

ORIGINAL

IN THE SUPREME COURT OF OHIO

McWane, Inc.,

Appellant,

vs.

Fields Excavating, Inc.,

Appellee.

Case No. _____

09-2303

On Appeal from the Clermont County
Court of Appeals, Twelfth Appellate
District

Court of Appeals
Case No. CA 2008-12-114

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT MCWANE, INC.

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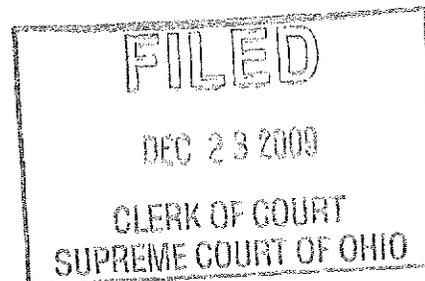


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**EXPLANATION OF WHY THIS APPEAL IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This Court has recognized Ohio's lack of established case law involving commercial cases. In an effort to address this problem, this Court established "commercial" courts in certain counties during the summer of 2008. The mission of the commercial courts is to create an accessible body of case law so that businesses and attorneys can determine the likely outcome of their cases. In turn, the hope is that predictability will increase economic development across the State of Ohio. The theory being that businesses who can predict how Ohio courts will interpret legal issues are more likely to relocate to Ohio much in the same way large businesses incorporate in Delaware. Although this case did not originate in a commercial court, the case provides this Court—for the first time—an opportunity to explain with clarity important commercial law doctrines.

Because nearly all businesses who sell goods in the State of Ohio incorporate no-oral-modification clauses and anti-waiver provisions into their contracts, this appeal presents two issues crucial to Ohio commercial law: (1) what constitutes a waiver of a no-oral-modification-clause; and (2) what effect does a valid anti-waiver provision have on an alleged waiver of rights. Ohio law has not directly addressed either of these issues. Answering these issues will give businesses the predictability that this Court hopes to create.

The Twelfth District Court of Appeals decision has completely eviscerated the meaning of no-oral-modification clauses and anti-waiver provisions in Ohio. Specifically, it has misinterpreted the contract between McWane, Inc. ("Clow") and Fields Excavating, Inc. ("Fields Excavating"). If left unchecked, this decision will have a

negative impact on the commercial law of one of Ohio's fastest economically developing areas. As this Court is aware, three of the counties which make up the Twelfth District—Butler, Warren and Clermont—are areas that have shown increasing economic growth during an economic downturn unlike any faced for generations. Businesses located not only in these counties—but across the state—need clarity regarding the effect courts will give similar clauses. Instead of clarifying Ohio's commercial law, the Court of Appeals decision has created more questions.

The core problem with deciding legal issues involving no-oral-modification clauses and anti-waiver provisions in Ohio is the overall lack of precedent interpreting R.C. 1302.12. Indeed, the trial court stated that “the plaintiff has not cited any case which holds that a written contract that requires modifications to be in writing may be validly modified by an oral agreement and this court **has found no such case law in its own research.**” See Exhibit A at p. 16.

In addition, when searching for contract principles underlying no-oral-modification clauses, the Court of Appeals was forced to cite a New York case authored by Justice Cardozo in 1919. This case is no longer good law. Even worse, when attempting to show Ohio is consistently critical of no-oral-modification clauses, the Court of Appeals failed to find a single case citation. Rather, it cited a Villanova Law Review article from 1987 to support its rationale that “the trial court failed to recognize the extensive Ohio authority relating to no-oral-modification clauses.” 2009-Ohio-5925, ¶ 18.

As a result of the non-existent case law, the Court of Appeals avoided the no-oral-modification clause issue. It held that “Ohio Courts consistently treat the issue of whether a no-oral-modification clause is waived as a question for the trier of fact.”

2009-Ohio-5925, ¶ 21. This analysis completely misses the point the trial court correctly recognized. The contract that governed the parties' actions required all modifications to be in writing. The trial court properly recognized that "there is no argument in the case at bar that there was a written waiver of any term of the contract, and, as a result, there has been no valid waiver of any term of the credit agreement." In other words, the trial court gave effect to the four corners of the parties' contractual agreement. The trial court correctly answered the only relevant question: does a written waiver of any term of the contract exist? The trial court found no such written waiver.

Similarly, the Court of Appeals also misinterpreted the contract's anti-waiver provision. Again, the main problem is the overall lack of case law interpreting anti-waiver provisions in Ohio. Indeed, the case most on-point for upholding anti-waiver provisions, *Allonas v. Royer* (1990), 67 Ohio App.3d 293, involved secured transaction law and floor plan agreements. Not a single Ohio case exists that interprets an anti-waiver provision within the sale of goods context. Nevertheless, the *Allonas* case should have been instructive on the Court of Appeals.

In *Allonas*, the anti-waiver provision upheld by the court stated that "waiver of **any provisions** herein contained shall not be binding upon * * * Whirlpool." *Allonas* 67 Ohio App.3d at 300 (emphasis added). Here, the similar Clow anti-waiver provision stated "[n]o delay or failure by Seller to exercise **any right of remedy** under these Terms and Conditions shall be construed to be a waiver thereof." 2009-Ohio-5925, ¶ 32 (emphasis added). The language of Clow's anti-waiver provision is clear: whatever right or remedy it may have previously accepted by Fields Excavating did not waive any of its rights under the contract. Thus, Clow never waived the requirement that all modifications to the contract must be in writing.

The Court of Appeals' decision could ultimately affect every commercial transaction in Ohio. Because of the Court of Appeals' error, the freedom to contract, a concept that Ohio courts have held to be "fundamental to our society," has been jeopardized. *Royal Indem. Co. v. Baker Protective Services, Inc.* (1986), 33 Ohio App.3d 184, 186, 515 N.E.2d 5. No-oral-modification clauses and anti-waiver provisions are commonly found in nearly every contract for the sale of goods. Every drafter who has incorporated these clauses is now uncertain of whether their contracts, as drafted, are valid and enforceable. Equally important is the matter of determining what language, if any, will make such clauses valid and enforceable. If predictability is the ultimate goal of Ohio commercial law, the Court of Appeals' decision stands in stark contrast to that goal. This Court, however, has the opportunity to speak with clarity for all commercial entities in Ohio.

STATEMENT OF THE CASE AND FACTS

Appellant Clow Water Systems Company is a subsidiary of Appellant, McWane, Inc. Appellee Fields Excavating specializes in public utility projects, primarily involving public sewer installation. During the early 1990s, Clow began supplying ductile iron pipe to Fields Excavating for use in its public utility projects. To memorialize their relationship, Clow and Fields Excavating entered into a Credit Agreement (the "Contract") on April 31, 1998. The Contract governed all of Fields Excavating's subsequent purchases from Clow. For each subsequent purchase made by Fields Excavating, the terms contained in the Contract were reaffirmed on each invoice issued by Clow. The Contract included the following relevant provisions:

- An integration clause (no-oral modification clause), providing that the "contract constitutes the entire agreement between parties with respect to the goods, and this Agreement may not be modified, amended or waived in any way except in writing

signed by an authorized representative of seller. No representation, promise or term no set forth herein has been nor may be relied upon by Buyer.”

- An anti-waiver provision, stating that “[n]o delay or failure by seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof.”

Under the terms of the Contract, the parties enjoyed a strong working relationship for many years. Recently, however, problems occurred on two specific jobs. These jobs are known as the Scioto Darby 24” job and the Clermont County job. On each job, Fields Excavating alleged that it encountered problems with pipe supplied by Clow. Specifically, Fields Excavating alleged that the pipe was “out of round,” leading to increased installation time and resulting downtime. Moreover, Fields Excavating alleged that Clow’s salespeople made oral assurances that any problems with the pipe and downtime would be “taken care of.” Fields Excavating also claimed that Clow provided “assurances” that it would credit Fields Excavating for labor and equipment, as it believed that Clow had done in the past.

After Clow informed Fields Excavating that its remedies were limited to Clow’s warranty by the parties’ Contract, Fields Excavating filed this action on June 20, 2007. In its suit, Fields Excavating alleged the following claims: (1) breach of contract; (2) breach of implied warranty of merchantability; (3) breach of implied warranty of fitness for a particular purpose; (4) bad faith breach of contract; and (5) fraud. Clow subsequently filed an answer and counterclaim against Fields Excavating and a third-party complaint against Fields Excavating’s surety, International Fidelity Insurance Company (“International Fidelity”), asserting: (1) breach of contract; (2) unjust enrichment; and (3) action on account.

Clow moved for summary judgment on both Fields Excavating's claims and its own counterclaim. After hearing oral argument on July 21, 2008, the trial court issued findings of fact and conclusions of law granting summary judgment in favor of Clow on (1) Fields Excavating's claims against Clow, and (2) Clow's counterclaim. In its decision, the trial court correctly held that the Credit Agreement—which controlled the parties' transactions—had not been modified by any alleged oral assurances because of the integration clause (“no-oral-modification clause”). The trial court's findings of fact and conclusions of law regarding its summary judgment decision was memorialized in a final judgment entry issued on December 9, 2008. The trial court entered judgment for Clow on its breach of contract claims and denied judgment to Fields Excavating on all of its claims. It was from this final judgment entry that Fields Excavating originally appealed.

Despite explicit language to the contrary, the Court of Appeals incorrectly held that the no-oral-modification clause could be modified or rescinded without the required written authorization of Clow. The Court of Appeals also completely disregarded the language contained in the Contract's valid anti-waiver provision. Without any statutory or common law support, it narrowly construed the anti-waiver provision as applying only in those instances where the seller had committed a breach. Fields Excavating did not appeal judgment in favor of Clow on its breach of contract claim, nor did it appeal the judgment denying its breach of implied warranty claim, claim for bad faith breach of contract or fraud. Accordingly, the Court of Appeals' decision was limited to Fields Excavating's claim for breach of contract.

Clow appeals from the decision overturning summary judgment as to Fields Excavating's breach of contract claim. The Court of Appeals' ruling that the no-oral-

modification clause may be modified without written authorization and the valid anti-waiver provision does not apply is not merely wrong: by ignoring the trial court's decision and the plain language of the Contract, the decision below calls to question the validity of such clauses for all commercial entities in Ohio.

ARGUMENT

Proposition of Law No. 1:

When a contract includes a no-oral-modification clause that limits the method for modifying or rescinding the contract or its provisions to written statements with signed authorization, no other action or oral statement may be relied upon as a valid modification or rescission.

Ohio law is clear on the authority of no-oral-modification clauses. R.C. 1302.12(B). Ohio legislators codified UCC 2-209 with R.C. 1302.12(B), which states in part that “a signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded.” *Id.* That is to say, if parties have agreed that only written modifications shall be recognized as valid, then no other action shall be construed as a modification or rescission.

The case law is consistent with this rule. See *Watkins & Son Pet Supplies v. The Iams Co.*, 254 F.3d 607, 613-14 (6th Cir. 2001); *Smaldino v. Larsick* (1993), 90 Ohio App.3d 691, 698, 630 N.E.2d 408 (11th Dist.); *Software Clearing House, Inc. v. Intrak, Inc.* (1990) 66 Ohio App.3d 163, 172, 583 N.E.2d 1056 (1st Dist.). In *Watkins*, the appellant, a pet food distributor, had a contract with a pet food manufacturer, the appellee. 90 Ohio App.3d at 609. The contract contained a provision that stated: “no change, modification or amendment of any provision of this Agreement will be binding unless made in writing and signed by the parties hereto.” *Id.* at 610. The appellant argued that the appellee made statements after the contract was formed that altered the

contract's terms. *Id.* at 613. The court, however, determined that the language of the contract and R.C. 1302.12(B) were authoritative and that appellee's subsequent statements had no effect on the contract's terms. *Id.* at 613-14.

Similarly, as the trial court correctly noted below, the court in *Smaldino* also accurately states the general rule in Ohio regarding written modifications. 90 Ohio App.3d at 698. In *Smaldino*, the court held that "subsequent acts and agreements may modify the terms of a contract, and, unless otherwise specified, neither consideration nor a writing is necessary." *Id.* (emphasis added). The court reached the same conclusion in *Intrak*. 66 Ohio App.3d at 172. In that case, the court specifically noted that the parties' contract did not contain any "requirement that subsequent modifications be in writing," and relied upon that fact in enforcing the subsequent oral agreement. *Id.* at 172, n. 3.

The immediate case, like *Watkins*, involves a contract that includes a no-oral-modification clause. Specifically, the Contract between Clow and Fields Excavating states that the "terms and conditions may not be amended, modified, terminated or revoked accept (sic) by a written document signed by an authorized representative of [Clow]." According to the Ohio Revised Code and relevant case law, the presence of this language means that the Contract could not be modified or rescinded unless Fields Excavating presented Clow with a written modification and Clow subsequently authorized that modification. Fields Excavating never presented Clow with a written modification.

The Twelfth District Court of Appeals disregarded these facts. 2009-Ohio-5925, ¶ 16. Rather than observing the authority of Ohio's statutes and courts, the appellate court was persuaded by a ninety year old case from New York that is no longer good law.

Id.; see *Beatty v. Guggenheim Exploration Co.* (1919), 225 N.Y. 380. As a result, the court determined:

Regardless of the clause, it is the parties' subsequent agreement that has legal effect, and **if the parties go on to make an oral modification after they agreed on a no-oral modification clause, then their subsequent agreement must be taken as itself modifying**, or at least waiving, the no-oral-modification clause.

2009-Ohio-5925, ¶ 17 (emphasis added). The Court of Appeals' reasoning in this case is in direct conflict with R.C. 1302.12(B), with *Watkins*, and with the principles of law established in *Smaldino* and *Intrak*. See *Watkins*, 254 F.3d at 609; *Smaldino*, 90 Ohio App.3d at 698; *Intrak*, 66 Ohio App.3d at 172. No-oral-modification clauses cannot, as the Twelfth District suggested, be modified by an oral statement, and to hold otherwise is to strip the parties of their freedom to contract.

As an afterthought, the appellate court indicated that while it believed the no-oral-modification clause had been orally modified, reaching such a conclusion was unnecessary for the clause had been waived. 2009-Ohio-5925, ¶ 17. Ohio law, however, is silent as to what constitutes a valid waiver. In light of this, the anti-waiver provision in the immediate case is of particular importance and should have precluded the appellate court from determining that the no-oral-modification clause had been waived.

Proposition of Law No. 2:

When a contract includes an anti-waiver provision that explicitly rejects the possibility of a party's actions being interpreted as an implied waiver of the contract or its terms, the anti-waiver provision will preclude the waiver exception contemplated in R.C. 1302.12(D).

According to R.C. 1302.12(D), "[a]lthough an attempt at modification or rescission does not satisfy the requirements of division (B) or (C) of this section, it can operate as a waiver." R.C. 1302.12(D). Nevertheless, the Contract in the current case

included a provision that unambiguously established the parties' agreement that "[n]o delay or failure by Seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof." This language should have precluded the appellate court's application of R.C. 1302.12(D).

Instead, the Court of Appeals held that a waiver had occurred and narrowly construed the credit agreement's anti-waiver provision, focusing on a single clause in the provision and distinguishing the relevant case law. *See Allonas v. Royer* (1990), 67 Ohio App.3d 293, 300, 586 N.E.2d 1169 (3d Dist.). In *Allonas*, the plaintiff brought a promissory estoppel claim, arguing that the terms of a sales agreement had been waived by the defendant's oral statement. *Id.* at 298. The court, however, noted a provision of the contract that said "waiver of any provisions herein contained shall not be binding upon [the defendant]." *Id.* at 300. Relying on this language, the court in *Allonas* held that waiver could not have occurred and that the terms of the contract should be enforced. *Id.*

In this case, the Court of Appeals incorrectly focused on the second sentence of the anti-waiver provision in order to distinguish it from the clause in *Allonas*. 2009-Ohio-5925, ¶ 34. The second sentence states: "Waiver by Seller of any breach shall be limited to the specific breach so waived and shall not be construed as a waiver of any subsequent breach." This merely indicates that if Clow should decide to waive a breach of the contract, that waiver will not have any lasting effect on future breaches. The appellate court relied upon this sentence, though, erroneously inflating its scope so that the entire anti-waiver provision seemed irrelevant without a breach by Fields Excavating. *Id.* By taking such an expansive reading of the second sentence, the appellate court needlessly limited the application of the anti-waiver provision.

Had the Court of Appeals not ignored the first sentence, it would have realized that the anti-waiver provision in the immediate case is almost identical to the provision relied upon in *Allonas*. The first sentence states: “No delay or failure by Seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof.” It explicitly indicates that “any right or remedy” articulated in the contract is protected against waiver. This concept is identical to “the general anti-waiver clause in *Allonas* [that applied] to all provisions in the contract.” *Id.* Accordingly, the appellate court should not have distinguished *Allonas* at all, but should have recognized the holding to be directly on point and enforced the anti-waiver clause. Furthermore, because Fields Excavating did not have to breach the contract in order for the anti-waiver provision to apply, the appellate court should have only considered whether any right or remedy prescribed in the Contract was at issue.

The no-oral-modification clause clearly created a right that was at issue. Clow reserved the right to have all potential modifications presented in writing for its authorization. Its failure to exercise this right on a few occasions had no impact on the right’s ultimate enforceability. That is to say, simply because Clow elected to forego the immediate imposition of its rights, it does not mean that Clow is forever precluded from enforcing those rights at later time. In fact, the anti-waiver provision expressly ensures he is well within his right to do just that. As such, the Court of Appeals should have found that Clow could not have waived the no-oral-modification clause.

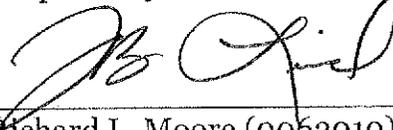
Instead, the appellate court determined that “the anti-waiver clause has no effect in the case at bar and does not prevent waiver of the no-oral-modification clause.” 2009-Ohio-5925, ¶ 36. This finding completely eviscerates the purpose of the anti-waiver provision and jeopardizes the freedom to contract. Because Ohio law is silent on

the issue of anti-waiver provisions trumping R.C. 1302.12(D), and because the Court of Appeals incorrectly limited the scope of the anti-waiver clause in this case, the Supreme Court of Ohio should assume jurisdiction of this case.

CONCLUSION

For the reasons stated above, this case involves matters of public and great general interest. The appellant requests that this Court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,



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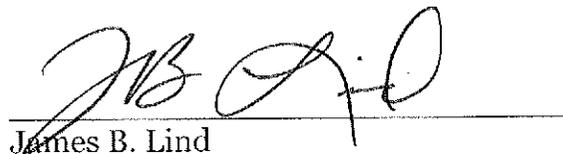
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I certify that a copy of this Memorandum in Support of Jurisdiction of Appellant, McWane, Inc. was sent by ordinary U.S. mail to counsel for appellees, Robert C. Delawder, Esq., and Philip J. Heald, Esq., Delawder Heald & Co. 120 So. 3rd St. Suite 200, Ironton, Ohio 45638 on December 23rd, 2009.



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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FIELDS EXCAVATING, INC. :
Plaintiff : **CASE NO. 2007 CVH 01098**
vs. : **Judge McBride**
MCWANE, INC. : **DECISION/ENTRY**
Defendant :

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This cause is before the court for consideration of a motion for summary
judgment filed by the defendant McWane, Inc.

The court scheduled and held a hearing on the motion on July 21, 2008.
At the conclusion of the hearing, the court took the issues raised by the motion
under advisement.

Upon consideration of the motion for summary judgment, the record of the
proceeding, the oral and written arguments of counsel, the evidence presented

for the court's consideration, and the applicable law, the court now renders this written decision.

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to Judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."¹

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.² Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.³

¹ Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

² *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Vlock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

³ *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

“As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”⁴

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present “a sufficient disagreement to require submission to a jury” or is it “so one-sided that the party must prevail as a matter of law[?]”⁵ “The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that can be resolved only by a finder of fact because they may reasonably resolved in favor of either party.”⁶

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.⁷ This burden requires the moving party to “specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.”⁸

⁴ *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

⁵ *Id.* at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

⁶ *Id.* at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.

⁷ *AAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

⁸ *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.⁹ The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.¹⁰ Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.¹¹

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.¹² However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.¹³ The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.¹⁴ Instead, this burden requires the nonmoving party to "produce evidence on any

⁹ *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.

issue for which that (the nonmoving) party bears the burden of production at trial."¹⁵

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.¹⁶ Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.¹⁷

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."¹⁸

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.¹⁹

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to

¹⁵ *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.

¹⁶ *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.

¹⁷ Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.

¹⁸ *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzier* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.

¹⁹ *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.²⁰ Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.²¹ Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.²²

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of

²⁰ *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

²¹ *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

²² *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.

fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.²³

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.²⁴

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiff Fields Excavating, Inc. (hereinafter "Fields Excavating") contracts to perform water, sewer, and storm line installation for various public utilities and public works projects.²⁵ Fields Excavating has used Clow Water Supply (hereinafter "Clow"), which is owned by the defendant McWane, Inc. (hereinafter "McWane"), as its pipe supplier since approximately 1992.²⁶

In 1998, Jeffrey Fields, as the president and owner of Fields Excavating, signed a credit application with Clow.²⁷ Since that document was executed, Fields Excavating has purchased all of its materials from Clow on that account.²⁸

²³ *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.

²⁴ Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

²⁵ Deposition of Jeffrey S. Fields at pg. 7 and Deposition of Michael Staton at pg 11.

²⁶ Fields Depo. at pgs. 10-11.

²⁷ *Id.* at pg. 11-12.

²⁸ *Id.* at pg. 12.

The credit agreement is a two-sided document and the front of the agreement states in pertinent part:

“ * * * Our signature also constitutes acceptance of all of Clow Water Systems Company's Terms and Conditions of Sale printed on the reverse side of this application, for all current and future orders and sales. These terms and conditions may not be amended, modified, terminated or revoked except (sic) by a written document signed by an authorized representative of Clow Water Systems Company.”²⁹

The back of the credit agreement states in pertinent part as follows:

“1. ENTIRE AGREEMENT. Clow Water Systems Company (the “Seller”), a division of McWane, Inc., agrees to sell the goods covered herein (the “Goods”) to Buyer on the following terms and conditions of sale (the “Terms and Conditions”) which supersede any other or inconsistent terms of Buyer. This contract constitutes the entire agreement between parties with respect to the Goods, and this Agreement may not be modified, amended or waived in any way except in writing signed by an authorized representative of Seller. No representation, promise or term not set forth herein has been nor may be relied upon by Buyer. No references by Seller to Buyer's specifications and similar requirements are only to describe the products and work covered hereby and no warranties or other terms therein shall have any force or effect.

*** * ***

4. TERMS OF PAYMENT. Terms to Buyers whose credit has been approved in writing by Seller are net cash 30 days after date of invoice, unless otherwise agreed in writing by Seller. * * * If Buyer fails to make payment for the Goods when due, Buyer's account shall be deemed delinquent and Buyer shall be liable to Seller for a service charge of eighteen percent (18%) per annum or the maximum allowed by law,

²⁹ Affidavit of Bernie Kenney, Exhibit 1.

whichever is greater, on any unpaid amount. Buyer shall be liable to Seller for all costs and expenses of collection, including court costs and reasonable attorney's fees.

* * *

9. WARRANTY AND LIMITATION OF LIABILITIES AND BUYER'S REMEDIES. Seller warrants that the Goods delivered hereunder shall be of the kind described in the within agreement and free from defects and material workmanship under conditions of normal use. * * * Any claim by Buyer with reference to the Goods for any cause shall be deemed waived by Buyer unless submitted to Seller in writing within ten (10) days from the date Buyer discovered, or should have discovered, any claimed breach. Buyer shall give Seller an opportunity to investigate.

Provided that Seller is furnished with prompt notice by Buyer of any defect and an opportunity to inspect the alleged defect as provided herein, Seller shall, and in its sole discretion, either: (i) repair the defective or non-conforming Goods; (ii) replace the nonconforming Goods, or part thereof, which are sent to Seller by Buyer within sixty days after receipt of the Goods at Buyer's plant or storage facilities, or (iii) if Seller is unable or chooses not to repair or replace, return the purchase price that has been paid and cancel any obligation to pay unpaid portions of the purchase price of nonconforming Goods. In no event shall any obligation to pay or refund exceed the purchase price actually paid. * * * The exclusive remedy of Buyer and the sole liability of Seller, for any loss, damage, injury or expense of any kind arising from the manufacture, delivery, sale, installation, use or shipment of the Goods and whether based on contract, warranty, tort or any other basis of recovery whatsoever shall be at the election of Seller, the remedies described above. The foregoing is intended as a complete allocation of the risks between the parties and Buyer understands that it will not be able to recover consequential damages even though it may suffer such damages in substantial amounts. Because this Agreement and the price paid reflect such allocation, this limitation will not have failed of its essential purpose even if it

operates to bar recovery for such consequential damages.

THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES WHETHER EXPRESS OR IMPLIED BY LAW. THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT, WHETHER AS A RESULT OF BREACH OF CONTRACT, WARRANTY, TORT (EXCLUDING NEGLIGENCE) OR STRICT LIABILITY SHALL SELLER BE LIABLE FOR ANY PUNITIVE, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFIT, LOSS OF USE OF THE GOODS OR OTHER PROPERTY EQUIPMENT, DAMAGE TO OTHER PROPERTY, COST OF CAPITAL, COST OF SUBSTITUTE GOODS, DOWNTIME, OR THE CLAIMS OF BUYER'S CUSTOMERS FOR ANY OF THE AFORESAID DAMAGES. SELLER SHALL NOT BE LIABLE FOR AND BUYER AGREES TO INDEMNIFY SELLER FOR ALL PERSONAL INJURY, PROPERTY DAMAGE OR OTHER LIABILITY RESULTING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF BUYER.

* * *

13. WAIVER. No delay or failure by Seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof. Waiver by Seller of any breach shall be limited to the specific breach so waived and shall not be construed as a waiver of any subsequent breach.³⁰

Jeffrey Fields acknowledges that he reviewed most of the Terms and Conditions contained on the reverse side of the credit agreement.³¹

In 2005, Fields Excavating began to experience problems with the pipe supplied by Clow.³² For the plaintiff's "Baltimore Lancaster Road Project," there

³⁰ Id.

³¹ Fields Depo. at pg. 12.

were a few problems, including a bad fitting.³³ Jeffrey Fields stated that he sent a bill to Clow for some back charges attributable to these problems, and Clow paid that bill after some negotiation.³⁴ On the "Social Road project," the plaintiff experienced problems with the Clow pipe being "out-of-round."³⁵ The plaintiff also submitted a bill to Clow for some charges incurred and, after negotiation, Clow paid a portion of that bill.³⁶

Fields was assured by Clow representatives that he would be taken care of should he continue to experience problems with the pipe.³⁷ Clow paid for the plaintiff's labor and equipment costs in addition to the replacement cost of the pipe for these claims submitted by Fields Excavating.³⁸

The three projects at issue in the present case are the "Scioto-Darby 30-inch project," "Scioto-Darby 24-inch project," and the "Clermont County project."³⁹ Fields met with Clow representatives and told them about the problems they experienced with Clow 24-inch pipe on other projects.⁴⁰ Those Clow representatives assured Fields that the problems were taken care of.⁴¹ While Fields had considered ceasing his business relationship with Clow due to the past problems and even solicited bids from at least one other supplier for the first Scioto-Darby job, he chose to continue to use Clow for those three projects with

³² Id. at pgs. 12-13.

³³ Id. at pg. 13.

³⁴ Id. at pgs. 13-14.

³⁵ Id. at 14-15.

³⁶ Id. at pg. 19-20.

³⁷ Id. at pgs. 23-24.

³⁸ Id. at pg. 25 and 49.

³⁹ Id. at pg. 44.

⁴⁰ Id.

⁴¹ Id.

the understanding that he would again be compensated for time and materials should he experience any further problems.⁴²

While the 30-inch pipe was used mostly without incident, the plaintiff continued to have problems with the 24-inch pipe going "out-of-round" on the Clermont County job and the two Scioto-Darby jobs.⁴³ Fields stated that as soon as he would have been informed about problems with the pipe by a superintendent or project manager, he would have called his contact, Robin, at Clow.⁴⁴ Fields testified that Robin would tell him to just keep track of his time or sometimes a Clow representative would come out to the job site.⁴⁵

The plaintiff submitted claims for all three of these jobs to Clow.⁴⁶ Michael Staton, a project manager for Fields Excavating, prepared these claims using information from the foreman on the job regarding the time spent in excess of the usual time spent on a fitting.⁴⁷ Staton would use the employees' actual wages, benefits paid, and federal taxes to determine the labor claims in addition to equipment costs.⁴⁸ While Clow paid the plaintiff for its submitted bill on the Scioto-Darby 24-inch project, it did not pay the submitted claims for the other two projects, including follow-up repairs on the Clermont County project.⁴⁹

Fields Excavating filed the present action bringing claims for (1) breach of contract; (2) breach of implied warranty of merchantability; (3) breach of implied

⁴² Id. at pgs. 45-46 and 63-65.

⁴³ Id. at pg. 46 and 70.

⁴⁴ Id. at pg. 73.

⁴⁵ Id. at pgs. 73-74.

⁴⁶ Staton Depo. at pgs. 22-23.

⁴⁷ Id. at pg. 23.

⁴⁸ Id. at pgs. 27-28.

⁴⁹ Id. at pg. 53, 75, 102, and 173 and Fields Depo. at pgs. 98, 110-114.

warranty of fitness for a particular purpose; (4) bad faith breach of contract; and (5) fraud. Fields is seeking compensation for damages allegedly incurred on the Clermont County and Scioto-Darby 30-inch projects.

This case was set to be tried before a jury on June 16, 2008. The defendant filed a motion for summary judgment on June 6th requesting summary judgment on all five of the plaintiff's claims as well as on its counterclaim for breach of contract for unpaid bills. Despite the fact that the motion was filed out of time and the fact that the defendant failed to request leave to file the motion, this court agreed on the morning of trial to vacate the trial date and set the matter for hearing on the motion for summary judgment. .

LEGAL ANALYSIS

I. MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIMS

(A) BREACH OF CONTRACT

“ * * * [T]he elements for a breach of contract are * * * (1) that a contract existed, (2) that the plaintiff fulfilled his obligations, (3) that the defendant failed to fulfill his obligations, and (4) that damages resulted from this failure.”⁵⁰

⁵⁰ *Farmers Market Drive-In Shopping Ctrs. v. Magana* (May 31, 2007), 10th Dist. No. 06AP-532, 2007-Ohio-2653, at ¶ 31, quoting *Spano Brothers Constr. Co., Inc. v. Adolph Johnson & Son Co.* (March 28, 2007), 9th Dist. No. 23405, 2007-Ohio-1427, at ¶ 12.

"A contract is an 'agreement or obligation, whether verbal or written, whereby one party becomes bound to another to pay a sum of money or to perform or omit to do a certain act.'"⁵¹ "In other words, an express contract connotes an exchange of promises where the parties have communicated in some manner the terms to which they agree to be bound."⁵² "In order to declare the existence of a contract, the parties to the contract must consent to its terms, there must be a meeting of the minds of both parties, and the contract must be definite and certain."⁵³

"The essential elements of a contract include an offer, acceptance, contractual capacity, consideration, a manifestation of mutual assent, and legality of the object of the contract and of the consideration. A meeting of the minds is an essential term of the contract and a requirement to enforce the contract."⁵⁴

In the case at bar, the evidence demonstrates the existence of an express written contract between the parties which was executed in 1998. The plaintiff first argues that this contract was cancelled when "Jeff Fields effectively terminated his relationship with the Defendant when he informed them that he would be purchasing pipe for the two jobs in question from another supplier."⁵⁵ The plaintiff relies primarily on the following testimony of Michael Staton: "We

⁵¹ *Choate v. Tranet, Inc.* (Sept. 5, 2006), 12th Dist. No. CA2005-09-105, 2006-Ohio-4565, at ¶ 67, quoting *Terex Corp. v. Grim Welding Co* (Ohio App. 9th Dist., 1989), 58 Ohio App.3d 80, 82, 568 N.E.2d 739.

⁵² *Id.*

⁵³ *Id.*, quoting *McSweeney v. Jackson* (Ohio App. 4th Dist., 1996), 117 Ohio App.3d 623, 631, 691 N.E.2d 303.

⁵⁴ *Ross v. Individual Assur. Co.* (March 29, 2007), 5th Dist. No. CT2006-0044, 2007-Ohio-1577, at ¶ 31, citing *Kostelnik v. Helper* (2002), 96 Ohio St.3d 1, 770 N.E.2d 58, at ¶ 16.

⁵⁵ Plaintiff's Response at pg. 5.

were informed, he – Mr. Fields has already informed – or had informed Clow in a meeting we had that he was not going to use them on Scioto Darby Creek or on Social – or on Clermont County, RPM pipe because of the 24-inch problems.”⁶⁶ However, the contractual language requires any termination of the contract to be in writing. Therefore, verbally informing Clow in a meeting of an intention not to use the company for a future job did not terminate the credit agreement contract between the parties.

Furthermore, as noted above, Jeffrey Fields stated that he considered using a different supplier but he never stated that he terminated the agreement with Clow. Again, the contract expressly requires that its termination be in writing and there is no allegation that any such writing exists. Therefore, the credit agreement between the parties remains in full effect.

The plaintiff next argues that, even if the credit agreement is binding on the parties, it was modified by subsequent oral agreements. Specifically, Fields Excavating states that the course of performance whereby Clow agreed to pay for costs incurred by the plaintiff beyond simply repair or replacement constitutes an enforceable oral modification to the written contract.

The credit agreement in the case at bar contains a clause which plainly states that the “Agreement may not be modified, amended or waived in any way except in writing signed by an authorized representative of [Clow].” R.C. 1302.12(B) allows such a limitation and states that “[a] signed agreement which

⁶⁶ Staton Depo. at pg. 41.

excludes modification or rescissions except by a signed writing cannot be otherwise modified or rescinded * * *."

An examination of the course of performance of a contract between the parties is allowed in Ohio law by R.C. 1302.11(A). However, that statute states that course of performance is relevant to determine the meaning of the agreement between the parties. In the case at bar, there is no ambiguity or lack of clarity in the written agreement between the parties which would require the court to examine the course of performance between the parties in order to decipher the meaning of the contract. Additionally, while R.C. 1302.11(C) states that the "course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance," that statute also clearly limits its application to being "subject to the provisions of [R.C.] section 1302.12."

The plaintiff has cited to no statutory or common law which contradicts the rule of law discussed above that a contract which expressly requires modifications to be in writing cannot be modified by subsequent oral agreements despite any course of performance between the parties. *Smaldino v. Larsick* (Ohio App. 11th Dist., 1993), 90 Ohio App.3d 691, 630 N.E.2d 408, holds that "[s]ubsequent acts and agreements may modify the terms of a contract, and, unless otherwise specified, neither consideration nor a writing is necessary."⁵⁷ This case is consistent with the statutory law discussed above as it recognizes that, if a writing is required, such a requirement must be honored. The plaintiff

⁵⁷ *Smaldino v. Larsick* (Ohio App. 11th Dist., 1993), 90 Ohio App.3d 691, 698, 630 N.E.2d 408.

has not cited any case which holds that a written contract that requires modifications to be in writing may be validly modified by an oral agreement and this court has found no such case law in its own research.

While the plaintiff did not make such an argument, the court would note that R.C. 1302.12(D) provides that "[a]lthough an attempt at modification or rescission does not satisfy the requirements of division (B) * * * of this section, it can operate as a waiver." In the case of *Canfic v. Dal-Ken Corp.* (March 29, 1990), 10th Dist. No. 89AP-868, the court noted that "[e]ven though parol evidence may not be introduced to show contrary intent or a subsequent modification, parol evidence of course of performance may be used to establish a waiver."⁵⁸ The appellate court in that case held that the trial court did not err in allowing the introduction of testimony concerning course of performance to show that the parties waived the method of payment provisions of the written contract.⁵⁹ Waiver is the voluntary surrender or relinquishment of a known legal right or intentionally doing an act inconsistent with claiming that right.⁶⁰

However, in the case at bar, the written credit agreement between the parties not only requires modifications to be in writing, but also requires any waivers of a contractual provision to be in writing. Therefore, the contract serves

⁵⁸ *Canfic* at *4. See also, *Uebelacker v. CinCom Systems, Inc.* (Ohio App. 1st Dist., 1988), 48 Ohio App.3d 268, 273, 549 N.E.2d 1210, 1217; and *Fisk Alloy Wire, Inc. v. Hermsath* (Dec. 30, 2005), 6th Dist. No. L-05-1097, 2005-Ohio-7007, at ¶¶ 54-55.

⁵⁹ *Id.*

⁶⁰ *Fultz & Thatcher v. Burrows Group Corp.* (Dec. 28, 2006), 12th Dist. No. CA2005-11-126, 2006-Ohio-7041, at ¶ 41, citing *Chubb v. Ohio Bur. of Workers' Comp.* (1998), 81 Ohio St.3d 275, 278, 690 N.E.2d 1267.

to prevent any verbal waiver of a contractual term.⁶¹ There is no argument in the case at bar that there was a written waiver of any term of the contract and, as a result, there has been no valid waiver of any term of the credit agreement.

The plaintiff's next argument in support of its breach of contract claim is that, even if there has been no valid modification, the remedy sought in the case at bar is "one that is essentially provided for in the contract," namely the option of a refund of the purchase price when Clow either refuses or is unable to repair or replace the defective product.

First, paragraph 9 of the contract requires that the plaintiff notify Clow of any potential claim under the warranty provision in writing and that Clow then be allowed time to investigate the issue. Fields Excavating did not provide written notification of any of the nonconforming goods. Additionally, the contract gives Clow the "sole discretion" to elect one of the stated remedies. Finally, in the case at bar, the plaintiff is not requesting a refund of the purchase price of the materials, but is instead requesting reimbursement for such things as labor and equipment costs. For these reasons, the court finds no merit in the suggestion that the plaintiff is seeking a remedy provided for under the contract.

Finally, the defendant argues that the limited warranty contained in the credit agreement failed in its essential purpose and, therefore, it is entitled to collect consequential damages.

" 'Repair or replacement' remedies are designed 'to give the seller an opportunity to make the goods conforming while limiting the risks to which he is

⁶¹ Id. at ¶ 44.

subject by excluding direct and consequential damages that might otherwise arise.⁶² "Such limited remedies generally fail only where the seller is unable or unwilling to make repairs within a reasonable time."⁶³

The court notes initially that the limited warranty provision was clearly delineated under a heading in capital letters in the written contract and was conspicuous. "Numerous cases have held that * * * where there is no great disparity of bargaining power between the parties, a contractual provision which excludes liability for consequential damages and limits the buyer's remedy to repair or replacement of the defective product is not unconscionable."⁶⁴ In the case at bar, while the credit agreement was presented to the plaintiff and drafted by Clow, there is no evidence of any great disparity in bargaining power between the two companies. Instead, these were two commercial businesses that voluntarily chose to enter into an agreement and, specifically, the plaintiff chose Clow as its supplier and chose to open a line of credit with the company.

In the case at bar, Jeffrey Fields provided testimony that he believed he would have notified Clow as soon as he learned about any problems. However, there is no evidence that he or any other representative of Fields Excavating conformed to the requirement that written notification be provided in order to activate the limited warranty.

⁶² *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 56, 537 N.E.2d 624, 639, quoting, *Beal v. General Motors Corp.* (D.Del. 1973), 354 F.Supp. 423, 426.

⁶³ *Id.*

⁶⁴ *Id.* at 55.

The court notes that there is no reason to deny a claim for lack of written notice if a party has actual notice of a fact and a proper opportunity to investigate and act on that knowledge.⁶⁵ However, there is insufficient evidence before the court demonstrating that the plaintiff promptly notified Clow when each problem occurred on the subject projects and thereby gave Clow the opportunity to inspect the problem and elect its remedy. In fact, while vaguely claiming that he would have contacted Clow upon learning of a problem, Jeffrey Fields specifically testified that the plaintiff would often simply use the pipe, after much work to get it to conform, and keep track of its costs to later bill the defendant.⁶⁶ Fields further testified that Clow representatives would come out to job sites on some occasions but there is no evidence regarding the results of those encounters.⁶⁷ The court understands that the plaintiff believed that there was a valid verbal agreement between it and Clow regarding reimbursement for any problems. However, as discussed above, the contract expressly excluded any such oral modifications and, if the plaintiff wanted to effect an enforceable agreement to modify or waive the terms of the limited liability, it needed to memorialize such an agreement in writing.

"In an action for breach of limited warranty, based on failure of its essential purpose, where a plaintiff-buyer fails to meet his burden of proof that either (A) the goods were defective, or (B) that the defendant-manufacturer failed to remedy the defect within a reasonable time after receiving notice of the defect, or

⁶⁵ *Stonehenge Land Company v. Beazer Homes Investments, LLC* (Jan. 17, 2008), 10th Dist. No. 07AP-449 and 07AP-559, 2008-Ohio-148, at ¶¶ 24-26.

⁶⁶ Fields Depo. at pgs. 49-50.

⁶⁷ Id. at pg. 73.

(C) that the alleged breach of warranty was the proximate cause of plaintiff's claimed damages, the defendant is entitled to a judgment as a matter of law.⁶⁸

While an issue of the failure of a limited warranty is generally a question of fact for the jury, based on the above discussion, the plaintiff is unable to show any genuine issue of material fact that the limited liability failed of its essential purpose because the plaintiff has failed to set forth sufficient evidence that the defendant failed or was unable to repair or replace the defective pipe after receiving sufficient notice.⁶⁹

The defendant has met its burden under the summary judgment standard in demonstrating that the contractual language in the credit agreement bars the plaintiff's breach of contract claim. The plaintiff did not meet its burden in demonstrating its right to recover under the contract for the breach and damages it alleges in its complaint.

As a result, the motion for summary judgment is well-taken and shall be granted as to the plaintiff's claim for breach of contract.

(B) BREACH OF IMPLIED WARRANTIES

The credit agreement expressly provides that the limited warranty contained therein is the exclusive warranty operating between the parties and

⁶⁸ *Maue v. Beam Tractor and Truck, Inc.* (April 20, 1983), 1st Dist. No. C-820404, at *2.

⁶⁹ *Chemtrol* at 56.

that there is no implied warranty of merchantability or fitness for a particular purpose.

“Contracting parties are free to determine which warranties shall accompany their transaction.”⁷⁰ “Accordingly, both implies warranties or merchantability and of fitness may be excluded or modified, if the exclusion or modification meets the criteria set forth in R.C. 1302.29(B).”⁷¹ That code provision requires that any exclusion specifically mention the warranties being excluded and must be conspicuous.⁷²

The court has found that the credit agreement is in full effect and binding on the parties. The implied warranties of merchantability and of fitness were specifically and expressly mentioned in the exclusion. Furthermore, the exclusion was contained in a paragraph labeled in capital letters “WARRANTY AND LIMITATION OF LIABILITIES AND BUYER’S REMEDIES,” and the exclusion itself was written in all capital letters. As a result, the court finds that the exclusion was conspicuous as required by R.C. 1302.29(B).⁷³

Therefore, the plaintiff cannot bring a claim for breach of either of these implied warranties and, as such, the motion for summary judgment as to these two claims is well-taken and shall be granted.

⁷⁰ *Chemtrol*, 42 Ohio St.3d at 55.

⁷¹ *Id.*

⁷² R.C. 1302.29(B).

⁷³ *Chemtrol* at 55.

(C) BAD FAITH BREACH OF CONTRACT

In the case of *U.S. Fidelity & Guar. Co. v. Pietrykowski* (Feb. 11, 2000), 6th Dist. No. E99-38, the court noted that "[t]he effort to identify and plead a tort for bad faith breach of contract is supported by no legal authority, and fails to state a cause of action as a matter of law."⁷⁴

This court has found no basis for such a cause of action for breach of a contract for the sale of goods. Therefore, the motion for summary judgment as to that claim is well-taken and shall be granted.

(D) FRAUD

"Fraud is defined as: (1) a representation or, where there is a duty to disclose, a concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness and to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately cause by the reliance."⁷⁵

⁷⁴ *U.S. Fidelity & Guar. Co. v. Pietrykowski* (Feb. 11, 2000), 6th Dist. No. E99-38, at *4, citing *Hoskins v. Aetna Life Ins.* (1983), 6 Ohio St.3d 272, 452 N.E.2d 1315; and *Tokes & Sons, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 605 N.E.2d 936.

⁷⁵ *Brothers v. Morrone-O'Keefe Development Co.* (Dec. 23, 2003), 10th Dist. No. 03AP-119, 2003-Ohio-7036, at ¶ 30, citing *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 475, 700 N.E.2d 859.

The parol evidence rule does not preclude a party from presenting extrinsic evidence that he was fraudulently induced to enter into a written agreement.⁷⁶ However, in the present case the plaintiff was already subject to a binding written contract at the time the alleged fraud occurred. This court has determined that there is no legal or factual support for the contention that the plaintiff terminated the written contract and entered into a new verbal agreement. Therefore, there can be no viable claim of fraudulent inducement when the contract was already in existence.

Therefore, the court is left with the plaintiff's claim that Clow fraudulently misrepresented that the problems with the pipes were remedied and that it would reimburse the plaintiff for costs incurred as a result of any future problem and, therefore, the plaintiff chose not to terminate its contract with Clow. However, this claim fails for three reasons. First, the plaintiff had a warranty under the contract for nonconforming goods. The plaintiff cannot now seek to circumvent the exclusivity of the express contractual remedy by bringing a fraud claim. Secondly, as noted above, the contract expressly prohibited oral modifications. Finally, there was no change in the plaintiff's position as a result of these statements. Instead, Fields Excavating chose to continue its contract with Clow instead of choosing to seek termination. There was no "transaction at hand" at the time these representations were made. The only "reliance" on the part of the plaintiff was the decision to continue its relationship with Clow under a contract by which it was already bound.

⁷⁶ *Casserlie v. Shell Oil Co.* (May 31, 2007), 8th Dist. No. 88361, 2007-Ohio-2633, at ¶ 49, citing *Galmish v. Cicchini* (20002), 98 Ohio St.3d 23, 28, 734 N.E.2d 782.

As a result, the motion for summary judgment is well-taken and shall be granted as to the plaintiff's fraud claim.

II. MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIM

In its counterclaim for breach of contract, the defendant seeks the balance remaining outstanding on the plaintiff's credit account.

This court has already determined that a valid credit agreement existed between the parties. The evidence demonstrates that the plaintiff purchased materials from Clow under that agreement.⁷⁷ Furthermore, Jeffrey Fields admitted in his deposition that an outstanding balance of \$150,272.59 remains on that account.⁷⁸ While there were problems with some of the pipe shipped by the defendant, there is no evidence that Clow failed to perform under the contract.

In its response to summary judgment, the plaintiff's only defense to this counterclaim is the affirmative defense of fraud. However, this court determined above that the plaintiff failed to set forth any genuine issue of material fact as to its fraud claim.

As a result, the court finds for the defendant on its breach of contract counterclaim and awards it damages on that counterclaim in the amount of

⁷⁷ Fields Depo. at pg. 12.

⁷⁸ Id. at pg. 122.

\$150,272.59 plus pre- and post-judgment interest in the amount of 18% per annum, as provided by the contract.

The issue of attorney fees remains outstanding and shall be set for hearing at which time both parties shall have the opportunity to present any legal arguments regarding this provision of the contract as well as any evidence in support of or in opposition to the requested amount.

III. CONCLUSION

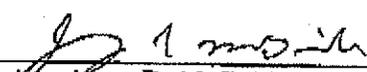
The defendant's motion for summary judgment is well-taken and shall be granted as to all of the claims set forth in the plaintiff's Complaint.

The defendant's motion for summary judgment is well-taken and shall be granted as to its counterclaim for breach of contract in the amount of \$150,272.59 plus pre- and post-judgment interest in the amount of 18% per annum.

The issue of attorney fees remains outstanding and shall be set for hearing. The parties are hereby ordered to conference with each other and call the Assignment Commissioner (732-7108) within five days of the date of this decision and set this matter for an evidentiary hearing on attorney's fees.

IT IS SO ORDERED.

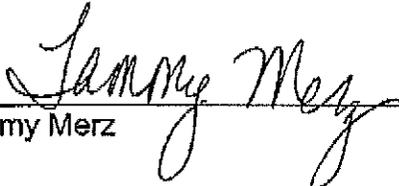
DATED: 8-15-08



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 15th day of August 2008 to all counsel of record and unrepresented parties.



Tammy Merz

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FILED

2008 DEC -9 AM 11:46

PARSONS
CLERK OF COURT
CLERMONT COUNTY, OHIO

FIELDS EXCAVATING, INC.,

Plaintiff,

v.

MCWANE INC.,

Defendant.

Case No. 2007 CVH 1098

Judge McBride

FINAL JUDGMENT ENTRY

This matter came before the Court on the motions of Defendant McWane, Inc. ("McWane") for summary judgment and for attorneys' fees and costs. On August 15, 2008, the Court granted Defendant's summary judgment motion as to all claims set forth in Plaintiff Fields Excavating, Inc.'s ("Fields Excavating") complaint and as to McWane's counterclaim for breach of contract in the amount of \$150,272.59 plus prejudgment and post-judgment interest in the amount of 18% interest per annum. After this decision was issued, the parties discovered that Fields Excavating was entitled to a credit of \$932.22 against the principal amount of the unpaid balance of its account. On October 30, 2008, the Court granted McWane's application for attorneys' fees and costs, awarding \$37,656 in attorneys' fees and \$2,691 in costs, for a total award of \$40,347. The findings of fact and conclusions of law set forth in the August 15, 2008 Decision and the October 30, 2008 Decision are hereby incorporated as if fully set forth herein.

Consistent with those decisions, the Court hereby enters judgment as follows:

1. In favor of McWane and against Fields Excavating on all claims set forth in the complaint of Fields Excavating;
2. In favor of McWane and against Fields Excavating and Defendant International Fidelity Insurance Company, the surety for Fields Excavating's performance bond, jointly



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and severally, on McWane's counterclaim for breach of contract in the amount of \$149,340.37 plus prejudgment interest at the rate of 18% per annum through October 31, 2008 in the amount of \$46,013.19 and post-judgment interest at 18% per annum beginning on November 1, 2008 and continuing until the balance is paid in full;

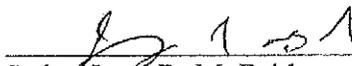
3. In favor of McWane and against Fields Excavating and Defendant International Fidelity Insurance Company, jointly and severally, on McWane's counterclaim for breach of contract in the amount of \$37,656 in attorneys' fees and \$2,691 in costs; and

4. Court costs shall be paid by Fields Excavating.

The Clerk of Courts shall serve a copy of this Final Judgment Entry on all parties pursuant to Civ.R. 58(B). There is no just cause for delay.

IT IS SO ORDERED.

DATED: _____



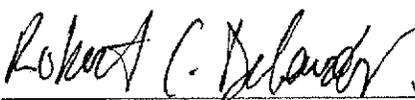
Judge Jerry R. McBride

APPROVED BY:



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and Third-Party Defendant International
Fidelity Insurance Company

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

FIELDS EXCAVATING, INC.,

Plaintiff-Appellant,

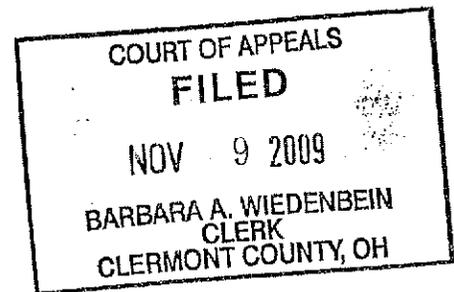
- vs -

MCWANE, INC.,

Defendant-Appellee.

CASE NO. CA2008-12-114

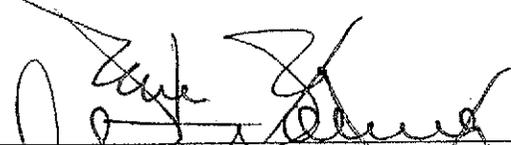
JUDGMENT ENTRY



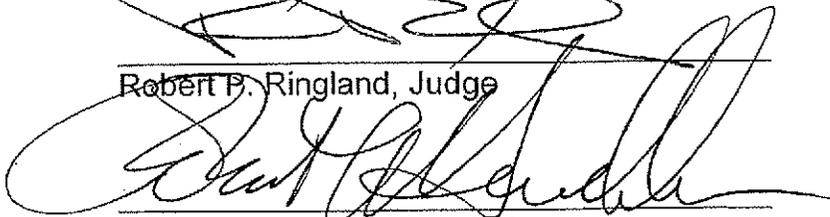
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


William W. Young, Presiding Judge


Robert P. Ringland, Judge


Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

FIELDS EXCAVATING, INC.,

Plaintiff-Appellant,

- vs -

MCWANE, INC.,

Defendant-Appellee.

CASE NO. CA2008-12-114

OPINION
11/9/2009

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007CVH1098

Delawder Heald & Co., Robert C. Delawder, Philip J. Heald, P.O. Box 297, 120 S. Third Street, Suite 200, Ironton, Ohio 45638, for plaintiff-appellant

Vorys, Sater, Seymour & Pease, LLP, Richard L. Moore, Jacob D. Mahle, James B. Lind, Atrium Two, Suite 2000, 221 East Fourth Street, P.O. Box 0236, Cincinnati, Ohio 45201-0236, for defendant-appellee

Samantha J. Fields, 407 Center Street, Ironton, Ohio 45638, for third-party/defendant, International Fidelity Insurance

RINGLAND, J.

{¶1} Plaintiff-appellant, Fields Excavating, Inc., appeals a decision of the Clermont Court of Common Pleas granting summary judgment in favor of defendant-appellee, McWane, Inc. We reverse and remand.

{¶2} Fields Excavating specializes in public utility projects, primarily involving the

installation of water, sewer and storm lines. Clow Water Supply, a subsidiary of McWane, manufactures ductile iron pipe used in water and sewer lines. Fields has used Clow as its pipe supplier since approximately 1992. In 1998, Fields Excavating entered into a credit agreement with Clow. Since then Fields has purchased all materials supplied by Clow on the credit account.

{13} In 2005, Fields began experiencing problems with the pipe supplied by Clow. Specifically, on the "Baltimore-Lancaster Road Project," several problems occurred including pipes that did not fit together properly. Fields notified Clow of the problems and submitted a bill to Clow for additional charges attributable to these problems. After some negotiation, Clow paid the bill. On the "Social Road Project," Fields experienced problems with the Clow pipe being "out-of-round." Fields once again submitted a bill to Clow for the additional charges incurred and, after negotiation, Clow paid a portion of the expenses. On those two occasions, Clow paid for Field's additional labor, equipment, and pipe replacement costs needed to properly complete the project.

{14} Fields considered ceasing its business relationship with Clow due to the past problems and even solicited a bid from another supplier. Fields met with Clow representatives to discuss the problems it experienced with the 24-inch pipe supplied by Clow. Clow representatives assured Fields that the problems had been remedied and Clow would continue to reimburse it for the additional expenses and materials if Fields experienced any future problems. As a result, Fields continued its business relationship with Clow for three additional projects; the "Scioto-Darby 30-inch Project," the "Scioto-Darby 24-inch project," and the "Clermont County Project."

{15} While the 30-inch pipe was used mostly without incident, Fields continued to experience problems with the 24-inch pipe being "out-of-round" on the projects. The president of Fields stated that he would often call his contact, Robin, at Clow whenever a

problem developed. According to the president, Robin would tell him to keep track of the additional time expended on the project or, sometimes, a Clow representative would come to the job site to observe the problems.

{¶16} Following completion, Fields submitted claims to Clow related to the projects. Clow reimbursed Fields for the additional expenses on the "Scioto-Darby 24-inch project," however, Clow refused to pay the submitted claims for the remaining projects.

{¶17} Fields Excavating filed an action against McWane, seeking compensation for damages allegedly incurred on the "Clermont County" and "Scioto-Darby 30-inch" projects. Fields alleged breach of contract, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, bad faith breach of contract, and fraud. McWane filed a counterclaim for breach of contract for unpaid bills. The case was set to be tried before a jury on June 16, 2006. However, on June 6, McWane moved for summary judgment on all claims. Although noting that the motion was untimely and without requesting leave to file the motion, the trial court agreed on the morning of trial to vacate the trial date and set the matter for hearing on the motion for summary judgment. Following a hearing on the matter, the trial court granted summary judgment in favor of McWane, concluding that the presence of a no-oral-modification clause and anti-waiver clause in the credit application prevented Fields from relying upon the course of business between the parties or statements made by Clow representatives. Additionally, the court ordered Fields to pay \$150,272.59 for the unpaid bill. Fields timely appealed, raising a single assignment of error:¹

{¶18} "THE TRIAL COURT ERRED IN NOT RECOGNIZING THE ENFORCEABILITY OF SUBSEQUENT ORAL MODIFICATIONS (DESPITE THE EXISTENCE OF PROHIBITING CLAUSES) WHERE ATTEMPTS AT MODIFICATION CONSTITUTED WAIVER, AND THE

1. In its brief, Fields makes no reference to the breach of implied warranty claims, claim for bad faith breach of contract or fraud. Accordingly, this appeal is limited to Field's claim for breach of contract.

WAIVER WAS NOT RETRACTED AS REQUIRED BY R.C. 1302.12. ADDITIONALLY, THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT COMMON LAW PRINCIPLES OF EQUITY ESTOPPED APPELLEE FROM ASSERTING THAT THE EXISTENCE OF 'NO ORAL MODIFICATION' AND A 'NO WAIVER' CLAUSES PRECLUDED ENFORCEMENT OF ORAL MODIFICATIONS, WHEN THE PURPORTED MODIFICATIONS WERE THE RESULT OF APPELLEE INDUCING THE APPELLANT TO ENGAGE APPELLEE AS SUPPLIER FOR TWO MAJOR PROJECTS."

{¶9} On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. See Civ.R. 56(C); see, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once this burden is met, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. *Id.*

{¶10} The issues in the instant appeal primarily involve the two provisions in the credit agreement relied upon by the trial court in entering judgment against Fields, the no-oral-modification and anti-waiver clauses.

{¶11} The contract's no-oral-modification clause provides that signing the credit application "constitutes acceptance of all of Clow Water Systems Company's Terms and Conditions of Sale printed on the reverse side of this application, for all current and future orders and sales. These terms and conditions may not be amended, modified, terminated or revoked accept [sic] by a written document signed by an authorized representative of Clow

Water Systems Company."

{¶12} Additionally, the anti-waiver provision states, "WAIVER. No delay or failure by Seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof. Waiver by Seller of any breach shall be limited to the specific breach so waived and shall not be construed as a waiver of any subsequent breach."

{¶13} In its sole assignment of error, Fields argues the trial court's decision relating to the anti-waiver and no-oral-modification provision was incorrect. Field's argues that the no-oral-modification clause was waived by the dealings between the parties and the trial court erred in entering summary judgment in favor of McWane.

No-Oral-Modification Clause – R.C. 1302.12 (UCC 2-209)

{¶14} Ohio's Uniform Commercial Code governs sales transactions such as the dealings between Fields and Clow. R.C. 1302.12, Ohio's codification of UCC 2-209, addresses no-oral-modification clauses: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." R.C. 1302.12(B).

{¶15} No-oral-modification clauses are designed to protect against fraudulent or mistaken oral testimony concerning transactions subsequent to a written contract. Nevertheless, the code drafters recognized the potential for abuse and various concerns that rigid no-oral-modification clauses may create. Accordingly, the drafters provided an important exception to the enforceability of no-oral-modification clauses. Wellman, *The Unfortunate Quest for Magic in Contract Drafting* (2006), 52 Wayne L.Rev. 1101, 1115. Specifically, R.C. 1302.12(D) provides, "[a]lthough an attempt at modification or rescission does not satisfy the requirements of division (B) or (C) of this section, it can operate as a waiver." Similarly, R.C. 1302.11(C) states, "course of performance shall be relevant to show

a waiver or modification of any term inconsistent with such course of performance."

{¶16} Numerous policy considerations and contract principles underlie the drafters' approach to no-oral-modification clauses. As Justice Cardozo stated, although two parties enter into "a contract, no limitation self-imposed can destroy their power to contract again * * *." *Beatty v. Geggenheim Exploration Co.* (1919), 225 N.Y. 380, 381. This is because parties to a contract possess, and never cease to possess, the freedom to contract even after the contract has been executed and what the parties have consented to do, they can later consent to abandon. *Wellman* at 1120. If strictly enforced, a no-oral-modification clause would deny effect to every oral modification – even those that are fully voluntary, freely entered, and entirely consensual – simply because there was no writing. *Id.* Similarly, in their agreement, parties can say they want the modifications in writing, but by the same rationale they can also, after the signing, decide to change how they deal with each other. *Id.* at 1117.

{¶17} Regardless of the clause, it is the parties' subsequent agreement that has legal effect, and if the parties go on to make an oral modification after they agreed on a no-oral-modification clause, then their subsequent agreement must be taken as itself modifying, or at least waiving, the no-oral-modification clause. *Id.* at 1113. Another problem with the idea behind a no-oral-modification clause is that it leads lawyers and judges to assume that post-signing words and conduct are somehow of no legal significance. *Id.* at 1115-1116. A no-oral-modification clause suggests that parties can, through the right words, invoke a power beyond their own: if such clauses are rigidly enforced, then a party could simply insert the clause into an agreement and would be magically protected in the future no matter what that party said or did. *Id.* at 1116. More simply, by including a no-oral-modification clause in a contract, a party could orally induce the opposing party in any way and then hide behind the clause as a defense. *Id.*

{¶18} Although R.C. 1302.12 permits parties to include an enforceable no-oral-modification clause in their written agreement, courts, including those in Ohio, have been consistently critical of the enforceability of such clauses due to these numerous considerations. Murray, *The Modification Mystery: Section 2-209 of the Uniform Commercial Code* (1987), 32 Vill.L.Rev. 1, 29. The trial court in this case failed to recognize the extensive Ohio authority relating to no-oral-modification clauses.

{¶19} "Despite principles of freedom of contract and the potential benefit of avoiding false claims, the no-oral-modification clause has not garnered favor in the law. Indeed, this clause, which purports to erect a kind of 'private' statute of frauds for contracting parties, has generally not been given full effect by courts. * * * Accordingly, it has been held that the clause itself can be waived by oral agreement like any other term in a contract." *Fahlgren & Swink, Inc. v. Impact Resources, Inc.* (1992), Franklin App. No. 92AP-303, 1992 WL 385941, *4; *Glenmoore Builders, Inc. v. Smith Family Trust*, Summit App. No. 24229, 2009-Ohio-3174, ¶41. See, also, *Frantz v. Van Gunten* (1987), 36 Ohio App.3d 96, 99-100.

{¶20} "Even though parol evidence may not be introduced to show contrary intent or a subsequent modification, parol evidence of course of performance may be used to establish a waiver." *Canfic v. Dal-Ken Corp.* (Mar. 29, 1990), Franklin App. No. 89AP-868, 1990 WL 34771, *4; see, also, *Uebelacker v. CinCom Systems, Inc.* (1988), 48 Ohio App.3d 268, 273.

{¶21} Accordingly, Ohio courts consistently treat the issue of whether a no-oral-modification clause is waived as a question for the trier of fact. *Franz* at 100; *Fahlgren* at *4; and *Pottschmidt v. Klosterman*, 169 Ohio App.3d 824, 2006-Ohio-6964, ¶20-24.

{¶22} Fields argues that Clow's history of reimbursing for additional charges incurred due to defects in the pipes and the continuing assurances by Clow representatives that it would continue this process operated as a waiver under R.C. 1302.12(D).

{¶23} In opposition, McWane advances three arguments. First, McWane heavily

relies upon R.C. 1302.12(B), which authorizes parties to include enforceable no-oral-modification clauses within contracts. However, McWane never acknowledges Ohio case law regarding no-oral-modification clauses, the effect R.C. 1302.12(D) may have upon the no-oral-modification clause, or whether waiver of the no-oral-modification clause occurred through the course of dealing. Instead, McWane argues that the anti-waiver provision contained in the agreement completely prevents waiver of any provision in the contract, including the no-oral-modification clause.²

Anti-waiver Clause

{¶24} Accordingly, we turn to the anti-waiver provision in the credit agreement to determine the extent of its applicability or the effect, if any, it has to the case at bar. Throughout its brief, McWane repeatedly suggests that the anti-waiver clause prevents waiver of the no-oral-modification clause. McWane basically claims that no provision in the contract, including the no-oral-modification clause, can ever be waived due to this anti-waiver clause.

{¶25} In support of this argument, McWane submits multiple instances where Ohio courts have upheld anti-waiver provisions. See *Ed Wolf, Inc. v. National City Bank* (Jan. 23, 1997), Cuyahoga App. No. 253045, 1997 WL 25524; *Lewis v. Motorists Mutual Insurance Co.* (Mar. 4, 1982), Cuyahoga App. No. 992735, 1982 WL 5196; *Shäh v. Cardiology South, Inc.* (Jan. 21, 2005), Montgomery App. No. 20440, 2005-Ohio-211; and *Tie Bar v. Buffalo Mall* (Apr. 30, 1979), Mahoning App. Nos. 78 CA 95, 96, 97, 98, 99, 100, 1979 WL 207348. Our review of the law reveals that Ohio courts consistently uphold anti-waiver provisions.

{¶26} McWane's principle authority, *Allonas v. Royer* (1990), 67 Ohio App.3d 293,

2. Additionally, Fields argues in its brief that the course of conduct also waived the anti-waiver provision. McWane submits that this argument was never raised to the trial court and, as a result, cannot be entertained on appeal. Since waiver of the anti-waiver provision is irrelevant to our decision, Field's and McWane's arguments are moot.

also involves a sales dispute. In *Allonas*, the plaintiffs owned a business selling and servicing televisions and appliances. *Id.* at 295. They signed a floor plan agreement to sell Borg-Warner and Whirlpool products. *Id.* Under the agreement, the companies would stock appliances at the store and, once sold, the store owners would pay the company for the item. *Id.* The security agreement allowed the companies to conduct routine inspections of the store to reconcile current inventory against payments made by the owners. *Id.* If any discrepancy was discovered, the store owners were required to reimburse the appliance companies immediately following the inspection. *Id.* at 296.

{¶127} In January 1986, the store owners went on vacation. *Id.* Towards the end of the month, both companies conducted an inventory inspection. *Id.* Borg-Warner discovered \$8,842.06 in unaccounted-for inventory, while Whirlpool found a \$3,428 discrepancy. *Id.* Both companies demanded immediate payment. *Id.* The store manager informed the inspectors that the owners were on vacation. *Id.* Two days later, the inspectors returned to the store and talked with the owners over the phone. *Id.* at 297. According to the owners, Borg-Warner and Whirlpool representatives told them that they could pay for the unaccounted-for merchandise upon returning from vacation. *Id.* Nevertheless, shortly following the conversation, both companies repossessed the remaining inventory that was currently at the store. *Id.* at 298.

{¶128} The owners filed suit, arguing the appliance companies were estopped from repossessing the inventory due to the agents' oral promises to forbear repossession until they returned from vacation. *Id.* The Third District Court of Appeals court affirmed an award of summary judgment in favor of the appliance companies, finding that the store owners did not have enough money in the store bank accounts to reimburse the companies at the time and there was no reliance upon the promises of the inspectors. *Id.* at 299-300. As additional support for the decision, the court also noted the presence of an anti-waiver clause in the

contract. Id. at 300. The court concluded that, despite any oral representations made by the inspectors, the companies retained the right to repossess the appliances.

{¶29} In this case, the trial court was persuaded by McWane's argument, relying upon the presence of an anti-waiver clause in the parties' agreement. In the written decision, the trial court stated, "the written credit agreement between the parties not only requires modifications to be in writing, but also requires any waivers of a contractual provision to be in writing."

{¶30} The trial court's conclusion is incorrect. Reading the actual language of the provision in this case, the anti-waiver clause does not prevent waiver of all provisions in the agreement, including the no-oral-modification clause.

{¶31} Typically, anti-waiver clauses serve to protect a party when it has previously accepted a late payment or failed to exercise a remedy when the agreement was earlier breached. This is highlighted in most of the cases cited by McWane. See *Ed Wolf*, 1997 WL 25524 at *7 (acceptance of past-due payments); *Lewis*, 1982 WL 5196 at *1 (acceptance of past-due payments); *Tie Bar*, 1979 WL 207348 at *3 (late acceptance of rent payment); and *Shah*, 2005-Ohio-211 at ¶29 (acceptance of less money did not preclude doctor from pursuing full amount due under the contract).

{¶32} The language of McWane's anti-waiver clause unambiguously limits operation to this type of situation. The clause provides in full, "[n]o delay or failure by Seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof. Waiver by Seller of any breach shall be limited to the specific breach so waived and shall not be construed as a waiver of any subsequent breach."

{¶33} The anti-waiver clause does not apply to the issue in this case. As provided above, the anti-waiver clause alludes to Clow's failure to exercise any rights or remedies if Field is in breach of the contract. In those instances, the anti-waiver clause provides that, if

Clow has failed to exercise those rights or remedies in the past, it has not waived its ability to rely upon them in the future. The clause makes no reference to situations where the seller has committed a breach. Neither Clow nor McWane were seeking to exercise contractual rights or remedies due to a breach by Fields when the alleged waiver of the no-oral-modification occurred. Rather, Clow had allegedly supplied Fields with defective pipe, as it had done before, when the oral assurances were made and the company paid Fields for the additional expenses incurred.

{¶34} When compared to the clause in *Allonas*, the anti-waiver provision in this case is substantively different. The *Allonas* clause provides that "waiver of any provisions herein contained shall not be binding upon * * * [Whirlpool]." The terms of McWane's anti-waiver provision are significantly more limited than the clause in *Allonas*. The general anti-waiver clause in *Allonas* applies to all provisions in the contract, while the clause in this case clearly alludes only to the seller's waiver of an earlier breach by the buyer and seller's delay or failure to exercise a right or remedy. As explained above, McWane was not in a position to exercise any right or remedy against Fields because Clow was the alleged breaching party. Additionally, the clause relied upon by McWane makes no reference to the no-oral-modification clause.

{¶35} Ohio courts have consistently upheld anti-waiver clauses, such as the cases cited by McWane. In those cases the anti-waiver clauses were enforced pursuant to their terms. We find no fault with the enforcement of anti-waiver clauses. However, an anti-waiver clause must be enforced pursuant to its explicit terms. In this case, McWane seeks to broadly construe the limited anti-waiver clause to apply to something for which it was not intended. If McWane wished to have a generalized anti-waiver that applied to all provisions in the contract like the clause in *Allonas*, it should have been included when drafting the contract. Accordingly, due to the express language of the clause, McWane's anti-waiver is

inapplicable to this case and does not prevent waiver of the no-oral-modification clause.

Summary Judgment

{¶36} Having found that the anti-waiver clause has no effect in the case at bar and does not prevent waiver of the no-oral-modification clause, we must determine whether a genuine issue of material fact exists in this case.

{¶37} Provisions preventing oral modification are waived if: 1) an oral modification is acted upon by the parties; and 2) refusal to enforce the oral modification would result in fraud or injury to the promisee, i.e. detrimental reliance. *Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 171.

{¶38} "[A] party seeking to establish waiver bears a heavy burden of proof." *Pottschmidt*, 169 Ohio App.3d 824 at ¶24. However, where it is difficult to determine whether a particular act sheds light on the meaning of the agreement or represents a waiver, the general preference would favor the "waiver" approach. R.C. 1302.11, Official Comment 3.

{¶39} After review of the record, Fields has presented sufficient evidence to demonstrate that a genuine issue of material fact exists regarding Field's breach of contract claim. Specifically, the deposition testimony and exhibits reveal that a possible waiver of the no-oral-modification clause occurred due to the course of dealing between the parties and statements made by Clow representatives. The record includes evidence and testimony that Clow supplied defective pipe to Fields during the "Baltimore-Lancaster Road Project" and "Social Road Project." Fields submitted a bill for reimbursement of additional expenses incurred during those projects, which Clow paid.

{¶40} Thereafter, Clow representatives assured Fields that the problems had been remedied and Clow would continue to reimburse for them for the additional expenses and materials if any problems were experienced during the "Scioto-Darby 30-inch Project," the "Scioto-Darby 24-inch project," and the "Clermont County Project." The 24-inch pipe

supplied by Clow continued to be out-of-round. The president of Fields stated in his deposition that he would often call his contact, Robin, to notify her of the continued problems. According to the president, Robin would tell him to keep track of the additional time expended on the project as was done in the past or, sometimes, a Clow representative would observe the problems at the job site. Following completion of the projects, Fields submitted claims to Clow. Clow failed to reimburse Fields for the additional expenses related to the "Scioto-Darby 30-inch project" and "Clermont County Project."

{¶41} Based upon this evidence, we cannot find that McWane is entitled to judgment as a matter of law. Fields' assignment of error is sustained.

{¶42} Judgment reversed and remanded.

YOUNG, P.J., and HENDRICKSON, J., concur.

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