[Cite as *Hanick v. Ferrara*, 2020-Ohio-5019.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

ROBERTA HANICK,

Plaintiff-Appellant,

v.

THOMAS P. FERRARA et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0074

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2017 CV 313

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl Waite, Judges.

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

Atty. Dimitrios Makridis, Atty. Irene Makridis, 155 South Park Avenue, Suite 160, Warren, Ohio 44481, for Plaintiff-Appellant and

Atty. Aaren Host, *Atty*. *Andrew Illig, Atty. Brian Nally,* Reminger Co. L.P.A; *Atty. Jesse Linebaugh*, *Atty. Monika Sehic,* Faegre Baker Daniels LLP, 801 Grand Avenue, 33rd Floor, Des Moines, IA 503for Defendants-Appellees.

Dated: September 28, 2020

Robb, J.

{¶1} Plaintiff-Appellant Roberta Hanick appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of Defendants-Appellees Thomas Ferrara (her former insurance agent) and Aviva Life and Annuity Company (nka Athene Annuity and Life Company). Appellant sets forth eight assignments of error. Initially, she raises issues with: the refusal to extend the discovery deadline for her expert's report; the denial of leave to amend the complaint; and the quashing of a subpoena. As we do not find the court abused its discretion on the motions, these discretionary decisions are affirmed.

{¶2} As to the fraud claim, Appellant only raises an issue with the failure to provide state-mandated replacement disclosures, but this was not pled with particularity or raised below. Thus, the summary judgment on fraud is affirmed. Similarly, Appellant did not raise the replacement disclosure topic in the opposition to summary judgment on the claims for breach of fiduciary duty and negligent misrepresentation. Consequently, the trial court did not err in failing to evaluate whether an issue with state-mandated replacement disclosures precluded summary judgment.

{¶3} On the claim for breach of fiduciary duty, Appellant also states the trial court erred in refusing to apply the exception to the general rule that an insurance agent does not occupy a fiduciary relationship with the insured. Viewing the evidence in the light most favorable to Appellant, we conclude that a reasonable person could find Appellant had a special trust relationship with her insurance agent. The trial court alternatively granted summary judgment on the breach of fiduciary duty claim because Appellant failed to present expert testimony. However, expert testimony was not required on that claim.

{¶4} The trial court also ruled that an expert was required for the claim of negligent misrepresentation. Although Appellant failed to demonstrate that alleged misrepresentations on the application (about net worth or income) caused an injury, various other allegations raised as to the negligent misrepresentation claim did not require expert testimony in order to avoid summary judgment. Accordingly, the entry of summary judgment on the breach of fiduciary duty claim is reversed, the entry of summary judgment

on the negligent misrepresentation claim is reversed in part, and the case is remanded for further proceedings on these claims.

STATEMENT OF THE CASE

{¶5} On February 6, 2017, Appellant filed a complaint sounding in tort against Thomas Ferrara, an insurance agent who sold her various annuities and life insurance policies beginning in 2009. Appellant said Ferrara advised her to cancel an annuity she purchased from another agent in 2008. She claims Ferrara thereafter sold her: an ING annuity for $80,600 in 2009; a life insurance policy in 2010 (which lapsed); an Aviva annuity for $15,000 in 2010; an Aviva annuity for $46,300 in 2012 (after the ING annuity was surrendered); an Aviva life insurance policy in 2012 with a $6,000 annual premium; an Aviva life insurance policy on May 17, 2013 with a $75,000 death benefit and a $5,500 annual premium (which lapsed in 2014); and an Accordia life insurance policy in February of 2015 with a $100,000 benefit (which was rescinded with premiums refunded upon Appellant's request in May 2015). Only the claims regarding the last two sales were not time-barred due to the trial court's application of the four-year statute of limitations, which is not contested on appeal.

{¶6} Appellant set forth three claims against Ferrara: negligent misrepresentation, breach of fiduciary duty, and fraud. The negligent misrepresentation claim alleged Ferrara made various misrepresentations to her, including: the products were affordable; his advice was sound; an annuity was like a savings account even though it had surrender charges on withdrawals; the life insurance did not have recurring premiums; and there were benefits to terminating old policies and buying new policies. The complaint alleged Ferrara made misrepresentations which induced Appellant to loan him money and to liquidate a portion of the annuity. The factual section of the complaint mentioned that Ferrara made misstatements on her life insurance applications where he inflated her income and net worth.

{¶7} The breach of fiduciary duty claim alleged Ferrara took advantage of their special relationship and cited to prior paragraphs in the complaint. In addition to the misrepresentations, she said he induced her to purchase products in order to make commissions or sales quotas, without regard for the appropriateness of the product to her situation or the detriment to her (such as through surrender charges for annuity withdrawals which were used to pay life insurance premiums). She also complained that

Ferrara induced her to loan him $3,500 in a 2014 written agreement providing for repayment with 5% interest with payments of $150 beginning on June 15, 2014 and full payment due by November 15, 2014.

{¶8} Her fraud claim specified this allegation of loan inducement and said she relied on his promise to repay the loan by the due date. The fraud claim also referred to Ferrara's unauthorized withdrawals from her annuity (to pay her insurance premiums and to provide her with funds after she asked him to repay the loan).

{¶9} Appellant named Aviva as a defendant under agency and vicarious liability principles. Appellant also sued ING and a local insurance agency where Ferrara previously worked, but the court dismissed the case against them after finding the four-year statute of limitations had run as to the sales in 2009 and 2010. (3/26/18 J.E.). The court additionally noted Appellant's acknowledgement that ING did not issue the 2010 life insurance policy. Appellant asked to amend the complaint to add the correct company and to add a different agent who ING claimed sold the 2010 annuity. (1/22/18, 2/8/18 Motions). The court denied leave to add these defendants finding it would be futile due to the statute of limitations. (3/26/18 J.E.).

{¶10} In applying the statute of limitations, the trial court also dismissed the claims against Ferrara and Aviva as related to the sale of the pre-2013 products. The court found Aviva remained as a defendant only as to the allegations of its agent's misrepresentation in the 2013 sale. (3/26/18 J.E.). Ferrara's motion sought partial judgment on the pleadings only as to the first five (pre-2013) sales and did not seek dismissal as to the 2013 and 2015 sales. Yet, the court's entry ruling on the motion seemed to dismiss all parts of the negligent misrepresentation and breach of fiduciary claims against Ferrara (finding the fraud count remained against him). The parties subsequently agreed at a hearing that those counts were reinstated against Ferrara for post-2013 sales. (3/13/19, 3/29/10 Mag. Orders).[1]

[1] The defense submitted a proposed agreed judgment of reinstatement on March 27, 2019. The next day, Appellant filed a motion for leave to file proposed stipulations instanter, which was granted; her proposed stipulations were attached to her motion but were not then separately filed. Appellant mentioned reinstating the negligent misrepresentation and breach of fiduciary claims as to the 2013 and the 2015 policies, while the defense mentioned only the 2013 Aviva policy. The 2015 policy was sold by Ferrara for Accordia who returned the premiums and was not sued. Ferarra's summary judgment motion acknowledged the reinstatement of the claim related to the 2015 policy.

{¶11} On May 25, 2018, Ferrara filed a motion for summary judgment, which Aviva joined. The motion argued: an expert was required for the negligent misrepresentation and breach of fiduciary duty claims; an insurance agent does not owe a fiduciary duty to a client unless a special relationship is understood by both parties; a misrepresentation claim cannot proceed where the plain language of the contract provides the information; breach of contract for failure to finish repaying a loan is not fraud; and the economic loss rule bars claims where the relationship was governed by contract.

{¶12} The motion for summary judgment pointed to Appellant's deposition testimony where she acknowledged her prior history of buying life insurance, her knowledge that a policy would lapse if an annual premium is not paid, her prior history of buying annuities from other agents (2008, 2005, 1998, and the one surrendered in 1998), and her past experience with surrender charges. The motion also cited a letter showing Appellant chose to let the 2013 life insurance policy lapse because she was upset about a withdrawal she directed from her Aviva annuity; a letter she wrote to Aviva said the company did not follow her instructions on gross versus net and on the percentage to withhold for taxes.

{¶13} In her April 26, 2019 response to summary judgment,[2] Appellant said she could not afford and did not need life insurance as she was divorced with no biological children and was estranged from her twin brother. She reviewed all transactions initiated by Ferrara but recognized the statute of limitations had run as to the sale of the first five products. She said Ferrara: failed to inform her how life insurance and an annuity were different; failed to disclose that the life insurance policies had premiums; withdrew from her annuity to pay her life insurance premiums; failed to inform her about early withdrawal penalties from annuities; withdrew money from her annuity without her consent; and lied on insurance applications. Her opposition to summary judgment argued: expert testimony was not required as the issues were not complex; their special relationship was an exception to the general rule that an insurance agent does not have a fiduciary duty to the client; there was justifiable reliance on the agent; misrepresentation and fraud claims are not barred merely because there was a contract; and she is not barred by the

[2] As for the delay between the motion and the response, the case was interrupted by Appellant's interlocutory appeal of the denial of a motion to amend the complaint, the quashing of a subpoena, and the magistrate's order denying an extension of discovery deadlines. This court dismissed the appeal on February 4, 2019. *Hanick v. Ferrara*, 7th Dist. Mahoning No. 18 MA 0073, 2019-Ohio-880.

economic loss rule by pursuing the torts claims apart from any contract claims she may have.

{¶14} As to the May 17, 2013 life insurance policy from Aviva for $75,000, Appellant noted: she was 72 years old when it was sold, the beneficiary was her friend, the $5,500 premium was paid from her annuity, this policy lapsed after the first year, and the policy he sold her exactly one year before this was about to lapse. At the time of the February 12, 2015 life insurance policy from Accordia for $100,000, Appellant was 74 years old and named her former spouse's grandson and his wife as beneficiaries. Appellant complained the money for the premiums came from her annuity (indirectly). An official check from her credit union was issued (on January 28, 2015) for the initial $5,000 estimated premium, and she wrote personal checks from her account at that credit union for two additional premium payments of $240 and $1,500 (March 27 and April 1, 2015, even though she filed a police report against Ferrara on March 9, 2015). Appellant acknowledged that Accordia issued her a full refund of all $6,740 in premiums when she canceled in 2015 with the assistance of her attorney (but noted the lost surrender charges from her annuity as a result of the withdrawal of money to pay the Accordia premiums).

{¶15} On June 5, 2019, the trial court granted summary judgment. The court said the remaining issues in the case were limited to: the negligent misrepresentation and breach of fiduciary claims against Ferrara for the 2013 and 2015 policies; the fraud claim against Ferrara for the 2014 personal loan; and the negligent misrepresentation claim as related to the 2013 policy against Aviva (through agency). On the negligent misrepresentation claim, the court found the lack of an expert was dispositive as the issues were complicated matters of finance beyond the comprehension of a layperson. As to the claim for breach of fiduciary duty, the court said an insurance agent does not owe a fiduciary duty, and even if Appellant could establish a special relationship, an expert was required to prove breach of a duty. Regarding the fraud claim, the court said it was not a tort to breach the loan contract and found no evidence showing fraudulent intent at the time the contract was made.

{¶16} Appellant filed a timely notice of appeal. Appellant's brief sets forth eight assignments of error.

A/E 1: DISCOVERY DEADLINE FOR EXPERT

{¶17} Appellant's first assignment of error contends:

"THE TRIAL COURT ERRED IN FAILING TO RULE ON APPELLANT'S MOTION TO EXTEND THE DISCOVERY AND EXPERT REPORT DEADLINE THAT WAS INITIALLY SET IN THE STATUS CONFERENCE HEARING."

{¶18} A scheduling order was instituted on July 18, 2017 after a status conference. With the parties' approval, the court set Appellant's discovery and expert report deadline as January 18, 2018 and the defense deadline as March 18, 2018. Appellant complains the trial court failed to rule on her initial requests to extend these deadlines and then overruled her June 12, 2018 request for an extension of the expert report deadline. She argues the court abused its discretion in failing to extend the time as the case was complex and claims it was not her fault the deadline was unworkable. She believes the court arbitrarily denied her request merely to maintain a set deadline. Claiming Ferrara's deposition was required before she could obtain an expert opinion, she says Ferrara could not be deposed until after her deadline expired. She notes that she was deposed after the defense deadline was extended.

{¶19} Referring to statute of limitations motions that were pending when her deadline expired, Appellant says she was busy responding to motions from multiple defendants, there was no reason for an expert to review transactions that may not be actionable, and the court did not issue the statute of limitations dismissal until March 26, 2018. We note that when the statute of limitations was first raised in 2017, the court granted Appellant a one-month extension and then an additional two weeks. In seeking the second extension, she also asked for time to respond to Aviva's discovery requests, which the court granted. Even after the court dismissed claims related to various transactions, Appellant continued to rely on those prior events as background, which suggests they were still relevant to an expert opinion. Moreover, the statute of limitations ruling still did not prompt Appellant's disclosure of an expert or her provision of an expert report.

{¶20} We turn to a review of the case progress from the day Appellant's expert report was due. On the January 18, 2018 deadline, she filed a motion to extend the expert report and general discovery deadline by 30 days. The reason she provided was that Ferrara's deposition had not been taken due to scheduling conflicts. She did not expressly connect this subject to her expert and merely presumed the deposition would be needed. She did not explain why she could not disclose her expert's name.

{¶21} Appellant's brief claims she filed a second request for an extension in her February 9, 2018 reply to the defense opposition to her request to add defendants. However, that filing contained no request to extend discovery deadlines and no mention of an expert report. Therefore, she did not advise the court of a lack of a ruling on the January motion or re-file a request before the summary judgment deadline.

{¶22} In March, the court granted an extension of defense's general discovery deadline on the basis that Appellant's deposition had not yet been taken, and she was then deposed on April 13, 2018. Appellant took Ferrara's deposition on March 8 and April 12, 2018. She filed his deposition for use in the summary judgment proceedings without objection. On May 7, 2018, the court granted a defense request to extend the summary judgment deadline to May 25 for all parties. Still, no expert report was provided by Appellant, and no expert was identified.

{¶23} The May 25, 2018 summary judgment motion raised Appellant's failure to obtain expert testimony to support certain claims. On June 8, 2018, Appellant filed notice of disclosure of her expert; she apparently disclosed the name of the expert to the defense the day before but still did not have an expert report. Appellant said the "good cause for the untimely disclosure" was the "unexpected unavailability of her original expert" who advised by email on June 6 that he would be unavailable for the July 24 trial.

{¶24} The defense moved to strike the "new" expert, noting they were never informed about the "original" expert. It was pointed out: Appellant's January 2018 response to interrogatories said she would supplement with her expert's name; the identity of the person she claimed was her original expert was not disclosed until after she named a new expert in June 2018, which was after the summary judgment motion was already filed; she not only failed to meet the original expert report deadline, but she also missed the deadline she requested in her January 18 extension motion (which she believed had been granted); and if an extension of the expert report deadline was granted, then the expert would have to be deposed, a new summary judgment motion would be required, and trial would not proceed as scheduled.

{¶25} Appellant provided an expert report to the defense on June 11, 2018. The next day, she moved to extend the expert report deadline (and the date of the jury trial), mentioning that Ferrara's deposition was not transcribed until mid-May 2018 and her original expert subsequently became unavailable.

{¶26} On June 14, 2018, the magistrate overruled the motion to extend the expert report deadline and granted the motion to strike her expert. Appellant was granted an extension to file an opposition to summary judgment. Instead, Appellant filed objections to the magistrate's decision. She said scheduling conflicts resulted in Ferrara's deposition being scheduled for January 8, 2018 at her co-counsel's office, but this had to be rescheduled when co-counsel withdrew from the case. She urged the delay was harmless and the expert's opinion should not be a surprise to the defense. She attached the report of the expert (who opined there was a breach of a fiduciary duty and a breach of the standard of reasonable care due to misrepresentation or manipulation).

{¶27} Appellant then attempted an interlocutory appeal. *See* fn. 1 supra. After this court dismissed the appeal, the trial court overruled Appellant's objections. Appellant's opposition to summary judgment then urged an expert was not required. The trial court granted summary judgment, finding an expert was required to support the negligent misrepresentation and breach of fiduciary duty claims.

{¶28} Where a court order provides for time deadlines, "the court for cause shown may at any time in its discretion" (1) extend the deadline if a request is made before its expiration or (2) if the motion is made after the expiration of the deadline, extend the deadline if the failure to act was the result of excusable neglect. Civ.R. 6(B). The failure to provide discovery material under an order may result in the court prohibiting a designated matter from being introduced into evidence. Civ.R. 37(B)(1)(b).

{¶29} The purpose of the rule is to prevent surprise and avoid obstructing a party from preparing the case for trial. *Huffman v. Hair Surgeon Inc.*, 19 Ohio St.3d 83, 86, 482 N.E.2d 1248, 1251 (1985). In *Huffman*, the Court found "it was certainly not an abuse of discretion for the trial court to have concluded that, in order to effect a just result, appellants' motion to exclude appellee's surprise expert witness must be granted." *Id.* "One of the purposes of the Rules of Civil Procedure is to eliminate surprise. This is accomplished by way of a discovery procedure which mandates a free flow of accessible information between the parties upon request, and which imposes sanctions for failure to timely respond to reasonable inquiries." *Paugh & Farmer Inc. v. Menorah Home for Jewish Aged,* 15 Ohio St.3d 44, 45-46, 472 N.E.2d 704 (1984) (finding no abuse of discretion to exclude expert), quoting *Jones v. Murphy*, 12 Ohio St.3d 84, 85-86, 465

N.E.2d 444 (1984) (sanction of excluding an expert was not too extreme where a plaintiff intentionally failed to supplement an interrogatory response).

{¶30} "A trial court has broad discretion when imposing discovery sanctions. A reviewing court shall review these rulings only for an abuse of discretion." *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 662 N.E.2d 1 (1996), syllabus. When reviewing whether a trial court abused its discretion in excluding an expert, the Supreme Court opined: "the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Id.* (upholding the exclusion of an expert witness where an expert report was not provided and the expert was not made available for deposition). The appellate court cannot substitute its judgment for that of the trial court in evaluating whether the court abused its discretion by issuing an unreasonable, arbitrary, or unconscionable decision. *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶31} As Appellees point out, the Appellant provided no reason for failing to at least identify the original expert. Moreover, she asked for a 30-day extension in January 2018 and then did not mention the matter again until two weeks after the May 25, 2018 summary judgment motion was filed. This motion for summary judgment was anticipated due to the extension of the dispositive motion deadline. Excusable neglect was not shown.

{¶32} Contrary to Appellant's contention, the date of her own deposition does not bolster her argument on the delay in obtaining an expert report. Where a deadline for an expert exists, waiting for the defense to take the plaintiff's own deposition was not reasonable as it was her expert and she could speak to him directly and provide him with answers to interrogatories and documents produced in discovery. It is not akin to a claim that depositions are needed in order to support a motion for summary judgment.

{¶33} As to Ferrara's deposition, Appellant's argument to the trial court assumed a defendant must be fully deposed before a plaintiff's expert can have an opinion, without explaining why this was true in this case. *See Kupczyk v. Kuschnir*, 8th Dist. Cuyahoga No. 76614 (July 27, 2000) (reasons set forth by appellant to justify additional time to oppose summary judgment motion, including a deposition scheduled in the future, do not sufficiently explain failure to provide an expert report by the required date). Appellant

responded to interrogatories and requests for production in July 2017 (from ING) and in November 2017 (from Ferrara). She could have generated information from serving her own timely interrogatories in order to provide her expert with information.

{¶34} Likewise, there was no explanation provided about why the *complete* deposition testimony of Ferrara was considered necessary in order to identify an expert and provide a report under the facts of this case. According to Appellant, the first day of Ferrara's deposition took 7 hours and the second day took 3 hours. Her June 12, 2018 extension request suggested she did not receive Ferrara's deposition until May 11 (she filed it with the court on May 14, 2018). However, this was only the transcript from the second day. The record shows *the main day of his deposition occurred in early March, and that transcript was filed with the court a mere week after the deposition took place*. (Appellant's transcriptionist took a month to transcribe the second day.) The trial court need not assume it was reasonable to wait to seek an expert report until after the second day of deposition where it was not scheduled for another month, the expert report deadline had long passed, and the summary judgment deadline was looming. Considering the time pressures, the expert could have been supplied with the information exchanged in discovery and received at the first day of Ferrara's deposition, with potential supplementation to follow.

{¶35} Also, Appellant suggested to the trial court that she had an expert when Ferrara's second deposition transcript was completed. However, she never identified the original expert. And, she did not indicate what was occurring between the May 11 receipt of the second part of Ferrara's deposition and the May 25 summary judgment date (or before June 6, which is when Appellant said her original expert advised he would be unavailable for the scheduled trial date). For instance, had that expert generated a timely report, she could have requested a continuance based on a retained and relied-upon expert being unavailable for trial.

{¶36} It was not until after her summary judgment opposition was due that Appellant filed the motion to extend the expert report deadline (and sought a two-week extension for filing her opposition). The expert report she submitted as an exhibit to her objections did not indicate a review of deposition testimony. Nor was it accompanied by an affidavit or used as an alternative argument in opposition to summary judgment. Likewise, no affidavit was submitted under Civ.R. 56(F), asking for more time to conduct

further discovery or to obtain an affidavit of her expert to use in her response to summary judgment. Rather than seek further discovery, she sought to justify the untimely disclosure.

{¶37} Appellant claims the defense was not prejudiced by the untimely filing of an expert report. However, the summary judgment motion was already filed by the defense, and they had no opportunity to depose the expert. This case is distinguishable from a case cited in Appellant's reply where the expert was timely disclosed and the report was provided on the day of deposition. *See Forman v. Kreps*, 2016-Ohio-1604, 50 N.E.3d 1, ¶ 55 (7th Dist.). Moreover, the defense had a later deadline than the plaintiff and did not disclose an expert. A decision by the defense whether to retain an expert often depends on whether an expert will be called by the party with the burden of proof. *See Kolidakis v. Glenn McClendon Trucking Co.*, 7th Dist. Mahoning No. 03 MA 64, 2004-Ohio-3638, ¶ 22, 31 (upholding decision to exclude expert whose disclosure was untimely). Contrary to Appellant's suggestion, the trial court could reasonably find the defense was unfairly surprised by the untimely disclosure of the expert.

{¶38} Under the totality of the circumstances in this case, the trial court reasonably excluded the expert due to the failure to articulate good cause and excusable neglect for the untimely disclosure of the expert identity and the expert report. As the trial court did not abuse its discretion in denying Appellant's motion to extend the expert report deadline, this assignment of error is overruled.

A/E 2: MOTION TO AMEND COMPLAINT

{¶39} Appellant's second assignment of error provides:

"THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND FINDING THAT THE AMENDMENT OF THE COMPLAINT WAS UNTIMELY."

{¶40} On May 14, 2018, Appellant requested leave to add new defendants and to file an amended complaint to assert claims for "common law fraud, unjust enrichment and conspiracy" against Ferrara and Aviva and to assert "timely new claims" against ING and Financial Concept Group. As to adding new defendants, the motion said two new defendants became known through discovery: one was the agent who (according to ING) sold the first annuity (rather than Ferrara) and the other was the issuer of the first life insurance policy (rather than ING). Appellant had already sought leave to add those

same defendants in January 2018 which was previously denied by the court's March 26, 2018 judgment, finding it would be futile to add them due to the statute of limitations. Thus, her knowledge of these defendants was not new. As to new claims against those defendants who were named in the original complaint, the motion did not identify what information was new, when the new information was learned and by whom, or why the claims could not have been asserted in the February 2017 complaint (or earlier than May 14, 2018).

{¶41} The defense responded by pointing out: document production was over; Appellant had not produced an expert report; the depositions were complete; during the time for response to Appellant's amendment motion, the summary judgment motion deadline ended and the summary judgment motion was filed; the final pretrial and trial dates would have to be rescheduled; and discovery would have to be reopened. The court denied Appellant's motion to amend, citing the delay and referring to the upcoming dates of the final pretrial, mediation, and trial.

{¶42} On appeal, Appellant says she wanted to amend the complaint to add "new claims of fraudulent misrepresentation [by] Ferrara, conspiracy, unsuitability, and public policy." (Apt. Br. 24). She claims she was entitled to amend her complaint due to information her attorney learned at Appellant's own deposition and argues there was no undue delay where only one month had passed since her deposition. She does not discuss the relevant facts allegedly learned at the deposition. (In the prior assignment of error, she mentioned testifying that her signature on an exhibit was signed by someone other than herself.)

{¶43} Pursuant to Civ.R. 15(A), when a party requests leave to amend a pleading, the trial court "shall freely give leave when justice so requires." Nevertheless, the trial court has discretion in determining whether to grant leave to amend a pleading. *Turner v. Central Local School Dist.*, 85 Ohio St.3d 95, 99, 706 N.E.2d 1261 (1999). "While the rule allows for liberal amendment, motions to amend pleadings pursuant to Civ.R. 15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party." *Id.* (where the Supreme Court reversed a decision allowing amendment and found the trial court should not have granted leave to amend).

{¶44} Here, Appellant filed her May 14, 2018 motion more than 15 months after the complaint was filed and 9 days before the summary judgment motion was due. The

jury trial was scheduled for July 24, 2018 and had been set with the parties' approval since July 2017. Adding new claims and parties would delay the litigation. Even if the trial court had been informed about and accepted the assertion that information learned at Appellant's own deposition triggered the new claims and even if Appellant was justified in not discovering the information earlier, there is no indication why it was reasonable to wait one month from the deposition to seek leave to amend the complaint, considering the prior deadlines and approaching events on the schedule.

{¶45} In any event, the motion for leave to amend the complaint did not refer to the deposition. It did not indicate when or where the movant learned of information which was allegedly necessary in order to set forth the new claims in a complaint. If no reason is apparent which justifies the delay for an untimely motion to amend, a trial court does not abuse its discretion in refusing to allow amendment. *See State ex rel. Smith v. Adult Parole Auth.*, 61 Ohio St.3d 602, 604, 575 N.E.2d 840 (1991), citing *Meadors v. Zaring Co.*, 38 Ohio App.3d 97, 99, 526 N.E.2d 107 (1st Dist.1987).

{¶46} Furthermore, new information learned by a plaintiff's attorney from the plaintiff's own deposition would not automatically justify a delay. Such information should be uncovered through interviews and by reviewing documents requested in discovery. The original complaint alleged unauthorized withdrawals from her annuity, and thus, there was incentive to review Appellant's signatures earlier. The failure to timely file a motion to amend based on evidence in the movant's possession constitutes undue delay, and the court has discretion to deny amendment. *Clay v. Shriver Allison Courtley Co.*, 2018-Ohio-3371, 118 N.E.3d 1027, ¶ 116 (7th Dist.). In other words, where information relied upon in seeking leave to amend should have been known to a plaintiff earlier, the delay can be considered unjustified. *See Leo v. Burge Wrecking LLC*, 6th Dist. No. L-16-1163, 2017-Ohio-2690, 89 N.E.3d 1268, ¶ 15 (plaintiff knew or should have known information relevant to new claim but failed to explain delay in seeking amendment).

{¶47} Under the totality of the circumstances, it was not unreasonable to deny the motion to amend based on undue delay in this case. This assignment of error is overruled.

A/E 3: QUASHED SUBPOENA

{¶48} Appellant's third assignment of error alleges:

"THE COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING APPELLANT'S SUBPOENA REQUEST TO JP MORGAN CHASE FOR APPELLEE'S PERSONAL AND BUSINESS BANK ACCOUNTS, AND FINDING THAT APPELLANT FAILED TO ESTABLISH THE RELEVANCE OF THE REQUESTED DISCOVERY, AND FURTHER FINDING THAT THE SUBPOENA WAS OVERLY BROAD AND SUBJECTED J.P. MORGAN CHASE BANK TO UNDUE BURDEN."

{¶49} Appellant issued a subpoena duces tecum to a bank on March 30, 2018, asking for Ferrara's bank records from January 1, 2009 through February 6, 2017. Ferrara attempted to resolve the issue through communications with Appellant's counsel, who did not respond. Ferrara then filed a motion to quash the subpoena, arguing Appellant sought his personal and confidential information that was irrelevant to the subject matter of this lawsuit and imposed an undue burden since it exceeded propriety, was unwarranted, and spanned eight years of information even though the court dismissed the claims related to pre-2013 policies. It was pointed out that Aviva already produced the requested records regarding Ferrara's commissions and Ferrara produced the records on loan repayment, which he repaid from an account at a different bank.

{¶50} Appellant responded by claiming: the records belonged to the bank as business records and were not privileged information; the information would stay private as the parties already had a confidentiality agreement; there was no undue burden on Ferrara as he did not personally have to produce anything; and the records were relevant to show his motive (for selling successive products to her) was commission-based; and the bank records may shed light on the personal loan. The trial court quashed the subpoena, stating the request did not appear relevant, was overbroad, created an undue burden, and was made long after Appellant's discovery deadline.

{¶51} On appeal, Appellant states Ferrara had no privacy right in the bank records due to the holding in *U.S. v. Miller* and concludes that if Ferrara had no privacy right, then he lacked standing to file the motion to quash the subpoena of a non-party. In *Miller*, the United States Supreme Court found there was no reasonable expectation of privacy from government intrusion into bank records under the Fourth Amendment; the Court said the depositor takes a risk that the bank's business records will be conveyed to the government. *United States v. Miller*, 425 U.S. 435, 442-443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). The Court pointed to a law requiring banks to keep records so the government

could investigate crimes. We note that in response to that case, legislation was passed setting forth privacy requirements for government requests for bank records and providing for a depositor's motion to quash a request. *See, e.g.*, 12 U.S.C. 3402, 3410. Most notably, *Miller* was a criminal case where the defendant sought suppression of evidence based on an alleged violation of his constitutional rights; it did not involve whether a party in a civil case is permitted to raise an argument about his opponent's subpoena to a non-party.

{¶52} Appellees acknowledge some courts have adopted a general rule stating that it is the subpoenaed person who has standing to quash the subpoena; however, there is an exception where a party has a personal privilege **or** right related to the information sought. *See, e.g., Riding Films, Inc. v. John Does 129-193,* S.D.Ohio No. 2:13-CV-46 (July 1, 2013) (personal rights or privileges have been recognized for personal bank records providing standing to quash); *Schmulovich v. 1161 Rt. 9 LLC*, D. N.J. Civ. No. 07-597 (Aug. 15, 2007) ("Personal rights claimed with respect to bank account records give a party sufficient standing to challenge a third party subpoena served upon financial institutions holding such information.").

{¶53} Privilege is a category in Civ.R. 45 requiring the court to quash, but it is not the sole test for finding a party has a right to contest a subpoena to a non-party. The Third District found a defendant-employer had standing to file a motion to quash a subpoena served by the plaintiff-employee on another employee. *Hoerig v. Tiffin Scenic Studios, Inc.*, 3d Dist. Seneca No. 13-11-18, 2011-Ohio-6103, ¶ 19-21, 24 (finding the party seeking to quash would be subject to undue burden).

{¶54} We turn to the arguments construing the Civil Rules, and the nature of a subpoena to a non-party. Civ.R. 45 deals with the issuance of a subpoena to a non-party. *See* Civ.R. 45(A)(1) ("A subpoena may not be used to obtain the attendance of a party or the production of documents by a party in discovery."). The rule provides for a motion to quash and states the court shall quash a subpoena (or modify it) if the subpoena does any of the following: (a) fails to allow reasonable time to comply; (b) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; (c) involves a non-retained expert (under certain circumstances); or (d) subjects a person to undue burden. Civ.R. 45(C)(3).

{¶55} Appellant believes a subpoena to a non-party is only subject to the four limitations in (C)(3) and can only be challenged by the person subpoenaed. Civ.R. 45(C)(3) does not say a motion to quash can only be filed by the person subject to the subpoena, and Appellant acknowledges that a party asserting privilege could file a motion to quash. We recognize the next division provides that if "the person resisting discovery" files a motion under (C)(3)(d), any claim of undue burden shall be attempted to be resolved through discussions with the issuing attorney and the motion "shall be supported by an affidavit *of the subpoenaed person* or a certificate of *that person's* attorney of the efforts made to resolve any claim of undue burden." Civ.R. 45(C)(4) (emphasis added). *See also* Civ.R. 45(C)(1)(b) (if "a person commanded to produce documents" by subpoena serves objections, the issuer of the subpoena will not be entitled to production without filing a motion to compel).

{¶56} Nevertheless, Civ.R. 45(A)(3) states the party issuing a subpoena "shall serve prompt written notice, including a copy of the subpoena, on all other parties * * *." Entitlement to notice and a copy of the subpoena impliedly suggests a party's ability to lodge a protest. The 2005 Staff Note to Civ.R. 45(A)(3) states the notice requirement was added with intent to provide the other party with the opportunity to object to the production or inspection of documents. Moreover, Civ.R. 45(C)(3) does not say the court can only quash a subpoena for the listed reasons. "Division (C)(3) contains four bases for quashing or modifying a subpoena. The latter division does not purport to catalog the substantive bases upon which an objection might be based." 1993 Staff Note to Civ.R. 45(C)(3).

{¶57} Even more importantly, Civ.R. 34 provides for discovery from a party through a request for production of documents but then provides: "(C) **Persons Not Parties**. Subject to the scope of discovery provisions of Civ. R. 26(B) and 45(F), a person not a party to the action may be compelled to produce documents, electronically stored information or tangible things or to submit to an inspection as provided in Civ. R. 45." Civ.R. 34(C) (Emphasis original). Thus, the subpoena issued to a non-party under Civ.R. 45 is specifically subject to the scope of discovery as limited by Civ.R. 26(B).

{¶58} Pursuant to Civ.R. 26(B)(1), a party may obtain discovery regarding any matter, not privileged, *which is relevant to the subject matter* involved in the pending action. Inadmissibility at trial is not grounds for objection *if* the information appears

reasonably calculated to lead to the discovery of admissible evidence. Civ.R. 26(B)(1). A non-party would be unaware if the information sought by the subpoena was relevant to the subject matter of the action (and would have little incentive to care).

{¶59} Reading Civ.R 34 in conjunction with its citation to Civ.R. 45 and Civ.R. 26(B) shows that a subpoena to a non-party can be challenged by a party on grounds that it seeks a matter which is not relevant to the subject matter involved in the pending action. *See* Civ.R. 34(C), citing Civ.R. 26(B) and Civ.R. 45. For instance, the Third District upheld a trial court's decision which granted a party's motion to quash a subpoena issued to a non-party and found the information sought was not relevant to the subject matter of the action. *Federal Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 3rd Dist. Allen No. 1-09-17, 2009-Ohio-5910, ¶ 42-44. *See also State ex rel. Ohio Civ. Rights Commission v. Gunn*, 45 Ohio St.2d 262, 268, 344 N.E.2d 327 (1976) (although the Supreme Court found the civil rules relating to filing litigation were not applicable to the Commission's request for a court to enforce a subpoena, the Court essentially said that in all cases where a subpoena duces tecum is before a court for enforcement, the subpoena "is subject to the requirements of pertinency to the issues being litigated").

{¶60} We also point to the provision discussing protective orders, which provides: "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including an order that the discovery not be had. Civ.R. 26(C). This language allows a party to file a motion (regardless of its label) which protests the "discovery" sought from a non-party to protect the party (or the subpoenaed person). A subpoena to a non-party is considered a form of discovery. *See id. See also* Civ.R. 45(C)(4) (speaking of a motion to quash the subpoena for the reason of undue burden by referring to the person "resisting discovery").

{¶61} As analyzed above, a subpoena is a type of discovery. The decision on Ferrara's motion to quash the subpoena seeking his bank records from a non-party falls within the trial court's broad discretion and cannot be reversed absent an abuse of discretion. *See generally State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998) (discovery decision on a party's attempt to compel non-party to attend deposition was discretionary). *See also In re Application of Champaign Wind*

L.L.C., 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 13-15 (where only two of the three non-parties filed motions to quash and *a party* filed a motion to quash the subpoena issued to the other non-party).

{¶62} Appellant sought personal bank records that would disclose all amounts received by a party from every source and all amounts paid by him to any person for a period of eight years. The requested period did not end until almost two years after Appellant terminated Ferrara as her agent and hired an attorney. The requested period began in 2009 and thus included the years with sales that could no longer be sued upon due to the trial court's prior statute of limitations decision. In response to this point, Appellant did not offer to narrow the scope of the subpoena. The personal loan was not granted until 2014, and Appellant did not clearly explain to the trial court how a subpoena to this bank related to the claim that Ferrara engaged in fraud by contracting with Appellant for a personal loan, which she admitted at deposition that she made and which was evidenced by a written agreement. There was no allegation of theft, and Appellant traced the annuity withdrawals to a loan she admitted making and insurance premiums. It was not self-explanatory how the requested years of bank records were "relevant to the subject matter involved in the pending action" as required by Civ.R. 26(B)(1).

{¶63} Appellant claims she wanted to view commissions deposited in Ferrara's bank account to show his motive for selling her multiple products. She emphasized Ferrara's inability to provide figures on his past commissions. However, she did not disagree with Ferrara's assertion that Appellant already received, from the insurer in discovery, the information regarding the commissions he earned on the relevant products sold to her. Moreover, it seems unreasonable to claim that she would be able to ascertain relevant commissions for specific products sold to one client from mere generalized bank deposits. Her rationale and this observation diminishes the relevance the records could have to the subject matter in this action.

{¶64} "The trial court has broad discretion in controlling the discovery process. * * * That discretion encompasses decisions regarding the relevance of information sought during discovery." *Metropolitan Life Ins. Co. v. Tomchik*, 134 Ohio App.3d 765, 789, 732 N.E.2d 430 (7th Dist.1999). These observations support the trial court's statement that the subpoena was overbroad. An overbroad request which includes irrelevant information could in turn make the burden of production an undue one on the party with the personal

right in the account (and on the non-party ordered to produce the records). An undue burden is one that is excessive, immoderate, *or unwarranted*. *Hoerig*, 3d Dist. No. 13-11-18 at ¶ 23. Plus, it was within the trial court's discretion to control discovery by precluding a request for information where the time frame of material sought was viewed as impermissibly broad. *See Blaschak v. Union Sav. Bank & Tr. Co.*, 7th Dist. Jefferson No. 91-J-7 (Sep. 30, 1992).

{¶65} Alternatively and in any event, the trial court found the subpoena was untimely issued by Appellant after her discovery deadline. On March 9, 2018, the court extended the March discovery deadline for the defense to May 17, 2018. However, this did not affect Appellant's January 18, 2018 deadline, which was originally and consensually set to expire two months earlier than the defendants' deadline. Appellant issued the subpoena on March 30, 2018, commanding the bank to produce the records by April 30, 2018.

{¶66} A subpoena used for discovery (as opposed to trial appearance) is subject to the discovery deadline relevant to the party issuing the subpoena and can be quashed where it is filed after the deadline. *McWreath v. Cortland Bank*, 11th Dist. Trumbull No. 2010-T-0023, 2012-Ohio-3013, ¶ 95 (subpoenas duces tecum properly quashed on defendant's motion where they were untimely issued to non-parties after discovery deadline). *See also Ohio Valley Associated Bldrs. & Contrs. v. Rapier Elec. Inc.*, 12th Dist. Butler No. CA2013-07-110, 2014-Ohio-1477, ¶ 18 (excluding evidence from subpoena filed two weeks before discovery deadline where no response was provided and subpoena was reissued after deadline); *Cobb v. Rodriguez*, 751 Fed.Appx. 988, 990 (9th Cir.2018) ("district court did not abuse its discretion by granting defendants' motion to quash Cobb's subpoenas served after discovery had closed because Cobb failed to show he was prejudiced by this order"); *Mortgage Info. Servs. Inc. v. Kitchens*, 210 F.R.D. 562, 566 (W.D.N.C.2002) (collecting cases). We conclude the trial court's decision quashing the subpoena was not arbitrary, unconscionable, or unreasonable.

{¶67} Furthermore, Appellant does not address this alternative holding of the trial court in quashing the subpoena (that the subpoena was untimely issued). She may be assuming we will craft the connection between this alternative holding by the trial court and the first assignment of error on the failure to extend the discovery deadline. However, the first assignment of error focused on the request to extend the expert report deadline,

and no motion was made to extend the discovery deadline based on a perceived need for these bank records. For all of these reasons, this assignment of error is overruled.

SUMMARY JUDGMENT

{¶68} The remaining assignments of error involve the granting of summary judgment against Appellant. Summary judgment can be granted when no genuine issue of material fact remains and reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The movant has the initial burden to point to evidence showing the absence of a genuine issue of material fact on an element of the non-movant's claim. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10; *Dresher v. Burt*, 75 Ohio St.3d 280, 293-294, 662 N.E.2d 264 (1996). If this initial burden is satisfied, the non-movant may not rest upon mere allegations or denials in the pleadings. *Id.*; Civ.R. 56(E). The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing there is a genuine issue for trial. *Id.*

{¶69} We review the granting of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. In doing so, we review the legal theories presented by the parties below to the extent that they were addressed by the trial court. *Yoskey v. Eric Petroleum Corp.*, 7th Dist. Columbiana No. 13 CO 42, 2014-Ohio-3790, ¶ 40-41 (if the trial court did not reach alternative arguments, we need not reach those arguments before reversing the entry of summary judgment on the ground relied upon by the trial court). We generally refrain from ruling on arguments that were unaddressed by the trial court on the theory that issues are not ripe for review when the trial court proceeded as if they were moot due to another ruling. *Jefferis Real Estate Oil & Gas Holdings LLC v. Schaffner Law Offices LPA*, 2018-Ohio-3733, 109 N.E.3d 1265, ¶ 41 (7th Dist.). For instance, in this case, the trial court's decision on the negligent misrepresentation claim was wholly based on the lack of an expert, and the decision on the breach of fiduciary duty claim was based on the lack of a special relationship and the lack of an expert.

{¶70} Civ.R. 56 must be construed in a manner that balances the right of the non-movant to have a jury try claims adequately based in fact with the right of the movant to demonstrate before trial that the plaintiff's claims have no discernible factual basis. *See Byrd*, 110 Ohio St.3d 24 at ¶ 11, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106

S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court is to consider the relevant evidence and reasonable inferences in the light most favorable to the non-movant. *See, e.g., Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 11. Nevertheless, "[a] trial court addressing summary judgment is not required to accept conclusory allegations that are devoid of any evidence which would create an issue of material fact." *Presidential Square Estates Condo. Assn. v. Slabochova*, 7th Dist. Mahoning No. 03 MA 111, 2004-Ohio-2936, ¶ 20. The material issues of each case depend on the arguments specified and the substantive law applicable to the case. *See Byrd*, 110 Ohio St.3d 24 at ¶ 12.

{¶71} In citing to the substantive law relevant to the negligent misrepresentation claim, the parties recognize that in addition to the duty to procure the requested coverage, an insurance agent must exercise "reasonable care" in advising the customer about the terms of the coverage if the customer is relying on the agent's expertise. *FDT Group, LLC v. Guaraci*, 10th Dist. Franklin No. 16AP-679, 2017-Ohio-663, ¶ 20; *Advent v. Allstate Ins. Co.*, 10th Dist. Franklin No. 05AP-1092, 2006-Ohio-2743, ¶ 17; *Welsh v. Williams*, 7th Dist. Jefferson No. 86-J-15 (Dec. 30, 1986) (and the insured is charged with knowledge of the contents of the policies), citing *First Catholic Slovak Union v. Buckeye Union Ins. Co.*, 27 Ohio App.3d 169, 170, 499 N.E.2d 1303 (8th Dist.1986). Nevertheless, the relationship is generally considered an ordinary business relationship, and the mere status as the insurance agent does not require the agent to place the client's best interest above his own self-interest (in making commissions or sales quotas for instance). *FDT Group* at ¶ 20-21; *Advent* at ¶ 14-17 (addressing the breach of fiduciary claim and the negligence claims separately). Only in certain special circumstances can the customer's reliance on the agent result in an expectation that the agent will act primarily for the client as a fiduciary. *Id.*

{¶72} This leads to the argument on whether there was evidence supporting Appellant's claim that her special relationship with Ferrara resulted in a fiduciary relationship. Aviva does not respond to Appellant's arguments on the fiduciary relationship, explaining that the claim for breach of fiduciary duty only applies to Ferrara. The trial court's summary judgment stated that the sole agency claim against Aviva involved the claim of negligent misrepresentation in connection with the sale of the 2013

policy. Appellant does not assign this holding as an error (and Appellant's reply did not touch on this contention.)

A/E 4: FIDUCIARY RELATIONSHIP

{¶73} Appellant's fourth assignment of error provides:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR BREACH OF FIDUCIARY DUTY BY FINDING THAT FERRARA HAD NOT CREATED A FIDUCIARY RELATIONSHIP BETWEEN HIMSELF AND HANICK."

{¶74} To maintain a claim of breach of a fiduciary duty, the plaintiff must prove: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom. *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (1988). In this assignment of error, Appellant challenges the trial court's decision on an aspect of the first element. The trial court found that she did not have a fiduciary relationship with Ferrara.

{¶75} A fiduciary relationship is one "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 16. The fiduciary has "a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." *Id.* "A fiduciary relationship may be created out of an informal relationship, but this is done only when both parties understand that a special trust or confidence has been reposed." *Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St.2d 282, 286-287, 390 N.E.2d 320 (1979) (the party claiming a fiduciary relationship must have a reasonable expectation that the other would act solely or primarily on his behalf and the fiduciary must understand this; "the rendering of advice by the creditor to the debtors does not transform the business relationship into a fiduciary relationship").

{¶76} In opposing summary judgment, Appellant acknowledged the general rule that there is no special relationship between an insurance agent and the insured and something more than the ordinary insured/insurer relationship is required for a breach of fiduciary duty claim; both parties must understand (bilaterally) that a special trust has been reposed. (S.J. Opp. at 13, 17). The parties all cited the trial court to the Tenth District's *Advent* case, which provides:

> Generally, the relationship between an insurance agent and his client is not a fiduciary relationship, but rather, an ordinary business relationship. * * * While the law has recognized a public interest in fostering certain professional relationships, such as the doctor-patient and attorney-client relationships, it has not recognized the insurance agent-client relationship to be of similar importance. * * * However, a fiduciary relationship can arise from such an informal relationship when both parties understand that a special trust or confidence has been reposed.

Advent, 10th Dist. No. 05AP-1092 at ¶ 14.

{¶77} In *Advent*, the length of the relationship between the agent and the insured was 13 years, and the insured submitted an affidavit saying he relied on the agent to advise him of the appropriate insurance coverage to adequately protect his family. *Id.* at ¶ 15-16. The court emphasized that the insured never communicated his reliance to the agent so as to indicate that he reposed a special trust or confidence in the agent. It was concluded that the evidence did not demonstrate that a bilateral understanding converted the ordinary business relationship into a fiduciary one. *Id.*

{¶78} In another case, the Tenth District noted that even assuming the evidence showed the plaintiff reposed a special trust in the agent, the plaintiff presented no evidence to contradict the agent's statement that he viewed the relationship as an ordinary agent-client relationship and was unaware of any special trust or confidence reposed in him. *Nichols v. Schwendeman*, 10th Dist. Franklin No. 07AP-433, 2007-Ohio-6602, ¶ 21 (where the record contained no evidence the insured communicated an alleged special confidence or trust to the insurance agent, the record failed to demonstrate the bilateral understanding necessary to convert an ordinary business relationship into a fiduciary one).

{¶79} Appellant urges that the evidence shows she was entirely dependent on Ferrara (and he took advantage of her trust by proceeding with transactions that put his interest over her best interest). She says she blindly followed his advice on buying life insurance and says it was clear that her life situation did not warrant life insurance; she testified that she would never have agreed to the purchases if she had knowledge of the high recurring premiums. Ferrara points out that Appellant acknowledged at deposition that she had prior experience with this type of life insurance (including knowledge that failure to pay an annual premium would cause the policy to lapse) and experience with

annuities (including the potential for surrender charges which she paid prior to meeting him). In any event, Appellant is not asking that we presume a special trust merely because of the unwarranted lapsing and purchasing of life insurance.

{¶80} In arguing there was evidence supporting a special relationship, Appellant relies on the following: her friend introduced her to Ferrara; she was approximately 68 years old when he began advising her; he has advised her and sold her various annuities and life insurance over a period of six years; the evidence suggests he knew she relied on his advice; he told her about his divorce; she cashed her annuity with ING when he advised her that he would be selling for another insurer; and she loaned him money (through a written contract with 5% interest) even though she had to pay surrender charges on her annuity to provide him with the loan. Appellant's response to summary judgment cited testimony from Ferrara's deposition, such as where he admitted she called and texted him at odd times, denied they were friends, and wrote a note (after she removed him as her agent) saying they were still friends.

{¶81} Ferrara emphasizes that both parties must understand a special trust and confidence has been reposed in one by the other. *Umbaugh Pole Bldg.*, 58 Ohio St.2d at 286-287. Ferrara testified at deposition that: he explained her choices when he left ING; they had conversations about all of the transactions; she did not have such trust in their business relationship that she would blindly do what he said; he did not discuss personal matters except when it would casually come up as part of any business relationship with a client; he had to instruct her not to overstep the boundaries of their business relationship when she contacted him too often; and regardless of his goodbye note after she hired an attorney and removed him as her agent, they were never friends.

{¶82} We must view the evidence including all reasonable inferences in favor of Appellant and resolve all doubts in her favor as well. *See Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218, 520 N.E.2d 198 (1988). In doing so and after considering the totality of the circumstances, we conclude that some reasonable person could find appellant reposed a special trust in Ferrara and he understood this relationship had developed (upon his own encouragement).

{¶83} Appellant's deposition testimony did not specifically attest to her trust in Ferrara, but of course, her deposition involved questioning by the opponent who would not seek to elicit such testimony. Appellant did not submit the expected affidavit attesting

to the mutual understanding of Ferrara's position of special trust, and as Ferrara notes, an attorney's arguments and conclusions are not a substitute for summary judgment evidence. Still, Appellant did suggest at deposition that she was not informed about the essentials of the transactions Ferrara was having her complete. She also indicated he had access to the funds in her annuity. (R.H. Depo 60 (contesting a 2013 signature); (R.H. Depo. 83) (discussing the receipt of a check after discussing her need for hearing aids with Ferrara).

{¶84} Moreover, Ferrara's own deposition testimony contained some contradictory indicators as to the nature of his special influence over her finances and decision-making. For instance, contrary to his testimony insisting that he did not develop a personal relationship with Appellant, Ferrara acknowledged he wrote a note to her which said they were still friends (after she had him removed as her agent). Ferrara also disclosed at deposition that he lectured Appellant about spending money on her friend. He even told her that if she continued to run through her money in this manner he could no longer "in good faith" be her agent, suggesting he occupied a position akin to a financial adviser. (T.F. Depo. 305).

{¶85} "A broker or financial advisor has a fiduciary relationship with his clients." *Lawarre v. Fifth Third Securities Inc.*, 1st Dist. Hamilton No. C-110302, 2012-Ohio-4016, ¶ 13, citing *Mathias v. Rosser*, 10th Dist. Franklin No. 01AP-768, 2002-Ohio-2772, ¶ 28 ("there is general agreement that a broker or financial advisor is in a fiduciary relationship with his clients"). Although the annuity sales are no longer actionable due to the statute of limitations decision, the fact that he sold her annuities in 2009, 2010, and 2012 and the use of the annuities to indirectly pay life insurance premiums helps establish a fiduciary relationship being maintained during the transactions in 2013 and 2015, especially due to the allegation that he had access to her annuity and directed withdrawals therefrom.

{¶86} Appellant emphasizes the existence of the loan as evidence of a fiduciary relationship. A personal loan evidenced in writing with 5% interest may, *in general*, appear to be a business transaction rather than evidence of a special relationship. *See generally Umbaugh Pole Bldg.*, 58 Ohio St.2d at 286-287 (finding the relationship of debtor and creditor without more is not a fiduciary relationship and "neither party had, nor could have had, a reasonable expectation that the creditor would act solely or primarily on behalf of the debtor. * * * the rendering of advice by the creditor to the debtors does

not transform the business relationship into a fiduciary relationship."). Yet, this loan from a client to her insurance agent suggests something more than an insurance agent/client relationship under the totality of the circumstances. *See generally Stone v. Davis*, 66 Ohio St.2d 74, 79, 419 N.E.2d 1094 (1981) (even if the banker does not occupy a fiduciary relationship in loan negotiation, the relationship may thereafter exist with the loan customer when the banker is advising, during loan processing, on the benefits of procuring mortgage insurance). In addition to the circumstances reviewed above, Appellant testified that she does not normally provide loans to people.

{¶87} There was a genuine issue of material fact as to the existence of a fiduciary relationship. Appellant's fourth assignment of error has merit. We proceed to address the trial court's alternative holding when it granted summary judgment on the breach of fiduciary duty claim, a holding the court also applied to the negligent misrepresentation claim.

NECESSITY OF EXPERT: A/E 5 & A/E 8(pt.1)

{¶88} On the negligent misrepresentation claim, the trial court in the case at bar held: expert testimony was required to establish the professional standard of care, a breach thereof, and damages proximately caused thereby; professional negligence cases generally require expert testimony; and the issues were beyond the common knowledge of a layperson as Ferrara's advisement dealt with a complicated financial investment. On the breach of fiduciary duty claim, the trial court concluded that even if Appellant could establish a fiduciary relationship gave rise to certain duties, she could not establish breach of a fiduciary duty without expert testimony and pointing to the reasoning it used for disposing of the negligent misrepresentation claim.

{¶89} Appellant claims she does not need an expert because the infractions and the loss are so obvious that a layperson would not require the assistance of an expert opinion. Appellant's fifth assignment of error addresses whether expert testimony was required to support the breach of fiduciary duty claim, while the eighth assignment of error addresses whether an expert was required to support the negligent misrepresentation claim.

{¶90} In medical and legal malpractice cases, the Supreme Court generally requires expert testimony on the professional standards of performance. *McInnis v. Hyatt Legal Clinics*, 10 Ohio St.3d 112, 113, 461 N.E.2d 1295 (1984); *Bruni v. Tatsumi*, 46 Ohio

St.2d 127, 130, 346 N.E.2d 673 (1976). Although not considered malpractice, the Court also required expert testimony as to a nurse's negligence because the claim involved the nurse's professional skill and judgment which encompassed matters outside the common knowledge and experience of jurors. *Ramage v. Central Ohio Emergency Serv. Inc.*, 64 Ohio St.3d 97, 103-104, 592 N.E.2d 828 (1992) (as opposed to ordinary negligence such as in a case where a patient fell from a hospital bed).

{¶91} Appellate courts have thus required expert testimony to show breach of the standard of care by an insurance agent in certain cases. *Associated Visual Communications v. Erie Ins. Group*, 5th Dist. Stark No. 2006 CA 00092, 2007-Ohio-708, ¶ 66, citing *MBE Collection, Inc. v. Westfield Cos. Inc.*, 8th Dist. Cuyahoga No. 79585 (Apr. 18, 2002). Yet, even in a legal malpractice case, expert testimony is not necessary where the breach of a professional duty is well within the common understanding of the laymen on the jury. *McInnis*, 10 Ohio St.3d at 113 (where the attorney promised not to publish notice in a newspaper but then did so without consulting with the client).

{¶92} This is known as the common knowledge exception. "Under this exception, matters of common knowledge and experience, subjects which are within the ordinary, common and general knowledge and experience of mankind, need not be established by expert opinion testimony." *Ramage*, 64 Ohio St.3d at 103.

{¶93} The Eleventh District held an expert was not required where an insured instructed the insurance agent to cancel a policy on a certain date and the agent failed to inform the insured the policy would be canceled immediately. The court ruled: the breach was "so apparent as to be within the comprehension of laymen"; "only common knowledge and experience" was needed to judge the issue; and the issues on the duty of care were "not of a complex nature involving industry standards or policy interpretation." *American Internatl. Recovery v. Allstate Ins. Co.*, 11th Dist. Portage No. 2009-P-0008, 2009-Ohio-6508, ¶ 16-18 (distinguishing the *MBE* case).

A/E 5: EXPERT FOR FIDUCIARY CLAIM

{¶94} The fifth assignment, addressing the breach of fiduciary claim, provides:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR BREACH OF FIDUCIARY [DUTY] BY ASSERTING THAT EXPERT TESTIMONY WOULD BE REQUIRED TO PROVE HANICK'S CLAIM OF

BREACH OF FIDUCIARY DUTY REGARDING THE DELIBERATE MISMANAGEMENT OF HER FUNDS AND LIFE/ANNUITY POLICIES BY FERRARA."

{¶95} First, Appellant states a layperson would know that it makes no sense to sell an annuity to buy another similar annuity. However, the trial court previously ruled that the transactions involving the purchase of the annuities were time-barred. Although the history of sales could be considered in determining whether a fiduciary relationship developed, the prior sales cannot be used to show breach due to an uncontested statute of limitations ruling.

{¶96} Second, Appellant states any layperson would know it is improper to withdraw from an annuity if the client did not request the withdrawal. For instance, Appellant testified that Ferrara initiated the March 2015 withdrawal without her consent after she asked when he would repay the personal loan and complained that she needed money for hearing aids. The allegation of unauthorized withdrawals from an annuity does not require an expert to show breach of fiduciary duty (or damages proximately caused by the withdrawal in the form of surrender charges).

{¶97} Third, Appellant refers to Ferrara's self-serving actions. Her analysis here appears to lack specific arguments. Yet, her prior assignment of error, which introduced her claim for breach of fiduciary duty, outlined additional allegations of breach of fiduciary duty. For example, Appellant said a fiduciary breaches his duty by taking a personal loan from a client, especially if he knows the funds will be withdrawn from an annuity with surrender charges. "Self-dealing by a fiduciary creates a presumption that the action is invalid, and an attorney-in-fact is obligated to demonstrate the fairness of his conduct." *Castro v. Castro*, 2013-Ohio-1347, 988 N.E.2d 58, ¶ 28 (8th Dist.). The matter of the personal loan was not a complex matter requiring a client to present an expert in order to avoid summary judgment.

{¶98} In the prior assignment of error, Appellant also urged that her fiduciary should not have advised her to purchase life insurance in 2013 and 2015 when she did not need it, especially considering the surrender charges for annuity withdrawals. She said Ferrara breached a fiduciary duty by recommending life insurance with a motive to merely increase commissions no matter the cost to the client. She believes the insurance was clearly unaffordable and inappropriate and any juror could ascertain there was no benefit to letting a policy lapse and then buying a more expensive policy. Ferrara counters

by arguing that the propriety of advising on the purchase of life insurance entails complexity and is based on various factors influencing professional judgment upon consideration of her age, goals, net worth, financial status, and other factors.

{¶99} Life insurance is a common and usual product, and an insurance agent is expected to promote such a product to his potential clients. If the agent is also a fiduciary, the client's position must be elevated. Whether Appellant should have been encouraged by her fiduciary (who made commissions on the products) to purchase the 2013 policy after letting the 2012 policy lapse and to purchase the 2015 policy after letting the 2013 lapse, where the known source of the premiums was an annuity with surrender charges, is not a matter of such complexity that an expert is required in order to avoid summary judgment under the totality of the circumstances in this case. Appellant's life and financial situation was not complex, and her goals were not difficult to explain. It does not require specialized knowledge or training to evaluate the amount of recurring premiums, the loan, and surrender charges in the context of Appellant's low retirement income and net worth. Moreover, an expert would not be required to show that a fiduciary breaches a duty if he fails to disclose recurring premiums for recommended new products and fails to disclose future annuity surrender charges (from an annuity he sold her in the past) all while inducing and helping a client to make withdrawals from the annuity to pay the premiums for those new products and to fund a personal loan to the fiduciary.

{¶100} We also agree with Appellant's statement that the topic of damages proximately caused by the breach of fiduciary would not mandate an expert. Arithmetic would establish the premiums paid for the 2013 policy and the annuity surrender charges (on the withdrawals used to pay the premiums on the 2013 and 2015 policies or to provide the agent with a personal loan). An expert would not be necessary to show that the fiduciary made commissions on the sale of each new policy, while the client lost annuity surrender charges in order to fund each new policy.

{¶101} These subjects are all within the common understanding and experience of a standard juror. *See generally Ramage*, 64 Ohio St.3d at 103 ("matters of common knowledge and experience, subjects which are within the ordinary, common and general knowledge and experience of mankind, need not be established by expert opinion testimony"); *McInnis*, 10 Ohio St.3d at 113 (even in a legal malpractice case, expert testimony is not necessary where the breach of a professional duty is well within the

common understanding of the laymen on the jury). As various allegations supporting the claim for breach of fiduciary duty would not require an expert, this assignment of error is sustained. In accordance, the entry of summary judgment on the breach of fiduciary duty claim is reversed based on the combination of assignments of error four and five.

A/E 8 (part 1): EXPERT FOR NEGLIGENT MISREPRESENTATION

{¶102} The eighth assignment of error, which argues in part one that an expert was unnecessary for the negligent misrepresentation claim, states:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S NEGLIGENT MISREPRESENTATION CLAIM."

{¶103} Initially, we address a contention regarding the insurance application Ferrara submitted on Appellant's behalf and misrepresentations allegedly made therein to the insurance company. Appellant points out that an expert is not required to establish the factual allegation that an agent misrepresented the client's situation to the insurer on the insurance application. However, expert testimony (or an admission by the defense) was required in order to show that the particular misrepresentation on the application *that was raised in opposition to summary judgment*[3] would have resulted in a different outcome (i.e., the misrepresentation proximately caused an injury).

{¶104} The misrepresentation alleged in opposition to summary judgment relevant to the 2013 life insurance policy was that Ferrara overstated her net worth as $250,000 and said she had earned income of $40,000 (when her income was closer to $25,000 and was from a pension and social security). As to the 2015 life insurance policy, the misrepresentation raised in opposition to summary judgment was that Ferrara listed her net worth as $400,000 and said her unearned income was $40,000. Appellant provided no evidence in opposition to summary judgment to show that the alleged misrepresentations in her financial status would have caused a rejection of her application by the insurance company or some other dispositive effect (to show the misrepresentation was the proximate cause of her injury).

{¶105} However, we do not agree with the trial court's conclusion that the lack of an expert barred her entire negligent misrepresentation claim. Appellant reiterates some

[3] See part two of assignment of error 8, addressing waiver of the replacement disclosure issue.

of the contentions set forth in the fifth assignment of error (where we found an expert was not needed for the breach of fiduciary claim to survive summary judgment). In connection with her argument that an agent must exercise reasonable care in advising the client if the client relies on his expertise, Appellant says a layperson would be able to grasp that the 2013 and 2015 purchases were not economically sound and that Ferrara made various negligent misrepresentations.

{¶106} We incorporate our relevant observations and conclusions under the prior section (assignment of error five). Contrary to Appellees' counterargument, the subject of purchasing new life insurance after other recent policies just lapsed by withdrawing money from annuities was not complex and an expert was not required in order to avoid summary judgment. An expert would not be required in order for Appellant to demonstrate that there were allegedly misrepresentations as to premiums, withdrawals, and surrender charges or that this caused Appellant to incur financial loss. We note, on the other side of the coin, an expert would not be required if defense counsel wished to argue that a client would have saved on premiums by letting one policy lapse and replacing it with a new policy with a lower annual premium. Likewise, an expert would not be required to show that the surrender charges on the annuity would make Appellant's purchase of life insurance more costly than represented or that the premiums for the 2015 policy were higher than prior policies. There is no need for an expert to opine on whether there were post-2013 misrepresentations which induced Appellant surrender portions of her annuity with penalty in order to fund premiums on new policies and to fund Ferrara's personal loan. And, an expert would not be required to determine whether Ferrara misrepresented the simple characteristics of the 2013 and 2015 life insurance policies.

{¶107} This is not to suggest that allegations within the negligent misrepresentation claim will prevail over other arguments presented by the defense in moving for summary judgment. However, as set forth above in the section on general summary judgment law, this court is only addressing those arguments upon which the trial court made rulings. *See, e.g., Jefferis Real Estate Oil & Gas Holdings LLC v. Schaffner Law Offices LPA*, 2018-Ohio-3733, 109 N.E.3d 1265, ¶ 41 (7th Dist.) (we generally refrain from ruling on arguments that were unaddressed by the trial court on the theory that issues are not ripe for review when the trial court proceeded as if they were moot due to another ruling); *Yoskey v. Eric Petroleum Corp.*, 7th Dist. Columbiana No.

13 CO 42, 2014-Ohio-3790, ¶ 40-41 (if the trial court did not reach alternative arguments, we need not reach those arguments before reversing the entry of summary judgment on the ground relied upon by the trial court).

{¶108} The trial court disposed of the negligent misrepresentation claim based solely upon the lack of an expert. We conclude that summary judgment should not have been granted on the negligent misrepresentation claim merely because an expert was not utilized in opposition to summary judgment. We thus sustain the arguments set forth in part one of Appellant's eighth assignment of error (with the exception of the argument on misrepresentations in the application which is overruled). We now address the replacement disclosure issue raised in the second part of this assignment of error (and in the sixth and seventh assignments of error).

REPLACEMENT DISCLOSURE LAW for A/E 6, 7, & 8 (part two)

{¶109} In the next three assignments of error, Appellant relies on the law relating to replacement disclosures applicable to the issuance of the life insurance policies. Appellant sets forth a different assignment of error relating to the effect of the law on each of the three causes of action: breach of fiduciary duty in the sixth assignment of error; negligent misrepresentation in part two of the eighth assignment of error; and fraud in the seventh assignment of error.

{¶110} Appellant cites Ohio Administrative Code 3901-6-05(E)(1), which requires the agent who initiates an application to submit to the insurer a statement signed by the applicant and the agent answering whether the applicant has an existing life insurance policy or annuity contract. If the question is answered in the affirmative, the agent shall present and read to the applicant a specified replacement notice; the notice shall be provided to the applicant after both sign the notice (attesting the agent read it aloud or the applicant refused the reading aloud). Ohio Adm.Code 3901-6-05(E)(2). The notice shall list all life insurance policies or annuities proposed to be replaced and state whether each policy or contract will be replaced or whether a policy will be used as a source of financing for the new policy or contract. Ohio Adm.Code 3901-6-05(E)(3). *See also* Ohio Adm.Code 3901-6-05(D)(10) ("replacement" is defined as a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing agent (or to the proposing insurer if there is no agent) that by reason of the transaction,

an existing policy or contract has been or is to be lapsed, forfeited, surrendered or partially surrendered, used in a financed purchase, etc.).

{¶111} Appellant points out that Ohio Administrative Code 3901-6-05(J) provides that a failure to comply with this rule shall be considered a violation of R.C. 3109.20. The cited statute provides, "No person shall engage in this state in any trade practice which is defined in sections 3901.19 to 3901.23 of the Revised Code as, or determined pursuant to those sections to be, an unfair or deceptive act or practice in the business of insurance." *See also* R.C. 3109.22(A) (a person aggrieved can apply to superintendent for a hearing on violation), (D)(3) (superintendent may order return of payments), (E) (superintendent can request attorney general to commence action on behalf of policyholders). Appellant states the surrender of amounts in her annuity and the subsequent use of these withdrawals to fund the life insurance premiums constituted a replacement requiring the disclosure.

A/E 6: EFFECT OF NONDISCLOSURE ON FIDUCIARY CLAIM

{¶112} Appellant's sixth assignment of error alleges:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR BREACH OF FIDUCIARY DUTY WHERE THE REPLACING INSURANCE AGENT OWES A FIDUCIARY DUTY TO THE APPLICANT TO ISSUE THE STATE-MANDATED DISCLOSURE WARNINGS REGARDING THE RISKS OF REPLACEMENT."

{¶113} As set forth above, the trial court granted summary judgment on the breach of fiduciary duty claim due to the lack of a special relationship and the failure to provide expert testimony on breach of fiduciary duty. Appellant is essentially arguing the existence of a statute and insurance regulation on a replacement disclosure provide the element of duty and a jury could factually determine a breach without an expert. Appellant suggests the lack of disclosure results in breach of a fiduciary duty because the agent was the same on both the replaced and replacement policy (or because the insurance company issued both the replaced and the replacement policy[4]), citing the *Cope* case.

[4] Appellant states the claim against Aviva for breach of fiduciary duty was for failing to provide the replacement disclosure notice. However, as mentioned supra, the trial court stated that only the negligent misrepresentation claim applied to Aviva, and this holding was not assigned as an error on appeal.

Appellees point out that the case dealt with class certification rather than the merits of the case. *See Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 696 N.E.2d 1001 (1998).

{¶114} Regardless of the ability to show the lack of a state-mandated replacement disclosure without an expert, this allegation was not before the trial court. As Appellees emphasize, Appellant failed to raise these arguments to the trial court in the opposition to summary judgment (and did not mention statutory or regulatory duty or breach thereof in the complaint). (The complaint alleged misrepresentations on the application but specified only the net worth and income items mentioned above, similar to the opposition to summary judgment.) Aviva points out that if Appellant would have made this claim below, it would have responded with evidence that it provided a replacement disclosure, noting that the pertinent evidence was provided to Appellant in discovery.

{¶115} The appellate court need not rule on a new legal argument which was waived by failing to raise it with the trial court when responding to a summary judgment motion. *Union Loc. Sch. Dist. v. Grae-Con Constr. Inc.*, 2019-Ohio-4877, 137 N.E.3d 122, ¶ 30-32 (7th Dist.). Here, Appellant is setting forth a new factual claim and a corresponding legal theory, neither of which were previously raised in arguing against summary judgment.

{¶116} "Even though this is a de novo review of a summary judgment decision, there is no 'second chance to raise arguments' that should have been raised before the trial court." *National College Student Loan v. Irizarry*, 7th Dist. Mahoning No. 14 MA 50, 2015-Ohio-1798, ¶ 31, quoting *American Express Centurian Bank v. Banaie*, 7th Dist. Mahoning No. 10MA9, 2010-Ohio-6503, ¶ 24. "When the non-moving party fails to raise an argument when responding to the motion for summary judgment, the party forfeits the right to raise that argument on appeal." *Federal Natl. Mtge. Assn. v. Porter*, 9th Dist. Summit No. 28600, 2017-Ohio-8852, ¶ 12 (refusing to address an assignment of error on implied contract via payment history where this was not raised in opposition to summary judgment). Accordingly, the merits of the argument set forth herein cannot be addressed, and this assignment of error is overruled.

A/E 8 (part 2): NONDISCLOSURE ON NEGLIGENT MISREPRESENTATION

{¶117} As set forth above, Appellant's eighth assignment contests the summary judgment entered on the negligent misrepresentation claim due to the lack of an expert. In the second part of the eighth assignment of error, Appellant invokes the

aforementioned replacement disclosure law similar to the argument in the sixth assignment of error addressed immediately supra. She claims an expert was not needed to support the negligence claim because the statute provides the duty and the breach and her reliance can be inferred as the replacement disclosure would have warned her about annuity withdrawals to pay for life insurance. Appellant adds that an expert is not required as there is negligence per se if an agent failed to provide the state-mandated disclosures.

{¶118} Again, Appellant's opposition to summary judgment did not cite the replacement disclosure law, argue replacement disclosure was required, or point to evidence that she was not provided the required disclosures in connection with the 2013 or 2015 life insurance policies. Nor did she mention negligence per se. As the premise was not raised below, Appellees were deprived of the ability to argue or present evidence in opposition. Consequently, Appellant waived this issue, and we cannot address the merits of Appellant's contention that the negligent misrepresentation claim was supported by a violation of the replacement disclosure law. Because the topic was not raised to the trial court, the trial court could not err on the ground herein asserted. *See Union Loc.*, 2019-Ohio-4877 at ¶ 30-32; *Federal Natl. Mtge.*, 2017-Ohio-8852 at ¶ 12; *National College*, 2015-Ohio-1798 at ¶ 31. Part two of the eighth assignment of error is therefore overruled.

A/E/ 7: FRAUD

{¶119} Appellant's seventh assignment of error contends:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF FRAUD AND DECEIT."

{¶120} The trial court stated the fraud claim arose out of the personal loan made by Appellant to Ferrara. In granting summary judgment on the fraud claim, the trial court found it was not a tort to breach the contract, fraud cannot be predicted on a promise about future actions unless there was no intent to perform, and Appellant failed to establish fraud based on a mere promise to make future payments under the loan. *See Link v. Leadworks Corp.*, 79 Ohio App.3d 735, 742, 607 N.E.2d 1140 (8th Dist.1992) (unless there is no intent on the part of the promisor to perform, the general rule prohibits a fraud claim based on a promise of future performance); *Gervace v. Master Foods Inc.*, 8th Dist. Cuyahoga No. 37643, 1978 ("Mere predictions about the future, expectations, or

opinions are not fraudulent misrepresentations unless those opinions are fraudulently stated. * * * An unfulfilled promise to do something in the future, gives rise to an action for breach of contract, not a fraudulent misrepresentation.")

{¶121} Appellant's brief does not argue the trial court erred in ruling that she failed to present evidence supporting her claim that Ferrara committed fraud in obtaining the personal loan (as opposed to merely breaching a contract or a fiduciary duty). Instead, Appellant argues that the replacement disclosure law provides a statutory fraud claim which eliminates the need to prove the elements of common law fraud. Appellant says she "need not prove the elements of common law fraud but only the failure to comply with the disclosure requirements of the replacement law." She states the law provides the duty and her reliance can be presumed as a result of the material omission. For the reasons expressed in the prior assignment of error, this is not a proper subject in this appeal.

{¶122} Appellant did not mention a statutory or regulatory fraud claim in her complaint or in opposition to summary judgment. As set forth in the prior assignment of error, a new factual allegation and a new corresponding legal theory cannot be relied upon in an appeal when that subject was never raised to or decided by the trial court. We cannot find the court erred in failing to find the state replacement law per se demonstrated her fraud claim where Appellant did not mention the state disclosure law or allege that it was violated in her opposition to summary judgment.

{¶123} As to the failure of the complaint to specify a lack of replacement disclosures, an additional legal principle comes into play for the fraud claim. Appellant believes the complaint sufficiently encompassed the state-mandated replacement disclosure issue. In the context of arguing the replacement disclosure law established the fraud claim for her, Appellant's brief says (at page 38): "Nonetheless, the trial court found that Hanick's claim for fraud against Ferrara was limited to the loan. However, Hanick's claim for fraud against Ferrara encompassed all his misrepresentations, omissions, and nondisclosures regarding the loan as well as those related to the replacement of her annuities."

{¶124} Even if, under notice pleading, the complaint could have sufficiently encompassed the replacement disclosure topic for a negligence or breach of fiduciary claim (had it been raised in opposing summary judgment), fraud is different. When

averring fraud in the complaint, the circumstances constituting fraud shall be set forth with particularity. Civ.R. 9(B). Appellant does not discuss this requirement or cite the particularities she set forth in her complaint on the replacement disclosure violations. The argument set forth in this assignment of error related to the fraud claim is overruled as the trial court could not err in failing to find a genuine issue remained on a fact (and a statute) not raised in opposition to summary judgment.

{¶125} Lastly, Appellant's reply brief attempts to assign two new errors on the fraud claim. Her reply brief argues the fraud claim did not only include the loan inducement allegation as the trial court held, but it also included the allegation of unauthorized withdrawals. In setting forth the cause of action for fraud, the complaint discussed the loan and then complained of Ferrara's unauthorized withdrawals from her annuity to repay the loan and to pay her life insurance premiums. The amounts and dates were not set forth within that claim. In the first sentence of the fraud claim, Appellant purported to incorporate by reference the foregoing paragraphs of the complaint. In those prior paragraphs, she mentioned an unauthorized March 2015 annuity withdrawal allegedly initiated by Ferrara.[5] However, where a plaintiff must plead the fraud claim with particularity, a broad reference to the prior seven pages of the complaint (some of which contain the negligent misrepresentation allegations) will not satisfy the Civ.R. 9(B) obligation. The court is not required to comb the factual recitations for arguable fraud claims.

{¶126} Appellant's initial brief on appeal complained the court found the fraud claim was limited to the loan, but this was in the context of arguing that the fraud claim also applied to the lack of replacement disclosures. Appellant's brief did not specifically raise an argument about unauthorized withdrawals under the fraud assignment of error. A reply is not the proper place to assign a new error by the trial court. *Shutway v. Chesapeake Expl. LLC*, 2019-Ohio-1233, 134 N.E.3d 721, ¶ 77 (7th Dist.). Moreover, Appellant never addresses compliance with Civ.R. 9(B). Additionally, this court has discretion to refuse to consider the entire assignment of error (and the final assignment

[5] We note that Appellant's own submissions in response to summary judgment contain her statement that she provided verbal consent for Ferrara to withdraw annuity funds in June 2014 and for a $2,000 withdrawal in January 2015. Contrary to an irrational suggestion, there was no indication Ferrara attempted to repay the loan by having Aviva send her a check from her annuity (after she asked about loan repayment *and* said she needed money for hearing aids). Plus, she admitted the insurer instructed her to return the March 2015 check to negate the withdrawal, but she chose to cash the check instead.

of error) since these arguments are contained in the parts of the brief that far exceeded the page limit without leave of court. *See* App.R. 19(A); 7th Dist. Loc.R. IV.

{¶127} Similarly, Appellant's initial brief did not challenge the trial court's decision that she failed to raise a genuine issue on common law fraud in inducing her to make the personal loan. The appellee's brief filed by Ferrara alternatively supported the disposal of the fraud claim by arguing in favor of the trial court's decision that his breach of contract was not a tort as there was no evidence he entered the contract with an intent to default on the loan. Appellant's *reply brief* states that Ferrara's fraud in the inducement of the May 2014 loan was evidenced by his long delay in beginning repayment (where the terms required the first payment in June and a balloon payment in November 2014). Contrary to the evidence she presented below, she now says she received the first loan payment in May 2015 (after she obtained counsel). However, she elicited testimony at Ferrara's deposition that her own exhibits showed he made payments in October and December of 2014. He was also asked to arrive at a total from her exhibits. Those exhibits (which she filed with the trial court) contain evidence of a loan payment in August 2014, only two months after the first payment was due.

{¶128} Furthermore, her opposition to summary judgment did not directly respond to the assertion in the motion for summary judgment that Ferrara's failure to timely repay the loan was not fraud (and a breach of contract claim was not filed). In any event, an appellant cannot use the reply brief to assign a new error by the trial court. *Shutway*, 2019-Ohio-1233 at ¶ 77.

CONCLUSION

{¶129} This court hereby overrules assignments of error one, two, and three (which contest discretionary decisions). We also overrule assignments of error six, seven, and part two of eight (which rely on a waived argument).

{¶130} Assignments of error four and five are sustained (as there was evidence of a special relationship and expert testimony was not required for the breach of fiduciary duty claim). As an expert was not required to support various allegations of negligent misrepresentation, we also sustain part one of assignment of error eight (except to the extent Appellant raises misrepresentations in the insurance application).

{¶131} In accordance, we affirm the trial court's discretionary decisions on the motion for extension, motion for leave to amend, and motion to quash. The entry of

summary judgment on the fraud claim is affirmed as is the part of the decision that would preclude further proceedings on the alleged misrepresentations in the insurance application. The entry of summary judgment is reversed as to the other aspects of the negligent misrepresentation claim and as to the breach of fiduciary duty claim, and the case is remanded for further proceedings consistent with this opinion

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed in part. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.