[Cite as *Butt v. Butt,* 2024-Ohio-4689.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FREDERICK A. BUTT	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	Hon. Andrew J. King, J.
-vs-	:	
	:	
GREGORY A. BUTT	:	Case No. 24CA0027
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 22-CV-846
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	September 25, 2024

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
G Q BUCK VAILE 776 Worthington New Haven Road Marengo, OH 43334	DAVID WATKINS KEVIN DUNN 411 East Town Street Floor 2 Columbus, OH 43215

King, J.

{¶ 1} Plaintiff-Appellant, Frederick A. Butt, appeals the February 1, 2024 judgment entry of the Court of Common Pleas of Licking County, Ohio, granting summary judgment to Defendant-Appellee, Gregory A. Butt. We affirm the trial court.

FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellant is the father of appellee. In 2012, appellee moved into a home jointly owned by his father and his father's sister. Appellee made improvements to the home and paid the property taxes and insurance.

{¶ 3} On October 4, 2018, appellant executed a quit-claim deed to Gregg A. Butt, Trustee of the Gregg A. Butt Trust Agreement, transferring his interest in the property to appellee. The sister also transferred her interest in the property to appellee. Twenty-two months later, appellee moved approximately seventeen miles away.

{¶ 4} On August 2, 2022, appellant filed a complaint against his sister and appellee, alleging fraud in the inducement, fraud in the execution, and civil conspiracy to perpetuate the fraud. Appellant sought to nullify the quit-claim deed "for want of consideration" and "no meeting of the minds." On March 20, 2023, appellant voluntarily dismissed his sister from the action, in effect eliminating the civil conspiracy claim.

{¶ 5} On August 22, 2023, appellant filed a motion to amend the complaint. By judgment entry filed September 26, 2023, the trial court denied the motion. Upon reconsideration, the trial court again denied the motion to amend.

{¶ 6} On October 16, 2023, appellee filed a motion for summary judgment, claiming no genuine issues of material fact to exist as appellant knowingly and willingly transferred his interest in the property to him and there was no evidence of fraudulent

conduct. Appellant filed a response on November 15, 2023, essentially claiming the parties never had a "meeting of the minds" as to consideration. Appellant believed appellee would live in the home and be in close proximity to help him and his sister as they aged. Instead, twenty-two months after the property was deeded to appellee, appellee moved approximately seventeen miles away. Appellant argued because appellee moved away, there was a want of consideration. Appellant further argued summary judgment would preclude his rights under Article I, Sections 5 and 16 of the Ohio Constitution.

{¶ 7} On November 15, 2023, appellant filed a request for a jury demand without leave. By judgment entry filed November 20, 2023, the trial court denied the motion.

{¶ 8} By judgment entry filed February 1, 2024, the trial court granted appellee's motion for summary judgment, finding consideration was recited in the deed so appellant's interest in the property transferred by a deed of purchase, not a deed of gift. The trial court found because parol evidence could not be used to establish a deed of gift and defeat a deed of purchase, it found no genuine issue of material fact to exist.

{¶ 9} Appellant filed an appeal with the following assignments of error:

I

{¶ 10} "THE TRIAL COURT ERRED WHEN IT RULED THAT THE PAROL EVIDENCE RULE NEGATED THE POSSIBILITY OF THE PLAINTIFF PREVAILING ON HIS CLAIMS ENUMERATED IN HIS COMPLAINT."

II

{¶ 11} "THE TRIAL COURT ERRED IN ALLOWING THE FILING OF A MOTION FOR SUMMARY JUDGMENT BY THE DEFENDANT AND IN SUSTAINING THE SAME

AS SAID FILING IS UNCONSTITUTIONAL BECAUSE IT HAS THE EFFECT OF DENYING THE PLAINTIFF THE RIGHT TO SEEK REDRESS AND A TRIAL BY JURY GUARANTEED BY SECTIONS 5 AND 16 OF ARTICLE I OF THE OHIO CONSTITUTION AND THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA."

III

{¶ 12} [IDENTICAL WORDING OF ASSIGNMENT OF ERROR II].

IV

{¶ 13} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE PLAINTIFF THE RIGHT TO AMEND HIS COMPLAINT."

I

{¶ 14} In his first assignment of error, appellant claims the trial court erred in ruling parol evidence was not permitted. We agree, but affirm the summary judgment ruling under de novo review.

{¶ 15} Appellant argues he should have been permitted to submit parol evidence to show his claims of fraud in the inducement and fraud in the execution. Specifically, appellant argues had he known it was appellee's intention to move out of the home, approximately seventeen miles away, he would have never deeded over his interest in the property; in appellant's mind, the "consideration" to transfer the property was appellee's commitment to live in the home and help care for him and his sister as they aged. *See* November 15, 2023 Response to Summary Judgment at 2-3. Appellant argues appellee misrepresented his intentions which negated any meeting of the minds

to deed over the property. In support of his argument, appellant cites the following from *Clemente v. Gardner,* 2004-Ohio-2254, ¶38-39 (5th Dist.):

> The parole evidence rule is designed to protect the integrity of final, written agreements. *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313, 109 N.E.2d 265. In general, the parole evidence rule states that "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish v. Cicchini,* 90 Ohio St.3d 22, 27, *2000-Ohio-7,* 734 N.E.2d 782 (quoting 11 Williston on Contracts (4 Ed.1999) 569–570, Section 33:4). The parole evidence rule excludes extrinsic evidence "because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself." *Id.* "If contracting parties integrate their negotiations and promises into an unambiguous, final, written agreement, then evidence of prior or contemporaneous negotiations, understandings, promises, representations, or the like pertaining to the terms of the final agreement are generally excluded from consideration by the court." *Bollinger v. Mayerson* (1996), 116 Ohio App.3d 702, 712, 689 N.E.2d 62 (citing *Durkee,* 158 Ohio St. 313, 109 N.E.2d 265, at paragraph two of the syllabus).
>
> However, even if we assume arguendo that the parole evidence rule is applicable as appellant argues, the parole evidence rule cannot prevent

> a party from introducing extrinsic evidence for the purpose of proving fraudulent inducement. See *Galmish v. Ciccihini,* supra. It "was never intended that the parole evidence rule could be used as a shield to prevent the proof of fraud, or that a person could arrange to have an agreement which was obtained by him through fraud exercised upon the other contracting party reduced to writing and formally executed, and thereby deprive the courts of the power to prevent him from reaping the benefits of his deception or chicanery." *Galmish v. Cicchini,* supra. (citing 37 American Jurisprudence 2d [1968] 621–622, Fraud and Deceit, Section 451). We find this logic applicable to issues of fraudulent inducement and negligent misrepresentation. This court finds that there was a genuine issue of material fact as to whether appellant committed fraudulent inducement or negligent misrepresentation. As such, appellant was not entitled to a grant of summary judgment.

{¶ 16} In his motion for summary judgment, appellee claimed appellant knowingly and willingly transferred the property and the transfer was a gift, notwithstanding the fact that the deed specifically indicated the transfer was made "for valuable consideration paid." *See* October 16, 2023 Motion for Summary Judgment at 3-5; Quit-Claim Deed attached to August 2, 2023 Complaint as Exhibit A. Appellee supported this claim with appellant's deposition testimony. Then, anticipating that appellant would argue a lack of consideration since it was a gift, appellee argued parol evidence was not admissible "to

affect the legal operation of the quit-claim deed." *Id.* at 6. In support, appellee argued the case of *McCoy v. AFTI Properties, Inc.,* 2008-Ohio-2304 (10th Dist.).

{¶ 17} In *McCoy,* the transferor alleged misrepresentation and argued the transfer in the quit-claim deed was made without consideration; therefore, the deed could be rescinded. The trial court reviewed the evidence presented during the hearings held and determined there was no evidence of misrepresentation and the transfer was a gift and as such, could not be rescinded. The deed in question contained the following language: "for valuable consideration paid." *Id.* at ¶ 6. In reviewing the trial court's decision, the Tenth District first stated: "When construing a deed, a court must examine the language contained within the deed, the question being not what the parties meant to say, but the meaning of what they did say, as courts cannot put words into an instrument which the parties themselves failed to do." *Id.* at ¶ 8, citing *Larwill v. Farrelly,* 8 Ohio App. 356, 360 (5th Dist. 1918). The court noted the trial court had "accepted the parties' representations that no consideration was actually exchanged for the transaction and proceeded to address whether the property was a gift." *Id.* at ¶ 10. The court found the trial court did not err in finding the deed could not be rescinded, but erred in finding the transfer was a gift as opposed to a transfer by deed of purchase. *Id.* at ¶ 14. The court stated the following at ¶ 11:

> Further, in determining whether an instrument for the conveyance of land is a deed of gift or a deed of purchase, its recitals of the payment and receipt of the consideration are material and concern the operation and effect of the deed. *Patterson v. Lamson* (1887), 45 Ohio St. 77, 89–90, 12

> N.E. 531. Thus, when a deed contains a recital of a valuable consideration received from the grantee, it is to be construed as a deed of purchase, and parol evidence may not be used to show that it was instead a deed of gift. *Groves v. Groves* (1902), 65 Ohio St. 442, 62 N.E. 1044, syllabus; *Natl. Bank of Lima v. Allen* (1952), 104 N.E.2d 469, 65 Ohio Law Abs. 27. The underlying rationale for this principle is apparent given the requirement of the statute of frauds for a writing when real property is involved. Attempts to prove assertions contradictory to the terms in the written instrument through parol evidence is exactly what the statute of frauds was designed to prohibit.

{¶ 18} The court found the language in the deed, "for valuable consideration paid," was unambiguous and such a consideration clause "is conclusive as to the amount, kind, and receipt of consideration and is not open to explanation by parol proof." *Id.* at 13. The court determined "the operation and effect of such deed was not subject to contravention, and the property must be deemed to have passed by deed of purchase." *Id.* at 14.

{¶ 19} Here, the trial court cited relevant case law, including the *McCoy* case, and determined because consideration was recited in the deed, appellant's transfer passed as a deed of purchase, not as a deed of gift. We agree with this determination.

{¶ 20} In his complaint, appellant sought to nullify the quit-claim deed "for want of consideration" and "no meeting of the minds." *See* August 2, 2022 Complaint at ¶ 7. Appellant did not argue a gift conveyance and/or a lack of consideration, he challenged the meaning of "valuable consideration." He argued consideration to him meant appellee

was going to remain living in the home to care for him and his sister and he did not receive what he expected to receive when appellee moved out. He argued whether appellee intentionally misled him or there was a misunderstanding between the parties is an issue of material fact. *See* November 15, 2023 Response to Summary Judgment at 5. This was the basis of his fraud claims, fraudulent inducement and fraudulent execution.

{¶ 21} Fraudulent inducement arises "when a party is induced to enter into an agreement through fraud or misrepresentation." *Coleman v. Galati,* 2017-Ohio-8034, ¶ 16. In order to prove fraud in the inducement, "a plaintiff must prove the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and the plaintiff relied upon that misrepresentation to his or her detriment." *Id.* Fraud in the execution or fraud in the factum arises when "a legal instrument as actually executed differs from the one intended for execution by the person who executes it, or when the instrument may have had no legal existence." *Lou Carbone Plumbing, Inc. v. Domestic Linen Supply & Laundry Co.*, 2002-Ohio-7169, ¶ 11 (11th Dist.), quoting *Black's Law Dictionary* (7th Ed.Abridged 2000). The trial court found it was improper for appellant to use parol evidence to prove his claims and defeat the operation of the deed. We disagree with this determination.

{¶ 22} As noted in *McCoy,* 2008-Ohio-2304, at ¶ 9 (10th Dist.), "failure of consideration does not inevitably result in a rescission, or cancellation, of a deed. It is well-settled that the mere failure of consideration, whether partial or total, when unmingled with fraud or bad faith, is not sufficient to warrant the rescission of an executed contract, such as a deed." Key in this quote are the words "unmingled with fraud or bad faith." In a case heavily cited by the trial court here, *Grimes v. Grimes,* 2009-Ohio-3126 (4th Dist.),

the Fourth District found an executor contesting a deed "may introduce parol evidence to prove undue influence, which would lead to the *equitable* rescission of the deeds" but "may not use parol evidence to try and change the *legal* operation of the deeds." (Emphasis in original.) *Id.* at ¶ 26. "'It is only where there is an equitable ground for reformation or rescission, such as fraud, duress, undue influence or mistake, that such [parol] evidence is admissible.'" *Freedman v. Freedman,* 83 N.E.2d 112, 115 (8th Dist. 1948), quoting *Scott on Trusts,* Vol. 1, page 226, Sec. 38.

{¶ 23} As noted by the Supreme Court of Ohio, "the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement." *Galmish v. Cicchini*, 90 Ohio St.3d 22, 28 (2000). The Court explained the following:

> "The principle which prohibits the application of the parol-evidence rule in cases of fraud inducing the execution of a written contract * * * has been regarded as being as important and as resting on as sound a policy as the parol-evidence rule itself. It has been said that if the courts were to hold, in an action on a written contract, that parol evidence should not be received as to false representations of fact made by the plaintiff, which induced the defendant to execute the contract, they would in effect hold that the maxim that fraud vitiates every transaction is no longer the rule; and such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing.

> "Fraud cannot be merged; hence the doctrine, which is merely only another form of expression of the parol-evidence rule, that prior negotiations and conversations leading up to the formation of a written contract are merged therein, is not applicable to preclude the admission of parol or extrinsic evidence to prove that a written contract was induced by fraud." (Footnotes omitted.)

Id., quoting Annotation, *Parol–Evidence Rule; Right to Show Fraud in Inducement or Execution of Written Contract,* 56 A.L.R. 13, 34-36 (1928).

{¶ 24} Here, appellant alleged fraud as explained above; therefore, the trial court should have looked to parol evidence to consider the fraud allegations, but did not do so.

{¶ 25} Because this court has de novo review, we now turn to the parol evidence in the record.

{¶ 26} In his affidavit, appellant stated he was 77 years old and averred the following in pertinent part:

> 9. When we spoke, Gregg indicated to me that he would like to have the home and that he would take care of it, and in exchange for the home, he would be present to provide care and assistance to both my sister, Marilyn Sue Ratai, and myself for the rest of our lives.
>
> 13. Based on Gregg's apparent willingness to make the commitment to care for the two of us as we got older and to help with situations that we

would no longer be able to accomplish on our own, I agreed to transfer my interest in the property to him.

14. My sister, Marilyn Sue Ratai, was also agreeable to do so and contacted an attorney to draw up the necessary paper work for us to complete the transfer of the property to Gregg Butt.

17. Approximately 22 months after the property in question was transferred to Gregg Butt, Gregg Butt moved from that home to a location in Centerburg, Ohio which is approximately 17 to 18 miles away from my home and that of my sister's.

18. Gregg's move was a surprise to me as I had no idea that he was planning to leave the home that my sister and I had deeded to him.

19. Once Gregg moved he was about a half hour away by car on a good day from myself and his Aunt Sue, and possibly longer if the weather or road conditions were difficult.

20. In other words, Gregg would no longer be able to respond rapidly to any needs that I and/or my sister would have simply due to the added distance between our houses and his new home.

21. My original understanding was that Gregg would remain in my mother's home at least until Sue Ratai and I had passed away in order to continue to assist us with situations that we could not manage and/or in case of an emergency.

> 22. In point of fact, had I known prior to transferring my interest in the property to Gregg that he had no intention of remaining in the home until after my sister and myself had passed, I would not have made the transfer.

{¶ 27} In his deposition, appellant was unable to answer the questions pertaining to the circumstances of the transfer. F. Butt depo. at 21-25. Much of appellant's testimony consisted of complaints about appellee making improvements to the home without his knowledge, all done prior to the deed transfer. *Id.* at 25-28, 37, 40-42, 59. Appellant did not offer any testimony as to his understanding of what the consideration for the transfer consisted of nor did he testify to any promises made by appellee that induced him to transfer the property. Appellant had difficulty explaining the allegations in his complaint and remembering details before, during, and after the transfer. Most of his deposition testimony focused on the conspiracy allegation that was not pursued after appellant dismissed his sister from the case.

{¶ 28} Appellant's sister gave her deposition. She stated she was "willing to give up my half of the inheritance so his son could benefit to move in and help us in our older ages doing splitting of the wood, mowing, and so forth and so on." Ratai depo. at 7-8. She provided no other testimony relevant to appellant's fraud allegations. She did not testify to the parties' understanding of the consideration or any promises made by appellee.

{¶ 29} Appellee did not submit an affidavit, but did give a deposition. He testified to all the work he did to the property prior to the transfer: new roof, tree trimming, flooring, cabinets, well, septic, windows, tankless water heater, and updates to a bathroom, the

kitchen, and an attached garage. G. Butt depo. at 21-27. No questions were asked of him relevant to the transfer and what his understanding was of the consideration i.e., whether he ever promised to live in the home and care for his father and aunt until they passed away.

{¶ 30} The only evidence appellant submitted in support of his fraud claims is his statements made in his affidavit. He did not support his statements with any evidentiary evidence of who promised what and what he relied on. The three depositions were devoid of testimony about any consideration and/or the terms of the transfer. "A nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit contradicting the evidence offered by the moving party." *Guernsey County Community Development Corp. v. Speedy*, 2024-Ohio-1039, ¶ 58 (5th Dist.). A self-serving affidavit that is not corroborated by any evidence is insufficient to establish the existence of an issue of material fact. *Wells Fargo Bank v. Blough,* 2009-Ohio-3672, ¶ 18 (4th Dist.); *Shreves v. Meridia Health System,* 2006-Ohio-5724, ¶ 27 (8th Dist.) ("a party's unsupported and self-serving assertions offered to demonstrate issues of fact, standing alone and without corroborating materials contemplated by Civ.R. 56, are simply insufficient to overcome a properly supported motion for summary judgment"). Appellant failed to meet his reciprocal burden to submit evidentiary quality material supporting his position.

{¶ 31} We find the record does not show that appellee knowingly made a material misrepresentation to induce appellant to transfer the property and appellant in fact relied upon the misrepresentation; there is no evidence of a failure of consideration.

{¶ 32} Under our de novo review, we find the trial court did not err in granting summary judgment to appellee.

{¶ 33} Assignment of Error I is denied.

II, III

{¶ 34} In his second and third assignments of error, appellant claims summary judgment under Civ.R. 56 is unconstitutional under the United States and Ohio Constitutions. We disagree.

{¶ 35} We first address his claim under two sections of the Ohio Constitution.[1]

{¶ 36} Article I, Section 5 of the Ohio Constitution states: "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." We begin with this text and endeavor to ascertain and declare its ordinary meaning. *Olentangy Local School Board of Education v. Delaware County Board of Revision*, 2023-Ohio-3984, ¶ 22. *See also State v. Yerkey*, 2022-Ohio-4298, ¶ 9. To find the text's meaning, we must focus on the public meaning of the text under review. *Yerkey* at ¶ 9. This approach reflects that our constitution and its amendments are subject to ratification by the voting public. *Id.*

{¶ 37} A corollary to this is we necessarily have to consider the language in the context of its time of ratification. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). Justice Gorsuch, writing for the Court, observed we do this for at least two reasons: it prevents amendment by judicial decision, and it could upset settled reliance interests. *Id.*

[1]In support of his arguments, appellant cites as his authority a law review article, Suja A. Thomas, *Why Summary Judgment is Unconstitutional,* 93 Va.L.Rev. 139 (2007).

We also do this because the meaning of words and phrases can "drift" over time. *See id.* at 540 (Justice Gorsuch explaining how the ordinary public meaning of "employment agreements" has changed over time); *see also* Lawrence B. Solum, *Original Public Meaning,* 2023 Mich.St.L.Rev. 807, 813 (2024) (explaining the meaning of "dollar" has changed since 1791). While this linguistic drift is perfectly acceptable in other contexts, when evaluating texts such as constitutions and statutes, we are obliged to consider the meaning of those texts fixed at the time of ratification or enactment. *Original Public Meaning* at 815; *see also Yerkey* at ¶ 9.

{¶ 38} The language presently found in Article I, Section 5 of the Ohio Constitution is as old as our state, first appearing in the Constitution of 1802. *McClain v. State*, 2021-Ohio-1423, ¶ 35 (Bergeron, J., dissenting). This language was ratified again in 1851, which is part of our present constitution. Although a 1912 amendment set a limit on the number of jurors required to concur in a verdict, it was not otherwise changed. *Id.* So, more narrowly framed, our inquiry is how the meaning of the phrase "the right of trial by jury shall be inviolate" would have been understood by the public at the point of ratification.[2]

{¶ 39} The leading case on the original public meaning of Article I, Section 5 reflects the judicial effort to effectuate the textual meaning fixed at the time of ratification:

> Section 5 of the Ohio Bill of Rights provides that 'the right of trial by jury shall be inviolate,' etc. It was not, however, the *intention of the framers*

[2]Because there are potentially three different ratification dates, there might be an issue in other cases determining the relevant period. But here, the conclusion is the same irrespective of which date is chosen.

> of that clause of the Bill of Rights to guarantee the right of trial by jury in all controversies. That guaranty only preserves the right of trial by jury in cases where under the principles of the common law it existed previously to the adoption of the Constitution. The right of trial by jury has uniformly been recognized and enforced in this state in actions for money, where the claim is an ordinary debt, but it is equally well recognized that many special proceedings for the enforcement of a moral duty, where the payment of money is the ultimate relief granted, does not entitle the parties to a jury trial.

(Emphsis added.) *Belding v. State ex rel. Heifner*, 121 Ohio St. 393, 396-397 (1929).

{¶ 40} In accord with *Belding*, our first step in determining the meaning of Article I, Section 5 is to ask whether the underlying case is consistent "under the principles of the common law it existed previously to the adoption of the Constitution" so that a jury trial is constitutionally required. We answer that question in the negative for the reasons that follow.

{¶ 41} Here, the dispute between the parties arises subsequent to the execution of a quit-claim deed and the conveyance of real property by appellant into a trust benefiting appellee. Appellant seeks to rescind the conveyance and cancel the deed, alleging fraud on the part of appellee. Thus, appellant's underlying claim to these remedies does not arise from the principles of common law; rather, it arises under equity. *See Miller v. Bieghler*, 123 Ohio St. 227, 228 (1931). We have previously held that a

party is not entitled to a jury trial for an equitable action under Article I, Section 5. *Green Tree Servicing, L.L.C. v. St. John*, 2015-Ohio-1111, ¶ 26. Because appellant was not entitled to a jury trial under the section, it cannot be the case that the summary judgment exercised here is unconstitutional.

{¶ 42} A brief review of Ohio's history and tradition regarding jury trials supports our conclusion that the text of Article 1, Section 5 allows summary judgment in cases rooted in equity as opposed to the common law. *Cable v. Alvord*, 27 Ohio St. 654, 661 (1875). In 1831 and again in 1852, the General Assembly passed legislation that granted the common pleas court original jurisdiction in all civil cases and both acts expressly included within "all civil cases" common law and equitable claims. *Id*. The distinction between law and equity was thus made early in our constitution and perpetuated by the General Assembly.

{¶ 43} We can see the distinction between the two has repeatedly impacted our appellate system too. In 1858, the General Assembly narrowed appeals de novo to only those cases where a party did not have a right to request a jury, which included (but were not exclusively) cases in equity. This distinction continued in the following decades and was discussed during the Constitutional Convention of 1912. *Proceedings and Debates of the Constitutional Convention of the State of Ohio - 1912,* at 1147-1157 (1912). The delegates ultimately retained this feature of our system and explicitly included it in its amendments to the jurisdiction of the courts of appeals. *Id*. As a result, the Supreme Court of Ohio later held that only chancery cases (not all cases without jury trials) could be appealed de novo. *Wagner v. Armstrong,* 93 Ohio St. 443, 446 (1916). In 1935, in an apparent attempt to simplify the complex appellate system resulting from the now

longstanding constitutional and historic distinction between law and equity, the General Assembly created appeals of law and appeals of law and fact. H.B. No. 42, 116 Ohio Laws 104. The latter of which continued until 1971 when App.R. 2 abolished those appeals.

{¶ 44} The point of this brief examination of the distinction between common law and equity in Ohio is to demonstrate that the distinction is longstanding, has been generally well understood, and the distinction has carried with it significant consequences to both the litigants and a court's authority in the case before it: thus, holding that a jury right arising under Article 1, Section 5 has no application in a summary judgment proceeding where the underlying case arises in equity.

{¶ 45} We reach a similar conclusion regarding the Seventh Amendment of the United States Constitution, which states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." The Supreme Court of the United States has likewise maintained a division between suits arising from the common law and those from equity. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830) (holding the right protected by the amendment included claims about legal rights but not equitable claims).

{¶ 46} Although it appears the Supreme Court has interpreted this federal right with less formality than Ohio courts have our constitutional right, the difference does not change the outcome. *See Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (directing courts to look at the nature of the action rather than the character of the overall action). Accordingly, we conclude the trial court's use of summary judgment did not violate appellant's rights under the Seventh Amendment of the United States Constitution.

{¶ 47} We turn to appellant's final claim: the trial court's summary judgment violated Article 1, Section 16 of the Ohio Constitution. The provision states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Here, appellant makes a general claim of his right under this provision that lacks specificity.

{¶ 48} We begin evaluating this claim by reviewing the Supreme Court of Ohio's decision in *Stolz v. J & B Steel Erectors, Inc.,* 2018-Ohio-5088. In considering whether the provision includes the right to a remedy, the court held "the right-to-remedy provision applies only to existing, vested rights and that the legislature determines what injuries are recognized and what remedies are available." *Id*. at ¶ 17. Here, appellant was entitled to plead a right and injury and seek a remedy. His case proceeded to summary judgment, where it was disposed of on the merits consistent with Civ.R. 56. This appears consistent with Article I, Section 16. To the extent appellant argues otherwise, the legislature was not required to enact a jury trial for his claim under this provision. To read this provision of Ohio's Constitution to mandate jury trials would render much of Article I, Section 5 as mere surplusage. Moreover, treating Article I, Section 16 as also regulating juries would avoid the constitutional requirement about juror concurrence. Thus, whatever affirmative right appellant has to a jury trial is determined under Section 5 rather than Section 16 of Article 1.

{¶ 49} Upon review, we do not find a summary judgment decision under Civ.R. 56 to be unconstitutional under the United States and Ohio Constitutions; we do not find a violation of appellant's constitutional rights.

{¶ 50} Assignments of Error II and III are denied.

IV

{¶ 51} In his fourth assignment of error, appellant claims the trial court erred and abused its discretion in denying his right to amend his complaint. We disagree.

{¶ 52} The decision to allow a party leave to amend a complaint will not be reversed absent an abuse of discretion. *Hoover v. Sumlin,* 12 Ohio St.3d 1 (1984). "Abuse of discretion" means an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.,* 19 Ohio St.3d 83, 87 (1985). Most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.,* 50 Ohio St.3d 157, 161 (1990). An unreasonable decision is one backed by no sound reasoning process which would support that decision. *Id.* "It is not enough that the reviewing court, were it deciding the issue *de novo,* would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *Id.*

{¶ 53} Civ.R. 15 governs amended pleadings. Subsection (A) states the following in pertinent part:

> A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may

> amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires.

{¶ 54} "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." *Turner v. Central Local School District*, 85 Ohio St.3d 95, 99 (1999).

{¶ 55} The complaint was filed on August 2, 2022. Appellee answered on September 28, 2022, with consent of appellant. In a pretrial entry filed December 1, 2022, the trial court set February 28, 2023, as the date to complete depositions, and May 1, 2023, as the final date to file pretrial motions. These dates were extended several times. Depositions were completed on March 17, 2023. On August 22, 2023, appellant filed a motion for permission to file a first amended complaint instanter. This motion was filed fourteen days before the new filing deadline for pretrial motions, September 5, 2023. But, in an agreed order filed August 31, 2023, the parties agreed to file any pretrial motions, including motions for summary judgment, twenty-one days after the trial court's ruling on appellant's motion to amend the complaint. In an order filed September 8, 2023, the trial court set a bench trial for February 5, 2024.

{¶ 56} The original complaint listed two causes of action, one being the conspiracy allegation that was no longer viable after appellant dismissed his sister from the case. The amended complaint was similar to the original complaint, but listed four causes of action, minus the conspiracy claim. Appellee argued he would be prejudiced if appellant was permitted to amend the complaint because he answered the complaint, conducted

discovery based on the complaint, and his counsel conducted research to support a motion for summary judgment based on the claims in the complaint. *See* September 14, 2023 Memorandum Contra at 2-3.

{¶ 57} Appellant countered he had just received a requested item from appellee and was still awaiting a second item. *See* September 18, 2023 Response at 1-2. Appellant noted numerous extensions had been granted and the bench trial was still five months away. *Id.* at 2. Appellant argued appellee would not be prejudiced by the amended complaint, as the additions were being done in "the spirit of full disclosure" so appellee "would know with some particularity" on what the allegations were based. *Id.* at 3. He argued he was attempting "to lay out clearly his position in this matter for the benefit of both the Defendant and the Court." *Id.*

{¶ 58} In a judgment entry filed September 26, 2023, the trial court denied the motion, stating the following: "The Court notes the case was filed August 3, 2022. The matter was set for pretrial conference on December 1, 2022. No amendments to the pleadings were discussed or noted in the pretrial entry. The Court also notes the matter is scheduled for trial January 5, 2024."

{¶ 59} The bench trial was actually set for one month later. And no amendment to the pleadings were discussed during the pretrial conference on December 1, 2022, because depositions had not yet been taken. But depositions were completed on March 17, 2023, and appellant waited five months before filing his motion to amend his complaint.

{¶ 60} In his appellate brief, appellant argues he had a prepared amended complaint ready to go within the first week after depositions, but "delayed filing it based

on the belief that it may need to be altered based on the information that the Defendant had agreed to provide." Appellant's Brief at 13. Appellant did not explain what those two items were or their relevance to the claims in the amended complaint. In his motion to the court, appellant stated he was "waiting for two items that were requested during the deposition which Plaintiff believed were supportive of the Amended Complaint." *See* August 22, 2023 Motion for Permission to File First Amended Complaint at 2. During the deposition of appellee, appellant's counsel requested an audio recording of a meeting between the parties that had occurred two years prior and a list of the cost of the home improvements. G. Butt depo. at 8-9, 22-23, 50. Appellant's counsel was present for that meeting so he would be aware of what transpired during the meeting. *Id.* at 8-9. And the cost of the home improvements made prior to the transfer do not have any bearing on the parties' understanding of the consideration in the deed.

{¶ 61} Appellant has not shown any reason for the undue delay.

{¶ 62} Upon review, we find the trial court did not abuse its discretion in denying appellant's motion to amend his complaint.

{¶ 63} Assignment of Error IV is denied.

{¶ 64} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By King, J.

Delaney, P.J. and

Baldwin, J. concur.