

ORIGINAL

IN THE SUPREME COURT OF OHIO

R.C. OLMSTEAD, INC.	:	CASE NO. 10-0198
	:	
Appellant	:	
	:	
v.	:	
	:	
GBS CORP., et al.	:	
	:	
Appellees	:	

**RESPONSE OF APPELLEE, STEPHEN P. MIHALICH,
TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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**Statement of Appellee, Stephen P. Mihalich’s Position as to
Whether this Case is of Public or Great General Interest**

This case does not present an issue of “public” interest because no governmental entity is involved in this litigation.

“The words ‘[i]n cases of public or great general interest,’ have been partially construed, and what the committee means is cases of ‘public interest’ in which the public is interested – state, county, or city, some public body” *Proceedings and Debates of the Ohio Constitutional Convention (1912-1913) 1030*

Furthermore, this case does not “involve questions . . . that have aroused general interest.” *Id.* Thus, it is not a case of great general interest warranting this court’s time and attention.

Over a three-week time period, a jury heard testimony from thirty-four witnesses; reviewed 123 separate exhibits; and considered and answered ten jury interrogatories. Their conclusions resulted in a verdict in favor of both Appellees, GBS Corp. (“GBS”) and Stephen Mihalich. Appellant, R.C. Olmstead, Inc. (“RCO”) then pursued its appeal raising four (4) Assignments of Error and nine (9) Issues for Review. After reviewing the 3200+ page transcript as well as the exhibits and docket filings of the parties, the Court of Appeals affirmed the judgment of the Trial Court.

The normal procedure in Ohio is that litigants are entitled to one trial and one appeal. Generally speaking, a decision from the Court of Appeals represents the final word for private litigants.

This framework means that uniformity of the law will develop within the Appellate Judicial Districts with this Court taking jurisdiction of only those cases necessary to clarify rules of law that are of great general interest. *State v.*

Bartrum 121 Ohio St.3d 148, 153, 2009-Ohio-355. ¶ 31. However, RCO's request for review clouds, rather than clarifies, the law.

RCO's Memorandum in Support of Jurisdiction represents the first time in this case that RCO has squarely raised the issues set forth in its proposed propositions of law. At trial, RCO did not ask that the jury be instructed on "forgery." Rather, Appellant requested an instruction on "fraud." Here is the jury instruction Appellant submitted to the trial court:

"MIHALICH'S DEFENSE OF FRAUD

If you determine that Mihalich beached his non-competition agreement you must consider whether Mihalich has proven by clear and convincing evidence that he did not sign the non-competition agreement and that his signature was affixed to the agreement through fraud.

To prove fraud Mihalich must prove by clear and convincing evidence all of the following elements:

- (A) A false representation of fact was made with knowledge of its falsity or with utter disregard and recklessness about its falsity.
- (B) The representation was material.
- (C) The representation was made with the intent to mislead; and
- (D) The plaintiff was justified in relying on the representation, and did, in fact, so rely.

Unlike the preponderance of the evidence standard, to prove fraud by 'clear and convincing evidence' the evidence in favor of fraud must have more than simply a greater weight than the evidence opposed to it rather it must produce in your minds a firm belief or conviction about the facts to be proved."

The trial court rejected the above-requested instruction. And that rejection was proper. At trial, Mihalich never argued that he signed a non-competition agreement because of fraud. Rather, he denied ever signing any such agreement and – more specifically – he denied signing the copy offered by RCO. Thus,

RCO's requested instruction on fraud was misleading and would have needlessly confused the jury.

Rather, *without* objection, the trial court submitted an interrogatory to the jury asking the jury to determine whether RCO proved by a preponderance of the evidence that Mihalich signed the purported non-compete Agreement. Given RCO's consent to that interrogatory, it cannot claim the trial erred in failing to instruct the jury on a burden of proof for forgery.

Nevertheless, on appeal, RCO continued framing the issue as a matter of "fraud." RCO presented the following issue for review:

2. Whether the Trial Court Properly Instructed the Jury as to Defendants' Affirmative Defense of "Fraud" at Trial.
 - a. Whether fraud is an affirmative defense.
 - b. Whether Appellees properly plead [sic] fraud as a defense or counterclaim.
 - c. Whether the Trial Court improperly instructed the jury as to Appellees' fraud defense.
 - d. Whether RCO should be forced to prove the absence of fraud.

The Court of Appeals rightly acknowledged that Appellees never asserted "fraud" as an affirmative defense and then explained how forgery differs from fraud. RCO disagrees with the Court of Appeals' discussion of forgery, affirmative defenses and burdens of proof. But RCO failed to properly preserve any claimed error.

The propositions of law that RCO offers for this Court's consideration were never properly raised below. RCO never requested a jury instruction on forgery and never assigned as error the lack of any instruction on the burden of proving

forgery. Rather, RCO proposes to muddy the waters by claiming forgery and fraud are synonymous – a proposition that this Court should reject.

Statement of the Case and Facts

In the spring of 2002, RCO proposed that its sales staff – including Mihalich – sign non-competition agreements. Mihalich adamantly opposed signing one. And he did not sign one.

At trial, one of RCO's vice-presidents, Harvey West, confirmed that Mihalich objected. Specifically, he testified that Mihalich was “very agitated” about the prospect of having to sign a non-competition agreement.

Mihalich's former supervisor, Ray Hinkelman also corroborated that testimony. He testified that Mihalich believed that he was too young to sign a non-compete.

Hinkelman further testified that when he presented the proposed non-competition agreements to the sales staff, Mihalich did not sign one. Hinkelman reported Mihalich's refusal to RCO's President, Robert Olmstead. But nothing further happened – at least not until Mihalich announced his resignation.

In the meantime, RCO gathered all of the non-competition agreements that had been signed and kept them offsite at the home of Mike and Agnes Wessinger – both RCO employees.

Ms. Wessinger testified that she prepared a spreadsheet listing RCO employees and identifying those employees that were bound by non-compete agreements. Ms. Wessinger's spreadsheet showed Mihalich did **not** have a non-compete agreement. Indeed, she acknowledged never seeing a non-compete signed by Mihalich.

A year after the non-competition agreements were circulated, GBS offered Mihalich a sales job. Before accepting GBS's employment offer, Mihalich asked

RCO for copies of any agreements restricting his future actions. He specifically asked Mike Wessinger, a member of RCO's top management for any such agreements. Mr. Wessinger checked, and told Mihalich that he did not have a non-competition agreement.

On December 8, 2003, Mihalich personally submitted a resignation letter to RCO President, Robert Olmstead. The next day, Olmstead made Mihalich a counter-offer. As part of the deal, Olmstead said that he wanted Mihalich to sign a non-compete agreement. However, Olmstead refused to put any other terms of his counter-offer in writing. So Mihalich decided to accept the job offer from GBS.

Five months after leaving RCO, Mihalich received a letter from RCO's counsel. The letter referenced "continuing obligations to R.C. Olmstead, Inc." It explained Ohio law regarding trade secret disclosures and tortious interference with contractual and business relations. ***The letter did not mention any non-compete agreement signed by Mihalich.***

Mihalich's first notice that RCO claimed it had a non-compete agreement came when he was served with the Complaint – ten months after leaving RCO.

During the course of litigation, RCO deposed Mihalich and asked him about signing any non-compete agreement. He testified that he did not recall signing any such agreement.

After deposing Mihalich – over one year after filing its Complaint and almost two years after Mihalich left RCO – RCO produced a copy of a non-competition agreement purportedly having Mihalich's signature.

RCO deposed Mihalich a second time and specifically asked about the newly produced written agreement. Though acknowledging the signature looked like his, Mihalich denied signing the document that RCO now claimed was his non-competition agreement.

As the discovery phase of the litigation continued, Appellees produced a report from a handwriting expert who opined that the signature on the written agreement was not genuine. RCO deposed Appellees' expert.

At trial, as part of its case-in-chief, RCO called a handwriting expert of its own. She opined that the signature on the copy she inspected appeared to be a genuine signature.

As part of their defense, Appellees' handwriting expert testified that the signature on the purported copy was "a simulated forgery executed by someone other than Mr. Mihalich."

For jury instructions, the trial court instructed the jury that RCO had the burden of proving: 1) the existence of a contract; 2) performance by RCO; 3) breach by Mr. Mihalich; and 4) damages or loss to RCO. RCO never requested an instruction on proving forgery.

Furthermore, RCO did not object to a specific jury interrogatory that was submitted to the jury addressing questions of proof about the non-competition agreement. That interrogatory asked the following:

"Do you find R.C. Olmstead, Inc. has proven that Stephen Mihalich signed a written non-compete agreement with R.C. Olmstead, Inc. on May 29, 2002?"

The jury's answer to that interrogatory was "no." All eight jurors signed that interrogatory as well as all other interrogatories testing their general verdict in favor of GBS and Mr. Mihalich.

The Court of Appeals overruled all of RCO's assignments of error and affirmed the judgment of the trial court.

Argument in Opposition to Appellant's Propositions of Law

Proposition of Law No. I: A defendant need not plead forgery as an affirmative defense to a claim for breach of a written contract when the defendant specifically denies entering into the purported written contract.

Civ. R. 8(C) offers a non-exhaustive list of affirmative defenses. Forgery is not on that list – and rightly so. Affirmative defenses represent confessions and avoidances to claims raised in a complaint. They raise new matters that assume the complaint to be true, yet assert legal reasons why the plaintiff cannot recover. *State ex rel. The Plain Dealer Publishing Co. v. Cleveland*, (1996) 75 Ohio St.3d 31, 33.

Within the context of a claim for breach of a written contract, forgery does not fit the definition of an affirmative defense. To successfully plead a breach of written contract, a plaintiff must allege 1) the existence of a valid contract; 2) the plaintiff's performance; 3) the defendant's non-performance; and 4) resulting loss or damage to the plaintiff. *Doner v. Snapp*, (1984) 98 Ohio App.3d 597, 600.

Defendants who claim their signatures were forged on a written contract are not admitting the existence of a valid contract. Rather, as the Court of Appeals recognized, "forgery is just another way of saying that the defendant never signed the contract and thus no contract ever existed, which is an element of the plaintiff's breach of contract claim." *R.C. Olmstead, Inc. v. GBS Corp.*, 7th Dist. App. No. 08 MA 83, 2009-Ohio-6808, ¶ 38.

Any effort to characterize forgery as a form of contractual fraud misses the mark. The general elements of fraud are:

- a) a representation, or where there is a duty to disclose, concealment of a 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 into relying on it;
- e) justifiable reliance upon the representation or concealment;
- f) a resulting injury proximately caused by the reliance. *Mussivand v. David*, (1989) 45 Ohio St.3d 314, 322.

Those same elements apply when fraud is asserted as a defense to a breach of contract claim. The party defending the breach of contract claim does not deny the existence of the contract. Rather, they claim their signature was procured by their detrimentally relying on a misrepresentation, concealment or other form of deceit. *ABM Farms, Inc. v. Woods*, (1998) 81 Ohio St.3d 498, 502; *Perry v. M. O'Neil & Co.* (1908) 78 Ohio St. 200, 209-210, 220.

With forgery, there is no detrimental reliance excusing the defendant's duty to perform under a written contract. Rather, with forgery, the defendant shows "that the alleged cause of action never existed and hence is fully covered by a simple denial." *World Enterprises, Inc. v. Midcoast Aviation Services, Inc.* (Mo. Ct. App., 1986) 713 S.W.2d 606, 609.

Proposition of Law No. II: The burden of proving the genuineness of the signatures on a written contract rests with the party claiming the validity of the contract.

The party seeking to enforce a written agreement has the burden of proving such an agreement exists. *Doner v. Snapp, supra*. A valid contract exists when there is a meeting of the minds between the parties. *Noroski v. Fallet*, (1982) 2 Ohio St.3d 77, 79. A signature on a written document is evidence of such a meeting of the minds. *Parklawn Manor, Inc. v. Jennings-Lawrence Co.* (1962) 110 Ohio App. 151.

However, the presence of a signature does not create a rebuttable presumption that a contract exists. Rather, the burden of proving each element of a breach of contract claim – including the existence of a valid contract – rests on the proponent of the contract. *Doner v. Snapp, supra*.

When, as occurred here -- from the initial answer, through three depositions, and continuing through trial -- the party accused of breaching a written contract denies signing any written contract, to prove that a valid contract exists, the proponent of the contract has the burden of proving the authenticity of the defendant's signature. In the absence of such proof, there is no meeting of the minds. If there is no meeting of the minds, there is no valid contract. *Noroski v. Fallet, supra*.

The Court of Appeals carefully considered the relevant case law from sister appellate panels – all of which concluded that the party claiming breach of a written contract has the burden of proving the defendant actually signed the contract. *R.C. Olmstead, Inc. v. GBS Corp.*, Mahoning App. No. 08 MA 83, ¶ 43-44; citing *Hickman v. Cole* (April 7, 1999) Hancock App. No. 5-98-30; *Credit*

Equip. Corp. v. Steiner, (1959) 112 Ohio App. 293, 294-295; *Lev Mar Realty Corp v. Katcase, Inc.* (March 17, 1975) Hamilton App. No. C-74205. The Court of Appeals followed suit -- rightly concluding that “the burden remained on RCO to prove that the signature [of Mihalich] was genuine.” *Id.* at ¶ 47.

Conclusion

RCO's propositions of law are misleading. RCO never asked the trial court to assign the burden of proving "forgery" to Mihalich. Rather, RCO asked the court for a confusing instruction on "fraud."

In the last 150 years, no Ohio court has equated "forgery" with "fraud." Rather, those few cases involving forgery have applied the longstanding rule that the party alleging breach of contract has the burden of proving the existence of a valid contract – and that burden included proving the genuineness of a disputed signature.

In these last 150 years, Ohio businesses have been capable of protecting and enforcing their contract rights under this existing rule of law. Their interests are neither threatened nor undermined by an appellate court decision that follows the decisions of its sister courts.

RCO's cause was considered by the trial court and reviewed by the court of appeals – both courts rejected RCO's claims. One trial and one appeal meets the ordinary demands of justice.

Respectfully submitted,



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I hereby certify that a copy of the foregoing was served via regular U.S. mail this 15th day of March, 2010 upon the following:

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