

IN THE SUPREME COURT OF OHIO

CITY OF ST. MARYS, OHIO,

Appellee,

v.

AUGLAIZE COUNTY BOARD OF
COMMISSIONERS,

Appellant.

Case No. 2006-1033

On Appeal from the Auglaize
County Court of Appeals
Third Appellate District
(No. 20517)

MERIT BRIEF OF APPELLEE
CITY OF ST. MARYS

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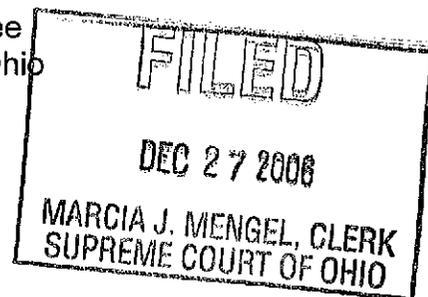


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STATEMENT OF FACTS

A. Nature of the Case

Plaintiff-appellee City of St. Marys filed this action against defendant-appellant Auglaize County Board of Commissioners after the County refused to perform their obligations under the parties' Agreement for disposal of the County's solid waste. (Complaint, May 30, 2002, Supp. 1; Amended Complaint, March 31, 2003, Supp. 19.) The Agreement obligated the City to demonstrate that it had capacity to accept the County's solid waste at the City's landfill (subject to the approval of the Ohio EPA) at a rate determined by an objective third party, and it obligated the County to assume "complete responsibility" for "all the environmental monitoring required for [the landfill] by applicable statutes and regulations . . . both prior to and subsequent to closure of [the landfill]." (Agreement, December 22, 1988, at ¶¶ 4(a) and 5(a), Supp. 271, 273.) Twelve years later, the County unilaterally announced that it would no longer be responsible for environmental monitoring at the landfill. The City then brought this lawsuit to enforce the terms of the Agreement.

B. Course of Proceedings

The Auglaize County Court of Common Pleas issued its ruling in two separate summary judgment opinions. In the first opinion, it rejected the County's contention that its environmental monitoring obligation terminated after twelve years. The trial court held that "the clear and unambiguous terms of the Agreement require [the County] to pay for all post-closure environmental monitoring costs" for the time period mandated by applicable environmental statutes and regulations. (Judgment Entry, May 6, 2004, at 9, Appx. 49.)

In its second summary judgment opinion, the trial court rejected the County's contention that the parties' Agreement is "void" because the County neglected to have it certified by the County Auditor in 1988, when the Agreement was approved and signed by the County Board of Commissioners. It held that the statute containing the certification requirement, R.C. 5705.41(D), expressly excludes this type of contract from those requirements. (Summary Judgment, March 7, 2005, at 11-13, Appx. 37-39.) Nevertheless, the trial court granted summary judgment in favor of the County after concluding that the City could not enforce the County's duty to continue the environmental monitoring at the landfill because the City itself had breached the Agreement by using the wrong methodology to allocate solid waste disposal fees, and, thus, could not enforce the County's contractual environmental monitoring duties. (Id., at 10-11, Appx. 36-37.)

The City appealed and the County cross-appealed from those rulings. The Court of Appeals for the Third Appellate District held that the County breached the Agreement and that the City did not. (Opinion, April 10, 2006, Appx. 6.) First, it agreed with the trial court that the County's contractual responsibility for the environmental monitoring at the landfill did not expire after twelve years but rather continued as long as monitoring was required by environmental statutes and regulations. It also agreed with the trial court that R.C. 5705.41(D) did not require certification of the parties' Agreement by the County Auditor. Finally, it examined the method that the County and the City had used to allocate landfill disposal fees and found that the City did not breach the Agreement. The Court of Appeals accordingly held that the City was entitled to summary judgment in its favor. (Id.)

The County appealed from that ruling and asked this Court to review four propositions of law. They involve: (1) whether the County's contractual responsibility for environmental monitoring at the landfill automatically expired after twelve years under the terms of the Agreement; (2) whether the County's consistent course of performance over the term of the contract was properly considered as evidence of its intent; (3) whether the County waived the City's alleged breach of the Agreement by failing to object for twelve years; and (4) whether the parties' Agreement is subject to the statutory certification requirements of R.C. 5705.41(D). (Memorandum in Support of Jurisdiction, May 25, 2006.)

This Court initially accepted jurisdiction over the first three issues only. (Entry, August 23, 2006.) The County moved for reconsideration, and the Court subsequently agreed to review all four propositions of law. (Reconsideration Entry, October 18, 2006.)

C. The Factual Record

The Ohio General Assembly enacted comprehensive solid waste management requirements in 1988 that directly affected Auglaize County. (H.B. 592, codified at R.C. Chapters 343 and 3734.) The new legislation required the County to participate jointly with other counties in a Solid Waste Management District ("SWMD") -- and thereby give up control over the County's solid waste disposal and related surcharge revenue -- unless the County obtained a C-2 exemption from the Ohio EPA authorizing the County to form its own single-county SWMD.

In order to obtain the necessary C-2 exemption, the County had to enter into a solid waste disposal agreement with a licensed landfill that was willing and had capacity

to dispose of the County's solid waste for at least ten years. The County approached the City, which operated a licensed landfill with sufficient additional capacity, and they executed a written Agreement on December 22, 1988. The City agreed that it had capacity to dispose of all solid waste from Auglaize County residents and businesses for a period of twelve years (subject to Ohio EPA approval), at a disposal rate established by an objective third party, and that it would pay a portion of the landfill disposal fees it collected into a Fund administered by the County that could be used for, inter alia, environmental monitoring at the landfill. The County agreed that it would administer the Fund, that it would accept complete responsibility for all environmental monitoring required at the landfill, and that it would pay monitoring expenses that exceeded the amount of the Fund.

Several provisions of the parties' Agreement are relevant to this appeal. It obligates the City to demonstrate that it has capacity to accept and dispose of all solid waste generated in Auglaize County at the City's landfill, subject to the continuing approval of the Ohio EPA. The Agreement provides that "[t]he term of this Agreement shall be twelve (12) years, commencing on the date the contract is signed by the parties" (Agreement, paragraphs 2, 4(a), Supp. 270-71.) The Agreement also requires the City to "establish the initial environmental monitoring program at the [landfill] required by applicable statutes and regulations." (Id., paragraph 4(f), Supp. 272-73.) The County's monitoring obligations are described in paragraph 5(a) of the Agreement:

Pursuant to this Agreement, the County shall: (a) as soon as the monitoring program initiated by the City . . . is approved by the OEPA, undertake complete responsibility for all environmental monitoring required for the [landfill] by

applicable statutes and regulations, including the operation of such environmental monitoring and any capital expenditures necessary to accomplish the monitoring, both prior to and subsequent to closure of the site.

(Emphasis added.) The County expressly warranted that it had "the authority and power to enter into this Agreement, pursuant to, inter alia, O.R.C. Section 307.15." (Agreement, paragraph 15, Supp. 273.)

The Agreement also provided that the City would establish a disposal rate for the landfill utilizing a rate study by an objective third party, and that "a portion of the rate established . . . shall be set aside for the creation and maintenance of a Fund." (Id., paragraph 8, Supp. 276.) Pursuant to paragraph 9(a) of the Agreement:

[A] portion of the Fund shall be allocated to pay the costs of environmental monitoring . . . both prior to and subsequent to the closure of the City [landfill] . . . to the extent that such monitoring is required by applicable statutes and regulations; the portion of the Fund to be set aside and accumulated for such monitoring purposes shall be established by the rate study . . . provided, however, that to the extent that the costs of environmental monitoring subsequent to the closure of the City [landfill] exceed the amounts set aside pursuant to this subparagraph, the County shall bear those costs

(Emphasis added.) "[T]he Fund shall be administered by the Board of the SWMD," not by the City. (Id., paragraph 9(d), Supp. 278.)

The County submitted an application for a C-2 exemption to the Ohio EPA after the City and the County executed the Agreement. The County included a financial feasibility study that showed the City would need to increase its gate fees for the landfill by almost \$20 per ton to cover construction and operational costs, including present and future environmental monitoring expenses. (Supp. 309-14.)

The Ohio EPA approved the County's request for a C-2 exemption on February 17, 1989, and the County formed its own SWMD. (Supp. 616.) The appellant

County Board of Commissioners served as the SWMD Board of Directors pursuant to R.C. 343.01.

The City and the County then agreed to select John Hull as the objective third party who would conduct the rate study required by Paragraph 8(a) of the Agreement. Hull conducted the rate study and calculated appropriate disposal fees for the landfill. He recommended that the City increase its gate fee to \$7 per ton and that the County SWMD enact a surcharge of \$5.24 per ton; the County SWMD has independent statutory authority to levy the surcharge for, inter alia, costs of groundwater monitoring at the landfill. R.C. 3734.57. Hull took environmental monitoring costs into account in calculating both the gate fee and the surcharge fee, so he specifically advised that the monitoring component should be removed from the gate fee if the recommended surcharge was implemented: "[p]rior to the initial district surcharge implementation, [the City] should adjust [its] gate fee so that monitoring fees, etc., are not included in both the [City] gate fee and the [County] surcharge."

The County followed Hull's recommendation and adopted a surcharge on solid waste disposed of at the City's landfill of \$5.24 per ton. The City initially increased its gate fee to \$7 per ton and subsequently reduced it to \$2 per ton, in accordance with Hull's recommendation. The City was required by law to collect the surcharge on behalf of the County and to remit it to the SWMD. Appellant County Board of Commissioners, serving as the SWMD Board of Directors, administered the Fund pursuant to paragraph 9(a) of the Agreement.

The City began disposing of the County's solid waste at the landfill and began making significant payments of landfill disposal fees to the County; in the first four years

alone, the City remitted surcharge fees of \$32,000 (1989), \$200,000 (1990), \$170,000 (1991), and \$200,000 (1992). During the following several years, the County never objected to their jointly-selected method of using surcharge disposal fees, rather than gate fees, to create the Fund for future environmental monitoring costs and other Fund expenses. In fact, when it submitted solid waste management plans to the Ohio EPA in 1992 and 1996, the County indicated that the "disposal fees" and "generation fees" the County imposed for waste disposal at the landfill -- i.e., the County surcharge -- would be used to cover post-closure monitoring expenses. (Supp. 624, 635.) For example, the 1996 plan expressly represented that the SWMD had established a fund to pay for post-closure monitoring and had set aside money for the fund each year. (Supp. 630, 635)

Paragraph 8(c) of the parties' Agreement provided that the City would review the disposal rate periodically and that the rate "may be modified" by the City in accordance with an index established during the initial rate study. (Supp. 276.) The City increased the gate fee slightly after it conducted a rate review in 1993. The County concedes that the 1993 increase in gate fees, like the original gate fees, did not include any amount for future environmental monitoring at the landfill. (Merit Brief of Appellant, at 9.) Nevertheless, the County did not claim that the City must contribute money to the Fund for post-closure environmental monitoring from the gate fees rather than from the surcharge fees. The County was fully aware that "during the 12-year term, [the City] never allocated or paid any portion of the City's [gate fees] to the Fund that was to be used for monitoring expenses at the landfill." (Merit Brief of Appellant, at 9.) In accordance with Hull's rate study and recommendations, the City paid the landfill

surcharge fees it collected to the County for use in the Fund. The City did so with the full knowledge, consent and participation of the County.

In October 1994, the Ohio EPA informed the City that the proposed expansion areas of the landfill did not meet the stringent best-available-technology ("BAT") regulations that were adopted after H.B. 592 was enacted. The Ohio EPA eventually ordered the landfill closed, and the City could no longer accept solid waste at the facility after June 1, 1998. The County continued to pay the environmental monitoring expenses for the landfill after it closed. The County did not claim that the City's inability to dispose of solid waste after June 1998 was a breach of the Agreement, and it did not claim that it was no longer responsible for environmental monitoring after the landfill closed. Instead, the County continued to provide the monitoring at the landfill for two more years.

In December 2000, the County unilaterally announced that it would no longer perform its environmental monitoring duties at the landfill. Although the County SWMD had consistently reported the existence of a "monitoring fund" that supposedly contained hundreds of thousands of dollars from the County surcharges collected and remitted by the City (Supp. 638-81; 682-85; 686-89; 690; 691-724), this was not true. The County had created a separate "groundwater monitoring" fund of \$167,000 in 1997, but it paid no further money into that account. Surcharge fees remitted by the City were used for other purposes.

ARGUMENT

- I. The termination date of contractual obligations is governed by the intentions of the contracting parties and is not subject to special proof requirements. (Response to Appellant's Proposition Law No. 1.)**

In its first proposition of law, the County asks this Court to adopt a new rule of law for Ohio that would automatically limit the duration of contractual obligations, without regard to the actual intentions of the contracting parties, unless the contract contains "explicit survival language." (Merit Brief of Appellant, at 13.) The County admits that no Ohio court has ever endorsed such a rule, and the meager caselaw it cites from intermediate appellate courts in other jurisdictions also provides little, if any, support. There is no good reason to change Ohio law, and the Court should affirm the rulings by the Court of Common Pleas and the Court of Appeals on this issue.

The County needs the Court to change Ohio law in this case because that is the only way the County can prevail on its contention that its responsibility for environmental monitoring at the landfill expired after twelve years. The Agreement itself specifies that:

[T]he County shall . . . undertake complete responsibility for all environmental monitoring required for the [landfill] by applicable statutes and regulations . . . both prior to and subsequent to closure of the [landfill].

(Agreement, paragraph 5(a), Supp. 273.) In short, the Agreement provides that the County's monitoring obligation will continue for as long as environmental laws require monitoring at the landfill. The parties agree that applicable statutes and regulations could require monitoring for up to thirty years after the landfill closed.

The trial court and the Court of Appeals both found that the plain and unambiguous language of Paragraph 5(a) of the Agreement makes the County responsible for all monitoring that is required at the landfill before and after closure.

Both rulings properly applied traditional Ohio contract law by enforcing the intentions of the contracting parties on this issue as expressed in the language of their contract, and they should be affirmed in this proceeding.

A. The parties' Agreement does not clearly and unambiguously limit the County's monitoring obligations to a ten-year time period.

The County begins its argument by ignoring the language of its own proposition of law and by arguing instead that both lower courts misapplied traditional contract law. It argues, first, that the Agreement "clearly sets forth the parties' intent" to terminate the County's environmental monitoring contractual duties after twelve years. (Merit Brief of Appellant, at 14.) According to the County, the duration of its monitoring obligations is controlled by "clear and ambiguous" language in an introductory paragraph of the Agreement, which provides generally that "[t]he term of this Agreement shall be twelve (12) years." (Agreement, paragraph 2, Supp. 270.) See Merit Brief of Appellant, at 15. But the language in paragraph 2 can be considered "clear and unambiguous" only if one ignores the language in paragraph 5(a) that extends the County's monitoring obligation for as long as monitoring is required by applicable environmental laws.

The provisions of paragraph 5(a) of the Agreement cannot be ignored; a court must give meaning to every paragraph and every provision of a contract. State v. Bethel (2006), 110 Ohio St. 3d 416, 423-24, 2006-Ohio-4853, ¶¶ 50-51. Intentions of the contracting parties that are evident from the four corners of their agreement cannot simply be ignored. Farmers' Nat. Bank v. Delaware Ins. Co. (1911), 83 Ohio St. 309, syllabus. "[T]erms and conditions are written into a contract for the purpose of being observed by the parties thereto." 83 Ohio St. at 329. The County's assertion that

paragraph 2 of the Agreement "unambiguously" limits its monitoring responsibility to a period of twelve years violates that rule by ignoring paragraph 5(a) of the Agreement.

According to the County, paragraph 5(a) cannot possibly mean what it says because it would be unfair to make the County responsible for environmental monitoring "for as long as the landfill was operating plus whatever post-closure period was required." (Merit Brief of Appellant, at 15-16) The County's contention should be rejected on both legal and factual grounds. It is legally incorrect because "[i]t is not the responsibility or function of this Court to rewrite the parties' contract in order to provide for a more equitable result." Foster Wheeler Environresponse, Inc. v. Franklin County Convention Facilities Authority (1997), 78 Ohio St. 3d 353, 362, 1997-Ohio-202. The County's contention is factually incorrect because there is nothing unfair about the County's monitoring responsibility under paragraph 5(a) of the Agreement. The County concedes that a twelve-year monitoring obligation would have been reasonable, and it was willing to accept a longer monitoring obligation in this case because it needed to get the City to enter into a contract allowing the County to use its landfill. The County needed the contract in order to obtain a C-2 exemption from the Ohio EPA which it had to have in order to form an SWMD and levy surcharges on the disposal of solid waste in Auglaize County.

Furthermore, it was reasonable for the County to assume responsibility for future environmental monitoring at the landfill because the County's solid waste could exhaust the capacity of the City's landfill and eventually force the City to close it to everyone, including City residents. In these circumstances, it is hardly "inconceivable" (Merit Brief of Appellant, at 15-16) that the City would impose -- and the County would accept --

responsibility for future monitoring requirements at the landfill. The County has articulated no legal basis upon which this Court can ignore the promises that the County made in paragraph 5(a) of the Agreement. The Court of Appeals properly found that the County is responsible for all future monitoring required at the landfill, and its decision should be affirmed.

B. The duration of the County's monitoring obligation is determined by the intent of the parties to the Agreement, and no special words are required to express that intent.

The County then turns to the legal issue raised by its proposition of law and urges this Court to follow the reasoning of the Illinois Court of Appeals in McDonald's Operators Risk Management Assn. v. CoreSource, (1999), 307 Ill. App. 3d 187, 717 N.E2d 485, which purportedly held that all contractual obligations simultaneously expire at the end of the term of the contract unless the contract contains "explicit language" to the contrary. (See Merit Brief of Appellant, at 16-17.) The contract in McDonald's provided that CoreSource would administer all claims against MORMA that occurred during the two-year term of their contract, but it also specifically required CoreSource to return all active files when the contract terminated. The Court held that CoreSource was not obligated to administer active case files after the contract terminated, even for claims that occurred during the contract term. It reasoned that "the parties would not have expressed their intent to impose such a substantial duty through use of the single word 'occurred'" when such an intent would be completely irreconcilable with CoreSource's express obligation to turn over all active files upon termination. 717 N.E. 2d at 490.

There is no similar contradiction in the present case; the County is not simultaneously required to turn over the monitoring to the City and to continue the

monitoring. Indeed, the City did exactly what the McDonald's Court indicated it should do to extend the County's environmental monitoring obligation beyond the twelve-year term of paragraph 2: it explicitly described the County's monitoring obligation in paragraph 5(a) and specifically stated that it included "all" monitoring required by environmental statutes and regulations "both prior to and subsequent to the closure of the site." The decision of the Illinois Court of Appeals in McDonald's requires no more.

The other case law cited by the County also fails to support its position that the Court cannot enforce its monitoring obligation in the absence of more "explicit" language in paragraph 5(a). In All West Pet Supply Co. v. Hill's Pet Production Division, Colgate-Palmolive Co. (D. Kan. 1993), 840 F. Supp. 1433, 1439, amended, 847 F. Supp. 858, the parties' contract "did not include any additional language" that indicated one of its provisions would extend longer than the other provisions of the contract. In Yearling Properties, Inc. v. Tedder (1988), 53 Ohio App. 3d 52, the Court held that the obligation of the guarantor of a lease ended when the lease expired, even though the tenant had renewed the lease automatically, because the lease did not contain any language that suggested the guarantor's obligation would extend to the renewed lease. In the present case, paragraph 5(a) contains language that extends the County's monitoring obligation beyond twelve years, and the parties' intentions should be enforced by this Court.

The County argues that the language in paragraph 5(a) of the Agreement is not sufficient to satisfy the "explicit survivor language" rule that it now proposes. But it concedes that no such rule has ever been adopted in Ohio, and, as set forth above, paragraph 5(a) satisfies whatever heightened standards are required by the case law

cited by the County. Paragraph 5(a) clearly expresses the parties' intention to define the length of the County's monitoring obligation by the duration of applicable environmental requirements rather than by the duration of the parties' other obligations, as set forth in paragraph 2.

This Court should not change Ohio law and impose a blanket rule that ignores the actual intentions of the contracting parties unless they use special "explicit" words in their contract to describe their respective obligations. Ohio has always followed the traditional common law rule that "[t]he cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties." Foster Wheeler, supra, 78 Ohio St. 3d at 361, 1997-Ohio-202. See In re All Kelly & Ferraro Asbestos Cases, (2004) 104 Ohio St. 3d 605, 2004-Ohio-104, ¶ 29:

In construing the terms of a written contract, the primary objective is to give effect for the intent of the parties, which we presume rests in the language that they have chosen to employ.

See also Graham v. Drydock Coal Co. (1996), 76 Ohio St.3d 311, 313, 1996-Ohio-393. Similarly, the Agreement in this case must be construed to carry out the intent of the parties as evidenced by the contractual language they used in paragraph 5(a). Skivolocki v. East Ohio Gas Co. (1974), 38 Ohio St. 2d 244, syllabus par. 1.

The trial court and the Court of Appeals agreed that paragraph 5(a) of the Agreement is "clear and unambiguous" and that it requires the County to assume responsibility for monitoring at the landfill for as long as it is required by environmental statutes and regulations. (Opinion, April 10, 2006, ¶ 16, Appx. 14.) Paragraph 5(a) states, without limitation, that the County will "undertake complete responsibility" for "all environmental monitoring" required at the landfill "both prior to and subsequent to

closure." (Agreement, Paragraph 5(a), emphasis added; Supp. 273.) The "plain and ordinary" meaning of the word "complete" is "having all necessary or normal parts, components, or steps; entire; whole." Roger v. Ohio Real Estate Commission (1999), 131 Ohio App. 3d 265, 268. In addition, "all" is "the most comprehensive word we have" and "must receive its common, ordinary, and usual meaning." Cudlip v. State of Ohio (C.P. 1921), 23 Ohio N.P. (N.S.) 533. See also Skotak v. Vic Tanny International, Inc. (1994), 203 Mich. App. 616, 619, 513 N.W. 2d 428, 430 ("in its ordinary and natural meaning, the word 'all' leaves no room for exceptions").

The County also suggests that the contract should be considered ambiguous and should therefore be construed against the City because the City's agent drafted the Agreement. (Merit Brief of Appellant, at 19.) However, the general twelve-year term provision of paragraph 2 cannot render the specific language of paragraph 5(a) ambiguous. A provision of a contract is not ambiguous merely because "multiple readings are possible." State v. Porterfield (2005), 106 Ohio St. 3d 5, 7, 2005-Ohio-3095, ¶ 11. Instead, "a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning." (Id.) In the present case, the Agreement contains a general provision in paragraph 2 setting out a twelve-year term for the contract and a specific provision in paragraph 5(a) that expressly applies to the County's monitoring obligations. "A specific provision controls over a general one." Mousler v. Cincinnati Casualty Co. (1991), 74 Ohio App. 3d 321, 330, appeal dismissed (1991), 62 Ohio St. 3d 1447 (finding no "internal conflict" in a personal injury insurance policy containing a general provision that defined "personal injury" to include discrimination and a specific provision that excluded coverage for discrimination claims). See also Aerel, S.R.L. v.

PCC Airfoils, L.L.C. (6th Cir. 2006), 448 F.3d 899, 903, holding that a contract was not ambiguous even though it contained a general provision requiring the payment of commissions for all sales originating in the territory, and also contained a specific provision barring the payment of commissions after the contract terminated, because "[u]nder Ohio law, [a] specific provision controls over a general one." (Citing Mousler, supra.) There is no ambiguity in the parties' Agreement to construe against the City.

In any event, the County could not prevail here even if the Agreement was ambiguous because there is substantial and undisputed extrinsic evidence that the County understood and intended that the monitoring obligation described in paragraph 5(a) would not be limited to twelve years. See Westfield Insurance Co. v. Galatis (2003), 100 Ohio St. 3d 216, 219, 2003-Ohio-5849, ¶ 11, 12:

When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties On the other hand, where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent.

See also State ex rel. Petro v. R.J. Reynolds Tobacco Co. (2004), 104 Ohio St. 3d 559, 564, 2004-Ohio-7102, ¶ 23 (Same).

Not surprisingly, the County insists that extrinsic evidence of its intent should not be considered in this case. (Merit Brief of Appellant, at 20-22.) It argues that "extrinsic evidence cannot make up for the lack of survival language" in the Agreement, based upon its proposition that the intent of contracting parties is irrelevant and that the presence (or absence) of special "explicit survival language" is controlling. There is no such rule in Ohio law, as set forth above, and the County cannot exclude the substantial evidence of the County's intent on that basis. For example, the County's original 1988 request for a C-2 exemption from the Ohio EPA acknowledged that its monitoring

obligations would continue for longer than twelve years. (Supp. 309) In 1991, the County asked a consultant to calculate the future monitoring costs the County would incur, based upon its obligation to conduct all required monitoring for 30 years after the landfill closed. Similarly, the solid waste disposal plan that the County submitted to the Ohio EPA for 1992 contained its projection of the required monitoring costs "for the 30 year Post Closure period." (Supp. 625.) In the 1996 updated plan it submitted to the Ohio EPA, the County again expressly acknowledged its "responsibility" to provide monitoring throughout the life of the landfill and the "30-year post closure time period." (Supp. 635.) This evidence is not offered as a substitute for missing contractual provisions; the Agreement itself imposes monitoring obligations on the County beyond twelve years, as set forth above. However, to the extent that the County claims that the Agreement is ambiguous, this evidence conclusively establishes the intent of the County under the Agreement to perform all required monitoring for up to thirty years after the landfill closed.

The Court of Appeals did not err when it held that the County's monitoring obligation under paragraph 5(a) extended beyond the twelve-year term of paragraph 2, and its decision should be affirmed.

II. The Court of Appeals did not err by considering evidence of the County's intention to pay all post-closure environmental monitoring expenses from landfill surcharge fees. (Response to Proposition of Law No. II).

In its second Proposition of Law, the County asks this Court to adopt a legal rule for Ohio that would bar evidence of the construction placed on a public contract by public officials. However, the related argument in its Merit Brief also touches on several other issues.

The County argues that paragraphs 8 and 9 of the Agreement unambiguously require the City to make payments to the Fund for, inter alia, future environmental monitoring from the waste disposal gate fees that the City collected on its own behalf rather than from the waste disposal surcharge fees that the City collected on behalf of the County. (Merit Brief of Appellant, at 23-24.) Accordingly, the County claims that the Court of Appeals erred when it noted that the word "rate" is not defined by the Agreement and looked to the parties' course of conduct over the life of the contract to determine whether the parties intended the City to make the payments to the Fund from the gate fees. (Id.) The County further claims that the Court of Appeals should have inferred somehow that the City was obligated to create the Fund and to make the monitoring allocations, when the Agreement itself is silent as to those matters. (Id., at 25-26)

The language of the Agreement does not support the inferences suggested by the County. In fact, it directly refutes them. Under the provisions of the contract, the City was to conduct a rate study through an objective third party that would "establish a rate for the disposal of solid waste" at the landfill. (Agreement, ¶ 8, Supp. 275.) A portion of the disposal fees collected at the landfill was to be "set aside for the creation and maintenance of a fund" in accordance with the findings of the rate study for, inter alia, future environmental monitoring expenses. (Id., Paragraph 9, Supp. 276.) Finally, "the Fund shall be administered by the Board of the SWMD established pursuant to the C-2 exemption," i.e., the appellant Auglaize County Board of Commissioners. (Id., Paragraph 9(d), Supp. 278.) Pursuant to Paragraph 4(g) of the Agreement, the City

would "collect all fees" associated with the landfill, which would include the City's gate fees and the County's surcharge fees.

None of these provisions required the City to establish the Fund, to allocate a portion of the Fund to monitoring expenses, or to make contributions to the Fund from gate fees rather than surcharge fees. On the contrary, the Agreement required the parties to proceed in accordance with Hull's rate study and required the County to administer the Fund. Hull's rate study specifically concluded that a portion of the surcharge should be set aside for environmental monitoring and that the monitoring costs should not be charged a second time as a component of the City's gate fees. The City and the County SWMD adopted Hull's recommendation; the City reduced its gate fees to remove the monitoring component and the County charged surcharge fees that were based in part on the amount of monitoring costs. The City then made payments to the County for the Fund from the surcharge fees for over ten years with absolutely no objection by the County.

Thus, the language used in the Agreement does not impose an obligation on the City to make the contributions to the Fund from its gate fees rather than from surcharge fees. The only provision of the contract that addresses this question provides that the parties will proceed in accordance with Hull's rate study, which concluded that the surcharge fees should be the source of the payments to the Fund. The City agrees with the County that the Agreement is not ambiguous; it simply does not contain the contractual obligations that the County now seeks to impose on the City.

The County also argues that extrinsic evidence of the parties' intentions on these matters could not be considered even if the Agreement were ambiguous because the

County's subsequent conduct does not "necessarily . . . reflect the joint understanding of the three [County] Commissioners who signed the Agreement." (Merit Brief of Appellant, at 28.) The County presumably cites no legal authority for that contention because there is none. In addition, the argument is irrelevant here because Hull conducted the rate study and made his recommendations at the outset of the contract, and the practice of using surcharge fees to make contributions to the Fund never changed in the following many years. The County clearly understood from the very beginning that the City was using this methodology, as recommended by Hull, and the practical construction placed upon the contract by the successors of the County officials who executed the Agreement is the same practical construction that the original County officials placed on the contract. There is no difference in this case between the understandings of the original County officials and of the successor County officials and, thus, no reason to preclude evidence of the practical construction both sets of officials placed on this contract.

The County argues, third, that the Court of Appeals "misunderstood" the "undisputed facts" that the City collected the surcharge fees "as a trustee" of the County and therefore could not use those fees for payments to the Fund. But this ignores the fact that Hull's rate study recommended that the surcharge -- not the City's gate fees -- should be set high enough to make contributions to the Fund for future monitoring costs at the landfill and the City and County accepted that methodology for over a decade.

It is also immaterial whether the surcharge is "a tax, rather than a charge for services," when the County concedes in the same paragraph of its Merit Brief that the SWMD gave its "approval to use a portion of its revenue to pay for monitoring at the

landfill." (Merit Brief of Appellant, at 30.) Similarly, it is irrelevant that a "distinction" can be made between the County and the SWMD despite their identical boards, when the County executed the Agreement, administered the Fund, and undertook all monitoring obligations at the landfill. (Id., at 31.)

In short, the Agreement contains no provisions requiring the City to establish the Fund or to make payments to the Fund from gate fees rather than surcharge fees. There is no ambiguity; the contract simply does not impose any such obligations on the City. In addition, the City would prevail even if the Agreement could be considered ambiguous on those questions because the County consistently placed the same practical construction on the contract. The decision of the Court of Appeals should be affirmed.

III. The Court of Appeals did not err by considering evidence that the County acquiesced throughout the term of the contract in a course of performance it now deems inadequate. (Response to Proposition of Law No. III.)

In its third Proposition of Law, the County contends that its silent acquiescence to the rate methodology used by the City and to the closure of the landfill before the expiration of the Agreement did not waive the County's current argument that the City breached the Agreement in both respects. The County does not deny its inaction and failure to object to the methodology or to the closure. Instead, it argues that a contracting party cannot waive a breach of a material term of a contract as a matter of law. The County's argument should be rejected for the reasons set forth below.

A. The County waived alleged breaches of the Agreement involving the creation and administration of the Fund and the source and amount of payments made to the Fund.

The Court of Appeals held on several different grounds, including waiver, that the City's purported failure to comply with provisions of the Agreement governing payments to the Fund did not defeat its claims. It held, first, that the language of the Agreement did not require the City to establish the Fund or to make payments to it from gate fees only. (Opinion, *supra*, at ¶ 29.) It held, second, that even if such an obligation could somehow be read into the Agreement, it was not a condition precedent to the County's obligation to perform its environmental monitoring duties. (*Id.*, at ¶ 30.) Third, the Court of Appeals held that even if the Agreement imposed that obligation on the City as a condition precedent to the County's performance of its contractual duties, the County waived that defense by continuing to perform under the Agreement for twelve years, with full knowledge of the situation and without any objection of any kind. (*Id.*, at ¶ 31.) The County addresses the second and third stages of the Court of Appeals' analysis in this Proposition of Law.

The County maintains that the City's alleged obligation to create an adequate Fund for required environmental monitoring at the landfill from gate fees "was a condition precedent to the County's obligation." (Merit Brief of Appellant, at 33.) The County notes that it was obligated by paragraph 9(a) of the Agreement to pay all monitoring costs that exceeded the amount of the disposal rate the City paid into the Fund, and, "[t]herefore," the City's alleged obligation to pay a sufficient amount of the rate to the Fund to cover monitoring costs "was a condition precedent to the County's obligation to bear the costs of post-closure monitoring." (*Id.*)

The County is mistaken. The City's (alleged) duty to pay a sufficient amount of gate fees to the Fund for all monitoring costs logically cannot be a condition precedent

to the County's (admitted) obligation to pay monitoring costs that exceed the amount of the Fund. Under the County's reasoning, it would never have any obligation to pay the excess monitoring costs because the mere existence of excess costs would demonstrate that the City breached its duty to make sufficient payments to the Fund, and the City's breach would excuse the County's obligation to pay the excess costs. (See Merit Brief of Appellant, at 35-36.)

The County also contends that the City breached a material duty under the Agreement because it "never set aside any portion of its landfill disposal rate [i.e., gate fees] to fund the Fund," and that this excuses the County's failure to perform its monitoring duties. (Id., at 34.) As discussed, supra, the Court of Appeals correctly held that no provision of the Agreement requires the City to establish the Fund, administer the Fund, make payments to the Fund from gate fees rather than surcharge fees, or pay sufficient amounts to the Fund to pay for all necessary environmental monitoring.

The Court of Appeals accurately observed that there is nothing in the Agreement that indicates which party must establish the Fund. The express language of the Agreement unquestionably places the duty to administer the Fund on the County. (Agreement, ¶ 9(d), Supp. 278.) Finally, the source and amount of the City's payments of disposal fees to the Fund were governed by paragraph 8(a) of the Agreement, which required the City to set the disposal "rate" for the landfill by "using an objective third party acceptable to the Parties hereto, who shall conduct a rate study . . . [and] create a reasonable index . . . that can be used to calculate periodic adjustments to the rate." (Supp. 275.)

In accordance with paragraph 8(a), the parties mutually agreed to use John Hull to conduct the rate study and establish the index for future periodic adjustments. The City then set the disposal rate on the basis of Hull's study. The Agreement does not require the City to guarantee Hull's work or to ensure that there will be sufficient amounts in the Fund to pay for all future environmental monitoring costs. On the contrary, it explicitly acknowledges that the Fund may prove to be insufficient and expressly requires the County to pay the difference between the monitoring costs and the amount in the Fund. (Id. paragraph 9(i), Supp. 279-80) ("to the extent that the costs of environmental monitoring subsequent to the close of the [landfill] exceed the amounts set aside pursuant to this subparagraph, the County shall bear those costs . . .").

The County then argues that it did not waive the City's failure to perform its purported obligations with respect to the Fund. The County does not deny that it had full knowledge of every pertinent fact: that the City did not establish the Fund; that the City did not administer the Fund; that the City was making payments from surcharge disposal fees rather than gate fees; and the precise amount that the City was paying each year. It is also undisputed that the County never raised any of these matters during the twelve-year period after the execution of the Agreement. If the County truly believed that the City was in breach of the Agreement during this time, it would not have waited twelve years to mention it. The County's acquiescence in these matters constitutes a waiver as a matter of law. See, e.g., Sweeney v. Grange Mut. Cas. Co. (2001), 146 Ohio App.3d 380, 385.,

The County maintains that it could not waive the City's failure to perform the purported contractual obligations because they were "material" terms of the Agreement.

(Merit Brief of Appellant, at 35.) According to the County, only conditions which are "technical" or "comparatively minor" can be waived. (Id.) The County believes that the City's alleged breaches were material in this case:

The City's duty to establish its landfill disposal rate in an amount sufficient to accumulate money in the Fund to meet the Landfill's future monitoring costs . . . was a material condition to the County's obligation under Paragraph 9(a) to bear the costs of post-closure environmental monitoring to the extent those costs exceeded the amount set aside in the Fund.

(Merit Brief of Appellant, at 35-36.) Once again, if the City had a duty to pay sufficient amounts into the Fund to pay for future environmental monitoring, then the Agreement would not have imposed a duty on the County to pay the excess when the Fund is insufficient.

More importantly, the County concedes that it cannot locate a single Ohio judicial decision adopting the rule it now proposes: that a material condition of a contract cannot be waived as a matter of law. (Id., at 35.) It would be a profoundly bad idea for the Court to adopt that rule. The only case law support that the County cites for its proposition consists of three 1980s opinions from intermediate appellate courts from around the country. (Id.) Whatever the merit of those decisions on the facts they considered under the law of other jurisdictions, a blanket pronouncement by this Court that material breaches of contracts can no longer be waived under any circumstances would be a major transformation of Ohio law. The County offers no good reason why the Court should make that leap in the present case, and its proposition of law should be rejected.

B. The County waived alleged breaches of the Agreement involving the closure of the City's landfill.

The County separately raises the same waiver argument with respect to another alleged breach of the Agreement by the City: the closure of the landfill by the Ohio EPA in June 1998. Although the County obviously knew about the closure when it occurred, it waited years to suggest that this was a breach of the contract by the City and continued to perform its obligations under the contract. Once again, the County's voluntarily relinquishment of a known right was a waiver of the City's alleged breach.

The County argues that its conduct did not amount to an irrevocable election of remedies, did not give rise to an estoppel, and did not constitute a modification of the terms of the contract. (Merit Brief of Appellant, at 37-41.) However, the Proposition of Law advanced by the County addresses only the defense of waiver. (Merit Brief of Appellant, at 32.) According to the County, "[t]he facts relied upon [by the Court of Appeals] to support an alleged . . . waiver of contract terms are explained equally well as evidencing the parties' abandonment or modification of the contract." (Id., at 40.) But even if that were true, it would not excuse the County's failure to address the waiver issues addressed by the Court of Appeals and the County's Proposition of Law.

On the other hand, the County may be suggesting that this Court abolish the waiver doctrine in Ohio law and deny relief in the absence of an estoppel or a modification of the contract. Once again, however, the County has offered no supporting case law authority and no explanation of why such a change is necessary or desirable.

The Court of Appeals had ample evidence to conclude that the County waived any claims it had against the City for breach of contract arising out of the closure of the landfill. In any event, the existence of any such claims is highly questionable, as both

parties expressly anticipated that closure could occur. The County concedes as much in this appeal when it agrees that it was responsible for post-closure monitoring costs that occurred before the twelve-year term of the contract terminated; there could be no such costs unless the landfill closed before the contract expired. Thus, as the trial court correctly observed, the closure of the landfill before the end of the twelve-year term was "a possibility contemplated in the Agreement," and any other interpretation would render meaningless paragraph 5(a) of the Agreement with respect to post-closure monitoring. (See May 6, 2004 Judgment Entry, Appx. 48.) Even if the closure could somehow be deemed a breach of the contract by the City, it was waived by the County's inaction during the following years. The City does not claim that the County's failure to object to the closure was an "implied modification of the Agreement," and thus the County's defenses to that hypothetical claim are irrelevant to this appeal. (Merit Brief of Appellant, at 41.)

Accordingly, this Court should decline to abolish the waiver doctrine, limit it to non-material breaches of a contract, or to substitute election of remedies, estoppel, or contract modification legal principles for the City's waiver claim. The decision of the Court of Appeals should be affirmed.

IV. The statutory certification requirements described in R.C. 5705.41(D) do not apply to contracts between political subdivisions. (Response to Proposition of Law No. IV.).

In its fourth Proposition of Law, the County contends that it cannot be held liable to the City for breach of contract because the Agreement is "void." (Merit Brief of Appellant, at 42.) It argues that its contractual obligations under the Agreement cannot be enforced because the Agreement was neither certified by the County Auditor nor

exempt from certification, pursuant to R.C. 5705.41(D), and because the Agreement does not specify the amount the County will spend for environmental monitoring, pursuant to R.C. 307.16. (Id., at 42, 47.) Both arguments should be rejected by this Court.

A. The parties' Agreement is exempt from the certification requirements of R.C. 5705.41(D).

The County argues first that its Agreement with the City is void, and that its contractual obligations to the City are thus unenforceable, because the County neglected to have the County Auditor certify the Agreement as required by R.C. 5705.41(D)(1):

No subdivision or taxing unit shall:

* * * *

(D)(1) *** make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation . . . has been lawfully appropriated for such purpose and is in the treasury or the process of collection Every such contract made without such a certificate shall be void

The Court of Common Pleas considered and rejected this argument. (Summary Judgment, Mar. 7, 2005, at 468-470; Appx. 37-39.) It noted that two statutory exemptions from the certification requirement are described in R.C. 5705.44, and it found that both exemptions apply to the Agreement between the City and the County. (Id., at 469.) First, R.C. 5705.44 provides that contracts that run "beyond the termination of the fiscal year" are not subject to the same R.C. 5704.41(D)(1) certification requirements; the contract between the City and the County in the present

case continued well beyond 1988, the year the contract was executed. Second, R.C. 5705.44 also provides:

The certificate required by Section 5705.41 of the Revised Code as to money in the treasury shall not be required for contracts on which payments are to be made from the earnings of a publicly operated water works or public utility

See Ohio Water Service Co. v. City of Washington (1936), 131 Ohio St. 459, 465, where the city enacted an ordinance fixing the rate that a water company could charge for water, but then failed to pay for the water and claimed that the ordinance lacked the required certification under G.C. 5625-33(d), the predecessor of R.C. 5705.41(D); the Court disagreed:

The provisions of [the certifying statute] are absolutely irreconcilable with the various statutes regulating and controlling public utilities, and the provisions of the latter particularly and specifically apply, and therefore must prevail.

See also Ohio Edison Company v. Board of Education, Highland Local Schools (9th App. Dist., Oct. 13, 1982), App. No. 1150, 1982 WL 2788 (copy attached) ("R.C. 5705.41 is not applicable to public utility service contracts").

The County argues that the Agreement is not exempt as a continuing contract but does not directly address the public-utility grounds for the lower court's decision. In the absence of any applicable case law authority, the County relies upon two Ohio Attorney General Opinions -- 1987 Ohio Atty. Gen. Ops. No. 87-069 and 1958 Ohio Att. Gen. Ops. No. 1604 -- for an extremely strict definition of "continuing contract" that defies the ordinary meaning of those words and finds no support whatsoever in the exemption statute itself, R.C. 5705.44.

The "continuing contract" exemption statute should be applied according to its express terms to "contracts . . . [that] run beyond the termination of the fiscal year" in which they are made, and the Agreement between the City and the County indisputably meets that requirement. Accordingly, the Agreement is not void for lack of certification.

The Agreement is also exempt from the R.C. 5705.41 certification requirements pursuant to the exemption provided in R.C. 5705.44 for contracts "on which payments are to be made from the earnings of a . . . public utility." Although the Court of Common Pleas expressly relied on that statutory exemption, it is not discussed in the County's Merit Brief in this appeal. Instead, the County pretends that the Agreement was improperly exempted from certification on the ground that it is a contract between political subdivisions and argues that there is no such statutory exemption. (Merit Brief of Appellant, at 45.)

The County misses the point; contracts and ordinances involving water and utility rates are exempt from certification in part because "the [Ohio] Supreme Court has determined that rate ordinances, though contractual in nature, are actually an exercise of legislative power This legislative power gives municipalities the right to fix the price of service and need not meet the general contracting requirements for municipalities." Ohio Power Co. v. Village of Mingo Junction (7th App. Dist., Sept. 24, 2004), App. No. 04-JE-3, 2004 WL 2334354, at *3 (copy attached), citing Ohio Water Service Co., supra, and Mutual Electric Co. v. Village of Pomeroy (1918), 99 Ohio St. 75.

There is also case law support for the proposition that formal statutory requirements imposed on contracts by political subdivisions, as a safeguard on the

public treasury, should not be applied when the contracts are with other political subdivisions because this merely shifts loss from one portion of the public to another portion of the public. See, e.g., Board of County Commissioners of Jefferson County v. Village of Smithfield (7th App. Dist., Nov. 24, 2006), App. No. 05-JE-38, 2006-Ohio-6242, involving the R.C. 735.05 requirement that contracts made by the director of public service that exceed twenty-five thousand dollars must be authorized by city ordinance, and holding that it should not be applied to disputes between two political subdivisions. Board of County Commissioners of Jefferson County v. Board of Township Trustees (1981), 3 Ohio App.3d 336, 338 ("[i]f the township escapes liability, [pursuant to the certification requirements of R.C. 5705.41], then it is the county taxpayers who will suffer. It is they who will pay for the fiscal irresponsibility of the township trustees, who knowingly accepted [water] hydrant service from [the county] and now refuse to compensate it").

In the present case, the certification requirements of R.C. 5705.41(D) do not apply because the Agreement runs beyond the end of a fiscal year, because it required payments from the earnings of a public utility, and because it was made between two political subdivisions (and for several additional reasons set forth in Appellee's briefs in the courts below). The decision of the Court of Appeals should be affirmed.

B. The parties' Agreement is exempt from the specificity requirements of R.C. 307.16.

The County also claims that its contractual obligations under the Agreement are void for failure to comply with R.C. 307.16, which requires that contracts entered into by political subdivisions must specifically provide the amount that will be paid under the contract. The statute has been cited by an Ohio court only once in its history, but it

clearly suffers from some of the same legal infirmities as R.C. 5705.41, discussed above.

Paragraph 8 and 9 of the Agreement describe a method for payment for the environmental monitoring obligation. Contrary to the County's claim, that is all R.C. 307.16 requires. Even the County, in claiming St. Marys breached by not following Paragraphs 8 and 9, implicitly concedes that Paragraphs 8 and 9 set forth a method of payment. Further, it is undisputed that the County budgeted, appropriated (**even for 2001**) and expended funds pursuant to the Agreement without raising with St. Marys that the Agreement did not prescribe a method for determining the amounts for the County's payments of its monitoring obligation. The County points to no case that allows it sixteen years after the fact, and after it has certified to the Ohio EPA that the Agreement is "proper and legal", (Supp. 294), and after it has set and received fees based upon its obligations under the Agreement, to raise now the argument that the Agreement was void under R.C. 307.16.

For all of the reasons set forth above, the Court should reject the County's Proposition of Law No. 4 and affirm the ruling by the Court of Appeals.

CONCLUSION

For the reasons discussed above, the Opinion and Judgment Entry of the Third District Court of Appeals in this action should be affirmed in its entirety.

Respectfully submitted,



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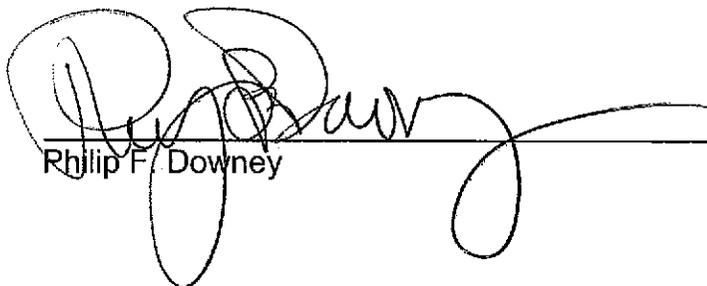
City of St. Marys, Ohio

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief was served this 27th day of December, 2006, by First Class, U.S. Mail, postage prepaid, upon the following:

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Not Reported in N.E.2d, 1982 WL 2788 (Ohio App. 9 Dist.)
 (Cite as: Not Reported in N.E.2d)

OHIO EDISON COMPANY v. BOARD OF
 EDUCATION, HIGHLAND LOCAL
 SCHOOLS. Ohio App., 1982. Only the Westlaw
 citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Medina
 County.

OHIO EDISON COMPANY, Plaintiff-Appellee
 v.

BOARD OF EDUCATION, HIGHLAND LOCAL
 SCHOOLS, Defendant-Appellant

C.A. NO. 1150.

1150

October 13, 1982.

APPEAL FROM JUDGMENT ENTERED IN THE
 COMMON PLEAS COURT COUNTY OF
 MEDINA, OHIO CASE NOS. 81 CIV 0077 37797.

BRUCE D. PARISH, Attorney at Law, 211 S.
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JAMES L. KIMBLER, Asst. Prosecutor, 219 E.
 Washington St., Medina, OH 44256 for Defendant.

DECISION AND JOURNAL ENTRY

MAHONEY, P.J.

*1 This cause was heard September 24, 1982, upon the record in the trial court, including the transcript of proceedings, and the briefs. Oral argument was waived by counsel for the parties and the matter was submitted to the court. We have reviewed each assignment of error and make the following disposition:

Board of Education, Highland Local Schools, defendantappellant, challenges a trial court judgment in favor of Ohio Edison Company, plaintiff-appellee, in the sum of \$15,749.91 for electrical service provided appellant but incorrectly billed by appellee. We affirm.

FACTS

On August 28, 1978, defendant-appellant, Board of Education, Highland Local Schools (Board), requested that the Ohio Edison Company (Edison), plaintiff-appellee, furnish electrical services to one of the school buildings owned by the Board. The Board agreed to use and pay for such service in accordance with the applicable rate schedule and rules and regulations set pursuant to R.C. Title 49.

On August 31, 1978, Edison installed a meter improperly at the school which resulted in underbilling of \$17,749.81 for the electricity used from August 31, 1978 to April 23, 1980, when the error was discovered and corrected. Edison then backbilled the Board for the correct amount. When the Board refused to pay \$15,749.91 of the corrected bill submitted by Edison, Edison brought suit for the backbilled amount. The trial court entered judgment for Edison.

LAW AND DISCUSSION OF ASSIGNMENT OF ERROR

"The Board cannot be held liable on any contract that is not enacted pursuant to O.R.C. Section 5705.41."

The Board admits that it consumed the electricity for which it is being backbilled. However, it contends that R.C. 5705.41 precludes payment. R.C. 5705.41 requires as a condition precedent to contracts executed by a taxing unit that there be a certificate of the fiscal officer that funds to meet the contract have been appropriated for such purposes and are available to meet the contractual obligations. In the instant case, the fiscal officer has not certified that funds were appropriated and are available to pay Edison's backbill. Thus, according to the Board, there is no lawful contract between the Board and Edison for the amount of money Edison now claims is due. We do not agree.

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(Cite as: Not Reported in N.E.2d)

R.C. 5705.41 is not applicable to public utility service contracts. *Ohio Water Service Co. v. Washington* (1936), 131 Ohio St. 459. See also, *Mutual Electric Co. v. Pomeroy* (1918), 99 Ohio St. 75.

SUMMARY

We overrule appellant's assignment of error. The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Medina Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

*2 Costs taxed to appellant.

Exceptions.

BELL, J., QUILLIN, J., CONCUR.

Ohio App., 1982.

Ohio Edison Company v. Board of Education, Highland Local Schools

Not Reported in N.E.2d, 1982 WL 2788 (Ohio App. 9 Dist.)

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Not Reported in N.E.2d, 2004 WL 2334354 (Ohio App. 7 Dist.), 2004 -Ohio- 4994
 (Cite as: Not Reported in N.E.2d)

Ohio Power Co. v. Village of Mingo Junction Ohio
 App. 7 Dist., 2004.

**CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.**

Court of Appeals of Ohio, Seventh District,
 Jefferson County.

OHIO POWER COMPANY d/b/a/ American
 Electric Power, Plaintiff-Appellant,

v.

VILLAGE OF MINGO JUNCTION,
 Defendant-Appellee.

No. 04-JE-3.

Sept. 20, 2004.

Background: Public utility brought action against village after village refused to pay utility for costs of relocation of power poles and wire, having determined that the contract it entered into with utility was invalid. The County Court, Jefferson County, No 03-CVF-00126, granted village's motion to dismiss for failure to state a claim on which relief could be granted. Utility appealed.

Holding: The Court of Appeals, Donofrio, J., held that utility could not recover in quantum meruit.

Affirmed.

Municipal Corporations 268 ↪ 247

268 Municipal Corporations
 268VII Contracts in General
 268k246 Unauthorized or Illegal Contracts
 268k247 k. In General. Most Cited Cases

Municipal Corporations 268 ↪ 249

268 Municipal Corporations
 268VII Contracts in General
 268k249 k. Implied Contracts. Most Cited

Cases

Public utility could not recover in quantum meruit against village that refused to pay utility for relocation of power poles and wire because contract in which village assumed such obligation was invalidly adopted; it was unclear whether utility had statutory duty to move poles and wire, utility had control of pricing for services in moving poles and wire, and utility was knowledgeable corporation and knew statutory requirements for contracting with village.

Civil Appeal from Jefferson County Court, No. 2, Case No. 03-CVF-00126, Affirmed.

Attorney Marilyn McConnell-Goelz, Worthington, Ohio, for Plaintiff-Appellant.

Attorney John J. Mascio, Steubenville, Ohio, for Defendant-Appellee.

Hon. GENE DONOFRIO, Hon. CHERYL L. WAITE and Hon. MARY DEGENARO.

OPINION

DONOFRIO, J.

*1 {¶ 1} Plaintiff-Appellant, Ohio Power Company, d/b/a American Electric Power, appeals a decision of the Jefferson County Court, No. 2, granting defendant-appellee's, Village of Mingo Junction, motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

{¶ 2} Appellant, as part of its business and at appellee's request, relocated power poles and a wire to allow for a retaining wall and improvements on St. Clair Avenue in Mingo Junction, Ohio. Appellee completed an "Ohio Power Company Application and Agreement for Electric Service" signed by the Village Administrator of Mingo Junction, Frank Bovina, who agreed to pay \$9,097.00 for the service. Appellee subsequently refused to pay appellant's bill dated February 12, 2002 pursuant to the account or contract.

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{¶ 3} Appellant filed a complaint against appellee on June 30, 2003 alleging three counts: breach of contract, payment due on the account, and unjust enrichment. Appellee filed a motion to dismiss on October 8, 2003 on the basis of failure to state a claim upon which relief could be granted. Appellant filed a memorandum contra to the motion on October 17, 2003. Appellee cited two R.C. sections which specify the mandatory procedures which act as a condition precedent to contract formation with a village. R.C. 731.141 requires all contracts "shall be executed in the name of the village and signed on its behalf by the village administrator and the clerk." R.C. 5705.41 places restrictions on the appropriation and expenditure of money and requires a certification by the subdivision's fiscal officer. Appellant and appellee's agreement complied with neither R.C. 731.141 nor 5705.41 and on November 14, 2003, the trial court determined the contract was null and void and granted the motion to dismiss on the first two counts. The trial court also dismissed the third count for unjust enrichment. The trial court reasoned that a party cannot recover for unjust enrichment against a political subdivision when the underlying contract is defective and void.

{¶ 4} Appellant's sole assignment of error states:

{¶ 5} "The Trial Court erred when it granted a Motion to Dismiss for Failure to State a Claim made by the Defendant Village of Mingo Junction."

{¶ 6} "A trial court may grant a motion to dismiss for failure to state a claim only when it appears 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.' *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 524, 668 N.E.2d 889, citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753. When reviewing a trial court's judgment granting a Civ.R. 12(B)(6) motion to dismiss, an appellate court must independently review the complaint. *Malone v. Malone* (May 5, 1999), 7th Dist. No. 98-CO-47. The appellate court is not required to defer to the trial court's decision to grant dismissal but instead considers the motion to dismiss de novo. *Harman v. Chance* (Nov. 14,

2000), 7th Dist. No. 99-CA-119. We are to presume the truth of all factual allegations in the complaint and must make all reasonable inferences in favor of the nonmoving party. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144, 573 N.E.2d 1063." *Hergenroder v. Ohio Bur. of Motor Vehicles*, 152 Ohio App.3d 704, 2003-Ohio-2561, 789 N.E.2d 1147, at ¶ 8.

*2 {¶ 7} Appellant contends that the court erred in ruling that when a municipality enters into a defective contract with a public utility the municipality cannot be held liable in quasi-contract. Appellant argues that contracts between a public utility and a municipality fall outside the traditional rule that all governmental liability must be express and must be entered into in the prescribed statutory manner, and that a municipality or county is liable neither on an implied contract nor upon a quantum meruit theory by reason of benefits received.

{¶ 8} Where one of the parties is a municipal corporation, contract formation or execution may only be done in a manner provided for and authorized by law. *Village of Moscow v. Moscow Village Council* (1984), 29 Ohio Misc.2d 15, 18, 29 OBR 284, 504 N.E.2d 1227. Furthermore, contracts, agreements, and/or obligations of a municipality must be made and entered into in the manner provided for by statute or ordinance and cannot be entered into otherwise. *Wellston v. Morgan* (1901), 65 Ohio St. 219, 62 N.E. 127. The principle that the burden of complying with statutory requirements falls on those who deal with municipalities is long standing and often reaffirmed. *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 54 N.E. 372.

{¶ 9} In *Lathrop v. City of Toledo* (1966), 5 Ohio St.2d 165, 173, 34 O.O.2d 278, 214 N.E.2d 408, the Ohio Supreme Court set forth the following explanation for this rule of law:

{¶ 10} "We think there is no hardship in requiring [private contractors], and all other parties who undertake to deal with a municipal body in respect of public improvements, to investigate the subject and ascertain at their peril whether the preliminary steps leading up to contract and prescribed by

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statute have been taken. No high degree of vigilance is required of persons thus situated to learn the facts. They are dealing with public agencies whose powers are defined by law, and whose acts are public transactions, and they should be charged with knowledge of both. If the preliminary steps necessary to legalize a contract, have not been taken, they can withdraw from the transaction altogether, or delay until the steps are taken. The citizen and taxpayer, in most instances, unless directly affected by the improvement, has but a remote, contingent and inappreciable pecuniary interest in the matter and should not be required to personally interest himself about its details. * * *

{¶ 11} “ * * *

{¶ 12} “An occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit. * * * ” quoting *McCloud & Geigle v. City of Columbus* (1896), 54 Ohio St. 439, 452 and 453, 44 N.E. 95.

*3 {¶ 13} Within this general rule lie two narrow exceptions. The Ohio Supreme Court created the first exception in *Mutual Electric Co. v. Village of Pomeroy* (1918), 99 Ohio St. 75, 124 N.E. 58 and reaffirmed the rule in *Ohio Water Serv. Co. v. City of Washington* (1936), 131 Ohio St. 459, 3 N.E.2d 422. Both cases dealt with a political subdivision exercising their legislative power to establish utility rates over a term of years. In both cases, the municipality, after enacting the ordinance, refused to pay for services rendered because the agreement violated statutory contracting procedure, voiding the contract. Despite this, the Supreme Court upheld the agreements in both cases. The Supreme Court determined that rate ordinances, though contractual in nature, are actually an exercise of legislative power. *Ohio Water Serv. Co.*, 131 Ohio St. at 463, 3 N.E.2d 422. This legislative power gives municipalities the right to fix the price of service and need not meet the general contracting requirements for municipalities. Id. Furthermore, in each case, the ordinance did not involve the

expenditure of any fixed amount or stipulate the level of services the village would pay for, but only fixed the rate and stipulated for monthly payments based on that rate. Id.

{¶ 14} *Ohio Water Serv. Co.* further states that the exception for rate ordinances may be constitutionally required for public utilities, which cannot terminate its services at will. Id. at 464, 3 N.E.2d 422. The Court observed that “[u]nder present statutory requirements regulating and controlling public utilities, their duties and obligations are made mandatory. They are not conditioned upon * * * the existence of * * * a contract.” Id. at 465, 3 N.E.2d 422. This exception is created to prevent the situation where “utility became bound but the municipality had no obligation whatever further than to pay at the rate fixed by its own ordinance if and to the extent that it did actually use such service.” Id. Furthermore, the Court made these statements within the context of a failure to pay under a rate ordinance or failed negotiations for rates, so the exception's scope seems limited to rate ordinance cases.

{¶ 15} However, it is important to note that this line of cases does not allow the public utility to recover in quantum meruit. Instead, the statutory requirements that act as a condition precedent to contract formation are waived and the court enforces the contract. Neither case, express or impliedly, mentions quasi-contract as the basis for recovery by the public utility.

{¶ 16} The second exception was created by this court in *Bd. of Cty. Commrs. v. Bd. of Twp. Trustees* (1981), 3 Ohio App.3d 336, 3 OBR 391, 445 N.E.2d 664. In that case, this Court first decided that the rule established in *Ohio Water Service Co.* applies to a political subdivision acting in the same capacity as a public utility by providing fire hydrants to the township. Id. at 338, 445 N.E.2d 664. Like a public utility, the political subdivision could not terminate its services at the end of the contract term without first making an application to the public utility commission under R.C. 4905.21. Id.

*4 {¶ 17} Next, this Court held that township

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trustees could be held liable on the theory of quasi-contract when the underlying contract is defective and the other party is a political subdivision. Id. at 339, 445 N.E.2d 664. This court made clear that it permitted quasi-contractual relief because of the "uniqueness of the instant case" where two political subdivisions are involved. Id. at 338, 445 N.E.2d 664. The rule exempting municipalities from liability by quasi-contract is based on a policy that protects taxpayers from the fiscal irresponsibility of government officials. Id. When both parties are political subdivisions, this policy is ineffectual because a set of taxpayers will bear the cost of the irresponsibility. As the Eleventh District Court of Appeals stated in *Rua v. Shillman* (1985), 28 Ohio App.3d 63, 65, 28 OBR 104, 502 N.E.2d 220, "recovery was permitted in *Bd. of Cty. Commrs. v. Bd. of Twp. Trustees, supra*, under a quasi-contractual theory, so that county taxpayers would not be forced to pay for a service which benefited township taxpayers, merely because the certification requirements had not been met."

{¶ 18} In this case, appellant seeks to merge these two exceptions into a new principle that allows recovery under quantum meruit by a public utility. Appellant argues that because a public utility has a statutory duty to move power lines when requested, the rule under rate ordinance cases is applicable to all cases that involve statutory duties. Appellant also argues that the cost of moving the power lines, when left unpaid by the appellee, shifts to the ultimate consumer, which it classifies as the "public at large" and tries to analogize to a public taxpayer in the *Bd. Of Cty. Commrs.* case cited above. To protect the "public at large" from paying for public improvements in the Village of Mingo Junction, appellant argues the court should allow quasi-contractual recovery.

{¶ 19} This argument has several flaws. First, there are the obvious inconsistencies with prior precedent established in the *Ohio Water Serv. Co. and Bd. Of Cty. Commrs.* cases. Appellant is not attempting to recover against a municipality failing to adhere to its own rate ordinance. Appellant is also not a political subdivision assuming the burden of public improvements in another municipality. Appellant's case does not fit into the pre-existing

categories on which the narrow exceptions were created. On this basis alone, appellant has not properly stated a claim upon which relief can be granted.

{¶ 20} Looking beyond the rule created by the prior precedents, appellant's attempt to expand the exceptions by analogy is also flawed. First, it is unclear whether appellant has a statutory duty to move power lines. Appellant cites R.C. 4933.03, 4933.13, and 4933.16 as the basis of a statutory duty to move power lines when requested by a municipality. However, read together, these sections merely state that appellant places all power lines within a municipality at the consent of that municipality. If appellant refuses to move the power lines, it runs the risk that appellee will revoke consent or institute eminent domain proceedings to move the lines. These business risks are not the same as a statutory duty to continue providing an essential utility service to the public in spite of contractual failures, which was the basis for the *Ohio Water Serv. Co. and Bd. Of Cty. Commrs.* decisions.

*5 {¶ 21} Second, appellant had control of pricing for the services provided in this case. According to *Ohio Water Serv. Co.*, rate ordinances are an exception because "the ordinance did not involve the expenditure of any fixed amount; it contained no stipulation as to the extent of service the village would be required to take or pay for; but, on the contrary, only fixed a rate for electric current and provided for monthly payments at that rate for current actually consumed." *Ohio Water Serv. Co.*, 131 Ohio St. at 463, 6 O.O. 145, 3 N.E.2d 422. When the utility has the power to fix the price for providing the service, as appellant did here, the exception should not apply. See *Mutual Electric Co.*, 99 Ohio St. at 86, 124 N.E. 58.

{¶ 22} Finally, although appellant will suffer a business loss if it cannot recover against appellee, this situation is common to all businesses that contract with municipalities. Appellant could easily avoid the loss to its customers by complying with all statutory requirements when contracting with appellee. Appellant is a knowledgeable public corporation and the requirements for contracting

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with municipalities have been established for over 100 years. Because appellant can mitigate this risk with careful contracting, there is no need to expand the narrow exceptions to allow quantum meruit recovery by a public utility against a municipality.

{¶ 23} Accordingly, appellant's sole assignment of error is without merit.

{¶ 24} The judgment of the trial court is hereby affirmed.

WAITE, P.J., concurs.

DEGENARO, J., concurs.

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