

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alternatives Unlimited-Special, Inc.	:	
et al.,	:	
	:	
Plaintiffs-Appellants,	:	
	:	No. 12AP-647
v.	:	(Ct. of Cl. No. 2009-03410)
	:	
Ohio Department of Education,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on September 10, 2013

Michael A. Sanchez, pro hac vice; and Edward D. Hayman,
for appellants.

Michael DeWine, Attorney General, and Christopher P.
Conomy, for appellee.

APPEAL from the Court of Claims of Ohio

KLATT, P.J.

{¶ 1} Plaintiffs-appellants, Alternatives Unlimited-Special, Inc. ("AU-Special") and Alternatives Unlimited, Inc. ("AU"), appeal from a judgment of the Court of Claims of Ohio. For the following reasons, we affirm in part and reverse in part.

{¶ 2} On September 1, 1999, the Ohio Board of Education ("Board"), entered into a contract with the board of directors of the Cleveland Alternative Learning Academy Community School ("CALA") to establish a new start-up school in the Cleveland City School District. In the contract, the Board agreed to sponsor CALA, and AU-Special

agreed to act as CALA's governing authority.¹ The contract set forth the parameters under which AU-Special, as governing authority, would establish and operate CALA.

{¶ 3} The contract stated that it would begin at the commencement of the 1999-2000 school year and terminate on June 30, 2004. Pursuant to Article VIII of the contract, the Board could terminate the contract prior to June 30, 2004 if: (1) AU-Special failed to meet student performance requirements, (2) AU-Special failed to meet generally accepted standards of fiscal management, (3) AU-Special violated any provision of the contract or applicable state or federal law, or (4) other good cause. Article VIII also provided:

The termination of this contract shall be effective only at the conclusion of a school year. At least one [sic] 180 days prior to the termination or non-renewal of this contract, the SPONSOR shall notify [CALA] of the proposed action in writing. The notice shall include the reasons for the proposed action in detail and that [CALA] may, within fourteen days of receiving the notice, request an informal hearing before the SPONSOR. Such request shall be in writing.

{¶ 4} CALA operated as a community school during the 1999-2000 and 2000-2001 school years. During the time CALA was open, AU-Special managed CALA, and AU managed AU-Special.

{¶ 5} Originally, the Board and appellants contemplated that CALA would educate children in grades three, four, five, and six. Shortly after opening for the 1999-2000 school year, CALA also began enrolling students in grades two, seven, and eight. CALA expanded to include additional grades because parents of students in grades three through six wanted to also enroll at CALA the younger and older siblings of those students. CALA requested that the Board approve a modification of the contract to include the additional grades. The Board never agreed to a modification.

{¶ 6} Defendant-appellee, the Ohio Department of Education ("Department"), funded CALA with state revenues in amounts calculated using a formula dependent on the number of students enrolled at the school. As the Board never modified its contract with AU-Special to include grades two, seven, and eight, the Department did not pay

¹ As explained below, the parties have litigated the question of who exactly was the governing authority named in the contract. Ultimately, AU-Special was identified as the governing authority.

CALA for the instruction of students in those grades. Throughout the years CALA operated, AU-Special repeatedly complained to the Department that it was not receiving the amount of funds that state statutes entitled it. The Department disagreed.

{¶ 7} In a letter dated August 24, 2001, the Department notified CALA that it no longer had the authority to operate as a community school. The Department had identified Elijah Scott and David Smith as CALA's governing authority and secured a rescission of the contract from them. Without the contract, CALA could not open for the 2001-2002 school year as a community school.

{¶ 8} CALA responded that Scott and Smith were not CALA's governing authority, and thus, they lacked the ability to rescind the contract. CALA continued to operate during the fall 2001 semester but closed thereafter because the Department refused to fund it.

{¶ 9} On May 7, 2002, appellants filed their initial action against the Department for breach of contract, promissory estoppel, and unjust enrichment. Appellants claimed that the Department had breached the contract by failing to pay for all students enrolled at CALA and improperly terminating the contract. After a trial on liability only, the Court of Claims determined that neither appellant was a party or intended third-party beneficiary to the contract. Consequently, the Court of Claims held that appellants lacked standing to pursue their claims for breach of contract and entered judgment in favor of the Department. Appellants appealed that judgment. We concluded that the state had previously recognized AU-Special as CALA's governing authority in another case. *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 168 Ohio App.3d 592, 2006-Ohio-4779, ¶ 51 (10th Dist.). Under the doctrine of collateral estoppel, that recognition was binding on the Department. *Id.* We therefore held that the Department was estopped from denying appellants' standing, and we reversed the Court of Claims' judgment and remanded the matter. *Id.* at ¶ 53.

{¶ 10} On remand, the Department moved for partial summary judgment, arguing that it did not breach the contract by failing to pay for all the students enrolled at CALA. The Department contended that it was not required to provide CALA with funding for instruction of students in grades two, seven, and eight because the contract did not include those grades. The Court of Claims granted the Department's motion and entered

judgment for the Department on one of appellants' breach-of-contract claims. Appellants then moved to amend their complaint to delete all remaining claims. The Court of Claims granted that motion.

{¶ 11} Armed with a final appealable order, appellants sought this court's review of the partial grant of summary judgment. We found no error in the Court of Claims' summary judgment decision. *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 10th Dist. No. 08AP-396, 2008-Ohio-6427, ¶ 24.

{¶ 12} On March 20, 2009, appellants re-filed their action against the Department. In their complaint, appellants again asserted claims for breach of contract, promissory estoppel, and unjust enrichment. Rather than answering the complaint, the Department filed a motion to dismiss or, in the alternative, for summary judgment. In part, the Department argued that appellants' action was barred by the two-year statute of limitations set forth in R.C. 2743.16(A). Appellants replied that their action was timely under the savings statute, R.C. 2305.19. The Court of Claims agreed with the Department's argument, and it granted the Department summary judgment. Appellants appealed that judgment to this court. We concluded that the savings statute applied, and thus, we reversed the Court of Claims' judgment and remanded the case. *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 10th Dist. No. 09AP-756, 2010-Ohio-1226, ¶ 29, 34.

{¶ 13} Once the case was again before the Court of Claims, appellants moved to recuse Judge Joseph T. Clark from the case. Appellants contended that Judge Clark's multiple rulings against them demonstrated that Judge Clark was partial to the Department. The Court of Claims denied the motion.

{¶ 14} Appellants then moved for summary judgment on the Department's liability for breaching the contract through improper termination. At the same time, the Department moved for summary judgment on appellants' claims for promissory estoppel and unjust enrichment. The Court of Claims granted both motions and ordered the case set for a trial on damages.

{¶ 15} Originally, August 15, 2011 was the trial date, but upon the parties' joint motion, the Court of Claims reset the trial for December 19, 2011. On that date, the parties appeared for trial and discovered that a key Department witness was unavailable.

The Court of Claims granted appellants' unopposed motion for a continuance, rescheduling the trial for March 5, 2012.

{¶ 16} On January 9, 2012, appellants requested a pretrial hearing. In their request, appellants represented that they intended to introduce expert testimony and sought guidance regarding the timing of filing an expert report. The Department opposed the scheduling of a pretrial hearing. It argued that appellants had never before mentioned their need for an expert witness and the deadline for identifying an expert witness had passed. The Court of Claims denied appellants' motion.

{¶ 17} At the damages trial, appellants presented the testimony of Stuart Berger, formerly AU's chief executive officer and board member of AU-Special. While CALA was open, Berger was in charge of the day-to-day operation of the school. Appellants also presented the testimony of Herbert Burk, who became AU's chief financial officer in August 2005. Through Berger's and Burk's testimony, appellants attempted to show that they were entitled to \$50,000 in federal grant money; the expenses that AU-Special incurred to operate CALA during the fall 2001 semester; lost profits for school years 2001-2002, 2002-2003, and 2003-2004; and other damages.

{¶ 18} The Department introduced the testimony of Joni Hoffman, who was the assistant director of the Department's Office of School Options in 2001. Hoffman testified to CALA's receipt of \$100,000 in grant funds. In a letter dated May 10, 2001, Hoffman had indicated that additional grant funds totaling \$50,000 would be available to CALA in October 2001 and October 2002. Hoffman explained at trial that payment of those funds was within the Department's discretion. Additionally, the Department introduced the testimony of David Varda, previously the Department's associate superintendent for finance and accountability. In late 2001, Varda received a letter from Daniel E. Schultz, Jr., then chief deputy auditor for the auditor of state, reporting that CALA's financial records and statements for the 1999-2000 school year were incomplete and inauditable.

{¶ 19} In its decision, the Court of Claims determined that appellants failed to prove entitlement to damages. As an initial matter, the Court of Claims found that the Department's obligation to fund CALA ended during the fall 2001 semester and, thus, appellants could not collect damages for the remaining two-and-one-half years of the five-year contract. Because CALA did not retain student enrollment data for the fall 2001

semester, appellants could not prove the amount the Department owed it under the statutory funding formula. Thus, the Court of Claims found it could not award appellants damages based on that measurement of loss. The Court of Claims also rejected appellants' alternative methods for demonstrating damages for the fall 2001 semester. Citing evidence that CALA's financial records were incomplete and inauditable, the Court of Claims concluded that appellants failed to prove the existence or amount of lost profits with reasonable certainty. Finally, the Court of Claims found that appellants did not prove that they were entitled to any additional grant funds.

{¶ 20} The Court of Claims issued a judgment entry on July 2, 2012 that rendered judgment in appellants' favor and ordered the Department to pay appellants \$25, the amount of their filing fee. Within 30 days of the judgment, appellants moved for their attorney fees pursuant to R.C. 2743.19 and 2335.39. The Court of Claims construed appellants' motion as a motion for reconsideration and denied it.

{¶ 21} Appellants now appeal from the July 2, 2012 judgment, and they assign the following errors:

I. THE TRIAL COURT ERRED BY FAILING TO AWARD ANY DAMAGES RESULTING FROM ODE'S BREACH, CONTRADICTING ITS EARLIER RULING GRANTING SUMMARY JUDGMENT IN FAVOR OF AU.

II. THE TRIAL COURT ERRED BY FAILING TO AWARD RELIANCE DAMAGES AFTER IT FOUND EXPECTANCY DAMAGES UNWARRANTED.

III. THE TRIAL COURT FAILED TO APPLY THE PLAIN LANGUAGE OF THE CONTRACT AND THUS HELD THAT THE CONTRACT TERMINATED (OPPOSITE OF STIPULATED FACTS), AND AS A RESULT, ERRONEOUSLY WITHHELD DAMAGES FOR GRANT FUNDS AND LOST PROFITS.

IV. THE TRIAL COURT ERRED BY FAILING TO AWARD MANDATORY STATUTORY INTEREST.

V. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DEPRIVED PLAINTIFFS OF A SUBSTANTIAL RIGHT TO CROSS-EXAMINE WITNESSES BY ADMITTING INADMISSIBLE HEARSAY.

VI. THE TRIAL COURT ERRED BY FAILING TO ALLOW PLAINTIFFS TO DESIGNATE AN EXPERT WITNESS AFTER TRIAL WAS CONTINUED.

VII. TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEYS FEES.

VIII. THE TRIAL COURT'S DECISION IS TAINTED BY PREJUDICE AGAINST AU.

{¶ 22} By their first assignment of error, appellants argue that the Court of Claims erred in awarding them no damages when the court had previously granted them summary judgment as to the Department's liability for breach of contract. Because damage is an element of a breach-of-contract claim, appellants assert that the Court of Claims must have determined that they suffered damage when it granted them summary judgment. Appellants maintain that the Court of Claims should have awarded them the amount of damages it found evidence of when it granted them summary judgment. We disagree.

{¶ 23} Generally, to recover for breach of contract, a plaintiff must prove the existence of economic damage as the result of the breach. *H & F Transp., Inc. v. Satin Ride Equine Transport, Inc.*, 9th Dist. No. 06CA0069-M, 2008-Ohio-1004, ¶ 18; *Leiby v. Univ. of Akron*, 10th Dist. No. 05AP-1281, 2006-Ohio-2831, ¶ 24-25; *2600 Far Hills Bldg. Partnership v. Premier Integrated Med. Assn., Ltd.*, 2d Dist. No. Civ.A.20268, 2004-Ohio-5289, ¶ 14. Recovery does not require proof of the amount of the economic damage. *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, ¶ 65 (7th Dist.) ("[R]ecovery is precluded only when the existence of damages is uncertain, not when the amount is uncertain."); *Woehler v. Brandenburg*, 12th Dist. No. CA2011-12-082, 2012-Ohio-5355, ¶ 35 (holding the same). A plaintiff may recover nominal damages where "some injury has been done, the extent of which the evidence fails to show." *Lacey v. Laird*, 166 Ohio St. 12 (1956), paragraph two of the syllabus. Thus, even if a plaintiff fails to prove the actual amount of economic damage, the trial court may enter judgment for the plaintiff and award nominal damages. *DeCastro v. Welleston City School Dist. Bd. of Edn.*, 94 Ohio St.3d 197, 199 (2002).

{¶ 24} Here, in their briefing in support of and in opposition to summary judgment, appellants asserted that they were damaged when they operated CALA at their

own expense during the fall 2001 semester. Appellants also claimed that they incurred damages in the form of lost profits, lost business opportunities, and damage to their reputation. However, appellants did not introduce any evidence of the amount of their claimed damages.

{¶ 25} The Court of Claims did not specifically address the damage element in its summary judgment decision. Nevertheless, the Court of Claims found the Department liable for breach of contract. Given the court's ruling, it must have determined that appellants proved the existence of at least some of the economic damage that they asserted. That determination, however, did not entitle appellants to any particular amount of damage at the conclusion of the damages trial. At trial, appellants bore the burden of proving the amount of their damage with reasonable certainty. *Eckel v. Bowling Green State Univ.*, 10th Dist. No. 11AP-781, 2012-Ohio-3164, ¶ 59. The Court of Claims concluded that appellants failed to carry that burden, so it awarded zero damages.

{¶ 26} Appellants' argument assumes that the Court of Claims implicitly determined not only the existence, but also the amount of damage, when it granted appellants summary judgment. Appellants are wrong. The Court of Claims merely needed to find the existence of damage to grant appellants summary judgment. In order to receive the full amount of damage claimed, appellants needed to satisfactorily prove that amount at the damages trial. At best, under appellants' argument, the summary judgment ruling only obligated the Court of Claims to award appellants nominal damages.²

{¶ 27} Moreover, by its very nature, the summary judgment decision had no binding effect on the Court of Claims' subsequent judgment. The grant of summary judgment was an interlocutory decision because it did not completely resolve all claims pending before the court. A court may reconsider and revise an interlocutory decision at any time before the entry of final judgment, either sua sponte or upon motion. *Vahadati'bana v. Scott R. Roberts & Assocs. Co., L.P.A.*, 10th Dist. No. 07AP-581, 2008-Ohio-1219, ¶ 15; *Lingo v. Ohio Cent. RR., Inc.*, 10th Dist. No. 05AP-206, 2006-Ohio-2268,

² As we will explain more fully below, the Court of Claims did not award appellants nominal damages. This failing, however, is not a basis for reversal of the July 2, 2012 judgment. *DeCastro*, 94 Ohio St.3d at 200.

¶ 17; *Chitwood v. Zurich Am. Ins. Co.*, 10th Dist. No. 04AP-173, 2004-Ohio-6718, ¶ 9; *Gahanna v. Cameron*, 10th Dist. No. 02AP-255, 2002-Ohio-6959, ¶ 38. Accordingly, we overrule appellants' first assignment of error.

{¶ 28} By appellants' second assignment of error, they argue that the Court of Claims erred in not awarding them reliance damages after finding that they could not prove expectation damages. Appellants ask that this court award them reliance damages. While we decline to do so, we do conclude that the Court of Claims erred in not addressing reliance damages in its damages decision.

{¶ 29} The purpose of contract damages is to compensate the non-breaching party for the losses suffered as a result of a breach. *DeCastro*, 94 Ohio St.3d at 201. Thus, money damages awarded for breach of contract are designed to place the non-breaching party in the same position it would have been in had the contract not been violated. *State ex rel. Stacy v. Batavia Local Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, ¶ 26. That position can be defined two different ways. First, a non-breaching party may recover a damage award that places it in the position it would have been had the contract been fully performed. Second, a non-breaching party may recover a damage award that places it in the position it was in before the contract was made. Placing the non-breaching party in the first position protects that party's expectation interest, i.e., its interest in having the benefit of the bargain. Restatement of the Law 2d, Contracts, Section 344(a) (1981); Lord, *Williston on Contracts*, Section 64:2 (4th Ed.2000). Placing the non-breaching party in the second position protects that party's reliance interest, i.e., its interest in being reimbursed for loss caused by reliance on the contract. Restatement, Section 344(b); Lord, Section 64:2. Expectation damages and reliance damages are fundamentally different: "[t]he expectancy recovery affirms the existence of a contract; the reliance recovery tries to deny it." Hunter, *Modern Law of Contracts*, Section 14:4 (2013).

{¶ 30} Generally, the non-breaching party may recover the highest of the measures of damages.³ *White v. Nemastil*, 29 Ohio App.3d 1, 6 (8th Dist.1985). Ordinarily, contract damages are calculated based on the protection of the non-breaching party's

³ A third measure of damage—based on the non-breaching party's restitution interest—also exists, but it is not implicated in this case.

expectation interest. Restatement, Section 347; Lord, Section 64:2. Such damages include lost profits. *Doner v. Snapp*, 98 Ohio App.3d 597, 601 (2d Dist.1994). However, if the non-breaching party cannot prove its expectation damages with reasonable certainty, it may instead recover based on its reliance interest. Restatement, Section 349, Comment a; *ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659, 669 (3d Cir.1998); *Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236, 245 (D.C.Cir.1995); *DPJ Co. Ltd. Partnership v. F.D.I.C.*, 30 F.3d 247, 249 (1st Cir.1994).

{¶ 31} Reliance damages are those amounts the non-breaching party has expended in preparation of or during performance of the contract, less any loss that the breaching party can prove with reasonable certainty that the non-breaching party would have suffered had the contract been fully performed. Restatement, Section 349; *Am. Capital Corp. v. Fed. Deposit Ins. Corp.*, 472 F.3d 859, 867 (Fed.Cir.2006); *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720, 729 (2d Cir.1992); *accord Designer Direct, Inc. v. Deforest Redevelopment Auth.*, 368 F.3d 751, 752 (7th Cir.2004) (reliance damages "include out-of-pocket expenditures incurred in preparation or performance of the contract"). Thus, reliance damages assign a dollar value to the detriment the non-breaching party incurred in reliance of the now-broken promise and reimburse the expenditures that the non-breaching party made in performing or preparing to perform the contract. Lord, Section 64:2.

{¶ 32} Here, appellants claim that they are entitled to reliance damages in the amount of the expenses that AU-Special incurred to operate CALA during the fall 2001 semester. These expenses constitute reliance damages because AU-Special incurred them in performing its contractual duty to operate CALA. Appellants argue that they deserve an award of reliance damages because the Court of Claims concluded that they failed to prove their expectation damages, i.e., damages in the amount of the statutory payments due to CALA or the amount of CALA's lost profits. However, an award of reliance damages does not automatically result when a non-breaching party fails to establish its expectation damages. Such an award is contingent on whether the non-breaching party proves the amount of its reliance damages with reasonable certainty. *Eckel*, 2012-Ohio-3164, at ¶ 59.

{¶ 33} To satisfy their burden of proof, appellants offered into evidence CALA's profit and loss statement for August 2001 through January 2002. The profit and loss statement set forth the amounts CALA expended to operate during the fall 2001 semester. Stuart Berger, who was responsible for overseeing CALA's day-to-day operation, testified that the profit and loss statement was "a fair and accurate record of [CALA]." (Tr. 84.) Appellants argued that the Court of Claims should award them the amount of expenses listed in the statement that were attributable to the education of students in grades three through six. They asserted that that amount was \$102,223.

{¶ 34} In its post-trial briefing, the Department attacked the reliability of the profit and loss statement, pointing out that appellants presented no invoices or other documentation to support the numbers contained in the statement. The Department also argued that the profit and loss statement reflected expenses, namely legal fees, unrelated to CALA's operation. The Department contended that, if the Court of Claims concluded that appellants should be compensated for their reliance damages, appellants could only recover \$59,814.

{¶ 35} Appellate courts review an award of damages under a manifest-weight-of-the-evidence standard. *Scarberry v. Lawless*, 4th Dist. No. 09CA18, 2010-Ohio-3395, ¶ 43; *Johnson v. Waterville Gas & Oil Co.*, 6th Dist. No. L-08-1143, 2009-Ohio-4061, ¶ 20. Under that standard, we must examine whether some competent, credible evidence supports the trial court's damages determination. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280 (1978). We cannot apply that standard here because the trial court's damages decision contains no discussion of the profit and loss statement or reliance damages. Generally, a trial court's "findings and conclusions must articulate an adequate basis upon which a party can mount a challenge to, and the appellate court can make a determination as to the propriety of, resolved disputed issues of fact and the trial court's application of the law." *Hahn v. Johnston*, 4th Dist. No. 06CA16, 2007-Ohio-2800, ¶ 2. Without a finding determining a disputed factual issue, an appellate court cannot conduct a meaningful review of that issue. *Walker v. Doup*, 36 Ohio St.3d 229, 230-31 (1988).

{¶ 36} The Department acknowledges that the Court of Claims failed to state any findings as to reliance damages. Nevertheless, the Department contends that the Court of

Claims implicitly addressed appellants' request for reliance damages when it stated that "CALA has failed to produce adequate records for * * * finances." (R. 122 at 8.) That statement, however, appears in the midst of a discussion of lost profits, which are expectation, not reliance, damages. Appellants offered different financial records to prove lost profits than they offered to prove reliance damages. Consequently, we are hesitant to assume that the Court of Claims' rejection of the lost profits evidence also applies to the reliance evidence.

{¶ 37} In the end, we conclude that we are unable to effectively review the issue of reliance damages due to the Court of Claims' silence on the matter. We sustain appellants' second assignment of error, but only to the extent that it challenges the Court of Claims' failure to address reliance damages in its decision. A remand will allow the Court of Claims to explicitly state whether appellants proved their reliance damages and, if so, in what amount.

{¶ 38} By appellants' third assignment of error, they argue that the trial court erred in finding that the contract terminated during the fall 2001 semester, which limited appellants' damages to the losses sustained during that period. Appellants maintain that the contract never terminated and, thus, they are entitled to lost profits they would have earned and grant funds they would have received in the last two-and-one-half years of the five-year contract term. We find the error alleged is, at best, merely harmless.

{¶ 39} A reviewing court will not disturb a judgment unless the error contained within is materially prejudicial to the complaining party. *Guertin v. Guertin*, 10th Dist. No. 06AP-1101, 2007-Ohio-2008, ¶ 13. When avoidance of the error would not have changed the outcome of the proceedings, then the error does not materially prejudice the complaining party. *Id.*; *Brothers v. Morrone-O'Keefe Dev. Co.*, 10th Dist. No. 05AP-161, 2006-Ohio-1160, ¶ 26.

{¶ 40} Here, appellants assert the alleged error prejudiced them because it precluded the Court of Claims from considering whether they were entitled to damage sustained after the fall 2001 semester. However, the reasons the Court of Claims gave for rejecting appellants' claims to lost profits and undistributed grant money apply regardless of the period to which those claims attach. The Court of Claims declined to award appellants damages for the grant funds due to CALA in October 2001 because it found

that the Department had discretion to withhold those funds. That reason for denying damages applies equally to the grant funds due to CALA in October 2002. The trial court did not award appellants damages for lost profits that CALA would have earned in the fall 2001 semester because CALA's financial records were inadequate to prove the existence and amount of the lost profits with reasonable certainty. That reason for denying damages applies equally to the lost profits attributable to the spring 2002 semester and the 2002-2003 and 2003-2004 school years.

{¶ 41} Because the reasons the Court of Claims gave for refusing to award damages based on lost profits and undistributed grant funds apply regardless of when those damages arose, we conclude that the Court of Claims would have denied appellants those damages for the periods the court did not consider. Accordingly, the alleged error was harmless, and we overrule appellants' third assignment of error.

{¶ 42} By their fourth assignment of error, appellants argue that the Court of Claims erred in failing to award them statutory interest. We disagree.

{¶ 43} R.C. 2743.18(A)(1) states that "[p]rejudgment interest shall be allowed with respect to a civil action on which a judgment or determination is rendered against the state for the same period of time and at the same rate as allowed between private parties to a suit." The Supreme Court of Ohio has interpreted this provision to mean that "[i]n a case involving breach of contract where liability is determined and *damages are awarded* against the state, the aggrieved party is entitled to prejudgment interest *on the amount of damages* found due by the Court of Claims." (Emphasis added.) *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110 (1995), syllabus.

{¶ 44} Here, the Court of Claims rendered judgment "in favor of plaintiffs in the amount of \$25 which represents the filing fee paid by plaintiffs." (R. 122.) The Court of Claims did not specify in its judgment whether the \$25 represented an award of damages or costs. Pursuant to *Royal Electric*, if the \$25 was an award of nominal damages, then R.C. 2743.18(A)(1) obligated the Court of Claims to grant statutory interest on the award. If, however, the \$25 was an award of costs, the court had no obligation to grant statutory interest.

{¶ 45} The Court of Claims' practice of awarding prevailing parties their filing fee arises from *Bailey v. Ohio Dept. of Rehab. & Corr.*, 62 Ohio Misc.2d 19 (Ct. of Cl.1990).

See, e.g., *Smalley v. Ohio Dept. of Transp.*, 142 Ohio Misc.2d 27, 2007-Ohio-1932, ¶ 19 (Ct. of Cl.) (relying on *Bailey* to award the filing fee to the prevailing party); *Meinking v. E. Fork State Park*, Ct. of Cl. No. 2005-10071-AD, 2006-Ohio-1015, ¶ 8 (same); *Hoelle v. Miami Univ.*, Ct. of Cl. No. 2005-06970-AD, 2005-Ohio-4643, ¶ 8 (same). In *Bailey*, the plaintiff sought reimbursement of his filing fee and postage costs. The Court of Claims reasoned:

R.C. 2335.19 provides in part that "on the rendition of judgment, in any cause, the cost of the party recovering, together with his debt or damages, shall be carried into his judgment." Costs do not include postage, but do include the \$15 filing fee plaintiff was required to post.

Id. at 19. Thus, the Court of Claims ordered the defendant to pay the plaintiff damages, plus the cost of the \$15 filing fee.

{¶ 46} Under the analysis set forth in *Bailey*, the award of the \$25 filing fee to appellants represented an award of costs.⁴ We recognize that subsequent Court of Claims' decisions relied on *Bailey* to award the filing fee as compensable damages. See, e.g., *Smalley* at ¶ 19; *Meinking* at ¶ 8; *Hoelle* at ¶ 8. However, R.C. 2335.19 distinguishes between "costs" and "debt or damages," and *Bailey* unambiguously characterized the filing fee as the former. Therefore, we conclude that the Court of Claims did not err in denying appellants prejudgment interest, and we overrule appellants' fourth assignment of error.

{¶ 47} By their fifth assignment of error, appellants argue that the Court of Claims erred in admitting into evidence the November 7, 2001 letter from Daniel E. Schultz, then chief deputy auditor for the auditor of state, to David Varda, then assistant superintendent for finance and accountability for the Department. Appellants assert that the letter constitutes impermissible hearsay evidence. We disagree.

{¶ 48} Decisions regarding the admissibility of evidence are within the discretion of the trial court. *Banford v. Aldrich Chem. Co., Inc.*, 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 38; *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, ¶ 20. An appellate court will uphold such a decision absent an abuse of discretion. *Banford* at

⁴ We do not express any opinion regarding the propriety of awarding prevailing parties their filing fees; we merely look to *Bailey* to determine whether to classify the \$25 award as a damage or cost award.

¶ 38; *Beard* at ¶ 20. Moreover, even in the event of an abuse of discretion, an appellate court will not reverse the judgment unless the abuse materially prejudiced the complaining party. *Banford* at ¶ 38; *Beard* at ¶ 20.

{¶ 49} Generally, hearsay is inadmissible. Evid.R. 802. If, however, the hearsay falls within one of the Evid.R. 803 exceptions, it is admissible. Here, the Court of Claims admitted the alleged hearsay under Evid.R. 803(8), which allows admission of:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report * * *.

{¶ 50} Varda, the recipient of the letter at issue, testified that the letter informed him that CALA's financial records and statements for the 1999-2000 school year were incomplete and inauditable. R.C. 3314.03(A)(8) and 117.10 impose a duty on the auditor of state to audit community schools. Varda explained that the letter set forth matters observed pursuant to the auditor of state's duty to audit CALA, and that the auditor of state had a duty to report the results of the audit to the Department because it was CALA's sponsor. The paucity of financial records and statements precluded the auditor of state from completing his duty to audit CALA, so the auditor reported his inability to audit via the November 7, 2001 letter.

{¶ 51} We conclude that Varda's testimony sufficiently established the foundational requirements for admission of the letter under Evid.R. 803(8)(b). Consequently, the Court of Claims did not abuse its discretion in admitting the letter as a public record.

{¶ 52} In arguing to the contrary, appellants assert that the trial court admitted the letter without knowing what document it had admitted. After reviewing the transcript, we find this argument disingenuous. The Department first attempted to question Stuart Berger about the letter. Appellants objected on the basis of hearsay, and the court asked the Department's attorney if a hearsay exception applied. The Department's attorney stated that he would "cover that when Mr. Varda's here" and moved on. (Tr. 163.) When Varda took the stand, the Department asked about the letter and appellants objected again. The Department's attorney argued that the letter fell within the Evid.R. 803(6)

exception for regularly conducted business activities. The Court of Claims sustained the objection. On redirect of Varda, the Department again inquired about the letter. After appellants' attorney objected that the court had already excluded the letter as hearsay, the court asked that the parties specify which document, among the many before the court, was at issue. The Court of Claims then allowed the Department's attorney to elicit the necessary information to qualify for the Evid.R. 803(8) exception. Appellants' attorney objected again when the Department's attorney asked a question regarding the substance of the letter. At that point, the Court of Claims allowed testimony regarding the letter pursuant to the Department's assertion that the Evid.R. 803(8) exception applied. Later, at the conclusion of testimony, the court admitted the letter into the record. Given this course of events, we conclude that the Court of Claims understood what document it was admitting and why.

{¶ 53} Next, appellants argue that the letter is too informal to qualify as a report or statement. We are not persuaded. Evid.R. 803(8) allows the admission of reports or statements "in any form"; the rule does not include any formality threshold.

{¶ 54} Appellants lastly argue that the letter constitutes the type of evaluative or investigative report that is outside of the Evid.R. 803(8) exception. We disagree. Although a report of an audit's findings might qualify as an evaluative or investigative report, the letter here merely reported that the auditor of state did not have sufficient records to conduct an audit. This observation does not amount to an evaluation or investigation.

{¶ 55} In sum, we find no abuse of discretion in the admission of the November 7, 2001 letter. Accordingly, we overrule appellants' fifth assignment of error.

{¶ 56} By their sixth assignment of error, appellants argue that the Court of Claims erred in refusing to allow them to designate an expert witness after the court postponed the trial from December 19, 2011 to March 5, 2012. We disagree.

{¶ 57} On August 26, 2010, the trial court issued a scheduling entry that ordered appellants to furnish the Department with the names of any expert witnesses and a copy of expert reports on or before February 15, 2011. The scheduling entry also set April 15, 2011 as the discovery cut-off date. Appellants let both deadlines pass without naming an expert witness.

{¶ 58} When this case came to trial on December 19, 2011, the parties discovered that a key Department witness was unavailable. Appellants moved for, and the trial court granted, a continuance of trial. On December 22, 2011, the Court of Claims issued an entry scheduling trial for March 5, 2012.

{¶ 59} On January 9, 2012, appellants filed a request for a pretrial hearing. The request informed the Court of Claims that appellants intended to call an expert witness and asked for the court's guidance regarding when to submit an expert report to the Department. The Court of Claims denied the request for a pretrial hearing. Appellants did not identify an expert witness prior to trial or attempt to introduce expert testimony during the trial.

{¶ 60} As the Department points out, in order to name an expert witness, appellants needed an extension of the February 15 and April 15, 2011 deadlines. Appellants, however, did not seek an extension; rather, they simply told the court that they were going to introduce expert testimony and only asked for a pretrial hearing so the court could set the date for submittal of the expert report. We disapprove of appellants' blatant disregard of the deadlines set in the August 26, 2010 scheduling order. Appellants knew the relevant deadlines but did not seek leave to exceed them. Nevertheless, we will review the denial of appellants' request for a pretrial hearing as they characterize it—as a denial of a motion to extend the relevant discovery deadlines.

{¶ 61} Trial courts have broad discretion over discovery matters. *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, ¶ 82; *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 2008-Ohio-6200, ¶ 27. Thus, appellate courts review a trial court's denial of a motion for an extension of the discovery period for abuse of discretion. *Harvey v. Republic Servs. of Ohio II, L.L.C.*, 5th Dist. No. 2007 CA 00278, 2009-Ohio-1343, ¶ 83.

{¶ 62} Appellants argue that we should follow *Allegro Realty Advisors, Ltd. v. Orion Assocs., Ltd.*, 8th Dist. No. 87004, 2006-Ohio-4588. There, the trial court granted summary judgment to the plaintiff as to the defendant's liability. The trial court thereafter scheduled a trial on damages. Approximately seven months after the expiration of the deadline to disclose an expert witness and five months prior to the trial date, the defendant filed a motion for leave to designate an expert witness on damages.

The trial court denied the motion. The defendant appealed that ruling after final judgment. The Eighth District held that under the "narrow and somewhat unusual circumstances [of the case] * * * the refusal to 'extend' or 'reopen' discovery on the only remaining issue [was] an abuse of discretion significant enough to justify a remand for a new trial upon the issue of damages only." *Id.* at ¶ 48.

{¶ 63} The circumstances of this case do not match those of *Allegro*. Here, appellants did not seek an extension of the February 15, 2011 deadline until January 9, 2012—almost one full year after the deadline elapsed. Moreover, appellants filed their request less than two months before the scheduled trial date. Prior to filing their request, appellants had never before mentioned that they intended to introduce expert testimony. Given the untimeliness of appellants' request, we conclude that the Court of Claims did not abuse its discretion in denying it. Accordingly, we overrule appellants' sixth assignment of error.

{¶ 64} By their seventh assignment of error, appellants argue that the Court of Claims erred in failing to award them attorney fees. More specifically, appellants contend that the Court of Claims improperly construed their motion for attorney fees as a motion for reconsideration. We agree. Appellants' July 30, 2012 motion is unambiguously a motion for attorney fees pursuant to R.C. 2743.19 and 2335.39. The Court of Claims erred in not treating it as such. Accordingly, we sustain appellants' seventh assignment of error, but only to the extent that it asserts that the Court of Claims erred in denying their motion without conducting the appropriate analysis.

{¶ 65} By their eighth assignment of error, appellants argue that the Court of Claims erred in denying their motion to recuse Judge Clark. We disagree.

{¶ 66} Pursuant to R.C. 2701.03, only the chief justice of the Supreme Court of Ohio or his or her designee has the authority to determine a claim that a common pleas court judge is biased or prejudiced. *Ford Motor Credit Co., L.L.C. v. Ryan & Ryan, Inc.*, 10th Dist. No. 09AP-809, 2010-Ohio-2905, ¶ 16; *Corbin v. Dailey*, 10th Dist. No. 08AP-802, 2009-Ohio-881, ¶ 14. Consequently, as a general matter, appellate courts lack authority to consider issues of disqualification. *Capital City Community Urban Redevelopment Corp. v. Columbus*, 10th Dist. No. 12AP-257, 2012-Ohio-6025, ¶ 23; *Ford Motor Credit Corp.* at ¶ 16. R.C. 2701.03, however, does not apply to allegations of bias

and prejudice against judges of the Court of Claims. *In re Disqualification of Clark*, 127 Ohio St.3d 1235, 2009-Ohio-7200, ¶ 3. Therefore, we will review whether the Court of Claims erred in denying appellants' motion to recuse.

{¶ 67} The test for determining whether a judge's participation in a case presents an appearance of impropriety is an objective one. *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, ¶ 8. "A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality." *Id.* Because a judge is presumed to follow the law and not to be biased, the appearance of impropriety must be compelling in order to require recusal. *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, ¶ 5.

{¶ 68} Here, appellants argue that an appearance of impartiality arose from this court's reversals of two of Judge Clark's judgments and Judge Clark's reconsideration and reversal of interlocutory rulings initially favorable to appellants. However, "a party's disagreement or dissatisfaction with a court's legal rulings, even if those rulings may be erroneous, is not grounds for disqualification." *In re Disqualification of McKay*, 135 Ohio St.3d 1286, 2013-Ohio-1461, ¶ 8. Moreover, reconsideration of interlocutory decisions is a matter within the judge's sound discretion and not evidence of bias or prejudice. *In re Disqualification of Lawson*, 135 Ohio St.3d 1243, 2012-Ohio-6337, ¶ 6. After reviewing the totality of Judge Clark's rulings, we conclude that appellants failed to overcome the presumption of lawfulness and impartiality. Accordingly, we overrule appellants' eighth assignment of error.

{¶ 69} For the foregoing reasons, we overrule appellants' first, third, fourth, fifth, sixth, and eighth assignments of error. We sustain appellants' second and seventh assignments of error to the extent set forth above. We affirm in part and reverse in part the judgment of the Court of Claims of Ohio, and we remand this case to that court for further proceedings consistent with law and this decision.

*Judgment affirmed in part; reversed in part;
cause remanded.*

SADLER and DORRIAN, JJ., concur.
