The Bullet Point: Ohio Commercial Law Bulletin

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Jim Sandy and Richik Sarkar

The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of in the area of commercial law and business practices. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of commercial intelligence to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

To further our goal of providing bullet points of commercial intelligence to help people do business better and better monitor the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs, the Bullet Point will provide previews of cases before the United States Supreme Court (SCOTUS) and the U.S. Sixth Circuit Court of Appeal. When appropriate, *The Bullet Point* will highlight industry issues that would benefit from amicus brief support. If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

The Bullet Point

Enforcement of Oral Agreements

***Cooper v. City of West Carrollton*, 2d Dist. Montgomery No. 27789, 2018-Ohio-2547.**

This was an appeal of a trial court's decision to dismiss a breach of contract action. The plaintiff was employed by the City of West Carrollton (the "City") in the parks and recreation department. He worked in that department for more than 30 years, during which time he belonged to a union. In 2008, the City approached the plaintiff about a promotion

to supervisor of the parks department. He met with the City and provided them a letter seeking guaranteed employment in exchange for the position, knowing that supervisory positions were not unionized. The City advised plaintiff at the meeting that it did not enter into employment contracts. Thereafter, the plaintiff orally advised the City that he would accept the position without a contract. While acting in his new role as supervisor, the plaintiff continued to perform his prior position duties. He noticed that he never received a pay raise and would ask about it from time to time. Eventually plaintiff sued the city.

The city moved to dismiss the contractual claims, arguing that they were barred by the statute of limitations. The trial court agreed, finding that the promissory estoppel and implied contract claims were barred by the statute of limitations and that there was no meeting of the minds necessary to find a contract existed. Plaintiff subsequently appealed. On appeal the Second Appellate District affirmed, finding that the oral agreement lacked the essential elements of a contract in order to enforce it.

The Bullet Point: Courts may enforce oral agreements if the terms "can be established by clear and convincing evidence." 'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained-for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." " 'In order for a meeting of the minds to occur, both parties to an agreement must mutually assent to the substance of the exchange.' " To that end, a contract which is not binding on one party because it is too indefinite and uncertain is not binding on the other as well.

Class Certification

***Unifund CCR Partners v. Rosenberg, et. al.*, 11th Dist. Ashtabula No. 2017-A-0003, 2018-Ohio-2575.**

This was an appeal of a trial court's decision to grant, in part, the defendant's motion for class certification on claims for violations of the Fair Debt Collection Practices Act (FDCPA). In 2009, Unifund filed a complaint against the defendant to collect on a credit card debt. It had been assigned the account from the original creditor. The defendant responded by asserting various individual and class claims, including a claim under the FDCPA for Unifund purportedly making false and misleading representations in lawsuits in Ohio. Eventually the defendant sought class certification on two classes of individuals: (1) an "incompetence class," consisting of individuals who had been sued by Unifund after December 23, 2008 and at the time of suit, someone else other than Unifund had the right to the money, and (2) a "time-bar class." The trial court ultimately granted the motion to certify in part, certifying a class that met the following definition: "At the time of filing of the lawsuit, an entity other than [Unifund] held the right, in whole or part, to receive the money that was sought to be collected through the lawsuit, and [Unifund] did not meet the FDCPA

requirements to lawfully file suit to collect the debt in its own name." Unifund appealed this decision. The Eleventh Appellate District affirmed in part and reversed in part. It found that the trial court did not abuse its discretion in certifying the class action but found that the class needed to be narrowed and remanded for that purpose.

The Bullet Point: A trial court has discretion to certify a class action, bound by Civil Rule 23. The following seven requirements must be satisfied before an action may be maintained as a class action under Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous, (2) the named representatives must be members of the class, (3) the class must be so numerous that joinder of all members is impracticable, (4) there must be questions of law or fact common to the class, (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three Civ.R. 23(B) requirements must be met. "'The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member."' Where a class is overbroad and could include a substantial number of people who have no claim under the theory advanced by the named plaintiff, the class is not sufficiently definite. A class can be overbroad if it is also considered a "fail-safe" class. "A fail-safe class definition is one in which the putative class is defined by reference to the merits of the claim." "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." When the class as defined is a fail-safe class, an appellate court can remand to redefine the class, such as what happened in this case.

Frivolous Conduct

***Hamlin v. Bosse,* 2d Dist. Miami No. 2017-CA-26, 2018-Ohio-2657.**

This was an appeal of a trial court's order denying sanctions, costs, and attorneys' fees for allegedly frivolous conduct under R.C. 2323.51 and a violation of Civil Rule 11. The case began as a divorce. As part of the divorce, the court appointed the defendant as an expert with respect to distributing the husband's retirement benefits to the plaintiff. Pursuant to court order, the defendant prepared certain qualified domestic relations orders regarding the equitable division of retirement benefits. Plaintiff eventually found out that the orders were improperly calculated by the defendant and eventually moved to amend them. Thereafter, the plaintiff sued defendant for breach of contract and malpractice, claiming damages in excess of $11,000 in the drafting of the orders. The defendant moved to dismiss the lawsuit and while plaintiff opposed, she also dismissed the lawsuit. In response, defendant sought sanctions under Civ.R. 11 and R.C. 2323.51 for frivolous conduct. The trial court denied the motion and defendant appealed.

The Second Appellate District affirmed on appeal. In so ruling it found that the trial court's finding that plaintiff had a good faith basis to file the complaint was not an abuse of discretion since there was some legal basis for her assertions.

The Bullet Point: R.C. 2323.51 allows a court to award "court costs, reasonable attorney's fees, and other reasonable expenses." Before making an award, the court must hold a hearing "to determine whether particular conduct was frivolous; to determine, if the conduct was frivolous, whether any party was adversely affected by it; and to determine, if an award is to be made, the amount of that award" to any party "who was adversely affected by frivolous conduct." Frivolous conduct is not proved merely by winning a legal battle or by proving that a party's factual assertions were incorrect. Rather, to be considered frivolous, it must be "absolutely clear under the existing law that no reasonable lawyer could argue the claim."

Unjust Enrichment

***Spalsbury v. Gill Construction Co.,* 9th Dist. Medina No. 17CA0030-M, 2018-Ohio-2616.**

This is an appeal of a trial court's decision to grant summary judgment on breach of contract and unjust enrichment claims. The appellants used to work as sale agents for the construction company. They claimed they were owed commissions for works on several projects from 2008. The construction company argued that the claims were time-barred, and the trial court agreed.

The Ninth Appellate District affirmed on appeal. In so ruling, the court noted that the appellants could not prevail on a claim for unjust enrichment because such an equitable claim does not exist when the parties' relationship is governed by a written contract, as was the case here.

The Bullet Point: To recover for unjust enrichment, a plaintiff must demonstrate: (1) that it conferred a benefit upon the defendant; (2) that the defendant knew of the benefit; and (3) that, under the circumstances, it would be unjust to allow the defendant to retain the benefit without payment. An unjust enrichment claim is a "quasi-contractual" claim that applies only in the absence of a written contract. "The reason for this rule is that if the parties have fixed their contractual relationship in an express contract, there is no reason or necessity for the law to supply an implied contractual relationship between them." Thus, if the parties' relationship is governed by a written contract, a plaintiff will not be able to succeed on a quasi-contractual claim like unjust enrichment.

The Preview Point

What constitutes "debt collection" under the FDCPA?

***Obduskey v. McCarthy & Holthus LLP*, No. 17-1307.**

The United States Supreme Court accepted this case to resolve a circuit split on what constitutes "debt collection" under the FDCPA.

In this case, a borrower obtained a mortgage loan from Wells Fargo. The borrower defaulted and Wells Fargo retained a law firm to pursue a non-judicial foreclosure. The law firm sent the borrower a letter advising that it was pursuing a non-judicial foreclosure, was a debt collector, and was attempting to collect a debt. The borrower ultimately filed suit against the law firm, claiming that it never verified the debt as required under the FDCPA. Eventually, the district court granted the law firm's motion to dismiss, finding that a non-judicial foreclosure is not debt collection activity subject to the mandates of the FDCPA. The borrower appealed and the Tenth Circuit Court of Appeals affirmed.

The United States Supreme Court granted certiorari based on a circuit split in the following cases on the issue of whether a foreclosure constitutes debt collection activity: *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013); *McCray v. Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015).

[Cite as *Cooper v. City of West Carrollton, Ohio*, 2018-Ohio-2547.]

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

TROY COOPER	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 27789
	:	
v.	:	Trial Court Case No. 2016-CV-6126
	:	
CITY OF WEST CARROLLTON, OHIO	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 29th day of June, 2018.

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DAVID M. DUWEL, Atty. Reg. No. 0029583, 130 West Second Street, Suite 2101, Dayton, Ohio 45402
Attorney for Plaintiff-Appellant

TIMOTHY G. PEPPER, Atty. Reg. No. 0071076, 40 North Main Street, Suite 1700, Dayton, Ohio 45423
Attorney for Defendant-Appellee

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WELBAUM, P.J.

{¶ 1} This case is before us on appeal of Plaintiff-Appellant, Troy Cooper, from a summary judgment rendered in favor of Defendant-Appellee, City of West Carrollton, Ohio ("City"). As a ground for his appeal, Cooper contends that the trial court erred in dismissing his breach of contract claim. He also argues that the trial court erred in concluding that the statute of limitations expired with respect to his contract claims. For the reasons set forth below, we find Cooper's assignments of error without merit. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 2} On December 2, 2016, Cooper filed a complaint against the City, alleging three causes of action: breach of contract, breach of implied contract, and promissory estoppel. The case was a refiling of a prior action that Cooper had filed against the City on June 1, 2015, and had dismissed without prejudice on December 4, 2015.

{¶ 3} Cooper's claims arose from his employment with the City. Cooper began part-time employment with the City's Parks and Recreation Department ("Parks Dept.") in 1980, when he was still in high school. Right after he graduated from high school in 1985, Cooper began full-time employment with the Parks Dept. as a Maintenance Repair Person I.[1] At that time, Cooper reported to Dixon Chaney, who was the supervisor of the Parks Dept.

{¶ 4} Cooper was employed continuously in the Parks Dept. until he retired on April

[1] The dates in this paragraph with respect to Cooper's high school attendance reflect the evidence in the record, but we note that they appear to span more than four years.

26, 2016. During his employment, Cooper belonged to a union, the West Carrollton Independent Employees Association ("Union"). At all pertinent times, the Union had a contract with the City that protected Union members.

{¶ 5} When Cooper was hired, there was no Maintenance II position; however, at some point, a Maintenance II position was created, and in 1998, Cooper was promoted to the position. Cooper applied for this position, which was competitive, and was chosen over another person who had also applied. Cooper continued in the Maintenance II position until he retired in 2016.

{¶ 6} Chaney continued to be Cooper's supervisor and retired on January 1, 2008. At that time, Cooper was acting supervisor because Chaney took a lot of vacation right before he retired. The Union contract allowed employees to receive a "plus rating to a supervisory position," and be paid a higher rate, which was calculated as an 8% increase from the employee's current hourly rate. This could be approved by the Department Director, on an as-needed basis and was solely at the director's discretion. Pursuant to this paragraph of the contract, Cooper was given an 8% increase in his hourly rate when he became acting supervisor, while still retaining his Maintenance II classification and Union membership. Cooper Deposition, pp. 71-72 and 77-78, and Union contract, Article IV, Section 3, p. 12 (attached as Ex. B to Cooper's Deposition, and hereafter referenced as "Contract").[2]

{¶ 7} At all relevant times, Christian Mattingly was the Director of the Parks Dept. and Brad Townsend was the City Manager. When Chaney retired, the City did not

[2] This contract was effective from November 10, 2011, to November 10, 2013, but neither side has noted any relevant differences between this and other Union contracts that were in effect during Cooper's employment.

publicly post the supervisor's position and did not establish a list of eligible candidates. Cooper also did not apply for the supervisor's position.

{¶ 8} Around January 25, 2008, Townsend and Cooper had a brief meeting, during which Townsend offered Cooper the position of supervisor of the Parks Dept. Because Cooper had previously spoken to Mattingly about a potential promotion, Cooper anticipated that he would receive an offer at the meeting. As a result, Cooper had prepared a letter requesting a guaranteed employment contract. *See* Ex. C attached to Cooper's Deposition.

{¶ 9} The letter, which was dated January 25, 2008, stated, in pertinent part, as follows:

> In order for me to accept the Parks and Recreation, Supervisor Position and leave the security of my current position as Maintenance Repair Person, I need to ask that this letter or some other legal agreement be signed by the City of West Carrollton and myself, guaranteeing me the opportunity to fall back in my current title and keep my seniority, in the event of cutbacks, Layoffs, or you find that my performance isn't satisfactory, or for any other reasons deemed necessary until my retirement is up November 2013.

Ex. C at p. 1.

{¶ 10} When Cooper wrote this letter, he was aware that supervisors did not have job security because they were not in the Union. In contrast, as a Union member, Cooper had seniority rights, including bumping rights; thus, if layoffs occurred, employees junior to Cooper would generally be laid off first. Cooper Deposition at p. 60. When Cooper

wrote the letter, he was unaware of any other City employee who had ever received such a contract. *Id*. at pp. 61-62.

{¶ 11} Townsend read Cooper's letter during the meeting and told Cooper that the City did not enter into employment contracts. Doc. #32, City's Motion for Summary Judgment, Affidavit of Brad Townsend, ¶ 7; Cooper Deposition at p. 63. When Townsend made this statement, Cooper told Townsend he would get back with him. *Id*. at p. 63. Cooper did not recall what Townsend said after that. However, Cooper thought that Townsend was not very happy with the letter. Apparently, during the meeting, Cooper also brought up the fact that, as City Manager, Townsend had a contract. Cooper concluded that Townsend did not like this reference. *Id*. at p. 64.

{¶ 12} Mattingly did not have authority to promote Cooper; he only could make recommendations to Townsend. A few days after the meeting, Cooper told Mattingly he would accept the job basically without a contract. According to Cooper, Mattingly said "great, he'll let [Townsend] know."[3] Cooper Deposition at p. 66. No further discussion occurred, including what Cooper's salary would be. Cooper indicated that the supervisor position had a range of salaries, from low to high. *Id*. at p. 90.

{¶ 13} While acting in both the acting supervisor capacity and what Cooper thought was his new position as "supervisor," Cooper performed his usual duties as a Maintenance II worker, but also performed other duties. After being promoted, Cooper

[3] A factual dispute exists in this context, as both Mattingly and Townsend stated that Cooper had declined the position. *See* Doc. #32, Mattingly Affidavit, ¶ 8, and Townsend Affidavit at ¶ 8. According to Townsend, Cooper decided to stay in his current classification and receive the 8% salary increase, while staying under Union protection. *Id*. For reasons that will become clear in our discussion, this is not a material factual dispute.

prepared monthly reports for Mattingly about the department's activities and assigned work to other employees. Cooper also helped Mattingly with the budget by making recommendations about needed equipment and obtaining prices.

{¶ 14} When Cooper received the promotion, he expected that his pay rate would change and that he would receive supervisor pay rather than the rate for Maintenance II, plus 8%. However, after receiving a few paychecks, Cooper noticed that he was not being paid any more than before his promotion. Cooper Deposition at pp. 75-76. In 2008, a few months after becoming supervisor, Cooper discussed the issue with Mattingly, who said he would "get with" Brad Townsend and look into it. Mattingly did not get back to Cooper with an answer, however.

{¶ 15} After that, Cooper asked about the issue several times a year, although he did not specify exactly when he asked. He said that in one incident he could recall, which he thought was in 2008, Mattingly said, "you turned down the job." *Id*. at p. 82.

{¶ 16} About four or five years later, Cooper demanded to talk to Townsend. Cooper had tried to talk to Townsend several times, but Townsend was not available. On this occasion, Townsend basically laughed at Cooper and said, "you've been doing it for four or five years, how do you expect me to take it to council?" *Id*. at p. 83.

{¶ 17} In 1982, the City adopted personnel rules and regulations. *See* Ex. D. (City of West Carrollton Personnel Rules and Regulations) ("Personnel Rules"), attached to the Cooper Deposition. Rule XII provides for a grievance procedure "through which all City employees may have an opportunity to have their problems and complaints considered in a fair and reasonable manner." Personnel Rules at p. 61, Section 12.01.

{¶ 18} Rule XII defines a grievance as a dispute based on one or more of the

following items: "1. The lack of a clearly defined City or Department Policy; 2. The existence of a policy which is unfair or discriminatory to a specific group of employees; 3. The deviation from established policy; [and] 4. The improper application of the rules, regulations or policies of the City." *Id*. at p. 61, Section 12.03. Employees initiate the process by filing grievances in writing with their supervisors within 10 days of when they "knew or should have known of the event on which the grievance is based." *Id*. at p. 62, Section 12.04. A three-level process, including appeals, is involved, ending with the City Manager's decision on the subject. *Id*. at pp. 62-63, Sections 12.04-12.05. Cooper testified that any full-time employee would know the rules and regulations, and that this was a general obligation of City employees. Cooper Deposition at pp. 92-93.

{¶ 19} During his deposition and in interrogatory answers, Cooper claimed that the City violated Section 6.10 of the Personnel Rules, which stated that:

> A. Whenever a vacancy occurs in the civil service of the City and there is no current eligible list from which a certification can be made, the Personnel Director shall so inform the appropriate Department Head. If, in the judgment of the Department Head, it is not expedient to wait until the establishment of a list, he shall request the Personnel Director to submit to him the application(s) of one or more persons who possess the minimum qualifications established for the position. Upon review of the applications, the Department Head may recommend to the City Manager the appointment of one of the candidates. Upon approval by the City Manager, the appointment shall become official.
>
> B. A provisional appointment shall not last longer than three

> months, during which time an examination shall be given and an eligible list established. The name of the provisional candidate shall be certified to the Department Head along with the names of the top five candidates on the eligible list, provided that the provisional employee receives a passing score on the examination. The probationary service of a provisional employee may be shortened by the length of time spent in a provisional status.

Ex. D, Personnel Rules, at p. 21.

{¶ 20} Both Townsend and Mattingly testified that Cooper was not a provisional appointee and was not given a test for provisional appointees; Cooper did not present contrary evidence. In fact, Cooper said that supervisory positons do not have to be posted. Cooper Deposition at p. 53. Cooper also stated that apparently Townsend considered him a provisional appointee because he paid Cooper less, but Cooper did not consider himself as such; he considered himself to have been actually appointed to the position of supervisor. *Id*. at p. 104. In any event, Cooper never said that he ever filed any grievances concerning his appointment or pay.

{¶ 21} The Union contract also contained grievance, mediation, and arbitration procedures. *See* Cooper Deposition, Ex. B, Contract, Article 8, at pp. 5-8. Again, Cooper failed to provide any evidence of attempts to use any grievance or other procedures contained in any Union contracts.

{¶ 22} As was noted, Cooper filed an initial complaint against the City in June 2015, dismissed it without prejudice, and refiled in December 2016. In February 2017, the City filed a Civ.R. 12(C) motion to dismiss, contending that Cooper's claims for promissory estoppel and implied contract were barred by the statute of limitations. The

City further argued that Cooper's breach of contract action, which was allegedly based on Section 6.10 of the City's personnel rules, failed to state a claim because there was no meeting of the minds.

{¶ 23} On March 30, 2017, the trial court sustained the City's motion to dismiss in part, and denied it in part. The court concluded that the statute of limitations for the promissory estoppel and implied contract claims expired in early to mid-2014, well before the initial complaint was filed. However, the court overruled the motion to dismiss the contract claim. The court noted the City's argument that Cooper had not offered any evidence about the meeting of the parties' minds, but stressed that it could not consider evidence outside the pleadings.

{¶ 24} Subsequently, on August 8, 2017, the City filed a motion for summary judgment with respect to the remaining claim. In support of its motion, the City filed affidavits from Townsend and Mattingly, as well as Cooper's deposition and the exhibits identified at the deposition. On September 29, 2017, the trial court sustained the City's motion for summary judgment and dismissed the case. Cooper then filed a timely appeal of the court's decision.

II. Breach of Contract Claim

{¶ 25} Cooper's First Assignment of Error states that:

> The Trial Court Erred When It Dismissed Appellant's Breach of Contract Claim.

{¶ 26} In granting summary judgment on the contract claim, the trial court first held that the matter involved an oral contract because no evidence of a written contract was

provided. The court further concluded that there was no evidence of a meeting of minds. While the court concluded that some sort of agreement existed, the terms were not evident, and there was no evidence of mutual assent to any of the material pay terms. As a result, the court held that the contract was not enforceable because it was indefinite as of its making and was not binding on the parties.

{¶ 27} In arguing that the trial court erred, Cooper contends that he was orally offered the position of supervisor and orally accepted the offer. According to Cooper, a meeting of the parties' minds took place for purpose of contract formation because his job duties changed after his acceptance of the offer, including that he provided monthly reports about the department's activity, presented budget items to Mattingly, attended meetings and seminars scheduled for City supervisors, was paid by the City for the use of his cell phone, responded to City emergencies, set daily work schedules for the department, and hired and fired seasonal employees.

{¶ 28} Before addressing these points, we note that "[a] trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks*, 134 Ohio App.3d 754, 760, 732 N.E.2d 422 (2d Dist.1999), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 375 N.E.2d 46 (1978). "We review decisions granting summary judgment de novo, 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.).

{¶ 29} As the trial court observed, the alleged agreement in this case was oral, as there is no evidence of any writing. Courts may enforce oral agreements if the terms " 'can be established by clear and convincing evidence.' " *Clemens v. Clemens*, 2d Dist. Greene No. 07-CA-73, 2008-Ohio-4730, ¶ 93, quoting *Pawlowski v. Pawlowski*, 83 Ohio App.3d 794, 798-799, 615 N.E.2d 1071 (10th Dist. 1992). The party asserting the existence of such an agreement also has the burden of proof. *Id*. at ¶ 102.

{¶ 30} " 'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F. Supp. 409, 414 (N.D.Ohio 1976). "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." *Id.*, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991). " 'In order for a meeting of the minds to occur, both parties to an agreement must mutually assent to the substance of the exchange.' " *Champion Gym & Fitness, Inc. v. Crotty*, 178 Ohio App.3d 739, 2008-Ohio-5642, 900 N.E.2d 231, ¶ 12 (2d Dist.), quoting *Miller v. Lindsay-Green, Inc.*, 10th Dist. Franklin No. 04AP-848, 2005-Ohio-6366, ¶ 63.

{¶ 31} The Supreme Court of Ohio has stressed that:

> A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being

> understood. It is not even enough that they had actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.

Rulli v. Fan Co., 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997), quoting 1 Corbin on Contracts 525, Section 4.1 (Rev. Ed. 1993).

{¶ 32} Assuming for the sake of argument that the parties had agreed for Cooper to be considered a supervisor, the terms of their agreement would have been insufficient for purposes of either determining if a breach occurred or the appropriate remedy to be provided. *See Nilavar v. Osborn*, 127 Ohio App.3d 1, 13, 711 N.E.2d 726 (2d Dist.1998). Specifically, a range of salaries existed for the supervisor's position, and the parties did not discuss a salary. During his deposition, Cooper speculated about what his starting salary might have been, by stating that he expected it would be "about middle ways"; however, even this is indefinite. Cooper Deposition at p. 90. More importantly, there was simply no evidence indicating what the parties intended the salary to be, nor would there be any way to decide whether a breach occurred, since no salary was specified. The only claim Cooper asserts in this case is that he was not paid the salary he thinks he should have received.

{¶ 33} A fundamental contract rule "is that a contract which is not binding on one party because it is too indefinite and uncertain as to a material matter, is not binding on the other party thereto." *Messner v. Beals*, 16 Ohio Law Abs. 506, 508 (9th Dist.1934)

(finding no binding contract where salary was not specified). *See also Snell Environmental Group v. Bd. of Commrs. of Warren Cty.*, 12th Dist. Warren No. 64, 1983 WL 4436, *2-3 (Aug. 3, 1983) (contract was unenforceable where parties did not agree to a fee when they contracted); *Cahill v. Owens*, 2016-Ohio-4972, 67 N.E.3d 1242, ¶ 18 (10th Dist.) (no enforceable contract existed due to lack of definite terms and mutual understanding where parties disagreed as to terms and amount of fees); *Allied Erecting & Dismantling Co. v. Uneco Realty Co.*, 146 Ohio App.3d 136, 142-143, 765 N.E.2d 420 (7th Dist.) (no meeting of minds where compensation was not agreed upon); *Ramun v. Ramun*, 7th Dist. Mahoning No. 12 MA 61, 2014-Ohio-4440, ¶ 29 (lack of agreement as to compensation rendered alleged oral contract unenforceable).

{¶ 34} In light of the preceding discussion, the trial court did not err in concluding that the parties did not enter into a binding and enforceable contract. Accordingly, the First Assignment of Error is overruled.

III. Statute of Limitations

{¶ 35} Cooper's Second Assignment of Error states that:

> The Trial Court Erred When It Found that the Applicable Statute of Limitations Had Ran [Sic].

{¶ 36} In addition to finding that no enforceable contract existed, the trial court held that Cooper's actions for promissory estoppel and implied contract were barred by the statute of limitations. Cooper concedes that the six-year statute of limitations in R.C. 2305.07 applies, but argues that he did not truly feel injured until he took his concerns to the City Manager in 2012 or 2013. Alternatively, Cooper contends that the statute of

limitations should be tolled because of the continuing nature of his alleged injury.

{¶ 37} R.C. 2305.07 provides for a six-year statute of limitations for actions based on "a contract not in writing, express or implied * * *." Causes of action for breach of contract accrue when the alleged breach causes actual damages to the complaining party. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 13, *modified on reconsideration on other grounds*, 127 Ohio St.3d 1550, 2011-Ohio-647, 941 N.E.2d 805, ¶ 20; *Columbus Green Bldg. Forum v. State*, 2012-Ohio-4244, 980 N.E.2d 1, ¶ 27 (10th Dist.).

{¶ 38} Again, assuming that an oral contract existed and that it was enforceable, the alleged breach would have occurred in early 2008, when Cooper failed to receive the salary raise (whatever that was) to which he says he was entitled. Six years from that time would have been in early 2014. However, Cooper's first action was not filed until June 2015, about a year and a half after the statute of limitations expired. The fact that Cooper did not "think" a problem existed until 2012 or 2013 is irrelevant; in addition, it defies logic.

{¶ 39} We also reject Cooper's assertion that the statute of limitations was tolled under the "continuous violation" doctrine. As authority, Cooper cites Ohio Adm. Code 4112-3-01(D)(2), which states that "[i]n cases of recurring or continuing violations, the filing period begins to run anew with each new discriminatory act or with each new day of the continuing violation." This regulation pertains to civil rights violations. *Marok v. Ohio State Univ.*, 10th Dist. Franklin No. 13AP-12, 2014-Ohio-1184, ¶ 26, fn.1.

{¶ 40} The Supreme Court of Ohio has stressed that courts are very reluctant to use the continuing violation doctrine outside the Title VII context. *State ex rel. Nickoli v.*

Erie MetroParks, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588, ¶ 31, citing *Natl. Parks Conservation Assn., Inc. v. Tennessee Valley Auth.*, 480 F.3d 410, 416 (6th Cir. 2007). Furthermore, continuing violations are distinguished from "continuing effects of prior violations"; in this context, " ' "[a] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." ' " *Id.* at ¶ 32, quoting *Broom v. Strickland*, 579 F.3d 553, 555 (6th Cir. 2009). (Other citation omitted.) *See also Painesville Mini Storage, Inc. v. Painesville*, 124 Ohio St.3d 504, 2010-Ohio-920, 924 N.E.2d 357, ¶ 3 (in takings case, continual violation doctrine did not apply because "the city did not perform any additional challenged actions after it issued the permit. Every event that occurred thereafter 'was merely a continuation of the effects of that solitary event rather than the occurrence of new discrete acts.' ")

{¶ 41} In rejecting a claim that the continuing violation doctrine should be applied to toll the limitations period for actions based on breach of contract, the Tenth District Court of Appeals quoted a federal case, which said that " 'the plaintiff has not cited any cases, nor is the court aware of any, indicating that Ohio would entertain extending the continuing violation doctrine to breach of contract cases.' " *Marok* at ¶ 26, citing *Vitek v. AIG Life Brokerage*, S.D. Ohio No. 06-cv-615 (Sept. 22, 2008). Our research also has not disclosed any Ohio cases that have extended the continuing violation doctrine to contract actions.

{¶ 42} In arguing that the statute of limitations should have been tolled, Cooper has additionally cited two cases from other jurisdictions. One case applied a continuous violation theory to avoid the effect of the statute of limitations on claims against a lessee for an air-conditioning unit that repeatedly leaked into the apartment below. *1050*

Tenants Corp. v. Lapidus, 289 A.D.2d 145, 735 N.Y.S.2d 47 (1st Dept. 2001). The court found that a violation of law resulting in "a continuous condition of nuisance" stated "a continuous and recurring wrong * * *." *Id*. at 147. That is not the situation here, and even though a lease agreement was involved in the cited case, the court's focus was on the alleged continuing nuisance.

{¶ 43} In the other case cited by Cooper, the California Supreme Court rejected application of the continuous violation theory in a situation involving breach of a copier lease agreement. *Aryeh v. Canon Business Sols.*, *Inc.*, 55 Cal.4th 1185, 1199, 151 Cal.Rptr.3d 827, 292 P.3d 871 (2013). However, the court did apply what it called a "continuous accrual" theory, which "supports recovery only for damages arising from those breaches falling within the limitations period." *Id*. Thus, where the plaintiff alleged that the lessor of the copier had breached "the duty not to impose unfair charges in monthly bills," the court held that "each alleged breach must be treated as triggering a new statute of limitations." *Id*. at 1200. The court also noted allegations in the complaint, which it construed as true, that the defendant's "bills periodically included test copy charges that were unfair or fraudulent." *Id*.

{¶ 44} We find no evidence that Ohio recognizes a similar "continual accrual" theory.[4] However, even if Ohio recognized such a theory, the case before us does not involve such circumstances. Here, the alleged damages arose from a single event – the

[4] The Supreme Court of Ohio has allowed tolling of the statute of limitations where "an act carried out on the actor's own land causes continuing damage to another's property and the actor's conduct or retention of control is of a continuing nature * * *." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, paragraph two of the syllabus. However, this type of conduct did not occur in the case before us; instead, the City's alleged breach of the parties' oral agreement was a single act.

City's purported breach of an oral agreement to promote Cooper. The cause of action arose at that time, not on every payday from January 2008 until Cooper retired in 2016. *See Barnett v. Connecticut Mut. Life Ins. Co.*, 8th Dist. Cuyahoga No. 69253, 1996 WL 284878, *2 (May 30, 1996) (rejecting plaintiff's contention that a separate cause of action arose every year that he did not receive a cost of living benefit adjustment on a disability policy. Instead, the damage arose from a single alleged wrongful act, which was the insurance agent's alleged failure to obtain coverage that included a cost of living increase).

{¶ 45} Cooper was clearly aware in early 2008 that he was not receiving the salary he expected, after having been "promoted" to supervisor. However, he failed to file his action for more than six years, and the trial court correctly concluded that his claim was barred under R.C. 2305.07. The Second Assignment of Error, therefore, is overruled.

IV. Conclusion

{¶ 46} All of Cooper's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

HALL, J. and TUCKER, J., concur.

Copies mailed to:

David M. Duwel
Timothy G. Pepper
Hon. Mary Katherine Huffman

[Cite as *Unifund CCR Partners v. Piaser*, 2018-Ohio-2575.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

UNIFUND CCR PARTNERS,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2017-A-0003
DAVID ROSENBERG, et al.,	:	
Counterclaim Defendants-Appellants,	:	
- vs -	:	
LISA R. PIASER,	:	
Defendant-Appellee.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CV 80.

Judgment: Affirmed in part, reversed in part, and remanded.

Alan H. Abes and *Elizabeth M. Shaffer,* Dinsmore & Shohl, LLP, 255 East Fifth Street, Suite 1900, Cincinnati, OH 45202 (For Plaintiff-Appellant and Counterclaim Defendants-Appellants).

Robert S. Belovich, 9100 South Hills Boulevard, Suite 320, Broadview Heights, OH 44147, and *Anand N. Misra,* The Misra Law Firm, L.L.C., 3659 Green Road, #100, Beachwood, OH 44122 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Unifund CCR Partners, et al. ("Unifund"), appeal the judgment of the Ashtabula County Court of Common Pleas granting in part appellee, Lisa R.

Piaser's, motion for class certification on her counterclaim for violations of the federal Fair Debt Collection Practices Act ("FDCPA"). At issue is whether the trial court abused its discretion in partially granting Ms. Piaser's motion. For the reasons that follow, the judgment is affirmed in part, reversed in part, and remanded.

{¶2} On October 15, 2009, Unifund filed a complaint against Ms. Piaser in the Ashtabula County Municipal Court to collect an alleged credit card debt. Unifund alleged that Providian National Bank was the original creditor and that the account had been assigned to it. The account was open from April to June 2000. The complaint alleged that the charge-off balance in 2001 was $267 and that, with interest, the amount due is now $684.

{¶3} In her first amended answer and counterclaim, Ms. Piaser denied the material allegations of the complaint, including that she owed any amount under the account. She also asserted individual and class counterclaims for violations of the FDCPA, the Ohio Consumer Sales Practices Act ("CSPA"), and various common law claims. Ms. Piaser alleged Unifund is a debt collector under the FDCPA and is in the business of acquiring and collecting defaulted consumer credit card debt. She alleged Unifund violated the FDCPA, at 15 U.S.C. 1692e, by making false and misleading representations in lawsuits and demanding payment. Ms. Piaser prayed for damages and injunctive relief. Upon assertion of her counterclaims, the municipal court transferred the case to the Common Pleas Court.

{¶4} On September 1, 2010, Unifund filed a motion for summary judgment on Ms. Piaser's counterclaims. On June 28, 2013, the trial court granted the motion in

Unifund's favor on Ms. Piaser's common law claims, leaving only her counterclaims for violations of the FDCPA and the CSPA. In its entry, the court noted:

> **{¶5}** [Unifund] contends that R.C. 1319.12 [regarding the collection of assigned debts] does not apply because it was not acting as a collection agency, but was pursuing collection of the debt against [Ms. Piaser] on its own behalf, as the purchaser of the obligation. If true, this could be correct as to [Ms. Piaser]. [Ms. Piaser] claims that [Unifund] cannot show that it received a valid assignment of her claimed credit card obligation to Providian National Bank. The Court finds that, on the state of the record, there remains an issue of fact as to this contention.

{¶6} On December 14, 2014, Ms. Piaser filed a motion seeking to certify her counterclaims as a class action and Unifund filed a brief in opposition. She also filed a motion for sanctions due to Unifund's alleged failure to comply with the court's September 4, 2014 discovery order requiring Unifund to produce documents related to the ownership of Ms. Piaser's account. Unifund filed a brief in opposition.

{¶7} In her motion for class certification, Ms. Piaser requested the court certify two classes, which she referred to as the "Incompetence Class" and the "Time-Bar Class." Since the court ultimately granted her motion to certify only as to the Incompetence Class, our analysis is confined to that class. Ms. Piaser has also filed an appeal of the trial court's denial of her motion to certify the Time-Bar Class. That appeal is also pending and will be addressed in a separate opinion.

{¶8} Ms. Piaser's proposed common class criteria for each member of the Incompetence Class (hereafter "the class") are that each member is (1) an individual; (2) against whom Unifund filed a lawsuit in Ohio; (3) to collect a debt related to a credit card; and (4) that the suit was filed on or after December 23, 2008 and thus with a one year look back period. Ms. Piaser also included the following additional class criteria:

"At the time of filing of the lawsuit, an entity other than [Unifund] held the right, in whole or part, to receive the money that was sought to be collected through the lawsuit.

{¶9} In her brief in support of her motion to certify, Ms. Piaser argued that Unifund does not own her account due to the lack of an assignment from the account's owner, Unifund Portfolio E, L.L.C. ("Portfolio E"), but, rather, was merely a debt collector. In support, she pointed out that in Unifund's answer to the counterclaim, it admitted it merely "manages the collection of distressed consumer receivables."

{¶10} Ms. Piaser further argued that the accounts of the purported class members are owned by several limited liability companies that are affiliated with Unifund, which it refers to as "Special Purpose Vehicles" ("SPVs"). Unifund's vice-president, Jeffrey Shaffer, testified in deposition that the "special purpose" of the SPVs is to purchase defaulted credit card accounts from creditors. Mr. Shaffer said that the SPVs purchase the accounts and Unifund is the "servicer" on these accounts.

{¶11} Further, Scott Walther, another Unifund vice-president, testified as to how defaulted accounts are purchased. He said Unifund acquires portfolios of defaulted credit card accounts with funds invested by one or more of the SPVs. He said that when the SPV(s) contribute funds for the purchase of a portfolio of defaulted accounts from a creditor, this is considered an investment. When Unifund purchases a portfolio of defaulted accounts, the accounts in the purchased portfolio are transferred to the balance sheets of the investing SPVs by a process that Unifund refers to as "marking."

{¶12} Mr. Walther said that when a payment comes in on an account, either in collection proceedings or in a later sale of the account, the proceeds are placed into a

trust account. The funds are then split between Unifund and the SPV (as a return on its investment) and the SPV pays a collection fee to Unifund.

{¶13} In this case, the SPV that invested the funds to purchase Ms. Piaser's account was Portfolio E. After the acquisition of this account, Unifund transferred or "marked" it to Portfolio E, and thereafter any funds collected on Ms. Piaser's account would have been given to Portfolio E.

{¶14} Ms. Piaser argued that Unifund's act of "marking" or transferring the accounts it purchased to the SPVs (whose funds were used to purchase them) resulted in a transfer of ownership of the account to the SPV. As a result, she argued that before Unifund could sue her, Unifund was required, but failed, to obtain an assignment of the account from Portfolio E that complied with R.C. 1319.12. She said Unifund failed to produce in discovery any assignment from Portfolio E of Ms. Piaser's account. She argued that because her account was never assigned to Unifund, its allegation in the complaint that it was entitled to sue on her account in its own name was a misrepresentation and, thus, a violation of the FDCPA.

{¶15} In a separate motion for sanctions, Ms. Piaser argued she has been unable to determine the exact interest Unifund transferred by way of "marking" her account to Portfolio E. She said this is due to Unifund's failure to comply with the court's prior discovery order requiring it to provide documents aimed at determining the interest Portfolio E received as a result of Unifund marking Ms. Piaser's account to it.

{¶16} Unifund filed a brief in opposition to Ms. Piaser's motion to certify, arguing that it, i.e., Unifund, owns and holds title to Ms. Piaser's account and that, as a result, Unifund was not required to obtain an assignment in order to sue her on the account. In

support, Unifund attached a bill of sale showing it purchased Ms. Piaser's account from Providian; however, the bill of sale from Providian to Unifund sheds no light on what interest, if any, was acquired by Portfolio E in the account as a result of Unifund's later transfer or marking the account to Portfolio E in exchange for Unifund's use of its funds to purchase the account. Unifund argued that marking an account has nothing to do with who holds title to the account. Instead, marking simply designates which SPV will receive a portion of collected funds from the account as a return on the funds the SPV invested to purchase the portfolio containing the account.

{¶17} On December 6, 2016, the trial court entered judgment partially granting Ms. Piaser's motion for class certification. However, the court found Ms. Piaser's definition of the class to be overbroad and modified it to read as follows (with the court's additional language in bold): "At the time of filing of the lawsuit, an entity other than [Unifund] held the right, in whole or part, to receive the money that was sought to be collected through the lawsuit, **and [Unifund] did not meet the FDCPA requirements to lawfully file suit to collect the debt in its own name."** (Emphasis in original.)

{¶18} The court also granted in part Ms. Piaser's motion for sanctions. Unifund argued that, because it did not consider Portfolio E as the owner of Ms. Piaser's account, in its view, it was not required to produce the documents listed in the court's discovery order. The court rejected Unifund's interpretation of the court's order, and found that the issue of Portfolio E's ownership interest in Ms. Piaser's account was the "crux" of this case and again ordered Unifund to turn over the requested documents within 45 days. These included (1) the servicing agreement Unifund entered into with Portfolio E, (2) the *accounting documents demonstrating Portfolio E's interest in Ms.*

Piaser's account, and the (3) *transfer documents showing the rights of the parties during the initial investment and during the "marking" process*. After both parties appealed in part the court's class-certification judgment, the trial court entered a stay of proceedings pending further order and the record does not show whether Unifund has complied with the court's discovery order.

{¶19} Unifund appeals the trial court's judgment, asserting the following for its sole assignment of error:

{¶20} "The trial court abused its discretion by granting Ms. Piaser's motion to certify an incompetence class."

{¶21} As a preliminary matter, the trial court's judgment was a final order because it was an order that determined whether the action may be maintained as a class action. R.C. 2505.02(B)(5).

{¶22} On appeal, the parties essentially repeat the arguments they made below. Ms. Piaser argues that, as a result of Unifund's practice of marking, the SPVs that invested in the purchase of the defaulted accounts have a right to the collection proceeds, with Unifund receiving a collection service fee. She argues the relationship between Unifund and the SPVs makes the SPVs the owners of the accounts and Unifund a debt collector subject to the FDCPA. She argues Unifund's practice of filing suit in its own name without obtaining an assignment from the SPVs in compliance with R.C. 1319.12 when one or more of the SPVs own the accounts violates the FDCPA by using false or misleading representations in the complaint.

{¶23} In opposition, Unifund argues that it is the owner of the account and, thus, was not required to have an assignment in order to sue on the account. Unifund argues

that, although Ms. Piaser's account was marked to Portfolio E, that did not make this SPV the owner of the account because, in Unifund's view, marking is not the same as transferring title to the account. Unifund argues that marking the account simply designates which SPV will receive the revenue from the account as a return on the funds the SPV invested to purchase the account.

{¶24} The Supreme Court of Ohio has held that "[a] trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion." *Marks v. C.P. Chem. Co., Inc*., 31 Ohio St.3d 200 (1987), syllabus. Thus, appellate courts generally give trial courts broad discretion in deciding whether to certify a class. *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 70 (1998). The Ohio Supreme Court has stated that "the appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded * * * in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Id*., citing *Marks, supra*, at 201.

{¶25} However, "the trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied." *Hamilton, supra*. Where the trial court's written decision granting class certification provides an articulated rationale sufficient to support an appellate inquiry into whether the relevant factors were properly applied and given

appropriate weight, the trial court does not abuse its discretion in conducting its rigorous analysis. *Baughman v. State Farm Mut. Auto. Ins. Co*., 88 Ohio St.3d 480, 483 (2000).

{¶26} In reviewing a motion for class certification, the court must take the substantive allegations of the claim as stated in the complaint (or counterclaim) as true and not reach the merits of those allegations and claims. *Ojalvo v. Bd. of Trustees of Ohio State Univ*., 12 Ohio St.3d 230, 233 (1984). "Class action certification does not go to the merits of the action." *Id*. However, the trial court may probe the merits for the limited purpose of determining that the plaintiff has satisfied Civ.R. 23. *Felix v. Ganley Chevrolet, Inc*., 145 Ohio St.3d 329, 2015-Ohio-3430, ¶26. "[A]ny doubts about adequate representation, potential conflicts, or class affiliation should be resolved in favor of upholding the class, subject to the trial court's authority to amend or adjust its certification order as developing circumstances demand, including the augmentation or substitution of representative parties." *Baughman, supra*, at 487.

{¶27} "The following seven requirements must be satisfied before an action may be maintained as a class action under Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met. *Jacobs v. FirstMerit Corp*., 11th Dist. Lake No. 2013-L-012, 2013-Ohio-4308, ¶24, citing Civ.R. 23(A) and (B); *Warner v. Waste Mgt., Inc*., 36 Ohio St.3d 91 (1988).

{¶28} The Ohio Supreme Court, in *Taylor v. First Resolution Invest. Corp*., 148 Ohio St.3d 627, 2016-Ohio-3444, ¶7, stated:

> **{¶29}** "Congress passed the FDCPA to address 'what it considered to be a widespread problem' of consumer abuse at the hands of debt collectors." *Wise v. Zwicker & Assocs., P.C*., 780 F.3d 710, 712-713 (6th Cir.2015), quoting *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir.1992). The intent of the FDCPA is to "eliminate abusive debt collection practices" that have contributed to personal bankruptcies, job loss, and invasions of individual privacy. 15 U.S.C. 1692(a) and (e); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A*., 559 U.S. 573, 577 (2010). "In reaction to the size of the problem, [Congress] crafted 'an extraordinarily broad' remedial statute." *Wise* at 713, quoting *Frey* at 1521. *The FDCPA prohibits debt collectors from employing "any false, deceptive, or misleading representation * * * in connection with the collection of any debt*[.]*"* 15 U.S.C. 1692e(2)(A). (Emphasis added.)

{¶30} Ms. Piaser alleges Unifund is a "debt collector" whose litigation activity is subject to the FDCPA. Her counterclaim alleged Unifund violated Sec. 1692e of the FDCPA (which prohibits a debt collector from using any false or misleading representation in the collection of a debt) by alleging in its complaint it was the owner of the account without obtaining an assignment from Portfolio E that complied with R.C. 1319.12. That section provides, in pertinent part:

> **{¶31}** (A)(1) "[C]ollection agency" means any person who, for compensation, * * * offers services to collect an alleged debt asserted to be owed to another.
>
> **{¶32}** (B) A collection agency * * * may take assignment of another person's accounts * * * in its own name for the purpose of * * * collecting * * * or filing suit in its own name as the real party in interest.
>
> **{¶33}** (C) No collection agency shall commence litigation for the collection of an assigned account unless it has taken the assignment in accordance with all of the following [pertinent] requirements:

{¶34} (1) The assignment was * * * properly executed * * *and acknowledged by the person transferring title to the collection agency.

{¶35} * * *

{¶36} (3) The assignment was manifested by a written agreement * * *. The written agreement shall state the effective date of the assignment and the consideration paid or given, if any, for the assignment * * *.

{¶37} In support of her FDCPA claim, Ms. Piaser cites *Wallace v. Washington Mut. Bank*, 683 F.3d 323, 327 (6th Cir.2012). In that case, the mortgage debtor brought an action alleging that the bank's law firm violated the FDCPA and state law by filing a foreclosure action on behalf of the bank because the bank did not own her mortgage or promissory note. The district court dismissed the complaint, but, on appeal, the Sixth District reversed. The court held the mortgage debtor's allegation that the law firm filed the foreclosure action claiming ownership of the mortgage by the bank before it received the transfer-of-ownership documents was sufficient to state a claim for material misrepresentation under the FDCPA (15 U.S.C. 1692e), even if state law permitted the client to anticipate that it would become the title-holder after the foreclosure action was initiated, but before it became final. The Sixth Circuit stated:

{¶38} District courts have decided, and we agree, that a clearly false representation of the creditor's name may constitute a "false representation * * * to collect or attempt to collect any debt" under Section 1692e. *Hepsen v. J.C. Christensen and Assocs., Inc*., No. 8:07-CV-1935-T-EAJ, 2009 WL 3064865, *5 (M.D.Fla. Sept. 22, 2009) (imposing liability based on a statement incorrectly identifying the name of a creditor comports with the purposes of the Act) * * *. *Wallace, supra*

{¶39} Further, this court has stated: "A collection agency may file suit in its own name only when it has become the legal and equitable owner of the debt through an

assignment that satisfies all of the requirements set forth in R.C. 1319.22" *Capital One Bank (USA), NA v. Reese*, 11th Dist. Portage No. 2014-P-0034, 2015-Ohio-4023, ¶89.

{¶40} IDENTIFIABLE CLASS AND UNAMBIGUOUS CLASS DEFINITION

{¶41} "'The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'" *Hamilton, supra*, at 71-72, quoting 7A Wright, Miller & Kane, Federal Practice and Procedure 120-121, Section 1760 (2d Ed.1986). Thus, the class definition must be precise enough "'to permit identification within a reasonable effort.'" *Hamilton, supra*, quoting *Warner, supra*, at 96. "An identifiable class must exist before certification is permissible. The definition of the class must be unambiguous." *Warner*, paragraph two of the syllabus. Where a class is overbroad and could include a substantial number of people who have no claim under the theory advanced by the named plaintiff, the class is not sufficiently definite. *Miller v. Painters Supply & Equip. Co*., 8th Dist. Cuyahoga No. 95614, 2011-Ohio-3976, ¶24.

{¶42} In its judgment, the trial court found that Ms. Piaser's class definition was overbroad because it would include consumers who have no claim since, under the FDCPA, there is no blanket prohibition against a plaintiff in a collection lawsuit filing suit in its own name to collect a debt owed to another entity. The court found the proposed class definition would include individuals who were not harmed by any unlawful conduct. In an attempt to limit the class members to those for whom Unifund lacked standing to sue, the court modified the class definition. That definition, with the court's modification in bold, states:

> **{¶43}** At the time of filing of the lawsuit, an entity other than [Unifund] held the right, in whole or part, to receive the money that was

> sought to be collected through the lawsuit, **and [Unifund] did not meet the FDCPA requirements to lawfully file suit to collect the debt in its own name.** (Emphasis sic.)

{¶44} Unifund argues the trial court abused its discretion in certifying the class because the class definition, as modified by the trial court, is an impermissible "fail safe" class. In support, *Unifund relies on Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 236, 2013-Ohio-3019, ¶8, n.2, in which the Ohio Supreme Court (quoting *Melton ex rel. Dutton v. Carolina Power & Light Co*., 283 F.R.D. 280, 288 (D.S.C.2012), stated:

> **{¶45}** "A fail safe class definition is one in which the putative class is defined by reference to the merits of the claim. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 826 (7th Cir.2012) * * *. It requires a court to rule on the merits of the claim at the class certification stage in order to tell who was included in the class. *Id*. "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 826.

{¶46} Unifund argues the class definition here defines a fail safe class because it includes the criterion that Unifund *did not meet the FDCPA requirements to lawfully file suit* in its own name. Unifund argues the class is improperly defined by reference to the merits of the claim because, for each class member, the court would have to find whether Unifund met the FDCPA requirements to tell who was included in the class.

{¶47} Other examples of fail safe class definitions include language such as activities "which violate the FDCPA," and the collection complaints "falsely stated that the plaintiff had taken assignment of the claims." *Cox v. Sherman Capital, LLC*, No. 1:12-cv-01654, 2016 WL 274877, *4 (S.D.Ind.2016); *Eager v. Credit Bureau Collection Servs., Inc*., Nos. 1:13-CV-30, etc., 2014 WL 3534949, *2 (W.D.Mich.2014).

{¶48} We agree that the class definition, as amended by the trial court, defines a fail safe class because it requires a court to rule on the merits of the claim at the class certification stage in order to tell who is included in the class. Thus, the language in the modified class definition should be deleted.

{¶49} *However, the main issues in this case are common to the members of the class.* Marking occurs for every class member's account that was purchased by Unifund and the rights and obligations, if any, transferred during marking are the same for all class member accounts. Further, Unifund concedes that the marking process gives each SPV the right to at least part of the collection proceeds derived from each class member's account. For this reason, the determination of this issue can potentially be made on a class-wide basis without the need for individualized inquiries if the class definition can be crafted without use of fail safe language.

{¶50} This court stated that "'*Warner*[*, supra*, at] 98, not only permits but encourages the trial court to modify what is otherwise an unidentifiable class.'" *Jacobs, supra*, at ¶29, quoting *Ritt v. Billy Blanks Enters*., 8th Dist. Cuyahoga No. 80983, 2003-Ohio-3645, ¶20. Specifically, courts have discretion to redefine a class to avoid the fail safe problem by, for example, making the class definition neutral by describing the defendant's conduct without interjecting an assumption of liability. *Spread Enters., Inc. v. First Data Merchant Servs. Corp*., 298 F.R.D. 54, 69-70 (E.D.N.Y.2014) (court replaced offending language that defendant charged an "excessive fee" in violation of the subject contract with neutral language that he charged a particular fee).

{¶51} The Ohio Supreme Court has stated that if the *appellate court* finds an abuse of discretion by the trial court in its definition of the class, the appellate court

should not proceed to formulate the class itself. Rather, the court should remand the matter to the trial court. *Stammco, supra*, at ¶12. This is because "the trial judge who conducts the class action and manages the case must be allowed to craft the definition with the parties." *Id*. Thus, rather than attempt to redefine (or narrow) the class ourselves, we remand the case to the trial court to do so.

{¶52} On remand, the court should remove the fail safe language and, if possible, modify or narrow the remaining provisions of the definition in such a way that the putative class is not defined by reference to the merits of the claim. In this endeavor, the court should consider referencing Unifund's practice of marking, but removing the language that presupposes Unifund is liable for an FDCPA violation.

{¶53} WHETHER LISA PIASER IS A MEMBER OF THE CLASS

{¶54} Unifund argues that Ms. Piaser is not a member of the class because, unlike the case with other class members, Unifund has title to her account and was thus entitled to sue her without an assignment. However, contrary to Unifund's argument, the fact that it has a bill of sale for Ms. Piaser's account does not address the central issue here, which is the legal effect of Unifund's marking the account to Portfolio E *after* Unifund bought it from Providian. Unifund faults the trial court for not making a "rigorous analysis" concerning whether Portfolio E or Unifund owns Ms. Piaser's account. However, *Unifund cannot fairly make this argument because it failed to comply with the trial court's discovery order to produce documents pertinent to this issue*. While Unifund's principals provided testimony supporting Ms. Piaser's position, without Unifund's compliance with the court-ordered document production, the trial court was

unable to determine at the certification stage whether the marking process resulted in the transfer of ownership to Portfolio E.

{¶55} Unifund acknowledges the trial court found in its judgment that Ms. Piaser is a member of the class because her account was marked to an SPV like those of other class members and that whether that proves to be a FDCPA violation is an unresolved question for the trier of fact that survived summary judgment. However, Unifund argues Ms. Piaser was required to prove Unifund does not own the account in order to be a member of the class. Again, Unifund's argument is disingenuous because it hindered Ms. Piaser in making such showing by failing to comply with the court's order that it produce its documents that bear on this issue. After Unifund complies with the court's discovery order, the issue will be decided at trial.

{¶56} NUMEROSITY

{¶57} Unifund does not dispute the court's finding that the class identified by Ms. Piaser is so numerous that joinder of all members is impracticable. The court noted that Ms. Piaser presented evidence that more than 3,000 accounts would fall into the class.

{¶58} COMMONALITY AND TYPICALITY

{¶59} Unifund argues that Ms. Piaser's claims are not common to or typical of the class. Commonality requires "a common nucleus of operative facts." *Warner, supra,* at 97. "The requirement for typicality is met where there is no express conflict between the class representatives and the class." *Hamilton, supra*, at 77. The trial court identified the following common questions: (1) "the extent that marking the accounts and investment by the SPVs transfers ownership of the accounts to the SPVs," (2)

"whether the SPVs must be named as parties to the action," and (3) "whether [Unifund] is the real party in interest."

{¶60} As the trial court noted, Ms. Piaser asserts that she was sued by Unifund on a debt that was marked to at least one SPV, Portfolio E. As such, the court found that her claim appears to be the same as the claims held by other members of the class. The court also noted that the defenses raised by Unifund would be the same as it would raise against the claims held by the other class members. Ms. Piaser thus satisfied the commonality and typicality requirements.

{¶61} ADEQUACY OF REPRESENTATION

{¶62} A representative party is adequate if his or her interest is not antagonistic to that of other class members *Warner, supra*, at 98. No evidence in the record indicates any conflict between Ms. Piaser and the class.

{¶63} THE CIV.R. 23(B) FACTORS

{¶64} Having found all Civ.R. 23(A) factors were met, the trial court was also required to determine that at least one of the three Civ.R. 23(B) factors was met. The court found that two apply. Under Civ.R. 23(B)(2), the court must find that the class is seeking to prevent future injury or damages by enjoining the class action defendant from engaging further in the practices alleged in the suit as violating the law. Civ.R. 23(B)(2) applies to suits seeking injunctive relief. *Warner, supra*, at 95. The trial court found that in her counterclaim, Ms. Piaser "is seeking, in addition to money damages, that [Unifund] be ordered to develop and implement procedures in order to ensure they meet the requirement of standing to sue." Unifund argues that injunctive relief is not available because the class remedy would be primarily monetary rather than injunctive.

However, the Ohio Supreme Court has stated that disputes over whether the action is primarily for injunctive relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. *Hamilton, supra*, at 87. Thus, such disputes should be avoided, and if injunctive relief has been requested, the action should be allowed to proceed under Civ.R. 23(B)(2). *Hamilton* at 87. Since Ms. Piaser seeks injunctive relief in addition to a monetary award, the Civ.R. 23(B)(2) factor was satisfied. Several federal courts have allowed injunctive relief in private class actions alleging FDCPA violations. *See,* e.*g., Schwarm v. Craighead*, 233 F.R.D. 655, 663 (E.D.Cal.Mar. 7, 2006).

{¶65} Civ.R. 23(B)(3) applies where the plaintiff seeks damages and the trial court makes two findings: (1) that the questions of law or fact common to members of the class predominate over questions affecting only individual members and (2) that a class action is superior to other available methods for efficiently adjudicating the controversy.

{¶66} "For common questions of law or fact to predominate, * * * the common questions must represent a significant aspect of the case and they must be capable of resolution for all members in a single adjudication." *Jacobs, supra*, at ¶41. The trial court noted that Ms. Piaser has asserted Unifund uses standardized procedures to "mark" accounts to SPVs and then files lawsuits to collect on the accounts, which forms the basis of her allegations of FDCPA violations. The court found the proposed class apparently relies on these procedures and their alleged unlawfulness as a basis for their claims.

{¶67} The court also found that class certification, as opposed to individual litigation, is appropriate here since there is a small amount of damages at issue for all class members and they are unsophisticated consumers who would most likely be unaware of the legal issues raised by the class action.

{¶68} We thus hold the trial court did not abuse its discretion in finding that Ms. Piaser met the criteria under Civ.R. 23 and in granting her motion for class certification.

{¶69} For the reasons stated in this opinion, the assignment of error is overruled. It is the order and judgment of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed in part, reversed in part, and remanded.

TIMOTHY P. CANNON, J.,

COLLEEN MARY O'TOOLE, J.,

concur.

[Cite as *Hamlin v. Bosse*, 2018-Ohio-2657.]

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

SAUNDRA L. HAMLIN	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2017-CA-26
	:	
v.	:	T.C. NO. 2017-CV-31
	:	
JOHN R. BOSSE	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 6th day of July, 2018.

. . . . . .

H. STEVEN HOBBS, Atty. Reg. No. 0018453, The Hobbs Law Office, 119 Commerce Street, P.O. Box 489, Lewisburg, Ohio 45338
Attorney for Plaintiff-Appellee

JOSEPH MOORE, Atty. Reg. No. 0014362, and BRIAN HUELSMAN, Atty. Reg. No. 55444, Moore & Associates, 262 James E. Bohanan Memorial Drive, Vandalia, Ohio 45377
Attorney for Defendant-Appellant

. . . . . .

DONOVAN, J.

{¶ 1} Defendant-appellant John R. Bosse appeals a decision of the Miami County Court of Common Pleas, Civil Division, denying his motion for sanctions, attorney's fees, and costs that he filed against plaintiff-appellee Saundra L. Hamlin and her attorney, H. Steven Hobbs, for frivolous conduct pursuant to R.C. 2323.51(A)(2)(a)(ii) and Civ.R. 11. Bosse filed a timely notice of appeal with this Court on November 9, 2017.

{¶ 2} In the instant case, the record establishes that Hamlin and her ex-husband, David, obtained a divorce on August 2, 1990, in Darke County Common Pleas Court Case No. 88-DIV-50267. Pursuant to one of the orders issued by the trial court, Hamlin was to receive one-half of her ex-husband's retirement benefits administered by the General Motors Corporation. In May of 2003, David retired from Delphi Corporation, a subsidiary of General Motors.

{¶ 3} Thereafter, on October 30, 2008, a magistrate from the Darke County Common Pleas Court issued an order designating Bosse as the trial court's expert witness with respect to the distribution of David's retirement benefits to the parties. Specifically, Bosse, as the trial court's expert, was ordered by the magistrate to prepare four Qualified Domestic Relations Orders ("QDRO") in order to equitably divide David's retirement benefits from Delphi Corporation. Pursuant to the magistrate's order, in June of 2009, Bosse presented the parties with four QDROs.

{¶ 4} In February 2010, Hamlin, through counsel, sent Bosse a letter informing him that certain necessary language was missing from the QDROs and that the amount of money distributed to her from David's retirement benefits was incorrect. According to Hamlin, Bosse did nothing to correct the QDROs, and on June 18, 2012, the four QDROs

were filed in the Darke County Court of Common Pleas. Due to drafting errors in the documents, Bosse subsequently prepared and filed an Amended QDRO on August 17, 2012.

{¶ 5} On January 22, 2016, the Darke County Court of Common Pleas issued a decision based upon the recommendations of Bosse. Thereafter on January 20, 2017, Hamlin filed a complaint in the Miami County Court of Common Pleas against Bosse for malpractice, breach of contract, and unjust enrichment. In her complaint, Hamlin alleged that the Darke County court's reliance on Bosse's recommendations and advice resulted in her not receiving the proper allocation of her ex-husband's retirement benefits. Specifically, Hamlin alleged that she was damaged in the amount of $11,260.20 because of the errors made by Bosse when he drafted the QDROs.

{¶ 6} On February 10, 2017, Bosse filed a motion to dismiss Hamlin's complaint pursuant to Civ.R. 12(B)(6). On March 6, 2017, Hamlin filed a memorandum in opposition to Bosse's motion to dismiss. On the same day, Hamlin also filed a notice of dismissal of her complaint without prejudice pursuant to Civ.R. 41(A)(1)(a).

{¶ 7} On April 18, 2017, Bosse filed a motion for sanctions, attorney fees, and costs against Hamlin in which he alleged that she acted frivolously when she filed the complaint against him. A brief hearing was held before the trial court on August 10, 2017, regarding stipulations agreed to by the parties and the admission of several exhibits.[1] Bosse filed a memorandum in support of his motion for sanctions on August 30, 2017.

[1] One of the primary exhibits filed with the trial court was Plaintiff's Exhibit 1, a typed transcript of a hearing held before a Darke County magistrate in Case No. 88-DIV-50267 on January 13, 2015. The hearing was being held in order to analyze the current status of David Hamlin's retirement pensions and the distribution of the accounts to the parties.

On August 31, 2017, Hamlin filed a memorandum in opposition to Bosse's motion for sanctions. On October 18, 2017, the trial court issued a decision denying Bosse's motion for sanctions, attorney fees, and costs.

{¶ 8} It is from this judgment that Bosse now appeals.

{¶ 9} Because they are interrelated, Bosse's first and second assignments of error will be discussed together as follows:

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING SANCTIONS AGAINST APPELLEE, SAUNDRA L. HAMLIN FOR BEING FRIVOLOUS BECAUSE THE COMPLAINT WAS FILED BEYOND THE STATUTE OF LIMITATIONS AND THEREFORE NOT WARRANTED UNDER THE LAW.
>
> THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING SANCTIONS AGAINST APPELLEE, SAUNDRA L. HAMLIN FOR BEING FRIVOLOUS BECAUSE APPELLANT, JOHN R. BOSSE HAD IMMUNITY AS THE TRIAL COURT'S EXPERT AND THE COMPLAINT FILED IS NOT SUPPORTED BY EXISTING LAW AND CANNOT BE SUPPORTED BY A GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW.

{¶ 10} In his first assignment, Bosse contends that the trial court erred when it denied his motion for sanctions because Hamlin's complaint was filed outside the statute of limitations for civil actions brought against accountants. In Bosse's second assignment, he argues that as a court-appointed expert, he is entitled to immunity from any liability with respect to the work he performed relating to the Hamlins' divorce and the

subsequent distribution of David's retirement benefits.

{¶ 11} "On appeal, [this court] will not reverse a lower court's decision on whether to award sanctions under R.C. 2323.51 absent a showing of an abuse of discretion." *State ex rel. Bell v. Madison Cty. Bd. of Commrs*., 139 Ohio St.3d 106, 2014-Ohio-1564, 9 N.E.3d 1016, ¶ 10, citing *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶ 11. To prove such an abuse, the appellant must establish that the court of appeals' award or denial of sanctions was unreasonable, arbitrary, or unconscionable. *Id*.

{¶ 12} R.C. 2323.51 allows a court to award "court costs, reasonable attorney's fees, and other reasonable expenses" to any party "who was adversely affected by frivolous conduct." R.C. 2323.51(B)(1). Before making an award, the court must hold a hearing "to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award." R.C. 2323.51(B)(2)(a).

{¶ 13} R.C. 2323.51(A)(2)(a) defines "frivolous conduct" as conduct that does the following:

> (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new

law.

(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶ 14} Frivolous conduct, as contemplated by R.C. 2323.51(A)(2)(a), is judged under an objective, rather than a subjective standard, and must involve egregious conduct. *Striker* at ¶ 21. Frivolous conduct is not proved merely by winning a legal battle or by proving that a party's factual assertions were incorrect. *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, ¶ 15; *see also Ohio Power Co. v. Ogle*, 4th Dist. Hocking No. 12CA14, 2013-Ohio-1745, ¶ 29–30, quoting *Hickman v. Murray*, 2d Dist. Montgomery No. CA15030, 1996 WL 125916, *5 (Mar. 22, 1996). (“ ‘A party is not frivolous merely because a claim is not well-grounded in fact. * * * [R.C. 2323.51] was designed to chill egregious, overzealous, unjustifiable, and frivolous action. * * * [A] claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim’ ”).

{¶ 15} In the instant case, Bosse argues that Hamlin’s filing of the malpractice complaint violated R.C. 2323.51(A)(2)(a)(ii), insofar as he contends that the complaint was not warranted by existing law or extension, modification, or reversal of existing law, or the establishment of new law.

Statute of Limitations

{¶ 16} In *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 546 N.E.2d 206 (1989), the court held that claims of negligence against an accountant were governed by the four-year statute of limitations found in R.C. 2305.09(D). *Id*. at 181. It noted that R.C. 2305.09 expressly included its own discovery rule, which did not apply to general negligence claims. *Id*. Therefore, the court held that the discovery rule "is not available to claims of professional negligence brought against accountants." *Id*. at ¶ 2 of the syllabus. As a result, it held that the statute of limitations began to run immediately when the acts of accounting negligence occurred. *Auckerman v. Rogers*, 2d Dist. Greene No. 2011-CA-23, 2012-Ohio-23, ¶ 13. The Supreme Court later reaffirmed that holding in *Grant Thornton, Inc. v. Windsor House*, 57 Ohio St.3d 158, 160–161, 566 N.E.2d 1220 (1991).

{¶ 17} Thereafter, in *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co*., 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, the Supreme Court held that a cause of action for professional negligence against an appraiser "accrues on the date that the negligent act is committed, and the four-year statute of limitations commences on that date." *Id*. at syllabus. The *Flagstar* court briefly discussed the delayed-damages rule and expressly refused to apply the rule in that case. It stated:

> Both the discovery rule and the delayed-damages rule relate to when a cause of action for negligence accrues. Nevertheless, with regard to claims for professional negligence under R.C. 2305.09, this court has clearly stated that the cause of action accrues when the allegedly negligent act is committed. * * * In *Investors REIT One*, we explicitly rejected the

> application of the discovery rule for these causes of actions. * * * We implicitly rejected the delayed-damages rule in *Grant Thornton*.

Flagstar at ¶ 25, citing *REIT One*, 46 Ohio St.3d at 182, 546 N.E.2d 206, and *Grant Thornton*, 57 Ohio St.3d 158, 566 N.E.2d 1220.

{¶ 18} In light of the foregoing precedent from the Ohio Supreme Court, Bosse argues that the statute of limitations for filing a complaint against an accountant for professional negligence is four years from the time the services were performed. Bosse asserts that the last time he provided any services to the Hamlins was in January 2012. Since Hamlin did not file her malpractice complaint until January of 2017, Bosse argues that she is clearly outside the statute of limitations for her claims. Bosse therefore contends that her malpractice complaint amounts to frivolous conduct requiring that she be sanctioned.

{¶ 19} Conversely, Hamlin argues that the delayed-damages rule applies in this case, and her cause of action for malpractice against Bosse did not accrue until January 22, 2016, when the Darke County Court of Common Pleas issued a decision based upon the allegedly erroneous recommendations of Bosse. Accordingly, Hamlin contends that her malpractice action was not filed outside of the statute of limitations for professional negligence claims, and therefore does not amount to frivolous conduct.

{¶ 20} As noted by the trial court, *LGR Realty, Inc. v. Frank & London Ins. Agency*, 2016-Ohio-5044, 58 N.E.3d 1179 (10th Dist.), was pending before the Ohio Supreme Court at the time that the trial court denied Bosse's motion for sanctions. In *LGR Realty,* the Tenth District Court of Appeals held that in a case of alleged insurance malpractice, unlike the discovery rule, the delayed-damages rule does not just toll the running of the

statute of limitations, it adjusts when the cause of action accrues. *Id*. at ¶ 14. "In other words, a cause of action for negligence is not complete, and the statute of limitations does not begin to run, until there has been an injury." *Flagstar* at ¶ 19. Thus, the negligent act did not accrue on the date that the insurance policy was originally issued by the company agent. Rather, the court applied the delayed-damages rule and held that the negligent act accrued years later when the insurance company refused to defend a claim when the insured individual was injured. *Id*. at ¶ 41.

{¶ 21} The Ohio Supreme Court ultimately reversed the judgment of the Tenth District Court of Appeals, holding that the delayed-damage rule did not apply in a case involving the four-year statute of limitations set forth in R.C. 2305.09 for negligent procurement of a professional-liability insurance policy and negligent representation. *LGR Realty, Inc. v. Frank & London Ins. Agency*, 152 Ohio St.3d 517, 2018-Ohio-334, 98 N.E.3d 241, at ¶ 31. Nevertheless, at the time that Hamlin filed her malpractice action against Bosse, *LGR Realty* had not yet been decided by the Ohio Supreme Court, and there was still an apparent conflict between the Ohio appellate districts regarding the application of the delayed-damages rule to the four-year statute of limitations in professional malpractice cases. Thus, we cannot say that the trial court erred when it denied Bosse's motion for sanctions for Hamlin's allegedly frivolous conduct.

Immunity

{¶ 22} In his second assignment, Bosse argues that, as the trial court's appointed expert regarding the Hamlins' QDROs, he has immunity from any malpractice claims based on his performance therein. In support of his argument, Bosse cites two Ohio cases in which psychologists who testified as experts in divorce cases were granted

immunity from suit. *See McCleery v. Leach*, 11th Dist. Lake No. 2001-L-195, 2003-Ohio-1875; *Crosset v. Marquette*, 1st Dist. Hamilton Nos. C-060148, C-060180, 2007-Ohio-550. Specifically, both cases stand for the proposition that the appointed psychologists were "acting as an arm of the court and only carrying out a duty imposed upon [them] by the court order, regardless of whether the duty was to produce an evaluation or to testify. In other words, [the psychologists] 'performed a function integral to the judicial process. As arms of the court, [they were] entitled to the absolute immunity given to judges and other judicial officials.' " *Crosset* at ¶ 20, quoting *McCleery* at ¶ 44.

{¶ 23} In his appellate brief, Bosse concedes there is no case law in Ohio stating that court-appointed accountants are entitled to absolute immunity for their evaluations and/or testimony in domestic relations cases. As noted by the trial court, the issue of whether an accountant should be provided immunity when acting as a court-appointed expert was not the issue before the trial court, and it is *not* the issue before us. The relevant issue before the trial court and before us is whether an argument that a court-appointed accountant is not necessarily immune from a malpractice suit constitutes frivolous conduct. Clearly, the issue of whether Bosse is entitled to absolute immunity as a court-appointed accountant is not settled in Ohio. Therefore, we cannot say that the trial court abused its discretion when it rejected Bosse's argument in this regard. Accordingly, the trial court did not err when it denied Bosse's motion for sanctions, attorney fees, and costs.

{¶ 24} Bosse's first and second assignments of error are overruled. The judgment of the trial court is affirmed.

. . . . . .

HALL, J. and TUCKER, J., concur.

Copies mailed to:

H. Steven Hobbs
Joseph Moore
Brian Huelsman
Hon. James F. Stevenson –
for Hon. Jeannine M. Pratt

[Cite as *Spalsbury v. Gill Construction Co., Inc.*, 2018-Ohio-2616.]

STATE OF OHIO))ss: COUNTY OF MEDINA)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
KELLY SPALSBURY, et al. Appellants v. GILL CONSTRUCTION CO., INC., et al. Appellees	C.A. No. 17CA0030-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 16CIV0509

DECISION AND JOURNAL ENTRY

Dated: July 2, 2018

HENSAL, Presiding Judge.

{¶1} Kelly and Susan Spalsbury appeal a judgment of the Medina County Court of Common Pleas that granted summary judgment to Gill Construction Co., Inc., Gill Design Group, Inc., and David Gill on their breach of contract and unjust enrichment claims. For the following reasons, this Court affirms.

I.

{¶2} According to the Spalsburys, they worked as sales agents for Gill Construction Co., Inc. and Gill Design Group on various residential construction projects in 2008 and 2009. They allege that they are still owed commissions for their work on several of those projects. In May 2016, they sued the two Gill companies and David Gill (collectively "Gill"), alleging breach of contract and unjust enrichment. Following discovery, Gill moved for summary judgment, arguing that the claims were time-barred. The Spalsburys opposed the motion and moved to strike the exhibits attached to Mr. Gill's affidavit, arguing that the exhibits did not

meet the requirements of Civil Rule 56(E). The trial court denied the motion to strike and granted Gill's motion for summary judgment, concluding that the Spalsburys' claims were barred under the applicable statutes of limitations. The Spalsburys have appealed, assigning three errors. For ease of consideration, we will address their first two assignments of error together.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED BY DENYING PLAINTIFFS' MOTION TO STRIKE THE AFFIDAVIT OF DAVID GILL AND THE MATERIALS SUBMITTED WITH THE AFFIDAVIT AS THE ATTACHMENTS DID NOT COMPLY WITH THE MANDATORY REQUIREMENTS FOR SUMMARY JUDGMENT AS SET FORTH IN OHIO CIVIL RULE 56(E).

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED BY IMPROPERLY SHIFTING THE BURDEN OF PROOF TO PLAINTIFFS EVEN THOUGH DEFENDANTS DID NOT FIRST MEET THEIR BURDEN OF PROOF UNDER OHIO CIVIL RULE 56.

{¶3} The Spalsburys argue that the trial court incorrectly denied their motion to strike and incorrectly granted Gill's motion for summary judgment. Under Civil Rule 56(C), summary judgment is appropriate if:

> (1) [n]o genuine issue as to any material fact remains to be litigated; (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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a motion for summary judgment, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party

"must set forth specific facts showing that there is a genuine issue for trial." *Id*. at 293, quoting Civ.R. 56(E). This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶4} The Spalsburys argue that Gill did not meet their initial burden under Rule 56(C) because the exhibits attached to Mr. Gill's affidavit did not comply with Rule 56(E). In their motion for summary judgment, Gill argued that all of the Spalsburys' claims were barred by the six-year statute of limitations that applies to oral contracts under Revised Code Section 2305.07. In support of their argument, Gill submitted the affidavit of Mr. Gill, who asserted that the Spalsburys worked for his companies under a verbal agreement. He asserted that Gill never had any written contracts with the Spalsburys and that all of the transactions for which the Spalsburys were seeking payment had concluded by the end of the first quarter of 2009. He further asserted that Gill had finished paying the Spalsburys all of the commissions they were owed by the end of February 2010. Attached to Mr. Gill's affidavit were copies of the deeds of the properties that the Spalsburys had helped sell for Gill, a copy of part of a home construction contract that the Spalsburys had helped procure for Gill, and a copy of a letter that Mr. Gill had written, allegedly listing all of Gill's commission payments to the Spalsburys.

{¶5} It is not necessary to determine whether the attachments to Mr. Gill's affidavit were proper under Rule 56(E) because Mr. Gill's affidavit was sufficient to satisfy his summary judgment burden without them. The averments in Mr. Gill's affidavit, which he asserted were based on firsthand knowledge, demonstrated that the Spalsburys' claims accrued, at the latest, in February 2010 when Gill allegedly finished paying them for their work. Mr. Gill's averments also demonstrated that the Spalsburys' breach of contract claims were based on oral contracts, which are subject to a six-year limitations period under Section 2305.07. In light of the fact that

the Spalsburys did not file their complaint until May 2016, which was more than six years after February 2010, Mr. Gill's affidavit, even without considering any of its attachments, established that Gill was entitled to judgment on the Spalsburys' breach of contract claims as a matter of law, shifting the summary judgment burden to the Spalsburys.

{¶6} The Spalsburys attached affidavits with exhibits to their memorandum in opposition to the motion for summary judgment, but the trial court determined that they failed to create a genuine issue of material fact regarding whether the breach of contract claims were based on a written contract. The Spalsburys have not contested the trial court's conclusion. Accordingly, upon review of the record, we conclude that the trial court correctly determined that Gill satisfied their initial summary judgment burden under Rule 56(C) and that it correctly granted summary judgment to Gill on the Spalsburys' breach of contract claims. We also conclude that any error by the trial court in considering the documents attached to Mr. Gill's affidavit or in denying the Spalsburys' motion to strike was, at worst, harmless. Civ.R. 61. The Spalsburys' first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS AS TO COUNT FOUR OF THE COMPLAINT FOR UNJUST ENRICHMENT WHEN DEFENDANTS DEFENDANTS' (SIC) MOTION FOR SUMMARY JUDGMENT DID NOT SPECIFICALLY ADDRESS THE UNJUST ENRICHMENT COUNT OF THE COMPLAINT AND THE TRIAL COURT DID NOT SPECIFICALLY ADDRESS ANY ISSUE AS TO UNJUST ENRICHMENT IN THE MAY 3, 2017 JUDGMENT ENTRY.

{¶7} The Spalsburys also argue that the trial court incorrectly granted summary judgment to Gill on their unjust-enrichment claim. The Spalsburys argue that Gill did not specifically address the elements of an unjust enrichment claim in their motion for summary judgment, meaning there was nothing to establish when the cause of action accrued. They also

argue that the trial court should have specifically addressed the claim in its judgment entry before granting Gill summary judgment on it.

{¶8} "[U]njust enrichment of a person occurs when [it] has and retains money or benefits which in justice and equity belong to another." *Hummel v. Hummel*, 133 Ohio St. 520, 528 (1938). To recover for unjust enrichment, a plaintiff must demonstrate: (1) that it conferred a benefit upon the defendant; (2) that the defendant knew of the benefit; and (3) that, under the circumstances, it would be unjust to allow the defendant to retain the benefit without payment. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984), citing *Hummel* at 525. "[T]he purpose of such claims 'is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant.'" *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶ 21, quoting *Hughes v. Oberholtzer*, 162 Ohio St. 330, 335 (1954).

{¶9} The Spalsburys acknowledge in their brief that a claim for unjust enrichment arises from a "contract implied in law, or quasi-contract." This Court has held that quasi-contract claims such as promissory estoppel and unjust enrichment apply only "in the absence of a contract[.]" *Glenmoore Builders, Inc. v. Smith Family Trust*, 9th Dist. Summit No. 24299, 2009-Ohio-3174, ¶ 42, quoting *Gevedon v. Gevedon*, 167 Ohio App.3d 1, 2006-Ohio-2668, ¶ 21, fn. 3. "The reason for this rule is that if the parties have fixed their contractual relationship in an express contract, there is no reason or necessity for the law to supply an implied contractual relationship between them." *Champion Contracting & Constr. Co. v. Valley City Post No. 5563*, 9th Dist. Medina No. 03CA0092-M, 2004-Ohio-3406, ¶ 25, quoting *Gehrke v. Smith*, 12th Dist. Madison No. CA92-10-027, 1993 Ohio App. LEXIS 3410, *6 (July 6, 1993). Accordingly, in light of Gill's establishment that the Spalsburys worked for them under an express oral

agreement, the trial court did not err when it determined that Gill was entitled to summary judgment on the Spalsburys' unjust enrichment claim. The Spalsburys' third assignment of error is overruled.

III.

{¶10} The Spalsburys' assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

JENNIFER HENSAL
FOR THE COURT

CALLAHAN, J.
CONCURS.

CARR, J.
DISSENTING.

{¶11} I respectfully dissent. The Spalsburys have argued on appeal that the trial court erred in granting summary judgment to Gill. They specifically allege that Gill did not meet its initial *Dresher* burden. As such, I would conclude that they argued that the trial court erred in determining a written contract did not exist. Accordingly, I would proceed to address the merits and reverse as a genuine issue of fact exists.

{¶12} Also, although the trial court granted summary judgment on the unjust enrichment claim by finding that Gill was entitled to judgment on all claims, it did not mention specifically the unjust enrichment claim. More importantly, Gill did not make any argument pertaining to the unjust enrichment claim in its summary judgment motion. *See Bentley v. Equity Trust Co.*, 9th Dist. Lorain No. 14CA010630, 2015-Ohio-4735, ¶ 10 (noting that a trial court lacks authority to grant summary judgment in the absence of motion or argument on a particular claim).

{¶13} Given the foregoing, I would reverse the judgment of the trial court.

APPEARANCES:

THOMAS M. WILSON and JOHN J. WARGO, JR., Attorneys at Law, for Appellants.

DANIEL F. LINDNER, Attorney at Law, for Appellees.