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The Bullet Point: Ohio Commercial Law Bulletin

Am I a third-party beneficiary under a contract?

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Jim Sandy and Stephanie Hand-Cannane

Third-Party Beneficiary

Santagate v. Pennsylvania Higher Edn. Assistance Agency (PHEAA), 10th Dist. Franklin No. 19AP-705, 2020-Ohio-3153

In this appeal, the Tenth Appellate District affirmed the trial court's decision in part, holding that student loan servicing is not a consumer transaction under the Ohio Consumer Sales Practices Act (CSPA) and that the consumer was not an intended third-party beneficiary of the servicing contract.

- **The Bullet Point**
  As with servicers of residential mortgages, servicers of student loans are not "suppliers" under the Ohio CSPA. Likewise, student loan servicing is not a "consumer transaction" within the meaning of the CSPA. The court explained that a student loan servicer's function is the same as the servicer of a residential mortgage loan – simply stated, "to service the loan." Moreover, the court stressed that there is no contractual relationship between the student loan servicer and the consumer to support a claim. Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio. In order for a party to prove it is an intended third-party beneficiary, the party must present evidence that the promisee intended to directly benefit the consumer in its performance of the contract. On the contrary, a third party who receives only a "mere happenstance benefit from the promisee's performance of a contract" is considered an incidental beneficiary to whom the servicer owes no contractual duty.

Contract Ambiguity

Campbell v. 1 Spring, LLC, 10th Dist. Franklin No. 19AP-368, 2020-Ohio-3190

In this appeal, the Tenth Appellate District affirmed the trial court's decision, finding that because the terms of the contract were ambiguous, the trial court properly allowed extrinsic evidence to determine the intent of the parties.

- **The Bullet Point**
  When parties to a contract dispute the meaning of language within the agreement, Ohio courts must first consider the language within the "four corners of the contract." When the terms are clear and precise, the contract is not ambiguous, and the court may not refer to outside evidence to ascertain the parties' intent. On the other hand, a contract is ambiguous when its meaning cannot be determined from the four corners or when the language is susceptible to two or more reasonable interpretations. When the language or terms of a contract is ambiguous, the meaning of the words becomes a question of fact. In

such cases where the meaning of terms used in a contract are ambiguous, extrinsic evidence is properly admissible to determine the intent of the parties.

Deceptive Trade Practices Act

Enduring Wellness, L.L.C. v. Roizen, 8th Dist. Cuyahoga No. 108681, 2020-Ohio-3180

In this appeal, the Eighth Appellate District affirmed the trial court's decision, holding that even if the defendant's alleged statements were false, the licensee did not state a claim for relief under the Ohio Deceptive Trade Practices Act (DTPA) as the defendant did not have the authority to make the statements on behalf of the licensor.

- **The Bullet Point**
  Under the Ohio DTPA, "a person engages in deceptive trade practice when, in the course of the person's business, vocation, or occupation, * * * the person represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have." R.C. 4165.02(A)(7). When adjudicating claims brought under the DTPA, Ohio courts look to and apply the same analysis applicable to claims brought under the analogous federal Lanham Act. In order to successfully bring a claim under the Lanham Act, the plaintiff must establish five elements: "(1) the defendant has made false or misleading statements of fact concerning his own product or another's; (2) the statement actually deceives or tends to deceive a substantial portion of the intended audience; (3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; (4) the advertisements were introduced into interstate commerce; and (5) there is some causal link between the challenged statements and harm to the plaintiff." As the court stressed, it is insufficient that the defendant made false or misleading statements to the plaintiff regarding a product. Rather, the plaintiff must show that the statements actually caused or tended to cause the plaintiff to be deceived. As such, where the defendant was not authorized or held out as authorized to make statements regarding a product, the plaintiff cannot show it was actually deceived by the defendant's false statements.

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[Cite as *Santagate v. Pennsylvania Higher Edn. Assistance Agency*, 2020-Ohio-3153.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Christopher P. Santagate,	:	
Plaintiff-Appellant,	:	No. 19AP-705 (C.P.C. No. 16CV-7291)
v.	:	(REGULAR CALENDAR)
Pennsylvania Higher Education Assistance Agency (PHEAA) d.b.a. FedLoan Servicing,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 2, 2020

On brief: *Bailey Cavalieri, LLC, Christopher P. Santagate,* and *Mark A. Glumac,* for appellant.

On brief: *Fisherbroyles, LLP, Michael R. Travern,* and *Robert B. Graziano,* for appellee.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, Christopher P. Santagate, appeals from a judgment entry of the Franklin County Court of Common Pleas granting the motion for summary judgment of defendant-appellee, Pennsylvania Higher Education Assistance Agency (PHEAA), d.b.a. FedLoan Servicing. Santagate additionally appeals from the trial court's previous decision granting in part PHEAA's motion to dismiss. For the following reason, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶ 2} On August 4, 2016, after initially filing a complaint in the trial court, removing the action to federal court, and the federal court dismissing his claims,

Santagate re-filed a complaint against PHEAA asserting claims for (1) breach of contract, (2) fraud/fraudulent representation/fraudulent concealment, (3) negligent misrepresentation/concealment, (4) breach of fiduciary duty, (5) unjust enrichment, and (6) violation of the Ohio Consumer Sales Protection Act ("CSPA"). In his complaint, Santagate stated he applied for and received several federal student loans from the United States Department of Education on June 11, 2008, with a final disbursement scheduled for August 12, 2011. The application and master promissory note, which Santagate attached to his complaint, provided that the Direct Loan Servicing Center ("DLSC") would service Santagate's loans. However, the complaint alleges that in June 2013, the Department of Education awarded a contract to PHEAA to service loans previously serviced by DLSC, and, as a result, PHEAA began servicing Santagate's loans on June 14, 2013.

{¶ 3} Santagate further alleged in his complaint that on June 28, 2013, he received a message from PHEAA's online messaging center notifying him of an income-contingent repayment ("ICR") plan. Santagate categorized this message as being in breach of the notes which required correspondence either to be mailed to Santagate's physical address or to be sent as an electronic message to Santagate's registered email address. Further, Santagate alleged the ICR plan notice informed Santagate he must submit an application within ten days or his monthly payments would increase from less than $800.00 per month to $1,716.61 per month. However, Santagate alleged he did not become aware of the online message until September 4, 2013, thereby missing the ten-day deadline to submit an application. After Santagate contacted PHEAA to discuss the matter, he alleged that PHEAA placed his loans into forbearance without him requesting it, causing his interest rate to increase. Santagate additionally alleged PHEAA improperly calculated the accrued interest on his loans.

{¶ 4} PHEAA responded to Santagate's complaint with a Civ.R. 12(B)(6) motion to dismiss filed September 6, 2016. In its motion to dismiss, PHEAA noted it did not own Santagate's loans, but acted only as the loan servicer. Instead, PHEAA asserted the master promissory notes exist between Santagate and the Department of Education. PHEAA then argued Santagate's complaint failed to state a claim for a violation of the CSPA, breach of contract, unjust enrichment, breach of fiduciary duty, fraud, fraudulent concealment, and negligent misrepresentation.

{¶ 5} In a November 8, 2017 decision and entry, the trial court granted in part and denied in part PHEAA's motion to dismiss. Specifically, the trial court granted PHEAA's motion to dismiss Santagate's claims for violation of the CSPA, unjust enrichment, breach of fiduciary duty, fraud/fraudulent representation/fraudulent concealment, and negligent misrepresentation. However, the trial court denied PHEAA's motion to dismiss Santagate's claim for breach of contract because Santagate alleged he was a third-party beneficiary to the contract between the Department of Education and PHEAA. Because the trial court concluded it did not appear beyond doubt that Santagate could not establish grounds for breach of contract on the theory of third-party beneficiary, the trial court determined it could not dismiss Santagate's claim for breach of contract under Civ.R. 12(B)(6). Subsequently, on November 22, 2017, PHEAA filed an answer for the sole remaining claim of breach of contract.

{¶ 6} Following discovery, PHEAA filed a motion for summary judgment on September 18, 2018 on Santagate's sole remaining claim of breach of contract. Santagate opposed the motion in a November 15, 2018 memorandum contra.

{¶ 7} In a September 11, 2019 decision and entry, the trial court granted PHEAA's motion for summary judgment. Specifically, the trial court found there was no privity between Santagate and PHEAA so the only remaining issue was whether Santagate was a third-party beneficiary to the servicing contract between PHEAA and the Department of Education. The trial court then concluded that the contract between PHEAA and the Department of Education was a government contract and, as such, there remained no genuine issue of material fact that Santagate was not an intended third-party beneficiary under the contract. Based on that finding, the trial court concluded PHEAA was entitled to summary judgment on Santagate's sole remaining claim of breach of contract. The trial court then entered judgment in favor of PHEAA in a September 24, 2019 judgment entry. Santagate timely appeals.

II. Assignments of Error

{¶ 8} Santagate assigns the following errors for our review:

> [1.] The trial court erred in holding the Ohio Consumer Sales Protection Act does not cover a student loan transaction.

> [2.] The trial court erred in clarifying its finding of privity of contract between a "Direct Loan" borrower and his servicer to hold none exists.
>
> [3.] The trial court erred in holding a "Direct Loan" borrower is not an intended third-party beneficiary of the contract between his servicer and the Department of Education.
>
> [4.] The trial court erred in holding no special relationship or fiduciary relationship can exist between a student loan borrower and his servicer.
>
> [5.] The trial court erred in holding a student loan borrower is not permitted to bring a claim for fraud against his student loan servicer.
>
> [6.] The trial court erred in holding that a "Direct Loan" servicer cannot be unjustly enriched by a "Direct Loan" borrower.

III. Standard of Review and Applicable Law

{¶ 9} Santagate appeals from both the trial court's November 8, 2017 decision and entry granting in part PHEAA's motion to dismiss and the trial court's September 11, 2019 decision and entry granting PHEAA's motion for summary judgment. More specifically, Santagate's first, fourth, fifth, and sixth assignments of error relate to the trial court's decision granting in part PHEAA's motion to dismiss, while Santagate's second and third assignments of error relate to the trial court's decision and entry granting PHEAA's motion for summary judgment.

A. Standard of Review for Civ.R. 12(B)(6) Motion to Dismiss

{¶ 10} Under Civ.R. 12(B)(6), a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted. A Civ.R. 12(B)(6) motion to dismiss tests the sufficiency of a complaint. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975). In ruling on a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must construe the complaint in the light most favorable to the plaintiff, presume all factual allegations in the complaint are true, and make all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). The dismissal of a complaint for failure to state a claim is proper when it appears,

beyond doubt, that the plaintiff can prove no set of facts entitling him to relief. *Celeste v. Wiseco Piston*, 151 Ohio App.3d 554, 2003-Ohio-703, ¶ 12 (11th Dist.). When reviewing a decision on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, this court's standard of review is de novo. *Foreman v. Dept. of Rehab. & Corr.*, 10th Dist. No. 14AP-15, 2014-Ohio-2793, ¶ 9.

B. Standard of Review for Motion for Summary Judgment

{¶ 11} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is appropriate only when the moving party demonstrates (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 12} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). However, the moving party cannot discharge its initial burden under this rule with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must specifically point to evidence of the type listed in Civ.R. 56(C) affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

IV. First Assignment of Error – CSPA Claim

{¶ 13} In his first assignment of error, Santagate argues the trial court erred in granting PHEAA's motion to dismiss his claim for a violation of the CSPA.

{¶ 14} Santagate brought his claim pursuant to the CSPA, which provides "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.02(A). "Such an unfair or deceptive act or practice violates this section whether it occurs before, during, or after the transaction." R.C. 1345.02(A). However, PHEAA argues, and the trial court found, that the CSPA does not apply to Santagate's allegations because PHEAA is not a "supplier" within the meaning of the CSPA and does not engage in a "consumer transaction" as required by the CSPA.

{¶ 15} PHEAA relies on the Supreme Court of Ohio's decision in *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, which held that a servicer of a residential mortgage loan is not a "supplier" within the meaning of the CSPA, and that the servicing of a residential mortgage loan is not a "consumer transaction" within the meaning of the CSPA. *Anderson* at syllabus. In considering the nature of mortgage servicing, the Supreme Court noted the servicing of a real estate mortgage does not involve the transfer of a service to a consumer. *Id.* at ¶ 12. Further, the Supreme Court stated:

> Mortgage servicing is a contractual agreement between the mortgage servicer and the financial institution that owns both the note and mortgage. *Mortgage servicing is carried out in the absence of a contract between the borrower and the mortgage servicer.* We recognize that the mortgage servicer's duties may involve direct and indirect interactions with borrowers on behalf of the financial institution. Sometimes the mortgage servicer may even assist the borrower in modifying the terms of the note, but the mortgage servicer undertakes the negotiation not for itself but on behalf of the financial institution.

(Emphasis added.) *Anderson* at ¶ 13. Thus, the Supreme Court reasoned that mortgage servicing is a "collateral service" that is not necessary to effectuate the underlying real estate transaction, and thus it does not qualify as a consumer transaction within the meaning of the CSPA. *Id.* at ¶ 14

{¶ 16} Moreover, the Supreme Court in *Anderson* reasoned that a mortgage servicer is not a "supplier" within the meaning of the CSPA because the mortgage servicer does not "engage in the business of effecting or soliciting consumer transactions." *Id.* at ¶ 31. Instead, in the context of residential mortgages, the transaction occurs between the

financial institution and the borrower, and "simply servicing the mortgage is not causing a consumer transaction to happen." *Id*.

{¶ 17} Although Santagate argues *Anderson* should not apply here because that case involved the servicer of a residential mortgage loan as opposed to a servicer of a federal student loan, we find this to be a distinction without a difference. Here, the note provides that the student loan servicer's function is to service the loan, answer questions about the loan, and process payments on the loan; in other words, the same functions provided by the servicer of a residential mortgage loan. Additionally, the underlying transaction occurred between the Department of Education and Santagate; there was not a contractual relationship between PHEAA and Santagate. *See Powers v. Green Tree Servicing, L.L.C.*, 8th Dist. No. 102753, 2015-Ohio-3355, ¶ 15 (reasoning "[t]he holding in *Anderson* that the servicing of a mortgage was not a consumer transaction was largely based on a lack of a contractual relationship between the servicer and the consumer and the fact that the interaction between the servicer and consumer did not have any of the hallmarks of an exchange"). Thus, we find that the Supreme Court's decision in *Anderson* applies to student loan servicers. It follows, then, that PHEAA is not a "supplier" within the meaning of the CSPA, and that student loan servicing is not a "consumer transaction" within the meaning of the CSPA. Accordingly, the trial court did not err in granting PHEAA's motion to dismiss Santagate's CSPA claim. We overrule his first assignment of error.

V. Second Assignment of Error – Privity of Contract

{¶ 18} In his second assignment of error, Santagate argues the trial court erred in concluding there exists no privity of contract between Santagate and PHEAA.

{¶ 19} To succeed on a claim of breach of contract, a plaintiff must demonstrate (1) the existence of a contract, (2) plaintiff's performance, (3) defendant's breach, and (4) damages or loss to the plaintiff. *Thyssen Krupp Elevator Corp. v. Constr. Plus, Inc.*, 10th Dist. No. 09AP-788, 2010-Ohio-1649, ¶ 13, citing *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶ 18 (10th Dist.). However, " 'a contract is binding only upon parties to a contract and those in privity with them.' " *Thyssen Krupp Elevator Corp* at ¶ 13, quoting *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, ¶ 25 (10th Dist.).

{¶ 20} Generally, privity is "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter." *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, ¶ 10; *Hahn v. Satullo*, 156 Ohio App.3d 412, 2004-Ohio-1057, ¶ 65 (10th Dist.). Santagate argues the trial court erred in finding he is not a party to the servicing contract between the Department of Education and PHEAA and that Santagate is not in privity with the Department of Education or PHEAA on the servicing contract.

{¶ 21} Despite Santagate's attempts to categorize the three-way relationship between Santagate, the Department of Education, and PHEAA as one that necessarily suggests privity on the servicing contract, we agree with the trial court that Santagate is not a party to the servicing contract between the Department of Education and PHEAA and that Santagate is not in privity with the Department of Education or PHEAA on the servicing contract. *See Thyssen Krupp Elevator Corp*. at ¶ 13 (a party cannot maintain a breach of contract action against an entity not a party to the contract at issue). Further, while the note itself references the role of DLSC, the prior loan servicer, nothing in the language of the note indicates that the loan servicer is a party to the note. Although there are multiple agreements here related to Santagate's student loan, the presence of these separate agreements does not give the parties of one agreement privity with the parties on the other agreement. *See, e.g., State v. Harding*, 10th Dist. No. 13AP-362, 2014-Ohio-1187, ¶ 29 (rejecting an argument that contractual privity exists simply because the parties are both subject to separate contracts that are part of the same loan transaction, noting that "relationship does not allow defendants to sue or be sued on contracts * * * to which they are not parties but [the other entity] is").

{¶ 22} Having reviewed the pleadings and the materials submitted in support of PHEAA's motion for summary judgment, we conclude that Santagate is not in privity with the Department of Education and PHEAA on the servicing contract. Thus, we overrule Santagate's second assignment of error.

VI. Third Assignment of Error – Third-Party Beneficiary

{¶ 23} In his third assignment of error, Santagate argues the trial court erred in concluding he is not an intended third-party beneficiary of the servicing contract between the Department of Education and PHEAA.

{¶ 24} Generally, "only an intended beneficiary may exert rights to a contract of which he is not a party." *TRINOVA Corp. v. Pilkington Bros., P.L.C.*, 70 Ohio St.3d 271, 277 (1994); *Grant Thorton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 161 (1991) ("[o]nly a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio"). A third-party beneficiary, while not a party to a contract, is " 'one for whose benefit a promise has been made in a contract.' " *Maghie & Savage, Inc. v. P.J. Dick Inc.*, 10th Dist. No. 08AP-487, 2009-Ohio-2164, ¶ 40, quoting *Chitlik v. Allstate Ins. Co.*, 34 Ohio App.2d 193, 196 (8th Dist.1973). "While an intended third-party beneficiary 'has enforceable rights under a contract, an incidental third-party beneficiary does not.' " *State ex rel. DeWine v. Mastergard*, 10th Dist. No. 14AP-1024, 2016-Ohio-660, ¶ 10, quoting *Maghie & Savage, Inc.* at ¶ 40.

{¶ 25} For a third party to acquire intended beneficiary status, it must present evidence that the promisee intended to directly benefit the third party. *Huff v. FirstEnergy Corp.* 130 Ohio St.3d 196, 2011-Ohio-5083, ¶ 11; *TRINOVA Corp.* at 277-78; *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St.3d 36, 40 (1988). A third party who receives a mere happenstance benefit from the promisee's performance of a contract is only an incidental beneficiary, to whom the promise owes no duty. *Hill* at 40.

{¶ 26} "Private citizens generally do not have the right to enforce government contracts as a third-party beneficiary on their own behalf, unless a different intention is clearly manifested in the contract." *Walker v. Jefferson Cty.*, 7th Dist. No. 02 JE 14, 2003-Ohio-3490, ¶ 40, citing *Doe v. Adkins*, 110 Ohio App.3d 427, 436 (4th Dist.1996). *See also Mastergard* at ¶ 22 (noting the "general contract principle that third party beneficiaries of a government contract generally are assumed to be merely incidental beneficiaries, and may not enforce the contract absent clear intent to the contrary"), citing *Hodges v. Pub. Bldg. Comm.*, 864 F.Supp. 1493, 1509 (N.D. Ill.1994). "It is not necessary for the third party to be expressly identified in the contract, however, the contract must have been made and entered into with the intent to benefit that individual." *Bungard v. Dept. of Job & Family Servs.*, 10th Dist. No. 07AP-447, 2007-Ohio-6280, ¶ 23. The parties' intention to benefit a third party will generally be found in the language of the agreement. *Graham v. Lakewood*, 8th Dist. No. 106094, 2018-Ohio-1850, ¶ 53, citing *Huff* at ¶ 12.

{¶ 27} Though Santagate argues the servicing contract is not a government contract, we agree with the trial court's conclusion that the servicing contract is, indeed, a government contract, as the Department of Education is a government agency. Thus, to determine whether the servicing contract manifested an intent that a private citizen could enforce it as a third-party beneficiary, we must review the language of the contract.

{¶ 28} Upon review of the servicing contract, we conclude the contract between the Department of Education and PHEAA does not contain any language expressing a clear intention that any specific borrowers would have a right to enforce the terms of the servicing contract against PHEAA. While Santagate continues to argue, as he did in the trial court, that he is affected by the servicing contract, he cannot overcome the lack of clear intention that he have any enforceable rights under the servicing contract. He is, at best, an incidental beneficiary to the servicing contract. *See Long v. Mount Carmel Health Sys.*, 10th Dist. No. 16AP-511, 2017-Ohio-5522, ¶ 16.

{¶ 29} Accordingly, we conclude the trial court did not err in granting summary judgment to PHEAA on Santagate's breach of contract claim because Santagate is not an intended third-party beneficiary under the servicing contract. We overrule Santagate's third assignment of error.

VII. Fourth Assignment of Error – Breach of Fiduciary Duty

{¶ 30} In his fourth assignment of error, Santagate argues the trial court erred in dismissing his claim for breach of fiduciary duty. More specifically, Santagate asserts the trial court erred in finding no special relationship existed between himself and PHEAA sufficient to create a fiduciary duty.

{¶ 31} In order to prevail on claim for breach of fiduciary duty, a plaintiff must demonstrate: (1) the existence of a duty arising from a fiduciary relationship, (2) the defendant's failure to observe the duty, and (3) an injury proximately resulting from the breach. *Cristino v. Admr., Ohio Bur. of Workers' Comp.*, 10th Dist. No. 12AP-60, 2012-Ohio-4420, ¶ 16, citing *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 36 (10th Dist.). " 'When there is no fiduciary relationship between the parties, a breach-of-fiduciary-duty claim necessarily fails.' " *Cristino* at ¶ 16, quoting *Wells Fargo Bank* at ¶ 36.

{¶ 32} The Supreme Court of Ohio has defined a fiduciary relationship as a relationship " 'in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.' " *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 16, quoting *In re Termination of Emp. of Pratt*, 40 Ohio St.2d 107, 115 (1974). "A fiduciary is an entity that has a duty, created by its undertaking, to act primarily for the benefit of another in matters connected with its undertaking." *Cristino* at ¶ 17, citing *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, ¶ 35.

{¶ 33} Ordinarily, a business transaction in which the parties deal at arm's length will not create a fiduciary relationship. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP-941, 2005-Ohio-6367, ¶ 30. However, "[a] fiduciary relationship can be created by a formal agreement or may arise de facto from an informal relationship if both parties understand that a special trust or confidence has been reposed." *Id.*, citing *Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St.2d 282 (1979), syllabus.

{¶ 34} Because the trial court dismissed Santagate's breach of fiduciary duty claim pursuant to Civ.R. 12(B)(6), we must look to the complaint to see if Santagate sufficiently pled facts to establish the existence of a fiduciary relationship between Santagate and PHEAA. Although Santagate states several times throughout the complaint that he placed trust and confidence in PHEAA, Santagate failed to make any allegation that PHEAA understood that Santagate held such trust or confidence in it. *Hoyt* at ¶ 31 (noting a de facto fiduciary relationship "can only be created where both parties understand that a special trust or confidence has been reposed," but appellant made no factual allegation that the entity intended to create such a relationship between himself and appellant, "regardless of Hoyt's unilateral understanding of their relationship"). *See also Groob* at ¶ 21 (noting that parties stand at arm's length when negotiating the terms and conditions of a consumer loan, so, absent an understanding *by both parties* that a special trust and confidence has been created, no fiduciary duty results); *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Companies*, 67 Ohio St.3d 274, 284 (1993) (holding that "a condominium owners' association may not maintain an action against a condominium developer for breach of fiduciary duty absent an understanding *by both parties* that special trust and confidence have been reposed in the developer") (emphasis added). Moreover, the

complaint contains numerous statements evincing that Santagate understood PHEAA worked for the Department of Education and not for him. Stated another way, though Santagate attempts to make the legal assertion that he had a fiduciary relationship with PHEAA, he did not plead any facts in the complaint demonstrating that his relationship with PHEAA was anything other than an arm's length relationship. *Groob* at ¶ 26.

{¶ 35} Because Santagate failed to plead facts sufficient to demonstrate the existence of a fiduciary relationship between himself and PHEAA, the trial court did not err in dismissing his claim for breach of fiduciary duty. We overrule Santagate's fourth assignment of error.

VIII. Fifth Assignment of Error – Fraud-Based Claims

{¶ 36} In his fifth assignment of error, Santagate argues the trial court erred in dismissing his claims for fraud, fraudulent representation, and/or fraudulent concealment.

{¶ 37} To prevail on a fraud claim, "a plaintiff must prove: (1) a representation, or if a duty to disclose exists, concealment of a fact, (2) that is material to the transaction at issue, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent to mislead another into relying on it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance." *Andrew v. Power Marketing Direct, Inc.*, 10th Dist. No. 11AP-603, 2012-Ohio-4371, ¶ 49, citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 73 (1986).

{¶ 38} The trial court determined dismissal of Santagate's fraud-based claims was warranted both because of the economic loss rule and the Higher Education Act ("HEA"). Generally, the economic loss rule prevents recovery in tort of damages for purely economic loss. *Clemens v. Nelson Fin. Group, Inc.*, 10th Dist. No. 14AP-537, 2015-Ohio-1232, ¶ 34, citing *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶ 6. "The economic-loss rule stems from the principle that, '[i]n the absence of privity of contract between two disputing parties the general rule is "there is no * * * duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." ' " *Waverly City School Dist. Bd. of Edn. v. Triad Architects, Inc.*, 10th Dist. No. 08AP-329, 2008-Ohio-6917, ¶ 26,

quoting *Floor Craft Covering, Inc. v. Parma Community Gen. Hosp. Assn.*, 54 Ohio St.3d 1, 3 (1990), quoting Prosser & Keeton, Law of Torts, Section 92, 657 (5th Ed.1984).

{¶ 39} There are exceptions, however, to the application of the economic loss rule to bar recovery in tort of purely economic loss. "A plaintiff may pursue such a tort claim if it is 'based exclusively upon [a] discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity.' " *Clemens* at ¶ 36, quoting *Corporex* at ¶ 9. These types of exempt claims may include negligent misrepresentation, breach of fiduciary duty, fraud, and conversion. *Clemens* at ¶ 36, citing *Potts v. Safeco Ins. Co.*, 5th Dist. No. 2009 CA 0083, 2010-Ohio-2042, ¶ 21, and *Morgan v. Mikhail*, 10th Dist. No. 08AP-87, 2008-Ohio-4598, ¶ 69.

{¶ 40} Despite the exemption of a fraud claim from the economic loss rule, PHEAA argues, and the trial court found, that dismissal of Santagate's fraud-based claims were still appropriate because of the HEA. The student assistance portions of the HEA, codified at 20 U.S.C. 1070-1100, govern federal student loans. Significantly, the HEA does not create a private right of action. *Thomas M. Cooley Law School v. The Am. Bar Assn.*, 459 F.3d 705, 710 (6th Cir.2006) (noting "nearly every court to consider the issue in the last twenty-five years has determined that there is no express or implied private right of action to enforce any of the HEA's provisions"), citing *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir.2002).

{¶ 41} Here, PHEAA argues the HEA precludes Santagate's claims even though he attempted to plead them as fraud-based claims. In support, PHEAA relies on several federal district court cases in which fraud-like claims were dismissed because, despite how they were pled, they were really claims for violations of the HEA. *See Salerno v. Am. Edn. Servs.*, M.D. Pa. No. 3:13-CV-1549, 2013 U.S. Dist. LEXIS 159172 (Oct. 3, 2013) (dismissing complaint on the grounds that the allegations related to interest accrual and penalties, as well as excessive collection calls, asserted violations of the HEA rather than separate tort actions); *Carter v. U.S. Dept. of Edn.*, N.D. Ill. No. 01 C 757, 2001 U.S. Dist. LEXIS 17365 (Oct. 23, 2001) (dismissing complaint on grounds that the allegations that the Department of Education "negligently or deliberately wronged" the plaintiff in the calculation of his student loan debt and interest asserted violations of the HEA).

{¶ 42} In particular, PHEAA relies on *Nehorai v. U.S. Dept. of Edn. Direct Loan*, E.D.N.Y. No. 08-CV-920, 2008 U.S. Dist. LEXIS 30161 (Apr. 14, 2008). In *Nehorai*, the federal district court dismissed a complaint from a borrower who alleged the Department of Education misled her about her eligibility for student financial aid. Although the borrower did not identify any federal law, the court in *Nehorai* nonetheless construed the complaint as attempting to assert a claim under the HEA and dismissed the complaint. *Id*. Here, the trial court agreed with PHEAA's reliance on *Nehorai* and found that Santagate's complaint, despite purporting to assert fraud-based claims, was actually asserting a claim arising under the HEA for which there is no private cause of action.

{¶ 43} However, despite PHEAA's and the trial court's reliance on *Nehorai*, other more recent federal cases have concluded that the HEA does not expressly preempt state law claims for fraud brought against a federal student loan servicer. Specifically, the United States Court of Appeals for the Eleventh Circuit recently held that the HEA neither expressly nor implicitly preempts state law claims for fraud based on a student loan servicer's affirmative misrepresentations. *Lawson-Ross v. Great Lakes Higher Edn. Corp.*, 955 F.3d 908, 911, 919-20 (11th Cir.2020) (concluding the HEA did not preempt state law claims related to borrowers' allegation that their federal student loan servicer "made affirmative misrepresentations to them and other borrowers that they were on track to have their student loans forgiven based on their public-service employment when, in fact, their loans were ineligible for the forgiveness program," and specifically noting the Department of Education had encouraged borrowers to consult their loan servicers for repayment options). In *Lawson-Ross*, the Eleventh Circuit made the important distinction that while the HEA would preempt a state law claim based on a *misleading disclosure* of information that a federal student loan servicer was required to disclose under the HEA and accompanying federal regulations, the HEA would not preempt state law claims for *affirmative misrepresentations* made on a matter on which the student loan servicer had no required disclosure under the HEA. *Id*. at 919-20.

{¶ 44} Similarly, the United States Court of Appeals for the Seventh Circuit recently held that the HEA did not preempt a student loan borrower's state law claims that a federal student loan servicer made affirmative misrepresentations to the borrower while counseling her on her repayment plan options. *Nelson v. Great Lakes Educational Loan*

Servs., Inc., 928 F.3d 639, 642 (7th Cir.2019) (noting the distinction between affirmative misrepresentations and failures to disclose). The Seventh Circuit in *Nelson* specifically noted that the HEA and accompanying regulations impose specific disclosure obligations on student loan servicers and preempt state law claims based on those disclosures. Thus, the Seventh Circuit clarified that a student loan borrower "may proceed on her claims based on affirmative misrepresentations, as distinct from those that require proof that defendant failed to disclose information." *Nelson* at 650.

{¶ 45} We find the reasoning employed by the Eleventh Circuit and the Seventh Circuit to be persuasive. Thus, based on both *Lawson-Ross* and *Nelson*, we disagree with the trial court's conclusion that the HEA necessarily preempts any fraud claim brought by a student loan borrower against a federal student loan servicer. Pursuant to the Seventh Circuit's decision in *Nelson* and the Eleventh Circuit's decision in *Lawson-Ross*, to the extent Santagate alleged that PHEAA made affirmative misrepresentations to him in counseling him on his repayment options, the HEA would not operate to bar those claims. In his complaint, Santagate alleges PHEAA made affirmative misrepresentations that he relied upon to his detriment. Because we must construe Santagate's factual allegations as true for purposes of a Civ.R. 12(B)(6) motion to dismiss, we find the trial court erred in granting PHEAA's motion to dismiss the fraud-based claims based on PHEAA's affirmative misrepresentations. We, therefore, sustain Santagate's fifth assignment of error.

IX. Sixth Assignment of Error – Unjust Enrichment

{¶ 46} In his sixth and final assignment of error, Santagate argues the trial court erred in dismissing his claim for unjust enrichment.

{¶ 47} "The doctrine of unjust enrichment 'applies when a benefit is conferred and it would be inequitable to permit the benefitting party to retain the benefit without compensating the conferring party.' " *Garb-Ko v. Benderson*, 10th Dist. No. 12AP-430, 2013-Ohio-1249, ¶ 25, quoting *Meyer v. Chieffo*, 193 Ohio App.3d 51, 2011-Ohio-1670, ¶ 16 (10th Dist.). To prove an unjust enrichment claim, a plaintiff must demonstrate (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant knew of the benefit, and (3) it would be unjust to allow the defendant to retain the benefit without repayment to the plaintiff. *Garb-Ko* at ¶ 25, citing *Meyer* at ¶ 37, citing *Maghie & Savage, Inc. v. P.J. Dick*

Inc. at ¶ 33. Santagate alleges he improperly overpaid due to PHEAA placing his loans in forbearance and, as a result, PHEAA was unjustly enriched.

{¶ 48} It is clear from the face of the complaint that PHEAA does not receive any funds from Santagate. Instead, as the trial court noted and as we have previously concluded, PHEAA's contractual relationship is with the Department of Education. Thus, the only entity potentially "enriching" PHEAA is the Department of Education, a non-party to this action. Because Santagate did not allege facts sufficient to demonstrate, if true, that he conferred a benefit upon PHEAA, the trial court did not err in granting PHEAA's motion to dismiss the claim for unjust enrichment. We overrule Santagate's sixth and final assignment of error.

X. Disposition

{¶ 49} Based on the foregoing reasons, the trial court did not err in granting PHEAA's motion for summary judgment on Santagate's breach of contract claim based on a theory of third-party beneficiary, in concluding Santagate was not in privity with PHEAA, or in dismissing Santagate's claims for violation of the CSPA, breach of fiduciary duty, and unjust enrichment. However, the trial court erred in granting PHEAA's motion to dismiss Santagate's fraud-based claims that alleged affirmative misrepresentations by PHEAA. Having sustained Santagate's fifth assignment of error and having overruled Santagate's first, second, third, fourth, and sixth assignments of error, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand the matter to that court for further proceedings consistent with this decision.

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

BROWN, J., concurs.
Nelson, J., concurs in part and dissents in part.

NELSON, J., concurring in part and dissenting in part.

{¶ 50} I agree with the majority that the trial court did not err in finding that Mr. Santagate was not in privity with PHEAA, in granting summary judgment against his contract claim, and in dismissing his CSPA, breach of fiduciary duty, and unjust enrichment claims. I also agree with what I understand to be the majority's view that even under the rubric of fraud, Mr. Santagate cannot pursue against PHEAA claims based on the terms of

the Notes or the commands of the Higher Education Act. And I agree with the majority that in this context, any fraud claims must be limited to "*affirmative misrepresentations* made on a matter on which the student loan servicer had no required disclosure under the HEA" (as opposed, we are told, to "*misleading disclosure* of information that a federal loan servicer was required to disclose," or to a failure to disclose information); Mr. Santagate's fraud claims must be confined to allegations of "affirmative misrepresentations that he relied upon to his detriment." *See* Majority Decision at ¶ 43-45 (emphasis in original).

{¶ 51} So I agree with what the majority has ruled out. I diverge from the majority only because, after all that, I don't think there's anything left to Mr. Santagate's complaint. His "fraudulent concealment" allegations, for example, go by the boards, in that they don't allege "affirmative misrepresentations." That excluded category encompasses his concerns that the loan servicer "intentionally does not provide new total monthly amounts in disclosure statements to borrowers," Complaint at ¶ 66, that its representatives "did not mention any other repayment plan options," *id.* at ¶ 70, that it "intentionally withheld information," *id.* at ¶ 73, *see also, e.g., id.* at ¶ 76 ("[a]s a result of [the servicer's] intentional withholding of repayment option information * * *, Plaintiff's Loans have been subject to higher interest rates and increased total amounts due and owing"), *id.* at ¶ 111 ("intentionally withheld accounting information"), or that it "intentionally delayed review and processing," *id.* at ¶ 81, and the like.

{¶ 52} Similarly, Mr. Santagate's assertion that PHEAA misrepresented its agents as "fully versed in repayment options," *id.* at ¶ 190, requires some additional claim of misconduct to state a fraud claim and, lacking some link to "affirmative misrepresentations" leading to damage, cannot be used to smuggle in recovery here on the "concealment" or "failure to disclose" claims. His assertions regarding PHEAA "representations on forbearance," as the trial court noted, fail to make out a fraud claim because his complaint explicitly disclaims that he acted in reliance on any such statements: he "took no action to place his Loans into forbearance before, during, or after the September 30, 2013 Discussion and did not direct [PHEAA] to place his Loans into forbearance." *Id.* at ¶ 87; *see also id.* at ¶ 88 (alleging that PHEAA "unilaterally, and without Plaintiff's consent, placed Plaintiff's Loans into forbearance"). His allegation of a PHEAA "promise that Plaintiff was receiving [an] EDA Rebate," *id.* at ¶ 190, falls prey to his

allegations that the notes called for such a rebate and that the alleged "assurances" came not from PHEAA but "from the Direct Loan Servicing Center," a different entity, *see id.* at ¶ 15, 51-52. His allegations that PHEAA told him during conversations of November 4 and 21, 2013, and again in conversations of January 6 and 21, 2014, that he would receive "additional information" or an "accounting breakdown" of accrued interest, *see id.* at ¶ 103, 105, 116, 117, are matched by allegations that "[o]n November 27, 2013 [PHEAA] mailed to Plaintiff what it considered to be the full accounting of Plaintiff's Loans requested by Plaintiff" and that it did the same in a "Second Accounting" on January 27, 2014, *see id.* at ¶ 108, 118. These are not allegations of "affirmative misstatements" that give rise to a fraud claim outside of HEA dictates.

{¶ 53} There are other examples, but in sum, I find no sufficiently pleaded allegations of "affirmative representations" that Mr. Santagate says he relied on to his detriment that fall outside the purview of the federal HEA and that come within the very narrow subclass of fraud claims on which the court majority says he may proceed. It is not dispositive, but I think it is telling, that Mr. Santagate identifies no such particular affirmative representations in the portions of his opening brief here or of his reply that address his fifth assignment of error and the trial court's handling of his fraud allegations. *See* Appellant's Brief at 43-48 (not citing any paragraph of his complaint); Reply Brief at 13-18. Mr. Santagate submits that he "sufficiently alleges fraud" because he relied on PHEAA to "(i) provide all repayment plan options, (ii) maintain and provide full and accurate accountings of his Loans, (iii) apply payments in a way that minimizes amounts owed, (iv) not increase interest rates in violation of the terms of the Notes, (v) investigate charges PHEAA admitted should not have been applied, and (vi) not put him in forbearance when they said they would not." Reply Brief at 14-15. Item (vi) does not track the allegations of paragraphs 85-96 of his complaint (reciting no reliance), and the first five items he lists relate to information allegedly withheld or to actions taken or not taken rather than to "affirmative misrepresentations."

{¶ 54} I think that the trial court was correct in dismissing Mr. Santagate's fraud claim in its entirety, not just to some very substantial degree. I therefore would affirm the

judgment of the trial court in full, and I respectfully dissent from the majority's decision to the limited extent that it reverses the trial court's judgment. I otherwise concur in the decision of this court.

[Cite as *Campbell v. 1 Spring, L.L.C.*, 2020-Ohio-3190.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert W. Campbell,	:	
Plaintiff-Appellee,	:	
		No. 19AP-368
v.	:	(C.P.C. No. 15CV-9033)
1 Spring, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on June 4, 2020

On brief: *Hrabcak & Company, L.P.A., Michael Hrabcak*, and *Benjamin B. Nelson*, for appellee. **Argued:** *Benjamin B. Nelson*.

On brief: *Law Office of W. Evan Price, II, LLC*, and *W. Evan Price, II*, for appellants. **Argued:** *W. Evan Price, II*.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendants-appellants, 1 Spring, LLC ("1 Spring"), James R. Horner, and Samuel Horner (collectively, "appellants") appeal from an order of the Franklin County Court of Common Pleas awarding damages to plaintiff-appellee, Robert W. Campbell, on his claim for breach of contract. For the reasons that follow, we affirm.

I. Facts and Procedural History

{¶ 2} Appellants appealed a prior judgment in favor of Campbell to this court; in that appeal we found the trial court erred by relying on extrinsic evidence in determining whether the agreement between the parties was ambiguous. We reversed and remanded for further proceedings. *Campbell v. 1 Spring, LLC*, 10th Dist. No. 18AP-94, 2019-Ohio-623, ¶ 12. In our prior decision, we set forth the facts underlying the disputed contract:

James R. Horner and Samuel Horner are members of 1 Spring, which owns the building located at the southwest corner of North High Street and West Spring Street in Columbus, Ohio. On April 20, 2012, 1 Spring entered into a lease with the Lamar Companies ("Lamar") providing for an outdoor advertising structure to be placed on the building ("sign lease"). The sign lease provided that Lamar would pay 1 Spring $80,000.04 per year in monthly installments for a term of ten years. Lamar also held an option to extend the sign lease for an additional ten years after the initial term expired.

Prior to entering the sign lease, 1 Spring had obtained approval from the Columbus Downtown Commission to erect a digital sign on the building. Shortly before entering the sign lease, the Horners became aware that due to the building's location on a state highway it would be necessary to comply with state regulations regarding outdoor advertising. James contacted the Ohio Department of Transportation ("ODOT") and was advised that a sign would not be permitted on the 1 Spring building under the existing rules due to its proximity to other signs in the surrounding area, unless 1 Spring acquired all the existing advertising in the area. The ODOT employee indicated the agency would not grant a variance to allow a sign on the 1 Spring building, but also indicated the Director of ODOT had expressed interest in amending the existing rules to exclude urban business districts from the sign spacing requirements.

A business associate of James recommended he contact Campbell, who was a former chief of staff at ODOT, regarding assistance in obtaining approval for the sign. The Horners and Campbell met on April 23, 2012 to discuss the possibility of Campbell assisting in obtaining approval for the sign and compensation for such assistance. Following the meeting, the parties agreed to memorialize their agreement in writing to establish that Campbell was authorized to represent 1 Spring. The agreement was set forth in the form of a letter to Campbell signed by James as the managing partner of 1 Spring ("the agreement"), providing the following terms:

Samuel and James Horner hereby agree to pay you 10% of the gross receipts ($80K/year) from a lease that has been executed in regards to the above referenced property.

Your compensation shall be $8,000/year during the initial term of ten (10) years. The lease commences at a point in time when the sign has been erected.

> For this compensation, we are "in your hands" to facilitate the proper "permitting issues" needed for the sign with regards to the State of Ohio.
>
> If this is agreeable to you, please sign below and return to me at my email address.
>
> (Joint Ex. No. IV.) A few days later, Campbell added a handwritten amendment to the agreement, providing as follows:
>
> In addition to the above terms and conditions, Samuel and James Horner agree to pay 10% of the gross receipts of the annual negotiated amount with Lamar Companies for the following term of 10 yrs at the end of the original 10 yr agreement. This contract is binding with 1 Spring LLC and heirs and assigns hereto.
>
> (Joint Ex. No. IV.) The Horners initialed this amendment, indicating their approval.

Id. at ¶ 1-4.

{¶ 3} On remand, the trial court issued a decision, including findings of fact and conclusions of law, concluding the agreement was a binding contract and certain terms in the agreement were ambiguous. The court further held that Campbell performed under the agreement and appellants breached the agreement by failing to compensate Campbell. The court subsequently issued a final judgment entry, incorporating its findings of fact and conclusions of law, holding appellants liable to Campbell for $51,764.14, plus interest, for the period through June 2019, and 10 percent of future rent revenues received from the sign lease beginning in July 2019, pursuant to the terms of the agreement.

II. Assignment of Error

{¶ 4} Appellants appeal and assign the following sole assignment of error for our review:

> The trial court erred by adopting conclusory findings of fact regarding the extrinsic evidence offered to explain ambiguities in the Parties' Contract that were against the manifest weight of the evidence, misinterpreting the contract based on those unsupported findings and entering judgment on Appellee's breach of contract claim based on that misinterpretation.

III. Analysis

A. Standard of Review

{¶ 5} The elements of a contract include an offer, acceptance, contractual capacity, consideration, a manifestation of mutual assent, and legality of purpose. *You v. Northeast Ohio Med. Univ.*, 10th Dist. No. 17AP-426, 2018-Ohio-4838, ¶ 19. A plaintiff asserting breach of contract must establish existence of a contract, performance by the plaintiff under the contract, breach by the defendant, and loss or damage to the plaintiff. *CosmetiCredit, LLC v. World Fin. Network Natl. Bank*, 10th Dist. No. 14AP-32, 2014-Ohio-5301, ¶ 13. "[J]udicial examination of [a] contract begins with the fundamental objective of ascertaining and giving effect to the intent of the parties at the time they executed the agreement." *Id*. When a contract is not ambiguous, it must be enforced as written. *Id*. at ¶ 14.

{¶ 6} A contract is ambiguous when its meaning cannot be determined from the four corners of the agreement or where the language is susceptible to two or more reasonable interpretations. *Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, ¶ 18 (10th Dist.). When parties to a contract dispute the meaning of language within the contract, the court must first consider the content within the four corners of the contract. *Drs. Kristal & Forche, D.D.S., Inc. v. Erkis*, 10th Dist. No. 09AP-06, 2009-Ohio-5671, ¶ 21. If the terms of the contract are clear and precise, it is not ambiguous and the court may not refer to evidence outside the contract to determine the meaning of those terms. *Id*. However, "[w]hen the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement give the plain language special meaning, extrinsic evidence can be used to ascertain the intent of the parties." *Id*. at ¶ 22.

{¶ 7} In the present case, the trial court found the phrases "in your hands" and "permitting issues" within the agreement to be ambiguous because they were susceptible to two or more conflicting but reasonable interpretations. (Apr. 5, 2019 Decision at 14.) The court concluded appellants relied on Campbell's experience and expertise with permitting and waiver issues and they were willing to place themselves in his hands to obtain the desired outcome—i.e., a permit for a sign on the 1 Spring building. The court concluded Campbell had broad latitude and unlimited authority to determine the means

through which a permit for the sign would be obtained, without interference from appellants.

{¶ 8} Appellants do not appear to dispute the trial court's conclusion that the agreement was ambiguous. Rather, appellants challenge the trial court's determination that Campbell had unlimited authority under the agreement to determine how to obtain a permit for a sign on the 1 Spring building. Appellants argue they only hired Campbell to obtain a waiver of the existing Ohio Department of Transportation ("ODOT") requirements and a permit to construct the sign on their building, not to obtain an amendment of ODOT's regulations.

{¶ 9} "Whether a contract is ambiguous is a question of law. The meaning of the words in an ambiguous contract becomes a question of fact. Extrinsic evidence is admissible to ascertain the parties' intentions, and the trial court's determination will not be overturned absent an abuse of discretion." (Internal citations omitted.) *Atelier Dist., LLC v. Parking Co. of Am., Inc.*, 10th Dist. No. 07AP-87, 2007-Ohio-7138, ¶ 17. *See also Benchmark Contrs., Inc. v. Southgate Mgt., LLC*, 10th Dist. No. 13AP-390, 2014-Ohio-1254, ¶ 41, quoting *Stoll v. United Magazine Co.*, 10th Dist. No. 03AP-752, 2004-Ohio-2523, ¶ 7 (" '[I]f a contract is ambiguous, the *meaning* of the words is a factual question and a court's interpretation will not be overturned absent an abuse of discretion.' " (Emphasis sic.)); *Ohio Historical Soc. v. Gen. Maintenance & Eng. Co.*, 65 Ohio App.3d 139, 147 (10th Dist.1989) ("The meaning of terms used in a contract, if ambiguous, is a question of fact and will not be overturned on appeal absent a showing that the trial court abused its discretion."). An abuse of discretion occurs when a trial court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). An arbitrary decision is one that lacks adequate determining principle and is not governed by any fixed rules or standard. *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.*, 10th Dist. No. 08AP-69, 2008-Ohio-3567, ¶ 11. An unconscionable decision may be defined as one that affronts the sense of justice, decency, or reasonableness. *Id.*

{¶ 10} Appellants also argue the trial court's decision was against the manifest weight of the evidence. The trial court concluded Campbell performed under the agreement by helping facilitate a rule change that allowed appellants to construct the sign, and appellants breached the agreement by failing to compensate Campbell. Appellants claim Campbell was not a credible witness and was frequently impeached at trial using his deposition testimony. Appellants also argue Campbell had no expertise in regulatory amendments and, therefore, it was illogical for the trial court to conclude appellants would hire him to obtain a change in Ohio law.

{¶ 11} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280 (1978). An appellate court applying the manifest-weight standard weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way. *Sparre v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-381, 2013-Ohio-4153, ¶ 10. "When reviewing a judgment under the civil manifest weight of the evidence standard, the court must presume that the findings of the trier of fact are correct, as the trial judge had the opportunity to view and observe the witnesses and to use those observations in weighting the credibility of the testimony." *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶ 39. *See also Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80 (1984) ("While we agree with the proposition that in some instances an appellate court is duty-bound to exercise the limited prerogative of reversing a judgment as being against the manifest weight of the evidence in a proper case, it is also important that in doing so a court of appeals be guided by a presumption that the findings of the trier-of-fact were indeed correct."). " 'If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 21, quoting *Seasons Coal Co.* at 80, fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191-92 (1978).

B. Evidence presented at trial

{¶ 12} Because appellants challenge the trial court's conclusions that Campbell had unlimited authority to determine how to obtain a permit for appellants' sign and that Campbell performed under the agreement by helping facilitate a regulatory change allowing construction of the sign, we must consider the evidence presented at trial related to those issues.

1. Initial meeting with Campbell and formulation of agreement

{¶ 13} James Horner testified he spoke with John Keckstein of ODOT in mid-April 2012, after the Horners obtained a certificate of appropriateness to construct a sign on the 1 Spring building from the city of Columbus. Keckstein informed him the sign could not be constructed under ODOT regulations, unless appellants purchased all the existing advertising permits in the area. Keckstein also indicated the director of ODOT had been encouraged by various municipal leaders to change the permitting regulations for signs in municipal areas. James testified he thought changing Ohio law would be a "Herculean kind of effort" that would take "months, if not years" and that appellants needed to get their sign permitted as quickly as possible. (Tr. Vol. II at 365.) Samuel Horner testified a mutual acquaintance recommended contacting Campbell for assistance, because Campbell was influential with ODOT.

{¶ 14} Campbell and the Horners met on April 23, 2012, at a restaurant in the 1 Spring building. Campbell testified he thought he could help the Horners get a permit for the sign because he was familiar with ODOT and had relationships with the relevant ODOT employees. Campbell worked for a private-sector company in 2012, but had previously worked for ODOT for 14 and one-half years, ultimately serving as chief of staff to the agency director for approximately one a one-half years.

{¶ 15} James testified that during the April 23rd meeting, Campbell claimed he could get a waiver from ODOT for construction of the sign. James stated Campbell indicated "if it entailed changing the laws of Ohio, he was out" because he would not have the time required for that type of effort. (Tr. Vol. II at 368.) James claimed he would not have asked Campbell to pursue amending the law because Campbell was not an attorney. Similarly, Samuel testified that during the meeting Campbell claimed he could get approval for the sign without changing Ohio law through a waiver, variance, or non-conforming

permit within 30 to 60 days. During the meeting, James told Campbell he had been informed the sign would not be permitted without changing ODOT's regulations. Samuel testified Campbell indicated he could get the permit without changing the law, and that if changing the law was required, he would not be involved because he did not have the experience or time required to amend the law. Samuel claimed this point was discussed multiple times. Campbell testified there was no discussion with the Horners about obtaining a waiver of the existing regulations, and asserted he had never heard the term waiver used with respect to outdoor advertising permits during his time at ODOT.

{¶ 16} After the discussion at the restaurant, Campbell and the Horners went to the Horners' office in the 1 Spring building so Campbell could get copies of certain documents. While at the Horners' office, the parties worked out the terms of the written agreement. Campbell testified the Horners insisted on putting the agreement in writing. By contrast, the Horners testified Campbell asserted he needed something in writing to demonstrate to ODOT that he was representing the Horners.

{¶ 17} James testified he and Campbell jointly dictated the agreement and that the terms "in your hands" and "permitting issues" were put in quotation marks because the parties had previously discussed what those terms meant. James stated "in your hands" meant Campbell "was going to get this done from A to Z, and he is going to get us - - he is going to take it from now, and he is going to get us a permit within the next 60 days." (Tr. Vol. II at 376.) James also testified about his understanding of the term "permitting issues":

> Q: Permitting issues, the next phrase that is in quotes, what was your understanding of what that meant?
>
> A: Well, he referred to waivers. I referred to a variance. I referred to nonconforming. So there was a lot of terms that were being thrown around at that meeting at the Barrio. So I didn't know what to put in there exactly. That is why I put permitting issues, because I thought that covered everything involving getting our permits within a short period of time.
>
> Q: Did it have anything to do with changing Ohio law?
>
> A: Absolutely 100 percent not, and he said it, I said it. He said it more than once, if you got to change Ohio law, I am out. I am quoting him as I sit here, I am not making this up. I am telling you the absolute truth. He said it more than once. We said it more than once, because, again, he was not a lawyer. He

> couldn't walk this thing through the [Joint Committee on Agency Rule Review] and hearings and everything else. He couldn't take it from A to Z.
>
> We wanted him to get permits just like other corners down there were over permitted, something happened to get those other corners over permitted. I wanted him to do the same thing for us, and he said he could do that.

(Tr. Vol. II at 376-77.)

{¶ 18} Samuel agreed that James and Campbell were the primary drafters of the agreement. Samuel testified about his understanding of the disputed terms in the agreement:

> Q: I was just going to ask you about two phrases. The first one is, quote/unquote, in your hands. What was your understanding of what that phrase meant?
>
> A: We were in Bob Campbell's hands from start to finish. I was upset about the ten percent. I wanted to do the five, but my father said this is very important, and I agreed with him, the ten percent to go forward.
>
> But I also made the point to Bob at lunch, I said, ten percent, you are doing everything, from start to finish, you are going to – - we are not doing a thing. And Bob Campbell said, I can get it done, and he agreed that it was going to be in a short period of time and that if he couldn't get it done and if Ohio law needed to be changed, he was out.
>
> * * *
>
> Q: The next quoted phrase is, quote/unquote, permitting issues. What was your understanding of that phrase?
>
> A: We didn't know what the term was, but we knew, we all knew at the meeting and at lunch when we came back to our office that Bob Campbell was being hired to get us a permit, whether it be with the waiver or a variance. It had nothing to do with changing Ohio law. That is why Bob Campbell was getting hired. So the permitting issue dealt with a waiver or a variance or a nonconforming permit so that we could erect our sign.

(Tr. Vol. II at 423-25.) Samuel testified the Horners wanted to get the permit for the sign quickly, but admitted there was no reference to timing in the agreement. He further

acknowledged that any limitations on Campbell's authority could have been included in the agreement.

{¶ 19} Campbell testified that in working out the agreement, the Horners did not specify a timeframe in which they needed to obtain the permit. Campbell further testified the Horners did not indicate they were concerned about the method used to obtain a permit for the sign. When asked about the meaning of the term "permitting issues" in the agreement, Campbell responded:

> I just -- I mean, I didn't think this was that complex. All I did was I read this and thought I am going to go work -- talk with the people at ODOT and see if I can make this happen. That is what I did, and I knew he had to get a permit.

(Tr. Vol. I at 73.) On cross-examination, Campbell reiterated this understanding of the phrase:

> Q: And you understood the quoted phrase, in your hands, to mean the defendants were relying on you to get a permit, to get the permitting issues resolved at ODOT, correct?
>
> A: Correct.
>
> * * *
>
> Q: Now, you understood on April 23, you believed that permitting issues, in quote, meant that basically that you were going to get the rules changed, the laws rewritten, so they could get a permit, correct? That was your understanding?
>
> A: My understanding was that I would do whatever I could to get the permit, that I could move the process through the department to do whatever I could to get that permit, no matter what that meant.

(Tr. Vol. I at 99, 102.)

{¶ 20} The Horners testified that a few days after the initial meeting, Campbell brought the handwritten addendum extending the term of the agreement to the Horners' office, where both James and Samuel initialed the addendum. The Horners stated Campbell only remained at their office briefly that day and was in a rush because he had a meeting with Sarah Lee at ODOT.

2. Campbell's interactions with ODOT

{¶ 21} Campbell testified he spoke with the ODOT chief of staff and chief engineer, who indicated they did not oppose a permit for appellants' sign and suggested they believed ODOT should not be regulating advertising in downtown municipal areas. On the evening of April 23, 2012, Campbell e-mailed the Horners to report on his initial contact with ODOT. Campbell advised the Horners he had made some progress, but needed to research the legalities with ODOT. Campbell indicated he was "getting some support from the top, but they have to listen to their council [sic] if laws crush us. Then we will need to take another course of action." (Apr. 23, 2012 e-mail from Campbell, Joint Trial Ex. III.)

{¶ 22} Campbell subsequently met with Sarah Lee, the ODOT advertising device control manager, and John Keckstein, a field agent in the ODOT advertising device control department. Lee told Campbell there had been pressure from other cities for ODOT to not interfere with advertising in municipal business districts. Lee indicated another ODOT employee had previously drafted proposed regulatory amendments that would allow signs like the one sought by appellants to be constructed and suggested appellants could be the flagship case for adopting the amendments. Campbell testified these previously drafted amendments were "way on the back shelf" and "[n]obody was doing anything" with them. (Tr. Vol. I at 82.) Campbell testified that as a result of his meeting with Lee, ODOT initiated the process of amending the regulations:

> So we took it off the back shelf, and brought it to the forefront, and then we had to start the process of getting the law changed. * * * It is simple. It is a couple paragraphs that had to go through [the Common Sense Initiative] and [the Joint Committee on Agency Rule Review]. And so it wasn't that complex.

(Tr. Vol. I at 83.) Campbell testified he checked in "somewhat regularly" on the progress of the amendment. (Tr. Vol. I at 83.)

{¶ 23} On May 1, 2012, the Horners sent a letter to ODOT requesting a waiver allowing construction of a sign on the 1 Spring building. Samuel testified he sent the letter at Campbell's direction, and that Campbell reviewed the letter before it was sent. In response to the letter, Lee prepared an internal memorandum about the proposed sign on the 1 Spring building. Lee's memorandum noted one option would be to grant the requested waiver, but indicated this would be contrary to all outdoor advertising rules and

regulations and could create a problem when enforcing the rules against other non-conforming signs. As an alternative, Lee recommended amending the Ohio Administrative Code to institute business district spacing, as permitted under a state-federal agreement. The proposed amendments eliminated sign spacing requirements in areas that qualified as business districts. Lee noted the amendments would allow appellants' sign to be constructed. Lee's memorandum did not mention Campbell's involvement with appellants' request.

{¶ 24} Lee testified at trial about her meeting with Campbell. She asserted she would not have re-engaged in an effort to amend ODOT's regulations unless Campbell had discussed appellants' permit request with her. Lee testified Campbell was instrumental in getting the regulations amended. Lee further testified she was not aware of waivers being granted by ODOT for outdoor advertising.

{¶ 25} Keckstein also testified about his interactions with Campbell regarding permitting for appellants' sign:

> Q: At some point do you recall having a discussion with Mr. Campbell in regard to the property located at 185 North High Street or otherwise known as 1 Spring Street?
>
> A: Yes. I believe we had some conversations about the site. He came into the office and was wondering how we could get this thing done, basically.
>
> Q: When you say get this thing done, get it permitted or get the rule changed, or what do you mean?
>
> A: Get it permitted. What do we need to do to get it permitted?

(Tr. Vol. I at 219-20.) Keckstein characterized Campbell as the "lightning rod" to get the proposed amendments to the ODOT regulations enacted. (Tr. Vol. I at 226.)

3. Events during summer and autumn of 2012

{¶ 26} Samuel claimed Campbell terminated the agreement on July 25, 2012 when he called Samuel and informed him that no waiver would be granted for the sign and that it was necessary to change the law for the sign to be approved. Samuel testified Campbell told him "the law needs to be changed, I am out, I can't be involved, I am done, I can't get you waivers," and recommended the Horners contact Andrew Bremer, who managed

legislative affairs at ODOT. (Tr. Vol. II at 442.) Samuel stated he sent an e-mail to Bremer about the issue but received no response.

{¶ 27} Samuel testified that in August 2012, he discussed the issue with former Ohio Supreme Court Justice Andrew Douglas, who agreed to lobby for the Horners and pursue an amendment to the ODOT regulations. Samuel testified he and James had a meeting with Douglas on August 23, 2012; at Douglas's request, the Horners asked Campbell to join the meeting so that Douglas could learn the status of Campbell's activities. Samuel stated Campbell reiterated again at the meeting with Douglas that he would not be involved in amending the law. Douglas and another member of his law firm subsequently represented the Horners at meetings and hearings at ODOT and the Joint Committee on Agency Rule Review ("JCARR"). Campbell testified he thought it was unnecessary for the Horners to hire Douglas as a lobbyist because JCARR was not likely to reject ODOT's proposed amendments. The proposed amendments were ultimately adopted[1] and a permit for appellants' sign was issued in December 2012. Samuel testified the sign was constructed over approximately nine months and appellants began receiving revenue from the sign lease in September 2013. Samuel admitted Campbell was not paid any compensation pursuant to the agreement.

C. Evaluation of appellants' claims

1. Meaning of disputed terms in agreement

{¶ 28} As explained above, once a court determines a contract is ambiguous, the meaning of the disputed term or terms is a question of fact, subject to review for abuse of discretion. The relevant clause in the agreement stated "we are 'in your hands' to facilitate the proper 'permitting issues' needed for the sign with regards to the State of Ohio." The trial court found the phrases "in your hands" and "permitting issues" to be ambiguous.

{¶ 29} James and Campbell were primarily involved in drafting the language used in the agreement, including the disputed terms. Campbell testified the agreement authorized him to do whatever was necessary to get approval for a sign on the 1 Spring building. He claimed there was no discussion with the Horners about obtaining a waiver

[1] The regulatory amendments, which were adopted effective December 6, 2012, modified Ohio Adm.Code 5501:2-2-01 to add subsection (KK), defining a "business district," and Ohio Adm.Code 5501:2-02-02, to add subsection (A)(3)(b)(iv), providing that there was no spacing requirement between advertising devices located within a business district, with certain exceptions.

of the permit requirements and stated he was not aware of ODOT issuing waivers for outdoor advertising. By contrast, the Horners testified their discussion with Campbell focused solely on quickly obtaining a waiver of the existing permit requirements. They asserted they did not intend for Campbell to pursue amendment of ODOT's regulations, and claimed that Campbell indicated he would not be involved if approval of the sign required amending state law. However, the Horners admitted that no language limiting Campbell's authority was included in the agreement. The testimony from Lee and Keckstein tended to support Campbell's interpretation of the disputed terms, because they indicated Campbell wanted to determine what was necessary to obtain approval for the sign, rather than being narrowly focused on obtaining a waiver of the existing requirements.

{¶ 30} Under these circumstances, where there was competing credible evidence regarding the meaning of the terms used in the agreement, we cannot conclude the trial abused its discretion by finding that the phrase "we are 'in your hands' to facilitate the proper 'permitting issues' needed for the sign with regards to the State of Ohio" gave Campbell broad authority to pursue approval of the sign through whatever means he found appropriate. Appellants have failed to demonstrate the trial court's decision was arbitrary, unreasonable, or unconscionable. *See Ruehl v. Air/Pro, Inc.*, 1st Dist. No. C-040339, 2005-Ohio-1184, ¶ 7-12 (concluding trial court did not abuse its discretion by holding that contractual provision stating a terminated employee "may forfeit all or part of his accrued commissions" upon termination meant the employee forfeited commissions on orders for which the employer had not yet been paid at the time of termination, but did not forfeit previously earned commissions on orders for which the employer had been paid at the time of termination (Emphasis omitted.)). *Compare Benchmark Contrs.* at ¶ 50 (concluding it was unreasonable for trial court to resolve ambiguity in contract by finding a particular entity was a party to the contract because the face of the contract was not reasonably susceptible to that conclusion and no evidence was produced that would permit the court to determine what role, if any, the entity had in formation of the contract).

2. Weight of the evidence

{¶ 31} We apply a deferential standard in evaluating appellants' claim that the trial court's decision was against the manifest weight of the evidence. In reviewing the judgment, we must presume the trial court's findings of fact are correct and, where the

evidence is susceptible to more than one construction, give it the interpretation consistent with sustaining the judgment. *Eastley* at ¶ 21; *Mayle* at ¶ 39. The trial court concluded Campbell performed under the agreement by helping facilitate the regulatory amendments that ultimately allowed construction of appellants' sign on the 1 Spring building. Based on our review of the record, we find there was competent, credible evidence to support that conclusion. As explained above, we find the trial court did not abuse its discretion by concluding that the agreement gave Campbell broad authority to determine the method for obtaining approval of appellants' sign. Campbell testified he discussed with ODOT employees how to get appellants' sign approved, and those employees indicated a regulatory amendment would be necessary. Following those discussions, ODOT revived previously drafted regulatory amendments, which were ultimately enacted and allowed appellants to construct a sign on the 1 Spring building. Campbell testified he checked in to follow the progress of the amendment. Lee and Keckstein characterized Campbell's involvement as having been instrumental in motivating ODOT to undertake the regulatory amendments. Although there was conflicting evidence in this case, we cannot conclude the trial court clearly lost its way in resolving those conflicts, and thus the trial court's decision was not against the manifest weight of the evidence.

IV. Conclusion

{¶ 32} For the foregoing reasons, we overrule appellants' sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BEATTY BLUNT and NELSON, JJ., concur.

[Cite as *Enduring Wellness, L.L.C. v. Roizen*, 2020-Ohio-3180.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ENDURING WELLNESS, L.L.C., :

Plaintiff-Appellant, :

No. 108681

v. :

MICHAEL F. ROIZEN, M.D., ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 4, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-909042

Appearances:

Seeley, Savidge, Ebert & Gourash Co., L.P.A., Jeffrey S. Moeller, and Daniel F. Gourash, *for appellant*.

Hahn, Loeser, & Parks, L.L.P., Robert J. Fogarty, E. Sean Medina, and David M. Hopkins, *for appellees*.

MARY EILEEN KILBANE, J.:

{¶ 1} Plaintiff-appellant, Enduring Wellness, L.L.C. ("EW"), appeals from the order of the trial court that dismissed all five counts alleged in its complaint against defendants-appellees, Michael R. Roizen, M.D. ("Roizen") and Cleveland

Clinic Wellness Enterprise, L.L.C. ("CCWE") under Civ.R. 12(B)(6) for failing to state a claim upon which relief can be granted.

{¶ 2} For the reasons that follow, we affirm the trial court.

I. Factual Background

{¶ 3} The facts as alleged in the complaint and documents attached to it are as follows.

A. The Licensing Agreement

{¶ 4} On June 17, 2015, CCWE, a subsidiary of the Cleveland Clinic Foundation ("CCF"), entered into a "Non-Exclusive Strategic Alliance Agreement Related To Manufacturing And Distribution Of Certain Products" ("Licensing Agreement") with a company called Balance Product Development, Inc. On December 21, 2015, the Licensing Agreement was assigned from Balance Product Development, Inc. to EW with CCWE's written consent.

{¶ 5} The Licensing Agreement is signed by Tom Gubanc ("Gubanc") on behalf of CCF. Gubanc is a Senior Director of CCWE. Roizen is not party to the contract. The Licensing Agreement set forth terms for the development, marketing, and sale of wellness products — here, pillows — that would be marketed as approved by CCWE. CCWE was to receive a percentage-based royalty on sales in exchange for its licensed approval branding.

B. Roizen

{¶ 6} According to the complaint, Roizen is the Chief Wellness Officer of CCWE. He was "involved in developing, testing and approving Enduring Wellness'

pillows" and "held himself out as having actual authority to act on behalf of CCWE in administering the Licensing Agreement, and CCWE allowed him to so hold himself out."

C. EW's Pillows

{¶ 7} Between 2015 and 2016, EW incurred expenses in the course of manufacturing, marketing, obtaining necessary approvals for, and making ready to sell a line of pillows branded as CCWE-approved.

{¶ 8} CCWE and Roizen reviewed and approved samples of the pillows to be marketed and sold with CCWE's approved branding. In November 2016, CCWE approved packaging for the pillows. The complaint does not expressly allege that EW received approval from CCWE in writing, but states that EW obtained all necessary approvals.

D. The Aeroscena Sublicense

{¶ 9} Around May 2016, Roizen and Gubanc, Senior Director of CCWE, together approached EW with a proposal by which EW would sublicense the CCWE approval to a business called Aeroscena, L.L.C. ("Aeroscena"), which owned a brand of aromatic oils. Roizen was an equity owner in Aeroscena, but EW did not know that at this time. EW declined to sublicense Aeroscena after it was advised that CCWE would separately license Aeroscena. The complaint does not clarify who initially advised EW that CCWE would separately license Aeroscena rather than authorize a sublicense. What is clear is that EW initially declined to sublicense Aeroscena after learning that it did not have CCWE's approval to do so.

{¶ 10} Close to a year later, around January 2017, Roizen advised EW that Aeroscena would not be licensed directly by CCWE, but instead would be sublicensed through EW. Relying on Roizen's actual or apparent authority to act on behalf of CCWE, EW began negotiating a sublicense with Aeroscena. EW relied on Roizen's approval of the sublicense even though it knew CCWE had refused to allow EW to grant Aeroscena a sublicense several months earlier.

{¶ 11} Roizen also advised around this time that a "summary in-house review of the pillows might be needed." This claim was "contrary to all prior approvals and assurances from both him, as CCWE's actual or apparent agent, and others at CCWE." Roizen also stated that Aeroscena wanted to attend a trade show in Las Vegas in March 2017, and indicated a "need for haste."

E. The Las Vegas Trade Show

{¶ 12} EW and Aeroscena shared booth space at a Las Vegas trade show in March 2017, during negotiations for the sublicense that CCWE initially refused to grant. Roizen attended the trade show where he marketed a book he authored and also marketed Aeroscena's essential oils, which were displayed as though they branded as CCWE-approved.

F. Contract Termination

{¶ 13} Two days after the Las Vegas trade show, CCWE "purported to terminate Enduring Wellness' Licensing Agreement." Around this time, EW learned that Roizen was an equity owner in Aeroscena.

G. The QVC Launch Show

{¶ 14} The pillows were scheduled for a test-marketing product launch on QVC on or around June 21, 2017, for EW's pillows. CCWE and Roizen were aware of the QVC launch and the expenses EW incurred in preparing for it. CCWE prepared another doctor, Dr. Bang, to appear on QVC for the launch show while wearing CCWE logo gear.

{¶ 15} The QVC launch show took place about three months after CCWE had terminated the Licensing Agreement. The pillows were still marketed during the scheduled test launch on QVC, but without the CCWE-approved branding and at a lower price. The test launch was not rebroadcast. It appears from the complaint that no pillow sales occurred before the QVC launch show in June 2017.

{¶ 16} Afterwards, EW lost other contracts related to the pillows and incurred approximately $450,000 in costs related to research, development, and marketing of the pillows.

II. Procedural Background

{¶ 17} On January 2, 2019, EW filed its complaint. It raised three claims against Roizen: (1) tortious interference with contract; (2) fraud; and (3) deceptive trade practices under R.C. 4165.02 and R.C. 4165.03 (Counts 1-3). It raised two claims against CCWE: (1) breach of contract and (2) liability for acts of agent with apparent authority/agency by estoppel (Counts 4 and 5).

{¶ 18} On April 4, 2019, Roizen and CCWE filed a Civ.R. 12(B)(6) motion to dismiss the complaint for failure to state a claim upon which relief may be granted.

On April 16, 2019, EW opposed the motion to dismiss, and the defendants-appellants filed a reply to EW's opposition on May 14, 2019.

{¶ 19} The trial court held a hearing on the motion to dismiss on May 22, 2019. It granted the motion to dismiss on June 6, 2019, on the grounds that EW failed to state a claim upon which relief could be granted. This appeal followed.

{¶ 20} EW has assigned one error for review:

Assignment of Error No. 1

> The trial court erred by dismissing the complaint for failure to state a claim under Ohio R. Civ. P. 12(B)(6); [e]ach and every count of the complaint stated a claim upon which relief could be granted, construing the facts most favorably to plaintiff.

III. Standard of Review

{¶ 21} This court applies a de novo standard of review of a trial court's ruling on a Civ.R. 12(B)(6) motion to dismiss. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. A trial court may grant a motion to dismiss for failure to state a claim upon which relief can be granted where it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling [him] to relief." *Thompson v. Cuyahoga Cty. Clerk of Courts*, 8th Dist. Cuyahoga No. 108806, 2020-Ohio-382, ¶ 7-8, quoting *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 2011-Ohio-6167, 967 N.E.2d 1249, ¶ 3 (8th Dist.).

{¶ 22} In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true

and make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "Under these rules, a plaintiff is not required to prove his or her case at the pleading stage. * * * Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Schmitz v. NCAA*, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 9 (8th Dist.), quoting *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063 (1991).

{¶ 23} "Under Ohio's liberal pleading rules, all that is required of a plaintiff bringing suit is (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. Unlike other claims, however, fraud claims must be plead with particularity as required under Civ.R. 9(B)." (Citations omitted). *Hammon v. Huntington Natl. Bank*, 2018-Ohio-87, 102 N.E.3d 1248, ¶ 58-59 (8th Dist.).

{¶ 24} However, even under Ohio's notice-pleading standard, a cause of action must be factually supported and courts need not accept bare assertions of legal conclusions. *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106, ¶ 28 (8th Dist.). "[B]are legal conclusions are not considered admitted and are not sufficient to withstand a motion to dismiss." *Harper v. Weltman, Weinberg & Reis Co., L.P.A.*, 8th Dist. Cuyahoga No. 107439, 2019-Ohio-3093, ¶ 33.

{¶ 25} Where a contract governs the parties' rights, "[d]ismissals under Civ.R. 12(B)(6) are proper where the language of the writing is clear and

unambiguous." *Abdallah v. Doctor's Assocs.*, 8th Dist. Cuyahoga No. 89157, 2007-Ohio-6065, ¶ 3, quoting *Fairview Realty Investors v. Seaair, Inc.*, 8th Dist. Cuyahoga No. 81296, 2002-Ohio-6819. "A motion to dismiss should be granted 'only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover,' or, in the case of a complaint seeking relief under a contract attached pursuant to Civ.R. 10(D), where the 'writing presents an insuperable bar to relief.'" *Id.*

IV. Law and Analysis

A. EW's Claims Against Roizen

1. Tortious Interference with Contract Against Roizen

{¶ 26} In its tortious interference claim, EW alleges that Roizen took actions to undermine the Licensing Agreement that existed between EW and CCWE by "tricking [EW] into negotiating a sublicense agreement and providing other marketing support for his Aeroscena, LLC aromatic oils company, which he knew would create a conflict of interest and/or circumvent CCWE's refusal to give Aeroscena" a branding license. EW alleges that Roizen had no legal privilege for his actions and that his actions caused CCWE to terminate the Licensing Agreement, which caused EW to incur damages.

{¶ 27} "The elements of tortious interference with a contract are: (1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) lack of justification; and (5) resulting damages." *Berardi's Fresh Roast, Inc. v. PMD*

Ents., 8th Dist. Cuyahoga No. 90822, 2008-Ohio-5470, ¶ 35, citing *Fred Siegel Co. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E.2d 853 (1999).

{¶ 28} According to the Ohio Supreme Court, "intentional procurement of the contract's breach," not the breach itself, is an element of tortious interference with contract. *Fred Siegel Co. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 707 N.E.2d 853 (1999). However, there is case law to support that a breach of contract is an implied element of tortious interference with contract, because there must be a breach of contract for a defendant to procure such a breach. *See Cairelli v. Brunner*, 10th Dist. Franklin No. 18 AP 000164, 2019-Ohio-1511, ¶ 58 ("Without a breach of contract there can be no tortious interference with contract."); *Sony Elec. v. Grass Valley Group*, 1st Dist. Hamilton Nos. C-010133 and C-010423, 2002 Ohio App. LEXIS 1304, 13 (Mar. 22, 2002) ("[A] tortious interference with a contract requires that there be a breach of contract."); *Pannozzo v. Anthem Blue Cross & Blue Shield*, 152 Ohio App.3d 235, 2003-Ohio-1601, 787 N.E.2d 91, ¶ 19 (7th Dist.) ("for [plaintiff's] claim of tortious interference to survive there must first be a breach of the contract between himself and [defendant]"). Because we determine below that EW has failed to state a cause of action for breach of contract, we affirm the trial court's dismissal of its tortious interference claim.

{¶ 29} Further, even assuming a breach occurred, the complaint fails to allege that Roizen intentionally procured the contract's breach. Roizen sought to use the Licensing Agreement between EW and CCWE to secure a sublicense for Aeroscena. Accordingly, even construing all the allegations in EW's favor, the

complaint indicates that Roizen would have wanted to preserve the Licensing Agreement, not intentionally procure its breach.

2. Fraud against Roizen

{¶ 30} In its fraud claim, EW alleges that Roizen falsely represented or concealed the truth where he had a duty to disclose that (1) he had authority to approve EW's pillows for sale with CCWE-approval branding; (2) that the pillows were approved by CCWE; and (3) that he had permission from CCWE to include Aeroscena products with EW's marketing efforts for its own products, including at the Las Vegas trade show in March 2017. EW alleges it relied on Roizen's representations in agreeing to negotiate a sublicense with Aeroscena and share a booth with it at the Las Vegas trade show that allegedly led to CCWE terminating the Licensing Agreement. EW also alleges it relied on Roizen's representations in deciding to incur costs to market, manufacture, and sell its pillows on QVC.

{¶ 31} "The elements of fraud are: (1) a representation of fact (or where there is a duty to disclose, concealment of a fact); (2) that is material to the transaction at issue; (3) made falsely, with knowledge of its falsity or with utter disregard and recklessness as to whether it is true or false; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the misrepresentation (or concealment) and (6) resulting injury proximately caused by the reliance." *Mobley v. James*, 8th Dist. Cuyahoga No. 108470, 2020-Ohio-380, ¶ 32, citing *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984).

{¶ 32} CCWE argues that EW cannot adequately allege that it relied on Dr. Roizen's oral statements. We agree that EW's fraud claim fails on the element of justifiable reliance. Before we address why EW's claim fails for lack of justifiable reliance, we resolve EW's concern that discussing justifiable reliance requires us to improperly look beyond the pleadings.

{¶ 33} To bolster its argument that EW could not have justifiably relied on any oral statements regarding approval, CCWE stated that EW did not receive written approval for the pillows. EW contends that CCWE's statement is outside the scope of the complaint because it contradicts EW's allegation that it obtained the necessary approvals for the pillows and that CCWE and Roizen reviewed and approved samples of the pillows. We agree with EW that CCWE's argument regarding a lack of written approval is beyond the scope of the complaint and may not be considered in our review of the trial court's dismissal of the complaint. However, we need not rely on nor consider CCWE's statement to find that EW's fraud claim fails for lack of justifiable reliance. Even accepting as true that the pillows were approved in writing, we nevertheless find that EW failed to state a claim for fraud.

{¶ 34} EW also challenges CCWE's argument that EW could not have reasonably relied on Roizen's misrepresentations because the Licensing Agreement required all approvals to be in writing. EW contends that the question of reasonableness required for a justifiable reliance determination is a fact question beyond the scope of the complaint. We disagree. In *Hoffman v. Fraser*,

11th Dist. Geauga No. 2010-G-2975, 2011-Ohio-2200, the Eleventh District relied on the written instrument attached to the complaint to affirm the trial court's dismissal of the plaintiff's claim for failing to sufficiently allege justifiable reliance. In *Hoffman*, a commitment for title insurance attached to the complaint stated that there could be no justifiable reliance on the title search unless the appellant purchased a title insurance policy, and the appellant did not purchase such a policy. *Id*. at ¶ 17. The Eleventh District held that the disclaimer precluded any claim of justifiable reliance. *Id*. at ¶ 17. Likewise, we reject EW's argument that we may not consider the issue of justifiable reliance on a motion to dismiss. As we explain below, the Licensing Agreement's requirement that all approvals be in writing prevents EW from successfully alleging that it justifiably relied on Roizen's alleged misstatements.

{¶ 35} In determining whether there was justifiable reliance, one looks to the relationship between the parties. *Mussivand v. David*, 45 Ohio St. 3d 314, 322, 544 N.E.2d 265 (1989). The Licensing Agreement governs the relationship between CCWE and EW, including CCWE's approval of the pillows or other licensed products. It is undisputed that Roizen is not party to the Licensing Agreement and we find that EW has failed to allege any facts to support that Roizen had any authority to grant approval related to the pillows or Aeroscena sublicense. Having reviewed each alleged misrepresentation, there is no set of facts that would show EW justifiably relied on any of the alleged misrepresentations.

{¶ 36} Regarding the first alleged misrepresentation, EW cannot prove it justifiably relied on Roizen's alleged misstatement that he had authority to approve EW's pillows for sale with CCWE-approval branding. The Licensing Agreement contains multiple provisions that require EW to obtain approval from CCWE in writing. As a result, there is no way EW could prove it justifiably relied on Roizen's representation. Section 3 of the Licensing Agreement provides: "Company [EW] shall perform all of the following duties and obligations *at the discretion and written direction of CCWE*." (Emphasis added.) Subsection 3.7 provides that EW shall "Develop products relating to the manufacture and sale of the Licensed Products which shall be *subject to the express written approval of CCWE*." (Emphasis added.) Similarly, subsection 3.9 provides, in part:

> CCWE retains the right to grant final, or interim when specifically requested, approval on art, design and editorial matters. Company agrees to submit to CCWE, for final approval, drafts, prototypes, and finished samples of all Licensed Products and any and all advertising promotional and packaging material related to said Licensed Products. *CCWE will respond in writing to Company regarding approval*, disapproval, or still under review within ten (10) business days after receipt of such samples.

(Emphasis added.)

{¶ 37} Nowhere does the Licensing Agreement state or indicate that Roizen had authority to approve the pillows. Rather, it plainly required EW to obtain written approval from CCWE in regards to the manufacture, marketing, and sale of the pillows. Thus, EW cannot show that it justifiably relied on Roizen's alleged statement that he had authority to approve the pillows.

{¶ 38} Moving to the second alleged misrepresentation, EW also cannot prove it justifiably relied on Roizen's alleged misstatement that CCWE approved the pillows. First, taking as true EW's allegation that it obtained all necessary approvals for the pillows from CCWE, Roizen's statement that the pillows were approved is not false and therefore cannot sustain a fraud claim. Otherwise, for the reasons already discussed, EW cannot prove that it justifiably relied on this alleged misstatement where the Licensing Agreement, to which Roizen was not a party, governed the approval process and required approval in writing.

{¶ 39} Finally, EW also cannot prove it justifiably relied on Roizen's alleged misstatement that he had authority to approve the Aeroscena sublicense. EW alleges that it reasonably believed Roizen had the authority "to act in this fashion on behalf of CCWE" and therefore agreed to negotiate a sublicense with Aeroscena and agreed to share space with Aeroscena at the Las Vegas trade show. However, both the Licensing Agreement and facts alleged show to a certainty that EW cannot prove its alleged reliance was justified.

{¶ 40} The Licensing Agreement prohibits EW from granting a sublicense without CCWE's prior written approval. Subsection 5.4 of the Licensing Agreement grants EW "a freely revocable, non-transferable, non-assignable, non-exclusive limited right to use CCWE's or CCWE's [sic] trademarks ("Marks") for advertising the CCWE and CCWE [sic] name and brand consistent with CCWE's branding guidelines." It further states that EW "agrees that it has no rights in the

CCWE Marks except as expressly authorized in this Agreement" and that "[a]ll uses of the CCWE Marks must be pre-approved by CCWE."

{¶ 41} Subsection 25, "Use of Name," provides:

> Except as stated in this Agreement, [EW] shall not use the name, logo, likeness, trademarks, image, or other intellectual property of CCWE for any advertising, marketing, press release, case study, endorsement, *or any other purposes without the specific prior written consent of CCWE's Corporate Communications Executive Director as to each such use.*

(Emphasis added.)

{¶ 42} It is clear from the complaint and the Licensing Agreement that Roizen did not have approval to grant a sublicense to Aeroscena to brand itself as CCWE-approved. Accordingly, EW could not have justifiably relied on Roizen's alleged approval for the sublicense or sharing a booth at the trade show.

{¶ 43} Further, EW alleges that Roizen and Gubanc, a Senior Director of CCWE, initially approached EW together about EW potentially sublicensing Aeroscena, but that EW declined because it was "further advised that CCWE would deal with Aeroscena's licensing separately." Afterwards, Roizen approached EW and advised that "CCWE had determined the Aeroscena aromatic oils would, in fact, be sublicensed through EW after all." As discussed, Gubanc — not Roizen — was the only one designated with the authority to sign and in fact signed the Licensing Agreement on behalf of CCWE; it is undisputed that Roizen is not party to the Licensing Agreement; and, discussed below, EW has not alleged sufficient facts to support that CCWE held Roizen out to have actual or apparent authority to

approve a sublicense. Further, EW has not alleged sufficient facts to demonstrate that it obtained the requisite approval to grant the sublicense pursuant to the Licensing Agreement. Accordingly, any reliance EW placed on Roizen having authority to approve the Aeroscena sublicense was not justified.

3. Deceptive Trade Practices against Roizen

{¶ 44} In Count 3, EW purports to allege a violation of the Deceptive Trade Practices Act ("Ohio DTPA"), codified at R.C. 4165.01 et seq. EW alleges that Roizen violated R.C. 4165.02(A)(7) by falsely representing to EW that: (1) EW's pillows had CCWE-approval for marketing and sale under the Licensing Agreement and (2) Roizen had all necessary permission from CCWE to extend marketing support to Aeroscena.

{¶ 45} The Ohio DTPA provides:

> A person engages in deceptive trade practice when, in the course of the person's business, vocation, or occupation, * * * the person represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have.

R.C. 4165.02(A)(7).

{¶ 46} "The Ohio Deceptive Trade Practices Act is substantially similar to the federal Lanham Act, and it generally regulates trademarks, unfair competition, and false advertising." *Dawson v. Blockbuster, Inc.*, 8th Dist. Cuyahoga No. 86451, 2006-Ohio-1240, ¶ 23, citing *Yocono's Restaurant, Inc. v. Yocono*, 100 Ohio App.3d 11, 17, 651 N.E.2d 1347 (1994). "When adjudicating claims under the Ohio Deceptive Trade Practices Act, Ohio courts shall apply the same analysis

applicable to claims commenced under analogous federal law." *Id.* at ¶ 23, quoting *Chandler & Assoc. v. Am.'s Healthcare Alliance*, 125 Ohio App.3d 572, 579, 709 N.E.2d 190 (8th Dist.1997). Thus, Ohio courts look to the analogous federal Lanham Act when analyzing Ohio DTPA claims. *Cesare v. Work*, 36 Ohio App.3d 26, 28, 520 N.E.2d 586 (9th Dist.1987); *Max Rack, Inc. v. Core Health & Fitness, LLC*, S.D.Ohio No. 2:16-cv-01015, 2019 U.S. Dist. LEXIS 158008, 21 (Sept. 17, 2019) (dismissing Ohio DTPA claim under R.C. 4165.02(A)(7) based on Lanham Act analysis). We therefore look to the Lanham Act for guidance regarding EW's Ohio DTPA claim. 15 U.S.C. 1125, et seq.

{¶ 47} The purpose of the Lanham Act, and by comparison the Ohio DTPA, "is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct." *Michelson v. Volkswagen Aktiengesellschaft*, 2018-Ohio-1303, 99 N.E.3d 475, ¶ 16 (8th Dist.), citing *Dawson v. Blockbuster, Inc.*, 8th Dist. Cuyahoga No. 86451, 2006-Ohio-1240, ¶ 24. Similarly, the Ohio DTPA requires a false representation be made while the person is engaged in some type of "business, vocation, or occupation." R.C. 4165.02. *See also Gascho v. Global Fitness Holdings, LLC*, 863 F.Supp.2d 677, 698 (S.D. Ohio 2012). The Lanham Act requires a plaintiff to establish five elements:

> (1) the defendant has made false or misleading statements of fact concerning his own product or another's; (2) the statement actually deceives or tends to deceive a substantial portion of the intended audience; (3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; (4) the advertisements were introduced into interstate commerce; and (5) there is some

> causal link between the challenged statements and harm to the plaintiff.

Max Rack, Inc. at 18, citing *Grubbs v. Sheakley Group Inc.*, 807 F.3d 785, 798 (6th Cir.2015).

{¶ 48} "Where an advertisement communicates a 'literally false' message to consumers, courts will presume that the consumers were deceived." *Id.*, quoting *Wysong Corp. v. APN, Inc.*, 889 F.3d 267, 270-71 (6th Cir. 2018). *Max Rack* at 18.

{¶ 49} Further, "[p]laintiffs seeking damages for false advertising must 'present evidence that a "significant portion" of the consumer population was deceived.'" *Grubbs* at 802, quoting *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 323 (6th Cir. 2001), quoting *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 616 (6th Cir.1999).

{¶ 50} We find that even if Roizen's alleged statements were false, EW has not stated a claim for relief under the Ohio DTPA.

a) Misrepresentation regarding the pillows

{¶ 51} EW alleges that Roizen falsely stated that CCWE had approved the pillows. As a result, EW displayed the pillows in a CCWE-branded booth at a trade show with Aeroscena oils; CCWE terminated the Licensing Agreement; and EW lost sales and development costs. We find that EW's claim fails under the Lanham Act analysis.

{¶ 52} At the motion to dismiss stage, we accept the plaintiff's allegations as true. *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991) ("Under Ohio

law, when a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party."). For purposes of our review, we therefore accept as true that Roizen's statement about the pillows was false. Even accepting that the statement was false, EW cannot show under these facts that Roizen's statement caused or tended to cause EW to be deceived. EW cannot show it was actually deceived by Roizen's statement where Roizen did not have authority under the governing Licensing Agreement to approve the pillows. Also, we find any connection between Roizen's statement and interstate commerce too tenuous to sustain a claim under these facts. To the extent the pillows were falsely advertised to consumers at the trade show, such advertisement was not the result of Roizen's statement to EW, but EW's decision to display the pillows at the trade show without getting CCWE's approval pursuant to the Licensing Agreement.

b) Misrepresentation regarding Roizen's authority to approve the Aeroscena sublicense

{¶ 53} EW's allegation that Roizen falsely represented he had the necessary permission from CCWE to extend marketing support to Aeroscena fails because the statement was not disseminated to any consumers, let alone a significant portion of consumers. *Grubbs*, 807 F.3d at 802. Further, there is no indication that the consumer population was deceived by Roizen's statement regarding his authority to approve the sublicense. *Id.* Thus, EW cannot sustain a claim under the Ohio DTPA based on that statement.

{¶ 54} Accordingly, we find that EW has failed to state a claim under the Ohio DTPA and affirm the trial court's dismissal of Count 3.

B. EW's Claims Against CCWE

1. Breach of Contract Against CCWE

{¶ 55} In its breach of contract claim, EW alleges that CCWE breached the Licensing Agreement and the implied duty of good faith when it terminated the agreement after the trade show. EW also alleges that CCWE, through Roizen's actions, breached the Licensing Agreement by violating subsection 3.17, which prohibits CCWE from employing "deceptive, misleading or unethical practices related to the advertising, marketing sales or licensing of the Product."

{¶ 56} We find that EW can prove no set of facts entitled it to recover and affirm the trial court's decision to dismiss EW's breach of contract claim against CCWE.

a) The Licensing Agreement is Valid and Enforceable

{¶ 57} CCWE argues that EW's breach of contract claim fails because CCWE did not breach the contract and, even if it did, EW has not alleged that it can recover damages under the contract. The threshold issue at the heart of these arguments is whether the termination and limitation of liability clauses in the Licensing Agreement are valid and enforceable. We find that they are.

{¶ 58} "[C]ontracts entered into freely and fairly are enforceable." *Alotech Ltd. L.L.C. v. Barnes*, 8th Dist. Cuyahoga No. 104389, 2017-Ohio-5569, ¶ 14, citing *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 132 Ohio St. 3d 468, 2012-

Ohio-2447, 974 N.E.2d 78, ¶ 15. "Further, '[t]he freedom to contract is a deep-seated right that is given deference by the courts.'" *Id.* However, the right is not absolute and "[a] court may refuse to enforce a contract when it violates public policy." *Id.* at ¶ 15, quoting *DeVito v. Autos Direct Online, Inc.*, 2015-Ohio-3336, 37 N.E.3d 194, ¶ 37 (8th Dist.).

{¶ 59} As the Supreme Court has explained:

> "'Public policy' is the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like.' 'Again, public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good.'"

Id., quoting *Conners* at ¶ 17, quoting *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*, 95 Ohio St. 64, 64, 115 N.E. 505 (1916); *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 64 (9th Dist.); Ohio Jurisprudence 3d, Contracts, Section 94, at 528 (1980).

{¶ 60} Accordingly, "contracts which bring about results which the law seeks to prevent are unenforceable as against public policy." *Alotech* at ¶ 15, quoting *Conners* at ¶ 17. The legislative branch is the arbiter of public policy, but it is the courts who must determine when the public-policy exception to freedom of contract should be recognized. *Id.* at ¶ 16, citing *Conners* at ¶ 17. We, therefore, must determine whether enforcing the terms of the Licensing Agreement "accomplishes a result that the state has sought to prevent or whether it accomplishes something that the state seeks to facilitate." *Id.*

{¶ 61} EW argues that the termination and limitation of liability clauses violate public policy and that EW can therefore sustain a breach of contract claim by alleging that CCWE terminated the agreement in bad faith. We disagree. Although the contract overall is extremely favorable to CCWE, it is not against public policy. CCWE and Balance Product Development, Inc. freely entered into the Licensing Agreement. EW was competent enough to read and understand the terms of the Licensing Agreement and accepted the assignment without negotiating any new terms. Thus, we find that the termination clause and limitation of liability clause are not against public policy and are, therefore, enforceable under freedom of contract principles.

i. The Termination Clause is Enforceable

{¶ 62} Section 12 of the Licensing Agreement is titled "Term and Termination." It states, in pertinent part:

> Either party may terminate this Agreement for its convenience at any time upon one hundred twenty days written notice to the other party. Upon termination of this Agreement for any reason, Company agrees to cease all use of the CCWE Marks within thirty (30) days after such termination and shall cease offering Programs to third parties.

{¶ 63} The parties were free to include a mutual provision allowing for termination at the convenience of the party exercising the right. EW did not renegotiate the termination clause when it accepted the assignment of the Licensing Agreement. As a matter of law, the provision does not violate public policy and is therefore valid and enforceable. CCWE plainly had the right to terminate the Licensing Agreement at its convenience, as did EW.

ii. Limitation of Liability Clause is Enforceable

{¶ 64} EW argues that limitation of liability clauses are not enforceable under Ohio law if they excuse willful, wanton, or reckless behavior, or offend public policy. We find that the limitation of liability clause does not offend public policy.

{¶ 65} Section 10 of the Licensing Agreement is titled "Limitation of Liability." It states, in all capital letters:

> Other than company's indemnification obligation under this agreement, neither party shall have any liability in regard to consequential, exemplary, special, incidental or punitive damages, even if it has been advised of the possibility of such damages. Except for company's indemnification obligation under this agreement, *in no event shall either party's total liabiltiy in connection with or under this agreement* (whether under the theories of breach of contract, tort, negligence, strict liability, or any other theory of law) *exceed the fees payable to CCWE for the license and sale of products during the first 12 months of this agreement.*

(Emphasis added.)

{¶ 66} EW relies on *Berjian v. Ohio Bell Tel. Co.*, 54 Ohio St.2d 147, 375 N.E.2d 410 (1978), and *Purizer Corp. v. Battelle Mem. Inst.*, 2002 U.S. Dist. LEXIS 138 (N.D. Ill. 2002), to argue that the limitation of liability clause violates public policy and is therefore unenforceable, but neither case is applicable here.

{¶ 67} *Berjian* determined that a limitation clause by which a public utility was exempt from damages resulting from its own negligence was valid and enforceable where the utility did not have a legal or public duty to provide a specific service to its customers and it did not violate any other public policy. The court further held that, absent a showing of a duty owed by the defendant and

willful or wanton misconduct by the defendant, the limitation clause was enforceable. *Berjian* at 158. Unlike *Berjian*, the limitation clause does not exempt CCWE from its own negligence; it merely sets a limit on damages recoverable by either party. Further, the instant case does not involve any public or legal duty that would render the limitation of liability clause unenforceable under *Berjian*.

{¶ 68} *Purizer* similarly held that a limitation of liability clause was ineffective because the plaintiff's fraud claim contained an allegation of willful and reckless misconduct. *Purizer* at 14. However, the limitation clause in *Purizer*, as in *Berjian*, completely excused the defendant from any liability for damages in connection with the agreement. Here, the limitation clause does not excuse CCWE or EW from willful, wanton, or reckless behavior or offend public policy. It merely limits the damages either party can recover. EW's allegations regarding willful and wanton misconduct are conclusory and without factual support. We therefore find the limitation of liability clause in the Licensing Agreement to be valid and enforceable.

{¶ 69} Having determined that the Licensing Agreement is valid and enforceable, we next consider whether EW has stated a claim for breach of contract upon which it can obtain relief.

b) Breach

{¶ 70} "A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the

breach." *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 41.

{¶ 71} EW argues that to survive a motion to dismiss, it need not plead a claim for breach of contract with specificity. Nonetheless, we must dismiss a claim if, as here, it "'appear[s] beyond doubt from the complaint that the plaintiff can prove no set of facts entitling [it] to recover.'" *Cord v. Victory Solutions, LLC*, 8th Dist. Cuyahoga No. 106006, 2018-Ohio-590, ¶ 11, quoting *Chinese Merchants Assn. v. Chin*, 159 Ohio App.3d 292, 2004-Ohio-6424, 823 N.E.2d 900, ¶ 4 (8th Dist.).

{¶ 72} EW has alleged that CCWE breached by wrongfully terminating the Licensing Agreement and by violating subsubsection 3.17, which prohibits unethical conduct related to the licensing or marketing of the product, through Roizen's actions. CCWE argues that EW's breach of contract claim fails on its face because the contract allowed either party to terminate "for its convenience at any time" and claims it did not breach subsection 3.17.

{¶ 73} EW argues the following in response: (1) CCWE lost the right to terminate for convenience because Roizen caused a breach of the contract by violating subsection 3.17 of the Licensing Agreement; (2) CCWE is improperly relying on the termination and limitation of liability clauses as affirmative defenses that cannot be proved based on the pleadings and may not be considered on a motion to dismiss unless the allegations in the complaint "leave no doubt that the asserted avoidance is unavoidable"; and (3) CCWE's bad faith prohibits it from

relying on the termination clause to avoid a breach of contract claim. We address each of these arguments in turn.

i. Subsection 3.17

{¶ 74} First, the complaint and Licensing Agreement demonstrate that EW cannot prove Roizen or CCWE breached subsection 3.17 of the Licensing Agreement. That section states as follows, in pertinent part:

> Each party agrees that it will not employ in any manner any deceptive, misleading or unethical practices related to the advertising, marketing, sales or licensing of the Product(s).

{¶ 75} One of the "whereas" clauses of the Licensing Agreements provides that:

> CCWE desires to enter into an arrangement with [EW] for the production and sale of Products, defined collectively and individually as "electric and non-electric consumer durable/hard goods along with any directly- related consumable components (e.g. razor and razor blades) and directly-related software/mobile apps (e.g. Nest thermostat and related mobile app and website), which must also further the charitable mission of CCF[.]

{¶ 76} Thus, the definition of "Product" in the Licensing Agreement contemplates that CCWE and EW were contracting for the production and sale of any number of products. Roizen's alleged violation of subsection 3.17 related to Aeroscena's essential oils, not to any product produced by EW. Roizen's alleged request for a sublicense for his company, Aeroscena, under false pretense or without authority, is not a deceptive, misleading or unethical practice related to the advertising, marketing, sales, or licensing of a product as defined in the Licensing Agreement. Further, EW also alleges that it obtained all the necessary approvals to

license its pillows. Roizen's alleged statement that EW had the necessary approval for the licensing could not have been a deceptive, misleading, or unethical practice if the statement was true, as EW alleged. We conclude, based on the complaint and contract, that Roizen did not breach subsection 3.17.

{¶ 77} The allegation that CCWE violated subsection 3.17 before terminating the Licensing Agreement is based exclusively on Roizen's alleged actions. However, discussed more thoroughly below, the complaint fails to allege any factual support for its allegation that Roizen had actual or apparent authority to act on CCWE's behalf. Thus, according to the complaint and terms of the contract, EW cannot prove CCWE breached subsection 3.17.

ii. First Material Breach

{¶ 78} EW next argues that CCWE did not have the right to terminate the Licensing Agreement at its convenience because it alleged Roizen or CCWE breached subsection 3.17 before CCWE terminated the agreement. This argument fails because, having considered the complaint and contract, Roizen did not breach subsection 3.17.

{¶ 79} EW's argument misconstrues the principle of a first material breach. EW asserts that because it alleged Roizen breached subsection 3.17 before CCWE terminated the agreement, Roizen's breach precluded CCWE from exercising its right to terminate for convenience. EW's theory misses the mark. Even if Roizen or CCWE breached subsection 3.17 and the breach was material, such a first material breach might excuse EW from further performance, but would not

prohibit CCWE from exercising its contractual termination rights. *Lease Auto Corp. Div. of Milt Miller Pontiac v. Starr*, 8th Dist. Cuyahoga No. 35460, 1977 Ohio App. LEXIS 7491, 12 (Feb. 24, 1977) (holding that a first material breach can excuse the non-breaching party from further performance).

iii. Termination and Limitation of Liability Clauses as Avoidable Defenses

{¶ 80} EW next argues that the termination and limitation of liability clauses are avoidances that may only be used as the basis for dismissal under Civ.R. 12(B)(6) if the allegations of the complaint leave no doubt that the asserted avoidance is unavoidable. EW is correct on this point of law. *See Pierce v. Woyma*, 8th Dist. Cuyahoga No. 94037, 2010-Ohio-5590, ¶ 38 ("An affirmative defense, such as statutory immunity, may be asserted through a motion to dismiss so long as the basis for the defense is apparent from the face of the complaint."). However, we find that we may properly consider these provisions of the Licensing Agreement at the motion to dismiss stage and that both provisions present unavoidable defenses that require EW's breach of contract claim against CCWE be dismissed.

{¶ 81} When a contract is attached to a complaint, Civ.R. 10(C) applies, which states in part, "A copy of any written instrument attached to a pleading is a part of the pleading for all purposes." Thus, to determine whether the allegations in a complaint are legally sufficient to state a claim, we look both to the complaint and "the copy of a written instrument upon which a claim is predicated[.]" *Fairview Realty Investors v. Seaair, Inc.*, 8th Dist. Cuyahoga No. 81296, 2002-

Ohio-6819, ¶ 8. We should grant a motion to dismiss if the writing attached to the complaint is "clear and unambiguous" and "'presents an insuperable bar to relief.'" *Id.*, quoting *Slife v. Kundtz Properties, Inc.*, 40 Ohio App.2d 179, 184, 318 N.E.2d 557 (8th Dist.1974). Although we consider the facts in the light most favorable to EW, we "need not presume the truth of 'unsupported conclusions.'" *Abdallah v. Doctor's Assocs.*, 8th Dist. Cuyahoga No. 89157, 2007-Ohio-6065, ¶ 2, quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988).

{¶ 82} The Licensing Agreement was attached to the complaint and therefore is considered part of the pleading. Having found that the termination and limitation of liability provisions therein are valid and enforceable provisions, they are properly considered on a motion to dismiss. We next discuss our finding that the termination and limitation of liability clauses are unambiguous and present insuperable bars to relief.

{¶ 83} There is nothing in the complaint or the Licensing Agreement to suggest that CCWE did not have the right to terminate the agreement at the time and in the manner alleged. Section 12 of the Licensing Agreement provides that CCWE could terminate the Agreement at any time for any reason: "Either party may terminate this Agreement for its convenience at any time upon one hundred twenty days written notice to the other party." The language of the clause is clear and unambiguous. Thus, even though EW alleges that CCWE breached the Licensing Agreement by terminating it in bad faith to shield Roizen, such an

allegation would fail to establish a breach under Section 12 of the Licensing Agreement because CCWE was permitted to terminate "for its convenience."

{¶ 84} Moving to the limitation of liability provision, Section 10 of the Licensing Agreement limits EW's recovery under the Licensing Agreement to the "fees payable to CCWE for the license and sale of products during the first 12 months of this agreement." The Licensing Agreement provides that its effective date was June 17, 2015. Thus, based on the clear and unambiguous terms of the Licensing Agreement, EW's recovery under the Licensing Agreement is limited to the fees payable to CCWE for the license and sale of products between June 17, 2015, to June 17, 2016. Although EW's complaint alleges that CCWE's "bad faith and material breaches" caused EW to suffer damages in excess of $25,000, it also alleges that the test-marketing launch on QVC for the pillows was June 21, 2017. Because June 21, 2017, is more than 12 months after June 17, 2015, the facts as alleged do not establish the damages element of a breach of contract. The limitation of liability provision therefore also presents an insuperable bar to relief.

{¶ 85} Because the termination and limitation of liability clauses both present insuperable bars to relief, they are properly considered on a motion to dismiss. *See Keenan v. Adecco Emp. Servs.*, 3d Dist. Allen No. 1-06-10, 2006-Ohio-3633, ¶ 16 (affirming the trial court's dismissal of the plaintiff's claim pursuant to Civ.R. 12(B)(6) where the claim asserted in the complaint contradicted the contract underlying the claim); *Beard v. N.Y. Life Ins. & Annuity Corp.*, 10th Dist. Franklin No. 12AP-977, 2013-Ohio-3700, ¶ 28 (affirming trial court's

dismissal of complaint because the claim expressly contradicted the terms of the writing attached to the complaint).

iv. Bad Faith

{¶ 86} EW also argues that CCWE did not have the right to exercise its termination rights because it did so in bad faith. EW alleges that CCWE terminated the Licensing Agreement two days after the Las Vegas trade show where EW shared a CCWE-branded booth with Aeroscena. Based on the timing of the termination, EW claims CCWE terminated the Licensing Agreement "to shield Roizen from the consequences of his misconduct, and to thrust the burden of Roizen's misconduct onto EW." EW contends that it sufficiently pled a breach of the implied duty of good faith and fair dealing because it alleged that CCWE had ulterior motives for terminating the Licensing Agreement.

{¶ 87} The "the implied duty of good faith and fair dealing does not mean that parties are forbidden from exercising the rights and duties defined in a contract[.]" *B&H Res., L.L.C. v. 28925 Lorain Inc.*, 8th Dist. Cuyahoga No. 105323, 2017-Ohio-7248, ¶ 12. Accordingly, we do not find that EW's allegation that CCWE terminated the contract in bad faith saves its claim for breach of contract. *See Duer v. Bd. of Edn.*, 8th Dist. Cuyahoga No. 45245, 1983 Ohio App. LEXIS 14762, 4 (Mar. 24, 1983) (even if the superintendent acted in bad faith, the teacher failed to state a claim for breach of contract because the superintendent had "complete discretion in the assignment of teachers"); *Ed Schory & Sons v. Francis*, 75 Ohio St.3d 433, 443, 662 N.E.2d 1074 (1996), quoting *Kham & Nate's*

Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357, 1990 U.S. App. LEXIS 12831 (7th Cir.1990) (bank's decision to enforce parties' agreements as written was not an act of bad faith; "'[a]lthough courts often refer to the obligation of good faith that exists in every contractual relation, * * * this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document'").

{¶ 88} In support of its argument, EW relies on two cases that, apart from not being binding authority, are distinguishable from the instant case: *Florence Urgent Care v. HealthSpan, Inc.*, 445 F.Supp.2d 871 (S.D.Ohio 2006), and *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49 (1st Dist.).

{¶ 89} *Florence* held that the employer-defendant was not entitled to summary judgment on a breach of contract claim where it terminated employees under a "without cause" clause. *Florence* at 879-880. The court reasoned that a jury might find the employer breached the implied duty of good faith and fair dealing because the employer admittedly gave false reasons for the termination and therefore, the termination might have violated public policy and constituted a breach of good faith. *Id. Florence*, however, involved allegations of discrimination related to the termination, which, unlike CCWE's alleged actions, would violate public policy.

{¶ 90} *Littlejohn* denied summary judgment in a mortgagee's lawsuit alleging the mortgagor unreasonably withheld consent to prepay a mortgage note

where the note required the mortgagor's approval to do so. The court held that the implied duty of good faith applied to the contract and that summary judgment was not appropriate because whether the mortgagor's denial was reasonable was a fact issue. *Littlejohn* at ¶ 31. It further reasoned that if the denial was unreasonable, such denial could amount to a restraint on the alienation of property. *Id.*

{¶ 91} EW argues that *Florence* and *Littlejohn* support its argument that CCWE breached the implied duty of good faith because it alleged an ulterior motive for terminating the Licensing Agreement. But unlike here, *Florence* and *Littlejohn* did not merely involve ulterior motives. Rather, both involved potential violations of public policy underlying the contract termination. As discussed, we do not believe the termination clause violates public policy and none of EW's allegations or arguments demonstrate that CCWE violated public policy in terminating the agreement. We decline to hold that CCWE's motive in terminating could result in a breach of bad faith where CCWE acted under a broad termination clause; such a holding would encroach upon the well-settled doctrine of freedom of contract.

{¶ 92} EW's position seems to be that CCWE was not free to terminate the contract for convenience because bad faith motivated the termination. That proposition, however, would result in a construction of the termination clause that is contrary to its plain meaning. It seems that EW would have us modify the plain wording of the termination clause to require that termination be restricted to instances supported by a showing of good cause. There is no reason to inquire into

CCWE's motive to terminate the contract because the parties agreed to a mutual termination clause that, as we determined, does not violate public policy and is therefore valid and enforceable. Thus, the issue of good faith regarding CCWE's termination is immaterial because the Licensing Agreement, a valid and enforceable contract, allows for termination for either party's convenience.

{¶ 93} Moreover, even if CCWE breached the contract, EW's claim fails for lack of damages. On the face of the complaint, EW did not suffer any damages that fall within the liability limitation clause of the Licensing Agreement.

c) Contract Damages

{¶ 94} As discussed, the Licensing Agreement limits EW's damages against CCWE to "the fees payable to CCWE for the license and sale of products during the first 12 months of this agreement." The Licensing Agreement was signed on June 17, 2015. Thus, CCWE's damages are limited to "the fees payable to CCWE for the license and sale of products" from June 17, 2015, to June 17, 2016.

{¶ 95} Pursuant to the Royalty Schedule set forth in Exhibit C of the Licensing Agreement, the fees payable to CCWE are a royalty based on the "gross sales price of the Product that are collected and paid to [EW] from the sale of Licensed Products less any trade or quantity discounts, warehouse allowances, and sales tax and other authorized taxes (if any) and CCWE approved returns."

{¶ 96} The complaint alleges that EW "incurred significant expense in manufacturing, marketing, obtaining necessary approvals for, and making ready to sell" the pillows between 2015 and 2016, including the QVC launch scheduled for

June 21, 2017. It does not allege that any fees payable to CCWE were incurred before June 17, 2016. On the face of the complaint and contract, EW is precluded from recovering from CCWE anything other than the royalties owed to CCWE for pillow sales between June 17, 2015 and June 17, 2016. According to the complaint, there were no sales until long after that time in June 2017.

{¶ 97} EW further alleges that "CCWE specifically advised Enduring Wellness that it had included royalty estimates for the 4th quarter of 2016 and 2017 for Enduring Wellness's approval branded pillow sales in its budget." The fourth quarter of 2016 would have started around October 1, 2016 — more than three months after the twelve-month liability limitation period set forth in the Licensing Agreement had ended. In addition, even presuming that EW sold pillows at the trade show in Las Vegas in March 2017, those sales are also beyond the contractual limitation period.

{¶ 98} Accordingly, presuming all factual allegations of the complaint as true and making all reasonable inferences in favor of the moving party, there is no set of facts consistent with EW's complaint, which would allow EW to recover damages from CCWE. Accordingly, we affirm the trial court's dismissal of Count 4 of the complaint.

2. Apparent Authority/Agency by Estoppel against CCWE

{¶ 99} In its apparent authority/agency by estoppel claim, EW alleges that Roizen acted with actual or apparent authority of CCWE by "administering the Licensing Agreement and latching onto Enduring Wellness's marketing efforts on

behalf of Aeroscena." It alleged, in conclusory fashion, that CCWE held out Roizen as having such authority and that EW in good faith believed Roizen possessed such authority. EW further alleged that Roizen's conduct damaged EW. EW alternatively requested that CCWE be estopped from terminating the Licensing Agreement given its actions in holding out Roizen to have had the authority to act as he did.

{¶ 100} "In order to establish apparent agency, the evidence must show that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority." *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809, 886 N.E.2d 827, ¶ 41, quoting *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), syllabus. "Under an apparent-authority analysis, an agent's authority is determined by the acts of the principal rather than by the acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agent's own conduct has created the apparent authority." *Id.*, quoting *Master Consol.* at 576-577. "The assurances of one who assumes to act as an agent of his authority to bind another are not, standing alone, sufficient to prove his agency. The putative agent cannot create apparent agency alone." *Koos v. Storms*, 8th Dist. Cuyahoga No. 84260, 2004-Ohio-6020, ¶ 38, quoting *Info. Leasing*

Corp. v. Chambers, 152 Ohio App.3d 715, 740, 2003-Ohio-2670, 789 N.E.2d 1155 (1st Dist.).

{¶ 101} Beyond Roizen's status as Chief Wellness Officer and assertions of his own authority, the complaint fails to state any facts to support EW's conclusory allegation that CCWE clothed Roizen with apparent authority. The Licensing Agreement itself does not give actual authority to Roizen for any of his alleged acts. Rather, the Licensing Agreement specifically required written approval from CCWE and does not mention Roizen or reference his title of Chief Wellness Officer. Further, the complaint tells us that EW was initially advised that CCWE would not approve a sublicense of Aeroscena through EW. A year later, Roizen advised that CCWE had changed its mind and that it would allow EW to sublicense Aeroscena. In light of the Licensing Agreement and CCWE's initial refusal to grant the sublicense, EW cannot prove that, acting in good faith, it had reason to believe that Roizen had actual or apparent authority from CCWE to approve EW's pillows or the Aeroscena sublicense. Thus, EW cannot prove that CCWE is responsible for any of Roizen's allegedly improper acts.

{¶ 102} We further note that because EW failed to state a claim against Roizen in his personal capacity, there is no liability for CCWE to assume. *See Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 20 ("If there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions.").

{¶ 103} We affirm the trial court's dismissal of EW's Count 5.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

MARY EILEEN KILBANE, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR