[Cite as *Lapkovitch v. Rankl & Ries Motorcars, Inc.*, 2021-Ohio-4436.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RONALD E. LAPKOVITCH

Plaintiff-Appellant

-vs-

RANKL & RIES MOTORCARS, INC.

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Earle E. Wise, Jr., J.

Case No. 2021CA00062

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2019CV01910
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 16, 2021

APPEARANCES:

For Plaintiff-Appellant

MATTHEW S. ROMANO
LAW OFFICE of MATTHEW S. ROMANO, LLC
7100 E. Pleasant Valley Road, Suite 110
Independence, Ohio 44131

For Defendant-Appellee

MERLE D. EVANS, III
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Post Office Box 35459
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Wise, John, J.

{¶1} Appellant Ronald E. Lapkovitch appeals the May 13, 2021, decision of the Stark County Court of Common Pleas granting summary judgment in favor of Appellee Rankl & Ries Motorcars, Inc.

STATEMENT OF THE FACTS

{¶2} For purposes of this Opinion, the relevant facts and procedural history are as follows:

{¶3} On September 22, 2018, Appellant Ronald Lapkovitch purchased a 2016 Jeep Renegade (VIN# ZACCJBCT4GPD57827) from Appellee Rankl & Ries Motorcars, Inc. for $29,061.00, which included the purchase of a $2,400.00 “Extra Mile” extended warranty service contract from a third-party, Preferred Warranties, Inc. (PWI). The Jeep had 37,830 miles on the odometer at the time of sale.

{¶4} The Extra Mile Vehicle Service Agreement expressly stated that it applied for an additional 60 months or 100,000 miles on the vehicle. (Rankl Depo. at 80). Said Extra Mile Vehicle Service Agreement also expressly required that the "odometer" be in working condition.

{¶5} On the date of purchase, Appellant and his wife came to Appellee's business because of a flier they received. (Lapkovitch Depo., p. 16-17). Appellant intended to purchase a vehicle for his wife, who had become interested in the Jeep as soon as she saw it. *Id*. Appellant took the vehicle for a test drive, looked under the hood, and otherwise inspected the vehicle. Appellant did not have the vehicle inspected by a mechanic.

{¶6} Appellant had owned and driven the vehicle for approximately 10 months when he received a manufacturer's recall notice for a cooling fan motor. (Complaint ¶9). Appellant took the vehicle to Progressive Jeep, a dealership in Massillon, Ohio, for the recall repair. *Id*. Appellant claims that while servicing the Jeep, an employee of Progressive informed Appellant that the Jeep engine in his vehicle had been replaced with an engine from a Dodge Dart. (Complaint ¶10). The Progressive employee based his conclusion upon the handwritten word "Dart" on the engine block, which was only visible after the plastic engine cover was removed. (Lapkovitch Depo. at 59). Plaintiff claims that he was informed by the service manager at Progressive that the original manufacturer's powertrain warranty on the Jeep was void because the vehicle no longer had the original factory engine. (Complaint ¶11, Lapkovitch Depo. at 60).

{¶7} On September 20, 2019, Appellant filed a Complaint against Appellee Rankl & Ries Motorcars, Inc. alleging breach of contract, fraud, violations of the Ohio Consumer Sales Practices Act ("CSPA"), and unjust enrichment. Appellant's claims are based on the allegation that Appellee had knowledge that the engine in the Jeep had been replaced with an engine from a Dodge Dart, and Appellee failed to disclose this to Appellant upon purchase of the vehicle.

{¶8} On February 1, 2021, Appellee filed a Motion for Summary Judgment as to all claims contained in Appellant's Complaint.

{¶9} On April 5, 2021, Appellant filed his Brief in Opposition.

{¶10} By Judgment Entry filed May 13, 2021, the trial court granted Appellee's Motion for Summary Judgment, finding no genuine issues of material fact, and that Appellee was entitled to judgment as a matter of law.

{¶11} Appellant now appeals, raising the following error for review:

ASSIGNMENT OF ERROR

{¶12} "I. THE TRIAL COURT'S GRANTING OF DEFENDANT-APPELLEE RANKL & REIS MOTORCARS, INC.'S ("DEFENDANT") MOTION FOR SUMMARY JUDGMENT IS REVERSIBLE ERROR."

Summary Judgment Standard

{¶13} Civil Rule 56 states, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶14} A trial court should not enter summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-

moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶15} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter *de novo*. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

I.

{¶16} In his sole assignment of error, Appellant argues the trial court erred in granting Appellee's motion for summary judgment. We disagree.

Breach of Contract Claim

{¶17} In his Complaint, Appellant claims Appellee breached the contract in this matter by failing "to provide Plaintiff with the benefits of the original factory warranty, the 'Extra Mile' warranty and service coverage, or the vehicle with its original factory engine or the proper engine type for the vehicle." (Complaint at ¶22).

{¶18} As explained by this Court in *Caley v. Glenmoor Country Club,* 5th Dist. Stark Nos. 2013 CA 00012 & 2013 CA 00018, 2013-Ohio-4877, ¶ 59-61:

> In order to succeed on a breach of contract claim, the plaintiff must demonstrate that: (1) a contract existed; (2) the plaintiff fulfilled his

obligations; (3) the defendant breached his obligations; and (4) damages resulted from this breach. *Chaney v. Ramsey,* 4th Dist. No. 98CA614, 1999 WL 217656, (Apr. 7, 1999), citing *Doner v. Snapp,* 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2nd Dist.1994).

" '[B]reach,' as applied to contracts is defined as a failure without legal excuse to perform any promise which forms a whole or part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence." *Natl. City Bank of Cleveland v. Erskine & Sons, Inc.,* 158 Ohio St. 450, 110 N.E.2d 598 (1953), paragraph one of the syllabus.

" 'When the facts presented are undisputed, whether they constitute a performance or a breach of a written contract, is a question of law for the court.' " *Koon v. Hoskins,* 4th Dist. No. 95CA497, 1996 WL 30018, (Jan. 24, 1996), fn. 5, quoting *Luntz v. Stern,* 135 Ohio St. 225, 20 N.E.2d 241 (1939), paragraph five of the syllabus.

{¶19} Here, Appellant testified that he never made or attempted to make any warranty claims under either the factory warranty or the PWI Extra Mile extended warranty. Appellant therefore has failed to show that he was denied coverage under said warranties or suffered any damages therefrom.

{¶20} Further, Appellant testified that he never spoke with anyone from the manufacturer or PWI to verify the status of the warranties. Appellee, however, presented an expert report indicating that only that portion of the factory powertrain warranty

pertaining to the factory engine would have been voided by the replacement engine, and that the remaining portion of the powertrain warranty would still be in effect.

{¶21} Appellee likewise presented evidence through its expert that he contacted PWI's local representative and was advised that the extended warranty in this case contained no restrictions and remained in full effect from the date of purchase.

{¶22} Additionally, evidence was presented that the value of the vehicle has not been diminished by the replacement engine.

{¶23} Based on the foregoing, we find Appellant has failed to prove any breach of contract or that he suffered any damages as a result of the alleged breach.

Unjust Enrichment

{¶24} "Unjust enrichment operates in the absence of an express contract." *Cozmyk v. Hoy* (June 30, 1997), Franklin App. No. 96APE10–1380, at 8, citing *Hummel v. Hummel* (1938), 133 Ohio St. 520–525–528, 14 N.E.2d 923.

{¶25} There is no dispute that a contract existed in this matter. Therefore, this Court finds Appellant's claim for unjust enrichment fails as a matter of law.

Fraud

{¶26} To prove fraud, a plaintiff must establish the following elements: (1) a representation, or silence where there is a duty to disclose, (2) which is material to the transaction, (3) made falsely, with knowledge of its falsity, or with such utter disregard as to its truth that knowledge may be inferred, (4) with the intent to mislead another into relying on it, (5) justifiable reliance on the representation, and (6) resulting injury proximately caused by the reliance. *Williams v. Aetna Finance Co.*, 83 Ohio St.3d 464,

700 N.E.2d 859 (1998). In addition, a plaintiff alleging fraud must plead with particularity the circumstances constituting fraud. Civil Rule 9(B).

{¶27} "A party seeking an equitable remedy, such as declaratory judgment, reformation or rescission of a contract, must prove a fraud claim with clear and convincing evidence, while a party seeking a monetary remedy must prove fraud by the preponderance of the evidence." *Andrew v. Power Marketing Direct, Inc.*, 10th Dist., 2012-Ohio-4371, 978 N.E.2d 974, ¶ 47, citing *Household Finance Corp. v. Altenberg,* 5 Ohio St.2d 190, syllabus, 214 N.E.2d 667 (1966).

{¶28} Upon review of the record, we find no evidence that Appellee made any false representations to Appellant with regard to the vehicle, the factory warranty or the PWI extended warranty.

{¶29} Again, as set forth above, the Court also finds that Appellant has not shown that he suffered any damages as a result of the alleged fraud. As previously set forth herein, the Court finds that Appellant was never denied coverage for any warranty repairs, under either the factory warranty or the PWI extended warranty. Also, again, the replacement engine has not diminished the value of the Jeep.

{¶30} Based on the foregoing, we find Appellee is entitled to summary judgment on Appellant's fraud claim.

Consumer Sales Practices Act

{¶31} In his brief in opposition to Appellee's motion for summary judgment, Appellant alleges Appellee violated R.C. §1345.02(B)(2),(10), by "several direct and implied false representations" regarding the vehicle and its warranty, including: 1) that the original factory powertrain warranty was still in place when it was not; 2) that the vehicle

qualified for an enforceable extended warranty when it did not; 3) that the odometer accurately reflected the miles driven on the (replacement) engine when it did not; and 4) the implication that the vehicle still had its original installed engine when it did not.

{¶32} Upon review, we find Appellee disclaimed all warranties in the Retail Sales Contract entered into by the parties. Appellant has failed to put forth evidence that any representations were made to him by Appellee with regard to the vehicle or the engine. (Lapkovitch Depo. at. 19-20).

{¶33} Further, as set forth above, Appellant never made any claims under the factory warranty or proved that the warranty was voided.

{¶34} The same holds true with regard to Appellant's PWI warranty claims as he did not make any claims under the PWI warranty and did not provide the trial court with any evidence that the PWI warranty was void. To the contrary, Appellee's expert testified that he contacted PWI and was informed that the extended warranty is and has been in full effect since the date of purchase.

{¶35} Appellant also claims that Appellee falsely represented that the odometer accurately reflected the miles driven on the replacement engine. Upon review, we find no evidence that Appellee ever made any representations about the odometer.

{¶36} Again, this Court find Appellant has failed to prove Appellee knew that the engine in the Jeep had been replaced.

{¶37} We therefore find Appellee is entitled to summary judgment on Appellant's Violation of the Consumer Sales' Practices Act claim.

{¶38} Based on the foregoing, we find Appellant's assignment of error not well-taken and hereby overrule same.

{¶39} For the reasons stated in the foregoing opinion, the decision of the Stark County Court of Common Pleas is affirmed.

By: Wise, John, J.

Hoffman, P. J., and

Wise, Earle, J., concur.

JWW/kw 1213

[Cite as *DC Welch Trucking v. Lagowski*, 2021-Ohio-4555.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

DC WELCH TRUCKING LLC,

Plaintiff-Appellee,

v.

ROGER LAGOWSKI,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 BE 0006

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 20-CV-021

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

JUDGMENT:
Affirmed

Atty. Jacob Manning, Dinsmore & Shohl, LLP., 2100 Market Street, Wheeling, West Virginia 26003, for Plaintiff-Appellee and

Atty. Dennis McNamara, McNamara Law Office, 88 East Broad Street, Suite 1350, Columbus, Ohio 43215, for Defendant-Appellant.

Dated:
December 13, 2021

Donofrio, J.

{¶1} Defendant-appellant, Roger Lagowski, appeals from a Belmont County Common Pleas Court judgment in favor of plaintiff-appellee, DC Welch Trucking, LLC, owned by Dennis Welch, in the amount of $25,734.39, plus interest.

{¶2} Appellant owns a six-acre plot of land across the street from his house. On this land he built a commercial building consisting of multiple office spaces, a townhouse, and several garages in the back. There is a small parking lot in front of the building where cars park. Behind the building there is a much larger space that the companies who rent space in the building use to park their trailers. This lot had an access road and was flattened out by appellant, but was otherwise unfinished.

{¶3} The rest of the facts in this case are in dispute. It can be determined from the record that appellant was looking to turn the large lot into a finished parking lot and entered into business with Wilcox Excavating in June of 2019. Wilcox Excavating is owned by Dennis Wilcox.

{¶4} Eventually, appellee was contacted and asked to deliver various types of stone to the lot in furtherance of building the parking lot. In total, appellee made 54 trips to appellant's land delivering stone valued at $27,234.39. There were no complaints from anyone involved as to appellee's performance or the quality of the materials delivered. But appellee was not paid for the work aside from a single $1,500 payment. Dennis Welch claimed appellant placed this payment on his front porch. This payment was deducted from the total bill. Appellant claims he paid Wilcox for the stone. Wilcox denied this.

{¶5} On January 21, 2020, appellee filed a complaint against appellant for breach of contract and unjust enrichment. The matter proceeded to a bench trial on December 14, 2020, where the court heard testimony from appellant, Welch, Wilcox, and the owner of the stone company.

{¶6} In its January 15, 2021 judgement entry, the trial court found appellee was entitled to judgment against appellant in the amount of $25,734.39. It found appellee showed by clear and convincing evidence the elements of a contract. The court also found appellee had met all elements needed to show unjust enrichment. So that even if

the court had not found that there was a contract present between the parties, appellee would still be entitled to judgment for unjust enrichment.

{¶7} Appellant filed a timely notice of appeal on February 1, 2021. He now raises two assignments of error. We will address appellant's assignments of error out of order for ease of discussion.

{¶8} Appellant's second assignment of error states:

> THE TRIAL COURT'S VERDICT FINDING THAT WELCH TRUCKING HAD PROVED ALL OF THE ELEMENTS OF ITS UNJUST ENRICHMENT CLAIM AND THAT ROGER LAGOWSKI OWED DC WELCH TRUCKING, LLC $25,734.39 AND INTEREST WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶9} Appellant argues that all three elements needed for a successful unjust enrichment claim were not met. Specifically, appellant focuses on the third element which states that "retention of the benefit in circumstances where retention without payment is unjust to the plaintiff" is not met. *Hambleton v. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d. 1298 (1984). Appellant points to his own testimony claiming he had already paid Wilcox for the work. Appellant also points to the relationship between Welch and Wilcox, who were friends since high school, and claims that it would be unfair for Wilcox to escape liability, and that appellee should have filed suit against him as well.

{¶10} When reviewing civil appeals from bench trials, an appellate court applies a manifest weight standard of review. *Revilo Tyluka, L.L.C. v. Simon Roofing & Sheet Metal Corp.,* 193 Ohio App.3d 535, 2011-Ohio-1922, 952 N.E.2d 1181, ¶ 5 (8th Dist.), citing App.R. 12(C), *Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). Judgments supported by some competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus (1978). See also, *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226, 638 N.E.2d 533 (1994). Reviewing courts must oblige every reasonable presumption in favor of the lower court's judgment and findings of fact. *Gerijo*, 70 Ohio St.3d at 226 (citing

Seasons Coal Co., supra). In the event the evidence is susceptible to more than one interpretation, we must construe it consistently with the lower court's judgment. *Id*.

{¶11} The trial court found that the elements of unjust enrichment were met. It looked to *HLC Trucking v. Harris*, 7th Dist. Belmont, No. 01 BA 37, 2003-Ohio-694, ¶¶ 25-26, to explain the elements of unjust enrichment, where this Court explained:

> Unjust enrichment is based on the principle that a person should not be allowed to profit or enrich himself inequitably at another's expense, and should be required to make restitution to the party suffering the loss. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 738, 600 N.E.2d 791.
>
> "To support a claim of unjust enrichment, a plaintiff must demonstrate that (1) he conferred a benefit upon the defendant, (2) the defendant had knowledge of the benefit, and (3) circumstances render it unjust or inequitable to permit the defendant to retain the benefit without compensating the plaintiff. *Hambleton v. R.G. Barry Corp*. (1984), 12 Ohio St.3d 179, 183, 12 OBR 246, 465 N.E.2d 1298. The plaintiff must confer the benefit as a response to fraud, misrepresentation, or bad faith on behalf of the defendant. *Natl. City Bank v. Fleming* (1981), 2 Ohio App.3d 50, 58, 2 OBR 57, 440 N.E.2d 590. That is, there must be a tie of causation between the plaintiff's loss and the defendant's benefit. *Elbert v. West* (Aug. 20, 1986), Lorain App. No. 3985, unreported, at 5, 1986 WL 9131." *Laurent v. Flood Data Serv., Inc*. (2001), 146 Ohio App.3d 392, 399, 766 N.E.2d 221.

{¶12} Thus, we must examine the evidence to determine if appellee presented competent, credible evidence going to all of the elements of unjust enrichment.

{¶13} Richard Petrozzi, owner of Egypt Valley Stone, was the first witness. Egypt Valley Stone conducts regular business with appellee. (Tr. 10). Petrozzi's testimony explained the process appellee goes through to buy stone and how it is billed for the stone received from stone suppliers like Egypt Valley Stone. Petrozzi explained that there is no way for him to know where each delivery that leaves Egypt Valley Stone goes. (Tr. 12). He stated that he documents how much and what type of stone appellee

takes at each delivery and then bills appellee at the end of each month. (Tr. 12). He also noted that appellee did not currently owe Egypt Valley Stone anything and that no one other than Welch ever paid the bill for appellee. (Tr. 13).

{¶14} Welch testified next. Welch stated he was first contacted about delivering stone to appellant by Wilcox. (Tr. 24). Wilcox gave him the address of the lot, asked for a bid, and Welch gave a bid price of $20 per ton. (Tr. 24). Welch expressed that he believed appellant was next to Wilcox while he and Wilcox were on the phone and he believed that appellant gave Wilcox the "go ahead" to accept his offer. (Tr. 70).

{¶15} Welch also testified that he communicated with appellant through text messages. (Tr. 29). Welch copied these text messages and printed the copies. (Plaintiff's Ex. 4). They showed multiple messages between Welch and appellant including appellant asking Welch if he could deliver more stone, messages discussing the total amount owed for the stone, appellant asking if he could stop by and grab an invoice from Welch, and a message that said appellant left $1,500 cash on Welch's porch. (Tr. 29-34, 39).

{¶16} Next, Wilcox testified. Wilcox denied the existence of any contract between appellant and himself, claiming any writings to the contrary were forged. (Tr. 85). In his testimony, Wilcox expressed that appellant was asking his opinion as to how to finish the parking lot, and that he recommended appellee and called Welch as a result of appellant's orders. (Tr. 75). He claimed that no agreement had been made about who would pay for the deliveries and that he only contacted Welch for appellant. (Tr. 77).

{¶17} Wilcox further denied having received the $36,500 from appellant and claimed that the invoices stating such are forged. (Tr. 80). However, he did admit that he was paid two separate times with checks of $3,000 and a third time with a cash payment of $1,000 for a total of $7,000. (Tr. 78). He noted that this did not cover the bill for the work he had done and that he was actually filing suit against appellant in small claims court for the remaining $3,500 of the original $10,500 that Wilcox claimed to have invoiced. (Tr. 98).

{¶18} Finally, appellant testified. He stated that he was in fact billed $36,500 by Wilcox and that he witnessed Wilcox mark the invoices as "Paid." (Tr. 104; Defense Exs. C, D, E, F, G). Appellant further testified that only two payments were made via check

and that Wilcox then asked him to pay the rest in cash because he was going through a divorce and wanted to hide the money. (Tr. 105). Exhibits were introduced to show pictures of money and of Wilcox sitting in his vehicle. (Tr. 111). Appellant claimed he took the pictures to show proof of the cash payments he was giving to Wilcox. (Tr. 111). Appellant stated that Wilcox would not allow pictures to be taken of him holding the money. (Tr. 127)

{¶19} Defense counsel also provided pictures of text messages between appellant and Wilcox. (Tr. 108). These text messages showed Wilcox asking appellant when he was going to get paid. (Tr. 109). Appellant then denied that the text conversations he supposedly had with Welch were real, and that he did not leave $1,500 on his porch. (Tr. 127-128).

{¶20} Lastly, counsel provided bank statements showing withdrawals that appellant claimed to have been made for payment to Wilcox. (Tr. 114). On cross examination, appellant was asked about why money was deposited into his account the same day money was withdrawn. (Tr. 121). Appellant testified that he would withdraw money from the account every time he was paid by his tenants. (Tr. 124). After being asked to look at the exhibits, appellant stated that he saw statements of withdrawals of $6,000 on September 5 and $6,000 on October 1. (Tr. 123).

{¶21} In finding that appellee proved all elements of unjust enrichment, the trial court pointed to the 54 deliveries totaling nearly 1,360 tons of stone that appellant received. Appellant was then able to complete his project and lease the space, so there was a benefit received. Then the court found that appellant had knowledge of this benefit, meeting the second element. Lastly, the court found that it would be inequitable to permit appellant to avoid payment to appellee. It stated that appellant's sole argument was that he had already paid Wilcox for the job, but the court found this testimony not credible. The trial court found that appellant's refusal to compensate appellee was at best bad faith and at worst fraudulent.

{¶22} The parties here presented conflicting evidence as to the agreement to purchase the stone and who paid, or failed to pay, whom. This case rested on which witnesses were more credible. Such issues are best left to the trier of fact. *Seasons Coal Co.*, 10 Ohio St.3d at 80. This is because the trier of fact is in a better position to judge

the witnesses' credibility since it can observe the witnesses' demeanor, gestures, and voice inflections, and use these observations in weighing their credibility. *Id*. In this case, the trial court clearly found Wilcox's and Welch's testimony to be more credible than appellant's testimony.

{¶23} When the trial court's judgment is supported by some competent, credible evidence going to all the material elements, we will not be reverse it as being against the manifest weight of the evidence. *C.E. Morris Co.*, 54 Ohio St.2d at the syllabus. Because the finding of unjust enrichment is supported by some competent, credible evidence it is not against the manifest weight of the evidence.

{¶24} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶25} Appellant's first assignment of error states:

> THE TRIAL COURT'S VERDICT FINDING THAT WELCH TRUCKING PROVIDED BY CLEAR AND CONVINCING EVIDENCE THAT ROGER LAGOWSKI VIOLATED THE TERMS OF THE ORAL CONTRACT AND OWED DC WELCH TRUCKING, LLC $25,734.39 AND INTEREST WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶26} Appellant argues that there was no contract between himself and Welch. He claims Wilcox was a subcontractor and should be the one responsible for paying Welch. Appellant asserts there was no evidence to support an oral contract because the theory of an oral contract was not believable.

{¶27} The burden of proof on one seeking to enforce an oral contract requires that party to prove the existence of the contract by clear and convincing evidence. *Ramun v. Ramun*, 7th Dist. Mahoning No. 12 MA 61, 2014-Ohio-4440, ¶ 26. Clear and convincing evidence is evidence that will produce in the fact-finder's mind a firm belief or conviction as to the facts sought to be established. *Id*. Since appellee looked to enforce the oral contract, the burden of proof was on it to prove the contract's existence by clear and convincing evidence. The trial court held that the burden of proof was met and that an oral contract existed.

{¶28} In its decision on the breach of contract claim, the trial court noted that the Ohio Supreme Court determined that contracts which call for performance by plaintiff, not for a definite period, but for so long as defendant required the product are known as requirement contracts. *Fuchs v. United Motor Stage Co.*, 135 Ohio St. 509, 21 N.E.2d 669 (1939). The trial court pointed to the following statement by the Supreme Court:

> There is no specific amount of merchandise to be sold on the one hand and purchased on the other. The amount is to be determined by the requirements of the defendant as demanded by its business, a matter which is within the control of the defendant and about which is not in position to complain. This contract in character is known as a requirement contract. Such contracts are not unusual and have been upheld generally by the courts. Of course, there must be terms, conditions, or circumstances from which quantities of material or merchandise sold may be determined, or at least approximated. But when such requirements have a fixed business basis, as distinguished from a mere whim of the party making the purchase, there is sufficient certainty in this respect.

Id. at 513.

{¶29} The trial court found that appellee had proven by clear and convincing evidence the elements of a requirement contract.

{¶30} A contract in writing whereby one agrees to buy, for a sufficient consideration, all the merchandise of a designated type which the buyer may require for use in his own established business, is known as a requirement contract. *Id.*, at paragraph two of the syllabus. Appellee claims that there existed an oral contract between itself and appellant. There is no claim or evidence to support that any written contract existed between the parties here. Therefore, the elements for a written requirement contract were not met.

{¶31} Nonetheless, we have already determined that the trial court's judgment in favor of appellee on the unjust enrichment claim was not against the manifest weight of the evidence and that judgment in appellee's favor was supported by the evidence. Therefore, whether there was a valid requirement contract between the parties or not, there is no reversible error as judgment in appellee's favor was proper.

{¶32} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶33} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.
D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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 *Mr. Pulpstone, L.L.C. v. The Shops on 58, L.L.C.*, 2021-Ohio-4467.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

MR. PULPSTONE, LLC	C.A. No. 21CA011718
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
THE SHOPS ON 58, LLC	
Appellee	CASE No. 20CV201165

DECISION AND JOURNAL ENTRY

Dated: December 20, 2021

CALLAHAN, Judge.

{¶1} Appellant, Mr. Pulpstone, LLC ("Mr. Pulpstone") appeals a judgment of the Lorain County Court of Common Pleas in favor of appellee, The Shops on 58, LLC ("The Shops on 58"). This Court reverses.

I.

{¶2} Mr. Pulpstone is a franchisee of Pulp Juice and Smoothie Bar in Lorain County that entered into a lease with The Shops on 58 for occupancy of one rental unit in a four-unit retail development. The lease provided that Mr. Pulpstone "shall have the exclusive right in the shopping center to engage as a specialty juice, smoothie, wrap and frozen yogurt shop." It also explained

> So long as [Mr. Pulpstone] is not in default of this Lease, [The Shops on 58] shall not permit or allow any other tenant in the shopping center of which the Premises is a part to engage in the selling of specialty juices, smoothies, wraps or frozen yogurt products as their primary business. Primary business for smoothies is defined as having no more than 4 smoothies offered on the menu at one time.

> Additionally, there is to be no external or outward facing signage or advertisements promoting smoothies.

After executing the lease, Mr. Pulpstone learned that The Shops on 58 was in negotiations with a franchisee of Rita's Italian Ice ("Rita's") for the lease of space within the same shopping center. Mr. Pulpstone objected under the exclusive-use clause, but The Shops on 58 moved forward nonetheless.

{¶3} Mr. Pulpstone filed an action for declaratory judgment against The Shops on 58, requesting a declaration "that Rita's is a competitor under the terms of the Lease and is prohibited from leasing any space at The Shops on 58." Mr. Pulpstone also asserted a claim for breach or anticipatory breach of contract. The Shops on 58, on the other hand, maintained that Rita's was not in competition with Mr. Pulpstone as defined by the lease. Mr. Pulpstone moved for partial summary judgment with respect to its request for a declaratory judgment, and The Shops on 58 moved for summary judgment on both of Mr. Pulpstone's claims.

{¶4} The trial court determined that the word "smoothie," as used in the relevant paragraph of the lease, was unambiguous; that Rita's does not offer products for sale that fell within the definition of "smoothie"; and, therefore, that the lease permitted The Shops on 58 to lease a portion of the shopping center to Rita's. The trial court denied Mr. Pulpstone's motion for partial summary judgment, granted The Shops on 58's motion for summary judgment, and entered judgment in favor of The Shops on 58.

{¶5} Mr. Pulpstone appealed, raising two assignments of error. Because the second assignment of error is dispositive, it is addressed first in this Court's analysis.

II.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT FAILED TO APPLY THE PRINCIPLES OF CONTRACT LAW TO THE EVIDENCE[.]

{¶6} Mr. Pulpstone's second assignment of error argues that the trial court erred by concluding that the term "smoothie" was unambiguous and, as a result, failing to consider extrinsic evidence. This Court agrees in part.

{¶7} This Court reviews an order granting summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Under Civ.R. 56(C), "[s]ummary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10. Likewise, this Court reviews legal determinations in a declaratory judgment de novo. *See Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, ¶ 14, 17; *Martin v. Steiner*, 9th Dist. Wayne No. 17AP0021, 2018-Ohio-3928, ¶ 10.

{¶8} Mr. Pulpstone's second assignment of error raises a threshold question of law regarding the interpretation of the lease itself. *See Boone Coleman Constr., Inc. v. Piketon*, 145 Ohio St.3d 450, 2016-Ohio-628, ¶ 10, citing *Arnott* at ¶ 14; *Gotham v. Basement Care, Inc.*, 9th Dist. Summit No. 29105, 2019-Ohio-3872, ¶ 8, quoting *Watkins v. Williams*, 9th Dist. Summit No. 22162, 2004-Ohio-7171, ¶ 23. As such, the material facts are not disputed. *See generally Daso v. Creston Ins. Ctr., LLC*, 9th Dist. Wayne No. 17AP0039, 2018-Ohio-5312, ¶ 5.

{¶9} "A lease is a contract between the landlord and the tenant." *Christe v. GMS Mgt. Co., Inc.*, 124 Ohio App.3d 84, 88 (9th Dist.1997). When considering the meaning of contract terms, this Court is guided by the principle that we must give effect to the parties' intentions.

Sunoco, Inc. (R & M) v. Toledo Edison Co., 129 Ohio St.3d 397, 2011-Ohio-2720, ¶ 37. The intentions of the parties are presumed to be reflected in the plain language used in the contract. *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C.*, 159 Ohio St.3d 194, 2019-Ohio-4716, ¶ 13. When reviewing a contract,

> [w]e will examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract. In addition, we will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning."

Sunoco, Inc. (R & M), at ¶ 37, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11.

{¶10} Exclusive-use clauses, such as the one at issue in this case, are interpreted in the same manner. *See Rite Aid of Ohio, Inc. v. Marc's Variety Store, Inc.*, 93 Ohio App.3d 407, 413-414 (8th Dist.1994). Exclusive-use clauses must be construed narrowly, with any doubts "'resolved against a possible construction thereof which would increase the restriction upon the use of such real estate.'" *Id*. at 413, quoting *Loblaw, Inc. v. Warren Plaza, Inc.*, 163 Ohio St. 581, 592 (1955). *See also Kent State Univ. v. Univ. Coffee House, Inc.*, 10th Dist. Franklin No. 02AP-1100, 2003-Ohio-2950, ¶ 35. The intentions of the parties with respect to exclusive-use clauses are "to be gleaned from the contract language used unless there is some ambiguity." *Rite Aid of Ohio, Inc.* at 414. Ambiguity, in the context of an exclusive-use clause, must "be resolved in favor of a narrow construction[.]" *Id*.

{¶11} Because contracts must be construed with reference to the ordinary meaning of words, courts may rely upon dictionary definitions to establish their meaning. *Rite Aid of Ohio, Inc.* at 415, citing *Andrews v. Tax Commr.*, 135 Ohio St. 374, 376 (1939). *See also Commercial*

Intertech Corp., f.k.a. Commercial Shearing, Inc. v. Guyan Internatl., Inc., 11th Dist. Portage No. 99-P-0119, 2001 WL 314869, *2 (Mar. 30, 2001) ("A dictionary definition does not amount to parol evidence. It is a reliable source for finding the plain and ordinary meaning of a word."). This Court has noted the use of dictionary definitions on many occasions. *See*, *e.g.*, *Dalton v. Massillon*, 9th Dist. Wayne No. 19AP0027, 2020-Ohio-1174, ¶ 18, 20; *Founders Ins. Co. v. Gurung*, 9th Dist. Summit Nos. 28508, 28511, 2017-Ohio-8983, ¶ 7; *Envision Waste Servs., LLC v. Cty. of Medina*, 9th Dist. Medina Nos. 15CA0104-M, 15CA0106-M, 2017-Ohio-351, ¶ 26. Other courts of appeals have done the same. For example, in considering the meaning of the term "drug store" for purposes of an exclusive-use clause, the Eighth District Court of Appeals concluded dictionary definitions provided "ample support" for the conclusion that the term "drug store" referred to "a store where prescriptions are filled, even if non-prescription items are also sold." *Rite Aid of Ohio, Inc.* at 414-415. In reaching this conclusion, the Court emphasized the consistency across the numerous dictionary definitions consulted by the trial court. *Id*. at 415.

{¶12} A contract term is ambiguous when it "'may reasonably be understood in more than one sense[.]'" *Envision Waste Servs., LLC* at ¶ 15, quoting *Town & Country Co-Op, Inc. v. Sabol Farms, Inc.*, 9th Dist. Wayne No. 11CA0014, 2012-Ohio-4874, ¶ 15. A term that has more than one possible meaning in its ordinary and usual sense must be considered in its context within the contract to discern the appropriate meaning. *Skidmore v. Natl. Bronze & Metals (Ohio) Inc.*, 9th Dist. Lorain No. 12CA010328, 2014-Ohio-4423, ¶ 30, citing *Carroll Weir Funeral Home v. Miller*, 2 Ohio St.2d 189, 192 (1965). When the context proves unhelpful in this regard, this Court has concluded that a contract term is ambiguous. *Skidmore* at ¶ 31.

{¶13} The exclusive-use clause at issue in this case provides:

> So long as [Mr. Pulpstone] is not in default of this Lease, [The Shops on 58] shall not permit or allow any other tenant in the shopping center of which the Premises

> is a part to engage in the selling of specialty juices, smoothies, wraps or frozen yogurt products as their primary business. Primary business for smoothies is defined as having no more than 4 smoothies offered on the menu at one time. Additionally, there is to be no external or outward facing signage or advertisements promoting smoothies.

The lease does not define the term "smoothies." Nonetheless, the "'mere absence of a definition * * * does not make the meaning of [a] term ambiguous.'" (Alteration in original.) *May v. Lubinski*, 9th Dist. Summit No. 26528, 2013-Ohio-2173, ¶ 13, quoting *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). In this circumstance, we look to whether there is a plain and ordinary meaning of the term. *See May* at ¶ 13.

{¶14} In its motion for summary judgment, The Shops on 58 referenced one dictionary definition of smoothie: "a creamy beverage made of fruit blended with juice, milk or yogurt." Noting that the lease did not define the terms "juice" or "yogurt," The Shops on 58 also referenced definitions of those terms from a dictionary and from the United States Food and Drug Administration. Notably, The Shops on 58 did not argue that the contract terms were unambiguous—rather, The Shops on 58 argued, as it has in this appeal, that the terms *were* ambiguous and, as a result, that the trial court was obligated to construe the exclusive-use provision narrowly.

{¶15} Mr. Pulpstone, in turn, referenced multiple definitions of the term "smoothie":

- A thick, smooth drink of fresh fruit pureed with milk, yogurt **or** ice cream. The New Oxford American Dictionary (Elizabeth J. Jewell & Frank Abate, eds., 2001)

- A creamy beverage made of fruit blended with juice, milk, **or** yogurt. Merriam-Webster's Collegiate Dictionary (11th ed., 2011)

- A drink made of fruit or sometimes vegetables, blended with juice, milk, **or** yogurt and often ice until smooth. The American Heritage Dictionary of the English Language (5th ed., 2011.)

(Emphasis in original.) Contrary to the position taken by The Shops on 58, however, Mr. Pulpstone maintained that there was no ambiguity in the lease on this point. In response, The Shops on 58 argued that the diversity within the definitions referenced by Mr. Pulpstone proved the existence of ambiguity.

{¶16} The trial court noted that the lease itself does not define "smoothie" "[a]side from distinguishing 'smoothies' from 'specialty juices' and 'frozen yogurt products[.]'" The trial court also acknowledged that the relevant definitions of "smoothie" differed but concluded that "the fact that some secondary sources may have different definitions for the word 'smoothie' is not dispositive of whether it is ordinary or ambiguous." Without looking to the context of the lease to determine whether one definition should be favored over another, the trial court concluded that "smoothie" is an unambiguous term and adopted a plain and ordinary meaning of its own. Noting that "the margins between products of this type are tight," the trial court nonetheless determined "that smoothie is not ambiguous and has a plain and ordinary meaning which is 'a creamy blended beverage made with fruit and juice, milk, or yogurt.'"

{¶17} When determining whether a contract term is ambiguous, however, it is incumbent upon courts look to context in order to discern which of competing definitions comports with the parties' intentions. *See Skidmore*, 2014-Ohio-4423, at ¶ 30, citing *Carroll Weir Funeral Home*, 2 Ohio St.2d at 192; *Rite Aid of Ohio*, 93 Ohio App.3d at 414. *See generally Beverage Holdings, L.L.C.*, 159 Ohio St.3d 194, 2019-Ohio-4716, at ¶ 13; *Sunoco, Inc. (R & M)*, 129 Ohio St.3d 397, 2011-Ohio-2720, at ¶ 37. When the parties' intentions cannot be determined with resort to the use of the term in context, that term is properly considered ambiguous. *Skidmore* at ¶ 31.

{¶18} In this case, the trial court erred by resolving competing definitions of the term "smoothie" without considering the parties' intentions, as reflected in the context of the agreement itself. The trial court's resulting conclusion that the term is unambiguous is error for this reason.[1] Mr. Pulpstone's second assignment of error is sustained solely on this basis.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE WEIGHT OF THE EVIDENCE PRESENTED.

{¶19} Mr. Pulpstone's first assignment of error argues that the trial court erred by granting summary judgment to The Shops on 58 because the evidence submitted in support of the parties' respective motions for summary judgment did not support the trial court's conclusion. In light of this Court's resolution of Mr. Pulpstone's second assignment of error, the first is premature.

III.

{¶20} Mr. Pulpstone's second assignment of error is sustained. The first assignment of error is premature. The judgment of the Lorain County Court of Common Pleas is reversed, and this matter is remanded to the trial court for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

[1] This Court makes no determination regarding whether, with due consideration of the context, the term "smoothie" is ultimately ambiguous.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

LYNNE S. CALLAHAN
FOR THE COURT

HENSAL, P. J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

BRIAN C. LEE, Attorney at Law, for Appellant.

MARK E. STEPHENSON, Attorney at Law, for Appellee.

[Cite as *Vesper v. Otterbein Lebanon*, 2021-Ohio-4545.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

MARY GLORIA VESPER, et al.,	:	
Appellants,	:	CASE NO. CA2021-02-016
	:	O P I N I O N
- vs -		12/27/2021
	:	
OTTERBEIN LEBANON,	:	
Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 19CV92211

Pro Senior, Inc., and Miriam H. Sheline and M. Elizabeth Hils, for appellants.

The Holfinger Stevenson Law Firm, Ltd., and Michael S. Kearns; Rolf Goffman Martin Lang LLP, and David S. Brown and W. Cory Phillips, for appellee.

BYRNE, J.

{¶1} Plaintiffs, Mary Gloria Vesper and Catherine Vesper (collectively, "the Vespers"), appeal from the decision of the Warren County Court of Common Pleas, which denied the Vespers' motion for summary judgment and granted the summary judgment motion of Defendant, Otterbein Lebanon Seniorlife Community ("Otterbein")t, thereby dismissing the Vespers' claims against Otterbein for alleged violations of the Ohio

Consumer Sales Practices Act. For the reasons discussed below, we affirm the trial court's decision.

I. Factual Background

{¶2} Mary Gloria Vesper was the wife of George Vesper. Catherine Vesper is Mary Gloria and George's daughter. George was admitted to Otterbein's long-term care facility in October 2015 and began receiving personal care and nursing services, as well as room and board. Contemporaneous with George's admission, Mary Gloria signed Otterbein's Residency Agreement. Mary Gloria executed the Residency Agreement as "Representative," which is a defined term in the agreement. George did not sign the Residency Agreement.

{¶3} Consistent with federal and state laws and regulations, the Residency Agreement specifically provided that the person executing the agreement as Representative bore no personal liability as to the financial obligations incurred by the Resident for services rendered by Otterbein.[1] However, the Representative did agree to the following relevant terms:

> Duty of Representative on Behalf of Resident.
> During the term of his/her residency, the Resident may need assistance in arranging for payment for the services provided. You have asserted to Otterbein that the Representative shall act in a fiduciary capacity on the Resident's behalf to satisfy the Resident's financial obligations under this Agreement if the Resident chooses not to, or is unable to, meet those obligations. The Resident shall be primarily responsible for making payments to Otterbein until such time as he/she assigns the responsibility for making payment to the Representative or until he/she can no longer make payments on his/her own behalf; at such time, the Representative shall become primarily responsible for making such payments.

1. Federal and state law prohibits nursing facilities from requiring a third party to personally guarantee payment of charges incurred by a resident. 42 U.S.C. 1396r(c)(5)(A)(ii) and (B)(ii); 42 C.F.R. 483.15(a)(3); and O.A.C.5160-3-02(C)(4). These statutes and regulations, however, do not prohibit a nursing facility from requiring third parties who have access to the resident's funds from entering into a contract requiring payment by the third party from the resident's funds. *Id*.

> Legal Authority to Access Resident's Funds.
> You have asserted that the Representative has legal access to the Resident's income, assets or resources, including, but not limited to, social security, pension or retirement funds, annuities, insurance, bank accounts, and mutual funds; and, You understand that Otterbein is entering into this Agreement in reliance on that assertion. * * *.[2]
>
> Diversion of Resident's Resources.
> Representative agrees to be a good financial steward of the Resident's income, resources and assets over which he/she has control. * * * If any payments or funds of the Resident that are available to pay for the Resident's care are withheld, misappropriated for personal use, or otherwise not turned over to Otterbein for payment of the Resident's financial obligations under this Agreement, then Representative agrees to pay those amounts to Otterbein from the Representative's own resources. * * *.

{¶4} Catherine was not present during George's admission. She also did not sign the Residency Agreement. However, Catherine had previously met with Otterbein's representatives and provided them with a copy of a general, durable power of attorney nominating her as George's attorney-in-fact. Catherine worked with Otterbein's Medicaid specialist to transition the payments of George's Medicaid benefits to Otterbein.[3]

{¶5} George's Medicaid benefits were successfully transitioned to pay for Otterbein's services. Otterbein's Medicaid specialist regularly contacted Catherine, requesting and receiving certain records to ensure that Otterbein continued receiving George's Medicaid benefits. From October 2015 through July 2017, Otterbein received uninterrupted payments from the Ohio Department of Medicaid for services and supplies furnished to George.

{¶6} However, on July 31, 2017, George's Medicaid benefits were terminated. This was apparently due to a determination by Job and Family Services that George had failed

2. The Residency Agreement defined "You," as referring to both the Resident and Representative.

3. Prior to entering Otterbein, George was receiving Medicaid benefits and had been at a different facility.

to "cooperate with the redetermination process." It is not clear from the record how the agency made this determination. Catherine and Otterbein thereafter worked on submitting a new application for Medicaid benefits on behalf of George. George's Medicaid benefits were eventually reinstated, but not for many months. Despite not being paid during this period of time, Otterbein continued providing George with healthcare services and room and board.

{¶7} George died in February 2018, prior to a determination regarding his new, pending Medicaid application. At the time of George's death, Otterbein had still not been paid for services and room and board rendered to George between August 2017 and February 2018. George's outstanding bill at Otterbein at that time was approximately $61,000.

II. The Hamilton County Lawsuit

{¶8} In April 2018, Otterbein filed suit against Mary Gloria and Catherine in the Hamilton County Court of Common Pleas. Against Mary Gloria, Otterbein alleged breach of contract, promissory estoppel, and a claim for necessaries under R.C. 3103.03(C). Against Catherine, Otterbein asserted claims for promissory estoppel and a statutory action pursuant to R.C. 1337.092(B) for alleged negligent/unauthorized acts Catherine undertook as George's attorney-in-fact.

{¶9} The Vespers separately answered and counterclaimed. The counterclaims both alleged that Otterbein had violated Ohio's Consumer Sales Practice Act, R.C. 1345.02 and 1345.03 ("CSPA"). Specifically, the Vespers allege that they were consumers and Otterbein was a supplier under the CSPA and that Otterbein acted unfairly, deceptively, and unconscionably by filing the Hamilton County lawsuit and attempting to collect a debt upon which neither Mary Gloria nor Catherine were liable.

{¶10} In July 2018, Otterbein moved to dismiss the Vespers' counterclaims, arguing

that the Vespers lacked standing to bring CSPA claims against Otterbein. The Vespers filed memoranda in opposition and the matter was fully briefed.

{¶11} In September 2018, George's Medicaid benefits were retroactively reinstated via an administrative appeal. Otterbein thereafter received payment for George's past due amount. Otterbein dismissed its claims against the Vespers in the Hamilton County lawsuit. The Vespers' counterclaims remained pending.

{¶12} In October 2018, the Hamilton County common pleas court judge's law clerk emailed the parties to advise them that the judge intended to grant Otterbein's motions to dismiss the Vespers' counterclaims. He also requested that Otterbein prepare, and the Vespers review, a proposed entry. However, hours later, and before the court's dismissal entry was prepared or filed, the Vespers voluntarily dismissed their counterclaims under Civ.R. 41(A)(1), terminating the Hamilton County lawsuit.

III. The Warren County Lawsuit

{¶13} Six months later, in April 2019, the Vespers filed this action against Otterbein in the Warren County Court of Common Pleas. The Vespers' new complaint included near identical CSPA claims to those they had previously filed and then dismissed in Hamilton County.[4]

{¶14} The parties filed competing motions for summary judgment. In the Vespers' summary judgment motion, in relevant part, they argued that Otterbein violated the CSPA by wrongfully filing suit against them in Hamilton County and additionally violated the CSPA by failing to refund Mary Gloria with an approximate overpayment of $5,076.79 of George's Medicaid benefits for 21 months.

4. Otterbein moved to transfer the case to Hamilton County. The Warren County court denied the motion. The court, while indicating its concern for what appeared to be forum shopping, observed that venue was proper in Warren County and the Vespers had an absolute right, regardless of motive, to dismiss their Hamilton County claims under Civ.R. 41(A)(1).

{¶15} The trial court denied the Vespers' summary judgment motion and granted Otterbein's summary judgment motion. In granting Otterbein's motion, the trial court found that Catherine was not a "consumer" with respect to her interaction with Otterbein and therefore lacked standing to assert a CSPA claim. The court noted that Catherine had not signed the Residency Agreement, nor was she present at its signing.

{¶16} The court did find that Mary Gloria was a consumer with respect to Otterbein because she had signed the Residency Agreement and had entered into a transaction with Otterbein in a fiduciary capacity. However, the court found that there was nothing "wholly unfair, deceptive, or unconscionable" with respect to Otterbein's action of filing suit against the Vespers in Hamilton County. The court noted that the Residency Agreement indicated the potential that Otterbein would bring suit against Mary Gloria in her capacity as "Representative" if Otterbein was not paid for the services provided to George.

{¶17} With respect to the overpayment refund, the court found that Otterbein had not acted unfairly, deceptively, or unconscionably. The court noted that Mary Gloria was not the person entitled to the refund, and instead those funds were owed to George's estate, which was not a party to the suit. Accordingly, the court found that Mary Gloria lacked standing to claim that the delayed release of the overpayment was a CSPA violation.

{¶18} The Vespers appeal, raising two assignments of error, which we will address out of order.

IV. Law and Analysis

{¶19} Assignment of Error No. 2:

{¶20} THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT DISMISSING APPELLANT MARY GLORIA VESPER'S CLAIMS.

{¶21} In their second assignment of error, the Vespers argue the trial court erred in dismissing their CSPA claims because they were wrongfully sued in Hamilton County, the

filing of the lawsuit constituted a CSPA violation, and because Otterbein delayed refunding to Mary Gloria an overpayment of George's Medicaid benefits.

A. Standard of Review

{¶22} This court reviews a trial court's summary judgment decision under a de novo standard. *Deutsche Bank Natl. Trust Co. v. Sexton*, 12th Dist. Butler No. CA2009-11-288, 2010-Ohio-4802, ¶ 7. Summary judgment is appropriate under Civ.R. 56 when (1) there is no genuine issue of material fact remaining to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed in his favor. *BAC Home Loans Servicing, L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, ¶ 17 (12th Dist.), citing *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998).

{¶23} The party requesting summary judgment bears the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Once a party moving for summary judgment has satisfied its initial burden, the nonmoving party "must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings." *Sexton* at ¶ 7; Civ.R. 56(E).

B. Overview of the CSPA

{¶24} The CSPA prohibits unfair or deceptive acts or practices and unconscionable acts or practices by suppliers in consumer transactions. R.C. 1345.02(A) and 1345.03(A); *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29 (1990). A "consumer" is defined as "a person who engages in a consumer transaction with a supplier." R.C. 1345.01(D). A "supplier" is a "seller, lessor, assignor, franchisor, or other person engaged in the business

of effecting or soliciting consumer transactions * * *." R.C. 1345.01(C). A "consumer transaction" means "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." R.C. 1345.01(A).

{¶25} R.C. 1345.02(B) contains a representative list of unfair and/or deceptive practices. In one example, a supplier violates the CSPA if it makes false claims as to the quality or newness of the subject of a consumer transaction. R.C. 1345.02(B)(2) and (3). In another example, a supplier acts deceptively if it falsely informs a consumer that repair or replacement is needed. R.C. 1345.02(B)(7).

{¶26} R.C. 1345.03(B)(1) through (7) presents a list of considerations for a trial court to undertake in determining whether an act or practice was "unconscionable." One example is where a "supplier has knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement* * *." R.C. 1345.03(B)(1). When these examples and considerations are considered together, "the CSPA defines "unfair or deceptive consumer sales practices" as those that mislead consumers about the nature of the product they are receiving, while "unconscionable acts or practices" relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue." *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶ 24.

{¶27} Unfair, deceptive, or unconscionable acts or practices constitute a CSPA violation whether they occur before, during, or after the consumer transaction. R.C. 1345.02(A) and 1345.03(A). Accordingly, "[t]he collection of debts associated with consumer transactions is within the purview of the [CSPA] since it covers acts which occur

before, during, or after the transaction." *Broadnax v. Greene Credit Serv.*, 118 Ohio App.3d 881, 892 (2d Dist.1997), citing *Celebrezze v. United Research, Inc.*, 19 Ohio App.3d 49 (9th Dist.1984). *Accord Smith v. A.B. Bonded Locksmith, Inc.,* 143 Ohio App. 3d 321, 331 (1st Dist.2001).

C. Analysis of Otterbein's Hamilton County Lawsuit Claims as Alleged CSPA Violations

{¶28} In the proceedings below, the parties stipulated that Otterbein qualified as a "supplier" for CSPA purposes.[5] But Otterbein disputed that the Vespers were "consumers" under the CSPA and disputed that the parties engaged in a "consumer transaction" with Otterbein. We will presume, for purposes of deciding this assignment of error only, that both Catherine and Mary Gloria qualified as "consumers" under the CSPA and that they engaged Otterbein in a "consumer transaction." As demonstrated below, it is unnecessary for us to decide these questions because we do not find that Otterbein's action of authorizing its legal counsel to file the Hamilton County lawsuit constituted an unfair, deceptive, or unconscionable practice in conjunction with a consumer transaction. After careful review of the background facts, pleadings, and relevant law, there is nothing about the Hamilton County complaint, i.e., its content and claims, that is unfair, deceptive, or unconscionable under the CSPA.

{¶29} The Vespers did not dispute many of the basic factual allegations of the complaint. That is, the parties do not dispute that George was admitted to Otterbein, that Mary Gloria signed Otterbein's Residency Agreement as "Representative," or that Otterbein was aware that George designated Catherine, via a durable power of attorney, as his attorney-in-fact. The parties further do not dispute that Catherine was actively involved in

5. Residential care facilities, such as Otterbein, have been considered "suppliers" that are subject to the CSPA. *Elder v. Fischer*, 129 Ohio App.3d 209, 215, (1st Dist.1998).

George's care and with assisting Otterbein with obtaining George's Medicaid benefits. The parties further agree that for six months leading to his death, Otterbein provided personal and nursing services and room and board to George and was not paid for those services at that time.

{¶30} Based upon these facts, and for the reasons explained below, the legal claims asserted by Otterbein against the Vespers were colorable and the assertion of those claims does not constitute an unfair, deceptive, or unconscionable act or practice under the CSPA. We will analyze each claim separately.

a. Breach of Contract Claim Against Mary Gloria

{¶31} With regard to Mary Gloria, Otterbein asserted breach of contract. There were obvious grounds for this claim given that it was undisputed that Mary Gloria signed the Residency Agreement, which contained terms in which she represented that she had access to George's assets and that she would act in a fiduciary capacity with respect to satisfying George's financial obligations incurred at Otterbein. Otterbein alleged that it had not been paid and that Mary Gloria had breached aspects of the agreement relating to assuring payment of George's assets.

{¶32} The Vespers challenge the legitimacy of the breach of contract claim on two grounds. First, they argue that the Residency Agreement was unenforceable because it was unsigned by George, and Mary Gloria could not guarantee an unsigned contract. Second, they argue that Mary Gloria did not and could not sign the agreement on behalf of George because she was not his attorney-in-fact for financial purposes. These arguments are simply in the nature of legal defenses that the Vespers could have raised in the proceedings in Hamilton County had that litigation been decided on the merits. These arguments do not establish that the breach of contract claim was wholly baseless or that its assertion constituted a deceptive, unfair, or unconscionable act under the CSPA.

b. Necessaries Claim Against Mary Gloria

{¶33} Otterbein also asserted a claim for necessaries against Mary Gloria, pursuant to R.C. 3103.03. The necessaries statute imposes a statutory duty on spouses to support one another out of the person's property or labor and that if one spouse is unable to do so, the other spouse must assist in support so far as they are able. R.C. 3103.03(A). The statute further provides that if one spouse fails to support the other, then any other person may supply the spouse needing support with "necessaries," i.e., food, shelter, clothing, and medical services, and thereafter recover the reasonable value of necessaries supplied from the non-supporting spouse. R.C. 3103.03(C). The statute has been utilized by nursing facilities seeking to obtain payment from the spouse of a non-paying resident. *See Embassy Healthcare v. Bell*, 155 Ohio St.3d 430, 2018-Ohio-4912. It is undisputed that Mary Gloria was George's spouse and that Otterbein provided George with necessaries during his stay at Otterbein's facility. Thus, there were colorable grounds for the assertion of the necessaries claim and its assertion in the Hamilton County lawsuit was not an unfair, deceptive, or unconscionable act under the CSPA.

{¶34} The Vespers nonetheless argue that the necessaries claim was groundless. The Vespers specifically argue that Otterbein was required by R.C. 2117.06(C) and *Embassy Healthcare* to present its claim to George's estate within six months of his death before it was permitted to pursue a necessaries claim, and that Otterbein's failure to do so barred its necessaries claim.

{¶35} This argument may have been a successful defense to Otterbein's necessaries claim, but it was only a defense. The necessaries claim was not groundless when it was filed because it is undisputed that Otterbein provided George with care, room, and board for six months without being paid the $61,000 it was owed, and Mary Gloria was George's spouse. In these circumstances, the fact that Otterbein asserted a colorable

necessaries claim does not establish an unfair, deceptive, or unconscionable act under the CSPA.

c. Promissory Estoppel Claim Against Mary Gloria and Catherine

{¶36} Otterbein brought claims of promissory estoppel against both Mary Gloria and Catherine. Both claims appear colorable based on the undisputed, underlying facts. The promissory estoppel claim against Mary Gloria is effectively just an alternative theory of recovery with regard to the breach of contract claim. That is, if the court were to determine that the Residency Agreement was unenforceable, then Otterbein would argue that it relied upon Mary Gloria's promise to use her access to George's fund to pay for his nursing care at Otterbein.

{¶37} The promissory estoppel claim against Catherine also appears colorable based on the parties' situation. Otterbein alleged in its Hamilton County complaint that Catherine made some promises or guarantees to Otterbein's staff concerning payment for George so that he could remain in the facility for months following the termination of his Medicaid benefits. Otterbein's awareness of Catherine's status as George's attorney-in-fact could potentially make it reasonable for it to rely on such a promise – or at least, it made Otterbein's claim colorable.

{¶38} Nonetheless, the Vespers argue that Otterbein's promissory estoppel claim would be barred by R.C. 1335.05, the statute of frauds, which requires that any agreement to answer for the debt of another must be in writing. Again, this is a defense to a legal claim; it does not demonstrate that Otterbein's claims were not colorable, much less that the assertion of the claims in the Hamilton County lawsuit constituted an unfair, deceptive, or unconscionable act or practice under the CSPA.

d. R.C. 1337.092(B) Claim Against Catherine

{¶39} Finally, Otterbein asserted a claim pursuant to R.C. 1337.092(B)(3) against

Catherine for damages in conjunction with allegedly negligent acts she undertook as George's attorney-in-fact. Like the aforementioned claims, this claim is also colorable based on the fact that Catherine was George's attorney-in-fact, frequently communicated with Otterbein regarding George's care and Medicaid benefits, and Otterbein alleged that Catherine's negligent failure to take certain actions as George's attorney-in-fact caused George to accrue a debt with Otterbein. The inclusion of the R.C. 1337.092(B) claim was not an unfair, deceptive, or unconscionable act under the CSPA.

D. Analysis of Otterbein's Request for Contractual Interest and Attorney Fees as Alleged CSPA Violation

{¶40} The Vespers further argue that the Hamilton County lawsuit was unfair, deceptive, or unconscionable because Otterbein's complaint sought 18 percent interest and attorney fees on certain claims. The Vespers contend that Otterbein was not entitled to 18 percent interest or attorney fees, and, citing *Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 2016-Ohio-3444, argue that Otterbein's action constituted a violation of the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692 et seq., as well as the CSPA. We disagree.

{¶41} In *Taylor*, the debt collector filed a lawsuit demanding interest at 24 percent. *Id*. at ¶ 26. However, the debt collector did not actually possess the credit card agreement to prove the contractual interest rate and otherwise would have only been entitled to interest at a rate of 4 percent. *Id*. at ¶ 26, 83. The Ohio Supreme Court noted that the debt collector "here went far beyond simply filing a complaint without yet having 'adequate proof of its claim.'" *Id.* at ¶ 83, *quoting Harvey v. Great Seneca Fin. Corp.*, 453 F.3d at 324, 333 (6th Cir.2006). The debt collector did not attach any document potentially supporting the claimed 24 percent interest rate, sought default judgment, and filed an affidavit signed by its employee asserting that 24 percent interest was owed, without any basis for that

assertion. *Id.* Essentially the debt collector in *Taylor* wholesale fabricated a claim that 24 percent interest was owed. The court held that the consumer could bring an action under the FDCPA and the CSPA in these circumstances where the requested interest rate was "unavailable under the law." *Id*. at ¶ 1, 83-86.

{¶42} This case is distinguishable from *Taylor*. Otterbein sought 18 percent interest and attorney fees only with respect to the breach of contract claim against Mary Gloria and the R.C. 1337.092(B)(3) claim against Catherine. Otterbein relied on the Residency Agreement, which contained a provision for interest accruing at the rate of 1.5 percent per month (or 18 percent annually) and also provided for the collection of attorney fees if Otterbein had to resort to collection efforts. Thus, Otterbein's request for contractual interest and attorney fees was not groundless and was colorable.

{¶43} This is not to say that Otterbein necessarily would have prevailed and properly been awarded 18 percent interest from Mary Gloria on its breach of contract claim against her and/or Catherine on its R.C. 1337.092(B)(3) claim against her if the Hamilton County case had proceeded. While it is not certain that Otterbein would have ultimately prevailed in obtaining interest at 18 percent or attorney fees on those specific claims, the request for interest and attorney fees was colorable and therefore did not constitute an unfair, deceptive, or unconscionable act under the CSPA.

E. Analysis of Otterbein's Failure to Refund Overpayment as Alleged CSPA Violation

{¶44} The Vespers argue that the trial court erred in finding that Otterbein did not violate the CSPA by its "refusal" to refund a $5,076.79 overpayment for 21 months. The "overpayment" was seemingly due to the July 2018 decision of the Bureau of State Hearings, which, in reinstating George's Medicaid benefits, also redetermined his monthly patient liability.

{¶45} The record indicates Mary Gloria had requested, through counsel, that Otterbein issue a check for the overpayment to her personally. Otterbein resisted this request and instead offered to issue a check to the Estate of George Vesper. The check was eventually issued to George's Estate in May 2020 at the Vespers' counsel's request.

{¶46} It is undisputed that the refund did not belong to Mary Gloria and instead was property of George's estate. The record indicates that Otterbein offered to transfer the refund proceeds to George's estate, but that Mary Gloria wanted the refund to be issued to her personally. Otterbein argues that it could not comply with Mary Gloria's demand without exposing itself to potential liability. We find nothing unfair, deceptive, or unconscionable under the CSPA with respect to the timing of the overpayment refund.

V. Conclusion

{¶47} Based on the foregoing, we find that there are no genuine issues of material fact remaining to be litigated that would preclude summary judgment, that Otterbein was entitled to summary judgment, and that even when the facts are construed in favor of the Vespers, reasonable minds can come to but one conclusion: the challenged actions by Otterbein were not unfair, deceptive, or unconscionable for purposes of the CSPA. For the foregoing reasons, we overrule the Vespers' second assignment of error.

{¶48} Assignment of Error No. 1:

{¶49} THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE CLAIMS OF APPELLANT CATHERINE VESPER.

{¶50} In their first assignment of error, the Vespers contend that the trial court erred in its determination that Catherine was not a "consumer" under the CSPA with respect to her involvement with Otterbein. However, given this court's resolution of the second assignment of error, the issue is moot and need not be addressed. App.R. 12(A)(1)(c). Accordingly, we overrule the Vespers' first assignment of error.

{¶51} For all of these reasons, and based on our review of the record, we affirm the trial court's decision to grant Otterbein's motion for summary judgment and to deny the Vespers' motion for summary judgment.

{¶52} Judgment affirmed.

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

[Cite as *Cortland Savs. & Banking Co. v. Platinum Rapid Funding Group, Ltd.*, 2021-Ohio-4615.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY

THE CORTLAND SAVINGS AND BANKING COMPANY, Plaintiff-Appellee, - v - PLATINUM RAPID FUNDING GROUP, LTD., et al., Defendant-Appellant.	**CASE NO. 2021-T-0006** Civil Appeal from the Court of Common Pleas Trial Court No. 2019 CV 00633

O P I N I O N

Decided: December 30, 2021
Judgment: Reversed; remanded

Matthew G. Vansuch and Timothy M. Reardon, Brouse McDowell LPA, 6550 Seville Drive, Suite B, Canfield, OH 44406 (For Plaintiff-Appellee).

Jerry M. Bryan and *J. Michael Thompson*, Henderson, Covington, Messenger, Newman & Thomas Co., LPA, 6 Federal Plaza Central, Suite 1300, Youngstown, OH 44503 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Platinum Rapid Funding Group, Ltd. ("Platinum") appeals the decision denying its motion for summary judgment and granting partial summary judgment to The Cortland Savings and Banking Company ("Cortland Bank"). We reverse and remand.

{¶2} Cortland Bank is a community bank in Northeastern Ohio. On March 19, 2018, Cortland Bank, 21st Century Concrete Construction, Inc. ("21st Century"), and Patrick J. Butler as president of 21st Century, entered into a written business loan

agreement, whereby Cortland Bank loaned 21st Century $1,000,000 pursuant to a promissory note and a commercial security agreement. The commercial security agreement granted Cortland Bank a security interest in numerous assets owned by 21st Century, including its accounts. Pursuant to the business loan agreement, 21st Century maintained a deposit account with Cortland Bank ("the checking account"). Cortland Bank filed a UCC-1 Financing Statement with the Ohio Secretary of State identifying the collateral involved in the transaction.

{¶3} Platinum is a "New York corporation engaged in the business of providing businesses with working capital funding for operating expenses by virtue of purchasing future business receivables and sales proceeds from merchants at a discount." In April, June, and October 2018, Platinum and 21st Century entered into three merchant agreements, whereby Platinum agreed to make two advances of $250,000 and one advance of $846,000 to 21st Century in exchange for a percentage of 21st Century's future receivables in the total amount of $1,526,000. 21st Century authorized Platinum to withdraw weekly payments from its checking account maintained at Cortland Bank until the amount owed to Platinum was paid in full. Between March 2018 and March 2019, $869,250 was transferred from the checking account to Platinum.

{¶4} 21st Century defaulted on its loan with Cortland Bank. On April 29, 2019, Cortland Bank received a judgment against 21st Century and Butler in the approximate amount of $1,000,000.

{¶5} Thereafter, Cortland Bank filed a complaint against 21st Century, Butler, and Platinum. Subsequently, Cortland Bank amended its complaint, removing 21st Century as a named defendant. With respect to Platinum, Cortland Bank sought return

of all funds transferred to Platinum from the checking account prior to 21st Century defaulting on the Cortland Bank loan. Cortland Bank alleged claims of conversion, unjust enrichment, impairment of a security interest, and tortious interference with contract. Cortland Bank and Platinum filed competing summary judgment motions. The trial court denied Platinum's motion and granted Cortland Bank's motion on its claims for conversion, impairment of security interest, and tortious interference with contract and certified that there was no just cause for delay pursuant to Civ.R. 54.

{¶6} In its first assigned error, Platinum argues:

{¶7} "[1.] The trial court erred in granting Cortland's Motion for Summary Judgment, and denying Platinum's Motion for Summary Judgment, based upon its finding that Platinum did not receive the Transfers from the Deposit Account of 21st Century at Cortland free and clear of any Cortland security interest (T.d. 75)."

{¶8} "We review decisions awarding summary judgment de novo, i.e., independently and without deference to the trial court's decision." *Hedrick v. Szep*, 11th Dist. Geauga No. 2020-G-0272, 2021-Ohio-1851, ¶ 13, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

> Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); *Allen v. 5125 Peno, LLC*, 2017-Ohio-8941, 101 N.E.3d 484, ¶ 6 (11th Dist.), citing *Holliman v.*

Allstate Ins. Co., 86 Ohio St.3d 414, 415, 715 N.E.2d 532 (1999). "The initial burden is on the moving party to set forth specific facts demonstrating that no issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Allen* at ¶ 6, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). "If the movant meets this burden, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial." *Allen* at ¶ 6, citing *Dresher* at 293.

{¶9} Here, the trial court's decision turns largely upon statutory construction. "The meaning of statutory language is a question of law, which we review de novo." *State v. Jeffries*, 160 Ohio St.3d 300, 2020-Ohio-1539, 156 N.E.3d 859, ¶ 15, *cert. denied*, 141 S.Ct. 1085, 208 L.Ed.2d 539, citing *State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, ¶ 6. "A fundamental preliminary step in our analysis of any legislation is to review the plain language of the statute." *Jeffries* at ¶ 15, citing *Vanzandt* at ¶ 7. "'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.'" *Jeffries* at ¶ 15, quoting *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000). "When there is no ambiguity on the face of the statute, it must simply be applied as written." *Jeffries* at ¶ 15, citing *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 634 N.E.2d 611 (1994).

{¶10} "We must read statutory words and phrases in context and construe them in accordance with the rules of grammar and common usage." *Jeffries* at ¶ 16, citing *State ex rel. Barley v. Ohio Dept. of Job & Family Servs.*, 132 Ohio St.3d 505, 2012-Ohio-3329, 974 N.E.2d 1183, ¶ 20. "But words and phrases that have a technical or particular meaning by legislative definition must be construed accordingly." *Jeffries* at ¶ 16, citing

State ex rel. Barley at ¶ 21. "'Where a statute defines terms used therein which are applicable to the subject matter affected by the legislation, such definition controls in the application of the statute.'" *Jeffries* at ¶ 16, quoting *Woman's Internatl. Bowling Congress, Inc. v. Porterfield*, 25 Ohio St.2d 271, 267 N.E.2d 781 (1971), paragraph two of the syllabus.

{¶11} This matter involves Article 9 of the Uniform Commercial Code ("UCC") as adopted in Ohio Revised Code Chapter 1309, as it applies to "[a] transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract[.]" R.C. 1309.109(A)(1). Pursuant to R.C. 1309.201(A), "[e]xcept as otherwise provided * * *, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors."

{¶12} There does not appear to be any dispute that Cortland Bank held a security interest in 21st Century's accounts receivable and deposit account effective against Platinum pursuant to R.C. 1309.201(A). In addition, Cortland Bank's interest in the accounts receivable attached to proceeds from the accounts receivable pursuant to R.C. 1309.315(A), which provides:

> Except as otherwise provided in this chapter and in division (B) of section 1302.44 of the Revised Code:
>
> (1) A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and
>
> (2) A security interest attaches to any identifiable proceeds of collateral.

{¶13} However, the parties dispute the meaning of R.C. 1309.332, which provides:

> (A) A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.
>
> (B) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

Neither party argues that subsection (A) applies. However, based upon R.C. 1309.332(B), Platinum maintains that the funds it received from 21st Century's account at Cortland Bank were transferred free of Cortland Bank's interest.

{¶14} The trial court disagreed, concluding that because the "funds from a deposit account" are different than the "deposit account" itself, R.C. 1309.332(B) strips a secured party's interest in "the deposit account," leaving intact its interest in the "funds." In reaching this conclusion, the trial court relied on the Fifth Circuit's decision in *In re Tusa-Expo Holdings, Inc. v. Knoll, Inc.,* 811 F.3d 786, 798 (5th Cir.2016). There, the court found that the plain language of Texas' adoption of this UCC provision (identical to that adopted in Ohio) does not "even address, must less strip, a security interest that encumbers *the funds contained in the deposit account*." (Emphasis added.) *Id.* at 796.

{¶15} However, the Fifth Circuit did not consider the definition of an "account" under Article 9. Despite ordinary parlance, a "deposit account" under Article 9 *is not* a device containing funds. *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/deposit%20account (defining a deposit account as "a bank account in which people keep money that they want to save: savings account.") (accessed August 5, 2021). Instead, Article 9 defines a "deposit account" as "a demand, time, savings, passbook, or similar *account* maintained with a bank but does not include

investment property or accounts evidenced by an instrument." (Emphasis added.) R.C. 1309.102(A)(29). The UCC defines an "account" as, with certain exclusions,

> *a right to payment of a monetary obligation*, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state.

(Emphasis added.) R.C. 1309.102(A)(2)(a).

{¶16} Accordingly, for purposes of Article 9, a deposit account is by statutory definition a right to payment from a bank of the money that was deposited by the customer. Pursuant to this definition, the deposit of funds in an account is the equivalent of exchanging the funds for a promise to pay. Therefore, we disagree with *In re Tusa-Expo* insofar as the court based its decision on the premise that a deposit account *contains* funds. Instead, the funds are transformed to a right to payment, i.e. the deposit account, to which the security interest attaches. However, the security interest does not attach from the deposit account to the funds ordered paid, absent collusion, pursuant to R.C. 1309.322(B).

{¶17} Although we reach this conclusion based upon the statutory definition of "account," this reading of the statute is also consistent with the policy underlying R.C. 1309.332, as set forth in Official Comment 3, which provides:

> Broad protection for transferees helps to ensure that security interests in deposit accounts do not impair the free flow of

> funds. It also minimizes the likelihood that a secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules concerning recovery of payments traditionally have placed a high value on finality. The opportunity to upset a completed transaction, or even to place a completed transaction in jeopardy by bringing suit against the transferee of funds, should be severely limited. * * *

{¶18} Applying the above Article 9 provisions and definitions to this case, Cortland Bank's interest in 21st Century's accounts receivable attached to the proceeds of the accounts receivable upon payment. *See* R.C. 1309.315(A). When the proceeds were deposited to the checking account, Cortland Bank's interest attached to the deposit account, i.e. the right to payment. *See id.* Cortland Bank also had an original interest in the deposit account, i.e. the right to payment, superior to Platinum's, due to Cortland Bank's position as a secured creditor that is also the depository bank. *See* R.C. 1309.203(B)(3)(d) (security interest in a deposit account enforceable pursuant to security agreement where creditor has control of the account); R.C. 1309.104(A)(1) ("A secured party has control of a deposit account if * * * [it] is the bank with which the deposit account is maintained[.]"); and R.C. 1309.327(C) ("[e]xcept as otherwise provided * * *, a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party"). However, when the funds were transferred to Platinum, R.C. 1309.332(B) operated to transfer the funds free of the interest in the right to payment, i.e. the deposit account, if there was no collusion.

{¶19} Therefore, Platinum's first assigned error has merit insofar as we agree that R.C. 1309.332(B) permits Platinum, as the transferee, to take the funds free of Cortland Bank's security interest in the deposit account absent collusion, and that the trial court erred in its determination that a security interest in the funds remained intact. This is the

outcome precisely contemplated by Comment 2 to R.C. 1309.332, as illustrated by Example 1 to that Comment:

> **Example 1**: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. Debtor draws a check on the account, payable to Payee. Inasmuch as the check is not the proceeds of the deposit account (it is an order to pay funds from the deposit account), Lender's security interest in the deposit account does not give rise to a security interest in the check. Payee deposits the check into its own deposit account, and Bank A pays it. Unless Payee acted in collusion with Debtor in violating Lender's rights, Payee takes the funds (the credits running in favor of Payee) free of Lender's security interest. This is true regardless of whether Payee is a holder in due course of the check and even if Payee gave no value for the check.

{¶20} Although the parties raised arguments regarding collusion in their summary judgment filings, the trial court did not reach that issue, as it was unnecessary due to its construction of the statute. However, the issue of collusion is now determinative, and this matter is remanded to the trial court to address that issue in the first instance. *See Alcus v. Bainbridge Twp.*, 11th Dist. Geauga No. 2019-G-0206, 2020-Ohio-626, ¶ 30 ("Where the trial court does not rule on a summary judgment argument because it finds it moot, it is not proper for the appellate court in the first instance to address the argument." (Citations omitted.)).

{¶21} In its remaining assigned errors, Platinum argues:

{¶22} "[2.] The trial court erred in granting Cortland's Motion for Summary Judgment, and denying Platinum's Motion for Summary Judgment, based upon its finding that Cortland's common law claims were not preempted by the Uniform Commercial Code (T.d. 75, pp. 9-10)."

{¶23} "[3.] The trial court erred in granting Cortland's Motion for Summary Judgment and denying Platinum's Motion for Summary Judgment on Cortland's conversion claim, based upon its finding that the Transfers received by Platinum were specifically identifiable funds and/or proceeds subject to a conversion claim (T.d. 75, p. 10)."

{¶24} "[4.] The trial court erred in granting Cortland's Motion for Summary Judgment, and denying Platinum's Motion for Summary Judgment, on Cortland's claim for impairment of a security interest (T.d. 75, p. 11)."

{¶25} "[5.] The trial court erred in granting Cortland's Motion for Summary Judgment, and denying Platinum's Motion for Summary Judgment, on Cortland's claim for tortious interference with contract (T.d. 75, pp. 11-12)."

{¶26} Based on our disposition of Platinum's first assigned error, the trial court's judgment is reversed, and the matter is remanded for the trial court to apply R.C. 1309.332(B) as set forth above. Because the trial court's judgment regarding the claims for conversion, impairment of a security interest, and tortious interference with contract depend upon application of R.C. 1309.332(B), our review of the second through fifth assigned errors would be premature, and we decline to address them.

{¶27} The judgment is reversed, and this matter is remanded for further proceedings consistent with this opinion.

MARY JANE TRAPP, P.J.,

MATT LYNCH, J.,

concur.