

IN THE SUPREME COURT OF OHIO

GARY A. GREENSPAN,

Appellee,

v.

THIRD FEDERAL SAVINGS & LOAN
ASSOCIATION,

Appellant.

CASE NO. 08-1568

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District

Court of Appeals
Case No. 07-89850

**MEMORANDUM IN RESPONSE TO JURISDICTION
OF APPELLEE GARY A. GREENSPAN**

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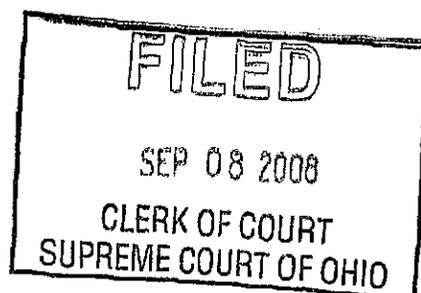


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THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST AND
DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court should not accept discretionary review because this case is not one of public or great general interest, and does not involve a substantial constitutional question. The potential application of the decision below is extremely limited both in time and in scope, the issue decided is not novel or of broad application, and neither court below ruled on any constitutional question.

This case's application is limited in time because the decision below affects only potential claims that accrued before September 15, 2004, and that are still within the six year statute of limitations for unjust enrichment claims. *Greenspan v. Third Fed. Sav. & Loan*, 8th Dist. No. 89850, 2008-Ohio-3528, at ¶5–15. This potential group of affected claims spans only two years, shrinks with each passing day, and will be completely extinguished on September 15, 2010. This case presents no issue of far-reaching future application or effect.

The issue decided by the Eighth District in this case is also narrow in scope. The Eighth District held that the Plaintiff stated a claim for unjust enrichment by alleging that he was charged a fee for legal services that were performed by a non-lawyer, and that based on the facts of this case it would unjustly enrich the non-lawyer to retain fees for its unauthorized practice of law. This holding is consistent with past precedent, and there is no public or great general interest in the case. *See Middleton & Assocs. v. Weiss* (June 19, 1997), 8th Dist. No. 71416, 1997 WL 337616 (holding that a contract for legal services performed by a non-lawyer is unenforceable as against public policy); *Cocon, Inc. v. Botnick Bldg. Co.* (1989), 59 Ohio App.3d 42, 570 N.E.2d 303 (same); *Med Controls, Inc. v. Hopkins* (1989), 61 Ohio App.3d 497, 573 N.E.2d 154 (same); *Foss v. Berlin* (1981), 3 Ohio App.3d 8 (explaining that Ohio law would

not permit a non-lawyer to “profit from the unauthorized practice of law itself, by attempting to charge * * * a fee”).

There is also no substantial constitutional question involved in this case. Neither the trial court nor the Eighth District ruled on any constitutional question or cited to any constitutional provision, and as set forth above, the decision below is consistent with precedent from several districts.

Appellant’s characterizations and predictions of the expansive scope and affect of the ruling in this case, while dramatic, are simply inaccurate and overstated. And the Appellant’s insistence that it was entitled to en banc review of the decision below does not transform this case into one of public or great general interest. An appellate court must have discretion in determining whether or not to convene en banc proceedings, and in this case not even the dissenting judge felt that this case warranted en banc proceedings, even though the Eighth District’s rules allow any judge on a panel to invoke en banc review. Article 8(b)(i) of the Standing Resolution of the Rules for the Conduct of Court Work. The Court should decline jurisdiction over this appeal.

STATEMENT OF THE CASE AND FACTS

The Plaintiff filed his Complaint on June 13, 2006, seeking to recover the \$300 “document preparation fee” that Third Federal Savings & Loan (“Appellant”) charged to the Plaintiff for the preparation of legal documents, including mortgages and deeds, that were prepared by *non-lawyers*. The Complaint alleges that Appellant failed to inform the Plaintiff that it was using non-lawyers to prepare these legal documents. The Complaint further alleged that, because a non-lawyer may not charge for the preparation of legal documents without engaging in the unauthorized practice of law, and because an agreement to pay a non-lawyer for legal

services is unenforceable, the Plaintiff is entitled to restitution of the “document preparation fee” under theories of unjust enrichment and money had and received.

In the trial court the Appellant moved for judgment on the pleadings, although it did not dispute that it had engaged in the practice of law by preparing legal documents for a fee. The trial court granted the motion on the grounds that no private cause of action existed.

On appeal the Eighth District reversed and held that the Complaint stated a valid cause of action for unjust enrichment or money had and received, and that the Plaintiff could seek disgorgement of the fee the Appellant had charged. The Eighth District cited precedent from the Eighth, Ninth, and Tenth Districts in support of its decision, and specifically explained why a prior Eighth District decision relied on by the Appellant, *Crawford v. FirstMerit Mortgage Corp.*, 8th Dist. No. 89193, 2007-Ohio-6074, was not controlling. The Appellant moved for reconsideration of the decision, or alternatively to certify a conflict, and the Eighth District denied the motion.

ARGUMENT IN RESPONSE TO APPELLANT’S PROPOSITIONS OF LAW

I. RESPONSE TO APPELLANT’S PROPOSITION OF LAW NO. I

A. The Eighth District did not error by declining to hold en banc proceedings.

Appellant’s contention that this case is like *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, and that the Eighth District was *required* to hold en banc proceedings is incorrect. The concerns at issue in *In re J.J.*, in which two panels of the same court issued conflicting decisions on the same day, are not present in this case, where the court decided two cases six months apart, where one judge was common to both panels of the court, and where the court in this case provided a reasoned analysis of why its decision was not governed by the prior decision.

Moreover, the appellate courts should have discretion to decide whether a conflict within their respective districts exists and whether en banc review is necessary. Such discretion is uniformly recognized by the federal judiciary. *See W. Pacific R.R. Corp. v. W. Pacific R.R. Co.* (1952), 345 U.S. 247, 259 (“[E]ach Court of appeals is vested with a wide latitude of discretion to decide for itself how that power [to convene en banc proceedings] shall be exercised.”); *In re Byrd* (6th Cir. 2001), 269 F.3d 585, 593 (“[T]he Supreme Court has determined that the process by which a federal appellate court decides to rehear a matter en banc is inherently internal, beyond the review of litigants or even the Supreme Court itself.” (citing *Shenker v. B. & O. R.R.* (1963), 374 U.S. 1, 5)). This discretion prevents unnecessary litigation over the determination of whether an intra-district conflict requiring en banc review exists, while at the same time preserving this Court’s ability to review questionable decisions.

The Eighth District’s decision that en banc proceedings were not necessary in this case is also entitled to deference because one judge was common to the two panels that the Appellant claims issued conflicting decisions, and yet even that judge did not feel that this case warranted en banc review. Under the Eighth District’s rules any judge of a panel, even a dissenting judge, may invoke en banc proceedings. Article 8(b)(i) of the Standing Resolution of the Rules for the Conduct of Court Work. Yet no member of the court chose to do so in this case, even after the procedure was suggested by the Appellant.

The concerns of uncertainty present in *In re J.J.* are also not present in this case. The decision below directly addressed the decision the Appellant claims is in conflict, and provided a reasoned analysis of why that decision was not controlling. There is no risk that future parties will be confused about which decision applies.

II. RESPONSE TO PROPOSITION OF LAW NO. II

B. Ohio recognizes a common law claim for unjust enrichment to recover a fee charged by a non-lawyer for legal services.

In its second proposition of law, the Appellant continues to mischaracterize the claim approved by the Eighth District as a claim *for* the unauthorized practice of law, when on its face, and as stated by the Eighth District, the claim in this case is *for* unjust enrichment, long recognized in Ohio. *See, e.g., Hummel v. Hummel* (1938), 133 Ohio St. 520, 528, 14 N.E.2d 923. The Eighth District's decision cites a consistent line of authority that Ohio courts will act to prevent a defendant from profiting from the unauthorized practice of law and to reimburse a party who has paid a fee for legal services performed by a non-lawyer. In *Foss v. Berlin* (1981), 3 Ohio App. 3d 8, 9–10, 3 OBR 9, 443 N.E.2d 197, the Tenth District explicitly engaged in a determination of whether or not a real estate broker engaged in the unauthorized practice of law, and recognized that a remedy would be available to prevent a non-lawyer from profiting from the unauthorized practice of law.

In *Foss*, the Court explained that the issue was whether a fee could be recovered for certain legal services:

[T]he single issue [is] whether a real estate broker's drafting of a real estate sales contract constitutes the unauthorized practice of law, such as to void the contract as illegal and, hence, relieve defendant from his obligation to pay the broker his commission.

Id. The Court held that a real estate broker's drafting of a real estate sales contract constituted the unauthorized practice of law, and explained that Ohio courts would not permit a broker to "profit

from the unauthorized practice of law itself, by attempting to charge defendant a fee for drafting the contract.” *Id.* at 10.¹

Similarly, in *Middleton & Associates v. Weiss* (June 19, 1997), 8th Dist. No. 71416, 1997 WL 337616, the Eighth District held that a non-lawyer may not receive any fee for services that constitute the unauthorized practice of law. In *Middleton*, a non-lawyer attempted to recover a fee for representing a party before the Board of Tax Revisions. The Eighth District was asked to decide “whether * * * representation before the Board of Revisions by an non-attorney based upon a contingency fee agreement constitutes an unauthorized practice of law” so as to prevent a non-lawyer from collecting a fee for such representation. *Id.* at *3. The Eighth District affirmed the trial court’s holding that “the representation * * * before the Cuyahoga County Board of Revision constitutes the unauthorized practice of law,” and therefore “the contract [that] provided for such service is unenforceable.” *Id.* at *2; *see also Med Controls, Inc. v. Hopkins* (1989), 61 Ohio App.3d 497, 498, 573 N.E.2d 154 (holding that a contract is unenforceable when it is for the unauthorized practice of law).

In *Cocon, Inc. v. Botnick Building Co.* (1989), 59 Ohio App.3d 42, 570 N.E.2d 303, syllabus, 305, the Ninth District Court of Appeals similarly determined that a specific act “constitute[d] the unauthorized practice of law” such that no fee could be collected for certain legal services performed by a non-lawyer. The plaintiff in *Cocon* sued to recover fees for tax consulting services and for services in representing the defendant before the board of revision. *Id.* at 43. The Ninth District held that the non-lawyer could not recover such fees as a matter of

¹ In *Foss*, the court ultimately determined that the real estate broker’s commission was not a charge for his document preparation services, but compensation for procuring a buyer—a service for which he could be compensated. In this case, by contrast, the Complaint alleges that the “document preparation fee” Appellant charged is specifically for its preparation of legal documents, which the court in *Foss* recognized is prohibited.

law, because the services for which it charged constituted the unauthorized practice of law. *Id.* at 44.

As *Foss, Middleton & Associates, Cocon, and Hopkins* all demonstrate, an agreement to pay a non-lawyer for legal services is unenforceable because it is illegal for a non-lawyer to practice law. “As a general rule, one may recover back money paid under an illegal contract, where the payor is not equally at fault with the defendant,” through a claim in equity for unjust enrichment or restitution. 73 Ohio Jur.3d Payment and Tender § 78 (citing *Reinhard v. Columbus* (1892), 49 Ohio St. 257, 31 N.E. 35). Here, the Appellant benefited from its unauthorized practice of law by charging plaintiff a fee; the Eighth District properly held that in equity the Appellant may be ordered to disgorge the benefit it retains from its unauthorized acts.

Brushing these precedents aside, the Appellant relies on *Miami Valley Hospital v. Combs* (1997), 119 Ohio App. 3d 346, 353, 695 N.E.2d 308. However, as the Eighth District recognized, *Miami Valley Hospital* is inapplicable to this case because (1) the plaintiff in *Miami Valley Hospital*, unlike the Plaintiff here, did not suffer any monetary loss as a result of the unauthorized practice of law alleged; (2) the unauthorized practice of law alleged in *Miami Valley Hospital* was that of a *third party* not part of the suit; and (3) the plaintiff in *Miami Valley Hospital* did not pay a non-lawyer for legal services.

In *Miami Valley Hospital*, a hospital brought suit against its patient to recover for unpaid medical bills. *Id.* The patient did not dispute that she was liable for the unpaid bills, but defended solely on the ground that the hospital’s collection agency had engaged in the unauthorized practice of law while attempting to collect the debt. *Id.* The Second District stated the only issue in the case as “whether [the patient] may claim *as a defense* the fact that *a third party, not part of the suit*, is engaging in the unauthorized practice of law. (Emphasis added.) *Id.* at 346. In holding

that the patient could not, the court emphasized that the patient suffered no pecuniary injury because of the collection agency's unauthorized practice of law.

While the *Miami Valley Hospital* court prevented the defendant from using a third party's unauthorized practice of law as a defense to a valid unrelated debt, in *Foss*, the court recognized that a remedy would be available where a party to a lawsuit has attempted to benefit from its unauthorized practice of law by charging a fee. Unlike *Miami Valley Hospital*, and like *Foss*, here the Plaintiff has suffered a direct pecuniary loss (and the Appellant has gained a corresponding benefit) because Appellant specifically charged a \$300 fee for the preparation of legal documents by non-lawyers. Unlike *Miami Valley Hospital*, and like *Foss*, the alleged unauthorized practice of law here is that of a party to the suit. And, unlike *Miami Valley Hospital*, and like *Foss*, the alleged unauthorized practice here took place between the parties to this suit, not under a collateral contract.

Appellant also cites to several foreign cases that are inapplicable to the claims in this case. *Reliable Collection Agency, Ltd. v. Cole* (Haw. 1978), 584 P.2d 107, involved a collection action, and is therefore distinguishable on the same grounds as *Miami Valley Hospital*. And *King v. First Capital Fin. Serv. Corp.* (Ill. 2005), 215 Ill.2d 1, 828 N.E.2d 1155, involved the defense of voluntary payment. But in this case, the Complaint explicitly pleads that Appellant failed to inform the plaintiff that attorneys were not involved in the preparation and completion of documents related to their mortgage loan transactions. The voluntary payment doctrine does not apply when the plaintiff did not know the facts that made the payment demand unenforceable, nor does it apply to an illegal agreement where the payor is not in *pari delicto* with the payee. See *Firestone Tire & Rubber Co. v. C. Nat'l Bank of Cleveland* (1953), 159 Ohio St. 423, 433, 112 N.E.2d 636; 73 Ohio Jur.3d Payment and Tender § 78 (citing *Reinhard v. Columbus* (1892), 49

Ohio St. 257, 31 N.E. 35). In addition, several other states have explicitly approved of claims like those in this case, either by statute, common law, or both. *E.g.*, *Carpenter v. Countrywide Home Loans, Inc.* (Mo. 2008), 250 S.W.3d 697; Texas Gov't Code § 83.001(a) (Vernon 2006); *Lenders Title Co. v. Chandler* (Ark. 2004), 358 Ark. 66, 71, 186 S.W.3d 695, 697.

Appellant also cites to R.C. 4705.07, which creates a limited cause of action to recover damages for the unauthorized practice of law *after* a disciplinary action has been decided by this Court. However, R.C. 4705.07 does not apply to Plaintiff's claim because Plaintiff's claims arose *before* the effective date of the statute. R.C. § 4705.07(C)(3) (the statute is applicable only to acts occurring on or after the effective date of September 14, 2004). Because the facts alleged by the Plaintiff occurred before 2004, he has no statutory claim and instead brought common law claims for unjust enrichment and for money had and received. Nonetheless, the amendments to the statute support the proposition that prior to the amendments, trial courts may hear claims like the Plaintiff's without a prior unauthorized practice of law adjudication by this Court.

“When confronted with amendments to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law.” *Lynch v. Gallia County Bd. of Comm'rs* (1997), 79 Ohio St.3d 251, 254 680 N.E.2d 1222, 1224. “A basic rule of statutory construction requires that ‘words in statutes should not be construed to be redundant * * *.’” *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶6 (quoting *E. Ohio Gas Co. v. Pub. Util. Comm'n* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875).

The legislature's amendments to R.C. 4705.07(C) provide that “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.” (Emphasis added.) R.C. 4705.07(C)(2). The legislature’s addition of a requirement that a prior unauthorized practice of law adjudication by this Court is a prerequisite to suit under the statute must be presumed to have been made to effect a change—that is, prior to the amendment, there was no such requirement. Thus, the amendments to R.C. 4705.07 confirm that the court of common pleas may hear claims based on events occurring prior to the effective date of the statute without a prior adjudication by this Court.

III. RESPONSE TO PROPOSITION OF LAW NO. III

B. The Eighth District’s decision is limited and is in keeping with past precedent.

The Appellant’s overstated assertions that the decision in this case will lead to innumerable “new” causes of action are wholly-unfounded. The issue in this case is whether the Complaint stated a cause of action for unjust enrichment by alleging that the Appellant collected fees for providing legal services as a non-lawyer. The Eighth District’s decision is limited to the equities of this fact pattern, the strong public policy considerations in deterring the unauthorized practice of law, and other considerations that do not necessarily require a similar result for cases involving other regulated professions. Moreover, as shown above, the decision is in line with past precedent concerning the practice of law.

IV. RESPONSE TO PROPOSITION OF LAW NO. IV

B. The Eighth District’s decision does not intrude upon this Court’s jurisdiction.

Appellant wrongly contends that the Eighth District’s decision intrudes upon this Court’s jurisdiction over the unauthorized practice of law, even though this is a standard civil case for

damages, not a disciplinary action for the unauthorized practice of law. Section 4(B), Article IV of the Ohio Constitution provides that “[t]he courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law.” Pursuant to this provision, the General Assembly has given the common pleas courts “original jurisdiction *in all civil cases*.” (Emphasis added.) R.C. 2305.01. “[T]he usual and customary meaning accorded to a civil action is ‘[a]n action brought to enforce, redress or protect a private or civil right; a noncriminal litigation.’” *Benjamin v. Credit Gen. Ins. Co.*, 10th App. No. 04AP-642, 2005-Ohio-1450, ¶19 (quoting Black’s Law Dictionary (7th Ed. 1999)). An action for unjust enrichment is a civil case. *See, e.g., Clapp v. Mueller Elec. Co.*, 162 Ohio App.3d 810, 2005-Ohio-441, 835 N.E.2d 757, ¶41.

The Plaintiff brought a civil case for restitution of an unlawful fee, based on theories of unjust enrichment and money had and received. Accordingly, the court of common pleas has jurisdiction over this civil case under R.C. 2305.01 and section 4(B), article IV of the Ohio Constitution.

Appellant incorrectly argues that the common pleas court lacked jurisdiction, even though this is a civil case. Appellant incorrectly reasons that because the trial court would be required to determine the issue of whether Appellant’s preparation of legal documents for a fee was the practice of law, the trial court lacked jurisdiction because this Court has “original jurisdiction * * * [over] [a]dmission 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 Constitution.

The fact that the conduct making the agreement unenforceable in this case is the unauthorized practice of law, however, does not transform this civil case into one within this

Court's original jurisdiction. A civil case for restitution under an illegal or unenforceable contract often involves conduct that is criminal or otherwise prohibited. *Licking County v. Maharg* (1990), 61 Ohio Misc.2d 126, 575 N.E.2d 529 (granting motion for summary judgment on claim by county for restitution of money paid by county informant to drug dealer). The fact that the underlying conduct is criminal does not transform the civil case into a criminal case. *Cf. id.* Similarly, the fact that the underlying conduct in this case is the unauthorized practice of law does not transform this civil case into one within this Court's original jurisdiction.

The mere fact that a civil case may share an *issue* in common with a disciplinary matter within this Court's original jurisdiction does not deprive the trial court of jurisdiction over the *civil case*. For example, this Court would certainly have jurisdiction to discipline an attorney who failed to "act with reasonable diligence and promptness in representing a client" or "neglect[ed] a legal matter entrusted to him." Prof. Cond. Rule 1.3; DR 6-101(A)(3) (superseded February 1, 2007). But no one could seriously suggest that a client harmed by a lawyer's neglect could not pursue an ordinary malpractice claim in the trial courts, or that the claim must first be presented in this Court, and then only if the client can enlist the support of a local bar association. *See, e.g., Disciplinary Counsel v. McKenna* (2006), 108 Ohio St.3d 178, 2006-Ohio-547, 842 N.E.2d 46, ¶6 (suspending lawyer from practice of law and noting related malpractice action had been filed).

Similarly here, the court of common pleas has jurisdiction over the Plaintiff's civil case. That this Court would have jurisdiction over a petition by a local bar association to *enjoin* Appellant's use of nonlawyers to prepare legal documents does not change the result.

To the contrary, this Court's precedent requires lower tribunals to deal with the issue of unauthorized practice when it arises in a case otherwise properly before those tribunals. For

example, in *Fravel v. Stark County Board of Revision*, 88 Ohio St.3d 574, 2000-Ohio-430, 728 N.E.2d 393, this Court affirmed a Board of Tax Appeals' holding that a non-lawyer engaged in the unauthorized practice of law. The Court did *not* suggest that the Board of Tax Appeals lacked jurisdiction to determine that the non-lawyer engaged in the unauthorized practice of law.

Instead, the Court explained that the BTA correctly applied the law:

* * * Dorn engaged in the unauthorized practice of law, and, under *Sharon Village*, the BTA correctly dismissed the complaint Dorn filed on behalf of Fravel. Accordingly, we hold that the BTA's decision is reasonable and lawful, and we affirm it.

Id. at 576. See also *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision*, 85 Ohio St.3d 125, 1999-Ohio-257, 707 N.E.2d 472 (affirming board of tax appeals' decision that non-lawyer engaged in unauthorized practice of law); *C.I.A. Props. v. Cuyahoga County Auditor*, 89 Ohio St.3d 363, 2000-Ohio-192, 731 N.E.2d 680 (same); *Gammarino v. Hamilton County Bd. of Revision*, 80 Ohio St.3d 32, 1997-Ohio-361, 684 N.E.2d 309 (reversing board of tax appeals's decision that non-lawyer did not engage in unauthorized practice of law); *State ex rel. Cooker Rest. Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St.3d 302, 306, 686 N.E.2d 238, 1997-Ohio-315 (holding that board of elections did not abuse discretion when it held that the preparation and filing of a statutory protest with a board of elections constitutes the practice of law).

The courts of appeals have similarly exercised jurisdiction over claims nearly identical to those raised by the Plaintiff without ever suggesting the common pleas courts lacked jurisdiction over such civil cases, which involved some determination of the unauthorized practice of law. See *Middleton & Assocs., Cocon, Med. Controls, Foss*, supra. Contrary to Appellant's argument, Gov. Bar R. VII does not change this result, it merely allows local bar associations to initiate disciplinary proceedings, not civil damages suits, against unauthorized practitioners.

CONCLUSION

This case is not one of great public or general interest and does not involve a substantial constitutional question. The motion for leave to appeal should not be allowed.

Dated: September __, 2008

Respectfully submitted,

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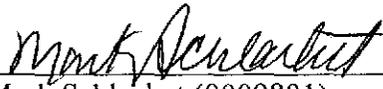
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Response was sent by regular U.S. mail to counsel for appellant this 5th day of September, 2008.

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