

IN THE SUPREME COURT OF OHIO

08-2137

**LAW OFFICES OF JACK A. DONENFELD,
A LEGAL PROFESSIONAL ASSN.**

PLAINTIFF/APPELLEE

v.

MARTHA A. McADAM

DEFENDANT/APPELLANT

On Appeal From The
Hamilton County Court of Appeals, First Appellate District
Court of Appeals Case No. C-070641

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT MARTHA A. MCADAM**

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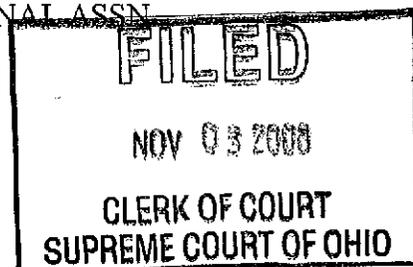


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AND
ASSIGNMENTS OF ERROR

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***EXPLANATION OF WHY THIS IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST***

This case presents issues that, while novel, apply broadly to determine the course of Ohio fraud litigation. The issues include: (1) whether a court may enter judgment on a claim for fraud never articulated in pleadings; and (2) whether a plaintiff may assert fraud damages consisting of no more than belief that his reputation was damaged by repeating a fraudulent statement.

The Issue of Fraud Pleading

The Court of Appeals' decision threatens the historical notion that allegations of fraud must be pled with particularity, so that defendants aren't required to address theories of fraud not apparent in pleadings or subject to discovery and contradiction. In this case, the Court of Appeals approved a fraud judgment on a theory that the Defendant intentionally misrepresented a company's ability to pay negotiated settlements, inducing the Plaintiff attorney to make settlement agreements for the company. The attorney was embarrassed after the settlements weren't paid. The Court also found fraud when the Defendant altered documents during discovery, forcing the Plaintiff to prove the authenticity of his contrary document. None of these fraud allegations were found in the pleadings.

The decision approves a trial court's actions to reassemble the evidence and apply it to new fraud theories, without notice or opportunity to defend against them. Applied to other fraud cases, the appellate court's ruling would subject fraud defendants to trials in which plaintiffs' evidence doesn't prove their own fraud theories, but let a court reconstrue the evidence after-the-fact to fit a different theory, one the defendant didn't know to disprove.

The Issue of Fraud Damages

Likewise, the ruling relaxes the historical requirement that fraud damage a plaintiff directly. The classic example of fraud injury is that posed by the Plaintiff's articulated theory that he was fraudulently induced to provide legal services, and suffered damages when he provided the services without the represented payment.

The Court of Appeals' decision recognizes indirect fraud damages falling far outside traditional direct damages. Apparently recognizing that the trial court's fraud theory didn't cause a monetary loss to the Plaintiff, the Court of Appeals discussed damages consisting of alleged harm to reputation caused by the Defendant's belief in the fraudulent statements as a basis to negotiate settlement agreements with third party creditors. These indirect damages were supported by no more than the Plaintiff's subjective belief or embarrassment, and are in fact derivative of harm to other intended victims.

Again, applying this rule to fraud cases generally, any attorney may file a fraud claim against a client who provides misinformation incorporated into a trial proceeding. It has never before been the history of Ohio courts to encourage lawsuits against clients, even those who misinform counsel in litigation. The ruling discourages attorneys/client discussions and burdens attorney/client relationships with new duties of candor and opportunities for suspicion.

Applying the ruling broadly to other claims, this derivative damage theory extends damage jurisprudence far beyond traditional notions of proximate cause. Recognition of damages arising from feelings or reputation connected to harm suffered by others opens the door to similar derivative damages in an infinite array of tort suits – to claims by financial institutions used to facilitate thefts against others, to couriers who transmit fraudulent communications, to owners of vehicles whose cars are involved in a collision, all caused to feel embarrassment or reputational harm because of the harm suffered by a defendant's act to harm someone else.

STATEMENT OF THE CASE AND FACTS

This case arose after Plaintiff/Appellee Law Offices of Jack A. Donenfeld, A Legal Professional Assn. (“Donenfeld”) wasn’t paid its final billings for legal services to Multifold International, Inc. (“Multifold”). Donenfeld sued Defendant/Appellant Martha A. McAdam, claiming she agreed to be liable for Multifold’s debt, received the benefit of the representation and misrepresented her intent to be responsible for Multifold’s fees. T.d. 19

Because Ms. McAdam didn’t attend trial, facts are drawn only from Donenfeld. According to Donenfeld, in June 2000 Ms. McAdam asked him to represent Multifold, claiming to be the corporation’s co-owner. T.p. 84, 174. She said Multifold was in financial distress and needed Donenfeld’s help to settle debts. T.p. 85.

Donenfeld was told his fees would be paid by a related company, International Paperbox Machine Co., Inc. (“IPM”). T.p. 104, 175. Nonetheless, Donenfeld explained that Martha and Hugh McAdam, the co-owners, would also be liable for Multifold’s fees. T.p. 86.

Donenfeld memorialized the fee agreement in a June 16, 2000 letter to Hugh McAdam. T.p. 89; Tr. Ex. A. The letter enclosed Donenfeld’s standard billing policies reflecting that company owners would be personally responsible for a company’s fees. *Id.*; Tr. Ex. B. The letter contained a signature line only for Hugh McAdam, *Id.*, and Donenfeld conceded that Martha McAdam wasn’t a party to the agreement. T.p. 196. On July 5, 2000, Hugh returned the letter with his signature. T.p. 90, 98; Tr. Ex. D.

Over the next year, Donenfeld settled a number of Multifold debts. See T.p. 109. He was paid up to July 2001. T.p. 126. Donenfeld billed additional amounts on July 24, September 11, and October 12, 2001 and April 19, 2002. T.p. 127-131. On May 15, 2002, he received another \$10,000 from Martha McAdam, but held a balance of \$17,736.24. *Id.*

By May 2002, Donenfeld wrote Hugh and Martha McAdam and asked them to “renew” Multifold’s fee agreement, this time supplying individual signature lines. T.p. 131; Tr. Ex. F. This was the first letter with a signature line for Ms. McAdam. T.p. 194, 196. The letter referenced work done for Martha, personally, but didn’t specify her guarantee of Multifold fees. Tr. Ex. G.

Multifold filed bankruptcy in September 2002. T.p. 155. On September 11, Ms. McAdam faxed Donenfeld the May 9 letter with her signature. T.p. 134-135, 185, 196; Tr. Ex. G. Shortly after, on October 31, Donenfeld terminated the representation. T.p. 160; Tr. Ex. L.

This case followed. The Complaint alleged that Ms. McAdam agreed to be personally liable for Multifold’s fees, enjoyed the benefits of the representation, and was obligated to pay the rest of Multifold’s fees. T.d. 2. By amendment, Donenfeld also claimed that Ms. McAdam intentionally misrepresented that IPB, she and her brother would guarantee Multifold’s legal fees, inducing Donenfeld to provide and continue legal services to Multifold. T.d. 19. Donenfeld later moved to allege spoliation, claiming Ms. McAdam altered two emails produced in discovery, but withdrew the claim before trial. T.d. 34; T.p. 3.

To prove its claims, Donenfeld offered testimony from Jack Donenfeld, who testified to the facts related above. He added that, in reliance on Ms. McAdam’s representations that Multifold or IPM would pay settlements he negotiated, he secured settlement agreements with other attorneys, but Multifold didn’t pay them. T.p. 102-103.

On these facts, the Hamilton County Court of Common Pleas entered judgment against Ms. McAdam in the amount of \$133,788.62, including damages of \$52,283.60, punitive damages of \$54,000 and attorney fees of \$25,659.56. T.d. 42. The trial court ruled that “McAdam orally agreed to be personally responsible for the payment of” Multifold’s fees, and that she committed fraud by misrepresenting that Multifold and IPM were separate companies,

that they would pay settlements negotiated by Donenfeld, that she altered discovery documents and that she falsely affirmed that she didn't retain Donenfeld to represent her personally. T.d. 40-1.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The Court of Appeals erred in affirming this judgment. Particularly, it erred when it affirmed a judgment of fraud based on new theories not raised in pleadings, and based on indirect and speculative reputational injury.

Proposition of Law I:

A court may not enter judgment on a theory of fraud not raised before trial.

Ohio's civil rules require that, when pleading fraud, a complaint describe the fraud with particularity. *Ohio R. Civ. P. 9(B)*. Case law cautions that complaints of misrepresentation must specify, at a minimum, the content of the misrepresentation, the time and place it was made, and the person who made it. *Hamblin v. Daugherty* (9th Dist. 2007), 2007 Ohio App. LEXIS 5180, *10. Claims of misrepresentation not stated with specificity are subject to dismissal. *Id.*

This general rule of pleading serves a fundamental social interest in fair litigation. Citizens shouldn't be forced to defend against claims not articulated before trial. *Id.*, citing *Korodi v. Minot* (10th Dist. 1987), 40 Ohio App. 3d 1, 4, 531 N.E.2d 318. Without fair notice of a claim, citizens have no reasonable chance to build a case and defend themselves.

The fairness concern is exacerbated by a "bait and switch," where a complaint properly describes one allegation of fraud, but a different undisclosed theory is substituted at or after trial. In that case, defendants may be duped into building a case to defend the articulated theory, but not even know to address other theories not raised before trial.

That is just what happened here. The Plaintiff alleged with particularity a claim of fraud based on an allegation that the Defendant intentionally misrepresented that she would personally

guarantee payment of Multifold's legal fees. The Plaintiff alleged that it relied on this misrepresentation to deliver services to Multifold, and was injured when it wasn't paid in full.

The trial court didn't sustain this claim of fraud. Instead, after trial, it made up its own new theories of fraud to justify a fraud judgment. T.r. 40-3-5 Particularly, it found that the Defendant misrepresented IPM's ability to pay settlements, inducing the Plaintiff to settle claims that weren't paid. The trial court also found that the Defendant fraudulently altered discovery documents. This claim had been raised as a spoliation claim by the Plaintiff, but was dismissed before trial. T.p. 3. None of the fraud theories in the judgment were articulated in pleadings or the parties' pretrial statements.

It is simply unfair to subject parties to trial on claims not identified before trial. It opposes fundamental notions of due process under federal and state law. It is also extraordinarily inefficient, requiring defendants to anticipate undisclosed potential theories of liability, take discovery, and introduce evidence at trial on each potential claim.

The Court of Appeals' decision ignores these fundamental principles of fairness and efficiency by ruling that the Plaintiff didn't object to the introduction of evidence of these frauds, and so consented to the trial of these new fraud theories. This argument ignores that the Defendant had no notice of the new fraud theories, and didn't know of the need to object to evidence or introduce testimony or other evidence directed to fraud. It should be noted that the Plaintiff introduced the evidence for other legitimate purposes and didn't argue the new fraud theories. The theories were asserted for the first time in the court's findings, after trial.

Accordingly, the Court of Appeals' fraud judgment should be reversed, with an opinion instructing trial courts not to enter judgment on fraud theories not articulated in the parties' pleadings.

Proposition of Law II:

A court may not award fraud damages for injury to a third party, or “reputational injury.”

Perhaps one reason the parties didn't raise argument over the court's new fraud theories is that the Plaintiff wasn't injured by the frauds. The fraud described by the court was an attempt to defraud creditors to settle claims below their value based on false information, and was intended to harm creditors, not the Plaintiff. T.r 40-1.

In the first set of fraud theories, the trial court found that the Defendant misrepresented Multifolds' ability to pay settlements made by the Plaintiff, so that creditors were harmed when they weren't paid the settlement amounts. *Id.* Of course, the alleged fraud is directed against creditors. The record doesn't disclose how the Plaintiff harmed by the alleged misrepresentation. It didn't pay any money based on the misrepresentation, and it didn't give up any claims based on the misrepresentation.

Likewise, on the other theory of fraud, the record fails to disclose any harm to the Plaintiff. The trial court ruled that the Defendant delivered fraudulently altered documents and false statements in the course of discovery. *Id.* Obviously the Plaintiff didn't rely on the documents, the Plaintiff wasn't duped by the documents, so the Plaintiff couldn't suffer any harm in reliance on the allegedly fraudulent statements. The Plaintiff could have raised a claim for spoliation, and it did, but dismissed the claim before trial. T.p. 3.

To justify the judgment for damages, the Court of Appeals reasoned that the Plaintiff suffered reputational injury after the creditors weren't paid on the settlements. The record disclosed no injury to the Plaintiffs' reputation, perhaps because the fraud theory wasn't part of the case recognized by either party. Noone testified that the Plaintiff's reputation was compromised by nonpayment of the settlements. At most, the Plaintiff testified that he was

embarrassed by the nonpayments and felt bad for the creditors. That is, because others compromised claims based on false information, the Plaintiff felt bad or embarrassed.

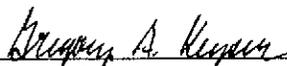
Of course, this wasn't expressed as a fraud theory at trial, so the Defendants didn't know to contest any alleged reputational or embarrassment injury. The claims are derivative to the claims of creditors who fraudulently duped into compromising claims. These derivative claims – arising from the harm to a third party – fall beyond the bounds of proximate cause that constrain damages in tort cases. *Environmental Network Corp. v. Goodman Weiss Miller, LLP* (2008), 119 Ohio St. 3d 209, 893 N.E.2d 173; *Schirmer v. Mt. Auburn Obstetrics & Gynecological Assocs.* (2003), 108 Ohio St. 3d 494, 844 N.E.2d 1160; *Kleinholz v. Goettke* (1st Dist. 2007), 173 Ohio App. 3d 80, 877 N.E.2d 403.

Accordingly, the Court should reverse the Court of Appeals' finding of fraud damages and dismiss the fraud claims for lack of proximate damages.

CONCLUSION

For the reasons discussed above, this case involves matters of public or great general interest. (The case presents additional issues that, though not as generally important, prevented justice in this case.) The Appellant asks the Court to accept jurisdiction in this case so these important fraud issues may be reviewed on the merits and explained to Ohio litigants who must make informed decisions in future tort cases.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed by ordinary U.S. Mail, postage prepaid, to Kenneth G. Hawley, Esq., 810 Sycamore Street, 5th Floor, Cincinnati, Ohio 45202, this 31 day of October, 2008.

Gregory A. Keeper

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



LAW OFFICES OF JACK A.
DONENFELD, A LEGAL
PROFESSIONAL ASSN.,

Plaintiff-Appellee,

vs.

MARTHA A. McADAM,

Defendant-Appellant.

APPEAL NO. C-070641
TRIAL NO. A-0600377

JUDGMENT ENTRY



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellee the Law Offices of Jack A. Donenfeld, a Legal Professional Association (“the law firm”) brought this action against defendant-appellant Martha A. McAdam (“McAdam”) and her brother, Hugh McAdam, III (“Hugh”), to recover unpaid fees for legal services performed by attorney Jack A. Donenfeld on behalf of the defendants and Multifold International, a division of International Paperbox Machine Company, the McAdams’ former closely held corporation. The law firm sought to recover under several alternative theories, including breach of an express contract, breach of an implied contract, quantum meruit, and promissory estoppel. It later amended the complaint to add claims for fraud and punitive damages. The firm requested leave to amend the complaint a second time, which McAdam opposed in part because the evidence

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

to support the claim sought to be added, spoliation of evidence, would be presented to the court in support of the existing claims, and, therefore, amendment was not needed. The law firm apparently withdrew the motion prior to trial to avoid delay.

The proceedings were stayed and ultimately dismissed without prejudice as to Hugh, who had filed for bankruptcy. The law firm moved for summary judgment against McAdam, relying upon Donenfeld's affidavit, which detailed McAdam's representations and authenticated correspondence that had been attached as exhibits A through G. McAdam presented her own affidavit in opposition. She alleged that exhibit G to Donenfeld's summary-judgment affidavit had been altered such that the words "Agent for Multifold/IPBM, Inc." had been redacted after her signature, and she attached her own "copy" of plaintiff's exhibit G. The court did not journalize an entry disposing of the summary-judgment motion, and we presume that it was denied because the court set the case for a bench trial on January 22, 2007.

A few days before the January trial date, McAdam moved for a continuance. The trial court did not journalize an entry disposing of the continuance motion. But the court continued the trial for some reason, as the trial did not begin until February 28, 2007, before a visiting judge. On that date, McAdam's attorney informed the court that the prior judge had overruled the law firm's motion for summary judgment and McAdam's motion for a continuance. Testimony was taken on February 28, March 1, and June 26.

The only two witnesses were Donenfeld and Richard Bond, an expert in information technology, who testified that two emails that McAdam had presented in defense of the lawsuit had been altered. The court found against McAdam for breach of contract, holding that McAdam had expressly agreed to personal liability for the legal services provided to Multifold and IPBM. The court also found against McAdam for fraud, holding that McAdam's misrepresentations concerning her indebted companies and her purpose in retaining the law firm to represent those companies had damaged the law firm. Finally, the court determined that McAdam had committed fraud on the law firm and the

court to avoid liability by altering two documents and presenting false facts in two affidavits. The court concluded that McAdam's intentional falsification and alteration of correspondence, as well as her presentation of false statements in her affidavit, amounted to actual malice supporting an award of punitive damages.

The court awarded the law firm \$54,129.06 in compensatory damages and the \$25,625.56 in attorney fees and costs that the law firm had expended to recover those damages. Further, the court awarded punitive damages of \$54,000, for a total judgment of \$133,788.62.

Martha McAdam did not attend any of the trial proceedings. She now appeals the trial court's judgment.

McAdam first argues that the denial of her request for a continuance was an abuse of discretion, where she had alleged that she was unable to appear at trial due to a temporary medical disability, and where there was no compelling reason to try the case immediately.

This argument is feckless. McAdam moved to continue only the January trial date. Although the court did not journalize an entry disposing of the motion, the court did in fact delay the commencement of the trial for several weeks. Further, counsel for McAdam did not renew the continuance request when the trial began at the end of February. Rather, counsel advised the court that McAdam was ready to proceed to trial and expressed surprise at his client's absence. Further, on the June trial date, counsel blamed McAdam's absence on her challenge to the court's jurisdiction over her.

Moreover, McAdam's motion for a continuance was only supported by an unsworn, unauthenticated doctor's note dated November 15, 2007, stating that McAdam "would have great difficulty travelling at this time." The note said nothing about her condition in January 2007, when her motion had been filed, or in February, March, and June 2007, when the trial was actually held, and it failed to indicate whether McAdam

could have appeared within a reasonable time. Thus, McAdam failed to establish a sufficient ground for a continuance.²

Where McAdam failed to establish a sufficient ground for a continuance, and counsel did not renew the continuance request at the February trial, we cannot say that the trial court abused its discretion to McAdam's prejudice.

Next, McAdam contends, for the first time, that the breach-of-contract claim was barred by the statute of frauds. Because McAdam failed to raise this affirmative defense in the trial court, she is precluded from raising the issue on appeal. Thus, we do not address the merits of her argument.

McAdam also challenges the judgment for fraud, arguing that the law firm had failed to plead fraud with particularity and that the judgment was not supported by the evidence.

Under Civ.R. 9(B), fraud must be pleaded with particularity in the complaint. While the law firm's amended complaint did allege fraud with particularity, the misrepresentations cited were not the ones presented at trial to support the fraud claim that the law firm ultimately prevailed upon. But the record establishes that McAdam was fully aware of the misrepresentations that supported the judgment and that the law firm had presented these misrepresentations in support of the successful claim. Moreover, McAdam's attorney cross-examined the witnesses on the issues and had the opportunity to address the issues. And McAdam chose not to attend the trial, much less to testify in her own defense. In light of these facts and the lack of an objection at trial, the prevailing theory of fraud was tried by the implied consent of the parties and, therefore, must be

² *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, 45 N.E.2d 763, paragraph two of the syllabus.

treated as if it had been raised in the pleadings, notwithstanding any defect in formal pleading that may have been in the amended complaint under Civ.R. 9(B).³

Finally, we reject McAdam's assertion that the law firm failed to establish the elements of fraud. The evidence supports the trial court's determination that the law firm had relied upon McAdam's material and false representations, that it was justified in doing so, that McAdam had intended such reliance, and that, as a result of McAdam's false representations, the law firm undertook and maintained the legal representation, suffering damage to its reputation and the unpaid legal fees.

Moreover, where the record contains proof of actual damages for the underlying claims, and the intentional alteration of documents supported a finding of actual malice by clear and convincing evidence, we hold that the award of punitive damages was proper.⁴

Accordingly, we overrule the assignments of error and affirm the trial court's judgment.

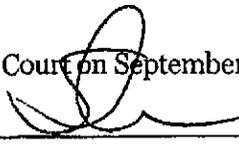
Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 17, 2008

per order of the Court _____


Presiding Judge

³ Civ.R. 15(B); See *State ex rel. Evans v. Bainbridge Twp. Trustees* (1983), 5 Ohio St.3d 41, 448 N.E.2d 1159; *McCartney v. Universal Elec. Power Corp.*, 9th Dist. No. 21643, 2004-Ohio-959, at ¶7; *A.G. Hauck Co. v. Toll Gate Square* (June 29, 1977), 1st Dist. No. C-76364.

⁴ See *Moskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331.