IN THE SUPREME COURT OF OHIO

Eric Longmire, *et al.*	:	
	:	
Plaintiffs – Appellees	:	
	:	On Appeal from the
v.	:	Franklin County Court of Appeals
	:	Tenth Appellate District
Ozgun Danaci,	:	
	:	Court of Appeals Case No. 19-AP-000770
Defendant – Appellant	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT OZGUN DANACI

Ozgun Danaci
Defendant - Appellant, Pro Se
62 Rogge St.
Dayton, Ohio 45409
330-475-3937
ozgundanaci@yahoo.com

Alesandro Sabatino, Jr (0062406)
Attorney for Plaintiffs - Appellees
471 E. Broad St. #1500
Columbus, Ohio 43215
614-458-1200
asabatino@zsa-law.com

Table of Contents

Cases

Statutes

Rules

Other Authorities

EXPLAINATION OF WHY THIS CASE IS A PUBLIC OR GREAT GENERAL INTEREST

This case presents many critical issues regarding contracts, statute of frauds, unjust enrichment and gifts. Courts exclusively rely on *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923 (Ohio, 1938) for unjust enrichment cases and falsely create quasi-contracts simply because contracts are deemed unenforceable by the R.C. 1335.05 Statute of Frauds. The public interest is affected if the plain meaning of the statute duly adopted by the General Assembly can be judicially altered or if the statute is bypassed to subvert the legislature's intent to create quasi-contracts.

This case is one of a public interest because Appeals Court acted as the fact finder court when it found contractual terms not found by the Magistrate and abrogated the meaning of "breach" when it held "the fact that appellees did not pay for all of appellant's tuition or living expenses does not mean they did not fully perform under the agreement", ¶39.

Lower courts effected the outcome of this case by not following civil procedures, by deviating from the rule of law, by adding terms to the alleged agreement and words to appellant's statements, by ignoring documentary evidence, by moving appellant's statements from one year to another and by finding Berrin Longmire denied witness deposition when she did not (F.F. 11; Tr. 121-122). As a result, courts found three agreements other than the alleged in the complaint, all with different terms, none evidenced by offer, acceptance and consideration.

Lower courts did not follow the rules of equity (1) when it did not find a reason to take the case out of the operation of statute of frauds and (2) when it awarded contract damages to appellees instead of determining monetary value of appellant's retained benefit; his enrichment from his degree. See how court differentiated between contractual damages and what was received, electricity, in *U.S. v. Consolidated Edison Co. of N.Y*, 580 F.2d 1122, 1127 n.7 (2d Cir. 1978).

Appeals Court's decision sets a precedent for an arbitrary and subjective rule as to what constitutes a circumstance for unjust enrichment. The Supreme Court of Oregon stated: "The enrichment must be 'unjustified' under the law, not simply 'unjust' because you as a judge, scholar, or a lawyer might think so." *Larisas's Home Care, LLC v. Nichols-Shields*, 362 Or. 115 (2017).

Finally, this case creates a need for the Supreme Court to determine if sponsorship letters sent by appellees to U.S. Consulate and UD are binding, enforceable or create a circumstance for unjust enrichment and lack of a writing, when there is another, demonstrate intent to make a gift.

STATEMENT OF THE CASE AND FACTS

Appellees allege "during August 2011 an oral contract was established... whereby plaintiffs agreed to loan money to defendant for his graduate program, tuition and living expenses at the University of Dayton" (Comp. ¶3). "Defendant agreed to begin repaying all money loaned to him on a monthly basis after securing full time employment upon graduation..." (Comp. ¶4). "Plaintiffs have been damaged by defendant's breach of contract..." (Comp. ¶8). Appellees, in the Count Two of the Complaint, claimed "defendant was unjustly enriched to the detriment of plaintiffs" (Comp. ¶10), for the same reasons stated in the Count One (Complaint. ¶9).

Appellant filed a motion for Summary Judgement on February 13, 2018 arguing the alleged August 2011 oral contract could not be performed within one year of its making and unenforceable.

Judge Reece, on June 18, 2018, held (P.8) "the e-mails exchanged between plaintiff Eric Longmire and defendant in November of 2013, more than two years after the alleged making of the oral agreement, do not satisfy the requirements of a writing pursuant to R.C. 1335.05. Therefore, the Court finds plaintiffs' claim for breach of contract fails as a matter of law."

Appellees remaining claim of unjust enrichment was tried to Magistrate. Parties submitted their closing arguments in writing. Magistrate found an oral agreement other than the alleged in the complaint, did not address appellees breach, and determined appellant was unjustly enriched

(Mag. Dec. P. 12-15). Appellant objected to Magistrate's findings and the trial court found appellant is unjustly enriched based on Nov. 2013 emails but did not address the alleged agreement and breach of it by appellees. Appeals Court found two agreements other than the one Magistrate found and affirmed. Appellant applied for reconsideration on the basis that appellees breached and did not fully perform the agreement they sued upon. Appeals Court denied reconsideration.

Facts of this case are very simple. Appellant reached out to appellees in the end of 2009 to pursue a master's degree in the U.S. (Tr. 228, 229). Appellees agreed to pay for appellant's graduate education, both tuition and living expenses (Ex. E) and sent sponsor letters to UD and U.S. Consulate (Ex. C, D). Appellant came to U.S. in Aug. 2011 (Tr. 243, 244). After he arrived, appellees bought a vehicle for appellant to commute to school and titled it to themselves. Appellees claim they made the alleged agreement on the way to buy the vehicle beginning of Aug. 2011 (Tr. 153,154). Appellant inherited monies in Sep. 2011 and told appellees (Tr. 291, L.23-34).

Appellees then stopped paying appellant's living expenses (Tr. 125, L.1-8) and breached their alleged Aug. 2011 agreement (F.F.18). Appellant graduated in May 2013 (Tr. 186, L.7-9) and started full time employment in Aug. 2013 (Tr. 254, L.11-15), appellees then asked appellant to pay for the vehicle they bought in Aug. 2011, appellant agreed, but because he did not have the money to pay for it; he was asked to sign a promissory note in Sep. 2013 with interest (Ex. R).

In Nov. 2013, appellant's employment status changed (Ex. G), allowing him to remain in the U.S. via extension of his work permit (Tr. 295) and told appellees (Tr. 258, 259). Appellees then asked back the monies they gave (Tr. 32, L. 7-12). Reasoning was to pay for their daughter's high school tuition (Ex. 34). There is no reference to a prior agreement or repayment conversation. Appellees admitted everything started in Nov. 2013 (Tr. 129, L.9-11). Appellant did not accept the terms offered and the amount, $50,000, which was not given to him (Ex. 36); relationship between the parties ruptured and appellees filed suit in Mar. 2017.

In April 2014, Eric alleged an agreement for the first time (Ex. 48). Appellees did not know how much money they allegedly loaned and found out after the trial in 2019 (Mag. Dec. P.15,16). Appellant testified he never promised to repay before Nov. 2013 (Tr. 27, L.21; Tr. 40, L.6-10).

Judge Reece found Nov. 2013 emails do not evidence offer, acceptance and consideration of the alleged agreement. No witness, no writing, not appellees acts corroborates existence of an agreement. Appellees self-serving testimony is the only evidence that they wanted to be repaid in 2011. In contrary, appellant's independent witness testified to appellees intend to make a gift (Fatos Depo. P.11, L. 21-24); Berrin stated, in Feb. 2011, "…If I have additional capabilities, then I can help others… You better trust people who want to support you…" (Ex. E). Berrin, at her deposition, admitted Turkish word "yardim" "help" means gift (Appellant's Final Arg. P.2). Berrin, contrary to her deposition, testified "help" "yardim" does not mean gift (Tr. 91, L.13-16).

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: Unjust enrichment is not a remedy to a party in the absence of fraud or some other illegality when the subject matter of the claim is governed by an unenforceable express contract

Appeals Court at ¶27 stated "Ohio law does not bar unjust enrichment if the contract claim is ultimately deemed unenforceable under the statute of frauds. In fact, unjust enrichment is available as an equitable remedy for that very reason". Appellant respectfully disagrees.

It is well established in Ohio that "Absent bad faith, fraud, or some other illegality, an equitable action for unjust enrichment will not lie when the subject of the claim is governed by an express contract." *Cent. Allied Ents., Inc. v. Adjutant Gen.'s Dept.,* 2011-Ohio-4920, ¶39. However, there is a confusion around quantum meriut, unjust enrichment and unenforceable contracts. This court, in *Towsley v. Moore,* 30 Ohio St. 184, in a quantum meriut case, stated:

> When courts say that performance takes a case out of the statute, or that contract is fully completed on both sides, or where it has been completed on one side and payment alone remains, the statute has no application… When one has received money, goods, or benefits from another, justice and equity demand that he should pay therefor, and the law will, if necessary, imply a promise to that effect. And although such benefits may have been rendered under a void contract, or one that cannot be enforced, it cannot be allowed that a defendant can retain his advantage without compensation…

When contract is completed on both sides; there is no more contract; equity has jurisdiction. When contract is completed on one side and payment alone remains; means payment for services remains. ""Quantum meruit" means literally "as much as deserved." See Black's Law Dictionary (6 Ed. 1990) 1243. The equitable doctrine of quantum meruit is based on an implied "promise on the part of the defendant to pay the plaintiff as much as he reasonably deserved to have for his labor."" *Reid, Johnson v. Lansberry*, 68 Ohio St. 3d 570, 573 n.1 (Ohio 1994).

This court, in *Hummel, supra* conflated the principles of quantum meriut with unjust enrichment and created an exception to statue of frauds by full performance and stated:

> Even though a contract is unenforceable under the Statute of Frauds… **a plaintiff who has fully performed** his part of the contract may maintain an action **for money had and received** against the other contracting party who is the recipient of a benefit to his unjust enrichment… but refuses to perform himself; the basis of the liability is the quasi-contractual relation to which the law gives rise. *Towsley v. Moore*, 30 Ohio St. 184.

Full performance is important in a quantum meriut case because it implies a contract for services, however, unjust enrichment is not based on express or implied contract. "Money had and received" means **money paid** under mistake or compulsion or without consideration or **money acquired** by a tortious act (https://legal-dictionary.thefreedictionary.com/). An action for money had and received exist in the absence of an agreement. See *State v. Park*, 204 A.D.2d 531, 532 (N.Y. App. Div. 1994). In a contract case, unjust enrichment is constructed because there is a violation of a duty imposed by law, tort, not because there is a violation of a duty established between the parties in their contract. See *Brown v. Brown*, 12 A.D.3d 176, (N.Y. App. Div. 2004).

In *Hummel*, there was an oral agreement that the parents would pay the premiums and get the money on their son's endowment policy. Father paid the premiums and proceeds was issued by a check. Father gave the check to son with an understanding that son would deposit the check to father's account, instead, son deposited the monies to his account. At that point, there was no agreement between the parties. Unenforceable agreement was a purchase agreement. When father made the final payment, fully performed, proceeds naturally became his property; son had given up the monies with his promise; the contract was completed on both sides. Son deposited the monies to his account and retained monies that belonged to his father; money had and received.

Towsley is about paying for reasonable worth of services; *Hummel* is about monies given without consideration; neither case is about application of unjust enrichment to an unenforceable contract. However, syllabus of *Hummel, supra* reads completely different. This court's statements in those cases are falsely interpreted as unjust enrichment can raise simply by a breach of a party, if an express contract is unenforceable. This court must clarify.

This is an action for damages six years after alleged making of an agreement. This Court, in *Hughes v. Oberholtzer*, 162 Ohio St. 330, 123 N.E.2d 393 (Ohio 1954), stated:

> It is to be observed that this is an action for damages for breach of an alleged oral agreement... This is an action at law... It is not an action for restitution… The plaintiff asserts that the facts pleaded show a cause of action arising under a quasi contract, as held by the Court of Appeals, and relies in large part upon the cases of *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923… It is generally agreed that there cannot be an express agreement and an implied contract for the same thing existing at the same time… The plaintiff in the instant case alleges an express oral contract with certain items of consideration to which he alleges the defendant assented, but which now the defendant fails and refuses to perform to the plaintiff's damage. A specific contract, oral in character, is relied upon and enforcement thereof is attempted by way of damages… The petition in this case does not plead the essential elements of quasi contract… The petition does not plead facts which would remove the transaction from the operation of the statute of frauds… In our judgement this case is a good example of the reason for the statute of frauds and of the danger of a sweeping arbitrary rule that… takes the entire transaction out of the statute. If such were the law the extent of frauds which could be perpetrated by an unscrupulous grantor, long after the transfer is effected, would be unlimited.

Applicability of statute of frauds, in fact, means this is an action at law. Just because breach of contract claim failed, is not a reason to take the case out of the statute and place it into equity. Unjust enrichment as used in this case is nothing but a tool to bypass the statute and circumvent writing requirements. Breach of contract claim requires the finding (1) an agreement exist and (2) appellant breached it; unjust enrichment used this way requires the finding (1) an agreement exist and (2) appellant breached it. Making unjust enrichment duplicative of breach of contract claim and allowing judges to enforce the unenforceable contract. R.C. 1335.05 Statute of Frauds states:

> **No action shall be brought whereby to charge the defendant**, upon a special promise, to answer for the debt…or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged...

Action in equity for an unenforceable contract is not "no action". Plain meaning of the statute is clear. Complaint only, 100% alleges an express contract. Law of this case is that alleged agreement is not actionable. "Breach" alone cannot be the third element, circumstance, of unjust enrichment in light of statute of frauds. Also, full performance on one side is not in the statute as an exception. This court in *Ullmann v. May*, 147 Ohio St. 468, 475-476 (Ohio 1947), stated:

> Appellant claims: "That under quantum meruit and unjust enrichment theories plaintiff was entitled to recovery." Neither of these theories applies for the reason that there is an express contract **which has not been breached, and no fraud or bad faith necessary to support the theory of unjust enrichment has been shown**...unless there is fraud or other unlawfulness involved, courts are powerless to save a competent person from the effects of his own voluntary agreement...

This court already held fraud or bad faith is necessary to find unjust enrichment and that courts are not to interfere with the effects of voluntary agreements between competent parties unless some unlawfulness is involved. Hence, appellees decision to not put alleged agreement in writing cannot be concern to the courts in the instant case because there is no claim or finding of illegality. This court, in *Olympic Holding Co., L.L.C. v. ACE Ltd*., 122 Ohio St.3d 89, 2009-Ohio-2057, explained the purpose of the statute frauds and declined an exception to statute of frauds:

> {¶ 33} The purpose of the statute of frauds is to prevent "frauds and perjuries." ...[T]he statute of frauds is supposed ... to reduce the occasions on which judges enforce non-existent contracts because of perjured evidence.... {¶ 35} ... Thus, "[t]o allow [a] plaintiff to recover on a theory of promissory estoppel where the oral contract is precluded by the Statute of Frauds, '"would abrogate the purpose and intent of the legislature in enacting the statute of frauds and would nullify its fundamental requirements."'... {¶ 36} We decline to recognize an exception to the statute of frauds...

If unjust enrichment is available to a party as an equitable remedy when the relationship between the parties is governed by an unenforceable contract, without the finding of any illegality, statute of frauds is rendered completely meaningless. Appellees claim must fail.

Proposition of Law II: When the dispute is gift v. loan, party claiming the oral agreement has the burden of proof by clear and convincing evidence and emails in foreign language cannot be admitted to evidence without stipulation of the translation by the parties

If this court disagrees with the Proposition of Law I, to find unjust enrichment, courts first must find the alleged agreement. It was appellees burden to prove the alleged agreement by clear and convincing evidence. *Cooper v. City of W. Carrollton*, 112 N.E.3d 477, 483-84 (Ohio Ct. App. 2018). Instead, Magistrate set the standard as preponderance, conflicting tenth district's previous rulings and other districts. Appellant objected but Trial Court did not address the alleged agreement at all violating C.R. 53(D)(4)(d). Trial Court stated "plaintiff always intended to pay the loan back" (Oct. 28, 2019 Dec. P.6) based on an email it could not read (Ex. 39). See Ex. 32 where appellees refer to monies as "gave" not loan. Appellant testified he referred to Nov. 2013 emails in Ex. 39; appellees translation of Ex. 39 does not state loan (Tr. 303; 136). Appellant, in his reply, stated clear and convincing evidence was required, however, Appeals Court did not address the issue.

Appellees have not met their burden. Appellant also argued he does not have the burden to prove gift (Final Arg. P.11-13; Obj. P.7-8), nevertheless, courts erroneously charged him to prove gift by clear and convincing evidence based on estate cases where there was no claim for loan, properties at question were listed in decedent's estate and there was no record of transfer.

Proposition of Law III: Parties cannot be relieved from their expressed obligations in an agreement which they claim exist and partly performing a specific term of a contract means breaching party did not fully perform

Berrin Longmire testified she committed to pay appellant's tuition and living expenses but she didn't because appellant got part-time job and inherited monies (Tr. 124, L.21-24; Tr. 125, L.1-9). Appellees paid $2,324 (Ex. M) of appellant's living expenses when it **equaled** over $30,000 at UD (Ex. Q). According to *Hummel, supra*, (see syllabus) full performance is required and appellees cannot prevail because, by their own admissions, they did not fully perform.

The Magistrate determined appellees "did not have to pay most of the living expenses because he inherited monies" (F.F.18). According to the alleged agreement they had to; F.F.18 is finding of lack of full performance. Appeals Court found two new terms; one with payments "as needed" another "at appellant's request" to overcome F.F.18. No one testified to these terms or it was mutually agreed or to a consideration supporting agreement. Dispute between the parties is gift or loan, courts turned it to if "all" living expenses were to be paid. Both parties testified living expenses were to be paid and wasn't. Magistrate did not find alleged agreement was novated nor did he find a term that relieved appellees from paying living expenses if appellant inherited monies. It is appellee's, undisputed, one-sided decision not to pay living expenses after making the alleged agreement (Tr. 292). In *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, this court stated:

> {¶18} ... novation is created... **with the consent of all the parties**, and based on valid consideration... novation can never be presumed but **must be evinced by a clear and definite intent on the part of all the parties** ...

Appeals Court, to support the finding appellees were to pay expenses "as needed", stated "When appellant was asked whether appellees paid his tuition and living expenses "to the extent that [he] needed it," appellant responded"[y]es" (¶39). Appellant's response is proof of breach, not a term of a contract. It was after appellant inherited monies in the beginning of Sep. 2011 (Tr. 291)

that appellees decided to send money to the extend appellant needed "when he went over his monthly budget" (Tr. 251, 293). Even if the contract created by Appeals Court was true, appellant "needed" over $30,000 (Ex. Q) to live for two years and courts still cannot say appellees fully performed. Then, Appeals Court at ¶48 stated "appellees provided all tuition and living expenses requested by appellant". There is also no evidence of what appellant requested or it was all provided; what appellant needed or requested is different then what appellees were contractually obligated to do under the alleged agreement. Appeals Court materially changed the alleged agreement. This Court, in *Blosser v. Enderlin (1925)*, 113 Ohio St. 121, in the syllabus stated:

> "...there can be no intendment or implication inconsistent with the express terms thereof... evidence cannot be introduced to show an agreement between the parties materially different from that expressed by clear and unambiguous language of the instrument...".

Appeals Court, upon reconsideration (Oct. 27. 2020, ¶11), relied on appellant's assumption from 2009 that appellees were to pay all of his expenses when he first reached out to them and appellant's acknowledgment of appellee's decision not to pay living expenses after the inheritance in Sep 2011 (Tr. 239, 242, 292, 293), as the agreement. Law does not permit such determination.

Appellees alleged, in Aug 2011, they agreed to pay tuition **and living expenses at the UD** (Comp. ¶3). "Courts have long recognized that a signed contract constitutes a party's final expression of its agreement." *Fillinger Constr. Inc. v. Coon* (Sept. 28, 1993), Greene App. No. 93-CA-0002, 1993 WL 386320. Appellees final expression of the alleged agreement is written in the Complaint. "Where a contract is plain and unambiguous, it does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties" *Ohio Crane Co. v. Hicks (1924)*, 110 Ohio St. 168, 172, 143 N.E. Appellees committed to pay tuition, $25,085, and living expenses, $30,000; but paid $25,085 and $2,324; they paid 8% of living expenses and did not fully perform the alleged agreement. Appellees sued on an alleged agreement they breached not on an agreement courts created. Appellees unjust enrichment claim fails as a matter of law.

<u>Proposition of Law IV:</u> There must be a connection between the elements of unjust enrichment and gratuitous promises of one is not a circumstance which can create unjust enrichment of himself

Courts rely on two instances for determining unjust enrichment other than the alleged agreement; "(1) Appellees testimony that they wanted the monies back from the beginning and (2) appellant, in Nov. 2013, said he would pay the monies back" (Trial Court 10/28/2019 Dec. P.5).

Appeals Court held (1) "Appellees provided $27,409.37 in tuition and living expenses with the understanding they would be repaid, (2) Appellant confirmed over multiple emails that he planned on paying appellees back... Based on the emails and testimony at trial, we determine appellees have met their burden that it would be unjust for appellant to retain the benefit..." ¶38.

Appellant's Nov. 2013 promises in emails came after appellees completed tuition and other payments. By relying on these after the fact promises, courts combined two separate events in addressing first and third element of unjust enrichment; first element as the benefits received from the alleged agreement and third element as appellant's Nov. 2013 promises. In other words, appellant did not receive any benefits as part of his Nov. 2013 promises yet court found he is enriched by those promises. Appellant testified he offered to pay the monies back out of gratitude (Tr. 45,46). This court, in *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, stated at ¶17:

> Gratuitous promises are not enforceable as contracts, because there is no consideration. A written gratuitous promise, even if it evidences an intent by the promisor to be bound, is not a contract ... it must be determined in a contract case whether any "consideration" was really bargained for. If it was not bargained for, it could not support a contract.

Courts did not cite any case to support their conclusion of law as a recognized form of unjust enrichment referred in the proposition of law III and IV. This court stated "...**<u>pleadings rely on express promises and this is not such a situation where plaintiff is seeking to have the law create the fictional implied promise of the quasi contract</u>**..." *Hughes, supra*.

Lower Courts' decisions are not supported by law and contrary to this court's previous rulings, hence arbitrary and subjective as to what constitutes circumstance for unjust enrichment.

Appellant's benefits are tied to the alleged agreement. Can the courts rely on unrelated events transpired many years after making the alleged agreement to satisfy the third element of unjust enrichment? If yes, does the retention of the benefits become an unjust circumstance by appellant's gratuitous promises, hence nullifying the law of gratuitous promises?

<u>Proposition of Law V:</u> Monies given with the understanding that it will be returned is a contract and express requests of one is not a circumstance which can create unjust enrichment of others

Appeals Court and Trial Court determined monies were given with the "understanding" that it would be returned, ¶39. Understanding is appellees alleged statements at the time of making the alleged agreement. Giving the monies with an understanding that it will be returned is by definition offer, acceptance and consideration; the alleged agreement. This court laid out the principles of contracts in *Williams, supra*. Appellant believes courts were seeking a way to conform to *Hummel, supra* where father gave the check to his son with the "understanding" that it would be deposited to father's account. In *Hummel*, there was no consideration, detriment, to son; in the instant case, consideration is the alleged repayment promise of the monies.

If the understanding that monies were to be repaid is not an agreement, court in *Ohmer v. Ohmer*, 149 Ohio Misc.2d 60, 2008-Ohio-6099, held "when one gives money to another, it is an unconditional gift, and irrevocable, unless the parties had an agreement that it would be repaid or that the gift was conditional". If the "understanding" is an agreement, appellant believes appellees' claim is barred by the statute of frauds and the rules of equity. If not, can appellees alleged statements that they wanted to be repaid create a circumstance that unjustly enrich appellant? In other words, one makes a request, another does not comply, courts find unjust enrichment.

<u>Proposition of Law VI:</u> Determination of receiving a benefit does not relieve appellees from their burden to prove the monetary value of appellant's received benefit; measure of his enrichment from his degree

> "The purpose of the quasi-contract action is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant. **<u>Thus, while equity might compel a return of the article involved, the obligation which is recognized and enforced in law is the obligation to pay the reasonable worth of the benefit received.</u>**" *Hughes, supra*.

Appellees sent tuition monies directly to UD (Ex. 51-56) per Ex. C and D; appellant did not receive any of the tuition money (Mag. Dec. P.16). Appellant received a degree, the benefit. Appellees provided no proof of reasonable worth of appellant's degree nor can they. In *Stevens v. Stevens*, 23 Ohio St. 3d 115, 117-18 (Ohio 1986), this court stated:

> It [a professional degree] does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged... It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement...[I]t has none of the attributes of property in the usual sense of that term.

The Magistrate stated "The undersigned cannot order the return of the "education" but he can order the return of the cost of the education if the facts warrant it." (Mag. Dec. P. 13). Cost of appellant's education is appellees damages. "Including contract damages in an award for an unjust enrichment claim was a mistake of law making the trial court's damage award to appellees unreasonable, arbitrary and capricious." *Clifton v. Johnson*, 2019-Ohio-2702.

Appeals Court at ¶35 held "trial court did not commit plain error in determining that appellees conferred a benefit to appellant". However, appellant argued appellees did not prove the worth of his benefit, his enrichment, they proved their contract damages; not that they did not confer benefit (Appeal Br. P.47,51). Equity demands appellant's enrichment from receiving a degree, retained benefit, to be calculated and it was not. Appellant's enrichment is unknown. See also *Johnson v. Microsoft Corp*, 106 Ohio St. 3d 278 (Ohio 2005) at ¶22 for no money received.

Proposition of Law VII: "Sponsor" means "assume responsibility for" and written sponsorship agreements are binding, and third-party beneficiary of a sponsorship agreement cannot be unjustly enriched

Iowa Supreme Court stated ""sponsor" commonly means to assume responsibility for." *State v. Cartee*, 577 N.W.2d 649, 653 (Iowa 1998). Responsibility means "something that it is your job or duty to deal with" (https://dictionary.cambridge.org/us/). Appellees offered to U.S. Consulate General to sponsor appellant's graduate education for two years (Ex. C, D). Government accepted, issued certificate of eligibility for a visa, form I-20, (Ex. A), then issued a visa, F-1, and granted appellant entry to U.S.; offer, acceptance and consideration. Ex. A specifies "family funding" in the amount reflected on bank statements attached to Ex. C, D. Appellant is the third-party beneficiary of appellees agreement with UD and the government. Alleged agreement shifts appellees responsibility to appellant. "An oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter yet has different terms." *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 533 N.E.2d 325. See *Burton, Inc. v. Durkee (1952),* 158 Ohio St. 313, 49 O.O. 174, 109 N.E.2d 265 for parol evidence rule.

Proposition of Law VIII: When one loan is memorialized by a writing, lack of a writing for a far greater amount is a clear and convincing evidence of intend to make a gift

Appeals Court stated, ¶ 41, "The elements required to demonstrate an inter vivos gift are: (1) an intention on the part of the donor to transfer the title and right of possession of property to the done...". Appeals Court at ¶26 stated "the emails provide valuable insight into parties intentions at the time of the dispute". Monies were decided to be given in year 2011 not 2013. Appellees intentions in Nov. 2013 are irrelevant in determining intend and appellant's intentions are not relevant at all. "The donor's intent is gleaned from her express declarations at the time of making the gift" *Cooper v. Smith*, 155 Ohio App. 3d 218 (4th Dist. Ct. App., Lawrence Co. 2003).

In 2011, appellees titled the car to themselves they purchased for appellant and neither the car nor other payments was reduced to writing. Appellant signed a note when title was transferred to him (Ex. R) with a lien on the title. Clearly, when appellees were not concerned with the return of a property, they did not evidence it with writing. Courts kept ignoring this fact. Does existence of a written agreement for $5,058.75 and lack of it for $27,409.37 alleged loan demonstrate appellees intent to make a gift before the dispute raised between the parties in Nov. 2013?

CONCLUSION

Neither party in Nov. 2013 emails refer to a prior agreement or conversation regarding repayment from 2011. Appellant never admitted a loan. Courts, not appellant, refers to monies as a loan. In Nov. 2013, appellant stated what he intended to do; not what he promised to do in 2011. Promise evidences intend; intend does not evidence promise; intentions cannot be substitute to spoken words. Nov. 2013 emails evidences nothing unless the courts want it to and they did.

To solve this case, one must focus at the time all matters relating to appellant's expenses were concluded when appellant signed a note in Sep. 2013. Appellant was already full-time employed as of Sep. 2013 (Mag. Dec. P.15) and no payment request was made per alleged agreement's terms. At the trial, appellees added "permanent" employment term, a new term, to alleged Aug. 2011 agreement to justify their wait until Nov. 2013 to request the monies back (F.F. 27 & Mag. Dec. P.15). Magistrate did not find acceptance of this new term or consideration; a novation and courts cannot say appellees were acting according to an agreement.

Appellees claimed one agreement, Magistrate found another, Appeals Court found two others; all with different terms. Appellant lived with appellees two months (Tr. 97, L. 17-19). According to courts and appellees, parties were making a new agreement bi-weekly.

This case is one of a fraud not unjust enrichment. Appellant requests that this court accept jurisdiction in this case so that the important issues presented above will be reviewed on its merits.

Respectfully submitted,

/s/ Ozgun Danaci
Ozgun Danaci
Defendant - Appellant, Pro Se
62 Rogge St.
Dayton, Ohio 45409
330-475-3937
ozgundanaci@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served electronically on the 3rd day of November, 2020 upon the following:

Alesandro Sabatino, Jr (0062406)
Attorney for Plaintiffs - Appellees
471 E. Broad St. #1500
Columbus, Ohio 43215
614-458-1200
asabatino@zsa-law.com

/s/ Ozgun Danaci
Ozgun Danaci
Defendant - Appellant, Pro Se

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Eric Longmire et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 19AP-770 (C.P.C. No. 17CV-2624)
Ozgun Danaci,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 14, 2020

On brief: *Zeehandelar, Sabatino & Associates, LLC,* and *Alessandro Sabatino, Jr.*, for appellees. **Argued:** *Alessandro Sabatino, Jr.*

On brief: *Stanley L. Myers*, for appellant. **Argued:** *Stanley L. Myers.*

APPEAL from the Franklin County Court of Common Pleas

SADLER, P.J.

{¶ 1} Defendant-appellant, Ozgun Danaci, appeals from the judgment of the Franklin County Court of Common Pleas overruling objections to the magistrate's ruling in favor of plaintiffs-appellees, Eric Longmire and Berrin Ergun-Longmire, for unjust enrichment in the amount of $27,409.37. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On March 16, 2017, appellees filed a complaint seeking judgment against appellant for unjust enrichment and breach of contract. In their complaint, appellees generally alleged that an oral contract was formed between the parties, and appellant had

failed to repay appellees for tuition and living expenses while he was enrolled at the University of Dayton. Appellees alleged appellant had agreed to repay the loan on a monthly basis after he began full-time employment. Appellant filed his answer on April 14, 2017.

{¶ 3} On February 13, 2018, appellant filed a motion for partial summary judgment. Appellant argued appellees' breach of contract claim failed as a matter of law because the oral contract was barred under the statute of frauds codified in R.C. 1335.05. In their memorandum contra, appellees argued there was enough written documentation between the parties over email to meet the writing requirements imposed by the statute of frauds.

{¶ 4} On June 18, 2018, the trial court granted appellant's motion for partial summary judgment dismissing the breach of contract claim. The trial court reasoned that "the e-mails exchanged between Plaintiff Eric Longmire and Defendant in November of 2013, more than two years after the alleged making of the oral agreement, do not satisfy the requirements of a writing pursuant to R.C. §1335.05." (June 18, 2018 Decision & Entry at 9.) The trial court concluded that while the breach of contract claim was barred under the statute of frauds, appellees could proceed on their unjust enrichment claim.

{¶ 5} The trial court referred this matter to a magistrate for a bench trial pursuant to Civ.R. 53 and Loc.R. 99.02. A bench trial commenced on December 19, 2018. All parties appeared and were represented by counsel. The trial included live testimony from appellees, as well as appellant. The testimony of Fotos Akkus, appellant's ex-girlfriend, was presented by deposition. The trial produced the following facts.

{¶ 6} Appellant is a Turkish citizen and the nephew of appellees. In 2009, appellant began discussions with appellees concerning his desire to pursue a graduate degree in the United States. Appellant began to take English courses and sat for the G.R.E. exam.

{¶ 7} In April 2011, Berrin met with appellant in Turkey during a visit with her sister. Appellant's girlfriend at the time, Akkus, also attended the meeting. The parties agree Berrin made an offer to assist appellant with the tuition and living expenses while he pursued his graduate education. Appellant testified he understood Berrin's offer to pay for tuition and living expenses as a gift. Akkus testified she also heard Berrin state something

to that effect. Berrin denies she ever offered the money as a gift, and "[f]rom the beginning" she made it clear that "[a]s soon as you start to work, you will pay me back." (Tr. at 72-73.)

{¶ 8} Over the next few months, the parties worked together on letters to the University of Dayton and the U.S. Consulate for appellant's student visa. In August 2011, appellant moved to the United States to start his graduate program, initially living with appellees. Eric testified when appellant arrived, he made it clear that the money would need to be repaid. Berrin also told appellant that the money was a loan, stating "I told him, of course, we trust you that you will pay us back." (Tr. at 99.) Appellant denies any such conversations occurred. Around the start of his graduate program, appellant inherited some money and became less reliant on appellees for his living expenses. Even though appellant received an inheritance, appellees still would "send [appellant] some money when [his] budgeted amount went over." (Tr. at 251.)

{¶ 9} There is no evidence that the parties ever codified the terms of the agreement in a written contract. Despite no written agreement, appellees testified they made it clear from the start and during appellant's time in school that the money would need to be repaid. Berrin testified appellant would put his hand on her shoulder and say, "Auntie, I will pay you back." (Tr. at 110.) Appellees both testified that appellant would repay them the loan amount within two years of obtaining full-time employment.

{¶ 10} In 2013, appellant graduated from the University of Dayton. Around this time, appellees helped appellant purchase a vehicle. There is no dispute that this was not a gift, and the automobile loan would be repaid. In November 2013, appellant called Berrin to inform her that he had obtained full-time employment. Berrin stated appellant told her that he could not pay them back because his salary was not as high as anticipated. Berrin described this revelation as "out of the blue," and she tried "to process what he's saying. Of course, I was upset." (Tr. at 107.)

{¶ 11} After the November telephone call, appellees' relationship with appellant quickly deteriorated. A series of emails between the parties ensued. In a November 26, 2013 email, appellant stated:

> Since you have been acting like an investigator find one email which says you are giving the money in condition to pay it back and I agree to pay you. I am sure I mentioned voluntarily to pay it without you or Berrin asking because that is my

> intention. Besides everything I never once thought not to pay you. I always planned to pay [you] back.

(Nov. 26, 2013 email, Pl.'s Ex. 30 at 2.)

{¶ 12} In a subsequent November 26, 2013 email, appellant wrote:

> One more time, I am going to pay you back. Berrin yes all you asked is your money back and you should but there is time and how. * * * I haven't seen my paycheck yet how dare you tell me what is it going to be and how much I will be having to spend.

(Nov. 26, 2013 email, Pl.'s Ex. 33 at 1.)

{¶ 13} Appellant testified at trial that he intended to repay the money but as a gift. Appellant also testified that prior to the November emails, "[t]here was never any discussion" that he was required to repay the tuition and living expenses. (Tr. at 282.) In lieu of closing arguments, the magistrate requested written briefs and to provide supplemental information regarding appellees' claimed damages for tuition payments.

{¶ 14} On January 22, 2019, the magistrate issued a written decision finding in favor of appellees for unjust enrichment in the amount of $27,409.37 against appellant. Relevant to the instant case, the magistrate determined the evidence established an oral contract between the parties. While the contract claim was unenforceable under the statute of frauds, a quasi-contract claim for unjust enrichment remained. The magistrate wrote the previous decision by the trial court "did not hold that there was never an oral agreement for the repayment of the money advanced by the Plaintiffs on behalf of the Defendant. The Decision only applied the statute of fraud to the agreement and held that the statute of fraud required that the agreement be in writing." (Jan. 22, 2019 Mag.'s Decision at 12.) The magistrate found appellees conferred a benefit to appellant by providing financial support for his education. While appellant claimed the funds constituted a gift, the magistrate cited a November 27, 2013 email in which appellant wrote "[i]t is your money you can get it back." (Mag.'s Decision at 14.) The magistrate ultimately concluded it would be unjust for appellant to retain the benefit of the loan payments. The magistrate awarded damages to appellees in the amount of $2,324.37 for living expenses and $25,085.00 for tuition payments to the University of Dayton.

{¶ 15} On February 1, 2019, appellant filed a combined motion to set aside the magistrate's decision and objections to the magistrate's decision pursuant to Civ.R. 53(D)(3). Appellant argued, in pertinent part, the magistrate's decision violated the law of

the case doctrine. Appellant also generally objected to the magistrate's finding that appellees were entitled to unjust enrichment, and the magistrate's ruling was against the weight of the evidence. On February 15, 2019, appellees filed a memorandum contra to appellant's combined motion.

{¶ 16} On October 28, 2019, the trial court overruled appellant's objections and adopted the magistrate's decision. Relevant to this appeal, the trial court determined consideration of the emails between the parties did not violate the law of the case doctrine, stating "[t]he Magistrate's ruling does not reflect that liability was imposed for anything other than unjust enrichment, which was not inconsistent with any prior ruling." (Oct. 28, 2019 Decision & Entry at 4.) The court reasoned the emails were germane to determine whether the funds constituted a gift and whether it would be unjust to allow appellant to retain the benefit of the loan without repayment. The trial court also found that based on appellees' testimony and exhibits, they had met their burden of proof demonstrating their unjust enrichment claim. Finally, the trial court determined the magistrate's decision was supported by competent, credible evidence and was not against the manifest weight of the evidence.

{¶ 17} Appellant filed a timely appeal.

II. ASSIGNMENTS OF ERROR

{¶ 18} Appellant assigns the following as trial court error:

> [1.] THE COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THE LAW OF THE CASE DID NOT BAR THE JUDGMENT THAT APPELLANT WAS UNJUSTLY ENRICHED.
>
> [2.] THE COURT ERRED AS A MATTER OF LAW IN ITS JUDGMENT THAT APPELLANT WAS UNJUSTLY ENRICHED.
>
> [3.] IF THE ISSUE OF PROOF OF BENEFIT, UNJUST ENRICHMENT, WAS NOT ADEQUATELY RAISED IN APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION AND/OR NOT RAISED TO THE MAGISTRATE AT TRIAL, APPELLANT RAISES THE CLAIM OF PLAIN ERROR.
>
> [4.] THE DECISION THAT APPELLANT WAS UNJUSTLY ENRICHED IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. STANDARD OF REVIEW

{¶ 19} Civ.R. 53(D)(4)(d) provides: "If one or more objections to a magistrate's decision are timely filed, the [trial] court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Once objections to the magistrate's ruling are filed, the trial court " 'undertakes a de novo review of a magistrate's decision.' " *Gallick v. Benton*, 10th Dist. No. 18AP-171, 2018-Ohio-4340, ¶ 15, quoting *Meccon, Inc. v. Univ. of Akron*, 10th Dist. No. 12AP-899, 2013-Ohio-2563, ¶ 15.

{¶ 20} An appellate court generally reviews the trial court's decision to adopt, reject, or modify the magistrate's decision for an abuse of discretion. *Altercare of Canal Winchester Post-Acute Rehab. Ctr., Inc. v. Turner*, 10th Dist. No. 18AP-466, 2019-Ohio-1011, ¶ 15, citing *Tedla v. Al-Shamrookh*, 10th Dist. No. 15AP-1094, 2017-Ohio-1021, ¶ 11. An abuse of discretion occurs when a court's judgment is unreasonable, arbitrary, or unconscionable. *Altercare of Canal Winchester Post-Acute Rehab. Ctr.* at ¶ 15, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "However, the standard of review on appeal from a trial court judgment that adopts a magistrate's decision varies with the nature of the issues that were (1) preserved for review through objections before the trial court and (2) raised on appeal by assignment of error" (Internal quotations omitted.) *Fraley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 18AP-731, 2019-Ohio-2804, ¶ 9; *Feathers v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 16AP-588, 2017-Ohio-8179, ¶ 10; *In re Adoption of N.D.D.*, 10th Dist. No. 18AP-561, 2019-Ohio-727, ¶ 27; *Bickerstaff v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-1028, 2014-Ohio-2364, ¶ 10. Accordingly, we will note the appropriate assignment of error throughout this analysis.

IV. LEGAL ANALYSIS

A. Appellant's First Assignment of Error

{¶ 21} In his first assignment of error, appellant presents a multitude of arguments. First, appellant argues that appellees' complaint was defective and insufficient to establish the requisite facts at trial to demonstrate a claim for unjust enrichment. While appellant made a similar argument during his closing remarks to the magistrate, he failed to raise this alleged issue in his objections to the magistrate's decision with the trial court.

{¶ 22} A party may file written objections to the decision of the magistrate within fourteen days of the filing of the decision. Civ.R. 53(D)(3)(b)(i). "An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). " '[I]f a party fails to object to a magistrate's finding or conclusion, that party waives the right to challenge the finding or conclusion on appeal.' " *Patrick v. Ressler*, 10th Dist. No. 04AP-149, 2005-Ohio-4971, ¶ 25, quoting *Brott Mardis & Co. v. Camp*, 147 Ohio App.3d 71, 78 (9th Dist.2001). "This court has held that, when a party fails to file objections to a magistrate's decision, we may still review the decision for plain error." *Little v. Watkins*, 10th Dist. No. 12AP-335, 2012-Ohio-5041, ¶ 7, citing *Brown v. Zurich US*, 150 Ohio App.3d 105, 2002-Ohio-6099, ¶ 27 (10th Dist.). Because appellant did not raise this issue in his objections nor assert plain error, we decline to address the merits of this argument.

{¶ 23} Appellant next argues the trial court erred in finding appellees' unjust enrichment claim was not precluded by the law of the case doctrine. Appellant contends the magistrate erred in considering emails between the parties after the trial court ruled appellees' breach of contract claim was barred by the statute of frauds.

{¶ 24} The law of the case doctrine states "legal questions resolved by a reviewing court in a prior appeal remain the law of that case for any subsequent proceedings at both the trial and appellate levels." *Giancola v. Azem*, 153 Ohio St.3d 594, 2018-Ohio-1694, ¶ 1, citing *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984). The doctrine includes decisions by the trial court on its prior rulings. *Nolan* at 8. Whether the law of the case doctrine applies is a question of law. *Glasstetter v. Rehab. Servs. Comm.*, 10th Dist. No. 13AP-932, 2014-Ohio-3014, ¶ 27, citing *DeAscentisi v. Margello*, 10th Dist. No. 08AP-522, 2008-Ohio-6821, ¶ 12. Questions of law are reviewed de novo on appeal. *Altercare of Canal Winchester Post-Acute Rehab. Ctr.*, 2019-Ohio-1011, at ¶ 15, citing *PHH Mtge. Corp. v. Ramsey*, 10th Dist. No. 13AP-925, 2014-Ohio-3519, ¶ 14; *see also In re Adoption of N.D.D.* at ¶ 27.

{¶ 25} After a review of the record, we find the trial court correctly found the magistrate did not violate law of the case doctrine. In its June 18, 2018 entry, the trial court granted appellant's motion for partial summary judgment finding that appellees' breach of contract claim was barred by the statute of frauds. "The [trial] Court finds the e-mails exchanged between Plaintiff Eric Longmire and Defendant in November of 2013, more than

two years after the alleged making of the oral agreement, do not satisfy the requirements of a writing pursuant to R.C. §1335.05." (June 18, 2018 Decision & Entry at 9.) In his January 22, 2019 decision, the magistrate wrote: "The July 18, 2018 Decision of this Court did not hold that there was never an oral agreement for the repayment of the money advanced by the Plaintiffs on behalf of the Defendant. The Decision only applied to the statute of fraud to the agreement and held that the statute of fraud required that the agreement be in writing." (Mag.'s Decision at 12.)

{¶ 26} In the instant case, the magistrate's consideration of the emails was limited to whether the loan constituted a gift and whether it would be inequitable to allow appellant to retain the benefit of the funds. The emails provide valuable insight into the parties' intentions at the time of the dispute. As such, consideration of such evidence is probative to the resolution of the unjust enrichment claim consistent with the trial court's previous ruling.

{¶ 27} Appellant next argues that "[t]he Magistrate determined the oral evidence proved an enforceable contract as alleged in ¶3 and ¶4 of the Complaint. That finding violated the Law of the Case." (Appellant's Brief at 13.) This is simply incorrect. The magistrate concluded that "the evidence established an oral contract. But due to the July 18, 2018 [decision,] a contract claim was precluded. Leaving the Plaintiffs with the quasi contract claim of unjust enrichment." (Mag.'s Decision at 12.) Ohio law does not bar unjust enrichment if the contract claim is ultimately deemed unenforceable under the statute of frauds. In fact, unjust enrichment is available as an equitable remedy for that very reason:

> An oral contract that cannot be performed within a year of its making is unenforceable under the Statute of Frauds; but where one party fully performs and the other party, to his unjust enrichment, receives and refuses to pay over money which, under the unenforceable contract, he agreed to pay to the party who has fully performed, a quasi-contract arises, upon which the performing party may maintain an action against the defaulting party for money owed.

Hosterman v. French, 7th Dist. No. 13 CO 25, 2014-Ohio-5855, ¶ 20, citing *Hummel v. Hummel*, 133 Ohio St. 520 (1938), paragraph one of the syllabus.

{¶ 28} Here, while the trial court deemed the oral agreement was barred under the statute of frauds, appellees were able to proceed with the quasi-contract claim for money

conferred to appellant. We find the magistrate's consideration of the emails was limited to whether it would be unjust to allow appellant to retain the benefit of the loan and determine there is no evidence in the record that the magistrate deemed the oral evidence at trial to create an enforceable contract.

{¶ 29} Finally, appellant argues that appellees' unjust enrichment claim is precluded by the statute of frauds. This argument is without merit. Even when the statute of frauds precludes a breach of contract claim, "it has no applicability to [an] equitable claim for unjust enrichment." *Hosterman* at ¶ 19. As previously noted, when an oral contract is deemed unenforceable under the statute of frauds but one party has fully performed under the contract, the fully performing party may maintain a cause of action against the defaulting party. Here, the trial court correctly concluded that while an oral agreement was in place, the contract was unenforceable, and the equitable remedy of unjust enrichment provided appellees a viable cause of action. " '[I]f no remedy is available in contract or tort, then the equitable remedy in unjust enrichment may be afforded to prevent injustice.' " *Saraf v. Maronda Homes, Inc.*, 10th Dist. No. 02AP-461, 2002-Ohio-6741, ¶ 12, quoting *Banks v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 99AP-1413 (Nov. 28, 2000). As such, the statute of frauds does not preclude appellees' claim for unjust enrichment and afforded appellees a viable equitable remedy under the law.

{¶ 30} Based on the forgoing, we overrule appellant's first assignment of error.

B. Appellant's Second and Third Assignments of Error

{¶ 31} In his second assignment of error, appellant argues that as a matter of law, the trial court erred in finding in favor of appellees for unjust enrichment. In his third assignment of error, appellant argues there was no evidence as a matter of law that appellees conferred a benefit to appellant. For clarity of analysis, we will address appellant's second and third assignments of error together.

{¶ 32} To succeed in a claim for unjust enrichment, the trial court must find: "(1) a benefit conferred by the plaintiff on the defendant, (2) knowledge of the benefit by the defendant, and (3) retention of the benefit by the defendant in circumstances where it would be unjust to do so." *Lundeen v. Smith-Hoke*, 10th Dist. No. 15AP-236, 2015-Ohio-5086, ¶ 51, citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984). To demonstrate a claim of unjust enrichment, " ' "[i]t is not sufficient for the plaintiffs to show

that [they have] conferred a benefit upon the defendants. [Plaintiffs] must go further and show that under the circumstances [they have] a superior equity so that as against [them] it would be unconscionable for the defendant to retain the benefit." ' " *Liberty Mut. Ins. Co. v. Three-C Body Shop, Inc.*, 10th Dist. No. 19AP-775, 2020-Ohio-2694, ¶ 10, quoting *United States Health Practices v. Blake*, 10th Dist. No. 00AP-1002 (Mar. 22, 2001), quoting *Katz v. Banning*, 84 Ohio App.3d 543, 552 (10th Dist.1992). A cause of action for unjust enrichment arises from a contract implied in law or quasi-contract. *Hummel* at 525. " ' "Under this type of contract, civil liability 'arises out of the obligation cast by law upon a person in receipt of benefits which he [or she] is not justly entitled to retain' without compensating the individual who conferred the benefits." ' " *Camp St. Marys Assn. of the W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 3d Dist. No. 2-06-40, 2008-Ohio-1490, ¶ 23, quoting *Fisk Alloy Wire, Inc. v. Hemsath,* 6th Dist. No. L-05-1097, 2005-Ohio-7007, ¶ 69, quoting *Firstar Bank, N.A. v. Prestige Motors, Inc.*, 6th Dist. No. H-04-037, 2005-Ohio-4432, ¶ 8, quoting *Hummel* at 525.

{¶ 33} Appellant argues the trial court erred as a matter of law by finding appellees conferred a benefit to appellant in the form of tuition and living expenses. Appellant contends "[t]he offered evidence supporting the judgment deviated and was not supported by Ohio law; what Appellees paid, the costs of Appellant's graduate tuition, is not evidence of received benefit." (Appellant's Brief at 54.) Appellant does concede that the issue might not have been adequately raised to the trial court but argues it is plain error to find a benefit was conferred in this case.

{¶ 34} After an independent review of the record, we find appellant failed to preserve his proof of benefit argument with the trial court and is raising the issue for the first time on appeal. At trial during a discussion with the magistrate, appellant conceded the first two elements of unjust enrichment were established. Because appellant failed to preserve this issue for appeal as required by Civ.R. 53(D)(3), our review is limited to plain error. Civ.R. 53(D)(3)(b)(iv). "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error seriously affects the basic fairness, integrity, or public reputation of the judicial process itself." *Recovery Funding, LLC v. Leader Technologies*

Inc., 10th Dist. No. 18AP-177, 2018-Ohio-5364, ¶ 8, citing *Brown*, 2002-Ohio-6099, at ¶ 27, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

{¶ 35} We conclude the trial court did not commit plain error in determining that appellees conferred a benefit to appellant in the form of a loan for tuition and living expenses while he was enrolled at the University of Dayton. We agree with the trial court that the tuition and living expenses provided needed financial support to appellant allowing him to finance his graduate education. As such, we find appellant's argument unpersuasive.

{¶ 36} As to the second element of unjust enrichment, the parties do not dispute that appellant was aware of the financial assistance provided by appellees. Accordingly, the rest of our analysis will focus on the final element of unjust enrichment as to whether it would be inequitable to permit appellant to retain the benefit of the tuition and living expenses.

{¶ 37} Appellant argues the trial court erred as a matter of law in finding that it would be unjust to permit appellant to retain the benefit of the tuition and living expenses without repayment. Questions of law are reviewed de novo. *Altercare of Canal Winchester Post-Acute Rehab. Ctr.*, 2019-Ohio-1011, at ¶ 15. In determining whether it would be unjust for appellant to retain the benefit, the court must look at what party has the "superior equity so that * * * it would be unconscionable for [him] to retain the benefit." *Katz*, 84 Ohio App.3d at 552. There also must be a causal connection between the benefit retained by appellant and the detriment of appellees. *Giles v. Hanning*, 11th Dist. No. 2001-P-0073, 2002-Ohio-2817, ¶ 13.

{¶ 38} After a review of the record, we find the trial court was correct in determining appellees have a superior equity interest that it would be unjust for appellant to retain the benefit of the loan. Appellees provided $27,409.37 in tuition and living expenses with the understanding they would be repaid. Appellant confirmed over multiple emails that he planned on paying appellees back for the financial assistance. In a November 26, 2013 email, appellant stated "[b]esides everything I never once thought not to pay you. I always planned to pay [you] back." (Nov. 26, 2013 email, Pl.'s Ex. 30 at 2.) In another November 26 email, appellant wrote "[o]ne more time, I am going to pay you back. Berrin yes all you asked is your money back and you should but there is time and how." (Nov. 26, 2013 email, Pl.'s Ex. 33 at 1.) Finally, in a November 27, 2013 email, appellant wrote "[t]hat is your money," and he "always told [appellees] that [he] would pay [them] back." (Tr. at

137.) Based on the emails and testimony at trial, we determine appellees have met their burden that it would be unjust for appellant to retain the benefit of the financial assistance without repayment.

{¶ 39} Appellant argues that the trial court erred in "excusing Appellees from their obligation to pay all living expenses" and to "fully perform the contract upon which they sued; performing about only 42% of it." (Appellant's Brief at 48.) Appellant's argument is without merit. The parties agreed appellees would provide financial assistance as needed to appellant for tuition and living expenses. When appellant was asked whether appellees paid his tuition and living expenses "to the extent that [he] needed it," appellant responded "[y]es." (Tr. at 293.) Moreover, the evidence at trial demonstrated appellees aided appellant whenever possible. Appellees, for all intents and purposes, were appellant's financial safety net. When asked if appellees provided financial assistance with his living expenses after he received his inheritance, appellant stated they would "send me some money when my budgeted amount went over." (Tr. at 251.) The fact that appellees did not pay for all of appellant's tuition or living expenses does not mean they did not fully perform under the agreement. Accordingly, we find appellant's argument unpersuasive.

{¶ 40} Appellant next argues that the payment of tuition and living expenses constituted a gift. Appellant contends that any statements that he would repay appellees was out of gratitude, not from a legal obligation. Appellant also argues that "[w]ithout an express contract, family members are not required to reimburse family." (Reply Brief at 12.) For the reasons that follow, we find both arguments without merit.

{¶ 41} "The elements required to demonstrate an inter vivos gift are: '(1) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there, and (2) in pursuance of such intention, a delivery by the donor to the donee of the subject-matter of the gift to the extent practicable or possible, considering its nature, with relinquishment of ownership, dominion, and control over it.' " *Howard v. Himmelrick*, 10th Dist. No. 03AP-1034, 2004-Ohio-3309, ¶ 5, quoting *Bolles v. Toledo Trust Co.*, 132 Ohio St. 21 (1936), paragraph one of the syllabus. There is a general presumption that exchanges of funds between family members is a gift. *Martin v. Steiner*, 9th Dist. No.17AP0021, 2018-Ohio-3928, ¶ 11, citing *Kostyo v. Kaminski*, 9th Dist. No. 12CA010266, 2013-Ohio-3188, ¶ 20. "The family gift presumption

may be rebutted by 'circumstances or evidence going to show a different intention, and each case has to be determined by the reasonable presumptions arising from all the acts and circumstances connected with it.' " *Filkins v Schwartz*, 3d Dist. No. 1-07-73, 2008-Ohio-1340, ¶ 15, quoting *Wertz ex rel. Estate of Jurkoshek v. Tomasik*, 9th Dist. No. 20209 (Feb. 7, 2001).

{¶ 42} At trial, appellees testified that appellant repeatedly stated the funds would be repaid. Berrin testified she told appellant that she would "help [appellant] as much as [she could]" but do not forget "[a]s soon as you start to work, you will pay me back." (Tr. at 72-73.) Berrin also told appellant, "of course, we trust you that you will pay us back. * * * And I said, as you can see how expensive it is." (Tr. at 99-100.) Berrin's testimony is supported by several emails between the parties noting appellant would repay the tuition and living expenses. While appellant argues this was out of a moral obligation, not a legal one, the repeated assurances that he would repay appellees and classifying the loan as "your money" contradicts appellant's contention that the money was a gift. (Tr. at 136.) Accordingly, the trial court correctly determined that appellees rebutted the presumption that the tuition and living expenses constituted a gift.

{¶ 43} As such, we overrule appellant's second and third assignments of error.

C. Appellant's Fourth Assignment of Error

{¶ 44} In appellant's fourth assignment of error, appellant argues the trial court's decision was against the manifest weight of the evidence. For the reasons that follow, we disagree.

{¶ 45} When reviewing a judgment under a manifest-weight standard, we must " 'weigh[] the evidence and all reasonable inferences, consider[] the credibility of witnesses, and determine[] whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way.' " *Mid Am. Constr., LLC v. Univ. of Akron*, 10th Dist. 18AP-846, 2019-Ohio-3863, ¶ 21, quoting *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-804, 2014-Ohio-1810, ¶ 19. The weight of the evidence "is not a question of mathematics, but depends on [the evidence's] effect in inducing belief." (Emphasis omitted; internal quotations omitted.) *Mid Am. Constr.* at ¶ 21.

{¶ 46} When reviewing a civil action under a manifest-weight standard, we must be cognizant of the presumption favoring determinations by the finder of fact. " 'A trial court's

findings of fact are presumed correct, and "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to decide." ' " *Miller v. Ohio Dept. of Transp.*, 10th Dist. No. 13AP-849, 2014-Ohio-3738, ¶ 44, quoting *Rex v. Univ. of Cincinnati College of Medicine*, 10th Dist. No. 13AP-397, 2013-Ohio-5110, ¶ 18, quoting *Eagle Land Title Agency, Inc. v. Affiliated Mtge. Co.*, 10th Dist. No. 95APG12-1617 (June 27, 1996). " 'Judgments supported by competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.' " *Williams v. Ohio Dept. of Rehab. & Corr.*, 18AP-720, 2019-Ohio-2194, ¶ 17, quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

{¶ 47} Appellant focuses his manifest weight argument on the magistrate's finding that "[t]he Plaintiffs did not in fact have to pay for most of the Defendant's living expenses because the Defendant had inherited money at or near the same time he came to America." (Mag.'s Decision at 8.) Appellant restates his previous argument that because appellees did not pay for all of appellant's living and tuition expenses, they did not fully perform under the agreement.

{¶ 48} On review, there was competent, credible evidence for the trial court to conclude appellees provided all tuition and living expenses requested by appellant. By providing a financial safety net and additional funds when appellant exceeded his monthly budget, appellees offered much needed support to appellant while he pursued his graduate education. Accordingly, we find the weight of the evidence supports the ruling of the trial court.

{¶ 49} For the forgoing reasons, appellant's fourth assignment of error is overruled.

V. CONCLUSION

{¶ 50} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and BEATTY BLUNT, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Eric Longmire et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 19AP-770 (C.P.C. No. 17CV-2624)
Ozgun Danaci,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on July 14, 2020, appellant's four assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Any outstanding appellate court costs are assessed to appellant.

SADLER, P.J., DORRIAN, and BEATTY BLUNT, JJ.

/S/ JUDGE

Tenth District Court of Appeals

Date: 07-16-2020

Case Title: ERIC LONGMIRE ET AL -VS- OZGUN DANACI

Case Number: 19AP000770

Type: JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge Lisa L. Sadler

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Eric Longmire et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 19AP-770 (C.P.C. No. 17CV-2624)
Ozgun Danaci,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

M E M O R A N D U M D E C I S I O N

Rendered on October 27, 2020

Zeehandelar, Sabatino & Associates, LLC, and *Alessandro Sabatino, Jr.*, for appellees.

Stanley L. Myers, for appellant.

ON APPLICATION FOR RECONSIDERATION

SADLER, P.J.

{¶ 1} Defendant-appellant, Ozgun Danaci, filed an application for reconsideration, pursuant to App.R. 26(A), requesting that this court reconsider its decision rendered on July 14, 2020 in *Longmire v. Danaci*, 10th Dist. No. 19AP-770, 2020-Ohio-3704. For the reasons that follow, we deny appellant's application.

I. PROCEDURAL BACKGROUND

{¶ 2} On July 23, 2020, appellant filed a motion for reconsideration of our July 14, 2020 decision in this case. On July 24, 2020, appellant filed a motion for leave to amend his motion for reconsideration to change the caption of the filing to an application for reconsideration. Appellant filed an application for reconsideration contemporaneously with the motion to amend. Also, on July 24, 2020, appellant filed a second motion for leave

to amend his first application for reconsideration stating he inadvertently filed the incorrect document. Appellant also filed his amended application for reconsideration on July 24, 2020. On August 3, 2020, plaintiffs-appellees, Eric Longmire and Berrin Ergun-Longmire, filed a memorandum contra appellant's motion for reconsideration. A reply brief was filed on August 5, 2020.

{¶ 3} Appellees have not filed a memorandum in opposition to either of appellant's motions for leave to amend. Accordingly, we grant appellant's second July 24, 2020 motion to amend, and we grant leave to file the July 24, 2020 amended application for reconsideration. Appellant's initial motion for reconsideration and leave to amend are denied as moot.

II. DISCUSSION

{¶ 4} Pursuant to App.R. 26(A)(1), an appellate court must consider if the application for reconsideration "calls to the attention of the court an obvious error in its prior determination or raises an issue that was not fully considered by the court when it should have been." *Carmen v. Baier*, 10th Dist. No. 17AP-443 (Dec. 5, 2019) (memorandum decision), citing *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 10th Dist. No. 17AP-684, 2019-Ohio-1069, ¶ 2, citing *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981); *Thyroff v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 15AP-1043, 2016-Ohio-5715, ¶ 2. The purpose of App.R. 26 is to provide an avenue that a party " 'may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law.' " (Internal quotations omitted.) *Carmen*, quoting *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, ¶ 103. This rule is not designed for the moving party to relitigate an issue where a party merely does not agree with the prior conclusion of the court. *State v. Stewart*, 10th Dist. No. 11AP-787, 2013-Ohio-78, ¶ 6. We will not grant an application simply because a party disagrees with the conclusions of the underlying decision. *Id.* at ¶ 3.

{¶ 5} As provided in more detail in our decision, appellees generally alleged that an oral contract was formed between the parties wherein appellees would provide tuition and living expenses to appellant while enrolled at the University of Dayton. A dispute arose concerning whether the money was a gift or whether appellant was obligated to repay the funds provided by appellees. Appellees filed a complaint alleging causes of action for

breach of contract and unjust enrichment. After appellant filed a motion for summary judgment, the trial court dismissed the breach of contract claim finding that while an agreement was in place, the oral contract was unenforceable under the statute of frauds. The trial court did allow appellees to proceed with their unjust enrichment claim. After the case was referred to a magistrate, pursuant to Civ.R. 53, the matter proceeded to trial. The magistrate ultimately concluded appellees conferred a benefit to appellant by providing financial support for his tuition and living expenses, and it would be unjust for appellant to retain the benefit of the loan. Appellees were awarded damages in the amount of $25,085.00 for tuition payments and $2,324.37 for living expenses. After the trial court overruled appellant's objections and adopted the magistrate's decision, appellant filed a timely appeal.

{¶ 6} Relevant to his application for reconsideration, appellant argued in his second and third assignments of error that as a matter of law, the trial court erred in finding in favor of appellees for unjust enrichment.[1] Appellant does not ask us to reconsider his first or fourth assignments of error related to the merits of his claims against appellees. In upholding the trial court's decision, we specifically addressed and disagreed with appellant's contention the trial court erred in finding appellees fully performed under the agreement to provide tuition and living expenses to appellant while enrolled in graduate school. In overruling appellant's assignments of error, we stated:

> After a review of the record, we find the trial court was correct in determining appellees have a superior equity interest that it would be unjust for appellant to retain the benefit of the loan. Appellees provided $27,409.37 in tuition and living expenses with the understanding they would be repaid. Appellant confirmed over multiple emails that he planned on paying appellees back for the financial assistance. In a November 26, 2013 email, appellant stated "[b]esides everything I never once thought not to pay you. I always planned to pay [you] back." (Nov. 26, 2013 email, Pl.'s Ex. 30

[1] Appellant's third assignment of error argues the trial court erred in finding appellees conferred a benefit to appellant in the form of tuition and living expenses. As stated in our original decision, after an independent review of the record, appellant failed to preserve his proof of benefit argument with the trial court and raised the issue for the first time on appeal. *Longmire* at ¶ 34. We found the trial court did not commit plain error in determining appellees conferred a benefit to appellant by providing funds for tuition and living expenses. *Id.* at ¶ 35. Here, appellant asks this court to reconsider its ruling on the third assignment of error but fails to present any arguments on this issue. Regardless, we find nothing in appellant's brief to bring to the court's attention an obvious mistake, nor does appellant raise an issue not previously considered by this court in overruling his third assignment of error.

> at 2.) In another November 26 email, appellant wrote "[o]ne more time, I am going to pay you back. Berrin yes all you asked is your money back and you should but there is time and how." (Nov. 26, 2013 email, Pl.'s Ex. 33 at 1.) Finally, in a November 27, 2013 email, appellant wrote "[t]hat is your money," and he "always told [appellees] that [he] would pay [them] back." (Tr. at 137.) Based on the emails and testimony at trial, we determine appellees have met their burden that it would be unjust for appellant to retain the benefit of the financial assistance without repayment.
>
> Appellant argues that the trial court erred in "excusing Appellees from their obligation to pay all living expenses" and to "fully perform the contract upon which they sued; performing about only 42% of it." (Appellant's Brief at 48.) Appellant's argument is without merit. The parties agreed appellees would provide financial assistance as needed to appellant for tuition and living expenses. When appellant was asked whether appellees paid his tuition and living expenses "to the extent that [he] needed it," appellant responded "[y]es." (Tr. at 293.) Moreover, the evidence at trial demonstrated appellees aided appellant whenever possible. Appellees, for all intents and purposes, were appellant's financial safety net. When asked if appellees provided financial assistance with his living expenses after he received his inheritance, appellant stated they would "send me some money when my budgeted amount went over." (Tr. at 251.) The fact that appellees did not pay for all of appellant's tuition or living expenses does not mean they did not fully perform under the agreement. Accordingly, we find appellant's argument unpersuasive.

Longmire at ¶ 38-39.

{¶ 7} In his application for reconsideration, appellant first argues this court erred in finding appellees fully performed under the agreement. Appellant argues appellees committed to pay for all tuition and living expenses then changed the agreement once appellant received his inheritance. This is effectively the same argument appellant presented in his original appellate brief. We carefully considered this issue but ultimately disagreed with appellant's argument.

{¶ 8} We see nothing in appellant's amended application to reconsider our previous ruling that appellees fully performed their obligation to provide appellant tuition and living expenses while he was enrolled at the University of Dayton. While appellant disagrees with our assessment of the law and facts at issue, disagreement with the court's

analysis is insufficient to meet the test for granting an application for reconsideration. *Stewart*, 2013-Ohio-78, at ¶ 6. We find nothing in appellant's first argument to bring to the court's attention an obvious error, nor does he raise an issue not previously considered by this court.

{¶ 9} Appellant next argues that our decision added "as needed" to the agreement materially changing the terms between the parties. Appellant contends that appellees providing financial assistance "as needed" was "not evidence of an agreement, but an action." (Am. Application for Recons. at 7.) We find appellant's argument without merit.

{¶ 10} The complaint states "Plaintiffs agreed to loan money to Defendant for his graduate program, tuition and living expenses at the University of Dayton." (Compl. at ¶ 3.) Despite appellant's insistence that the agreement required appellees provide payment of all tuition and all living expenses, the plain language of the complaint does not support such an interpretation.

{¶ 11} At trial, appellant conceded that his belief appellees would pay for each and every expense was an assumption. Appellant was asked "you told us here that you don't recall exactly what it was that [appellees] were going to pay for, but you assumed it meant everything?" (Tr. at 293.) Appellant responded "[y]eah." (Tr. at 293.) When asked at trial whether his aunt and uncle no longer had to pay for his living expenses after he received his inheritance, appellant responded they did not "but they did get -- send me some money when my budgeted amount went over." (Tr. at 251.) This testimony is consistent with the magistrate's finding that "[t]he Plaintiffs did not in fact have to pay for most of the Defendant's living expenses because the Defendant had inherited money at or near the same time he came to America." (Jan. 22, 2019 Mag.'s Dec. at ¶ 18.) Regarding appellant's understanding of the agreement, counsel for appellees stated "I asked you whether you -- whether the agreement was basically that [appellees] would pay your tuition and that they would pay your living expenses to the extent that you *needed it*. And your answer was yes, was it not?" (Emphasis added.) (Tr. at 293.) Appellant responded "[y]es." (Tr. at 293.) Here, appellant acknowledged that he understood the agreement between the parties was that appellees would support him financially as his needs required. Given the plain language of the complaint, language in the magistrate's decision, and testimony at trial, we find the language in our decision stating appellees provided tuition and living expenses as

needed by appellant is consistent with the findings of the trial court and did not materially alter the language of the agreement.

{¶ 12} Accordingly, appellant's application for reconsideration does not call attention to an obvious error or raise an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. As such, appellant's application is without merit and is hereby denied.

III. CONCLUSION

{¶ 13} For the forgoing reasons, we deny as moot appellant's July 23, 2020 motion for reconsideration; deny as moot appellant's initial July 24, 2020 motion for leave to amend; grant appellant's second July 24, 2020 motion to amend his application for reconsideration; and deny appellant's July 24, 2020 amended application for reconsideration.

July 23, 2020 motion for reconsideration denied as moot;
July 24, 2020 initial motion for leave to amend denied as moot;
July 24, 2020 second motion to amend granted;
and July 24, 2020 amended application for reconsideration denied.

DORRIAN and BEATTY BLUNT, JJ., concur.