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IN THE SUPREME COURT OF OHIO

MIKE McGARRY & SONS, INC. Plaintiff-Appellee vs MAROUS BROTHERS CONSTRUCTION, INC. Defendant-Appellant	)))))))))	Case No. 2010-0702 On Appeal from the Court of Appeals for Lake County, Eleventh Appellate District Case No. 2009-L-056

APPELLEE MIKE McGARRY & SONS, INC.'S RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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This Case Is Not One of Public or General Interest

Defendant-Appellant Marous Brothers Construction, Inc.'s ("Marous's") form subcontract agreement mandated that any dispute between Marous and Plaintiff-Appellee Mike McGarry & Sons, Inc. ("McGarry & Sons") had to be resolved by arbitration. After seven (7) days of hearings and tens of thousands of pages of documents, an arbitration panel ("Panel") awarded McGarry & Sons $953,111.52. Approximately three weeks after the initial award, the Panel issued a modified award in the amount of $821,382.52 after considering a request to modify the award by Marous. No where in either the original award or the modified award did the Panel indicate that it was awarding punitive damages. No record was made of these proceedings.

In arguing this case is one of general or great interest, Marous alleges that a general contractor must be entitled to withhold disputed funds on a good faith basis without running afoul of Ohio's Prompt Payment Act (Ohio Rev. Code §4113.61). No one is disputing that point. The Eleventh Appellate District in this case agreed with the Tenth Appellate District that a general contractor can do so. What the Court of Appeals found herein was that without a record, it had no basis for reversing the Panel's decision that undisputed funds were improperly withheld. This is hardly an earth shattering determination requiring review by this Court.

In filing this appeal, Marous also grasps at an error made by the dissent in arguing that damages awarded under the Prompt Pay Act are "punitive" and thus were prohibited from being awarded by the parties' contract. Nothing could be further from the truth. Statutory damages are not "punitive" damages. In fact, courts and/or juries often award

both, as this Court recently recognized. Whitaker v. M.T. Automotive, Inc., 2006-Ohio-5481.

Marous did not think much of this argument as it did not make this argument to either the trial court or the court of appeals. As demonstrated below, this prohibits Marous from raising this issue for the first time on appeal to this Court.

Marous points out that the construction industry has been "hit hard" by the recession. This includes subcontractors. In enacting the Prompt Pay Act, Ohio's legislature has protected those subcontractors by forcing general contractors to pay subcontractors "promptly" after the general contractor has been paid, and not use those funds as leverage to force a subcontractor to relinquish or severely compromise legitimate claims. The Panel clearly found that Marous did just that here, and properly awarded damages under the Act. Without a transcript, there is nothing for this Court to review to determine if that decision was erroneous.

Finally, Marous alleges that this Court needs to clarify how arbitration awards are reviewed by the courts. This Court long ago found "the arbitrator is the final judge of both law and facts, and that an award will not be set aside except upon a clear showing of fraud, misconduct or some other irregularity rendering the award unjust, inequitable, or unconscionable..., and even a grossly erroneously decision is binding in the absence of fraud." Goodyear v. Local Union No. 220 (1975), 42 Ohio St.2d 516, 522 (citation omitted). The courts of this state have routinely found that they only are entitled to vacate or modify an arbitration award pursuant to the reasons identified in Ohio Rev. Code §§ 2711.10 and 2711.11, respectively. Samber v. Mullinax Ford East, 2007-Ohio-5778 (Lake Cty.) at ¶43.

Ohio has a strong public policy favoring arbitration. Schaeffer v. Allstate Ins. Co., 63 Ohio St.3d 708, 711, 590 N.E.2d 1242, 1245 (1992). Arbitration is favored because it provides the parties with a relatively speedy and inexpensive means of resolving a dispute and has the additional advantage of unburdening crowded court dockets. Mahoning County Bd. of Mental Retardation and Developmental Disabilities v. Mahoning County TMR Educ. Ass'n., 22 Ohio St.3d 80, 83, 488 N.E.2d 872, 875 (1986); Schaeffer, 63 Ohio St.3d at 712, 590 N.E.2d at 1245. "The whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator's award." Mahoning, 22 Ohio St.3d at 83-84, 488 N.E.2d at 875. This Court has repeatedly stated that "[i]t is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts." *Id.* at 84, 488 N.E.2d at 875, quoting Campbell v. Automatic Die & Products Co., 162 Ohio St. 321, 329, 123 N.E.2d 401 (1954).

Neither the trial court nor the court of appeals abdicated their responsibility here. As there is no record for them to review, they could only look for error on the face of the arbitration award. Samber v. Mullinax Ford East, 2007-Ohio-5778 (Lake Cty.) at ¶ 57. Finding none, both courts correctly confirmed the award.

This is a dispute between two private parties which has little or no impact on the public in general. Even if there were errors made by the Court of Appeals, this case offers no issues of great public import. As demonstrated below, the Court of Appeals did not err. Accordingly, this Court should refuse to accept jurisdiction.

The Arbitrator's Award

Marous does not provide this Court with the breakdown of the entire amount awarded to McGarry & Sons. First, the Panel awarded McGarry & Sons $112,235 for its contract balance, which the Panel found was "undisputed" and for which amount Marous was paid by the owner. The Panel also found that the contract balance should have been increased by $303,808 for extra work McGarry & Sons performed. The Panel also awarded McGarry & Sons $293,068 for lost productivity, $8000 related to OSHA citations, $53,700 in attorneys' fees related to collecting the undisputed contract balance, $45,492 in Prompt Pay interest (which was only upon the undisputed $112,235) and interest of $100,907. Against these amounts, the Panel offset $95,827.48 to which it found Marous entitled on its counterclaims.

Contrary to Marous's assertions, the Panel never found that Marous "rightfully withheld $95,827.40 under the Act." Instead, the Panel found that Marous owed McGarry & Sons $112,235 which was "undisputed" and which was the basis for the Prompt Pay Act award. Furthermore, the Panel ultimately found that the contract balance should have been increased by another $300,000, or over three times the amount Marous was ultimately awarded on its counterclaim. The Panel clearly found that Marous had no right to withhold the undisputed contract balance, even if it had certain "back charges", when it should have been increasing the contract by over $300,000. Marous's arguments to the contrary are nothing more than an impermissible attempt to re-determine the merits of the claims without the benefit of a record.

Response to Marous Proposition of Law No. 1 – The Arbitrators Did Not Award Punitive Damages

There is no need for this Court to "clarify" the "review" of arbitration cases. Ohio courts have uniformly found that they can only vacate an arbitration award for the reasons set forth in Ohio Rev. Code §2711.10. *See, e.g.*, Plastech Engineered Products, Inc. v. Cooper-Standard Automotive, Inc., 2003-Ohio-6984 at ¶9. Those reasons are:

(A) The award was procured by corruption, fraud, or undue means.

(B) There was evident partiality or corruption on the part of the arbitrators, or any of them.

(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Ohio Rev. Code §2711.10.

Marous does not argue (A), (B) or (C), or that the Award was not final and definite. Instead, Marous now argues that the Panel exceeded its powers because it awarded punitive damages by awarding damages under the Prompt Pay Act. This argument fails for a simple reason: an award of interest and attorneys' fees under the Act is not an award of punitive damages.

Interest and attorneys' fees under Ohio Rev. Code §4113.61 are statutory damages. An award of 18% interest, in addition to the payment due, is mandatory if a contractor fails to comply with R.C. 4113.61(A)(1). *See*, R.C. 4113.61(A)(1) ("the contractor shall pay the subcontractor or material supplier, in addition to the payment due, interest in the amount of eighteen percent per annum of the payment due . . .") and R.C. 4113.61(B)(1) ("the court

shall award the interest specified" in R.C. 4113.61(A)(1)).[1] An award of reasonable attorneys' fees to the prevailing party also is mandatory unless such an award would be inequitable. *See*, R.C. 4113.61(B)(1) and (3).

Marous fails to cite any legal authority supporting its argument that attorneys' fees and interest under the Prompt Pay Act are punitive damages. Indeed, nothing in the Prompt Pay Act indicates that an award of interest and attorneys' fees is an award of punitive damages. McGarry & Sons never requested punitive damages in its Statement of Claim or at the arbitration hearing. And the Panel's decision makes no reference to punitive damages. In making an award of interest and attorneys' fees, the Panel simply awarded the statutory damages it found appropriate to award under the Prompt Pay Act.

Indeed, just because statutory damages might be "penal" in nature does make them punitive. Many statutes allow punitive damages in addition to statutory damages which are penal in nature. For example, Ohio's Consumer Sales Practices Act provides for the statutory **trebling** of damages, as well as awarding attorneys' fees, in certain situations. Ohio Rev. Code § 1345.09. This Court has found that punitive damages and treble damages under the OCSPA may both be awarded in certain cases. Whitaker v. M.T. Automotive, Inc., 2006-Ohio-5481. Thus, statutory damages, even those penal in nature, are not "punitive damages."

Indeed, Marous did not even make this argument to the trial court or the court of appeals. It is well settled Ohio law that an appellant waives, and cannot raise for the first time on appeal, issues which it failed to raise with the trial court. Stores Realty Co. v. City

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1 *See*, Dorrian v. Scioto Conservancy District, 27 Ohio St.2d 102, 108, 271 N.E.2d 834, 837 (1971) ("The word 'shall' is usually interpreted to make the provision in which it is contained mandatory...").

of Cleveland, Bd. of Bldg. Standards and Bldg. Appeals, 41 Ohio St.2d 41, 43, 322 N.E.2d 629, 630 (1975); LeFort v. Century 21-Maitland Realty Co., 32 Ohio St.3d 121, 123, 512 N.E.2d 640, 643 (1987); Holman v. Grandview Hosp. & Medical Center, 37 Ohio App.3d 151, 157, 524 N.E.2d 903, 910 (2nd Dist. 1987). An appellant also cannot raise for the first time on appeal to the Supreme Court of Ohio issues neither raised in, nor passed upon by, the court of appeals. Portage Cty. Bd. of Commrs. v. Akron, 109 Ohio St.3d 106, 123, 846 N.E.2d 478, 495 (2006); Moats v. Metropolitan Bank of Lima, 40 Ohio St.2d 47, 49-50, 319 N.E.2d 603, 604 (1974). The same maxims apply to appeals of arbitration awards.

In R. L. Bates Co. v. Schmidt, 1999 WL 3894 (5th Dist. 1998), the homeowners contracted with a construction contractor to build an addition to their home. During construction a dispute arose regarding the homeowners' failure to pay certain monies which the contractor claimed were due. The homeowners refused to pay the monies because the contractor failed to provide certain lien waivers as required under the contract. The dispute proceeded to arbitration, and the arbitrator rendered an award in favor of the contractor. The contractor filed a motion to confirm the arbitration award in the trial court, and the homeowners responded with a motion to vacate the arbitration award. After a hearing, the trial court confirmed the arbitration award.

The homeowners appealed, assigning as error the trial court's failure to vacate the arbitration award. The homeowners claimed the arbitrator exceeded his powers and committed misconduct in making an award which conflicted with the express terms of the parties' contract. The homeowners argued that the arbitrator exceeded his authority in finding the contractor was entitled to compensation, because the contract specifically provided that final payment was not due until the contractor delivered a complete release

of all liens to them. The Fifth District affirmed the judgment of the trial court, holding that the homeowners could not raise for the first time on appeal an issue which they failed to raise in their motion to vacate the arbitration award:

> We have reviewed appellants' motion to vacate the arbitration award. We note appellants did not contend therein the arbitrator exceeded his authority in rendering a decision as to whether appellant was due compensation under the contract, but only that the arbitrator exceeded his authority in awarding pre-judgment interest and by extending the time for making an award without the consent of the parties. As such, appellants' argument the arbitrator exceeded his power in rendering a judgment for appellees is waived as it cannot be raised for the first time on appeal.

Id. at *3 (footnote omitted). *See also*, Asset Acceptance LLC v. Stancik 2004-Ohio-6912 (8th Dist. 2004) and Michael v. American Arbitration Ass'n 1999 WL 652440 (10th Dist. 1999) (both holding that the appellant could not raise for the first time on appeal issues which he failed to raise at the arbitration hearing and at the trial court in a motion to vacate the arbitration award).

Marous attempts to confuse the well defined concept of "punitive damages" (which were never requested or awarded in this case) with the penalties provided for by the Act. As no punitive damages were awarded, Marous's attempts to paint the arbitrator's award as such is simply a red herring. Thus, Marous's Proposition of Law No. 1 has no merit.

Response to Proposition of Law No. 2 – "Punitive Damages" Were Not Awarded On "Disputed Claims"

The Panel (consisting of two attorneys who practice in the construction industry and an architect) found that Marous improperly failed to pay McGarry & Sons $112,235 which was undisputed under the contract. That Panel never found that Marous "rightfully withheld $95,827.40 under the Act." Instead, the Panel found that Marous should have increased the

contract balance by another $300,000, or over three times the amount Marous was ultimately awarded on its counterclaims.

Without a transcript, this Court can not review the arbitrators decision that $112,235 was owed under the contract without dispute. The Panel heard evidence regarding a number of Marous's completely baseless "change orders," which were simply issued by Marous so that it could avoid paying McGarry & Sons the undisputed $112,235. This allowed Marous to leverage McGarry & Sons to waive or settle its legitimate claims. This is exactly the type of conduct the Act prohibits.

Contrary to Marous's assertions, the Panel's decision does not force general contractors to forego conditional payment provisions. Instead, the Panel determined in this unique factual scenario that the general contractor had no right to withhold undisputed amounts when those amounts had been paid to it by the owner. Accordingly, Marous's Proposition of Law No. 2 lacks merit.

Response to Proposition of Law No. 3 – Marous Did Not Withhold Amounts in Good Faith

The Prompt Pay Act clearly allows a general contractor to withhold "disputed" amounts from a subcontractor. Marous correctly points out that the Tenth District Court of Appeals has indicated that the amount withheld must be in good faith. Consortium Communications v. Cleveland Telecommunications, Inc., 1998 WL 63538. The Court of Appeals herein agrees. *See* Court of Appeals Opinion at ¶44. Thus, there is no need for this Court to review this matter to tell the courts of appeal to apply the test they are already applying.

Marous agrees that this should be the standard. Marous then alleges that it did withhold amounts in good faith. However, the Panel found that $112,235 of the award was

undisputed. The Court of Appeals found that without a record, it could not review that determination. Court of Appeals Opinion at ¶46. Without a transcript, the arbitration proceedings and the award must be presumed correct. Samber v. Mullinax Ford East, 2007-Ohio-5778 at ¶ 57. Similarly, without a transcript, this Court will be unable to determine whether amounts were withheld in good faith. Accordingly, Marous's Proposition of Law No. 3 fails.

Response to Marous Proposition of Law No. 4 – Interest Is Not Punitive Damages

Marous argues that the award of prejudgment interest contained in the Modified Award is "punitive." Marous does not cite to any case so holding. Ohio law is clear that prejudgment interest is designed not to punish, but to make a party whole. Miami Valley Hosp. v. Edwards, 2008-Ohio-2721. Thus, the Panel clearly had the right to award prejudgment interest.

Marous argues that the Panel applied interest to the wrong amounts and incorrectly started interest from when the award was made. Thus, Marous' claims that the Panel incorrectly applied the law to the facts of this case. This is simply not a basis for vacating the Award. Samber, 2008-Ohio-5778 at ¶37 (Finding that even legally wrong awards are binding).

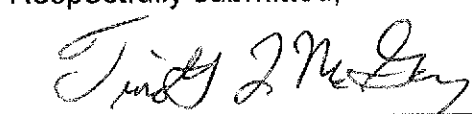
Marous' arguments that the Panel was wrong are simply no basis for vacating an arbitration award. If this Court were to adopt Marous' position, then no Award would ever be final. Accordingly, Marous's Proposition of Law No. 4 does not have merit.

Conclusion

The parties proceeded to arbitration as mandated by Marous' form contract. The arbitrators sat through seven (7) days of hearings and tens of thousands of pages of documents. Marous's appeal is simply an attempt to relitigate a result it did not like. Marous has woefully failed to demonstrate that "the arbitrators were corrupt or committed gross procedural improprieties." Samber v. Mullinax Ford East, 2007-Ohio-5778 at ¶ 37 (quoting Huffman v. Valletto (1984), 15 Ohio App. 3d 61, 63). This is particularly so where there is no transcript for this Court to review. Thus, "regularity of the arbitration proceedings and the Award must be presumed by a court when a complete record of evidence and arguments presented at the arbitration hearing is not provided to the court." *Id.* at ¶ 57.

There is no general or public interest here. Even if there were, without a transcript, this Court would have no basis to review it. Based upon the foregoing, this Court should not accept jurisdiction of this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff-Appellee Mike McGarry & Sons, Inc.'s Response to Appellant's Memorandum in Support of Jurisdiction was served by first class U.S. mail, postage prepaid, this 20th day of May, 2010 to the following:

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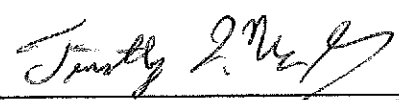

One of the Attorneys for Mike McGarry & Sons, Inc.