IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

J&H Reinforcing & Structural Erectors, Inc.,	:	
	:	
Plaintiff-Appellee,	:	Appeal No. 12-AP-588
	:	
v.	:	(REGULAR CALENDAR)
	:	
Ohio School Facilities Commission,	:	
	:	
Defendant-Appellant,	:	
	:	

BRIEF OF *AMICI CURIAE* AMERICAN SUBCONTRACTORS ASSOCIATION AND AMERICAN SUBCONTRACTORS ASSOCIATION OF OHIO IN SUPPORT OF PLAINTIFF-APPELEE

On Appeal from the Ohio Court of Claims

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STATEMENT OF INTEREST OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

The American Subcontractors Association ("ASA") is a national non-profit corporation supported by membership dues paid by approximately 5,000 member companies throughout the country, including Ohio. Membership is open to all commercial construction subcontractors, material suppliers and service companies. ASA members represent the combined interest of both union and non-union companies, and range from the smallest private firms to the nation's largest specialty contractors. Thousands of ASA's member company employees live and work here in Ohio. ASA of Ohio is a statewide chapter of the national ASA. ASA of Ohio was formed in 2008 to consolidate the former Columbus, Cincinnati, and Cleveland chapters. The first ASA chapter formed in Ohio was the Cincinnati Chapter which was originally filed in 1965.

The issues set forth in this Appeal profoundly impact ASA's member companies, as well as the thousands of Ohioans who are gainfully employed by these companies and other construction contractors, subcontractors, suppliers in Ohio.

The ASA is especially interested in assisting Ohio courts in interpreting and applying various construction contract provisions, Ohio's Fairness in Construction Contracting Act as embodied in R.C. 4113.62, as well as the public policy in Ohio as it relates to the tens of thousands of Ohioans employed by contractors, subcontractors and suppliers engaged in construction projects with the State of Ohio. This Court's decision will impact construction across the State of Ohio where billions of dollars of construction work in progress.

This Amicus Brief is concerned with the perilous precedent that a reversal of the Court of Claims decision would set, the public policy effects of a reversal, and the equitable and legal issues affecting the enforceability of the contractual claim notice provisions.

STATEMENT OF THE CASE

Plaintiff-Appellee J&H Reinforcing & Structural Erectors, Inc. ("J&H") filed its Complaint against the Defendant-Appellant Ohio School Facilities Commission ("OSFC") seeking damages for OSFC's breach of contract, including, among other things, costs, expenses, and losses J&H sustained as a result of numerous delays that occurred on the Wheelersburg Local School District K-12 school building construction project ("Project"). These delays occurred through no fault of J&H, but were caused, exacerbated, and concealed, by the OSFC and others. OSFC filed a counterclaim, also based on breach of contract, among other things, against J&H.

A full trial two-week trial on the merits was held in November 2011 before the Court of Claims of Ohio, Referee Thomas R. Yocum, who was appointed by the Chief Justice of the Supreme Court of Ohio. Referee Yocum issued a Decision of the Referee on February 10, 2012, which granted judgment in favor of J&H in the amount of $959,232 exclusive of interest, and judgment in favor of OSFC in the amount of $180,332. Both parties objected to the Referee's decision. Over these objections, the Court of Claims adopted the Decision of the Referee on June 6, 2012. OSFC filed its appeal with this Court and J&H filed a cross-appeal.

The central issues on appeal to be addressed by *amici curiae* American Subcontractors Association and American Subcontractors Association of Ohio are whether: (1) the Court of Claims properly analyzed OSFC's misrepresentations, concealments, contractual waivers, and breach of the duty of good faith and fair dealing; (2) whether substantial compliance was sufficient with contract terms expressly found by the Referee and Trial Court to be impossible and unworkable; and (3) whether the Court of Claims properly determined that J&H was legally entitled to delay damages for its losses and increased costs that arose out of actions and delays

caused, exacerbated, and concealed by the OSFC and its construction manager acting as OSFC's agent.

STATEMENT OF FACTS

A. The Project, Parties, and the Contract.

Plaintiff-Appellee J&H, a construction contractor from Portsmouth, Ohio, entered into a construction contract ("Contract") with the OSFC and agreed to perform general trades work and other subcontracting, as well as self-perform masonry and interior case work. (Ref. Dec., at 1.) The OSFC administers the entire Ohio Public School Building Program. The OSFC hired Bovis/Lend Lease Company ("Construction Manager") to manage the overall Project as an agent of OSFC. (*Id.*) The Construction Manager issued a Notice to Proceed (with the commencement of the construction of the project) to J&H on October 2, 2006. (*Id.*) When J&H started its work, it discovered unexpected, unstable soil conditions that were neither shown in the plans and specifications provided to J&H and the other bidders in the bid package, nor anticipated by either the OSFC or J&H. These unforeseen site conditions required extra stabilization work pursuant to a change order. (*Id.* at 2.)

The soil conditions delayed the start date of building construction to December 26, 2006. (*Id.*) While J&H's work was progressing, J&H learned that many air handling units[1] ("AHU"), which were to be supplied by a different contractor, would not be delivered in May 2007 as scheduled, but instead delivery would be delayed about four months, until September 2007. (*Id.*) The delay in the delivery of the AHUs had a direct impact on the progress of all of the other trade contractors that were to follow the installation of the AHUs, trades whose work was

[1] AHUs are large pieces of equipment/fixtures that are installed to circulate air within a building. On this Project, the AHU's were to be provided and installed by another contractor, and were not the responsibility of J&H.

required to be performed prior to J&H's work. J&H did identify that there was some delay in those trades' work, but, especially in the short time period required by the contract, could not discern who or what was the actual cause of the delay of those trades.

After the Construction Manager received notice of the various allowable delays, it adjusted the contract schedule. Construction schedules are generally revised by construction managers, after such delays, with input from the impacted contractors and subcontractors. But here, the Construction Manager performed unilateral and undisclosed scheduled revisions, without considering such input. The Construction Manager's computer program is designed to aid in schedule adjustments, such as those required here, and contained various program routines to make such changes in a logical and efficient manner. However, OSFC's Construction Manager overrode its computer program to produce an illogical and "unworkable schedule," to the detriment of J&H. (*Id.*, at 15-16.)

B. The Contract Claim Notice Provisions.

The Contract contained multiple differing and unworkable claim notice provisions which had the effect of placing J&H in a position where it was impossible to strictly comply when the cause of delay was beyond the control or knowledge of J&H. For example, Article 6.4.2.2 required J&H to identify all responsible parties for any delays, even if it was, as the Referee and trial court found, an "impossible burden on J&H" because J&H could not know whether the AHU delay was caused by the manufacturer, U.S. Customs, the installer, the engineer, the OSFC, the Construction Manager, or some other party. Similarly, J&H did not know, and could not be expected to know, when that delay would be incurred, and whether the schedule could be revised. (*Id.*, at 12-13.) Article 8.1.1 required J&H to make a request for equitable adjustment within "ten (10) days after the initial occurrence of the facts which are the basis of the claim," even though J&H would have no way to know the full amount of an adjustment needed within

just ten days of an event as required by the contract. (*Id.*, at 11.) As yet another example, Article 6.4.1 required J&H to request a time extension within ten days of an event that entitled J&H to an extension of time, even if the amount of time could not be fully known, or would increase on a daily basis. (*Id.*, at 10-12.) The Court of Claims determined that "it was impossible for J&H to strictly comply with any requirement to quantify the amount of its damages for labor inefficiency until it could conduct a 'measured mile' analysis."[2] (*Id.*)

C. Change Order Not an Accord and Satisfaction of All Claims.

Change Order 29 ("CO 29") states under its "Description/Justification" that it covered only "[a]dditional costs associated with revising the Contract Completion Date to July 15, 2008, which includes General Conditions costs . . . and Overtime Allowance." (*Id.*, at 6.) The boilerplate language on the same change order form stated that "this Change Order constitutes full and complete satisfaction for all . . . costs . . . in connection with this change to the work." (*Id.*)

D. Claim Notices Provided by J&H and Impossibility of Performance.

J&H did encounter events which it anticipated might cause a delay in its work and provided repeated written notice of its claims, in a form as complete as possible, given the circumstances. The very nature of many claims is such that some of the information might not be determinable within the time required by the Contract because to provide such information for some delays, such as a delay caused by another party where it is unknown when the other party

[2] A measured mile analysis compares productivity of a period that was impacted by negative conditions or events with the productivity of similar work under normal conditions, with the difference in productivity being the amount of excess cost to the contractor resulting from labor inefficiencies and loss of productivity. *James Corp. v. North Allegheny School Dist.*, 938 A.2d 474, 495 (Pa. Cmwlth. 2007). Understandably, this analysis takes time to perform, and requires there to be similar work performed under normal conditions. Performing or analyzing such a process would be impossible in the ten-day time period. In this case, the similar work could not be performed under normal conditions until late in the Project.

will begin to perform and what they will do to recover the schedule is pure conjecture. Any information not provided by J&H in its notices was because it was such pure conjecture and "impossible" for J&H to supply that unknowable information to OSFC. (*Id.*, at 12-13.)

In a good faith effort to comply with the unreasonably burdensome and impossible Contract requirements, J&H "wrote numerous letters [to the OSFC Construction Manager] in an effort to comply with the Contract notice requirements," and such letters advised OSFC's Construction Manager of the delay and providing any and all information available to J&H at the time. (*Id.*, at 14.) Indeed, OSFC's Construction Manager directed J&H to stop writing claim letters because they were so numerous. (*Id.*) There is no genuine dispute that the OSFC recognized the importance of these letters and was on notice of the delays and possible damages because its Construction Manager used the letters as the basis for its own warning letters to other contractors warning them of their own liability to OSFC and J&H. (*Id.*, at 3.) The letters accomplished the purpose for including claim notice requirements in the Contract. (*Id.*, at 3.)

E. OSFC and Its Construction Managers' Conduct.

After receiving numerous and timely written and oral claims from J&H, each containing the information determinable and reasonably required by the Contract, OSFC and its Construction Manager failed or refused to comply with the Article 8 cooperative process and meeting requirements, voluntarily relinquishing rights under Article 8. (*Id.*, at 16-17.) J&H complied with the requirements when it wrote timely claim letters and mailed them within the time required after learning of the facts permitting such claims. (*Id.*)

Furthermore, OSFC's Construction Manager ordered J&H to "stop writing" letters, a clear waiver of all written notice and timing requirements. (*Id.*, at 14.) Moreover, OSFC's Construction Manager issued informal "tickets" allowing changes in work to proceed without a formal change order and without following formal Contract requirements related to changes in

work or delays. (*Id.*, at 4.) Finally, despite alleged noncompliance with the formal requirements of the Contract, OSFC executed a change order, Change Order 29, which extended time and provided limited additional compensation as a partial settlement of the disagreement between the parties. (*Id.*, at 2.)

The Court of Claims also determined that OSFC engaged in bad faith acts and unfair dealings. OSFC's Construction Manager engaged in secretive manipulation of the Project schedule and contractor relationships in order to "paint J&H as instigator" and "watch fireworks." (*Id.*, at 3.) It was the intention of OSFC's Construction Manager to "pit[] other contractors against J&H" for OSFC's Construction Manager to be in a "win-win" situation. (*Id.*, at 14) (discussing the animus against J&H). OSFC's Construction Manager overrode the "logic" controls used in its Project scheduling software in order to create an "unrealistic and unworkable schedule" which led to a stacking of trades, labor inefficiency, and delays, all having a negative impact on the Project and J&H in particular. (*Id.*, at 15-16.) Only OSFC's Construction Manager, not J&H, knew the effect and negative impact that such computer program manipulation would have on completion times and costs. The software would otherwise not have permitted this scheduling—it "disconnects logic ties between activities." (*Id.*)

SUMMARY OF THE ARGUMENT

Reversing the Court of Claims decision that J&H is entitled to damages would have a catastrophic impact on Ohio's construction industry. Because, in a public construction project, there is only one project owner for all school construction projects, the OSFC enjoys a monopsony[3], where it is the only buyer and it has the power to dictate inefficient, impossible,

[3] Similar to a monopoly, a monopsony exists where there is only one buyer, and that buyer dictates the terms of a transaction, whereas a monopoly exists when there is only one seller, and that seller therefore has the power to dictate all terms.

and illogical contract terms. Courts across the nation have long recognized and controlled the dangers posed by both monopolies and monopsonies. The "impossible" and "unworkable" terms of the Contract between J&H and OSFC are a result of OSFC's abuse of its monopsonistic power. Contractors on public projects, such as J&H, have no opportunity and no ability to negotiate any term in the Contract, as the contractual terms are dictated by the public owner. The contract forms are selected and all bidding parties are required to bid based on those contract forms. Any contractor bidding otherwise, in an attempt to "negotiate" different contract terms, would be rejected as a non-conforming bidder. These contracts are the definition of contracts of adhesion.

This Court would embolden and protect these abuses in the future if it reverses the Court of Claims' decision and strictly enforces these impossible Contract notice obligations. The effects will be increased unemployment, economic harm to the construction industry, long-term financial harm to contractors, and sharply increased costs to the State of Ohio and ultimately its taxpaying citizens. This Court must join courts from across the nation and take a stand against the dangers of monopsony by affirming the Court of Claims decision finding OSFC liable for delay damages.

Reversing the trial court's decision would cause an inequitable forfeiture of J&H's right to be paid for costs incurred due to OSFC's delay. This right is so fundamental to J&H and other contractors in Ohio that any effort of a project owner to contractually limit delay damage liability due to delays caused by it, such as the Construction Manager's manipulation of the schedule is unenforceable as against public policy. OSFC's arguments run contrary to Ohio's case law, statutory law, and public policy. OSFC cannot benefit from its intentional and secretive manipulation of the project schedule, which created impossible and illogical work

expectations. OSFC and its Construction Manager actively refused to cooperate with J&H in resolving claims, as required by the Contract.

OSFC's manipulative and uncooperative conduct breached its duty to act in good faith and engage in fair dealings with J&H and prevented J&H's performance, relieving J&H from further notice obligations under the Contract. The Court of Claims correctly held that OSFC' violation of its duty to act in good faith and engage in fair dealings, as well as its waiver of the strict Contract claim notice requirements, excused J&H from having to comply with those requirements. OSFC and its Construction Manager repeatedly ignored the Contract claim process, made modifications without requiring strict compliance with the terms of the Contract, and even directed J&H to stop its attempts to comply with the contract by writing claim letters. Furthermore, after its waiver of strict compliance with the Contract requirements, the OSFC never put J&H on notice that it later sought to strictly comply with the Contract claim requirements. Because of this waiver, and given J&H's "substantial compliance" with the Contract requirements, OSFC is liable for extra costs incurred by J&H.

CO 29, by its express language, only partially settled the dispute between J&H and OSFC. The plain language of CO 29 supports the Court of Claims decision that it addresses only additional costs of extending the general conditions to July 15, 2008, and anticipated overtime. It did not settle the other claims which had repeatedly and clearly been raised by J&H, and it did not settle the claims that J&H could not yet quantify. OSFC's argument to the contrary ignores the plain language of CO 29 and the course of performance between the parties.

For all of these reasons, this Court should affirm in part the Court of Claims' decision holding that OSFC is liable for J&H's delay damages, that CO 29 only partially settled the

claims of J&H, and that OSFC's conduct prevents it from strictly enforcing the Contract claim notice requirements.

ARGUMENT

I. STANDARD OF REVIEW

Decisions regarding contract interpretation are matters of law, and are also subject to a *de novo* review on appeal. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 37. However, an appellate Court presumes that a trial court's factual findings are correct, and must affirm the trial court's judgment if those factual findings are supported by some "competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. This is because the trial court is in the best position to weigh the evidence and judge the credibility of witnesses. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273 (1984).

II. PUBLIC POLICY WEIGHS AGAINST OSFC'S POSITION ON APPEAL AND IN FAVOR OF THE COURT OF CLAIMS DECISION; PERMITTING OSFC TO ESCAPE LIABILITY NOW WILL EMBOLDEN MONOPSONIST PROJECT OWNERS AND CAUSE SERIOUS HARM TO CONTRACTORS, THE STATE, AND TAXPAYERS.

Reversing the Court of Claims decision regarding OFSC's liability for damages will only lead to further abuses by project owners, like the OSFC, and harm the construction industry. Because the OSFC is the only buyer of K-12 school construction services, and it is the only buyer of construction services on the Project, it enjoys a monopsony—a market condition where a buyer has the power to dictate the terms of its purchase because there are a large number of contractors (sellers), but only one buyer. A monopsony is the mirror image of a monopoly, and causes the same harm to society. This is especially true when dealing with school construction—the OSFC administers construction projects for all public K-12 schools. *See* R.C. 3318.08(J). This year alone it will oversee over $1 billion in construction projects in Ohio. AP News, *Ohio*

School Construction Projects Half Done, BLOOMBERG BUSINESS WEEK, Aug. 7, 2012, *available at* www.businessweek.com/ap/2012-08-07/ohio-school-construction-projects-half-done.

OSFC uses its monopsony power to dictate contract terms such as J&H's agreement. When left uncontrolled by courts, this can produce contracts of adhesion containing strict, impossible, impracticable, and unfeasible conditions in the standard contract form as used with J&H. The OSFC, in Article 6.4.2.2, requires contractors, here J&H, to identify all responsible parties for any delays, even though it was "impossible burden on J&H" because J&H could not possibly know whether a delay in AHUs was caused by the manufacturer, U.S. Customs, the installer, the engineer, the OSFC, the Construction Manager, or some other party—that information was known only to the party causing the delay. (Ref. Dec., at 12-13.)

OSFC dictates in Article 8.1.1 that contractors such as J&H make a request for equitable adjustment within "ten (10) days after the initial occurrence of the facts which are the basis of the claim," even though J&H would have no way to know the full amount of an adjustment needed within just ten days of the beginning of an ongoing delay, and may not even know it needs an adjustment within ten days of the occurrence of an event. (*Id.*, at 11.) Third, OSFC requires in Article 6.4.1 that contractors, such as J&H, request a time extension within ten days of an event that entitles J&H to an extension of time, even if the amount of time could not be fully known, or would increase on a daily basis. (*Id.*, at 10-12.)

The Court of Claims properly concluded that "as a practical matter, it was impossible for J&H to strictly comply with any requirement to quantify the amount of its damages for labor inefficiency until it could conduct a 'measured mile' analysis." As stated by other courts across the nation, these damages for inefficient labor and additional payroll caused by the delays "could

not accurately be assessed until completion of the Project." *See, e.g., James Corp. v. North Allegheny School Dist.*, 938 A.2d 474, 485-86 (Pa. Cmwlth. 2007).

At the time that this contract was put out for bid, there was one project delivery method available in public construction projects within Ohio: multi-prime bidding.[4] In the multi-prime delivery method there is an inherent conflict between the schedules of one prime contractor versus another. Absent the proper coordination of the public authority, here the OSFC and its Construction Manager, damages may flow directly to one or more of the prime trades. The Court in *Valentine Concrete, Inc. v. Ohio Department of Administrative Services* held the State liable for the failure to coordinate the work of the prime contractors. *Valentine Concrete, Inc. v. Ohio Department of Administrative Services*, 62 Ohio Misc.2d 591, 671, 609 N.E.2d 623 (Ct. of Cl. 1991). Here, the OSFC cannot escape liability by pointing to other trades, claiming that they were the cause of the delay because it was OSFC's obligation to properly coordinate the trades, which it failed to do and then attempted to cover that failure up by manipulating the schedule.

Finally, multiple other Contractual provisions, e.g. General Conditions Articles 4.1.2 and Article 6, seek to eliminate or limit OSFC's liability for delay damages, even if the OSFC itself causes the delay thoughts its own acts or omissions. These provisions, given the construction sought by OSFC, are void and unenforceable as against public policy because the delay is caused by the acts or omissions of the owner, here OSFC. *See* R.C. 4113.62(C)(1). OSFC's contract is so one-sided and unconscionable that it not only contains "impossible" requirements, but also terms that are void and unenforceable under Ohio law.

In order to comply with the strict and impracticable requirements of the Contract, contractors such as J&H are forced into the position of having to guess what unknown damages

[4] Ohio law has since been changed to include multi-prime bidding, as well as other delivery methods of single prime bidding, construction manager at risk and design/builder.

the future will hold, and what unknown party caused the damages. Worse, OSFC breached its duty of good faith and fair dealing with J&H when its Construction Manager engaged in secretive manipulation of the Project schedule and contractor relationships in order to "paint J&H as instigator" and "watch fireworks." (Ref. Dec., at 3.) It was the intention of OSFC's Construction Manager to "pit[] other contractors against J&H" for OSFC and its Construction Manager to be in a "win-win" situation. (*Id.*, at 14) (discussing the animus against J&H). OSFC's Construction Manager overrode the "logic" controls used in its Project scheduling software in order to create an "unrealistic and unworkable schedule" which led to a stacking of trades, labor inefficiency, and delays, all to the detriment of J&H. (*Id.*, at 15-16.) Only OSFC's Construction Manager, and not J&H, could know the full effect and negative impact such project overriding would have on completion times and costs. The project software itself would not have permitted this scheduling because it "disconnects logic ties between activities." (*Id.*) These bad faith acts and deceptive dealings made it even more "impossible" for J&H to comply with the Contract requirements and rendered meaningless the schedule's critical path logic ties as required by Article 4 of the General Conditions of the Contract.

It is bad for business in Ohio and bad for the construction industry to permit a public owner to create a contract document that is one-sided and non-negotiable with terms which place impossible burdens on a contractor, and then allow the public owner and its agents to secretly manipulate the schedule to hide the true cause of the delay. It is also bad for taxpayers, as such monopsonistic abuses will have the chilling effect on competitive bidding. It will discourage good contractors that understand the pitfalls of such contract terms from bidding at all, or encouraging them to bid higher prices to make up for the additional risks attendant to such

uncontrollable situations, leaving only the unwary, untested, and inexperienced contractors to construct schools for Ohio's children.

If determined to be enforceable in their current form, these contract terms will cause conscientious bidders to anticipate the "unanticipatable." Planning for such events forces conscientious bidders to add additional money to their bids as a contingency factor, raising the cost of the project for the owner and taxpayer. If there is a bidder who did not plan for such an unanticipated contingency, the strict terms of the contract will improperly punish that bidder, who is now a contractor. When that contractor is not properly paid because of such burdensome, "impossible" and non-negotiable clauses, not only do its profits evaporate, frequently so does its ability to pay its subcontractors, suppliers and employees, not to mention its employees' union benefits. When subcontractors and suppliers are not paid, a cascading effect to their employees, subcontractors, and suppliers can occur.[5]

This will harm not only to Ohio businesses—construction contractors and subcontractors—but also the state budget and individual taxpayers, who ultimately have to pay higher construction costs or suffer work performed by less careful contractors. Courts across this nation, specifically the Tenth Circuit U.S. Court of Appeals, have warned of the dangers posed by a monopsony:

> We have acknowledged that, like a monopoly, a monopsony can threaten competition . . . . According to economists . . . a monopsonist will lower prices paid to sellers, which over time results in higher consumer prices. In other words, a poultry processor with monopsony power can fix and manipulate prices

[5] Affidavits for claim (public project mechanic's liens) and payment bond claims are available to subcontractors, suppliers and laborers, but those are often the subject of litigation, involve extreme delays in payment, are not guaranteed and require strict statutory compliance, often requiring the claimant to hire an attorney to recover money which it should have been properly paid, but for the unreasonableness of the contract terms and the actions of the public authority, which should not have been anticipated by anyone.

> resulting in injury to both poultry producers . . . and end-users. . . . 'Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the . . . service, and over the long run . . . reduced product quality, or substitution of less efficient alternative products.'

See, e.g., Been v. O.K. Indus., Inc., 495 F.3d 1217, 1232 (10th Cir. 2007) (quoting *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1136 (10th Cir. 2002)).

Ohio will suffer that harm if this Court reverses the Court of Claims decision and emboldens public owners, such as the OSFC. In the long-run, where a public owner has the power to dictate unreasonable contract terms in a contract of adhesion, such as the OSFC did here, everyone loses. Everyone loses when the OSFC can dictate contractual terms that create "impossible" notice requirements that the contractor cannot satisfy with substantial compliance, and thus virtually eliminate its liability to compensate contractors like J&H, for costs of delays that the OSFC's acts and omissions cause. Because the OSFC is the only buyer of public school construction services, and because it was the only buyer for the Project, it had the power to dictate that a contractor agree to a contract of adhesion containing impossible and unconscionable terms. The Referee and Court of Claims agreed that J&H had substantially complied with those terms through numerous notices containing the essential information to put the OSFC on notice of the claim and Project events. If this factual determination of substantial compliance is reversed on appeal, such reversal will cause the good contractors to, among other things, either: (1) close their doors; (2) refuse to bid on such public projects; (3) increase their bid prices to cover their increased risks of uncompensated delay damages; or (4) suggest lower quality alternatives that are less costly in the short term, but more costly to Ohio's budget in the long-term, in order to ensure they have the lowest bid while still increasing their price to cover their increased risk. When these good contractors leave the market and refuse the bid on

projects, only the less skilled, inexperienced contractors will remain to bid on OSFC projects. These outcomes can only lead to increased unemployment, inefficient construction market, and higher long-term costs to the State of Ohio and taxpayers alike.

Given the factual findings of the Referee and Trial Court, reversing the Court of Claims decision as to the Contract notice provisions will cement this abuse of power by the OSFC for all public project owners across Ohio. For that reason, this Court should affirm the Court of Claims decision insofar as it awards J&H damages for delays caused by OSFC. Only then will contractors and taxpayers have any meaningful protection against the OSFC's shortsighted and costly abuse of power.

III. THE COURT OF CLAIMS DECISION MUST BE AFFIRMED AS TO OSFC'S LIABILITY FOR DELAY DAMAGES BECAUSE OSFC'S ARGUMENTS TO THE CONTRARY RUN AFOUL OF OHIO'S LAW ON CONTRACTUAL WAIVER, FORFEITURE, AND PREVENTION OF PERFORMANCE.

A. OSFC Cannot Escape Liability for J&H's Delay Damages Simply Because J&H Allegedly Failed to Strictly Comply with Contract Notice Requirements—This Would Constitute a Forfeiture and is Disfavored in Ohio.

OSFC asks this Court to disregard Ohio law, flout public policy, and defy fundamental maxims of equity by denying J&H its right to receive delay damage compensation on the grounds of forfeiture. "Forfeiture is 'a deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition.'" *Barkacs v. Perkins*, 165 Ohio App. 3d 576, 2006-Ohio-469, 847 N.E.2d 481, ¶ 11 (6th Dist.) (quoting *Webster v. Dwelling House Ins. Co.*, 52 Ohio St. 558, 42 N.E. 546 (1895)). J&H and similarly situated contractors have an overriding right to receive compensation for delays caused by the acts or omissions of OSFC. The right is so important that any contractual provision limiting this right is unenforceable as against public policy. R.C. 4113.62(C)(1) makes it illegal for a project owner (public and private) to 'contract around' liability for costs of a delay caused by the owner, specifically providing that such clauses

are "void and unenforceable as against public policy." R.C. 4113.62(C)(1). According to OSFC, J&H should be deprived of this right due to nonperformance of some condition, i.e. failing to identify the exact entity that caused a delay pursuant to Article 8 of the Contract. OSFC's position is untenable given Ohio law on forfeiture.

OSFC's argument on appeal violates the maxims of equity as articulated by the Supreme Court of Ohio. The Supreme Court of Ohio has stated that "[e]quity abhors a forfeiture . . . and . . . weigh[s] against forfeiture [when] the breach was immaterial and non-substantial." *Joseph J. Freed and Assoc., Inc. v. Cassinelli Apparel Corp.*, 23 Ohio St. 3d 94, 96, 491 N.E.2d 1109 (1986) (Per Curiam). Furthermore, "a forfeiture clause . . . must be strictly construed . . . in favor of denying forfeiture." *Id.* Any alleged breach by J&H for failing to report unknown claims of unknown future damages within ten days from an event that J&H did not know had occurred is an immaterial and non-substantial breach, especially where, as here, any such alleged breach is directly caused and substantially exacerbated by OSFC, and its Construction Manager's, conduct, and there was an express finding of substantial compliance with the Contract provisions that OSFC now hangs its appellate hat on. Therefore, this immaterial breach cannot be used by the OSFC to cause a forfeiture of the contractor's rights.

As the Court of Claims found, J&H "substantially complied" with the Contractual obligations to provide notice of its potential claims to OSFC once it learned of the extent of those claims. J&H provided repeated written notice of its claims, and any information not provided by J&H was because it was "impossible" for J&H to supply that unknowable information to OSFC. (Ref. Dec., at 12-13.) The Court of Claims correctly noted that "as a practical matter, it was impossible for J&H to strictly comply with any requirement to quantify the amount of its damages for labor inefficiency until it could conduct a 'measured mile' analysis," which by its

very nature could not be performed within the required 10-day time limitation. (*Id.*, at 14.) In light of the circumstances, J&H's actions were reasonable as it "wrote numerous letters in an effort to comply with the Contract notice requirements." (*Id.*) OSFC, through its Construction Manager, even directed J&H to stop writing claim letters—stop giving the contractually required notices—because they were so numerous. (*Id.*)

The point of requiring such a notice in a construction contract is to inform the project owner, making the project owner aware of unanticipated conditions or events, not to set a trap for the contractor. When the owner has constructive or actual notice of a condition, and where the terms of the contract require specific, written notice, the failure by the contractor to comply with the specific technical notice is harmless and defeats the public owner's claim that damages would not be allowable as a result of the lack of technical compliance with the notice provision. *Roger J. Au & Son, Inc. v. Northeast Ohio Regional Sewer District*, 29 Ohio App. 3d 284, 504 N.E.2d 1209 (8th Dist, 1986).[6]

J&H's notices put OSFC on notice of the delays and possible damages—OSFC's Construction Manager used these letters as the basis for its own notice letters to other contractors warning them of their own liability to OSFC and J&H for the schedule impacts and increased costs. (Ref. Dec., at 3.) Given J&H's good faith and substantial compliance, as well as the instruction from OSFC's Construction Manager and use of the information by the OSFC and its

[6] The *Roger J. Au & Son* Court in Syllabus 2 held that, "[t]here is no reason to deny the claims for lack of written notice if the owner was aware of differing soil conditions throughout the job and had the proper opportunity to investigate and act on its knowledge, as the purpose of the formal notice would thereby have been fulfilled." *Roger J. Au*, 29 Ohio App. 3d 284, at syllabus paragraph 2. This fact pattern differs from the facts which gave rise to the holding of the Court in *Foster Wheeler Enviresponse, Inc., v. Franklin County Convention Facilities Authority*, 78 Ohio St. 3d 353, 678 N.E.2d 519 (1997), where the contractor relied only on "direction from" the owner's on-site consultant, rather than actual involvement of the Owner (and its Construction Manager), as was the case in *Roger J. Au & Son* and in the instant action.

Construction Manager, any breach of the Contract by J&H was immaterial and insubstantial. The letters accomplished the purpose for including claim notice requirements in the Contract. (*See id.*, at 3.) It would violate the maxims of equity articulated by the Supreme Court of Ohio if this Court reversed the Court of Claims decision finding OSFC liable for delay damages. Because J&H's alleged breaches are, at worst, insubstantial, and caused by the impossible requirements of the contract language and the actions of OSFC's Construction Manager, this Court should affirm the Court of Claim's finding of OSFC's liability for delay damages.

B. OSFC Repeatedly and Deliberately Ignored the Contract Claim Notice Process and Thereby Waived Reliance and Strict Enforcement of the Notice and Timing Obligations Against J&H.

The Court of Claims correctly stated that OSFC waived contractual requirement that J&H provide written notice strictly complying with the timing and notice requirements. Although some statutory laws cannot be waived, OSFC can always waive a contractual right when it voluntarily relinquishes its known right. *State ex rel. Athens Cty. Bd. of Commrs. v. Bd. of Dirs.*, 75 Ohio St. 3d 611, 616, 665 N.E.2d 202 (1996).

Here, OSFC knew that its Contract, which it drafted, had provisions regarding the nature and kind of notice required for claims. Despite this knowledge, on multiple occasions OSFC ignored these provisions. After receiving numerous and timely written and oral claims containing the information required by the Contract, OSFC failed or refused to comply with the Article 8 cooperative process and meeting requirements, voluntarily relinquishing rights under Article 8. (Ref. Dec., at 16-17.) J&H complied with the requirements when it wrote and mailed timely claim letters after it learned of the facts giving rise to such claims. (*Id.*) Furthermore, OSFC's Construction Manager ordered J&H to "stop writing" letters, a clear written waiver of all written notice and timing requirements. (*Id.*, at 14.)

OSFC's Construction Manager also issued informal "tickets" allowing changes in work to proceed without a formal change order and without following formal Contract requirements related to changes in work or delays. (*Id.*, at 4.) Finally, despite alleged noncompliance with the formal requirements of the Contract, OSFC executed a change order, CO 29, which extended time and provided limited additional compensation as a partial settlement of the claims made by J&H. (*Id.*, at 2.) Therefore, the Court of Claims properly found that through this conduct, OSFC on multiple occasions waived the formal written notice and timing requirements under the Contract.

Ohio courts have already ruled that the forfeiture OSFC seeks is not permitted where one party waives compliance with strict contractual requirements. In *Ohio Beef Processors, Inc. v. Consolidated Processors Marketing, Inc.*, the Second District held that once a party waives its right to strictly enforce a timing provision in a contract, it must first give notice of its revocation of that waiver to the other party before the other party is charged with strict compliance again. *Ohio Beef Processors, Inc. v. Consol. Packers Marketing, Inc.*, 2d Dist. No. 2310, 1987 Ohio App. LEXIS 8880, at *6 (2d Dist. 1987) (attached hereto in Appendix). The Court in *Ohio Beef Processors* was dealing with situation similar to the case at hand: Ohio Beef Processors, Inc. waived contractual timing requirements, and never gave notice that it would revoke that waiver. *Id.*, at *6. Instead, Ohio Beef Processors, Inc. argued that the Consolidated Packers Marketing, Inc. breached the strict timing requirements of the contract and was prevented from exercising its right to possess the premises. *Id.*

In this case, OSFC likewise waived the strict timing requirements of the Contract. After this waiver, OSFC never gave notice to J&H that it was revoking its prior waiver. OFSC instead

argued at trial that J&H breached the strict timing requirements of the Contract and is prevented from exercising its right to receive delay damages.

Because equity abhors forfeiture, and because OSFC failed to notify J&H that it was revoking its prior waiver of the notice timing requirements, equity weighs in favor of the trial court's decision that J&H is entitled to delay damages—No forfeiture occurred because OSFC waived those requirements.

C. OSFC's Conduct Prevented J&H's Strict Performance of Claim Notice Terms and Therefore OSFC Cannot Hold Non-Performance Against J&H.

The Court of Claims decision must be affirmed as to OSFC's liability because OSFC prevented J&H's performance of the strict claim notice requirements. "A contracting party who prevents the adverse party from performing under the contract cannot take advantage of the adverse party's nonperformance." *Landis v. William Fannin Bldrs., Inc.*, 193 Ohio App. 3d 218, 2011-Ohio-1489, 951 N.E.2d 1078, ¶ 48 (10th Dist.). OSFC's bad faith and secretive conduct prevented J&H from performing the strict claim notice requirements of the Contract. Specifically, OSFC's Construction Manager secretively manipulated the project schedule in order to override logic controls in the scheduling software, leading to the stacking of trades and inefficient labor work. Additionally, OSFC's Construction Manager actively created a situation where other contractors would not cooperate and share information necessary for J&H to make its claims, because the Construction Manager wanted to pit the other contractors against J&H and prevent cooperation. These acts prevented J&H from understanding the full extent of the delay within the strict claim notice requirements of the Contract, and this prevention was a direct result of the bad faith and deceptive acts of OSFC's agent, its Construction Manager. Therefore, this Court should affirm the Court of Claims decision in regard to OSFC's liability—OSFC prevented J&H's performance, and it cannot now take advantage of that alleged nonperformance.

IV. THE PLAIN LANGUAGE OF CO 29 BETWEEN THE OSFC AND J&H ONLY PARTIALLY SETTLED THE DISPUTE BETWEEN THE TWO, LEAVING J&H TO PURSUE ADDITIONAL DAMAGES FROM OSFC.

CO 29 only settled one extension of time and some overtime damages suffered by J&H. In interpreting a contract, the court must give effect to every provision of the contract. *Sunco, Inc. v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 54. CO 29 states under its "Description/Justification" that it covered only "[a]dditional costs associated with revising the Contract Completion Date to July 15, 2008, which includes General Conditions costs . . . and Overtime Allowance." (Ref. Dec., at 6.) Thus, the trial court and Referee correctly found that CO 29 was limited in scope, covering only the revision of the contract completion date to July 15, 2008. If there was any other need to extend the contract completion date further than July 15, 2008, such extension and compensation was not included in this change order, and would have been dealt with separately. The boilerplate language further supports J&H and the Court of Claims interpretation that CO 29 was limited in scope and did not settle all claims. The boilerplate language stated that "this Change Order constitutes full and complete satisfaction for all . . . costs . . . in connection with this change to the work." (*Id.*)

The only interpretation of this contractual language that gives effect to every provision is the Court of Claim's interpretation, which found that the boilerplate language limited CO 29 to be a partial settlement of the overtime and general conditions amounts, but not other damages or delays not included in the "change to the work" covered by CO 29. OSFC's argument to the contrary would require CO 29 to be rewritten to state that it is "full and complete satisfaction for all costs and delays incurred to date." CO 29 is limited in its coverage, not as all-inclusive as the OSFC would like to read it. Therefore, this Court should affirm the Court of Claims decision that CO 29 was only a partial settlement of claims, and not a full settlement of all claims and damages related to the delays at the Project.

V. THE COURT OF CLAIMS' INTERPRETAION IS CONSISTENT WITH CURRENT THE SUPREME COURT OF OHIO'S OPINION IN *DUGAN & MEYERS* AND SUBSEQUENT DECISIONS OF THIS COURT.

This interpretation is consistent with current case law of this district. First, it is consistent with this Court's decision in *Stanley Miller Construction Co. v. OSFC*. In *Stanley Miller*, this Court determined that a contractor failed to comply with the notice requirements of OSFC's contract. *Stanley Miller Constr. Co. v. OSFC*, 10th Dist. Nos. 10AP-298, 10AP-299, 10AP-432, 10AP-433, 2010-Ohio-6397, ¶ 1 (attached hereto in Appendix.) However, the *Stanley Miller* Court expressly noted that the Court of Claims failed to base its ruling on evidence in the record which might establish that OSFC waived its right to require strict compliance with the contract notice requirements. *Id.*, at ¶ 18. Therefore, the Court remanded the matter to the Court of Claims to explore this evidence. *Id.*, at ¶¶ 18, 22. On remand to the Court of Claims, the court found that evidence supported that the OSFC waived the formal and strict claim notice requirements, at least in part. *Stanley Miller Constr. Co. v. OSFC*, Court of Claims Case. No. 2006-04351, 2012-Ohio-3995, ¶ 35 (attached hereto in Appendix).

Here, the Court of Claims did base its opinion upon the evidence showing that OSFC waived its right to enforce the strict requirements of the Contract claim notice provisions. As such, this case is consistent with this Court's *Stanley Miller* holding.

The Court of Claims interpretation is also consistent with the *Dugan & Meyers Construction Co., Inc. v. Ohio Department of Administrative Services*. In *Dugan & Meyers*, the Supreme Court of Ohio found in favor of the State in part because Dugan & Meyers failed to strictly comply with claim notice procedures in its construction contract. *Dugan & Meyers Constr. Co., Inc. v. Ohio Dep't of Admin. Serv's*, 113 Ohio St. 3d 22, 2007-Ohio-1687, 864 N.E.2d 68, at ¶ 41. However, that finding and holding was based upon the fact that the "record

lacks evidence of either an affirmative or implied waiver by the [State] of the . . . procedures contained in the contract." *Id.*

In contrast, here the record is replete with facts, and findings by the trial court, that OSFC waived the claim notice requirements. Further, in *Dugan & Meyers*, there was no finding that the State's actions constituted bad faith or unfair dealings. Therefore, this Court should affirm the Court of Claims findings that J&H substantially complied with the notice provisions of the Contract and that that substantial compliance is sufficient to hold public authorities, such as OSFC, liable for delay damages based on its waiver of the claim notice provisions in the Contract. To permit strict enforcement of notice provisions where compliance is impossible and which have been waived is not supported by Ohio law and creates bad public policy. In circumstances where the bargaining power of the parties is unequal, the party with the greater bargaining power should be held to a standard of at least good faith and fair dealing, or be prohibited from exercising remedies that produce unjust results.

CONCLUSION

Given J&H's substantial compliance with the terms of the Contract, OSFC's repeated waiver of Contract claim notice requirements, OSFC's bad faith and unfair dealings with J&H, the fact that Ohio law "abhors" forfeiture, and that the greater weight of the equities and public policy implications weigh in favor of J&H's position, this Court should affirm the Court of Claims decision insofar as it holds OSFC liable for J&H's delay damages. Not doing so will cause much harm to construction contractors, subcontractors, construction suppliers and the thousands of employees of companies who live and work here and who expect the State to act fairly. It will ultimately harm the coffers of the State of Ohio, and the people that fill those coffers: taxpayers.

The OSFC already has a monopsony on school construction; this decision will not change that. Any contractor wishing to do school construction work must accept the contract terms dictated by the OSFC—the terms are non-negotiable. If they do not accept these non-negotiable, "impossible" terms, they will not work. However, this Court can and should take the steps necessary to prevent OSFC from inequitably and wrongfully benefiting from its abuse of its power. OSFC abused its power in this instance.

As the Court of Claims correctly pointed out, OSFC knew that it could not directly contract around the Fairness in Construction Contracting Act by limiting its liability for delay damages. Instead OSFC did the next best thing, dictating an "impossible," "unworkable," and "unenforceable" schedules and contract terms. This has the same affect on contractor rights—it effectively eliminates the project owner's liability for delay damages in contravention of R.C. 4113.62(C)(1). The result is that contractors are saddled with the burden of the extra costs and expenses created by the OSFC with only an illusory right. With no real remedy, the contractor is not properly compensated for performing its work, and the State received an unjustified benefit. While this appears to be a bonus to the taxpayers, it has the opposite effect—it keeps the best contractors from giving their best bids to the State, ultimately increasing the cost of construction paid by the taxpayers.

Reversing the Court of Claims decision on this matter will only serve to embolden project owners. They will see this Court's decision as either a green light to dictate impossible contract terms to circumvent Ohio law. Alternatively, upholding the Court of Claims decision will serve as a stark warning that this sort of gamesmanship will be seen for what it is and will be prohibited by the law of the State of Ohio.

Reversing the well-reasoned Court of Claims decision on this matter will only serve to harm hardworking Ohioans who are employed by or run construction companies engaged in public construction. Therefore, the American Subcontractors Association and the American Subcontractors Association of Ohio urge this Court affirm the Court of Claims decision insofar as it holds OSFC liability for delay damages caused by OSFC. It is far too costly to business in Ohio and to Ohio taxpayers to decide this case otherwise.

DATED: September 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for the above-named *Amici Curiae* hereby certifies that copies of the foregoing were served electronically and regular U.S. Mail, postage prepaid, on the following counsel of record this 24th day of September, 2012:

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APPENDIX TABLE OF CONTENTS

Ohio Beef Processors, Inc., et al. Plaintiffs-Appellees v. Consolidated Packers Marketing, Inc. Defendant-Appellant

No. 2310

Court of Appeals of Ohio, Second Appellate District, Clark County

1987 Ohio App. LEXIS 8880

September 23, 1987, Decided

DISPOSITION: [*1] The judgment will be reversed and the cause remanded to the Court of Common Pleas for further proceedings according to law.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a lessor and the owner of the leased premises, brought a forcible entry and detainer action against defendant lessee, seeking restitution of the leased premises. The Clark County Court of Common Pleas entered a judgment for the lessor and the owner. The lessee appealed.

OVERVIEW: The lessee encountered financial problems and was unable to pay the rent due under the parties' lease agreement. The lessor told the lessee that monthly rent would be suspended until the lessee's financial condition improved. The lessee later tendered rent payments to the lessor, but the lessor refused to accept the rent and filed it's eviction action for non-payment of rent. On appeal, the court reversed and remanded. The court held that the lessee waived its objections to the trial court's overruling the lessee's motion in limine where the lessee failed to object to the admission at trial of the evidence subject to the motion. The court held that the trial court's jury instructions regarding the possible verdicts under *Ohio Rev. Code Ann. § 1923.10* did not constitute plain error. The court held, however, that the trial court erred in denying the lessee's motion for a directed verdict because the lessor was estopped from seeking restitution for non-payment of rent when it acquiesced to the lessee deferring rental payments until its financial condition improved. The court held that the lessee was entitled to notice that the lessor was revoking of the rent waiver.

OUTCOME: The court reversed the trial court's judgment and remanded for further proceedings in accordance with law.

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Matters > Motions in Limine > General Overview

Civil Procedure > Appeals > Reviewability > Preservation for Review

Criminal Law & Procedure > Appeals > Reviewability > Waiver > Admission of Evidence

[HN1] Where the record fails to disclose any timely objection to any reference to certain evidence at a trial of an action, such failure constitutes a waiver of any possibility of error with regard to such evidence regardless of the disposition of a pretrial motion in limine.

Civil Procedure > Trials > Jury Trials > Jury Deliberations

Civil Procedure > Trials > Jury Trials > Jury Instructions > Requests for Instructions

Criminal Law & Procedure > Juries & Jurors > Jury Questions to the Court > Clarification of Instructions

[HN2] In addition to a verdict for the plaintiffs or for the defendant, *Ohio Rev. Code Ann. § 1923.10* permits a third option in forcible entry and detainer proceedings, whereby the jury may find that the complaint is partially true, and render a verdict setting forth those facts which it finds to be true.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN3] Where an appellant has not specifically challenged any portion of a jury charge, but instead merely asserts, somewhat belatedly, that the instruction is confusing, the alleged error is subject to the specific objection requirement of *Ohio R. Civ. P. 51(A).*

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Real Property Law > Landlord & Tenant > Landlord's Remedies & Rights > Eviction Actions > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > Commercial Leases > General Overview

[HN4] Where a lessor expressly waives his rights acquiesces in the nonpayment of rent, he is estopped him from seeking a forfeiture of the lease absent some advance notice to the lessee of his revocation of the waiver and of his intention to again require strict compliance with the terms of the contract.

COUNSEL: JOSEPH N. MONNIN, Martin, Grady, Monnin & Wilson, Attorney for Plaintiffs-Appellees.

TIMOTHY G. CROWLEY, Feinstein, Crowley, Fusco & Mulligan, Attorney for Defendant-Appellant.

JUDGES: KERNS, P.J., WOLFF, J. and FAIN, J., concur.

OPINION

PER CURIAM:

The defendant, Consolidated Packers Marketing, Inc., seeks review of an order of restitution entered by the Court of Common Pleas of Clark County in favor of the plaintiffs, Ohio Beef Processors, Inc. and K. L. H., in a forcible entry and detainer action.

In May, 1985, the parties entered into a three-year lease agreement under which Consolidated rented certain slaughterhouse facilities, owned by. K. L. H., from Ohio Beef Processors. Thereafter, Consolidated discontinued operations at the plant, and in May, 1986, its president, Bud Hamm, informed the president of Ohio Beef Processors, Eugene Kavanaugh, of Consolidated's strained financial condition, whereupon Kavanaugh advised Hamm that the monthly rental in the amount of $ 2000.00 would be suspended "until things get better". Thereafter, in September, 1986, [*2] Consolidated resumed its processing operation, but no demand for rental payments was ever made.

In December, 1986, Hamm tendered two checks to Kavanaugh in payment of rent for November and December, but at the time, Kavanaugh was apparently displeased over Consolidated's failure to repair a boiler on the leased premises. He therefore refused the tender of the rent, and subsequently, he served an eviction notice on Consolidated, stating "nonpayment of rent" as the reason for the notice. The present action for restitution of the premises was subsequently commenced pursuant to *Chapter 1923 of the Revised Code*, and the plaintiffs also included a second claim for monetary damages. As to the forcible entry and detainer claim, which was tried separately, the jury rendered a verdict for the plaintiffs, after which Consolidated perfected an appeal to this court under the authority of *Housing Authority v. Jackson, 67 Ohio St. 2d 129.*

The appellant has set fourth four assignments of error, the first of which has been stated as follows:

"1. The trial court erred in overruling defendant's motion *in limine* at the commencement of trial, but prior to plaintiffs' presentation of their case, [*3] to exclude certain irrelevant and/or highly prejudicial evidence concerning alleged violations of the parties' lease agreement which matters had never been alleged or stated in plaintiffs' 3-day eviction notice or in plaintiffs' complaint filed in the court."

The appellant's motion sought the exclusion of any evidence of any breach of the lease other than the failure to pay rent, since the complaint had not specifically alleged any other breaches. However, [HN1] the record fails to disclose any timely objection to any reference to other breaches at the trial of the matter, and such failure constitutes a waiver of any possibility of error with regard to such evidence regardless of the disposition of the pretrial motion in limine. See, *State v. Wilson, 8 Ohio App. 3d 216*; *State v. White, 6 Ohio App. 3d 1*. Accordingly, the first assignment of error must be overruled.

Passing the second assignment for a moment, the third assignment of error has been presented by the appellant as follows:

"3. The trial court committed plain error in its presentation and explanation of jury instructions as to the three (3) possible verdicts permitted under *Ohio Revised Code Section 1923.10.*"

[HN2] In addition [*4] to a verdict for the plaintiffs or for the defendant, *R.C. 1923.10* permits a third option in forcible entry and detainer proceedings, whereby the jury may find that the complaint is partially true, and render a verdict setting forth those facts which it finds to be true. In this case, the trial court so instructed the jury, but after some discussion with counsel, the court attempted to clarify the instructions. Then, during

deliberations, the jury requested that the third option be explained once again, after which the court gave additional instructions. During this period, the appellant did not request any specific instruction or suggest that the instruction be given in any particular manner. [HN3] And even in this appeal, the appellant has not specifically challenged any portion of the charge. Instead, the appellant merely asserts, somewhat belatedly, that the instruction was confusing. Hence, the alleged error is subject to the specific objection requirement of *Civ. R. 51(A). Schade v. Carnegie Body Co., 70 Ohio St. 2d 207*; *Singfield v. Thomas, 28 Ohio App. 2d 185*. Manifestly, nothing in the instructions constitutes plain error (*Cleveland Elec. Illum. Co. v. Astorhurst, 18 Ohio St. 3d* [*5] *268*), and the third assignment of error is overruled.

The second and fourth assignments of error allude to the quantum and quality of the evidence, and such errors have been alleged by the appellant as follows:

"2. The trial court erred in overruling defendant's motion for a directed verdict at the conclusion of plaintiffs' presentation of their case.

4. The jury's verdict is not supported by the manifest weight of the evidence in that plaintiffs failed to establish that defendant had breached the parties' lease agreement and/or plaintiffs failed to establish that, if defendant did breach said agreement, such breach(es) was not excused or waived by plaintiffs actions or lack thereof, or enforcement thereof is barred by promissory and/or equitable estoppel."

The operative facts of this case were largely undisputed, and the issue presented was essentially one of law. Unquestionably, Consolidated's failure to pay rent for several months was violative of the terms of the lease, and although a demand for payment is generally regarded as a prerequisite to such an action, the appellees would have been well within their rights in seeking the termination of the lease and the eviction [*6] of the appellant. See, 65 O. Jur. 3d 545, Section 472. Here, however, [HN4] Mr. Kavanaugh expressly waived the rights of the appellees, and his acquiescence in the nonpayment of rent estops him from seeking a forfeiture of the lease absent some advance notice to the appellant of his revocation of the waiver and of his intention to again require strict compliance with the terms of the contract. See, *Finkbeiner v. Lutz, 44 Ohio App. 2d 223*; *Lauch v. Monning, 15 Ohio App. 2d 112*; *Milbourn v. Aska, 81 Ohio App. 79*. See generally, 65 O. Jur. 3d 567, Section 493.

As a matter of fact, the record suggests that this action was in reality prompted by certain other breaches of the agreement, including a failure to make needed repairs and maintain insurance on the premises. Such matters may well have provided good grounds and an independent basis for eviction, but under the express terms of the lease, Consolidated was to receive a thirty-day written notice as to any such breaches. In this case, no such notice was given, and as pointed out by Consolidated, the notice issued pursuant to *R.C. 1923.04* referred only to the nonpayment of rent.

Under such circumstances, the appellant was without a fair opportunity [*7] to mend its ways and avoid a forfeiture, and it appears therefore that the institution of this action and the issuance of the resulting writ of restitution were premature as a matter of law. Upon the state of the record, a directed verdict in favor of Consolidated would not have been inappropriate, and accordingly, the second and fourth assignments of error must be sustained.

KERNS, P.J., WOLFF, J. and FAIN, J., concur.

Stanley Miller Construction Co., Plaintiff-Appellee/Cross-Appellant, v. Ohio School Facilities Commission et al., Defendants-Appellants/Cross-Appellees. Stanley Miller Construction Co., Plaintiff-Appellee/Cross-Appellant, v. State of Ohio et al., Defendants-Appellees, Ohio School Facilities Commission and Canton City School District et al., Defendants-Appellants/Cross-Appellees. Stanley Miller Construction Co., Plaintiff-Appellant/Cross-Appellee, v. State of Ohio, Defendant-Appellee, Ohio School Facilities Commission et al., Third-Party Defendants/Cross-Appellants. Stanley Miller Construction Co., Plaintiff-Appellant/Cross-Appellee, v. Ohio School Facilities Commission et al., Defendants-Appellees/Cross-Appellants.

No. 10AP-298, No. 10AP-299, No. 10AP-432, No. 10AP-433

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2010 Ohio 6397*; *2010 Ohio App. LEXIS 5347

December 28, 2010, Rendered

SUBSEQUENT HISTORY: Reconsideration denied by, Application denied by, En banc *Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm'n, 192 Ohio App. 3d 676, 2011 Ohio 909, 950 N.E.2d 218, 2011 Ohio App. LEXIS 772 (Ohio Ct. App., Franklin County, 2011)*

Discretionary appeal not allowed by *Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm., 129 Ohio St. 3d 1409, 2011 Ohio 3244, 949 N.E.2d 1004, 2011 Ohio LEXIS 1735 (2011)*

On remand at *Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm'n, 2012 Ohio 3995, 2012 Ohio Misc. LEXIS 114 (Ohio Ct. Cl., May 8, 2012)*

On remand at *Stanley Miller Constr. Co. v. State, 2012 Ohio 3994, 2012 Ohio Misc. LEXIS 118 (Ohio Ct. Cl., May 8, 2012)*

PRIOR HISTORY: [**1]

APPEALS from the Court of Claims of Ohio. (C.C. No. 2006-04351). (C.C. No. 2006-05632-PR). (C.C. No. 2006-05632). (C.C. No. 2006-04351).

Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm'n, 2010 Ohio 1528, 2010 Ohio Misc. LEXIS 29 (Ohio Ct. Cl., Mar. 1, 2010)

Stanley Miller Constr. Co. v. State, 2010 Ohio 1488, 2010 Ohio Misc. LEXIS 27 (Ohio Ct. Cl., Mar. 1, 2010)

DISPOSITION: Judgments reversed and remanded with instructions; Cross-appeal

rendered moot; Motion to dismiss cross-appeal rendered moot.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee contractor sued appellant school facilities commission in the Court of Claims of Ohio, for breach of contract, negligence, and unjust enrichment. The trial court granted judgment to the contractor in a bench trial. The commission appealed, while the contractor cross-appealed. The commission filed a motion to dismiss the cross-appeal on the basis that it was not properly perfected.

OVERVIEW: The contractor entered into a public works contract with the commission for the contractor to provide masonry work in the construction of a middle school. Upon the completion of the project, the contractor submitted a document to the commission demanding an equitable adjustment to the contract to compensate the contractor for unexpected costs it incurred during the project. The trial court determined that the construction schedule for the project was fundamentally flawed and incomplete and entered judgment for the contractor. The commission argued that the trial court ignored a provision in the parties' contract to fashion a more equitable remedy for the contractor. The contractor argued that the parties agreed to waive the dispute resolution procedures in their contract and waived the requirement that such an agreement was to be in writing. On appeal, the court found that the trial court should have considered the affirmative defense of waiver. Further, because waiver was an affirmative defense, the commission bore the burden of proving it at trial. The remaining issues depended upon findings which were to be made by the trial court.

OUTCOME: The judgment was reversed, and the matter was remanded to the trial court for further proceedings.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Contract Interpretation > General Overview

Public Contracts Law > Contract Interpretation > General Overview

[HN1] The construction of written contracts involves issues of law that appellate courts review de novo. The purpose of contract construction is to realize and give effect to the intent of the parties. The intent of the parties to a contract resides in the language they chose to employ in the agreement. When contract terms are clear and unambiguous, courts will not, in effect, create a new contract by finding an intent which is not expressed in the clear language utilized by parties.

Contracts Law > Contract Conditions & Provisions > Express Conditions > General Overview

Contracts Law > Contract Interpretation > General Overview

Public Contracts Law > Contract Interpretation > General Overview

[HN2] When a contract has an express provision governing a dispute, that provision will be applied; a court will not rewrite the contract to achieve a more equitable result.

Contracts Law > Contract Interpretation > General Overview

Public Contracts Law > Contract Interpretation > General Overview

[HN3] Courts cannot decide cases of contractual interpretation on the basis of what is just or equitable. When a contract is unambiguous, a court must simply apply the language as written.

Public Contracts Law > Alterations & Modifications > Authorized Changes

[HN4] Something more than actual notice on the part of the State of Ohio is required to excuse a contractor from complying with its obligations regarding change-order procedures in public works contracts.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

[HN5] Waiver is a voluntary relinquishment of a known right.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Waiver

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

[HN6] Waiver is an affirmative defense. An affirmative defense acknowledges the validity of a claim but asserts some legal reason why the plaintiff is precluded from recovering on the claim.

COUNSEL: Day, Ketterer Ltd., and Matthew Yackshaw, for Stanley Miller Construction Co.

Richard Cordray, Attorney General, William C. Becker, Jon C. Walden, and James E. Rook, for Ohio School Facilities Commision; Morrow & Meyer, LLC, and John C. Ross, for Canton City School District Board of Education.

JUDGES: CONNOR, J. SADLER and McGRATH, JJ., concur.

OPINION BY: CONNOR

OPINION

(REGULAR CALENDAR)

DECISION

CONNOR, J.

[*P1] Defendants-appellants/cross-appellees Ohio School Facilities Commission, the State of Ohio, and the Canton City School District Board of Education (collectively "OSFC"), appeal the judgments rendered by the Court of Claims of Ohio in favor of plaintiff-appellee/cross-appellant, Stanley Miller Construction Company ("Stanley Miller"), after a bench trial. For the reasons that follow, we reverse the judgments of the trial court.

[*P2] This matter results from a public works contract entered between OSFC and Stanley Miller for the construction of the Lehman Middle [**2] School in Canton, Ohio ("Lehman project"). Stanley Miller was one of nine contractors hired by OSFC to perform work on the Lehman project. While it submitted a cumulative bid for numerous components of the construction, the main component of Stanley Miller's work centered on masonry. OSFC hired the Ruhlin Company ("Ruhlin") as the construction manager for the Lehman project. Essentially, Ruhlin was to be an extension of OSFC in overseeing and managing the Lehman project. Brad Way ("Mr. Way") was Ruhlin's on-site field construction manager, while Joel Reott ("Mr. Reott") was Ruhlin's construction superintendent.

[*P3] Reott prepared the original, baseline schedule for the construction using the critical path method ("CPM"). The goal of a CPM schedule is to identify the activities that are critical to the completion of the work and to develop a logical sequence and reasonable time frame within which to complete the activities.

[*P4] Stanley Miller had serious reservations over the schedule prepared by Reott. Specifically, it believed certain predecessors and successors were missing, and certain components of the construction were not allotted adequate time. It also generally questioned the logic [**3] underlying the schedule in addition to the planned sequence for the project. Stanley Miller believed that the masonry component of the project should have led all others. Based upon these circumstances, Stanley Miller expressed concerns about the schedule to OSFC at various points through the project. The schedule was updated four different times through the Lehman project. However, none of these updates satisfied Stanley Miller's concerns over the costly inefficiencies it perceived. In addition to the problems with the schedule, Stanley Miller felt that Mr. Way interfered with their work on almost a daily basis. Based upon these circumstances, it was no secret that the parties had a contentious relationship during the Lehman project, as the trial court aptly noted. (Trial court's decision, at 19.) Indeed, the record is riddled with references to threats made by Mr. Way to Stanley Miller over the imposition of liquidated damages in the event Stanley Miller refused to comply with his directions.

[*P5] Although the schedule called for construction to be completed by July 2, 2004, work on the project continued into early 2005. Despite this delayed completion, the project was substantially completed [**4] in August 2004 when the building was open for classes.

[*P6] On the scheduled completion date, Stanley Miller submitted a one-page document to OSFC demanding an equitable adjustment to the contract in order to compensate Stanley Miller for unexpected costs it incurred during the Lehman project. The document listed the estimated versus the actual costs of eight different components of Stanley Miller's work, including: masonry costs, cold weather protection, backfill retaining walls, concrete costs, clean-up costs, temporary roads and repair of subgrade, sewer work, and roof trusses. After undertaking these comparisons, the total costs apparently incurred by Stanley Miller added up to over $ 1.1 million. Through the trial court proceedings, this July 2, 2004 document became known as the "one-page, $ 1.1 million claim." (Trial court's decision, at 2.) After Stanley Miller submitted this claim, the parties met and

had brief discussions about it. OSFC requested further information and documentation regarding a breakdown of the claim, but "no further action was taken" with regard to the one-page, $ 1.1 million claim. (Trial court's decision, at 5.)

[*P7] The instant matter presents Stanley Miller's [**5] efforts to recover these additional, unexpected costs under theories of breach of contract, negligence, and unjust enrichment. After the bench trial, the trial court held that the construction schedule was fundamentally flawed and incomplete. As a result, the trial court granted judgment to Stanley Miller in the total amount of $ 404,276.93. OSFC has timely appealed, while Stanley Miller has cross-appealed. OSFC has filed a motion to dismiss the cross-appeal on the basis that it was not properly perfected. By way of its appeal, OSFC raises the following assignments of error:

> ASSIGNMENT OF ERROR NO. 1
>
> The trial court's decision in this case must be reversed in light of this Court's recent decision in *Cleveland Construction v. Kent State University, Franklin App. No. 09AP-822, 2010 Ohio 2906*.
>
> ASSIGNMENT OF ERROR NO. 2
>
> The trial court erred as a matter of law in not requiring Plaintiff contractor to prove its damages.
>
> ASSIGNMENT OF ERROR NO. 3
>
> The trial court erred as a matter of law by holding that public owners, through their construction managers, interfere with the contractor's means and methods by enforcing the project schedule.

In its cross-appeal, Stanley Miller presents the following [**6] assignments of error: [1]

> [CROSS-ASSIGNMENT OF ERROR NO. 1]
>
> It was error for the trial court to reduce SMC's compensatory damages claimed for actual increased masonry costs by one-half from $ 476,392.77 to $ 238,196.39 when the stated reasons for the substantial reduction are not supported by the record.
>
> [CROSS-ASSIGNMENT OF ERROR NO. 2]
>
> It was error for the trial court to not award actual increased concrete costs of $ 102,829.96, as part of the compensatory damages when the same facts justifying the award of masonry costs apply to the concrete costs.
>
> [CROSS-ASSIGNMENT OF ERROR NO. 3]
>
> It was error for the trial court to not award as part of the compensatory damages the actual increased costs of $ 35,973.26 for cold weather protection for providing such protection for a second winter not originally planned for in the bid estimate underlying the contract.

[CROSS-ASSIGNMENT OF ERROR NO. 4]

It was error for the trial court to not award as damages the actual increased costs of $ 33,583.29 for cleanup costs incurred as a result of direction and interference by the co-owners' representative.

[CROSS-ASSIGNMENT OF ERROR NO. 5]

It was error for the trial court to reduce SMC's compensatory damages claimed [**7] for actual increased costs for backfill by $ 26,778.84 when that amount along with the $ 7,529.00 awarded for this item represented the entire additional out-of-pocket expense actually incurred and paid by SMC because of by OSFC's breach of contract.

[CROSS-ASSIGNMENT OF ERROR NO. 6]

It was error for the trial court to disallow as compensatory damages the $ 17,473.04 that was claimed for actual increased costs incurred for temporary roads and the repair of the subgrade done upon the direction of the co-owners' representative.

[CROSS-ASSIGNMENT OF ERROR NO. 7]

It was error for the trial court to reduce SMC's compensatory damages claimed for extra sewer work from $ 17,664.53 to $ 4,077.04 where the trial court mistakenly confused and conflated the two separate items of extra work involved in this claim.

[CROSS-ASSIGNMENT OF ERROR NO. 8]

It was error for the trial court to not award as compensatory damages the $ 350,000.00 of overhead and profit that was not recovered as a result of the breach of contract by OSFC.

[CROSS-ASSIGNMENT OF ERROR NO. 9]

It was error for the trial court to not award prejudgment interest to SMC on the money judgment entered in favor of SMC and against OSFC.

1 Stanley Miller [**8] also attempts to raise three additional assignments of error in its responsive brief to OSFC's appellate brief. Because these purported assignments of error were not properly presented in accordance with *Ohio App.R. 16,* we will not consider them.

[*P8] Because we find it to be dispositive of this matter, we begin our analysis by considering OSFC's first assignment of error in which OSFC argues that a reversal is warranted based upon this court's recent decision in *Cleveland Constr., Inc. v. Kent State Univ., 10th Dist. No. 09AP-822, 2010 Ohio 2906.*

[*P9] *Cleveland Construction* involved a contract for the construction of four residence halls amongst a contractor and a state university. *Id. at P2*. The contractor experienced difficulties meeting deadlines based upon various delays outside of its control. *Id. at P3, P11* and *P17*. As a result, the contractor submitted change order requests in order to extend the deadlines of the project. *Id. at P7, P8, P12* and *P18*. The university issued a change order that granted an extension to only one of the deadlines, which the contractor believed to be inadequate for the delays it had incurred. *Id. at P15*. Therefore, the contractor worked overtime and accelerated its [**9] work schedule in order to attempt to meet the deadlines. Ultimately, however, the contractor failed to meet the deadlines. *Id. at PP20-21*. It therefore filed suit for breach of contract against the university, while the university filed its own counterclaim for breach of contract. *Id. at P23*. After a bifurcated bench trial on the issue of liability, the trial court held that each party breached the contract in various ways. Generally, the university's breaches related to its responses to change order requests and the failure to remit the unpaid balance under the contract, while the contractor's breaches related to the quality of work it performed. Id. The trial court then held a damages trial and, after set-offs, awarded damages to the contractor in excess of $ 3 million. *Id. at P24*. The university appealed and presented arguments relating to the affirmative defenses of waiver and the failure to exhaust administrative remedies. *Id. at PP27-28*. After our court engaged in contractual construction and statutory interpretation analyses, we held that the university had asserted these viable affirmative defenses. *Id. at P46*. We then noted that the trial court never determined whether the university [**10] had, in fact, prevailed on these defenses. *Id. at P48*. We therefore remanded the matter to the trial court to reach a determination based upon the evidence in the record. Id.

[*P10] Based upon the arguments presented herein, we must engage in a contractual construction analysis of the public works contract underlying this matter. [HN1] The construction of written contracts involves issues of law that appellate courts review de novo. *Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph one of the syllabus*. The purpose of contract construction is to realize and give effect to the intent of the parties. *Skivolocki v. East Ohio Gas Co. (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, paragraph one of the syllabus*. "[T]he intent of the parties to a contract resides in the language they chose to employ in the agreement." *Shifrin v. Forest City Enterprises, Inc., 64 Ohio St.3d 635, 638, 1992 Ohio 28, 597 N.E.2d 499*, citing *Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St.3d 130, 31 Ohio B. 289, 509 N.E.2d 411, paragraph one of the syllabus*. See also *Saunders v. Mortensen, 101 Ohio St.3d 86, 2004 Ohio 24, P9, 801 N.E.2d 452* (it is presumed that the intent of the parties to the contract lies within the language used in the contract). When contract terms are clear and unambiguous, [**11] courts will not, in effect, create a new contract by finding an intent which is not expressed in the clear language utilized by parties. *Alexander at 246*, citing *Blosser v. Enderlin (1925), 113 Ohio St. 121, 2 Ohio Law Abs. 499, 3 Ohio Law Abs. 389, 148 N.E. 393, paragraph one of the syllabus*.

[*P11] The relevant portion of the contract at issue is Article 8, which describes the dispute resolution procedure under the contract. More specifically, Section 8.1.1 sets forth the procedure for requesting an equitable adjustment to the contract and provides:

> Any request for equitable adjustment of Contract shall be made in writing to the Architect, through the Construction Manager, and filed prior to Contract

> Completion, provided the Contractor notified the Architect, through the Construction Manager, no more than ten (10) days after the initial occurrence of the facts which are the basis of the claim. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice and a contemporaneous statement of damages shall constitute a waiver by the Contractor of any claim for additional compensation or for mitigation of Liquidated Damages.

Further, Section 8.1.2.1 requires the claim to specify its nature and amount, which was to [**12] have been certified by a notary as a fair and accurate assessment of the damages suffered by Stanley Miller. Section 8.1.2.2 requires the claim to have identified the persons, entities and events responsible for the claim. Section 8.1.2.3 requires the claim to have specified the activities affected. Section 8.1.2.4 requires the claim to specify any anticipated delay, interference, hindrance, or disruption. Finally, Section 8.1.2.5 requires the claim to have provided recommendations to prevent further delay, interference, hindrance, or disruption. (Aug. 10, 2006 Motion to Dismiss, exhibit No. 1b.)

[*P12] [HN2] "[W]hen a contract has an express provision governing a dispute, that provision will be applied; the court will not rewrite the contract to achieve a more equitable result." *Dugan & Meyers Constr. Co., Inc. v. Ohio Dept. of Adm. Servs., 113 Ohio St.3d 226, 2007 Ohio 1687, P39, 864 N.E.2d 68*, citing *Ebenisterie Beaubois Ltee v. Marous Bros. Constr., Inc. (Oct. 17, 2002), N.D. Ohio E.D. No. 02CV985, 2002 U.S. Dist. LEXIS 26625, 2002 WL 32818011*. This sentiment was echoed in *Cleveland Construction*, when our court had the opportunity to analyze a near identical section to Section 8.1.1. In *Cleveland Construction*, we held:

> [C]ourts [HN3] cannot [**13] decide cases of contractual interpretation on the basis of what is just or equitable. *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson, 103 Ohio St.3d 188, 2004 Ohio 4886, P 20, 814 N.E.2d 1210*. See also *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs., 113 Ohio St.3d 226, 2007 Ohio 1687, P 29, 864 N.E.2d 68* (holding that a contract "does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto" and that "it is not the province of courts to relieve parties of improvident contracts"). When a contract is unambiguous, a court must simply apply the language as written. *St. Marys [v. Auglaize Cty. Bd. of Commrs., 115 Ohio St.3d 387, 2007 Ohio 5026, P 18], 875 N.E.2d 561*. Here, the language of Section 8.1.1 is plain and unambiguous. Consequently, we conclude that the trial court erred when it, in effect, deleted the second sentence of Section 8.1.1 from the parties' contract.

Id. at P31.

[*P13] In its first assignment of error, OSFC argues that the trial court ignored the second

sentence of Section 8.1.1 in order to fashion a more equitable remedy for Stanley Miller. It also argues that Stanley Miller has made certain evidentiary concessions, which require a reversal [**14] under *Cleveland Construction*. Specifically, it notes that Stanley Miller conceded that it failed to comply with Article 8 of the contract in the submission of the one-page, $ 1.1 million claim. As a result, OSFC argues that Stanley Miller has waived its right to this claim. Further, it argues that Stanley Miller's claims for breach of contract, negligence, and unjust enrichment are barred because Stanley Miller failed to exhaust its administrative remedies under the contract.

[*P14] On the other side, Stanley Miller argues that it would be fundamentally unfair to hold against it. It argues that *Cleveland Construction* does not require a reversal. It references the course of dealing amongst the contractors and OSFC in support of the position that OSFC waived its ability to require strict compliance with Article 8. In further support, it references Section 8.4.1, which provides:

> Instead of, or in addition to, the procedures set forth above, the Contractor and the State may, by mutual agreement, waive the dispute resolution procedures provided in this Article and submit any claims, disputes or matters in question to a form of Alternative Dispute Resolution. Such agreement shall be in writing and [**15] shall include a procedure to equitably share the costs of the Alternative Dispute Resolution.

Stanley Miller argues that the parties agreed to waive the dispute resolution procedures and waived the requirement that such an agreement be in writing.

[*P15] In its decision granting judgment to Stanley Miller, the trial court relied upon *Craft Gen. Contractors, Inc. v. City of Urbana (Feb. 2, 1982), 10th Dist. No. 81AP-346, 1982 Ohio App. LEXIS 13164, 1982 WL 3960*. Our court reviewed *Craft General Contractors* after a summary judgment was granted in favor of the city of Urbana as against a contractor. *Id., 1982 Ohio App. LEXIS 13164, at *8, 1982 WL 3960, at *1*. In that case, we framed one of the issues as follows: "Is appellant precluded from recovery because of its failure to submit its claim to appellee, City of Urbana, within the time limit as set out in the contract?" *Id., 1982 Ohio App. LEXIS 13164, at *11, 1982 WL 3960, at *4*. In response to this issue of timing, we held that genuine issues of material fact existed because of the knowledge the city had, the oral notice of the complaints provided by the contractor, and the lack of prejudice to the city over the untimely submission of an earlier, [**16] written notice. *Id., 1982 Ohio App. LEXIS 13164, at *11, 1982 WL 3960, at *8*. We therefore reversed and remanded the matter for a trial. *Id., 1982 Ohio App. LEXIS 13164, at *11, 1982 WL 3960, at *9*.

[*P16] In the instant matter, unlike the claim raised in *Craft General Contractors*, there were many alleged deficiencies in the one-page, $ 1.1 million claim submitted by Stanley Miller. The trial court noted all of the specific Article 8 requirements in its decision before generally finding that Stanley Miller had not waived its claim by failing to strictly comply with Article 8.

[*P17] In *Dugan & Meyers*, the Supreme Court of Ohio held:

> [W]e reject [the Contractor's] argument that it was excused from complying with the specific change-order procedure for requesting extensions because the state had actual notice of the need for changes to the deadline, and therefore any failure to comply with procedure was harmless error. The record lacks evidence of either an affirmative or implied waiver by the department or OSU of the change-order procedures contained in the contract. [The Contractor] has not convinced us that its failure to request extensions was harmless to OSU. To the contrary, [the Contractor] [**17] agreed that the contract language stated that failure to provide written notice "shall constitute a waiver by the Contractor of any claim for extension or for mitigation of Liquidated Damages." The court of appeals correctly concluded that [the Contractor] "has not demonstrated that it was entitled to disregard its obligations under that part of the contract[.]"

Id. at P41, quoting *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs., 162 Ohio App.3d 491, 2005 Ohio 3810, P40, 834 N.E.2d 1*. Therefore, under *Dugan & Meyers*, [HN4] something more than actual notice on the part of the state is required to excuse a contractor from complying with its obligations regarding change-order procedures in public works contracts.

[*P18] Unlike the trial court in *Cleveland Construction*, it is clear that the trial court in the instant matter considered the issue of whether Stanley Miller waived its right to an equitable adjustment under Article 8. Although the record contains evidence relating to the position that OSFC may have waived strict compliance with Article 8, it is clear that the trial court did not base its decision on this evidence. Instead, the trial court based its decision upon evidence showing that OSFC had [**18] notice of Stanley Miller's concerns and failed to remedy them. Rather than supporting a finding on the issue, these failures actually undermine the idea that OSFC waived the Article 8 procedures. See *State ex rel. Athens Cty. Bd. of Commrs. v. Bd. of Dirs., 75 Ohio St.3d 611, 616, 1996 Ohio 68, 665 N.E.2d 202* ([HN5] "Waiver is a voluntary relinquishment of a known right."). Indeed, failing to remedy issues not properly raised through the Article 8 procedure would have no bearing on OSFC's voluntary relinquishment of known rights under Article 8 procedure. Again, something more than actual notice is required. This is particularly true in light of the fact that the parties had complied with the Article 8 procedure at various points through the Lehman project. The trial court noted that "the parties followed the contractual claims procedure on numerous occasions" resulting "in change orders and adjustments to the contract price totaling approximately $ 100,000." (Trial court's decision, at 20.) On the other side, however, Stanley Miller cites change orders, which demonstrate that equitable adjustments were made to the contract without complying with the specific Article 8 procedure. Under the guidance of *Dugan* [**19] *& Meyers*, these are the competing positions on the issue of waiver.

[*P19] Further, it is clear that the trial court decided this matter, at least in part, on the portion of *Conti Corp. v. Ohio Dept. of Adm. Servs. (1993), 90 Ohio App.3d 462, 629 N.E.2d 1073* that we expressly overruled in *Cleveland Construction*. While we acknowledge that Cleveland Construction was decided after the trial court rendered its decision in the instant matter,

we cannot ignore the trial court's reliance on the portion of *Conti* that now has no precedential value. As a result, the trial court would now be more adept at analyzing the issue of waiver, along with the pertinent evidence, in light of our recent decision in *Cleveland Construction.* Additionally, we reject Stanley Miller's contention that *Cleveland Construction* should only have prospective effect.

[*P20] [HN6] "Waiver is an affirmative defense." *Cleveland Construction at P47*, citing *Civ.R. 8(C)*. An affirmative defense acknowledges the validity of a claim but asserts some legal reason why the plaintiff is precluded from recovering on the claim. Id., citing *State ex rel. Plain Dealer Publishing Co. v. Cleveland, 75 Ohio St.3d 31, 1996 Ohio 379, 661 N.E.2d 187*. Because waiver is an affirmative defense, [**20] OSFC bore the burden of proving it at trial. *Cleveland Construction at P48.* Just as our court did in *Cleveland Construction*, we find that the trial court must consider this affirmative defense. We therefore sustain OSFC's first assignment of error and remand this matter to the trial court for it to determine whether OSFC met its burden of proving waiver based upon the evidence in the record.

[*P21] OSFC's second and third assignments of error necessarily depend upon findings yet to be made by the trial court. The same can be said of the issues presented in Stanley Miller's cross-appeal and OSFC's motion to dismiss Stanley Miller's cross-appeal.

[*P22] Based upon the foregoing, we sustain OSFC's first assignment of error. This resolution renders moot OSFC's second and third assignments of error, renders moot Stanley Miller's cross-appeal, and renders moot OSFC's motion to dismiss Stanley Miller's cross-appeal. We therefore reverse and remand this matter to the trial court for further proceedings in accordance with law and consistent with this decision.

Judgments reversed and remanded with instructions;

Cross-appeal rendered moot;

Motion to dismiss cross-appeal rendered moot.

SADLER and McGRATH, JJ., [**21] concur.

STANLEY MILLER CONSTRUCTION CO., Plaintiff v. OHIO SCHOOL FACILITIES COMMISSION, et al., Defendants

Case No. 2006-04351

COURT OF CLAIMS OF OHIO

2012 Ohio 3995; 2012 Ohio Misc. LEXIS 114

May 8, 2012, Filed

PRIOR HISTORY: *Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm'n, 2010 Ohio 6397, 2010 Ohio App. LEXIS 5347 (Ohio Ct. App., Franklin County, Dec. 28, 2010)*

CASE SUMMARY:

OVERVIEW: Although defendants breached a construction contract and that breach proximately caused plaintiff damages in the form of unanticipated extra costs, plaintiff waived its right to an equitable adjustment to the contract in most cases because plaintiff failed to comply with the contractual claims process; the only exception to the waiver was plaintiff's claim for additional costs in the site work division. Defendants did not challenge plaintiff's claim for interest.

OUTCOME: Judgment entered in favor of plaintiff for $ 44,757.39.

LexisNexis(R) Headnotes

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

[HN1] Waiver of a contract provision may be express or implied. Waiver by estoppel exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it. Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights. Whether a party's inconsistent conduct constitutes waiver involves a factual determination, and such a factual determination is properly made by the trier of fact.

Contracts Law > Remedies > Equitable Relief > General Overview

Contracts Law > Types of Contracts > Express Contracts

[HN2] Absent proof of bad faith or fraud, an equitable action for unjust enrichment will not lie

when the subject of the claim is governed by an express contract.

Torts > Damages > Economic Loss Doctrine

[HN3] A plaintiff may not pursue a claim for relief sounding in negligence where the loss is purely economic in nature.

JUDGES: [**1] Judge Joseph T. Clark.

OPINION BY: Joseph T. Clark

OPINION

DECISION

[*P1] Plaintiff, Stanley Miller Construction Company (Stanley Miller), brought this action against defendants, Ohio School Facilities Commission (OSFC) and State of Ohio, alleging breach of contract, negligence, and unjust enrichment. The case was tried to the court on the issues of liability and damages.

[*P2] On March 1, 2010, this court entered judgment in favor of Stanley Miller in the total amount of $404,276.93 (Stanley Miller I). The court concluded that Stanley Miller was entitled to an equitable adjustment to the contract as follows: $273,925.85 for masonry; $8,658.35 for site work; $80,930.10 for roof trusses; $4,018.79 for sewer work; and $36,074.04 for interest earned. OSFC appealed the decision of this court and Stanley Miller filed a cross-appeal. On December 28, 2010, the court of appeals reversed the decision of this court and remanded the case for further proceedings. *Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm., 10th Dist. Nos. 10AP-298, 10AP-299, 10AP-432, 10AP-433, 2010 Ohio 6397. (Stanley Miller II.)*

[*P3] On October 19, 2011, the parties were ordered to submit briefs upon remand and on January 6, 2012, all such briefs were [**2] submitted. [1] The case is now before the court for a decision. [2]

1 For good cause shown, Stanley Miller's December 29, 2011 motion for an extension of time is GRANTED instanter and OSFC's December 19, 2011 motion to strike is DENIED.

2 On September 1, 2006, Canton City School District (Canton) filed a petition seeking the removal of a case arising from the same transaction pending in Stark County Common Pleas Court. *See Stanley Miller Constr. Co. v. OSFC*, Ct. of Cl. No. 2006-05632-PR. Although the two cases were combined for trial, the court will issue a separate decision for each case.

[*P4] Stanley Miller entered into a contract with OSFC and Canton in January 2003, for the construction of what was to be the Lehman Middle School (Lehman project). During the construction phase, ownership of the proposed middle school was to be shared by OSFC (77 percent) and Canton (23 percent). [3] Stanley Miller was a prime contractor on the project having been awarded a contract for numerous divisions of the work, including the division for masonry, which was the largest single component of the project. Jeffrey Tuckerman, OSFC's project administrator, selected Ruhlin Construction (Ruhlin) as construction manager [**3] for the Lehman project. According to Tuckerman, Ruhlin was an extension of OSFC

with respect to the management of the Lehman project.

3 OSFC and Canton will be referred to collectively as "OSFC" throughout this decision.

[*P5] Stanley Miller alleges that their work on the Lehman project was plagued by a myriad of costly inefficiencies that were caused by factors outside of its control. For example, Stanley Miller alleges that the combined effect of a hopelessly flawed construction schedule and the persistent meddling of Ruhlin resulted in delays and extra work.

[*P6] On July 2, 2004, the scheduled project completion date, Stanley Miller submitted a one-page document to OSFC wherein Stanley Miller demanded that OSFC make an equitable adjustment to the contract price of more than $1.1 million in order to compensate Stanley Miller for unanticipated additional costs it had incurred on the project. The document was authored by Stanley Miller Vice President and Co-owner, Steve Miller, and became known at trial as the "one-page, $1.1 million claim." (Plaintiff's Exhibit 64.) The document reads as follows:

	Est.	**Actual**	**Difference**
Masonry costs including labor, material and equipment	2,274,738.00	2,751,130.77	(476,392.77)
Cold Weather Protect	0.00	35,973.27	(35,973.27)
Backfill Retaining Walls	17,400.00	51,707.84	(34,307.84)
Concrete Costs	404,200.00	507,029.96	(102,829.96)
Clean Up Costs	23,000.00	56,583.29	(33,583.29)
Temp. Roads, Repair Sub-grade	8,500.00	25,973.04	(17,473.04)
Sewer Work	53,700.00	71,364.53	(17,664.53)
Roof Trusses	221,600.00	291,974.39	(70,374.39)
		Total Losses	(788,598.79)
		Total OH & Profit	(350,000.00)
			(1,138,598.79)
		Current Contract	5,923,846.19

	Est.	Actual	Difference
		Costs as of this date (7/1/04)	(6,660,747.80)
			(736,901.61)
Estimated costs to complete, (Concrete bills yet to arrive and labor to install curb and sidewalk along Broad St.)			(51,697.18)
			(788,598.79)

[*P7] [**4] Although there were some subsequent communications between the parties regarding the claim and a brief meeting which occurred in July 2004, it is clear that no payment was made. Plaintiff now seeks to recover these additional costs under theories of breach of contract, negligence, and unjust enrichment. The third-party complaint states a claim for contractual indemnity.

I. MASONRY CLAIM

[*P8] In Stanley Miller I, the court awarded Stanley Miller the sum of $273,925.85 on its claim for damages arising out of bid package 4A pertaining to masonry. [4] For this division of the work, Stanley Miller was to provide "all labor, equipment, material and supervision as required to complete exterior and interior masonry, including site work masonry, insulation, caulking and related work as shown on the Contract Documents." This court determined that OSFC breached the contract by failing to provide Stanley Miller with a workable construction schedule and by wrongfully interfering with Stanley Miller's means and methods.

4 Stanley Miller was awarded a contract for multiple divisions of the work on the Lehman project, including the following:

"1. **Bid Package 2B - Site Work** is generally all labor, equipment, [**5] material and supervision as required to complete: site development, removal of existing concrete and asphalt, earthwork, asphalt paving, concrete walks and curbs, sewer collection systems, bicycle parking racks, landscape work, and site concrete.

"2. **Bid Package 3B - Interior Concrete Slabs** is generally all labor, equipment, material and supervision as required to complete: slab on grade and slab of deck.

"3. **Bid Package 4A - Masonry** is generally all labor, equipment, material and supervision as required to complete: exterior and interior masonry, including site work masonry, insulation, caulking and related work as shown on the Contract Documents.

"4. **Bid Package 5B - Miscellaneous Metals** is generally all work required to provide materials and complete installation of materials such as ladders, stairs, handrails, etc., which includes offloading, shakeout, raising, bolting, cutting, welding, alignment,

shop priming, galvanizing and touch-up. The Prime Contractor responsible for this work shall be termed the Miscellaneous Steel Installation Contractor (MSIC).

"5. **Bid Package 9A - General Trades Package** is generally all labor, equipment, material and supervision as required to complete: [**6] Rough and finish carpentry, insulation, EIFS, shingled and metal roof, all interior and exterior doors, frames, and hardware, rolling security gates, glass and glazing, studs and drywall, all flooring, finish carpentry, caulking, gypsum board walls, acoustical ceilings, paint, division 10 specialties, stage equipment, projection screens, athletic equipment, and gym bleachers." (Plaintiffs Exhibit 2.)

[*P9] In reversing the decision of this court, the court of appeals, in Stanley Miller II, stated: "[I]t is clear that the trial court in the instant matter considered the issue of whether Stanley Miller waived its right to an equitable adjustment under Article 8. Although the record contains evidence relating to the position that OSFC may have waived strict compliance with Article 8, it is clear that the trial court did not base its decision on this evidence. Instead, the trial court based its decision upon evidence showing that OSFC had notice of Stanley Miller's concerns and failed to remedy them. Rather than supporting a finding on the issue, these failures actually undermine the idea that OSFC waived the Article 8 procedures. *See State ex rel. Athens Cty. Bd. of Commrs. v. Bd. of Dirs., 75 Ohio St. 3d 611, 616, 1996 Ohio 68, 665 N.E.2d 202* [**7] ("Waiver is a voluntary relinquishment of a known right."). Indeed, failing to remedy issues not properly raised through the Article 8 procedure would have no bearing on OSFC's voluntary relinquishment of known rights under Article 8 procedure. Again, something more than actual notice is required. This is particularly true in light of the fact that the parties had complied with the Article 8 procedure at various points through the Lehman project. The trial court noted that "the parties followed the contractual claims procedure on numerous occasions" resulting "in change orders and adjustments to the contract price totaling approximately $100,000." (Trial court's decision, at 20.) On the other side, however, Stanley Miller cites change orders, which demonstrate that equitable adjustments were made to the contract without complying with the specific Article 8 procedure. Under the guidance of *Dugan & Meyers*, these are the competing positions on the issue of waiver." *Stanley Miller II, ¶18*.

[*P10] Stanley Miller argues on remand that it did, in fact, comply with Article 8 notice provisions with regard to its masonry claim. Article 8 details the procedure for requesting additional payment. The [**8] relevant provision of the parties' agreement reads as follows:

[*P11] "8.1.1 Any request for equitable adjustments of Contract shall be made in writing to the Architect, through the Construction Manager, and filed prior to Contract Completion, provided the Contractor notified the Architect, through the Construction Manager, no more than ten (10) days after the initial occurrence of the facts which are the basis of the claim. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice and a contemporaneous statement of damages shall constitute a waiver by the Contractor of any claim for additional compensation or for mitigation of Liquidated Damages."

[*P12] Although Article 8.1.1 clearly requires that a written claim be filed prior to contract completion, there is no writing requirement for the 10-day notice. [5] Consequently, the court must examine both the written and oral communications between Stanley Miller and Ruhlin in order to determine whether Stanley Miller complied with the notice provision of Article 8.1.1.

5 This case is distinguishable from *Tritonservices, Inc. v. Univ. of Cincinnati, Ct. of Cl. No. 2009-02324, 2011 Ohio 7010,* in that Article 8 of the [**9] contract in *Tritonservices* required the contractor to provide a 10-day notice in writing.

[*P13] Stanley Miller contends that it complied with Article 8.1.1 by notifying Ruhlin, within 10 days of the initial occurrence, of the facts which are the basis of the masonry claim. Stanley Miller maintains that the record is replete with evidence of notice in the form of progress meeting notes, letters, e-mail correspondence, and trial testimony regarding job site conversations. Indeed, this court has previously found that, with respect to both the problems with the schedule and the interference of Ruhlin, OSFC had actual notice of the facts which are the basis of the claim for damages. Moreover, given the frequency and timing of the oral and written communications in the record, the court finds that such notice was timely given within 10 days of the initial occurrence.

[*P14] In fact, with respect to the masonry division, the evidence also reveals that Stanley Miller submitted a written request for an extension of time pursuant to Article 6 of the contract. Article 6 provides as follows:

[*P15] "6.4 REQUEST FOR EXTENSION

[*P16] "6.4.1 *Any request by the Contractor for an extension of time shall be made in writing to* [**10] *the Construction Manager no more than ten (10) days after the initial occurrence of any condition which, in the Contractor's opinion, entitles the Contractor to an extension of time. Failure to timely provide such notice to the Construction Manager shall constitute a waiver by the Contractor of any claim for extension, damages or mitigation of Liquidated Damages, to the fullest extent permitted by law*

[*P17] "6.4.2 The Contractor's request shall provide the following information so that a timely response may be made to minimize any resulting damages, injury or expense.

[*P18] "6.4.2.1 Nature of the interference, disruption, hindrance or delay;

[*P19] "6.4.2.2 Identification of persons, entities and events responsible for the interference, disruption, hindrance or delay;

[*P20] "6.4.2.3 Date (or anticipated date) of commencement of the interference, disruption, hindrance or delay;

[*P21] "6.4.2.4 Activities on the Construction Schedule which may be affected by the interference, disruption, hindrance or delay, or new activities created by the interference, disruption, hindrance or delay and the relationship with existing activities;

[*P22] "6.4.2.5 Anticipated duration of the interference, disruption, hindrance or delay;

[*P23] "6.4.2.6 [**11] Specific number of days of extension requested; and

[*P24] "6.4.2.7 Recommended action to avoid or minimize any future interference, disruption, hindrance or delay." (Emphasis added.)

[*P25] Unlike the 10-day notice required by Article 8.1.1, a request for an extension of time pursuant to Article 6 must be submitted in writing. In this case, the evidence of a written request regarding Stanley Miller's masonry claim appears in the form of correspondence addressed to Joel Reott, Ruhlin's project manager, from both Steve Miller and Keith Hoffman, Stanley Miller's project manager. These correspondence evidence Stanley Miller's efforts, at the earliest stages of the project, to inform Ruhlin of Stanley Miller's problems with the baseline schedule. Steve Miller informed Ruhlin in February 2003, that there was insufficient time

built into the schedule for Stanley Miller to complete critical activities. In a correspondence dated February 12, 2003, regarding "proposed adjustments to the schedule," Steve Miller identifies, by item number, each activity for which a time extension is requested, along with the scheduled duration for each activity and the "revised duration" requested by Stanley Miller. (Plaintiffs [**12] Exhibit 15.) Stanley Miller requested, in total, that 174 days be added to its scheduled activities.

[*P26] Reott responded to this request by updating the schedule to incorporate some of the revised dates requested by Stanley Miller. However, when Steve Miller reviewed the new schedule he realized that, with a few exceptions, Stanley Miller's suggested revisions were not incorporated into the new schedule. On February 25, 2003, Steve Miller sent a follow-up correspondence to Reott wherein he explained Stanley Miller's position as follows: "I cannot sign your schedule in its present form. With regard to the masonry, I asked for an additional 174 days. In return you gave me 44, of those 44 days most have little affect (sic) on the critical path. On three (3) items which do affect the critical path, you decreased my time by 40 days. On other critical path items you gave me a total of 24 days. The bottom line is that I need more days especially on bearing CMU walls & brick veneer." (Plaintiff's Exhibit 16.)

[*P27] The court's review of Steve Miller's correspondence to Reott reveals that Stanley Miller complied with Article 6.4 in requesting an extension of time. Additionally, Steve Miller's follow-up [**13] correspondence represents notice to Ruhlin and OSFC of Stanley Miller's potential Article 8 claim for compensation in an amount equal to the extra costs associated with as many as 134 days of masonry work.

[*P28] However, even though Ruhlin had actual notice of such facts, there is no evidence that Stanley Miller provided Ruhlin with a contemporaneous statement of damages either orally or in writing. In fact, the evidence establishes that Stanley Miller did not provide any statement of damages until it filed its one-page, $1.1 million claim just prior to the project completion date. Thus, compliance with Article 8.1 has not been demonstrated by the evidence.

[*P29] Nevertheless, following the Steve Miller correspondence, Stanley Miller continued to voice concerns about the poor schedule and the effects such a schedule was having and would continue to have on the efficient progress of masonry work. In July 2003, Hoffman wrote to Reott that the schedule was "illogical at best." In his letter, Hoffman complained that the schedule erroneously required interior masonry walls to be completed before the structure was fully enclosed. He also stated that the schedule "is only seventy-five 75% complete and [**14] cannot be used effectively." (Plaintiffs Exhibit 20.) Hoffman advised Reott that proceeding with the work pursuant to the schedule was not efficient. Finally, Hoffman offered to meet with Reott to revise the schedule and asked Reott for an electronic copy of the schedule to facilitate that end.

[*P30] None of these subsequent correspondence were as specific as those sent by Steve Miller in February 2003. Moreover, as noted above, Stanley Miller did not provide any statement of damages, either orally or in writing, until just prior to the project completion date. Thus, the court concludes that Stanley Miller failed to comply with the 10-day notice provisions of Article 8.1.1 with respect to the masonry division.

[*P31] The same can be said of the negative impact that Ruhlin's project superintendent, Brad Way, may have had on the masonry division. Although Reott testified that he did not specifically recall any Stanley Miller complaints about Way, and that he "vaguely remembers" Stanley Miller's request that Way be removed from the project, the evidence proves that Stanley Miller frequently

expressed serious concerns about Way. For example, in a September 4, 2003 letter to Reott, Hoffman requested [**15] that "any communication between Ruhlin and Stanley Miller be directed either through this office or our job-site superintendent, Donnie Kramer. Please do not give direction to any other field personnel." (Plaintiffs Exhibit 23.) The evidence establishes that this letter was in reference to Way's interference. The very next day, Hoffman wrote Reott complaining that "there is no money in our bid to pay field personnel to discuss the job with [Way]. This disruption in work-flow adds up over the length of the job and is not recoverable." (Plaintiff's Exhibit 24.) David Krutz, Ruhlin's project executive, testified that he had oversight responsibility for all Ruhlin/OSFC projects, of which there were many. Although he visited the Lehman project job site on only a half-dozen occasions, he testified that in early 2004 he was aware that Stanley Miller was having trouble with Way.

[*P32] When Stanley Miller's complaints were not addressed, Hoffman requested that Way be removed from the project. In his March 11, 2004 letter to Reott, Hoffman recommended Way's removal to "avoid or minimize any future interference, disruption, hinderance or delay." (Plaintiff's Exhibit 43.) The trial testimony given by [**16] both Ruhlin and OSFC personnel involved in the project convinces the court that Stanley Miller's request for Way's removal was not seriously considered by OSFC. However, as was noted by the court of appeals in Stanley Miller II, OSFC's failure to address Stanley Miller's concerns about the interference of Way, actually supports a finding that OSFC intended to hold Stanley Miller to the contractual notice requirements of Article 8.1.1; [6] that such requirements were not waived.

6 The record establishes that the issue came to a head during the painting activities of Stanley Miller's subcontractor in the school gymnasium. In a March 15, 2004 correspondence, Hoffman criticizes Way's conduct as follows: "Item 5: Brad Way is on site to ensure that products are installed per the specifications, I agree. He is also there to see that the project proceeds in accordance with the schedule and specifications. The specifications are clear, in that, during a dispute, the work is to be performed so as not to delay the construction schedule. This project was held hostage for 45 days due to a disagreement about the value of a credit and because the manufacturer's recommendations were ignored." (Plaintiffs [**17] Exhibit 46.)

[*P33] Based upon the foregoing, the court finds that even though OSFC had actual notice that Way was having a negative impact on Stanley Miller's work in the masonry division, none of the correspondence between Stanley Miller and Ruhlin contain a contemporaneous statement of damages as required by Article 8.1.1 and there is no persuasive evidence that such a statement was provided orally.

[*P34] In conclusion, even though Stanley Miller provided Ruhlin with timely notice of facts which support as many as 134 days of uncompensated masonry work directly attributable to the faulty schedule, and which form the basis of a claim for unspecified delays caused by Brad Way's interference with Stanley Miller's means and methods, Stanley Miller never provided a contemporaneous statement of damages. Thus, the court finds that Stanley Miller failed to provide notice of its claim as required by Article 8.1.1 of the contract. Further, pursuant to Article 8.1.1, the failure of notice results in a waiver by Stanley Miller of its right to an equitable adjustment of the contract to compensate it for the additional costs in the masonry division.

[*P35] Stanley Miller argues, in the alternative, that OSFC, by [**18] and through Ruhlin, waived strict compliance with the notice

requirements of Article 8.1.1 by its words and conduct. [HN1] "'[W]aiver of a contract provision may be express or implied.' * * * '"[W]aiver by estoppel" exists *when the acts and conduct of a party are inconsistent with an intent to claim a right,* and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it.' * * * Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights.' * * * Whether a party's inconsistent conduct constitutes waiver involves a factual determination, * * * and such a factual determination is properly made by the trier of fact." *Lewis & Michael Moving and Storage, Inc. v. Stofcheck Ambulance Serv., Inc., 10th Dist. No. 05AP-662, 2006 Ohio 3810, ¶29-30,* quoting *Natl. City Bank v. Rini, 162 Ohio App. 3d 662, 2005 Ohio 4041, ¶24, 834 N.E.2d 836 (11th Dist.) See also Tritonservices, supra, at ¶27.*

The evidence of the parties' course of performance suggests that Article 8.1.1 compliance was expected by OSFC but that such compliance could be waived with respect to certain claims.

[*P36] For example, in a December [**19] 15, 2003 letter to Hoffman, Reott stated:

[*P37] "I received your Article 8 - Request for Equitable Adjustment of the Contract in the amount of $8,142.52 today for the stairwell landings. Article 8 - Dispute Resolution Procedure Item 8.1.1 states the following - Any request for equitable adjustment of Contract shall be made in writing to the Architect, through the Construction Manager, and filed prior to Contract Completion, provided the Contractor notified the Architect, through the Construction Manager, no more than 10 days after the initial occurrence of the facts which are the basis of the claim.

[*P38] "Stanley Miller is out of their claim right for this issue, however in the spirit of partnering I will submit this request to the Commission." (Defendants' Exhibit AA.)

[*P39] It is clear from Reott's letter that although OSFC's construction manager expected Stanley Miller to comply with the notice provisions of Article 8.1.1, exceptions could be made, on a claim by claim basis.

[*P40] There is also evidence that where Ruhlin agreed to pay Stanley Miller for work performed in excess of that which was required by the contract, some form of correspondence would be issued to document the agreement. For example, [**20] a July 23, 2004 e-mail string evidences an agreement to pay Stanley Miller for approximately $2,100 of additional painting. (Plaintiff's Exhibit 34.) Similarly, a May 27, 2004 correspondence from Reott to Hoffman memorializes a negotiated agreement regarding payment for defective curbs. (Defendants' Exhibit I.)

[*P41] Similarly, Article 7.3.1 expressly permits OSFC to issue a Field Work Order (FWO) in lieu of a formal change order for additional work costing no more than $10,000. Correspondence in March and April 2005 also evidence the fact that the parties utilized both the change order process of Article 7 and the Article 8 dispute resolution process throughout the course of the project. Moreover, as noted above, Stanley Miller complied with the Article 6 process for requesting extensions of time on more than one occasion as evidence by Hoffman's March 11, 2004 letter to Reott.

[*P42] As noted by this court in Stanley Miller I, the contractual claims procedure resulted in change orders and adjustments to the contract price totaling approximately $100,000. The correspondence admitted into evidence as Plaintiff's Exhibits 72-74, show that Stanley Miller submitted Change Order requests for a number [**21] of items of work that had previously been completed; that subsequent meetings attended by representatives of Stanley Miller, Ruhlin, OSFC,

and the project Architect resulted in the resolution of many of these requests; and that further dispute resolution meetings were discussed regarding the remaining disputed items.

[*P43] The evidence clearly demonstrates that time was of the essence on this project and that, on many occasions, the parties agreed that Stanley Miller would perform certain work and that either a change order or agreed adjustment to the contract price would be negotiated at a later date. The parties referred to the later practice as "partnering." However, neither the existence of the FWO procedure under Article 7.3.1 nor the concept of partnering support a finding that OSFC waived the Article 8.1.1 notice requirements either for masonry claims or on a project wide basis as Stanley Miller now contends.

[*P44] Moreover, even if the court believed that such notice provisions were waived in respect to the masonry division, the court must still determine whether Stanley Miller complied with the remaining requirements of Article 8.1 with respect to any portion of the masonry claim for [**22] which proper notice had been waived.

[*P45] Article 8.1 further provides:

[*P46] "8.1.2 In every such written claim filed in accordance with paragraph GC 8.1.1, the Contractor shall provide the following information to permit evaluation of the request for equitable adjustment of the Contract.

[*P47] "8.1.2.1 Nature and amount of the claim, which the contractor shall certify before a notary public is a fair and accurate assessment of the damages suffered by the contractor;

[*P48] "8.1.2.2 Identification of persons, entities and events responsible for the claim;

[*P49] "8.1.2.3 Activities on the Construction Schedule affected by the claim or new activities created by any delay, interference, hindrance or disruption and the relationship with existing activities;

[*P50] "8.1.2.4 Anticipated duration of any delay, interference, hindrance or disruption;

[*P51] "8.1.2.5 Recommended action to avoid or minimize any future delay, interference hindrance or disruption."

[*P52] There is no doubt that the one-page, $1.1 million claim submitted by Stanley Miller completely and utterly fails to comply with the above-cited requirements of Article 8. With respect to the masonry portion of the claim, Stanley Miller simply subtracted its total estimated costs [**23] of the masonry division from total actual masonry costs in order to arrive at $476,392.77. The one-page document is not notarized; it does not identify the persons, entities and events responsible for the claim; it does not set forth the activities on the Construction Schedule affected by the claim or new activities created by any delay, interference, hindrance or disruption and the relationship with existing activities; and it does not identify the anticipated duration of any delay, interference, hindrance or disruption. The claim does not even state when the delay, interference, hindrance or disruption occurred.

[*P53] Stanley Miller acknowledges the bare bones nature of the one-page claim document, but it argues that OSFC waived its right to strict compliance with the requirements of Article 8.1.2 through a course of performance. The court disagrees.

[*P54] Article 8.2.1 states: "To avoid or minimize the filing of requests for equitable adjustment of the Contract, the Contractor and the Construction Manager, with the assistance of the Architect, shall endeavor to timely and proactively identify, address and resolve matters involving persons, entities or events which may give rise to a

request [**24] for equitable adjustments of the Contract."

[*P55] There is no question that Stanley Miller's toxic relationship with Ruhlin hindered the process contemplated in Article 8.2.1. Indeed, based upon the evidence, the court finds that Stanley Miller believed that any further resort to the process with regard to the scheduling issues and the interference of Way would have been futile. However, as noted by the court of appeals in Stanley Miller II, this belief, even if it was well founded, does not excuse Stanley Miller's patent failure to properly document its masonry claim.

[*P56] David Miller, President of Stanley Miller, testified that he told his field staff that if performing the masonry work in the manner desired by Way resulted in extra costs, that Stanley Miller would simply charge OSFC at the end of the job; that he "just wanted to get the job done." Although Miller's desire to get the job done is laudable, his expectation that OSFC would simply pay for the extra costs without any documentation to support either OSFC's contractual liability for such costs or the amount thereof was misplaced. As difficult as it may have been to completely and accurately track extra masonry costs associated with [**25] either the schedule deficiencies or Way's interference, Stanley Miller was contractually obligated to make the effort. The evidence suggests that Stanley Miller's method of tracking costs by phase could have been used by Stanley Miller to track masonry costs attributable to both the poor schedule and the interference of Way, but that no such effort was made.

[*P57] The evidence also shows that OSFC made an effort to address Stanley Miller's one-page, $1.1 million claim in the context of Article 8, even though the document was patently deficient on its face.

[*P58] "8.2.2 The Construction Manager, with the assistance of the Architect, shall within 30 days of receipt of a request for equitable adjustments of the Contract filed pursuant to paragraph GC 8.1.1, schedule a meeting with the Contractor to implement the job site dispute resolution procedures the parties agreed to implement as a result of the partnering arrangement."

[*P59] Stanley Miller sent its one-page claim document to Jeffrey Tuckerman who forwarded the claim to David Krutz. The document was stamped "received" by OSFC on July 2, 2004. According to Krutz, he spoke with Steve Miller shortly thereafter and asked him to provide some "back-up" [**26] documentation to support the claim. Steve Miller reportedly told Krutz he would have something for him in August.

[*P60] A meeting was held on July 16, 2004, to discuss the $1.1 million claim. In attendance were David and Steve Miller, Tuckerman, Krutz, and a representative from both Canton City Schools and the project architect. According to Tuckerman and Krutz, Steve Miller was asked to provide documentation to back up the claim in accordance with Article 8 of the contract. Tuckerman testified that the meeting lasted approximately 30-45 minutes and ended when both David and Steve Miller "walked out."

[*P61] At a March 24, 2005 meeting with Hoffman regarding Stanley Miller's outstanding change order requests for other portions of the work, Krutz inquired about back-up documentation for the $1.1 million claim, whereupon Hoffman told him to contact Steve Miller. Krutz's subsequent e-mail to Tuckerman, dated April 25, 2005 states in relevant part: "These three change orders equal the $22,429.44 that was agreed to at the March 24, 2005 meeting. There is still $33, 685.16 in disputed change order requests from Stanley Miller that the commission wants to review and discuss *when additional information* [**27] *is presented on the $1 million claim."* (Emphasis added.) (Plaintiffs Exhibit 74.)

[*P62] Neither Krutz nor Tuckerman ever received further documentation regarding the $1.1 million claim. Although Tuckerman acknowledged that OSFC failed to formally reject the $1.1 million claim, and that he wishes he had put something in writing, it was his understanding that Steve Miller was planning to follow up with a more detailed document. [7]

7 *R.C. 153.16(B)* provides that a contractor may bring suit against the owner where a claim is not resolved within 120 days.

[*P63] While Stanley Miller claims that OSFC was not prejudiced either by the eleventh-hour presentation of the one-page, $1.1 million claim, the lack of detail and the failure to provide back-up, the obligation to comply with the contractual claims process is not conditioned upon prejudice to the owner. Moreover, the evidence establishes that poor weather also contributed to the costs of the Lehman project. In an e-mail string dated April 2004, Hoffman referred to the summer of 2003 as "the rainiest summer in over 100 years." (Defendants' Exhibit H.) Additionally, in the meeting with OSFC regarding the one-page, $1.1 million claim, Steve Miller complained [**28] to Krutz that costs were elevated by a cold winter and a wet spring. At trial, Hoffman admitted that a portion of the extra time required to complete the masonry work was due to rainy weather but he estimated that portion to be only ten percent.

[*P64] Furthermore, the evidence at trial establishes that two partially constructed masonry walls were razed and then reconstructed as a result of Stanley Miller's errors. Carl Weithman, Stanley Miller's masonry foreman, admitted that Stanley Miller erred in the framing of a doorway and that the fix "took about one full day."

[*P65] Article 8.3.1 states: "The Contractor shall promptly provide any additional information requested by the Construction Manager or the Architect."

[*P66] Based upon the language of the contract and the facts of this case, Ruhlin and OSFC were obligated to seek additional information from Stanley Miller in support of the claim before considering either denial of the claim, payment of the claim, or the submission of the claim to alternative forms of dispute resolution. OSFC clearly made such a request but Stanley Miller either failed or refused to provide the required information.

[*P67] To the extent that Stanley Miller argues that *R.C. 4113.62* [**29] prohibits OSFC from relying upon Article 8.1 in denying Stanley Miller's claim for an equitable adjustment because the "delay" in the masonry division was caused by Ruhlin, *R.C. 4113.62* provides:

[*P68] "(C) (1) Any provision of a construction contract * * * that is made a part of a construction contract, agreement * * * that waives or precludes *liability for delay* during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the *cause of the delay* is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy." (Emphasis added.)

[*P69] Based upon the totality of the evidence the court finds that Stanley Miller incurred increased costs due to inefficiencies in the masonry division caused both by Ruhlin's inadequate construction schedule and the interference of Way in Stanley Miller's means and methods. Although Stanley Miller acknowledges that there is a distinction between a claim based upon inefficiency and a claim based upon delay, Stanley Miller argues that *R.C. 4113.62* legislatively nullifies the entirety of Article [**30] 8 as it applies to Stanley Miller's

claim. (See Plaintiff's Brief upon Remand, at p. 9.) The court disagrees.

[*P70] The court of appeals in Stanley Miller II did not address *R.C. 4113.62*. Rather, upon remand, this court was asked to "analyz[e] the issue of waiver, along with the pertinent evidence, in light of our recent decision in *Cleveland Construction." Stanley Miller II, ¶19*. The court of appeals further stated: "We therefore * * * remand this matter to the trial court for it to determine whether OSFC met its burden of proving waiver based upon the evidence in the record." *Id. at ¶20*. Given the explicit instructions of the court in Stanley Miller II, Stanley Miller's argument based upon *R.C. 4113.62* is without merit.

[*P71] Moreover, even if *R.C. 4113.62* nullifies the Article 8.1.1 and renders notice unnecessary in this case, Stanley Miller was still required to follow both Article 8.1.2 regarding the content of the claim and Article 8.3.1 which required Stanley Miller to provide additional information to OSFC upon request. As noted above, Stanley Miller completely and utterly failed to comply with either provision.

[*P72] In short, it is clear from the testimony of Stanley Miller field personnel [**31] that when Stanley Miller first began experiencing inefficiencies in its masonry operation as a result of the faulty schedule and Way's interference, Stanley Miller "had no idea that this would snowball into the mess that it did." Although the court finds this evidence to be credible, it does not provide a legal excuse for Stanley Miller's failure to timely provide a contemporaneous statement of damages as required by Article 8.1.1, file the claim in accordance with Article 8.2, and subsequently provide OSFC with additional information regarding the claim as required by Article 8.3.

[*P73] As noted above, in February 2003, Stanley Miller documented as many as 134 days of additional masonry work not accounted for in the schedule. Stanley Miller, however, did not file a claim for additional costs in the masonry division until July 2005, when it submitted its one-page, $1.1 million claim. And, it is clear upon the face of the one-page, $1.1 million claim that Stanley Miller simply deducted its bid costs for the masonry division from its total masonry costs in order to arrive at $476,392.77. Although Stanley Miller representatives Steve and Dave Miller subsequently attended an Article 8 meeting [**32] at which time Steve Miller was asked to provide additional information in support of the claim, no further information was provided.

[*P74] Pursuant to Stanley Miller II, although OSFC, by and through Ruhlin, had actual notice of the facts forming the basis of the masonry claim and the fact that OSFC, by and through Ruhlin, caused or contributed to Stanley Miller's inefficiencies in the masonry division, such facts do not provide a legal excuse for Stanley Miller's complete failure to document its claim in accordance with the contract; particularly where there is no convincing evidence of a waiver of the relevant contract procedures by OSFC.

[*P75] In short, even though the court previously concluded, in Stanley Miller I, that OSFC breached the contract by failing to provide a workable construction schedule and by wrongfully interfering with the means and methods of Stanley Miller's masonry work, the evidence establishes that Stanley Miller waived its right to an equitable adjustment to the contract by failing to comply with the contractual claims process. The court shall award nothing to Stanley Miller with respect to the masonry claim.

II. CONCRETE COSTS

[*P76] Given the court's determination that OSFC [**33] did not waive its right to insist on compliance with Article 8.1.1 on a project wide

basis, the court must review the evidence to determine whether any part of the process was waived with respect to concrete costs. Similarly, while this court ruled in Stanley Miller I that Stanley Miller's claim for additional labor costs in the concrete division failed due to a lack of necessary proof, upon remand this court must first consider the issue of waiver.

A. Concrete Division

[*P77] For the concrete division of the work, Stanley Miller was required to furnish "all labor, equipment, material and supervision as required to complete: slab on grade and slab of deck." As was the case with masonry, Stanley Miller claims that the faulty schedule combined with the interference by Ruhlin added to the costs of the concrete division. Stanley Miller's concrete foreman, Norman George, testified that he was unaware of any interference by Way with Stanley Miller's prosecution of the work. His only complaint was that he believed his crew was required to do more leveling on the Lehman project than was required on other similar projects. George remembered, however, that during his work on the concrete floors he observed [**34] Way storm out of a meeting and exclaim, "nobody calls me an asshole and gets away with it; you guys are gonna pay." George surmised that Way was referring to Stanley Miller.

[*P78] Hoffman testified that on certain unspecified occasions, his crews were prevented by Way from pouring concrete in large quantities at one time; that concrete was poured in a "piecemeal" fashion. According to Kramer, Way also prohibited Stanley Miller from pouring any concrete at all in certain areas even though Stanley Miller had already "set up" the area. In Kramer's opinion, Way's interference turned 40 days of concrete work into 60 days, significantly increasing Stanley Miller's labor costs. Kramer also attributed extra costs to Ruhlin's decision to restrict contractor ingress and egress to a single set of doors. Although logic suggests that the poor schedule combined with the interference by Ruhlin to produce inefficiencies in the prosecution of the concrete work, there is little evidence of Article 8.1 compliance with respect to this portion of Stanley Miller's claim. As noted above, the evidence does not support a waiver of strict compliance with Article 8 on a project wide basis. Accordingly, even if the [**35] court could find actual notice of the facts forming the basis of the claim was timely provided to OSFC, there is no evidence that Stanley Miller provided OSFC with a contemporaneous statement of damages as required by Article 8.1.

[*P79] Stanley Miller's one-page, $1.1 million claim letter seeks an equitable adjustment for "concrete costs" of $102,829.96. Inasmuch as concrete work was required in several divisions of Stanley Miller's contract, the one-page claim letter completely fails to comply with Article 8.2 and, as noted above, Stanley Miller also failed to provide back-up documentation pursuant to Article 8.3 when requested by OSFC to do so.

[*P80] Moreover, as this court found in Stanley Miller I, even if OSFC had waived strict compliance with Article 8, Stanley Miller failed to produce sufficient evidence to support a finding that any of its extra costs in this division were directly attributable either to the faulty schedule or to the improper interference of Ruhlin with Stanley Miller's means and methods.

B. Site Work Division

[*P81] With respect to concrete costs associated with the site work division, Stanley Miller claims that incomplete plans provided by the architect delayed Stanley Miller's [**36] prosecution of the work. Steve Miller testified that the plans did not provide sufficient reference points

to enable Stanley Miller to lay out the concrete sidewalks. Miller estimated that his crews were delayed by approximately one month while they waited for additional information from the architect and that, when work resumed, Stanley Miller was required to put more men on the job in order to complete the work in the allotted time.

[*P82] In the court's March 1, 2010 decision, it was determined that Stanley Miller failed to follow the claims process with respect to this delay claim and that Stanley Miller also failed to convince the court, pursuant to *Conti Corp. v. Dept. of Admin. Servs., 90 Ohio App. 3d 462, 629 N.E.2d 1073 (10th Dist. 1993)*, either that it was unfairly prohibited from filing an acceleration claim or that filing such a claim would have been a vain act. In light of the reversal of *Conti* by the court of appeals in Stanley Miller II, the court turns its attention to the issue of waiver. Specifically, whether the evidence supports a finding that OSFC waived the Article 8 requirements with respect to this portion of Stanley Miller's claim. [8]

8 In Stanley Miller I, this court determined that [**37] recovery under a total cost theory is unavailable to Stanley Miller for this element of the one-page, $1.1 million claim.

[*P83] Based upon the evidence in the record, Stanley Miller has not convinced the court that OSFC waived the contractual claims process with respect to the concrete claim. Consequently, even though OSFC had actual notice of the facts which form the basis of this claim, there is no evidence upon which the court can infer that OSFC waived its right to insist that Stanley Miller provide a contemporaneous statement of damages, that Stanley Miller file a claim in compliance with Article 8.2, and that Stanley Miller provide additional relevant information when asked by OSFC.

C. General Trades Division

[*P84] The testimony regarding the concrete costs allegedly incurred by Stanley Miller in the general trades division is scant. As noted above, Stanley Miller was required by the contract to furnish "all labor, equipment, material and supervision as required to complete: rough and finish carpentry, insulation, EIFS, shingled and metal roof, all interior and exterior doors, frames, and hardware, rolling security gates, glass and glazing, studs and drywall, all flooring, finish carpentry, [**38] caulking, gypsum board walls, acoustical ceilings, paint, division 10 specialties, stage equipment, projection screens, athletic equipment, and gym bleachers." (Article 9A.)

[*P85] It is not evident to the court from the above quoted description of the work that any meaningful portion of the general trades division involved concrete, and the testimony did not enlighten the court on this point, either with respect to Article 8 notice or the merits of the claim, if any. Accordingly, waiver is not an issue as Stanley Miller has not satisfied its burden of proof on this issue.

III. SITE WORK

[*P86] With respect to the division pertaining to site work, Stanley Miller agreed to provide "all labor, equipment, material and supervision as required to complete: site development, removal of existing concrete and asphalt, earthwork, asphalt paving, concrete walks and curbs, sewer collection systems, bicycle parking racks, landscape work, and site concrete." (Article 2B.)

[*P87] Stanley Miller claims that when it arrived at the job site to begin the construction of a retaining wall, the conditions were materially different than those that were represented to

bidders. Specifically, Stanley Miller asserts that a substantial [**39] amount of fill was either missing from the site or unuseable, and that it was required to purchase additional fill and provide additional labor and equipment in order to restore the site to the proper grade. According to Stanley Miller, additional costs of $34,307.84 were incurred in this process.

[*P88] Way testified that sufficient fill material was, in fact, on site but that Stanley Miller was not permitted to use the fill due to its own negligence in allowing the material to become saturated with water. OSFC also claims that Stanley Miller has waived this claim inasmuch as it agreed to assume such costs as evidenced by a correspondence dated March 21, 2003. (Defendants' Exhibit P.) Defendants' Exhibit P is a letter drafted by Reott memorializing his understanding as to the resolution of certain site work issues. Although this correspondence provides some evidence of an agreement, it is not conclusive given the fact that: 1) the correspondence was neither generated nor signed by Stanley Miller; and, 2) the correspondence conflicts with credible testimony from Stanley Miller's employees that the issue of costs was not resolved upon completion of the work. See Plaintiffs Exhibit 33.

[*P89] When [**40] Defendants' Exhibit P is considered in conjunction with the trial testimony, the court is convinced that the site conditions were materially different than those represented in the bid documents. Specifically, the fill material left on site was either insufficient to perform the work or was unuseable due to factors beyond the control of Stanley Miller. The court is not persuaded by the testimony that Stanley Miller was at fault for the lack of useable fill.

[*P90] Moreover, the contract provided at Article 7.5.3: "The Architect and the Construction Manager will promptly investigate the conditions and if the Architect or the Construction Manager finds that such conditions do materially differ from those upon which the Contract Documents permit the Contractor to rely and differ materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract, causing an increase or decrease in the cost of the Contract, *an appropriate Change Order shall be processed"* (Emphasis added.)

[*P91] Both Way and Reott recalled that a change order was issued for the work on the retaining wall in the amount $10,000 or $12,000; neither witness identified the [**41] specific change order. Way believed the change order compensated Stanley Miller for the costs incurred to thaw soil left on site. Based upon the totality of the evidence, the court finds that Stanley Miller has proven that the cost to purchase the additional backfill and the additional labor associated with the fill was a cost to Stanley Miller that was not contemplated by the agreement. It is simply not reasonable to believe that Stanley Miller agreed to absorb this extra cost without compensation. Article 7.5.3 requires the processing of an appropriate change order. The court finds, however, that the parties elected to proceed with the work and resolve the issue informally rather than to resort to the change order procedures. Consequently, Stanley Miller did not waive its right to seek an equitable adjustment to the contract by failing to strictly comply with the contractual claims process for this portion of its site work claim.

[*P92] At trial, Stanley Miller's controller, Kathy Kneisel, testified that according to Stanley Miller's company records, the estimated cost to back-fill the retaining wall was $44,400 and the actual cost was $50,929, resulting in a loss of only $7,529. The court [**42] finds this figure to be the more reliable estimate. Adding allowable overhead and profit results in a total equitable adjustment of $8,658.35.

IV. SITE CLEAN-UP

[*P93] The relevant Articles of the contract provide in part:

[*P94] "2.10.2 If the Contractor fails to clean up during the progress of the Work, the provision of paragraph GC 5.3 may be invoked.

[*P95] "2.10.3 If the Contractor fails to maintain the areas adjacent to the Project clean and free of waste materials and rubbish, upon written notification by the Architect or the Construction Manager, the School District Board shall direct the local jurisdiction having responsibility for the area to clean the area.

[*P96] "2.10.3.1 The cost of cleaning the area adjacent to the Project shall be deducted from the responsible Contractor as the Architect or the Construction Manager recommend and the State determines to be appropriate.

[*P97] "2.10.3.2 The decision of the State shall be final."

[*P98] Stanley Miller claims that it was constantly pressured by Ruhlin to clean the site even though, in many instances, the debris had been discarded by other contractors. Although the contract contained a provision for Ruhlin to bring in another contractor for the specific purpose of [**43] cleaning excess debris from the site, Stanley Miller claims that it alone was required to do such work.

[*P99] In his January 13, 2004 correspondence, Hoffman complains that Ruhlin's 72-hour notice regarding cleanup is "totally without merit," however, there is no other convincing evidence of Article 8 compliance with regard to this claim. Even if the oral and written communications provided actual notice to Ruhlin that clean up costs were being incurred by Stanley Miller in excess of what was required by the contract, there is no evidence of a contemporaneous statement of damages.

[*P100] Additionally, Stanley Miller took no photographs to support the claim nor did it otherwise document the claim as required by Article 8.2 and 8.3. Although Kramer acknowledged that his crew completed "clean-up slips" whenever such work was done, Stanley Miller made no effort to describe the debris removed or apportion the costs to the responsible party. Based upon the foregoing, the court finds that Stanley Miller waived its right to an equitable adjustment for clean up costs.

V. ROOF TRUSSES

[*P101] As part of the general trades division, Stanley Miller installed metal roof trusses throughout the project. Hoffman testified [**44] that prior to the installation of the trusses, he cautioned Way that the project plans called for trusses to be installed in such a way that they would block access to some of the duct work. According to Hoffman, Way told Stanley Miller to install the trusses as specified in the plans, and the evidence establishes that Stanley Miller did so. When the HVAC contractor subsequently informed Way that access to the duct work was blocked by the trusses, Way instructed the contractor to cut the trusses. According to Stanley Miller site foreman, Ron Nichols, Way then demanded that Stanley Miller "fix it."

[*P102] In Stanley Miller I, this court found both that Stanley Miller was entitled to an equitable adjustment to the contract for the additional costs to repair the damaged trusses, and that resort to the contractual claims process would have been a waste of time. In light of Stanley Miller II and given the reversal of *Conti*, *supra*, the court must determine whether Stanley Miller complied with Article 8 with respect to the claim.

[*P103] As noted above, the evidence does not support a waiver of the process by OSFC on a contract wide basis. In this instance, Ruhlin clearly had actual notice of the facts [**45] that form the basis of the claim, but there is no evidence of a contemporaneous statement of damages.

[*P104] The relevant evidence of an implied waiver by OSFC is Hoffman's testimony that Way told him to send a bill to the HVAC contractor. Steve Miller testified that the ordinary and usual practice in the construction industry under such circumstances is for the aggrieved contractor to assert its claim against the owner and for the owner to "back-charge" the responsible party. Reott acknowledged that OSFC uses this practice in resolving intra-contractor delay claims. In this instance, the responsible party is OSFC, by and through Ruhlin, inasmuch as Way instructed the HVAC contractor to cut the trusses.

[*P105] While the evidence may show that the filing of a claim by Stanley Miller would be a vain act, the evidence does not establish a waiver by OSFC of the claims process. [9] And, even if such evidence could be construed as an implied waiver of Article 8.1 notice, Stanley Miller subsequently failed to properly file the claim in accordance with Article 8.2 or to provide any back up documentation pursuant to Article 8.3.1, when requested by OSFC to do so. There is no convincing evidence of a waiver [**46] by OSFC of the requirements of Article 8.2 and 8.3 in regard to this claim.

9 As noted above, the scope of remand in Stanley Miller II does not contemplate the application of *R.C. 4113.62* as a means for Stanley Miller to avoid Article 8 waiver.

VI. COLD WEATHER PROTECTION

[*P106] Stanley Miller's claim is based upon its assumption that, but for the scheduling issues attributable to Ruhlin, the Lehman project would have been under roof before the winter of 2003-2004. OSFC argues that Stanley Miller should not recover the costs of additional cold weather protection inasmuch as its bid estimate for cold weather protection exceeds the total actual costs incurred by Stanley Miller. Stanley Miller counters that even though it overestimated weather protection, it was still required to pay for extra cold weather protection in the winter of 2003-2004.

[*P107] Putting the merits of Stanley Miller's claim aside, the court finds that Stanley Miller waived its claim to additional cold weather costs inasmuch as it did not provide timely notice and a contemporaneous statement of damages. The one-page, $1.1 million claim was submitted in July 2004, many months after the extra costs were incurred. Stanley Miller has [**47] provided no convincing evidence of a waiver by OSFC of Article 8.

[*P108] Moreover, even if there were a waiver, Stanley Miller has not satisfied Article 8.2 or 8.3. The actual costs of additional cold weather protection could have been calculated by Stanley Miller with relative ease, but Stanley Miller chose not to itemize its claim nor did it provide the back-up documentation requested by OSFC.

[*P109] In short, Stanley Miller has not proven that it is entitled to an equitable adjustment to the contract in order to compensate it for additional cold weather protection.

VII. TEMPORARY ROADS

[*P110] The relevant language in division 2B of the contract states:

[*P111] "Bid Package #2B [Stanley Miller] shall provide and maintain the construction entrance

off of Broad Ave. This contractor shall maintain the construction entrance and construction road that was installed by the #2A contractor. This contractor is shall (sic) remove these two (2) temporary site entrances when required by CM. Temporary roads for access around the site are the responsibility of each Prime Contractor requiring such. Bid Package #2B shall remove all site access roads (whether installed by 2A or not) prior to completing landscaping and final site [**48] improvements."

[*P112] Although the contract is not crystal clear, the court finds that Stanley Miller was required to construct and maintain the temporary road at Broad Avenue and that it was required to maintain a temporary road ending at 13th Street.

[*P113] The dispute regarding the temporary roads is two-fold. First, Stanley Miller claims that the site conditions in the area where it was to construct the Broad Avenue temporary road differed significantly from those represented in the specifications. Second, Stanley Miller claims that the extensive repairs made to the temporary road ending at 13th Street far exceeded what could be reasonably considered "maintenance."

[*P114] Nichols testified that when he arrived at the site to begin construction of Broad Avenue he found that the grade was too high; the previous site contractor had not removed sufficient material for the area to receive limestone and asphalt. According to Nichols, Kramer was concerned about the tight time-frame and that Kramer simply told him to perform the necessary additional work and that he (Kramer) would work out the payment details later.

[*P115] The evidence does not show that Stanley Miller made an attempt to comply with the contractual [**49] claims process in regard to Broad Avenue. Accordingly, even if Ruhlin had actual notice of the facts that form the basis of this portion of Stanley Miller's claim, no contemporaneous statement of damages was submitted either orally or in writing.

[*P116] With respect to the repair of the sub-grade at 13th Street, Stanley Miller's project superintendent, Greg Davis, testified that the temporary road was damaged either by excessive water runoff or by the activities of another contractor. Davis stated that he informed Way that repair of the sub-grade was not Stanley Miller's obligation. Steve Miller testified that when he raised the issue with Way in May 2004, Way threatened to assess liquidated damages against Stanley Miller unless and until the damage was repaired. Miller subsequently brought in equipment to make the necessary repairs, "under protest."

[*P117] Even if the court were to determine either that Stanley Miller complied with the 10-day notice requirement of Article 8.1 or that Way's conduct resulted in a waiver by OSFC of strict compliance therewith, the evidence does not demonstrate compliance either with Article 8.2 or 8.3 of the contractual claims process. As noted above, a waiver of [**50] Article 8.2 and 8.3 has not been shown. Moreover, as this court held in Stanley Miller I, the evidence does not support recovery upon the total cost theory. Thus, Stanley Miller has not proven an entitlement to an equitable adjustment to the contract for the extra costs allegedly incurred in regard to the temporary roads.

VIII. SEWER WORK

[*P118] The evidence establishes that the contractor responsible for the building foundation was required to leave voids in the concrete so that Stanley Miller could later run down spouts for the sanitary sewer. Stanley Miller contends that Way intentionally permitted the contractor to omit the openings; Way testified that he simply "missed it." In either event, the foundation contractor left extra materials (90 degree elbows) so that Stanley Miller could run the down-spouts outside the foundation. Although Stanley Miller was able to complete the work, Kramer testified that the process required

additional labor as well as the purchase of additional down-spouts.

[*P119] According to Kramer, Way did not dispute Stanley Miller's entitlement to an equitable adjustment and he agreed to take care of payment at a later date. Hoffman testified that Way later reneged on his [**51] promise and told him not to bother to make such a claim because it would be denied. Way admitted that he agreed to arrange for payment but he insists that Stanley Miller never got back to him with a figure.

[*P120] In Stanley Miller I, this court found that any effort by Stanley Miller to employ the contractual claims process would have been futile. Given the scope of remand under Stanley Miller II, the court must determine whether OSFC waived strict compliance with Article 8. Based upon the credible testimony of Stanley Miller's witnesses, the court finds that Way's words and conduct amounted to a waiver of the notice requirements of Article 8.1.

[*P121] However, with regard to the Article 8.2 and 8.3, there is no convincing evidence of waiver. OSFC was entitled to a more detailed claim under Article 8.2 and more information in support of the claim when requested by OSFC pursuant to Article 8.3.1. Indeed, while the $17,473.04 figure set forth in the one-page, $1.1 million claim for "sewer work" represents the costs of 30 additional down-spouts, upon cross-examination, Steve Miller conceded that he was mistaken and that there were only seven extra down-spouts installed.

[*P122] Based upon the foregoing, Stanley [**52] Miller shall not recover for the portion of the claim related to sewer work.

IX. INTEREST

[*P123] As stated above, Stanley Miller has asserted a claim for interest earned but not paid on sums that, by agreement of the parties, became due and owing to Stanley Miller in or about 2004. OSFC did not remit the funds until after this lawsuit was filed in 2006. OSFC has not asserted a legal defense to the interest claim nor has it challenged the amount of such claim. Accordingly, Stanley Miller shall be awarded damages representing the interest earned in the total amount of $36,074.04.

X. OTHER CLAIMS

[*P124] With respect to Stanley Miller's claim for unjust enrichment,[HN2] absent proof of bad faith or fraud, an equitable action for unjust enrichment will not lie when the subject of the claim is governed by an express contract. *See Kucan v. Gen. Am. Life Ins. Co., 10th Dist. No. 01AP-1099, 2002 Ohio 4290, ¶35,* citing *Rumpke v. Acme Sheet & Roofing, Inc., 2nd Dist. No. 17654, 1999 Ohio App. LEXIS 5392 (Nov. 12, 1999).* Although the evidence in this case demonstrates that there was an animosity between Stanley Miller and Ruhlin, the evidence is inconsistent with a finding of either bad faith or fraud on the part of Ruhlin and OSFC.

[*P125] Additionally, [**53] [HN3] Stanley Miller may not pursue a claim for relief sounding in negligence where the loss is purely economic in nature. *See Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 42 Ohio St.3d 40, 45, 537 N.E.2d 624 (1989)*; *Inglis v. Am. Motors Corp., 3 Ohio St.2d 132, 209 N.E.2d 583 (1965),* paragraph one of the syllabus. Accordingly, these claims are without merit.

CONCLUSION

[*P126] Even though the court has previously found, in Stanley Miller I, that OSFC breached the contract and that the breach proximately caused Stanley Miller damages in the form of unanticipated

extra costs, Stanley Miller waived its right to an equitable adjustment to the contract in most cases due to its failure to comply with the contractual claims process. The only exception to the waiver in this case is Stanley Miller's claim for additional costs in the Site Work division in the amount of $8,658.35 and its claim for interest earned of $36,074.04.

JUDGMENT ENTRY

[*P127] On March 1, 2010, this court issued a judgment rendered in favor of plaintiff in the amount of $404,276.93. On December 28, 2010, the Tenth District Court of Appeals reversed the judgment of this court and remanded the case for further proceedings.

[*P128] Based upon the court's review of the evidence [**54] in record, the briefs of counsel, and in accordance with the opinion of the court of appeals, judgment is hereby rendered in favor of plaintiff in the amount of $44,757.39, which includes the $25 filing fee. Court costs are assessed against OSFC. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK

Judge