

IN THE OHIO SUPREME COURT

11-0936

KENNETH RATHERT,
aka Kenneth Rathert, P.C.,

Appellee,

v.

LOIS KRISTINE KEMPKER,

Appellant.

Case No. CA2010-06-043

On appeal from the Court of Appeals
for the Twelfth Appellate District,
Clermont County

**APPELLANT LOIS KRISTINE KEMPKER'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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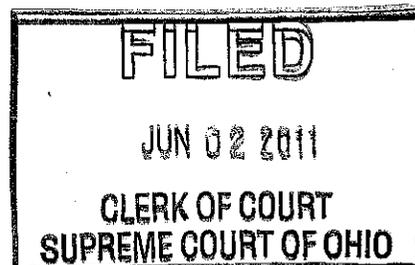


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THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Public Has a Great Interest in the Application of the FDCPA to State Court Lawsuits

A prolonged recession has caused a rise in defaults on consumer debt. As fewer consumers make timely payments, lawsuits against consumers have increased. This Court has noted dramatic increases in foreclosure suits in Ohio courts, as economic conditions force homeowners to default on mortgage debt. Ohio courts also host other lawsuits to collect conventional consumer debt.

The scramble to collect consumer debt in this difficult economy has led debt collectors to more desperate collection tactics against consumers. The Ohio Attorney General has reported that his office has lately handled record numbers of complaints of unscrupulous and illegal debt collection practices. Complaints include allegations of failure to verify debts, attempts to collect debts not owed, unauthorized withdrawals from bank accounts, and verbal abuse, insults and foul language. Columbus Dispatch, 9/11/2009, *Ohio Attorney General Says Complaints About Debt Collection Abuse May Reach Record Levels in 2009*.

In 1977, the United States Congress passed the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (“the FDCPA”), to protect consumers against such abusive collection tactics. Senate Report No. 95-382, 95th Cong. 1st Sess. 12, reprinted in (1977) U.S. Cong. & Admin. News 1695, 1696; 15 U.S.C. § 1692, FDCPA Section 802, Findings and Purposes. It applies broadly to regulate communications, other collection activities, and litigation by debtholders and collectors against consumers. *See Id.*

Notwithstanding the federal character of the FDCPA, lawsuits regulated by the Act are most often filed in state courts. Debtholders generally sue consumers for debt falling below the minimum threshold for federal diversity jurisdiction. Many consumers decline legal

representation and don't invoke a right of removal. The roles of Ohio's small claims, municipal and common pleas courts consider these consumer collection actions in full dockets on a daily basis.

Yet as difficult economic times foster more consumer abuse and more state court collection activity, this Court has remained silent on how the FDCPA is to be enforced in state court proceedings. Research has not revealed any opinion by this Court to address the applicability or provisions of the FDCPA. As this case shows, Ohio trial courts need this Court's instruction on the application of the FDCPA in state court proceedings.

This case presents issues relating to the applicability of the FDCPA in Ohio state court proceedings, and to a few of the FDCPA's substantive requirements. In particular, the trial court and Court of Appeals erroneously failed to recognize the FDCPA's application as a defense to the Plaintiff's consumer collection claim. Ohio trial courts, consumers and debt collectors would all benefit from this Court's decision to address the application of the FDCPA in this case.

Standards to Assert and Prove Attorney Fees is a Matter of Public Interest

This Court and its Bar regard the practice of law as a trust that imposes responsibilities on lawyers entrusted to represent public clients. The Court has promulgated rules -- minimal normative standards of behavior -- to inform and guide client relationships. The standards are designed to foster public confidence in the legal process and in lawyers privileged to practice law, so as to make legal representation available for, and trusted by, the public.

Among other things, these standards include procedural law governing standards of proof necessary to support a lawyer's claim for fees. These standards of proof are an essential part of the mandatory professional norms designed to foster public confidence in the legal system and

the lawyers who practice within it. This Court, the Bar, and the public in general have a strong interest in examining and enforcing these standards in Ohio courts.

This case presents an issue regarding the standard of proof necessary to prove a claim for attorney fees in Ohio courts. The trial court and Court of Appeals erroneously refused to apply Ohio procedural law to this issue of the standard of proof, and the Court should address the issue.

STATEMENT OF THE CASE AND FACTS

Appellee Kenneth Rathert is a Michigan attorney who represented Appellant Kris Kempker in a Michigan divorce proceeding. Although Ms. Kempker paid more than \$13,000 in fees, Mr. Rathert claimed that Ms. Kempker still owed \$15,176.77 through December 2000. He sued Ms. Kempker in the Clermont County Court of Common Pleas in 2006, but voluntarily dismissed the suit under Rule 41(A).

Through counsel, Mr. Rathert refiled his suit in October 2008, again asserting that Ms. Kempker owed more than \$15,000 in outstanding fees. Before filing the second suit, in September 2008, Mr. Rathert's counsel sent Ms. Kempker a dunning letter made to appear as if it was a form of legal process. The letter demanded payment, but failed to warn Ms. Kempker that it came from a debt collector, that any information received would be used for that purpose, that Ms. Kempker had 30 days to dispute the debt's validity, and that a response would be made to her dispute within 30 days (the FDCPA's "mini-Miranda warnings"). In a responsive letter, Ms. Kempker contested the debt and requested verification, but neither Mr. Rathert nor his counsel ever responded to the request.

Service papers for the lawsuit also failed to incorporate the FDCPA's mini-Miranda warnings or billing statements and other evidence to verify the debt. Nonetheless, Mr. Rathert and his counsel continued to prosecute the collection action. In response to the action, Ms. Kempker contested the debt and claimed that the actions of Mr. Rathert and his attorney violated the FDCPA.

The case was tried to the Clermont County Court of Common Pleas in December 2009. Mr. Rathert testified that the parties orally agreed to hourly billings of \$95. He also presented correspondence to Ms. Kempker and ledger statements asserting a history of his claim to fees.

But he didn't introduce any detailed billing records to account for how he spent the time charged. And he didn't introduce any surveys of fee charges, any expert testimony of customary and reasonable charges in the area, or any other evidence in an attempt to prove the reasonableness of his charges.

Ms. Kempker sought to introduce evidence of violations of the FDCPA, including the September 2008 letter from Mr. Rathert's counsel and her responsive letter to dispute the debt. But the trial court refused to admit the exhibits. The trial court believed that the FDCPA didn't apply to a case where an attorney, Rathert, attempted to collect from a client for his own account. It therefore determined that Ms. Kempker couldn't present an affirmative claim under the FDCPA, so that evidence of FDCPA violations was irrelevant to the suit.

The trial court announced its ruling in a 15-page decision entered March 25, 2010. The decision granted judgment in Mr. Rathert's favor in the reduced amount of \$15,064.10. Ms. Kempker moved for a new trial, but the motion was denied.

On appeal to the Twelfth District Court of Appeals, the appellate court affirmed the trial court's decision in all respects. Specifically, it agreed that the FDCPA did not apply to Mr. Rathert because he was attempting to collect his own account. *Opinion, 4/18/11, A-1, pp. 7-8.* Accordingly, it believed the trial court properly excluded the exhibits offered by Ms. Kempker. *Id.*, p. 11. The Court of Appeals also ruled that Mr. Rathert's letters to Ms. Kempker and ledger statements were sufficient to prove the amount owed. *Id.*, p. 7.

In these rulings, the courts below were wrong.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The FDCPA Offers a Defense to a State Court Claim for Lawyer's Fees From a Divorce Client

Congress passed the Fair Debt Collections Practices Act because it found compelling evidence that debt collectors had used harassing collection techniques to try to collect debts from consumers. 15 U.S.C. § 1692. Congress linked these pernicious debt collection practices to such social evils as bankruptcy, marital instability job loss and invasions of privacy. *Id.* The FDCPA comprised Congress' effort to protect consumers against debt collection abuses. *Id.*

Under the FDCPA, Congress intended generally to protect "consumers," defined to include "any natural person obligated or allegedly obligated to pay any debt," from "debt collectors," including "one who "attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another." 15 U.S.C. § 1692a. The FDCPA established a scheme of reasonable protections that would generally require debt collectors to advise a consumer of an alleged debt without deception, permit a consumer to contest the debt, and obligate the debt collector to confirm the debt before taking further collection action.

Specifically, under 15 U.S.C. § 1692e(11), a debt collector must identify himself as a "debt collector" and advise the consumer that his letter is an attempt to collect a debt and that any information obtained will be used for that purpose, often called a "mini-Miranda warning." Once the consumer is advised, the debt collector must also identify the debt and advise the consumer that she has 30 days to dispute the debt's validity. 15 U.S.C. § 1692g(a). The debt collector must then promise to respond to the consumer's dispute within 30 days. *Id.* If the consumer contests the debt, efforts to collect the debt must stop until the consumer receives verification of the debt. 15 U.S.C. § 1692g(b).

In this case, the trial and appellate courts didn't specifically rule that the FDCPA generally applied to this suit to recover attorney fees from an individual divorce client, but seemed to assume that Ms. Kempker was a "consumer," Mr. Rathert's counsel was a "debt collector," and that the FDCPA generally applied to such suits. But the courts ruled that the FDCPA didn't create an affirmative claim against Mr. Rathert in this case because in collecting for his own account, Mr. Rathert wasn't a "debt collector" subject to the FDCPA. The courts also commented that while the FDCPA may have created an affirmative claim against Mr. Rathert's collection attorney, the lawsuit didn't name the attorney as a party.

But the courts failed to analyze the effect of the FDCPA as a defense against Mr. Rathert's claim to collect the consumer debt from Ms. Kempker. In fact, in §1692g(b) the FDCPA extended an effective defense against any efforts to collect the consumer debt until after a response to Ms. Kempker's request for verification of the debt. Until a response was issued, with an appropriate mini-Miranda warning, efforts to collect the debt could not proceed. See 15 U.S.C. § 1692g(b).

This Court should expressly address this, and all other, issues under the FDCPA so that Ohio trial and appellate courts may have this Court's proper instruction on application of the FDCPA to proceedings in Ohio courts.

Proposition of Law No. 2: To Establish a Claim for Fees, an Attorney Must Prove the Reasonableness of His Fees

In Ohio, to prove a lawyer's claim for professional fees, Ohio trial and appellate courts have established a policy requiring attorneys to prove both a contractual basis for fees and, in addition, the "reasonableness and fairness" of the charges. *Climaco, Seminatore, Delligati and Hollenbaugh v. Carter* (10th Dist. 1995), 100 Ohio App.3rd 313, 323, 653 N.E.2nd 1246, 1251; *Holston v. Jacobs* (6th Dist. 1980), 70 Ohio App.2nd 55, 434 N.E.2nd 738; *Summers & Vargas Co. v. Abboud* (8th Dist. 2010), 2010-Ohio-5595, No. 94310, ¶¶ 23-24. The policy finds its root in ethical requirements that prohibit attorneys from charging unreasonable fees. See DR 2-106, Code of Professional Responsibility.

Courts faced with determining the reasonableness of attorneys fees generally look for evidence of how the attorney spent his time to justify the fee, and consider the factors articulated in DR 2-106(B), including the time and labor involved, the novelty of issues, the skill necessary to pursue the representation, the customary fee in the locality, the result, and the experience, reputation and skill of counsel. *Climaco*, 100 Ohio App.3rd at 324; *Summers & Vargas*, at ¶24; *Pyle v. Pyle* (8th Dist. 1983), 11 Ohio App.3rd 31, 463 N.E.2nd 98. A court's failure to consider these factors in determining fees is ground to set aside a judgment for fees. *Climaco, supra*.

In this case, after alleging the terms of his oral contract for hourly fees, Mr. Rathert made no effort to demonstrate the reasonableness of the fees. He submitted nothing more than ledger sheets showing raw charges. He didn't present detailed billings or other evidence to describe the time necessary to the representation or how his time was spent. Nor did he present evidence of customary charges in the community. Of course, the courts made no analysis of these factors in evaluating or reviewing the fee charges.

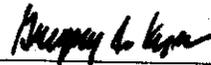
This Court should address the issue of the resolution of attorney fee claims, and should vacate the judgment below.

The courts appear to have passed the traditional damage inquiry compelled by Ohio law by concluding that Michigan law governed the claim. But while Michigan law may govern the substantive claim for breach of contract, Ohio choice of law rules apply Ohio procedural law to prescribe the methods of enforcing the rights, including issues of burdens of proof. *Rose v. Phinney* (3rd Dist. 2007), 2007-Ohio-5494, No. 1-06-108, *citing State ex rel. Columbus v. Boylan* (1979), 58 Ohio St.2nd 490, 492, 391 N.E.2nd 324. Regardless, Michigan law imposes the same requirements to prove a claim for attorneys fees, and if applicable, the courts erred in failing to apply the Michigan law. See *Smith v. Khouri* (Mich. 2008), 481 Mich. 519, 751 N.W.2nd 472.

CONCLUSION

For the reasons discussed above, this case involves issues of public and great general interest. Appellant Lois Kristine Kempker asks this Court to accept jurisdiction in this case and so these important issues can be addressed by this Court for the benefit of Ohio courts, the Bar, and the public.

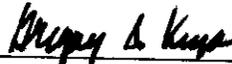
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was served by ordinary U.S. mail, postage prepaid, on Kenneth J. Rathert, 137 North Park Street, Kalamazoo, Michigan 49007 on June 2, 2011.



Gregory A. Keyser

ATTENTION

Please find enclosed a copy of this court's decision in this matter. **The original decision will be officially and publicly released at 9:00 a.m. on April 18, 2011.**

The court is sending you this copy in advance of the official release as a courtesy so that you may review it before either you or the litigants become aware of the court's decision from some other source.

It is anticipated that public comment will not be made prior to the official release of the decision.

The Court of Appeals

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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

KENNETH RATHERT,
aka Kenneth Rathert, P.C.,

Plaintiff-Appellee,

- vs -

LOIS KRISTINE KEMPKER,

Defendant-Appellant.

CASE NO. CA2010-06-043

OPINION
4/18/2011

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008-CVH-02030

Kenneth Rathert, 137 North Park Street, Kalamazoo, Michigan 49007, plaintiff-appellee
pro se

George P. Brandenburg, 905 Ohio Pike, Cincinnati, Ohio 45245, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Lois Kristine Kempker, appeals the decisions of the Clermont County Common Pleas Court entering judgment in favor of plaintiff-appellee, Kenneth Rathert, aka Kenneth Rathert, P.C., and denying her motion for a new trial in a collection action for unpaid attorney fees. For the reasons discussed below, we affirm the decisions of the trial court.

{12} In May 1992, appellee, an attorney practicing law in Kalamazoo, Michigan, entered into an oral contract with appellant to represent her in divorce proceedings in a Michigan domestic relations court. According to appellee, although his hourly rate at the time was \$145, he agreed to represent appellant at a reduced rate of \$95 per hour as a result of her financial constraints.

{13} In a May 15, 1992 engagement letter addressed to appellant at her residence in Kalamazoo, appellee confirmed the terms of their contract. The letter provided, in pertinent part, as follows:

{14} "This letter will confirm our May 12, 1992 conference in which I agreed to represent you * * *. The minimum fee is \$1,500, \$800 of which you have already paid. You will pay the balance of \$700 as soon as possible. This minimum fee is the least amount you will be charged and is non-refundable. As we also agreed, you will be making monthly payments of \$200-300 on your account.

{15} "I will charge you \$95 per hour for all time I spend on your case and keep track of my time in increments of quarter hours. * * * I will send you statements about once a month and you will be expected to pay the full balance within TEN (10) DAYS." (Emphasis sic).

{16} After her divorce was finalized in 1994, appellant requested that appellee continue to represent her in post-judgment matters in domestic relations court, including her efforts to collect support awards. He also represented her interests in bankruptcy proceedings filed by her ex-husband. Following appellant's relocation to Ohio, appellee sent her another letter in June 1997, confirming that he would continue to charge her a discounted hourly rate of \$95 on the related divorce matters. In the letter, appellee also stated, "I will send you statements about once a month and I would appreciate a payment each month, regardless of the amount you send."

{¶7} According to the record, appellee represented appellant from May 1992 through approximately December 2000. During the course of the parties' relationship, appellant consistently made late and partial payments on the balance owed to appellee. Her last payment was made on December 16, 2002.

{¶8} In October 2008, appellee initiated the instant action against appellant, alleging that she owed \$15,176.77 in outstanding legal fees. Appellant filed a counterclaim for breach of contract, unjust enrichment, promissory estoppel, negligent infliction of emotional distress, violations of the Fair Debt Collection Practices Act (FDCPA), and loss of consortium. Appellant's claims centered on her allegation that the parties had agreed upon a maximum fee of \$8,000 for all of the legal work performed by appellee for the divorce and post-judgment matters. In her answer, appellant claimed that she paid appellee a total of \$13,247.42.

{¶9} Following a bench trial in December 2009, the trial court entered judgment in favor of appellee. In its March 25, 2010 decision, the court concluded that appellant breached the terms of the parties' oral contract and awarded appellee \$15,064.10 in unpaid legal fees as damages. The court entered judgment against appellant on her counterclaims.

{¶10} Appellant subsequently moved for a new trial pursuant to Civ.R. 59(A). Following a hearing, the trial court denied appellant's request in its May 21, 2010 decision.

{¶11} Appellant has appealed the trial court's March 25 and May 21 decisions, raising eight assignments of error for our review.¹ Several of the assignments involve

1. The record indicates that appellee neither filed an appellate brief nor appeared at oral argument in this matter. In failing to file a brief, this court "may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." App.R. 18(C). The record further indicates that at oral argument, appellant moved to dismiss appellee's underlying action for want of prosecution as a result of his failure to appear. Appellant's motion to dismiss is not well-taken and is hereby overruled.

similar issues and arguments and will be consolidated for purposes of discussion.

{¶12} Prior to addressing the merits of her assignments, however, we observe that appellant's brief is less than clear with regard to the rationale for her challenges on appeal. The burden of affirmatively demonstrating error on appeal and substantiating one's arguments in support thereof falls upon the appellant. *State v. Fields*, Brown App. No. CA2009-05-018, 2009-Ohio-6921, ¶7, citing *State v. Hairston*, Lorain App. No. 05CA008768, 2006-Ohio-4925, ¶11. See, also, App.R. 16(A)(7). It is not an appellate court's duty to "root out" or develop an argument that can support an assignment of error, even if one exists. *Hairston* at id.; *Hausser & Taylor, LLP v. Accelerated Systems Integration, Inc.*, Cuyahoga App. No. 84748, 2005-Ohio-1017, ¶10. We are mindful of these considerations in addressing the following errors assigned by appellant.

{¶13} Assignment of Error No. 1:

{¶14} "[THE TRIAL] COURT ABUSED ITS DISCRETION BY GRANTING JUDGMENT FOR APPELLEE WITHOUT RECORDS[.]"

{¶15} Assignment of Error No. 5:

{¶16} "[THE TRIAL] COURT ABUSED ITS DISCRETION BY GRANTING ATTORNEY FEES IN THE ABSENCE OF TIME RECORDS, WITH NO EVIDENCE OF FAIR, REASONABLE AND LEGAL VALUE OF SERVICES RENDERED [SIC]."

{¶17} In her first and fifth assignments of error, appellant challenges the trial court's conclusion that appellee was entitled to judgment on his claim that appellant breached the terms of the parties' contract.

{¶18} Citing choice of law principles, the trial court determined that Michigan law applied to the construction of the contract. The court found that the contract was negotiated, formed, and performed in Michigan and related to appellee's representation of appellant in various courts in that state. After applying Michigan law, the court further

determined that there was "clearly a meeting of the minds and valid oral agreement that [appellant] would be required to pay for all of the legal services rendered to her by [appellee]." Despite her testimony to the contrary, the court did not find her claim that appellee had agreed to charge a maximum of \$8,000 for all legal services rendered to be credible. The court determined that given the course of conduct between the parties of making and accepting late and partial payments, appellant breached the terms of the contract in April of 2003 after failing to make payments for several months.

{¶19} It is well-established that "judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Because the trier of fact is best able to view the witnesses and observe their demeanor when weighing the credibility of the offered testimony, a reviewing court will presume that the trial court's factual findings and witness credibility determinations are correct. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77.

{¶20} Appellant argues that the trial court erred in granting judgment in favor of appellee because he failed to produce adequate time records to establish the fairness of his fee. Appellant also argues that the court "disregarded [appellee's] lack of supporting evidence." Appellant cites to Ohio law in support of her arguments.

{¶21} Upon review, we conclude that the trial court properly applied Michigan law to the parties' contract. As the court noted, there is no evidence in the record of any choice of law by the parties. Under Ohio law, where a conflict of law issue arises in a case involving a contract, choice of law rules require a court to apply the law of the state with "the most significant relationship to the transaction and the parties." *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 477, 2001-Ohio-100, quoting Restatement

of the Law 2d, Conflict of Laws (1971), Section 188. To assist in this determination, a court should consider "the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.* at 477, quoting Restatement of the Law 2d, Conflict of Laws (1971), Section 188(2)(a) through (d).

{¶22} In this case, the state of Michigan had the most significant relationship to the transaction. Evidence introduced at trial indicated that at the time the contract was formed, both parties were residents of the state. The parties discussed the terms of the contract in Kalamazoo. In addition, as the trial court noted, all of the legal work performed pursuant to the contract was conducted in Michigan courts.

{¶23} Michigan law provides that an attorney-client relationship must be established by contract before an attorney is entitled to payment for services rendered. *Plunkett & Cooney, PC v. Capitol Bancorp Ltd.* (1995), 212 Mich.App. 325, 329. The essential elements of a valid contract are: (1) competency of the parties, (2) proper subject matter, (3) legality of consideration; (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v. Leja* (1991), 187 Mich.App. 418, 422. Once a valid contract has been established, a plaintiff seeking to recover for breach of contract must prove, by a preponderance of the evidence, the terms of the contract, breach of its terms, and resulting injury to the plaintiff. See *In re Brown* (C.A.6, 2003), 342 F.3d 620, 628. Parties may enter into an oral contract for legal services, the terms of which may be demonstrated by a course of dealing and performance. *H.J. Tucker & Assoc., Inc. v. Allied Chucker & Engineering Co.* (1999), 234 Mich.App. 550, 567.

{¶24} Although appellant argues that the parties had agreed to a maximum of \$8,000 for all services, as discussed above, the trial court did not find her testimony on that issue to be credible. We must defer to the court's determination in this regard,

because, as the trier of fact, it was in the best position to assess her credibility. In addition, although appellant also contends that appellee failed to produce sufficient evidence to substantiate his claim that the fees were owed, appellee produced copies of letters sent to appellant in connection with the work he performed on her behalf during the approximate eight year period he represented her. He also produced ledger statements showing the history of balances owed and payments made by appellant from May of 1992 through December 2002. The ledger statements demonstrated that appellant owed \$15,064.10 in legal fees.

{¶25} Based on the foregoing, we find competent, credible evidence in the record to support the trial court's conclusion that appellant breached the terms of the parties' contract. Appellant's first and fifth assignments of error are therefore overruled.

{¶26} Assignment of Error No. 3:

{¶27} "[THE] TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE BY CLAIMING IMPROPER VENUE OF MICHIGAN LAW."

{¶28} Although as written, appellant's third assignment of error states that the trial court erred in using Michigan as the purported "venue" for this action, upon review of the arguments in the assignment, we have construed two issues for our consideration: (1) whether the trial court erred in concluding that appellee's trial counsel was not subject to the FDCPA, and (2) whether the trial court improperly applied Michigan state law to appellant's FDCPA counterclaim.

{¶29} In her counterclaim, appellant alleged that appellee violated several provisions of the FDCPA. Specifically, she averred that appellee committed violations of Sections 1692e(5) and (10), Title 15, U.S.Code. These sections provide that a debt collector is prohibited from "threat[ening] to take any action that cannot legally be taken or that is not intended to be taken," and "[t]he use of any false representation or deceptive

means to collect or attempt to collect any debt or to obtain information concerning a consumer." See 1692e(5) and (10), Title 15, U.S.Code. She also claimed that appellee violated Section 1692c(c), Title 15, U.S.Code, by contacting her after she had requested that he cease further communication with her.

{¶30} At trial, appellant did not produce much evidence by way of testimony or documentation to support her FDCPA claims. In her trial brief, she appeared to argue that appellee's trial counsel had violated the FDCPA by failing to send her written notice of the alleged debt.

{¶31} In its decision, the trial court determined that appellant's claim failed, as a matter of law, because appellee did not constitute a "debt collector" for purposes of the FDCPA. The court found that he was a creditor attempting to collect on his own account which "place[d] him outside the purview of the [FDCPA]." The court also found that to the extent that appellant attempted to incorporate allegations against appellee's counsel with regard to violations of the FDCPA, such a claim was not properly before the court because appellee's trial counsel was not a party to the action.

{¶32} On appeal, appellant appears to once again contend that appellee's trial counsel violated the FDCPA. As noted by the trial court, appellee's counsel is not a party to this case. As a result, her argument is not properly before us on appeal and is therefore without merit.

{¶33} With respect to her claim that the trial court erred in applying Michigan law to her FDCPA claim, we likewise find this argument without merit. Our review of the trial court's decision indicates that the court properly applied federal law, and not the laws of the state of Michigan, in construing the applicable provisions of the FDCPA.

{¶34} Based on the foregoing, appellant's third assignment of error is overruled.

{¶35} Assignment of Error No. 2:

{¶36} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE IN DENYING APPELLANT'S DUE PROCESS AND RIGHT TO A FAIR TRIAL [SIC]."

{¶37} Assignment of Error No. 4:

{¶38} "[THE] TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S DECEASED FATHER'S WITNESS TO ORAL AGREEMENT WAS A HEARSAY EXCEPTION [SIC]."

{¶39} Assignment of Error No. 6:

{¶40} "[THE TRIAL] COURT ABUSED ITS DISCRETION BY RE[M]OVING APPELLEE'S FRAUDULENT CONCEALMENT AND ATTORNEY MISCONDUCT FROM THE RECORD."

{¶41} Assignment of Error No. 7:

{¶42} "[THE TRIAL] COURT ABUSED ITS DISCRETION BY IGNORING [THE] INADMISSIBILITY OF APPELLEE'S EVIDENCE."

{¶43} Assignment of Error No. 8:

{¶44} "[THE TRIAL] COURT ABUSED ITS DISCRETION TO THE HARM OF APPELLANT BY DENYING APPELLANT'S COUNTERCLAIM DAMAGES FROM [THE] FRIVOLOUS FIRST FILING."

{¶45} Appellant's second, fourth, sixth, seventh, and eighth assignments of error concern the exclusion of evidence at trial. In addition, although she has not separately assigned as error the trial court's decision denying her motion for a new trial, our review of her brief indicates that she has raised arguments in support of her claim in several of her assignments. As a result, we have elected to address the denial of her motion for a new trial within the context of her remaining assignments of error.

Evidentiary issues

{¶46} It is well-established that decisions regarding the admission or exclusion of evidence are within the discretion of the trial court and will not be reversed on appeal absent a showing that the court abused its discretion and that a party was materially prejudiced as a result. *Silver v. Jewish Home of Cincinnati*, Warren App. No. CA2010-02-015, 2010-Ohio-5314, ¶59. An abuse of discretion is more than an error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶47} Appellant initially contends that the trial court abused its discretion in denying appellant's request to admit her deceased father's affidavit into evidence at trial. Appellant argues that in his affidavit, Bruce Parker averred that he was present with his daughter at the first meeting with appellee in May of 1992 and that appellee had quoted her a maximum fee of \$8,000 for the legal work performed on her behalf. Parker died in June of 2007 and was unavailable to testify at trial. His affidavit was apparently submitted in opposition to a motion for summary judgment filed by appellee in a previous collection action initiated against appellant in 2006. The action was subsequently dismissed by appellee in 2007.

{¶48} The trial court determined that the affidavit was hearsay and excluded it from evidence. Appellant claims that valid hearsay exceptions exist for the admission of the affidavit. First, she claims that under Evid.R. 804(B)(1), Parker's affidavit is admissible "former testimony." However, an affidavit does not constitute "testimony" pursuant to the requirements of this rule. *Kiser v. Allstate Insurance Co.*, 144 Ohio Misc.2d 12, 2007-Ohio-6070, ¶10. Although it is a sworn statement, it is "distinguishable from the former testimony of unavailable witnesses addressed by Evid.R. 804(B)(1) because it [is] not subject to cross-examination *at the time of its making*." *Id.* (Emphasis added.) Contrary to appellant's argument, an affidavit submitted in response to a summary judgment motion

does not constitute testimony subject to cross-examination.

{¶49} Appellant also argues that Parker's affidavit should have been admitted as a statement made under belief of impending death pursuant to Evid.R. 804(B)(2), as a statement against personal or family history pursuant to Evid.R. 804(B)(4), and as a statement by a deceased or incompetent person under Evid.R. 804(B)(5). However, these exceptions are inapplicable because the statement appellant seeks to admit on behalf of Parker, i.e., that he witnessed appellee telling appellant he would cap her legal fees at \$8,000, does not concern the cause or circumstances of Parker's death or his personal or family history. See Evid.R. 804(B)(2) and (4). In addition, it does not qualify as a statement by a deceased or incompetent person because neither Parker's estate nor a personal representative of his estate is a party to the current action. See Evid.R. 804(B)(5).

{¶50} Appellant also claims generally that the trial court abused its discretion in excluding 16 additional trial exhibits, including those allegedly demonstrating that appellee concealed payments made by appellant, made false statements during discovery, and engaged in misconduct and "bad faith actions and filings" in the 2006 case filed against her.

{¶51} Upon review of the record, we find no abuse of discretion on the part of the trial court in excluding the exhibits referenced by appellant. First, the court properly concluded that the exhibits relating to appellee's alleged noncompliance with her discovery requests, and those from the 2006 case were not relevant to the issues presented at the trial on the merits of the instant matter. Moreover, although appellant also claims that the court erred in excluding an additional exhibit allegedly showing \$4,500 in payments made to appellee for which she did not receive credit, the record indicates that upon reviewing the ledger statements introduced into evidence, the court found that

she was properly credited by appellee for that amount.

{¶152} Finally, appellant argues that the court "took appellant's second scheduled trial day away without permission" after finding that she had stipulated to the admission of an additional witness' affidavit in lieu of calling him to testify on the second day of trial. Appellant appears to claim that this alleged error violated her due process rights. We find this argument is without merit, as the record clearly indicates that appellant's counsel stipulated to the admission of the affidavit:

{¶153} "THE COURT: Counsel was - - is agreeable to stipulating as to Exhibit E-2, which is the affidavit of Lawrence Mudd. Does that cover all the testimony he's going to offer tomorrow, or is there additional?"

{¶154} "[APPELLANT'S TRIAL COUNSEL]: Well, I want to make sure, okay?"

{¶155} "THE COURT: Sure.

{¶156} "[APPELLANT'S TRIAL COUNSEL]: If they stipulate to it, that's fine.

{¶157} "THE COURT: If they stipulate to what?"

{¶158} "[APPELLANT'S TRIAL COUNSEL]: To the - - to the admission of Mr. Mudd's affidavit so that he doesn't have to be here. There is no paper on him; is there not?"

{¶159} "THE COURT: Yeah. Is this - - this is what I have. Is the extent of the testimony that you would have him?"

{¶160} "[APPELLEE]: Yup, that's it.

{¶161} "[APPELLANT'S TRIAL COUNSEL]: That's what you have?"

{¶162} "[APPELLEE]: As long as we can finish today.

{¶163} "THE COURT: Right.

{¶164} "[APPELLANT'S COUNSEL]: That's correct, [y]our honor.

{¶165} "THE COURT: Okay."

{¶66} Notwithstanding the foregoing exchange, we conclude that even if appellant believed she had not stipulated to the admission of the affidavit, she acquiesced to the stipulation in failing to raise the issue to the trial court prior to the conclusion of the first day of trial. *Wolf v. Wolf*, Warren App.No. CA2008-03-045, 2009-Ohio-1845, ¶27. At that time, appellant informed the court that she was resting her case. Accordingly, any error with regard to the stipulation was invited by appellant. *Id.* at ¶28. "A party will not be permitted to take advantage of an error which he himself invited or induced the court to make." *Id.*, quoting *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus.

Civ.R. 59(A) motion

{¶67} With regard to her additional appeal from the court's decision denying her motion for a new trial, Civ.R. 59(A) sets forth nine grounds under which a party may seek a new trial, and also permits a court to grant a new trial for "good cause shown."² The decision to grant or deny a motion for a new trial is reviewed on appeal under an abuse of discretion standard of review. *Kranz v. Kranz*, Warren App. No. CA2008-04-054, 2009-Ohio-2451, ¶38; *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224.

{¶68} In her motion, appellant contended that each of the nine grounds outlined in Civ.R. 59(A) were present to justify a new trial. Upon review of her motion and the transcript of the hearing on the matter, however, it appears that appellant attempted to use several of the grounds as a vehicle to relitigate the issues in the case. The trial court

2. These grounds include: "(1) [i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial; (2) [m]isconduct of the jury or prevailing party; (3) [a]ccident or surprise which ordinary prudence could not have guarded against; (4) [e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice; (5) [e]rror in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property; (6) [t]he judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case; (7) [t]he judgment is contrary to law; (8) [n]ewly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial; and (9) [e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application." See Civ.R. 59(A).

declined to consider such arguments and we likewise will not entertain them on appeal.

{¶69} It appears that the gravamen of her request for a new trial centers on her assertion that her trial counsel suffered from a "medical episode." In her motion, appellant argued that this caused "confusion and disorientation" during the trial, which prohibited her counsel from representing her effectively. In support of her request, she offered both her own affidavit and that of her step-mother, Karen Parker, a witness to the trial. She also submitted the affidavits of her trial counsel and his treating physician.

{¶70} In her affidavit, appellant averred that during the course of the trial, she observed that her counsel "could barely speak and did not seem to be able to focus on any of the details that were part of the day's hearing. He could not find his glasses or papers directly in front of him on the podium * * *." Appellant stated that counsel was unable to ask her questions or object to appellee's arguments, and appeared to be "lost." She was alarmed by his behavior and believed that it was an emergency that could not have been avoided. Parker also averred in her affidavit that she was present in the courtroom during the entire trial. She stated that counsel appeared to be confused and that no one could hear him when he spoke.

{¶71} Counsel's affidavits made similar averments. He claimed that he experienced a health episode which included dizziness and disorientation during the trial. These symptoms apparently affected his ability to concentrate. He stated that the episode occurred without warning and that he was unaware that he was suffering from the symptoms until "several hours after I left the courtroom at the conclusion of the trial and was able to consult with my client." He further averred that during the episode he left the courtroom without properly completing his duties as attorney for appellant. In his supplemental affidavit, he also claimed that as a result of his physical impairment, he was precluded from introducing exhibits and testimony relating to several issues in dispute.

{¶72} Counsel's physician, Douglas Moore, M.D., averred in his affidavit that his patient's medical history included "diabetes, hypertension, coronary artery disease, and [a] previous stroke." He further averred that counsel presented to his office on February 5, 2010 and "describ[ed] an episode during a court appearance on 12/14/09 in which he experienced an episode of dizziness, disorientation, difficulty with concentration and leaving the courtroom before he was scheduled. These symptoms came on suddenly." According to Dr. Moore, the symptoms counsel described could have been indicative of a transient ischemic attack, a precursor to another stroke, or a hypoglycemic episode.

{¶73} The court considered appellant's claim under divisions (A)(1) and (3) of Civ.R. 59, dealing with an irregularity in proceedings preventing a fair trial, and accident or surprise which ordinary prudence could not have guarded against. However, upon review of the evidence submitted by appellant, the court found that she had not demonstrated her entitlement to a new trial. Citing this court's decision in *Luna-Corona v. Esquivel-Parrales*, Butler App. No. CA2008-07-175, 2009-Ohio-2628, ¶42, the trial court noted that parties in civil actions do not enjoy a constitutional right to effective representation. As such, a reversal of a trial court's decision based upon the ineffective assistance of counsel does not exist when there is no right to counsel. *Id.*

{¶74} The court found that contrary to counsel's averment in his affidavit, at no time during the course of the trial did he leave the courtroom before completing his duties. Although appellant claimed that she was prohibited from a second day of testimony, as discussed above, the court concluded that appellant had stipulated to the admission of Mudd's affidavit. In addition, although counsel claimed that his medical impairment precluded him from introducing additional evidence, the court noted that he attempted to introduce most, if not all, of the testimony and documents referenced in his supplemental affidavit. The evidence was found to be inadmissible based upon evidentiary rules.

{¶75} The court also found Dr. Moore's affidavit unpersuasive. Of significance to the court was Moore's averment that counsel did not visit him until February 2010, approximately two months after the date of the trial. Given that counsel stated that he had learned of his impairment several hours after the trial had concluded, the court had "difficulty believing that counsel would have waited two months to see a doctor about these concerns." Moreover, Moore's affidavit contained only speculation as to what may have contributed to counsel's alleged health episode.

{¶76} Finally, the court stated that at no time during the course of various court appearances, in-chamber conferences, or at trial did it observe any change in counsel's behavior or cognitive function. To the court, counsel consistently appeared to be "somewhat forgetful and never quite 'on top of things.'"

{¶77} Based on the foregoing, we conclude that appellant failed to demonstrate an abuse of discretion on the part of the trial court in overruling her motion for a new trial. Appellant's second, fourth, sixth, seventh, and eighth assignments of error are overruled.

{¶78} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

2010 MAR 25 PM 2:37

KENNETH RATHERT, P.C. :
Plaintiff : **CASE NO. 2008 CVH 02030**
vs. : **Judge McBride**
LOIS KEMPKER : **DECISION/ENTRY**
Defendant :

Weltman, Weinberg & Reis Co., L.P.A., Glenn E. Algie, 525 Vine Street, Suite 800, Cincinnati, Ohio 45202, and Kenneth Rathert, P.C., Kenneth Rathert, appearing *pro hac vice*, 137 North Park Street, Kalamazoo, Michigan 49007, attorneys for the plaintiff Kenneth Rathert, P.C.

George Brandenburg, attorney for the defendant Lois Kempker, 905 Ohio Pike, Cincinnati, Ohio 45245.

This cause came before the court for trial on December 14, 2010. At the conclusion of the presentation of evidence, the court set out a schedule by which counsel could submit their written closing arguments. Upon the submission of the final closing argument, the court took the issues raised at the trial under advisement.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.



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APPENDIX

1
A. DECISION-ENTRY FOR TRIAL HELD DECEMBER 14, 2009
ENTRY on March 25, 2010

FINDINGS OF FACT

In May 1992, Kenneth Rathert, an attorney whose practice is located in Kalamazoo, Michigan, entered into an oral agreement with Lois Kempker to represent her in divorce proceedings in a Michigan family court. Rathert agreed to substantially lower his customary hourly rate to \$95.00 per hour for the entirety of her case. Rathert sent an engagement letter to Kempker after their meeting which reflects that oral agreement.¹

While a minimum fee of \$1,500.00 was agreed upon by the parties, there was no agreement as to a maximum amount of fees to be charged. Rathert told Kempker that, if she wanted to keep her costs down, she could help him in "doing her own legwork," including preparing written statements of her understanding of the facts of her case.

Kempker did in fact prepare some written documents for her case. However, there was never any agreement that credits or reductions would be taken off of Rathert's billed hours for work that Kempker did on her own.

The defendant's divorce was very contentious and required a great deal of time and effort from the plaintiff. Rathert was able to obtain a decree of divorce for Kempker which contained terms that were favorable to her, including those terms addressing child and spousal support.² After receiving the judgment of divorce, Kempker requested that Rathert continue to represent her in post-judgment proceedings in the domestic court, including aiding her in collecting her support and other monetary awards, as well

¹ Plaintiff's Exhibit 1.

² Plaintiff's Exhibit 2.

as in bankruptcy matters. The parties continued their agreement that Kempker would be charged an hourly fee of \$95.00, and there was no agreement as to any maximum amount. Additionally, after the defendant moved to Cincinnati and began to pursue a degree, Rathert agreed to double-credit all payments made by the defendant while she was in school.

The bulk of the work done by Rathert on Kempker's behalf appears to have been done from 1992-1999. There is evidence that Rathert was still representing Kempker on December 18, 2000.³ Throughout this period and through 2002, Rathert's ledger sheets indicate that partial payments on the balance were continually accepted and that several months were allowed to elapse between payments.⁴ The defendant's last payment was made on December 16, 2002.⁵

TESTIMONY OFFERED FOUND BY THE COURT TO NOT BE CREDIBLE

The following testimony was offered at trial but was found by this court to not be credible:

Lois Kempker testified that Kenneth Rathert agreed to cap his attorney fees at \$8,000.00. She also testified that the plaintiff failed to give her credit for all of the payments she made on her outstanding bill.

³ Plaintiff's Exhibit 4M.

⁴ Defendant's Exhibit J.

⁵ Id.

LEGAL ANALYSIS

I. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT

In the case at bar, there is no evidence of any choice of law by the parties. As articulated in the Restatement (Second) of Conflict of Laws § 188:

"(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties * * * the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied."

While this case was filed in Ohio due to the defendant's residency in this state, the oral agreement at issue was negotiated, formed, and performed in Michigan and involved the plaintiff's representation of the defendant in Michigan courts. As a result, Michigan law applies in the present case.

"In order to establish a claim for breach of contract, a plaintiff must prove the existence of a valid contract, breach of that contract, and damages."⁶ "A cause of action for breach of contract accrues when a defendant fails to perform its contractual obligations."⁷

"An attorney-client relationship must be established by contract before an attorney is entitled to be paid for services."⁸ "A valid contract requires a meeting of minds on all essential terms, which is judged by an objective standard that looks to the express words of the parties and their visible acts, not the subjective state of mind."⁹ "** * * [P]arties may enter into an oral contract, the term of which may be demonstrated by a course of dealing and performance."¹⁰

In the case at bar, the court finds that a valid oral contract existed between the parties. That oral agreement provided that Kenneth Rathert would provide legal representation to Lois Kempker at the rate of \$95.00 per hour. While there did not appear to be an express agreement as to the requirements of when payments had to be made for the services rendered, there was clearly a meeting of the minds and valid oral

⁶ *Lusader v. Law Firm of John F. Schaefer, P.L.L.C.* (Dec. 21, 2004), Mich.App. No. 246983, 2004 WL 2952592, citing *Stoken v. J.E.T. Electronics & Technology, Inc.* (1988), 174 Mich.App. 457, 463, 436 N.W.2d 389.

⁷ *Id.*, citing *HJ Tucker & Assoc., Inc. v. Allied Chucker & Engineering Co.* (1999), 234 Mich.App. 550, 562, 595 N.W.2d 176.

⁸ *Plunkett & Cooney, PC v. Capitol Bankcorp, Ltd.* (1995), 212 Mich.App. 325, 329, 536 N.W.2d 886.

⁹ *Young & Associates, PC v. Rocar Precision, Inc.* (May 25, 2001), Mich.App. 218417, 2001 WL 637405, *5, citing *Kamalath v. Mercy Memorial Hosp Corp* (1992), 194 Mich.App. 543, 548.

¹⁰ *Id.*, citing *HJ Tucker & Assoc.*, *supra*, 234 Mich.App. at 567.

agreement that Lois Kempker would be required to pay for all of the legal services rendered to her by the plaintiff.

Despite the statement on Rathert's 1992 engagement letter, there is no evidence that the parties actually agreed that all of the defendant's bills would be due in full ten days after they were billed. This is evidenced by the numerous times that Rathert accepted partial payments. Therefore, the course of dealing between the parties demonstrates that they agreed that Kempker would be responsible to pay her bill but that Rathert would accept monthly partial payments of the balance and, later in the relationship, even payments every three months or so, as opposed to regular monthly payments.

Therefore, the question becomes: When was this oral contract breached? The last payment by or on behalf of Lois Kempker was made on December 16, 2002. Given the parties practice of allowing several months to elapse without payment, the court finds that the breach occurred in this case in April 2003, at which point Rathert should have been aware that no further payments were being made and that the defendant was wholly in breach of her agreement to pay her bill for legal services rendered.

Therefore, the court finds a valid oral contract and a breach by the defendant Lois Kempker. Upon its examination of Rathert's ledger pages on Kempker's account, which begin in May 1992 and continue until one final entry in 2005, the court finds that the ledger provides unrebutted credible proof that Kempker currently owes \$15,064.10. This amount shall be awarded to the plaintiff as damages for the defendant's breach of contract.

II. PLAINTIFF'S REQUEST FOR SANCTIONS

The plaintiff in his written closing argument requested that this court award attorney fees as sanctions for frivolous conduct. Pursuant to R.C. 2323.51:

"(2) "Frivolous conduct" means either of the following:

(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record that satisfies any of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

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

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

A trial court abuses its discretion when it fails to schedule and hold a hearing on motions which demonstrate arguable merit, including motions for sanctions based on

alleged frivolous conduct.¹¹ Therefore, a hearing will be scheduled on the plaintiff's request for such sanctions as set forth in his written closing argument.

III. DEFENDANT'S COUNTERCLAIMS

(A) BREACH OF CONTRACT

As articulated in the Findings of Fact, the court found credible evidence that the parties entered into a verbal representation agreement whereby Kenneth Rathert would represent Lois Kempker in her divorce and various subsequent proceedings at a rate of \$95.00 per hour. However, this court does not find Lois Kempker's testimony credible that the parties agreed upon a maximum fee of \$8,000.00. Furthermore, this court finds no evidence that Kenneth Rathert breached his obligation to effectively represent Lois Kempker in her divorce proceedings or in the subsequent post-judgment proceedings. Therefore, the defendant has set forth no credible basis for a breach of contract action and has failed to offer proof that the plaintiff breached the oral agreement between them.

(B) UNJUST ENRICHMENT

" * * * [U]nder the equitable doctrine of unjust enrichment, a person who has been unjustly enriched at the expense of another is required to make restitution as though a

¹¹ See, e.g., *Springfield Tp. v. Adams* (Feb. 16, 2005), 9th Dist. No. 22069, 2005-Ohio-591, ¶¶ 16-20.

contract existed.”¹² “This equitable doctrine, based on the legal fiction of quasi-contract or constructive contract, implies an obligation to pay for benefits received in order to insure that justice is done.”¹³ “A quasi-contractual obligation is present when the defendant receives a benefit from the plaintiff, and it would be inequitable for the defendant to retain that benefit without payment.”¹⁴

In the case at bar, the defendant presented no credible evidence that the plaintiff was unjustly enriched at the expense of the defendant. Therefore, the defendant’s counterclaim for unjust enrichment has no merit and is not well-taken.

(C) PROMISSORY ESTOPPEL

“The elements of promissory estoppel are ‘(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided.’”¹⁵

¹² *Harrison v. Montgomery* (Sept. 28, 2006), Mich.App. No. 268642, 2006 WL 2787981, at *1, citing *Kammer Asphalt Paving Co. v. East China Twp. Schools* (1993), 443 Mich. 176, 185, 504 N.W.2d 635. See, also, *Cantwell Mach. Co. v. Chicago Mach. Co.*, 184 Ohio App.3d 287, 920 N.E.2d 994, ¶ 15 (Ohio App. 10th Dist., 2009).

¹³ *Id.*, citing *Kammer Asphalt* at 185-186. See, also, *Lucio v. Safe Auto Ins. Co.*, 183 Ohio App.3d 849, 919 N.E.2d 260, ¶ 23 (Ohio App. 7th Dist., 2009).

¹⁴ *Id.*, citing *Belle Isle Grill Corp. v. Detroit* (2003), 256 Mich.App. 463,478, 666 N.W.2d 271.

¹⁵ *City of South Lyon v. Demaria Bldg. Co.* (Jan. 28, 2010), Mich.App. No. 287703, 2010 WL 334569, *15, quoting *Ardt v. Titan Ins. Co.* (1999), 233 Mich.App. 685, 692, 593 N.W.2d 215. See, also, *Hitchcock Dev. Co. v. Husted* (Aug. 31, 2009), 12th Dist. No. CA2009-04-043, 2009-Ohio-4459, ¶ 24.

The court finds no evidence that the plaintiff made any promise to Kempker which caused damages to her. This court has found no credible evidence of a promise that Rathert would cap his fees at \$8,000 and finds no evidence of any other such promise. Therefore, the defendant has failed to prove the elements of promissory estoppel and her claim for such is not well-taken.

(D) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Both Michigan and Ohio recognize the tort of negligent infliction of emotional distress but only in very limited circumstances. To prevail on such a claim in both states, the claimant must prove that she witnessed negligent injury to a third party and suffers a mental disturbance or shock which results in actual physical harm.¹⁶ In the case at bar, there is a complete dearth of evidence tending to prove any of the elements of a claim for negligent infliction of emotional distress and, as a result, that claim is not well-taken.

¹⁶ See, *Hayes v. Langford* (Dec. 9, 2009), Mich.App. No. 280049, 2009 WL 5158896, citing *Taylor v. Kurapati* (1999), 236 Mich.App. 315, 360, 600 N.W.2d 670; *Duran v. Detroit News, Inc.* (1993), 200 Mich.App. 622, 629, 504 N.W.2d 715; and, *Nugent v. Bauermeister* (1992), 195 Mich.App. 158, 159, 489 N.W.2d 148. See, also, *Muehrcke v. Housel*, 181 Ohio App.3d 361, 909 N.E.2d 135, ¶ 44 (Ohio App. 8th Dist., 2008), citing *Bunger v. Lawson* (1998), 82 Ohio St.3d 463, 466, 696 N.E.2d 1029; *Heiner v. Moretuzzo* (1995), 73 Ohio St.3d 80, 85-86, 652 N.E.2d 664; and *High v. Howard* (1992), 64 Ohio St.3d 82, 592 N.E.2d 818.

(E) FAIR DEBT COLLECTION PRACTICES ACT

Pursuant to the definition section of the Fair Debt Collection Practices Act, 15

U.S.C.A. § 1692(a):

"(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

* * *

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor."

The Fair Debt Collection Practices Act " * * * applies only to 'debt collectors' seeking satisfaction of 'debts' from 'consumers'; it does not apply to 'creditors.' "17 A creditor is not a debt collector for the purposes of the Fair Debt Collection Practices Act and creditors are not subject to the Act when collecting on their own accounts.18

Under the facts of the case at bar, Kenneth Rathert does not meet the definition of a "debt collector" under the Fair Debt Collection Practices Act. Instead, he is a creditor attempting to collect on his own account, which places him outside the purview of the Fair Debt Collection Practices Act.

¹⁷ *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 500 (7th Cir., 2008), citing *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir, 2003)..

¹⁸ *Stafford v. Cross Country Bank*, 262 F.Supp.2d 776, 794 (W.D.Ky,2003), citing, e.g., *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 107 (6th Cir., 1996).

To the extent that the defendant's argument on this claim attempts to incorporate allegations against plaintiff's counsel in this matter, such a claim is not properly before this court because Kenneth Rathert, P.C. is the only named counterclaim defendant; plaintiff's counsel is not and has never been a party to the present case.

Therefore, the plaintiff's claim for a violation of the Fair Debt Collection Practices Act is not well-taken.

(E) LOSS OF CONSORTIUM

A claim for loss of consortium is a derivative claim for the loss of society, companionship, etc. caused by tortious injury, generally to one's spouse.¹⁹ In the case sub judice, while there is evidence of the death of the defendant's father, there is no competent, credible evidence that his death was caused by any tortious injury resulting from the actions of Kenneth Rathert. Therefore, there is no merit to the defendant's counterclaim for loss of consortium and that claim is not well-taken.

IV. MOTIONS CONTAINED IN DEFENDANT'S WRITTEN CLOSING ARGUMENT

In her written closing argument, the defendant attempts to make a motion to vacate judgment pursuant to Civ.R. 60(B) and a motion for a new trial pursuant to Civ.R.

¹⁹ See, *Berger v. Weber* (1981), 411 Mich. 1, 48-49, 303 N.W.2d 424; and *Piispanen v. Carter* (May 12, 2006), 11th Dist. No. 2005-L-133, 2006-Ohio-2382, ¶ 30, citing *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93, 585 N.E.2d 384.

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59. However, these are post-judgment motions and are therefore not ripe for the court's consideration prior to the entry of judgment.

CONCLUSION

The court finds that the plaintiff's claim for breach of contract is well-taken and the plaintiff is hereby awarded as damages on that claim the sum of \$15,064.10.

The parties are hereby ordered to conference and call the Assignment Commissioner (513-732-7108) within seven (7) days of the date of this decision to obtain a hearing date for the plaintiff's motion for sanctions.

The defendant's counterclaims are not well-taken and shall be denied in their entirety.

IT IS SO ORDERED.

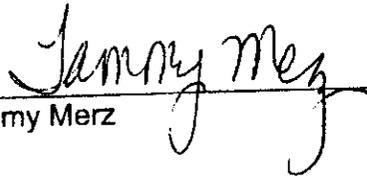
DATED: 3.25.10



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were mailed by regular U.S. Mail this 25th day of March 2010 to all counsel of record and unrepresented parties.



Tammy Merz

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