

IN THE SUPREME COURT OF OHIO

STALLOY METALS, INC.,)	On Appeal from the Geauga County
)	Court of Appeals, Eleventh Appellate District
Plaintiff-Appellee,)	
)	
v.)	Court of Appeals Case No. 2012-G-3054
)	
KENNAMETAL, INC.,)	SUPREME COURT CASE NO. 2013-0100
)	
Defendant-Appellant.)	

APPELLEE'S MEMORANDUM IN RESPONSE TO APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT
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This is not a case of public or great general interest. The Appellant is asking this Court to interpret and change a Pennsylvania statute. (See, 13 Pa.C.S.A. §2209(d)). That statute, however, can only be changed by the Pennsylvania legislature. Therefore, any evaluation of the issues raised by Appellant would have extremely limited impact on the citizens of Ohio.

Moreover, Appellant's attempt to mislead both the Eleventh District Court of Appeals ("Court of Appeals") and this Court, as well as the actual relevant facts of the case make this case unworthy of consideration by this Court.

First, the fact that Appellee, Stalloy Metals, Inc. ("Appellee") is now closed is irrelevant to the issue as to how the Trial Court applied the Parol Evidence rule to this fact situation. Second, the claim that the "sole motivation" for this lawsuit is the debt of a shareholder to a bank is not supported by the transcript and is also not relevant to the legal issues before the Court. The trial transcript does not say that the "sole motivation" for this lawsuit is a shareholder debt. Nor is the assertion that Appellant "is a vibrant company" that "contributes greatly to the economy of this region" in any way relevant to the decision this Court has to reach.

With regard to other fabrications, Stalloy refers the Court to Appellant's assertion that Stalloy began experiencing financial problems in 2008 before the transaction that gave rise to this lawsuit. That statement is utterly false. The witness' testimony who was cited had no knowledge of Stalloy's finances. With regard to the pay cut, the witness testified that she could not recall whether it occurred in 2008 or 2009, after Kennametal reneged on its agreement to purchase 120,000 pounds of carbide. In fact, the only testimony at the trial from anyone with personal knowledge confirmed that Stalloy had no financial problems and had no lay-offs prior to the transaction with Kennametal. Moreover, the Court of Appeals made no mention of

Stalloy's financial situation in its Order of January 3, 2012. In short, not only are these assertions false and misleading, but they were clearly inserted in Appellant's Memorandum to attempt to distract the Court from the real issue.

The real issue is that the Trial Court and the Court of Appeals found that there was a conversation between Sugar Peck ("Peck") and David Burns ("Burns"), an employee of Appellant, whereby Burns agreed that the carbide that Appellant agreed to purchase could be shipped in fifty-five (55) gallon drums weighing 2,000 pounds. This conversation was confirmed by a former employee of Appellee who was actually called as a witness during Appellant's case. The Trial Court indicated in its Order of January 3, 2012, that it found that portion of the employee's testimony credible. Therefore, there is no dispute but that an oral modification was made. The only issue for this Court is whether that oral modification was both admissible and binding on Appellant.

It is undisputed that during the time when Burns ordered the 120,000 pounds of carbide from Appellee and when the carbide arrived at Appellant's North Carolina facility, the price of carbide on the open market "dropped like a rock." This fact was confirmed by both Burns and Peck. Thereafter, Appellant suspended its entire carbide recycling program and announced it would no longer accept any carbide.

The Court of Appeals found that Burns told Appellee's principal, Peck, that Appellee could ship its carbide in containers weighing 2,000 pounds and permitted Appellee to load the carbide on three trucks hired by Appellant. The Court of Appeals further found that Appellant could not orally agree to accept the 2,000 pound containers and then refuse to pay on the grounds that there was no writing authorizing the shipment of the 2,000 pound containers. Under the circumstances, waiver could occur by implication. The Court of Appeals also correctly noted

that although Appellee had argued that 13 Pa.C.S.A. 2209(d) specifically provided for a waiver of no oral modification clauses in certain situations, the Trial Court did not even bother to consider that argument.

The Court of Appeals also instructed the Trial Court to consider several factors to determine if a waiver under Pennsylvania law occurred. The Trial Court was instructed that it could consider that Appellant actually removed Appellee's carbide from its trucks at its facility in North Carolina. The Trial Court was also instructed to consider that Appellant "stonewalled" Appellee's repeated requests for a reason for the rejection for a full week after the rejection. In addition, the Trial Court was instructed to consider the fact that Appellant regularly accepted shipments of carbide from other sellers in containers weighing more than 1,000 pounds and even more than 2,000 pounds in violation of the weight limitations in its terms and conditions. Finally, the Court of Appeals found there was evidence of reasonable reliance on the part of Appellee.

In summary, this is an issue which involves an interpretation of Pennsylvania statutory law. It is not a matter of public or great general interest. Therefore, this Court should decline to accept jurisdiction.

ARGUMENT IN SUPPORT OF APPELLEE'S PROPOSITION OF LAW

Proposition of Law No. I: A party to a commercial sales contract arising under Article II of the Uniform Commercial Code ("UCC") can rely on equitable principles of waiver under 13 Pa.C.S.A. §2209(d) to avoid application of the Parol Evidence Rule despite a no oral modification clause.

The Court of Appeals correctly found that 13 Pa.C.S.A. §2209(d), a Pennsylvania statute, permits a court to find that even where an attempt at modification does not satisfy a no-oral

modification provision, such an attempt can still constitute a waiver of the no-oral modification requirement.

The UCC is even broader than the common law in its disavowal of no-oral modification clauses. Under the UCC, where an attempt at modification does not satisfy a no-oral modification provision, such an attempt can constitute a waiver of the no-oral modification requirement. *See*, 13 Pa.C.S.A. §2209(d). The Pennsylvania Supreme Court has expressly held that a provision in a contract for the sale of goods that the contract be modified only in writing may be waived. *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10 (1968). Indeed, factors including the parties' course of conduct in performing the contract, may indicate whether the written terms of a contract have been modified. *Id.* at 15.

In *J.W. Goodliffe & Son v. Odzer* (Pa. Super. 1980), 423 A.2d 1032, a strikingly similar case to the case at bar, the plaintiff was a supplier of industrial gas and the defendant was a scrap dealer. The plaintiff charged the defendant a rental charge for gas cylinders in addition to the charge for the gas. The parties' performance was governed by a contract which required that any modifications be in writing. During the course of the contract period, the plaintiff requested that the defendant allow it to charge additional rent if the cylinders were returned late or damaged. The defendant agreed to this change orally. The question emerged whether the oral conversation and subsequent conduct of the parties effected a modification or a waiver of the no-oral modification provision. The appellate court first noted that it is "settled that the Uniform Commercial Code changed the law with regard to the oral modification of a contract that by its terms requires any modification to be in writing." *Id.* at 1034. The oral conversation regarding the changed pricing structure constituted an "attempt at modification" as described in 13

Pa.C.S.A. §2209(d). The oral agreement, coupled with the subsequent acts of the parties, was sufficient to show a waiver of the no-oral modification clause. *Id.* at 1035.

Here, the evidence was overwhelming that the packaging and no-oral modification requirements were waived by Appellant and were used by Appellant after the fact solely as a pretext to justify the return of the carbide Appellant no longer wanted. The Trial Court and the Court of Appeals recognized Appellee's evidence that a precipitous drop in the market value of carbide provided an incentive for Appellant to reject the carbide and breach the contract. The Trial Court also concluded that "one evaluating the testimony would be entitled to infer that Peck's question to Burns with respect to 2,000 pound drums was answered by him in the affirmative." Thus, the Trial Court concluded that Peck's version of the telephone conversation with Burns was the more credible version of the conversation.

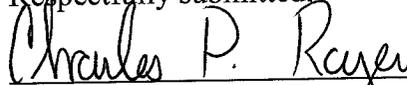
The Trial Court should have held, pursuant to 13 Pa.C.S.A. §2209(d), that the no-oral modification clause in the Terms and Conditions was waived and that evidence of the oral modification was not precluded by the parol evidence rule. The error was correctly identified by the Court of Appeals. Appellant can offer no legitimate reason to overturn a decision that really can only be changed by a change in 13 Pa.C.S.A. §2209(d) by the Pennsylvania legislature. The Ohio Supreme Court is not a legislature. Nor can the Ohio Supreme Court change Pennsylvania law. Therefore, this Court should decline to accept jurisdiction.

CONCLUSION

This case does not involve a matter of public and great general interest. Nor does Appellant have even remotely strong legal grounds to challenge the findings of the Eleventh District Court of Appeals. This Court should not accept jurisdiction in this case.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing *Appellee's Memorandum in Response to Appellant's Memorandum In Support Of Jurisdiction* was served by ordinary U.S. mail this 23rd day of January, 2013, upon the following:

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