Did my behavior ratify a contract?

April 22, 2021

Contract Ratification

***Gionino's Pizzeria Inc. v. Reynolds*, 7th Dist. Carroll No. 20 CA 0940, 2021-Ohio-1289**
In this matter, the Seventh Appellate District reversed and remanded the lower court's decision, finding that although the document was only partially executed, the parties' behavior constructively ratified the contract.

The Bullet Point: As a gatekeeping issue, a plaintiff must demonstrate the existence of a valid contract in order to prevail on a breach of contract claim. Where, as here, there exists only a partially signed agreement, the court analyzes the parties' conduct to determine the existence of a contract. Specifically, the court considers a partially signed contract in conjunction with the parties' subsequent conduct to determine whether they behaved as if the contract were in effect. Under this so-called doctrine of "constructive ratification," a contract may be found to exist where the parties' behavior is consistent with the terms of an unsigned or unwritten contract. In this case, the plaintiff-franchisor sought to enforce a contract against the defendant-franchisee, who was the only party who signed the document. While the franchisee initially testified he did not remember ever receiving a contract, the franchisee also acknowledged key terms of the contract, including the purchase price and paying the required franchise transfer fee. The court also analyzed the parties' behavior and found that they both conducted themselves according to the terms and conditions of the agreement. Notably, the franchisee obtained financing to purchase the franchise and operated the franchise location for ten years. As such, the court found that the parties' conduct evidenced their intention to be bound by the contract, even though said contract was only partially executed.

Duty of Easement Owner

***Johnson's Island Property Owners' Assoc. v. Cianciola*, 6th Dist. Ottawa No. OT-20-011, 2021-Ohio-1341**
In this appeal, the Sixth Appellate District affirmed in part and modified the trial court's decision, agreeing that the easement owners had a duty to contribute to the reasonable costs of necessary repairs and maintenance of the easement.

The Bullet Point: An easement is the interest in land owned by another that entitles the owners of the easement to a limited use of the other person's land. Stated differently, the owners of an easement, known as the dominant estate, have authority to use the so-called servient estate's property for the easement purposes. One of the most common easements is a road for the dominant estate to cross

over the land of the servient estate. Under Ohio common law, owners of an easement have an obligation to perform reasonable repairs and maintenance of the easement when necessary. Where there are multiple easement owners, the owners have a duty to each other to contribute to the "reasonable costs of repair and maintenance" of the easement. Restat 3d of Prop: Servitudes, § 4.13 (3rd 2000). While there is no affirmative duty to initiate repair, once repair or maintenance is "reasonably undertaken" by one or more of the easement owners, the other owners have a responsibility to contribute to the reasonable costs based upon a fair proportion of said costs. *Id., at comment e.* In determining whether an easement holder is required to contribute to the cost of maintenance and repair of said easement, Ohio courts generally consider five factors: "(1) the amount and intensity of each party's actual use of the road and the benefits they derive from that use; (2) whether a party had notice of and an opportunity to participate in repair and maintenance decisions; (3) whether the work consisted of reasonable and necessary repairs and maintenance, rather than improvements to the road; (4) whether the quality and price of the work was reasonable; and (5) the value of other monetary or in-kind contributions to repair and maintenance made by the parties." In this matter, the defendants, along with 300 property owners in nearby subdivisions, owned an easement over island roads and a causeway. The defendants agreed they had a common-law obligation to contribute to and pay their share of the repair and maintenance costs, but argued the work performed was not necessary and was instead unnecessary improvements and upgrades. The court rejected this argument, as the plaintiffs presented uncontroverted evidence that the projects undertaken were appropriate and only for necessary repairs and maintenance of the island roads and causeway, not improvements. The court also noted that the defendants had actual use of the easement from which they derived a benefit, as the island roads and causeway provided direct access to and from their homes. As such, the defendants had a responsibility to contribute their share of the repair costs to the other easement owners.

Res Judicata

***AJZ's Hauling, L.L.C. v. Trunorth Warranty Programs of N. Am.*, 8th Dist. Cuyahoga No. 109632, 2021-Ohio-1190**

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that it would be unjust and unreasonable to apply the doctrine of res judicata to prohibit the trial court from reconsidering its prior ruling.

The Bullet Point: The doctrine of res judicata requires a final order of the court to preclude re-litigation of issues that have or could have been raised in a prior proceeding. Stated simply, if a court's final appealable order is not timely appealed, all matters that could have been reviewed on appeal become res judicata and are not reviewable in a related or subsequent proceeding or appeal. This is an important legal concept. It provides finality and security to litigants that they will not be continually sued for the same claims or issues over and over again. Similarly, under the law of the case doctrine, the decision of a reviewing court in a case remains the law of that case on legal questions involved for all subsequent proceedings in the case at both trial and reviewing levels. Pursuant to R.C. 2711.02(C), an order that grants or denies a stay of an action pending arbitration is a final order that may be reviewed on appeal. Consequently, a party who fails to appeal an order staying an action pending arbitration will

generally be barred by res judicata from subsequently arguing that the arbitration provision at issue is unenforceable. Rarely will courts refuse to enforce the concept of res judicata when it is clearly applicable, as was the case here. However, despite this, the Eighth Appellate District refused to apply the doctrine on the basis that it would be unreasonable or unjust to do so.

Land Contract

***Lovejoy v. Diel*, 12th Dist. Butler No. CA2020-06-067, 2021-Ohio-1124**
In this appeal, the Twelfth Appellate District reversed and remanded the trial court's decision, holding that the determination of whether a real estate agreement constitutes a land installment contract requires a two-part analysis under R.C. 5313.01(A) and 5313.02(A).

The Bullet Point: When determining whether an agreement to sell property constitutes a land installment contract, Ohio courts must look to the clear and unambiguous language of both R.C. 5313.01(A) and R.C. 5313.02(A). R.C. 5313.01(A) defines a land installment contract, in part, as an agreement under which the seller, referred to as the vendor, agrees to convey title in real property to the buyer, referred to as the vendee, and the vendee agrees to pay the purchase price in installment payments while the vendor retains title to the property as security for the vendee's obligation. After determining whether or not the agreement meets the definition of a land installment contract under R.C. 5313.01, the court must continue its analysis under R.C. 5313.02. While there are four subsections in R.C. 5313.02 that impose several requirements, R.C. 5313.02(A) itself lists 16 provisions that must be contained in all land installment contracts. In this case, the parties entered into a real estate agreement. The trial court analyzed the agreement solely under R.C. 5313.02 and determined it was a land installment contract despite lacking the 16 mandatory elements. On appeal, the court found that the parties' agreement failed to satisfy the definition of a land installment contract under R.C. 5313.01 as it did not state the plaintiff would ever convey title to the defendants. Moreover, the agreement did not even state the address or generally identify the property being sold. The court further noted that the agreement contained only six of the 16 elements that R.C. 5313.02(A) says a land installment contract "shall * * * at least" contain. The court rejected the "substantial compliance" position that has been taken by some Ohio Districts who have held that an agreement can be a land installment contract if it substantially complies with the 16 provisions. Instead, this court determined that the mandatory language of R.C. 5313.02(A) is plain and unambiguous and must be applied, not interpreted. As the agreement failed to include all 16 of the mandatory provisions in R.C. 5313.02(A), and because it failed to meet the definition under R.C. 5313.01(A), the real estate agreement was not a land installment contract.

Related people

Stephanie Hand-Cannane
James W. Sandy

[Cite as *Gionino's Pizzeria, Inc. v. Reynolds*, 2021-Ohio-1289.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
CARROLL COUNTY

GIONINO'S PIZZERIA INC.,

Plaintiff-Appellant,

v.

JAMES F. REYNOLDS JR., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 20 CA 0940

Civile Appeal from the
Court of Common Pleas of Carroll County, Ohio
Case No. 2019 CVH 29449

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Clair E. Dickinson, *Atty. Nicholas P. Capotosto, Atty. Daniel L. Silfani*, and *Atty. Christopher T. Teodosio*, Brouse McDowell, L.P.A., 388 South Main Street, Suite 500, Akron, Ohio 44311, for Plaintiff-Appellant.

Atty. Jude B. Streb and *Atty. Justin S. Greenfelder*, 4277 Munson Street NW, Canton, Ohio 44718, for Defendants-Appellees.

Dated: March 31, 2021

WAITE, J.

{¶1} Appellant Gionino's Pizzeria, Inc., appeals from a judgment of the Carroll County Court of Common Pleas granting in part and denying in part Appellant's motion for a preliminary and permanent injunction against Appellees, James Reynolds ("Reynolds") and Livinthedream, Inc. For the following reasons, we reverse the judgment of the trial court and remand the matter for a hearing on Appellant's motion for injunctive relief.

Factual and Procedural History

{¶2} Appellant operates over 45 pizzeria franchises in the region. In 2006, Jeremy Larkin ("Larkin"), Mark Mitchell and JAE Twin, Inc. (collectively "JAE Twin"), entered into a franchise agreement with Appellant to open a Gionino's Pizzeria franchise in Carrollton, Ohio. In 2009 JAE Twin was looking to sell the franchise. JAE Twin subsequently sold the franchise to Appellees, James F. Reynolds and Livinthedream, Inc., purportedly pursuant to a written agreement. Reynolds had worked for JAE Twin at the Carrollton Gionino's franchise for a number of years and was familiar with the operation of the pizzeria.

{¶3} The parties have differing accounts of the nature of the franchise sale, including: (1) whether any contractual relationship exists at all between the parties; (2) the terms and conditions of the sale of the franchise and whether the sale properly incorporated the original franchise agreement between Appellant and JAE Twin. JAE Twin, through the testimony of, Larkin, testified at trial that he drafted a written sale

agreement and provided it to Appellees for signature. A copy of the Gionino's franchise agreement was attached to the sale agreement when given to Appellees. Both parties agree that a fully executed sale agreement between JAE Twin and Appellees has never been made part of the record. However, Appellees' accountant produced a copy of a written sale agreement containing only Appellee Reynold's signature, which was not witnessed. A copy of the Gionino's franchise agreement was not attached. The sale agreement signed by Reynolds was admitted into evidence at trial as Plaintiff's Exhibit 5. The sale agreement itself refers to "a certain Sales Agreement." Appellant contends this language is actually a reference to the Gionino's franchise agreement. The lion's share of Appellant's arguments are based on this sale agreement and the alleged incorporation by reference of the Gionino's franchise agreement. All described facts are derived from a statement of evidence made pursuant to App.R. 9(C) and issued by the trial court, after an opportunity for objections and amendments by both parties. A technical difficulty prevented the hearing held by the trial court from being recorded.

{¶4} Exhibit 5 provides that "[s]eller shall assign all rights and liabilities created by a certain Sales Agreement attached hereto and made with Gionino's Pizzeria, Inc." (Statement of Evidence, p. 8.). Exhibit 5 also recites that Appellees were purchasing "assets, goodwill, going concern value and right to use the name of Gionino's Pizzeria" for a purchase price of $65,000. (Statement of Evidence, p. 8.) Exhibit 5 allowed Appellant the right of first refusal under the "aforementioned Agreement" which, again, Appellant contends is a reference to the Gionino's franchise agreement. (Statement of Evidence, p. 8.)

{¶5} Appellant asserts that the original franchise agreement incorporated into the sale agreement required that any Gionino's franchise assignment must be preapproved by Appellant and that any assignment must also acknowledge that all rights assigned to Appellees were subject to the rights of Appellant as set forth in that Gionino's franchise agreement, including a covenant not to compete. There is evidence that Appellant provided consent to the transfer and Appellees paid the required $5,000 franchise transfer fee, as memorialized in a letter dated March 30, 2009 from Appellant to JAE Twin, made part of the record. (Statement of Evidence, Exh. 3.) In 2012 Appellees requested menu changes to accommodate their lack of sales of certain items, which was approved by Appellant. The Gionino's franchise agreement required Appellees to purchase food items from Appellant's exclusive food distributor, Hillcrest Foods. Appellees acknowledged in their written business plan that they were required to use Hillcrest Foods, but that they also intended to purchase certain items at wholesale clubs in order to save money. (Statement of Evidence, Exh. 6.). Appellant discovered that Appellees were purchasing food items from other suppliers in breach of the franchise agreement, causing product inconsistency. Appellees were then informed in writing that they were in breach of the Gionino's franchise agreement. A copy of the cease and desist letter was made a part of the record filed under seal. (Statement of Evidence, Exh. 11.) Appellees failed to correct their behavior and Appellant terminated the franchise on October 14, 2019. The cease and desist letter included a termination notice which, pursuant to the Gionino's franchise agreement, required Appellees to: (1) cease and desist from holding themselves out to be a Gionino's Pizzeria franchise, including forfeit of the name, marks, recipes, trademarks and trade secrets, signs or symbols; (2) submit all outstanding franchise

reports along with all outstanding franchise fees, advertising fees and royalty payments; (3) cease and desist from using any of Appellant's confidential manuals, forms and recipes; and (4) transfer their telephone number to Appellant. (Statement of Evidence, Exh. 11.) After the termination of the Gionino's franchise, Appellees changed their business name to Jimmy's Pizzeria, but continued to use the same location and the same telephone number. Appellant contends this conduct violates the terms of the franchise agreement and caused damage to Gionino's reputation and goodwill by causing customer confusion.

{¶6} According to Appellees' version of events, they were never made a party to the Gionino's franchise agreement and never agreed to be bound by its terms. This argument is entirely based on the failure to produce a fully executed sale agreement with the reverenced attachment for the record. Appellees point out that Appellant is unable to present a fully executed sale agreement and the agreement presented by Appellant does not specifically refer to a "franchise" agreement. Appellees maintain they never entered into a written sale agreement with JAE Twin and initially claimed to the trial court that a sale agreement was never presented by JAE Twin. However, Appellee Reynolds ultimately testified at the hearing that he did get such a document and gave a copy of the agreement to his accountant. Once Appellant's subpoenaed this accountant, Exhibit 5 was produced by Appellees. Appellee Reynolds has never disputed that it is his signature on the only copy of the sale agreement entered into evidence and acknowledged that it stated that Appellees were purchasing the assets, goodwill and going concern of Gionino's Pizzeria for $65,000. (Statement of Evidence, p. 10.) Appellee Reynolds also testified in his deposition that he had signed a commercial security agreement with

Portage Community Bank as the president of "Livinthedream, Inc. dba Gionino's Pizzeria" and a copy of that security agreement was made a part of the record. Appellees acknowledge that Appellant's approval was required for the transfer and do not dispute that they paid the $5,000 franchise transfer fee. However, Appellees maintain on appeal that they had only an oral contract with Appellant, the terms of which required they pay Appellant a monthly royalty of 4% in exchange for the right to use the Gionino's trade name, recipes and trademarks and to have the Carrollton franchise listed on the Gionino's corporate website. Appellees state that after Appellant terminated the relationship on October 14, 2019, they immediately ceased utilizing any of Appellant's trade secrets and no longer possess any of Appellant's trade secrets or proprietary information. Appellees argue that five days after termination they opened up "Jimmy's Pizzeria" at the same location as the Gionino's franchise and using the same phone number because they were not bound by any of the franchise termination requirements as alleged by Appellant. They contend the only relevant term in this oral agreement was payment of a 4% monthly royalty, but only so long as they were operating as a Gionino's.

{¶7} Appellant originally brought suit against Appellees in Summit County Common Pleas Court. That court transferred venue to Carroll County. According to the verified complaint, Appellant raised claims regarding breach of contract, misappropriation of trade secrets, unfair competition, and promissory estoppel. Appellant sought not only monetary damages but asked the court for injunctive relief to enjoin Appellees from operating a pizza shop in Carrollton at the same location and with the same phone number, and to enjoin Appellees from using any of Appellant's trade secrets or other proprietary information.

{¶8} On November 15, 2019, Appellant filed a motion for a temporary restraining order and a preliminary injunction, asserting that injunctive relief was necessary to protect their trade secrets, proprietary information and the unfair competition caused by Appellees' breach of the assigned franchise agreement. A deposition of Reynolds was taken on December 18, 2019. At his deposition, Reynolds testified that he bought the tangible assets of the Gionino's franchise including the equipment, recipes and operations manuals. He also testified that he was assigned the lease for the Gionino's franchise.

{¶9} On January 7, 2020, the trial court held an evidentiary hearing, purportedly on the preliminary injunction motion. Three witnesses testified at the hearing: (1) Samuel Owen, President of Gionino's Pizzeria; (2) Larkin, a Gionino's franchise owner who had assigned the franchise to Appellees; and (3) Appellee Reynolds. Owen testified that he executed the Gionino's franchise agreement between Appellant and JAE Twin. A copy of that franchise agreement was admitted into evidence under seal. (Statement of Evidence, Exh. 1.) Owens testified that he felt comfortable with Appellees taking over as a Gionino's franchisee because Appellee Reynolds had worked at the Carrollton location since 2006. (Statement of Evidence, p. 3.) An unsigned copy of the sale agreement transferring the franchise to Appellees was admitted into evidence (Statement of Evidence, Exh. 2) as well as the March 30, 2009, letter memorializing the transfer of the Gionino's franchise and serving as a receipt for payment of the $5,000 transfer fee by Appellees. (Statement of Evidence, Exh. 3.) Finally, a copy of an assignment of lease related to the transfer of the lease for the real property in which the Carrollton Gionino's franchise operated was also admitted. (Statement of Evidence, Exh. 4.)

{¶10} Larkin testified that he was the previous owner of the Carrollton Gionino's franchise and owns several other Gionino's franchises. He also serves as an area sales representative. Larkin testified that he entered into a signed sale agreement with Appellees to transfer the Gionino's franchise in question to Appellees. He testified that four days before the hearing, Appellant had obtained, through a subpoena served on Appellees' accountant, a copy of the sale agreement signed only by Appellee Reynolds. This copy of the sale agreement was also admitted into evidence at the hearing. (Statement of Evidence, Exh. 5.) Larkin testified that he had searched his business files for the sale agreement and found one from another franchise that was similar to the one presented to Appellees. He recalled drafting Exhibit 5 and providing it, with the franchise agreement attached to it, to Reynolds for his signature. (Statement of Evidence, p. 9.) He testified that the franchise agreement was referred to in the sale agreement as "Sales Agreement". (Statement of Evidence, p. 9.) The sale agreement obtained from Appellees' accountant contained a provision that Appellant had the option to purchase the franchise pursuant to the "aforementioned Agreement," which Larkin testified actually meant the franchise agreement. (Statement of Evidence, p. 9.) Their agreement also provided that Appellant had to consent to the transfer of the Gionino's franchise to Appellees. Larkin also testified that he had assisted in obtaining the transfer fee from Appellees in the amount of $5,000. (Statement of Evidence, p. 9.)

{¶11} Appellees presented the testimony of James Reynolds. He testified that he was aware the sale agreement existed and that the transfer letter he received from Appellant and provided to his bank indicated that Appellant had approved of the transfer "of the franchise agreement" in exchange for the payment of $5,000. The letter was

admitted into evidence at the hearing. (Statement of Evidence, Exh. 3.) Reynolds testified that while he had provided an affidavit earlier in the case stating he was not aware that a written sale and franchise agreement existed between Appellant and JAE Twin, he was now aware that such a sale agreement existed but he had never asked to see this agreement. (Statement of Evidence, p. 10.) Reynolds stated he never saw the sale agreement and that he did not recall giving it to his accountant. However, Reynolds did not dispute that he had given it to her or that this sale agreement had come from her files. (Statement of Evidence, p. 10.) Reynolds testified that he had been buying food items from Atlantic Foods rather than exclusively from Hillcrest Foods even though the business plan he had submitted to his bank to obtain a loan for the business reflected that he knew he was required to buy from Hillcrest exclusively. A copy of the business plan was admitted into evidence. (Statement of Evidence, Exh. 6.) Reynolds testified that after termination of the Gionino's franchise, he opened Jimmy's Pizzeria and continued to use the same telephone number and operate from the same location as the Gionino's franchise. Reynolds testified that Jimmy's Pizzeria continued to use the same point of sale system, a system that had collected customer data while he was operating the Gionino's franchise. Reynolds testified that he was aware a Gionino's franchise agreement contains restrictive covenants and that he was openly competing by operating Jimmy's Pizzeria and employing former Gionino's employees. (Statement of Evidence, p. 12.)

{¶12} On January 8, 2020, the day following the hearing, the parties filed a joint stipulated protective order. The terms included that all documents produced during discovery, including all exhibits, deposition testimony and responses to discovery, would

be deemed confidential where necessary. Either party could designate documents as confidential after making a good faith determination the document contained information that was protected from disclosure; including confidential personal information, medical information, trade secrets, personnel records, or other commercial information that was not publicly available. Any documents labeled "confidential" would be filed under seal. The opposing party could challenge the confidential designation of any document and the trial court was then authorized to make a determination as to the confidential nature of the document in question. On January 8, 2020, Appellant filed a motion to file a number of items under seal to protect trade secrets and other proprietary information, including: Appellant's Gionino's franchise agreement attached to their complaint as an exhibit; a copy of the assignment of lease attached to the verified complaint; Appellant's preliminary injunction brief and the attached exhibits; and the deposition of James Reynolds. The trial court granted the motion and the documents were ordered sealed in the record.

{¶13} On January 28, 2020, the trial court issued an order which purported to grant the preliminary injunction in part and deny it in part. In this order the court concluded: (1) Appellant's motion for preliminary injunction on the basis of breach of contract was denied because Appellant failed to prove a contract existed between Appellant and Appellees; (2) regarding the relief sought for misappropriation of trade secrets, Appellant presented sufficient evidence that Appellees possessed operations manuals, recipes, printed forms and a point of sale system that tracked customers; (3) regarding unfair competition, the trial court concluded that Appellant's unfair competition claim was essentially a noncompete claim, and better suited to Appellant's breach of contract argument, but that Appellant had failed to establish a breach of contract.

{¶14} Based on the decision to partially grant a preliminary injunction, the trial court ordered Appellees to stop using any of Appellant's recipes, manuals, trade secrets, programs, or customer lists, and to remove all customer information and data tracking from equipment acquired prior to October 14, 2019. Appellees were also ordered to review all of their advertising materials to ensure they contained no reference to Appellant's trademark name.

{¶15} The trial court's App.R. 9(C) statement of evidence and the accompanying exhibits were filed under seal pursuant to the joint stipulated protection order.

{¶16} It is from the January 28, 2020 order that Appellant filed this timely appeal.

Jurisdiction

{¶17} Before addressing Appellant's assignments of error, we must consider whether the preliminary injunction order is a final appealable order subject to appellate review. The Ohio Constitution limits an appellate court's jurisdiction to the review of final judgments. (Section (3)(B)(2), Article IV, Ohio Constitution.) In the absence of a final appealable order, we must dismiss the appeal for lack of subject matter jurisdiction. *Helmstedter v. Helmstedter,* 9th Dist. No. 24237, 2009-Ohio-3559, ¶ 9. Generally, an order denying a preliminary injunction is not a final order because preliminary injunctions are considered interlocutory and impermanent in nature. *N. Fairfield Baptist Church v. G129,* 12th Dist. Butler No. CA2009-11-281, 2010-Ohio-2543, ¶ 16. However, R.C. 2505.02 sets forth a two-prong test. If both prongs are met, the order will be considered final and appealable. *Id.* It provides in pertinent part:

(A) As used in this section:

* * *

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction * * *

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

* * *

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2502.02.

{¶18} The parties do not dispute that preliminary injunction is a provisional remedy. However, the crux of the conflict is whether in denying some of the requested relief, the court entirely precluded a judgment in Appellant's favor and whether subsection (b) applies. That is, whether Appellant would have a meaningful and effective remedy by filing a later appeal following a later judgment. Appellant concedes that typically, a

judgment denying a preliminary injunction in part or in whole is not final. In this case, Appellant contends the preliminary injunction relates to a noncompete agreement and it would suffer "immediate irreparable damage" because its trade secrets may be revealed, its privileged information may be disclosed, and its business relationships with its customers may be destroyed. (Appellant's Reply Brf., p. 2.) Appellant also cites our decision in *Blakeman's Valley Office Equip., Inc. v. Bierdeman,* 152 Ohio App.3d 86, 2003-Ohio-1074, 786 N.E.2d 917 (7th Dist.). In *Blakeman's,* an assignee of a buyer's interest in a sale agreement containing a covenant not to compete filed a complaint against the seller. The trial court denied assignee's motion seeking a preliminary injunction. We reversed and granted the preliminary injunction, concluding the covenant not to compete was assignable and enforceable. There was no analysis of whether the trial court had issued a final appealable order, but we held: "This case is a final appealable order under the current versions of R.C. 2502.02(A)(3) and (B)(4), which specifically include a 'preliminary injunction' as a final appealable order." *Id.* at ¶ 2. Appellant cites *Blakeman's* for the blanket proposition that the denial of preliminary injunction seeking enforcement of a covenant not to compete is final and appealable.

{¶19} Appellees claim the partial denial of the preliminary injunction here does not preclude a meaningful or effective remedy on appeal following final judgment because Appellant is not precluded from pursuing any remaining breach of contract, misappropriation of trade secrets, and unfair competition claims in the trial court, and has not been denied a final remedy in the matter. Appellees argue that Appellant's reliance on *Blakeman's* is misplaced for this reason.

{¶20} In determining whether an appellant will be denied a meaningful, effective remedy if the decision on the provisional remedy is not immediately appealable, the Ohio Supreme Court has stated:

> [R.C. 2502.02(B)(4)(b)] recognizes that in spite of courts' interest in avoiding piecemeal litigation, occasions may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment. In some instances, "[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage" suffered by the appealing party.

State v. Muncie, 91 Ohio St.3d 440, 451, 746 N.E.2d 1092 (2001).

{¶21} There have been instances where a preliminary remedy has been deemed a final order where the order compelled documents containing trade secrets or production of privileged communications or contained the denial of a request to enforce a noncompete agreement. See *Callahan v. Akron Gen. Med. Ctr.,* 9th Dist. Summit No. 22387, 2005-Ohio-5103, ¶ 28; *LCP Holding Co. v. Taylor,* 158 Ohio App.3d 546, 2004-Ohio-5324, 817 N.E.2d 439, ¶ 28 (11th Dist.); *Premier Health Care Serv., Inc. v. Schneiderman,* 2d Dist. Montgomery 18795, 2001 WL 1479241.

{¶22} In *Blakeman's,* although there was no analysis, we concluded that because the covenant not to compete was valid and assignable, it was necessary to have the preliminary order reversed in order for Appellant to protect its rights under that covenant. *Blakeman's,* ¶ 40.

{¶23} In the instant matter, Appellant sought both preliminary and permanent injunctive relief in its complaint. The motion for a temporary restraining order and preliminary injunction asserted that relief was necessary to protect their trade secrets, proprietary information and to protect them from unfair competition based on three claims: breach of contract; misappropriation of trade secrets; and unfair competition. The trial court partially denied relief with regard to the unfair competition claims. However, the court determined that Appellant failed to prove the existence of a contract between the parties. The court also concluded that Appellant's unfair competition claim was based on the noncompete clause found in the Gionino's franchise agreement, and that this claim failed because there was no proof the parties agreed to be bound by any franchise agreement. The trial court granted limited injunctive relief based on Appellant's claim for misappropriation of trade secrets and ordered Appellees enjoined from using any of Appellant's manuals, recipes, printed forms and the like; erasing some data from the point of sale equipment; and reviewing all advertising and marketing materials to ensure that Appellant's proprietary information did not appear, to avoid creating customer confusion. In reading the order as a whole, the trial court essentially completely disposed of Appellant's breach of contract and unfair competition claims. In ruling that no contract for sale contract of the business existed, thus the parties were subject to no valid franchise agreement, the trial court of necessity precluded any further action on these claims. Based on the trial court's ruling in preliminary injunction, the trial court has, in effect, barred Appellant from any meaningful or effective remedy on the rest of Appellant's claims. Other than the trial court's calling its decision a preliminary injunction, the decision for all intents and purposes disposes of all of Appellant's claims for relief. For this reason,

we conclude that this is a final appealable order pursuant to R.C. 2502.02 and this Court has subject matter jurisdiction over the matter.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT INCORRECTLY DETERMINED THAT THE SALES AGREEMENT SIGNED BY MR. REYNOLDS DID NOT CONSTITUTE AN ENFORCEABLE CONTRACT BECAUSE A COPY OF THE SALES AGREEMENT SIGNED BY ALL PARTIES WAS NOT LOCATED.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT'S FAILURE TO DETERMINE THAT THE FRANCHISE AGREEMENT V/AS ASSIGNED TO MR. REYNOLDS AND LIVINTHEDREAM WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT INCORRECTLY DETERMINED THAT GIONINO'S WAS NOT ENTITLED TO INJUNCTIVE RELIEF TO ENFORCE THE RESTRICTIONS IN THE FRANCHISE AGREEMENT AGAINST MR. REYNOLDS AND LIVINTHEDREAM.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT INCORRECTLY DETERMINED THAT THE TELEPHONE NUMBER ASSOCIATED WITH GIONINO'S CARROLLTON

FRANCHISE LOCATION FOR THIRTEEN YEARS WAS NOT REQUIRED TO BE TRANSFERRED TO GIONINO'S UPON TERMINATION OF THE FRANCHISE.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT INCORRECTLY DETERMINED THAT MR. REYNOLDS AND LININTHEDREAM'S CONTINUED USE OF THE TELEPHONE NUMBER FOR "JIMMY'S PIZZERIA" IS NOT UNFAIR COMPETITION WITH GIONINO'S INC.

{¶24} Appellant's assignments of error relate to the two contracts at issue in this matter: the alleged written sale agreement between JAE Twin and Appellees and the original Gionino's franchise agreement between Appellant and JAE Twin, which Appellant contends was assumed by or assigned to Appellees when purchase of the franchise was approved and finalized.

{¶25} Appellant argues in its first assignment of error that the trial court erred in concluding no contract existed between the parties because copy of the agreement that was signed by all parties was not submitted into evidence at trial. Appellant argues this presents a matter of contract interpretation, which is a question of law requiring a *de novo* review.

{¶26} A trial court's judgment regarding whether to grant an injunction is reviewed under an abuse of discretion standard. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 653 N.E.2d 646 (1995), paragraph three of the syllabus. An abuse of discretion is more than an error of judgment; it implies that the

court's attitude is unreasonable, arbitrary, or unconscionable. *Yashphalt Seal Coating, LLC v. Giura*, 7th Dist. Mahoning No. 18 MA 0107, 2019-Ohio-4231, ¶ 14, citing *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The purpose of a preliminary injunction is to preserve the status quo between the parties pending a judgment on the merits. *Chapin v. Nameth,* 7th Dist. Mahoning No. 08 MA 18, 2009-Ohio-1025, ¶ 16. A party requesting a preliminary injunction must show: (1) there is a substantial likelihood the party will prevail on the merits; (2) the party will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction. *Chapin,* ¶ 16. Each element must be established by clear and convincing evidence. *Cleveland v. Cleveland Elec. Illum. Co.,* 115 Ohio App.3d 1, 14, 684 N.E.2d 343 (8th Dist.1996). No one factor is dispositive as the court must balance all factors and weigh the equities. *Blakeman's,* ¶ 20-21.

{¶27} Appellant moved for a preliminary and permanent injunction based on three claims: (1) breach of contract; (2) misappropriation of trade secrets; and (3) unfair competition. In reality, all of the Appellant's grounds for seeking injunctive relief rely on whether a contractual relationship exists between the parties. To prevail on a breach of contract claim, Appellant must demonstrate the existence of a valid contract, performance by one party, breach by the opposing party, and that the performing party suffered damages or loss. *Price v. Dillon,* 7th Dist. Mahoning Nos. 07-MA-75, 07-MA-76, 2008-Ohio-1178, ¶ 48. The question regarding the existence of a contract raises a mixed question of fact and law. We accept the relevant facts found by the trial court that are

supported by some competent, credible evidence, but review *de novo* the application of the law to the facts.

{¶28} The trial court denied Appellant's breach of contract claim concluding there were two major defects. The first relates to Appellant's first assignment of error and involves whether an agreement existed between Appellees and JAE Twin for the sale of the Gionino's franchise. Neither party was able to produce a fully executed written sale agreement between Appellees and JAE Twin. Citing *American States Ins. Co. v. Honeywell, Inc.,* 8th Dist. Cuyahoga No. 56552, 1990 WL 19319 *6, Appellant argues that it was not necessary for both parties to sign an agreement for it to be enforceable against the party to be charged with breach under the agreement. Known as constructive ratification, a partially signed contract must be considered in light of the subsequent conduct of the parties and whether their behavior shows that they were proceeding as if the contract were in effect. *Hocking Valley Community Hospital v. Community Health Plan of Ohio,* 4th Dist. Hocking No. 02CA28, 2003-Ohio-4243, ¶ 16. That is, a contract may be found to exist where the parties' behavior is consistent with the terms of an unsigned or unwritten contract. *Brown v. Lagrange Dev. Corp.*, 6th Dist. Lucas No. L-09-1099, 2015-Ohio-133, ¶ 12 citing *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.,* 54 Ohio St.2d 147, 152, 375 N.E.2d 410, 413 (1978). In *Honeywell,* a contract was found to exist between a theft alarm company and a commercial customer where the customer requested a series of changes in equipment orders as specified in the written contract, although only the alarm company agent had signed the contract. This Court has held that, conversely, where the record demonstrates one party has clearly not acted in

accordance with an essential term of a contract, no constructive ratification has occurred. *Ameritech v. Hayman,* 7th Dist. Jefferson No. 94-J-45, 1995 WL 708578, *2.

{¶29} In the instant matter, the trial court correctly found that neither party presented a fully executed written sales agreement for the transfer of the Gionino's franchise from JAE Twin and Appellees. The only copy submitted was the product of a subpoena to Appellees' accountant, and this copy contained only Appellee Reynolds' unwitnessed signature. Although Reynolds first testified that he did not remember ever receiving a contract, he later testified that he did give it to his accountant and did not dispute that his signature is on the contract or that it was held by his accountant. This record reveals the only signature on this document is from the party who is not seeking to enforce the contract. This is evidence that must be considered when determining whether a valid sale contract existed. While this sale agreement does refer to an attachment, the attachment is not specifically called a Gionino's "Franchise Agreement." Instead, the document cites; somewhat confusingly, to another "Sales Agreement." The referenced "Sales Agreement" is not attached to the partially signed agreement for the sale of the business. Thus, the terms of the incorporated "Sales Agreement" are in question. But the record does show that Appellees were also aware of and operating under at least some of the terms found in a Gionino's franchise agreement, and there is a Gionino's franchise agreement in this record under which Appellant had operated and which it transferred to Appellees in the sale.

{¶30} It is undisputed that Appellees sought and received financing for the purchase of a Gionino's franchise and subsequently began operating as a Gionino's franchise in 2009. They continued to so operate for ten years, until October 14, 2019.

Appellees' written business plan admitted into evidence states that Appellees sought financing "to purchase Gionino's Pizzeria" because "[t]his franchise has a great reputation for a quality product and great customer service." Appellees applied for $70,000 to "pay the purchase price of $65,000 to JAE Twin, Inc. and to pay the franchise transfer fee of $5,000," acknowledging that a Gionino's franchise was being transferred or assigned to Appellees. (Statement of Evidence, Exh. 6.) The business plan also states that Reynolds was aware that the Gionino's franchise agreement stated Hillcrest Foods was the exclusive food supplier for Gionino's franchises, even though he was planning to purchase some items from other wholesalers to lower costs. Moreover, Reynolds testified in his deposition that he had purchased the assets of the franchise from JAE Twin and executed an assignment of the lease for the location. The record is clear that although no one presented a sale agreement executed by both Appellees and JAE Twin, the parties all conducted themselves according to the terms and conditions of the sale agreement. *Richard A. Berjian, D.O., Inc.* at 152. Moreover, Appellees acknowledged the key terms of the sale agreement, including purchase price, the Gionino's franchise transfer fee requirement and the purchase of all assets of the franchise in their business plan, and conducted themselves accordingly. It was the contractual relationship which enabled Appellees to lawfully operate a Gionino's franchise for ten years until it was terminated by Appellant. A review of this record shows evidence establishes not only that a valid sale agreement existed, thus a contractual relationship existed between Appellees and JAE Twin, but also contains evidence that Appellees behaved as though they were subject to the Gionino's franchise agreement, as well.

{¶31} According to the trial court, the second defect in Appellant's breach of contract claim is that Appellant failed to establish Appellees were bound by the terms of the original franchise agreement, because the sale agreement, even if it existed, did not adequately refer to a Gionino's franchise agreement and the franchise agreement itself was not attached to either sale agreement admitted into evidence. All of the claims Appellant alleges relating to the noncompete and unfair competition claims are directly dependent on the existence of a valid franchise agreement between the parties.

{¶32} Appellant asserts that the trial court erred in concluding the franchise agreement was not transferred and assigned to Appellees and that Appellant was not entitled to injunctive relief, including the transfer of the telephone number used to operate as a Gionino's pizzeria as required in the franchise agreement. Again, Appellant maintains that the sale agreement adopted and included the Gionino's franchise agreement when it referred to "a certain Sales Agreement" within the sale agreement and that this can only be a direct reference to the franchise agreement. Larkin testified he understood that the language "a certain sales agreement" was intended to refer to the Gionino's franchise agreement. (Statement of Evidence, p. 9.) Reynolds disputed this, and testified that this was not his understanding. However, he also testified that he had never read the sale agreement. (Statement of Evidence, p. 10.) Owen and Larkin testified that Larkin had attached a copy of the franchise agreement to the sale agreement when he presented it to Appellees. Appellees did not dispute this fact. However, Reynolds maintained that he had only an oral contract with Appellant which required him to pay a 4% monthly royalty fee. He testified in his deposition that had met with Owens

prior to the franchise transfer but maintains that he never signed a Gionino's franchise agreement or agreed to be bound by all of the terms of the Gionino's franchise agreement.

> An assignment is defined as a transfer to another person of the whole of any property or right therein. Black's Law Dictionary (6th Ed. 1990) 119. A valid assignment may be oral or written, and should satisfy the requirements of a contract, i.e., the legality of object, capacity of parties, consideration, and meeting of the minds. 6 Ohio Jurisprudence 3d (2011), Assignments, Section 25. An assignment, no matter how informal, may be found when there is intent on the part of the assignor to assign the rights in question, an intent on the part of the assignee to be assigned the rights in question, and valuable consideration exchanged. *Id;* see also, *Morris v. George Banning, Inc.* (1947), 77 N.E.2d 372, 374, 49 Ohio Law Abs. 530.

Acme Co. v. Saunders TopSoil, 7th Dist. Mahoning No. 10 MA 93, 2011-Ohio-6243, ¶ 82, J. Waite concurring.

{¶33} Any cause of action arising out of a contract may be assigned. In order to demonstrate a valid and equitable assignment, the court may consider any words or conduct demonstrating a party's intent to assign a right or action, whether there appears to be an intention of the other party to receive the benefit, and whether valuable consideration was given. *Langhals v. Holt Roofing Co.,* 47 Ohio App.3d 114, 116, 547 N.E.2d 401 (6th Dist.1988).

{¶34} The sale agreement between JAE Twin and Appellees that contains Reynolds' signature, obtained from Appellees' accountant, satisfies all of the contract

requirements, including the capacity of the parties, a meeting of the minds, and valuable consideration. In exchange for the purchase price of $65,000 Appellees purchased "business, property and assets" of the Gionino's pizzeria franchise in Carrollton, Ohio. This contract also required an assignment of the lease and, most notably, the sale agreement was valid only after the consent of Appellant: "Seller shall seek the approval of Gionino's Pizzeria, Inc. within five (5) days from the signing of this Agreement. This consent is a pre-requisite to this agreement having full force and effect." (Statement of Evidence, Exh. 5,)

{¶35} The trial court and Appellees place great emphasis on the fact that a franchise agreement was not attached to this sale agreement and that the sale agreement never specifically refers to a Gionino's franchise agreement within in the document. While both of these assertions are correct, it is clear from the terms of the sale agreement that Appellees were purchasing the business franchise for Gionino's pizzeria located in Carrollton, Ohio for valuable consideration and agreed to be bound by all requisite terms, including the consent and approval of Appellant. Although Reynolds maintains that he had only an oral contract for purchase of the business to operate a Gionino's, and the only franchise requirement was that he pay a 4% royalty fee, Appellees' conduct appears to demonstrate otherwise. We have already determined that the parties' conduct shows they evinced an intention to be bound by the written contract, even if no completely executed copy can be found. Included within that contract and the record as a whole are multiple instances where Appellees accepted the terms of the Gionino's franchise agreement, including acknowledging the need for Appellant's consent and the payment of the transfer fee; signing off on the assignment of the lease for the premises; noting in

their business plan and commercial security agreement that they were "Livinthedream, Inc. dba Gionino's Pizzeria" and that they were seeking bank financing for the purchase of a Gionino's franchise. Appellees continued to operate the franchise for a period of ten years. Although the term "Gionino's franchise agreement" is missing from the sale agreement and a copy of the franchise agreement was not found attached, Appellees' conduct appears to lead to the conclusion that they intended to be transferred and assigned the rights of a Gionino's pizzeria franchisee. *Langhals,* at 116.

{¶36} The original franchise agreement between Appellant and JAE Twin, while not attached to the Exhibit 5 sale agreement, was admitted at trial as Exhibit 1. It is a twenty-six page document which contains multiple restrictive covenants, including a noncompete covenant; an exclusive supplier provision requiring Hillcrest Foods be the sole food supplier to the franchise and Coca-Cola the sole beverage distributor. (Statement of Evidence, Exh. 1.) The franchise agreement also sets out termination provisions, including the obligations of the franchisee to cease and desist from use of the Gionino's name in all advertising, to pay all outstanding fees, and to cease and desist from utilizing "all methods associated with the Seller or its name, marks, recipes, forms, manuals, slogans, signs [sic] symbols, devices or any part of the GIONINO'S PIZZERIA franchise." (Statement of Evidence, Exh. 1.)

{¶37} The issue here is whether there the parties intended to be bound to two separate contracts: the sale agreement between Appellees and JAE Twin and the Gionino's franchise agreement. The evidence of record reflects that, as a matter of law, a valid sale agreement between Appellees and JAE Twin existed. The terms of that sale agreement require adherence to and assignment of a Gionino's franchise, as that is the

only interest in the business of Gionino's that JAE Twin (as seller) was able to convey to Appellees (as buyer). Based on the specific facts in this record, including the conduct and admissions of the parties, this record shows a valid sale agreement was entered into by JAE Twin and Appellees for the assignment of a Gionino's franchise. Based on this record, the trial court erred in concluding that a contractual relationship did not exist. Appellant's first assignment of error has merit and is sustained.

{¶38} Appellant's second, third, fourth and fifth assignments relate to the terms of the franchise agreement and the availability of injunctive relief based on the assignment of the franchise. The trial court concluded incorrectly that there was no contractual relationship between the parties. However, in doing so, it also granted "preliminary" injunction on some of Appellant's claims, recognizing that Appellees owed some duties to Appellant stemming from their operation of a franchise while at the same time deciding that Appellees were not bound by a franchise agreement.

{¶39} Generally, injunctive relief is separated into three categories: (1) temporary restraining orders, which can be granted *ex parte* and are to last only long enough until a full hearing can be held; (2) preliminary injunctions, granted with notice and a hearing to maintain the parties status quo until trial on the merits; and (3) permanent injunctions, which are issued after a trial on the merits. *City of Bexley v. Duckworth,* 10th Dist. Franklin No. 99AP-414, 2000 WL 249121 (Mar.7, 2000), *5 citing *McCormac*, *Ohio Civil Rules Practice,* (2 Ed.1992) 403, Section 14.08. The United States Supreme Court has held that "the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct.1830, 68 L.Ed.2d 175 (1981).

{¶40} Civ.R. 65(B) sets forth the procedure for hearings on preliminary injunctions:

> (1) **Notice**. No preliminary injunction shall be issued without reasonable notice to the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion.
>
> (2) **Consolidation of hearing with trial on merits**. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (B)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

{¶41} Because of the nature of a preliminary hearing, procedures may be less formal and evidence less complete than on a trial of the merits. *Camenisch* at 395. A party is also "not required to prove his case in full at a preliminary-injunction hearing." *Id.* Thus, "it is generally improper to dispose of a case on the merits following a hearing for a preliminary injunction without consolidating that hearing with a trial on the merits or otherwise giving notice to counsel that the merits would be considered." *George P. Ballas Buick-GMC, Inc. v. Taylor Buick, Inc.,* 5 Ohio App.3d 71, 74, 449 N.E.2d 403 (6th Dist.1982). Courts have held that it is improper to dispose of a case on the merits after a hearing on a preliminary injunction without formally consolidating that hearing with a trial

on the merits or otherwise providing notice to counsel that the matter was being heard on its merits. *Id.*

{¶42} Here, the trial court essentially decided all pending matters on the merits following the preliminary injunction hearing when it concluded there was no contractual relationship between the parties. A review of the judgment entry reveals the trial court did not conduct a thoughtful analysis on Appellant's preliminary injunction motion. In its entry, the trial court did not determine on each claim presented by Appellant whether Appellant had established by clear and convincing evidence that: (1) there was a substantial likelihood they would prevail on the merits; (2) that they would suffer irreparable injury if the injunction was not granted; (3) that no third parties would be unjustifiably harmed if the injunction was granted; and (4) the public interest would be served by the injunction. *Chapin,* ¶ 16. Despite this, and without warning the parties that it intended to consolidate the request for preliminary relief into a final hearing on the request for permanent relief, the trial court did, in fact, dispose of the merits of the case in its determination that there was no contractual relationship between the parties. Appellant's complaint alleged breach of contract, misappropriation of trade secrets and unfair competition. Each of these claims, however, stemmed from the presumption that the parties operated under a contract, spelling out the rights and duties on which the demands for relief were based. If no contractual relationship between the parties existed, there are no rights and duties on which to base relief.

{¶43} Interestingly, the trial court did grant part of the injunctive relief requested by Appellant, despite finding that no sale agreement existed and no valid Gionino's franchise agreement was enforceable in this matter. However, if the terms and conditions

of the sale agreement and franchise agreement do not apply, there appears to be no basis on which to grant any injunctive relief. Clearly, the court determined that the Appellees were "operating" a Gionino's "Franchise." (1/28/20 J.E., p. 5.) In its judgment entry, the trial court also recognized that Appellees were given access to trade secrets of the Gionino's franchise business. The trial court, however, does not attribute this to the parties' intent to be bound by the terms of any agreement. The trial court also does not recognize Appellees' actions, through their admissions and the exhibits presented, show they intended to operate a business franchise and that such an enterprise is normally subject to a franchise agreement. While there appears to be a question as to whether the franchise agreement between Gionino's and Appellees is fully binding on Appellees and whether this document is actually referenced in the sale agreement when it discusses "a certain Sales Agreement," it is apparent that Appellant was selling, and Appellees did purchase, a business franchise. It also appears Appellees understood that they were bound to certain Gionino's franchise requirements, requirements found within this franchise agreement. Appellees acted on these requirements.

{¶44} Because the trial court improperly determined, following a preliminary hearing, that no contractual relationship existed, the trial court in effect foreclosed any avenue for Appellants to seek relief. While it does appear that the trial court intended to hold additional proceedings in this matter, it does not appear that the court left Appellant with any triable claims. The trial court's actions in determining the merits of this case following the preliminary injunction hearing without proper notice to the parties violated Civ.R. 65(B). Further, as the parties did enter into a valid contract for the sale of the business based on the record, the trial court's determinations based on the assumption

that no contract existed are erroneous even regarding a preliminary injunction request. Further, the record reveals a question as to whether Appellees' behaviors demonstrated an intent to be bound by the Gionino's franchise agreement, and this question was not fully addressed below due to the trial court's erroneous determination as to the underlying sale agreement. Thus, this matter must be remanded for the trial court to undertake another hearing on Appellant's request for injunctive relief.

{¶45} Based on the foregoing, Appellant's first assignment of error has merit and is sustained. Because a new hearing must be held, Appellant's second, third, fourth and fifth assignments of error are moot. The judgment of the trial court is reversed and this cause is remanded to the trial court for consideration of Appellant's request for injunctive relief and other damages relative to the parties' contractual relationship.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and its remaining assignments are moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Carroll County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *Johnson's Island Property Owners' Assn. v. Cianciola*, 2021-Ohio-1341.]

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

Johnson's Island Property Owners' Assoc.

Appellee

v.

Anthony Cianciola, et al.

Appellants

Court of Appeals No. OT-20-011

Trial Court No. 18CV382

DECISION AND JUDGMENT

Decided: April 16, 2021

* * * * *

John A. Coppeler, for appellee.

George C. Wilber, for appellants.

* * * * *

DUHART, J.

{¶ 1} This case is before the court on appeal by appellants, Anthony and Elizabeth Cianciola, from the May 4, 2020 judgment of the Ottawa County Court of Common Pleas. For the reasons that follow, we affirm, in part, and modify the May 4, 2020 judgment.

Assignments of Error

I. The Trial Court Erred as a Matter of Law in Failing to Follow "Common Law Principles" in Regards to the Duty of a Dominant Estate Easement Owner to Contribute to the Repair and Maintenance Cost of a Common Private Roadway.

II. The Trial Court Erred in Failing to Follow the Judicial Doctrines of Res Judicata and Stare Decisis in Reaching a Decision That Was Not Only at Odds with the Prior Findings and Holdings of this Court but Also Was Contrary to the Prior Decisions of the Trial Court Itself.

Background

{¶ 2} This is the latest in a series of cases involving payment for repair and maintenance to the roadways on Johnson's Island. These cases, to varying degrees, involve the following parties: appellants, who own property on Johnson's Island in the Bay Haven Estates subdivision; appellee, Johnson's Island Property Owners' Association ("JIPOA"), a property owners' association compiled of two of the three subdivisions on Johnson's Island (Bay Haven Estates and Shiloh Estates); Johnson's Island Investment Group, LLC ("JIIG"), which is the owner of the roads and causeway on Johnson's Island; and Baycliffs Homeowners Association (BHOA"), the homeowners' association for the third subdivision on Johnson's Island, Baycliffs.

{¶ 3} The first of the cases, *Baycliffs Homeowners' Association v. Johnson's Island Property Owners' Assn.*, Ottawa C.P. No. 04-CHV-202 was brought by BHOA

against JIPOA over issues pertaining to the repair and maintenance of the island roadways and causeway. This case was ultimately settled. As part of the settlement, JIPOA, BHOA, JIIG, and some Johnson Island property owners who were not members of either homeowners' association (jointly "non-member owners") entered into an Operating Agreement For Governance Of Johnson's Island Causeway and Roadways ("operating agreement").

{¶ 4} The operating agreement provided for the establishment of a road commission, a seven-member entity consisting of representatives of JIPOA, BHOA, JIIG and the non-member owners, which would have the "authority and responsibility to oversee the planning, budgeting, administration, management, maintenance, repair and improvement * * * of Island Roads, the Causeway, and the Tollgate." The operating agreement required the road commission to develop two annual budgets—one budget for the causeway and tollgate which is to include a reserve fund, and a budget for the island roads. In addition, the operating agreement provides for two sources of funding for the road commission: revenue generated from the tollgate and assessments advanced by JIPOA and BHOA which represent the total annual shares owed by each property owner for which each homeowners' association has been given the responsibility of billing and collection. Pursuant to the operating agreement, the road commission is to determine the "annual share" owed by each property owner. A property owner only pays one "annual share" regardless of how many lots each property owner owns.

{¶ 5} The second case in the series was *Cianciola v. Johnson's Island Property Owners' Assn.*, Ottawa C.P. Nos. 10CV232H and 10CV366H ("*Cianciola 1*"). In this case, appellants and other property owners on Johnson's Island brought suit against JIPOA seeking a declaratory judgment to quiet title and an injunction to prevent JIPOA from enforcing its amended code of regulations against the plaintiff property owners, including appellants. Of concern in that case was the fact that the amended code of regulations gave JIPOA authority to impose assessments on the property owners. The trial court granted a motion for summary judgment filed by the appellants and the other property owners and found that JIPOA's code of regulations was not enforceable against them since the amended code of regulations was not in their chain of title. The trial court's judgment entry (hereinafter "2011 injunction order"), in part, enjoined and restrained JIPOA and others acting in concert with JIPOA "from directly or indirectly attempting to enforce the Amended Code of Regulations or the Operating Agreement against [appellants]" and further restrained and enjoined them from "making any filings or publications that may cloud [appellants'] titles."

{¶ 6} The 2011 injunction order was appealed to this court, and we affirmed, stating in relevant part, that since the code of regulations and operating agreement are not restrictive covenants, they "provide no authority to JIPOA to take action that would cloud [appellants'] title" and further that the injunction "prevents JIPOA from taking action pursuant to the code of regulations and operating agreement." *Cianciola v. Johnson's Island Property Owner's Assn.*, 2012-Ohio-5261, 981 N.E.2d 311, ¶ 28-29 (6th Dist.).

{¶ 7} Next, in 2016, JIPOA filed a complaint against appellants in the Ottawa County Municipal Court in case No. CVF1600777. This complaint made reference to the operating agreement, but alleged that appellants were required to pay a proportionate share of the cost to repair and maintain the island roadways based upon common law principles. Months later, appellants filed a motion to show cause in the Ottawa County Common Pleas Court in case No. 10CV232 arguing that the municipal court complaint was an attempt to enforce the code of regulations and operating agreement which violated the 2011 injunction order.

{¶ 8} The motion to show cause was denied at the trial court level, and then appealed to this court. We affirmed the trial court's decision, concluding that references in the complaint to the operating agreement and the road commission "merely explain the manner in which JIPOA has attempted to collect the proportionate share of road maintenance and repair expenses from [appellants]" but were not cited as the basis of JIPOA's legal claims. *Cianciola v. Johnson's Island Property Owners Assoc*., 6th Dist. Ottawa No. OT-17-027, 2018-Ohio-2037, ¶ 14 ("*Cianciola 2*"). We concluded that, when considering only the allegations in JIPOA's municipal court complaint, JIPOA's claims were "rooted in the common law obligation of an owner of an easement to perform reasonable repairs and maintenance when necessary." *Id*. at ¶ 17. We did, however, note that "[t]o the extent JIPOA's claims cannot be established solely based upon common law principles and without reference to the operating agreement and code

of regulations, they will fail on the merits." *Id*. at ¶ 15. The municipal court case was ultimately dismissed without prejudice.

Present Case

{¶ 9} On October 9, 2018, JIPOA filed a complaint against appellants in the Ottawa County Common Pleas Court seeking to recover costs incurred for the causeway and road repair and maintenance for the years 2010 through 2018, based on claims of unjust enrichment and quantum meruit. JIPOA's complaint also includes a request for a declaratory judgment that appellants' "proportionate share" "should be calculated based on the concept of an 'equal share' among all property owner[s] on Johnson's Island and not based on the number of lots owned by [appellants] or on any other basis."

{¶ 10} On November 26, 2018, appellants filed their answer and a counterclaim alleging JIPOA's complaint attempts to enforce the operating agreement against the appellants and thus violates the 2011 injunction order. Appellants seek damages as a result.

{¶ 11} A two-day bench trial was had on November 25 and 26, 2019, and the following relevant testimony was presented.

{¶ 12} On the first day of trial, JIPOA called Michael Kelty, who at various times has been a member of JIPOA, JIIG, and the road commission. Kelty detailed how the road commission evaluates the condition of the roads and what projects should be done to maintain them. He explained that the road commission had studies done to evaluate the condition of the roads and causeway. The commission then considered the "state of

disrepair as expressed in the * * * studies and the availability of drainage laterals to the Sandusky Bay" when determining the priority of road projects. According to Kelty, the road commission would get multiple bids on a project and then elect one of the bidding companies to do a project.

{¶ 13} Kelty also described the actual expenditures incurred by the road commission and that these amounts are billed out to the two homeowners' associations who pay for the shares owed by all island property owners assigned to that association and then the association bills the individual property owners. He also testified that the amount paid by the association includes any amount apportioned to nonpayers. He further explained that when drafting the operating agreement, the methodology for proportioning the cost to each owner was discussed and "various ways, frontage, value of property and by owner" were considered before it was decided that "the benefit of crossing over the causeway and roads isn't much affected by how many lots you have," so it would be equitable to apportion based on a per owner basis. Later, when recalled by JIPOA, Kelty added that apportioning based on value would be difficult to manage "because valuations change frequently" which would increase the administrative burden on the system.

{¶ 14} Kelty stated that JIPOA has two general meetings a year to which everyone, including nonmembers, are invited and at those meetings, participants are updated as to "what is going on with the road commission" and that the road commission also has quarterly meetings which are open to everyone. He also testified that the

minutes of the road commission meetings are available to the public on the road commission's website, although he later admitted that the website was not up-to-date.

{¶ 15} On cross-examination, Kelty explained the road commission creates a budget and then collects assessments in advance based on the budget. If money is not spent, it is put in three reserve accounts, including one for "good roads" that need to be maintained. Actual expenses have an "up and down" effect from year to year as the road commission schedules a major project every other year to "avail [itself] of the economies of scale."[1] He also agreed that the list of actual expenses included taxes, insurance and administrative expenses. He admitted he was unaware of any specific steps to contact appellants directly regarding road projects.

{¶ 16} Upon redirect examination, Kelty testified that "the projects undertaken through the road commission for the period of time in question for maintenance and repair of the roads and causeway" were "reasonable and necessary."

{¶ 17} JIPOA next called Barry Neumann, an engineer at Richland Engineering, Limited, a company that evaluated the causeway[2] a number of times. Neumann detailed the findings in the evaluations and testified to problems with the causeway as well as recommendations made and the work done. He also testified "repairs" done in 2014 were

[1] Actual expenses differ from the assessments which remain relatively constant. The evidence shows the actual expenses incurred per property owner during the period from 2010-2018 was $3,364, whereas the total assessment amount billed to each property owner during that period was $3,109.

[2] The causeway is a span of five bridges.

"reasonable and necessary" and there would be "a need for ongoing maintenance of the causeway bridges."

{¶ 18} On cross-examination, Neumann stated in 2007, the overall rating of the causeway was either "fair or satisfactory."

{¶ 19} JIPOA's third witness was Rich Schulz, a property owner on Johnson's Island in the Baycliffs subdivision who was in the construction business for over forty years. Schulz was president of BHOA at the time the operating agreement was entered into, and he participated in the negotiation and finalization of the agreement. He was also a member of the road commission.

{¶ 20} Schulz testified about obtaining engineering and expert advice concerning how to take care of the roads in accordance with the studies previously discussed. Schulz outlined the procedure for determining priority of projects. He explained that drainage agreements were necessary because without proper drainage "the wet gets underneath the road and softens the base" and in the wintertime "it is stuck in there with all the stone and freezes and expands, starts moving, and roads start cracking." He also described the entire process for a project, from obtaining bids and awarding contracts to making payments.

{¶ 21} Additionally, Schulz testified that the road and causeway projects undertaken during the period from 2010 through 2018 were "done in accordance with the recommendations of the consultants that the road commission * * * retained."

{¶ 22} On cross-examination, Schulz explained the process for installing a new pavement section, which included removing the existing road, putting in a drainage system, and constructing a new road.

{¶ 23} JIPOA's last witness was Karen Gannon, a resident of Johnson's Island, who has held various offices in JIPOA, including trustee, president, and most recently, secretary. She explained the process by which JIPOA invoices property owners for their share of the road work, which includes the cost for printing, mailing and using an accounting firm.

{¶ 24} Gannon testified that appellants and thirteen others have not paid for road work, so JIPOA has had to pay the amounts owed by these property owners to the road commission. She also testified that the invoices sent to appellants are not based upon the operating agreement, but on the common law understanding that, as property owners, "it is fair to pay our share of the repair and maintenance of our island roads and causeway." She acknowledged the amount billed to appellants is the same amount billed to JIPOA by the road commission.

{¶ 25} Kelty, Schulz, and Gannon also testified that they have seen appellants on island roads other than those providing access to and from appellants' property.

{¶ 26} On the second day of trial, appellants requested a directed verdict. The court reserved its ruling and Betty Cianciola was called to testify. She stated when she and her husband purchased their property 31 years ago, the roads were gravel, which were not difficult to drive on. She detailed her route to and from her property, "[f]rom

Bayshore down Gaydos over the causeway and down Memorial Shoreway," and she has no use for Confederate Drive or other Bayhaven roads unless she is visiting friends.

{¶ 27} Mrs. Cianciola explained that prior to the road commission, JIPOA performed the road repair and maintenance and the roads were "fine." She stated that she and her husband were members of JIPOA until 2008, and during the period at issue here, she did not have advance notice of road work done on the island. She asserted that she and her husband have not paid for any road construction projects because "[t]hey are using the operating agreement," but she would pay if it was based on common law. She disclosed that she was not able to look at the road commission website when she tried. When it was discussed that appellants' share would actually be larger if the total share was apportioned based upon number of lots, Mrs. Cianciola did not disagree.

{¶ 28} Anthony Cianciola testified, and his testimony was similar to his wife's. He agreed he had an obligation to contribute to "reasonable repair and maintenance costs" and would "be willing to pay" if his cost was based on common law. He acknowledged that the road in front of his and his wife's house had been rebuilt by the road commission.

{¶ 29} On May 4, 2020, the trial court issued its decision and judgment entry making the following findings.

> In the present case, the Court finds that the [appellants] have an easement to use the roads and causeway on Johnson's Island and that easement grantees, including [appellants], have a common law obligation to

> contribute to the maintenance and repair of those easements. The Court finds that the Road Commissions [sic] has undertaken only the appropriate and necessary repairs and maintenance on those roads and causeway. The Court finds the Operating Agreement to be enforceable and further finds that the "proportionate share" is properly defined as an equal share (1/300) for each property owner on Johnson's Island. The Court finds that [appellants] have been unjustly enriched by filing [sic] to pay the invoices from JIPOA for the repairs and maintenance from 2010 – 2018.

{¶ 30} The court awarded JIPOA $3,109 less $150 already paid, denied appellants' motion for a directed verdict, and dismissed appellants' counterclaim. Appellants timely appealed this decision.

Arguments

{¶ 31} The parties agree that appellants have a common law obligation to pay a reasonable cost for the repair and maintenance of some island roads. However, the parties disagree significantly on the amount and how it is to be calculated.

{¶ 32} Appellants contend they are required to pay an amount for the maintenance and repair of the roadways they actually use leading to their home. However, appellants argue the amount sought by JIPOA and awarded by the trial court includes an amount for roadways they do not use, administrative costs for JIPOA and the road commission, entities to which they do not belong, and the cost of upgrades and replacement projects initiated by the road commission that go beyond their common law obligation.

{¶ 33} Appellants direct our attention to *Koch v. J & J Ranch, LLC.*, 2013 WY 51, 299 P.3d 689, wherein one easement holder improved a common roadway and asked his neighbor, who also held an easement over the roadway, to contribute to the cost. In determining whether the defendant neighbor should contribute to the cost, the court looked at the following factors:

> (1) the amount and intensity of each party's actual use of the road and the benefits they derive from that use; (2) whether a party had notice of and an opportunity to participate in repair and maintenance decisions; (3) whether the work consisted of reasonable and necessary repairs and maintenance, rather than improvements to the road; (4) whether the quality and price of the work was reasonable; and (5) the value of other monetary or in-kind contributions to repair and maintenance made by the parties. *Id.*, at ¶ 21, citing *Rageth v. Sidon Irrigation District*, 2011 WY 121, 258 P.3d 712, ¶ 22 and *Freeman v. Sorchych*, 226 Ariz. 242, 245 P.3d 927, 935-36 (App.2011).

{¶ 34} Appellants contend that application of these factors leads to the conclusion that they had no duty to pay for much of the road work completed by the road commission. They argue: (1) they only use Memorial Shoreway Drive and the causeway, with the exception of incidental use of the other roads and thus they derive no real benefit from the repair and maintenance of the other roads; (2) they receive no notice or information regarding the roadwork and have no opportunity to participate in the road

repair and maintenance decisions; and (3) the majority of the projects undertaken by the road commission went beyond necessary repair and maintenance and included completely removing, rebuilding and replacing those roads. Appellants do not object to the quality and price of the road work.

{¶ 35} As additional support for their argument that all of the work performed was not necessary repair and maintenance, appellants point to language in documents from JIPOA and the road commission referencing road and drainage improvements "in addition to normal maintenance," the building of new roads, and a report entitled "Roadway Evaluation and Upgrade Program" which includes the development of "a recommended long term roadway upgrade program" as well as scheduled road maintenance and needed repairs. They cite to cases distinguishing between maintenance and upgrades, including *Wiebelt v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 93AP-117, 1993 WL 238846 (June 24, 1993) (Ohio Department of Transportation's duty to maintain state highways involves only the duty to preserve the existing highways, not to initiate substantial improvements) and *Whitehair v. Stiers*, 5th Dist. Guernsey No. 15-CA-18, 2016-Ohio-348 (court determined using gravel to replenish pathway was an improvement, not a repair, based on the language of the right of way).

{¶ 36} Appellants further assert that JIPOA cannot establish a claim of unjust enrichment as appellants derive no benefit from the repair of the majority of the roads on the island, and JIPOA was obligated by the operating agreement to make the repairs and

incur the cost, and that any benefit to appellants was merely incidental to JIPOA's duty under the operating agreement.

{¶ 37} Lastly, in their second assignment of error, appellants assert that the trial court's finding that the operating agreement was enforceable and its award of the full amount of the annual road maintenance assessments determined by the road commission are contrary to prior decisions of this court and the trial court itself, and therefore violate the doctrines of res judicata and stare decisis.

{¶ 38} JIPOA counters the road commission, as created by the operating agreement, merely provides the structure for determining how to manage the repair and maintenance of the roads when there are 300 easement holders, and the assessments are not an attempt to enforce the operating agreement. As additional evidence that it is not seeking to enforce the operating agreement, JIPOA points out that the operating agreement provides for charging interest against the nonpaying property owners, filing property liens, and for the collection of costs and attorney fees, all of which JIPOA has not attempted. JIPOA further argues its claims are based upon appellants' common law obligation to pay a portion of the cost of maintaining the easement, and the evidence presented established the reasonableness and necessity of the repairs and maintenance performed by the road commission.

{¶ 39} With respect to appellants' reliance on the test set forth in *Koch*, JIPOA distinguishes *Koch,* where only two easement owners were involved, from the present case involving approximately 300 easement holders, and cites to *Lake Lookover Property*

Owner's Assn v. Olsen, 348 N.J.Super. 53, 791 A.2d 270 (2002) as a more applicable case.

{¶ 40} *Lake Lookover* involved an attempt by a property owners' association, which owned a lake and connected beaches as well as a dam on the lake, to levy assessments on owners of property surrounding the lake after the association entered into a consent judgment with the New Jersey Department of Environmental Protection, and another entity. The court found the owners of the surrounding property, who had easements to use the lake, were responsible for the cost of repairing the dam.

{¶ 41} Additionally, JIPOA argues that the factors set forth in *Koch* do not support appellant's position. First, JIPOA contends it would be impossible to determine the individual usage, per year, of each of the 300 property owners. Second, JIPOA asserts that appellants were provided the opportunity to attend road commission meetings, or meetings held by JIPOA, at which both the road projects and assessments were discussed, and JIPOA points out that appellants did not otherwise attempt to communicate with the road commission or JIPOA regarding their concerns. With respect to the reasonableness and necessity of the repairs, JIPOA cites to testimony from the engineering experts.

{¶ 42} In response to JIPOA's argument, appellants take issue with the inclusion of the organizations' administrative expenses, citing to *Sandy Beach Apt. Ltd. v. Mitiwanga Park Company*, 6th Dist. Erie Nos. E-06-041, E-06-040, and E-06-042, 2008-Ohio-606 as support for their argument that "an association has no authority to charge administrative costs to nonmembers."

{¶ 43} Appellants also contend there are only 14 property owners out of the approximately 300 owners who do not pay the annual road assessments, and with such a small number, it would not be that difficult to determine what roads appellants actually use, or what costs are associated with the roads that appellants use. Additionally, appellants insist that any attempt on their part to attend a meeting would have been fruitless and they made their opposition known by refusing to sign the operating agreement and by bringing suit against JIPOA to ensure the operating agreement was not enforced against them.

{¶ 44} Appellants also distinguish *Lake Lookover* from the present case as in that case, the dam was found to be unsafe and the state of New Jersey had issued directives to the owner to repair and reconstruct the dam. Lastly, appellants reiterate their argument that in awarding the assessment amount, the trial court was making an award based upon the operating agreement. Appellants maintain the operating agreement established the road commission and provided authority for JIPOA to levy assessments against non-members.

Standard of Review

{¶ 45} Appellants argue that the standard of review is de novo as the trial court's order is based upon an "erroneous standard or a misconstruction of the law." JIPOA, on the other hand, argues that the trial court's allocation of costs based upon unjust enrichment is subject to an abuse of discretion standard.

{¶ 46} With respect to questions of law, including questions of law with respect to JIPOA's declaratory judgment action, we agree with appellants that the appropriate standard of review is de novo. *Buehrer v. Meyers*, 2020-Ohio-3207, 155 N.E.3d 222, ¶ 12-13 (6th Dist.), citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 13 and *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4.

{¶ 47} We disagree with appellants' broader claim that this entire appeal is to be reviewed using a de novo standard. The parties agree that appellants are easement holders and as easement holders, are responsible for a portion of the necessary maintenance and repair of roads upon which they have an easement. The trial court also found this to be the applicable law. Further, both parties rely on Restatement of the Law Third, Property (Servitudes), Section 4.13(4) (2000) as support for this duty. However, the parties disagree over what costs appellants are responsible for under this law. With respect to these issues, we do not find that de novo is the appropriate standard of review.

{¶ 48} JIPOA argues that an abuse of discretion standard applies as the trial court was exercising its equitable jurisdiction. A trial court's exercise of its equity jurisdiction is reviewed for an abuse of discretion. *KeyBank, N.A. v. MRN Ltd. Partnership*, 193 Ohio App.3d 424, 2011-Ohio-1934, 952 N.E.2d 532, ¶ 44 (8th Dist.), citing *Sandusky Properties v. Aveni*, 15 Ohio St.3d 273, 274 - 275, 473 N.E.2d 798 (1984).

{¶ 49} Here, the trial court awarded JIPOA damages based upon the equitable doctrine of unjust enrichment, and thus, we find abuse of discretion to be the appropriate

standard of review. Under this standard, we consider whether the trial court's decision was "arbitrary, unreasonable, or unconscionable." *Sandusky Properties* at 275.

Law and Analysis

{¶ 50} Generally, "'[a]n easement is the interest in the land of another, created by prescription or express or implied grant, that entitles the owners of the easement, the dominant estate, to a limited use of the land in which the interest exists, the servient estate.' (Citations omitted.)" *Shikner v. Stewart*, 6th Dist. Ottawa No. OT-09-015, 2010-Ohio-1478, ¶ 24, quoting *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App.3d 57, 66, 740 N.E.2d 328 (4th Dist.2000). Under the common law, an owner of an easement is obligated to perform reasonable repairs and maintenance when necessary. *Cianciola 2*, 6th Dist. Ottawa No. OT-17-027, 2018-Ohio-2037, at ¶ 17; *National Exchange Bank v. Cunningham*, 46 Ohio St. 575, 589, 22 N.E. 924(1889) ("The burden devolves upon the owner of the dominant estate of making whatever repairs are necessary for his use of the easement.").

{¶ 51} In cases, such as this one, where there are multiple easement owners, Restatement of the Law Third, Property (Servitudes), Section 4.13(4) states that "holders of separate easements * * * who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate." Comment e to this section further explains, in relevant part, that "[n]o affirmative duty to initiate repair is imposed by this section, but once repair or

maintenance is reasonably undertaken by one or more of the servitude beneficiaries, the others have a duty to contribute to the reasonable costs. The responsibility of each user should reflect a fair proportion of the costs. The basis of fair apportionment will vary depending on the circumstances."

{¶ 52} While appellants acknowledge they have an easement over the roads on Johnson's Island that provide them direct access to their home, specifically the causeway and Memorial Shoreway Drive, and thus, have a duty to pay their fair share of the cost to repair and maintain those roads, they argue that they do not have an obligation to repair other roads on Johnson's Island. The trial court found that appellants have an easement to use all the roads on Johnson's Island. Based upon the evidence provided, we agree with this conclusion.[3]

{¶ 53} As appellants have an easement over all of the roads on Johnson's Island, they have a common law obligation to contribute to the reasonable cost to repair and maintain these roads. Appellants have argued that the amounts awarded go beyond the reasonable costs for repair and maintenance and include the costs of improvements and upgrades as well as unrelated costs such as administrative costs for both the road commission and JIPOA.

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[3] Although not binding on appellants, as they were not parties to that action, we note this finding is consistent with the trial court's finding in *Baycliffs Homeowner's Association, Inc. v. Johnson's Island Property Owners' Assn.*, Ottawa C.P. No. 04-CVH-202 (June 7, 2007).

{¶ 54} We first note the fact that the work was done by the road commission and the amount charged is equal to the amount of the assessments does not necessarily mean that these charges were attempts to enforce the operating agreement against appellants. In *Cianciola 2*, we did not find references to the operating agreement and road commission to be determinative, concluding that references to these in the complaint "merely explain[ed] the manner in which JIPOA has attempted to collect the proportionate share of road maintenance and repair expenses." *Cianciola 2* at ¶ 14. The issue is whether JIPOA's claims can be established solely based upon common law principles. *See id*. at ¶ 15.

{¶ 55} Here, JIPOA's claims stem from the doctrine of unjust enrichment and the common law duty of an easement holder to keep the easement in repair. The trial court found the road commission undertook "only the appropriate and necessary repairs and maintenance to the roads and causeway." Additionally, as the trial court awarded the entire amount requested, which included the administrative costs of JIPOA and the road commission, we conclude that the trial court found these amounts necessary costs of repairing and maintaining the roads. We do not find these conclusions to be an abuse of discretion.

{¶ 56} Appellants also contend that the trial court erred in concluding that they had been unjustly enriched, such that JIPOA was entitled to recover these amounts. The elements of an unjust enrichment claim are as follows: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and

(3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Hammill Mfg. Co. v. Park-Ohio Industries, Inc.*, 6th Dist. Lucas No. L-12-1121, 2013-Ohio-1476, ¶ 14, citing *L & H Leasing Co. v. Dutton*, 82 Ohio App.3d 528, 534, 612 N.E.2d 787 (3d Dist.1992). Appellants contend JIPOA has not met these requirements, and further, that any benefit to appellants was merely incidental to JIPOA discharging its own commitments as JIPOA was bound to make these payments to the road commission by the settlement agreement in *Baycliffs Homeowners' Assn v. Johnson's Island Property Owners' Assn.*, Ottawa C.P. No. 04-CHV-202 and by the operating agreement. In support, appellants cite to *Sandy Beach*, 6th Dist. Erie Nos. E-06-041 and E-06-042, 2008-Ohio-606.

{¶ 57} In *Sandy Beach*, property owners in the Mitiwanga Subdivision filed suit against the Mitiwanga Park Company ("Mitiwanga"), a company that governed and maintained the subdivision, regarding attempts by the company to enforce by-laws against the property owners. The trial court granted summary judgment to Mitiwanga on the issue of the validity and enforceability of the by-laws and also found the property owners liable under the doctrine of unjust enrichment from disavowing the by-laws and assessments imposed by Mitiwanga under the theory that the property owners had derived a benefit from the use of the common areas.

{¶ 58} On appeal, we concluded the by-laws were not restrictive covenants and therefore not binding on the property owners. In so concluding, we stated "there is no statutory or common law principle that requires the subdivision lot owners to become a

member of Mitiwanga and share in the cost of the maintenance of the common areas." *Id*. at ¶ 38. Additionally, we concluded the trial court erred in finding that the property owners were liable for the upkeep of the common areas based upon unjust enrichment. We reasoned that "where a party does not agree to sharing the costs of maintaining the common areas, there is no basis for making them pay for such maintenance that was done." *Id*. at ¶ 43.

{¶ 59} We find *Sandy Beach* to be distinguishable with regard to JIPOA's unjust enrichment claim for a number of reasons. In *Sandy Beach*, we found relevant to the equitable analysis the fact that "Mitiwanga told [some of the defendant property owners] that they were not entitled to use the common areas." More importantly, since *Sandy Beach*, we have acknowledged that there is a "common law obligation of an owner of an easement to perform reasonable repairs and maintenance when necessary." *Cianciola 2* at ¶ 17. Unlike this case, in *Sandy Beach* there was no finding that the property owners had an easement to use the common areas. *See Sandy Beach* at ¶ 45-46.

{¶ 60} After reviewing the parties' arguments and the evidence set forth, we do not find that the trial court's finding of unjust enrichment was an abuse of discretion.

{¶ 61} In their second assignment of error, appellants argue the trial court's decision failed to follow the doctrines of res judicata and stare decisis. Specifically, appellants allege that the trial court's decision was contrary to prior decisions of both the trial court and this court that the operating agreement was not binding on appellants. Appellants reference the trial court's language finding the operating agreement to be

enforceable. While the court's statement does not specifically state it is enforceable *against appellants*, this language is troubling and in violation of the prior court orders.

{¶ 62} "Under App.R. 12(A)(1)(a) and (B), we have the authority to 'affirm, modify, or reverse' trial court judgments, which encompasses the ability to 'render the judgment the trial court should have entered.'" *Quest Workforce Sols., LLC v. Job1USA, Inc.*, 6th Dist. No. L-17-1194, 2018-Ohio-3304, 119 N.E.3d 817, ¶ 23, quoting *Bell v. Turner*, 4th Dist. Highland Nos. 12CA14 and 12CA15, 2013-Ohio-1323, ¶ 20. Therefore, pursuant to App.R. 12, we strike the language in the decision and judgment entry finding the operating agreement to be enforceable.

{¶ 63} However, we find that the trial court's judgment is supportable without this language. It appears that the trial court's statement was limited to the definition of "proportionate share," as in both places where the enforceability of the operating agreement is discussed, it is in a sentence with the finding that the "proportionate share" is defined as "an equal share (1/300) for each property owner on Johnson's Island." The conclusion that a "proportionate share" is equivalent to an equal share for each property owner on Johnson's Island, without consideration of amount of lots, or size of lots, is supported by the evidence and can be reached without consideration of the operating agreement.

{¶ 64} Comment e to Restatement of the Law Third, Property (Servitudes), Section 4.13(4) states that "[t]he basis of fair apportionment will vary depending on the circumstances." There is testimony in the record that different ways of apportionment

had been considered and it was concluded that the use of the roads would not be significantly different based upon the size or amount of lots, or the value of a property, and that it was equitable to apportion the cost on a per owner basis. There was additionally evidence put forth at trial that the appellants, as owners of two and one-half lots on Johnson's Island, benefit from the per owner apportionment and would actually pay a larger percentage if "proportionate share" was based upon amount of lots owned. While we recognize that appellant has suggested that the costs should be apportioned based on usage of the roads, after considering the evidence and the specific facts of this case, we find it equitable to define "proportionate share" as an equal share (1/300) for each Johnson's Island property owner.

{¶ 65} Appellants further argue that the trial court's determination that appellants' proportionate share is the same as the annual assessment is similarly problematic. Appellants assert the assessment amounts are based upon the operating agreement and are not consistent with the common law duty to pay for repair and maintenance expenses. For the reasons we have set forth above, we do not find this argument persuasive.

{¶ 66} Conclusion

{¶ 67} Having carefully considered the record and the parties' arguments, we find appellants' first assignment of error not well-taken, and appellants' second assignment of error well-taken, in part. Accordingly, the following language is stricken from the trial court's judgment entry. In the second paragraph on page three of the trial court's judgment, we strike "finds the Operating Agreement to be enforceable and further." On

page four of the court's opinion, we strike "that the Operating Agreement is enforceable and." We affirm the remainder of the judgment of the Ottawa County Court of Common Pleas. Pursuant to App.R. 24, appellants are hereby ordered to pay the costs incurred on appeal.

Judgment affirmed
and modified.

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

Mark L. Pietrykowski, J.

_____
JUDGE

Thomas J. Osowik, J.

_____
JUDGE

Myron C. Duhart, J.
CONCUR.

_____
JUDGE

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

[Cite as *AJZ's Hauling, L.L.C. v. TruNorth Warranty Program of N. Am.*, 2021-Ohio-1190.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

AJZ's HAULING, L.L.C., :

Plaintiff-Appellee, :

No. 109632

v. :

TRUNORTH WARRANTY PROGRAMS OF NORTH AMERICA, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 8, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-926630

Appearances:

Meyers, Roman, Friedberg & Lewis, and Ronald P. Friedberg, *for appellee.*

Schneider Smeltz Spieth Bell, L.L.P., and Mark M. Mikhaiel, *for appellant.*

ANITA LASTER MAYS, P.J.:

{¶ 1} Defendant-appellant TruNorth Warranty Programs of North America ("TruNorth") brings this appeal challenging the trial court's judgment denying TruNorth's motion to stay proceedings and compel arbitration, or alternatively, to

dismiss for lack of jurisdiction and improper venue. TruNorth argues that the trial court erred by declining to apply the doctrine of res judicata, erred by declining to enforce the applicable arbitration and forum selection provisions, and erred by denying TruNorth's motion without holding a hearing. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} The instant matter involves a dispute regarding a truck that plaintiff-appellee, AJZ Hauling, L.L.C., ("AJZ") purchased in October 2018. AJZ is a Pennsylvania limited liability company with its principal place of business in Pittsburgh. AJZ is registered in the state of Ohio as a foreign limited liability company.

{¶ 3} TruNorth is a North Carolina entity with its principal place of business in Huntersville. AJZ alleged in its complaint that TruNorth "transacts business in Cuyahoga County, Ohio." Complaint at ¶ 2.

{¶ 4} In October 2018, AJZ purchased a 2011 Kenworth truck from Premier Truck Sales & Rental, Inc. ("Premier"). Premier is an Ohio-based company, with its principal place of business in Valley View. The purchase price for the truck was $119,300. The purchase agreement provided that the purchase price included a two-year warranty on the engine, transmission, rear ends, and after treatment from TruNorth. The truck was covered by TruNorth's "All-Inclusive Component Breakdown Limited Warranty Agreement."

{¶ 5} Shortly after taking possession of the truck, AJZ experienced significant engine- and transmission-related issues. Between October 31, 2018, and January 16, 2019, AJZ submitted five claims and repair estimates to Premier and TruNorth.

{¶ 6} AJZ claimed that the claims and repairs should have been covered under and paid by TruNorth, pursuant to the two-year warranty set forth in the truck's purchase agreement. TruNorth did not provide coverage for these claims and repairs. AJZ paid out-of-pocket to have the truck repaired by third parties.

{¶ 7} AJZ commenced two civil actions based on the issues related to the truck and TruNorth's failure to provide coverage pursuant to the warranty agreement. The same judge presided over both actions.

A. CV-19-915772

{¶ 8} First, on May 23, 2019, AJZ filed a complaint against Premier and TruNorth. AJZ asserted causes of action against Premier for breach of contract, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, fraudulent misrepresentation, and negligent misrepresentation/inducement. AJZ asserted causes of action against TruNorth for breach of contract and breach of the implied covenant of good faith and fair dealing.

{¶ 9} On July 11, 2019, TruNorth filed a combined motion to stay proceedings, pursuant to R.C. 2711.02, and compel arbitration, pursuant to R.C. 2711.03, on the claims AJZ asserted against TruNorth. Alternatively, TruNorth moved to dismiss the claims asserted by AJZ for lack of personal jurisdiction, subject

matter jurisdiction, and improper venue. TruNorth's motion was based on the "dispute resolution" provision in its "All-Inclusive Component Breakdown Limited Warranty Agreement." TruNorth submitted a copy of the warranty agreement in support of its motion to stay, compel arbitration, or alternatively to dismiss. AJZ's representative, Kristi LaBryer, signed the front page of the agreement on October 29, 2018, and initialed each page. The dispute resolution provides,

> This Agreement shall be governed by and in accordance with the laws of the State of North Carolina, USA. The parties agree that any action, suit, or proceeding arising out of or related to this Agreement, not submitted to arbitration, shall be instituted only in the state or federal courts located in Mecklenburg County, North Carolina, USA. In the event of any dispute between parties concerning coverage under this Agreement, a written request to TruNorth™ for Arbitration must be submitted. Customer agrees that Arbitration is the sole method of dispute resolution between parties. Customer's written request for Arbitration must be done and received by TruNorth™ within 30 days of the day claim is filed. Each party will select one certified arbitrator. The two arbitrators will then select a third arbitrator. Each of the parties will pay equally the total of the three arbitrators selected. The in-person arbitration hearing will take place only in Mecklenburg County, North Carolina unless both parties agree in writing to a different hearing location. The rules utilized by the American Arbitration Association will apply. A majority decision from the three arbitrators will be binding and final. The determination and award of the arbitrators may be filed by the prevailing party in a court of proper jurisdiction and shall thereafter have the full force and effect of a judgment at law.

{¶ 10} In opposing TruNorth's motion to compel arbitration or dismiss, AJZ argued that the arbitration provision in the warranty agreement is unenforceable due to unconscionability. Regarding the forum selection clause, AJZ argued that the clause was unenforceable as a product of "overreaching," and that enforcement of the clause would be unreasonable and unjust. In support of its brief in opposition,

AJZ submitted an affidavit of LaBryer, the purchase agreement for the truck, and a copy of TruNorth's warranty agreement. The purchase agreement contained an order date of October 12, 2018, and provided that the truck's purchase price included "2 year [TruNorth] warranty on engine, transmission, rear ends and after-treatment." The purchase agreement made no mention of the dispute resolution provision contained in the warranty agreement.

{¶ 11} On August 2, 2019, TruNorth filed a reply brief in support of its motion to stay, compel arbitration, or alternatively to dismiss. Therein, TruNorth argued that the arbitration provision was not unconscionable and that the forum selection provision was valid and enforceable.

{¶ 12} There is no indication in the record that the trial court held a hearing on TruNorth's motion to stay and compel arbitration, or to dismiss. On August 6, 2019, the trial court granted TruNorth's motion to compel arbitration, pursuant to R.C. 2711.02 and 2711.03. The trial court's judgment entry provided, in relevant part, "[t]he court grants [TruNorth's] motion to stay the proceedings and to compel arbitration as to [the claims AJZ asserted against TruNorth] pursuant to R.C. 2711.02 and 2711.03. The court finds that [AJZ's] claims are subject to a valid and enforceable arbitration agreement." AJZ did not file an appeal challenging the trial court's judgment.

{¶ 13} AJZ filed a notice of dismissal on November 7, 2019. The trial court dismissed AJZ's claims against TruNorth without prejudice on November 8, 2019.

After a settlement was reached between AJZ and Premier, AJZ's claims against Premier were dismissed with prejudice.

B. CV-19-926630

{¶ 14} Second, on December 16, 2019, AJZ filed a complaint against TruNorth asserting causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.

{¶ 15} On February 10, 2020, TruNorth again filed a combined motion to stay proceedings, pursuant to R.C. 2711.02, and compel arbitration, pursuant to R.C. 2711.03. Alternatively, TruNorth moved to dismiss AJZ's complaint for lack of personal jurisdiction, subject matter jurisdiction, and improper venue.

{¶ 16} In support of its motion to compel arbitration, TruNorth argued that the parties entered into a "valid and enforceable arbitration agreement, which covers all claims between the parties." Alternatively, in support of its motion to dismiss, TruNorth argued that AJZ's complaint should be dismissed "in its entirety pursuant to Civ.R. 12(B)(2), (3) for lack of personal jurisdiction and/or improper venue." TruNorth maintained that the warranty agreement's forum selection clause mandated all proceedings related to the warranty agreement be commenced in North Carolina.

{¶ 17} TruNorth referenced the trial court's August 6, 2019 judgment in CV-19-915772 granting TruNorth's motion to compel arbitration and finding that AJZ's claims against TruNorth were subject to a valid and enforceable arbitration agreement. In support of its motion to compel or dismiss, TruNorth submitted a

copy of the trial court's August 6, 2019 journal entry in CV-19-915772, and a copy of TruNorth's "All-Inclusive Component Breakdown Limited Warranty Agreement," dated October 29, 2018.

{¶ 18} On February 24, 2020, AJZ filed a brief in opposition to TruNorth's motion to compel arbitration or dismiss. Therein, AJZ argued again that the arbitration and forum selection clauses were unenforceable. Regarding the arbitration provision, AJZ asserted that (1) it did not receive the TruNorth warranty agreement from Premier until four days after accepting delivery of the truck on October 25, 2018; (2) Premier sent the warranty agreement via email; (3) AJZ was never provided a copy of the warranty agreement that had been signed by Premier or TruNorth; (4) the warranty agreement's "dispute resolution" provision is "no more conspicuous, and in fact is less conspicuous, than other sections of the TruNorth Warranty Agreement"; (5) the arbitration provision does not provide specific details concerning the arbitration process; (6) neither Premier nor TruNorth informed AJZ that the warranty agreement contained an arbitration provision, or that the provision specified that arbitration would take place in North Carolina; (7) AJZ has never been involved in arbitration proceedings, and is unfamiliar with the arbitration process; (8) AJZ was not aware that it could object to or seek to modify the arbitration provision, and AJZ was unable to do so because it did not receive the warranty agreement until four days after paying for and receiving the truck; and (9) AJZ was not represented by counsel in relation to the purchase agreement with Premier or the TruNorth warranty agreement.

{¶ 19} Regarding the forum selection clause, AJZ argued that (1) AJZ is not operated to conduct, and has not conducted business in North Carolina, (2) the truck has never been in North Carolina, and the truck has never been owned by anyone in North Carolina, (3) the people with personal knowledge of the truck's defects, TruNorth's warranty, and AJZ claims against TruNorth are located in northeast Ohio or western Pennsylvania, (4) there is no one in North Carolina who has personal knowledge about the issues related to the truck, and (5) no one from TruNorth, who is located in North Carolina, has ever seen, inspected, or repaired the truck.

{¶ 20} In support of its brief in opposition, AJZ submitted an affidavit of LaBryer, a copy of the trial court's August 6, 2019 journal entry in CV-19-915772, the October 12, 2018 purchase agreement for the truck between Premier and AJZ, and a copy of TruNorth's "All-Inclusive Component Breakdown Limited Warranty Agreement."

{¶ 21} In her affidavit, LaBryer confirmed AJZ's assertions about the arbitration and forum selection provisions. She averred that AJZ did not receive the warranty agreement via email until four days after paying for and receiving the truck, and that neither Premier nor TruNorth advised her that the warranty agreement contained an arbitration provision or forum selection clause.

{¶ 22} On February 28, 2020, TruNorth filed a reply brief in support of its motion to compel or dismiss. Therein, TruNorth argued that AJZ "should not have executed an Agreement without fully reading and understanding its terms."

TruNorth asserted that AJZ is an established business entity, not "an uninformed, unsophisticated small shop that should be treated more like an individual consumer[.]"

{¶ 23} TruNorth disputed AJZ's argument that the trial court's August 6, 2019 judgment in CV-19-915772 granting TruNorth's motion to compel arbitration was not a final appealable order. Because AJZ did not file an appeal challenging the trial court's August 6, 2019 judgment, TruNorth argued that AJZ was barred by res judicata from relitigating the issue of the arbitration agreement's enforceability.

{¶ 24} There is no indication in the record that the trial court held a hearing on TruNorth's motion to stay and compel, or to dismiss in the second case. On March 7, 2020, the trial court denied TruNorth's motion to compel or dismiss. The trial court's journal entry provides, in relevant part,

> The court finds the arbitration provision to be procedurally and substantively unconscionable.
>
> The court finds a voluntary meeting of minds did not occur as the arbitration agreement and forum selection clause were never explained to [AJZ] and [AJZ] did not understand any information regarding arbitration proceedings or the surrendering of certain appellate rights. The language compelling arbitration was inconspicuous and the warranty was provided by a third-party and not signed by [TruNorth]. Further, [AJZ] was not provided a copy of the agreement until four days after taking possession of the vehicle at issue.
>
> The court finds enforcement of the forum selection clause would be unreasonable and unjust as [AJZ] has no contacts with North Carolina nor does anyone in North Carolina have any contacts or information regarding the vehicle at issue in this suit.

{¶ 25} It is from this judgment that TruNorth filed the instant appeal on March 24, 2020. TruNorth assigns three errors for review:

I. The trial court erred in refusing to apply res judicata against AJZ since the same court had previously held the Arbitration and Forum Selection Clauses to be "valid and enforceable" against AJZ on August 6, 2019 in case captioned AJZ's Hauling, LLC v. Premier Truck Sales and Rental, Inc. et al, Cuyahoga County Case No. CV-19-915772.

II. The trial court erred when it failed to hold a hearing on the motion to compel arbitration.

III. The trial court erred in its refusal to follow either the arbitration provision or the venue provision.

II. Law and Analysis

{¶ 26} All three of TruNorth's assignments of error pertain to the trial court's March 7, 2020 judgment denying TruNorth's motion to stay proceedings and compel arbitration, or alternatively to dismiss.

A. Res Judicata

{¶ 27} In its first assignment of error, TruNorth argues that the trial court erred by declining to apply the doctrine of res judicata to the trial court's August 6, 2019 judgment in CV-19-915772 granting TruNorth's motion to compel arbitration and determining that the claims asserted against TruNorth were subject to a valid and enforceable arbitration agreement.

{¶ 28} "[T]he doctrine of res judicata requires a final order of the court to preclude relitigation of issues that have or could have been raised in a prior proceeding." *Deutsche Bank Natl. Co. v. Caldwell*, 8th Dist. Cuyahoga No. 100594, 2014-Ohio-2982, ¶ 19. "'[I]f a final appealable order is not timely appealed, all matters that could have been reviewed had an appeal been taken become res judicata and are not reviewable in a related or subsequent proceeding or appeal.'"

Parker v. Jamison, 4th Dist. Scioto No. 02CA002857, 2003-Ohio-7295, ¶ 10, quoting *Jeffers v. Jeffers*, 10th Dist. Franklin No. 00AP-442, 2001 Ohio App. LEXIS 501, 3 (Feb. 13, 2001). The application of res judicata is a question of law that we review de novo. *Hempstead v. Cleveland Bd. of Edn.*, 8th Dist. Cuyahoga No. 90955, 2008-Ohio-5350, ¶ 6, citing *Gilchrist v. Gonsor*, 8th Dist. Cuyahoga No. 88609, 2007-Ohio-3903, ¶ 18.

{¶ 29} It is undisputed that the trial court's August 6, 2019 judgment granting TruNorth's motion to compel was a final appealable order. Although AJZ disputed whether the judgment was a final appealable order in opposing TruNorth's motion to stay and compel arbitration in the second action, AJZ concedes in its appellate brief that the trial court's August 6, 2019 order was a final appealable order under R.C. 2711.02(C).

{¶ 30} An order "that grants or denies a stay of a trial of any action pending arbitration * * * is a final order that may be reviewed * * * on appeal." R.C. 2711.02(C); *Dumas v. N.E. Auto Credit, L.L.C.*, 8th Dist. Cuyahoga Nos. 108151 and 108388, 2019-Ohio-4789, ¶ 6. "R.C. 2711.02(C) permits a party to appeal a trial court order that grants or denies a stay of trial pending arbitration, even when the order makes no determination pursuant to Civ.R. 54(B)." *Mynes v. Brooks*, 124 Ohio St.3d 13, 2009-Ohio-5946, 918 N.E.2d 511, syllabus; *see Duncan v. Wheeler*, 4th Dist. Scioto No. 09CA3296, 2010-Ohio-4836, ¶ 4, fn. 1 (pursuant to *Mynes*, the trial court's judgment denying a motion to stay proceedings pending arbitration of several claims was a final appealable order even though other claims remained

pending and the trial court's judgment did not make a finding of "no just reason for delay").

{¶ 31} In this appeal, TruNorth argues that because AJZ failed to file an appeal challenging the trial court's August 6, 2019 judgment in TruNorth's favor, res judicata barred the trial court from altering its prior determination that the arbitration agreement was valid and enforceable. AJZ, on the other hand, argues that it would be unjust and unfair to apply res judicata in this case. After reviewing the record, and based on the totality of the circumstances present in this case, we find that it would be unreasonable or unjust to strictly apply the doctrine of res judicata.

{¶ 32} The Ninth District has recognized that when a trial court granted the defendant's motion to stay and compel arbitration, and the plaintiff did not appeal the trial court's judgment, the trial court necessarily determined that the arbitration clause was valid and enforceable. *Heller v. Pre-Paid Legal Servs.*, 9th Dist. Summit No. 26376, 2013-Ohio-680, ¶ 21, citing *Dun-Rite Constr., Inc. v. Hoover Land Co.*, 9th Dist. Summit No. 25731, 2011-Ohio-4769, ¶ 10. The Ninth District concluded that the plaintiff was barred by res judicata from challenging the arbitrability of its claims on appeal from the trial court's judgment confirming the arbitrator's award. *Dun-Rite* at *id*. This court has also recognized that when a trial court grants or denies a motion to stay proceedings pending arbitration, the trial court's order "becomes final and must be appealed if the party intends to challenge the court's decision." *Fazio v. Gruttadauria*, 8th Dist. Cuyahoga No. 90562, 2008-Ohio-4586,

¶ 20, citing *Schmidt v. Bankers Title & Escrow Agency, Inc.*, 8th Dist. Cuyahoga No. 88847, 2007-Ohio-3924, ¶ 11.

{¶ 33} In certain instances, it is unreasonable or unjust to strictly apply the doctrine of res judicata. *See, e.g., State v. Linen*, 8th Dist. Cuyahoga Nos. 74070 and 74071, 2000 Ohio App. LEXIS 654, 17-18 (Feb. 17, 2000) (Patton, J., dissenting); *State v. Murnahan*, 63 Ohio St.3d 60, 65-67, 584 N.E.2d 1204 (1992) (recognizing that it may be unjust to apply res judicata in certain circumstances, such as when a defendant is unable to discover an ineffective assistance of appellate counsel claim, due to inadequate appellate counsel or the defendant's inability to identify appellate counsel's errors, within the time allotted for filing a motion for reconsideration or an appeal in the Ohio Supreme Court). "The binding effect of res judicata has been held not to apply when fairness and justice would not support it." *State ex rel. Estate of Miles v. Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786, 903 N.E.2d 311, ¶ 30, citing *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 491, 756 N.E.2d 657 (2001).

> "'[T]he doctrine of res judicata is to be applied in particular situations as fairness and justice require, and that it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.'" [*Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 386, 653 N.E.2d 226 (1995) (Douglas, J., dissenting)], quoting 46 American Jurisprudence[, 2d Judgments, Section 522, at 786-787 (1994)].

(Emphasis deleted.) *Davis* at 491.

{¶ 34} In the instant matter, the record reflects that the trial court summarily concluded in the first case that the arbitration provision was valid and enforceable. The trial court did not make any factual findings, set forth the reasoning for its

determination, or reference the evidence submitted by the parties. The trial court did not address AJZ's unconscionability argument, or reference the forum selection clause based upon which TruNorth alternatively moved to dismiss the case.

{¶ 35} After reviewing the record, it is evident that the trial court reconsidered its ruling in the first case that the arbitration agreement was valid and enforceable. It is evident that in the second case, the trial court conducted a more thorough and full review of the arbitration issue and the arguments presented in the parties' briefs. The trial court addressed (1) the issue of procedural unconscionability, (2) the issue of substantive unconscionability, (3) the affidavit submitted by AJZ's representative, Kristi LaBryer, and (4) the forum selection clause.

{¶ 36} Under the law of the case doctrine, "*the decision of a reviewing court* in a case remains the law of that case on legal questions involved for all subsequent proceedings in the case at both trial and reviewing levels." (Emphasis added.) *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). *Accord Rimmer v. CitiFinancial Inc.*, 2020-Ohio-99, 151 N.E.3d 988, ¶ 43 (8th Dist.). In this case, the trial court could, and had jurisdiction to, reconsider its prior ruling regarding the validity and enforceability of the arbitration provision. The trial court's prior holding that the arbitration provision was valid and enforceable was not entered by a reviewing court, and as a result the trial court's prior holding was not the law of the case. Had this court or the Ohio Supreme Court held that the arbitration

provision at issue was valid and enforceable, then TruNorth's argument that AJZ was precluded from relitigating the issue would have merit.

{¶ 37} Based on the trial court's complete and thorough analysis of the unconscionability issue in the second case, we find that it would be unreasonable and unjust to rigidly apply the doctrine of res judicata to prohibit the trial court from reconsidering its prior ruling in the first case. Furthermore, as set forth in further detail below, based on the trial court's complete and thorough analysis of the enforceability and unconscionability issues, we find that a remand for an evidentiary hearing to further develop the record is not necessary.

{¶ 38} TruNorth's first assignment of error is overruled.

B. Hearing

{¶ 39} In its second assignment of error, TruNorth argues that the trial court erred by failing to hold a hearing on the motion to stay and compel arbitration, despite TruNorth's request for a hearing. TruNorth contends that the trial court was required to hold a hearing pursuant to R.C. 2711.03.

{¶ 40} TruNorth filed a combined motion to stay proceedings and compel arbitration. In *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7, the Ohio Supreme Court explained that a motion to compel arbitration and a motion to stay proceedings are separate and distinct procedures that serve different purposes. *Id*. at ¶ 14. A party may choose to move for a stay of proceedings, petition for an order compelling arbitration, or seek both. *Id*. at ¶ 18.

{¶ 41} The Ohio Supreme Court held that a trial court is not required to conduct a hearing when a party moves for a stay pursuant to R.C. 2711.02. The trial court may stay proceedings "upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration[.]" *Id*. at ¶ 7.

{¶ 42} R.C. 2711.03, on the other hand, "applies where there has been a petition for an order to compel the parties to proceed to arbitration." *Id*. at ¶ 15. R.C. 2711.03 provides, in relevant part:

> (A) The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. Five days' notice in writing of that petition shall be served upon the party in default. Service of the notice shall be made in the manner provided for the service of a summons. *The court shall hear the parties*, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement.
>
> (B) If the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court *shall proceed summarily to the trial of that issue*.

(Emphasis added.)

{¶ 43} Accordingly, pursuant to R.C. 2711.03,

> where a party has filed a motion to compel arbitration, the court must, in a hearing, make a determination as to the validity of the arbitration clause. *Maestle*[, 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7, at ¶ 18]; *Benson v. Spitzer Mgt., Inc.*, [8th Dist. Cuyahoga No. 83558, 2004-Ohio-4751], ¶ 19; [*Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 163, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 20 (9th Dist.)]; *Boggs Custom Homes, Inc. v. Rehor*, [9th Dist. Summit No. 22211, 2005-Ohio-1129, ¶ 16]; *Herman v. Ganley Chevrolet, Inc.*[, 8th Dist.

> Cuyahoga Nos. 81143 and 81272, 2002-Ohio-7251]. Additionally, this court has held that the parties should be afforded an evidentiary hearing on the validity of an arbitration clause where unconscionability is raised as an objection to its enforceability. *See, e.g.*, *Bencivenni v. Dietz*, [8th Dist. Cuyahoga No. 88269, 2007-Ohio-637]; *Olah* [*v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga No. 86132, 2006-Ohio-694, ¶ 29-31] and cases cited therein; *Molina v. Ponsky*, [8th Dist. Cuyahoga No. 86067, 2005-Ohio-6349].

Post v. ProCare Automotive Serv. Solutions, 8th Dist. Cuyahoga No. 87646, 2007-Ohio-2106, ¶ 29.

{¶ 44} We acknowledge that the plain language of R.C. 2711.03 requires a trial court to hold a hearing on a motion to compel arbitration when the arbitration agreement's enforceability is raised. *See Post* at ¶ 29, citing *Maestle* at ¶ 18. In this case, in both of TruNorth's combined motions to stay proceedings and compel arbitration, TruNorth requested a hearing. There is no indication in the record that the trial court held a hearing regarding the enforceability of the arbitration provision in either the first or second civil actions.

{¶ 45} Nevertheless, based on the circumstances present in this case, and for the following three reasons, we are unable to conclude that the trial court's failure to hold an oral or evidentiary hearing constitutes reversible error. *See Moran v. Riverfront Diversified, Inc.*, 197 Ohio App.3d 471, 2011-Ohio-6328, 968 N.E.2d 1, ¶ 12 (2d Dist.). First, both of TruNorth's motions to stay and compel arbitration generically state "Hearing Requested." TruNorth did not specifically request an evidentiary or oral hearing on its motions to stay and compel arbitration.

{¶ 46} In *Chrysler Fin. Servs., Ams., L.L.C. v. Henderson*, 4th Dist. Athens No. 11CA4, 2011-Ohio-6813, appellants argued that the R.C. 2711.03's language that "[t]he court shall hear the parties" requires trial courts to hold oral or evidentiary hearings. *Id*. at ¶ 15. The Fourth District explained that some Ohio appellate courts, including the Eighth District, have not interpreted the language of R.C. 2711.03 that way. *Id*., citing *Mattox v. Dillard's, Inc.*, 8th Dist. Cuyahoga No. 90991, 2008-Ohio-6488, ¶ 15, *Liese v. Kent State Univ.*, 11th Dist. Portage No. 2003-P-0033, 2004-Ohio-5322, ¶ 43, and *Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806, 874 N.E.2d 795, ¶ 29-30 (5th Dist.). In *Mattox*, this court recognized that a trial court must grant a party's request for an oral hearing under R.C. 2711.03. However, the court explained, "an oral hearing is not mandatory absent a request." *Id*. at ¶ 15. Here, we find that an oral or evidentiary hearing was not mandatory based on TruNorth's general, unspecified request for a "hearing" on its motion to stay and compel.

{¶ 47} Second, the record reflects that the trial court did, in fact, "hear" the parties for purposes of R.C. 2711.03. In both civil actions, the parties fully and thoroughly briefed the enforceability and unconscionability issues pertaining to the arbitration provision. The parties submitted evidence in support of their respective briefs. *See Panzica Constr. Co. v. Zaremba, Inc.*, 8th Dist. Cuyahoga No. 95103, 2011-Ohio-620, ¶ 32-38 (holding that the trial court "heard" the parties for purposes of R.C. 2711.03 based on the fact that the parties were given an opportunity to fully brief the arbitration issue, both parties filed memoranda in support of their

respective positions, and the trial court issued a detailed opinion setting forth the rationale for its decision).

{¶ 48} In *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, the Ninth District recognized that the trial court failed to properly dispose of a motion to compel arbitration because the trial court failed to hold a hearing as required by R.C. 2711.03. *Id*. at ¶ 22-23. Nevertheless, the court proceeded to determine whether the arbitration clause was unconscionable, rather than remanding the matter to the trial court for a hearing, because the trial court afforded appellant the opportunity to conduct discovery and brief the issue of the validity of the arbitration clause, and the trial court issued an order on the arbitration clause based on the briefing. *Id*.; *see Marks v. Morgan Stanley Dean Witter Commercial Fin. Servs.*, 8th Dist. Cuyahoga No. 88948, 2008-Ohio-1820, ¶ 40 (holding that an evidentiary hearing on a motion to compel arbitration was not necessary because the trial court could adequately determine the arbitration issue based on parties' briefs and the evidence in the record).

{¶ 49} In the instant matter, both parties had an opportunity to brief the arbitration and unconscionability issues in both civil actions. The parties had an opportunity to submit, and did submit, evidence to the trial court in support of their respective positions. Based on the briefing and supporting evidence submitted by the parties, the trial court had an adequate record before it to determine if the arbitration agreement was valid and enforceable.

{¶ 50} Here, like *Panzica Constr.*, 8th Dist. Cuyahoga No. 95103, 2011-Ohio-620, the trial court in the second case fully and thoroughly considered the issues of enforceability and unconscionability and issued a detailed decision based on the parties' briefs and supporting evidence. The trial court specifically referenced LaBryer's affidavit in concluding that the arbitration provision was substantively and procedurally unconscionable.

{¶ 51} For all of the foregoing reasons and based on the totality of the circumstances present in this case, we find that the trial court "heard" the parties for purposes of R.C. 2711.03, and had an adequate record based upon which to determine whether the arbitration provision was valid and enforceable. Based on the record before this court, we cannot conclude that the trial court's failure to conduct an evidentiary or oral hearing constitutes reversible error or that a remand for a hearing is necessary.

{¶ 52} TruNorth's second assignment of error is overruled.

C. Enforcement of Dispute Resolution Provision

{¶ 53} In its third assignment of error, TruNorth argues that the trial court erred in refusing to enforce the arbitration provision or the forum selection clause in the warranty agreement's dispute resolution provision.

1. Arbitration Provision

{¶ 54} In Ohio, there is a strong public policy favoring arbitration of disputes. Ohio courts have recognized a "'presumption favoring arbitration'" that arises "'when the claim in dispute falls within the scope of the arbitration provision.'"

Taylor Bldg. Corp. of Am. v. Benfield, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 27, quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859 (1998). "[A]lthough arbitration is encouraged as a method to settle disputes, an arbitration clause is not enforceable if it is found to be unconscionable." *Felix v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga Nos. 86990 and 86991, 2006-Ohio-4500, ¶ 15.

> This court applies an abuse of discretion standard when addressing whether a trial court has properly granted a motion to stay litigation pending arbitration. [*Seyfried v. O'Brien*, 2017-Ohio-286, 81 N.E.3d 961, ¶ 18 (8th Dist.)], citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7. This court applies a de novo standard of review, however, when reviewing the scope of an arbitration agreement, that is, whether a party has agreed to submit a certain issue to arbitration. *Seyfried* at *id*., citing *McCaskey* at *id*. This court also applies a de novo standard of review over a trial court's decision on unconscionability of an arbitration clause. *Seyfried* at *id*., citing *McCaskey* at ¶ 8, citing *Taylor Bldg*. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Sebold v. Latina Design Build Group, L.L.C., 8th Dist. Cuyahoga No. 109362, 2021-Ohio-124, ¶ 10.

{¶ 55} As noted above, the trial court concluded that the arbitration provision was both procedurally and substantively unconscionable.

> Unconscionability embodies two separate concepts: (1) unfair and unreasonable contract terms, i.e., substantive unconscionability; and (2) an absence of meaningful choice on the part of one of the parties, i.e., procedural unconscionability. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 34. A party asserting the unconscionability of a contract "must prove a quantum of both substantive and procedural unconscionability." *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 30;

> *Taylor Bldg.* at *id.* These two concepts create a two-prong conjunctive test for unconscionability. *Gates v. Ohio Sav. Assn.*, 11th Dist. Geauga No. 2009-G-2881, 2009-Ohio-6230, ¶ 47; *Strack v. Pelton*, 70 Ohio St.3d 172, 637 N.E.2d 914 (1994). Again, we review whether an arbitration agreement is enforceable in light of a claim of unconscionability using a de novo standard of review. *Hayes* at ¶ 21, citing *Taylor Bldg.* at ¶ 37.

Sebold at ¶ 24. "'A determination of unconscionability is a fact-sensitive question that requires a case-by-case review of the surrounding circumstances.'" *Brunke v. Ohio State Home Servs., Inc.*, 9th Dist. Lorain No. 08CA009320, 2008-Ohio-5394, ¶ 8, quoting *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, 822 N.E.2d 841 (9th Dist.); *Wallace v. Ganley Auto Group*, 8th Dist. Cuyahoga No. 95081, 2011-Ohio-2909, ¶ 44.

a. Procedural Unconscionability

{¶ 56} Procedural unconscionability pertains to the circumstances surrounding the transaction. *Dozier v. Credit Acceptance Corp.*, 2019-Ohio-4354, 135 N.E.3d 804, ¶ 15 (8th Dist.) In determining whether an arbitration agreement is procedurally unconscionable, courts consider the relative bargaining positions of the parties including each party's age, education, intelligence, experience, and which party that drafted the contract. *Taylor Bldg.* at ¶ 44. Additionally, the following factors may contribute to a finding that an arbitration agreement is procedurally unconscionable:

> "belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his [or her]

> interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors."

Taylor Bldg. at ¶ 44, quoting Restatement of the Law 2d, Contracts, Section 208, Comment d (1981).

{¶ 57} Procedural unconscionability also considers "'*whether the terms were explained to the weaker party*, [and] whether alterations in the printed terms were possible[.]'" (Emphasis added.) *Wallace* at ¶ 21, quoting *Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2d Dist.1993). "The crucial question is whether a party, considering his education or lack of it, *had a reasonable opportunity to understand the terms of the contract*, or were the important terms hidden in a maze of fine print." (Emphasis added.) *DeVito v. Autos Direct Online, Inc.*, 2015-Ohio-3336, 37 N.E.3d 194, ¶ 19 (8th Dist.).

{¶ 58} In the instant matter, in opposing TruNorth's motion to compel, AJZ asserted that (1) AJZ did not receive the TruNorth warranty agreement from Premier until four days after accepting delivery of the truck on October 25, 2018, (2) Premier sent the warranty agreement to AJZ via email (rather than providing it to AJZ to review in person at the time of the purchase or delivery), and (3) neither Premier nor TruNorth informed AJZ that the warranty agreement contained an arbitration provision or a forum selection clause. In support of its unconscionability argument, AJZ submitted LaBryer's affidavit.

{¶ 59} LaBryer averred that "AJZ's is a small family business whose sole members and employees are my husband, Rick LaBryer, and me." She stated that

AJZ purchased the truck on October 12, 2018, and received the truck on October 25, 2018. On October 29, 2018, four days after paying for and accepting delivery of the truck, AJZ received — for the first time — the TruNorth warranty agreement from Premier via email. LaBryer averred, in relevant part, that

> a. [n]either Premier nor TruNorth ever informed [AJZ] that the TruNorth Warranty Agreement contained an arbitration provision calling for arbitration in Mecklenburg County, North Carolina, or even that the TruNorth Warranty Agreement contained any arbitration provision at all.
>
> b. Neither Premier nor TruNorth ever explained the arbitration provision to [AJZ] or provided [AJZ] with any information about arbitration proceedings.
>
> c. [AJZ] has never been involved in arbitration proceedings, does not know anything about the arbitration process, and does not even know what the term "arbitration" means.
>
> d. [AJZ] was not informed, and did not understand, that the arbitration provision made arbitration in North Carolina the only method by which [AJZ] could enforce TruNorth's obligations under the TruNorth Warranty Agreement.
>
> e. [AJZ] was never informed that arbitration proceedings involved significant fees and expenses which did not exist in court proceedings, including much higher filing fees, administrative and hearing fees, deficient filing fees, and arbitration compensation and expenses.
>
> f. [AJZ] was unaware that it had any rights to object to or modify the arbitration provision in the TruNorth Warranty Agreement. In fact, [AJZ] had no objection or modification right at all, in that it was not provided with the TruNorth Warranty Agreement until four days after it had already paid for and taken delivery of the Truck.
>
> g. [AJZ] did not understand that is was giving up certain appeal and other right as a result of the arbitration provision in the TruNorth Warranty Agreement.

Finally, LaBryer asserted that AJZ was not represented by counsel in relation to either the purchase agreement with Premier or the TruNorth Warranty Agreement.

{¶ 60} TruNorth had the opportunity to present evidence contradicting or refuting LaBryer's affidavit in support of its motion to stay and compel arbitration, or in its reply brief. However, TruNorth failed to take advantage of these opportunities. As a result, LaBryer's assertions were undisputed.

{¶ 61} After reviewing the record, and based on LaBryer's affidavit, we find that the arbitration agreement is procedurally unconscionable. LaBryer did not have an opportunity to understand the terms of the arbitration provision because it was not presented or explained to her at the time of purchase or delivery. Rather, the arbitration agreement was on the last page of the warranty agreement that AJZ received via email four days after receiving the truck. *See Schwartz v. Alltel Corp.*, 8th Dist. Cuyahoga No. 86810, 2006-Ohio-3353, ¶ 34-35 (this court concluded that an arbitration was procedurally unconscionable because it was "adhesive in nature," presented on a "take-it-or-leave it basis," and the arbitration agreement was hidden in "small, hard-to-read print * * * at the very bottom of the back side of the agreement."); *Dozier*, 2019-Ohio-4354, 135 N.E.3d 804, at ¶ 24 (finding that an arbitration clause was not procedurally or substantively unconscionable where notice of the arbitration agreement was conspicuously displayed on the first page of the contract, and the arbitration clause afforded Dozier the right to reject it).

{¶ 62} TruNorth argues that AJZ is a commercial entity rather than an ordinary or naive consumer. This argument is unsupported by LaBryer's affidavit.

As noted above, LaBryer averred that AJZ is a family-owned small business that is run entirely by LaBryer and her husband. Furthermore, LaBryer asserted that AJZ (her and her husband) are unfamiliar with the arbitration process and have never been involved in arbitration.

{¶ 63} For all of the foregoing reasons, the trial court did not err in finding the arbitration agreement to be procedurally unconscionable. Under these circumstances, the trial court reasonably concluded that AJZ was unaware that the TruNorth warranty agreement contained an arbitration provision, and as a result, there was no meeting of the minds with respect to the arbitration provision. "Procedural unconscionability concerns the formation of the agreement, and occurs *where no voluntary meeting of the minds was possible*." (Emphasis added.) *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081, ¶ 10 (9th Dist.), citing *Bushman v. MFC Drilling*, 9th Dist. Medina No. 2403-M, 1995 Ohio App. LEXIS 3061, 7-8 (July 19, 1995), and *Collins*, 86 Ohio App.3d at 834, 621 N.E.2d 1294.

b. Substantive Unconscionability

{¶ 64} Substantive unconscionability pertains to the terms of the arbitration agreement and whether those terms are unfair and unreasonable. *Collins* at 834. These factors may include: "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Id.*

{¶ 65} "There is a point at which the costs of arbitration could render a clause unconscionable as a matter of law." *Neel v. A. Perrino Constr., Inc.*, 2018-Ohio-1826, 113 N.E.3d 70, ¶ 18 (8th Dist.). The party claiming substantive unconscionability on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs. *Green Tree Fin. v. Randolph*, 531 U.S. 79, 92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

{¶ 66} In the instant matter, the arbitration provision provides that the parties will equally pay the costs of the three arbitrators, and that the in-person arbitration hearing will take place in North Carolina. After reviewing the record, we find that the prohibitively expensive costs of arbitration would effectively deny AJZ its day in court.

{¶ 67} The dispute between AJZ and TruNorth in this lawsuit involves $25,000. There is nothing in the arbitration provision laying out, limiting, or capping the costs of the three-arbitrator panel. AJZ asserted during oral arguments that the arbitration filing fee alone would be $2,500. Furthermore, pursuant to the terms of the arbitration provision, AJZ, a Pennsylvania limited liability company, would bear the expenses of traveling to North Carolina, along with any witnesses or legal representation, for the in-person arbitration hearing.

{¶ 68} For all of the foregoing reasons, the trial court did not err in finding the arbitration agreement to be substantively unconscionable.

2. Forum Selection Provision

{¶ 69} This court reviews the enforceability of a forum selection clause de novo. *Original Pizza Pan v. CWC Sports Group, Inc.*, 194 Ohio App.3d 50, 2011-Ohio-1684, 954 N.E.2d 1220, ¶ 10 (8th Dist.), citing *Baker v. LeBoeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1104 (6th Cir.1997), and *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir.1995). AJZ, as the party challenging the forum selection clause, bears a heavy burden of establishing that it should not be enforced. *Original Pizza Pan* at *id.*, citing *Discount Bridal Servs. v. Kovacs*, 127 Ohio App.3d 373, 376-377, 713 N.E.2d 30 (8th Dist.1998), and *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-12, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

{¶ 70} Forum selection clauses are "prima facie valid in the commercial context, so long as *the clause has been freely bargained for*," there is no evidence of fraud or overreaching, and "*unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust*." (Emphasis added.) *Kennecorp Mtge. Brokers v. Country Club Convalescent Hosp.*, 66 Ohio St.3d 173, 175-176, 610 N.E.2d 987 (1993). Furthermore, in the commercial context, forum selection clauses should be upheld "so long as *enforcement does not deprive litigants of their day in court*." (Emphasis added.) *Id.*

{¶ 71} In the instant matter, as set forth in our analysis of the validity of the arbitration provision, we find that the forum selection provision in this case was not freely bargained for by AJZ, and enforcement of the forum selection provision would be unjust and unreasonable, effectively denying AJZ its day in court. LaBryer was

neither advised nor aware that the warranty agreement contained a forum selection clause. AJZ did not receive the warranty agreement until four days after accepting delivery of the truck.

{¶ 72} AJZ is a Pennsylvania limited liability company. The other company involved in the transaction, Premier, is an Ohio-based company. It would be unreasonable, unjust, and prohibitively expensive to require AJZ to travel to North Carolina, and bear the costs of transporting witnesses and legal representation to North Carolina, for the in-person arbitration hearing.

{¶ 73} For all of the foregoing reasons, the trial court did not err in concluding that enforcement of the forum selection provision would be unreasonable and unjust.

{¶ 74} TruNorth's third assignment of error is overruled.

{¶ 75} Judgment affirmed.

It is ordered that appellee recover of 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.

ANITA LASTER MAYS, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J., CONCUR

[Cite as *Lovejoy v. Diel*, 2021-Ohio-1124.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

TAMARA J. LOVEJOY,	:	
Appellant,	:	CASE NO. CA2020-06-067
	:	O P I N I O N
- vs -		4/5/2021
	:	
TAMMY DIEL, et al.,	:	
Appellees.	:	

CIVIL APPEAL FROM MIDDLETOWN MUNICIPAL COURT
Case No. 19CVI02127

Joseph R. Matejkovic, 9078 Union Centre Boulevard, Suite 350, West Chester, Ohio 45069, for appellant

Christina N. Harrison, 1735 North Derexa Drive, Hamilton, Ohio 45011, for appellees

BYRNE, J.

{¶1} Appellant, Tamara J. Lovejoy, appeals from the decision of the Middletown Municipal Court, Small Claims Division, dismissing her complaint for lack of subject-matter jurisdiction. For the reasons discussed below we reverse.

I. Factual Background[1]

{¶2} In 2015, Lovejoy and appellees, Tammy Diel and Dan Diel, entered into an agreement. The cover page was titled "LAND CONTRACT," but the next page captioned the agreement as an "Agreement to sell [sic] Real Estate." We will refer to this document as "the Agreement." The Agreement's full text is as follows, with typographical errors not corrected:

> Agreement to sell Real Estate
>
> This agreement is made on May 29, 2015, between Tamara J. Lovejoy, Seller, of 3206 Morgan Street, City of Middletown 45044, State of Ohio and Dan and Tammy Diel, Buyers, of 3206 Morgan Street, City of Middletown 45044, State of Ohio.
>
> For valuable consideration, the Seller agrees to sell and the Buyers agrees to buy this property for the following price and on the following terms:
>
> 1. The Seller will sell the property to the Buyers, free from all claims, liabilities, and indebtedness, unless noted in this Agreement.
>
> 2. The following personal property is also included in this sale: 2 green rocking chairs, 2 front porch swings.
>
> 3. The Buyers agrees to pay the Seller the sum on $64,632.63, which the Seller agrees to accept as full payment. The Buyers mortgage payments will be: $740.00 monthly, and due on the 1st of each month. The Buyers are to arrange a mortgage in their names within 5 years.
>
> 4. The Buyers also agrees to pay the sum of $740.00 as a deposit
>
> $64,632,63 Purchase Price
> $ -0- Down Payment
> $64,632,63 Balanced Carried
>
> It is the responsibility of the Buyers to obtain a tenants insurance policy to cover their personal belongings, the dwelling insurance

1. We assume for purposes of this opinion that the following facts asserted in the letter attached to Lovejoy's Small Claims Complaint are true.

> is included in the house payment.
>
> It is the Buyers responsibility to maintain the premises inside and out. This property is sold "As Is" condition.
>
> In the event that the Buyer should elect not to purchase the property, it is agreed that the Buyer shall forfeit the monies paid and any credit for work started or completed shall remain the property of the Seller.
>
> THIS AGREEMENT on May 29, 2015 shall be binding upon and insure to the benefit of the respective heirs, representatives, successors and assigns of the parties hereto.

The Agreement included the signatures of the parties and a single notary stamp and notary signature. Though the Agreement listed the Seller as "Tamara J. Lovejoy," it was signed by "Jennifer Lovejoy." The record does not indicate whether "Tamara J. Lovejoy" and "Jennifer Lovejoy" are the same person. Because the parties have not made an issue of this discrepancy, we will assume that they are the same person.

{¶3} The Diels lived in the house located at 3206 Morgan Street, Middletown, Ohio 45044 ("the House") for almost five years. In May 2009, Lovejoy learned that the Diels were moving out. During a walkthrough, Tammy Diel told Lovejoy that the House would be ready for move-in condition and that she would have the carpets cleaned.

{¶4} After the Diels moved out, Lovejoy identified a number of problems with the House, including, but not limited to extensive mold, overgrown vegetation, trash strewn on the lawn, rat nests inside the House, animal droppings and stains in the House, other unidentified stains, missing closet doors, broken steps and a broken fence, holes in siding, piles of junk on the driveway and in the garage, and other general filth, damage, and disrepair. The city of Middletown also issued a citation for violations of the city's grass and weeds ordinance, violations of the garbage, litter, and rubbish ordinance, and violations of the tree/shrubbery ordinance.

{¶5} Lovejoy paid to clean up the House and its yard, as well as to clean up trash,

tires, and miscellaneous items that the Diels had dumped on the adjacent city-owned lot.

{¶6} By the time the Diels moved out of the House, they had paid to Lovejoy monthly payments totaling around $35,500, nearly 55% of the total $64,632.63 purchase price contemplated by the Agreement.

II. Procedural Background

{¶7} In July 2019, Lovejoy filed a complaint against the Diels in the small claims division of the Middletown Municipal Court. Lovejoy sought $6,000 as compensation for her efforts to clean up the House and the adjacent city-owned lot.

{¶8} The Diels filed a motion to dismiss the complaint. The Diels argued that the Agreement was a land installment contract and because the Diels had paid more than 20% of the purchase price, Section 5313.07 of the Ohio Revised Code required Lovejoy to seek foreclosure and judicial sale in order to recover possession of the property. *See* R.C. 5313.07 ("If the vendee of a land installment contract has paid in accordance with the terms of the contract for a period of five years or more from the date of the first payment or has paid toward the purchase price a total sum equal to or in excess of twenty per cent thereof, the vendor may recover possession of his property only by use of a proceeding for foreclosure and judicial sale of the foreclosed property as provided in section 2323.07 of the Revised Code"). The Diels argued that if Lovejoy were required to seek foreclosure, which is an equitable action, the small claims division would lack subject-matter jurisdiction with respect to Lovejoy's complaint. R.C. 1925.02(A)(1) (small claims division has jurisdiction "in civil actions for the recovery of taxes and money only"); *Small v. Stub Hub*, 9th Dist. Summit No. 27997, 2016-Ohio-3438, ¶ 5 (small claims division does not have jurisdiction over claims for equitable relief); *Stidham v. Wallace*, 12th Dist. Madison No. CA2012-10-022, 2013-Ohio-2640, ¶ 9 (foreclosure is an equitable proceeding). Lovejoy filed a memorandum opposing the Diels' motion to dismiss.

{¶9} The magistrate initially denied the motion to dismiss because neither party provided the court with a copy of the Agreement. At a subsequent hearing, the Diels submitted a copy of the Agreement to the trial court. The trial court sua sponte reconsidered its subject-matter jurisdiction and ordered the parties to file memoranda on whether the Agreement constituted a land installment contract. The Diels filed a memorandum renewing the arguments in their motion to dismiss, but they titled this memorandum a "Trial Brief." Lovejoy did not file a memorandum at that time.

{¶10} In January 2020, the magistrate entered a decision determining that the Agreement constituted a land installment contract and that the Diels had paid more than 20% of the total purchase price for the House. Therefore, the magistrate concluded, Lovejoy's only recourse was through a foreclosure proceeding pursuant to R.C. 5313.07. The magistrate dismissed Lovejoy's complaint for lack of subject-matter jurisdiction. Lovejoy filed objections to the magistrate's decision. In April 2020, the trial court overruled Lovejoy's objections, adopted the magistrate's decision, and dismissed the complaint for lack of subject-matter jurisdiction. Lovejoy timely appealed.

III. Law and Analysis

{¶11} Lovejoy raises the following sole assignment of error:

{¶12} THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF/APPELLANT BY DISMISSING HER COMPLAINT.

{¶13} In support of this assignment of error, Lovejoy presents four issues for review. We will address Lovejoy's arguments out of order.

A. Revival of the Question of Subject-Matter Jurisdiction

{¶14} Lovejoy argues that the trial court erred when it revived the question of subject-matter jurisdiction because the trial court denied the Diels' motion to dismiss, and the Diels did not object to that decision. She also argues that the issue of subject-matter

jurisdiction was improperly raised by way of a "trial brief," which, she contends, is not a proper motion. We disagree.

{¶15} "Subject matter jurisdiction refers to a court's power to hear and decide a case on the merits." *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 75 (1998). "It is well-established that subject matter jurisdiction 'may not be conferred by agreement of the parties or waived, and is the basis for mandatory, sua sponte dismissal either at the trial court or on appeal.'" *In re S.C.R.*, 12th Dist. Clinton No. CA2017-11-018, 2018-Ohio-4063, ¶ 22, quoting *In re B.M.*, 4th Dist. Hocking No. 16CA12, 2017-Ohio-7878, ¶ 8; *see also In re O.V.*, 12th Dist. Butler No. CA2019-03-046, 2019-Ohio-4628, ¶ 6. Once a court determines that it lacks subject-matter jurisdiction it is required to dismiss the complaint. *In re S.C.R.* at ¶ 22. In this case the municipal court was not provided with a copy of the Agreement until after it had denied the Diels' motion to dismiss. We conclude that the trial court did not err in asking the parties at that time to brief the question of whether the Agreement was a land installment contract which, by operation of R.C. 5313.07, could have deprived the trial court of subject-matter jurisdiction.

B. Appellate Standard of Review

{¶16} On review of a trial court's dismissal for lack of subject-matter jurisdiction, this court must determine whether "'any cause of action cognizable by the forum has been raised in the complaint.'" *McDaniel v. McDaniel*, 12th Dist. Warren No. CA2006-12-142, 2007-Ohio-4220, ¶ 10, quoting *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80 (1989). Whether a court has subject-matter jurisdiction is a question of law. *Duke Energy Ohio, Inc. v. Hamilton*, 12th Dist. Butler No. CA2018-01-001, 2018-Ohio-2821, ¶ 21, citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 34. As a matter of law, this court will conduct a de novo review of the trial court's decision. *In re S.C.R.*, 2018-Ohio-4063 at ¶ 12. This means that the court engages in an independent review without deference to the

trial court's decision. *Geyer v. Clinton Cty. Dept. of Job & Family Servs.*, 12th Dist. Clinton No. CA2020-06-008, 2021-Ohio-411, ¶ 10.

C. Nature of the Agreement

{¶17} Lovejoy argues that the Agreement cannot be construed as a land installment contract because it does not comply with the requirements of R.C. 5313.02. We agree, but we find that the Agreement also fails to meet the definition of land installment contract in R.C. 5313.01. We will describe these two statutes, then analyze how they apply to the Agreement.

1. The Relevant Statutes

{¶18} Chapter 5313 of the Ohio Revised Code includes a number of provisions describing land installment contracts, the requirements relating to land contracts, and the procedures associated with disputes regarding land installment contracts. Two sections, in particular, are relevant to the question of whether a contract constitutes a land installment contract: R.C. 5313.01 and R.C. 5313.02. The first of these statutes, R.C. 5313.01(A), defines "land installment contract" as:

> an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation. Option contracts for the purchase of real property are not land installment contracts.

The second statute, R.C. 5313.02, has four subsections imposing several requirements regarding land installment contracts. R.C. 5313.02(A) provides:

> Every land installment contract shall be executed in duplicate, and a copy of the contract shall be provided to the vendor and the vendee. The contract *shall contain at least the following provisions:*

(1) The full names and then current mailing addresses of all the parties to the contract;

(2) The date when the contract was signed by each party;

(3) A legal description of the property conveyed;

(4) The contract price of the property conveyed;

(5) Any charges or fees for services that are includable in the contract separate from the contract price;

(6) The amount of the vendee's down payment;

(7) The principal balance owed, which is the sum of the items specified in divisions (A)(4) and (5) of this section less the item specified in division (A)(6) of this section;

(8) The amount and due date of each installment payment;

(9) The interest rate on the unpaid balance and the method of computing the rate;

(10) A statement of any encumbrances against the property conveyed;

(11) A statement requiring the vendor to deliver a general warranty deed on completion of the contract, or another deed that is available when the vendor is legally unable to deliver a general warranty deed;

(12) A provision that the vendor provide evidence of title in accordance with the prevailing custom in the area in which the property is located;

(13) A provision that, if the vendor defaults on any mortgage on the property, the vendee can pay on that mortgage and receive credit on the land installment contract;

(14) A provision that the vendor shall cause a copy of the contract to be recorded;

(15) A requirement that the vendee be responsible for the payment of taxes, assessments, and other charges against the property from the date of the contract, unless agreed to the contrary;

(16) A statement of any pending order of any public agency against the property.

(Emphasis added). The "legal description" referenced in R.C. 5313.02(A)(3) is defined as "a description of the property by metes and bounds or lot numbers of a recorded plat including a description of any portion of the property subject to an easement or reservation, if any." R.C. 5313.01(E).

{¶19} R.C. 5313.02(B) imposes certain requirements on mortgages held on property sold by land installment contract. R.C. 5313.02(C) requires that the vendor—that is, the seller—of property sold by land installment contract "shall cause a copy of the contract to be recorded" with the county recorder and a copy of the contract delivered to the county auditor "[w]ithin twenty days after a land installment contract has been signed by both the vendor and the vendee." R.C. 5313.02(D) further requires that "[e]very land installment contract shall conform to the formalities required by law for the execution of deeds and mortgages." It also states that vendors of property sold by land installment contract "shall" have any metes and bounds descriptions of the property reviewed by the county engineer. R.C. 5313.02(D).

{¶20} We now turn to the question of how these statutes apply to the Agreement.

2. Application of Statutes to the Agreement

{¶21} In addressing the Diels' argument that the Agreement was a land installment contract, the magistrate—whose decision was adopted by the trial court—analyzed the Agreement solely under R.C. 5313.02. We must examine both R.C. 5313.01(A) and R.C. 5313.02. Contract interpretation is a matter of law and is subject to a de novo review on appeal. *City of St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶ 38.

{¶22} R.C. 5313.01(A) defines a land installment contract, in part, as an agreement "under which the vendor agrees to convey title in real property located in this state to the

vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation." In the instant case, the Agreement does not satisfy the definition of a "land installment contract" found in R.C. 5313.01(A). Three elements of the definition are missing from the Agreement.

{¶23} First, R.C. 5313.01(A) states that a land installment contract is one under which the vendor agrees to convey title in real property, but this element is lacking because there is no provision in the Agreement stating that Lovejoy, the putative vendor, would convey title.

{¶24} Second, R.C. 5313.01(A) states that a land installment contract concerns "real property located in this state," but this element is lacking because the Agreement does not identify the property at issue. The Agreement simply lists 3206 Morgan Street, Middletown, OH 45044 as the home address of both Lovejoy and the Diels in its introductory paragraph. In the next paragraph, the Agreement states that "[Lovejoy] agrees to sell and the [Diels] agrees [sic] to buy this property * * *." But nowhere does the Agreement state what, exactly, "this property" is. The Agreement never once explicitly identifies 3206 Morgan Street—or any other property, whether by metes and bounds or not—as the property to be conveyed by the Agreement.

{¶25} Third, R.C. 5313.01(A) states that a land installment contract is one in which the "vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation," but this element is also missing. The Diels did not agree to pay the full "purchase price"—that is, $64,632.63. Rather than imposing an obligation to pay, the Agreement explicitly gave the Diels the option to "elect not to purchase the property," in which case the Diels "shall forfeit the monies paid and any credit for work started or completed shall remain the property of

[Lovejoy]."[2] Because the Agreement did not expressly require the Diels to purchase the property, and they had the option to walk away, the Agreement seems to be more like an option contract than a land installment contract. *See McGlothin v. Stout*, 12th Dist. Butler No. CA89-03-050, 1989 Ohio App. LEXIS 3126, *6-7 (Aug. 14, 1989). Significantly, R.C. 5313.01(A) provides that "[o]ption contracts for the purchase of real property are not land installment contracts."

{¶26} For all three of these reasons, we determine that the Agreement does not satisfy the definition of land installment contract under R.C. 5313.01(A) and is not, in fact, a land installment contract.

{¶27} The same is true with regard to R.C. 5313.02(A), to which we now turn. The parties agree that the Agreement does not contain all of the elements of a land installment contract set forth in R.C. 5313.02(A). The Diels argued at the trial court level that the Agreement "actually complies with a majority of the requirements set forth in R.C. 5313.02," but this does not appear to be correct. The Agreement contains the full names and then-current mailing addresses of the parties, *see* R.C. 5313.02(A)(1); the date when the contract was signed by each party, *see* R.C. 5313.02(A)(2); the contract price of the property conveyed, *see* R.C. 5313.02(A)(4); the amount of the down payment, *see* R.C. 5313.02(A)(6); the principal balance owed, *see* R.C. 5313.02(A)(7); and the amount and due date of each installment payment, *see* R.C. 5313.02(A)(8). Altogether, the Agreement contains only six of the 16 elements that R.C. 5313.02(A) says a land installment contract "shall * * * at least" contain.

{¶28} On the other hand, the Agreement does *not* contain a legal description of the

2. As far as can be determined from the record, this is what the Diels chose to do. They informed Lovejoy that they were leaving the property and they have not made any claim for recovery of any amount paid to Lovejoy under the Agreement.

property conveyed, *see* R.C. 5313.02(A)(3); a statement requiring the vendor to deliver a general warranty deed, *see* R.C. 5313.02(A)(11); a provision that the vendor provide evidence of title, s*ee* R.C. 5313.02(A)(12); a provision that the vendee can pay on any mortgage on the property on which the vendor defaults, *see* R.C. 5313.02(A)(13); a provision that the vendor shall cause a copy of the contract to be recorded, *see* R.C. 5313.02(A)(14); or a provision regarding which party is responsible for the payment of taxes, assessments, and other charges against the property, *see* R.C. 5313.02(A)(15). Therefore, six of the 16 elements that R.C. 5313.02(A) says "shall" be included in a land installment contract are missing from the Agreement. As previously discussed, R.C. 5313.01(E) defines a "legal description" as "a description of the property by metes and bounds or lot numbers of a recorded plan, including a description of any portion of the property subject to an easement or reservation, if any." The Agreement not only failed to use metes and bounds or lot numbers of a recorded plat to identify the property, but it also failed to even generally identify the property at issue.

{¶29} This leaves three of R.C. 5313.02(A)'s 16 requirements: "any charges or fees for services that are includable in the contract separate from the contract price," *see* R.C. 5313.02(A)(5); "a statement of any encumbrances against the property conveyed," *see* R.C. 5313.02(A)(10); and "a statement of any pending order of any public agency against the property," *see* R.C. 5313.02(A)(16). The word "any" as used in these three provisions suggests that the elements referenced may or may not exist. The record does not indicate why these three items were excluded from the Agreement.

{¶30} The trial court concluded that the Agreement was a land installment contract despite lacking the mandatory elements provided in R.C. 5313.02(A). On appeal, the parties disagree whether all 16 elements of R.C. 5313.02(A) must be included to produce a valid land installment contract.

{¶31} To resolve this issue, we must examine the words of the statute. A court's "duty in construing a statute is to determine and give effect to the intent of the General Assembly as expressed in the language it enacted." *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, ¶ 14, citing *Griffith v. Aultman Hosp.*, 146 Ohio St.3d 196, 2016-Ohio-1138, ¶ 18. "In construing a statute, we do not ask 'what did the general assembly intend to enact, but what is the meaning of that which it did enact.'" *Lingle v. State*, Slip Opinion No. 2020-Ohio-6788, ¶ 14, quoting *Slingluff v. Weaver*, 66 Ohio St. 621 (1902), paragraph two of the syllabus. "To discern legislative intent, we read words and phrases in context and construe them in accordance with rules of grammar and common usage." *Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd.*, 137 Ohio St.3d 257, 2013-Ohio-4654, ¶ 15.

{¶32} "When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation." *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553 (2000). Rather, "[a]n unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus. "To interpret what is already plain is not interpretation, but legislation, which is not the function of the courts, but of the general assembly." *Id*. at 316.

{¶33} R.C. 5313.01(A) sets forth the definition of a land installment contract in clear and unambiguous terms. R.C. 5313.02(A) provides that land installment contracts "shall" contain "at least" the 16 elements set forth in that statute. It is self-evident that "'[s]hall' means must." *Wilson v. Lawrence,* 150 Ohio St.3d 368, 2017-Ohio-1410, ¶ 13. The Ohio Supreme Court "repeatedly ha[s] recognized that use of the term 'shall' in a statute connotes a mandatory obligation unless other language evidences a clear and unequivocal intent to the contrary." *Id*. at ¶ 13. We are unaware of any language in R.C. 5313.02 or anywhere

else in R.C. Chapter 5313 that indicates that the General Assembly intended "shall" to mean anything other than "must." *See e.g., id.*, at ¶ 13 (no indication in statutory scheme of R.C. 2117.06 that General Assembly intended any other meaning than "must"). Moreover, the use of the phrase "at least" in R.C. 5313.02(A) emphasizes that *all* of the 16 elements must be met in order for an agreement to constitute a land installment contract under R.C. Chapter 5313.

{¶34} It is the duty of a court to give effect to the words used; not to delete or insert new words. *Cleveland Elec. Illum. Co. v. City of Cleveland*, 37 Ohio St.3d 50, 53 (1988). The General Assembly has explicitly required that the 16 elements set forth in R.C. 5313.02(A) must be included, at a minimum, for the agreement to constitute a land installment contract. We hold that the Agreement was not a land installment contract under R.C. Chapter 5313 because it only included six of the 16 elements required by R.C. 5313.02(A), and because it does not meet the definition of a land installment contract in R.C. 5313.01(A).[3] R.C. 5313.07, therefore, does not apply, and the trial court does not lack subject-matter jurisdiction. Our holding does not mean that the Agreement is not a contract—rather, we merely hold that it is not a land installment contract as defined by R.C. Chapter 5313.

{¶35} In the magistrate's decision adopted by the trial court, the magistrate cited only one Twelfth District case, *Young v. Hodapp*, 12th Dist. Butler No. CA85-08-094, 1986 Ohio App. LEXIS 9534 (Dec. 29, 1986), in support of his conclusion that the Agreement was a land installment contract despite the omission of multiple R.C. 5313.02(A) elements. The Diels rely on two cases from other districts to make the same argument, *Real Flo*

3. R.C. 5313.02(A)'s plain language indicates that the elements described in R.C. 5313.02(A)(5), (10), and (16) only apply if relevant as each subsection uses the word "any." Even if we assume that the elements listed in these subsections were properly omitted from the Agreement because they are not relevant, the Agreement will still lack at least six of the 16 required elements, and our holding would remain the same.

Properties v. Kelly, 6th Dist. Lucas No. L-99-1099, 1999 Ohio App. LEXIS 6030 (Dec. 17, 1999), and *Shimko v. Marks,* 91 Ohio App.3d 458 (5th Dist.1993), one of which was also cited by the magistrate. We will address these cases.

{¶36} *Young* was our earliest case addressing the question of whether an agreement constituted a land installment contract under R.C. Chapter 5313. In *Young*, we stated that "R.C. 5313.02 contains the necessary provisions for creating a land installment contract." *Id*. at *5. We determined that the contract in that case did not satisfy the minimum requirements in R.C. 5313.02 because it was neither executed nor properly recorded. *Id*. at *5. That agreement also did not meet all 16 requirements of R.C. 5313.02(A) because it contained only "a fairly detailed description of the property," not a legal description by metes and bounds or lot number. *Id*. at *6. We concluded—relying on a law review article, not the text of the statute—that R.C. Chapter 5313 was a consumer protection law, and therefore "[w]hile the disputed contract fails to meet the specific minimum requirements of the statute, this failure does not by itself make the contract void and unenforceable."[4] *Id*. at *7. We explained that when the requirements of R.C. 5313.02 were not satisfied, "the appropriate inquiry to establish whether the land installment contract was valid is to determine if all the essential elements of a contract were present." *Id*. at *7. We determined that the essential elements of a contract were met, and on that basis "the land installment contract was valid as between the parties." *Id*. at *8. Notably, while we continued to describe the agreement with the phrase "land installment contract," we did not explicitly state that, despite the deficiencies described above, the agreement was a land installment contract *under R.C. Chapter 5313*. Instead, we simply held that the agreement was an

4. Notably, the law review article upon which we relied does not state that an agreement may be a land installment contract even when the elements that R.C. 5313.02(A) says "shall" be included are missing. On the contrary, the article describes R.C. 5313.02(A) as "* * * setting forth the required contents of land contracts." James Geoffrey Durham, *Forfeiture of Residential Land Contracts in Ohio: The Need for Further Reform of a Reform Statute*, 16 Akron L. Rev. 397, 425 (1983).

enforceable *contract*. *Id.* at *8. We did not analyze the agreement under R.C. 5313.01 at all. *See id.*, *passim*.

{¶37} A few years after *Young*, we issued our opinion in *McGlothin v. Stout,* 12th Dist. Butler No. CA89-03-050, 1989 Ohio App. LEXIS 3126 (Aug. 14, 1989). In *McGlothin,* we reviewed whether a rental agreement and a contract for purchase that were signed together created a land installment contract. *Id.* at *6. We listed many of the 16 elements in R.C. 5313.02(A) and explained that the statute "requires the land installment contract to contain" those items. *Id.* at *6. Because the "purchase contract in question contained only the barest instruction regarding down payment and future financing" we found that the contract "cannot be interpreted as a land installment contract" and was "more like an option contract." *Id.* at *6. We stated that, "[w]hatever the contractual relationship the parties intended to create by signing these documents, they failed to create a land installment contract as it is statutorily defined." *Id* at *6. At no point in *McGlothin* did we state that an agreement may constitute a valid land installment contract even if it fails to meet all of the requirements of R.C. 5313.02. Moreover, we did not cite or analyze the contract under R.C. 5313.01.

{¶38} Fourteen years later in *Hubbard v. Dillingham*, 12th Dist. Butler No. CA2002-02-045, 2003-Ohio-1443, we decided whether an agreement was a land installment contract solely by analyzing whether the agreement met the definition of a land installment contract in R.C. 5313.01(A). We noted that the agreement was titled "Lease with Option to Purchase;" that the agreement "did not contain any language suggesting that appellant would gain ownership of the property upon the end of the lease;" that the putative vendor did not agree to "convey title" in the property; and that the putative vendee did not "agree to pay the entire purchase price in installment payments." *Hubbard* at ¶ 14. We specifically noted that, "[r]ather, [the putative vendee] had the option to purchase the property under

the terms of the agreement, and was not compelled in any way to purchase the property." *Id*. at ¶ 14. We also noted that while the putative vendee's payments were credited to the sale price, that credit would only take effect if she opted to purchase the property, which she did not do. *Id*. at ¶ 15. We concluded that instead of creating a land installment contract, the agreement instead created a lease with an option to purchase. *Id*. at ¶ 15. We did not cite or refer to R.C. 5313.02 at all.

{¶39} A cursory review could leave the impression that these three cases are inconsistent with one another. However, *Young*, *McGlothin*, and *Hubbard* can and should be read as consistent with one another and with our opinion today. *Young* and *McGlothin* both explained that the 16 elements listed in R.C. 5313.02(A) are required, as we conclude today. *Young* did not explicitly hold that an agreement could be a land installment contract where it failed to meet all of R.C. 5313.02(A)'s 16 elements. Instead, *Young* held that an agreement that did not meet all 16 requirements was still a valid *contract*—not necessarily a land installment contract—because it still met the requirements for a valid contract. *Id.*, 1986 Ohio App. LEXIS 9534 at *8. This is consistent with our opinion today. The Agreement is not a land installment contract pursuant to R.C. Chapter 5313, but it may be a valid contract. And while *Young* and *McGlothin* relied solely on R.C. 5313.02(A) and ignored R.C. 5313.01(A), and *Hubbard* relied solely on R.C. 5313.01(A) and ignored 5313.02(A), none of the three opinions held that *only* R.C. 5313.02(A) or R.C. 5313.01(A) should be considered when determining if an agreement is a land installment contract. Finally, the Agreement omits some of the same terms that were crucial to our determination in *Hubbard* that the agreement at issue was not a land installment contract. *Id*., 2003-Ohio-1443 at ¶ 14 (finding R.C. 5313.01[A] definition not met when agreement lacked reference to conveying title and purchaser was not obligated to purchase the property).

{¶40} We are aware that the Fourth, Fifth, Sixth, and Tenth Districts have held that

an agreement can be a land installment contract under R.C. 5313.02 even if the agreement fails to include the 16 mandatory elements set forth in R.C. 5313.02(A). These courts have determined that "substantial compliance" is sufficient—meaning compliance with some, but not all, of the 16 elements. *See Elkins v. Colburn*, 4th Dist. Pike No. 18CA893, 2019-Ohio-2681, ¶ 36; *Shimko,* 91 Ohio App.3d at 462; *Real-Flo Properties,* 1999 Ohio App. LEXIS 6030 at *6; *Merivale Invests. v. Tuggle*, 6th Dist. Lucas No. L-08-1439, 2009-Ohio-6502, ¶ 27; *Gollihue v. Russo*, 152 Ohio App.3d 710, 2003-Ohio-2663, ¶ 34 (10th Dist.). We view these courts' "substantial compliance" approach as inconsistent with the plain language of R.C. 5313.02(A).[5] Our approach described above is both consistent with the relevant statutes and with our own precedents in *Young*, *McGlothin*, and *Hubbard*. The Diels have offered no persuasive basis for abandoning this approach and ignoring the plain language of the statute.

{¶41} Nevertheless, the outcome of this case would not change even if we followed the "substantial compliance" approach. In *Shrock v. Spognardi*, 5th Dist. Richland No. 15CA33, 2015-Ohio-4555, the Fifth District analyzed a residential lease agreement and a purchase real estate agreement that were signed on the same day. The Fifth District noted that, collectively, these "documents failed to include the majority of the R.C. 5313.02(A) statutory requirements, including, but not limited to, a legal description of the property to be conveyed, the amount and due date of each installment payment; and the interest rate on the unpaid balance and the method of computing the rate." *Id*. at ¶ 21. The Fifth District also noted that there was "no evidence the parties recorded the documents." *Id*. at ¶ 21. The Fifth District concluded that there was no land installment contract because "neither

5. We are also aware of the policy reasons why some courts have preferred the "substantial compliance" approach. But if that approach is preferable to our approach from a policy perspective, it is for the General Assembly to amend R.C. 5313.02, not for us to ignore its plain language. *See, e.g.*, *Erickson v. Morrison*, Slip Opinion No. 2021-Ohio-746, ¶ 34.

document, individually or collectively, satisfies the requirements of a land installment contract as set forth in R.C. 5313.02." *Id.* at ¶ 21. Though the Fifth District did not specifically refer to its "substantial compliance" approach by name, it seems to have applied that concept when it noted that the documents did not include "a majority of the statutory requirements." *Id.* at ¶ 21. *Shrock* is highly relevant here because the text of the *Shrock* purchase agreement was very similar—and in places identical—to the text of the Agreement at issue in this case. *Id.* at ¶ 4. The Agreement in this case lacks most of the same elements that the Fifth District specifically noted were missing from the *Shrock* agreement, plus other R.C. 5313.02(A) elements. Therefore, even if we applied the "substantial compliance" approach, our determination that the Agreement is not a land installment contract pursuant to R.C. Chapter 5313 would remain the same.

3. Lovejoy's Remaining Arguments

{¶42} Lovejoy raises two other issues for review in her brief. She argues that the trial court erred as a matter of law because its dismissal of her complaint constituted a declaratory judgment, and declaratory judgments may not be issued by small claims divisions of municipal courts. Lovejoy also argues that a foreclosure proceeding is not required where a vendee in the land installment contract breaches the contract and surrenders possession of the property. Because we have determined that the Agreement is not a land installment contract and the trial court erred when it dismissed Lovejoy's complaint for lack of subject-matter jurisdiction, both of Lovejoy's remaining two arguments are moot and need not be addressed at this time.

IV. Conclusion

{¶43} Given our determination that the Agreement was not a land installment contract under R.C. Chapter 5313, Lovejoy was not required to pursue foreclosure under R.C. 5313.07 and the trial court erred in dismissing the complaint for a lack of subject-matter

jurisdiction.[6] Tamara J. Lovejoy's sole assignment of error is sustained.

{¶44} Our decision does not address the merits of Lovejoy's claim against the Diels. Whether there is a lawful basis for Lovejoy to recover, whether the facts support Lovejoy's claim, and how much Lovejoy may be able to recover, if at all, remain to be determined by the trial court.

{¶45} Judgment reversed and remanded for further proceedings consistent with this opinion.

M. POWELL, P.J., and HENDRICKSON, J., concur.

6. Based on our conclusions regarding R.C. 5313.01(A) and R.C. 5313.02(A), we need not examine additional deficiencies related to R.C. 5313.02(C) and (D).