

[Cite as *Rodata, Inc. v. Christian & Timbers*, 2002-Ohio-3.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 79439

| | | |
|---------------------|---|---------------|
| RODATA, INC. | : | |
| | : | JOURNAL ENTRY |
| Plaintiff-Appellant | : | |
| | : | and |
| -vs- | : | |
| | : | OPINION |
| CHRISTIAN & TIMBERS | : | |
| | : | |
| Defendant-Appellee | : | |
| | : | |

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| DATE OF ANNOUNCEMENT OF DECISION: | <u>JANUARY 10, 2002</u> |
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| CHARACTER OF PROCEEDING: | Civil appeal from Common Pleas Court Case No. CV-403116 |
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| JUDGMENT: | Reversed and Remanded. |
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DATE OF JOURNALIZATION:

APPEARANCE:

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| For Plaintiff-Appellant: | JAMES R. DOUGLASS, ESQ. ERNEST D. DEFOY, ESQ. 630 Leader Building 526 Superior Avenue Cleveland, Ohio 44114 |
| For Defendant-Appellee: | CHARLENE R. MILETI, ESQ. LESLIE E. WARGO, ESQ. McCarthy Lebit Crystal & Haiman 1800 Midland Building 101 Prospect Avenue, West Cleveland, Ohio 44115 |

PATRICIA ANN BLACKMON, P.J.:

Appellant RoData appeals from a jury verdict in favor of appellee Christian & Timbers. The jury determined that Christian & Timbers repudiated their contract with RoData for the purchase of video-teleconferencing equipment. The jury also determined that RoData failed to fulfill all its contractual obligations, and found in favor of Christian & Timbers. RoData assigns the following as errors for our review:

1. *THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A SELLER HAS THE OBLIGATION TO TENDER DELIVERY OF GOODS TO A BUYER WHO HAS REPUDIATED THE CONTRACT PRIOR TO DELIVERY.*
2. *THE TRIAL COURT ERRED BY SUBMITTING INTERROGATORIES TO THE JURY THAT FAILED TO DIRECT THE JURY TO CONSIDER DAMAGES AFTER IT DETERMINED THAT BUYER REPUDIATED A CONTRACT FOR THE SALE OF GOODS BUT DIRECTED THE JURY TO DETERMINE WHETHER OR NOT THE SELLER CONTINUED TO PERFORM AFTER BUYER'S ANTICIPATORY REPUDIATION.*

Having reviewed the record and pertinent law, we reverse and remand to the trial court for proceedings consistent with this opinion. The apposite facts follow.

This appeal follows a jury verdict in favor of Christian & Timbers, and against RoData, stemming from a purported contract for sale of video-teleconferencing equipment. RoData initially claimed against Christian & Timbers for (1) "Breach of Contract, (2) "Breach of Sales Act; O.R.C. 1302," (3) "Promissory Estoppel," and (4) "Specific Performance." Following the close of its case, RoData voluntarily dismissed all but its second claim solely as it relates to anticipating repudiation.

At the close of evidence, the trial court provided the jury with instructions accurately detailing the concepts of "anticipatory repudiation." The trial court also provided accurate instruction regarding concepts of "tender and delivery," "rejection and acceptance," "revocation,"

even though RoData had dropped the complaints that implicated these concepts.” After reaching its decision, the jury answered interrogatories revealing that they found a contract existed between the parties, that Christian & Timbers repudiated the contract, that Christian & Timbers properly rejected the contract, and that RoData failed to entirely meet its obligations under the contract.

Because RoData’s assigned errors are interrelated, we address them concurrently.

RoData concedes the trial court provided the jury with proper instructions regarding “anticipatory repudiation,” and that all jury instructions were accurate statements of law. In its assigned errors, RoData contends the trial court erred by instructing the jury regarding “tender and delivery,” “rejection and acceptance,” and “revocation.” RoData argues these irrelevant instructions, and the jury interrogatories pertaining to those instructions, so confused the jury that we should reverse the jury’s decision and remand to the trial court for further proceedings.

When an appellant challenges the trial court's jury charge, we proceed under an abuse of discretion standard.¹ The Ohio Supreme Court has defined the abuse of discretion standard as follows:

The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an abuse of that choice, the result

¹*State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443; *State v. Sims*, (1997), Ohio App. LEXIS 2563 (June 12, 1997), Cuyahoga App. No. 71236, unreported.

must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias.²

²*Nakoff v. Fairview General Hospital* (1996), 75 Ohio St.3d 254, 256-257, 662 N.E.2d 1, 3. Internal citations omitted.

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A trial court should confine its instructions to the issues raised by the pleadings and the evidence.³ A party is not entitled to a particular jury instruction if no evidence was presented that may support that instruction.⁴ However, a court ordinarily should give requested instructions if they are correct statements of law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the specific instruction.⁵ Any “challenged jury instruction may not be reviewed piecemeal or in isolation but must be reviewed within the context of the entire charge.”⁶

³*Becker v. Lake Cty. Mem. Hosp. West* (1990), 53 Ohio St.3d 202, 208, 560 N.E.2d 165.

⁴*Sims, supra.*

⁵*Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828.

⁶*Sims, supra*, citing *State v. Hardy* (1971), 28 Ohio St.2d 89, 276 N.E.2d 247; *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772; *State v. Wise* (Jan. 29, 1993), Wood Cty. App. No. 91 WC 113, unreported.

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Christian & Timbers's alleged anticipatory repudiation is the only claim that survived to the jury. Anticipatory repudiation occurs when a contracting party "repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other."⁷ The repudiating party must clearly and unequivocally relay its intention not to perform its contractual obligations.⁸ Such notice gives the other party legal standing to pursue remedial measures.⁹

Thus, the only relevant questions to the jury were whether a contract existed, and if so, whether Christian & Timbers repudiated that contract. An affirmative response to the later question would permit RoData to proceed to damages; a negative response would fully resolve RoData's claim.

In addition to providing instructions pertaining to "anticipatory repudiation," the trial court instructed the jury regarding "tender and delivery," "rejection and acceptance," and "revocation." As the parties agree, the court properly gave an accurate anticipatory repudiation instruction because RoData's second claim survived to the jury. However, because RoData dismissed all other claims, the jury's concern was limited to whether a contract existed, and if so, whether Christian & Timbers

⁷*American Bronze Corp. v. Streamway Products* (1982), Ohio App. 3d 223; 456 N.E.2d 1295, paragraph three of the syllabus.

⁸*Id.*

⁹R.C. 1302.68 (B) .

repudiated the contract. Any instructions pertaining to performance of contractual obligations became irrelevant.

The interrogatories and jury responses were as follows. In response to the first interrogatory, the jury answered that a contract existed between RoData and Christian & Timbers for the sale of video conferencing equipment. In response to the second interrogatory, the jury answered that Christian & Timbers repudiated that contract. Regardless of the jury's response to this interrogatory, the jury was then directed to answer questions pertaining to whether Christian & Timbers made "a proper rejection of the contract," and whether RoData fulfilled "all of its obligations required of it under the contract."

Prior to charging the jury, counsel and the trial judge discussed the interrogatories. Counsel for RoData wanted the interrogatories not pertaining to repudiation removed. During this discussion, counsel for Christian & Timbers stated, "Well, your Honor, if you want to be really particular, meticulous about it, it probably should also read, did the defendant repudiate the contract? If the answer is no, proceed no further. That's not in here either." We agree that this would have been appropriate.

Because the sole claim for the jury's consideration was whether Christian & Timbers repudiated the contract, instructions and interrogatories regarding the performance of RoData's obligations were irrelevant and could only serve to confuse the jury. If Christian & Timbers repudiated the contract, RoData was entitled to pursue damages without obligation to tender the contract for goods. No reason exists to consider "tender and delivery," "rejection and acceptance," or "revocation." Because such irrelevant instructions and interrogatories could only serve to confuse

the jury, we determine that the trial court abused its discretion in providing those instructions and presenting those interrogatories. Accordingly, RoData's assigned errors have merit.

Judgment reversed and cause remanded to the trial court for proceedings consistent with this opinion.

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Judgment reversed and cause is remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE, J., CONCURS;

TERRENCE O'DONNELL, J., DISSENTS.
(SEE DISSENTING OPINION ATTACHED.)

PATRICIA ANN BLACKMON
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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| RODATA, INC. | : | |
| | : | |
| Plaintiff-appellant | : | D I S S E N T I N G |
| | : | |
| vs. | : | O P I N I O N |
| | : | |
| CHRISTIAN & TIMBERS | : | |
| | : | |
| Defendant-appellee | : | |

DATE: JANUARY 10, 2002

TERRENCE O'DONNELL, J. DISSENTING:

I respectfully dissent.

The majority concludes that a new trial is warranted because the trial court abused its discretion by providing irrelevant instructions and confusing interrogatories to the jury. I disagree.

In this case, appellant changed its theory of recovery during trial: it began by asserting claims of breach of contract, promissory estoppel, anticipatory repudiation, and specific performance; during trial, however, it dismissed all counts except for its anticipatory repudiation claim pursuant to R.C. Chapter 1302.68. Despite the dismissal of the breach of contract claim, the court instructed the jury on rejection, revocation, tender of performance, and acceptance in accordance with the prior agreement between the parties, over the objection of RoData, and also submitted the interrogatories previously agreed to by the parties.

At Tr. 401-405, the following exchanges took place between the court and counsel:

THE COURT: **The interrogatories we're not changing, they are correct. They are exactly what my notes indicated from our discussion.**

So if you want to object, that's fine, but they are exactly what we discussed. Again, by changing that, you want them to go right to damages without considering the defense, which was the long discussion we had in the back.

Mr. DOUGLASS [RoData's counsel]: That's correct. And just for the record, your Honor, it is our position that once, assuming the jury finds that Christian & Timbers repudiated the contract or had an anticipatory repudiation, there is no obligation on the part of the plaintiff to perform further, they have the right to suspend their performance. So the intended delivery is relevant [sic].

THE COURT: They didn't tender delivery. The issue was whether there was a rejection.

MR. DOUGLASS: Well, but you can't have a rejection until the delivery, until there's been a delivery.

THE COURT: Interrogatory 2 is, Did the defendant repudiate the contract? If your answer is yes, proceed to Interrogatory 3. If they did not repudiate the contract, proceed to Interrogatory 3. Interrogatory 3, Did the defendant make a proper rejection of the contract? If your answer is yes, proceed to 4.

No. 5, Did the defendant make a valid revocation of the contract? If the answer is yes, do not proceed further. If the answer is no, proceed to 6. And then to damages.

MR. DEFOY [RoData's counsel]: Your Honor, if I may make one statement in terms of rejection. The statutes specifically provide for a rejection of goods, not a contract, and the

rejection set forth in the UCC applies to a situation where if the goods have been delivered. And therefore anything in regards to rejection is only applicable if delivery has been made. If there's an anticipatory repudiation, rejection is irrelevant.

THE COURT: Miss Mileti.

MS. MILETI [C & T 's counsel]: I don't know what he is referring to.

THE COURT: If you would like to, **these are my notes from when we were discussing this, which I will remind you, these were all agreed to** before they went to the secretary.

Are they ready?

THE BAILIFF: Yeah.

MS. MILETI: Well, your Honor, if you want to be really particular, meticulous about it, it probably should also read, did the defendant repudiate the contract? If your answer is no, proceed no further.

That's not in here either.

MR. DOUGLASS: I am not certain that I disagree with that, because I think the statute is clear, if there is anticipatory repudiation, the plaintiff need do nothing more, he may proceed directly to his remedy. If there is no repudiation, then I would agree with you, there must be a tender, but by definition, one can not reject goods that have not been delivered.

* * *

THE COURT: Okay. You can note your objections for the record, but these were agreed to before I sent them to the secretary, they are going to remain the same. *** Any objections to the instructions ***?

* * *

MR. DOUGLASS: Consistent with the objections on the interrogatories, I would just put on the record I do not believe it is necessary under the circumstances of this case to provide an instruction on tendered delivery or

rejection and acceptance. (Tr. 401-405)
(Emphasis added.)

I recognize that because of RoData's mid-trial dismissal of its breach of contract claim, the instructions on tender of delivery, rejection, and acceptance are not necessary for consideration of the sole remaining anticipatory repudiation count.

I note, however, the court prefaced its instructions on rejection of goods and acceptance with the following statement:

If RoData actually tendered delivery of conforming * videoconferencing equipment, you must then consider** whether Christian & Timbers either rejected the goods, or accepted the goods and then revoked that acceptance.
(Tr. 443) (Emphasis added.)

Furthermore, the court's charge of anticipatory repudiation included the following instructions:

When either party repudiates a contract with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the other, **the aggrieved party may suspend his own performance.**
(Emphasis added.)

Thus, the court correctly instructed the jury that RoData may suspend its own performance, i.e., need not tender delivery, if the jury found it to have repudiated the contract. This instruction ensured that, in the event that the jury found RoData to have repudiated the contract, it would not consider whether RoData had tendered delivery. And, since the jury would only consider the issue of C&T's rejection of goods and acceptance if it determined that RoData had tendered delivery, the jury, as instructed, would

not have considered the issues of tender of delivery, rejection of goods, or acceptance if they found C&T to have repudiated the contract. See, *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195, 559 N.E.2d 1313 (a presumption exists that the jury follows the instructions given by the trial court).

Thus, while the jury instructions on tender of delivery, rejection, and acceptance were surplusage in light of RoData's mid-trial abandonment of its breach of contract claim, when read as a whole, they did not mislead the jury. In my view, therefore, the court did not abuse its discretion by giving these instructions.

As to the interrogatories, the purpose of an interrogatory is to "test the jury's thinking in resolving an ultimate issue so as not to conflict with its verdict." See *Freeman v. Norfolk & W. Ry.* (1994), 69 Ohio St. 3d 611, 635 N.E.2d 31.

Here, RoData complains that the jury should have been directed to Interrogatory No.6, which deals with damages, if it answered in the affirmative to Interrogatory No. 2, which asked whether C&T had repudiated the contract. Instead, RoData contends, the jury was misdirected to Interrogatories 3, 4, and 5, which state, respectively:

Interrogatory No. 3

Did Defendant make a proper rejection of the contract? If your answer is "Yes", please proceed to Interrogatory No.4.

Interrogatory No. 4

Did Plaintiff fulfill all of its obligations required of it under the contract? If

your answer is "Yes", please proceed to Interrogatory No. 5. If you find that plaintiff failed to fulfill all of its obligations, do not proceed any further.

Interrogatory No. 5

Did Defendant make a valid revocation of the contract? If your answer is "Yes", do not proceed any further. If your answer is "No", please proceed to Interrogatory No. 6.

First, the record indicates that the court articulated its position that the interrogatories had resulted from a long discussion between the court and counsel and had been agreed to by the parties. A review of these interrogatories and the jury's answers, furthermore, shows that the jury responded to them in a fashion consistent with the general verdict and not indicative of confusion or misunderstanding on its part.

Interrogatory No. 3 references "rejection of the *contract*"; rejection normally refers to rejection of *goods* but, as used here, relates to the inquiry of whether RoData had indicated a definite and unequivocal refusal to perform the contract, an element of the anticipatory repudiation claim. Thus, the jury's affirmative answer to this interrogatory suggests no inconsistency, confusion or misunderstanding on its part.

Interrogatory No. 4 broadly refers to plaintiff's obligations pursuant to the contract; it does not specifically ask the jury if RoData has fulfilled its obligations *after* C&T's repudiation. In my view, submitting Interrogatory No. 4 to the jury is harmless error at best because the court had correctly instructed the jury

that an aggrieved party may suspend its own performance following the other party's repudiation of the contract.

Undoubtedly, the court could have submitted interrogatories to this jury better tailored to the issues presented; however, I do not believe the court abused its discretion in submitting these interrogatories because, as the court indicated on the record, they resulted from a long discussion between the court and the parties' counsel and had been agreed to by the parties.

Because the court correctly instructed the jury on anticipatory repudiation, because the jury's answers to the interrogatories are not inconsistent with its verdict and do not necessarily indicate confusion on its part, and because the verdict is supported by sufficient and credible evidence, I would affirm the judgment of the court in this case.