[Cite as *Bova v. B & J Pools, Inc.*, 2023-Ohio-1680.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

JOSEPH BOVA ET AL,

Plaintiffs-Appellees,

v.

B & J POOLS, INC., ET AL,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0033

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CV 726

BEFORE:
Mark A. Hanni, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part. Reversed in part and Remanded.

Atty. Christopher A. Maruca, 201 East Commerce Street, Suite 316, Youngstown, Ohio 44503, for Plaintiffs-Appellees

Atty. William Kissinger, 7631 South Avenue, Suite F, Youngstown, Ohio 44512, for Defendant-Appellant.

Dated: May 16, 2023

HANNI, J.

{¶1} Defendant-Appellant, B & J Pools, Inc. (B & J), appeals from a Mahoning County Common Pleas Court judgment finding that it was liable to Plaintiffs-Appellees, Joseph Bova and Sherri Bova, for breach of contract and unjust enrichment following a bench trial.

{¶2} The Bovas were interested in installing an in-ground pool at their home. They met with defendant, James Shoemaker, one of the owners of B & J, to discuss plans for the pool. On April 3, 2019, the Bovas entered into a contract with B & J for the installation of a swimming pool at their residence (the contract). The total for the project was $92,744.52 and was payable in four installments: (1) $45,000 due upon signing of the contract; (2) $25,000 due upon delivery of the "pool package"; (3) $20,000 due upon concrete ready for paint; and (4) $2,744.52 due upon completion. The term "pool package" was not defined in the contract. The contract did list various parts of the pool under the heading, "The Pool." The Bovas paid the initial $45,000 upon signing the contract.

{¶3} The Bovas hired Hunter Electrical Services to install all electrical systems required for the pool.

{¶4} B & J began installation of the pool on May 2, 2019. Some problems arose with the side panels being too high and the lower part of the pool not being properly leveled. Once these issues were corrected, B & J poured the concrete pool floor.

{¶5} The Bovas paid the second installment of $25,000 on August 20, 2019. However, not all of the pool components had yet been delivered including pumps, filters, and heaters.

{¶6} Cracks then developed between the side panels and another crack developed on the pool floor. B & J undertook to remedy these issues.

{¶7} The relationship between the parties deteriorated and ultimately ended in November 2019. The Bovas did not make the final two installment payments. The pool was never "winterized" and, as a result, further damage occurred.

{¶8} The Bovas then hired BC Contracting to purchase the remaining necessary parts and conduct additional labor to finish the pool. The Bovas paid $58,975.07 to BC Contracting for its work.

{¶9} The Bovas filed a complaint on April 6, 2020, against B & J and Shoemaker. They brought claims for breach of contract and unjust enrichment and sought to pierce the corporate veil to hold Shoemaker personally liable. B & J and Shoemaker filed an answer and counterclaim also raising claims for breach of contract and unjust enrichment.

{¶10} The matter proceeded to a bench trial before a magistrate on March 2, 2022. The magistrate listened to testimony from Joseph Bova, the electrician, the contractor hired to finish the pool, and Shoemaker. The magistrate noted that because Shoemaker drafted the contract, any ambiguities or inconsistencies were to be construed against him and B & J. The magistrate also found that Shoemaker's testimony was not credible. The magistrate found that B & J failed to construct the pool in a competent and workmanlike manner. However, he also found that the Bovas did not sustain their burden to pierce the corporate veil. Consequently, the magistrate found in favor of the Bovas on their claims for breach of contract and unjust enrichment. He found in favor of Shoemaker on the Bovas' claim to pierce the corporate veil. The magistrate also ruled in favor of the Bovas on Shoemaker's and B & J's counterclaims. The magistrate awarded the Bovas a judgment of $100,000.

{¶11} The trial court entered judgment consistent with the magistrate's decision. B & J filed a timely notice of appeal on April 7, 2022. It now raises two assignments of error for our review.

{¶12} B & J's first assignment of error states:

> THE TRIAL COURT ERRED WHEN IT RULED THAT DEFENDANT B & J POOLS INC. WAS GUILTY [sic] OF BREACH OF CONTRACT AND UNJUST ENRICHMENT.

{¶13} B & J argues that a party cannot maintain an unjust enrichment action if there is an express contract. Thus, it asserts this court must reverse the judgment on the Bovas' unjust enrichment claim since the trial court determined that B & J breached the contract.

{¶14} In response, the Bovas assert they can maintain an unjust enrichment claim in addition to a breach of contract claim where the contract does not cover a particular dispute between the parties.

{¶15} In order to establish a breach of contract claim, a plaintiff must establish the following elements: "the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff." *Doner v. Snapp*, 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2d Dist.1994). To prove an unjust enrichment claim, the plaintiff must prove: (1) he conferred a benefit on the defendant; (2) the defendant knew of the benefit; and (3) the defendant retained the benefit under circumstances where it would be unjust for him to retain that benefit without payment. *Apostolos Group, Inc. v. Josephson*, 9th Dist. Summit No. 20733, 2002-Ohio-753.

{¶16} Generally, the doctrine of unjust enrichment is "inapplicable if an express agreement existed concerning the services for which compensation is sought; [and] the parameters of the agreement limit the parties' recovery, in the absence of bad faith, fraud or illegality." *Pawlus v. Bartrug*, 109 Ohio App.3d 796, 800, 673 N.E.2d 188 (9th Dist.1996), citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co*., 46 Ohio St.3d 51, 55, 544 N.E.2d 920 (1989). However, when evidence is presented at trial that a party breached the contract and was unjustly enriched by separate conduct, both claims may be viable. *Zeck v. Sokol*, 9th Dist. Medina No. 07CA0030-M, 2008-Ohio-727, ¶ 14-16.

{¶17} In this case, evidence was presented at trial that B & J breached the contract. But there was no evidence presented that B & J was unjustly enriched by separate conduct. Likewise, there was no evidence of bad faith, fraud, or illegality.

{¶18} The contract provided that B & J would install a swimming pool at the Bovas' residence for the sum of $92,744.52. (Plaintiffs' Ex. B). The contract then provided:

PAYMENT UPON SIGNING THE CONTRACT	$ 45,000.00
PAYMENT UPON DELIVERY OF POOL PACKAGE	$ 25,000.00
PAYMENT UPON CONCRETE READY FOR PAINT	$ 20,000.00
BALANCE UPON COMPLETION	$ 2,744.52

> B & J Pools Inc. states that all material used in completing the pool installation contracted for herein will be high quality and that all work on the pool will be done in competent and workmanlike manner; that if any substantial defect occurs in the workmanship of the pool it will be remedied without cost to the owner, provided that written notice thereof is given the company within one (1) year after completion of such work. Walks or docks are not part of the pool. No claim may be filed under this warranty and no obligations to make adjustment there under will accrue until the full indebtedness of the owner to B & J Pools Inc. is paid.

(Plaintiffs' Ex. B)

{¶19} The contract does not define the term "pool package." But page two of the contract contains the heading "THE POOL." Listed under this heading are all of the components of the pool, including such items as the 16 x 32 double pool evolution, auto cover, drain, deck jets, skimmers, heater, plumbing, and labor. It then lists five items that are not included.

{¶20} Shoemaker testified that B & J drafted the contract. (Tr. 183, 186). He stated that the term "pool package" only included the panels, the anchors, the stanchions, the steps, and the brackets. (Tr. 187, 203-204). Joseph Bova testified that under his reading of the contract, the "pool package" included all of the items listed under the heading "THE POOL" in the contract. (Tr. 23-29). Bova testified that the pool walls and brackets were delivered to his house but many of the other items listed were never delivered. (Tr. 25-29).

{¶21} Despite his belief that the "pool package" had not been delivered, Bova testified that he paid B & J the second installment payment. (Tr. 44-46). Bova testified that he paid this second installment to B & J on August 20, 2019, despite the fact that many items of what he believed to be the "pool package" had not yet been delivered. (Tr. 46). Bova stated that Shoemaker asked him for the second installment because Shoemaker needed the money since he was running behind on other jobs. (Tr. 44).

{¶22} Bova testified that sometime after the epoxy was sprayed on the pool walls on September 25, 2019, cracks appeared in the pool walls. (Tr. 51, 55-59: Plaintiff's Ex. K). On October 16, 2019, the company that was subcontracted to spray on the epoxy

came back to attempt to fix the cracks. (Tr. 60). However, the company was unable to remedy the cracks completely. (Tr. 60-61). Bova also testified that because B & J did not prepare the pool walls properly, the spray epoxy did not adhere. (Tr. 64). Next, on November 18, 2019, B & J painted the pool floor. (Tr. 64). But the paint did not adhere. (Tr. 66). The Bovas had to pay another company to re-paint the pool. (Tr. 66). This was the last time B & J was at the Bova house. (Tr. 70-71). Bova testified that Shoemaker told him the pool then needed to be winterized and he would take care of it. (Tr. 71-72). However, B & J did not winterize the pool, which led to cracks in the pool floor. (Tr. 72; Plaintiff's Exs. O, P). Bova further testified there is currently a leak somewhere in the pool because it is continuously losing water. (Tr. 77).

{¶23} Bova testified that he contacted BC Contracting to finish/repair the pool. Bova stated that he had to purchase many items that B & J was supposed to provide under the contract but never did supply. (Tr. 81). These items included sand filters, heaters, and pumps. (Tr. 81). The supplies totaled $32,640.88. (Tr. 82, Plaintiff's Exs. U, V, W, X). In addition, Bova paid BC Contracting to pressure test the pool, repair plumbing and leaks, and fix fittings. (Tr. 84). In all, the Bovas paid $58,000 to BC Contracting to finish the pool and fix issues B & J had created. (Tr. 84-86).

{¶24} Bova testified that he paid B & J $70,000 in total. (Tr. 87). He acknowledged that he was not seeking reimbursement for that entire amount. (Tr. 87). He stated that he kept the pool walls, which were approximately $20,000 to $25,000, and the PVC pipes. (Tr. 87). And Bova stated that there was labor involved in installing the walls. (Tr. 87). In total, Bova testified that B & J was entitled to keep approximately $30,000 of the $70,000 paid. (Tr. 88).

{¶25} The Bovas hired electrician, Jonathan Hunter, to perform the electrical work required for the pool. Hunter testified that the wiring, heaters, pool cover, and control panels were not delivered to the Bova residence until mid-2020. (Tr. 125-126). Thus, he corroborated Joseph Bova's testimony that B & J never provided these items.

{¶26} Jeff Collingwood is in the business of heating, plumbing, and swimming pool repair. He testified the Bovas contacted him in 2020, to look at their pool and assess what they should do. (Tr. 147-148). Collingwood testified the pool was unfinished, the epoxy on the pool floor had to be replaced due to cracks, many pool components had to

be ordered, the laminars had to be repaired, the pool walls had to be resealed and sprayed, and the plumbing lines had to be tested to address leaks. (Tr. 148-154).

{¶27} Shoemaker testified on behalf of B & J. He testified that B & J was three days away from completing the Bovas' pool when the Bovas refused to pay the third installment payment. (Tr. 193-194, 197). Shoemaker stated B & J had already painted the pool, which triggered the third installment. (Tr. 194). On cross-examination, however, Shoemaker stated that he had not yet ordered the pumps, had not yet ordered the heaters, the auto-cover was not yet on site, the filter was not on site, the chlorinator was not on site, the lighting was not on site, the handrails were not on site, in addition to many other components. (Tr. 216-225).

{¶28} The above supports the Bovas' breach of contract claim. There was clearly a contract. The Bovas paid the first two installments totaling $70,000. B & J never ordered/delivered all of the pool components and it ceased working on the pool before it was completed. Additionally, the pool had issues with cracks, paint, and leaks. The Bovas had to pay $58,000 to another company to finish the job and repair the pool.

{¶29} Nonetheless, the evidence does not support an independent claim for unjust enrichment. "'[U]njust enrichment 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.' *Gallo v. Westfield Natl. Ins. Co*., 8th Dist. Cuyahoga No. 91893, 2009-Ohio-1094, 2009 WL 625522, ¶ 19. * * * An unjust enrichment claim cannot stand when the parties have an otherwise enforceable agreement. In such situations, the appropriate claim is for a breach of contract." *Carbone v. Nueva Construction Group, L.L.C*., 8th Dist. Cuyahoga Nos. 103942 and 104147, 2017-Ohio-382, ¶ 18. There is no evidence in this case that B & J retained money or another benefit other than the money the Bovas paid under the contract. Likewise, there is no evidence of bad faith, fraud, or some other illegality. Thus, the trial court erred in finding in favor of the Bovas on their unjust enrichment claim.

{¶30} The trial court awarded the Bovas a judgment of $100,000 on the breach of contract claim and the unjust enrichment claim combined. It did not separate the damages award by claim. Since the court erred in finding in favor of the Bovas on the unjust enrichment claim, that part of the award must be vacated.

{¶31} The general measure of damages in a contract action is the amount necessary to place the nonbreaching party in the position he or she would have been in had the breaching party fully performed under the contract. *F. Enterprises, Inc. v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154, 159, 351 N.E.2d 121 (1976). "[W]here a contractor breaches a contract and a portion of the contract is left unpaid, the proper measure of damages is the cost for the owner having to complete the work minus the part of the contract left unpaid." *Green Maple Enterprises, LLC v. Forrester*, 7th Dist. Jefferson No. 20 JE 0020, 2021-Ohio-4640, ¶ 93, citing *Lynn v. Schulte*, 11th Dist. Ashtabula Nos. 2015-A-0017, 2015-A-0026, 2015-Ohio-5527, ¶ 28.

{¶32} In this case, the total cost of the contract was $92,744.52. Of that amount, the Bovas paid B & J $70,000, leaving a remaining balance on the contract of $22,744.52. The Bovas also paid $58,000 to BC Contracting to finish the job and repair the pool. Subtracting the part of the contract left unpaid ($22,744.52) from the cost for the Bovas having to complete the work ($58,000) equates to a loss to the Bovas in the amount of $35,255.48. Thus, the proper amount of damages on the breach of contract is $35,255.48.

{¶33} Accordingly, B & J's first assignment of error has merit and is sustained.

{¶34} B & J's second assignment of error states:

> THE TRIAL COURT ERRED WHEN IT FAILED TO RULE THAT PLAINTIFF, JOSEPH BOVA COMMITTED AN ANTICIPATORY BREACH AND WAS LIABLE TO DEFENDANT, B & J POOLS INC. FOR THE UNPAID BALANCE OF THE WRITTEN CONTRACT.

{¶35} Here, B & J contends the trial court should have found that the Bovas committed an anticipatory breach of contract. B & J asserts it was undisputed that the Bovas refused to pay the third draw. It points to Joseph Bova's testimony that he refused to pay the third draw even though Shoemaker had told Bova he needed the third draw to complete the work. (Tr. 95). It notes that Bova further testified the reason he did not pay the third draw was because, in his opinion, Shoemaker had been overpaid. (Tr. 95). Given this testimony, B & J argues, it was not liable for breach of contract and was justified

for stopping work on the pool. B & J argues Joseph Bova's opinions regarding the fairness of the contract or the quality of the work already completed were irrelevant.

{¶36} When reviewing civil appeals from bench trials, an appellate court applies a manifest weight standard of review. *Revilo Tyluka, L.L.C. v. Simon Roofing & Sheet Metal Corp.*, 193 Ohio App.3d 535, 2011-Ohio-1922, 952 N.E.2d 1181 (8th Dist.), citing App.R. 12(C), *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). Judgments supported by some competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Const. Co*., 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus (1978). See, also, *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226, 638 N.E.2d 533 (1994). Reviewing courts must oblige every reasonable presumption in favor of the lower court's judgment and finding of facts. *Gerijo*, 70 Ohio St.3d at 226, 638 N.E.2d 533 (citing *Seasons Coal Co*., supra). If the evidence is susceptible to more than one interpretation, then we must construe it consistently with the lower court's judgment. *Id*. In addition, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *Kalain v. Smith*, 25 Ohio St.3d 157, 162, 495 N.E.2d 572 (1986).

{¶37} "An anticipatory breach of contract by a promisor is a repudiation of the promisor's contractual duty before the time fixed for performance has arrived." *McDonald v. Bedford Datsun*, 59 Ohio App.3d 38, 40, 570 N.E.2d 299 (8th Dist.1989). The promisor must express the repudiation in clear and unequivocal terms. *Id*.

{¶38} When a party to a contract repudiates the contract before the time that their performance is due, this constitutes an "anticipatory breach" or an "anticipatory repudiation" and the injured party has an action for breach of the contract. *Northway McGuffey College v. Brienza*, 7th Dist. Mahoning No. 07 MA 145, 2008-Ohio-6207, ¶ 34, citing *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Commrs*., 152 Ohio App.3d 95, 2003-Ohio-1227, 786 N.E.2d 921, ¶ 44. The non-breaching party can also rely on an anticipatory repudiation as a defense against a later breach-of-contract claim. *Id*.

{¶39} The contract in this case provided that the second installment payment was due upon "delivery of pool package." The third installment payment was due upon

"concrete ready for paint." There was conflicting evidence regarding whether these triggering events occurred.

{¶40} The contract does not define the term "pool package." But the second page of the contract, titled "THE POOL," lists the components of the pool. Joseph Bova testified that under his reading of the contract, the "pool package" included all of the items listed under the heading "THE POOL." (Tr. 23-29). Shoemaker, on the other hand, testified that the term "pool package" only included the panels, the anchors, the stanchions, the steps, and the brackets. (Tr. 187, 203-204). Bova testified that the pool walls and brackets were delivered to his house but many of the other items listed were never delivered. (Tr. 25-29). Shoemaker agreed that many of the pool components had not been delivered to the Bovas' house. (Tr. 216-225).

{¶41} The term "pool package" is ambiguous. When a contractual provision is ambiguous, that provision is to be strictly construed against the drafter. *Columbiana Cty. Bd. of Commrs. v. Nationwide Ins. Co*., 130 Ohio App.3d 8, 15, 719 N.E.2d 561 (7th Dist.1998), citing *McKay Machine Co. v. Rodman*, 11 Ohio St.2d 77, 80, 228 N.E.2d 304 (1967). Shoemaker testified that B & J drafted the contract. (Tr. 183, 186). Thus, the ambiguous term "pool package" is construed against B & J.

{¶42} Given this interpretation, the triggering event for the second installment payment never occurred. While some components of the "pool package" were delivered, the entirety of the "pool package" was never delivered to the Bovas' residence. Joseph Bova testified that despite the fact that the "pool package" had not been delivered, he gave B & J the second installment payment. (Tr. 44-46). Bova stated Shoemaker asked him for the second installment because Shoemaker needed the money. (Tr. 44). It stands to reason that if the second installment payment never became due and owing, the third installment payment would likewise not be due.

{¶43} Moreover, the triggering condition for the third installment payment was "concrete ready for paint." On November 18, 2019, B & J painted the pool floor. (Tr. 64). But the paint did not adhere. (Tr. 66). The Bovas had to pay another company to re-paint the pool. (Tr. 66). Thus, it is questionable whether the concrete was "ready to paint" when B & J painted it.

{¶44} Because the evidence demonstrated that the triggering events did not occur to require the Bovas to pay the second, and possibly the third, installment payments, the Bovas cannot be said to have anticipatorily breached or repudiated the contract.

{¶45} Accordingly, B & J's second assignment of error is without merit and is overruled.

{¶46} For the reasons stated above, the trial court's judgment is reversed as to the unjust enrichment claim. The judgment is affirmed as to the breach of contract claim. The matter is remanded with instructions to the trial court to modify the damages award in favor of the Bovas to $35,255.48, stemming from the breach of contract claim.

Waite, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, B & J's first assignment of error is sustained. B & J's second assignment of error is overruled. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio is affirmed as to the breach of contract claim. It is reversed as to the unjust enrichment claim. Further, the matter is remanded with instructions to the trial court to modify the damages award in favor of the Bovas to $35,255.48, stemming from the breach of contract claim. Costs to be taxed against the Appellees.

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *Danziger & De Llano, L.L.P. v. Morgan Verkamp, L.L.C.*, 2023-Ohio-1728.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

DANZIGER & DE LLANO, LLP,	:	APPEAL NO. C-220478 TRIAL NO. A-2201568
Plaintiff-Appellant,	:	*O P I N I O N.*
vs.	:	
MORGAN VERKAMP, LLC,	:	
FREDERICK M. MORGAN, JR.,	:	
and	:	
JENNIFER M. VERKAMP,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 24. 2023

Strauss Troy Co., LPA, and *Robert R. Sparks*, for Plaintiff-Appellant,

Montgomery Jonson LLP, *George D. Jonson* and *G. Todd Hoffpauir*, for Defendants-Appellees.

KINSLEY, Judge.

{¶1} This case marks the third attempt in as many jurisdictions by plaintiff-appellant Danziger & De Llano, LLP, ("D&D") to recover a share of legal fees for a client it did not actually represent. After unsuccessfully suing in the federal courts of Pennsylvania and Texas, D&D sued both the law firm that did represent the client—Morgan Verkamp, LLC,—and its two principals, Frederick Morgan and Jennifer Verkamp (collectively "Morgan Verkamp"), in the Hamilton County Court of Common Pleas. *See Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124 (3d Cir.2020); *Danziger & De Llano, L.L.P. v. Morgan Verkamp, L.L.C.*, 24 F.4th 491 (5th Cir.2022). Its claims included breach of contract, breach of contract implied in fact, unjust enrichment, quantum meruit, promissory estoppel, and fraudulent concealment.

{¶2} Raising arguments that D&D's claims were barred by the applicable statutes of limitations and the applicable professional conduct rules, Morgan Verkamp moved to dismiss the complaint under Civ.R. 12(B)(6). The trial court granted Morgan Verkamp's motion and dismissed the action. In a single assignment of error, D&D argues that the trial court erred in dismissing its complaint.

{¶3} For the reasons that follow, we affirm the trial court's judgment.

Factual and Procedural Background

{¶4} Danziger & De Llano, LLP, is a law firm located in Texas that frequently represents clients in whistleblower cases. D&D and Rod De Llano, one of its principals, have a history of referring a specialized type of whistleblower cases known as qui tam actions to Frederick Morgan and Jennifer Verkamp. When the referral relationship began, Morgan and Verkamp were working at Volkema Thomas, an Ohio

law firm. Later, they left that firm to open their own law practice known as Morgan Verkamp. This dispute concerns a client, Michael Epp, whom D&D referred to Morgan and Verkamp when they were attorneys at Volkema Thomas and whom Morgan Verkamp later successfully represented in a federal qui tam action in Pennsylvania.

{¶5} D&D's relationship with Morgan and Verkamp began in 2006, when D&D referred a different client in a potential qui tam action, Stacy Vanderslice, to Volkema Thomas. Morgan, Verkamp, and D&D then entered into a written fee agreement with Stacy Vanderslice. The agreement provided that Vanderslice would share 40 percent of any recovery obtained on her behalf with this team of attorneys. The attorneys agreed to allocate their share of the contingent fee by giving 33 percent to Volkema Thomas, 33 percent to D&D, and the remaining 34 percent in proportion to the hours spent on representation of Vanderslice by each firm.

{¶6} Also in 2006, D&D referred Donald Galmines, another potential qui tam relator, to Morgan. Galmines entered into a fee agreement with Volkema Thomas and D&D that was identical to the agreement used in the Vanderslice action.

{¶7} In April of 2007, Epp contacted D&D about his potential claim. Acting on behalf of D&D, De Llano responded via email to Epp stating that D&D was interested in discussing the matter further and explaining that it would be partnering with Volkema Thomas in the investigation and, if warranted, prosecution of the case. D&D also contacted Morgan regarding the Epp action.

{¶8} On April 19, 2007, De Llano, Morgan, Verkamp, and Epp participated in a conference call to discuss Epp's case. On April 23, 2017, Epp emailed D&D and Morgan with a question about how their legal fees would be paid. Morgan responded to Epp, informing him that the attorneys would not be paid if Epp did not obtain a

recovery. Morgan also informed Epp that, if a recovery was obtained, the attorney's contingent share would be disbursed from the proceeds.

{¶9} On May 21, 2007, Epp, De Llano, and Morgan participated in another conference call to discuss a draft of Epp's complaint and the parties' fee agreement. On May 30, 2007, in response to a request from Epp, Morgan sent Epp a draft fee agreement that was similar in its structure, but not the amount of fees to be paid, to the fee agreement used in the Vanderslice and Galmines actions. Morgan informed Epp that the draft agreement "does not include the details of the relationship between [De Llano's] and our firms, which will also be subject to your approval." The draft fee agreement that was sent to Epp provided that:

> Each law firm has agreed to divide any recovery of attorney's fees generated from the contingent portion of the relators' share of any award (as described above) in the following manner:
>
> ____ percent (%) of the fees generated by the contingent portion of the relators' of any recovery shall be paid to Volkema Thomas, LPA.
>
> ____ percent (%) of the fees generated by the contingent portion of the relators' of any recovery shall be paid to Danziger & De Llano, P.C.

{¶10} The numerical amount of the percentage that each party was to recover was left blank. No other provision in the draft agreement described the work to be performed by D&D and Morgan Verkamp or how the firms would share fees or responsibility for Epp's case. On June 4, 2007, in response to questions from Epp about this draft agreement, Morgan wrote a letter clarifying that the contingency fee to be charged would be 40 percent of the amount the client recovered as well as attorneys' fees for attorney time and billable staff. On June 13, 2007, Epp responded

with questions unrelated to the fee agreement. After those questions, neither party heard any further from Epp for a period of time.

{¶11} In September of 2007, Epp reinitiated contact with De Llano and Morgan and expressed interest in proceeding with the case. However, Epp again ceased communication shortly thereafter.

{¶12} In January of 2008, Morgan and Verkamp left Volkema Thomas and established a new firm, Morgan Verkamp, LLC. Morgan and Verkamp entered into a separation agreement with Volkema Thomas in which they assumed responsibility for the Vanderslice, Galmines, and Epp cases and agreed to reimburse Volkema Thomas for case expenses.

{¶13} On January 13, 2008, Morgan emailed Epp and De Llano to advise them that he and Verkamp had started their own firm. The email additionally informed Epp that "As I am no longer affiliated with Volkema Thomas, the draft contract I sent you several months ago is no longer relevant. Let Rod [De Llano] and me know if we can be of further service." Epp responded to Morgan and De Llano, asking, "[A]re you interested to take over the case on the same basis as Volkema Thomas?"

{¶14} Morgan answered Epp, communicating that "Michael, we're doing the same work in the same place, and definitely remain interested in your case. The terms were ours to begin with, so while we would need to reacquaint ourselves with the case and still would need to obtain the rest of your materials for review, if we were to handle the case we would do it on the same terms."

{¶15} After this exchange of emails, D&D never heard from Epp again. D&D and Morgan Verkamp continued to work together on the Vanderslice and Galmines cases. In January of 2010, De Llano saw a press release regarding a qui tam action

that seemed to be similar to Epp's action, and he emailed Morgan inquiring whether the press release was referring to the Epp case. Morgan responded in the negative.

{¶16} In March 2010, Morgan Verkamp brought suit on Epp's behalf in the Pennsylvania federal court. More than four years after the suit was filed, the United States government intervened and settled the suit for millions of dollars, resulting in several millions in legal fees for Morgan Verkamp. *See Danziger & De Llano*, 948 F.3d at 128.

{¶17} In October of 2016, D&D learned about Epp's lawsuit, the settlement, and Morgan Verkamp's fee award. Believing that it was entitled to a share of the recovery in that action, D&D filed a discovery action in 2016, and then a complaint in 2018, against Morgan Verkamp in Pennsylvania state court. *Id.* Morgan Verkamp removed the case to federal court, where they filed a motion to dismiss the action. *Id.* The motion to dismiss was granted by the United States District Court for the Eastern District of Pennsylvania, and the Third Circuit Court of Appeals affirmed that dismissal. *Id.* at 128, 133.

{¶18} D&D subsequently filed a complaint against Morgan Verkamp in federal court in the Southern District of Texas. Morgan Verkamp again filed a motion to dismiss. *Danziger & De Llano*, 24 F.4th at 494. The motion to dismiss was granted, and that dismissal was affirmed on appeal by the Fifth Circuit Court of Appeals. *Id.*

{¶19} On May 2, 2022, D&D filed the complaint in this case. The complaint contained claims for breach of contract, breach of contract implied in fact, unjust enrichment, quantum meruit, promissory estoppel, and fraudulent concealment. It alleged that Morgan Verkamp had willfully deceived D&D by representing Epp in the action that D&D had initially referred years earlier.

{¶20} The complaint described a number of communications involving Morgan Verkamp, D&D, and Epp. For one, Morgan Verkamp resumed communication by email with Epp in 2010 regarding his claim without including D&D. This was the case even though Morgan told Epp in his January 2008 email that his new firm would take over the case on the same basis as had previously been arranged with Volkema Thomas. The complaint also referenced an email that Morgan sent to Epp in February of 2010 transmitting a draft fee contract. In that email, Morgan informed Epp that "I have not included Rod DeLlano [sic] on this contract, as we have not discussed whether you wish to retain his firm as well as ours. If you wish me to reach out to Rod to see if he wishes to participate, I will do so. Otherwise, I will work with him once the case evolves to ensure that he is reasonably compensated for the work he did for you in 2007."

{¶21} The complaint further alleged that Morgan never reached out to De Llano or ensured that he was reasonably compensated for his earlier work and that Morgan Verkamp fraudulently concealed their representation of Epp while continuing to work together with D&D on the Vanderslice and Galmines cases during the pendency of the Epp litigation.

{¶22} According to the complaint, Morgan Verkamp filed suit on behalf of Epp in a qui tam action in March of 2010 in the Eastern District of Pennsylvania and ultimately received a contingency share of the award that Epp had obtained in excess of five million dollars. D&D asserted it was entitled to approximately $2,133,333 in fees for its referral of Epp.

{¶23} Morgan Verkamp filed a Civ.R. 12(B)(6) motion to dismiss D&D's complaint. In support of the motion, Morgan Verkamp argued that the claims asserted

in the complaint were barred by the applicable statutes of limitations, D&D's claims were substantially flawed, the equitable claims were barred by laches, the Ohio and Texas Rules of Professional Conduct barred D&D's claims, and fee disputes between lawyers in different law firms cannot be litigated in court in Ohio.

{¶24} The trial court issued an entry granting the motion to dismiss. The entry stated that the motion was well taken, but it did not set forth the basis on which dismissal was granted.

Standard of Review

{¶25} We review a trial court's ruling on a Civ.R. 12(B)(6) motion to dismiss de novo. *Plush v. Cincinnati*, 2020-Ohio-6713, 164 N.E.3d 1056, ¶ 12 (1st Dist.). A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief may be granted tests the sufficiency of the complaint. *Thomas v. Othman*, 2017-Ohio-8449, 99 N.E.3d 1189, ¶ 18 (1st Dist.). When ruling on such a motion, the trial court is confined to the allegations in the complaint, must accept all the allegations as true, and must draw all reasonable inferences in favor of the nonmoving party. *Plush* at ¶ 12. A Civ.R. 12(B)(6) motion to dismiss should only be granted if it "appear[s] beyond a doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Id.*, quoting *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶26} The parties raise statute-of-limitations arguments in this appeal. Because a statute-of-limitations defense typically requires reference to materials outside the complaint, it is not generally properly raised in a Civ.R. 12(B)(6) motion. *Lyons v. Kindell*, 2015-Ohio-1709, 35 N.E.3d 7, ¶ 30 (1st Dist.). "But a Civ.R. 12(B)(6)

motion may be granted on statute-of-limitations grounds when the complaint on its face conclusively indicates that the action is time-barred." *Id.*

Civ.R. 12(B)(6) Analysis

{¶27} In a single assignment of error, D&D argues that the trial court erred in granting the motion to dismiss. It contends that each claim asserted in the complaint was filed within the applicable limitations period. We discuss each claim in turn.

1. Breach of Contract

{¶28} With respect to the claim for breach of contract, D&D's complaint alleged that the parties' oral and written communications, along with their longstanding course of conduct, resulted in an enforceable agreement. The complaint specifically asserted that:

> The parties' written agreements, acts, and years-long course of dealing establish that their agreement included: (1) that Plaintiff and Defendant would work together on *qui tam* cases; (2) that Plaintiff would refer *qui tam* Relators to Defendants and, if litigation resulted from the referral, Plaintiff would be involved in such litigation as co-counsel; (3) that Plaintiff and Defendants would make full disclosure of all relevant facts to their clients or prospective clients and also make full disclosure of all relevant facts to each other; (4) that they would divide attorney fees with one-third to Plaintiff, one-third to Defendants, and one-third divided based upon time expended in the matter; and, (5) that Plaintiff and Defendants would act in accordance with the ethical requirements of the

legal profession and would not actively conceal relevant facts from each other.

{¶29} To establish a claim for breach of contract, a plaintiff must show the existence of a contract, performance by the plaintiff, breach by the defendant, and a resulting damage or loss to the plaintiff. *White v. Pitman*, 2020-Ohio-3957, 156 N.E.3d 1026, ¶ 37 (1st Dist.).

{¶30} D&D argues that Morgan Verkamp improperly attempted to characterize their breach of contract claim below as a claim for a breach of an oral contract, when the complaint, in fact, alleged a claim for breach of a written contract. D&D further argues that, regardless of whether the claim was for breach of an oral or written contract, the claim was filed within the applicable limitations period. We need not reach the issue of whether the claim was filed within the relevant statute of limitations, as we find that the complaint fails to allege the existence of a contract, either written or oral.[1]

{¶31} In order for a contract to exist, there generally must be an offer, acceptance, and consideration. *N. Side Bank & Trust Co. v. Trinity Aviation LLC*, 2020-Ohio-1470, 153 N.E.3d 889, ¶ 15 (1st Dist.). The alleged contract must also reflect the essential terms with definiteness and certainty, as there must be a meeting of the minds as to all essential terms. *Id.*; *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991). To reflect a meeting of the minds, all parties to an agreement must mutually assent to the

[1] On appeal, D&D argues that the contract it seeks to enforce existed solely between it and Morgan Verkamp. However, the complaint appears to describe a three-party agreement between Epp, D&D, and Morgan Verkamp, and it was this alleged contract that the trial court reviewed in granting the motion to dismiss. We limit our review to the alleged three-party contract described in the complaint, given that Civ.R. 12(B)(6) tests the sufficiency of the complaint, which did not include any purported agreement that existed solely between D&D and Morgan Verkamp.

substance of the contract. *Jackson Tube Serv. v. Camaco LLC*, 2d Dist. Miami Nos. 2012 CA 19 and 2012 CA 25, 2013-Ohio-2344, ¶ 11, citing *Zelina v. Hillyer*, 165 Ohio App.3d 255, 2005-Ohio-5803, 846 N.E.2d 68, ¶ 12 (9th Dist.) (stating that a meeting of the minds occurs if "a reasonable person would find that the parties manifested a present intention to be bound to an agreement"). The parties must have a distinct and common intention that is communicated by each party to the other. *Id.*, citing *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.*, 87 Ohio App.3d 613, 620, 622 N.E.2d 1093 (8th Dist.1993).

A. The Draft Agreement and Related Emails Were Not Specific Enough to Constitute a Valid Offer

{¶32} D&D's complaint was less than precise in its basis for arguing the existence of a written contract. However, D&D appears to rely upon the draft agreement that Morgan sent to Epp in May of 2007 and the emails that both accompanied and came after its circulation to suggest that a written contract existed. We consider at the outset whether the draft agreement and Morgan's emails constitute a valid offer to contract. An offer must be specific enough to form the basis for a meeting of the minds. *Callander v. Callander*, 10th Dist. Franklin No. 07AP-746, 2008-Ohio-2305, ¶ 14.

{¶33} Under this standard, the draft agreement and Morgan's emails to Epp were insufficient to constitute a valid offer to contract because they expressly omitted key terms regarding D&D's role. First, the document failed to include the percentages of the contingent fee that each party would receive, prohibiting an adequate meeting of the minds regarding the consideration to be paid or the relationship between the two law firms. Morgan's email to Epp specifically noted as much, highlighting that the

draft agreement "does not include the details of the relationship between [De Llano's] and our firms, which will also be subject to your approval." Morgan's June 4, 2007 letter to Epp did not shed sufficient light on the matter, as it only clarified that the contingency fee would be set at 40 percent, but did not describe how that fee would be divided between the firms.

{¶34} The complaint also references an email from Epp inquiring as to whether Morgan, at his new firm, would take over the case on the same terms that Volkema Thomas had agreed to, as well as an email from Morgan stating that "if we were to handle the case we would do it on the same terms." But Morgan's email failed to set forth the referenced terms or to clarify the previously-omitted provisions regarding D&D's role and responsibility. As a result, Morgan's later email suffered from the same lack of specificity as the initial draft agreement.

{¶35} The complaint additionally asserts that Morgan sent another draft fee contract to Epp in February of 2010. But D&D was not included in that contract at all, which proposed an agreement solely between Epp and Morgan Verkamp. Thus, the February 2010 email cannot possibly form the basis of an offer to contract between Morgan Verkamp and D&D.

{¶36} Even accepting all allegations in the complaint as true and construing all inferences in D&D's favor, the writings referenced in the complaint simply fail to set forth a specific offer to contract between Morgan Verkamp and D&D to jointly represent Epp and share a contingent fee of any recovery obtained from that representation. Absent such an offer, we cannot find a valid written contract to enforce in this case.

B. The Offer Was Withdrawn Before It Was Accepted

{¶37} Even if we were to find that the draft agreement and Morgan's emails about the draft agreement constituted a specific offer, a further problem with D&D's argument is that Morgan withdrew the offer prior to acceptance by either Epp or D&D. Under "traditional contract principles * * * an offer may be withdrawn at any time before it is accepted." *Ohio Title Corp. v. Pingue*, 10th Dist. Franklin No. 10AP-1010, 2012-Ohio-1370, ¶ 48.

{¶38} After Morgan sent Epp the draft agreement and clarified the overall contingency fee amount, the attorneys lost contact with Epp. He never agreed to the arrangement or otherwise assented to the proposed contract. Importantly, neither did D&D. Thus, even were we to interpret the draft agreement and related emails as an offer, there was no acceptance by the other parties to the contract—Epp and D&D.

{¶39} When Morgan left Volkema Thomas, he then emailed Epp to inform him of Morgan and Verkamp's new firm. In that email, Morgan told Epp that, as a result of the principals' change in firms, "the draft contract I sent you several months ago is no longer relevant." This statement revoked any previous offer by Morgan Verkamp to represent Epp in conjunction with D&D. Since the previous offer had not been accepted at that point, the offer could be freely revoked, which it was. *See id.*

{¶40} Morgan subsequently emailed Epp to suggest that Morgan Verkamp would be willing to represent him "on the same terms" as the previous draft offer. However, for the reasons already discussed, those terms were not sufficiently specific to allow a meeting of the minds with regard to D&D's role. Moreover, no party—not D&D or Epp—followed up on Morgan's suggestion of negotiating the prior draft

agreement. As a result, we find no offer and acceptance between D&D and Morgan Verkamp sufficient to form a written contract.

{¶41} While D&D argues that the parties' representation of Epp was to be undertaken with the same terms present in the Vanderslice and Galmines actions, the complaint fails to delineate any writing, or combination of writings, that sets forth those terms with respect to Epp and establishes an acceptance by Epp of those terms. We therefore hold that the complaint failed to establish the existence of an enforceable written contract and that the trial court did not err in dismissing this claim under Civ.R. 12(B)(6).

C. The Complaint Did Not Describe an Oral Contract

{¶42} In addition to suing for breach of a written contract, D&D also advances a breach of contract theory premised on the existence of an oral contract. An oral agreement may be enforceable provided there is sufficient particularity to form a binding contract. *Kodu v. Medarametla*, 1st Dist. Hamilton No. C-160319, 2016-Ohio-8020, ¶ 9. The complaint, however, fails to identify the existence of any oral agreement between the parties regarding Epp's representation and touches only on the written communication alleged to form a contract in this case.

{¶43} Because, even accepting all allegations in the complaint as true, the complaint failed to establish the existence of an oral contract, it failed to state a claim upon which relief could be granted, and the trial court did not err in dismissing D&D's claim for breach of an oral contract.

2. Breach of a Contract Implied in Fact

{¶44} In addition to its claims for breach of written and oral contracts, D&D also alleges a breach of a contract implied in fact. The complaint contains the same allegations in support of this claim as it does for the breach of contract claim. As with the claim for breach of contract, we do not need to consider whether this claim was filed within the applicable limitations period because we find that the complaint fails to establish the existence of a contract implied in fact.

{¶45} As this court has recognized, "an implied-in-fact contract contains no express provision defining its terms." *Deffren v. Johnson*, 2021-Ohio-817, 169 N.E.3d 270, ¶ 17 (1st Dist.). Rather, "the court must construe the facts and circumstances surrounding the offer and acceptance to determine the terms of the agreement." *Id.*, quoting *Linder v. Am. Natl. Ins. Co.*, 155 Ohio App.3d 30, 2003-Ohio-5394, 798 N.E.2d 1190, ¶ 18 (1st Dist.). A contract that is implied in fact "hinges upon proof of all of the elements of a contract." *Akron v. Baum*, 9th Dist. Summit No. 29882, 2021-Ohio-4150, ¶ 15. In fact, "[t]he only difference between an express contract and a contract implied in fact is one of proof. The former is proved by words, the latter by acts, conduct, and circumstances." *J.S. Keate & Co. v. Barnett's Car Wash*, 1st Dist. Hamilton No. C-920895, 1994 Ohio App. LEXIS 100, 10 (Jan. 19, 1994).

{¶46} Again, accepting all allegations in the complaint as true and construing all inferences in the favor of D&D, we hold that the complaint in this case fails to establish the existence of a valid contract implied in fact. To begin, D&D argues that its prior course of conduct in referring Vanderslice and Galmines to Morgan Verkamp and receiving a fee award for doing so establishes a contract with respect to Epp. We disagree. The fact that two other clients agreed to a shared fee arrangement between

D&D and Morgan Verkamp in their cases does not imply that all clients referred by D&D will automatically do so. In fact, the existence of blank lines in the draft fee agreement for the percentages of the contingency to be apportioned to each firm suggests an expectation that the attorneys will negotiate a personalized agreement with each client. The back-and-forth emails between Morgan and Epp and the absence of specifics with regard to D&D's role only confirm the lack of an implied contract between Morgan Verkamp and D&D as to fee splitting.

{¶47} Moreover, even if the allegations in the complaint concerning the parties' actions and the surrounding circumstances could be used to establish the terms of a contract, and we do not hold that they do, they do not establish that Epp accepted any offer of a fee agreement containing those terms from both Morgan Verkamp and D&D. Because the alleged contract concerned the joint legal representation of Epp and included a contingency fee, it could not take effect without Epp's approval. *See* Prof.Cond.R. 1.5(c)(1). We accordingly hold that, with respect to the claim for breach of a contract implied in fact, the complaint failed to set forth a claim upon which relief could be granted, and that the trial court did not err in dismissing the claim.

3. Unjust Enrichment

{¶48} With respect to the claim for unjust enrichment, the complaint alleged that D&D conferred a monetary benefit on Morgan and Verkamp by referring Epp's claim to them, that Morgan Verkamp knew it was receiving a monetary benefit and attempted to conceal their work on Epp's case from D&D, and that Morgan Verkamp retained monetary benefits from D&D under circumstances in which it was unjust to do so.

{¶49} A plaintiff asserting a claim for unjust enrichment must establish "that (1) a benefit was conferred by the plaintiff upon the defendant; (2) the defendant had knowledge of the benefit; and (3) the benefit was retained by the defendant in circumstances where it would be unjust to do so without payment." *Helton v. Fifth Third Bank*, 1st Dist. Hamilton No. C-210451, 2022-Ohio-1023, ¶ 25.

{¶50} R.C. 2305.07 sets forth the statute of limitations for an unjust enrichment claim. *Brown v. Fukuvi USA Inc.*, 2d Dist. Montgomery No. 29294, 2022-Ohio-1608, ¶ 85. It provides that such an action shall be brought within four years after the cause of action accrued. R.C. 2305.07(A). However, the editor's notes to R.C. 2305.07 state:

> Acts 2021, SB 13, § 5 provides: "(A) For causes of action that are governed by division (A) of section 2305.07 of the Revised Code that accrued prior to the effective date of this act, the period of limitations shall be four years from the effective date of this act or the expiration of the period of limitations in effect prior to the effective date of this act, whichever occurs first."

See Tabbaa v. Nouraldin, 8th Dist. Cuyahoga No. 110737, 2022-Ohio-1172, ¶ 23. As this court has held, a claim for unjust enrichment is not subject to the discovery rule for statute-of-limitations purposes. *Palm Beach Co. v. Dun and Bradstreet, Inc.*, 106 Ohio App.3d 167, 175, 665 N.E.2d 718 (1st Dist.1995).

{¶51} D&D's unjust enrichment claim accrued prior to the effective date of 2021 S.B. 13 ("S.B. 13"), which was June 16, 2021. *Tabbaa* at ¶ 23. The applicable limitations period to this claim is thus the earlier of four years from the effective date of S.B. 13, which would be June 16, 2025, or the expiration of the limitations period in

effect prior to the effective date of S.B. 13, which was six years. *Id.* at ¶ 24. Under the latter timeline, D&D's unjust enrichment claim accrued in December of 2014, when Morgan Verkamp settled Epp's qui tam action and did not share any recovery obtained with D&D. The limitations period for the claim therefore expired six years from that date, which was December of 2020. As December of 2020 is earlier than June 16, 2025, that is the period to be applied to determine if the unjust enrichment claim was timely filed. *See Tabbaa* at ¶ 23; editor's notes to R.C. 2305.07.

{¶52} D&D did not file its Ohio complaint until May 2, 2022. Because the limitations period for the unjust enrichment claim expired in December of 2020, well before D&D filed its Ohio complaint, the claim was not timely.

{¶53} In an effort to save its claim, D&D contends that the doctrine of equitable tolling applies to extend the statute of limitations. The equitable-tolling doctrine "is to be applied sparingly and only in exceptional circumstances." *Roach v. Vapor Station Columbus, Inc.*, 10th Dist. Franklin No. 21AP-511, 2022-Ohio-2106, ¶ 8. To establish entitlement to equitable tolling, a plaintiff must show that "(1) he has diligently pursued his rights, and (2) some extraordinary circumstance stood in his way and prevented timely filing." *Strother v. Columbus*, 10th Dist. Franklin No. 22AP-7, 2022-Ohio-4097, ¶ 29. Application of the doctrine of equitable tolling "is generally limited to circumstances in which a litigant is intentionally misled or tricked into missing the filing deadline." *Roach* at ¶ 8.

{¶54} Here, the complaint contains no evidence that D&D was intentionally misled or tricked into missing the filing deadline or that an extraordinary circumstance stood in D&D's way to prevent timely filing of the complaint. Rather, after learning that Morgan Verkamp had represented Epp and obtained a recovery,

D&D elected to file suit in two other jurisdictions prior to filing suit in Hamilton County. This was the product of calculated decision-making by D&D regarding the forum in which to file suit rather than an extraordinary circumstance that prevented D&D from timely pursuing its claim in Ohio. Given this background, we decline to apply the doctrine of equitable tolling to D&D's unjust enrichment claim.

{¶55} We accordingly hold that the trial court did not err in dismissing D&D's claim for unjust enrichment because it was filed outside of the applicable limitations period.

4. Quantum Meruit

{¶56} D&D also sued on a theory of quantum meruit. As set forth in the complaint, this claim contends that "in the event it is determined that there is no express or implied contract between Plaintiff and Defendants, Defendants unjustly received and retained compensation in the form of attorney fees as alleged in the complaint." The complaint further alleges that Morgan Verkamp's retention of such monetary benefits was inequitable and unjust, and that D&D was entitled to equitable relief based on a quasi-contract with defendants under the doctrine of quantum meruit.

{¶57} A claim for quantum meruit is essentially the same as a claim for unjust enrichment. *Univ. Hosp. v. Wells*, 1st Dist. Hamilton No. C-210132, 2021-Ohio-3666, ¶ 11; *Garb-Ko, Inc. v. Benderson*, 10th Dist. Franklin Nos. 12AP-430, 12AP-474, 12AP-475 and 12AP-476, 2013-Ohio-1249, ¶ 26 (recognizing that the claims of unjust enrichment and quantum meruit share the same essential elements but differ in the calculation of damages). Like the claim for unjust enrichment, D&D's claim for quantum meruit accrued in December of 2014 when Morgan Verkamp settled Epp's

qui tam action and did not share any recovery obtained with D&D. Since the complaint was filed on May 2, 2022, the claim for quantum meruit was filed outside of the applicable six-year-limitations period set forth in R.C. 2305.07.[2]

{¶58} We therefore hold that the trial court did not err in dismissing the quantum-meruit claim.

5. Promissory Estoppel

{¶59} D&D's complaint also contained a claim for promissory estoppel. In support of this claim, D&D's complaint relied on the same allegations that were made in support of the claim for breach of contract. It additionally alleged that Morgan Verkamp should reasonably have expected D&D to rely on its promises regarding joint representation, that D&D relied on Morgan Verkamp's promises by referring clients like Epp to Morgan Verkamp instead of to other law firms, and that Morgan Verkamp is bound by its promises to D&D.

{¶60} Like the claim for breach of contract, we need not determine whether the claim for promissory estoppel was filed within the applicable limitations period because we hold that, accepting all allegations in the complaint as true and construing all inferences in favor of D&D, the complaint failed to state a claim upon which relief could be granted with respect to this claim.

{¶61} The elements of a claim for promissory estoppel are: "1) a clear and unambiguous promise, 2) reliance by the party to whom the promise is made, 3) the reliance must be reasonable and foreseeable, and 4) the party relying on the promise

[2] Because the quantum meruit claim accrued prior to the effective date of S.B. 13, like the claim for unjust enrichment, the applicable limitations period for this claim is the earlier of four years from the effective date of S.B. 13, which would be June 16, 2025, or the expiration of the six-year-limitations period in effect prior to the effective date of S.B. 13. Again, as with the claim for unjust enrichment, the earlier date is the expiration of the six-year-limitation period.

must have been injured by the reliance." *Brown,* 2d Dist. Montgomery No. 29294, 2022-Ohio-1608, at ¶ 69, quoting *Mishler v. Hale*, 2014-Ohio-5805, 26 N.E.3d 1260, ¶ 28 (2d Dist.).

{¶62} Much of our previous discussion as to why the complaint failed to state a claim for breach of contract upon which relief could be granted is applicable to our analysis of the promissory estoppel claim as well. The complaint failed to establish that Epp accepted any proposed terms of representation from both Morgan Verkamp and D&D. Morgan Verkamp and D&D may have discussed terms of their joint representation of other clients and the division of any recovery, but the complaint does not establish Epp's assent to joint representation or to specific terms regarding D&D's role in the matter or share of any recovery. And, as discussed above, in the absence of approval from Epp as to Morgan Verkamp and D&D's joint representation, there was no clear and unambiguous promise from Morgan Verkamp to D&D to share any fees it obtained.

{¶63} We accordingly hold that the trial court did not err in dismissing the claim for promissory estoppel.

6. Fraudulent Concealment

{¶64} The last claim asserted in D&D's complaint is that of fraudulent concealment. In support of this claim, the complaint alleged that Morgan Verkamp had a duty to disclose to D&D that it had undertaken representation of Epp, and that it concealed that material fact with the intention that D&D would rely on the concealment. It further alleged that as a result of its reliance on Morgan Verkamp's failure to disclose, D&D was prevented from discovering Morgan Verkamp's breaches.

{¶65} A claim for fraudulent concealment is subject to the four-year statute of limitations set forth in R.C. 2305.09. *Malone v. Malone*, 7th Dist. Columbiana No. 98 CO 47, 1999 Ohio App. LEXIS 2209, 9 (May 5, 1999); *Auto Chem Labs. Inc., v. Turtle Wax, Inc.*, S.D.Ohio No. 3:07cv156, 2008 U.S. Dist. LEXIS 83158, 16 (Sept. 23, 2008). This statute provides that all causes of action for relief on the ground of fraud shall be brought within four years of the cause of action accruing. R.C. 2305.09(C).

{¶66} If D&D's cause of action for fraudulent concealment accrued in 2010 when Morgan Verkamp filed Epp's qui tam action and failed to disclose its representation of Epp to D&D, the limitations period expired in 2014. If the cause of action accrued in 2016 when D&D learned of Morgan Verkamp's representation of Epp, the limitations period expired in 2020. Because the claim for fraudulent concealment was filed outside of the limitations period using either date, we need not specifically determine when the cause of action accrued.

{¶67} Because it was filed outside of the statute of limitations, we hold that the trial court did not err in dismissing D&D's claim for fraudulent concealment. The first assignment of error is accordingly overruled.

Conclusion

{¶68} Because the trial court properly dismissed all claims in D&D's complaint either because the complaint failed to state a claim upon which relief could be granted or because the claims were filed outside of the applicable limitations period, we affirm the trial court's judgment granting Morgan Verkamp's motion to dismiss.

Judgment affirmed.

BERGERON, P.J., and **WINKLER, J.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.

[Cite as *Hoffman v. Atlas Title Solutions, Ltd.*, 2023-Ohio-1706.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

CONOR HOFFMAN,

PLAINTIFF-APPELLANT, **CASE NO. 14-23-04**

v.

ATLAS TITLE SOLUTIONS, LTD, **O P I N I O N**

DEFENDANT-APPELLEE.

Appeal from Union County Common Pleas Court
Trial Court No. 2021-CV-0123

Judgment Reversed and Cause Remanded

Date of Decision: May 22, 2023

APPEARANCES:

Micaela M. Taylor **for Appellant**

David L. Van Slyke **for Appellee**

ZIMMERMAN, J.

{¶1} Plaintiff-appellant, Conor Hoffman ("Hoffman"), appeals the November 17, 2022 judgment of the Union County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Atlas Title Solutions, Ltd. ("Atlas Title"), as to Hoffman's breach-of-contract and breach-of-fiduciary-duty claims. For the reasons that follow, we reverse.

{¶2} This case presents a novel issue requiring the analysis of who bears the responsibility for the escrow fraud that took place in this case. Even though we ultimately conclude that the trial court improperly granted summary judgment in favor of Atlas Title as to Hoffman's breach-of-contract and breach-of-fiduciary-duty claims because (at a minimum) genuine issues of material fact remain as to whether an implied agreement for escrow services exists, we acknowledge that more percolating issues exist in this case. Importantly, we agree that triable issues remain as to whether (at the very least) Atlas Title implemented "proper" security measures to prevent Hoffman's personal information from being "phished" to precipitate the "spoofed" email or whether Hoffman should have recognized that the email was "spoofed."

{¶3} By way of background, this case stems from an April 22, 2021 real-estate closing during which Hoffman and Macie McMahon ("McMahon"),

Hoffman's fiancé, were defrauded of $289,722.19.[1] Hoffman contracted to purchase real-estate located at 322 Moss Court in Marysville, Ohio for $290,000.00 (cash) from Richard D. and Stephanie Little (the "Littles"). *See Rassi v. Buckeye Title Agency, Inc.*, 2d Dist. Montgomery No. 28985, 2021-Ohio-2129, ¶ 3 (explaining that "[t]his was a cash transaction, meaning, of course, that a bank was not involved"). For purposes of the transaction, Tamie Gordon ("Gordon"), a real-estate agent with Big Hill Realty Corporation, dba Better Homes and Gardens Big Hill ("Better Homes and Gardens") represented the Littles, while Jasmine McKenzie ("McKenzie"), a real-estate agent with Consultants Realty, LLC, dba Keller Williams Consultants Realty ("Keller Williams") represented Hoffman and McMahon.

{¶4} Nevertheless, Hoffman and the Littles engaged Atlas Title as the escrow agent and title agent for the sale after Gordon suggested its services.[2] As a result, Melonie McCaulley ("McCaulley") of Atlas Title served as the escrow agent and closing official for the transaction. Importantly, Hoffman and the Littles shared the cost of Atlas Title's services. Of those services, Hoffman bore the recording fee, the wire fee, and cost of title insurance, while Hoffman and the Littles shared the cost of the title binder and Atlas Title's settlement fee.

[1] The purchase contract and deed are in only Hoffman's name.
[2] At the time that Gordon recommended hiring Atlas Title as the escrow officer and title agent for the sale of the property, Gordon "had a marketing role with Atlas" and Atlas Title employed Gordon's fiancé. (McCaulley Depo. at 68).

{¶5} On April 13, 2021, a representative of Keller Williams informed Hoffman and McMahon that they needed to wire $289,722.19 to Atlas Title at least one day prior to the April 22, 2021 closing. McCaulley and Alice Elliot ("Elliot"), McCaulley's assistant, were copied on that email. The email further instructed Hoffman and McMahon that "[t]he Title company will send you wire instructions in a secure email. Upon receiving your wiring instructions, *please contact or have your bank contact the title company above, to confirm wiring instructions*." (Italics sic.); (Underline added.) (Doc. No. 51, Ex. K1). Similarly, the day before, McKenzie instructed Hoffman by text message that "[t]he title company will provide wiring instructions. Be sure to call them to confirm the amount to wire and instructions BEFORE you wire any money." (Emphasis sic.) (Doc. No. 51, Ex. I).

{¶6} Further, Joanie Lowry ("Lowry"), a client care coordinator with Keller Williams, sent a Google Calendar invitation to Hoffman and McMahon as well as McKenzie, McCaulley, and Elliott indicating the details for closing. Critically, the invitation reflects McCaulley's and Elliott's email addresses as melonie@atlastitlesoulutions.com and alice@atlastitlesoulutions.com, respectively.

{¶7} On April 20, 2021, Hoffman and McMahon received an email—which appeared to be legitimate—from someone claiming to be Elliot (from email address titleclosingagent101@gmail.com). *See Children's Apparel Network Ltd. v. Twin City Fire Ins. Co.*, S.D.N.Y. No. 18 Civ. 10322, 2019 WL 3162199, *1 (June 26,

2019), fn. 3 (noting that "'an email spoofing scheme'" is "defined as 'a fraudulent or malicious practice in which a communication is sent from an unknown source disguised as a source known to the receiver'"); *Silverstein v. Keynetics Inc.*, 192 F.Supp.3d 1045, 1051 (N.D.Ca.2016) (defining "email spoofing'" as a situation "by which 'the header of an e-mail appears to have originated from someone or somewhere other than the actual source.'"), quoting Dep't of Justice News Release, *FBI Says Web "Spoofing" Scams Are A Growing Problem*, 2003 WL 21692056, (July 21, 2003); *Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F.Supp.2d 1161, 1163 (D.Nev.2005) (defining "'spoofing'" as "the practice of forging e-mail header information to hide the source of the e-mail").

{¶8} The above email instructed Hoffman and McMahon to wire $289,772.19 to an account purporting to belong to Atlas Title. Importantly, the email was sent to Hoffman and McMahon during the timeframe that they were expecting to receive such email and the email "contained the actual time and date of the closing * * * , [Hoffman's and McMahon's] names, the purchase price, the identity of the individual at Atlas [Title] involved in the closing, and a replica of [Atlas Title's] actual wire transfer form, complete with the Atlas [Title] logo." (Doc. No. 2). Believing the authenticity of the email, Hoffman completed the wire transfer that same day. Indeed, Hoffman, using the contact number provided on the e-mail that he thought was from Atlas Title, contacted the person posing as a

representative of Atlas Title to confirm the transaction. However, the email was not from Elliot or anyone at Atlas Title, and, unbeknownst to Hoffman and McMahon, the email instructed them to wire the funds to an account belonging to an unidentified person. Specifically, Hoffman and McMahon were instructed to wire the funds to Frances Real Estate, LLC at an account held by Wells Fargo Bank in Cincinnati, Ohio.

{¶9} Significantly, prior to the transaction at issue in this case, Atlas Title had been notified of a prior hacking incident, which compromised its email system in February 2021, as well as prior email-spoofing efforts, including incidents involving the same fraudster at issue in this case. Incredibly, the *same* fraudster attempted to spoof the Littles on April 20, 2021—the same day that Hoffman sent the wire transfer to the fraudster—in conjunction with the closing on the house they were purchasing.

{¶10} According to McCaulley, Atlas Title alerted Mark Milliron ("Milliron") of Kloud9, Atlas Title's internet-technology security provider, of the hacking and spoofing incidents. According to McCaulley, Milliron reported that Atlas Title's system was hacked and that the hacker was in an Atlas Title's employee's email "for about an hour." (McCaulley Depo. at 37). However, McCaulley testified that Milliron reported that the hacker did not obtain any

information from Atlas Title. Notwithstanding these incidents, Atlas Title did not inform Hoffman, McMahon, or McKenzie of the occurrences.

{¶11} Nonetheless, Atlas Title emailed "the settlement statement and real wire instructions * * * using an *unencrypted* email" on April 21, 2021 to Hoffman and McMahon. (Emphasis added.) (*Id.*). However, that email was intercepted by Hoffman's email-spam filter.

{¶12} Unaware of the fraud, Hoffman and McMahon "closed on the property on April 22, 2021," and "did not become aware of the legitimate e-mail and that Atlas [Title] had not received the Purchase Funds until April 23, 2021." (*Id.*). Significantly, Atlas Title did not "alert [Hoffman or McMahon] that it had not received the wire transfer" "prior to April 23, 2021." (*Id.*). Consequently, Hoffman and McMahon were unable to recover "the funds through banking channels * * * ." (*Id.*). Nevertheless, because Hoffman and McMahon secured a loan from Hoffman's grandmother, closing was rescheduled and the purchase was completed on April 27, 2021.

{¶13} On July 28, 2021, Hoffman and McMahon filed a complaint in the trial court against Atlas Title, Keller Williams, Better Homes and Gardens, McKenzie, and Gordon alleging claims for negligence, breach of fiduciary duty, and (as an alternative to their negligence claim) breach of contract (as to Atlas Title, Keller Williams, and McKenzie).

{¶14} After being granted leave, Better Homes and Gardens and Gordon filed an answer on September 21, 2021. Likewise, Atlas Title filed its answer along with cross-claims against Keller Williams, Better Homes and Gardens, McKenzie, and Gordon on September 28, 2021. Also that day, Keller Williams and McKenzie filed an answer along with cross-claims against Atlas Title, Better Homes and Gardens, and Gordon. Atlas Title as well as Keller Williams and McKenzie, respectively, alleged cross-claims for implied indemnity and implied contribution.

{¶15} Keller Williams and McKenzie field an answer to Atlas Title's cross-claims on November 1, 2021 and Better Homes and Gardens and Gordon filed an answer to Atlas Title's cross-claims on November 2, 2021.

{¶16} On August 31, 2022, Atlas Title filed a motion for summary judgment, arguing that it "did not owe a legally recognized duty to protect [Hoffman] from third-parties"; that Atlas Title "never agreed to act in a fiduciary capacity for the benefit of" Hoffman or McMahon; Hoffman and McMahon are "barred by the economic loss rule"; and that there was no contract. (Doc. No. 51).

{¶17} After being granted an extension of time, Hoffman and McMahon filed their memorandum in opposition to Atlas Title's motion for summary judgment on October 18, 2022. As evidence in support of their memorandum in opposition to Atlas Title's motion for summary judgment, Hoffman and McMahon submitted the affidavit of Carole Bullion ("Bullion"), an account executive with

Liberty Title Agency in Brighton, Michigan. In her affidavit, Bullion averred that, based on her "experience and review and analysis of the materials provided" in this case, "Atlas Title Solutions owes obligations to [Hoffman and McMahon] by virtue of its serving as an escrow agent for the transaction for the purchase of the home" at issue in this case. (Doc. No. 64, Ex. B).

{¶18} To illustrate, Bullion highlighted that "[t]he title insurance/closing industry is comprised of two parts—title insurance and escrow closing services" and that "[a]n agency can conduct one or both of these functions during a transaction." (*Id.*). "The title insurance part of a transaction includes the examination of a property's title, preparation of a title commitment, and eventual issuance of a title policy once all requirements have been met," while "[t]he escrow closing services portion of a transaction involves the clearance of all requirements of a title commitment and the preparation of closing documents (including generating settlement statements, ensuring the receipt of any funds needed for the transaction, recording documents, and disbursing funds)." (*Id.*).

{¶19} According to Bullion, Atlas Title "was serving as an escrow agent even without a written agreement" when it agreed to provide "escrow closing services" in this case. (*Id.*). Bullion averred that Atlas Title accepted its role as an escrow agent in this case based on (1) "[t]he Master Settlement Statement" reflecting "that Ms. McCaulley was the 'Escrow Officer/Closer"; (2) the fees paid

by Hoffman and McMahon to Atlas Title, including "wire, recording, recording service, and settlement fees"; and (3) because Atlas Title "performed tasks consistent with those of an escrow agent," including closing the transaction. (*Id.*).

{¶20} Regarding escrow agreements, Bullion instructed that an "escrow agreement to act as a settlement or escrow agent for the buyers and/or sellers" is typically not required. (*Id.*). Such agreements are required only "when a settlement/escrow agent needs direction on how to disburse funds held when there are potential liens against the property or if there is a disagreement as to whom the funds should be paid." (*Id.*).

{¶21} After reviewing the evidence in the record, Bullion averred that "Atlas had an obligation to put in place procedures to protect consumers like [Hoffman and McMahon] from the spoofing incident that occurred, as well as warn [Hoffman and McMahon] of known spoofing incidents." (*Id.*). Specifically, Bullion identified that Atlas Title failed [Hoffman and McMahon]

> by (1) not having procedures in place for the safe transmittal of wiring instruction [sic] and adequately informing customers about such procedures; (2) not having procedures in place to warn customers of the risk of spoofing incidents and how to effectively avoid them; and (3) not warning [Hoffman and McMahon] that Atlas had been the target of the same spoofer multiple times prior to the transaction involving [Hoffman and McMahon].

(*Id.*).

{¶22} Further, Bullion averred that "Atlas Title Solutions did not have an adequate compliance program to safeguard their customers' information." (*Id.*). Importantly, Bullion averred that Atlas Title "did not follow its own policy or the [American Land Title Association ("ALTA")] Best Practices," which "fell well below the industry standards of practice and failed their obligations to [Hoffman and McMahon]" in this case. (*Id.*). Importantly, Bullion identified that

> this incident could not have happened had Atlas (1) had adequate procedures for wire transfers in place; (2) had adequate procedures for communicating wire procedures to customers; (3) adequately warned customers about spoofs and how to avoid them; (4) specifically warned [Hoffman and McMahon] that Atlas had been a target by the same fraudster * * * ; and (5) promptly advised [Hoffman and McMahon] that the wire had not been received.

(*Id.*).

{¶23} Atlas Title filed its reply to Hoffman and McMahon's memorandum in opposition to its motion for summary judgment on November 10, 2022.

{¶24} On September 9, 2022, Atlas Title dismissed its cross-claims against Keller Williams and McKenzie without prejudice under Civ.R. 41(A)(1)(a). On October 25, 2022, McMahon dismissed her claims against Atlas Title, Keller Williams, Better Homes and Gardens, McKenzie, and Gordon without prejudice under Civ.R. 41(A)(1). On October 27, 2022, Hoffman dismissed his claims against Keller Williams and McKenzie with prejudice. On November 14, 2022, Hoffman dismissed his claims against Better Homes and Gardens and Gordon with prejudice.

{¶25} On November 17, 2022, the trial court granted summary judgment in favor of Atlas Title as to Hoffman's breach-of-fiduciary-duty and breach-of-contract claims after concluding that "there exists no fiduciary duty or no privity of contract." (Doc. No. 78).

{¶26} On December 16, 2022, Hoffman filed a motion requesting the trial court to certify its November 17, 2022 decision under Civ.R. 54(B), which the trial court granted on December 19, 2022. Consequently, the trial court dismissed Hoffman's negligence and gross-negligence claims with prejudice (based on Hoffman's request) and certified that there is no just reason for delay.

{¶27} Hoffman filed his notice of appeal on December 19, 2022. He raises two assignments of error for our review, which we will address together.

Assignment of Error No. I

The Trial Court erred in dismissing Conor Hoffman's breach of contract claim against Atlas Title Solutions, Ltd.

Assignment of Error No. II

The Trial Court erred in dismissing Conor Hoffman's breach of fiduciary duty claim against Atlas Title Solutions, Ltd.

{¶28} In his assignments of error, Hoffman argues that the trial court erred by granting summary judgment in favor of Atlas Title and dismissing his breach-of-contract and breach-of-fiduciary-duty claims. In particular, Hoffman contends, under his first assignment of error, that the trial court erred by concluding that a

written contract is necessary for Atlas Title to be in contractual privity with him. Consequently, he argues genuine issues of material fact remain as to whether an implied-in-fact contract for escrow services existed. Under his second assignment of error, Hoffman specifically argues that genuine issues of material fact remain as to whether Atlas Title breached its fiduciary duty.

Standard of Review

{¶29} We review a decision to grant summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000). "De novo review is independent and without deference to the trial court's determination." *ISHA, Inc. v. Risser*, 3d Dist. Allen No. 1-12-47, 2013-Ohio-2149, ¶ 25, citing *Costner Consulting Co. v. U.S. Bancorp*, 195 Ohio App.3d 477, 2011-Ohio-3822, ¶ 10 (10th Dist.). Summary judgment is proper where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219 (1994).

{¶30} "The party moving for summary judgment has the initial burden of producing some evidence which demonstrates the lack of a genuine issue of material fact." *Carnes v. Siferd*, 3d Dist. Allen No. 1-10-88, 2011-Ohio-4467, ¶ 13, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). "In doing so, the moving party is

not required to produce any affirmative evidence, but must identify those portions of the record which affirmatively support his argument." *Id.*, citing *Dresher* at 292. "The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; he may not rest on the mere allegations or denials of his pleadings." *Id.*, citing *Dresher* at 292 and Civ.R. 56(E).

Analysis

{¶31} In this case, the trial court granted summary judgment on November 17, 2022 in favor of Atlas Title as to Hoffman's breach-of-contract and breach-of-fiduciary-duty claims. Specifically, the trial court concluded that Atlas Title did not breach any contract with Hoffman. Reaching this conclusion, the trial court reasoned that there is no genuine issue of material fact that there is no contractual privity between Hoffman and Atlas Title. Likewise, the trial court concluded that Atlas Title did not breach a fiduciary duty to Hoffman after concluding there is no genuine issue of material fact that Atlas Title did not owe a fiduciary duty to Hoffman since there is "no written contract or documentation that supports the assertion that Atlas Title was the agreed upon escrow agent." (Doc. No. 78).

{¶32} Generally, Hoffman contends that Atlas Title breached its escrow agreement and its corresponding fiduciary duty as a result of the escrow fraud because Atlas Title agreed to facilitate the deal at issue in this case by conducting a safe and compliant transaction. Atlas Title disputes Hoffman's argument and

contends that "[t]he trial court correctly found that there was no contract by which Atlas agreed to insure or otherwise guarantee that [Hoffman] would successfully fund his purchase of the Real Estate." (Appellee's Brief at 18). Specifically, Atlas Title argues that there is no genuine issue of material fact that no implied agreement existed between it and Hoffman because Hoffman did not "relay his expectations to Atlas and receive confirmation from Atlas that Atlas agreed to ensure that [he] would successfully fund the purchase * * * ." (*Id.* at 19). Based on our review of the record, we conclude that several triable issues remain in this case.

{¶33} We will begin by addressing Hoffman's argument that the trial court erred by granting summary judgment in favor of Atlas Title as to his breach-of-contract claim. For the reasons that follow, we conclude that genuine issues of material fact remain as to whether Atlas Title breached its escrow agreement with Hoffman. "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, ¶ 41.

{¶34} In this case, Hoffman argues that the trial court erred by concluding that a written agreement is a requirement for him to maintain his breach-of-contract claim. "'There are three classes of simple contracts; express, implied in fact, and implied in law.'" *Waffen v. Summers*, 6th Dist. Ottawa No. OT-08-034, 2009-Ohio-

2940, ¶ 31, quoting *Hummel v. Hummel*, 133 Ohio St. 520, 525 (1938). "'The 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 consideration.'" *Rassi*, 2021-Ohio-2129, at ¶ 8, quoting *Thies v. Wheelock*, 2d Dist. Miami No. 2017-CA-8, 2017-Ohio-8605, ¶ 16.

{¶35} "'In express contracts the assent to its terms is actually expressed in offer and acceptance.'" *Waffen* at ¶ 31, quoting *Hummel* at 525. However, "'[i]n contracts implied in fact the meeting of the minds, manifested in express contracts by offer and acceptance, is shown by the surrounding circumstances which make it inferable that the contract exists as a matter of tacit understanding.'" *Id.*, quoting *Hummel* at 525. *See also Union Savs. Bank v. Lawyers Title Ins. Corp.*, 191 Ohio App.3d 540, 2010-Ohio-6396, ¶ 21 (10th Dist.) ("'While both express and implied contracts require the showing of an agreement based on a meeting of the minds and mutual assent, the manner in which these requirements are proven varies depending upon the nature of the contract.'"), quoting *Reali, Giampetro & Scott v. Soc. Natl. Bank*, 133 Ohio App.3d 844, 849 (7th Dist.1999).

{¶36} "An escrow agent 'is an agent of both parties, as well as a paid trustee with respect to the purchase money funds placed in his hands.'" *Hurst v. Ent. Title Agency, Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307, ¶ 40 (11th Dist.), quoting

Pippin v. Kern-Ward Bldg. Co., 8 Ohio App.3d 196, 198 (8th Dist.1982). "The escrow agent owes the parties a duty 'to carry out the terms of the agreement as intended by the parties.'" *Id.*, quoting *Pippin* at 198. """The main function of an escrow agent is to hold documents and funds until the conditions of the purchase agreement are met whereupon the escrow agent releases the documents and funds."""" *Union Savs. Bank* at ¶ 22, quoting *Waffen* at ¶ 32, quoting *Saad v. Rodriguez*, 30 Ohio App.3d 156, 158 (8th Dist.1986).

{¶37} "Ohio courts have held that escrow agreements do not have to be in writing." *Id. See also Johnson v. U.S. Title Agency, Inc.*, 8th Dist. Cuyahoga No. 103665, 2017-Ohio-2852, ¶ 47 (addressing "that an escrow agreement need not be express or formal, and may be deemed to exist where there are only closing instructions"). Indeed, to constitute an "implied escrow agreement[]," "'[n]o precise form of words is necessary to constitute an escrow'" agreement and "'[t]he term "escrow" need not be used.'" *Union Savs. Bank* at ¶ 22, quoting *Waffen* at ¶ 30. Rather, "'whether an escrow exists in any case depends not so much upon the terms the parties may use as upon the intent with which the deed or paper is deposited in the hands of a third party.'" *Id.*, quoting *Waffen* at ¶ 30.

{¶38} We conclude that (at a minimum) a genuine issue of material fact exists as to whether Hoffman and Atlas Title entered into an escrow agreement. *Accord Rassi*, 2021-Ohio-2129, at ¶ 8; *Waffen* at ¶ 36. *See also Union Savs. Bank*

at ¶ 23 (concluding that "the court erred in granting summary judgment on appellant's breach-of-contract claim" "[b]ecause the trial court did not consider whether an implied-in-fact contract existed between the parties and erroneously concluded that appellant had paid no consideration"). Indeed, based on the circumstances surrounding the transaction at issue in this case, a triable issue remains as to whether an escrow agreement exists as a matter of tacit understanding.

{¶39} Here, the record reveals that Hoffman and the Littles requested that Atlas Title serve as the escrow agent *and* title agent for their real-estate transaction. *Compare Lawyers Title Ins. Corp. v. MHD Corp.*, 6th Dist. Erie No. E-10-007, 2010-Ohio-5174, ¶ 3 (noting that the title company "acted as escrow agent and title agent") *with Kenney v. Henry Fischer Builder, Inc.*, 129 Ohio App.3d 27, 31 (1st Dist.1998) (noting the title company served only as the title abstractor). Further, the record reveals that Atlas Title agreed to perform as the escrow agent and title agent and that Hoffman and the Littles promised to pay Atlas Title for those services. (*See, e.g.*, Doc. No. 51, Ex. G); (Doc. No. 34). *Compare Waffen* at ¶ 37 (concluding that "the contract exists as a matter of mutual tacit understanding" even though "not expressly articulated" because all the elements of a contract—offer, acceptance, contractual capacity, consideration, [and] manifestation of mutual assent—exist"). Critically, the record reveals that Hoffman promised to pay the recording fee, the wire fee, and cost of title insurance, while Hoffman and the Littles

promised to share the cost of the title binder and Atlas Title's settlement fee. *See Rassi* at ¶ 8 (analyzing that "the Rassis requested that Buckeye perform the 'necessary title work and closing'" and that "Buckeye, through [its agent], agreed to and did perform the requested services, and the Rassis paid Buckeye for the completed services").

{¶40} Moreover, Hoffman provided evidence in opposition to Atlas Title's motion for summary judgment that an "escrow agreement to act as a settlement or escrow agent for the buyers and/or sellers" is typically not required. (Doc. No. 64, Ex. B). According to Bullion's affidavit (supplied by Hoffman), such agreements are required only "when a settlement/escrow agent needs direction on how to disburse funds held when there are potential liens against the property or if there is a disagreement as to whom the funds should be paid." (*Id.*).

{¶41} Likewise, Buillion averred that Atlas Title "was serving as an escrow agent even without a written agreement" when it agreed to provided "escrow closing services" in this case. (*Id.*). Bullion averred that Atlas Title accepted its role as an escrow agent in this case based on (1) "[t]he Master Settlement Statement" reflecting "that Ms. McCaulley was the 'Escrow Officer/Closer"; (2) the fees Hoffman promised to pay to Atlas Title, including "wire, recording, recording service, and settlement fees"; and (3) because Atlas Title "performed tasks consistent with those of an escrow agent," including closing the transaction. (*Id.*).

{¶42} Nevertheless, the trial court concluded that the parties did not have contractual privity. """A contract is binding only upon parties to a contract and those in privity with them."""" *Gilchrist v. Saxon Mtge. Servs.*, 10th Dist. Franklin No. 12AP-556, 2013-Ohio-949, ¶ 23, quoting *DVCC, Inc. v. Med. College of Ohio*, 10th Dist. Franklin No. 05AP-237, 2006-Ohio-945, ¶ 19, quoting *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, ¶ 25 (10th Dist.). "Privity is defined as '[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter.'" *Bohan v. Dennis C. Jackson Co., L.P.A.*, 188 Ohio App.3d 446, 2010-Ohio-3422, ¶ 12 (8th Dist.), quoting *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, ¶ 10. Generally, "Ohio courts have refused to find privity of contract between a purchaser and a title company when the title examination is performed as part of a contract between the *lender* and the title company." (Emphasis added.) *Rassi*, 2021-Ohio-2129, at ¶ 9.

{¶43} Here, the trial court erroneously concluded that Hoffman and Atlas Title lacked contractual privity. Since the transaction at issue in this case was a cash transaction, Hoffman and the Littles contracted directly with Atlas Title to serve as the escrow agent and title agent for the transaction. *Accord id.* (concluding that "there was privity of contract between" the Rassis and Buckeye because "the Rassis contracted directly with Buckeye to perform the title examination and the closing").

Thus, genuine issues of material fact remain as to whether an implied contract for escrow services exists in this case. Consequently, we conclude that the trial court erred by granting summary judgment in favor of Atlas Title as to Hoffman's breach-of-contract claim.

{¶44} Turning to Hoffman's breach-of-fiduciary-duty claim, Hoffman argues that the trial court erred by granting summary judgment in favor of Atlas Title as to his breach-of-fiduciary-duty claim because (at a minimum) genuine issues of material fact remain as to whether an implied agreement for escrow services exists. Importantly, Hoffman argues that, "[i]f Atlas [Title] was an escrow agent, then Ohio law provides as a matter of common law [that] Atlas [Title] owes fiduciary obligations to Mr. Hoffman." (Appellant's Brief at 24). Atlas Title contests Hoffman's argument by remaining steadfast that the parties did not form any such agreement. Alternatively, Atlas Title argues that "[i]f there is a contract, * * * the economic lass rule precludes recovery for economic damages for any alleged breach of fiduciary duty." (Appellee's Brief at 25). Based on our review of the record, we conclude that genuine issues of material fact remain as to whether Atlas Title breached a fiduciary duty to Hoffman.

{¶45} "'The elements for a breach of fiduciary duty claim are: "(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom."'" *Camp St. Mary's Assn.*

of W. Ohio Conference of the United Methodist Church, Inc., 176 Ohio App.3d 54, 2008-Ohio-1490, ¶ 19 (3d Dist.), quoting *Thomas v. Fletcher*, 3d Dist. Shelby No. 17-05-31, 2006-Ohio-6685, ¶ 13, quoting *Werthmann v. DONet*, 2d Dist. Montgomery No. 20814, 2005-Ohio-3185, ¶ 42. "'A claim of breach of fiduciary duty is basically a claim for negligence that involves a higher standard of care.'" *Id.*, quoting *All Star Land Title Agency, Inc. v. Surewin Invest., Inc.*, 8th Dist. Cuyahoga No. 87569, 2006-Ohio-5729, ¶ 36. "Thus, the party asserting such a breach must establish the existence of a fiduciary duty, a breach of that duty, and an injury proximately resulting therefrom." *Hurst v. Ent. Title Agency, Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307, ¶ 39 (11th Dist.).

{¶46} "'A fiduciary has been defined as a person having a duty, created by his or her undertaking, to act primarily for the benefit of another in matters connected with such undertaking.'" *Id.*, quoting *All Star Land Title Agency* at ¶ 36. *See also Ciszewski v. Kolaczewski*, 9th Dist. Summit No. 26508, 2013-Ohio-1765, ¶ 10 ("A fiduciary relationship is 'a relationship "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust."'"), quoting *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 442 (1996), quoting *In re Termination of Employment of Pratt*, 40 Ohio St.2d 107, 115 (1974). "A fiduciary's role may be assumed by formal appointment or may arise from a more

informal confidential relationship, wherein 'one person comes to rely on and trust another in his important affairs and the relations there involved are not necessarily legal, but may be moral, social, domestic, or merely personal.'" *Foelsch v. Farson*, 5th Dist. Knox No. 19CA000036, 2020-Ohio-1259, ¶ 20, quoting *Craggett v. Adell Ins. Agency*, 92 Ohio App.3d 443, 451 (8th Dist.1993).

{¶47} Significantly, """[t]he very name 'escrow' gives it the earmarks of a trust."""" *Johnson*, 2017-Ohio-2852, at ¶ 45, quoting *Pippin*, 8 Ohio App.3d at 198, quoting *Squire v. Branciforti*, 131 Ohio St. 344, 355 (1936). "'Thus, the escrow agent is a *fiduciary* agent for both parties to a purchase agreement.'" (Emphasis added.) *Id.*, quoting *Saad*, 30 Ohio App.3d at 158. "The escrow agent owes the parties a duty 'to carry out the terms of the agreement as intended by the parties."' *Hurst*, 157 Ohio App.3d 133, 2004-Ohio-2307, at ¶ 40, quoting *Pippin* at 198. However, "[a]n escrow agent, despite fiduciary status, will not be liable when he or she acts in accordance with the escrow agreement or instructions." *Waffen* at ¶ 34.

{¶48} Based on our resolution of Hoffman's first assignment of error, we conclude that (at a minimum) a genuine issue of material fact exists as to whether an implied contract for escrow services exists. *See Waffen*, 2009-Ohio-2940, at ¶ 36 (concluding that "sufficient documentation and evidence exists to show that an implied contract for escrow exists"). Importantly, the record reveals that Atlas Title agreed to act as the escrow agent and title agent in this case. *See id.* at ¶ 35

(analyzing that "Midland acted as escrow agent, and knew the terms by which it was bound to perform" because, in part, its agent "acknowledged that Midland provided escrow services for Waffen"). Indeed, the record reflects that Hoffman was a party to the transaction and that the parties promised to pay Atlas Title the fees for its escrow services as listed in the settlement agreement. *See id.* (concluding that the record reflected sufficient evidence that an implied contract for escrow services existed because, in part, the title agency "collected fees for escrow services as listed in the settlement worksheet"). Thus, because we conclude that a triable issue as to the existence of an escrow agreement exists, a triable issue as to the existence of a fiduciary duty remains and, consequently, whether Atlas Title breached that duty. *See Hurst* at ¶ 54 (O'Neill, J., dissenting) (concluding that "as an escrow agent, [the title company] owed a fiduciary duty to Hurst"); *Waffen* at ¶ 41 (establishing that "ordinarily, escrow agents are fiduciaries").

{¶49} Furthermore, contrary to Atlas Title's contention that the economic-loss rule precludes Hoffman's recovery for economic damages for any alleged breach of [a] fiduciary duty," Atlas Title's argument is misplaced. Generally, "[a]bsent tangible physical harm to persons or tangible things, there is generally no duty to exercise reasonable care to avoid economic losses to others." *Clemens v. Nelson Fin. Group, Inc.*, 10th Dist. Franklin No. 14AP-537, 2015-Ohio-1232, ¶ 34. "The economic-loss rule, therefore, 'generally prevents recovery in tort of damages

for purely economic loss.'" *Id.*, quoting *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶ 6. "That is, 'a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.'" *Id.*, quoting *Corporex* at ¶ 6.

{¶50} "Although the economic-loss rule sweeps widely, it does *not* preclude all tort claims for economic damages." (Emphasis added.) *Id.* at ¶ 36. Importantly, "[a] plaintiff may pursue such a tort claim if it is 'based exclusively upon [a] discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity.'" *Id.*, quoting *Corporex* at ¶ 9. Exempt claims include, as relevant here, a breach-of-fiduciary-duty claim. *Id.*, citing *Morgan v. Mikhail*, 10th Dist. Franklin No. 08AP-87, 2008-Ohio-4598, ¶ 69. Therefore, Atlas Title's argument regarding the application of the economic-loss rule as to Hoffman's breach-of-fiduciary-duty claim fails.

{¶51} For these reasons, Hoffman's assignments of error are sustained.

{¶52} Having found error prejudicial to the appellant herein in the particulars assigned and argued, we reverse the judgment of the trial court and remand for further proceedings.

Judgment Reversed and
Cause Remanded

MILLER, P.J. and WILLAMOWSKI, J., concur.