

**Ohio State Legal Services Association
Southeastern Ohio Legal Services
Significant Litigation Report— June 13, 2011**

I. Cases resolved since previous managing attorney meeting	3
Adoption of J.B.B.	3
Beebe v. JW’ Deems Auto Sales, LLC	4
Centennial Bank v. Myers	5
Comston v. Licking Metropolitan Housing Authority	6
Hall v. Hupp	8
In re Jones	8
Murphy v. Litton Loan Servicing, L.P.	9
Rona Enterprises, Inc. v. VanScoy	10
Trainer v. Setlan Financial, L.P.	12
II. New cases	13
Beneficial Ohio, Inc. v. Parish (homeownership protection)	13
Richards v. Maysville Regional Water District (consumer)	13
Strizak v. Strizak (family law)	14
Wells Fargo Bank, NA v. Oiler (homeownership protection)	15
III. Ongoing litigation	17
A. Consumer	17
Dillard v. U.S. Bank, N.A.	17
Kimmey v. Logan Gas, Inc.	18
Smedley v. Discount Drug Mart, Inc.	19

B. Housing	20
Fulk v. Dutiel	20
Gothard v. Dingess, Akers v. Dingess, Ruggles v. Dingess, Runyon v. Dingess, Tanner v. Dingess, Waddle v. Dingess	21
Kelly v. Chillicothe Metropolitan Housing Authority	22
Klein v. Boyd	23
C. Homeownership protection	24
Eveland v. U.S. Bank, National Association	24
Johnson v. Mullen	24
Newman v. BNC Mortgage, Inc.	26
PHH Mortgage Corp. v. Albus	27
Shelpman v. Foreclosure Assistance USA	28
D. Public Benefits	30
Bridgeway, Inc. v. Williams	30
Burrier v. Director, ODJFS	31
Russell v. Lumpkin	32

I. Cases resolved since previous managing attorney meeting

Case Name: Adoption of J.B.B.

Court docket #: 09CA3335

Electronic docket: none/

Court: Fourth District Court of Appeals, Scioto County

Attorneys: Valerie Webb, Douglas Rogers

SEOLS office: Portsmouth

Party represented: relator, defendant-appellant

Category: family law

Issue: Whether indigent mother responding to petition to adopt her son is constitutionally entitled to appointed counsel.

Summary: Our client's son, now three years old, was the subject of an abuse/neglect/dependency case brought in 2007 by the county children's services board against our client and the father. In March 2008 while incarcerated our client agreed in that case for her cousin to take custody of the child. Four months later our client was sentenced to prison, where she spent a year. During her incarceration our client sent pictures, cards, and gifts to her son and obtained a juvenile court order requiring her cousin to notify her of all changes of address. However, the cousin returned a money order our client sent her son and, after our client's release, refused to allow her to visit him. On September 3 our client moved the juvenile court for a modified visitation order, and with that motion pending eleven days later the cousin filed a petition in the probate court for adoption. Our client filed formal objection to the adoption and requested appointed counsel in the adoption case. On November 18 the probate court denied appointed counsel.

"The Supreme Court of Ohio has explicitly stated that a probate court *must* refrain from proceeding with the adoption of a child when an issue concerning the parenting of that child is at issue in the juvenile court."

- Opinion announcing judgment of the court, ¶10.

On November 20 in the court of appeals we filed an original complaint for writ of mandamus and application for alternative writ, seeking a writ commanding the probate judge to appoint counsel. Then, on December 16, our client appealed from the denial of her motion for appointed counsel. On March 2, 2010, the court of appeals issued an order dismissing our petition for writ of mandamus, holding that appeal was an adequate remedy at law, even though the trial court action was not automatically stayed, because we retained the option of moving for a stay pending outcome of our appeal. On the same date the court ruled that it had jurisdiction over our appeal, because an order denying appointed counsel in an adoption case affected a substantial right in a special proceeding.

On March 30, 2011, the court of appeals reversed the order denying appointed counsel and remanded to the probate court with instructions to stay proceedings in the adoption case during pendency of our visitation motion in the juvenile court. The court of appeals held that the probate court lacked authority to proceed on an adoption case while a biological parent had a visitation motion pending in juvenile court, with one judge in the majority believing the matter not ripe for appellate review and the other judge believing the probate court without jurisdiction. A third judge dissented, giving the view that the only juvenile court motions that should divest probate courts of authority to proceed on an adoption would be motions involving the act or

process of becoming a parent. We are now prosecuting in the juvenile court our client's motion for visitation.

Date decided: March 30, 2011

Documents submitted to OSLSA Reports:

Trial court entry denying appointed counsel
mandamus case
Complaint for writ of mandamus
Application for alternate writ of mandamus
Respondent's motion to dismiss
Memorandum in opposition to motion to dismiss
Respondent's reply to relator's memorandum contra
Decision and judgment entry granting motion to dismiss
appeal
Brief of appellant on existence of final appealable order
Merits brief of appellant
Entry finding trial court decision final and appealable
Court of appeals opinion

Case Name: Beebe v. JW' Deems Auto Sales, LLC

Court docket #: CVF 1000959

Electronic docket:

<http://www.mariettacourt.com/cgi-bin/mdocket.cgi?pre=CVF&num=1000959>

&sub=&type=CV&acc=

Court: Marietta Municipal Court

Attorney: Robert Henry

SEOLS office: Marietta

Party represented: plaintiff

Category: consumer

Issue: Used car dealer's liability for sale of sixteen-year-old car with broken motor mount and leaking transmission with unkept promise to provide a warranty.

Summary: Our client, who lives on social security, bought a 1995 Pontiac Grand Am from a used car lot for a list price of \$4995, plus title transfer fee, taxes, and trade-in value for 1993 Grand Prix. When, during the test drive, she noticed the windshield wipers did not work and there was duct tape on the engine, the salesman said they probably needed to replace the wiper fuse, the duct tape was for the cooling unit and would not hurt anything, and the car ran well. The dealer agreed to sell her a three-month, 4500-mile warranty but said at the time of executing the sale agreement that it was changing warranty companies and warranty arrangements would be made at a later date.

“Ms. Beebe was forced to move from her residence in Waterford to an apartment in Marietta**because she had no working vehicle which she needed to travel to her doctor's office, to shop for groceries, and to perform other essential daily activities.”

- Complaint, ¶22.

Within a month, the headlights and dashboard gauges stopped working, and the car began violently shaking. Our client learned that the motor mounts were broken, the cooling was not

working properly, transmission fluid was leaking, the computer system was not working properly, and the car was not safe to drive. The dealer refused to make repairs or to rescind the sale, then repossessed the car, leaving our client with a handwritten note saying it would refrain from reselling the car for thirty days. Our client received no further contact from the dealer. In June 2010, we filed suit and on August 4 obtained a default judgment, but with our damages hearing set for September 3 the defendant began divesting assets. Our motions for continuance and for leave to amend the complaint to add new defendants were denied. We then voluntarily dismissed our complaint September 3.

On October 4 we filed a new action against the business that sold the car to our client by its business and corporate names, the corporation to which that business has transferred its assets, the owner of the dealership at the time of the sale, his successor, and the owner of the corporation that received transfer of the original dealership's assets. In December 2010 and January 2011 we obtained default judgments against the business that first received the original dealer's assets and its owner. We then settled our claims against the owner of the original dealer for \$1500, and against the successor to the original dealer for \$750, in exchange for dismissal of the action.

Date decided: May 10, 2011

Documents submitted to OSLSA Reports:

Case No. 10 CVF 608:

Complaint

Motion to continue and for leave to amend complaint

Notice of dismissal

Case No. 10 CVF 959:

Complaint

Dismissal entry following settlement

Case Name: Centennial Bank v. Myers

Court docket #: 2009 CF 12 1317

Electronic docket:

Court: Court of Common Pleas, Tuscarawas County

Attorney: Kara Williams

SEOLS office: New Philadelphia

Party represented: defendants

Category: homeownership protection

Issue: Whether mediated settlement agreement providing for loan reinstatement was enforceable against foreclosure plaintiff.

Allegations/History: Our clients bought their home in 2003 but lost their jobs in December 2008 and June 2009. After defaulting on their mortgage in July 2009, they regained employment in August and November 2009 and again became able to make their mortgage payments. However, on December 18, 2009, Centennial Bank filed a foreclosure lawsuit against them. At mediation May 17, 2010, the parties reached what the mediator in a report to the court on June 8 called a "full

"Evid. R. 408 and the Ohio Uniform Mediation Act were not intended to allow, and do not allow, a party to unilaterally repudiate a valid contract simply because that contract was made during mediation. To do so would render the mediation process a farce."

- Brief supporting motion to enforce, at 8.

agreement” resolving the case. As we confirmed in subsequent correspondence, this agreement called for reinstatement of the loan upon our client making regular scheduled payments plus nine monthly catch-up payments of six hundred dollars. Centennial was to draft a written agreement for execution by the parties.

After our repeated requests for a draft of the written settlement agreement, Centennial made demand for an additional \$3300 lump sum payment for corporate costs, including attorney fees. On August 11 we filed a motion requesting that the mediator be asked to waive her privilege and disclose the terms of settlement or that our evidence of the settlement terms be received by the court and the agreement enforced. Centennial argued that the mediation discussions, including the outcome, were privileged and that its pre-mediation demand for a lump sum payment suggested such a payment was part of the terms of the settlement ultimately reached. On November 2, the court found that under the circumstances in this case, evidence from mediation discussions of the settlement terms met a statutory exception to the mediation communication privilege. The court set an evidentiary hearing regarding those terms.

After an evidentiary hearing November 12, we argued that Centennial had not disputed either the mediator’s characterization of the settlement as a “full agreement” or our summary of the settlement terms in subsequent correspondence until an inordinate amount of time had passed, and that the evidence suggested there had been no discussion of a lump-sum payment during mediation. Centennial argued that due to misunderstandings by the parties there had been no meeting of the minds. On December 7, the court granted our motion to enforce the settlement agreement, holding that the terms of the agreement were as presented in our motion and did not include a lump sum payment for “corporate costs.” The court ordered that upon certification that our clients had duly made their regular payments plus catch-up payments under the agreement for nine months, the loan would be considered current and the foreclosure action would be dismissed with prejudice. On February 1 we filed a status report advising our clients had fully complied with this order. The court then issued a judgment entry dismissing the foreclosure action with prejudice.

Date decided: April 20, 2011

Documents submitted to OSLSA Reports:

Brief in support of Defendants’ motion to enforce settlement agreement
Plaintiff’s brief opposing motion to enforce settlement agreement
Defendant’s reply supporting motion to enforce settlement agreement
Plaintiff’s supplemental brief opposing motion to enforce settlement agreement
Final memorandum supporting Defendants’ motion to enforce settlement agreement
Judgment entry enforcing settlement agreement
Judgment entry dismissing foreclosure action

Case name: Comston v. Licking Metropolitan Housing Authority

Court docket #: 11 CV 0246

Electronic docket:

Court: Court of Common Pleas, Licking County

Attorney: Dennis Harrington

SEOLS office: Newark

Party represented: appellant

Category: housing

Issue: Whether housing authority can terminate housing subsidy for delay by tenant in recertifying eligibility.

Summary: Our client, a federally subsidized Section 8 tenant in private housing for four years, received two notices mailed December 2, 2010, from the housing authority. Citing her failure to comply with her six-month obligation to recertify certain eligibility criteria in November, one threatened to terminate her from the program effective January 31 and scheduled a final recertification appointment for December 9. Citing her failure to comply with her monthly obligation to recertify other eligibility criteria, the other notice proposed to terminate her participation in the program effective December 31 and advised her of her right to an informal hearing if requested within ten days. Our client, believing information she had supplied the housing authority on November 30 had resolved all eligibility issues, did not request an informal hearing. On January 18, the housing authority notified our client by letter that her subsidy was terminated effective December 31. On the following day our client filed a request for “state hearing” with the housing authority to which the housing authority failed to respond. On February 7 our client’s landlord provided our client with a notice to leave premises alleging she had failed to pay rent. Landlord then filed an eviction action against our client.

“The Housing Authority**sent Ms. Cassidy two letters dated December 2, 2010, proposing to terminate the assistance effective January 31, 2011, and terminating the assistance December 31, 2010, so it is unclear as to when the subsidy was terminated.”

- Motion to stay at 2.

On February 17, we filed with the clerk of courts a notice of appeal of the housing authority’s decision to the court of common pleas. We moved the court for an order staying termination of our client’s subsidy on February 25, and the court granted it three days later. On March 10 the housing authority moved to dismiss our appeal for lack of jurisdiction with an affidavit stating it did not receive a copy of the notice of appeal until February 23, more than thirty days after its final administrative order. After we filed our memorandum in opposition to the housing authority’s motion to dismiss, the housing authority agreed to restore our client’s voucher in exchange for our agreeing to dismiss the appeal. We then filed a notice of voluntary dismissal of our appeal.

Date decided: April 29, 2011

Documents submitted to OSLSA Reports:

Verified motion to stay and determine bond
Order granting stay and setting bond
Appellee’s motion to dismiss appeal
Appellant’s memorandum in opposition to motion to dismiss appeal
Notice of voluntary dismissal

Case Name: Hall v. Hupp

Court docket #: 2-10-53528

Electronic docket:

https://ecf.ohsb.uscourts.gov/cgi-bin/HistDocQry.pl?689608146889907-L_88_0-1

Court: United States Bankruptcy Court for the Southern District of Ohio

Attorneys: Reid Haddick

SEOLS office: Athens

Party represented: plaintiffs

Category: homeownership protection

Issue: Liability of sellers for misrepresenting status of their mortgage account to induce sale of property under land contract.

Summary: Our clients agreed to buy a home under land contract in June 2008 from sellers who misrepresented that they were current on mortgage and tax payments. In reliance on those representations, our clients made total payments of over \$38,000, which exceeded thirty percent of the total payments due for purchase of the property. Our clients also made substantial improvements to the property. Our clients then received notice of foreclosure proceedings involving the property, and the sellers filed Chapter 7 bankruptcy proceedings.

“The Halls reasonably relied on and were induced to enter the land contracts by the Hupps’ representation that they would maintain the mortgage payments in up-to-date status**.”
- Complaint to determine dischargeability, ¶19.

On July 6, 2010, we filed a complaint to determine dischargeability of indebtedness in the sellers’ bankruptcy case. We allege counts for misrepresentation and for attorney fees and our clients’ litigation costs in the state court foreclosure action against the sellers. The parties then reached a mediated settlement under which sellers would be ordered to pay our clients \$27,000 in monthly installments of \$150 on a nondischargeable debt, with the court retaining jurisdiction over implementation of the settlement. The court has approved the agreed order.

Date decided: May 11, 2011

Documents submitted to OSLSA Reports:

Complaint to determine dischargeability of indebtedness

Debtors’ answer to complaint

Agreed order to settle adversary complaint

Case Name: In re Jones

Court docket #: 20104039 (trial court)

Electronic docket:

Court: Fourth District Court of Appeals, Meigs County

Attorney: Kara Williams

SEOLS office: Athens

Party represented: plaintiff-appellant

Category: family law

Issue: Whether trial court committed plain error by imputing full time minimum wage income to client with partial disability without finding her voluntarily underemployed.

Summary: Our client has three minor children ages 16, 14, and 12 in the care of her mother, who is receiving public assistance for the children. Although she has some physical disabilities, she works fifteen hours per week at Pizza Hut. The child support enforcement agency brought a case to establish child support in the juvenile division of common pleas court. While our client was still pro se, the case was heard before a magistrate on November 19, 2010. On November 30 the magistrate issued a decision requiring our client to pay \$417 per month-- more than she earns--in child support. It appeared that the magistrate imputed full-time minimum wage income to our client, but there is no finding in her decision that our client was voluntarily underemployed. Our client failed to object to the magistrate's decision, and it became the final order of the common pleas court on December 15.

Upon receiving a request for representation in the case, we took a protective appeal to the court of appeals on January 14, 2011. The parties then agreed to have the case reset for hearing in the trial court to determine whether the issues pending on appeal could be resolved. On March 25 at a hearing in the trial court our client's mother waived her claim to current and retroactive child support, our client agreed to a medical support order, and the CSEA agreed to reinstate our client's driver's license. The magistrate's decision issued April 4, adopted by the court, reset the monthly child support obligation at zero and documented waiver of our client's child support arrearage. We then moved on May 16 to dismiss our appeal, and the court of appeals granted our motion.

Date decided: May 26, 2011

Documents submitted to OSLSA Reports:

Trial court judgment entry of December 15, 2010, establishing child support order
Magistrate's decision of April 4, 2011, implementing waiver of child support
Appellant's motion to dismiss appeal
Court of appeals entry of dismissal

Case Name: [Murphy v. Litton Loan Servicing, L.P.](#)

Court docket #: 2010 CV 06 0742

Electronic docket: http://www.co.tuscarawas.oh.us/PA/pa.urd/pamw2000.docket_1st?90999406

Court: Court of Common Pleas, Tuscarawas County

Attorney: Michael Harrington, Peggy Lee

SEOLS office: New Philadelphia

Party represented: plaintiffs

Category: homeownership protection

Issue: [Mortgage servicer's liability for refusing to tender permanent loan modification pursuant to terms of accepted written offer in compromise of foreclosure action.](#)

Summary: In 2005 our clients entered into a mortgage serviced by Litton Loan Servicing at an initial rate of 9.1% adjustable as high as 13.1%. Both borrowers suffered a reduction in work hours and in 2008 began falling behind on their payments. During pendency of a

foreclosure action filed in 2008, our clients applied for loan modification under HAMP and, in September 2009, Litton offered them a loan modification reducing their monthly payments from

“Litton informed the Murphys on March 25, 2010 that it would not abide by the agreement.”

- Complaint, ¶1.

\$1083 excluding taxes and insurance to \$922 including taxes and insurance, to become final after a ninety-day trial period.

Our clients accepted the offer and kept their monthly payment schedule through May 2010 and, in February 2010, the foreclosure action was dismissed. However, on March 25, 2010, Litton sent them notice that because the modification terms were better than those required by HAMP, Litton would not make the modification permanent. Accordingly, in April Litton issued a notice of default accelerating the loan and purporting to require payment of almost twenty thousand dollars by June 1 to avert another foreclosure action. On June 25, 2010, we filed suit for declaratory judgment, injunction, actual and punitive damages, and attorney fees, alleging claims for breach of contract, promissory estoppel, defamation, intentional infliction of emotional distress, and violation of the Consumer Sales Practices Act. After some discovery, the parties entered into a confidential settlement of this case, and we filed a notice of voluntary dismissal with prejudice.

Date decided: June 7, 2011

Documents submitted to OSLSA Reports:

Complaint

Answer

Notice of dismissal with prejudice

Case name: [Rona Enterprises, Inc. v. VanScoy](#)

Court docket #: 09-CA-6, 09-CA-8

Electronic docket: none

Court: Court of Common Pleas, Perry County

Attorneys: Pat Skilliter

SEOLS office: Zanesville

Party represented: defendant

Category: homeownership protection

Issue presented: Whether dispute over purchase of manufactured home can be ordered into arbitration when as part of the relevant series of transactions the purchaser deeded real estate to which the home was affixed to the dealer.

Summary: In December 2007 our client signed an agreement to buy a manufactured home from a dealer, Rona Enterprises, based on representations the dealer would find financing for the purchase. Rona told our client the land on which the home would be located had to be owned by our client alone before it could sell him the home, so other family members deeded over their share of part of the land they owned in common to our client. A series of transactions then ensued under which our client then made a \$2000 downpayment and executed a February 2008 contract addendum with an arbitration clause. Although financing never came through, Rona then began work on a foundation. After a worker got injured in that process they induced our client to execute a deed to Rona for the land on which the home would be sited. Rona then completed work on the foundation and constructed the home on the premises, and in May 2008 our client moved in. Rona then said any payments our client would make under the contract would be

“[Mr. VanScoy] did not know until it was too late that Rona would engage in a series of ruthless, one-sided dealings that would result in Rona having putative title to his land.”

- Motion for summary judgment at 2.

considered rent and threatened to evict our client if he didn't make payments. When our client did not make payments, Rona demanded he arbitrate its claims before Judicial Alternatives. In January 2009 Rona filed a petition in the court of common pleas to enforce its arbitration agreement. On April 23, 2009, over our opposition the court granted Rona's petition and ordered our client into arbitration. We appealed.

On July 14 we filed suit against Rona in the Licking County Court of Common Pleas, alleging that Rona committed common law fraud and violated the Consumer Sales Practices Act in divesting our client of his land. We requested a judgment quieting our client's title, an award of treble and punitive damages, an order requiring Rona to comply with the consent decree it entered with the Attorney General, and injunctive relief prohibiting Rona from disposing of the property pending final judgment. On October 16 the Licking County Court of Common Pleas transferred our suit there to Perry County for consolidation with Rona's petition to enforce the arbitration agreement.

On April 23, 2010, the court of appeals reversed the order compelling arbitration of the dispute. The court held that a dispute over title to land under the mobile home and our client's fraud claim were outside the scope of the arbitration clause in the contract for sale of the mobile home, and therefore our client's motion to dismiss the petition to compel arbitration should have been granted. The parties filed and exhaustively briefed cross-motions for summary judgment, which the court denied in January 2011. On February 8 we moved the court to add defendant's president as a party defendant. Shortly before a jury trial scheduled for March 14, the parties reached a settlement agreement in principle. As finally agreed by the parties and approved by the court, the consent order and an accompanying agreed judgment entry quieted title to the land in the name of our client and resulted in our client executing a promissory note, secured by a mortgage, in the amount of \$124,000, contemplating two years of payments on a thirty-year amortization schedule at 4.75 percent interest and a balloon payment due after two years, with an option for our client to secure a six-month extension of the balloon payment upon proof of unsuccessful efforts to secure financing.

Date decided: April 14, 2011

Documents submitted to OSLSA Reports:

common pleas proceedings on motion to compel arbitration
Plaintiff's petition to enforce arbitration agreement
Defendant's motion to dismiss and memorandum contra petition to enforce arbitration agreement
Plaintiff's reply to motion to dismiss and memorandum contra
Entry granting petition to enforce arbitration agreement
Entry making findings of fact
Plaintiff's memorandum in opposition to motion for stay pending appeal
Entry denying stay pending appeal
proceedings in court of appeals
Defendant-appellant's motion to stay proceedings pending appeal
Plaintiff-appellee's memorandum in opposition to motion to stay
Judgment entry granting stay pending appeal
Brief of Defendant-Appellant
Brief of Appellee Rona Enterprises
Reply Brief of Defendant-Appellant
Opinion
proceedings on remand
VanScoy complaint in Licking Common Pleas
VanScoy motion to dismiss Rona prayer for attorney fees
Order dismissing Rona prayer for attorney fees

Plaintiff Rona's motion for summary judgment
VanScoy motion for summary judgment
VanScoy memorandum opposing Rona motion for summary judgment
Rona memorandum opposing VanScoy motion for summary judgment
Rona's reply supporting its motion for summary judgment
VanScoy reply supporting his motion for summary judgment
Defendant VanScoy's proposed jury instructions
Consent order and decree
Agreed judgment entry

Case Name: Trainer v. Setlan Financial, L.P.

Court docket #: 1100017

Electronic docket:

Court: Vinton County Court

Attorney: James Buchanan

SEOLS office: Chillicothe

Party represented: plaintiff

Category: consumer

Issue: Liability of out-of-state debt adjustment business for failing to assist clients with debts as promised while charging nearly three thousand dollars in electronically collected fees.

Summary: Our clients entered into an online contract with a Texas debt settlement company in February 2009 with the understanding that the company would assist them with outstanding debts. Over the ensuing eighteen months, the company electronically withdrew \$2,998.37 from our clients' bank account but did not successfully resolve a single debt.

“Defendant withdrew electronically from Plaintiff’s bank account \$2,998.37 over an 18 month period. During this period, Defendant did not successfully resolve a single debt of Plaintiffs.”

- Complaint, ¶7-8.

On February 1, 2011, we sued the company for violations of the Ohio Debt Adjusting and Consumer Sales Practices Acts. We alleged that the company charged fees in excess of those permitted by statute and failed to provide an audit of our clients' account. However, we were unable to obtain service upon the defendant, which had closed its office and website and terminated telephone service. Accordingly on March 14, 2011, we served a notice of voluntary dismissal.

Date decided: March 14, 2011

Documents submitted to OSLSA Reports:

Complaint

Notice of voluntary dismissal

II. New cases

Case Name: Beneficial Ohio, Inc. v. Parish

Court docket #: 11 CA 003210

Electronic docket:

<http://gov.gbscorp.com/OH.Ross.CP/CaseDetail/default.aspx?csnr=11CA003210>

Court: Fourth District Court of Appeals, Ross County

Attorney: Luke Feeney, Joshua Goodwin

SEOLS office: Chillicothe

Party represented: defendant-appellant

Category: homeownership protection

Issue: Whether lender's unilateral reinstatement of mortgage loan after discharge in bankruptcy is sufficient basis for third foreclosure action after two prior voluntary dismissals.

Allegations/History: Our clients granted their mortgage to the plaintiff in March 2007 but were granted a Chapter 7 bankruptcy discharge seven months later. Our clients did not reaffirm the loan. After discharge of the loan, there was a history of plaintiff holding out the possibility of removing the threat of foreclosure and modifying or reconstituting a mortgage loan in exchange for voluntary payments from our clients. Plaintiff filed a foreclosure action in March 2008 but dismissed it the following month. In May 2009 plaintiff filed a second foreclosure action and, while it was pending, plaintiff claims to have reinstated the mortgage loan before again voluntarily dismissing its case the following month.

"A discharged note simply cannot be restructured post discharge."

- Memorandum opposing motion for summary judgment at 10.

On October 1, 2009, plaintiff filed the presently pending foreclosure action. The court set a briefing schedule and hearing on the question of whether suit was barred by the double dismissal rule. On September 7, 2010, the court held the suit not barred by the two previous dismissals. Plaintiff then moved for summary judgment. After receiving affidavits and memoranda from the parties, the court on January 12, 2011, granted a summary judgment of foreclosure.

Current status: On February 11, 2011, we appealed and on April 25 moved to stay execution of the order of sale. The parties have been in mediated negotiations. Our principal brief on appeal is due June 10.

Case Name: Richards v. Maysville Regional Water District

Court docket #: CH2011-0282

Electronic docket:

Court: Court of Common Pleas, Muskingum County

Attorney: Patrick Skilliter, David Little

SEOLS office: Zanesville

Party represented: plaintiffs

Category: consumer

Issue: Whether unregulated public water district may assess \$1000 connection fee when unauthorized by its policies and when unrelated to the cost of connection because most hardware permitting service to the property is already in place.

Allegations/History: Our clients' land received service from the Water District for over two years when, in 1996, a previous owner with an unpaid water bill authorized abandonment of service to the property. There was no lien or other encumbrance on the property when our clients bought it in 2008. Their well collapsed in September 2009, and they then requested reconnection of service by the Water District. In February 2010 our clients and the Water District entered into a water user's agreement.

However, in spite of the fact that most of the plumbing and hardware necessary to connect service remains in place, the District demanded a connection fee of \$1000 that is unrelated to the cost of restoring service to the property and not mentioned in either the District's policies or the water user's agreement.

At a hearing held March 24, 2010, on our request, the general manager of the District conducted the proceedings, introduced evidence, and affirmed her earlier decision conditioning connection on payment of \$1000. Pursuant to the District's policies, we appealed to the five-member District board composed primarily of persons whose terms have expired. When we arrived timely at an April 26, 2010, hearing before that board, the general manager had already argued her position and the board had already decided to affirm her decision conditioning connection of service on payment of a \$1000 fee. At that hearing the board accepted no evidence or argument from us.

Current status: On May 17, 2011, we filed suit against the Water District, its board of trustees, two board members and three acting board members in their official capacities, and the District's general manager in her official and personal capacities. We assert claims for breach of contract, violation of statutory process for collecting utility debts by attaching encumbrances to land; violation of the common law duty to serve, negligence, negligent supervision of the general manager, denial of due process and equal protection, and inequitable conduct. We request declaratory relief, including a judgment setting a lawful connection fee; preliminary and permanent injunctive relief ordering connection of water service and creation of an administrative complaint process with rights to advance notice, a record of proceedings, a hearing before an independent and impartial tribunal, and a right of further appeal; an order removing from the District board members that are not lawfully entitled to their offices; damages; and attorney fees. We are now in settlement discussions with the Defendants.

“Without concern for the health or well-being of Mr. Richards or Ms. Wells**, Defendants have made their arbitrary and capricious decisions in secret and then had sham meetings that they labeled ‘hearings’ to rubber stamp their illegal refusal**.”

- Complaint, ¶1.

Case Name: Strizak v. Strizak

Court docket #: 10 DRC 26573 (trial court)

Electronic docket: none

Court: Seventh District Court of Appeals, Carroll County

Attorney: Kara Williams

SEOLS office: New Philadelphia

Party represented: petitioner-appellant

Category: family law

Issue: Whether indigent custodial parent is entitled to appointed counsel on request at civil visitation contempt hearing posing possibility of imprisonment.

Allegations/History: In January 2011 our client secured a divorce in her seventh year of marriage and was awarded custody of three children of that marriage age ten, five, and two. There were allegations against ex-husband of violence against the five-year-old on one of the early visits that on investigation were held unsubstantiated. Denied a civil protection order, our client withheld visitation, and her ex-husband filed a contempt motion. In response to the statutory contempt summons served upon her, our client asked the clerk of courts for appointed counsel and was told to discuss that request with the judge at her hearing April 6. However, at the contempt hearing the judge told her appointed counsel was unavailable for civil contempt hearings. In its judgment entry April 18 the court found our client in contempt and announced that a ten-day jail sentence would be imposed if she continues to violate the court's visitation order. The court further announced that it would impose the same sentence if our client fails to pay \$643.75 in costs, attorney fees, and compensation for ex-husband's lost wages and travel associated with the contempt hearing.

“[W]e don't appoint attorneys for people in these situations.**[Y]ou may be punished for violating the court order, but it's incumbent upon you to have your own attorney.”

- Hon. Dominick E. Olivito, Jr., at April 6, 2011, hearing.

Current status: On May 17, 2011, we entered our appearance and filed a notice of appeal. We await filing of the record.

Case Name: Wells Fargo Bank, NA v. Oiler

Court docket #: 08CIV0170 (trial court)

Electronic docket:

Court: Fourth District Court of Appeals, Jackson County

Attorney: Joshua Goodwin

SEOLS office: Chillicothe

Party represented: defendant-appellant

Category: homeownership protection

Issue: Whether agreement for purchase of property was a valid land contract and lender subsequently granted a mortgage by the vendor was a bona fide purchaser of its mortgage interest in the property.

Allegations/History: On November 8, 2001, our client and another person executed a document entitled “Agreement to Lease Premises with Option to Purchase Property” under which monthly payments of \$300 were to be credited toward a purchase price of \$25,000 for land on which they would be living. The agreement was not recorded. In January 2004, vendors granted a mortgage on the property for almost \$47,000. Vendors disclosed to the mortgage lender that they held the property for investment purposes, and that somebody else was living there. Vendors did

“New Century and Plaintiff, which were nationwide companies that made millions of dollars in the mortgage business, made a business decision to not exercise due diligence and find out what interest Ms. Smith had.”

- Defendant's Memorandum Supporting Cross Motion for Summary Judgment at 16.

not tell our client about the mortgage. New Century did not visit the property but recorded the mortgage. Our client made over \$25,000 of payments and essential repairs. In July 2008, Plaintiff Wells Fargo sued the vendors for foreclosure and, in September 2008, Wells Fargo recorded an assignment of the mortgage to it by New Century.

In January 2009 we moved for partial summary judgment on our claim that the 2001 agreement is a land contract and our client is the owner of the real estate. When the vendors filed for bankruptcy, in March 2009, we filed an adversarial complaint against the vendors and Wells Fargo in Bankruptcy Court that settled for reaffirmation by vendors of a debt to our client in the amount of \$25,000 and left a determination of the priority of liens to the foreclosure action. After discharge of vendors' other debts and expiration of the Bankruptcy Court's stay of foreclosure proceedings, Wells Fargo moved March 7, 2011, for summary judgment. On April 11 the court set the summary judgment motion for non-oral hearing April 25 but simultaneously granted a default judgment against the vendors and issued a foreclosure decree. The court being closed for Good Friday April 22 despite exclusion in the local rules of Good Friday as a holiday, we filed our memorandum in opposition, cross-motion for summary judgment, and motion for relief from judgment April 25.

Current status: With our motion for relief from judgment still pending, we appealed. The court of appeals has set a pre-hearing conference call for July 8 to discuss settlement. Our principal brief is due July 28.

III. Ongoing litigation

A. Consumer

Case Name: Dillard v. U.S. Bank, N.A.

Court docket #: 2:09-cv-00635-MHW-MRA

Electronic docket:

https://ecf.ohsd.uscourts.gov/cgi-bin/HistDocQry.pl?109365531550523-L_1_0-1

Court: United States District Court for the Southern District of Ohio

Attorneys: Anne Rubin

SEOLS office: Athens

Party represented: plaintiff

Category: consumer

Issue: Liability of manufactured home manufacturer, dealership, and bank for defects in home and poor installation resulting in water damage and mold, for breaches of warranty, and for nondisclosures in connection with sale.

Allegations/History: Our client bought a manufactured home on June 19, 2008, and contracted with the dealer to deliver and install the home. The dealer was accompanied at the time of installation by a person who claimed to be an “inspector” but was in fact without any government licensing or credentials. The “inspector” demanded our client have ditches dug for drainage.

Ultimately the home was installed on foundation or padding other than that

required by the owner’s manual. Now there are cracks in the ceiling and walls, leaking windows, and warped doors, resulting in extensive water damage and mold. Shortly our client took possession, the air conditioning stopped working. In early August 2008, our client received a check from the dealership for \$143 containing in its indorsement section a general release of the dealership and its affiliates from all claims and liability. Our client has not negotiated the check.

“When CMH and/or Clayton first delivered the home, the CMH employees were accompanied by an individual who followed the home in a separate vehicle. He identified himself as ‘the inspector.’”

- Complalint, ¶13.

On June 19, 2009, we filed suit in the court of common pleas against the dealership, manufacturer, and the bank that holds the purchase loan, alleging claims for common law negligence, breach of contract, fraud, unjust enrichment, and unconscionability, and violations of the Truth-in-Lending Act, Consumer Sales Practices Act, Uniform Commercial Code implied warranties, and express warranty provisions in the Magnuson-Moss Act. We seek actual damages trebled and/or rescission relief. On July 20, the dealership and manufacturer filed their answer, setting forth as defenses our client’s failure to exhaust contractual arbitration remedies, and on July 27 they filed a notice of removal to federal court. The lender filed its answer November 9, asserting the holder in due course, bona fide error, and disclaimer of warranties doctrines and provisions in the Ohio Tort Reform Act as defenses and adopting the defenses pled by the other defendants. The parties have executed a mediated settlement agreement and release under which defendants will perform repairs and some additional work on the home at their cost.

Current status: We are monitoring defendants’ completion of the repair work required by our settlement agreement. We are submitting a substitution of counsel to the court preparatory to filing a stipulation of dismissal pursuant to our settlement agreement.

Case name: Kimmey v. Logan Gas, Inc.

Court docket #: 08 CV 0412

Electronic docket:

<http://www.court.co.hocking.oh.us/cgi-bin/db2www.pgm/cpq.mbr/main?nuser=22:04:39>

Court: Court of Common Pleas, Hocking County

Attorneys: Patrick Skilliter, Benjamin Horne, Kara Williams

SEOLS office: Zanesville

Party represented: plaintiff

Category: consumer

Issue presented: Obligation of sole area natural gas suppliers to restore service to resident who paid all claimed arrears in reliance on promise to restore service.

Allegations/History: In 2007 Southeastern Natural Gas Company, a natural gas supplier regulated by the Public Utilities Commission, transferred its obligation of providing natural gas to Logan Gas, an unregulated supplier, and our client was so notified by mail. In June 2008 Logan terminated service to our client due to claimed nonpayment. A Logan employee told our client service would be

restored if she paid the full claimed arrearage of \$545, which our client did on July 23. However, Logan then refused to reconnect service, and Southeastern, which is the only other supplier of natural gas in the area, also refused to supply gas.

“My twin sons sleep in our living room, near the kerosene heater, to stay warm at night and we are all forced to bundle-up, sleeping in winter clothing with extra blankets on our beds.”

- Plaintiff's TRO Affidavit, ¶9.

On November 21, 2008, we filed suit against both natural gas companies. We allege claims against both utilities for breach of contract and violation of the common law duty to serve. We allege claims against Logan for fraud and violation of the Consumer Sales Practices Act. We seek compensatory damages trebled, punitive damages, declaratory judgment, and injunctive relief. On November 24 the court held a hearing on our motion for temporary restraining order against the unregulated utility. Logan introduced testimony that Southeastern had sold it the gas line running to our client's home because Southeastern did not want to pay the costs of repairing it. Logan's witness further testified that because Logan did not own a utility easement permitting access to our client's land, Logan could not supply her with natural gas without coming under PUCO regulation. On December 3 Logan filed its answer. On the following day the trial court denied our motion for TRO out of concern that requiring Logan to serve our client would force the company into PUCO regulation and jeopardize the utility services of scores of other residential users. On May 1 Southeastern filed an answer with counterclaims, and on May 14 our client and Southeastern filed a joint dismissal of their claims. Following repeal of the restriction on legal services programs requesting attorney fees, we moved for leave to amend our prayer for relief to seek attorney fees, and on February 16 over defendant's opposition the court granted our motion.

Current status: The remaining parties have exchanged settlement offers and written discovery requests and responses. We are preparing to take deposition discovery.

Case Name: Smedley v. Discount Drug Mart, Inc.

Court docket #: CVE-0900702

Electronic docket:

http://cp.onlinedockets.com/fayettecp/case_dockets/Docket.aspx?CaseID=38000

Court: Court of Common Pleas, Fayette County

Attorney: Michael Gibbons-Camp, Robert Walter

SEOLS office: Chillicothe

Party represented: plaintiff-appellee

Category: consumer

Issue: Liability for treble damages under Consumer Sales Practices Act of seller for billing purchaser for more than twenty percent of the Medicare reimbursement rate for lift chairs.

Allegations/History: Our client bought a lift chair on September 19, 2008, for \$999.99. Medicare reimbursed him in the amount of \$264.57 for the purchase. We sued the seller under the Consumer Sales Practices Act for violating R.C. 4769.02. We argued that R.C. 4769.02 limits balance billing by providers of certain Medicare-covered medical devices to twenty percent beyond the Medicare

reimbursement rate. Seller argued that the lift chair was actually two items, a lift device covered by Medicare, and a chair portion that was not Medicare-covered, and it was therefore entitled to bill a full list price for the chair portion.

“**Appellant asks the Court to allow [it] to avoid the balance billing statute by accepting that any charge to Mr. Smedley beyond what Medicare covers must be for uncovered components.”

- Appellee’s answer brief at 11.

On March 15, 2010, the court granted our client summary judgment as to liability, holding that seller had engaged in prohibited deceptive sales practices regardless of whether the lift chair was a single item with a single price or two separate items with two separate prices. On April 22, the court issued judgment for our client in the amount of \$709.43, which it held to violate several court opinions in the Ohio Attorney General’s public information file and therefore trebled for a total damage award of \$2128.29. On November 22, 2010, the court of appeals reversed. The court held that seller did not violate Ohio’s Medicare balance billing act because, although the lift chair our client bought was a single item, federal law contemplates that items may be assembled from multiple components, some Medicare covered and some not. Under those circumstances, the court held, a Medicare-covered component is covered by the prohibition in state law against balance billing, while a component not covered by Medicare may be billed to the patient without violating the balance billing statute.

With respect to our claim under the CSPA that seller had deceived our client by causing him to believe that the entire chair was Medicare-reimbursable, the court held our client’s affidavit conflicted with the seller’s written notes from the transaction and the terms of the written contract of sale. This created a dispute of material fact on which summary judgment was inappropriate. Consequently, the court remanded for further proceedings on the CSPA claim.

Current status: We have had status hearings with the court and settlement discussions with defendant after the remand.

B. Housing

Case name: Fulk v. Dutiel

Court docket #:

Electronic docket: none

Court: County Court, Perry County

Attorneys: David Little

SEOLS office: Zanesville

Party represented: plaintiff

Category: housing

Issue presented: Large landlord's liability for damages to tenant who resided for three years in rental housing found condemnable by county health department due to condition of premises.

Allegations/History: For almost three years ending in November 2005, our client resided in housing rented from a large landlord. Our client's family began experiencing health problems, and a doctor prescribed that a breathing machine for our client. We allege that conditions in the home included a leaking roof with extensive water damaged and mold infestation, clogged sewer drains and plumbing exposing the family to raw sewage, sparking at electrical outlets, unsafe heating system, exposed wiring, holes in the floor, missing and unusable windows, and lack of a fire exit. In November 2005 the county health department directed the landlord to replace or repair the sewage line, floors, gutters, roof, porch, walls, and concrete steps. Shortly after that, our client moved and no longer needed a breathing machine.

“Defendant’s rental and sale properties present a visible barrier to businesses, companies, or industries who might consider locating in Perry County and providing employment opportunities for Perry County citizens, as well as an obstacle to economic growth and development for Perry County.”

- Complaint, ¶41.

On March 5, 2007, we filed suit against the landowner for negligence and breach of his statutory duties to comply with health-related codes and maintain fit and habitable rental housing. We seek compensatory damages in the amount of \$8540 and punitive damages in the amount of five thousand dollars. The court heard four half days of trial testimony, including testimony from several local public officials offered by Plaintiff. We filed our written closing argument in September 2008. Opposing party did not file any responsive closing argument.

Current status: We await the court's decision.

Case name: Gothard v. Dingess, Akers v. Dingess, Ruggles v. Dingess, Runyon v. Dingess, Tanner v. Dingess, Waddle v. Dingess

Court docket #: CVH 0900172, CVG 0900234, CVH 0900193, CVH 0900194, CVH 0900195, CVH 0900196, CVH 0900197

Electronic docket:

<http://www.lawcomunicourt.com/cgi-bin/mdocket.cgi?pre=CVH&num=0900172&sub=&type=CV&acc=>

<http://www.lawcomunicourt.com/cgi-bin/mdocket.cgi?pre=CVG&num=0900234&sub=&type=CV&acc=>

<http://www.lawcomunicourt.com/cgi-bin/mdocket.cgi?pre=CVH&num=0900193&sub=&type=CV&acc=>

<http://www.lawcomunicourt.com/cgi-bin/mdocket.cgi?pre=CVH&num=0900194&sub=&type=CV&acc=>

<http://www.lawcomunicourt.com/cgi-bin/mdocket.cgi?pre=CVH&num=0900195&sub=&type=CV&acc=>

<http://www.lawcomunicourt.com/cgi-bin/mdocket.cgi?pre=CVH&num=0900196&sub=&type=CV&acc=>

<http://www.lawcomunicourt.com/cgi-bin/mdocket.cgi?pre=CVH&num=0900197&sub=&type=CV&acc=>

Court: Municipal Court, Lawrence County

United States Bankruptcy Court for the Southern District of Ohio

Attorneys: Valerie Webb, Mark Cardosi, Reid Haddick

SEOLS office: Portsmouth

Party represented: plaintiffs

Category: housing

Issue presented: Remedies available to tenant renting one of landlady's 31 dilapidated properties currently in foreclosure proceedings.

Allegations/History: On February 27, 2009, our client Rebekah Gothard received a foreclosure summons regarding residential property for which she was current in her rental obligation. Landlady owns 31 properties in foreclosure on which the mortgage arrears were \$300,000 and the tax default was \$50,000. On March 12 we filed an action against her and her husband in municipal court for breach of the rental agreement, for negligence, and for statutory injunctive relief requiring repairs. We requested temporary, preliminary, and permanent injunctive relief; appointment of a receiver; and compensatory and punitive damages.

On the following day the court denied our motion for an ex parte temporary restraining order, holding there was insufficient showing of a threat of immediate harm to justify an order before defendants had been served and could appear in opposition. On March 18, 2009, we filed five additional suits against the same defendants on behalf of additional tenants seeking similar relief. We allege that one nearby property owned by defendants is partially razed and dangerous; garbage has accumulated on other nearby properties owned by defendants that attracts vermin; and access to the defendants' properties is severely limited by a decaying roadbed. In our clients' homes, we allege there is inadequate and interrupted heating and water heating, inadequate insulation, malfunctioning plumbing, standing water, vermin, mold, and bad electrical fixtures.

The landlady has filed eviction countersuits against some of our clients, on which we demanded trial by jury. On April 21, in lieu of a preliminary injunction hearing on all of the cases, the parties submitted, and the court entered, an agreed order requiring landlady to cause appropriate repairs to the premises by May 5. Landlady filed answers in all of the suits during May. The landlady then filed for a Chapter 13 bankruptcy. Judgment was entered against the landlady

October 21 in the foreclosure action, but she has entered into an agreement with her mortgagee to complete a short sale. On October 19 we filed proofs of claim on behalf of four of our clients in the landlady's bankruptcy proceedings. Pursuant to a Bankruptcy Court order adoption landlady's revised bankruptcy plan, our clients who filed proofs of claim in the bankruptcy action will be paid 11% of the amount of their claims.

Current status: We are keeping our state court countersuits open to preserve the right to proceed if landlady fails to comply. In the meantime, we have convinced the community action agency to buy fifteen of the affected properties and either rehab them or build new homes. This work is now in progress.

Case Name: Kelly v. Chillicothe Metropolitan Housing Authority

Court docket #: 10CVF430

Electronic docket:

<http://www.chillicothemunicipalcourt.org/cgi-bin/mdocket.cgi?pre=CVF&num=1000430&sub=&type=CV&acc=>

Court: Municipal Court, Chillicothe

Attorney: Melissa Benson

SEOLS office: Chillicothe

Party represented: plaintiff

Category: housing

Issue: Liability of public housing authority for entering tenant's premises during her tenancy, changing locks, and discarding and damaging her personal property.

Allegations/History: Our client received a thirty-day notice of termination of her tenancy in public housing due to housekeeping issues and began moving her belongings into private housing. When she returned during her tenancy to her public housing apartment to finish moving out she found the locks had been changed, some of her personal belongings were in the dumpsters, some were broken, and some missing.

“Ms. Kelly...was told by an employee that CMHA had removed her property and she could get it from the dumpsters.”

- Complaint, ¶10.

We filed suit against the public housing authority for compensatory and punitive damages and attorney fees, alleging statutory claims for unlawful entry and unlawful eviction, and common law claims for conversion and breach of contract. Defendant has demanded trial by jury in its answer and asserted as affirmative defenses abandonment of the premises and personal property, repudiation and termination by our client of the lease agreement, waiver and estoppel, and failure to mitigate damages. Defendant has filed an answer. We have responded to requests for admission and, after filing a motion to compel discovery, have received responses to interrogatories and requests for production of documents.

Depositions occurred in the case December 8. On January 14 the housing authority moved for partial summary judgment on any claims not constituting negligence and on our claims for punitive damages and attorney fees, arguing those claims barred by the Ohio Tort Claims Act as recently interpreted by the Ohio Supreme Court. On April 5 the court granted summary judgment to the housing authority on our claims for trespass and conversion, holding tort claims barred by political subdivision immunity under the Tort Claims Act. The court denied summary judgment on our requests for actual damages and attorney fees under our claims sounding in

contract, holding that there is no immunity for political subdivisions from contractual liability under the Act. Finally, the court granted summary judgment to the housing authority on our contract-related claims for punitive damages, holding that the law of contracts does not provide for such relief.

Current status: Our case is scheduled to be tried to a jury on September 1.

Case name: Klein v. Boyd

Court docket #: 07-CV-158 (trial court)

Electronic docket:

Court: Court of Common Pleas, Meigs County

Attorney: Anne Rubin

SEOLS office: Athens

Party represented: plaintiff

Category: housing

Issue presented: Right of mobile home owner to access his land by means of abandoned roadway to permit replacement of his 42-year-old mobile home currently situated on that land.

Allegations/History: Our client lives on his land in a 42-year-old mobile home. In June 2008 he bought an eleven-year-old mobile home and arranged to have it moved to his property to replace the older home in which he currently lives. Unfortunately, the only means of

accessing his property is by a roadway that has been abandoned by the Village of Pomeroy. The day before the scheduled

move, our client's neighbor erected a fence on that neighbor's property that blocks the path the new mobile home would take over the abandoned roadway to our client's land. The neighbor refuses to temporarily move or remove his fence or to allow our client to do so. On October 7, 2008, we sued the neighbor for declaratory judgment recognizing an easement by necessity over the abandoned roadway and adjoining land of the neighbor, for an injunction permitting our client to move the newer mobile home to his land, and for damages for trespass to his easement.

“On or about July 15, 2008, the Defendant Dennis Boyd erected a fence on his property in such a manner as to obstruct the Plaintiff from moving the mobile home he purchased up the road and onto his property.”

- Complaint, ¶5.

During hearing on our motion for preliminary injunction October 27, we reached agreement on an order, journalized October 30, that allows our client to temporarily remove defendant's fence at our client's expense and move his newer mobile home to his land. Pursuant to that order, our client has now moved his new mobile home to his land.

Current status: We are preparing a motion for summary judgment on our claim for damages, which remains pending.

C. Homeownership protection

Case name: Eveland v. U.S. Bank, National Association

Court docket #:

Electronic docket:

Court: Court of Common Pleas, Perry County

Attorney: Pat Skilliter

SEOLS office: Zanesville

Party represented: plaintiffs

Category: homeownership protection

Issue: Whether housing authority can terminate housing subsidy for delay by tenant in recertifying eligibility.

Allegations/History: In July 2009 U.S. Bank filed a foreclosure suit against our clients. During pendency of that suit, our clients found a buyer for their home and, in January 2010, secured agreement from U.S. Bank and the U.S. Department of Agriculture, which had guaranteed the loan, permitting a short sale of the property. The sale closed the following month and our clients paid the proceeds of \$102,880.70 over to U.S. Bank. In March 2010 we requested a copy of the satisfaction of mortgage to be filed with the county recorder's office and, when we received no response, in July 2010 demanded defendants comply with the settlement agreement by recording a satisfaction of mortgage. U.S. Bank has not done so.

“Defendants**have failed and refused to perform their duties owed to the Evelands under the terms and conditions of the settlement agreement**and their duties under statute, including the timely filing of a notice of satisfaction of mortgage.”

- Motion to stay at 2.

On April 14, 2011, we filed suit against U.S. Bank and an affiliated company that services our clients' mortgage, alleging claims for breach of contract, for violation of the Ohio statute requiring satisfaction of mortgage to be recorded within ninety days, and, against the servicer, for violation of the Consumer Sales Practices Act. We seek statutory, treble, and punitive damages, injunctive relief requiring recording of a satisfaction of the mortgage, and attorney fees.

Current status: U.S. Bank has now filed its notice of satisfaction of the mortgage. We have reached a verbal settlement agreement under which the defendants will pay our clients \$500 in damages and will be responsible for court costs. Draft dispositional documents are in circulation.

Case name: Johnson v. Mullen

Court docket #: 10CI000505

Electronic docket:

<http://gov.gbscorp.com/OH.Ross.CP/CaseDetail/default.aspx?csnr=10CI000505>

Court: Court of Common Pleas, Ross County

Attorneys: Melissa Benson

SEOLS office: Chillicothe

Party represented: plaintiff

Category: homeownership protection

Issue presented: Liability of mortgage broker and servicer for succession of transactions converting unencumbered ownership of home into tenancy and leading to threat of eviction.

Allegations/History: Our client owned her home without encumbrance when she unsuccessfully sought credit from conventional lenders to pay for improvements. She then called the toll-free number for a mortgage brokerage that advertised financing for persons with poor credit. An agent of the brokerage, under the pretext of facilitating a \$50,000 mortgage, induced our client to quitclaim the property to him with both himself and our client as mortgagors and our client obligated to purchase her home back from him under land contract. Our client received \$24,000 of the mortgage proceeds and used them for home improvements. Although the agent originally told our client that monthly payments for a year on the land contract were \$400, before the first payment was due he increased monthly payments to \$580. When our client lost her job and defaulted, the agent convinced her to sign a lease with option to purchase obligating her to pay \$600 per month until February 2008 when she would have a one-time opportunity to buy her home back for \$57,000.

“Defendant Mullen**had Ms. Johnson transfer the property to him without her knowledge, took out a mortgage on the property in his own name**, kept \$26,4000 of that mortgage, failed to disclose the ‘costs’ that \$26,400 covered, required Ms. Johnson to make payments of varying amounts, and required her to sign an agreement that she would pay him more than \$57,000 in less than one year’s time for the \$24,000 she received from him**”

- Complaint, ¶57.

On May 16, 2007, we sued the mortgage brokerage, its agent, and an unnamed loan officer employed by the brokerage. In July 2009 the parties reached a mediated settlement under which our client voluntarily dismissed her suit; the parties mutually waived their statute of limitations defenses; the parties would seek agreement by the lender on the mortgage broker’s mortgage to refinance the mortgage in our client’s name; the mortgage broker would deed the property back to our client if the lender agreed to refinance; and otherwise our client would refile the case and name the lender, who was not named as a party to our original lawsuit, as a defendant. Pursuant to this settlement agreement, the parties filed a mutual notice of voluntary dismissal. On July 26, 2010, we filed suit against the mortgage broker and Countrywide, the current servicer of the mortgage on our client’s home, asserting violations of the Ohio Mortgage Broker Act, breach of fiduciary duty, and fraud. We seek declaratory relief voiding the mortgage broker’s transactions involving the home, compensatory and punitive damages, an order enjoining the broker from continuing the business practices described in our suit, costs, and attorney fees.

On September 24 Countrywide filed an answer and counterclaim, a cross-claim against the mortgage broker, and a partial motion to dismiss. Countrywide’s motion asks that all affirmative claims against it be dismissed. We filed a responsive memorandum. The mortgage broker has filed an answer to our complaint and a reply to the servicer’s cross-claim.

Current status: On January 19, Countrywide’s motion for partial dismissal was granted, but we continue to press our claims against the mortgage broker, with whom we have had some settlement discussions.

Case name: Newman v. BNC Mortgage, Inc.

Court docket #: 08CI000423

Electronic docket:

<http://gov.gbscorp.com/OH.Ross.CP/CaseDetail/default.aspx?csnr=08CI000423>

Court: Court of Common Pleas, Ross County

Attorneys: Luke Feeney, Peggy Lee

SEOLS office: Chillicothe

Party represented: plaintiff

Category: homeownership protection

Issue presented: Liability of lender, mortgage broker, and brokerage for facilitating 12% mortgage on senior citizen's unencumbered property in over double the amount desired based on fraudulent income and appraisal figures.

Allegations/History: Our client, a 63-year-old widow whose only income was a monthly check for less than \$1000, had lived in her home almost forty years. She owned her home, which was tax appraised at \$53,370, without encumbrance. Needing money to fix the roof and retain an attorney for her grandson, she asked a mortgage broker to find her a mortgage for \$20,000.

On her behalf, the broker prepared a loan application for \$50,000 indicating her income was from earnings and the value of her home \$85,000 and secured an appraisal in that amount.

At closing our client learned that her loan would be made at an interest rate of 12 percent, not the ten percent quoted to her earlier, and that credit insurance she had been promised as part of the transaction would not be provided. The mortgage documents she signed at closing required monthly payments exceeding half of her income, a balloon payment of \$36,000 that she was to make upon reaching 93 years of age, and a total mortgage cost of \$221,432.73. She received no notice of her statutory right to rescind the transaction.

On March 28, 2008, we filed suit against the lender, mortgage broker, and brokerage. Against the lender we allege violations of the Truth-in-Lending Act and Home Ownership Equity Protection Act and common law claims for negligent and unconscionable lending, negligent misrepresentation, and for cancellation or reformation of the contract. Against the broker and brokerage we allege claims for fraud, breach of fiduciary duty, and violations of the Mortgage Broker Act and Consumer Sales Practices Act. We seek judgment for rescission or reformation; compensatory, statutory, and punitive damages; injunctive relief against the broker and brokerage; and costs. Defendants have filed answers, and we have received answers to interrogatories and requests for production of documents. Discovery was in progress when, on January 15, 2009, the lead defendant filed a notice that it was in bankruptcy proceedings and our state court claims against it were under a bankruptcy stay. We have filed a proof of claim against the lead defendant in its bankruptcy case.

Current status: We await the outcome of our claim in the bankruptcy action. We have had some settlement discussions.

“After the...meeting, Ms. Graves told Ms. Newman that...Ms. Newman would have to go to the Bob Evans parking lot...in Chillicothe to pick up her check.”

- Complaint, ¶21.

Case Name: PHH Mortgage Corp. v. Albus

Court docket #: 09 MO 09

Electronic docket:

Court: Seventh District Court of Appeals, Monroe County

Attorneys: Robin Bozian, Rob Henry, Leslie Vincent

SEOLS office: Marietta

Party represented: defendant-appellant

Category: homeownership protection

Issue: Whether summary money judgment for lender in foreclosure action must be reversed for lack of any evidence establishing the amount of the debt.

Allegations/History: Our client bought a home and granted the plaintiff a mortgage in 2004 but then lost half her income from work and then became unable to work due to diabetic complications. As a result, she defaulted on her mortgage. In July 2008, plaintiff sued our client for foreclosure, and in November 2008 moved for summary judgment. Plaintiff's motion attached only

an unauthenticated promissory note and mortgage between our client and Century 21 Mortgage and a New Jersey certificate of good standing suggesting that Century 21 was a business name used by the plaintiff. We opposed summary judgment in part because we had received no affidavit evidence proving the balance our client owed on the account or that plaintiff had accelerated the mortgage. On October 9, 2009, the court granted summary judgment for plaintiff, issuing a money judgment on the note for \$56,874.74, plus pre-judgment interest and advances, and entering a decree of foreclosure.

“In the entirety of the pleadings, there is not one admissible piece of evidence that supports PHH’s claim that the amount owed on the note is \$56,874.74.”

- Brief of Appellant at 3.

On November 9, 2009, we appealed. On January 28 the trial court stayed preparations for a sheriff's sale on condition of our client making her scheduled monthly mortgage payments during pendency of her appeal. We filed our principal brief February 8. On March 16, appellee lender served its principal brief, attaching a copy of an affidavit file-stamped as a separate document by the trial court that does not include proof of service and in fact was never served upon us. Lender nonetheless contends that this document supports summary judgment against our client.

Current status: Oral argument occurred May 4. We await the court's decision.

Our arguments on appeal:

1. A party moving for summary judgment may not make a conclusory assertion about a material fact without specifically pointing to some evidence demonstrating that there is an absence of a genuine issue of fact.

2. There is not a single reference in any document permitted as summary judgment evidence under the Civil Rules and served upon us to the amount remaining due under the promissory note in this case.

3. Because the summary judgment of foreclosure was not based on any evidence of the debt owed that was served upon the defendant, our client's statutory right to redeem the property by paying the amount owed before confirmation of sheriff's sale has been negated.

4. The amount of a money judgment accompanying a decree of foreclosure must be definite enough to wind up the matter without any further litigation.

5. Because the money judgment below permits the plaintiff to add unspecified fees after judgment, there has been insufficient winding up of the matter to permit our client to exercise her right of redemption with the confidence required by statute.

Case name: [Shelpman v. Foreclosure Assistance USA](#)

Court docket #: 2009CIV000139 (common pleas), 1:10-ap-01006 (bankruptcy)

Electronic docket: none

Courts: Court of Common Pleas, Pike County

United States Bankruptcy Court for the Southern District of Ohio

Attorneys: Lauren Weller, Stacy Brooks, Scott Torguson, Reid Haddick

SEOLS office: Portsmouth, Chillicothe, Newark

Party represented: plaintiffs

Category: homeownership protection

Issue presented: [Liability of putative mortgage rescue service for accepting fees for promises to resolve foreclosure and then failing to deliver effective services.](#)

Allegations/History: Five southeastern Ohio residents defending three foreclosure actions received mail solicitations from a purported mortgage rescue service that guaranteed for a fee that it could save their homes. All paid hundreds of dollars in fees to the rescue service, which committed their foreclosure defense to an attorney who filed answers generally denying their lenders' allegations and then performed little additional work. Summary judgment was entered against two of our clients with no opposition from the mortgage rescue attorney, and they subsequently lost their homes. In the foreclosure action against a third client stayed due to the involvement of New Century Mortgage, our client has fired the mortgage rescue attorney, we have entered an appearance, and we are preparing to assert defenses when the stay is lifted.

“FA USA works directly with your mortgage company to ensure that you will keep your property and we personally guarantee it!”

- Foreclosure Assistance USA solicitation letter.

Summary judgment was entered against two of our clients with no opposition from the mortgage rescue attorney, and they subsequently lost their homes. In the foreclosure action against a third client stayed due to the involvement of New Century Mortgage, our client has fired the mortgage rescue attorney, we have entered an appearance, and we are preparing to assert defenses when the stay is lifted.

On June 11, 2008, we filed suit against the purported mortgage rescue operation, alleging violations of the Consumer Sales Practices Act and claims for common law misrepresentation/fraud and breach of fiduciary duty. One client, Mr. Shelpman, has pled a malpractice claim against the mortgage rescue attorney. We seek damages and costs against both defendants and, against the purported mortgage rescue operation, an injunction against further deceptive and unconscionable acts. We have requested trial by jury. The mortgage assistance attorney has filed an answer to plaintiff Shelpman's malpractice claim, asserting as defenses the statute of limitations, failure to mitigate damages, mootness, laches, setoff, res judicata, contributory or comparative negligence, and consent. We have engaged in written discovery and document production with the defendant mortgage assistance attorney. On August 6 we took his deposition and he took the deposition of our client Mr. Shelpman.

Foreclosure Assistance USA has not filed an answer to our complaint. The chief officer of Foreclosure Assistance USA has filed for bankruptcy, and in his bankruptcy case we have filed an adversarial complaint to determine dischargeability. The bankrupt has filed a pro se answer, and we have filed our pretrial statement. In our state court litigation we have filed a suggestion of bankruptcy that has resulted in a stay of proceedings pending an outcome in the bankruptcy

court. We have settled our clients' claims against the bankrupt chief officer of the mortgage rescue operation. We have agreed not to disclose the terms of that settlement, but they are fully set forth in the final order of the Bankruptcy Court. We have reached a confidential settlement in principle regarding Mr. Shelpman's claims against the attorney to whom the rescue operation referred Mr. Shelpman's foreclosure case for representation

Current status: A draft agreement resolving Mr. Shelpman's claims against the referral attorney is circulating between the parties.

D. Public Benefits

Case Name: *Bridgeway, Inc. v. Williams*

Court docket #: 2010-1166

Electronic docket:

<http://www.supremecourt.ohio.gov/Clerk/ecms/resultsbycasenumber.asp?type=3&year=2010&number=1166&myPage=searchbycasenumber.asp>

Court: Supreme Court of Ohio

Attorney: Thomas Weeks

Anita Myerson, Legal Aid Society of Cleveland (lead amicus counsel)

Gordon Beggs, Kenneth Kowalski (counsel for claimant)

SEOLS office: OSLSA/Columbus

Party represented: amicus curiae

Category: unemployment compensation

Issue: Whether standards in unemployment compensation law for evaluating underperformance on the job as just cause for firing should be extended to all situations in which a claimant was fired.

Allegations/History: When she was promoted to a position as a residential program manager for a community mental health center, claimant agreed she would become a licensed independent social worker within fifteen months. At the end of the fifteenth month she received a one-month extension of that obligation and then failed the examination and was fired. She was then denied unemployment compensation. After a hearing in which she proved that the employer had not required other residential program managers to obtain LISW licensing and a license was not required by either employer or government policy for her former position, she received a final administrative decision denying benefits.

“Ohio unemployment law should not penalize the employee who tries work in a new field [and is] then unable to pass a new employer’s required test, despite their best effort...”

- Legal services amicus brief at 23.

The court of common pleas affirmed denial of benefits, but the court of appeals reversed. Although the court of appeals declined to certify any conflict with an opinion of another court of appeals, the Ohio Supreme Court granted discretionary jurisdiction over the employer’s appeal. The parties filed their principal briefs. The Ohio Department of Job and Family Services, in an amicus brief supporting the employer, argued that (1) the primary purpose of unemployment benefits is to support workers laid off due to adverse business conditions, (2) underperformance of an employer’s expectations is disqualifying for benefits if those expectations were reasonable and constant and the worker was aware of them, and (3) proof that an employer selectively enforced its rules against the worker is not relevant in an unemployment compensation case. On January 13, 2011, we filed an amicus brief.

Current status: The case was orally argued March 22, and we are awaiting the court’s decision.

Our amicus arguments:

1. The four-pronged test for evaluating firings for underperformance in unemployment compensation cases established in *Tzangas, Plakas & Mannos v. Administrator* should not be extended to apply to all firings.

2. There is no evidence in the case at bar that claimant was performing unsatisfactory work.

3. Firing of a worker for failing a test should not be found to have occurred with just cause unless the agency considers whether failing the test was the worker's fault, based on the worker's individual circumstances.

4. Unfair and discriminatory treatment of a worker is relevant to the question of whether that worker's firing was for just cause.

5. The agency's own Policy Guide, and previous court of appeals decisions, limit application of the four pronged *Tzangas* case only to firings for underperformance on the job, not to failure to pass an unessential licensing test.

Case name: *Burrier v. Director, ODJFS*

Court docket #: 2011 AA 02 0176

Electronic docket: http://www.co.tuscarawas.oh.us/PA/pa.urd/pamw2000.docket_lst?79057823

Court: Court of Common Pleas, Tuscarawas County

Attorney: Michael Harrington

SEOLS office: New Philadelphia

Party represented: claimant-appellant

Category: unemployment compensation

Issue: Whether garage door installer was fired with just cause for walking off the job or without just cause for expressing safety concerns.

Allegations/History: For five years our client worked as a garage door installer at Holmes Lumber, which has a progressive discipline policy. On May 18, 2010, while at a job site with his direct supervisor installing garage doors in a dairy barn, our client expressed concerns about the safety of sharing a fifteen-foot ladder with the supervisor, who is overweight, on a floor that was extremely slippery because it was covered with manure. Despite company policy that required employees to bring safety issues up first with a direct supervisor, the supervisor told our client he "was done" and to take his truck back to the office. Our client, who had the company truck in his possession the entire previous five years, understood this to mean he would be fired. Per the company's safety policy, he then raised his safety concerns with the owner the next morning at his office. The owner fired him.

"[T]he ground the ladders were on was not flat and was slippery due to the significant amount of manure in the barn."

- Appellant's brief at 4-5.

Our client was awarded unemployment compensation benefits, and the employer appealed. On redetermination the agency reversed the award of benefits and assessed an overpayment claim, and we appealed. At administrative hearing we proved existence of the company progressive discipline and safety policies, and the employer admitted our client had raised safety concerns, had followed company policy in raising them, and had a sterling employment record prior to the incident for which he was fired. Employer also claimed, however, that the dispute on May 18 was over money and that our client had actually walked off the job and quit. After the hearing we submitted a discharge notice from the company showing our client had been fired. Nonetheless, an agency hearing officer found that our client had walked off the job because of money issues, not safety concerns, and upheld termination of benefits to our client and the overpayment claim.

After the Unemployment Compensation Review Commission denied further review, on February 15, 2011, we appealed to common pleas. On March 8 the court entered an order denying our motion to proceed without prepayment of costs because the motion was unaccompanied by authority permitting the court to waive prepayment in cases seeking judicial review of unemployment compensation appeals. We filed a motion for reconsideration of that order arguing that statutory authority permitting common pleas courts to waive prepayment in the general run of their cases applied to unemployment compensation appeals and, on April 6 the court granted leave to proceed without prepayment.

Current status: On April 27, we filed our principal brief, and the appellee agency and employer filed their briefs May 23. We are preparing our reply brief.

Our arguments on appeal:

1. Whether discharge of an employee was for just cause and therefore disqualifying for purposes of unemployment compensation depends on the Unemployment Compensation Act, not the employment agreement.

2. By complaining of safety conditions to his supervisor on the job site and then declining to engage in unsafe work and leaving the job site to discuss those conditions with employer's upper management, our client was complying with his employer's policies.

3. Even if employer doubted our client's safety concerns and found his leaving the job site due to those concerns was misconduct, it was obligated to follow its six-step progressive discipline policy and not skip immediately to termination, which was the employer's sixth step.

4. By finding that our client left the job site over monetary concerns over other testimony from both sides that our client had reported his safety concerns to top management after leaving the job site, the agency ruled contrary to the manifest weight of the evidence.

Case Name: Russell v. Lumpkin

Court docket #: 2:10cv0314

Electronic docket:

Court: United States District Court for the Southern District of Ohio

Attorney: Anne Rubin

Paralegal administrative representation: Mary Ellen Nose

SEOLS office: Athens

Party represented: plaintiffs

Category: health

Issue: Whether delays exceeding a year in determining applications for disability-related Medicaid violate prompt processing statute and discriminate based on disability.

Allegations/History: Four applicants for disability-related Medicaid in Meigs, Gallia, and Perry Counties applied for benefits on dates ranging from 2007 to January 2009 and continue waiting for final administrative action, all after the Disability Determination Area of the state Medicaid agency returned the cases to county agencies requesting further evidence of disability. In three

cases, we secured state hearing decisions reversing denials of benefits and requiring still further evidence be gathered and evaluated, but the decisions have not been enforced. In all four cases, the agency has failed to evaluate whether our clients' remaining ability to perform work, in combination with their age, work experience, and education, enables them to hold any jobs available in substantial numbers in the national economy.

“After waiting—for no justifiable reason—for more than 90 days after receiving an application, Defendants...further defer making a decision...on the pretext of needing more information, without making any finding of the reason for not requesting and obtaining the additional information earlier.”

- Complaint, ¶22(b).

On April 13, 2010, we filed suit against three officials of the Ohio Department of Job and Family Services, alleging violation of the federal Medicaid prompt processing statute, the Americans with Disabilities Act, and the Due Process Clause. We seek declaratory and injunctive relief and attorney fees. On May 3 we moved for preliminary injunction. Defendants' answer, filed May 10, asserts among other defenses mootness, ripeness, and failure to exhaust administrative remedies. On May 17 the court entered a consent decree on our motion for preliminary injunction. The consent decree enjoins defendants from denying the plaintiffs' Medicaid applications due to lack of information and orders defendants to arrange and pay for the evaluations and tests that defendants' disability determination division has identified as needed to make disability determinations with respect to the plaintiffs. The decree further orders defendants to evaluate plaintiffs' employability based on an assessment of their remaining work-related abilities by a medical doctor to be recruited and paid by defendants. Finally, the decree requires defendants to determine the eligibility of two of the plaintiffs for disability-related Medicaid within 45 days and to give an evidentiary basis in writing if benefits are denied either plaintiff.

Current status: The parties remain in final settlement discussions.