

[Cite as *Stanley Miller Constr. Co. v. Ohio School Facilities Comm.*, 2010-Ohio-6397.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stanley Miller Construction Co.,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
v.	:	No. 10AP-298
Ohio School Facilities Commission et al.,	:	(C.C. No. 2006-04351)
Defendants-Appellants/ Cross-Appellees.	:	(REGULAR CALENDAR)
Stanley Miller Construction Co.,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
v.	:	No. 10AP-299
State of Ohio et al.,	:	(C.C. No. 2006-05632-PR)
Defendants-Appellees,	:	(REGULAR CALENDAR)
Ohio School Facilities Commission and Canton City School District et al.,	:	
Defendants-Appellants/ Cross-Appellees.	:	
Stanley Miller Construction Co.,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
v.	:	No. 10AP-432
State of Ohio,	:	(C.C. No. 2006-05632)
Defendant-Appellee,	:	(REGULAR CALENDAR)
Ohio School Facilities Commission et al.,	:	

	:	
Third-Party Defendants/ Cross-Appellants.	:	
Stanley Miller Construction Co.,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
v.	:	No. 10AP-433
	:	(C.C. No. 2006-04351)
Ohio School Facilities Commission et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees/ Cross-Appellants.	:	

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D E C I S I O N

Rendered on December 28, 2010

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

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

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APPEALS from the Court of Claims of Ohio

CONNOR, J.

{¶1} Defendants-appellants/cross-appellees Ohio School Facilities Commission, the State of Ohio, and the Canton City School District Board of Education (collectively "OSFC"), appeal the judgments rendered by the Court of Claims of Ohio in favor of plaintiff-appellee/cross-appellant, Stanley Miller Construction Company ("Stanley Miller"),

after a bench trial. For the reasons that follow, we reverse the judgments of the trial court.

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

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

{¶4} Stanley Miller had serious reservations over the schedule prepared by Reott. Specifically, it believed certain predecessors and successors were missing, and certain components of the construction were not allotted adequate time. It also generally questioned the logic underlying the schedule in addition to the planned sequence for the project. Stanley Miller believed that the masonry component of the project should have led all others. Based upon these circumstances, Stanley Miller expressed concerns about the schedule to OSFC at various points through the project. The schedule was

updated four different times through the Lehman project. However, none of these updates satisfied Stanley Miller's concerns over the costly inefficiencies it perceived. In addition to the problems with the schedule, Stanley Miller felt that Mr. Way interfered with their work on almost a daily basis. Based upon these circumstances, it was no secret that the parties had a contentious relationship during the Lehman project, as the trial court aptly noted. (Trial court's decision, at 19.) Indeed, the record is riddled with references to threats made by Mr. Way to Stanley Miller over the imposition of liquidated damages in the event Stanley Miller refused to comply with his directions.

{¶5} Although the schedule called for construction to be completed by July 2, 2004, work on the project continued into early 2005. Despite this delayed completion, the project was substantially completed in August 2004 when the building was open for classes.

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

documentation regarding a breakdown of the claim, but "no further action was taken" with regard to the one-page, \$1.1 million claim. (Trial court's decision, at 5.)

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

ASSIGNMENT OF ERROR NO. 1

The trial court's decision in this case must be reversed in light of this Court's recent decision in *Cleveland Construction v. Kent State University*, Franklin App. No. 09AP-822, 2010-Ohio-2906.

ASSIGNMENT OF ERROR NO. 2

The trial court erred as a matter of law in not requiring Plaintiff contractor to prove its damages.

ASSIGNMENT OF ERROR NO. 3

The trial court erred as a matter of law by holding that public owners, through their construction managers, interfere with the contractor's means and methods by enforcing the project schedule.

In its cross-appeal, Stanley Miller presents the following assignments of error:<sup>1</sup>

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

[CROSS-ASSIGNMENT OF ERROR NO. 1]

It was error for the trial court to reduce SMC's compensatory damages claimed for actual increased masonry costs by one-half from \$476,392.77 to \$238,196.39 when the stated reasons for the substantial reduction are not supported by the record.

[CROSS-ASSIGNMENT OF ERROR NO. 2]

It was error for the trial court to not award actual increased concrete costs of \$102,829.96, as part of the compensatory damages when the same facts justifying the award of masonry costs apply to the concrete costs.

[CROSS-ASSIGNMENT OF ERROR NO. 3]

It was error for the trial court to not award as part of the compensatory damages the actual increased costs of \$35,973.26 for cold weather protection for providing such protection for a second winter not originally planned for in the bid estimate underlying the contract.

[CROSS-ASSIGNMENT OF ERROR NO. 4]

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

[CROSS-ASSIGNMENT OF ERROR NO. 5]

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

[CROSS-ASSIGNMENT OF ERROR NO. 6]

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

[CROSS-ASSIGNMENT OF ERROR NO. 7]

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

[CROSS-ASSIGNMENT OF ERROR NO. 8]

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

[CROSS-ASSIGNMENT OF ERROR NO. 9]

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

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

{¶9} *Cleveland Construction* involved a contract for the construction of four residence halls amongst a contractor and a state university. *Id.* at ¶2. The contractor experienced difficulties meeting deadlines based upon various delays outside of its control. *Id.* at ¶3, 11 and 17. As a result, the contractor submitted change order requests in order to extend the deadlines of the project. *Id.* at ¶7, 8, 12 and 18. The university issued a change order that granted an extension to only one of the deadlines, which the contractor believed to be inadequate for the delays it had incurred. *Id.* at ¶15. Therefore, the contractor worked overtime and accelerated its work schedule in order to attempt to meet the deadlines. Ultimately, however, the contractor failed to meet the deadlines. *Id.*

at ¶20-21. It therefore filed suit for breach of contract against the university, while the university filed its own counterclaim for breach of contract. *Id.* at ¶23. After a bifurcated bench trial on the issue of liability, the trial court held that each party breached the contract in various ways. Generally, the university's breaches related to its responses to change order requests and the failure to remit the unpaid balance under the contract, while the contractor's breaches related to the quality of work it performed. *Id.* The trial court then held a damages trial and, after set-offs, awarded damages to the contractor in excess of \$3 million. *Id.* at ¶24. The university appealed and presented arguments relating to the affirmative defenses of waiver and the failure to exhaust administrative remedies. *Id.* at ¶27-28. After our court engaged in contractual construction and statutory interpretation analyses, we held that the university had asserted these viable affirmative defenses. *Id.* at ¶46. We then noted that the trial court never determined whether the university had, in fact, prevailed on these defenses. *Id.* at ¶48. We therefore remanded the matter to the trial court to reach a determination based upon the evidence in the record. *Id.*

{¶10} Based upon the arguments presented herein, we must engage in a contractual construction analysis of the public works contract underlying this matter. The construction of written contracts involves issues of law that appellate courts review *de novo*. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. The purpose of contract construction is to realize and give effect to the intent of the parties. *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, paragraph one of the syllabus. "[T]he intent of the parties to a contract resides in the language they chose to employ in the agreement." *Shifrin v. Forest City Enterprises, Inc.*,

64 Ohio St.3d 635, 638, 1992-Ohio-28, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. See also *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶9 (it is presumed that the intent of the parties to the contract lies within the language used in the contract). When contract terms are clear and unambiguous, courts will not, in effect, create a new contract by finding an intent which is not expressed in the clear language utilized by parties. *Alexander* at 246, citing *Blosser v. Enderlin* (1925), 113 Ohio St. 121, paragraph one of the syllabus.

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

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

Further, Section 8.1.2.1 requires the claim to specify its nature and amount, which was to have been certified by a notary as a fair and accurate assessment of the damages suffered by Stanley Miller. Section 8.1.2.2 requires the claim to have identified the persons, entities and events responsible for the claim. Section 8.1.2.3 requires the claim to have specified the activities affected. Section 8.1.2.4 requires the claim to specify any anticipated delay, interference, hindrance, or disruption. Finally, Section 8.1.2.5 requires

the claim to have provided recommendations to prevent further delay, interference, hindrance, or disruption. (Aug. 10, 2006 Motion to Dismiss, exhibit No. 1b.)

{¶12} "[W]hen a contract has an express provision governing a dispute, that provision will be applied; the court will not rewrite the contract to achieve a more equitable result." *Dugan & Meyers Constr. Co., Inc. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶39, citing *Ebenisterie Beaubois Ltee v. Marous Bros. Constr., Inc.* (Oct. 17, 2002), N.D. Ohio E.D. No. 02CV985, 2002 WL 32818011. This sentiment was echoed in *Cleveland Construction*, when our court had the opportunity to analyze a near identical section to Section 8.1.1. In *Cleveland Construction*, we held:

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

Id. at ¶31.

{¶13} In its first assignment of error, OSFC argues that the trial court ignored the second sentence of Section 8.1.1 in order to fashion a more equitable remedy for Stanley Miller. It also argues that Stanley Miller has made certain evidentiary concessions, which require a reversal under *Cleveland Construction*. Specifically, it notes that Stanley Miller conceded that it failed to comply with Article 8 of the contract in the submission of the

one-page, \$1.1 million claim. As a result, OSFC argues that Stanley Miller has waived its right to this claim. Further, it argues that Stanley Miller's claims for breach of contract, negligence, and unjust enrichment are barred because Stanley Miller failed to exhaust its administrative remedies under the contract.

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

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

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

{¶15} In its decision granting judgment to Stanley Miller, the trial court relied upon *Craft Gen. Contractors, Inc. v. City of Urbana* (Feb. 2, 1982), 10th Dist. No. 81AP-346, 1982 Ohio App. LEXIS 13164, 1982 WL 3960. Our court reviewed *Craft General Contractors* after a summary judgment was granted in favor of the city of Urbana as against a contractor. *Id.*, 1982 Ohio App. LEXIS 13164, at \*8, 1982 WL 3960, at \*1. In that case, we framed one of the issues as follows: "Is appellant precluded from recovery because of its failure to submit its claim to appellee, City of Urbana, within the time limit as set out in the contract?" *Id.*, 1982 Ohio App. LEXIS 13164, at \*11, 1982 WL 3960, at

\*4. In response to this issue of timing, we held that genuine issues of material fact existed because of the knowledge the city had, the oral notice of the complaints provided by the contractor, and the lack of prejudice to the city over the untimely submission of an earlier, written notice. *Id.*, 1982 Ohio App. LEXIS 13164, at \*11, 1982 WL 3960, at \*8. We therefore reversed and remanded the matter for a trial. *Id.*, 1982 Ohio App. LEXIS 13164, at \*11, 1982 WL 3960, at \*9.

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

{¶17} In *Dugan & Meyers*, the Supreme Court of Ohio held:

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

*Id.* at ¶41, quoting *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 162 Ohio App.3d 491, 2005-Ohio-3810, ¶40. Therefore, under *Dugan & Meyers*, something more than actual notice on the part of the state is required to excuse a contractor from

complying with its obligations regarding change-order procedures in public works contracts.

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

{¶19} Further, it is clear that the trial court decided this matter, at least in part, on the portion of *Conti Corp. v. Ohio Dept. of Adm. Servs.* (1993), 90 Ohio App.3d 462 that we expressly overruled in *Cleveland Construction*. While we acknowledge that *Cleveland Construction* was decided after the trial court rendered its decision in the instant matter, we cannot ignore the trial court's reliance on the portion of *Conti* that now has no precedential value. As a result, the trial court would now be more adept at analyzing the issue of waiver, along with the pertinent evidence, in light of our recent decision in *Cleveland Construction*. Additionally, we reject Stanley Miller's contention that *Cleveland Construction* should only have prospective effect.

{¶20} "Waiver is an affirmative defense." *Cleveland Construction* at ¶47, citing Civ.R. 8(C). An affirmative defense acknowledges the validity of a claim but asserts some legal reason why the plaintiff is precluded from recovering on the claim. *Id.*, citing *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 75 Ohio St.3d 31, 1996-Ohio-379. Because waiver is an affirmative defense, OSFC bore the burden of proving it at trial. *Cleveland Construction* at ¶48. Just as our court did in *Cleveland Construction*, we find that the trial court must consider this affirmative defense. We therefore sustain OSFC's first assignment of error and remand this matter to the trial court for it to determine whether OSFC met its burden of proving waiver based upon the evidence in the record.

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

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

*Judgments reversed and remanded with instructions;  
Cross-appeal rendered moot;  
Motion to dismiss cross-appeal rendered moot.*

SADLER and McGRATH, JJ., concur.

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