[Cite as *Mid-Ohio Mechanical, Inc. v. Eisenmann Corp.*, 2009-Ohio-5804.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MID-OHIO MECHANICAL, INC.	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 07 CA 000035 &
	:	08 CA 00012
EISENMANN CORPORATION	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Guernsey County Court Of Common Pleas Case No. 04 CV 000261
JUDGMENT:	Affirmed In Part and Reversed and Remanded In Part
DATE OF JUDGMENT ENTRY:	November 2, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DONALD W. GREGORY Kegler, Brown, Hill & Ritter Co., L.P.A. 65 East State Street, Suite 1800 Columbus, Ohio 43215-4294	JOHN N. MACKAY DAVID W. WICKLUND MICHAEL J. PODOLSKY Shumaker, Loop & Kendrick, LLP 1000 Jackson Street Toledo, Ohio 43604-5573

Edwards, J.

{¶1} Appellant, Eisenmann Corporation (Eisenmann), appeals a judgment of the Guernsey County Common Pleas Court awarding appellee Mid-Ohio Mechanical, Inc. (Mid-Ohio) $768,396.67 on a mechanic's lien and appellant $14,550.00 on its counterclaim, following jury trial (Case No. 07-35). Appellant also appeals a judgment of the Guernsey County Common Pleas Court ordering appellant to pay attorney fees and post-judgment interest (Case No. 08-12). The appeals were consolidated by this court under case number 08-12.

STATEMENT OF FACTS AND CASE

{¶2} LDM/Plastech owns a factory in Byesville, Ohio. LDM contracted with Eisenmann to upgrade the paint line in the factory. The paint line applies high-tech coatings to car bumpers. The project included replacing a cure oven and its platform under the roof with an oven and platform mounted above the roof, replacing existing paint sludge removal equipment, replacing and adding paint booth scrubbers and other pollution control equipment, replacing and adding robotic paint sprayers, moving and extending the conveyor and numerous other changes to the factory.

{¶3} Eisenmann is an Illinois process engineering firm that designs, manufactures, buys, sells and installs factory machinery and equipment. As the general contractor on the project, Eisenmann subcontracted with Carden Metal Fabricators, Inc. to remove old equipment and install new equipment. In turn, Carden subcontracted with Mid-Ohio to assemble the roof on the new bake oven and to construct the "dog house." Parts would travel up a conveyor belt to the new bake oven on the factory roof, and the roof that covered the conveyor belt is called the "dog house." Mid-Ohio's contract with

Carden was mostly a time and materials contract, meaning Mid-Ohio submitted bills to Carden for the costs for time and materials as they were actually incurred on the project. A portion of the work was done pursuant to a fixed price contract.

{¶4} As the project proceeded through the fall of 2003, issues began to surface with the project design. In October of 2003, Eisenmann became aware of a problem between Carden and Mid-Ohio regarding Carden's failure to pay Mid-Ohio. Representatives of Eisenmann and Mid-Ohio met with representatives of Carden at Carden's office in Michigan on November 25, 2003. At that time, Carden announced that they were going out of business and would be leaving the LDM/Plastech project. Shocked by the announcement, Eisenmann and Mid-Ohio entered discussions about the possibility of Mid-Ohio finishing Carden's work on the project. Initially, Eisenmann issued purchase orders to have Mid-Ohio continue the work on Carden's part of the project. Shortly thereafter, Eisenmann asked Mid-Ohio to cease work on the project. The last purchase order issued from Eisenmann to Mid-Ohio was December 3, 2003, and related to securing the project from deterioration and damage by December 5, 2003. Mid-Ohio left the project on December 5, 2003.

{¶5} Because Carden had not paid Mid-Ohio in full, on December 24, 2003, Mid-Ohio filed a mechanic's lien in the amount of $768,396.67. When the lien was filed, Charlie Birks, Eisenmann's project manager for the LDM project, telephoned Mid-Ohio's division manager, Brek Wildermuth, and said, "You know, one of these days we're going to sit down and have a beer and laugh about this whole thing." Tr. 291.

{¶6} In May of 2004, Mid-Ohio filed a complaint against Eisenmann, LDM (the landowner), Plastech (LDM's parent company), Carden, Carden's principals and several

lien holders on LDM's land. Mid-Ohio filed an amended complaint on June 9, 2004. Counts one and two were against Carden, and counts five and six were against Carden's principals. Default judgment was entered against Carden and its principals in each of these four counts. Count 3 asserted a mechanic's lien claim against LDM, Plastech, and four lien holders having claims against LDM's property. Count four asserted claims for unjust enrichment against Eisenmann and LDM.

{¶7} Eisenmann filed a counterclaim seeking damages from breach of the December 3, 2003 purchase order, and damages from Mid-Ohio's work on the Carden sub-contract.

{¶8} In August of 2004, LDM posted a cash deposit with the court to lift the cloud of title from their property so Mid-Ohio's mechanic's lien could be released. The cash was obtained from Eisenmann under an indemnity agreement. In pertinent part, the court's judgment accepting the cash deposit states:

{¶9} "IT IS THEREFORE ORDERED that the parties consent to the submission of this matter without the necessity of an oral hearing as provided by Ohio Revised Code Section 1311.11, and that the cash deposited with this Court in the amount of $1,152,605.00 by the Applicants is hereby approved….

{¶10} "IT IS FURTHER ORDERED that upon the filing of this order, the mechanic's lien, a copy of which is attached as Exhibit A, recorded in Book Number 384, pages 103 – 104, of the Official Records of the Guernsey County, Ohio Recorder shall be void and the property described in Exhibit A attached hereto shall be wholly discharged from such lien, pursuant to the provisions of Section 1311.11 of the Ohio Revised Code. The cash deposit shall be substituted for the security of the lien, the

action on the lien is terminated automatically, the land is freed from the lien, and the action on the lien shall proceed as an action on the cash deposit.

{¶11} "IT IS FURTHER ORDERED that the cash deposit shall be released by the Clerk of Courts for the Guernsey County Court of Common Pleas and paid to Applicants, Eisenmann Corporation, Plastech Engineered Products, Inc., and LDM Technologies – jointly, upon dismissal of this lawsuit with or without prejudice, or the satisfaction of such judgment and/or verdict as may be entered in favor of Plaintiff or any Defendant." Judgment Entry, August 13, 2004.

{¶12} On August 30, 2004, the court dismissed the lien holders on LDM's property because of the transfer of the lien to the cash deposit.

{¶13} On December 15, 2005, Mid-Ohio dismissed all claims against LDM and Plastech. Eisenmann moved to release the cash deposit, arguing that the dismissal of LDM and Plastech from the case operated to dismiss Mid-Ohio's claim on the mechanic's lien because they were the only remaining defendants named in the mechanic's lien claim.

{¶14} In March of 2006, the court granted summary judgment to Eisenmann. Mid-Ohio appealed the summary judgment to this court. We reversed and remanded the case, finding in pertinent part, "We find Mid-Ohio's lien is enforceable as a matter of law on the undisputed facts and the applicable statutory definitions and requirements." *Mid-Ohio Mechanical, Inc. v. Carden Metal Fabricators, Inc.,* Guernsey No. 2006-CA-13, 2006-Ohio-5293, ¶33.

{¶15} The case proceeded to jury trial on May 2, 2007. After the jury was impaneled, Mid-Ohio dismissed its unjust enrichment claim against Eisenmann. The

case proceeded on Mid-Ohio's claim against the cash deposit on its mechanic's lien and on Eisenmann's counterclaim for damages for Mid-Ohio's failure to complete the work on the December 3, 2003, purchase order in a workmanlike manner. The jury returned a verdict on May 10, 2007, awarding Mid-Ohio $768,396.67 on the mechanic's lien and Eisenmann $14,550 on the counterclaim. Eisenmann's motions for a new trial, to vacate the judgment and to release the deposit, were overruled.

{¶16} On July 6, 2007, Eisenmann filed an action in the Ohio Supreme Court seeking a writ of prohibition to stop the trial court from conducting further proceedings regarding Mid-Ohio's complaint. The Supreme Court dismissed the writ without written opinion on August 29, 2007, finding that Eisenmann had an adequate remedy by way of appeal.

{¶17} Mid-Ohio filed a post-trial motion for attorney fees and interest. The court found that Eisenmann had engaged in frivolous conduct and awarded Mid-Ohio attorney fees in the amount of $559,743.04. The court also awarded Mid-Ohio pre-judgment interest in the amount of $210,997.58, plus interest at the rate of 8% until paid.

{¶18} The case was orally argued to this court on October 7, 2008. Subsequent to oral argument, we received notification that LDM/Plastech had filed for bankruptcy. On December 15, 2008, we stayed the appeal and closed the case on the basis that the cash deposit at issue on the mechanic's lien claim in this appeal might be part of the bankruptcy estate of LDM/Plastech. Having received notification from the parties that the bankruptcy court had cleared the way for this court to proceed on the appeal, we reopened the appeal on April 27, 2009.

{¶19} Eisenmann assigns three errors to the judgment of the court upon the jury verdict:

{¶20} "I. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF/APPELLEE MID-OHIO MECHANICAL, INC. ('MID-OHIO') TO PROCEED TO TRIAL ON A MECHANIC'S LIEN CLAIM AGAINST DEFENDANT/APPELLANT EISENMANN CORPORATION ('EISENMANN').

{¶21} "II. THE TRIAL COURT ERRED IN FAILING TO PROVIDE THE JURY WITH JURY INSTRUCTIONS THAT ACCURATELY STATED OHIO LAW.

{¶22} "III. THE TRIAL COURT ERRED IN RENDERING JUDGMENT ON EISENMANN'S COUNTERCLAIMS THAT WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE."

{¶23} Eisenmann assigns seven errors to the court's judgment awarding attorney fees and post-judgment interest:

{¶24} "I. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF PREJUDGMENT INTEREST ON ITS MECHANIC'S LIEN CLAIM BECAUSE THERE WAS NO PRIVITY OF CONTRACT BETWEEN PLAINTIFF AND THE OWNER OR PLAINTIFF AND EISENMANN, AND ERRED IN AWARDING POST JUDGMENT INTEREST AGAINST EISENMANN IN ITS INDIVIDUAL CAPACITY, BECAUSE IT MUST BE PAID OUT OF THE FUND REALIZED FOR LIEN CLAIMANTS.

{¶25} "II. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF ATTORNEY'S FEES UNDER §1311.16, OHIO REV. CODE, BECAUSE PLAINTIFF INCURRED MOST OF ITS ATTORNEY'S FEES IN PURSUING UNJUST ENRICHMENT CLAIMS AGAINST THE OWNER AND EISENMANN, BECAUSE THE

AWARD IS AGAINST PUBLIC POLICY SINCE A SUBSTANTIAL PORTION OF PLAINTIFF'S WORK WAS PERFORMED IN VIOLATION OF THE OHIO BUILDING CODE, AND BECAUSE PLAINTIFF'S OWN CONDUCT WAS RESPONSIBLE FOR MUCH OF THE ATTORNEY'S FEES INCURRED.

{¶26} "III. THE TRIAL COURT ERRED TO THE EXTENT THAT THE AWARD OF ATTORNEY'S FEES UNDER § 1311.16, OHIO REV. CODE, CAUSED THE TOTAL AWARD AGAINST EISENMANN, WHICH ALSO INCLUDES DAMAGES, INTEREST AND COSTS, TO EXCEED THE CASH DEPOSIT, BECAUSE THE AWARD OF ATTORNEY'S FEES MUST BE PAID OUT OF THE FUND REALIZED FOR LIEN CLAIMANTS.

{¶27} "IV. THE TRIAL COURT ERRED IN DETERMINING THAT EISENMANN HAD LIABILITY UNDER THE FRIVOLOUS CONDUCT STATUE, § 2323.51, OHIO REV. CODE, BECAUSE PLAINTIFF DID NOT FILE ITS MOTION FOR ATTORNEY'S FEES, COSTS AND LITIGATION EXPENSES RESULTING FROM EISENMANN'S ALLEGED FRIVOLOUS CONDUCT WITHIN 30 DAYS AFTER FINAL JUDGMENT AS REQUIRED BY § 2323.51.

{¶28} "V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DETERMINING THAT EISENMANN ENGAGED IN FRIVOLOUS CONDUCT, BECAUSE THE TRIAL COURT'S FINDINGS ON ITS OWN INITIATIVE DID NOT COMPLY WITH STATUTORY PROCEDURE, AND BECAUSE EISENMANN'S ARGUMENTS WERE WARRANTED UNDER EXISTING LAW, WERE MADE AT PROCEDURALLY CORRECT TIMES DURING THE COURT OF THE PROCEEDINGS,

AND WERE NOT MADE MALICIOUSLY OR TO HARASS PLAINTIFF, CAUSE DELAY, OR INCREASE THE COST OF LITIGATION.

{¶29} "VI. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY AWARDING PLAINTIFF ATTORNEY'S FEES AND LITIGATION EXPENSES AGAINST EISENMANN UNDER § 2323.51, OHIO REV. CODE, WHERE PLAINTIFF FAILED TO MEET ITS BURDEN OF PROOF TO SHOW THAT IT WAS ADVERSELY AFFECTED BY THE ALLEGED FRIVOLOUS CONDUCT AND TO SHOW WHICH FEES AND EXPENSES WERE INCURRED AS A DIRECT AND IDENTIFIABLE RESULT OF DEFENDING PARTICULAR INSTANCES OF FRIVOLOUS CONDUCT, AND WHERE THE TRIAL COURT FAILED TO DELINEATE THE SPECIFIC FEES AND SERVICES NECESSITATED BY THE ALLEGED FRIVOLOUS CONDUCT.

{¶30} "VII. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT EISENMANN HAD ENGAGED IN FRIVOLOUS CONDUCT FOR FILING A POST TRIAL AFFIDAVIT AND A POST HEARING BRIEFS (SIC), WHERE THE TRIAL COURT HAD APPROVED THE USE OF THE AFFIDAVIT IN LIEU OF TESTIMONY, AND WHERE THE TRIAL COURT HAD GRANTED EISENMANN LEAVE TO FILE THE POST HEARING BRIEF."

{¶31} We first address the assignments of error pertaining to the judgment upon the jury's verdict.

I

{¶32} Eisenmann argues that the trial court erred in allowing Mid-Ohio to pursue its mechanic's lien claim because after the dismissal of LDM and Plastech on the mechanic's lien claim, there was no party-defendant to the claim. Eisenmann argues

that having dismissed LDM and Plastech and having never filed a mechanic's lien claim against Eisenmann, Mid-Ohio had no valid claim remaining and the cash deposit should have been released to Eisenmann. Eisenmann also argues that the dismissal of the mechanic's lien claim against LDM discharged its indemnification liability to LDM, and in any event, Mid-Ohio does not have standing to raise an indemnification claim against Eisenmann.

{¶33} We note at the outset that although we did not address this issue directly in our decision on appeal from summary judgment, Eisenmann made this argument prior to the trial court's decision on summary judgment and raised the issue in the first appeal:

{¶34} "Eisenmann argued when Mid-Ohio dismissed the other defendants, any and all parties who might be liable to Mid-Ohio were then gone from the suit . . . The trial court's judgment merely stated Eisenmann had met its burden on the summary judgment, and Mid-Ohio had not." *Mid-Ohio*, supra, at ¶10, 11.

{¶35} After reviewing the lien under the applicable statutes, we concluded, "Mid-Ohio's lien is enforceable as a matter of law on the undisputed facts and the applicable statutory definitions and requirements." Id. at ¶33.

{¶36} R.C. 1311.11(C)(3) provides for the substitution of a cash deposit for property securing a mechanic's lien:

{¶37} "Before or after suit has been commenced upon a lien, and whether or not a notice to commence suit has been served, a bond, cash deposit, general obligation of any state government or of the United States government, obligation insured by an agency of the United States government, or, subject to this division, other reasonable

security may be provided in double the amount of the claim secured by the lien or, if the claim secured by the lien exceeds five thousand dollars, in the amount of one and one-half times the amount of the claim, conditioned upon payment of any judgment and costs. . .

{¶38} "(3) As of the date of the entry of approval, the security of the bond, cash deposit, general obligation of any state government or of the United States government, obligation insured by an agency of the United States government, or other reasonable security shall be substituted for the security of the lien, and the lien is void and the property wholly discharged from the lien. If an action on the lien has been or is commenced and a bond, cash deposit, general obligation of any state government or of the United States government, obligation insured by an agency of the United States government, or other reasonable security has been or is provided in accordance with this section*, the action on the lien is terminated automatically, the land is freed from the lien, and the action on the lien may proceed as an action on the bond, cash deposit,* general obligation of any state government or of the United States government, obligation insured by an agency of the United States government, or other reasonable security, through, if appropriate, a supplemental pleading bringing in as additional parties sureties on the bond.

{¶39} A bond is discharged and the sureties released, or a cash deposit, general obligation of any state government or of the United States government, obligation insured by an agency of the United States government, or other reasonable security provided is released, upon failure of the lien holder to commence suit within the time allowed pursuant to division (B) of this section, *or if a suit on the security is dismissed*

with prejudice to the plaintiff or judgment is entered against the plaintiff, or if judgment is entered in favor of the plaintiff upon payment of the judgment with costs. The court may direct that costs and a judgment in favor of the plaintiff in a suit be paid from a cash deposit, general obligation of any state government or of the United States government, obligation insured by an agency of the United States government, or other reasonable security, and may direct, if necessary, that other reasonable security be sold and the proceeds of the sale be applied to the judgment and costs." (Emphasis added).

{¶40} The statute outlines the procedure which occurred in the instant case. A cash deposit was posted and approved by the court to release the lien on LDM's property. The court accordingly released the lien against LDM's property and allowed the action on the lien to proceed as an action on the cash deposit. Judgment Entry, August 13, 2004. Contrary to appellant's argument, the statute provides for release of the deposit not upon release of the defendant from the case, but when the suit against the security is dismissed as to the plaintiff or judgment is entered in favor of or against the plaintiff.

{¶41} A proceeding brought to enforce a mechanic's lien deals with the status of the property itself, and is therefore recognized as a suit in rem. *Schuholz v. Walker* (1924), 11 Ohio St. 308, 312; *Crandall v. Irwin* (1942), 139 Ohio St. 253, 257-58.

{¶42} "Given the nature of a mechanic's lien, the lien follows the property, and not the current or former owners of the property. The lien does not magically transform into an in personam right against any former owner of the property simply because that property passed through his hands at some point in time. An in personam right only exists where there is some separate contractual relationship between the parties . . .

Accordingly, a suit purely to enforce a mechanic's lien turns on whether the lien is currently valid against the property." *Mollohan v. Court Development, Inc.,* Lorain App. No 03CA008361, 2004-Ohio-2118, ¶22 (internal cite omitted).

{¶43} Eisenmann's interest in the claim against the cash deposit was not as a party against whom Mid-Ohio was asserting a claim, but as the party who had an interest in the cash deposit which they posted on behalf of LDM/Plastech. The dismissal of LDM and Plastech as party-defendants and the dismissal of the unjust enrichment claim against Eisenmann did not affect the pending claim on Mid-Ohio's lien which was properly transferred to the cash deposit, as the in personam causes of action in Mid-Ohio's complaint were separate from the action against the deposit on the mechanic's lien, which was an action in rem. As this court found the lien to be valid in our prior opinion, the only question remaining for determination by the jury concerning the lien was the value of the lien.

{¶44} Because the action is an action in rem against the deposit and not an in personam action against LDM/Plastech or Eisenmann, we need not address appellant's argument that Mid-Ohio can not maintain an action against it for indemnification. The action proceeded against the cash deposit in which Eisenmann had an interest, not against Eisenmann on an indemnification claim.

{¶45} Finally, Mid-Ohio argues that Eisenmann lacks standing to maintain the instant action pursuant to R.C. 1703.29(A) because the company does not have an Ohio license. Mid-Ohio first raised this issue by way of a motion for summary judgment filed January 9, 2006. The trial court overruled the motion without discussion on February 24, 2006. Mid-Ohio raised this issue again by filing a motion to dismiss the

appeal in this court on October 26, 2007. We overruled the motion on November 29, 2007, stating in pertinent part, "The trial court considered the issue of the applicability of R.C. 1703.29 and found Appellant exempt from the requirement that it be licensed. Consequently, this issue relates to the merits of the underlying appeal and should be addressed in the parties' briefs rather than in a motion to dismiss." Judgment Entry, November 29, 2007.

{¶46} Mid-Ohio has not challenged the ruling of the trial court by way of a cross-appeal or a cross-assignment of error. Further, the issue is not germane to this assignment of error which relates to the in rem claim against the deposit on the mechanic's lien. The argument is not an alternative basis for sustaining the trial court's decision concerning the ability of Mid-Ohio to maintain an action against the deposit after all claims were dismissed against Eisenmann. Mid-Ohio's claim has not been properly raised before this Court and we therefore disregard the argument.

{¶47} The first assignment of error is overruled.

II

{¶48} In the second assignment of error, Eisenmann argues that the court improperly instructed the jury regarding evaluation of the work done by Mid-Ohio and the standard to be applied to the reasonableness of the amount billed to Carden by Mid-Ohio under the time and materials contract. Eisenmann also argues that the court erred in failing to instruct the jury that over $300,000.00 of the work for which Mid-Ohio sought to collect on the mechanic's lien was performed under an illegal contract because portions of the work were performed under an illegal contract pursuant to R.C. 3791.04.

{¶49} Eisenmann argues that the court erred in failing to instruct the jury according to its Proposed Instruction No. 11:

{¶50} "2. CONCLUSION FOR EISENMANN: If you find, by a greater weight of the evidence, that Mid-Ohio overbilled for the work that it did complete within the Project because Mid-Ohio failed to provide a consistent effort, efficiently manage its work force, or acted wastefully and extravagantly by allocating a disproportionate percentage of overtime to time and materials work as compared to the steel work performed under fixed price contracts, then you shall reduce the value of Mid-Ohio's mechanic's lien claim by the amount of Mid-Ohio's overbillings because such work did not further or provide value to the Project, as required under Ohio Revised Code § 1311.02."

{¶51} The court refused to give the proposed instruction on the basis that the instruction changed the burden of proof, and because the claim that Mid-Ohio acted wastefully and extravagantly by allocating a disproportionate percentage to the time and materials contract is an issue for the argument of counsel, not for an instruction of law from the court. Tr. 1450. Instead, over objection, the court gave the following instruction:

{¶52} "Mid-Ohio has a cost plus base time and material invoices as part of an alleged oral subcontract with Carden. Mid-Ohio claims to be owed $768,396.67 for its work, and $559,809.67 is alleged to be based on a cost plus time and material invoices, and that amount is presumed reasonable. As Eisenmann disputes the reasonableness of Mid-Ohio's invoices to Carden, then Eisenmann must produce evidence by a preponderance of the evidence that Mid-Ohio engaged in bad faith or fraud." Tr. 1524.

{¶53} In determining the proper instruction for recovery under a time and materials or "cost plus" contract, the parties and the court focused on the interpretation of two cases: *Burton v. Durkee* (1952), 158 Ohio St. 313, 109 N.E.2d 265 (*Burton I*) and *Burton v. Durkee* (1954), 162 Ohio St. 433, 123 N.E.2d 432 (*Burton II*).

{¶54} *Burton I* involved a dispute over the amount due the plaintiff for a house constructed on a cost plus contract. The defendant argued that a builder can only recover the proven reasonable cost of his labor and material. The Ohio Supreme Court held that the language of the contract was clear and unambiguous and payment was to be the cost of all materials, labor, permits, taxes, insurance and all other costs and expenses incurred directly in the work plus a fixed fee. 158 Ohio St. at 326.

{¶55} After retrial, the case returned to the Supreme Court in *Burton II*. The trial court gave the following instruction to the jury without objection from the parties:

{¶56} "Now in this case, * * * we have not only the general law but the law of this case, and it has been fixed by the Supreme Court of the state of Ohio after a full and complete review. This case has been sent back by them for trial and the unanimous opinion of the Supreme Court of Ohio is that we are dealing with a cost-plus contract, not a fixed contract. The contractor * * * is entitled to recover * * * the amount of his unpaid costs, inclusive of fee and compensation, as hereinbefore indicated, $2,700 * * * and of the amount, if any-and you are to deduct also the amount, if any, of any lawfully compensable damages which the defendants may have suffered by reason of any malfeasance, extravagance, wastefulness or negligence upon the part of *** plaintiff in the prosecution of said work, or failure to proceed therewith with reasonable dispatch and due diligence.

{¶57} "Now then, the question you have to decide is this: Has the defendant Durkee, have the defendants, the Durkees, established by a preponderance of the evidence, any wastefulness, malfeasance and negligence or failure to proceed with reasonable dispatch and due diligence upon the part of this contractor. We say they must establish it by a preponderance of the evidence; negligence, malfeasance and any wrong doing is not presumable; it must be proven, and of course the defendant has that burden * * *." 162 Ohio St. at 440.

{¶58} The defendant maintained that the burden was on the plaintiff to show reasonable cost. The Supreme Court held that under the contract, the builder was not bound by reasonable cost but was entitled to actual costs, and the burden of proof is upon the owners to show that the costs were erroneous or false. Id. at 442-443. There is no established principle in the law that one who contracts to do certain work for another must disprove his default as a part of his affirmative case for compensation. Id. at 443. Honesty, good faith and performance of duty are presumed, while fraud and negligence are not presumed. Id. "If and when the owners produce evidence of such character as to raise a presumption of negligence or default on the part of the builder, the latter will be required only to produce evidence sufficient to balance the state of proof." Id., citing *Tresise v. Ashdown*, 118 Ohio St. 307, 160 N.E. 898.

{¶59} Proposed Jury Instruction 11 does not accurately state the law according to *Burton II*. The instruction does not squarely place the burden of proof on Eisenmann to show that the costs billed by Mid-Ohio were erroneous or false. The instruction further allows the jury to reduce the amount owed to Mid-Ohio to the amount which would have been appropriate under a fixed-price contract, which reverts to the

"reasonableness" standard which the Supreme Court expressly rejected for a cost-plus contract in *Burton I*.

{¶60} Eisenmann's argument in its brief attacks the cost-plus billing process itself. Appellant argues, "Mid-Ohio's contracting process was inherently extravagant, wasteful and negligent. The project itself was defined, and was subject to a fixed price…This was customary for this type of work...Except for Mid-Ohio, all substantial subcontracts and sub-subcontracts, were defined, fixed price contracts...Time and materials contracts were well outside industry practices and custom for projects such as the one in dispute because they led to wastefulness, extravagance, and lack of reasonable due diligence." Brief of appellant, pages 18-19.

{¶61} Whether or not Carden struck a good deal in entering a cost-plus contract with Mid-Ohio is not the issue before the jury when considering the mechanic's lien. While Eisenmann may have preferred that Carden's contract with Mid-Ohio be a fixed price contract like the others in the case, Eisenmann cannot now attempt to convert the contract to a fixed price contract through jury instructions which allow the jury to reduce the amount due to a reasonable cost of the work.

{¶62} The court did not abuse its discretion in failing to give the requested instruction, as the instruction did not accurately state the law concerning recovery on a cost plus contract. The court's instruction that Mid-Ohio's billings are presumed valid, and in good faith unless Eisenmann proved otherwise, is consistent with the law of Ohio as set forth in *Burton I* and *II*.

{¶63} Eisenmann also argues that the court erred in failing to give Proposed Instruction No. 12:

{¶64} "Ohio law requires submission of plans or drawing specifications and data to the appropriate building department for approval to ensure compliance with the Ohio Revised Code and the Ohio Building Code, which a subcontractor may not violate. These laws and regulations impose minimum requirements and are designed to protect the public.

{¶65} "CONCLUSION FOR EISENMANN: If you find, by a greater weight of the evidence, that Mid-Ohio violated the Ohio Revised Code and Ohio Administrative Code in moving the oven, then you shall reduce the value of Mid-Ohio's mechanic's lien claim by the amount of Eisenmann's costs to complete and correct Mid-Ohio's erection of the structural steel because Mid-Ohio's work did not further or provide value to the Project, as required under Ohio Revised Code § 1311.02."

{¶66} Eisenmann argues that the work Mid-Ohio did to move the bake oven was performed pursuant to an illegal contract because the plans did not have the seal of a registered architect or engineer as required by R.C. 3791.04, which provides in pertinent part:

{¶67} "(A)(1) Before beginning the construction, erection, or manufacture of any building to which section 3781.06 of the Revised Code applies, including all industrialized units, the owner of that building, in addition to any other submission required by law, shall submit plans or drawings, specifications, and data prepared for the construction, erection, equipment, alteration, or addition that indicate the portions that have been approved pursuant to section 3781.12 of the Revised . . .

{¶68} "(2)(a) The seal of an architect registered under Chapter 4703. of the Revised Code or an engineer registered under Chapter 4733. of the Revised Code is

required for any plans, drawings, specifications, or data submitted for approval, unless the plans, drawings, specifications, or data are permitted to be prepared by persons other than registered architects pursuant to division (C) or (D) of section 4703.18 of the Revised Code, or by persons other than registered engineers pursuant to division (C) or (D) of section 4733.18 of the Revised Code.

{¶69} "(B) No owner shall proceed with the construction, erection, alteration, or equipment of any building until the plans or drawings, specifications, and data have been approved as this section requires, or the industrialized unit inspected at the point of origin. No plans or specifications shall be approved or inspection approval given unless the building represented would, if constructed, repaired, erected, or equipped, comply with Chapters 3781. and 3791. of the Revised Code and any rule made under those chapters.

{¶70} "(I) No owner or persons having control as an officer, or as a member of a board or committee, or otherwise, of a building to which section 3781.06 of the Revised Code is applicable, and no architect, designer, engineer, builder, contractor, subcontractor, or any officer or employee of a municipal, township, or county building department shall violate this section.

{¶71} "(J) Whoever violates this section shall be fined not more than five hundred dollars."

{¶72} An illegal contract is a "promise that is prohibited because the performance, formation, or object of the agreement is against the law." *Snyder v. Snyder,* 170 Ohio App.3d. 26, 865 N.E.2d 944, 2007-Ohio-122, ¶32. Ohio courts will not enforce an illegal contract because no rights can arise from an illegal contract. Id.

{¶73} In the instant case, the evidence does not support Eisenmann's claim that the contract between Mid-Ohio and Carden was an illegal contract. There was abundant evidence that it was not Mid-Ohio's responsibility to get the necessary permits. Don Neifer, a professional engineer, testified that on a fast track project a lot of work is done from preliminary drawings and verbal agreements. Tr. 754. He testified that Mid-Ohio was not responsible for getting building permits, as engineering was excluded in their contract proposal to Carden. Tr. 677. He further testified that approved plans were not released by the architect, Salim Engineering, because they had not been paid by Carden. Tr. 124-25. Hamid Salim of Salim Engineering testified that he provided preliminary drawings to Carden, which eventually were finalized and a building permit was obtained. Tr. 1076. He testified that changes on the job site necessitated plan changes. Tr. 1080. Charlie Birks, Eisenmann's project manager, testified that Eisenmann had ultimate responsibility for building code compliance. Tr. 1012. Jeffrey Longsworth, LDM's plant manager, testified that the design was Eisenmann's responsibility and Eisenmann would secure permits if needed. Tr. 400. Lynn Tatro of the Mid-East Ohio Building Department testified that responsibility for obtaining building permits rests with the owner of the property or the owner's representative, or possibly the architect. Tr. 435.

{¶74} Based on the evidence presented at trial, the court did not abuse its discretion in failing to instruct the jury that the work done by Mid-Ohio to move the bake oven according to plans which were not at that point in time in compliance with the building code rendered the contract illegal. Mid-Ohio was not responsible for obtaining the necessary permits and there is no evidence that they had reason to believe that

Carden and Eisenmann were not obtaining the necessary permits as the project moved along.

{¶75} The second assignment of error is overruled.

III

{¶76} In the third assignment of error, Eisenmann argues that the jury's verdict of $14,550.00 on the counterclaim is against the manifest weight of the evidence. Specifically, Eisenmann argues that the jury's award of damages on the counterclaim does not correlate to any combination of possible damage amounts submitted on Exhibit HH. Eisenmann argues that the recovery should have been equal to at least $22,861.86, representing the amount that Eisenmann paid Mid-Ohio for work on the doghouse ($16,852.01) plus Eisenmann's cleanup costs for disassembling and discarding the errant work on the doghouse ($6,009.60). The greatest amount of possibly recovery on the counterclaim pursuant to Eisenmann's calculations is $91,980.78, including, in addition to the work on the doghouse, $41,732.92 to secure the oven and $27,386.25 for explosion relief. Eisenmann argues that because Mid-Ohio claimed that all work was done satisfactorily and Eisenmann was therefore not entitled to any damages on its counterclaim, the jury's verdict of $14,550.00 is not supported by the evidence presented by Eisenmann or Mid-Ohio at trial.

{¶77} We first note that the jury returned a general verdict in favor of Eisenmann in the amount of $14,550.00 on the counterclaim. No interrogatories were submitted to the jury. Consequently, we do not know upon what evidence the jury returned its verdict on the counterclaim.

{¶78} Proper jury interrogatories lead to findings which will test the correctness of the general verdict returned and enable the court to determine as a matter of law whether the verdict should stand. *Bobb Forest Products, Inc. v. Morbark Industries, Inc.,* 151 Ohio App.3d 63 783 N.E.2d 560, 2002-Ohio-5370, ¶64, citing *Freeman v. Norfolk & W. Ry. Co.* (1994), 69 Ohio St.3d 611, 613-614, 635 N.E.2d 310. When a jury returns a verdict and the mental processes of the jury have not been tested by special interrogatories to indicate which of the issues was resolved in favor of the successful party, error with respect to one claim will be disregarded if another independent claim, free from prejudicial error, will support the verdict of the jury. Id., citing *Wagner v. Roche Laboratories,* 85 Ohio St.3d 457, 460, 709 N.E.2d 162, 1999-Ohio-309. Eisenmann is therefore limited to challenging the jury's verdict as a whole as being against the manifest weight of the evidence. Id.

{¶79} It is the function of the jury to assess damages, and generally not for a trial or appellate court to substitute its judgment for the trier-of-fact. *Betz v. Timken Mercy Med. Ctr.* (1994), 96 Ohio App. 3d 211, 218, 644 N.E.2d 1058. "It has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's assessment absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive." *Moskovitz v. Mt. Sinai Med. Ctr*., 69 Ohio St. 3d 638, 635 N.E.2d 331, at syllabus, 1994-Ohio-324.

{¶80} Additionally, where there is only a general verdict with no interrogatories, a reviewing court is authorized to infer that the jury found on all issues in favor of the successful and against the unsuccessful party. *Nott v. Homan* (1992), 84 Ohio App. 3d

372, 378, 616 N.E. 2d 1152, 1156, citing *Berisford v. Sells* (1975), 43 Ohio St.2d 205, 331 N.E.2d 408. A trier of fact is free to reject any evidence of damages even if such evidence is uncontroverted, unimpeached, or unchallenged. *Hicks v. Freeman* (September 18, 2000), Waren App. No. CA99-12-140, unreported. The unsuccessful party is in the best position to have corrected the indeterminate nature of a general verdict at the trial court level, and having failed to do so, the appellate court cannot speculate as to the particular damages compensated by the jury award. *Nott*, supra.

{¶81} In *Bottles v. Rentz* (October 31, 1997), Hamilton App. No. C-960787, C-968042, 1997 WL 677959, unreported, the appellant argued that the jury award was inconsistent with the uncontroverted evidence of reasonable and necessary medical expenses. The court held that while a medical bill is prima facie evidence of the necessity and reasonableness of the charges for medical and hospital services, the jury may still disbelieve the plaintiff's contentions about the nature and extent of his injuries. Id. At 8. In *Bottles*, the jury had before it sufficient evidence to discredit Bottles' claim as to the nature and extent of his injuries because he did not complain of any symptoms after the accident, he described the force of impact as a "bump," he did not miss any work as a result of his injury, and several witnesses saw him dancing after the accident. Id.

{¶82} In the instant case, there was evidence presented throughout the trial that Eisenmann never complained to Mid-Ohio about any of the work until the counterclaim was filed, that Charlie Birks as project manager for Eisenmann did not competently supervise the project as it moved along, and that the problems with the work on the doghouse were caused by problems with the drawings and materials provided to Mid-

Ohio by Carden. From all this evidence, the jury could have chosen to disbelieve Eisenmann's claims of the extent of the damages incurred by problems in Mid-Ohio's work and award only a portion of the damages requested. The damage award is within the range of damages presented by Eisenmann as the figure falls between the lowest figure of $6,009.60 for clean-up work on the doghouse and the highest figure of $91,980.78. See, e.g. *Trebmal v. Sherway* (Feb. 7, 1991), Cuyahoga App. NO. 58033, unreported (jury verdict of $300,000.00 was within range of reasonableness where range of damages presented was between $150,000.00 and $725,000.00).

{¶83} The third assignment of error is overruled.

{¶84} We next turn to the assignments of error raised in Case No. 08-12 related to the post-trial rulings of the trial court concerning prejudgment interest, post-judgment interest, and attorney fees.

I

{¶85} In the first assignment of error, Eisenmann argues that the court erred in its award of interest.

{¶86} Eisenmann first argues that the court erred in awarding prejudgment interest. The court awarded interest in the amount of $210,997.58 as of February 8, 2008. The court's judgment states that this is post-judgment interest and makes no mention of prejudgment interest. However, Eisenmann argues that the amount necessarily includes prejudgment interest because the amount of post-judgment interest from May 10, 2007, the date of the judgment, through February 8, 2008, the date of the hearing on attorney fees and interest, would be $45,961.11.

{¶87} In support of its claim for interest, Mid-Ohio prepared tables setting forth interest calculations for various periods of time. These exhibits were admitted without objection into evidence at the hearing on interest. Melissa Hartfield, contracts administrator for Mid-Ohio, testified at the hearing regarding the interest calculations set forth in the tables. It is clear from her testimony and the exhibit itself that $210,997.58 represented interest at the statutory rate from December 5, 2003, which would include prejudgment and post-judgment interest.

{¶88} With respect to mechanic's liens, prejudgment interest pursuant to R.C. 1343.03 may only be awarded where privity of contract exists between the contractor holding the lien and the owner of the property benefiting from the materials and labor provided. *ABC Supply Company, Inc. v. Custom Installation, Inc*.(1993), 89 Ohio App.3d 758, 766, 627 N.E.2d 618, 624; *Tri-State Crane Rental v. Watson Gravel*, Hamilton App. No. C-030392, 2004-Ohio-1262, ¶10. See also *Guernsey Bank v. Milano Sports Enterprises*, 177 Ohio App.3d 314, 894 N.E.2d 715, 2008-Ohio-2420, ¶71 (all actions to enforce a mechanic's lien are in rem; therefore, as the entitlement to enforce a mechanic's lien arises as a matter of law, holders of mechanic's liens cannot receive prejudgment interest).

{¶89} The court made a finding of fact that Mid-Ohio was not in privity of contract with LDM/Plastech. Judgment Entry, February 21, 2008, Finding of Fact 8. From this finding it appears the court did not intend to award prejudgment interest.

{¶90} Mid-Ohio argues that they were in privity of contract with Eisenmann, as Eisenmann's counterclaim, on which the jury found in favor of Eisenmann, was premised on a breach of contract claim. However, the contract at issue in the

counterclaim was a purchase order entered December 4, 2003, to secure the project from deterioration and damage, and the trial court instructed the jury accordingly. Tr. 1525. Privity of contract between the parties which related to this purchase order did not extend to privity of contract for the entire project for which Mid-Ohio recovered on the mechanic's lien. The evidence is undisputed that Mid-Ohio did not have a contract with Eisenmann for the work done on the main project prior to the time Carden left the project. The court therefore erred in awarding prejudgment interest on the judgment on the mechanic's lien.

{¶91} Eisenmann next argues that the trial court erred by not limiting the award of post-judgment interest to the cash deposit. Eisenmann again argues that because the parties were not in privity of contract, the amount of Mid-Ohio's total recovery is limited to the cash deposit. While the court noted that the amount of recovery for attorney fees would be limited to the cash deposit, the court did not make an express finding limiting post-judgment interest to the amount of the deposit.

{¶92} Pursuant to R.C. 1311.11(C), the instant action is an action in rem to recover against the bond. Therefore, Mid-Ohio's right to recover interest is limited to the amount of the bond. See *Reliance Universal, Inc. v. Deluth Constr. Co* (June 26, 1980), Franklin App. No. 80AP-63, unreported, reversed on other grounds (1981), 67 Ohio St.2d 56, 425 N.E.2d 404. The court did not find that Eisenmann was personally liable for any amount of interest above and beyond the amount of the cash deposit, nor does the record reflect an attempt to collect interest beyond the amount of the cash deposit. Therefore, Eisenmann has not demonstrated that the judgment is not in compliance with the statute. Until such time as there is a judgment awarding interest in excess of the

amount of the bond and ordering Eisenmann to pay the excess, this claim is premature. However, because the judgment concerning post-judgment and prejudgment interest is reversed on other grounds, the trial court will have the opportunity to clarify this issue on remand.

{¶93} Finally, Eisenmann argues that the court erred in setting the per diem rate of post-judgment interest at $170.76 per day rather than $168.30 per day. The only interest figures testified to at the hearing and provided to the trial court were those calculated by Melissa Hartfield of Mid-Ohio. The only per diem figure before the court was $170.76 per day. However, at page 7 of its brief, Mid-Ohio states, "Even though the only interest figures provided to the trial court, at hearing or otherwise, were those testified by Melissa Hartfield of Mid-Ohio and relied upon by the trial court, Mid-Ohio sees no need to quibble about the alleged $2.00 per diem 'error' now claimed by Eisenmann." As it appears appellee has conceded the error in the per diem amount, and the calculation as set forth in appellant's brief at page 6 demonstrates that the correct per diem interest amount is $168.30 rather than $170.76, we find that the court erred in the amount of per diem interest on the judgment.

{¶94} The first assignment of error is sustained.

II

{¶95} Eisenmann next assigns error to the trial court's award of attorney fees to Mid-Ohio pursuant to R.C. 1311.16, which provides in pertinent part:

{¶96} "When judgment is rendered in the proceeding in favor of the parties succeeding therein, the court may allow reasonable attorney fees to be paid out of the fund realized for lien claimants."

{¶97} R.C. 1311.16 allows the prevailing party on a mechanic's lien action to recover, in the discretion of the trial court, reasonable attorney fees to be paid out of the fund realized for lien claimants. *Ramos v. Rodak* (June 12, 1997), Cuyahoga App. Nos. 71390, 71217, 1997 WL 321466, unreported.

{¶98} Eisenmann first argues that it was not a party to the proceedings because the unjust enrichment claim was dismissed prior to trial. Eisenmann also argues that the mechanic's lien claim was dismissed prior to trial and therefore Mid-Ohio was not a party "succeeding" on a mechanic's lien claim within the meaning of R.C. 1311.16. This argument is a restatement of Eisenmann's argument in Assignment of Error One in case number 07-35. For the reasons stated earlier in this opinion, the argument is without merit. The case proceeded as an in rem action against the cash deposit posted by Eisenmann. Mid-Ohio succeeded on that claim following jury trial. The court therefore did not err in awarding attorney fees pursuant to the statute.

{¶99} Eisenmann next argues the award of fees is against public policy because Mid-Ohio violated the Ohio Building Code. Again, this argument was considered and rejected in Eisenmann's second assignment of error in case number 07-35. For the reasons stated earlier in this opinion, this argument is without merit.

{¶100} Eisenmann next argues that Mid-Ohio's own conduct is responsible for much of the cost of litigation. Eisenmann argues at page 12 of its brief:

{¶101} "Mid-Ohio caused much of the excess costs in this litigation and should not be rewarded for doing so by having fees awarded to it pursuant to § 1311.16. Even before Mid-Ohio filed its original complaint, it created considerable confusion by failing to provide adequate information about its claim and in misrepresenting the nature of its

claim. As a result, the pre-litigation negotiations between Mid-Ohio and Eisenmann over the amount owing to Mid-Ohio and its continued work on the project broke down, making the present litigation all but inevitable."

{¶102} Eisenmann points to no evidence in the record to support this argument. The evidence presented by Mid-Ohio at the hearing on fees demonstrated that the fees were reasonable given the complexity and voluminous filings in the case. Attorney Holman, Mid-Ohio's expert witness, testified that he would have had a second chair and legal assistant with him at jury trial, while Attorney Gregory tried the case alone, reducing the cost to Mid-Ohio. The court made findings of fact that the fees were reasonable and similar to other attorneys practicing construction law in central Ohio. The court further found that Attorney Gregory used paralegals and other staff members whenever possible to reduce the cost of attorney fees. The record does not support Eisenmann's argument that Mid-Ohio's conduct was responsible for the cost of the litigation. The court did not abuse its discretion in awarding attorney fees pursuant to R.C. 1311.16.

{¶103} The second assignment of error is overruled.

III

{¶104} Eisenmann argues that the court erred in failing to limit collection of fees under R.C. 1311.16 to the amount of the cash deposit. The court clearly made such a limitation in the following findings of fact:

{¶105} "The court finds that § 1311.16 of the Ohio Revised Code governing the Proceeding by Person Holding Mechanic's Lien states in pertinent part, '[w]hen judgment is rendered in the proceeding in favor of the parties succeeding therein, the

Court may allow reasonable attorney fees to be paid out of the fund realized for lien claimants.'

{¶106} "The Court finds that in this case the attorney fees are limited to and to be paid out of the 'cash deposit,' which contains approximately $1,152,594 excluding interest and poundage." Judgment Entry, February 21, 2008, Finding of Fact 4, 5.

{¶107} The third assignment of error is overruled.

IV

{¶108} Eisenmann argues that Mid-Ohio's motion for fees based on frivolous conduct was filed 118 days after the court entered final judgment on May 10, 2007, and was therefore untimely under R.C. 2323.51(B)(1), which provides:

{¶109} "Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal ."

{¶110} In *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 763 N.E.2d 1169, 2002-Ohio-1246, the Ohio Supreme Court considered the issue of when a motion for fees must be filed under a prior version of R.C. 2323.51(B)(1), which provided that the court may award fees "within twenty-one days after the entry of judgment." The court construed the word "judgment" as used in the statute to mean a final appealable order,

and gave the aggrieved party the option of filing a sanctions motion at any time prior to the commencement of the trial or within twenty-one days of a final judgment. Id. at 436.

{¶111} On May 10, 2007, the trial court entered judgment on the jury verdict. On the same day, the court on its own motion set the case for a hearing on attorney fees pursuant to R.C. 1311.16 and on prejudgment interest. Eisenmann filed a motion for a new trial on May 23, 2007, a motion to stay execution of the judgment on May 24, 2007, an appendix to the motion for new trial on May 24, 2007, and a motion for an order granting partial judgment notwithstanding the verdict on May 24, 2007. The court set the motions for a non-oral hearing on June 8, 2007.

{¶112} On May 31, 2007, the court continued the hearing on fees, interest and Eisenmann's pending motions for a hearing on all matters on June 21, 2007.

{¶113} Eisenmann filed a motion to correct a clerical mistake in the judgment entry on June 8, 2007, and a motion to vacate the judgment and release the cash deposit on June 14, 2007.

{¶114} On July 5, 2007, the trial court overruled Eisenmann's motions to correct a clerical mistake, for judgment notwithstanding the verdict, for new trial, and to vacate the judgment and release the cash deposit. The court did not rule on the pending issues concerning fees and interest.

{¶115} Eisenmann filed a writ of prohibition in the Supreme Court seeking to prohibit Judge Ellwood from conducting further proceedings in the case on July 6, 2007. The court stayed all proceedings in the trial court on July 13, 2007.

{¶116} The order staying the proceedings stated: "The court finds that on July 6, 2007 a Writ of Prohibition was filed in the Ohio Supreme Court as to the instant case.

The court further finds that, on the court's own motion, this case is hereby **STAYED** until decision has issued on the complaint for a Writ of Prohibition in the Supreme Court."

{¶117} Eisenmann filed its notice of appeal in this court in Case No. 07-35 on August 3, 2007. On August 29, 2007, the Ohio Supreme Court dismissed the writ of prohibition. The trial court lifted the stay on August 30, 2007. Mid-Ohio filed its motion for attorney fees for frivolous conduct on September 5, 2007.

{¶118} Mid-Ohio filed a motion to dismiss Eisenmann's appeal on the basis that the judgment appealed from was not a final appealable order because the court had not resolved the issues of attorney fees and interest. While we did not dismiss the appeal, on November 28, 2007, this Court remanded the case to the trial court to rule on the issue of attorney fees.

{¶119} Given the plethora of post-trial motions filed by Eisenmann, we do not find that the final order from which Mid-Ohio had 30 days to file its motion for fees for frivolous conduct is the judgment of May 10, 2007, entering judgment on the jury's verdict. At the earliest, the motion needed to be filed within 30 days of the July 5, 2007, the date of the judgment disposing of Eisenmann's motions directed to the merits of the verdict. The action was stayed in the trial court from July 13, 2007, through August 30, 2007. Mid-Ohio filed its motion six days after the stay was lifted. The motion was timely filed.

{¶120} The fourth assignment of error is overruled.

V

{¶121} Eisenmann next argues that the court erred in finding its conduct to be frivolous. The trial court found that Eisenmann's conduct violated R.C. 2323.51(A)(2)(a)(i):

{¶122} "(2) 'Frivolous conduct' means either of the following:

{¶123} "(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record that satisfies any of the following:

{¶124} "(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation."

{¶125} This Court outlined the standard of review on a determination of frivolous conduct in *Kinnison v. Advance Stores Company*, Richland App. No.2005CA0011, 2006-Ohio-222, ¶19-21:

{¶126} "R.C. 2323.51 provides that a court may award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal that was adversely affected by frivolous conduct. 'Frivolous conduct,' as defined in R.C. 2323.51(A)(2)(a)(i), includes conduct that 'obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation'.

{¶127} "As the court found in *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 673 N.E.2d 628, no single standard of review applies in R.C. 2323.51 cases, and the

inquiry necessarily must be one of mixed questions of law and fact. With respect to purely legal issues, we follow a de novo standard of review and need not defer to the judgment of the trial court. *Wiltberger*, supra, at 51-52, 673 N.E.2d 628. 'When an inquiry is purely a question of law, clearly an appellate court need not defer to the judgment of the trial court. Id. However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations; accordingly, we will not disturb a trial court's findings of fact where the record contains competent, credible evidence to support such findings. Id This standard of review of factual determinations is akin to that employed in a review of the manifest weight of the evidence in civil cases generally, as approved in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.' Id. at 51-52.

{¶128} "Where a trial court has found the existence of frivolous conduct, the decision whether or not to assess a penalty lies within the sound discretion of the trial court. Id. at 52, 673 N.E.2d 628. Abuse of discretion requires more than simply an error of law or judgment, implying instead that the court's attitude is unreasonable, arbitrary or unconscionable. *Tracy v. Merrell-Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152, 569 N.E.2d 875. Furthermore, R.C. 2323.51 employs an objective standard in determining whether sanctions may be imposed against either counsel or a party for frivolous conduct. *Stone v. House of Day Funeral Serv., Inc.* (2000), 140 Ohio App.3d 713, 748 N.E.2d 1200."

{¶129} The court made the following findings of fact regarding Eisenmann's frivolous conduct:

{¶130} "16. The Court finds that when Carden Metal filed for bankruptcy, Melissa Hartfield, agent for Mid-Ohio, met with Herbert Buder of Eisenmann at Plastech offices in Detroit, Michigan. Where Herbert Buder told Melissa Hartfield that she had better settle for fifty cents on the dollar or intense litigation would ensue and referenced a previous case where a contractor refused to settle its claims.

{¶131} "17. The Court finds that Melissa Hartfield interpreted this conversation as a threat, and rightly so, as Eisenmann is a national multi-million dollar German corporation and Mid-Ohio is a small Ohio corporation based in Granville, Ohio.

{¶132} "18. The Court finds that Eisenmann has continually pursued to re-litigate the same issues multiple times.

{¶133} "19. The Court finds that Eisenmann argued that the release of the 'cash deposit' released Mid-Ohio mechanic's lien claims, six separate times including: (1) in Eisenmann's Motion For Release of Cash Deposit dated 12/29/05; (2) in Eisenmann's Court of Appeals brief dated 07/11/06; (3) in Motions for a Directed Verdict during the trial in May of 2007; (4) in Eisenmann's Motion to Vacate Judgment and Release Cash Deposit dated 06/13/07; (5) in Eisenmann's Writ of Prohibition filed in July of 2007; (6) and again during this Evidentiary Hearing dated 02/08/08. Each time this Court has ruled against Eisenmann on this issue. (See Civil Rule 46).

{¶134} "20. The Court finds that '[i]t is patently unfair and unreasonable that any person should be continually forced to defend against, and the court system should be forced to handle, the same unwarranted complaint that cannot be supported by any recognizable good-faith argument.' *Hull v. Sawchyn* (2001), 145 Ohio App.3d 193, 197.

{¶135} "21. The Court finds that Eisenmann filed the Writ of Prohibition with the Ohio Supreme Court, which ultimately stayed the hearing on Mid-Ohio's attorney's fees. The Court further finds that the Writ of Prohibition was dismissed by the Supreme Court of Ohio.

{¶136} "22. The Court finds that subsequently Eisenmann filed an appeal with the Fifth District Court of Appeals leaving Mid-Ohio's attorney fees unlitigated, until that Court remanded the issue of attorney fees to this Court. (See Case No. 07-CA-350.)" Judgment Entry, February 21, 2008, Findings of Fact 16-22.

{¶137} Eisenmann argues that the trial court erred in finding that its conduct in continuing to litigate the issue of the validity of the mechanic's lien action as an in rem proceeding against the cash deposit was frivolous. Eisenmann also argues that the court erred in finding that the statement made by Mr. Buder to Ms. Hartfield was a malicious threat, because "Mr. Buder's statement to Ms. Hartfield in pre-litigation settlement discussions that Mid-Ohio would probably be worse off if it litigates was a realistic assessment and should not be the basis for a conclusion that the subsequent defense of the litigation was harassing or malicious." Brief of appellant, page 24.

{¶138} The record contains competent, credible evidence to support the court's findings. Melissa Hartfield testified both at trial and at the hearing on fees concerning the conversation with Herbert Buder wherein Buder urged Hartfield to accept 50 cents on the dollar and told her a story of another similar case where, after the contractor engaged in litigation with Eisenmann, all the contractor received was 50 cents on the dollar. Tr. 183; Tr. (2/8/08 hearing) 60.

{¶139} Further, the record supports the court's findings that Eisenmann continued to attempt to relitigate the issue of the ability of Mid-Ohio to proceed on a mechanic's lien claim against the cash deposit as an action in rem. Eisenmann posted the cash deposit to release LDM/Plastech's property from the lien in August of 2004. In the August 13, 2004, judgment accepting the cash deposit, the trial court echoes the language of R.C. 1311.11 substituting the deposit for the security of the lien, terminating the action on the lien automatically, and allowing the action on the lien to proceed as an action on the cash deposit. LDM and Platech were dismissed from the action on August 30, 2004.

{¶140} Eisenmann first moved for release of the cash deposit on the basis that there was no party defendant to the mechanic's lien on December 29, 2005. The trial court overruled this motion on February 23, 2006. Eisenmann raised the argument to this Court in its brief dated July 11, 2006. This Court held in our previous opinion, "Mid-Ohio's lien is enforceable as a matter of law on the undisputed facts and the applicable statutory definitions and requirements." *Mid-Ohio Mechanical, Inc. v. Carden Metal Fabricators, Inc.,* Guernsey No. 2006-CA-13, 2006-Ohio-5293, ¶33.

{¶141} Eisenmann continued to raise the issue of Mid-Ohio's ability to proceed on its mechanic's lien claim against the cash deposit. Eisenmann raised the issue by motion for directed verdict, a post-judgment motion to vacate the judgment and release the cash deposit, and in a writ of prohibition filed in the Ohio Supreme Court. Upon the filing of the writ, the trial court stayed its actions pending the Supreme Court's dismissal of the writ, said dismissal indicating that Eisenmann had an adequate remedy by way of appeal of the issue. The trial court's inability to decide the issues of fees and interest in

a timely fashion due to the stay caused by the filing of the writ further delayed the appeal in this court.

{¶142} We cannot find that the court abused its discretion in concluding that Eisenmann's conduct was harassing and for the purpose of delay.

{¶143} Eisenmann also argues that the court erred in making findings of frivolous conduct on several issues without setting a hearing on those matters in compliance with the statute, thus depriving Eisenmann of notice and an opportunity to defend itself against the trial court's concerns. Eisenmann does not specifically identify on what matters it was deprived of notice and a hearing. We presume from the other arguments in the brief that the reference is to the trial court's Findings of Fact 48-50, concerning the filing of a post-hearing brief and post-trial affidavit filed by Eisenmann. The court noted that these matters required the court's further time and attention without giving Mid-Ohio an opportunity to respond. The court stated that counsel for Eisenmann knew the court was under a deadline from this Court for its ruling on the motions for fees and interest and, therefore, there was not time to give Mid-Ohio an opportunity to respond.

{¶144} The court had not given Eisenmann leave of court to file the post-hearing brief and post-hearing affidavit, but had only granted Eisenmann the opportunity to file a summary of the exhibits and entries it relied on so the judge would not have to go through the voluminous files to find such information.

{¶145} Eisenmann has not demonstrated prejudice from the court's reference to these post-trial and post-hearing filings. The court's finding of frivolous conduct was amply supported by the court's findings concerning the issues raised in Mid-Ohio's motion, of which Eisenmann had notice and a hearing. The trial court's findings

concerning Eisenmann's ongoing delay tactics even after the hearing on frivolous conduct was not an abuse of discretion, and the court was not required to give Eisenmann a second hearing regarding these limited issues.

{¶146} The fifth assignment of error is overruled.

VI

{¶147} In the sixth assignment of error, Eisenmann argues that the court erred in awarding fees for frivolous conduct without a specific showing that Mid-Ohio incurred additional attorney fees as a direct, identifiable result of defending the particular frivolous conduct.

{¶148} Eisenmann cites several cases in support of its proposition that Mid-Ohio was required to prove attorney fees directly linked to the frivolous conduct found by the trial court. The cases cited by Eisenmann all cite or link through another cite to *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 54, 673 N.E.2d 628. In *Wiltberger*, the 10th District Court of Appeals held that where a determination of frivolous conduct has been made, the party seeking R.C. 2323.51 attorney's fees must affirmatively demonstrate that he or she incurred additional attorney's fees as a direct, identifiable result of defending the frivolous conduct in particular. Id. The court noted that the statute itself speaks to this requirement and disallows an award in excess of fees "reasonably incurred and necessitated by the frivolous conduct." Id., citing R.C. 2323.51(B)(3).

{¶149} The statute at the time *Wiltberger* was decided provided in pertinent part:

{¶150} "(B)(1) Subject to division (B)(2) and (3), (C), and (D) of this section, at any time prior to the commencement of the trial in a civil action or within twenty-one

days after the entry of judgment in a civil action, the court may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct. The award may be assessed as provided in division (B)(4) of this section.

{¶151} "(3) The amount of an award that is made pursuant to division (B)(1) of this section shall not exceed, and may be equal to or less than, whichever of the following is applicable:

{¶152} "(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney's fees that were both reasonably incurred by a party and necessitated by the frivolous conduct."

{¶153} However, the statute was amended in 1996 to change the language concerning the necessity of fees being reasonably incurred and necessitated by the frivolous conduct. The current version of the statute provides in pertinent part:

{¶154} "(B)(1) Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in division (E)(2)(b) of section 101.15 or division (I)(2)(b) of section 121.22 of the Revised Code, at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal . . .

{¶155} "(3) The amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney's fees shall not exceed, and may be equal to or less than, whichever of the following is applicable:

{¶156} "(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney's fees that were reasonably incurred by a party." R.C. 2323.51(B)(1), (3)(b).

{¶157} We find that based on the revision of the statute, Eisenmann's reliance on *Wiltberger* and its progeny is misplaced. The amendment to the statute clearly removed the requirement that fees be necessitated by the frivolous conduct, and replaced it with language allowing a party to recover attorney's fees "reasonably incurred" by a party in a civil action.

{¶158} While not expressly discussing *Wiltberger* or the revision to the statute, the 10th District revisited the issue in *Neubauer v. Ohio Remcon, Inc.,* Franklin App. No. 05AP-946, 2006-Ohio-1481. In that case the appellant argued that the court should not have awarded sanctions for payment of attorney fees associated with appellee's counterclaim. The court held that R.C. 2323.51 did not limit the award of fees to those incurred as a result of appellant's filings only, but allowed an award of fees "incurred in connection with the civil action." Id. at ¶50. The court concluded that based on the evidence of fees incurred in connection with the action, the trial court did not abuse its discretion in awarding an amount equal to appellee's fees and court costs. Id.

{¶159} Based on the wording of the statute, we find no abuse of discretion in the court's award of attorney fees for frivolous conduct. As discussed earlier, there was abundant evidence to support the court's findings that the fees incurred by Mid-Ohio were reasonably incurred in the action. The court did not abuse its discretion in awarding attorney fees beyond those paid from the cash deposit pursuant to R.C. 1311.16 for Eisenmann's frivolous conduct.

{¶160} The sixth assignment of error is overruled.

VII

{¶161} In its final assignment of error, Eisenmann argues that the trial court demonstrated an "unreasonable and arbitrary attitude" toward it throughout the proceedings. While appellant's assignment of error claims error in the court's finding of frivolous conduct for filing a post-hearing brief, its argument is directed toward the court's attitude throughout the trial. In support of this argument, appellant cites to the court's findings concerning its filing of a post-hearing brief, the award of prejudgment interest, its refusal to address the issue of lack of jurisdiction, its finding that Eisenmann engaged in frivolous conduct, its "apparent attitude" that Eisenmann engaged in frivolous conduct for merely defending itself in the lawsuit, and by awarding all attorney fees and costs beyond the cash deposit and not connected to the frivolous conduct.

{¶162} All of these specific claims of error were raised and considered on the merits earlier in this opinion. We find nothing in the court's rulings on these issues which demonstrates an arbitrary, unreasonable attitude toward Eisenmann.

{¶163} To the extent Eisenmann is claiming the trial court was biased, the Chief Justice of the Supreme Court has exclusive jurisdiction to determine a claim that a common pleas court judge is biased or prejudiced, and common pleas litigants must bring any challenge to the trial judge's objectivity by way of the procedure set forth in R.C. 2701.03. *State v. Lawless*, Muskingum App. No. CT2000-0037, 2002-Ohio-3686, citing *Jones v. Billingham* (1995), 105 Ohio App. 3d 8, 11, 663 N.E.2d 657. A court of appeals is without authority to void the judgment of a trial court because of bias or

prejudice of the judge. Id., citing *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441-42, 377 N.E.2d 775.

{¶164} The seventh assignment of error is overruled.

{¶165} The judgment of the Guernsey County Court of Common Pleas awarding prejudgment interest to appellee Mid-Ohio is reversed. The judgment setting a per diem rate of post-judgment interest of $170.76 is reversed. In all other respects the judgment is affirmed. This case is remanded to the Guernsey County Court of Common Pleas for a determination of the appropriate amount of post-judgment interest.

By: Edwards, J.

Wise, P. concur and

Hoffman, P.J. concurs in part

and dissents in part

s/Julie A. Edwards

s/John W. Wise

JUDGES

JAE/r0617

Hoffman, P.J., concurring in part and dissenting in part

{¶166} I concur in the majority's analysis and disposition of Appellant's three assignments of error in Case No. 07CA000035. I further concur in the majority's analysis and disposition of Appellant's Assignments of Error 2, 3, 4, 5, 6, and 7 in Case No. 08 CA 00012.

{¶167} I further concur with the majority's analysis and disposition of Appellant's first assignment of error in Case No. 08 CA 00012, except for that portion dealing with pre-judgment interest. I would find Appellee is entitled to pre-judgment interest commencing August 13, 2004, the date of judgment entry recognizing LDM's cash deposit to release the mechanic's lien. Because the cash deposit was provided by Appellant under an indemnity agreement, I find such action by Appellant sufficient to place it in privity with Appellee.

s/William B. Hoffman
HON. WILLIAM B. HOFFMAN

[Cite as *Mid-Ohio Mechanical, Inc. v. Eisenmann Corp.*, 2009-Ohio-5804.]

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MID-OHIO MECHANICAL, INC.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
EISENMANN CORPORATION	:	
Defendant-Appellee	:	CASE NOS. 07 CA 000035 & 08 CA 00012

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Guernsey County Court of Common Pleas is affirmed in part, and reversed and remanded in part. Costs assessed to appellant.

s/Julie A. Edwards

s/John W. Wise

JUDGES