

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

ALFRED K. NIPPERT, JR.,	:	APPEAL NO. C-080594
	:	TRIAL NO. A-0607763
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
W. DEEMS CLIFTON,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Plaintiff-appellant, Alfred K. Nippert, Jr., appeals the judgment entered on a jury verdict in a breach-of-contract case in favor of defendant-appellee, W. Deems Clifton. We find no merit in Nippert's two assignments of error, and we affirm the trial court's judgment.

The record shows that, in August 2000, Clifton borrowed \$100,000 from Nippert. He signed a promissory note in which he agreed to repay the \$100,000 to Nippert, along with ten percent interest, by August 30, 2005.

Subsequently, the parties became involved in a separate air-freight business. Nippert provided the capital, and Clifton managed and operated the enterprise. After the terrorist attacks of September 11, 2001, the business struggled financially. Nippert began to insist that Clifton invest some of his own funds in the business.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Clifton's only source of income was the air-freight business. According to Clifton, in April 2002, the parties agreed (1) that Clifton would obtain a loan and contribute \$55,000 to be used in the operation of the business; (2) that Clifton would manage the business without Nippert's interference; (3) that after the depletion of Clifton's contribution of \$55,000, Nippert would resume funding the business as needed; and (4) that any payments on the note would be made exclusively from funds that Clifton obtained through the operation of the business. Nippert denied making this agreement.

When Clifton did not pay the \$100,000 plus interest on August 30, 2005, Nippert filed a breach-of contract suit. The case was tried to a jury. At Clifton's request and over Nippert's objections, the trial court instructed the jury on oral modification of a contract and prevention of performance. The jury returned a verdict in favor of Clifton. This appeal followed.

In his first assignment of error, Nippert contends that the trial court erred in instructing the jury on oral modification of a written contract. He argues that the evidence did not support the instruction. This assignment of error is not well taken.

Generally, the trial court should give the parties' requested jury instructions if they are correct statements of law applicable to the case, and if reasonable minds could reach the conclusions sought by the instructions.<sup>2</sup> But the court has discretion to refuse to give a proposed jury instruction that is redundant or immaterial to the case.<sup>3</sup>

The parties to a contract may enter into a subsequent oral agreement that modifies a prior written agreement if both parties agree to the modification and if the subsequent agreement rests upon new and distinct consideration.<sup>4</sup> Clifton's testimony regarding the

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<sup>2</sup> *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 575 N.E.2d 828; *Knowlton v. Schultz*, 179 Ohio App.3d 497, 2008-Ohio-5984, 902 N.E.2d 548.

<sup>3</sup> *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881; *Knowlton*, supra.

<sup>4</sup> *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190, 2 N.E.2d 501; *Hanna v. Groom*, 10<sup>th</sup> Dist. No. 07AP-502, 2008-Ohio-765; *Cooper v. Singleton* (May 2, 1984), 1<sup>st</sup> Dist. No. C-830434.

April 2002 agreement was competent, credible evidence to show an oral modification of the written note.<sup>5</sup>

Nippert denied making this agreement. Thus, the issue turned upon the credibility of the witnesses. Matters as to the credibility of evidence were for the trier of fact to decide.<sup>6</sup> Since evidence existed upon which reasonable minds could differ, the trial court did not err in instructing the jury on an oral modification of the written contract.

Nippert argues that Clifton failed to prove that separate consideration existed for the subsequent oral modification and that both parties relied upon the modification. But the jury could have reasonably concluded that Clifton's consideration was borrowing \$55,000 and contributing it toward the business and that Nippert's consideration was agreeing to allow Clifton to manage the business without interference and to accept payment on the note from the proceeds of the business. Because evidence existed showing that the modification was based on consideration and was not a gratuitous modification, Clifton did not have to show reliance by both parties.<sup>7</sup> Consequently, we overrule Nippert's first assignment of error.

In his second assignment of error, Nippert contends that the trial court erred in instructing the jury on prevention of performance. He argues that Clifton did not present evidence showing that he had prevented Clifton from repaying the note. This assignment of error is not well taken.

A party to a contract may invoke the doctrine of prevention of performance to excuse performance of a contractual obligation where another party to the agreement has, in some way, actively hindered or impeded the attainment of a material part of the

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<sup>5</sup> See *Shemo v. Mayfield Hts.*, 88 Ohio St.3d 7, 2000-Ohio-258, 722 N.E.2d 1018.

<sup>6</sup> *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 495 N.E.2d 572; *Capeheart v. O'Brien*, 1<sup>st</sup> Dist. No. C-040223, 2005-Ohio-3033.

<sup>7</sup> See *Bischel v. Laughlin* (Sept. 27, 1995), 5<sup>th</sup> Dist. No. 95 AP 030010; *Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 863 N.E.2d 1056.

bargain.<sup>8</sup> “[F]ailure to perform a promise is excused where performance is prevented by the other party.”<sup>9</sup>

Clifton testified that the parties had orally modified the written agreement by agreeing that Clifton would repay the note out of the proceeds of the business and that Nippert would allow Clifton to manage the business without interference. Clifton also testified that Nippert had refused to pay for insurance on the company’s airplane. The plane could not fly without insurance, and, therefore, several business opportunities were lost. Also, Clifton testified that Nippert had demanded that the plane be moved to a Tennessee airport, which was closer to Nippert’s residence, even though Clifton had planned to move it to Texas, where more business opportunities existed.

Thus, Clifton presented evidence that, if believed, showed that Nippert had impeded or hindered the performance of the contract, as orally modified. He prevented the air-freight business from earning profits, which Clifton could have used to pay the note. Consequently, evidence existed to support the trial court’s instruction on prevention of performance. Again, the issue was credibility, and matters as to the credibility of evidence were for the jury to decide.<sup>10</sup> We overrule Nippert’s second assignment of error and affirm the trial court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., PAINTER and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on April 29, 2009

per order of the Court \_\_\_\_\_  
Presiding Judge

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<sup>8</sup> *Campbell v. Marple*, 4<sup>th</sup> Dist. No. 00CA0013, 2000-Ohio-1993; *Wittrock v. Paragon Paper Co.* (Dec. 18, 1985), 1<sup>st</sup> Dist. No. C-840883; *Werner v. Biederman* (1940), 64 Ohio App. 423, 28 N.E.2d 957.

<sup>9</sup> *Campbell*, supra, quoting 18 Ohio Jurisprudence 3d (1980) 166, Contracts Section 249.

<sup>10</sup> *Kalain*, supra; *Capeheart*, supra.