

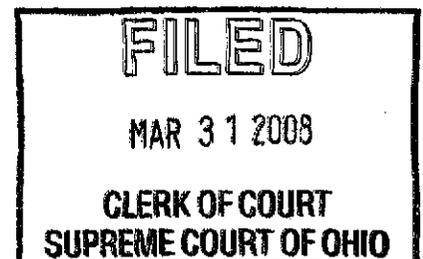
IN THE SUPREME COURT OF OHIO

Stonehenge Land Company, :
Appellant, : On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District
vs. : Supreme Court Case
No. 2008-0464
Beazer Homes Investments, LLC, :
Appellee. : MEMORANDUM IN RESPONSE

MEMORANDUM OF APPELLEE BEAZER HOMES INVESTMENTS, LLC
IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

David M. Scott (0068110) (Counsel of Record)
Nicole VanderDoes (0079736)
LUPER NEIDENTHAL & LOGAN
A Legal Professional Association
50 W. Broad Street, Suite 1200
Columbus, Ohio 43215-3374
Tel. (614) 229-4455
Fax (614) 345-4948
Counsel for Appellant
Stonehenge Land Company

David A. Dye (0029447) (Counsel of Record)
BAILEY CAVALIERI LLC
10 W. Broad Street, Suite 2100
Columbus, Ohio 43215-3455
Tel. (614) 229-3226
Fax (614) 221-0479
Counsel for Appellee
Beazer Homes Investments, LLC



**MEMORANDUM OF APPELLEE BEAZER HOMES
INVESTMENTS, LLC IN OPPOSITION TO JURISDICTION**

Now comes Appellee Beazer Homes Investments, LLC (“Beazer”), and by and through counsel herein and pursuant to Section 2 of SCt R III, respectfully tenders this, its Memorandum In Response, Opposing Appellant’s contention that this Court should accept jurisdiction of Stonehenge Land Company’s (“Stonehenge”) appeal from the decision of the Franklin County Court of Appeals.

I. THIS CASE PRESENTS NO SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR ARE THE ISSUES PRESENTED HEREIN OF PUBLIC OR GREAT GENERAL INTEREST

As explained herein after, this case presents no issues which give rise to jurisdiction in the Ohio Supreme Court. In support of its contention that constitutional questions and issues of public or great general interest are involved in this case, Appellant has presented arguments based recitations of the facts and underlying agreements which are inaccurate and incomplete.

- A. The Court of Appeals did not fail to give effect to the intent of the parties as shown by the terms used in their agreements. Rather, the Court of Appeals correctly read and applied the plain English meanings of the words used by the parties in their agreements to conclude that Appellant was not entitled to the remedies it sought;
- B. The Court of Appeals’ decision is clearly based on its reading of the entirety of the parties’ agreements, and the giving of effect to the parties intentions as evidenced thereby;
- C. No aspect of the decision of the Court of Appeals relies upon a construction of the underlying agreements that renders conditions therein meaningless. On the contrary, had the Court of Appeals rendered a decision in Appellant’s favor, it

would have been forced to disregard or interpret as meaningless the express liquidated damages provisions of the agreements;

- D. The Court of Appeals did not engage in any re-writing of the parties' agreements;
- E. The Court of Appeals did not substitute its judgment for the judgment of the jury; and
- F. The Court of Appeals did not raise any issues *sua sponte* on appeal.

All of the questions and issues presented herein turn on facts that are not disputed, and law that is not challenged either as to its content or application. Appellant simply disagrees with the results of the correct application of law to the facts of this case. Accordingly, no constitutional questions are presented herein, nor is this case of public or great general interest, and this Court should not accept jurisdiction.

II. APPELLANT'S PROPOSITIONS OF LAW, AS STATED IN ITS MEMORANDUM IN SUPPORT OF JURISDICTION, DO NOT LEAD TO THE CONCLUSION THAT THIS CASE INVOLVES MATTERS OF PUBLIC AND GREAT GENERAL INTEREST

- A. Appellant's 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.*

Appellee Beazer concurs in Appellant's Proposition of Law No. I. However, nothing in the actions of the lower courts causes such proposition to give rise to jurisdiction of this case by the Supreme Court. The Court of Appeals expressly agreed with Appellant's Proposition of Law No. I, which it stated in only slightly different terms at page 14 of its Opinion: "*A court should interpret a contract to give effect to the intention of the parties as manifested by the language of the contract.*" Citing *Sivolocki v. East Ohio Gs Co.* (1974), 38 Ohio St.2d 244, 67 O.O.2d 321, 313 N.E.2d 374. The Court then correctly applied Ohio law to give full effect to the intent of the parties, as

disclosed by the terms of the written agreements between them. Those terms clearly and specifically stated that the consequence of a breach by Beazer of any of Beazer's obligations under such agreements was the right of Stonehenge to retain the balance¹ of the deposit paid by Beazer to Stonehenge. The parties intended that if Beazer failed to perform any of its contractual obligations, Stonehenge as its SOLE REMEDY would be entitled to retain the balance of Beazer's deposit.

In its Memorandum in Support of Jurisdiction, Stonehenge misleadingly states that the Court of Appeals' decision left Stonehenge with "zero dollars" as its remedy for Beazer's breach. That assertion is inaccurate. Clear from the trial transcript, the parties' pleadings and the Court of Appeals' Opinion, Beazer deposited Seventeen Thousand Dollars (\$17,000.00) with Stonehenge, and received a One Thousand Dollar (\$1,000.00) credit toward the purchase price of each of SIXTEEN (16) lots purchased by Beazer. See, CA Opinion at page 5, ¶8. As such, there remained a One Thousand Dollar (\$1,000.00) balance of the Earnest Money Deposit to be retained by Stonehenge as the agreed liquidated damages flowing from Beazer's alleged breach. Appellant's 'after-the-fact' dissatisfaction with the terms of the bargain it negotiated, gives rise to no disputed general proposition of Ohio law.

The Court of Appeals simply read the plain English of the parties' agreements which made it clear that the parties intended that a pre-negotiated liquidated damages amount would be retained by Stonehenge following Beazer's decision to stop purchasing lots. Since clauses in contracts providing for reasonable liquidated damages are recognized in Ohio as valid and enforceable (*Samson Sales, Inc. v. Honeywell, Inc.*,

¹ It was clear from the Agreements that the amount of the deposit available to be retained by Stonehenge would be a diminishing amount as Beazer closed additional lots. No provision of the Agreements established a minimum amount that had to remain in the Earnest Money Deposit in order for it to continue to stand as the agreed liquidated damages amount.

(1984) 12 Ohio St. 3d 27, 465 N.E.2d 392), the Court correctly applied Ohio law and held that the trial court erred by submitting the question of Stonehenge's *actual* damages to the jury.

B. Appellant's Proposition of Law No. II: *A writing shall 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.*

Appellant's Proposition of Law No. II creates no issue giving rise to jurisdiction in the Supreme Court. As with its first Proposition, the fallacy in Appellant's contention resides not in the Proposition itself, but in Appellant's characterization of the facts and of the actions of the lower court. The record makes it abundantly clear that the Court of Appeals *DID* read the Agreements, in their entirety and as a whole, and gave effect to the parties' intentions as embodied in the language the parties employed therein. The Court of Appeals did not "fixate" on one part of the Agreement and fail to consider the broader context, as argued by Appellant. Rather, the Court of Appeals noted the clear language of the Agreement which *repeatedly* stated that if Beazer failed or refused to perform, Appellant's sole remedy was the right to retain the Earnest Money Deposit as liquidated damages.

Appellant's argument includes an acknowledgement that the Agreement provides for the retention by Appellant of Beazer's deposit as liquidated damages if Beazer failed or refused to perform its contractual obligations. However, Appellant argues that a failure to make future deposits was a breach that was somehow "carved out" of the general liquidated damages provision. Note that the Agreement did not *say* that the obligation to make future deposits was excepted from the provisions of the liquidated damages clause, it simply provided "...forfeiture of the Earnest Money shall be [Appellant'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 [Beazer].” 2004 Agreement, Section 2 para. 2, emphasis added. For Appellant to make its argument, Beazer’s obligation to make future deposits somehow had to be excluded from the “any covenants or agreements” language. Appellant then built a hypothetical argument, based on *its* interpretation of the Court’s decision, so that the language of the Agreement could be read circularly². The linguistic gymnastics employed by Appellant to get to such a point notwithstanding, the Court of Appeals thoroughly addressed Appellant’s argument and found that the language of the Agreement was “clear and unambiguous.” CA Opinion, at 16, 17. Since the contract language was clear and unambiguous, the Agreement had to be enforced as written. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096.

Simply put, Beazer elected to refuse to purchase additional lots and elected to refuse to make additional deposits, at a time when Appellant still held Earnest Money on deposit that was available to be retained as liquidated damages. Nothing in Appellant’s hypothetical description, or in the analysis of the Court of Appeals on this point, presents a question of public or great general interest – the Court correctly applied Ohio law.

C. Appellant’s 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.*

Appellant’s Proposition of Law No. III fails to establish jurisdiction in the Supreme Court for the same reasons Proposition of Law No. II fails – the Agreement as written is not ambiguous, and clearly states the intentions of the parties that the earnest money deposit stood as liquidated damages. Beazer does not need to repeat the analysis

² At page 6 of Appellant’s Memorandum, the interpretive re-write is stated as “Builder shall forfeit the earnest money for Section 2 if Builder fails to deposit the earnest money for Section 2.”

contained in subpart B above, but does point out that, again, part of the basis for Appellant's claim that the Agreement is ambiguous and/or nonsensical is Appellant's erroneous contention that it was left with "zero dollars" as its damages. The One Thousand Dollars (\$1,000.00) in Earnest Money Deposit that was in Appellant's possession and which was available to be retained by Appellant when Beazer refused to continue purchasing lots and making deposits was addressed by the Court of Appeals, when it wrote, "...the measure of Beazer's damages was readily ascertainable by reference to the language of the contract... the fact that the liquidated damages may be far less than Stonehenge's actual damages does not change this result." CA Opinion at 16. There was no "doubtful condition" in the parties' Agreement, and the Court of Appeals did not interpret anything in the Agreement that rendered other provisions thereof meaningless. It is clear that no question of public or great general interest is presented by the Court's Opinion.

D. Appellant's 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.*

Appellant makes no discernable argument in support of how its Proposition of Law No. IV gives rise to jurisdiction in the Supreme Court. Rather, Appellant asks an apparently rhetorical question [*"What specific contract provision was the Court of Appeals referring to?"* Appellant's Memorandum at 8] to suggest that the Court of Appeals "rewrote" the parties' Agreement to create a provision for the measuring of Appellant's damages flowing from Beazer's failure to make a future deposit. Reading the Court of Appeals' Opinion makes it extremely clear that the Court of Appeals read the plain language of the Agreement that says liquidated damages were Appellant's sole

remedy in the event of a breach by Beazer of any covenants or agreements to be performed by Beazer, to mean liquidate damages were Appellant's sole remedy in the event of a breach by Beazer of any of its covenants or agreements. The Court of Appeals did not rewrite the Agreement – it relied on the exact language the parties chose to employ in the Agreement, which stated that the earnest money deposit stood as liquidated damages for a failure or refusal by Beazer to perform any covenant or agreement to be performed by Beazer thereunder. A Court's interpretation of plain language to have its plain meaning raises no question of public or great general interest.

III. THIS CASE DOES NOT INVOLVE SUBSTANTIAL CONSTITUTIONAL QUESTIONS

A. Appellant's 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.*

The actions of the Court of Appeals did not deny Appellant its right to a trial by jury. The Court of Appeals held that it was the obligation and duty of the trial court (and error when the trial court failed) to find as a matter of law that Beazer was entitled to summary judgment on the liquidated damages issue. Parties do not have a right to a trial by jury of issues that present only questions of law. *Conley v. Shearer*, (1992) 64 Ohio St. 3d 284, 595 N.E.2d 862. See, also, R.C. 2311.04 and Civ.R. 56(C).

Appellant's contention that the Court of Appeals' analysis of the jury interrogatory raises a constitutional issue is also incorrect. Neither party ever argued that the 2000 Agreement had been nullified. Appellant sought to have the Court of Appeals disregard the entire body of evidence and argument presented to the jury on the question of whether and to what extent the execution of the 2004 Agreement superseded the 2000 Agreement. On appeal, Appellant urged the Court of Appeals to view the jury

interrogatory in a vacuum, and to apply the strictest definition possible of the term “nullify” in construing the interrogatory, even though neither party made the argument that the entire 2000 Agreement had been nullified. The Court of Appeals correctly considered the various meanings of the words used in the jury interrogatory, applied them to the issues actually presented to the jury, and correctly concluded that the jury’s response and verdict consistently support the argument posited by Beazer – the obligation to purchase lots in Phase 4, as contained in the 2000 Agreement, was superseded by the 2004 Agreement.

It merits mentioning that Appellant’s argument (regarding the question of the jury’s answer to the jury interrogatory dealing with the “nullification” of the 2000 Agreement) is a red herring. The question embodied in the entire issue was whether Beazer was in breach of an obligation to purchase lots in Phase 4 at Elmont Place. By finding that the 2000 Agreement had been nullified (in whole or in part), the jury answered that question in the negative: Beazer was not in breach. Appellant now objects to the decision of the Court of Appeals which held that the 2000 Agreement was only partially superseded, because Appellant contends that the Opinion preserved for Beazer the right to collect an award of its attorney’s fees based on other terms contained in the 2000 Agreement. That issue is now irrelevant, however, because based on the Court’s finding that Appellant was not entitled to any of the relief it sought in the filing of its Complaint (specific performance and/or actual damages), Beazer is the prevailing party in this case, and it is entitled to a recovery of its attorney’s fees under the 2004 Agreement, regardless of the Court of Appeals’ analysis of the 2000 Agreement. Thus Appellant’s entire argument regarding whether the jury determined that the 2000 Agreement was nullified, is moot.

The Court of Appeals' Opinion correctly dealt with the jury interrogatory issue, which in any event is now moot, and no substantial constitutional issue has been presented for the Supreme Court to address.

B. Appellant'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.*

Appellant argues that the Court of Appeals modified the jury interrogatories and/or jury verdict, *sua sponte*, based on the Court's determination that there was a defect in the jury instructions and/or in the jury interrogatories. Contrary to Appellant's argument, the Court of Appeals expressly harmonized the jury's general verdict with the jury interrogatory answers. The Court of Appeals did not modify the jury interrogatories; it merely examined the jury's answer to one interrogatory, in the context of the issues presented during trial. Stonehenge argued at trial that the 2000 Agreement survived the execution of the 2004 Agreement, and Beazer argued that the 2004 Agreement superseded the portion of the 2000 Agreement that required Beazer to purchase the Phase 4 lots. The jury made two findings of relevance to this issue. It answered the jury interrogatory that asked whether the 2000 Agreement had been nullified, with a "yes," and it answered the interrogatory that asked whether Beazer breached the 2000 Agreement with a "no." When the jury found that Beazer did not breach the 2000 Agreement, that answer was consistent with the jury's finding that the 2004 Agreement nullified a portion of the 2000 Agreement – exactly as argued by Beazer. If the 2000 Agreement had been entirely nullified (as now argued by Appellant), there would have been no 2000 Agreement remaining for the jury to find Beazer had not breached – the question would have been irrelevant. Clearly, neither party claimed or argued that the entire 2000 Agreement had been nullified, and had the Court of Appeals construed the

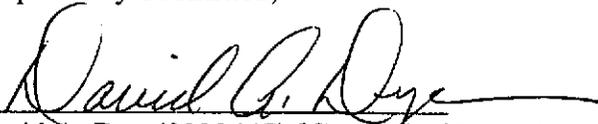
jury interrogatory to mean the entire 2000 Agreement had been nullified, it would have been failing to harmonize the verdict with the interrogatory answers.

Importantly, the Court of Appeals did not raise this issue *sua sponte* – both Appellant and Beazer briefed the issue and addressed it in oral argument to the Court. Beazer’s Assignment of Error Number Three was that the trial court erred by denying Beazer’s motion for an award of attorney’s fees to which it was entitled under the 2000 Agreement. Appellant and Beazer extensively addressed this Assignment of Error in the context of the question of whether the jury’s answer to the jury interrogatory resulted in a total nullification of the 2000 Agreement. Appellant had a meaningful opportunity to be heard on this issue, and in fact presented its case to the Court. Appellant’s disagreement with the conclusions drawn by the Court in its Opinion, does not give rise to a constitutional question.

CONCLUSION

For the reasons stated herein, this case does not involve any issues of public or great general interest for the Supreme Court to address, nor does it present any constitutional questions. Accordingly, the Supreme Court should refuse to accept jurisdiction of Appellant’s appeal.

Respectfully Submitted,



David A. Dye (0029447) [Counsel of Record]

BAILEY CAVALIERI LLC

10 W. Broad Street, Suite 2100

Columbus, Ohio 43215

(614) 229-3226

(614) 221-0479 fax

david.dye@baileycavalieri.com

Attorney for Appellee Beazer Homes Investments,
LLC

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Memorandum in Response was served upon the following by regular U.S. Mail, postage prepaid, this 31st day of March, 2008.

David M. Scott (0068110) [Counsel of Record]
Nicole VancerDoes (0079736)
LUPER NEIDENTHAL & LOGAN
50 W. Broad Street, Suite 1200
Columbus, Ohio 43215
Attorneys for Appellant, Stonehenge Land Company, LLC


David A. Dye, Esq.