

1. Was each Claimant “placed in a worse condition with respect to their employment by reason of the merger?”¹

2. Has each Claimant “complied with the MPA’s requirements so as to warrant an award of benefits?”²

3. Did each Claimant come forward with evidence of “compensation loss to which they are entitled to payment?”³

Tellingly, nowhere in their post arbitration brief do the Claimants ever discuss these three issues. Nowhere in their brief do they argue that the evidence they presented at the hearing proves these issues. The reason for this failure is patently clear. The Claimants have not presented credible evidence to prove any one, let alone all three, of these issues. Indeed, the evidence at the arbitration is to the contrary and establishes that each Claimant has failed to satisfy any of the three tests necessary for recovery as set forth by Judge Lambros and the Sixth Circuit.

Instead of evidence on the three issues, Claimants submit to the Panel a number of inchoate and muddled propositions that are cobbled together from disparate hearsay sources or literally fabricated from whole cloth. The Claimants’ propositions are contradicted by a combination of Judge Lambros, the Sixth Circuit, the plain language of the Merger Protection Agreement, the unrebutted evidence at the arbitration, their own witnesses, and their own admissions and concessions in prior pleadings, briefs and proceedings.

¹ 1976 Lambros Ruling (Claimants’ Exhibit 4) at 19.

² Augustus v. Surface Transportation Board, 2000 U.S. App. LEXIS 33966 (6th Cir. 2000) (Penn Central Ex. 93) at *5.

³ 1976 Lambros Ruling at 35.

Each proposition of the Claimants is exposed and rebutted in the following order:

1. The MPA is, always has been and always will be an agreement for “merger protection,” that is, protection from proven loss caused by the merger.

2. Distinctions the Claimants invented for the first time after trial and after 40 years of litigation between "1(a) claims"/"1(b) claims" and between "adversely affected employees"/"present employees" are false dichotomies designed to avoid the fact that they have not come forward with any evidence of compensation loss as defined and required by the MPA, WJPA and Judge Lambros.

3. Continued repetition of the falsehood about records not being produced and spoliation of evidence does not make it true. Opposing counsel's failure to use Civil Rule 45 to obtain from Conrail personnel records necessary to prove their case cannot be blamed on Penn Central.

4. The Claimants' arguments from “Penn Central’s Standard Forms” are unavailing because those forms: a) are irrelevant as they pertain to workers outside the CUT who are not claimants in this case, b) have never been authenticated and were not testified about during the hearing, c) are rank hearsay taken completely out of context and d) even if they had evidentiary value, they still do not demonstrate the validity of any of the Claimants’ claims.

5. The O’Neill letter is a Conrail document and not binding on Penn Central. There is no evidence in the record that: a) authenticates it, b) links it to Penn Central or c) otherwise explains its relevance to this case.

6. The Sixth Circuit, and Claimants’ concessions in pursuing a flawed legal strategy, preclude the Knapik claimants from recovery.

7. The Sophner Claimants are not entitled to any recovery because there is no evidence that anything happened to them as a result of the merger.

8. Watjen/Bundy Claimants are not entitled to recovery because they voluntarily quit full-time jobs with Penn Central.

9. None of the Claimants came forward with evidence of compensable loss as required by Judge Lambros because Dr. Rosen's calculations are not consistent with paragraph 6(c) of the WJPA and are improperly based upon Railroad Retirement Board records.

10. Prejudgment interest, attorney fees, expert witness fees, their claimed costs, and punitive damages would not be awardable even if Claimants had proven some compensable loss under the MPA.

II. ARGUMENT

1. **The MPA Is, Always Has Been And Always Will Be An Agreement For "Merger Protection," That Is, Protection From Proven Loss Caused By The Merger.**

- a. By Its Plain Language And As Definitively Interpreted By Judge Lambros And The Sixth Circuit, The Merger Protection Agreement Did Not "Eliminate Causation."

The Claimants have repeatedly tried to read "merger protection" out of the Merger Protection Agreement, but the causation element of the WJPA was not eliminated by the MPA. The Sixth Circuit has spoken on the causation issue, ruling that the MPA was "for the protection of employees **affected by the proposed merger.**"⁴ Judge Lambros in his 1976 order charged this Panel with determining "were plaintiffs placed in a worse condition with respect to their

employment by reason of the merger?"⁵ These prior decisions in this case are dispositive of the issue of whether or not the MPA "eliminates causation." What Judge Lambros and the Sixth Circuit said is binding on the Panel. No amount of fallacious arguments or tortuous readings of the MPA by the Claimants can change these definitive and binding interpretations of the MPA.

Claimants' argument about causation is not only directly contradicted by Judge Lambros and the Sixth Circuit, it is so disingenuous that it should cause the Panel to question Claimants' credibility on all issues. Indeed, as we saw at the hearing, Claimants continually attempt to turn night to day and day to night. As the lawyer Abraham Lincoln observed in one of his trials: "Calling a dog a goat doesn't make it a goat."

The Claimants concede in their post arbitration brief that the WJPA requires a demonstration of causation: "the WJPA limited benefits to only those employees displaced 'as a result of such coordination.'"⁶ Even though the entire WJPA is expressly incorporated into the MPA in Section 1, the Claimants argue that the causation element of the WJPA no longer applies to the MPA. Claimants cite Section 1 of the MPA, but carefully and disingenuously omit several key phrases. Section 1 states in its entirety:

If, notwithstanding the opposition of the said labor organization, the Commission should approve the said merger, then upon consummation thereof the provisions of the Washington Job Protection Agreement of 1936 (a copy of which is attached hereto as Appendix A) shall be **applied for the protection of all employees** of the Pennsylvania and Central as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated **who may be adversely affected** with respect to their compensation, rules, working conditions,

⁴ Augustus at *2.

⁵ Lambros 1976 Ruling at 19.

⁶ Claimants' Post Arbitration Brief, p. 4.

fringe benefits or rights and privileges pertaining thereto incident to approval and effectuation of said merger . . .⁷

Claimants then attempt to argue that the MPA's language above changes the meaning of the WJPA. Specifically, they argue that this MPA language -- "adversely affected . . . incident to approval and effectuation of said merger" -- is a change or departure from the WJPA's causation requirement that "the provisions of this agreement are to be restricted to the changes in employment in the Railroad industry solely due to and resulting from such coordination."⁸ Like calling night day, Claimants are trying to convince the Panel that simple words of the English language have a meaning opposite of their actual dictionary definitions. The Merriam-Webster dictionary defines "incident" as "something dependent on or subordinate to something else of greater or principal importance."⁹ Thus, by definition, being "adversely affected with respect to compensation . . . **incident** . . . to the merger" actually means that any adverse effect on employees is protected under the MPA only to the extent it is "dependent on" or caused by the merger. It is clear, therefore, that the MPA does not limit the causation element of the WJPA but rather reinforces it.

Claimants' "causation" argument is also contradicted by other provisions of the MPA.

The third paragraph of the MPA specifically states:

AND WHEREAS, it is the intent and purpose of Pennsylvania and Central . . . to effectuate the merger through unification, coordination and consolidation of their separate facilities, all of which will or may have adverse effect upon employees represented by the labor organization parties hereto.¹⁰

⁷ MPA (Penn Central Ex. 100), pp. 3-4.

⁸ WJPA (Penn Central Ex. 100), p. 9 (emphasis added).

⁹ Merriam-Webster's Collegiate Dictionary, Tenth Edition (2002).

¹⁰ MPA, p. 3 (emphasis added).

Two paragraphs later, the MPA states:

As a condition to its approval . . . of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission . . . shall include terms and conditions providing that . . . **such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position** with respect to their employment . . .¹¹

These "WHEREAS" paragraphs at the beginning of the MPA are definitive and apply to the whole agreement. Indeed, they set forth the basis for and scope of the entire MPA. In Aho v. Cleveland-Cliffs, Inc., 219 Fed. Appx. 419, 423 (6th Cir. 2007),¹² the Sixth Circuit found that "the role of prefatory language is to define the scope of a contract, and that is how it has been analyzed by the Ohio courts." See, e.g., Pasco v. State Auto Mut. Ins. Co., 1999 Ohio App. LEXIS 6492, *12-13 (Ohio Ct. App. 1999).¹³ In Aho, the Sixth Circuit held the prefatory "whereas" clause to be relevant in determining the scope of the contract, a ruling directly applicable in this case. The "WHEREAS" clauses in the MPA plainly demonstrate that the scope and purpose of the MPA is to protect railroad employees in the event they are placed in a worse position as a result of the merger.

b. Claimants' Own Pleadings Concede That Loss Must be Related to the Merger and Further Illustrates the Disingenuousness of Claimants' Current Position

Claimants' argument that causation has been removed from the MPA is disproved by their own Complaints filed to initiate these cases. In their Complaints, Claimants specifically sought recovery under Appendix A of the MPA. Appendix A is the WJPA. By invoking the WJPA with its undisputed requirement of causation, Claimants clearly knew that recovery for

¹¹ Id. (emphasis added).

¹² Copy attached at Tab A.

any loss must be caused by coordination of their jobs as a result of the merger. The Knapik Claimants knew that recovery under the MPA required a loss resulting from the merger. In fact, they cite to the WJPA, pleading that Penn Central must compensate “any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination.”¹⁴

In their Complaint, the Sophner Claimants also cite to the WJPA with respect to payment for lost or diminished compensation. They stated: “[t]he Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to ‘any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination . . .’”¹⁵

Similarly, in their Complaint, the Watjen Claimants expressly recognized that any recovery was predicated upon proving causation by the merger. In the section entitled “**Basis for Complaint**” the Watjen Claimants argue that their claim arises because “[t]he agreement purports to give protection to employees in accordance with Section 5(2)(f) of the Act which provides that **the effect of a merger** as approved by the Commission ‘will not result in employees . . . of the railroad **affected by such** should be in a worse position with respect to their employment . . .’”¹⁶

Claimants have presented to the Panel time and time again arguments and facts that are in direct contradiction to the truth. Claimants are now, after forty years of litigation, asserting a position contrary to the claims set forth in their own Complaints. It is undeniable that when they filed their Complaints the Claimants understood that the MPA was for the protection of

¹³ Copy attached at Tab B.

¹⁴ Knapik Complaint, Case Number C69-722, p. 6 (copy attached at Tab C).

¹⁵ Sophner Complaint, Case Number C74-914, p. 3 (copy attached at Tab D).

employees adversely “affected by such [merger].”¹⁷ But now, after all the facts have been revealed, the Claimants realize that they do not meet the causation requirement set out in their own Complaints. They have not come forward with evidence that any compensation loss was as a result of the merger. The Claimants, therefore have made a disingenuous argument that the MPA eliminates a causation requirement. Indeed, the un rebutted testimony in the record is to the contrary. The Panel, however, must recognize this argument for what it is -- evidence of the desperate lengths the Claimants’ have gone to distort the truth to the Panel.

The intent of the WJPA and the MPA is clearly expressed -- to provide protection to employees adversely affected solely as a result of the merger. The Sixth Circuit and Judge Lambros have definitively interpreted the MPA’s causation requirements as such and this Panel is bound to require Claimants to demonstrate that the merger placed them in a worse condition.

2. Distinctions The Claimants Invented For The First Time After Trial And After 40 Years Of Litigation Between "1(A) Claims"/ "1(B) Claims" And Between "Adversely Affected Employees"/"Present Employees" Are False Dichotomies Designed To Avoid The Fact That They Have Not Come Forward With Any Evidence Of Compensation Loss As Defined And Required By The MPA, WJPA And Judge Lambros.

In the first ten pages of their post arbitration brief, the Claimants introduce strange and meaningless distinctions between "1(a) claims" and "1(b) claims" and between “all employees adversely affected” by the merger as defined in Section 1(a) of the MPA and “present employees” as defined in Section 1(b) of the MPA. Never once during the arbitration did the Claimants attempt to make these distinctions or arguments. Never once in their voluminous pre-

¹⁶ Watjen Complaint, Case Number C69-675, p. 5 (copy attached at Tab E).

¹⁷ Id.

arbitration filings. Never once to the Sixth Circuit. Never once to the STB or previous panels. Never once to Judge Lambros. Never once in 40 years of litigation. So, why now?

The answer is that they had to manufacture a way to salvage the testimony of their economic expert -- and, indeed, their entire case on damages -- because their expert conceded that he did not follow the damage calculations set forth in Section 6(c) of the WJPA. Faced with the unsettling truth that Dr. Rosen's testimony precludes them from recovery under Section 6(c), the Claimants resort to the same strategy they used with the causation issue discussed above. They conveniently argue for the elimination of Section 6(c) as the basis and methodology for calculating damages under the MPA.

This argument to get around the preclusive effect of 6(c) is just as false and disingenuous as their argument to get around the fact that the MPA requires them to prove that compensation loss was caused by the merger. Unfortunately for the Claimants, Dr. Rosen in his report dated July 30, 2007 cites Section 6(c) of the WJPA as containing the correct calculation for displacement allowances, stating: "The displacement allowance provided that: 'if his compensation in his current position is less in any month **in which he performs work** than the aforesaid average compensation he shall be paid the difference . . .'"¹⁸ This is a **direct quote** from Section 6(c) of the WJPA. Later, in his testimony during the arbitration, Dr. Rosen further acknowledged that Section 6(c) is the **only** section applicable to the Claimants that defines and provides the formula for calculating damages:

Q: And specifically, your report is -- here you cited this language "if his compensation in his current position is less than any amount [*sic* month] in which he performed work,

¹⁸ Claimants' Exhibit 9.

then [*sic* than] the aforesaid average compensation, he shall be paid the difference."

A: Yes.

Q: All right. And that's generally what's known as the displacement allowance, correct?

A: That's my understanding, yes.

Q: Now, I think we all agree, and you agreed a little bit earlier, that Section C tells us how to calculate the displacement allowance; isn't that right?

A: Section C outlines a formula on page 10. That's correct.¹⁹

Then cross examination happened and Professor Wigmore -- who said, "Cross examination is the great engine of the truth-finding process" -- was again proven correct. Dr. Rosen had to concede that he did not have or consider the data required by Section 6(c) and did not follow the formula therein. Exposed in this fashion Dr. Rosen invented an excuse -- that Appendix E allowed him to do a calculation different from Section 6(c), even though he had said in his report and on direct that Section 6(c) was the applicable section with respect to the computation of damages. Never before cross examination (and now the post-arbitration brief) did Dr. Rosen or Claimants so much as mention Appendix E or suggest that it had any relevance to the computation of compensation loss. As pointed out by Penn Central on cross and in closing argument, Appendix E is totally unavailing because the last paragraph of Appendix E provides that compensation loss must be "computed in accordance with the provisions of the Washington Job Protection Agreement."

The false dichotomies in the first 10 pages of Claimants' post arbitration brief are invented by the Claimants to circumvent the fact they have presented no evidence to satisfy Section 6(c). They attempt this circumvention by arguing for the first time in 40 years that they

really are not pursuing claims under Section 6(c) after all. Instead they have "1(b) claims" as "present employees." Nowhere, of course, does the MPA make a distinction between "1(a)" and "1(b)" claims. In fact, the terminology of a "1(a) claim" or "1(b) claim" never appears in the MPA and is literally invented from whole cloth. Nowhere does the MPA say that damages should be calculated under Appendix E. Black letter contract law, as articulated by the Ohio Supreme Court and the courts of every other jurisdiction, specifically forbids a party from substituting its interpretation or inserting words or terminology to change the plain meaning of the contract. Cleveland Elec. Illum. Co. v. Cleveland, 37 Ohio St.3d 50, 53 (1988) (reiterating that the court's duty is to give effect to the words used by the parties, *not* "to insert words not used"); Turner v. Langenbrunner, 2004 Ohio App. LEXIS 2489 at *13 (holding that a court may not make contracts for others and "read into them terms or language not there").²⁰ Neither the parties nor the Panel may rewrite the MPA under the guise of interpretation; it is not the Panel's function to make a new contract for the parties. Aultman Hosp. Ass'n v. Community Mut. Ins. Co., 46 Ohio St.3d 51, 54-55 (1989).

Like their disingenuous causation argument, Claimants' "1(a)" and "1(b)" argument is directly contradicted by their own pleadings filed in these actions. In their Complaints, the Claimants make no reference to bringing actions under section "1(a)" or "1(b)." Quite to the contrary, Claimants concede in their Complaints that their alleged damages should be calculated under the WJPA, not 1(b) or Appendix E of the MPA. The Knapik Complaint pleads:

all provisions of the Washington Job Agreement -- shall be applied for the protection of all employees -- who may be adversely affected with respect to their compensation . . . The Washington Job Agreement specifically provides for the payment of a

¹⁹ Arbitration Transcript at 438.

²⁰ Copy attached at Tab F.

scheduled separation allowance to 'any employee of any of the carriers participating in a particular coordination who is deprived as a result of said coordination . . .'²¹

The Sophner Complaint pleads:

The Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to any 'employee of any of the carriers participating in a particular coordination who is deprived as a result of said coordination...'²²

The Watjen Complaint pleads:

The Agreement of May, 1936, Washington, D.C. [the Washington Job Agreement], Appendix A (part of the Labor Agreement) makes provision for 'coordination allowance' in the event an employee is 'deprived of employment' and 'separation allowances' for those employees separated or terminated.²³

The Claimants concede, therefore, that any damages they could recover under the MPA would have to be calculated in accordance with the WJPA. Claimants are bound by these pleadings. There is no pleading for recovery under Appendix E of the MPA, only recovery under Appendix A of the MPA -- the WJPA. It was not until after Dr. Rosen's utter failure to follow Section 6(c) of the WJPA was exposed on cross that the Claimants realized they could not recover. Faced with this dire circumstance, they literally made up an excuse in their post arbitration brief -- the false dichotomy between Section 1(a) and Section 1(b). But the truth is contained in their Complaints filed almost 40 years ago.

As with their causation argument, the plain language, architecture and grammar of the MPA contradict Claimants' "1(a)"/"1(b)" argument. Claimants argue that MPA Section 1(a) claims can be brought under the WJPA by "all employees," but that a different set of employees -- separate and distinct from "all employees" -- has a different claim under MPA Section 1(b).

²¹ Knapik Complaint, p. 4.

²² Sophner Complaint, p. 3.

²³ Watjen Complaint, p. 6.

According to the Claimants, this distinct and separate set of employees with different claims is called "present employees." It is their status as "present employees" that allows them to bring their "1(b) claims." These distinctions unravel because there is no difference in the MPA between "all employees" and "present employees." Section 1(a) defines "all employees" as:

All employees of Pennsylvania and Central as of the effective date of this agreement or subsequent thereto up to and including the date the merger is consummated . . .²⁴

Section 1(b) defines "present employees" as:

For purposes of this Agreement the term "present employees" is defined to mean all employees of Pennsylvania or Central who render any compensated service between the effective date of this Agreement and the date the merger is consummated (both dates inclusive) . . .²⁵

It is clear from this comparison that "all employees" and "present employees" are the same. There is no distinction between them and no distinction between "1(a)" and "1(b)" claims.

The only reason Claimants try to read a separate claim into 1(b) is to justify Dr. Rosen's latching on to Appendix E as an excuse and lifeboat when cross-examination revealed that he had not followed Section 6(c) of the WJPA. Following Dr. Rosen's retreat to Appendix E, the Claimants attempt to argue that Appendix E contains a lost compensation calculation that is separate from Section 6(c) of the WJPA and that is unique to Section 1(b) and Appendix E. Nowhere does Section 1(b) of the MPA say that damages under 1(b) should be calculated as set forth in Appendix E. Appendix E does not say that it is the source of the damage calculation under 1(b). Appendix E makes no

²⁴ MPA p. 3.

distinction between "1(a)" and "1(b)" claims. Indeed, Appendix E is clear: lost compensation should be "computed in accordance with the provisions of said Washington Job Protection Agreement." The second last paragraph of Appendix E is simply a short summary of the more detailed calculation of compensation loss set forth in Section 6(c) of the WJPA.

Prior to Dr. Rosen's devastating admission on cross that he did not follow the WJPA, Claimants had maintained for forty years, beginning with their Complaints, that damages were to be calculated under the WJPA. Prior to cross, Dr. Rosen himself said in his expert report dated July 30, 2007 that damages were to be calculated under the WJPA. Prior to cross, Dr. Rosen, on direct, testified that damages were to be calculated under the WJPA. Only after cross did all of these prior admissions change. The Panel should not be fooled by the Claimants' recent inventions. The Panel's hands are tied by the plain language and grammar of the agreements. It must apply the damage calculation of the WJPA.

3. Continued Repetition Of The Falsehood About Records Not Being Produced And Spoliation Of Evidence Does Not Make It True. Opposing Counsel's Failure To Use Civil Rule 45 To Obtain From Conrail Personnel Records Necessary To Prove Their Case Cannot Be Blamed On Penn Central.

Claimants, yet again, seek to excuse the failure to meet their burden of proof with false accusations that Penn Central did not produce, or otherwise spoiled, evidence -- their personnel files. No matter how many times the Claimants distort the truth about non-production or

²⁵ MPA, p. 4.

destruction of records and spoliation of evidence, it simply does not make the allegations true.

As Penn Central conclusively demonstrated at the arbitration and in its post arbitration brief:

- 1) legal custody of all personnel files was conveyed to Conrail -- by Act of Congress and Order of the Reorganization Court -- on April 1, 1976;
- 2) Penn Central told opposing counsel of the conveyance in Penn Central's discovery responses;
- 3) from April 1, 1976, Conrail had legal custody of all personnel records and files;
- 4) the physical location of the personnel records has always been in the same place -- the car department at the CUT; and
- 5) the individual Claimants themselves were well aware of the conveyance to Conrail as well as the location of the personnel files in the car department.

The Claimants were aware that legal custody of the personnel records was conveyed by Penn Central to Conrail on April 1, 1976 as Penn Central told the Claimants this in its discovery responses back in February 2007, by stating:

On April 1, 1976, pursuant to the Final System Plan formulated by the United States Railway Association ("USRA"), § 743(b) of the Rail Act, and Special Orders issued by the Reorganization Court, PCTC transferred most of its trackage, equipment, real estate and personnel, and other records to Conrail. Personnel and personnel records associated with commercial transportation of goods became employees of Conrail at this time. That same day, Conrail reconveyed title of PCTC's inter-city passenger services to Amtrak. Personnel and personnel records associated with inter-city passenger service became employees of Amtrak at this time. As a result of USRA, Penn Central ceased and no longer existed as an operated railroad as of April 1, 1976.²⁶

In footnote 10 of their post arbitration brief, the Claimants state that during discovery in 1970, Penn Central admitted that it had legal custody and possession of the Claimants' personnel

²⁶ Defendant's Feb. 2007 Discovery Responses (Claimants' Exhibit 33).

records. This is true. Penn Central did have legal custody of all personnel records until April 1, 1976. At that time, legal custody was conveyed to Conrail pursuant to an Act of Congress and Order of The Reorganization Court.²⁷

Claimants false accusations about Penn Central not preserving or producing personnel records is further undercut by the fact that, regardless of who had legal custody, the records never moved **physical** location. At all times, the Claimants themselves knew that the records remained exactly where they were prior to the conveyance. As the testimony during the arbitration demonstrated, the personnel files were located in the car department since they were created, and remained in the car department after legal custody was conveyed to Conrail on April 1, 1976. Claimant Gallagher testified:

On Direct Examination

Q: Mr. Gallagher, who kept the personnel files at the railroad, as far as you know?

A: Car department had their own office. It was comprised of a clerk on each shift. The first shift had a chief clerk and a timekeeper and all that. They kept the records right there in the car department office.²⁸

On Recross Examination

Q: My question is, was the car department there when Penn Central was your employer, correct?

A: That's correct.

Q: And the car department with the records were there after Conrail took over, isn't that correct?

A: That's correct.

Q: The car department is still there today?

²⁷ Penn Central Exhibit 105, Schedule D.

²⁸ Arbitration Transcript at 173.

A: It's still there today.²⁹

On Redirect Examination

Q: When you say the records would show when you were injured, you are talking about personnel records, right?

A: Absolutely.

Q: And those are the personnel records that would have been in the possession of Penn Central until at least 1976; isn't that correct?

A: They should have been in the records file from Penn Central to Conrail. They were on their property.³⁰

Similarly, Mr. Knapik testified:

Q: And in about 1976, you became a Conrail employee.

A: Yes.

Q: And all your personnel records, your seniority records, et cetera went with Conrail, didn't it?

A: Yes.³¹

The CUT personnel records have been preserved and kept in the same location -- the car department -- throughout the entire course of this litigation. They were never moved or destroyed or otherwise hidden by Penn Central. When Congress and the Reorganization Court conveyed legal custody to Conrail in 1976, the records remained in the car department. All Claimants had to do was subpoena the records from Conrail pursuant to Civil Rule 45. The Claimants' failure to do so is their own problem, and the repercussions of their inaction cannot

²⁹ Arbitration Transcript at 209.

³⁰ Arbitration Transcript at 211.

be cast upon Penn Central. At their own peril, the Claimants failed to obtain their personnel files from Conrail and must now suffer the consequences of failing to put forth evidence to substantiate their claims.

4. The Claimants' Arguments From "Penn Central's Standard Forms" Are Unavailing Because Those Forms: A) Are Irrelevant As They Pertain To Workers Outside The CUT Who Are Not Claimants In This Case, B) Have Never Been Authenticated And Were Not Testified About During The Hearing, C) Are Rank Hearsay Taken Completely Out Of Context And D) Even If They Had Evidentiary Value, They Still Do Not Demonstrate The Validity Of Any of Claimants' Claims.

Claimants argue that what they call "Penn Central's Standard Forms"³² are relevant to their claims as evidence of how Penn Central administered MPA benefits. Claimants' counsel attempts to argue the relevance of these forms for the first time in their post arbitration brief. These arguments are nothing but counsel's own improper conjecture, unsubstantiated by any evidence in the record. Counsel's bold assertions, unsupported by testimony from a witness or evidence of any kind, cannot be considered as evidence by the Panel. It is black letter law that "arguments made by counsel cannot be considered as evidence, [when] no evidence to support counsel's statement was offered." Gemini, Inc. v. Ohio Liquor Control Comm., 2007-Ohio-4518, ¶ 11 (Ohio App. 2007).³³ In fact, this argument is also unavailing for at least four additional reasons and, therefore, should be rejected by the Panel.

One, these forms appear to show payment of MPA benefits to Penn Central employees who did not work at the CUT. The forms do not mention any Claimant. Rather, three workers

³¹ Arbitration Transcript at 143. The Panel will recall that Mr. Knapik, not a Claimant himself but the son of a Claimant, worked for the railroad, including Penn Central after the merger, continuously from 1947 to the date of his retirement from Conrail. Arbitration Transcript at 91, 142 & 143.

³² Claimants' Post Arbitration Brief, p. 11.

³³ Copy attached at Tab G.

are mentioned in the forms: a Mr. Middleton, a Mr. Predmore, and a Mr. Behnen. According to the forms themselves, these men did not work at the CUT or even in Cleveland. They certainly are not on any CUT roster in evidence in this case.³⁴ In fact, the forms do not mention the CUT at all. Thus, the “standard forms” that Claimants discuss all pertain to workers other than the Claimants at facilities other than the CUT.³⁵ The forms are, therefore, not relevant to any of the claims before this Panel. Indeed, no witness at the arbitration connected these forms to any point of relevance to the claims at issue in this case. In short, there is no evidence that any of these men were similarly situated to any of the Claimants before this Panel. Without at least this basic foundational testimony, the “standard forms” have no meaning or bearing on the issues and the Claimants before the Panel. Tellingly, the Claimants have offered absolutely no evidence, because there is none, of any payments made to any worker at the CUT, evidence which might be relevant to their claims. That is in stark contrast to the forms Claimants do offer, which are not relevant to any issue before the Panel.

Two, these forms have not been authenticated or identified, which is a precondition to a document’s admissibility. No foundation was laid for these forms such as whether these are stand-alone forms, cover forms for more detailed documents, summaries of claims, or something else. There is no evidence in the record regarding their reliability. No evidence about who created them. No evidence about who has had custody of them. Indeed, they were not testified

³⁴ See, e.g., Claimants’ Exhibit 16.

³⁵ As clearly demonstrated during the arbitration, and as highlighted in Penn Central’s post arbitration brief, the CUT was a passenger station of the New York Central before the merger and not one single Pennsylvania Railroad employee displaced a worker at the CUT after the merger. Claimants in their post arbitration brief at page 3 concede that the very purpose of the merger was to consolidate operations of the two railroads and maximize efficiencies by eliminating redundancies – something that did not happen at the CUT where the Claimants worked. Whether Mr. Middleton, Mr. Predmore, and Mr. Behnen worked at facilities with redundancies between NYC and PRR employees resulting in payments to them under the MPA is simply not in evidence, which makes the forms irrelevant.

about or even mentioned at all during the arbitration. Without these supporting bases, these documents have no evidentiary value and cannot be relied upon.

Three, these forms are rank hearsay taken completely out of context. Indeed, there is no context at all for these forms. No testimony about how these records were created or even why they were created. Again, the conjecture of Claimants' counsel as to what the forms show or what they mean has no evidentiary value. It is impermissible testimony by counsel. There is no evidence whether there had been previous proceedings determining Mr. Middleton's, Mr. Predmore's, or Mr. Behnen's eligibility for MPA benefits. There is nothing in the record about the individual circumstances or work history of any of these three gentlemen. No witness testified, and there is nothing in the record, about the facilities where these three employees worked, such as what type of facilities they were, whether the facilities had NYC or PRR employees or both, or anything else. Unsubstantiated hearsay documents such as these forms cannot be the basis for any decision by the Panel.

Four, even if the forms were relevant, authenticated, and not hearsay, thereby having even at least some evidentiary value, they still would not demonstrate that any of the Claimants' claims are valid. Past MPA benefit payments paid to other former employees at other locations have no probative value as to whether the Claimants in this case have each proved that they are entitled to benefits under the MPA based upon their specific jobs at the CUT and any adverse affect upon them under their individual circumstances. The fact that non-CUT employees like Mr. Middleton and Mr. Predmore and Mr. Behnen had valid claims that were paid says nothing about whether the Claimants in this proceeding have valid claims. Rather, payments to others only underscore that Penn Central indeed paid claims under the MPA when such claims were valid, as opposed to Claimants' claims here.

5. The O'Neill Letter Is a Conrail Document And Not Binding on Penn Central. There Is No Evidence In The Record That: A) Authenticates It, B) Links It To Penn Central Or C) Otherwise Explains Its Relevance To This Case.

At the arbitration, and throughout their post arbitration brief, the Claimants repeatedly refer to, and rely upon, a Conrail document they call the "O'Neill Letter." It is Claimants' position that this letter contains wage calculations for the Knapik Claimants that purportedly act as some sort of example or proof of how displacement allowances are to be calculated under the MPA. Opposing counsel's arguments that the O'Neill Letter is proof of how displacement allowances are to be calculated and is proof of entitlement to MPA benefits are wrong for at least five separate reasons:

1. There is no testimony authenticating the letter;
2. On its face, the letter is a Conrail document, not a Penn Central document;
3. There is no testimony or other evidence about what the letter means -- only the conjecture of Claimants' counsel;
4. The letter is irrelevant; and
5. On its face, the O'Neill letter has no application to the calculation of benefits under 6(c).

There is absolutely no evidence in the record that authenticates the O'Neill Letter, links it to Penn Central, or otherwise explains its relevance to this case. In short, the O'Neill letter is unreliable, irrelevant and is not binding in any way upon Penn Central. If Conrail were a party to this case, the answer might be different.

Authentication is a condition precedent to the consideration of any document. This means that a witness must lay a sufficient foundation so that the trier of fact can make a

determination as to the reliability of the document and its contents. The whole purpose of authentication is to have a knowledgeable party testify to explain or connect the document to something of relevance to the case. Here, Claimants failed to introduce any evidence whatsoever to authenticate the O'Neill letter or to prove the foundation requirements for its consideration. No effort was made to prove when the O'Neill Letter was created, the origin of its contents, whether the information was kept in the course of a regularly conducted business activity, or whether it was the regular practice of the author to compile such information. No connection was made between the document and anything of relevance to this case. The only "testimony" provided about the O'Neill Letter was that of Claimants' counsel. However, counsel's arguments are not proof of reliability or relevance, and are not to be considered as evidence. Ohio Liquor Control, 2007-Ohio-4518 at ¶11. The O'Neill Letter contains no indicia of reliability based on the Claimants' own failure to authenticate the document and establish basic prerequisites to admissibility.

What is known of the O'Neill Letter is that it is a Conrail document, on Conrail letterhead, containing information gathered by Conrail, submitted by a Conrail employee, and it makes no mention of Penn Central. There is simply no association between Penn Central and the O'Neill Letter.

Even if the O'Neill Letter were authenticated and somehow applicable to Penn Central, the compensation totals contained in the O'Neill Letter are totally irrelevant to this case because they reflect compensation earned from 1963 to 1964. The 1963 and 1964 compensation totals were only relevant because the MPA was executed in 1964; however, the actual merger was unexpectedly delayed and did not occur until four years later in 1968. In order to calculate displacement allowances, Section 6(c) of the WJPA requires proof of the "total compensation

received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding his displacement.” In other words, the WJPA requires proof of compensation totals for the twelve months preceding displacement, and **not** compensation earned from 1963 to 1964. As Claimants’ expert Dr. Rosen admitted at the arbitration, none of the Claimants in this case were displaced during the following two years:

Q: Did any of the 32 Claimants become displaced in 64, ’65?

A: No. In fact, none of them.³⁶

Hence, any reference to compensation totals from 1963 to 1964 is irrelevant and not permitted to be used for the required calculations of displacement allowances under Section 6(c) of the WJPA. What is needed are the compensation totals for each Claimant for the twelve months preceding their displacement, that reflect current compensation totals, and which the Claimants failed to produce. Therefore, even if the O’Neill letter were somehow considered, the wage calculations contained therein fail to comport with Section 6(c) of the WJPA, are of no relevance in deciding this case, and must be disregarded in their entirety.

The Claimants’ speculative reliance upon the O’Neill Letter is designed to conceal their inability to produce competent evidence relating to their burden of proof. The O’Neill Letter does not show that the Claimants were adversely affected by the merger, as Judge Lambros required the Claimants to prove.³⁷ The O’Neill Letter also fails to prove that the Claimants complied with the MPA’s requirements or that they suffered compensation loss to which they are entitled to payment, both of which are also burdens imposed on the Claimants by Judge

³⁶ Arbitration Transcript at 446.

³⁷ 1976 Lambros Ruling at 19.

Lambros.³⁸ In short, the O'Neill Letter is a Conrail document that is inherently unreliable, is not binding upon Penn Central, and contains completely irrelevant information.

6. **The Sixth Circuit, And Claimants' Concessions In Pursuing A Flawed Legal Strategy, Preclude The Knapik Claimants From Recovery.**

a. **The *Knapik* Claimants Failed to Report to Work and Are Barred From Recovering Under the MPA by the Decision in *Augustus***

The Knapik Claimants' entire argument in their post arbitration brief is based upon a fundamentally flawed premise that because they eventually "accepted recall to work" many months, and in some cases years, after the February 21, 1968 furlough notice, they avoid the preclusive effect of Augustus.³⁹ This argument is false and misleading.⁴⁰ This Panel's hands are bound by the Sixth Circuit's clear holding in Augustus which required the Knapik Claimants to **report to work** at the freight yard, pursuant to the Top and Bottom agreement, within 15 days of the February 21, 1968 furlough notice or be precluded from recovery under the MPA.⁴¹ In Augustus, the Sixth Circuit was specific as to when and how trainmen like the Knapik Claimants (i.e., claimants who received furlough notices on February 21, 1968) were obligated to report to work:

On February 21, 1968, Petitioners and other CUT employees were furloughed from their CUT jobs as part of a reduction in force on the CUT, effective February 25, 1968. The furlough notice told the CUT employees to "**immediately contact**" the N.Y. Central yardmaster for work in the freight yard, pursuant to the Top and Bottom Agreement.⁴²

³⁸ 1976 Lambros Ruling at 16 and 35.

³⁹ Claimants' Post Arbitration Brief at 22.

⁴⁰ "Reporting to work" and "accepting recall" to work are two separate and distinct concepts, as the Claimants' own witness Knapik testified to. As the Sixth Circuit explained, reporting to work required the Claimants to immediately contact the NYC yardmaster within 15 days of the February 25, 1968 effective date of the furlough notice. None of the Knapik Claimants did so.

⁴¹ Augustus at *4 and *14; see also Penn Central's Post Arbitration Brief at 18.

The Sixth Circuit held that failure to comply with this obligation precludes any recovery under the MPA:

The arbitration panel's ruling – that Petitioners' **failure to report to work** precluded their recovery under the MPA – was based upon the express terms of the MPA . . . As the arbitration panel observed, section 1(b) of the MPA expressly required covered employees to accept available work in order to qualify for benefits . . . refusal to report to work was at their own peril . . .⁴³

All of the Knapik Claimants failed to report to work at the freight yard within the requisite 15 day period. They conceded this fact in the 1990 Arbitration:

Defendant was guilty of misrepresenting to all Plaintiffs that they were not covered by the Merger Protection Agreement. **Plaintiffs relied on this 'misrepresentation of existing fact' by electing not to stand for work in the freight yard . . .** Based on Defendant's original position, **Plaintiffs were justified in their decision to not mark up for work in the freight yard.** In other words, Plaintiffs' decision was reasonable in light of the circumstances with which they were confronted in February, 1968.⁴⁴

The Knapik Claimants' proffered excuse for failing to report to work, based on a legal position which they took, was rejected by the Sixth Circuit, which further held that "Petitioners' failure to report to work precluded their recovery under the MPA"⁴⁵ and was "at their own peril."⁴⁶ Regardless of how much the Claimants obfuscate the actual holding in Augustus, they will never escape the obligation that Augustus, the MPA, and the Top and Bottom Agreement imposed upon them: the Claimants were required to report to work at the freight yard within 15 days of receiving the February 21, 1968 furlough notice. These Claimants themselves conceded that they failed to do so, and are thus barred from benefits under the MPA.

⁴² Augustus at *3-4 (emphasis added).

⁴³ Id. at *14, * 16 (emphasis added).

⁴⁴ Claimants' 1990 Arbitration Brief at 33 (emphasis added).

⁴⁵ Augustus at *14.

b. Failure to Report to Work Precludes All Benefits under the MPA

In another attempt to avoid the binding precedent set forth in Augustus, the Knapik Claimants allege in their brief that voluntary absences (i.e, failing to report to work) only reduce, not eliminate, benefits under the MPA.⁴⁷ Claimants' unfounded assertion flies directly in the face of the Sixth Circuit's explicit holding in Augustus that "Petitioners' failure to report to work **precluded their recovery** under the MPA."⁴⁸ Clearly, the Claimants' failure to report to (or voluntary absence from) the freight yard fully precludes, not simply diminishes, their recovery under the MPA. The Top and Bottom agreement specifically provides that an affected CUT employee was to "report for service [at the freight yard] within fifteen days of the date notified by U.S. mail" or he would "forfeit all seniority in both territories."⁴⁹ Failure, therefore, to comply with a notice to report to work terminates seniority and disqualifies an employee from receiving **any and all** benefits under the MPA. The Sixth Circuit's holding in Augustus is consistent with, and based upon, this language in the Top and Bottom Agreement, and the Claimants' failure to report to work at the freight yard completely precludes them from all benefits under the MPA.

c. There Was Available Work at the Freight Yard; The Knapik Claimants, However, Refused to Report to Work

In their post arbitration brief, Claimants invent a new way to run around the Sixth Circuit's decision in Augustus. They assert that Penn Central must pay benefits under the MPA unless Penn Central can prove that a Claimant was "voluntarily absent when there was **available**

⁴⁶ Augustus at *16.

⁴⁷ Claimants' Post Arbitration Brief at 25.

⁴⁸ Augustus at *14 (emphasis added).

⁴⁹ Penn Central Exhibit 97.

work.”⁵⁰ Augustus, however, is devoid of any such distinction between “work” and “available work.” The Sixth Circuit plainly held: “[t]he arbitration panel’s ruling – that Petitioners’ failure to **report to work** precluded their recovery under the MPA – was based upon the express terms of the MPA.” This holding is clear and lacks the term “available” that the Claimants desperately seek to insert. Whether there was “available work” is irrelevant under the Sixth Circuit’s holding because the **outright refusal** of the Claimants in Augustus to **report to work** at the freight yard (the exact same refusal of the Knapik Claimants) was the basis for their disqualification from MPA benefits.

Even so, contrary to what the Knapik Claimants allege, work was available at the freight yard. The whole purpose of the February 21, 1968 notice was to direct them to go where work was available, which was at the freight yard. The availability of work at the freight yard was confirmed at the 1990 arbitration by George Ellert, the assistant to the manager of labor relations at the CUT:

Q: Okay. Let me ask you this. Were there jobs available for those who returned to work at the freight yard?

A: Yes, there were.

Q: They all could have gotten jobs, is that your testimony?

A: That’s my testimony.

Q: And they all could have gotten full-time jobs?

A: I believe they could have, yes.⁵¹

The Knapik Claimants’ argument that they failed to report to the freight yard because of the alleged unavailability of work is just another manufactured excuse for their non-compliance with the MPA. The Claimants, as they have admitted all along, failed to report to the freight

⁵⁰ Claimants’ Post Arbitration Brief at 20.

yard, not because of the lack of work, but because of their legal position that Penn Central had anticipatorily breached the MPA. According to the Claimants, this anticipatory breach relieved them of the obligation to report to the freight yard. As explained by Penn Central at the hearing and in its post arbitration brief, the Sixth Circuit unequivocally rejected this argument in Augustus.

7. The Sophner Claimants Are Not Entitled To Any Recovery Because There Is No Evidence That Anything Happened To Them As A Result Of The Merger.

Pursuant to Judge Lambros and the Sixth Circuit, the Sophner Claimants must prove they: 1) were placed in a worse condition with respect to their employment by reason of the merger;⁵² 2) complied with the MPA's requirements so as to warrant an award of benefits;⁵³ and 3) suffered compensation loss as defined by the MPA and for which the MPA provides entitlement to payment.⁵⁴ No Sophner Claimant has put forth competent evidence on any of these three issues.

a. No Sophner Claimant Has Put Forth Any Evidence on Element #1 – That His Employment Was Adversely Affected By the Merger

The record is bereft of any evidence that any Sophner Claimant was adversely affected by reason of the merger. No one testified as to how the merger adversely affected any of Sophner Claimants or even that the CUT was impacted at all by the merger. Mr. Gallagher, the only Sophner Claimant to testify, provided no facts to support a causal relationship between the merger and an adverse affect upon him or any other Claimant. All of the Sophner Claimants

⁵¹ 1990 Arbitration Transcript (Claimants' Exhibit 34) at 149.

⁵² 1976 Lambros Ruling at 19.

⁵³ 1976 Lambros Ruling at 16.

⁵⁴ 1976 Lambros Ruling at 35.

were furloughed well before or well after the merger,⁵⁵ thus no temporal connection between the merger and the furloughs exists, and therefore, no prima facie inference that they were affected by the merger. As their lack of evidence demonstrates, the Claimants did not prove that the merger was the source of any alleged adverse affect.

b. Each *Sophner* Claimant Has Failed to Put Forth Any Evidence on Element #2 – That He Complied With the MPA’s Requirements So As to Warrant An Award of Benefits

The record is also devoid of any evidence that each of the Sophner Claimants complied with the MPA’s requirements to warrant an award of benefits. Under Section 1(b) of the MPA, “An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation . . . in case of his . . . **failure to obtain a position available to him** in the exercise of his seniority rights.” (emphasis added). The Claimants did not put forth one shred of evidence that any Claimant exercised his seniority rights to obtain all available work during months in which he is claiming a displacement allowance. Mr. Gallagher did not testify to this. Instead, in their post arbitration brief, the Claimants make only conclusory assertions that they “marked up but got less work”⁵⁶ and “were damaged because they were not able to work enough . . .,”⁵⁷ without providing any competent evidence in support thereof. Mere allegations of less work are insufficient to satisfy their burden of proof. In order to be eligible for a displacement allowance, as a condition precedent to eligibility for benefits under the MPA, each Sophner Claimant **must show** that he exercised his seniority rights. Without such testimony, none of them are not entitled to any MPA benefits.

⁵⁵ See PCTC Post Arbitration Brief at 15.

⁵⁶ Claimants’ Post Arbitration Brief at 29.

⁵⁷ Claimants’ Post Arbitration Brief at 31.

c. Each Sophner Claimant Has Put Forth Only Unreliable Evidence on Element #3 – That He Suffered Compensation Loss

Due to the Sophner Claimants' failure to obtain their personnel and financial records from Conrail, they rely solely on the findings of Dr. Rosen to satisfy their burden of proving they suffered compensation loss. However, Dr. Rosen's calculations are not competent evidence of compensation loss because they fail to comport with Section 6(c) of the WJPA. Dr. Rosen admitted in his report⁵⁸ and on cross examination⁵⁹ that Section 6(c) contains the correct calculation for displacement allowances, but later in his testimony at the arbitration, Dr. Rosen admitted that he **did not follow** Section 6(c).⁶⁰ Dr. Rosen also acknowledged that the MPA and WJPA required him to consult monthly records of compensation (which he did not have), as opposed to the yearly totals provided by the RRB records which he based all of his calculations on. Clearly, Dr. Rosen's arbitrary calculations of displacement allowances are not evidence of compensation loss, and should be stricken as they admittedly fail to comport with the required calculations under Section 6(c) of the WJPA.

The **only** Sophner Claimant to put forth any testimony regarding his compensation was Claimant Gallagher, and he even admitted that he made more money each year that he was with the railroad, except for 1969 when he was out of work for six months due to injury:

Q: So really from 1970, on, except from [*sic* for] the year you were injured [1969], from 1970, on, you made \$7,800 and then \$9,000 and \$10,000. You were making more than at any period prior to the merger, right?

A: Yes, I was. It's a matter of economics.⁶¹

⁵⁸ Claimants' Exhibit 9.

⁵⁹ Arbitration Transcript at 438.

⁶⁰ Arbitration Transcript at 454-59, 475.

⁶¹ Arbitration Transcript at 195 & 196.

No other Sophner Claimant testified.

As their overwhelming lack of evidence demonstrates, none of the Sophner Claimants has met their three-pronged burden of proof as required by Judge Lambros and the Sixth Circuit, and each of their claims must be denied.

8. **Watjen/Bundy Claimants Are Not Entitled To Recovery Because They Voluntarily Quit Full-Time Jobs With Penn Central.**

a. **The Claimants Do Not Meet the Qualifications to Receive Lump Sum Separation Allowances**

The Claimants in Watjen and Bundy held clerical positions at the CUT and must prove that they were deprived of employment with Penn Central as a result of the merger. The Claimants seek entitlement to lump sum separation allowances, which is an alternative to receiving a coordination allowance under the existing agreements. However, these Claimants were never **deprived** of employment with Penn Central. When their rate clerk positions were abolished, the Claimants were given full-time jobs as utility employees. Each of these Claimants accepted, and subsequently **quit**, their jobs as utility employees and are thereby disqualified from receiving benefits under the MPA.

Entitlement to a lump sum separation allowance under the MPA is contingent upon an employee's eligibility to receive a coordination allowance as articulated in the WJPA. Section 7(a) of the WJPA states that "[a]ny employee of any of the carriers participating in a particular coordination who is **deprived of employment** as a result of said coordination shall be accorded an allowance (hereinafter termed a coordination allowance), based on length of service."⁶² Section 7(c) of the WJPA qualifies the scope of eligibility by stating that "[a]n employee shall be regarded as deprived of his employment and entitled to a coordination allowance . . . when the

position which he holds on his home road is abolished as a result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation.” The language is clear. In order to become eligible for a coordination allowance the employee must meet the following criteria: 1) be deprived of employment, 2) the deprivation of employment must be as a result of the merger, and 3) the employee must be unable to obtain a position anywhere within the merged company. Further, Section 9 of the WJPA states that “any employee **eligible to receive a coordination allowance** under section 7 hereof, may, at his option at the time of coordination, resign and accept in a lump sum a separation allowance.” (emphasis added). Therefore, an employee must be “eligible to receive a coordination allowance” in order to be entitled to the option of receiving a lump sum separation allowance. Thus, to be eligible to receive a coordination allowance, a Claimant must prove he was deprived of employment as a result of the merger and that he was unable to obtain a position within the merged company, Penn Central. None of the Watjen/Bundy Claimants were deprived of employment. They simply quit the jobs they were given after the merger.

The Claimants in Watjen and Bundy claim that they are entitled to lump sum separation allowances.⁶³ But they have failed to prove that they qualify for any such payment under the explicit terms of the WJPA. Section 7(a) of the WJPA cannot be read in a vacuum devoid of the qualifications Section 7(c) imposes upon it. These Claimants were given the option of, and accepted, full-time positions as utility employees with Penn Central.⁶⁴ Each Claimant accepted such position and eventually quit, thereby disqualifying himself from receiving a separation

⁶² Attachment A to the MPA, Penn Central Exhibit 100 (emphasis added).

⁶³ Rosen Reports for Claimants Franz, O’Neil, Watjen, Wilger, Bundy, and Feldscher, Claimants’ Exhibit 9.

⁶⁴ Penn Central Exhibit 79.

allowance.⁶⁵ The position of utility employee was “a position in the coordinated operation” and as Claimant Franz testified, the new position was on the “home road”:

Q: So you are saying you were on your home road, correct?

A: It's in Cleveland.

Q: It's on your home road, right?

A: That's where I previously worked.

Q: Right. Exactly.⁶⁶

Claimant Franz and the other Claimants simply quit their jobs as utility clerks. This voluntary resignation from an equivalent position on their home road in the merged company disqualifies them from receiving benefits under the MPA.

b. Claimants Invent Facts Contrary to the Actual Record in Order to Sway the Panel to Award Undeserved Damages

Claimants also argue that they are entitled to severance payments under Section 1(b) of the MPA, specifically under an agreement between Penn Central and the clerk's union (“Clerk Agreement”)⁶⁷ that replaces MPA Appendix F. In Section D(6) of their post arbitration brief, Watjen and Bundy Claimants argue that they were requested by the company to transfer with their work requiring a change of residence and thus under the new implementing agreement are entitled to a lump sum separation allowance. This argument goes beyond taking liberty with the truth, and in fact is a direct falsehood.

⁶⁵ Claimants' Trial Brief at 23.

⁶⁶ Arbitration Transcript at 239.

⁶⁷ Agreement February 1, 1968, Penn Central Ex. 101

Under the Clerk Agreement, an employee may resign and request a lump sum separation allowance if and only if he is "requested by the Company to transfer with his work."⁶⁸ The Watjen and Bundy Claimants now contend to this Panel that they were requested by Penn Central to transfer with their work to another city. This is not true. The letter each Claimant received notifying him that his position was terminated states "[y]our position is being abolished as the work you are now performing is being transferred to the Regional Controller's office at [relevant city]."⁶⁹ Not one Claimant was ever told or requested by Penn Central to transfer to another city. In fact Penn Central specifically rejected the transfer request of Claimant Feldscher.⁷⁰ The notice did not state that the employee or his job was being transferred. Rather the notice informed each Claimant that his job was abolished and only the work he was performing was being transferred. The Claimants were instructed by the notice not to transfer with their work to a new city, but rather to "obtain a regularly assigned position within ten (10) calendar days [or] you will become a utility employee . . ." ⁷¹ Once again, unable to meet the criteria and standards of the MPA and implementing agreements, the Claimants resort to inventing facts to confuse and obfuscate the truth from the Panel.

The simple fact is these Claimants became utility clerks. They had full-time jobs with Penn Central. The relevant section as to the Watjen and Bundy Claimants in the Clerk Agreement is Section IX, which states:

A utility employee may, **at the election of the Company**, be accorded the option of resignation provided he elects to do so within the seven calendar days of the date the option is extended

⁶⁸ Claimants' Post Arbitration Brief p. 37

⁶⁹ Claimants' Ex. 20

⁷⁰ Claimants' Ex. 22

⁷¹ Claimants' Ex. 20

and, if he so elects, will be paid a lump sum separation allowance...⁷²

In order for the Watjen and Bundy Claimants to receive a separation allowance under the Clerk Agreement they must be permitted by Penn Central to do so. Penn Central never granted Claimants the option of resigning. Resigning was at the Claimants' own peril and completely disqualifies them from recovery under the MPA.

9. None Of The Claimants Came Forward With Evidence Of Compensable Loss As Required By Judge Lambros Because Dr. Rosen's Calculations Are Not Consistent With Paragraph 6(c) Of The WJPA And Are Improperly Based Upon Railroad Retirement Board Records.

Judge Lambros was clear in his 1976 ruling that “the plaintiffs now **must come forward with evidence** to support the position that there was **compensation loss** to which they are entitled to payment.”⁷³ Yet, after 40 years of litigation, the Claimants have still failed to put forth any competent evidence of compensation loss. At the arbitration, the Claimants attempted to put forth evidence of such loss through their expert, Dr. Rosen. He, however, failed to apply the proper formula for calculating compensation loss under the MPA. Dr. Rosen’s failure to follow the MPA results in the Claimants’ failure to meet their burden of proving compensation loss, a prerequisite for payment under the MPA.

The MPA⁷⁴ sets forth the formula for determining what amount of compensation is owed, if any, using Section 6(c) of the WJPA, which states:

⁷² Penn Central Ex. 101, Section IX, p. 155 (emphasis added)

⁷³ 1976 Lambros Ruling at 35 (emphasis added).

⁷⁴ Appendix E of the MPA requires displacement allowances to be calculated in accordance with the WJPA by stating: “Employees not entitled to preservation of employment but entitled to the benefits of the Washington Job Protection Agreement pursuant to the provisions of Section 1(a) of the Protective Agreement shall be entitled to compensation in accordance with the provisions of the Washington Job Protection Agreement.”

Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference . . .

In his report, Dr. Rosen cites Section 6(c) of the WJPA as containing the correct calculation for displacement allowances, and states: "The displacement allowance provided that: 'if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference . . .'"⁷⁵ This is a **direct quote** from Section 6(c) of the WJPA.

Furthermore, in his testimony, Dr. Rosen admits that Section 6(c) contains the proper formula for calculating displacement allowances.

Q: And specifically, your report is -- here you cited this language "if his compensation in his current position is less than any amount [*sic* month] in which he performed work, then [*sic* than] the aforesaid average compensation, he shall be paid the difference."

A: Yes.

Q: All right. And that's generally what's known as the displacement allowance, correct?

A: That's my understanding, yes.

Q: Now, I think we all agree, and you agreed a little bit earlier, that Section C tells us how to calculate the displacement allowance; isn't that right?

⁷⁵ Claimants' Exhibit 9.

A: Section C outlines a formula on page 10. That's correct.⁷⁶

However, at the arbitration, on cross examination, when his calculations were put to the test, Dr. Rosen admitted that he did not follow Section 6(c).⁷⁷ Dr. Rosen inexplicably claimed that Appendix E allowed him to deviate from the required calculations under Section 6(c).⁷⁸ Dr. Rosen's and Claimants' counsel's failed end around Section 6(c) is demonstrated by Appendix E itself which completely contradicts their flawed interpretation:

Employees not entitled to preservation of employment but entitled to the benefits of the Washington Job Protection Agreement pursuant to the provisions of Section 1(a) of the Protective Agreement shall be **entitled to compensation computed in accordance with the provisions of said Washington Job Protection Agreement.**⁷⁹

Appendix E says just the opposite of what Dr. Rosen (and Claimants' counsel) says it does.

Another reason why Dr. Rosen's testimony is not competent to prove compensation loss is his reliance upon Railroad Retirement Board records. He used information from the RRB records, not actual compensation before or after the merger, even though he admitted on cross-examination that nothing in the MPA or WJPA allows their use:

Q: Where in Section C or Appendix E or anywhere in the MPA or WJPA does it say to consult that source [RRB records] in calculating the displacement allowance?

A: **It doesn't.** It says you should consult the monthly records from the railroad for each person's compensation wage rate and time worked.⁸⁰

Dr. Rosen used information from the RRB records even though he admitted that the RRB records are **flawed and imperfect:**

⁷⁶ Arbitration Transcript at 438.

⁷⁷ Arbitration Transcript at 454-59, 475.

⁷⁸ Arbitration Transcript at 468, 473-76.

⁷⁹ MPA Appendix E (emphasis added).

⁸⁰ Arbitration Transcript at 477 (emphasis added).

Q: Did you have the actual salary records, the actual compensation records, not assumptions, not wages from tables, but for each of the 32, did you actually have their compensation records from the 12 months prior to displacement?

A: I had the **imperfect records** from the Railroad Retirement Board only. Imperfect because **they don't show the total compensation**, they only show the total up to the covered compensation.⁸¹

Further, Dr. Rosen admits that the determination of compensation loss under the MPA and WJPA requires a comparison of monthly compensation post-merger against the monthly guarantee.⁸² Yet his opinion relies upon the yearly totals set forth in the RRB records. For all these reasons, the RRB records are not competent evidence to support a finding of compensation loss under the MPA and WJPA as demonstrated by Dr. Rosen's own testimony.

10. Prejudgment Interest, Attorney Fees, Expert Witness Fees, Their Claimed Costs, And Punitive Damages Would Not Be Awardable Even If Claimants Had Proven Some Compensable Loss Under The MPA.

As conclusively demonstrated above and in Penn Central's post arbitration brief, no Claimant has met his three-prong burden of proof to recover. Recognizing their failure to carry their burden of proof on each of the three contract issues, Claimants seek to divert attention from that failure by artificially inflating their supposed damages to include prejudgment interest, attorney fees, expert witness fees, costs, and punitive damages. Indeed, they begin and end their post arbitration brief on this same theme. On the second page of their post arbitration brief, they assert: "To make the Claimants whole, the award here must include actual damages, interest, attorney's fees/costs and punitive damages." The very last sentence of their brief reasserts: "After more than thirty-five years of litigation, for all the foregoing reasons, the panel should

⁸¹ Arbitration Transcript at 451 (emphasis added).

⁸² Arbitration Transcript at 454.

award each of the Claimants damages caused by Penn Central's breach of the MPA, including actual damages with interest, attorney fees/costs and punitive damages."⁸³ But, even assuming for the sake of argument that Claimants had proven the three issues necessary for compensable loss under the MPA, they would not, as a matter of law, be entitled to interest, attorney fees, expert witness fees, their claimed costs, or punitive damages.

- a. The Usual and Longstanding Rule in Arbitrations Is No Award of Pre-Award Interest Where, As Here, The Arbitration Agreement Does Not Specifically Allow Such An Award; There Are No Egregious Circumstances in the Record Here to Deviate From That Rule

Claimants claim they are "entitled to interest on their injuries."⁸⁴ But the longstanding rule in arbitrations is that pre-award interest may not be allowed on a labor claim if the underlying agreement does not specifically authorize such an award. Cincinnati Public Schools, 124 LA 143, 149 (2007) ("The Union's claim for pre-award interest on the back pay award is denied. There is no provision in the CBA for an award of pre-award interest. Arbitrators historically have not issued such remedial awards without an expressed contractual authorization.");⁸⁵ Dobson Cellular Systems, 120 LA 929, 934 (2004) ("However, the Union's request for interest on the back pay award must be denied. Arbitrators traditionally do not award interest on back pay or other monetary awards where the contract does not provide for payment of interest.");⁸⁶ Grou Cold Storage Inc., 119 LA 1464, 1466 (2004) ("At the hearing, the Union also requested pre-award interest on any amounts determined by the Arbitrator to be due and

⁸³ Claimants' Post Arbitration Brief, p. 49.

⁸⁴ Claimants' Post Arbitration Brief, p. 40. Indeed, this is the title of the section in their brief on interest.

⁸⁵ Copy attached at Tab H.

⁸⁶ Copy attached at Tab I.

owing to the eight laid off employees. The Arbitrator finds no provision in the collective bargaining agreement that would allow the award of such interest.”).⁸⁷

The parties before this Panel freely negotiated two separate agreements that established and govern this very arbitration. Neither agreement contains any authorization or allowance of pre-award interest. The first agreement -- the MPA -- was negotiated between sophisticated parties (Penn Central and the unions) with comparable bargaining strength, each side negotiating in its own best interest. Indeed, the Claimants themselves assert in their brief that the unions who signed the MPA on their behalf “knew they had the power to block any merger that did fully protect their then current members.”⁸⁸ Yet these same unions who represented the Claimants did not include any provision in the MPA authorizing an award of interest, even though they negotiated an entire section of the MPA dealing with arbitration procedures specifically to replace the procedures in the WJPA.⁸⁹ Likewise, the second agreement -- the Agreement For Arbitration signed in 1979 -- did not include any authorization for an award of interest on any claim.⁹⁰ This was the agreement to govern the scope of the arbitration negotiated between the Claimants and Penn Central during the course of this litigation on the very claims that they now seek interest on, and it did not include any provision for awarding interest on those claims. Absent such specific authorization in either governing agreement, an award of interest would not be allowable even if any Claimant had proven a compensable loss under the MPA.

To avoid this result, Claimants cobble together disparate labor cases to purportedly demonstrate a right to prejudgment interest. They cite to inapposite cases involving ordered

⁸⁷ Copy attached at Tab J.

⁸⁸ Claimants' Post Arbitration Brief, p. 3.

⁸⁹ See MPA, p. 5, § 1(e).

⁹⁰ See 1979 Agreement For Arbitration, Claimant's Exhibit 24.

reinstatements and accompanying back pay awards for improper suspensions or terminations.⁹¹ Neither situation is before this Panel. Moreover, Claimants cite language from some of these cases out of context to support their position. For example, they cite Laidlaw Transit Co., 109 LA 647 (1997) for the proposition that “employers must pay prejudgment interest to employees in order to make them whole.”⁹² Claimants neglect to mention that the arbitrator in Laidlaw ruled that “**Although most arbitrators generally decline to include interest on monetary awards, some arbitrators have done so where special circumstances exist . . .**” Id. at 651 (emphasis added). The “special circumstances” in Laidlaw are completely inapposite here.

In that case, after imposing a disciplinary suspension on a bus driver, the employer failed to show up on a continued day of arbitration, failed to show up the rescheduled next day, did not provide a satisfactory reason for not appearing, and in response to a telephone call from the arbitrator who began proceeding ex parte, simply withdrew the suspension as lacking the necessary just cause. Id. at 648, 651. It was these “special circumstances” that justified a departure from the general rule of no interest on an arbitration monetary award. Id. at 651. There are no such special circumstances in the record before this Panel that would permit an award of pre-arbitration interest.

Similarly, Claimants also cite National Railroad Passenger Corp. and AMTRAK Service Workers’ Council, NMB Case No. 67, 95 LA 617 (1990) as supporting the proposition that employers “must” pay prejudgment interest as part of a remedy to employees. Again, Claimants neglect to mention that the arbitrator recognized his award of prejudgment interest and

⁹¹ See e.g. Laidlaw Transit Co., 109 LA 647, 652 (1997) (reinstatement and back pay awarded after improper suspension); National Railroad Passenger Corp. and AMTRAK Service Workers’ Council, NMB Case No. 67, 95 LA 617, 631 (1990) (reinstatement and back pay awarded after unlawful termination); Vermont Dept. of Corrections, 89 LA 383, 384-85 (1987) (reinstatement and back pay awarded after grievant improperly discharged). (cases collected at Claimants’ Arbitration Exhibit 35).

⁹² Claimants’ Post Arbitration Brief, p. 40.

compensation for damages to the employee's reputation were "rare in arbitration." Id. at 631; accord Yakima School District, 122 LA 1094, 1100 (2006) ("An award of interest, in the absence of statutory language such as is found in the federal sector, is quite rare.").⁹³ Further, in National Railroad Passenger Corp., the "egregious" conduct of the employer that the arbitrator found to deviate from the traditional no interest rule involved accusations of assault and rape against an employee, accusations that were not proven at the hearing. Id. at 621, 631. Nothing in the record before this Panel demonstrates this level of outrageous conduct.

Similarly, Claimants cite Dayco Products Inc., 92 LA 877 (1989), where even the union admitted that "it is unusual for arbitrators to award interest on monetary awards." Id. at 882 (emphasis added). There, the unusual circumstances justifying prejudgment interest was the employer's repeated delay in processing and then paying a lump sum pension severance to four former employees whom two company representatives acknowledged were owed such lump sum payments, even going so far as to falsely represent that "payment was in the mail." Id. at 879, 882. There are no such unusual circumstances in the record before this Panel as Penn Central has consistently maintained that the Claimants are not entitled to benefits under the MPA.

Claimants also cite Kent Worldwide Machine Works, 107 LA 455 (1996) to support an award of interest but that case also involved egregious conduct not applicable here. The issue before the arbitrator there was "What is the appropriate remedy for the admitted violations of the Labor Agreements by the Company and its refusal to make any payments?" The owner of the company had admitted that employees were due certain amounts for Christmas bonuses and dental claims and had promised to pay the employees after certain litigation ended and the company returned to profitability. The arbitrator awarded prejudgment interest as a sanction for

⁹³ Copy attached at Tab K.

the company's "egregious" conduct: "The Company's failure to pay is made egregious by its refusal to make any kind of payment on the overdue amount even though it admittedly is operating profitably. The Company brazenly refuses to pay obligations without even claiming any reasonable excuse." Again, nothing in the record here supports a finding of any such egregious or brazen conduct.

There is nothing in the record before this Panel to permit pre-award interest even if any Claimant had proven his underlying claim. There is no specific authorization in the terms of the governing arbitration provisions. There are no egregious circumstances⁹⁴ to permit the \$8.6 million of interest on top of the \$560,000 they claim in damages.⁹⁵ The interest they each claim is a double digit multiple of the base amount of their alleged damages. Small wonder that Judge Fullam held that any award of interest would be unenforceable.

b. The American Rule Prevents Claimants From Receiving An Award of Attorney Fees and There Is No Competent Evidence of Such Fees

Adding to the amount of their perceived damages, Claimants further assert they are entitled to attorney fees. But the MPA itself, which contains the arbitration provisions that Judge Lambros enforced in 1979 when he referred this litigation to arbitration, expressly provides that the parties shall bear their own expenses. MPA, § 1(e) ("All other expenses shall be borne by the party incurring them.").

Moreover, this is a contract action. "Attorney fees are generally not recoverable in contract actions. Such a principle comports with the 'American Rule' that requires each party in

⁹⁴ Claimants do not cite any egregious conduct of Penn Central in their argument section for pre-award interest. As discussed *infra*, they do argue Penn Central's alleged delay as supporting an award of attorney fees but they offer no evidence of delay, and Judge Oliver found that delay in these proceedings was attributable equally to the parties and to the protracted nature of appeals in this matter.

litigation to pay its own attorney fees in most circumstances.” Stonehenge Land Co. v. Beazer Homes Invests., L.L.C., 2008-Ohio-148, ¶ 34 (Ohio App. 2008),⁹⁶ Kunkle v. Akron Mgmt. Corp., 2005-Ohio-5185, ¶ 30 (Ohio App. 2005) (“It is well-established that Ohio adheres to the ‘American Rule,’ which generally requires that each party involved in litigation shall pay his or her own attorney fees.”).⁹⁷ Indeed, “it is well established that attorney’s fees ‘are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.’” Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters & Joiners of America, 456 U.S. 717, 721 (1982) (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967)). Here, neither any statute nor the MPA itself provides for an award of attorney fees, and Claimants would not be entitled to any such award even if any of them had met their evidentiary burden to recover. Claimants filed these cases in federal court: “In federal litigation, the American Rule generally precludes an award of attorneys’ fees absent statutory authorization or an enforceable contractual fees provision.” Golden Pisces, Inc. v. Fred Wahl Marine Constr., 495 F.3d 1078, 1081 (9th Cir. 2007) (citing Alyeska Pipeline Serv. v. Wilderness Soc’y, 421 U.S. 240, 257 (1975)).

The only justification for attorney’s fees that Claimants advance is to be “made whole” as a result of “Penn Central’s forty-year delay.”⁹⁸ Claimants did not offer one shred of evidence at the arbitration about delay or that any delay was attributable to Penn Central. They simply point to proceedings before Judge Oliver, who did not award them attorney fees for any delay, instead finding that Claimants and Penn Central were equally responsible for the protracted length of these proceedings. Addressing Penn Central’s laches argument, Judge Oliver found that *neither*

⁹⁵ Claimants’ Post Arbitration Brief, pp. 42-43.

⁹⁶ Copy attached at Tab L.

⁹⁷ Copy attached at Tab M.

⁹⁸ Claimants’ Post Arbitration Brief, p. 44.

side had clean hands: “The Court concludes that Defendant does not come with clean hands. In assessing the causes of delay over the past five years, the Court concludes, based on Plaintiffs’ letters calling for new mediation panels and a return to arbitration, that **Plaintiffs are no more responsible than Penn Central for delay . . .** Defendant Penn Central seeks an equitable remedy of laches, but it bears **at least as much responsibility as Plaintiffs for the recent delay** in these cases.”⁹⁹

Even so, during the arbitration, Claimants themselves passionately accused Penn Central of improper delay without offering any supporting evidence into the record. But, while lamenting the “tortured history” of this litigation, Judge Oliver recognized that the lengthy duration resulted not from improper delay by Penn Central but from the parties exercising their respective rights: “The record shows that the case has been pending before various decisionmaking tribunals – the two arbitration panels, the Surface Transportation Board, the district court, and the Sixth Circuit – for a substantial portion of its history . . . Plaintiffs were within their rights to appeal the arbitration findings, and have yet to receive a final ruling on the first case that went to arbitration. Further, Defendant has exercised its appeal rights in this case as well.”¹⁰⁰ The circuitous nature of appeals in railroad labor arbitration cases -- from a panel to the Surface Transportation Board to a Circuit Court of Appeals -- is inherent in the process itself, and is not the fault of Penn Central.

Because delay in resolution of these cases was attributable to both parties and the result of the process itself, that delay cannot support an award of attorney fees.

The speciousness of Claimants’ asserted right to attorney fees is plainly demonstrated by the token evidence of attorney fees they offered. On the December 3, 2007 due date for

⁹⁹ Order of February 18, 2005 (Claimants’ Exhibit 25), p. 8

arbitration exhibits to be exchanged, Claimants forwarded a notebook with a sheet of paper behind tab 40 stating “Exhibit 40 Attorney Fees will be presented at the hearing.”¹⁰¹ At the arbitration, Claimants offered Exhibit 54 which consisted of four identically-worded contracts engaging counsel by four different Claimants. Although these actions have been pending for close to 40 years, have been appealed twice and arbitrated now a third time, the contracts were not signed and dated until September and October of 2007. The remaining 28 Claimants did not even submit any evidence of their counsel engagement. This half-hearted attempt at documenting their purported attorney fees underscores Claimants’ own recognition that they are not entitled to any such fees even if any of them had sustained their burden of proof on the merits of their claims at the arbitration.

c. Dr. Rosen’s Expert Witness Fees Are Not Recoverable

Claimants also assert a right to recover Dr. Rosen’s fees. Such an award is prohibited first by the express provision in Section 1(e) of the MPA that “expenses shall be borne by the party incurring them.” Further, the United States Supreme Court has held that unless a statute unambiguously permits a prevailing party to receive expert witness fees, they may not be awarded as costs. Arlington Central School Dist. Bd. of Education v. Murphy, 126 S.Ct. 2455, 2462 165 L.Ed.2d 526 (2006). The Ohio Supreme Court has similarly ruled. Moore v. General Motors Corp., 18 Ohio St.3d 259, 260 (1985) (“without statutory provision, a trial court should not tax an expert's witness fee as costs”). Trying to avoid this rule, Claimants attempt to recast Dr. Rosen’s fees of \$49,050 as damages.¹⁰² They simply implore the Panel to “recognize” his expert fees as damages without citing any authority for this exception to the well-established rule

¹⁰⁰ Id. at 9.

¹⁰¹ See Claimants’ Exhibit 40.

¹⁰² Claimants’ Post Arbitration Brief, p. 29 n. 18.

that expert fees are not recoverable. See Gold v. Orr Felt Co., 21 Ohio App.3d 214, 216 (1985) (“Nor are we aware of any other source of authority which allows for an expert witness’ fee to be charged against the losing party.”).

d. The Vast Majority of Expenses Claimants Seek Are Not Recoverable

Moreover, even if they had succeeded in meeting their burden of proof on all three issues necessary to any recovery, the Claimants still would not be entitled to the other costs they seek. First, the parties agreed in the MPA that “expenses shall be borne by the party incurring them.” MPA, § 1(e). Moreover, even if any costs were awardable, Penn Central objects to the itemization of “expenses” Claimants submitted for the first time with their post arbitration brief. Evidence was closed at the conclusion of the hearing and, with few exceptions, the expenses listed by Claimants were incurred before the close of evidence. There is no underlying documentation of the expenses or other probative evidence of the nature or necessity of any such amount. The itemization of alleged expenses should be stricken.

Moreover, Sonic Knitting – the one case relied upon by Claimants to support an award of litigation expenses -- itself requires denial of more than \$52,000 of the costs claimed by Claimants for payments to arbitrators Frendenberger, Blackwell, and Steffen (from the first two arbitrations) and Chairman Steinglass from this Panel as well as the “future estimated expenses” left blank for Chairman Steinglass and arbitrator Lansdowne. Like Claimants here, the union in Sonic Knitting claimed arbitrator fees as litigation expenses. Id. at 468. The agreement containing the arbitration clause provided that arbitrator’s fee “shall be borne equally by the parties.” Id. The arbitrator squarely ruled: “To shift any part of the arbitrator’s fee to the losing party, would constitute an impermissible amendment of the Agreement, and hence cannot be entertained.” Id.

Here, the two governing arbitration agreements likewise expressly provide that the fees for the arbitrators are to be divided between the parties. The MPA specifically provides that the “compensation of the Chairman shall be borne equally by the parties to the proceeding” and contemplates that each side will pay for its appointed arbitrator. MPA, § 1(e). The Agreement For Arbitration signed by the parties during the course of this litigation expressly provides “each member of the [arbitration] Committee shall be compensated by the party he is to represent. The compensation and expenses of the neutral person so selected or appointed shall be paid equally by the Employees and the Employer.”¹⁰³ This Panel may not impermissibly amend the parties’ agreement by accepting the Claimants’ argument to shift the burden of paying their arbitrator and their half of the neutral arbitrator to Penn Central.

Other impermissible categories of costs sought by Claimants include the cost of “caselaw research and copies” from the Cleveland Law Library, Probate Court charges presumably associated with the appointing personal representatives for deceased Claimants, the fee of a “consultant” (Richard K. Radek), various Federal Express charges, IKON and other copying services charges, expenses associated with the law firm of Troutman Sanders, and travel expenses of Claimants’ counsel Tricarichi. Such expenses are not awardable as costs even if the parties had not previously agreed to bear their own expenses.

e. Punitive Damages Are Not Recoverable In This Breach of Contract Action

To further aggrandize their purported recovery, Claimants assert they are also entitled to punitive damages. Implicitly recognizing the lack of any evidentiary support whatsoever for their claim for punitive damages, Claimants in their one-paragraph argument entitled “Punitive Damages” fail to make any argument at all as to why they would be entitled to punitive damages.

¹⁰³ Claimants’ Exhibit 24, p. 2.

They simply say nothing.¹⁰⁴ The short answer is that, even if they had proved any actual damages on their claims, they still would not be entitled to punitive damages. The longstanding rule is that “Punitive damages are not recoverable in an action for breach of contract.” Ketcham v. Miller, 104 Ohio St. 372, syllabus ¶ 2. “The law is quite clear in Ohio that: ‘As a general rule exemplary damages are not recoverable in actions for the breach of contracts, irrespective of the motive on the part of defendant which prompted the breach. No more can be recovered as damages than will fully compensate the party injured.’ This has been the nearly universal rule for some time. **No matter how willful the breach, [p]unitive damages are not recoverable in an action for breach of contract.**” Digital & Analog Design Corp. v. North Supply Co., 44 Ohio St.3d 36, 46 (1989) (emphasis added) (internal citations omitted). Even assuming that any Claimant had met his burden of proof on each of the three contract issues, there is not one shred of evidence before the Panel supporting an award of punitive damages.

III. CONCLUSION

Each of the Claimants failed at the arbitration to prove each of the three contract issues necessary to any recovery under the MPA. No Claimant proved at the arbitration that he was placed in a worse condition with respect to his employment by reason of the merger. No Claimant proved at the arbitration that he complied with the MPA’s requirements to warrant an

¹⁰⁴ Earlier in their brief, Claimants make the preposterous claim that an award of punitive damages is part of what is necessary to “make the Claimants whole . . .” Claimants’ Post Arbitration Brief, p. 2. It is axiomatic that punitive damages are not an element of compensatory damages but rather are intended to punish and deter reprehensible conduct. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (“It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”). Punitive damage “by definition, provide monetary relief in excess of . . . actual loss.” International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 50 (1979) (quoting Scott v. Donald, 165 U.S. 58 (1897)). Claimants also make a passing reference to “bad faith conduct” earlier in their brief without elaboration. There certainly has been no showing on the record of bad faith or of any ground for punitive damages. Judge Lambros made no such finding or award. Neither previous arbitration panel made any such finding or award. The Surface Transportation Board made no such finding or award. Judge Oliver

award of benefits. No Claimant proved at the arbitration that he suffered loss as defined by the MPA and for which the MPA provided entitlement to payment. Nothing in Claimants' post arbitration brief alleviates that failure of proof. Nothing in their brief demonstrates that they came forward with evidence at the hearing on each and every one of these issues. Rather, each and every Claimant failed to meet his burden of proof on each and every of the three contract issues, and each and every one of their claims must be denied.

Respectfully submitted,

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made no such finding or award. Judge Fullam made no such finding or award. The Sixth Circuit made no such finding or award. And, on the record before it, this Panel cannot make any such finding or award.

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Brief in Response to Claimants' Post-Arbitration Brief was sent on March 11, 2008 by email transmission (except for Mr. Goldfarb) to:

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LEXSEE 219 FED. APPX 419

GARY D. AHO, Plaintiff-Appellant, v. CLEVELAND-CLIFFS, INC., Defendant-Appellee.

No. 06-3553

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

07a0178n.06; 219 Fed. Appx. 419; 2007 U.S. App. LEXIS 5592; 2007 FED App. 0178N (6th Cir.); 41 Employee Benefits Cas. (BNA) 1643

March 6, 2007, Filed

NOTICE: [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff former employee sued defendant employer, seeking a declaration that it was not their intent for him to forfeit vested stock options when he signed a voluntary separation agreement as part of his early retirement, which included a waiver. He sought review of a decision of the U.S. District Court for the Northern District of Ohio which entered *Fed. R. Civ. P. 12(c)* judgment on the pleadings for the employer.

OVERVIEW: The employee contended that a release clause had to be read in conjunction with the contract as a whole, and he argued that a paragraph of the agreement's prefatory language excluded the vested stock options from the release clause as they were given in lieu of bonuses and pay increases. The court of appeals affirmed, finding that the employee relinquished his rights to his stock options via the agreement. The prefatory language excluded from the release clause all incentives and benefits paid to the employee, and that would be

paid to him. Therefore, if the options were considered "incentives" or "benefits," then the agreement did not apply. To make that determination, the court of appeals first had to try to ascertain the parties' intent by affording full meaning to the entire contract, but the plain language weighed in the employer's favor. The agreement clearly stated that the employee gave up all claims for stock options. Further, the fact that the parties chose not to explicitly exempt those that had vested under the employer's incentive plan was convincing that the agreement applied to those in issue. Moreover, the covenant not to sue was unambiguous and enforceable.

OUTCOME: The court of appeals affirmed.

CORE TERMS: stock options, covenant, vested, prefatory, retirement, meaningless, contract interpretation, pension, salary, construe, stock, ore, forever, bonuses, declaratory judgment, present case, de novo, contractual obligations, full force, well-settled, interpreting, entitlements, unambiguous, construing, ascertain, correctly, forgoing, vacation, analyzed, omitting

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Judgments > Judgment on the Pleadings

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

[HN1] The U.S. Court of Appeals for the Sixth Circuit reviews a district court's grant of a motion for judgment on the pleadings de novo. A motion for judgment on the pleadings is proper where it is made after the pleadings are closed, but within such time as to not delay the trial. *Fed. R. Civ. P. 12(c)*. In reviewing a motion for judgment

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ment on the pleadings, the Sixth Circuit construes the complaint in the light most favorable to the plaintiff, accepts all of the complaint's factual allegations as true, and determines whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief.

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Civil Procedure > Settlements > Releases From Liability > General Releases

Contracts Law > Types of Contracts > Covenants

Contracts Law > Types of Contracts > Releases

[HN2] According to Ohio law, a release is a contract, as is a covenant not to sue.

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Contract Interpretation > General Overview

[HN3] Ohio courts have held that prefatory language cannot alone create contractual obligations. It is, however, an equally well-settled tenet of Ohio law that, when construing a contract, a trial court not only must give meaning to every paragraph, clause, phrase and word, omitting nothing as meaningless, or surplusage, it also must consider the subject matter, nature, and purpose of the agreement.

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Contract Interpretation > General Overview

[HN4] While prefatory language cannot, in and of itself, create binding contract obligations, it cannot be entirely discounted in contract interpretation. In fact, the role of prefatory language is to define the scope of a contract, and that is how it has been analyzed by Ohio courts. This is the most logical way to understand the role of prefatory language in Ohio contract interpretation because it is consistent with both the rule that no element of a contract may be disregarded and the rule that prefatory language alone cannot create contractual obligations.

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

[HN5] In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties. Where two interpretations can be given to a term

in a contract, one which will make a provision meaningless, and one which will give full force to all provisions, the latter must be adopted. However, the U.S. Court of Appeals for the Sixth Circuit must construe any ambiguity strictly against the drafter of the contract. Interpreting terms to give full force to all provisions trumps the other canons of interpretation.

Contracts Law > Contract Interpretation > General Overview

[HN6] For purposes of contract interpretation, Ohio employs the doctrine of *expressio unius est exclusio alterius*, which means that the expression of one thing is the exclusion of another.

Civil Procedure > Settlements > Releases From Liability > Covenants Not to Sue

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview

Contracts Law > Remedies > General Overview

Contracts Law > Types of Contracts > Covenants

[HN7] The U.S. Court of Appeals for the Sixth Circuit, while interpreting Ohio law, has repeatedly enforced covenants not to sue. It has adopted the Second Circuit rule that it is not beyond the powers of a lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail liability for damages, including the most certain of all—defendant's litigation expense. The only caveat is that the language must be unambiguous.

COUNSEL: For GARY D. AHO, Plaintiff - Appellant: Stephen M. Bales, Nicholas C. De Santis, Ziegler, Metzger & Miller, Cleveland, OH.

For CLEVELAND-CLIFFS INC, Defendant - Appellee: W. Eric Baisden, Daniel P. Petrov, Calfee, Halter & Griswold, Cleveland, OH.

JUDGES: BEFORE: NORRIS, COLE, and CLAY, Circuit Judges.

OPINION BY: CLAY

OPINION

[*419] CLAY, Circuit Judge. Plaintiff Gary D. Aho appeals the district court's grant of judgment on the pleadings for Defendant Cleveland-Cliffs, Inc., dismissing Plaintiff's motion for a declaratory judgment that Plaintiff retained the right to exercise his vested stock options after entering into a release agreement with Defendant. For the reasons that follow, we **AFFIRM** the

219 Fed. Appx. 419, *, 2007 U.S. App. LEXIS 5592, **;
2007 FED App. 0178N (6th Cir.); 41 Employee Benefits Cas. (BNA) 1643

order of the district court dismissing Plaintiff's claim pursuant to *Federal [**2] Rule of Civil Procedure 12(c)*.

[*420] BACKGROUND

Plaintiff is a former long-term manager for Defendant, a corporation primarily engaged in the production of iron ore pellets. Plaintiff was in Defendant's employ for thirty-four years, during which time he participated in the 1992 Incentive Equity Plan ("the IEP"). The IEP was a stock-options program that granted Plaintiff shares of Defendant's stock in lieu of annual incentive bonuses and salary increases. Pursuant to the terms of the IEP, between 1996 and 2000, Plaintiff received options to acquire 4,550 shares of Defendant's stock. Before the options could vest, Plaintiff was required to remain employed by Defendant for at least three years after the options were granted. Thus, the options began vesting yearly beginning in January 2000, with the last of the options vesting on January 11, 2003. Plaintiff never attempted to exercise any of these options during his employment.

On July 24, 2003, Defendant notified Plaintiff that it had implemented an employee reduction program, which eliminated the positions of many employees, including Plaintiff's. Plaintiff's position was scheduled to terminate on September 30, 2003. Defendant informed [**3] Plaintiff that, instead of being terminated, he was eligible to take early retirement because of his age and years of service. Thus, on November 5, 2003, Plaintiff and Defendant entered into a Separation Agreement and Release of Claims ("the Agreement"), that outlined the terms of Plaintiff's retirement benefits and settlement. Specifically, the Agreement stated that, in addition to all salary and pension benefits earned by Plaintiff as of September 2003, Defendant agreed to the following terms:

"1) Defendant would pay an additional \$ 106,116 into a Special Cash Balance Account for the Plaintiff; 2) Defendant would continue to pay Plaintiff's health insurance premiums for a year following the date of severance; 3) Defendant would increase Plaintiff's pension benefits; 4) Defendant would increase the long-term medical benefits available to the Plaintiff; and 5) Defendant would provide Plaintiff with up to \$ 9,000 in outplacement services."

(J.A. at 35-36). In return, Plaintiff signed a waiver, which appeared in Section H of the Agreement. It read:

Employee hereby forever gives up, waives and releases any right to recall or

reinstatement by Employer, and Employee [**4] does hereby for himself/herself and for his/her heirs, executors, successors, and assigns, release and forever discharge Employer, as well as each of its past and present successors, assigns, divisions, parents, subsidiaries, related or affiliated companies, and the officers, directors, shareholders, members, employees, heirs, agents, and attorneys of each of the forgoing, including without limitation any and all management and supervisory employees, and all persons acting under or in concert with any of them (hereinafter collectively termed the "Released Parties") of and from any and all debts, claims, demands, charges, complaints, grievances, promises, actions, or causes of actions, suits at law or equity, and/or damages of any and every kind that Employee has or may have, whether known or unknown, including but not limited to, any and all claims and/or demands for back pay, reinstatement, hire or re-hire, front pay, *stock options*, group insurance or employee benefits of whatsoever kind (except on rights expressly provided for herein), claims for monies and/or expenses, any claims arising out of or relating to the cessation of Employee's employment with Employer, any claims [**5] for breach of contract or Employee's failure to obtain [*421] employment with any other person or employer, claims for discrimination on any basis arising under any federal, state, or local statute, ordinance, or law, and any and all claims for wrongful termination of employment, misrepresentation, harassment, mental anguish, emotional distress, breach of contract, breach of implied contract, promissory estoppel, defamation, violation of public policy, attorneys' fees and costs of any legal proceeding, if any, and any and all other claims or causes of action, however denominated, that Employee has or may have by reason of any matter or thing arising out of, or in any way connected with, directly or indirectly, any act and/or omission that has occurred prior to the Effective Date of this Agreement. Employee understands that Employer denies or will deny any and all claims and liability which may be asserted by Employee under any of the foregoing

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and under the laws and regulations described in Paragraph K below.

This release does not apply to Employee's entitlements under this Agreement, the Pension Plan, the Retiree Medical Plan, the Cliffs and Associated Employers Salaried Employees Supplemental [**6] Retirement Savings Plan (the "Savings Plan"), the Ore Mining Companies Retirement Income Plan, and the Employer's vacation policy.

(J.A. at 36). (emphasis added). Also relevant is Section J of the Agreement, which was a covenant not to sue. It reads:

Employee covenants and agrees that Employee will not bring . . . any action or proceeding or otherwise prosecute or sue Employer . . . with respect to the claims herein released.

(J.A. at 43).

On December 11, 2003, after he had already signed the Agreement, Plaintiff attempted for the first time to exercise his previously vested stock options by purchasing shares of Defendant's stock. Plaintiff was informed that he had forfeited those stock options when he signed the Agreement. Plaintiff contended that his vested stock options were excluded from Section H of the Agreement ("the release clause"). Plaintiff filed a complaint on April 13, 2005, requesting the district court to issue a declaratory judgment holding that it was not the intent of the parties for Plaintiff to forfeit vested stock options he received under the IEP. Defendant moved for judgment on the pleadings on June 13, 2005, pursuant to *Federal Rule [**7] of Civil Procedure 12(c)*, arguing that Plaintiff released his claims to the stock options when he signed the Agreement and, additionally, that Plaintiff is barred from litigating his claim because Section J of the Agreement, the covenant not to sue, barred this action.

The district court analyzed Defendant's arguments together because the interpretation of the covenant not to sue depends upon the interpretation of the release clause inasmuch as the covenant not to sue bars only claims pertaining to rights that had been released. The district court began by examining the language of the Agreement. Defendant focused on the fact that the release clause explicitly listed "stock options" as one of the items that Plaintiff released as a term of the Agreement. Plaintiff contended that the release clause had to be read in conjunction with the contract as a whole and argued that a paragraph of the Agreement's prefatory language

excluded the vested stock options from the release clause. The language to which Plaintiff refers is found in paragraph four of the prefatory language of the Agreement and reads:

WHEREAS, Employee has been paid or will be paid all wages, *incentives* and [**8] *benefits* owed to Employee in consideration of and as compensation for Employee's [*422] services as an employee but that the Employer desires to provide additional benefits to the Employee. . . .

(J.A. at 41). (emphasis added). Plaintiff argued that because the stock options were given in lieu of incentive bonuses and salary increases, they were excluded from the terms of the Agreement by this prefatory language ("the whereas clause"). The district court was unpersuaded. It held that, at best, the whereas clause could be read as vaguely referring to the stock options and excluding them from the release clause; however, the plain language of the Agreement expressly named rights to stock options as one of the rights being relinquished, and thus, such an express reference trumped the vague language of the whereas clause. The court likewise held that because the stock options were not exempted from the Agreement, the covenant not to sue applied to claims relating to the stock options. Thus, the court concluded that Plaintiff's claim was barred. On these grounds, the district court granted Defendant's motion for judgment on the pleadings and Plaintiff timely filed notice of appeal.

[**9] DISCUSSION

I. The district court properly held that Plaintiff relinquished his rights to his stock options when he entered into the Agreement

A. Standard of Review

[HN1] This Court reviews a district court's grant of a motion for judgment on the pleadings *de novo*. *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001). A motion for judgment on the pleadings is proper where it is made, as it was in this case, "after the pleadings are closed, but within such time as to not delay the trial." *Fed. R. Civ. P. 12(c)*. In reviewing a motion for judgment on the pleadings, we "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998)

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(citing *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475 (6th Cir. 1990)).

B. Analysis

[HN2] According to Ohio law, "[s]tated in basic terms, [a release] is a contract, as is the covenant not to sue." *Fabrizio v. Hendricks*, 100 Ohio App. 3d 352, 654 N.E.2d 127, 129 (Ohio Ct. App. 1995). [**10] There are two principles of contract interpretation that are important to our analysis. [HN3] Ohio courts have held that prefatory language, like the whereas clause, cannot alone create contractual obligations. See *Illinois Controls, Inc. v. Langham*, 1992 Ohio App. LEXIS 4748 (Ohio Ct. App. 1992), *rev'd on other grounds*, 70 Ohio St. 3d 512, 1994 Ohio 99, 639 N.E.2d 771 (Ohio 1994) (unpublished); *Cleveland Trust Co. v. Snyder*, 55 Ohio App. 2d 168, 380 N.E.2d 354, 359 (Ohio Ct. App. 1978). It is, however, an equally well-settled tenet of Ohio law that when "construing a contract, a court not only must give meaning to every paragraph, clause, phrase and word, omitting nothing as meaningless, or surplusage; it must consider the subject matter, nature, and purpose of the agreement." *Affiliated FM Ins. Co. v. Owens-Corning Fiberglas Corp.*, 16 F.3d 684, 686 (6th Cir. 1994) (internal citations omitted). Thus we are confronted with two conflicting canons of contract interpretation. We must consider the contract in its entirety, "omitting nothing as meaningless," which would include the whereas clause; but that clause cannot be viewed as creating a provision of the contract. See *id.*; [**11] see also *Cleveland Trust*, 380 N.E.2d at 359. Examining the [**423] relevant case law is of limited assistance. Although both *Illinois Controls* and *Cleveland Trust* state that contract provisions cannot be determined by the prefatory language of the contract, neither case contains analysis of this issue and, thus, neither case offers much guidance as to what this means *vis-a-vis* the general rule that every aspect of a contract must be considered. Accordingly, our initial task is to reconcile these principles.

[HN4] While prefatory language cannot, in and of itself, create binding contract obligations, it cannot be entirely discounted in contract interpretation as Defendant contends it should be. In fact, the role of prefatory language is to define the scope of a contract, and that is how it has been analyzed by the Ohio courts. See, e.g., *Pasco v. State Auto. Mut. Ins. Co.*, 1999 Ohio App. LEXIS 6492, *12-13 (Ohio Ct. App. 1999) (unpublished) (concluding that the trial court properly considered the prefatory language of a contract in determining whether a specific provision of a contract was applicable to that case). This is the most logical way to understand [**12] the role of prefatory language in Ohio contract interpretation because it is consistent with both the rule that no element of a contract may be disregarded and the rule

that prefatory language alone cannot create contractual obligations. Thus, we will consider the pertinent whereas clause insofar as it is relevant to determining whether the Agreement was applicable to Plaintiff's stock options.

In the present case, the prefatory language excludes from the release clause all "incentives and benefits" paid to Plaintiff and that will be paid to Plaintiff. Therefore, this language instructs us that if Plaintiff's vested stock options are considered "incentives" or "benefits," then the Agreement does not apply to them. See *Pasco*, 1999 Ohio App. LEXIS 6492, *12-13. Thus, we will now turn to defining those terms.

[HN5] "In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties." *Aultman Hosp. Ass'n. v. Cmty. Mut. Ins. Co.*, 46 Ohio St. 3d 51, 544 N.E.2d 920, 923 (1989). Defendant correctly observes that it is well-settled that "where two interpretations can be given to a term in a contract, one will make a provision meaningless, [**13] and one which will give full force to all provisions, the latter must be adopted." *Lightning Rod Mut. Ins. Co. v. Midwestern Indem. Co.*, 1987 Ohio App. LEXIS 6198, *7 (Ohio Ct. App. 1987). Plaintiff, however, also correctly points out that this Court must "construe any ambiguity strictly against the drafter of the contract." *Molnar v. Castle Bail Bonds, Inc.*, 2005 Ohio 6643, *43 (Ohio Ct. App. 2005). In *Molnar*, the court expressly clarified that interpreting terms to give full force to all provisions trumps the other canons of interpretation. *Id.* Thus, we must first try to ascertain the intent of the parties by affording full meaning to the entire contract. *Id.* Only if that is impossible will we attempt to construe the ambiguous terms in a way that provides deference to the non-drafting party.

Plaintiff argues that the terms "incentives" and "benefits" refer to his vested stock options. As Plaintiff argues, the stock options were issued in lieu of incentive bonuses and annual salary increases. Thus, they meet a common sense definition of "incentive" or "benefit." Further, the fact that the stock options were referred to as "incentive stock [**14] options" in Defendant's Stock Option Award Statement weighs in favor of Plaintiff's interpretation. However, the plain language of the Agreement weighs more strongly in Defendant's favor. [**424] First, the language clearly states that Plaintiff "forever gives up, waives and releases any right . . . to, any and all claims and/or demands for . . . stock options . . . of whatsoever kind." (J.A. at 36). Thus, understanding the term "incentive" to apply to Plaintiff's stock options would render this section meaningless. Because Plaintiff concedes that he had no right to his unvested stock options, the only rights he could have possibly been signing away were those to his vested stock options. Indeed, if both the unvested stock options and the vested stock op-

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tions fell beyond the reach of the Agreement, there is no explanation why the release clause would specifically refer to stock options, and that provision would be rendered meaningless.

Defendant's argument is further strengthened by the fact that the Agreement contains a provision that explicitly exempts several benefits plans from the release clause. This section makes the Agreement inapplicable to Plaintiff's entitlements under the Pension [**15] Plan, the Retiree Medical Plan, the Cliffs and Associated Employers Salaried Employees Supplemental Retirement Savings Plan, the Ore Mining Companies Retirement Income Plan, Plaintiff's vacation policy, and the Agreement itself. (J.A. at 36). Noticeably absent from this list is the IEP. According to [HN6] the doctrine of *expressio unius est exclusio alterius* [the expression of one thing is the exclusion of another], which Ohio employs, this absence strongly evidences the parties' intention to make the Agreement applicable to the IEP. See *Third Nat'l Bank v. Laidlaw*, 86 Ohio St. 91, 102, 98 N.E. 1015, 10 Ohio L. Rep. 73 (Ohio 1912). The fact that the parties chose not to explicitly exempt the IEP from the Agreement convinces us that the parties intended to make the Agreement applicable to Plaintiff's rights to his vested stock options.

II. The district court properly held that the covenant not to sue applied to claims related to Plaintiff's rights in his vested stock options

A. Standard of Review

As discussed above, we review a district court's grant of a motion for judgment on the pleadings *de novo*. See *supra* Part I.A.

B. Analysis

[HN7] This Court, while interpreting Ohio law, [**16] has repeatedly enforced covenants not to sue. In *Astor v. International Business Machines Corporation*, 7 F.3d 533, 540 (6th Cir. 1993), we were faced with a case similar to the present one, where the plaintiff challenged the validity of the covenant because it argued such covenants did not apply to the right to sue over the covenant itself. We quickly dismissed that argument and adopted the Second Circuit rule that "[i]t is not beyond the powers of a lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail liability for damages, including the most certain of all-defendant's litigation expense." *Id.* (quoting *Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966)). The only caveat was that the language must be unambiguous. *Id.*

In the present case, the language of the covenant not to sue is unambiguous. It states: "Employee covenants and agrees that Employee will not bring . . . any action or proceeding or otherwise prosecute or sue Employer . . . with respect to the claims herein released." (J.A. at 43). Plaintiff does not argue otherwise. Accordingly, if the covenant not to sue applies [**17] to Plaintiff's claims, it is enforceable. Plaintiff argues that because the Agreement does not apply to his vested stock options, the covenant not to sue is [*425] unenforceable because it does not apply to his claim. Essentially, this envelopes the previous argument Plaintiff made. Thus, because we find that the Agreement does in fact apply to Plaintiff's vested stock options, we likewise find that this claim is barred by the covenant not to sue.

CONCLUSION

For the forgoing reasons, we **AFFIRM** the order of the district court dismissing Plaintiff's complaint pursuant to *Federal Rules of Civil Procedure 12(c)*.

LEXSEE 1999 OHIO APP LEXIS 6492



Caution
As of: Mar 11, 2008

**Leslie Pasco, Individually and as assignee of Claims, Plaintiff-Appellant, v. State
Automobile Mutual Insurance Co., Defendant-Appellee.**

No. 99AP-430

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

1999 Ohio App. LEXIS 6492

December 21, 1999, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed in part, reversed in part; case remanded for further proceedings.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, as assignee of defendant's insured's claims, appealed the judgment of the Franklin County Court of Common Pleas (Ohio) granting in part defendant's summary judgment motion on plaintiff's claims for insurance coverage, bad faith refusal to pay or settle Consumer Sales Practices Act, *Ohio Rev. Code Ann. § 1345.01 et seq.*, claims, and bad faith claims handling.

OVERVIEW: Plaintiff, as assignee of defendant's insured's claims, sued defendant, contending that, under the insurance policy, defendant was obligated to pay the statutory damages awarded and attorney fees assessed as costs in connection with Consumer Sales Practices Act (CSPA), *Ohio Rev. Code Ann. § 1345.01 et seq.*, violations found in the underlying litigation. Plaintiff also raised claims for bad faith refusal to pay or settle the damages awarded, and for bad faith failure to investigate and process the claims. The trial court partially granted defendant's summary judgment motion. Plaintiff appealed. The court held that the CSPA violations could not reasonably be interpreted to fall within the meaning of "unfair competition" under the policy. However, construing the policy's ambiguous language strictly against

defendant and liberally in plaintiff's favor, the "supplementary payments" provision did cover the costs (including attorney fees) assessed. Thus, the partial grant of defendant's summary judgment motion was affirmed in part, reversed in part, and the case was remanded.

OUTCOME: The partial grant of defendant's summary judgment motion was affirmed in part, reversed in part, and the case was remanded. The Consumer Sales Practices Act violations could not reasonably be interpreted to fall within the meaning of "unfair competition" under the insurance policy. However, the policy's "supplementary payments" provision did cover the costs (including attorney fees) assessed.

CORE TERMS: insured, insurer, coverage, attorney fees, bad-faith, insurance policies, underlying litigation, summary judgment, reservation of rights, defended, assignments of error, consumer, timing, damages awarded, unfair competition, prejudiced, estoppel, manifest, settle, advertising, doctrines of waiver, investigate, unambiguous, umbrella policies, liability coverage, deny coverage, statutory damages, issues of material fact, refusal to pay, failure to investigate

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality



[HN1] A trial court shall grant summary judgment only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Ohio R. Civ. P. 56(C)*.

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Questions of Law

[HN2] The fundamental goal in interpreting an insurance policy, like any other contract, is to ascertain the intent of the parties. If the contract language is clear and unambiguous, then its interpretation is a matter of law. However, where language in an insurance policy is doubtful, uncertain, or ambiguous, the language will be construed strictly against the insurer and liberally in favor of the insured.

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > Claims & Contracts > Policy Interpretation > Plain Language

[HN3] The test for determining whether language used in an insurance policy is ambiguous is whether that language is reasonably susceptible of more than one interpretation. The mere fact that a term in an insurance policy is not defined does not, by itself, make the term ambiguous. Rather, undefined terms in an insurance policy must be given their plain and ordinary meaning, if any.

Insurance Law > Excess Insurance > Umbrella Policies

Insurance Law > General Liability Insurance > Coverage > Style of Doing Business

Insurance Law > Industry Regulation > Unfair Business Practices > General Overview

[HN4] The purpose of the Consumer Sales Practices Act (CSPA), *Ohio Rev. Code Ann. § 1345.01 et seq.*, is to protect consumers, not competitors, from the harm of deceptive or unconscionable sales practices. In general, harm to consumers does not equate with harm to competitors and, hence, does not equate with unfair competition. This is especially true where the CSPA violations

involve a single consumer and relate to a single transaction.

Insurance Law > Claims & Contracts > Costs & Attorney Fees > General Overview

Insurance Law > Industry Regulation > Unfair Business Practices > General Overview

[HN5] *Ohio Rev. Code Ann. § 1345.09(F)* allows a trial court to award attorney fees against persons who knowingly commit acts in violation of the Consumer Sales Practices Act, *Ohio Rev. Code Ann. § 1345.01 et seq.*

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Payments

[HN6] An insurer has a duty to its insured to act in good faith in the handling and payment of the insured's claims.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Payments

[HN7] An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor. The duty of good faith is grounded in the recognition of the disparity in economic positions that often exists between the insurer and insured, and to ensure that the acts of the insurer do not impair the insured's right to receive the benefits that would flow from the contractual relationship.

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > General Overview

[HN8] If a reason for coverage denial is correct, it is per se reasonable. In other words, if an insurer's denial of coverage was proper, the plaintiff's bad faith claim cannot be maintained.

Civil Procedure > Judicial Officers > Magistrates > General Overview

Insurance Law > Claims & Contracts > Disclosure Obligations > General Overview

Insurance Law > Claims & Contracts > Reservation of Rights > General Overview

[HN9] The doctrine of waiver and estoppel bars an insurer from denying coverage if the insurer makes a clear

misrepresentation as to coverage or if the insurer provides a defense, without reserving its rights, for a period of time sufficient to prejudice the insured's ability to conduct its own defense.

Insurance Law > Claims & Contracts > Fiduciary Responsibilities

Insurance Law > Claims & Contracts > Reservation of Rights > General Overview

[HN10] A conflict of interest does not necessarily exist when an insurer does not defend on the theory that the insured's liability precludes its own.

Civil Procedure > Judgments > General Overview

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview

[HN11] In considering whether a civil judgment is against the manifest weight of the evidence, a reviewing court is guided by the presumption that the findings of the trier of fact are correct. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.

COUNSEL: Ron M. Tamburrino, for appellant.

William J. Christensen and Leslie T. Caborn, for appellee.

JUDGES: LAZARUS, P.J. PETREE and BOWMAN, JJ., concur.

OPINION BY: LAZARUS

OPINION

REGULAR CALENDAR

LAZARUS, P.J.

Plaintiff-appellant, Leslie Pasco, appeals the March 16, 1999 judgment entry of the Franklin County Court of Common Pleas granting judgment in favor of defendant-appellee, State Automobile Mutual Insurance Company. For the following reasons, we affirm in part and reverse in part.

This matter arises out of prior litigation between appellant and appellee's insured, B&B Marine Sales and Service and its general partners, Robert McCoy and Bill Fannin (collectively, "B&B Marine"), in Ottawa County, Ohio. In the Ottawa County litigation, appellant sued B&B Marine alleging damages to her boat and raising, *inter alia*, claims of negligence and violations of Ohio's

Consumer Sales Practices Act ("CSPA"), *R.C. 1345.01 et seq.* B&B Marine was insured under a Preferred Business Policy and a Commercial Umbrella Liability [*2] Policy issued by appellee. Pursuant to the terms of these policies, appellee defended B&B Marine in the underlying lawsuit reserving its rights to deny coverage for damages awarded for violations of the CSPA.

On July 21, 1994, the Ottawa County Court of Common Pleas issued its decision, generally finding in favor of B&B Marine on most of appellant's claims but also finding certain technical violations of the CSPA. In so doing, the court specifically found that all damages sustained to appellant's boat were due to appellant's own negligence. As to the CSPA violations, the court found that a certain work order dated May 20, 1988, and the circumstances surrounding it, violated various CSPA regulations, in particular, those found in *Ohio Adm.Code 109:4-3-05* requiring notices informing consumers of their right to a written estimate for repair services, prohibiting charges for work performed without prior authorization, and requiring itemized lists for work performed and copies of documents to be given to consumers.

Ultimately, the trial court awarded appellant \$ 1,800 in statutory damages (\$ 200 per violation), \$ 10,000 in attorney fees, \$ 2,588.60 in expenses, and \$ 960 in pre-judgment [*3] interest. Pursuant to the judgment entry, the attorney fees and expenses were assessed as costs, to be paid directly to appellant. In settlement of the underlying Ottawa County litigation, B&B Marine assigned to appellant any claims it had against appellee arising out of the Ottawa County litigation.

On August 30, 1996, appellant, as assignee of B&B Marine's claims, filed suit in the Franklin County Court of Common Pleas against appellee. Appellant sought a declaration that under the insurance policies at issue, appellee was obligated to pay the statutory damages awarded and attorney fees assessed as costs in connection with the violations of the CSPA found in the underlying litigation. Appellant also raised claims for bad-faith refusal to pay or settle the damages awarded on the CSPA claims and for bad-faith failure to investigate and process the CSPA claims.

On June 5, 1997, appellee filed a motion for summary judgment as to all claims. Appellee argued that violations of the CSPA were not covered by the clear and unambiguous language of the applicable policies, that it had no obligation to pay the attorney fees assessed as costs, that it properly informed the insured that it was [*4] defending under a reservation of rights, and that appellant could prove no damages. Appellant responded arguing that the CSPA claims were covered by the language of the policies, that even if such claims were not

specifically covered, the doctrines of waiver and estoppel barred appellee from failing to pay such claims, that attorney fees assessed as costs in the underlying litigation were covered by the clear and unambiguous language of the policies, and that genuine issues of material fact existed on their bad-faith claims.

On August 18, 1997, the trial court issued its decision granting appellee's motion for summary judgment in part and denying it in part. In so doing, the trial court made several rulings. First, the trial court ruled that the CSPA statutory damages were not covered under the clear and unambiguous language of the insurance policies. Second, the trial court ruled that there was a genuine issue of material fact as to whether the doctrines of waiver and estoppel, as enunciated in *Turner Liquidating Co. v. St. Paul Surplus Lines Ins. Co.* (1994), 93 Ohio App. 3d 292, 638 N.E.2d 174, barred appellee from refusing to pay such claims. Third, the trial court [*5] ruled that the attorney fees assessed as costs were not recoverable because only those costs associated with covered claims were recoverable under the language of the policies. Finally, the trial court ruled that appellant's bad-faith failure to pay or settle claims could not be maintained since an insurer has no obligation to pay or settle a claim for which the policy does not provide coverage. The trial court did not separately address appellant's bad-faith failure to investigate claims.

The issue of whether the doctrines of waiver and estoppel barred appellee from refusing to cover the damages awarded for violating the CSPA was tried to a magistrate. On June 22, 1998, the magistrate issued its decision finding that B&B Marine was not prejudiced by the timing or manner in which they were notified that appellee would deny coverage for the CSPA claims. As such, the magistrate recommended that judgment be rendered in favor of appellee and against appellant.

Appellant filed objections to the magistrate's decision. On March 16, 1999, the trial court issued its decision and entry, overruling appellant's objections and approving and adopting the magistrate's decision as its own. It is [*6] from this final judgment that appellant appeals, raising the following three assignments of error:

1. The trial court erred in granting in part State Auto Mutual Insurance Company's Motion for Summary Judgment and in granting judgment in favor of State Automobile Insurance Company on Plaintiff-Appellant's claims for insurance coverage, and claims for bad faith refusal to pay or settle claims and bad faith claims handling.

2. The trial court erred in granting judgment after trial in favor of State Automobile Insurance Company (by approving and adopting the Magistrate's Report and Recommendation over Plaintiff-Appellant's timely objec-

tion to findings of fact and conclusions of law therein) on Plaintiff-Appellant's claims for insurance coverage on theories of waiver and/or estoppel.

3. The trial court's judgment is against the manifest weight and sufficiency of the evidence.

In her first assignment of error, appellant challenges the trial court's August 18, 1997 summary judgment decision. [HN1] A trial court shall grant summary judgment only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; [*7] and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Civ.R. 56(C); Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St. 3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 65-66, 375 N.E.2d 46.

Here, appellant argues that the trial court erred in making three specific rulings: (1) that CSPA damages were not covered under the language of the policies at issue; (2) that attorney fees assessed as costs against B&B Marine in the underlying action were not covered under the language of the policies at issue; and (3) that there were no genuine issues of material fact as to appellant's bad-faith claims. We address each of appellant's claims in turn.

1. CSPA statutory damages.

On appeal, appellant concedes that the CSPA statutory damages awarded in the underlying litigation are not covered under the liability provisions for property damage as set forth in the primary business and umbrella policies. Appellant contends, however, that the damages are recoverable under the [*8] umbrella policy's indemnification provision related to liability arising out of an advertising offense. The relevant provision of the umbrella policy provides as follows:

The Company [appellee] will indemnify the insured for ultimate net loss *** which the insured shall become legally obligated to pay as damages because of

- A. personal injury or
- B. property damage or
- C. advertising offense

to which this policy applies, caused by an occurrence.

The umbrella policy defines an "advertising offense" to mean "libel, slander, defamation, infringement of copyright, title or slogan, piracy, unfair competition, idea misappropriation or invasion of rights of privacy, arising

out of the insured's advertising activities." (Emphasis sic.)

Appellant contends that the CSPA violations found by the trial court in the underlying litigation constitute "unfair competition" arising out of B&B Marine's advertising activities and, as such, constitutes damages arising out of an "advertising offense." We disagree.

[HN2] The fundamental goal in interpreting an insurance policy, like any other contract, is to ascertain the intent of the parties. *Boso v. Erie Ins. Co./Erie Ins. Exchange* (1995), 107 Ohio App. 3d 481, 487, 669 N.E.2d 47. [*9] If the contract language is clear and unambiguous, then its interpretation is a matter of law. *Heritage Mut. Ins. Co. v. Ricart Ford, Inc.* (1995), 105 Ohio App. 3d 261, 266, 663 N.E.2d 1009. However, where language in an insurance policy is doubtful, uncertain or ambiguous, the language will be construed strictly against the insurer and liberally in favor of the insured. *Id.* [HN3] "The test for determining whether language used in an insurance policy is ambiguous is whether that language is *** reasonably susceptible of more than one interpretation." *Santana v. Auto Owners Ins. Co.* (1993), 91 Ohio App. 3d 490, 494, 632 N.E.2d 1308. The mere fact that a term in an insurance policy is not defined does not, by itself, make the term ambiguous. *Boso, supra*, at 486 (citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St. 3d 107, 108, 652 N.E.2d 684). Rather, undefined terms in an insurance policy must be given their plain and ordinary meaning, if any. *Id.*

Here, the CSPA violations found in the underlying action cannot reasonably be interpreted to fall within the meaning of "unfair competition" as [*10] that term is used in the umbrella policy at issue here. [HN4] The purpose of the CSPA is to protect consumers, not competitors, from the harm of deceptive or unconscionable sales practices. See *Crye v. Smalak* (1996), 110 Ohio App. 3d 504, 512, 674 N.E.2d 779; *Fletcher v. Don Foss of Cleveland, Inc.* (1993), 90 Ohio App. 3d 82, 87, 628 N.E.2d 60. In general, harm to consumers does not equate with harm to competitors and, hence, does not equate with unfair competition. Cf. *Heritage Mut. Ins. Co., supra*, at 266 (allegations of harm to consumers but not competitors failed to trigger coverage under policy providing coverage for "misappropriation of the style of doing business"). This is especially true where the CSPA violations, as found in the underlying litigation here, involved a single consumer and related to a single transaction.

Appellant argues that B&B Marine's failure to follow the CSPA gave it a competitive advantage over its competitors that followed the requirements of the CSPA. Appellant's argument, however, is not only factually unsupported by the record, its logical conclusion turns any

violation of any business regulation or [*11] law into "unfair competition." We do not believe that such an unreasonable result was intended by the use of the words "unfair competition." As such, we find that the trial court did not err in holding that the statutory damages awarded against B&B Marine for violating the CSPA in this case were not covered as a matter of law under the insurance policies at issue here.

2. Attorney Fees Assessed as Costs.

The Ottawa County Court of Common Pleas awarded attorney fees under [HN5] *R.C. 1345.09(F)*, which allows the court to award such fees against persons who knowingly commit acts in violation of the CSPA. As noted above, the court assessed the attorney fees as costs. Appellant contends that, under the policies, appellee is required to pay the attorney fees assessed as costs against its insured in the underlying Ottawa County litigation. In so doing, appellant relies on the following language from the primary liability policy:

Supplementary Payments. The company will pay, in addition to the applicable limit of liability:

(a) all expenses incurred by the company, *all costs taxed against the insured in any suit defended by the company* ***. [*12] [Emphasis added.]

The trial court ruled that this provision does not cover the attorney fees assessed as costs in the underlying Ottawa County litigation because it only covers costs associated with covered claims. The trial court reasoned that the prefatory language "in addition to the applicable limit of liability" indicates that the cost provision applies only if the applicable limit of liability is first triggered, *i.e.*, if the claim giving rise to the costs is one in which liability coverage applies. Since, according to the trial court, the attorney fees arose out of the CSPA violations to which no liability coverage applies, appellant is not liable for the costs (including the attorney fees) associated with those claims.

We find, however, that the trial court's interpretation is not the only reasonable interpretation of the policy. The language could reasonably be interpreted to mean that appellee will pay all costs taxed against the insured in a suit defended by appellee, irrespective of, and in addition to, the liability limits provided under the policy. Nothing in the language makes payment of costs contingent on liability coverage first being triggered. In fact, [*13] the provision's use of the language "*all costs taxed in any suit defended by the company*" (as opposed to "those costs taxed against the insured and associated with a covered claim") indicates that no such requirement exists. Moreover, the trial court's interpretation is inconsistent with the balance of the "supplementary payments" provision. For example, under division (c), appellee

agreed to pay the "expenses incurred by the insured for first aid to others at the time of an accident, for bodily injury to which this policy applies." (Emphasis added.) The limiting language "to which this policy applies" would be superfluous under the trial court's interpretation since the "supplementary payments" provision itself would not be triggered unless coverage first applied.

Given the requirement that we construe ambiguous language strictly against the insurer and liberally in favor of the insured, we find that the primary policy's "supplementary payments" provision does cover the costs (including attorney fees) under the specific facts of this case assessed against appellee's insured in the Ottawa County litigation.¹ As such, the trial court erred in granting summary [*14] judgment for appellee on this claim.

¹ One could question whether the attorney fees awarded under R.C. 1345.09(f) should be assessed "as costs" or as damages. In general, absent specific statutory authority, attorney fees are not "costs." See *Muze v. Mayfield* (1991), 61 Ohio St. 3d 173, 573 N.E.2d 1078. R.C. 1345.09(f) does not indicate whether attorney fees are costs or damages, but merely states that under certain circumstances, the court may award such fees. But, see, *Easterday v. Gumm*, 1996 Ohio App. LEXIS 5198 (Nov. 15, 1996), Ross App. No. 96 CA 2179, unreported (attorney fees awarded under CSPA are to be considered costs). Regardless, neither appellee nor its insured appealed the decision of the Ottawa County Court of Common Pleas assessing the attorney fees "as costs." As such, appellee is precluded from challenging this determination here.

3. Bad-faith Claims.

Appellant also challenges the trial court's decision granting summary judgment on appellant's [*15] claims for bad-faith failure to pay or settle the CSPA claims and for bad-faith failure to investigate the CSPA claims. As noted above, the trial court ruled that, because the policies at issue did not cover the damages arising out of the CSPA violations, appellant could not maintain a bad-faith claim against appellee related to appellee's handling of such claims. Appellant contends that the trial court erred in concluding that appellant's lack of success on their contract coverage claim precluded their bad-faith claim, especially one based upon appellee's alleged failure to properly investigate the claims.

It is well established that [HN6] an insurer has a duty to its insured to act in good faith in the handling and payment of an insured's claims. *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St. 3d 272, 452 N.E.2d 1315, paragraph two of the syllabus. In *Zoppo v. Homestead*

Ins. Co. (1994), 71 Ohio St. 3d 552, 644 N.E.2d 397, paragraph one of the syllabus, the Ohio Supreme Court established the standard governing whether an insurer acted in bad-faith: [HN7] "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to [*16] pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." The duty of good faith is grounded in the recognition of the disparity in economic positions that often exists between the insurer and insured, see *Hoskins*, at 275, and to ensure that the acts of the insurer do not impair the insured's right to receive the benefits that would flow from the contractual relationship, see *Buckeye Union Insurance Co. v. State Farm Mut. Auto. Ins. Co.*, 1997 Ohio App. LEXIS 1472 (Apr. 16, 1997) Hamilton App. No. C-960282, unreported.

Given these basic principles, appellant cannot show that the trial court erred in granting summary judgment as to her claims of bad-faith as to appellee's handling of the CSPA claims. As discussed above, appellee defended its insured in the underlying litigation, including the CSPA claims, with a reservation of its right to refuse coverage for any CSPA violation. Appellee's justification for its refusal to pay the CSPA statutory damages was that such claims were not covered under the clear and unambiguous language of the applicable policies, and this coverage decision has been upheld by this court. "Obviously, [HN8] if a reason for coverage denial is [*17] correct, it is per se reasonable." *GRE Ins. Group v. Int'l. EPDM Rubber Roofing Systems, Inc.*, 1999 Ohio App. LEXIS 1926 (Apr. 30, 1999), Lucas App. No. L-98-1387, unreported (given that insurer's denial of coverage was proper, plaintiff's bad-faith claim could not be maintained).

Appellant relies on *Bullet Trucking, Inc. v. Glen Falls Ins. Co.* (1992), 84 Ohio App. 3d 327, 616 N.E.2d 1123, for the proposition that an insured need not establish coverage under the policy to maintain a bad-faith failure to investigate claims against the insurer. We find *Bullet Trucking* to be unpersuasive. In *Bullet Trucking*, at 333-334, the Montgomery County Court of Appeals indicated *in dicta* that a bad-faith claim based solely upon the insurer's failure to properly investigate whether there was a lawful basis to refuse coverage could be maintained even though the insured otherwise failed to establish that coverage did apply. In so doing, the *Bullet Trucking* court cited no additional authority for this proposition, and appellant has cited none here. Research by this court has failed to reveal any case in which a bad-faith claim was maintained when the insurer defended its insured under a reservation [*18] of right to deny coverage as to a particular claim and the insurer's coverage decision was determined to be correct. As such, we find that the trial court correctly ruled that appellant could not

maintain her bad-faith claims for failure to settle, pay, or investigate the CSPA claims at issue here.

Moreover, to the extent that the trial court failed to separately address appellant's bad-faith-failure-to-investigate claim in its summary judgment decision, we find that appellant can show no prejudice. The magistrate permitted appellant to fully litigate its case at the trial, including the presentation of evidence as to her claim that appellee failed to properly investigate the CSPA claims. The magistrate specifically ruled, however, that appellant failed to prove that appellee improperly investigated all the claims it was required to investigate pursuant to the terms of the policies and failed to prove that appellee improperly and inadequately defended the insured in the underlying lawsuit. Given these findings, which were subsequently adopted as part of the magistrate's decision by the trial court, appellant can show no prejudice in the trial court's disposition of appellant's bad-faith [*19] claims.

For the foregoing reasons, appellant's first assignment of error is sustained in part and reversed in part.

In her second and third assignments of error, appellant challenges the trial court's resolution of whether appellant proved that appellee was barred from denying coverage by application of the doctrine of waiver and estoppel. [HN9] The doctrine of waiver and estoppel has been held to bar an insurer from denying coverage if the insurer makes a clear misrepresentation as to coverage or if the insurer provides a defense without reserving its rights for a period of time sufficient to prejudice the insured's ability to conduct its own defense. See *Turner Liquidating*, 93 Ohio App. 3d at 299-300; see, also, *Collins v. Grange Mut. Cas. Co.* (1997), 124 Ohio App. 3d 574, 577-579, 706 N.E.2d 856. The trial court referred the matter to the magistrate for trial on this issue. As noted above, the magistrate ruled that neither doctrine factually applied in this case, and the trial court adopted this decision. On appeal, appellant essentially makes two arguments: (1) that the trial court improperly placed the burden on appellant to show prejudice; and (2) that [*20] the trial court's finding (by adopting the magistrate's report) that appellee's insured was not prejudiced by the manner or timing of appellee's reservation of rights was against the manifest weight of the evidence. We find neither of appellant's contentions persuasive.

Appellant contends that a presumption of prejudice arises because of the inherent conflict of interest whenever an insurer fails to approve coverage for all claims asserted against the insured but, nevertheless, "unilaterally controls" the defense of the insured. (Appellant's brief at 43.) Appellant cites no authority for this broad and sweeping contention. Cf. *Collins*, at 577 (noting that "there is an obvious potential for a conflict of interest

where an insured assumes and controls a defense for its insured but also intends to challenge its coverage liability if the defense is unsuccessful"). Rather, appellant primarily relies on cases, in particular, *Belcher v. Dooley*, 1988 Ohio App. LEXIS 508 (Feb. 16, 1988), Montgomery App. No. 10444, unreported, which discuss the inherent conflict between an insured and an insurer when the damages sought by a third party in the underlying litigation may have been caused by insured's intentional [*21] acts and, thus, are not covered by the insurance policy.

In *Belcher*, the court noted that the proper course of conduct for the insurance company in such cases is to inform its insured to obtain his own counsel at the expense of the insurance company. According to the court, such a procedure would ensure that counsel's interests and the client's would be identical and would remove any conflict of interest that would exist between counsel, chosen by the insurer, and his client. In so discussing, the *Belcher* court relied extensively on Chief Justice O'Neill's concurring opinion in *State Farm Fire & Cas. Co. v. Pildner* (1974), 40 Ohio St. 2d 101, 105-106, 321 N.E.2d 600, in which he stated:

If the insurance company does not assert noncoverage, there is no conflict between the insurer and the insured who is being sued, and hence the counsel selected by the insurance company could ethically defend the insured. However, in the present case the insurer alleges that the insured intentionally caused the injuries which are the basis of the damage suit, and that, therefore, his actions are outside the scope of the insurance policy. In such case, although the company [*22] has a duty to defend the insured, there is an undeniable conflict between the insurance company and the insured. The insured, if he cannot totally escape liability, will desire to show that his liability is based on negligent conduct which is covered by his insurance policy. The insurance company will, on the other hand, desire to prove that the insured's actions were intentional and hence not within the scope of the policy. Under these facts, I believe that D. R. 5-105, which is mandatory, dictates that the insurance company not be allowed to select counsel to defend the insured. The adversity between the insurance company and the insured, coupled with the pressure which the insurance company could exert on counsel selected by it, simply presents too great a possibility that that counsel's loyalty to the insured will be diluted.

The insurance company, when it notifies an insured who is being sued that it denies coverage, should invite the insured to select his own counsel to represent him in the damage action. If the action is one in which the insurance company has a duty to defend, reasonable attorney fees and other proper costs incurred by the insured in

making his defense [*23] will ultimately have to be assumed by the insurance company. ***

Appellant has failed to show how such adversity was present in the underlying litigation here. Appellee defended its insured, B&B Marine, on all claims in the underlying litigation. The facts related to the negligence claims (those for which appellee had potential liability) had no relation to the facts forming the basis of the CSPA violations. Thus, appellee's interest and efforts in defending B&B Marine on the negligence claims (and thus avoiding liability coverage) did not increase B&B Marine's exposure to liability under the CSPA. In short, the trial court did not err in failing to presume any prejudice in this case based upon a claimed inherent conflict of interest between appellee and its insured. Cf. *Lusk v. Imperial Cas. & Indemn. Co.* (1992), 78 Ohio App. 3d 11, 16, 603 N.E.2d 420 [HN10] (no conflict of interest existed when insurer did not defend on theory that insured's liability precluded their own).

Similarly, we reject appellant's contention that the trial court's finding that B&B Marine was not prejudiced by the timing or manner of appellee's reservation of rights is against the manifest weight [*24] of the evidence. [HN11] In considering whether a civil judgment is against the manifest weight of the evidence, we are guided by the presumption that the findings of the trier of fact are correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77, 79-80, 461 N.E.2d 1273. Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C. E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279, 376 N.E.2d 578, syllabus; see, also, *Myers v. Garson* (1993), 66 Ohio St. 3d 610, 615-616, 614 N.E.2d 742 ("an appellate court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court").

Here, there is competent and credible evidence supporting the trial court's conclusion that B&B Marine was

not prejudiced by the timing and manner of appellee's reservation of rights. The record reveals that the underlying lawsuit was filed on March 1, 1990. On April 2, 1990, appellee [*25] sent a general reservation of rights letter to B&B Marine. On April 18, 1991, appellee sent B&B Marine's counsel a specific reservation of rights letter, denying coverage for the CSPA claims. Evidence in the record also supports a conclusion that counsel for B&B Marine informed B&B Marine's general partners about appellee's denial of coverage on the CSPA claims and that neither partner, Robert McCoy nor Bill Fannin, asserted any prejudice by appellee's timing of their reservation of rights letters. Neither partner testified below that they were prejudiced by the timing or manner of appellee's reservation of rights and, in fact, McCoy specifically testified, by way of deposition, that he had not been damaged or disadvantaged by appellee's actions. In sum, the trial court's decision that appellant failed to show that B&B Marine was prejudiced by the timing or manner of appellee's reservation of rights is not against the manifest weight of the evidence. Cf. *Collins, supra* (trial court's finding of prejudice upheld when evidence showed that: [1] insurer initially gave impression that coverage applied; [2] insurer failed to reserve rights sixteen months after assuming [*26] defense; and [3] had insured known earlier, he would have taken a more active role in the litigation and pursued settlement options more aggressively). Appellant's second and third assignments of error are not well-taken and are overruled.

For the foregoing reasons, we find that appellant's first assignment of error is sustained in part and reversed in part, and appellant's second and third assignments of error are not well-taken and are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed in part, reversed in part and this case is remanded to that court for further proceedings.

*Judgment affirmed in part, reversed in part;
case remanded for further proceedings.*

PETREE and BOWMAN, JJ., concur.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NO. 069-722

MICHAEL J. KNAPIK
4312 Bucyrus Avenue
Cleveland, Ohio 44109

CLARENCE C. TOMCZAK
2419 Stanfield Drive
Parma, Ohio 44134

WILLIAM E. GRADY
12885 Bass Lake Road
Chardon, Ohio

GEORGE R. NORRIS
17891 Shurmer Road
Strongsville, Ohio 44136

SAM TANNENBAUM
780 East 266th Street
Euclid, Ohio 44132

MICHAEL J. McLAUGHLIN
1821 West 52nd Street
Cleveland, Ohio

FRANK C. UHER
1148 Mantowlin Pike
Brunswick, Ohio

KENNETH B. DAY
8607 Detroit Avenue
Cleveland, Ohio

ANTONIO AUGUSTUS
17625 Detroit Avenue
Lakewood, Ohio

HARVEY E. DORAN *lee*
1400 West 25th Street
Apartment 204
Cleveland, Ohio

WALTER V. POTOSKY
5965 Edgahill Drive
Parma Heights, Ohio 44130

GEORGE A. GENTILE
4718 Snow Road
Parma, Ohio 44134

RAYMOND BEEDLOW
15518 Clifton Blvd.
Lakewood, Ohio 44107

COMPLAINT
(Trial By Jury Requested)

TAB C

JACK F. ACREE)
37096 Sugar Ridge Road)
North Ridgeville, Ohio)

EDWARD BENKO)
13415 Harlan Avenue)
Lakewood, Ohio 44107)

CHRIST STEIMLE, JR.)
12224 Lorain Avenue)
Cleveland, Ohio 44111)

JOSEPH D. GASTONY)
3205 West 73rd Street)
Cleveland, Ohio)

On behalf of)
themselves and)
all others sim-)
ilarly situated,)
Plaintiffs,)

-vs-

COMPLAINT)
(Trial By Jury Requested))

PENN-CENTRAL COMPANY)
1324 West Third Street)
Cleveland, Ohio,)

and)

UNITED TRANSPORTATION UNION)
15401 Detroit Avenue)
Cleveland, Ohio,)

and)

BROTHERHOOD OF RAILROAD TRAINMEN)
666 Euclid Avenue)
Cleveland, Ohio,)

Defendants.)

1. This action arises under 63 Stat. 485, 49 U.S.C. #5 (2) (Interstate Commerce Act), and the matter in controversy exceeds, exclusive of interests and costs, the sum of \$10,000.00 in respect to each of the plaintiffs. Jurisdiction is also based on 28 U.S.C. #1331.

TAB C

Union Terminal District as Yard Passenger Service Employees. These individuals number approximately 35, and it is therefore impractical to bring them all before the Court; there are questions of law and fact presented herein which are common to the entire class of these persons so situated; and the claims of the plaintiffs herein are typical of the claims of all members of this class who will be fairly and adequately protected by plaintiffs.

3. Plaintiffs allege that up to and at the time of the merger agreement hereinafter referred to they were part of the New York Central Railroad for which they performed regular duties at the Cleveland Union Terminal and received wages and various other fringe benefits.

4. Defendant Penn-Central Company is a corporation which exists as a result of a merger of two (2) railroads formerly known as the Pennsylvania and the New York Central. Said defendant is presently engaged in the business of hauling passengers and freight in interstate commerce for compensation.

5. Defendants United Transportation Union hereinafter referred to as U.T.U. is the successor to the labor organization formerly known as the Brotherhood of Railway Trainmen, hereinafter referred to as B.R.T. Both of these are labor organizations and "representatives" of plaintiffs pursuant to 45 U.S.C. # 151, sixth.

6. The Penn-Central, New York Central, Pennsylvania and the B.R.T. and U.T.U. were all parties to an initial agreement known as "Agreement for the Protection of Employees in the Event of Merger of Pennsylvania and New York Central Railroads.", and various other subsequent agreements hereinafter referred to collectively as Agreement or Agreements.

7. Pursuant to the terms of these Agreements defendants provided that "none of the present employees of either of said carriers shall be deprived of employment or placed in a worse position with respect to compensation.

thereto at any time during such employment." This Agreement further states that all provisions of the Washington Job Agreement --- shall be applied for the protection of all employees --- who may be adversely affected with respect to their compensation, rules, working conditions, fringe benefits or rights and privileges ---."

The Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to "any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination --- beginning at the date he is first deprived of employment ---,"

8. Based upon the above mentioned representations, as well as others not herein stated, the Interstate Commerce Commission approved the merger in that "employees would be retained in their present or comparable employment with no worsening of positions."

9. The Penn-Central, by its conduct deliberately and in bad faith placed Plaintiffs in a worse position by depriving them of employment, compensation, fringe benefits, seniority rights, prior working conditions, rights and privileges, and coordination allowances. Penn-Central's conduct was in violation of these Agreements, and the Interstate Commerce Act, and the Fifth Amendment of the United States Constitution. Plaintiffs further state that these Agreements were a sham and that the misrepresentations made to the Interstate Commerce Commission by the New York Central and Penn-Central were made knowingly and in direct violation of the Interstate Commerce Act, 49 U.S.C. # 1, et seq.

10. Plaintiffs registered complaints to the B.R.T., now known as U.T.U., pursuant to law but said Union has arbitrarily and discriminatorily failed to represent Plaintiffs and has been guilty of bargaining in bad

TAB C

the Penn-Central to deprive plaintiffs of their rights.

11. The above-mentioned conduct of defendants has damaged plaintiffs by loss of employment, seniority, wages, fringe benefits, welfare and retirement rights and coordination allowances in the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00)

WHEREFORE, plaintiffs pray for judgment against the Defendants, jointly and severally, in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) for damages and punitive damages plus the costs of this action and for such other and further relief as is just and equitable.

TRICARICHI & CARNES
Attorneys at law
75 Public Square, Suite 1310
Cleveland, Ohio 44113
579-1202

BY: _____
CHARLES S. TRICARICHI

MICHAEL R. KUBE
Attorneys for Plaintiffs



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

74-914

CIVIL ACTION NO.

JUDGE LAMBORN

COMPLAINT - JURY TRIAL REQUESTED

G. V. SOPHNER)
 2538 Delaware Street)
 Wickliffe, Ohio 44092)
)
 P. O. SOWINSKI)
 9210 McCracken Boulevard)
 Garfield Heights, Ohio 44125)
)
 L. S. PENTZ)
 1864 West 45th Street)
 Cleveland, Ohio 44102)
)
 J. CRTALIC)
 2985 Bishop Road)
 Willoughby Hills, Ohio 44092)
)
 R. G. McNEELY)
 11918 Franklin Boulevard)
 Lakewood, Ohio 44107)
)
 JOHN F. GALLAGHER)
 4457 West 66th Street)
 Brooklyn, Ohio 44144)
)
 JOSEPH M. JARABECK)
 11912 Mortimer Avenue)
 Cleveland, Ohio 44111)
)
 E. W. KOCHENDERFER)
 10814 Glamer Drive)
 Parma, Ohio 44129)
)
 GUS JANKE)
 12350 S. W. 188th Terrace)
 Miami, Florida 33157)
)
 P. E. MOLAUGHLIN)
 1821 West 52nd Street)
 Cleveland, Ohio 44102)
)
 WILLIAM BILINSKY)
 8210 Essen Avenue)
 Parma, Ohio 44129)
)
 PAUL FOECKING)
 3212 Bowman Lane)
 Parma, Ohio 44134)
)
 A. C. NOVOTNY)
 2684 Dale Avenue)
 Rocky River, Ohio 44116)

FILED
 Oct 9 3 32 PM '74
 CLERK OF COURT
 NORTHERN DISTRICT OF OHIO

M. OPALK
1533 East 256th Street
Euclid, Ohio 44132

R. N. SCHREINER
760 East 258th Street
Euclid, Ohio 44132

and

PAUL SCUBA
4600 West 11th Street
Cleveland, Ohio 44109

Plaintiffs

-vs-

PENN CENTRAL TRANSPORTATION CO.
Cleveland Union Terminal
Cleveland, Ohio 44113

and

BROTHERHOOD OF RAILWAY CARMEN
6112 West Melrose Street
Chicago, Illinois 60634

Defendants

1. This action arises under Section 5 of the Interstate Commerce Act, 49 U.S.C. §9, and the Railway Labor Act.
2. Plaintiffs were all employees of the New York Central Railroad prior to the time of merger hereinafter referred to.
3. Plaintiffs at all times relevant herein were members of Defendant Union, the Brotherhood of Railway Carmen.
4. Defendant Penn Central Company is a corporation which exists as a result of a merger of two (2) railroads, the Pennsylvania and the New York Central.
5. Both of Defendant's predecessors were and said Defendant is now engaged in interstate commerce.
6. Prior to the merger, Plaintiffs worked at the Cleveland Union Terminal.
7. Prior to the date of merger, the aforementioned railroads and various Unions, including Defendant Union, entered into an Agreement called

the "Agreement for the Protection of Employees in the Event of Merger of Pennsylvania and New York Central Railroads", and various other subsequent agreements hereinafter referred to collectively as Agreement or Agreements.

8. Pursuant to the terms of these Agreements, defendants provided that "none of the present employees of either of said carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." This Agreement further states that all provisions of the Washington Job Agreement ". . . shall be applied for the protection of all employees . . . who may be adversely affected with respect to their compensation, rules, working conditions, fringe benefits or rights and privileges. . ."

The Washington Job Agreement specifically provides for the payment of a scheduled separation allowance to "any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination. . . beginning at the date he is first deprived of employment . . ."

9. Based upon the above-mentioned representations, as well as others not herein stated, the Interstate Commerce Commission initially approved the merger in that "employees would be retained in their present or comparable employment with no worsening of positions" and has issued subsequent orders as referred to above.

10. The Penn Central, by its conduct, deliberately and in bad faith, placed Plaintiffs in a worse position by depriving them of employment, compensation, fringe benefits, seniority rights, prior working conditions, rights and privileges, and coordination allowances. Penn Central's conduct was in violation of these Agreements and the Interstate Commerce Act. Plaintiffs further state that these Agreements were a sham and that the misrepresentations made to the Interstate Commerce Commission by the New York Central and Penn Central were made knowingly and in direct violation of the Interstate Commerce Act.

11. Plaintiffs registered complaints to Defendant Union, but said Union has arbitrarily and discriminatorily failed to represent Plaintiffs and has been guilty of bargaining in bad faith. Any other further action through their "representatives" would be futile. Plaintiffs further allege that their "representatives" not only failed to adequately and fairly represent them, but acted in concert with the Penn Central to deprive Plaintiffs of their rights.

12. The above-mentioned conduct of Defendants has damaged Plaintiffs by loss of employment, seniority, wages, fringe benefits, welfare and retirement rights and coordination allowances in the sum of Two Million Dollars (\$2,000,000.00).

WHEREFORE, Plaintiffs pray for judgment against the Defendants, jointly and severally, in the amount of Two Million Dollars (\$2,000,000.00), the costs of this action, and for such other and further relief as is just and equitable.

TRICARICHI, CARNES & KUBE

Charles S. Tricarichi

Michael R. Kube

Charles S. Tricarichi
Michael R. Kube, of counsel
Attorneys for Plaintiffs
55 Public Square - Suite 2120
Cleveland, Ohio 44113
861-6677



E



40-267

TAB E

71-1322

Jeffrey FILED
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CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT B. WATJEN
24213 Knickerbocker Road
Bay Village, Ohio

PHILLIP J. FRANZ
6823 Frye Road
Middleburgh Heights, Ohio

ANNA MAE WILGER
6410 Beechmont Avenue
Cincinnati, Ohio 45230

THOMAS D. O'NEIL
820 Court Street
Syracuse, New York

Plaintiffs

-vs-

PENN CENTRAL COMPANY,
formerly known as
THE PENNSYLVANIA-NEW YORK CENTRAL
TRANSPORTATION COMPANY
(a corporation)
1324 West Third Street
Cleveland, Ohio 44113

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES,
also known as BROTHERHOOD OF RAIL-
WAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION
EMPLOYEES
(an unincorporated association)
Colonial Hotel
Cleveland, Ohio

Defendants

C69-675

CIVIL ACTION NO. _____

COMPLAINT

Plaintiffs bring this action against the Defendants
and allege as follows:

LAW OFFICES OF
BERNARD S. GOLDFARB
1625 THE ILLUMINATING BUILDING
NEW YORK, N.Y.

TAB E

I. JURISDICTION

1. (a) Jurisdiction is based on 28 U.S.C. §1331 and the matter in controversy exceeds the sum of Ten Thousand Dollars (\$10,000.00). In addition to other matters, this action concerns itself with the application, interpretation and compliance of and with 63 Stat. 485, 49 U.S.C. §5 (2) (Interstate Commerce Act), and generally with the Interstate Commerce Act, 72 Stat. 568, et sequi., as amended, 49 U.S.C. §1, et sequi.

(b) Jurisdiction is also based on 28 U.S.C. §1332 by virtue of the fact that Plaintiff, Thomas D. O'Neil, is a citizen of the State of New York, and Plaintiffs, Robert B. Watjen, Phillip J. Franz and Anna Mae Wilger, are citizens of the State of Ohio. The Defendant, Penn Central Company, formerly known as The Pennsylvania-New York Central Transportation Company, is a corporation organized under the laws of the Commonwealth of Pennsylvania and does business in the State of Ohio in interstate commerce. The Defendant, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, is an unincorporated association domiciled in the State of Ohio. The amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000.00). Both Defendants maintain offices in this district.

II. DESCRIPTION OF PARTIES, CONTRACTS, ETC.

2. (a) The Plaintiffs hereinafter will be referred to by their last name only.

(b) The Penn-Central Company will be referred to as "Penn-Central."

(c) The Brotherhood of Railway, Airline and Steamship, Freight Handlers, Express and Station Employees also known as the Brotherhood of Railway and Steamship Clerks,

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ATTORNEY FOR PLAINTIFF

Freight Handlers, Express and Station Employees shall be hereinafter referred to as "Brotherhood of Railway Clerks." When a lodge number is indicated, the designation will be added to "Brotherhood of Railway Clerks."

(d) The Labor Agreement between the parties is known as "Agreement Entered Into By and Between the Pennsylvania-New York Central Transportation Company and Clerical, Other Office, Station and Store House Employees of the Pennsylvania-New York Central Transportation Company designated herein represented by Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees effective February 1, 1968," and all attachments, appendices, memorandum, etc. attached thereto shall hereinafter be referred to collectively as the "Labor Agreement" or "Agreement."

3. The merging companies are the Pennsylvania Railroad Company hereinafter referred to as the "Pennsylvania" and the New York Central Railroad Company hereinafter referred to as the "New York Central" or "Central" and the new company known as the Penn-Central Company, formerly known as the Pennsylvania-New York Central Transportation Company referred to as the "Penn-Central" or the "Merged Company."

4. The Interstate Commerce Commission decision approving the merger is entitled Pennsylvania Railway Company-Merger-New York Central Railroad Company, decided April 6, 1966, Finance Docket No. 21989 and reported at 327 I.C.C. 475, shall be identified as the "ICC Report."

5. The Interstate Commerce Act (49 U.S.C. §1, et sequi, as amended) shall be referred to as the "Act" and the Interstate Commerce Commission shall be referred to as the "Commission."

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III. PLAINTIFFS

6. (a) Plaintiffs Watjen and Franz and O'Neil were employed by the New York Central as rate clerks, but their jobs were abolished by the Penn-Central and they were not reassigned or compensated in accordance with the Act or the Labor Agreement. Penn-Central's conduct caused and/or provoked their termination of employment.

(b) Plaintiff Wilger was head of the Accounting Department with the New York Central but that her job was abolished with the Penn-Central and she was not reassigned or compensated in accordance with the Act or the Labor Agreement. Penn-Central's conduct caused and/or provoked her termination of employment.

7. All Plaintiffs were members of lodges of Brotherhood of Railway Clerks and were members in good standing and were entitled to protection of the Act and the Labor Agreement.

IV. DEFENDANTS

8. The Pennsylvania and the New York Central and the Penn-Central are railroad companies subject to Part I of the Act and are engaged in the business of hauling passengers and freight for compensation in interstate commerce.

9. The Brotherhood of Railway Clerks and individual lodges of the Brotherhood of Railway Clerks are "labor organizations" and "representative" of Plaintiffs. (45 U.S.C. §151, Sixth.)

10. The Penn-Central, the New York Central, the Pennsylvania, the pertinent lodges of the Brotherhood of Railway Clerks and the Brotherhood of Railway Clerks were parties to the Labor Agreement and Agreements that covered the plaintiffs to this action.

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TAB E

V. BASIS FOR THE COMPLAINT

11. The Commission approved the merger of the Pennsylvania and the New York Central and the merged company became the Pennsylvania-New York Central Transportation Company (Penn-Central or Merged Company). The Commission based its approval on the Act and the Agreement of May 20, 1964 between the parties (part of Labor Agreement). In addition thereto, the Plaintiffs had all their rights, under the Labor Agreement and any other prior labor agreement.

12. The Penn-Central, subsequent to the merger, retained the Plaintiffs for a period of time in their positions but then deprived them of their employment and/or compensation, contrary to the Act, the Labor Agreements, the ICC Report, causing them damage as hereinafter claimed.

13. The Labor Agreement provides for seniority and the protection of rights of employees of the New York Central and the Pennsylvania and the rights of such employees in the Merged Company. The Agreement purports to give protection to employees in accordance with Section 5(2)(f) of the Act which provides that the effect of a merger as approved by the Commission "will not result in employees of the carrier or carriers of the railroad affected by such should be in a worse position with respect to their employment" This also included provisions for the employees of the Pennsylvania and the New York Central and that none of the employees of either carrier shall be deprived of employment or "placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.

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14. The Agreements between the parties further provided for arbitration with respect to the interpretation or application of the Agreement. The Agreement of May, 1936, Washington, D.C., Appendix A, (part of the Labor Agreement) makes provision for "coordination allowances" in the event an employee is "deprived of employment" and "separation allowances" for those employees separated or terminated.

15. In the merger proceedings before the Commission, the ICC Report provided that in reference to the employees "none shall be deprived of employment or placed in a worse position with respect to compensation, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment (p. 543). The Report further provided that employees may be transferred "across seniority lines" but "within their craft on the basis of implementing agreements to be negotiated from time to time as provided for in the basic agreement" (p. 543). The Commission accepted the Agreement of May 20, 1964, and concluded that the "employees would be retained in their present or comparable employment, with no worsening of positions" (p. 544). Based on these representations, the merger was approved.

16. The Penn-Central, by its conduct, deliberately and in bad faith placed the Plaintiffs in a "worse position" and deprived them of employment. Penn-Central's conduct was in violation of the Agreements and the Act. Plaintiffs also allege that the Labor Agreements were a sham and that the New York Central misrepresented to the Commission in violation of the Act and the Penn-Central furthered the misrepresentation knowingly.

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LAW OFFICES OF
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17. Plaintiffs complained to the Brotherhood of Railway Clerks and to the Lodges of Brotherhood of Railway Clerks, pursuant to the Labor Agreement and pursuant to law, but that the Brotherhood of Railway Clerks arbitrarily and discriminatorily failed to represent the Plaintiffs, and that the Defendants, Brotherhood of Railway Clerks has been guilty of bad faith conduct. Plaintiffs further allege any other or further action through their "representatives" would be futile. Plaintiffs further allege that Defendant, Brotherhood of Railway Clerks, failed to adequately and fairly represent the Plaintiffs.

18. The Penn-Central and the Brotherhood of Railway Clerks and the pertinent lodges of Brotherhood of Railway Clerks acted in concert to deprive the Plaintiffs of their rights under law and the Labor Agreements and that such conspiracy damaged the Plaintiffs.

VI. DAMAGES

19. Plaintiffs state that they have been damaged by the loss of their employment, loss of seniority, wages, fringe benefits, welfare and retirement rights, separation allowances, in the sum of Six Hundred Thousand Dollars (\$600,000.00).

WHEREFORE, Plaintiffs pray for judgment against the Defendants, jointly and severally, in the amount of Six Hundred Thousand Dollars (\$600,000.00) for damages and punitive damages plus costs of this action and for such other and further relief as is just and equitable.

Dated at Cleveland, Ohio
 this 2 day of Sept, 1969.


 Bernard S. Goldfarb
 Attorney for Plaintiffs
 1625 The Illuminating Building
 55 Public Sq., Cleveland, Ohio 44113
 781-0383

TAB E

JURY DEMAND ENDORSEMENT

Pursuant to Rule 38, F.R.C.P., Plaintiffs demand
trial by jury.


Attorney for Plaintiffs

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F



LEXSEE 2004 OHIO APP LEXIS 2489



Positive
As of: Mar 11, 2008

**PATRICK TURNER, Plaintiff-Appellant, - vs - MARY LANGENBRUNNER, et al.,
Defendants-Appellees.**

CASE NO. CA2003-10-099

**COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, WAR-
REN COUNTY**

2004 Ohio 2814; 2004 Ohio App. LEXIS 2489

June 1, 2004, Decided

PRIOR HISTORY: **[**1]** CIVIL APPEAL FROM
WARREN COUNTY COURT OF COMMON PLEAS.
Case No. 02CV60257.

DISPOSITION: Judgment of the Court of Common
Pleas affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant neighbor chal-
lenged an order from the Warren County Court of Com-
mon Pleas (Ohio), which granted summary judgment to
appellee landowners in the neighbor's breach of contract
action where the neighbor had initiated foreclosure of a
mechanics' lien against the landowner's property.

OVERVIEW: The parties were adjoining home owners
who experienced water runoff from subdivisions up-
stream of their properties. The neighbor and the land-
owners orally agreed that the neighbor would build a
retaining wall and the landowners would pay for materi-
als. The neighbor sent the landowners a letter memorial-
izing the deal. The neighbor finished the work and sent
the landowners an invoice that included a charge for his
work. The landowners refused to pay, and the neighbor
filed a mechanics lien against the landowners' real prop-
erty and began a foreclosure action. The landowners filed
for summary judgment, arguing the agreement was for
them to pay for materials, which they did, and not labor.
The neighbor argued he agreed to a weekend of work
and that the landowners were responsible for any time
beyond that. Summary judgment was entered in the

landowners' favor and the neighbor appealed. The court
found that the letter the neighbor sent was a complete
contract and the parol evidence rule prevented alteration
of the terms outlined in the letter. Since the letter was
clear on its terms that the neighbor would build the wall
in exchange for provision of materials, summary judg-
ment was proper.

OUTCOME: The court affirmed the summary judgment
in the landowners' favor.

CORE TERMS: summary judgment, concrete, matter
of law, parol evidence, invoice, express contract, storm
drainage, neighbor, integrated, donated, retaining wall,
approximate, cure, oral agreement, assignments of error,
moving party, reasonable minds, subject matter, unjust
enrichment, genuine, trespassing, erosion, donate, issue
of material fact, written contract, written agreement,
genuine issue, entitled to judgment, essential terms, es-
sential elements

LexisNexis(R) Headnotes

*Civil Procedure > Summary Judgment > Standards >
Genuine Disputes*

*Civil Procedure > Summary Judgment > Standards >
Materiality*

[HN1] Pursuant to *Ohio R. Civ. P. 56(C)*, summary
judgment is appropriate when no genuine issue of mate-
rial fact remains to be litigated; the moving party is enti-

tled to judgment as a matter of law; and reasonable minds can come to but one conclusion.

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

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

Contracts Law > Contract Interpretation > General Overview

[HN2] The construction or interpretation of a contract is a matter of law to be resolved by the court. Questions of law are reviewed by appellate courts de novo.

Contracts Law > Contract Interpretation > General Overview

Evidence > Inferences & Presumptions > General Overview

Labor & Employment Law > Employment Relationships > General Overview

[HN3] The cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement.

Contracts Law > Formation > Acceptance > General Overview

Contracts Law > Formation > Meeting of Minds

Contracts Law > Formation > Offers > General Overview

[HN4] To prove the existence of a contract, a party must establish the essential elements of a contract: an offer, an acceptance, a meeting of the minds, an exchange of consideration, and certainty as to the essential terms of the contract. A valid contract must be specific as to its essential terms, such as the identity of the parties to be bound, the subject matter of the contract, the consideration to be exchanged, and the price to be paid. Additionally, an enforceable agreement must be mutual and must bind all parties to the contract.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

[HN5] The parol evidence rule is a rule of substantive law that prohibits parties to a contract from later contradicting the express terms of the contract with evidence of other alleged or actual agreements. Absent claims of

fraud, mistake, or some other invalidating cause, the parties' written agreement may therefore not be varied, contradicted, or supplemented by evidence of prior or contemporaneous oral agreements, or by written agreements that the terms of the principal contract do not expressly authorize. However, the parol evidence rule applies only to integrated writings.

Contracts Law > Contract Interpretation > General Overview

[HN6] The question of whether a contract is integrated is one of law. The crucial issue is whether the parties intended the written instrument to serve as the exclusive embodiment of their agreement. To resolve this issue, a court should first look to the written contract itself. The court should also consider the circumstances surrounding the contract, including prior negotiations between the parties.

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Formation > General Overview

[HN7] In a contract that is not for goods, the essential terms are, generally, the parties and the subject matter. Furthermore, a written contract which does not specify the price or amount of compensation for services is not void for uncertainty.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Standards > Appropriateness

Civil Procedure > Summary Judgment > Standards > Materiality

[HN8] Pursuant to *Ohio R. Civ. P. 56(C)*, summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

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

[HN9] Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN10] The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Supporting Materials > General Overview

[HN11] The summary judgment movant must point to some evidence in the record of the type listed in *Ohio R. Civ. P. 56(C)* in support of the motion. Once this burden is satisfied, the nonmoving party has the burden, as set forth in *Ohio R. Civ. P. 56(E)*, to offer specific facts showing a genuine issue for trial. The nonmoving party may not rest upon the mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material showing that a genuine dispute over material facts exists.

Contracts Law > Remedies > Equitable Relief > General Overview
Contracts Law > Types of Contracts > Implied-in-Fact Contracts
Contracts Law > Types of Contracts > Implied-in-Law Contracts

[HN12] Unjust enrichment is an equitable doctrine to justify a quasi-contractual remedy that operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
Contracts Law > Types of Contracts > Oral Agreements Evidence > Documentary Evidence > Parol Evidence

[HN13] The terms of a contract cannot be varied, contradicted, or supplemented by evidence of prior or contemporaneous oral agreement pursuant to the parol evidence rule. The scope of any contractual provision must not be extended beyond the plain import of the words used when such give reasonable effect.

COUNSEL: William G. Fowler, Lebanon, Ohio, for plaintiff-appellant.

Constance A. Hill, Cincinnati, Ohio, for defendant-appellee, Mary Langenbrunner.

Rachel A. Hutzel, Warren County Prosecuting Attorney, Christopher A. Watkins, Lebanon, Ohio, for defendants, Nick Nelson and Jim Lefevers.

JUDGES: VALEN, J. POWELL, P.J., and WALSH, J., concur.

OPINION BY: VALEN

OPINION

VALEN, J.

[*P1] Plaintiff-appellant, Patrick Turner, appeals the decision of the Warren County Court of Common Pleas granting summary judgment to defendants-appellees, Ralph and Mary Langenbrunner, in a breach of contract action. We affirm the decision of the trial court.¹

1 Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

[*P2] During 1997, appellant and the Langenbrunners experienced water runoff from two subdivisions upstream of their property. Appellant [*P2] and the Langenbrunners reside on adjacent lots at 9575 Winding Lane and 9571 Winding Lane.

[*P3] In early 1998, appellant and Mary Langenbrunner discussed solutions to alleviate the water runoff problem. Appellant has 30 years of experience in construction work and he outlined a possible solution. Appellant entered into an oral contract with Mary Langenbrunner to construct a catch basin and concrete retaining wall to minimize the water runoff. According to Mary Langenbrunner, appellant agreed to donate his labor if she agreed to pay for all of the materials costs. Appellant maintains he only agreed to donate one weekend of labor.

[*P4] However, appellant reduced the arrangement to writing shortly after the oral agreement.² Appellant wrote a letter stating that it is in "reference to the issue of the over abundance of storm drainage water, trespassing on your property as well as mine." The letter informs the Langenbrunners that the approximate costs to cure the erosion issue will be \$ 2,199.12. However, the letter advises the Langenbrunners that "all costs are per actual invoices or receipts." Lastly, the letter states that

"Neighbor Labor" is "Donated." The letter is signed by appellant, [**3] "Patrick E. Turner (neighbor)."

2 We have attached the letter as an appendix at the end of the opinion.

[*P5] Appellant completed the work on June 12, 1998. Appellant then submitted an invoice to the Langenbrunners for his labor. Mary Langenbrunner declined to pay the invoice because her understanding of the agreement was that appellant's labor was donated. On August 4, 1998, appellant filed a mechanics lien against the Langenbrunners' real property in the amount of \$ 17,020.

[*P6] On November 27, 2002, appellant filed a complaint in foreclosure against the Langenbrunners' real property. Mary Langenbrunner filed an answer to the complaint on December 16, 2002. On July 21, 2003, the Langenbrunners moved for summary judgment. On September 3, 2002, the trial court granted the Langenbrunners' motion for summary judgment.

[*P7] Appellant appeals the decision raising three assignments of error:

[*P8] Assignment of Error No. 1:

[*P9] "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT PLAINTIFF'S LETTER TO DEFENDANT IS AN EXPRESS CONTRACT. [**4] "

[*P10] Appellant argues that when "a letter produced by one party to an oral contract lacks the elements of a written contract, it cannot be considered an express contract, thereby excluding parol evidence."

[*P11] [HN1] Pursuant to *Civ.R. 56(C)*, summary judgment is appropriate when no genuine issue of material fact remains to be litigated; the moving party is entitled to judgment as a matter of law; and reasonable minds can come to but one conclusion.

[*P12] [HN2] The construction or interpretation of a contract is a matter of law to be resolved by the court. *Lovewell v. Physicians Ins. Co. of Ohio*, 79 Ohio St.3d 143, 144, 1997 Ohio 175, 679 N.E.2d 1119. Questions of law are reviewed by appellate courts de novo. Id. [HN3] The cardinal purpose for judicial examination of any written instrument "is to ascertain and give effect to the intent of the parties." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 1997 Ohio 202, 678 N.E.2d 519. The intent of the parties to a contract "is presumed to reside in the language they chose to employ in the agreement." Id.

[*P13] [HN4] To prove the existence of a contract, "a party must establish the essential elements of a con-

tract: an offer, [**5] an acceptance, a meeting of the minds, an exchange of consideration, and certainty as to the essential terms of the contract." *Juhasz v. Costanzo (2001)*, 144 Ohio App.3d 756, 762, 2001 Ohio 3338, 761 N.E.2d 679. A valid contract must be specific as to its essential terms, such as the identity of the parties to be bound, the subject matter of the contract, the consideration to be exchanged, and the price to be paid. *Alligood v. Proctor & Gamble Co. (1991)*, 72 Ohio App.3d 309, 311, 594 N.E.2d 668. Additionally, an enforceable agreement must be mutual and must bind all parties to the contract. *Fanning v. Insurance Co. (1881)*, 37 Ohio St. 339, 343-344.

[*P14] Upon review, we agree with the trial court's determination that the letter written by appellant meets the requirements of a binding, enforceable written contract. After examining the letter, we find that it contains a discernable offer for acceptance and an indication of what performance would constitute acceptance. Furthermore, it is specific as to the identity of the parties to be bound, the subject matter of the contract, and the consideration to be exchanged.

[*P15] Appellant's letter is addressed to the Langenbrunners. The letter states [**6] it is in "reference to the issue of the over abundance of storm drainage water, trespassing on your property as well as mine." Appellant then states that he has "prepared a summary of the approximate costs associated with helping to cure or help lessen the erosion issue at large." The letter itemizes the costs for materials at an approximate total of \$ 2199.12.

[*P16] However, the letter also advises the Langenbrunners that, "there is absolutely no guarantee that this is a perfect solution to the problem." Furthermore, the letter advises them that "all costs are per actual invoices or receipts." Lastly, the letter states that "Neighbor Labor" is "Donated." The letter is signed by appellant as "Patrick E. Turner (neighbor)." Both parties consented to the terms of the contract. Appellant completed the work described in the letter and Mary Langenbrunner paid for all the necessary building materials.

[*P17] Having carefully reviewed the letter in question, and having thoroughly considered each of the arguments presented by the parties, we find that reasonable minds can come to but one conclusion; that the letter is an express contract as a matter of law. Consequently, the first assignment of error [**7] is overruled.

[*P18] Assignment of Error No. 2:

[*P19] "THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT CONSIDERING PAROL EVIDENCE BECAUSE PLAINTIFF'S LETTER TO DEFENDANT IS NOT A FULL INTEGRATION OF THE AGREEMENT."

[*P20] Appellant argues that when "a writing is not a full and complete integration of the terms of an agreement, parol evidence is admissible to determine the full agreement."

[*P21] [HN5] The parol evidence rule is a rule of substantive law that prohibits parties to a contract from later contradicting the express terms of the contract with evidence of other alleged or actual agreements. See *Brantley Venture Partners II, L.P. v. Dauphin Deposit Bank & Trust Co.* (N.D. Ohio 1998), 7 F. Supp. 2d 936. Absent claims of fraud, mistake, or some other invalidating cause, the parties' written agreement may therefore not be varied, contradicted, or supplemented by evidence of prior or contemporaneous oral agreements, or by written agreements that the terms of the principal contract do not expressly authorize. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 2000 Ohio 7, 734 N.E.2d 782. However, the parol evidence rule applies only to integrated writings. *Id.* at 28.

[*P22] [HN6] The question of whether [*8] a contract is integrated is one of law. *Globe Metallurgical, Inc. v. Hewlett-Packard Co.* (S.D. Ohio 1996), 953 F. Supp. 876, 884. The crucial issue is "whether the parties intended the written instrument to serve as the exclusive embodiment of their agreement." *Id.*, citing *Banco Do Brasil, S.A. v. Latian, Inc.* (Cal. Ct. App. 1991), 234 Cal. App. 3d 973, 1001, 285 Cal. Rptr. 870. To resolve this issue, the Court should first look to the written contract itself. *Id.* The Court should also consider the circumstances surrounding the contract, including prior negotiations between the parties. *Id.*

[*P23] Upon examining the letter, we find that it is intended by the parties to be the complete expression of their agreement. The letter was the only written agreement between the parties. The letter outlines the need for the agreement, "the overabundance of storm drainage water trespassing" on both parties' property. It itemizes the Langenbrunn's cost at \$ 2199.12 for materials to "help to cure or lessen the erosion issue."

[*P24] The letter also contains clauses that seek to limit appellant's liability. The letter states that "there is absolutely no guarantee that this is [*9] a perfect solution to the problem." Appellant's letter also seeks to limit his liability for miscalculations in material costs by stating that "all costs are per actual invoices or receipts."

[*P25] However, appellant argues that the letter cannot be an integrated contract because it does not include essential elements, particularly the expenses for the concrete retaining wall. Yet, the letter itemizes the costs for the concrete retaining wall as "concrete costs, backhoe costs, and form materials costs. Concrete costs are approximately \$ 55.00 per cubic yard." Consequently, the contract is fully integrated even though it lacks item-

ized expenses for the concrete retaining wall because the contract informs the Langenbrunn's that "all costs are per actual invoice."

[*P26] [HN7] Furthermore, in a contract that is not for goods, the essential terms are, generally, the parties and the subject matter. *Nilavar v. Osborn* (1998), 127 Ohio App. 3d 1, 13, 711 N.E.2d 726. Furthermore, a written contract which does not specify the price or amount of compensation for services is not void for uncertainty. *In re estate of Butler* (1940), 137 Ohio St. 96, 112, 28 N.E.2d 186.

[*P27] We find that the letter was intended [*10] by the parties to be the complete expression of their agreement and is a fully integrated contract. Therefore, the parol evidence rule applies. *Galmish*, 90 Ohio St.3d at 28. As such, an oral agreement cannot be enforced in preference to the signed writing that pertains to exactly the same subject matter, yet has different terms. *Id.* at 29. Consequently, the second assignment of error is overruled.

[*P28] Assignment of Error No. 3:

[*P29] "THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS."

[*P30] Appellant argues that when "there is a material issue of fact as to the existence of an express contract, summary judgment is not proper where there is a material issue of fact to the moving party's unjust enrichment."

[*P31] [HN8] Pursuant to *Civ.R. 56(C)*, summary judgment is proper if:

[*P32] "(1) No genuine issue as to any material fact remains to be litigated;

[*P33] "(2) the moving party is entitled to judgment as a matter of law; and

[*P34] "(3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary [*11] judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

[*P35] [HN9] Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491, 609 N.E.2d 1272. [HN10] The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that

demonstrate an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264.

[*P36] [HN11] The movant must point to some evidence in the record of the type listed in *Civ.R. 56(C)* in support of the motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in *Civ.R. 56(E)*, to offer specific facts showing a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material showing that a genuine dispute over material facts exists. *Henkle v. Henkle (1991)*, 75 Ohio App.3d 732, 735, 600 N.E.2d 791. [**12]

[*P37] Appellant claims he only agreed to donate one weekend of labor. Therefore, appellant argues that he conferred a benefit upon Langenbrunner when the storm drainage job required more than one weekend to complete. He argues that Langenbrunner had knowledge of that benefit and to allow her to retain the benefit would be unjust. As a result, appellant argues there is a material issue of fact concerning unjust enrichment and summary judgment is therefore not proper.

[*P38] [HN12] Unjust enrichment is an equitable doctrine to justify a quasi-contractual remedy that operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another. *University Hospitals of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 130, 2002 Ohio 3748, 772 N.E.2d 105. As stated above, we find appellant's letter is an express contract. Because there is a valid, enforceable contract in this case, the doctrine of unjust enrichment is not applicable. *Id.*

[*P39] Appellant drafted the contract himself and it states that his labor is "Donated." [HN13] The terms of the contract cannot be varied, contradicted, or supplemented by evidence of prior [**13] or contemporaneous oral agreement pursuant to the parol evidence rule. *Galmish*, 90 Ohio St.3d at 29. The scope of any contractual provision "must not be extended beyond the plain import of the words used when such give reasonable effect." *Herder v. Herder (1972)*, 32 Ohio App.2d 75, 76, 288 N.E.2d 213.

[*P40] Furthermore, "a court cannot make contracts for others, read into them terms or language not there, nor change the conditions of contracts lawfully made." *Id.* As the Supreme Court has observed, "it will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be

worth the paper on which they are written." *Upton v. Tribilcock (1875)*, 91 U.S. 45, 50, 23 L. Ed. 203.

[*P41] Therefore, according to the terms of the contract, summary judgment is appropriate because no genuine issue as to any material fact remains to be litigated; the moving party is entitled to judgment as a matter of law; and reasonable minds can come to but one conclusion, and that conclusion is adverse to appellant. Under the [**14] terms of the contract drafted by appellant, no issues of unjust enrichment or any entitlement to recovery for his labor exist because his labor was donated. The third assignment of error is overruled.

[*P42] Judgment affirmed.

POWELL, P.J., and WALSH, J., concur.

APPENDIX 1

Mr. and Mrs. Ralph Langenbrunner Ph. # xxx-xxx-xxxx

9571 Winding Lane

Loveland, Ohio 45140

Reference: Storm Drainage at rear of property

Dear Mr. and Mrs. Langenbrunner,

In reference to the issue of the over abundance of storm drainage water, trespassing on your property as well as mine. I have prepared a summary of the approximate costs associated with helping to cure or help lessen the erosion issues at large. Please examine this and above all remember, that there is absolutely no guarantee that this is a perfect solution to the problem. But per the Professional Engineers recommendations this should cure or help the problem.

Summary of Itemization:

A. Catch basin with grate \$ 538.12

B. 105 L/F of 24 inch Plastic N-12

Drainage Pipe mfg by ADS \$ 1,001.00

C. Approximately 18 Tons of Fill Sand \$ 180.00

D. Approximately 8 Hrs Backhoe Time x \$ 60.00 [**15] per hour \$ 480.00

E. Concrete retaining wall will be concrete costs, backhoe costs, and form materials costs.

Concrete costs are approximately \$ 55.00 per cubic yard.

Total Summary for drainage only, not including concrete retaining wall.

\$ 2,199.12 Approximate costs for materials,

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2004 Ohio 2814, *; 2004 Ohio App. LEXIS 2489, **

Neighbor Labor (Donates) Please remember all costs
are per actual invoices or receipts

Sincerely,

Patrick E. Turner (neighbor) 9575 Winding Lane,
Loveland, Ohio 45140

Home Ph. # xxx-xxx-xxx



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ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 08-14-2013 BY 60322 UCBAW



TAB G

[Cite as *Gemini, Inc. v. Ohio Liquor Control Comm.*, 2007-Ohio-4518.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Gemini, Inc.,	:	
Appellant-Appellant,	:	
v.	:	No. 07AP-112 (C.P.C. No. 06CVF03-3042)
Ohio Liquor Control Commission,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

O P I N I O N

Rendered on August 9, 2007

David J. Graeff, for appellant.

Marc Dann, Attorney General, *Todd A. Nist*, and *Stephen E. DeFrank*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, P.J.

{¶1} Appellant, Gemini, Inc. dba Gemini ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas, in which the court affirmed two separate orders by appellee, the Ohio Liquor Control Commission ("the commission"), revoking appellant's liquor permit. For the reasons that follow, we affirm the trial court's judgment.

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{¶2} This case arose from an investigation conducted by the Ohio Department of Public Safety at an establishment owned by appellant located at 6700 North Dixie Drive in Dayton (hereafter referred to as Gemini I). As a result of this investigation, two notices of hearing were issued to appellant, which were assigned case numbers 1436-05 and 1438-05. The notice in case No. 1436-05 alleged two violations:

Violation #1: On April 15, 2004, you and/or your agent and/or employee AMY did knowingly and/or willfully allow in and upon or about the permit premises, improper conduct, in that you and/or your agent and/or employee AMY did traffic in a narcotic and/or an hallucinogen, to wit, COCAINE, in violation of 4301:1-1-52, a regulation of the Ohio Liquor Control Commission.

Violation #2: On April 15, 2004, you and/or your agent and/or employees SANDY and/or MARYANNE and/or AMY and/or your unidentified agent and/or employee did solicit and/or allowed others to solicit in and upon your permit premises for a thing of value, to wit, DRINKS and/or TIPS FOR DANCERS and/or EMPLOYEES, in violation of 4301:1-1-59, a rule of the Ohio Liquor Control Commission.

Case No. 1438-5 alleged four violations:

Violation #1: On April 23, 2004, you and/or your agent and/or employees NANCY DUKE and/or CYNTHIA BOYNTON and/or HEATHER WENDLING and/or JANICE SAMUELS, did knowingly and/or willfully allow in and upon or about the permit premises, improper conduct, in that you and/or your agent and/or employees NANCY DUKE and/or CYNTHIA BOYNTON and/or HEATHER WENDLING and/or JANICE SAMUELS did possess in [sic] a narcotic, to wit, MARIJUANA, in violation of 4301:1-1-52, a regulation of the Ohio Liquor Control Commission.

Violation #2: On April 23, 2004, you and/or your agent and/or employees NANCY DUKE and/or CYNTHIA BOYNTON and/or HEATHER WENDLING and/or JANICE SAMUELS, did knowingly and/or willfully allow in and upon or about the permit premises, improper conduct, in that you and/or your agent and/or employees NANCY DUKE and/or CYNTHIA

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BOYNTON and/or HEATHER WENDLING and/or JANICE SAMUELS did possess in [sic] a narcotic, to wit, CRACK COCAINE, in violation of 4301:1-1-52, a regulation of the Ohio Liquor Control Commission.

Violation #3: On April 23, 2004, you and/or your agent and/or employees NANCY DUKE and/or CYNTHIA BOYNTON and/or HEATHER WENDLING and/or JANICE SAMUELS, did knowingly and/or willfully allow in and upon or about the permit premises, improper conduct, in that you and/or your agent and/or employees NANCY DUKE and/or CYNTHIA BOYNTON and/or HEATHER WENDLING and/or JANICE SAMUELS did possess in [sic] a narcotic, to wit, CLONAZEPAM 1 mg (1 tablet), in violation of 4301:1-1-52, a regulation of the Ohio Liquor Control Commission.

Violation #4: On or about Sept. 8, 2005, you and/or your agent and/or employee AMANDA WARD and/or your unidentified agent and/or employee was convicted in the Montgomery [County] Common Pleas Court for violating in and upon the permit premises, Section 2925.11(A)(C)(3) [sic] of the Ohio Revised Code (Possession of a Controlled Substance), on April 23, 2004, in violation of Section 4301.25(A) of the Ohio Revised Code.¹

{¶3} At the same time, separate hearing notices were sent alleging various violations at another establishment, known as Gemini II, also owned by appellant, but operated at a different address and under a separate liquor permit. The hearings for each of the two establishments were held on February 1, 2006. The record shows that initially, the hearings regarding the two separate establishments owned by appellant were to be held separately. The assistant attorney general representing the Department of Liquor Control moved into evidence the exhibits regarding the proceedings against Gemini II. At that point, the following colloquy took place:

¹ This statement of the violation represents the violation as amended at the hearing before the commission. The original notice identified a different date of conviction, convicting court, and employee. Appellant did not object to the amendment at the hearing.

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MR. LEWIS [appellant's counsel]: Mr. Chairman, if I may, my comments will be directed both to this particular case, which is Gemini Two as well as Gemini One, so I won't be repetitive and waste this Commission's time.

* * *

MR. DEFRANK [Assistant Attorney General]: I apologize. I thought you indicated that you wanted them separated at first. If you're going to speak to both, would you like the other cases and reports presented to you as well then, before he speaks?

CHAIRMAN MCNAMARA: Probably should if you want to --

MR. LEWIS: My comments only go as general nature of the situation, not to the specific facts of these particular cases.

CHAIRMAN MCNAMARA: All right. Well, why don't we take the exhibits in the other cases then, and Mr. Lewis can cover it all.

(Tr. 9-10.)

{¶4} The assistant attorney general then moved into evidence the exhibits regarding the action against Gemini I. In case No. 1436-05, the state dismissed the second violation, with appellant admitting to the first violation. In case No. 1438-05, the state dismissed the first and third violations, with appellant admitting to the second and fourth violations. Appellant's counsel agreed that appellant was admitting to the three violations, and made a statement to the commission regarding health problems that were being experienced by appellant's owner, Arley Childers, at the time the violations occurred. Appellant's counsel further stated that Arley Childers had since died, and that the executor of the estate, Ken Childers, was present at the hearing. Counsel did not seek to have Ken Childers testify regarding the charges against appellant.

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{¶5} The commission then issued orders in each of the two case numbers involving Gemini I. Each of the orders revoked the liquor permit under which Gemini I was operated. Appellant appealed the orders to the Franklin County Court of Common Pleas, which affirmed the commission's decision.² Appellant then filed this appeal, alleging the following assignments of error:

Assignment of Error One:

WHEN THE TRIAL COURT AFFIRMS THE FINDING OF THE COMMISSION, BASED ON A CONVICTION OF AN INDIVIDUAL, NOT EMPLOYED AT THE TIME OF SAID CONVICTION, THE REVOCATION IS NOT BASED ON RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE, AND THE DECISION OF THE TRIAL COURT IS AN ABUSE OF DISCRETION.

Assignment of Error Two:

THE TRIAL COURT ERRED WHEN IT FOUND THE ORDER OF THE COMMISSION WAS IN ACCORDANCE WITH LAW, BECAUSE THE ORDER OF REVOCATION WAS BASED ON EVIDENCE FROM ANOTHER ESTABLISHMENT, NOT INVOLVED IN THE ALLEGED VIOLATIONS. THIS VIOLATED THE CONSTITUTIONAL RIGHT OF DUE PROCESS.

Assignment of Error Three:

PLAIN ERROR OCCURS WHEN THE RECORD ESTABLISHES THAT THE ADMINISTRATOR OF AN ESTATE WAS AVAILABLE TO TESTIFY AS TO ALLEGED VIOLATIONS IN A LIQUOR ESTABLISHMENT.

{¶6} When a court of common pleas reviews an administrative determination such as that of the commission, its review is "neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence,

² Separate orders were also issued revoking the liquor permit under which the Gemini II establishment was operated. A separate appeal was filed in the court of common pleas for those orders, and the court affirmed the commission's decision.

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and the weight thereof.' " *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, at ¶¶14, 784 N.E.2d 753, quoting *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, 441 N.E.2d 584. In its review, the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, 407 N.E.2d 1265. An appellate court's review of an administrative decision is more limited than that of a common pleas court, being limited to a determination of whether the trial court abused its discretion. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748. However, an appellate court has plenary review of purely legal questions. *Big Bob's, Inc.*, supra, at ¶14.

{¶7} In its first assignment of error, appellant argues that the commission's finding that appellant violated R.C. 4301.25(A)(1) was not supported by reliable, probative and substantial evidence because Amanda Ward was no longer an employee of appellant's at the time she was convicted. The version of R.C. 4301.25(A)(1) in effect at the time of the alleged violations provided that the commission may suspend or revoke a liquor permit upon "[c]onviction of the holder or the holder's agent or employee for violating a section of this chapter or Chapter 4303. of the Revised Code or for a felony."

{¶8} We have held in a number of cases that the plain language in R.C. 4301.25(A)(1) requires a showing that the person convicted was an employee at the time of the conviction, or became an employee after the conviction, in order to support an action against the liquor permit. See, e.g., *Waterloo, Inc. v. Liquor Control Comm.*, Franklin App. No. 02AP-1288, 2003-Ohio-3333; *WCI, Inc. v. Ohio Liquor Control Comm.*,

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Franklin App. No. 05AP-896, 2006-Ohio-2751; *Twenty Two Fifty, Inc. v. Ohio Liquor Control Comm.*, Franklin App. No. 06AP-844, 2007-Ohio-946.

{¶9} However, this case differs from the above-cited cases, because, in this case, appellant admitted to the violation at the hearing before the commission. Appellant argues that the stipulation entered into at the hearing included not just the notice setting forth the violation, but to the rest of the record as well, and appellant claims that it is clear from the face of the record that Amanda Ward was no longer employed by appellant by the time she was convicted on September 8, 2005. However, appellant points to no specific portion of the record that would establish this as a fact.

{¶10} Appellant argues first that it would have been impossible for Amanda Ward to have been employed by appellant at the time of her conviction, because she was sentenced to a three-year sentence of incarceration at that time. However, the fact that Ward's sentence would have prevented her from being employed after her conviction has no bearing on the question of whether she was actually employed at the time of her conviction. Appellant also suggests that the sheer passage of time between the time of the violation in April of 2004, and Ward's conviction in September of 2005, is enough to establish that Ward was no longer employed at the time of her conviction. In the absence of any clear evidence that Ward's employment was terminated prior to her conviction, we are unwilling to make such an inference.

{¶11} The only other evidence in the record appellant can point to is the fact that appellant's counsel informed the commission during the hearing that Ward had been terminated prior to her conviction. However, counsel's statement was made during

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argument in mitigation of the penalty to be imposed. Argument made by counsel cannot be considered as evidence, and no evidence to support counsel's statement was offered.

{¶12} Therefore, appellant's first assignment of error is overruled.

{¶13} In its second assignment of error, appellant argues that its due process rights were violated when the commission hearing became confused between issues involving Gemini I and Gemini II, the other establishment owned by appellant. The record shows that the commission initially planned to hear the two cases separately, with the case against Gemini II to be heard first. It was only when appellant's counsel stated his intention to address the two cases together that the commission elected to have the evidence regarding Gemini I entered into evidence as well. Thus, if there was any confusion between the two cases, that confusion was caused by appellant's counsel.

{¶14} However, the record shows that there was no confusion regarding which charges were applicable to Gemini I and which were applicable to Gemini II. The commission issued separate orders revoking the liquor permit belonging to Gemini II. Appellant filed a separate appeal regarding Gemini II in the court of common pleas, and that court separately affirmed the commission's decision. There is nothing in the record indicating that the issues between the two establishments became so confusing that appellant was not afforded adequate due process.

{¶15} Accordingly, appellant's second assignment of error is overruled.

{¶16} In its third assignment of error, appellant argues that it was plain error for the commission to fail to hear testimony by Ken Childers, executor of the estate of Arley Childers, who was the owner when the violations occurred. Appellant argues that Ken Childers was in a position to testify regarding the previous operation under Arley Childers,

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as well as steps he had taken since becoming executor to ensure that Gemini I was operated in compliance with the laws covering liquor establishments.

{¶17} Appellant's counsel did not seek to have Ken Childers testify at the hearing before the commission, so it cannot be said that the commission took any steps to prevent him from testifying. Counsel made a statement in mitigation that raised a number of steps that had supposedly been taken by Arley Childers to address the violations that had occurred. At the conclusion of his statement, counsel stated, "Other than that, I really have no other information on these incidences. They were obviously very unfortunate, but the permit holder is not here to explain to you why they occurred." (Tr. 14.) Counsel's argument could not have been considered as evidence, and nothing in that argument provides any indication that Ken Childers had any relevant testimony to offer.

{¶18} We find no plain error where appellant's counsel made no attempt to call a particular witness, particularly in these circumstances where there is no indication that the particular witness had relevant testimony to offer. Consequently, appellant's third assignment of error is overruled.

{¶19} Having overruled all of appellant's assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

TYACK and WHITESIDE, JJ., concur.

WHITESIDE, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.



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LABOR RELATIONS REPORTER

Labor Arbitration Reports

124 Lab. Arb. Rep. (BNA) 143

In re CINCINNATI PUBLIC SCHOOLS and CINCINNATI FEDERATION OF TEACHERS

No Number in Original

March 1, 2007

HEADNOTES: EVIDENCE

[**1H] Burden of proof (100.0775) (100.30)

School system's burden of proving that teacher used inappropriate physical force against minor is clear and convincing evidence, since this is consistent with higher standard imposed by legislature for terminating teacher's continuing contract.

DISCHARGE

[**2H] Excessive force (100.552510) (100.0775)

School system did not prove that teacher used inappropriate physical force against student, where witness evidence against him was hearsay statements of students, statements were not in affidavit form or even signed, some of children were called as witnesses in criminal proceeding, and there was no evidence that they were unavailable to testify; party's testimony, otherwise not impeached through other admissions and persuasive evidence, should not be outweighed by hearsay statements.

EVIDENCE

[**3H] Criminal proceeding (100.552514) (100.0775)

Teacher's acquittal in criminal court for using excessive force against minor is not helpful piece of evidence in arbitration of his discharge for using inappropriate physical force, since prosecution in criminal case had to meet more heightened level of proof.

DISCHARGE

[**4H] Excessive force (100.552510)

School system did not prove that teacher used inappropriate physical force against student, even though student went to hospital that evening and was examined for back injury and pain, where he did not complain of injury before he left school and did not testify at hearing so that time gap between incident and trip to hospital could be explored.

[**5H] Inappropriate physical force (100.552510)

School system did not prove that teacher used inappropriate physical force against student, where he restrained student, who had pushed papers off table, in order to protect other students from harm and to prevent any destruction of property.

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124 Lab. Arb. Rep. (BNA) 143, *; LA Headnotes 143, **

[**6H] Conditions on reinstatement (100.559535)

Teacher, who is reinstated because school system did not prove that he used inappropriate physical force when he restrained student, may be provided with corrective and/or progressive discipline counseling if system believes that there was better or more appropriate way for grievant to have addressed and handled his disciplinary issues with student.

CLASSIFICATION-NUMBER: 100.0775, 100.30, 100.552510, 100.552514, 100.559535

COUNSEL: Appearances: For the employer--Cynthia Dillon, general counsel; Deborah Heater, human resources director; Daniel Dalton Jr., principal; Ralph Rowan, investigator; Sarah Eisenhardt, teacher-in charge. For the union--Karen Imbus, Donald Mooney, and Christie Bryant, attorneys; Edward Jaspers, staff representative.

JUDGES: Arbitrator: Mitchell B. Goldberg

OPINION-BY: GOLDBERG, Arbitrator.

OPINION:

I. Introduction and Background.

A ("Grievant"), a fifth grade science teacher at Clifton Elementary School, filed a [*144] grievance on September 1, 2006 after the Board terminated his teaching contract on September 11, 2006 for the 2006-2007 school year. The Board's action was based upon the determination that the Grievant used "inappropriate physical force with a student."

The Grievant and the Union deny that inappropriate force was used. They allege that the Board's decision was unjustified and failed to comply with the requirements of Ohio Revised Code 3319.16. The grievance demands reinstatement, lost pay and the removal of any discipline from the Grievant's personnel file. The Board denied the grievance throughout each grievance step, and the matter proceeded to binding arbitration on December 13, 2006 at the Board's offices. The parties presented sworn testimonial evidence and submitted documentary exhibits. They examined and cross-examined witnesses. n1 A reporter transcribed the proceedings as the official record. Post-hearing briefs were filed after all of the evidence was received. The parties stipulated that all requirements of the grievance procedure and CBA were met, and that the matter is properly before the arbitrator for a final and binding decision.

n1 The student involved in the incident and other students were interviewed. The Board submitted un-sworn written statements into evidence, but the students were not called as witnesses and subject to direct and cross-examination. The names of the students shall be kept confidential in accordance with applicable laws, rules and regulations.

The specific charges against the Grievant are (1) the use of excessive and unnecessary force with a student when he put the student's arms behind him and shoved him on a desk; (2) while restraining the student with his arms across the front of his body, he lifted the student off the floor; and (3) having already subjected [the student] to physically inappropriate force, he acted with additional malice when he took the student's personal property, his backpack, without justification, re-escalating [the student's] distress.

II. Applicable Contractual Provisions.

Section 400

1. b. Administrative Support of Teacher

The Board and Federation agree that consistent enforcement of clear and specific rules are vital to maintaining a safe and orderly learning environment. The classroom teacher shall have the full support of the Board in maintaining classroom discipline. Professional support services shall be provided to insure that every student's opportunity for an education is protected.

c. Self Defense

A teacher may use such force as shall be reasonable and necessary to protect himself/herself from attack, to prevent school property from damage and/or destruction, and/or to prevent possible injury to another person.

* * *

e. Removal of Disruptive Students

A teacher shall have the right to remove from class pupils exhibiting disruptive behavior with reasons submitted in writing as soon as possible. Disruptive behavior includes the use of violence, force, coercion, threat, harassment, serious insubordination, or repeated acts of misbehavior, any of which cause disruption or obstruction to the educational process. The right to remove students for cause extends to all curricular and extracurricular activities affecting teachers while acting in the course of their employment.

III. Facts.

The Grievant testified in accordance with a written statement that he provided to his principal on October 11, 2006. n2 October 10th was his second day as the 4th, 5th and 6th grade science teacher. Student X, a fifth grade student, entered the class at 11:20 a.m. Shortly thereafter, a female student entered the class and gave X an orange juice container. Food and drinks are not permitted in science classes, so the Grievant requested X (several times) to give him the juice. The Grievant intended to return the juice to X during the following lunch period. X refused to give the Grievant the juice, so the Grievant took it from him. X then reacted by pushing things off his worktable, and pushing the table toward another student. The Grievant then decided to control X by using a technique he learned when he was trained at a former job in another school district. The technique is referred to as the Crisis Prevention Institute Inc. (CPI) Children's Control Position. The teacher is to wrap the child's arms around the child's chest. The child is held under his armpits. X kept yelling for the Grievant to let him go. The child was struggling but did not complain [*145] of any pain. The Grievant told X that he would let him go if he calmed down. The Grievant attempted to remove X from the classroom for a "time out."

n2 The statement supplemented another statement provided on October 11th.

As the Grievant and X entered the hallway outside the classroom, the other students began misbehaving, jeering and yelling. The Grievant called for the principal, Mr. Dalton. The Grievant was still holding X when Mr. Dalton arrived. The Grievant released X into Mr. Dalton's custody.

X returned minutes later and was dismissed with the rest of the class for a 30 minute lunch period. The Grievant offered the juice back to X, but he refused it. X returned after lunch, but he refused to do any work. He became talkative and distracted the other students in the class. The Grievant ignored him. The Grievant attempted to call X's parents but he could not reach them. X took a compass from his book bag and started carving an eraser. The Grievant took the items from him. Students are not supposed to have their book bags in the classroom. X refused the Grievant's request to put his name on the book bag. Instead, he picked up his papers and threw them at the Grievant. X refused to turn in his work after class, and he refused to line up with the other students. He walked out of the room without following class dismissal procedures.

X's version of the incident, based upon a statement obtained from an interview, and not subject to cross-examination in this proceeding, is that the Grievant hit his hand when he was bent over attempting to put his juice in his book bag. The juice was knocked to the floor. Then the Grievant grabbed both of his arms and put them behind his back. He stated that the Grievant lifted him up and slammed him on the desk (table). The side of his face struck the

desk. The Grievant then took his arms from behind him, crossed them in front of him, held both his hands, and lifted him out of the chair. The rest of the students started yelling for the Grievant to let X go. The Grievant returned to the room and called for Mr. Dalton. The Grievant let X go when Mr. Dalton instructed him to do so. He returned to class after lunch, but he stated that the Grievant removed X's book bag from him after lunch and would not return it until after the class ended. X stated that Ms. Coleman came to the class shortly after Mr. Dalton, and both of them talked with him.

Statements were obtained from the following students in the classroom:

Student A was the student who brought the juice to X. She saw the juice in Ms. Coleman's room. X had left it behind. Ms. Coleman requested her to deliver the juice to X in the Grievant's room. She did not observe the altercation, but at some point she heard the Grievant yelling at X in X's face and she heard X yelling at the Grievant to "get off me."

Student B walked in the hallway next to the Grievant's room and observed the Grievant holding X. He stated that X was crying. He observed the Grievant pick X up and take him back into the classroom. He heard the Grievant call for Mr. Dalton.

Student C, a friend and classmate of X's stated that he observed the Grievant grabbing the juice from X, knocking the juice to the ground when the Grievant grabbed X's arms. He stated that the Grievant put X's hands behind his back "like the cops do" and slammed X on the desk. He observed the Grievant cross X's arms in front of his body, and the Grievant lifted X up and started to take him out of the room. The other students started yelling that he should not remove X. The Grievant stopped and called for Mr. Dalton. C stated that X did line up with the rest of the students at the end of class.

Student D stated that the Grievant "snatched" the juice from X's hand. She stated that X got mad and threw his folder on the floor. The Grievant then pulled X's arms around his back "like he was handcuffing him" and slammed him on the desk. The Grievant then pulled his arms in front and crossed them while holding on to X's hands. She stated that X returned to the class and "everything was OK" until the end of the class. The Grievant took X's book bag from him as they were lining up to proceed to the next class.

Student E stated that the Grievant requested that X give him the juice after it was delivered to him, but he refused. The Grievant took the juice from X, after which X threw some papers on the floor. The Grievant then grabbed X out of his seat, put his hands behind his back, and shoved him face first down on the table. Everything was OK after X returned to class until the end of class when the Grievant took X's book bag. As the students were lining [*146] up, X bumped into someone. The Grievant then approached X and took his book bag. X got mad and left the room before he was told.

Student F stated that X got mad when the Grievant reprimanded him for "fooling around" and not doing his work. He got mad when the Grievant took his "stuff" (juice) and threw his folder on the floor. The Grievant grabbed X by both arms and put both arms behind his back "like he was going to arrest him" and "threw him on the desk." F observed X starting to cry when the Grievant was holding him with his arms in front of him. Some students complained that the Grievant was holding X too tight. F stated that X "inadvertently" bumped into another student when they were in line at the end of class. The Grievant took X's book bag and refused to give it back to him. X got mad and left the room.

Student G stated that the Grievant grabbed X by the arms, put his arms behind his back, and pushed him on the desk. X started to cry. G stated that X did not leave the room until the class ended after lunch. The class lined up and left together.

Student H saw X throw some papers on the floor. The Grievant took X's arms and put them behind his back "like he was handcuffing him" and then "threw him on the table." H observed X crying. The Grievant then pulled X's arms in front of him, lifted him up from his chair and then called for Mr. Dalton. H stated that the Grievant took X's book bag from him after he refused to do his work. X left the room when the Grievant would not return his bag.

X was taken to the Children's Hospital Emergency Department on the evening of October 10th after he complained of back pain. He was examined by a treating physician and diagnosed as having a muscle or ligament strain, a common soft tissue injury. The prognosis was that X would be better in 2-3 days, but sometimes the injury may have a longer healing period. The recommended treatment was rest, movement but not bending or lifting, medication and possible therapy.

The Hamilton County Job and Family Services was contacted regarding the allegations that X was "physically abused" by the Grievant. They conducted an investigation and concluded "physical abuse has been indicated."

X's parents contacted the police and the Grievant was arrested and prosecuted assault. A Hamilton County jury acquitted him.

IV. The Issue.

The issue for resolution is whether the Grievant's conduct on the day in question constituted the use of excessive force upon student X, such as to constitute "immorality, willful and persistent violations of reasonable rules and regulations of the Board of Education" and/or whether there is "other good and just cause" for termination of his teaching contract. n3

n3 Section 3319.16 of the Ohio Revised Code.

V. Burden of Proof.

The Board, as the employer in this labor arbitration dispute, has the burden to prove the charges of misconduct. The use of excessive force by a teacher against a minor child is a serious offense, one that if proven, would have a devastating effect upon a teacher's career and livelihood. The damage to a teacher's reputation could be irreparable. In such cases, most arbitrators require a higher quantum of proof, typically expressed as "clear and convincing evidence." n4 It is a standard somewhat higher than that which is applied to lesser offenses, a preponderance of the evidence, but less of a standard than that which is applied in criminal proceedings, evidence beyond a reasonable doubt.

n4 *The Common Law of the Workplace, The Views of Arbitrators*, 2nd Ed., NAA, Theodore J. St. Antoine, Editor, BNA, Section 6.10, p. 192 (2005).

Go to Headnotes [**1R] The clear and convincing standard is consistent with the higher standard imposed by the legislature for terminating a teacher's continuing contract. The "other good and just cause" has been defined by the courts to encompass offenses or misconduct similar to the serious offenses embodied in the terms "gross inefficiency, immorality and willful and persistent violations of Board regulations." n5

n5 *Hale v. Board of Education*, (1968) 13 Ohio St.2d 92; *Rumora v. Bd. of Educ.*, (1973) 43 Ohio Misc. 48.

VI. Evidence, Findings and Discussion.

The Quality of the Evidence

The Board acknowledges that its case is based upon the statements made by students [*147] to school officials regarding the Grievant's excessive use of force upon student X. The Board further acknowledges that this evidence is "hearsay" evidence, as courts and the legal community use that term. A hearsay statement is one made by someone other than the declarant, or the person testifying at a proceeding, offered in evidence to prove the truth of the matter

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asserted. n6 The unsigned statements from the students given to the Board witnesses who did testify at the hearing are offered by the Board for the truth of the facts contained in the statements that contradict the Grievant's testimony about his physical contacts with student X. These are classic hearsay statements in the legal sense, and the Board does not assert that the statements would be admissible in court under one of the recognized exceptions to the hearsay rule. n7

n6 Rule 801(C) of the Ohio Rules of Evidence.

n7 Rule 803(1)-(22) of the Ohio Rules of Evidence.

Instead, the Board argues that the statements should be accepted for the truth of what they say, and should outweigh the conflicting testimony from the Grievant. This is because arbitration proceedings are less formal than court proceedings. Accordingly, there are two issues: first whether the statements should be admissible at all, and second, the weight that should be attributed to the contents of the statements as contradicting the Grievant's version of the event. The question of admissibility is more of an academic exercise. Arbitrators will generally accept hearsay evidence for whatever the evidence is worth, except if the evidence is prejudicial. n8

n8 See Common Law, Section 1.57, p. 36.

For example, Rule 28 of the Labor Arbitration Rules of the American Arbitration Association states:

The parties may offer such evidence as is relevant and material to the dispute, and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute . . . The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.

AAA Rule 29 permits the arbitrator to receive and consider evidence of witnesses by sworn affidavit. But, the arbitrator, in accordance with his or her authority may accord "only such weight" as he or she deems proper after consideration of any objection made to its admission.

The reason hearsay statements, such as the students' statements offered in this case, are inadmissible in court, or are accorded less weight by arbitrators on the precise issue for determination is because the statements cannot be tested for reliability in the same way as the testimony of a witness--through cross-examination. The interrogator is provided with substantial leeway to test a witness' recollection against other conflicting evidence, challenge one's credibility, or use testimony to bolster his or her theory of the case. One cannot cross-examine a piece of paper containing a factual statement offered for the truth of what is asserted.

Go to Headnotes [**2R] Therefore, in terms of weighing evidence, a party or witness' testimony, otherwise not impeached through other admissible and persuasive evidence should not be outweighed by hearsay statements offered for the truth of what is asserted regardless of the number of such statements. This is the fundamental problem with the Board's evidence in this case.

Go to Headnotes [**3R] There is one piece of evidence that could have been received and given appropriate weight to challenge the Grievant's recollection and credibility, a conviction on the assault charge in criminal court. Rule 803(21) provides that a final judgment of conviction after a trial on a criminal charge finding an accused guilty of a crime punishable by imprisonment of more than one year is admissible as an exception to the hearsay rule. n9 This type of conviction could be afforded considerable weight if the Grievant was found guilty, particularly if the students who provided statements gave similar testimony under cross-examination in the criminal trial. However, the Grievant was

acquitted, not convicted. But, the fact of the acquittal is not a helpful piece of evidence in this proceeding. This is because the prosecution failed to meet its heightened level of proof, guilt beyond a reasonable doubt. This case, as stated above, must be analyzed under a lesser standard.

n9 The record is not clear as to the nature of the assault charge against the Grievant. For purposes of argument, I assume it was a charge that provided for more than one year of imprisonment as a penalty.

There are other reasons why the statements do not outweigh the Grievant's sworn testimony, [*148] which was subject to intensive cross-examination. The statements were not in affidavit form--they were not even signed. Children are more susceptible to coaching or outside influences because of their youth and inexperience. This is all the more reason why cross-examination is preferable. One cannot overlook the fact that some of the children were called as witnesses in the criminal proceeding and testified about the same subject matter. Yet, no conviction was obtained. There is no evidence that the children were unavailable to testify. The Board decided, as a matter of policy, that they should not be called to testify in this hearing. The failure to testify and be cross-examined, as in the criminal proceeding, makes it difficult for the Board to prove the Grievant's excessive use of force by clear and convincing evidence.

The Board relies upon another arbitration case decided by James Duff, a well-respected arbitrator that addressed the issue of admissibility of children interview statements obtained by school investigators. n10 The statements admitted in that case were less important for determining the factual issue of misconduct than the statements offered in this case. In that case, a bus driver's discharge was sustained after finding that the misconduct charge was proven. The driver lectured a busload of children on the subject of abortion. The driver essentially admitted that he lectured the students on the subject after he was "shocked" over the subject of discourse and conversations among the children. Arbitrator Duff found that the "only substantive differences between the children's and Grievant's account of what was said is that the children's account suggested a more vivid and somewhat more graphic presentation." n11

n10 *Shoreline School District, 96 Lab. Arb. Rep. (BNA) 159 (Duff, 1990).*

n11 *Id. at 161.* The grievant also denied that he mentioned the word "skull" in his lecture.

Arbitrator Duff admitted the interview statements over objection notwithstanding that the statements were clearly hearsay. He did so because "(1) hearsay evidence is generally admissible in arbitration hearings, (2) having the children appear and testify may have an adverse [effect] on them n12 , and most importantly, (3) the hearsay testimony was corroborated by the testimony of the Grievant, and any differences between the testimony of the District official and the Grievant are insignificant." He concluded that the hearsay evidence was reliable because it was "supported by other undisputed record evidence." n13

n12 It appears from opinion that the children were younger than the children in this case. The opinion refers to second and third graders, and mentions that some of the children were younger. *Id. at 160.* Our case involves fifth grade students.

n13 *Id.*

This case, unlike *Shoreline*, involves interview statements that directly conflict with the Grievant's sworn testimony on the critical issue of excessive force and abuse upon student X. If the statements are believed, the Grievant manhandled X by slamming him down on the desk, putting his arms behind his back like a police arrest and picking him up in an excessively rough fashion. The Grievant denies all of these statements. The statements were not corroborated, they are dramatically different than the Grievant's sworn testimony, and other undisputed record evidence does not support them. Accordingly, the reliability of the hearsay evidence found by arbitrator Duff in *Shoreline* is absent from this case.

The Injury Claim

The Board contends that evidence establishes that X was injured by the Grievant when he was restrained and carried out of the classroom and into the hallway. The injury shows that the Grievant used excessive force. X's parents stated to investigators that X complained of back pain in the evening. They took X to the Children's Hospital Medical Center Emergency Department for treatment on the evening of Monday, October 10th. The Board offered an unsigned partial medical report from the Medical Center as evidence of X's injury.

The medical report probably would not be admissible in a court trial because it is unsigned and not otherwise properly authenticated. Moreover, the report is incomplete in terms of qualifying as an admissible record as an exception to the hearsay rule. It does not show that the statements made in the report are for purposes of medical diagnosis or treatment; it does not describe X's medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source of those conditions [*149] insofar as reasonably pertinent to the diagnosis or treatment of his injury. n14

n14 Rule 803(4) of the Ohio Rules of Evidence.

Nevertheless, considering the relaxed rules of admitting evidence in arbitration proceedings, the report was admitted and shall be considered for the appropriate weight. It is on hospital letterhead and states that X was examined for back pain and injury. The injury is diagnosed as a muscle and ligament strain. It is a common soft tissue injury evidenced by stiffness, muscle spasms and pain. The treatment plan consists of rest, pain medication, and ice and heat therapy.

Go to Headnotes [**4R] One may infer from this evidence that X hurt his back sometime before the evening when he complained of pain to his parents. There is no evidence connecting his pain and injury to the altercation with the Grievant earlier in the day. The evidence in the record indicates that X was not injured before he left school. X did not complain of pain or any injury to the Grievant, to Mr. Dalton or to Ms. Coleman. Principal Dalton returned X to his classroom after he calmed down. None of the student statements refer to any complaints by X that he was in pain or injured. Mr. Dalton did not become aware any injury complaint until the next day when the parents came to the school. Ms. Eisenhardt, the teacher-in-charge who investigated the incident on October 11th, after the parents came to the school to complain, does not refer to any comments from the students during her interviews stating that X was injured or in pain during or after his encounter with the Grievant. The parents informed her of the injury, and she observed X in discomfort while he was sitting in a chair.

It is understood and recognized that these types of soft tissue injuries do not always manifest themselves right after the trauma. Automobile accident victims, for example, sometimes do not register pain until well after the accident. Nevertheless, there is an unexplainable time gap between the Grievant's restraint upon X and his complaints of pain in the evening. X did not testify, so that this gap could be explored or explained. Without further information or evidence, it would be too much of an inferential leap to conclude that X's injuries were caused by the Grievant. The medical report omits any reference to the cause of the injury or that the patient (X) attributed his injury to his encounter with the Grievant.

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Finally, even if X received his injury when the Grievant restrained him, the injury could have been self-inflicted by X as when he was struggling to get loose from the Grievant's restraint. This explanation would contradict a finding that the Grievant intentionally applied excessive force in an effort to control X's behavior.

Go to Headnotes [**5R] Accordingly, I find the evidence insufficient to prove the charge that the Grievant applied "inappropriate physical force" to X. The Grievant's testimony that he restrained X after X pushed his papers off the table in order to protect the other students from harm, and to prevent any destruction of property must stand, absent clear and convincing evidence to the contrary. Force was used, but the evidence is not clear that it was excessive under the circumstances. There may have been better procedures to use to prevent the repercussions from his action, a charge of misconduct and a criminal prosecution, but it cannot be found that the Grievant exceeded his contractual authority to maintain classroom discipline, and to use such force as was reasonable and necessary to prevent school property from damage and to protect the other students from possible injuries. He further had the contractual authority to remove X from the classroom. X was exhibiting disruptive behavior, as that term is defined in Section 400(d).

VII. AWARD.

The grievance is sustained for the above-mentioned reasons. The Grievant shall be reinstated to his former position, or a comparable position. He shall be restored all lost pay and benefits. His seniority shall be restored on an uninterrupted basis as if there was no termination of his contract. The discharge shall be removed from his employment record.

The Union's claim for pre-award interest on the back pay award is denied. There is no provision in the CBA for an award of pre-award interest. Arbitrators historically have not issued such remedial awards without, an expressed contractual authorization. n15

n15 Common Law, Section 10.35, pp. 393-94.

Go to Headnotes [**6R] The Board may provide the Grievant with corrective and/or progressive discipline [*150] counseling if it believes that there was a better or more appropriate way for the Grievant to have addressed and handled his disciplinary issues with Student X. The record of such counseling may be included as part of the Grievant's personnel file or employment record.

Jurisdiction is retained for a period of thirty days after the issuance of this award to resolve any issues that arise from the implementation of the above remedies.

LOAD-DATE: 10/19/2007



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LABOR RELATIONS REPORTER

Labor Arbitration Reports

120 Lab. Arb. Rep. (BNA) 929

In re DOBSON CELLULAR SYSTEMS, INC. [Fairbanks, Alaska] and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547

AAA Case No. 75-L-300-0087-04

December 10, 2004

HEADNOTES: WAGES

[**1H] Cost-of-living adjustments -- Past practice (114.63) (24.367)

Collective-bargaining agreement, which provided that wages for 2004 would be increased by increase in DOL Consumer Price Index for area, "measured from July 1, 2002 to June 30, 2003," is ambiguous, since it does not explicitly provide whether CPI increase is to be calculated by comparing first half of year with first half of preceding year or with second half of preceding year, and there is no past practice to aid in interpretation of agreement, inasmuch as union had used both methods over past three years and employer had simply accepted union's calculations.

[**2H] Cost-of-living adjustments -- Industry practice -- Expert evidence (114.63) (94.60505)

Employer violated collective-bargaining agreement which provided that wages for 2004 would be increased by increase in DOL Consumer Price Index for area, "measured from July 1, 2002 to June 30, 2003," when it paid wage increase for 2004 of 1.3% based on comparison of CPI for first half of 2003 and second half of 2002, where contract clearly calls for measurement of one-year change in CPI, comparing first half of 2003 with first half of 2002 is more consistent with measurement of one-year period of CPI wage increase called for by contract, and this method is supported by industry practice and by weight of expert testimony of state labor economist and Bureau of Labor Statistics officials.

[**3H] Cost-of-living adjustments -- Authority of arbitrator (114.63) (94.557)

Employer violated collective-bargaining agreement when it paid wage increase for 2004 of 1.3% based on comparison of CPI for first half of 2003 and second half of 2002, despite contention that adopting union's proposed method of calculating increase by comparing first half of 2003 with first half of 2002 would violate provision in agreement that arbitrator has no authority to change wage rate or establish new wage rate, where arbitrator is not changing or establishing wage rate, but rather is merely interpreting ambiguous contract language.

[**4H] Cost-of-living adjustments -- Interest on back pay (114.63) (117.178)

Employer that violated collective-bargaining agreement when it paid wage increase for 2004 of 1.3% must pay bargaining unit members full amount of correct 2.3% CPI increase from January 1, 2004, but request for interest on back pay is denied, where contract does not explicitly provide for payment of interest, and employer did not act in arbitrary, capricious, or bad faith manner.

CLASSIFICATION-NUMBER: 114.63, 117.178, 24.367, 94.557, 94.60505

COUNSEL: Appearances: For the employer--Peter T. Van Dyke (McAfee & Taft, PC), attorney. For the union--Bill Wielechowski, associate general counsel.

JUDGES: Arbitrator: Robert W. Landau

OPINION-BY: LANDAU, Arbitrator.

OPINION:

Issue

The parties submitted separate issue statements. Upon consideration, the arbitrator formulates the issue as follows:

Did the Company violate the collective bargaining agreement by not paying the correct wage increase on January 1, 2004, based on the increase in the U.S. Department of Labor Consumer Price Index?

If so, what is the appropriate remedy? [*930] ?

Factual Background

Dobson Cellular Systems, Inc. ("Dobson" or "Company"), operating under the name "Cellular One," has provided cellular services in the Fairbanks, Alaska area since 2000. In May 2000, Dobson and the International Brotherhood of Electrical Workers, Local Union 1547 ("IBEW" or "Union") signed a Bridging Agreement under which both parties agreed to recognize the existing collective bargaining agreement ("CBA") between the IBEW and Dobson's predecessor, Pacific Telecom, Inc., effective from October 7, 1997, through December 31, 2004. The CBA provides for annual wage increases on January 1 of each year, based on the increase in the U.S. Department of Labor Consumer Price Index--Urban ("CPI") for Anchorage, Alaska.

When Dobson began its Fairbanks operations in 2000, the annual CPI wage increase for 2000 had already been determined by the Union to be 1.3%. According to IBEW business representative Jay Quakenbush, the Union did not calculate the CPI wage increase for 2000, but simply obtained the figure from Alaska Communications Systems ("ACS"), another telecommunications company that had the same CPI wage increase language in its labor agreement. The CPI wage increase for 2000 was calculated by comparing the percentage increase in the CPI index for the first half of 1999 with the first half of 1998 $((148.6 / 146.7) - 1 = 1.3\%)$. Dobson did not calculate the CPI wage increase for 2000 and simply paid the percentage increase proposed by the Union.

To calculate the CPI wage increase for 2001 under the CBA, Quakenbush contacted Janet Davison at the Fairbanks North Star Borough Community Research Center, a local government agency that provides information on socio-economic issues, including CPI calculations. Davison informed Quakenbush that the appropriate method to calculate the CPI increase for 2001 was to compare the first half of the 2000 CPI index with the second half of the 1999 index $((150.0 / 148.3) - 1 = 1.1\%)$. Quakenbush communicated this calculation to Gall Kudla, Dobson's Vice President of Human Resources. Dobson accepted the Union's calculation and paid a 1.1% wage increase for 2001.

For the wage increase due on January 1, 2002, Quakenbush used the same formula as he did for 2001. He calculated a wage increase of 1.6% for the year 2002 by comparing the first half of the 2001 CPI index to the second half of the 2000 CPI index $((154.4 / 151.9) - 1 = 1.6\%)$. The 1.6% wage increase was accepted and paid by Dobson.

For the 2003 wage increase, Quakenbush initially relied on the same formula provided by Janet Davison, which indicated that the 2003 CPI increase should be 1.0% $((157.5 / 156.0) - 1 = 1.0\%)$. However, on February 12, 2003, Quakenbush advised Kudla that he had "made a mistake" on the wage increase calculation by using a six-month period as opposed to an entire year. Quakenbush recalculated the 2003 wage increase at 2.0% by comparing the CPI index for the first half of 2002 to the first half of 2001 $((157.5 / 154.4) - 1 = 2.0\%)$. Dobson accepted and paid the 2.0% wage increase for 2003.

In December 2003, Quakenbush again contacted Davison regarding the CPI wage increase calculation. Based on information he had received about the manner in which ACS calculated the CPI increase, Quakenbush questioned Davison about her method of calculation. Davison contacted Todd Johnson at the Bureau of Labor Statistics (BLS) in San Francisco, an agency of the U.S. Department of Labor. Johnson advised her that it was incorrect to calculate an annual CPI increase by comparing the first half of one year to the second half of the preceding year because this method only

measured a six-month increase. According to the BLS, the correct method of determining an annual CPI increase was to compare an entire year with the preceding year, without crossing calendar years.

On December 22, 2003, based on the additional information obtained from Davison and the BLS, Quakenbush advised Gail Kudla that the CPI increase for 2004 should be 2.3%. Quakenbush calculated this increase by comparing the CPI index for the first half of 2003 to the first half of the 2002 $((161.1 / 157.5) - 1 = 2.3\%)$. On December 23, 2003, Kudla notified Quakenbush of her belief that it was incorrect under the CBA to calculate the CPI increase by comparing the first half of one year to the first half of the preceding year. Kudla subsequently advised Quakenbush that Dobson [*931] believed the correct CPI increase for 2004 was 1.3%, based on a comparison of the CPI index for the first half of 2003 and the second half of 2002 $((161.1 / 159.0) - 1 = 1.3\%)$. Dobson paid a wage increase of 1.3% as of January 1, 2004.

On January 16, 2004, Quakenbush filed a grievance alleging that Dobson had violated the CBA by not paying the correct CPI increase of 2.3% as of January 1, 2004. As a remedy, the Union requested that the CPI increase for 2004 be established at 2.3%, and that the Company be required to pay back wages and interest for having underpaid the 2004 CPI increase. Thereafter, the parties had discussions with BLS officials and with an ACS representative regarding the computation of the 2004 CPI increase, but were unable to resolve their dispute and the matter was advanced to arbitration.

Relevant Contract Provisions

ARTICLE III

COMPLAINT AND GRIEVANCE PROCEDURE/DISCIPLINE

APPENDIX I--WAGE RATES & OCCUPATIONAL CLASSIFICATION

3.4 Arbitration

(c) The parties agree that the decision or award of the arbitrator shall be final and binding on each of the parties and that they will abide thereby, subject to such laws, rules and regulations as may be applicable. The authority of the arbitrator shall be limited to determining questions directly involving the interpretation or application of specific provisions of this Agreement, and no other matter shall be subject to arbitration hereunder. The arbitrator shall have no authority to add to, subtract from, or to change any of the terms of this Agreement, to change an existing wage rate, or to establish a new wage rate. In no event shall the same question be the subject of arbitration more than once. Each party shall bear the expense of preparing its own case. The expense of arbitration shall be borne equally by the Company and the Union.

5.1 Wage Rates

Wage rates shall be as set forth in Appendix I of this Agreement.

(b) On January 1, 2000, wages will be increased by the increase in the US Department of Labor CPI-U, Consumer Price Index for Anchorage, measured from July 1, 1998, to June 30, 1999, but in no event will the increase exceed four percent nor be less than zero percent.

(c) On January 1, 2001, wages will be increased by the increase in the US Department of Labor CPI-U, Consumer Price Index for Anchorage, measured from July 1, 1999, to June 30, 2000, but in no event will the increase exceed four percent nor be less than zero percent.

(d) On January 1, 2002, wages will be increased by the increase in the US Department of Labor CPI-U, Consumer Price Index for Anchorage, measured from July 1, 2000, to June 30, 2001, but in no event will the increase exceed four percent nor be less than zero percent.

(e) On January 1, 2003, wages will be increased by the increase in the US Department of Labor CPI-U, Consumer Price Index for Anchorage, measured from July 1, 2001, to June 30, 2002, but in no event will the increase exceed four percent nor be less than zero percent.

(f) On January 1, 2004, wages will be increased by the increase in the US Department of Labor CPI-U, Consumer Price Index for Anchorage, measured from July 1, 2002, to June 30, 2003, but in no event will the increase exceed four percent nor be less than zero percent.

Positions of the Parties

A. The Union

The Union argues that Dobson violated the CBA when it incorrectly calculated the CPI wage increase for 2004 at 1.3% instead of 2.3%. According to all of the independent, objective government officials providing information in this case, including State of Alaska labor economist Neal Fried, BLS officials Todd Johnson and Amar Mann, and Janet Davison from the Fairbanks North Star Borough, the correct CPI increase for 2004 under the terms of the CBA should be 2.3%. It is undisputed that the parties meant to give bargaining unit employees an increase based on a one-year period of change. The testimony clearly established that Dobson's reliance on a comparison of the first half of one year with the second half of the preceding year measures only a six-month period of change. Moreover, IBEW assistant business manager Bob Larsen, who has been a Union business representative since 1990 and is familiar with other utility labor agreements in Alaska, testified that other Alaska utilities that have the [*932] same CPI increase language, for example Alaska Communications Systems, gave their employees a 2.3% CPI wage increase for 2004.

B. The Employer

Dobson argues that the express language of the CBA requires a comparison of the second half of 2002 to the first half of 2003 in order to determine the proper CPI increase due on January 1, 2004. Nothing in the CBA permits the Union to unilaterally change the time periods for the CPI calculation or indicates that the BLS method of computing the CPI wage increase was intended to be controlling by the parties. In addition, Dobson's method of calculation is supported by the past practice of the parties. The Union's calculations of the CPI increase for 2001, 2002, and initially for 2003, all followed Dobson's approach by comparing the first half of the year with the second half of the preceding year. This is consistent with the express language of the contract which measures the CPI increase from July 1 of each year through June 30 of the following year. Finally, Dobson argues that under the CBA, the arbitrator has no authority to rewrite the labor agreement by changing an existing wage rate or establishing a new wage rate. Because the express language of the CBA requires a comparison between the second half of one year and the first half of the following year, the arbitrator has no authority to modify this language and impose a different method of calculation. Any change in the method of calculating the CPI wage increase must occur through the collective bargaining process, not through arbitration.

Discussion

This is a straightforward contract interpretation case. The dispute involves the proper interpretation of subsection (f) in Appendix I of the CBA which provides: The parties do not disagree about the mathematical formula for calculating the CPI increase under the contract. n1 Rather, the heart of the dispute concerns the time periods (known as "reference periods") by which the increase in the CPI should be measured. The Union argues that the correct reference periods are the first half of a year compared to the first half of the preceding year, while Dobson maintains that the correct reference periods are the first half of a year and the second half of the preceding year.

On January 1, 2004, wages will be increased by the increase in the US Department of Labor CPI-U, Consumer Price Index for Anchorage, measured from July 1, 2002, to June 30, 2003, but in no event will the increase exceed four percent nor be less than zero percent.

n1 The undisputed formula used by both parties to calculate the CPI increase is as follows: establish the beginning and ending time periods for which the change in the CPI will be measured; divide the CPI average for the ending period by the average for the beginning period; subtract 1; multiply by 100; and the result will be the percent change in the CPI for the time period in question.

The CBA provides that the wage increases due on January 1 of each year are to be determined by reference to the U.S. Department of Labor's CPI-U index for Anchorage. The CPI-U index for Anchorage is prepared by the Bureau of Labor Statistics on a semiannual basis: a January-June average and a July-December average. The two semiannual averages are then averaged to determine the average for the calendar year. In this manner, the annual averages for two successive calendar years can be compared to determine the percentage change from one year to the next. According to the BLS guidelines for CPI calculations, CPI increases are normally measured by comparing the same month in two successive years or by comparing calendar-year averages (the CPI does not correspond to a specific day or week of the month). For Anchorage, the CPI-U index is calculated on a semiannual and not a monthly basis, therefore the only available reference periods are either six-month averages or annual averages.

In contract interpretation cases, the arbitrator's primary task is to determine the mutual intent of the contracting parties. If an arbitrator determines that a disputed contract provision is clear and unambiguous, the provision will normally be applied according to its plain meaning. However, if a disputed contract provision is reasonably susceptible to more than one meaning, it may be found to be ambiguous. In such cases, arbitrators typically rely on extrinsic evidence to help clarify the parties' contractual intent, including bargaining history, [*933] past practice, industry standards, or the course of dealing between the parties. n2

n2 National Academy of Arbitrators, Theodore J. St. Antoine, Editor, *The Common Law of the Workplace*, Sections 2.1, 2.4 (1998) (hereinafter "The Common Law of the Workplace").

Go to Headnotes [**1R] After reviewing the evidence in this case, I conclude that the disputed contract language in subsection (f) of Appendix I in the CBA is ambiguous because it is susceptible to more than one reasonable interpretation. The reference period specified in the CBA is from July 1 of each year to June 30 of the following year. This language does not explicitly describe whether the CPI increase is to be determined by comparing the first half of two successive years or the first half of a year to the second half of the preceding year. The ambiguity in the disputed contract provision is underscored by the fact that since 2000, both of the above methods of calculating the CPI increase have been used to determine the annual wage increase.

Having concluded that the disputed contract language is ambiguous, I must next determine the most reasonable interpretation of this language using extrinsic evidence and the interpretative tools normally used by labor arbitrators.

The bargaining history of the contract is not a helpful aid. There is virtually no evidence of the bargaining history of the disputed language, except to note that Dobson, unlike IBEW, was not one of the original contracting parties but is a successor employer that agreed to be bound by the terms of the existing contract.

The past practice and course of dealing between the parties are also not instructive as to the correct interpretation of the disputed language. For the years 2000 through 2003, the Union calculated what it believed was the appropriate annual CPI increase and communicated this information to Dobson without discussion. Dobson simply accepted the Union's calculations and paid the requested CPI increases. Gail Kudla testified that Dobson paid the increases for these years without reviewing the Union's calculations or doing its own calculations. Kudla did not question the Union's calculations until late 2003 when the Union notified her of its proposed 2004 CPI increase. More importantly, for the years 2000 through 2003, the Union used two different methods of calculating the CPI increase, one consistent with its current position and another consistent with Dobson's position. Under these circumstances, I find that there was no established past practice or course of dealing with respect to calculating the CPI increase that was longstanding, consistent, and mutually acknowledged by both parties.

Go to Headnotes [**2R] Evidence of industry practice is somewhat more enlightening. The Union presented evidence that several other utilities in Alaska have labor agreements containing virtually identical language providing for annual CPI wage increases. At least one of these utilities, Alaska Communications Systems--one of Dobson's chief competitors--calculated the CPI increase for 2004 to be 2.3% using the same method of calculation proposed by the IBEW.

Apart from industry practice, the Union presented evidence supporting its position from State of Alaska labor economist Neal Fried and BLS officials in San Francisco. Although the testimony and information from these experts is not binding or controlling as to the correct interpretation of the labor agreement, I find this evidence to be persuasive. The CBA clearly calls for an annual CPI wage increase to be paid on January 1 of each year. The specified contractual reference period is from July 1 to June 30, which measures a one-year change and not a six-month change. The experts were in agreement that comparing the CPI index for the first half of two successive years would provide the CPI increase for a one-year period, while comparing the CPI increase between the second half of one year and the first half of the following year would measure only a six-month change.

Based on the foregoing, I conclude that the most accurate representation of the CPI index for Anchorage on July 1 would be the January-June average for the preceding six months, and the most accurate representation of the CPI index on June 30 of the following year would be the January-June average for that year. Therefore, the appropriate reference periods for calculating the annual CPI increase are the first half averages for two successive years. Because the Union's proposed method of calculation is more consistent with [*934] the one-year period of the CPI wage increase and is supported by industry practice and the substantial weight of testimony and information from experts in the calculation of CPI wage increases, I conclude that the Union's position is the most reasonable interpretation of the disputed contract language. Accordingly, the appropriate CPI wage increase due on January 1, 2004, is 2.3% as calculated by the Union.

Go to Headnotes [**3R] I must reject Dobson's contention that adopting the Union's method of calculation would amount to an improper exercise of authority by the arbitrator. As Article 3.4 of the CBA states, the arbitrator has no authority to change an existing wage rate or establish a new wage rate. However, the arbitrator is neither changing the existing method of calculating the CPI increase nor establishing a new wage rate. The arbitrator is merely interpreting the disputed contract language to confirm the Union's method of calculation which was used in previous years without objection.

Go to Headnotes [**4R] As a remedy, I conclude that it is appropriate for Dobson to pay affected bargaining unit members the full amount of the 2.3% CPI increase effective January 1, 2004. However, the Union's request for interest on the back pay award must be denied. Arbitrators traditionally do not award interest on back pay or other monetary awards where the contract does not provide for payment of interest. The only recognized exceptions are where one party has acted in an arbitrary, capricious, or bad faith manner. Because the parties had a bona fide dispute about the proper interpretation of the contract and there is no evidence of bad faith by Dobson, I find no basis to include interest on the back pay award. n3

n3 See The Common Law of the Workplace at Section 10.35.

AWARD

The grievance is sustained. The Company violated the collective bargaining agreement by not paying a 2.3% CPI wage increase effective January 1, 2004. As a remedy, the Company shall pay the full amount of the wage increase within 15 days or as may be agreed otherwise by the parties. The arbitrator retains jurisdiction for 30 days in the event of any dispute regarding implementation of the remedy.

LOAD-DATE: 02/24/2005



J



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LABOR RELATIONS REPORTER

Labor Arbitration Reports

119 Lab. Arb. Rep. (BNA) 1464

In re Lab. Arb. Rep. (BNA) GROU COLD STORAGE INC. [Chicago, Ill.] and UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1546

FMCS Case No. 04/01256

May 12, 2004

HEADNOTES: VACATION PAY

[**1H] Eligibility after layoff (116.1554)

Employer violated collective-bargaining agreement, when it failed to pay employees with one or more years of service who had been laid off during calendar year prorated vacation pay, based upon hours worked from their employment anniversary date to date of layoff, where plain and clear provision of agreement is that when employees with one or more years of service are laid off, they are entitled to prorated vacation pay.

REMEDIES

[**2H] Pre-award interest (116.1711)

Employees are not entitled to pre-award interest on vacation pay, where there is no provision in collective-bargaining agreement that would allow it, and employer did not apply vacation pay section of agreement in bad faith or act with malice toward laid-off employees.

CLASSIFICATION-NUMBER: 116.1554, 116.1711

COUNSEL: Appearances: For the employer--Steven N. Schuldt, chief financial officer. For the union--Daniel R. Dosenbach, general counsel.

JUDGES: Arbitrator: Richard A. Van Kalker, selected by parties through procedures of the Federal Mediation and Conciliation Service

OPINION-BY: VAN KALKER, Arbitrator.

OPINION:

Issue

The following issue is to be resolved: did the Company violate the collective bargaining agreement by failing to provide laid off bargaining unit employees with (1) pay for vacation earned during the year prior to the layoffs and/or (2) pay for accrued vacation, also known as pro rata vacation, for the year of the layoffs.

Findings of Fact

1. The Company and the Union are parties to a collective bargaining agreement covering the term of January 1, 2001 to December 31, 2005.

2. Section VII of said collective bargaining agreement provides as follows:

SECTION 7.1 DURATION

Each regular full-time employee who shall have completed the years of continuous service shown below is given an annual vacation with pay in accordance with the schedule as follows:

Years of Service	Weeks of Vacation
1 but less than 3	1
3 but less than 8	2
8 but less than 15	3
15 or more	4

Vacations are not cumulative from year to year.

SECTION 7.2 ELIGIBILITY

To be eligible for a vacation, an employee shall have completed 1400 hours or more of work (excluding overtime hours) during the previous year. To determine eligibility, time off due to illness or accident for which sickness and accident benefits shall be payable or due to occupational injury for which workmens' compensation benefits shall be [*1465] payable, shall be considered as time worked, but this shall apply only for the vacation immediately after the occurrence of the injury or beginning of the illness. Also three-fourths (3/4) of previous vacation time shall be considered as time worked.

SECTION 7.3 "YEAR" DEFINED

The work "year" as used in this Article means, for the first year of employment, one (1) year from the date of an employee's most recent hiring, and subsequent years coincide with the anniversary of his most recent hiring. The Employer's records are conclusive.

SECTION 7.4 VACATION DETERMINATION

All regular employees employed on January 1, 1980 and every January 1st thereafter, with more than one year's service and 1400 hours or more of work (including overtime hours counted as additional straight time hours of work) in the previous calendar year, shall be entitled to a vacation as called for in Section 7.1 of the contract.

SECTION 7.5 ADDITIONAL VACATION TIME

All employees with less than one year's service and those that are not employed on January 1 and those that would receive an additional week of vacation under Section 7.1 (3 years, one (1) additional week; 8 years one (1) additional week; 15 years, one (1) additional week) must qualify under Sections 7.2 and 7.3 of the contract.

SECTION 7.6 VACATION PAY

Each week of vacation pay is forty-five (45) times the employees's straight time hourly rate of pay during the previous calendar year, but if a calendar year shall not have elapsed, then on the basis of his average earnings to the week before his vacation. Vacation pay is paid on the last day prior to the vacation. An employee shall not be given vacation pay in lieu of vacation time off.

SECTION 7.7 TIME OF VACATION

Vacations are taken at times designated by the Company, but due consideration is given to the desire of the employee.

SECTION 7.8 BEREAVEMENT DURING VACATION

If there is a death which would, under Section 12.4, entitle and require an employee to a bereavement leave of absence during his vacation, his vacation will be extended up to the number of days allowed under Section 12.4 and actually so used during the vacation time.

SECTION 7.9 ACCRUED VACATION PAY

(A) If the employment of an employee who has one or more years of service has been terminated as of that date he fails to qualify for a vacation under the 1400 hours eligibility clause but shall have completed 700 hours, he shall be given half the vacation pay he would otherwise have been entitled to receive.

(B) If an employee who has been (sic.) one or more years of service is laid off, and as of that date fails to qualify for a vacation under the 1400 hours eligibility clause, but shall have completed 700 hours, he shall receive vacation prorated as follows:

700 hours to 1049 hours-- 1/2 the vacation pay to which he is otherwise entitled

1050 hours to 1399 hours-- 3/4 vacation pay to which he is otherwise entitled

1400 hours--full vacation paid at the employees rate x 45 straight time hours per week.

SECTION 7.10 VACATION TIME

A vacation period of one (1) week only may be taken one day at a time. One whole week (5 days) must be taken in this manner. A twenty-four (24) hour advance notice must be given to the Company for each day taken. Days cannot be attached to either side of a holiday nor to the remainder of their vacation.

3. On April 27, 2003, eight of the Company's employees were laid off of work. The layoffs were a result of a "catastrophic event" at one of the Company's warehouses. The Union does not contest the validity of these lay offs. The eight employees laid off were: A_, B_, C_, J_, D_, G_, R_, and V_. The Company and the Union stipulated that each of the above employees began employ with the Company after January 1, 1980. The Company and Union also stipulated that each of the above employees had been employed by the Company at least for one full year prior to their respective layoffs.

4. On August 22, 2003, a formal grievance was filed on behalf of the above eight employees by the Union alleging violation of Section VII of the collective bargaining agreement.

5. The Union's position is that the following vacation pay dollar amounts are due the eight laid off employees:

	Earned During 2001-2002	Earned During 2003	Total Due
A_	0.00	981.00	981.00
B_	1,937.25	1,327.50	3,264.75
C_	0.00	1,701.00	1,701.00
J_	645.75	2,655.00	3,300.75
D_	1,291.50	2,655.00	3,946.50
G_	555.75	1,721.25	2,277.00
R_	1,937.25	1,991.25	3,928.50
V_	472.50	492.00	964.50

At the hearing the Union presented into evidence eight exhibits detailing the calculations for the above amounts.

6. The Company's position is that no amounts are due the laid off employees for time served during 2003, seeing that said employees were not employed by the Company for the full 2003 calendar year.

Discussion

Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, an arbitrator will first examine the language used by the parties. If the language of the contract is clear and unambiguous, an arbitrator is bound to apply said contract language as it is written. If, however, the language is ambiguous, an arbitrator will assess comments made when the bargain was reached, assum-

ing there is evidence on the subject. In addition, an arbitrator will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

Go to Headnotes [**1R] The Arbitrator in the present matter finds that the language of the collective bargaining agreement is clear and unambiguous. Accordingly, it is not within the Arbitrator's authority to look beyond the collective bargaining agreement as written or to amend, modify, or rewrite clear and unambiguous language of the collective bargaining agreement. The Arbitrator finds that the words in the collective bargaining agreement are plain and clear, not susceptible of more than one meaning. Hence, there is no occasion to resort to parol evidence to determine the meaning of the collective bargaining provision at issue, see *Ralphs Grocery Co., 109 Lab. Arb. Rep. (BNA) 33* (Kaufman, 1997), *National Linen Serv., 95 Lab. Arb. Rep. (BNA) 829* (Abrams, 1990), and *Down River Forest Prods., 94 Lab. Arb. Rep. (BNA) 141* (Gangle, 1989).

The controlling provision of the collective bargaining agreement for the purposes of deciding this grievance is Section 7.9(B). Section 7.9(B) provides as follows: "If an employee who has . . . one or more years of service is laid off . . . he shall receive vacation prorated as follows: 700 hours to 1049 hours-- 1/2 the vacation pay to which he is otherwise entitled [;] 1050 hours to 1399 hours-- 3/4 vacation pay to which he is otherwise entitled [;] 1400 hours--full vacation paid at the employees rate x 45 straight time hours per week."

In the instant case, all of the laid off employees had one or more years of service with the Company and were laid off prior to the completion of calendar year 2003. Per the plain reading of the language of the collective bargaining agreement, the employees are entitled to prorated vacation time based upon the hours worked since the employment anniversary date for said employees to the date of their layoffs.

Go to Headnotes [**2R] At the hearing, the Union also requested pre-award interest on any amounts determined by the Arbitrator to be due and owing to the eight laid off employees. The Arbitrator finds no provision in the collective bargaining agreement that would allow the award of such interest. Similarly, the Arbitrator finds that the Company did not apply the accrued vacation pay section of the collective bargaining contract in bad faith and did not act with any particular harm or malice directed at the laid off employees.

AWARD

Having heard and carefully reviewed the evidence and the argumentative materials in this case and in light of the above Discussion, the grievance is granted.

The Company is directed to pay the following vacation pay dollar amounts, less the appropriate tax and other withholdings, to the following eight laid off employees:

- A_ 981.00
- B_ 3,264.75
- C_ 1,701.00
- J_ 3,300.75
- D_ 3,946.50 [*1467]
- G_ 2,277.00
- R_ 3,928.50
- V_ 964.50.

Based upon the parties request at the hearing, the Arbitrator will retain jurisdiction of the present grievance until July 12, 2004 to resolve disputes, if any, regarding the remedy directed herein. If the Union or the Company advises the Arbitrator in writing of any dispute regarding the remedy directed on or before July 12, 2004, the Arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the Arbitrator is not advised of the existence of a dispute regarding the remedy directed herein by said date, the Arbitrator's jurisdiction over this grievance shall then cease.

LOAD-DATE: 08/04/2004



K



TAB K

LEXSEE 122 LAB. ARB. 1094

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LABOR RELATIONS REPORTER

Labor Arbitration Reports

122 Lab. Arb. Rep. (BNA) 1094

In re YAKIMA [Wash.] SCHOOL DISTRICT and YAKIMA EDUCATION ASSOCIATION

AAA Case No. 75-390-00248-05-LYMC

April 3, 2006

HEADNOTES: GRIEVANCES

[1H] Waiver (100.0738)**

School district waived timeliness objection to grievance, where it did not raise timeliness objection until step two response.

[2H] Continuing violation (100.0733)**

Grievance claiming that special education teachers were not properly compensated was timely filed, even though it was not filed within 20 days of first check in which teachers were allegedly not given proper overload [*1095] compensation, since claims are in nature of continuing violation; remedy is limited to starting in month grievance was filed.

WAGES

[3H] Special education compensation (100.45)**

Special education teachers are entitled to overload pay for teaching students who change classes every period, as other students do, since they are still in self-contained classrooms inasmuch as they are not mixed with general population in these classrooms.

[4H] Special education compensation (100.45)**

Special education teachers are entitled to overload pay calculated to add number of individualized education programs (IEPs) and number of students served or taught (caseload) minus any duplication, where collective-bargaining contract refers to "IEPs/caseload", and teachers often prepare IEPs for students they do not teach.

ARBITRATION

[5H] Interest (100.0777)**

Special education teachers who were not paid required overload compensation are not entitled to interest, since award of interest, in absence of statutory language, is quite rare, and circumstances do not warrant it.

CLASSIFICATION-NUMBER: 100.0733, 100.0738, 100.0777, 100.45

COUNSEL: Appearances: For the employer--Rock L. Johnson (Menke Jackson Beyer Elofson Ehlis & Harper), attorney. For the union--Michael E. Horner, uniserv representative.

JUDGES: Arbitrator: Martin Henner

OPINION-BY: HENNER, Arbitrator.

OPINION:

This arbitration arises out of a grievance filed by the Yakima Education Association (Association) against the Yakima School District (District). The grievance was filed as a class grievance on behalf of special education teachers in the District.

The Association claimed that the District violated the parties' Negotiated Agreement (Agreement) for the 2002-2005 period, and the addendum to that Agreement dated October 25, 2004, requiring overload compensation to special education teachers whose Individualized Education Programs (IEP) or case loads exceed specified ratios. In response, the District claimed that no overload was due under the terms of the Agreement.

The District also raised a procedural objection to the grievance being considered by the Arbitrator, asserting that it had not been timely filed within the deadlines set forth in the Agreement.

Issue Presented

The parties were unable to stipulate as to the issue presented for determination by the Arbitrator. Accordingly, it was left to the Arbitrator to frame the issue presented for determination in this matter. Upon consideration, the issue presented is:

Did the Employer violate the Agreement by not properly compensating certain Davis High School special education teachers? If so, what is the remedy?

Procedural Objection

The District raised a procedural objection which I have worded as follows:

Should this matter be dismissed as having been untimely filed, under the terms of the Agreement?

Relevant Contract Language

YAKIMA EDUCATION ASSOCIATION AND YAKIMA PUBLIC SCHOOLS DISTRICT NO. 7 NEGOTIATED AGREEMENT SEPTEMBER 1, 2002 TO AUGUST 31, 2005, as supplemented by AGREEMENTS OF OCTOBER 10, 2003 and October 25, 2004

ARTICLE I--ADMINISTRATION

ARTICLE VIII--INSTRUCTION

ARTICLE XI--GRIEVANCE PROCEDURES

SECTION 3. JOINT PROBLEM SOLVING MEETINGS

The parties agree to continue the practice of informal problem solving in the spirit of cooperation and compromise. Either party may request a meeting between the Superintendent or designee and an Association representative. Such meeting shall be held at mutually agreed times and locations.

SECTION 16. SPECIAL EDUCATION [*1096]

A. The District and the Association shall continue the Special Education Council (SEC) that has been jointly established

B. The following are general purposes of the SEC

* * *

TAB K

122 Lab. Arb. Rep. (BNA) 1094, *; LA Headnotes 1094, **

4. To examine and make recommendations regarding special education workloads and compensation.

F. SPECIAL EDUCATION WORKLOAD

(Sections 1, 2 and 3 follow here as an attachment.)

F. Special Education Workload

1. Each employee with workload exceeding the ratios set forth on the chart below shall receive compensation calculated on the first school day of each month, and paid on a monthly basis as identified in subsection 2, Special Education Overload Compensation.

Category/Grade	Ratio *	Details
Deaf	1:8	IEPs/Caseload *
Birth to Age 3	1:40	IEPs/Caseload *
Pre-School	1:40	IEPs/Caseload *
Resource--Elementary	1:29	IEPs/Caseload *
Resource--Grade 6-8	1:35	IEPs/Caseload *
Resource--Grade 9-12	1:35	IEPs/Caseload *
Elementary SC--Mild	1:15	IEPs/Caseload *
Elementary SC--Moderate	1:10	IEPs/Caseload *
Elementary SC--Severe	1:8	IEPs/Caseload *
Middle School SC--Mild	1:15	IEPs/Caseload *
Middle School SC--Moderate	1:10	IEPs/Caseload *
Middle School SC--Severe	1:8	IEPs/Caseload *
High School SC--Mild	1:15	IEPs/Caseload *
High School, SC--Moderate	1:10	IEPs/Caseload *
High School SC--Severe	1:8	IEPs/Caseload *
Elementary SST	1:8	IEPs/Caseload *
Secondary SST	1:10	IEPs/Caseload *
Audiologist	1:30	IEPs/Caseload *
OT/PT	1:30	IEPs/Caseload *
Adaptive PE	1:35	IEPs/Caseload *
Speech-Language Pathologist	1:45	IEPs/Caseload *
Augmented Communication Specialist	1:30	IEPs/Caseload *

* Includes special education students placed in caseload awaiting receipt of student records. A caseload starts the day a certified staff member becomes responsible for providing service to the student.

2. Special Education Overload Compensation.

Maximum annual amount per overload caseload

Birth to Age 3 *	\$ 540/yr per student
Pre-School (1:10) *	180 School days pro-rated and paid monthly
	Per Section 1.

Elementary Resource Room (1:29)
 Middle School Resource Room (1:35)
 High School Resource Room (1:35)
 OT/PT (1:30)
 ADP PE (1:35)
 SLP (1:45)
 Augmented Communication Specialist (1:30)
 Elementary Self-Contained (Mild) (1:15)
 Middle School Self-Contained (Mild) (1:15)
 High School Self-Contained (Mild) (1:15)
 Elementary Self-Contained (Mod) (1:10)

\$ 810/yr per student

Middle School Self-Contained (Mod) (1:10)	180 School days pro-rated and paid monthly
High School Self-Contained (Mod) (1:10)	
SST Secondary (1:10)	Per Section 1.
SST Elementary (1:8)	\$ 1,080/yr per student
Elementary Self-Contained (Sev) (1:8)	180 School days pro-rated and paid monthly
Middle School Self-Contained (Sev) (1:8)	
High School Self-Contained (Sev) (1:8)	Per Section 1.
Deaf (1:8)	

* Current employees will continue to receive the 2003-2004 rate. New hires will receive the amounts set forth in the above chart.

3. Paraprofessional Assistance.

a) One paraprofessional will be assigned to each self-contained classroom.

b) The Director of Special Education, jointly with the special education team leaders, shall [*1097] provide appropriate relief as deemed necessary to meet classroom needs beyond those specified above. By mutual written agreement between the Director and Employee, a paraprofessional may be provided in lieu of compensation set forth in subsections 1. and 2., above.

c) High school teachers of combined prevocational self-contained (mild-moderate) and social skills training self-contained classrooms shall not have an average class size which exceeds a ratio of 1:16 with no one period exceeding 1:20. Average class size shall be computed by adding the total in-class enrollment of each class, and dividing the total by the number of combined classes instructed. Should 1:20 be exceeded, an additional paraprofessional will be assigned for that period.

d) If the teacher/student ratio exceeds 1:20 in a middle/high school period or elementary time block, an additional paraprofessional will be assigned to the classroom.

SECTION 2. INFORMAL COMMUNICATIONS

Every effort shall be made to settle problems at the lowest level through informal communication between the employee(s) and the immediate supervisor.

SECTION 4. PROCEDURES AND STEPS

A. A grievance must be filed within twenty (20) days of the occurrence of the event on which the grievance is based, or within twenty (20) days of the date the grievant knew or should have known of the event. The time lines and procedures herein shall be strictly followed unless waived in writing by the parties. Failure of the grievant to follow the time lines shall mean the grievance is waived and forever lost. Failure by the district to follow the time lines shall mean the grievance shall advance to the next step in the grievance procedure.

Arguments of the Parties

Procedural Issue

THE DISTRICT

The District claims that the filing of this grievance is time barred under the terms of the negotiated grievance procedures. These provide that a grievance must be filed within twenty days of the occurrence of the event on which the grievance is based, or notice of that occurrence. In this case, that occurrence would have been the receipt at the end of December or early January of pay for the month of December, 2004, which the Association asserts failed to include the proper overload compensation. As the Grievance was not filed until March 23, 2005, the Grievance must be dismissed.

THE ASSOCIATION

The Association claims that the Grievance was timely filed. Prior to proceeding to the grievance stage, it followed a long standing practice of attempting to informally resolve the dispute. This practice has been formalized in the language of Article Section 3. Furthermore, Article VIII, Section 16, created a Special Education Council for just such informal resolution of issues.

That the District waived the Agreement's time deadlines, the Association claims is demonstrated by the fact that when it finally did file the Grievance on March 23, 2005, the District raised no timeliness objection. In fact, the first time that the District raised this issue was in July, 2005, after the conclusion of Step 2 meeting.

Finally the Association notes that as an ongoing violation, time restrictions are generally not enforced.

Discussion of Procedural Objection

Waiver

Where the parties have negotiated provisions which require the dismissal of a grievance because it has not been filed within the prescribed deadline, such a provision will be enforced. But arbitrators do not favor the dismissal of cases on procedural grounds, such as lack of timeliness. The general view is that the parties are better served when a decision based on the merits of the matter can be reached.

As in the judicial arena, arbitrators recognize that a party who does not properly raise procedural objections can be said to have waived them. This view is best summarized in Elkouri:

If the parties allow a grievance to move from step to step in the procedure without making objections of untimeliness, the right to object may be deemed to have been waived. n1

n1 Page 219, Elkouri and Elkouri, How Arbitration Works, 6th Edition, 2003, BNA Books

Go to Headnotes [**1R] In this case, the District processed the Grievance without objection from its filing in [*1098] March, 2005 through the Step 2 meeting with the Superintendent. Only in the Superintendent's formal Step 2 response in July, 2005, after the Step 2 meeting, was the timeliness objection first raised. Such a delay presents clear evidence of waiver.

Continuing Violation

More importantly, this Grievance presents a claim of what is referred to a 'continuing violation' of the Agreement. A violation is deemed continuing when the Agreement is violated anew on a regular basis. Thus if an employee discovered he was not being credited the proper vacation of sick leave time or receiving a proper shift differential, each new pay period or incorrect pay check received would constitute a new violation of the Agreement. Thus arguably, a grievance could be timely filed on each new occasion.

Elkouri summarizes the doctrine:

Many arbitrators have held that "continuing" violations of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to repeated from day to day, with each day treated as a new "occurrence." These arbitrators permit the filing of such grievances at any time, although any back pay would ordinarily accrue only from the date of filing. n2

n2 Ibid, pages 218-219.

The logic of this becomes even clearer when one considers the inequitable result which could occur if an employee were barred from grieving a continuing violation. Imagine a case where an employee fails to timely grieve an improper computation of his bonus pay or leave accrual on the first occurrence. Other employees he works with, hired subsequently, could still file such grievances. Thus different employees could wind up receiving different benefits under the same agreement.

In the case before me, the Grievance concerns whether some special education teachers at Davis High School are being compensated properly under the terms of the Agreement. It does not raise any claim for teachers at the other high schools in the District, as currently none of those teachers are impacted. If the Grievance were dismissed as untimely, it would only impact these teachers at Davis.

But it could later occur, if a change in assignments were made at either of the District's other high schools, that similar claims could arise there. Those teachers, who were not covered by this Grievance, would be able to file a timely grievance based on provisions in Agreement which had never been considered here on the merits. Ultimately, a situation could arise where teachers in different schools performing identical work were paid at different rates.

Go to Headnotes [**2R] In this case, I find that the claims made in the Grievance are in the nature of continuing violations. Accordingly, the motion to dismiss is denied.

Additionally, I find that the District, by its actions in processing the Grievance without objection through the Step 2 meeting, waived its timeliness objections to the Grievance.

However, I recognize that a delay has occurred. As notice to the Grievant of the violation occurred about the beginning of January, 2005 with receipt of her pay check, an initial timely filing of the Grievance would have been shortly January 21 or shortly after. The Grievance was not filed until March 23. Accordingly any remedy I may impose, if the Grievance is upheld, will exclude computations for extra pay for the months of January and February, 2005.

Discussion of Substantive Issue

In essence the Association's position is that the parties, after extensive bargaining, negotiated the Agreement, setting new terms of overload compensation for special education teachers. Now the District has now refused to comply with the provisions of that bargain.

The District claims that it is complying precisely with the terms of the Agreement.

Some of the provisions of Article VIII, Section 16 deal with the rate at which overload pay for special education teachers will be paid. This is not at issue here. Another section concerns at what point additional paraprofessional assistance will be provided. Again that is not an issue.

This case concerns the determination of when a teacher will become entitled to receive overload pay. For that, the Agreement sets forth a series of teacher/student ratios which vary with the severity of the disability of the student, the grade level, and whether the teacher is providing services in a self contained classroom, in a resource room, or as a specialist (e.g. audiologist, physical therapist, etc.). [*1099]

Extensive collaborative bargaining occurred, with the Association proposing to measure the student/teacher ratio by class size or caseload, and the District proposing to use the number of Individualized Education Programs (IEPs) for which a teacher is responsible. Ultimately, the parties negotiated a provision which listed a ratio, and then in a "details" column, specified "IEPs/Caseload *". The asterisk noted that a student would be included on a teacher's caseload from the first day the teacher or specialist became responsible for the student, even though the School was still awaiting receipt of records.

The District argues that "IEPs/Caseload" should be considered as alternatives: IEP or caseload. For most teachers, the number of IEPs they administer determines their overload status. For some specialists who provide auxiliary services, it is their caseload.

The Association claims that "IEPs/Caseload" means the number of IEPs administered plus the caseload of students for whom they provide services but whose IEPs are prepared and managed by others. They should be added. The Association argues that as this language was the District's proposed wording, if the District meant "IEPs/Caseload" to mean

IEP or caseload, it would have put IEP in the details column for self contained classrooms and Caseload in the details column for resource rooms and specialists.

This dispute has arisen because at the Davis High School an attempt has been made to provide special education students with an educational experience which more closely mirrors what general education students receive. (This dispute does not concern the students who are receiving general education with pull out special education services or resources.)

Rather than place the special education students into self-contained classrooms for the entire day as at elementary and middle schools, special education students are sent to a new classroom for each class period throughout the day, to mirror the experience received by regular education students. However, these classrooms are comprised exclusively of special education students. And the student's entire day is spent in special education classes, with minor exceptions.

The District has chosen to categorize the teachers of these classes as resource room teachers rather than self-contained classroom teachers. The Association argues that they are not properly categorized; they are really more akin to self-contained classroom teachers.

The District's Special Education Services Handbook n3 provides some guidance regarding the definitions of special education resource rooms and self-contained classrooms. It describes

1. Special Education Resource Rooms

Resource rooms provide supplementary aid and services to assist students to progress in the general education curriculum. Elementary special education students will generally spend 60 to 120 minutes per day in the resource room receiving specifically designed instruction depending on the individual needs of the student.

2. Self-Contained Special Education Classes

Special classes are provided for students whose needs cannot be met in the general education environment and where specially-designed instruction is needed for the majority of the school day. Often students placed in special classes have significant cognitive delays or other needs that cannot be met in resource rooms.

n3 Section C, Child Study Team. V. Program Services, Section B. Special Education Services

The District's Handbook n4 also gives guidance on how to classify the level of functioning of students placed in self contained classrooms:

Students assigned to a mild-level self contained classroom will generally have skill levels 2.0 standard deviation below age peers in academic achievement, social, daily living, cognitive, communication, and self-help skills. While there are measured delays in these areas, the student generally will be able to function independently in the classroom, on school grounds and with adaptive behaviors.

n4 Section F, Placement Procedures, Self-Contained Special Education Placement Considerations, Section B.

122 Lab. Arb. Rep. (BNA) 1094, *; LA Headnotes 1094, **

Based on the definitions in the District's Handbook, it seems clear that the critical distinction between resource rooms and self-contained classrooms is the type of students they serve; that is, the level of their disability:

--Students whose greater level of impairment prevents them from participating in general education classrooms alongside of general education students are placed in self-contained classrooms. [*1100]

--Students with milder levels of impairment may be placed in general education--the least restrictive environment--(LRE)--and receive some supplementary educational services from resource rooms and specialists.

The Davis High School special education teachers, who teach classes throughout the day comprised exclusively of special education students are improperly characterized as resource room teachers. They are not providing additional services to special education students who have been placed in general education. They are teaching students who are exclusively in special education classes.

In fact, they are teaching more severely impaired special education students who are not being educated parallel to but not with their general education classmates. These are the students who would be in self-contained classrooms, but for the fact that the District has determined not to offer a self-contained classroom option at Davis High.

Go to Headnotes [**3R] Thus, I must determine that the category in Section 16(F) table which they most closely fit, is teachers of self-contained classrooms, notwithstanding that their students change each period. In fact, that is what they are.

This determination is also supported by testimony that most of the students in these classes meet the standard for placement in self-contained special education classrooms, as described in the District's own Special Education Services Handbook. That is, being more than two standard deviations below age/peer level.

Having made a determination that the Davis High teachers are self-contained classroom teachers, I must consider the "IEPs/caseload" issue. Here the facts become critical.

I find that the District has undermined its own position by its practice at Davis High of assigning a single teacher to prepare a large number of IEPs, even though she may not provide services for these students. The result of this practice is that self-contained classroom teachers may be actually teaching a number of students for whom the IEP has been prepared by that other teacher. In fact, it could occur that a self-contained classroom teacher might teach a very great number of students over the course of many periods in a day and never get to prepare a single IEP. And never be entitled to overload compensation only because of that. That could not have been the intent of the parties in their bargaining.

Go to Headnotes [**4R] The only reasonable way to interpret the Agreement, is that "IEPs/caseload" in the 'details' column, must mean the number of students served or taught, plus the number of IEPs for which the teacher is responsible for, with a subtraction to adjust for duplicate students who are in both categories. That must be my interpretation of Article VIII, Section 16(F).

Another problem which arises is that the table in Section 16(F)(1) does not contemplate a situation where a self contained classroom teacher at the high school level will serve a large number of students, for each only for a single period. One of the Grievants serves 113 students in an average day, far above the ratio of 1:15 for high school self contained classrooms (mild). However, the parties have demonstrated their intent to use average class size in the case of high school teachers who teach a number in periods, as evidenced by the language adopted in Section 16(F)(3)(c) dealing with limitation on class size and the assignment of paraprofessional assistance in case of overload.

I believe the same approach, averaging class sizes, is the most appropriate in dealing with overload compensation.

Thus, in the case of the teacher who taught 113 students per day, when divided by the 5 periods she teaches, her average is 22.6 or rounded to 23 students. As the prescribed ratio is 1:15, she would be entitled to overload compensation for 8 students.

Go to Headnotes [**5R] I cannot find that the Association has met its burden of proof regarding its request that any remedy imposed also include interest. An award of interest, in the absence of statutory language such as is found in the federal sector, is quite rare. Nothing in the arguments of the Association persuades me that it is appropriate in this case.

AWARD

1. The Grievance is Sustained.

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122 Lab. Arb. Rep. (BNA) 1094, *; LA Headnotes 1094, **

2. The special education teachers at Davis High School are determined to be self-contained classroom teachers. Their class sizes shall be averaged, and they are entitled to be receive overload compensation for their class sizes that exceed the 1:15 ratio.

3. The special education teachers shall receive their overload pay retroactive to September, [*1101] 2004, except for the months of January and February, 2005.

4. By stipulation of the parties, the arbitrator retains jurisdiction over this matter for 90 days, but only for purposes of resolving issues relating to remedy.

5. No interest is awarded.

6. The parties are jointly and severally liable for the Arbitrator fees and expenses, of \$ 4550.65, But as a courtesy, they will each be billed for half, or 2275.32, pursuant to the Agreement.

LOAD-DATE: 09/15/2006



L



TAB L

[Cite as *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 2008-Ohio-148.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stonehenge Land Company,	:	
Plaintiff-Appellee,	:	
v.	:	No. 07AP-449 (C.P.C. No. 06 CVC 02-2724)
Beazer Homes Investments, LLC,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
Stonehenge Land Company,	:	
Plaintiff-Appellant,	:	
v.	:	No. 07AP-559 (C.P.C. No. 06 CVC 02-2724)
Beazer Homes Investments, LLC,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on January 17, 2008

Luper, Neidenthal & Logan, LPA, and David M. Scott, for Stonehenge Land Company.

Bailey Cavalieri LLC, and David A. Dye, for Beazer Homes Investments, LLC.

APPEALS from the Franklin County Court of Common Pleas.

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SADLER, J.

{¶1} This case involves consolidated appeals from the judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict, on the breach of contract claims of plaintiff-appellee/cross-appellant, Stonehenge Land Company ("Stonehenge") against defendant-appellant/cross-appellee, Beazer Homes Investments, LLC ("Beazer").

{¶2} The relevant factual and procedural history follows. This case concerns the development of a residential subdivision located in the city of Groveport in Franklin County, and known as "Elmont Place." Stonehenge is a land developer and Beazer is in the business of building and selling single-family homes. On July 27, 2000, Stonehenge entered into a written contract with Beazer's predecessor-in-interest, Crossmann Communities, Inc. dba Beazer Homes, relating to Beazer's purchase of all of the lots to be developed in Elmont Place (the "2000 contract"). In April 2002, the parties executed an amendment to the 2000 contract, which allowed Stonehenge to sell some lots to another builder, thereby reducing the number of lots that Beazer was required to purchase.

{¶3} By letter dated June 9, 2004, Beazer's counsel advised Stonehenge that Beazer did not wish to acquire any additional lots in the Elmont Place development. By letter dated September 9, 2004, however, Beazer's counsel advised Stonehenge that, despite having not received a response to its previous letter, Beazer had reevaluated its position and now wished to move forward with purchasing additional lots. Later, following additional negotiations, the parties entered into another contract dated November 23, 2004 (the "2004 contract"). This contract concerned only the lots located in Sections 1 and 2 of Phase III of the Elmont Place development.

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{¶4} The 2004 contract provided for separate purchase prices for lots in Sections 1 and 2, and contained the following provision with respect to earnest money, including a liquidated damages clause:

2. Earnest Money Deposit. Upon execution of this Agreement, Builder shall deposit Seventeen Thousand Dollars (\$17,000) (the Earnest Money) with Developer, to be held by Developer in trust upon and subject to the terms and conditions set forth herein.

Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified. In such event, damages will be impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute liquidated damages and not a penalty, and shall be Developer's sole remedy at law or in equity for a breach of any covenants or agreements of this Agreement to be performed or observed by Builder.

Notwithstanding the foregoing, and any other provision of this Agreement to the contrary also notwithstanding, as to the first ten (10) Lots in each Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law and in equity, including the right to pursue specific performance.

The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and a transaction is closed, then the Earnest Money shall be applied as a One Thousand Dollar (\$1,000) credit toward the purchase price as to each specific Lot as to which the transaction is closed.

When future sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand Dollars (\$1,000) per Lot when Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The said Earnest Money shall be applied as a credit in the same amount toward the purchase price of each such Lot.

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{¶5} Section 4 of the 2004 contract required that Beazer "take down" at least two lots per month, and also provided, in pertinent part:

If Builder fails to take down the required number of Lots in any single calendar month, Builder will stand in default, and upon five (5) business days' written notice thereof to Builder, at the expiration of which Builder shall still have failed to take down the required number of Lots, Developer may terminate this agreement and retain the balance of the Earnest Money as liquidated damages (and not as a penalty, since damages will be impossible to determine).

Notwithstanding the foregoing, Developer may require assurances from Builder at any reasonable time (and from time to time) as to Builder's readiness, willingness, and ability to perform under this Agreement. Builder's failure to provide Developer with assurances upon Developer's reasonable request within the reasonable time requested by Developer, and/or any breach by Builder, shall entitle Developer to retain the balance of the Earnest Money and, further, relieve Developer of any further obligation under this Agreement.

(Emphasis sic.)

{¶6} The 2004 contract also contained an integration clause:

14. Entire Agreement and Modification. This Agreement sets forth the entire and final agreement and understanding of the parties with respect to the subject matter hereof. Any and all prior agreements, understandings, or undertakings, whether written or oral, with respect to the same, are hereby superseded and replaced by this Agreement. This Agreement may not be modified or amended except by an instrument in writing, executed by each party.

{¶7} Both the 2000 contract and the 2004 contract contained provisions related to default and cure, non-waiver, and notices as follows:

15. Cure and Default. Except as provided in section 4, no failure or default by either party hereto concerning any act required by it shall result in the termination of any right of either party hereunder until such party shall have failed to remedy such failure or cure such default within thirty (30) days

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after the receipt of written notice of the failure to [sic] default. Receipt shall be assumed upon the earlier of actual receipt or three (3) days after such notice is placed in the U.S. Mail, properly addressed with postage prepaid.

16. Non-Waiver. No waiver, forbearance, of [sic] failure by any party of its right to enforce any provision of this Agreement shall constitute a waiver or estoppel of such party's right to enforce such provision in the future.

17. Notices. All notices shall be in writing, and shall be deemed delivered when deposited in the U.S. Mail, addressed to the notices as follows:

Crossmann Communities, Inc.
dba Beazer Homes
Attn: Jeff Lodgson
929 Eastwind Drive, Suite 223
Westerville, Ohio 43081

Stonehenge Land Company
Attn: Mo M. Dioun
41 North High Street
New Albany, Ohio 43054

(Emphasis sic.)

{¶8} Following execution of the 2004 contract, Beazer deposited the \$17,000 in earnest money and closed on 16 lots in Phase III, Section 1 of Elmont Place. On May 12, 2005, Stonehenge notified Beazer that all necessary construction permits and plan approvals had been obtained for Phase III, Section 2. It is undisputed that Beazer did not deposit any earnest money for Section 2, nor did it purchase any lots in Section 2.

{¶9} The evidence suggests that between May 12, 2005, and November 2, 2005, Beazer's legal counsel wrote several letters to Stonehenge indicating Beazer's position that it had no contractual obligation to purchase additional lots. Then, by letter

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dated November 2, 2005, Stonehenge's counsel sent a letter to Beazer's counsel, which stated, in pertinent part:

Dear Mr. Dye:

This firm represents The Stonehenge Company ("Stonehenge"). We are responding to your letters to Mr. VanSlyck and Mr. Dioun regarding Crossman's obligations under the Purchase Agreement (the "Agreement") for the Elmont Place Subdivision ("Elmont").

Under any reasonable interpretation of the Agreement, Crossman is in breach. The Agreement required Crossman to deposit one thousand dollars (\$1,000) per lot in earnest money with Stonehenge when written notice is given that all necessary and appropriate construction permits and plat approvals have been obtained for Section 2 at Elmont. * * *

By letter dated May 12, 2005, Stonehenge gave written notice that all necessary construction permits and plot [sic] approvals for Section 2 at Elmont have been obtained. Despite Stonehenge's repeated demands for payment of earnest money, Crossman has failed to deposit the earnest money as required by the Agreement. Crossman's failure to make the deposit of earnest money is a material breach of the Agreement.

* * *

* * * If I do not hear from you in five business days from the date of this letter, I will assume you have no interest in negotiating a resolution of this dispute, and we will proceed accordingly.

{¶10} On February 27, 2006, Stonehenge filed a complaint against Beazer, which stated causes of action for breach of the 2000 and 2004 contracts, intentional misrepresentation, and fraudulent inducement, and sought damages in excess of \$300,000. The breach of contract claims included claims that Beazer breached its duty to

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purchase Phase III lots under both the 2000 and 2004 contracts, and that it anticipatorily breached its duty to purchase Phase IV lots under both contracts.

{¶11} The parties filed cross-motions for summary judgment. With respect to the breach of contract claims, Beazer argued that it did not breach either contract, Stonehenge's claims were barred because it had not satisfied the condition precedent of properly serving a notice of default, and the liquidated damages provision in the 2004 contract limited Stonehenge's damages to the amount of earnest money already deposited. Stonehenge argued that Beazer breached both the 2000 and 2004 contracts by failing to purchase certain lots in Phase III and any lots in Phase IV, and that Stonehenge is entitled to specific performance as a remedy for these breaches. With respect to the tort claims, Beazer argued that Stonehenge could not establish the element of justifiable reliance common to both claims, and Stonehenge argued that genuine issues of material fact existed with respect to that element.

{¶12} By decision and entry dated February 21, 2007, the trial court granted summary judgment in favor of Stonehenge on its claim for breach of its obligations to purchase Phase III lots under the 2004 contract. The court found that Stonehenge's failure to provide written notice of default, in accordance with the provisions for such notice set forth in the contract, was a "technical breach" of the notice provision, but that it was not a "material" breach. Therefore, the court reasoned, the failure to comply with the notice provision did not entitle Beazer to summary judgment on the breach of contract claims.

{¶13} The court found that Stonehenge is entitled to damages for breach of contract, but is not entitled to specific performance. This is because the 2004 contract

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only provides for specific performance as to any lots with respect to which Beazer had deposited earnest money but then failed to purchase. Since Beazer had purchased all lots for which it had deposited earnest money, specific performance was not available. The trial court further found that the liquidated damages provision is ambiguous as to whether it provides merely for retention of earnest money already deposited, or whether it also allows Stonehenge to recover monies that it expected Beazer would deposit for Phase III lots, but that never were in fact deposited. Therefore, it determined that the jury would decide what the liquidated damages provision meant.

{¶14} As to Beazer's obligation to purchase Phase IV lots, the court denied both parties' summary judgment motions. The court recognized that the 2004 contract contains an integration clause, but noted that the 2000 contract concerns *all phases* of Elmont Place, whereas the 2004 contract only concerns Phase III. Therefore, the court determined that there remained a question for the jury whether the 2004 contract superseded the 2000 contract with respect to Phases III and IV, or whether it only superseded the 2000 contract with respect to Phase III. In other words, the jury was to determine whether Beazer's obligation to purchase Phase IV lots under the 2000 contract survived the parties' execution of the 2004 contract. Finally, the court denied both parties' motions for summary judgment with respect to the tort claims.

{¶15} Beazer made several motions in limine, including a motion to exclude any evidence as to the actual value of the Elmont Place lots, and other evidence as to Stonehenge's actual damages, arguing that the liquidated damages clause precluded the jury's consideration of such evidence. The court denied the motion and allowed Stonehenge to introduce evidence of its actual damages.

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{¶16} Following a four-day trial, the jury answered a series of interrogatories. The jury granted judgment in favor of Beazer on the fraudulent inducement and intentional misrepresentation claims. The jury determined that the 2004 contract "nullified," or superseded, the 2000 contract, with respect to Phase III lots, and that Beazer did not breach the 2000 contract when it failed to purchase Phase IV lots. Therefore, it granted judgment in favor of Beazer with respect to Stonehenge's claims for breach of the un-superseded portion of the 2000 contract; that is, the claims based on Beazer's failure to purchase Phase IV lots. With respect to Stonehenge's claims for breach of the obligation to purchase Phase III lots under the 2004 contract (for which the trial court had already granted summary judgment to Stonehenge), the jury determined that the liquidated damages provision does not limit Stonehenge's damages to earnest money already deposited. The jury awarded Stonehenge \$359,522 in damages for breach of the 2004 contract, and \$100,000 in attorney fees. Finally, the jury determined that Stonehenge had not made reasonable efforts to mitigate its damages, and had incurred \$45,960 in damages that it could have avoided by mitigating.

{¶17} After trial, Beazer moved the court for a judgment notwithstanding the verdict, pursuant to Civ.R. 50(B). Specifically, it argued that the jury's award of attorney fees was unsupported by the evidence because Stonehenge had offered no evidence as to the reasonableness of the fees. The trial court agreed and granted the motion. Beazer also moved the court for an award of attorney fees expended in its successful defense of Stonehenge's claims under the 2000 contract, which the trial court denied.

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{¶18} Each party filed a separate appeal, and we consolidated the appeals for decision. In its appeal, Beazer advances three assignments of error for our consideration, as follows:

Assignment of Error Number One

The Trial Court erred in granting Appellee's Motion for Summary Judgment because Appellant was not given a contractually required notice of default and opportunity to cure.

Assignment of Error Number Two

The Trial Court erred by submitting the issue of Appellee's actual damages to the jury when the Court had already determined that there was a clear and unambiguous contract provision for liquidated damages.

Assignment of Error Number Three

The Trial Court erred by denying Appellant's motion for an award of attorneys' fees, to which Appellant was entitled pursuant to the terms of the 2000 Purchase Agreement.

{¶19} In its appeal, Stonehenge advances the following assignments of error for our review:

Assignment of Error No. 1: The Trial Court erred by granting Beazer's Motion for Judgment Notwithstanding the Verdict and vacating the jury award of attorney's fees.

Assignment of Error No. 2: The Trial Court erred by denying Stonehenge an award of prejudgment interest.

Assignment of Error No. 3: The Trial Court erred by failing to order a post-trial hearing to allow Stonehenge to present complete evidence of its attorneys fees.

{¶20} We begin with Beazer's first assignment of error, in which Beazer argues that the trial court erred in concluding that Stonehenge's breach of contract claim was not

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barred by Stonehenge's failure to provide notice of default and an opportunity to cure, according to the specific procedure set forth in the 2004 contract. The contract provided that no failure or default by any party results in termination of any right under the contract until the party shall have failed to cure the default within 30 days after receipt of written notice of the failure or default, and that any such written notices were to be sent via U.S. Mail to Stonehenge in care of employee Jeff Logsdon. See ¶7, *supra*.

{¶21} The trial court found that the letter dated November 2, 2005, from Stonehenge's attorney to Beazer's attorney, constituted sufficient notice of default and of Stonehenge's intent to declare a breach and to pursue its remedies under the contracts. The court determined that Stonehenge's failure to address the letter to Mr. Logsdon, at the address provided in the contracts, was a technical breach of the notice provision, but was not material or prejudicial. The court also found that Beazer had both actual notice of Stonehenge's declaration of default and intent to declare a breach, and an opportunity to cure.

{¶22} On appeal, Beazer argues that the trial court's determination undermined the purpose for which the notice provision was negotiated; that is, so that the designated decision-maker, Mr. Logsdon, could be aware of circumstances in which Stonehenge believed Beazer to be in default, and of how long Beazer had to decide whether or not to cure. The only case that Beazer cites in support of its position is the case of *Cummings v. Getz* (Feb. 11, 1985), Butler App. No. CA84-09-105, which does not support Beazer's argument.

{¶23} In *Cummings*, a former tenant sued her landlord for return of her security deposit, and the landlord asserted the affirmative defense that the tenant had not given

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the contractually required 30-day written notice of intent to vacate at the end of the lease term. The court of appeals held that, in the context of a residential lease, the purpose of requiring written notice of intent to vacate is to create certainty. However, the court determined that the tenant's failure to provide written notice of intent to vacate was immaterial because she had requested that the landlord allow her and her husband to terminate the lease before the expiration of the lease term, and he had advised her that she would have to wait until the end of the term. Thus, because the landlord had actual notice that the tenant intended not to renew her lease, her failure to comply with the notice terms was not a defense to the tenant's breach of contract action.

{¶24} Our research reveals support for the trial court's conclusion that where there is evidence of actual notice, a technical deviation from a contractual notice requirement will not bar the action for breach of contract brought against a party that had actual notice. In *Interstate Gas Supply, Inc. v. Callex Corp.*, Franklin App. No. 04AP-980, 2006-Ohio-638, we held:

"The long and uniformly settled rule as to contracts requires only a substantial performance in order to recover upon such contract. Merely nominal, trifling, or technical departures are not sufficient to breach the contract." *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph two of the syllabus. "A court should confine the application of the doctrine of substantial performance to cases where the party has made an honest or good faith effort to perform the terms of the contract." *Burlington Resources Oil & Gas Co. v. Cox* (1999), 133 Ohio App.3d 543, 548, 729 N.E.2d 398, citing *Ashley v. Henahan* (1897), 56 Ohio St. 559, 47 N.E. 573, paragraph one of the syllabus. "For the doctrine of substantial performance to apply, the part unperformed must not destroy the value or purpose of the contract." *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 2002-Ohio-198, at ¶12, 772 N.E.2d 138, citing *F.C. Mach. Tool & Design, Inc. v. Custom Design*

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Technologies, Inc. (Dec. 27, 2001), Stark App. No. 2001CA00019, citing *Wengerd v. Martin* (May 6, 1998), Wayne App. No. 97CA0046. Furthermore, "when the facts presented in a case are undisputed, whether they constitute performance or a breach of the contract, is question of law for the court." *Luntz v. Stern* (1939), 135 Ohio St. 225, 237, 20 N.E.2d 241.

Id. at ¶35.

{¶25} Stonehenge's attorney's letter to Beazer's attorney may have deviated from the contract's express terms as to where Stonehenge was required to send written notice of default and election to pursue contractual remedies for breach. However, under the facts and circumstances of this case, we cannot say that this technical deviation was sufficient to constitute breach of the 2004 contract that would relieve Beazer of liability for its breach. See, e.g., *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph two of the syllabus (holding that merely nominal, trifling or technical departures are not sufficient to constitute breach of contract); see, also, *Roger J. Au & Son, Inc. v. N.E. Ohio Regional Sewer Dist.* (1986), 29 Ohio App.3d 284, 292, 29 OBR 349, 504 N.E.2d 1209 (stating that "[t]here is no reason to deny the claims for lack of written notice [if a party] was aware of [a disputed fact] and had a proper opportunity to investigate and act on its knowledge, as the purpose of the formal notice would thereby have been fulfilled").

{¶26} "A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution without performing acts that would otherwise have been conditions precedent." 5 Corbin on Contracts (1951) 920, 922, Section 977. On this principle Ohio courts have concluded that the " * * * renunciation of a contract by one of the parties constitutes a breach of contract which gives rise to a cause of action for

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damages, and in such a case notice, demand and tender are waived." *Loft v. Sibcy-Cline Realtors* (Dec. 13, 1989), Hamilton App. No. C-880446, 1989 Ohio App. LEXIS 4593, at *7. Here, Beazer repudiated the contract by failing and refusing to perform the obligations that went to the heart of the contract itself – the purchase of lots. Under those circumstances, Beazer cannot now insist that Stonehenge scrupulously adhere to every term of the contract. *Midwest Payment Sys., Inc. v. Citibank Fed. Sav. Bank* (S.D. Ohio 1992), 801 F.Supp. 9, 13.

{¶27} For all of the foregoing reasons, Beazer's first assignment of error is overruled.

{¶28} In support of its second assignment of error, Beazer contends that the trial court erred in determining that the liquidated damages provision of the 2004 contract was ambiguous, and in submitting the issue of damages to the jury. The question of whether a contract is ambiguous is a question of law. *Wells v. C.J. Mahan Constr. Co.*, Franklin App. No. 05AP-180, 2006-Ohio-1831, ¶21, discretionary appeal not allowed, 111 Ohio St.3d 1411, 2006-Ohio-5083, 854 N.E.2d 1091, citing *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St.3d 212, 214, 567 N.E.2d 262. An appellate court reviews a trial court's resolution of legal issues de novo, without deference to the result that was reached by the trial court. *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313, 667 N.E.2d 949. A court should interpret a contract to give effect to the intention of the parties as manifested by the language of the contract. *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 67 O.O.2d 321, 313 N.E.2d 374, paragraph one of the syllabus. When the terms of the contract are clear and unambiguous, courts may not create a new

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contract by finding intent not expressed by the terms. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 245-246, 7 O.O.3d 403, 374 N.E.2d 146.

{¶29} In this case, the liquidated damages provision is contained within Section 2 of the 2004 contract and provides:

Earnest Money Deposit. Upon execution of this Agreement, Builder shall deposit Seventeen Thousand Dollars (\$17,000) (the Earnest Money) with Developer, to be held by Developer in trust upon and subject to the terms and conditions set forth herein.

Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified. In such event, damages will be impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute liquidated damages and not a penalty, and shall be Developer's sole remedy at law or in equity for a breach of any covenants or agreement of this Agreement to be performed or observed by Builder.

Notwithstanding the foregoing, and any other provision of this Agreement to the contrary also notwithstanding, as to the first ten (10) Lots in each Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law and in equity, including the right to pursue specific performance.

The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and a transaction is closed, then the Earnest Money shall be applied as a One Thousand Dollar (\$1,000) credit toward the purchase price as to each specific Lot as to which the transaction is closed.

When future Sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand Dollars (\$1,000) per Lot when Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The said Earnest Money

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shall be applied as a credit in the same amount toward the purchase price of each such Lot.

(Emphasis added.)

{¶30} The trial court concluded that the liquidated damages provision was ambiguous as to whether it provides only for Stonehenge to keep any earnest money that Beazer had *already deposited*, or whether it also entitles Stonehenge to monies it *expected* would be deposited, but that Beazer never ultimately deposited. Contrary to the trial court's conclusion, we think the language is clear and unambiguous.

{¶31} The liquidated damages provision states, "Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified." Contract terms are to be given their plain and ordinary meaning. *City of Sharonville v. Amer. Emp. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶6, citing *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168, 24 O.O.3d 274, 436 N.E.2d 1347. "Earnest money" is defined as, "[a] deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults." *Black's Law Dictionary* (8th Ed.2004) 547. Because "earnest money" plainly refers to a "deposit paid" and does not refer to a deposit not yet paid, the liquidated damages clause only encompasses those monies that Beazer had *already* deposited with Stonehenge prior to Beazer's breach. Therefore, the measure of Beazer's damages was readily ascertainable by reference to the language of the contract, and the trial court erred in submitting this issue to the jury instead of resolving the issue as a matter of law. The fact that the liquidated damages may be far less than Stonehenge's actual damages does not change this result. If the

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language of a contract is clear and unambiguous, courts must enforce the instrument as written. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096.

{¶32} For all of the foregoing reasons, Beazer's second assignment of error is sustained.

{¶33} In support of its third assignment of error, Beazer argues that the trial court erred in denying Beazer's motion for attorney fees expended in its successful defense of Stonehenge's claim for breach of the 2000 contract vis à vis Phase IV lots. It directs our attention to a provision within the 2000 contract that states:

In the event a party hereto engages counsel to represent such party in connection with any breach or default, or threatened breach or default, hereof by the other party or to construe or enforce compliance with this Agreement, then the non-breaching or non-defaulting party and/or the party otherwise prevailing in any action to enforce or construe this Agreement, or any settlement associated therewith, shall be entitled to recover from the other all attorney fees, disbursements and costs to be incurred.

{¶34} Attorney fees are generally not recoverable in contract actions. *First Bank of Marietta v. L.C. Ltd.* (Dec. 28, 1999), Franklin App. No. 99AP-304. Such a principle comports with the "American Rule" that requires each party involved in litigation to pay its own attorney fees in most circumstances. *Sorin v. Bd. of Edn. of Warrensville Hts. School Dist.* (1976), 46 Ohio St.2d 177, 179, 75 O.O.2d 224, 347 N.E.2d 527. An exception to that rule allows for the recovery of attorney fees if the parties contract to shift fees. *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 699, 725 N.E.2d 1193, citing *Pegan v. Crawmer* (1997), 79 Ohio St.3d 155, 156, 679 N.E.2d 1129.

{¶35} In denying Beazer's motion for attorney fees the trial court explained:

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The jury returned a verdict in favor of [Beazer] on [Stonehenge's] breach of contract claim relating to the 2000 Purchase Agreement. The 2000 Purchase Agreement contained a provision stating that the non-breaching party in an action to enforce or interpret the 2000 Purchase Agreement is entitled to its reasonable attorney's fees. [Beazer] has moved the Court for an award of its attorney's fees, based on such verdict, and has requested a hearing to determine the reasonable amount thereof.

At trial, the Court determined that the question of whether an award of attorney's fees was to be made and if so the amount thereof, was to be submitted to the jury. * * * [Beazer] offered no evidence at trial from which a determination could be made of the amount or reasonableness of attorney's fees to be awarded to [Beazer], and as such the Court is incapable of making such an award.

(May 2, 2007 Decision and Entry, 5-6.)

{¶36} On appeal, Beazer argues that it did not have to present evidence at trial regarding its attorney fees expended in defense of Stonehenge's claim for breach of the 2000 contract, because its right to recover these fees only vested when the jury rendered a verdict in its favor on that claim. Beazer maintains that it would have been inappropriate and confusing to the jury if it had presented evidence as to its attorney fees at the same time it presented substantive evidence that it had not breached the 2000 contract.

{¶37} In response, Stonehenge presents two arguments, which we will address in turn. First, it points out that the jury answered "yes" to the interrogatory inquiring, "Was the 2000 Purchase Agreement, as amended in 2002, nullified by the 2004 Purchase Agreement?" Stonehenge argues that because the jury determined that the 2000 contract had been "nullified," then the *entire contract*, including the attorney fees provision, is unenforceable.

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{¶38} We note initially that the trial court did not rely on this interrogatory in denying Beazer's motion for attorney fees. More importantly, however, the record demonstrates that the jury did not determine that the *entire 2000 contract* had been nullified. The *only* issue before the jury respecting whether the 2004 contract nullified the 2000 contract was whether or not Beazer's 2000 contract obligation to purchase Phase IV lots survived the 2004 contract. Stonehenge claimed that Beazer had breached the 2000 contract by failing to purchase Phase IV lots, and Beazer's defense to that claim was that the 2004 contract superseded all terms in the 2000 contract that would have obligated Beazer to purchase Phase IV lots.¹ The jury interrogatory that Stonehenge cites does not even encompass whether the 2004 contract nullified the attorney fees provision, or other non-Phase IV lot purchase-related provisions; *the interrogatory only concerns whether the 2004 contract nullified Beazer's obligation to purchase Phase IV lots*. By its answer to the interrogatory, the jury indicated it found that Beazer's obligation under the 2000

¹ Jury Instruction No. 10 states, in pertinent part:

"Stonehenge also claims that Beazer breached the parties' contract with respect to Phase 4 of Elmont Place. Stonehenge also alleges that the 2004 Purchase Agreement was an amendment to the parties' contract that did not relieve Beazer of its obligations to buy the lots in Phase 4. According to Stonehenge, the subject matter of the 2004 Purchase Agreement was limited to Phase 3 of Elmont Place. Therefore, Stonehenge asserts that Beazer remained obligated pursuant to the 2000 Purchase Agreement, as amended in 2002, to purchase 10 lots in Phase 4. Stonehenge alleges that statements by Beazer that it would be making no further purchases of lots at Elmont Place constitutes an anticipatory breach of Beazer's contractual obligation to purchase the lots in Phase 4 of Elmont Place. * * *

"Beazer denies that it breached the contract with respect to Phase 4. Beazer contends that the terms of the 2000 Purchase Agreement, as amended in 2002, created no obligation on the part of Beazer to purchase, nor on the part of Stonehenge to sell, the Phase 4 lots. Rather, Beazer claims the parties intended only to establish the price at which such lots would be sold to Beazer, if Beazer wanted to purchase and Stonehenge wanted to sell those lots, if Stonehenge did not exercise its right to rezone Phase 4 for condominiums. Beazer also claims the 2004 Purchase Agreement superseded all terms of the 2000 Purchase Agreement, as amended in 2002, and that under the 2004 Purchase Agreement Beazer had no obligation to purchase lots in Phase 4.

"You must decide whether the amended 2000 Purchase Agreement obligated Beazer to purchase Phase 4 lots." (Emphasis added.)

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contract to purchase Phase IV lots had been nullified by the parties' 2004 contract. The interrogatory does not mean that Beazer is not entitled to attorney fees under the 2000 contract; on the contrary, the interrogatory means that Beazer successfully defended itself against Stonehenge's claims that Beazer's obligation to purchase Phase IV lots survived the 2004 contract, and that Beazer had breached that obligation. Thus, under the 2000 contract, Beazer had a right to its reasonable attorney fees expended in defense of that claim.

{¶39} But Stonehenge also argues that the trial court correctly observed that Beazer was required to present evidence of its attorney fees at trial and that, because Beazer failed to do so, the trial court correctly denied Beazer an award of fees or an opportunity to present evidence to the court. In reply, Beazer argues that requiring it to present evidence to the jury as to its attorney fees "had the legal effect of shifting to Beazer the burden of proof on a matter on which [Stonehenge] had such burden * * * [because evidence about Beazer's attorney fees was a matter] that the jury could not possibly have distinguished as being applicable to Beazer's case only." (Reply Brief of Appellant Beazer, 10.) Beazer maintains that this, coupled with the fact that its right to attorney fees only "vested" upon the jury's verdict in its favor on Stonehenge's claim for breach of the 2000 contract, required that Beazer's claim for attorney fees be addressed not at trial but in a post-trial motion hearing.

{¶40} Beazer does not provide any authority for the proposition that a right to attorney fees under a contractual fee-shifting provision only vests upon the jury returning a verdict for the prevailing party. However, we note that this court has previously held that a plaintiff's right to *statutory* attorney fees did not vest until she received a judgment

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in her favor. *Pasco v. State Auto Mut. Ins. Co.*, Franklin App. No. 04AP-696, 2005-Ohio-2387, ¶20, discretionary appeal not allowed, 106 Ohio St.3d 1536, 2005-Ohio-5146, 835 N.E.2d 384. In the case of *Keal v. Day*, 164 Ohio App.3d 21, 2005-Ohio-5551, 840 N.E.2d 1139, the First Appellate District held that for purposes of a contract providing for reasonable attorney fees for the "prevailing party" in any dispute over the contract, the term "prevailing party" means "one in whose favor the decision or verdict is rendered and judgment entered." *Id.* at ¶8.

{¶41} We are persuaded that Beazer did not acquire the right to attorney fees for its successful defense of Stonehenge's claim for breach of the 2000 contract until the jury rendered its verdict in Beazer's favor on this claim. As such, it was not required to seek its reasonable attorney fees until that time. We note that Beazer moved for an award of attorney fees and a hearing on the issue merely three days after the jury rendered its verdict. Under these circumstances, we agree that the trial court erred in summarily denying Beazer's motion for a hearing on its request for attorney fees. Accordingly, we sustain Beazer's third assignment of error.

{¶42} We now move on to Stonehenge's appeal. Because they are interrelated, we will address Stonehenge's first and third assignments of error together. In its first assignment of error, Stonehenge argues that the trial court erred in granting Beazer's motion for judgment notwithstanding the verdict ("JNOV") and vacating the jury's award of attorney fees. In its third assignment of error, it maintains that the trial court should have allowed Stonehenge a post-trial hearing in order to submit additional evidence on the issue of attorney fees.

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{¶43} A motion for JNOV should be granted when the trial court, construing the motion most strongly in favor of the nonmoving party, finds that upon any determinative issue, reasonable minds could come to but one conclusion upon the evidence submitted, and such conclusion is adverse to the nonmoving party. *Mantua Mfg. Co. v. Commerce Exchange Bank* (1996), 75 Ohio St.3d 1, 4, 661 N.E.2d 161. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon a motion for judgment notwithstanding the verdict. *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 137, 17 OBR 281, 477 N.E.2d 1145, quoting *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 344 N.E.2d 334. "A motion * * * for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 58 O.O.2d 424, 280 N.E.2d 896. Thus, our review is de novo. *Hale v. Spitzer Dodge, Inc.*, Franklin App. No. 04AP-1379, 2006-Ohio-3309, ¶15, citing *Miller v. Lindsay-Green, Inc.*, Franklin App. No. 04AP-848, 2005-Ohio-6366, ¶52.

{¶44} The parties' 2004 contract provides that the non-breaching and/or prevailing party in an action to enforce the contract "shall be entitled to recover from the other its reasonable attorney fees." The trial court granted Beazer's motion for JNOV as to the jury's award of attorney fees under the 2004 contract because, it found, Stonehenge had presented no evidence as to the reasonableness of its fees. Stonehenge argues that it presented evidence as to the reasonableness of its attorney fees through the testimony of its owner, Mr. Dioun, who testified that the fees Stonehenge seeks to recover are reasonable. Stonehenge also argues that Beazer never presented evidence that

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Stonehenge's fees were unreasonable. Stonehenge admits that it did not present "complete evidence of its attorney's fees,"² but argues this was because the trial court required it to present proof of its attorney fees during trial rather than at a post-trial hearing. It contends that the trial court should have held a separate post-trial hearing on attorney fees, but does not specify what other evidence would constitute "complete" evidence of its attorney fees.

{¶45} In response, Beazer points out that even though the 2004 contract provided that Stonehenge was *entitled* to its reasonable attorney fees by virtue of its status as a prevailing party, Stonehenge still had to prove that the amount it sought was in fact reasonable in the circumstances of this case. We agree. "A party seeking an award of attorney fees has the burden of demonstrating the reasonable value of such services." *DeHoff v. Veterinary Hosp. Operations of Cent. Ohio, Inc.*, Franklin App. No. 02AP-454, 2003-Ohio-3334, ¶145, discretionary appeal not allowed, 100 Ohio St.3d 1471, 2003-Ohio-5772, 798 N.E.2d 406; see, also, *Roth Produce Co. v. Scartz* (Dec. 27, 2001), Franklin App. No. 01AP-480 ("A 'reasonable' fee must be related to the work reasonably expended on the case and not merely to the amount of the judgment awarded." 2001 Ohio App. LEXIS 5907, at *12).

{¶46} "In calculating attorney fee awards, we require that a number of factors be considered, including, among other things, the time and labor involved in maintaining the litigation, the novelty and difficulty of the questions presented, the professional skill required to perform the necessary legal services, the reputation of the attorney, and the

² Brief of Stonehenge, 11.

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results obtained." *Christe v. GMS Mgt. Co., Inc.* (2000), 88 Ohio St.3d 376, 378, 726 N.E.2d 497, citing *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 145-146, 569 N.E.2d 464. The factual determination of reasonableness must also be predicated upon an analysis of the hourly rates charged multiplied by the hours actually and necessarily spent, along with the aforementioned considerations of difficulty and complexity of the case, the attorney's reputation and the results obtained. *Bittner*, supra.

{¶47} In the present case, as Stonehenge concedes, the only evidence it presented as to its attorney fees was the testimony of Mr. Dioun. Mr. Dioun merely testified that his attorney fees were reasonable in his opinion, and that the amount of fees that Stonehenge was requesting was consistent with what the attorneys estimated their fees would be for this litigation. But he did not know whether the hourly rates charged are typical for the market, which hourly rates were charged to Stonehenge, exactly who had worked on the case, or how much Stonehenge had actually been charged. He did not personally review Stonehenge's attorney invoices. This evidence is insufficient for the jury to determine the reasonableness of the attorney fees that Stonehenge seeks.

{¶48} Moreover, the trial court did not err in submitting the attorney fee issue to the jury rather than holding a separate post-trial hearing on the matter. "Generally, attorney's fees are allowable as damages in breach of contract cases where the parties have bargained for a particular result and the breaching party's wrongful conduct led to the legal fees being incurred." *Natl. Eng. & Contracting Co. v. U.S. Fid. & Guar. Co.*, Franklin App. No. 03AP-435, 2004-Ohio-2503, ¶23, citing *Westfield Cos. v. O.K.L. Can Line*, 155 Ohio App.3d 747, 2003-Ohio-7151, 804 N.E.2d 45. Because the attorney fees being sought herein were in the nature of damages, the trial court was required to submit

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the issue to the jury. "If the fees are damages, then the availability and amount of such fees have to be determined by the jury." *Christe, supra*, at 378, citing *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 557, 644 N.E.2d 397. Accordingly, the trial court correctly submitted the issue of Stonehenge's attorney fees to the jury, rather than holding a separate hearing on the issue.

{¶49} For all of the foregoing reasons, Stonehenge's first and third assignments of error are overruled.

{¶50} In its second assignment of error, Stonehenge argues that the trial court erred in the calculation of prejudgment interest. The trial court awarded prejudgment interest "only for the time period after the breach, and prior to the Court's entry of judgment herein, which was not already covered by Plaintiff's interest calculation at trial, i.e. from March 9, 2007 to the date of filing of this decision."³ Stonehenge argues that it was entitled to prejudgment interest on the jury's damage award from June 2005, at eight percent per annum, for a total of \$43,141.53. In light of our disposition of Beazer's second assignment of error, which alters the amount of compensatory damages upon which any prejudgment interest calculation would be based, we find Stonehenge's second assignment of error to be moot, and overrule it on that basis.

{¶51} In summary, we overrule Beazer's first assignment of error and sustain Beazer's second and third assignments of error; and we overrule Stonehenge's first and third assignments of error on their merits, and its second assignment of error as moot. We affirm in part and reverse in part the judgment of the Franklin County Court of

³ May 2, 2007 Judgment Entry, at 5.

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Common Pleas, and remand this cause to that court for further proceedings consistent with law and with this opinion.

*Judgment affirmed in part and reversed in part;
cause remanded.*

PETREE and KLATT, JJ., concur.



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[Cite as *Kunkle v. Akron Mgt. Corp.*, 2005-Ohio-5185.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STEVE KUNKLE

C. A. No. 22511

Appellant

v.

AKRON MANAGEMENT CORP.,
et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2003 09 5163

Appellees

DECISION AND JOURNAL ENTRY

Dated: September 30, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} Appellant/cross-appellee, Steve Kunkle, appeals from the order of the Summit County Court of Common Pleas, which granted summary judgment in favor of appellees/cross-appellants, Akron Management Corporation and ClubCorp USA, Inc., on appellant's claims. Appellees/cross-appellants appeal from the order of the Summit County Court of Common Pleas, which granted summary judgment in favor of appellant/cross-appellee on appellees' counterclaims. This Court affirms.

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I.

{¶2} Appellant began working for appellees as a greens keeper at Firestone Country Club on March 27, 1991. At all times during the course of appellant's employment with appellees, appellant was an at-will employee. Appellant was promoted over the years and was working for appellees as the superintendent of the north and south golf courses at Firestone Country Club, when he was cited on July 31, 2001, for driving under the influence. At the time of the citation, appellant was driving one of appellees' company vehicles while off duty.

{¶3} Appellant informed his supervisor, Brian Mabie, about his citation on August 1, 2001. Mr. Mabie informed Donald Padgett, appellees' general manager, about appellant's DUI citation. Appellant asserted that both Mabie and Padgett informed him that his job was secure notwithstanding the citation.

{¶4} On August 15, 2001, appellant secured a letter from Mr. Mabie regarding appellant's employment so that he could obtain a work release permit from the court hearing his criminal case. The same day, appellant entered a no contest plea regarding the driving under the influence charge. Appellant informed appellees that he had pled no contest and was subsequently found guilty by the court.

{¶5} Appellant continued to work for appellees through end of the NEC Invitational on August 26, 2001. On August 27, 2001, Mabie, Padgett and two

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other of appellees' representatives met with appellant. Mr. Padgett informed appellant that appellees decided to terminate appellant's employment because of his DUI conviction. Mr. Padgett gave appellant the opportunity to resign in lieu of termination. Appellant signed and submitted to appellees a letter, which stated, "Please accept this notice of resignation from Firestone Country Club effective today, August 27, 2001."

{¶6} On September 8, 2003, appellant filed a complaint against appellees, alleging one count of promissory estoppel, one count of fraudulent misrepresentation, and one count of breach of contract. Appellees filed an answer and counterclaims, alleging that appellant breached "a multitude of employment agreements" by filing his complaint and that appellant is promissory estopped from bringing his claims in which he alleged that he was terminated from his employment with appellees.

{¶7} Appellant filed a motion for summary judgment on appellees' counterclaims, and appellees filed a motion for summary judgment on appellant's claims. The parties filed their respective responses. On January 10, 2005, the trial court issued two orders. In one, the trial court entered judgment in favor of appellant in regard to appellees' counterclaims, thereby dismissing the counterclaims. In the other, the trial court entered judgment in favor of appellees in regard to appellant's three claims, thereby dismissing appellant's complaint. Appellant timely appealed, raising two assignments of error for review. Appellees

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also timely appealed, raising one assignment of error for review. Appellant's assignments of error are consolidated for review.

II.

APPELLANT'S FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO FIRESTONE ON KUNKLE'S CLAIMS OF BREACH OF CONTRACT AND PROMISSORY ESTOPPEL BECAUSE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING THAT KUNKLE HAD ANY WRITTEN EMPLOYMENT AGREEMENT; RATHER, KUNKLE'S ORAL, AT-WILL EMPLOYMENT AGREEMENT WAS ALTERED WHEN DEFENDANTS PROMISED HIM JOB SECURITY, WHICH THEY BREACHED WHEN THEY TERMINATED HIM."

APPELLANT'S SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO FIRESTONE ON KUNKLE'S FRAUD CLAIM BECAUSE THE VIABILITY OF THIS CLAIM HAS NOTHING TO DO WITH WHETHER AN AT-WILL EMPLOYMENT RELATIONSHIP IS BASED ON A WRITTEN OR ORAL AGREEMENT, AND BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO EACH ELEMENT OF THIS CLAIM."

{¶8} Appellant argues that the trial court erred in granting summary judgment in favor of appellees in regard to the claims in his complaint. This Court disagrees.

{¶9} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most

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favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶10} Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶11} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party’s pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a “genuine triable issue” exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶12} To prevail on a claim for promissory estoppel, appellant must prove:

“(1) a clear and unambiguous promise; (2) reliance on that promise; (3) reliance that was reasonable and foreseeable; and (4) damages caused by that reliance.”

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Current Source, Inc. v. Elyria City School Dist., 157 Ohio App.3d 765, 2004-Ohio-3422, at ¶31.

{¶13} In his complaint, appellant alleged that appellees made certain representations to him regarding his continued employment, that appellant reasonably relied upon those representations, that he changed his position for the worse in reliance on those misrepresentations by pleading no contest to the DUI charge instead of pursuing the matter at trial, and that he suffered damages as a result of his subsequent termination. In essence, appellant alleged that appellees promised that appellant would not be terminated. He argues that he relied on that promise when he decided to plead no contest to the DUI charge, which resulted in his conviction. Appellant asserts that he was damaged, because his conviction thereafter resulted in appellees' termination of his employment. He asserts that appellees should be estopped from terminating his employment because of their representations that appellant's job remained secure despite his DUI citation.

{¶14} In this case, appellant's claim must fail for the simple reason that appellees did not terminate appellant. Appellant admits that he submitted a resignation to appellees on August 27, 2001. Although he argues that his resignation is invalid because he was coerced or forced to resign under duress, appellant makes no claims of duress or constructive discharge in his complaint. He merely claims that his actions (pleading no contest to the DUI charge), premised on his reasonable reliance on appellees' promise that his job was secure,

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resulted in appellees' termination of him. Because appellant resigned, and was not terminated by appellees as alleged, he cannot prove that appellees actions resulted in any injury to him. Accordingly, estoppel does not lie under these circumstances. No genuine issue of material fact exists, and appellees are entitled to judgment as a matter of law on appellant's claim of promissory estoppel.

{¶15} To prevail on a claim for fraudulent misrepresentation, appellant must prove:

“that there was a representation; or where there was a duty to disclose, concealment of a fact which is material to the transaction; made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; with the intent of misleading another into relying upon it; justifiable reliance upon the representation or concealment; and a resulting injury proximately caused by the reliance.” *DiCillo v. Prindle*, 9th Dist. No. 21618, 2004-Ohio-2366, at ¶27.

{¶16} In his complaint, appellant alleged that appellees represented that appellant's job was secure notwithstanding his DUI citation and concealed their plan to maintain appellant as an employee only until after the NEC Invitational golf tournament. Appellant further contended that he relied on those representations and concealed facts when he pled no contest to the DUI charge. As a result, appellant alleged that he suffered damages when appellees terminated him.

{¶17} Again, appellant's claim must fail, because appellees did not terminate appellant. Appellant acknowledges that he submitted his resignation on

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and appellees are entitled to judgment as a matter of law in regard to appellant's claim for breach of implied contract.

{¶21} Appellant's first and second assignments of error are overruled.

III.

APPELLEES'/CROSS-APPELLANTS' ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS WERE NOT ENTITLED TO RECOVER DAMAGES CAUSED BY PLAINTIFF'S BREACH OF HIS WRITTEN, EXPRESSED COMMITMENT THAT 'ANY STATEMENTS, ORAL OR WRITTEN, MADE OR WHICH MAY BE MADE CONTRARY TO THE ABOVE [AT-WILL STATURE] ARE NOT TRUE AND THE EMPLOYER DISAVOWS THEM,' AND THAT PLAINTIFF 'CANNOT RELY ON ANY STATEMENTS MADE WHICH ARE CONTRARY TO THE ABOVE BECAUSE SUCH STATEMENTS ARE NOT BINDING ON THE EMPLOYER FOR ANY PURPOSE WHATSOEVER.'"

{¶22} Appellees argue that the trial court erred in granting summary judgment in favor of appellant in regard to appellees' counterclaims. This Court disagrees.

{¶23} The standard by which this Court reviews the trial court's order on a motion for summary judgment is set forth above.

{¶24} Appellees alleged in their counterclaims that appellant's filing of claims against appellees constitutes a breach of various employment agreements, including two "Receipt[s] of Employee Handbook" and a statement in appellant's employment application, wherein he signed an acknowledgement that "I agree and acknowledge that should I become employed by the Company my employment

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August 27, 2001. Accordingly, appellant cannot establish that appellees caused any injury to appellant as a result of appellant's reliance on any representations or concealments by appellees. The trial court did not err in finding that no genuine issue of material fact exists and that appellees are entitled to judgment as a matter of law on appellant's claim of fraudulent misrepresentation.

{¶18} To prevail on a claim of breach of contract, appellant must prove "the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff." *Preferred Capital, Inc. v. Sturgil*, 9th Dist. No. 21787, 2004-Ohio-4453, at ¶11, quoting *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600.

{¶19} In his complaint, appellant alleged that he had an implied contract with appellees that they would not terminate appellant for violating the company's zero tolerance drug policy. Appellant continued that appellees breached that implied contract when they subsequently terminated him.

{¶20} This Court reiterates that appellant admits that he submitted his resignation to appellees on August 27, 2001. Appellant had the option of refusing to resign. He then might have filed a complaint alleging wrongful termination in addition to his instant claims. Instead, appellant resigned and failed to allege any claims for duress or constructive discharge. Under the circumstances, appellant cannot prove that appellees breached any implied contract not to fire appellant, because appellant resigned. Accordingly, no genuine issue of material fact exists,

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can be terminated, with or without cause, at any time by myself or The Company.” Appellees further alleged that appellant was estopped from alleging that he was “terminated” by appellees. Appellees seek as damages its fees and costs in defending against appellant’s claims.

{¶25} This Court reiterates that to prevail on their claim of breach of contract, appellees must prove “the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.” *Preferred Capital, Inc.* at ¶11.

{¶26} To prevail on their claim of promissory estoppel, appellees must prove “(1) a clear and unambiguous promise; (2) reliance on that promise; (3) reliance that was reasonable and foreseeable; and (4) damages caused by that reliance.” *Current Source, Inc.* at ¶31.

{¶27} Appellant argued in his motion for summary judgment that no representative of appellees could enunciate the nature of appellees’ counterclaims, let alone articulate damages suffered as a result of appellant’s filing of his complaint.

{¶28} Brian Mabie, appellees’ director of golf course maintenance, testified at his deposition that he was not aware of appellees’ counterclaims against appellant until counsel inquired about them at the deposition. Diane Shamp, controller for Akron Management Corporation, testified at her deposition

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that she had previously heard something to the effect that appellees had filed counterclaims against appellant, but she did not know the nature of those claims.

{¶29} Finally, Donald Padgett, general manager of Firestone Country Club, testified at his deposition that he was unaware of the nature of appellees' counterclaims against appellant. He expressly testified that he could not testify to the facts that gave rise to appellees' counterclaims. In addition, Mr. Padgett swore that he could not detail the damages sought by appellees in their counterclaims against appellant. Mr. Padgett could only assert that it was his understanding that appellees brought the counterclaims "to seek damages and for costs that we incurred in defending ourselves." Accordingly, the only harm which appellees could assert with any particularity was their desire for attorney fees in defending this action.

{¶30} It is well-established that Ohio adheres to the "American rule," which generally requires that each party involved in litigation shall pay his or her own attorney fees. *Krasny-Kaplan Corp. v. Flo-Tork, Inc.* (1993), 66 Ohio St.3d 75, 77. In fact, "it is well established that attorney's fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'" *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters & Joiners of America* (1982), 456 U.S. 717, 721, 72 L.Ed.2d 511.

{¶31} In this case, appellees cite to no statutory authority which would allow them to recover their attorney fees associated with defending appellant's

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claims. Further, assuming arguendo that the "Receipt[s] of Employee Handbook" and the employment application executed by appellant constitute valid contracts, none of those documents contains any promise by appellant not to sue appellees. Accordingly, in the absence of any justification by appellees that appellant is responsible to pay for appellees' attorney fees in this matter and any evidence of their other alleged damages, appellees have failed to meet their reciprocal burden of establishing that a genuine issue of material fact remains. *Zimmerman*, 75 Ohio St.3d at 449. Accordingly, the trial court did not err in granting summary judgment in favor of appellant in regard to appellees' counterclaims. Appellees' assignment of error is overruled.

IV.

{¶32} Appellant's (cross-appellee's) two assignments of error are overruled. Appellees' (cross-appellants') assignment of error is overruled. The orders of the Summit County Court of Common Pleas, which granted summary judgment in favor of appellees in regard to appellant's claims and granted summary judgment in favor of appellant in regard to appellees' counterclaims, are affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

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We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to all parties.

Exceptions.

DONNA J. CARR
FOR THE COURT

BATCHELDER, J.
MOORE, J.
CONCUR

APPEARANCES:

JOHN A. TUCKER and CHRISTINA M. ROYER, Attorneys at Law, 1 South Main Street, Suite 301, Akron, Ohio 44308, for appellant.

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