[Cite as *R.C. Olmstead, Inc. v. GBS Corp.*, 2009-Ohio-6808.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

R.C. OLMSTEAD, INC.,	)	
	)	CASE NO. 08 MA 83
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	O P I N I O N
	)	
GBS CORP., et al.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 04CV3080.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

Attorney G. Ross Bridgman
Attorney David Campbell
Attorney Daniel Clark
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

For Defendants-Appellees:

Attorney Mark Skakun
Attorney Mark Frasure
4518 Fulton Drive, N.W.
P.O. Box 35548
Canton, Ohio 44735-5548

Attorney Stuart Strasfeld
Attorney David Barbee
100 Federal Plaza East, Suite 600
Youngstown, Ohio 44503

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 18, 2009

VUKOVICH, P.J.

¶{1} Plaintiff-appellant R.C. Olmstead, Inc. (RCO) appeals the decision of the Common Pleas Court after a jury ruled in favor of defendants-appellees GBS Corp. and Stephen Mihalich. The main issues on appeal concern the denial of summary judgment, whether forgery of a signature is a type of fraud that must be raised as an affirmative defense to a breach of contract claim and that must be proven by forgery claimant, and manifest weight of the evidence on a Deceptive Trade Practices Act claim.

¶{2} We conclude that the denial of summary judgment was proper as there was a genuine issue of material fact concerning the alleged forgery and the denial of summary judgment is moot in any event. We also conclude that forgery of a signature is not an affirmative defense. Rather, it is the denial of an element of the plaintiff's contract claim. Thus, when the defendant denies he ever executed the contract, the burden remains on the plaintiff to prove the signature is genuine. Finally, the jury verdict on the Deceptive Trade Practices Act was not contrary to the manifest weight of the evidence. Accordingly, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{3} RCO supplies software, hardware, and support to credit unions. Mihalich worked for RCO in its sales department from the fall of 1999 until the end of 2003. He then began working for GBS, a competitor of RCO. Mihalich thereafter approached various customers of RCO. He advised one customer that RCO's pricing was arbitrary and warned against relying on the potential release of new software that had not yet been developed.

¶{4} On September 2, 2004, RCO filed a complaint against Mihalich and GBS. RCO alleged multiple claims against both defendants; most pertinent to the appeal are the claims for tortious interference with a business relationship and for a violation of the Deceptive Trade Practices Act. Regarding just Mihalich, RCO also alleged breach of a non-compete agreement, but RCO did not attach such agreement, alleging that Mihalich must have destroyed it.

¶{5} Mihalich answered in part by denying that he had signed a non-compete agreement and noted that RCO advised him before he left that he had not signed such an agreement. On November 23, 2005, RCO announced that it had found a copy of the non-compete agreement allegedly signed by Mihalich.

¶{6} On February 13, 2006, RCO asked for partial summary judgment. Relevant to this appeal, the motion argued that RCO was entitled to judgment as a matter of law on its breach of contract claim. RCO attached the newly-found non-compete agreement, which provided that, for twenty-four months after termination of employment, a former employee could not market a competing product to RCO customers or potential customers (those who requested a proposal while the employee was still employed). The agreement also prohibited the employee from discussing trade secrets, system design, or system strengths and weaknesses with a competitor or its customers. RCO claimed that Mihalich executed this non-compete agreement on May 28, 2002, when all employees were asked to sign after an incident with another employee who left to work for GBS.

¶{7} On March 16, 2006, the trial court denied the motion for summary judgment finding that there were genuine issues of material fact for trial. Thereafter, the case was tried to a jury. After thirteen days of testimony, the jury returned a unanimous verdict in favor of GBS and Mihalich on all claims. The court entered judgment accordingly on March 31, 2008. RCO filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE, PART I

¶{8} RCO's first assignment of error provides:

¶{9} "THE TRIAL COURT ERRED BY FAILING TO ENTER JUDGMENT IN FAVOR OF RCO ON ITS BREACH OF CONTRACT CLAIM AND BY FAILING TO PROPERLY ALLOCATE THE BURDEN OF PROOF ON APPELLEES' FRAUD DEFENSE."

¶{10} RCO raises two distinct issues within this assignment, which we shall discuss separately. First, RCO contends that the trial court should have granted its motion for summary judgment on its breach of contract claim. RCO focuses on the dispute about whether the non-compete agreement was enforceable and states that this was a purely legal question. RCO then states that the denial of summary

judgment is not moot after a trial on a purely legal question. However, this argument is based upon RCO's contention that Mihalich conceded that a non-compete contract existed.

¶{11} GBS and Mihalich agree that enforceability would be purely a legal question, allowing a review of the denial of summary judgment, if that had been the only issue. However, they argue that enforceability is irrelevant where the threshold factual issue of whether Mihalich signed the contract is answered by the jury in the negative. That is, if the contract never existed as it was never executed, then its scope and enforceability are moot.

¶{12} Contrary to RCO's suggestions, Mihalich's response to RCO's summary judgment motion did not admit that he signed the contract. Admittedly, Mihalich's response focused on other topics, such as urging in part that the agreement was not enforceable as it was too broad. However, he also called the May 28, 2002 document produced by RCO an "alleged" non-compete agreement, pointing out that GBS required him to ask RCO if he had ever signed a non-compete agreement and that RCO informed him that he did not have a non-compete agreement. (Resp. to S.J. at 4, 13). He noted how RCO urged him to stay after he tendered his resignation and how RCO offered him better compensation if he would sign a non-compete agreement *at that time* in late 2003, thus again acknowledging that he had never signed one before.

¶{13} Moreover, Mihalich's deposition, which had been attached, contained his statement that did not believe that he ever signed the May 28, 2002 non-compete agreement which had been presented to the employees and that when he inquired to ensure that he had never signed one, RCO told him that he did not have a non-compete agreement. (Depo. 168-174). It was also pointed out that a demand letter which RCO's counsel sent to Mihalich after he terminated his employment failed to mention any non-compete agreement. Likewise, the response to RCO's motion for summary judgment filed by GBS specified that it was not conceded that Mihalich had signed the non-compete agreement and made reference to an "alleged" signature. (Resp. to S.J. at 6-7).

¶{14} Finally, as Mihalich pointed out, the alleged agreement had not yet been attached to the complaint as required under Civ.R. 10(D). For all of these reasons, whether the agreement was executed by Mihalich constituted a genuine issue of material fact. As such, RCO was not entitled to summary judgment on the breach of contract claim.

¶{15} Regardless, even if Mihalich did not sufficiently frame his argument that he did not place the signature on the non-compete agreement and even if the trial court should have granted summary judgment at the time, any error is considered harmless or moot. The Supreme Court has held that "any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issue raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made." *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 156. As the Court noted, Civ.R. 61 provides that no error in any ruling is ground for disturbing a judgment unless the refusal to do so appears to the court to be inconsistent with substantial justice. Id. at 155-156 (finding that substantial justice was done where the full and complete development of the facts at trial {as opposed to the limited factual evidence elicited in discovery} showed a genuine issue for the jury).

¶{16} RCO argued in its summary judgment motion that a non-compete agreement had been executed and attached the newly-found agreement to the motion. However, the jury specifically found by way of interrogatory that Mihalich never executed the agreement. Any deficient evidentiary arguments at summary judgment on the lack of execution became merged in the subsequent trial. Id. at 157-158 ("The question of whether the trial court erred in denying the motion for summary judgment became irrelevant and the error {if any} was corrected when the jury determined the issues at trial in favor of [the defendants].").

¶{17} RCO is not assisted by the fact that *Continental* does not apply where the denial of summary judgment is predicated on a pure question of law. See id. at 158. Even if enforceability was a pure question of law, the threshold issue regarding the existence of the non-compete agreement (i.e. whether Mihalich actually signed it) in the first place was not a question of law. See *Bobb Forest Prods., Inc. v. Morbank*

Indus., Inc., 151 Ohio App.3d 63, 2002-Ohio-5270, ¶41 (even if certain issues were purely legal, if other genuine issues of material fact were presented at trial, which would leave the verdict unaffected, then any error is harmless).

¶{18} Instead, whether a contract existed was a factual question the jury answered in the negative. Hence, under the facts and circumstances existing herein, any error in denying summary judgment was rendered moot or harmless after the jury trial. See *Wells v. Hoppel*, 7th Dist. No. 99CO41, 2001-Ohio-3170, ¶14 (defendant's motion alleged factual issue and even if record before the trial court at summary judgment did not reflect the existence of a genuine issue of material fact, the facts presented at trial on this issue rendered the denial of summary judgment harmless or moot). See, also, *The Promotion Co., Inc. v. Sweeney*, 150 Ohio App.3d 471, 2002-Ohio-6711, ¶14 (where this court held that *Continental* precludes the review of the denial of summary judgment where the nonmovant set forth a proper genuine issue of material fact at trial even though it should have been set forth earlier).

¶{19} For the foregoing reasons, the trial court did not err in denying summary judgment on the breach of contract claim, and even assuming arguendo the court did err at the summary judgment stage, any error was harmless or moot after trial when the jury found for the nonmovants on the threshold factual issue of the existence of a contract. Accordingly, the first part of RCO's first assignment is overruled.

ASSIGNMENT OF ERROR NUMBER ONE, PART II

¶{20} The second distinct issue raised in assignment of error number one revolves around RCO's characterization of Mihalich's claim that he did not sign the non-compete agreement as an affirmative defense of fraud. RCO first claims that this defense was waived when it was not specifically raised in the answer. RCO alternatively claims that the court should have instructed the jury in accordance with its proposed jury instructions on breach of contract. Such proposal contended that when determining whether RCO established breach of contract, the jury cannot consider Mihalich's claim that he did not sign the agreement and that such claim would not be considered until the jury found breach of contract and proceeded to address the defense of fraud for which Mihalich had the burden of proof by clear and convincing evidence.

¶{21} Instead, the court merely instructed the jury that they had to find that RCO proved by a preponderance of the evidence *the existence of a contract*, breach, and damages proximately caused by the breach. (Tr. 3211-3214, 3230-3231). The court also provided an interrogatory wherein the jury answered that they did not find that RCO proved by the preponderance of the evidence that Mihalich signed a non-compete agreement. Thus, RCO urges that the court improperly placed the burden on RCO to show that the signature was genuine.

¶{22} The defendants respond that they did not raise fraud as an affirmative defense and that fraud was not an issue at trial. The defendants urge that their claim that there was no contract and that Mihalich did not sign the agreement produced by RCO was a mere denial of an element of RCO's breach of contract action, i.e. the existence of an executed contract.

¶{23} Although there is a general rule that an affirmative defense can be considered waived if not asserted in the answer, there is the overriding rule that if a defense is tried by express or implied consent, then the pleading can be considered amended to conform to the evidence. Civ.R. 15(B). Here, the trial court had expressly allowed amendment of the answers in an entry. Although the answers were not amended to add a claim of fraud or forgery, the forgery issue was tried and RCO does not cite to it anywhere in the 3200-page transcript or elsewhere in the record where RCO preserved the argument regarding the trial of this issue in a timely manner, i.e. at a time when the court could have excluded evidence regarding whether the signature was that of Mihalich. It is not our duty to scour the record to find a timely preservation.

¶{24} Still, this does not affect RCO's claim that even if the defense were permitted to proceed, the jury instructions were prejudicially improper. It is presumed prejudicial where the court puts a burden on the appellant that is greater than the law requires. *Hyneman v. Cash Reg. Serv. Co.* (1980), 62 Ohio St.2d 310, 311. Thus, we will still eventually reach the issue of whether forgery is an affirmative defense which places the burden of proof on the one alleging such forgery.

¶{25} First, however, GBS argues that RCO did not enter a timely or sufficient objection to the court's failure to give its requested jury instructions. Civ.R. 51(A) provides: "On appeal, a party may not assign as error the giving or the failure to give

any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection."

¶{26} Contrary to GBS's first suggestion, the objection need not occur after the charge is given in order to be preserved. Pursuant to Civ.R. 51(A), the objection must be made prior to the time the jury retires to deliberate. Thus, objecting before the charge is given is sufficient in the realm of timeliness. See *Presley v. City of Norwood* (1973), 36 Ohio St.2d 29, 33. Moreover, after the jury instructions, RCO voiced that it was renewing its prior exceptions. (Tr. 3048). Thus, it is the content of the prior objection that is relevant here.

¶{27} As to this issue of the sufficiency of the objection, the mere provision of proposed jury instructions is not an objection to a charge which fails to incorporate the proposal. Id. at 32. See, also, *Henry v. Lincoln Elec. Holdings, Inc.*, 8th Dist. No. 90182, 2008-Ohio-3451, ¶28. If there is no formal objection, the record must show that the court was fully apprised of the correct law on the issue and that appellant unsuccessfully requested its inclusion. *Presley*, 36 Ohio St.2d at 33.

¶{28} A general objection to jury interrogatories as given is not sufficient to preserve a specific objection for appeal. (Tr. 3054). See *Kucharek v. Tri-City Fam. Med., Inc.*, 148 Ohio App.3d 38, 2001-Ohio-4383. The question thus becomes whether certain statements demonstrate sufficient preservation of an objection pursuant to the requirements of Civ.R. 51(A).

¶{29} The trial court opened court one morning by noting that they were about to begin instructions and that they had the opportunity to discuss in detail the instructions of law and the proposed interrogatories. (Tr. 3045-3046). The court asked if RCO had anything to add regarding those discussion, to which RCO responded:

¶{30} "I think the record needs to be cleared up on a couple of points. We had proposed an instruction, which the Court refused to give, on the issue of pleading and affirmative defense and the issue of forgery and whether or not that is appropriately before the jury. And the judge has considered that, as I understand it, and has declined to offer that instruction. We would note our exception for purposes of the record." (Tr. 3046).

¶{31} Thus, there was a formal objection to the refusal to give an instruction on the affirmative defense of forgery. However, GBS urges that this is general and vague and does not "stat[e] specifically the matter objected to and the grounds of the objection". That is, RCO did not specifically demonstrate that the court was fully apprised of RCO's argument that fraud or forgery was an affirmative defense that had to be proven by the defense by clear and convincing evidence as opposed to a mere denial of an element of RCO's complaint. Although the statement mentions a proposed instruction, GBS suggests that the statement is merely an untimely complaint that the issue of the signature should not have been tried to the jury due to waiver by omission from the answer.

¶{32} However, counsel took exception (objects) to the court's declining to provide the proposed instruction on an affirmative defense and then mentioned forgery (implying that forgery is an affirmative defense). The proposed instruction clearly set forth the argument now made on appeal. Under the totality of the circumstances, we conclude that RCO's statement was sufficient to preserve the objection to the jury instructions under Civ.R. 51(A).

¶{33} Thus, we must proceed to determine whether Mihalich's defense that he did not sign a non-compete agreement is an affirmative defense or a mere denial of a claim within RCO's complaint. To recover for breach of contract, the first element the plaintiff has the burden to prove is the existence of a contract. *Price v. Dillon*, 7th Dist. Nos. 07MA75, 07MA76, 2009-Ohio-1178, ¶44; *Gore v. Kamal*, 7th Dist. No. 05MA204, 2007-Ohio-1129, ¶14. See, also, *Sans v. Neal* (1894), 52 Ohio St. 56, 58 (burden on one asserting contract to show its existence). Thus, GBS and Mihalich urge that the denial of the existence of a contract is a simple denial of an element of the plaintiff's case rather than an affirmative defense, leaving the burden of proof on RCO. RCO cites no case law for its proposition that the nonexistence of a contract due to forgery is an *affirmative* defense as opposed to a mere defense. RCO merely assumes it is a type of fraud and notes that fraud is an affirmative defense.[1]

---

[1]In their reply brief, they cite two inapplicable cases. In *Fourth & Central Trust Co. v. Rowe* (1930), 122 Ohio St. 1, the Supreme Court stated that the burden was not on the person asserting forgery but was on the bank to prove that a withdrawal was not based upon forgery. Id at. 6-7, 10. This is the opposite of the holding attributed to *Rowe* by appellant. In *Countrywide Home Loans, Inc. v.*

¶{34} As such, a discussion of the types of fraud defenses seems warranted here. Such defenses to a contract claim have been divided into two categories: (1) fraud in the inducement (such as a false representation as to the quality of the consideration) and (2) fraud in the execution. The question becomes whether forgery is fraud in the execution and if so whether such is an affirmative defense because it is a type of fraud and because fraud is listed in Civ.R. 8(C) as an affirmative defense.

¶{35} The Supreme Court has explained that fraud in the execution exists where the contract is misread to an illiterate party to be charged or where the charging party engaged in some trick or device and imposed upon the party to be charged so as to procure his signature on an instrument which he did not intend to give, such as where there is a surreptitious substitution of one paper for another at signing or where the other party sought the signature while knowing the other was under anesthesia. *Perry v. M. O'Neil & Co.* (1908), 78 Ohio St. 200, 209-210, 220. The burden to prove such fraud in the execution was placed upon the one claiming it. Id. at 225.

¶{36} The *Perry* Court's definition of fraud in the execution dealt with a real signature procured improperly, not forgery. In fact, the Court suggested that an issue regarding the genuineness of the signature is not in the same category as fraud in the execution when the court adopted the following rule: "When the signature is admitted the presumption is that the party signing the instrument understood its terms, and he is bound by it, unless he can prove facts that will avoid it." Id. at 225-226. Similarly, the United States Supreme Court has stated that if the signature is genuine, then the burden is on the defendant to show that the document above the signatures is a forgery. *Sturm v. Boker* (1893), 150 U.S. 312, 340. These statements suggest that the rule regarding the defendant's burden is inapplicable where the signature is said to be forged.

¶{37} We acknowledge that Ohio Jurisprudence lists forgery of a signature as a type of fraud in the execution. 50 Ohio Jurisprudence 3d (2002, Supp. 2007), Fraud and Deceit, Section 14. However, the case it cites for this proposition did not make

---

Poppy, 11th Dist. No. 2003-L-134, 2004-Ohio-5936, the court upheld summary judgment due to the defendant's lack of response to the bank's motion and thus spoke of summary judgment burdens, not trial burdens. Id. at ¶31. The court then noted that fraud and forgery can both be defenses. Id. at ¶34. The court did not say that forgery was fraud or that forgery was an affirmative defense, which, as we outline, is distinct from a mere defense.

such a pronouncement. It did say that if one forges a deed, he does not acquire title with power to convey to a bona fide purchaser because the original "fraud" taints the transaction. *Ogden v. Ogden* (1854), 4 Ohio St. 182, 195. This does not classify forgery of a signature as fraud in the execution. Furthermore, this was pure dicta. *Ogden* had nothing to do with a forged signature. Rather, the issues surrounded possible fraud in the procurement of an actual signature and a premature delivery of a deed contrary to its conditions. Id. at 187-188, 194-195. Plus, this case is older than *Perry* and *Sturm*.

¶{38} We hold that forgery is just another way of saying that the defendant never signed a contract and thus no contract ever existed, which is an element of the plaintiff's breach of contract claim. In further support, we point out that the defense of forgery does not fit the definition of an affirmative defense. Pursuant to Civ.R. 8(C):

¶{39} "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

¶{40} An affirmative defense is said to be a defense in the nature of confession and avoidance as it admits the plaintiff has a claim but asserts a legal reason that the plaintiff cannot recover on it. *State ex rel. Plain Dealer Pub. Co. v. Cincinnati* (1996), 75 Ohio St.3d 31, 33 (exceptions to public records act are not in the nature of confession and avoidance because the assertion of the exception does not admit the allegations are true, i.e. it does not concede that the requested records are "public" records); *List & Son Co. v. Chase* (1909), 80 Ohio St. 42, 47-48 (the defendant's argument that the actual oral contract entered varied from that claimed by the plaintiff is not an affirmative defense and burden never shifted from the plaintiff); *Sain v. Estate of Hain*, 10th Dist. No. 06AP-902, 2007-Ohio-1705, ¶16-18 (non-existence of oral contract is not an affirmative defense).

¶{41} An affirmative defense attacks the legal right to bring a claim as opposed to attacking the truth of the claim. Black's Law Dict. 60 (6th Ed. 1990). It is more than

a mere denial or a contradiction of the evidence but is a substantive or independent matter which the defendant claims exempts him from liability even if the facts of the complaint are conceded. *State v. Poole* (1973), 33 Ohio St.2d 18, 19. Thus, where one simply testified to that which disproves the plaintiff's claim, an affirmative defense is not asserted. See *Schneider v. Schneider*, 178 Ohio App.3d 264, 2008-Ohio-4495 (where the Ninth District held that the defense that the item was a gift was not an affirmative defense but rather was a denial of the plaintiff's contract claim). See, also, *Alberts v. Dunlavey* (1936), 54 Ohio App. 111 (where the Fifth District likewise held that a claim of gift in defense of a contract claim is not an affirmative defense).

¶{42} RCO's claimed that a non-compete agreement existed and that Mihalich signed that agreement on May 28, 2002 when the agreement was presented to all employees. Mihalich's claim that a non-compete agreement does not exist and that he did not sign it at that time is merely controverting the truth of the material averments in the plaintiff's complaint. It is not a confession and avoidance. That is, he is not saying that he breached the contract (confession) but there is a reason he should not be held liable for his breach (avoidance). Rather, he is saying that he never executed a contract and thus no contract exists. In accordance, the plain definition of an affirmative defense shows that a defense involving the forgery of the defendant's signature is more akin to a denial that a contract was executed than it is to a confession and avoidance. This analysis is also supported by the following appellate cases.

¶{43} The Third District has held that there was competent and credible evidence to support a trial court's determination that the plaintiff did not establish that the defendant signed the alleged contract where the defendant testified that he was out of town on the day of the contract and that he did not sign it. *Hickman v. Cole* (Apr. 7, 1999), 3d Dist. No. 5-98-30. Thus, that court left the burden on the one claiming breach of contract to show that the signature was actually that of the defendant. Id.

¶{44} The Ninth District has also held that when a defendant's answer denies that he executed the three documents on which the suit is based, the defendant has not asserted an affirmative defense but rather he has merely denied that he signed the

document as claimed by the plaintiff. *Credit Eq. Corp v. Steiner* (1959), 112 Ohio App. 293, 294-295 (noting that it is more fair for the plaintiff to have to prove how he obtained the signature). See, also, *Lev Mar Realty Corp. v. Katcase, Inc.* (Mar. 17, 1975), 1st Dist. No. C-74205 (when execution is specifically denied in the answer, the burden to prove the existence of the contract remained on the one who is trying to collect under the contract).

¶{45} It has also been stated that a signature on a contract creates a rebuttable presumption that it was validly executed. See *Cardinal Constr. Co. v. Americare Corp.* (Apr. 28, 1986), 3d Dist. No. 9-84-46. When the defendant offers evidence to rebut the presumption, the presumption drops out and the burden of proof remains on plaintiff. Id. See, also, *Buck v. Cobletnz* (1934), 18 Ohio Law Abs. 1 (signature on contract establishes prima facie case unless there is an issue as to genuineness of signature).[2]

¶{46} Under this analysis, RCO produced a contract with a signature purporting to be that of Mihalich. Mihalich denied that a contract existed in his answer when he denied plaintiff's claim that he signed a contract. At trial, he set forth evidence rebutting the presumption that the signature on the document was genuine. As such, the burden remained on RCO to prove the authenticity of the signature.

¶{47} For all of these reasons, we hold that forgery was a defense but not an affirmative defense. Thus, upon Mihalich's claim that he did not sign the contract, the burden remained on RCO to prove that the signature was genuine. As such, the trial court's jury instructions were not improper.

---

[2]His is similar to the concept the Supreme Court previously utilized when stating that want of consideration was not an affirmative defense but failure of consideration was. See *Ginn v. Dolan* (1909), 81 Ohio St. 121, 127 (the party who maintains the affirmative of an issue carries the burden of proof through the whole case, although he may be aided by a rebuttable presumption of law and his opponent need do no more than counterbalance the presumption), partly superseded by *Ohio Loan & Disc. Co. v. Tyarks* (1962), 173 Ohio St. 564, 568 (*Ginn* was before Ohio Negotiable Instruments Law which places burden on defendant for want of consideration defense as well). Although inapplicable here, we note that this rule regarding presumptions and burdens has been codified in R.C. 1303.36(A) for cases involving negotiable instruments. Notably, when Civ.R. 8(C) was amended to reflect the statutory U.C.C. change, the only affirmative defense that was added was "want of consideration for a negotiable instrument" rather than merely "want of consideration". Forgery of the signature of the party to be charged is more akin to want of consideration as both mean that no contract was ever entered because they deny an element of contract.

¶{48} Lastly, RCO urges that the jury's verdict in answering the interrogatory regarding Mihalich's signature was not supported by the manifest weight of the evidence. Specifically, RCO states that if the trial court had instructed the jury on the affirmative defense of fraud, then the jury would not have ruled in favor of Mihalich. If the trial court was required to instruct on fraud or place the burden for forgery on the defense, then we would not evaluate the weight of the evidence but would merely reverse and remand for a new trial. See *Hyneman v. Cash Reg. Serv. Co.* (1980), 62 Ohio St.2d 310, 311 (it is presumed prejudicial where the court puts a burden on appellant that is greater than the law requires).

¶{49} However, as we held above, the trial court's instructions placing the burden on RCO to prove the existence of a contract were proper in this case. Thus, RCO's specific weight of the evidence argument is without merit. Still, in case RCO also means to raise weight of the evidence on this issue in general, we shall review whether the jury's finding that Mihalich did not sign the non-compete agreement was contrary to the manifest weight of the evidence.

¶{50} Judgments supported by some competent, credible evidence will not be reversed on appeal as being against the manifest weight of the evidence. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24. When addressing a trial court's decision on weight and credibility, the reviewing court is guided by the presumption that the findings of the trial court are correct. Id. One rationale for this presumption is that the trial court is in the best position to view witnesses and observe their demeanor, voice inflection, and gestures. Id. We do not second-guess credibility decisions or rational inferences drawn by the jury.

¶{51} As the Supreme Court recently explained, the standard for evaluating the weight of the evidence in a civil case is even more deferential to the fact-finder than in a criminal case. Id. at ¶26. While the evidence in criminal appeals can be reweighed by the appellate court, in a civil appeal, there is no appellate reweighing of the evidence permitted and judgments supported by some competent, credible evidence must be affirmed. Id.

¶{52} RCO's handwriting expert testified that she did not believe the signature had been traced or drawn (simulated) by someone other than Mihalich, whom she

opined had signed the non-compete agreement. (Tr. 1986-1987). RCO notes that the defense's handwriting expert testified that the signature had not been forged by the owner of RCO, the executive vice president or the other employees of RCO. (Tr. 2768). However, this handwriting expert testified that the signature on the non-compete agreement had been traced or simulated by someone and had not been signed by Mihalich himself. (Tr. 2715, 2724-2727, 2740-2743, 2749-2750). He pointed to hesitation marks, improper overlap and suspicious initiation strokes. It was also pointed out to be suspicious that RCO did not produce the alleged May 28, 2002 agreement until November 23, 2005, over a year after filing suit and nearly two years after Mihalich left.

¶{53} RCO emphasizes that all salespersons and vice-presidents were required to sign the non-compete agreement or face termination, and RCO points out that Mihalich knew this. Executive vice-president Kambeitz stated that Mihalich did not sign the agreement at the May 23, 2002 initial meeting wherein the vice-presidents signed. He said that Mihalich must have signed it with his sales department on May 28, 2002 because he remembered receiving from Ray Hinkleman three completed non-compete agreements thereafter, one of which belonged to Mihalich. (Tr. 1631-1632).

¶{54} However, Ray Hinkleman, Mihalich's supervisor at the time the non-compete agreements were circulated, testified that he only provided Kambeitz with two signed agreements and did not provide a signed agreement from Mihalich. (Tr. 2383-2384). Hinkleman testified that Mihalich expressed that he was too young to sign a non-compete agreement. He testified that Mihalich did not sign the agreement at the May 28, 2002 meeting and that he thus informed the owner that Mihalich would not sign. (Tr. 2381). He disclosed that the owner said he would handle it. (Tr. 2382). The owner did not testify as to having approached Mihalich about the lack of an agreement and instead testified that he was informed that everyone had signed the agreement. (Tr. 772).

¶{55} Furthermore, *Mihalich testified that he did not sign the non-compete agreement provided to the employees in May 2002*. (Tr. 1261, 1274, 1597-1599). Contrary to RCO's characterization that Mihalich admitted to his father-in-law that he

signed the document, Mihalich stated that he was referring to an internal security policy when he was speaking to his father-in-law and the father-in-law's testimony confirmed this statement. (Tr. 1270, 965-967). Another vice-president testified that Mihalich was adamantly opposed to signing the agreement and that Mihalich believed the non-compete agreement showed that the owner was only concerned about his own best interests and not those of the employees. (Tr. 489-490).

¶{56} Testimony showed that the non-compete agreements were moved off-site to the accountant's residence some months to a year before Mihalich tendered his resignation. (Tr. 2803). The accountant testified that she was never given a non-compete agreement for Mihalich. She also testified that the executive vice-president once gave her a stack of documents and asked her to create a spreadsheet with employee information. (Tr. 857-858, 862). This spreadsheet (apparently generated prior to Mihalich's resignation) showed that Mihalich never signed an agreement. (Tr. 857, 866, 869).

¶{57} The jury viewed the gestures, demeanor, voice inflection and tone of the witnesses as they testified. The jury apparently believed the testimony of Mihalich and that of the witnesses whose testimony supported Mihalich's defense. This was within their province. As there exists plenty of competent, credible evidence supporting the jury's decision that Mihalich did not sign the contract, this argument is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

¶{58} RCO's second assignment of error alleges:

¶{59} "THE TRIAL COURT ERRED FAILING TO ENTER JUDGMENT IN FAVOR OF RCO ON ITS TORTIOUS INTERFERENCE CLAIMS."

¶{60} As far as this assignment alleges error in the failure to enter judgment on this claim of tortious interference, GBS and Mihalich point out that RCO cannot claim that the trial court erred in failing to enter judgment after the jury verdict where RCO did not file a motion for directed verdict or for judgment notwithstanding the verdict. Yet, RCO appears to be once again referring to the failure to enter summary judgment on this claim.

¶{61} The tort of interference with business relationships and contract rights is generally committed when one without a privilege to do so, induces or otherwise

purposely causes a third person not to enter into or continue a business relation with another or not to perform a contract with another. See *A&B-Abell Elev. Co., Inc. v. Columbus/Central Ohio Building & Construct. Trades Council* (1995), 73 Ohio St. 1, 14. RCO states that the defendants' only defense was that they engaged in legitimate competition. Mihalich responds that the jury could rationally find that the contact with certain customers was fair competition. See *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 176 (only *improper* interference is actionable).

¶{62} In any event, RCO's only argument regarding a lack of legitimate competition is that the competition was wrongful *if it was in violation of a non-compete agreement*. (Apt. Brief at 22 "if RCO can demonstrate, as it has, that this competition was in violation of Mihalich's Agreement it is unlawful and therefore wrongful competition ***."). In other words, RCO's argument here is merely: if there was a non-compete agreement, then the defense of legitimate competition is without merit.

¶{63} *This argument is wholly premised on the claims addressed in the prior assignment of error concerning breach of the non-compete agreement*. Thus, as we have upheld the jury verdict concerning the lack of an agreement, this assignment is moot.

ASSIGNMENT OF ERROR NUMBER THREE

¶{64} Appellant's third assignment of error argues:

¶{65} "THE VERDICT IN FAVOR OF APPELLEES ON APPELLANT'S DECEPTIVE TRADE PRACTICES ACT CLAIM IS UNSUPPORTED BY THE EVIDENCE."

¶{66} The pertinent provision of the Deceptive Trade Practices Act states:

¶{67} "A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following: * * * Disparages the goods, services, or business of another by false representation of fact * * *." R.C. 4165.02(A)(10).

¶{68} RCO argues that the jury verdict on this claim is contrary to the manifest weight of the evidence[3] because the contested statements: (1) were representations

[3]GBS initially argues that a manifest weight of the evidence challenge is waived where the plaintiff never sought directed verdict. However, this argument is misguided. Only sufficiency of the

of fact rather than protected opinions; (2) were false rather than true; and (3) were made with actual malice as Mihalich had knowledge of the falsity or recklessly disregarded the truth. Citing *A&B-Abell Elevator Co. v. Columbus/Central Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 15-16 (defining actual malice and applying the clear and convincing evidence burden). RCO acknowledges that any of the three categories listed can constitute a defense if some competent, credible evidence exists as to one or the other category.

¶{69} First, RCO takes issue with Mihalich's statements while marketing the GBS product to an RCO customer (whom Mihalich considered a friend) that RCO's pricing was arbitrary and had no rhyme or reason. Mihalich testified that these statements were true as there was no set formula for pricing until he attempted to set one. (Tr. 1374, 1377). He explained that he tried to develop a pricing model to remedy this problem but RCO did not apply the model to renewals (inside sales). (Tr. 1376). He noted that the renewing customer's price was arbitrary and was based on the pricing that they had for fifteen years and would go on forever without a ceiling. (Tr. 1375-1376). He further stated that the owner's philosophy was to charge the customer to the "gag point" and to charge as much as he could "without killing" them. (Tr. 1377).

¶{70} The jury apparently chose to believe that this was an opinion based upon truth or that he did not recklessly disregard that the statement was false. As they were free to choose to believe Mihalich's testimony that these statements were not false representations of fact, the jury could properly find that RCO failed to meet its burden regarding the Deceptive Trade Practices Act. See R.C. 4165.02(A)(10). We cannot reverse such a verdict as it is supported by some competent, credible evidence.

¶{71} Next, RCO contests Mihalich's characterization of RCO-2, the software under development to replace RCO-1, as a "science project" and "still vaporware". The jury could rationally find that "science project" is a protected opinion rather than a false representation of fact. The term is in the nature of opinion, and a rational person could

---

evidence has been held waived where directed verdict was never sought or renewed. The cases cited do not support their claim here. The Supreme Court case explains the waiver rule regarding *sufficiency*, states that the case is to go to the jury in the absence of a renewed directed verdict motion, and later specifically notes that the verdict was not contrary to the weight of the evidence. *McKellips v. Indus. Comm*. (1945), 145 Ohio St. 79, 80. See, also, *Sull v. Kain*, 172 Ohio App.3d 297, 2007-Ohio-3269, ¶12-13 (noting the rule regarding sufficiency and then reviewing the weight of the evidence).

take it as such. We also note that Mihalich encouraged the customer to whom he made this statement to visit RCO for a demonstration of the product, which the customer did. This tends to negate actual malice or reckless disregard for the truth.

¶{72} Furthermore, the use of the term "science project" was taken by the customer to be synonymous with the other contested descriptor, "vaporware." (Tr. 365). A commonly accepted definition of "vaporware" is software announced by the developer before or during development meaning that the product has not and may never end up being available. See, e.g., http://www.mirriam-webster.com/dictionary. (See, also, Tr. 363 where the customer to whom the comment was made defined the term as software that is not yet fully developed but is being sold as a final product.) This was the status of RCO-2 at the time of the statement and at trial five years thereafter. (Tr. 2311). Mihalich testified that RCO-2 was in fact "vaporware" as RCO was working on a new product that was still a theory and was not done yet. (Tr. 1379-1380, 1384). Considering the basic definition of the term, a jury could believe his assessment was truthful. Regarding any implication that the developer was overly optimistic, a rational juror could also consider the use of this term to constitute a protected opinion.

¶{73} The jury's verdict that the aforementioned statements were not disparaging the product of RCO by false representation of fact was supported by some competent, credible evidence. As such, we cannot overturn such verdict on weight of the evidence grounds. See *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24, 26. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{74} Appellant's final assignment of error posits:

¶{75} "THE ERRORS IN THE TRIAL COURT WARRANT A NEW TRIAL ON ALL CLAIMS."

¶{76} Here, RCO merely reiterates that the breach of contract problem impacted the other claims. This assignment is thus applicable only if we were to sustain RCO's arguments regarding their breach of contract claim. As we are upholding the jury finding no breach of contract, a new trial is not warranted on this basis. This assignment of error is therefore overruled.

¶{77} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.