[Cite as *Sonis v. Rasner*, 2015-Ohio-3028.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101929

OLGA SONIS

PLAINTIFF-APPELLEE

vs.

OLGA RASNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-818099

BEFORE: E.A. Gallagher, J., Keough, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: July 30, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Olga Rasner a.k.a. Olga Bitenbinder ("Rasner") appeals from a verdict following a bench trial in favor of plaintiff-appellee Olga Sonis, as attorney-in-fact for Andrey Silantyev, on her claims for civil theft, fraud, conversion and unjust enrichment arising out of Rasner's alleged wrongful receipt and retention of proceeds from an immigration bond that Silantyev had posted through Rasner. Rasner contends (1) that the trial court abused its discretion in excluding the testimony of her handwriting expert because he was not timely disclosed; (2) that Sonis lacked standing to assert claims relating to the immigration bond; (3) that the trial court's finding that the immigration bond was posted with $5,000 paid by Silantyev's friends and family on his behalf (and not with Rasner's own money) was against the manifest weight of the evidence and (4) that Sonis's civil theft claim was barred by the applicable statute of limitations. Finding no merit to the appeal, we affirm the trial court's judgment.

Factual and Procedural Background

{¶2} On December 2, 2013, Sonis, individually and in her capacity as attorney-in-fact for Silantyev, filed a complaint against Rasner, alleging that Rasner had stolen $5,000 from Silantyev by refusing to return to Sonis the proceeds Rasner had received from Silantyev's immigration bond after the conditions of the bond had been met. Sonis asserted claims of civil theft, fraud, conversion and unjust enrichment against Rasner, seeking $5,000 in compensatory damages, treble damages as punitive damages

under R.C. 2307.61, prejudgment and post-judgment interest, costs and attorney fees. Rasner filed an answer in which she admitted that she had received $5,000 from Silantyev's immigration bond and that she had not paid the money she had received to Sonis but denied that Sonis was entitled to the funds. Rasner denied the remaining allegations of the complaint and asserted affirmative defenses of failure to state a claim for which relief could be granted and failure to plead fraud with sufficient specificity.

{¶3} On April 2, 2014, the court held a pretrial conference. The parties waived their right to a jury trial, and the trial court set the case for a bench trial on June 9, 2014. The trial date was thereafter continued several times. In its journal entry memorializing the pretrial conference, the trial court indicated that "expedited civil trial procedures will be in effect as follows" and set forth the case schedule and various requirements relating to pretrial stipulations, exhibits, motions in limine, the filing and exchange of exhibit and witness lists, procedures for the examination of witnesses and opening and closing statements. With respect to the disclosure of witnesses, the journal entry stated:

> The parties shall file with the court and exchange with the other parties an itemized list identifying all witnesses each party intends to call no later than 5/26/2014 at 4:30 p.m. Any witness not so identified and disclosed shall not be permitted to be called by any party except for good cause shown.

There is nothing in the record that suggests that Rasner raised any objections to these requirements or deadlines.

{¶4} On May 23, 2014, Rasner submitted her trial brief in which she identified the fact witnesses she anticipated calling to testify at trial. With respect to expert witnesses, Rasner stated that she "does not anticipate calling an expert witness."

{¶5} On July 28, 2014, two days before the rescheduled trial date, Rasner filed a motion for leave to present the testimony of Curt Baggett, a handwriting expert, explaining that she had not previously disclosed him as an expert witness because she was "unable to obtain the testimony and report at an earlier date."[1] According to Rasner, Baggett would testify that someone "forge[d]" Rasner's signature on one of the key documents in the case, i.e., a designation of attorney in fact dated March 14, 2008. Sonis opposed the motion, and the court denied it.

{¶6} A bench trial commenced on July 30, 2014. Silantyev, Silantyev's cousin, Roman Sviridenko, Sonis, Yelena Tarkhanova, who worked with Sonis and Rasner (by cross-examination) testified in the plaintiff's case.[2] Rasner testified in her defense. A summary of the evidence presented at trial follows.

{¶7} In July 2005, Silantyev came to the United States from Kazakhstan "to work a little and study." On March 4, 2008, the United States Department of Homeland Security ("DHS") issued a warrant for his arrest, claiming that Silantyev was in the country illegally. Although he did not have a work authorization, Silantyev testified that he had been working as a mechanic. Silantyev was arrested, taken into custody and held

[1]At no time prior to July 28, 2014, did Rasner indicate that she had changed her mind and intended to call an expert witness or request a continuance due to her difficulty in locating an expert witness, obtaining an expert report or for any other reason.

[2]Silantyev testified with the assistance of an interpreter live via Skype from Kazakhstan. Sviridenko testified live via Skype from Marrington, Florida.

in immigration detention. In order to be released from DHS custody, he needed to post a $5,000 immigration bond.

{¶8} To make the arrangements necessary to post the bond, Silantyev testified that he called his cousin, Sviridenko, his then-girl friend, Antonia Aladinskaya,[3] and a good friend, Farkhat Ashurov and explained that he had been arrested and told them that he needed money to post a bond. He testified that after speaking with his cousin and friends, he called Rasner. He testified that he had obtained Rasner's name from Ashurov, who had worked with her previously. Silantyev testified that Rasner told him that Sviridenko and Ashurov gave her $5,000 to post the immigration bond. Silantyev stated that it was his understanding that Sviridenko contributed $2,000, Aladinskaya $2,000 and Ashurov $1,000 toward the bond. Silantyev testified that, to his knowledge, Rasner did not provide a receipt for the money they gave her for the bond.

{¶9} Sviridenko testified that in March 2008, he was working as a project manager at a small electrical company in Akron, Ohio when he received a call from Rasner. He testified that Rasner informed him that Silantyev had an immigration problem, was in detention and needed $5,000 for a bond to release him. He testified that he took $2,000 out of his savings and gave it to Rasner and that Ashurov also gave Rasner money to post the bond. Sviridenko did not recall with certainty how much money Ashurov gave Rasner but believed it to be $3,000. Sviridenko testified that Rasner would not take cash, so he and Ashurov went to the post office and converted their cash to money orders

[3]Silantyev and Aladinskaya later married.

before delivering the money orders to Rasner at her office. Sviridenko testified that he did not have the receipts he was given when he purchased the money orders and that Rasner did not give them a receipt for the money orders they gave her for Silantyev's bond. Sviridenko testified that he attempted to find documentation from his bank evidencing his withdrawal of the $2,000 but that he could not find anything because it was "too many years ago."

{¶10} On or about March 5, 2008, Silantyev was released from DHS custody on bond pending the disposition of his immigration status. Silantyev testified that approximately a month or two after his release, he repaid Ashurov and Sviridenko the money they had given to Rasner for his immigration bond from money he had earned working. He testified that he did not pay Aladinskaya back because "[w]e have money together." Sviridenko confirmed that Silantyev repaid him about a month later.

{¶11} Rasner denied that Silantyev's friends and family were the source of the $5,000 used to post his immigration bond and claimed that she used her own personal funds to post the bond. Rasner testified that in March 2008, Silantyev called her from jail and asked her to help him post an immigration bond. She testified that Silantyev gave her Sviridenko's telephone number and that she made "many phone calls," i.e., "[a]t least 5 or 6," to Sviridenko, "trying to convince him that the jail is not very good place for anybody to be" but that he refused to pay the bond. Rasner testified that after Sviridenko refused to pay the bond, she took her own money, i.e., cash she had in her office at the time, obtained five $1,000 money orders from a nearby post office and used the money

orders to post the bond with the DHS, Immigration and Customs Enforcement ("ICE"). Rasner testified that although she did not know Silantyev, she used her own money to post the $5,000 immigration bond on his behalf because she believed it was "a good investment." Rasner explained that the United States government pays five percent interest on funds used to secure immigration bonds and that when she uses her own funds to post an immigration bond for a client, she usually gets the "business" associated with that bond as well. She testified that she has used her own funds to post immigration bonds for her clients "a lot" and that she has always gotten her money back plus interest.

{¶12} Rasner denied that neither Silantyev nor anyone else contributed any money toward his immigration bond. Rasner testified that whenever she receives cash from clients or others on their behalf, it is her "office procedure" to "always" give them a receipt. She testified that because she never received any money from Sviridenko or anyone else for Silantyev's bond, she did not give anyone a receipt. Rasner testified that she has no "office procedure" for documenting when she uses her own money to pay a client's bond because "this is my own choice[,]" "[t]his is my own money." As such, she was not aware of any documentation supporting her claim that she paid the $5,000 to post Silantyev's bond.

{¶13} After posting the bond for Silantyev, Rasner received (1) the immigration bond, (2) an original Form I-305, Receipt for U.S. Bonds or Notes, or Cash, Accepted as Security on Immigration Bonds for the funds deposited to post the bond (the "I-305 receipt") and (3) a "notice to obligor for bond posted," which explained the procedures by

which the funds deposited as security for the bond would either be refunded (upon satisfaction and cancellation of the bond) or forfeited (upon breach of the bond). Because she was the person who had deposited the postal money orders with ICE, Rasner was listed as the "obligor" on the immigration bond and the I-305 receipt.[4]

{¶14} Rasner testified that two or three days after she posted the bond, Silantyev appeared at her office and she gave him copies of the I-305 receipt and the bond. She testified that she never gave him the originals "[b]ecause the money belonged to me."

{¶15} Silantyev testified that after he was released from custody, he decided he did not want to continue working with Rasner "because of her reputation." He, therefore, contacted Sonis and requested that she make the necessary arrangements to change the obligor on his immigration bond. Silantyev testified that he asked Sonis to contact Rasner and "get all of the papers needed to get the bond back."

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[4]According to the "notice to obligor for bond posted," when cash or money orders are posted as security for an immigration bond, the monies are deposited with the United States Treasury where they earn interest during the pendency of the bond. The bond remains in effect until the individual for whom the bond is posted departs the United States voluntarily; departs the United States as a result of a court order to depart and verification of departure is received by the U.S. Immigration Service; the individual's deportation proceedings are terminated by the court due to the legalization of the individual's status and proof of that termination/legal status is received by the deportation department of the U.S. Immigration Service; the individual dies and a death certificate is received by the deportation section of the U.S. Immigration Service or a new bond is posted to replace the bond. If all of the conditions of the bond are met, the bond is cancelled, and the obligor may recover the security provided for the bond. If the bond is breached, e.g., if the individual fails to appear for an interview, hearing or deportation and the obligor was given notice to present the individual as directed, the monies are forfeited. After a bond is cancelled, the obligor must generally submit the original I-305 receipt to the DHS, Debt Management Center in order to receive a refund of the cash posted for the bond and any accrued interest.

{¶16} Sonis testified she first met Silantyev when he needed assistance translating documents related to the loss of his passport. Sonis testified that when Silantyev contacted her in March 2008, he told her that immigration enforcement officers had arrested him while he was working at a body shop because he was not authorized to work. Sonis testified that Silantyev requested her assistance in changing the obligor on his immigration bond and recovering the bond money.

{¶17} To change the obligor on an immigration bond, a Form I-312, Designation of Attorney in Fact ("I-312 designation of attorney in fact") is required. Sonis testified that after meeting with Silantyev, she attempted to schedule an appointment with Rasner to complete paperwork necessary to change the obligor on the bond and to obtain the original bond documents but was unsuccessful.

{¶18} On March 14, 2008, Silantyev appeared at Sonis's office. Sonis testified that because Rasner's office was nearby and Sonis had been unable to schedule an appointment with her, Silantyev and Sonis decided to go to Rasner's office to see if she was there. Sonis's partner, Tarkhanova, a notary, accompanied them to Rasner's office so that she could notarize the parties' signatures on the I-312 designation of attorney in fact.

{¶19} When the group arrived at Rasner's office, Sonis testified that Rasner told them to "do whatever you want." Sonis testified that the atmosphere in Rasner's office was "very tense" and "nervous." She testified that Rasner was "very, very unfriendly," "pretty rude" and "upset" and that "[s]he didn't talk to us at all." As a result, Sonis

attempted to fill out the I-312 designation of attorney in fact "very quickly." Sonis testified that as she was filling out the form, she became confused regarding whose name should go where on the form. She testified that in her haste, she filled out the form incorrectly. Instead of identifying Rasner as the "designator" on the form and herself as "designee," she did it "exactly backwards," identifying herself as "designator" and Rasner as "designee."[5] She testified that once the form was completed, she and Rasner signed it, and Tarkhanova notarized their signatures (the "March 14, 2008 designation of attorney in fact"). Sonis and Tarkhanova testified that they personally observed Rasner sign the March 14, 2008 designation of attorney in fact.[6]

{¶20} Tarkhanova and Sonis testified that while they were in Rasner's office, Rasner typed up a second document, which she requested that Sonis sign, "certifying" that Sonis would be the "new obligor of Silantyev Andrey (A 78390013) in the Immigration matter" as of March 14, 2008 (the "document confirming Sonis as obligor"). Sonis signed the document and Tarkhanova notarized Sonis's signature. Sonis testified that she asked Rasner whether she should sign the document as well and that Rasner told

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[5]The "obligor" is the person who receives the security posted for an immigration bond when the bond terminates. Through the use of an I-312 Designation of Attorney in Fact, a bond's obligor (identified on the I-312 as the "designator") can designate a new obligor (identified on the I-312 as the "designee") to change the obligor on the bond. To properly change the obligor, the designator and designee must be identified at the appropriate places on the form, sign the form where indicated and their signatures must be notarized.

[6]Although the notary acknowledgment on the March 14, 2008 designation of attorney in fact indicates that Silantyev also "personally came * * * and * * * executed" the document, Silantyev did not execute the March 14, 2008 designation of attorney in fact.

her that she did not need to sign it "because I have nothing to do with this loan [sic] anymore, I want you to know." Tarkhanova testified that Rasner made a copy of the document for her records and gave the original to Sonis. Sonis and Tarkhanova testified that Rasner also gave Sonis the originals of the Form I-305 receipt that had to be sent to the ICE, Debt Management Center ("DMC") in order to obtain the return of the funds used to post the immigration bond once the immigration bond was cancelled.

{¶21} Sonis testified that "[v]ery soon," "[m]aybe the next day," she realized the mistake she had made in completing the March 14, 2008 designation of attorney in fact. She testified that she contacted Rasner "right away" and requested that they "redo" the designation of attorney in fact but that Rasner refused to cooperate, stating that she "had already signed a special form stating that I have nothing to do with this bond anymore." Sonis testified that after the DHS updated and simplified Form I-312 in 2009, she continued to contact Rasner, requesting that Rasner sign a new I-312 designation of attorney in fact, but that Rasner refused to do so.

{¶22} Although she could not recall the date, Rasner acknowledged that shortly after Silantyev was released from DHS custody, Sonis, Tarkhanova and Silantyev came to her office. She testified that, at that time, Silantyev paid her $200 for purchasing the money orders and posting his bond. Rasner denied that she was asked to complete or sign any forms during this visit and further denied that she ever signed any form designating Sonis as the obligor on Silantyev's immigration bond. Rasner denied signing the March 14, 2008 designation of attorney in fact and claimed that her purported

signature on that document looked nothing like her signature on other documents, including Silantyev's immigration bond. With respect to the document confirming Sonis as obligor, Rasner denied that she created the document or that the document was created or executed in her office.

{¶23} After his release from DHS custody, Silantyev applied for asylum. However, his request was denied. In December 2011, the immigration court granted Silantyev's application for voluntary departure on the condition that he post an additional $500 voluntary departure bond with ICE. Silantyev posted the bond himself using a Fifth Third Bank personal money order. Because he was the obligor on the bond and was scheduled to leave the United States, he executed an I-312 designation of attorney in fact appointing Sonis to receive the refund of the $500 he had posted as security for the voluntary departure bond. He also executed a general power of attorney in favor of Sonis. On September 17, 2012, Silantyev left the United States and returned to Kazakhstan.

{¶24} In October 2012, once Silantyev was back in Kazakhstan, Rasner received a Form I-391, Notice - Immigration Bond Cancelled ("bond cancellation notice") from ICE, indicating that Silantyev's immigration bond had been cancelled and that she, as obligor on the bond, could now seek a refund of the $5,000 cash that had been deposited to secure the bond. To obtain a refund, Rasner was required to send a copy of the notice along with the original I-305 receipt to the DMC. The bond cancellation notice stated, "If you have lost your original Form I-305, you will be given an opportunity to submit an

Original notarized Form I-395 Affidavit in Lieu of Lost Receipt." The notice further provided that "[i]f you wish to designate another person to receive the deposit on your behalf, you must complete a Designation of Attorney in Fact, Form I-312, designating that person and include the completed original notarized form in your application to the DMC."

{¶25} Rasner testified that after she received this notice, she looked for the original I-305 receipt for Silantyev's bond but could not find it. She testified through an interpreter that "[t]o the best of her knowledge," she believed the original receipt was destroyed during a roof leak in her office sometime prior to October 2012. She testified that although she did not check to see whether, in fact, Silantyev's file had been destroyed as a result of the leak, a lot of files were destroyed at that time. Accordingly, Rasner prepared a Form I-395, Affidavit in Lieu of Lost Receipt of United States ICE for Collateral Accepted as Security, in which she attested that she did not have the original I-305 receipt because it had been destroyed in a flood, i.e., that "the ceiling above my desk was leaking because of bad weather & a lot of rain, so receipt & other paperwork was destroyed." She submitted the affidavit along with a copy of the bond cancellation notice to the DMC. A couple of weeks later, she received a letter from ICE's Burlington Finance Center requesting that Rasner provide a copy of her photo identification and three signature samples "to verify her signature." Rasner testified that she signed three pieces of paper and sent them to the Burlington Finance Center. Shortly thereafter, she

received $5,700 from the United States Treasury Department — the funds originally deposited as security for Silantyev's immigration bond plus $700 in interest.

{¶26} Sonis testified that after Silantyev left the country, she mailed documentation to the DMC requesting the return of the funds deposited as security for both Silantyev's voluntary departure bond and his March 2008 immigration bond. With respect to the March 2008 immigration bond, Sonis testified that although she knew the March 14, 2008 designation of attorney in fact had been filled out incorrectly, she submitted it along with the original I-305 receipt to the DMC, anticipating that the DMC would contact her after they reviewed her documentation and that she could then explain what had happened.

{¶27} In November 2012, Sonis received a check in the amount of $512.98 from the United States Treasury Department, refunding the $500 Silantyev had posted as security for his voluntary departure bond plus accrued interest. However, she received no response to her request to refund the $5,000 that had been posted as security for Silantyev's March 2008 immigration bond. Sonis testified that when she contacted the DMC to inquire why she had not received a refund of the funds posted for the March 2008 immigration bond, she was informed that those funds had already been "released to another person." Sonis testified that because Rasner was the only other person "involved in the whole procedure" to whom the funds could have been released, she immediately called Rasner. Sonis testified that Rasner confirmed that she had received the money

from the March 2008 immigration bond and told her, "It's my money, so don't even ask about it."

{¶28} Sonis testified that she thereafter continued to contact Rasner, requesting that Rasner turn over the money she had received from the March 2008 immigration bond to Sonis so that Sonis could return it to Silantyev. On February 27, 2013, Sonis sent a fax to Rasner attaching copies of the March 14, 2008 designation of attorney in fact, the document confirming Sonis as obligor, and the I-305 receipt. In her fax, Sonis also indicated that she possessed written statements from Sviridenko and Aladinskaya confirming that they had provided Rasner with the $5,000 used to post the bond for Silantyev. Sonis testified that Rasner was difficult to reach, did not return her calls and failed to respond to her fax. On March 29, 2013, however, Sonis finally connected with Rasner. Sonis testified that she had a telephone conversation with Rasner in which Rasner agreed to repay the money that had been refunded to her for Silantyev's March 2008 immigration bond after she paid the taxes due on the interest earned on the $5,000. Rasner denied that any such conversation occurred.

{¶29} Rasner admitted that after she received the $5,000 from Silantyev's March 2008 immigration bond, she did not return any of Sonis's calls or respond to her fax. As to why she did not respond, Rasner explained, "[w]hy would I spend time on someone who is whining and complaining about something that she has no knowledge of?" She testified that she later spoke with Sonis "a couple of times" and that she told Sonis "this is not her business, that this is my own money and * * * to stay out of it. That's it."

Rasner denied that she ever promised to pay the money that she had received from Silantyev's March 2008 immigration bond to Sonis.

{¶30} After the tax filing deadline had passed, Sonis testified that she again attempted to contact Rasner to obtain the return of Silantyev's money. Once again, Rasner failed to return her calls or messages. When Sonis finally reached Rasner on May 23, 2013, Sonis testified that Rasner told her she "had changed her mind" and would not be returning Silantyev's money. Sonis testified that Rasner stated: "Why do you care, he is out of the country, he would never come back here, why you need it? * * * Don't call me about it, forget about it, I changed my mind, I'm not returning the money." Rasner denied making any such statements, describing Sonis's testimony on the issue as a "complete lie."

{¶31} At Silantyev's request, in a further attempt to recover the bond funds from Rasner, Sonis hired an attorney to assist her in filing a complaint with the Beachwood Police Department. When Sonis learned the police department was unable to help her recover the funds,[7] she sought the assistance of another attorney, Richard Herman. Herman sent a letter to Rasner, setting forth the facts surrounding Rasner's allegedly improper receipt and retention of the $5,000 from Silantyev's immigration bond and demanding that Rasner return the funds or face possible legal action. On September 19, 2013, Rasner responded to Herman's letter as follows:

[7]Rasner was never charged with any criminal offense related to this incident.

> I understand that you are trying to collect $5,000.00 from me on behalf of A. Silantyev, however the facts in this case has not been lay out to you correctly. A. Silantyev in fact called my cell phone from detention center and asked me to contact his relative. I called Roman Sviridenko number of times and was not able to convince him to pay this money. So, I actually paid $5,000.00 out of my own pocket. Once A. Silantyev was released, he came to my office, with your partner Olga Sonis, and paid me $200.00 for posting this bond. Your partner informed me that your firm will be representing A. Silantyev. She also asked me for a copy of paperwork. I don't recall signing any documents to discharge me as Obligor. Of course, I do have witnesses to it and A. Silantyev is not a first person that I paid my own money. Therefore, I received this money as fair compensation. Should this matter be refer to court I will have to request graphological expertise and full process of discovery. If you need more information, please let me know. Also, since this was my own money and no business was done via my company, please forward all correspondences to my home address.

{¶32} This action followed. At the conclusion of Sonis's case-in-chief, Rasner moved to dismiss the case pursuant to Civ.R. 41(B)(2). The trial court denied the motion.

{¶33} On August 18, 2014, the trial court entered its verdict, finding in favor of Sonis and against Rasner on each of the four causes of action in her complaint. The trial court awarded Sonis a total judgment of $17,100, plus post-judgment interest at 3% and costs.

{¶34} Rasner appeals the trial court's judgment, raising four assignments of error for review:

> FIRST ASSIGNMENT OF ERROR: The trial court abused its discretion in denying Ms. Rasner the right to present expert testimony as to the authenticity of signature, purported to belong Ms. Rasner, at trial when the "Expedited Civil Trial Procedure," not identified as part of the local rules, hampered Ms. Rasner's ability to procure said expert report and opinion prior to the date it was offered, and where the local rules allowed for less severe sanctions to prevent any undue surprise [or] prejudice.
>
> SECOND ASSIGNMENT OF ERROR: The trial court erred in finding in favor of Plaintiff on all counts when the record makes clear that Plaintiff did not possess the necessary ownership interest in the $5,000.00 bond, either directly or as attorney in fact for Mr. Silantyev, due to a lack of legally enforceable assignment, which divested her of jurisdiction due to a lack of standing and created a failure to prove each and every element of her claims under the manifest weight standard.
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> THIRD ASSIGNMENT OF ERROR: The trial court erred in finding in favor of Ms. Sonis on her First Cause of Action, Civil Theft, as her complaint was filed outside of the applicable statute of limitations for that cause of action.
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> FOURTH ASSIGNMENT OF ERROR: The trial court abused its discretion in finding that the entire value of the $5,000.00 bond was posted by third parties when such a finding is not supported by a manifest weight of the evidence.

Law and Analysis

Exclusion of Rasner's Handwriting Expert

{¶35} In her first assignment of error, Rasner argues that the trial court abused its discretion in excluding the testimony of her handwriting expert. Rasner contends that the "authenticity of [Rasner's] signature [on the March 14, 2008 designation of attorney in fact] was a critical fact in regard to the trial court's determination that [Rasner] should be found liable on all counts of the complaint" and that she was, therefore, unfairly prejudiced by the trial court's exclusion of this evidence.

{¶36} Loc. R. 21.1, governing the disclosure of expert witnesses provides, in relevant part:

> (A) Since Ohio Civil Rule 16 authorizes the Court to require counsel to exchange the reports of medical and expert witnesses expected to be called by each party, each counsel shall exchange with all other counsel written reports of medical and non-party expert witnesses expected to testify in advance of the trial. *The parties shall submit expert reports in accord with the time schedule established at the Case Management Conference*. The party with the burden of proof as to a particular issue shall be required to first submit expert reports as to that issue. Thereafter, the responding party shall submit opposing expert reports within the schedule established at the Case Management Conference. *Upon good cause shown, the Court may grant the parties additional time within which to submit expert reports.*
>
> (B) A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. It is counsel's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the non-party expert's opinion. However, *unless good cause is shown, all supplemental reports must be supplied no later than thirty (30) days prior to trial*. The report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report.

> (C) *All non-party experts must submit reports. If a party is unable to obtain a written report from a non-party expert, counsel for the party must demonstrate that a good faith effort was made to obtain the report and must advise the Court and opposing counsel of the name and address of the expert the subject of the expert's expertise together with his qualifications and a detailed summary of his testimony. * * * The Court shall have the power to exclude testimony of the expert if good cause is not demonstrated.*
>
> (D) If the Court finds that good cause exists for the non-production of a non-party expert's report, the Court shall assess costs of the discovery deposition of the non-complying expert against the party offering the testimony of the expert unless, by motion, the Court determines such payment would result in manifest injustice. These costs may include the expert's fee, the Court reporter's charges and travel costs. * * *

(Emphasis added.)

{¶37} The trial court's scheduling order imposed a May 26, 2014 deadline for disclosing witnesses and further provided that "[a]ny witness not so identified and disclosed shall not be permitted to be called by any party except for good cause shown."

{¶38} In her motion to permit expert testimony, Rasner sought leave to offer testimony from her previously undisclosed expert based on her assertion that she was "unable to obtain the testimony and report at an earlier date." Rasner concedes that her disclosure of this expert, two days before the thrice-rescheduled trial date, was untimely pursuant to both the deadlines imposed in the trial court's April 2, 2014 scheduling order and Loc. R. 21.1. Rasner further concedes that her assertion that she was "unable to obtain the testimony and report at an earlier time" does not "by itself, * * * rise to 'good cause.'" She nonetheless contends that the trial court abused its discretion in excluding her expert because "when the case is taken as a whole, good cause did exist." Specifically, she contends that the "incredibly shortened timeline," which resulted from

the trial court's imposition of "'Expedited Civil Trial Procedures' not identified in the local rules, * * * contributed to [her] inability to procure [an expert report] in a timely fashion" and that the trial court's exclusion of her expert's testimony, given the limited time frame in which the parties had to timely disclose expert witnesses, constituted an abuse of the trial court's discretion.

{¶39} The "expedited civil trial procedures" and case deadlines, including the deadline for disclosing witnesses, were clearly set out in the trial court's April 2, 2014 pretrial order. Rasner did not raise any objections to these procedures or deadlines at any time and never requested a continuance or extension of any of these deadlines. Indeed, although Rasner stated in a September 2013 letter to Sonis's counsel that she would require "graphological expertise" if a lawsuit was filed, suggesting that Rasner was well aware even before the complaint was filed that she might need an expert to defend Sonis's claims, Rasner stated in her May 23, 2014 trial brief that she "does not anticipate calling an expert witness."

{¶40} Trial courts have broad discretion in managing their dockets, setting case schedules and imposing discovery sanctions for violations of court rules and scheduling orders, including the exclusion of expert witnesses who are not timely disclosed. *See, e.g., Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 662 N.E.2d 1 (1996), syllabus. A trial court's decision to exclude an expert witness due to unfair surprise is reviewed for abuse of discretion. *Poppy v. Whitmore*, 8th Dist. Cuyahoga No. 84011, 2004-Ohio-4759, ¶ 18; *see also Blandford v. A-Best Prods. Co.*, 8th Dist Cuyahoga Nos.

85710 and 86214, 2006-Ohio-1332, ¶ 13 ("Our standard of review concerning the trial court's ruling on a Loc.R. 21.1 question is abuse of discretion.").

{¶41} With respect to the untimely disclosure of experts, "the existence and effect of prejudice resulting from noncompliance with the disclosure rules is of primary concern." *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 85, 482 N.E.2d 1248 (1985); *Blandford* at ¶ 14 ("'The primary purpose of Loc.R. 21 is to avoid prejudicial surprise resulting from noncompliance with the report requirement.'"), quoting *Preston v. Kaiser*, 8th Dist. Cuyahoga No. 78972, 2001 Ohio App. LEXIS 4988, *12 (Nov. 8, 2001).

{¶42} In this case, Rasner did not notify Sonis that she had changed her mind and, in fact, intended to call an expert witness until two days before trial. The trial court reasonably concluded that Sonis would be unfairly prejudiced if Rasner's expert had been allowed to testify at trial. Although Rasner argues that the trial court could have imposed a lesser sanction for her failure to timely disclose her handwriting expert, such as that provided for in Loc.R.21(D), where, as here, Rasner failed to establish good cause for the untimely disclosure of her expert, the trial court was not obliged to do so. Even if Sonis could have deposed Rasner's expert prior to trial, she would have had little time to prepare and would not likely have had an expert of her own to assist with preparation for the deposition and cross-examination or to rebut Rasner's expert's testimony. Given these facts, we decline to find that the trial court abused its discretion in precluding Rasner's expert from testifying at trial. *See, e.g., Paugh & Farmer, Inc. v. Menorah*

Home for Jewish Aged, 15 Ohio St.3d 44, 45-46, 472 N.E.2d 704 (1984) (trial court did not abuse its discretion in excluding testimony of expert who was not timely disclosed under local rule; "the trial court had discretion to set a deadline by which expert reports had to be filed, and to enforce its order by excluding all testimony relating to reports filed past the deadline"); *Huffman* at 83-87 (trial court's decision to preclude defendants from presenting expert testimony at trial where defendants did not inform plaintiffs that they would be calling an expert witness until four days before trial did not constitute an abuse of discretion; rejecting appellate court's conclusion that the trial court should have considered other means of remedying unfair surprise such as granting a continuance to allow plaintiffs to depose defendant's expert); *Mynes v. Brooks*, 4th Dist. Scioto No. 08CA3211, 2009-Ohio-5017, ¶ 40-42 (trial court did not abuse its discretion in excluding expert's testimony when proponent did not disclose the witness as an expert witness until eleven days before trial, well after the court's discovery deadline had passed); *Oliver v. Oliver*, 5th Dist. Tuscarawas No. 2012 AP 11 0067, 2013-Ohio-4389, ¶ 44-48 (trial court did not abuse discretion in excluding expert's testimony where expert was not timely disclosed pursuant to the trial court's discovery schedule and local rule and there was no evidence to support assertion that expert's testimony would assist the trier of fact in determining the issue on which the expert's testimony was offered). Further, we do not agree that the authenticity of Rasner's signature on the March 14, 2008 designation of attorney in fact was a "critical fact" in the trial court's determination of liability. Even without evidence of her signature on that document, the trial court could have reasonably

found liability based on the abundant credible evidence in the record that the funds used to secure Silantyev's immigration bond came from Silantyev's friends and family on his behalf (rather than from Rasner's personal funds), that the parties intended, at the time the immigration bond was posted, that the funds used to post the bond would be returned to Silantyev after the bond was cancelled, and Rasner refused to return those funds to Sonis after they were refunded to Rasner. *See infra* at ¶ 60-65. Accordingly, Rasner's first assignment of error is overruled.

Silantyev's "Ownership Interest" in the Funds Returned to Rasner After Cancellation of the Immigration Bond

{¶43} Rasner's second and fourth assignments of error are interrelated and will, therefore, be considered together. In her second assignment of error, Rasner argues that the trial court erred in entering judgment for Sonis because she failed to prove by a preponderance of the evidence that she or Silantyev had an "ownership interest" in the funds returned to Rasner after the cancellation of Silantyev's immigration bond. As a result, Rasner contends that Sonis (1) lacked standing to sue Rasner to recover the funds and (2) failed to prove essential elements of her claims of civil theft, fraud, conversion and unjust enrichment. Specifically, Rasner argues that even if Silantyev's friends and family were the source of the funds used to post immigration bond, because (1) persons other than Silantyev gave Rasner the money that was used to post his immigration bond and (2) Sonis failed to establish the existence of a "legally enforceable assignment between them and Silantyev," Silantyev (and, therefore, Sonis as his attorney-in-fact)

lacked the "injury in fact" necessary to have standing to bring these claims against Rasner and the trial court's judgment in favor of Sonis on these claims was against the manifest weight of the evidence. These arguments are meritless.

Standing

{¶44} "[S]tanding is '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637, ¶ 8, quoting *Black's Law Dictionary* 1625 (10th Ed.2014). Before a court can properly consider the merits of a claim, "'the person or entity seeking relief must establish standing to sue.'" *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27. Standing is a jurisdictional requirement; "a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court — even a court of competent subject-matter jurisdiction — over the party's attempted action." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 22.[8]

{¶45} "'[A] party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action."' *Horn* at ¶ 8, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973). Standing does not

[8]Rasner improperly equates lack of standing with a lack of subject matter jurisdiction. However, the concepts are distinct; a party's lack of standing does not deprive a court of subject matter jurisdiction. Rather, standing is "an inquiry into a party's ability to invoke the court's jurisdiction" that goes to the court's jurisdiction over a particular case. (Emphasis omitted.) *Kuchta* at ¶ 22.

depend on the merits of a plaintiff's claim. *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7, citing *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 23. Rather, standing turns on "the nature and source of the claim asserted by the plaintiff," *Moore* at ¶ 23, i.e., whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" that the plaintiff is "entitled to have a court hear [the] case." *ProgressOhio.org* at ¶ 7. "Traditional standing principles require [a litigant] to show, at a minimum, that [he or she has] suffered '(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.'" *Id.*, quoting *Moore* at ¶ 22 ("These three factors—injury, causation, and redressability—constitute 'the irreducible constitutional minimum of standing.'"), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Whether a party has established standing is a question of law, which this court reviews de novo. *Moore* at ¶ 20, citing *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 23.

{¶46} Based on the our review of the record in this case, we find that Sonis, in her representative capacity as attorney-in-fact for Silantyev, established a "personal stake in the outcome of the action" sufficient to establish standing. (Emphasis omitted.) *Kuchta* at ¶ 23, citing *Ohio Pyro* at ¶ 27.

{¶47} In September 2012, more than a year before Sonis filed the complaint in this case, Silantyev executed a general power of attorney granting authority to Sonis to act on

his behalf. Rasner does not dispute that this general power of attorney was valid or that Sonis had the legal right to pursue any causes of action Silantyev would have otherwise had against Rasner pursuant to this general power of attorney. Rasner nevertheless asserts that any injury caused by her alleged misconduct was not to Sonis or Silantyev, but rather, to the parties who "fronted" the money to post Silantyev's immigration bond, i.e., Silantyev's family and friends and that because there was no "assignment of any right" by those individuals to Silantyev or Sonis, Sonis lacked standing to bring a claim to recover the money Rasner received from the immigration bond.

{¶48} Rasner's arguments go to the first two standing requirements — injury and causation. Specifically, Rasner argues that because (1) Silantyev "did not provide any of the funds personally," (2) "no clear paper trail exists" confirming how much each person provided towards the $5,000 used to post the bond and (3) there was "a complete lack of evidence" as to whether the funds provided to Rasner for Silantyev's release were a gift or a loan, it cannot be said that Silantyev was "injured at all." Rasner further contends that because Sonis "claims her right to enforcement against the $5,000.00 through [the March 14, 2008 designation of attorney in fact]" and that document was executed before Silantyev had repaid the money provided for his release to his friends and family, he was "divest[ed] of any claim for a return of the funds allegedly provided by the other parties." We disagree.

{¶49} In entering judgment in favor of Sonis and against Rasner, the trial court made the following factual findings:

> The court finds, inter alia, that Andrey Silantyev caused $5,000 to be paid in his behalf to defendant Olga Rasner for the purpose of posting Silantyev's $5,000 cash bond with immigration; that defendant Olga Rasner did post that bond with Silantyev's $5,000 as a service she regularly performed in her business and received compensation for that service directly from Silantyev; that defendant Olga Rasner did not post said bond with $5,000 of her own money; * * * that at Silantyev's direction said defendant delivered the receipt for payment of Silantyev's $5,000 bond to plaintiff Olga Sonis; that plaintiff Olga Sonis was at all relevant times the attorney-in-fact for Andrey Silantyev; that Andrey Silantyev met all conditions of immigration for return of his $5,000 bond plus interest through his said attorney-in-fact; that said defendant submitted a false affidavit to immigration to obtain the $5,000 bond and $700 interest from it; that defendant Olga Rasner falsely claimed said amount as her own and wrongfully caused immigration to pay her the $5,000 bond money plus its accrued interest of $700; that at the time of said defendant's wrongful conduct, plaintiff was in possession of Silantyev's receipt for payment of the bond and interest; that said defendant falsely stated to immigration she was unable to deliver the original receipt for Silantyev's bond because it had been lost in a flooding; that said defendant knew her representation to immigration was false and that the original receipt had been delivered to plaintiff; that plaintiff Olga Sonis is the attorney-in-fact for Andrey Silantyev and as such is entitled to judgment in her favor and against defendant Olga Rasner in the amount of $5,700.00 upon each of counts 2, 3 and 4 of plaintiff's complaint; that the trial evidence established all of the elements of the plaintiff's causes of action in said counts 2, 3, and 4; that said defendant committed a theft offense as defined in R.C. 2913.02(A)(1) and as defined in R.C. 2913.02(A)(3) and thereby obtained the $5,000 bond money and the $700 interest thereon belonging to Silantyev; and that under R.C. 2307.61 plaintiff is entitled to recovery against said defendant for $5,700 times three (3) for a total of $ 17,100.00 under count 1 of the complaint. * * *

{¶50} The facts establish all three requirements of standing: (1) that Silantyev sustained an injury — the loss of $5,700 paid on his behalf that should have been returned to him after the immigration bond was cancelled and the funds refunded to Rasner, (2) causation — Rasner's submission of a false affidavit to obtain a refund of the funds used to secure Silantyev's immigration bond and accrued interest after she had given the

original I-305 receipt to Sonis and her subsequent refusal to return those funds to Silantyev and (3) redressability — the injury Silantyev sustained could be redressed with an award of damages or restitution. Sonis presented evidence from which it could be reasonably inferred that it was understood by all parties that the funds Rasner received from Sviridenko and Ashurov were provided to Rasner on Silantyev's behalf, i.e., as an agent for Silantyev, in order to secure his release and that Silantyev would be entitled to the return of the security used to post the bond if and when the bond was cancelled. Whether the source of the funds transmitted to Rasner on Silantyev's behalf was Silantyev's own money, gifts from friends and family to Silantyev or one or more loans that Silantyev was obliged repay is of no consequence in determining whether Silantyev sustained an injury caused by Rasner's misconduct sufficient to establish standing. Because Sonis was not seeking to enforce the rights of Silantyev's friends and family or to recover for an injury allegedly sustained by Silantyev's friends and family, no assignment of their rights to Sonis (or Silantyev) was required. As such, we find that Sonis, in her representative capacity as attorney-in-fact for Silantyev, had standing to pursue claims against Rasner based on Rasner's wrongful retention of the $5,700 she received from Silantyev's immigration bond.

Manifest Weight of the Evidence

{¶51} Rasner next argues that even if Sonis had standing to assert her claims against Rasner, the trial court's judgment should be vacated because Sonis failed to establish essential elements of each of her four claims. Once again, we disagree.

{¶52} When reviewing a civil appeal from a bench trial, we apply a manifest weight standard of review. *Revilo Tyluka, L.L.C. v. Simon Roofing & Sheet Metal Corp.*, 193 Ohio App.3d 535, 2011-Ohio-1922, 952 N.E.2d 1181, ¶ 5 (8th Dist.), citing App.R. 12(C) and *Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). A verdict supported by some competent, credible evidence going to all the essential elements of the case must not be reversed as being against the manifest weight of the evidence. *Domaradzki v. Sliwinski*, 8th Dist. Cuyahoga No. 94975, 2011-Ohio-2259, ¶ 6; *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶53} As the Ohio Supreme Court explained in *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517:

> "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the [trier of fact] that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'"

Id. at ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1594 (6th Ed.1990). In assessing whether a verdict is against the manifest weight of the evidence, we examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a

new trial ordered. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶54} In weighing the evidence, we are guided by a presumption that the findings of the trier of fact are correct. *Seasons Coal* at 80. This presumption arises because the trier of fact had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id.* Thus, "to the extent that the evidence is susceptible to more than one interpretation," we will "construe it consistently with the * * * verdict." *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318, ¶ 22 (8th Dist.), citing *Ross v. Ross*, 64 Ohio St.2d 203, 414 N.E.2d 426 (1980); *see also Seasons Coal* at 80, fn. 3 ("'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * * If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'"), quoting 5 *Ohio Jurisprudence 3d*, Appellate Review, Section 60, at 191-192 (1978).

{¶55} Each of the four claims asserted in this action are premised on the same facts, i.e., Rasner's actions in causing the DMC to disburse the security posted for Silvantyev's immigration bond and the accrued interest to her after the bond was

cancelled and her failure to return those funds to Silantyev (or Sonis on his behalf) after she received them.

{¶56} R.C. 2307.60(A)(1), the civil theft statute, provides:

> Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code.

{¶57} To prove fraud, a plaintiff must establish: (1) a representation (or concealment of a fact when there is a duty to disclose), (2) that it is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance on the representation or concealment and (6) resulting injury proximately caused by the reliance. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 27; *Gaines v. Preterm-Cleveland Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987). Conversion is the "'wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.'" *Blue Water Bin Mgmt. v. Advanced Auto & Towing*

Serv., 8th Dist. Cuyahoga No. 101827, 2015-Ohio-1155, ¶ 10, quoting *State ex rel. Toma v. Corrigan*, 92 Ohio St.3d 589, 592, 2001-Ohio-1289, 752 N.E.2d 281. To prevail on a conversion claim, a plaintiff must demonstrate: (1) the plaintiff's ownership or right to possession of the property at the time of conversion; (2) the defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) resulting damages. *Dream Makers v. Marshek*, 8th Dist. Cuyahoga No. 81249, 2002-Ohio-7069, ¶ 19. Where conversion is premised on the unlawful retention of property, the plaintiff must establish that (1) he or she demanded the return of the property from the defendant after the defendant exerted dominion or control over the property and (2) the defendant "'refused to deliver the property to its rightful owner.'" *Blue Water Bin Mgmt.* at ¶ 11, quoting *Tabar v. Charlie's Towing Serv.*, 97 Ohio App.3d 423, 427-428, 646 N.E.2d 1132 (8th Dist.1994).

{¶58} Unjust enrichment occurs where "a person 'has and retains money or benefits which in justice and in equity belong to another.'" *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 20, quoting *Hummel v. Hummel*, 133 Ohio St. 520, 528, 14 N.E.2d 923 (1938). "The purpose of an unjust enrichment claim is * * * to enable the plaintiff to recover the benefit he has conferred on the defendant under circumstances in which it would be unjust to allow the defendant to retain it." *San Allen v. Buehrer*, 8th Dist. Cuyahoga No. 99786, 2014-Ohio-2071, ¶ 114, citing *Johnson* at ¶ 21. To prevail on a claim for unjust enrichment, a plaintiff must prove by a preponderance of the evidence that: (1) the plaintiff conferred a benefit upon

the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant retained that benefit under circumstances in which it would be unjust for him to retain that benefit. *San Allen* at ¶ 114, citing *Johnson* at ¶ 20, citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984).

{¶59} Rasner's argument in support of her manifest weight challenge is virtually the same as that used to support her claim that Sonis lacked standing, i.e., that because Silantyev did not directly provide the funds to Rasner that were used to post his immigration bond and no assignment was executed in favor or Silantyev or Sonis by the individuals who did provide the funds directly to Rasner, Sonis failed to establish that Silantyev had an ownership interest in the funds used to secure the immigration bond. Rasner argues that this "failure of the evidence" precluded the trial court from finding (1) that Silantyev or Sonis was harmed as a proximate result of Rasner's actions, as required for each of Sonis's claims, (2) that Rasner interfered with the rights of a property owner, as required for her conversion claim or (3) that Silantyev conferred a benefit on Rasner as required for her unjust enrichment claim.[9] With respect to Sonis's fraud claim, Rasner further argues that Sonis failed to establish justifiable reliance because the alleged fraudulent statements that resulted in the disbursement of the bond funds and interest to Rasner were made to the DCM rather than to Sonis or Silantyev.

[9]Rasner does not claim that Sonis failed to present sufficient, competent credible evidence to prove the remaining elements of her claims for civil theft, conversion or unjust enrichment. Accordingly, we do not address them here.

{¶60} Turning first to Rasner's injury– ownership arguments, as stated above, the trial court found that "*Silantyev caused* $5,000 to be paid *on his behalf* to Rasner" for the purpose of posting Silantyev's immigration bond and that Rasner, in fact, posted that bond "with Silantyev's $5,000" (and not her own money). (Emphasis added.) The trial court further found that "Silantyev met all conditions of immigration for return of his $5,000 bond plus interest through his said attorney-in-fact" and that Rasner, by submitting a false affidavit to obtain the $5,000 bond and $700 interest from it, "falsely claimed said amount as her own and wrongfully caused immigration to pay her the $5,000 bond money plus its accrued interest of $700," depriving Silantyev of $5,700 to which he was entitled.

{¶61} The trial court's findings on these issues are not against the manifest weight of the evidence. Sonis presented competent, credible evidence that the funds at issue were given to Rasner, in trust, on Silantyev's behalf, so that she could post the immigration bond for Silantyev and secure his release from DHS custody. Silantyev testified that because he was in jail and could not deliver funds to Rasner personally to secure his release, he contacted his friends and family — his cousin, Sviridenko, his then-girl friend, Aladinskaya, and a good friend, Ashurov — to collect the money necessary to secure his release and provide it to Rasner on his behalf, i.e., as his agents. Silantyev testified that he "returned" the money Sviridenko and Ashurov had provided on his behalf approximately a month or two after his release but did not repay Aladinskaya because "we have money together." Sviridenko confirmed that Silantyev paid him back "around one month" after Silantyev's release.

{¶62} Although Rasner was listed as the obligor on the bond because she was the person who deposited the security with ICE, no evidence was presented that the parties intended that Rasner would keep any of the funds refunded if and when the conditions of the bond were satisfied and the bond was cancelled.[10] To the contrary, Silantyev testified that it was his understanding that the $5,000 would ultimately be returned to him (or to Sonis on his behalf) and that, for this reason, he asked Sonis "to go to Ms. Rasner to get all the papers needed to get the bond back."

{¶63} Rasner makes much the fact that there were issues with the March 14, 2008 designation of attorney in fact and whether Sonis was "in fact designated the attorney in fact for the return of the bond" based on that document. However, the fact that Rasner and Sonis completed the form incorrectly does not mean that Rasner was entitled to retain funds that should have otherwise been returned to Silantyev upon the cancellation of his immigration bond or otherwise preclude a finding that Silantyev was injured as a result of Rasner's actions in this case. As Silantyev, Sonis and Tarkhanova each testified, the purpose of the March 14, 2008 designation of attorney in fact was not, as Rasner now contends, to assign Silantyev's interest in the immigration bond to Sonis, but rather, to substitute Sonis for Rasner as the obligor on the bond. In addition, these witnesses testified that, consistent with that intent, Rasner asked Sonis to sign the March 14, 2008 document confirming Sonis as obligor and gave Sonis both the original immigration bond

[10]Rasner acknowledged that she was not a bondsman and had no license to pay bonds.

and the original I-305 receipt the obligor would need in order to obtain a refund of the funds deposited to secure the bond.

{¶64} As to the causal connection between Rasner's conduct and Silantyev's injury, Sonis presented competent, credible evidence establishing that although the parties had intended to change the obligor on the bond from Rasner to Sonis, Rasner (1) refused to sign a corrected I-312 designation of attorney of fact, (2) caused the DMC to disburse the funds posted to secure Silantyev's bond to her by submitting a false affidavit, stating that the original I-305 receipt (which she had earlier given to Sonis) had been destroyed in a flood, and (3) refused to return those funds to Silantyev after she received them. Accordingly, the trial court's findings on these issues were not against the manifest weight of the evidence. *See, e.g., De Jesus Suarez-Negrete v. Trotta*, 47 Conn. App. 517, 518, 705 A.2d 215 (1998) (trial court properly awarded plaintiff immigrant treble damages under statutory theft statute where plaintiff entrusted funds to defendant for the purpose of posting an immigration bond to guarantee plaintiff's appearance in proceedings before the United States Immigration and Naturalization Service, the funds were returned to defendant after plaintiff fulfilled the conditions of the bond, and defendant refused to return plaintiff's funds to him).

{¶65} Likewise, with respect to Sonis's unjust enrichment claim, we do not agree that Sonis failed to prove that Silantyev conferred a benefit on Rasner. As explained above, Sonis presented competent, credible evidence establishing that Silantyev caused Rasner to be paid $5,000 on his behalf and that after using those funds to post Silantyev's

immigration bond, Rasner became the obligor on the bond, i.e., the person legally entitled to collect on the bond if and when the conditions of the bond were satisfied and the bond was cancelled. The record reflects that Rasner then used her status as obligor on the bond to cause the DMC to refund to her the funds posted to secure the bond and the accrued interest and then refused to return those funds to Silantyev (or to Sonis on his behalf), notwithstanding that those funds properly belonged to Silantyev. Thus, the evidence supports the trial court's determination that Silantyev conferred a benefit on Rasner under circumstances in which it would be unjust for Rasner to retain that benefit.

{¶66} Sonis does not address Rasner's arguments specifically relating to her fraud claim. Based on the record before us, given that the fraud that allegedly caused the injury to Silantyev occurred when Rasner submitted a false affidavit to the DMC, we do not believe fraud was a proper basis upon which to award relief to Sonis in this case. *See, e.g., Temple v. Fence One, Inc.*, 8th Dist. Cuyahoga No. 85703, 2005-Ohio-6628, ¶ 65 ("a plaintiff fails to state a cause of action for fraud where she claims that a third party relied on representations and she suffered injury as a result of those representations"); *Wiles v. Miller*, 10th Dist. Franklin No. 12AP-989, 2013-Ohio-3625, ¶ 37 ("It is well-established law in Ohio that a fraud claim may not be based on a misrepresentation made to a third party."); *Lisboa v. Tramer*, 8th Dist. Cuyahoga No. 97526, 2012-Ohio-1549, ¶ 32 (appellant failed to state a cause of action for fraud where fraud claim was based statements appellees allegedly made to the IRS).[11] However, given that

[11]In her complaint, Sonis also alleged that Rasner committed fraud when she represented to

there is substantial competent, credible evidence in the record to support the trial court's judgment and award of damages or restitution on Sonis's civil theft, conversion and unjust enrichment claims and given that fraud was simply an alternative theory of recovery for the losses sustained and recovered on these claims, we find that even if the trial court's finding as to the fraud claim was against the manifest weight of the evidence, any such error would be harmless.

{¶67} In her fourth assignment of error, Rasner challenges the trial court's finding that the entire value of the $5,000 immigration bond was provided by third parties at Silantyev's direction (rather than from Rasner's personal funds). Rasner claims that because (1) there were some "inconsistencies" in Sviridenko's testimony regarding how the funds used to post the bond were delivered to Rasner, (2) Sviridenko could testify with certainty only as to the source of $2,000 of the $5,000 used to post Silantyev's bond and (3) Sonis could not produce any documentation supporting her claim that the entire $5,000 was paid by persons other than Rasner, the trial court's finding that the entire

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Sonis in March 2013 that she would return the funds to Silantyev after she paid the taxes on the interest earned. However, "[g]enerally, 'a claim of fraud cannot be predicated upon promises or representations relating to future actions or conduct.'" *Cleveland Constr., Inc. v. Roetzel & Andress, L.P.A.*, 8th Dist. Cuyahoga No. 94973, 2011-Ohio-1237, ¶ 38, quoting *Martin v. Ohio State Univ. Found.*, 139 Ohio App.3d 89, 98, 742 N.E.2d 1198 (10th Dist.2000); *see also RAE Assocs. v. Nexus Communications., Inc.*, 10th Dist. Franklin No. 14AP-482, 2015-Ohio-2166, ¶ 16. Although an exception has been recognized where an individual makes a promise concerning a future action, occurrence or conduct and, at the time he or she makes the promise, has no intention of keeping it, *see, e.g., Powers v. Pinkerton,* 8th Dist. Cuyahoga No. 76333, 2001 Ohio App. LEXIS 138, *26 (Jan. 18, 2001); *RAE Assocs.* at ¶ 16, it does not appear that Sonis's reliance on this broken promise was the proximate cause of Silantyev's injury.

$5,000 was paid by third parties on Silantyev's behalf was against the manifest weight of the evidence.

{¶68} Sviridenko testified that he contributed $2,000 from his savings for the bond and that Ashurov also gave Rasner money to be used for Silantyev's bond. Although Sviridenko testified that he didn't "know exactly how much Ashurov g[a]ve" Rasner for the bond, he testified that he believed it was $3,000 "if I remember right." Despite Rasner's claims Sviridenko's testimony was "inconsistent" as to whether they paid Rasner in cash or money orders, the record reflects that Sviridenko consistently testified that the "money" they gave Rasner was in the form of postal money orders because "[s]he would not take cash" and that he and Ashurov, therefore, went to the post office and converted their cash into postal money orders before giving it to Rasner.

{¶69} Silantyev similarly testified that Rasner told him that Sviridenko and Ashurov gave her $5,000 for the bond and that it was his understanding that Sviridenko contributed $2,000, Aladinskaya $2,000 and Ashurov $1,000 toward the immigration bond. He testified that he "returned" the amounts Sviridenko and Ashurov contributed on his behalf shortly after his release. Although Rasner now claims that "all * * * testimony as to the source and value of [the funds]," other than Sviridenko's testimony as to what he personally provided, was "inadmissible hearsay," it is clear that Silantyev's testimony regarding what Rasner told him was not hearsay and was admissible under Evid.R. 801(D)(2). With respect to the remaining testimony, Rasner acknowledges that she did not object "to the majority of this testimony." As such, she waived any error,

except for plain error, which does not exist here. *See, e.g., Iglodi v. Tolentino*, 8th Dist. Cuyahoga No. 88264, 2007-Ohio-1982, ¶ 39-41; *Siuda v. Howard*, 1st Dist. Hamilton Nos. C-000656 and C-000687, 2002-Ohio-2292, ¶ 17-19; *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997).

{¶70} Furthermore, this was a bench trial. In a bench trial, the trial court is presumed to consider only reliable, relevant and competent evidence in rendering its decision unless it affirmatively appears to the contrary. *See, e.g., State v. Cornish*, 12th Dist. Butler No. CA2014-02-054, 2014-Ohio-4279, ¶ 30; *see also Lopez v. Thomas*, 9th Dist. Summit No. 27115, 2014-Ohio-2513, ¶ 25 ("'There is a presumption in a bench trial that the trial judge knows and follows the law, and only considers matter properly before it.'"), quoting *State v. Pleban*, 9th Dist. Lorain No. 10CA009789, 2011-Ohio-3254, ¶ 45. Although Rasner complains about the lack of documentation supporting Sonis's claim that Silantyev's friends and family contributed the entire $5,000 used to post Silantyev's bond, she testified that she likewise has no documentation supporting her claim that she paid the $5,000 to secure the bond out of her own funds.

{¶71} This case came down to the credibility of Rasner and the credibility of plaintiff's witnesses. In this case, the trial court heard all of the evidence and chose to believe the testimony of plaintiff's witnesses. The trial court was entitled to find Silantyev and Sviridenko's testimony that the entire $5,000 used to post the bond came from Silantyev's family and friends more credible than Rasner's testimony that she used

$5,000 of her personal funds to post a bond for a stranger. The trial court was able to view the witnesses, observe their demeanor and assess their credibility.

{¶72} Following a complete and careful review of the record, we cannot say that, in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the trial court's judgment must be overturned and a new trial ordered. Rasner's second and fourth assignments of error are overruled.

Statute of Limitations for Civil Theft

{¶73} In her third assignment of error, Rasner contends that the trial court erred in entering judgment in favor of Sonis on her civil theft claim because the claim was barred by the one-year statute of limitations. *See Steinbrick v. Cleveland Elec. Illum. Co.*, 8th Dist. Cuyahoga No. 66035, 1994 Ohio App. LEXIS 3756, *4-5 (Aug. 25, 1994) (one year statute of limitations set forth in R.C. 2305.11(A) for action upon a statute for a penalty or forfeiture applicable to claim for civil restitution for a criminal act under R.C. 2307.60). Rasner contends that because she received the check returning the funds deposited for Silantyev's immigration bond in November 2012 and Sonis did not file her complaint until December 2013 — thirteen months later — her claim under R.C. 2307.60 was time-barred. Sonis concedes that a one-year limitations period applied but argues that the statute of limitations did not begin to run until April 2013 when Rasner failed to keep her promise to return the funds to Silantyev or, alternatively, that a "discovery exception" extended the limitations period based on Sonis's efforts to investigate the status of the funds. As such, she contends her civil theft claim was timely.

{¶74} We need not decide this issue because even if the statute of limitations would have otherwise barred this claim, Rasner did not raise a statute of limitations defense below and has, therefore, waived it. *See Shury v. Greenaway*, 8th Dist. Cuyahoga No. 100344, 2014-Ohio-1629, ¶ 22 (where plaintiff's complaint was not timely filed, defendant's failure to raise the statute of limitations as an affirmative defense in her answer and "fatally waived that defense"); *Fazio v. Gruttadauria*, 8th Dist. Cuyahoga No. 90562, 2008-Ohio-4586, ¶ 23 (statute of limitations is an affirmative defense that is waived unless timely pled); *see also Haas v. Gerski*, 175 Ohio St. 327, 331, 194 N.E.2d 765 (1963) ("The statute of limitations was not pleaded as a defense by the appellant. By failing to plead the statute, the appellant waived the bar."). Accordingly, Rasner's third assignment of error is overruled.

{¶75} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

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EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and

SEAN C. GALLAGHER, J., CONCUR