

IN THE SUPREME COURT OF OHIO

08-1568

GARY A. GREENSPAN, :
 :
 Plaintiff-Appellee, :
 :
 v. :
 :
 THIRD FEDERAL SAVINGS & LOAN :
 ASSOCIATION, :
 :
 Defendant-Appellant. :

On Appeal From the
Cuyahoga County Court
of Appeals, Eighth
Appellate District,
Case No. 07-89850

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT THIRD FEDERAL SAVINGS & LOAN ASSOCIATION

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**EXPLANATION OF WHY THIS CASE IS OF
PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

In *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, at ¶18, a case in which two Eighth District panels reached opposite conclusions on the same point of law, this Court held that appellate districts are “duty-bound” to resolve intradistrict conflicts through en banc proceedings. This Court noted that “[t]he Eighth District’s conflicting rulings on the same legal issue create confusion for lawyers and litigants and do not promote public confidence in the judiciary.” *Id.* In *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, this Court was again confronted with two conflicting decisions from Eighth District panels. Once again, this Court made it clear that “[i]n future cases, appellate courts should resolve internal conflicts through en banc proceedings[.]” *Id.* at ¶40.

Yet a panel of the Eighth District has again refused to heed this Court’s express directives. Appellee Gary A. Greenspan filed this statewide putative class action to recover a \$300 “document preparation” fee that appellant Third Federal Savings & Loan Association charged in connection with his 2002 mortgage loan. Greenspan alleges that Third Federal engaged in the unauthorized practice of law by preparing the documents in connection with that mortgage transaction. The panel in this case held – in direct contravention of an Eighth District decision issued six months earlier in an identical case – that Greenspan could recover damages for the unauthorized practice of law that occurred in 2002, even though the General Assembly did not authorize such actions until September 15, 2004.

The Eighth District panel issued its decision in this case without invoking the Eighth District’s en banc proceedings. In so doing, the panel not only created an

intradistrict conflict but also violated the Eighth District's rules, which deem a prior panel's decision binding. The Eighth District's failure to follow this Court's mandates and its own rules requires this Court's intervention. Permitting the Eighth District's decision to stand will allow appellate districts in Ohio to ignore this Court's express directives and will create enormous confusion for lawyers, litigants, and members of the public attempting to discern applicable law.

This case is also one of great public and general interest because of the panel's holding. Even though the General Assembly did not create a private right of action for the unauthorized practice of law until September 2004, the panel held that such a cause of action impliedly existed before that date. This decision improperly found an implied cause of action without any indication whatsoever by the General Assembly that such an action existed prior to that date.

Moreover, the rationale for the panel's decision was that every affirmative defense under Ohio law "inexorably" gives rise to a private right of action. *Greenspan v. Third Federal Sav. & Loan*, 8th Dist. No. 89850, 2008-Ohio-3528, at ¶20, attached as Exhibit A. This is not the proper basis upon which to determine whether a private cause of action exists, particularly where the issue involved is itself a creature of rule or regulation. Indeed, the panel is the only Ohio court to make such a sweeping proposition. This holding opens the door for private causes of action against any person whose profession is regulated by Ohio law even if there are no allegations of fraud, negligence, or breach of contract. This profound change in Ohio law is unfounded and unwarranted.

Finally, the panel's reasoning undermines this Court's exclusive jurisdiction over the unauthorized practice of law. This decision, if unchecked, would allow the plaintiff's

cause of action to proceed before a trial court without any determination by this Court of whether the defendants engaged in the unauthorized practice of law.

STATEMENT OF THE CASE AND FACTS

I. Greenspan Sues Third Federal To Recover Damages For The Unauthorized Practice Of Law.

Greenspan filed this statewide putative class action on June 13, 2006. Greenspan sought to recover a \$300 “document preparation” fee that Third Federal charged in connection with his 2002 mortgage loan. Greenspan alleges that Third Federal engaged in the unauthorized practice of law by preparing certain documents in connection with that loan, and seeks to disgorge the \$300 from Third Federal. Greenspan does not allege that Third Federal failed to disclose the document preparation fee, defrauded him, breached a contract, or otherwise provided deficient or improper loan documents. Rather, his single complaint is that he should recover the \$300 fee because Third Federal allowed non-attorneys to prepare the loan documents.¹ Greenspan neither filed a grievance against Third Federal with the Office of Disciplinary Counsel nor contacted his local bar association.

II. After The Trial Court Dismisses Greenspan’s Claim, The Eighth District Affirms The Dismissal Of An Identical Class Action.

The trial court dismissed Greenspan’s case, holding that no private right of action existed for the unauthorized practice of law in 2002: “[F]or any claims arising prior to

¹ See, e.g.: “Third Federal routinely charges customers a document preparation fee in the sum of approximately \$300 for services performed by clerical personnel in preparing or completing documents relating to the issuance of mortgage loans, * * * *even though Ohio law prohibits Third Federal from charging fees for such services performed by non-attorneys.*” (Cmplt., at ¶2) (emphasis added); “Whether the document preparation fee charged by Third Federal *for services performed by non attorneys in preparing such legal documents is prohibited by Ohio law.*” (Id. at ¶14(c)) (emphasis added).

September 15, 2004, there was no private right of action for enforcing either directly or collaterally the unauthorized practice of law.” (Apr. 26, 2007 Op., attached as Exhibit B.)

While Greenspan’s appeal was pending, the Eighth District decided *Crawford v. FirstMerit Mortgage Corp.*, 8th Dist. No. 89193, 2007-Ohio-6074, appeal not accepted, 117 Ohio St.3d 1478, 2008-Ohio-1841, a purported class action identical to the present case – the same cause of action, the same class, the same attorneys. The plaintiff in *Crawford* brought a putative class action against a bank to recover the \$300 document preparation fee relating to the issuance of his mortgage loan. *Id.* at ¶4. As here, the plaintiff alleged unjust enrichment, arguing that the document preparation constituted the unauthorized practice of law. *Id.* at ¶4-7, 10. The Eighth District – in a unanimous decision – affirmed the dismissal of Crawford’s claim, holding that a party may not bring an action to recover document preparation fees based on the alleged unauthorized practice of law. *Id.* at ¶22.

Crawford was decided by the Eighth District after the briefing in *Greenspan* was completed but before oral argument, so Third Federal submitted *Crawford* as supplemental authority. Greenspan’s counsel, conceding that the Eighth District recently “affirmed the trial court’s decision in a nearly identical case,” jointly moved the panel to waive oral argument to avoid traveling to Cleveland from out of state for the argument. The motion was granted.

III. The Eighth District Reverses The Trial Court’s Decision Without An En Banc Hearing.

Despite the *Crawford* decision, the Eighth District panel in this case – in a 2-1 decision – reversed and vacated the trial court’s dismissal of Greenspan’s complaint.

Although the panel conceded that “[t]he facts in *Crawford* are almost identical to the case at bar,” the panel found that *Crawford* was “simply in error,” and that Greenspan could proceed with his action. *Greenspan* at ¶26. Judge Celebreeze dissented because stare decisis “compelled” him to follow *Crawford*.

Third Federal filed an application for reconsideration, or alternatively, a motion to certify a conflict. Third Federal argued that because *Crawford* is controlling precedent, absent an en banc decision to the contrary, the *Greenspan* panel could not issue a decision in conflict with *Crawford* pursuant to this Court’s jurisprudence, the Eighth District’s rules, and stare decisis. The Eighth District denied the application without opinion, and the judgment was journalized on June 25, 2008.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition Of Law No. I: The Eighth District violated this Court’s directives and its own rules by knowingly issuing an opinion that directly conflicts with a prior decision without holding an en banc proceeding.

This Court has now held on two prior occasions – and may reiterate in *McFadden v. Cleveland State Univ.*, No. 2007-0705, which is currently before the Court – that appellate districts are “duty-bound” to resolve intradistrict conflicts through en banc proceedings. In this Court’s 2006 opinion in *In re J.J.*, and its 2007 opinion in *In re C.F.*, this Court made clear to the Eighth District that it was not free to create or ignore intradistrict conflicts, as they “create confusion for lawyers and litigants and do not promote public confidence in the judiciary.” *In re J.J.* at ¶18.

Yet that is precisely what occurred in this case. In *Crawford*, a unanimous Eighth District panel held that prior to the 2004 amendments to Revised Code 4705.07, there was no cause of action for the unauthorized practice of law, and the plaintiff’s

claims, however styled, should be treated as such. *Crawford* at ¶21-22. It further held that “a person who claims to have been harmed by conduct alleged to have constituted the authorized practice of law must take his or her claim through the avenues prescribed by the Ohio Supreme Court, because it is the court with exclusive jurisdiction to make that determination.” *Id.* at ¶30.

Despite acknowledging that *Crawford* was on all fours with *Greenspan*, and despite this Court’s directives, the two judge majority in *Greenspan* deemed *Crawford* to have been wrongly decided and held to the contrary – without en banc consideration of the issue. As a result, there are now two Eighth District cases involving precisely the same facts which have directly contrary holdings. This cannot stand.

The panel in *Greenspan* not only failed to heed this Court’s directives. It also failed to follow its own rules. The Eighth District’s local rules provide that that majority opinions by Eighth District panels are binding on the entire Eighth District absent an en banc hearing. “Decisions reached by the majority of a panel sitting as a Court *shall be binding* upon the whole Court.” Article 8(b)(i) of the Standing Resolution of the Rules for the Conduct of Court Work (emphasis added). The Eighth District enacted this rule because there should “not be interpanel conflict among the decisions of this Court.” See Amendment to Article 8(b) (Appendix C to Eighth District Local Rules).

The only way that an Eighth District panel may overrule a previous decision or issue a decision conflicting with a previous decision is by following the en banc

procedures in Article 8(b).² Thus, the *Greenspan* panel refused to follow its own procedures as well.

Proposition Of Law No. II: A private right of action for the unauthorized practice of law did not exist before September 15, 2004.

The court below is the first and only court in Ohio to hold that a private remedy for damages for the unauthorized practice of law existed before September 15, 2004, the date on which the legislature created such an action.³

The panel relied on three cases that state the unauthorized practice of law may be an affirmative defense to a collection action.⁴ The panel reasoned that “if the law permits one to resist paying a fee for unauthorized legal representation, it inexorably follows that one should be able to recoup a fee incurred under the identical circumstances.” *Greenspan* at ¶26.

But this “affirmative-defense” analysis is not the proper standard. The prohibition on the unauthorized practice of law derives from statute, namely R.C. 4705.01. When determining whether a private cause of action impliedly exists pursuant

² The Eighth District has previously used this procedure to hold en banc hearings. See, e.g., *State v. Lett* (8th Dist.), 161 Ohio App.3d 274, 2005-Ohio-2665, 829 N.E.2d 1281, reversed on other grounds, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174; *State v. Delgado* (Apr. 9, 1998), Cuyahoga App. No. 71497, 1998 WL 185535, *1, overruled by *State v. Teixeira* (Dec. 10, 1998), Cuyahoga App. No. 73745, 1998 WL 855620; *Eisenberg v. Peyton* (8th Dist. 1978), 56 Ohio App.2d 144, 381 N.E.2d 1136.

³ The 2004 revisions to Revised Code 4705 are not retroactive, and *Greenspan* does not contend that they were. See R.C. 4705.07(C)(3) (creating private action for unauthorized practice of law claims occurring after September 15, 2004, the amendment’s effective date).

⁴ *Cocon, Inc. v. Botnick Building Co.* (9th Dist. 1989), 59 Ohio App.3d 42, 570 N.E.2d 303; *Foss v. Berlin* (10th Dist. 1981), 3 Ohio App.3d 8, 443 N.E.2d 197; and *Middleton Associates v. Weiss* (June 19, 1997), Cuyahoga App. No. 71416, 1997 WL 337616. This Court has never opined on this issue.

to statute, a court must conduct a statutory analysis. It may not find “a private civil action [exists] absent a clear implication that such a remedy was intended by the Ohio General Assembly.” *Nielsen v. Ford Motor Co.* (9th Dist. 1996), 113 Ohio App.3d 495, 501, 681 N.E.2d 470, citing *Fawcett v. G.C. Murphy & Co.* (1976), 46 Ohio St.2d 245, 249, 348 N.E.2d 144 (superseded on other grounds by statute).

Accordingly, Ohio courts apply a three-part test adopted from *Cort v. Ash* (1975), 422 U.S. 66, for determining when a private cause of action arises by implication under a particular statute: (1) whether the plaintiffs are in a class for whose special benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create or deny a private cause of action; and (3) whether it is consistent with the underlying purposes of the legislative scheme to infer such a remedy for the plaintiffs. *Nielson*, 113 Ohio App.3d at 501; see, also, *Doe v. Adkins* (4th Dist. 1996), 110 Ohio App.3d 427, 435-436, 674 N.E.2d 731 (applying *Cort* test to determine whether private cause of action was implied).

In *Miami Valley Hospital v. Combs* (2d Dist. 1997), 119 Ohio App.3d 346, 354, 695 N.E.2d 308, appeal not allowed, 79 Ohio St.3d 1491, reconsideration denied, 80 Ohio St.3d 1427, the Second District analyzed these factors and concluded that a private cause of action for the unauthorized practice of law was not implied by R.C. 4705.01. The court held that the statute was intended “to protect lawyers and their clients,” not plaintiffs, that “the rules implementing R.C. 4705.01 reveal an explicit intent to deny a private remedy, or to restrict any remedy to the procedures contained in the [Supreme Court Rules],” and that a private remedy was not contemplated by the legislative scheme either. *Id.* at 352-353.

Miami Valley further held that permitting a private right of action would prevent uniform enforcement “resulting from varying conclusions reached by different judges or in different circuits[,]” and “that a private remedy is not consistent with the underlying purposes of R.C. 4705.01 and Gov. Bar.R. VII.” *Id.* at 353. Based upon this statutory analysis, the court held that there was no private right of action for the unauthorized practice of law. *Id.* at 351; see, also, *Sarum Mgmt., Inc. v. Alex N. Sill Co.*, 9th Dist. No. 23167, 2006-Ohio-5710, at ¶27, 30 (no private right of action for the unauthorized practice of law under R.C. 4705.01); *Crawford* at ¶22 (same).

The fact that R.C. 4705.07 was amended in 2004 to “specifically . . . provide for the recovery of damages for a violation of the prohibition [of the unauthorized practice of law]” further underscores that no such cause of action previously existed. The amendment’s purpose was to create a private right of action where one did not previously exist. “[T]he mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by *creating a new right* or withdrawing an existing one.” Norman J. Singer, 1A Statutes & Statutory Constr. (6th Ed. rev. 2000) 22:30, 357-358 (emphasis added).

In any event, the notion that anything that is an affirmative defense also “inexorably” constitutes a private right of action is simply incorrect. *Greenspan* at ¶20. Just because something may be asserted as an affirmative defense does not mean it is also a cause of action. Many affirmative defenses unrelated to the legislature’s regulation of professionals, including the statute of frauds, equitable estoppel, and unclean hands, exist as affirmative defenses but do not have a corollary private right of action. See, e.g., *Grenga v. Bank One, N.A.*, 7th Dist. No. 04 MA 94, 2005-Ohio-4474, at ¶95 (refusing to allow suit based on statute of frauds); *Transitron Elec. Corp. v.*

Hughes Aircraft Co. (D. Mass. 1980), 487 F. Supp. 885, 892-893 (explaining why affirmative defense of misuse of patent does not translate into cause of action).

Moreover, courts have recognized that there is a distinct difference between the affirmative defense of the unauthorized practice of law and a putative cause of action for the same. The unauthorized practice of law may exist as an affirmative defense to prevent the use of the court as a vehicle for unlawful conduct. In the typical case in which the affirmative defense is raised, a party engaged in the unauthorized practice of law brings suit against a defendant to whom he had rendered services. The defendant raises the affirmative defense that the plaintiff's services constituted the unauthorized practice of law. Should the court disallow such a defense and order the defendant to pay fees for the services, the court itself would be enforcing unlawful conduct. See, e.g., *Reliable Collection Agency, Ltd. v. Cole* (Haw. 1978), 584 P.2d 107, 112-113. Such use of the court system to reinforce unlawful behavior violates public policy. *Id.*

However, no such use of the court system to reinforce unlawful conduct exists when a plaintiff attempts to bring a private right of action to recoup fees he has already paid. Instead, when a plaintiff attempts to bring a private right of action to recoup fees already paid, he seeks to obtain the services of the defendant for nothing. As such, both state and federal courts have recognized that in circumstances when the judgment of the court will not operate to enforce unlawful conduct, courts are guided by the general principle that parties should be prevented from getting something for nothing. *Id.*, citing *Kelly v. Kosuga* (1959), 358 U.S. 516, 520-521, 3 L.Ed.2d 475, 79 S.Ct. 429. In other words, when it is the conduct of the parties themselves (and not the court) that results in payment for services that are unlawful, the parties are bound by their actions.

The recipient of the unauthorized services cannot seek to retain the benefits of the services and recoup fees he voluntarily paid.

The Supreme Court of Illinois elucidated upon the distinction between a cause of action for, and an affirmative defense of, the unauthorized practice of law in *King v. First Capital Fin. Serv. Corp.* (Ill. 2005), 215 Ill.2d 1, 828 N.E.2d 1155. As here, a group of mortgage holders brought an action against a mortgage issuer alleging that it had engaged in the unauthorized practice of law in preparing mortgage documents and charging a fee for the service. Arguing for a private right of action, the plaintiffs cited Illinois cases that allowed the use of the affirmative defense of practicing without a license.

The Illinois Supreme Court found the “affirmative defense” decisions inapt because in those cases, “the unlicensed parties were seeking to enforce contracts that courts determined were void and unenforceable. . . . [T]he courts will not aid a plaintiff who bases his cause of action on an illegal act.” *Id.* at 1174. In contrast, in *King* “no misrepresentation was involved and the lenders are not seeking to enforce void contracts. Rather, plaintiffs seek to recover payments voluntarily made with full knowledge as to the nature of the services rendered.” *Id.* Accordingly, the court “reject[ed] plaintiffs’ public policy argument as it applie[d] to their cases.” *Id.*

Like *King*, *Greenspan* is attempting to recover payments he made voluntarily with full knowledge as to the nature of the services rendered. As such, the public policy reasons to allow assertion of the affirmative defense of the unauthorized practice of law do not apply here.

Ultimately, in holding that an implied cause of action for the unauthorized practice of law existed, the *Greenspan* court failed to conduct the requisite statutory

analysis, failed to consider the necessary implications of the 2004 amendments to R.C. 4701, and failed to consider the differences between affirmative defenses and causes of action. Its holding should be rejected and that of *Miami Valley* embraced.⁵

Proposition of Law No. III: The Eighth District’s determination that anything that is an affirmative defense is also “inexorably” a private cause of action would create countless new causes of action and wreak havoc on regulated industries.

“A private cause of action does not exist for every question or issue.” *Nielsen*, 113 Ohio App.3d at 500-501. Should the Eighth District’s decision stand, however, any affirmative defense would also constitute a cause of action. The decision would transform affirmative defenses to collection actions by professions regulated under Ohio law, such as architects, *Elephant Lumber Co. v. Johnson* (4th Dist. 1964), 120 Ohio App. 266, 268-269, 202 N.E.2d 189, and real estate brokers, *Maglione v. Wijno* (9th Dist. 1939), 63 Ohio App. 223, 225-226, 25 N.E. 946, into private causes of action, including class actions, even if there are no allegations of fraud, negligence, or breach of contract. Given that Chapter 47 of the Revised Code contains sections regulating more than 50 different professions, the Pandora’s box that the decision below opens is large.

The potential new causes of action spawned by the decision below are not limited to regulated professions. If affirmative defenses “inexorably” lead to causes of action, one can expect new litigation based on causes of action for unclean hands, violations of the statute of frauds, equitable estoppel, etc. This unfettered creation of new causes of action would occur absent any express or implied statutory right. The Court should act to prevent the problematic ramifications of the panel’s decision.

⁵ The panel below refused to certify a conflict between its decision and *Miami Valley*.

Proposition of Law No. IV: The panel’s decision intrudes upon this Court’s exclusive jurisdiction over matters relating to the unauthorized practice of law.

The Ohio Constitution provides that “[t]he supreme court shall have original jurisdiction in the following [matters] * * * Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.” Section 2(B)(1)(g), Article IV, Ohio Const. This constitutional provision “confers on the [Ohio Supreme Court] exclusive jurisdiction over all matters related to the practice of law[,]” including matters relating to the unauthorized practice of law. *Disciplinary Counsel v. Alexicole*, 105 Ohio St.3d 52, 2004-Ohio-6901, 822 N.E.2d 348, at ¶8; see, also, *Cleveland Bar Assn. v. Baron*, 106 Ohio St.3d 259, 2005-Ohio-4790, 834 N.E.2d 343, at ¶6 (holding Ohio Constitution confers Ohio Supreme Court jurisdiction “over all matters relating to the practice of law, including allegations of laypersons practicing law without a license”); *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, at ¶39, 48 (same).

This Court has created a comprehensive and exclusive procedure to address claims regarding the unauthorized practice of law. See Gov. Bar.R. VII; Section 5(B), Art. IV, Ohio Const. The Rules for the Government of the Bar unambiguously state: “All proceedings arising out of complaints of the unauthorized practice of law shall be brought, conducted, and disposed of in accordance with the provisions of this rule.” Gov. Bar.R. VII §4(A). This is the “exclusive remedy” for such claims. *Miami Valley*, 119 Ohio App.3d at 353; *Sarum* at ¶32, 37.

Because this Court never determined that the defendants’ conduct constituted the unauthorized practice of law, Greenspan should not have been able to proceed with his lawsuit, even if a private cause of action existed. By allowing the case to proceed before

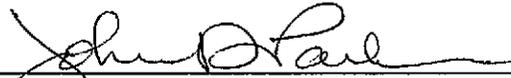
the trial court, the Eighth District undermined this Court's exclusive jurisdiction over whether conduct constitutes the unauthorized practice of law.

CONCLUSION

The Court should review and reverse the decision below.

Date: August 8, 2008

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this 9th day of August 2008:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89850

GARY A. GREENSPAN

PLAINTIFF-APPELLANT

vs.

THIRD FEDERAL SAVINGS & LOAN

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-593882

BEFORE: McMonagle, J., Gallagher, P.J., and Celebrezze, J.

RELEASED: May 22, 2008

JOURNALIZED: JUN 25 2008

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CHRISTINE T. McMONAGLE, J.:

Appellant Gary A. Greenspan filed a complaint for money had and received and unjust enrichment against Third Federal Savings and Loan. The gravamen of his claim was that Third Federal charged him, and routinely charged its other mortgage loan customers, a "document preparation fee" of approximately \$300. He further alleged that the preparation of the loan documents constituted the unauthorized practice of law. He sought to recoup monies paid by him for document preparation relating to a \$38,000 loan taken from Third Federal in 2002, and secured upon his real estate by a mortgage. He also sought class certification on behalf of others who had been similarly charged "anytime after June 13, 2001."

Third Federal filed an answer and then moved for judgment on the pleadings under Civ.R. 12(C), which provides that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The trial court subsequently granted Third Federal's motion, ruling that there was no private right of action "for enforcing directly or collaterally the unauthorized practice of law," prior to September 15, 2004. The court further held that for any claims arising after September 15, 2004, there is a private right of action, but that said action "may occur only upon a finding by the Supreme Court that the other person has committed an act that is prohibited

by the Supreme Court as being the unauthorized practice of law.” Greenspan now appeals in a single assignment of error alleging that the trial court erred by granting Defendant’s motion for judgment on the pleadings. The court never addressed the matter of class certification during the pendency of this matter.¹

A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a “belated” Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. However, a Civ.R. 12(C) motion is specifically designed for resolving questions of law. *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St. 3d 574, 2001-Ohio-1287, 752 N.E.2d 267. When considering a motion for judgment on the pleadings, the trial court is required to construe as true all the material allegations of the complaint, and draw all reasonable inferences in favor of the non-moving party. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 63 Ohio Op.2nd 262, 297 N.E.2d 113.

It is important in analyzing this case to note that Greenspan’s complaint alleges that he entered into the questioned loan agreement with Third Federal in July of 2002. On that date, R.C. 4705.07 (the statute prohibiting the unauthorized practice of law) provided simply and in pertinent part that “no

¹Greenspan’s personal claim accrued in 2002; however, he did request class certification for others, some of whose claims would, in fact, be governed by the statute as amended. However, insofar as the class was never certified, there is no relevance whatsoever to the terms of the amendment, except as to the specific language that its terms are not retroactive.

person not licensed to practice law in this state shall hold him or herself out as an attorney at law, represent to others that he is authorized to practice law, or use the title of 'lawyer,' 'attorney at law,' 'counselor at law,' or in any other fashion advertise or hold himself out as a lawyer, attorney or counselor at law."

The statute was substantially amended on September 15, 2004, by the addition of the following language:

"(B) ***

"(2) Only the supreme court may make a determination that any person has committed the unauthorized practice of law in violation of division (A)(3) of this section.

"(C)(1) If necessary to serve the public interest and consistent with the rules of the supreme court, any person who is authorized to bring a claim before the supreme court that alleges the unauthorized practice of law in violation of division (A)(3) of this section may make a motion to the supreme court to seek interim relief prior to the final resolution of the person's claim.

"(2) Any person who is damaged by another person who commits a violation of division (A)(3) of this section may commence a civil action to recover actual damages from the person who commits the violation upon a finding by the supreme court that the other person has committed an act that is prohibited by the supreme court as being the unauthorized practice of law in violation of that

division. The court in which that action for damages is commenced is bound by the determination of the supreme court regarding the unauthorized practice of law and shall not make any additional determinations regarding the unauthorized practice of law. The court in which the action for damages is commenced shall consider all of the following in awarding damages to a person under division (C)(2) of this section:

“(a) The extent to which the fee paid for the services that constitute the unauthorized practice of law in violation of division (A)(3) of this section exceeds the reasonable fees charged by licensed attorneys in the area in which the violation occurred;

“(b) The costs incurred in paying for legal advice to correct any inadequacies in the services that constitute the unauthorized practice of law in violation of division (A)(3) of this section;

“(c) Any other damages proximately caused by the failure of the person performing the services that constitute the unauthorized practice of law to have the license to practice law in this state that is required to perform the services;

“(d) Any reasonable attorney’s fees that are incurred in bringing the civil action under division (C)(1) or (2) of this section.

“(3) Divisions (C)(1) and (2) of this section apply, and may be utilized, only regarding acts that are the unauthorized practice of law in violation of division

(A)(3) of this section *and that occur on or after the effective date of this amendment.*” (Emphasis added.)

Third Federal interprets this amendment as standing for the proposition that prior to September 15, 2004, there was no cause of action for the unauthorized practice of law, and that the cause of action was created for the first time, by this amendment.

However, prior to September 15, 2004, three significant cases were litigated in reference to R.C. 4705.07. The first of these was *Foss v. Berlin* (1981), 3 Ohio App.3d 8, 443 N.E.2d 197. In *Foss*, the Tenth District held that “although plaintiff’s actions in drafting the contract constituted the unauthorized practice of law, such conduct is available to defendant as a defense only should plaintiff attempt to profit from the unauthorized practice itself, by attempting to charge defendant a fee for drafting the contract.”² *Id.* at 10.

Some eight years later, in *Cocon, Inc. v. Botnick Bldg. Co.* (1989), 59 Ohio App.3d 42, 570 N.E.2d 303, Cocon represented Botnik Building Company at a tax valuation hearing before the Summit County Board of Revision, and, for its services, charged Botnik \$17,811.45. When Botnik refused to pay, Cocon sued,

²The court found that the plaintiff was not attempting to profit from the unauthorized practice of law; rather, that he sought “compensation for selling real property as a broker,” and, accordingly, the judgment of the trial court was affirmed.

and the trial court found that because Cocon had engaged in the unauthorized practice of law as prohibited by R.C. 4705.01, summary judgment should be granted to Botnik. The Ninth District affirmed and held summary judgment appropriate.

Another eight years later, the Eighth District was heard upon this very same issue. In *Middleton and Assoc. v. Weiss* (June 19, 1997), Cuyahoga App. No. 71416, Judge David Matia, joined by Judges Nahra and Dyke, addressed the same issue raised by *Cocon*, i.e., whether a non-lawyer who represented someone before the Board of Revision could collect a fee for that representation. The Eighth District reached the same conclusion as did the Ninth and Tenth Districts, and affirmed the trial court's dismissal of Middleton's claim for fees.

These three cases constitute more than just a "walk down memory lane." They clearly establish that over a span of twenty-three years before the amendment of R.C. 4705.07 in 2004, there was common law recognition that proof that a plaintiff had engaged in the unauthorized practice of law was, in fact, a defense to a suit for fees.

The question we have before us today concerns the corollary issue, i.e., whether a plaintiff may recoup fees already paid from one who engaged in the unauthorized practice of law. Try as we might, we can conclude nothing but that this is a distinction without a difference; if the law permits one to resist paying

a fee for unauthorized legal representation, it inexorably follows that one should be able to recoup a fee incurred under the identical circumstances.

The trial court in this matter relied solely upon *Miami Valley Hospital v. Combs* (1997), 119 Ohio App.3d 346, 695 N.E.2d 308, in support of its conclusion that the amended statute created the first, and only, private cause of action for unauthorized practice of law.

In *Miami Valley Hosp.*, a defendant, attempting to avoid a balance due to a hospital after exhaustion of her health insurances, alleged that a collection agency (which was not a party to the lawsuit) had engaged in the unauthorized practice of law in its attempt to collect monies from her. While the opinion contains dicta that there is no private right of action for “enforcing [sic] the unauthorized practice of law,” the facts are wholly distinguishable from the matter before us, because the allegation of unauthorized practice of law did not involve anyone who was a party to the action. Further, *Miami Valley Hosp.* neither cites, recognizes, or distinguishes the cases from the Eighth, Ninth, and Tenth Districts, which clearly hold that the prohibition against the unauthorized practice of law occurring prior to 2004 could be enforced by a refusal to permit the wrongdoer to collect fees for its activities.

In its judgment granting Third Federal’s motion for judgment on the pleadings, the trial court stated: “[f]or any claims arising prior to September 15,

2004 [the date of the amendment] there was no private right of action for enforcing either directly or collaterally the unauthorized practice of law [citing *Miami Valley Hosp. v. Combs*].” This statement is in error; there were at least three cases, one of which, *Middleton and Assoc.*, arose within the trial court’s own district.

It should also be noted that the pleadings in this case do not directly make a claim for the “unauthorized practice of law;” the causes of action here are entitled “monies had and received” and “unjust enrichment.” Both of these claims for relief are equitable in nature. “Unauthorized practice of law” was merely the means by which appellant asserted these equitable claims; the “unauthorized practice of law” was never asserted as an independent cause of action.

In sum, R.C. 4705.07, as amended in 2004, does not, by its very terms, apply retroactively. Hence, the holding of the trial court that “there has been no finding by the Supreme Court that Third Federal Savings and Loan has committed an act that is prohibited by the Supreme Court as being the unauthorized practice of law” is irrelevant, because pre-2004, there was no requirement that the Supreme Court first make such a finding before a private cause of action could be recognized.

Appellee filed as supplemental authority from the Eighth District, *Crawford v. FirstMerit Mtge. Corp.*, Cuyahoga App. 89193, 2007-Ohio-6074. The

facts in *Crawford* are almost identical to the case at bar: Crawford borrowed money from FirstMerit in 2001 and was charged a document preparation fee which Crawford alleged was the “unauthorized practice of law” and for which she sought restitution. Crawford likewise sought certification as a class action; the record is not clear as to the requested parameters of the requested class; nonetheless, as in the instant case, the issue of class certification was never resolved. FirstMerit filed a Civ.R. 12(C) motion for judgment on the pleadings, contending that “only the Ohio Supreme Court could consider a complaint that raised the issue of the unauthorized practice of law.” *Id.* at 3. The appellate court concluded that “a person who claims to have been harmed by conduct alleged to have constituted the unauthorized practice of law must take his or her claim through the avenues prescribed by the Ohio Supreme Court, because it is the court with exclusive jurisdiction to make that determination.” *Id.* at 11. This finding is simply in error for reasons we have previously addressed. The requirement that the supreme court first find an “unauthorized practice of law” before a separate cause of action can arise, quite simply, does not apply to acts committed before September 15, 2004.

Additionally, *Foss*, *Cocon*, and *Middleton and Assoc.*, from the Tenth, Ninth, and Eighth Districts respectively, none of which have been overruled (or

even criticized), all hold that a defendant in a lawsuit may resist a demand for fees charged by one who has engaged in the unauthorized practice of law.

The only issue before us then is: if, prior to 2004, one was permitted to defend a demand for fees sought by another who generated those fees by the unauthorized practice of law, may one likewise seek a return of fees paid prior to 2004 from one who has generated those fees by the unauthorized practice of law? We discern no difference, answer affirmatively, and, accordingly, reverse the decision of the trial court granting judgment on the pleadings, and remand this matter to the trial court for further proceedings.

Appellant's assignment of error is sustained.

Reversed and remanded.

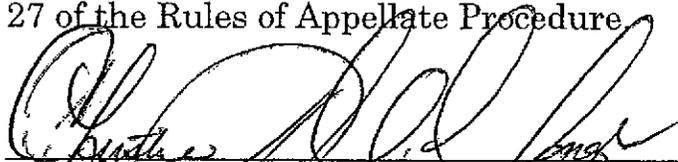
It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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



CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS
FRANK D. CELEBREZZE, JR., J., DISSENTS
WITH SEPARATE DISSENTING OPINION

FRANK D. CELEBREZZE, JR., J., DISSENTING:

I respectfully dissent. As the majority concedes, the facts of this case are almost identical to those in *Crawford v. FirstMerit Mortgage Corp.*, Cuyahoga App. No. 89193, 2007-Ohio-6074. Based on the doctrine of stare decisis, I feel compelled to follow this court's decision in *Crawford*, which holds that R.C. 4705.07 places within the exclusive jurisdiction of the Ohio Supreme Court the determination that the alleged conduct constitutes the unauthorized practice of law. Appellants here did not first seek such a determination; therefore, they cannot succeed on the merits of their claims. Accordingly, I would affirm the lower court's decision.



CASE: CV-06-593882

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file

GARY A. GREENSPAN
VS.
THIRD FEDERAL SAVINGS & LOAN

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JUDGE: DAVID T MATIA
ROOM: 17D JUSTICE CENTER
DOCKET DATE: 04/26/2007

PLAINTIFFS CLAIM THAT DEFENDANT THIRD FEDERAL SAVINGS & LOAN ALLOWED NON-ATTORNEYS TO PREPARE LOAN DOCUMENTS THAT WERE LEGAL IN NATURE. PLAINTIFFS SEEK RELIEF ON BEHALF OF INDIVIDUALS WHO OBTAINED LOANS FROM THE DEFENDANT ANY TIME AFTER JUNE 13, 2001 AND WHO WERE CHARGED A DOCUMENT PREPARATION FEE. THE CLASS REPRESENTATIVE BORROWED MONEY FROM THE DEFENDANT ON OR ABOUT JULY, 2002. FOR ANY CLAIMS ARISING PRIOR TO SEPTEMBER 15, 2004, THERE WAS NO PRIVATE RIGHT OF ACTION FOR ENFORCING EITHER DI-

FROM:

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