[Cite as *Allan v. Allan*, 2022-Ohio-1488.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

RAIDA ALLAN, :

Plaintiff-Appellant, :

Nos. 110177 and 110179

v. :

TAREQ ALLAN, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: May 5, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CV-18-907570 and CV-19-922868

Appearances:

RaslanPla & Company, LLC, Jorge Luis Pla, Nadia R. Zaiem, and Erika Molnar, *for appellants* Raida Allan and Tallan, LLC.

Dinn Hochman & Potter, LLC, and Edgar H. Boles, *for appellees* Qais Allan, 871 Rocky River Drive, Inc., and Pearl Road, Inc.

Blum & Associates Co., L.P.A., and Monica E. Russell, for *appellee* 871 Rocky River Drive, Inc.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Plaintiff-appellant Raida Allan contests the grant of summary judgment in favor of appellees Qais Allan, 871 Rocky River Drive, Inc. ("871 Rocky River Dr."), and Pearl Road, Inc. ("Pearl Road") in a suit brought under Ohio's Fraudulent Transfer Act and the grant of summary judgment in favor of 871 Rocky River Dr., in a declaratory judgment action. Because we find that issues of material fact exist in both the Fraudulent Transfer Act suit and the declaratory judgment action, we reverse the judgments of the trial court and remand these cases for further proceedings.

I. STATEMENT OF THE CASE AND FACTS

A. The parties, property, and divorce proceedings

{¶ 2} Raida Allan and Tareq Allan were married in October 2002. During the marriage, Tareq acquired Pearl Road, a gas station business located in Middleburg Heights, Ohio from Raida.[1] In 2004, Tareq purchased 871 Rocky River Dr., a gas station business located in Berea, Ohio. In that same year, Tallan, LLC,

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[1] For ease of reference, individual parties will be referred to by their first names and we refer to the business entities as follows:

Pearl Road, Inc.	"Pearl Road"	The gas station in Middleburg Heights, Ohio
871 Rocky River Drive, Inc.	"871 Rocky River Dr."	The gas station business located in Berea, Ohio
Tallan, LLC	Tareq was the original member; divorce decree granted Raida sole membership interest	Owns the real property 871 Rocky River Dr. is located upon; divorce decree awarded this property to Raida

whose sole member was Tareq, acquired the real property upon which 871 Rocky River Dr. was located.

{¶ 3} In 2010, Raida filed for divorce. Raida dismissed the divorce complaint on April 14, 2011. In 2015, Tareq filed for divorce. That case was resolved after trial with the entry of divorce being journalized on April 20, 2018. The divorce proceedings were the subject of litigation in this court in *Allan v. Palos*, 8th Dist. Cuyahoga No. 103815, 2016-Ohio-3073; *Allan v. Allan*, 8th Dist. Cuyahoga No. 107142, 2019-Ohio-2111; and *T. A. v. R. A.*, 8th Dist. Cuyahoga No. 107166, 2019-Ohio-3179.

{¶ 4} Around the time that Raida filed an action for divorce, Tareq attempted to transfer his interests in 871 Rocky River Dr. and Pearl Road to his brother Qais. At the divorce trial, Tareq testified that he sold 871 Rocky River Dr., the gas station business, to Qais in two transactions, first selling 49 percent in October 2010 and then selling the rest on September 14, 2012. *Allan*, 2019-Ohio-2111, ¶ 26-27. In addition to the sale of the business, Tareq testified that in November 2014, he borrowed $188,088 from Qais to pay the balance due on a loan from Charter One Bank for his purchase of Rocky River Dr. *Id.* at ¶ 48.

{¶ 5} As to Pearl Road, Tareq testified that he decided to sell the business to Qais on November 22, 2013. *Id.* at ¶ 40. The purchase agreement for the sale as provided in the record is first dated November 22, 2013, with a revised agreement executed on September 12, 2014. On February 4, 2015, two weeks before Tareq filed for divorce, mortgages in favor of Qais for the $188,088 loan noted above were

placed on the real estate that 871 Rocky River Dr. is located on as well as the marital home. *Id.*

{¶ 6} In answering Tareq's divorce complaint, Raida filed counterclaims and joined Tareq's brother, Qais, as well as the businesses 871 Rocky River Dr. and Pearl Road, alleging that the business transfers from Tareq to Qais were the subject of fraud. After Qais and the businesses were joined in the divorce proceedings and their motion to dismiss Raida's counterclaims was denied, Qais filed a writ of prohibition in this court arguing that the domestic relations court did not have jurisdiction over him. *Palos*, 2016-Ohio-3073. In dismissing the writ, we found that the domestic relations court had subject-matter jurisdiction to "determine what constitutes marital property versus separate property and divide the marital and separate property equitably between the husband and wife." *Id.* at ¶ 11.

{¶ 7} Before the divorce case was tried, the domestic relations court dismissed Raida's claims against Qais and the gas station businesses as well as Qais's counterclaims against Raida and Tareq. *Allan,* 2019-Ohio-2111, ¶ 5. However, Qais and the businesses remained as parties in the divorce as stakeholders of property. *Id.*

{¶ 8} After trial, the domestic relations court determined that the gas station businesses, including the real estate 871 Rocky River Dr. operated on, were to be considered marital property. *Id.* at ¶ 52–53. In the appeal of the divorce, we noted that the domestic relations court found "that the gas stations were marital property for purposes of its distributive award because it found that husband had

committed financial misconduct in attempting to divest himself of any property so that he did not have to share any of it with wife — despite the fact that it was wife who originally owned the first gas station and despite the fact that wife had transferred title of that first gas station to him for mere pennies compared to what she paid for it." *Id.* at ¶ 79. As to the transfer of the gas stations, the domestic relations court determined within the divorce decree that under R.C. 3105.171(F):

> (2) Assets and liabilities of the spouses: The parties had two businesses when the first divorce was filed. By the second divorce filing, [Tareq] had divested himself on paper of the two businesses, and mortgaged both the marital home and the only remaining business asset, the real property owned by Tallan, LLC at 871 Rocky River Drive for the same $181,088 alleged to be owed to Qais.

{¶ 9} The domestic relations court found that "[Tareq] has engaged in financial misconduct in that he transferred the two gas station businesses with convenience stores and the liquor licenses to his brother to avoid an equitable division of property." Regarding Raida's and Tareq's relative earnings ability, it found that there were "examples of Tareq's expenses being paid by Qais or one of the gas-station accounts that gave credence to Raida's claim that Tareq has willfully attempted to hide assets and income."

{¶ 10} In addition to dividing the marital property, the divorce judgment ordered Tareq to pay Raida almost $550,000 in spousal support, child support, temporary support arrearages, and attorney fees. The judgment further awarded title to the real estate 871 Rocky River Dr. operates on and the marital home to

Raida. The judgment also ordered Qais to extinguish the mortgages he held on the real property at 871 Rocky River Dr. and the marital home.

B. The Fraudulent Transfer Act lawsuit

1. The complaint

{¶ 11} On November 28, 2018, Raida filed suit against Tareq, Qais, 871 Rocky River Dr. and Pearl Road alleging that the transfer of the businesses from Tareq to Qais, his brother, were fraudulent and sought recission of the transfers in an effort to collect on the judgment Raida obtained against Tareq through the divorce decree. Tareq never entered an appearance in the lawsuit.

{¶ 12} In an amended complaint, Raida alleged that the transfers of the gas station businesses from Tareq to Qais were not supported by consideration, the sales of 871 Rocky River Dr. and Pearl Road were not completed under Ohio law, Tareq had withdrawn money from the business accounts after the purported transfer occurred, Tareq's personal expenses were being paid from the business account through April 2015, and the business continued to pay Tareq's expenses through October 2016.

{¶ 13} In the first and second counts of the amended complaint under Ohio's Fraudulent Transfer Act, Raida alleged that the transfer of 871 Rocky River Dr. and Pearl Road should be considered as occurring immediately before the filing of the lawsuit as a presumed date of transfer for the purpose of the statute of limitations pursuant to R.C. 1336.02(A)(2)(a). Raida argued that this statute applies because the transfer of the businesses from Tareq to Qais were 1) not perfected under Ohio

law and 2) there was no consideration for the transfer of the businesses. In the third count of the amended complaint, Raida sought punitive damages. In her prayer, in addition to other requested relief, Raida specifically sought a receiver to take control of the gas station businesses and Qais's and Tareq's assets, avoidance of the purported transfers of 871 Rocky River Dr. and Pearl Road to the extent necessary to satisfy the judgment entered in the divorce decree, garnishment of the gas station businesses, an injunction against further disposition of the gas station businesses, and compensatory and punitive damages.

2. Dispositive Motions

{¶ 14} Appellees filed a motion for summary judgment arguing that 1) the statute of limitations barred the filing of the lawsuit, 2) the claims made in the amended complaint were barred by the doctrine of issue preclusion, 3) the claims made in the amended complaint were barred by the doctrine of collateral estoppel, and 4) the claims made in the amended complaint were barred by the doctrine of res judicata. Raida sought default judgment against Tareq.

C. The Declaratory Judgment Action

{¶ 15} On October 8, 2019, 871 Rocky River Dr. filed a complaint for declaratory judgment seeking the trial court's determination that the underground storage tanks, canopy, signs, fixtures, furnishings and equipment, and gas pumps located at 871 Rocky River Dr., Berea, Ohio were assets of the business. The complaint was supported by a bill of sale as well as state regulatory filings that showed a history of registration of the underground storage tanks by 871 Rocky

River Dr., Tareq, or Qais. This action was consolidated with the Fraudulent Transfer Act case.

{¶ 16} In seeking summary judgment, 871 Rocky River Dr. argued that it owned the underground storage tanks, canopy, signs, fixtures, furnishings and equipment, and gas pumps located at 871 Rocky River Dr., Berea, Ohio prior to any transfer of the business from Tareq to Qais and, as such, there was no issue that 871 Rocky River Dr. was the owner of those assets.

{¶ 17} In opposition to the motion for summary judgment, Raida asserted that the ownership of the underground storage tanks was registered with the fire marshal by Tareq from 2005 until 2018 and thereafter by Raida, who asserted ownership of the underground storage tanks as the real property owner.

D. The trial court's judgments

1. The trial court's grant of summary judgment

{¶ 18} On November 23, 2020, the trial court journalized an entry ruling upon the motions for summary judgment and upon the declaratory judgment action. In determining the summary judgment motions, the trial court found Raida failed to set forth a genuine issue of material fact to support a judgment in her favor and granted summary judgment in favor of Qais, 871 Rocky River Dr., and Pearl Road. It denied Raida's motions for summary judgment against Qais and Tareq, and her motion for default judgment against Tareq. The trial court did not state its reasons for granting summary judgment and denying default judgment.

{¶ 19} The trial court granted summary judgment in favor of 871 Rocky River Dr. as to the declaratory judgment action, denied Raida's motion for summary judgment, and declared that 871 Rocky River Dr. to be the owner of the underground storage tanks, canopy, signs, fixtures, furnishings and equipment, and gas pumps located at 871 Rocky River Drive, Berea, Ohio. The trial court did not state reasons for its rulings.

II. LAW AND ARGUMENT

A. Fraudulent Transfer Act Case

{¶ 20} The appeal raises five assignments of error contesting summary judgment in both the Fraudulent Transfer Act case and the declaratory judgment case. The first and second assignments of error argue that the trial court erred by granting summary judgment in the Fraudulent Transfer Act case on the basis of the statute of limitations or on the basis of res judicata. In the third and fourth assignments of error, Raida argues that the trial court erred by denying her motion for default judgment against Tareq and by allowing appellees to oppose her summary judgment on Tareq's behalf.

{¶ 21} These assignments of error read:

> 1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF QAIS ALLAN, 871 ROCKY RIVER DRIVE, INC. AND PEARL ROAD, INC. BECAUSE RAIDA ALLAN S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.
>
> 2. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF QAIS ALLAN, 871 ROCKY RIVER DRIVE, INC. AND PEARL ROAD, INC. BECAUSE RAIDA ALLAN S

CLAIMS ARE NOT BARRED BY THE DOCTRINE OF RES JUDICATA.

3. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING RAIDA ALLAN DEFAULT JUDGMENT AGAINST TAREQ ALLAN.

4. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING QAIS ALLAN, 871 ROCKY RIVER DRIVE, INC. AND PEARL ROAD, INC. TO OPPOSE SUMMARY JUDGMENT ON BEHALF OF TAREQ ALLAN UNDER R.C. 1336.04.

1. Issues of material fact remain regarding when the statute of limitations commenced under the Fraudulent Transfer Act

{¶ 22} Raida argues that her claims are not barred by the statute of limitations because the transfer of the businesses from Tareq to Qais was never perfected and thus the statute of limitations did not begin to run until the day prior to the lawsuit being filed. Appellees argue that the trial court properly granted summary judgment because Raida was aware of the transfer over four years prior to the lawsuit being filed and the transfer of the stock certificates does not determine that the gas stations were not in fact transferred to avoid the application of the statute of limitations.

a. Standards of Review

{¶ 23} Under Civ.R. 56, the grant of a motion for summary judgment is appropriate where

> (1) there is no genuine issue as to any material fact; (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 averse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his or her favor.

Legacy Village Investors, L.L.C. v. Bromberg, 2021-Ohio-2930, 176 N.E.3d 1181, ¶ 9 (8th Dist.); Civ.R. 56(C).

{¶ 24} Civ.R. 56(C) provides that summary judgment shall be rendered 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 as to any material fact and that the moving party is entitled to judgment as a matter of law." A trial court's grant of summary judgment is reviewed de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241

b. Issues of fact remain as to when the statute of limitations commenced

{¶ 25} The complaint in this case was filed on November 28, 2018. R.C. 1336.09 provides that a lawsuit under the Fraudulent Transfer Act must be brought within four years. As such, at issue in determining whether or not the suit was brought within the four-year statute of limitations contained in R. C. 1336.09 is whether the businesses were transferred for purposes of the Ohio Fraudulent Transfer Act and, if so transferred, when those transfers occurred.

{¶ 26} Under the Ohio Fraudulent Transfer Act, a transfer is defined as "every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." R.C. 1336.01(L). In arguing that 817 Rocky River Dr. and Pearl Road

were transferred to Qais, appellees cite evidence of the transaction in the form of purchase agreements, filings with state agencies, and the findings of the domestic relations court. Raida argues that transfer was not complete because it was not supported by consideration and that because the corporate records of the businesses were incomplete, no transfer of the gas stations were perfected under Ohio law.

{¶ 27} Raida and appellees cite differing law to be used to determine if and when the transfer of the businesses to Qais took place. Raida argues that Ohio corporation law is definitive for the purposes of determining whether or not the ownership of the businesses changed. In addition to the failure of corporate records, Raida alleges in the complaint that there was no consideration paid for the businesses and, as such, the transfer never took place.

{¶ 28} Appellees assert that the lawsuit was filed outside the statute of limitations. They argue that the transfer of the gas stations took place as evidenced by the purchase agreements, public filings, and evidence and that Raida was aware of the transfers prior to November 2014.

{¶ 29} "Application of a statute of limitations presents a mixed question of law and fact; when a cause of action accrues is a question of fact, but in the absence of a factual issue, application of the limitations period is a question of law." *Schmitz v. NCAA*, 155 Ohio St.3d 389, 2018-Ohio-4391, 122 N.E.3d 80, ¶ 11. "R.C. 1336.06 specifically and expressly addresses the narrower issue of 'when a transfer is made' for the purposes of the [Ohio Fraudulent Transfer] Act." *Comer v. Calim*, 128 Ohio

App.3d 599, 604, 716 N.E.2d 245 (1st Dist.1998). In determining whether a transfer is made under the Fraudulent Transfer Act, R.C. 1336.06 provides in relevant part:

> (A)(1) A transfer is made if either of the following applies:
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> * * *
>
> (b) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee.
>
> (2)(a) If applicable law permits the transfer to be perfected as provided in division (A) of this section and the transfer is not so perfected before the commencement of an action for relief arising out of a transfer that is fraudulent under section 1336.04 or 1336.05 of the Revised Code, the transfer is deemed made immediately before the commencement of the action.
>
> (b) If applicable law does not permit the transfer to be perfected as provided in division (A) of this section, the transfer is made when it becomes effective between the debtor and the transferee.

{¶ 30} The Ohio Uniform Transfer Act was adopted in 1990 by Ohio with language promulgated by the Uniform Law Commission. In 2014, the Uniform Law Commission published an updated version of the laws, with commentary. The commentary to section 6 of the uniform act, codified verbatim in R.C. 1336.06, reads in pertinent part:

> One of the uncertainties in the law governing the avoidance of transfers and obligations of the nature governed by this Act is the time at which the cause of action arises. Section 6 clarifies that point in time. * * * For transfers of fixtures and assets constituting personalty, paragraph (1)(ii) fixes the time as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection under paragraph (1) typically is effected by notice-filing, recordation, or delivery of unequivocal possession. * * * The provision for postponing the time a transfer is made until its perfection is an

> adaptation of Bankruptcy Code § 548(d)(1) (1984). When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer arguably would be immune to attack.

Uniform Voidable Transactions Act, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=58b5d88d-a3b9-b3bf-873d-8787811656b1 (accessed Apr. 6, 2022).

{¶ 31} Although this statute may usually provide a means of determining a definite date of transfer for the purpose of the statute of limitations, in this case, application of this statute to definitively determine when the transfer occurred as a matter of law is precluded because there remain genuine issues of fact to determine if the transfer of the gas stations actually took place and, if so transferred, when the transfer of the gas stations occurred. There is contradictory evidence regarding whether or not the transfer of the businesses took place.

{¶ 32} Appellees cite to the purchase agreements as evidence of the transfer of the gas station businesses and argue further that required public filings made regarding liquor licensing and registration of the underground storage tanks indicate the transfers were perfected under R.C. 1336.06(A)(2)(a). In opposition, Raida cites to R.C. 1308.27 that governs how corporate shares are to be transferred as the applicable law to be applied to determine whether the transfers of the gas station businesses were perfected under R.C. 1336.02(A)(2)(a), arguing that no

transfer of the businesses from Tareq to Qais took place as the shares reflecting ownership of the businesses were never transferred or properly registered.

{¶ 33} Both parties submitted expert reports regarding the validity of the transfers. Raida submitted an expert report that highlighted the irregularities in the financial dealings between Tareq and Qais, and the report opined that the corporate documents of Pearl Road and 871 Rocky River Dr. indicate that no transfer of the businesses occurred. In contrast, Qais submitted a contrary report opining that the transfers did in fact occur.

{¶ 34} There exists disputed evidence as to whether, and when, the transfers of the gas stations were made and, if so, when those transfers were perfected.[2] The parties' reliance on either Ohio corporate law or the public filings alone are not definitive as to transfer of the ownership of the gas station businesses. The issuance of shares in a corporation is not necessarily determinative of ownership of the corporation. *See Estate of Thomas v. Thomas*, 6th Dist. Lucas No. L-11-1064, 2012-Ohio-3992, ¶ 40 ("Further, the issuance of a stock certificate is not necessary to establish corporate ownership."), citing *Algren v. Algren*, 183 Ohio App.3d 114, 119, 2009-Ohio-3009, 916 N.E.2d 491 (2d Dist.); *Graham v. Szuch*, 8th Dist. Cuyahoga No. 100228, 2014-Ohio-1727, ¶ 13. Similarly, the public filings asserting

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[2] We also note that factual disputes regarding the transfers of the gas stations are better resolved at trial as the credibility of the parties was called into question during the divorce proceedings. In the divorce decree, the domestic relations court found Tareq's and Qais's testimony "lacked credibility" and that Raida's testimony contained some "credibility gaps." *See Allan*, 2019-Ohio-2111, at ¶ 80.

ownership of a business are evidence that, but not determinative of, a transfer of a business took place.

{¶ 35} Accordingly, to the extent that the grant of summary judgment was based upon the grounds that the suit was filed beyond the statute of limitations, it was improper. Appellant's first assignment of error is sustained.

2. The claims made in the complaint are not precluded by the doctrines of res judicata, claim preclusion, or issue preclusion

a. Res Judicata

{¶ 36} "Under the doctrine of res judicata, 'a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the same transaction or occurrence that was the subject matter of a previous action.'" *E. Cleveland Firefighters v. E. Cleveland*, 8th Dist. Cuyahoga No. 107034, 2019-Ohio-534, ¶ 14, quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 1995-Ohio-331, 653 N.E.2d 226. Res judicata further encompasses the concepts of both claim and issue preclusion. *State ex rel. A.N. v. Cuyahoga Cty. Pros. Dept.*, 2020-Ohio-5628, 164 N.E.3d 526, ¶ 8 (8th Dist.) Claim and issue preclusion have been explained by this court as follows: "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or

point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies." *Id.* at ¶ 7. For a claim or suit to be barred by issue preclusion, it is necessary to show:

> "(1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action."

Portage Cty. Bd. of Commrs. v. Akron, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 84, quoting *Hapgood v. Warren*, 127 F.3d 490, 493 (6th Cir. 1997).

{¶ 37} In this case, appellees allege that litigation in the divorce proceedings preclude a lawsuit brought under the Fraudulent Transfer Act. As to the elements of applying the doctrine of res judicata based upon issue or claim preclusion, the divorce decree satisfies the first element because it is a final decision on the merits by a court of competent jurisdiction. The fourth element is also met because the transfer of the businesses was considered in the divorce case in part in order for that court to determine what was to be considered marital property.

{¶ 38} However, under the second element, we find that Qais was not a party to the divorce and that he was not in privity with Tareq. The individual claims against Qais could not have been fully litigated in the domestic relations court and were dismissed by the court prior to trial. Although Qais and the businesses remained as parties in the divorce proceedings as stakeholders of the property, they

were not parties to the proceeding subject to judgment or relief to the extent such relief would be available under the Fraudulent Transfer Act.[3]

{¶ 39} As Qais was not a party subject to a personal judgment by the domestic relations court, in order to apply res judicata in the Fraudulent Transfer Act case, it would have to be determined Qais was in privity with Tareq. The Ohio Supreme Court recognized that "what constitutes privity in the context of res judicata is somewhat amorphous." *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000). In *Wiggins Invest., Inc. v. Waterstreet Mgt., L.L.C.*, 8th Dist. Cuyahoga No. 103820, 2016-Ohio-4869, ¶ 15-16, we explained that there is a broad definition to determine privity and that a mutuality of interest may create privity in order to apply res judicata.

{¶ 40} Although Tareq and Qais had a common interest in having the transfers found valid in the divorce proceedings, we cannot say that they were in privity on the ultimate issue in the case as the determination of whether the businesses constituted marital property would not be detrimental to Qais's interests. That determination would affect Tareq's interest and affect the distribution of marital assets but would not, and did not, subject Qais to any personal judgment or damages for fraud as alleged in the instant lawsuit.

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[3] Additionally, we note Qais argued that those claims against him could not be brought against him in the divorce proceedings. *Palos*, 2016-Ohio-3073, at ¶ 10.

{¶ 41} Further, to find a claim is barred by issue preclusion, there must be, in part, a determination that the issue was admitted or actually tried and decided as well as necessary to the final judgment. *Kelley v. Kelley*, 8th Dist. Cuyahoga No. 55944, 1989 Ohio App. LEXIS 5006, 3-4 (Sept. 28, 1989), citing *Monahan v. Eagle Pieher Industries, Inca*, 21 Ohio App.3d 179, 486 N.E.2d 1165 (1st Dist.1984). The domestic relations court heard evidence to determine whether or not the businesses constituted marital property. Whether or not the transfers actually took place was not necessary for the domestic relations court to fashion an equitable distribution of the marital property. Accordingly, we cannot say that a final determination of whether the transfers were legitimate, whether they consisted of fraud on Tareq's part, or whether they consisted of fraud on Qais's part was an issue that was material and necessary to the final judgment in the divorce decree in order to distribute marital property.

{¶ 42} The second assignment of error is sustained.

3. The trial court abused its discretion in denying Raida's motion for default judgment

a. Standard of review and applicable law

{¶ 43} A trial court's ruling on a motion for default judgment is reviewed under the abuse of discretion standard. *Deutsche Bank Trust Co. Ams. v. Smith*, 8th Dist. Cuyahoga No. 89738, 2008-Ohio-2778, ¶ 30. Civ. R. 55 provides in pertinent part that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party

entitled to a judgment by default shall apply in writing or orally to the court therefore."

{¶ 44} "[A] default judgment should not be granted when the complaint fails to state a claim upon which relief could be granted." *X-S Merchandise, Inc. v. Wynne Pro, L.L.C.*, 8th Dist. Cuyahoga No. 97641, 2012-Ohio-2315, ¶ 11, citing *Streeton v. Roehm*, 83 Ohio App. 148, 81 N.E.2d 133 (1st Dist.1948) (A "court should make its decision conform to the law as applicable to the facts proven, and if no cause of action is shown no default judgment in plaintiff's favor should be rendered.") *State ex rel. Pullins v. Eyster*, 5th Dist. Knox No. 2009-CA-09, 2009-Ohio-2846, ¶ 8.

{¶ 45} Civ.R. 8(C) requires that a party is required to plead affirmative defenses, including the "statute of limitations," "res judicata," or "any other matter constituting an avoidance or affirmative defense." Where a defendant does not enter an appearance, the defendant is precluded from raising an affirmative defense. *Shikner v. S & P Solutions*, 11th Dist. Lake No. 2004-L-108, 2006-Ohio-127, ¶ 18 ("Thus, when a defendant fails to answer, default judgment under Civ.R. 55(A) is appropriate because the defendant has admitted liability to the averments of the plaintiff's pleading and the defendant is precluded from raising an affirmative defense.") .

b. The trial court abused its discretion in denying the motion for default judgment

{¶ 46} Tareq has not appeared in the case and has not raised any affirmative defenses as raised by appellees. Raida argues that default judgment against him is appropriate on her claims.

{¶ 47} Appellees argue that the trial court properly denied the motion for default judgment where the trial court had exclusive jurisdiction of the marital property. This court has rejected this argument and found that a spouse may bring an action under the Fraudulent Transfer Act when attempting to collect a judgment entered in the divorce proceedings against an ex-spouse. *Dinu v. Dinu,* 8th Dist. Cuyahoga No. 91705, 2009-Ohio-2879, ¶ 8-10.

{¶ 48} In this case, the trial court did not explain its reasoning for denying the motion for default judgment and we are left to presume that because the trial court granted summary judgment against Raida, it therefore exercised its discretion to deny the default judgment motion. However, in resolving Raida's first and second assignments of error, we determined summary judgment was not appropriate on the basis of the affirmative defenses raised by appellees in their motion for summary judgment. Accordingly, where summary judgment was not appropriate based upon affirmative defenses alleged by appellees, we find that the trial court abused its discretion by denying the motion for default judgment.

{¶ 49} The third assignment of error is sustained. Based on our resolution of this assignment of error, we find the fourth assignment of error moot.

B. Declaratory Judgment Action

{¶ 50} Raida's fifth assignment of error reads:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF 871 ROCKY RIVER DRIVE, INC. DECLARING IT THE OWNER OF THE UNDERGROUND STORAGE TANKS, CANOPY, SIGNS, FIXTURES, FURNISHINGS AND EQUIPMENT, AND GAS PUMPS LOCATED AT 871 ROCKY RIVER DRIVE, BEREA, OHIO.

{¶ 51} 871 Rocky River Dr. sought declaratory judgment over the ownership of the underground storage tanks, canopy, signs, fixtures, furnishings and equipment, and gas pumps located at 871 Rocky River Drive, Berea, Ohio and filed for and was granted summary judgment.

{¶ 52} An action for declaratory judgment "enables a court to declare the rights, status, and other legal relations of the parties." *Priore v. State Farm Fire & Cos. Co.,* 8th Dist. Cuyahoga No. 99692, 2014-Ohio-696, ¶ 14; Civ.R. 57; R.C. 2721.02(A). The ownership of underground gasoline storage tanks is subject to certain registration requirements under Ohio Law. R.C. 3737.88, et seq.; *see also State ex rel. Dewine v. Klepper*, Cuyahoga C.P. No. 2012CV0422, 2014 Ohio Misc. LEXIS 3402 (Nov. 21, 2014) (The Ohio State Fire Marshall is tasked with "monitoring and compelling compliance with state laws and rules governing the ownership and operation of underground storage tanks in Ohio.").

{¶ 53} In this case, Tareq acquired the ownership of the gas station business and underground storage tanks when he bought the gas station and real property in 2004. Thereafter, 871 Rocky River Drive and Tallan, LLC were created. 871 Rocky

River Dr. argues that it acquired ownership of the underground storage tanks in 2005, as evidenced by Tareq's initial registration of 871 Rocky River Dr. as both the owner and operator of the underground storage tanks with the state fire marshal and through the further registration of the tanks through 2018. Additionally, 871 Rocky River Dr. argues that the bill of sale executed by Tareq on behalf of Tallan, Inc. and by Qais as president of 871 Rocky River Dr. evidenced ownership of the tanks.

{¶ 54} Raida argues that underground storage tanks are customarily a part of the real property and that when she was granted the membership interest in Tallan, LLC and thus title to the real property in which the underground storage tanks are located, she took steps to register her ownership of the underground storage tanks with the fire marshal.

{¶ 55} In resolving the first and second assignments of error, we found that there remain issues of fact as to whether the transfer of 871 Rocky River Dr. took place and, if so, when the transfer took place. As such, in determining the ownership of the underground tanks, there remains conflicting evidence of the transfer of ownership of the underground storage tanks and the grant of summary judgment in the declaratory judgment action is reversed.

{¶ 56} Appellant's fifth assignment of error is sustained.

III. CONCLUSION

{¶ 57} We reverse the trial court's grant of summary judgment in both the Fraudulent Transfer Act case and the Declaratory Judgment Action because there

remain issues of material fact regarding whether the transfer of the 871 Rocky River Drive and Pearl Road occurred and, if it did occur, when the transfer was perfected. This case is remanded to the trial court for further proceedings.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

_____

MICHELLE J. SHEEHAN, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EMANUELLA D. GROVES, J., CONCUR

[Cite as *Grande Voiture D'Ohio La Societe Des 40 Hommes Et 8 Chevaux v. Simpson*, 2022-Ohio-1422.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

GRANDE VOITURE D'OHIO LA SOCIETE DES 40 HOMMES ET 8 CHEVAUX	:	Appellate Case No. 29330
Plaintiff-Appellee	:	Trial Court Case No. 2021-CV-2084
v.	:	(Civil Appeal from Common Pleas Court)
CHARLES J. SIMPSON, et al.	:	
Defendant-Appellant	:	

. . . . . .

O P I N I O N

Rendered on the 29th day of April, 2022.

. . . . . .

ROBERT H. HOLLENCAMP, Atty. Reg. No. 0084370, 130 West Second Street, Suite 1500, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

CHARLES J. SIMPSON, Atty. Reg. No. 0007339, 157 Lammes Lane, New Carlisle, Ohio 45344
Attorney for Defendant-Appellant

. . . . . .

TUCKER, P.J.

{¶ 1} Defendant-appellant Charles J. Simpson appeals from a judgment of foreclosure awarded to Grande Voiture D'Ohio La Societe des 40 Hommes et 8 Chevaux ("Grande Voiture"). For the reasons set forth below, we affirm.

I. Facts and Procedural Background

{¶ 2} This appeal represents the latest iteration in a protracted series of lawsuits and appeals involving Simpson, Huber Heights Veterans Club, Inc. ("HHVC"), and various factions of a charitable organization known as the Forty and Eight. We have previously summarized the background of these cases as follows:

> The Forty and Eight has a hierarchical structure consisting of a national organization and associated state and local organizations. Voiture Nationale is the national organization, and Grande Voiture is the Ohio state-level organization. Montgomery Voiture Locale No. 34 La Societe des 40 Hommes et 8 Chevaux ("Voiture Locale") is the county-level organization in Montgomery County. HHVC purports to be a successor organization to Voiture Locale that is no longer associated with The Forty and Eight.
>
> At some point, Voiture Locale began engaging in conduct that was contrary to the constitution, bylaws, and other governing documents of the national and state-level organizations. Among other things, Voiture Locale

adopted an amended constitution, elected a new board of governors under that amended constitution, created an auxiliary membership, and failed to pay national dues.

In 2017, Grande Voiture initiated internal disciplinary proceedings against Charles Simpson, one of the local organization's officers under the new constitution, and permanently expelled him from membership for life. Following that determination, Voiture Locale resolved to prohibit Grande Voiture officials from entering Voiture Locale's premises, located at 4214 Powell Road in Huber Heights. Another member of Voiture Locale, however, filed a criminal trespass complaint against Simpson with the Huber Heights police.

In 2018, Grande Voiture brought an action against Voiture Locale seeking declaratory and injunctive relief, and an accounting. Montgomery C.P. No. 2018-CV-1457. Voiture Locale filed a counterclaim against Grande Voiture and a third-party complaint against Voiture Nationale, alleging that Grande Voiture and Voiture Nationale engaged in actions to wrongfully take possession and control of its property, as well as extortion, coercion, libel, slander and defamation.

On April 28, 2019, the trial court in Case No. 2018-CV-1457 granted summary judgment to Grande Voiture and Voiture Nationale. The court noted: “The evidence in the record is undisputed that Montgomery Voiture Locale No. 34 has violated numerous provisions of the state and national

constitutions and is now being run by nonmembers of the 40 and 8, such as Defendant Simpson, who was expelled permanently from membership." The trial court held that Voiture Locale was bound by the constitutions of the organization at the national, state, and local levels, as well as the other rules promulgated by the national and state-level organizations.

The court voided all actions taken by Voiture Locale that were in violation of those constitutions, invalidated Voiture Locale's amended constitution, and dissolved the purported board of directors appointed under that constitution. The court further granted an injunction, which, among other things, barred Simpson from participating in or interfering with the affairs of Voiture Locale. * * * We affirmed the trial court's judgment. *Grande Voiture D'Ohio La Societe Des 40 Hommes Et 8 Chevaux v. Montgomery Cty. Voiture No. 34 La Societe Des 40 Hommes Et 8 Chevaux*, 2d Dist. Montgomery No. 28388, 2020-Ohio-3821 [("*Grande Voiture I*")].

Despite the trial court's rulings, Simpson (a licensed attorney) has continued to act ostensibly on behalf of Voiture Locale, either as a purported officer or as an attorney retained by the now-dissolved board of directors. These actions have included filing a forcible entry and detainer action in municipal court * * *, a bankruptcy petition for Voiture Locale in bankruptcy court * * *, and additional litigation in common pleas court * * *. Several of the lawsuits challenged conduct by Grande Voiture officials with respect to the local organization's property. In addition, based on Simpson's belief

that Voiture Locale was a non-profit corporation under Ohio law that was separate and apart from The Forty and Eight, Simpson filed paperwork to change the name of Voiture Locale to the Huber Heights Veterans Club (HHVC) and to have the Powell Road property retitled in that name. * * *

To date, Simpson has been unsuccessful at every turn. The municipal court, bankruptcy court, and common pleas court actions were resolved based on res judicata and/or due to Simpson's lack of authority to act on behalf of Voiture Locale. * * * The trial court in Case No. 2018-CR-1457 held Simpson in contempt for continuing to act as an officer of Locale Voiture and as counsel for the organization. * * * The court declared the new deed in HHVC's name to be invalid and ordered Simpson to restore title to Voiture Locale. We have affirmed the trial court's orders in Case No. 2018-CR-1457 related to contempt and sanctions and to correct record title. *Grande Voiture D'Ohio La Societe des 40 Hommes et 8 Chevaux v. Montgomery Cty. Voiture No. 34 La Societe des 40 Hommes et 8 Chevaux*, 2d Dist. Montgomery No. 28854, 2021-Ohio-1430 [("*Grande Voiture II*")]. We have also affirmed that court's order authorizing Grande Voiture to restore the prior name (Voiture Locale) with the Ohio Secretary of State. *Grande Voiture D'Ohio La Societe Des 40 Hommes et 8 Chevaux v. Montgomery Cty. Voiture No. 34 La Societe Des 40 Hommes et 8 Chevaux*, 2d Dist. Montgomery No. 29064, 2021-Ohio-2429 [("*Grande Voiture IV*")].

Huber Hts. Veterans Club, Inc. v. Grande Voiture d'Ohio La Societe des 40 Hommes et

8 Chevaux, 2d Dist. Montgomery No. 29095, 2021-Ohio-2784, ¶ 3-10 ("*Grande Voiture VI*").

{¶ 3} The case currently before us originates with the injunction issued against Simpson by the trial court in Montgomery C.P. No. 2018-CV-1457. As noted, we affirmed the injunction in *Grande Voiture I*, 2d Dist. Montgomery No. 28388, 2020-Ohio-3821. Thereafter, the trial court issued a finding of contempt against Simpson for repeated violations of that injunction, including, but not limited to, filing documents with the Ohio Secretary of State renaming the local level of the organization, Voiture Locale, to HHVC. The court imposed sanctions against Simpson in the sum of $39,767.22 for attorney fees, costs and expenses incurred by Grande Voiture. As stated above, we affirmed both the finding of contempt and the sanctions. *Grande Voiture II*, 2d Dist. Montgomery Nos. 28854, 28929, 2021-Ohio-1430.

{¶ 4} On August 13, 2020, Grande Voiture filed a R.C. 2329.02 certificate of judgment lien with the Montgomery County Clerk of Courts with regard to the judgment awarding sanctions. On March 24, 2021, it filed the instant foreclosure action against Simpson in order to collect upon its judgment. The subject real estate, located at 153 High Street in Dayton, is solely owned by Simpson.

{¶ 5} On June 21, 2021, Simpson filed an answer on his own behalf in which he admitted the existence of the judgment for contempt and sanctions. He further admitted that he was the owner of the real property described in the foreclosure complaint. However, Simpson alleged HHVC was a necessary party to the foreclosure because it is "the real party in interest in the judgment set forth in the complaint herein." Simpson also

alleged that HHVC was obligated to indemnify him for any judgment rendered against him because the actions resulting in the finding of contempt were authorized by and taken on behalf of HHVC.

{¶ 6} On the same date, Simpson filed documents entitled "Motion and Application by Huber Heights Veterans Club Inc. for Intervention of Right" and "Answer and Counterclaim of Huber Heights Veterans Club Inc." Simpson signed both documents as attorney for HHVC. Grande Voiture filed a motion in opposition to the motion to intervene. It also filed a motion for summary judgment on its foreclosure action. Simpson filed a motion for summary judgment on his own behalf.

{¶ 7} On November 15, 2021, the trial court denied the motion to intervene, finding that HHVC had no interest in the foreclosure. The trial court then granted summary judgment in favor of Grande Voiture regarding the foreclosure. In doing so, the court noted that Simpson had not presented any defense to the foreclosure action. The trial court denied Simpson's motion for summary judgment.

{¶ 8} On November 16, 2021, Simpson filed a motion to vacate the judgment. On November 17, 2021, the trial court filed a judgment entry and decree of foreclosure. On November 18, Simpson filed a motion for an order canceling the order of sale and extending the redemption period. He also filed a "Motion for Order Amending Decree to Correct the Statutory Interest Rate." On November 24, Simpson filed a document entitled "Notice of Payment by Defendant and Motion for Order of Discharge and Release." In the notice, Simpson claimed that he had paid the sum of $41,464 to the Clerk of Court for Montgomery County. On November 30, 2021, Grande Voiture filed a

memorandum in opposition, asserting that the amount then due and owing on the judgment, with appropriate accrued interest, had yet to be determined. However, on December 8, 2021, Grande Voiture filed a motion for disbursement in which it asserted that the total paid by Simpson to the Clerk of Courts was "slightly less than the current balance of the Certificate of Judgment." Nonetheless, Grande Voiture stated it was willing to accept the "amount deposited, customary institutional costs and/or deductions expected." Before the pending motions were ruled upon, Simpson filed a notice of appeal on his own behalf as well as HHVC's behalf from the orders granting summary judgment and denying intervention.[1]

II. Intervention by HHVC

{¶ 9} The first assignment of error asserted by Simpson states:

> THE COURT ERRED IN DENYING THE APPLICATION OF HUBER HEIGHTS VETERANS CLUB, INC. FOR INTERVENTION AS A MATTER OF RIGHT.

{¶ 10} Simpson asserts that the trial court erred by denying HHVC's motion to intervene because the corporation was "the real party in interest in the judgment set forth in the complaint." In support, he claims the judgment of contempt against him was due to actions authorized and requested by HHVC. Thus, he contends HHVC has a duty to

[1] There is a motion pending before this court in which Grande Voiture seeks to dismiss this appeal as moot given that Simpson paid the judgment amount to the Montgomery County Clerk of Courts. However, because the pleadings regarding that payment were not ruled upon, and because Simpson claims he was coerced into making the payment, we will proceed to the merits of this case.

indemnify him regarding the contempt sanctions, which necessarily includes this action in foreclosure.

{¶ 11} Civ.R. 24(A), which governs interventions of right, states:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

{¶ 12} Civ.R. 24 is to be liberally construed so as to permit intervention. *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 41. A trial court's decision on a motion to intervene is reviewed under the abuse of discretion standard. *Id.*

{¶ 13} As noted, the trial court concluded that HHVC was not a necessary party to the foreclosure action. We agree. The only parties necessary to an action in foreclosure are those who have any title, right, or interest in the subject real estate. *Keybank Natl. Assn. v. Liberty Holding Group, L.L.C.*, 8th Dist. Cuyahoga No. 93888, 2011-Ohio-923, ¶ 17. Simpson does not claim, and the record does not show, that HHVC had an interest in the property at issue. Thus, the trial court did not abuse its discretion in denying the motion to intervene.

{¶ 14} Furthermore, the pleadings filed in opposition to the motions for contempt

and sanctions show that Simpson, at that time, actually argued that he could not be liable for sanctions because all of his actions were performed as the attorney for and at the direction of HHVC. Thus, it is readily apparent that his claim for indemnification existed at the time the sanctions were litigated and that the claim arose out of the same acts for which the sanctions were sought. Therefore, Simpson could—and should—have raised his claim for indemnification at the time the sanctions were being litigated. This foreclosure action is merely a procedure for collecting that judgment, and it is not an opportunity to collaterally attack the sanctions judgment.

{¶ 15} Further, we cannot ascertain how the inability to intervene in the foreclosure action will "impair or impede" HHVC's "ability to protect" any interest it may have in indemnifying Simpson. To the extent HHVC has agreed to or is legally required to indemnify Simpson, it remains able to do so despite the denial of its motion to intervene.

{¶ 16} Lastly, but most significantly, we note that Simpson has continuously asserted that HHVC is the successor organization to Voiture Locale. However, this court has previously stated "that HHVC does not lawfully exist as the successor to Voiture Locale." *Grande Voiture VI*, 2d Dist. Montgomery App. No. 29095, 2021-Ohio-2784, ¶ 21. Further, we have stated that "[t]he Huber Heights Veterans Club is a legal nullity. It was created solely as a result of Simpson's actions in violation of the injunction." *Grande Voiture IV*, 2d Dist. Montgomery No. 29064, 2021-Ohio-2429. Simply put, there is no evidence to support a finding that HHVC exists outside of the improper filing of the name change. Intervention by a non-existent entity is an impossibility.

{¶ 17} The first assignment of error is overruled.

III. Summary Judgment

{¶ 18} The second and third assignments of error state as follows:

> THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.
>
> THE COURT ERRED IN DISREGARDING DEFENDANTS [SIC] MOTION FOR SUMMARY JUDGMENT AND FAILING TO RULE UPON DEFENDANTS [SIC] MOTIONS FOR SUBSTITUTION OF PARTIES AND RELEASE FROM THE JUDGMENT SUED UPON.

{¶ 19} In his combined argument in support of the second and third assignments of error, Simpson asserts that the trial court erred by rendering summary judgment in favor of Grande Voiture and by denying his motion for summary judgment. In support, Simpson claims (1) the trial court did not consider his claim for indemnification, (2) Grande Voiture failed to file this foreclosure action as a compulsory counterclaim in a prior action, and (3) the trial court did not consider his request for release from judgment and to substitute HHVC as the defendant in this case.

{¶ 20} Our disposition in the first assignment of error resolves all of Simpson's claims regarding intervention for purposes of indemnification.

{¶ 21} The argument regarding the compulsory counterclaim is quite convoluted. However, it relates to Montgomery C.P. No. 2020-CV-2183, in which HHVC filed an action for forcible entry and detainer against Grand Voiture and Voiture Nationale regarding property located at 4214 Powell Road in Huber Heights. *See Grande Voiture VI*, 2d Dist.

Montgomery No. 29078, 2021-Ohio-2695. Simpson claims Grande Voiture was required to bring the instant foreclosure as a compulsory counterclaim in the prior action. We disagree.

{¶ 22} In *Rettig Ents., Inc. v. Koehler*, 68 Ohio St.3d 274, 626 N.E.2d 99 (1994), the Ohio Supreme Court stated that Civ.R. 13(A) requires all existing claims between opposing parties that arise out of the same transaction or occurrence to be litigated in a single lawsuit, regardless of which party initiates the lawsuit. *Id.* at 278. Whether the claim arises out of the original transaction involves the "logical relation" test or a showing that the claim "is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts." *Id.* at paragraph two of the syllabus.

{¶ 23} Arguably, one could claim that all of the numerous trial court cases and appeals in this ongoing litigation arose out of the same common occurrence. However, we discern no logical relation between the forcible entry and detainer case and this case. In *Grande Voiture VI*, HHVC claimed Grande Voiture had improperly taken possession of real estate owned by HHVC. Here, Grande Voiture seeks to foreclose on property solely owned by Simpson in order satisfy its judgment against Simpson. This case involves proof of facts completely separate from the forcible entry and detainer action. The two cases involve different properties owned by different entities, and the separate lawsuits arose from different occurrences. Further, we discern no duplication of effort and time by the parties and the court. Thus, we find this argument without merit.

{¶ 24} We next note that Simpson argues he should be released from the judgment

imposing sanctions and that HHVC should be substituted as the defendant in this action. In support, he claims there was no showing of contempt upon which to base an award of sanctions. He also once again argues that all his actions were taken at the behest of HHVC. This argument lacks merit. The judgment awarding sanctions against Simpson has been tried and affirmed on appeal. It is final and cannot be challenged in this action. As stated above, HHVC has no interest in this foreclosure action, and thus, regardless of whether Simpson believes it must indemnify him, there is no basis for substituting HHVC as the defendant.

{¶ 25} Finally, we address the propriety of the trial court's judgment. To be entitled to summary judgment, the moving party must demonstrate (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the non-moving party and that conclusion is adverse to the non-moving party. *Rhododendron Holdings, LLC v. Harris*, 2021-Ohio-147, 166 N.E.3d 725, ¶ 22 (2d Dist.), citing *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 617, 687 N.E.2d 735 (1998). "We review a trial court's ruling on a summary-judgment motion de novo." *Id.,* citing *Schroeder v. Henness*, 2d Dist. Miami No. 2012-CA-18, 2013-Ohio-2767, ¶ 42.

{¶ 26} With this standard in mind, we must determine whether Grande Voiture presented evidence sufficient to sustain the trial court's summary judgment decision. As noted, after obtaining a judgment for sanctions, Grande Voiture caused an R.C. 2329.02 certificate of judgment lien to be filed. R.C. 2329.02 provides, in pertinent part, as follows:

> Any judgment or decree rendered by any court of general jurisdiction, including district courts of the United States, within this state shall be a lien upon lands and tenements of each judgment debtor within any county of this state from the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of such judgment, setting forth the court in which the same was rendered, the title and number of the action, the names of the judgment creditors and judgment debtors, the amount of the judgment and costs, the rate of interest, if the judgment provides for interest, and the date from which such interest accrues, the date or rendition of the judgment, and the volume and page of the journal entry thereof.

{¶ 27} "It is well established in Ohio that 'a lien is immediately created upon the lands of the judgment debtor when a certificate of judgment is filed with the clerk of courts.' " *Denune v. Carter-Jones Lumber Co.*, 144 Ohio App.3d 266, 268-69, 759 N.E.2d 1289 (2d Dist.2001), quoting *Std. Hardware & Supply Co. v. Bolen*, 115 Ohio App.3d 579, 582, 685 N.E.2d 1264 (4th Dist.1996). Such a lien may be enforced in several ways, including by an R.C. 2323.07 action in foreclosure. *Id.* at 269.

{¶ 28} There are no disputed facts in this foreclosure action; thus, the question is strictly a matter of law. On June 29, 2020, Grande Voiture obtained a judgment against Simpson in the amount of $39,767.22. That judgment was upheld on appeal. On August 13, 2020, the certificate of judgment was filed in the office of the Clerk of the Montgomery County Court of Common Pleas in accordance with R.C. 2329.02. On May 14, 2021, Grande Voiture commenced this action to foreclose the lien created by the filing

of the certificate of judgment on specifically described real estate owned by Simpson. It also joined all parties necessary to foreclose the lien. Grande Voiture obtained a preliminary judicial report for the identified property, which indicated that Simpson was the sole owner of that property. Grande Voiture filed a motion for summary judgment which established the foregoing facts. Simpson did not dispute these facts. Further, he did not dispute the validity of the certificate of judgment, and he did not claim Grande Voiture had failed to properly plead or prove its right to foreclosure.

{¶ 29} Based upon our review of the record, we conclude that the trial court properly rendered summary judgment in favor of Grande Voiture. We further conclude that Simpson failed to present evidence sufficient to support his motion for summary judgment.[2] Thus, the trial court did not err in denying that motion.

{¶ 30} The second and third assignments of error are is overruled.

IV. Conclusion

{¶ 31} All of the assignments of error being overruled, the judgment of the trial court is affirmed.

. . . . . .

EPLEY, J. and LEWIS, J., concur.

Copies sent to:

[2] Simpson's arguments in his motion for summary judgment are the same arguments addressed in this opinion and, thus, need not be restated.

Robert H. Hollencamp
Charles J. Simpson
Hon. Dale Crawford, Visiting Judge

[Cite as *Digitalight Sys., Inc. v. Cleveland Clinic Found.*, 2022-Ohio-1400.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

DIGITALIGHT SYSTEMS, INC., :

Plaintiff-Appellant, :

v. : No. 110723

CLEVELAND CLINIC FOUNDATION, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 28, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-935343

Appearances:

Davis & Young and Dennis R. Fogarty, *for appellant*.

Hahn Loeser & Parks, LLP, Robert J. Fogarty, and Gregory A. Thompson, *for appellee*.

FRANK DANIEL CELEBREZZE, III, J.:

{¶ 1} Plaintiff-appellant, Digitalight Systems, Inc., brings this appeal challenging the trial court's decision granting summary judgment in favor of defendant-appellee, Cleveland Clinic Foundation, in Digitalight's action for breach of contract, unjust enrichment, action on an account, and promissory estoppel.

Digitalight argues that genuine issues of material fact existed that precluded judgment as a matter of law in Cleveland Clinic's favor on Digitalight's breach-of-contract claim and that the trial court erred in granting summary judgment in Cleveland Clinic's favor on Digitalight's claims for unjust enrichment, promissory estoppel, and action on an account. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} Digitalight is a Florida corporation that supplies health care equipment. In response to the equipment needs associated with the COVID-19 pandemic, Cleveland Clinic engaged Digitalight for the purpose of purchasing "KN95" surgical masks (hereinafter "masks").[1]

{¶ 3} Digitalight submitted a quote to the Cleveland Clinic on March 20, 2020. The unit price of each individual mask was $3.99. Digitalight's quote provided that the total cost of the 500,000 masks Cleveland Clinic sought to purchase would be $1,995,000. The quote made no mention of any terms and conditions that would apply to the sale.

{¶ 4} The next day, on March 21, 2020, Cleveland Clinic submitted a "rush" purchase order to Digitalight, offering to purchase 500,000 masks for $1,995,000. Cleveland Clinic's purchase order provided, in relevant part, "Deliver by March 22, 2020 unless specified by line[.]" Steve Pohlman, Cleveland Clinic's senior director

[1] Cleveland Clinic also purchased hand sanitizer from Digitalight.

of materials management, verbally extended the delivery deadline to March 31, 2020.[2]

{¶ 5} Cleveland Clinic's purchase order incorporated Cleveland Clinic's "Purchase Order Terms and Conditions." The purchase order provided, in relevant part, "*Seller's commencement of Services or Seller's shipment of any Products shall be deemed to be acceptance of Terms and Conditions located at www.clevelandclinic.org/SCM[.]" Cleveland Clinic's terms and conditions contain a "Cancellation/Termination," under which Cleveland Clinic could terminate or cancel a purchase order, in whole or in part, "at any time upon written notice to Seller."

{¶ 6} The record reflects that Digitalight accepted Cleveland Clinic's offer. Digitalight began working to fulfill Cleveland Clinic's order on March 23, 2020, and, on March 25, 2020, Digitalight sent a "revised [p]roposal"[3] to Cleveland Clinic confirming Cleveland Clinic's order. Digitalight's revised proposal contained, in relevant part, the specifications, instructions, and the "Certification of FDA Registration" for the masks. The revised proposal also included Digitalight's "Terms of Sale and Security Agreement."

{¶ 7} Digitalight sent three shipments of masks to Cleveland Clinic. First, in late March or early April, Digitalight donated 6,000 masks to Cleveland Clinic.

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[2] See Pohlman's affidavit, executed on March 19, 2021, at ¶ 12.

[3] See affidavit of Dewey Gosselin, Digitalight's CEO and owner, executed on February 18, 2021, at ¶ 7.

Cleveland Clinic's main point of contact at Digitalight was James Haney. Haney sent an email to Pohlman and other Cleveland Clinic representatives on March 30, 2020, indicating that he "was able to get 6,000 mask[s] out tonight" and that "these [masks] are not out of [Cleveland Clinic's] order[,] these are a donation." The parties dispute whether Cleveland Clinic received the first shipment. Subsequently, as set forth in further detail below, Pohlman offered to pay Digitalight for the donated masks.

{¶ 8} Digitalight failed to deliver the 500,000 masks to Cleveland Clinic by March 31, 2020. On April 15, 2020, Pohlman sent an email to Haney cancelling Cleveland Clinic's purchase order explaining "[i]t has taken too long to get the [masks] to the [United States]." Pohlman indicated that Cleveland Clinic would pay for the 6,000 masks that Digitalight donated to Cleveland Clinic. Pohlman's email was sent at 3:25 p.m. At 4:44 p.m., Haney sent an email to Pohlman acknowledging the cancellation and thanking Pohlman for the update. Subsequent emails were sent from Cleveland Clinic to Digitalight on April 27 and 28, 2020, confirming cancellation of the purchase order.

{¶ 9} After Cleveland Clinic cancelled the purchase order, Digitalight sent a second shipment of approximately 85,000 masks to Cleveland Clinic on or about May 21, 2020. The parties dispute whether Cleveland Clinic "accepted" the second shipment. Digitalight sent a third shipment of approximately 409,000 masks to Cleveland Clinic on or about May 21, 2020. It is undisputed that Cleveland Clinic rejected this third shipment. Before Digitalight sent the second and third

shipments, Pohlman sent an email to Haney on May 19, 2020, that provided, in relevant part, "I cancelled the [purchase order] for the mask shipment on April 27, 2020. If I receive these[,] I will not be paying for them. Please do not ship them. Please confirm you received this e-mail."

{¶ 10} Based on the disputes that arose during the course of the parties' transaction, Digitalight filed a complaint against Cleveland Clinic on July 29, 2020. Digitalight asserted causes of action for breach of contract, unjust enrichment or quantum meruit, action on an account, and promissory estoppel.

{¶ 11} Cleveland Clinic filed an answer on September 29, 2020. Therein, Cleveland Clinic acknowledged that (1) it received the first shipment of approximately 6,000 masks, (2) it received the second shipment of masks after Cleveland Clinic had cancelled the purchase order, and (3) it rejected the third and final shipment of masks.

{¶ 12} On March 2, 2021, Digitalight filed a motion for partial summary judgment. Therein, Digitalight argued that it was entitled to judgment as a matter of law on its breach-of-contract claim pertaining to the first and second shipments of masks to Cleveland Clinic. Digitalight acknowledged that genuine issues of material fact remained regarding the third shipment that was rejected by Cleveland Clinic.

{¶ 13} On March 22, 2021, Cleveland Clinic filed a motion for summary judgment on all of Digitalight's claims. Therein, Cleveland Clinic argued that it was entitled to judgment as a matter of law on Digitalight's breach-of-contract claim

because (1) Digitalight failed to deliver the 500,000 masks on or before March 31, 2020, (2) Cleveland Clinic cancelled the purchase order, and (3) Digitalight acknowledged Cleveland Clinic's cancellation before shipping the masks. Cleveland Clinic argued that it was entitled to judgment as a matter of law on Digitalight's claim for action on an account because it "rises and falls with its underlying breach of contract claim." Finally, Cleveland Clinic argued that it was entitled to judgment as a matter of law on Digitalight's equitable claims for unjust enrichment or quantum meruit and promissory estoppel because a binding contract existed between the parties. In support of its summary judgment motion, Cleveland Clinic submitted an affidavit of Pohlman, Cleveland Clinic's "Purchase Order Terms and Conditions" that were incorporated into the purchase order, and email correspondence between Pohlman and other Cleveland Clinic representatives and Haney and other Digitalight representatives.

{¶ 14} On April 19, 2021, Digitalight filed a combined brief in support of its motion for partial summary judgment and in opposition to Cleveland Clinic's motion for summary judgment. Therein, Digitalight argued that Cleveland Clinic owed approximately $400,000 for the first and second shipments of masks, and that Cleveland Clinic cancelled the purchase order for the remaining masks without justification. Digitalight raised a "battle of the forms" argument, maintaining that the transaction was governed by Digitalight's "Terms of Sale and Security Agreement," rather than Cleveland Clinic's "Purchase Order Terms and Conditions."

Finally, Digitalight argued that it did not breach any contractual provision by failing to deliver the masks on or before a specific date.

{¶ 15} On April 26, 2021, Cleveland Clinic filed a reply brief in support of its motion for summary judgment. Therein, Cleveland Clinic argued that Digitalight failed to meet the contractual requirement that the masks would be delivered on or before March 31, 2020. Cleveland Clinic argued that it was discharged from its duty to tender payment to Digitalight upon canceling the order. Cleveland Clinic disputed Digitalight's claim that Cleveland Clinic was obligated to pay for the first shipment of 6,000 masks, arguing that these masks were donated by Digitalight and Cleveland Clinic never received the first shipment.

{¶ 16} On July 9, 2021, the trial court issued a judgment entry denying Digitalight's motion for partial summary judgment and granting Cleveland Clinic's motion for summary judgment. Regarding Digitalight's breach-of-contract claim, the trial court concluded that (1) there was no contract regarding the first shipment of 6,000 donated masks and that Pohlman's subsequent offer to pay Haney for the masks was not supported by consideration; (2) Digitalight's breach-of-contract claim fails due to lack of performance — Digitalight's failure to deliver the masks on or before March 30, 2020; (3) alternatively, even if Digitalight's late delivery did not constitute failed performance, Cleveland Clinic cancelled the purchase order before Digitalight sent the second and third shipments. The trial court also held that Cleveland Clinic was entitled to judgment as a matter of law on Digitalight's

remaining claims for unjust enrichment or quantum meruit, promissory estoppel, and action on an account.

{¶ 17} On August 9, 2021, Digitalight filed the instant appeal challenging the trial court's July 9, 2021 judgment. Digitalight assigns two errors for review:

> I. The trial court erred in granting [Cleveland Clinic's] [m]otion for [s]ummary [j]udgment on Digitalight's claim for breach of contract.
>
> II. The trial court erred in granting [Cleveland Clinic's] [m]otion for [s]ummary [j]udgment on Digitalight's claims for unjust enrichment, promissory estoppel, and action on an account.

A. Summary Judgment

{¶ 18} Both of Digitalight's assignments of error challenge the trial court's decision granting summary judgment in favor of Cleveland Clinic.

1. Standard of Review

{¶ 19} Summary judgment, governed by Civ.R. 56, provides for the expedited adjudication of matters where there is no material fact in dispute to be determined at trial. In order to obtain summary judgment, the moving party must show that "(1) there is no genuine issue of material fact; (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 when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party." *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219, 631 N.E.2d 150 (1994).

{¶ 20} The moving party has the initial responsibility of establishing that it is entitled to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). "[I]f the moving party meets this burden, summary judgment is appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact." *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 16, citing *Dresher* at 293.

{¶ 21} Once the moving party demonstrates no material issue of fact exists for trial and the party is entitled to judgment, the burden shifts to the nonmoving party to put forth evidence demonstrating the existence of a material issue of fact that would preclude judgment as a matter of law. *Dresher* at *id*. In order to meet this burden, the nonmoving party may not merely rely upon allegations or denials in his or her pleadings, and must set forth specific facts, by affidavit or as otherwise provided in Civ.R. 56(E), demonstrating the existence of a genuine issue of material fact for trial. *See Houston v. Morales*, 8th Dist. Cuyahoga No. 106086, 2018-Ohio-1505, ¶ 7, citing *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996). Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Dresher* at *id*.

2. Breach of Contract

{¶ 22} In its first assignment of error, Digitalight argues that the trial court erred in granting summary judgment in favor of Cleveland Clinic on Digitalight's breach-of-contract claim.

{¶ 23} "A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the breach." *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 41.

{¶ 24} In this appeal, Digitalight argues that genuine issues of material fact existed that precluded summary judgment in favor of Cleveland Clinic on its breach-of-contract claim. Specifically, Digitalight argues that genuine issues of material fact existed regarding (1) whether the first shipment of 6,000 masks was a donation, (2) the timeliness of the delivery of the second and third shipments of masks and whether Digitalight breached the parties' agreement with respect to the timeliness issue, and (3) whether Cleveland Clinic accepted the masks after attempting to cancel the purchase order.

a. First Shipment of 6,000 Masks

{¶ 25} First, Digitalight argues that a genuine issue of material fact exists regarding whether the first shipment of 6,000 masks was a donation from Digitalight to Cleveland Clinic.

{¶ 26} As noted above, the parties dispute whether the first shipment of masks was, in fact, received by Cleveland Clinic. Pohlman averred in his affidavit that "[t]he 6,000 mask donation from Digitalight never arrived at any Cleveland Clinic facility." *Id.* at ¶ 15. In support of its partial summary judgment motion,

Digitalight submitted a July 24, 2020 letter from Cleveland Clinic's Deputy Chief Legal Officer, Lisa Barrett, to Digitalight's counsel, that provided, in relevant part,

> After receiving the "good faith" shipment of the 6,000 masks in early April, we had the masks fit tested, as required by [the Occupational Safety and Health Administration] in order for them to be used by our employees. The masks were of such poor quality that they could not sustain a seal; and therefore could not pass the fit test and could not be used for the purposes for which they were purchased.

{¶ 27} This letter suggests that Cleveland Clinic did, in fact, receive the shipment of the 6,000 masks. Regardless of whether Cleveland Clinic received these masks, the record reflects that these masks were donated by Digitalight.

{¶ 28} Pohlman averred in his affidavit that "[b]y email dated March 30, 2020, Digitalight claimed that it had obtained 6,000 masks, which were being shipped to Cleveland Clinic that night. Digitalight stated the 6,000 masks were a donation." *Id.* at ¶ 14. The emails that Cleveland Clinic submitted in support of its summary judgment motion demonstrate that the masks were donated to Cleveland Clinic by Digitalight.

{¶ 29} The March 30, 2020 email from Haney to Kevin Velasquez,[4] provided, in relevant part, "I was able to get 6,000 masks[s] out tonight. Again *these are not out of your order these are a donation*." (Emphasis added.) The April 10, 2020 email from Pohlman to Haney provided, in relevant part, "For the record, we never received the 6,000 masks. * * * In addition, these 6,000 [masks] were not part of

[4] Velasquez was Cleveland Clinic's nonclinical sourcing director.

our order, this was *a good faith shipment* that you made to me because of the now, almost 2 week miss on your promised delivery date." (Emphasis added.)

{¶ 30} Cleveland Clinic did, in fact, offer to pay for the donated masks. Pohlman averred in his affidavit that "Cleveland Clinic later offered to pay Digitalight for the 6,000 masks, but that offer was gratuitous, lacked consideration, and has since been withdrawn." *Id*. at ¶ 15. The April 15, 2020 email from Pohlman to Haney, provided, "[u]nfortunately, [i]t has taken too long to get the [masks] to the [United States]. As a result, I asked my team to cancel the [purchase order] today. We will pay for the 6,000 [masks] you sent so you are made whole on those." In an April 28, 2020 email from Pohlman to Velasquez and Haney, Pohlman confirmed that he agreed to pay for the 6,000 masks because Cleveland Clinic cancelled the rest of the order.

{¶ 31} Although Cleveland Clinic offered to pay for the donated masks, the record reflects that this offer was not supported by consideration.

{¶ 32} "Contract formation requires an offer, acceptance, consideration, and mutual assent between two or more parties with the legal capacity to act." *Widok v. Estate of Wolf*, 8th Dist. Cuyahoga No. 108717, 2020-Ohio-5178, ¶ 52. Courts may generally not inquire into the adequacy of consideration, which is left to the parties as "the sole judges of the benefits or advantages to be derived from their contracts." *Hotels Statler Co., Inc. v. Safier*, 103 Ohio St. 638, 644-645, 134 N.E. 460 (1921). Whether there is consideration at all, however, is a proper question for a court. *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 17.

> "Gratuitous promises are not enforceable as contracts, because there is no consideration. * * * A written gratuitous promise, even if it evidences an intent by the promisor to be bound, is not a contract. * * * Likewise, conditional gratuitous promises, which require the promisee to do something before the promised act or omission will take place, are not enforceable as contracts. * * * While it is true, therefore, that courts generally do not inquire into the adequacy of consideration once it is found to exist, it must be determined in a contract case whether any 'consideration' was really bargained for. If it was not bargained for, it could not support a contract."

Id., quoting *Carlisle v. T & R Excavating, Inc.*, 123 Ohio App.3d 277, 283-284, 704 N.E.2d 39 (9th Dist.1997).

{¶ 33} In the instant matter, we find that there remain no genuine issues of fact as to whether the alleged contract — Cleveland Clinic's offer to pay for the 6,000 masks — contained bargained-for consideration. The donation was purportedly shipped from Digitalight to Cleveland Clinic on March 30, 2020. Cleveland Clinic did not offer to pay for the donated masks until April 15, 2020, when it cancelled the purchase order. Accordingly, when Cleveland Clinic offered to pay for the masks, they had already been donated by Digitalight. The trial court did not err in granting summary judgment in favor of Cleveland Clinic in this respect.

b. Timeliness of Delivery

{¶ 34} Second, Digitalight argues that a genuine issue of material fact exists regarding whether the timeliness of the delivery of the second and third shipments of masks constituted a breach of the parties' agreement and justified Cleveland Clinic's cancellation of the purchase order.

{¶ 35} As it did in opposing Cleveland Clinic's motion for summary judgment in the trial court, Digitalight argues in this appeal that "the date of delivery was not specified in any of the documents" and that Digitalight did not breach the agreement by delivering the masks in installments or shipments as they became available. Appellant's brief at 8. Digitalight's argument is unsupported by the record.

{¶ 36} Cleveland Clinic's purchase order unequivocally specified the date of delivery for the 500,000 masks ordered by Cleveland Clinic as March 22, 2020. Pohlman averred in his affidavit that he verbally extended the March 22 deadline to March 31, 2020. *Id.* at ¶ 12.

{¶ 37} The emails Cleveland Clinic submitted in support of its summary judgment motion demonstrate that the timeliness of delivery was, in fact, a material term of the parties agreement. In an April 10, 2020 email from Pohlman to Haney, Pohlman references the fact that almost two weeks had passed since the delivery date promised by Haney. In the April 15, 2020 email from Pohlman to Haney in which Pohlman cancelled the purchase order, Pohlman cited the fact that "[i]t has taken too long to get the [masks] to the [United States]." In an April 28, 2020 email from Haney to Pohlman, Haney acknowledges that the 6,000 masks had been "sent prior to *the delay of the full order*." (Emphasis added.)

{¶ 38} Digitalight failed to present any evidence contradicting the March 22, 2020 delivery date identified in Cleveland Clinic's purchase order, or Pohlman's assertion that he extended the delivery deadline to March 31, 2020. Furthermore, regarding performance — or delivery of the masks to Cleveland Clinic on or before

March 31, 2020 — Digitalight failed to present any evidence indicating that it either delivered the masks to Cleveland Clinic or made the masks available to a carrier on or before the March 31, 2020 deadline, or (2) that it delivered the masks to Cleveland Clinic or made the masks available to a carrier before Cleveland Clinic provided written notice that it was cancelling the order on April 15, 2020.

{¶ 39} Digitalight further raises a "battle of the forms" argument pursuant to R.C. 1302.10 and Section 2-207 of the Uniform Commercial Code ("UCC"). Digitalight contends that the masks were, in fact, delivered in a timely manner, and as a result, Cleveland Clinic was not relieved of its obligation to accept delivery and tender payment to Digitalight. The timeliness issue comes down to whether Digitalight's "Terms of Sale and Security Agreement," which was included in Digitalight's March 25, 2020 revised proposal to Cleveland Clinic, controls the parties' transaction, or whether Cleveland Clinic's "Purchase Order Terms and Conditions" are controlling. If Digitalight's agreement controlled, the delay in delivery was permissible and did not relieve Cleveland Clinic of its obligation to perform. If Cleveland Clinic's terms and conditions are controlling, Cleveland Clinic had a right to cancel the purchase order prior to shipment.

{¶ 40} After reviewing the record, we find that Digitalight failed to meet its burden of demonstrating the existence of a genuine issue of material fact regarding Cleveland Clinic's right to cancel the purchase order. R.C. 1302.10, governing additional terms in acceptance or confirmation, provides, in relevant part:

> (A) A definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, *unless acceptance is expressly made conditional on assent to the additional or different terms*.
>
> (B) The additional terms are to be construed as proposals for addition to the contract. Between merchants, the terms become part of the contract unless one of the following applies:
>
> (1) *The offer expressly limits acceptance to the terms of the offer*.
>
> (2) They materially alter it.
>
> (3) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(Emphasis added.)

{¶ 41} In the instant matter, the offer — Cleveland Clinic's March 21, 2020 purchase order — provided, in relevant part, "*Seller's commencement of Services or Seller's shipment of any Products shall be deemed to be acceptance of Terms and Conditions located at www.clevelandclinic.org/SCM[.]" Accordingly, the purchase order incorporated Cleveland Clinic's "Purchase Order Terms and Conditions."

{¶ 42} Cleveland Clinic's terms and conditions provide, in relevant part,

> Notwithstanding any different or additional terms or conditions contained in Seller's invoice, proposals or other communication, Seller accepts Buyer's order for products ("Products") or services ("Services") only on the condition that Seller expressly accepts these Terms and Conditions. Unless Seller accepts these terms and conditions without deviation or reservation, no contract shall result from an order. Any terms and conditions in any confirmation by Seller that states different or additional terms shall be null and void. Buyer hereby objects to and rejects such different or additional terms and any such different or additional terms shall be deemed to be material alterations and notice of objection to such terms is hereby given. Seller's commencement of performance of Services or Seller's shipment of any Products shall be deemed to be acceptance of these Terms and Conditions. Any notice

> by Seller objecting to these Terms and Conditions must be in writing separate from any form including but not limited to any invoice or acknowledgement form, and must be communicated to Buyer prior to any shipment of Products or commencement of any Services. Any amendment, waiver or other alteration of these Terms and Conditions by Seller shall be effective only if made by mutual agreement.

(Emphasis added.)

{¶ 43} This language expressly limited acceptance of Cleveland Clinic's offer to the terms set forth therein, including the Cleveland Clinic's terms and conditions.

{¶ 44} Digitalight's "Terms of Sale and Security Agreement" were added into the March 25, 2020 revised proposal. Digitalight's agreement provided, in relevant part,

> (a) Unless agreed upon in writing to the contrary, this Agreement shall govern the sale, delivery and distribution of all products manufactured, sold or marketed, including spare parts thereto[.] * * *
>
> * * *
>
> (d) Any purchase contract hereunder shall become effective upon the mailing of a written acceptance of Purchaser's order by Seller. Any conditions of Purchaser which are contradictory to the conditions contained herein are invalid.

{¶ 45} Digitalight's agreement also contained a "Delivery" provision that provides, in relevant part, "(e) Seller reserves the right to make delivery in installments, unless otherwise expressly stipulated to the contrary in a written document signed by Seller. Delay in delivery of any installments shall not relieve Purchaser of its obligation to accept remaining deliveries."

{¶ 46} After reviewing the record, we find Digitalight's battle of the forms argument to be misplaced. Digitalight's agreement did not expressly indicate that

Cleveland Clinic's assent to the added terms set forth in the revised proposal — including Digitalight's agreement — was necessary in order to create a valid contract. Nor do the terms of Digitalight's agreement expressly state that Digitalight would be unwilling to proceed with the transaction unless Cleveland Clinic assented to the additional terms.

{¶ 47} Accordingly, the language in Digitalight's agreement did not make Digitalight's acceptance of Cleveland Clinic's offer conditional on the terms added in the revised proposal. Pursuant to R.C. 1302.10(A), the additional terms do not control the parties' contract. Rather, pursuant to R.C. 1302.10(B), the additional terms constituted proposed additions to the parties' contract.

{¶ 48} The additional terms in Digitalight's agreement did not become a part of the contract between Cleveland Clinic and Digitalight pursuant to R.C. 1302.10(B)(1). As noted above, Cleveland Clinic's offer expressly limited acceptance to the terms of the offer, including the Cleveland Clinic's terms and conditions that were incorporated therein.

{¶ 49} Because Digitalight's additional terms did not become a part of the parties' contract under either R.C. 1302.10(A) or (B), they are not controlling. Digitalight's reliance on the provision in its agreement permitting delivery in installments and delivery delays is misplaced and did not demonstrate the existence of a genuine issue of material fact that precluded summary judgment in Cleveland Clinic's favor.

{¶ 50} Cleveland Clinic's terms and conditions include a "Cancellation/Termination" provision that provides, "Buyer may terminate or cancel a [purchase order], in whole or in part, at any time upon written notice to Seller. Buyer will remain obligated for goods shipped or services performed by Seller prior to receipt of Buyer's notice." Here, after the masks were not delivered in a timely manner, Cleveland Clinic exercised this right to cancel the purchase order by providing written notice to Digitalight on April 15, 27, and 28, 2020.

{¶ 51} Finally, Digitalight argues, for the first time in this appeal, that Cleveland Clinic waived the timeliness issue. Digitalight did not raise its waiver argument in opposing Cleveland Clinic's motion for summary judgment in the trial court. It is well-established that a party cannot raise an argument for the first time on appeal. *See, e.g., Lycan v. Cleveland*, 2019-Ohio-3510, 142 N.E.3d 210, ¶ 32 (8th Dist.) ("arguments raised for the first time on appeal are generally barred and a reviewing court will not consider issues that the appellant failed to raise in the trial court").

{¶ 52} Nevertheless, we find no merit to Digitalight's waiver argument. Digitalight directs this court to an April 10, 2020 email from Pohlman to Haney in which Pohlman stated, "I will take smaller shipments of masks[.]" Digitalight assumes that Pohlman was referring to the 500,000 masks Cleveland Clinic originally offered to purchase from Digitalight, rather than the 6,000 masks Digitalight donated to Cleveland Clinic. In the same email, Pohlman states that Cleveland Clinic did not receive the 6,000 donated masks and that the 6,000 masks

were not part of the 500,000 mask order, but rather a "good faith shipment" Digitalight made "because of the now, *almost 2 week miss on your promised delivery date*." (Emphasis added.)

{¶ 53} Digitalight breached the parties' agreement by failing to timely deliver the masks to Cleveland Clinic, and Cleveland Clinic exercised its right to cancel the purchase order before Digitalight shipped the masks to Cleveland Clinic. Accordingly, the trial court did not err in granting summary judgment in favor of Cleveland Clinic in this respect.

c. Acceptance

{¶ 54} Third, Digitalight argues that a genuine issue of material fact exists regarding whether, after cancelling or attempting to cancel the purchase order, Cleveland Clinic accepted the masks.

{¶ 55} Digitalight contends that Cleveland Clinic accepted the first two shipments of masks, and as a result, the trial court erred in concluding that Cleveland Clinic cancelled the order. Digitalight concedes that Cleveland Clinic rejected the third shipment of approximately 409,000 masks. Assuming, arguendo, that Cleveland Clinic accepted the first shipment of 6,000 masks, the record reflects that these masks were donated by Digitalight and not part of the 500,000 mask order.

{¶ 56} Regarding the second shipment of approximately 85,000 masks, Digitalight directs this court to Section 2-606 of the UCC and R.C. 1302.64(A)(1), which provide,

(A) Acceptance of goods occurs when the buyer:

(1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(2) fails to make an effective rejection as provided in division (A) of section 1302.61 of the Revised Code, but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(3) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

{¶ 57} Cleveland Clinic acknowledges that it did, in fact, take possession of the second shipment of masks after (1) cancelling the purchase order, (2) instructing Digitalight not to ship the masks, and (3) advising Digitalight that Cleveland Clinic would not be paying for the masks if they were shipped.

{¶ 58} In his affidavit, Pohlman averred, in relevant part,

22. Despite Cleveland Clinic's several, written notifications of cancellation of the masks, Digitalight proceeded to ship a portion of the order over my objection. Digitalight broke the shipment down into two smaller shipments, which were delivered by two separate carriers on or about May 21, 2020. Cleveland Clinic was aware of one of the carriers, but not the other.

a. Cleveland Clinic rejected the [third] shipment delivered by the known carrier, which contained approx. 409,000 masks.

b. The [second] shipment delivered by the unknown carrier contained approx. 85,000 masks. That shipment was dropped off at Cleveland Clinic's docks with the carrier leaving before Cleveland Clinic could inspect and reject the shipment. The loading dock clerk did not know that he was signing for a shipment from Digitalight. Even if he did, the loading dock clerk did not have authority to accept a shipment from Digitalight. Had Cleveland Clinic been given the opportunity to inspect this shipment, or had Cleveland Clinic known what it was, it would have rejected and refused the shipment.

* * *

> 24. * * * The masks Digitalight shipped are sitting in a Cleveland Clinic warehouse and Digitalight is free to retrieve them.

{¶ 59} On May 19, 2020, Pohlman sent an email to Haney that provided, in relevant part, "I cancelled the [purchase order] for the mask shipment on April 27, 2020. If I receive these I will not be paying for them. Please do not ship them. Please confirm you received this e-mail." Pohlman's email was sent at 4:58 p.m. At 6:11 p.m., Haney forwarded Pohlman's email to another Digitalight representative, Andrea Merritt.

{¶ 60} The evidence submitted by Cleveland Clinic establishes that Cleveland Clinic did not "accept" the second shipment of masks pursuant to R.C. 1302.64(A)(1). Cleveland Clinic cancelled the purchase order before the masks were shipped. Cleveland Clinic rejected the masks before they were delivered. Cleveland Clinic took possession of the second shipment without having an opportunity to inspect the contents of the shipment. Finally, after discovering the contents of the shipment that Cleveland Clinic took possession of, Cleveland Clinic rejected the shipment and invited Digitalight to retrieve the masks from Cleveland Clinic's warehouse at any time.[5] Accordingly, the trial court did not err in granting summary judgment in favor of Cleveland Clinic in this respect.

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[5] See exhibit No. 3a of Digitalight's motion for partial summary judgment.

{¶ 61} For all of the foregoing reasons, the trial court properly granted summary judgment in favor of Cleveland Clinic on Digitalight's breach-of-contract claim. Digitalight's first assignment of error is overruled.

3. Remaining Claims

{¶ 62} In its second assignment of error, Digitalight argues that the trial court erred in granting summary judgment in Cleveland Clinic's favor on Digitalight's claims for unjust enrichment, promissory estoppel, and action on an account.

a. Unjust Enrichment

{¶ 63} First, regarding the unjust-enrichment claim, Digitalight argues that the trial court erred in holding that Digitalight was only entitled to recovery in accordance with the terms of the contract because the trial court "found a valid contract did not exist." Appellant's brief at 12. Digitalight's argument is misplaced and unsupported by the record.

{¶ 64} Contrary to Digitalight's assertion, the trial court did not conclude that a valid contract did not exist. Rather, the trial court concluded that Digitalight could not recover under a theory of unjust enrichment because "there is *a valid — albeit, canceled* — contract for the second and third shipments [of masks.]" (Emphasis added.)

{¶ 65} A claim for unjust enrichment, or quantum meruit, is an equitable claim based on a contract implied in law, or a quasi-contract. *See Hummel v. Hummel*, 133 Ohio St. 520, 525-528, 14 N.E.2d 923 (1938). "Where a valid contract

exists between the parties, there can be no recovery under a theory of quantum meruit in the absence of fraud, bad faith, or illegality." *Restivo v. Continental Airlines, Inc.*, 192 Ohio App.3d 64, 2011-Ohio-219, 947 N.E.2d 1287, ¶ 12 (8th Dist.), citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 55, 544 N.E.2d 920 (1989), and *Ullmann v. May*, 147 Ohio St. 468, 72 N.E.2d 63 (1947), paragraph three of the syllabus. "Ohio law does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject." *Padula v. Wagner*, 2015-Ohio-2374, 37 N.E.3d 799, ¶ 48 (9th Dist.), citing *Ullmann* at 475, 478-479, and paragraph four of the syllabus, and *Wochna v. Mancino*, 9th Dist. Medina No. 07CA0059-M, 2008-Ohio-996, ¶ 18.

{¶ 66} In the instant matter, Digitalight alleged in its complaint that Digitalight "conferred a benefit on [Cleveland Clinic] by ordering and shipping the masks," "[a]s [Cleveland Clinic] did not pay for these orders, it is unjust to permit [Cleveland Clinic] to retain the masks without making payment to [Digitalight]," and "[Digitalight] is entitled to damages as a result of [Cleveland Clinic's] unjust retention of the benefits conferred by [Digitalight]." Digitalight's complaint at ¶ 20, 22, and 23. There was an express, valid contract between Digitalight and Cleveland Clinic that covered the same subject — Digitalight ordering and shipping masks to Cleveland Clinic — that Cleveland Clinic cancelled after Digitalight failed to perform in a timely manner.

{¶ 67} Digitalight did not allege in its unjust-enrichment claim, much less demonstrate through Civ.R. 56, evidence, fraud, bad faith, or illegality on Cleveland

Clinic's behalf. As a result, Digitalight was not permitted to recover under an unjust enrichment or quantum meruit theory.

{¶ 68} The trial court properly granted summary judgment in favor of Cleveland Clinic on Digitalight's unjust-enrichment claim. Digitalight's second assignment of error is overruled in this respect.

b. Promissory Estoppel

{¶ 69} Second, regarding the promissory-estoppel claim, Digitalight argues that the trial court erred in granting summary judgment in favor of Cleveland Clinic because the "trial court found the contract in question was invalid," and therefore, should have considered the alternative claim for promissory estoppel. As noted above, the trial court did not find that the contract was invalid. Rather, the trial court concluded that a valid contract existed and that Cleveland Clinic cancelled the contract.

{¶ 70} The existence of an express contract precludes a claim of an implied contract or promissory estoppel. *Pagano v. Case W. Res. Univ.*, 2021-Ohio-59, 166 N.E.3d 654, ¶ 78 (8th Dist.), citing *Manno v. St. Felicitas Elementary School*, 161 Ohio App.3d 715, 2005-Ohio-3132, 831 N.E.2d 1071, ¶ 31 (8th Dist.), citing *Cuyahoga Cty. Hosps. v. Price*, 64 Ohio App.3d 410, 416, 581 N.E.2d 1125 (8th Dist.1989), and *Gallant v. Toledo Pub. Schools*, 84 Ohio App.3d 378, 616 N.E.2d 1156 (6th Dist.1992). Here, an express contract existed between Digitalight and Cleveland Clinic. Therefore, Digitalight's promissory-estoppel claim was barred.

{¶ 71} The trial court properly granted summary judgment in favor of Cleveland Clinic on Digitalight's promissory-estoppel claim. Digitalight's second assignment of error is overruled in this respect.

c. Action on an Account

{¶ 72} Digitalight does not make a separate argument or present any argument or authority challenging the trial court's judgment in favor of Cleveland Clinic on Digitalight's claim for action on an account. *See* App.R. 16(A). Pursuant to App.R. 12(A)(2), this court may disregard any assignment of error, or portion thereof, if the appellant fails to make a separate argument. *Cleveland v. Taylor*, 8th Dist. Cuyahoga No. 109371, 2021-Ohio-584, ¶ 87, citing *State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 55.

{¶ 73} Nevertheless, the record reflects that the trial court properly granted Cleveland Clinic's motion for summary judgment on Digitalight's claim for action on account.

> An action on an account is not a separate claim but, rather, "a pleading device 'used to consolidate several claims which one party has against another.'" *Kwikcolor Sand v. Fairmount Minerals Ltd.*, 8th Dist. Cuyahoga No. 96717, 2011-Ohio-6646, ¶ 13, quoting *AMF, Inc. v. Mravec*, 2 Ohio App.3d 29, 440 N.E.2d 600 (8th Dist.1981), paragraph one of the syllabus. An action on account "simplifies pleadings by allowing a party to advance, as one claim, claims for separate breaches of contract based on a series of transactions by providing a summary of accounting for the transactions." *Kwikcolor Sand* at ¶ 13.

Garfield Estates, L.L.C. v. Whittington, 2021-Ohio-211, 167 N.E.3d 113, ¶ 19 (8th Dist.).

{¶ 74} In the instant matter, Digitalight's claim for action on an account is really a claim for breach of contract. *Garfield Estates* at ¶ 19, citing *Schottenstein, Zox & Dunn Co., L.P.A. v. Reineke*, 9th Dist. Medina No. 10CA0138-M, 2011-Ohio-6201, ¶ 18. As noted above, the trial court properly granted summary judgment in favor of Cleveland Clinic on Digitalight's breach-of-contract claim.

{¶ 75} Accordingly, Digitalight's claim for action on an account fails, and Cleveland Clinic was entitled to judgment as a matter of law. Digitalight's second assignment of error is overruled in this respect.

{¶ 76} For all of the foregoing reasons, the trial court properly granted summary judgment in favor of Cleveland Clinic on Digitalight's claims for unjust enrichment, promissory estoppel, and action on an account.

II. Conclusion

{¶ 77} After thoroughly reviewing the record, we affirm the trial court's judgment granting summary judgment in favor of Cleveland Clinic on Digitalight's claims for breach of contract, unjust enrichment, promissory estoppel, and action on an account.

{¶ 78} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

FRANK DANIEL CELEBREZZE, III, JUDGE

SEAN C. GALLAGHER, A.J., and
ANITA LASTER MAYS, J., CONCUR

[Cite as *Sharp v. M3C Invests., L.L.C.*, 2022-Ohio-1394.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ARIELLE SHARP,	:	
Plaintiff-Appellant,	:	No. 110442
v.	:	
M3C INVESTMENTS LLC, ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: April 28, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-900382

Appearances:

Milton and Charlotte Kramer Law Clinic, Case Western Reserve University School of Law, Joseph Shell and Andrew S. Pollis, Supervising Attorneys and Joshua M. Knauf, Certified Legal Intern, *for appellant*.

EMANUELLA D. GROVES, J.:

{¶ 1} Plaintiff-appellant, Arielle Sharp ("Sharp"), appeals the trial court's failure to hold a jury trial to determine the proper amounts of compensatory damages, treble damages, attorney fees, and costs following its grant of default judgment in Sharp's favor on her complaint, brought pursuant to the Ohio Consumer Sales Practices Act (the "CSPA"). For the reasons set forth below, we

reverse the trial court's decision and remand for further proceedings consistent with this opinion.

Procedural and Factual History

{¶ 2} In July 2018, Sharp filed a complaint against MC3 Investments, LLC, d.b.a. Keep It Moving Auto Sales 2, Inc. ("KMAS2"), and Robert Middlebrooks ("Middlebrooks"), asserting several claims under the CSPA, as well as claims of breach of contract, conversion, and fraud. Sharp's complaint included a demand for a jury trial, plus a request for treble economic damages, noneconomic damages, and punitive damages.

{¶ 3} In November 2018, Sharp amended her complaint to add Ronnie Simmons ("Simmons") as a defendant. Sharp brought the action to seek relief in connection with her purchase of a 2007 Mitsubishi Endeavor (the "Vehicle"). The following abstract of the attendant events is generated from the allegations set forth in Sharp's complaint.

{¶ 4} On February 3, 2018, Sharp contacted KMAS2 about purchasing the Vehicle. Subsequently, Middlebrooks, one of the owners of KMAS2, brought the Vehicle to Sharps' home. After inspecting the Vehicle and perceiving issues with the muffler, as well as observing damage to both bumpers, Sharp declined to purchase the vehicle.

{¶ 5} About a week later, Middlebrooks returned with the Vehicle and, again offered it for sale if Sharp agreed to make a down payment of $1,000 with a total purchase price of $3,000. Middlebrooks proclaimed the deal was "great" and

"awesome" and promised to have the car fully functional before Sharp would have made the final payment. Sharp again declined to purchase the Vehicle.

{¶ 6} On February 11, 2018, Middlebrooks brought the Vehicle back to Sharp's home. Sharp, who by then was desperately in need of personal transportation, accepted Middlebrooks' offer. Under the offer, Sharp could purchase the Vehicle for a total of $3,000, with a down payment of $1,000, and Middlebrooks would fix all issues with the vehicle before the final payment was due. While still at Sharp's home, Middlebrooks presented the contract and asked Sharp to complete it claiming he was experiencing pain in his hands. After Sharp filled out the paperwork, Middlebrooks proceeded to sign the contract as "Ronnie Simmons."

{¶ 7} The following day, Middlebrooks met Sharp at Norwood's Discount Muffler & Brake ("Norwood") to have the muffler repaired. While there, a Norwood technician informed them that there was a problem with the Vehicle's O2[1] sensor and advised that it should be repaired immediately. Middlebrooks promised that he would have someone else repair the O2 sensor but reneged. Middlebrooks paid Norwood $50 to repair the muffler.

{¶ 8} In the ensuing weeks, the Vehicle began manifesting additional problems, including frequent stalling at traffic lights. Sharp notified Middlebrooks, who promised to address the mechanical issue, but instead attempted to placate Sharp by fixing cosmetic or minor issues and offering to buy gasoline for the Vehicle.

[1] Oxygen sensor.

At other times, Middlebrooks would either not respond or hang up the phone when he unintentionally answered Sharp's telephone call.

{¶ 9} Eventually, in March 2018, the Vehicle completely broke down, shortly after Sharp had taken her children to school. Sharp notified Middlebrooks, who had the Vehicle towed. Subsequently, Sharp requested a refund, but Middlebrooks indicated that he needed to first determine what was wrong with the Vehicle. Despite Sharp's repeated requests, Middlebrooks did not refund the deposit and did not provide any information on the Vehicle, which was never returned to Sharp. Hence, Sharp brought the underlying CSPA action.

{¶ 10} On April 16, 2019, after none of the three defendants had filed an answer to the complaint, Sharp filed a motion for default judgment as to liability on all claims. Sharp again requested that the trial court schedule a jury trial to determine the proper amounts of compensatory damages, treble damages, attorney fees, and costs. The trial court scheduled a default hearing and directed Sharp to submit an affidavit of damages and proposed judgment entry.

{¶ 11} Sharp complied with the trial court's directives and submitted a damages affidavit and proposed judgment entry that would have awarded her $23,040 in economic damages, $5,000 in noneconomic damages, plus an indefinite amount of punitive damages. At the default hearing, the trial court granted Sharp's motion for default judgment and awarded her only $1,080.

{¶ 12} Sharp now appeals and assigns the following errors for review:

Assignment of Error No.1

The trial court erred in not holding a jury trial on damages.

Assignment of Error No. 2

The trial court erred in failing to treble Ms. Sharp's economic damages.

Assignment of Error No. 3

The trial court erred in failing to award noneconomic damages.

Law and Analysis

{¶ 13} In the first assignment of error, Sharp, who included a demand for a jury trial in her complaint, reasserted that demand in her motion for default judgment, and never abandoned her demand, argues the trial court erred in not holding a jury trial on the issue of damages in the underlying CSPA action.

{¶ 14} We review a trial court's decision to grant a motion for default judgment under an abuse of discretion. *Chase Bank USA, N.A. v. Courey*, 8th Dist. Cuyahoga No. 92798, 2010-Ohio-246, ¶ 22. "But unlike the initial decision to grant a default judgment, 'the determination of the kind and maximum amount of damages that may be awarded is not committed to the discretion of the trial court, but is subject to the mandates of Civ.R. 55(C) and Civ.R. 54(C).'" *Arendt v. Price*, 8th Dist. Cuyahoga No. 101710, 2015-Ohio-528, ¶ 8, quoting *Dye v. Smith*, 189 Ohio App.3d 116, 2010-Ohio-3539, 937 N.E.2d 628, ¶ 7 (4th Dist.), quoting *Natl. City Bank v. Shuman*, 9th Dist. Summit No. 21484, 2003-Ohio-6116, ¶ 6. Therefore, "the question of whether a trial court's grant of default judgment complies with Civ.R.

55(C) and Civ.R. 54(C) is one of law, which we review de novo." *Id.*; *see also Masny v. Vallo*, 8th Dist. Cuyahoga No. 84938, 2005-Ohio-2178, ¶ 15.

{¶ 15} In this matter, to support her contention that the trial court erred in not holding a jury trial to determine damages, Sharp relies on our pronouncements in *Berube v. Richardson*, 8th Dist. Cuyahoga No. 104651, 2017-Ohio-1367. We find Sharp's reliance on *Berube* to be well-placed.

{¶ 16} In *Berube*, we were also called on to consider a party's right to a jury trial on damages in the context of a default judgment. In consideration of that right, we noted that Civ.R. 55(A),[2] which governs the entry of default judgment and the necessity of a hearing on damages, gives the trial court the discretion to conduct a hearing following an entry of default judgment in order to determine the measure of damages. *Id.* at ¶ 13, citing *Malaco Constr. v. Jones*, 10th Dist. Franklin No. 94APE10-1466, 1995 Ohio App. LEXIS 3534, 21 (Aug. 24, 1995).

{¶ 17} Again, as in *Berube*, we recognize that the discretion accorded the trial court, under Civ.R. 55(A), is tempered with a party's constitutional and substantial right to a jury trial. In this respect, the Constitution provides that "[t]he right to a trial by jury shall be inviolate * * *." Section 5, Article I, Ohio Constitution; Civ.R. 38(A). *Id.* at ¶ 14. Further, we again recognize that this constitutional guarantee is

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[2] Civ.R. 55(A): "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties."

limited by certain procedural rules. *Id. See White v. Bannerman*, 5th Dist. Stark Nos. 2009CA00221, 2009CA00245 and 2009CA00268, 2010-Ohio-4846, ¶ 58.

{¶ 18} Relevant here, as it was in *Berube*, is that it is critical that "[i]n order to invoke the right to a jury trial, a party must take affirmative action." *Id.*, 8th Dist. Cuyahoga No. 104651, 2017-Ohio-1367, at ¶ 15, citing *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 437, 2002-Ohio-1246, 763 N.E.2d 1169.

> Under Civ.R. 38(B), [a]ny party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefore at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Conversely, issues not demanded for trial by jury as provided in the rules shall be tried by the court. Civ.R. 39(B). The failure to timely serve and file a demand for a jury trial constitutes a waiver of the right to a trial by jury. Civ.R. 38(D). Moreover, a demand for trial by jury made in accordance with the rules may not be withdrawn without the consent of the parties.

Id. at ¶ 15, citing *Soler* at 438.

{¶ 19} In *Berube*, upon considering the confluence of interests inherent in Civ.R. 55(A), we stated:

> [C]ourts have determined that the language of Civ.R. 55(A) — "the court * * * shall when applicable accord a right of trial by jury to the parties" — mandates the right to a jury trial. In *Sanitas Servs. of Ohio, Inc. v. Blaushild Chevrolet, Inc.*, 8th Dist. Cuyahoga No. 36398, 1977 Ohio App. LEXIS 9361 (July 21, 1977), this court held that where the defendant made a timely request for a jury trial at the damage hearing that followed the entry of default judgment against him, the defendant was entitled to a jury trial. In finding the question of mitigation to be in dispute, we determined that "[s]uch issues are classic examples of the kinds of questions resolved by juries as a matter of right." *Id.* at 6; *See* also *DMAC Co. v. Bochner,* 1st Dist. Hamilton Nos. C-840686 and C-840687, 1985 Ohio App. LEXIS 6841 (July 31, 1985) (finding where the defendant made a timely jury demand, a bench trial on the issue of damages "was clearly improper under Civ.R. 55(A)").

Id. at ¶ 16.

{¶ 20} Further, in reconciling Civ.R. 55(A) with 38(D), we stated:

> The Civil Rules are quite explicit that, once a jury demand has been made by any party, it cannot be withdrawn without the consent of all parties, and the trial must be by jury, even in the case of a trial on the issue of damages following the entry of a default judgment as to liability, unless all parties appearing for the trial consent to the withdrawal of the jury demand and trial to the court.

Id. at ¶ 17, quoting *Harris v. Interstate Check Sys.,* 10th Dist. Franklin No. 77AP-275, 1977 Ohio App. LEXIS 7578, 4 (Sept. 20, 1977).

{¶ 21} In the instant matter, like that presented in *Berube,* 8th Dist. Cuyahoga No. 104651, 2017-Ohio-1367, Sharp alleged CSPA violations, where the resultant damages were all "triable issues" under the rules. At this juncture, without veering from the central issue under discussion, we briefly note that the CSPA in an effort to promote its objectives, provides a variety of remedies, including multiple forms of damages.

{¶ 22} "Indeed, punitive damages and treble damages may both be awarded in an appropriate case under the CSPA." *Kelley v. Sullivan*, 8th Dist. Cuyahoga No. 106189, 2018-Ohio-1410, ¶ 7, citing *Samber v. Mullinax Ford E.*, 173 Ohio App.3d 585, 2007-Ohio-5778, 879 N.E.2d 814 (11th Dist.); *Crawford v. Bill Swad Chevrolet, Inc.*, 10th Dist. Franklin No. 00AP-188, 2000 Ohio App. LEXIS 4221 (Sept. 19, 2000); *Mid-America Acceptance Co. v. Lightle*, 63 Ohio App.3d 590, 579 N.E.2d 721 (10th Dist.1989).

{¶ 23} In this matter, Sharp also demanded a jury trial in her complaint, renewed that demand in her motion for default judgment, and never abandoned her demand. Although no defendant appeared in the action, we note the rules explicitly mandate that once a jury demand is made by one party, it may not be withdrawn without the consent of all parties, regardless of the fact that default judgment had been entered.

{¶ 24} In addition, the trial court granted Sharp's motion for default judgment but, as in *Berube*, 8th Dist. Cuyahoga No. 104651, 2017-Ohio-1367, never honored her jury demand. Instead, the trial court opted to decide the issue of damages, despite Sharp's request, which complied in all respects with Civ.R. 38(D).

{¶ 25} Here, because Sharp's right under Section 5, Article I of the Ohio Constitution to a trial by jury is inviolate, we are constrained, as we were in *Berube*, to reverse the trial court's judgment denying Sharp's request for a jury trial on the issue damages.

{¶ 26} Accordingly, we sustain Sharp's first assignment of error.

{¶ 27} In the second and third assignments of error, Sharp collectively argues the trial court erred by failing to treble her economic damages and by failing to award her noneconomic damages. However, based on our resolution of the first assignment of error, specifically addressing the denial of Sharp's request for a jury trial on the issue of damages, these errors are now moot. This matter is remanded to the trial court for further proceedings consistent with this opinion.

{¶ 28} Judgment reversed, and matter remanded.

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

The court finds there were reasonable grounds for this appeal.

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

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

EMANUELLA D. GROVES, JUDGE

MICHELLE J. SHEEHAN, P.J., and
MARY EILEEN KILBANE, J., CONCUR