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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	)))))	**Case No. 11-346-EL-SSO** **Case No. 11-348-EL-SSO**
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	))))	**Case No. 11-349-EL-AAM** **Case No. 11-350-EL-AAM**

MOTION OF FIRSTENERGY SOLUTIONS CORP.
TO
STRIKE TESTIMONY

Pursuant to Rule 4901-1-12, FirstEnergy Solutions Corp. ("FES") moves to strike certain portions of the direct testimony proffered by the Columbus Southern Power Company and the Ohio Power Company ("AEP Ohio") in support of their pending Electric Security Plan ("ESP") application. As demonstrated in the attached memorandum in support, FES specifically seeks to strike those sections of the direct testimony of AEP Ohio witnesses Laura J. Thomas and Chantale LaCasse that rely on the so-called "constrained option model" (the "Model") used allegedly to calculate the value of AEP Ohio's Provider of Last Resort ("POLR") obligation in the proposed ESP. On August 9 and August 10, counsel for FES deposed these witnesses. These depositions revealed that neither witness meets the standards required under Ohio law to qualify as an expert with regards to the Model. Neither could confirm the reliability of the Model as applied in the instant matter, also a basic requirement for admissible testimony under Ohio law.

In light of Ms. Thomas's and Dr. LaCasse's failure to meet the qualification requirements of Rule 702(B) and the reliability requirements of Rule 702(C), FES respectfully requests that the following portions of their direct testimony involving the Model be stricken:

1. **Laura Thomas' Direct Testimony (filed Jan. 27, 2011)**:

- Page 17, Lines 3 to 15
- Page 17, Lines 18 to 22
- Page 18, Lines 1 to 2
- Page 18, Lines 5 to 11
- Page 19, Lines 4 to 14
- Page 20, Lines 18 to 22
- Page 21, Lines 21 to 23
- Page 22, Lines 6 to 14

2. **Laura Thomas' Supplemental Direct Testimony (filed July 6, 2011):**

- Page 14, Lines 14 to 18
- Page 16, Lines 1 to 11
- Page 18, Lines 1 to 12

3. **Chantale LaCasse's Corrected Direct Testimony (filed July 8, 2011):**

- Page 13, Lines 7 to 13
- Page 14, Lines 3 to 9
- Page 14, Lines 12 to 14
- Page 15, Lines 6 to 11
- Page 15, Lines 15 to 18
- Page 16, Lines 6 to 10
- Page 16, Lines 14 to 23
- Page 17, Lines 1 to 8
- Page 17, Lines 12 to 16
- Page 18, Lines 9-14
- Page 22, Lines 12-13

Dated: August 30, 2011

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FIRSTENERGY SOLUTIONS CORP.

BEFORE THE
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In the Matter of the Application of	)	
Columbus Southern Power Company and	)	
Ohio Power Company for Authority to	)	**Case No. 11-346-EL-SSO**
Establish a Standard Service Offer	)	**Case No. 11-348-EL-SSO**
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in the Form of an Electric Security Plan.	)	
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Columbus Southern Power Company and	)	**Case No. 11-349-EL-AAM**
Ohio Power Company for Approval of	)	**Case No. 11-350-EL-AAM**
Certain Accounting Authority.	)	

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE TESTIMONY

I. INTRODUCTION

As a component of their proposed Electric Security Plan ("ESP"), Columbus Southern Power Company and the Ohio Power Company ("AEP Ohio") seek to recover the cost of their Provider of Last Resort ("POLR") obligation due to an alleged risk of customer shopping. AEP Ohio witnesses Laura J. Thomas and Chantale LaCasse claim that the so-called "constrained option model" (the "Model"), is the appropriate method to quantify the risk of AEP Ohio's POLR obligation in the proposed ESP. (*See* Thomas Dir. Test. 18:3-11, filed Jan. 27, 2011; LaCasse Dir. Test. 3:19-22; 13:7-13, filed July 6, 2011.) The Model is supposedly based on a model known as the Black model which, in turn, is based on a model known as the Black-Scholes model. The Black-Scholes model was originally developed as a mathematical tool to estimate the value of stock options. *See* John C. Hull, *Options, Futures, and Other Derivatives*, 234-66, (5th ed. 2002). The Black model was developed to calculate the value of options on commodity futures. *See id.* at 287-88; 508-10. In their respective direct testimonies, Ms. Thomas and Dr. LaCasse propose to extend the use of the Black Model to encompass the

calculation of the value of the POLR obligation via a model developed specifically for AEP Ohio's litigation of its POLR obligation in this case and in the joint cases *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-SSO and *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-918-EL-SSO, filed July 31, 2008 (*"AEP Ohio ESP I Remand"*).

On August 9 and 10, 2011, Ms. Thomas and Dr. LaCasse were deposed. This testimony establishes that neither witness is sufficiently qualified to testify about the Model and its applicability in the instant matter. Neither witness could adequately confirm the reliability of the Model as a tool for calculating the value of the POLR obligation for the proposed ESP. Specifically, neither witness could state that the Model used here has ever been used for any purpose other than for the purpose of presenting testimony in this case and in the remand of AEP Ohio's first ESP application. Thus, neither witnesses' testimony regarding their proposed use of the Model meets the standards of Rules 702(B) and 702(C) of the Ohio Rules of Evidence. For this reason, the Commission should strike those portions of the witnesses' direct, expert testimony that address the use of the Model to calculate the value of AEP-Ohio's POLR obligation for the proposed 2012 to 2014 ESP.

II. ARGUMENT

To qualify as an expert, a witness testifying in an Ohio proceeding must satisfy the requirements mandated by Rule 702 of the Ohio Rules of Evidence. Rule 702 provides, in part:

> A witness may testify as an expert if all of the following apply:

****

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Rule 702(B) requires that any testifying expert possess sufficient experience or specialized knowledge in the relevant subject area in which he or she intends to testify. Further, even if an expert satisfies Rule 702(B), he or she must also meet the requirements of Rule 702(C). Rule 702(C) provides for the exclusion of expert testimony based upon methodologically suspect theories, analyses or procedures.

A. The Commission May Rely on Rule 702 to Exclude Expert Witness Testimony.

While not strictly bound by the Ohio Rules of Evidence, the Commission "use[s] the rules of evidence for guidance in evaluating the evidence presented at hearing." *Kingsville Apartments v. Columbia Gas of Ohio*, No. 05-1229-GA-CSS, 2007 Ohio PUC LEXIS 269, at *25 (Entry April 4, 2007). The Commission thus regularly relies on the Ohio Rules of Evidence when deciding whether to exclude testimony. *See, e.g., Merchant v. Ohio Edison Co.*, No. 08-428-EL-CSS, 2008 Ohio PUC LEXIS 312 (Entry May 14, 2008), at * 5 (adhering to Rule 408 to

preemptively exclude evidence that might arise during planned settlement discussions); *In re FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, No. 06-786-TR-CVF, 2006 Ohio PUC LEXIS 705, at *12 (Entry Nov. 21, 2006) (excluding an affidavit on the basis of hearsay "not excused by any exception to the rules of evidence"); *S.G. Foods, Inc. v. FirstEnergy Corp.*, No. 04-28-EL-CSS, 2006 Ohio PUC LEXIS 172, at *49-50 (Entry Mar. 7, 2006) (finding that proffered expert report failed to satisfy the exception to hearsay under Rule 803(8)); *Westside Cellular, Inc. v. New Par Companies,* No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 972, at *29-31 (Entry Apr. 25, 2001) (refusing to modify the attorney examiner's decision to exclude hearsay evidence).

Moreover, the Ohio Supreme Court has upheld Commission decisions to strike testimony for failure to satisfy the requirements for admissibility under rules of evidence. In *Greater Cleveland Welfare Rights Org. v. Pub. Util. Commn.*, 2 Ohio St. 3d 62 (1982), the court, while noting that the Commission is not strictly bound by the Ohio Rules of Evidence, nevertheless upheld the Commission's decision to strike portions of the testimony of a witness "when he made reference to a study but was unable to answer questions relating to the basic principles of the study." *Id.* at 67. The court further observed that the appellant was not prejudiced by the Commission's action striking additional portions of the witness's testimony as inadmissible hearsay. *Id.* at 68. *See also Cincinnati Bell Tel. Co.* v. *Pub. Util. Commn.*, 12 Ohio St. 3d 280, 288 (1984) (finding that Commission's evidentiary rulings excluding two exhibits as hearsay did not prejudice complainants).

B. Witnesses Thomas and LaCasse Fail to Meet the Qualification Requirements of Rule 702(B).

Under Ohio law, Rule 702(B) "provides that a witness may qualify as an expert by reason of his or her specialized knowledge, skill experience, training or education." *State v. Conway*,

108 Ohio St. 3d 214, 236 (2006). Ohio courts regularly exclude proffered expert testimony in cases where a purported expert fails to meet the standards of Rule 702(B). Courts have held that Rule 702(B) requires that the proposed expert have relevant direct experience or training in the subject matter upon which the witness is being presented as an expert. For example, in *Conway*, an appeal in a capital murder case, the Ohio Supreme Court upheld the trial court's exclusion of testimony where the witness attempted to proffer a crime scene reconstruction video because there was no evidence that the witness had "any specialized knowledge, skill, experience, training or education" in crime scene reconstruction. *Id.*

Likewise, courts look to see that the proposed expert has direct experience or training in the area of the witness' proposed expert testimony. Thus, for example, in *Wilson v. Marino*, 164 Ohio App. 3d 662 (Lucas Cty. 2005), a chiropractic malpractice case, the appeals court upheld the trial court's disqualification of the appellant's proposed expert, a licensed orthopedist, because the witness had admitted in deposition that he was not a licensed chiropractor, had not studied chiropractic techniques, did not practice applied kinesiology or spinal manipulation, and was not a member of any chiropractic associations. *Id.* at 672. The court also noted the expert's admission that his only "knowledge of chiropractic methodology was obtained through observation of a chiropractor" at high school football games. *Id.* Thus, knowledge obtained indirectly by talking or working with others who may be experts is insufficient to qualify as an expert under Rule 702(B).

Similarly, courts will review a witness' background to determine whether the proposed witness has experience or training in the specific area of the witness' proposed testimony. For example, in *State v. Mitchell,* No. 97-P-0074, 1998 Ohio App. LEXIS 5809 at *7-8 (Portage Cty.

Dec. 4, 1998), an appellate court reversed a trial court's finding that the state's witness qualified as an expert in DNA testing. The court stated:

> A review of the record reveals no testimony that Ms. May was qualified to render an opinion on DNA evidence. Although she testified that she has a Bachelor of Science degree in Medical Technology, she did not state that this degree entailed education in DNA analysis. Moreover, she testified that the Coroner's office conducted thousands of DNA tests, but she did not testify that she was involved in those tests. She testified that she worked primarily with "blood," but she did not testify that she performed DNA tests on the blood with which she worked. Finally, even though she stated she has been qualified as an expert in court before, she did not state that she was qualified as an expert in DNA analysis.

Id. at *6-7. *See also Newman v. The Farmacy Natural and Specialty Foods*, 168 Ohio App. 3d 630, 635 (Athens Cty. 2006) (affirming the disqualification of an expert whose background experience as an administrative case manager "did not fit the subject area" of competency determinations in brain-injured individuals); *Lofti-Fard v. First Fed. Of Lakewood,* No. 87207, 2006 Ohio App. LEXIS 3686, at *11-12 (Cuyahoga Cty. July 20, 2006) (affirming the disqualification of an expert whose experience in the banking industry was limited to foreign countries and not the United States).

During their recent deposition testimony, neither Ms. Thomas nor Dr. LaCasse demonstrated that they were sufficiently qualified, pursuant to Rule 702(B), to opine about the validity of the use of the Model to quantify the value of the POLR obligation in AEP Ohio's proposed ESP. Ms. Thomas has exceptionally limited experience using the Model, or, for that matter, almost any model:

> Q. In your career do you have experience or expertise in developing models?
>
> A. I have worked in various areas where models are used, and I've worked with folks who develop models. [Thomas Dep. 8:12-16, Aug. 10, 2011.]
>
> * * *

Q. You have not personally worked with models other than a cost-of-service study, correct?

A. I've not personally developed models, but I have worked with people who have developed models where we have utilized the results of that. [*Id.* at 10:8-13.]

* * *

Q. Prior to this year had you worked with a model called the Black-Scholes model?

A. No.

Q. Prior to this year had you worked with a model called the Black model?

A. No. [*Id.* at 11:7-12.]

* * *

Q. Now, is it correct to say that your use of the Black model or the Black-Scholes model during this year has been confined to the two cases that AEP Ohio has before the commission and I'll call them ESP I and this case? Fair to say?

A. Yes.

Q. So you've used those models only for the purposes of the litigation or hearing of those cases, correct?

A. Yes. [*Id.* at 11:22-24; 12:1-7.]

Ms. Thomas by no means possesses any specialized knowledge or expertise with regards to the Model:

Q. In your work with those models did you review any academic literature with respect to the proper use of those models, and by "those models," I mean either the Black-Scholes model or the Black model?

A. I recall reading portions of textbooks related to the use of the Black model.

Q. What textbook did you read?

A. I believe it was Hull. [*Id.* at 12:8-16.]

* * *

Q. Okay. Now did you read any textbook or any other academic literature other than the Hull textbook?

A. As I said earlier, that's the one I recall.

Q. Okay. Well do you recall reading other materials?

A. I don't recall. [*Id.* at 16:16-23.]

* * *

Q. So, ma'am, you're not familiar with any of the authors, articles, treatises that criticize both the Black-Scholes model and efficient market theory; is that correct?

A. That's correct.

Q. You haven't read those articles, you haven't reviewed them, you don't know whether or not they exist; is that right?

A. That's correct. [*Id.* at 266:10-18.]

Ms. Thomas' primary intellectual acquaintance with the Model is apparently through casual conversations with co-workers:

Q. Okay. So what we have so far in terms of the information that you've gathered [about the Black-Scholes Model] is at least one textbook that you can recall and discussions with five people; fair to say?

A. That I recall, yes. [*Id.* at 19:5-9.]

As the foregoing deposition testimony indicates, Ms. Thomas has read little of the relevant academic literature on the Model, and has minimal experience in using the Model. Like the proposed experts routinely excluded by the courts discussed above, Ms. Thomas has no training or background in the very thing upon which she presents testimony. She had absolutely no experience in the area prior to this year. Since her involvement as a witness for AEP Ohio in this case and the *AEP Ohio ESP I Remand* matter, her "training" has consisted of reading one textbook and being briefed by others who may or may not be qualified. Accordingly, this does

not qualify her as an expert with regards to the Model and her testimony that addresses the use of the Model should be stricken.

Dr. LaCasse has a similar lack of experience and specialized knowledge with regards to the Model. Her experience here is minimal:

> Q. None of your consulting experience listed on Exhibit CL-1 [her resume] relates to using the valuation of an option as a method for measuring costs associated with the shopping risk; is that correct?
>
> A. Correct. [LaCasse Dep. 11:5-9, Aug. 9, 2011.]
>
> * * *
>
> Q. You don't work regularly with the Black model; is that correct?
>
> A. I do not.
>
> Q. And have you ever worked with the Black model before your testimony in these two AEP cases?
>
> A. Not specifically. I relied on other experts at NERA that do work regularly with the Black model and that's it. Sorry. [*Id.* at 16:18-24; 17:1.]
>
> * * *
>
> Q. So I'm going to reask the last question because I want to make sure we're on the same page here. Outside of your testimony in these two AEP cases have you ever worked with an option model to price shopping risk?
>
> A. No. [*Id.* at 18:14-19.]
>
> * * *
>
> Q. The Black model formula provided by AEP is a binomial model; is that correct?
>
> A. Yes.
>
> Q. Do you have hands-on experience developing binomial models?

A. No. [*Id.* at 45:19-24.]

As in the case of Ms. Thomas, Dr. LaCasse's only experience with using the Model is limited to the two pending AEP Ohio ESP cases. Otherwise, she has absolutely no professional experience in using, applying, or working with the Model.

Similarly, she lacks any specialized knowledge with regards to the Model.

Q. None of the testimony listed on Exhibit CL-1 relates to examining the methods by which costs associated with shopping risk were quantified or measured by an EDU supplier, correct?

A. That's correct.

Q. None of your testimony listed on Exhibit CL-1 relates to using the valuation of an option as a method for measuring costs associated with shopping risk, correct?

A. That's correct. [*Id.* at 14:11-19, 24.]

* * *

Q. None of the publications listed on Exhibit CL-1 relates to examining the methods by which costs are associated with shopping risk are quantified or measured, correct?

A. That's correct.

Q. None of your publications listed on Exhibit CL-1 relates to using the valuation of an option as a method for measuring costs associated with shopping risk, correct?

A. That's correct. [*Id.* at 15:22-24; 16:1-7.]

* * *

Q. What portion, if any, [of your publications] included a discussion of the Black model?

A. I did not study that specifically.

Q. Do any of your published works contain a discussion of the Black model?

A. No. [*Id.* at 16:12-17.]

As with Ms. Thomas, Dr. LaCasse's primary exposure to the Model has apparently been from conversations with co-workers. She has no direct experience with, or any specialized knowledge of, the Model. As the foregoing deposition testimony shows, she has authored no articles on the Model, presented no papers on the Model, and, indeed, has admittedly never studied the Model in any depth whatsoever. While Dr. LaCasse may qualify as an expert in other subject areas, she does not do so with regard to the use of the Model. Pursuant to Rule 702(B), the portions of Witness LaCasse's direct testimony addressing the use of the Model to calculate the value of the POLR obligation should be stricken.

C. The Testimony of Ms. Thomas and Dr. LaCasse Regarding the Model Fails to Meet the Reliability Requirements of Rule 702(C).

Even if Ms. Thomas and Dr. LaCasse met the qualification requirements of Rule 702(B) (which they do not), their proposed testimony on the Model would still fail to meet the reliability requirements of Rule 702(C). On this issue, Ohio law on the admissibility of proposed expert testimony has followed the U.S. Supreme Court's rationale in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). For example, in *Terry v. Caputo*, 115 Ohio St. 3d 351, 356 (2007), the Ohio Supreme Court noted, "[t]his gatekeeping function imposes an obligation on the trial court to assess both the reliability of an expert's methodology and the relevance of any testimony offered . . . ." The court went on to list three factors an Ohio court should consider when testing the reliability of the expert's methodology. The trial court should: (1) "assess whether the method or theory has been tested"; (2) "consider whether the theory has been the subject of peer review, and then whether the method has a known or potential error rate"; and (3) "look at whether the theory has gained general acceptance in the scientific community." *Id.* at 356-57 (citing *Daubert*, 509 U.S. at 592-94). This inquiry is flexible and the

focus should be "solely on principles and methodology, not on the conclusions generated." *Id.* at 357 (quoting *Daubert*, 509 U.S. at 595).

As part of this inquiry, courts have regularly rejected testimony when the methodology employed in the testimony has not been developed and used for purposes other than litigation. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) ("*Daubert II*") (holding that an expert's testimony was inadmissible as unreliable under *Daubert* and noting that "[o]ne very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of litigation, or whether they have developed their opinions expressly for purposes of testifying."); *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434 (6th Cir. 2007) (quoting *Daubert II* and affirming the district court's order excluding an expert's testimony that the expert prepared solely for litigation as unreliable). This factor is significant because "[a court] may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office." *Id.* "That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science." *Id.* Thus, an expert's methodology that is developed and used solely for litigation creates suspicion regarding its reliability.

For example, in *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 408 (6th Cir. 2007), the Sixth Circuit held that the district court abused its discretion by admitting expert testimony based on a methodology created solely for litigation purposes and, as a result, remanded the case for a new trial. The court found no evidence that the expert's methodology had been tested, subjected to peer review, or gained general acceptance. *Id.* These failures coupled with the fact that the expert had "not only created his report for purposes of litigation,

but that he created the precise methodology at issue for that purpose as well" supported the court's conclusion that the expert's testimony was unreliable under *Daubert*. *Id.* Indeed, the court noted that "[w]e have been suspicious of methodologies created for the purpose of litigation, because 'expert witnesses are not necessarily always unbiased scientists.'" *Id.* (quoting *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1352 (6th Cir. 1992)).

Applying these principles to the Model relied upon by Ms. Thomas and Dr. LaCasse, the option calculation methodology advocated by each fails to pass muster under Ohio's version of the *Daubert* test. The deposition testimony of these witnesses demonstrates that the Model – and the models on which the Model has been derived – have never been used in any context relating to POLR risk other than AEP Ohio's attempt to justify a POLR charge in litigation before the Commission. Ms. Thomas could not identify any case, other than this case and the *AEP Ohio ESP I Remand* case, where the Model or the Black model had been used:

> Q. So would it be fair to say that you cannot say whether anyone within the AEP companies has used the Black model for purposes other than this case or the ESP I case.
>
> A. I don't know. [Thomas Depo. at 20:7-11.]
>
> * * *
>
> Q. Now, in your study of the Black model are you aware of any case other than the ESP I case and this case in which that model, the Black model, has been used to identify the cost involved in the risks—the cost of the risks involved in the POLR service?
>
> A. I am—no, I am not aware of where that's specifically been used. [20:15-22.]
>
> * * *
>
> Q. Can you tell me of anything you read that gave you the view that the POLR risk equals the valuation of the option as calculated in using the Black option?

A. I don't recall. [148:23-24; 149:1-3.]

Similarly, Dr. LaCasse's testimony reveals that the Model in its present context – the so-called "constrained option model" – has been developed solely for use in this case and in the *AEP Ohio ESP I Remand* case, and further, that she is unaware of any confirmatory testing of the Model relevant to the instant cases:

Q. And in all of the auctions that you conducted did you ever examine the methodologies used by bidders to measure the costs associated with shopping?

A. No. [Lacasse Dep. at 20:9-13.]

* * *

Q. Did you or others at NERA test alternative assumptions or inputs?

A. I did not.

Q. Do you know if anyone else at NERA did?

A. I don't know.

Q. Did you or others at NERA examine the constraints in the formula to ensure that they accurately reflected all Ohio switching constraints?

A. I don't believe so. [43:13-21.]

* * *

Q. So you have not reviewed the actual formula to determine whether it appropriately included the shopping constraints that exist in Ohio law.

A. That's correct. [45:14-18.]

* * *

Q. Did you check AEP's calculation of the volatility?

A. I did not.

Q. Did you check AEP's calculation of any of the inputs into the Black model?

A. No. [46:23-24; 47:1-4.]

Q. Have you personally run the Black model proposed by AEP in this case to verify that the outcome testified on by Witness Thomas is correct?

A. No. [52:4-7.]

Pursuant to Rule 702(C), the portions of Witnesses Thomas's and LaCasse's direct testimony addressing the use of the Model to calculate the value of the POLR obligation should thus be stricken.

D. Direct, Expert Testimony to Be Stricken

In light of Ms. Thomas's and Dr. LaCasse's failure to meet the qualification requirements of Rule 702(B) and the reliability requirements of Rule 702(C), FES respectfully requests that the following portions of their direct testimony involving the Model be stricken:

1. Witness Thomas's Direct Testimony (filed Jan. 27, 2011):

- Page 17, Lines 3 to 15
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2. Witness Thomas's Supplemental Direct Testimony (filed July 6, 2011):

- Page 14, Lines 14 to 18
- Page 16, Lines 1 to 11
- Page 18, Lines 1 to 12

3. Witness LaCasse's Corrected Direct Testimony (filed July 8, 2011)[1]:

- Page 13, Lines 7 to 13
- Page 14, Lines 3 to 9

[1] Dr. LaCasse's corrected direct testimony replaces her original direct testimony filed on July 6, 2011. AEP Ohio filed Dr. LaCasse's corrected direct testimony on July 8, 2011 as an exhibit to its *Motion of Columbus Power Company and Ohio Power Company for Leave to File Inadvertently Omitted Pages of Testimony and Request for Expedited Ruling* which the Attorney Examiner granted in the Entry dated July 22, 2011, p. 3.

- Page 14, Lines 12 to 14
- Page 15, Lines 6 to 11
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- Page 16, Lines 6 to 10
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III. CONCLUSION

For the foregoing reasons, the Commission should strike those portions of the direct, expert testimony of Ms. Thomas and Dr. LaCasse that address the use of the Model to calculate the value of AEP Ohio's POLR obligation for the proposed 2012 to 2014 ESP.

Dated: August 30, 2011

Respectfully submitted,

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ALI LOTFI-FARD, ET AL., Plaintiffs-appellants -vs- FIRST FEDERAL OF LAKEWOOD, Defendant-appellee

NO. 87207

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2006 Ohio 3727*; *2006 Ohio App. LEXIS 3686

July 20, 2006, Date of Announcement of Decision

PRIOR HISTORY: **[**1]** CHARACTER OF PROCEEDING: Civil appeal from the Court of Common Pleas. Case No. CV-513546.

DISPOSITION: Affirmed.

COUNSEL: For Plaintiffs-Appellants: SAEID B. AMINI, ESQ., Cleveland, Ohio.

For Defendant-Appellee: ROBERT C. MCCLELLAND, ESQ., NICOLE M. HOLT, ESQ., RADEMAKER, MATTY, MCCLELLAND & GREVE, Cleveland, Ohio.

JUDGES: ANN DYKE, ADMINISTRATIVE JUDGE. JAMES J. SWEENEY, J., AND ANTHONY O. CALABRESE, JR., J., CONCUR.

OPINION BY: ANN DYKE

OPINION

JOURNAL ENTRY AND OPINION

ANN DYKE, A.J.:

[*P1] Plaintiffs-Appellants, Ali and Pardis Lotfi-Fard ("Appellants") appeal from various decisions of the trial court. For the reasons set forth below, we affirm.

[*P2] On October 29, 2003, Appellants filed a complaint against Defendant-Appellee, First Federal of Lakewood ("Appellee") asserting claims of breach of contract, unjust enrichment and fraud and bad faith dealing. The alleged claims arose out of a loan agreement between Appellants and Appellee.

[*P3] After discovery, Appellee filed a motion for summary judgment on September 1, 2004. Soon thereafter, on September 29, 2004, Appellants filed a motion for class certification, which Appellee opposed.

[*P4] On October 19, 2004, the trial court [**2] conducted a final pretrial hearing, at which time the court denied Appellee's motion for summary judgment as well as Appellants' motion for class certification. The court further referred the matter to arbitration which was held on April 19, 2005. Appellants appealed the arbitration award and the case was returned to the trial court.

[*P5] The trial court scheduled the case for trial for September 26, 2005. Prior to trial, Appellee filed a number of motions in limine: one motion sought to disqualify Appellants' expert witness; one sought to preclude Appellants from offering any testimony and/or evidence regarding the lawsuit between Dr. Hariri and Appellants to establish damages; one sought to preclude the testimony of James Elwell, Esq.; and one sought to disqualify Appellants' accountant from testifying as to Appellants' interest payments on the undisbursed loan.

[*P6] On September 26, 2005, the morning of trial, the trial judge referred the case to the administrative judge for a trial by a visiting judge. That afternoon, the visiting judge impaneled a jury, granted Appellee's motion in limine to preclude Appellants from offering any testimony or evidence regarding the [**3] lawsuit between Dr. Hariri and Appellants, and reserved ruling on the remaining motions in limine pending voir dire of the witnesses.

[*P7] After hearing the testimony of Ali Lofti-Fard, the visiting judge conducted a voir dire of Appellants' expert, Rogelio Navarro ("Navarro"), in order to ascertain his qualifications and ultimately rule upon Appellee's motion in limine to exclude his testimony. Based upon the extensive testimony provided by Navarro, the visiting judge found Navarro lacked sufficient qualifications to testify as to banking industry standards in the United States. Therefore, the visiting judge disqualified Navarro as an expert witness and granted Appellee's motion in limine.

[*P8] As previously stated, Appellants offered the testimony of Ali Lotfi-Fard. Appellants also proffered the testimony of the following witnesses: James Elwell, Esq., Roy Schultz, Ali Mohammadpour, Jacqueline McLucas, David Shaw, Michael Berichon, and Paris Lotfi-Fard. A brief synopsis of the testimony follows with a detailed account of the testimony being discussed within the assigned errors.

[*P9] On or about June 7, 1999, Appellants signed and executed a commercial loan application [**4] with Appellee ("Loan Application"). In the Loan Application, Appellants sought financing in the amount of $ 207,900 in order to pay the remaining balance of a land contract, as well as to renovate a building located on Detroit Avenue in Cleveland, Ohio that contained several commercial storefronts and apartment suites.

[*P10] In the Loan Application, Appellants agreed to the following:

[*P11] "1) Withholding of $ 30,000 of Loan Proceeds until FFL receives verification of repairs to property; 2) Withholding of $ 1,200 of Loan Proceeds until FFL receives verification of boiler repairs being completed 3) $ 75.00 Fee per Inspection; 4) Mortgage placed on subject property at 9406-9424 Detroit Ave., Cleveland, OH; 5) Cross-collateralize principal's residence located at 2243 Georgia Ave., Westlake, OH; 6) Signatures (Guarantees) of Ali-Lofti-Fard & Pardis Lofti-Fard; 7) Hold $ 15,000 for repairs of 9 suites ($ 1,700 per suite)."

[*P12] Appellee approved the Loan Application on July 2, 1999. Consequently, on July 20, 1999, Appellants executed an Adjustable Rate Mortgage Note ("Mortgage Note") and Open-End Mortgage ("Mortgage") in favor of Appellee.

[*P13] Roy Schutz [**5] testified that, per the terms of the Loan Application, he was to inspect the Detroit Avenue property and report to Appellee the status of the repairs. Roy Schultz explained that if the repairs were complete, Appellee then would release the withheld funds accordingly. If the repairs were not complete, Appellee would retain the funds until verification of the repairs. Michael Berichon testified that the withheld loan proceeds were placed in a separate loan-in-process escrow account.

[*P14] Schultz testified that he was able to view a number of areas of the property and that he verified that some repairs were completed in these areas. Consequently, Appellee released $ 13,450.00 to Appellants in July, 2000.

Appellee attempted to release another $ 8,875.00 in June of 2003, but Appellants denied the funds. Schultz further testified that he was unable to verify the completion of repairs to other areas of the property until July of 2004. Therefore, it was not until that time that Appellee released the balance of the withheld loan proceeds to Appellants.

[*P15] After the summation of Appellants' case, Appellee moved for directed verdict on all claims asserted in Appellants' complaint. **[**6]** The trial court granted Appellee's motions as to all claims.

[*P16] Appellants now appeal and assert eight assignments of error for our review. Appellee asserts one cross-assignment of error for review. We will address Appellants' assignments of error first.

[*P17] Appellants' first assignment of error states:

[*P18] "The trial court erred as a matter of law and abused its discretion in summarily denying Plaintiffs-Appellants' Motion for Class Certification without articulating its rationale as set forth in *Civ.R. 23(B)*."

[*P19] In this assignment of error, Appellants maintain that the trial court erred in denying their motion for class certification. For the following reasons, we find that Appellants have waived their rights to appeal on this issue.

[*P20] Final orders are defined in *R.C. 2505.02* which provides in relevant part as follows:

[*P21] "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

[*P22] "* * *

[*P23] "(5) An order that determines that an action may or may not be maintained as a **[**7]** class action;"

[*P24] Accordingly, pursuant to *R.C. 2505.02(B)(5)*, an order of a trial court denying a party class action certification is a final, appealable order. Furthermore, *App.R. 4(A)* mandates that a party file its appeal within thirty days of a final appealable order. Thus, an order of a trial court determining that an action shall not be maintained as a class action, is a final appealable order, and a party must appeal such an order within 30 days of the date of entry pursuant to *App.R. 4(A)*.

[*P25] In the instant action, the court denied Appellants' motion for class certification in a judgment entry dated October 19, 2004. Pursuant to *R.C. 2505.02(B)(5)*, such an order is final and appealable. Accordingly, Appellants had 30 days to file a notice of appeal with this court. Appellants, however, did not file their notice of appeal of this issue until October 26, 2005, more than one year after the final, appealable order. As Appellants have failed to timely appeal the trial court's denial of class certification, they have waived their right to challenge this issue on appeal. **[**8]** Appellants' first assignment of error is without merit.

[*P26] Appellants' second assignment of error states:

[*P27] "The presiding visiting trial Judge abused its discretion and erred to the prejudice of Plaintiffs-Appellants by granting Defendant's motion in limine and disqualified Plaintiffs' expert witness."

[*P28] As an initial matter, we note that Appellee maintains that Appellants waived their right to appeal the issue of Navarro's disqualification because Appellants failed to proffer the substance of Navarro's testimony. A review of the record, however, reveals that Appellants proffered, during voir dire of Navarro, which occurred during the trial but out of the presence of the jury, that Navarro would testify as to banking industry standards, more specifically, "whether or not somebody can withhold loan and charge interest." Accordingly, Appellants did not waive their appeal of the trial court's disqualification of Navarro to testify as an expert witness.

[*P29] In this assignment of error, Appellants assert that the trial court erred in finding that Rogerio Navarro

("Navarro") was not qualified as an expert to testify concerning banking industry standards.

[9]** **[*P30]** Admissibility of expert testimony is determined on a case by case basis, *State v. Clark (1995), 101 Ohio App.3d 389, 410, 655 N.E.2d 795*, and the trial court is vested with discretion to make this determination, in accordance with the terms of *Evid.R. 702*. Id.; *State v. Nemeth (1998), 82 Ohio St.3d 202, 207, 1998 Ohio 376, 694 N.E.2d 1332*; *Alexander v. Mt. Carmel Med. Ctr. (1978), 56 Ohio St.2d 155, 159, 383 N.E.2d 564*. Thus, an appellate court must not reverse a trial court's determination as to the qualification of an expert witness absent a clear abuse of discretion. *Ohio Turnpike Comm. v. Ellis (1955), 164 Ohio St. 377, 131 N.E.2d 397*, paragraph eight of the syllabus. An abuse of discretion connotes more than mere error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144*.

[*P31] Pursuant to *Evid.R. 104(A)*, the trial court must make a threshold determination regarding the qualification of a person to be an expert witness **[**10]** before it permits expert testimony. See *Scott v. Yates (1994), 71 Ohio St.3d 219, 221, 1994 Ohio 462, 643 N.E.2d 105*. Pursuant to *Evid.R. 702*, a witness may testify as an expert if he or she is qualified as an expert by virtue of specialized knowledge, skill, experience, training or education regarding the subject matter of the testimony. *Evid.R. 702(B)*; *Nichols v. Hanzel (1996), 110 Ohio App.3d 591, 597, 674 N.E.2d 1237*. The Supreme Court of Ohio in *State Auto Mut. Ins. Co. v. Chrysler Corp. (1973), 36 Ohio St. 2d 151, 160, 304 N.E.2d 891*, expounded the test for qualification of an expert witness by quoting 21 Ohio Jurisprudence 2d 429, Evidence, Section 421:

[*P32] "* * * His qualification [as an expert witness] depends upon his possession of special knowledge which he can impart to the jury, and which will assist them in regard to a pertinent matter, which he must have acquired either by study of recognized authorities on the subject or by practical experience, and it must appear that he has an option of his own, or is able to form one, upon the matter in question."

[*P33] Reviewing **[**11]** Navarro's testimony within reference to *Evid.R. 702* we note, as a preliminary matter, that Navarro admitted to never having testified as an expert in court, nor had he ever been qualified as an expert by a court of law. As to his specialized knowledge, skill, experience, training or education regarding the subject matter, the record reveals that Navarro was employed in 1970 through 1983 in the banking industry, but that nearly all his professional experience during that time occurred in foreign countries. Accordingly, Navarro's experience required him to be knowledgeable in banking regulations of those countries. In fact, Navarro testified that he had never worked as a bank regulator, bank auditor, or loan officer in the United States.

[*P34] Thus, we believe that while Navarro may be qualified to testify as to banking industry standards in foreign countries, he is not properly qualified to testify as an expert in the instant matter because this case involves a commercial loan entered into between U.S. citizens and a federally chartered U.S. savings and loan association. Accordingly, we find that the trial court correctly determined that Navarro lacked **[**12]** sufficient qualifications to opine regarding banking industry standards in the U.S. Appellants' second assignment of error is without merit.

[*P35] In the interests of convenience, we will now address Appellants' fourth, fifth and sixth assignments of error before proceeding to Appellants' third assignment of error.

[*P36] In Appellants' fourth, fifth and sixth assignments of error, Appellants assert that the trial court erred in granting Appellee's motion for directed verdict as to all three of Appellants' causes of action.

[*P37] As a procedural matter, we review de novo a court's ruling on a motion for directed verdict. *Hardy v. Gen. Motors Corp. (1998), 126 Ohio App. 3d 455, 462, 710 N.E.2d 764*, citing *Howell v. Dayton Power & Light Co. (1995), 102 Ohio App.3d 6, 13, 656 N.E.2d 957*. As *Civ.R. 50(A)(4)* provides:

[*P38] "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence **[**13]** submitted and that conclusion is

adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

[*P39] A motion for a directed verdict tests the legal sufficiency of the evidence presented by a plaintiff. *Balog v. Matteo Aluminum, Inc., Cuyahoga App. No. 82090, 2003 Ohio 4937.* In ruling upon a motion for directed verdict, an appellate court must not consider the weight of the evidence, nor the credibility of witnesses. *Cater v. Cleveland, 83 Ohio St.3d 24, 33, 1998 Ohio 421, 697 N.E.2d 610*, citing *Strother v. Hutchinson (1981), 67 Ohio St.2d 282, 423 N.E.2d 467.* Further, the trial court must construe the evidence in a light most favorable to the non-moving party. *Rinehart v. Toledo Blade Co. (1985), 21 Ohio App.3d 274, 21 Ohio B. 345, 487 N.E.2d 920.* Hence, the court must deny a motion for directed verdict if substantial competent evidence exists from which reasonable minds might reach different conclusions. *Ramage v. Cent. Ohio Emergency Serv., Inc., 64 Ohio St.3d 97, 109, 1992 Ohio 109, 592 N.E.2d 828.*

[*P40] Keeping the aforementioned standard **[**14]** of review in mind, we now review Appellants' fourth, fifth and sixth assignments of error.

[*P41] Appellants' fourth assignment of error states:

[*P42] "The presiding visiting trial Judge erred to the prejudice of Plaintiffs-Appellants by granting Defendant's Motion for Directed Verdict in dismissing Plaintiffs' Contract Claim."

[*P43] For the following reasons, we find that the trial court properly granted Appellee's motion for directed verdict as to Appellants' breach of contract claim.

[*P44] The elements of a cause of action for breach of contract are: "'the existence of a contract; performance by the plaintiff; breach by the defendant; and damage or loss to the plaintiff.'" *Powell v. Grant Med. Ctr., 148 Ohio App.3d 1, 10, 2002 Ohio 443, 771 N.E.2d 874*, quoting *Nilavar v. Osborn (2000), 137 Ohio App.3d 469, 483, 738 N.E.2d 1271.*

[*P45] In the instant matter, the record reveals that Appellants did not present sufficient evidence to establish a claim for breach of contract in that Appellants failed to establish that Appellee breached the loan agreement.

[*P46] The record demonstrates that the parties agreed that **[**15]** Appellee would withhold $ 46,200 from the loan proceeds until Appellee verified that Appellants made various repairs to the property. Appellants assert that this condition was not part of the loan agreement and that they did not know what they needed to do to receive the withheld loan proceeds. A review of the transcript, however, reveals that such an assertion is in direct contradiction to the admissions in their testimony at trial.

[*P47] Ali Lofti-Fard admitted under oath that he understood that a portion of the loan proceeds would be withheld. First, he testified that he signed the Loan Application that stated that loan proceeds would be withheld. In fact, he admitted that the conditions prescribed in the Loan Application were proffered by him. He also testified that he understood that $ 1200 would be withheld until boiler repairs were made and that $ 15,000 would be withheld until the nine apartment suites were repaired. Furthermore, he admitted under oath that he signed the settlement statement and knew that part of the agreement was that $ 46,200 was being withheld for repairs of the property.

[*P48] Pardis Lofti-Fard also testified that prior to signing the loan **[**16]** agreement, Michael Berichon "told us they going to withhold some money until we finish."

[*P49] In light of Appellants' own admissions, it is clear that Appellants understood and agreed to several conditions of the loan agreement requiring Appellee to withhold funds until repairs to the property were completed. Thus, we find Appellants' argument that Appellee acted in bad faith in withholding the loan proceeds until Appellants completed the repairs without merit. Appellee cannot act in bad faith when it is merely performing under the terms of the contract. Accordingly, as Appellants failed to establish that Appellee breached the contract, an essential element of a breach of contract claim, the trial court was correct in granting Appellee's motion for directed verdict. Appellants' fourth assignment of error is without merit.

[*P50] Appellants' fifth assignment of error states:

[*P51] "The presiding visiting trial Judge erred to the prejudice of Plaintiffs-Appellants by granting Defendant's Motion for Directed Verdict in dismissing Plaintiffs' Unjust Enrichment Claim."

[*P52] One is unjustly enriched if the retention of a benefit would be unjust or one profits **[**17]** or enriches himself inequitably at another's expense. *McClanahan v. McClanahan (1946), 79 Ohio App. 231, 233, 72 N.E.2d 798.* To maintain a cause of action for unjust enrichment, "[i]t is not sufficient for the plaintiff to show that it has conferred a benefit upon the defendants. It must go further and show that under the circumstances it has a superior equity so that, as against it, it would be unconscionable for the defendant to retain the benefit." *Cincinnati v. Fox (1943), 71 Ohio App. 233, 239, 38 Ohio Law Abs. 59, 49 N.E.2d 69.*

[*P53] Appellants in the present action failed to show that Appellee was unjustly enriched at their expense. Appellants contend that Appellee was unjustly enriched three times: first by withholding or re-lending the undisbursed loan proceeds; second, by receiving interest on the undisbursed loan proceeds; and third, by re-lending or reinvesting the interests it received from Appellants' undisbursed funds. We find each of their assertions without merit.

[*P54] First, in regards to Appellants' assertions that Appellee reinvested or re-lended either the withheld loan proceeds or the interest on the withheld loan proceeds, a review **[**18]** of the record reveals that Appellants did not offer any evidence establishing that this money was either reinvested or re-lended. In fact, Michael Berichon testified that the withheld funds were placed in a loan-in-process escrow account. Accordingly, without any evidence establishing Appellants' assertions, their claim of unjust enrichment on this ground is without merit.

[*P55] We also disagree with Appellants' assertion that Appellee was unjustly enriched by receiving interest on the withheld loan proceeds. Appellants maintain that they were not aware that Appellee would be receiving interest on the withheld loan proceeds. A review of that Mortgage Note, however, establishes that the Note is a "Fully Amortizing Loan" and that principal and interest will be paid for life of the entire amount of the loan. Appellants do not dispute that they signed the Mortgage Note. Therefore, their argument lacks merit because Appellee failed to produce any evidence establishing Appellee received an unjust benefit because the benefit they received is that which the parties agreed to. Consequently, dismissal was appropriate as it pertained to Appellants' claim for unjust enrichment. Therefore, **[**19]** their fifth assignment of error is without merit.

[*P56] Appellants' sixth assignment of error states:

[*P57] "The presiding visiting trial Judge erred to the prejudice of Plaintiffs-Appellants by granting Defendant's Motion for Directed Verdict in dismissing Plaintiffs' Bad Faith Dealing and Fraud Claim."

[*P58] In order to recover on a claim of fraud, the plaintiff must present evidence which demonstrates that following:

[*P59] "(a) A representation or, where there is a duty to disclose, concealment of fact, (b) which is material to the transaction at hand, (c) 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, (d) with the intent of misleading another to rely upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance."

[*P60] *Williams v. Aetna Fin. Co. (1998), 83 Ohio St.3d 464, 475, 1998 Ohio 294, 700 N.E.2d 859*, citing *Cohen v. Lamko, Inc. (1984), 10 Ohio St.3d 167, 169, 10 Ohio B. 500, 462 N.E.2d 407.* All these elements must be supported by evidence **[**20]** or the cause of action cannot be maintained. *See Burr v. Stark Cty. Bd. of Commrs. (1986), 23 Ohio St. 3d 69, 23 Ohio B. 200, 491 N.E.2d 1101*, paragraph two of the syllabus.

[*P61] In the case sub judice, Appellants assert that they were not aware that Appellee would withhold loan

proceeds until repairs on the property were completed. They further aver Appellee never disclosed to them that they were going to be charged interest on the withheld loan proceeds. A review of the record, however, reveals that Appellants have failed to set forth specific facts showing a genuine issue of fact regarding fraud on the part of Appellee.

[*P62] As stated previously, Appellants acknowledged that they signed the Loan Application, and in fact, proposed the conditions listed on the Application. Pardis Lofti-Fard also admitted under oath that prior to signing the loan agreement, Michael Berichon "told us they going to withhold some money until we finish." Accordingly, Appellants are unable to establish that Appellee concealed the fact that it would withhold loan proceeds until repairs to the property are completed.

[*P63] Additionally, the record reveals that Appellants admitted to **[**21]** signing the Mortgage Note, which clearly states that it is a "Fully Amortizing Loan" and that principal and interest must be paid for the life of the entire amount of the loan. Again, in light of this evidence, we find that Appellants failed to produce sufficient evidence establishing any alleged concealment on the part of Appellees as to the issue of charging interest on the withheld loan proceeds. Accordingly, Appellants' sixth assignment of error is without merit.

[*P64] We now return to Appellants' third assignment of error, which states:

[*P65] "The presiding visiting trial Judge abused its discretion and erred to the prejudice of Plaintiffs-Appellants by granting Defendant's motion in limine to exclude all the evidence relating to a lawsuit filed by Dr. Hariri against Plaintiffs' and their lost profits."

[*P66] First, we note that Appellee maintains that Appellants waived their right to pursue this issue on appeal because Appellants, having been restricted from introducing evidence as a result of a motion in limine, must seek to introduce the evidence by proffer or some other manner at trial. We decline to accept Appellee's contention. Appellants did not waive **[**22]** their right to assert this issue on appeal because, during the trial of this matter, they attempted to introduce evidence of the prior lawsuit, but were denied admissibility by the trial judge.

[*P67] We now proceed to consider whether the trial court abused its discretion in disallowing the admission of evidence concerning the prior lawsuit between Appellants and Dr. Hariri to show the economic losses resulting from Appellee's alleged breach of contract.

[*P68] As a procedural matter, we note that a trial court has broad discretion in determining whether to admit or exclude evidence. *State v. Lyles (1989), 42 Ohio St.3d 98, 99, 537 N.E.2d 221.* Thus, absent an abuse of discretion that materially prejudices a party, an appellate court will not reverse an evidentiary determination of a trial court. Id.; see, also, *Weiner, Orkin, Abbate & Suit Co. L.P.A. v. Nutter (1992), 84 Ohio App.3d 582, 589, 617 N.E.2d 756.* An abuse of discretion connotes more than an error in law or judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd. (1993), 66 Ohio St.3d 619, 621, 1993 Ohio 122, 614 N.E.2d 748.* **[**23]** When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

[*P69] We find that the trial court did not abuse its discretion in refusing to admit evidence of the Hariri case as the trial court's refusal did not materially prejudice Appellants. In *Fada v. Information Sys. & Networks Corp. (1994), 98 Ohio App.3d 785, 792, 649 N.E.2d 904*, the court stated:

[*P70] "The existence of error does not require a disturbance of the judgment unless the error is materially prejudicial to the complaining party. *McQueen v. Goldey (1984), 20 Ohio App.3d 41, 20 Ohio B. Rep. 44, 484 N.E.2d 712.* Pursuant to *Civ.R. 61*, the error must affect the substantial rights of the complaining party or substantial justice must not have been done. It is well established that errors 'will not be deemed prejudicial where their avoidance would not have changed the result of the proceedings.' *Walters v. Homberg (1914), 3 Ohio App. 326, 25 Ohio Cir. Dec. 337, 19 Ohio C.A. 514, 19 Ohio C.C. (n.s.) 514*, syllabus; *Surovec v. LaCouture (1992), 82 Ohio App.3d 416, 612 N.E.2d 501.*"

[*P71] In the instant matter, **[**24]** any refusal to admit evidence of the Hariri case to prove damages did not change the outcome of the directed verdicts. As decided above, the trial court correctly granted a directed verdict as to each of Appellants' causes of action not based on the fact that they failed to prove damages, but for the lack of sufficient evidence establishing other essential elements in each cause of action. Accordingly, even if we were to agree with Appellants' assertions that the trial court erred in not allowing the introduction of evidence regarding the Hariri lawsuit to prove damages, such an alleged error was harmless and did not affect the outcome of the trial court's decision to dismiss Appellants' causes of action. Accordingly, Appellants' third assignment of error is without merit.

[*P72] Because Appellants' seventh and eighth assignments of errors are interrelated, we will address both simultaneously.

[*P73] Appellants' seventh assignment of error states:

[*P74] "The presiding visiting trial Judge committed a reversible error when it failed to disclose his past position in the City of Lakewood and connections to the Defendant bank."

[*P75] Appellants' eighth assignment **[**25]** of error states:

[*P76] "The presiding visiting trial Judge erred by not recusing himself from the case when his actions and statement showed a clear bias and prejudice against Plaintiffs, thus violating their right to a fair trial."

[*P77] Within these assignments of error, Appellants argue that the trial judge should have recused himself from the case because of his alleged close ties to Appellee. Appellants further assert that the trial judge erred in not recusing himself from the case when his actions and statement showed a clear bias and prejudice. We, however, are without authority to address Appellants' assertions.

[*P78] Pursuant to *Section 5(C) of Article IV of the Ohio Constitution*, the power to pass upon disqualification of any judge of the court of common pleas is vested solely with the Chief Justice of the Supreme Court of Ohio or his designee. *Beer v. Griffith (1978), 54 Ohio St.2d 440, 441-442, 377 N.E.2d 775.* Therefore, a court of appeals lacks the authority to pass upon the disqualification of a judge or void a judgment of the trial court on that basis. Id.; see, also, *Furlan v. Saloka, Cuyahoga App. No. 83186, 2004 Ohio 1250.* **[**26]** Accordingly, the proper procedure for a party who believes that a judge is biased and should not preside over a case is to file an affidavit of disqualification with the Supreme Court of Ohio. *Furlan, supra.* As we are without authority to void a judgment of the trial court based upon the trial judge's alleged bias or prejudice, Appellants' seventh and eighth assignments of error are overruled.

[*P79] Appellee's cross-assignment of error states:

[*P80] "The trial judge erred by not granting Defendant-Appellee's Motion for Summary Judgment."

[*P81] Appellee filed a brief as Defendant-Appellee. In that brief, Appellee raises an assignment of error concerning the trial court's denial of its motion for summary judgment. We decline to address Appellee's assignment of error pursuant to the Supreme Court of Ohio's decision in *Pang v. Minch (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313.* In that case, the court held:

[*P82] "Thus, where the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in the brief thereof, *App.R. 12(B)* **[**27]** requires the appellate court to refrain from consideration of errors assigned and argued in the brief of appellee on cross-appeal which, given the disposition of the case by the appellate court, are not prejudicial to the appellee. The judgment or final order of the trial court should, under such circumstances, be affirmed as a matter of law by the court of appeals."

[*P83] As the trial court in the instant matter did not prejudice Appellants in any of the assertions assigned in their brief, we decline to address Appellee's cross-appeal. Accordingly, we affirm the judgment of the trial court.

Judgment affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas 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.*JAMES J. SWEENEY, J., AND ANTHONY O. CALABRESE, JR., J., CONCUR.

ANN DYKE

ADMINISTRATIVE JUDGE

N.B. This entry is an announcement of the court's **[**28]** decision. See *App.R.22(B)*, *22(D)* and *26(A)*; *Loc.App.R.22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App. R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also *S.Ct.Prac.R. II, Section 2(A)(1)*.

STATE OF OHIO, Plaintiff-Appellee, - vs - JAMES MITCHELL, Defendant-Appellant.

CASE NO. 97-P-0074

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, PORTAGE COUNTY

1998 Ohio App. LEXIS 5809

December 4, 1998, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas. Case No. 96 CR 0223.

DISPOSITION: JUDGEMENT: Reversed and remanded.

COUNSEL: VICTOR V. VIGLUICCI, PORTAGE COUNTY PROSECUTOR, MARRETT W. HANNA, ASSISTANT PROSECUTOR, Ravenna, OH, (For Plaintiff-Appellee).

ATTY. MICHAEL A. PARTLOW, Cleveland, OH, (For Defendant-Appellant).

JUDGES: HON. DONALD R. FORD, P.J., HON. ROBERT A. NADER, J., HON. WILLIAM M. O'NEILL, J. FORD, P.J., O'NEILL, J., concur.

OPINION BY: ROBERT A. NADER

OPINION

OPINION

NADER, J.

On September 17, 1996, defendant-appellant, James Mitchell, was indicted on one count of rape, *R.C. 2907.02(A)(2)* and*(B)*, and one count of aggravated burglary, *R.C. 2911.11(A)(1)* and/or *(3)*. The indictment stemmed from acts allegedly committed on August 28, 1993. At his arraignment, appellant pled not guilty. He was ordered to submit to body exemplars for comparison with evidence gathered at the scene of the alleged rape and aggravated burglary.

Appellant was tried to a jury on June 11 through 13, 1997. At trial, the victim testified that early in the morning of August 28, 1993, her husband left their one bedroom apartment to go golfing. After he left, the victim locked the **[*2]** door and returned to bed. All of the windows in the apartment were left open due to the heat. At approximately 7:00 that morning, a man apparently removed the screen from one of the windows and entered the apartment. He entered the victim's bedroom with his face concealed and raped her. He then allegedly fled with several items. The victim immediately reported the rape to the police and went to Robinson Memorial Hospital for an examination. The trace evidence collected from the victim's body and from items in and around a dumpster seventy-five yards from the victim's apartment was eventually matched to appellant. His fingerprints were found on papers and other items in and around the dumpster and his DNA was consistent with that found on the victim's underwear. Several police officers and evidence experts testified at the trial. Appellant did not testify.

The jury found appellant guilty on both counts. He

was sentenced to ten to twenty-five years in prison on each count. The sentences were ordered to be served consecutively. He was also adjudged a sexual predator and notified he would be required to register as a sexual offender for the remainder of his life when he was released **[*3]** from prison.

Appellant timely appealed. He raises three assignments of error for our review:

> "[1.] The trial court committed plain error when it sentenced the defendant based on the sentencing law in effect prior to July 1, 1996, instead of the new law which took effect on July 1, 1996; the sentencing was in violation of the Ohio Constitution, *R.C. 1.58* and due process.
>
> "[2.] The trial court abused its discretion in allowing prosecution witness Kay May to testify as an expert where she was not qualified as an expert as required by *Evidence Rule 702(B).*
>
> "[3.] The trial court committed an abuse of discretion where it admitted into evidence exhibits that were not properly authenticated and identified as required by *Rule 901(A) of the Ohio Rules of Evidence.*"

For his first assignment of error, appellant claims the trial court erred in sentencing him under the more stringent sentencing requirements of pre-Senate Bill 2 law. He contends Senate Bill 2's more lenient scheme should be applied retroactively to those offenses committed before its effective date, July 1, 1996, despite its allegedly unconstitutional language to the contrary. The Supreme Court recently addressed **[*4]** this issue and upheld the constitutionality of Senate Bill 2's provision that it only applies to those offenses committed after the effective date. *State v. Rush (1998) 83 Ohio St. 3d 53, 697 N.E.2d 634.* See, also, *State v. Sprafka, 1998 Ohio App. LEXIS 1535* (Apr. 10, 1998), Lake App. No. 96-L-137, unreported, affirmed (1998), *83 Ohio St. 3d 168, 699 N.E.2d 55.* The offenses in this case were committed in August 1993, well before the enactment of Senate Bill 2. Thus, the trial court did not err in sentencing appellant under pre-Senate Bill 2 law.

The first assignment of error is without merit.

For his second assignment of error, appellant asserts the trial court erred in permitting the expert testimony of Kay May when the state did not sufficiently qualify her. We agree.

Evid.R. 702 requires an individual purporting to be an expert to be duly qualified before giving an expert opinion. The witness may be qualified by establishing she has "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony ***." *Evid.R. 702(B).* The rule does not specify the quantum of education or experience necessary to establish expertise in a given field. *State v. Browne, 1997 Ohio App. LEXIS 2810,* *12-13 (June 27, 1997), **[*5]** Lake App. No. 96-L-121, unreported. Therefore, the determination must be made on a case-by-case basis.

The qualification of an expert is a preliminary question that is left to the sound discretion of the court. *Scott v. Yates (1994), 71 Ohio St. 3d 219, 221, 643 N.E.2d 105.* We will not reverse a lower tribunal's decision to qualify an individual as an expert unless it is shown that there was an abuse of discretion. *Id.*

Kay May was called to testify regarding DNA evidence left at the scene in comparison to a sample provided by appellant. She testified that she has been a member of the Trace Evidence Department of the Cuyahoga County Coroner's Officer for seven years, working chiefly with blood. She attended the College of Wooster, the University of Michigan, the State University of South Dakota, and has a Bachelor of Science degree in Medical Technology. She also testified that she has worked in various hospital laboratories for twenty-seven years. Most of her training relating to DNA identification has been through practical application as opposed to educational seminars. She stated the Coroner's office has conducted DNA identification procedures for five years and **[*6]** has handled thirty-five hundred cases in that time. She has been qualified to testify as an expert witness in court on prior occasions.

Appellant objected to Ms. May's qualifications in relation to DNA identification, but the court overruled his objection. Ms. May then testified generally about polymerase chain reaction ("PCR") typing, as opposed to RFLP typing, in DNA analysis. She opined, after comparing the DNA left at the scene with the sample provided by appellant, that the two samples were

consistent. She stated that the markers found in both samples would be found in one in 1,606 in the black population, one in 19,409 in the caucasian population, and one in 6,992 in the hispanic population.

A review of the record reveals no testimony that Ms. May, individually, was qualified to render an opinion on DNA evidence. Although she testified she has a Bachelor of Science degree in Medical Technology, she did not state that this degree entailed education in DNA analysis. Moreover, she testified that the Coroner's Office conducted thousands of DNA tests, but she did not testify that she was involved in those tests. She testified that she worked primarily with "blood," but she did not [*7] testify that she performed DNA tests on the blood with which she worked. Finally, even though she stated she has been qualified as an expert in court before, she did not state that she was qualified as an expert in DNA analysis. Resultantly, it was an abuse of discretion for the court, on this testimony, to qualify Ms. May as an expert in DNA. [1]

1 We would note, however, that the fact that most of Ms. May's claimed expertise came not from formal education, but from practical application, would not render her incompetent to give an expert opinion. In fact, *Evid.R. 702* recognizes that expertise may be gained through experience.

Removing the DNA evidence from this case would have a great impact on the determination of appellant's guilt or innocence. The DNA evidence is the only evidence directly tying appellant to the victim and her apartment. The victim was unable to identify appellant as her assailant. Even though appellant's fingerprints were found on the items discovered in a dumpster near the victim's [*8] apartment, the victim did not testify that the items that contained appellant's fingerprints removed from the dumpster were hers or were in her apartment before the incident. As will be discussed *infra,* this deficiency in testimony does not render the actual items inadmissible; however, there is no testimony from one with personal knowledge that connects the items to the victim or the victim's apartment on the day of the incident. The jury could draw an inference from the proximity of the items, some of which contained the victim's name and her mother's name, to the victim's apartment, that they were hers and were in her apartment when the incident took place. But, this inference is by no means certain. We conclude the error committed by the trial court in admitting the DNA testimony by Ms. May was prejudicial because we cannot say the outcome of the trial, without the DNA evidence, would clearly have remained the same, and because our confidence in the verdict has been undermined.

The second assignment of error is sustained.

Although it is now rendered moot by our disposition of the second assignment of error, we will address appellant's third assignment of error; in which appellant [*9] claims the trial court erred in admitting certain unauthenticated evidence. Specifically, appellant challenges the admission of three photographs of items found in a dumpster near the victim's apartment (Exhibits 10, 11, and 12) and the admission of the actual items found in the dumpster (Exhibits 15, 15-A-1, and 16). He contends the victim did not identify the items in the dumpster as those belonging to her. We would note that appellant did not object to the testimony that appellant's fingerprints were found on the items in the dumpster, and appellant does not raise that issue in this appeal.

Appellant correctly asserts that all physical evidence must be authenticated before it may be admitted into evidence. *Evid.R. 901.* To authenticate evidence, a witness must be produced who will testify that the item sought to be admitted is what it is claimed to be. *Evid.R. 901(B)(1).*

For photographs, a witness must testify that he or she has personal knowledge of the subject of the photograph and that the photograph is a fair and accurate representation of its subject. *State v. Hannah (1978), 54 Ohio St. 2d 84, 88, 374 N.E.2d 1359; State v. Strock, 1998 Ohio App. LEXIS 4544,* *11 (Sept. 25, 1998), Trumbull App. No. 97-T-0077, [*10] unreported, at 9. Exhibits 10, 11, and 12 are photographs of items found in a dumpster near the victim's apartment. Patrolman Donald Miller and Sergeant Ronald Piatt testified that they looked in the dumpster when they arrived on the scene and that the photographs fairly and accurately represent what they saw in the dumpster. No more was required to authenticate the photographs.

The remaining exhibits were the actual items recovered from the dumpster. Again, Patrolman Miller and Sergeant Piatt testified at trial that the items in those exhibits were the ones found in the dumpster near the victim's apartment. For the purposes of establishing the

items introduced in court were those found in the dumpster, no more was required to authenticate them.

Appellant seems to claim that the victim must testify that the items were hers before they may be admitted. Although, as discussed previously, it would be preferable from the state's perspective to have the victim testify as to her ownership of the items, it was not necessary *to authenticate them as the items found in the dumpster.* The jury was free to conclude that the items found in the dumpster, some of which displayed the victim's **[*11]** name or her mother's name, did or did not belong to the victim.

Additionally, the items were not necessary to establish appellant's guilt on either the rape charge or the aggravated burglary charge. A conviction for rape requires proof that the defendant engaged in unconsensual sexual conduct with the victim. *R.C. 2907.02(A)(2).* A conviction for aggravated burglary requires proof that the defendant trespassed in an occupied structure with the purpose to commit a felony when either the offender inflicts, attempts, or threatens physical harm or the occupied structure is a habitation in which a person is or is likely to be present. *R.C. 2911.11(A).* The items found in the dumpster were not essential to prove any element of either charge, but they were relevant in proving appellant was in the victim's apartment at the time of the incident.

The third assignment of error lacks merit.

In accordance with the foregoing, the judgment of the trial court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

JUDGE ROBERT A. NADER

FORD, P.J.,

O'NEILL, **[*12]** J.,

concur.