RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0062p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COTY LEWIS, individually and on behalf of a class of similarly situated persons,

Plaintiff-Appellant,

v.

ACUITY REAL ESTATE SERVICES, LLC; KEVIN STUTEVILLE,

Defendants-Appellees.

No. 22-1406

Appeal from the United States District Court for the Eastern District of Michigan at Bay City.
No. 1:21-cv-12319—Thomas L. Ludington, District Judge.

Argued: December 8, 2022

Decided and Filed: April 4, 2023

Before: MOORE, STRANCH, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Philip L. Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellant. Jonathan B. Frank, FRANK & FRANK LAW, Bloomfield Hills, Michigan, for Appellees. **ON BRIEF:** Matthew E. Gronda, MATTHEW E. GRONDA, J.D., P.L.C., St. Charles, Michigan, for Appellant. Jonathan B. Frank, FRANK & FRANK LAW, Bloomfield Hills, Michigan, for Appellees.

OPINION

MURPHY, Circuit Judge. Acuity Real Estate Services operates a website that connects people looking to buy or sell homes with a local real-estate agent in their area. Acuity offers its

services for free to home buyers and sellers but requires realtors to pay a fee for referrals. The real-estate broker that employed Coty Lewis, a real-estate agent, signed up to receive Acuity's referrals. The broker required its agents (including Lewis) to pay Acuity's fee out of their commissions from home sales. In this suit, Lewis alleges that Acuity makes false claims to home buyers and sellers on its website and that this false advertising violates the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). But the Lanham Act provides a cause of action only for businesses that suffer commercial injuries (such as lost product sales) from the challenged false advertising. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131–32 (2014). The Act does not provide a cause of action for customers who suffer consumer injuries (such as the cost of a defective product) from the false advertising. *See id.* And here, Lewis alleges this type of consumer harm as his injury from Acuity's allegedly false advertising: He seeks to recover the referral fee (that is, the price) he paid for Acuity's services. Because Lewis may not bring this claim under the Lanham Act, we affirm the district court's dismissal of his complaint.

I

Because this case comes to us from an order granting a motion to dismiss, we must accept the complaint's well-pleaded factual allegations as true. *See Rudd v. City of Norton Shores*, 977 F.3d 503, 511 (6th Cir. 2020).

Lewis, a licensed real-estate agent, provides his realtor services to buyers and sellers of homes in and around Saginaw County, Michigan. Compl., R.1, PageID 2. At the times relevant to this suit, he was a member of Re/Max New Image, a brokerage company. *Id.*, PageID 6.

In the internet age, many prospective home buyers and sellers use online searches to find realtors. The frequency of these internet searches has led to a new industry of companies that operate what Lewis calls "online real estate referral network[s]." *Id.*, PageID 3. Among other competitors, Acuity provides one of these referral networks. *Id.* Kevin Stuteville founded and manages Acuity. *Id.*, PageID 2.

A potential customer's internet search for realtors may bring back a "hit" for Acuity's website: www.effectiveagents.com. *See id.*, PageID 3. On this website, Acuity allegedly tells customers that it has a "proprietary algorithm" designed to match the "perfect" real-estate agent

to their unique needs. *Id.* Acuity also assures customers that it has rigorously screened the 1.5 million realtors in the United States and included only a small number of "hand-picked" and "top talent" realtors on its site. *Id.*, PageID 4. Perhaps best of all for these customers, Acuity informs them that it offers its referral services free of charge. *Id.* The customers need only fill out a form on Acuity's website providing their contact information. *Id.*

According to Lewis, Acuity's statements to these customers do not match reality. He alleges that Acuity does not undertake any detailed "mathematical analysis" to find the perfect realtor. *Id.*, PageID 6. Rather, Acuity allegedly sends customers to any realtor willing to pay its referral fee. *Id.* And its only alleged expertise consists of designing a website that will be among the top results when customers search for realtors in web browsers. *Id.*, PageID 10.

In 2019, Lewis's brokerage firm, Re/Max, contracted with Acuity for referrals. *Id.*, PageID 6. Re/Max agreed that its agents would pay 35% of their commissions to Acuity for each successful home sale involving an Acuity-referred buyer or seller. *Id.*, PageID 6–7.

In October of that year, Lewis received a referral from Acuity indicating that a potential customer named Lillian Garrett was looking to sell her Saginaw home. *Id.*, PageID 7–8. As it turns out, Garrett's son-in-law filled out the form on her behalf because the 93-year-old Garrett had moved to a nursing home. *Id.*, PageID 10. Undertaking his due diligence, her son-in-law also provided Garrett's information to a competing online referral network, Agent Pronto, which sent a second referral to Lewis. *Id.*

After receiving the referrals from both Acuity and Agent Pronto, Lewis contacted Garrett's son-in-law and successfully sold her home. *Id.*, PageID 11. Lewis paid Agent Pronto its referral fee. *Id.* But Acuity sought its fee too. *Id.* When Lewis refused to pay a second time, Acuity sued him in a Florida court (relying on a venue provision to which Re/Max had agreed in its contract with Acuity). *Id.* Acuity won this breach-of-contract suit and obtained its attorney's fees, so Lewis had to pay a judgment that was over twice the size of the commission he had earned for selling Garrett's home. *Id.* According to Acuity, when two real-estate referral networks send the same referral, its contract requires a realtor to pay the network that first sends

the referral. Acuity won its suit against Lewis because it sent him its referral of Garrett ahead of Agent Pronto. Appellees' Br. 6.

Having lost the Florida case, Lewis brought this suit against Acuity on behalf of himself and a putative class of "real estate agents, brokers, and professional[s] who paid, or are liable for, payment of a referral fee to Acuity." Compl., R.1, PageID 12. He alleged that Acuity engaged in false advertising in violation of the Lanham Act by misleading home buyers and sellers into thinking that it uses sophisticated means to find the realtor best suited for them. *Id.*, PageID 15; 15 U.S.C. § 1125(a)(1)(B). Acuity's conduct allegedly injured Lewis because customers might have found him directly (rather than through Acuity) without its false statements. Compl., R.1, PageID 16. In that scenario, he would not have been on the hook for Acuity's referral fee. *Id.*

The district court granted Acuity's motion to dismiss Lewis's complaint. *See Lewis v. Acuity Real Est. Servs., LLC*, 597 F. Supp. 3d 1154, 1156 (E.D. Mich. 2022). The court held that the Lanham Act does not permit customers to sue over false advertisements and that Lewis's allegations showed that he was Acuity's customer. *See id.* at 1158–59. It next held that Lewis failed to plausibly plead that Acuity's online statements to home buyers and sellers caused him an injury. *See id.* at 1159–60. At the same time, the court rejected Acuity's alternative argument that its online statements to home buyers and sellers do not qualify as "commercial advertising" under the Lanham Act because they do not pay anything for its services. *See id.* at 1160–62. We review the district court's decision de novo. *See Rudd*, 977 F.3d at 511; *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, 615 F.3d 622, 626–27 (6th Cir. 2010).

II

On appeal, the parties debate all three questions that the district court answered: Did Lewis plausibly allege the type of commercial injury that permitted him to sue under the Lanham Act? Did he plausibly allege that the statements on Acuity's website proximately caused an injury to him? And did those statements qualify as "commercial advertising" under the Act? To resolve Lewis's appeal, however, we need not proceed past the first question. The district court properly dismissed this suit because Lewis's complaint pleaded a consumer injury that resulted only from his status as Acuity's customer rather than its competitor.

The Lanham Act prohibits a "person" from using a "false or misleading description" or "representation of fact" in "commercial advertising or promotion" that "misrepresents the nature, characteristics, qualities, or geographic origin" of the person's or another's "goods, services, or commercial activities[.]" 15 U.S.C. § 1125(a)(1)(B). The Act expressly authorizes "a civil action by any person who believes that he or she is or is likely to be damaged by" the false advertising. *Id.* § 1125(a)(1).

On its face, this text could be read to place no limits on the injured parties who may sue over false advertising. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). Nearly anyone might claim to have been "damaged" by a business's false advertising. Consumers might argue that they would not have bought the business's poor product except for the false claims in its advertising. *See id.* at 132. Competitors might argue that they lost sales because the false advertising caused consumers to buy the business's product rather than their own. *See Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697, 712 (4th Cir. 2016). Distributors of the business's product might argue that its false advertising harmed their reputations because they became associated with a lemon product. *See The Knit With v. Knitting Fever, Inc.*, 625 F. App'x 27, 40–41 (3d Cir. 2015). Even the business's shareholders might argue that the false advertising caused the business's stock prices to go down when the falsity came to light.

But courts have never read the Lanham Act to permit suit by all parties who can show an injury. *See Lexmark*, 572 U.S. at 129. That is because we must read all statutory causes of action, including the Lanham Act's cause of action, against background interpretive rules. *See id.* Under one rule with common-law roots, courts will interpret a statute's private right of action to authorize a suit only by those potential "plaintiffs whose interests 'fall within the zone of interests'" that the law protects. *Id.* at 129–30 & n.5 (citation omitted); *Bennett v. Spear*, 520 U.S. 154, 163 (1997). Although the Supreme Court at one time described this zone-of-interests test as a "prudential standing" doctrine that judges could apply in seemingly common-law fashion, it has now made clear that the test asks an ordinary question of statutory interpretation: Is the specific statutory text best read to grant a cause of action to a specific plaintiff? *Lexmark*, 572 U.S. at 126–28.

In *Lexmark*, the Court held that the zone-of-interests test applies to the Lanham Act's cause of action "for false advertising under § 1125(a)." *Id.* at 131; *see also id.* at 129–32. To identify the "damaged" parties for which this cause of action offers a remedy, the Court interpreted it together with the Act's statement of purposes. *See id.* at 131. Highlighting the purpose most relevant to false advertising, the Court explained that Congress's "intent" in passing the Act was "to protect persons engaged in [interstate] commerce against unfair competition[.]" *Id.* (quoting 15 U.S.C. § 1127). The Act's use of this common-law term of art ("unfair competition") revealed a narrow goal to protect parties only against "injuries to business reputation and present and future sales." *Id.* The Court thus interpreted the zone of interests for false-advertising claims to include only businesses that complain about an "injury to a commercial interest in reputation or sales." *Id.* at 131–32. It concluded, by contrast, that consumers do not fall within this zone of interests even if they waste money on a useless product because the traditional unfair-competition tort did not encompass this consumer harm. *See id.* at 131–32. After *Lexmark*, then, a plaintiff suing under § 1125(a) of the Lanham Act must allege a commercial—not a consumer—injury.

Lexmark did not offer much guidance on how to distinguish between these two types of injuries, recognizing the "nebulous" nature of the inquiry. *Id.* at 135. That said, the Court did provide two useful data points showing that it is the nature of the *injury* (not the nature of the *plaintiff*) that matters. On the one hand, the Court clarified that, as long as the plaintiff sues for business or reputational harms, the plaintiff need not be a "direct competitor" of a false advertiser to assert a claim against it. *Id.* at 136. The dispute between Lexmark and Static Control in *Lexmark* itself proves this point. Lexmark made toner cartridges for its laser printers, and its competitors refurbished and resold Lexmark's used cartridges. *Id.* at 121. Static Control did not itself resell these used cartridges in competition with Lexmark; it instead sold parts to Lexmark's competitors so that they could do so. *Id.* Lexmark told end users of the cartridges that they must obtain them from Lexmark, and it told Static Control's customers (Lexmark's competitors) that Static Control's business violated federal law. *Id.* at 123. Static Control brought false-advertising claims against Lexmark for these allegedly false statements. *Id.* It asserted that Lexmark's statements had caused it to lose sales to customers (Lexmark's competitors) and had damaged its business reputation. *Id.* at 137. The Court had "no doubt" that

these commercial injuries fell within the Act's zone of interests even though Static Control did not directly compete with Lexmark. *Id.*

On the other hand, the Court concluded that even commercial businesses that sell goods to end users may qualify as "customers" who cannot sue under the Act—depending on the nature of their injuries. The Court gave as an example a business that buys a defective input from a "supplier" based on the supplier's false advertising. *Id.* at 132. The Court noted that this business could not sue the supplier under the Act to recover damages for the "inferior" input. *Id.*

This divide requires us to focus on whether Lewis seeks to recover for a commercial or consumer injury. Recall that he alleges that Acuity's website falsely advertised the nature of its referral network to the end buyers and sellers of real estate. Compl., R.1, PageID 15. If Acuity had not engaged in this false advertisement, Lewis says, these home buyers and sellers may have found his services in other ways. *Id.*, PageID 16. Acuity's false advertising thus allegedly harmed Lewis because he had to pay the 35% referral fee that he would not have been forced to pay if he had closed on a home without the referral. *Id.* Confirming that the payment of this referral fee sits at the center of Lewis's suit, he cabined his proposed class to include only those realtors "who paid, or are liable for, payment of a referral fee to Acuity[.]" *Id.*, PageID 12.

These allegations leave "no doubt" that Lewis sues to recover for a consumer injury that he incurred as Acuity's customer. *Lexmark*, 572 U.S. at 137. The referral fee that Lewis now asks Acuity to return to him is the "price" that he paid for Acuity's services. And a person who makes a payment to a party in exchange for a service from the party is generally described as the party's "customer." Because Lewis uses Acuity's services to help him perform his real-estate job, he is analogous to the hypothetical company "misled by a supplier into purchasing an inferior product" that *Lexmark* said falls outside the Act. *Id.* at 132. The same rule applies both to companies that seek a good to run a business and to end users who seek only to consume the good: the Lanham Act simply does not cover parties who are "hoodwinked into purchasing a disappointing product," *id.*, because that injury does not constitute "unfair competition," 15 U.S.C. § 1127.

Conversely, no reasonable person would describe Lewis's payment of this referral fee as a commercial injury to his "reputation or sales." *Lexmark*, 572 U.S. at 131. As for sales, whenever this injury arose (that is, whenever Acuity requested its fee), Lewis will have gained, not lost, a sale. This fact distinguishes the cases on which Lewis relies because the plaintiffs there claimed that the defendants' false advertising diverted sales away from (not toward) them. *See ThermoLife Int'l, LLC v. Compound Sols., Inc.*, 848 F. App'x 706, 709 (9th Cir. 2021) (memorandum); *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820, 825–26 (9th Cir. 2011). As for reputation, Lewis makes no claim that his payment of this referral fee injured his status in the realtor market in any way. Nor does he allege any reputational harm from, say, Acuity's online description of the realtors in its network (including Lewis) as "top talent." Compl., R.1, PageID 4.

In response, Lewis contends that he has asserted a commercial injury because he competes with Acuity in that both are "licensed real estate sales professional[s] whose business is premised on finding consumers interested in buying or selling a home." Appellant's Br. 13. Here again, however, whenever Lewis pays Acuity the referral fee (his purported injury), Acuity will have sought out buyers and sellers on his behalf, not to divert sales away from him. And while the referred buyers and sellers may also qualify as Acuity's customers, that fact does not turn Lewis into Acuity's competitor. To the contrary, Acuity operates "what economists call a 'two-sided platform.'" *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018). Like credit-card companies that seek to connect purchasers of goods and services and the merchants that sell those goods and services, Acuity has customers on *both* sides of its platform (home buyers and sellers on one side and the realtors who seek to help them on the other). *See id.* at 2280–81. This type of platform often tends to charge a higher price to the side with the more inelastic demand curve, which may explain why Acuity's customers receive its services for free while real-estate agents must pay for them. *See id.* at 2281. Be that as it may, both the home buyers and sellers and the realtors "jointly consume[]" Acuity's referral services. *Id.* at 2286 (citation omitted).

To be sure, it is not difficult to imagine a potential commercial injury to realtors arising from Acuity's allegedly false advertising. Instead of identifying the referral fee as the injury,

suppose that a different group of realtors *refused* to join Acuity's network. Suppose further that these realtors alleged that they lost business because Acuity's purportedly false advertising caused home buyers and sellers to use Acuity's referral services and the competing realtors in Acuity's network. Even though this different group of realtors would not directly compete with Acuity (as compared to its network of realtors), this purported lost business may well qualify as "an injury to a commercial interest in . . . sales" that falls within the Act's zone of interests. *Lexmark*, 572 U.S. at 132. (These realtors would, of course, have to plead the Act's other elements, including, for example, its proximate-causation requirement. *See, e.g., id.* at 132–34.)

But we need not decide this hypothetical case. Perhaps one could have read Lewis's complaint—charitably—to suggest that he alleged lost sales because Acuity's false advertising "divert[ed] potential business" toward other realtors. Compl., R.1, PageID 16. At oral argument, however, Lewis's counsel conceded that he alleged the payment of Acuity's referral fee as his *only* injury. Oral Arg., 34:50–35:05. Because Lewis incurred that specific injury as Acuity's customer, he failed to present a claim within the Lanham Act's zone of interests. *Lexmark*, 572 U.S. at 132.

Lewis lastly spent significant time at oral argument suggesting that Acuity's business model violates the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601–17. But his complaint did not assert a claim under this Act. So this argument is irrelevant in this case.

* * *

All told, Lewis's complaint alleged consumer injuries that fall outside the Lanham Act's zone of interests. That fact independently dooms his lawsuit. We thus need not resolve whether he has adequately alleged that Acuity proximately caused any injury to him or engaged in commercial advertising under the Act.

We affirm.

[Cite as *Weiler v. DLR Group*, 2023-Ohio-1221.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

SHAWN WEILER,	:	
Plaintiff-Appellant,	:	
v.	:	No. 112091
DLR GROUP, A NEBRASKA CORP., ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 13, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-22-964279

Appearances:

Shawn Weiler, *pro se*.

A. Steven Dever Co., L.P.A., and A. Steven Dever, *for appellees*.

SEAN C. GALLAGHER, J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. Shawn Weiler appeals the dismissal of his action

based on the failure to state a claim upon which relief could be granted. For the following reasons, the trial court's judgment dismissing the action is affirmed.

{¶ 2} Weiler filed a complaint advancing two claims for tortious interference with a business relationship: DLR Group, Inc., headquartered in Omaha, Nebraska, interfered with Weiler's employment with Osborn Engineering Company; and DLR Group also interfered with his attempts to thereafter secure a new job. As is relevant to the discussion of Weiler's allegations, there are five elements to a tortious interference claim: "(1) [the existence of] a business relationship or contract; (2) the defendant's knowledge of the relationship or contract; (3) the defendant's intentional or improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of privilege; and (5) resulting damages." *Woods v. Sharkin*, 2022-Ohio-1949, 192 N.E.3d 1174, ¶ 90 (8th Dist.). Any claim for tortious interference requires allegations of an improper act or conduct. *Id.*, citing *Syed v. Poulos*, 8th Dist. Cuyahoga Nos. 103137 and 103499, 2016-Ohio-3168, ¶ 17, and *Baseball at Trotwood, L.L.C. v. Dayton Professional Baseball Club*, S.D.Ohio No. C-3-98-260, 2003 U.S. Dist. LEXIS 27460 (Sept. 2, 2003). In order to present a cognizable claim for relief, a plaintiff must include allegations of fact supporting each element of the tort claim.

{¶ 3} According to Weiler's allegations, Weiler worked for Westlake Reed Leskosky ("WRL") in 2016, when it was acquired by DLR Group. It is unclear whether WRL is a subsidiary of DLR Group or was subsumed into DLR Group as

part of the referenced acquisition. DLR Group outsourced services to Osborn on one occasion during the relevant time frame. At one point, Weiler remembered a conversation in which his manager at DLR Group stated that "upsetting an architect would be [a] 'very career limiting decision.'" Weiler's manager later approached Weiler, inquiring about prospective candidates who had submitted résumés. Weiler told his manager he did not have any information about those candidates. DLR Group terminated Weiler's employment in April 2017.

{¶ 4} Approximately a month later, Osborn hired Weiler.[1] Over a year after being hired at Osborn, Weiler sent an email addressed to "many employees" at WRL. He attached a copy of the email to his complaint, the copy of which was reproduced over two print pages, redacting all but two partial sentences: "Hello WRL employees, [. . .] [t]ime passed and I started a new job at The Osborn Engineering Company. In a last ditch[. . . .]"[2] Weiler did not explain the reason for, or the contents of, the email. In response to the email, an architect employed by DLR Group contacted an individual at Osborn expressing anger at its contents and

---

[1] Weiler filed a separate action against Osborn in CV-22-964282 advancing similar allegations as raised in the underlying action. Based on a different procedural posture, the dismissal was reversed in *Weiler v. Osborn*, 8th Dist. Cuyahoga No. 112023, 2023-Ohio-619. Weiler did not disclose the related proceeding to either this court or the trial court.

[2] An email bearing the same date and including the same phrases was discussed in greater detail in *Weiler v. C.L.*, 8th Dist. Cuyahoga No. 111657, 2022-Ohio-4212, ¶ 9, a case involving Weiler's employment at WRL from May 2016 through April 2017 and detailing allegations of Weiler's harassment of a coworker from his perspective. *See also C.L. v. Weiler*, 8th Dist. Cuyahoga No. 111474, 2023-Ohio-13, (affirming the order of contempt entered against Weiler for violating the terms of a protection order entered in favor of the coworker).

"threatening economic consequences." Weiler was informed of the conversation, and Osborn terminated Weiler's employment "for cause." A copy of the termination letter was also attached to the complaint. Other than the timing of the events, there are no allegations tying Weiler's termination for cause to the threat of "economic consequences" referenced in the complaint.[3]

{¶ 5} After losing his job with Osborn in June 2018, Weiler listed DLR Group and WRL as previous employers on his résumé. He was able to secure a new position four months after leaving Osborn. Although gainfully employed, Weiler continued looking for other opportunities. In March 2020, Weiler was offered a position with an unidentified company. A month after rejecting the other offer, he lost his job.

{¶ 6} Weiler started a new position in October 2020, but was terminated the following December. Weiler continued his job search using pseudonyms for "some of his prior employers." It is unclear whether that included DLR Group or WRL. The allegations do not provide that context. It is Weiler's understanding, based on a conversation he had with a "close relative" who was a "co-owner in a business in the fall of 2020," that potential employers contact a job applicant's previous employer during an application process. After securing a telephone interview with an unidentified prospective employer, Weiler provided the

---

[3] In general terms, appellate review typically focuses on the operative pleading, which in this case is the amended complaint. As will become apparent, discussing the complaint as originally filed, which was superseded by the amended complaint, is relevant to the allegations against DLR Group and Weiler's motion for default judgment.

interviewer with the actual names of those prior employers whose identity was previously hidden. It is unclear which of his prior employers' names were then revealed. Weiler was not offered that position.

{¶ 7} Based on those allegations in the complaint, Weiler claimed that DLR Group, ostensibly through its employees, tortiously interfered with Weiler's employment at Osborn and thereafter interfered with all of Weiler's prospective employment opportunities.

{¶ 8} DLR Group timely answered the allegations with general denials. After DLR Group filed its answer, 28 days later as a matter of fact, Weiler filed an amended complaint adding two additional parties to the action: Griff Davenport, a resident of Minneapolis, Minnesota, and Paul Westlake, a resident of Cleveland, Ohio. Davenport is alleged to be the CEO of DLR Group and Westlake the managing principal of WRL.

{¶ 9} The amended complaint also provided insight into the redacted email referenced earlier. According to the amended complaint, the email "related public — with regards to the company — actions of Davenport which might have indicated criminal behavior" and further accused Westlake of unspecified "criminal behavior." Three days after Weiler sent the email, Westlake, the architect at DLR Group generically referenced in the complaint, was alleged to have threatened Osborn with unspecified "consequences," the foundation of the first tortious interference claim. Davenport, also as an employee of DLR Group, is alleged to have damaged Weiler's reputation, which impeded Weiler's job search, the foundation of the second

tortious interference claim. Importantly, the new pleading did not impact the allegations against DLR Group but merely clarified the parties acting on behalf of DLR Group.

{¶ 10} On August 26, 2022, Weiler filed a motion for default judgment against DLR Group based on its failure to file an answer to the amended complaint within 14 days, as required under Civ.R. 15(A).[4] DLR Group filed a brief in opposition, seeking to strike the amended complaint or to permit the belated filing of a responsive pleading. The same day, all three defendants jointly filed a motion for judgment on the pleadings, asking for the case to be dismissed for the failure to state a claim upon which relief could be granted under Civ.R. 12(B)(6).[5]

{¶ 11} After granting Weiler leave to file an amended complaint, the trial court granted the motion to dismiss, which was unopposed, concluding that the amended complaint was "comprised of legal conclusions and is unsupported by any factual allegations sufficient to raise a right to relief," citing *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106, ¶ 56 (8th Dist.). Weiler timely appealed, advancing four assignments of error.

---

[4] Because Davenport and Westlake were new party defendants, their responses were due 28 days following service of the amended complaint. Civ.R. 12(A).

[5] Although the DLR Group sought leave to file an answer to the amended complaint and attached a copy of the answer to the motion for leave to file an answer instanter, the trial court deemed that motion moot after considering the Civ.R. 12(B)(6) defense asserted in the defendants' motion for judgment on the pleadings. Thus, it appears the motion for judgment on the pleadings should have been simply captioned as a motion to dismiss. The difference between a motion to dismiss and a motion for judgment on the pleadings is not relevant to the merits of the claims advanced and discussed in this appeal.

{¶ 12} In the first assignment of error, Weiler claims the trial court erred by granting him leave to amend his complaint because leave was not required under Civ.R. 15(A). Weiler is correct to a certain extent, but that does not entitle him to any relief.

{¶ 13} There are three procedural mechanisms available to file an amended complaint once an answer is filed. *See* Civ.R. 15(A). A "party may amend its pleading once as a matter of course * * * if the pleading is one to which a responsive pleading is required within twenty-eight days *after service of a responsive pleading* * * *." (Emphasis added.) Civ.R. 15(A); *see also* Staff Notes for July 1, 2013 amendment ("Rule 15(A) is amended to allow amendment without leave of court of a complaint, or other pleading requiring a responsive pleading, for a period of 28 days after the service of a responsive pleading or motion"); *Hunter v. Shield*, 10th Dist. Franklin No. 18AP-244, 2019-Ohio-1422, ¶ 13. Outside of that 28-day window, the plaintiff must either seek written consent from the opposing party or request leave of court to amend the pleading. *Hunter* at ¶ 13-14. An amended complaint, once properly filed, supersedes the preceding ones. *Fried v. Friends of Breakthrough Schools*, 8th Dist. Cuyahoga No. 108766, 2020-Ohio-4215, ¶ 12, citing *Morris v. Morris*, 189 Ohio App.3d 608, 2010-Ohio-4750, 939 N.E.2d 928, ¶ 32 (10th Dist.) (applying the proposition of law that an amended pleading supersedes the original pleading). In this case, the amended complaint was filed within 28 days of DLR Group's answer being served.

{¶ 14} Thus, Weiler has a point; leave may not have been required to file the amended pleading at the time it was filed. Regardless of how the amended complaint became the operative pleading, however, the trial court considered the allegations contained within the four corners of the amended complaint for the purposes of resolving the motion to dismiss. It is immaterial whether the amendment occurred as a matter of right or through leave of court under Civ.R. 15(A). Either way, the amended complaint became the operative pleading as of the date it was filed and through whichever procedural path was taken. As of the filing date, the amended complaint superseded and, therefore, replaced the original complaint. Any error in the way the amended complaint was recognized, even if the existence of error is presumed for the sake of the discussion, that error would be, at best, harmless because it did not impact a substantial right. Civ.R. 61. The first assignment of error is overruled.

{¶ 15} In the second assignment of error, Weiler claims the trial court erred in granting the motion for judgment on the pleadings because the trial court's conclusion, that the amended complaint failed to include allegations of operative facts in support of the elements of the tortious interference claims, "was false." On this point, Weiler relies on *Tuleta,* 2014-Ohio-396, 6 N.E.3d 106 (8th Dist.), and the

concept of notice pleading — claiming that the factual allegations in the complaint were sufficient to present a prima facie case to survive the motion to dismiss.[6]

{¶ 16} Dismissals under Civ.R. 12 are reviewed de novo. *Weiler v. Technipower Inc.*, 8th Dist. Cuyahoga No. 111729, 2023-Ohio-465, ¶ 11. Under Civ.R. 12(C), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The defense of failure to state a claim under Civ.R. 12(B)(6) may be made within a motion for judgment on the pleadings or through a stand-alone motion to dismiss. Civ.R. 12(H). A motion to dismiss for failure to state a claim upon which relief can be granted, whether the defense is advanced through a motion to dismiss or a motion for judgment on the pleadings, is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 605 N.E.2d 378 (1992). Appellate courts accept all factual allegations of the complaint as true, and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v.*

---

[6] Weiler failed to file a brief in opposition to the motion for judgment on the pleadings, and as a result, it could be said that he has forfeited all but plain error for any arguments challenging the trial court's decision granting the motion to dismiss. *Ohio Power Co. v. Burns*, Slip Opinion No. 2022-Ohio-4713, ¶ 40 (arguments not presented to the trial court before it resolves the issue presented for review are forfeited for appellate review, except if the appellant can demonstrate the existence of plain error), citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, and *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121-122, 679 N.E.2d 1099 (1997); *see also Tye v. Beausay*, 2020-Ohio-3746, 156 N.E.3d 331, ¶ 77 (2d Dist.), quoting *USA Freight, L.L.C. v. CBS Outdoor Group, Inc.*, 2d Dist. Montgomery No. 26425, 2015-Ohio-1474, ¶ 21, and *Rodger v. McDonald's Restaurants of Ohio, Inc.*, 8 Ohio App.3d 256, 258, 456 N.E.2d 1262 (8th Dist.1982), fn. 7. Weiler's forfeiture of the arguments in defense of his claims, however, was not presented as a basis to affirm. For this reason, the merits of the argument as presented must be discussed. *See Quarterman* at ¶ 19.

Faber, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); *Doe v. Greenville City Schools*, Slip Opinion No. 2022-Ohio-4618, ¶ 8. Thus, in reviewing the dismissal of a complaint under Civ.R. 12(B)(6), whether advanced as a motion to dismiss under Civ.R. 12(B)(6) or as applied through Civ.R. 12(C), it must be determined whether the plaintiff alleged "sufficient operative facts to support this claim." *Tuleta* at ¶ 36.

{¶ 17} As has already been mentioned, the elements of a tortious interference tort claim are "(1) a business relationship or contract; (2) the defendant's knowledge of the relationship or contract; (3) the defendant's intentional or improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of privilege; and (5) resulting damages." *Woods*, 2022-Ohio-1949, 192 N.E.3d 1174, at ¶ 90 (8th Dist.).

{¶ 18} There are two independent tortious interference claims presented in the amended complaint: interference with an existing business relationship (Weiler's employment with Osborn) and interference with prospective business relationships (Weiler's attempts to seek employment after his position was terminated by Osborn). With respect to the latter claim, Weiler alleges that Davenport, as an employee of DLR Group, interfered in Weiler's job search through

damaging his reputation. Weiler, however, failed to identify the existence of any specific prospective business relationships that were prevented based on Davenport's conduct.

{¶ 19} In order to substantiate a claim for tortious interference with a prospective business relationship or contract, a plaintiff must include allegations of fact demonstrating the existence of "an actual prospective contractual relation" that but for the interference, would have been consummated. *One Energy Ents., LLC v. Ohio DOT*, 10th Dist. Franklin No. 17AP-829, 2019-Ohio-359, ¶ 75 (string citing case authority); *see also Emanuel's LLC v. Restore Marietta, Inc.*, 4th Dist. Washington No. 22CA6, 2023-Ohio-147, ¶ 23, citing *Wilkey v. Hull*, 366 Fed.Appx. 634, 638 (6th Cir.2010). "A vague assertion that a party interfered with certain unspecified business relationships is insufficient to state a claim for tortious interference with a business relationship." *Emanuel's LLC* at ¶ 23. Weiler has not presented any allegations that demonstrate the existence of a prospective employment opportunity that would have been entered but for the tortious conduct of Davenport and DLR Group. The amended complaint is limited to a conclusion that his unsuccessful job search was a result of Davenport ruining Weiler's reputation based on Weiler's belief that prospective employers may have contacted Weiler's previous employers.

{¶ 20} That vague and conclusory allegation is insufficient to establish a claim for tortious interference with prospective business relationships. Weiler failed to include allegations identifying the existence of any specific, prospective business relationships that would have been entered but for the alleged interference.

{¶ 21} With respect to the tortious conduct related to Westlake's alleged interference with Weiler's employment at Osborn, the allegations are similarly limited. Westlake obtained knowledge of Weiler's employment relationship with Osborn through the email accusing Westlake of criminal behavior, and according to Weiler, Westlake thereafter caused Osborn to "maliciously" terminate his employment. That naked assertion is not based on any factual allegations, and accordingly, such a conclusion is not sufficient to demonstrate a claim of tortious interference with a business relationship or contract. *Tuleta*, 2014-Ohio-396, 6 N.E.3d 106, at ¶ 36 (8th Dist.).

{¶ 22} On this claim, the factual allegations as set forth in the amended complaint are limited to Westlake calling an unidentified person at Osborn, threatening Osborn with unidentified "consequences," and expressing "how upset" Westlake was over Weiler's email that had accused Westlake of "criminal behavior." None of those allegations, even when accepted as true, demonstrate that Westlake intended Osborn to terminate or otherwise interfere with Weiler's employment to avoid imposition of the unspecified consequences or that Westlake lacked any privilege to discuss the matter with an Osborn employee.

{¶ 23} The amended complaint does not contain allegations of fact supporting each element of a tortious interference claim, and as a result, those allegations are not sufficient to survive a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6). Without allegations of operative facts in support of each element of a tort claim, the action is properly dismissed. *See id.* at ¶ 42, 46, 51, and

57. Accordingly, it cannot be concluded that the trial court erred in granting the motion to dismiss the amended complaint. The second assignment of error is overruled.

{¶ 24} In the last two assignments of error, Weiler claims the trial court erred in deeming his motion for default and DLR Group's motion to strike the amended complaint as being moot following the dismissal of the case. As a matter of course, Weiler lacks standing to contest the trial court's decision deeming DLR Group's motion moot. No more need be said on that point.

{¶ 25} Even if deeming Weiler's motion for default moot was construed as denying him the relief requested, a trial court has discretion to grant or deny a motion for default judgment. *533 Short N. LLC v. Zwerin*, 10th Dist. Franklin No. 14AP-1016, 2015-Ohio-4040, ¶ 50, citing *Zuljevic v. Midland-Ross Corp., Unitcast Div.*, 62 Ohio St.2d 116, 119, 403 N.E.2d 986 (1980), fn. 2. "Under Civ.R. 55(A), a default judgment is only proper when a party has 'failed to plead or otherwise defend.'" *Miranda v. Saratoga Diagnostics*, 2012-Ohio-2633, 972 N.E.2d 145, ¶ 28 (8th Dist.), quoting *Chase Manhattan Automotive Fin. Corp. v. Glass*, 11th Dist. Trumbull No. 2000-T-0090, 2001 Ohio App. LEXIS 3187, 2001 WL 799875, *1 (July 13, 2001).

{¶ 26} DLR Group did not fail to plead or otherwise defend the action initiated by Weiler. An answer was filed to the original complaint, which contained the same operative facts and allegations as advanced against DLR Group in the amended complaint. The amended complaint solely added two additional parties

and offered clarification with respect to some of the general allegations. In addition, a motion for leave to file a belated answer was pending along with the motion for default. In light of the procedural circumstances and the affirmance of the decision dismissing the case based on the deficiencies within the amended complaint, it cannot be concluded that the trial court abused its discretion by declaring the motion for default as being moot based on the trial court's resolution of the case.

{¶ 27} The final two assignments of error are overruled.

{¶ 28} The decision of the trial court is affirmed.

It is ordered that appellees recover of appellant 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.

_____
SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR

[Cite as *Subel v. AMD Plastics, L.L.C.*, 2023-Ohio-1139.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JACK M. SUBEL, ADMINISTRATOR, ET AL., :

Plaintiffs-Appellants, :

No. 111770

v. :

AMD PLASTICS, LLC, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED
RELEASED AND JOURNALIZED: April 6, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-946764

Appearances:

Dubyak Nelson, LLC, Robert J. Dubyak, and Christina C. Spallina, *for appellants*.

Ulmer & Berne, LLP, Jeffrey J. Patter, Sarah M. Benoit, and Mengxue Xie, *for appellees*.

FRANK DANIEL CELEBREZZE, III, P.J.:

{¶ 1} Appellant Jack M. Subel, as Administrator of the Estate of Jack Louis Subel and Carol E. Subel ("Estate"), appeals the judgment of the Cuyahoga County Court of Common Pleas granting the motion for summary judgment of appellees

AMD Plastics, LLC ("AMD") and Brian Coll ("Coll") (collectively "appellees") on the Estate's claims against them. After a thorough review of the applicable law and facts, we affirm in part, reverse in part, and remand for further proceedings.

I. Factual and Procedural History

{¶ 2} This appeal arises from a dispute over the existence of a contract for commission fees. AMD is an Ohio LLC that is in the business of manufacturing sheet products for customers in the automotive industry. Coll is the president and majority owner of AMD. AMD employed the decedent, Jack Louis Subel ("Subel" or "decedent"), as a sales agent and later vice president of sales, for several years until his passing in December 2018.

{¶ 3} In 2017 and 2018, Subel pursued Daimler, a large supplier of cars and trucks, for AMD to supply Daimler with tooling and production parts of P4 headliners for use in Daimler's freightliner truck lines.

{¶ 4} The Estate claims that in summer and/or fall 2018, appellees agreed to pay Subel a 2 percent commission on all sales of P4 production parts, along with tooling, for five years ("Purported Agreement"). The Estate further maintains that the commissions were to be paid in monthly installments and that the terms of the Purported Agreement were not to be affected by the financial performance of AMD. Finally, the Estate contends that the parties agreed that if Subel passed away during the five-year period of the Purported Agreement, any commissions owed to him would be paid to his wife, Carol Subel ("Carol").

{¶ 5} The Estate asserts that Coll represented to Subel in September 2018 that he was having his attorney reduce the terms of the Purported Agreement to writing. Subel did not receive a written agreement, but in November 2018, he sent an email to Coll and AMD memorializing the terms of the Purported Agreement. Coll did not respond to this email, and Subel passed away in December 2018.

{¶ 6} In January 2019, Carol sent an email to Coll requesting an opportunity to discuss the terms of the Purported Agreement. Coll did not respond to this email.

{¶ 7} In February 2020, counsel for the estate sent an email to Coll stating as follows:

> My firm has been retained to represent the Estate of Jack Subel (the "Estate") for commissions owed to the Estate by AMD Plastics, LLC ("AMD"). It is my understanding that Mr. Subel procured the P4 headliner business for AMD from Daimler AG ("Daimler") prior to his passing in December of 2018, and that AMD has begun shipping, or is about to begin shipping, products to Daimler. Mr. Subel's commission agreement with AMD entitled him to 2% of the gross sales to Daimler. Please provide me with all documentation between AMD and Daimler, including but not limited to all contracts, purchase orders and invoices, in order to determine the amount of commissions owed, and to be owed, to the Estate. Please do not hesitate to contact me with any questions.

{¶ 8} After a week without any response from Coll, counsel for the Estate again sent an email requesting documents to determine the commissions owed to the Estate.

{¶ 9} In April 2020, Coll forwarded an email to counsel for the Estate from AMD's Chief Financial Officer attaching AMD's invoices reflecting total P4 headliner

sales from July 2019 to March 2020 of $1,566.76. Coll further stated in the email, "To whom and where would you like me to send the $32.00 commission check[?]"

{¶ 10} The Estate filed a complaint against appellees alleging claims for breach of contract, unjust enrichment, and failure to pay commissions due under R.C. 1335.11. The complaint further sought a judgment declaring that appellees were required to remit payments under the Purported Agreement within 13 days of the payments becoming due for the next five years.

{¶ 11} Appellees moved to dismiss the Estate's claims, arguing that they failed to state a claim upon which relief can be granted. The court denied the motion to dismiss, and appellees then filed their answer. Appellees later amended their answer to add counterclaims for tortious interference with prospective contractual and business relations along with breach of the duties of loyalty and good faith.

{¶ 12} Appellees moved for summary judgment on the Estate's claim as well as their own counterclaim. Appellees argued that there was no agreement between the parties, and even if the court were to find an agreement existed, the Estate's claims were barred by the statute of frauds. Appellees further asserted that the estate could not maintain a claim for unjust enrichment.

{¶ 13} In support of their motion, appellees submitted the affidavit of Coll wherein he stated he was generally agreeable to an arrangement with Subel that included a 2 percent commission on revenue received by AMD for the P4 headliner parts for a two-year period. Coll further stated that in September 2018, he informed Subel via text message that he would have his attorney prepare a written agreement

regarding commissions for the P4 headliner for their review and terminating AMD's relationship with Subel. The text message was attached to Coll's affidavit and stated as follows:

> I have the lawyer drafting the commission agreement for P4 headliners. At this point I see no purpose to pay you a monthly fee for zero services. I also am not willing to pay commission for future products that I am doing all the work on.
>
> Therefore I think it is best for us to honor the P4 headliner commission and move on.
>
> Thanks for everything over the years and best of luck! I will have the commission agreement back to you next week.
>
> Brian

{¶ 14} Coll further acknowledged in his affidavit that he received an email from Subel in November 2018 purporting to memorialize terms that the two had agreed upon. Coll denied in his affidavit that he was agreeable to the terms Subel set forth and stated that he took the email as an ongoing effort to negotiate an agreement.

{¶ 15} The Estate filed a response in opposition, offering the affidavits of Carol and Subel's son, Jack M. Subel, correspondence between counsel for the Estate and Coll (outlined above), along with invoices for AMD. Also attached to the Estate's brief in opposition was the affidavit of Dean A. Sutton, CPA, who is the manager, accounts payable, of Daimler. Sutton stated that he had conducted a search of available records at Daimler evidencing purchases by Daimler of P4 headliners manufactured and sold by AMD to Daimler from 2019 to June 2022.

Sutton attached to his affidavit a spreadsheet summarizing the records and data retrieved.

{¶ 16} The trial court granted appellees' motion for summary judgment as to the Estate's claims, finding that no genuine issues of material fact remained. The court denied appellees' motion for summary judgment on their counterclaim. Appellees then voluntarily dismissed the counterclaim, and the Estate appealed the trial court's granting of summary judgment, raising one assignment of error for our review:

> The trial court erred, as a matter of law, by granting summary judgment in favor of defendant-appellees and against plaintiff-appellants.

II. Law and Analysis

{¶ 17} In its sole assignment of error, the Estate argues that the trial court erred by finding that there were no facts in dispute in this matter, including whether the Purported Agreement was valid.

{¶ 18} Under Civ.R. 56, summary judgment is appropriate when no genuine issue exists as to any material fact and, in viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is averse to the nonmoving party, entitling the moving party to judgment as a matter of law.

{¶ 19} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Mitseff*

v. Wheeler, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 604 N.E.2d 138 (1992).

{¶ 20} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. *Id.*

{¶ 21} This court reviews a trial court's granting of summary judgment de novo. *Brown v. Cty. Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C), evaluate the record in a light most favorable to the nonmoving party, and overrule the motion if reasonable minds could find for the party opposing the motion. *Saunders v. McFaul*, 71 Ohio App.3d 46, 50, 593 N.E.2d 24 (8th Dist.1990), citing *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 433, 424 N.E.2d 311 (1981).

A. Personal Liability of Coll

{¶ 22} Preliminarily, we address whether Coll may be held liable for acts undertaken in his representative capacity as chairman and CEO as well as a member

of AMD. The Estate contends that Coll can be held personally liable as majority owner of AMD who would capitalize on the profits of the company, which would be higher if Subel was not compensated appropriately under the Purported Agreement.

{¶ 23} We find that there has been no evidence presented that Coll made the Purported Agreement in his individual capacity or that Subel conferred any benefits on him personally. There is no evidence in the record demonstrating Coll's interest in AMD or how he is compensated. Accordingly, Coll cannot be held personally liable on the Estate's claims, and summary judgment was properly granted in Coll's favor. We will therefore analyze the Estate's claims solely against AMD.

B. Breach of Contract

{¶ 24} Contract formation requires an offer, acceptance, consideration, and mutual assent between two or more parties with the legal capacity to act. *See, e.g., Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976) ("'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.'"); *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997).

{¶ 25} For a contract to be enforceable, there must be a "meeting of the minds" as to the essential terms of the agreement, i.e., the essential terms of the agreement must be "'reasonably certain and clear'" and mutually understood by the

parties. *Kostelnik* at ¶ 16-17, quoting *Rulli* at 376; *see also Episcopal Retirement Homes v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991) (To "declare the existence of a contract," both parties must consent to its terms, there must be a meeting of the minds of both parties and the contract must be "definite and certain.").

{¶ 26} An oral agreement is enforceable when the terms of the agreement are sufficiently particular. The terms of an oral contract may be determined from "'words, deeds, acts, and silence of the parties.'" *Kostelnik* at ¶ 15, quoting *Rutledge v. Hoffman*, 81 Ohio App. 85, 75 N.E.2d 608 (12th Dist.1947).

{¶ 27} "'The burden of proof on one seeking to enforce an oral contract requires that party to prove the existence of the contract by clear and convincing evidence.'" *Widok v. Estate of Wolf*, 8th Dist. Cuyahoga No. 108717, 2020-Ohio-5178, ¶ 50-54, quoting *Bumgarner v. Bumgarner*, 4th Dist. Highland No. 09CA22, 2010-Ohio-1894, ¶ 20, citing *Nofzinger v. Blood*, 6th Dist. Huron No. H-02-014, 2003-Ohio-1406, ¶ 53. "'Clear and convincing evidence' is evidence that will produce in the fact-finder's mind a firm belief or conviction as to the facts sought to be established." *Id.* Ohio applies this heightened burden because oral contracts are disfavored. *Busch Bros. Elevator Co. v. Unit Bldg. Servs.*, 190 Ohio App.3d 413, 2010-Ohio-5320, 942 N.E.2d 404, ¶ 6 (1st Dist.), citing *Kostelnik*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, at ¶ 15.

{¶ 28} AMD argues there was no meeting of the minds as to the Purported Agreement. AMD contends that the text message from Coll to Subel demonstrates

that the parties had not agreed on whether Subel would be compensated for a monthly fee or any future services nor had they agreed on what constituted the commission and whether the Purported Agreement would include P4 production parts, tooling for Freightliner headliner/backwalls, or some combination of the two. Finally, AMD asserts that it had never agreed to compensate Subel on a commission basis for five years or that there was any mutual understanding as to whether Subel's family would receive commission fees after his passing. Consequently, AMD contends that no agreement had ever formed; the parties were simply negotiating the terms of a potential agreement.

{¶ 29} "Meeting of the minds refers to the manifestation of mutual assent by the parties of an agreement to the exchange and consideration, or to the offer and acceptance." *Tiffe v. Groenenstein*, 8th Dist. Cuyahoga No. 80668, 2003-Ohio-1335, ¶ 25, citing 1 Restatement of the Law 2d, Contracts, Section 17, Comment c (1981). To have a meeting of the minds, "'there must be a definite offer on one side and an acceptance on the other.'" *Turoczy Bonding Co. v. Mitchell*, 2018-Ohio-3173, 118 N.E.3d 439, ¶ 18 (8th Dist.), quoting *Garrison v. Daytonian Hotel*, 105 Ohio App.3d 322, 325, 663 N.E.2d 1316 (2d Dist.1995). Furthermore, "[t]he relevant inquiry is the manifestation of intent of the parties as seen through the eyes of a reasonable observer, rather than the subjective intention of the parties." *Bennett v. Heidinger*, 30 Ohio App.3d 267, 268, 507 N.E.2d 1162 (8th Dist.1986).

{¶ 30} This court has stated that "whether a meeting of the minds has been obtained is a question of fact to be determined by the trier of fact from all the

relevant facts and circumstances." *Gutbrod v. Schuler*, 8th Dist. Cuyahoga No. 94228, 2010-Ohio-3731, ¶ 17, citing *Garrison* at 325. *See also Oglebay Norton Co. v. Armco, Inc.*, 52 Ohio St.3d 232, 235, 556 N.E.2d 515 (1990) ("[W]hether the parties intended to be bound * * * is a question of fact properly resolved by the trier of fact.").

{¶ 31} In addition to Subel's own account of the Purported Agreement, the Estate has presented outside evidence that corroborates its contention that, although nothing was reduced to writing, Coll had expressed an intention to compensate Subel. Coll's text message to Subel states that he wanted to "honor the P4 headliner commission." Further, Coll's email to counsel for the Estate appears to acknowledge that Subel was owed $32 for total sales of P4 headliners to Daimler. The documentation states that the total sales amounted to $1,566.76, of which 2 percent would equate to $31.34. Presumably, Coll was rounding up to a whole dollar in his email.

{¶ 32} The estate has therefore presented evidence that there was some agreement to pay Subel 2 percent commission on sales of the P4 headliners. Whether that agreement was the Purported Agreement would be a question for the trier of fact to consider.

{¶ 33} However, AMD further contends that even if we were to find that the parties entered into a valid oral agreement, Subel's claims are barred by the statute of frauds because the Purported Agreement could not be performed within one year. We agree.

{¶ 34} "'Agreements that do not comply with the statute of frauds are unenforceable.'" *6610 Cummings Court, L.L.C. v. Scott*, 2018-Ohio-4870, 125 N.E.3d 362, ¶ 38 (8th Dist.), quoting *Qutifan v. Shafiq*, 2016-Ohio-4555, 70 N.E.3d 43 (10th Dist.), ¶ 13, citing *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923 (1938). The statute of frauds constitutes an affirmative defense to a claim for breach of contract. *Id.*, citing *ELM Invests., Inc. v. BP Exploration & Oil, Inc.*, 10th Dist. Franklin No. 11AP-1000, 2012-Ohio-2950, ¶ 11.

{¶ 35} An agreement that is capable of being performed within one year does not violate the provision of the statute of frauds, which states that a contract that is "not to be performed within one year" must be made in writing. As the Supreme Court of Ohio explained in *Sherman v. Haines*, 73 Ohio St.3d 125, 127, 652 N.E.2d 698 (1995):

> For over a century, the "not to be performed within one year" provision of the Statute of Frauds, in Ohio and elsewhere, has been given a literal and narrow construction. The provision applies only to agreements which, by their terms, cannot be fully performed within a year, and not to agreements which may possibly be performed within a year. Thus, where the time for performance under an agreement is indefinite, or is dependent upon a contingency which may or may not happen within a year, the agreement does not fall within the Statute of Frauds.

(Citations omitted.) *See also Shaver v. Priore*, 8th Dist. Cuyahoga No. 71298, 1997 Ohio App. LEXIS 3526, 7 (Aug. 7, 1997), quoting *Bryan v. Looker*, 94 Ohio App.3d 228, 234, 640 N.E.2d 590 (3d Dist.1994) ("'A contract which is not likely to be fully completed within a year, and which in fact is not completed within a year, does not automatically violate the Statute of Frauds if, at the time the contract is made, there

is a possibility in law and in fact that full performance such as the parties intended may be completed before the expiration of a year.'").

{¶ 36} The "not to be performed within one year" provision "applies only to agreements that, *by their terms*, cannot be fully performed within a year * * *." (Emphasis added.) *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-5077, 797 N.E.2d 1002, ¶ 21 (8th Dist.), citing *Sherman* at 127.

{¶ 37} The Estate maintains that the Purported Agreement was for 2 percent commission on sales of P4 headliners *for a period of five years*. Consequently, by its own terms, the Purported Agreement could not possibly be completed in one year. The Purported Agreement is therefore barred by the statute of frauds, and AMD was entitled to judgment as a matter of law on the Estate's breach-of-contract claim. Summary judgment was properly granted on this claim.

C. Failure to Pay Commissions Under R.C. 1335.11

{¶ 38} In its complaint, the Estate alleges that appellees violated R.C. 1335.11(C) by failing to pay all commissions due to Subel within 13 days after the date that the commissions became due.

{¶ 39} R.C. 1335.11(C) provides that

> [u]pon the termination of a contract between a principal and a sales representative for the solicitation of orders for a product or orders for services, the principal shall pay the sales representative all commissions due the sales representative at the time of the termination within thirty days of the termination and shall pay the sales representative all commissions that become due after the termination within thirteen days of the date on which the commissions become due.

{¶ 40} The statute clearly requires the existence of a contract between the parties but does not require that the contract be written. *See* R.C. 1335.11(B)(2). We determined above that the statute of frauds barred recovery on the Estate's breach-of-contract claim and rendered the Purported Agreement unenforceable. Without an enforceable contract, the statute does not apply to the instant matter, and AMD was entitled to judgment as a matter of law on this claim. The trial court properly granted summary judgment.

D. Unjust-Enrichment Claim

{¶ 41} A claim for unjust enrichment arises out of a contract in law, or a quasi-contract. *CCI Props. v. McQueen*, 8th Dist. Cuyahoga No. 82044, 2003-Ohio-3674, ¶ 13, citing *Hummel*, 133 Ohio St. at 525, 14 N.E.2d 923. This type of contract is not a true contract; rather, it is an "'obligation that is created by the law without regard to expressions of assent by either words or acts,' * * * and is imposed to prevent a party from retaining money or benefits which in justice and equity belong to another." *Legros v. Tarr*, 44 Ohio St.3d 1, 7-8, 540 N.E.2d 257 (1989), quoting 1 Corbin on Contracts 44, Section 19 (1963).

{¶ 42} Unjust enrichment occurs where ""'a person has and retains money or benefits which in justice and in equity belong to another.'"" *Smith v. Vaughn*, 174 Ohio App.3d 473, 2007-Ohio-7061, 882 N.E.2d 941, ¶ 10 (1st Dist.), quoting *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 20, quoting *Hummel* at 528. The purpose of an unjust-enrichment claim is to enable the plaintiff to recover the benefit he has conferred on the defendant under

circumstances in which it would be unjust to allow the defendant to retain it. *Johnson* at ¶ 21, citing *Hughes v. Oberholtzer*, 162 Ohio St. 330, 335, 123 N.E.2d 393 (1954).

{¶ 43} In order to prevail on a claim for unjust enrichment, a plaintiff must demonstrate by a preponderance of the evidence that: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had knowledge of the benefit; and (3) the defendant retained the benefit under circumstances in which it would be unjust for him or her to retain that benefit. *PNC Bank, N.A. v. Bulldog Asset Recovery*, 8th Dist. Cuyahoga No. 100692, 2014-Ohio-4802, ¶ 15, citing *Johnson* at ¶ 20.

{¶ 44} In its motion for summary judgment, AMD contends that it was entitled to judgment as a matter of law because the Estate cannot pursue a claim of unjust enrichment when it also seeks to recover the commission pursuant to a contract covering the payment of such commissions.

{¶ 45} AMD is mistaken, however, in its interpretation of Ohio law. "Unjust enrichment is an alternative theory of recovery, which 'operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another.'" *Cantlin v. Smythe Cramer Co.*, 2018-Ohio-4607, 114 N.E.3d 1260, ¶ 41 (8th Dist.), citing *Gallo v. Westfield Natl. Ins. Co.*, 8th Dist. Cuyahoga No. 91893, 2009-Ohio-1094, ¶ 19.

{¶ 46} Pertinent to the case at hand,

> [a]n oral contract incapable of being performed within a year is unenforceable under the Statute of Frauds; nonetheless, where one party fully performed and the other defaulted under the agreement a

> quasi-contract may arise upon which the performing party may maintain an action against the defaulting party under a theory of unjust enrichment or quantum meruit.

Kopsky v. MURrubber Technologies, Inc., 9th Dist. Summit Nos. 29867 and 29984, 2022-Ohio-511, ¶ 21, citing *Hummel*, 133 Ohio St. 520, 14 N.E.2d 923, at paragraph one of the syllabus.

{¶ 47} We have determined that the Purported Agreement was barred by the statute of frauds and therefore must analyze whether the Estate could proceed on its unjust-enrichment claim.

{¶ 48} As discussed above, unjust enrichment occurs where "'a person has and retains money or benefits which in justice and in equity belong to another.'" *Smith*, 174 Ohio App.3d 473, 2007-Ohio-7061, 882 N.E.2d 941, at ¶ 10, quoting *Johnson*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, at ¶ 20. The purpose of an unjust-enrichment claim is not to compensate the plaintiff for loss or damages suffered by the plaintiff, but to enable the plaintiff to recover the benefit he has conferred on the defendant under circumstances in which it would be unjust to allow the defendant to retain it. *Johnson* at ¶ 21, citing *Hughes*, 162 Ohio St. at 335, 123 N.E.2d 393. Restitution is the remedy provided upon proof of unjust enrichment "to prevent one from retaining property to which he is not justly entitled." *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 256, 141 N.E.2d 465 (1957); *see also Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, ¶ 11 (restitution is available as

the remedy for an unjust enrichment of one party at the expense of another), citing Restatement of the Law, Restitution, Section 9 (1937).

{¶ 49} In its complaint, the Estate alleged that Subel conferred a benefit on AMD by performing services in accordance with the terms and conditions of the Purported Agreement and that AMD had knowledge that Subel was entitled to be paid. The email from Coll to counsel for the Estate seems to suggest that Coll (and by extension, AMD) agreed that Subel was entitled to 2 percent on the P4 headliner sales.

{¶ 50} We therefore find that the Estate has demonstrated the existence of a genuine issue of material fact as to whether AMD was unjustly enriched by Subel's performance. Accordingly, AMD was not entitled to judgment as a matter of law on this claim, and the trial court improperly granted summary judgment.

E. Declaratory-Judgment Claim

{¶ 51} Finally, the Estate sought a judgment declaring that appellees were "required to remit payments under the [Purported] Agreement within 13 days of the payments coming due for the next 5 years." This cause of action was based upon the Estate's claim for failure to pay commissions under R.C. 1335.11. Because we have determined that AMD was entitled to judgment as a matter of law on the Estate's R.C. 1335.11 claim, the Estate was not entitled to a declaratory judgment relating to

payment under the statute. The trial court properly granted summary judgment on this claim.

III. Conclusion

{¶ 52} The trial court erred in granting appellees' motion for summary judgment with regard to AMD on the Estate's claims for unjust enrichment. The trial court correctly granted summary judgment in favor of AMD on the Estate's claims for breach of contract, declaratory judgment, and failure to pay commissions under R.C. 1335.11, and did not err in granting summary judgment in favor of Coll.

{¶ 53} The estate's sole assignment of error is sustained only as to its unjust-enrichment claim against AMD and overruled as to its remaining claims against AMD and all of its claims against Coll.

{¶ 54} The judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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 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, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
EMANUELLA D. GROVES, J., CONCUR