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# RESPONSE OF JOHN KULEWICZ TO PROFESSOR SHANKER

by

JOHN J. KULEWICZ\*

A glaring error in Professor Shanker's recent article proves the value of the parol evidence rule at least as effectively as the balance of his scholarly contribution to this journal. In reviewing the arguments of counsel in the *Marion PCA v. Cochran* case,<sup>1</sup> Professor Shanker claims that the Court "was led astray by the lawyers" and that "[m]isleading from the [l]awyers" caused the Court to undertake its analysis of the Statute of Frauds.<sup>2</sup> He stakes this claim on his apparent belief that counsel did not ask the Court to apply the parol evidence rule to the facts of the case. By subjecting a definitive written text -- the brief of appellant Marion PCA -- to his own extrinsic assumptions, it is Professor Shanker who has gone astray.

The Supreme Court, at the urging of the Marion PCA, directly considered the parol evidence issue. I served as counsel to the Marion PCA and, in that capacity, wrote its brief. On pages 23 through 25 of the brief, under the sub-heading "Parol Evidence Rule," the Marion PCA made the following argument:

Count One of the counterclaim also is legally insufficient because its proof would depend upon admission of the alleged Marion PCA promise into evidence to vary or contradict the written terms of the agreement of the Cochrans. Because of the parol evidence rule, no Ohio court could allow such proof. In *Burton, Inc. v. Durkee*, 158 Ohio St. 313 (1952), this Court ruled that:

Where parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, the parol evidence rule excludes from consideration evidence as to other promises resulting from such negotiations.

The notes and mortgage attached to the complaint as Exhibits A, B and E (the execution and delivery of which the Cochrans admitted), and Exhibit I attached to the Cochran counterclaim are the unambiguous written agreement between the parties. (J.R. at 13-14, 19-22, 34-36.) The alleged oral agreement would vary or contradict that agreement. As

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<sup>1</sup> 40 Ohio St. 3d 265 (1988).

<sup>2</sup> See Shanker, *Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds (With Some Cheers and Jeers for the Ohio Supreme Court)*, 23 AKRON L. REV. 1, 11 (1989).

such it would be inadmissible. There is no other basis for Count One of the Cochran counterclaim.

Indeed, the parol evidence rule, as one commentator has noted, provides that “when two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.” 3 A. Corbin, *Contracts* § 573 (1963). “Consideration of the circumstances surrounding a contract,” as another commentator has observed, “is not for the purpose of varying the intention of the parties, as disclosed by the writing, but for the purpose of ascertaining what the parties, in fact, meant by the doubtful language employed for the expression of their intention.” 18 O. Jur. 3d *Contracts* § 162 (1980 & Cum. Supp. 1987). See also *Id.* at § 163 (“where the contract is plain and unambiguous, it is not error to refuse to admit evidence as to the negotiations which led up the execution of the contract”); 3 A. Corbin, *Contracts* § 573 (1963) (“if the parties have stated the terms of their contract in the form of a complete written integration, it cannot be varied or contradicted by proof of antecedent negotiations and agreements”).

Courts have recognized that the parol evidence rule specifically bars guarantor claims for fraudulent inducement based upon oral statements that would vary or contradict the written terms of the guaranty agreement. See, e.g., *U.S. v. Willard E. Fraser Co.*, 308 F. Supp. 557, 562-63 (D. Mont. 1970), *aff’d* 459 F.2d 483 (9th Cir. 1972) (parol evidence rule bars consideration of oral statements upon which fraudulent inducement claim based); *Dahmes v. Industrial Credit Co.*, 261 Minn. 26, 110 N.W. 2d 484 (1961) (“[p]arol evidence is not admissible to contradict the express terms of a written agreement. . . . As a matter of law, plaintiffs’ fraud claims cannot be sustained”); *Marx v. Schwartz*, 14 Or. 177, 12 P. 253 (1886) (alleged oral representations “became merged in the writing itself when it was executed, and must be held to contain the entire agreement between the parties at the time”).

The Marion PCA also raised the questions, of course, of: (1) whether Ohio law allows a claim for fraud based upon a promise that is unenforceable under the Statute of Frauds; (2) whether, because the parties to a contract are presumed to know the law, one justifiably can rely on a promise that is void under the Statute of Frauds; (3) whether Ohio law allows a claim for fraud based upon a promise of future performance; and (4) whether Ohio law allows a claim for fraud in the inducement by one who has failed to return the consideration that he or she received in the transaction.

The Court chose to explain its decision in terms of the Statute of Frauds and -- in my own assessment -- reached a sound result. When he claims that the Statute of Frauds issue was the only question that the Court considered, however, Professor Shanker unfairly impugns the conscientiousness of the Court and considerably understates the efforts of counsel. The Ohio Supreme Court knew what it was writing about when it reviewed the arguments of counsel in the *Marion PCA* case. Professor Shanker, with all due respect, did not.

## REPLY OF MORRIS G. SHANKER TO JOHN J. KULEWICZ

March 27, 1990

Dear Mr. Kulewicz:

I acknowledge your letter of March 19 with enclosures. The statements in your brief came as a complete surprise to me.

Nothing in the Ohio Supreme Court's opinion indicated that the litigants had raised the Parol Evidence Rule, or that it was an issue in the case. To the contrary, on the matter which is the subject of my article, the Court throughout its opinion indicates that the only issue before it is one involving the Statute of Frauds; more particularly, whether PCA could raise the Statute of Frauds by way of a late filed reply and, if so, whether it was a meritorious defense to defendants' counterclaims. Thus, Justice Kerns writes:

"The only issue of any consequence in this appeal is essentially one of pleading--whether the Statute of Frauds is a complete defense . . . ." P. 276.

Comparably, the majority opinion in the factual statement states that:

". . . PCA thereafter filed a motion to dismiss the counterclaim on the basis that the Statute of Frauds bars the relief requested therein [by defendants]." P. 269.

The Court then notes that the appeal it was deciding arose when the trial court ". . . determined that PCA's motion to dismiss was well taken in that the Statute of Frauds is a legal bar to the action." P. 269. Comparably, in its analysis, the Court states that the issue for its consideration was ". . . whether the Cochran's remaining counterclaim was properly dismissed by the trial court on the pleadings pursuant to

PCA's motion based on the ground that the counterclaim is barred by Ohio Statute of Frauds.' P. 272. And, at page 273: "PCA's defense to this counterclaim is that this action is barred by the Statute of Frauds . . . ." Further, headnotes 2, 3, and 4 each expressly state that only the Statute of Frauds was being considered and decided.

In writing my article, I relied upon what was contained in the Supreme Court's opinion which several times indicates that PCA's motion was based on the Statute of Frauds. Thus, your letter advising that your brief also raised issues on the Parol Evidence Rule came as a quite a surprise.

You are entitled to a correction from me. Based on the information you have now supplied to me, anything in my article which infers or suggests that you had not mentioned or raised the Parol Evidence Rule to the Court is factually inaccurate and I apologize for it. Indeed, I compliment you for having raised the Parol Evidence issue since, as my article makes clear, I believe it was the controlling legal principle for this case.

For the reasons stated in my article, I do not agree with your assessment in your Response that the Ohio Supreme Court "reached a sound result" with respect the Statute of Frauds. Nevertheless, to help set the record straight, I would join with your request to the Akron Law Review that they publish your Response. They also have my permission to publish at the same time this letter.

Morris G. Shanker  
John Homer Kapp, Professor of Law