

IN THE SUPREME COURT OF OHIO

08-0464

Stonehenge Land Company :
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 :
 Plaintiff-Appellee, :
 :
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 v. :
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 Beazer Homes Investment, LLC :
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 :
 :
 Defendant-Appellant. :

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

Court of Appeals
CASE NO. 07 APE 050449
(consolidated with 07 APE 070559)

MEMORANDUM IN SUPPORT OF JURISDICTION
OF PLAINTIFF-APPELLEE STONEHENGE LAND COMPANY

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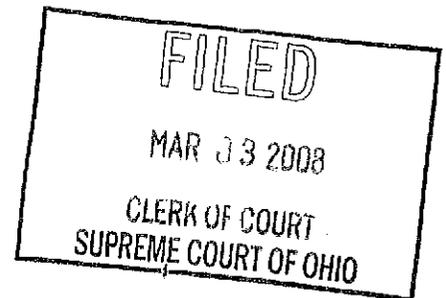


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EXPLANATION OF WHY THIS CASE INVOLVES PUBLIC OR GREAT GENERAL INTEREST AND SUBSTANTIAL CONSTITUTIONAL QUESTIONS

This case presents critical issues related to contractual construction, the inviolate right to a trial by jury, and substantive and procedural due process. This case involves matters of public and great general interest related to construction of contracts because the opinion eviscerates no fewer than four fundamental tenets of contractual construction. This case involves substantial constitutional questions because the Court of Appeals substitutes its judgment for the plain language of the jury's findings and effectively manufactures (and simultaneously sustains) objections that no party either asserted or had any opportunity to argue at trial.

STATEMENT OF THE CASE AND FACTS

Stonehenge and Defendant-Appellant Beazer Homes Investment, LLC ("Beazer") entered into a series of three agreements whereby Beazer was to purchase a specified number of lots, on a section-by-section basis, in each phase of the residential subdivision known as Elmont Place. See Decision and Entry filed February 21, 2007 ("Summary Judgment Decision"), attached as Appx. A.

The parties' initial agreement (the "2000 Agreement") provided for Stonehenge to develop and improve the real estate at issue into a residential subdivision consisting of approximately 230 lots and that Beazer would purchase all of the lots. Appx. A, at 2. The second agreement (the "2002 Amendment") came about after Beazer experienced difficulties selling lots. (TR at 84). As a concession to Beazer, Stonehenge agreed to modify Beazer's obligations. (TR at 84-86; pursuant to the "2002 Amendment"). The 2002 Amendment allowed Stonehenge to sell certain lots to another builder, thereby reducing the number of lots that Beazer was required to purchase. (Appx. A, at 3). The third agreement (the "2004 Agreement") came about after Beazer gave conflicting indications regarding whether or not Beazer intended to

honor its obligations. Once again, Stonehenge offered concessions to Beazer that led to the 2004 Purchase Agreement.

The 2004 Agreement related to two distinct sections, "Section 1" (which included 17 lots) and "Section 2" (29 lots). Mandatory earnest money deposits for each section were addressed separately in the 2004 Agreement. The first of five paragraphs under the "Earnest Money" heading mandated that, upon execution of the agreement, Beazer was to deposit \$17,000 for Section 1 (17 lots at \$1,000 per lot equals \$17,000). The second paragraph of the Earnest Money heading states that, "Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations." The fifth and final paragraph under the Earnest Money heading provided that, "when future sections [Section 2] are developed, [Beazer] shall deposit earnest money in the amount of One Thousand Dollars (\$1,000) per lot." (2004 Agreement, at § 2, ¶ 5. The 2004 Agreement is silent regarding any remedy (and, more importantly, the *limitation* of any remedy) available to Stonehenge if Beazer were to *fail to make the deposit* for Section 2.

Beazer breached the 2004 Agreement by failing to deposit earnest money for Section 2. See Opinion, attached as Appx. B, at ¶ 8 ("It is undisputed that Beazer did not deposit any earnest money for section 2"). The trial court concluded that the clear terms of the 2004 Agreement obligated Beazer to deposit earnest money and purchase lots in Sections 1 and 2 of Phase III. (Appx. A, at 9). Therefore, Stonehenge established as a matter of law, that Beazer breached the 2004 Agreement by not depositing earnest money for Section 2 and by not purchasing the lots therein. (Appx. A, at 9).

The matter proceeded to a trial on the merits upon the remaining issues. The jury determined that the 2000 Agreement, as amended in 2002, was "nullified" by the 2004

Agreement, so the jury awarded no damages to any party under the 2000 Agreement. See Jury Interrogatory No. 5. The jury awarded Stonehenge a net total of \$313,562 for Beazer's breach of the 2004 Purchase Agreement, and awarded Stonehenge \$100,000 for attorney's fees for Beazer's Breach of the 2004 Agreement. Trial Court Judgment Entry, attached as Appx. D, at 6.

The trial court granted Beazer's motion for judgment notwithstanding the verdict and reduced Stonehenge's attorney's fees award to zero dollars. Both parties appealed. The Court of Appeals vacated the jury award of Stonehenge's damages, affirmed the reduction of Stonehenge's attorney's fees to zero, and permitted Beazer to seek recovery of its attorneys fees under the 2000 Agreement.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. This case involves matters of public and great general interest related to construction of contracts because the opinion eviscerates no fewer than four fundamental tenets of contractual construction.

The Court of Appeals' Opinion eviscerates four fundamental tenets of contractual construction by interpreting the 2004 Agreement to mean that Beazer could simultaneously breach (by failing to make the deposit upon Section 2) and, in the act of breaching, limit its damages to zero dollars. The cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties. *Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920, 923. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, at paragraph one of the syllabus. A writing, or writings executed as part of the same transaction, will be read as a whole, and the intent of each part will be gathered from a consideration of the whole. *Legler v. United States Fid. & Guar. Co.* (1913), 88 Ohio St. 336, 103 N.E. 897. In the construction of a contract courts should give

effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain. *Farmers' Nat's Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, 94 N.E. 834, at paragraph six of the syllabus. It is not the responsibility or function of the courts to rewrite the parties' contract in order to provide for a more equitable result. *Ohio Crane Co. v. Hicks* (1924), 110 Ohio St. 168, 172, 143 N.E. 388; see also *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202, 678 N.E.2d 519.

Proposition of Law No. I: Courts should give effect to the intent of the parties, which is presumed to reside in the language the parties chose to employ in the agreement.

The Court of Appeals ignored the language that the parties chose to employ in the 2004 Agreement. The 2004 Agreement provided for the following two possible scenarios regarding damages: (i) if Beazer deposited the earnest money for a given section, then Beazer benefited by limiting its damages to any unused portion of the deposit, but Beazer became burdened to specifically perform by buying the first ten lots of each section; (ii) if Beazer *failed* to deposit the earnest money, then Beazer *did not* benefit from the limitation of damages, but Beazer also did not become burdened by specific performance. The Court of Appeals ignores the language that the parties employed in the 2004 Agreement by allowing Beazer to benefit by limiting its damages *and* simultaneously avoid the burden of specific performance.

The Earnest Money portion (Part 2) of the 2004 Agreement states as follows:

- 2. Earnest Money Deposit.** Upon execution of this Agreement, Builder shall deposit Seventeen Thousand Dollars \$(17,000) (the Earnest Money) with Developer, to be held by Developer in trust upon and subject to the terms and conditions set forth herein.

Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified. In such event, damages will be

impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute liquidated damages and not a penalty, and shall be Developer's sole remedy at law or in equity for a breach of any covenants or agreement of this Agreement to be performed or observed by Builder.

Notwithstanding the foregoing, and any other provision of this Agreement to the contrary also notwithstanding, as to the first ten (10) Lots in each Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law and in equity, including the right to pursue specific performance.

The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and a transaction is closed, then the Earnest Money shall be applied as a One Thousand Dollars \$(1,000) credit toward the purchase price as to each specific Lot as to which the transaction is closed.

When future Sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand Dollars (\$1,000) per Lot when Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The said Earnest Money shall be applied as a credit in the same amount toward the purchase price of each such Lot.

Conspicuously absent from the 2004 Agreement is any provision that limits the remedies available to Stonehenge if Beazer were to *fail to make the security deposit* for any given section.

In the absence of any provision limiting the remedies available to Stonehenge if Beazer were to fail to deposit the earnest money for Section 2, the Court of Appeals should have simply affirmed the holding of the trial court. The trial court noted that the 2004 Agreement "provides that [Stonehenge's] remedy is limited to forfeiture of the Earnest Money deposit and specific performance against the first ten lots *of any section for which the deposit has been made.*" See Appx. A (emphasis added). Because the deposit for Section 2 *was not made*, the trial court denied Stonehenge's request for specific performance and properly left the question of the measure of damages to the jury, which properly determined that the 2004 Agreement does not limit Stonehenge's damages to liquidated damages if the deposit is not made. Because Beazer did not make the deposit upon Section 2, Beazer should have gotten neither the burden of

specific performance nor the benefit of the liquidated damages clause. The Court of Appeals ignored the contract language by giving Beazer the benefit of the liquidated damages clause *and* absolving Beazer of the duty of specific performance.

Proposition of Law No. II: A writing will be read as a whole, and the intent of each part is to be gathered from a consideration of the whole, construing any ambiguous provisions so as to avoid an absurd result.

The Court of Appeals failed to read the agreement as a whole and failed to consider the entire agreement in interpreting one part. In particular, the Court of Appeals fixated upon the first sentence of the second paragraph of Part 2 of the 2004 Agreement and thereby failed to consider the broader context. Although the Court of Appeals correctly noted at Opinion ¶31 that the second paragraph of Part 2 of the 2004 Agreement provides that, “Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations,” the Court of Appeals failed to evaluate the surrounding context. Instead, the Court of Appeals simply concluded at Opinion ¶31 that, because “‘earnest money’ plainly refers to a ‘deposit paid’ and does not refer to a deposit not yet paid, the liquidated damages clause only encompasses those monies that Beazer had *already* [sic] deposited with Stonehenge prior to Beazer’s breach.”

The Court of Appeals failed to consider the significance of the other paragraphs of Part 2 of the 2004 Agreement and, therefore, reached an absurd conclusion. Presuming that earnest money only means deposits paid, and presuming that Beazer failed to deposit the earnest money for Section 2, then the Court of Appeals effectively interprets the clause “Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations” to mean that “Builder shall forfeit the earnest money for Section 2 if Builder fails to deposit the earnest money for Section 2.” Such a nonsensical interpretation could not have been made if the entire agreement were considered.

By fixating upon one sentence from the second paragraph of Part 2 of the 2004 Agreement, the Court of Appeals gives Beazer the benefit of the liquidated damages clause *and* absolves Beazer of the burden of specific performance. If the Court of Appeals had considered the entirety of the 2004 Agreement, it would have affirmed the trial court determination that Beazer's failure to make the deposit meant that, although Stonehenge was not entitled to specific performance, Stonehenge's damages were not limited.

Proposition of Law No. III: If one construction of a doubtful condition in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.

The Court of Appeals construed the 2004 Agreement so as to render a condition meaningless and rejected an alternate construction that would have given the condition meaning and purpose. In particular, the Court of Appeals renders the condition regarding specific performance meaningless by limiting Stonehenge to liquidated damages and concurrently absolving Beazer of its obligation to specifically perform. Ohio law permits liquidated damages provisions in certain contexts because parties are presumed to best know "what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure." *Jones v. Stevens* (1925), 112 Ohio St. 43, 51–52, 146 N.E. 894. Furthermore, Ohio law recognizes specific performance as a remedy designed "to place the parties in the relative position that they would have been in had the sale of the real estate proceeded according to the agreement." *Sandusky Props. v. Aveni* (1984), 15 Ohio St.3d 273, 276, 473 N.E.2d 798. If Beazer had made the deposit, then Stonehenge would have been limited to liquidated damages *and* Beazer would have been obligated to specifically perform. By limiting Stonehenge's damages to zero, and concurrently absolving Beazer of its obligation to specifically perform, and simultaneously depriving Stonehenge of the jury award of actual damages, the Court of Appeals

renders both the liquidated damages and the specific performance conditions meaningless. The Court of Appeals should have affirmed the alternate construction of the trial court, which concluded that Beazer's failure to make the deposit meant that Beazer was neither obligated to specific performance nor entitled to the benefit of the liquidated damages clause.

Proposition of Law No. IV: Because courts must give effect to the language employed by the parties, courts should not rewrite or read language into an agreement.

The Court of Appeals rewrote the parties' agreement. In particular, the Court of Appeals rewrote the parties' agreement by concluding at Opinion ¶31 that, "the measure of Beazer's damages was readily ascertainable by reference to the language of the contract." What specific contract provision was the Court of Appeals referring to? The 2004 Agreement contains no provision regarding the measure of damages if Beazer were to fail to make the deposit for Section 2. The Court of Appeals rewrote the 2004 Agreement by giving Beazer the benefit of limiting its damages to liquidated damages without the burden of specific performance.

- II. **This case involves substantial constitutional questions because the Court of Appeals substitutes its judgment for the plain language of the jury's findings and effectively manufactures (and simultaneously sustains) objections that no party either asserted or had any opportunity to argue at trial.**

Proposition of Law No. V: A party is deprived of its right to trial by jury when a court substitutes its judgment for the judgment of the jury.

A. Introduction and statement of law.

The Court of Appeals deprived Stonehenge of its fundamental right to trial by jury by substituting its judgment for that of the jury as expressed by the jury's general verdict and answers to special interrogatories. Beazer never objected to any relevant jury instructions, jury interrogatories, or to the consistency between the answers to interrogatories and general verdict, thus waiving any objection. Nevertheless, the Court of Appeals sua sponte concluded that the jury instructions and/or the jury interrogatories were erroneous, and/or that the jury

interrogatories were inconsistent with the general verdict. The Court of Appeals then substituted its judgment for that of the jury by inserting language into the jury findings that was not contained in the plain language of the jury interrogatories and verdict.

The Ohio Constitution provides that “The right of trial by jury shall be inviolate,” Section 5, Article I, Ohio Constitution, and Civil Rule 38(A) similarly provides, “The right to trial by jury shall be preserved inviolate.” The right of trial by jury has uniformly been recognized and enforced in this state in actions for money, where the claim is an ordinary debt. *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 396–97, 169 N.E. 301. “It has long been held that the right of trial by jury is a substantive, fundamental constitutional right.” *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 437, 2002-Ohio-1246, 763 N.E.2d 1169.

Civil Rule 51(A) provides that “on appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict.” The “failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401, 679 N.E.2d 1099. Even when a party timely objects, a jury instruction is only erroneous if “the jury charge probably misled the jury in a matter materially affecting the complaining party’s substantial rights.” See *Perez v. Falls Fin., Inc.*, 87 Ohio St.3d 371, 376–77, 2000-Ohio-453, 721 N.E.2d 47. “Failure to object at trial waives all but plain error.” *McBride v. Quebe*, 2d Dist. No. 21310, 2006-Ohio-5128, at ¶ 48 (internal citations omitted). In appeals of civil cases, the plain error doctrine “is not favored and may be applied only in the extremely rare case involving exceptional circumstances.” *Perez*, 87 Ohio St.3d at 375, 2000-Ohio-453, 721 N.E.2d 47; see also *Goldfuss v. Davidson*, 79 Ohio St.3d at 122, 1997-Ohio-401, 679 N.E.2d 1099 (“[T]he doctrine is sharply limited to the *extremely rare* case involving *exceptional*

circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself.”) (emphasis in original).

B. The Court of Appeals unilaterally rewrote the decision of the jury with respect to the nullification of the 2000 Agreement by the 2004 Agreement.

The Court of Appeals unilaterally rewrote the decision of the jury with respect to the nullification of the 2000 Agreement by the 2004 Agreement. Jury Instruction No. 10 stated that Beazer “claims that the 2004 Purchase Agreement superseded *all terms* of the 2000 Purchase Agreement, as amended in 2002.” (Emphasis added). Jury Interrogatory No. 5 related to Jury Instruction No. 10 and asked, in its entirety, “Was the 2000 Purchase Agreement, as amended in 2002, nullified by the 2004 Purchase Agreement?” Responding to Jury Interrogatory No. 5, the jury simply and unequivocally answered “YES.” Notwithstanding the clear and unequivocal jury response to Interrogatory No. 5, the Court of Appeals stated that, “The jury determined that the 2004 contract ‘nullified,’ or superseded, the 2000 contract, with respect to Phase III lots, and that Beazer did not breach the 2000 contract when it failed to purchase Phase IV lots.” See Appx. B, at 9. The Court of Appeals further concluded that the jury “granted judgment in favor of Beazer with respect to Stonehenge’s claims for breach of the un-superseded portion of the 2000 contract; that is, the claims based on Beazer’s failure to purchase Phase IV lots.” *Id.* The Court of Appeals unilaterally rewrote the jury’s answer because nowhere in any interrogatory response does the jury declare that *any portion* of the 2000 Agreement was “un-superseded.”

Nothing in the record substantiates the Court of Appeals’ modification of the jury’s answer to Interrogatory No. 5 to mean that the 2000 Agreement was modified “with respect to Phase III lots only.” Beazer did not object to the wording of Jury Interrogatory No. 5, which does not limit its subject matter to “Phase III lots only.” In addition, the trial court did not return to the jury the question of whether or not Interrogatory No. 5 was limited to “Phase III lots only.”

If Beazer, or the trial court, had deemed there to be any inconsistencies between the jury instructions, the jury interrogatories, and the general verdict, then the matter should have been raised at trial and assigned as an error on appeal. But no such objections were made at trial, and no such assignments of error were made on appeal, because no inconsistencies exist. Interrogatory No. 6 asks, "Did Beazer breach the 2000 Purchase Agreement (as amended in 2002) by not purchasing the lots in Phase 4 of Elmont Place?" The jury simply answered "NO." This response is consistent with the jury's determination that the 2000 Agreement was a nullity because, obviously, one cannot breach an agreement that is a "nullity."

Once the jury found that the 2000 Agreement was nullified by the 2004 Agreement, the 2000 Agreement could no longer be the basis for any relief (including, but not limited to, an award of attorney's fees) for any party. Nevertheless, the Court of Appeals held that "under the 2000 contract, Beazer had a right to its reasonable attorney fees expended in defense of that claim." *Id.* at 20. The Court of Appeals invaded the province the jury by declaring that Beazer was entitled to an award of attorney's fees under an agreement that the jury declared to have been nullified by a later agreement (which later agreement *Beazer breached*). *Id.*

C. The Court of Appeals substituted its judgment for the jury's sound and consistent judgment on the application of the liquidated damages clause.

The Court of Appeals substituted its judgment for the jury's sound and consistent judgment on the application of the liquidated damages clause. Jury Interrogatory No. 1 asks, "Based upon your review of the evidence, does the liquidated damages provision in the 2004 Purchase Agreement limit the amount of damages awardable to Stonehenge? Where, as here, Beazer did not make the Earnest Money deposit for Phase 3, Section 2?" The jury answered "NO." Beazer neither objected to this interrogatory, nor had reason to object. During trial, Beazer's attorney asked the trial court to "direct [the jury] in your jury instructions ... that the

liquidated damages clause is enforceable allowing for the fact that you're going to give them the description to determine whether or not they award that as the damages or something else that they may determine?" (TR at 54). Consistent with this request, and without objection, the trial court instructed the jury that the "parties disagree as to the meaning of the liquidated damages clause in the contract. Stonehenge claims that the liquidated damages clause does not apply *** Beazer claims that the liquidated damages clause limits Stonehenge's right to recover." (TR at 629-30). Beazer's failure to object at trial waives all but plain error.

Had the wording of the interrogatories led to inconsistency between the jury's answers and general verdict, Beazer or the trial court could have remedied such inconsistency pursuant to Civ.R. 49. But not all of the remedies provided under Civ.R. 49 remain available after the jury is excused. Any objections to interrogatories "must be raised while the jury is still impaneled and the court has the full range of choices before it." *Basil v. Wagoner* (Sept. 12, 1995), 10th Dist. Nos. 94APE12-1716, 94APE12-1792. Beazer's failure to object to any jury interrogatories or instructions in a timely manner meant that, if the Court of Appeals believed that the answers to the interrogatories and the general verdict were so inconsistent that it was plain error for the trial court not to have remedied the inconsistency pursuant to Civ.R. 49 of its own accord, the Court of Appeals would have had the authority to remand with instructions to order a new trial.

Even if there was plain error (Stonehenge maintains there was not), the Court of Appeals still invaded the province of the jury by disregarding the judgment of the jury instead of ordering a new trial. "It is the duty of a court to harmonize, if possible, a special finding of a jury with its general verdict." *Klever v. Reid Bros. Express, Inc.* (1949), 151 Ohio St. 467, 86 N.E.2d 608, at paragraph one of the syllabus. The trial court should only "enter judgment in accordance with answers to interrogatories inconsistent with the general verdict," when "it is absolutely clear that

the answers to the interrogatories require a certain result.” *Thornton v. Parker* (1995), 100 Ohio App.3d 743, 756, 654 N.E.2d 1282 (internal citations omitted). The record is devoid of support for the conclusion that it is “absolutely clear” that the jury’s answers to the interrogatories require any result other than what the jury actually determined. The Court of Appeals impermissibly substituted its judgment for that of the jury by unilaterally rewriting the jury’s answers to the interrogatories.

Even if the Court of Appeals was correct in concluding that the 2004 Agreement was unambiguous, it was still improper for the Court of Appeals to override the jury’s determination regarding whether or not the liquidated damages clause applied. Questions of fact can exist as to how the liquidated damages formula applies to the facts of the particular case. See *Midwest Payment Systems, Inc. v. Citibank Federal Sav. Bank* (1992), 801 F. Supp. 9, 15 (S.D. Ohio) (internal citations omitted) (cited in the Court of Appeals’ Opinion for an unrelated proposition. Appx. B, at 14). The Court of Appeals held that the trial court erred as a matter of law when it determined that the liquidated damages provision of the 2004 Agreement was ambiguous. If the Court of Appeals was correct, and the liquidated damages clause was unambiguous, the jury was still entitled to determine whether or not the liquidated damages clause applied to the type of breach Beazer committed. The jury’s decision never implicated whether the liquidated damages clause was ambiguous because the jury simply decided that the liquidated damages clause *did not apply*. The jury found that Stonehenge’s damages were not limited because Beazer never made the deposit that would have triggered the liquidated damages provision and the jury instead awarded Stonehenge actual damages consistent with the jury instructions submitted by the parties. The Court of Appeals violated Stonehenge’s right to a trial by jury by substituting its judgment in place of the jury’s.

Proposition of Law No. VI: A party is denied its right to due process when the court of appeals raises issues on appeal sua sponte that were waived by the other party's failure to object at trial.

The Court of Appeals also violated Stonehenge's right to due process by modifying the jury interrogatories and general verdict. The parties prepared the jury instructions and interrogatories and no objections relevant to this appeal were raised before the jury's deliberations. The Court of Appeals deprived Stonehenge of its right to due process by unilaterally determining that there was a defect in the jury instructions and/or interrogatories and/or that the general verdict and answers to interrogatories were inconsistent, rather than making every effort to harmonize them.

Pursuant to the Fourteenth Amendment to the United States Constitution, no state may "deprive any person of life, liberty, or property, without due process of law." "Section 16, Article I of the Ohio Constitution provides, inter alia, that every person who sustains a legal injury 'shall have remedy by due course of law.' The 'due course of law' provision is the equivalent of the 'due process of law' provision in the Fourteenth Amendment to the United States Constitution." *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422, 1994-Ohio-38, 633 N.E.2d 504. "According to principles of due process, *** governmental action which limits the exercise of fundamental constitutional rights is subject to the highest level of judicial scrutiny." *Id.* at 424. "It is well established that the right of trial by jury in this state is a fundamental and substantial right guaranteed by the Ohio Constitution." *Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 425, 1994-Ohio-64, 644 N.E.2d 298.

The Court of Appeals violated Stonehenge's substantive due process right to trial by jury and robbed Stonehenge of its procedural due process right to an opportunity to be heard. "Due process requires both notice and an opportunity to be heard." *In re Thompkins*, 115 Ohio St.3d

409, 2007-Ohio-5238, 875 N.E.2d 582, at ¶ 13. Because Beazer never objected to any relevant jury instruction or interrogatory, Stonehenge never had occasion to argue the merits of an alleged inconsistencies between the instructions and interrogatories. Similarly, Beazer never objected to the trial court entry of judgment as being inconsistent between the general verdict and answers to interrogatories, so (once again) Stonehenge never had an opportunity to argue the merits of that issue. Furthermore, Beazer never presented on appeal any assignment of error related to inconsistencies between the instructions and/or interrogatories and/or general verdict, so (once again) Stonehenge never had an opportunity to argue the merits of that issue on appeal. Yet, the Court of appeals based its decision on an interpretation of jury instructions and interrogatories to which no party objected, and about which Stonehenge never had an opportunity to be heard.

Although fundamental rights may be limited by a compelling governmental interest, no such interest exists that justifies the Court of Appeals basing its decision on objections that were waived by Beazer and on which Stonehenge had no opportunity to be heard.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and two substantial constitutional questions. Stonehenge requests that this Court accept jurisdiction to allow these important matters to be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, this 3rd day of March, 2008 upon the following:

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Stonehenge Land Company, :
 :
 Plaintiff, : Case No. 06CVC02-2724
 -v- : JUDGE PFEIFFER
 Beazer Homes Investments, LLC, :
 :
 Defendant. :

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2007 FEB 21 PM 3:00
CLERK OF COURTS

DECISION AND ENTRY GRANTING, IN PART, AND DENYING, IN PART,
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 24, 2006

AND

DECISION AND ENTRY GRANTING, IN PART, AND DENYING, IN PART,
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 13, 2006

AND

ENTRY GRANTING DEFENDANT'S MOTION FOR LEAVE TO FILE A SURREPLY
FILED JANUARY 4, 2007

AND

ENTRY DENYING DEFENDAN'S MOTION FOR CIV. R. 56(F) EXTENSION FILED
JANUARY , 2007

Rendered this 21ST day of February, 2007

PFEIFFER, J.

This matter is before the Court on Defendant's Motion for Summary Judgment filed October 24, 2006 and Plaintiff's Motion for Summary Judgment filed November 13, 2006. Also before the Court is Defendant's Motion for Leave to File a Surreply and for Civ. R. 56(F) Extension filed January 4, 2007. The requests are opposed by Plaintiff. Upon review, the Court will GRANT Defendant leave to file a Surreply, but DENY the request for a Civ. R. 56(F) Extension.

This dispute stems from Plaintiff's development of a residential subdivision known as Elmont Place, which has been constructed in phases. The parties entered

into a series of agreements whereby Defendant was to purchase a specified number of lots in each section of each phase. Plaintiff's lawsuit alleges that Defendant breached its obligations to deposit earnest money and purchase lots in connection with Phase III, Section 2 and has further anticipatorily repudiated its obligations in connection with Phase IV of the subdivision. Plaintiff also asserts claims for intentional and negligent misrepresentation and fraudulent inducement. Its Complaint seeks money damages as well as specific performance of the parties' agreements based on the following facts.

The parties' initial Purchase Agreement, executed July 27, 2000, indicates that Plaintiff would develop and improve the real estate into a residential subdivision consisting of approximately 230 lots and that Defendant would purchase all of the lots. The Agreement requires Plaintiff to timely complete all improvements necessary to allow the construction of a single family residence upon a lot, including properly platting the lot pursuant to applicable zoning regulations; providing proof that no building portions of the lot lies within a "100-year flood elevation;" rough grading for sufficient drainage; installing the storm sewer system, sanitary sewer system, and other utility lines; installing all curbs, gutters, and paved streets; and ensuring that all building permits can be immediately obtained and that all conditions necessary for the eventual issuance of a certificate of occupancy have been satisfied. (Plaintiff's Ex. A). The "Takedown Schedule" for Defendant's purchase of the lots was to commence within 10 days of Plaintiff delivering written notice that the foregoing steps had been completed.

The initial Purchase Agreement sets forth a liquidated damages clause providing:

Upon execution of this Agreement, Builder shall deposit One Hundred Thousand and no/100ths Dollars (\$100,000.00) (the "Earnest Money") with Developer, to be held by Developer, in trust, upon and

subject to the terms and conditions set forth herein. Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified and Developer is fully able to close pursuant to the terms hereof and is not in default hereunder. The parties stipulate that in such event, damages will be impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute Liquidated damages and not a penalty, and shall be Developer's sole remedy at law or in equity for a breach of any covenants or agreement of this Agreement to be performed or observed by Builder. Except that for the first fifteen (15) Lots to be purchased in the first section, and the first ten (10) Lots in each subsequent Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law, including the right to pursue specific performance. The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and the transaction is closed, then the Earnest Money shall be applied as a One Thousand Two Hundred Fifty Dollars (\$1,250.00) credit toward the purchase price of each Lot in Sections 1A and 1B.

When future Sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand and no/100ths Dollars (\$1,000.00) per Lot when Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The Earnest Money shall be applied as a One Thousand Dollar (\$1,000.00) credit toward the purchase price of each Lot in future Sections.

(Id.).

In April 2002, the initial Purchase Agreement was amended to allow Plaintiff to sell some of the lots in Elmont Place to another builder, thereby reducing the number of lots Defendant was required to purchase. The Amendment indicates that \$52,000.00 of the \$100,000.00 Earnest Money Deposit had been credited for the 42 lots that

Defendant had purchased and that the balance would be applied to the next 38 lots purchased by Defendant, regardless of which section or phase the lot was located. The Amendment further provides that once Defendant has purchased 80 lots and received credit for the full \$100,000.00 Earnest Money Deposit, then Defendant is obligated to deposit additional Earnest Money in the amount of \$1,000.00 per lot for half of the number of lots in the next section to be developed. (Plaintiff's Ex. B). The Amendment expresses that "[a]ll other terms of the contract dated July 27, 2000 stay the same." (Id.).

In June 2004, Defendant's counsel informed Plaintiff, via a letter, that Defendant did not want to acquire additional lots at that time. The letter stated:

[Plaintiff's] recent development of the next phase of the subdivision was not requested by [Defendant], and [Defendant] neither needs, nor desires to purchase additional lots at this time. Under the terms of the contract, [Defendant's] exposure to damages in the event of its default is specifically limited to [Plaintiff's] retention of [Defendant's] deposit. Accordingly, if [Defendant] elects not to proceed with the purchase of any additional lots at Elmont Place, [Plaintiff's] only recourse is to retain the remaining balance of any deposit it currently holds.

(Defendant's Ex. B).

Defendant's counsel conceded that Plaintiff might have a different interpretation of the contract, and thus, proposed as a settlement that Defendant waive its right to acquire additional lots and allow Plaintiff to re-market the lots to another builder. (Id.). However, On September 9, 2004, Defendant's counsel sent correspondence stating Defendant had re-evaluated its position and no longer desired to waive its right to purchase lots. Counsel indicated:

[s]ince [Plaintiff] neither accepted [Defendant's] proposal to enter into a waiver agreement, nor did it take any action to declare [Defendant] in default, [Plaintiff] has no right to convey the Lots desired by [Defendant] to any party other than [Defendant]. Please accept this letter as formal notification that [Defendant] intends to proceed with its purchase of lots in Elmont Place under the terms of its contract with [Plaintiff].

(Defendant's Ex. C).

Defendant contends that negotiations then ensued, with the parties entering into a new Purchase Agreement on November 23, 2004:

[w]hereas, Developer has an option to purchase, or has purchased, real estate in the City of Groveport, Franklin County, Ohio, as more particularly described in Exhibit A (the Real Estate), which Developer will develop and improve into a single family residential subdivision to be known as Elmont Place (the Subdivision), and intends to make available to Builder a number of lots (Lots) in Elmont Place Phase III, to wit: seventeen (17) Lots in Section 1 and twenty-nine (29) Lots in Section 2 * * *.

(Plaintiff's Ex. C).

The 2004 Purchase Agreement imposes nearly the same obligations upon the Plaintiff as set forth in the parties' initial Purchase Agreement. The 2004 Purchase Agreement also contains the following liquidated damages provision:

Earnest Money Deposit. Upon execution of this Agreement, Builder shall deposit Seventeen Thousand Dollars \$(17,000) (the Earnest Money) with Developer, to be held by Developer in trust upon and subject to the terms and conditions set forth herein.

Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified. In such event, damages will be impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute liquidated damages and not a penalty, and shall be Developer's

sole remedy at law or in equity for a breach of any covenants or agreement of this Agreement to be performed or observed by Builder.

Notwithstanding the foregoing, and any other provision of this Agreement to the contrary also notwithstanding, as to the first ten (10) Lots in each Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law and in equity, including the right to pursue specific performance.

The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and a transaction is closed, then the Earnest Money shall be applied as a credit in the same amount toward the purchase price as to each specific Lot as to which the transaction is closed.

When future Sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand Dollars (\$1,000) per Lot when Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The said Earnest Money shall be applied as a credit in the same amount toward the purchase price of each such Lot.

(Id.).

The 2004 Purchase Agreement further provides:

[i]f Builder fails to take down the required number of Lots in any single calendar month, Builder will stand in default, and upon five (5) business days' written notice thereof to Builder, at the expiration of which Builder shall still have failed to take down the required number of Lots, Developer may terminate this agreement and retain the balance of the Earnest Money as liquidated damages (and not as a penalty, since damages will be impossible to determine).

Notwithstanding the foregoing, Developer may require assurances from Builder at any time (and from time to

time) as to Builder's readiness, willingness, and ability to perform under this Agreement. Builder's failure to provide Developer with assurances within the reasonable time requested by Developer, and/or any breach by Builder, shall entitle Developer to retain the balance of the Earnest Money and, further, relieve Developer of any further obligation under this Agreement.

(Id.). (Emphasis in original).

Additionally, the Agreement sets forth the following integration clause: "This Agreement sets forth the entire and final agreement and understanding of the parties with respect to the subject matter hereof. Any and all prior agreements, understandings, or undertakings, whether written or oral, with respect to the same, are hereby superseded and replaced by this Agreement. This Agreement may not be modified or amended except by an instrument in writing, executed by each party." (Id.).

Finally, the Agreement contains a notice of default provision:

* * * no failure or default by either party hereto concerning any act required by it shall result in the termination of any right of either party hereunder until such party shall have failed to remedy such failure or cure such default within thirty (30) days after the receipt of written notice of the failure to default. Receipt shall be assumed upon the earlier of actual receipt of three (3) days after such notice is placed in the U.S. Mail, properly addressed with postage prepaid. (Emphasis in original).

(Id.).

Defendant made the \$17,000.00 deposit and proceeded to close on 16 lots in Phase III, Section 1 of Elmont Place. On May 12, 2005, Plaintiff notified Defendant that all necessary construction permits and plan approvals had been obtained for Phase III, Section 2. (Mo Dioun Affidavit, ¶3). There is no dispute that Defendant did not deposit the Earnest Money for this section, nor did it purchase any of the lots. (Id. at ¶4).

Additionally, the parties have not performed on the Agreement as to the lots in Phase IV of the development. (Id. at ¶5).

The parties have filed Cross-Motions for Summary Judgment. Defendant argues that it is entitled to summary judgment on Plaintiff's breach of contract claims on the grounds that: 1) it did not breach the parties' contracts; 2) the bargained for contract terms provide Plaintiff no right to specific performance or monetary damages; and 3) Plaintiff breached the notice of default provision. Defendant seeks summary judgment on Plaintiff's tort claims on the grounds that Plaintiff cannot establish the element of justifiable reliance. Defendant further asserts that Plaintiff's discovery responses demonstrate that the tort claims fail as a matter of law.

Plaintiff's Motion for Summary Judgment seeks a finding that Defendant breached the parties' agreements as to Phase III, Section 2 of the development and anticipatorily breached the contracts as to Phase IV. Plaintiff further seeks a finding that it is entitled to the remedy of specific performance for those breaches. Finally, Plaintiff argues that genuine issues of fact remain for trial on its claims for fraudulent misrepresentation, negligent misrepresentation, and fraudulent inducement.

Under Civ. R. 56, summary judgment is proper when "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327. Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in

favor of the nonmoving party. Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 360. Nevertheless, summary judgment is appropriate where a party fails to produce evidence supporting the essentials of its claim. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108 at paragraph three of the syllabus.

The Court will first address the arguments relating to the breach of contract claims. Both parties state that the terms of the 2004 Purchase Agreement are clear and unambiguous. Yet they have different interpretations of the Agreement's meaning. Plaintiff argues there can be no dispute that Defendant breached the parties' contract by failing to deposit the Earnest Money for Phase III, Section 2 and by not purchasing the lots therein. Defendant disputes that it committed those breaches, arguing that the 2004 Purchase Agreement does not require it to purchase lots in Phase III, but rather affords it an option to do so.

Upon review, the Court finds that the clear terms of the Agreement obligated Defendant to deposit Earnest Money and purchase the lots in Sections 1 and 2 of Phase III. The Agreement unambiguously requires Plaintiff to develop the land for residential construction and Defendant to deposit money for and purchase the developed lots. No reasonable interpretation of the Agreement would lead to the conclusion that it is an option contract. Thus, the Court finds that Plaintiff has established, as a matter of law, that Defendant breached the Agreement by not depositing Earnest Money for Phase III, Section 2 and further by not purchasing the lots therein.

The Court's next inquiry concerns Plaintiff's damages for Defendant's breaches of contract. Plaintiff seeks both monetary damages and specific performance, i.e., an

order requiring Defendant to purchase the lots in Phase III, Section 2, while Defendant argues that Plaintiff's remedy is limited to retention of the Earnest Money deposit. Defendant contends the Agreement provides for a right of specific performance as to the first ten lots in each section, but only if the Earnest Money deposit has been made for that section. As it is undisputed that no Earnest Money was deposited for Phase III, Section 2, Defendant asserts that Plaintiff is not entitled to specific performance for the lots therein. Plaintiff counters that the liquidated damages clause, including the language limiting its right to specific performance to the first ten lots in each section, applies only if Defendant has paid the Earnest Money deposit. Plaintiff asserts that as the provision does not address what happens in the event that Defendant fails to make the deposit, then its damages are not limited, and it is entitled to all available legal remedies for such a breach.

After careful consideration of the terms of the Agreement, the Court agrees with Defendant that Plaintiff has no right of specific performance under these facts. The liquidated damages provision unambiguously states that Plaintiff's sole remedy for any breach of the contract is retention of the Earnest Money deposit. The provision then sets forth an exception whereby Plaintiff is entitled to specific performance as to the first ten lots of a section, but only if Defendant has deposited Earnest Money for the section. Plaintiff argues that this latter caveat means that if a deposit is not made for a section, then it has a right to specific performance as to all lots in the section rather than being limited to only ten. But this interpretation essentially re-writes the parties' contract. As written, the Agreement clearly provides that Plaintiff's remedy is limited to forfeiture of the Earnest Money deposit and specific performance against the first ten lots of any

section for which the deposit has been made. As no Earnest Money was deposited for Phase III, Section 2, Plaintiff has no right to specific performance against the lots in that section.

Defendant further asserts that Plaintiff has no available monetary damages remedy. Defendant interprets the liquidated damages provision as providing only for forfeiture of the initial \$17,000.00 Earnest Money deposit for any breach of the Agreement. As that amount has already been credited towards Defendant's purchases of lots in Section 1, Defendant argues that Plaintiff is left with no monetary damages remedy.

The Court understands the basis for Defendant's argument. The liquidated damages clause begins by requiring Defendant to remit Earnest Money in the amount of \$17,000.00, and the next paragraph states that forfeiture of the Earnest Money shall be Plaintiff's sole remedy in the event of a breach by Defendant. However, in examining the remainder of the paragraphs and interpreting the provision as a whole, the Court finds an ambiguity exists as to whether the forfeiture refers only to the initial \$17,000.00 deposit or includes the future required deposits. Thus, at this stage of the proceedings, the Court cannot render a finding as to the issue of Plaintiff's monetary damages.

Additionally, the Court finds that an ambiguity exists as to Plaintiff's claim for anticipatory breach of contract with regards to Phase IV of the subdivision. The 2004 Purchase Agreement provides for Plaintiff's development of and Defendant's purchase of lots in Phase III. The Agreement contains an integration clause stating that the contract "sets forth the entire and final agreement and understanding of the parties with respect to the subject matter hereof. Any and all prior agreements, understandings, or

undertakings, whether written or oral, with respect to the same, are hereby superseded and replaced by this Agreement." It is not clear whether the 2004 Purchase Agreement supersedes the 2000 Purchase Agreement and 2002 Amendment, thereby nullifying the parties' obligations with regard to Phase IV, or whether the 2004 Purchase Agreement modifies the parties' prior contracts only as to Phase III. Consequently, Plaintiff cannot be granted summary judgment on its claim for anticipatory breach of contract.

The final issue to be addressed concerning the breach of contract claims is Defendant's argument that Plaintiff cannot proceed on its claims due to its failure to comply with the notice of default provision set forth in the Agreement. The provision mandates that a party be given notice of a default and an opportunity to cure. Although Plaintiff did not send Defendant the notice in the manner prescribed by the contract, the record demonstrates that Defendant nonetheless did have notice of the default and further ample opportunity to cure. Thus, the Court finds that Plaintiff's technical breach of the notice provision was not material and cannot be utilized by Defendant as a defense to this action. Gillard v. Green, Washington App. No. 00CA54, 2001-Ohio-2624 (the appellee complied with the spirit, if not the technical letter, of the contract's notice provision, and technical departure from a contract term was not sufficient to constitute a material breach).

The Court will next discuss Defendant's request for summary judgment on Plaintiff's claims for intentional misrepresentation, negligent misrepresentation, and fraudulent inducement. The claims are based on Plaintiff's contention that Defendant fraudulently or negligently misrepresented that it would continue to purchase lots in the subdivision. Defendant first argues that the claims must fail as Plaintiff cannot establish

the essential element of justifiable reliance. In support, Defendant relies upon the following language from the 2004 Purchase Agreement:

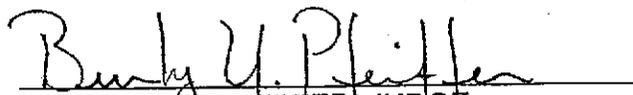
[n]otwithstanding the foregoing, Developer may require assurances from Builder at any time (and from time to time) as to Builder's readiness, willingness, and ability to perform under this Agreement. Builder's failure to provide Developer with assurances within the reasonable time requested by Developer, and/or any breach by Builder, shall entitle Developer to retain the balance of the Earnest Money and, further, relieve Developer of any further obligation under this Agreement.

Defendant asserts that the import of this provision is that Plaintiff at all times had notice that it may not be able to perform on the contract, and therefore, Plaintiff could not have justifiably relied on any representations to the contrary. Upon review, the Court agrees with Plaintiff that the provision merely affords it the right to demand assurances from Defendant as to Defendant's ability to perform on the contract. The clause makes no intimations as to Defendant's actual readiness or ability to perform its contractual obligations.

Defendant next relies upon Plaintiff's discovery responses to demonstrate it is entitled to summary judgment on the tort claims. However, Plaintiff has a different interpretation as to the meaning of the responses at issue. As the evidence must be construed in a light most favorable to Plaintiff, the Court finds the discovery responses would not be a proper foundation for granting Defendant judgment as a matter of law.

Based on the foregoing, the Motions for Summary Judgment are GRANTED, in part, and DENIED, in part. Plaintiff is entitled to a finding that Defendant breached the 2004 Agreement by not depositing Earnest Money for and purchasing lots in Phase III, Section, 2 of the development. However, the Court agrees with Defendant's

interpretation of the contract as to the remedy of specific performance. All other issues and causes of action remain for trial.


BEVERLY Y. PFEIFFER, JUDGE

Copies to:

Albert J. Lucas
William J. Michael
Counsel for Plaintiff

David A. Dye
Sabrina C. Haurin
Counsel for Defendant

APPENDIX B

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 JAN 17 PM 3:24
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Stonehenge Land Company,	:	
Plaintiff-Appellee,	:	
v.	:	No. 07AP-449 (C.P.C. No. 06 CVC 02-2724)
Beazer Homes Investments, LLC,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
Stonehenge Land Company,	:	
Plaintiff-Appellant,	:	
v.	:	No. 07AP-559 (C.P.C. No. 06 CVC 02-2724)
Beazer Homes Investments, LLC,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on January 17, 2008

Luper, Neidenthal & Logan, LPA, and David M. Scott, for Stonehenge Land Company.

Bailey Cavalieri LLC, and David A. Dye, for Beazer Homes Investments, LLC.

APPEALS from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} This case involves consolidated appeals from the judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict, on the breach of contract claims of plaintiff-appellee/cross-appellant, Stonehenge Land Company ("Stonehenge") against defendant-appellant/cross-appellee, Beazer Homes Investments, LLC ("Beazer").

{¶2} The relevant factual and procedural history follows. This case concerns the development of a residential subdivision located in the city of Groveport in Franklin County, and known as "Elmont Place." Stonehenge is a land developer and Beazer is in the business of building and selling single-family homes. On July 27, 2000, Stonehenge entered into a written contract with Beazer's predecessor-in-interest, Crossmann Communities, Inc. dba Beazer Homes, relating to Beazer's purchase of all of the lots to be developed in Elmont Place (the "2000 contract"). In April 2002, the parties executed an amendment to the 2000 contract, which allowed Stonehenge to sell some lots to another builder, thereby reducing the number of lots that Beazer was required to purchase.

{¶3} By letter dated June 9, 2004, Beazer's counsel advised Stonehenge that Beazer did not wish to acquire any additional lots in the Elmont Place development. By letter dated September 9, 2004, however, Beazer's counsel advised Stonehenge that, despite having not received a response to its previous letter, Beazer had reevaluated its position and now wished to move forward with purchasing additional lots. Later, following additional negotiations, the parties entered into another contract dated November 23, 2004 (the "2004 contract"). This contract concerned only the lots located in Sections 1 and 2 of Phase III of the Elmont Place development.

{¶4} The 2004 contract provided for separate purchase prices for lots in Sections 1 and 2, and contained the following provision with respect to earnest money, including a liquidated damages clause:

2. Earnest Money Deposit. Upon execution of this Agreement, Builder shall deposit Seventeen Thousand Dollars (\$17,000) (the Earnest Money) with Developer, to be held by Developer in trust upon and subject to the terms and conditions set forth herein.

Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified. In such event, damages will be impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute liquidated damages and not a penalty, and shall be Developer's sole remedy at law or in equity for a breach of any covenants or agreements of this Agreement to be performed or observed by Builder.

Notwithstanding the foregoing, and any other provision of this Agreement to the contrary also notwithstanding, as to the first ten (10) Lots in each Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law and in equity, including the right to pursue specific performance.

The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and a transaction is closed, then the Earnest Money shall be applied as a One Thousand Dollar (\$1,000) credit toward the purchase price as to each specific Lot as to which the transaction is closed.

When future sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand Dollars (\$1,000) per Lot when Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The said Earnest Money shall be applied as a credit in the same amount toward the purchase price of each such Lot.

{¶5} Section 4 of the 2004 contract required that Beazer "take down" at least two lots per month, and also provided, in pertinent part:

If Builder fails to take down the required number of Lots in any single calendar month, Builder will stand in default, and upon five (5) business days' written notice thereof to Builder, at the expiration of which Builder shall still have failed to take down the required number of Lots, Developer may terminate this agreement and retain the balance of the Earnest Money as liquidated damages (and not as a penalty, since damages will be impossible to determine).

Notwithstanding the foregoing, Developer may require assurances from Builder at any reasonable time (and from time to time) as to Builder's readiness, willingness, and ability to perform under this Agreement. Builder's failure to provide Developer with assurances upon Developer's reasonable request within the reasonable time requested by Developer, and/or any breach by Builder, shall entitle Developer to retain the balance of the Earnest Money and, further, relieve Developer of any further obligation under this Agreement.

(Emphasis sic.)

{¶6} The 2004 contract also contained an integration clause:

14. Entire Agreement and Modification. This Agreement sets forth the entire and final agreement and understanding of the parties with respect to the subject matter hereof. Any and all prior agreements, understandings, or undertakings, whether written or oral, with respect to the same, are hereby superseded and replaced by this Agreement. This Agreement may not be modified or amended except by an instrument in writing, executed by each party.

{¶7} Both the 2000 contract and the 2004 contract contained provisions related to default and cure, non-waiver, and notices as follows:

15. Cure and Default. Except as provided in section 4, no failure or default by either party hereto concerning any act required by it shall result in the termination of any right of either party hereunder until such party shall have failed to remedy such failure or cure such default within thirty (30) days

after the receipt of written notice of the failure to [sic] default. Receipt shall be assumed upon the earlier of actual receipt or three (3) days after such notice is placed in the U.S. Mail, properly addressed with postage prepaid.

16. Non-Waiver. No waiver, forbearance, of [sic] failure by any party of its right to enforce any provision of this Agreement shall constitute a waiver or estoppel of such party's right to enforce such provision in the future.

17. Notices. All notices shall be in writing, and shall be deemed delivered when deposited in the U.S. Mail, addressed to the notices as follows:

Crossmann Communities, Inc.
dba Beazer Homes
Attn: Jeff Lodgson
929 Eastwind Drive, Suite 223
Westerville, Ohio 43081

Stonehenge Land Company
Attn: Mo M. Dioun
41 North High Street
New Albany, Ohio 43054

(Emphasis sic.)

{¶8} Following execution of the 2004 contract, Beazer deposited the \$17,000 in earnest money and closed on 16 lots in Phase III, Section 1 of Elmont Place. On May 12, 2005, Stonehenge notified Beazer that all necessary construction permits and plan approvals had been obtained for Phase III, Section 2. It is undisputed that Beazer did not deposit any earnest money for Section 2, nor did it purchase any lots in Section 2.

{¶9} The evidence suggests that between May 12, 2005, and November 2, 2005, Beazer's legal counsel wrote several letters to Stonehenge indicating Beazer's position that it had no contractual obligation to purchase additional lots. Then, by letter

dated November 2, 2005, Stonehenge's counsel sent a letter to Beazer's counsel, which stated, in pertinent part:

Dear Mr. Dye:

This firm represents The Stonehenge Company ("Stonehenge"). We are responding to your letters to Mr. VanSlyck and Mr. Dioun regarding Crossman's obligations under the Purchase Agreement (the "Agreement") for the Elmont Place Subdivision ("Elmont").

Under any reasonable interpretation of the Agreement, Crossman is in breach. The Agreement required Crossman to deposit one thousand dollars (\$1,000) per lot in earnest money with Stonehenge when written notice is given that all necessary and appropriate construction permits and plat approvals have been obtained for Section 2 at Elmont. * * *

By letter dated May 12, 2005, Stonehenge gave written notice that all necessary construction permits and plot [sic] approvals for Section 2 at Elmont have been obtained. Despite Stonehenge's repeated demands for payment of earnest money, Crossman has failed to deposit the earnest money as required by the Agreement. Crossman's failure to make the deposit of earnest money is a material breach of the Agreement.

* * *

* * * If I do not hear from you in five business days from the date of this letter, I will assume you have no interest in negotiating a resolution of this dispute, and we will proceed accordingly.

{¶10} On February 27, 2006, Stonehenge filed a complaint against Beazer, which stated causes of action for breach of the 2000 and 2004 contracts, intentional misrepresentation, and fraudulent inducement, and sought damages in excess of \$300,000. The breach of contract claims included claims that Beazer breached its duty to

purchase Phase III lots under both the 2000 and 2004 contracts, and that it anticipatorily breached its duty to purchase Phase IV lots under both contracts.

{¶11} The parties filed cross-motions for summary judgment. With respect to the breach of contract claims, Beazer argued that it did not breach either contract, Stonehenge's claims were barred because it had not satisfied the condition precedent of properly serving a notice of default, and the liquidated damages provision in the 2004 contract limited Stonehenge's damages to the amount of earnest money already deposited. Stonehenge argued that Beazer breached both the 2000 and 2004 contracts by failing to purchase certain lots in Phase III and any lots in Phase IV, and that Stonehenge is entitled to specific performance as a remedy for these breaches. With respect to the tort claims, Beazer argued that Stonehenge could not establish the element of justifiable reliance common to both claims, and Stonehenge argued that genuine issues of material fact existed with respect to that element.

{¶12} By decision and entry dated February 21, 2007, the trial court granted summary judgment in favor of Stonehenge on its claim for breach of its obligations to purchase Phase III lots under the 2004 contract. The court found that Stonehenge's failure to provide written notice of default, in accordance with the provisions for such notice set forth in the contract, was a "technical breach" of the notice provision, but that it was not a "material" breach. Therefore, the court reasoned, the failure to comply with the notice provision did not entitle Beazer to summary judgment on the breach of contract claims.

{¶13} The court found that Stonehenge is entitled to damages for breach of contract, but is not entitled to specific performance. This is because the 2004 contract

only provides for specific performance as to any lots with respect to which Beazer had deposited earnest money but then failed to purchase. Since Beazer had purchased all lots for which it had deposited earnest money, specific performance was not available. The trial court further found that the liquidated damages provision is ambiguous as to whether it provides merely for retention of earnest money already deposited, or whether it also allows Stonehenge to recover monies that it expected Beazer would deposit for Phase III lots, but that never were in fact deposited. Therefore, it determined that the jury would decide what the liquidated damages provision meant.

{¶14} As to Beazer's obligation to purchase Phase IV lots, the court denied both parties' summary judgment motions. The court recognized that the 2004 contract contains an integration clause, but noted that the 2000 contract concerns *all phases* of Elmont Place, whereas the 2004 contract only concerns Phase III. Therefore, the court determined that there remained a question for the jury whether the 2004 contract superseded the 2000 contract with respect to Phases III and IV, or whether it only superseded the 2000 contract with respect to Phase III. In other words, the jury was to determine whether Beazer's obligation to purchase Phase IV lots under the 2000 contract survived the parties' execution of the 2004 contract. Finally, the court denied both parties' motions for summary judgment with respect to the tort claims.

{¶15} Beazer made several motions in limine, including a motion to exclude any evidence as to the actual value of the Elmont Place lots, and other evidence as to Stonehenge's actual damages, arguing that the liquidated damages clause precluded the jury's consideration of such evidence. The court denied the motion and allowed Stonehenge to introduce evidence of its actual damages.

{¶16} Following a four-day trial, the jury answered a series of interrogatories. The jury granted judgment in favor of Beazer on the fraudulent inducement and intentional misrepresentation claims. The jury determined that the 2004 contract "nullified," or superseded, the 2000 contract, with respect to Phase III lots, and that Beazer did not breach the 2000 contract when it failed to purchase Phase IV lots. Therefore, it granted judgment in favor of Beazer with respect to Stonehenge's claims for breach of the un-superseded portion of the 2000 contract; that is, the claims based on Beazer's failure to purchase Phase IV lots. With respect to Stonehenge's claims for breach of the obligation to purchase Phase III lots under the 2004 contract (for which the trial court had already granted summary judgment to Stonehenge), the jury determined that the liquidated damages provision does not limit Stonehenge's damages to earnest money already deposited. The jury awarded Stonehenge \$359,522 in damages for breach of the 2004 contract, and \$100,000 in attorney fees. Finally, the jury determined that Stonehenge had not made reasonable efforts to mitigate its damages, and had incurred \$45,960 in damages that it could have avoided by mitigating.

{¶17} After trial, Beazer moved the court for a judgment notwithstanding the verdict, pursuant to Civ.R. 50(B). Specifically, it argued that the jury's award of attorney fees was unsupported by the evidence because Stonehenge had offered no evidence as to the reasonableness of the fees. The trial court agreed and granted the motion. Beazer also moved the court for an award of attorney fees expended in its successful defense of Stonehenge's claims under the 2000 contract, which the trial court denied.

{¶18} Each party filed a separate appeal, and we consolidated the appeals for decision. In its appeal, Beazer advances three assignments of error for our consideration, as follows:

Assignment of Error Number One

The Trial Court erred in granting Appellee's Motion for Summary Judgment because Appellant was not given a contractually required notice of default and opportunity to cure.

Assignment of Error Number Two

The Trial Court erred by submitting the issue of Appellee's actual damages to the jury when the Court had already determined that there was a clear and unambiguous contract provision for liquidated damages.

Assignment of Error Number Three

The Trial Court erred by denying Appellant's motion for an award of attorneys' fees, to which Appellant was entitled pursuant to the terms of the 2000 Purchase Agreement.

{¶19} In its appeal, Stonehenge advances the following assignments of error for our review:

Assignment of Error No. 1: The Trial Court erred by granting Beazer's Motion for Judgment Notwithstanding the Verdict and vacating the jury award of attorney's fees.

Assignment of Error No. 2: The Trial Court erred by denying Stonehenge an award of prejudgment interest.

Assignment of Error No. 3: The Trial Court erred by failing to order a post-trial hearing to allow Stonehenge to present complete evidence of its attorneys fees.

{¶20} We begin with Beazer's first assignment of error, in which Beazer argues that the trial court erred in concluding that Stonehenge's breach of contract claim was not

barred by Stonehenge's failure to provide notice of default and an opportunity to cure, according to the specific procedure set forth in the 2004 contract. The contract provided that no failure or default by any party results in termination of any right under the contract until the party shall have failed to cure the default within 30 days after receipt of written notice of the failure or default, and that any such written notices were to be sent via U.S. Mail to Stonehenge in care of employee Jeff Logsdon. See ¶7, *supra*.

{¶21} The trial court found that the letter dated November 2, 2005, from Stonehenge's attorney to Beazer's attorney, constituted sufficient notice of default and of Stonehenge's intent to declare a breach and to pursue its remedies under the contracts. The court determined that Stonehenge's failure to address the letter to Mr. Logsdon, at the address provided in the contracts, was a technical breach of the notice provision, but was not material or prejudicial. The court also found that Beazer had both actual notice of Stonehenge's declaration of default and intent to declare a breach, and an opportunity to cure.

{¶22} On appeal, Beazer argues that the trial court's determination undermined the purpose for which the notice provision was negotiated; that is, so that the designated decision-maker, Mr. Logsdon, could be aware of circumstances in which Stonehenge believed Beazer to be in default, and of how long Beazer had to decide whether or not to cure. The only case that Beazer cites in support of its position is the case of *Cummings v. Getz* (Feb. 11, 1985), Butler App. No. CA84-09-105, which does not support Beazer's argument.

{¶23} In *Cummings*, a former tenant sued her landlord for return of her security deposit, and the landlord asserted the affirmative defense that the tenant had not given

the contractually required 30-day written notice of intent to vacate at the end of the lease term. The court of appeals held that, in the context of a residential lease, the purpose of requiring written notice of intent to vacate is to create certainty. However, the court determined that the tenant's failure to provide written notice of intent to vacate was immaterial because she had requested that the landlord allow her and her husband to terminate the lease before the expiration of the lease term, and he had advised her that she would have to wait until the end of the term. Thus, because the landlord had actual notice that the tenant intended not to renew her lease, her failure to comply with the notice terms was not a defense to the tenant's breach of contract action.

{¶24} Our research reveals support for the trial court's conclusion that where there is evidence of actual notice, a technical deviation from a contractual notice requirement will not bar the action for breach of contract brought against a party that had actual notice. In *Interstate Gas Supply, Inc. v. Calex Corp.*, Franklin App. No. 04AP-980, 2006-Ohio-638, we held:

"The long and uniformly settled rule as to contracts requires only a substantial performance in order to recover upon such contract. Merely nominal, trifling, or technical departures are not sufficient to breach the contract." *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph two of the syllabus. "A court should confine the application of the doctrine of substantial performance to cases where the party has made an honest or good faith effort to perform the terms of the contract." *Burlington Resources Oil & Gas Co. v. Cox* (1999), 133 Ohio App.3d 543, 548, 729 N.E.2d 398, citing *Ashley v. Henahan* (1897), 56 Ohio St. 559, 47 N.E. 573, paragraph one of the syllabus. "For the doctrine of substantial performance to apply, the part unperformed must not destroy the value or purpose of the contract." *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 2002-Ohio-198, at ¶12, 772 N.E.2d 138, citing *F.C. Mach. Tool & Design, Inc. v. Custom Design*

Techonologies, Inc. (Dec. 27, 2001), Stark App. No. 2001CA00019, citing *Wengerd v. Martin* (May 6, 1998), Wayne App. No. 97CA0046. Furthermore, "when the facts presented in a case are undisputed, whether they constitute performance or a breach of the contract, is question of law for the court." *Luntz v. Stern* (1939), 135 Ohio St. 225, 237, 20 N.E.2d 241.

Id. at ¶35.

{¶25} Stonehenge's attorney's letter to Beazer's attorney may have deviated from the contract's express terms as to where Stonehenge was required to send written notice of default and election to pursue contractual remedies for breach. However, under the facts and circumstances of this case, we cannot say that this technical deviation was sufficient to constitute breach of the 2004 contract that would relieve Beazer of liability for its breach. See, e.g., *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph two of the syllabus (holding that merely nominal, trifling or technical departures are not sufficient to constitute breach of contract); see, also, *Roger J. Au & Son, Inc. v. N.E. Ohio Regional Sewer Dist.* (1986), 29 Ohio App.3d 284, 292, 29 OBR 349, 504 N.E.2d 1209 (stating that "[t]here is no reason to deny the claims for lack of written notice [if a party] was aware of [a disputed fact] and had a proper opportunity to investigate and act on its knowledge, as the purpose of the formal notice would thereby have been fulfilled").

{¶26} "A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution without performing acts that would otherwise have been conditions precedent." 5 Corbin on Contracts (1951) 920, 922, Section 977. On this principle Ohio courts have concluded that the " * * * renunciation of a contract by one of the parties constitutes a breach of contract which gives rise to a cause of action for

damages, and in such a case notice, demand and tender are waived." *Loft v. Sibcy-Cline Realtors* (Dec. 13, 1989), Hamilton App. No. C-880446, 1989 Ohio App. LEXIS 4593, at *7. Here, Beazer repudiated the contract by failing and refusing to perform the obligations that went to the heart of the contract itself – the purchase of lots. Under those circumstances, Beazer cannot now insist that Stonehenge scrupulously adhere to every term of the contract. *Midwest Payment Sys., Inc. v. Citibank Fed. Sav. Bank* (S.D. Ohio 1992), 801 F.Supp. 9, 13.

{¶27} For all of the foregoing reasons, Beazer's first assignment of error is overruled.

{¶28} In support of its second assignment of error, Beazer contends that the trial court erred in determining that the liquidated damages provision of the 2004 contract was ambiguous, and in submitting the issue of damages to the jury. The question of whether a contract is ambiguous is a question of law. *Wells v. C.J. Mahan Constr. Co.*, Franklin App. No. 05AP-180, 2006-Ohio-1831, ¶21, discretionary appeal not allowed, 111 Ohio St.3d 1411, 2006-Ohio-5083, 854 N.E.2d 1091, citing *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St.3d 212, 214, 567 N.E.2d 262. An appellate court reviews a trial court's resolution of legal issues de novo, without deference to the result that was reached by the trial court. *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313, 667 N.E.2d 949. A court should interpret a contract to give effect to the intention of the parties as manifested by the language of the contract. *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 67 O.O.2d 321, 313 N.E.2d 374, paragraph one of the syllabus. When the terms of the contract are clear and unambiguous, courts may not create a new

contract by finding intent not expressed by the terms. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 245-246, 7 O.O.3d 403, 374 N.E.2d 146.

{¶29} In this case, the liquidated damages provision is contained within Section 2 of the 2004 contract and provides:

Earnest Money Deposit. Upon execution of this Agreement, Builder shall deposit Seventeen Thousand Dollars (\$17,000) (the Earnest Money) with Developer, to be held by Developer in trust upon and subject to the terms and conditions set forth herein.

Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified. In such event, damages will be impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute liquidated damages and not a penalty, and shall be Developer's sole remedy at law or in equity for a breach of any covenants or agreement of this Agreement to be performed or observed by Builder.

Notwithstanding the foregoing, and any other provision of this Agreement to the contrary also notwithstanding, as to the first ten (10) Lots in each Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law and in equity, including the right to pursue specific performance.

The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and a transaction is closed, then the Earnest Money shall be applied as a One Thousand Dollar (\$1,000) credit toward the purchase price as to each specific Lot as to which the transaction is closed.

When future Sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand Dollars (\$1,000) per Lot when Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The said Earnest Money

shall be applied as a credit in the same amount toward the purchase price of each such Lot.

(Emphasis added.)

{¶30} The trial court concluded that the liquidated damages provision was ambiguous as to whether it provides only for Stonehenge to keep any earnest money that Beazer had *already deposited*, or whether it also entitles Stonehenge to monies it *expected* would be deposited, but that Beazer never ultimately deposited. Contrary to the trial court's conclusion, we think the language is clear and unambiguous.

{¶31} The liquidated damages provision states, "Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified." Contract terms are to be given their plain and ordinary meaning. *City of Sharonville v. Amer. Emp. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶6, citing *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168, 24 O.O.3d 274, 436 N.E.2d 1347. "Earnest money" is defined as, "[a] deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults." *Black's Law Dictionary* (8th Ed.2004) 547. Because "earnest money" plainly refers to a "deposit paid" and does not refer to a deposit not yet paid, the liquidated damages clause only encompasses those monies that Beazer had *already* deposited with Stonehenge prior to Beazer's breach. Therefore, the measure of Beazer's damages was readily ascertainable by reference to the language of the contract, and the trial court erred in submitting this issue to the jury instead of resolving the issue as a matter of law. The fact that the liquidated damages may be far less than Stonehenge's actual damages does not change this result. If the

language of a contract is clear and unambiguous, courts must enforce the instrument as written. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096.

{¶32} For all of the foregoing reasons, Beazer's second assignment of error is sustained.

{¶33} In support of its third assignment of error, Beazer argues that the trial court erred in denying Beazer's motion for attorney fees expended in its successful defense of Stonehenge's claim for breach of the 2000 contract vis à vis Phase IV lots. It directs our attention to a provision within the 2000 contract that states:

In the event a party hereto engages counsel to represent such party in connection with any breach or default, or threatened breach or default, hereof by the other party or to construe or enforce compliance with this Agreement, then the non-breaching or non-defaulting party and/or the party otherwise prevailing in any action to enforce or construe this Agreement, or any settlement associated therewith, shall be entitled to recover from the other all attorney fees, disbursements and costs to be incurred.

{¶34} Attorney fees are generally not recoverable in contract actions. *First Bank of Marietta v. L.C. Ltd.* (Dec. 28, 1999), Franklin App. No. 99AP-304. Such a principle comports with the "American Rule" that requires each party involved in litigation to pay its own attorney fees in most circumstances. *Sorin v. Bd. of Edn. of Warrensville Hts. School Dist.* (1976), 46 Ohio St.2d 177, 179, 75 O.O.2d 224, 347 N.E.2d 527. An exception to that rule allows for the recovery of attorney fees if the parties contract to shift fees. *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 699, 725 N.E.2d 1193, citing *Pegan v. Crawmer* (1997), 79 Ohio St.3d 155, 156, 679 N.E.2d 1129.

{¶35} In denying Beazer's motion for attorney fees the trial court explained:

The jury returned a verdict in favor of [Beazer] on [Stonehenge's] breach of contract claim relating to the 2000 Purchase Agreement. The 2000 Purchase Agreement contained a provision stating that the non-breaching party in an action to enforce or interpret the 2000 Purchase Agreement is entitled to its reasonable attorney's fees. [Beazer] has moved the Court for an award of its attorney's fees, based on such verdict, and has requested a hearing to determine the reasonable amount thereof.

At trial, the Court determined that the question of whether an award of attorney's fees was to be made and if so the amount thereof, was to be submitted to the jury. * * * [Beazer] offered no evidence at trial from which a determination could be made of the amount or reasonableness of attorney's fees to be awarded to [Beazer], and as such the Court is incapable of making such an award.

(May 2, 2007 Decision and Entry, 5-6.)

{¶36} On appeal, Beazer argues that it did not have to present evidence at trial regarding its attorney fees expended in defense of Stonehenge's claim for breach of the 2000 contract, because its right to recover these fees only vested when the jury rendered a verdict in its favor on that claim. Beazer maintains that it would have been inappropriate and confusing to the jury if it had presented evidence as to its attorney fees at the same time it presented substantive evidence that it had not breached the 2000 contract.

{¶37} In response, Stonehenge presents two arguments, which we will address in turn. First, it points out that the jury answered "yes" to the interrogatory inquiring, "Was the 2000 Purchase Agreement, as amended in 2002, nullified by the 2004 Purchase Agreement?" Stonehenge argues that because the jury determined that the 2000 contract had been "nullified," then the *entire contract*, including the attorney fees provision, is unenforceable.

{¶38} We note initially that the trial court did not rely on this interrogatory in denying Beazer's motion for attorney fees. More importantly, however, the record demonstrates that the jury did not determine that the *entire 2000 contract* had been nullified. The *only* issue before the jury respecting whether the 2004 contract nullified the 2000 contract was whether or not Beazer's 2000 contract obligation to purchase Phase IV lots survived the 2004 contract. Stonehenge claimed that Beazer had breached the 2000 contract by failing to purchase Phase IV lots, and Beazer's defense to that claim was that the 2004 contract superseded all terms in the 2000 contract that would have obligated Beazer to purchase Phase IV lots.¹ The jury interrogatory that Stonehenge cites does not even encompass whether the 2004 contract nullified the attorney fees provision, or other non-Phase IV lot purchase-related provisions; *the interrogatory only concerns whether the 2004 contract nullified Beazer's obligation to purchase Phase IV lots*. By its answer to the interrogatory, the jury indicated it found that Beazer's obligation under the 2000

¹ Jury Instruction No. 10 states, in pertinent part:

"Stonehenge also claims that Beazer breached the parties' contract with respect to Phase 4 of Elmont Place. Stonehenge also alleges that the 2004 Purchase Agreement was an amendment to the parties' contract that did not relieve Beazer of its obligations to buy the lots in Phase 4. According to Stonehenge, the subject matter of the 2004 Purchase Agreement was limited to Phase 3 of Elmont Place. Therefore, Stonehenge asserts that Beazer remained obligated pursuant to the 2000 Purchase Agreement, as amended in 2002, to purchase 10 lots in Phase 4. Stonehenge alleges that statements by Beazer that it would be making no further purchases of lots at Elmont Place constitutes an anticipatory breach of Beazer's contractual obligation to purchase the lots in Phase 4 of Elmont Place. * * *

"Beazer denies that it breached the contract with respect to Phase 4. Beazer contends that the terms of the 2000 Purchase Agreement, as amended in 2002, created no obligation on the part of Beazer to purchase, nor on the part of Stonehenge to sell, the Phase 4 lots. Rather, Beazer claims the parties intended only to establish the price at which such lots would be sold to Beazer, if Beazer wanted to purchase and Stonehenge wanted to sell those lots, if Stonehenge did not exercise its right to rezone Phase 4 for condominiums. Beazer also claims the 2004 Purchase Agreement superseded all terms of the 2000 Purchase Agreement, as amended in 2002, and that under the 2004 Purchase Agreement Beazer had no obligation to purchase lots in Phase 4.

"You must decide whether the amended 2000 Purchase Agreement obligated Beazer to purchase Phase 4 lots." (Emphasis added.)

contract to purchase Phase IV lots had been nullified by the parties' 2004 contract. The interrogatory does not mean that Beazer is not entitled to attorney fees under the 2000 contract; on the contrary, the interrogatory means that Beazer successfully defended itself against Stonehenge's claims that Beazer's obligation to purchase Phase IV lots survived the 2004 contract, and that Beazer had breached that obligation. Thus, under the 2000 contract, Beazer had a right to its reasonable attorney fees expended in defense of that claim.

{¶39} But Stonehenge also argues that the trial court correctly observed that Beazer was required to present evidence of its attorney fees at trial and that, because Beazer failed to do so, the trial court correctly denied Beazer an award of fees or an opportunity to present evidence to the court. In reply, Beazer argues that requiring it to present evidence to the jury as to its attorney fees "had the legal effect of shifting to Beazer the burden of proof on a matter on which [Stonehenge] had such burden * * * [because evidence about Beazer's attorney fees was a matter] that the jury could not possibly have distinguished as being applicable to Beazer's case only." (Reply Brief of Appellant Beazer, 10.) Beazer maintains that this, coupled with the fact that its right to attorney fees only "vested" upon the jury's verdict in its favor on Stonehenge's claim for breach of the 2000 contract, required that Beazer's claim for attorney fees be addressed not at trial but in a post-trial motion hearing.

{¶40} Beazer does not provide any authority for the proposition that a right to attorney fees under a contractual fee-shifting provision only vests upon the jury returning a verdict for the prevailing party. However, we note that this court has previously held that a plaintiff's right to *statutory* attorney fees did not vest until she received a judgment

in her favor. *Pasco v. State Auto Mut. Ins. Co.*, Franklin App. No. 04AP-696, 2005-Ohio-2387, ¶20, discretionary appeal not allowed, 106 Ohio St.3d 1536, 2005-Ohio-5146, 835 N.E.2d 384. In the case of *Keal v. Day*, 164 Ohio App.3d 21, 2005-Ohio-5551, 840 N.E.2d 1139, the First Appellate District held that for purposes of a contract providing for reasonable attorney fees for the "prevailing party" in any dispute over the contract, the term "prevailing party" means "one in whose favor the decision or verdict is rendered and judgment entered." *Id.* at ¶8.

{¶41} We are persuaded that Beazer did not acquire the right to attorney fees for its successful defense of Stonehenge's claim for breach of the 2000 contract until the jury rendered its verdict in Beazer's favor on this claim. As such, it was not required to seek its reasonable attorney fees until that time. We note that Beazer moved for an award of attorney fees and a hearing on the issue merely three days after the jury rendered its verdict. Under these circumstances, we agree that the trial court erred in summarily denying Beazer's motion for a hearing on its request for attorney fees. Accordingly, we sustain Beazer's third assignment of error.

{¶42} We now move on to Stonehenge's appeal. Because they are interrelated, we will address Stonehenge's first and third assignments of error together. In its first assignment of error, Stonehenge argues that the trial court erred in granting Beazer's motion for judgment notwithstanding the verdict ("JNOV") and vacating the jury's award of attorney fees. In its third assignment of error, it maintains that the trial court should have allowed Stonehenge a post-trial hearing in order to submit additional evidence on the issue of attorney fees.

{¶43} A motion for JNOV should be granted when the trial court, construing the motion most strongly in favor of the nonmoving party, finds that upon any determinative issue, reasonable minds could come to but one conclusion upon the evidence submitted, and such conclusion is adverse to the nonmoving party. *Mantua Mfg. Co. v. Commerce Exchange Bank* (1996), 75 Ohio St.3d 1, 4, 661 N.E.2d 161. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon a motion for judgment notwithstanding the verdict. *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 137, 17 OBR 281, 477 N.E.2d 1145, quoting *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 344 N.E.2d 334. "A motion * * * for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 58 O.O.2d 424, 280 N.E.2d 896. Thus, our review is de novo. *Hale v. Spitzer Dodge, Inc.*, Franklin App. No. 04AP-1379, 2006-Ohio-3309, ¶15, citing *Miller v. Lindsay-Green, Inc.*, Franklin App. No. 04AP-848, 2005-Ohio-6366, ¶52.

{¶44} The parties' 2004 contract provides that the non-breaching and/or prevailing party in an action to enforce the contract "shall be entitled to recover from the other its reasonable attorney fees." The trial court granted Beazer's motion for JNOV as to the jury's award of attorney fees under the 2004 contract because, it found, Stonehenge had presented no evidence as to the reasonableness of its fees. Stonehenge argues that it presented evidence as to the reasonableness of its attorney fees through the testimony of its owner, Mr. Dioun, who testified that the fees Stonehenge seeks to recover are reasonable. Stonehenge also argues that Beazer never presented evidence that

Stonehenge's fees were unreasonable. Stonehenge admits that it did not present "complete evidence of its attorney's fees,"² but argues this was because the trial court required it to present proof of its attorney fees during trial rather than at a post-trial hearing. It contends that the trial court should have held a separate post-trial hearing on attorney fees, but does not specify what other evidence would constitute "complete" evidence of its attorney fees.

{¶45} In response, Beazer points out that even though the 2004 contract provided that Stonehenge was *entitled* to its reasonable attorney fees by virtue of its status as a prevailing party, Stonehenge still had to prove that the amount it sought was in fact reasonable in the circumstances of this case. We agree. "A party seeking an award of attorney fees has the burden of demonstrating the reasonable value of such services." *DeHoff v. Veterinary Hosp. Operations of Cent. Ohio, Inc.*, Franklin App. No. 02AP-454, 2003-Ohio-3334, ¶145, discretionary appeal not allowed, 100 Ohio St.3d 1471, 2003-Ohio-5772, 798 N.E.2d 406; see, also, *Roth Produce Co. v. Scartz* (Dec. 27, 2001), Franklin App. No. 01AP-480 ("A 'reasonable' fee must be related to the work reasonably expended on the case and not merely to the amount of the judgment awarded." 2001 Ohio App. LEXIS 5907, at *12).

{¶46} "In calculating attorney fee awards, we require that a number of factors be considered, including, among other things, the time and labor involved in maintaining the litigation, the novelty and difficulty of the questions presented, the professional skill required to perform the necessary legal services, the reputation of the attorney, and the

² Brief of Stonehenge, 11.

results obtained." *Christe v. GMS Mgt. Co., Inc.* (2000), 88 Ohio St.3d 376, 378, 726 N.E.2d 497, citing *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 145-146, 569 N.E.2d 464. The factual determination of reasonableness must also be predicated upon an analysis of the hourly rates charged multiplied by the hours actually and necessarily spent, along with the aforementioned considerations of difficulty and complexity of the case, the attorney's reputation and the results obtained. *Bittner*, supra.

{¶47} In the present case, as Stonehenge concedes, the only evidence it presented as to its attorney fees was the testimony of Mr. Dioun. Mr. Dioun merely testified that his attorney fees were reasonable in his opinion, and that the amount of fees that Stonehenge was requesting was consistent with what the attorneys estimated their fees would be for this litigation. But he did not know whether the hourly rates charged are typical for the market, which hourly rates were charged to Stonehenge, exactly who had worked on the case, or how much Stonehenge had actually been charged. He did not personally review Stonehenge's attorney invoices. This evidence is insufficient for the jury to determine the reasonableness of the attorney fees that Stonehenge seeks.

{¶48} Moreover, the trial court did not err in submitting the attorney fee issue to the jury rather than holding a separate post-trial hearing on the matter. "Generally, attorney's fees are allowable as damages in breach of contract cases where the parties have bargained for a particular result and the breaching party's wrongful conduct led to the legal fees being incurred." *Natl. Eng. & Contracting Co. v. U.S. Fid. & Guar. Co.*, Franklin App. No. 03AP-435, 2004-Ohio-2503, ¶23, citing *Westfield Cos. v. O.K.L. Can Line*, 155 Ohio App.3d 747, 2003-Ohio-7151, 804 N.E.2d 45. Because the attorney fees being sought herein were in the nature of damages, the trial court was required to submit

the issue to the jury. "If the fees are damages, then the availability and amount of such fees have to be determined by the jury." *Christe*, supra, at 378, citing *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 557, 644 N.E.2d 397. Accordingly, the trial court correctly submitted the issue of Stonehenge's attorney fees to the jury, rather than holding a separate hearing on the issue.

{¶49} For all of the foregoing reasons, Stonehenge's first and third assignments of error are overruled.

{¶50} In its second assignment of error, Stonehenge argues that the trial court erred in the calculation of prejudgment interest. The trial court awarded prejudgment interest "only for the time period after the breach, and prior to the Court's entry of judgment herein, which was not already covered by Plaintiff's interest calculation at trial, i.e. from March 9, 2007 to the date of filing of this decision."³ Stonehenge argues that it was entitled to prejudgment interest on the jury's damage award from June 2005, at eight percent per annum, for a total of \$43,141.53. In light of our disposition of Beazer's second assignment of error, which alters the amount of compensatory damages upon which any prejudgment interest calculation would be based, we find Stonehenge's second assignment of error to be moot, and overrule it on that basis.

{¶51} In summary, we overrule Beazer's first assignment of error and sustain Beazer's second and third assignments of error; and we overrule Stonehenge's first and third assignments of error on their merits, and its second assignment of error as moot. We affirm in part and reverse in part the judgment of the Franklin County Court of

³ May 2, 2007 Judgment Entry, at 5.

Common Pleas, and remand this cause to that court for further proceedings consistent with law and with this opinion.

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

PETREE and KLATT, JJ., concur.

APPENDIX C

JAN 2 2008

IN THE COURT OF COMMON PLEAS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2008 JAN 18 AM 9:44

CLERK OF COURTS

Stonehenge Land Company, :
Plaintiff-Appellee, :

v. :

Beazer Homes Investments, LLC, :
Defendant-Appellant. :

No. 07AP-449/
(C.P.C. No. 06 CVC 02-2724)
(REGULAR CALENDAR)

Stonehenge Land Company, :
Plaintiff-Appellant, :

v. :

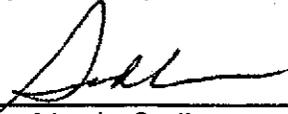
Beazer Homes Investments, LLC, :
Defendant-Appellee. :

No. 07AP-559
(C.P.C. No. 06 CVC 02-2724)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on January 17, 2008, Beazer's first assignment of error is overruled, and its second and third assignments of error are sustained, Stonehenge's first and third assignments of error are overruled on their merits, and its second assignment of error is overruled as moot, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part. This cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs shall be assessed against Stonehenge.

SADLER, PETREE, and KLATT, JJ.

By 
Judge Lisa L. Sadler

FINAL APPEALABLE ORDER

COPY

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

TERMINATION NO. #5
By: <i>Sandy Vachied</i>

STONEHENGE LAND COMPANY,

Plaintiff,

CASE NO. 06 CVC 02-2724

BEAZER HOMES INVESTMENTS, LLC,

Defendant.

JUDGE JOHN D. MARTIN By
Assignment

DECISION AND ENTRY

FILED
 COMMON PLEAS COURT
 FRANKLIN COUNTY, OHIO
 OCT 11 2 01 PM '06

This matter is before the Court following a decision and entry with respect to the parties' cross-motions for summary judgment and a jury trial that was conducted on the remaining issues. The Court has jurisdiction over the subject matter of this dispute and the parties, and this matter is properly and lawfully venued in Franklin County, Ohio.

This lawsuit was filed by Plaintiff Stonehenge Land Company ("Plaintiff") against Defendant Beazer Homes Investments, LLC ("Defendant"). Plaintiff sought compensation for damages that it claims were caused by Defendant's failure to make deposits on and purchase certain lots in a subdivision known as Elmont Place. Plaintiff's claims were based on three separate written agreements, referred to at trial as the "2000 Purchase Agreement," the "2002 Amendment to the 2000 Purchase Agreement," and the "2004 Purchase Agreement." Plaintiff also sought compensation for damages it claims were caused by misrepresentations that Defendant allegedly made about its intentions to purchase the lots.

In its Complaint, Plaintiff alleged that the parties entered into the 2000 Purchase Agreement by which Plaintiff agreed to sell, and Defendant agreed to purchase, lots in the Elmont Place Subdivision. Plaintiff alleged that the 2000 Purchase Agreement was amended by the 2002 Amendment, and again by the 2004 Purchase Agreement. Plaintiff alleged that Defendant was

obligated under the 2000 Purchase Agreement, as amended, to make earnest money deposits on all lots it contracted to purchase in Elmont Place, including a deposit of \$1,000 per lot on 17 lots in Section 1 of Phase III and on 29 lots in Section 2 of Phase III of Elmont Place, as described in the 2004 Purchase Agreement. Plaintiff claimed that Defendant breached the 2000 Purchase Agreement, and separately breached the 2004 Purchase Agreement, by not making the required deposits and by not purchasing the 29 lots in Section 2 of Phase III of Elmont Place. In addition, Plaintiff alleged that Defendant failed to purchase lots in Phase IV of Elmont Place pursuant to the 2000 Purchase Agreement. Plaintiff sought an order of specific performance of the 2000 Purchase Agreement, as amended, and the 2004 Purchase Agreement, or in the alternative, monetary damages.

Based upon the allegations summarized above, Plaintiff's complaint asserted claims against Defendant for breach of contract relating to the 2004 Purchase Agreement and the 2000 Purchase Agreement, and tort claims based upon Defendant's alleged negligent misrepresentations, intentional misrepresentations, and fraud. Defendant denied that it breached either the 2000 Purchase Agreement or the 2004 Purchase Agreement. Defendant claimed that Plaintiff had no right to specific performance under the express terms of the 2000 Purchase Agreement or under the 2004 Purchase Agreement, and Defendant further contended that any damages awardable to Plaintiff for breach of contract were limited by a liquidated damages clause in the 2004 Purchase Agreement. Defendant denied the allegations contained in all of Plaintiff's tort claims.

The parties filed cross-motions for summary judgment. On February 21, 2007, the Court prepared and caused to be filed a Decision and Entry regarding the parties' summary judgment motions. The Court hereby confirms and adopts its Decision and Entry and holds as a matter of law that Defendant breached the 2004 Purchase Agreement; and that Plaintiff was not entitled

to specific performance for Defendant's breach. All remaining issues were submitted to and heard by the jury during a trial that was conducted from March 8 to March 13, 2007.

The jury was instructed that the Court had already determined that Defendant was in breach of the 2004 Purchase Agreement, for which breach the jury returned a verdict awarding Plaintiff actual damages in the amount of \$313,562, and attorney's fees in the amount of \$100,000. The jury returned a verdict in favor of Defendant on Plaintiff's claim for a breach of the 2000 Purchase Agreement, and on Plaintiff's negligent misrepresentation, intentional misrepresentation, and fraud claims. This matter is now before the Court for an Entry of Judgment based on the foregoing verdicts. Also before the Court are (i) Defendant's Motion for Award of Attorney's Fees and Request for Hearing filed by Defendant on March 16, 2007; (ii) Plaintiff's Request for Prejudgment Interest; and (iii) Defendant's Motion for Judgment Notwithstanding the Verdict, filed March 23, 2007.

I. PLAINTIFF'S ATTORNEY'S FEE AWARD

Following the verdict awarding Plaintiff's attorney's fees, Defendant moved for judgment notwithstanding the verdict, and the Court finds Defendant's argument to be persuasive. It is not fairly debatable under Ohio law that a movant seeking an award of attorney's fees bears the burden of proving reasonableness by presenting competent, credible evidence thereof. *Christie v. GMS Mgmt. Co.*, 88 Ohio St. 3d 376, 378 (2000); *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St. 3d 143, 145-146 (1991); *Gioffre v. Simakis*, 72 Ohio App. 3d 424 (Franklin County 1991). Unless the requested fees are so obviously reasonable as to enable the Court to take judicial notice thereof, a factual determination must be made that fees sought are reasonable, and such a determination should be predicated on an analysis of hourly rate, multiplied by hours actually and necessarily spent, as combined with issues of novelty, difficulty, skill, reputation and results, as described in former Disciplinary Rule DR 2-106(B). *Id.*; see also *Brandon/Wiant Co. v. Teamor*,

135 Ohio App. 3d 417 (Cuyahoga County 1999). The Court finds that judicial notice cannot be taken of the reasonableness of an alleged \$100,000.00 attorney's fee amount.

For a determination of reasonableness to be made, the movant for legal fees must present evidence of how the fee was calculated. Plaintiff herein presented no evidence at trial from which such a determination could be made. Plaintiff's only witness testified that he did not see or review the invoices for the legal fees charged, did not know how much time was spent by Plaintiff's counsel nor the hourly rates thereof, nor was he familiar with the customary rates charged in Central Ohio for services of the type provided by Plaintiff's counsel. Plaintiff offered no testimony or other evidence from which any analysis could be conducted on any of the factors which must be considered under *Christie* and *Bittner*. Accordingly, the Court will not accept the verdict of the jury awarding attorney's fees to Plaintiff.

The Court finds that construing the evidence most strongly in favor of Plaintiff on this issue, reasonable minds could come to but one conclusion, and that conclusion is adverse to Plaintiff. Although Plaintiff may have been entitled to an award of attorney's fees based on the language of the contract, Plaintiff nevertheless had the burden of proving the reasonableness of the amount to be awarded, and failed to do so.

Because there was no evidence from which the jury could conclude that the attorney's fees sought by Plaintiff were reasonable, the Court grants Defendant's Motion for Judgment Notwithstanding the Verdict, and enters an award of zero dollars (\$0.00) for Plaintiff's attorney's fees herein.

II. PREJUDGMENT INTEREST

Pursuant to R.C. §1343.03(A), the prevailing party in an action on a contract claim is entitled to an award of prejudgment interest. *Zunshine v. Cott*, 2007 Ohio App. LEXIS 1351 (Franklin County March 29, 2007). However, it is incumbent on the Court to determine the date

on which prejudgment interest commences, and the rate at which such interest is to be applied. *Dwyer Elec. v. Confederated Builders*, 1998 Ohio App. LEXIS 5490 (Crawford County Oct. 28, 1998). The purpose of prejudgment interest is to make the aggrieved party whole, rather than punishing the party responsible for the injury, by compensating the aggrieved party for the lapse of time between the accrual of the claim and judgment. *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St. 3d 110 (1995).

In determining when prejudgment interest commences to run, the Court must look to the jury's verdict and answer the question, 'has the Plaintiff been fully compensated?' *Id.* at 116. In this case, Plaintiff included as a part of its demand for damages a thorough calculation of the interest it was entitled to as a result of Defendant's non-payment of the amounts Defendant was obligated to pay Plaintiff under the 2004 Purchase Agreement. The jury awarded \$313,562 in compensatory damages to Plaintiff, based on the evidence presented by Plaintiff. The Court finds that the jury's award included interest from the time of Defendant's breach to March 8, 2007, on the money that became due and payable under the 2004 Purchase Agreement. As such, the award of prejudgment interest as requested by Plaintiff would duplicate a portion of the Jury's award, and is not necessary to fully compensate Plaintiff. Pursuant to R.C. §1343.03(A), Plaintiff is entitled to an award from the Court of prejudgment interest, only for the time period after the breach, and prior to the Court's entry of judgment herein, which was not already covered by Plaintiff's interest calculation at trial, i.e. from March 9, 2007 to the date of filing of this decision. The rate to be applied in calculating such award is as provided in R.C. §5703.47, which for 2007 is 8% per annum, simple interest.

III. DEFENDANT'S MOTION FOR AN AWARD OF ATTORNEY'S FEES

The jury returned a verdict in favor of Defendant on Plaintiff's breach of contract claim relating to the 2000 Purchase Agreement. The 2000 Purchase Agreement contained a provision

stating that the non-breaching party in an action to enforce or interpret the 2000 Purchase Agreement is entitled to its reasonable attorney's fees. Defendant has moved the Court for an award of its attorney's fees, based on such verdict, and has requested a hearing to determine the reasonable amount thereof.

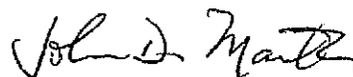
At trial, the Court determined that the question of whether an award of attorney's fees was to be made and if so the amount thereof, was to be submitted to the jury. For the same reasons that the Court has granted Defendant's Motion for Judgment Notwithstanding the Verdict relative to Plaintiff's attorney's fee award, the Court denies Defendant's request for fees. Defendant offered no evidence at trial from which a determination could be made of the amount or reasonableness of attorney's fees to be awarded to Defendant, and as such the Court is incapable of making such an award.

Based upon the foregoing, the Court hereby enters judgment in this matter as follows:

1. Judgment is GRANTED to PLAINTIFF in the amount of \$313,562 with respect to Defendant's breach of the 2004 Purchase Agreement.
2. Judgment is GRANTED to PLAINTIFF in the amount of \$0.00 for attorney's fees incurred in pursuing its claim for breach of the 2004 Purchase Agreement.
3. Judgment is GRANTED to DEFENDANT on Plaintiff's breach of contract claim relating to the 2000 Purchase Agreement. The Court hereby finds and orders that Defendant is not entitled to an award of attorney's fees with respect to the 2000 Purchase Agreement.
4. Judgment is GRANTED to DEFENDANT on Plaintiff's negligent misrepresentation, intentional misrepresentation, and fraud claims.
5. Plaintiff is GRANTED prejudgment interest on the jury's award of \$313,562 at 8% per annum from March 9, 2007 to the date this Decision and Entry is filed.
6. Costs paid.

This is a final appealable order, and there is no just cause for delay.

So Ordered, Adjudged, and Decreed.

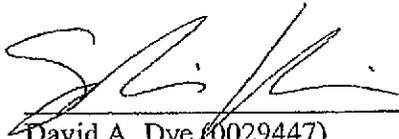


Judge John D. Martin
By Assignment

Submitted for approval, but not signed

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