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No. 35813-1

**COURT OF APPEALS, DIVISION 2
OF THE STATE OF WASHINGTON**

BAGELHEADS, INC. and ROBERT MACKEY, JR.,

Appellants

v.

DONALD KOSTEROW,

Respondent

**REPLY BRIEF OF APPELLANTS
BAGELHEADS, INC. and ROBERT MACKEY, JR.**

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Long in words, but short in substance, the brief from Respondent Donald Kosterow (“Kosterow”) offers no support for the jury’s verdict in this case. Kosterow cannot point to any evidence from which the jury could have inferred that the parties intended the phrase “no less than fifty-one percent (51%)” to mean “majority” interest, as Kosterow suggests. He cannot point to any evidence that Mackey disclosed any of Kosterow’s information to any third party in violation of the confidentiality clause of the contract; indeed, he still does not identify the information that Mackey allegedly disclosed. And he fails to identify any actual damages he sustained from the alleged disclosure of this still unidentified information. In fact, stripped of its extraneous information, Kosterow’s brief does little more than ask this Court to assume that the jury had a factual basis for its verdict.¹ But saying it does not make it so.

¹ Kosterow’s brief includes a statement of facts that addresses, for the most part, factual issues with no relevance to this appeal. Of the 31 pages in his statement of facts, seven are devoted to Kosterow’s performance under the contract, while another five discuss Mackey’s failures under the contract. Neither section relates to an assignment of error. Further, while he accuses the Appellants of failing to state the facts in the light most favorable to Kosterow, Kosterow fails to identify a single instance in Appellants’ Brief in which that occurred. Bagelheads and Mackey will focus this reply on the holes in his proof. The facts related to the assignments of error do not support the verdict.

I. Even if Bagelheads failed to preserve the error regarding the construction of the contract, this Court still has the discretion to review and correct the error

Bagelheads stated in its initial brief that the trial court should not have allowed the jury to determine whether the phrase “no less than fifty-one percent (51%)” meant anything other than what it said. Kosterow’s primary argument on this issue—indeed, the only argument he could conceivably muster—is that Mackey failed to preserve the trial court’s error in submitting to the jury the interpretation of an unambiguous written contract provision.

Bagelheads recognizes that, as a general rule, appellate courts will not consider unpreserved errors for the first time on appeal. The rule, however, is not absolute. In fact, the rule itself provides that “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a) (emphasis added). As the Supreme Court of Washington has recently reaffirmed, “by using the term ‘may,’ RAP 2.5(a) is written in discretionary, rather than mandatory, terms.” Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844, 848 (2005). Thus, this Court has the discretion to review an unpreserved issue when warranted.

Bagelheads respectfully suggests that this is one time when exercising this discretion is warranted. As Bagelheads pointed out in its

initial brief, the Supreme Court of Washington held more than 75 years ago that a jury should not be instructed on the proper interpretation of an unambiguous contract because the instruction violated the long-standing “rule that contracts are to be construed by the court.” See Jones v. Shell Oil Co., 164 Wash. 543, 550, 3 P.2d 141, 144 (1931). This clear division of responsibility between judge and jury is precisely the type of fundamental legal right that appellate courts should preserve. In short, the trial court cannot abdicate its responsibility to interpret an otherwise unambiguous written contract even absent an objection.

If the Court exercises its discretion to review this otherwise-unpreserved error, the Court would have little choice but to reverse the judgment on this point. As Bagelheads argued in its initial brief, the phrase “no less than fifty-one percent (51%)” is plain and unambiguous—and cannot, under any conceivable interpretation, be interpreted to include 50.5 percent. In fact, nowhere in Kosterow’s brief does he suggest that the phrase is at all ambiguous. For that reason, the judgment should be reversed.

II. Kosterow cannot point to any evidence that the parties agreed that 51 percent meant majority ownership

Regardless of whether the Court entertains the trial court’s error in permitting the jury to construe the contract provision, the result of this

appeal should be the same. The evidence was insufficient to support the verdict. Under Washington law, as Respondents concede, parties are permitted to argue the sufficiency of the evidence for the first time on appeal. See Roberson v. Perez, *supra*, 156 Wn.2d. at 40. See also RAP 2.5(a)(2) (holding that a party may raise for the first time on appeal the “failure to establish facts upon which relief may be granted”). Here, even assuming the provision was ambiguous—which it was not, as Kosterow implicitly concedes—Kosterow offered no evidence to support a finding that the parties mutually agreed upon an alternate interpretation.

In his brief, Kosterow accuses Bagelheads of making the “bald assertion” that Kosterow never testified that he and Mackey had agreed that 51 percent was intended to mean “a majority.” Respondent’s Brief, p. 37. Bagelheads made that exact assertion in its brief and stands by it. The “proof” on this issue offered by Kosterow fails to prove any agreement between the parties at all:

Q. Okay. And why was it important for you to put limits on the number of stores or ownerships Mr. Mackey had in other stores? Can you explain that to us?

A. Why it was important?

Q. Yeah, why was that important for you to have limits on other stores?

A. Well, I think the importance to Donna and I were that we knew the Mackeys and we knew Bob and Julia very well. We therefore trusted Robby. It was thousands of miles away from Vancouver, Washington, and there was no way I could possibly know what was happening unless Robert was a full owner—a major owner in a store.

RP vol. I, pp. 109-110 (emphasis added). Far from demonstrating any agreement between Kosterow and Mackey on the meaning of the phrase, this testimony, at best, demonstrates Kosterow's *unilateral* intent. The unilateral intentions of a party to an otherwise unambiguous contract are irrelevant to contract interpretation under both Florida and Washington law. See Bryant v. State Bd. of Regents, 596 So. 2d 1233 (Fla. Dist. Ct. App. 1992), *rev den.* 604 So. 2d 486 (Fla. 1992); Hearst Communications, Inc. v. Seattle Times, 154 Wn.2d 493, 503-04, 115 P.2d 262, 267 (2005).

Kosterow's remaining arguments on this point can be dismissed summarily. First, his argument that the jury could have inferred that the parties intended for "percentages of ownership to be measured in no less than 1% increments" begs the obvious question: based on what evidence? Indeed, Kosterow points to no evidence in the record from which the jury could have drawn this inference, which is fatal to the argument. See, e.g., State v. Hermann, 138 Wn. App. 596, 602, 158 P.3d 96, 99 (2007) (noting that a "jury may draw reasonable inferences from the evidence") (emphasis added). Second, his argument that the jury could infer that

Mackey himself believed that 51 percent meant “majority” is similarly unsupported. The argument is also internally inconsistent. If Mackey understood that Bagelheads would owe Kosterow royalties on any stores in which he held a majority interest, why would he purchase 50.5 percent of the Pensacola Beach store with the express intent of avoiding royalty payments, as he testified?

Kosterow cannot overcome both the plain language in the contract and elementary rules of math. Since Bagelheads owed royalties only on stores in which Mackey owned “no less than fifty-one percent (51%),” and since 50.5 percent is unquestionably less than 51 percent, the jury verdict was not supported by substantial evidence. Thus, it should be reversed.

**III. Kosterow cannot point to any evidence that
Mackey disclosed any of his information to third parties**

In his initial brief, Mackey challenged Kosterow to point to any evidence demonstrating that Mackey had disclosed any of Kosterow’s information to third parties. Kosterow failed to do so in his response.

Again, the argument advanced by Kosterow in his brief is the same cynical argument he advanced at trial. Stacking supposition on supposition, he asks this Court (just like he asked the jury) to assume that Mackey disclosed information because he helped others start bagel stores in the northwest Florida area. But he points to no evidence—direct or

circumstantial—that any of Kosterow’s information changed hands. See Respondent’s Brief, pp. 39-41. In fact, his only citation to the record during his discussion of this issue is to the jury verdict! Id. at pp. 39-41 (citing to CP 433). The jury verdict is not evidence, and is clearly insufficient support for itself.

The one specific allegation Kosterow makes in his brief to insinuate that his information was communicated to these new stores—his assertion that Mackey supplied the stores “with raw bagel products that Mr. Mackey made using information provided from Mr. Kosterow”—not only lacks any citation to the record, but is also flatly contradicted by the only evidence on this point. Respondent’s Brief, p. 40. See RP vol. II, pp. 113, 181, 186-90, 201 (undisputed testimony that Bagelheads has not used Kosterow’s recipes since 2000, *before* he began supplying raw bagel dough to the other stores).

Kosterow still fails to identify the information that Mackey allegedly disclosed in violation of the agreement. Instead, he asks the Court to affirm the jury’s verdict that Mackey provided information to third parties without (1) identifying the information provided; or (2) identifying the specific person or entity who received it.

Kosterow does not cite, much less attempt to distinguish, the cases cited by Mackey on this point in his initial brief. See Sip-Top, Inc. v.

Ekco Group, 86 F.3d 827, 831 (8th Cir. 1996); Vision-Ease Lens, Inc. v. Essilor Int'l SA, 322 F.Supp. 2d 991 (D. Minn. 2004). The omission speaks volumes. As Mackey noted in his initial brief, these cases point out the seemingly self-evident fact that breach of a confidentiality agreement must be established by more than supposition and speculation. Yet supposition and speculation is all that Kosterow raises to attempt to support the jury's verdict on this point. The verdict is unsupported.

In the end, Kosterow asks this Court to affirm the jury's verdict because the jury was entitled not to believe Mr. Mackey when he denied disclosing information to third parties. But even if the jury rejected Mackey's testimony entirely, that would not satisfy any of the elements of Kosterow's affirmative case. See Moore v. Chesapeake & O.R. Co., 340 U.S. 573, 576 (1951) (holding that "disbelief of [a witness's] testimony would not supply a want of proof").

IV. Kosterow cannot identify any damages he sustained from the alleged disclosure

In response to Mackey's argument that Kosterow failed to prove any actual damages at trial from the alleged breach of the confidentiality provision, Kosterow implicitly concedes the point. He points to no evidence from which a jury could have awarded him actual damages for

the alleged breach. He does not argue that he lost a single dollar from the breach.

Instead, relying upon a single Florida case—Perdue Farms, Inc. v. Hook, 777 So. 2d 1047 (Fla. Dist. Ct. App. 2001)—Kosterow argues that “payment of a reasonable royalty is a proper measure of damages for breach of a non-disclosure.” See Respondent’s Brief, pp. 42-43. Kosterow is incorrect for at least three reasons.

First, even a cursory review of the Perdue Farms case demonstrates that it is readily distinguishable on one fundamental point: the award of royalties in that case was for misappropriation of a trade secret, a statutory cause of action. Id. at 1051-52 (approving royalty as method of damages based upon “[t]he law of damages as applied in misappropriation of trade secret cases”). Here, the jury awarded damages for common law breach of contract, which requires proof of the *actual damages* sustained from the failure to perform the contract. See Home Ins. Co. v. Crawford & Co., 890 So. 2d 1186, 1189 (Fla. Dist. Ct. App. 2005); Mason v. Mortgage America, Inc., 114 Wn.2d 842, 849 n.6, 792 P. 2d 142 (1990). In fact, the jury returned a verdict *against* Kosterow on his statutory claim for misappropriation of trade secrets. *CP 432-34*.

Second, even assuming a royalty would be a proper measure of damages in a breach of contract case, Kosterow introduced no evidence by

which the jury could have calculated a proper royalty. See University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 544 (5th Cir. 1974) (holding that a plaintiff in a case for misappropriation of trade secrets may fulfill its burden of proving damages provided it “introduces evidence by which the jury can value the rights that the defendant has obtained”), *reh’g den* 505 F.2d 1304 (5th Cir. 1974). The opinion in Perdue Farms relays at length the expert testimony presented in support of the damages claim. Perdue Farms, *supra*, 777 So. 2d at 1051. Kosterow never introduced such evidence.

Third, a fundamental problem remains: Kosterow still cannot identify the specific information he believes was improperly disclosed by Mackey. Without knowing what information was improperly disclosed, how could a jury have placed a value on the information? See Palm Bay Imps., Inc. v. Miron, 55 Fed. Appx. 52, 57 (3d Cir. 2002) (affirming summary judgment in part because the plaintiff was unable to identify the information allegedly disclosed).

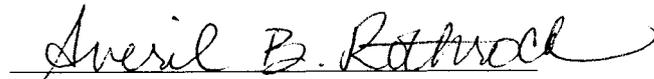
Proof of damages from the alleged breach is absent.

V. Conclusion

For the foregoing reasons, as well as those stated in their initial brief, Appellants ask the Court to reverse those portions of the final judgment from which they appeal, award Appellants their attorney fees for

prosecuting the appeal, and remand the case to the trial court for entry of a new judgment.

Respectfully submitted this 19th day of September, 2007.



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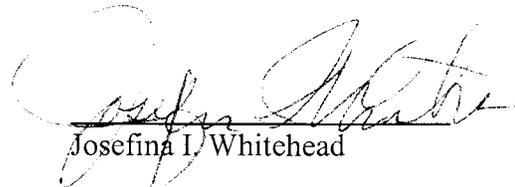
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September 2007, I caused to be served by hand delivery the foregoing Reply Brief of Appellants Bagelheads, Inc. and Robert Mackey, Jr. on the following:

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