

NO. SC87565

IN THE MISSOURI SUPREME COURT

**LEONARD J. VERNI,
Appellant/Cross-Respondent**

vs.

**CLEVELAND CHIROPRACTIC COLLEGE,
Respondent;**

**ALEKSANDR MAKAROV,
Respondent/Cross-Appellant**

**Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, 00CV210044C
Honorable Preston K. Dean, II**

**RESPONDENT/CROSS-APPELLANT DR. ALEKSANDR MAKAROV'S
SUBSTITUTE REPLY BRIEF
TO APPELLANT/CROSS-RESPONDENT
LEONARD J. VERNI'S SUBSTITUTE RESPONSIVE BRIEF**

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REPLY ARGUMENT

**REPLY TO APPELLANT/CROSS-RESPONDENT'S RESPONSE TO POINT I
WHICH STATED AS FOLLOWS:**

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN PLAINTIFF'S FAVOR AND DENYING DEFENDANT MAKAROV'S JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM ARISING OUT OF THE EMPLOYMENT CONTRACT BETWEEN DEFENDANT MAKAROV AND THE COLLEGE BECAUSE PLAINTIFF LACKED STANDING TO ASSERT SUCH CLAIM WHICH DEPRIVED THE TRIAL COURT OF SUBJECT MATTER JURISDICTION OVER THE CLAIM IN THAT PLAINTIFF WAS NOT A PARTY TO OR THIRD-PARTY BENEFICIARY OF THE EMPLOYMENT CONTRACT.

A. Standard of Review.

The scope of the trial court's jurisdiction is a question of law. Richardson v. Jallen Inv. Group, Inc., 140 S.W.3d 112, 113 (Mo. App. 2004). Accordingly, issues relating to the subject matter jurisdiction of the trial court are questions of law subject to de novo review by this court. Pettigrew v. Hayes, 196 S.W.3d 53 (Mo. App. 2005); Richardson, 140 S.W.3d at 113.

The subject matter jurisdiction of the trial court in the present matter turns on whether the plaintiff had standing to assert his claim for breach of contract. Specifically, plaintiff claims that he is a third-party beneficiary to the employment contract entered

into by defendant Makarov with Cleveland Chiropractic College. Whether plaintiff is a third-party beneficiary to such contract turns on this Court's interpretation of the contract between defendant Makarov and Cleveland Chiropractic College. The interpretation of a contract is also entirely a question of law for the Court's determination; the cardinal rule of which is to ascertain the intention of the parties and give its affect. Sonoma Management Co. v. Boessen, 70 S.W.3d 475, 579 (Mo. App. W.D. 2002). Where the contract is unambiguous, the intention of the parties is to be determined solely from the contract itself. Id.

B. Argument and Analysis.

In his Response Brief, plaintiff contends that he has standing to bring a breach of contract claim against defendant Makarov premised on defendant Makarov's employment contract with the College. Specifically, plaintiff claims he is a third-party beneficiary of such contract and thereby entitled to bring a breach of contract action. Plaintiff's argument, however, is not supported by the contract at issue in the present case and is contrary to Missouri law. That is, plaintiff's position that he is a third-party beneficiary to defendant Makarov's employment contract with the College is premised upon an argument that it was the intent of the College and Dr. Makarov to benefit plaintiff, as a student of the College, when the contract was entered.

In support of this argument, plaintiff relies on the provisions contained in the College's student handbook issued to the students and the testimony of the College's President, Dr. Carl S. Cleveland III and the College's Academic Dean, Mary Ruth

Sandefur. Plaintiff's reliance on this evidence and testimony is misplaced. In determining the intent of the parties, this Court must look solely to the four corners of the contract itself, where the contract is unambiguous. Mid-Rivers Mall, LLC v. McMannon, 37 S.W.3d 253, 255 (Mo. App. 2000). The student handbook and the testimony of Dr. Cleveland and Mary Ruth Sandefur is certainly not found within the four corners of the document, the employment contract. Accordingly, the consideration of this evidence, in the absence of an ambiguity, is contrary to Missouri law.

The contract in the present matter is not ambiguous. In fact, plaintiff does not argue that such ambiguity exists. Rather, the contract is a plain and unambiguous one page document entered into between the College and defendant Makarov. The plain and unambiguous terms of the employment contract between Dr. Makarov and the College do not express an intent to benefit plaintiff. Although it is not necessary that the third-party beneficiary's name appear in the contract, the terms of the contract must express "directly and clearly an intent to benefit an identifiable person or class." Terre Du Lac Ass'n. v. Terre Du Lac, Inc., 737 S.W.2d 206, 213 (Mo. App. 1987). In other words, in order for the third-party to be able to enforce the contract, the *contract terms* "must clearly express that the contracting parties intended the third-party to ... have the right to maintain an action on the contract." Laclede Inv. Corp. v. Kaiser, 596 S.W.2d 36, 42 (Mo. App. 1980). Moreover, the right of the third-party beneficiary to maintain an action on the contract must spring from the terms of the contract itself. Id. at 44. Accordingly, under Missouri law, in the absence of such an express declaration of an intent to benefit a third-

party, there is a strong presumption against the existence of a third-party beneficiary. State ex rel. William Ranni Assoc., Inc. v. Hartenbach, 742 S.W.2d 134, 141 (Mo. banc 1987).

As previously stated, plaintiff failed to overcome the strong presumption that Dr. Makarov and the College contracted for themselves and did not intend plaintiff to be a third-party beneficiary of such contract and additionally provide plaintiff with the right to maintain an action for the breach of such contract. Any benefits provided to plaintiff under the terms of the contract are merely incidental benefits not entitling plaintiff to maintain an action for any alleged breach. In the present case, to allow plaintiff standing to bring a breach of contract action against Dr. Makarov based upon Dr. Makarov's employment contract with the College simply because as part of Dr. Makarov's employment contract, Dr. Makarov was required to provide services that not only benefit the College, but also benefitted the College's students such as plaintiff, is illogical. Such a finding unnecessarily and exponentially expands an employee's liability for breach of contract claims made by persons that are not a party to the employment contract under Missouri law. This extension of the law unfairly imposes liability for breach of contract on an employee whose duties include providing a service to the clients, customers, patrons, and/or consumers of the employer.

For example, such a holding will permit a breach of contract action premised upon an employment contract by a restaurant patron against a waiter in that restaurant for failing to promptly deliver food where the waiter's employment contract, or as in the

present case, the employee handbook, requires prompt delivery of food. This is just one example of a situation where a holding allowing plaintiff in the present matter standing to bring a breach of contract action as a third-party beneficiary to Dr. Makarov's employment contract would expand the liability of employees for breach of contract actions under Missouri law. There is an infinite number of similar situations where such holding will allow a third-party to bring a claim for breach of contract premised on an employment contract where, as part of the employee's duties under his employment contract, the employee is required to provide services to the employer's customers. As such, it is impractical and clearly illogical to allow plaintiff standing to bring a breach of contract action against Dr. Makarov in the present case based upon a finding that plaintiff was a third-party beneficiary to Dr. Makarov's employment contract with the College. Accordingly, because plaintiff lacks standing to bring a claim for breach of contract based upon defendant Makarov's employment contract with the College, the trial court lacks subject matter jurisdiction over such claim. Because the trial court lacked jurisdiction, this Court should reverse the decision of the trial court and remand the case with instructions to dismiss plaintiff's breach of contract claim against Dr. Makarov for lack of subject matter jurisdiction.

**REPLY TO APPELLANT/CROSS-RESPONDENT'S RESPONSE TO POINT II
WHICH STATED AS FOLLOWS:**

THE TRIAL COURT ERRED IN DENYING DEFENDANT MAKAROV'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT WITH REGARD TO PLAINTIFF'S BREACH OF CONTRACT CLAIM ASSERTED AGAINST DEFENDANT MAKAROV BECAUSE MISSOURI LAW IS CLEAR THAT THE TERMS CONTAINED IN A HANDBOOK DISTRIBUTED BY EMPLOYERS TO EMPLOYEES ARE UNILATERAL IN NATURE, GENERALLY STATED IN VAGUE TERMS AND DO NOT CREATE A CONTRACT BETWEEN AN EMPLOYER AND EMPLOYEE IN THAT PLAINTIFF'S BREACH OF CONTRACT CLAIM WAS BASED ON THE VAGUE AND UNILATERAL TERMS CONTAINED IN THE COLLEGE'S FACULTY HANDBOOK AND THEREFORE NOT PART OF AN ENFORCEABLE CONTRACT.

Plaintiff first claims that defendant's Motion for Directed Verdict did not preserve the issue raised in Point II of Dr. Makarov's Brief which relates to whether the terms of the employee handbook constitute and create a contract between the College and Dr. Makarov. Plaintiff simply asserts because the case of Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. banc 1988) was not cited in defendant Makarov's Motion for Directed Verdict then such issue was not preserved for appeal. However, defendant Makarov's Motion for Directed Verdict contains several allegations as to the

insufficiency of the evidence relating to the contract and the terms contained therein to form the basis of a breach of contract action. Specifically, Dr. Makarov's Motion for Directed Verdict indicates that (1) the allegations alleged in plaintiff's Petition relating to the breach of contract failed to state a claim upon which relief can be granted upon the evidence offered in support of plaintiff's case; (2) the evidence fails to establish that defendants Cleveland and Makarov entered into a contract; (3) the evidence fails to establish the subject matter of the alleged contract; (4) the evidence fails to establish the terms of the alleged contract between defendant Makarov and defendant College; (5) the evidence fails to establish that plaintiff was in privity with defendant Makarov to any contract; (6) the evidence fails to establish that plaintiff was a third-party beneficiary to any contract which defendant Makarov was a party; (7) the evidence fails to establish that the alleged contract obligated defendant Makarov to treat each student with courtesy, respect, fairness and professionalism; and (8) the terms of the alleged contract upon which plaintiff bases his breach of contract are too vague to permit enforcement and cannot form the basis of a breach of contract claim. These are the very issues raised in Point II of Dr. Makarov's Brief. Accordingly, plaintiff's claim that defendant Makarov failed to preserve the issue by not including it in the Motion for Directed Verdict is unfounded and without merit.

Secondly, in response to Point II, plaintiff claims that the terms of the employee handbook constitute and form a part of the contract between defendant Makarov and the College because such terms are incorporated by reference into the contract. Plaintiff's

argument, however, overlooks the reasoning and rationale in Johnson for this Court's holding that the terms of an employee handbook cannot constitute a valid and enforceable contract. First, this Court reasoned that an employer's distribution of an employee handbook to its employees does not meet the required elements of an enforceable contract. Johnson, 745 S.W.2d 661, 662 (Mo. banc 1988). That is, an employer's unilateral act of publishing the handbook does not constitute a contractual offer under Missouri law. Id. Rather, this Court described the employee handbook as an informational statement of the employer's self-imposed policies which are often couched in general terms that are undoubtedly open to broad discretion and interpretation. Id.

Furthermore, in order for the terms of a contract to be valid and enforceable, such terms must be "sufficiently definite to enable the court to determine its exact meaning and to definitely measure the extent of the promisor's liability." Kemp Const. Co. v. Landmark Bankshares Corp., 784 S.W.2d 306, 308 (Mo. App. 1990). Where the terms of an alleged contract are overly vague and general, such terms are impossible to enforce. See Wilson v. Pharaoh, 583 S.W.2d 545, 546 (Mo. App. 1979). Additionally, in finding that an employee handbook cannot form the basis of an employment contract, this Court recognized in Johnson that an employee handbook is subject to change at any time. As such, this Court reasoned that where an employer reserves the right to alter the terms of the handbook, without prior notice to the employee, reliance upon such terms is not reasonable given the circumstances. Application of the holding and supporting rationale in Johnson to the facts and circumstances in the present case clearly reveals that

the terms contained in the faculty handbook distributed to Dr. Makarov cannot constitute valid and enforceable terms of the employment contract between Dr. Makarov and the College. These terms were continually subject to change. Additionally, the provisions contained in the employee handbook were couched in overly general and vague terms. Specifically, the provision upon which plaintiff relies on his breach of contract claim that “faculty members have a duty to treat each student with courtesy, respect, fairness and professionalism.” The trial court, therefore, erred in denying defendant Makarov’s Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict. For these reasons, the judgment of the trial court against Dr. Makarov on the breach of contract claim should be reversed.

CONCLUSION

WHEREFORE, for the above-stated reasons and the reasons set forth in his Substitute Brief, Dr. Aleksandr Makarov prays for an Order from this Court reversing the judgment of the trial court based on lack of jurisdiction, and remanding the case to the trial court with instructions to dismiss plaintiff's breach of contract claim or, in the alternative, reversing the judgment of the trial court and entering judgment in favor of Dr. Makarov and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Substitute Reply Brief of Respondents/Cross-Appellant, a floppy disk containing the Substitute Reply Brief, along with a copy of this Certificate of Mailing, were mailed this ____ day of September, 2006, to:

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RULE 84.06(c) CERTIFICATION

The undersigned counsel hereby certifies that this brief includes the information required by Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b). This brief contains 2,602 words counted using Corel WordPerfect 10. Counsel also certifies that the attached floppy disk containing this brief has been scanned for viruses and is virus-free.

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