SLIP OPINION NO. 2023-OHIO-1866

MARCHBANKS, DIR. OF THE OHIO DEPARTMENT OF TRANSPORTATION, APPELLEE, *v.* ICE HOUSE VENTURES, L.L.C., ET AL., APPELLANTS.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Marchbanks v. Ice House Ventures, L.L.C.*, Slip Opinion No. 2023-Ohio-1866.]

Contracts—Damages—Eminent domain—Parties did not make a material mistake about a basic assumption on which their contract was made—Settlement agreement was enforceable—Court of appeals' judgment reversed and cause remanded to the court of appeals.

(No. 2022-0047—Submitted February 7, 2023—Decided June 8, 2023.)

APPEAL from the Court of Appeals for Franklin County, No. 21AP-24, 2021-Ohio-4195.

STEWART, J.

{¶ 1} In this discretionary appeal, we are asked to determine whether there was an enforceable settlement agreement between appellee, Jack Marchbanks,

director of the Ohio Department of Transportation ("ODOT"),[1] and appellants, Ice House Ventures, L.L.C., Lion Management Services, L.L.C., and Smokestack Ventures, L.L.C. (collectively, "IHV"), related to an appropriation proceeding resulting from ODOT's exercise of eminent domain over property owned by IHV. Because we conclude that there was an enforceable settlement agreement, we reverse the judgment of the Tenth District Court of Appeals and remand the case to that court for further proceedings.

I. Facts and Procedural History

{¶ 2} As part of a project to repair and improve Interstate 70 running through downtown Columbus, the state, through ODOT, sought to exercise eminent domain over property owned by IHV in the city's Brewery District. In 2016, ODOT filed a petition in the Franklin County Court of Common Pleas to appropriate the property in accordance with statutorily prescribed eminent-domain procedures. IHV exercised its right to demand a jury trial to determine the value of the appropriated property. In 2018, a few days before trial was scheduled to begin, ODOT and IHV informed the trial court that they had reached an agreement on a compensation package, under which ODOT would compensate IHV in exchange for a release of all claims for further compensation, including interest, arising from the appropriation. The trial court memorialized the parties' settlement agreement in a judgment entry.

{¶ 3} The compensation portion of the settlement agreement consisted of two parts: (1) a payment of $900,000 from ODOT to IHV and (2) the transfer of a small parcel of land, which is referred to in the agreement as the "Parking Mitigation Property," to IHV. The second part of the compensation portion of the agreement, regarding the transfer of the small parcel of land, is the basis of this

1. The current director of ODOT, Marchbanks, is substituted as a party for the former director of ODOT, Jerry Wray, who was the director when this action commenced. *See* S.Ct.Prac.R. 4.06(B); Civ.R. 25(D)(1).

dispute. Although the city of Columbus owned the small parcel of land at the time of the agreement, ODOT believed that the city would be willing to transfer the parcel to ODOT, which could then transfer the parcel to IHV. The agreement stated that "ODOT shall provide IHV with marketable fee simple title" to the Parking Mitigation Property and that the property "shall be conveyed to [IHV] free and clear of all limitations of access or other liens and encumbrances, excepting only such restrictions and easements of record which shall not unreasonably interfere with use of the Parking Mitigation Property as a parking lot sufficient to hold twelve (12) parking spaces as generally depicted in [a parking plan attached to the agreement as an exhibit]."

{¶ 4} There is no dispute that ODOT was unable to transfer the Parking Mitigation Property to IHV. Because that portion of the agreement was not performed, the following language in the agreement is relevant to this appeal:

> It is further **ORDERED** that, within one year after the date hereof: (1) if ODOT fails to convey marketable fee simple title to the Parking Mitigation Property as provided herein; or (2) if ODOT fails to modify its plans for [the improvements to Interstate 70] to allow for the construction of a parking lot on the Parking Mitigation Property in accordance with the Parking Plan; or (3) if all permits and/or approvals required for IHV to construct a parking lot on the Parking Mitigation Property in accordance with the Parking Plan have not been obtained; then the Court shall retain jurisdiction to determine the damages due to IHV for the failure of ODOT to deliver this portion of the consideration for ODOT's appropriation of IHV's property.

(Boldface and capitalization sic.)

{¶ 5} In April 2019, IHV moved to enforce the agreed judgment entry on the settlement. In June 2019, the trial court held an evidentiary hearing on the motion and thereafter issued an order granting IHV's motion and awarding damages to IHV. The following portion of the order summarizes the trial court's reasoning for the damages award and states the amount of the award:

> Once the Parties settled the case in October 2018, ODOT's Eminent Domain action terminated. After ODOT informed IHV and the Court that it could not deliver the Parking Mitigation Property, this case became about ODOT's potential breach of settlement, nothing more. The Court appreciates the evidence from the numerous expert witnesses who testified about the various eminent domain appraisals, but once ODOT conceded it could not deliver the Parking Mitigation Property, this case ceased to be about the value of IHV's property before and after the taking. It was never about the damage to the residue, or what the Parking Mitigation parcel is worth. The issues are 1) did ODOT breach the settlement, and if so, 2) what is the value of twelve (12) parking spaces in the Brewery District, because that is what ODOT promised to IHV. Those spaces are what IHV expected, and the monetary damages for the value of those twelve (12) spaces is what IHV is entitled to under Ohio law.
>
> **V. HOLDINGS AND ORDERS**
>
> Based on the foregoing, the Court hereby issues the following orders:
>
> 1. The Court awards Ice House Ventures judgment in the amount of nine hundred thousand dollars ($900,000.00).
>
> * * *

(Boldface and capitalization sic.)

{¶ 6} ODOT appealed the trial court's judgment to the Tenth District Court of Appeals, raising four assignments of error: (1) "The trial court erred in enforcing settlement because there was no meeting of the minds on a material term of settlement," (2) "The trial court lacked subject-matter jurisdiction to award contract damages against ODOT," (3) "The trial court erred in finding that ODOT breached the settlement," and (4) "The trial court erred in finding ODOT liable for IHV's attorney fees."

{¶ 7} The Tenth District reversed the trial court's judgment based on ODOT's first assignment of error. 2021-Ohio-4195, ¶ 7, 17-18. The court of appeals noted that the term "damages" was not defined in the agreement. *Id.* at ¶ 11. It also noted that ODOT had argued that the term "damages" in the agreement meant eminent-domain damages, i.e., "damages to the residue," whereas IHV had contended that "damages" meant contract damages, i.e., "expectation damages premised on the benefit of the bargain." *Id.* The court determined that "the record does not contain any evidence to support the conclusion that the parties mutually agreed that 'damages' meant expectation damages versus damages to the residue and indeed, shows that the parties disagreed on what 'damages' meant." *Id.* at ¶ 17. And it held that "[b]ecause there is no evidence of a meeting of the minds on what the parties meant by 'damages,' the trial court erred by finding there was an enforceable settlement agreement in the first place." *Id.* The court of appeals vacated the agreed judgment entry on the settlement and remanded the matter for trial "as any appropriation proceeding would be tried—on the issues of compensation for the property taken and damages to the residue." *Id.*

{¶ 8} This court accepted IHV's discretionary appeal on the following propositions of law[2]:

> [1.] When parties enter into a written settlement agreement, a meeting of minds is presumed. That presumption may only be rebutted by competent evidence, not after-the-fact argument by counsel.
>
> [2.] After a written agreement is memorialized in a court order, a party may not collaterally attack the order by claiming that no meeting of the minds exists. A trial court has the inherent authority to interpret and enforce its own order.
>
> [3.] A party alleging a breach of a settlement agreement in an eminent domain matter is entitled to its expectation damages.

See 166 Ohio St.3d 1448, 2022-Ohio-994, 184 N.E.3d 159.

II. Law and Analysis

{¶ 9} Under its first proposition of law, IHV asks this court to hold that Ohio law presumes that a meeting of the minds exists when parties enter into a written agreement and that the presumption may be overcome only by "clear and satisfactory" evidence. At the outset, we note that the posture of this case is different from that in a contract dispute in which one side files a complaint seeking

2. We note that in its memorandum in opposition to jurisdiction, ODOT, the appellee here, presented three "Plaintiff-Appellee's Proposition[s] of Law," even though ODOT did not file a cross-appeal in this court. In its merit brief, ODOT has presented three "Proposition[s] of Law" that do not correspond directly to IHV's propositions of law that we accepted for review. Although parties in this court are free to strategically craft their arguments as they see fit, we caution appellees to be mindful of two relevant rules of practice in this court. S.Ct.Prac.R. 7.03(B)(1)(b) requires a memorandum in response to a memorandum in support of jurisdiction to contain "[a] brief and concise argument in support of the appellee's position regarding each proposition of law raised *in the memorandum in support of jurisdiction*." (Emphasis added.) And S.Ct.Prac.R. 16.03(B)(1) states, "The appellee's brief *shall* * * * *answer the appellant's contentions* * * * and make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken." (Emphasis added.)

to enforce contractual terms and the other side asserts defenses. Here, the proceeding in the trial court that led to this appeal was a damages hearing conducted pursuant to the parties' settlement agreement, which stated that the trial court "shall retain jurisdiction" to determine damages. The arguments at that hearing centered on the proper nature and amount of damages and not on whether the agreement was valid or any alleged lack of clarity about the parties' performances or obligations under the agreement.[3] Although ODOT argued in the trial court that it should interpret the meaning of the term "damages" in the agreement as meaning "damages to the residue," ODOT also presented evidence of what it asserted to be the proper calculation of expectation damages, if the court were to determine that expectation damages were what IHV should be awarded.

{¶ 10} ODOT attempts to analogize this case to *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 683 N.E.2d 337 (1997). In *Rulli*, this court recognized that "[t]o constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear." *Id.* at 376. We held that "[w]here the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment." *Id.* at 377.

{¶ 11} We find *Rulli* wholly distinguishable from this case. This court described the facts in *Rulli* as follows:

3. We recognize that ODOT argued in its response to IHV's motion to enforce the agreed entry on settlement that "[i]n the alternative, if as stated by IHV, 'the property conveyance was the linchpin to the settlement[,]' then this court can set aside the entire settlement and set this for a trial on the merits to determine the issues of compensation for the property taken and damages to the residue, if any, pursuant to standard practice in eminent domain actions." We understand that argument to go to IHV's request for specific performance—i.e., that the court require ODOT to convey the Parking Mitigation Property to IHV—and not to any argument that the contract was not valid or enforceable.

> Though upon first examination, the settlement terms as read into the record on June 23, 1993, appear reasonably clear, the parties were subsequently unable to agree upon the meaning and effect of those terms. They were unable to execute a formal purchase agreement and they did not provide the court with an entry as ordered by the court. The parties instead offered varying interpretations of the terms read into the record, and disputed nearly every major element of the purported agreement. Therefore, the language read into the record at the initial hearing reflects, at best, merely an agreement to make a contract.

Id. at 376-377.

{¶ 12} Unlike in *Rulli*, the record in this case demonstrates that ODOT and IHV clearly intended to enter into, and in fact entered into, a binding settlement agreement. During ODOT's closing argument at the June 2019 evidentiary hearing, ODOT's counsel stated about the agreement: "It's black and white. It's written. Your Honor signed it. You know, so we are not disputing that at all. What we—what we are disputing is that valuation attached to [the Parking Mitigation Property]." The circumstances in this case are not analogous to those in *Rulli*, in which the parties had failed to even reduce their purported oral agreement to a judgment entry as was requested by the court, *id.* at 374-375.

{¶ 13} Moreover, " '[e]ssential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976). Because a breach of a contract is not an inevitability, it cannot follow that a definition of "damages" is an essential element of a contract.

If a contract's terms are properly performed, the question of damages never arises. Indeed, a valid contract may exist and bind the parties without its mentioning damages at all. Thus, we reject ODOT's argument that *Rulli* instructs that the settlement agreement here was not a valid contract simply because the term "damages" was not defined therein.

{¶ 14} After the trial court awarded expectation damages to IHV, ODOT argued on appeal that the trial court had erred by enforcing the parties' settlement agreement because, in its view, there had been no meeting of the minds as to what the parties meant by the term "damages." Indeed, ODOT's arguments in the court of appeals and here seem to conflate the concepts of lack of a meeting of the minds and mutual mistake. Its arguments are best understood as claims that it should be *relieved* of its obligations under the settlement agreement, not that it did not agree to those obligations under the settlement in the first place.

{¶ 15} This court has recognized the doctrine of mutual mistake as a ground for rescission of an existing agreement. *See Reilley v. Richards*, 69 Ohio St.3d 352, 632 N.E.2d 507 (1994), citing *Irwin v. Wilson*, 45 Ohio St. 426, 15 N.E. 209 (1887). The mistake must be one that is material to the contract, i.e., a mistake regarding a basic assumption on which the contract was made that frustrates the intent of the parties. *Id.* at 353; 1 Restatement of the Law 2d, Contracts, Section 152(1), at 385 (1981). "The party alleging mutual mistake bears the burden of proving its existence by clear and convincing evidence." *Coldwell v. Moore*, 2014-Ohio-5323, 22 N.E.3d 1097, ¶ 18 (7th Dist.), citing *Frate v. Rimenik*, 115 Ohio St. 11, 152 N.E. 14 (1926), paragraph one of the syllabus.

{¶ 16} ODOT asserts that the "textbook" example of mutual mistake found in *Raffles v. Wichelhaus*, 159 Eng.Rep. 375 (1864), is instructive here. In *Raffles*, the parties agreed to the sale of cotton arriving at Liverpool, England, from Bombay, India, aboard a ship named "Peerless." *Id.* But two ships named "Peerless" sailed from Bombay to Liverpool several months apart carrying cotton,

with the seller having meant one of those ships and the buyer having meant the other. *Id.* ODOT argues that the parties' disagreement over the meaning of the term "damages" here is like the confusion over the ships in *Raffles*.

{¶ 17} But unlike in *Raffles*, the purported "mistake" here does not concern the basis of the parties' agreement. Specifically, the parties' performances under the agreement—ODOT's compensation to IHV for the appropriation of IHV's land and IHV's release of claims for further compensation relating to the appropriation—did not depend on a particular calculation or amount of damages. And the parties did not contract for a particular type or amount of damages, despite being sophisticated parties negotiating in good faith with the advice of legal counsel. For example, the parties could have included a liquidated-damages clause or some specific description of the type of damages to be awarded if that were appropriate under and material to the agreement. However, the agreement is clear that the parties left the question of damages to the trial court, if the question arose. The agreed judgment entry on the settlement plainly states: "[T]he Court shall retain jurisdiction to determine the damages due to IHV for the failure of ODOT to deliver this portion of the consideration[, i.e., the Parking Mitigation Property,] for ODOT's appropriation of IHV's property."

{¶ 18} Moreover, had the terms of the contract been fully performed, the question of damages never would have arisen. In other words, even assuming that each party understood the term "damages" to mean something different, that mistake would not frustrate the obligations of the parties or the intent of the agreement, because the parties' performances of the terms existed independently of the type or amount of damages that might become due if a breach occurred. Any uncertainty regarding the meaning that each party assigned to the term "damages" in the agreement is irrelevant, because the essential elements of the parties' agreement were clear. *See, e.g.*, *Coldwell*, 2014-Ohio-5323, 22 N.E.3d 1097, at ¶ 22 ("Regardless of the meaning the [buyers] attached to the term 'minerals' or

what they believed they already owned, the record is clear that they intended to buy *all* of the mineral rights to those parcels from the [sellers]" [emphasis sic]). Thus, even if we were to determine that the parties understood the meaning of the term "damages" in the agreement differently, that is not a mistake that is material to the agreement.

{¶ 19} Further, recall that a material mutual mistake is " 'a mistake * * * as to a basic assumption *on which the contract was made* [that] has a material effect on the agreed exchange of performances.' " (Ellipsis and brackets added in *Reilley* and emphasis added.) *Reilley*, 69 Ohio St.3d at 353, 632 N.E.2d 507, quoting 1 Restatement, Section 152(1), at 385. ODOT points to no evidence showing that it had a different understanding of the term "damages" *at the time* the agreement was made in a way that has a material effect on the parties' agreed-upon settlement obligations. The point in time at which a different understanding of a term occurs is important. The court of appeals determined that the parties' "fundamentally divergent understandings" of the term "damages" was apparent based on the arguments presented at the hearing on the motion to enforce the settlement agreement, during which ODOT attempted to minimize its damages exposure while IHV attempted to maximize its potential recovery. 2019-Ohio-4195 at ¶ 16. This after-the-fact disagreement about how to construe the term "damages" does not support a finding that the parties made a material mistake about a basic assumption *on which the contract was made.*

{¶ 20} Accordingly, ODOT has not shown by clear and convincing evidence that it is entitled to rescission of the settlement agreement or that any lack of understanding about the term "damages" in the agreement renders it unenforceable.

III. Conclusion

{¶ 21} Because we conclude that the settlement agreement is enforceable, we reverse the judgment of the Tenth District holding otherwise. The Tenth

District's decision resolved ODOT's appeal only on its first assignment of error, in which ODOT argued that there had been no meeting of the minds on a material term of the settlement agreement. 2021-Ohio-4195 at ¶ 19. Based on that resolution, the court of appeals declined to address ODOT's three remaining assignments of error, some of which raise issues that may be determinative of the parties' liabilities and obligations under the agreement. Given that those issues remain unresolved in the court of appeals, and given our resolution of IHV's first proposition of law, we need not address IHV's remaining propositions of law to this court and, instead, we remand the cause to the Tenth District Court of Appeals for it to address ODOT's remaining assignments of error.

Judgment reversed
and cause remanded.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, BRUNNER, and DETERS, JJ., concur.

Dave Yost, Attorney General, Benjamin M. Flowers, Solicitor General, Samuel C. Peterson, Deputy Solicitor General, and William J. Cole and L. Martin Cordero, Assistant Attorneys General, for appellee.

Vorys, Sater, Seymour & Pease, L.L.P., Joseph R. Miller, John M. Kuhl, Daniel E. Shuey, and Danielle S. Rice, for appellants.

Dinsmore & Shohl, L.L.P., and Richik Sarkar; and Kevin D. Shimp, Ohio Chamber of Commerce, urging reversal for amicus curiae, Ohio Chamber of Commerce.

[Cite as *Mitchell v. Fix*, 2023-Ohio-1957.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BOBBY MITCHELL	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2022 CA 00037
	:	
JEFFREY M. FIX	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Case No. 2022 CV 00153
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	June 13, 2023

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee:
JOSHUA J. BROWN 5086 North High Street Columbus, OH 43214	BRIAN S. STEWART LUCAS A. THOMPSON 118 North Washington Street Circleville, OH 43113

Delaney, J.

{¶1} Plaintiff-Appellant Bobby Mitchell appeals the August 30, 2022 judgment entry of the Fairfield County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} On April 4, 2022, Plaintiff-Appellant Bobby Mitchell filed a verified complaint for defamation with the Fairfield County Court of Common Pleas. Mitchell named Defendant-Appellant Jeffrey M. Fix as the party defendant. Based on procedural posture of this case, the following facts are taken from Mitchell's complaint, which included his affidavit, the affidavit of Michael Tussey, and copies of Facebook posts.

Election for the Bloom Township Trustee

{¶3} For the November 2, 2021 election cycle, Plaintiff-Appellant Bobby Mitchell was running for one of the two open seats for Trustee in Bloom Township, Fairfield County, Ohio. He was running as a Republican. His opponents for the Trustee position were Carol Moore and Brian Randles, also members of the Republican Party.

The Mailer

{¶4} Sometime in the Fall of 2021, residents of Fairfield County received political mailers through the USPS. The mailer said,

JOE BIDEN & THE DEMOCRATS ARE DESTROYING AMERICA

X RISING GAS PRICES …

X EMBARRASSMENT IN AFGHANISTAN …

X OUTRAGEOUS MASK MANDATES …

DON'T LET CAROL MOORE & BRAIN RANDLES Do the Same to Bloom Township

The mailer included a photo of Joe Biden surrounded by the American flag. It also included the photos of Carol Moore and Brian Randles. Mitchell's complaint states the mailings were sent by the "End Corruption PAC."

{¶5} Mitchell states in his complaint that he spoke with Fix on the telephone regarding the mailers two times, during which Mitchell told Fix that he was not aware of or involved in the dissemination of the mailers.

{¶6} According to his March 22, 2022 affidavit attached to Mitchell's complaint, Michael Tussey was the Chief of Police in Baltimore, Ohio at the time Fairfield County residents received the mailers. Chief Tussey was contacted by a Fairfield County resident who was concerned about the mailer. After contacting Mitchell who denied any knowledge of the source of the mailer, Chief Tussey started an "inquiry" into the mailer. Chief Tussey's affidavit does not state the "inquiry" was an official police investigation. After his inquiry into the mailer, which included contacting people involved in central Ohio politics, Chief Tussey was convinced that Mitchell did not participate in the mailer. Chief Tussey contacted Fix to share the results of his inquiry. Fix told Chief Tussey that he was going to withdraw his endorsement of Mitchell.

Fix's Facebook Posts

{¶7} In 2021, Defendant-Appellant Jeffrey M. Fix was the Chairman of the Fairfield County Republican Party. He also served as a Fairfield County Commissioner.

{¶8} Mitchell attached Exhibit C to his complaint, which are Facebook posts regarding the Bloom Township Trustee Election. The following posts are relevant to this appeal.

{¶9} On October 23, 2021, "Jeff Fix" posted the following to his Facebook page:

Endorsing candidates is a tricky business. As a Commissioner and as Chairman of the Republican Party in Fairfield County I am asked often to support one candidate or another. I reserve these endorsements for people that I know and trust, and who I believe will do an excellent job as a public servant. I am proud of both my and the County Party's record (two separate things) when it comes to endorsements.

This year, among many others in various races, Bobby Mitchell asked me to support his run for Bloom Township Trustee. As I had encouraged Bobby previously to run for a local office so that he could prove himself as a public servant, and have been working with Bobby to expand our conservative minority base in the Republican Party in Fairfield County, I felt it appropriate to endorse Bobby in this race.

* * * So last weekend I publicly stated my endorsement for both Bobby Mitchell and Brian Randles for the two seats up for election in Bloom Township.

Thursday I got a copy of a mail piece that was sent out in Bloom Township – paid for by the "End Corruption PAC." This mail piece is a succinct example of how unsavory our political process has become. The piece is supportive of Bobby Mitchell but goes on to attempt to tie Brian Randles and Carol Moore (also an incumbent Republican) to Joe Biden * * *. I thought I had seen it all in the most recent Republican Primary for the 15th Congressional District, but this mail piece is – by far – the worst thing I've ever seen. It honestly makes me want to throw up.

* * * This mail piece is the most disgusting piece of political advertising I've ever witnessed. I confronted Bobby Mitchell with all of this yesterday. He completely and passionately denied any knowledge of this piece, said it was an embarrassment, and immediately made public his disdain for it. And on the other side I've had some people tell me that Bobby had predicted that a PAC would be putting out a mail piece that would be helpful to him.

At this point, I don't know what to believe.

Here's what I do know. I know that Brian Randles and Carol Moore have been Township Trustees in Bloom Township for quite some time and there's never been any drama there. * * *

We've worked really hard in the County Party, and I've worked really hard as Chairman, to minimize the drama with all of our elected officials. We've successfully removed those who created problems, and replaced them with capable, hard-working, honest public servants; and we've recruited, endorsed, and supported strong candidates who have become great elected officials as well.

I hear the passion in Bobby Mitchell's voice when he declares that he has nothing to do with this advertisement. I honestly believe him. But if avoiding drama and at the same time supporting those who to job well is the path we follow, then perhaps we should all support Brian Randles and Carol Moore in Bloom Township and hope that Bobby Mitchell can find a way to become a public servant that does not create this type of angst.

> This is a no-win situation. Bobby Mitchell is a decent, smart man who served in the military, serves his community as a pastor, a day-care operator, and a food-bank leader. He takes care of many people who need help and that is something I admire.
>
> At the same time, there is no place for this type of tripe in our local politics.
>
> * * * There is no place in our county for this type of campaign advertising. Not now, hopefully not ever.
>
> So there you have it. All my thoughts. I have rarely struggled more with knowing exactly what the right thing to do is. I hate being in this position. I hate that some stupid PAC – who really knows the motivation – has taken a blender to our local political scene. I hate that Bobby Mitchell, if he had nothing to do with this, is getting sucked under the bus. And I hate that if he did have something to do with it that he didn't understand that this is NOT how to win the hearts and minds of the electorate.

(Exhibit C).

{¶10} On October 28, 2021, "Jeff Fix, Fairfield County Commissioner" posted the following on his Facebook page:

> I am officially rescinding my endorsement of Bobby Mitchell. The same PAC that "mysteriously" intervened into the Bloom Township race has now joined the Canal Winchester City Council race where – not coincidentally – Bobby Mitchell's "God-daughter" is a first time candidate. There is no room for this type of politics in Fairfield County. I am tremendously disappointed.

(Exhibit C).

{¶11} On October 29, 2021, "Jeff Fix" posted the following on his Facebook page:

> To all my friends in Bloom Township. You may have gotten a piece of political mail yesterday that is outrageous and sick. Brian Randles and Carol Moore are good Republicans, strong Township Trustees, and just plain good people. The fact that a PAC is spreading lies like this can easily be attributed to the fact that Bobby Mitchell is in this race. This is NOT how we run elections in Fairfield County and that message needs to be reiterated by the voters loud and clear. I strongly urge all the good people of Bloom Township to vote for both Brian Randles and Carol Moore on Tuesday.

(Exhibit C).

Post-Election Comments

{¶12} The election was held on November 2, 2021. Carol Moore and Brian Randles were elected as the Trustees for Bloom Township.

{¶13} Chief Tussey attended the Fairfield County Republican Party Executive Committee meeting on November 4, 2021. During Fix's leadership report, Chief Tussey averred that Fix told the party members to avoid engaging in negative campaigning and raised the Bloom Township Trustee election as an example. Chief Tussey further stated in his affidavit that he heard Fix say:

> As a result, Fix decided to endorse Mitchell [for the Bloom Township Trustee election]. Fix stated that a Political Action Committee unknown to him (Fix), entered the Bloom Township Trustee race, disseminating negative documents by mail about the two candidates opposing Mitchell in the race, in support of Mitchell's campaign. Fix stated that he contacted Mitchell and

> that Mitchell pleaded to Fix that Mitchell had nothing to do with the PAC and had no control of what was being said. Fix said this is why he withdrew his endorsement and (in Fix's words) "distanced himself from Mitchell." Fix ended by saying that Mitchell's actions had sickened him.

(Exhibit B).

Claim for Defamation

{¶14} The sole claim raised in Mitchell's complaint was for defamation. He argued Fix's statement that Mitchell sent the mailers was false and Fix had knowledge of the falsity. (Complaint, ¶ 26). Fix's statements on Facebook and at the Fairfield County Republican Party Executive Committee Meeting also disseminated false, factual information about Mitchell and was not Fix's opinion. (Complaint, ¶ 30, 31). Fix's statements subjected Mitchell to public contempt, public hatred, ridicule, shame, and disgrace. (Complaint, ¶ 18, 28). "Fix's statements were defamatory per se, where damages are presumed. Alternatively, due to the defamation of Defendants, Plaintiff suffered and continues to suffer irreparable harm. Plaintiff asserts these damages to exceed $25,000.00." (Complaint, ¶ 38).

Motion to Dismiss

{¶15} On May 6, 2022, Fix filed a motion to dismiss the complaint in lieu of an answer. Fix argued that Mitchell's complaint for defamation should be dismissed for failure to state a claim under Civ.R. 12(B)(6). Fix first claimed that his statements regarding Mitchell were not defamatory per se. In his complaint, Mitchell argued that Fix defamed him when he said that Mitchell sent the mailers. Fix admitted that he authored the October 23, 28, and 29, 2021 Facebook posts. A review of his Facebook posts,

however, showed that Fix never said Mitchell sent the mailers; rather, Fix stated the PAC sent the mailers. Fix next argued that as the Chairman of the Fairfield County Republic Party, any statements he made about Mitchell, a candidate for public office in Fairfield County, were privileged. Finally, Fix argued that upon a review of the alleged facts in a light most favorable to Mitchell, it could be argued that Mitchell raised arguments for defamation per quod; however, Mitchell's complaint did not plead special damages and therefore, his complaint should be dismissed for failure to state a claim.

{¶16} Mitchell filed his memorandum contra on May 20, 2022. Mitchell argued Fix's statements that Mitchell was responsible for the mailers were knowingly false and therefore, met the Civ.R. 12(B)(6) threshold for defamation per se. It was unnecessary to plead special damages because Mitchell was not alleging defamation per quod.

{¶17} Fix filed a reply on May 31, 2022.

{¶18} On August 30, 2022, the trial court issued its judgment entry granting Fix's motion to dismiss Mitchell's complaint for defamation. The trial court found that taking all statements in Mitchell's complaint as true and construing all inferences in favor of Mitchell, Mitchell raised a claim for defamation per quod. Mitchell, however, did not plead special damages in his complaint and therefore, failed to state a claim entitling him to relief.

{¶19} It is from this judgment that Mitchell now appeals.

ASSIGNMENTS OF ERROR

{¶20} Mitchell raises four Assignments of Error:

I. THE TRIAL COURT ERRED BY FINDING THAT THE COMPLAINT OF PLAINTIFF-APPELLANT BOBBY MITCHELL FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE BASED, PURSUANT TO CIV.R. 12(B)(6),

BECAUSE MITCHELL'S COMPLAINT FOR DEFAMATION WAS A COMPLAINT FOR DEFAMATION PER QUOD, AND THUS REQUIRED AN AVERMENT OF SPECIAL DAMAGES IN THE PLEADING.

II. WHETHER THE TRIAL COURT IMPROPERLY BASED ITS OPINION ON CERTAIN ERRONEOUS CONCLUSIONS OF FACT, WHERE THERE WAS A MATERIAL AND GENUINE DISPUTE REGARDING THOSE FACTS.

III. THE TRIAL COURT ERRED IN FINDING THAT APPELLEE FIX'S STATEMENTS WERE PRIVILEGED.

IV. THE TRIAL COURT ERRED IN FINDING THAT APPELLEE FIX'S STATEMENTS WERE OPINION.

ANALYSIS

Standard of Review

{¶21} On August 30, 2022, the trial court dismissed Mitchell's complaint for defamation pursuant to Civ.R. 12(B)(6), failure to state a claim upon which relief can be granted. Our standard of review on a Civil Rule 12(B) motion to dismiss is de novo. *Dover Chemical Corp. v. Dover*, 2022-Ohio-2307, 192 N.E.3d 559, ¶ 32 (5th Dist.) citing *Huntsman v. State*, 5th Dist. Stark No. 2016CA00206, 2017-Ohio-2622, 2017 WL 1710432, ¶ 20, citing *Greeley v. Miami Valley Maintenance Contractors Inc*., 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey County Bd. of Commissioners*, 65 Ohio St.3d 545, 605 N.E.2d 378 (1992). Under a de novo analysis, we must accept all factual allegations of the

complaint as true, and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991). In order to dismiss a complaint pursuant to Civil Rule 12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle plaintiff to relief. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 573 N.E.2d 1063 (1991).

Types of Defamation

{¶22} To establish defamation, the plaintiff must show (1) a false statement of fact was made, (2) that the statement was defamatory, (3) the statement was published, (4) the plaintiff suffered injury as a proximate result of the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement. *Dordea v. Freleng*, 5th Dist. Stark No. 2022 CA 00128, 2023-Ohio-1408, ¶ 13 citing *Am. Chem. Soc. v. Leadscope, Inc*., 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶77, citing *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1st Dist.1996). "Defamation can take the form of libel or slander. Libel refers to written or printed defamatory words and slander generally refers to spoken defamatory words." *Id*. quoting *Matikas v. Univ. of Dayton*, 152 Ohio App.3d 514, 2003-Ohio-1852, 788 N.E.2d 1108, ¶27.

{¶23} There are two types of defamation, defamation per se and defamation per quod. For a communication to be defamatory per se, it must be actionable upon the very words spoken without regard to the interpretation of the listener, i.e., it is actionable on its face. *Spitzer v. Knapp*, 5th Dist. Delaware No. 19 CAE 01 0006, 2019-Ohio-2770, 2019 WL 2764071, ¶ 51 citing *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Contr. Trades Council*, 73 Ohio St.3d 1, 651 N.E.2d 1283 (1995). A statement is defamation per

se, on its face, when it reflects upon his or her character in such a manner that would cause him to be ridiculed, hated, or held in contempt, or in a manner that will injure him in his trade or profession. *Id*. Unless a privilege applies, damages and fault are generally presumed to exist if a statement is defamatory per se. *Wampler v. Higgins*, 93 Ohio St.3d 111, 752 N.E.2d 962 (2001). Defamation per quod refers to a communication that is capable of being interpreted as defamatory, i.e., it must be determined by the interpretation of the listener, through innuendo, as being either innocent or damaging. *Dover Chem. Corp. v. Dover*, 5th Dist. No. 2021 AP 07 0016, 2022-Ohio-2307, 192 N.E.3d 559, 2022 WL 2357262, ¶ 59 citing *Northeast Ohio Elite Gymnastics Training Center v. Osborne*, 183 Ohio App.3d 104, 2009-Ohio-2612, 916 N.E.2d 484 (9th Dist.). For defamation per quod, special damages must be pled and proven. *Northeast Ohio Elite Gymnastics Training*, 2009-Ohio-2612 at ¶ 9. Special damages are of such a nature that they do not follow as a necessary consequence of the complained injury. *Id*. "Special damages are those direct financial losses resulting from the plaintiff's impaired reputation." *Becker v. Toulmin*, 165 Ohio St. 549, 138 N.E.2d 391 (1956); *Sky v. Westhuizen*, 5th Dist. Stark No. 2018 CA 00127, 2019-Ohio-1960.

I. Defamation Per Quod

{¶24} In his first Assignment of Error, Mitchell contends the trial court erred when it found that his complaint alleged defamation per quod. We disagree.

{¶25} A statement is defamatory per se when it falls into three categories: (1) the imputation of an indictable offense involving moral turpitude or infamous punishment, (2) the imputation of some offensive or contagious diseases calculated to deprive the person or society, or (3) having the tendency to injure the plaintiff in his trade or occupation.

Martin v. Wegman, 1st Dist. Hamilton Nos. C-180268, C-180308, 2019-Ohio-2935, ¶ 13 quoting *Williams v. Gannett Satellite Information Network, Inc.*, 162 Ohio App.3d 596, 2005-Ohio-4141, 834 N.E.2d 397, ¶ 8 (1st Dist.). To constitute libel per se, the statement must reflect "upon the character of such person by bringing him into ridicule, hatred, or contempt, or affect him injuriously in his trade or profession." *Martin*, 2019-Ohio-2935, ¶ 20 quoting *Becker v. Toulmin*, 165 Ohio St. 549, 553, 138 N.E.2d 391 (1956). Mitchell argues that Fix's Facebook posts and statements at the Fairfield County Republican Party Executive Committee Meeting are defamatory per se because he accused Mitchell of moral turpitude. He also claimed that Fix's false statements "were made in the context of an attempt to persuade people to view Mitchell with contempt." (Verified Complaint, page 6). We find that while Mitchell's complaint recites the language from the defamation per se definition, the factual allegations in his complaint cannot sustain an action for defamation per se.

{¶26} In order for a statement to be defamatory per se, it must be defamatory upon the face of the statement. *Dudee v. Philpot*, 2019-Ohio-3939, 133 N.E.3d 590, ¶ 68 (1st Dist.) citing *Becker v. Toulmin*, 165 Ohio St. 549, 556, 138 N.E.2d 391 (1956). When a statement is only defamatory through interpretation, innuendo, or consideration of extrinsic evidence, then it is defamatory per quod and not defamatory per se. *Id*. Mitchell's defamation complaint centers on the mailer. In Mitchell's complaint he alleged, "26. Fix's statement that Mitchell sent the mailers was false. 27. Fix's statements were about Plaintiff Bobby Mitchell – Fix stated that Mitchell sent the mailers." (Verified Complaint, page 5). A review of Fix's Facebook posts and Chief Tussey's affidavit attached to the verified complaint shows, however, Fix never stated that Mitchell sent the mailer. Fix

stated the PAC sent the mailer. Fix's Facebook posts and alleged statement as recited in Chief Tussey's affidavit requires interpretation and consideration of extrinsic evidence that Mitchell was responsible for the mailer.

{¶27} Fix posted on Facebook:

> This mail piece is the most disgusting piece of political advertising I've ever witnessed. I confronted Bobby Mitchell with all of this yesterday. He completely and passionately denied any knowledge of this piece, said it was an embarrassment, and immediately made public his disdain for it. And on the other side I've had some people tell me that Bobby had predicted that a PAC would be putting out a mail piece that would be helpful to him.
>
> At this point, I don't know what to believe.
>
> * * *
>
> I hear the passion in Bobby Mitchell's voice when he declares that he has nothing to do with this advertisement. I honestly believe him. But if avoiding drama and at the same time supporting those who to job well is the path we follow, then perhaps we should all support Brian Randles and Carol Moore in Bloom Township and hope that Bobby Mitchell can find a way to become a public servant that does not create this type of angst.

Another Facebook post stated:

> The same PAC that "mysteriously" intervened into the Bloom Township race has now joined the Canal Winchester City Council race where – not coincidentally – Bobby Mitchell's "God-daughter" is a first time candidate.

Another Facebook post stated, "The fact that a PAC is spreading lies like this can easily be attributed to the fact that Bobby Mitchell is in this race." Drawing all reasonable inferences in favor of Mitchell, Mitchell stated a claim for defamation per quod because Fix implied that Mitchell was involved with the mailer and negative politics through interpretation and innuendo.

{¶28} Our analysis does not end here, however. In a claim for defamation per quod, the plaintiff must allege special damages. "Special damages are damages of such a nature that they do not follow as a necessary consequence of the claimed injury. * * * Civ.R. 9(G) requires that if special damages are claimed, they must be specifically stated." *Peters v. Ohio Dept. of Rehab & Corr*., 10th Dist. Franklin No. 14AP-1048, 2015-Ohio-2668, ¶ 7 quoting *Mohican Ents., Inc. v. Aroma Design Group, Inc*., 10th Dist. Franklin No. 96APE01-26 (Sept. 10, 1996). In this case, Mitchell's allegations regarding damages cannot sustain an action for defamation per quod because he did not allege special damages in his verified complaint. "Absent an explanation of how the harm extends beyond reputation and translates into a separate harm, like an economic harm, the complaint fails to plead special damages at all, much less with the specificity required by Civ.R. 9(G)." *Martin*, 2019-Ohio-2935, ¶ 21.

{¶29} Accordingly, the trial court did not err in granting Fix's motion to dismiss pursuant to Civ.R. 12(B)(6) on Mitchell's claim for defamation per quod as Mitchell cannot maintain a defamation per quod claim without pleading special damages. *Spitzer v. Knapp*, 5th Dist. Delaware No. 19 CAE 01 0006, 2019-Ohio-2770, 2019 WL 2764071, ¶ 52 citing *McWreath v. Cortland Bank*, 11th Dist. Trumbull No. 2010-T-0023, 2012-Ohio-

3013; *Peters v. Ohio Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 14AP-1048, 2015-Ohio-2668.

{¶30} Mitchell's first Assignment of Error is overruled.

II., III., and IV.

{¶31} In his second Assignment of Error, Mitchell contends the trial court improperly based its opinion on certain erroneous conclusions of fact. He argues in his third Assignment of Error that the trial court erred in finding that Fix's statements were privileged. Finally, in his fourth Assignment of Error, he contends the trial court erred in finding that Fix's statements were opinions.

{¶32} This appeal is before us regarding the trial court's judgment to grant Fix's motion to dismiss pursuant to Civ.R. 12(B)(6). Our standard of review on a Civ.R. 12(B)(6) appeal is de novo, which requires an independent review of the evidence before the trial court without any deference to the trial court's determination. In this case, our de novo review found that Mitchell alleged a claim for defamation per quod but failed to plead special damages pursuant to Civ.R. 9(G), necessitating a dismissal for failure to state a claim.

{¶33} Having determined the trial court's granting of Mitchell's claim pursuant to Civ.R. 12(B)(6) on the issue of defamation per quod was appropriate, we find it is unnecessary to address the Mitchell's remaining Assignments of Error based on the two-issue rule. *Blackmore v. S. Cent. Power Co*., 5th Dist. Fairfield No. 13-CA-54, 2014-Ohio-2946, 2014 WL 2998702, ¶ 36 citing *Hawkins v. World Factory, Inc*., 5th Dist. Muskingum No. CT2012–0007, 2012–Ohio–4579, ¶ 22.

{¶34} The second, third, and fourth Assignments of Error are overruled.

CONCLUSION

{¶35} The judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Delaney, J.,

Hoffman, P.J. and

Baldwin, J., concur.

[Cite as *Metro Renovations 12, L.L.C. v. Sabir*, 2023-Ohio-1867.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

METRO RENOVATIONS 12, LLC,	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
BILAL SABIR, ET AL.,	:	Case No. 2022 CA 00022
	:	
Defendants - Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Case No. 20 CV 243
JUDGMENT:	Reversed in Part and Affirmed in Part
DATE OF JUDGMENT:	June 6, 2023

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
MICHELLEA TENNIS DANIEL FRUTH Stebelton Snider LPA 109 N. Broad Street, Suite 200 P.O. Box 130 Lancaster, Ohio 43130	FELICE HARRIS Harris Law Firm, LLC Reynoldsburg, Ohio 43068

Baldwin, J.

{¶1} Bilal and Faatimah Sabir appeal the Fairfield County Court of Common Pleas judgment in favor of appellee, Metro Renovations 12, LLC. The Sabirs also appeal the trial court's decisions finding that Bilal Sabir acted in bad faith and that Faatimah Sabir was liable for attorney's fees and court costs. The Sabirs also assign as error the trial court's decision barring Sabirs' expert from tendering an opinion regarding the percentage of completion of the project and they contend the trial court improperly took judicial notice of evidence outside the record.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant, Bilal Sabir, is a veteran of the Vietnam war who suffered a disabling injury during his service. Faatimah Sabir is his spouse and also serves as his veteran's affairs fiduciary. Together they determined that Bilal's quality of life could be improved by modifications to his home that would increase his mobility and preserve his independence. They sought and were granted a sum of money from the Department of Veteran's Affairs (VA) to complete renovations to Sabir Bilal's home to enable him to "'live more independently in a barrier-free environment.' VA Manual 26-12, Chapter 1-3." (Judgment Entry, March 23, 2022, p. 1; Exhibit 18, p. 1-4). The total amount allotted for this Special Adaptive Housing Grant (SAH) was $81,080.00.

{¶3} Metro Renovations 12, LLC (Metro) is a contractor with experience in renovation and construction of residential properties, but with no experience in completing renovations financed through a Specially Adapted Housing Grant financed by the VA. Bilal contacted Metro about completing the renovations to his home, and Metro, interested

in expanding their business into completion of SAH projects, agreed to meet with the Sabirs to discuss the project.

{¶4} After discussion the parties entered into an agreement for the completion of renovations to the home. The Agreement was comprised of a three-page contract, plans and a material list all of which were either signed or initialed by Bilal. This document was then approved by SAH Agent, Rand Barnes, as meeting the VA's minimum property requirements. (Exhibit 18, p. 5-8; Exhibits 21, 25).

{¶5} During the hearing Faatimah repeated that she was Bilal's VA fiduciary, implying that her presence or her approval was necessary for a valid contract. Neither Faatimah nor Bilal provided further insight regarding the purpose or breadth of her fiduciary authority and it is evident that she had no concern regarding his entering the Agreement at the time it was signed. During the trial, she acknowledged that she was aware that Bilal was executing the documents and that she was at work and was unable to attend the signing. There is no evidence that she took advantage of the opportunity to review the documents before or after they were approved by Bilal.

{¶6} The contract provided no initial payment, then five separate disbursements at specific stages of the project. The first disbursement was $10,000; the second disbursement was $28,800; the third disbursement was to be $14,000 the fourth disbursement was $12,000; and the final disbursement would represent 20.08 % of the contract or $16,280 for a total contract amount of $81,080.00. (Exhibit 40). Under the terms of the contract, the first four disbursements would occur after inspection and approval by the SAH agent with no requirement that Bilal be consulted for his input or

approval. Disbursement of the final amount required the written approval of the SAH agent and Bilal Sabir.

{¶7} The contract expressly states that only Bilal and Metro are parties to the contract but the VA retained the authority to inspect and confirm that Metro's work "conforms to the contract, plans and/or specifications submitted to and approved by the VA" prior to the disbursement of any funds. (Exhibit 1, ⁋ I, VI, VIII; Exhibit 40). The fact that disbursements were made by the VA to Metro confirms that the SAH agent approved Metro's work. While the Sabirs expressed frustration with the SAH agent and the VA, disagreed with their assessment of Metro's work, and at one point insisted that a new SAH agent be assigned to their case, they did not include the SAH agent or the VA in this matter, so the approval of the SAH agent and the disbursement of funds subject to that approval are not at issue.

{¶8} The contract was to be completed within approximately ninety days of the deposit of the funds into escrow, but the contract contained no express date upon which work was to be completed, nor did it state that time was of the essence. While the record contains a reference to delay in the start of work due to the completion of unidentified documentation, it is not possible to determine with certainty who was responsible for that delay. Metro did begin work on the renovations in October. (Trial Transcript, p. 302, lines 9-14).

{¶9} The details of the contract changed significantly when it was discovered that the municipality would not issue a permit for the changes to the Sabirs' deck. The Sabir's assumed responsibility for obtaining that permit, explained that they intended to pursue litigation over that issue but did not succeed in obtaining a permit. Metro had completed

preparation of the porch and the deck, but halted all work when it became clear that no permit was to be issued to complete the deck. The modifications to the deck and the porch were removed from the scope of the contract and the price reduced by $14,000.00.

{¶10} The Sabirs requested additions to the contract including a generator, ceiling fan, smart thermostat, fireplace tile and sump pump repair, but these items were not part of the SAH grant. Metro completed work regarding some of those items and issued a separate invoice, but the Sabirs made no payment.

{¶11} Metro began work on the home in October 2018 while the Sabirs were out of the home. When the Sabirs decided to move back into the home in November 2018 the work was not yet completed and progress was slowed due to their presence. With the Sabir's in the home, Metro felt restrained to work only normal business hours and no earlier or later.

{¶12} The Sabir's were originally pleased with the work performed by Metro, at one point concluding a text message with a comment that "* * * overall I am quite pleased with your work and you." Exhibit 39, p. 5. The relationship soured later and the comments were not complementary. One of the last texts offered in Exhibit 39 reflects a comment from the Sabirs: "Curse you, and your lying mother, may you go out of business very, very soon! I hope you get nothing but Curse after Curse on you, your lying mother and your worthless bullshit business!" These comments were in response to a request from Metro: "VA has proved their unwillingness to help you or us. The court system hasn't been favorable for you either. You ready to talk and figure this out without our lawyer and VA? Or should we continue to let this money sit and escrow where neither of us can touch it? IM(sic) sick of all this red tape with having them involved. Let me know if you'd like to

come to a decision together so we can move forward in life." (Exhibit 30, p. 45). The dispute between the parties was not resolved and the current litigation is the result.

{¶13} The point at which the relationship broke down is not clear from the record. The Sabirs were frustrated that the project was not completed in the time frame they anticipated. When they discovered that Metro installed a laminate flooring instead of the wood that they expected, the relationship between the parties became more adversarial. Metro considered the project ninety-five to ninety-seven percent complete but they stated they were unable to complete the project because the Sabirs would not let them enter the home. Metro claimed that it made several attempts to enter the home or agree to a plan to finish the work, but they were not permitted access beginning in December 2018. The Sabirs claim they never prevented Metro from entering the home, but a comment of Faatimah Sabir regarding access suggests that permission was limited: "They were welcome to come back during the time that was allotted for them for the contract." (Trial Transcript, Volume II, page 315, lines 18-20).

{¶14} The VA attempted to assist with mediation, but that effort was unsuccessful and Metro claimed that the Sabirs continued to keep them from entering the home and completing the work.

{¶15} On April 2, 2019, the Sabirs filed a small claims complaint in Franklin County, seeking to recover hotel expenses and boarding expenses for their pets they attributed to Metro. (Trial Transcript, page 282, line 20 to page 283, line 3; page 288, line 8; page 314, lines 1-2, 11-12). Once the lawsuit was filed, the VA no longer attempted to engage in any mediation between the parties. On April 8, 2019 the Sabirs delivered an email to the VA and Metro explaining that they had lost all confidence in Metro and the

lack of confidence is why Bilal "has not decided to proceed with choosing any options presented." (Exhibit 31).

{¶16} The small claims complaint was dismissed and the dispute between the parties remained unresolved. Metro contends it offered to discuss a resolution of the matter with the Sabirs, but claims that their attempts were rejected. Bilal expressed his anger and frustration in expletive riddled texts he delivered to Metro toward the end of 2019.

{¶17} On July 17, 2020, Metro filed a complaint in the Fairfield County Court of Common Pleas alleging that Bilal had breached the contract and that the Sabirs had been unjustly enriched as a result of the labor and materials provided by Metro. The Sabirs responded by filing an answer and counterclaim alleging Metro breached the contract, that Metro was negligent and damaged the home and that Metro had been unjustly enriched as a result of the payment of services that were of no value to the Sabirs. The Sabirs also filed a third-party action against Esteban Ceron, a member of Metro, individually, claiming that his negligence was a direct and proximate cause of damages to the Sabirs. This third-party complaint was withdrawn prior to the trial court deciding the matter.

{¶18} Prior to trial there was a dispute regarding the Sabirs' identification of their expert witnesses and compliance with Civ.R. 26. After submission of motions, the trial court ordered that the Sabirs provide Metro the curriculum vitae and compensation schedule of the experts that they intend qualify as an expert witness on or before March 7, 2022 and warned that "failure to do so will result in the court precluding defendants from soliciting expert testimony from these witnesses." (Magistrate Order, March 4, 2022).

On March 7, 2022 the Sabir's filed a document stating that they were "unable to comply with the magistrate's order * * * will proceed with only the expert testimony of Richard Acree."

{¶19} The case was presented to the trial court on March 15, 2022 and completed the following day. On March 23, 2022 the trial court issued a lengthy judgment entry awarding plaintiff the amount of $28,290.00 and dismissing plaintiff's second cause of action regarding unjust enrichment for lack of evidence showing an increase in value of the Sabirs' home. The Sabirs' counterclaim was dismissed. The trial court also ruled that "[b]ecause the Defendant filed a small claims lawsuit against the sole owner of the Plaintiff during the execution of the contract, essentially preventing a workable solution being reached in good faith, this court will award attorney fees to the Plaintiff as well as assess court costs upon the Defendants." (Judgment Entry, March 23, 2022, page 4).

{¶20} The parties filed pleadings regarding the attorney fees and, on June 7, 2022 the trial court awarded Metro attorney fees and costs in the amount of $20,548.41.

{¶21} The Sabirs filed a notice of appeal and submitted six assignments of error:

{¶22} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING FAATIMAH SABIR LIABLE FOR ATTORNEYS FEES AND COURT COSTS."

{¶23} "II. THE TRIAL COURT ERRED IN FINDING BILAL SABIR "BREACHED THE WRITTEN CONTRACT BY REFUSING TO ALLOW PLAINTIFF TO COMPLETE THE CONTRACT FOR CONSTRUCTION SERVICES RENDERED UNDER THE CONTRACT."

{¶24} "III. THE TRIAL COURT ERRED IN DISMISSING DEFENDANT-APPELLANTS(SIC) FIRST DEFENSE AND COUNTERCLAIM AGAINST METRO RENOVATIONS 12, LLC."

{¶25} "IV. THE TRIAL COURT ERRED IN PROHIBITING DEFENDANTS' EXPERT FROM TENDERING AN OPINION AS TO METRO'S PERCENTAGE OF COMPLETENESS."

{¶26} "V. THE TRIAL COURT ERRED IN FINDING DEFENDANT, BILAL SABIR, ACTED IN BAD FAITH."

{¶27} "VI. THE TRIAL COURT ERRED IN TAKING IMPROPER JUDICIAL NOTICE OF EVIDENCE OUTSIDE THE RECORD."

STANDARD OF REVIEW

{¶28} The issues presented in this appeal implicate different standards of review. This court reviews de novo issues of law, including the sufficiency of the evidence, See *N. Side Bank & Trust Co. v. Trinity Aviation LLC*, 2020-Ohio-1470, 153 N.E.3d 889, ¶ 17 (1st Dist.), but reviews fact finding under a deferential standard of review. In weighing the evidence, we must presume that the findings of the trier of fact are correct, and if the evidence is susceptible of more than one construction, as a reviewing court, we must give it that interpretation that is consistent with the verdict or finding and judgment. *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 21.

{¶29} While the standard of review in a breach of contract action is whether the trial court erred as a matter of law, the Sabirs' assignments of error focus on factual issues. *Unifund, CCR, L.L.C. v. Johnson,* 8th Dist. Cuyahoga No. 100600, 2014–Ohio–

4376 ¶ 7, citing *Arrow Unif. Rental LP v. Wills*, Inc., 6th Dist. Wood No. WD–12–057, 2013–Ohio–1829. To the extent a legal issue is addressed, we must "determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law." *Id*. At the same time, due deference must be given to the trial court's findings of fact if supported by competent, credible evidence. *State v. Clements,* 5th Dist. No. 08 CA 31, 2008–Ohio–5549 ¶ 11.

THE CONTRACT

{¶30} The contract between Bilal Sabir and Metro warrants examination prior to beginning our analysis as it differs significantly from the more common construction contract. The renovations to be completed under the contract were funded by a grant from the Department of Veteran's Affairs. In exchange for the grant, Bilal empowered the VA to inspect and approve the work that was completed as well as certify that Metro's work complied with the applicable Minimum Property Requirements (MPR), the Special Adaptive Housing Requirements and the plan that had been approved by the VA. While the contract explicitly states that the VA is not a party to the contract, it possessed authority to conclude that the work performed by Metro satisfied the requirements of the contract and to pay for that work. We find this significant because the Sabirs are contradicting the findings of the VA and claiming the work did not fulfill the terms of the contract and violated the MPR's, raising the question of whether the VA should have been included as a party to this action.

{¶31} The contract between Bilal Sabir and Metro was subject to the requirements established by the VA, the most relevant of which to this matter is that the funds be held in escrow subject to the completion of the process for the release of those funds to the

contractor. VA Manual 26-12, captioned Specially Adapted Housing Grant Processing Procedures Loan Guaranty Operations for Regional Offices (Manual) (Exhibit 18) contains an explanation of the regulations controlling the use and application of SAH grant funds. The Manual provides a clear requirement that the grant monies be deposited by the veteran, in this case Bilal, into an escrow account where they are to be held pending authorization of their release. (Manual, p. 8-2). Paragraph VIII of the contract provides that “Payment will be in accordance with VA procedures and in accordance with the disbursement schedule agreed to by the contractor and VA. It is understood that no payment will be made "up-front", and that there will be a holdback of 20% after the job is complete subject to final approval by VA and the veteran.” (Exhibit 1, p. 3).

{¶32} Funds held in escrow are to be disbursed only after fulfilling the requirements of the Manual. At appropriate stage of the project, a Compliance Inspector (CI) who has been assigned to the project completes an inspection to ensure that the work completed by the contractor fulfills the term of the contract.

{¶33} The purpose of a compliance inspection is to verify compliance of individual construction phases, or turn-key construction, for all Specially Adapted Housing (SAH) and Special Housing Adaptation (SHA) grant projects in which grant funds are being disbursed to a builder. The compliance inspection is used to certify that the property has been constructed in accordance with Department of Veterans Affairs (VA) approved plans and specifications, including SAH minimum property requirements (MPs) and recommended adaptations (RAs).

{¶34} VA can authorize the release of grant funds to the builder only after:

- A compliance inspection has been completed by a VA-assigned compliance inspector (CI).
- A VA Form 26-1839, Compliance Inspection Report (CIR), indicating "no evidence of noncompliance observed" is received.
- The CIR has been reviewed and approved by the SAH Agent.

Manual, page 7-2.

{¶35} The parties acknowledge the authority of the VA to conduct the compliance inspections: “We, the undersigned, do hereby acknowledge and agree to periodic inspections and final approval by a VA compliance inspector and/or SAH agent of the above reference construction to assure that the construction conforms to the contract, plans and/or specifications submitted to and approved by the VA” and that payment will be made in accordance with VA procedures.” (Exhibit 18, page 3).

{¶36} Upon the CI’s report of compliance, the escrow agent is authorized to issue payment to the contractor. As noted in the Escrow Agreement signed by Bilal, “The Veteran agrees that for the purpose of this Agreement the VA Representative is authorized to consent on his/her behalf to disbursements of escrowed funds by the Escrowee to such payees, in such amounts and at such times as the VA Representative considers proper to fulfill the purposes and conditions of this Agreement.” The Manual does provide that a signed letter of satisfaction from the Veteran is needed prior to the release of the final 20% of the contract amount, but this contract stalled prior to the final compliance inspection, and no Final Field Review was completed, so those provisions are not applicable. (Manual, p. 5-26, 7-10, 8-9, 8-11, 10-2).

{¶37} The record in this case contains evidence demonstrating that two disbursements were made by the VA to Metro, consequently the trial court had before it evidence to support a conclusion that the VA completed at least two compliance inspections and found that Metro had completed construction "in accordance with Department of Veterans Affairs (VA) approved plans and specifications, including SAH minimum property requirements (MPRs) and recommended adaptations (RAs)."

{¶38} We review the Sabirs assignments of error in the context of this unique contractual arrangement.

ANALYSIS

{¶39} As a preliminary matter, we will address the first assignment of error regarding the award of attorney fees and costs against Faatimah Sabir with the fifth assignment of error addressing the finding of bad faith on the part of Bilal Sabir as it is the more logical place for that assignment.

II.

{¶40} In their second assignment of error, the Sabirs argue that the trial court erred in finding that Bilal breached the written contract by refusing to allow Metro to complete the contract. The Sabirs offer citations to parts of the record reflecting correspondence regarding their request to have Metro complete parts of the project or make corrections, but it is evident that most of these exchanges occurred in the early part of December 2018. Metro offered testimony that supports a conclusion that it was excluded from the home "somewhere between December and January" or after much of the correspondence the Sabirs describe in their brief. (Trial Transcript, Vol. I, p. 129). Metro claims that it did send working crews to the home and that the Sabirs did not permit

them to enter. This rejection is confirmed in the email, delivered January 24, 2019 and admitted as Exhibit 27 where a representative from the VA states:

> * * I believe it will take some cooperation. It will also take your cooperation for Metro to be able to correct any defects that may exist in the work already completed.
>
> It seems that Metro is willing to attempt to address your concerns, but you must be willing to let them. In addressing any issues, Metro only must comply with the signed contract. No party of that contract is bound to any new terms, conditions, and/or materials that have not been agreed to by all parties and then formally adopted as a part of the contract.
>
> We all want resolution and we all want your satisfaction with the completed work. The work and materials are clearly defined in your husband's contract with Metro. The builder needs to be able to resume work to finish the project in accordance with the contract.

{¶41} Both witnesses who testified on behalf of Metro confirmed that they attempted to return to the site to complete the work and correct errors, but were not permitted access. (Trial Transcript, p. 59, lines 8-15; p. 131, line 7 to p. 132, p. 2). In response to a question regarding Metro being locked out of the premises, Faatimah responded in a manner that suggests that Metro's access was limited by Faatimah's belief that the contract was subject to a fixed date of completion:

> You're insisting that you did not lock Plaintiff off your property; that they were always welcome to come back. Right? Was that your testimony?

> They were welcome to come back during the time that was allotted for them for the contract.

Trial Transcript, p. 315, lines 14-10.

{¶42} This court relies on the trial court to resolve disputed issues of fact and weigh the testimony and credibility of the witnesses. *Bechtol v. Bechtol,* 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990). We defer to the trial court's discretion because the trial court had the opportunity to observe the witnesses and parties in weighing the credibility of the proffered testimony in a way a reviewing court cannot. The Sabirs sole issue in this assignment of error questions the factual finding of the trial court regarding whether the Sabirs prevented Metro from completing the contract. The parties provided contradicting evidence regarding whether Metro was permitted to enter the home to complete the contract and the resolution of that issue required the trial court to resolve the dispute based upon the weight of the testimony and the credibility of the witnesses. We find that the trial court's decision is supported by competent, credible evidence and that the trial court did not abuse its discretion in finding that the Sabir's prevented Metro from entering the home and completing the contract.

{¶43} The second assignment of error is denied.

III.

{¶44} In their third assignment of error, the Sabirs contend that the "trial court erred in dismissing Defendant-Appellants first defense and counterclaim against Metro Renovations 12, LLC." The Sabirs argue that Metro failed to meet the contractual

completion date, failed to complete the work in a workmanlike manner and fulfill the minimum property requirements and erred in addressing damages.

COMPLETION DATE

{¶45} The contract contains a section captioned VII. COMMENCEMENT AND COMPLETION SCHEDULE that includes the following:

> The work specified above shall be started on or about: Within two weeks of the grant check being placed in the escrow account.
>
> Completed on or about: within ninety days of the start date.

{¶46} The Sabirs contend "the contract includes a date of completion" (Appellant's Brief, page 15) but no such date appears in the contract. As noted above there is a commencement and completion schedule which gives general instructions when the work is to begin and when it should be completed but no specific date for commencement or completion. The description of the commencement and completion as being "on or about" an unspecified date further undermines the Sabirs' contention that the contract was subject to a specific completion date.

{¶47} The contract provides work was to begin on or about "within two weeks of the grant check being placed in the escrow account." The Escrow Agreement, Exhibit 40, was signed by Bilal on October 16, 2018, and the terms of that Agreement provide that Bilal was to deposit the check on the day it was executed. Metro was to begin work no later than October 30 and, though the first date of work is not recorded in an exhibit, Metro filed a Partial Unconditional Waiver of Lien dated October 29, 2018 for labor and materials

provided prior to that date. (Exhibit 40, p. 5) Further, Sabir admitted in a response to a written interrogatory that the work began on October 17. (Trial Transcript, p. 302, lines 9-14). The record supports a conclusion that Metro began work in a timely manner.

{¶48} We have concluded that the Sabir's prevented Metro from entering the home and completing the work that remained unfinished in our resolution of the second assignment of error. That finding plays an important role in the resolution of this assignment of error as well. The delay caused by the Sabirs refusing access as well as any delay that may be attributable to the dispute over the permit for the deck, the vendor's delay in delivering appliances and the need to work around the Sabirs when they returned to the home played a role in Metro's inability to complete the project within ninety days of the start date. We cannot find that the trial court erred by not finding that Metro breached the contract by not completing the work in a timely manner.

{¶49} If, arguendo, we disregard the delays outside the control of Metro, we must determine whether the date of completion was a material term of the contract. Ohio cases have held broadly that time of performance is not of the essence of a contract unless made so by its terms or by the acts of the parties. *Hubbard v. Norton,* (1875) 28 Ohio St. 116, para. 4 of the syllabus. *Adams v. Walton,* 5th Dist. Morrow No. 601, 1983 WL 5069, *3; *Accord Brown v. Brown*, 90 Ohio App.3d 781, 784, 630 N.E.2d 763, 765 (11th Dist.1993), *cause dismissed,* 68 Ohio St.3d 1441, 626 N.E.2d 124 (1994) We have searched the contract to determine whether "the contract expressly provided that the time for completing the project was 'of the essence' and that the project had to be substantially completed within [90] days of the date of the commencement of the project." *Boone Coleman Constr., Inc. v. Piketon*, 145 Ohio St.3d 450, 2016-Ohio-628, 50 N.E.3d 502,

¶ 3. The contract contains only the general description of the start date and completion date and no express completion date nor anything from which a reasonable person could imply that the parties had agreed that time was of the essence.

{¶50} The parties did not make the time of completion an essential element of the contract and the trial court did not err in failing to find that Metro breached the contract by failing to complete the project in a timely manner.

WORKMANLIKE MANNER AND MINIMUM PROPERTY REQUIREMENTS

{¶51} Sabir urges us to find that Metro failed to complete the project in a workmanlike manner and did not satisfy the Minimum Property Requirements as required by the Manual. Minimum Property Requirements "are absolute conditions specified under governing law for the Specially Adapted Housing (SAH) grant." (Manual, Appendix A, p. A-2). The parties agreed and the Manual requires that the VA Representative complete an inspection and find that the work complies with the plans and the MPR before funds are issued. The parties also agreed that payment would be issued upon the approval of the work by the VA. The VA issued two payments, one in the amount of $10,000.00 and one in the amount of $28,000.00 comprising the first two disbursements described in the Escrow Agreement. This information supports a conclusion that the VA found that Metro satisfied the terms of the contract and fulfilled the applicable MPRs.

{¶52} The Sabirs did present the testimony of an expert who concluded that Metro failed to satisfy the MPRs, contradicting the implication to be drawn from the payment made by the VA. The trial court was required to weigh the evidence and testimony regarding compliance with the MPRs and the contract and we find that there was

sufficient, credible evidence to support a finding that Metro received approval of its work from the VA and, therefore, it satisfied the terms of the contract and the MPRs applicable to the stage of the project that had been completed.

{¶53} The Sabirs' expert, Richard Acree, completed a "limited accessibility survey" of the home and concluded that some elements were installed in error or omitted by Metro or exhibit poor workmanship. Acree submitted an extensive report containing a long list of criticisms and recommendations, but no comment regarding the approval received from the VA. Acree reviewed the projects as if the work had been completed, but Metro had been prevented from completing the project and the VA never had the opportunity to complete the final inspection, during which Bilal would have had the opportunity to reject Metro's work and insist on changes or withhold distribution of the final 20% of the contract amount.

{¶54} Also, Acree offers no information regarding whether the recommendations in his report could be completed with the grant money available.

{¶55} We find that the record supports the trial court's decision to give little weight to the report and that the trial court did not err by failing to find that Metro violated Minimum Property Requirements or that the work was not completed in a workmanlike manner.

DAMAGES

{¶56} The Sabirs contend that the trial court miscalculated damages, relying on a comment in an email from a VA Representative: "In reviewing the disbursement schedule, it seems that the builder is reasonably owed $12,000 to $15,000 based on stage 4 and taking into consideration a portion of the 20% holdback." (Exhibit 34, page 3). This

comment was made in the context of attempting to come to a compromise and does not appear to be offered as a firm figure. Further, that same email mentions that "[t]here is also some off contract work between the Sabirs and Metro Renovation that we have been made aware of for ceiling fans, the thermostat, the fireplace, and the sump pump. VA will not enforce any payment or agreement for that work that wasn't in the signed contract. The two parties can negotiate that separately without VA involvement. The builder could also use that additional work in lien proceedings."

{¶57} The amount that the "builder is reasonably owed" as described in this email was a factor that the trial court could consider, but was not a binding amount, does not appear to be calculated with accuracy and can interpreted as part of an effort to get the builder "out from under this" as quickly as possible. (Exhibit 34, page 1).

{¶58} The Sabirs also complain that the trial court did not permit Faatimah to testify regarding damages and that it required expert testimony to establish damages. As we have concluded that the trial court did not err is dismissing the counterclaim, this issue is moot. However, even if we would consider the merits, our conclusion would not change.

{¶59} Expert testimony is not always required to establish the necessity of repairs or the reasonableness of the costs incurred to repair such" *McCoy v. Good*, 2d Dist. No. 06–CA–34, 2007-Ohio-327, 2007 WL 196551, ¶ 21 as quoted in *Evans Landscaping, Inc. v. Stenger,* 1st Dist. No. C-110104, 2011-Ohio-6033, 969 N.E.2d 1264, ¶ 24, and lay persons can, in proper circumstances, testify regarding damages to property. In this case, Faatimah did not offer her own estimate of the damages, but only a comment regarding the conclusion of an expert who would not testify, so the trial court properly excluded it from the record. (Trial Transcript, p. 346). No other testimony from Faatimah or Bilal

regarding damages was proffered, so we find that the trial court did not err in its handling of damages.

{¶60} The third assignment of error is denied.

IV.

{¶61} In their fourth assignment of error, the Sabirs claim the trial court erred in prohibiting their expert from tendering an opinion as to Metro's percentage of completeness.

{¶62} Richard Acree, the Sabirs' expert, was asked whether he felt he was competent to discuss the degree of completion and he stated "In most cases, yes" but he conceded that he had never been asked "to do this type of thing before." (Trial Transcript, p. 607, lines 1-12). Thereafter the parties engaged in a lengthy discussion regarding the propriety of the testimony, initiated by the trial court's comment that "This is too – it's too dangerous of a ground to pursue." (Trial Transcript, p. 609, lines 2-3). Metro's counsel objected:

> MR. FRUTH: Your Honor, the problem here is that we're trying to stretch the witness beyond what he was disclosed to do.
>
> THE COURT: I agree.
>
> MR. FRUTH: And the reason we're trying to stretch the witness beyond what he was disclosed to do is because the other experts that would have competently addressed this issue were barred. So we're trying to make him do too much.

(Trial Transcript, p. 615, lines 7-17).

{¶63} Ultimately the trial court decided the testimony would not be allowed. (Trial Transcript, p. 615, lines 18-19). Sabirs counsel responded "Okay" continued the questioning of Acree and did not proffer the excluded testimony nor any evidence that would establish Acree's qualifications to provide an opinion regarding the percentage of completion.

{¶64} "When the court's ruling is one excluding evidence, a party must proffer the evidence at trial to preserve the issue for appeal." *State v. Smith,* 9th Dist. Wayne No. 15AP0001, 2017-Ohio-359, ¶ 19 as quoted in *State v. Freed*, 5th Dist. Fairfield No. 2019 CA 00018, 2020-Ohio-655, ¶ 28. The record in this case shows that the Sabirs were asking Acree to offer an opinion that he had not offered in any other case and which violated the court's requirements regarding disclosure of witnesses. Without a proffer explaining the qualifications of the witness and the evidence to be offered, we cannot consider this assignment of error.

{¶65} The fourth assignment of error is denied.

I., V.

{¶66} We will consider the first and the fifth assignment of error collectively as they are closely related. In the first assignment of error, the Sabirs claim that the trial court erred as a matter of law in holding Faatimah Sabir liable for attorney fees and court costs and in the fifth assignment of error they claim the trial court erred in finding Defendant, Bilal Sabir, acted in bad faith, presumably in an attempt to undermine the basis for an award of attorney fees against him.

I.

{¶67} When considering an award of attorney fees, Ohio follows the "American Rule," under which a prevailing party in a civil action may not generally recover attorney fees. *Wilborn v. Bank One Corp.,* 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. However, attorney fees may be awarded when a statute or an enforceable contract specifically provides for an award of attorney fees, or when the prevailing party demonstrates the losing party acted in bad faith. *Id.* McHenry v. McHenry, 5th Dist. No. 2016CA00158, 2017-Ohio-1534, 88 N.E.3d 1222, ¶ 54. The Sabirs contend that Metro is not the prevailing party in relation to Faatimah as its only claim against her, unjust enrichment, was dismissed by the trial court "because there is no evidence in the record any(sic) appraisal that would indicate how much value the Defendants' home has increased because of the renovation work." (Judgment Entry, March 23, 2022, p. 4). Metro implicitly concedes this point, but argues that the trial court reinstated Plaintiff's claim for unjust enrichment against Faatimah Sabir or, in the alternative, that the trial court held she was a third-party beneficiary.

{¶68} A prevailing party is generally the party " 'in whose favor the decision or verdict is rendered and judgment entered.' " *Hagemeyer v. Sadowski* (1993), 86 Ohio App.3d 563, 566, 621 N.E.2d 707, quoting *Yetzer v. Henderson,* 5th Dist. No. CA–1967, 1981 WL 6293 *2 (June 4, 1981). *See also Falther v. Toney,* 5th Dist. No. 05 CA 32, 2005-Ohio-5954, 2005 WL 2995161. We find that with regard to the claim of unjust enrichment against Faatimah, Metro was not the prevailing party.

{¶69} The trial court dismissed Metro's unjust enrichment claim against Faatimah and we decline Metro's invitation to interpret the trial court's June 7, 2022 Judgment Entry

Regarding Fees and Costs as a reinstatement of that claim. The Entry contains no reference to the unjust enrichment claim and contains no information that can be interpreted as reversing trial court's March finding that Metro provided no evidence "that would indicate how much value the Defendants' home has increased because of the renovation work."

{¶70} Alternatively, Metro contends that Faatimah was found to be a third-party beneficiary when the trial court stated: "Despite the fact that Defendant Faatimah Sabir would sometimes act as her husband's veteran representative during the creation and, execution of the contract, both Faatimah Sabir and her husband would personally benefit from the improvements of the residence under the renovation contract." (Judgment Entry, June 7, 2022, p. 3).

{¶71} The trial court does not state that it is finding that Faatimah is a third-party beneficiary and we will not construe the entry to support such a conclusion. "Ohio law * * * requires that for a third party to be an intended beneficiary under a contract, there must be evidence that the contract was intended to directly benefit that third party." *Huff v. FirstEnergy Corp*., 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3, ¶ 12. The Supreme Court of Ohio adopted the "intent to benefit" test to measure the rights and responsibilities of a third-party beneficiary and found that if Metro had intended that Faatimah should benefit from the contract she could be an intended beneficiary with rights under the contract but if Metro had no intent to benefit her, then she was an incidental beneficiary who has no enforceable rights under the contract. The court also noted that "the mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise

must also satisfy a duty owed by the promisee to the beneficiary." *Hill v. Sonitrol of Southwestern Ohio, Inc.,* 36 Ohio St.3d 36, 40, 521 N.E.2d 780, 784–85 (1988) quoting *Norfolk & Western Co. v. United States* (C.A.6, 1980), 641 F.2d 1201, 1208.

{¶72} The trial court's finding that Faatimah would personally benefit from the improvements is, at most, a finding that she is an incidental beneficiary and not a third-party beneficiary to the contract against whom Metro was the prevailing party.

{¶73} Because Metro is not a prevailing party with regard to Faatimah, the trial court was not authorized to order her to pay attorney fees. The Sabirs' first assignment of error is sustained.

V.

{¶74} In their fifth assignment of error, the Sabirs contend that the trial court erred in finding that Bilal acted in bad faith.

{¶75} In the March 2022 Entry, the trial court stated: "Because the Defendant filed a small claims lawsuit against the sole owner of the Plaintiff during the execution of the contract, essentially preventing a workable solution being reached in good faith, this Court will award attorney fees to the Plaintiff as well as assess court costs upon the Defendants. The Plaintiff shall submit an attorney fee affidavit no later than April 7, 2022. A non-oral hearing shall take place on April 27, 2022 at 11 a.m." (Judgment Entry, March 23, 2022, p. 4). After the parties filed pleadings regarding their respective positions, the trial court awarded attorney fees to Metro after considering "all of the actions taken by Defendants during the execution of the contract" the trial court found "that the Defendants acted in bad faith, wantonly and/or obdurately." (Judgment Entry Regarding Attorney Fees And Costs, June 7, 2022, p. 1).

{¶76} Attorney fees are not ordinarily recoverable but may be awarded where it is demonstrated that an action is defended in bad faith, namely, continuing litigation that is obdurate, vexatious, wanton, or engaged in for oppressive reasons. *Sorin v. Bd. of Edn.* (1976), 46 Ohio St.2d 177 as quoted in *State ex rel. Esselburne v. Maurer,* 10th Dist. Franklin No. 89AP-953, 1991 WL 94443, *2. *See also State ex rel. Butterbaugh v. Ross Cty. Bd. of Commrs.,* 79 Ohio App.3d 826, 837, 608 N.E.2d 778, 785 (4th Dist.1992) Though not specifically labeled as such, we find the trial court essentially found and the evidence supported, that the Sabirs acted obdurately; therefore, attorney fees incurred to enforce Metro's contractual rights were recoverable for Sabirs' breach of the contract.

{¶77} Webster's dictionary defines "obdurately" as stubbornly persistent in wrongdoing; hardened in feeling; resistant to persuasion. *Stambaugh v. T.C. Wood* Realty, Inc., 5th Dist. Morrow No. 09 CA 00008, 2010-Ohio-3763, fn. 3 and the trial court cites to instances of such obdurate behavior. Both Sabirs insisted they were entitled to wood flooring despite the contract clearly reflecting that they had chosen a laminate flooring. They argued that the contract had been altered to allow Metro to install appliances they had not chosen, but the evidence reflected that the correct appliances where installed. The trial court found, and we have found that the record supports the conclusion that the Sabirs prevented Metro from finishing the contract and filed a small claims suit that was unsuccessful on its merits, but did serve to prevent resolution of the dispute.

{¶78} Both Bilal and Faatimah complained that Metro's work failed to fulfill applicable MPR's and SAH standards and provided expert testimony to support that contention. Neither the Sabirs nor their expert addressed the fact that the VA was the

sole arbiter of the quality of the work prior to the last disbursement and that the record shows that the VA had concluded that the work satisfied the SAH standards and MPR's. The same expert criticized Metro's exterior work when the parties had agreed that it was no longer part of the contract and Metro would receive no payment for any work involved in the demolition they had completed on that part of the project. Metro fulfilled its duties under the contract and the Sabirs expert's opinion "truly didn't matter" and only served to increase Metro's litigation expenses. (Judgment Entry March 23, 2022, p. 3).

{¶79} After a review of the record we find that the trial court did not abuse its discretion when it concluded that Bilal "acted in bad faith, wantonly and/or obdurately."

{¶80} The fifth assignment of error is denied.

VI.

{¶81} In their sixth assignment of error, the Sabirs assert that the trial court erred in taking improper judicial notice of evidence outside the record. The Sabirs contend that because the second filing date is included within the trial court's June 7, 2022 entry, "it appears the trial court may have independently obtained information regarding the second filing and incorporated such information into its Judgment." (Appellants' Brief, p. 27).

{¶82} The record contains information regarding the small claims lawsuit filed by the Sabirs on April 2 that was dismissed and refiled in Fairfield County to recover money for the Sabirs' hotel stay and boarding their dog. (Trial Transcript, p. 283, line 10 to p. 284, line 2; p. 313, line 19, to p. 314, line 15). The Sabirs threatened to file a lawsuit and did file against the owner, Gloria Urrea. Both claims were dismissed. One case was dismissed for "the wrong court," and one for suing the owner instead of the Metro. (Trial

Transcript, p. 144, lines 22-24). The Sabirs notified the VA of the lawsuit and knew that the VA would "shut down" not "help anybody" and "everything is held up in escrow." (Trial Transcript, p. 315, lines 1-12).

{¶83} The trial court's findings regarding the lawsuit are supported by the record. In the March Entry, the trial court found that "defendant had filed a small claims lawsuit against the owner of the plaintiff's business on April 2, 2019 in the wrong jurisdiction and refiled days later in the proper jurisdiction." The trial court concluded "because the defendant filed a small claims lawsuit against the sole owner of the plaintiff during the execution of the contract, essentially preventing a workable solution being reached in good faith, this court will award attorney fees to the plaintiff as well as assess court costs upon the defendants." The June entry provides little additional information as the court found "that during the execution of the contract the defendants veteran representative (the defendant's wife) filed a small claims lawsuit against the owner of plaintiff reimbursement of hotel expenses and dog boarding. This lawsuit was first filed in the wrong jurisdiction (Franklin County) on April 2, 2019. The small claims action was then refiled by the veteran representative in Fairfield County on June 11, 2019, before it was dismissed."

{¶84} The only fact contained within the judgment entries that is not found within the record is the date of June 11, 2019. The Sabirs attach unwarranted significance to this date and claimed that it is evidence that the trial court "may have independently obtained information regarding the second filing and incorporated such information into its judgment." (Appellant's Brief, p. 27). After reviewing the record, we find that the trial court's findings are supported by the evidence in the record and that the date of June 11,

2019 is inconsequential. Even if the trial court had committed an error by including this date, the error is not materially prejudicial to the Sabirs as we find that the absence of this error would not have changed the outcome of the proceedings. *Fada v. Information Sys. & Networks Corp.* (1994), 98 Ohio App.3d 785, 649 N.E.2d 904 as quoted in *Nilavar v. Osborn*, 137 Ohio App.3d 469, 500, 738 N.E.2d 1271, 1293 (2nd Dist.2000).

{¶85} The sixth assignment of error is overruled.

{¶86} The decision of the Fairfield County Court of Common Pleas is reversed to the extent that it ordered Faatimah Sabir to pay attorney fees. The balance of the judgment is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Wise, John, J. concur.