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 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.

In the interest of helping people do business better, The Bullet Point provides previews of cases before the United States Supreme Court (SCOTUS) and the U.S. Sixth Circuit Court of Appeal. When appropriate, The Bullet Point highlights 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.

Is My Unsigned Settlement Enforceable?

Tort Damages Cap

***Wayt v. DHSC L.L.C.*, Slip. Op. No. 2018-Ohio-4822.**

This jurisdictional appeal to the Ohio Supreme Court raised the question as to whether the statutory cap for damages for noneconomic loss found under Revised Code 2315.18(B)(2) applies to compensatory damages awarded for a defamation claim.

Plaintiff was a nurse who was terminated following an investigation for neglect of duties and falsification of a medical record by the hospital where she worked. Thereafter, her boss sent a complaint to the Ohio Board of Nursing accusing the plaintiff of engaging in patient neglect. At the same time, plaintiff's union filed charges against the hospital claiming that it had refused to bargain with the union and plaintiff had been terminated because of her involvement with the union. The union was ultimately successful in getting the complaint rescinded and in restoring plaintiff's job. However, when plaintiff returned to her position, a hospital employee stated, in front of several nurses, that plaintiff was not a good nurse, nor did she deserve to regain her position.

Plaintiff filed suit for defamation. Ultimately, a jury found that she had been defamed and awarded her $800,000 in compensatory damages and $750,000 in punitive damages. Defendant then filed a post-judgment motion asking the trial court to apply the cap on non-economic damages set forth in Revised Code 2315.18(B)(2). The court refused, stating that the cap did not apply to injuries to reputation.

The hospital appealed and ultimately the Ohio Supreme Court held that the cap on non-economic damages found at Revised Code 2315.18(B)(2) did in fact apply to defamation claims.

The Bullet Point: R.C. 2315.18(A)(7) provides: " 'Tort action' means a civil action for damages for injury or loss to person or property." R.C. 2315.18(B)(2) provides that the maximum noneconomic damages that can be awarded to a plaintiff in a tort action is $250,000, barring certain exceptions that do not apply here. The term "property" does not include reputation. However, under Ohio law, it is well-settled that defamation is an injury to a person and thus this type of claim falls within the cap of non-economic damages found at R.C. 2315.18(B)(2).

RESPA Recovery

***Lewis v. PNC Bank, N.A.*, No. 3:17-cv-220, 2018 WL 6249989 (S.D. Ohio Nov. 29, 2018).**

This case involved claims against a loan servicer for alleged violations of the Real Estate Settlement Procedures Act (RESPA). The plaintiff alleged that he had sent several letters to the loan servicer seeking information on his mortgage loan but that the loan servicer failed to timely or properly respond. As a result, plaintiff brought suit in federal court alleging various RESPA violations.

Ultimately, the loan servicer moved for summary judgment arguing, among other things, that even if it violated RESPA, the plaintiff has no actual recoverable damages. The District Court agreed and ultimately awarded summary judgment to the loan servicer.

The Bullet Point: Recovery under RESPA requires more than establishing a violation; a plaintiff also must suffer actual, demonstrable damages that occurred "as a result of" that specific violation. As many courts have noted, "the costs incurred while preparing a qualified written request for information from a servicer cannot serve as a basis for damages because, at the time those expenses are incurred, there has been no RESPA violation." Indeed, to hold otherwise would negate the requirement that a litigant must have actual damages to pursue a RESPA claim, as damages would be considered "built-in" to the claim itself.

Motion to Enforce Settlement

***Rayco Manufacturing, Inc. v. Murphy, Rogers, Sloss, & Gambel*, 8th Dist. Cuyahoga No. 106714, 2018-Ohio-4782.**

This was an appeal of the trial court's decision to grant a motion to enforce a settlement agreement in a legal malpractice action. Plaintiff had filed a lawsuit against his former attorneys based on their handling of a breach of warranty case for plaintiff. The parties spent substantial time mediating the case. During these conversations plaintiff continued to demand payment in the amount of $3,050,000 to resolve the case. Eventually, defendants acquiesced and agreed to pay $3,050,000 to settle the case in the aggregate on behalf of all defendants. Thereafter, the parties advised the court that a settlement in principal had occurred and began trading versions of the written settlement. Unfortunately, plaintiff ultimately never signed the settlement and defendants moved to enforce the agreement.

Plaintiff opposed, arguing, among other things, that there was no settlement because its $3,050,000 demand had "lapsed," and correspondence reiterating that number were not offers, but merely evidenced an intent by plaintiff to re-open settlement negotiations. An evidentiary hearing was held before an advisory jury. Ultimately the advisory jury found that the parties had entered into a settlement agreement. The trial court thereafter granted the motion to enforce and plaintiff appealed.

On appeal, the Eighth Appellate District affirmed the decision to grant the motion to enforce settlement, finding that the parties had entered into an agreement to resolve the case.

The Bullet Point: A settlement agreement is a contract designed to terminate a claim by preventing or ending litigation. Like any other contract, it requires an offer, acceptance, consideration, and mutual assent between two or more parties with the legal capacity to act. This also requires a meeting of the minds on the "essential terms" of the agreement which must be reasonably certain and clear. However, once a settlement offer has been accepted, the settlement agreement is mutually binding; the settlement agreement cannot be set aside simply because one of the parties later changes its mind. Likewise, if a client authorizes its attorney to negotiate a settlement and the attorney negotiates a settlement within the scope of that authority, the client is bound by it.

Laches and Estoppel

***U.S. Bank N.A. v. Mitchell*, 2d Dist. Montgomery No. 27984, 2018-Ohio-4887.**

This was an appeal of a trial court's decision to grant a lender summary judgment in a foreclosure action. The defendant claimed the lender was estopped from foreclosing because it sat on its rights and should not be permitted to foreclose. The trial court disagreed and the defendant appealed.

On appeal, the Second Appellate District affirmed, finding that neither laches nor estoppel defenses were established by the defendant, thus they did not apply in the case to defeat summary judgment.

The Bullet Point: Laches and estoppel are affirmative defenses. To establish laches, a defendant must show: (1) conduct on the part of the defendant * * * giving rise to the situation of which complaint is made and for which the complainant seeks a remedy (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant. Laches is an "acquiescence in the assertion of adverse rights and undue delay on complainant's part in asserting his own, to the prejudice of the adverse party." Further, the party asserting the defense must demonstrate that the prejudice is material to the claim, and it "may not be inferred from a mere lapse of time."

Similarly, in order to prevail on an estoppel defense, a defendant must show (1) that the plaintiff made a factual representation, (2) that the representation was misleading, (3) that defendant acted in good faith reliance on that misrepresentation, and (4) that his reliance had a detrimental result.

SLIP OPINION NO. 2018-OHIO-4822

WAYT, APPELLEE, *v.* DHSC, L.L.C., D.B.A. AFFINITY MEDICAL CENTER, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Wayt v. DHSC, L.L.C.*, Slip Opinion No. 2018-Ohio-4822.]

Torts—Damages—R.C. 2315.18—Defamation—Cap on noneconomic compensatory damages— R.C. 2315.18(B)(2) caps noneconomic damages that can be recovered as a result of defamation.

(No. 2017-1548—Submitted August 1, 2018—Decided December 7, 2018.)

APPEAL from the Court of Appeals for Stark County, No. 2016CA215, 2017-Ohio-7734.

FISCHER, J.

{¶ 1} Appellee, Ann Wayt, filed a civil complaint against appellant, DHSC, L.L.C., d.b.a. Affinity Medical Center ("Affinity Medical"), alleging, among other claims, defamation. The case proceeded to trial. The only claim submitted to the

jury was for defamation. The jury found that Wayt had been defamed and awarded her $800,000 in compensatory damages and $750,000 in punitive damages.

{¶ 2} The only issue before this court is whether the cap on damages for noneconomic loss set forth in R.C. 2315.18(B)(2) applies to compensatory damages awarded for defamation. We hold that the statute unambiguously caps the noneconomic damages that can be recovered as a result of defamation, and we remand the case to the trial court for further proceedings.

I. BACKGROUND

{¶ 3} Wayt was a nurse who was employed at Affinity Medical. Affinity Medical terminated Wayt's employment after an investigation that followed an accusation that Wayt had neglected her duties and falsified a medical record.

{¶ 4} Following Wayt's dismissal, the head of nursing at Affinity Medical sent a complaint to the Ohio Board of Nursing that included an accusation that Wayt had engaged in patient neglect. Some additional documentation was sent to the board that detailed Wayt's alleged improper conduct.

{¶ 5} Following her termination, Wayt applied for multiple nursing positions. She had only two interviews and did not obtain a permanent nursing position.

{¶ 6} The National Nurses Organizing Committee, a union and professional organization for registered nurses, filed charges against Affinity Medical before the National Labor Relations Board ("NLRB"), claiming that the hospital had refused to bargain with the union and that Wayt had been terminated because of her involvement with the union. After an administrative law judge issued a report favorable to the union, the NLRB successfully petitioned the United States District Court for the Northern District of Ohio for injunctive relief that included an order that Wayt be reinstated to her prior position at Affinity Medical. *Calatrello ex rel. Natl. Labor Relations Bd. v. DHSC, L.L.C.*, N.D. Ohio No. 5:13 CV 1538, 2014 WL 296634 (Jan. 24, 2014). The court also ordered Affinity Medical to retract the

report made to the Nursing Board. Wayt did return to her position, but an Affinity Medical employee allegedly stated, in front of several nurses, that the court order did not mean that Wayt deserved to regain her position or that she was a good nurse.

{¶ 7} Wayt filed a complaint in the Stark County Court of Common Pleas alleging that Affinity Medical and its employees had defamed her. At trial, the jury found that Wayt had been defamed and awarded her $800,000 in compensatory damages and $750,000 in punitive damages.

{¶ 8} Affinity Medical filed a posttrial motion requesting that the trial court apply the cap on noneconomic compensatory damages set forth in R.C. 2315.18(B)(2) and the cap on punitive damages set forth in R.C. 2315.21(D) to reduce the awards. The trial court ruled that the statutory caps on compensatory and punitive damages did not apply to injuries to reputation. The trial court also held that the punitive-damages cap is twice the amount of compensatory damages awarded, not twice the amount of compensatory damages as capped under R.C. 2315.18(B)(2).

{¶ 9} Affinity Medical filed an appeal and argued that the amount awarded in damages was in excess of the applicable caps on damages set forth in R.C. 2315.18(B)(2) and 2315.2(D). The appellate court adopted the reasoning of the trial court and overruled Affinity Medical's assignment of error relating to caps on damages. Affinity Medical then appealed to this court, presenting two propositions of law. We accepted jurisdiction over only one proposition, whether the cap in R.C. 2315.18 that applies to tort actions seeking noneconomic loss as a result of an alleged injury or loss to person or property also applies to defamation. *See* 152 Ohio St.3d 1420, 2018-Ohio-923, 93 N.E.3d 1002.

II. ANALYSIS

{¶ 10} Affinity Medical argues that under the plain and unambiguous language of R.C. 2315.18(B), compensatory damages awarded in a defamation action must be capped. Affinity Medical also argues that the caps on punitive

damages set forth in R.C. 2315.21(D) apply and that the amount of punitive damages awarded to Wayt by the jury should be reduced accordingly.

{¶ 11} Like Affinity Medical, Wayt argues that the plain language of R.C. 2315.18 is controlling but asserts that the statutory language applies to injuries only to a person or property, not to a person's reputation. Wayt asserts that defamation is an injury to a person's reputation and is distinct from injuries to a person. She relies on Article I, Section 16 of the Ohio Constitution, which provides that courts shall be open to redress injuries to "land, goods, person, or reputation" to support her argument.

{¶ 12} Wayt further contends that R.C. 2315.18 does not cap the damages awarded for defamation because the statute applies only to negligent torts, not to intentional torts like defamation.

{¶ 13} Wayt also argues that the proposition of law presented in this case need not be answered because Affinity Medical failed to request a jury interrogatory that would have allowed it to show that the jury awarded noneconomic rather than economic damages. Wayt adds that the statute plainly applies only to noneconomic damages and that the trial court could find that the damages awarded were economic damages without an interrogatory that showed what kind of damages were awarded.

{¶ 14} Finally, Wayt argues that she was defamed on more than one occasion. Thus, argues Wayt, even if R.C. 2315.18(B)(2) does apply, the amount awarded should not be reduced and she should be awarded the statutory maximum for each instance of defamation.

A. Standard of Review

{¶ 15} The standard of review for questions of statutory interpretation is de novo. *Ceccarelli v. Levin*, 127 Ohio St.3d 231, 2010-Ohio-5681, 938 N.E.2d 342, ¶ 8. When a statute is plain and unambiguous, we apply the statute as written, *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846

N.E.2d 478, ¶ 52, and no further interpretation is necessary, *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996).

B. Plain Meaning of the Statute

{¶ 16} R.C. 2315.18(A)(7) provides: " 'Tort action' means a civil action for damages for injury or *loss to person or property*." R.C. 2315.18(B)(2) provides that the maximum noneconomic damages that can be awarded to a plaintiff in a tort action is, barring certain exceptions that do not apply here, $ 250,000.

{¶ 17} Property "means real and personal property." R.C. 1.59(E). The term "property" as used in R.C. 2315.18(A)(7) does not include reputation, and neither party argues to the contrary.

{¶ 18} The key question in this case is, therefore, whether defamation, which is an injury to reputation, falls within the category of injury to a person. R.C. 1.59(C) defines person as "an individual, corporation, business trust, estate, trust, partnership, and association." This definition does not provide an answer to the question before us. We have held for 90 years, however, that defamation is an injury to a person. *See Smith v. Buck*, 119 Ohio St. 101, 162 N.E. 382 (1928), paragraph two of the syllabus. We cited this decision with approval as recently as 2008. *See Nadra v. Mbah*, 119 Ohio St.3d 305, 2008-Ohio-3918, 893 N.E.2d 829.

{¶ 19} In *Buck*, this court addressed whether "slander is a 'personal injury' by a 'wrongful act,' within the intent and meaning of the proviso to section 11819, General Code." *Id*. at 101. This court held that the term "personal injury," "as defined by lexicographers, jurists and text-writers, and by common acceptance," includes injuries to a person's reputation, *id*. at paragraph one of the syllabus, and we cited with approval several cases from other jurisdictions in which those courts decided that slander or libel is an injury to a person. *See Tisdale v. Eubanks*, 180 N.C. 153, 104 S.E. 339 (1920) ("the security of one's reputation and good name [is] among the personal rights of the citizen"); *Times Democrat Publishing Co. v.*

Mozee, 136 F. 761, 763 (5th Cir.1905) ("At common law, libel and slander were classified as injuries to the person, or personal injuries"); *McDonald v. Brown*, 23 R.I. 546, 51 A. 213, 214 (1902) (statute providing that bankruptcy discharges debts but not judgments for willful or malicious injuries to a person or property did not discharge debts resulting from judgments in libel). These three cases remain good law.

{¶ 20} The court in *Buck* held that barring a phrase or definition within the statute that would lead to a contrary conclusion, injuries resulting from slander are plainly personal injuries. *Id.* at 104. Further, the court did not distinguish between personal injuries and injuries to a person. *Id.* at paragraph two of the syllabus.

{¶ 21} Wayt argues that the legislature's inclusion of the phrase "bodily injury" in R.C. 2315.18 demonstrates that the legislature intended to cap only damages resulting from physical injuries. The term "bodily injury" appears in R.C. 2315.18(A)(5) in the definition of "occurrence," and the term "occurrence" appears in R.C. 2315.18(B)(2). Neither of these statutory sections defines the actions to which the caps on damages apply. Thus, the legislature used no phrase or definition within R.C. 2315.18 that would lead to the conclusion that it intended the phrase "injury or loss to person" to mean "bodily injury" or anything other than its plain meaning. And, as noted above, this court has already decided that, under the plain meaning, defamation is an injury to a person.

{¶ 22} We hold that under the plain language of R.C. 2315.18(A)(7), defamation is a "civil action for damages for injury or loss to person." This holding, as explained above, is in accord with prior decisions of this court and several other courts that were interpreting similar language. We see no reason to overturn the well-established precedent that defamation is a "personal injury" according to the plain meaning of the term.

{¶ 23} We do not look to the canons of statutory construction when the plain language of a statute provides the meaning. *See Hartmann v. Duffey,* 95 Ohio St.3d

456, 2002-Ohio-2486, 768 N.E.2d 1170, ¶ 8, citing *Lake Hosp. Sys. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 634 N.E.2d 611 (1994). Assuming arguendo only that the court must look to the canons of statutory construction to determine what the legislature intended by using the phrase "injury or loss to person or property," the result in this case would be the same. It is well established that the legislature is presumed to have full knowledge of prior judicial decisions. *State ex rel. Huron Cty. Bd. of Edn. v. Howard*, 167 Ohio St. 93, 96, 146 N.E.2d 604 (1957). Thus, despite the position taken by those in the dissent, the legislature is presumed to have full knowledge of this court's decision in *Buck*. Moreover, the legislature could easily have drafted the statute to prevent the holding from that case from affecting the outcome of this case; the legislature merely needed to add "defamation" to the list of actions enumerated in R.C. 2315.18(A)(7) to which the caps do not apply.

C. Constitutional Argument

{¶ 24} Wayt argues that the phrase "injury or loss to person or property" in R.C. 2315.18(A)(7) must be interpreted in light of the language that appears in the Ohio Constitution. Wayt highlights Article I, Section 16 of the Ohio Constitution and notes that the constitutional language distinguishes injuries to reputation from injuries to a person, lands, or goods. Article I, Section 16 of the Ohio Constitution provides, "All courts shall be open, and every person, for an injury done him in his land, goods, *person, or reputation*, shall have remedy by due course of law, and shall have justice administered without denial or delay." (Emphasis added.)

{¶ 25} Despite the state's Constitution differentiating between injuries to a person and injuries to reputation, any distinction found in the Constitution is not dispositive in this case. In this case, we must decide whether the legislature drew a distinction in R.C. 2315.18 similar to the one that appears in the Constitution.

{¶ 26} As noted above, the first step in answering that question is to interpret the plain language of the statute. We do not begin the analysis by

examining external sources in order to define the terms used in the statute. While the language in the Constitution appears to draw a distinction between injuries to a person and injuries to reputation, the distinction is not consistent with the common meaning of the terms used in R.C. 2315.18. *See Buck*, 119 Ohio St. 101, 162 N.E. 382, at paragraph two of the syllabus. Moreover, R.C. 2315.18 uses phrases that are more general than those that appear in the Constitution. R.C. 2315.18 (2)(a) uses the phrase "loss to person or property" whereas Article I, Section 16 of the Ohio Constitution provides that courts are open to redress injuries done to a person's "land, goods, person, or reputation." The statutory term "property" is encompassing of the constitutional terms "lands [or] goods." Similarly, the statutory term "loss to person" encompasses the injuries described in the Constitution as injuries to a person as well as injuries to a person's reputation.

{¶ 27} For these reasons, we decline Wayt's invitation to hold that R.C. 2315.18 does not apply to an injury to reputation or to hold that defamation is not a "tort action" as it is defined in R.C. 2315.18(A)(7).

D. S.B. 80 and Legislative Intent

{¶ 28} Wayt argues that the statement of findings and intent made in Am.Sub.S.B. No. 80, Section 3, 150 Ohio Laws, Part V, 7915, 8024 ("S.B. 80"), indicates that the legislature intended in R.C. 2315.18 to limit damages in negligence-based cases only. From this, Wayt concludes that there is no cap on damages for defamation claims because defamation is an intentional tort, not a negligence-based tort.

{¶ 29} Again, we do not look at legislative intent to determine the meaning of a statute when the statute is unambiguous. *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16. However, even if we did review S.B. 80 to determine the legislative intent, the text and history of S.B. 80, when viewed in conjunction, do not support Wayt's argument.

{¶ 30} Section 3(A)(3) of S.B. 80 provides that the state has a rational and legitimate interest in ensuring that it has a system that balances the rights of those injured by *negligent behavior* and the need to eradicate frivolous lawsuits that cost jobs. This statement, when read in context with the codified sections of the bill, is one of several intentions behind the bill.

{¶ 31} For example, as enacted in S.B. 80, R.C. 4507.07(B) provides that any person who signs an application for a driver's license for a minor is jointly and severally liable for "*negligence or wanton or willful misconduct*" committed by that minor while the minor is driving. (Emphasis added.)

{¶ 32} And, as enacted in S.B. 80, R.C. 1775.14(B) provides that

> a partner in a registered limited liability partnership is not liable * * * for debts, obligations, or other liabilities of any kind of, or chargeable to, the partnership or another partner or partners arising from *negligence or from wrongful acts, errors, omissions, or misconduct*, whether or not intentional or characterized as tort, contract, or otherwise.

(Emphasis added.)

{¶ 33} If, as Wayt suggests, the legislature's sole intent when passing S.B. 80 was to "remedy negligent behavior," the above-cited sections, which deal with behavior other than negligent behavior, would not be part of S.B. 80. In light of this conclusion, the argument that the legislature's *sole intent* behind S.B. 80 was to address negligence claims does not pass muster.

{¶ 34} Moreover, interpreting R.C. 2315.18 in the way that Wayt suggests would require the court to add the word "negligence" to the definition of "tort actions" provided in R.C. 2315.18(A)(7). " '[I]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words

not used.' " (Emphasis omitted; brackets added in *Bernardini*.) *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.*, 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979), quoting *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). For these reasons, we decline to interpret R.C. 2315.18 to cap damages awarded only in negligence cases.

E. Remaining Issues

{¶ 35} In her brief, Wayt argues that even if the caps on damages set forth in R.C. 2315.18 do apply to defamation claims, the award of compensatory damages in this case should not be reduced because there was more than one incident of defamation. Also, because the caps apply only to noneconomic damages, Wayt claims that this court could determine that the jury awarded Wayt economic damages, which have no statutory cap. In its brief, Affinity Medical requests that the court order that the punitive-damages cap set forth in R.C. 2315.21(D) be applied to the award in this case.

{¶ 36} No proposition of law arguing these issues was accepted by this court, and we decline to address these arguments because they are beyond the scope of this appeal.

III. CONCLUSION

{¶ 37} For the foregoing reasons, we reverse the judgment of the court of appeals as to compensatory damages, and we remand the case to the trial court for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

KENNEDY, FRENCH, and DEWINE, JJ., concur.

DEGENARO, J., concurs in judgment only.

O'CONNOR, C.J., dissents, with an opinion joined by O'DONNELL, J.

O'CONNOR, C.J., dissenting.

{¶ 38} I dissent. At issue in this case is whether the damage caps in R.C. 2315.18 apply when a court awards damages to a person for defamation. R.C. 2315.18 provides that its caps apply to damages resulting from "an injury or loss to person or property." The majority concludes that the statute is unambiguous and that the plain language of the statute provides its meaning, ultimately determining that "the statutory term 'loss to person' encompasses the injuries described in the Constitution as injuries to a person as well as injuries to a person's reputation." Majority opinion at ¶ 26. But in construing R.C. 2315.18, the majority relies on a 90-year-old case in which this court interpreted the term "personal injury" as well as numerous cases outside this jurisdiction that consider injury to reputation in the context of common law rather than in the context of Ohio's constitutional and statutory schemes. The majority's reliance on those cases shows that it has *not* relied on the plain meaning of the statute. By considering case law, the majority is engaging in exactly the kind of statutory interpretation that it claims is unnecessary.

{¶ 39} If we look only at the words in the statute, it is clear that injury or loss to person does not include loss of reputation. If an injury to a person occurs, then there is an identifiable harm to the person's body and typically a course of action for healing it, often with medical aid.[1] There is also identifiable and relatively quantifiable harm to establish damages and a financial remedy.

{¶ 40} On the other hand, a person's reputation is separate from her or his body, and the person has little control over it—reputation exists entirely in the hearts and minds of others. The lack of control over one's own reputation is one reason that the tort of defamation is so menacing. A person can be of upstanding

1. Noneconomic compensatory damages caps do not apply to "[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system," R.C. 2315.18(B)(3)(a), or to "[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities," R.C. 2315.18(B)(3)(b).

character, yet when someone defames her or him, there is no well-defined solution for piecing reputation back together or even for determining the damage. A reputation damaged by defamation is not fixed by mending it; one can only attempt to repair reputation by convincing each and every person who observed the defamatory statement that it is not true. It is often nearly impossible to determine whether reputation is restored or to quantify the damage. In part, that is why a victim of defamation per se, that is, defamation that is clear on its face, does not have to prove damages. *Becker v. Toulmin*, 165 Ohio St. 549, 553, 138 N.E.2d 391 (1956).

{¶ 41} Defamation is an injury or loss to reputation, not to person, and therefore the caps on damages in R.C. 2315.18 do not apply when a person is defamed. Although statutory interpretation is unnecessary given the plain meaning of R.C. 2315.18, the exercise bears out this conclusion.

{¶ 42} The Ohio Constitution reinforces the distinctions between person and reputation. The framers, recognizing the differences between these injuries, ensured access to the courts for both wrongs. Article I, Section 16 provides that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law." The majority does not explain why we should assume that when the General Assembly drafted R.C. 2315.18, it was aware of two of this court's decisions that were spread over a span of 90 years but was not aware of Ohio's Constitution, our government's preeminent controlling document. But it stands that "no portion of a written constitution should be regarded as superfluous." *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 120, 110 N.E. 648 (1915). In drafting R.C. 2315.18, the General Assembly clearly chose to subsume land and goods under the single label of property. No similar effort was made to combine person and reputation. Instead, the General Assembly left out any reference to reputation. The Constitution authorizes the courts to remedy four kinds of injuries, and the General Assembly

included only three of them in R.C. 2315.18. The only conclusion I can reach is that the General Assembly did not wish to cap damages for people who are defamed.

{¶ 43} Instead of relying on a clear constitutional provision establishing that injury to reputation and injury to person are two separate harms, the majority mistakenly depends on this court's 1928 interpretation of the term "personal injury," *Smith v. Buck*, 119 Ohio St. 101, 162 N.E. 382 (1928). That reliance is misplaced. The term at issue in this case is "injury to person." The court had two holdings in *Buck*:

> The words "personal injury" as defined by lexicographers, jurists and text-writers, and by common acceptance, denote an injury either to the physical body of a person or to the reputation of a person, or to both.
>
> The words "personal injury" by "wrongful act," of section 11819, General Code, comprehend, among other injuries to the person, injury by libel or slander.

Buck at paragraphs one and two of the syllabus.

{¶ 44} In reaching these conclusions, the court in *Buck* primarily considered the definition of the word "personal," which it found to mean "pertaining to the person" or " 'relating to an individual.' " *Id.* at 101, quoting *Webster's New International Dictionary*. It is true that a reputation generally pertains to or is related to a person, but R.C. 2315.18 does not refer to loss or injury *relating* to a person but refers to "loss or injury to person." The first syllabus paragraph in *Buck* addresses only "personal injury" and does not squarely support the majority's position in this case.

{¶ 45} The second paragraph of *Buck* is at least ambiguous and should not be the basis for interpreting a statute today, 90 years after this court decided that case. The second syllabus paragraph can be construed to stand for the proposition that personal injury includes injury to the person as well as injury by libel or slander. This interpretation is entirely consistent with my reading of R.C. 2315.18. Because the law at issue in *Buck* does not contain the language "injury to person," the holding does not define that term and cannot determine the outcome of this case. Further, if the General Assembly was focused on this case when it drafted R.C. 2315.18, then it could have used the term "personal injury" when it described torts to which the caps applied, in an effort to combine injury to person and injury to reputation. It did not.

{¶ 46} The majority also includes a string cite of cases that the *Buck* court relied on. Although still technically good law, these cases are either unpersuasive or help to establish that R.C. 2315.18 does not apply to loss of reputation. In *Tisdale v. Eubanks*, 180 N.C. 153, 104 S.E. 339, 340 (1920), the North Carolina Supreme Court conflated character and reputation in order to find that libel is injury to the person. In *Times-Democrat Publishing Co. v. Mozee*, 136 F. 761, 762 (5th Cir.1905), one of Ohio's most famous daughters, Annie Oakley, sought damages for "shame, disgrace, and mental suffering." In the manner of the decision in *Tisdale*, the court in *Mozee* described the claims as "injuries to character and mental suffering" and invoked the common law. *Id.* But the situation of appellee, Ann Wayt, is distinguishable from the circumstances in both *Tisdale* and *Mozee* because of Wayt's free-standing defamation claim. Wayt has no need to prove injury in the form of shame, disgrace, or mental suffering, all of which could be construed as injury to the person. Wayt's damages resulted from loss of reputation, not injury to person, and those damages were assumed after she proved her claim of defamation per se.

{¶ 47} Further, the courts in both *Tisdale* and *Mozee* relied on common law. Traditionally, the common law protected three types of personal rights: personal security, personal liberty, and private property. The right of personal security was divided into life, limb, body, health, and reputation.

> Reputation is a sort of right to enjoy the good opinion of others, and is capable of growth and real existence, as an arm or a leg. If it is not to be classed as a personal right, where does it belong? No provision has been made for any middle class of injuries between those to person and those to property, and the great body of wrongs arrange themselves under the one head or the other.

Mozee, quoting *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S.E. 250, 251 (1891). *Tisdale* and *Mozee* are wholly inapposite because Ohio's Constitution specifically answers the question "where does [reputation] belong?" by recognizing a middle class of injuries and creating an entirely separate action for loss or injury to reputation that supplants the common law's less differentiated protections. Because the Ohio Constitution recognizes injury to reputation as separate from injury to person, the court is amiss in relying on cases depending on common-law causes of action. *See, e.g.*, *Drake v. Rogers*, 13 Ohio St. 21, 29 (1861) ("wherever the legislature has by statutory law assumed to establish either rules of property or conduct, it has always been the policy of the law in this state, or at least such is the generally received understanding, that the common law can neither add to nor take from the statutory rules so established").

{¶ 48} In the last case that the majority cites, *McDonald v. Brown*, 23 R.I. 546, 51 A. 213, 214 (1902), the Rhode Island Supreme Court construed the term "injury to the person" "in its broad and general sense." But in *State v. Simmons*, 114 R.I. 16, 19, 327 A.2d 843 (1974), the Rhode Island court declined to extend its

own finding in *McDonald*, taking a narrower view and holding that " 'injury to the person' contemplates the peril of actual bodily harm and does not include danger to reputation alone." *Id.* If Rhode Island's own Supreme Court refused to rely on *McDonald* because it " 'would verge upon speculation with reference to the legislative intent,' " *id.*, quoting *Commerce Oil Refining Corp. v. Miner*, 98 R.I. 14, 18, 199 A.2d 606 (1964), it stands to reason that we should also view the case with skepticism.

{¶ 49} This court's decision in *Nadra v. Mbah*, 119 Ohio St.3d 305, 2008-Ohio-3918, 893 N.E.2d 829, which the majority also cites favorably, is likewise unpersuasive. The court in *Nadra* cited *Buck* for the proposition that "personal injury includes injury to one's body and injury to one's reputation." *Id.* at ¶ 26. But *Nadra* does not stand for the proposition that an injury to person includes defamation.

{¶ 50} The court in N*adra* relied on the same case that appellant, DHSC, L.L.C., d.b.a. Affinity Medical Center, points to now: *Lawyers Coop. Publishing Co. v. Muething*, 65 Ohio St.3d 273, 603 N.E.2d 969 (1992). But *Muething* did not involve an allegation of defamation, libel, or slander. Muething's claimed loss of reputation arose from his reliance on legal forms that Lawyers Cooperative wrote and published. Indeed, the court held that "Muething's claims for humiliation and damage to his reputation are virtually indistinguishable from his claim for negligent infliction of emotional distress and, therefore, could not be maintained in the absence of an assertion that he feared or saw some quantifiable physical loss." *Id.* at 280. *Muething* is inapplicable to defamation claims.

{¶ 51} The majority's position is also unsupported by the dictionary definitions of the statute's key terms. *Black's Law Dictionary* 506 (10th Ed.2014) defines defamation as "[m]alicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person." Reputation means "[t]he esteem in which someone is held or the goodwill extended to or

confidence reposed in that person by others, whether with respect to personal character, private or domestic life, professional and business qualifications, social dealings, conduct, status, or financial standing." *Id.* at 1497. *Black's* defines person as a "human being." *Id.* at 1324.

{¶ 52} Applying these definitions to R.C. 2315.18 demonstrates that the law does not limit damages to a person who proves defamation. Reputation is the esteem in which someone is held by others, often in respect to personal character. It is not the person's actual character. It is separate and apart from the human being. Reputation exists in the minds of others.

{¶ 53} In a defamation action, the alleged injury or loss is to a person's reputation, not to one's being or possessions. Consequently, I would hold that the plain language of the statute does not cap damages for people who are defamed. I would affirm the judgments of the trial and appellate court.

{¶ 54} I dissent.

O'DONNELL, J., concurs in the foregoing opinion.

B. Zimmerman Law and Brian L. Zimmerman; and Crabbe, Brown & James, L.L.P., and Andrew G. Douglas, for appellee.

Hanna, Campbell & Powell, L.L.P., Douglas G. Leak, W. Bradford Longbrake, Frank G. Mazgaj, and Emily R. Yoder; and Howard & Howard Attorneys and Michael O. Fawaz, for appellant.

Elfvin, Klingshirn, Royer & Torch, L.L.C., and Christina Royer; and McCarthy, Lebit, Crystal & Liffman Co., L.P.A., and Colin R. Ray, urging affirmance for amicus curiae Ohio Employment Lawyers Association.

Cooper & Elliot, L.L.C., C. Benjamin Cooper, and Charles H. Cooper, urging affirmance for amicus curiae Ohio Association for Justice.

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Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Western Division.

Stevie Lewis, Plaintiff,
v.
PNC Bank, N.A., Defendant.

Case No.: 3:17-cv-220
|
11/29/2018

THOMAS M. ROSE, UNITED STATES DISTRICT JUDGE

ENTRY AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, ECF 36, DENYING MOTION FOR SANCTIONS, ECF 37, AND TERMINATING CASE

***1** Pending before the Court are Defendant PNC Bank, N.A.'s Motion for Summary Judgment, ECF 36, and Motion for Rule 11 Sanctions. ECF 37. Because Plaintiff Stevie Lewis's Complaint, ECF 1, is anything but frivolous, Defendant's Motion for Rule 11 Sanctions will be denied. Plaintiff's claim only failing for a lack of damages, Defendant's Motion for Summary judgment will be granted.

Background

On April 15, 2004, Plaintiff, then known as Stevie Booher, executed a promissory note with National City Mortgage Company in the original amount of $97,000 with interest at the rate of 5.625% per annum. (Exhibit B, Affidavit of Dorothy J. Thomas). The note was secured by a mortgage executed by Plaintiff and National City on the property located at 2800 Argella Ave., Dayton, Ohio 45140. (Id.) In November 2015, Plaintiff and her husband purchased property located at 1078 Bristol Drive, Vandalia, Ohio 45377. (Exhibit C, Deposition of Stevie Lewis dated February 21, 2018 at 12:16-25 and 13:1-25). One month prior, in October 2015, Plaintiff defaulted on the mortgage loan for the Argella Ave. property. (Ex. B, Thomas Aff. at ¶9).

On April 27, 2016 PNC Bank, N.A. filed a complaint for foreclosure captioned *PNC Bank, N.A. v. Stevie N. Booker*, Montgomery County Court of Common Pleas Case No. 2016 CV 02225. The foreclosure involved the enforcement by PNC of its note and mortgage on the property located at 2800 Argella Avenue, Dayton, Ohio 45140. In the foreclosure PNC obtained a judgment entry and decree in foreclosure on July 8, 2016.

During the course of the foreclosure Plaintiff retained HER Realtors for the purposes of negotiating a short sale of the Argella Ave. property. Deposition of Stevie Lewis, ECF 38 at 18, Lines 6-8, Page ID 787. During all relevant times to the foreclosure HER Realtors had a working relationship with attorney Carol Herdman of Herdman Law whom Plaintiff believed was assisting HER with negotiations. Id., at 28, Lines 14-20, Page ID 797. At no time did Plaintiff ever speak directly with Carol Herdman to know what exactly she did with HER Realtors. Id.

On May 19, 2016 HER Realtors submitted a loss mitigation application to PNC, signed by Plaintiff using her current name, Stevie N. Lewis. Complaint, ECF 1 at ¶ 22, Page ID 4. The May 19, 2016 application was re-submitted on July 15, 2016 by HER Realtors. Id. at ¶¶ 26-27, Page ID 5 Between July 27, 2016 and October 3, 2016 Plaintiff, through HER, submitted additional documentation on the loan modification to PNC Bank, N.A. Id. at ¶¶ 29-30, Page ID 5.

In the early fall of 2016, Herdman Law sent several Requests for Information to PNC. See Affidavit of Dorothy Thomas, ECF 36-1 at 9, ¶¶ 18-19, Page ID 588; see also ECF 36-2 and Deposition of Stevie Lewis, ECF 38 at 42:22-45:22 and 46:17-47:20. PNC sent the responses to these inquiries to Plaintiff at her Bristol Ave. address. Id.

On January 5, 2017, Plaintiff, through Dann Law, sent three separate requests for information to PNC. See Affidavit of Dorothy Thomas, ECF 36-1 at 7, ¶ 10, Page ID 586; see Exhibit A, ECF 1-1, at 1-4, Page ID 50-54 ("RFI #1"); see Exhibit C, ECF 1-3, 1-4, Page ID 57-60 ("RFI #2"); see Exhibit E, ECF 1-5, 1-3, Page ID 64-66. By this point in the foreclosure, PNC had obtained default judgment, but the sale was not complete. These letters sent from Dann Law contained an authorization from Plaintiff with her legal name with a request that responses be sent to counsel. Nevertheless, PNC claims that it sent a response to RFI #1 and RFI #2 instead to Plaintiff at her Bristol Ave. address on January 13, 2017. See Affidavit of Dorothy Thomas, ECF 36-1 at 7, ¶ 11, Page ID 586.

PNC, through their foreclosure counsel, sent a response to RFI #3 to Plaintiff at her current residence on January 12, 2017. Id. at 7-8, ¶ 12, Page ID 586-87.

***2** On February 3, 2017, the foreclosed property was sold at a sheriff sale.

On February 7, 2017 PNC received correspondence from Dann Law titled Notice of Error. Id. at 8, ¶ 13, Page ID 587; see also Exhibit H, ECF 1-8, 1-8, Page ID 72-79 ("NOE #1"). NOE #1 requested an explanation of why PNC had not responded to RFI #3, as Dann Law had not received a response from PNC and neither had Plaintiff. Id. at 3-4, Page ID 74-75; see also Deposition of Stevie Lewis, ECF 38 at 61, Lines 1-7, Page ID 830.

After receiving NOE #1 from Dann Law containing an authorization from Plaintiff with her legal name, PNC sent a response to NOE #1 to Plaintiff's residence on February 22, 2017. See Affidavit of Dorothy Thomas, ECF 36-1 at 8, ¶ 13, Page ID 587. On February 16, 2017 PNC received correspondence from Dann Law titled Notice of Error for PNC's purported error in failing to respond to RFI #2. Id. at 8, ¶ 14, Page ID 577; see also Exhibit J, ECF 1-10, at 1-9, Page ID 82-90. ("NOE #2") NOE #2 requested an explanation why PNC had not responded to RFI #2, as Dann Law had not received a response from PNC and neither had Plaintiff. Id. at 1-3, Page ID 83-85.

On March 22, 2017, PNC received correspondence from Dann Law titled Notice of Error for PNC's purported error in failing to respond to RFI #1. See Affidavit of Dorothy Thomas, ECF 36-1 at 8, ¶ 15, Page ID 577; see also Exhibit N, ECF 1-14, 1-9, Page ID 99-107. (NOE #3) NOE #3 requested an explanation why RFI #1 was not responded to as Dann Law had not received a response from PNC and neither had Plaintiff. Id. at 1-4, Page ID 99-102.

On May 31, 2017, PNC received correspondence from Dann Law titled as a Notice of Error for PNC's purported failure to respond to NOE #4. Affidavit of Dorothy Thomas, ECF 36-1 at 8-9, ¶ 16, Page ID 587-588; see also Exhibit N, ECF 1-18, 1-19, Page ID 116-134. NOE #4 requested an explanation why NOE #3 had not been responded to as Dann Law had not received a response from PNC and neither had Plaintiff. Id. at 1-4, Page ID 116-120.

On June 13, 2017, for the first time since it received RFI #1, RFI #2, RFI #3, NOE #1, NOE #2, and NOE #3 which all contained the exact same borrower authorization as NOE #4, PNC sent Dann Law a response to NOE #4. Affidavit of Dorothy Thomas, ECF 36-1 at 8-9, ¶ 16; see ECF 36-1 at 49-56, Page ID 628-635; compare ECF 1-18, 6, Page ID 121 with ECF 1-1 at 4, Page ID 53; ECF 1-3 at 4, Page ID 60; ECF 1-5 at 3, Page ID 66; and ECF 1-8 at 5, Page ID 76; ECF 1-10 at 5, Page ID 86.

On June 28, 2017 Plaintiff filed the instant action asserting eleven claims against PNC for servicing violations under the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617. After PNC filed a Motion for Judgment on the Pleadings as to Counts One through Five on October 25, 2017 (ECF 18), Plaintiff stipulated to dismissal of Counts One through Five on November 8, 2017. See ECF 20, 21, and 30. Following the dismissal of Counts One through Five, litigation has continued against Defendant for Counts Six through Eleven which allege: Count Six: PNC violated 12 C.F.R. § 1024.36(d) by failing to timely respond to Plaintiff's RFI #1; Count Seven: PNC violated 12 C.F.R. § 1024.36(d) by failing to timely respond to Plaintiff's RFI #2; Count Eight: PNC violated 12 C.F.R. § 1024.36(d) by failing to timely respond to Plaintiff's RFI #3; Count Nine: PNC violated 12 C.F.R. § 1024.35 by failing to timely respond to Plaintiff's NOE #1; Count Ten: PNC violated 12 C.F.R. § 1024.35 by failing to timely respond to Plaintiff's NOE #2; Count Eleven: PNC violated 12 C.F.R. § 1024.35 by failing to timely respond to Plaintiff's NOE #3; see Complaint, ECF 1, at 32-46, Page ID 32-46.

***3** Defendant has now filed a Motion for Summary Judgment, ECF 36, claiming that no triable issues of fact and law remain as to Counts Six through Eleven.

II. Standard of Review

The standard of review applicable to motions for summary judgment is established by Federal Rule of Civil Procedure 56 and associated case law. Rule 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. at 56(c). Alternatively, summary judgment is denied "[i]f there are any genuine

factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Thus, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The party seeking summary judgment has the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions and affidavits which it believes demonstrate the absence of a genuine issue of material fact. *Id.*, at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S., at 250 (quoting Fed. R. Civ. at 56(e)).

Once the burden of production has shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rule 56 "requires the nonmoving party to go beyond the pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S., at 324.

In determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in the favor of that party. *Anderson*, 477 U.S., at 255. If the parties present conflicting evidence, a court may not decide which evidence to believe by determining which parties' affiants are more credible. 10A Wright & Miller, *Federal Practice and Procedure*, § 2726. Rather, credibility determinations must be left to the fact-finder. *Id.*

Finally, in ruling on a motion for summary judgment, "[a] district court is not…obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). Thus, in determining whether a genuine issue of material fact exists on a particular issue, the court is entitled to rely upon the Rule 56 evidence specifically called to its attention by the parties.

III. Analysis

***4** Plaintiff Stevie Lewis asserts Defendant PNC Bank, N.A., has violated the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617. "**RESPA** is a consumer protection statute that regulates the real estate settlement process, including servicing of loans and assignment of those loans." *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 680 (7th Cir. 2011).

The crux of Counts Six through Eleven against the Defendant are that three Requests for Information were sent to PNC to which PNC failed to respond in a timely fashion in violation of 12 C.F.R. § 1024.36(d) (Counts Six, Seven and Eight); one Notice of Error was sent to the Defendant which PNC failed to properly investigate pursuant to 12 C.F.R. § 1024.35 (Count Nine); one Notice of Error was sent to Defendant which PNC failed to properly investigate pursuant to 12 C.F.R. § 1024.35 (Count Ten); and one Notice of Error was sent to Defendant on which PNC failed to properly investigate pursuant to 12 C.F.R. § 1024.35 (Count Eleven).

Rooker-Feldman

Defendant first asserts that this Court lacks jurisdiction under the *Rooker-Feldman* doctrine. The *Rooker–Feldman* doctrine, named for *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), bars two categories of cases:

> First, when the federal courts are asked to 'engage in appellate review of state court proceedings,' the doctrine necessarily applies ...In determining whether a plaintiff asks for appellate review, [the lower federal courts] look to the relief sought...or asks the question whether the plaintiff alleges 'that the state court's judgment actively caused him injury [rather than] merely failing to address a preexisting injury....
>
> The second category of cases barred by *Rooker-Feldman* are those which allege an injury that predates a state-court determination, but present issues inextricably intertwined with the claim asserted in the prior state court proceeding....'The federal claim is inextricably intertwined with the state-court judgment when the

> federal claim succeeds only to the extent that the state court wrongly decided the issues before it....'

DLX, Inc. v. Kentucky, 381 F.3d 511, 516 (6th Cir. 2004) (citations omitted). Where a federal complaint raises claims independent of, but in tension with, a state court judgment, the *Rooker-Feldman* doctrine "is not an impediment to the exercise of federal jurisdiction" simply because "the same or a related question was earlier aired between the parties in state court," and any tension created by the concurrent federal and state proceedings "should be managed through the doctrines of preclusion, comity, and abstention." *Thana v. Bd. of License Comm'rs for Charles Cty., Md.*, 827 F.3d 314, 320 (4th Cir. 2016) (internal quotation marks omitted).

While "the mere fact that a ruling favorable to [a] federal plaintiff may call into question the correctness of a state court judgment has no bearing on the federal court's jurisdiction over the plaintiff's claims under *Rooker-Feldman*," *Vicks v. Ocwen Loan Servicing, LLC*, 676 F. App'x 167, 169 (4th Cir. 2017)(citation omitted), here, *Rooker-Feldman* is inapposite, as the question of whether Plaintiff's property was subject to foreclosure is not related to whether Defendant properly serviced Plaintiff's loan under **RESPA**. Protesting the servicing of the loan is not an appeal of the foreclosure, nor are the two questions inextricably intertwined.

Applicability of RESPA to Defendant

***5** Next, Defendant claims that, because a foreclosure judgment had already been obtained before it received the **RESPA** notices from Plaintiff, it is not subject to **RESPA**. It is:

> Other courts have found that the language of **RESPA** and Regulation X contemplates post-judgment responsibilities of servicers. See *Loconsole v. Wells Fargo Mortgage*, 2018 WL 3158816 at *5-6 (D.N.J. June 28, 2018); *Mannarino v. Ocwen Loan Serv., LLC*, 2018 WL 1526558, at *4-5 (D.N.J. Mar. 28, 2018). Specifically, both courts cite to 12 C.F.R. § 1024.41(g), which states that under certain circumstances "a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale...". On this basis...courts found that **RESPA** does apply to post-judgment, pre-sale claims. See *Loconsole v. Wells Fargo Mortgage*, 2018 WL 3158816, at *6 (**RESPA's** loss mitigation procedures apply after entry of final judgment of foreclosure but before foreclosure sale); *Mannarino v. Ocwen Loan Serv., LLC*, 2018 WL 1526558, at *5 (regulations suggest servicer has [an] obligation to Plaintiff until judicial sale [is] completed; defendant's 'merger' theory lacks merit).
>
> This Court agrees with the analysis in *Mannarino* and *Loconsole*. As noted, adopting Wells Fargo's position that "servicing" under **RESPA** ceases post foreclosure judgment, and therefore there can be no "servicer" after that event would have the effect of making several regulations superfluous. In addition to § 1024.41(g), 12 C.F.R. § 1024.35(b)(10) lists "moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j)" as a covered notice of error requiring a response from the servicer. A foreclosure sale cannot occur absent a final judgment in foreclosure being entered. If the definition of "servicer" only extends to the date of the final judgment, as Wells Fargo submits, then there would be no need to enact any regulations related to foreclosure sales. It would be illogical to allow for a scenario where a borrower submits a notice of error regarding a foreclosure sale under the plain, unambiguous language of § 1024.35(b)(10), which explicitly contemplates and allows for such a request, only to find that there is no "servicer"
>
> who would be required to comply under **RESPA**. Because foreclosure sales are referenced, the only reasonable reading of the regulations is that a party must still be considered a "servicer" up to at least that point, despite the entry of a final judgment in foreclosure.

In re Rosa, No. 17-27826 (CMG), 2018 WL 4352168, at *4–5 (Bankr. D.N.J. Aug. 9, 2018). This Court also agrees. Defendant is subject to **RESPA** at least until the foreclosure sale.

Is Defendant a Servicer

Next, Defendant asserts PNC is not subject to **RESPA** because it is not a "servicer" of the loan. PNC reasons it was no longer servicing the property after the judgment of foreclosure was entered by the state court on July 9, 2016.

As noted above, the "position that 'servicing' under **RESPA** ceases post foreclosure judgment, and [that] therefore there can be no 'servicer' after that event would have the effect of making several regulations

superfluous....If the definition of 'servicer' only extends to the date of the final judgment,..., then there would be no need to enact any regulations related to foreclosure sales. Because foreclosure sales are referenced, the only reasonable reading of the regulations is that a party must still be considered a 'servicer' up to at least that point, despite the entry of a final judgment in foreclosure." *In re Rosa*, No. 17-27826 (CMG), 2018 WL 4352168, at *4–5 (Bankr. D.N.J. Aug. 9, 2018).

RESPA Violation

***6** Finally, Defendant asserts its actions did not violate **RESPA**. It reasons 12 CFR § 1024.35(d) requires a servicer who receives a notice of error to acknowledge receipt of the notice of error within five days and to provide the requested information by a certain date. *Genid v. Fannie Mae*, 2016 U.S. Dist. LEXIS 100896 at * 7-8. There are similar, though slightly different, requirements for Requests for Information. Id.

PNC asserts it responded directly to Plaintiff because its records did not reflect that the Dann Law Firm was authorized to receive information regarding Plaintiff's mortgage loan and account and because the name on the authorization reflected a different name than in PNC's system. (Id. at ¶ 11 (Exhibit 4 to Thomas Aff.)). PNC sent responses to Requests for Information 1 and 2 in correspondence dated January 13, 2017. (Id.). The law firm, Laurito & Laurito, LLC, PNC's foreclosure counsel, responded to Request for Information 3 in a letter dated January 12, 2017. (Exhibit F, Affiavit of Joshua J. Epling, sworn to on May 31, 2018 at ¶ 4). Both responses to the Requests for Information were sent to Plaintiff at the Bristol Dr. Property address. (Exhibit B, Thomas Aff. at ¶ 11; Exhibit F, Epling Aff. at ¶ 4). PNC received the correspondence identified as a Notice of Error dated February 7, 2017. PNC sent the February 22, 2017 response to Plaintiff at the Bristol Dr. Property.

RESPA's implementing regulations at 12 C.F.R. § 1024.36(d)(1)(i) provide that "except as provided in paragraphs (e) and (f) of this section, a servicer must respond to a request for information by...providing the borrower with the requested information and contact information, including a telephone number, for assistance in writing." While 12 C.F.R. § 1024.36(d)(1)(i) does not define what "providing the borrower" means, the Mortgage for the Property does. Paragraph (O) of the Mortgage incorporated **RESPA** into the Mortgage Loan between Plaintiff

and Defendant. See Exhibit B-2, ECF 36-1 at 21, Page ID 601. Paragraph 15 of the Mortgage

provides for the sending of Notices by the Lender to the Borrower:

> "All notices given by the Borrower or lender in connection in this Security Instrument must be in writing. Any notice to Borrower in connection with this security instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means...The notice address shall be the Property Address unless Borrower has designated a substitute notice address by Notice to Lender….There may be only one designated Notice address under this Security Instrument at any one time....If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the correspondence requirement under this Security Instrument."

ECF 36-1, at 29, Page ID 608. While Plaintiff requested that notices be sent to her attorney, the January 12, 2017 letter, the January 13, 2017 letter, the February 22, 2017 and the March 29, 2017 letter by the Affiant of the Defendant's own admissions were each sent to the Plaintiff at her current Bristol Ave. address, which is not the Argella Ave. Property Address.

Use of legally designated addresses is essential to fulfilling **RESPA** duties. See *Best v. Ocwen Loan Servicing, LLC*, No. 16-1217, 2016 WL 10592245, at *2 (6th Cir. Nov. 29, 2016) ("a servicer may designate an exclusive address for the receipt of **QWRs**. *See* 12 C.F.R. §§ 1024.35(c) and 1024.36(b). A servicer is not obligated to respond to **QWRs** sent to an address other than the designated **QWR** address. *Berneike*, 708 F.3d at 1149; *Roth*, 756 F.3d at 181-82."). PNC, by its own admission, did not fulfill its **RESPA** duties.

Damages

***7** Defendant's final contention is that Plaintiff has no recoverable actual damages for Counts Six through Eleven. Plaintiff is seeking (1) actual damages in excess

of $42,023.36, costs, and reasonable attorneys' fees and (2) statutory damages of "*no less than*" $2,000.00 for each violation of Regulation X of **RESPA**. ECF 1 at 48, Page ID 48 (emphasis added).

RESPA makes violators liable to individual borrowers for "(A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount *not to exceed $2,000*." 12 U.S.C. § 2605(f)(1) (emphasis added).

Recovery under **RESPA** requires more than establishing a violation; a plaintiff also must suffer actual, demonstrable damages that occurred "as a result of" that specific violation. See *Tsakanikas v. JP Morgan Chase Bank N.A.*, No. 2:11-CV-888, 2012 WL 6042836, at *4 (S.D. Ohio Dec. 4, 2012); see also *Eichholz v. Wells Fargo Bank, NA*, No. 10–cv–13622, 2011 WL 5375375, at *5 (E.D. Mich. Nov.7, 2011) (quoting 12 U.S.C. § 2605(f)(1)(A)); accord *Webb v. Chase Manhattan Mortg. Corp.*, No. 2:05–CV–0548, 2008 WL 2230696, at *14 (S.D. Ohio May 28, 2008).

Initially, the Court notes that the statute caps statutory damages for a pattern and practice of violations at $2,000. Next, Plaintiff concedes she is not entitled to receive any actual damages related to the foreclosure action itself. Plaintiff, by dismissing Counts One through Five, which alleged violations that occurred during the foreclosure, explicitly denied those claims. According to Plaintiff, Counts Six through Eleven show violations for which Plaintiff is seeking relief that "all occurred after the Order for Sheriff Sale occurred and are separately actionable." ECF 42, PageID 1195. "Counts Six through Eleven arise out of a complete separate occurrence than the merits of the foreclosure: the failure to properly service the mortgage. The claims have no direct effect on the ownership of the real property." ECF 42, PageID 1196. Unfortunately for Plaintiff, as discussed above, after the sheriff sale Defendant was no longer servicing the loan.

Additionally, Plaintiff asserts that due to the Defendant's actions, Plaintiff has been forced to incur expenses and damages by having "to hire counsel to send Requests for Information and Notices of Error under **RESPA** in an attempt to discover what went awry in the application process and to attempt to amicably resolve any errors." ECF 1, PageID 12, ¶ 72.

This Court joins the chorus rejecting damages based upon seeking to initially assert **RESPA** rights, prior to any possible violation of **RESPA**:

> "the costs incurred while preparing a qualified written request for information from a servicer cannot serve as a basis for damages because, at the time those expenses are incurred, there has been no **RESPA** violation."[*Zaychick v. Bank of Am., N.A.*, No. 9:15-CV-80336, 2015 WL 4538813 (S.D. Fla. July 27, 2015)], (citing *Steele v. Quantum Serv. Corp.*, 12–CV–2897, 2013 WL 3196544 (N.D. Tex. June 25, 2013)). To hold otherwise would negate the element of actual damages entirely, for "every **RESPA** claim [would have] damages built-in to the claim." *Id.* (citing *Lal v. Amer. Home Serv., Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010)); cf. *Burdick v. Bank of Am.*, No. 14–62137–CIV, 140 F. Supp. 3d 1325, 1331-32, 2015 WL 4555239, at *5 (S.D. Fla. July 28, 2015) (citing *Cezair v. JPMorgan Chase Bank, N.A.*, No. DKC 13–2928, 2014 WL 4295048, at *8 (D. Maryland Aug. 29, 2014)) (finding costs of post-violation communications recoverable under **RESPA**). The costs of sending the correspondence prior to the alleged **RESPA** violation may not serve as evidence of actual damages. See 12 U.S.C. § 2605(f)(1)(A) (allowing for recovery of "any actual damages to the borrower as a result of" the violation). As the record is devoid of damages bearing a causal relationship to Ocwen's purported failure to comply with 12 C.F.R. § 1024.35, an essential element of Plaintiffs' claim is lacking and no genuine issue of material fact exists.
>
> ***8** *Lage v. Ocwen Loan Servicing LLC*, 145 F. Supp. 3d 1172, 1197 (S.D. Fla. 2015), aff'd, 839 F.3d 1003 (11th Cir. 2016).

This leaves Plaintiff's last basis for damages as statutory damages if Defendant engaged in a pattern or practice of violations, which pattern Plaintiff would have the Court find in the instances contained in this case. That is insufficient:

> The phrase "pattern or practice" appears in many federal statutes, and "the words reflect only their usual meaning." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977). To show a pattern or practice, a plaintiff must show that noncompliance with the statute "was the company's standard operating procedure— the regular rather than the unusual

> practice." *Id.* at 336; *see Renfroe*, 822 F.3d at 1247 (discussing the meaning of "pattern or practice" in **RESPA**). Conduct that does not amount to a violation of **RESPA** may not be considered, because the statute requires "a pattern or practice of noncompliance with the requirements of this section." § 2605(f)(1)(B).
>
> [Plaintiff] did not produce evidence to support a finding of "pattern or practice" here. There was no evidence that [Defendant] failed to investigate and respond reasonably to qualified written requests from other borrowers. See *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d at 523.

Wirtz v. Specialized Loan Servicing, LLC, 886 F.3d 713, 720 (8th Cir. 2018). A plaintiff must allege some **RESPA** violations "with respect to other borrowers." *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 523 (10th Cir. 2013).

Indeed, even if Plaintiff could show a pattern or practice involving other borrowers, that would only get the Court to the point of determining if pattern-or-practice damages can stand alone without actual damages. See *Kantz v. Bank of Am., N.A*, No. 3:17-CV-00051, 2018 WL 1948164, at *6 (M.D. Tenn. Apr. 25, 2018)("Nor has Plaintiff demonstrated entitlement to statutory damages for "a pattern or practice of noncompliance" under subsection 2605(f)(1)(B). In order to recover statutory damages for a pattern or practice of noncompliance, a borrower must first recover actual damages.").

Motion for Sanctions

What remains, then, is resolution of Defendant's Motion for Sanctions. ECF 37. Therein, Defendant asserts that Plaintiff is subject to sanctions, essentially because Defendant's Motion for Summary Judgment is really, really, right. Defendant's motion failed at every step, but the last, and even there it did so amidst undeveloped case law that could have potentially lead to a different result in a just slightly different circumstance.

The Court reminds Defendant's counsel that a frivolous motion for sanctions is, in itself, sanctionable. See *Alliance to End Repression v. City of Chicago*, 899 F.2d 582, 583 (7th Cir. 1990) ("Hair-trigger motions for sanctions by lawyers who do not recognize [the difference between vigorous advocacy and frivolous conduct] are themselves sanctionable"). The motion for sanctions is denied.

Conclusion

Because Plaintiff suffered no damages and has no evidence of a pattern or practice of **RESPA** violations, Defendant PNC Bank, N.A.'s Motion for Summary Judgment, ECF 36, is **GRANTED**. Defendant's Motion for Rule 11 Sanctions, ECF 37, is **DENIED**. The Clerk is **ORDERED** to enter judgment in favor of Defendant and against Plaintiff. The instant case is **TERMINATED** from the dockets of the United States District Court, Southern District of Ohio, Western Division at Dayton

***9 DONE** and **ORDERED** in Dayton, Ohio, this Thursday, November 29, 2018.

s/Thomas M. Rose

THOMAS M. ROSE

UNITED STATES DISTRICT JUDGE

All Citations

Slip Copy, 2018 WL 6249989

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[Cite as *Rayco Mfg., Inc. v. Murphy, Rogers, Sloss & Gambel,* 2018-Ohio-4782.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106714

RAYCO MANUFACTURING, INC.

PLAINTIFF-APPELLANT/
CROSS-APPELLEE

vs.

MURPHY, ROGERS, SLOSS & GAMBEL, A PROFESSIONAL LAW CORPORATION, ET AL.

DEFENDANTS-APPELLEES/
CROSS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-815844

BEFORE: E.A. Gallagher, A.J., Stewart, J., and Boyle, J.

RELEASED AND JOURNALIZED: November 29, 2018

ATTORNEYS FOR APPELLANT/CROSS-APPELLEE

Robert D. Kehoe
Kevin P. Shannon
Kehoe & Associates, L.L.C.
900 Baker Building
1940 East Sixth Street
Cleveland, Ohio 44114

J. Douglas Drushal
Andrew P. Lycans
Critchfield, Critchfield & Johnston Ltd.
P.O. Box 599
225 N. Market Street
Wooster, Ohio 44691

Steven J. Shrock
Critchfield, Critchfield & Johnston Ltd.
138 E. Jackson Street
Millersburg, Ohio 44654

ATTORNEYS FOR APPELLEES MURPHY, ROGERS, SLOSS & GAMBEL, A PROFESSIONAL LAW CORPORATION, ROBERT H. MURPHY, PETER B. SLOSS, GARY J. GAMBEL AND DONALD R. WING

Ernest E. Vargo
Michael E. Mumford
Baker & Hostetler, L.L.P.
127 Public Square, Suite 2000
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEES/CROSS-APPELLANTS CAVITCH, FAMILIO & DURKIN CO., L.P.A., DOUGLAS A. DIPALMA, MICHAEL C. COHAN AND ERIC J. WEISS

Timothy Brick
Gallagher Sharp L.L.P.
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115

Steven D. Strong
Gallagher Sharp L.L.P.

35 North Fourth Street
Suite 200
Columbus, Ohio 43215

EILEEN A. GALLAGHER, A.J.:

{¶1} Plaintiff-appellant/cross-appellee Rayco Manufacturing, Inc. ("Rayco") appeals from the trial court's decision granting defendants-appellees/cross-appellants' (collectively, "appellees")[1] motion to enforce a settlement agreement that resolved legal malpractice claims Rayco had filed against appellees. Rayco contends that the trial court erred in finding that there was an enforceable settlement agreement. In their cross-appeal, appellees contend that the trial court erred in denying their request to recover the attorney fees they incurred to enforce the settlement agreement. For the reasons that follow, we affirm the trial court's decision to the extent that it grants appellees' motion to enforce the settlement agreement, reverse the trial court's decision to the extent that it denies appellees' motion for attorney fees and remand the case for further proceedings.

Factual Background and Procedural History

{¶2} In October 2013, Rayco filed a complaint against appellees for legal malpractice arising out of appellees' handling of a prior lawsuit Rayco had filed against Deutz Corporation and Deutz AG (collectively, "Deutz") for breach of warranty and other claims arising out of Deutz's sale of engines to Rayco. In that case, summary judgment was granted in favor of Deutz and affirmed by the United States Court of Appeals for the Sixth Circuit.

[1]Defendants-appellees/cross-appellants consist of Murphy, Rogers, Sloss & Gamble, A Professional Law Corporation; Robert H. Murphy, Peter B. Sloss, Gary J. Gambel and Ronald R. Wing (collectively, "Murphy"); Cavitch, Familo & Durkin Co., L.P.A., Douglas DiPalma, Michael C. Cohan and Eric J. Weiss (collectively, "Cavitch").

{¶3} In February 2015 and June 2016, the parties attempted to mediate their dispute with the assistance of a retired judge as the mediator. At the second mediation, Rayco authorized the mediator to convey a settlement demand of $3,050,000, in the aggregate, to appellees. At the conclusion of the second mediation, no agreement had been reached but efforts to settle the case continued.

{¶4} In July 2016, the mediator issued a written recommendation to the parties, recommending that they settle the case for $2,650,000 in the aggregate. Rayco's counsel advised the mediator that Rayco did not agree with the recommendation and that appellees would have to pay the full $3,050,000 it had demanded to settle the case. In September 2016, with the consent of all parties, the mediator met with Rayco's chief executive, John Bowling, to further discuss the possibility of resolving the case. After the meeting, the mediator continued to have settlement discussions with Rayco and its counsel by telephone.

{¶5} In the fall of 2016, several pretrial conferences were cancelled at the parties' request due to ongoing settlement negotiations. During this time period, one of Rayco's attorneys, Robert Kehoe, had discussions with appellees' counsel in which he reiterated that the only way to settle the case would be to pay Rayco's full settlement demand of $3,050,000. Given the amount of the demand, appellees needed to request additional authority from their insurance carriers to settle the case. To that end, in late 2016, Murphy's counsel and Cavitch's counsel separately requested written settlement demands from Rayco that they could submit to their insurance carriers. In January 2017, Cavitch's counsel emailed Attorney Kehoe inquiring about the status of the "demand letter" from Rayco. Attorney Kehoe replied that he was "working on it."

{¶6} On January 26, 2017, Attorney Kehoe sent letters to Murphy's counsel and Cavitch's counsel. He indicated that he was writing "to follow up on the June 23, 2016 mediation and

subsequent settlement discussions with [appellees' counsel] and the mediator." He stated that Rayco had authorized the mediator to convey a "firm demand" of $3,050,000 to settle the case and had "made it clear" that "$3,050,000 was an absolute aggregate amount necessary to settle the case." He further indicated that "[w]e have not explored the possibility of resolving Rayco's claims against [the Murphy and Cavitch appellees] independent[ly]" but that there was "enough insurance coverage" for appellees "[i]n combination" to "meet Rayco's demand."

{¶7} At a pretrial conference on January 30, 2017, the parties advised the trial court that settlement negotiations were ongoing. A month later, on February 23, 2017, one of Murphy's attorneys, Ernie Vargo, with the consent of Cavitch's counsel, sent an email to Rayco's counsel, stating as follows:

> This is in response to Rayco's offer of settlement as set forth in your letter of January 26, 2017 to me. Counsel for Cavitch indicates that he has received a substantively similar letter on behalf of the Cavitch firm and named attorneys.
>
> The Murphy firm, Cavitch firm, and named lawyers from each firm accept the collective settlement demand of $3,050,000 in the aggregate. This acceptance is conditioned upon a full release and dismissal and other customary provisions to be negotiated and memorialized in a formal settlement agreement. Defendants agree to provide the initial draft of the written agreement to you for comments. Please expect the draft within 14 days of this email.
>
> Thank you for your efforts in negotiating this resolution with us.

{¶8} Later that day, Attorney Kehoe responded to the email. He left a voicemail message for Attorney Vargo, thanking him and requesting that he return his call, indicating, "I'd like to talk to you briefly about the logistics and I note that you'll take the first cut at the settlement documents and have them in about 14 days, which is fine." The following day, another of Rayco's attorneys, J. Douglas Drushal, emailed Attorney Vargo. He thanked Attorney Vargo for his February 23,

2017 email and stated that "[i]f he has not done so yet, [Attorney Kehoe] will be in touch shortly with how we would like to proceed to finalize things."

{¶9} On March 2, 2017, Attorney Drushal emailed appellees' counsel, stating, "I believe we are waiting for the final versions of what your side wants signed in the way of releases, etc. before presenting the package to Rayco. We need to know every detail before we can finalize. Anything you could do to expedite that would be helpful. Thanks."

{¶10} On March 7, 2017, Murphy's counsel emailed "defendants' draft settlement agreement and release" to Rayco's counsel. Murphy's counsel also inquired whether the parties should notify the court that they had "an agreement in principle" given that a pretrial conference was scheduled with the trial court for the following day. Attorney Drushal responded: "Agree that we should contact [the] court and say we don't need the conference. I will defer to the rest of you to coordinate that, assuming all others concur." The trial court cancelled the March 8, 2017 pretrial conference at the parties' request.

{¶11} On March 10, 2017, Attorney Kehoe forwarded a red-lined version of the settlement agreement "with suggested changes from Plaintiff's counsel" along with a proposed dismissal entry. The suggested changes included a mutual release provision, i.e., in addition to Rayco's release of its claims against Murphy and Cavitch, Murphy and Cavitch would release any claims they had against Rayco, and a provision that the trial court would retain jurisdiction over any disputes related to the settlement agreement. Attorney Kehoe stated: "Kindly review and let us know if [the suggested changes] are acceptable. If so, we will proceed to obtain our client's signature."

{¶12} Appellees' counsel made additional changes to the revised settlement agreement circulated by Rayco's counsel and sent a red-lined version of the document to Rayco's counsel on March 16, 2017.[2]

{¶13} On April 4, 2017, Attorney Kehoe left a voicemail message for Attorney Vargo. He indicated that "[t]he settlement document itself is fine" and that "[w]e had John [Bowling's] commitment to settle with the number that we agreed upon, but he's being a little bit difficult in getting the document signed."

{¶14} Rayco never signed the settlement agreement.

{¶15} On June 16, 2017, appellees filed a motion to enforce the settlement agreement. Appellees asserted that the parties had agreed to settle the case on February 23, 2017 but that Rayco refused to sign the settlement agreement. Appellees requested that the court enforce the settlement agreement and award them the attorney fees they incurred to enforce the settlement agreement.

{¶16} Rayco opposed the motion. It argued that there was no settlement agreement because, by the time appellees "accepted" the $3,050,000 settlement offer Rayco made at the June 2016 mediation, it had lapsed. Rayco further argued that its counsel's January 26, 2017 letters simply summarized the parties' past settlement positions and indicated Rayco's "willingness to re-open negotiations" and were not settlement offers.

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[2]All drafts of the settlement agreement exchanged between the parties, including the "final" version of the settlement agreement, included a "costs" provision that stated, "[t]he Parties shall bear their own costs, expenses, and attorney fees in connection with this agreement," and a "specific performance" provision that stated, "[t]he Parties agree that, in the event of a breach of the terms of this Agreement, there will be no adequate remedy at law to remedy such breach and, accordingly, the Parties agree that specific performance may be awarded to enforce the terms of this Agreement."

{¶17} The trial court held an evidentiary hearing on the motion to enforce the settlement. The hearing was held before an advisory jury, which the trial court empaneled, sua sponte, to address the issue of "whether the parties entered into a contract to settle the lawsuit."

{¶18} Attorney Vargo (one of Murphy's attorneys), Attorney Timothy Brick (one of Cavitch's attorneys), and two of Rayco's attorneys, Attorneys Kehoe and Drushal, testified at the hearing. The parties also submitted a joint stipulation of undisputed facts. The 38 facts to which the parties stipulated detailed the history of the parties' settlement negotiations and included 15 documents created or exchanged by the parties during the course of their settlement negotiations.[3]

{¶19} During their testimony, Attorneys Vargo and Brick "walked through" the parties' stipulations and incorporated exhibits. Appellees argued there were at least three potential "offers" and three potential "acceptances" that gave rise to an enforceable settlement agreement. Appellees argued that Rayco's counsel's January 26, 2017 letters to appellees' counsel constituted offers that appellees accepted by means of Attorney Vargo's February 23, 2017 email to Rayco's counsel. They argued that the subsequent conduct of counsel, i.e., exchanging drafts of the settlement agreement, constituted further evidence of the parties' agreement to settle the case. Alternatively, appellees argued that (1) Murphy's counsel's February 23, 2017 email constituted a counteroffer to settle the case for $3,050,000 that Rayco accepted (a) by means of Attorney Kehoe's voicemail message to Attorney Vargo later that day or (b) by means of the email Attorney Drushal sent to Attorney Vargo the following day or (2) Rayco's counsel submission of the revised

[3] Prior to the hearing the parties filed a joint motion for leave to file a stipulation of undisputed facts regarding appellees' motion to enforce the settlement agreement. In their joint motion, the parties asserted that there were no disputed questions of material fact relevant to the motion to enforce the settlement agreement, that an advisory jury was no longer necessary and that "[t]he sole remaining question is whether the undisputed facts give rise to a binding settlement agreement as a matter of law." The trial court denied the motion.

settlement agreement (which included mutual releases and other changes) to appellees' counsel on March 10, 2017 constituted an offer to settle the case for $3,050,000 that appellees accepted on March 16, 2017, when they made additional changes to the revised settlement agreement and returned the document to Rayco's counsel.

{¶20} Attorney Kehoe testified upon cross-examination. He acknowledged the "tru[th] and accura[cy]" of the facts set forth in the parties' joint stipulation and confirmed that he was authorized to enter into the stipulation on behalf of Rayco. He indicated that he sent the January 26, 2017 letters to appellees' counsel in response to their request for a written settlement demand and that Rayco had authorized him to send the letters. He further acknowledged receipt of Attorney Vargo's February 23, 2017 email, indicating that appellees agreed to pay the amount Rayco had demanded ($3,050,000 in the aggregate), that he understood the email was sent on behalf of both Murphy and Cavitch and that he and appellees' counsel thereafter exchanged various emails congratulating and thanking one another for "working so hard to get this done." Attorney Kehoe testified that after he received Attorney Vargo's February 23, 2017 email, he reported the settlement to Bowling. He indicated that Bowling accepted his congratulations on the settlement and did not dispute that the case had been settled or object to the settlement at that time. He further testified, however, that when Bowling was presented with the settlement documents, he was "unwilling to sign" them. According to Attorney Kehoe, Bowling told him that he believed the settlement of the lawsuit was like a real estate transaction, i.e., that the deal was not finalized and there was no settlement until he signed the written settlement agreement. Attorney Kehoe further testified, however, that he had fully intended to consummate a settlement through his communications with appellees' counsel.

{¶21} Attorney Drushal testified that he interpreted his co-counsel's January 26, 2017 letters not as a "renewed demand" or "offer that could be accepted" but rather, as a "recitation of the history of what had happened" and "as seeking an offer from the lawyers, law firms, and their insurance company which would be presented to Mr. Bowling to see if he would accept it at that point." He further testified that, as he communicated in his March 2, 2017 email, in his view, "everybody needed to sign off on" the final version of the agreement before the parties had a settlement.

{¶22} After the parties concluded their presentation of evidence and gave closing arguments, the advisory jury deliberated. Six interrogatories were submitted to the advisory jury. The advisory jury answered interrogatories indicating that the parties had entered into a settlement agreement and signed a verdict form in favor of appellees and against Rayco on the motion to enforce the settlement agreement.[4]

{¶23} After dismissing the jury, the trial court stated that "[b]ased upon the evidence hearing and having taken into consideration or under consideration the jury's verdict in this case, I find that the motion to enforce the settlement is well taken."

{¶24} On December 14, 2017, the trial court issued a written decision granting appellees' motion to enforce the settlement agreement. The trial court determined, "[b]ased upon all the evidence," that the parties had "a contract to settle with terms clear and enforceable," as a result of

[4] One of the trial court's November 9, 2017 journal entries states: "The jury answered interrogatories to the effect that the parties did enter into an enforceable settlement agreement and signed a verdict form in favor of the defendants." The interrogatories submitted to the advisory jury, the advisory jury's answers to those interrogatories and the jury's signed verdict form were not included in the record this court received on appeal. And the jury's answers to the interrogatories were not read into the record. Accordingly, we do not know what specific findings were made by the advisory jury.

Rayco's "acceptance" of appellees' February 23, 2017 "offer" to settle the case for $3,050,000. As the trial court explained:

> In this case, on February 23 the defendants unambiguously offered the plaintiff a settlement of $3,050,000 in exchange for a dismissal of all claims against all defendants. The plaintiff — through counsel but with the authority of Rayco's chief executive — accepted that offer as shown by trial counsel's February 23 voicemail and as further evidenced by: 1) plaintiff's co-counsel's email that same day, 2) the plaintiff's March 10 proposed release of all claims leaving the figure of $3,050,000 undisturbed and 3) the plaintiff's confirmation on April 4 that "the settlement document (release dated March 16 and drafted by the defendants) is fine" and that Bowling had previously accepted the proffered settlement.

The trial court ordered the parties to "conclude the settlement under the terms outlined in the March 16, 2017, written settlement agreement."

{¶25} The trial court, however, denied appellees' request to recover the attorney fees they had incurred to enforce the settlement agreement based on the "American rule," i.e., that each party to a lawsuit is responsible for its own attorney fees unless they agreed otherwise, had a statutory entitlement to attorney fees or the other party acted in bad faith. Because the parties did not agree to shift fees, because there was no applicable statute providing for the recovery of attorney fees and because there was "insufficient evidence of the reasons for, and nature of, Bowling's resistance to finalizing the settlement" to support a finding that Rayco acted in bad faith by refusing to finalize the settlement, the trial court held that appellees were not entitled to recover the attorney fees they incurred in enforcing the settlement agreement.

{¶26} Rayco appealed, raising the following three assignments of error for review:

I. The trial court erred in finding that there was an enforceable settlement agreement entered into by the parties.

II. The trial court erred by permitting appellees' counsel to testify in violation of the witness advocate rule.

III. The trial court erred in applying a preponderance of the evidence standard to determine whether there was an enforceable settlement agreement.

{¶27} Murphy and Cavitch cross-appealed, raising the following single assignment of error for review:

Whether the trial court erred as a matter of law when it failed to award appellees reasonable attorney fees incurred to enforce the settlement agreement.

{¶28} For ease of discussion, we address Rayco's assignments of error out of order.

Law and Analysis

Motion to Enforce Settlement Agreement

Standard of Review

{¶29} The standard of review applied when reviewing a ruling on a motion to enforce a settlement agreement depends on the question presented. If the question is a factual or evidentiary one, the reviewing court will not overturn the trial court's finding if there was sufficient evidence to support the finding. *Turoczy Bonding Co. v. Mitchell*, 8th Dist. Cuyahoga No. 106494, 2018-Ohio-3173, ¶ 15, citing *Chirchiglia v. Ohio Bur. of Workers' Comp.*, 138 Ohio App.3d 676, 679, 742 N.E.2d 180 (7th Dist.2000). If the issue is a question of contract law, the reviewing court must determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law. *Turoczy* at ¶ 15. Rayco raises both factual and legal issues in its appeal.

Requirements for an Enforceable Settlement Agreement

{¶30} A settlement agreement_is a contract designed to terminate a claim by preventing or ending litigation. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996). Like any other contract, it requires an offer, acceptance, consideration and mutual assent between two or more parties with the legal capacity to act. *See, e.g., Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16; *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997). For a contract to be enforceable, there must be a "meeting of the minds" as to the essential terms of the agreement. *Kostelnik* at ¶ 16-17. The essential terms of the agreement must be "'reasonably certain and clear'" and mutually understood by the parties. *Id.*, quoting *Rulli* at 376. As the Ohio Supreme Court explained in *Rulli*:

> "A court cannot enforce a contract unless it can determine what it is. * * * [The parties] 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."

Rulli, at 376, quoting 1 *Corbin on Contracts*, Section 4.1, at 525 (Rev.Ed.1993). The burden of establishing the existence and terms of a settlement agreement lies with the party who claims its exists. *Turoczy* at ¶ 19, citing *Nilavar v. Osborn*, 127 Ohio App.3d 1, 11, 711 N.E.2d 726 (2d Dist.1998).

{¶31} Once a settlement offer has been accepted, the settlement agreement is mutually binding; the settlement agreement cannot be set aside simply because one of the parties later changes its mind. *See, e.g., Turoczy* at ¶ 18 ("Once there is * * * a meeting of the minds, one cannot refuse to proceed with settlement due to a mere change of mind."), citing *Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34, 36-37, 470 N.E.2d 902 (1984); *Clark v. Corwin*, 9th Dist. Summit

No. 28455, 2018-Ohio-1169, ¶ 13 ("'[W]hen the parties agree to a settlement offer, [the] agreement cannot be repudiated by either party, and the court has the authority to sign a journal entry reflecting the agreement_and to enforce the settlement."); *Kostelnik*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, at ¶ 17 ("'[A]ll agreements have some degree of indefiniteness and some degree of uncertainty'"; however, "'people must be held to the promises they make.'"), quoting 1 *Corbin on Contracts*, Section 4.1 at 530 (Perillo Rev.Ed.1993). It is only where the parties intend that there will be no contract until the agreement is fully reduced to writing and executed that no settlement exists unless the final, written settlement agreement is signed by all of the parties. *PNC Mtge. v. Guenther*, 2d Dist. Montgomery No. 25385, 2013-Ohio-3044, ¶ 15. If a client authorizes its attorney to negotiate a settlement and the attorney negotiates a settlement within the scope of that authority, the client is bound by it. *See, e.g., Bromley v. Seme*, 2013-Ohio-4751, 3 N.E.3d 1254, ¶ 25 (11th Dist.) (" 'It is well-recognized that a party may be bound by the conduct of his or her attorney in reaching a settlement."), quoting *Saylor v. Wilde*, 11th Dist. Portage No. 2006-P-0114, 2007-Ohio-4631, ¶12. A party cannot avoid a settlement that was negotiated through counsel by claiming that his attorney lacked actual authority to enter into the settlement. *See, e.g., Fugo v. White Oak Condominium Assn.*, 8th Dist. Cuyahoga No. 69469, 1996 Ohio App. LEXIS 2725, 8-12 (June 27, 1996); *Klever v. Stow*, 13 Ohio App.3d 1, 4-5, 468 N.E.2d 58 (9th Dist.1983); *see also Argo Plastic Prods. Co. v. Cleveland*, 15 Ohio St.3d 389, 392-393, 474 N.E.2d 328 (1984).

The Existence of an Enforceable Settlement Agreement

{¶32} In its first assignment of error, Rayco contends that the trial court erred in finding that the parties entered into an enforceable settlement agreement because (1) the $3,050,000 settlement offer Rayco made at the June 2016 mediation had lapsed by the time appellees

purported to accept it and (2) its counsel's January 26, 2017 letters simply indicated Rayco's "willingness to re-open negotiations" and were not sufficiently "certain and clear regarding the settlement terms" to constitute a valid settlement offer. Rayco asserts that these letters simply summarized the parties' past settlement positions and made it clear that Rayco was still willing to consider settlement rather than specifying the terms upon which Rayco would settle the case. Rayco further contends that the letters could not be deemed settlement offers because they did not specifically allocate settlement amounts between Murphy and Cavitch and because they lacked "other essential settlement terms required to execute a proper settlement agreement."

{¶33} The trial court, however, did not find an enforceable settlement agreement based on the settlement demand Rayco made at the mediation or its counsel's January 26, 2017 letters to appellees' counsel. Rather, the trial court found that Murphy's counsel's February 23, 2017 email constituted an "unambiguous offer" to Rayco to settle the case for $3,050,000, which Rayco accepted when its counsel, Attorney Kehoe, left a voicemail message for Murphy's counsel later that day. The trial court found that the parties' agreement was "further evidenced" by (1) Attorney Drushal's February 24, 2017 email, (2) Rayco's counsel's circulation of its proposed revisions to the settlement agreement on March 10, 2017 leaving the figure of $3,050,000 undisturbed and (3) Attorney Kehoe's statement on April 4, 2017 that "the settlement document is fine" and that Bowling had previously agreed to the settlement.

{¶34} Accordingly, Rayco's first assignment of error is meritless.

Standard of Proof

{¶35} In its third assignment of error, Rayco contends that the trial court instructed the jury regarding, and itself applied, the wrong standard of proof. Rayco argues that if the trial court had properly instructed the jury that appellees needed to prove the existence of a settlement agreement

by clear and convincing evidence rather than a preponderance of the evidence, "the jury may well have ruled in Rayco's favor." Rayco further argues that "[t]o the extent the trial court acted independently of the advisory jury," the trial court erred in applying a preponderance of the evidence standard rather than a clear and convincing evidence standard in determining whether a settlement agreement existed.

{¶36} This was a bench trial with an advisory jury pursuant to Civ.R. 39(C)(1). The advisory jury in this case was not the factfinder. After receiving answers to interrogatories and the verdict from the advisory jury, the trial court made its own findings of fact and conclusions of law. As the trial court stated in its journal entry: "Based upon all the evidence, I find that there is a contract to settle with terms that are clear and enforceable." As such, any error in the trial court's instructions to the advisory jury was harmless.

{¶37} There is no indication in either the trial transcript or the trial court's decision what standard of proof the trial court applied in determining that a settlement agreement existed. As a general matter, "[a] presumption of regularity attaches to all judicial proceedings." *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 19. This presumption of regularity extends to the trial court's application of the correct burden of proof. Thus, we presume that the trial court applied the correct legal standard absent an affirmative demonstration otherwise. *See, e.g., In re Adoption of K.N.W.*, 4th Dist. Athens Nos. 15CA36 and 15CA37, 2016-Ohio-5863, ¶ 44; *Wilson v. Jones*, 3d Dist. Seneca No. 13-13-06, 2013-Ohio-4638, ¶ 28.

{¶38} Citing *Brilla v. Mulhearn*, 168 Ohio App.3d 223, 2006-Ohio-3816, 859 N.E.2d 578, ¶ 21 (9th Dist.), *Foor v. Columbus Real Estate Pros.com*, 5th Dist. Delaware No. 12 CAE 08 0063, 2013-Ohio-2848, ¶ 26, and *Ivanicky v. Pickus*, 8th Dist. Cuyahoga No. 91690, 2009-Ohio-37, ¶ 8, 13, Rayco contends that "[w]hen asked to enforce a settlement agreement," the "correct legal

standard" is whether the record contains clear and convincing evidence of both the terms of the settlement agreement and the parties' assent to those terms. Rayco further contends that since the trial court instructed the advisory jury that appellees needed to prove the existence of a settlement agreement by a preponderance of the evidence, we must assume that the trial court applied a preponderance of the evidence standard in determining that the parties had agreed to settle the case for $3,050,000.

{¶39} Following a thorough review of the record and the relevant case law, we cannot say that the trial court applied the wrong standard of proof in determining that a settlement agreement existed in this case. In the cases cited by Rayco, the evidence the court relied upon when referencing the clear and convincing evidence standard was evidence of an oral settlement agreement. *See Brilla* at ¶ 20-21 (observing that "a settlement agreement may be enforced regardless of whether it has been reduced to writing, as long as the terms of the agreement can be established by clear and convincing evidence" and concluding that an enforceable settlement agreement existed where, "even disregarding the magistrate's documentation of [the parties' settlement] agreement," it was clear to the court that the terms of the agreement and appellant's assent to those terms "may be established by clear and convincing evidence"), citing *Shetler v. Shetler*, 9th Dist. Wayne No. 00CA0070, 2001 Ohio App. LEXIS 2289, 3 (May 23, 2001) ("An oral settlement agreement 'can be enforced by the court in those circumstances where the terms of the agreement can be established by clear and convincing evidence.'"), quoting *Pawlowski v. Pawlowski*, 83 Ohio App.3d 794, 799, 615 N.E.2d 1071 (10th Dist.1992); *Foor* at ¶ 5, 26 (where during a telephone conversation, counsel agreed that the parties would each "walk away" but the parties did not mutually understand what that meant, court erred in finding that a "completed settlement agreement" was proven by clear and convincing evidence); *see also Cugini & Capoccia*

Builders, Inc. v. Tolani, 5th Dist. Delaware No. 15 CAE 10 0086, 2016-Ohio-418, ¶ 18 ("when the alleged settlement agreement is verbal and not written, the existence and the terms of such agreement must be established by clear and convincing evidence"); *Stanton v. Holler*, 7th Dist. Belmont No. 07 BE 29, 2008-Ohio-6208, ¶ 14 ("A settlement agreement that has not been reduced to writing may be enforced if its terms can be established by clear and convincing evidence.").

{¶40} In this case, by contrast, the purported settlement agreement is evidenced by writings on all sides, including the mutual exchange of drafts of the written settlement agreement that set forth the essential terms of the settlement.

{¶41} Further, in *Ivanicky*, although the appellant argued on appeal that the trial court had erred in enforcing appellee's motion to enforce settlement agreement because appellee did not offer clear and convincing evidence that an oral settlement agreement had been reached, this court held only that the trial court had erred in failing to hold an evidentiary hearing prior to confirming the settlement; it did not indicate what standard should be applied in determining whether an enforceable settlement agreement existed. *Ivanicky* at ¶ 8, 13.

{¶42} Particularly where, as here, there is written evidence of a settlement agreement, other courts — including this court — have indicated that a preponderance of the evidence standard applies in determining whether a settlement agreement exists. *See, e.g., Hillbrook Bldg. Co. v. Corporate Wings*, 8th Dist. Cuyahoga No. 68619, 1996 Ohio App. LEXIS 3854, 9-13 (Sept. 5, 1996) ("'Reduced to its simplest terms, a settlement agreement is a contract. The party asserting the contract (settlement agreement) must prove by a preponderance of the evidence the existence of the elements of the contract, including an offer, acceptance and consideration as to the existence of the contract and as to its terms.'"), quoting *Ohio State Tie & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App.3d 236, 456 N.E.2d 1309 (10th Dist.1982); *see also Sutter v. Henkle*, 3d Dist. Mercer

No. 10-15-14, 2016-Ohio-1143, ¶ 9; *Savoy Hospitality, LLC v. 5839 Monroe St. Assocs. LLC*, 6th Dist. Lucas No. L-14-1144, 2015-Ohio-4879, ¶ 26; *Burrell Indus. v. Cent. Allied Ents.*, 7th Dist. Belmont Nos. 96 BA 18 and 96 BA 25, 1998 Ohio App. LEXIS 6176, *12-13 (Dec. 15, 1998); *Rondy, Inc. v. Goodyear Tire Rubber Co.*, 9th Dist. Summit No. 21608, 2004-Ohio-835, ¶ 7; *State v. Lomaz*, 11th Dist. Portage Nos. 2002-P-0118, and 2003-P-0062, 2006-Ohio-3886, ¶ 48; *DSW, Inc. v. Zina Eva, Inc.*, S.D.Ohio No. 2:11-cv-0036, 2011 U.S. Dist. LEXIS 143377, *5 (Dec. 13, 2011), quoting *Ohio State Tie & Timber* ("Although there is some suggestion that if the agreement is oral only, the burden of proof is by clear and convincing evidence, * * * where there is a written agreement, the burden (under Ohio law) appears to be the same as in any other case based on breach of contract, and that is to 'prove by a preponderance of the evidence the existence of the elements of the contract, including offer, acceptance and consideration both as to the existence of the contract and as to its terms.'").

{¶43} In this case, however, regardless of whether a preponderance of the evidence or a clear and convincing evidence standard applies, a review of the record shows that the trial court's finding that the parties entered into an enforceable settlement agreement is supported by sufficient competent, credible evidence. Here, the material facts relating to the parties' settlement negotiations were undisputed. Based on the facts set forth in the parties' joint stipulation of undisputed facts, not only was there a clear offer and acceptance showing a mutual understanding of the essential terms, the parties thereafter confirmed their settlement agreement in various follow-up communications. The only evidence Rayco offered to refute the existence of a settlement agreement was Attorney Drushal's testimony that he believed "everybody needed to sign off" on the final version of the agreement before the parties had a settlement. However, that testimony was contradicted by (1) his co-counsel's April 4, 2017 voicemail message to Attorney

Vargo (in which Attorney Kehoe stated indicated that "[t]he settlement document itself is fine" and that "[w]e had John [Bowling's] commitment to settle with the number that we agreed upon, but he's being a little bit difficult in getting the document signed") and (2) Attorney Kehoe's testimony at the hearing that he had intended, by his words and actions, to consummate a settlement with appellees' counsel. Thus, the uncontroverted evidence in this case was not only sufficient to prove the existence of a settlement agreement by the greater weight of the evidence under a preponderance of the evidence standard but was also sufficient to produce a firm belief or conviction in the mind of the trier of fact as to the existence of a settlement agreement, so as to establish the existence of a settlement agreement under a clear and convincing evidence standard. *See In re Phillips*, 3d Dist. Marion Nos. 9-96-44, 9-96-45, and 9-96-46, 1997 Ohio App. LEXIS 1152, 4-8 (Mar. 13, 1997) (trial court's improper use of a lower standard of proof was harmless error where the evidence plainly demonstrated that the movant had proven its case by the requisite clear and convincing evidence).

{¶44} Accordingly, we overrule Rayco's third assignment of error.

The Witness-Advocate Rule

{¶45} In its second assignment of error, Rayco argues that the trial court erred by permitting appellees' counsel to testify at the hearing in violation of the "witness-advocate rule." The "witness-advocate rule" is based on Ohio R.Prof.Cond. 3.7(a). That rule provides:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case;
>
> (3) the disqualification of the lawyer would work substantial hardship on the client.

{¶46} Prof.Cond.R. 3.7(a), however "does not render a lawyer incompetent to testify as a witness on behalf of his client. Rather, * * * the [r]ule functions to allow the court to exercise its inherent power of disqualification to prevent a potential violation of [the ethics rules]." *Damron v. CSX Transp., Inc.*, 184 Ohio App.3d 183, 2009-Ohio-3638, 920 N.E.2d 169, ¶ 39 (2d Dist.); *see also Mentor Lagoons, Inc. v. Rubin*, 31 Ohio St.3d 256, 258-259, 510 N.E.2d 379 (1987) (noting that the "Code of Professional Responsibility 'does not delineate rules of evidence but only sets forth strictures on attorney conduct'" and that "[w]hen an attorney seeks to testify, his employment as counsel goes to the weight, not the competency, of his testimony"), quoting *Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp.*, 546 F.2d 530, 539 (3d Cir. 1976). In *Mentor Lagoons*, the Ohio Supreme Court, applying the disciplinary rules then in place, set forth a procedure for courts to follow in determining whether a lawyer can serve as both an advocate and a witness. *Mentor Lagoons* at paragraph two of the syllabus; *see also 155 N. High, Ltd. v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 427-428, 650 N.E.2d 869 (1995). As the Second District explained in *Damron*, when applying that procedure in the context of the subsequently adopted Ohio Rules of Professional Conduct:

> In determining whether a lawyer can serve as both an advocate and a witness, a court must first determine the admissibility of his testimony without reference to the Disciplinary Rules. If the court finds the testimony admissible, and a party or the court moves for the attorney to withdraw or be disqualified, the court must then consider whether any exceptions to Prof.Cond.R. 3.7(a) apply to permit the attorney to both testify and continue representation.

Id. at ¶ 39. Where a party moves for disqualification, the moving party bears the burden of proving that disqualification is necessary. *McCormick v. Maiden*, 6th Dist. Erie No. E-12-072, 2014-Ohio-1896, ¶ 11, citing *Baldonado v. Tackett*, 6th Dist. Wood No. WD-08-079,

2009-Ohio-4411, ¶ 20. The burden of proving that one of the exceptions in Prof.Cond.R. 3.7(a)(1)-(3) applies falls upon the attorney seeking to claim the exception. *McCormick* at ¶ 11.

{¶47} In this case, the trial court was not asked to exercise its "inherent power of disqualification" to prevent a potential violation of the Rules of Professional Conduct. Instead, after appellees' counsel conducted voir dire, gave their opening statements and called their first witness — Attorney Vargo — Rayco's counsel objected to his testimony based on the witness-advocate rule.

{¶48} It should have come as no surprise that counsel for appellees would testify at the evidentiary hearing. This is not a case in which the testimony presented could have been elicited by other means. Aside from the mediator and the clients themselves, who were not directly involved in the settlement negotiations after the parties stopped working with the mediator, the only persons with personal knowledge regarding the parties' settlement negotiations were the parties' attorneys. Although the parties had attempted to avoid having their attorneys testify by submitting a joint motion for leave to file stipulation of undisputed facts regarding defendants' motion to enforce settlement agreement, the trial court denied their request to have appellees' motion decided based on the stipulation.

{¶49} As explained in the comments to Prof.Cond.R. 3.7, the rationale for the advocate-witness rule is as follows:

> The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Comment 2, Prof.Cond.R. 3.7.

{¶50} Rayco argues that it was prejudiced by appellees' counsel serving as both witnesses and advocates at the hearing because it enabled appellees' counsel to refer to their own testimony during closing arguments and urge the jury to accept their recitation of the facts — in essence vouching for "the truthfulness of their own testimony."

{¶51} However, in this case, the jury had only an advisory role. The advisory jury gave its "advice," based on its view of the evidence, to the trial court, but its decision was not binding on the trial court. The trial court was required to make its own independent findings of fact and conclusions of law as if there had been no verdict from the advisory jury. The trial court was well aware of the different roles assumed by appellees' counsel at the hearing and was not likely to be confused or misled by the lawyers' dual capacities. *See Michael P. Harvey Co., L.P.A. v. Ravida*, 2012-Ohio-2776, 972 N.E.2d 1087, ¶ 5 (8th Dist.) (noting that "[t]he concerns expressed in the comments to Prof.Cond.R. 3.7(a)(2)" had "no applicability" where the case was tried to the court, the court "fully understood" that lawyer was acting pro se and "should have been able to distinguish between his role as advocate and his role as a witness without the same risk of confusion that might have been present had the case been tried to a jury").

{¶52} Further, the matters as to which appellees' counsel testified were not in dispute. *See* Prof.Cond.R. 3.7(a)(1). Appellees' counsel's testimony tracked the stipulation of undisputed facts the parties had jointly submitted and admitted into evidence at the hearing. When testifying on cross-examination, Attorney Kehoe acknowledged that 95 percent of appellees' counsel's testimony was "substantively accurate" and that the "few details around the edges that [he] might * * * state differently" were not material.

{¶53} Accordingly, Rayco was not prejudiced by appellees' attorneys' testimony and the trial court did not abuse its discretion or otherwise err in permitting appellees' attorneys to testify at the hearing. *See Erie Air Conditioning & Heating, Inc. v. S.C. Co.*, 8th Dist. Cuyahoga No. 63216, 1993 Ohio App. LEXIS 3652, 19-22 (July 22, 1993) (trial court did not abuse its discretion in failing disqualify plaintiff's counsel or in allowing plaintiff's counsel to testify in defense of counterclaim and in rebuttal of defendants' case-in-chief where motion to disqualify counsel was filed on the eve of trial and to have prevented counsel from testifying would have worked a substantial hardship on the client given counsel's unique role in the contested dealings). Rayco's second assignment of error is overruled.

Request for Attorneys' Fees Incurred to Enforce the Settlement Agreement

{¶54} In their cross-assignment of error, appellees contend that the trial court erred in denying their request for an award of the reasonable attorney fees they incurred to enforce the parties' settlement agreement. We agree.

{¶55} Ordinarily, the decision whether to award attorney fees is within the sound discretion of the trial court. *See, e.g., Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15, citing *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991); *Buck v. Pine Crest Condominium Assn. Group D-E-F*, 8th Dist. Cuyahoga No. 97861, 2012-Ohio-5722, ¶ 27. Absent a clear abuse of that discretion, the trial court's decision should not be reversed. An abuse of discretion implies that a decision is unreasonable, arbitrary, or unconscionable. It may be found where the trial court applies the wrong legal standard, misapplies the correct legal standard or relies on clearly erroneous findings of fact. *Resco Holdings, L.L.C. v. AIU Ins. Co.*, 8th Dist. Cuyahoga No. 106234, 2018-Ohio-2844, ¶ 13; *Thomas* at ¶ 15.

{¶56} Public policy strongly favors the enforcement of settlement agreements. *See, e.g., Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 36, 38, 285 N.E.2d 324 (1972) ("'The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation. * * * The resolution of controversies * * * by means of compromise and settlement * * * results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole.'"), quoting 15 American Jurisprudence 2d, Compromise and Settlement, Section 4 at 938; *Turoczy*, 8th Dist. Cuyahoga No. 106494, 2018-Ohio-3173, at ¶ 16 ("Settlement agreements are generally favored in the law."); *see also Fugo*, 8th Dist. Cuyahoga No. 106469, 1996 Ohio App. LEXIS 2725, at 10 ("public policy strongly favors the enforcement of settlements freely arrived at").

{¶57} Ohio follows the "American rule," which provides that a prevailing party in a civil action may not generally recover their attorney fees as part of the costs of litigation unless attorney fees are provided for by statute, the non-prevailing party acts in bad faith or there is an enforceable contract that specifically provides for the losing party to pay the prevailing party's attorney fees. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. Appellees do not contend that any of these exceptions apply here.

{¶58} Rather, appellees argue that, notwithstanding the American rule, they are entitled to recover the reasonable attorney fees they incurred in enforcing the parties' settlement agreement as compensatory damages for Rayco's breach of the settlement agreement.

{¶59} This court previously addressed the issue of whether a party can recover attorney fees as compensatory damages for breach of a settlement agreement in *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318 (8th Dist.).

{¶60} In *Berry*, an employee, Berry, filed suit against his supervisor and employer, Wachovia Securities ("Wachovia"), alleging that Wachovia breached an agreement to pay the full amount of Berry's share of an arbitration award that had been entered against Berry in an arbitration between Berry and his former employer, Merrill Lynch. *Id.* at ¶ 1. The arbitration panel awarded Merrill Lynch $250,000 on its claims against Berry and awarded Berry $125,000 on his claim against Merrill Lynch. *Id.* at ¶ 2. Wachovia paid the $250,000 judgment against Berry. *Id.* at ¶ 3. Berry endorsed the $125,000 check he received from Merrill Lynch and gave it to his Wachovia branch manager with a note requesting that the check be placed on deposit "to offset the interest due on our contract" and indicating that "[t]he $125,000 is to be returned on demand." *Id.* at ¶ 3-4. The check was deposited into a Wachovia account dedicated to legal settlements. Berry later asked to have the check returned to him but Wachovia refused to return it. *Id.* at ¶ 5. Wachovia filed a counterclaim, alleging that Berry had breached an agreement that he would reimburse Wachovia for certain of the amounts it had paid to Merrill Lynch in satisfaction of the arbitration award. *Id.* at ¶ 1, 6. It sought to recover as damages the attorney fees it would be required to expend to enforce the agreement. *Id.* at ¶ 6.

{¶61} At trial, the issue was whether the parties had agreed that the sum Berry received from Merrill Lynch would be set off against the $250,000 Wachovia paid to Merrill Lynch to satisfy the judgment against Berry. *Id.* at ¶ 7. In its closing argument, Wachovia asked the jury to "return an award * * * for $133,691 which is the amount of the fees and expenses we've incurred in defending the case." *Id.* at ¶ 34. The jury found against Berry on all of his claims and in favor of Wachovia on its counterclaim; it awarded Wachovia $432,000 in damages for the attorney fees Wachovia incurred in enforcing the settlement agreement. *Id.* at ¶ 8.

{¶62} Berry appealed to this court, asserting, among other arguments, that the award of attorney fees to Wachovia violated the "American Rule." *Id.* at ¶ 18-19. This court disagreed. It held that Berry had breached the settlement agreement when he filed suit against Wachovia, seeking the return of the $125,000. *Id.* at ¶ 15. It further held that the attorney fees Wachovia incurred to enforce the settlement agreement were recoverable as compensatory damages resulting from Berry's breach of their agreement. *Id.* at ¶ 19-20. As the court explained:

> Ohio adheres to the rule that "a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation." *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009 Ohio 306, 906 N.E.2d 396, at ¶ 7. However, attorney fees are allowed as compensatory damages when the fees are incurred as a direct result of the breach of a settlement agreement. *See Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. No. OT-09-026, 2010-Ohio-4714, ¶ 34; *Tejada-Hercules v. State Auto. Ins. Co.*, 10th Dist. No. 08AP-150, 2008-Ohio-5066, ¶ 10. The rationale behind the exception for allowing attorney fees expended as a result of enforcing a settlement agreement is that "any fees incurred after the breach of the settlement agreement were relevant to the determination of compensatory damages, including those fees [a party was] 'forced' to incur by filing the action." *Tejada-Hercules* at ¶ 10.
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> The legal fees awarded in this case were the measure of compensatory damages directly related to Wachovia's need to enforce the settlement agreement. The court did not err by awarding Wachovia its attorney fees as compensatory damages.

Id. at ¶ 19-20. Because it found the jury's damages award to be "plainly excessive," the court gave Wachovia the option of accepting a remittitur of the damages award to $133,691 – the amount that Wachovia requested and proved at trial — or a new trial. *Id.* at ¶ 44, 46.

{¶63} Thus, under *Berry*, where a party breaches a settlement agreement to end litigation and the breach causes a party to incur attorney fees through continued litigation to enforce the settlement agreement, those fees are recoverable as "compensatory damages" for breach of the settlement agreement. Because the attorney fees sought in that context are regarded as compensatory damages — rather than as costs of litigation to remedy a breach of contract — the

American rule does not preclude their recovery even where none of the other exceptions to the American rule applies. *See also Shelly Co. v. Karas Properties*, 8th Dist. Cuyahoga No. 98039, 2012-Ohio-5416, ¶ 41 (observing that "[c]ourts often award attorney fees incurred after the breach of a settlement agreement because 'when a party breaches a settlement agreement to end litigation and the breach causes a party to incur attorney fees in continuing litigation, those fees are recoverable as compensatory damages in a breach of settlement claim,'" but concluding that *Berry* did not apply because cross-appellant's breach of contract claim did not involve a settlement agreement), quoting *Shanker v. Columbus Warehouse Ltd. Partnership*, 10th Dist. Franklin No. 99AP-772, 2000 Ohio App. LEXIS 2391 (June 6, 2000). *Berry* is consistent with the strong public policy that exists in encouraging settlements and enforcing settlement agreements.

{¶64} A number of cases from other jurisdictions are in accord. *See, e.g., Brown v. Spitzer Chevrolet Co.,* 5th Dist. Stark No. 2012 Ca 00105, 2012-Ohio-5623, ¶ 19-21; *Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. Ottawa No. OT-09-026, 2010-Ohio-4714, ¶ 33-34; *State ex rel. Ohio AG v. Tabacalera Nacional, S.A.,* 10th Dist. Franklin No. 12AP-606, 2013-Ohio-2070, ¶ 34-35; *Tejada-Hercules v. State Auto. Ins. Co.*, 10th Dist. Franklin No. 08AP-150, 2008-Ohio-5066, ¶ 9-11; *Shanker v. Columbus Warehouse Ltd. Partnership,* 10th Dist. Franklin No. 99AP-772, 2000 Ohio App. LEXIS 2391, 11-15 (June 6, 2000); *Myron C. Wehr Props., L.L.C. v. Petraglia*, 2016-Ohio-3126, 65 N.E.3d 242, ¶ 36, 38 (7th Dist.)*; see also Rohrer Corp. v. Dane Elec Corp. USA*, 482 Fed.Appx. 113, 115-117 (6th Cir.2012) ("Ohio law allows a court to award attorney's fees as compensatory damages when a party's breach of a settlement agreement makes litigation necessary, even where none of the exceptions to the American Rule have been shown."); *Wilson v. Prime Source Healthcare of Ohio*, N.D.Ohio No. 1:16-cv-1298, 2018 U.S. Dist. LEXIS 34445, 8-9 (Mar. 2, 2018) (Where a settling party forces the other party to litigate a motion to

enforce the settlement, the party forced to enforce the settlement agreement is entitled to attorney fees stemming from the additional litigation as compensatory damages). *But see Mayfran Internatl. v. May Conveyor, Inc.*, 8th Dist. Cuyahoga No. 62913, 1993 Ohio App. LEXIS 3511, 15 (July 15, 1993) (reversing trial court's award of attorney fees as compensatory damages for breach of settlement agreement, reasoning that "absent a statutory provision, a prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed was found to have acted in bad faith").

{¶65} The trial court did not address *Berry* in its decision below[5] and Rayco does not address this aspect of *Berry* in its brief.[6] Instead, Rayco cites *Kornick v. Zomparelli*, 8th Dist. Cuyahoga Nos. 53599, 53875, 1988 Ohio App. LEXIS 896, 9 (Mar. 17, 1988), for the proposition that "[t]he Eighth District has specifically recognized that the American Rule applies to actions seeking to enforce a settlement agreement," and *Mayfran* at 15, *Doss v. Cleveland*, 8th Dist. Cuyahoga No. 1995 Ohio App. LEXIS 659 (Feb. 23, 1995), and *Ludwinski v. Seven Hills*, 8th Dist. Cuyahoga No. 52416, 1987 Ohio App. LEXIS 8659, 10-11 (Sept. 10, 1987), for the proposition that "in the absence of a finding of bad faith, a trial court commits reversible error in awarding attorney fees on a motion to enforce a settlement agreement."

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[5]The trial court did, however, address *Shanker v. Columbus Warehouse Ltd. Partnership*, 10th Dist. Franklin No. 99AP-772, 2000 Ohio App. LEXIS 2391 (June 6, 2000). The trial court refused to apply *Shanker*, concluding that to "adopt[] the *Shanker* rationale," would "nullify the American rule."

[6]Although Rayco cites *Berry* in its brief, it does so only for the proposition that a party seeking to recover legal fees must offer evidence showing the fees charged, the reasonableness of the fees charged and the number of hours worked. At oral argument, for the first time, Rayco attempted to distinguish *Berry* on the ground that, in *Berry*, Wachovia was forced to litigate the existence of the settlement agreement in a separate action rather than by filing a motion to enforce settlement in a pending action. It also argued that the award of attorney fees in *Berry* could be interpreted as an award based on Berry's bad faith in breaching the settlement agreement. Finally, it argued that to the extent *Berry* conflicts with *Mayfran. Mayfran* is controlling over *Berry* because *Mayfran* was decided first. Rayco's arguments are not persuasive.

Likewise, other than a brief discussion of *Kornick*, appellees failed to distinguish or otherwise address any of the authorities cited by Rayco on this issue in their brief.

{¶66} In *Kornick*, although the court acknowledged the "general rule" that "attorney fees are not recoverable in contract actions unless there has been a showing of bad faith or wrongful motives," it affirmed the trial court's award of $225 in attorney fees to appellees for appellant's breach of a settlement agreement, reasoning that the award was "justified" "[g]iven appellees' attempts to personally enforce the agreement as well as the necessity to seek the court's assistance in that same regard." *Id.* at 9. It is unclear from the court's decision whether it found that the evidence of failed "attempts to personally enforce the agreement" and "necessity to seek the court's assistance" was sufficient to support an award of attorney fees based on "bad faith or wrongful motives" or whether it recognized another exception to the general rule where a party incurs attorney fees to enforce a settlement agreement.

{¶67} In *Doss*, appellants argued that they were entitled to recover their attorney fees because appellee's failure to timely credit their benefits constituted bad faith — of which the court found no evidence — not as compensatory damages incurred to enforce the parties settlement agreement. *Id.* at 2, 4-6. Similarly, in *Ludwinski*, this court found that the trial court did not abuse its discretion in denying appellant's request for attorney fees after certain appellees "reneged" on a settlement agreement. This court noted that although the trial court enforced the settlement, it found the appellees' conduct to be "just" in light of the fact that the trial court had dismissed the case based on appellant's failure to file preliminary judicial title reports. *Id.* at 10-11. No argument appears to have been made, and the court did not otherwise address, whether attorney fees incurred in enforcing a settlement agreement could be recovered as compensatory damages.

{¶68} *Stringer v. Dept. of Health-Ohio*, 8th Dist. Cuyahoga No. 102166, 2015-Ohio-2277, ¶ 5-6. *Simmons v. Lee*, 8th Dist. Cuyahoga No. 103108, 2016-Ohio-25, ¶ 16, and *State ex rel.*

Delmonte v. Woodmere, 2005-Ohio-6489, ¶ 53 — the additional authorities upon which Rayco relies for its argument that the trial court did not abuse its discretion in denying appellees' request for attorney fees — are likewise distinguishable.

{¶69} In *Stringer*, the attorney fee issue was not raised on appeal. In *Simmons*, this court held that the trial court acted within its discretion in denying appellant's motion for attorney fees based on his alleged untimely receipt of settlement proceeds from the estate, because (1) there was no evidence in the record that the administrator "acted in bad faith, vexatiously, wantonly, or for oppressive reasons"; (2) the alleged delay in appellant's receipt of the settlement proceeds was "nonexistent"; (3) appellant was the last party to sign the settlement agreement and (4) in signing the agreement, he agreed that all pending motions were withdrawn as moot. *Simmons* at ¶ 5, 15-16. Once again, no argument appears to have been made, and the court did not otherwise address, whether attorney fees incurred in enforcing a settlement agreement could be recovered as compensatory damages.

{¶70} In *Delmonte*, the village of Woodmere sought to recover its attorney fees under R.C. 2323.51, the frivolous conduct statute, after appellee breached a settlement agreement. *Delmonte* at ¶ 52-56. There is no claim or argument in this case that appellees are entitled to attorney fees under the frivolous conduct statute.

{¶71} We acknowledge that a panel of this court reached a different result in *Mayfran*, 8th Dist. Cuyahoga No. 62913, 1993 Ohio App. LEXIS 3511. However, that decision, unlike *Berry*, is not controlling authority.[7] Although in *Berry*, the nonbreaching party sought enforcement of its

[7] In the past, "reported" decisions were controlling authority in the district, and "unreported" decisions were merely "persuasive." As of May 1, 2002, the Supreme Court abolished the distinction between "controlling" and "persuasive" opinions, based merely upon whether a case is "reported." *See* Rep.Op.R. 3.4 ("All opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published."). As an

counterclaim in a separate action rather than by filing a motion to enforce settlement, we see no reason that a different rule should apply depending on how a party seeks to enforce a settlement agreement. *See, e.g., Wilson*, N.D., Ohio No.1:16-CV-1298, 2018 U.S. Dist. LEXIS 34445, at *8-9 ("Attorney's fees as compensatory damages are available whether a party files a separate breach of contract suit or a motion to enforce settlement before the original trial court."). In both instances, a party seeking to enforce a settlement agreement is subjected to additional or continued litigation as a result of the other party's attempted repudiation of a settlement agreement.

{¶72} Rayco also argues that we should affirm the trial court's decision because appellees presented no evidence at the hearing regarding the amount of attorney fees they incurred in enforcing the settlement agreement or the reasonableness of those fees. However, as stated in the trial court's journal entry, the issue to be decided at the hearing was "whether the parties entered into a contract to settle the lawsuit."[8] After that issue was decided, the trial court inquired whether it had "enough law [and] evidence" to decide "whether to award fees or not." The trial court granted the parties leave to submit "legal briefs" on the issue of whether "a motion to enforce in and of itself gives rise to a potential entitlement for fees." There was no opportunity for appellees to present evidence as to the amount of attorney fees they contended should be awarded.

{¶73} Accordingly, the trial court abused its discretion in denying appellees' request for attorney fees. Appellees' cross-assignment of error is sustained.

{¶74} The trial court's judgment is affirmed to the extent that it grants appellees' motion to enforce the settlement agreement and reversed to the extent that it denies appellees' motion for

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unreported decision decided before May 1, 2002, *Mayfran* is not controlling authority. *See, e.g., In re B.L.*, 3d Dist. Allen Nos. 1-15-65, 1-15-66, 1-15-67, and 1-15-68, 2016-Ohio-2982, ¶ 11.

[8] Appellees also filed a motion in limine to limit testimony and evidence at the hearing to the issue of the "settlement between the parties," which the trial court granted.

attorney fees. Case remanded for a determination of the amount of reasonable attorney fees appellees incurred to enforce the settlement agreement.

{¶75} Judgment affirmed in part; reversed in part; case remanded.

It is ordered that appellees recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

EILEEN A. GALLAGHER, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS;
MELODY J. STEWART, J., CONCURS IN PART AND DISSENTS IN PART

MELODY J. STEWART, J., CONCURRING IN PART, DISSENTING IN PART:

{¶76} I would affirm the trial court's decision in its entirety. The American Rule — that each party be responsible for its attorney fees — does not necessarily apply in actions to enforce a settlement agreement. *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318, ¶ 19 (8th Dist.) ("attorney fees are allowed as compensatory damages when the fees are incurred as a direct result of the breach of a settlement agreement."). The key point, however, is that attorney fees must be "compensatory damages" for enforcing a settlement, not merely attorney fees costs. Thus, in *Berry*, the party seeking to enforce a settlement had to file a separate action for breach of a settlement agreement.

{¶77} The law firms did not file a separate action to enforce the settlement agreement in this case. At all events, this was a legal malpractice case and the efforts to enforce the settlement were made by motion, not by a formal complaint in a separate action. It follows that the attorney fees were not sought as compensatory damages, but only as a cost of litigating the motion. The court did not err by denying the motion for attorney fees.

[Cite as *U.S. Bank Natl. Assn. v. Mitchell,* 2018-Ohio-4887.]

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

U.S. BANK, NATIONAL ASSOCIATION SUCCESSOR BY MERGER TO U.S. BANK NATIONAL ASSOCIATION ND	:	Appellate Case No. 27984
	:	Trial Court Case No. 2017-CV-1351
Plaintiff-Appellee	:	(Civil Appeal from Common Pleas Court)
v.	:	
KATHERINE MITCHELL, et al.	:	
Defendant-Appellant		

. . . . . .

O P I N I O N

Rendered on the 7th day of December, 2018.

. . . . . .

BRIAN E. CHAPMAN, Atty. Reg. No. 0039826, 3962 Red Bank Road, Cincinnati, Ohio 45227
Attorney for Plaintiff-Appellee

JOHN A. FISCHER, 70 Birch Alley, Suite 240, Dayton, Ohio 45440
Attorney for Defendant-Appellant

. . . . . .

DONOVAN, J.

{¶ 1} Defendant-appellant Katherine Mitchell appeals a judgment of the Montgomery County Court of Common Pleas, granting the motion for summary judgment of plaintiff-appellee U.S. Bank National Association, Successor by Merger to U.S. Bank National Association ND (hereinafter referred to as "U.S. Bank"). Mitchell filed a timely notice of appeal with this Court on May 3, 2018.

{¶ 2} The record establishes that on July 23, 2007, Jill Long executed a promissory note in favor of U.S. Bank in the amount of $40,000, plus interest at the rate of 7.69 percent per year. The promissory note provided that a payment of $306.71 was due on the 22nd of each month and that, upon default, U.S. Bank was entitled to accelerate the due date of the unpaid principal balance, plus accrued interest and charges. The note was secured by a mortgage encumbering real property located at 35 Illinois Avenue in Dayton, Ohio. The mortgage was recorded with the Montgomery County Recorder on August 21, 2007, as Instrument No. 2007-00071187, and is available for viewing at the Recorder's Office and online.

{¶ 3} Long stopped making payments toward the note in April 2014. Thereafter, on October 8, 2014, Long conveyed the property to Mitchell by quit claim deed, which was recorded in Montgomery County and given Instrument No. 2014-00053922. Mitchell alleges that she payed $30,000 for the property and that, shortly after purchasing the property, she called the Montgomery County Recorder, who informed her that there were no existing mortgages or other liens on the property. However, Mitchell acknowledges that she did not personally examine the public records as they related to the property, nor did she hire a title company to check the records *before* purchasing the

property. Mitchell also alleges that after taking possession of the property, she immediately began making repairs and improvements. Mitchell claims that the repairs were not completed until some point in late 2015, at a cost of over $30,000.

{¶ 4} The record establishes that U.S. Bank became aware of the conveyance of the property from Long to Mitchell by quit claim deed on December 2, 2014. On February 25, 2015, U.S. Bank contacted Long's daughter, who informed the bank that Long had passed away during the previous month, on January 19, 2015. On November 16, 2016, U.S. Bank sent a letter to the now-deceased Long at 2285 Crew Circle in Dayton, Ohio, indicating that she was in default with respect to the property located at 35 Illinois Avenue, and that, absent payment, the bank would accelerate the amount due on the promissory note. Thereafter, U.S. Bank sent another letter to the deceased Long at the Crew Circle address, advising her that it was initiating foreclosure proceedings. We note that during this time period, the record establishes that U.S. Bank did not call or otherwise contact Mitchell regarding the property located at 35 Illinois Avenue or the promissory note encumbering the property.

{¶ 5} On March 17, 2017, U.S. Bank filed a foreclosure complaint against Mitchell, Mitchell's Unknown Spouse, if any, and the Montgomery County Treasurer. On May 10, 2017, Mitchell filed an answer and a counterclaim, asserting unjust enrichment. On September 26, 2017, Mitchell amended her counterclaim. U.S. Bank filed a reply to the amended counterclaim on October 5, 2017. Thereafter, on October 18, 2017, U.S. Bank filed an amended complaint, attaching a Lost Note affidavit. On October 30, 2017, Mitchell filed an answer to the amended complaint.

{¶ 6} On January 30, 2018, U.S. Bank filed a motion for summary judgment against

Mitchell. Mitchell filed a memorandum in opposition to U.S. Bank's summary judgment motion on February 28, 2018. On March 6, 2018, U.S. Bank filed a reply memorandum in support of its motion for summary judgment. After considering the parties' arguments, the trial court issued a decision on April 9, 2018, granting U.S. Bank's motion for summary judgment.

{¶ 7} It is from this judgment that Mitchell now appeals.

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

> THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE BANK ON MS. MITCHELL'S LACHES AND ESTOPPEL DEFENSES.
>
> THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE BANK ON MS. MITCHELL'S UNJUST ENRICHMENT COUNTERCLAIM.

{¶ 9} In her first assignment, Mitchell contends that the trial court erroneously granted U.S. Bank's summary judgment motion with respect to her affirmative defenses of laches and estoppel. In her second assignment, Mitchell argues that the trial court erred when it granted U.S. Bank summary judgment regarding her counterclaim of unjust enrichment.

{¶ 10} This Court reviews the grant of summary judgment de novo, or without deference to the trial court's determination of the legal issues involved. Summary judgment, pursuant to Civ.R. 56, is appropriate when a trial court correctly finds the following:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

Harless v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 11} A party who moves for summary judgment bears the initial burden of informing the trial court of the basis of its motion and "identifying those portions of the record that demonstrate the genuine absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. * * * [If] the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Doriott v. MVHE, Inc*., 2d Dist. Montgomery No. 20040, 2004-Ohio-867, ¶ 37.

Laches

{¶ 12} Initially, we note that in granting summary judgment with respect to Mitchell's affirmative defense of laches, the trial court addressed the elements of laches as set forth in *Smith v. Smith,* 168 Ohio St. 447, 455, 156 N.E.2d 113 (1950), and *Stevens v. Natl. City Bank*, 45 Ohio St.3d 276, 285-286, 544 N.E.2d 612 (1989). The elements of laches, as set forth in *Smith* and *Stevens*, are as follows:

> (1) conduct on the part of the defendant * * * giving rise to the situation of which complaint is made and for which the complainant seeks a remedy

> * * *;
>
> (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of defendant's conduct and having been afforded an opportunity to institute a suit;
>
> (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and
>
> (4) injury or prejudice to the defendant in the event relief is accorded to the complainant.

Smith at 455; *Stevens* at 285. Laches is an "acquiescence in the assertion of adverse rights and undue delay on complainant's part in asserting his own, to the prejudice of the adverse party." *Smith* at 456, citing 30 C.J.S. Equity § 112, p. 521. Further, the party asserting the defense must demonstrate that the prejudice is material to the claim, and it "may not be inferred from a mere lapse of time." *Gordon v. Reid,* 2d Dist. Montgomery No. 26117, 2014-Ohio-4708, ¶ 15, citing *Atwater v. King,* 2d Dist. Greene No. 02CA45, 2003-Ohio-53, ¶ 19.

{¶ 13} "Whether laches should bar an action is a fact-sensitive determination. Accordingly, we review the trial court's application of the doctrine of laches for an abuse of discretion. An abuse of discretion means 'that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Citations omitted.) *Gordon* at ¶ 17; *see also Reid v. Wallaby's Inc.*, 2d Dist. Greene No. 2011-CA-36, 2012-Ohio-1437, ¶ 34 (reviewing the trial court's application of laches for an abuse of discretion). We addressed the elements of laches as set forth in *Smith* and *Stevens* recently in *In re Estate of Rife*, 2d Dist. Montgomery No. 26072, 2014-Ohio-3644; there, we held that where the children of

decedent's predeceased son lacked actual or constructive knowledge of injury or wrong, the doctrine of laches did not bar the children's action. Neither *Smith* nor *Stevens* has been overruled.

{¶ 14} Mitchell argues that it was error for the trial court to utilize the elements of laches set forth in *Smith* and *Stevens.* Rather, Mitchell contends that the trial court should have considered the elements of laches as set forth in *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 2011-Ohio-4189, 54 N.E.2d 104 (2011). In that case, the Ohio Supreme Court listed the elements of laches as: "(1) an unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury involved, and (4) prejudice to the other party." *Id*. at ¶ 45, citing *State ex rel. Cater v. N. Olmsted*, 69 Ohio St.3d 315, 325, 631 N.E.2d 1048 (1994). In *Martin Marietta*, the Ohio Supreme Court held that appellants' claims were not barred by laches because appellees failed to establish that there was unreasonable or prejudicial delay, when only four months elapsed between termination of the parties' contracts and the initiation of litigation.

{¶ 15} Upon review, we conclude that under the elements of laches set forth in either *Smith* or *Martin Marietta,* U.S. Bank's foreclosure claim was not barred. First, we note that Mitchell's laches argument is premised, in part, upon her claim that she was unaware of the existing mortgage securing the property when she took possession from Long pursuant to a quit claim deed. Specifically, Mitchell argues that she would not have purchased the property if she had known of the existing mortgage with U.S. Bank, and that she would not have made improvements to the property. Mitchell alleges that U.S. Bank had a duty, which it ignored, to inform her of the existence of the mortgage.

Mitchell's argument in this regard is undermined by the record. Notwithstanding the difference in the wording of the elements of laches found in *Smith* and *Martin Marietta,* U.S. Bank's complaint is not barred by laches; Mitchell had constructive notice of the mortgage because it had been properly recorded.

{¶ 16} In *Sky Bank-Ohio Bank Region v. Sabbagh*, 161 Ohio App.3d 133, 2005-Ohio-2517, 829 N.E.2d 743 (2d Dist.), we stated the following:

> Persons who acquire a possessory interest in real property take with constructive notice of instruments of title that are recorded. *Mellon Natl. Mtge. Co. v. Jones*, 54 Ohio App.2d 45, * * * 374 N.E.2d 666. To constitute constructive notice of its provisions, the instrument must be one that by law may be recorded. *Underwood v. Lapp* (App.1939), 29 Ohio Law Abs. 582. County recorders are charged to maintain a record of mortgages. R.C. 317.08(B); R.C. 5302.15. Those records may be summarized in indexes, written or electronic. R.C. 5302.15.

Id. at ¶ 15.

{¶ 17} It is the object and purpose of recording an encumbrance on a parcel of real property to furnish notice to the world of the existence of the instrument. *Brown v. Kirkman*, 1 Ohio St. 116, 1853 WL 3 (1853). Thus, those who acquire a possessory interest in real property take with constructive notice of instruments of title that are recorded. *Sky Bank-Ohio Bank Region* at ¶ 15.

{¶ 18} In the instant case, the record establishes that U.S. Bank recorded the mortgage on the property with the Montgomery County Recorder on August 21, 2007, as Instrument No. 2007-00071187. Therefore, Mitchell was put on constructive notice that

the property was encumbered by an existing mortgage held by U.S. Bank. Furthermore, Mitchell took possession of the encumbered property in 2014 by quitclaim deed. "A quitclaim deed conveys no more than whatever title the grantor held at the time of granting the deed." *Welsh v. Estate of Cavin*, 10th Dist. Franklin No. 02AP-1328, 2004-Ohio-62, ¶ 30; *Jonke v. Rubin*, 170 Ohio St. 41, 162 N.E.2d 116 (1959), paragraph one of the syllabus (the rights of a grantee under a quitclaim deed are no higher than those of his grantor at the time of the conveyance). Additionally, as the trial court found, at the time Mitchell took title to the property in 2014, the mortgage, which was recorded in August 2007, had been recorded in the official records of the Recorder's Office for approximately seven years. Thus, the record affirmatively establishes that Mitchell had constructive notice of the mortgage encumbering the property when she executed the quitclaim deed and took possession of the property from Long. This knowledge is clearly relevant under *Smith,* and we cannot say it is wholly irrelevant under *Martin Marietta*. We also note that Mitchell argues that, rather than sending notice of its intent to foreclose on the property to her, U.S. Bank improperly sent the foreclosure notices to the 2285 Crew Circle address, thereby depriving her of notice. Since the original mortgage had been duly recorded, however, Mitchell had constructive notice that the property was encumbered.

{¶ 19} As previously stated, U.S. Bank learned that Long had conveyed the property to Mitchell by quitclaim deed on December 2, 2014. Thereafter, on February 24, 2015, U.S. Bank learned that Long had passed away. On March 17, 2017, approximately two years and three months after becoming aware of the transfer of the property from Long to Mitchell, U.S. Bank initiated foreclosure proceedings against Mitchell.

{¶ 20} For purposes of the doctrine of laches, prejudice exists when the plaintiff's delay causes the loss of evidence helpful to the defendant's case or when the person against whom the claim is asserted has changed his position in reasonable reliance on the words or conduct of the party who would enforce the claim. *Reid*, 2d Dist. Greene No. 2011-CA-36, 2012-Ohio-1437, ¶ 36, citing *State ex rel. Donovan v. Zajac*, 125 Ohio App.3d 245, 250, 708 N.E.2d 254 (11th Dist.1998). The prejudice must be material, and it may not be inferred from a mere lapse of time. *Gordon*, 2d Dist. Montgomery No. 25507, 2013-Ohio-3649, ¶ 15. The accumulation of interest and the absence of a timely demand for payment does not constitute material prejudice where the terms of the debt are set forth in the contract. *Thirty-Four Corp. v. Sixty-Seven Corp.*, 15 Ohio St.3d 350, 353, 474 N.E.2d 295 (1984).

{¶ 21} In the instant case, Mitchell failed to adduce any facts establishing that she was materially prejudiced as a result of U.S. Bank's two-year, three month delay in filing its complaint. "Material prejudice" consists of "two types of material prejudice, either of which necessitate the application of laches: (1) the loss of evidence helpful to the defendant's case, and (2) a change in the defendant's position that would not have occurred had the plaintiff not delayed in asserting her rights." *Reid* at ¶ 36, citing *Zajac*, at 250.

{¶ 22} Here, Mitchell argues that she was materially prejudiced because, absent the delay, she would have "worked out some resolution while [Long] was still alive" by seeking "to reverse the sale." Mitchell, however, fails to identify any grounds upon which she would have been able to reverse the sale of the property. Moreover, assuming that Mitchell's loss of the opportunity to "work out some resolution" while Long was still alive

constituted material prejudice, such prejudice resulted from Long's death approximately 48 days after U.S. Bank learned of the conveyance, not from the two year, three month delay in filing the complaint. Any suggestion Mitchell could work out a resolution with U.S. Bank is highly speculative.

{¶ 23} Additionally, Mitchell argues that she was materially prejudiced because she would not have made repairs to the property but for the delay in U.S. Bank filing the complaint. Mitchell clams that she began repairing the property immediately after taking possession on October 14, 2014, and she did not complete the repairs until "well into 2015." Mitchell also stated that the repairs cost in excess of $30,000. Accordingly, Mitchell acknowledges that she completed the repairs less than twelve months after U.S. Bank learned of the property conveyance from Long. Assuming Mitchell's completion of the repairs constituted material prejudice, such prejudice resulted from a delay of less than 12 months.

{¶ 24} Significantly, in support of her claims, Mitchell has presented no evidence, other than her uncorroborated affidavit, that she made any improvements or repairs to the property. Specifically, Mitchell did not provide the trial court with any invoices or receipts for labor or materials in order to substantiate her claims. Moreover, other than her uncorroborated affidavit, Mitchell failed to provide the trial court with any evidence that she actually paid $30,000, or any sum, for the property. Self-serving affidavits made by the non-moving party normally cannot be used to survive summary judgment. *Han v. Univ. of Dayton*, 28 N.E.3d. 547, 2015-Ohio-346, ¶ 41 (2d Dist.). Even if we were to accept Mitchell's argument regarding the two year, three month delay, much longer periods of time have been held not to justify the application of laches. *See Reid*, 2d Dist.

Greene No. 2011 CA 36, 2012-Ohio-1437; *see also Gordon*, 2d Dist. Montgomery No. 25507, 2013-Ohio-3649. In light of the foregoing, we find that the trial court did not err when it held that Mitchell failed to establish the existence of a genuine issue of material fact regarding her argument that laches precluded enforcement of the mortgage against her.

Estoppel

{¶ 25} The defense of equitable estoppel applies when a party prosecuting a claim for relief has induced the adverse party to believe that certain facts exist and the adverse party changed his position in reasonable reliance thereon, to his detriment. *Sky Bank-Ohio Bank Region,* 161 Ohio App.3d 133, 2005-Ohio-2517, 829 N.E.2d 743, at ¶ 10. In order to prevail on a claim of equitable estoppel, a defendant must show (1) that the plaintiff made a factual representation, (2) that the representation was misleading, (3) that defendant acted in good faith reliance on that misrepresentation, and (4) that his reliance had a detrimental result. *Id*., citing *Gullatte v. Rion*, 145 Ohio App.3d 620, 627, 763 N.E.2d 1215 (2d Dist.2000).

{¶ 26} As previously stated, Mitchell's main argument on appeal is premised upon her claim that she was unaware of the existing mortgage securing the property when she took possession from Long pursuant to a quitclaim deed. Specifically, Mitchell argues that she would not have purchased the property if she had known of the existing mortgage with U.S. Bank, nor would she have made improvements to the property. Mitchell alleges that U.S. Bank had a duty, which it ignored, to inform her of the existence the mortgage.

{¶ 27} In the instant case, Mitchell fails to point to any facts establishing that U.S.

Bank made a false and/or misleading statement of fact regarding the existence of the mortgage. Rather, Mitchell contends that U.S. Bank's failure to contact her constituted "silence when [U.S. Bank] ought to speak out." However, U.S. Bank was "silent" regarding the existence of the mortgage because the mortgage had been duly recorded. *See Sky Bank-Ohio Bank Region* at ¶ 15. Moreover, because the mortgage had been properly recorded, Mitchell could not rely on the representation of an employee at the Recorder's office who allegedly told her that the property was unencumbered. Finally, as previously stated, Mitchell took possession of the property pursuant to a quitclaim deed, which served as notice that there may have been other equitable interests in the property or potential title defects. Accordingly, we find that the trial court did not err when it held that no genuine issue existed with respect to Mitchell's estoppel argument.

Unjust Enrichment

{¶ 28} Mitchell's final argument is that she should be permitted to recover on her counterclaim under a theory of unjust enrichment. "In Ohio, unjust enrichment is a claim under quasi-contract law against a person in receipt of benefits that he is not justly and equitably entitled to retain." *Crawford v. Hawes*, 2013-Ohio-3173, 995 N.E.2d 966, ¶ 34 (2d Dist.), citing *Hummel v. Hummel*, 133 Ohio St. 520, 527, 14 N.E.2d 923 (1938). "A quasi contract is not the result of a meeting of the minds but is implied and imponed [sic] by law without the consent of the obligor to prevent the obligor from enjoying benefits which in equity and good conscience he is not entitled to retain." *Hughes v. Oberholtzer*, 162 Ohio St. 330, 123 N.E.2d 393 (1955), paragraph one of the syllabus.

{¶ 29} "The elements of an unjust enrichment claim are as follows: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit;

and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the 'unjust enrichment' element)." *Crawford* at ¶ 24, citing *L & H Leasing Co. v. Dutton*, 82 Ohio App.3d 528, 534, 612 N.E.2d 787 (3d Dist.1992).

{¶ 30} In the instant case, Mitchell argues that her repair of the property conferred a benefit on U.S. Bank, that U.S. Bank knew of the repairs, and that U.S. Bank's retention of the property would be unjust without payment to her. As previously stated, Mitchell claims that the value of the repairs was in excess of $30,000, which she paid for personally. However, other than her uncorroborated statement, she provided no additional evidentiary materials in that regard that would create a genuine issue of material fact sufficient to overcome summary judgment. We also note that Mitchell produced no evidence, other than her uncorroborated statement, that U.S. Bank was aware that she had made improvements to the property. No benefit to U.S. Bank was established on this record. Therefore, we find that the trial court did not err when it held that no genuine issue existed with respect to Mitchell's unjust enrichment argument.

{¶ 31} Mitchell's first and second assignments of error are overruled.

{¶ 32} Both of Mitchell's assignments of error having been overruled, the judgment of trial court is affirmed.

. . . . . .

FROELICH, J., concurring:

{¶ 33} Almost all affidavits are self-serving and in many circumstances (generally not when contradicting previous sworn statements) may be a legitimate method of presenting facts on summary judgment. *See*, *e.g.*, *Widmar v. Sun Chemical Co.,* 722 F.3d

457 (7th Cir.2014).

{¶ 34} However, even if the trial court considered Mitchell's affidavit that she expended certain funds for repair, this would not create a genuine issue of material fact that she was materially prejudiced because of anything the bank did or do not do. I concur.

TUCKER, J., concurring:

{¶ 35} I concur in Judge Donovan's opinion and in Judge Froelich's concurring opinion.

Copies sent to:

Brian E. Chapman
John A. Fischer
Michele Phipps
Hon. Steven K. Dankof