What can I recover for breach of my contract?

August 20, 2021

Statute of Frauds

Csizmadia v. Gilkey, 5th Dist. Morgan No. 20AP0006, 2021-Ohio-2760

In this appeal, the Fifth Appellate District affirmed the trial court's decision, agreeing that the property owners could not assert a defense under the statute of frauds as they were not parties to the assignment of the land installment contract.

The Bullet Point: The plaintiff in this action, who was the assignee to a land installment contract, filed suit seeking quiet title against the owners of real property. In response, the owners argued that the plaintiff was not a valid assignee as the assignment of the land installment contract did not comply with the statute of frauds. Pursuant to Ohio's statute of frauds defense, "no action can be brought upon an agreement on the sale of land unless the agreement is in writing and signed by the party to be charged therewith." R.C. 1335.05. Simply stated, the statute of frauds prevents a party from enforcing an oral agreement regarding the sale of land. Notably, the statute of frauds is a defense that is personal to the parties to the transaction. As the court further explained, a non-party to a contract has no standing to question the enforceability of said contract and cannot "avail itself of the affirmative defense to a claim that a contract is unenforceable."

Here, the owners of the property were not a party to the assignment of the land installment contract. Instead, the original vendor and the plaintiff were the parties to the assignment. As such, the court determined the owners were unable to assert a statute of frauds defense regarding the assignment of the land installment contract.

Unilateral Agreement to Arbitrate

Gibbs v. Firefighters Community Credit Union, 8th Dist. Cuyahoga No. 109929, 2021-Ohio-2679

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that the credit union's email notification it amended the terms of service to add an arbitration agreement was insufficient and as such, there was no binding agreement to arbitrate.

The Bullet Point: At issue in this case was the enforceability of an arbitration agreement. Specifically, the defendant credit union filed a motion to stay pending arbitration, asserting that the plaintiffs agreed to a change in terms and conditions to their account agreements to add an "Arbitration and Waiver of Class Action Relief provision." The plaintiffs disagreed, arguing that they did not make an informed

decision regarding the arbitration or waiver clauses and because there was no meeting of the minds, there was no enforceable agreement to arbitrate. Both the trial and appellate courts agreed with the plaintiffs, finding that no arbitration agreement existed. Whether a party has agreed to arbitration is a matter of contract, and Ohio courts apply ordinary principles that govern the formation of contract when deciding whether a party has agreed to arbitrate. As such, a valid arbitration agreement, like any contract, requires offer, acceptance, consideration, and a meeting of the minds as to the essential terms of the agreement.

Here, the credit union attempted to modify its account agreement to add arbitration and waiver clauses by emailing a notice to its customers, including the plaintiffs, that such clauses had been added. The credit union argued that it had the right to amend the terms of the agreement at any time so long as it provided the plaintiffs notice of such amendments, which was satisfied via the email notification. The court disagreed the email notification was sufficient, and further noted that just because a party may have the unilateral right to modify a contract does not mean the party has a right to make any kind of change whatsoever. In determining that no valid arbitration agreement existed, the trial and appellate courts underscored the specific circumstances under which the changes to the terms of service were sent.

The subject line of the credit union's email notification stated, "We've updated our terms of services." The body of the email provided: "We're writing to let you know that *we've updated our terms of service. These updates apply to all members* and accounts…*The changes in terms are attached to this email*. We recommend that you familiarize yourself with these updated agreements. *As you continue to use [FFCCU] for your banking needs, you agree to these updated terms*." (Emphasis in opinion.)

This email merely indicated that the terms of service had been updated, and nothing in the content of the email informed the recipient of the addition of the arbitration and waiver provisions or the ability to opt-out. Rather, the email notification simply stated that the change in terms applied to all members and was attached to the email. The courts stressed that "notice of arbitration and waiver provisions must be clear so that the parties can make an informed decision" and that the language used by the credit union "implied that all members already agreed to the updated terms." Clear notice was not provided for the plaintiffs to make an informed decision or to demonstrate they agreed to be bound by the arbitration provision. Instead, "[t]he plaintiffs were thus lulled into not giving a thought to the unilateral addition of the arbitration provision * * *."

The court also pointed out that the circumstances in this case were "the antithesis of good faith and fair dealing." Specifically, the evidence demonstrated the credit union sent out the email notification after the parties had been engaged in pre-suit settlement negotiations on a class-wide basis for several months. Therefore, the credit union arguably had knowledge that the plaintiffs would have opted out of the provision had proper notice been given. Regardless, the credit union failed to provide proper notice of the added arbitration provision. Without sufficient notice, there was no meeting of the minds and no binding agreement to arbitrate.

Breach of Contract Damages

180 Degree Solutions LLC v. Metron Nutraceuticals, LLC, 8th Dist. Cuyahoga No. 109986, 2021-Ohio-2769

In this appeal, the Eighth Appellate District partially reversed and remanded with instructions the trial court's decision, finding that there was no evidence the defendant incurred damages as a result of the plaintiff's breach of contract.

The Bullet Point: In this dispute, the parties to a distribution agreement filed competing claims alleging the other breached said contract. Following a jury verdict in favor of the defendant, the plaintiff filed a judgment notwithstanding the verdict (JNOV), arguing the defendant failed to introduce evidence of damages. The trial court denied the JNOV motion, and the plaintiff appealed. The appellate court reversed the trial court's decision, finding that there was no evidence the defendant incurred damages as a result of the plaintiff's breach. Under Ohio law, an injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty. Reasonable certainty does not mean that damages must be calculated with absolute exactness. Rather, evidence is sufficient if it "affords a reasonable basis for computing damages, even if the result is only an approximation." Stated differently, "recovery for breach of contract is precluded only when the existence of damages is uncertain, not when the amount is uncertain." That being said, as to damages for lost profits, "the amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty."

Upon reviewing the record, this court found there was no evidence whatsoever that any of the plaintiff's breaches of the distribution agreement caused the defendant to incur damages. This court noted there was no evidence the defendant suffered damages as a result of the plaintiff's actions after the termination of the agreement, or that the defendant lost a particular business relationship with another distributor due to the plaintiff's sales. Further, even if the defendant had established it suffered some amount of lost profits as a result of the plaintiff's breaches, there was no evidence as to what those lost profits might be. As this court explained, lost profits must be substantiated by calculations based on facts available or evidence, not conclusory statements. The defendant produced no testimony or expert report to establish an amount of lost profits, and there was no explanation of how to calculate any lost profits. Therefore, without evidence of damages resulting from the plaintiff's breach, the defendant failed to establish a claim for breach of contract.

Duty of Care

S.L. & M.B., L.L.C. v. United Agencies, Inc., 8th Dist. Cuyahoga No. 109540, 2021-Ohio-2780

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing an insurance broker does not owe a duty of care to protect a third-party lienholder's interests.

The Bullet Point: In this dispute, the plaintiffs alleged the defendants insurance broker and agency breached their duty of care when they failed to protect the plaintiffs' third-party interests. Specifically, as

the third-party lienholders of a horse farm, the plaintiffs were to be named as a loss payee on the insurance policy pursuant to a note and security agreement entered into with the property owners of the farm. In response to these allegations, the defendants filed a motion for summary judgment, arguing that they did not owe the plaintiffs a duty of care. Both the trial and appellate courts agreed, finding that no duty of care exists to protect a third-party lienholder's interests.

As a gatekeeping matter, it must first be established that a legal duty of care exists in order to successfully bring a claim for breach of said duty. In Ohio, insurance agents do not generally owe a duty of care to third parties to make certain they are insured when there is no oral or written obligation to do so. The plaintiffs argued that because the defendants had knowledge of the security agreement pursuant to which they were to be named as a loss payee, the defendants had a duty to ensure the plaintiffs were named on the policy. The court disagreed, noting that while the plaintiffs had a contractual relationship with the property owners of the farm, there was no relationship between the plaintiffs and defendants. Further, the farm's business owner was the party who purchased the policy from the defendants. While the business owner initially instructed the defendants to name the plaintiffs as a loss payee, these instructions were later rescinded. As there was no contractual relationship between the plaintiffs and defendants, and as the purchaser of the policy directed that the plaintiffs not be named on the policy, the defendants did not owe a duty of care to protect the plaintiffs' third-party interests.

Related people

Stephanie Hand-Cannane
James W. Sandy

[Cite as *Csizmadia v. Gilkey*, 2021-Ohio-2760.]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

HOLLY CSIZMADIA Plaintiff-Appellee -vs- KIMBERLY GILKEY, et al. Defendants-Appellants	JUDGES: Hon. Craig R. Baldwin, P. J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 20AP0006 O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 18CV0072
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 9, 2021

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
JANNA WOODBURN 214 West Liberty Avenue McConnelsville, Ohio 43756	KRISTOPHER K. HILL 17 North 4th Street Zanesville, Ohio 43701

Wise, J.

{¶1} Appellants Kimberly Gilkey and Carl Gilkey appeal from the November 9, 2020 Judgment Entry by the Morgan County Court of Common Pleas. Appellee is Holly Csizmadia. The relevant facts leading to this appeal are as follows.

FACTS AND PROCEDURAL HISTORY

{¶2} On April 16, 2018, Appellee filed a civil action against Appellants, the Estate of Russell Farley, Harold Tucker III, and the Morgan County treasurer for quiet title, permanent injunction, conversion and declaratory judgment.

{¶3} The property which is the subject of the complaint is real estate located at 1998 E State Route 60 NE, McConnelsville, Ohio 43756 and 1996 E State Route 60 NE, McConnelsville, Ohio 43756, in Morgan County, Ohio ("disputed property").

{¶4} Oh August 18, 1999, Appellant Kimberly Gilkey, wife of Appellant Carl Gilkey, executed a promissory note and mortgage with the First National Bank of Southeastern Ohio, Chesterhill office, in the amount of $55,302.

{¶5} On January 11, 2001, Appellants and Russell Farley entered into a Land Contract, which was recorded in the Official Records of Morgan County on January 25, 2002. The land contract was for the disputed property in exchange for $53,000.

{¶6} On April 22, 2009, Appellants filed for Bankruptcy in United States Bankruptcy Court for the Southern District of Ohio. They listed the disputed property as an asset.

{¶7} Russell Farley filed a motion in the bankruptcy proceeding claiming the disputed property was not Appellant's property to surrender, and Peoples Bank had no claim to terminate and sell the property.

{¶8} On September 23, 2010, the bankruptcy case was closed and the disputed property was not surrendered to Peoples Bank. Appellant Kimberley Gilkey was not discharged her obligation on the Promissory Note.

{¶9} Appellee and Harold Tucker were in a romantic relationship and lived together at 1996 E. State Route 60 NW, McConnelsville, Ohio 43756 from February of 2010 until August of 2012 and then at 1998 E. State Route 60 NW, McConnelsville, Ohio 43756 until September of 2016.

{¶10} In January of 2011, Appellee and Tucker entered into an agreement with Russell Farley to transfer and convey the property to Appellee and Tucker if they made all mortgage payments in dispute on behalf of Russell Farley.

{¶11} From February 2, 2011 through January 2, 2015, Appellee and Tucker made mortgage payments to Peoples Bank, paying off the mortgage in full.

{¶12} Appellants made no payments themselves on the mortgage. Appellants were unaware payments were being made on the mortgage until they received a Release and Satisfaction of Mortgage notification. Appellants did not pay property taxes on the property since 2011.

{¶13} Upon receipt of the Release and Satisfaction of Mortgage notification, Appellants attempted to reenter the property and take possession. They refused to execute and deliver a warranty deed to Appellee and/or Russell Farley.

{¶14} On September 27, 2016, Appellants filed a complaint to forcible entry and detainer and money in Morgan County Court seeking to evict Appellee and Tucker. The court found Russell Farley was a necessary party to the action, and that the court was required to transfer the case to the Morgan County Court of Common Pleas.

{¶15} After transfer to the Court of Common Pleas, Appellants dismissed the action.

{¶16} On January 11, 2018, Russell Farley died before he made the transfer of property to Appellee.

{¶17} On May 2, 2018, the Morgan County treasurer filed an answer to the complaint.

{¶18} On June 26, 2018, Appellee filed an amended complaint for quiet title, permanent injunction, conversion, declaratory judgment, and unjust enrichment.

{¶19} On June 27, 2018, Diana Castle, the administrator of the Russell H. Farley estate, filed an answer to the amended complaint.

{¶20} On July 24, 2018, Appellants filed an answer to the amended complaint. Harold Tucker, III never appeared in this action. The Morgan County treasurer never filed an answer to the amended complaint.

{¶21} On October 10, 2018, Appellee filed a motion for summary judgment on counts 1, 4, and 5 of the amended complaint.

{¶22} On November 8, 2018, Appellants filed a brief in opposition to Appellee's motion for summary judgment.

{¶23} On March 8, 2019, Harold Tucker died.

{¶24} On March 13, 2019, the Court dismissed the Estate of Russell Farley as a party to the action.

{¶25} On April 16, 2020, the Morgan County Court of Common Pleas held a bench trial on the matter.

{¶26} At trial, Appellee testified that Russell Farley's estate had prepared a quitclaim deed, deeding over any interest he had in the property, and that she believed once the mortgage payments were completed it was Russell Farley's intent to transfer ownership of the property to Harold Tucker and Appellee. Appellee also testified that she paid the real estate taxes during the time they lived at the disputed property, and that she put money in Harold Tucker's bank account to help pay the mortgage each month.

{¶27} Next, Appellant Carl Gilkey testified Russell Farley never approached him about assigning the contract to Harold Tucker or Appellee.

{¶28} Appellant Kimberly Gilkey also testified she did not provide consent for Russell Farley to assign the contract to Harold Tucker or Appellee. Appellant Kimberly Gilkey testified that after Russell Farley took over the mortgage payments, she did not make any payments to the bank, and that she did not pay property taxes on the property taxes from 2016 to 2018.

{¶29} In a journal entry dated November 9, 2020, the Morgan County Court of Common Pleas ordered Appellee be declared the owner of the disputed property.

ASSIGNMENT OF ERROR

{¶30} On December 9, 2020, Appellant filed a notice of appeal raising the following Assignment of Error:

{¶31} "I. THE TRIAL COURT ERRED RULING IN FAVOR OF APPELLEE, WHEN THE ASSIGNMENT OF THE LAND CONTRACT DID NOT COMPLY WITH THE STATUTE OF FRAUDS; THE ASSIGNMENT BREACHED THE EXPRESS LAND CONTRACT LANGUAGE ITSELF; AND PRIVITY OF CONTRACT BETWEEN APPELLEE AND APPELLANTS DID NOT EXIST."

I.

{¶32} In Appellants' Assignment of error, Appellants argue that the trial court erred by granting ownership of the disputed property to Appellee. We disagree.

a. Applicability of the Statute of Frauds

{¶33} The first issue Appellants raise is that if the assignment of the land contract from Russell Farley to Appellee and Harold Tucker did not comply with the Statute of Frauds, then such no contract exists.

{¶34} The statute of frauds states that no action can be brought upon an agreement on the sale of land unless the agreement is in writing and signed by the party to be charged therewith. R.C. 1335.05. The statute of frauds bars a party from enforcing an oral agreement falling within the statute. *FirstMerit Bank, N.A. Inks*, 138 Ohio St.3d 384, 2014-Ohio-789, 7 N.E.3d 1150, ¶22. The term "party" refers to a party to the contract. *Blain's Folding Serv., Inc. v. Cincinnati Ins. Co.*, 8th Dist. No. 105913, 2018-Ohio-959, 109 N.E.3d 177, ¶4. "A defense under the statute of frauds is personal to the parties to the transaction and cannot be availed of by third parties." *Texeramics v. United States*, 239 F.2d 762, 764 (5th Cir.1957), *Legros v. Tarr*, 44 Ohio St.3d 1, 8, 540 N.E.2d 257 (1989).

{¶35} In *Blain's Folding Service, Inc. v. Cincinnati Insurance Company*, the court found that defendant-appellee Dane Contractors, Inc., had "no standing to question the enforceability of any contract that Blain's made with a third party" and that Dane cannot "avail itself of the affirmative defense to claim that a contract is unenforceable." *Blain's Folding Serv., Inc. v. Cincinnati Ins. Co.*, 8th Dist. No. 105913, 2018-Ohio-959, 109

N.E.3d 177, ¶5, *Legros v. Tarr*, 44 Ohio St.3d 1, 8, 540 N.E.2d 257 (1989) citing *Bradkin v. Leverton*, 26 N.Y.2d 192, 199, 309 N.Y.S.2d 192, 257 N.E.2d 643 (1970).

{¶36} In the case *sub judice*, Appellants were not a party to the contract between Russell Farley and Appellee. Therefore, they are unable to avail themselves of a statute of frauds defense. There is no merit in the argument that the statute of frauds prevented Appellee from quieting title to the disputed property.

b. Appellants and Appellee were not in privity of contract and Russell Farley was forbade from assigning his rights under the land sale contract

{¶37} Appellants argue that Appellants and Appellee were not in privity of contract. Appellants further contend that the contract Appellants signed with Russell Farley contained an anti-assignment clause, so any assignment of Russell Farley to Appellee would be invalid. Therefore, the question before us is whether Russell Farley breached his contract with Appellants causing Appellants damage by conveying his interest in the property to Appellee and Harold Tucker.

{¶38} Ohio enforces anti-assignment clauses where there is clear contractual language prohibiting an assignment. *J.D. Wentworth, LLC v. Otisha Christian, et al.,* 7th Dist. Mahoning 07MA113, 2008-Ohio-3089, ¶40. To recover on a breach of contract claim, the claimant must prove not only that the contract was breached, but that the claimant was thereby damaged. *Munoz v. Flower Hosp.* (1985), 30 Ohio App.3d 162, 168, 30 OBR 303, 309-310, 507 N.E.2d 360, 366. “Generally, a party injured by a breach of contract is entitled to his expectation interest or ‘his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.’ ” *Rasnick v. Tubbs*, 126 Ohio App.3d 431, 437, 710 N.E.2d 750, 753-

54 (3rd Dist.1998), citing Restatement of the Law 2d, Contracts (1981) 102-103, Section 344.

{¶39} In the case *sub judice*, Appellants agreed to sell the disputed property to Russell Farley, who then agreed with Appellee and Mr. Tucker that if Appellee and Mr. Tucker took over the mortgage payment to the bank, he would deed the disputed property to them. Appellants have not alleged that they did not receive the benefit of any bargain struck or that they were not in the same position as they would have been had Russell Farley made the required payments. Appellants have not demonstrated or alleged that they did not receive the benefit of their bargain. They do not contest that the mortgage was paid off by Russell Farley, Harold Tucker, and Appellee. Therefore, even if we assume Russell Farley breached the anti-assignment clause of the contract, the trial court properly ruled in favor of Appellee absent proof Appellants were damaged.

{¶40} Appellants' sole Assignment of Error is overruled.

{¶41} For the foregoing reasons, the judgment of the Court of Common Pleas, Morgan County, Ohio, is hereby affirmed.

By: Wise, J.

Baldwin, P. J., and

Hoffman, J., concur.

JWW/br 0805

[Cite as *Gibbs v. Firefighters Community Credit Union*, 2021-Ohio-2679.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

RICHARD GIBBS, ET AL.,	:	
Plaintiffs-Appellees,	:	No. 109929
v.	:	
FIREFIGHTERS COMMUNITY CREDIT UNION,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 5, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-927066

Appearances:

Branstetter, Stranch & Jennings, P.L.L.C., Alyson Steele Beridon, Karla Campbell, Michael J. Wall, J. Gerard Stranch, and Martin F. Schubert; Cohen & Malad, L.L.P., and Lynn A. Toops, *for appellees*.

Litchfield Cavo, L.L.P., James Branit, and Keith L. Gibson; Bricker & Eckler, L.L.P., and Daniel C. Gibson, *for appellant*.

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant Firefighters Community Credit Union ("FFCCU") appeals the decision of the trial court that denied its motion to stay the action pending arbitration. Upon review, we affirm the decision of the trial court.

Background

{¶ 2} On December 26, 2019, appellees Richard Gibbs, Randall L. Joy, and Donna M. Joy (collectively "appellees") filed a class-action complaint against FFCCU. The complaint states that appellees have checking accounts at FFCCU and alleges that FFCCU engages in practices of (1) charging ATM/VCC fees on transactions that do not actually overdraw an account, and (2) charging two or more returned item fees on the same item. The complaint includes class allegations and raises claims for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment.

{¶ 3} In response to the complaint, FFCCU filed a motion to dismiss or, in the alternative, application for stay pending arbitration pursuant to R.C. 2711.02(B). FFCCU argued that appellees agreed to a change in terms and conditions to their account agreements, which adopted an "Arbitration and Waiver of Class Action Relief provision." FFCCU provided an affidavit of an authorized representative who averred that "[o]ne amendment to the Account Agreement that [FFCCU] notified the members of was the inclusion of an arbitration and class action waiver provision, effective August 21, 2019." It was also averred that this notice was sent to email addresses previously provided by appellees to FFCCU and that no failure to deliver

notices were received. FFCCU maintained that because appellees never opted out of the Arbitration and Waiver of Class Action Relief provision, it became effective and controls in this matter. Relevant hereto, the Account Agreement provided that it "may be amended by Us at any time in which case We will provide You with a notice of amendment as required by law or regulation," and that the "Agreements and Disclosures provided to You at the time you opened Your Account * * * may be amended by Us from time to time in a manner as prescribed by law."

{¶ 4} The email that purportedly was sent to appellees on August 28, 2019, contained the subject "We've updated our terms of services" and stated as follows:

> Dear Valued Member,
>
> We're writing to let you know that *we've updated our terms of service. These updates apply to all members* and accounts at Firefighters Community Credit Union. We believe these updates will help us serve all of our members better. *The changes in terms are attached to this email.* We recommend that you familiarize yourself with these updated agreements. *As you continue to use FFCCU for your banking needs, you agree to these updated terms.* If you have any questions, please don't hesitate to contact us at * * *. We look forward to continuing to serve you and to help you meet your financial goals.

(Emphasis added.)

{¶ 5} This email indicated that the terms of service had been updated, and nothing in the content of the email informed the recipient of the addition of the Arbitration and Waiver of Class Action Relief provision or the ability to opt out. Rather, the Notice of Change in Terms that was stated to "apply to all members" was "attached to this email." The attached Notice of Change in Terms included the

Arbitration and Waiver of Class Action Relief provision and opt-out requirements, which were shown in a box.

{¶ 6} In opposing FFCCU's motion, appellees argued in part that they "did not agree to the arbitration or waiver clauses because [they] * * * were not fully informed * * *." Appellees alleged in their opposition that the parties had been engaged in presuit settlement discussions on a class-wide basis for months leading up to the filing of the case and that the August 28, 2019 email informing members of changes to the terms of service was sent after counsel for the Joys sent a presuit demand letter on July 17, 2019. Appellees argued that because they did not make an informed decision, there was no meeting of the minds and no agreement to arbitrate or waiver of their right to participate in a class-action lawsuit or to a jury trial. They maintained that their claims were governed by the 2018 account agreement and that they are not subject to the added provisions under the 2019 agreement. Appellees also argued that at the time the notice was sent, FFCCU was already aware of the claim against it and that the Joys were represented by class counsel. Additionally, they argued that the added arbitration and class or jury waiver clauses were unconscionable.

{¶ 7} In its reply, FFCCU argued that the opposition included no admissible evidence and that appellees did not dispute receiving the notice that was sent or their failure to opt out of the arbitration requirement. FFCCU continued to maintain that the 2019 agreement and its arbitration and waiver provisions applied in this matter.

FFCCU further argued that appellees failed to establish procedural or substantive unconscionability.

{¶ 8} Following a hearing on FFCCU's motion, the trial court issued a decision that denied the motion and found "plaintiffs' claims may proceed as the arbitration clause in issue is not enforceable against them." The trial court recognized the circumstances under which the change to the terms of service was sent, including the active negotiations between the parties, and determined that "there was no agreement to arbitrate because plaintiffs could not have made an informed decision as to whether or not to opt out of the arbitration clause under these factual circumstances." The trial court specifically recognized that the "notice of arbitration and class waiver provisions must be clear so that the parties can make an informed decision" and that "the language used by defendants in the notice email implied that all members already agreed to the updated terms." In this regard, the trial court determined as follows:

> Further, the language used by defendant in the notice email implies that all members have already agreed to the updated terms. Defendant's notice e-mail dated August 28, 2019 indicated that the terms had already been updated and that members should familiarize themselves with the updated terms because by continuing to use defendant's services, members had actually already agreed to the terms. (See Def. Mem. Ex. 2. at 1. e-mail entitled "We've updated our terms of service," stating that "we recommend that you familiarize yourself with these updated agreements" and "As you continue to use FFCCU for your banking needs, you agree to these updated terms.").

{¶ 9} The trial court concluded that "there was no agreement to arbitrate" and denied FFCCU's motion. This appeal followed.

Law and Analysis

{¶ 10} Under its sole assignment of error, FFCCU claims the trial court erred by denying its motion to dismiss.

{¶ 11} Initially, we address appellees' contention that there is a lack of a final appealable order because the trial court denied FFCCU's motion to dismiss. Although FFCCU styled its motion as a motion to dismiss, it requested in the alternative that the case be stayed pending arbitration pursuant to R.C. 2711.02(B). The trial court ultimately determined that the case was not subject to arbitration because there was no agreement to arbitrate. Pursuant to R.C. 2711.02(C), "an order under [R.C. 2711.02(B)] that grants or denies a stay of a trial of any action pending arbitration * * * is a final order * * *." Accordingly, "Ohio law authorizes appellate review of such orders." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 30.

{¶ 12} R.C. 2711.02(B) requires a trial court to stay litigation pending arbitration when certain conditions are met and provides as follows:

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

{¶ 13} The standard of review for a trial court's decision on whether to stay a case pending arbitration under R.C. 2711.02(B) depends on the underlying issue

presented. *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7. Generally, an abuse-of-discretion standard has been applied when there is a question such as whether a party has waived its right to arbitrate a given dispute, and a de novo standard has been applied when reviewing whether a party has agreed to arbitration or questions of unconscionability. *Hedeen v. Autos Direct Online, Inc.*, 2014-Ohio-4200, 19 N.E.3d 957, ¶ 9 (8th Dist.), citing *McCaskey* at ¶ 7-8. "The existence of a contract is a question of law that we review de novo." *Vogel v. Albi*, 1st Dist. Hamilton No. C-190746, 2020-Ohio-5242, ¶ 21, citing *N. Side Bank & Trust Co. v. Trinity Aviation, L.L.C.*, 1st Dist. Hamilton Nos. C-190021 and C-190023, 2020-Ohio-1470, ¶ 17. Accordingly, because we are reviewing the trial court's determination that there was no agreement to arbitrate, we apply a de novo standard of review. *See Hedeen* at ¶ 9. However, any factual findings regarding the circumstances surrounding the making of the contract should be reviewed with great deference. *See Benfield* at ¶ 38.

{¶ 14} Whether a party has agreed to arbitration is a matter of contract. *Maestle v. Best Buy Co.*, 8th Dist. Cuyahoga No. 79827, 2005-Ohio-4120, ¶ 10, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Palumbo v. Select Mgt. Holdings, Inc.*, 8th Dist. Cuyahoga No. 82900, 2003-Ohio-6045, ¶ 18. Therefore, when deciding whether a party has agreed to arbitrate, courts should apply ordinary principles that govern the formation of contracts. *Seyfried v. O'Brien*, 2017-Ohio-286, 81 N.E.3d 961, ¶ 19 (8th Dist.), citing *First Options* at 944; *Roberts v. KND Dev. 51, L.L.C.*, 8th Dist.

Cuyahoga No. 108473, 2020-Ohio-4986, ¶ 10, citing *Avery v. Academy Invests., L.L.C.*, 8th Dist. Cuyahoga No. 107550, 2019-Ohio-3509, ¶ 9. "'A valid arbitration agreement, like any contract, requires an offer and acceptance that is supported by consideration and is premised on the parties' meeting of the minds as to the essential terms of the agreement.'" *Rousseau v. Setjo, L.L.C.*, 8th Dist. Cuyahoga No. 109237, 2020-Ohio-5002, ¶ 8, quoting *Corl v. Thomas & King*, 10th Dist. Franklin No. 05AP-1128, 2006-Ohio-2956, ¶ 8. A party with a unilateral right to modify a contract does not have the right to make any kind of change whatsoever. *Maestle* at ¶ 20.

{¶ 15} Although Ohio courts recognize a strong public policy favoring arbitration, when deciding motions to compel arbitration, the proper focus is whether the parties actually agreed to arbitrate the issue. *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203, ¶ 20. Because arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute which he or she has not agreed so to submit. *See id.* at ¶ 20; *Maestle* at ¶ 10, 22. "'The party seeking to compel arbitration bears the burden of establishing the existence of an enforceable arbitration agreement [with] the party against whom the moving party seeks enforcement.'" *Dorgham v. Woods Cove III*, 8th Dist. Cuyahoga No. 106838, 2018-Ohio-4876, ¶ 16, quoting *Fifth Third Bank v. Senvisky*, 8th Dist. Cuyahoga No. 100030, 2014-Ohio-1233, ¶ 11.

{¶ 16} In this action, FFCCU sought to amend the agreement with its customers to add an Arbitration and Waiver of Class Action Relief provision.

However, the record fails to demonstrate sufficient notice was sent such that there was a "meeting of the minds" or an agreement as to the inclusion of the subject provision. There is nothing to show that an arbitration provision was included in the original account agreement, and the content of the email notice that was purportedly sent to appellees did not provide any indication that the changes to the account agreement involved the addition of the Arbitration and Waiver of Class Action Relief provision. As stated by the Sixth Circuit in *Sevier Cty. Schools Fed. Credit Union v. Branch Banking & Trust Co.*, 990 F.3d 470, 15 (6th Cir.2021),

> The proper question is whether, upon assenting to the original two-page * * * agreement, such individuals * * * would reasonably expect their relationship to be governed * * * by new provisions unilaterally added * * * to such an extent that the [Bank Services Agreement] ultimately contained terms that materially changed the Plaintiffs' rights and obligations under the original agreement.

{¶ 17} Despite the fact that the email notice indicated that "[t]he changes in terms are attached to this email," as the trial court aptly recognized, the language used by the defendants in the email implied that all members had already agreed to the updated terms. Likewise, the email notice stated as the subject, "We've updated our terms of services," and the email did not call attention to the arbitration provision or opt-out requirements. Simply put, clear notice was not provided for appellees to make an informed decision or to demonstrate they agreed to be bound by the arbitration provision. Instead, "[t]he Plaintiffs were thus lulled into not giving a thought to the unilateral addition of the arbitration provision * * *." *Id.* at 24.

{¶ 18} Although FFCCU spends much time arguing that appellees failed to present admissible evidence to rebut their claim that proper notice of the provision and opt-out requirements was provided, FFCCU had the burden of establishing sufficient notice was sent and to establish the existence of an enforceable arbitration agreement. FFCCU failed to meet its burden.[1] Additionally, this case is distinguishable from *AT&T Mobility Servs., L.L.C. v. Boyd*, N.D.Ohio No. 1:19cv2539, 2020 U.S. Dist. LEXIS 196141 (Oct. 22, 2020), which is relied on by FFCCU. In stark contrast to this case, in *Boyd*, the email notice included a subject line, "Action Required: Notice Regarding Arbitration Agreement," and specifically informed the recipient that the "Arbitration Agreement [is] linked to this email" and included instruction for opting out in the content of the email. *Id*. at 4-5.[2]

{¶ 19} We also are not persuaded by the supplemental authority filed by FFCCU, which cites *Qualls v. Wright Patt Credit Union*, 2d Dist. Greene No. 2020-CA-48, 2021-Ohio-2055, and *Rudolph v. Wright Patt Credit Union*, 2d Dist. Greene No. 2020-CA-50, 2021-Ohio-2215.

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[1] We would be remiss not to point out that as was the case in *Sevier*, the circumstances argued in this case present "the antithesis of good faith and fair dealing." *Id*. In light of the representation that active negotiations were occurring between the parties at the time the email notification was sent, FFCCU arguably had knowledge that appellees would have opted out of the provision had proper notice been given.

[2] *Joseph v. M.B.N.A. Am. Bank, N.A.*, 148 Ohio App.3d 660, 2002-Ohio-4090, 775 N.E.2d 550 (8th Dist.), is also distinguishable because it applied Delaware law, which expressly permits banks to amend credit card agreements to add an arbitration clause pursuant to Del.Code Ann., Title 5, Section 952(a), and proper notice of intent to amend the credit card agreement to incorporate an arbitration provision was sent in a mailing to card holders. *Id*. at ¶ 2, 9, 12.

{¶ 20} In *Qualls,* the version of the membership agreement that was attached to the complaint included the disputed arbitration clause, which had been unilaterally added to the agreement by the credit union. The Second District Court of Appeals determined that Qualls "acknowledged in his complaint that his and [the credit union's] contractual relationship was embodied in that Membership Agreement and 'related documentation.'" *Id*. at ¶ 86. The credit union, which had reserved the right to change the terms of the agreement at any time, had posted new versions of the agreement to its website and also asserted "it had mailed the July 2019 Membership Agreement to * * * the same mailing address Qualls had provided to [the credit union] as his mailing address." *Id*. at ¶ 10. The court found "Qualls manifested his assent to the arbitration provision" by "continuing to maintain his account * * * [and] by his continued use online banking." *Id*. at ¶ 88. The *Qualls* opinion contains little if any constructive legal analysis regarding notice of a unilateral modification of an agreement to include an arbitration clause. Also, unlike *Qualls*, in this case there was no physical mailing of the modified agreement and appellees did not acknowledge the 2019 agreement was applicable in filing their claims. Rather, appellees assert their claims are governed by the 2018 account agreement, which is attached to the complaint, and maintain they are not subject to the 2019 agreement containing the Arbitration and Waiver of Class Action Relief provision that was unilaterally added by FFCCU without proper notice.

{¶ 21} In *Rudolph*, the Second District Court of Appeals upheld a trial court's decision to enter a stay pending arbitration upon finding that the credit union could

make a unilateral change to a membership agreement to change the prior method of dispute resolution to arbitration and that Rudolph had notice of changes to the agreement because he had registered for online banking and accepted responsibility to review the member agreements that the credit union posted on its website. *See id*. at ¶ 49. Additionally, the court found "the terms were sufficiently conspicuous on the website, which Rudolph repeatedly accessed." *Id*. at ¶ 57. The decision in *Rudolph* attempts to distinguish *Maestle*, 8th Dist. Cuyahoga No. 79827, 2005-Ohio-4120, and *Sevier*, 990 F.3d 470. *Rudolph* is not controlling to our decision.

{¶ 22} Under the circumstances presented, we find the decision in *Coleman v. Alaska USA Fed. Credit Union*, D.Alaska No. 3:19-cv-0229-HRH, 2020 U.S. Dist. LEXIS 3301 (Jan. 9, 2020), to be persuasive in this matter:

> In order for plaintiff to have been bound by the terms of the arbitration agreement, there must be some evidence that shows "that a reasonably prudent user would have been on inquiry notice that [an arbitration] agreement existed." [*Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 569, (9th Cir.2014)]. "While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir.2014) (internal citation omitted). As the Seventh Circuit has explained, "we cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.)." *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1035 (7th Cir.2016). *Here, defendant's pop notice made no mention of the specific changes being made to the Account Agreement. The notice failed to describe the update or call attention to the new arbitration provision. Such notice is insufficient to put a member on inquiry notice that an arbitration agreement was being added to its contract with defendant.* Requiring such notice is not "[a]n arbitration-specific rule [that] would be preempted by the FAA," *O'Connor v. Uber Technologies, Inc.*, 904 F.3d 1087, 1093 (9th

> Cir.2018), as defendant argues. It is a necessary requirement for a binding contract.

(Emphasis added.) *Coleman* at 13-15.

{¶ 23} On the record before us, FFCCU cannot show that appellees clearly agreed to the Arbitration and Waiver of Class Action Relief provision. Without sufficient notice, there was no meeting of the minds and no binding agreement to arbitrate. As the Supreme Court of Ohio has held, a party cannot be forced to arbitrate a dispute that he or she did not agree to arbitrate. *Taylor*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203, at ¶ 20. Therefore, we find no error in the trial court's denial of FFCCU's motion for stay pending arbitration pursuant to R.C. 2711.02(B).

{¶ 24} Finally, contrary to FFCCU's argument, we do not find that the trial court extended its ruling to all FFCCU members because class-action issues and class certification had yet to be determined. Also, the trial court did not suggest the arbitration provision was unconscionable; rather, it found no arbitration agreement existed. We find no merit to any other arguments raised by appellant that are not specifically addressed herein. The assignment of error is overruled.

{¶ 25} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

_____
SEAN C. GALLAGHER, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
EILEEN T. GALLAGHER, J., CONCUR

[Cite as *180 Degree Solutions, L.L.C. v. Metron Nutraceuticals, L.L.C.*, 2021-Ohio-2769.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

180 DEGREE SOLUTIONS LLC,	:	
Plaintiff-Appellant,	:	No. 109986
v.	:	
METRON NUTRACEUTICALS, LLC, ET AL.	:	
Defendant-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED IN PART AND REMANDED
RELEASED AND JOURNALIZED: August 12, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-888247

Appearances:

Hahn Loeser & Parks L.L.P., Dennis R. Rose, Daniel A. DeMarco, Michael B. Pascoe, and David M. Hopkins, *for appellant.*

Lewis Brisbois Bisgaard & Smith L.L.P., Ryan K. Rubin, Greg Amend, and Daniel A. Leister, *for appellees*.

MARY J. BOYLE, A.J.:

{¶ 1} Plaintiff-appellant, 180 Degree Solutions, LLC ("180"), appeals from the trial court's denial of its motion for judgment notwithstanding the verdict ("JNOV") and other discovery and expert rulings after the jury returned a verdict in favor of defendants-appellees, Metron Nutraceuticals, LLC and Dr. Nikolaos Tsirikos-Karapanos. 180 raises two assignments of error for our review:

> 1. The trial court erred in its denial of Appellant's Motion for Judgment Notwithstanding the Verdict.
>
> 2. The cumulative effect of the trial court's pre-trial discovery and expert rulings against Appellant constitutes an abuse of discretion.

{¶ 2} Finding merit to 180's first assignment of error, we reverse and remand with instructions for the trial court to enter judgment in favor of 180 on Metron's claim for breach of contract. We overrule 180's second assignment of error.

I. Procedure Before Trial

{¶ 3} In October 2017, 180 filed a complaint against Metron and its owner, Dr. Tsirikos-Karapanos, for fraud and negligent misrepresentation. The complaint stemmed from a distribution agreement entered between 180 and Metron for a nutritional supplement ("HCF-C" or "CytoDetox"). In an amended complaint before Metron and Dr. Tsirikos-Karapanos filed an answer, 180 added claims for tortious interference with business relations and breach of contract. 180 claimed that Metron and Dr. Tsirikos-Karapanos made false representations about how CytoDetox should be consumed.

{¶ 4} In January 2018, Metron and Dr. Tsirikos-Karapanos filed an answer. They also brought counterclaims against 180 and a third-party complaint against its owner, Warren Phillips, for abuse of process, breach of contract, negligent misrepresentation, tortious interference with business relations, and fraud. Metron and Dr. Tsirikos-Karapanos claimed that 180 breached various provisions of the distribution agreement, misrepresented that CytoDetox caused tongue inflammation, overstated its customer base, and engaged in fraudulent behavior.

{¶ 5} In March 2020, 180 and Phillips moved to dismiss the counts for abuse of process and fraud from the counterclaim and third-party complaint for failure to state a claim upon which relief can be granted. The trial court denied the motion, and 180 and Phillips filed an answer.

{¶ 6} In November 2018, 180 and Phillips sought leave to file a second amended complaint, which the trial court granted. 180 and Phillips added allegations that recent tests of CytoDetox showed that Metron was supplying a "minimal strength version of its product that has nowhere close to the represented dose of active ingredient[.]"

{¶ 7} Before trial, the trial court denied three of 180's motions to compel the production of documents and struck 180's expert witness for untimely disclosure. The trial court also denied 180's motions in limine to exclude reference to Phillips's business partner, testimony that 180 had violated FDA regulations, and argument that 180 breached the distribution agreement on theories not included in Metron's complaint.

{¶ 8} The week before trial, Metron and Dr. Tsirikos-Karapanos voluntarily dismissed their claim for tortious interference with business relations from their counterclaim and third-party complaint. 180 also dismissed its claim for tortious interference with a business relationship.

II. Trial Procedure and Evidence

{¶ 9} The case proceeded to a jury trial in February 2020. In its case in chief, 180 presented Phillips and Dr. Tsirikos-Karapanos as if on cross-examination. For its case in chief, Metron presented four witnesses: Dr. Tsirikos-Karapanos, Phillips as if on cross-examination, and the videotaped deposition testimony of Erin Smith (180's former regional sales manager) and Sean Behun (180's former chief financial officer). 180 also presented Bill Labovitz (180's legal counsel) as a rebuttal witness to Behun's testimony. For clarity, we will describe the trial evidence in chronological order of the underlying events rather than the order in which each witness testified at trial.

{¶ 10} Dr. Tsirikos-Karapanos testified that he developed a process to create hydrolyzed clinoptilolite fragments ("HCF"), which are consumed to remove toxins from the body. He explained that Metron creates a concentrate of the fragments and sends the concentrate to contract manufacturing organizations, which dilute the concentrate with water and add vitamin C to create the final product, hydrolyzed clinoptilolite fragments with vitamin C, or "HCF-C." Dr. Tsirikos-Karapanos explained that the commercial name for HCF-C was "CytoDetox." The contract

manufacturing organizations would bottle the CytoDetox, test it pursuant to FDA regulations, and ship Metron samples with certificates of analyses for each batch.

{¶ 11} Phillips testified that Metron reached out to him to see if he would help bring CytoDetox to market. Dr. Tsirikos-Karapanos testified that Phillips and his business partner said they had a large distribution network and could reach "tens of thousands" of practitioners in the United States. 180's former regional sales manager, Erin Smith, testified that in 2015, Phillips was building the business "literally from the ground up, from ground zero."

{¶ 12} Dr. Tsirikos-Karapanos and Phillips testified that in January 2015, Metron and 180 entered the distribution agreement, which was admitted into evidence. The agreement states that 180 has the exclusive right to distribute Metron's professional strength "product" to healthcare practitioners within the United States. Appendix B to the agreement defines "product" as "Hydrolyzed Clinoptilolite Fragments (HCF)." The agreement sets forth minimum quantities that 180 must purchase to maintain its exclusive right to sell the product.

{¶ 13} The distribution agreement provides that 180 "assures" Metron that it or its affiliated entities have the "facilities, personnel, and technical expertise necessary to market the products." It also states that 180 is responsible for developing marketing materials, but 180 must obtain Metron's prior written approval before using them. The agreement states that if 180 "ceases to market and sell" HCF for Metron "for any reason," 180 and Metron "shall not use any such product name or logo/graphic unique to the Product to sell and/or market the

Product[.]" The agreement also contains a termination clause, which provides that each party has the right to terminate the agreement "at any time for a breach of this Agreement and the failure to cure such breach within ten (10) days after written notice of such breach by a party."

{¶ 14} Phillips testified that 180 purchased CytoDetox from Metron for $13 to $15 per bottle. He did not dispute that 180 sold CytoDetox to practitioners for roughly $45 per bottle and directly to consumers at roughly $84 per bottle. He explained that 180 would offer a lower price per bottle depending on the volume of the purchase.

{¶ 15} Phillips testified that on December 23, 2015, Metron sent a letter to him that 180 had breached the distribution agreement by selling CytoDetox to nonpractitioners. He testified that he sent a letter in response disputing the claim but assuring Dr. Tsirikos-Karapanos that 180 had modified its website to clarify that only practitioners were authorized to purchase CytoDetox.

{¶ 16} Dr. Tsirikos-Karapanos and Phillips testified that on April 21, 2016, Metron and 180 executed an amendment to the distribution agreement. Dr. Tsirikos-Karapanos explained that the amendment "waived" the minimum amount of product that 180 was required to sell to maintain exclusivity in 2015. Phillips testified that Metron was having financial challenges and offered a "better rate" to sell "extra inventory" with a lower concentration of HCF. He explained the amendment was "mutually beneficial" to both parties.

{¶ 17} Phillips testified that in July 2016, he had a phone call with Dr. Tsirikos-Karapanos about selling a product to nonpractitioners. He said that he offered to purchase more CytoDetox and make it available for the public to purchase, and Dr. Tsirikos-Karapanos told him that was a "great idea" and to "sell as much as you can." Dr. Tsirikos-Karapanos denied having this phone call with Phillips.

{¶ 18} Phillips testified that on December 29, 2016, Metron sent 180 a "Notice of Breach" letter, which was admitted into evidence. The letter identifies two violations to the distribution agreement: the sale of CytoDetox to nonpractitioners and the sale of CytoDetox outside of the United States. Phillips testified that he was surprised to receive Dr. Tsirikos-Karapanos's letter, but Metron and 180 resolved the dispute by executing a second amendment to the distribution agreement. The amendment includes a release in which Metron agreed to waive any claims it had against 180 arising from 180's "unauthorized retail sales" of CytoDetox to nonpractitioners and to customers outside of the United States.

{¶ 19} Phillips testified that in early 2017, he had "calls all the time" with Dr. Tsirikos-Karapanos and that Dr. Tsirikos-Karapanos gave him permission to distribute CytoDetox outside of the United States. Phillips admitted that he did not get this authorization in writing because "he didn't know better." On March 8, 2017, Dr. Tsirikos-Karapanos sent Phillips a letter titled, "Notice to Cure Sales of CytoDetox Outside the Territory," which was admitted into evidence. The letter states that Metron does not consent to 180's sales to six practitioners outside of the

United States. Metron reminded 180 in the letter that 180 must request written consent if it wished to expand sales outside of the United States.

{¶ 20} 180's former chief financial officer, Sean Behun, testified that 180 was "selling fairly extensively at one point in Europe" and directly to customers in Canada. 180 and Phillips rebutted this testimony by calling Bill Labovitz, 180's legal counsel. Labovitz testified that after 180 terminated Behun's employment, Behun "was attempting to blackmail or engage in extortion to get $25,000 so that he would not go back to Metron and disclose to Metron what he called harmful information about 180." Labovitz testified that 180 did not pay Behun the $25,000.

{¶ 21} Phillips testified that in May 2017, 180 had shipments of CytoDetox delivered and stored in the garage of Phillips's townhouse in Pittsburg. Phillips admitted that his garage was not temperature controlled and that he "probably shouldn't have stored it in the garage" but that Dr. Tsirikos-Karapanos knew that 180 was having CytoDetox shipped to the townhouse and did not object. Dr. Tsirikos-Karapanos testified that he saw the delivery address for the CytoDetox shipments but did not know it was Phillips's townhouse.

{¶ 22} Phillips testified that in September 2017, he received a question from a Facebook group member asking if CytoDetox had ever caused tongue swelling. He said that he emailed Dr. Tsirikos-Karapanos with the question, and the email chain was admitted into evidence. In his email in response to Phillips, Dr. Tsirikos-Karapanos stated that Metron "has never received such a report" and "recommends that CytoDetox is added to a beverage and <u>not</u> taken orally directly." (Emphasis sic.)

Dr. Tsirikos-Karapanos testified that Phillips's email made him "jump off the ground" because he knew that tongue swelling "can be deadly." He testified that he asked 180 to investigate into the tongue-swelling incident, and he did not receive any information back from 180. Phillips testified that he did not know whether 180 investigated.

{¶ 23} Phillips and Dr. Tsirikos-Karapanos both testified that on October 6, 2017, Metron sent 180 a letter terminating the distribution agreement. Behun testified that 180's leadership was happy when Metron terminated the agreement because "they wanted to get out of" it.

{¶ 24} Phillips testified that on October 16, 2017, Metron sent 180 a letter that it had further violated the distribution agreement by publishing a brochure that contained instructions for consuming CytoDetox that were "wrong and could be dangerous." The letter was admitted into evidence and demanded that 180 immediately remove the brochure from the market and notify all its customers that the brochure contained incorrect instructions. The letter stated that if 180 did not complete the requested actions, Metron would file a lawsuit and seek injunctive relief "for the protection of the public."

{¶ 25} The brochure states the following instructions for "how to get the best results" from CytoDetox: (1) take CytoDetox in the morning and evening "on an empty stomach or 30 minutes away from food"; (2) take 10 drops "under the tongue, and swish for 30 seconds prior to swallowing"; and (3) "[w]ait 30 minutes before eating or drinking." Dr. Tsirikos-Karapanos testified that CytoDetox is not meant to

be taken under the tongue and without food or drink. He said that these instructions, combined with the question about tongue swelling, was "a huge red flag." Phillips testified that these were "always the instruction[s]" that Metron provided, but he had nothing in writing from Metron with these instructions. Dr. Tsirikos-Karapanos testified, and Phillips admitted, that 180 did not send the brochure to Metron for prior approval like the distribution agreement required.

{¶ 26} Phillips testified that after receiving Metron's letter, 180 removed the brochure from its website, but he did not remember whether 180 informed its customers that the instructions were wrong. He also stated that 180 did not respond to Metron's October 16, 2017 letter. Instead, on October 30, 2017, 180 filed its first complaint against Metron for fraud and negligent misrepresentation, alleging that Metron had misrepresented how to consume CytoDetox.

{¶ 27} Dr. Tsirikos-Karapanos stated that throughout the litigation, Metron began to sell HCF-C under the name "Clear Detox Pro," and 180 continued to sell the CytoDetox bottles it had purchased from Metron before Metron terminated the distribution agreement.

{¶ 28} Behun testified that in the spring or summer of 2017, 180 began seeking manufacturers to replace Metron's product, and Phillips testified that on May 23, 2018, 180 received its first shipment of the new product. Metron introduced into evidence a brochure showing that 180 had been marketing its new product under the name "CytoDetox." Dr. Tsirikos-Karapanos testified that 180 had been advertising its product as "molecular" clinoptilolite fragments, which he

emphasized is identical to Metron's product except for the addition of the word "molecular." Phillips testified that adding the word "molecular" was purely a marketing strategy. Phillips also said that 180's annual revenue at the time of trial was somewhere between $500,000 and $1 million dollars, and 180 had experienced sales growth every year.

{¶ 29} Dr. Tsirikos-Karapanos testified that Metron has had difficulty selling Clear Detox Pro because 180 is selling its product as CytoDetox. He explained that Metron could not find a distributor for Clear Detox Pro in 2018 or 2019. Dr. Tsirikos-Karapanos testified that the month before trial, Metron sold approximately 50 bottles of Clear Detox Pro, and Metron sold a "very small number of bottles" in 2018 and 2019. He explained that the original distribution agreement with 180 reflects that Metron had expected to sell 50,000 or 75,000 bottles of HCF-C per quarter. He testified that if he had known in 2015 what he knows now about 180, he would "never" have entered the distribution agreement with 180.

{¶ 30} Phillips testified that in the spring and summer of 2019, during this litigation, 180 hired a chemistry professor to conduct a test on Metron's version of CytoDetox. Phillips testified that the results showed there was no aluminum, silica, or vitamin C in the samples. He interpreted the test results to mean that unbeknownst to 180, Metron was selling it ionized water. He explained that 180 therefore stopped selling the rest of its supply of Metron's CytoDetox.

{¶ 31} After 180's and Phillips's case in chief, Metron and Dr. Tsirikos-Karapanos moved for a directed verdict on all claims against them, and the trial

court denied the motion. Metron and Dr. Tsirikos-Karapanos renewed their motion for directed verdict at the close of all evidence, and the trial court again denied the motion.

{¶ 32} On February 12, 2020, the jury returned a verdict in favor of Metron on its claim for breach of contract and awarded Metron $260,000 in damages. The jury also found that 180 proved its claim that Metron committed negligent misrepresentation but awarded 180 no damages. The jury found no liability for the remainder of the parties' claims. The jury awarded no punitive damages but found that an unspecified amount of attorney fees should be awarded to Metron. 180 orally moved to set aside the attorney fees, and although the record does not reflect that the trial court ruled on the motion, the trial court did not journalize the jury's award of attorney fees.

III. Procedure After Trial

{¶ 33} In March 2020, Metron filed a motion for prejudgment interest and a motion for legal costs, expenses, and fees. The motion for legal expenses explained that the distribution agreement contained a fee-shifting provision. Metron included affidavits from its attorneys and Dr. Tsirikos-Karapanos attesting to the costs, fees, and expenses Metron incurred throughout the litigation for a total amount of $276,260.71.

{¶ 34} Also in March 2020, 180 filed a motion for JNOV. 180 requested that the trial court enter a judgment in favor of 180 on Metron's claim for breach of contract because Metron failed to introduce evidence of damages.

{¶ 35} On August 31, 2020, the trial court granted Metron's motion for prejudgment interest and denied 180's JNOV motion. In its opinion denying the JNOV motion, the trial court explained its reasoning:

> At trial, Defendants produced evidence of 180 engaging in improper non-territory sales to consumers, having insufficient temperature controlled facilities, and publicizing an unapproved brochure, which demonstrate material breaches of the [distribution] agreement. At trial, Defendants produced evidence of damages through product sales, revenue, and per unit costs.

{¶ 36} On September 1, 2020, the trial court granted Metron's motion for legal expenses.

{¶ 37} On September 28, 2020, 180 filed a notice of appeal, challenging the trial court's denial of its JNOV motion as well as the trial court's orders striking 180's expert and denying its motions to compel and motions in limine.

IV. Judgment Notwithstanding the Verdict

{¶ 38} In its first assignment of error, 180 argues that the trial court erred in denying its JNOV motion because Metron failed to establish damages for its breach of contract claim. 180 contends that Metron did not present evidence that it suffered any damages at all. 180 further maintains that Metron admitted that its damages were speculative because during closing arguments, Metron's counsel told the jury that he would not suggest a dollar amount for damages.

{¶ 39} Civ.R. 50(B)(1), JNOV, allows a party to "serve a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion[.]" "If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is

reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence." Civ.R. 50(B)(3).

{¶ 40} We review the trial court's ruling on a JNOV motion de novo. *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173, ¶ 23. On review, "we must test whether the evidence, construed most strongly in favor of appellees, is legally sufficient to sustain the verdict." *Id.* Accordingly, we consider neither the weight of the evidence nor the credibility of the witnesses when undertaking this review. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679, 693 N.E.2d 271 (1998).

{¶ 41} To recover on a claim for breach of contract, a plaintiff must demonstrate (1) the existence of a binding contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damages resulting from the breach. *Corsaro v. ARC Westlake Village, Inc.*, 8th Dist. Cuyahoga No. 84858, 2005-Ohio-1982, ¶ 20, citing *Am. Sales, Inc. v. Boffo*, 71 Ohio App.3d 168, 175, 593 N.E.2d 316 (2d Dist.1991). The damages must "correspond to injuries resulting from the breach." *Corsaro* at ¶ 20.

{¶ 42} "As a general rule, an injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty, and generally, courts have required greater certainty in the proof of damages for breach of contract than in tort." *Id.* at 808-809. Damages are not uncertain merely because they cannot be calculated with absolute exactness; it

is sufficient if the evidence affords a reasonable basis for computing damages, even if the result is only an approximation. *TJX Cos., Inc. v. Hall*, 183 Ohio App.3d 236, 2009-Ohio-3372, 916 N.E.2d 862, ¶ 32 (8th Dist.). If sufficient evidence is presented from which the jury could award damages, then the jury's verdict should not be disturbed. *Fiorilli Constr., Inc. v. A. Bonamase Contracting, Inc.*, 8th Dist. Cuyahoga No. 94719, 2011-Ohio-107, ¶ 38.

{¶ 43} Ohio courts consistently recognize that recovery for breach of contract is precluded only when the existence of damages is uncertain, not when the amount is uncertain. *Woehler v. Brandenburg*, 12th Dist. Clermont No. CA2011-12-082, 2012-Ohio-5355, ¶ 35; *Fiorilli Constr.* at ¶ 36. However, to recover damages for lost profits, "the amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty." *Rhodes v. Rhodes Indus., Inc.*, 71 Ohio App.3d 797, 809, 595 N.E.2d 441 (8th Dist.1991).

{¶ 44} As an initial matter, we acknowledge that 180's argument is appropriately asserted through a JNOV motion instead of a motion for a new trial or remittitur. Metron argues that attacking the amount of damages must be raised in a motion for a new trial or remittitur because a JNOV motion attacks the jury's verdict, not its award of damages. We agree with this principle. *See Gateway Consultants Group, Inc. v. Premier Physicians Ctrs., Inc.*, 8th Dist. Cuyahoga No. 104014, 2017-Ohio-1443, ¶ 9, quoting *Desai v. Franklin*, 177 Ohio App.3d 679, 2008-Ohio-3957, 895 N.E.2d 875, ¶ 25 (9th Dist.) ("'Civ.R. 50(B) provides the means to challenge the jury's verdict, not the jury's award of damages.'"). However,

180 is indeed challenging the jury's verdict in finding 180 liable for breach of contract. 180 is arguing that it cannot be liable for breach of contract because Metron did not establish damages; 180 is not arguing that the jury's damages award should be a different amount.

{¶ 45} 180 argues that Metron's damages were speculative, like the damages in the case *Peltier v. McCartan*, 3d Dist. Shelby No. 17-05-14, 2005-Ohio-3901. In *Peltier*, owners of an alpaca farm brought claims against their vet for negligence and malpractice for misdiagnosing their alpaca as pregnant because they sold her as a pregnant alpaca, she never gave birth, and they had to refund the purchaser. *Id.* at ¶ 6. The owners argued that had they known the alpaca was not pregnant, they would have continued trying to breed her, and they would have been able to advertise her for mating on Alpaca.com. *Id.* at ¶ 11-12. The trial court granted summary judgment in favor of the vet because the owners' claim for monetary damages was speculative. *Id.* at ¶ 7. The Third District affirmed, finding that the misdiagnosis caused no loss in value to the alpaca itself, and there was no evidence as to what the monetary damages were. *Id.* at ¶ 12. 180 contends that Metron's damages were likewise speculative because Metron presented no evidence of the specific damages it was entitled to.

{¶ 46} 180 also points to *Lee v. Cooke*, 11th Dist. Lake No. 2018-L-045, 2019-Ohio-1163, in which Cooke and the country club he owned sued a former employee to recover funds that the former employee allegedly took from the country club. *Id.* at ¶ 2-6. The former employee testified that the funds went toward the country

club's expenses. *Id.* at ¶ 8-9. Cooke's ex-wife, "who has no golf-course experience or first-hand information as to the operation of the" golf course, testified as to which expenses "she thought may or may not be necessary to operation of a golf course." *Id.* at ¶ 9. Cooke himself also testified that he had no "exact numbers" that he claimed that the former employee took that should have belonged to the country club. *Id.* at ¶ 19-21. The trial court granted the former employee's motion for directed verdict for Cooke's failure to establish damages. *Id.* at ¶ 10. On appeal, Cooke argued that the jury should have been allowed to determine the issue of damages. *Id.* at ¶ 15. The Eleventh District affirmed the trial court's judgment, finding that Cooke's testimony failed to establish damages, and his ex-wife's testimony as to which expenses were for the golf course "was pure speculation." *Id.* at ¶ 15-17. 180 draws a comparison between Cooke's testimony that he had no "exact numbers" and Metron's counsel's decision to "never" ask Dr. Tsirikos-Karapanos how much Metron was "financially harmed."

{¶ 47} Metron argues that *Cooke* is distinguishable because it involved a directed verdict instead of a JNOV motion, and although the court in *Cooke* could consider only the plaintiff's evidence, we must consider all the evidence presented at trial. This is a distinction without a difference in this case because even looking at all the evidence presented at trial in the light most favorable to Metron, there is no evidence showing that Metron incurred damages. Metron also contends that *Cooke* "attempted to distinguish a substantive split" between the Eighth and Eleventh Districts by noting that once the fact of damage is established with

reasonable certainty, the plaintiff has latitude to prove the amount of the loss. We recognize that *Cooke* cites an Eighth District case for this proposition of law, but there is no discussion or acknowledgement of a district split on this issue. Lastly, Metron points out that *Cooke* is from the Eleventh District and has never been cited. We acknowledge that *Cooke* is not binding authority, but we find it persuasive.

{¶ 48} Metron identifies the following evidence to support its award for damages:

- Dr. Tsirikos-Karapanos testified that Metron would have never entered the agreement with 180 if it knew how 180 would conduct itself.
- 180 developed its own product, stockpiled Metron's product to sell in the meantime, and failed to notify Metron of its plans.
- At the time it entered into the Agreement, 180 was a[t] "ground zero" with respect to product sales. But by 2017, 180's annual revenue had grown to $562,000, and CytoDetox was its "best seller."
- 180 paid Metron $13 per bottle of CytoDetox and sold them to customers at $45-$84 per bottle.
- After the termination of the distribution agreement, 180 sold at least 6,700 bottles of Metron's product in 2018.
- 180's revenue has "definitely" increased in the years following the termination, totaling nearly $1 million in 2019.
- After the agreement termination, Metron was unable to find a new distributor and saw a "dramatic decline" in its sales volume.

{¶ 49} Metron maintains that 180 did not object to the jury instruction regarding contract damages or the lack of jury interrogatories, and we must

therefore presume that the jury followed the instruction. The instruction stated as follows:

> The law provides that a person who has been damaged by a breach of contract shall be fairly and reasonably compensated for his or her loss. In determining the damages, if any, you will allow an amount that will reasonably compensate the injured person for all losses that are the natural and probable result of the breach.

Metron emphasizes that 180 did not request, and the trial court did not submit, special jury interrogatories that would have differentiated between the types of damages the jury was awarding or the theories of breach. Metron points out that we therefore do not know whether the jury awarded damages for 180's non-territory sales to consumers or for publicizing an unapproved brochure, for example, or how it calculated its award. Metron maintains that 180 is therefore limited to challenging the jury's verdict "as a whole."

{¶ 50} Jury interrogatories to clarify how the jury reached its damages award would have certainly been helpful to "'test the correctness of the general verdict returned.'" *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St.3d 611, 613-614, 635 N.E.2d 310 (1994), quoting *Bradley v. Mansfield Rapid Transit, Inc.*, 154 Ohio St. 154, 160, 93 N.E.2d 672 (1950). But the lack of jury interrogatories on this topic and 180's lack of objection do not prevent us from reviewing whether Metron produced evidence of damages at all. *See Bobb Forest Prods. v. Morbark Indus.*, 151 Ohio App.3d 63, 2002-Ohio-5370, 783 N.E.2d 560, ¶ 63-64 (7th Dist.) (reviewing each specific ground upon which the jury could have based its award in the absence of

jury interrogatories differentiating between the types of damages the jury was awarding).

{¶ 51} In this case, the lack of jury interrogatories differentiating between the theories of breach is inconsequential because Metron produced no evidence that any of 180's breaches of the distribution agreement caused it to incur damages. "A claimant seeking to recover for breach of contract must show damage as a result of the breach. Damages are not awarded for a mere breach of contract; the amount of damages awarded must correspond to injuries resulting from the breach." *Corsaro*, 8th Dist. Cuyahoga No. 84858, 2005-Ohio-1982, at ¶ 20 (finding plaintiff had not proven contract damages because the injury was "not the natural consequence" of the breach).

{¶ 52} Metron produced no evidence that it suffered any damages arising from 180's sales outside of the United States, sales to nonpractitioners, failure to maintain appropriate facilities and personnel, publication of the brochure without prior approval, or continued use of the name "CytoDetox" to sell its own product after the termination of the distribution agreement. Metron produced no evidence, for example, that practitioners stopped purchasing CytoDetox because of allegedly faulty instructions in the brochure, or that Metron lost a particular relationship with another distributor due to 180's international sales or sales directly to consumers. Although Metron produced testimony that it could not find a new distributor for its Clear Detox Pro, and Dr. Tsirikos-Karapanos thought that was because 180 continued to use the name CytoDetox, Metron produced no evidence of specific

distributors with which it tried to do business and no evidence that those distributors refused to sell Metron's Clear Detox Pro because of 180's continued use of the name CytoDetox.

{¶ 53} Metron does not explicitly state that 180's breaches of the distribution agreement caused Metron to lose profits. But to the extent Metron makes such an argument, it lacks merit. Even if Metron established that it suffered some amount of lost profits as a result of 180's breaches of the distribution agreement, Metron produced no evidence as to what its lost profits might be. *See Blain's Folding Serv. v. Cincinnati Ins. Co.*, 2018-Ohio-959, 109 N.E.3d 177 (8th Dist.) (holding that the plaintiff failed to adequately prove its damages for lost profits because it "failed to offer any evidence of what those lost profits might be.") *Id.* at ¶ 18. To establish lost profits, Metron must produce more than a "conclusory statement" and must explain "how that sum was determined." *Rhodes*, 71 Ohio App.3d 797, at 809, 595 N.E.2d 441. "Lost profits must be substantiated by calculations based on facts available or in evidence, otherwise they are speculative and uncertain." *Id.* Metron points to the evidence of 180's revenue growth, but evidence of 180's revenue is not evidence of Metron's lost profits. Metron produced no testimony or expert report to establish an amount of lost profits. Metron does not purport to explain how to calculate lost profits, and its counsel in closing arguments specifically told the jury that the "dollar figures are for you-all to decide. I'm not going to suggest them." *See MADFAN, Inc. v. Makris*, 2017-Ohio-979, 86 N.E.3d 707 (8th Dist.) (lack of evidence to support a

damages award was further shown "by the fact that plaintiffs' counsel could not even offer a number or method of calculating damages during closing argument").

{¶ 54} Accordingly, we find that Metron failed to establish with reasonable certainty that it suffered damages from any of 180's breaches of the distribution agreement. Although Metron may have established (1) the existence of a binding contract, (2) performance by Metron, and (3) breach by 180, without evidence of damages resulting from the breach, Metron has failed to establish a claim for breach of contract. We find that the trial court therefore erred in denying 180's JNOV motion. We sustain 180's first assignment of error.

V. Pretrial and Trial Rulings

{¶ 55} In its second assignment of error, 180 requests a new trial on its claims against Metron. 180 argues that the cumulative effect of many of the trial court's rulings before and during trial "constituted abuse of discretion" and deprived 180 of a fair trial. Specifically, 180 challenges the trial court's denial of three motions to compel discovery, exclusion of an expert witness, limitation of Phillips's testimony to his personal knowledge, and denial of three motions in limine.

{¶ 56} Under the cumulative-error doctrine, a judgment can be reversed when the cumulation of errors prevents a fair trial even if each individual error alone does not justify reversal. *Daniels v. Northcoast Anesthesia Providers, Inc.*, 2018-Ohio-3562, 120 N.E.3d 52, ¶ 66 (8th Dist.2018).

{¶ 57} We review a trial court's decisions regarding discovery matters, motions in limine, and the admissibility of expert testimony for abuse of discretion.

Penix v. Avon Laundry & Dry Cleaners, 8th Dist. Cuyahoga No. 91355, 2009-Ohio-1362, ¶ 30 ("It is well established that a trial court enjoys considerable discretion in the regulation of discovery proceedings."); *Halenar v. Ameritech-Ohio SBC/Ameritech*, 8th Dist. Cuyahoga No. 94976, 2011-Ohio-2030, ¶ 28 ("A trial court's determination of the admissibility of expert testimony * * * [and] a trial court's ruling on a motion in limine is left to the sound discretion of the trial court."). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Ruwe v. Bd. of Twp. Trustees*, 29 Ohio St.3d 59, 61, 505 N.E.2d 957 (1987). "Appellate courts should defer to trial judges, who witnessed the trial firsthand and relied upon more than a cold record to justify a decision." *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, ¶ 36.

{¶ 58} We address 180's arguments separately regarding the motions to compel, expert rulings, and motions in limine.

A. Motions to Compel Discovery

{¶ 59} 180 argues that the trial court abused its discretion in denying its three motions to compel Metron to produce certain categories of documents, including documents related to a settlement in a different lawsuit, Metron's internal communications about HCF concentrate, and the results of Metron's internal testing of the HCF concentrate and HCF-C final product. 180 contends that the denials of the motions to compel prevented it from presenting "a considerable amount of evidence" and prejudiced it at trial.

{¶ 60} "'Ohio has a liberal discovery policy which, subject to privilege, enables opposing parties to obtain from each other all evidence that is material, relevant and competent, notwithstanding its admissibility at trial.'" *Nemcek v. Northeast Ohio Regional Sewer Dist.*, 8th Dist. Cuyahoga No. 98431, 2012-Ohio-5516, ¶ 8, quoting *Fletcher v. Nationwide Mut. Ins. Co.*, 2d Dist. Darke No. 02CA1599, 2003-Ohio-3038, ¶ 14, citing Civ.R. 26(B)(1). While discovery should be liberally allowed, a trial court is vested with broad discretion in discovery matters. *Roe v. Planned Parenthood S.W. Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61, ¶ 82. Notwithstanding Ohio's liberal discovery provisions, a trial court is vested with the authority to limit pretrial discovery to prevent an abuse of the discovery process. *Arnold v. Am. Natl. Red Cross*, 93 Ohio App. 3d 564, 575, 639 N.E.2d 484 (8th Dist.1994).

1. Documents Related to Prior Litigation

{¶ 61} In May 2019, 180 subpoenaed LifeHealth Science, a lab where Dr. Tsirikos-Karapanos worked before he created Metron. 180 sought a settlement agreement from litigation between LifeHealth Science and Metron in 2014, communication leading to the settlement, and all documents relating to the ownership and development of HCF-C. 180 then broadened the request to the entire case file to "reduce the burden" so that LifeHealth Science would not need to sort through the documents itself. Metron filed a motion to quash the subpoena, explaining that as part of the settlement, the owner of LifeHealth Science executed an affidavit stating that LifeHealth Science "does not contest Dr. Tsirikos-

Karapanos's ownership and rights to any and all patents filed and/or issued as of the date of this affidavit and any rights emanating therefrom." 180 then filed a motion to compel the documents from either Metron or LifeHealth Science.

{¶ 62} The trial court held a hearing on the matter, and in a later judgment entry, the trial court granted Metron's motion to quash the subpoena and denied 180's motion to compel. In the detailed judgment entry, the trial court explained that the current case between 180 and Metron involves the "alleged representations in marketing and instruction for use of the product, the alleged concentration of the product supplied, and the alleged breaches of the [distribution] agreement." The trial court continued that neither party raised a claim about "the ownership or patent rights of the product or Metron's ability to sell its product." The trial court concluded that, therefore, the documents 180 sought "are irrelevant to this matter, unduly burdensome, and require[] disclosure of privileged or otherwise protected matter pursuant to Civ.R. 45(C)(3)."

{¶ 63} Civ.R. 26(B)(1) provides that, in general, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" 180 sought discovery regarding the ownership of HCF-C, but its claims were based on allegations regarding misrepresentations of how to consume CytoDetox and the concentration of HCF in CytoDetox. 180 did not allege in its complaint that the distribution agreement was void because Metron did not own HCF-C. Therefore, we find that the trial court did not abuse its discretion when it precluded 180 from obtaining discovery irrelevant

to its claims. *See Janezic v. Eaton Corp.*, 8th Dist. Cuyahoga No. 99897, 2013-Ohio-5436, ¶ 16 (holding trial court did not abuse discretion where the plaintiff sought discovery that had no relevance to his claims).

2. Internal Communications and Testing

{¶ 64} In August 2019, 180 filed a motion to compel Metron to provide a "forensic image of [its] internal computers and a harvest of all e-mails for both the professional and personal accounts" of Metron's employees. 180 argued that after taking depositions, it had proof that Metron withheld a "substantial number" of relevant documents, including "testing of the HCF-C concentrate," testing of the finished CytoDetox product, and "electron scanning microscopy testing." 180 maintained that Metron could not be trusted to produce documents responsive to 180's discovery requests, and forensic imaging of their computers and an email "harvest" is warranted. After briefing, the trial court denied 180's motion, explaining that it "weighed and considered the significant privacy and confidentiality concerns inherent in imaging against the utility or necessity of the imaging." But the trial court stated in its judgment entry that "if discovery disputes remain, the parties may file motions to compel for any specific and clearly defined items for production."

{¶ 65} In September 2019, 180 filed another motion to compel, identifying six categories of documents: (1) testing results of Metron's HCF concentrate, (2) results of electron microscopy testing of HCF and HCF-C, (3) internal Metron correspondence regarding HCF and HCF-C, (4) communications between Metron

and third parties relating to 180 or Phillips, (5) documents relating to Metron's claims for breach of contract and tortious interference, and (6) correspondence between Metron and 180's former CFO, Sean Behun. In its appellate brief, 180 argues that the most important documents were those relating to "internal testing of concentration" because they directly related to 180's allegations that CytoDetox did not contain the "critical amount" of the active ingredient.

{¶ 66} In its opposition to 180's motion to compel, and again in its appellate brief, Metron argued that 180 never sought in its discovery requests documents relating to the testing of the HCF concentrate. Metron highlighted the distinction between the HCF concentrate that it produces in its lab and the bottles of CytoDetox that the contract manufacturing organizations create by adding water and vitamin C to the HCF concentrate. Metron maintained that electron microscopy testing was performed only on the HCF concentrate, not on the HCF-C final product. Regarding communications, Metron claimed that the requests for "all communications" were too broad, it already produced "specifically responsive" communications, it stipulated it would not contest the authenticity of emails from 180, and it has not challenged 180's subpoenas to Metron's contract manufacturing and research organizations. The trial court denied 180's motion to compel without opinion.

{¶ 67} The trial court did not abuse its discretion in denying these motions to compel. As an initial matter, 180 does not argue on appeal that the trial court erred by refusing to order an imaging of Metron's computers and harvesting Metron's email. Regarding the test results for the HCF concentrate, a review of 180's

discovery requests shows that 180 never requested documents related to the testing of HCF concentrate. Instead, 180 requested documents relating to "HCF-C" or "CytoDetox." 180 does not dispute this and implies that such a request includes the HCF concentrate. But the test results for the finished product — not the HCF concentrate — would be the documents relevant to 180's allegations that CytoDetox does not contain any HCF concentrate and is instead simply ionized water. Metron's test results for the HCF concentrate would be meaningless if, as 180 claims, the concentrate was not actually in the finished CytoDetox product. Furthermore, given Metron's representation that it produced all relevant communication, combined with the additional documents 180 obtained directly from Metron's contract manufacturing and research organizations, we find that the trial court's decisions to deny these motions to compel were not unreasonable, arbitrary, or unconscionable.

B. Expert Rulings

{¶ 68} Next, 180 argues that the trial court erred when it excluded its expert, Dr. Ball, and refused to qualify Phillips as a party expert.

1. Exclusion of Dr. Ball

{¶ 69} 180 argues that the trial court abused its discretion by striking the proposed testimony and expert report of Dr. Ball, who would have testified that he designed a procedure to test the amount of HCF in CytoDetox samples, that he secured a facility (Jordi Labs) to run the test, and that the test results show that the CytoDetox samples contained only a "miniscule fraction" of HCF. 180 contends that cases should be decided on their merits, and the trial court's decision to strike the

expert report for being untimely prevented the jury from considering highly probative evidence. 180 also argues that the expert-disclosure deadline became moot when the trial court later continued the trial date by several months.

{¶ 70} "Trial courts have broad discretion in managing their dockets, setting case schedules and imposing discovery sanctions for violations of court rules and scheduling orders, including the exclusion of expert witnesses who are not timely disclosed." *Sonis v. Rasner*, 2015-Ohio-3028, 39 N.E.3d 871, ¶ 40 (8th Dist.2015). Cuyahoga County Common Pleas Court Loc.R. 21.1 Part(I)(A) provides in relevant part that parties "shall submit expert reports in accord with the time schedule established at the Case Management Conference. Upon good cause shown, the Court may grant the parties additional time within which to submit expert reports." Furthermore, pursuant to Part(I)(B) of this rule, "unless good cause is shown, all supplemental [expert] reports must be supplied no later than thirty (30) days prior to trial."

{¶ 71} On August 17, 2018, the trial court extended the deadline for the parties to submit expert reports. The order imposed a deadline for 180 and Phillips to disclose expert reports by October 31, 2018. 180 and Phillips did not object to this deadline or at any point request a continuance or extension. But on August 1, 2019, 180 and Phillips filed an amended pretrial statement that disclosed for the first time Dr. Ball as an expert witness. The amended pretrial statement provides that they will call Dr. Ball and "a representative of Jordi Labs LLC to provide expert testimony regarding the information contained in Dr. Ball's and Jordi Labs' expert reports,"

which were being submitted separately. This filing was 9 months after the deadline to disclose expert reports and less than 30 days before the scheduled trial. Metron and Dr. Tsirikos-Karapanos moved to strike the experts, and the trial court granted the motion because 180 and Phillips produced the experts after the deadline, "failed to seek an extension of time to produce an expert," and produced the experts only 20 days before trial.

{¶ 72} 180 cites to *Booker v. Revco DS, Inc.*, 113 Ohio App.3d 540, 544, 681 N.E.2d 499 (8th Dist.1996), for the proposition that when an expert report requires results from an independent laboratory and the testing will take 60 days, the trial court abuses its discretion in not extending the expert deadline to allow the testing and report. 180 contends that, like in *Booker*, Dr. Ball's expert report was late because of a delay in getting subpoena responses necessary to conduct the testing and the need to secure a lab. However, the plaintiff in *Booker* moved for an extension of time to file an expert report, and the Eighth District found that the trial court abused its discretion in not granting the extension. But 180 did not file a motion for extra time. If 180 anticipated delays in obtaining subpoena response and the lab-testing process, it should have alerted the court ahead of time and sought an extension.

{¶ 73} We are not persuaded by 180's argument regarding the trial court continuing the trial date. A trial court has discretion to continue a trial date without also continuing the deadline for disclosing expert witnesses. *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged*, 15 Ohio St.3d 44, 472 N.E.2d 704 (1984) ("The

subsequent postponement of the trial date did not lead to a reasonable presumption that the filing deadline was extended as well."); *see also Cox v. Greene Mem. Hosp.*, 2d Dist. Greene No. 2000-CA-46, 2000 Ohio App. LEXIS 3942, 9-10 (Sept. 1, 2000) (The plaintiff "acknowledged that it would have been within the trial court's discretion to continue the trial date without also continuing the deadline for disclosing expert witnesses."). Given 180's delay in producing Dr. Ball as an expert and failure to seek an extension of time, we find that the trial court did not abuse its discretion when it continued the trial date but did not extend the expert deadlines.

{¶ 74} After reviewing the record, we find that the trial court acted within the wide range of its discretion and was not unreasonable, arbitrary, or unconscionable in striking 180's untimely expert disclosure.

2. Limitation of Phillips's Testimony

{¶ 75} 180 also argues that the trial court erred in preventing Phillips from testifying about the contents of Dr. Ball's expert report and in refusing to qualify Phillips as an expert himself.

{¶ 76} On January 28, 2020, Metron filed a motion in limine to prevent Phillips from testifying about the contents of Dr. Ball's report, citing to 180's trial brief in which 180 stated that "there is nothing that prevents Warren Phillips from testifying to these facts [that CytoDetox lacked clinoptilolite]." The trial court granted the motion, explaining that objections to Phillips's testimony may be made at trial but that Phillips "is precluded from testifying as to the data and opinions contained in the report as he did not conduct the testing nor did he author the

report." 180 first contends that the trial court abused its discretion in granting this motion in limine because it was untimely. 180 also argues that the exclusion of expert witnesses pursuant to a motion in limine can be reversible error, citing to *Brannon v. Austinburg Rehab. & Nursing Ctr.*, 190 Ohio App.3d 662, 2010-Ohio-5396, 943 N.E.2d 1062 (11th Dist.2010), and *Estate of Thompson v. Club Car, Inc.*, 5th Dist. Richland No. 2009-CA-0120, 2010-Ohio-2593.

{¶ 77} We disagree with these arguments. A trial court has discretion to grant an untimely pretrial motion. *McGowan v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. Cuyahoga No. 79137, 2001 Ohio App. LEXIS 3699, 4 (Aug. 23, 2001). And *Brannon* and *Estate of Thompson* do not stand for the principle that it is reversible error to exclude an expert witness via a motion in limine. In *Brannon*, the trial court erred in granting a motion in limine to exclude an expert witness because the trial court applied the wrong qualification standards. *Id.* at ¶ 19. In *Estate of Thompson*, the trial court erred in granting a motion to exclude an expert witness because the witness's testimony complied with Evid.R. 702(C).

{¶ 78} 180 also argues that the trial court erred in not qualifying Phillips as an expert. Evid.R. 702 states:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> > (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
> >
> > (2) The design of the procedure, test, or experiment reliably implements the theory;
> >
> > (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

{¶ 79} At trial, Phillips testified that he double majored in environmental science and geology in college, he has a master's degree in geology, and he pursued a thesis in aqueous chemistry, which he described as "sediment interaction of heavy metals and aqueous environment in the sediments in a coal mine pit lake." He said he spent time in a lab in the geology department analyzing "low level metal," where he conducted an "acqua regia microwave digestion" that would break down the contents of a water sample to allow for measurement at "very low levels in the ICP mass spectrophotometer." He testified that he ran a microwave digestion over one hundred times and spent over 500 hours running the ICP mass spectrophotometer and analyzing water samples. He also worked "cleaning up the hazardous waste for U.S. Forest Service, Army Corps of Engineers, Bureau of Land Management." In this role, he used mass spectrometry to analyze soil samples to "figure out how many heavy metals were in the soil."

{¶ 80} At trial, after this testimony, 180's counsel asked the trial court to qualify Phillips as an expert in chemistry, "specifically the analysis of samples for the

presence of heavy metals using microwave digestion and ICP mass spectrometry." Metron's counsel objected, and the parties presented argument out of the jury's presence about whether Phillips was qualified to testify regarding the results of the microwave digestion tests that Dr. Ball designed to analyze the CytoDetox samples. After considering extensive arguments that afternoon and the following morning, the trial court declined to qualify Phillips as an expert. The trial court explained that Phillips did not design or conduct the test and therefore could not be examined about the test process and whether the test was conducted properly. The trial court ordered that Phillips could not testify to the contents of Dr. Ball's report but that he could testify to his personal knowledge and how he reached the conclusion that he believes CytoDetox is simply ionized water.

{¶ 81} After reviewing the record, we find that the trial court's decision to limit Phillips's testimony to his personal knowledge was not unreasonable, arbitrary, or unconscionable. 180 cites to cases to show that relevant college experience is sufficient to qualify someone as an expert witness. But the trial court did not base its decision on Phillips's lack of education. Rather, the problem was a lack of foundation. Although Phillips spent time in graduate school running the types of tests that Dr. Ball conducted, Phillips did not design or conduct the tests on the CytoDetox samples. He could not be examined to establish the reliability of the test design or whether the test "was conducted in a way that [would] yield accurate results." Evid.R. 702(C)(3). Accordingly, the trial court did not abuse its discretion

in refusing to qualify him as an expert and in prohibiting him from testifying about the details of the test and the contents of Dr. Ball's report.

C. Motions in Limine

{¶ 82} Lastly, 180 argues that the trial court abused its discretion when it denied 180's motions in limine to exclude reference to Pompa and his criminal record, to preclude testimony about 180's lack of compliance with FDA regulations, and to prevent Metron from arguing that 180 breached the distribution agreement based on theories not included in Metron's complaint.

1. FDA Regulations Violations and Unpled Bases for Breach of Contract

{¶ 83} 180's motions to exclude testimony about its failure to comply with FDA regulations and to prevent Metron from arguing unpled bases for breach of contract are based on related concepts, so we will address them together. In December 2019, 180 filed its motion to exclude reference to alleged violations of FDA regulations, arguing that the issue is irrelevant and calls for legal conclusions, and such testimony would unfairly prejudice 180. The trial court denied the motion before trial. During trial, 180 filed a motion to prevent Metron from arguing "[unpled] breach of contract claims." In this motion, 180 argued that Metron was advancing a theory that 180 breached the distribution agreement because it violated FDA regulations and was unqualified to sell CytoDetox, but Metron did not allege this theory for breach of contract in its complaint. The parties presented argument on this motion the next morning out of the presence of the jury, and the trial court

denied the motion. 180 contends that the trial court abused its discretion when it denied both motions.

{¶ 84} Ohio law is clear "that a ruling on a [pretrial] motion in limine may not be appealed and that objections to the introduction of testimony or statements of counsel must be made during the trial to preserve evidentiary rulings for appellate review." *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, ¶ 34; *see also U.S. Bank v. Amir*, 8th Dist. Cuyahoga No. 97438, 2012-Ohio-2772, ¶ 26 ("[A] ruling on a motion in limine may not be appealed unless the claimed error is preserved by an objection made during trial."). This is because a "trial court's ruling on a motion in limine is tentative and precautionary in nature," and the trial court "is at liberty to change its ruling on the disputed evidence at trial." *U.S. Bank* at ¶ 26.

{¶ 85} The record shows that 180 did not properly preserve its challenge to the trial court's denial of these motions in limine. During the presentation of evidence at trial, 180 did not object to any of the testimony about whether 180 complied with FDA regulations. 180 has thus waived all but plain error. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 133 (defense waived all but plain error when it did not renew its objections at trial after its motion in limine). Plain errors are those that prejudice the appellant and that "are clearly apparent on the face of the record." *Wells Fargo Bank, N.A. v. Lundeen*, 8th Dist. Cuyahoga No. 107184, 2020-Ohio-28, ¶ 12. Courts reviewing plain error in civil

cases "must proceed with the utmost caution." *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27.

{¶ 86} As to the trial court's denial of 180's pretrial motion to exclude testimony about alleged FDA violations, 180 argues that Dr. Tsirikos-Karapanos's opinions about 180's lack of FDA compliance severely prejudiced 180 and were improper because lay witnesses cannot testify to legal conclusions. Specifically, 180 challenges Dr. Tsirikos-Karapanos's statement that he would not have entered the distribution agreement with 180 if he knew 180 "did not have any FDA compliance officers in their company or any affiliated company." While we do not dispute the principle that lay witnesses may not offer legal conclusions, the trial transcript reflects that Dr. Tsirikos-Karapanos spoke generally about his impression of 180's operations based on his personal knowledge. 180 points to no testimony where a witness specifically stated that 180 violated a particular FDA regulation. We can identify no error clearly apparent on the face of the record.

{¶ 87} Turning to the trial court's denial of 180's motion to prevent Metron from arguing breach of contract based on 180's supposed violations of FDA regulations, we likewise find no plain error. Although the jury found that 180 breached the distribution agreement, the record does not reveal the specific basis for this finding. We cannot determine from the record whether the jury concluded that 180 breached the agreement because it found that 180 sold CytoDetox outside the United States, that 180 did not obtain Metron's approval for the contested brochure, or that 180 violated FDA regulations. The jury could have relied on a

combination of these findings or another finding altogether, and the record does not show that the jury found breach of contract because it found that 180 violated FDA regulations. Accordingly, it is not apparent on the face of the record that Metron's argument that 180 breached the agreement because it violated FDA regulations prejudiced 180. We therefore find no plain error.

2. Pompa Conviction

{¶ 88} 180 also argues that the trial court abused its discretion in denying its motion in limine to exclude testimony about a criminal conviction of Phillips's business partner, Dan Pompa. At trial, Metron's counsel elicited testimony from Phillips that Pompa pleaded guilty to "stealing $1.4 million from orphans." On redirect examination, Phillips explained that Pompa and his wife adopted two children of their close friends when the friends were killed. He said that the children had a trust, and he agreed that the Pompas "accepted responsibility that what they had done with the funds was wrong." He stated that the Pompas are paying restitution, and the children are still living with them. Dr. Tsirikos-Karapanos later testified, twice, that he would not have trusted 180 if he knew that Pompa "stole money from seven-year-old orphans." 180 contends that this evidence is irrelevant to the case and highly prejudicial, and Pompa was not a witness at trial.

{¶ 89} Metron argues that 180 waived its challenge to the trial court's denial of this motion in limine because it did not object to Dr. Tsirikos-Karapanos's statements. However, the trial transcript reflects that 180's counsel did object to the

introduction of evidence of Pompa's conviction when Metron's counsel first introduced it:

Metron's Counsel:	In terms of credibility for the business and helping sales, does pleading guilty to stealing $1.4 million from orphans —
180's Counsel:	Objection. Sidebar, your Honor?
The Court:	Overruled.
Metron's Counsel:	Does Dan Pompa pleading guilty to stealing $1.4 million from orphan children affect your sales or credibility?
Phillips:	I can't say sales, but credibility for sure.

Accordingly, 180 preserved its challenge to this evidence, and we review its admission for abuse of discretion.

{¶ 90} Pursuant to Evid.R. 402, "[e]vidence which is not relevant is not admissible." Evid.R. 403(A) states 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."

{¶ 91} The relevancy of Pompa's conviction is questionable. Metron contends that Pompa's conviction is relevant to the credibility of Phillips, who chose to do business with Pompa, and to 180's failure to have appropriate personnel. But Pompa was not a party to this lawsuit and was not a witness at trial, so his credibility was not at issue. And the characterization of "stealing from orphans" is certainly highly prejudicial. We find that the danger of unfair prejudice substantially outweighed the probative value of the evidence of Pompa's conviction. We therefore

find that the trial court abused its discretion in allowing evidence of Pompa's criminal conviction.

{¶ 92} However, this is the only error we have identified in the trial court's rulings. The cumulative error doctrine does not apply where, as here, "there have not been multiple errors." *O'Malley v. O'Malley*, 8th Dist. Cuyahoga No. 98708, 2013-Ohio-5238, ¶ 95; *see also Snell v. Snell*, 5th Dist. Richland No. 13CA80, 2014-Ohio-3285, ¶ 64 ("[W]e do not find the [cumulative error] doctrine applicable here where there have not been multiple errors.").

{¶ 93} Accordingly, we find that the cumulative error doctrine does not apply here, and 180 is not entitled to a new trial on its claims against Metron. We therefore overrule 180's second assignment of error.

{¶ 94} The trial court's judgment on 180's motion for judgment notwithstanding the verdict is reversed and remanded with instructions for the trial court to enter judgment in favor of 180 on Metron's claim for breach of contract. As Metron has not succeeded on any of its claims against 180, we also vacate Metron's awards of prejudgment interest and legal costs, expenses, and fees.

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

The court finds there were reasonable grounds for this appeal.

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

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

MARY J. BOYLE, ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN A. GALLAGHER, J., CONCUR

[Cite as *S.L. & M.B., L.L.C. v. United Agencies, Inc.*, 2021-Ohio-2780.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

S.L. & M.B., L.L.C., ET AL.,	:	
Plaintiffs-Appellees,	:	No. 109540
v.	:	
UNITED AGENCIES, INC., ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 12, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-910072

Appearances:

Mazanec, Raskin & Ryder Co., L.P.A., Joseph F. Nicholas, Jr., and Frank H. Scialdone, *for appellees*.

Whipple Law, L.L.C., and Douglas P. Whipple, *for appellants*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} This case is about whether an insurance broker owes a duty of care to investigate and ultimately protect a third-party lienholder's interest in a property despite the customer's specific instructions otherwise. Ohio law does not

recognize such a duty, and we affirm the trial court's judgment granting summary judgment in favor of appellees, United Agencies, Inc., d.b.a. United Agencies Insurance Group (hereinafter "United Agencies") and Joann M. Justus.

I. PROCEDURAL HISTORY AND FACTS

{¶ 2} In 2011, appellants, S.L. & M.B., L.L.C., sold a horse farm in Kirtland, Ohio to Denver Barry and Oryann, Ltd. (hereinafter "Oryann"). In the sale of the property, Denver Barry and Oryann executed a "Note and Security Agreement" in which they were required to "maintain adequate insurance" on the farm to protect the security interest of S.L. & M.B., L.L.C., and name S.L. & M.B., L.L.C., as a loss payee. At the time of the sale of the farm, Oryann and Denver Barry also purchased the business assets of appellant, Patriot Partners, a partnership d.b.a. Dorchester Farms (hereinafter "Patriot Partners"). The purchase documents were executed by Denver Barry, individually, and Tracy Barry, Denver Barry's daughter, as the managing member of Oryann. After the sale of the farm, an insurance policy providing coverage for the property was purchased from Westfield Insurance that named S.L. & M.B., L.L.C., as holding an additional interest. Appellants were aware in October 2012, that the policy lapsed.

{¶ 3} In November 2012, S.L. & M.B., L.L.C., Oryann, and Denver Barry were involved in litigation over nonpayment of the note and security agreement. The facts underlying the dispute are contained in *Oryann, Ltd. v. S.L. & M.B., L.L.C.*, 11th Dist. Lake No. 2014-L-119, 2015-Ohio-5461. A judgment for $460,000

was eventually entered in favor of S.L. & M.B., L.L.C., and Patriot Partners in 2017 against Oryann and Denver Barry.

A. INSURANCE POLICY AT ISSUE

{¶ 4} In 2015, Tracy Barry was residing at the farm. She contacted United Agencies to purchase insurance on the farm. United Agencies is an insurance broker that works with different insurance companies to obtain policies for its clients. United Agencies had its employee, Joann Justus, work with Tracy Barry. In May 2016, in an email, Tracy Barry asked Joann Justus to name S.L. & M.B., L.L.C., as a loss payee on the insurance policy. Two days later in another email, she rescinded that request, indicating her attorney advised her not to name S.L. & M.B., L.L.C., on the policy. United Agencies eventually procured a policy for Tracy Barry from Westfield Insurance in June 2016. The policy did not name S.L. & M.B., L.L.C., as a loss payee.

{¶ 5} While United Agencies and Justus were working with Tracy Barry to obtain insurance, neither S.L. & M.B., L.L.C., or its representatives had any contact or communication with United Agencies or its employees. In September 2016, a fire occurred at the residence on the farm where Tracy Barry resided. Westfield Insurance and Kirtland authorities investigated the fire, and Westfield Insurance eventually paid a claim to Tracy Barry.[1]

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[1] Westfield Insurance paid the claim totaling $458,675.39 comprised of $371,375.96 to Tracy Barry, $62,000 to the city of Kirtland, and $25,299.43 to the Lake County Treasurer.

{¶ 6} In January 2019, appellants, S.L. & M.B., L.L.C., and Patriot Partners, filed the instant lawsuit against United Agencies and its employee, Joann Justus, for breach of legal duties, tortious interference with contractual relationship, and fraud and misrepresentation, as well as seeking punitive damages.

{¶ 7} On November 4, 2019, appellees, United Agencies and Joann Justus, filed a motion for summary judgment. They alleged they owed no duty to S.L. & M.B., L.L.C., and that Patriot Partners did not have standing to bring an action because it had no interest in the property. They further argued that there was no evidence that Tracy Barry was a party to the note and security agreement that S.L. & M.B., L.L.C., presented as evidence of their interest in the property. As to the fraud claims, they argued that there was no evidence of a knowing misrepresentation that S.L. & M.B., L.L.C., and/or Patriot Partners justifiably relied on because there was no evidence of any communication or statements between United Agencies and Justus and S.L. & M.B., L.L.C., Patriot Partners, or their representatives.

{¶ 8} As to the claim for tortious interference with a contractual relationship, they argued that there was no evidence that they interfered with Oryann's contract with S.L. & M.B., L.L.C., and Patriot Partners. They further argued that there was no proximate cause established for the claimed loss because S.L. & M.B., L.L.C., and Patriot were not third-party beneficiaries of the insurance policy.

{¶ 9} Appellants, S.L. & M.B., L.L.C., and Patriot Partners, filed a brief in opposition to the motion for summary judgment. They argued that United Agencies and Joann Justus knew of the existence of a mortgage but did not investigate the details of that mortgage. As such, S.L. & M.B., L.L.C., claimed that United Agencies and its employee made representations to Westfield Insurance that circumvented the lien it held on the farm by not disclosing the lien to Westfield Insurance. They further argued that there was a genuine issue of material fact as to whether United Agencies and its employees actively committed fraud with Tracy Barry against Westfield Insurance in obtaining an insurance policy in order to circumvent their interest.

{¶ 10} The trial court granted summary judgment to United Agencies and Joann Justus without a written opinion.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW OF SUMMARY JUDGMENT

{¶ 11} This is an appeal of a grant of summary judgment. Under Civ.R. 56, the grant of a motion for summary judgment is appropriate where:

> (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his or her favor.

Carter v. Officer Hymes, 8th Dist. Cuyahoga No. 108523, 2020-Ohio-3967, ¶ 20-23, citing *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 12} Civ.R. 56(C) provides that summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A trial court's grant of summary judgment is reviewed de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

B. DUTY OF CARE OWED BY AN INSURANCE AGENT TO THIRD PARTIES

{¶ 13} In this appeal, appellants raise six assignments of error. Appellants' first assignment of error alleges appellees owed a duty to include them as an insured in the insurance policy and reads:

> The Trial Court's judgment was in error because Defendants were not entitled to summary judgment on the issue of whether they owed a duty to Plaintiffs.

{¶ 14} With regard to appellants' allegations, the following causes of action were alleged in their complaint: 1) breach of legal duties, 2) tortious interference with contractual relationship, and 3) fraud and misrepresentation, as well as seeking punitive damages. The primary issue underlying these causes of action is whether appellees owed appellants a duty of care. *See, e.g., Lu-An-Do, Inc. v. Kloots*, 131 Ohio App.3d 71, 75-76, 721 N.E.2d 507 (5th Dist.1999).

{¶ 15} It is undisputed that the note and security agreement that forms the basis of the complaint was executed by Oryann and Denver Barry. In 2016, Tracy Barry purchased an insurance policy from Westfield Insurance through United Agencies. That policy did not name either S.L. & M.B., L.L.C., or Patriot Partners as a loss payee. When applying for that policy, Tracy Barry indicated to United Agencies and Justus that she wished to include S.L. & M.B., L.L.C., as a loss payee but then rescinded that request, stating it was done upon the advice of her attorney.

{¶ 16} In order to establish a claim of breach of legal duty, it is axiomatic that appellants establish that appellees owed them a legal duty. In general, an insurance agent owes no duty to third parties. *Lu-An-Do, Inc.* at 76. The court in *Lu-An-Do, Inc.* held an insurance agent does not owe a duty to a third party to make sure they are insured for a particular type of coverage when there is no oral or written obligation to do so. In *Lu-An-Do, Inc.*, when Lu-An-Do, Inc. sold a restaurant and its contents to Timothy Kloots, it retained a lien on the real property and a U.C.C. security interest in the personal property in the restaurant. *Id.* at 73. Lu-An-Doc, Inc. was listed as a loss payee for real property coverage. *Id.* The insurance policy purchased by Kloots did not list Lu-An-Do, Inc. as a loss payee for personal property coverage. *Id.* After a fire, Lu-An-Do, Inc., sued the insurance agency that procured the policy for Kloots for failing to identify Lu-An-Do, Inc. for personal property coverage. *Id.* The court declined to impose such a duty on the part of the insurance agent or agency, finding that "[a]n insurance

agent, however, owes no duty to ensure that a party is named as an insured on a policy when there was no oral or written agreement to obtain insurance coverage between the party and the agent and when the party never contacted the agent or any other insurance agent about procuring coverage." *Id*. at 76.

{¶ 17} In this case, appellees procured an insurance policy on behalf of the named insured, Tracy Barry. Moreover, Tracy Barry specifically instructed the appellees to not name a loss-payee in the insurance policy. Appellants argue that an insurance agent has a duty to protect the interests of third parties, such as a mortgagee, where a person seeking insurance has an obligation to do so. While appellants may have had a contractual agreement with Oryann and Denver Barry to name appellants as a loss payee in any policy insuring the property, they had no such contract with appellees. Appellants have not shown that without a contractual obligation or other relationship with appellees, appellees owed them any duty of care upon which to base tort claims.

{¶ 18} Appellants cite several cases that they claim impose duties upon an insurance agent and agency that would entitle them to maintain the causes of action in their complaint. However, these cases do not extend any legal duty to parties not in a relationship with the insurance agent or agency. Appellants cite *Stuart v. Natl. Indemn. Co.*, 7 Ohio App.3d 63, 454 N.E.2d 158 (8th Dist.1982), for the proposition that an insurance agent and agency can be held liable for tortious misconduct where misrepresentations are made. However, in *Stuart*, the case resolved whether a customer could sue an insurance agent and agency, not

whether a third party with whom the agent or agency had no contact or relationship with could sue for breach of a duty. *Id*. Appellants cite to *Roberts v. State Farm Mut. Auto.*, 8th Dist. Cuyahoga Nos. 43388 and 43449, 1982 Ohio App. LEXIS 11698 (Jan. 7, 1982), and argue that an insurance agent and agency may be found to act in a fiduciary manner to their client. However, *Roberts* does not extend any liability to third parties. *Id*.

{¶ 19} Appellants cite to *Arlington Bank v. United Ohio Ins. Co.*, 5th Dist. Muskingum No. CT11-0024, 2011-Ohio-5938, ¶ 27, to argue appellees owe them a legal duty. In *Arlington Bank*, the court found that a bank could bring an action against an insurer for failing to jointly pay the insured and the bank because

> [t]he policy * * * issued * * * recognized [an] obligation to the Bank with the home as collateral. The policy also acknowledged, in the event of a loss, the Bank's collateral might be impaired; therefore, the Bank was contractually made a payee of any benefits to be paid under the policy.

Id. In contrast, in this case, appellants were not named in the insurance policy and therefore no rights inured on their behalf.

{¶ 20} Appellants' citation to *Robson v. Quentin E. Cadd Agency*, 179 Ohio App.3d 298, 2008-Ohio-5909, 901 N.E.2d 835 (4th Dist.), is also misplaced. In *Robson*, the court determined that "[a]n insurance agency has a duty to obtain the coverage its insured requests." *Id*. at ¶ 31. However, the court found that the plaintiff, who was not the named insured, was not entitled to bring suit where he "did not have any discussions with [agent] regarding insurance coverage, and did not request [agent] to procure insurance coverage." Again, this case is inapposite

to the facts in this case where no relationship was shown to exist between appellants and appellees. Appellants further cite *Minor v. Allstate Ins. Co.*, 111 Ohio App.3d 16, 675 N.E.2d 550 (2d Dist.1996), to argue an insurance agent has a duty to third parties. However, in *Minor*, there was evidence the customers requested the agent include a third party as an insured person when procuring the policy. *Id*. at ¶ 21. This case is distinguishable because Tracy Barry instructed that appellees not be included on the policy.

{¶ 21} Appellants have cited two cases from the state of Texas that they argue stand for the proposition that an insurance agent has a duty to act to protect a mortgagor or beneficiary of an insurance policy. In *Westchester Fire Ins. Co. v. English*, 543 S.W.2d 407 (Tex.Civ.App.1976), the court held that a mortgagee is entitled to insurance proceeds where the customer/mortgagor instructed the insurance agent to include the mortgagee on the policy. Appellants' argument to extend the holding in *Westchester Fire Ins. Co.* to impose a duty on the insurance agent simply because the agent was aware of a mortgage was later rejected in *Clare v. Richards*, 992 F.Supp. 891, 895 (E.D.Tex.1998) ("Further, there is no claim that the insurance agent in this case negligently failed to follow instructions to include Defendant.").

{¶ 22} Appellants also cite *Fid. & Guar. Ins. Corp. v. Super-Cold Southwest Co.*, 225 S.W.2d 924 (Tex.Civ.App.1949), which recognized an equitable interest by a mortgagee in Texas. However, that interest was later noted to be codified in Texas law. *See Std. Fire Ins. Co. v. United States*, 407 F.2d 1295, 1300 (5th

Cir.1969) ("'[T]he statute involved is in effect a legislative adoption of the interpretation placed upon the 'Union Mortgage Clause' by the courts of the country * * *.'"[2]), quoting *Camden Fire Ins. Assn. v. Harold E. Clayton & Co.*, 117 Tex. 414, 6 S.W.2d 1029 (1928). However, Ohio law requires such interest to be expressed in the policy. *See, e.g., Pittsburgh Natl. Bank v. Motorists Mut. Ins. Co.*, 87 Ohio App.3d 82, 85, 621 N.E.2d 875 (9th Dist.1993) (discussing the types of loss payee clauses in insurance contracts).

{¶ 23} Appellants have not cited applicable Ohio statutes, regulations, or jurisprudence that establishes they were owed a duty of care by appellees where they were not named in the insurance policy and there was no relationship between appellants and appellees. Because appellants did not establish that appellees owed them a legal duty, the trial court did not err in entering summary judgment in appellees' favor on appellants' claims for breach of legal duties and tortious interference with a contractual relationship.

{¶ 24} Appellants' first assignment of error is overruled.

C. A CLAIM OF FRAUD OR MISREPRESENTATION REQUIRES A SHOWING OF RELIANCE ON A STATEMENT OR A DUTY TO DISCLOSE INFORMATION

{¶ 25} Appellants allege they were the victims of fraud or misrepresentation by appellees. Their second assignment of error provides:

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[2] A "standard" or "union mortgage clause" is an industry term for a policy section defining the rights of persons with additional interests who may be named as loss payees. *See Arkwright Mut. Ins. Co. v. Lexington Ins. Co.*, 1st Dist. Hamilton No. C-990347, 2000 Ohio App. LEXIS 4468, at 6 (Sept. 29, 2000).

> The Trial court's judgment was in error because Defendants were not entitled to summary judgment as to Plaintiffs' claims for fraud, misrepresentation and punitive damages.

{¶ 26} Appellants argue that they presented evidence that created a material issue of fact as to their claims of fraud, misrepresentation, and damages. In order to maintain an action for fraud or misrepresentation a plaintiff must demonstrate:

> (1) a representation or, where there is a duty to disclose, omission of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.

Morgan Stanley Credit Corp. v. Fillinger, 2012-Ohio-4295, 979 N.E.2d 362, ¶ 23 (8th Dist.), citing *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 462 N.E.2d 407 (1984).

{¶ 27} In resolving appellants' first assignment of error, we found that appellants have not identified a legal duty owed to them by appellees. There is no dispute that appellees had no contact with appellants regarding the insurance policy. Further, appellants did not establish that there was any duty to disclose information to them or that a representation was made to them.

{¶ 28} Appellants argue that the fraud and/or misrepresentations they relied upon were fraudulent statements and/or misrepresentations made by appellees to Westfield Insurance. However, even if those communications were fraudulent or were misrepresentations made to Westfield Insurance, appellants have not shown they were aware of the statements and thus cannot show they

relied on those statements made to Westfield Insurance. Further, where there is no ability to maintain an action for fraud or misrepresentation, appellees' arguments for punitive damages are moot.

{¶ 29} Because appellants have not shown they can establish appellees owed them a duty, or that appellees made any statements to appellees that could be relied upon, the trial court properly granted summary judgment. Accordingly, appellants' second assignment of error is not well taken.

D. IMPLIED THIRD PARTY BENEFICIARY OF INSURANCE POLICY

{¶ 30} Appellants' fourth assignment of error reads:

> The Trial Court's judgment was in error because Defendants were not entitled to summary judgment on the issue of whether Plaintiffs are third-party beneficiaries or, alternatively, parties to an implied contract with Defendants.

{¶ 31} Appellants argue that they are a third party beneficiary of an implied contract, citing *Waterfield Mtge. v. Buckeye State Mut. Ins. Co.*, 2d Dist. Miami No. 93-CA-53, 1994 Ohio App. LEXIS 4343 (Sept. 30, 1994). However, in *Waterfield Mtge.*, the court found that implied beneficiary status to a contract is premised upon a showing that there was an intention by the contracting parties to confer third party beneficiaries' rights under the contract. *Id*. at 10. Appellants have not shown there was an intention on appellees' or Tracy Barry's part to make them beneficiaries of the insurance contract. Instead, the evidence presented expressed the opposite. Appellants also cite case law discussing the union mortgage clause in insurance contracts in Ohio to argue they have an equitable

interest in the insurance contract. *See Union Cent. Life Ins. Co. v. Clinton Mut. Ins. Assn.*, 51 Ohio App. 20, 199 N.E. 223 (12th Dist.1935). As discussed above, Ohio courts require the insurance contract to expressly provide protection to third parties in order for an action to be maintained in Ohio. *See Pittsburgh Natl. Bank*, 87 Ohio App.3d, at 85. Accordingly, we overrule appellants' fourth assignment of error.

III. CONCLUSION

{¶ 32} In resolving the first and second assignments of error, we determined that there was no legal duty owed appellants and that appellants cannot maintain their causes of action against appellees. Appellants raise three additional assignments of error in this appeal.[3] Because we find the trial court properly granted summary judgment, the issues raised in the remaining assignments of error, whether proximate cause could be established, whether Patriot Partners had standing, and whether the economic loss doctrine would

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[3] Appellants' third assignment of error reads:

> The Trial Court's judgment was in error because Defendants were not entitled to summary judgment on the alleged absence of proximate cause.

Appellant's fifth assignment of error reads:

> The Trial Court's judgment was in error because Defendants were not entitled to summary judgment on the issue of whether Plaintiff Patriot Partners has standing to bring claims against defendants.

Appellant's sixth assignment of error reads:

> The trial court's judgment was in error because defendants were not entitled to summary judgment on the economic loss doctrine.

apply to the claims, are moot. Accordingly, we decline to address appellants' remaining assignments of error. *See* App.R. 12(A)(1)(c). The trial court properly entered summary judgment in favor of appellees.

{¶ 33} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

_____
MICHELLE J. SHEEHAN, JUDGE

MARY J. BOYLE, A.J., and
LARRY A. JONES, SR., J., CONCUR