

**Newcombe Revised Code § 1293.56 *Certain oral contracts unenforceable***

The following classes of contracts are forbidden from enforcement unless there is a written memorandum:

- (a) a contract made upon consideration of marriage;
- (b) a contract for the sale of an interest in land;
- (c) a contract that is not to be performed within one year from the making thereof.

**NEWCOMBE COURT OF APPEALS**

**KANETSKY PEST CONTROL, INC., PLAINTIFF-APPELLEE,**

v.

**HORATIO ANTON, DEFENDANT-APPELLANT.**

**June 12, 2012**

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Defendant Horatio Anton appeals from the trial court’s grant of summary judgment in favor of the plaintiff, Kanetsky Pest Control. The trial court’s judgment included an award of \$150 in Kanetsky’s favor.

**Background**

The facts are largely not in dispute. Rolando Kanetsky owns and operates a pest control business. On the morning of Saturday, May 10, 2008, Kanetsky was preparing to depart from a service call on Belle Hollow Lane in Grove City. As Kanetsky sat in his van writing up his notes, he was approached by a man. Kanetsky’s van was prominently marked with his company name, logo, and contact information. Furthermore, Kanetsky was wearing a shirt with “Kanetsky Pest Control” embroidered on it.

The man, Horatio Anton, asked whether Kanetsky was in the pest control business. Kanetsky pointed to his shirt and responded in the affirmative. Anton then said something to the effect of “Please come with me, there’s an animal trapped in my crawlspace. I just live across the street.” Kanetsky followed Anton across the street to Anton’s house. Anton introduced himself and told Kanetsky that he had heard scratching sounds coming from his crawlspace. At no time did Anton or Kanetsky discuss payment for Kanetsky’s pest control services.

Kanetsky proceeded to physically inspect Anton’s crawlspace. After approximately ten minutes, Kanetsky emerged from the crawlspace, went to his truck, and returned with a small cage. He then went back into the crawlspace and emerged approximately two minutes later with a catatonic opossum in the cage. Anton inquired whether the opossum was dead, and Kanetsky explained that it was simply “playing possum” and would likely regain mobility in a matter of minutes. Kanetsky further explained that he would release the opossum into a forested area on the other side of town. Anton thanked him for removing the opossum and Kanetsky hurried off to his next appointment.

The following week, Anton received a bill in the mail for \$150 from Kanetsky Pest Control for removal of the opossum. Anton called and refused to pay the bill. After three additional bills went unanswered, Kanetsky Pest Control sued to recover \$150 for the opossum removal. The trial court entered summary



judgment in Kanetsky Pest Control’s favor. On appeal, Anton argues that he owes nothing to Kanetsky because he and Kanetsky never formed an agreement for Kanetsky’s services.

### Analysis

Even if we were to accept Anton’s argument that he and Kanetsky formed no contract, we would be compelled to affirm the trial court’s judgment in Kanetsky’s favor. Newcombe courts have long recognized restitution as a remedy separate and apart from contractual remedies.

Restitution is appropriate to the extent that one party has conferred a benefit on another party. It is immaterial whether the benefit results from the transfer of goods or services. Even in the absence of an enforceable contract, it would simply be unfair to allow one party to extract a benefit from another party in exchange for nothing.

Because restitution is based on the concept of fairness rather than on a contract, a restitution award is based on the reasonable value of the benefit conferred upon the receiving party. When it comes to measuring the reasonable value of services, the relevant inquiry is the market price of the services. In other words, the amount it would cost to obtain the same services from an alternative vendor. *See, e.g., Bryan v. Bhutimmy* (Newc. Ct. App. 1997) (calculating restitution award based on the market price of engaging a veterinarian of similar skill and training to perform the same procedure).

When Anton approached Kanetsky, Anton was not simply engaging the help of a “Good Samaritan.” Anton knew that Kanetsky was engaged in the business of controlling pests for profit. It was therefore reasonable for Kanetsky to expect compensation for his service to Anton even though the two men never discussed payment. In response to Anton’s request for help, Kanetsky conferred exactly the benefit that Anton sought: the removal of a pest from Anton’s crawlspace. Regardless of whether Anton and Kanetsky had a contract or not, it would simply be unfair to allow Anton to extract the benefit of opossum removal from Kanetsky without any compensation in return.

The trial court’s award was properly based on the reasonable market value of Kanetsky’s service. The record supports the trial court’s finding that \$150 is a reasonable rate for extracting a live animal from a crawlspace in the Grove City demographic region. If Anton had hired a competing vendor to remove the same animal, he could have expected to pay a fee in the range of \$150. Thus, we affirm the trial court’s judgment in Kanetsky Pest Control’s favor in the amount of \$150.

Affirmed.



**NEWCOMBE COURT OF APPEALS**  
**MOLLIE FROST, PLAINTIFF-APPELLANT,**

v.

**SARSAPARILLA INCHWORMS BASEBALL CLUB, DEFENDANT-APPELLEE.**

**November 26, 2018**

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Mollie Frost sued the Sarsaparilla Inchworms Baseball Club for breach of contract. Frost now appeals the trial court’s grant of summary judgment in favor of the Inchworms.

Frost is a recording artist who enjoyed momentary popularity in 2014. In December 2014, Frost was contacted by phone by the talent manager for the Sarsaparilla Inchworms, a minor-league baseball team. During that phone call, the Inchworms’s talent manager invited Frost to sing the national anthem at the Inchworms’s first home game of the following season, to be played in April 2015. Frost declined because she was scheduled for a tour in Eastern Europe during Spring 2015; however, as a fan of the Inchworms, she was generally interested in singing the national anthem at a home opener. The conversation continued. Frost and the Inchworms’s talent manager orally agreed that Frost would sing the national anthem at the first home game of the Inchworms’s 2016 season. In exchange, the Inchworms would pay Frost \$3000.

Frost’s career declined rapidly in 2015. She released an album that was critically panned. As her fan base decreased, her concerts struggled to sell tickets. Indeed, Frost canceled the final leg of her 2015 tour because of slow ticket sales.

During 2015, Frost and the Inchworms exchanged no communication. In early 2016, Frost contacted the Inchworms to arrange logistics for her to sing the national anthem at the home opener scheduled for April 7, 2016. Although the Inchworms acknowledged that they had formed an oral agreement with Frost in December 2014, the team informed her that it no longer wished for her to sing the national anthem on opening day of 2016. Instead, the team had hired a more popular recording artist, Tina Byrne, to sing the national anthem on opening day. Furthermore, the Inchworms refused to pay any money to Frost.

With no facts in dispute, both parties moved for summary judgment before the trial court. The trial court denied Frost’s motion, granted the Inchworms’s motion, and entered judgment in favor of the Inchworms. Frost appealed. On appeal, Frost claims that the trial court erred in finding that the Inchworms were entitled to judgment as a matter of law. Finding no error, we affirm.

Under N.R.C. § 1293.56(c), “a contract that is not to be performed within one year from the making thereof” is unenforceable unless it is in writing. We have construed this provision in favor of



enforceability. *See Reiser v. Shen* (Newc. Ct. App. 2010). Thus, an oral contract will only be rendered unenforceable under section 1293.56(c) if it is impossible for the contract to be performed within a year. If an oral contract could theoretically be performed within a year, it will not be rendered unenforceable by section 1293.56(c). For example, an oral construction contract is not unenforceable under section 1293.56(c) simply because the project would usually take three years to perform. *See id.* If a builder could theoretically hire an army of workers to work around the clock and complete the project within a year, it does not fall within the scope of section 1293.56(c). *See id.*

If, however, any promise in a contract cannot be fully performed within a year from the time the contract is made, section 1293.56(c) renders all of the promises in the contract unenforceable. An exception to this rule is triggered when one party has completed full performance of the oral contract. Once one party has fully completed performance of her side of the contract, the contract is immediately removed from the scope of section 1293.56(c). *See Bartlett v. McManus* (Newc. Ct. App. 2012) (holding that oral contract was not unenforceable under section 1293.56(c) when contract called for seller to deliver all goods at the beginning of the contract term and for buyer to pay in three annual installments). Because neither Frost nor the Inchworms have fully performed their part of the contract, this exception is not triggered in this case.

Here, Frost and the Inchworms entered into an oral agreement in December 2014. However, all of the promises in the agreement could not be performed within one year. Specifically, the promise that Frost would sing the national anthem on the first home game of the 2016 season could not under any theoretical set of circumstances occur within one year of December 2014. Thus, section 1293.56(c) renders the entire contract unenforceable. Because the contract was legally unenforceable, the trial court was correct in finding that the Inchworms were not liable to Frost for damages in the amount \$3000.

Although Frost sued the Inchworms for breach of contract, she could potentially recover an award in restitution to the extent that she conferred a benefit to the Inchworms. *See Kanetsky Pest Control Inc. v. Anton* (Newc. Ct. App. 2012). A party who would otherwise have a claim in restitution is not barred from restitution for the reason that the action initially arose from a contract that is unenforceable by him because of section 1293.56(c). Even so, Frost is due no restitution here. A party who has partly performed under an unenforceable contract is entitled to restitution to the extent that he has conferred a benefit on the other party. *See id.* Here, Frost conferred no benefit to the Inchworms, and thus deserves no restitution.

With no enforceable contract and nothing in need of being paid back, Frost has no cognizable claim against the Inchworms. Accordingly, we affirm the trial court's grant of summary judgment in the Inchworms's favor.

Affirmed.