The Bullet Point: Ohio Commercial Law Bulletin

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Does My Lawsuit Violate the FDCPA?

Magnuson-Moss Warranty Act

***Powell v. Airstream, Inc.,* 3rd Dist. Shelby No. 17-18-17, 2019-Ohio-3034.**

This was an appeal of a summary judgment decision in favor of a mobile home manufacturer regarding various alleged breaches of warranties and representations. The plaintiff purchased a mobile home. His son and sister-in-law were the ones who actually used it. The mobile home had various issues and defects and ultimately needed to be worked on at least half a dozen times. Ultimately, the plaintiff filed suit, alleging violations of the Magnuson-Moss Warranty Act and breach of express and implied warranties. The mobile home company ultimately was awarded summary judgment and plaintiff appealed. The Third Appellate District affirmed that decision on appeal, finding that the various state law warranty claims failed and, therefore, the Magnuson-Moss Warranty Act claim also failed.

The Bullet Point: The Magnuson-Moss Warranty Act "limits the ability of manufacturers to disclaim or modify implied warranties in cases where they have offered express warranty protection." It does not create new implied warranties or otherwise modify the implied warranties existing according to state law. Rather, the Act adopts the implied warranty protections previously established under the governing state law. "Claims under the Magnuson–Moss Act stand or fall with [the] express and implied warranty claims under state law." Accordingly, if an underlying state warranty claim fails, a claim under the Magnuson-Moss Act must likewise fail.

Doctrine of the Spoliation of Evidence

***City of Cincinnati v. Triton Servs., Inc. et. al.*, 1st Dist. Hamilton No. C-170705, 2019-Ohio-3108.**

This appeal involved various challenges to a trial court's decision in favor of the city of Cincinnati, regarding various disputes that arose in sewer-related construction contracts. The parties filed claims against each other, some of

which were decided by motion. The only claim that went to trial was a claim for "differing-site-conditions." Prior to trial, the court granted various motions in limine by the city excluding some of the defendant's evidence. Ultimately judgment was entered in favor of the city and the defendant appealed, arguing, among other things, that the court erred in granting the city's pre-trial motions in limine on the basis of spoliation of evidence. The First Appellate District agreed and remanded the matter to the trial court.

The Bullet Point: The effect of the doctrine of spoliation of evidence, when applied in a defensive manner, is to allow the defendant to exculpate itself from liability because the plaintiff has barred it from obtaining evidence necessary to prove the existence or absence of the essential elements of the claim. Expert testimony can be excluded as a sanction for spoliation of evidence if a court finds the evidence was intentionally altered or destroyed before the opposing party had a chance to examine it. Sanctions and causes of action for spoliation of evidence are designed to place responsibility and accountability on parties who were actually in possession of evidence that existed at one time, but who later failed to provide the evidence without adequate explanation.

Fair Debt Collection Practices Act (FDCPA)

***Harper v. Weltman, Weinberg, & Reis*, 8th Dist. Cuyahoga No. 107439, 2019-Ohio-3093.**

This was an appeal of the trial court's decision to dismiss a claim under the Fair Debt Collection Practices Act (FDCPA) against the defendant law firm. Plaintiff alleged that the law firm's filing of a lawsuit on behalf of its client against plaintiff violated the FDCPA. The trial court disagreed and plaintiff appealed. On appeal the Eighth Appellate District affirmed, finding that plaintiff had failed to properly allege a violation of the FDCPA.

The Bullet Point: The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." Under the FDCPA, a debt collector is prohibited from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." A debt collector is also prohibited from using "unfair or unconscionable means to collect or attempt to collect any debt." When analyzing whether conduct giving rise to the claim fits within the broad scope of the FDCPA, "the conduct is viewed through the eyes of the 'least sophisticated consumer.'" That standard, while protecting "the gullible and the shrewd alike," also presumes "a basic level of reasonableness and understanding on the part of the debtor." In order to state a viable FDCPA claim, a plaintiff must establish: (1) that he or she is a "consumer" under the statute, (2) that the "debt" arises out of a transaction entered primarily for personal, family, or household purposes, (3) the defendant is a "debt collector," and (4) the defendant violated a provision of the FDCPA.

Conditions Precedent to Foreclosure?

***Citizens Bank v. Duchene*, 11th Dist. Trumbull No. 2018-T-0085, 2019-Ohio-2972.**

This was an appeal of the trial court's decision to grant a lender summary judgment in a foreclosure lawsuit. On appeal, the Eleventh Appellate District reversed, finding an issue of fact regarding whether the lender satisfied conditions precedent prior to foreclosure.

The Bullet Point: "To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the Note and Mortgage, or is a party entitled to enforce it; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due." "Where prior notice of default and/or acceleration is required by a provision in a Note or Mortgage instrument, the provision of notice is a condition precedent subject to Civ.R. 9(C)." A lender can prove compliance with this by showing that the notice of default was mailed to the property address listed on the loan documents and in a manner specified in the loan documents.

[Cite as *Powell v. Airstream, Inc.*, 2019-Ohio-3034.]

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

DAVID POWELL,

CASE NO. 17-18-17

PLAINTIFF-APPELLANT,

v.

AIRSTREAM, INC., **O P I N I O N**

DEFENDANT-APPELLEE.

Appeal from Shelby County Common Pleas Court
Trial Court No. 17CV000145

Judgment Affirmed

Date of Decision: July 29, 2019

APPEARANCES:

Elizabeth Ahern Wells **for Appellant**

James L. Thieman and Cameron C. Downer **for Appellee**

WILLAMOWSKI, J.

{¶1} Plaintiff-appellant David Powell ("Powell") brings this appeal from the judgment of the Court of Common Pleas of Shelby County granting summary judgment to defendant-appellee Airstream, Inc. ("Airstream"). For the reasons set forth below, the judgment is affirmed.

{¶2} On June 12, 2016, Powell purchased a new 2016 Airstream Flying Cloud RV ("the RV") that was built and warranted by Airstream in Jackson Center, Ohio. Doc. 1. Powell purchased the RV from Airstream Adventures ("AA") in Covington, Washington. *Id*. Soon after the purchase, the RV allegedly began to have several issues and spent a significant amount of time being repaired. *Id*. Powell lost confidence in the vehicle and filed a complaint with a jury demand in Shelby County, Ohio on July 19, 2017. *Id*. In the complaint, Powell alleged that Airstream had breached the express warranties, breached the contract, violated the Magnuson-Moss Warranty Act, and violated the Washington Consumer Protection Act ("WCPA"). *Id*. On August 24, 2017, Airstream filed its answer denying the alleged violations and raising several defenses including lack of privity of contract, limitation of damages, and failure of conditions precedent. Doc. 7.

{¶3} On April 19, 2018, Airstream filed a motion for summary judgment. Doc. 23. Airstream claimed that without privity of contract, the implied warranty and breach of contract claims must fail. *Id*. Airstream further asserted that the breach of the express warranties and violations of the Magnuson-Moss act must also

fail because Airstream complied with the warranties by complying with the Repair Remedy. *Id*. Airstream also alleges that Powell failed to exhaust his remedies by not complying with the "Back-Up Remedy". *Id*. Finally, Airstream claimed that the WCPA claim fails because there was no underlying statutory violation or a public interest to support the claim. *Id*. Powell filed his memorandum in opposition to the motion on May 23, 2018. Doc. 37. Airstream then filed its reply to the memorandum on June 19, 2018. Doc. 45. On October 1, 2018, the trial court granted Airstream's motion for summary judgment. Doc. 95. Powell filed a timely notice of appeal from this judgment. Doc. 101. On appeal, Powell raises one assignment of error.

> **The trial court erred when it granted Airstream's motion for summary judgment on all claims.**

{¶4} The sole assignment of error in this case raises the question as to whether the lower court erred in granting summary judgment.

> **An appellate court reviews a trial court's summary judgment decision de novo, independently and without deference to the trial court's decision. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, at ¶ 5, citing *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, at ¶ 8. Summary judgment is appropriate only "when the requirements of Civ.R. 56(C) are met." *Adkins v. Chief Supermarket*, 3d Dist. No. 11-06-07, 2007-Ohio-772, at ¶ 7. The party moving for summary judgment must establish: (1) that there are no genuine issues of material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor.**

> **Id., citing Civ.R. 56(C); *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, at paragraph three of the syllabus. In ruling on a motion for summary judgment, a court may not "weigh evidence or choose among reasonable inferences * * *." *Id.*, at ¶ 8, 653 N.E.2d 1196, citing *Jacobs v. Racevskis* (1995), 105 Ohio App.3d 1, 7, 663 N.E.2d 653. Rather, the court must consider the above standard while construing all evidence in favor of the non-movant. *Jacobs*, at 7, 663 N.E.2d 653.**
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> **The party moving for summary judgment must identify the basis of the motion to allow the non-movant a "meaningful opportunity to respond." *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 116, 526 N.E.2d 798. In its motion, the moving party "must state specifically which areas of the opponent's claim raise no genuine issue of material fact and such assertion may be supported by affidavits or otherwise as allowed by Civ.R. 56(C)." *Id.* at 115, 526 N.E.2d 798, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46, citing *Hamlin v. McAlpin Co.* (1964), 175 Ohio St. 517, 519-520, 196 N.E.2d 781; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If the moving party fails to meet its burden, summary judgment is inappropriate; however, if the moving party meets its initial burden, the non-moving party has a "reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial * * *." *Dresher*, at 294, 662 N.E.2d 264.**

Lillie v. Meachem, 3d Dist. Allen No. 1-09-09, 2009-Ohio-4934, ¶21-22. This court notes that the parties agree that Washington law applies to the substantive arguments. As the standard of review is de novo, we will review whether reasonable minds could reasonably reach a verdict in favor of Powell based upon the claims set forth in the complaint.

{¶5} A review of the repair records for this RV provided as exhibits for Powell's memorandum contra the motion for summary judgment show the following history of repairs. See Doc. 27, Ex. 8, 10, and 11. Prior to the delivery

of the vehicle, AA conducted a pre-delivery inspection report and repaired or noted issues found. *See also* Lamb Dep. at 32. The inspection noted eight issues: 1) rock dings on the rock guard, 2) a rivet missing about the entry door, 3) chips in bedroom closet door, 4) gaps in the sealant in various locations, 5) a scratch in the wall by the bathroom door, 6) a scratch on the range cover, 7) a noisy bathroom fan, and 8) a small divot in the linoleum at the entrance. The records produced by Powell indicate that new rock guards were ordered, the missing rivet was replaced, the chips in the bedroom door were repaired, the areas missing sealant were resealed, the scratch on the range cover was removed and repolished, and the bathroom fan was adjusted to run properly. The scratch on the wall and the divot in the linoleum had no noted repairs.[1] Powell was notified on June 20, 2016, that the vehicle was ready for pickup.

{¶6} On July 21, 2016, Powell's son Dan and sister-in-law Teresa (collectively known as "the customers"), who were the ones using the RV, took the vehicle to George Sutton RV ("Sutton") claiming six alleged issues: 1) the Velcro was pulling off the seat cushions, 2) the dinette table was not releasing from the brackets, 3) the Sothco had pulled out of the cabinet door below the stove, 4) the shower leaked at the bottom of the door when used, 5) the USB port was pushed in at the bedroom cabinet, and 6) the rear awning arm was hard to retract. Sutton

[1] Although there was no noted repair to the linoleum, the warranty claim to Airstream showed that AA billed them for labor in regard to the linoleum. Doc. 37, Ex. 11.

aligned the tabs on the dinette table so that it worked properly, replaced a stripped screw on the cabinet door to resolve the second and third issue. The shower was repaired by replacing the wipe seal. Upon testing, there was no more leak. Nothing was done about the cushion, the USB ports, or the awning at that time and the RV was returned to Dan and Teresa that same day. On July 27, 2016, the customers returned to AA to have these issues resolved. AA replaced the USB port and adjusted the awning arm to function smoothly. AA also requested approval from Airstream to replace the cushions. The vehicle remained with AA for two days.

{¶7} On August 29, 2016, the customers brought the RV back to AA with three new complaints: 1) water was pooling in the corner of the shower cabinet when attached to city water; 2) the shower door was leaking again, and 3) a drawer in the bedroom opened in transit. The customers also requested that a multi-point inspection ("MPI") be completed and requested a status check on the replacement of the cushions. The water in the shower cabinet was caused by a loose fitting at the water pump, which went away when tightened. The shower door was leaking because the frame and threshold were not square. AA sought to fix this issue by ordering replacements. The drawer issue was resolved by replacing the 5 lb. latch with a heavy duty 10 lb. latch. The status check on the cushions showed that replacements had been approved and ordered. The MPI showed that 1) a 30 amp

inlet LED light[2] was not working, 2) the bathroom fan was rattling, 3) the shower fan was hitting the housing, 4) the deadbolt was loose in the door, 5) the screen door gasket was torn in the corner, 6) the screen door latch was hitting the frame, and 7) a rivet head had popped off by the entry door during transit. AA resolved these issues by replacing the bad outlet, moving wires to resolve the noisy bathroom fan, replacing a missing screw in the shower fan allowing it to function as designed, tightening the screws in the deadbolt to allow it function as designed, removing the torn gasket on the screen door and replacing it with a new one, realigning the screen door to allow it to function properly, and drilling out the old rivet to replace it with a new one. The time out for these repairs is not clear from the record, but part of the time also included the installation of a satellite dish per the request of the customers.

{¶8} On October 3, 2016, the customers returned the RV to AA to allow AA to install the new shower assembly and to replace the covers on the cushions. An MPI was completed at that time as well, which showed that the bolt nuts on the rock guard were stripped. AA remedied this problem by replacing the bracket and riveting it into place. The customers also complained that the bedroom drawer would still open during transit and that the toilet was leaking at its base. AA's inspection showed that the drawer was functioning as designed. AA could not

[2] This is a small light on the outlet showing that it is receiving power. The light not working may indicate the outlet was not working or that the light itself was bad.

reproduce the leak at the base of the toilet and saw no issues, so no repair was attempted at that time. The RV was undergoing repairs for seven days this time.

{¶9} On November 18, 2016, a tree branch came down on the RV causing damage to it. The customers took the RV to AA on December 3, 2016, to have an estimate done for the cost of repairs and presented a lengthy list of issues with the RV that they believed to be covered by the warranty. This list included the following issues: 1) the deadbolt was loose, 2) USB port had no power, 3) ceiling covers falling off, 4) hinge on wardrobe door pops off, 5) toilet won't hold water, 6) no warm air in front vents, 7) beds not level, 8) 30 amp outlet LED lights not working, 9) burners on stove will not light, 10) cabinet door by DVD player was hard to open, 11) refrigerator seal falling off, 12) a rivet was pulled down in the bathroom ceiling, 13) the entry door was leaking on the interior side of the door, 14) the fantastic fan[3] was not working, and 15) the entry door was hard to open and close. Over six days, AA repaired the problems by 1) tightening the screws in the deadbolt and verifying it was functioning; 2) replacing the bad USB port; 3) replacing all the vent covers with new ones and verifying that they snapped into place tightly; 4) resetting the hinges on the wardrobe door and screwing them into place; 5) removing and replacing the bowl seal on the toilet; 6) installing additional supports to the bed frame to level the mattresses; 7) replacing the 30 amp outlet

[3] The fantastic fan appears to be the vent fan over the stove.

lights on both receptacles and testing to make sure they were functioning; 8) replacing the left rear wire to the stove burners and testing to insure they were functioning properly; 9) resetting the screws in the cabinet door to allow it to open and close correctly; 10) realigning the refrigerator seal and refastening it into the proper place; 11) drilling out the damaged rivet and installing a new one; 12) cleaning and resealing around the entry handle where it was leaking; 13) securing the ground switch to the fantastic fan to allow it to function properly; and 14) shimming the door frame catch out with a washer to allow it to function correctly. AA was not able to resolve the furnace problem because the same air flow was coming out of the front and rear vents, so the problem could not be replicated. Additionally, during the time the RV was there, AA performed an MPI, winterized the vehicle and installed a customer supplied vent fan in the bathroom as well as completing the insurance estimate.

{¶10} On December 13, 2016, the customers returned the RV to AA due to water pooling in the shower and a drawer opening in the bedroom during transit. The water issue was found to be caused by a loose fitting behind the wall. The fitting was tightened and no leaks were found when tested under pressure. The 5 lb. drawer catch was replaced with a 10 lb. drawer catch to remedy the problem. At that same time, another MPI was conducted and revealed more issues: 1) a 30 amp inlet light was not working; 2)the bathroom fan was rattling when it hit wires; 3) the deadbolt needed tightened; 4) the screen door gasket was torn and the door was not

closing correctly; and 5) a rivet head had popped off in transit. The inlet light was removed and replaced, the wires in the fan were moved out of the way and secured to not interfere with the function of the fan, the deadbolt was tightened, the damaged seal on the screen door was removed and a new one installed, the screen door was realigned, and the old rivet was removed and a new one was installed. This was completed on that same date.

{¶11} On January 5, 2017, the customers brought in the RV for repairs due to the damage from the tree branch. In addition to those repairs, the customers informed AA that 1) water was coming in the dinette window, 2) air was coming in the bedroom window and there was a water stain on the curtain, 3) the left rear burner on the stove would not light, 4) the grey and black valves were sticking, 5) a blind clip had cracked, and 6) weather stripping was coming off the entry door. The first two issues were resolved by tightening the latch to provide a better seal and checking the sealants. AA noted that there was a condensation issue in the trailer due to improper venting. AA fixed the stove by tightening the burner springs for better contact. Valve lube was added to the sticking valves. The damaged blind was removed and replaced with a new one. The weather stripping coming off the entry door was removed and replaced with new. Although the repair records do not indicate how long these repairs, as well as the accident damage, took, Powell claims that the RV was returned to them on January 12 for seven days.

{¶12} On January 19, 2017, a repair order was created indicating that the shower fan and the fantastic fan were inoperable. AA replaced the motor in the shower fan allowing it to work correctly. The fantastic fan was not inoperable, but the issue was the result of user error, so proper use was explained to the customers. This took one day.

{¶13} On January 26, 2017, the RV was brought in to AA due to a claim that the toilet was leaking at the base. AA replaced the valve and no leak was found at that time. The RV was returned that same day. Later, AA received a call from the customers indicating that it was leaking again. AA sent a technician to the customers' location. The technician then replaced the toilet. On February 10, 2017, AA was notified that the furnace was inoperable. When checked by AA, the furnace seemed to be working properly. The outside temperature was 47, but the inside temperature was 75. This also took one day.

{¶14} On February 15, 2017, the customers brought in the RV and claimed that 1) the furnace was not putting out hot air, 2) the toilet was not getting water, and 3) the toilet was leaking. They also requested that an MPI be performed. The MPI showed that the RV was in good working order. The furnace was fixed by the installation of a new ignitor board and sail switch. The toilet began to receive water once the valve was properly seated. The toilet was not the source of the water leak, but AA found the leak was coming from a fitting on the inlet side of the water heater.

AA fixed this problem by installing a new cone washer. All of this was done in one day.

{¶15} On April 28, 2017, the customers brought in the RV claiming that 1) the 30 amp LED light was not working, 2) a light switch was pushed in, 3) the bathroom fan was rubbing on the housing, 4) the refrigerator light was inoperable, 5) there was a squeak in the floor between the beds at the rear of the RV, 6) the water heater was leaking again, and 7) the black tank would not zero out when dumped. The plugs with the 30 amp LED lights were removed and replaced. The light switch and the housing was removed and replaced. The bathroom fan was removed and a new fan was installed with new set screws to allow it to function properly. The refrigerator light was working properly, the bulb just needed replaced. The squeak in the floor was noted, but no issue was found. The leak at the water heater was a drip at the city fill inlet, which was replaced. The sensor in the black tank needed cleaning. This was all completed within a day or two.

{¶16} On June 7, 2017, the customers brought in the RV and requested and MPI be completed. The Customers alleged the following complaints: 1) the mattress was moldy, 2) the floor squeaked, 3) the toilet was not getting or retaining water, 4) the bedroom window was hard to open, 5) the window in the dining area would not pull in all the way, 6) the air conditioning was not cold enough, 7) the license plate light was loose, 8) the kitchen floor area was soft, 9) the latch cap had come off the cabinet door under the bed, 10) the molding trim was loose in the

bedroom, 11) the entry door latch was hard to open, and 12) the furnace was inoperable. The mattress was replaced by Airstream at no cost. The squeaky floor and the alleged soft area in the floor of the kitchen were checked, but no problem was found. The toilet was replaced and tested to insure the new one was working. A check of the bedroom window showed the brackets were too low, so they were moved up ¼ inch and then worked correctly. The window in the dining room had a broken latch, so the latches on all the windows in the dining area were replaced so they would match. The air conditioning system was checked and found to be working as designed. The connections on the license plate light were tightened. A new latch cap was installed on the cabinet door. The molding trim was glued to the wall and new seam trim was installed. The door latch was corrected by lubing the lock and latch assembly. The furnace could not be repaired at that time because the issue was a bad board and a replacement had to be ordered. The repair records of AA show that the repairs, except for the furnace, were completed in one day.

{¶17} On August 2, 2017, the customers brought the RV back to AA to complete the repair on the furnace and the toilet, which was not filling with water. On that day, the bad board on the furnace was replaced and the air gap on the ignitor was adjusted to allow the furnace to function correctly. The toilet was repaired. AA's records show that the customers were notified it was ready after one day, however the customers did not pick up the RV until October.

Breach of Warranties

{¶18} The first claim in the complaint alleges that Airstream breached the manufacturer's warranties. Powell claims that Airstream violated not only the express warranties, but the implied warranties as well.

Implied Warranties

{¶19} Powell argues that the RV breached the implied warranties of merchantability. Article 2 of the UCC, as adopted in Washington, provides an implied warranty of merchantability that assures that goods sold are fit for the ordinary purposes for which such goods are used as long as the seller is a merchant of goods of that kind and the warranty is not specifically excluded by contract. RCW 62A.2-314. However, a "lack of privity has historically been a defense to claims of breach of warranty." *Tex Enterprises, Inc. v. Brockway Standard, Inc*. 149 Wash.2d 204, 209, 66 P.3d 625 (2003).

> **There are two types of plaintiffs for whom lack of privity has been a concern. A " 'horizontal' non-privity plaintiff" is not a buyer of the product in question, but is one who consumes or is affected by the goods. * * * The " 'vertical' non-privity plaintiff" is a buyer who is in the distributive chain, but who did not buy the product directly from the defendant.**

Id. (citations omitted). Although the Washington Legislature chose to eliminate the privity requirement for horizontal non-privity plaintiffs under certain circumstances, it was silent in regard to vertical privity. *Id*. The Supreme Court of Washington held that absent privity or an underlying contract to which the remote

purchaser is a third-party beneficiary, there can be no recovery for a vertical non-privity plaintiff based upon breach of an implied warranty. *Id*. at 214.

{¶20} In this case, Powell purchased the RV from AA. The Vehicle Purchase Order identified the seller as AA. Doc. 37 at Ex. 3. Additionally, the Retail Installment Sales Contract specifically identifies the seller as AA. *Id*. at Ex. 4. Neither of the documents indicates that Airstream was the merchant selling the RV to Powell. The deposition testimony of Richard March ("March"), the General Manager of the Customer Relations Group of Airstream, indicated that the RV was sold by them to AA and paid for by AA before it was delivered. March Dep. 30-31. Daniel Lamb ("Lamb"), the Parts and Service Manager for AA, testified in his deposition that although AA is an authorized dealer of Airstream's products, it is a separate entity from Airstream and is neither owned nor controlled by Airsteam. Lamb Dep. 95. Given this evidence, there is no question that pursuant to Washington law, Powell is a vertical non-privity plaintiff as he is in the distributive chain, but did not buy the RV directly from Airstream.

{¶21} Since Powell is a vertical non-privity plaintiff, the only way that an implied warranty would apply would be if Powell was an intended third-party beneficiary of the contract between Airstream and AA. *Babb v. Regal Marine Industries, Inc.* 186 Wash.App. 1003 (2015). Washington courts "have allowed a remote purchaser to pursue claims for breach of implied warranties of merchantability notwithstanding lack of vertical privity when the remote purchaser

can show that it was an intended third-party beneficiary of a contract involving the manufacturer." *Id*. (citing *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wash.2d 334, 347, 831 P.2d 724 (1992)).

> **Our Supreme Court first applied the test to a claim for a breach of an implied warranty of merchantability in *Touchet Valley*. There, the [Court] examined *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn. 2d 153, 422 P.2d 496 (1967). In *Kadiak*, our Supreme Court held that a purchaser of a specially-built marine diesel motor could sue the manufacturer for breach of implied warranties even though the purchaser bought the diesel motor from a retail dealer. * * * The *Kadiak* court relied on the sum of the interaction and the expectations between the purchaser and the manufacturer: (1) the manufacturer knew the identity, purposes, and requirements of the purchasers' specifications; (2) Kadiak had communicated its needs to the manufacturer, not only directly, but also through its agent, the supplier; (3) although the manufacturer invoiced the supplier, the manufacturer delivered the motor directly to Kadiak; (4) the manufacturer's representatives attended installation of the motor; and (5) after difficulties developed, the manufacturer tried to fix the motor's problem. * * ***
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> **Applying *Kadiak's* reasoning, the *Touchet Valley* court concluded that the owner of a collapsed grain-storage facility could maintain an implied warranty action against a subcontractor with whom there was no privity because the owner was the intended third-party beneficiary of the contract between the general contractor and the subcontractor. * * * In so holding, the [Court] determined that the subcontractor knew Touchet Valley's identity, its purpose, and its requirements for the storage building. * * * The subcontractor had also designed the building to the purchaser's specifications and delivered components to the construction side. * * * And when the building first began to collapse, the subcontractor helped to attempt repairs.**
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> **In contrast, in *Urban Development, Inc. v. Evergreen Building Products, LLC*, * * * Division One of this court declined to extend implied warranties of merchantability to a general contractor of**

> **a leaking condominium complex when there was no privity of contract between the general contractor and the manufacturer of the building's siding. The court there so held because the general contractor had no interaction with the siding manufacturer and because the manufacturer did not design the siding system specifically for the contractor's requirements.**

Babb, supra. The *Babb* court then went on to note that in the case before it, the manufacturer did not know the purchaser's identity or purpose and did not specifically build the boat with the purchaser's requirements in mind. Instead, the boat was merely an ordinary model built at the manufacturer's factory and then sold and shipped to a dealer. The dealer then sold the boat to the purchaser. When the dealer went bankrupt and the purchaser had issues with the boat, the manufacturer attempted to assist after the sale. The court then went on to find that the only interaction was a series of post-sale contacts "related to the repair of a boat that [the manufacturer] did not build specifically for [the purchaser]." *Id.* Based upon the facts of that case, the court found that the purchaser was not an intended third-party beneficiary of the contract between the manufacturer and the dealer and that the implied warranty of merchantability failed for lack of privity of contract. *Id.*

{¶22} In short, to be a third-party beneficiary, the purchaser must show that the manufacturer was involved in the transaction, knew the purchaser's identity and purpose, communicated with the purchaser regarding the purchase, or delivered the goods to the purchaser. *See Johnson v. Metro-Goldwyn-Mayer Studios Inc.*, W.D. Washington No. C17-541 RSM, 2017 WL 3313963 (Aug. 3, 2017). A third-party

beneficiary is not entitled to coverage pursuant to an implied warranty when a manufacturer is unaware of the party's identity or did not intend to sell to that specific party. *Id*. at *6. Here, the undisputed facts show that Airstream made a standard model RV and sold it to AA. Prior to the manufacture or sale of the RV at issue, there is no evidence presented of any contact between Airstream and Powell. This was not a special order and there is no evidence that Airstream knew who would purchase this RV. After the sale, most of the communication about the issues with the RV were between AA and Powell. March testified that he knew of one post-sale email and only a few phone calls. Most of the communication was between AA and Powell and then between AA and Airstream. The record does not support the conclusion that Powell was a third-party beneficiary of the sales contract between AA and Airstream. Since Powell lacks privity of contract with Airstream and is not a third-party beneficiary, he cannot avail himself of the implied warranty of merchantability against Airstream.

{¶23} *Express Warranties*

{¶24} Powell also argues that Airstream violated the express warranty. Express warranties are any affirmation of fact or promise, any description, or any sample or model by a seller relating to or describing the goods when such representation forms the basis of the bargain. RCW 62A.2–313. At the time of purchase, Powell was provided with a limited warranty on the travel trailer. This warranty provided as follows in pertinent part.

THIS LIMITED WARRANTY COVERS: (i) ONLY the first retail owner and any second owner (ii) ONLY those portions of a NEW travel trailer not excluded under the section "What is Not covered", when sold by an authorized dealership; and (iii) ONLY defects in workmanship performed and/or materials used to assemble those portions of your travel trailer not excluded under the section "What is Not Covered". "Defect" means the failure of the workmanship performed and/or materials used to conform with the design and manufacturing specification and tolerances of Airstream. * * *

*** * ***

LIMITATION OF IMPLIED WARRANTIES

IMPLIED WARRANTIES ARISING UNDER APPLICABLE LAW, IF ANY INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE HEREBY LIMITED IN DURATION TO THE TERM OF THIS LIMITED WARRANTY AND ARE LIMITED IN SCOPE OF COVERAGE TO THOSE PORTIONS OF THE TRAVEL TRAILER COVERED BY THE LIMITED WARRANTY. THERE ARE NO EXPRESS WARRANTIES OR ANY IMPLIED WARRANTIES OF MERCHANTABILITY ON THOSE PORTIONS OF THE TRAVEL TRAILER EXCLUDED FROM COVERAGE. There is no warranty of any nature made by Airstream beyond that contained in this Limited Warranty. * * *

REPAIR REMEDY: Airstream's sole and exclusive obligation is to repair any covered defects discovered within the warranty coverage period if: (1) within 10 days of your discovery of a defect you notify Airstream OR an authorized dealership of the defect; AND (2) you deliver your travel trailer to Airstream OR an authorized dealership at your cost and expense.

BACK-UP REMEDY: If the primary repair remedy fails to successfully cure any defect after a reasonable number of repair attempts, your sole and exclusive remedy shall be to have Airstream pay an Independent service shop of your choice to perform repairs to the defect OR if the defect is incurable, have

Airstream pay diminution in value damages. The repair remedy and the back-up remedy MUST both be exhausted AND those remedies must fail to fulfill their essential purpose before you can seek any legal or equitable relief.

*** * ***

WHAT IS NOT COVERED

1. Tires, batteries, stereo, television, range/stove, furnace, refrigerator, air conditioner, toilet, water heater, microwave generator, glass breakage, and other materials, parts and component warranted by persons or entities other than Airstream. Please refer to the warranties of component manufacturers for terms and conditions of coverage;

2. Accessories and equipment that are working as designed, but which you are unhappy because of the design

3. Any part or component of the travel trailer that was not manufactured or installed by Airstream;

4. Normal deterioration due to wear or exposure, including but not limited to upholstery, flooring rust, corrosion, oxidation, and cosmetic blemishes.

5. Normal maintenance and service items, including but not limited to light bulbs, fuses, lubricants, sealants and seals, door adjustments, and awning tension;

6. After market equipment or accessories installed on the travel trailer after completion of manufacture by Airstream, or any defects or damage caused by such items;

*** * ***

8. Defects or damage caused by, in whole or in part, or in any way related to: Accidents, misuse (including off-road use), or negligence; Failure to comply with the instructions set forth in any owner's manual provided with the travel trailer; Alteration or modification of the travel trailer except such alterations or modifications approved in writing by Airstream; Acts of God or

other environmental conditions, such as lightning, hail, salt causing rust, or other chemicals in the atmosphere; De-icing agents or other chemicals applied to the travel trailer; Failure to properly maintain or service the travel trailer, including but not limited to the maintenance of lubricants, sealants, and seals; Condensation and the results of condensation including water damage and the growth of mold or mildew. Mold and mildew are natural growths given certain environmental conditions and are not covered by the terms of this Limited Warranty; The addition of weight to the travel trailer that causes the total weight to exceed applicable weight ratings, or additions of weight causing improper distribution of the weight of the travel trailer; Failure to seek and obtain repairs in a timely manner; Failure to use reasonable efforts to mitigate damage caused by defects; Failure to properly ventilate the travel trailer; Improper electric power supply or improper travel trailer hookup to other facilities; Acts or omissions of any person or entity other than Airstream.

DISCLAIMER OF INCIDENTAL AND CONSEQUENTIAL DAMAGES

Airstream disclaims any and all incidental and consequential damages, including but not limited to expenses such as transportation to and from dealerships and Airstream repair facilities, loss of time, loss of pay, loss of use, inconvenience, commercial loss (including but not limited to lost profits), towing charges, bus fares, vehicle rental, service call charges, gasoline expenses, incidental charges such as telephone calls and facsimile transmissions, and expenses for lodging and moisture damages such as mold and mildew as well as rust and corrosion. This disclaimer is independent of any failure of the essential purpose of any warranties provided with the travel trailer, and shall survive any determination that a warranty failed of its essential purpose. * * *

*** * ***

If you believe a defect covered by this Limited Warranty still exists after an attempted repair by an authorized Airstream dealer, you must contact Airstream at the following address, specifying:

> **1. The complete serial number of the travel trailer;**
> **2. The date of original purchase and the date of original delivery;**
> **3. The name of the selling dealer; and**
> **4. The nature of the problem and the steps or service which has been performed.**
>
> *** * ***
>
> **Airstream may direct you to an authorized Airstream dealer, or may request that you bring your travel trailer to the Airstream factory in Jackson Center, Ohio for repairs.**
>
> **Airstream does not control the scheduling of repairs at its authorized Airstream dealers, and repairs at the Airstream factory may not be immediately available. Therefore, you may encounter delays in scheduling repairs and/or completion of repairs. All costs associated with transporting the travel trailer for any warranty service shall be the sole responsibility of the owner.**

Doc. 7, Ex. A.

{¶25} Powell claims that Airstream breached its express warranty by failing to correct the issues with the RV within a reasonable time and with a reasonable number of repair attempts. As noted by the trial court, there were many issues with the RV. However, a review of the warranty shows that many of these issues were not warranty issues. The warranty specifically excluded issues with the furnace, toilet, stove, air conditioner, refrigerator, and doors, including the door adjustments. Additionally, issues with the awning were excluded as it was a component covered by a third party warranty and only installed by Airstream. March Dep. 27. Although AA and Airstream addressed many of these issues for the benefit of the customers,

the warranty coverage was provided by third parties. Excluding the issues clearly excluded under the warranty, a view of the evidence in a light most favorable to Powell shows the following repeat problems: 1) bath fan rattling; 2) drawer in the bedroom opening in transit; 3) 30 amp outlet lights going out on the receptacles; 4) water pooling in the shower; 5) rivet head popping out in transit;[4] and 6) a squeaky floor.[5] The record shows that most of these issues were corrected each time they were brought in, however some of them came back. The bath fan rattling resulted from wires coming loose or a screw coming loose allowing the fan to hit the housing. The problem with the bedroom drawer was resolved by changing the 5 lb. catches to 10 lb. catches, which allowed for more pressure during transit. AA noted during one repair that the catches were working as designed, but were not strong enough for the customers' purposes. The 30 amp outlet lights did keep going out and were repeatedly replaced. The new one would work for a while, but the light in the new ones would eventually fail as well. The issue with the shower was completely resolved when the shower was replaced and all the fittings were tightened. The rivet

[4] Without knowing exactly which rivets were coming loose, it is difficult for this court to know if it is a repeat issue as in the same rivet, or is in a different location. However the undisputed testimony is that frequently rivets do come loose during transit and have to be replaced. As we are viewing the evidence in a light most favorable to Powell, we will treat this as a repeat issue.

[5] This Court notes that there were other issues that repeated according to the customers, but some of these, such as the fantastic fan becoming inoperable or issues with the air conditioning fan and furnace running at the same time were due to user error. Some other issues listed showed that the component was functioning as designed. The customer just did not like that aspect. However, this type of issue is specifically excluded by the warranty. The remaining issues were either repaired the first time or were for a component excluded by the terms of the warranty. Additionally, in its motion opposing summary judgment, Powell listed additional complaints such as "excessive mold growth on the exterior of the RV." However, these alleged additional issues were not brought to the attention of Airstream and thus cannot be considered when determining whether Airstream breached the terms of its express warranty.

heads were resolved by drilling out the old rivets and replacing them with new ones. Although the squeaky floor was noted, it was checked and no issues were found.

{¶26} Even if Airstream failed to repair everything according to the warranty, Powell failed to follow the terms of the warranty. The Back Up Remedy of the warranty provides that if Airstream has not successfully repaired the issue after a reasonable attempt, the purchaser has the right to take the RV to an independent repair facility to get the issue resolved and that Airstream will pay for the repairs. If the issue cannot be remedied, Airstream will then pay diminution in value. This is the sole and exclusive remedy permitted under the terms of the warranty. Instead of trying to get a third party to repair the RV and have Airstream pay for those repairs, Powell instead chose to request to rescind the sales contract and have Airstream give him his money back.[6] This is not a remedy offered under the warranty. The warranty specifically provides that "the repair remedy and the back-up remedy MUST both be exhausted AND those remedies must fail to fulfill their essential purpose before you can seek any legal or equitable relief." This portion of the warranty was listed in bold print and was not hidden. Powell has not exhausted his remedies under the warranty. Thus, pursuant to the terms of the warranty, he is not entitled to seek legal or equitable relief at this time.

[6] This court notes again that Powell did not purchase the RV from Airstream, but from AA. AA purchased the RV from Airstream.

{¶27} Powell also argues that the terms of the limited warranty should not be applied because it failed of its essential purpose.

> **Under the Uniform Commercial Code, a limitation of remedy clause is ineffectual when it deprives a party of the substantive value of its bargain. Wash.Rev.Code § 62A.2–719. Limited remedies clauses fail of their essential purpose in two situations, one of which is "when the seller or other party required to provide the remedy, by its action or inaction, causes the remedy to fail." Marr Enterprises, Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 955 (9th Cir.1977). Typically, cases in this category are those in which the plaintiff's remedy was limited solely to repair or replacement of defective parts and the seller failed to replace or repair in a reasonably prompt and non-negligent manner.**

Polygon Northwest Co. LLC v. Louisiana-Pacific Corp., W.D. Wash No. C11-620 MJP, 2012 WL 2504873 (June 28, 2012). "When there are alternate exclusive limited remedies, such as repair or refund, the exclusive remedies have been held not to fail of their essential purposes, although there was a failure to repair or replace the defective parts." *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 229, 797 P.2d 477 (1990).

{¶28} Pursuant to the language of the warranty, the purpose in this case was to 1) allow an Airstream dealer to repair any alleged covered defects, 2) if the dealer could not successfully repair the alleged covered defect, permit the owner to take it to a third party for repair at Airstream's cost, and 3) if the alleged defect was not curable, allow the owner to receive the diminution in value. As discussed above, the repairs were all successfully completed within one to three attempts excluding those for which the problem could either not be duplicated or no issue could be

found. Although Powell and the customers did take the RV to AA, an authorized dealer for repairs, when those repairs did not meet their expectations, they did not attempt to arrange for a third party to repair the RV at Airstream's expense. Airstream gave Powell an alternative to continuing to allow Airstream's dealers to attempt to repair the issues, but Powell did not avail himself of this option. As there were alternatives, the warranty did not fail of its essential purpose.

{¶29} Powell also argues that the back up remedy should fail because he would not have purchased the RV if he had known about the "secret" back up remedy provision prior to the purchase. This court notes that even assuming that Powell did not receive a copy of the warranty until he picked up the RV, he did receive a copy of it.[7] The customers then proceeded to use the RV for more than a year after receiving the warranty. The customers even took advantage of the warranty by having items repaired at no charge. Even assuming that the purchase contract was voidable because Powell did not know all of the terms, i.e. the back up remedy in the limited warranty, a party ratifies those terms if he or she remains silent or continues to accept the benefits of the contract after discovering the unknown provisions. *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wash.App. 423, 433, 754 P.2d 120 (1988). By using the RV and the warranty, Powell ratified the provisions in the limited warranty, including the back up remedy.

[7] The back up remedy was not hidden amongst the fine print of the limited warranty. The copy of the warranty provided by Powell shows that the back up remedy was labeled in bold print and all capital letters on the first page right under the repair remedy. It was clearly placed for anyone to view.

{¶30} Powell also argues three other issues: 1) Airstream waived the back up remedy, 2) the back up remedy left him with no remedy, and 3) the back up remedy was against public policy. A review of the record shows that these issues were neither raised in the initial complaint nor in the response to the motion for summary judgment. This Court has long held that issues that were not, but could have been, raised in the trial court may not be raised for the first time on appeal. *Cortez v. Smith*, 3d Dist. Defiance No. 4-95-5, 1995 WL 505928 (Aug. 10, 1995). Powell could have argued these claims in the trial court, but did not. Thus, we will not address them on appeal.

Magnuson-Moss Warranty Act

{¶31} The third claim raised in the complaint was that Airstream violated the Magnuson-Moss Warranty Act. The "Act limits the ability of manufacturers to disclaim or modify implied warranties in cases where they have offered express warranty protection." *Curl v. Volkswagon of Am. Inc.*, 114 Ohio St.3d 266, 2007-Ohio-3609, ¶ 10, 871 N.E.2d 1141. It does not create new implied warranties or otherwise modify the implied warranties existing according to state law. *Id.* Rather, the Act adopts the implied warranty protections previously established under the governing state law. *Id*. "Claims under the Magnuson–Moss Act stand or fall with [the] express and implied warranty claims under state law." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). The outcome of the state law warranty claims determines the disposition of the Magnuson-Moss Act

claims. *Id*. If the underlying state warranty claims are dismissed, the Magnuson-Moss Act claims must also be dismissed. *Id*.

{¶32} Here, Powell brought the Magnuson-Moss Act claims based on violation of the limited and express warranties pursuant to the law in the state of Washington. This Court addressed the alleged breaches of the express and limited warranties above. The conclusion reached was that Airstream did not breach the express warranty and that Powell lacked privity to contract to recover on the theory of implied warranties. Since the underlying state warranty claims fail, as a matter of law the federal claims under the Magnuson-Moss Act must also fail.

Washington Consumer Protection Act

{¶33} Powell also claims that Airstream violated the Washington Consumer Protection Act ("CPA") by violating the warranties and the Moss-Magnuson Act and by deceiving the general public. "To prevail on a CPA action, the plaintiff must prove an '(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.' " *Klem v. Washington Mut. Bank*, 176 Wash. 2d. 771, 782, 295 P.3d 1179, (2013) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co*., 105 Wash.2d 778, 780, 719 P.2d 531 (1986)). If a plaintiff does not satisfy each of these elements, the CPA claim must fail. *Rush v. Blackburn*, 190 Wash. App. 945, 961, 361 P.3d 217 (2015). The determination of whether an act is unfair or deceptive is a question of law, not fact. *Id*.

{¶34} The purpose of the CPA is to address acts injurious to the public. RCW 19.86.920. Thus, a plaintiff bringing a cause of action pursuant to the CPA must show that there was a public interest impact resulting from the alleged deceptive act. *Id*. To determine if the act affects the public, courts should look to see if the acts form a pattern, whether they have been repeated, or if the alleged deceptive acts affected many consumers. *McLaughlin v. Watercraft International, Inc.*, 87 Wash.App.1051 (1997).

{¶35} Here, Powell claims that there was deceptive acts by Airstream when it breached its warranty. This court has already determined that there was no breach of warranty, so it cannot be a deceptive act. Powell also claims that by advertising that the RV was well made and would last a long time, Airstream was deceptive. However, the only evidence of this was that this specific RV had many issues and was not up to the quality expected by Powell. Powell presented no evidence that there was a pattern of behavior or that it affected many consumers. An isolated incident, i.e. putting a subpar RV into the commerce stream, while it may affect a few consumers catastrophically, does not necessarily affect a large number of consumers as is necessary to establish a claim under the CPA. *McLaughlin, supra.* Without any evidence that an allegedly deceptive or unfair act is likely to be repeated or has affected a large number of consumers, there is no public impact as is required for a claim under the CPA. *Id*. Since the undisputed evidence does not show that there was a public impact in this case, the CPA claim must fail.

{¶36} Having reviewed all of the claims raised in the complaint and the arguments raised in the memorandum contra to the motion for summary judgment, the undisputed evidence shows that there are no material issues of fact. Viewing the evidence in a light most favorable to the nonmoving party, reasonable minds can only reach one conclusion and that conclusion is adverse to the nonmoving party. The motion for summary judgment was properly granted and the assignment of error is overruled.

{¶37} Having found no error in the particulars assigned and argued, the judgment of the Court of Common Pleas of Shelby County is affirmed.

Judgment Affirmed

SHAW and PRESTON, J.J., concur.

/hls

[Cite as *Cincinnati v. Triton Servs., Inc.*, 2019-Ohio-3108.]

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

CITY OF CINCINNATI, Plaintiff-Appellee/Counterclaim-Defendant, vs. TRITON SERVICES, INC., Defendant-Appellant/ Counterclaim-Plaintiff, OHIO FARMERS INSURANCE COMPANY, and MAJID H. SAMARGHANDI, Defendants/Counterclaim-Plaintiffs, and TRITON PROPERTIES, LLC, Defendant.	:	APPEAL NO. C-170705 TRIAL NO. A-1405757 *OPINION*.

TRITON SERVICES, INC., Plaintiff-Appellant/Counterclaim-Defendant, vs. CITY OF CINCINNATI, A MUNICIPAL CORPORATION, Defendant-Appellee/ Counterclaim-Plaintiff.	:	APPEAL NO. C-170705 TRIAL NO. A-1500905

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: August 2, 2019

Paula Boggs Muething, City Solicitor, *Joseph C. Neff*, Assistant City Solicitor, and *Taft Stettinius & Hollister, LLP, Earl K. Messer* and *Nicolas J. Pieczonka*, for the City of Cincinnati,

Stites & Harbison, PLLC, William G. Geisen and *Andrew J. Poltorak*, for Triton Services, Inc., Ohio Farmers Insurance Company, and Majid H. Samarghandi.

WINKLER, Judge.

{¶1} Appellant Triton Services, Inc., ("Triton") appeals several orders entered against it in favor of appellee city of Cincinnati ("the city") in two consolidated cases. We find merit in four of Triton's eight assignments of error. We therefore affirm the trial court's judgment in part and reverse it in part.

The Wesselman/Carroll Projects

{¶2} The record shows that in April 2008, Triton entered into a contract with the city, acting on behalf of the Metropolitan Sewer District ("MSD"). Under the contract, Triton was the general contractor performing sewer work for the Wesselman Road Interceptor Sewer Phase 1A-3 and 1B project ("Wesselman Project"). Subsequently, Triton entered into another contract with the city to perform the Carroll Avenue Sewer Replacement Project ("Carroll Project"). Ohio Farmers Insurance Company provided surety bonds for both projects.

{¶3} In June 2011, the city issued three checks totaling $496,256.09 to Triton for the work it had performed on the Wesselman and Carroll Projects. Triton deposited the checks into its bank account. Several months later, the city discovered that Pavement Management, one of Triton's subcontractors, had not been paid. The city took steps to stop payment on the checks it had issued to Triton. The city was erroneously informed by its bank that the payment had been stopped.

{¶4} Subsequently, Pavement Management filed suit against Triton and the city, seeking the money that it was owed for its work on the projects. To resolve that lawsuit, the city paid $396,756.09 to Triton and $99,500 to Pavement Management.

{¶5} In January 2014, the city discovered that the checks for the original payments of $496,256.09 had not been stopped because the stop-payment orders had been issued too late. After the city discovered the accidental double payment, it

sent numerous letters to Triton requesting the return of the original payment of $496,256.09. Triton never returned the payment.

{¶6} Subsequently, in the case numbered A-1405757, the city filed a complaint against Triton alleging unjust enrichment and breach of contract. The city also named Ohio Farmers Insurance Company ("Farmers") as a defendant and made a claim under the surety bonds on the projects. In conducting discovery, it learned that Triton knew that the city's checks were fully deposited into Triton's checking accounts and that the relevant funds were never returned to the city. In fact, the overpayment was transferred between numerous bank accounts.

{¶7} Consequently, the city amended its complaint to add claims for fraud and punitive damages against Triton and Majid H. Samarghandi, Triton's CEO. In response, Triton and Samarghandi asserted counterclaims for abuse of process and frivolous conduct, in which they alleged that the city had filed the fraud claim to harass them and force them to surrender the payment.

{¶8} Eventually, the city withdrew its fraud and punitive-damages claims. The trial court granted summary judgment in favor of the city on its unjust-enrichment claim and awarded the city $496,256.09. The court also granted summary judgment in favor of the city on Triton's claim for abuse of process. As to the claim for attorney fees for frivolous conduct, the court found that the issue should have been raised by motion rather than in Triton's counterclaim. The court stated that the evidence related to frivolous conduct should not be presented to the jury, but that it would allow Triton to raise the issue by motion after the trial of the other issues raised in a consolidated case.

The Sagebrush Project

{¶9} In July 2011, Triton entered into a contract with the city to perform work on the Sagebrush Lane, Susanna Drive, and Yellowstone Drive sewer project ("Sagebrush Project"). The original contract amount was $2,698,440. The contract incorporated the bid booklet, the State of Ohio Department of Transportation Construction and Material Specifications ("ODOT CMS"), and the city of Cincinnati's supplement to the ODOT CMS.

{¶10} A geotechnical report was incorporated into the bid booklet. It provided that "excavations for the sewer are anticipated to primarily encounter cohesive soils interbedded occasionally with cohesionless soils." The report stated that no water was found at a majority of the test borings, which led to the recommendation that trench excavations be performed in 50-foot sections with each section being backfilled before proceeding to the next trench excavation. The bid booklet stated that the geotechnical report was for informational purposes only and that the report was not a substitute for actual site inspection.

{¶11} Triton began work on the Sagebrush Project in September 2011. Soon after, it discovered differing soil conditions than it had expected. Triton claimed that it had encountered sloughing soils, trench cave-ins, excessive groundwater, and extremely wet conditions, which caused it to incur substantial increased expenses.

{¶12} The contract spelled out what should occur if Triton encountered differing site conditions. ODOT CMS ¶ 104.02(B) provided:

> During the progress of the Work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract Documents or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in

> the Work provided for in the Contract Documents, are encountered at the site, notify the Engineer as specified in 104.05 of the specific differing conditions before they are disturbed or the affected Work is performed.
>
> Upon notification, the Engineer will investigate the conditions and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any Work under the Contract, the Department will make an adjustment and modify the Contract as specified in 108.06 and 109.05. The Engineer will notify the Contractor of the determination whether or not an adjustment of the Contract is warranted.

The "Engineer" was defined as a "[d]uly authorized agent of the Department acting within the scope of its authority for purposes of engineering and administration of the Contract." ODOT CMS ¶ 101.03.

{¶13} ODOT CMS 104.05(D), as amended by the city supplement, required the contractor to:

> Give written notice of any circumstance or dispute on the project that may result in a claim. Give early notice by the end of the second working day following the discovery of the occurrence of the circumstance or dispute. Maintain records on the Superintendent's daily report of the additional labor, equipment, and materials used on the disputed work or made necessary by the circumstance. Begin record keeping when the project personnel are aware of the circumstance of dispute. Submit these records on a weekly basis.

This section further states that "[f]ailure to give early notice or keep and submit cost records will be a sufficient reason for the City to deny the claim."

{¶14} According to Triton, Brian Gessner, Triton's director of site development, discussed the differing site conditions frequently with city representatives throughout the project, including Steve Jones, the supervising engineer for the Sagebrush Project. Triton also contended that it sent numerous written notices to the city relating to the differing site conditions.

{¶15} On February 1, 2012, Gessner sent an email to Sara Cramer, MSD's construction manager for the Sagebrush Project. Gessner advised Cramer of the poor condition of the water mains at the site and that there had been three water main breaks at the site, causing "undue saturation" of the "surrounding subsurface." He also expressed concern about the future impact of the water mains on Triton's work.

{¶16} On March 7, 2012, Gessner sent a letter to Cramer stating,

> As I am sure you have witnessed by your numerous site visits, review of the inspector's daily notes as well as Tritons [sic] notifications both verbally and as was addressed in last week's meeting, the bore and trench excavations have exposed poor ground conditions at every excavation completed on the upper subdivision part of the project and are currently experiencing [m]ajor delays. The soil strata have consisted of large seams of sand as well as groundwater that are inconsistent with the bore reports.

He stated that the field operations should be delayed and asked for a meeting to discuss the problems.

{¶17} On March 15, 2012, Gessner sent another email to Cramer discussing the wet site conditions. At that time, the differing site conditions had brought

Triton's work on the project to a standstill, and it was waiting on a proposal from MSD so that it could continue with its work on the project. Gessner also stated that he had been in "continuous communication" with Jones on those issues.

{¶18} On March 16, 2012, Gessner sent Cramer documentation regarding additional trench protection that Triton's crews would need to use due to the site conditions. He advised her that the additional trench protection would cause Triton to incur additional costs. As of March 19, 2012, work remained at a standstill. Gessner sent an email to Cramer and Jones requesting that they approve the extra costs associated with more substantial trench boxes, the use of which was necessitated by the sloughing and saturated soils. MSD agreed to pay those costs, and Triton was able to continue work on the project.

{¶19} On May 21, 2012, Gessner sent an email to Cramer advising her that soil conditions on the west end of Susanna Drive were unsuitable due to saturated and sloughing soils and approximately four inches of water, which would cause Triton additional costs. He asked Cramer to confirm conditions with MSD's field staff and to confirm that MSD would pay for Triton's additional costs.

{¶20} In early June 2012, Gessner and Cramer exchanged emails regarding the deteriorated and unsuitable subbase on the project. Gessner advised Cramer that the unforeseen conditions had caused compromised trench walls during the mainline pipe operations, causing Triton to incur costs for additional materials and labor.

{¶21} Gessner also indicated that work on the project had been delayed. Triton contended that while work was stopped, Jones had directed Gessner to wait and submit all costs incurred due to differing site conditions at the end of the project. The city contends that Jones only told him to submit costs for certain discrete parts of the project.

{¶22} On June 26, Gessner sent an email in which he requested that Cramer visit the job site. He attached a photograph showing sloughing soils, trench cave-ins and deteriorated subbase. In July, he sent Cramer a series of photographs showing the deteriorated subbase on Susanna Drive, east of Flattop Drive.

{¶23} On July 24, 2012, Jones sent an email to Patrick Arnette, MSD's principal engineer. He stated,

> This is likely the most difficult project I have seen since I have been in the construction section. Fill soils in excavation, angry and resistant residents towards the project, rain in Fall and Winter working near the creeks, 105 degree heat and no rain in the summer working in the streets, an unqualified contract duration, communication on the project from numerous entities, a design that does not allow traffic, mismarked and failing utilities, unrealistic expectations from residents, confrontational and deceitful residents, a contractor without a full crew at the beginning of the project[.] * * * I have said since the beginning of the project that we may all do great work but we will all receive black eyes at the end of this project. Where others see failure, I see success by MSD and Triton. The contractor went from a half crew to 4 crews on the job, save 3 to 4 months on the contract time using a new more costly boring method, has done a remarkable job communicating and trying to get traffic through the work areas.

Jones would later state that the project was difficult primarily due to the residents and secondarily due to all of the entities involved.

{¶24} James Wilmes was MSD's on-site inspector for the project. Typically, he was at the site for ten hours per day. As part of his duties, he would prepare an "Inspector Daily Report" ("IDR"), in which he would document his observations. He

also took photographs of the site conditions. According to Triton, the IDRs supported its claims of differing site conditions. The city contended that Wilmes's job was not to inspect subsurface conditions at site, and he did not have the training and experience to make those kinds of determinations. Wilmes stated that he had no reason to conduct any further inspections into ground-water conditions and that he would have referred any issues with subsurface conditions to the engineer.

{¶25} Triton completed the trench excavations by August 28, 2012. Though the contract had an expiration date of September 21, 2012, the job continued after that date. Part of the reason was that Triton had to temporarily stop work on the project for Colerain Township to install new curbs. Triton finished the final work, mostly involving the final grinding and paving of the roads, on December 12, 2012.

{¶26} On November 19, 2012, Triton submitted change order request ("COR") #5 relating to unforeseen ground conditions at manholes three through six in the mainline pipe installation. The associated work occurred between February 27, 2012, and April 9, 2012. It stated "[a]s per the notification via the attached letter dated 6/4/12 and the Time Impact Analysis dated 6/26/2012, Triton has incurred the additional costs as listed below as a result of the differing site conditions." MSD approved that change order request through Construction Change Order ("CCO") #7 on October 3, 2014.

{¶27} On November 19, 2012, Triton also submitted COR #3 related to unforeseen ground conditions during the bore at manhole number three. The work associated with that bore occurred between November 1 and 11, 2011. MSD approved that change order request through CCO #6 on September 2, 2013.

{¶28} On March 15, 2013, eight months after it had finished trench excavations, Triton submitted COR #6 for unforeseen ground conditions at manholes three through six. The work associated with that request occurred

between February 27, 2012, and April 9, 2012. Triton again referenced its letter of June 12, 2012, and the Time Impact Analysis dated June 26, 2012. Triton contended that it had submitted this request at that time because Jones had requested that Triton gather all costs associated with the differing site conditions and submit those requests after the conclusion of the project. MSD approved this change order request through CCO #6 on September 2, 2013.

{¶29} On March 15, 2013, Triton also submitted COR #7 for additional concrete roadway restoration due to the deteriorated road base. It stated that it had submitted the request after the conclusion of the project, per Jones's request. MSD approved COR #7 through CCO #7.

{¶30} Finally, on March 19, 2013, Triton submitted COR #14 for expenses incurred due to undocumented, unsuitable ground conditions throughout the project. Again, it claimed that it had submitted this request at that time because Jones had requested that it submit all change order requests after work on the project was finished. Triton requested additional compensation of $534,321.65. Gessner calculated that amount by using what Triton contends was a total-cost method. It supported that request with a binder full of information that contained numerous photographs and copies of numerous IDRs, which it contended documented its claim for differing site conditions.

{¶31} After the city refused to approve COR #14, Triton filed a complaint in the case numbered A-1500905 alleging breach of contract. It sought damages for the unpaid contract balance, costs related to the differing site conditions, extended and unabsorbed home office overhead, interest, and attorney fees. The city filed a counterclaim for breach of contract and indemnification. At Triton's request, the trial court consolidated that case with the case numbered A-1405757.

{¶32} Subsequently, the city filed two motions in limine. In its first motion, the city asked the court to exclude the testimony of Brian Gessner, Triton's director of site development, relating to Triton's damages for the differing-site-conditions claim because he did not use a proper method to calculate those damages, and the damages were purely speculative. In its second motion, the city asked the court to exclude evidence related to Triton's claim for differing site conditions due to spoliation of the evidence. It argued that Triton had failed to preserve evidence necessary for it to rebut Triton's claims that the soil conditions it encountered on the Sagebrush Project were different than those stated in the contract. The trial court granted both motions in limine.

{¶33} The court granted summary judgment in favor of Triton and Farmers on the city's claims against the performance and payment bonds. The trial court also granted summary judgment in favor of the city on Triton's claims for its home office overhead and for attorney fees.

{¶34} But the court denied the city's motion for summary judgment on Triton's differing-site-conditions claim. The court stated that a genuine issue of material fact existed "as to whether the subsurface conditions at the site materially differed from those indicated in the geotechnical engineering report that the city issued with the bid documents."

{¶35} Thus, the only issue remaining for trial was Triton's differing-site-conditions claim. On October 23, 2017, a jury trial commenced. Triton and the city entered into an agreement resolving some of the claims, which included dismissing the jury and proceeding to a bench trial. Triton proffered the evidence that it would have presented had that evidence not been excluded. The trial court then granted the city's motion for a "directed verdict" on the differing-site-conditions claim. On

November 28, 2017, the court journalized a judgment entry incorporating all of its previous rulings. This appeal followed.

{¶36} Triton presents eight assignments of error for review, which we address out of order. We will discuss the assignments of error related to the Sagebrush Project first and then the assignments of error related to the Wesselman/Carroll projects.

Spoliation of Evidence

{¶37} In its first assignment of error, Triton contends that the trial court erred in granting the city's motion in limine precluding Triton from presenting evidence concerning differing site conditions due to spoliation of evidence. The basis of the city's spoliation argument was that Triton had failed to collect and preserve soil samples at the job site to support its differing-site-conditions claim. Triton argues that the court abused its discretion, because the threshold showing of spoliation had not been met. In its second assignment of error, Triton contends that the trial court erred in precluding Triton from presenting evidence regarding soil conditions at the site and any difference between the soil conditions it had encountered and the soil conditions it expected at the Sagebrush Project site as a sanction for spoliation of evidence. We sustain these assignments of error.

{¶38} The doctrine of spoliation of the evidence may be raised in a number of ways including as an affirmative defense or by motion. The effect of the doctrine, when applied in a defensive manner, is to allow the defendant to exculpate itself from liability because the plaintiff has barred it from obtaining evidence necessary to prove the existence or absence of the essential elements of the claim. *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶ 12 (1st Dist.). A trial court may exclude expert testimony as a sanction for spoliation

of the evidence if it determines that evidence has been intentionally altered or destroyed by a party or its expert before the defense has had an opportunity to examine the evidence. *Id.* at ¶ 13; *Hetzer-Young v. Elano Corp.*, 2d Dist. Greene No. 2013-CA-32, 2014-Ohio-1104, ¶ 29; *Cincinnati Ins. Co. v. Gen. Motors Corp.*, 6th Dist. Ottawa No. 94OT017, 1994 WL 590566, *3 (Oct. 28, 1994).

{¶39} The city does not contend that Triton destroyed soil samples. Instead, it argues that Triton failed to collect and preserve them. Nothing in the record shows that Triton had a duty to collect soil samples, and the city never asked Triton to provide soil samples. The contract for the Sagebrush Project did not require Triton to do so. Further, the contract gave the city the right to inspect job-site conditions at any time so it could have collected its own soil samples, if needed.

{¶40} The city contends that Triton failed to give it proper notice of the condition of the soil as provided for in the contract. That is a separate contractual issue, which is irrelevant to the doctrine of spoliation of the evidence. That issue was never fully addressed because of the trial court's decisions granting the two motions in limine, an issue we discuss more fully under Triton's eighth assignment of error.

{¶41} Thus, the doctrine of spoliation of evidence is not implicated in this case because no evidence existed to be destroyed. Sanctions and causes of action for spoliation of evidence are designed to place responsibility and accountability on parties who were actually in possession of evidence that existed at one time but who later failed to provide the evidence without adequate explanation. *Wheatley v. Marietta College*, 2016-Ohio-949, 48 N.E.3d 587, ¶ 105 (4th Dist.); *Keen v Hardin Mem. Hosp.*, 3d Dist. Hardin No. 6-03-08, 2003-Ohio-6707, ¶ 16. "Non-existent evidence, by its very nature, cannot be spoiled." *Keen* at ¶ 16.

{¶42} Consequently, we hold that the trial court erred in granting the city's motion in limine and in precluding Triton from presenting evidence regarding soil

conditions at the Sagebush Project site based on spoliation of evidence. We sustain Triton's first and second assignments of error.

Testimony on Damages for Differing-Site-Conditions Claim

{¶43} In its third assignment of error, Triton contends that the trial court erred in precluding Gessner from testifying in support of its claim for damages relating to differing site conditions. It argues that the evidence was probative and was calculated with a reasonable degree of certainty, and therefore, should not have been excluded. We find this assignment of error to be well taken, although not precisely for the reasons Triton states.

{¶44} We note that the city argues in its brief that Gessner was not qualified as an expert witness under Evid.R. 702, which was not the basis of its motion to exclude his testimony about damages in the trial court. In its motion, the city had argued that the probative value of the testimony on damages was substantially outweighed by the danger of unfair prejudice under Evid.R. 403(A). Its argument was threefold: (1) that Gessner's damage calculation was based on documents that Triton had lost, disposed of, or intentionally withheld; (2) that Gessner could not explain the basis of his damage calculation; and (3) that Gessner's calculation did not conform to the requirements of a total-cost claim.

{¶45} The trial court has broad discretion in determining whether evidence should be excluded under Evid.R. 403(A). A reviewing court will not reverse that decision absent an abuse of discretion. *State v. Simms*, 1st Dist. Hamilton Nos. C-030138 and C-030211, 2004-Ohio-652, ¶ 4; *Cincinnati v. Banks*, 143 Ohio App.3d 272, 287, 757 N.E.2d 1205 (1st Dist.2001).

{¶46} Evid.R. 403(A) provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair

prejudice, of confusion of the issues, or of misleading the jury." Exclusion of evidence under Evid.R. 403(A) requires more than mere prejudice, it requires unfair prejudice. *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001); *Conway v. Dravenstott*, 3d Dist. Crawford No. 3-06-05, 2006-Ohio-4840, ¶ 11. "Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision." *Oberlin* at 172. If evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish," it may be unfairly prejudicial. *Id.*; *Conway* at ¶ 11. "Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect." *Oberlin* at 174.

{¶47} The contract required the use of a measured-mile analysis to quantify labor inefficiencies. Triton originally stated that its damages were based on a measured-mile analysis. Using that analysis, it presented a much lower figure for damages than it claimed later in the proceedings. Gessner testified that due to the nature of the work it was impossible to do a measured-mile analysis.

{¶48} Later, Triton claimed to be using the total-cost method, which Gessner acknowledged he had no experience calculating. He stated that he had never used the calculation he had relied upon in determining Triton's damages for the alleged differing-site-conditions claim. He stated he did his "best effort at a total costs method," and that his opinion was not based on any construction journal or industry standard.

{¶49} We cannot hold that any of the alleged defects in Gessner's testimony would have caused the city unfair prejudice. Gessner's testimony would not appeal to a jury's emotions rather than its intellect. It also would not arouse a jury's emotional sympathies, evoke a sense of horror, or appeal to an instinct to punish. The city contends that Gessner's estimate of damages was speculative and based on

conjecture. *See Kahn v. CVS Pharmacy, Inc.*, 165 Ohio App.3d 420, 2006-Ohio-Ohio-112, 846 N.E.2d 904, ¶ 25 (1st Dist.); *Hollobaugh v. D & V Trucking*, 7th Dist. Mahoning No. 99 CA 303, 2001 WL 537058, *5 (May 8, 2001). But any defects in Gessner's testimony go to its weight, not its admissibility.

{¶50} Under the circumstances, we hold that the trial court's decision to grant the motion in limine excluding Gessner's testimony on damages was an abuse of discretion. We make no decision as to whether Gessner's testimony was proper expert testimony under Evid.R. 702 since the trial court did not decide the motion in limine on that basis. We, therefore, sustain Triton's third assignment of error.

Home-Office-Overhead Damages

{¶51} In its fourth assignment of error, Triton contends that the trial court erred in granting partial summary judgment in favor of the city on Triton's claim for home-office-overhead damages related to the city's unilateral extension of the project from September 2012 to June 2013. It argues that issues of fact exist as to whether it was entitled to those damages. This assignment of error is not well taken.

{¶52} An appellate court reviews a trial court's ruling on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Wal-Mart Realty Co. v. Tri-County Commons Assoc., Ltd.*, 1st Dist. Hamilton No. C-160747, 2017-Ohio-9280, ¶ 8. Summary judgment is appropriate if (1) no genuine issue of material fact exists for trial, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his or her favor. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); *Wal-Mart Realty Co.* at ¶ 8.

{¶53} Home office overhead is the cost of running a contractor's home office during a government-caused delay. *Complete Gen. Constr. Co. v. Ohio Dept. of Transp.*, 94 Ohio St.3d 54, 55, 760 N.E.2d 364 (2002). Contractors cover overhead costs by spreading the costs proportionally across ongoing projects. When an owner-caused delay substantially diminishes a project's cash flow, the contractor's fixed overhead costs are not absorbed by the delayed project and must be absorbed by other projects. If a contractor is unable to take on other construction projects during the period of the delay, the contractor's overhead costs are not absorbed by the project to which they were apportioned. *Id.* at 57; *Royal Elec. Constr. Co. v. Ohio State Univ.*, 10th Dist. Franklin Nos. 93AP-399 and 93AP-424, 1993 WL 532013 *6 (Dec. 21, 1993).

{¶54} In *Complete Gen. Constr. Co.*, the Ohio Supreme Court adopted what is known as the *Eichleay* formula "an equation employed by federal courts for determining such costs." *Complete Gen. Constr. Co.* at 55. It is "the most well-known formula for calculating unabsorbed overhead" costs arising out of government-caused delay. *Id.*, quoting Shapiro & Washington, *Use of the* Eichleay *Formula to Calculate Unabsorbed Overhead for Government Caused Delay Under Manufacturing Contracts*, 25 Pub.Contr.L.J. 513, 514 (1996). The Supreme Court did note, however, that the *Eichleay* formula is not the only way to determine unabsorbed home-office-overhead damages. *Complete Gen. Constr. Co.* at 61.

{¶55} Before that formula may be applied, the contractor must demonstrate two important elements to establish a prima facie case. First, the contractor must show that it was on "standby." A contractor is on standby "when work on a project is suspended for a period of uncertain duration and the contractor can at any time be required to return to work immediately." *Complete Gen. Constr. Co.* at 58, quoting *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1373 (Fed.Cir.1998). In effect, the

contractor is not working on the project, yet remains bound to the project. The contractor must be ready to immediately resume performance at any time. Second, the contractor must show that it was unable to take on any other work while on standby. That is, it must show that the uncertainty of the duration of the delay made it unable to commit to replacement work on another project. *Complete Gen. Constr. Co.* at 58-59.

{¶56} The government can rebut the contractor's prima facie case by demonstrating either (1) that it was not impractical for the contractor to obtain replacement work during the delay, or (2) that the contractor's inability to obtain or perform work was not caused by the government's suspension. *Complete Gen. Constr. Co.*, 94 Ohio St.3d at 59, 760 N.E.2d 364. "The *Eichleay* formula goes nowhere without causation." *Id.* at 60. A contractor may recover only if there is an owner-caused delay. *Id.*

{¶57} The contract language in the present case is similar to the contract language in *Complete Gen. Constr. Co.* It provides that "[t]he City will only pay for the Contractor's home office overhead if all work on the project is suspended at no fault of the Contractor, the length of the suspension is unknown, the Contractor's crews are put on standby, and the Contractor cannot get replacement work for the time period of the suspension."

{¶58} First, the record shows that some of the delay was not caused by the city. The delay from September 2012 to December 2012 was caused by the installation of curbs by Colerain Township, which is not a party to either suit. Gessner acknowledged that he knew Triton would return to work on the project when the curbs were installed.

{¶59} Triton contends that the city caused a nine-month suspension from September 2012 until June 2013. The record shows that the city had a policy in

which it extends a contract for at least nine months past its final completion date to negotiate change orders and close out the contract. Since Triton finished its work in December 2012, it is difficult to say that the city's extension for closing out the project caused Triton to incur additional home-office-overhead costs. But, even if we attribute all the delay to the city, nothing in the record shows that the city put Triton on "standby" status during that time.

{¶60} Further, Triton was not prevented from accepting other work from September 2012 through June 2013. In granting summary judgment to the city on Triton's claim for unabsorbed home office overhead, the trial court stated,

> Triton's own employee time records show that its employees were working on various replacement projects from September 2012 (contract completion date) and December 2012 (the date Triton admits its work on the project was completed). Mr. Gessner's inability to recall whether Triton passed up other opportunities is not sufficient to create an issue of fact concerning whether Triton was prevented from obtaining replacement work as a result of the Sagebrush Project. Triton failed to locate or produce any admissible record or evidence that shows that Triton was unable to undertake replacement work as a result of the Sagebrush Project. The burden is on Triton to set forth specific facts showing there is a genuine issue for trial.

The record supports the trial court's assessment.

{¶61} We find no issue of material fact. Construing the evidence most strongly in Triton's favor, reasonable minds can come to but one conclusion—that Triton did not suffer home-office-overhead damages. The city was entitled to judgment as a matter of law, and the trial court did not err in granting summary

judgment to the city on that issue. Consequently, we overrule Triton's fourth assignment of error.

Directed Verdict/Motion to Dismiss

{¶62} Finally, in its eighth assignment of error, Triton contends that the trial court erred in granting the city's motion for a directed verdict. It contends that the court's prior rulings erroneously prevented it from pursuing its claims in the action. This assignment of error is well taken, although not precisely for the reasons Triton argues.

{¶63} When the case proceeded to trial, it was heard by a visiting judge. The visiting judge advised the parties that he would not change any of the assigned judge's evidentiary rulings. Triton and the city entered into an agreement resolving some of the claims, which included dismissing the jury and proceeding to a bench trial. The court permitted Triton to proffer the evidence it would have presented if that evidence had not been excluded by the motions in limine before granting the motion for a directed verdict.

{¶64} Civ.R. 50(A)(4) governs motions for a directed verdict. A ruling on a motion for a directed verdict determines whether the evidence was sufficient to proceed to a jury. *Osler v. Lorain*, 28 Ohio St.3d 345, 347, 504 N.E.2d 19 (1986); *Williams v. Sharon Woods Collision Ctr. Inc.*, 2018-Ohio-2733, 117 N.E.3d 57, ¶ 14 (1st Dist.). Therefore, directed verdicts are inapplicable in bench trials where no jury exists. *Hayes v. Carrigan*, 2017-Ohio-5867, 94 N.E.3d 1091, ¶ 21 (1st Dist.).

{¶65} Instead, a defendant in a nonjury action must move for an involuntary dismissal under Civ.R. 41(B)(2) at the close of the plaintiff's evidence. *Id.* Therefore, we will treat Triton's assignment of error as one challenging the trial court's decision to grant a dismissal under Civ.R. 41(B)(2). *See id.*

{¶66} When ruling on a Civ.R. 41(B)(2) motion to dismiss, a trial court is entitled to weigh the evidence presented. It is not required to view the evidence in the light most favorable to the plaintiff. *Goering v. Chriscon Builders Ltd.*, 1st Dist. Hamilton No. C-100729, 2011-Ohio-5480, ¶ 16. A reviewing court may not set aside the trial court's judgment on such a motion unless the judgment was erroneous as a matter of law or against the manifest weight of the evidence. *Id.*

{¶67} We have already held that the trial court erred in excluding Triton's evidence regarding differing site conditions and Gessner's testimony regarding damages. Because the court did not consider that evidence, its judgment on the motion to dismiss was erroneous as a matter of law. Consequently, we sustain Triton's eighth assignment of error and reverse the trial court's decision granting the motion to dismiss. We remand the cause for a new trial on Triton's differing-site-conditions claim under the provisions of the contract.

Unjust Enrichment

{¶68} We now address Triton's assignments of error related to the Wesselman/Carroll Projects. In its fifth assignment of error, Triton contends that the trial court erred in granting summary judgment in favor of the city on the city's claim for unjust enrichment. Triton argues that genuine issues of material fact exist as to whether it would be inequitable for it to repay $496,256.09 to the city based on the city's mistaken payment of additional sums to Triton. This assignment of error is not well taken.

{¶69} Unjust enrichment occurs when a party retains money or benefits that in equity belong to another. *Liberty Mut. Ins. Co. v. Indus. Comm.*, 40 Ohio St.3d 109, 110-111, 532 N.E.2d 124 (1988); *Alexander v. Motorists Mut. Ins. Co.*, 1st Dist. Hamilton No. C-110836, 2012-Ohio-3911, ¶ 23. To establish unjust enrichment, the

plaintiff must demonstrate: (1) a benefit conferred by the plaintiff on the defendant; (2) knowledge by the defendant of that benefit; and (3) retention of that benefit by the defendant under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984); *Alexander* at ¶ 23.

{¶70} Triton argues that it was entitled to the first payment of $496,256.09 at the conclusion of the Wesselman/Carroll Project. Pavement Management did not assert claims against the city until six months after the project had been completed. Triton denied that it had contracted with Pavement Management and that it was liable to pay it any amount. Triton argues that it was entitled to receive, deposit and retain the first payment that it had earned by its performance of the work on the Wesselman/Carroll Project.

{¶71} As to the second, mistaken payment, Triton contends that genuine issues of fact exist as to whether the city breached a duty imposed on it by law in making the second payment. It argues that the city was obligated by law to account for its own expenditures and reconcile its own accounts. Therefore, genuine issues of material fact existed as to whether it would be unconscionable for Triton to retain the benefits conferred on it, and whether the city is precluded from recovery by its own failure to carry out its obligations.

{¶72} We find no merit in Triton's arguments. The record shows that Triton was paid twice for its work on the Wesselman/Carroll Projects. The trial court was correct when it stated,

> Since January 2014 the City's position has not changed with regard to the receipt or lack of receipt of the funds in question. Triton has not located any bank documents which contradict the [bank's] records. Triton was aware that it still possessed the funds in 2011. Triton has

> failed to present any evidence to show the return of the overpayment to the City. Majid Samarghandi and Triton knew that the City's checks were deposited into Triton's checking accounts and the relevant funds were never returned to the City.

{¶73} Triton is essentially arguing that it should be able to take advantage of a simple mistake by the city. We find no issue of material fact. Construing the evidence most strongly in Triton's favor, reasonable minds can come to but one conclusion—that Triton was unjustly enriched when it failed to return the mistaken payment. The city was entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in its favor on its claim for unjust enrichment. Consequently, we overrule Triton's fifth assignment of error.

Abuse of Process

{¶74} In its seventh assignment of error, Triton contends that the trial court erred in granting summary judgment in the city's favor on Triton's claim for abuse of process. It argues that the trial court applied the wrong standard and improperly concluded that Triton had failed to present "clear evidence" of the elements of abuse of process. This assignment of error is not well taken.

{¶75} To establish a claim for abuse of process, a plaintiff must show (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from that wrongful use of process. *Robb v. Chagrin Lagoons Yacht Club,* 75 Ohio St.3d 264, 270, 662 N.E.2d 9 (1996); *Losch* & *Assoc., Inc.,* 1st Dist. Hamilton No. C-150716, 2016-Ohio-4950, ¶ 22. "[A]buse of process occurs when someone attempts

to achieve through use of the court that which the court is itself powerless to order." *Robb* at 271.

{¶76} Triton takes the trial court's statement that it failed to present "clear evidence" out of context. The abuse-of-process claim was based on the allegation that the city had brought its fraud claim for the improper purpose of forcing Triton to pay the city $495,256.09, the amount of the mistaken payment to Triton, and punitive damages. As the trial court pointed out, "The entire basis of the City's original complaint is to get Triton to repay the $496,265.09. But the court does have the power to order the repayment of money."

{¶77} Triton also claims that the city filed the fraud claim to punish it and to pressure it into settling its claims against the city for a lower amount. Triton presented no evidence to support these allegations, other than Samarghandi's deposition testimony in which he stated that he believed that the city had filed the fraud claim to exert pressure on him. That belief is insufficient to create a genuine issue of material fact. *See Schlaegel v. Howell,* 2015-Ohio-4296, 42 N.E.3d 771, ¶ 23 (2d Dist.); *White v. Sears, Roebuck & Co.,* 10th Dist. Franklin No. 10AP-294, 2011-Ohio-204, ¶ 8-9.

{¶78} Though the trial court's use of the phrase "clear evidence" was unfortunate, the record contains no evidence to support Triton's contention that the proceeding was perverted to attempt to accomplish an improper purpose for which it was not designed. Therefore, the trial court did not err in granting summary judgment in favor of the city on Triton's claim for abuse of process. We overrule its seventh assignment of error.

Frivolous Conduct

{¶79} In its sixth assignment of error, Triton contends that the trial court erred in granting the city's motion for summary judgment on its claim for frivolous conduct under R.C. 2323.51, and in precluding it from raising the issue until after trial. It argues that Ohio law allows a party to raise a frivolous-conduct claim either by motion or counterclaim, and that the trial court erred in finding that it could only be pursued by motion.

{¶80} The record shows that the trial court allowed the city to amend its complaint to add a claim for fraud, based on Triton's failure despite repeated requests to return the mistaken payment. Triton then asserted counterclaims for abuse of process and for frivolous conduct. In its counterclaim, Triton alleged that

> the City's fraud claims were initiated and other actions were taken merely for the purpose of harassing or maliciously injuring Triton and Mr. Samarghandi, or for another improper purpose; and/or, upon information and belief, the City's fraud claims consist of allegations or other factual contentions that have no evidentiary support or are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

The city withdrew its fraud claim as part of a settlement of some issues immediately before trial.

{¶81} R.C. 2323.51(B)(1) provides that "at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of attorney costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal."

{¶82} A split of authority exists as to the proper procedure to raise a claim of frivolous conduct. Some courts have held that a request for sanctions under R.C. 2323.51 must be made by motion after the trial and some have held that it may be made by counterclaim as well as by motion. *See Scheel v. Rock Ohio Caesars Cleveland, LLC*, 8th Dist. Cuyahoga No. 105037, 2017-Ohio-7174, ¶ 16; *Craine v. ABM Serv., Inc.*, 11th Dist. Portage No. 2011-P-0028, 2011-Ohio-5710, ¶ 10; *Shaver v. Wolske & Blue*, 138 Ohio App.3d 653, 673, 742 N.E.2d 164 (10th Dist.2000).

{¶83} The trial court held that a claim for frivolous conduct must be raised by motion rather than in a counterclaim. Nevertheless, Triton was not foreclosed from relief. The court stated:

> However, until the Supreme Court resolves the conflicting case law the Court finds that the claim is not entirely waived under Ohio law. Therefore, to the extent that the City's motion wishes this Court to find as matter of law that the claim is forever extinguished, the City's motion is denied. The Court does find that the claim is premature and should be completely separated from the upcoming jury trial * * *. The Court finds that if Triton would like to pursue this claim it should be restyled as a motion and filed after trial.

{¶84} Triton never filed that motion. The final judgment entry stated that in accordance with the court's previous entry, "judgment is entered in the City's favor and against Triton dismissing without prejudice Triton's counterclaim of frivolous conduct." Since we have remanded the matter for a new trial, Triton is not foreclosed from raising the issue again in the trial court. We need not issue an advisory opinion on this issue. Therefore, we find the issue to be moot, and we decline to address it. *See Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-

1372, 848 N.E.2d 912, ¶ 10 (1st Dist.); *In re Bailey*, 1st Dist. Hamilton Nos. C-040014 and C-040479, 2005-Ohio-3039, ¶ 9.

{¶85} In sum, we sustain Triton's first, second, third and eighth assignments of error and we remand the cause to the trial court for a new trial on Triton's differing-site-conditions claim. We find Triton's sixth assignment of error to be moot, and we decline to address it. Finally, we overrule Triton's remaining assignments of error, and we affirm the trial court's judgment in all other respects.

Judgment affirmed in part, reversed in part, and cause remanded.

MYERS, P.J., and **CROUSE, J.**, concur.

Please note:

The court has recorded its own entry this date.

[Cite as *Harper v. Weltman, Weinberg & Reis Co., L.P.A.*, 2019-Ohio-3093.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CHARLES HARPER, ET AL., :

Plaintiffs-Appellants, :

No. 107439

v. :

WELTMAN, WEINBERG
AND REIS CO., L.P.A., ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 1, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-894696

Appearances:

Weltman, Weinberg & Reis Co., L.P.A., and Daniel A. Friedlander, *for appellees*.

Darryl E. Pittman & Associates, and Darryl E. Pittman, *for appellants*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Plaintiffs-appellants, Charles Harper, et al. (collectively "appellants," individually "Charles" and "Bernadette"), appeal from the trial court's judgment granting the motion to dismiss filed by defendants-appellees, Weltman, Weinberg

& Reis Co., L.P.A., et al. ("defendants"). Appellants raise the following assignment of error for review:

> The trial court abused its discretion in dismissing the case because there were questions of fact which precluded the court from granting a motion to dismiss.

{¶ 2} After careful review of the record and relevant case law, we affirm the trial court's judgment.

I. Procedural and Factual History

{¶ 3} In May 2011, a complaint for cognovit judgment (the "Cognovit Complaint") was filed against Charles and others in Cuyahoga C.P. No. CV-11-756112. The Cognovit Complaint alleged that in March 2010, Charles Emerman, as trustee of the Charles Emerman Revocable Trust, loaned $63,374 to Donald Williams, Sr., Donald Williams, Jr., and Charles. Trustar Funding, L.L.C. ("Trustar") served as the loan servicer for Emerman, and thus, the cognovit note was between Trustar and the three borrowers. The note was secured by a mortgage on commercial property located at 22021 Euclid Avenue, Euclid, Ohio. The property was owned by Shepherd Group Realty and Development Corporation, a Georgia corporation that was owned and operated by Donald Williams, Sr.

{¶ 4} Judgment in that case was ultimately rendered in favor of Trustar and against Charles in the amount of $71,951.11. In February 2018, this court affirmed the trial court's judgment denying Harper's motion to vacate the cognovit judgment. *Trustar Funding, L.L.C. v. Harper*, 8th Dist Cuyahoga No. 105837, 2018-Ohio-495.

{¶ 5} In September 2017, defendants filed a complaint on behalf of Trustar in Cuyahoga C.P. No. CV-17-886346 (the "Fraudulent Conveyance Complaint") against Charles, Bernadette, and Gilmore Heights Dental Holdings, Ltd. In the Fraudulent Conveyance Complaint, Trustar stated that it was "the holder of an outstanding cognovit judgment rendered in the Cuyahoga Court of Common Pleas, under Case No. CV-11-756112 on May 25, 2011 against Charles W. Harper and others." In an effort to collect the outstanding judgment, Trustar sought a creditor's bill and set forth a fraudulent conveyance cause of action. Trustar alleged that Bernadette "holds, receives, [and] conceals income rightfully due [to Charles] * * * in an attempt to avoid payment of creditors' claims including that of [Trustar]." In January 2018, Trustar voluntarily dismissed the complaint.

{¶ 6} On March 16, 2018, appellants filed the complaint that is the subject of this appeal in Cuyahoga C.P. No. CV-18-107439 against the defendants, Weltman, Weinberg & Reis Co., L.P.A., and attorney Donald A. Mausar. The complaint alleged that by filing the Fraudulent Conveyance Complaint on behalf of Trustar, the defendants violated certain provisions of the federal Fair Debt Collection Practices Act, 15 U.S.C. 1692 ("FDCPA"), and the Ohio Consumer Sales Practices Act ("OCSPA"), R.C. 1345.01 et seq. Specifically, appellants alleged that because Trustar previously assigned the cognovit judgment to a third party in 2016, defendants filed the Fraudulent Conveyance Complaint while having knowledge that Trustar "had no interest whatsoever in the judgment being sued upon." Relevant to this appeal, the complaint incorporated the Fraudulent Conveyance Complaint by reference.

{¶ 7} In April 2018, defendants filed a Civ.R. 12(B)(6) motion to dismiss, arguing that appellants' complaint failed to state a claim upon which relief may be granted because the underlying debt did not arise from a "consumer transaction" as contemplated under the FDCPA or the OCSPA. Thus, defendants maintained that appellants' FDCPA and OCSPA claims fail as a matter of law because they "are definitionally invalid given that the [underlying] lawsuit was based on a commercial, not a consumer transaction." The motion to dismiss attached copies of the Cognovit Complaint, the Fraudulent Conveyance Complaint, and the underlying cognovit promissory note.

{¶ 8} In June 2018, the trial court issued a journal entry granting defendants' motion to dismiss. The court stated, in relevant part:

> The court, in construing all factual allegations in the complaint as true and drawing all reasonable inferences in favor of Plaintiffs, finds that Plaintiffs' complaint fails to state a claim upon which relief may be granted.

{¶ 9} Appellants now appeal from the trial court's judgment.

II. Law and Analysis

{¶ 10} In their sole assignment of error, appellants argue the trial court erred by granting defendants' motion to dismiss. Appellants contend that its complaint "alleged facts sufficient to satisfy Ohio's notice pleading standard on all counts."

A. Standard of Review

{¶ 11} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim on which relief can be granted "is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605

N.E.2d 378 (1992), citing *Assn. for Defense of Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989). In order for a trial court to grant a motion to dismiss for failure to state a claim on which relief can be granted, it must appear "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to relief." *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 2011-Ohio-6167, 967 N.E.2d 1249, ¶ 3 (8th Dist.), citing *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶ 14.

{¶ 12} An appellate court employs "a de novo standard of review for motions to dismiss filed pursuant to Civ.R. 12(B)(6)." *Grey* at ¶ 3, citing *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). Under de novo analysis, we are required to "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Id.* at ¶ 3, citing *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991). "Unsupported conclusions of a complaint[,] [however,] are not considered admitted and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639 (1989), citing *Schulman v. Cleveland*, 30 Ohio St.2d 196, 283 N.E.2d 175 (1972).

{¶ 13} Given the litigation history of the parties involved in this case, it is necessary to note that when assessing a Civ.R. 12(B)(6) motion to dismiss, a trial court is not permitted to "take judicial notice of court proceedings in another case." *NorthPoint Props. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, 901 N.E.2d 869, ¶ 16 (8th Dist.), citing *Campbell v. Ohio Adult Parole Auth.*, 10th Dist. Franklin

No. 97APE05-616, 1997 Ohio App. LEXIS 4829 (Oct. 28, 1997). Similarly, "'a trial court may not take judicial notice of prior proceedings in the court even if the same parties and subject matter are involved.'" *Id.*, quoting *First Michigan Bank & Trust Co. v. P. & S. Bldg.*, 4th Dist. Meigs No. 413, 1989 Ohio App. LEXIS 527 (Feb. 16, 1989). A trial court "may only take judicial notice of prior proceedings in the immediate case." *Id.*, quoting *In re LoDico,* 5th Dist. Stark No. 2003-CA00446, 2005-Ohio-172, ¶ 94.

{¶ 14} With that said, however, courts may take judicial notice of judicial opinions and public records accessible from the internet. *See, e.g., State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 8, 10. In addition, this court has previously stated that "'documents attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ.R. 12(B)(6).'" *Glazer v. Chase Home Fin. L.L.C.,* 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38, quoting *NCS Healthcare, Inc. v. Candlewood Partners, L.L.C.*, 160 Ohio App.3d 421, 2005-Ohio-1669, 827 N.E.2d 797, ¶ 20 (8th Dist.); *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997). In fact, the trial court may "review documents that were incorporated into the complaint, even if not attached to the complaint." *Id.*, citing *Irvin v. Am. Gen. Fin., Inc.*, 5th Dist. Muskingum No. CT2004-0046, 2005-Ohio-3523, ¶ 16, fn. 6; *Fillmore v. Brush Wellman, Inc.*, 6th Dist. Ottawa No. OT-03-029, 2004-Ohio-3448.

{¶ 15} In this case, the trial court did not convert the motion to dismiss into a motion for summary judgment. Our review, therefore, is limited to the four corners of the complaint and to the documents attached or incorporated therein. *Fillmore* at ¶ 9.

B. The FDCPA and the OCSPA

{¶ 16} As stated, appellants' complaint alleged that defendants violated certain provisions of the OCSPA and FDCPA while attempting to collect a consumer debt on behalf of Trustar. Both the FDCPA, 15 U.S.C. 1692 et seq., and the OCSPA, R.C. 1345.01 et seq., are remedial statutes, intended to reach a broad range of conduct.

{¶ 17} The United States Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. 1692a.

{¶ 18} Under the FDCPA, a debt collector is prohibited from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. A debt collector is also prohibited from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. The FDCPA includes a list of these prohibited practices under each of these sections. 15 U.S.C. 1692e and f.

{¶ 19} When analyzing whether conduct giving rise to the claim fits within the broad scope of the FDCPA, "the conduct is viewed through the eyes of the 'least sophisticated consumer.'" *Currier v. First Resolution Invest. Corp.*, 762 F.3d 529, 533 (6th Cir.2014). That standard, while protecting "the gullible and the shrewd alike," also presumes "a basic level of reasonableness and understanding on the part of the debtor." *Id*.

{¶ 20} A plaintiff must prove four essential elements to establish a prima facie case for a violation of the FDCPA:

> 1. [T]he plaintiff is a natural person who is harmed by violations of the FDCPA, or is a "consumer" within the meaning of 15 U.S.C.A. §§ 1692a(3), 1692(d) for purposes of a cause of action, 15 U.S.C.A. § 1692c or 15 U.S.C.A. § 1692e(11);
>
> 2. [T]he "debt" arises out of a transaction entered primarily for personal, family, or household purposes, 15 U.S.C.A. § 1692a(5);
>
> 3. [T]he defendant collecting the debt is a "debt collector" within the meaning of 15 U.S.C.A. § 1692a(6); and
>
> 4. [T]he defendant has violated, by act or omission, a provision of the FDCPA, 15 U.S.C.A § 1692a—1692o; 15 U.S.C.A § 1692a; 15 U.S.C.A § 1692k.

Whittiker v. Deutsche Bank Natl. Trust Co., 605 F.Supp.2d 914, 938-939 (N.D.Ohio 2009). "The absence of any one of the four essential elements is fatal to a FDCPA lawsuit." *Id*. at 939.

{¶ 21} Regarding the elements of a claim under the FDCPA, this court has stated:

> The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the

> transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5). As the plain language of the statute indicates, not all obligations to pay are considered debts subject to the FDCPA. *Rather, the FDCPA may be triggered only when an obligation to pay arises out of a consumer transaction. Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1068 (9th Cir.1992) (holding that the FDCPA applies only to "consumer debts" incurred "primarily for personal, family, or household purposes").
>
> A "debt collector" includes "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). Within this context, a "consumer" is "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. 1692a(3).

(Emphasis added.) *Cawrse v. Melvin Banchek Co., L.P.A. (In re Apelt),* 8th Dist. Cuyahoga No. 102765, 2015-Ohio-5149, ¶ 22-23.

{¶ 22} "[T]he OCSPA also provides protections for consumer debtors against debt collectors and their attorneys." *Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 2016-Ohio-3444, 72 N.E.3d 573, ¶ 12. The act states that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.02(A). R.C. 1345.03(A) provides that "[n]o supplier shall commit an unconscionable act or practice in connection with a consumer transaction."

{¶ 23} R.C. 1345.01(A) defines a "consumer transaction" as follows:

> "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code,

> and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; * * *.

{¶ 24} With the essential elements of appellants' federal and state claims in mind, we now consider the sufficiency of appellants' complaint to determine whether it fails to state a claim on which relief can be granted.

C. Sufficiency of Appellants' Complaint

{¶ 25} With respect to the necessary elements of claims under the FDCPA and the OCSPA, appellants' complaint alleged, in relevant part:

> 6. Plaintiffs are "consumers" as defined in FDCPA 15 U.S.C. § 1692a(3) and OCSPA R.C. 1345.01(D).
>
> 7. Defendants, Weltman, Weinberg and Reis Co., L.P.A., and Donald A. Mauser, are attorneys engaged in the business of debt collection in the State of Ohio, and regularly collect debts due to others. Defendants are debt collectors within the meaning of the FDCPA, as defined at 15 U.S.C. § 1692a(6).
>
> 8. Defendants sought to collect debts allegedly owed to Trustar, a defunct Ohio corporation, and a third-party who is not a party to this suit.
>
> 9. The debt that is the subject of this Complaint is a "consumer debt" as defined by FDCPA 15 U.S.C. § 1692a([5]) and a "consumer transaction" as defined [under] R.C. 1345.01(A).

Appellants' complaint, ¶ 6-9.

{¶ 26} In support of their claims under the FDCPA, appellants alleged that the defendants' Fraudulent Conveyance Complaint falsely misrepresented "that Trustar had standing to sue Plaintiffs, that [Trustar] owned the alleged debt, and that Plaintiffs owed money to Trustar." Complaint at ¶ 23, citing 15 U.S.C. 1692e.

Appellants further alleged that "'defendants' efforts to collect the alleged debt violated 15 U.S.C. 1692f, as there was no basis—legal nor contractual—which could support the collection of the [cognovit judgment] from Plaintiff." *Id*. at ¶ 24.

{¶ 27} Regarding their claims under the OCSPA, appellants alleged that defendants violated R.C. 1345.01 et seq. by using "abusive, harassing, deceptive, and unconscionable sales practices" to collect the cognovit judgment debt. *Id*. at ¶ 32. Appellants asserted that defendants' violations include, but are not limited to (1) "engaging in conduct the natural consequence of which is to harass, oppress or abuse Plaintiff"; (2) "giving Plaintiffs the impression that Defendants would take action they could not legally take"; (3) "engaging in conduct which had the purpose and effect of disgracing Plaintiffs"; and (4) "failing to include consumer warnings in communications with Plaintiffs." *Id*.

{¶ 28} On appeal, appellants argue that their complaint "alleged facts sufficient to satisfy Ohio's notice pleading standard on all counts." Appellants further contend that the trial court erred by failing to "look at the substance" of the underlying cognovit note transaction in "determining whether or not the transaction was a consumer transaction." Defendants oppose appellants' position, arguing that appellants' complaint contains "no factual allegations in any way supporting the 'consumer' and 'consumer transaction' elements of an OCSPA or FDCPA claim."

{¶ 29} Because Ohio is a notice-pleading state, Ohio law ordinarily does not require a plaintiff "to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 29. However,

"the 'notice pleading' requirement is not meaningless." *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 8th Dist. Cuyahoga No. 98861, 2014-Ohio-25, ¶ 13.

{¶ 30} Civ.R. 8(A) requires "a short and plain statement of the claim showing that the party is entitled to relief." "Although a complaint need not state with precision all elements that give rise to a legal basis for recovery, fair notice of the nature of the action must be provided." *McWreath v. Cortland Bank*, 11th Dist. Trumbull No. 2010-T-0023, 2012-Ohio-3013, ¶ 40, citing *Bridge v. Park Natl. Bank*, 10th Dist. Franklin No. 03AP-380, 2003-Ohio-6932, ¶ 5. "Under the notice pleading requirements, 'to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions.'" *Id.*, citing *Gonzalez v. Posner*, 6th Dist. Fulton No. F-09-017, 2010-Ohio-2117, ¶ 11. This court has explained:

> "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusion' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'"

Sultaana v. Horseshoe Casino, 8th Dist. Cuyahoga No. 102501, 2015-Ohio-4083, ¶ 12, quoting *Digiorgio v. Cleveland*, 8th Dist. Cuyahoga No. 95945, 2011-Ohio-5878, ¶ 49, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

{¶ 31} As stated, appellants alleged in their complaint that (1) "[they] are 'consumers' as defined in FDCPA 15 U.S.C. 1692a(3) and OCSPA R.C. 1345.01(D)";

and (2) "[t]he debt that is the subject of this complaint is a 'consumer debt' as defined by FDCPA 15 U.S.C. § 1692a([5]) and a 'consumer transaction' as defined [under] R.C. 1345.01(A)." However, appellants' recitation of the relevant language used in the FDCPA and the OCSPA amounts to "legal conclusions, deductions, or opinions couched as factual allegations." *Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, 8th Dist. Cuyahoga No. 97065, 2012-Ohio-90, ¶ 8. Thus, they are not given a presumption of truthfulness.

{¶ 32} Upon review, we find appellants complaint is entirely devoid of any factual allegations that would support or further enhance any inference that the underlying debt arose from a transaction that was primarily for "personal, family, or household purposes." *See* 15 U.S.C. 1692a(5) and R.C. 1345.01(A). Beyond referencing the cognovit judgment rendered against Charles and others in Case No. CV-11-756112, the complaint does not contain any factual allegations relating to the circumstances of the relevant transaction. Thus, we find appellants failed to allege sufficient facts to support essential elements of their claims under the FDCPA and the OCSPA — i.e., the consumer nature of the underlying transaction.

{¶ 33} Because bare legal conclusions are not considered admitted and are not sufficient to withstand a motion to dismiss, we find appellants' complaint failed to state a claim upon which relief can be granted. *See, e.g., Michelson v. Volkswagen Aktiengesellschaft*, 2018-Ohio-1303, 99 N.E.3d 475, ¶ 24 (8th Dist.) (finding plaintiff's complaint failed to state a claim upon which relief can be granted because plaintiff made "bare legal conclusion[s]" that "are not supported by any facts in the

complaint[.]"); *Bush v. Cleveland Mun. School Dist.*, 8th Dist. Cuyahoga No. 99612, 2013-Ohio-5420, ¶ 13 (stating that the recitation of relevant statutory language, without additional facts to support the allegation, is not sufficient to withstand a motion to dismiss).

{¶ 34} Similarly, we find no merit to appellants' broad position that the trial court "erred by not examining the [underlying cognovit] transaction as a whole to determine whether it was primarily consumer or commercial in nature." Appellants suggest the trial court took a "short cut" by failing to carefully examine the "purpose of the [underlying cognovit transaction]." However, under Civ.R. 12(B)(6), the trial court was not required to render legal conclusions on disputed issues of fact, such as the purpose of the underlying loan, at this stage of the litigation. As previously stated, dismissal under Civ.R. 12(B)(6) was appropriate in this case due to the insufficiency of the complaint, and not the merits of the unsupported legal conclusions raised therein.

{¶ 35} In an effort to avoid the aforementioned deficiencies of the complaint, appellants argue Bernadette was not required to demonstrate that "the underlying transaction was a consumer transaction" because she was not a party to the cognovit transaction in 2010. In support of this argument, appellants rely on a decision issued by the United States District Court for the Eastern District of California.

{¶ 36} In *Davis v. Midland Funding, L.L.C.*, 41 F.Supp.3d 919 (E.D.Cal. 2014), the plaintiff filed an action against defendants, alleging that the defendants violated several provisions of the FDCPA. The gravamen of plaintiff's complaint was

that defendants wrongly attempted to collect an obligation from him that was actually owed by another person. Defendants moved for summary judgment, arguing that they were entitled to judgment because plaintiff was unable to establish whether the obligation the defendants sought to collect arose from a "debt" as defined under 15 U.S.C. 1692a(5). Thus, the issue before the court was "whether a debt collector that attempts to collect an obligation from the wrong person is subject to the FDCPA, even if there is some possibility that the underlying obligation stemmed from a commercial transaction." *Id*. at 923.

{¶ 37} Ultimately, the *Davis* court denied the defendants' motion for summary judgment, stating, in relevant part:

> By its plain text, the FDCPA encompasses claims brought by individuals subjected to collection efforts for obligations they are falsely alleged to have owed.
>
> * * *
>
> It would be absurd to hold that a plaintiff who is subject to debt collection efforts for an obligation that he does not owe is ineligible for the FDCPA's protections simply because he cannot characterize the nature of that obligation.

Davis at 924-925. *But see Strauss v. CBE Group, Inc.*, S.D.Fla. No. 15-62026-CIV-COHN/SELTZER, 2016 U.S. Dist. LEXIS 194257 (June 8, 2016) (stating that "*Davis* is seemingly in conflict with binding Eleventh Circuit precedent that, in order to recover on an FDCPA claim, 'a plaintiff must make a threshold showing that the money being collected qualifies as a debt.'"), citing *Oppenheim v. I.C. Sys., Inc.*, 627 F.3d 833, 838 (11th Cir.2010); *McBeth v. Credit Protection Assn., L.P.*, M.D.Fla. No. 8:14-CV-606-T-36AEP, 2015 U.S. Dist. LEXIS 94016 (July 20, 2015).

{¶ 38} In this case, appellants ask this court to follow the reasoning of *Davis*, and hold that Bernadette need not establish that the debt at issue was a "consumer debt" as defined by the FDCPA. However, after careful consideration, we find *Davis* to be factually distinguishable, and therefore, inapplicable. Contrary to the facts addressed in *Davis*, the defendants' fraudulent conveyance claim against Bernadette in this case did not equate to an attempt "to collect an obligation from the wrong person." This case does not involve a mistaken identity, nor does it involve a debt, the nature of which is unknown to the parties. *See Lyon v. Am. Recovery Serv.*, N.D.Ohio No. 1:14CV25412016, U.S. Dist. LEXIS 119936 (Sept. 6, 2017) (distinguishing *Davis*). Here, the Fraudulent Conveyance Complaint supporting appellants' FDCPA and OCSPA claims sought a creditor's bill to collect the underlying obligation from Charles. It did not allege that Bernadette owed the defendants a consumer debt. Rather, the fraudulent conveyance claim against Bernadette was predicated on alleged conduct that was completely independent from the underlying transaction that gave rise to the cognovit judgment against Charles and others. Accordingly, we find no basis to apply *Davis* to the circumstances of this case.

III. Conclusion

{¶ 39} Viewing the four corners of the appellants' complaint, we find the trial court did not err by granting defendants' Civ.R. 12(B)(6) motion to dismiss.

{¶ 40} Appellants' sole assignment of error is overruled.

{¶ 41} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

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EILEEN T. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
PATRICIA ANN BLACKMON, J., CONCUR

[Cite as *Citizens Bank, N.A., v. Duchene*, 2019-Ohio-2972.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CITIZENS BANK, N.A., f.k.a. RBS CITIZENS, N.A., f.k.a. CITIZENS BANK, N.A., SBMT CHARTER ONE BANK, N.A., et al.,	:	**O P I N I O N**
	:	**CASE NO. 2018-T-0085**
Plaintiff-Appellee,	:	
- vs -	:	
ALAN F. DUCHENE, a.k.a. ALAN DUCHENE, et al.,	:	
Defendants,	:	
(STEVEN DUCHENE,	:	
Defendant-Appellant).	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2017 CV 00942.

Judgment: Reversed and remanded.

Johna M. Bella, Goranson, Parker & Bella, 405 Madison Avenue, Suite 2200, Toledo, OH 43604 (For Plaintiff-Appellee).

Bruce M. Broyles, The Law Offices of Bruce Broyles, 2670 North Columbus Street, Suite L, Lancaster, OH 43130 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Steven DuChene, appeals the August 6, 2018, judgment of the Trumbull County Court of Common Pleas granting summary judgment in favor of

appellee, Citizens Bank ("Citizens"). For the following reasons, we reverse the decision of the court below and remand for further proceedings.

{¶2} This appeal stems from an action in foreclosure. In 2005 and 2006 Alan and Virginia DuChene signed certain subject Notes and Mortgages in favor of Citizens. Virginia DuChene died in 2009. Subsequently, Alan DuChene defaulted on the Notes and Mortgages, and in June 2017, Citizens filed the underlying complaint against him. Alan DuChene filed an answer but died shortly thereafter. His son, Steven DuChene, the appellant in the case sub judice, was named as a defendant, both in his capacity as the Administrator of his father's estate and individually as an heir who may have an interest in the property.

{¶3} In June 2018, Citizens moved for summary judgment against Steven DuChene, who filed a memorandum in opposition asserting no notice of acceleration was provided as required by the terms of the Mortgage. Citizens filed a reply and attached an affidavit showing notice was sent to Alan and Virginia DuChene in Arcadia, Florida. Steven DuChene filed a sur-reply, specifically asserting that Citizens failed to comply with the notice requirements by sending the notice to an address that was not the Property Address and by not allowing a full 30 days to correct the default as provided by the terms of the Mortgage. On August 6, 2018, the trial court granted summary judgment against Steven DuChene, finding, "[t]he Notice complies with the terms of the Note and Mortgage. Defendant has failed to illustrate that a genuine issue remains for trial". On September 11, 2018, the Court entered a Judgment, Foreclosure, Order of Sale in favor of Citizens on all claims and motions.

{¶4} Steven DuChene appealed from the August 6, 2018 entry. Citizens filed a motion to dismiss, alleging the appeal was not timely filed and that the August 6, 2018 Judgment was not a final, appealable order. On November 5, 2018, this court denied Citizens' motion, finding the appeal was timely filed pursuant to App.R. 4(C) and that the August 6, 2018 entry was a final, appealable order. Thus, we consider Steven DuChene's appeal on the merits.

{¶5} Steven DuChene sets forth one assignment of error for our review:

{¶6} "The trial court erred in granting summary judgment to Appellee when there were genuine issues of material fact still in dispute."

{¶7} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision." *Peer v. Sayers*, 11th Dist. Trumbull No. 2011-T-0014, 2011-Ohio-5439, ¶27. In deciding a motion for summary judgment, a court may only consider the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action * * *." *Erie Ins. Co. v. Stalder*, 114 Ohio App.3d 1, 4 (3d Dist.1996).

{¶8} The moving party bears the burden of establishing that summary judgment is proper. *Morris v. Ohio Cas. Ins. Co.*, 35 Ohio St.3d 45, 46-47 (1988). Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * that reasonable

minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor."

{¶9} "[T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case," by pointing to evidentiary materials of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant fails to meet this initial burden, the motion for summary judgment must be denied. If, however, this initial burden is met, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Civ.R. 56(E).

{¶10} "To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the Note and Mortgage, or is a party entitled to enforce it; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due." *JPMorgan Chase Bank, Natl. Assn. v. Blank*, 11th Dist. Ashtabula No. 2013-A-0060, 2014-Ohio-4135, ¶14, citing *Wachovia Bank v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3203, ¶¶40-45.

{¶11} "'Where prior notice of default and/or acceleration is required by a provision in a Note or Mortgage instrument, the provision of notice is a condition precedent subject to Civ.R. 9(C).'" *Citimortgage, Inc. v. Hijjawi*, 11th Dist. Lake No. 2013-L-0105, 2014-Ohio-2886, ¶17, quoting *First Fin. Bank v. Doellman*, 12th Dist.

Butler No. CA2006-02-029, 2007-Ohio-0222, ¶20. Civ.R. 9(C) states: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

{¶12} Citizens' complaint asserts, inter alia, that all conditions precedent to the foreclosure have been met. Alan DuChene filed an answer denying Citizen's compliance with the conditions precedent, specifically stating that no notice of acceleration was sent, in violation of the terms of the Mortgage. Nevertheless, in its motion for summary judgment, Citizens stated, "the entire unpaid principal and accrued interest due Plaintiff is immediately due and payable *without notice* or demand." (Emphasis added.) Steven DuChene filed a memorandum in opposition, stating Citizen's assertion that no notice is required directly conflicts with the terms of the Notes. Citizens does not attempt to reconcile their assertion with section 17 of the Mortgage, which states, in pertinent part:

> **{¶13}** Lender shall give notice to [Borrower] prior to acceleration following any breach of covenant or agreement in this Security Instrument. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to [Borrower], by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.

{¶14} However, Citizens replied by attaching an affidavit attesting that notice was sent to Alan and Virginia DuChene and a copy of the certified mail confirmation, showing the notice was sent to the DuChenes at an address in Arcadia, Florida. Steven DuChene filed a sur-reply, without attaching any affidavits or evidence, specifically directing the court's attention to the conflicting mailing address between the Mortgage

and the certified mail receipt, and that the notice did not provide the full 30 days to correct the default as required by the terms of the Mortgage. We find this reply to be sufficiently specific to meet the requirements of Civ.R. 9(C). Therefore, we turn to the requirements of Civ.R. 56.

{¶15} Section 15 of the Mortgage provides, in pertinent part:

> **{¶16}** [n]either [Borrower] nor Lender may commence, join, or be joined to any court action * * * that arises from the other party's actions pursuant to this Security Instrument or that allege that the other has not fulfilled any of its obligations under this Security Instrument, unless the other is notified (in the manner required under Section 12 of this Security Instrument) of the unfulfilled obligation and given a reasonable time period to take corrective action.

{¶17} Section 12 of the Mortgage, provides, in pertinent part:

> **{¶18}** [s]ubject to Applicable Law, any notice to [Borrower] in connection with this Security Instrument is considered given to [Borrower] when mailed by first class mail or when actually delivered to [Borrower's] notice address if sent by other means. [Borrower's] notice address is the Property Address unless [Borrower] give[s] notice to Lender of a different address.

{¶19} The Property Address listed in the Mortgage is located in Hubbard, Ohio. As Steven DuChene points out, however, the notice was not mailed to the Property Address but to an address in Arcadia, Florida. The record indicates that Alan DuChene's niece, Roxana Jacobs, lives at the Florida address to which the notice was sent and that Ms. Jacobs was Alan DuChene's attorney in fact under a durable Power of Attorney; however, there is no indication, nor does Citizens argue, that the DuChenes ever provided Citizens or its predecessor with an alternate address to which notice were to be sent. It remains altogether unclear why the notice was sent to Arcadia, Florida instead of Hubbard, Ohio.

{¶20} Pursuant to Civ.R. 56, Citizens bears the initial burden of affirmatively demonstrating that DuChene has no evidence to support his assertion that a question of material fact remains. To that end, Citizens has provided a copy of the Notice and proof that it was sent to "Alan and Virginia DuChene" in Arcadia, Florida. However, we find that this evidence alone is insufficient to meet the initial burden required for a proper grant of summary judgment. On its face, the notice of acceleration does not comply with the terms of the Mortgage; it was not sent to the Property Address, as required by the Mortgage, and there is no explanation as to the deviation. Accordingly, the burden never shifted to DuChene to produce competent evidence showing there is a genuine issue for trial.

{¶21} Moreover, even if we assume Citizens met its initial burden and the burden shifted to Steven DuChene to produce competent evidence showing there is a genuine issue for trial, Citizens does not prevail. Generally, the nonmoving party's response must set forth specific facts by affidavit or as otherwise provided by Civ.R. 56. *Bank of New York Mellon v. Grund*, 11th Dist. Lake No. 2014-L-025, 2015-Ohio-466, ¶20. Moreover, "an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). Here, however, Steven DuChene does not merely rest upon the allegations or denials of the pleadings, but instead points to documents that have already been authenticated by Citizens, i.e., the Note, Mortgage**,** and notice. Thus, Steven DuChene's response is sufficient to meet the nonmoving party's burden under Civ.R. 56.

{¶22} Citizens argues that "[i]t is, or at least should be, axiomatic that the intended purpose of any required notice should be delivery." We disagree; the purpose of a required notice is "to ensure fair dealing and give the maker opportunity to cure the default." *Wells Fargo Bank, N.A. v. Mayo*, 6th Dist. Erie No. E-16-007, 2018-Ohio-1432, ¶13. Delivery alone to an address at which the mortgagor is not expecting to receive such notice does not further these purposes. In this case, the parties agreed that the manner in which notice was to be provided was by mail to the Property Address, or as updated by the DuChenes. Simply arguing the notice was delivered to an address different to that specified in the Mortgage does not satisfy the question of whether the conditions precedent have been met. Without evidence that notice was mailed to the Property Address or that Alan or Virginia DuChene notified Citizens or its predecessor of an alternate address, a question of compliance with the conditions precedent remains, precluding summary judgment.

{¶23} Additionally, section 17 of the Mortgage states, in pertinent part: "Lender shall give notice to [Borrower] prior to acceleration following [Borrower's] breach of any covenant or agreement in this Security Instrument. The notice shall specify: (a) the default; (b) the action required to cure default; (c) a date, not less than 30 days from the date the notice is given to [Borrower], by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property."

{¶24} Citizens does not argue that the notice it mailed provided for 30 days to cure but argues that Steven DuChene's "interpretation" of the Mortgage language is

"hyper-technical and unpersuasive as Citizens complied with the spirit of the requirement." We are not so convinced. The language of the Mortgage leaves no room for ambiguity; the mortgagor is entitled to 30 days to cure.

{¶25} Considering both defects in notice, we find that when viewing the facts in the light most favorable to the non-moving party, reasonable minds could differ as to whether the mortgagors were provided with notice in accordance with the terms of the Notes and Mortgages and, thus, the required conditions precedent to a foreclosure action were not met. "[W]hen summary judgment is entered when a material fact remains to be tried, due process is violated." *Cragon v. Shinkle*, 11th Dist. Ashtabula No. 2016-A-0005, 2017-Ohio-617, ¶34, citing *Houk v. Ross*, 34 Ohio St.2d 77, 83-84 (1973). Since there remains a question of material fact, the trial court's granting of summary judgment was improper.

{¶26} Accordingly, Steven DuChene's assignment of error has merit.

{¶27} We also briefly address Citizens contention, raised for the first time on appeal, that Steven DuChene "has no basis to assert the arguments raised in this appeal." Citizens notes that Steven DuChene appeals only in his individual capacity, not as fiduciary for Alan DuChene, and argues these appeals are rendered moot as a result of the decedent or his fiduciary to assert these claims. This is, effectively, an argument challenging Steven DuChene's standing.

{¶28} While the Supreme Court of Ohio held in *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶22, that standing is a jurisdictional requirement, the Court subsequently clarified that standing relates to jurisdiction over a particular case, not subject matter jurisdiction. *Bank of Am., N.A. v. Kuchta*, 141 Ohio

St.3d 75, 2014-Ohio-4275, ¶23. Unlike a challenge to subject matter jurisdiction, a challenge to standing may not be brought at any time. *Id.*, at ¶15 (finding res judicata prevented the mortgagors from raising the issue of standing on appeal since it was not raised during foreclosure proceedings); *see also U.S. Bank v. Blank*, 11th Dist. Ashtabula No. 2014-A-0036, 2015-Ohio-1687, ¶17 (allegation that mortgagee did not have standing, raised for the first time on appeal, had no effect of the trial court's subject-matter jurisdiction.). Similarly, Citizens could have raised the question of Steven DuChene's standing in his individual capacity in the trial court as Steven DuChene has consistently responded as "Steven DuChene, an heir at law, [and] next of kin." Since it did not, however, Citizens is precluded from now raising a question of Steven DuChene's standing for the first time on appeal.

{¶29} In light of the foregoing, we reverse the judgment of the Trumbull County Court of Common Pleas and remand for further proceedings.

TIMOTHY P. CANNON, J.,

MARY JANE TRAPP, J.,

concur.