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The Bullet Point: Ohio Commercial Law Bulletin

Did I properly verify income under the Truth-in-Lending Act's Ability to Repay Rule?

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Ability to Re-pay Rule

Elliott v. First Fed. Community Bank of Bucyrus, 6th Cir. No. 19-3690, 2020 U.S. App. LEXIS 21470 (July 8, 2020)

In this appeal, the Sixth Circuit Court of Appeals reversed in part the district court's decision to grant a lender summary judgment, holding that the bank's failure to verify and document the borrower's listed income violated TILA's ability-to-repay requirements.

- **The Bullet Point**
  Pursuant to the Truth in Lending Act (TILA) ability-to-repay requirements, "no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments. . . ." 15 U.S.C. § 1639c(a)(1). In making a reasonable and good-faith determination that the consumer has a reasonable ability to repay the loan, the creditor must verify the consumer's income or assets "using reasonably reliable third-party records" and reviewing "required documentation." 12 C.F.R. § 1026.43(c)(2), (3) & (4); 12 C.F.R. Pt. 1026, App. Q § II(A). As explained by this court, a creditor cannot rely on verbal statements made by the consumer or the consumer's spouse to verify income under TILA. The court further explained that a creditor must review "third-party records that provide reasonably reliable evidence of the consumer's income or assets" to verify a consumer's rental income, including current rental agreements and previous tax returns. Simply stated, a creditor violates 15 U.S.C.S. § 1639c and 12 C.F.R. § 1026.43 by considering spousal support and rental income that are not properly verified and documented in making its reasonable ability-to-repay determination.

Class Action Opt-Outs

McAdams v. Mercedes-Benz USA, L.L.C., 2020-Ohio-3702

In this appeal, the Supreme Court of Ohio reversed the lower court's decision, finding that it was an error for the state appellate court to conduct an analysis related to whether certain members of a class opted-out of it, as the issue was barred by res judicata.

- **The Bullet Point**
  Class members are bound by a final judgment in a class action, and res judicata bars further litigation by those class members regarding that same cause of action. Res judicata also serves to bar subsequent litigation by absent class members because although they are passive parties, absent class members may intervene in order to protect their individual interests in the action. In addition, members may "opt-out" of the class action by following the opt-out procedure set by the court maintaining the class action. That being said, class members must follow the specific opt-out procedure established by the court in order to opt out and be excluded from the class action. Full faith and credit prevents another court from later determining that a class member "adequately" opted out, and the class member's claims will be barred by res judicata.

Bad Faith

Hillier v. Fifth Third Bank, 2d Dist. Miami No. 2019-CA-21, 2020-Ohio-3679

In this appeal, the Second Appellate District affirmed in part the trial court's decision, holding that there was no evidence the bank acted in bad faith or that the bank owed the executor a duty separate from the obligations of the contract.

- **The Bullet Point**
  As noted by the court, "bad faith" is a legal term of art which is not specifically defined, but is logically the inverse of "good faith." Bad faith suggests intentional dishonesty, fraud, or misrepresentation. Therefore, without evidence that a bank's actions were dishonest, willful, or malicious, a bad faith claim cannot exist. The court further noted that under Ohio law, the existence of a contract action generally excludes a tort action. An exception to this general rule occurs "if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed." Accordingly, without evidence of an independent tort separate from a breach of contract, a negligence claim cannot survive.

Unjust enrichment

Longmire v. Danaci, 10th Dist. Franklin No. 19AP-770, 2020-Ohio-3704

In this appeal, the Tenth Appellate District affirmed the trial court's decision, agreeing that Ohio law does not bar the equitable remedy of unjust enrichment if the breach of contract claim is deemed unenforceable under the statute of frauds.

- **The Bullet Point**
  Under the statute of frauds, an oral contract that cannot be performed within one year of its making is unenforceable. However, "where one party fully performs and the other party, to his unjust enrichment, receives and refuses to pay over money which, under the unenforceable contract, he agreed to pay to the party who has fully performed, a quasi-contract arises, upon which the performing party may maintain an action against the defaulting party for money owed." Stated differently, even when the statute of frauds precludes a breach of contract claim, unjust enrichment may be available as an equitable remedy. To succeed on a claim for unjust enrichment, the trial court must find: "(1) a benefit conferred by the plaintiff on the defendant, (2) knowledge of the benefit by the defendant,

and (3) retention of the benefit by the defendant in circumstances where it would be unjust to do so. To demonstrate a claim of unjust enrichment, it is not sufficient for the plaintiffs to show that they have conferred a benefit upon the defendants. Plaintiffs must go further and show that under the circumstances, they have a superior equity so that as against them, it would be unconscionable for the defendant to retain the benefit."

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Elliott v. First Fed. Cmty. Bank of Bucyrus

United States Court of Appeals for the Sixth Circuit

July 8, 2020, Filed

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No. 19-3690

Reporter
2020 U.S. App. LEXIS 21470 *; 2020 FED App. 0391N (6th Cir.); __ Fed. Appx. __; 2020 WL 3839865

G. RALPH ELLIOTT, Plaintiff-Appellant, v. FIRST FEDERAL COMMUNITY BANK OF BUCYRUS, Defendant-Appellee.

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Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Elliott v. First Fed. Cmty. Bank of Bucyrus, 2019 U.S. Dist. LEXIS 50405 (S.D. Ohio, Mar. 26, 2019)

Core Terms

mortgage, consumer, verify, spousal, foreclosure, rental, repay, borrower, unconscionability, monthly, lender, third-party, lease, spousal-support, divorce, finance, recoupment, ratio, consummated, residential, reliable, balloon, lending, unclean, broker, setoff, debt-to-income, counterclaims, collateral, good-faith

Case Summary

Overview

HOLDINGS: [1]-Grant of summary judgment to the bank on the TILA claim was reversed because the bank violated *15 U.S.C.S. § 1639c* and *12 C.F.R. § 1026.43* by considering spousal support and rental income that were not properly verified and documented in making its reasonable-ability-to-repay determination; [2]-The district court's grant of summary judgment on the negligence claim was affirmed because appellant did not cite, and the court did not find, an Ohio case suggesting that a borrower could establish a negligence claim for a lender's technical violations of an income-verification statute where the lender relied on the borrower's own representations in approving the loan.

Outcome
Judgment affirmed in part and reversed in part and remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN1[] Amendment of Pleadings, Leave of Court

Generally, a party may amend its pleading once as a matter of course, but in all other cases it may amend a pleading only with the opposing party's consent or with leave of the court. Fed. R. Civ. P. 15(a). The court should freely give leave when justice so requires. Once the scheduling order's deadline to amend the complaint passes, however, a plaintiff first must show good cause under Fed. R. Civ. P. 16(b) for failure earlier to seek leave to amend and the district court must evaluate prejudice to the nonmoving party before a court will even consider whether amendment is proper under Rule 15(a).

Civil Procedure > Judicial Officers > Magistrates

HN2[] Judicial Officers, Magistrates

Pursuant to Fed. R. Civ. P. 73(b)(1), when parties consent to a magistrate judge conducting the proceeding, to signify their consent, the parties must jointly or separately file a statement consenting to the referral.

Banking Law > ... > Banking & Finance > Consumer Protection > Truth in Lending

Civil Procedure > ... > Pleadings > Counterclaims > Permissive Counterclaims

HN3[] Consumer Protection, Truth in Lending

A counterclaim on an underlying debt in a Truth in Lending Act (TILA) action is permissive rather than compulsory.

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN4[] Summary Judgment, Entitlement as Matter of Law

An appellate court reviews de novo a district court's grant of summary judgment. Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In making this determination, the court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in his favor.

Real Property Law > Financing > Mortgages & Other Security Instruments

HN5[] Financing, Mortgages & Other Security Instruments

A creditor may rely on evidence that spousal support payments have been received for periods less than 12 months, provided the creditor can adequately document the payer's ability and willingness to make timely payments. Appendix Q requires that, for spousal support income to be considered effective, the consumer must provide required documentation. 12 C.F.R. pt. 1026, app. Q § II(A)(2). Examples of required documentation include a final divorce decree, legal separation agreement, court order, or voluntary payment agreement.

Real Property Law > Financing > Mortgages & Other Security Instruments

HN6[] Financing, Mortgages & Other Security Instruments

12 C.F.R. § 1026.43 allows a creditor to consider income or assets that are current or reasonably expected but requires the creditor in considering the income or assets to use third-party records that provide reasonably reliable evidence of the consumer's income or assets. 12 C.F.R. § 1026.43(c)(2)(i), (c)(4).

Real Property Law > Financing > Mortgages &

Other Security Instruments

HN7 **Financing, Mortgages & Other Security Instruments**

Appendix Q requires verification of rental income by reviewing current rental agreements and previous tax returns. 12 C.F.R. pt. 1026, app. Q § II(D)(1) & (4). For roommates in a single-family property, Appendix Q requires the income to be shown on a tax return if it is to be used in qualifying. 12 C.F.R. pt. 1026, app. Q § II(D)(3).

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

HN8 **Truth in Lending, Liability for Violations**

The Fifth Circuit Court of Appeals has held that once a court finds a violation of the Truth in Lending Act TILA, no matter how technical, the court has no discretion as to the imposition of civil liability.

Torts > Negligence > Elements

HN9 **Negligence, Elements**

The elements of an ordinary negligence suit between private parties are (1) the existence of a legal duty, (2) the defendant's breach of that duty, and (3) injury that is the proximate cause of the defendant's breach.

Torts > Negligence > Proof > Violations of Law

HN10 **Proof, Violations of Law**

Ohio generally recognizes that, where a legislative enactment imposes a specific duty for the safety of others, failure to perform that duty is negligence per se. When given a choice between an interpretation of state law which reasonably restricts liability, and one which greatly expands liability, courts should choose the narrower and more reasonable path.

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

HN11 **Maxims, Clean Hands Principle**

It is fundamental that he who seeks equity must do equity, and that he must come into Court with clean hands.

Contracts Law > Defenses > Unconscionability

Real Property Law > Financing > Mortgages & Other Security Instruments

HN12 **Defenses, Unconscionability**

Unconscionability is a legal question involving an absence of choice on the part of one of the parties to a contract and contract terms that are unreasonably favorable to the other party. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. Ohio law considers mortgage flipping to be an unconscionable act.

Real Property Law > Financing > Mortgages & Other Security Instruments

HN13 **Financing, Mortgages & Other Security Instruments**

Flipping a mortgage is defined as making a mortgage loan that refinances an existing mortgage loan when the new loan does not have reasonable, tangible net benefit to the consumer considering all of the circumstances, including the terms of both the new and refinanced loans, the cost of the new loan, and the consumer's circumstances. *Ohio Rev. Code Ann. § 1345.031(B)(12)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Setoffs

Real Property Law > Financing > Foreclosures

HN14 **Affirmative Defenses, Setoffs**

Recoupment or setoff is a matter of defense to foreclosure, and recovery is limited to the amount to which the consumer would be entitled under *15 U.S.C.S. § 1640(a)* for damages for a valid claim brought in an original action against the creditor. *15 U.S.C.S. § 1640(k)(1)* & *(2)*.

Counsel: For G. Ralph Elliott, Plaintiff - Appellant: Aaron E. Michel, Marysville, OH.

For First Federal Community Bank of Bucyrus, Defendant - Appellee: Michael S. Kolman, D. Wesley Newhouse II, Newhouse, Prophater, Kolman & Hogan, Columbus, OH; Charles R. Dyas Jr., Dyas Law, Marysville, OH.

Judges: BEFORE: GIBBONS, McKEAGUE, and WHITE, Circuit Judges..

Opinion by: HELENE N. WHITE

Opinion

HELENE N. WHITE, Circuit Judge. Plaintiff-Appellant G. Ralph Elliott brought this action under the *Truth in Lending Act (TILA)* asserting that Defendant-Appellee First Federal Community Bank of Bucyrus (the Bank) failed to properly verify his income and negligently approved his mortgage loan. The Bank counterclaimed for breach of contract and sought to foreclose on the property. The district court granted summary judgment in the Bank's favor. Because the Bank's failure to verify and document Elliott's listed income violated the TILA, we REVERSE the grant of summary judgment to the Bank on that claim, REVERSE the denial of summary judgment to Elliott, and REMAND for further proceedings. We AFFIRM the district court's grant of summary judgment on the **[*2]** negligence claim and the magistrate judge's decision allowing the Bank to amend its answer.

I.

Elliott, born in 1936, worked as a licensed real estate agent for over 30 years. His fourth wife, Golan, was also a realtor, and the two worked together until sometime in 2014. Elliott and Golan owned at least two homes in Ohio: one on Maple Ridge Road, and one on Restoration Drive. In July 2013, Elliott and Golan refinanced their mortgage on the Maple Ridge Road property, receiving from Defendant a $320,000 loan at 4.25% interest, providing for monthly payments of $1981.55 over 20 years (2013 Loan).

At the end of 2014, Golan and Elliott contemplated separating and agreed, among other things, to divide the properties: Golan would relinquish all interest in, and Elliott would assume all responsibility for, the Maple Ridge Road home, where Elliott was living, and Elliott would relinquish all interest in, and Golan would assume all responsibility for, the Restoration Drive home. To accomplish this, Elliott submitted an application for a loan in his name alone to be secured by the Maple Ridge Road property. The application listed the amount of the loan as $315,000 to be paid back over 25 years with **[*3]** an interest rate of 4.875%, resulting in monthly payments of $1818.59.[1] The application listed his income as follows: base employment income of $528.95 per month, spousal support of $2300 per month, Social Security of $1975 per month, and rental income of $1400 per month.

Eric Savidge was the loan officer who reviewed Elliott's application and gathered relevant documentation. To verify the spousal-support income, the Bank relied on representations from Golan and Elliott that they were going to enter a separation agreement requiring payment of spousal support to Elliott. The separation agreement itself, however, which provided for $2200 per month in spousal support to Elliott, was not executed until early February 2015, nearly two months after the loan was consummated.

To verify rental income, the Bank reviewed Elliott's tax returns showing rental income in the past, but not from the Maple Ridge Road property. Although unknown to the Bank, in March 2014, Elliott entered into a one-year lease with a tenant, leasing a portion of the Maple Ridge Road property for $1000 per month. And in March 2015, after his loan closed, Elliott entered a new one-year lease with a different tenant for $1000 **[*4]** per month.

On November 25, 2014, the Bank's loan committee rejected the loan. After the initial rejection, Golan met with the Bank's President, Phil Gerber, and Vice President, Brad Murtiff, explained that it was important

[1] With property taxes and insurance, the monthly payment was $2318.46.

to her that Elliott be able to stay at the Maple Ridge Road property, and assured the Bank that she would enter into a separation agreement that would cover Elliott's monthly mortgage payments. She also explained that the agreement would require her to maintain a $250,000 life insurance policy with Elliott as the beneficiary.

After the meeting, Gerber emailed the other members of the loan committee, explaining his meeting with Golan and Murtiff, and stating that he and Murtiff now believed they should approve the loan. The information Elliott listed on the loan application resulted in a debt-to-income ratio of 37.367%, lower than the Bank's 40% maximum threshold at the time. Elliott's credit scores were 652 and 663, which were near the Bank's guideline of 660. All members of the loan committee agreed to approve the loan on December 3, 2014.

On December 11, 2014, Elliott executed a promissory note for $315,000 and a mortgage securing the loan (2014 Loan). On February **[*5]** 4, 2015, Elliott signed the separation agreement, which provided that Elliott would be paid spousal support of $2200 per month provided certain conditions did not occur.

Golan paid spousal support for a few months but then stopped. Elliott testified in this case that he does not recall why he and Golan did not follow through with the separation agreement. But he acknowledged that he testified in his divorce case that he decided not to abide by the separation agreement and instead sought more spousal support from the divorce court. In discovery responses, Golan stated that she paid $2200 in spousal support for three months until Elliott refused to perform the separation agreement.

Elliott was also fired from his job, and bills from his divorce proceedings began to pile up. The divorce judgment was far less favorable to Elliott than the separation agreement. The divorce court ordered Elliott to pay a substantial sum to Golan for real-estate division and marital debt, which he would not have owed had he abided by the separation agreement. Additionally, the divorce court ordered Golan to pay Elliott only $250 per month in spousal support for three years. Elliott eventually defaulted on the **[*6]** Maple Ridge Road note and mortgage in early 2017, and the Bank sent him a notice of default.

Elliott filed this action on January 13, 2017, alleging two claims against the Bank: (1) violation of the TILA by making the 2014 loan to Elliott without a reasonable and good-faith determination that he had a reasonable ability to repay the loan and for failing to verify his stated income with documentation; and (2) negligence in making the 2014 loan.

Before the Bank filed its answer in this case, it filed a foreclosure action in Ohio state court. On August 7, 2017, the state trial court granted Elliott's motion to dismiss the foreclosure action, finding that the Bank's claims "arise out of the same transaction or occurrence that is the subject matter" of this case, "specifically, the subject note and mortgage," and thus allowing a separate foreclosure action "would result in the multiplicity of suits, would be contrary to the spirit and intent of *Ohio Rule of Civil Procedure 13(A)*, entitled, 'Compulsory Counterclaims,' and would not be in the interest of judicial economy." R. 19-1, PID 79. The state court, therefore, dismissed the bank's claims without prejudice.

On August 29, 2017—after the **[*7]** deadline to file amended pleadings, which was set for June 30, 2017—the Bank filed a motion for leave to file an amended answer to include counterclaims for breach of contract and foreclosure. Several months later, the Ohio Court of Appeals affirmed the state trial court's dismissal.

The magistrate judge granted the Bank's motion for leave to amend its answer after finding that the Bank had been diligent in seeking to amend by filing its motion shortly after the state trial court's dismissal of the foreclosure action. The magistrate judge also rejected Elliott's primary argument that the Bank could not amend its answer because the foreclosure action involved compulsory counterclaims that the Bank was required to bring at the outset of this case. The magistrate judge extended deadlines for completing discovery and filing dispositive motions.

Both parties filed motions for summary judgment. The district court denied Elliott's motion but granted the Bank's. As to the TILA claim, the district court found that the Bank had been diligent in determining whether Elliott had the ability to repay the loan and that it was not foreseeable to the Bank that Elliott and Golan would not abide by the **[*8]** terms of the separation agreement. It also reasoned that the Bank's reliance on the separation agreement and representations from Golan to verify spousal-support income, and tax returns and a then-current lease to verify rental income, constituted compliance with applicable regulations.[2] The district

[2] In doing so, the district court appeared to overlook that the separation agreement was not executed until after the loan

court determined that Elliott's negligence claim failed because the Bank owed no duty to Elliott. Finally, the district court granted summary judgment to the Bank on its breach-of-contract claim and issued a decree of foreclosure against the Maple Ridge Road property.

Elliott then filed a motion under Federal Rules of Civil Procedure 52, 59, 60, and 62(a), requesting amended or additional findings, an altered or amended judgment, relief from judgment, and a stay of foreclosure. The district court granted a stay of foreclosure but otherwise denied the motion.

Elliott now appeals.

II.

Elliott first argues that the magistrate judge abused her discretion in granting the Bank's motion for leave to amend its answer to assert counterclaims against Elliott after the initial deadline to file amended pleadings under the scheduling order. ***HN1***[] We review that determination for abuse of discretion. *See* Commercial Money Ctr., Inc. v. Ill. Union Ins. Co., 508 F.3d 327, 346 (6th Cir. 2007).

> Generally, a party may amend its pleading once as **[*9]** a matter of course, but in all other cases it may amend a pleading only with the opposing party's consent or with leave of the court. Fed. R. Civ. P. 15(a). "The court should freely give leave when justice so requires." *Id.* Once the scheduling order's deadline to amend the complaint passes, however, "a plaintiff first must show good cause under Rule 16(b) [of the Federal Rules of Civil Procedure] for failure earlier to seek leave to amend" and the district court must evaluate prejudice to the nonmoving party "before a court will [even] consider whether amendment is proper under Rule 15(a)." Leary v. Daeschner, 349 F.3d 888, 909 (6th Cir. 2003).

Commerce Benefits Grp., Inc. v. McKesson Corp., 326 F. App'x 369, 376 (6th Cir. 2009) (alterations in original) (footnote omitted).

As an initial matter, the Bank argues that Elliott is precluded from challenging the magistrate judge's grant of its motion for leave to amend because Elliott never objected to the magistrate judge's order. The Bank asserts that the magistrate judge's ruling was made pursuant to Federal Rule of Civil Procedure 72(a), which governs referrals of non-dispositive motions to a magistrate judge and provides in relevant part that

> [a] party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case **[*10]** must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

In Scott v. Eastman Chemical Co., 275 F. App'x 466, 483-84 (6th Cir. 2008), the magistrate judge denied the plaintiff's motion to amend her complaint, and the plaintiff failed to object. Applying Rule 72(a)'s plain language, we held that because the plaintiff "did not object, she has waived her right to assign error to the Magistrate Judge's order" on appeal. *Id.* at 484; *see also* In re Garcia, 347 F. App'x 381, 382 (10th Cir. 2009) ("While 28 U.S.C. § 636(b)(1) provides that a party may file objections to a report and recommendation, it has long been accepted in this circuit that a party may file objections within ten days or he may not, as he chooses, but he shall do so if he wishes further consideration." (internal quotation marks and citations omitted)); *cf.* Caidor v. Onondaga County, 517 F.3d 601, 605 (2d Cir. 2008) ("Accordingly, we hold that a *pro se* litigant who fails to object timely to a magistrate's order on a non-dispositive matter waives the right to appellate review of that order, even absent express notice from the magistrate judge that failure to object within ten days will preclude appellate review.").

In his reply brief, Elliott does not appear to dispute that if Rule 72(a) applies, he has forfeited his right to appeal the magistrate judge's order.[3] Instead, Elliott argues **[*11]** that this case is governed by Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c), which apply to consent proceedings before a magistrate judge and give the magistrate judge authority to conduct a civil action or proceeding and enter judgment, and allows a party to appeal a magistrate judge's judgment directly to the court of appeals. *See* 28 U.S.C. § 636(c)(1) ("Upon

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was consummated and the Bank had no record of the then-current lease for the Maple Ridge Road property.

[3] Elliott briefly states that *Scott*'s waiver language is dicta because the court alternatively addressed the merits, but he does not explain how Rule 72(a)'s plain language would permit an appeal of the magistrate judge's order without an objection made to the district court.

the consent of the parties, a . . . magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves."); *id.* § 636(c)(3) ("Upon entry of judgment in any case referred under [§ 636(c)(1)], an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court."); Fed. R. Civ. P. 73(c) ("In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment."). **HN2**[↑] There is no indication on the district court docket that the parties consented to the magistrate judge conducting the proceedings. *See* Fed. R. Civ. P. 73(b)(1) (providing that when parties **[*12]** consent to a magistrate judge conducting the proceeding, "[t]o signify their consent, the parties must jointly or separately file a statement consenting to the referral"). Further, the district judge—not the magistrate judge—ruled on the later motions for summary judgment, suggesting that the magistrate judge acted pursuant to Rule 72 when she disposed of the non-dispositive motion for leave to amend. Accordingly, Elliott's failure to object to the magistrate judge's order precludes him from "assign[ing] as error a defect in the order." Fed. R. Civ. P. 72(a). We therefore affirm the magistrate judge's grant of the Bank's motion for leave to amend.[4]

III.

Elliott next argues that the district court erred in granting the Bank's motion for summary judgment. **HN4**[↑] We review de novo a district court's grant of summary judgment. Baker v. City of Trenton, 936 F.3d 523, 529 (6th Cir. 2019) (citation omitted). Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making this determination, we view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in his favor. Baker, 936 F.3d at 529 (citation omitted).

A. TILA Claim

Elliott argues that the **[*13]** district court erred in granting summary judgment to the Bank and denying his motion for summary judgment on his TILA claim. He asserts that the Bank violated the TILA and its regulations by failing to make a reasonable and good-faith determination that he had a reasonable ability to repay the 2014 loan based on verified documentation of his income. The reasonable-ability-to-repay provision at issue here was passed as part of the *Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010)*, which amended several sections of the TILA. Dodd-Frank was passed "in response to a 'financial crisis that nearly crippled the U.S. economy,'" which had as a "major cause" "the simple failure of federal regulators to stop abusive lending, particularly unsustainable home mortgage lending." Lusnak v. Bank of Am., N.A., 883 F.3d 1185, 1189 (9th Cir. 2018) (quoting S. Rep. No. 111-176, at 2, 15 (2010)).

The relevant statute, 15 U.S.C. § 1639c, provides in part:

> **(a) Ability to repay**
>
> **(1) In general**
>
> In accordance with regulations prescribed by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has **[*14]** a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee

[4] We note that we find no abuse of discretion in the magistrate judge's granting the Bank's motion for leave to amend its answer. **HN3**[↑] As the magistrate judge found, the claims asserted in the foreclosure action are not compulsory counterclaims in this action. *See* Bauman v. Bank of Am., N.A., 808 F.3d 1097, 1101 (6th Cir. 2015) ("This Court has previously held that a counterclaim on the underlying debt in a Truth in Lending Act (TILA) action is permissive rather than compulsory." (citing Maddox v. Ky. Fin. Co., 736 F.2d 380, 383 (6th Cir. 1984)). Additionally, the magistrate judge noted that no trial date had been set and found that reopening discovery was insufficient on its own to constitute sufficient prejudice to deny leave to amend. The magistrate judge also correctly found that the Bank satisfied the standard for amendment under Rule 15(a), which provides that "[t]he court should freely give leave when justice so requires."

insurance), and assessments. . . .
. . . .

(3) Basis for determination
A determination under this subsection of a consumer's ability to repay a residential mortgage loan shall include consideration of the consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that secures repayment of the loan. A creditor shall determine the ability of the consumer to repay using a payment schedule that fully amortizes the loan over the term of the loan.

(4) Income verification

A creditor making a residential mortgage loan shall verify amounts of income or assets that such creditor relies on to determine repayment ability, including expected income or assets, by reviewing the consumer's Internal Revenue Service Form W-2, tax returns, payroll receipts, financial **[*15]** institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets. In order to safeguard against fraudulent reporting, any consideration of a consumer's income history in making a determination under this subsection shall include the verification of such income by the use of--

> **(A)** Internal Revenue Service transcripts of tax returns; or
>
> **(B)** a method that quickly and effectively verifies income documentation by a third party subject to rules prescribed by the Bureau

15 U.S.C. § 1639c.

Consistent with the statute, the Consumer Financial Protection Bureau also promulgated regulations that contain more specific requirements, which are discussed in pertinent part below. The Bank concedes that the regulations are binding on it.

Elliott first argues that the spousal-support information in the application—listing spousal support at $2300 per month—was not documented or verified in violation of *15 U.S.C. § 1639c(a)(1)* & *(4)*, *12 C.F.R. § 1026.43(c)(2)*, *(3)* & *(4)*, and "Appendix Q," 12 C.F.R. Pt. 1026, App. Q §§ I(A)(1), II(A). In particular, Elliott argues that the Bank failed to make a reasonable and good-faith determination that he could reasonably repay the loan "based on verified and documented information" "at the time the loan [was] **[*16]** consummated," *15 U.S.C. § 1639c(a)(1)*, that it failed to "verify" the spousal support "using reasonably reliable third-party records," *12 C.F.R. § 1026.43(c)(2)*, *(3)* & *(4)*, and that it failed to review "required documentation" including a "[l]egal separation agreement," 12 C.F.R. Pt. 1026, App. Q § II(A). According to Elliott, the Bank violated the statute and regulations by failing to confirm the spousal-support income through review of the separation agreement—instead relying on statements made by Golan and Elliott.

The Bank does not dispute that it did not review the executed separation agreement at the time the loan was consummated. Nor could it, because the separation agreement was not signed by both parties until early February 2015, nearly two months after the loan was finalized. Instead, the Bank argues that it appropriately relied on the information available to it, including Golan's assurances that she and Elliott had agreed on spousal support and that she would follow through with her commitment to enter the separation agreement, and documentation that Golan would be able to make the spousal-support payments. Further, the Bank notes that Golan and Elliott did, in fact, sign the separation agreement providing for sufficient spousal support for Elliott **[*17]** to pay his mortgage, and that Elliott would have continued to pay his mortgage had he not breached the separation agreement. The Bank also argues that it complied with Appendix Q because, although Appendix Q generally requires a creditor to verify that spousal-support payments "have been received during the last 12 months" to include those payments in a consumer's income calculation, Appendix Q also authorizes a bank to rely on "evidence that [spousal support] payments have been received" for "[p]eriods less than 12 months . . . , provided the creditor can adequately document the payer's ability and willingness to make timely payments." 12 C.F.R. Pt. 1026, App. Q § II(A)(3).

The parties seem to assume that Appendix Q applies in this case. However, it appears that Appendix Q only provides the standards to be used in determining monthly debt and income in order for a mortgage to be considered a "qualified mortgage." *See* *12 C.F.R. §*

1026.43(e)(2)(v)-(vi) (defining "qualified mortgage" in part as complying with Appendix Q); 12 C.F.R. Pt. 1026, App. Q ("Section 1026.43(e)(2)(vi) provides that, to satisfy the requirements for a qualified mortgage under § 1026.43(e)(2), the ratio of the consumer's total monthly debt payments to total monthly income at the time of consummation cannot exceed 43 percent. Section 1026.43(e)(2)(vi)(A) requires **[*18]** the creditor to calculate the ratio of the consumer's total monthly debt payments to total monthly income using the following standards, with additional requirements for calculating debt and income appearing in § 1026.43(e)(2)(vi)(B)."). A "qualified mortgage," under certain circumstances, results in either a conclusive or rebuttable presumption that the lender complied with the reasonable-ability-to-repay requirement. 12 C.F.R. § 1026.43(e)(1). The Bank did not argue in its briefing that the 2014 Loan constitutes a "qualified mortgage" or that the Bank was entitled to a presumption that it satisfied the reasonable-ability-to-pay requirement.

In any event, Appendix Q does not help the Bank because the Bank did not comply with it. **HN5**[] Although a creditor may rely on "evidence that [spousal support] payments have been received" for "[p]eriods less than 12 months . . . , provided the creditor can adequately document the payer's ability and willingness to make timely payments," here, the Bank had no evidence of any spousal-support payments because Golan had not begun making them, and thus no evidence that any payments had been received "during the last 12 months." Further, Appendix Q requires that, for spousal support income to be considered **[*19]** effective, the consumer must provide required documentation. 12 C.F.R. Pt. 1026, App. Q § II(A)(2). Examples of required documentation include a final divorce decree, legal separation agreement, court order, or voluntary payment agreement. *Id.* Verbal assertions from Golan that she and Elliott would execute a separation agreement plainly do not comply with the rule.

HN6[] The Bank also failed to comply with 12 C.F.R. § 1026.43, which allows a creditor to consider income or assets that are "current or reasonably expected" but requires the creditor in considering the income or assets to use "third-party records that provide reasonably reliable evidence of the consumer's income or assets." 12 C.F.R. § 1026.43(c)(2)(i), (c)(4); *see also id.* § 1026.43(c)(3) ("Verification using third-party records. A creditor must verify the information that the creditor relies on in determining a consumer's repayment ability under § 1026.43(c)(2) using reasonably reliable third-party records, except that . . . [f]or purposes of paragraph (c)(2)(i) of this section, a creditor must verify a consumer's income or assets that the creditor relies on in accordance with § 1026.43(c)(4)."). Under the regulation,

> [t]hird-party record means:
>
> (i) A document or other record prepared or reviewed by an appropriate person other than the consumer, the creditor, or the **[*20]** mortgage broker, as defined in § 1026.36(a)(2), or an agent of the creditor or mortgage broker;
> (ii) A copy of a tax return filed with the Internal Revenue Service or a State taxing authority;
> (iii) A record the creditor maintains for an account of the consumer held by the creditor; or
> (iv) If the consumer is an employee of the creditor or the mortgage broker, a document or other record maintained by the creditor or mortgage broker regarding the consumer's employment.

12 C.F.R. § 1026.43(b)(13). The Bank does not explain how it verified Elliott's spousal-support income with reliable third-party documents. The Bank instead argues that it "properly documented its file" because the file shows the meetings with Golan and reflects her assurances that she would enter a separation agreement. The Bank also notes that it requested a copy of the separation agreement. The summary of the meeting with Golan was prepared by Bank management and thus cannot constitute a third-party record. And the separation agreement was not executed until nearly two months after the loan was made, and therefore cannot constitute a third-party record that the Bank relied on to make a reasonable-ability-to-repay determination. Further, that the Bank requested **[*21]** a copy of the separation agreement suggests that it understood that it needed to verify and document the spousal support with a reliable third-party document such as an executed separation agreement.

Elliott also argues that the Bank failed to properly document and verify rental income. Elliott points out that there was no documentation in the loan file to support his statement on the loan application that he was receiving rental income of $1400 per month, in violation of § 1639c(a)(1) & (4), 12 C.F.R. § 1026.43(c)(3) & (4), and Appendix Q. The Bank responds that Elliott was in fact receiving $1000 in rental income per month from his Maple Ridge Road property when the loan was approved, and that the Bank reviewed Elliott's tax returns showing previous rental income. The Bank,

however, ignores that it did not review the lease; the rent Elliott was receiving was less than what he listed; and the rent listed on the 2013 tax returns was income from different properties and amounted to $712.50 gross income per month with a net annual loss of $1427. In short, in issuing the loan, the Bank relied on rental income of $1400 per month, but Elliott was only receiving $1000 per month, and it was through a lease agreement that the Bank did **[*22]** not verify prior to consummation of the loan.[5] Accordingly, the Bank did not comply with *12 C.F.R. §1026.43(c)(3)* & *(4)* because it did not verify the listed rental income with any documents that establish that income.

HN7[] To the extent Appendix Q applies, Appendix Q requires verification of rental income by reviewing current rental agreements and previous tax returns. 12 C.F.R. Pt. 1026, App. Q § II(D)(1) & (4). For roommates in a single-family property, Appendix Q requires the income to be shown on a tax return if it is to be used in qualifying. *Id.* § II(D)(3). The Bank did not comply with these requirements to verify the income from the 2014 lease of the Maple Ridge Road property.

If rental income and spousal support are excluded from Elliott's income, Elliott's debt-to-income ratio would be over 90%. The Bank does not argue that a borrower with a debt-to-income ratio of over 90% would have a reasonable ability to repay the loan, or that it could reasonably so determine if spousal support and rental income were excluded. Rather, Murtiff's affidavit states that the Bank had a 40% threshold at the time of this loan. Thus, under the Bank's own standard, exclusion of the spousal support and rental income would result in a debt-to-income ratio **[*23]** that is too high to repay the loan.

Accordingly, the Bank violated *15 U.S.C. § 1639c* and *12 C.F.R. § 1026.43* by considering spousal support and rental income that were not properly verified and documented in making its reasonable-ability-to-repay determination.

We acknowledge that the Bank's arguments are sympathetic. The Bank initially denied Elliott's application because it preferred to keep the loan as it was. It only changed course after meeting with Golan, a good client who, along with Elliott, was familiar with mortgage requirements and had never missed a payment. Golan stressed that it was important that Elliott stay in his family home and gave assurances that she would pay spousal support sufficient to cover the monthly mortgage payment. The Bank then closed the loan—which helped facilitate Golan and Elliott's separation plan—with minimal closing costs. The Bank also points out that the loan was a portfolio loan—the loan was designated to stay in-house and would not be sold on the secondary market—meaning this is not a situation where a bank approves a risky loan in order to collect the closing costs and then sells the loan, leaving another servicer to deal with the risk of default. *See* Dee Pridgen & Richard M. **[*24]** Alderman, Consumer Credit and the Law § 9A:1 ("All too often [prior to Dodd-Frank], mortgage brokers would encourage consumers to take out loans based on the value of the collateral rather than the consumer's income or other resources. Mortgages could then be sold, the originator could collect their fees and let the consumer worry about making payments or suffer foreclosure."). Finally, the Bank's trust in Golan's representations were validated: Golan and Elliott executed a separation agreement providing that Golan would pay spousal support of approximately the amount listed in the loan application, and she paid that amount for several months. As the Bank argues, Elliott would still be receiving that money, and paying his mortgage, had he followed through with the separation agreement.

Although the Bank's arguments are sympathetic, they do not change the fact that technical violations of TILA generally result in liability. In a previous case, we addressed an argument by a creditor that a borrower cannot recover statutory damages under TILA where the borrower made fraudulent misrepresentations in obtaining the credit:

> Moreover, Eldridge points out that the TILA is a remedial statute which serves **[*25]** two purposes: (1) to permit an individual consumer to recover for her injuries; and (2) to deter socially undesirable lending practices. Eldridge contends that the congressional purpose would not be served by awarding Purtle any statutory damages because she admittedly suffered no damages, was never misled or confused by the credit agreement, and understood all of her credit terms. Furthermore, Eldridge contends that as a matter of public policy fraudulent conduct should not be condoned or encouraged nor should it serve as the basis for recovering damages. Therefore, Eldridge argues that Purtle is not entitled to recover statutory damages.

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[5] The parties dispute whether the $1000 per month should be reduced due to the costs associated with maintaining the property, but resolution of this issue is not material to whether the Bank properly verified the rental income.

> On the other hand, Purtle argues that her alleged misrepresentations of her financial condition are no defense to Eldridge's violation of the TILA. HN8[] The Fifth Circuit Court of Appeals has held that once a court finds a violation of the TILA, no matter how technical, the court has no discretion as to the imposition of civil liability. This Court agrees with the reasoning of the Fifth Circuit Court of Appeals in Grant [v. Imperial Motors, 539 F.2d 506 (5th Cir. 1976)]. According to that Court, "once the court finds a violation, no matter how technical, it has no discretion with respect to the imposition **[*26]** of liability." . . . .
>
> . . . The Eighth Circuit Court of Appeals has followed the same rule. Based on the unambiguous statutory language, it is clear that unless one of the defenses provided in the TILA is applicable to this transaction, the district court appropriately awarded Purtle the statutory penalty set out above.

Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 801-02 (6th Cir. 1996) (citations omitted).

Purtle applied 15 U.S.C. § 1640(a), which is the same statute that provides liability for the TILA violation alleged here, although it has been amended and now provides:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of--**(1)** any actual damage sustained by such person as a result of the failure; **(2)(A)** (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $200 nor greater than $2,000, (iii) in the case **[*27]** of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of $500 and a maximum of $5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures; or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000; . . . .
>
> . . . . **(3)** in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and **(4)** in the case of a failure to comply with . . . section 1639c(a) of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

Thus, other arguments the Bank raises that could be construed as defenses—e.g., that Elliott was aware that lenders relied on **[*28]** income stated in an application and yet lied about his income, or that the divorce court determined that Elliott's income was $5500 per month—are not defenses to liability in this case. *See* 15 U.S.C. § 1640(b), (c), (f), (l) (listing defenses such as correction of errors, bona fide errors, good-faith compliance with regulation or interpretation of the Bureau, or where the obligor is "convicted of obtaining by actual fraud such residential mortgage loan").

Accordingly, we reverse the grant of summary judgment to the Bank and reverse the denial of summary judgment to Elliott.

As for the amount of damages, the district court did not address the issue (because it found no violation) and the parties' briefing on appeal is insufficient to conclusively determine damages. We therefore leave it to the district court to determine damages in the first instance, either through supplemental summary-judgment briefing or a trial.

B. Negligence Claim

Elliott also argues that the district court erred in granting summary judgment to the Bank on his negligence claim. Elliott's negligence claim is a repackaging of his TILA claim, alleging that the Bank breached a duty of care owed to Elliott by approving the 2014 loan without a reasonable **[*29]** and good-faith determination that he had a reasonable ability to repay the loan and for failing to verify his stated income with documentation. HN9[] "[T]he elements of an ordinary negligence suit between private parties are (1) the existence of a legal duty, (2) the defendant's breach of that duty, and (3) injury that is the proximate cause of the defendant's breach."

Wallace v. Ohio Dep't of Commerce, 96 Ohio St. 3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, 1025-26 (Ohio 2002).

We agree with the district court that Elliott has not established that the Bank owed him a duty because Ohio law provides that lenders owe no duty to prospective borrowers during negotiations about terms and conditions of a loan. *Blon v. Bank One, 35 Ohio St. 3d 98, 519 N.E.2d 363, 368 (Ohio 1988)* ("[A] bank and its customers stand at arm's length in negotiating terms and conditions of a loan." (citation omitted)); *see also Shaner v. United States, 976 F.2d 990, 993 (6th Cir. 1992)* ("[T]he borrower and lender stand at arm's length while negotiating the terms and conditions of the loan and no fiduciary duty exists at this stage of the relationship . . . ."); *Provident Bank v. Adriatic, Inc., 2005-Ohio-5774, ¶ 23 (Ohio Ct. App. Oct. 31, 2005)* (unpublished) ("Appellants cite to no authority for the proposition that a lender owes a borrower a duty of care in the context of negotiating a loan agreement.").

Elliott argues, however, that the duty the Bank owes is supplied by the TILA, *15 U.S.C. § 1639c(a)(1)*, which was enacted to protect borrowers like him, **[*30]** the housing market, and the public. ***HN10***[↑] Although Ohio generally recognizes that, "[w]here a legislative enactment imposes a specific duty for the safety of others, failure to perform that duty is negligence *per se*," *Chambers v. St. Mary's Sch., 82 Ohio St. 3d 563, 1998-Ohio-184, 697 N.E.2d 198, 201 (Ohio 1998)*, Elliott does not cite, and we have not found, an Ohio case suggesting that a borrower can establish a negligence claim for a lender's technical violations of an income-verification statute where the lender relied on the borrower's own representations in approving the loan.[6] "'[W]hen given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path.'" *Combs v. Int'l Ins. Co., 354 F.3d 568, 577 (6th Cir. 2004)* (second alteration in original) (quoting *Todd v. Societe Bic, S.A., 21 F.3d 1402, 1412 (7th Cir. 1994)* (en banc)).

Accordingly, we affirm the district court's grant of summary judgment to the Bank on Elliott's negligence claim.

C. Foreclosure

Elliott does not dispute that the Bank has made its affirmative case for foreclosure. Rather, Elliott argues that he has valid defenses to foreclosure: unclean hands, unconscionability, and recoupment or setoff.

HN11[↑] "[I]t is fundamental that he who seeks equity must do equity, and that he must come into Court with clean hands." *Christman v. Christman, 171 Ohio St. 152, 168 N.E.2d 153, 154 (Ohio 1960)*. For **[*31]** the Bank to be deemed to have unclean hands, Elliott must demonstrate that the Bank committed reprehensible conduct in regard to the subject matter of the suit. *Basil v. Vincello, 50 Ohio St. 3d 185, 553 N.E.2d 602, 607 (Ohio 1990)*.

Elliott argues that the Bank had unclean hands due to its predatory lending, including by approving a loan that Elliott had no possibility to repay and for taking advantage of Elliott's advanced age. He also argues that the Bank made the loan based solely on the collateral. The undisputed facts, however, do not rise to the level of unclean hands. Although the Bank may have failed to properly verify Elliott's income, Elliott himself signed an application confirming that the income he listed was accurate, and the Bank gathered and reviewed many standard loan-file documents, including tax returns and bank statements. Further, the Bank approved the financing that he requested to assist him and Golan in dividing their assets, and there is no evidence that the Bank took advantage of Elliott's age. Although Elliott appears to be having cognitive difficulties now, the Bank knew him as an experienced realtor knowledgeable about mortgage products.

Elliott also points to brief testimony from Savidge to suggest that the Bank approved the **[*32]** loan based solely on the collateral rather than an expectation that Elliott could repay the loan. That series of questions, however, was discussing whether Elliott's age was a factor in determining the terms to offer him:

> Q. What's the logic of extending a longer term to the borrower when the 80-year-old borrower is the one staying on the loan and the 50-some borrower is getting off the loan?

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[6] Elliott cites several cases, but none of them aid him here. *Childs v. Charske, 2004-Ohio-7331, 822 N.E.2d 853 (Ohio Ct. Com. Pl 2004)*, is a trial court case involving misrepresentations by title companies. *Lewis v. Wall, 2008-Ohio-3387 (Ohio Ct. App. July 3, 2008)* (unpublished), is a landlord-tenant matter involving a slip and fall. *Daniels v. Select Portfolio Servicing, Inc., 246 Cal. App. 4th 1150, 201 Cal. Rptr. 3d 390 (Cal. App. 2016)*, has never been cited by an Ohio court and involved alleged misrepresentations in connection with a proposed loan modification.

> A. I mean, I'm sure we presented the options of, you know, whether it's 25 or 20 or 15. Those would have been the portfolio choices, so ---
> Q. But he's not going to live that long, is he?
> MR. KOLMAN: Objection.
> A. I would be discriminating against him if I based giving him a loan on his age and, you know, so, you know.
> Q. So, in that situation, it's really a loan covered by collateral?
> A. Correct. Age is irrelevant.

This brief testimony—where Savidge was explaining whether he considered Elliott's age in determining the terms to offer—does not support a finding that the Bank approved the loan so that it could take the property, as the remainder of Savidge's testimony detailed the efforts he made to determine that Elliott could repay the loan. Thus, although Elliott has cited no caselaw finding unclean **[*33]** hands even under the facts that he alleges, his version of events is unsupported by the record.

As to unconscionability, in addition to repeating some of the same arguments as above, Elliott argues that he has established the defense of unconscionability due to the Bank's predatory lending, including "mortgage flipping," and taking advantage of an elderly borrower in exchange for a promise of referrals by Golan.

HN12[⬆] "Unconscionability is a legal question involving an absence of choice on the part of one of the parties to a contract and contract terms that are unreasonably favorable to the other party. . . . In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power." *Swayne v. Beebles Invs., Inc., 176 Ohio App. 3d 293, 2008-Ohio-1839, 891 N.E.2d 1216, 1222 (Ohio Ct. App. 2008)*. Ohio law also considers mortgage flipping to be an unconscionable act. ***HN13***[⬆] "Flipping" a mortgage is defined as "making a mortgage loan that refinances an existing mortgage loan when the new loan does not have reasonable, tangible net benefit to the consumer considering all of the circumstances, including the terms of both the new and refinanced loans, the cost of the new loan, and the consumer's circumstances." *Ohio Rev. Code Ann. § 1345.031(B)(12)*. Elliott argues that the Bank engaged in mortgage flipping when the 2013 Loan **[*34]** was refinanced with the 2014 Loan, pointing out that the 2014 Loan had a higher interest rate. He also suggests that the Bank knew he could not repay the 2014 Loan and instead intended to take the property and gain favor with Golan, a potential source of referrals. He claims that these actions are also unconscionable under *Ohio Revised Code Annotated § 1345.031(B)(2)*, which makes unconscionable "[e]ngaging in a pattern or practice of providing consumer transactions to consumers based predominantly on the supplier's realization of the foreclosure or liquidation value of the consumer's collateral without regard to the consumer's ability to repay the loan in accordance with its terms."

Elliott relies on *Swayne* in arguing that he has a valid defense of unconscionability. *Swayne* involved a senior citizen who lived off of $1206 per month. *891 N.E.2d at 1219*. She owned her home free and clear of any liens or mortgages but needed money for repairs, so she approached a small company in hopes of borrowing funds because her credit score was too low to obtain financing from most lenders. *Id. at 1219-20*. The court explained that Swayne had met her burden to establish unconscionability under the egregious facts of that case:

> Here, Swayne was in her 70s when she engaged in **[*35]** this transaction. She had not worked outside the home since 1972. Her husband, who had managed the couple's finances, had died two years before. Swayne soon found herself in need of money to pay bills and to repair the roof, kitchen, and bathroom of her home of 20 years. For help, she contacted a company that listed itself as A—Loan. Beebles does business under the name of A—Loan.
> Swayne did not seek the help of a lawyer or even of a financially sophisticated friend. She stated that she relied upon the representations of a loan officer for Beebles and upon the representations of Timothy Farkas personally in deciding to go forward with the mortgage. On July 10, 2002, she executed a note and a mortgage. The mortgage is 12 pages of single-spaced type. In addition, there is a two-page Balloon Rider (Conditional Right to Refinance). The interest on the balloon note is listed at 24.990 percent, but the federal Truth—in—Lending Disclosure lists the annual percentage rate as 41.657 percent, with a final balloon payment of $25,612.11 due on August 1, 2003. The interest rate alone clearly favors the lender.
>
> Of the $20,000 face amount of the note, Swayne received $13,734.60. This demonstrates that **[*36]** approximately 31 percent of the loan's proceeds were allocated to closing costs and fees. As indicated earlier, Beebles received a $1,000 loan origination fee, a $1,000 loan discount fee, a $75

processing fee, and a $50 payment purportedly to reimburse the costs for a credit report. In addition to state and federal statutes that prohibit some of these provisions, these numbers, on their face, are one-sided in favor of Beebles.

Beebles knew that with a monthly income of $1,206, Swayne would be unable to make the balloon payment when it became due. Thus, Beebles placed Swayne in a position in which Beebles knew or should have known that Swayne was certain to default. All of these factors demonstrate substantive unconscionability.

With respect to procedural unconscionability, the relative bargaining positions of the parties could not be more disparate. Beebles and Farkas were in the business of brokering mortgages. Beebles took advantage of Swayne's lack of financial sophistication by having Swayne execute two sets of loan documents with differing terms. Swayne was unfamiliar with financial matters, as she was a recent widow whose husband had managed the couple's finances. Swayne did not **[*37]** consult a lawyer or even a financially sophisticated friend. Rather, she relied upon the representations of the loan officer, and then Farkas himself.

Farkas, on the other hand, knew the poor state of Swayne's finances, knew of her bad credit, knew of her lack of resources, knew that no lenders were willing to lend her money, and knew that Swayne could not possibly pay back the balloon note. He also testified that even with the loan, there was "no way" that Swayne had enough money to do the necessary repairs to her house. Despite all of that knowledge, appellants entered into a loan agreement with terms that Swayne could not possibly meet. On these undisputed facts, Farkas and Beebles took advantage of the parties' unequal bargaining positions to create a one-sided agreement in their favor.

Id. at 1222-23.

The facts in *Swayne* do not resemble this case. Here, the 2014 Loan, although it had a slightly higher interest rate than the 2013 Loan, had a far lower interest rate than in *Swayne*, and the terms of the loan actually lowered Elliott's monthly payments. *See Deutsche Bank Nat'l Tr. Co. v. Pevarski, 187 Ohio App. 3d 455, 2010-Ohio-785, 932 N.E.2d 887, 896-98 (Ohio Ct. App. 2010)* ("In the present case, an interest rate of 6.3 percent or 11.125 percent is also not, in and of itself, so extreme as to appear unconscionable."). **[*38]** Further, the 2014 Loan was issued at Elliott's and Golan's request to facilitate their separation, not as a plot between Golan and the Bank to saddle Elliott with debt.[7] Elliott is an experienced real estate agent familiar with mortgage products who could have chosen not to voluntarily divide the properties in the way that he and Golan did. Further, unlike *Swayne*, where the plaintiff had no possibility of ever making the balloon payment, Elliott would likely still be current with his mortgage payments had he continued to abide by the terms of the separation agreement.

Accordingly, there is no genuine dispute of material fact regarding Elliott's defenses of unclear hands and unconscionability.

Finally, regarding recoupment and setoff, *15 U.S.C. § 1640(k)* provides:

> **(k) Defense to foreclosure**
>
> **(1) In general**
>
> Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of *paragraph (1)* or *(2)* of *section 1639b(c)* of this title, **[*39]** or of *section 1639c(a)* of this title, as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under *subsection (e)*.
>
> **(2) Amount of recoupment or setoff**
>
> **(A) In general**

[7] Although Elliott repeatedly suggests that Golan was controlling his every move and that he applied for the 2014 Loan thinking that they would stay together, it is not clear why that would result in liability for the Bank where there is no evidence that the Bank was aware of Golan's alleged manipulation.

> The amount of recoupment or set-off under *paragraph (1)* shall equal the amount to which the consumer would be entitled under *subsection (a)* for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney's fee.

HN14[↑] Recoupment or setoff is "a matter of *defense*" to foreclosure, and recovery is limited to "the amount to which the consumer *would be entitled* under *[§ 1640(a)*] for damages for a valid claim brought in an original action against the creditor." *15 U.S.C. § 1640(k)(1)* & *(2)* (emphasis added). Here, though, Elliott brought an original action for violations of the TILA against the Bank. He is already entitled to seek damages under *§ 1640(a)*. By *§ 1640(k)*'s own terms, he cannot obtain double damages for TILA violations through recoupment or setoff; however, he can offset his recovery against the foreclosure amount. As discussed above, the district court should determine in the first instance the amount to which Elliott is entitled under *§ 1640(a)* directly.

IV.

For the reasons set out above, **[*40]** we affirm the district court's grant of summary judgment as to the negligence claim, reverse the grant of summary judgment to the Bank on the TILA claim, reverse the denial of summary judgment to Elliott on the TILA claim, and remand for further proceedings consistent with this opinion.

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SLIP OPINION NO. 2020-OHIO-3702

MCADAMS, APPELLEE, *v.* MERCEDES-BENZ USA, L.L.C., APPELLANT, ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *McAdams v. Mercedes-Benz, USA, L.L.C.*, Slip Opinion No. 2020-Ohio-3702.]

Res judicata—Class-action settlement—Opt-out provision—Federal court's determination of the class bound all nonexcluded class members to settlement agreement—State court erred in conducting an analysis of the class—When a party was not excluded from a class-action suit by a federal court that determined the class, the question whether the party opted out of the class is res judicata.

(No. 2018-1667—Submitted January 8, 2020—Decided July 16, 2020.)

APPEAL from the Court of Appeals for Franklin County,

No. 17AP-120, 2018-Ohio-4078.

FISCHER, J.

{¶ 1} We accepted the discretionary appeal of appellant, Mercedes-Benz USA, L.L.C. ("MB USA"), to address whether appellee Pattiann McAdams's lawsuit against MB USA and others was barred by a class-action settlement that was approved in *Seifi v. Mercedes-Benz USA, L.L.C.*, N.D.Cal. No. 12-CV-05493 (TEH), 2015 U.S. Dist. LEXIS 109015 (Aug. 18, 2015). The issue before us is whether McAdams had opted out of the *Seifi* class action and thus could pursue her individual claim against MB USA. The Tenth District Court of Appeals held that McAdams had opted out of the *Seifi* class action.

{¶ 2} Because the federal court in *Seifi* determined the composition of the class, specifically excluded from the action only those class members who had followed a specific opt-out procedure, and did not exclude McAdams, we conclude that McAdams's status as a member of the *Seifi* class was determined in that case and thus that her claim here is barred by res judicata. We reverse the judgment of the Tenth District Court of Appeals on the opt-out issue, and we reinstate the trial court's judgment granting MB USA summary judgment on McAdams's balance-shaft-gear claim.

I. BACKGROUND

A. McAdams's 2006 Mercedes ML350 SUV

{¶ 3} McAdams purchased a certified preowned 2006 Mercedes ML350 SUV with a M272 engine, No. 27296730275576, from Mercedes-Benz of New Rochelle, a dealership in New York, in 2008. McAdams claimed that in 2014, she experienced mechanical problems related to the vehicle's balance-shaft gear and transmission conductor plate.

{¶ 4} Mercedes-Benz of Easton ("MB Easton") determined that the balance-shaft gear in the vehicle needed to be replaced; the repair would cost several thousand dollars. Crown Eurocars, another Mercedes-Benz dealership, completed the repair. Crown Eurocars later determined that the vehicle's

transmission conductor plate needed to be replaced. All the repairs were eventually made.

B. Lawsuits against MB USA

1. Class action in federal court

{¶ 5} In 2012, a federal class-action lawsuit was filed against MB USA on behalf of a proposed class of Mercedes-Benz owners and lessees whose vehicles were equipped with certain M272 engines. *See Seifi*, 2013 U.S. Dist. LEXIS 47796, at *1 (Apr. 2, 2013). The plaintiffs alleged in that complaint that defective balance-shaft gears in their 2006 Mercedes ML350 vehicles caused engine malfunctions resulting in repairs that cost several thousand dollars. *See id*.

{¶ 6} On April 8, 2015, the federal court issued a notice of pendency and proposed settlement of the class action and conditionally certified the class on a nationwide basis. *Seifi*, 2015 U.S. Dist. LEXIS 46107, at *3-4 (Apr. 8, 2015) The class was defined as "[a]ll current and former owners and lessees of Mercedes-Benz branded automobiles equipped with M272 and M273 engines bearing serial numbers up to 2729..30 468993 or 2729..30 088611, found in the Subject 2005-2007 Model Year Vehicles" who had purchased or leased their vehicles within the United States. *Id.*

{¶ 7} Class members to be excluded from the class action were those "who validly and timely excluded themselves." *Id.* The order provided that a class member who wished to be excluded from the class action was required to submit a written request for exclusion to KCC Class Action Services, L.L.C. *Id.* at *7-8. Further, the court stated that "[a]nyone who [fell] within the Settlement Class definition and [did] not submit a Request for Exclusion in complete accordance with the deadlines and other specifications * * * shall remain a Settlement Class Member and shall be bound by all proceedings, orders, and judgments * * * pertaining to the Settlement Class." *Id.* at *8.

{¶ 8} On August 18, 2015, the federal court approved the settlement agreement between MB USA and the class-action members. *Seifi,* 2015 U.S. Dist. LEXIS 109015, *1 (Aug. 18, 2015). The court concluded that all class members had been given a fair opportunity to participate and to exclude themselves from the settlement. *Id.* at *3. Thus, the federal court ordered that "every Settlement Class Member, except for those excluded from the Settlement Class * * *, shall be bound by the Settlement Agreement and be deemed to release and forever discharge all released Claims and as outlined in * * * the Settlement Agreement." *Seifi,* 2015 WL 12964340, at *5 (Aug. 18, 2015). The Settlement Agreement provided that the class members released and forever discharged MB USA and its affiliated dealerships "from each and every claim of liability, on any legal or equitable ground whatsoever, including relief under federal law or the laws of any state, regarding or related to the repair or replacement of balance shaft sprockets or idle gears in the Subject Vehicles."

{¶ 9} The court ordered that all class members who did not timely exclude themselves from the action were "barred, enjoined, and restrained from commencing, prosecuting, or asserting any Released Claim against MBUSA or any *other* Released Party." *Id.* The court entered judgment and dismissed the entire class action with prejudice. *Id.*

2. McAdams's lawsuit in the Franklin County Court of Common Pleas

{¶ 10} While the *Seifi* class action was pending, on February 23, 2015, McAdams filed a complaint in the Franklin County Court of Common Pleas against MB USA, MB Easton, and Mercedes-Benz of New Rochelle, alleging several claims relating to her issues with the balance-shaft gear and the transmission conductor plate.

{¶ 11} MB USA and MB Easton each filed an answer to McAdams's complaint on April 27, 2015, after the proposed settlement was filed in *Seifi* but prior to final approval of the settlement by the federal district court. MB USA and

MB Easton each asserted as an affirmative defense that McAdams's "claims [were] barred, in whole or in part, by the doctrines of waiver and estoppel."

{¶ 12} On August 22, 2016, a year after the judgment in the *Seifi* class action was issued, defense counsel representing both MB USA and MB Easton deposed McAdams. In the deposition, McAdams testified that she was aware of the *Seifi* class action and that she had spoken with counsel for the class. She knew that the *Seifi* action dealt with the balance-shaft-gear issue that she had experienced and admitted that class counsel had invited her to join the class. McAdams also knew that the *Seifi* class action had settled. She explained that joining the class action was not in her best interest due to the additional issue she had with her transmission conductor plate. Defense counsel did not question whether McAdams had opted out of the *Seifi* class-action settlement by following the procedures mandated by the federal court.

{¶ 13} On October 31, 2016, MB USA and MB Easton jointly moved for summary judgment. They alleged that McAdams's claims about the mechanical problems with the balance-shaft gear were foreclosed by the *Seifi* class action. Because McAdams was a class member and she had not opted out of the class under the approved procedure, they argued that McAdams was bound by the *Seifi* class-action settlement and order of the court declaring that each settlement-class member had released MB USA and affiliated dealerships from liability related to the balance-shaft-gear issue.

{¶ 14} McAdams argued that MB USA and MB Easton had waived the res judicata defense and that res judicata was inapplicable because she had effectively opted out of the *Seifi* class-action settlement by filing and maintaining her lawsuit against MB USA and MB Easton.

{¶ 15} The trial court, on February 16, 2017, ruled against McAdams and in favor of MB USA and the other defendants. The trial court determined that MB USA and MB Easton had preserved the res judicata defense by raising estoppel as

an affirmative defense in their answers. The trial court found that McAdams was bound by the *Seifi* class-action settlement and therefore that her balance-shaft-gear claim was barred by res judicata because she had not formally opted out of the class action. The trial court granted summary judgment to MB USA and MB Easton and dismissed McAdams's complaint with prejudice. The trial court also dismissed the complaint as to Mercedes-Benz of New Rochelle due to the lack of evidence presented by McAdams.

3. McAdams's appeal to the Tenth District Court of Appeals

{¶ 16} McAdams appealed to the Tenth District Court of Appeals. She argued that MB USA and MB Easton had waived the affirmative defense of res judicata and that she had effectively opted out of the class-action lawsuit.

{¶ 17} The Tenth District Court of Appeals reversed the trial court's decision granting MB USA and MB Easton summary judgment on McAdams's balance-shaft-gear claims. The appellate court agreed that MB USA and MB Easton had preserved the res judicata affirmative defense. However, the court determined that this did not matter because McAdams had effectively opted out of the *Seifi* class-action settlement.

{¶ 18} The appellate court, relying on *Frost v. Household Realty Corp.*, 61 F.Supp.3d 740 (S.D.Ohio 2004), and *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62 (N.D.Cal. 1976), noted that " ' "any reasonable expression of a request for exclusion should serve to relieve a class member from a class suit." ' " 2018-Ohio-4078, 112 N.E.3d 935, ¶ 19, quoting *Frost* at 747, quoting *McCubbrey* at 70. The appellate court determined that even though McAdams had not opted out of the class action through the procedure required by the federal court, her actions were a reasonable expression of her request for exclusion: (1) she had communicated with the class-action counsel that she did not want to be included in the class action, (2) she had sued MB USA and MB Easton prior to the deadline to submit an opt-out notice, (3) she had pursued her case while the *Seifi* class action

was ongoing and after it had settled, and (4) she had included in her lawsuit the information that was required to formally opt out of the settlement agreement—her name, address, and telephone number, the VIN number of her car, the dates she owned the car, and a recitation of the issues she had experienced with the vehicle. Because it concluded that McAdams had opted out of the class action, the Tenth District reversed the trial court's judgment granting MB USA and MB Easton summary judgment on McAdams's balance-shaft-gear claims. The court remanded the cause for further proceedings.

4. MB USA's appeal to the Ohio Supreme Court

{¶ 19} MB USA appealed to this court and asserts two propositions of law:

> (1) An Ohio state court may not usurp a federal court's authority by re-adjudicating the federal court's already finalized class action opt-out decision.
>
> (2) Ohio should adopt the majority approach requiring compliance with court-mandated opt-out procedures and should reject the Tenth District's approach treating maintenance of a pre-existing lawsuit as an "informal opt-out."

Neither MB Easton nor McAdams appealed to this court. We accepted jurisdiction over both of MB USA's propositions of law. 154 Ohio St.3d 1499, 2019-Ohio-345, 116 N.E.3d 154.

II. ANALYSIS

{¶ 20} The crux of this case is whether the final judgment in *Seifi*—in which the federal court approved a settlement that defined a class, excluded only those members of the class who opted out through the procedure set forth by the court, and released MB USA and others from the remaining class members' balance-

shaft-gear claims—precludes McAdams's balance-shaft-gear claims against MB USA. We conclude that it does.

A. Res judicata

{¶ 21} Res judicata involves both claim preclusion and issue preclusion. *Brooks v. Kelly*, 144 Ohio St.3d 322, 2015-Ohio-2805, 43 N.E.3d 385, ¶ 7. A final judgment rendered on the merits by a court of competent jurisdiction serves as a complete bar to any subsequent action on the same issue between the same parties or those in privity with them. *Id.*

{¶ 22} A judicially approved settlement agreement that includes a dismissal of the action with prejudice is considered a final adjudication on the merits, and res judicata will apply to bar any further action on the same issue. *See*, *e.g.*, *Langton v. Hogan,* 71 F.3d 930, 935 (1st Cir.1995); *Toscano v. Connecticut Gen. Life Ins. Co.*, 288 Fed.Appx. 36, 38 (3d Cir.2008); *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 449 (5th Cir.2016); *Rein v. Providian Financial Corp.*, 270 F.3d 895, 903 (9th Cir.2001); *see also In re Gilbraith*, 32 Ohio St.3d 127, 129, 512 N.E.2d 956 (1987) ("consent judgment operates as *res judicata* with the same force given to a judgment entered on the merits in a fully adversarial proceeding").

{¶ 23} Res judicata also applies to class-action lawsuits. A class member, even an absent class member, is bound by the judgment of the class action, and res judicata bars further litigation by those class members regarding that same cause of action. *In re Kroger Co. Shareholders Litigation*, 70 Ohio App.3d 52, 59, 590 N.E.2d 391 (1st Dist.1990) (a class action represents an exception to the rule that only parties may be bound by a judgment, and when the class action conforms to the requirements of due process, res judicata bars further litigation by class members on the cause of action); *Cooper v. Fed. Res. Bank of Richmond*, 467 U.S. 867, 874, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984) (a judgment in a properly entertained class action is binding on class members in any subsequent litigation); *Juris v. Inamed Corp.*, 685 F.3d 1294, 1335 (11th Cir.2012) (an absent class

member cannot escape the res judicata effect of a prior judgment by arguing that there was an error in certifying the class). This court has recognized that absent class members, though passive parties, may intervene in order to protect their individual interests in the action lest they be bound by the class-action judgment. *See Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 694 N.E.2d 442 (1998).

B. The opt-out issue is precluded by res judicata

{¶ 24} The federal court in *Seifi* determined various issues as to composition of the class and resolved the action. That court defined the class, and the class definition included McAdams: a current owner of a 2005-2007 Mercedes-Benz with an M272 engine that bears an engine serial number within the specified range. *Seifi*, 2015 WL 12964340, at *4. The court also expressly identified the people who had successfully opted out of the class action, naming them in Exhibit A and Exhibit B in the order granting approval of the settlement. *Id*. at *5. The court then determined that those class members who were not excluded "shall be bound" by the settlement agreement and "be deemed to release and forever discharge" all claims outlined in the agreement. *Id.* The court "barred, enjoined, and restrained" those class members "from commencing, prosecuting, or asserting" against MB USA or a related party any claim outlined in the settlement agreement. *Id.* Because the federal court in *Seifi* determined the issues related to class composition, any challenge to the composition of the class by a class member is precluded by res judicata. *See Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus.

{¶ 25} The federal court determined which class members were bound by the settlement agreement—it excluded only those class members who had opted out of the class action by following the mandated opt-out procedure and McAdams was not one of those people. The federal court's judgment bound all nonexcluded class members to the settlement agreement and barred them from bringing the claim outlined in the settlement agreement against MB USA and other related

parties. Therefore, while McAdams's action was pending in the trial court, the federal court determined the issue of whether McAdams was a class member, and it was error for the Tenth District to conduct an analysis related to this issue. The parties do not dispute and the record affirmatively shows that McAdams falls within the *Seifi* class definition. Because McAdams was not excluded from the class action by the federal court that certified the class, the issue whether she opted out is res judicata. And because the issue whether McAdams opted out of the class action is barred by res judicata, we need not address in this case the issue whether this court should adopt a strict or liberal view when determining whether a class member adequately opted out of a class action. What is clear in this case is that a court cannot deem a class member, who was not found by the court maintaining the class action to have opted out, and who has not demonstrated a due-process violation by being included in the class action, as having adequately opted out of the class action. To do so is to ignore the order of a court of competent jurisdiction. And such a determination would serve to "trespass against the principles at the very core of the full faith and credit doctrine" and demean the class-action process, *Fine v. Am. Online, Inc.*, 139 Ohio App.3d 133, 142, 743 N.E.2d 416 (9th Dist.2000); *see also Durfee v. Duke*, 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) (full faith and credit requires every state to give a judgment at least the res judicata effect that would be accorded in the state that rendered the judgment). For this court to wade into discussing a strict or liberal view of opt-out determinations is unnecessary in this case, as the issue was clearly barred by res judicata.

{¶ 26} We conclude that the Tenth District Court of Appeals erred in analyzing whether McAdams opted out of the class action because that issue had already been determined by the federal court in *Seifi*.

III. CONCLUSION

{¶ 27} McAdams's claim that she had not opted out of the class action is barred by res judicata, because the federal court had determined who had opted out

in its entry adopting the *Seifi* class-action settlement. Therefore, we reverse the decision of the Tenth District Court of Appeals on McAdams's claim that she did not opt out and reinstate the trial court's judgment granting MB USA summary judgment on McAdams's balance-shaft-gear claim.

{¶ 28} We acknowledge the Tenth District's error also affects the judgment against MB Easton, which did not appeal from the Tenth District's judgment. Generally, a reversal as to an appealing party will not justify reversal as to a nonappealing party unless the respective rights of the appealing party and nonappealing party are so interwoven or dependent on each other as to require a reversal of the whole judgment. *Wigton v. Lavender*, 9 Ohio St.3d 40, 457 N.E.2d 1172 (1984), syllabus. Thus, because MB Easton did not appeal, we leave the Tenth District's judgment as to that party undisturbed.

Judgment reversed.

O'CONNOR, C.J., and KENNEDY, SHEEHAN, DEWINE, and STEWART, JJ., concur.

DONNELLY, J., concurs in judgment only.

MICHELLE J. SHEEHAN, J., of the Eighth District Court of Appeals, sitting for FRENCH, J.

Luper, Neidenthal & Logan, Gregory H. Melick, and Matthew T. Anderson, for appellee.

Benesch, Friedlander, Coplan & Aronoff, L.L.P., Jennifer M. Turk, Michael J. Meyer, and Gregory T. Frohman; and Squire Patton Boggs, L.L.P., Troy M. Yoshino, and David M. Rice, for appellant.

[Cite as *Hillier v. Fifth Third Bank*, 2020-Ohio-3679.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

JAMES L. HILLIER, INDIVIDUALLY AND AS EXECUTOR OF LESLIE R. HILLIER'S ESTATE	:	Appellate Case No. 2019-CA-21
Plaintiff-Appellant	:	Trial Court Case No. 87766-B
v.	:	(Appeal from Common Pleas Court-Probate Division)
FIFTH THIRD BANK, et al.	:	
Defendants-Appellees	:	

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O P I N I O N

Rendered on the 10th day of July, 2020.

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. . . . . .

WELBAUM, J.

{¶ 1} Plaintiff-Appellant, James L. Hillier, appeals individually and as executor of the Estate of Leslie R. Hillier, from summary judgments granted to Defendants-Appellees, Fifth Third Bank and Judith Brown.[1] James is Leslie's grandson, and Judith is Leslie's daughter. When Leslie died, he had $203,758.09 in two accounts at Fifth Third. The claims against Fifth Third and Judith arose from the bank's payment to Judith of the total balance in Leslie's accounts.

{¶ 2} According to James, the trial court erred in granting summary judgment for Fifth Third because the bank could not create a contract for a payable on death account by any means other than a written contract signed by the account owner, and Leslie had not entered such a contract. James also argues that Fifth Third exercised bad faith by paying out the funds when it knew the accounts' ownership was disputed.

{¶ 3} As to Judith, James contends that the trial court incorrectly granted summary judgment in her favor on his unjust enrichment claim, because Judith did not to move for summary judgment. Additionally, on the merits, James maintains that Judith should not have received summary judgment on unjust enrichment because she received funds that the bank improperly administered.

{¶ 4} After reviewing the record, we conclude that the trial court erred in rendering summary judgment in favor of Fifth Third on the contract and conversion claims. Under the unambiguous terms of the contract between Leslie and the bank, Leslie's accounts were not payable on death accounts and should have been paid instead to Leslie's estate for distribution under his will. The trial court also erred in awarding summary judgment

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[1] For purposes of clarity, we will refer to Fifth Third Bank as "Fifth Third," to the other parties by their first names, and to Leslie Hilliard as "Leslie."

to Judith, as she was not entitled to the amounts in Leslie's accounts and was unjustly enriched by the payments. The court did not err in awarding summary judgment to Fifth Third on James's bad faith, negligence, and estoppel claims, nor did the court err in granting summary judgment to Judith on James's conversion claim. Accordingly, the judgment of the trial court will be affirmed in part and reversed in part, and the matter will be remanded for further proceedings consistent with this opinion.

I. Facts and Course of Proceedings

{¶ 5} Because we are reviewing this matter after a grant of summary judgment, we review the facts in a light most favorable to the non-movant (James). This case involves the disposition of proceeds in two alleged payable on death ("POD") accounts at Fifth Third, which were owned by Leslie Hillier. Leslie was 98 years old when he died on August 20, 2015.

{¶ 6} In June 1976, Leslie opened savings account XXXXXXX518 ("518") with the bank. The record is not clear with respect to whether the account originated with Fifth Third or was purchased from another bank. Nonetheless, Fifth Third was not able to produce any copies of signature cards that were ever signed for this account, other than an August 2015 card that James signed as power of attorney ("POA").

{¶ 7} In March 1983, Leslie opened checking account XXXXXXX636 ("636"). Fifth Third produced four signature cards for this account. Two of the cards, which were signed in 2012, stated that Leslie and his wife, Glenna, had "joint – with survivor" ownership. On these signature cards, Judith Brown and James L. Hillier (the father of James, the plaintiff-appellant in this case) were listed as POD beneficiaries. Deposition

of Jennifer Nicely (Fifth Third's retail operations manager), Ex.5. Judith was Leslie's daughter, and James L. was his son.

{¶ 8} James L. died in November 2014. Shortly after James L. died, James, who lived in North Carolina, received a call from Leslie; Leslie asked if James would be his power of attorney. Leslie also said he was changing his will and asked if James would be the executor. Deposition of James Hillier, p. 38-39. According to James, Leslie was concerned that Judith would come in and take all his money, and he would be a beggar. In addition, neither Glenna nor Leslie wanted to deal with Judith. *Id*. at p. 39-41. James could not recall whether there were one or more powers of attorney, but the only time he used a POA at Fifth Third was on August 13, 2015, when he went to the bank to obtain electronic access to Leslie's bank account. At that time, James was concerned because Leslie had been withdrawing sums of cash from the bank that appeared to be disappearing. *Id*. at p. 38-39, 42, and 45-46.

{¶ 9} Glenna died on April 8, 2015. *Id*. at p. 43. On April 17, 2015, James and Leslie went to the Fifth Third Bank in Piqua, Ohio, to remove Glenna's name from Leslie's accounts. After indicating what they wanted, they were asked to wait. A few minutes later, Lesley Swarts, a Fifth Third personal banker, took them into a small office.[2] This was the first time James had been to the bank. *Id*. at p. 62-66. When Swarts asked why they were there, James said his grandmother had passed away, and he (Leslie) wanted to take her off the account. *Id*. at p. 67-68. After that, Leslie did most of the talking. *Id*.

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[2] Swarts denied ever meeting James prior to her deposition, which was taken on September 2, 2016. Deposition of Lesley Swarts, p. 23. Other factual issues existed as well. However, for reasons that will become apparent, none of the factual issues are genuine issues precluding summary judgment. We provide the factual information as background.

at p. 68.

{¶ 10} Leslie told Swarts that life was not fair, that his son had died in November, that his wife had died, and that his daughter did not talk to him. *Id*. During the conversation, Leslie indicated that James was his grandson and said his grandchildren were helping him. *Id*. at p. 69 and 78. Leslie also said that he wanted his estate to go to his grandchildren. *Id*. at p. 77-78. In addition, Leslie stated during the visit that his directions to the bank were for a distribution of the account funds to his grandchildren. *Id*. at p. 82.

{¶ 11} According to James, Leslie signed several documents that day. James did not read them, but pointed to where Leslie needed to sign. *Id*. at p. 71. One signature card was signed that day – for the 636 checking account. On this card, Leslie was listed as the sole owner, and no POD beneficiaries were listed. Nicely Deposition at p. 71-72, and Ex. 9.

{¶ 12} James and Leslie were at the bank for 30 to 45 minutes, and then immediately went to the office of Leslie's attorney, Thomas Buecker. Hillier Deposition at p. 63-64. Buecker had been Leslie's attorney for years, but James had never met or talked with him before that day. *Id*. at p. 42-43. James and Leslie were at Buecker's office for about 30 to 45 minutes, but it was less time than they had spent at the bank. *Id*. at p. 64. At that time, Leslie signed a POA appointing James as his power of attorney and a new will that granted all his personal and real property to his grandchildren. One half of the estate was to be given James L.'s children, per stirpes, and the other half was to be distributed to Judith's children, per stirpes. In the will, Leslie also stated that "I make no provision for my daughter, Judith Brown." *Id.* at p. 72-73, 83, 100, and 141-144

and Ex. B; April 13, 2015 Will of Leslie Hillier, filed with the probate court on August 25, 2015.

{¶ 13} As noted, the next time James went to Fifth Third was on August 13, 2015, when he met with an employee, Kathy McGill, and filed the POA so he could electronically access the accounts. Hillier Deposition at p. 83-84. On that day, James signed two signature cards using the POA. One card was for checking account 636 and the other was for savings account 518. These cards both listed Judith Brown and James L. Hillier as POD beneficiaries. *Id*. at p. 97 and 106 and Ex. E; Nicely Deposition at p. 129 and Exs. 13 and A; Deposition of Kathy McGill, p. 28-29 and Exs. 1-D and 1-F.

{¶ 14} Leslie died on August 20, 2015. Within a week or two after Leslie's death, James and the estate attorney went to Fifth Third. At that time, they found out that the accounts were supposedly designated POD. Hillier Deposition at p. 32, 37,100, and 149. Fifth Third then paid the total amounts of the checking and savings accounts ($203,758.09) to Judith, because the only other listed person (James L. Hillier) had already died.

{¶ 15} In June 2017, James filed an action, individually and on behalf of Leslie's estate, against Fifth Third and Judith. The complaint asserted claims against Fifth Third for breach of contract, negligence, conversion, bad faith, and estoppel, while the claims against Judith were based on conversion and unjust enrichment. In July 2017, Judith filed an answer and a counterclaim based on frivolous conduct and "punitive or exemplary damages."

{¶ 16} In May 2018, James filed a motion for summary judgment on all of his claims and on Judith's counterclaims. Fifth Third then filed a cross-motion for summary

judgment. After holding an oral hearing in October 2018, the trial judge issued a decision in January 2019, overruling the motion and cross-motion with respect to the breach of contract claims, negligence claims, and conversion. The judge granted summary judgment to Judith on the issue of unjust enrichment, even though she had not filed a motion for summary judgment, and also granted summary judgment to Fifth Third on the bad faith and estoppel claims. In addition, the judge granted summary judgment in favor of James on Judith's claim for frivolous conduct. The judge did not resolve the claim for punitive damages.

{¶ 17} Following an unsuccessful attempt at mediation, a new judge decided to reconsider the prior summary judgment ruling and gave the parties a chance to file optional supplemental memoranda. Only Fifth Third took that opportunity. On November 22, 2019, the new judge filed an amended entry on the motions for summary judgment. This time, the judge overruled James's motion for summary judgment as to all the claims against Fifth Third and granted Fifth Third's cross-motion as to all claims against it. The judge also granted summary judgment in favor of Judith on James's claims, even though she had not filed a summary judgment motion. And finally, the judge granted James's motion for summary judgment on both of Judith's counterclaims.

{¶ 18} James then filed a notice of appeal from the trial court's judgment. Judith did not appeal the dismissal of her counterclaims.

II. Did the Trial Court Properly Grant Summary Judgment on James's Claims?

{¶ 19} On appeal, James presents one assignment of error (the propriety of the summary judgment decision), with the following two subparts:

A. The Trial Court Erred in Awarding Summary Judgment to Fifth Third.

B. The Trial Court Erred in Awarding Summary Judgment to Judith Brown.

{¶ 20} We will consider these subparts together, as they are interrelated. In rendering summary judgment against James, the trial court concluded that Leslie did not specifically inform Fifth Third that he wanted POD designations for the grandchildren on the accounts. The court further held that if any mistake were made, it was by James and Leslie in believing that the bank understood what Leslie wanted. Without discussing applicable legal principles, the trial court also concluded that the signature cards James signed on August 13, 2015, clearly designated Judith and James's father (who was then deceased) as POD beneficiaries, and that, again, James was at fault because he failed to read the cards. The court therefore concluded that Fifth Third did not breach its contract with Leslie because the last cards that were signed designated POD beneficiaries.

{¶ 21} Due to the existence of a contract, the court also rejected the negligence claim. Furthermore, based on the conclusion that payment to Judith was proper, the court rejected James's unjust enrichment and conversion claims against her. In addition, the court found that James failed to argue estoppel and entered judgment for Fifth Third on that claim as well. Finally, the court held that there was no claim for bad faith, essentially because such a claim is of recent origin and because lack of good faith, as relevant to some issues, is not the same as a cause of action for bad faith. We will consider the court's holdings, beginning with the contract claim.

A. The Contract Claim

{¶ 22} In arguing that the trial court erred, James contends that statutory requirements for POD accounts require a written contact with the "account owner," which was not satisfied here because James was not the account owner. James notes that no proper signature card existed for the savings account, and that the April 17, 2015 signature card, which contained no POD designations, was the proper card. In contrast, Fifth Third argues that the August 13, 2015 signature cards were controlling because they superseded all prior signature cards. Both sides have also spent considerable time discussing Fifth Third's "Signature Card Procedures" (internal bank policies), whether those procedures were properly followed, and Fifth Third's internal distinction between "add" or replacement cards.

{¶ 23} In reviewing summary judgment decisions, we conduct de novo review, "which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 2007-Ohio-2722, 873 N.E.2d 345, ¶ 16 (2d Dist.). "Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 24} James filed a claim against Fifth Third for breach of contract. "The elements of a breach of contract claim are 'the existence of a contract, performance by

the plaintiff, breach by the defendant, and damage or loss to the plaintiff.' " *Becker v. Direct Energy, LP*, 2018-Ohio-4134, 112 N.E.3d 978, ¶ 38 (2d Dist.), quoting *Doner v. Snapp*, 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2d Dist.1994). "When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

{¶ 25} "Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). "Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence." *Id*. Thus, if we conclude that the contracts here are unambiguous, factual disputes as to what was said or not said to Fifth Third employees or Fifth Third's compliance or lack thereof with its internal procedures would be irrelevant.

{¶ 26} Under R.C. 1109.07(B), banks are permitted to "enter into a written contract with a natural person for the proceeds of the person's deposits to be payable on the death of that person to another person or to any entity or organization in accordance with the terms, restrictions, and limitations set forth in sections 2131.10 and 2131.11 of the Revised Code." According to R.C. 2131.10:

> A natural person, adult or minor, referred to in sections 2131.10 and 2131.11 of the Revised Code as the owner, may enter into a written contract with any bank * * * whereby the proceeds of the owner's investment share certificate, share account, deposit, or stock deposit may be made payable

> on the death of the owner to another person or to any entity or organization, referred to in such sections as the beneficiary, notwithstanding any provisions to the contrary in Chapter 2107. of the Revised Code. In creating such accounts, "payable on death" or "payable on the death of" may be abbreviated to "P.O.D."
>
> * * *
>
> No change in the designation of the beneficiary shall be valid unless executed in the form and manner prescribed by the bank, building and loan or savings and loan association, credit union, or society for savings.

{¶ 27} "The General Assembly enacted R.C. 2131.10 and 2131.11 in 1961 with the apparent intention of recognizing in Ohio the use of a deposit in a financial institution as a 'tentative trust,' whereby the depositor (settlor) can withdraw funds from the deposit during his lifetime, and at the same time allow the beneficiary of the deposit to have the remainder of the funds at the depositor's death, without regard to the depositor's will or the statute of descent and distribution. The tentative trust doctrine was recognized in the state of New York in the leading case of *In re Totten* (1904), 179 N.Y. 112, 71 N.E. 748, and resulted in widespread use of what many have called a 'Totten trust' or 'poor man's trust.' " *Powell v. City Nat. Bank & Tr. Co*., 2 Ohio App.3d 1, 2, 440 N.E.2d 560 (10th Dist.1981).

{¶ 28} "Although a P.O.D. account is contractual in nature, it has a special purpose. It allows a person to make a testamentary disposition of assets without following the formalities of the Statute of Wills, R.C. Chapter 2107. Although it is an exception to the Statute of Wills, one of the basic requirements of the Statute of Wills

cannot be ignored; that is, the requirement of a writing signed by the testator evidencing his intent. Since a P.O.D. account is testamentary in nature, it follows that the term 'written contract' means a writing signed by the owner of the funds showing the intent to dispose of property in contravention of his or her will or the statutes of descent and distribution." *Witt v. Ward*, 60 Ohio App.3d 21, 26, 573 N.E.2d 201 (12th Dist.1989). The statutory language in R.C. 2131.10 gives "the depositor full ownership of a P.O.D. account's funds during her lifetime, whereas the beneficiary's interest does not vest until the owner's death." *Miller v. Peoples Fed. Sav. & Loan Assn.*, 68 Ohio St.2d 175, 178, 429 N.E.2d 439 (1981).

{¶ 29} In the case before us, the last signature card the account owner, Leslie, signed was the April 17, 2015 card without any POD beneficiaries. The parties have quibbled over the meaning of the first sentence in R.C. 2131.10 – "A natural person, adult or minor, referred to in sections 2131.10 and 2131.11 of the Revised Code as the owner * * *." James contends that this means that only the account owner (Leslie) may enter into the contract, while the bank asserts that the statutory language means that any natural person may enter into the contract, and that, therefore, the cards signed by James on August 13, 2015, were valid. Our view of the statute is that the term "owner" and natural person are one and the same. In other words, "owner" is simply another means of referring in the statute to the person entitled to enter into a POD.

{¶ 30} We find that the distinctions both sides suggest are essentially irrelevant, because the real issues center on the terms of the contract and whether James's POA permitted him to change the beneficiaries.

{¶ 31} "A power of attorney is a written instrument authorizing an agent to perform

specific acts on behalf of his principal." *Testa v. Roberts*, 44 Ohio App.3d 161, 164, 542 N.E.2d 654 (6th Dist.1988). In Ohio, powers of attorney are controlled by statute. *See* R.C. Chap. 1337. As relevant here, R.C. 1337.49 provides that:

> Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to do all of the following:
>
> (A) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;
>
> (B) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent * * *.

{¶ 32} This authority, however, is qualified by R.C. 1337.42. which states, in pertinent part, that:

> (A) An agent under a power of attorney may do any of the following on behalf of the principal or with the principal's property *only* if the power of attorney *expressly grants* the agent the authority and if exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject * * * :
>
> (3) Create or change rights of survivorship;
>
> (4) Create or change a beneficiary designation;
>
> * * *
>
> (C) Subject to divisions (A), (B), (D), and (E) of this section, if a power

> of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in sections 1337.45 to 1337.57 of the Revised Code.

(Emphasis added.)

{¶ 33} In *Dorsey v. Dorsey*, 11th Dist. Trumbull No. 2010-T-0043, 2011-Ohio-6336, a son of the decedent held a POA and used it during the decedent's lifetime to change the joint and survivorship designations on some accounts. He also closed one joint and survivorship account on which the decedent and his brother were co-owners, and opened up a new account, listing the decedent and a sister as co-owners. After reviewing the issues, the court of appeals held that the changes were invalid, because "there is no provision in that instrument giving [the son] authority to remove co-owners from [the decedent's] joint and survivorship accounts or to designate others as co-owners on those accounts." *Id*. at ¶ 50. The court, therefore, agreed with the trial court that those amounts would have to be returned to the decedent's estate. *Id*.

{¶ 34} Reviewing the power of attorney involved in this case, it likewise did not expressly give James the right to designate beneficiaries. Specifically, the POA provided, in relevant part, that:

> Know All Men by These Presents, that I, Leslie R. Hillier, * * * do appoint James Leslie Hillier as my true and lawful attorney in fact to act in, manage, and conduct all my business affairs, and for that purpose for me in my name, place, and stead, and for my use and benefit, and as my act and deed, to do and execute, to concur with persons jointly interested with myself therein in the doing or executing of, all or any of the following acts or

deeds, and things, to wit:

* * *

3. To make, do and transact all and every kind of business of whatsoever kind or nature, including the receipt, recovery, collection, payment, compromise, settlement and adjustment of all accounts, including checking, savings, and/or commercial accounts * * *;

* * *

Giving and granting unto my said attorney full power and authority to do and perform any and every act, deed, matter, and things whatsoever in and about my estate, property, and affairs, as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present, the above specifically enumerated powers being in aid and exemplification of the full, complete, and general power herein granted and not in limitation or definition thereof; and hereby ratifying all that my said attorney shall lawfully do or cause to be done by virtue of those presents.

Affidavit of Fifth Third Employee Kathy McGill, Ex. A., p. 1-2

{¶ 35} The above powers, while broad and general, do not provide, as R.C. 1337.42(A)(4) requires, that James had the specific power to change or designate beneficiaries on Leslie's accounts. In this vein, Fifth Third argues that because R.C. 1337.49 lets POAs "modify" accounts, James was entitled to change beneficiaries and the August 2015 signature card, therefore, is binding. Fifth Third Brief, p. 11. However, the statutory limitations on POAs are quite specific, and the wording in the POA Leslie granted is not sufficient to satisfy the requirements in R.C. 1337.42(A). Consequently,

the beneficiary designations on the August 13, 2015 signature card were invalid and had no effect. In view of these facts, whether James read or was aware of the designations was irrelevant.

{¶ 36} Furthermore, Fifth Third's assertion on appeal contradicts the admissions it made in the trial court. Specifically, in its answer, Fifth Third stated that "Fifth Third admits that Plaintiff, as Decedent's Power of Attorney or otherwise, did not authorize Fifth Third [to] change the payable on death beneficiaries listed on the Accounts." Answer of Fifth Third, ¶ 11.

{¶ 37} In its answers to requests for admissions, Fifth Third further stated that James's "execution of the Checking Account signature card dated August 13, 2015 did not create new payable on death beneficiaries for the Checking Account on August 13, 2015," and that "a power of attorney does not have the ability to change beneficiaries on accounts if the document creating the power of attorney does not permit it." *See* Fifth Third Notice of Filing Answers to Requests for Admissions #3, p. 5, and #4, p. 5. Fifth Third's contention in its answers to the requests for admissions was that the signature card James signed "confirmed" the beneficiaries already in the bank's system. *Id*. However, as the following discussion reveals, James could not confirm what did not exist.

{¶ 38} Accordingly, the signature card James signed in August 2015 had no effect and did not create POD beneficiaries for the account. The last signature card was the one that Leslie signed on April 17, 2015, which stated that Leslie was the sole owner of the checking account and did not designate any POD beneficiaries.

{¶ 39} Fifth Third's argument on appeal (contrary to its above argument) is that the POD beneficiaries were in its "internal" system, and that its employee simply accidentally

omitted them on the April 2015 signature card. In this respect, Fifth Third relies on its internal signature card procedures. However, whether Fifth Third followed these procedures or what its internal procedures may have been is irrelevant. As we indicated, individuals are statutorily allowed to enter into written contracts with banks for payments of their accounts.

{¶ 40} There is no question that a contract existed between Leslie and Fifth Third. "In order to form any contract, there must be a meeting of the minds of the parties regarding the contract's essential terms, and those terms must be reasonably certain and clear." *Bank of New York Mellon v. Rhiel*, 155 Ohio St.3d 558, 2018-Ohio-5087, 122 N.E.3d 1219, ¶ 19. "The primary goal in construing any contract is to ascertain and give effect to the intention of the parties," and courts "presume that the intent of the parties to a written contract is found in the writing of the contract itself." *Id*. at ¶ 20. The law is well-established that "where * * * the parties following negotiations make mutual promises which thereafter are integrated into an unambiguous contract duly executed by them, courts will not give the contract a construction other than that which the plain language of the contract provides." *Aultman Hosp. Assn.*, 46 Ohio St.3d at 55, 544 N.E.2d 920.

{¶ 41} Although, in one sense, there is no real negotiating with a bank when one opens an account, the signature card is the legally binding contract between the customer and Fifth Third. Nicely Deposition, p. 52 and 53. In contrast, the signature card procedures are internal bank documents; customers are not given these procedures, nor do they have access to them. *Id*. at p. 51. As a result, these procedures could have no bearing on the contract, where the contract is not ambiguous.

{¶ 42} The signature card that Leslie signed on April 17, 2015, was for the

checking account (636) only. As noted, Fifth Third has not been able to produce a signature card for the savings account. The 636 signature card provided, in pertinent part, under "Terms and Conditions," that:

> 1. The terms and conditions stated herein, together with resolutions or authorizations which accompany this signature card, if applicable and the Rules, Regulations, Agreements, and Disclosures of Bank constitute the Deposit Agreement ("Agreement") between the Individual (s) or entity (ies) and the named person herein ("Depositor") and the Bank.
>
> 2. This Agreement incorporates the Rules, Regulations, Agreements, and Disclosures established by Bank from time to time, clearing house rules and regulations, state and federal laws, recognized banking practices and customs, service charges as may be established from time to time and is subject to laws regulating transfers at death and other taxes.
>
> * * *
>
> 7. All signers agree to the Terms and Conditions set forth herein and acknowledge receipt of a copy of the Rules and Regulations, Agreements, and Disclosures of Bank and agree to the terms set forth herein.

Affidavit of Jennifer Nicely, Ex. C, p. 1.

{¶ 43} The Rules and Regulations of the bank that were in effect as of May 2015 were attached to Nicely's affidavit as Ex. H. Concerning POD accounts, these rules stated that:

> 17. Payable on Death Accounts. If your account type permits a payable on death beneficiary or custodian designation, this paragraph applies. *When the signature card designates the beneficiary to receive the account funds upon the death of the Customer, it supersedes and revokes any previous appointment of any other Beneficiary*. Customer may withdraw all or any portion of the account balance during his lifetime and Customer retains the right to revoke the designation of any Beneficiary. Bank has the right to deal with Customer as if a Beneficiary was not named. The amount on deposit in this account at the death of the Customer shall belong and be paid to the Beneficiary, if the Beneficiary survives the Customer, subject to the provisions of this Agreement, the rules of Bank and applicable laws. Payment to the Beneficiary after the death of the Customer shall be a valid and full release and complete discharge of the Bank from any and all liability and shall be binding on the heirs, executors, administrators and assigns of Customer. Bank reserves the right to require satisfactory proof of death of the Customer and survival of Beneficiary.

Ex. H, p. 15.

{¶ 44} According to the clear and unambiguous meaning of this provision, the signature card that Leslie signed on April 17, 2015, superseded and revoked any prior beneficiary with respect to the checking account. There was also no ambiguity in the signature card. It stated that Leslie was the sole owner of the account and no POD beneficiaries were listed. Consequently, there was no need to consider extrinsic evidence of any kind. (In this regard, we note that the facts set forth in the statement of

facts and proceedings were intended as background information only.)

{¶ 45} Based on the preceding discussion, and under the undisputed facts and applicable law, the trial court erred in granting summary judgment to Fifth Third on the breach of contract claim. To the contrary, summary judgment should have been granted to James, as executor, and the funds in checking account 636 ($82,647.72) should have been paid to Leslie's estate. Whether the bank is liable for this amount will be discussed shortly.

{¶ 46} The facts concerning the savings account (518) are somewhat different. As noted, Fifth Third did not have a signature card for the 518 account. There were indications in Fifth Third's internal records that POD beneficiaries may have been designated at one time for that account. However, Fifth Third's argument likewise fails for this account because there was not sufficient evidence of a *written agreement* for the account. To establish the existence of POD beneficiaries as an exception to the Statute of Wills, both R.C. 1109.07(B) and R.C. 2131.10 require a *written contract* signed by the account owner. Fifth Third could not produce a written signature card, and its internal records were insufficient to substitute for the statutory requirements. As a result, the $121,145.13 in the savings account should have been paid to Leslie's estate, rather than to Judith, and the trial court erred in granting summary judgment to Fifth Third on this point as well. Judgment should have been awarded to James, as executor for the estate.

{¶ 47} Even if judgment should have been awarded to the executor, an issue remains whether the bank is liable. According to Fifth Third, James, as executor, had a mechanism under R.C. 1109.10 by which he could have asserted his claim to the funds, but he failed to use it. Fifth Third contends that because James did not have a proper

right to the funds and failed to assert his claim using the statutory procedure, Fifth Third was obligated to release the funds to Judith and is not liable.

{¶ 48} As a preliminary point, Fifth Third's contention is incorrect to the extent that it is based on the fact that James, as executor, did not have a right to the funds. We have already concluded that the estate had such a right, and James, as executor of the estate, was the appropriate party to bring claims on the estate's behalf. *E.g.*, R.C. 2107.46; *Ross v. Barker*, 101 Ohio App.3d 611, 615, 656 N.E.2d 363 (2d Dist.1995).

{¶ 49} As to the remainder of Fifth Third's argument, we note that R.C. 1109.10 was enacted in 1996 via H.B. 538, 1996 Ohio Laws File 187, for purposes of adopting a new section number for former R.C. 1107.11. No substantive changes were made in the content of the statute. At the time of the events at issue in this case, R.C. 1109.10 provided that:

> If any claim not clearly consistent with the terms of any applicable authority on file with a bank is made to any deposit, safe deposit box, property held in safekeeping, security, obligation, or other property in the bank's possession or control, in whole or in part, by any person, including any depositor, individual, or group of individuals, whether or not authorized to draw on or exercise any right or control with respect to the property, the bank is not required to recognize the claim without one of the following:
>
> (A) A court order, issued by a court of competent jurisdiction and served on the bank, enjoining or restraining the bank from taking any action with respect to the property or instructing the bank to pay the balance of the, [sic] provide access to the safe deposit box, or deliver the property as

provided in the order;

(B) A bond in the form and amount and with sureties satisfactory to the bank, indemnifying the bank against any liabilities, loss, and expenses it might incur because of its recognition of the claim or because of its refusal, due to the claim, to honor or recognize any right with respect to the property.[3]

{¶ 50} The commentary to the former section, R.C. 1107.11 (which was adopted in 1967), says that "[t]his section is new and states the requirement which one making an adverse claim to a deposit or property held in safe deposit must meet before the bank will be required to deliver such deposit or property."

{¶ 51} The fact that a bank is not necessarily required to deliver the property to an adverse claimant does not mean that the bank lacks responsibility for delivering property to the wrong party. Thus, James's failure, as executor, to use the process in R.C. 1109.10 does not relieve the bank from liability for breach of contract.

{¶ 52} We note that Fifth Third's Rules and Regulations state that, "[i]n the event of a conflict between Account Owners or individuals with signing authority or those purporting to have signing authority on the Account, the Bank reserves the right to take action, which may include, without limitation, placing a hold on the Account or instituting legal proceedings." Nicely Affidavit, Ex. H, at p. 9.

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[3] R.C. 1109.10 was subsequently amended in 2017 as part of a new banking law that repealed separate statutes pertaining to savings and loan associations (R.C. Chapters 1151 to 1157), savings banks (R.C. Chapters 1161 to 1165), and "regulated banks, savings and loan associations, and savings banks under the same statute" by modifying the law governing banks. Ohio Bill Analysis, 2017 H.B. 49. The contents of this amended version and the version in effect in 2015 do not differ in any appreciable way.

{¶ 53} Fifth Third was notified before it disbursed the funds to Judith that an adverse claim to the funds existed. Hillier Deposition at p. 100 and 128-129. However, rather than placing a hold on the account or instituting legal proceedings, Fifth Third chose to release the funds. Even if this were otherwise, Fifth Third could have taken this action to protect itself from liability for breach of contract. Accordingly, Fifth Third may be held liable for breach of contract.

{¶ 54} As was noted, the trial court also granted summary judgment to Fifth Third on claims for bad faith, negligence, conversion, and estoppel. James has not addressed the estoppel issue on appeal, and we will not consider it further. We will next discuss the bad faith claim.

B. Bad Faith Claim

{¶ 55} Concerning "bad faith," the trial court concluded that bad faith claims are of recent origin and a lack of good faith, as relevant to some issues, is not the same as a cause of action for bad faith. Decision on Summary Judgment, p. 10-11.

{¶ 56} "The duty of good faith and fair dealing being integral to any contract, the breach of that duty, when alleged, is thus integral to the plaintiff's cause of action for breach of contract. Accordingly, 'an allegation of a breach of the implied covenant of good faith cannot stand alone as a separate cause of action from a breach of contract claim * * *.' " *Krukrubo v. Fifth Third Bank*, 10th Dist. Franklin No. 07AP-270, 2007-Ohio-7007, ¶ 19, quoting *Interstate Gas Supply, Inc. v. Calex Corp*., 10th Dist. Franklin No. 04AP-980, 2006-Ohio-638, ¶ 98. "In essence, a claim for breach of contract subsumes the accompanying claim for breach of the duty of good faith and fair dealing." *Id*.

{¶ 57} In view of this authority, we agree that summary judgment was properly granted on James's bad faith claim. We do note that banks may be held liable in some situations for bad faith under R.C. Chap. 1334, which governs "Bank Deposits and Collections; Transfer of Funds." Under R.C. 1304.03(A), the parties may vary the effect of the provisions of R.C. Chap. 1334, but they "cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable."

{¶ 58} R.C. 1304.03(E) further provides that, "[t]he measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there also is bad faith, the measure of damages includes any other damages the party suffered as a proximate consequence." This statute was effective in 1962 and corresponded with Uniform Commercial Code 4-103. It was then amended in 1994, but no substantive changes were made to R.C. 1304.03(E). *See* S.B. 147, 1994 Ohio Laws File 145.

{¶ 59} This is not to say R.C. 1304.03(E) applies here. We raise the matter merely to indicate that a bank may, indeed, be found guilty of acting in bad faith in certain situations, even in light of a contractual relationship or breach of contract claim. For example, in *Natl. City Bank v. Rhoades*, 150 Ohio App.3d 75, 2002-Ohio-6083, 779 N.E.2d 799 (2d Dist.), we agreed that a bank was liable for improperly disbursing funds in its customer's account to the customer's girlfriend. *Id*. at ¶ 37-43. We recognized that a bad faith claim could exist, which would allow recovery of consequential damages

under R.C. 1304.03(E). *Id*. at ¶ 68-69. However, we held that there was no evidence of the bank's bad faith.

{¶ 60} Banks may also be held liable for consequential damages like profit or for attorney fees where their acts are willful or malicious. *See Cincinnati Ins. Co. v. First Nat. Bank of Akron*, 63 Ohio St.2d 220, 226, 407 N.E.2d 519 (1980) (rejecting award of profits bank made when it improperly paid checks drawn on customer's account because the bank's acts were not willful; attorney fee award was also improper due to lack of statutory basis or evidence that bank's acts were malicious). *See also City of Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65, 66, 521 N.E.2d 814 (1988) ("[g]enerally a prevailing party may not recover attorney fees as costs of litigation in the absence of statutory authority unless the breaching party has acted in bad faith, vexatiously, wantonly, obdurately or for oppressive reasons.")

{¶ 61} " ' "Bad faith" is a legal term of art, which is not defined in the Ohio Uniform Commercial Code. Logically, it is the inverse of "good faith," which is defined as "honesty in fact in the conduct or transaction concerned." R.C. 1301.01(S). Thus, while not specifically defined, "bad faith" suggests dishonesty, fraud, or misrepresentation, which are intentional in nature and beyond the perimeters of mere negligence.' " *Fifth Third Bank v. Gen. Bag Corp*., 8th Dist. Cuyahoga No. 92793, 2010-Ohio-2086, ¶ 31, quoting *Johnson v. Third Fed. S. & L. Assn. of Cleveland*, 8th Dist. Cuyahoga No. 49236, 1985 WL 6888 (June 27, 1985).

{¶ 62} Assuming for purposes of argument that a bad faith claim could exist, the trial court did not err in granting summary judgment on this claim in this case. There was no evidence that Fifth Third's actions were dishonest, willful, or malicious, and James did

not present evidence of damages beyond what was due to be paid under the contract between the account owner and the bank. Accordingly, the trial court correctly rendered summary judgment against James on the claim that Fifth Third acted in bad faith.

C. The Negligence Claim

{¶ 63} Regarding the negligence claim, the trial court rejected this claim as well, citing *Solid Gold Jewelers v. ADT Sec. Sys., Inc*., 600 F.Supp.2d 956 (N.D.Ohio 2007). In *Solid Gold Jewelers*, the court explained that " '[u]nder Ohio law, the existence of a contract action generally excludes the opportunity to present the same case as a tort claim.' " *Id.* at 960, quoting *Wolfe v. Continental Cas. Co*., 647 F.2d 705, 710 (6th Cir.1981). Exceptions to this rule exist " 'if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed.' " *Id*., quoting *Wolfe*.

{¶ 64} The authority that *Wolfe* relied on was *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922). *Wolfe* at 710. The holding in *Ketcham* was essentially that, where the gravamen of a party's complaint is breach of contract, the perpetrator's motive in breaching is irrelevant, and a trial court errs if it admits evidence indicating that the case is one in which exemplary damages might be awarded. *Ketcham* at 377-378. As recently as 2018, the Supreme Court of Ohio approved and followed *Ketcham,* holding that "[p]unitive damages are not recoverable in an action for breach of contract." *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, paragraph one of the syllabus.

{¶ 65} In *Lucarell*, the court acknowledged that Ohio cases have held that both a

contract action and a tort action may exist where breach of an independent duty is involved. *Id*. at ¶ 36. The court cautioned, however, that while "we have noted that the conduct constituting a breach of contract can also constitute a tort, we have made clear that punitive damages are available only when the claimant 'suffered a harm distinct from the breach of contract action and attributable solely to the alleged tortious conduct.' " *Id*. at ¶ 37, quoting *Shimola v. Nationwide Ins. Co.*, 25 Ohio St.3d 84, 86, 495 N.E.2d 391 (1986).

{¶ 66} In the case before us, James failed to present any evidence of an "independent tort," and he has not outlined any harm he or the estate suffered other than that attributable to the breach of contract. Accordingly, the trial court did not err in rendering summary judgment on the negligence claim.

D. Conversion

{¶ 67} The claim for conversion was brought against both Fifth Third and Judith. In rejecting the claim with regard to both parties, the trial court noted that Fifth Third acted properly in honoring Judith's claim. The court also remarked that Judith could have subjected the bank to a lawsuit had it not complied with the POD designation. Decision on Summary Judgment at p. 9-10. To the extent the court's conclusions rest on the fact that the balance of the accounts was properly owed to Judith, the court erred, for the reasons noted above.

{¶ 68} "Conversion is an exercise of dominion or control wrongfully exerted over property in denial of or under a claim inconsistent with the rights of another." *Dice v. White Family Cos*., 173 Ohio App.3d 472, 2007-Ohio-5755, 878 N.E.2d 1105, ¶ 17 (2d

Dist.). "Typically, '[t]he elements of a conversion cause of action are (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages.' " *Id*., quoting *Haul Transport of VA, Inc. v. Morgan*, 2d Dist. Montgomery No. 14859, 1995 WL 328995 (June 2, 1995).

{¶ 69} Given the undisputed facts in this case, James established that the checking and savings accounts belonged to Leslie's estate, that Fifth Third wrongfully disposed of the sums in the accounts by paying them to Judith, and that the estate was damaged by Fifth Third's acts. Consequently, the trial court erred in rendering summary judgment to Fifth Third on this cause of action. Instead, judgment should have been rendered in favor of James, as executor of the estate. We do agree that summary judgment on this point was properly granted to Judith, as she was not the party wrongfully disposing of the assets. The claim against Judith was more properly classified as one for unjust enrichment, as we will explain below. Accordingly, the assignment of error is sustained with respect to the summary judgment on conversion granted to Fifth Third, but overruled as to Judith.

E. Unjust Enrichment

{¶ 70} The final issue relates t0 the summary judgment granted to Judith (subpart B). As indicated, the only claims against Judith were for conversion and unjust enrichment. The trial court granted summary judgment in Judith's favor on the unjust enrichment claim even though she had not moved for summary judgment, and it gave no reasons for doing so. Decision on Summary Judgment at p. 8-9. Presumably, the

court's decision was based on its prior conclusion that the money in the accounts was properly paid to Judith as the POD beneficiary.

{¶ 71} "Unjust enrichment occurs when a person has and retains money or benefits that in justice and equity belong to another." *Union Sav. Bank v. White Family Cos., Inc*., 167 Ohio App.3d 51, 2006-Ohio-2629, 853 N.E.2d 1182, ¶ 26 (2d Dist.), citing *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923 (1938). " 'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.' " *Dixon v. Smith*, 119 Ohio App.3d 308, 317, 695 N.E.2d 284 (3d Dist.1997), quoting Restatement of the Law 1st, Restitution, Section 1 at 12 (1937).

{¶ 72} For the reasons previously discussed, the trial court erred in entering summary judgment in Judith's favor on this claim. Based on the undisputed facts and applicable law, the proceeds of Leslie's savings and checking accounts were improperly paid to Judith and should have been paid to Leslie's estate. Judith, therefore, retains money that belongs to another. Consequently, James's assignment of error is sustained as to the grant of summary judgment in Judith's favor on the unjust enrichment claim.

III. Conclusion

{¶ 73} James's sole assignment of error having been sustained in part and overruled in part, the judgment of the trial court is reversed as to the summary judgment rendered in favor of Fifth Third on the breach of contract and conversion claims. The summary judgment in favor of Fifth Third on the claims for bad faith, negligence, and estoppel are affirmed. In addition, the summary judgment in Judith's favor is affirmed as to the conversion claim and reversed as to the claim for unjust enrichment. This cause

is remanded to the trial court for further proceedings consistent with this opinion.

. . . . . .

FROELICH, J. and HALL, J., concur.

Copies sent to:

T. Andrew Vollmar
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Nathan H. Blaske
Harry W. Cappel
Hon. Scott Altenburger

[Cite as *Longmire v. Danaci*, 2020-Ohio-3704.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Eric Longmire et al.,	:	
Plaintiffs-Appellees,	:	
		No. 19AP-770
v.	:	(C.P.C. No. 17CV-2624)
Ozgun Danaci,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 14, 2020

On brief: *Zeehandelar*, *Sabatino & Associates, LLC*, and *Alessandro Sabatino, Jr.*, for appellees. **Argued:** *Alessandro Sabatino, Jr.*

On brief: *Stanley L. Myers*, for appellant. **Argued:** *Stanley L. Myers*.

APPEAL from the Franklin County Court of Common Pleas

SADLER, P.J.

{¶ 1} Defendant-appellant, Ozgun Danaci, appeals from the judgment of the Franklin County Court of Common Pleas overruling objections to the magistrate's ruling in favor of plaintiffs-appellees, Eric Longmire and Berrin Ergun-Longmire, for unjust enrichment in the amount of $27,409.37. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On March 16, 2017, appellees filed a complaint seeking judgment against appellant for unjust enrichment and breach of contract. In their complaint, appellees generally alleged that an oral contract was formed between the parties, and appellant had

failed to repay appellees for tuition and living expenses while he was enrolled at the University of Dayton. Appellees alleged appellant had agreed to repay the loan on a monthly basis after he began full-time employment. Appellant filed his answer on April 14, 2017.

{¶ 3} On February 13, 2018, appellant filed a motion for partial summary judgment. Appellant argued appellees' breach of contract claim failed as a matter of law because the oral contract was barred under the statute of frauds codified in R.C. 1335.05. In their memorandum contra, appellees argued there was enough written documentation between the parties over email to meet the writing requirements imposed by the statute of frauds.

{¶ 4} On June 18, 2018, the trial court granted appellant's motion for partial summary judgment dismissing the breach of contract claim. The trial court reasoned that "the e-mails exchanged between Plaintiff Eric Longmire and Defendant in November of 2013, more than two years after the alleged making of the oral agreement, do not satisfy the requirements of a writing pursuant to R.C. §1335.05." (June 18, 2018 Decision & Entry at 9.) The trial court concluded that while the breach of contract claim was barred under the statute of frauds, appellees could proceed on their unjust enrichment claim.

{¶ 5} The trial court referred this matter to a magistrate for a bench trial pursuant to Civ.R. 53 and Loc.R. 99.02. A bench trial commenced on December 19, 2018. All parties appeared and were represented by counsel. The trial included live testimony from appellees, as well as appellant. The testimony of Fotos Akkus, appellant's ex-girlfriend, was presented by deposition. The trial produced the following facts.

{¶ 6} Appellant is a Turkish citizen and the nephew of appellees. In 2009, appellant began discussions with appellees concerning his desire to pursue a graduate degree in the United States. Appellant began to take English courses and sat for the G.R.E. exam.

{¶ 7} In April 2011, Berrin met with appellant in Turkey during a visit with her sister. Appellant's girlfriend at the time, Akkus, also attended the meeting. The parties agree Berrin made an offer to assist appellant with the tuition and living expenses while he pursued his graduate education. Appellant testified he understood Berrin's offer to pay for tuition and living expenses as a gift. Akkus testified she also heard Berrin state something

to that effect. Berrin denies she ever offered the money as a gift, and "[f]rom the beginning" she made it clear that "[a]s soon as you start to work, you will pay me back." (Tr. at 72-73.)

{¶ 8} Over the next few months, the parties worked together on letters to the University of Dayton and the U.S. Consulate for appellant's student visa. In August 2011, appellant moved to the United States to start his graduate program, initially living with appellees. Eric testified when appellant arrived, he made it clear that the money would need to be repaid. Berrin also told appellant that the money was a loan, stating "I told him, of course, we trust you that you will pay us back." (Tr. at 99.) Appellant denies any such conversations occurred. Around the start of his graduate program, appellant inherited some money and became less reliant on appellees for his living expenses. Even though appellant received an inheritance, appellees still would "send [appellant] some money when [his] budgeted amount went over." (Tr. at 251.)

{¶ 9} There is no evidence that the parties ever codified the terms of the agreement in a written contract. Despite no written agreement, appellees testified they made it clear from the start and during appellant's time in school that the money would need to be repaid. Berrin testified appellant would put his hand on her shoulder and say, "Auntie, I will pay you back." (Tr. at 110.) Appellees both testified that appellant would repay them the loan amount within two years of obtaining full-time employment.

{¶ 10} In 2013, appellant graduated from the University of Dayton. Around this time, appellees helped appellant purchase a vehicle. There is no dispute that this was not a gift, and the automobile loan would be repaid. In November 2013, appellant called Berrin to inform her that he had obtained full-time employment. Berrin stated appellant told her that he could not pay them back because his salary was not as high as anticipated. Berrin described this revelation as "out of the blue," and she tried "to process what he's saying. Of course, I was upset." (Tr. at 107.)

{¶ 11} After the November telephone call, appellees' relationship with appellant quickly deteriorated. A series of emails between the parties ensued. In a November 26, 2013 email, appellant stated:

> Since you have been acting like an investigator find one email which says you are giving the money in condition to pay it back and I agree to pay you. I am sure I mentioned voluntarily to pay it without you or Berrin asking because that is my

> intention. Besides everything I never once thought not to pay you. I always planned to pay [you] back.

(Nov. 26, 2013 email, Pl.'s Ex. 30 at 2.)

{¶ 12} In a subsequent November 26, 2013 email, appellant wrote:

> One more time, I am going to pay you back. Berrin yes all you asked is your money back and you should but there is time and how. * * * I haven't seen my paycheck yet how dare you tell me what is it going to be and how much I will be having to spend.

(Nov. 26, 2013 email, Pl.'s Ex. 33 at 1.)

{¶ 13} Appellant testified at trial that he intended to repay the money but as a gift. Appellant also testified that prior to the November emails, "[t]here was never any discussion" that he was required to repay the tuition and living expenses. (Tr. at 282.) In lieu of closing arguments, the magistrate requested written briefs and to provide supplemental information regarding appellees' claimed damages for tuition payments.

{¶ 14} On January 22, 2019, the magistrate issued a written decision finding in favor of appellees for unjust enrichment in the amount of $27,409.37 against appellant. Relevant to the instant case, the magistrate determined the evidence established an oral contract between the parties. While the contract claim was unenforceable under the statute of frauds, a quasi-contract claim for unjust enrichment remained. The magistrate wrote the previous decision by the trial court "did not hold that there was never an oral agreement for the repayment of the money advanced by the Plaintiffs on behalf of the Defendant. The Decision only applied the statute of fraud to the agreement and held that the statute of fraud required that the agreement be in writing." (Jan. 22, 2019 Mag.'s Decision at 12.) The magistrate found appellees conferred a benefit to appellant by providing financial support for his education. While appellant claimed the funds constituted a gift, the magistrate cited a November 27, 2013 email in which appellant wrote "[i]t is your money you can get it back." (Mag.'s Decision at 14.) The magistrate ultimately concluded it would be unjust for appellant to retain the benefit of the loan payments. The magistrate awarded damages to appellees in the amount of $2,324.37 for living expenses and $25,085.00 for tuition payments to the University of Dayton.

{¶ 15} On February 1, 2019, appellant filed a combined motion to set aside the magistrate's decision and objections to the magistrate's decision pursuant to Civ.R. 53(D)(3). Appellant argued, in pertinent part, the magistrate's decision violated the law of

the case doctrine. Appellant also generally objected to the magistrate's finding that appellees were entitled to unjust enrichment, and the magistrate's ruling was against the weight of the evidence. On February 15, 2019, appellees filed a memorandum contra to appellant's combined motion.

{¶ 16} On October 28, 2019, the trial court overruled appellant's objections and adopted the magistrate's decision. Relevant to this appeal, the trial court determined consideration of the emails between the parties did not violate the law of the case doctrine, stating "[t]he Magistrate's ruling does not reflect that liability was imposed for anything other than unjust enrichment, which was not inconsistent with any prior ruling." (Oct. 28, 2019 Decision & Entry at 4.) The court reasoned the emails were germane to determine whether the funds constituted a gift and whether it would be unjust to allow appellant to retain the benefit of the loan without repayment. The trial court also found that based on appellees' testimony and exhibits, they had met their burden of proof demonstrating their unjust enrichment claim. Finally, the trial court determined the magistrate's decision was supported by competent, credible evidence and was not against the manifest weight of the evidence.

{¶ 17} Appellant filed a timely appeal.

II. ASSIGNMENTS OF ERROR

{¶ 18} Appellant assigns the following as trial court error:

> [1.] THE COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THE LAW OF THE CASE DID NOT BAR THE JUDGMENT THAT APPELLANT WAS UNJUSTLY ENRICHED.
>
> [2.] THE COURT ERRED AS A MATTER OF LAW IN ITS JUDGMENT THAT APPELLANT WAS UNJUSTLY ENRICHED.
>
> [3.] IF THE ISSUE OF PROOF OF BENEFIT, UNJUST ENRICHMENT, WAS NOT ADEQUATELY RAISED IN APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION AND/OR NOT RAISED TO THE MAGISTRATE AT TRIAL, APPELLANT RAISES THE CLAIM OF PLAIN ERROR.
>
> [4.] THE DECISION THAT APPELLANT WAS UNJUSTLY ENRICHED IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. STANDARD OF REVIEW

{¶ 19} Civ.R. 53(D)(4)(d) provides: "If one or more objections to a magistrate's decision are timely filed, the [trial] court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Once objections to the magistrate's ruling are filed, the trial court " 'undertakes a de novo review of a magistrate's decision.' " *Gallick v. Benton*, 10th Dist. No. 18AP-171, 2018-Ohio-4340, ¶ 15, quoting *Meccon, Inc. v. Univ. of Akron*, 10th Dist. No. 12AP-899, 2013-Ohio-2563, ¶ 15.

{¶ 20} An appellate court generally reviews the trial court's decision to adopt, reject, or modify the magistrate's decision for an abuse of discretion. *Altercare of Canal Winchester Post-Acute Rehab. Ctr., Inc. v. Turner*, 10th Dist. No. 18AP-466, 2019-Ohio-1011, ¶ 15, citing *Tedla v. Al-Shamrookh*, 10th Dist. No. 15AP-1094, 2017-Ohio-1021, ¶ 11. An abuse of discretion occurs when a court's judgment is unreasonable, arbitrary, or unconscionable. *Altercare of Canal Winchester Post-Acute Rehab. Ctr.* at ¶ 15, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "However, the standard of review on appeal from a trial court judgment that adopts a magistrate's decision varies with the nature of the issues that were (1) preserved for review through objections before the trial court and (2) raised on appeal by assignment of error" (Internal quotations omitted.) *Fraley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 18AP-731, 2019-Ohio-2804, ¶ 9; *Feathers v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 16AP-588, 2017-Ohio-8179, ¶ 10; *In re Adoption of N.D.D.*, 10th Dist. No. 18AP-561, 2019-Ohio-727, ¶ 27; *Bickerstaff v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-1028, 2014-Ohio-2364, ¶ 10. Accordingly, we will note the appropriate assignment of error throughout this analysis.

IV. LEGAL ANALYSIS

A. Appellant's First Assignment of Error

{¶ 21} In his first assignment of error, appellant presents a multitude of arguments. First, appellant argues that appellees' complaint was defective and insufficient to establish the requisite facts at trial to demonstrate a claim for unjust enrichment. While appellant made a similar argument during his closing remarks to the magistrate, he failed to raise this alleged issue in his objections to the magistrate's decision with the trial court.

{¶ 22} A party may file written objections to the decision of the magistrate within fourteen days of the filing of the decision. Civ.R. 53(D)(3)(b)(i). "An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). " '[I]f a party fails to object to a magistrate's finding or conclusion, that party waives the right to challenge the finding or conclusion on appeal.' " *Patrick v. Ressler*, 10th Dist. No. 04AP-149, 2005-Ohio-4971, ¶ 25, quoting *Brott Mardis & Co. v. Camp*, 147 Ohio App.3d 71, 78 (9th Dist.2001). "This court has held that, when a party fails to file objections to a magistrate's decision, we may still review the decision for plain error." *Little v. Watkins*, 10th Dist. No. 12AP-335, 2012-Ohio-5041, ¶ 7, citing *Brown v. Zurich US*, 150 Ohio App.3d 105, 2002-Ohio-6099, ¶ 27 (10th Dist.). Because appellant did not raise this issue in his objections nor assert plain error, we decline to address the merits of this argument.

{¶ 23} Appellant next argues the trial court erred in finding appellees' unjust enrichment claim was not precluded by the law of the case doctrine. Appellant contends the magistrate erred in considering emails between the parties after the trial court ruled appellees' breach of contract claim was barred by the statute of frauds.

{¶ 24} The law of the case doctrine states "legal questions resolved by a reviewing court in a prior appeal remain the law of that case for any subsequent proceedings at both the trial and appellate levels." *Giancola v. Azem*, 153 Ohio St.3d 594, 2018-Ohio-1694, ¶ 1, citing *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984). The doctrine includes decisions by the trial court on its prior rulings. *Nolan* at 8. Whether the law of the case doctrine applies is a question of law. *Glasstetter v. Rehab. Servs. Comm.*, 10th Dist. No. 13AP-932, 2014-Ohio-3014, ¶ 27, citing *DeAscentisi v. Margello*, 10th Dist. No. 08AP-522, 2008-Ohio-6821, ¶ 12. Questions of law are reviewed de novo on appeal. *Altercare of Canal Winchester Post-Acute Rehab. Ctr.*, 2019-Ohio-1011, at ¶ 15, citing *PHH Mtge. Corp. v. Ramsey*, 10th Dist. No. 13AP-925, 2014-Ohio-3519, ¶ 14; *see also In re Adoption of N.D.D.* at ¶ 27.

{¶ 25} After a review of the record, we find the trial court correctly found the magistrate did not violate law of the case doctrine. In its June 18, 2018 entry, the trial court granted appellant's motion for partial summary judgment finding that appellees' breach of contract claim was barred by the statute of frauds. "The [trial] Court finds the e-mails exchanged between Plaintiff Eric Longmire and Defendant in November of 2013, more than

two years after the alleged making of the oral agreement, do not satisfy the requirements of a writing pursuant to R.C. §1335.05." (June 18, 2018 Decision & Entry at 9.) In his January 22, 2019 decision, the magistrate wrote: "The July 18, 2018 Decision of this Court did not hold that there was never an oral agreement for the repayment of the money advanced by the Plaintiffs on behalf of the Defendant. The Decision only applied to the statute of fraud to the agreement and held that the statute of fraud required that the agreement be in writing." (Mag.'s Decision at 12.)

{¶ 26} In the instant case, the magistrate's consideration of the emails was limited to whether the loan constituted a gift and whether it would be inequitable to allow appellant to retain the benefit of the funds. The emails provide valuable insight into the parties' intentions at the time of the dispute. As such, consideration of such evidence is probative to the resolution of the unjust enrichment claim consistent with the trial court's previous ruling.

{¶ 27} Appellant next argues that "[t]he Magistrate determined the oral evidence proved an enforceable contract as alleged in ¶3 and ¶4 of the Complaint. That finding violated the Law of the Case." (Appellant's Brief at 13.) This is simply incorrect. The magistrate concluded that "the evidence established an oral contract. But due to the July 18, 2018 [decision,] a contract claim was precluded. Leaving the Plaintiffs with the quasi contract claim of unjust enrichment." (Mag.'s Decision at 12.) Ohio law does not bar unjust enrichment if the contract claim is ultimately deemed unenforceable under the statute of frauds. In fact, unjust enrichment is available as an equitable remedy for that very reason:

> An oral contract that cannot be performed within a year of its making is unenforceable under the Statute of Frauds; but where one party fully performs and the other party, to his unjust enrichment, receives and refuses to pay over money which, under the unenforceable contract, he agreed to pay to the party who has fully performed, a quasi-contract arises, upon which the performing party may maintain an action against the defaulting party for money owed.

Hosterman v. French, 7th Dist. No. 13 CO 25, 2014-Ohio-5855, ¶ 20, citing *Hummel v. Hummel*, 133 Ohio St. 520 (1938), paragraph one of the syllabus.

{¶ 28} Here, while the trial court deemed the oral agreement was barred under the statute of frauds, appellees were able to proceed with the quasi-contract claim for money

conferred to appellant. We find the magistrate's consideration of the emails was limited to whether it would be unjust to allow appellant to retain the benefit of the loan and determine there is no evidence in the record that the magistrate deemed the oral evidence at trial to create an enforceable contract.

{¶ 29} Finally, appellant argues that appellees' unjust enrichment claim is precluded by the statute of frauds. This argument is without merit. Even when the statute of frauds precludes a breach of contract claim, "it has no applicability to [an] equitable claim for unjust enrichment." *Hosterman* at ¶ 19. As previously noted, when an oral contract is deemed unenforceable under the statute of frauds but one party has fully performed under the contract, the fully performing party may maintain a cause of action against the defaulting party. Here, the trial court correctly concluded that while an oral agreement was in place, the contract was unenforceable, and the equitable remedy of unjust enrichment provided appellees a viable cause of action. " '[I]f no remedy is available in contract or tort, then the equitable remedy in unjust enrichment may be afforded to prevent injustice.' " *Saraf v. Maronda Homes, Inc.*, 10th Dist. No. 02AP-461, 2002-Ohio-6741, ¶ 12, quoting *Banks v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 99AP-1413 (Nov. 28, 2000). As such, the statute of frauds does not preclude appellees' claim for unjust enrichment and afforded appellees a viable equitable remedy under the law.

{¶ 30} Based on the forgoing, we overrule appellant's first assignment of error.

B. Appellant's Second and Third Assignments of Error

{¶ 31} In his second assignment of error, appellant argues that as a matter of law, the trial court erred in finding in favor of appellees for unjust enrichment. In his third assignment of error, appellant argues there was no evidence as a matter of law that appellees conferred a benefit to appellant. For clarity of analysis, we will address appellant's second and third assignments of error together.

{¶ 32} To succeed in a claim for unjust enrichment, the trial court must find: "(1) a benefit conferred by the plaintiff on the defendant, (2) knowledge of the benefit by the defendant, and (3) retention of the benefit by the defendant in circumstances where it would be unjust to do so." *Lundeen v. Smith-Hoke*, 10th Dist. No. 15AP-236, 2015-Ohio-5086, ¶ 51, citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984). To demonstrate a claim of unjust enrichment, " ' "[i]t is not sufficient for the plaintiffs to show

that [they have] conferred a benefit upon the defendants. [Plaintiffs] must go further and show that under the circumstances [they have] a superior equity so that as against [them] it would be unconscionable for the defendant to retain the benefit." ' " *Liberty Mut. Ins. Co. v. Three-C Body Shop, Inc.*, 10th Dist. No. 19AP-775, 2020-Ohio-2694, ¶ 10, quoting *United States Health Practices v. Blake*, 10th Dist. No. 00AP-1002 (Mar. 22, 2001), quoting *Katz v. Banning*, 84 Ohio App.3d 543, 552 (10th Dist.1992). A cause of action for unjust enrichment arises from a contract implied in law or quasi-contract. *Hummel* at 525. " ' "Under this type of contract, civil liability 'arises out of the obligation cast by law upon a person in receipt of benefits which he [or she] is not justly entitled to retain' without compensating the individual who conferred the benefits." ' " *Camp St. Marys Assn. of the W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 3d Dist. No. 2-06-40, 2008-Ohio-1490, ¶ 23, quoting *Fisk Alloy Wire, Inc. v. Hemsath,* 6th Dist. No. L-05-1097, 2005-Ohio-7007, ¶ 69, quoting *Firstar Bank, N.A. v. Prestige Motors, Inc.*, 6th Dist. No. H-04-037, 2005-Ohio-4432, ¶ 8, quoting *Hummel* at 525.

{¶ 33} Appellant argues the trial court erred as a matter of law by finding appellees conferred a benefit to appellant in the form of tuition and living expenses. Appellant contends "[t]he offered evidence supporting the judgment deviated and was not supported by Ohio law; what Appellees paid, the costs of Appellant's graduate tuition, is not evidence of received benefit." (Appellant's Brief at 54.) Appellant does concede that the issue might not have been adequately raised to the trial court but argues it is plain error to find a benefit was conferred in this case.

{¶ 34} After an independent review of the record, we find appellant failed to preserve his proof of benefit argument with the trial court and is raising the issue for the first time on appeal. At trial during a discussion with the magistrate, appellant conceded the first two elements of unjust enrichment were established. Because appellant failed to preserve this issue for appeal as required by Civ.R. 53(D)(3), our review is limited to plain error. Civ.R. 53(D)(3)(b)(iv). "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error seriously affects the basic fairness, integrity, or public reputation of the judicial process itself." *Recovery Funding, LLC v. Leader Technologies*

Inc., 10th Dist. No. 18AP-177, 2018-Ohio-5364, ¶ 8, citing *Brown*, 2002-Ohio-6099, at ¶ 27, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

{¶ 35} We conclude the trial court did not commit plain error in determining that appellees conferred a benefit to appellant in the form of a loan for tuition and living expenses while he was enrolled at the University of Dayton. We agree with the trial court that the tuition and living expenses provided needed financial support to appellant allowing him to finance his graduate education. As such, we find appellant's argument unpersuasive.

{¶ 36} As to the second element of unjust enrichment, the parties do not dispute that appellant was aware of the financial assistance provided by appellees. Accordingly, the rest of our analysis will focus on the final element of unjust enrichment as to whether it would be inequitable to permit appellant to retain the benefit of the tuition and living expenses.

{¶ 37} Appellant argues the trial court erred as a matter of law in finding that it would be unjust to permit appellant to retain the benefit of the tuition and living expenses without repayment. Questions of law are reviewed de novo. *Altercare of Canal Winchester Post-Acute Rehab. Ctr.*, 2019-Ohio-1011, at ¶ 15. In determining whether it would be unjust for appellant to retain the benefit, the court must look at what party has the "superior equity so that * * * it would be unconscionable for [him] to retain the benefit." *Katz*, 84 Ohio App.3d at 552. There also must be a causal connection between the benefit retained by appellant and the detriment of appellees. *Giles v. Hanning*, 11th Dist. No. 2001-P-0073, 2002-Ohio-2817, ¶ 13.

{¶ 38} After a review of the record, we find the trial court was correct in determining appellees have a superior equity interest that it would be unjust for appellant to retain the benefit of the loan. Appellees provided $27,409.37 in tuition and living expenses with the understanding they would be repaid. Appellant confirmed over multiple emails that he planned on paying appellees back for the financial assistance. In a November 26, 2013 email, appellant stated "[b]esides everything I never once thought not to pay you. I always planned to pay [you] back." (Nov. 26, 2013 email, Pl.'s Ex. 30 at 2.) In another November 26 email, appellant wrote "[o]ne more time, I am going to pay you back. Berrin yes all you asked is your money back and you should but there is time and how." (Nov. 26, 2013 email, Pl.'s Ex. 33 at 1.) Finally, in a November 27, 2013 email, appellant wrote "[t]hat is your money," and he "always told [appellees] that [he] would pay [them] back." (Tr. at

137.) Based on the emails and testimony at trial, we determine appellees have met their burden that it would be unjust for appellant to retain the benefit of the financial assistance without repayment.

{¶ 39} Appellant argues that the trial court erred in "excusing Appellees from their obligation to pay all living expenses" and to "fully perform the contract upon which they sued; performing about only 42% of it." (Appellant's Brief at 48.) Appellant's argument is without merit. The parties agreed appellees would provide financial assistance as needed to appellant for tuition and living expenses. When appellant was asked whether appellees paid his tuition and living expenses "to the extent that [he] needed it," appellant responded "[y]es." (Tr. at 293.) Moreover, the evidence at trial demonstrated appellees aided appellant whenever possible. Appellees, for all intents and purposes, were appellant's financial safety net. When asked if appellees provided financial assistance with his living expenses after he received his inheritance, appellant stated they would "send me some money when my budgeted amount went over." (Tr. at 251.) The fact that appellees did not pay for all of appellant's tuition or living expenses does not mean they did not fully perform under the agreement. Accordingly, we find appellant's argument unpersuasive.

{¶ 40} Appellant next argues that the payment of tuition and living expenses constituted a gift. Appellant contends that any statements that he would repay appellees was out of gratitude, not from a legal obligation. Appellant also argues that "[w]ithout an express contract, family members are not required to reimburse family." (Reply Brief at 12.) For the reasons that follow, we find both arguments without merit.

{¶ 41} "The elements required to demonstrate an inter vivos gift are: '(1) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there, and (2) in pursuance of such intention, a delivery by the donor to the donee of the subject-matter of the gift to the extent practicable or possible, considering its nature, with relinquishment of ownership, dominion, and control over it.' " *Howard v. Himmelrick*, 10th Dist. No. 03AP-1034, 2004-Ohio-3309, ¶ 5, quoting *Bolles v. Toledo Trust Co.*, 132 Ohio St. 21 (1936), paragraph one of the syllabus. There is a general presumption that exchanges of funds between family members is a gift. *Martin v. Steiner*, 9th Dist. No.17AP0021, 2018-Ohio-3928, ¶ 11, citing *Kostyo v. Kaminski*, 9th Dist. No. 12CA010266, 2013-Ohio-3188, ¶ 20. "The family gift presumption

may be rebutted by 'circumstances or evidence going to show a different intention, and each case has to be determined by the reasonable presumptions arising from all the acts and circumstances connected with it.' " *Filkins v Schwartz*, 3d Dist. No. 1-07-73, 2008-Ohio-1340, ¶ 15, quoting *Wertz ex rel. Estate of Jurkoshek v. Tomasik*, 9th Dist. No. 20209 (Feb. 7, 2001).

{¶ 42} At trial, appellees testified that appellant repeatedly stated the funds would be repaid. Berrin testified she told appellant that she would "help [appellant] as much as [she could]" but do not forget "[a]s soon as you start to work, you will pay me back." (Tr. at 72-73.) Berrin also told appellant, "of course, we trust you that you will pay us back. * * * And I said, as you can see how expensive it is." (Tr. at 99-100.) Berrin's testimony is supported by several emails between the parties noting appellant would repay the tuition and living expenses. While appellant argues this was out of a moral obligation, not a legal one, the repeated assurances that he would repay appellees and classifying the loan as "your money" contradicts appellant's contention that the money was a gift. (Tr. at 136.) Accordingly, the trial court correctly determined that appellees rebutted the presumption that the tuition and living expenses constituted a gift.

{¶ 43} As such, we overrule appellant's second and third assignments of error.

C. Appellant's Fourth Assignment of Error

{¶ 44} In appellant's fourth assignment of error, appellant argues the trial court's decision was against the manifest weight of the evidence. For the reasons that follow, we disagree.

{¶ 45} When reviewing a judgment under a manifest-weight standard, we must " 'weigh[] the evidence and all reasonable inferences, consider[] the credibility of witnesses, and determine[] whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way.' " *Mid Am. Constr., LLC v. Univ. of Akron*, 10th Dist. 18AP-846, 2019-Ohio-3863, ¶ 21, quoting *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-804, 2014-Ohio-1810, ¶ 19. The weight of the evidence "is not a question of mathematics, but depends on [the evidence's] effect in inducing belief." (Emphasis omitted; internal quotations omitted.) *Mid Am. Constr.* at ¶ 21.

{¶ 46} When reviewing a civil action under a manifest-weight standard, we must be cognizant of the presumption favoring determinations by the finder of fact. " 'A trial court's

findings of fact are presumed correct, and "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to decide." ' " *Miller v. Ohio Dept. of Transp.*, 10th Dist. No. 13AP-849, 2014-Ohio-3738, ¶ 44, quoting *Rex v. Univ. of Cincinnati College of Medicine*, 10th Dist. No. 13AP-397, 2013-Ohio-5110, ¶ 18, quoting *Eagle Land Title Agency, Inc. v. Affiliated Mtge. Co.*, 10th Dist. No. 95APG12-1617 (June 27, 1996). " 'Judgments supported by competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.' " *Williams v. Ohio Dept. of Rehab. & Corr.*, 18AP-720, 2019-Ohio-2194, ¶ 17, quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

{¶ 47} Appellant focuses his manifest weight argument on the magistrate's finding that "[t]he Plaintiffs did not in fact have to pay for most of the Defendant's living expenses because the Defendant had inherited money at or near the same time he came to America." (Mag.'s Decision at 8.) Appellant restates his previous argument that because appellees did not pay for all of appellant's living and tuition expenses, they did not fully perform under the agreement.

{¶ 48} On review, there was competent, credible evidence for the trial court to conclude appellees provided all tuition and living expenses requested by appellant. By providing a financial safety net and additional funds when appellant exceeded his monthly budget, appellees offered much needed support to appellant while he pursued his graduate education. Accordingly, we find the weight of the evidence supports the ruling of the trial court.

{¶ 49} For the forgoing reasons, appellant's fourth assignment of error is overruled.

V. CONCLUSION

{¶ 50} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and BEATTY BLUNT, JJ., concur.

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