

IN THE SUPREME COURT OF OHIO

11-1933

Mohamed Bassem Rayess,

Plaintiff-Appellee,

v.

Educational Commission for Foreign
Medical Graduates,

Defendant-Appellant.

On Appeal from the Montgomery
County Court of Appeals, Second
Appellate District

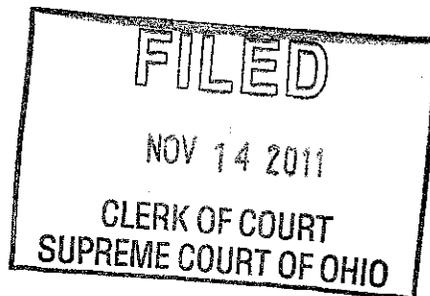
Court of Appeals
Case No. CA24125

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
EDUCATIONAL COMMISSION FOR FOREIGN MEDICAL GRADUATES

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

This case involves a question of significant importance to professionals, would-be professionals, and entities that administer professional examinations around the State of Ohio: whether an examinee may maintain a breach of contract action against an entity that administered the examination based upon the examinee's submission of an application to take the examination, payment of an application fee, and receipt of informational brochures containing general information about the exam. Indeed, while the particular facts of this case present a unique look at the foregoing question, an affirmative answer to the foregoing undoubtedly will affect both individuals and entities in every profession that rely upon examinations, in any capacity, to regulate the profession. This issue, and the far-reaching implications the Court of Appeals of Ohio for the Second Appellate District's ("Second District") September 30, 2011 Opinion¹ could have on contract actions in general, but more specifically to examination applications and testing administrators, is of great public interest generally, and to the entire professional examination community.

In this case, Mohammed Rayess claims the Educational Commission for Foreign Medical Graduates ("ECFMG") breached a written contract by not permitting him the appropriate amount of time to complete a medical licensing examination. He based this claim upon a statement in an informational brochure he received prior to the examination regarding the time periods allotted for each portion of the test. The Second District's finding that general informational brochures can constitute a promise and create a written and enforceable contract between an applicant and the examination administrator will open the floodgates for baseless claims against testing administrators based on circumstances that essentially amount to an examinee not experiencing

¹ As the September 30, 2011 Opinion was subject to a Motion to Seal in the Second District, it is being filed under seal with the Supreme Court of Ohio as well.

exactly what was described in an informational brochure the examinee received prior to taking the examination. The Second District's Opinion, when read in conjunction with the fifteen (15) year statute of limitations that governs written contracts, exposes ECFMG and other similarly situated entities to potential claims arising from examinations that were administered as far back as 1996.

When taken to its logical conclusion, the Second District's Opinion would permit any examinee to claim that an entity, like ECFMG, breached a written contract when the circumstances encountered by the examinee on test day varied, in any respect, from those circumstances described in an informational brochure distributed prior to the examination. Should the Second District's Opinion decision be permitted to stand, entities like ECFMG could be subject to countless breach of contract claims from examinees, like Rayess, who failed their examinations. Certainly, such exposure could materially alter the examination processes followed by administrators and their willingness to distribute information regarding the examination to examinees prior to test day. Further, if examination administrators become unwilling or unable to administer examinations because of the time and expense spent dealing with these types of claims, there would be no method to regulate the various professional industries and this burden would then fall to the State of Ohio. Because of the importance professional examinations play in controlling the quality of professionals in the State of Ohio and the services provided to Ohio citizens, negatively impacting exam administrators' ability to distribute general information about the examinations that are given, for fear of breach of contract lawsuits from those who fail, presents an issue of the utmost public concern.

STATEMENT OF THE CASE AND FACTS

On August 6, 1993, Rayess applied to take Part I of the United States Medical Licensing Exam ("USMLE"), which is administered by ECFMG. At some point after submitting his \$400.00 application fee to ECFMG, Rayess received a copy of USMLE's 1993 Bulletin of Information and ECFMG's Certification and Application informational brochures. Rayess was ultimately assigned to take Part I of the USMLE in Cincinnati, Ohio on September 21 and 22, 1993.

On September 21, 1993, Rayess presented to the test center in Cincinnati to take Part I of the USMLE. Rayess claims he failed Part I of the USMLE as a result of being given insufficient time to complete the first book of the exam.

On September 19, 2008, Rayess filed claims against ECFMG in the Court of Common Pleas for Montgomery County, Ohio ("Trial Court"), which was later dismissed pursuant to Civil Rule 41(A).

On October 16, 2009, Rayess re-filed his Complaint alleging breach of contract, tortious damages, negligent infliction of emotional distress ("NIED"), and intentional infliction of emotional distress ("IIED") against ECFMG. Rayess' claims alleged that ECFMG's failure to provide him with sufficient time to complete Part I of the USMLE caused him to fail the test, deprived him of the ability to practice medicine and make a living as an orthopedic surgeon, gain experience in orthopedic surgery, earn money for retirement, obtain medical and dental insurance, and impacted his social and marital life, among other things.

On March 17, 2010, ECFMG moved the Trial Court for judgment on the pleadings arguing that no written contract existed between Rayess and ECFMG and that Rayess' tort claims were barred by the statute of limitations. On April 30, 2010, Rayess opposed ECFMG's

Motion for Judgment on the Pleadings. On May 17, 2010, ECFMG filed a Reply in Support of Motion for Judgment on the Pleadings.

On June 3, 2010, the Trial Court granted ECFMG's Motion for Judgment on the Pleadings. The Trial Court found that there was no enforceable written contract on which to base Rayess' claim for breach of contract. The Trial Court further found that even if an oral contract existed, the statute of limitations had expired and any right to bring such an action had been extinguished. Next, the Trial Court determined that Rayess' tort claims were likewise barred by the statute of limitations. The Trial Court found that Rayess' causes of action accrued in 1993, that he did not bring his tort claims within four (4) years of that date, and that his emotional distress claims were not actionable.

On June 29, 2010, Rayess filed a Notice of Appeal in the Second District.

On May 10, 2011, Rayess filed his appellant brief arguing the Trial Court erred when it determined that all of the documents he had submitted with his Complaint and the additional documents attached as exhibits to his Opposition to ECFMG's Motion for Judgment on the Pleadings did not constitute a written contract. Rayess also argued that the Trial Court committed reversible error when it found that his tort claims were barred by the statute of limitations and that various equitable doctrines entitled him to a tolling of the applicable statutes of limitations on all his claims.

On June 13, 2011, ECFMG filed its brief in accordance with the Ohio Rules of Appellate Procedure and the Second District's standing orders. With respect to Rayess' breach of contract claim, ECFMG argued that the Trial Court's June 3, 2010 Order granting ECFMG judgment on the pleadings was proper because there was no set of documents in existence that could establish the existence of a written contract. Additionally, ECFMG argued that the Trial Court properly

granted ECFMG judgment on the pleadings with respect to Rayess' various tort claims because Rayess was aware of his "injury" on September 21, 1993 and failed to bring his claims against ECFMG before 2008.

On August 22, 2011, Rayess filed his reply brief, re-asserted his prior arguments and asserted new arguments, including, but not limited to the fact that ECFMG had given Rayess a "special guaranty" and that ECFMG failed to object to new documents Rayess attached to his appellant brief.

On August 23, 2011, ECFMG and Rayess presented oral arguments to the Second District.

On September 30, 2011, the Second District issued its Opinion and Final Entry. In its Opinion, the Second District reversed the Trial Court's grant of judgment on the pleadings on the breach of written contract issue, finding that the informational brochure, application, and payment of a fee, when taken together, created a written contract which survived ECFMG's statute of limitations argument. The Second District affirmed the Trial Court's ruling on all other issues.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law: A written contract cannot exist when it is based on a general informational brochure coupled with supplemental evidence to establish the obligations of the parties.

It is a long-standing principle that in order to create a written contract, Rayess must be able to show offer, acceptance, contractual capacity, consideration, and a manifestation of mutual assent and legality of object and of consideration. *See Kostelnik v. Helper*, 96 Ohio St.3d 1, 3, 770 N.E.2d 58, 61 (2002). There must also be a "meeting of the minds as to the essential terms of the contract". *Id.* at 3-4, 770 N.E.2d at 61; *see also Rayess v. Kaplan Educ. Ctr.*, 2009 WL

1125537, *3 (Ohio App. 2nd Dist. Apr. 17, 2009) (a party seeking to enforce a contract must prove the “essential terms of the contract by a preponderance of the evidence”), *citing J.A. Wigmore Co. v. Chapman*, 113 Ohio St. 682, 687-88, 150 N.E. 752, 754 (1925).

Pursuant to Civ.R. 10(D), Rayess was required to produce “a copy of the . . . written instrument” to his Complaint and absent the existence of a written contract, no cause of action exists. *See Rayess*, 2009 WL 1125537 at *3; *Sullivan v. Anderson Twp.*, 2009 WL 4882818, *3 (Ohio App. 1st Dist. Dec. 18, 2009) (reversing trial court’s denial of motion for judgment on pleadings where plaintiff could prove no set of facts establishing existence of contract). In order to meet his burden under Civil Rule 10(D)(1), the written instrument must “clearly define the unilateral or bilateral obligations of the parties without reference to supplemental evidence to establish the terms of the agreement, contract, or promise.” *See Claxton v. Mains*, 33 Ohio App.3d 49, 51, 514 N.E.2d 427, 429 (Ohio App. 10th Dist. 1986).

Here, Rayess claims that he entered into a written contract with ECFMG. Rayess supports this claim by asserting that the following documents, when taken together, constitute an enforceable written contract: (1) Rayess’ application to take the September 21-22, 1993 administration of the USMLE Part I; (2) documents evidencing Rayess’ payment of the \$400.00 application fee to take the September 21-22, 1993 administration of the USMLE Part I; (3) documents evidencing Rayess’ request to change his exam location from Washington D.C. to Cincinnati, Ohio; and (4) excerpts from USMLE’s 1993 Bulletin of Information and ECFMG’s Certification and Application informational brochures. As an initial matter, the sheer number of documents which Rayess claims comprise the written contract demonstrates their unenforceability as a written contract. *See Claxton*, 33 Ohio App.3d at 51, 514 N.E.2d at 429; *see also Culp v. Miller, Stillman & Bartel*, 2000 WL 502876, *3 (Ohio App. 8th Dist. Apr. 27,

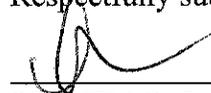
2000) (instrument was unenforceable as written contract where additional documents were necessary to supply “missing terms”); *Mancino v. Rydarowicz*, 2000 WL 181243, *2 (Ohio App. 7th Dist. Feb. 11, 2000) (documents which “did not provide a clear definition of the parties obligations” were not written contracts); *Copeland v. Custom Craft Builders*, 1991 WL 30262, *4 (Ohio App. 8th Dist. Mar. 7, 1991) (a party is not entitled to the fifteen (15) year statute of limitations when the breach of contract claim “grows out of” abbreviated commercial forms which do not define contractual obligations). Nevertheless, and despite the fact that no document exists which could qualify as a written contract, the Second District determined that the over ten (10) exhibits provided by Rayess to prove the existence of a written contract somehow demonstrated promises between ECFMG and Rayess and a recitation of the obligations between them.

Clearly, the Second District’s determination that ECFMG’s Certification and Application informational brochure constitutes a written contract is not supported by existing contract law and creates a dangerous precedent that unnecessarily exposes ECFMG and other similarly situated entities to meritless claims stemming from examinations administered as far back as 1996. Under the Second District’s reasoning, ECFMG has entered into a written contract with each and every individual to whom a USMLE examination has ever been administered. This conclusion could ultimately lead ECFMG, and all other similarly situated entities, to be exposed to claims from any number of examinees whose examination experience differed in any way from the processes generally described in the informational brochure or other information source. In order to protect the State of Ohio and examination administrators from endless litigation and claims from disgruntled examinees who failed to pass their examinations, ECFMG respectfully requests this Court accept jurisdiction and hear ECFMG’s appeal on the merits.

CONCLUSION

For all of the foregoing reasons, this case involves matter of public and great general interest. Accordingly, ECFMG respectfully requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The foregoing was served, via First Class United States Mail, postage prepaid, this 14th
day of November, 2011, upon:

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Appendix A

(Document Filed Under Seal)