[Cite as *Michels Corp. v. Rockies Express Pipeline, L.L.C.*, 2015-Ohio-2218.]

STATE OF OHIO, MONROE COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

MICHELS CORPORATION,	)	CASE NO. 14 MO 14
	)	
PLAINTIFF- APPELLANT,	)	
	)	
VS.	)	OPINION
	)	
ROCKIES EXPRESS PIPELINE LLC,	)	
	)	
DEFENDANT- APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Monroe County, Ohio Case No. 2014-206

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellant:

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JUDGES:
Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 5, 2015

[Cite as *Michels Corp. v. Rockies Express Pipeline, L.L.C.*, 2015-Ohio-2218.]
ROBB, J.

{¶1} Plaintiff-appellant Michels Corporation ("Michels" or "Appellant") appeals the decision of the Monroe County Common Pleas Court which dismissed the complaint filed against defendant-appellee Rockies Express Pipeline, L.L.C. ("REX" or "Appellee") due to an out-of-state forum selection clause in the parties' contract. Michels states that an Ohio statute plainly declares such a clause and an out-of-state choice of law clause "void and unenforceable as against public policy" when placed in a construction contract dealing with an improvement to real estate located in Ohio. *See* R.C. 4113.62(D). REX responds that the statute only applies where one of the contracting parties is an Ohio resident. REX alternatively argues that an interstate gas pipeline is not included in the definition of "improvement," which is defined as "any gas pipeline."

{¶2} For the following reasons, the statute is applicable to this contract. It does not contain an exception for a contract with two out-of-state parties or an exception for a pipeline that connects to an interstate pipeline. In applying the statute, the forum selection and choice of law clauses are void and unenforceable. The trial court erred in dismissing the complaint. This case is reversed and remanded for further proceedings.

STATEMENT OF THE CASE

{¶3} REX is a Delaware limited liability company with its principal office and corporate headquarters in Johnson City, Kansas. Its operating headquarters is located in Colorado where it operates a natural gas pipeline that begins there and extends into Eastern Ohio. Michels is a Wisconsin corporation headquartered in Brownsville, Wisconsin. The parties entered into a contract on October 22, 2013, wherein REX hired Michels to construct a 14.3 mile extension of the pipeline. This extension is located solely in the Ohio counties of Noble and Monroe.

{¶4} On June 17, 2014, Michels filed suit against REX in the Monroe County Common Pleas Court for claims arising out of the contract. The complaint stated that the case was properly brought in Ohio, citing R.C. 4113.62(D). It was noted that REX

is registered to transact business in Ohio and was served with the complaint at its statutory agent in Ohio.

{¶5} On July 17, 2014, REX filed an answer and a motion to enforce the forum selection clause and to dismiss the complaint. REX urged that Michels was bound by contract to file suit in a court with jurisdiction over Johnson City, Kansas, citing the contract's forum selection and choice of law clauses.

{¶6} A choice of law clause, entitled "Governing Law," contained in Section 19.10 of the contract, provides in pertinent part: "This Agreement shall be governed by, and construed in accordance with, the law of the State of Kansas (without giving effect to the principles thereof relating to conflicts of laws)." The forum selection clause, contained in Section 17.2 of the contract, provides in pertinent part:

> Litigation of any Dispute shall be brought exclusively in a state court within Johnson County, Kansas or a federal court having jurisdiction over Johnson County, Kansas. Each Party hereby consents to personal jurisdiction in any legal action, suit, or proceeding brought in any court, federal or state, within Johnson County, Kansas, having subject matter jurisdiction and irrevocably waives, to the fullest extent permitted by Applicable Law and the laws of the State of Kansas, any claim or any objection it may now or hereafter have, that venue or personal jurisdiction is not proper with respect to any such legal action, suit, or proceeding brought in such a court in Johnson County, Kansas, including any claim that such legal action, suit, or proceeding brought in such court has been brought in an inconvenient forum.

{¶7} Michels responded that the construction project is located entirely in two Ohio counties and that an Ohio statute clearly invalidates any out-of-state forum selection clause (and any foreign choice of law clause) in contracts for construction projects located on Ohio land. Specifically, pursuant to R.C. 4113.62(D):

> 1. Any provision of a construction contract * * * for an improvement, or portion thereof, to real estate in this state that makes the

> construction contract * * * subject to the laws of another state is void and unenforceable as against public policy.
>
> 2. Any provision of a construction contract * * * for an improvement, or portion thereof, to real estate in this state that requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract * * * to occur in another state is void and unenforceable as against public policy. Any litigation, arbitration, or other dispute resolution process provided for in the construction contract * * * shall take place in the county or counties in which the improvement to real estate is located or at another location within this state mutually agreed upon by the parties.[1]

{¶8} Michels continued by stating that the project in this construction contract met the statutory definition of "improvement," which means "*constructing, erecting*, altering, repairing, demolishing, or removing any building or appurtenance thereto, fixture, bridge, or other structure, and *any gas pipeline* or well including, but not limited to, a well drilled or constructed for the production of oil or gas * * *." (Emphasis added). *See* R.C. 4113.62(G)(4), citing R.C. 1311.01(J) (for the definition of improvement). *See also* R.C. 4113.62(G)(5) (defining construction contract as an agreement for the design, planning, construction, alteration, repair, maintenance, moving, demolition, or excavation of a building, structure, highway, road, appurtenance, or appliance situated on real estate located in this state).

{¶9} REX replied that the statute should not be applied where the parties are not Ohio residents, stating that neither party has an office in Ohio. REX also argued that since this is an interstate pipeline, it does not fall under the definition of improvement because the statute does not specifically state "interstate gas pipeline." REX cited unrelated statutes showing that legislature has characterized pipelines in the past.

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[1]These provisions are 2001 amendments to the Fairness in Construction Contracting Act.

{¶10} Michels filed a surreply urging the court to apply the statute as written, saying the statute contained no exception for two non-residents or language making it applicable only where there is a local contractor and it focused on the location of the project as being on Ohio real estate. Regarding the interstate connectivity, it was emphasized that REX avoided the word "any" placed by the legislature before "gas pipeline." Michels concluded that the most REX showed by its statutory examples was that an interstate gas pipeline is a subset of "any gas pipeline" and is thus plainly included in the definition of improvement. It was also emphasized that this contract was for construction of a pipeline in only two Ohio counties.

{¶11} On August 26, 2014, the trial court granted REX's motion to dismiss and to enforce the forum selection clause. The court stated that the parties are bound by the contract they signed and that the contract requires any litigation to be brought exclusively in a state court in Johnson County, Kansas or in a federal court having jurisdiction over Johnson County, Kansas.

{¶12} Michels filed a timely notice of appeal on September 8, 2014. Appellant sets forth one assignment of error asserting:

"The trial court committed reversible error in granting REX's Motion to force Forum Selection Clause and dismissing Michel's Complaint because, pursuant R.C. 4113.62(D)(1) and (2), the Contract's choice-of-law and forum-selection clauses are both 'void and unenforceable as against public policy.' "

{¶13} Appellant breaks this assignment of error into three issues presented: residency of the parties; definition of improvement; and application of the statute.

STATUTORY INTERPRETATION

{¶14} The interpretation of a statute is a matter of law subject to de novo review. *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 9 (including consideration of the statute's ambiguity); *Riedel v. Consol. Rail Corp.*, 125 Ohio St.3d 358, 2010-Ohio-1926, 928 N.E.2d 448, ¶ 6. In order to determine and give effect to the legislative intent, the court first looks to the plain language of the statute. *Id.; AT&T Communications of Ohio, Inc. v. Lynch,* 132 Ohio St.3d 92, 2012-

Ohio-1975, 969 N.E.2d 1166, ¶ 18. If the language is clear and unambiguous, it must be applied as written. *Id.*

{¶15} The court has the obligation "to give effect to the words used, not to delete words used or to insert words not used." *Straley*, 139 Ohio St.3d 339 at ¶ 9. *See also Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568, ¶ 12 (give effect to words General Assembly has chosen). It has also been observed that, when interpreting a statute, the court is to avoid an illogical or absurd result. *AT&T,* 132 Ohio St.3d 92 at ¶ 18; *Riedel*, 125 Ohio St.3d 358 at ¶ 10.

RESIDENCY OF CONTRACTING PARTIES

{¶16} The first issue presented by appellant asks: "Does R.C. 4113.62(D) apply only to construction contracts involving at least one Ohio resident?"

{¶17} Appellant urges that the residency of the parties is immaterial to the application of R.C. 4113.62(D). This statutory division contains no exception for out-of-state residents. Rather, the location of the improvement to land is wholly determinative of the statute's application. Appellant states that the court must give effect to the words used in the statute and refuse to insert words.

{¶18} Appellant notes that the legislature easily could have limited the statute to construction contracts for Ohio projects where at least one party is an Ohio resident if the legislature had the intent to exclude cases where both parties are out-of-state residents. Examples were provided of states whose legislatures did add such a limitation to their statutes. *See, e.g.,* Utah Code Ann. 13-8-3(2) (requiring one of parties to be domiciled in the state); Cal.Civ.Proc.Code 410.42(a) (principal offices in the state); Va.Code Ann. 8.01-262.1(A) (principal place of business in state); La.Rev.Stat.Ann. 9:2779(A) (one of the parties is domiciled in state). For comparison, Appellant listed states, including Ohio, where the legislature did not limit their statutes to contracts involving an in-state party. *See, e.g.,* Tenn.Code Ann. § 66-11-208; Ill.Ann.Stat. 815, 665/10.

{¶19} Appellee responds by reiterating its general position that because neither party is an Ohio company, R.C. 4113.62(D) does not apply. Appellee asserts

the legislature did not intend the statute to apply when no local parties are involved. Although the project is wholly located on Ohio land, Appellee claims this is not a local controversy and Ohio has no strong interest in litigation over the contract covering the project. Appellee distinguishes cases applying the statute if they involve an Ohio resident.

{¶20} For instance, the Twelfth District stated that the portions of a construction contract requiring all litigation and alternative dispute resolution to take place in Kentucky violated R.C. 4113.62(D). *See Taylor Bldg. Corp. of Am. v. Benfield*, 168 Ohio App.3d 517, 2006-Ohio-4428, 860 N.E.2d 1058, ¶ 43-46. In the Supreme Court, that particular issue was not appealed, but the Court quoted the statute and stated: "R.C. 4113.62(D) by its terms renders invalid a contract clause imposing an out-of-state forum selection for litigation of claims arising out of a contract to build a residence in Ohio." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-838, 884 N.E.2d 12, ¶ 61-64.

{¶21} Although the property owner was an Ohio resident, the courts did not point to this fact in applying the statute. Moreover, the out-of-state party was the one who filed suit in the Ohio trial court, and no one sought to enforce the forum selection clause for litigation. Rather, its invalidity was mentioned while evaluating the arbitration clause for enforceability.

{¶22} Appellee believes the purpose of the statute is solely to protect local contractors from behemoth out-of-state corporations who use contractual clauses for a "home town advantage" over in-state companies. In support, Appellee cites comments before the Illinois General Assembly in 2002 and a construction article, Mackay & Greves, *Foreign Forum Selection Clauses in Construction Contracts and State Attempts to Limit Their Enforcement*, Construction Briefings No. 2004-7 (July 2004).

{¶23} Appellant replies that Appellee's source explains how *unlike the Illinois statute*, California, Utah, and Virginia bar out-of-state forum selection clauses only where one of the parties to the construction project has a home base in the state. *Id.* Appellant points out that the article recites how the Illinois legislature reached a

different result after a debate. *Id.* They specifically discussed the scenario of two Indiana companies and concluded that Illinois's statute invalidating the forum selection clause would still apply. *Id.* (statute applies if dispute arises out of Illinois project regardless of residency).

{¶24} As Appellant also points out, the proceedings before an Illinois legislature are not controlling in Ohio. In addition, a legislative desire to protect local contractors or subcontractors may co-exist with the public policy intent to have disputes concerning Ohio construction projects improving Ohio land adjudicated in Ohio courts applying Ohio law regardless of the home-state of the contracting parties.

{¶25} In any event, R.C. 4113.62(D) has plain and clear language. The statute provides that "[a]ny provision of a construction contract * * * for an improvement, or portion thereof, to real estate in this state that requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract * * * to occur in another state is void and unenforceable as against public policy." R.C. 4113.62(D)(2). Instead, these proceedings "shall take place in the county or counties in which the improvement to real estate is located or at another location within this state mutually agreed upon by the parties." *Id.* Moreover, "[a]ny provision of a construction contract * * * for an improvement, or portion thereof, to real estate in this state that makes the construction contract * * * subject to the laws of another state is void and unenforceable as against public policy." R.C. 4113.62(D)(1).

{¶26} The pertinent portions of the statute set forth clear elements: a construction contract for an improvement or part of an improvement to real estate in Ohio. There is no additional element of Ohio residency of one of the parties, i.e. there is no exception where both parties are out-of-state companies. The words used clearly show the legislature's intent to make a construction contract's forum selection and choice of law clauses void and unenforceable as against public policy where the contract is for an improvement to land in Ohio, period.

{¶27} We cannot add an all-party out-of-state residency exception to this plain language. *See, e.g., State ex rel. Coble v. Lucas Cty. Bd. of Elections*, 130 Ohio

St.3d 132, 2011-Ohio-4550, 956 N.E.2d 282, ¶ 27 (cannot add to or delete from plain language). Appellant's first argument is correct.

IMPROVEMENT INCLUDES ANY GAS PIPELINE

{¶28} The second issue presented asks: "Does the Project meet the definition of 'improvement' set forth in R.C. 1311.01(J)?"

{¶29} As aforementioned, subdivisions (1) and (2) of R.C. 4113.62(D) apply to: "[a]ny provision of a construction contract * * * for an improvement, or portion thereof, to real estate in this state * * *." This statute refers to R.C. 1331.01 for the definition of improvement. R.C. 4113.62(G)(4). An improvement means: "*constructing, erecting*, altering, repairing, demolishing, or removing any building or appurtenance thereto, fixture, bridge, or other structure, and *any gas pipeline* or well including, but not limited to, a well drilled or constructed for the production of oil or gas * * *." (Emphasis added). R.C. 1311.01(J).

{¶30} Appellant asserts that this clearly applies to the pipeline in this case, noting that the legislature specifically used the word "any" and did not except an interstate gas pipeline. Appellee's position would require the court to delete the word "any" and insert the word "intrastate" or to completely add an exception for interstate gas pipelines. Appellant adds that the project took place solely in Ohio and did not become "interstate" merely because it connects to pre-existing pipeline that eventually reaches out of state. Appellant compares the project to road building or the raising of electric lines that eventually cross state borders.

{¶31} Appellee responds that applying the statute to an interstate gas pipeline (between two out-of-state parties) is absurd. Appellee notes that the statute does not expressly mention an interstate gas pipeline. Again, Appellee omits the word "any" before "gas pipeline" when quoting the statute. Appellee then cites to three unrelated statutes in an attempt to show that the legislature distinguishes between a "gas pipeline" and an "interstate gas pipeline."

{¶32} However, these statutes have nothing to do with this case and do not support Appellee's argument. For instance, one statute states: "The legislative authority of a municipal corporation may prescribe, by ordinance, for the laying down

of gas pipes in highways about to be paved, macadamized, or otherwise permanently improved, and for the assessment of the cost and expense thereof * * *." R.C. 743.37. This is wholly off topic and does not use the same terminology we are applying here.

{¶33} Appellee also cites a section of the Revised Code dealing with Underground Utility Facilities Protection Service and Excavations, which is similar to a "call before you dig" service. The cited section applies to an underground utility facility that is defined as "any" item buried or submerged and used to convey (in pertinent part) natural gas. R.C. 3781.25(B). The definition includes "all" operational underground pipes. *Id.* The statute defines an "interstate gas pipeline" as "an interstate gas pipeline subject to the 'Natural Gas Pipeline Safety Act of 1968,' 82 Stat. 720, 49 U.S.C. 1671, as amended." R.C. 3781.25(L). Subsequent statutes then provide that in the case of an interstate gas pipeline, "the public safety program of the owner of the pipeline * * * " governs a special notice and the timelines for marking the lines. R.C. 3781.28(C); R.C. 3781.29(A)(2).

{¶34} Notably, this definition for interstate gas pipeline would not mean that when the phrase "any gas pipeline" is used, an interstate one is excluded. Rather, that statute merely provides a differing standard where "gas pipeline" is in fact modified by "interstate." In any case, the cited definition statute provides definitions for terms "used in sections 3781.25 to 3781.32 of the Revised Code * * *." R.C. 3781.25. It does not apply to other sections of the Revised Code.

{¶35} Another statute cited by Appellee for comparison purposes provides that the public utilities commission shall require an operator of a "gas gathering pipeline" or a "processing plant gas stub pipeline" that transports gas produced from a horizontal well to comply with the applicable pipe design requirements of a federal regulation and comply with other requirements. R.C. 4905.911(A)(1). A "gas gathering pipeline" is a gathering line that is not regulated under the Natural Gas Pipeline Safety Act. R.C. 4905.90(D). A "processing plant gas stub pipeline" is defined as "a gas pipeline that transports transmission quality gas from the tailgate of a gas processing plant to the inlet of an interstate or intrastate transmission line * * *."

R.C. 4905.50(M). An operator includes a person who operates intra-state pipeline transportation facilities within the state and gas gathering lines within this state which are not exempted by the Natural Gas Pipeline Safety Act. R.C. 4905.90(J)(4),(5) .

{¶36} Again, the definitions of this section dealing with the Public Utility Commission and Natural Gas Pipeline Safety are those to be "used in sections 4905.90 to 4905.96 of the Revised Code * * *." R.C. 4905.90. The terminology used does not support Appellee's argument that "any gas pipeline" would exclude an interstate gas pipeline.

{¶37} It is only when the phrase "gas pipeline" is modified by a limiting term or when it is specifically defined in the pertinent statutes to mean only one type that the phrase could be read as limited to a certain type of gas pipeline. Here, the statute specifies "any gas pipeline." It does not have a modifier as to intra- or inter- state, and it does not provide definitions in order to exclude certain gas lines from the statute's application. To reach Appellee's result, we would have to delete "any" and insert "intrastate" or add an interstate exception.

{¶38} The legislature plainly stated that R.C. 4113.62(D)(1) and (2) apply to construction contracts for the construction of "any" gas pipeline "or portion thereof" on real estate in Ohio. R.C. 4113.62(D)(1), (2), (G)(4), citing R.C. 1311.01(J). The construction of 14.3 miles of a gas pipeline in Ohio is the construction of "any gas pipeline" and meets the definition of improvement under R.C. 1311.01(J) and R.C. 4113.62(G)(4). We conclude that Appellant's second issue presented has merit.

FINAL APPLICATION OF R.C. 4113.62(D)

{¶39} The final issue presented asks: "Do R.C. 4113.62(D)(1) and (2) bar enforcement of the Contract's choice-of-law and forum-selection clauses?"

{¶40} Appellee's arguments are based upon the fact that both parties are out-of-state companies and upon the contention that an interstate gas pipeline does not fall within the phrase "any gas pipeline." Other than these arguments, which were disposed of above, Appellee generally states that it would be absurd to apply the statute to sophisticated out-of-state parties involved in an interstate gas pipeline.

Appellee insists that the parties should be bound by their contractual forum selection and choice of law clauses as there is no allegation of fraud or overreaching.

{¶41} However, it is far from absurd to conclude that the legislature intended to ensure that construction projects taking place on Ohio soil are governed by Ohio law as applied by Ohio courts. Local interests in such a project are considered substantial. The State of Ohio has a material interest in construction improvements on and through its soil.

{¶42} In general, a forum selection clause contained in a commercial contract between business entities is valid and enforceable unless there is fraud or overreaching *or* "unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust." *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.*, 66 Ohio St.3d 173, 176, 610 N.E.2d 987 (1993), syllabus, citing *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513, 523 (1972). A forum-selection clause is characterized as unreasonable and thus unenforceable if it would be against public policy to enforce it. *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, 860 N.E.2d 741, ¶ 15. *See also Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436, 453 N.E.2d 683 (1983) (conflict of law clause is not enforceable if it is against a fundamental policy of the state with a materially greater interest).

{¶43} A statute can establish the public policy of the state. *See Bremen*, 407 U.S. at 15-17 (which pointed to statute or judicial decision for source of whether important public policy of forum would be violated by enforcement of clause). The plaintiff's venue privilege that is effectively exercised prior to a dispute by way of a forum selection clause "exists within the confines of statutory limitations." *See Atlantic Marine Constr. Co., Inc. v. United States District Ct. for Western Dist. of Texas*, 134 S.Ct. 568, 581-582, 187 L.Ed.2d 487 (2013), fn. 7 (state statute providing that a foreign forum selection clause is "voidable" did not apply because the project took place on federal land).

{¶44} Here, our state's public policy was explicitly identified by the legislature and placed into a statutory prohibition: foreign forum selection and choice of law clauses in construction contracts for improvements to Ohio land are "void and unenforceable as against public policy." R.C. 4113.62(D). Appellee's suggestion that a different public policy is more rational is an argument for the legislature, not the court, who must apply the law as written.

{¶45} In conclusion, Appellee's arguments against applying the statute lack merit. The statute clearly limits the contracting parties' forum selection and choice of law for Ohio real estate improvement projects. The provisions within Section 17.2 of the construction contract providing for an out-of-state forum and waiver of venue issues and the provisions within Section 19.2 of the contract providing for the application of out-of-state law are void and unenforceable as against public policy.

{¶46} The trial court erred in dismissing the lawsuit based upon language in a construction contract that the General Assembly has categorized as "unenforceable and void as against public policy." Therefore, the trial court's decision is reversed, and the case is remanded for further proceedings.

Waite, J., concurs.

DeGenaro, J., concurs.