

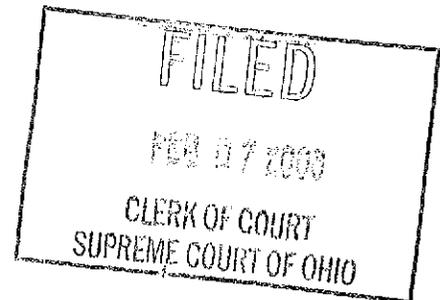
IN THE SUPREME COURT OF OHIO

ISKANDER ABI ABDALLAH,)	CASE NO. 2008-0053
a.k.a. Alex Abi Abdallah,)	
)	DISCRETIONARY APPEAL
Appellant,)	(NON-FELONY)
v.)	
)	ON APPEAL FROM EIGHTH DISTRICT
DOCTOR'S ASSOCIATES INC.,)	COURT OF APPEALS CASE NO 89157
)	
Appellee.)	CUYAHOGA COUNTY COURT OF
)	COMMON PLEAS CASE NO. 597969

MEMORANDUM IN RESPONSE
OF APPELLEE
DOCTOR'S ASSOCIATES, INC.

MICHAEL A. PARTLOW (#0037102)
MORGANSTERN, MACADAMS & DEVITO, Co., LPA
623 West Saint Clair Avenue
Cleveland, Ohio 44113-1204
Telephone: (216) 621-4244
Email: partlowlaw@aol.com
Attorney for Appellant, Iskander Abi Abdallah

CHRISTOPHER M. ERNST (0056159)
BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP
One Cleveland Center, 17th Floor
1375 East Ninth Street
Cleveland, Ohio 44114
Telephone: (216) 736-4216
Facsimile: (216) 615-3014
Email: cernst@bdbl.com
Attorney for Appellee, Doctor's Associates Inc.



I. STATEMENT OF POSITION

THE COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE THIS MATTER INVOLVES APPELLANT'S PERSONAL DISAGREEMENT WITH THE TRIAL COURT'S APPLICATION OF WELL-SETTLED PRINCIPLES OF LAW TO SIMPLE, CASE-SPECIFIC ISSUES, NOT ISSUES OF "PUBLIC OR GREAT GENERAL INTEREST" SUFFICIENT TO SUPPORT THIS COURT'S EXERCISE OF JURISDICTION

II. ARGUMENT

A. Introduction

Pursuant to the Ohio Constitution, the Supreme Court of Ohio shall have appellate jurisdiction "[i]n cases of public or great general interest, [where it] may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals," OH Const., Art. 4, Section 2(B)(2)(e). In situations where a matter "is not one of great public or general interest, the judgment of the Court of Appeals ... is final and not subject to review." *Kern v. Contract Cartage Co.* (1936) 55 Ohio App. 481, 486, 9 N.E.2d 869. An appellant to the Supreme Court of Ohio must be able to show why a case is of public or great interest, and why the Court should accept it for merit review. S.Ct. Prac.R. III, Section 5 (Staff Notes, 1994).

The underlying dispute involved Appellant's claim that he was entitled to certain rights under a franchise agreement with Appellee Doctor's Associates Inc., the franchisor for Subway® sandwich shops. However, as the Eighth Appellate District found when unanimously affirming the trial court's dismissal of Appellant's claims, "the express terms of the written documents attached to appellant's complaint demonstrate that there is simply no way appellant could reasonably and in good faith believe that he was the franchisee" for the Subway® sandwich shop in question and that "[a]ppellant can prove no set of facts in support of his claim which would

entitle him to relief.” (*Abdallah vs. Doctor’s Associates, Inc.*, 2007-Ohio-6065 (page 7) (hereinafter referred to as the “Opinion”)).

The Appellant has failed to show why this case merits review by the Supreme Court and how this is a matter of public or great general interest. In short, this is a run-of-the-mill contract dispute that has no significant ramifications to the general public, nor does Appellant even attempt to argue that this Court should make new law for this case. Accordingly, this is not a case that warrants Supreme Court review.

B. Background

On December 6, 2006, the trial court granted Appellee’s Civ. R. 12(B)(6) motion and dismissed Appellant’s Complaint. On November 15, 2007, the Eighth Appellate District of the Court of Appeals unanimously affirmed dismissal concluding, among other things, that Appellant had no standing to raise claims concerning a certain Subway® franchise where his own Complaint, together with its exhibits, made clear that he was not the franchisee.

As noted by the Eighth District Appellate Court, the Appellee entered into a written Franchise Agreement with Shirley Robichaud to operate Franchise No. 7782 in Oakwood Village, Ohio. (Opinion, p. 3). Robichaud, in turn, owned a fifty percent interest in a non-party company known as Abdallah, Inc. *Id.* The other half of Abdallah, Inc. was owned by the Appellant. *Id.*

Pursuant to the terms of the Franchise Agreement between Robichaud and Appellee, only a natural person may become a franchisee. Opinion at 4. Day-to-day management of the business operations of the franchise, however, may be assigned to a corporation by the individual franchisee. Though not established in this case to date, Robichaud may have assigned the quotidian tasks of running the franchise to Abdallah, Inc.

In 1998, Robichaud gave Appellant the authority to sell the franchise on her behalf when she executed a "Limited Power of Attorney to Sell or Transfer a Franchise." *Id.* Robichaud subsequently withdrew from Abdallah, Inc. and, by the close of 1998, Abdallah, Inc. was owned exclusively by Appellant. The Power of Attorney was rescinded five years later, with no sale of the franchise occurring. It is important to note that, during this time period, Robichaud remained the named franchisee, and the written Franchise Agreement between Robichaud and Appellee remained in full and complete effect. There exist no allegations in this case to the contrary.¹

Unfortunately, issues arose as to Robichaud's running of the franchise and, in 2003, Appellee instituted arbitration proceedings to terminate her Franchise Agreement. Appellant attempted to intervene in the arbitration but was specifically denied the opportunity to do so by the arbitrator because he was not the franchisee. Opinion at 4-5. While the 2003 arbitration

¹ Appellee takes issue with several "statements of fact" made by Appellant in his Memorandum in Support of Jurisdiction, in that they were not substantiated by citations to the record in this case. They are unsupported allegations or conclusions which were inappropriately presented as "facts". These include, but are not limited to:

- That Shirley Robichaud moved out of state (page 3);
- That failures to comply with franchise standards were presented to Mr. Abdallah to remedy, and not Shirley Robichaud (page 3);
- That Shirley Robichaud may not attempt whatsoever to participate in the 2003 arbitration proceedings (page 4);
- That Shirley Robichaud never made any attempt to participate in the 2006 arbitration proceedings (page 4);
- That Appellee was the only party that presented any evidence at the 2006 arbitration proceedings (page 4);
- That the Arbitrator's Award in the 2006 arbitration was "essentially a default judgment." (page 4); and
- That Franchise No. 7782 has been Mr. Abdallah's sole source of income since 1997 (page 7).

This type of pleading style mirrors Appellant's arguments in this case to date. Appellant has made bold statements with little, if any, support and has continually attempted to reach outside the confines of the initial proceedings, as dictated in Rule 12(B)(6) of the Ohio Rules of Civil Procedure. The ability to discern between what is and is not proper before the Court is important in the analysis of the issue presented by Appellant.

terminated without a formal decision (due to a resolution of the pending issues between Robichaud and Appellee), Appellee instituted another arbitration termination proceeding in 2006. Again, the 2006 arbitration involved only Robichaud and neither Appellant nor Abdallah, Inc. even attempted to intervene. The arbitration proceedings concluded with a decision by the arbitrator that terminated the Franchise Agreement. Opinion at 5.

C. Analysis

Appellant was displeased with the trial court's error-free ruling and the Court of Appeals' reasoned affirmance. He now seeks his third bite at the apple, trying to insert facts into the record and rearguing for an unsupportable interpretation of the doctrine of equitable estoppel. There is no reason to entertain his request for review.

Appellant seeks to convince this Court that the trial court's discussion of reasonableness in the context of a Civ. R. 12(B)(6) motion involving equitable estoppel has sufficient broader implications to warrant Supreme Court review. However, the law of equitable estoppel is well-settled in Ohio and, as acknowledged by the Court of Appeals (Opinion at 6), equitable estoppel is "a shield, not a sword. It does not furnish a basis for damages claims, but a defense against the claim of the stopped [sic] party." See *First Fed. Sav. & Loan Assn. v. Perry's Landing, Inc.*, 11 Ohio App.3d 135, 144 (1983) (quoting Dobbs, *The Law of Remedies* (1973) 42, Section 2.3). Accordingly, any finding of unreasonableness would be irrelevant to the determination of whether Appellant is entitled to bring an affirmative claim for "equitable estoppel" – for the definitive reason that the claim, as a cause of action, simply does not exist. In an apparent attempt to confuse the Court, Appellant cites *promissory* estoppel cases to support his argument, but promissory estoppel and equitable estoppel are two different animals entirely, and this is not a promissory estoppel case.

Even if the Court were to determine that this were an equitable estoppel case, the Appellant's argument still does not rise to the level of having public or great general interest.

Equitable estoppel requires the following four elements:

1. that the defendant made a factual representation;
2. which was misleading;
3. which induced the actual reliance;
 - (a) which is reasonable;
 - (b) in good faith;
4. which causes detriment to the relying party.

Walworth v. BP Oil Co. (1996), 112 Ohio App.3d 340, 678 N.E.2d, 959.

The concept of reasonableness and good faith, as set forth in the third prong above, was addressed by this Honorable Court in *Ohio State Board of Pharmacy v. Frantz*, when it held that "the party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading." *Ohio State Board of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, 555 N.E.2d, 630, 633.

Here, the concepts of reasonableness and good faith are very easy to discern in light of the applicable law. An examination of the undisputed facts in the case shows the following:

- Appellee executed a Franchise Agreement with Shirley Robichaud wherein Robichaud was the franchisee (Complaint, Para. 8);
- The Franchise Agreement was in Robichaud's name only (Complaint, Para. 8);
- The Franchise Agreement, by its own terms, is modifiable only in writing (Franchise Agreement, attached to the Complaint);

- Robichaud and Appellant co-owned Abdallah, Inc. (Complaint, Para. 6);
- Robichaud transferred her ownership interest in Abdallah, Inc. to Appellant (Complaint, Para. 11);
- Appellant became sole owner of Abdallah, Inc. (Complaint, Para. 11);
- There was no attachment to the Complaint indicating that written modifications had occurred which authorized the transfer of the franchise from Shirley Robichaud to Appellant (Complaint and its attachments, *generally*);
- The 2003 Arbitrator's Ruling determined that neither Appellant nor Abdallah, Inc. was not the franchisee (Complaint, Para. 21 and July 18, 2003 letter from Jay H. Feldstein attached to the Complaint);
- Appellant was told in 2003, by both the Appellee and the Arbitrator, that he was not legally recognized as the franchisee (Complaint, Para. 21 and July 18, 2003 letter from Jay H. Feldstein attached to the Complaint); and
- Appellant did not attempt to intervene in a 2006 arbitration, which was instituted against Robichaud as the franchisee (Complaint, Para. 21).

From these undisputed facts, there are several reasonable inferences, which can be made in accordance with *Burks v. Peck, Shaffer & Williams* (1996) 109 Ohio App.3d 1, 671 N.E.2d 1023, as follows:

- That Appellant knew he was not the franchisee when he obtained the 1998 Power of Attorney from Robichaud;
- That no contract amendment or subsequent written Franchise Agreement was entered into between Appellant and Appellee;

- That Appellant did not attempt to intervene in the 2006 arbitration because he knew he was not legally recognized as the franchisee;
- That Appellant is confused between the role of himself as an individual and his company as a business management firm.

Based upon the facts – which are presumed as true, as this was brought before the Court in a Motion to Dismiss pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure – the Appellant was well aware that he was not recognized as the franchisee by Appellee. Though he may argue to the contrary, the undisputed facts contradict his arguments. As the Eighth District Court of Appeals determined, the attachments to the Appellant’s Complaint clearly show that his arguments, as a matter of law, must fail. This is even more true when utilizing the *Frantz* test, *supra*, where the reliance of the Appellant must be reasonable and in good faith. The attachments to Appellant’s Complaint clearly show that his reliance was neither reasonable nor in good faith. That he felt he should be the franchisee, or that he wants the opportunity to advance a frivolous argument that he should be considered the franchisee, does not mean that this is a matter of public or general interest.

C. Promissory Estoppel

Unfortunately, Appellant continues -- as he did in the Eighth District Court of Appeals -- to confuse and mix the concepts of equitable estoppel and promissory estoppel. In fact, the three cases² that Appellant cites in his Memorandum in Support of Jurisdiction pertain to promissory estoppel and not equitable estoppel. In the instant case, the issue is equitable estoppel and not promissory estoppel. Further, the three cases cited pertain exclusively to employment law issues

² *Kelly v. Georgia-Pacific Corporation* (1989), 46 Ohio St.3d 134, 545 N.E.2d, 1244; *Hale v. Volunteers of America* (2004), 158 Ohio App.3d 415, 816 N.E.2d 259, 2004-Ohio-4508; and *Wallace v. Gray Drug, Inc.* (1999), 8th Dist. Ct. App. No. 57031 (1990 WL121500).

rather than franchise contract law. They use different legal tests which are not relevant to the issue currently before this Honorable Court.

Notwithstanding this, the cases relied upon by Appellant require a clear and unambiguous promise to be made. *Hale* at 429. Further, as this Court has pointed out, the concept of reasonable reliance in a promissory estoppel action is dependent upon the reasonable beliefs of the promise maker, rather than the promise receiver. *Kelly* at 139. This is the distinctly different from equitable estoppel where, as shown in *Frantz, supra*, the determination of reasonableness is based upon the perspective or viewpoint of the promise receiver.

Put more succinctly, if this matter pertained to promissory estoppel, the tests for reasonable reliance would examine whether or not Appellee reasonably believed that Appellant would rely upon its alleged representations that he was the authorized franchisee. Rather, the applicable test is whether or not Appellant was acting reasonably when he relied upon his belief that he was the franchisee. *Id.* As stated above, a review of the attachments to Appellant's Complaint show that he clearly was not acting reasonably.

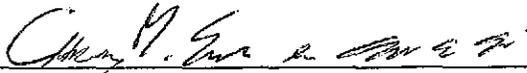
III. CONCLUSION

As demonstrated above, there is little, if anything, in this case of interest to anyone but Appellant. Rather, this request for review is a misguided attempt to merge two separate and distinct theories of law into one hybrid version in an apparent effort to mask or otherwise correct pleading deficiencies.

Accordingly, Appellee respectfully requests that this Honorable Court decline to assert jurisdiction over this matter.

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP

By: 

CHRISTOPHER M. ERNST (0056159)
BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP
One Cleveland Center, 17th Floor
1375 East Ninth Street
Cleveland, Ohio 44114
Telephone: (216) 736-4216
Facsimile: (216) 615-3017
Email: cernst@bdbl.com
Attorney for Appellee Doctor's Associates Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Response of Appellee Doctor's Associates, Inc.* been served, via regular U.S. Mail, postage prepaid upon the following on this 7th day of February, 2008:

Michael A Partlow (#0037102)
MORGANSTERN, MACADAMS & DEVITO, Co., LPA
623 West Saint Clair Avenue
Cleveland, Ohio 44113-1204
Attorney for Appellant, Iskander Abi Abdullah



CHRISTOPHER M. ERNST (0056159)
Attorney for Appellee, Doctor's Associates Inc.

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