[Cite as *Reid v. Plainsboro Partners, III*, 2010-Ohio-4373.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Madelynn Reid,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-442 (C.P.C. No. 05CVH12-14637)
Plainsboro Partners, III et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	
Lawrence W. Friel, Jr.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-456 (C.P.C. No. 05CVH05-5825)
Margaret E. Swartz,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 16, 2010

Carrie M. Varner, for appellant Madelynn Reid.

Onda, LaBuhn, Rankin & Boggs Co., LPA, Patrick H. Boggs and *Benjamin W. Ogg*, for appellant Margaret E. Swartz.

Giorgianni Law LLC, and *Paul Giorgianni*, for appellees Plainsboro Partners III, Columbus Junction Co., Bellows & Associates, Lawrence W. Friel, Jr., Jeffrey C. Bellows, Kathleen M. Underwood, and Tammi L. Tootle.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} In this consolidated appeal, Madelynn Reid ("Reid" or "appellants"), and Margaret E. Swartz ("Swartz" or "appellants"), appeal judgments rendered by the Franklin County Court of Common Pleas. For the following reasons, we affirm in part and reverse in part the judgments of the trial court.

{¶2} The factual background of this impassioned familial dispute regards a father, Lawrence W. Friel, Jr. ("Friel" or "appellees"), and his estranged twin daughters, Reid and Swartz. Although the record does not conclusively establish the relationships amongst the appellees in this matter, Friel and Jeffrey C. Bellows ("Bellows" or "appellees") are business partners who own, operate, or have some business interest in Columbus Junction Company, Bellows & Associates, Inc., and Plainsboro Partners III, L.P. dba Olde Mill Lakes Apartments ("appellees"). At all relevant times, Kathleen M. Underwood was employed by Bellows & Associates, Inc., while Tammi L. Tootle was allegedly employed by one or some number of the foregoing entities.

{¶3} In 2004, Reid resided in an apartment unit at the Olde Mill Lakes Apartments in Dublin, Ohio. She did not pay rent and was not residing there pursuant to a written lease. She had been living there under these terms for around seven years. According to the record, Friel frequently allowed Reid and her three siblings to live rent-free at his properties.

{¶4} In August 2004, Reid informed the property manager of Olde Mill Lakes Apartments that she was scheduled to undergo bilateral foot surgeries and would need a disability access ramp to make her apartment wheelchair accessible. On September 3,

2004, Swartz notified Reid that a ramp had been built. However, Swartz and Reid felt that the ramp appellees had constructed was unsafe and outside city code. As a result, over the next few weeks, appellants and appellees disputed various issues, including the ramp's specifications and the party who would ultimately be responsible for bringing the ramp up to code.

{¶5} Appellants contacted building inspectors and government agencies to raise issue with the ramp. On September 28, 2004, appellees sent Reid a letter informing her of their intent to remove the ramp. The letter also served as an eviction notice and gave Reid until October 31, 2004 to leave the premises. Days later, appellees recanted and indicated that Reid could remain on the property if she entered into a lease and began paying rent in the amount of $550 per month. Additionally, appellees granted permission for a new ramp to be installed.

{¶6} Based upon the circumstances, Reid filed a charge of disability discrimination with the Ohio Civil Rights Commission ("OCRC") on October 1, 2004 ("charge one"). The allegations of charge one referenced appellees' inability to construct an access ramp that met code requirements in addition to the threat of eviction that resulted from her complaints.

{¶7} In the middle of October 2004, appellants and appellees had a dispute over the installation of a viewer/peephole for the front door of Reid's apartment.

{¶8} Construction of the new ramp was completed in early December 2004. Reid acknowledged that the new ramp met code requirements but indicated that appellees needed to provide handicap parking and proper signage. Appellees agreed to

provide such by December 17, 2004, the date of a scheduled inspection. The day before the inspection, however, Reid had her own contractor paint a handicap parking space. Appellees then installed signage that Reid claimed was not in accordance with city code. As a result, Reid's contractor corrected the deficiencies. The ramp, parking space, and signage passed the inspection with minor modifications.

{¶9} As a result of these circumstances, Reid filed a charge of retaliation with the OCRC on December 21, 2004 ("charge two"). In charge two, Reid expressed her belief that appellees intended for the inspection to fail.

{¶10} In the meantime, the OCRC had been investigating charge one. In January 2005, the parties executed a conciliation agreement and consent order ("CACO") to resolve charge one. The OCRC approved the CACO, under which Plainsboro Partners III dba Olde Mill Lakes Apartments, Bellows & Associates, and their respective agents paid Reid $13,325 to resolve charge one without admitting to liability. Reid received the CACO check and deposited the funds on March 14, 2005. Three days later, she received a letter indicating she would be required to sign a lease and begin paying rent if she intended to remain at Olde Mill Lakes Apartments. The proposed rent was $650 per month. The letter gave Reid until April 17, 2005 to enter the lease.

{¶11} The OCRC informed Reid that its staff had recommended charge two receive a "no probable cause" finding. On March 24, 2005, Reid withdrew charge two before the OCRC issued its anticipated no probable cause order.

{¶12} Nevertheless, one day before charge two was formally withdrawn, Reid filed another charge with OCRC ("charge three"). Again, she alleged disability discrimination

and retaliation. Charge three was based upon appellees' request for Reid to enter into a lease and begin paying rent. The record indicates that charge three was amended on April 5, 2005. After investigating charge three, the OCRC found that no probable cause existed to support Reid's allegation that appellees engaged in discrimination.

{¶13} As Reid lodged these complaints, Swartz consistently participated in the disputes and supported Reid. In May 2005, Friel filed a complaint for breach of contract and unjust enrichment against Swartz in the Franklin County Court of Common Pleas. The case resulted from a loan that Friel provided to Swartz in the amount of $7,448.19 in June 1985. Based upon the allegations of the complaint, the unpaid debt accumulated interest and had grown to $93,993.39 at the time Friel filed his complaint. The matter was assigned as case No. 05CVH05-5825 ("5825 case"). In response, Swartz filed an answer and counterclaims, in which she alleged Friel engaged in discrimination and retaliation against Swartz based upon her involvement in the disputes amongst Reid and appellees.

{¶14} In June 2005, appellees initiated an eviction action against Reid in the Franklin County Municipal Court, which was assigned case No. 2005 CVG 023432. In July 2005, Reid filed her answer and counterclaims, which resulted in a transfer to the Franklin County Court of Common Pleas. The matter was assigned case No. 05CVH07-8122 ("8122 case") and was consolidated with the 5825 case. Eventually, however, the parties dismissed the claims and counterclaims in the 8122 case. However, Reid's claims were re-filed and assigned case No. 05CVH12-14637 ("14637 case"), which was again consolidated with the 5825 case. In the 14637 case, Reid presents causes of action against appellees for: (1) retaliation in violation of R.C. Chapter 4112 and the

Americans with Disabilities Act ("ADA"); (2) discrimination and harassment in violation of R.C. Chapter 4112 and the ADA; (3) violations of the Fair Housing Amendments Act of 1988 ("FHAA"); (4) intentional infliction of emotional distress; (5) violations of 42 U.S.C. 1985, 1986; (6) hostile environment in violation of R.C. Chapter 4112; (7) punitive damages; (8) retaliation in violation of R.C. Chapter 5321; and (9) violation of public policy.

I. The 14637 Case

{¶15} The claims in the 14637 case were all resolved when the trial court granted summary judgment in favor of appellees on September 20, 2006. An appeal followed, which this court dismissed based upon the absence of a final appealable order. See *Reid v. Plainsboro Partners III*, 10th Dist. No. 06AP-1099, 2007-Ohio-5655, ¶12. After the trial court resolved Swartz's retaliation claims in the 5825 case, Reid again appealed and raises the following assignments of error:

> I. THE COURT OF COMMON PLEAS ERRONEOUSLY APPLIED ORC 4112 06(H) THUS IMPROPERLY DISMISSING THE ENTIRE COMPLAINT OF PLAINTIFF-APPELLANT.
>
> II. THE COURT OF COMMON PLEAS ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON THE CLAIMS OF PLAINTIFF-APPELLANT.

Both of Reid's assignments of error challenge the trial court's decision to grant summary judgment to appellees. Therefore, the issue raised in Reid's portion of this consolidated appeal is whether summary judgment was properly granted against her.

{¶16} Appellate courts review decisions on summary judgment motions de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When

reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶17} Summary judgment is proper only when the party moving for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183. Additionally, a moving party cannot discharge its burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the non-moving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. Id.

{¶18} In her first assignment of error, Reid argues that the trial court erred in applying R.C. 4112.06 to reach the finding that it lacked subject-matter jurisdiction. We agree and find that the trial court erred when it granted summary judgment on this basis.

{¶19} "The filing of an unlawful discriminatory practice charge with the Ohio Civil Rights Commission under R.C. 4112.05(B)(1) does not preclude a person alleging handicap discrimination from instituting an independent civil action under R.C. 4112.99." *Smith v. Friendship Village of Dublin, Ohio, Inc.*, 92 Ohio St.3d 503, 2001-Ohio-1272, paragraph one of the syllabus. In the instant matter, the trial court distinguished *Friendship Village* because the aggrieved party therein filed a civil complaint within the 30-day time frame set forth in R.C. 4112.06, whereas Reid did not. (Trial court's decision granting summary judgment, Sept. 20, 2006, at 4.) Additionally, the trial court found that OCRC retained exclusive jurisdiction for two years after the CACO was signed. Id. These two distinctions overlook the basic idea that Reid filed this lawsuit not to challenge the CACO under R.C. 4112.06, but rather to pursue "an independent civil action under R.C. 4112.99." *Friendship Village* at paragraph one of the syllabus. The trial court's analysis prevents Reid from asserting an independent civil action and limits her remedy to only being permitted to challenge the CACO she undisputedly signed. Such an analysis runs counter to controlling case law on the issue of whether a party must elect remedies in disability discrimination claims. See *Friendship Village*, see also *Jackson v. Internatl. Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, quoting *Carney v. Cleveland Hts.-Univ. Hts. City School Dist.* (2001), 143 Ohio App.3d 415, 426 ("race, disability, and retaliation claims do not, as a matter of law, require an election of remedies by a claimant"); see also

Dworning v. City of Euclid, 8th Dist. No. 87757, 2006-Ohio-6772, affirmed by 119 Ohio St.3d 83, 2008-Ohio-3318; see also *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, (holding that an aggrieved party may pursue an independent cause of action for disability discrimination, and that state and federal courts have concurrent jurisdiction). Accordingly, we find that the trial court erred when it granted summary judgment on this basis.

{¶20} Despite this error and based upon our de novo review, we will nevertheless determine whether appellees were entitled to judgment on the substance of Reid's claims. *Tucker v. Kanzios*, 9th Dist. No. 08CA009429, 2009-Ohio-2788, ¶16. Indeed, an appellate court need not reverse an otherwise correct judgment merely because the trial court utilized different or erroneous reasons as the basis for its determination. *Columbus Steel Castings Co. v. King Tool Co*., 10th Dist. No. 08AP-385, 2008-Ohio-6309, ¶7, citing *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co.*, 148 Ohio App.3d 596, 2002-Ohio-3932, ¶25, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn*., 69 Ohio St.3d 217, 222, 1994-Ohio-92.

A. Americans with Disabilities Act Claims

{¶21} Based upon the record, it is unclear what forms the basis of Reid's ADA claims. Indeed, through this matter, Reid has uniformly failed to set forth a cognizable argument supporting the alleged violations of the ADA. Instead, she references her amended complaint and affidavits in their entireties and plainly states that she must have claims under the ADA.

{¶22} " 'It is well established that mere conclusory allegations are insufficient to establish a cause of action for a violation of civil rights.' " *Mian v. Donaldson, Lufkin & Jenrette Securities Corp*. (C.A.2, 1993), 7 F.3d 1085, 1088, quoting *Mazurek v. Wolcott Bd. of Educ.* (D.Conn. 1993), 815 F.Supp. 71, 77; see also *Reyes v. Fairfield Properties* (E.D.N.Y. 2009), 661 F.Supp.2d 249. Further, an appellant must support her assignments of error with an argument, which includes citations to legal authority. App.R. 16(A)(7). If an argument exists supporting an assignment of error, "it is not this court's duty to root it out." *State v. Breckenridge*, 10th Dist. No. 09AP-95, 2009-Ohio-3620, ¶10, citing *Whitehall v. Ruckman*, 10th Dist. No. 07AP-445, 2007-Ohio-6780, ¶20; see also *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, dismissed, appeal not allowed, 83 Ohio St.3d 1429; see also *State ex rel. Physicians Commt. For Responsible Medicine v. Bd. of Trustees of Ohio State Univ.*, 108 Ohio St.3d 288, 2006-Ohio-903, ¶13, citing *Day v. N. Indiana Pub. Serv. Corp*. (C.A.7, 1999), 164 F.3d 382, 384. Indeed, it is inappropriate for an appellate court to construct legal arguments in support of an appellant's appeal. *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶94, appeal not allowed, 110 Ohio St.3d 1439, 2006-Ohio-3862, reconsideration denied, 111 Ohio St.3d 1418, 2006-Ohio-5083.

{¶23} With regard to Reid's ADA claims, appellees construe Reid's general allegations as Title III claims. Under that portion of the ADA:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182. Appellees argue that summary judgment was proper because they were not private entities providing public accommodations. Based upon the record before us, we agree. See *Reyes* at 249, fn. 5, citing *Roberts v. Royal Atlantic Corp*. (C.A.2, 2008), 542 F.3d 363, 368 (affirming the dismissal of a Title III claim because the plaintiff failed to allege: (1) she is disabled within the meaning of the ADA; (2) defendants own, lease, or operate a place of public accommodation; and (3) defendants discriminated against the plaintiff within the meaning of the ADA); see also *Phibbs v. Am. Property Mgt.*, 2008 U.S. Dist. LEXIS 21879, 2008 WL 746977, at *3 (D.Utah, Mar. 19, 2008) (holding that the ADA does not apply to private residences such as residential homes or apartments); *Mabson v. Assoc. of Apt. Owners of Maui*, 2007 U.S. Dist. LEXIS 59260, 2007 WL 2363349, at *10 (D.Haw., Aug. 13, 2007) (stating that a residential condominium is a long-term rental unit and is not a place of "public accommodation" within the definition of the ADA); *Lancaster v. Phillips Invest., LLC* (M.D.Ala. 2007), 482 F.Supp.2d 1362, 1366 (holding that Title III of the ADA does not apply to residential facilities such as apartment complexes); *Indep. Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs*. (N.D.Cal. 1993), 840 F.Supp. 1328, 1344 (recognizing that "apartments and condominiums do not constitute public accommodations within the meaning of the Act"). As a result, and particularly because Reid has made no argument to the contrary, we find that Reid has failed to present a cognizable claim under Title III of the ADA.

{¶24} Instead of arguing in favor of a Title III claim, Reid states that she has Title II claims under the ADA. Again, however, she fails to present a legal argument supporting this position. Nevertheless, Title II of the ADA applies to "public entities," which includes,

" 'any State or local government' and 'any department, agency, * * * or other instrumentality of a State.' " See *United States v. Georgia*, 546 U.S. 151, 154, 126 S.Ct. 877, quoting 42 U.S.C. 12131(1). Reid makes no contention that appellees are public entities under the ADA. Indeed, they are not. As a result, we find that Reid has failed to present a claim under Title II of the ADA.

{¶25} Based upon the foregoing, it is clear that summary judgment was appropriate on claims brought under Title II and III of the ADA. Because Reid has failed to present an argument in support of a cognizable ADA claim, and we may not construct one for her, we find that the trial court did not err when it granted summary judgment on Reid's ADA claims.

B. Hostile Environment Claim under R.C. Chapter 4112

{¶26} In her amended complaint, Reid presents a hostile housing environment claim under R.C. Chapter 4112. In regard to this claim, appellees argue that Ohio courts have never before recognized such a claim. This is an accurate assessment of the status of Ohio law. See *Ohio Civ. Rights Comm. v. Akron Metro. Hous. Auth.*, 119 Ohio St.3d 77, 2008-Ohio-3320. Further, appellees note that Reid has again failed to set forth a legal argument in regards to this claim. After our review, we concur with this assessment of the record.

{¶27} As the party asserting error, Reid bears the burden of affirmatively demonstrating that error. *Woods* at ¶21, citing *Petro* at ¶94 (citing App.R. 9 and 16(A)(7) and *State ex rel. Fulton v. Halliday* (1944), 142 Ohio St. 548). In support of her hostile

housing environment claim, Reid plainly states that such a claim is actionable. She fails to cite case law or provide a legal argument supporting her position.

{¶28} Again, as an appellate court, we may not construct legal arguments for Reid. See *Petro* at ¶94. Further, we "will not consider arguments that were not raised in the courts below." *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 279, citing *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

{¶29} Because Reid has failed to present a legal argument before both the trial court and our court, we find that Reid has waived any alleged error on the part of the trial court in granting summary judgment on this claim. Because Reid has waived any alleged error in regard to this claim, we need not address whether a hostile housing environment claim may be brought under R.C. Chapter 4112.

C. Retaliation Claim under R.C. Chapter 5321

{¶30} Reid's retaliation claim is based upon alleged violations of R.C. 5321.02(A)(1), which makes it unlawful for a landlord to retaliate against a tenant by increasing rent, decreasing services, or by "bringing or threatening to bring" an eviction action after the tenant has "complained to an appropriate governmental agency of a violation of a building, housing, health, or safety code that is applicable to the premises, and the violation materially affects health and safety[.]" In this regard, Reid's claim generally stems from her complaints to governmental agencies and building inspectors, and appellees' subsequent efforts to impose additional rent obligations and pursue eviction.

{¶31} With regard to this claim, appellees present two general arguments.[1] First, they argue that there was no written lease agreement amongst the parties. However, oral agreements may form the basis of a claim under Ohio's Landlord Tenant Act. See R.C. 5321.01(A); see also *Lee v. Wallace*, 186 Ohio App.3d 18, 2010-Ohio-250, ¶27. Accordingly, we find that this argument lacks merit. Appellees also argue that the permission to reside in the apartment unit was nothing more than a gratuitous gesture of a father to his daughter. As a result, appellees assert that the mere acts of charging rent and pursuing eviction cannot constitute retaliatory actions under R.C. 5321.01(A)(1).

{¶32} Under Ohio's Landlord Tenant Act, a "tenant" is defined as, "a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others." R.C. 5321.01(A). A "rental agreement" is "any agreement or lease, written or oral, which establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of residential premises by one of the parties." R.C. 5321.01(D).

{¶33} Although oral agreements typically implicate Ohio's Statute of Frauds, in the absence of a written, enforceable lease, a tenancy at will is created. *Tonjes v. Chiaverini*, 3d Dist. No. 7-09-02, 2009-Ohio-3314, ¶6, citing *Craft v. Edwards*, 11th Dist. No. 2007-A0095, 2008-Ohio-4971, ¶35; see also *Weishaar v. Strimbu* (1991), 76 Ohio App.3d 276, 284; see also *New York Life Ins. Co. v. Simplex Products Corp*. (1939), 135 Ohio St. 501, 507 (noting that a person occupying land with "bare permission" is merely a tenant at will). A tenancy at will converts to a periodic tenancy when rent is paid and accepted. Id.,

[1] We refuse to consider the unsupported arguments presented in appellees' brief. See App.R. 12 and 16, see also *Hill v. City of Urbana* (1997), 79 Ohio St.3d 130.

citing *Manifold v. Schuster* (1990), 67 Ohio App.3d 251, 255. "Possession taken and rents paid under a defectively executed lease creates a tenancy from year to year, or month to month, *dependent upon the terms as to payment of rentals* * * *." Id., citing *Lithograph Bldg. Co. v. Watt* (1917), 96 Ohio St. 74.

{¶34} Appellees concede that Reid had a tenancy at will. The legal effects of tenancies at will are often uncertain with respect to their duration and the party or parties who may terminate them. *Myers v. East Ohio Gas Co*. (1977), 51 Ohio St.2d 121, 124, citing 3 Thompson on Real Property 33, Section 1020 (1959). We believe the Second Appellate District outlined the fundamental principles that apply to this matter. See *Voyager Village Ltd. v. Williams* (1982), 3 Ohio App.3d 288. In *Voyager Village*, the court provided:

> [A landlord] need not assign any reason for evicting a tenant who does not occupy the premises under a lease. But while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities.

Id. at 296, quoting *Edwards v. Habib* (C.A.D.C. 1968), 397 F.2d 687, 702. In addition to the act of evicting a tenant, we find that these principles may also be applied to the acts of increasing rent and decreasing services. See R.C. 5321.01(A)(1).

{¶35} Appellees argue that they did not increase the rent owed but, instead, merely charged rent for the first time in Reid's life. Further, after Reid refused to enter a lease and begin paying rent, appellees contend that she became a holdover tenant. Accordingly, appellees argue they lawfully filed the eviction action. We believe appellees' position glosses over a more fundamental issue.

{¶36} Ohio courts understandably use the term "rent" in reference to a form of financial payment. Without a doubt, some form of financial payment is the typical rent obligation imposed upon tenants. However, rent is a contractual obligation rather than a statutory one. See *Adams v. Windau*, 6th Dist. No. L-08-1041, 2008-Ohio-5023, ¶21; *Georgetown Park Apts. v. Woernley* (1996), 112 Ohio App.3d 428, 431; *Tucker v. Kanzios*, 9th Dist. No. 08CA009429, 2009-Ohio-2788, ¶21. Given its contractual basis, we see no reason to limit the term rent to financial payments. Nothing in Ohio's Landlord Tenant Act prevents parties from agreeing to allow a tenant to perform services as a rent obligation in lieu of making financial payments. Indeed, courts have recognized that the performance of services may constitute rent under Ohio's Landlord Tenant Act. See *Lee* at ¶27; see also *Tucker* at ¶20 ("testimony was sufficient to raise a genuine issue of fact regarding whether the parties had reached a 'rental agreement' within the meaning of Section 5321.01(D) under which Ms. Tucker performed duties for Ms. Kanzius in lieu of paying rent.")

{¶37} Through this matter, Reid has consistently conceded that she resided at the Olde Mill Lakes Apartments at a rate of $0 per month in rent for approximately seven years. The fact that Reid never provided financial payments, therefore, is undisputed. Importantly, however, she also notes that she provided services for the property pursuant to a housing arrangement and agreement, under which she performed ministerial duties and permitted her apartment to be used as a sample unit for prospective tenants to tour. Nowhere do appellees challenge the existence or enforceability of this purported agreement.

{¶38} Given that rent can include the performance of services and assuming Reid provided such services, as she has alleged, then the imposition of an additional $550 or $650 rental obligation each month may have been an increase in the rent in violation of R.C. 5321.01(A)(1).

{¶39} At this point, we must also consider the underlying motive for appellees' actions. Typically, the finder of fact must determine the reasons and motives for a landlord's actions. *Weishaar* at 286. Further, temporal proximity is a substantial factor in determining such motives. *Karas v. Floyd* (1981), 2 Ohio App.3d 4, paragraph one of the syllabus.

{¶40} Clearly, the record reveals a temporal proximity between Reid's actions and appellees' actions. Mere days passed between Reid's complaints and appellees' letters, which sought rent payments and eventually an eviction. This occurred in spite of the fact that Reid had resided at the property for seven years without making rent payments. Under these circumstances, the finder of fact must determine appellees' reasons for arguably increasing rent and pursuing eviction. See *Weishaar* at 286.

{¶41} Based upon the foregoing and in light of the limited basis upon which appellees sought summary judgment, we find that genuine issues of material fact exist with regard to Reid's retaliation claim under R.C. 5321.01(A)(1). Based upon the record before us, the trial court erred in granting summary judgment on this claim.

D. Fair Housing Claims

{¶42} We next consider Reid's claims for housing discrimination on the basis of a disability under R.C. Chapter 4112 and 42 U.S.C. 3604.[2] When reviewing such claims, Ohio courts may consider analogous federal statutes and the federal case law interpreting those statutes. *Ohio Civil Rights Comm. v. Fairmark Dev., Inc*., 10th Dist. No. 08AP-250, 2008-Ohio-6511, ¶24, citing *Kozma v. AEP Energy Serv., Inc*., 10th Dist. No. 04AP-643, 2005-Ohio-1157, ¶30, citing *Wooton v. Columbus Div. of Water* (1993), 91 Ohio App.3d 326, 334; *Ohio Civil Rights Comm. v. Harlett* (1999), 132 Ohio App.3d 341, 344; see also *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶12, citing *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm*. (1981), 66 Ohio St.2d 192, 196 ("federal case law interpreting * * * Title 42 U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112"); see also *Martin v. Barnesville Exempted Village School Dist. Bd. of Educ.* (C.A.6, 2000), 209 F.3d 931, fn. 2, citing *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St.3d 607 ("Both federal and Ohio disability discrimination actions require the same analysis.").

{¶43} The fair housing statutes make it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of [a disability]." 42 U.S.C. 3604(f)(1); see also R.C. 4112.02(H)(15). There are several theories upon which a plaintiff may base her disability discrimination claims,

[2] The FHAA extended the Fair Housing Act's protection against discrimination in the sale or rental of housing to those with disabilities. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(a), 102 Stat. 1619 (1988). While the FHAA and case law use the term "handicap" and "handicapped," we will use the preferred terms, "disability" and "disabled." See *Giebeler v. M & B Assocs*. (C.A.9, 2003), 343 F.3d 1143, 1146, fn. 2.

including; (1) disparate treatment, or intentional discrimination; (2) disparate impact; (3) failure to permit reasonable modifications, and (4) failure to make reasonable accommodations. *Tsombanidis v. West Haven Fire Dept.* (C.A.2, 2003), 352 F.3d 565, 573. In the instant matter, Reid alleges disparate treatment and an alleged failure to make reasonable accommodations.

{¶44} Fair housing claims are subject to the burden shifting framework that was established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. See *Lindsay v. Yates* (C.A.6, 2009), 578 F.3d 407, 414, citing *Seldon Apts. v. U.S. Dept. of Hous. & Urb. Dev.* (C.A.6, 1986), 785 F.2d 152, 159; *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 582. Under *McDonnell Douglas*, a plaintiff must first present evidence from which a reasonable jury could conclude that there exists a prima facie case of discrimination. *Lindsay* at 415, citing *Blair v. Henry Filters, Inc*. (C.A.6, 2007), 505 F.3d 517, 524. If the plaintiff meets her initial burden, the burden then shifts to the defendant to offer "evidence of a legitimate, nondiscriminatory reason for" the adverse action. Id. If the defendant meets its burden, the burden then shifts back to the plaintiff to afford her with the opportunity to demonstrate that the defendant's proffered reason was actually a pretext for unlawful discrimination. Id. When presented with a motion for summary judgment on such claims, a court must consider "whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry." *Cline v. Catholic Diocese of Toledo* (C.A.6, 2000), 206 F.3d 651, 661.

{¶45} At its most basic level, a disparate treatment claim alleges that an individual is being treated differently than others. *Teamsters v. United States* (1977), 431 U.S. 324, 335-36, 97 S.Ct. 1843. As a result, an aggrieved plaintiff must demonstrate that she was treated differently than similarly situated individuals who do not have disabilities.

{¶46} The heart of Reid's disparate treatment claim centers on the fact that Friel has a history of permitting his children to reside rent free at his properties. As a result, Reid argues that she is being discriminated against because she is being treated differently than her non-disabled siblings. However, we refuse to make the leap that Reid suggests. Based upon our review of the record, there is no evidence indicating that any of Reid's siblings are currently residing rent free at Friel's properties, such that Reid is currently being treated differently than her non-disabled siblings. Indeed, the evidence merely shows that a father has a history of providing housing to his children. Presumably, most children could make such averments regarding former living arrangements. Such averments say nothing about whether an individual is currently being treated differently than others who are similarly situated. As a result, the evidence does not support a disparate treatment claim because Reid is not currently being treated differently than any similarly situated individuals. The trial court did not err in granting summary judgment on this portion of Reid's fair housing claims.

{¶47} Under the fair housing statutes, it is also unlawful to "refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit[.]" R.C. 4112.02(H)(19); see also 42 U.S.C. 3604(f)(3)(B): see also *Temple v. Gunsalus* (C.A.6,

1996), 1996 U.S. App. LEXIS 24994, 1996 WL 536710. The elements of such a claim require a plaintiff to demonstrate that (1) she suffers from a disability; (2) the defendants knew or reasonably should have known of the disability; (3) accommodation of the disability "may be necessary" to afford the plaintiff an equal opportunity to use and enjoy the dwelling; and (4) the defendants refused to make such an accommodation. *Giebeler v. M & B Assoc.* (C.A.9, 2003), 343 F.3d 1143, 1147, quoting *United States v. California Mobile Home Park Mgt. Co*. (C.A.9, 1997), 107 F.3d 1374, 1380.

{¶48} In regards to this portion of her housing claims, it is unclear which specific accommodations form the basis of Reid's claims. Indeed, Reid references her entire affidavit, her sister's entire affidavit, and all of the allegations in her amended complaint to support these claims. Nevertheless, we believe the thrust of Reid's claims concerns the requests for appellees to construct a wheelchair access ramp, lower a viewer/peephole, and provide a parking space and proper signage.

{¶49} With regard to the first two requests, we note that federal courts have rejected reasonable accommodations claims such as these. See *Reyes* at 259; see also *Rodriguez v. 551 West 157th St. Owners Corp*. (S.D.N.Y. 1998), 992 F.Supp. 385. When presented with reasonable accommodations claims, courts distinguish between alterations of policies and alterations of the physical premises. *Reyes* at 260, citing *Salute v. Stratford Greens Garden Apartments* (C.A.2, 1998), 136 F.3d 293, 301. The former are afforded protections, while the latter often are not. Indeed, the reasonable accommodations, again, only pertain to the "rules, policies, practices, or services." R.C. 4112.02(H)(19); 42 U.S.C. 3604(f)(3)(B). Further, "the ordinary and plain meaning of the

terms rule, policy, practice, or service do not encompass the installation of ramps." Id., citing *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 809, 109 S.Ct. 1500. As a result, "[f]ailing to construct a ramp is not a failure to accommodate in a rule, policy, practice, or service." *Thompson v. Westboro Condominium. Assoc.* (W.D.Wash., Aug. 25, 2006), 2006 U.S. Dist. LEXIS 60328, 2006 WL 2473464, citing *Rodriguez* at 387; see also *Fagundes v. Charter Builders, Inc.* (N.D.Cal., Jan. 29, 2008), 2008 U.S. Dist. LEXIS 9617, 2008 WL 268977 ("a request for construction or repair is not actionable under [42 U.S.C. 3604(f)(3)(B)]").

{¶50} We follow these well-established and well-reasoned analyses. Accordingly, we find that Reid's requests for the construction of an access ramp and installation of a viewer cannot form the basis for a reasonable accommodations claim. These requests have nothing to do with appellees' policies or services.

{¶51} With regard to Reid's request for parking and signage, such requests may support reasonable accommodations claims. See *Jankowski Lee & Assoc. v. Cisneros* (C.A.7, 1996), 91 F.3d 891; *California Mobile Home Park Mgt. Co.; Shapiro v. Cadman Towers, Inc*. (C.A.2, 1995), 51 F.3d 328; *Assisted Living Assoc. of Moorestown v. Moorestown Township* (D.N.J. 1998), 996 F.Supp. 409; *Hubbard v. Samson Mgt. Corp.* (S.D.N.Y. 1998), 994 F.Supp. 187; *Trovato v. City of Manchester* (D.N.H. 1997), 992 F.Supp. 493.

{¶52} In the instant matter, again, Reid requested appellees provide a parking space and signage for her apartment. Appellees agreed to do so by December 17, 2004. Before this agreed upon deadline, Reid engaged her own contractor to paint her parking

space. Appellees then provided a sign that, according to appellants, was unsatisfactory. Under these circumstances, no reasonable jury could conclude that appellees failed to make reasonable accommodations with regard to the parking and signage. Indeed, "[u]ntil an accommodation request is denied, there is no discrimination under [42 U.S.C. 3604(f)(3)(B)]." *Prindable v. Assoc. of Apt. Owners of 2987 Kalakaua* (D.Haw. 2304 F.Supp.2d 1245003), 304 F.Supp.2d 1245, 1258, citing 42 U.S.C. 3604(f)(3)(B); see also *Bryant Woods Inn, Inc. v. Howard Cty., Maryland* (C.A.4, 1997), 124 F.3d 597, 602. Appellees never denied Reid's request for parking and signage. Instead, they agreed to provide it for her. As a result, there was no discrimination to support Reid's reasonable accommodations claim based upon parking and signage.

{¶53} As a result, we find that Reid has failed to demonstrate a genuine issue of material fact with regard to her housing discrimination claims. The trial court therefore properly granted summary judgment on these claims.

E. Retaliation Claim under R.C. Chapter 4112

{¶54} R.C. 4112.02(I) makes it unlawful:

> For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

Again, when reviewing R.C. Chapter 4112 claims, Ohio courts may consider federal statutes and case law. *Fairmark* at ¶24, citing *Kozma* at ¶30, citing *Wooton* at 334.

{¶55} It is well-established that an aggrieved plaintiff may establish retaliation through either direct or circumstantial evidence. *Imwalle v. Reliance Med. Prods*., *Inc.,*

(C.A.6, 2008), 515 F.3d 531, 543, citing *DiCarlo v. Potter* (C.A.6, 2004), 358 F.3d 408, 420. In the absence of direct evidence, an inference of retaliation may be reached after engaging in the burden shifting framework established in *McDonnell Douglas*. Id. at 544, citing *Wrenn v. Gould* (C.A.6, 1987), 808 F.2d 493. However, when the record contains direct evidence that establishes retaliation, there is no need to rely on *McDonnell Douglas*. *Christopher v. Stouder Mem. Hosp*. (C.A.6, 1991), 936 F.2d 870, 879, quoting *Blalock v. Metals Trades, Inc*. (C.A.6, 1985), 775 F.2d 703, 707 (" 'if the trier of fact believes the prima facie evidence * * *[,] no inference of discrimination is required.' ").

{¶56} The prima facie elements for retaliation under R.C. 4112.02(I) require a plaintiff to demonstrate: (1) that she engaged in a protected activity; (2) that the defendants were aware she engaged in the activity; (3) that the defendants took an adverse action against her; and (4) that a causal link exists between the protected activity and the adverse action. *Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶45, citing *Greer-Burger* at ¶13; see also *Aycox* at ¶17, citing *Peterson* at 727.

{¶57} In the instant matter, Reid's R.C. Chapter 4112 retaliation claim stems from appellees' decisions to charge rent and seek eviction after Reid attempted to assert her rights. The first two elements are undisputedly met. Further, the decision to arguably increase the rental obligation presents an issue of fact pertaining to the third element.

{¶58} With regard to the fourth element, we note that there is direct evidence that, if believed, demonstrates that unlawful retaliation may have served as a motivating factor in appellees' decision to charge rent and seek eviction. See *Imwalle* at 543, citing *Abbott v. Crown Motor Co*. (C.A.6, 2003), 348 F.3d 537, 542 (evidence is circumstantial where a

conclusion may be reached only after making inferences). Indeed, according to the record, Friel threatened to evict Reid if she and Swartz did not stop complaining to government agencies and city inspectors. If the trier of fact believes this direct evidence, then appellees' underlying retaliatory motive is established. As a result, no inference of a retaliatory motive was necessary; appellees reliance upon *McDonnell Douglas* in seeking summary judgment was misplaced.

{¶59} Based upon the record before us, a reasonable jury could conclude that appellees retaliated against Reid for attempting to assert her rights. Genuine issues of material fact exist with regard to Reid's R.C. 4112.02(I) retaliation claim. We therefore find that the trial court erred when it granted summary judgment on this claim.

F. Intentional Infliction of Emotional Distress Claim

{¶60} We will next consider Reid's claim for intentional infliction of emotional distress. The Supreme Court of Ohio first recognized such a claim as an independent cause of action in *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, syllabus, abrogated on other grounds by *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451. The *Yeager* court held: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

{¶61} To succeed on this claim, a plaintiff needs to demonstrate: (1) that the defendant either intended to cause serious emotional distress or knew or should have known that their actions would result in serious emotional distress; (2) that the defendant's conduct was so extreme and outrageous that it went beyond all possible

bounds of decency and that it can be considered utterly intolerable in a civilized community; (3) that the defendant's actions were the proximate cause of the plaintiff's injuries; and (4) that the plaintiff's mental anguish was serious and of a nature that no reasonable person could be expected to endure it. *Cochran v. Columbia Gas of Ohio, Inc*. (2000), 138 Ohio App.3d 888, 896, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34; and *Oglesby v. City of Columbus*, 10th Dist. No. 01AP-1289, 2002-Ohio-3784, ¶10, quoting *Irvine v. Akron Beacon Journal*, 9th Dist. No. 20804, 2002-Ohio-3191, ¶48-51.

{¶62} "Only conduct that is truly outrageous, intolerable, and beyond the bounds of decency is actionable[.]" *Strausbaugh v. Ohio Dept. of Transp.*, 150 Ohio App.3d 438, 2002-Ohio-6627, ¶15, citing *Petrarca v. Phar-Mor, Inc*., 11th Dist. No. 2000-T-0121, 2001-Ohio-4320. Indeed, "major outrage is essential to the tort." Id. citing *Garrison v. Bobbitt* (1999), 134 Ohio App.3d 373, 382, quoting *Foster v. McDevitt* (1986), 31 Ohio App.3d 237, 240.

{¶63} After our review of the record, we find no genuine issues of material fact with regard to this claim. Essentially, Reid's claim is premised upon the difficulties she experienced in obtaining accommodations for her disability. There is no evidence of conduct that is so extreme and outrageous that it could be considered intolerable in a civilized community. There is no major outrage. No reasonable jury could conclude to the contrary. The trial court did not err in granting summary judgment on this claim.

F. Public Policy Claim

{¶64} Under this claim, Reid argues that public policy must afford protections for people with disabilities to maintain equal access to housing. We disagree because

Congress and the Ohio General Assembly have enacted statutes to afford such protections.

> Ohio law does not 'recognize a common-law claim when remedy provisions are an essential part of the statutes on which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct."

Carter v. Delaware Cty. Bd. of Commrs. (S.D.Ohio 2009), 2009 U.S. Dist. LEXIS 16436, at *37, 2009 WL 544907, at *13, quoting *Wakefield v. Children's Hosp.* (S.D.Ohio 2008), 2008 U.S. Dist. LEXIS 91835, at *25, 2008 WL 3833798, at *8, quoting *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 317, 2007-Ohio-4921.

{¶65} When presented with R.C. Chapter 4112 claims in addition to public policy claims, the *Carter* court dismissed the public policy claims because the aggrieved plaintiff was sufficiently protected by statute. Indeed, *Carter* held: "No public policy race discrimination or retaliation claims exist in Ohio because § 4112, with its 'full panoply of remedies, including compensatory and punitive damages,' adequately protects society's interests." Id.; see also *Rice v. CertainTeed Corp*., 84 Ohio St.3d 417, 422, 1999-Ohio-361; *Carrasco v. NOAMTC, Inc.* (C.A.6, 2004), 124 Fed.Appx. 297, 304 (affirming the dismissal of public policy claim because R.C. Chapter 4112 adequately protects society's interests); *Barlowe v. AAAA Internatl. Driving Sch., Inc.*, 2d Dist. No. 19794, 2003-Ohio-5748 (holding that R.C. Chapter 4112 provides "broad relief which is sufficiently comprehensive to vindicate the policy goals set forth in that statute.").

{¶66} Similarly, in this matter, R.C. Chapters 4112 and 5321 adequately protect society's interests in attempting to prevent the retaliation Reid allegedly suffered. See

Carter, 2009 U.S. Dist. LEXIS 16436, at *38, 2009 WL 544907, at *13, citing *Leininger* at 42-43. As a result, Reid's public policy claim fails. We therefore find that the trial court did not err in granting summary judgment on this claim.

G. Conspiracy Claims

{¶67} Reid presents conspiracy claims under 42 U.S.C. 1985 and 1986:

> Section 1985 provides a private civil remedy for individuals injured by conspiracies to deprive them of their right to equal protection under the laws. The plaintiff must prove the existence of a conspiracy that is aimed at interfering with any right or privilege of a United States citizen and that is motivated by a racial or other discriminatory animus.

(Internal citations omitted.) *Green v. City of Cincinnati*, 1st Dist. No. C-070830, 2008-Ohio-4908, ¶26.

{¶68} With regard to these claims, appellees present two arguments. First, they argue that there is no independent cause of action under 42 U.S.C. 1985. Stated differently, appellees argue that Reid's conspiracy claim must fail because all of her other claims fail. Based upon our resolution of the other portions of this appeal, we reject this argument. Appellees also argue that Reid's conspiracy claims fail because she was not in a protected class of persons. Instead, she only compares herself to her siblings. Reid fails to refute this argument and instead only makes general references to affidavits and pleadings.

{¶69} The emerging consensus amongst federal courts indicates a reluctance to recognize a "class of one" theory in the realm of 42 U.S.C. 1985(3). *McCleester v. Dept. of Labor & Indus*. (W.D.Pa., July 16, 2007), 2007 U.S. Dist. LEXIS 51436, at *43, 2007 WL 2071616, at *15, citing *Royal Oak Entertainment, LLC v. City of Royal Oak* (C.A.6,

2006), 205 Fed.Appx. 389 (holding that classes of one are not afforded protections under Section 1985); see also *Jackson v. Gordon* (C.A.3, 2005), 145 Fed.Appx. 774, 778 (affirming rejection of class of one theory in regards to Section 1985); *C&H Co. v. Richardson* (C.A.4, 2003), 78 Fed.Appx. 894; *Burns v. State Police Assn. of Mass*. (C.A.1, 2000), 230 F.3d 8; *Welsh v. Male* (E.D.Pa., Mar. 22, 2007), 2007 U.S. Dist. LEXIS 20267, at *14-15, 2007 WL 906182, at *4; *Traveler v. Ott* (N.D.Ind., Nov. 29, 2006), 2006 U.S. Dist. LEXIS 86724, at *7, 2006 WL 3450602, at *2; *Ferrone v. Onorato* (W.D.Pa. 2006), 439 F.Supp.2d 442; *Brewer v. Comm.* (S.D.Ala. 2006), 435 F.Supp.2d 1174; *Cataldo v. Moses* (D.N.J. 2004), 361 F.Supp.2d 420.

{¶70} Because Reid alleges that she was treated differently than her siblings, she is attempting to base her conspiracy claims on a class of one theory. In the absence of an argument to the contrary, we refuse to recognize Reid's conspiracy claims which are based upon this class of one theory. Accordingly, we find that Reid's 42 U.S.C. 1985 claim fails. As a result, Reid's derivative 42 U.S.C. 1986 claim similarly fails. *Bartell* at 560, citing *Browder v. Tipton* (C.A.6, 1980), 630 F.2d 1149. The trial court did not err in granting summary judgment on Reid's conspiracy claims.

H. Punitive Damages Claim

{¶71} In her amended complaint, Reid asserts a claim for punitive damages as a separate cause of action. However, it is well-settled that " 'punitive damages is not a separate claim in itself but rather an issue in the overall claim for damages.' " *State ex rel. Bd. of State Teachers Ret. Sys. v. Davis*, 113 Ohio St.3d 410, 417, 2007-Ohio-2205, ¶46, citing *Hitching v. Weese*, 77 Ohio St.3d 390, 391, 1997-Ohio-290, quoting *Horner v.*

Toledo Hosp. (1993), 94 Ohio App.3d 282, 288. Because Reid alleged punitive damages as a separate, independent claim, we find that the trial court properly granted summary judgment on this claim.

II. The 5825 Case

{¶72} This case originally presented Friel's efforts to collect on a loan he provided to Swartz in June 1985. The note evidencing the loan matured on June 1, 1990.

{¶73} On January 22, 2002, Swartz filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. In the bankruptcy proceedings, Swartz neglected to list as an asset a trust that Friel had established for her and her two brothers. She also failed to list Friel as a creditor. Nevertheless, on May 14, 2002, Swartz was granted a discharge by the bankruptcy court with a finding of no assets.

{¶74} From 2004 through early 2005, Swartz assisted Reid in the OCRC proceedings. In April 2005, Friel learned of Swartz's bankruptcy. Shortly thereafter, on May 25, 2005, he filed the collection action in the 5825 case. Swartz filed counterclaims for retaliation and intentional infliction of emotional distress. The trial court granted Friel's motion to dismiss Swartz's intentional infliction of emotional distress claim. This decision was never appealed.

{¶75} Both Friel and Swartz requested that the bankruptcy court reopen Swartz's case. Friel presented an adversarial proceeding that sought a finding that the 1985 loan was not discharged by Swartz's 2002 bankruptcy. Conversely, Swartz sought a contempt order finding that Friel's collection claim was a violation of the bankruptcy court's prior discharge injunction. In January 2008, the bankruptcy court reopened the matter to

consider these positions. As a result, the trial court stayed the 5825 case. Friel eventually dismissed his adversarial proceeding. On February 17, 2009, the bankruptcy court issued its order on Swartz's motion for contempt.

{¶76} The trial court lifted the stay and considered the competing summary judgment motions of Friel and Swartz. On April 10, 2009, the trial court issued a decision finding Swartz's counterclaim to be barred by the doctrine of res judicata. Swartz has timely appealed and raises the following assignments of error:

> I. THE TRIAL COURT ERRED IN SUA SPONTE DISMISSING MARGARET E. SWARTZ'S COUNTERCLAIMS BASED UPON THE DOCTRINE OF RES JUDICATA.
>
> II. THE TRIAL COURT ERRED IN FINDING MARGARET E. SWARTZ'S COUNTERCLAIMS WERE BARRED BY THE DOCTRINE OF RES JUDICATA.

{¶77} Swartz's first assignment of error challenges the procedure through which the trial court granted judgment on the doctrine of res judicata, while her second assignment of error regards the substance of that decision. We will address the assignments of error out of order because we find the second assignment of error to be dispositive.

{¶78} In her second assignment of error, Swartz asserts that the trial court erred in granting a summary judgment on the basis of res judicata. Specifically, she argues that the bankruptcy court's order on her contempt motion cannot act as a complete bar to her counterclaims for retaliation under R.C. 4112.02(I) and the ADA. We agree.

{¶79} The de novo summary judgment standard of review established above applies equally to the 5825 case. So too do the rules of law pertaining to R.C. 4112.02(I)

retaliation claims. Indeed, the statute affords anti-retaliatory protections for persons who assist or participate in OCRC investigations. R.C. 4112.02(I). Swartz unquestionably assisted Reid through the OCRC proceedings and may assert rights under the anti-retaliatory provisions of R.C. 4112.02(I).

{¶80} However, with regard to Swartz's counterclaim for retaliation under the ADA, we note that this claim necessarily depends upon a finding that Friel, or appellees generally, were entities that were subject to the ADA. See *Prowell v. Oregon* (D.Or., Aug. 11, 2003), 2003 U.S. Dist. LEXIS 25530, at *21, 2003 WL 23537979, at *7 ("plaintiff cannot maintain an ADA retaliation claim against entities which are not otherwise subject to Subchapters I, II, and III of the ADA."), citing *Van Hulle v. Pacific Telesis Corp*. (N.D.Cal. 2000), 124 F.Supp.2d 642, 646. Based upon our resolution of Reid's ADA claims above, we find that Swartz's ADA retaliation counterclaim similarly fails.

{¶81} We must nevertheless still determine if res judicata bars Swartz's remaining counterclaim for retaliation under R.C. 4112.02(I). In its February 17, 2009 order, the bankruptcy court noted that upon reopening the bankruptcy proceedings, the parties had reached a settlement with regard to Swartz's interest in the trust that was not listed in her 2002 bankruptcy. The proceeds from the settlement were nearly sufficient to pay all of the creditors' claims in full. The bankruptcy court further noted that Friel had no notice of Swartz's 2002 bankruptcy. As a result, it held:

> [T]he Creditor's claim was never discharged, and the collection action is not barred.
>
> To hold otherwise would lead to the illogical result of extinguishing the Creditor's interests without due process, and then punishing him for taking collection action that resulted in

> the recovery of assets sufficient to nearly pay all claims in full. While other issues are raised by the parties, this determination is dispositive.

(Bankruptcy Order, Feb. 17, 2009, at 4-5.) After reaching these findings, the bankruptcy court denied Swartz's motion for contempt. Based upon this February 17, 2009 order, the trial court issued a judgment finding Swartz's counterclaims barred by the doctrine of res judicata.

{¶82} "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp*., 113 Ohio St.3d 59, 2007-Ohio-1102, ¶6. "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." Id., citing *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd*., 81 Ohio St.3d 392, 395, 1998-Ohio-435. On the other hand, issue preclusion, or collateral estoppel, "precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action." *Ft. Frye Teachers Assn., OEA* at 395. Claim preclusion applies to bankruptcy proceedings if four elements are met. *Federated Mgt. Co. v. Latham & Watkins* (2000), 138 Ohio App.3d 815, 822, citing *Jungkunz v. Fifth Third Bank* (1994), 99 Ohio App.3d 148, 151. Specifically:

> A judgment in bankruptcy court bars a subsequent suit if (1) the prior judgment was a final judgment rendered by a court of competent jurisdiction, (2) both cases involve the same parties, (3) the subsequent action raises an issue that was actually litigated or that should have been litigated, and (4) the same cause of action is at issue in both cases.

Id. citing *Latham v. Wells Fargo Bank, N.A.* (C.A.5, 1990), 896 F.2d 979, 983.

{¶83} With regard to the first element, Swartz argues that the bankruptcy court lacked the authority to enter a final judgment on her retaliation counterclaims. She argues that a bankruptcy court cannot issue a final judgment in non-core proceedings, which are merely related to a bankruptcy.

{¶84} A bankruptcy court's jurisdiction extends to four types of matters: "(1) Title 11 cases; (2) proceedings that arise under Title 11; (3) proceedings that arise in a case under Title 11; and (4) proceedings related to a case under Title 11." Id. citing 28 U.S.C. 1334(a), (b). The first three types of proceedings are considered core proceedings, while the fourth are non-core proceedings. See *In re BN1 Telecomms., Inc*. (B.A.P.C.A.6, 2000), 246 B.R. 845, 849, citing 28 U.S.C. 157(b)(1); see also *In re Wolverine Radio Co*. (C.A.6, 1991), 930 F.2d 1132, 1144. " 'If the proceeding does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of the bankruptcy, then it is not a core proceeding;' rather, it 'may be related to the bankruptcy * * *.' " (Emphasis omitted.) Id. quoting *In re Wood* (C.A.5, 1987), 825 F.2d 90, 97.

{¶85} In the instant matter, there is no dispute as to whether Swartz's retaliation claim is a non-core proceeding. Indeed, a claim for retaliation under R.C. 4112.02(I) does not invoke rights under the Bankruptcy Code and clearly exists outside of the realm of bankruptcy law. Friel makes no contention to the contrary. After noting that her retaliation counterclaim is a non-core proceeding, Swartz then cites 28 U.S.C. 157(c)(1), which provides:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

{¶86} Swartz notes that this procedure was not followed in the bankruptcy proceedings underlying this matter. The bankruptcy court never submitted to the district court proposed findings of fact and conclusions of law with regard to Swartz's retaliation counterclaim. As a result, the parties never had the opportunity to file objections. The district court never conducted a de novo review and issued a final judgment. Based upon these circumstances, Swartz argues that there is no final judgment to support the trial court's holding that res judicata bars her counterclaim for retaliation. Friel offers no substantive argument in response and instead merely argues that equity should prevent Swartz from presenting arguments to the bankruptcy court and thereafter arguing that it lacked the authority to render a final judgment.

{¶87} Based upon the foregoing, we find that there was no final judgment rendered by a court of competent jurisdiction with regard to Swartz's retaliation claim under R.C. 4112.02(I). As a result, the first element of the res judicata analysis is lacking. We therefore find that the trial court erred by granting summary judgment to Friel on the doctrine of res judicata.

III. Conclusion

{¶88} Based upon the foregoing, we find that the trial court used improper bases to support its decisions to grant summary judgment with regard to both Swartz and Reid. Nevertheless, after our de novo review, we find that all of Reid's claims were properly resolved upon summary judgment with the exception of her retaliation claims under R.C. 4112.02(I) and R.C. 5321.02. These retaliation claims should have survived appellees' motion for summary judgment. As a result, we sustain Reid's first assignment of error and sustain in part and overrule in part Reid's second assignment of error.

{¶89} Additionally, Swartz's ADA retaliation counterclaim was properly resolved upon summary judgment. However, her retaliation counterclaim under R.C. 4112.02(I) should have survived Friel's motion for summary judgment. As a result, we sustain in part and overrule in part Swartz's second assignment of error and render as moot her first assignment of error. We affirm in part and reverse in part the judgments rendered by the Franklin County Court of Common Pleas. We therefore remand this matter for further proceedings to occur in a manner consistent with this decision.

Judgments affirmed in part, reversed in part; cause remanded.

BROWN, J., concurs.
SADLER, J., concurs in judgment only.