-President initialed the crossed-out release and signed the Third Modification. *Id.*

{¶ 12} Nationwide terminated the IC Agreement and the AE Agreement in May of 2013, citing Ms. Forbes's failure to meet the Modified Minimum Production Plan requirements. Third Amended Complaint at ¶ 5; June 13, 2017 Answer at ¶ 12. On May 24, 2013, she received a package from Nationwide containing a letter terminating her contracts and instructing her to "[p]repare files for pick up (this does not include any broker business)." August 4, 2017 Third Affidavit of Ruth Forbes (Forbes Deposition, Ex. 3) at ¶ 3-4. Because Ms. Forbes found the directive "unclear," she called sales manager Edgerton for "clarification." *Id.* at ¶ 4. Ms. Forbes avers that she was instructed "to turn over, not only any remaining documents I might have reflecting Nationwide policyholder activity, but also all of my own historical files and records on all my clients," including non-Nationwide clients she had developed over "thirty years" during her pre-Nationwide tenure. *Id.* According to Ms. Forbes, Mr. Edgerton asserted that all of her "client files and all contents within belonged to Nationwide," and that she "had 'no choice' but to prepare those files for pickup," even after she had "explained that more than half of the 1000 plus client files were [her] prior clients with multiple policies before coming to Nationwide." *Id.* at ¶ 5-6. Ms. Forbes discussed the situation with her daughter and the two "agreed that [they] would proceed to get the files prepared for pickup as directed by Gary." *Id.* at ¶ 8. Ms. Forbes's lawyer emailed a Nationwide representative on June 11, 2013 "to confirm that Ms. Forbes

will make Nationwide's files and customer information available for pick up on Wednesday, June 11, 2013 at 9:00 a.m. at her former Nationwide agency location." Forbes Deposition, Ex. 4.

{¶ 13} Ms. Forbes filed suit against Nationwide almost a year later, on May 7, 2014. Her suit originally claimed violation of R.C. 4111.03, the Ohio Minimum Wage Act; fraudulent inducement; intentional misrepresentation; breach of contract; wrongful termination in violation of public policy; a violation of R.C. 1335.11, the Ohio Wage Act, for failure to pay commissions; and promissory estoppel. May 7, 2014 Complaint. Nationwide counterclaimed for breach of the promissory note, seeking a claimed $171,478.34 unpaid balance on the loan to Ms. Forbes. Nationwide obtained dismissal of several of the original claims and Ms. Forbes amended the complaint twice before she eventually filed her Third Amended Complaint. That version asserted claims for breach of contract ("including [the] covenant of good faith and fair dealing"); unjust enrichment; and conversion (based on Nationwide's destruction of the client files, which occurred after this litigation commenced). May 22, 2017 Third Amended Complaint.

{¶ 14} Nationwide moved for summary judgment, which the trial court granted on all claims. The trial court ruled that the release provision in the Second Modification barred Ms. Forbes's claims because she "testified [that] she first became aware of Nationwide's alleged breach of the AE Program contracts in 2008," and she therefore "at least had constructive knowledge of Nationwide's possible faulty tracking of DWP numbers prior to, or at the time she signed the Second Modification on June 17, 2010." March 13, 2019 Decision at 21. Even without the release, the trial court ruled, the breach of contract claim would fail on its merits because: Ms. Forbes had failed to "identify any contractual provision/term breached by Nationwide"; her assertion that Nationwide was required to use "monthly compensation statements to measure the success of her agency" was inconsistent with the AE Agreement's grant of "sole discretion" to Nationwide regarding the measurement of DWP; and Ms. Forbes "admittedly failed to complete the educational training required under the contracts and defaulted on the loan" she took out. *Id.* at 22-24. The trial court also ruled that Ms. Forbes's conversion claim failed because she "was not an 'owner' of the files to the extent the files were about Nationwide policies and customers," and she had "implicitly consented" to the taking of the information she had "selected and

packed up * * * for pick up by Nationwide." *Id.* at 27-28. The trial court ruled in Nationwide's favor on the unjust enrichment claim, too; Ms. Forbes has not appealed from the judgment against her on that count.

{¶ 15} As to Nationwide's counterclaim, the trial court held: "As Forbes has failed to make any argument challenging Nationwide's status as a holder of the note, the amount due, or the facts regarding notice of default and acceleration, the Court finds the evidence in the record, even when construed in favor of Forbes, demonstrates Nationwide is entitled [to] a judgment in its favor on the note in the total amount of $171,478.34 plus interest at the statutory rate from the date of this judgment." *Id.* at 29. Ms. Forbes does not appeal from the counterclaim judgment (as predicated on the loan, with the balance not having been reduced given Nationwide's view that Ms. Forbes had failed to attain the requisite DWP thresholds).

{¶ 16} Ms. Forbes has, however, appealed the dismissal of her breach of contract and conversion claims. Her first assignment of error states: "The trial court erred as a matter of law in granting Defendant/Appellee Nationwide Mutual Insurance Company's Motion for Summary Judgment on Count 1 of the Third Amended Complaint (Breach of Contract including the Covenant of Good Faith and Fair Dealing)." Her second assignment urges: "The trial court erred as a matter of law in granting Defendant/Appellee Nationwide's Motion for Summary Judgment on Count 4 of the Third Amended Complaint (Conversion)." Appellant's Brief at v.

{¶ 17} We apply a de novo standard to a trial court's decision granting summary judgment, and the analysis is "governed by the standard set forth in Civ.R. 56." *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 8. The de novo standard of review encompasses matters of law, including the interpretation and construction of written contracts. *Long Beach Assn. v. Jones*, 82 Ohio St.3d 574, 576 (1998). Under this standard, we give no deference to a trial court's interpretation of legal issues. *See, e.g., Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9. Thus, we examine the grant of summary judgment afresh, conducting " 'an independent review of the record and stand[ing] in the shoes of the trial court.' " *See Bae v. Dragoo & Assocs.*, 10th Dist. No. 03AP-254, 2004-Ohio-544, ¶ 6, quoting *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997).

{¶ 18} Pursuant to Civil Rule 56, summary judgment "shall be rendered forthwith" if the pleadings and evidentiary quality materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It "shall not be rendered unless it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion * * * is made, [with the evidence] construed most strongly" in that party's favor. Civ.R. 56(C); *see also, e.g., Bostic v. Connor*, 37 Ohio St.3d 144, 146 (1988), *superseded by statute on other grounds* as stated in *Slauter v. Klink*, 2d Dist. No. 18150, 2000 Ohio App. LEXIS 3716 (Aug. 18, 2000). The moving party must identify those portions of the record that "demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims," and the nonmoving party then cannot rest on the mere allegations of the pleadings, but must point to specific facts showing a genuine question for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 294 (1996); *see also, e.g., Payne v. Ohio Performance Academy, Inc.*, 10th Dist. No. 17AP-202, 2017-Ohio-8006, ¶ 13.

{¶ 19} As to her contract claim, Ms. Forbes argues that the trial court erred by disregarding an expert report that used Nationwide "Compensation Statements" to assess DWP. Appellant's Brief at 21. She maintains that the Compensation Statements provide the best available way to satisfy the "purpose of the Minimum Production Requirement as stated by Nationwide's Rule 30(B)(5) witness -- determining viability by measuring commission flows," because "Nationwide refuses to reveal any information or data to support the unreconciled * * * numbers" in its Program Agency Performance Report—the form that Nationwide elected to use in determining DWP. *Id.* at 21-22. Ms. Forbes also argues that "Nationwide did *not* exercise its discretion in good faith and in accordance with fair dealing, when, confronted with incontestable evidence that Ms. Forbes did her job and met the minimum production requirement, it chose to terminate her contract anyway." *Id.* at 24-25.

{¶ 20} In response, Nationwide argues, as it did to the trial court, that Ms. Forbes's deposition testimony demonstrates that she cannot "identify a single term breached by Nationwide." Brief of Appellee at 27. Nationwide submits that Ms. Forbes's assertion that it was obliged to calculate DWP based on Compensation Statements is an attempt to assert an independent claim for breach of a covenant of good faith and fair dealing, which is not

recognized as a freestanding claim under Ohio law; her theory, says Nationwide, does not rely on a breach of any term of the parties' agreements. *Id.* at 28-29. Moreover, Nationwide urges that Ms. Forbes's arguments are without factual foundation in admitted evidence. *Id.* at 30-31. And Nationwide argues that the language of the AE Agreement and the First Modification, granting it "sole discretion" to measure an agent's performance and to "measure[]" DWP "by use of the Sales Results Report (Form 1361), or such other form developed by Nationwide * * * for use in making such determination," *see* First Modification, allowed it to use the "agency synopsis reports to measure DWP production, as it does with all Nationwide agents. Nothing in the AE Agreement allowed Forbes to decide which reports to use to measure her DWP." *Id.* at 32.

{¶ 21} The Third Amended Complaint did lay out Ms. Forbes's theory of breach: it was specifically predicated on the Second Modification. "Nationwide's May 24, 2013 termination of Ms. Forbes' contracts for failure to meet the modified P&C DWP minimum production plan breached the Second Modification, as revised by the March 2012 [95% communication], which set the minimum requirement at $1,460,556. * * * Ms. Forbes met and exceeded the minimum production requirement well in advance of the conclusion of the 72-month production period." Third Amended Complaint at ¶ 15-16. (Ms. Forbes had sought also to advance a contract claim relating to the calculation of "her commissions after executing the Second Modification," *id.* at ¶ 17, but she abandoned that commissions claim during the course of the litigation. *See, e.g.*, Forbes Deposition at 279.)

{¶ 22} As an initial matter, and viewing the evidence in the light most favorable to Ms. Forbes, we cannot conclude that the release language to which she assented in 2010 as part of the Second Modification bars her contract claim here. "A release is an absolute bar to a later action on any claim encompassed within it, absent a showing of fraud, duress, or other wrongful conduct in procuring it." *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, ¶ 48. " 'Whether a release operates upon a certain liability depends entirely upon the intention of the parties, which is to be gathered from the language of the release and the state of facts then existing.' " *Fox v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 17AP-745, 2018-Ohio-2830, ¶ 70, citations omitted (adding at ¶ 77 that "[r]eleases from liability for future tortious conduct are generally not favored by the law and will be narrowly construed"). In the usual course, " 'a release [of liability] is a binding

agreement between the parties under which at least one party to the agreement relinquishes an existing claim or cause of action against another party to the agreement.' " *Lucarell* at ¶ 55, quoting *Williston on Contracts*, Section 73:1, at 8 (4th Ed.2003)

{¶ 23} The release contained in the Second Modification specified that it worked to discharge Nationwide of "all claims or causes of action Agent has in any way relating to the AE Program * * * from the beginning of time to the present [June of 2010], including * * * breach of contract." Second Modification at 2. The trial court correctly noted that when she signed that modification, Ms. Forbes "knew, or should have reasonably known, * * * that Nationwide's tracking of her agency's production was based on information other than what she thought should or could be considered under the AE Program contracts * * *." Decision and Entry at 22. But, as the trial court also noted, " ' "[a] cause of action for breach of contract does not accrue until the complaining party suffers actual damages as a result of the alleged breach." ' " *Id.* at 20, quoting *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, ¶ 13, further citation omitted. And the claimed breach of which Ms. Forbes complains is her 2013 termination, from which she had not suffered damages when she agreed to the release in 2010. This case differs in that respect from *Fox*, where "the only reasonable inference supported by the evidence * * * [was that] Fox's fraud claims accrued prior to the time she executed the release." 2018-Ohio-2830, at ¶ 79. And it differs from *Sourial v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 17AP-731, 2018-Ohio-2528, ¶ 45, where again the plaintiff "acknowledged * * * that the fraudulent conduct alleged in [his] complaint * * * occurred prior to the date" he signed the release. Because Ms. Forbes's contract claim involving her (post-release) termination is not necessarily akin to the (pre-release) tortious conduct alleged in *Fox* and *Sourial*, we do not think that the release provided grounds for summary judgment here.

{¶ 24} Nonetheless, Ms. Forbes's undisputed knowledge, from at least October 2008 forward, that Nationwide was determining DWP in its own way instead of in the manner in which she would have wished, does eviscerate her contract claim. When Ms. Forbes entered into the Second Modification (invoked by her Third Amended Complaint) and again when she executed the Third Modification, she knew full well of the divergence between her calculations and calculation methodologies and Nationwide's. *See, e.g.*, Forbes Deposition at 229 (Q. "at what point in time is it that you thought or believed that

there was a discrepancy between what Nationwide was telling you it believed its DWP numbers to be and what you thought your DWP numbers were?" A. "Somewhere around October of 2008 it started"); *see also id.* at 96 ("when I saw in 2008 * * * around * * * October, the numbers went in the adverse direction when we were steadily moving forward, that's when I made contact with Mr. Edgerton and we had a conversation about it. I continued to watch and began to print reports and make comparisons * * * "); 98 (Q. "so from 2008 to 2010 * * * you continued to track this type of information because you * * * were concerned that Revenue Connection continued to not track correctly your agency's activities, correct?" A. "Correct."); 99 (her tracking moved from handwritten ledgers to computerized spreadsheets: Q. "so from 2010--by 2010, do you think it was in electronic format?" A. "It was.").

{¶ 25} Thus by the time that her DWP was reduced from a month 72, twelve-month-moving figure of $1,749,000 (which she does not claim ever to have met, even by her own calculations as based on Compensation Statements) to $1,537,428 (in the 2010 Second Modification), or to 95 percent of that (pursuant to the March 30, 2012 communication she invokes), and also by the time that Nationwide agreed to extend the 72-month end date to March 31, 2013 (in the Third Modification), she knew that she and Nationwide calculated DWP very differently. She offers no legally cognizable argument for claiming the benefit of those mutual modifications while simultaneously asserting an extra-contractual unilateral right to employ Compensation Statements as the basis for DWP determination.

{¶ 26} The express terms of the contract itself, a contract mutually modified three times before the termination of which she complains, leave that determination exclusively to Nationwide: "Nationwide shall, in its sole discretion, measure the achievement of Agent. The monthly * * * DWP * * * shall be measured by the use of the Sales Results Report (Form No. 1361), or such other form developed by Nationwide in its sole discretion for use in making such determination." First Modification (2008) at 3. In making its DWP "determination," Nationwide chose to "measure[]" DWP by agency synopsis reports (also referred to as Program Agent Performance Reports) that determined DWP levels for Ms. Forbes—levels that she concedes did not meet the contractual standards. *See, e.g.,* Appellant's Reply Brief at 4-5 (quoting opinion of Ms. Forbes's expert that the DWP amounts "per the Program Agent Performance Reports – Agency Synopsis do not [correlate

with] the direct written premium amounts per the * * * Compensation Statements for the fourteen months examined. We are not aware of any current information or data that would reconcile these differences. Without this reconciliation we cannot give an opinion as to the accuracy of the information in the Program Agent Performance Reports – Agency Synopsis") (emphasis omitted). As the trial court said, Ms. Forbes "agreed [that] nothing within the AE Program contracts required Nationwide to use compensation statements to measure DWP. [Forbes Deposition at 215] * * * * [U]nder the AE Program contracts, Nationwide did not have to use monthly compensation statements to measure DWP, and * * * Nationwide, in its sole discretion, could decide how to measure DWP." Decision and Entry at 23.

{¶ 27} Ms. Forbes falls back, therefore, on a contention that Nationwide breached a duty of good faith and fair dealing by exercising that discretion to use the Performance Reports and not the Compensation Statements. "In addition to a contract's express terms, every contract imposes an implied duty of good faith and fair dealing in its performance and enforcement." *Lucarell*, 2018-Ohio-15, at ¶ 42, citation omitted. "[T]here is no violation of the implied duty unless there is a breach of a specific obligation imposed by the contract, such as one that permits a party to exercise discretion in performing a contractual duty or in rejecting the other party's performance." *Id.* at ¶ 43, citing *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 443-44 (1996). That is what we understand Ms. Forbes to argue here.

{¶ 28} But " '[g]ood faith' is a compact reference to an implied understanding not to take opportunistic advantage in a way that could have not been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties." *Lucarell* at ¶ 42, quoting *Ed Schory & Sons* at 443-44 (further citation omitted). Ms. Forbes adduces no evidence that it "could not have been contemplated" when the original contract was formed in 2006 or at the time of the First Modification in 2008 that Nationwide would not use Compensation Statements to calculate DWP; the contract originally specified that "[t]he Sales Results Report ([form] 1361) monthly data will be used to calculate DWP" (and Ms. Forbes does not even invoke that Report to us, at least by name, or describe what her levels would have been pursuant to that specified form), and the contract then was changed to reference the "Sales Results Report (Form 1361), or such other form developed by

Nationwide in its sole discretion for use in making such determination." *See* 2006 AE Agreement at Article 2; First Modification at 3; *compare* Decision and Entry at 23 ("There is no evidence demonstrating that Nationwide measured/tracked DWP numbers for Forbes' agency in a manner inconsistent with the terms of the original AE Agreement or First Modification").

{¶ 29} And again, by the time in 2010 that the required DWP levels were reduced by the Second Modification to bring Ms. Forbes within the striking distance that she argues according to her own chosen (Commission Statements) method of calculation and by the 95 percent communication of 2012, *see* Complaint at ¶ 15 (relying on Second Modification and related 2012 communication), Ms. Forbes was under no illusion at all that she and Nationwide were calculating her DWP the same way. Having tracked the disparity for years by that point, *see* Forbes's Deposition at 96-99, she can point to no evidence that the difference "could not have been contemplated" at the time of the contract modifications on which she relies. We have underscored that the Supreme Court of Ohio has conditioned good faith enforcement of a contract on " 'consistency with the justified expectations of the other party,' " *Sourial*, 2018-Ohio-2528, at ¶ 31, quoting *Lucarell* at ¶ 43. Especially having opted to enter into the Second and Third Modifications reducing the DWP requirements and suspending their application for six months, Ms. Forbes has no room to argue that she would have been justified in expecting that the modified contract provided her with discretion to specify the measure for determining whether she had met those requirements. *Compare, e.g., Greenzalis v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 16AP-382, 2016-Ohio-8344, ¶ 22, 24, 26 (modified AE Agreement controlled; "appellant undisputedly chose to sign a modification").

{¶ 30} The trial court was correct to enter summary judgment against Ms. Forbes's contract claim: the contract never bound Nationwide to use Compensation Statements or forms reconciled to Compensation Statements in determining agent DWP levels, and there is no evidence of a breach of a duty of good faith and fair dealing in Nationwide's use of Agency Synopsis Reports in making that determination.

{¶ 31} What is more, it is undisputed that at the end of March 2013—the end of the 72-month Production Period, as specified in the Third Modification—Ms. Forbes fell short of her required DWP level, even by her own calculations as based on Compensation

Statements. Ms. Forbes's deposition is clear on this point: Q. "What is the position you're taking today was the 12-month moving DWP number for your agency as of March 2013?" A. "1,399,308.54." Q. "Can you say that again, please." A. "1,399,308.54." Forbes Deposition at 269. That result does not meet the month 72 requirement of $1,537,428 set forth in the Second Modification, or the 95 percent figure (of $1,460,556.60) referenced in the 2012 and 2013 communications.

{¶ 32} The original AE Agreement had provided that "[a]ll requirements of the Minimum Production Plan must be met on a monthly basis throughout the term of this Agreement, * * * including DWP * * *." 2006 AE Agreement at Article 2. Similarly, the First Modification provided that "[a]ll requirements of the Modified Minimum Production Plan must be met on a monthly basis throughout the term of this Agreement, including the Property and Casualty Direct Written Premium ('P&C DWP')." First Modification at 3. Ms. Forbes attempts to respond to this requirement that an agent meet her DWP level every month by noting other language from the First Modification that "Agent must: (1) meet or exceed the Year 6 * * * DWP on or before the conclusion of the seventy-two (72) month production period; [and] (2) complete all education and development requirements * * * ," First Modification at 4, then arguing that she met monthly DWP requirement "repeatedly" by her calculations, *see* Appellant's Brief at 19-20, and concluding that her DWP obligation would have ended at that point. But that position, envisioning on this record Ms. Forbes's early "graduation" from the program, *see* Forbes Deposition at 272, does not square with the language of the contract or with the history of the modifications.

{¶ 33} Ms. Forbes asserts, for example, that under her methodology, she met what she saw as DWP requirements for early graduation in "October of 2011." *Id.*; *see also id.* at 356 (agency hit $1,467,178 in October 2011). But the parties entered into their Third Modification almost a year after that, in September 2012. That Modification, the validity of which Ms. Forbes does not contest and which was made well after Ms. Forbes was notified of her loan default, *see* Forbes Deposition at 37, made clear (if any further clarity was necessary) that her DWP requirements were ongoing. It also reestablished a fixed end date for the Production Period: "her production schedule * * * *will conclude* at the end of the seventy-second (72nd) month, which is March 31, 2013." Third Modification at 1 (emphasis added); *see also* Appellant's Brief at 7 (March [31], 2013 was "the end of Ms.

Forbes' program"). Further still, when asked at her deposition whether she had understood "that as part of your participation in the AE program that you were required on a monthly basis to meet the minimum production requirements set forth in your contract for P&C DWP," Ms. Forbes answered, "Yes." Forbes Deposition at 218. (Even beyond that, Ms. Forbes also acknowledges that she never raised the issue of early graduation with Nationwide and "did not" satisfy the education and training requirements specified in her contract. Forbes Deposition at 273.)

{¶ 34} So even were Ms. Forbes's reading and use of her Compensation Statements to govern determination of her DWP achievement, she would by her own terms not have met the required level at the last month of the defined 72-month period.

{¶ 35} In light of the analysis sketched above, we need not reach the trial court's further, alternative finding that summary judgment on the contract claim was appropriate because Ms. Forbes had failed to satisfy her contractual obligations to complete the education and training requirements. *Compare* Decision and Entry at 24. The trial court did not err when granting summary judgment in Nationwide's favor on Ms. Forbes's breach of contract claim, and we overrule the first assignment of error.

{¶ 36} Ms. Forbes's second assignment of error, urging that the trial court was wrong to grant summary judgment against her conversion claim, fails as well. We note initially that despite various references in Ms. Forbes's arguments in briefing to us, the conversion claim—based on her allegation that "[b]y discarding or destroying Ms. Forbes' files [at some time after February 2014], Nationwide * * * wrongfully exercised dominion over her property to the exclusion of her rights," Third Amended Complaint at ¶ 35—is *not* pled or appropriately analyzed here as a claim of "spoliation" of evidence. *Compare* Appellant's Brief at 28 *with* Reply Brief at 17 (urging that "deliberate shredding was also an act of spoliation" giving rise to adverse inferences, but acknowledging that there is no "independent spoliation claim").

{¶ 37} Under Ohio law, "conversion is 'the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.' " *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 32 (10th Dist.), quoting *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96 (1990). However, "a party who consents to the manner by which another

deals with his property is estopped from asserting a claim for conversion." *Ahlers v. Pettinelli*, 8th Dist. No. 86257, 2006-Ohio-1199, ¶ 16 (citation omitted). Ms. Forbes advises us that Virginia law, which she thinks applicable to this claim, is to an effect quite "similar" to Ohio's law of conversion. *See* Appellant's Brief at 30-31, citing *PGI, Inc. v. Rathe Prods., Inc.*, 265 Va. 334, 344, 576 S.E.2d 438 (2003) (conversion includes "act of dominion wrongfully exerted over property in denial of the owner's right"); *compare* AE Agreement at Article 14 (which does not govern choice of law on non-contract issues: "This Agreement shall be deemed to have been made under and governed by the laws of the State of Ohio without regard to Ohio's choice of law rules").

{¶ 38} Ms. Forbes argues that although she herself turned the files over to Nationwide, after her counsel had "confirmed" with Nationwide that Nationwide's "files and customer information would be available for pick up," *see* Frederick Affidavit at ¶ 5-6, and although she "did not attempt to physically confront Nationwide [representatives] to block them from taking" the files she provided to them, the "taking" occurred "under duress." Appellant's Brief at 28.

{¶ 39} The trial court correctly ruled that Ms. Forbes "was not an 'owner' of the files to the extent the files were about Nationwide policies and customers." Decision and Entry at 28. Moreover, the trial court held, by turning over the files to Nationwide under the undisputed facts of record, Ms. Forbes "implicitly consented to the taking of those files as she – with the assistance of family and staff – selected and packed up all the hard copy files for pick up by Nationwide, and did not immediately [or for years] demand return of the files once she discovered [in her view that they] included non-Nationwide client information." *Id.*, citing *Cedar Creek Mall Properties, L.L.C. v. Krone*, 8th Dist. No. 104863, 2017-Ohio-7884; *Devil's Advocate, LLC v. Zurich Am. Ins. Co.*, Case No. 1:13-cv-1246, 2014 U.S. Dist. Lexis 146449 (E.D.Va. Oct. 10, 2014).

{¶ 40} On our de novo review, we find no error in that assessment that Ms. Forbes effectively (in both senses of the word) consented to the transfer of the files at issue. Given her description of her own efforts to prepare the files for Nationwide to pick up, as well as her attorney's notification to Nationwide "to confirm that Ms. Forbes will make Nationwide's files and customer information available for pick up on Wednesday, June 11, 2013 at 9:00 a.m. at her former Nationwide agency location," Ms. Forbes's conversion claim

fails as a matter of law. *See* Forbes Deposition, Ex. 4; *Devil's Advocate* at * 25-28 (implied consent or assent makes the taking not wrongful and negates conversion claim). We overrule Ms. Forbes's second assignment of error.

{¶ 41} Having overruled both of Ms. Forbes's assignments of error, we affirm the judgment of the trial court granting summary judgment in Nationwide's favor.

Judgment affirmed.

BRUNNER and BEATTY BLUNT, JJ., concur.

[Cite as *Diguglielmo v. FCA US, L.L.C.*, 2020-Ohio-2858.]

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

Peter Diguglielmo	Court of Appeals No. L-19-1187
Appellant	Trial Court No. CI0201801823
v.	
FCA US LLC, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 8, 2020

* * * * *

Taylor R. Ward, for appellant.

Kevin W. Kita and Ashley C. Wakefield, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Peter Diguglielmo, appeals the decision of the Lucas County Court of Common Pleas, awarding summary judgment to appellees, FCA US, LLC, and Charlie's Toledo Inc., dba Grogan's Towne Jeep Dodge Ram, on appellant's claims for

breach of Ohio's Lemon Law and breach of warranty. For the reasons that follow, we reverse, in part, and affirm, in part.

I. Facts and Procedural Background

{¶ 2} On May 10, 2016, appellant purchased a new 2016 Jeep Renegade from appellees. Appellant described that in February 2017, he began to notice "when I would come up to an intersection and be slowing up and then going to make that right hand turn I would make the turn and it felt like the vehicle was going to stall out, like for several seconds it felt like it just, it wouldn't do anything. My foot was on the gas but it wasn't going anywhere." Appellant said that he experiences this occurrence intermittently, about twice a week. He documented that it occurred 32 times between June and December 2017.

{¶ 3} On two of those occasions, appellant stated that he was almost involved in an accident because of the vehicle's failure to accelerate. Appellant testified in his deposition that on September 11, 2017,

> A. I was pulling out of a McDonald's parking lot which is right next to the corner of Monroe and Talmadge and I was, again, coming up to, easing up to getting out and then I felt like I had plenty of time to pull out and turn into that right-hand lane. As I did that the car hesitated for several seconds and a big dump truck came right up on me blaring its horn, you know. And I felt like, you know, I tried to go and I felt like I couldn't and he kept blowing his horn. And I was scared, I thought there was going to

be some road rage issues and then finally I got going and got, you know, got away from the dump truck.

Q. Could you tell if the dump truck had to slam on its brakes or, other than it blowing its horn what made you feel as if you almost got rear ended?

A. It did have to slam on its brakes and slow way down.

Appellant testified that the second incident occurred on October 10, 2017. He explained,

A. I was on King Road turning right onto Central Avenue. Same thing, I was at a red light turning right on red. Same thing happened only this time it was with a, someone in a mini van and I almost got rear ended and the person in the mini van I felt like thought that I was intentionally going slow because he kept, he stayed right on my tail and kept honking his horn, wouldn't get off his horn. And then finally when I was able to accelerate I accelerated and got the heck out of there because again I was in fear that there was going to be some road rage issues.

{¶ 4} Appellant's wife, Denise, corroborated appellant's concerns about the vehicle. She testified in her deposition that,

A. That hesitation, pulling out when there are cars coming and not knowing, you know, if it was a thing that happened all the time you would probably learn how to get around it, but it doesn't happen all the time. So, it's jarring to me when it does which is why I don't drive it very much.

Q. Let's talk a little bit more about this issue. So you stated that it happens when you're pulling out into traffic?

A. When you've stepped on the brake to stop say at a stop sign and then, so you've made your stop and then you step on the gas to go and you expect the car to accelerate, so, you know, you might be turning and there may be traffic coming, um, but the car doesn't quite go. It starts, seems like it starts to go and then it doesn't continue to go and feels like it's going to stall until it finally catches and goes again.

{¶ 5} On March 6, 2017, when the vehicle had 17,431 miles, appellant took the vehicle to Grogan's Towne for service, and reported that at times the vehicle fails to accelerate when coming to a near stop and then attempting to reaccelerate. The service worker could not verify appellant's complaint. The worker noted, "Using WITECH 2, found multiple stored codes for configuration, updated modules, cleared codes test drove vehicle for 8 miles, could not get vehicle to act up, can't duplicate concern at this time."

{¶ 6} Appellant returned to Grogan's Towne with the same concern again on June 12, 2017, when the vehicle had 23,801 miles. The service worker reported, "Checked for DTS codes. Found several not pertaining to concern. Cleared codes, road-test could not verify customer concern. Possible 9 speed transmission shifting characteristics."

{¶ 7} On August 10, 2017, when the vehicle had 26,924 miles, appellant returned to Grogan's Towne for a third time regarding this issue. Once again, the service worker was unable to duplicate the issue on test drives.

{¶ 8} Finally, on January 22, 2018, when the vehicle had 35,120 miles, appellant again reported his concern. The service worker noted that he road-tested the vehicle three times with numerous starts, stops, and turns, but could not duplicate the concern.

{¶ 9} Two of the service workers testified in depositions. Both testified that they were unable to find anything wrong with appellant's vehicle. Notably, both also testified that they have not experienced any other customers coming in with complaints about a 2016 Jeep Renegade hesitating when it accelerates.

{¶ 10} Richard Hansen, the service manager at Grogan's Towne, testified that he spoke many times with appellant about the vehicle. He further stated that he test-drove the vehicle several times with appellant—separate from the times that appellant brought the vehicle to Grogan's Towne for service—and was never able to duplicate the concern. Hansen explained that the 9-speed transmission in appellant's vehicle was designed for fuel economy, and that "it does characteristically shift unusually at times." Hansen elaborated that the vehicle may delay for a "short, short period of time" as it shifts more. Hansen testified that he explained to appellant that this was a normal condition for the transmission. In January 2018, appellant completed a customer service survey and continued to express his displeasure with the shifting of the vehicle. Hansen responded,

"I apologize that there is not a better fix for the shifting concerns on the 9 speed. As we have discussed they are very harsh shifting at times due to the design."

{¶ 11} On March 16, 2018, appellant initiated the present matter by filing a complaint against appellees asserting violations of Ohio's Lemon Law and breach of a written warranty.

{¶ 12} On January 11, 2019, appellees moved for summary judgment on appellant's claims. In their motion for summary judgment, appellees argued that appellant could not demonstrate that the vehicle suffered from a warranty non-conformity. In particular, they argued that appellant was unable to correlate his complaint of hesitation with any major defect. Appellees noted that the vehicle has never undergone any mechanical repairs related to the transmission, and no technician who inspected or test drove the vehicle could find that the transmission was operating in a way other than as designed. Alternatively, appellees argued that even if appellant could show a defect, the defect did not substantially impair the use, value, or safety of the vehicle because the vehicle has provided appellant with reliable transportation for over 50,000 miles.

{¶ 13} In his opposition to appellees' motion for summary judgment, appellant argued that his testimony, and that of his wife, that the vehicle would hesitate for several seconds and fail to accelerate was sufficient to provide a reasonable inference that the vehicle suffered from a warranty non-conformity, and thus a genuine issue of material fact existed. Moreover, appellant argued that because he testified that the defect

substantially impaired his belief in the safety, use, and value of the vehicle, a genuine issue of material fact existed on this point as well.

{¶ 14} In their reply, appellees argued that appellant's "self-serving allegations" were insufficient to establish a genuine issue of material fact regarding the existence of a defect, absent some corroborating evidence or supporting expert testimony of a mechanical defect. Appellees noted that appellant's testimony is not competent because he "lacks any knowledge, skill, training, or experience." Appellees contrasted that with all of the mechanics and technicians who have examined the vehicle and found no defect.

{¶ 15} Attached to their reply was an affidavit from Jeffery Teifer, a Technical Advisor for FCA US, LLC. Teifer attested that he inspected the vehicle on January 15, 2019, and conducted a 26-mile road test. According to Teifer, during the test the vehicle responded properly to any driver input, and had full acceleration at all times. Teifer concluded, with a high degree of technical certainty, that the vehicle is mechanically sound and does not have any defects that would impair the use, value, or safety of the vehicle.

{¶ 16} Following the briefing on the motion for summary judgment, the trial court allowed the parties to conduct additional discovery.

{¶ 17} As part of the additional discovery, appellant deposed Teifer. Teifer testified regarding circumstances where there would be a delay between the driver's pressure on the gas pedal and the vehicle's response:

Q. If a driver puts a lot of pressure on the gas pedal, he floors it, the intention is for it to accelerate quicker?

A. I believe that would be the driver's intention. The vehicle is designed to accelerate at the best rate possible given the circumstances. Traction, engine, temperature, performance, transmission, position, all the things that come into play are evaluated instantly and if the response can be - if it can be instantaneous, then it's allowed.

If it's not in conditions like loose pavement where tire spin is detected, it's going to back off. It won't give you that because it kind of makes it idiot proof in that respect.

Q. So what conditions would you believe that the gas pedal pressure would not necessarily correlate with the response from the vehicle in terms of accelerating?

A. In conditions where the wheel acceleration would be too fast to provide traction.

Q. Is that based on external conditions?

A. It's based on a lot of things. Wheel speed is one of them, the actual traction, that's possible. The torque that's available from the engine and the torque that's available to be dispersed through the transmission.

Q. Anything else?

A. There's a lot more but I don't think I could go into all that detail at this point.

Q. And when you're saying that those factors could affect whether or not the vehicle responds to the amount of pressure and the immediacy of that pressure, are you saying that problems in traction or problems in the torque could cause a delay?

A. Yeah, and delay we're talking anywhere from milliseconds to maybe a second, if that.

Q. So it would never be a delay of more than a second?

A. Unless you're in extreme conditions. So if you're on glaze ice, it would be quite a bit, but you'd get a lot of feedback from the vehicle. It would give you indications on the dash with the traction control and the stability control.

Q. Let's assume control of external factors where you're working with normal, dry, level, solid ground.

A. Okay.

Q. In those conditions, should there be any delay in a person's pressure on the gas pedal longer than a second?

A. I don't think so, no.

{¶ 18} Teifer was later asked, hypothetically:

> Q. * * * 2016 Jeep Renegade. Intermittent problems with acceleration once per day, sometimes once per week. Specifically acceleration hesitates between three to four seconds. It's not responding to the driver's pressure on the gas pedal. It has proper fuel, proper oil, proper level of traction. It's been verified by some sort of computer module. And there's no evidence of alteration or other damage to the vehicle causing that condition.
>
> If a 2016 Jeep Renegade experiences those conditions, would that be a defect covered by the manufacturer's express warranty?

He responded, "And again, once it's verified by a dealership that's inspected and found a defect then it is. If it's not, then it's all hypothetical at that point."

{¶ 19} In addition to conducting Teifer's deposition, appellant procured an expert report from Ben Hincher. Hincher reviewed the vehicle's repair records, spoke with appellant, and conducted a road-test while utilizing a "scan tool." Hincher concluded, to a reasonable degree of mechanical certainty, that the transmission output RPM does not match the throttle and engine RPM. Hincher stated that the driver would experience a delay in acceleration under those conditions.

{¶ 20} In Hincher's subsequent deposition conducted by appellees, he testified that during his four-mile test drive, he was unable to recreate appellant's complaint about the hesitation. However, he set up his scanning tool inside appellant's vehicle, and

instructed appellant on how to operate it to record whenever appellant experienced an event. Appellant then drove the vehicle for approximately 45 minutes. It is from those scans taken by appellant that Hincher developed his opinion. Notably, while Hincher concluded that the driver would experience a delay in acceleration, Hincher was unable to tell from the scans how long the delay lasted. Further, when asked what specific component of the vehicle was defective, Hincher replied,

> I'm not 100 percent sure. I feel the engine is working well. The engine is running correctly. It appears to be in the driveline, presumably someplace in the automatic transmission, whether that torque converter, the valve body, the way he describes it, how the engine races but it's not transmitted to the wheels, it seems to be something in the transmission.

{¶ 21} Following the additional discovery, appellant filed a supplemental opposition to appellees' motion for summary judgment. In the filing, appellant argued that not only should appellees' motion for summary judgment be denied, but in fact he is entitled to summary judgment on his claims. Appellant contended that his testimony of a three to four second hesitation when accelerating, coupled with Teifer's acknowledgment that the delay should last no longer than one-second, and Hincher's diagnostic conclusion that a delay occurred, demonstrates that there is no genuine issue of material fact regarding whether a defect exists. Furthermore, he contended that there is no genuine dispute that a three to four second delay in acceleration constitutes a substantial impairment to the safety of the vehicle. Finally, he argued that appellees have had a

reasonable opportunity to repair the defect, have failed to do so, and have effectively quit trying. Therefore, appellant concluded that he was entitled to summary judgment on his claims.

{¶ 22} Appellees, in their response to appellant's supplemental opposition, argued that there is no evidence that the vehicle contains a defect. They noted that the vehicle has never generated a diagnostic trouble code or illuminated a warning light, which would be expected if the vehicle did in fact fail to accelerate for three or four seconds. Further, they contended that every mechanic that has inspected the vehicle has found it to be operating as designed. On this point, appellees discounted Hincher's testimony that the transmission output RPM does not match the throttle and engine RPM because he was unable to replicate the condition during his road-test, and instead had to rely on the scans taken by appellant. Consequently, Hincher was unable to determine how the vehicle was being driven at the time of the scans, and was unable to determine how long the alleged hesitation lasted. In addition, appellees attacked Hincher's testimony on the basis that he has never examined other 2016 Jeep Renegades, and thus has no way to determine whether appellant's vehicle is operating abnormally.

{¶ 23} Appellees also argued that appellant presented no evidence to demonstrate that the alleged defect substantially impaired the use, value, or safety of the vehicle, other than his own self-serving testimony. Appellees concluded that appellant's testimony was insufficient to demonstrate a genuine issue of material fact on this point, especially in light of the fact that appellant has continued to drive the vehicle, the vehicle has never

broken down or failed to safely deliver appellant to or from his locations, and no one who has examined the vehicle has opined that the vehicle was unsafe. Therefore, appellees argued that summary judgment in their favor was appropriate.

{¶ 24} On August 6, 2019, the trial court entered its decision awarding summary judgment in favor of appellees. In its decision, the court found that appellant had failed to demonstrate a genuine issue of material fact that the vehicle suffered from a defect. In so finding, the court accepted that the vehicle's acceleration intermittently delays. However, the court found that there was insufficient evidence to support a reasonable inference that the vehicle was operating defectively, as opposed to as designed. On this point, the court found Hincher's testimony to be insufficient because although he determined that a driver would experience a delay in acceleration, he could not determine how long the delay would last, nor could Hincher specify what component of the vehicle was defective. As to Teifer's testimony, the court found that his testimony shows that a vehicle should not delay longer than one second. However, the court found that this was not helpful to appellant's case because Teifer never testified that appellant's vehicle delayed longer than one second. Therefore, the trial court concluded, "[a]s [appellant's] evidence fails to create a reasonable inference that the acceleration delay is a major defect, as opposed to an intended performance characteristic, he is left with nothing more than his own speculation."

II. Assignments of Error

{¶ 25} Appellant has timely appealed the August 6, 2019 judgment of the trial court, and now asserts four assignments of error for our review:

1. The trial court erred in finding, under the Ohio Lemon Law, Appellant did not present any facts from which a juror could reasonably infer the existence of a defect or a nonconformity.

2. The trial court erred by in effect requiring expert testimony on a Lemon Law claim in order for a Plaintiff to sustain a reasonable inference from which a jury may find a defect exists, and by weighing expert testimony which is a fact issue.

3. The trial court erred in failing to grant partial summary judgment in favor of the Plaintiff, Peter Diguglielmo.

4. The trial court erred in finding there was no issue of fact as to the existence of a defect under the Magnusson-Moss Warranty Act.

III. Analysis

{¶ 26} We review the grant or denial of a motion for summary judgment de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 527 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue as to any material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one

conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

A. Trial Court's Award of Summary Judgment to Appellees on Appellant's Claim for Violation of Ohio's Lemon Law

{¶ 27} Appellant's first and second assignments of error pertain to the trial court's decision to award summary judgment to appellees on appellant's claim for violation of Ohio's Lemon Law, R.C. 1345.71, et seq. Thus, we will address those assignments of error together.

{¶ 28} R.C. 1345.72 provides,

> (A) If a new motor vehicle does not conform to any applicable express warranty and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during the period of one year following the date of original delivery or during the first eighteen thousand miles of operation, whichever is earlier, the manufacturer, its agent, or its authorized dealer shall make any repairs as are necessary to conform the vehicle to such express warranty, notwithstanding the fact that the repairs are made after the expiration of the appropriate time period.
>
> (B) If the manufacturer, its agent, or its authorized dealer is unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any nonconformity after a reasonable number of

repair attempts, the manufacturer, at the consumer's option and subject to division (D) of this section, either shall replace the motor vehicle with a new motor vehicle acceptable to the consumer or shall accept return of the vehicle from the consumer and refund each of the following:

(1) The full purchase price;

(2) All incidental damages, including, but not limited to, any fees charged by the lender or lessor for making or canceling the loan or lease, and any expenses incurred by the consumer as a result of the nonconformity, such as charges for towing, vehicle rental, meals, and lodging.

Applicable here, "nonconformity" "means any defect or condition that substantially impairs the use, value, or safety of a motor vehicle to the consumer and does not conform to the express warranty of the manufacturer or distributor." R.C. 1345.71(E).

{¶ 29} In sum, to succeed on his claim, appellant must demonstrate: (1) he was the owner of a vehicle covered by a written warranty, (2) the motor vehicle does not conform to the applicable expressed warranty, (3) he reported the nonconformity to the manufacturer or manufacturer's authorized dealer within one year following the original date of delivery or the first 18,000 miles of operation, whichever is earlier, and (4) the manufacturer or authorized dealer was unable to conform the motor vehicle to the express warranty by repairing or correcting a defect that substantially

impaired the use, safety, or value of the motor vehicle, after a reasonable number of repair attempts.

Iams v. DaimlerChrysler Corp., 174 Ohio App.3d 537, 2007-Ohio-6709, 883 N.E.2d 466, ¶ 13 (3d Dist.). We will address each requirement in turn.

1. Whether Appellant is the Owner of a Vehicle Covered by a Written Warranty

{¶ 30} As to the first requirement, it is undisputed that appellant is the owner of the 2016 Jeep Renegade. It is further undisputed that the vehicle is covered by a 3 year/36,000 mile written basic limited warranty that "covers the cost of all parts and labor needed to repair any item on your vehicle when it left the manufacturing plant that is defective in material, workmanship, or factory preparation." Therefore, no genuine issue of material fact exists, and appellant has satisfied the first requirement.

2. Whether the Motor Vehicle Conforms to the Applicable Expressed Warranty

{¶ 31} As to the second requirement, based on the arguments of the parties, we find that there are three issues that must be resolved: (1) what is the symptom that appellant is experiencing; (2) is that symptom the result of a defect or is it a function of the vehicle's design; and (3) if it is the result of a defect, does the defect substantially impair the use, value, or safety of the vehicle to the consumer.

a. The Symptom

{¶ 32} This issue is perhaps the crux of this case. Appellant claims that the vehicle intermittently hesitates for three or four seconds before accelerating under certain conditions. To support his claim, appellant presented his own testimony and the

testimony of his wife as to their personal observations. In addition, appellant presented the expert testimony of Hincher, who, upon viewing scan reports captured by appellant, concluded that because the transmission output RPM does not match the throttle and engine RPM, a driver would experience a delay in acceleration.

{¶ 33} On the other hand, appellees point to the repair reports and the testimony of Hansen and Teifer, indicating that no one else was able to recreate the condition described by appellant. Further, appellees argue based on Teifer's and Hincher's testimony that if the vehicle were to hesitate for three to four seconds, a diagnostic trouble code would be generated in the vehicle. However, no one who examined the car found such codes.

{¶ 34} Upon our review of the record, we conclude that this is a classic instance of a genuine issue of material fact in that reasonable minds can view the evidence and either come to the conclusion that the vehicle delays for three to four seconds or that it does not delay for three to four seconds.

{¶ 35} Arguing against this result, appellees seek to discount the testimony of appellant and his wife because their testimony is self-serving, and because neither of them have any specialized training or knowledge regarding automobiles. However, appellant's testimony, and that of his wife, is not invalid for the sole reason that it was made by a party and sets forth facts in opposition to summary judgment. *See Tsirikos-Karapanos v. Ford Motor Co.*, 2017-Ohio-8487, 99 N.E.3d 1203, ¶ 10 (8th Dist.) ("An otherwise competent affidavit is not invalid for the sole reason that it is executed by a

party and submitted to aver facts in opposition to summary judgment."). "To the contrary, a party's [testimony] is competent to create a genuine issue of material fact if made on personal knowledge." *Telecom Acquisition Corp. I, Inc. v. Lucic Ents., Inc.*, 2016-Ohio-1466, 62 N.E.3d 1034, ¶ 92 (8th Dist.), citing *Wolf v. Big Lots Stores, Inc.*, 10th Dist. Franklin No. 07AP-511, 2008-Ohio-1837, ¶ 12. Here, appellant and his wife have personal knowledge regarding the performance and behavior of the vehicle, thus their testimony is competent to create a genuine issue of material fact. Likewise, appellant and his wife do not need to be automobile experts to testify that the vehicle hesitates to accelerate in certain situations, as the general performance of a vehicle is within the common knowledge or experience possessed by lay persons.

{¶ 36} Finally, we find that appellees' arguments regarding appellant's testimony, as well as their arguments pertaining to Hincher's testimony—i.e., that Hincher had to rely on the scans from appellant and that he was unable to determine the length of any delay in acceleration—go to the weight to be given to the testimony. However, "[i]n summary judgment proceedings, a court may not weigh the evidence or judge the credibility of sworn statements, properly filed in support of or in opposition to a summary judgment motion." *Id.* at ¶ 93. "When trial courts choose between competing affidavits and testimony, they improperly determine credibility and weigh evidence contrary to summary judgment standards." *Id.*

{¶ 37} Therefore, we hold that a genuine issue of material fact exists on whether the delay in acceleration lasts for approximately three to four seconds.

b. Defect or Design

{¶ 38} Assuming, as we must for purposes of summary judgment, that the vehicle does in fact experience a three to four second delay in acceleration, we must then consider whether appellant has demonstrated that a genuine issue of material fact exists that the delay is caused by a defect.

{¶ 39} In this case, we find that a reasonable person could conclude that a three to four second delay in acceleration is due to a defective part. Aside from the knowledge common to every driver that a three to four second delay in acceleration is an exceedingly long amount of time, Teifer testified that any hesitation should last no longer than one second. In addition, the two service workers testified that they were unaware of any other customers complaining about the acceleration in a 2016 Jeep Renegade, which suggests that the problem is unique to appellant's vehicle.

{¶ 40} In opposition, appellees point to Henson's testimony that appellant was informed that the vehicle's transmission was designed for fuel economy and that appellant may experience unusual shift patterns. Furthermore, Teifer testified that the vehicle was operating as designed. However, both of those statements were premised on a short hesitation of less than one second. Thus, we find them insufficient to demonstrate that a genuine issue of material fact does not exist regarding whether a three to four second delay in acceleration is due to a defective part.

{¶ 41} Likewise, we find that Hincher's inability to specifically identify the defective part is insufficient to demonstrate that a genuine issue of material fact does not

exist. "The consumer bears the burden of presenting evidence from which a reasonable inference can be made that a specific problem with the vehicle is due to a defective part which is covered by the warranty. Nothing in the statute imposes a higher burden on the consumer to eliminate all possible causes of the problem." *Reddin v. Toyota Motor Distributors, Inc.*, 6th Dist. Wood No. WD-90-002, 1991 WL 21522, *5 (Feb. 22, 1991); *see also McGuire v. American Suzuki Motor Corp.*, 7th Dist. Columbiana No. 03 CO 40, 2004-Ohio-6799, ¶ 57 ("Ohio's Lemon Law statute does not require expert testimony to establish causation of a nonconformity."). Here, a three to four second delay in acceleration leads to the reasonable inference that there is a problem with the transmission, which is consistent with Hincher's conclusion.

{¶ 42} Appellees contend that "a consumer's complaint about a symptom in their vehicle, without any evidence of a correlating mechanical defect or malfunction, is not sufficient circumstantial evidence to suggest that symptom is caused by a defect—especially in cases where dealership personnel could not verify any defect in the vehicle or found the vehicle was operating normally." We disagree, and find the cases relied upon by appellee for this proposition to be inapposite.

{¶ 43} Appellees cite *Miller v. DaimlerChrysler Motors Corp.*, 8th Dist. Cuyahoga No. 78300, 2001 WL 587496, *5 (May 31, 2001), which stated,

> [T]he fact that the vehicle makes an intermittent groaning or grinding noise while executing a turn and the steering column vibrates, without evidence of any functional impairment, did not, in itself, prove that the vehicle

> contained a defect or malfunction. Something more was needed to connect that symptom to a defect in material, workmanship or factory preparation covered by the warranty.

However, in that case, there was no evidence that the noise functionally impaired the vehicle in any way. Thus, the court concluded that intermittent noises and vibrations alone are not circumstantial evidence of a defect that substantially impairs the use, value, or safety of the vehicle. *Id.* at *4. *See also Sharkus v. Daimler Chrysler Corp.*, 8th Dist. Cuyahoga No. 79218, 2002-Ohio-5559, ¶ 20 (no evidence screeching noise was a result of a defect in the steering system); *Stepp v. Chrysler Corp.*, 5th Dist. Knox No. 95CA000052, 1996 WL 752794 (Nov. 7, 1996) (following bench trial, evidence that noise did not interfere with steering or operation of the vehicle, nor cause any wear or tear on the steering assembly, was sufficient to support court's conclusion that the noise was not a defect). Here, in contrast, the alleged symptom of a delay in acceleration functionally impairs the use of the vehicle, and thus is circumstantial evidence of a defect.

{¶ 44} Furthermore, other cases cited by appellees in support of this proposition are unhelpful in determining whether a genuine issue of material fact exists because they derive from decisions following a trial, not summary judgment. *See, e.g., Smith v. Toyota, U.S.A.*, 4th Dist. Scioto No. 2139, 1994 WL 69881 (Feb. 24,1994) (decision that issue with braking system was not a defect upheld based on evidence presented at a bench trial); *Hill v. Toyota Motor Sales, U.S.A., Inc.*, 2d Dist. Montgomery No.

CA 14465, 1995 WL 51051 (Feb. 10, 1995) (plaintiff failed to meet his burden of proof to prove by a preponderance of the evidence that a "lag" in the vehicle's transmission was the result of a defect).

{¶ 45} Therefore, we hold that, at the least, a genuine issue of material fact exists regarding whether a three to four second delay in acceleration is due to a defective part.

c. Substantial Impairment of the Use, Value, or Safety of the Vehicle to the Consumer

{¶ 46} The third, and final, issue to be resolved under this requirement is whether the defect substantially impairs the use, value, or safety of the vehicle to the consumer. The defect must be "major," "[Ohio's Lemon Law] does not create remedies for buyers who have soured on their new vehicle for cosmetic or other trivial reasons." *Royster v. Toyota Motor Sales, U.S.A., Inc.*, 92 Ohio St.3d 327, 331, 750 N.E.2d 531 (2001). Again, we find that conflicting evidence exists.

{¶ 47} On the one hand, appellant presented evidence that the delay in acceleration nearly caused an accident on two different occasions. Additionally, he offered his subjective belief that the delay in acceleration has substantially impaired the use and safety of the vehicle. On the other hand, appellees point to testimony that the vehicle has provided reliable transportation to appellant for tens of thousands of miles, and has never failed to transport appellant safely to and from his destinations.

{¶ 48} Because we believe that reasonable people could come to different conclusions on whether the delay substantially impairs the use, value, or safety of the vehicle to the consumer, we hold that a genuine issue of material fact exists.

d. Genuine Issue of Material Fact Regarding Whether the Vehicle Conforms to the Warranty

{¶ 49} Therefore, for the above reasons, we hold that a genuine issue of material fact exists regarding whether appellant's vehicle conforms to the written warranty.

3. Whether Appellant Presented the Vehicle to Appellees within One Year or 18,000 Miles

{¶ 50} As to the third requirement, we find that it is undisputed that appellant reported the alleged defect ten months after he purchased the vehicle, and at a time that the vehicle had 17,431 miles. Therefore, no genuine issue of material fact exists, and appellant has satisfied the third requirement.

4. Whether Appellees were Unable to Conform the Vehicle to the Warranty after a Reasonable Number of Repair Attempts

{¶ 51} As the fourth and final requirement, appellant must demonstrate that despite a reasonable number of repair attempts, appellees have been unable to remedy the defect. To aid in determining whether a reasonable number of repair attempts have been made, R.C. 1345.73(A) provides a presumption under certain circumstances:

> Except as provided in division (B) of this section, it shall be presumed that a reasonable number of attempts have been undertaken by the manufacturer, its dealer, or its authorized agent to conform a motor

vehicle to any applicable express warranty if, during the period of one year following the date of original delivery or during the first eighteen thousand miles of operation, whichever is earlier, any of the following apply:

(1) Substantially the same nonconformity has been subject to repair three or more times and either continues to exist or recurs;

(2) The vehicle is out of service by reason of repair for a cumulative total of thirty or more calendar days;

(3) There have been eight or more attempts to repair any nonconformity;

(4) There has been at least one attempt to repair a nonconformity that results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven, and the nonconformity either continues to exist or recurs.

{¶ 52} Here, the first three circumstances do not apply because appellant only presented the vehicle for repair one time during the first year and 18,000 miles, and there is no evidence that the vehicle was out of service for thirty or more calendar days. Thus, the only circumstance that could apply is if the condition is likely to cause death or serious bodily injury. As with our discussion of whether the defect substantially impaired the safety of the vehicle, we find that there is conflicting evidence on this issue.

{¶ 53} Certainly, a delay in acceleration of three to four seconds could cause an accident resulting in death or serious bodily injury. However, whether that is likely to

occur is mitigated by evidence that appellant has driven the vehicle for tens of thousands of miles and has never actually been involved in an accident. Therefore, we hold that the issue of whether the condition is likely to cause death or serious bodily injury presents a question of fact that is not appropriate for resolution on summary judgment.

{¶ 54} Without a presumption to guide us, we find that a genuine issue of material fact exists regarding whether appellees have been unable to remedy the defect despite a reasonable number of repair attempts. Supporting the conclusion that a reasonable number of attempts have been made is the evidence that appellant presented the vehicle to appellees no fewer than four times, and the issue continues to occur. In addition, appellant points to Henson's response to the customer survey, which appellant interpreted as an acknowledgment that appellees were no longer going to attempt to fix the problem. In contrast, supporting the conclusion that a reasonable number of attempts have not been made is the fact that during all of the repair attempts, appellees were unable to replicate the concern. Further, it is undisputed that the vehicle never generated any trouble codes pertaining to the delay in acceleration. Thus, without confirming a problem, and with no diagnostic codes alerting appellees to an issue, appellees simply had nothing to fix.

{¶ 55} Therefore, we hold that reasonable minds could come to different conclusions, and a genuine issue of material fact exists regarding whether appellees have been unable to remedy the defect despite a reasonable number of repair attempts.

5. Genuine Issues of Material Fact Preclude Summary Judgment

{¶ 56} Therefore, because genuine issues of material fact exist regarding whether the vehicle conforms to the applicable expressed warranty and whether appellees have been unable to make the vehicle conform to the warranty despite a reasonable number of repair attempts, we hold that the trial court erred in granting summary judgment to appellees on appellant's claim for violation of Ohio's Lemon Law.

{¶ 57} Accordingly, appellant's first and second assignments of error are well-taken.

B. Trial Court's Award of Summary Judgment to Appellees on Appellant's Claim for Breach of Warranty

{¶ 58} In his fourth assignment of error, appellant argues that the trial court erred in awarding summary judgment to appellees on his claim for breach of warranty under the Magnusson-Moss Warranty Act. The Magnusson-Moss Warranty Act "establishes a federal right of action for consumers to enforce written or implied warranties against suppliers, warrantors, or service contractors." *Curl v. Volkswagen of Am., Inc.*, 114 Ohio St.3d 266, 2007-Ohio-3609, 871 N.E.2d 1141, ¶ 10.

> In order to state an actionable claim of breach of warranty and/or violation of the Magnusson-Moss Act, a plaintiff must demonstrate that (i) the item at issue was subject to a warranty; (ii) the item did not conform to the warranty; (iii) the seller was given reasonable opportunity to cure any

defects; and (iv) the seller failed to cure the defects within a reasonable time or a reasonable number of attempts.

Temple v. Fleetwood Ents., Inc., 133 Fed.Appx. 254, 268 (6th Cir.2005).

{¶ 59} As discussed above, we hold that a genuine issue of material fact exists whether the vehicle conforms to the warranty, and whether appellees were unable to cure any defects despite a reasonable number of attempted repairs. Therefore, we hold that the trial court erred in granting summary judgment to appellees on appellant's claim for breach of warranty under the Magnusson-Moss Act.

{¶ 60} Accordingly, appellant's fourth assignment of error is well-taken.

C. Trial Court's Denial of Appellant's Partial Motion for Summary Judgment

{¶ 61} Finally, in his third assignment of error, appellant argues that the trial court erred when it did not award him partial summary judgment on his Lemon Law claim. For the same reasons above, and when viewing the evidence in the light most favorable to appellees, we find that genuine issues of material fact exist regarding whether the vehicle failed to conform to the warranty, and whether appellees were unable to conform the vehicle to the warranty despite a reasonable number of repair attempts. Therefore, we hold that the trial court did not err when it denied appellant's motion for partial summary judgment on his Lemon Law claim.

{¶ 62} Accordingly, appellant's third assignment of error is not well-taken.

IV. Conclusion

{¶ 63} For the foregoing reasons, we find that substantial justice has not been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is reversed, in part, and affirmed, in part. The trial court's award of summary judgment to appellees is reversed. The trial court's denial of appellant's motion for partial summary judgment is affirmed. This matter is remanded to the trial court for further proceedings consistent with this decision. Appellees are ordered to pay the costs of this appeal pursuant to App.R. 24.

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

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.supremecourt.ohio.gov/ROD/docs/.