[Cite as *Giffin v. Cohen*, 2011-Ohio-5487.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert E. Giffin [et al.],	:	
Plaintiffs-Appellants,	:	
v.	:	No. 11AP-360 (M.C. No. 2009 CVF 029120)
Stuart Cohen, dba Buckeye Handyman Services,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on October 27, 2011

Robert G. Kennedy, for appellants.

Brendan Hummer Law, LLC, and *Brendan Hummer*, for appellees.

APPEAL from the Franklin County Municipal Court

TYACK, J.

{¶1} Plaintiffs-appellants, Robert E. Giffin ("Giffin"), and Robert G. Kennedy appeal the decisions of the Franklin County Municipal Court. For the following reasons, we affirm those decisions.

{¶2} Giffin assigns the following errors:

> I. The Trial Court Erred in Failing to Find the Contract Between Appella[nt] and Appellee was Subject to the Consumer Sales Practice Act.
>
> II. The Trial Court Erred in Failing to Find Appellee Violated the Requirements of R.C. 1345.23(A) as Being Part of the Home Solicitation Sales Act and the Ohio Administrative Code Adopted Thereunder, which Under R.C. 1345.28 is a Violation of R.C. 1345.02 of the Consumer Sales Practice Act and OAC 109:-4-3-11.
>
> III. The Trial Court Erred in Failing to Award Appellant Triple Damages as Set Forth in R.C. § 1345.09(B) as Appellee Violated the Rule Adopted by the Ohio Attorney General under R.C. § 1345.05(B)(2), or the Appellee's Act Has Been Determined by a Court to Have Violated R.C. § 1345.02 or R.C. § 1345.03. A Copy of the Decision has been Made Available for Pubic Inspection by the Ohio Attorney General.
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> IV. The Trial Court Erred in Failure to Find Ohio Administrative Code 109:4-3-01 Definition of Services and Therefore Required Appellee to Provide a specific Written Form Informing of Appellant's Right to an Estimate for Additional Costs as Required by Ohio Administrative code 109:4-3-05.
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> V. The Trial Court Erred in Finding There were Oral Modifications to the Contract by the Appellant. The Trial Court failed to consider the effects of the Uniform Commercial Code Section 2-209 (R.C. 1302.12).
>
> VI. The Trial Court Erred in Finding that Appellant and Appellant's Counsel Engaged in Frivolous Conduct Under R.C. 2323.51(A)(2)(A)(III-IV) in their Prosecution of this Matter.

Facts and Procedures of the Case

{¶3} This case arises from a contract dispute over a basement remodeling. Giffin contacted appellee Stuart Cohen ("Cohen") doing business as Buckeye Handyman Service in July 2008 and inquired about hiring Cohen to remodel the basement of his

residence. Cohen presented Giffin with a written estimate and contract proposal for the remodeling project on July 28, 2008. Both parties negotiated and Giffin signed a revised contract proposal on August 22, 2008.

{¶4} The contract included the following language:

> Price includes labor for entire job as listed above.
>
> BHS [Buckeye Handyman Service] will provide all basic construction materials such as framing lumber, drywall, electrical wire, receptacles, switches, fasting devices and countertop steel bracing.
>
> Customer will provide all other materials or reimburse Cohen for other materials purchased at customers [sic] request, including, but not limited to, cabinets, countertops, base moldings, casings, switch and outlet covers, recessed lights, baffles and trim rings.

(Defendant's exhibit No. 9.)

{¶5} The contract further states that "[a]ny deviation or alteration from above specifications will be executed only upon written orders and will become an extra charge above the original estimate." (Defendant's exhibit No. 9.)

{¶6} Within a few days of Giffin signing the contract, Cohen began the remodeling project, which he completed on December 10, 2008. During the course of the project, changes were made to the original estimate. These changes were necessitated by unforeseen circumstances or made at Giffin's request. These changes resulted in a total additional cost of $863. These additional costs were presented to Giffin in a revised version of the contract.

{¶7} On December 9, 2008, the day before completion of the project, Giffin presented Cohen a letter objecting to the additional costs. In the letter, Giffin stated: "As

you know I did not sign any change order nor any other document authorizing the additional charges. There fore [sic] I do not feel I owe for the [additional] charges[.]" (Defendant's exhibit No. 23.)

{¶8} Upon completion of the project on December 10, 2010, Giffin added a notation at the bottom of the most recent version of the contract, which included a list of all the additional costs. The notation, which is positioned below the signature line, reads, "932.00 Bal. due on completion by 12/10/2008." (Defendant's exhibit No. 18.) Cohen and Giffin both signed the contract beneath this notation.

{¶9} Giffin then tendered a check for the full balance owed, but had typed on the back of the check, "Endorsement acknowledges copy of Mr. Giffin ltr of 12/09/08." (Defendant's exhibit No. 5.) Cohen endorsed and deposited this check into his account.

{¶10} For each payment made by Giffin, Cohen presented him with an updated version of the contract that included the date, the amount of payment received, and the outstanding balance due.

{¶11} On July 2, 2009, Giffin filed a complaint alleging breach of contract and violations of Ohio's Consumer Sales Practices Act ("CSPA"), R.C. Chapter 1345. Giffin alleged Cohen breached the contract and violated the CSPA by making changes to the original proposal absent written change orders. Giffin sought damages of $863 for the disputed costs, $1,500 to replace drywall on one wall of the basement, and $190 for an inspection of a replaced gas line damaged during the remodeling. He further prayed that these damages be tripled and that he be awarded attorney fees, pursuant to the CSPA.

Giffin further alleged that Cohen's failure to produce receipts for additional items purchased is also a violation of the CSPA.

{¶12} Giffin filed an amended complaint on January 12, 2010, in which Giffin added a count of fraud and/or negligence. A two-day bench trial was conducted on June 4, and 18, 2010. Giffin and Cohen were the only witnesses to testify. The trial court found that a valid contract existed and that Cohen did not breach the contract. The court also found that Cohen did not violate the CSPA or engage in fraud or negligence. No damages were awarded.

{¶13} The trial court also found Giffin's suit to be without merit and conducted a hearing to determine if Giffin and his attorney, Robert G. Kennedy ("Kennedy") engaged in frivolous conduct in the prosecution of the matter. The trial court found that the allegation of violation of the CSPA, the allegation of breach of contract, and the allegation of fraud and/or negligence prosecuted against Cohen were each frivolous under R.C. 2323.51(A)(2)(a)(iii)-(iv). After a March 2011 hearing, the trial court awarded $12,810 plus interest to Cohen's attorney for which Giffin and Kennedy are jointly and severally liable.

{¶14} Giffin timely appealed the trial court's decisions.

First Assignment of Error

{¶15} The first assignment of error asserts that the trial court erred in failing to find that the contract between Giffin and Cohen was subject to the CSPA. The trial court does not conclude that the contract is not subject to the CSPA. The trial court actually found

that Cohen did not violate the CSPA. Implicit in the trial court's argument is that the contract is subject to the CSPA.

{¶16} The first assignment of error is not well-taken and is overruled.

Second, Third, and Fourth Assignments of Error

{¶17} The second, third, and fourth assignments of error all assert that the trial court erred in finding that Cohen did not violate some provision of the CSPA. The CSPA "prohibits suppliers from committing either unfair or deceptive consumer sales practices or unconscionable acts or practices as catalogued in R.C. 1345.02 and 1345.03. In general, the CSPA defines 'unfair or deceptive consumer sales practices' as those that mislead consumers about the nature of the product they are receiving, while 'unconscionable acts or practices' relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue." *Hanna v. Groom*, 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶33; quoting *Johnson v. Microsoft Corp.,* 106 Ohio St.3d 278, 2005-Ohio-4985, ¶24. (Footnote omitted.) See, also, *Bungard v. Ohio Dept. of Job & Family Servs.,* 10th Dist. No. 07AP-447, 2007-Ohio-6280, ¶11 (describing CSPA and its purpose).

{¶18} In determining whether a violation of the CSPA occurred, appellate courts are guided by the principle that judgments supported by competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. *Pep Boys v. Vaughn*, 10th Dist. No. 04AP-1221, 2006-Ohio-698, ¶19.

{¶19} "Judgments supported by some competent, credible evidence going to all essential elements of the case will not by reversed by a reviewing court as being against the manifest weight of evidence." *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279. Further, "a reviewing court must be guided by the presumption that the findings of the trial court are correct, as the trial judge is best able to view the witnesses, observe their demeanor, gestures, voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Griffin v. Twin Valley Psychiatric Sys*., 10th Dist. No. 02AP-744, 2003-Ohio-7024.

{¶20} The arguments presented by Giffin at trial and alleged in his complaint are that Cohen committed unconscionable acts and practices in violation of the CSPA: (1) by charging for work required under the contract but not done; (2) by charging for work not authorized under the contract; (3) by charging for an additional amount of work that was to be completed under the contract; and (4) by threatening not to complete work required by the contract unless Giffin paid additional charges. The trial court also found that Giffin developed a CSPA argument at trial based on Cohen's failure to provide receipts for the additional expenses incurred.

{¶21} In the first allegation, Giffin claims that Cohen charged him for the installation of drywall even though Cohen did not install half-inch thick drywall on all walls, as the written contract required. Contrary to this claim, Cohen did install half-inch thick drywall on all walls but one, which was the wall with the bi-fold doors. That change was made with the full knowledge of Giffin, was made to enhance the appearance of the project, and did not result in any extra cost. "It is familiar law that stipulations in written

contracts may be waived by the parties, and that a construction placed by the parties upon a written contract in the progress of its performance, with full knowledge of all the circumstances, will be binding." *Edge Constr. Co., Inc. v. Robert E. Giffin Co., L.P.A.* (Mar. 7 1989), 10th Dist. No. 88AP-1052.

{¶22} Additionally, at no extra cost, Cohen painted the stairwell to the basement which was not in the contract. Cohen performed his contractual duties in a workmanlike manner and even performed additional work for which he did not charge. Therefore Giffin, failed to prove Cohen charged him for work not performed.

{¶23} In the second and the third allegations, Giffin claims Cohen charged him for work not included in the contract and for additional work that should have been completed under the contract. As discussed above, Cohen performed work not included in the original contract, but this work resulted from either the requests of Giffin or unforeseen circumstances. Furthermore, Cohen did not charge any additional labor costs in complying with these change orders, except for the additional work necessitated by Giffin's request to stain and lacquer the bi-fold doors rather than paint them, as the original contract required. Giffin assented to these change orders with full knowledge and without any fraud shown on the part of Cohen. Therefore, Giffin waived the requirement that change orders be in writing, and subsequently, these change orders served as valid modifications of the original contract.

{¶24} Giffin also failed to prove the fourth CSPA allegation. The trial court determined that Giffin failed to prove that Cohen threatened to walk off the job unless Giffin immediately paid the additional charges. The evidence shows that Giffin did not

tender the remainder of the balance due until Cohen completed the work. The trial court found Cohen's testimony to be more credible that he did not threaten to walk off the job.

{¶25} Lastly, Giffin argued that Cohen's failure to produce receipts for the building materials he purchased constituted a CSPA violation. Under R.C. 1345.02 and Ohio Adm.Code 109:4-3-07(c), the failure of a supplier to produce a receipt for a consumer's deposit that paid for goods or services is a violation of the CSPA. The receipt must state the date, the amount paid, and the remaining balance due. Giffin did not base his claim for relief on this CSPA provision. Giffin instead alleged that Cohen violated the CSPA by failing to produce receipts for the additional items purchased for the remodeling project. This argument is unavailing because the CSPA does not require a supplier to produce receipts for the purchase of all materials required to perform its services. See R.C. Chapter 1345 and Ohio Adm.Code 109:4-3.

{¶26} Even if Giffin alleged that Cohen had violated the CSPA by failing to provide him with receipts of deposits, that argument would fail as well. The record of this case shows that for the payments made by Giffin, Cohen presented him with a dated and revised version of the contract, which included the amount paid and the remaining balance. The trial court's conclusion that Cohen did not violate the CSPA is supported by competent and credible evidence.

{¶27} Giffin did not allege that Cohen violated the CSPA under any additional theories in his pleadings or during trial. However, Giffin has attempted to introduce additional arguments that Cohen violated the CSPA at a post-trial hearing to determine

whether Giffin and Kennedy engaged in frivolous conduct. Giffin also continues these arguments within their appellate briefs. These arguments are not well-taken.

{¶28} It is well-settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal. Ordinarily, errors which arise during the course of a trial, which are not brought to the attention of the court by objection or otherwise, are waived and may not be raised upon appeal. *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43. Thus, a party cannot raise new issues or legal theories for the first time on appeal. *Hudson v. P.I.E. Mut. Ins. Co.,* 10th Dist. No. 10AP-480, 2011-Ohio-908, ¶12.

{¶29} Giffin would also fail in an attempted argument of an implied amendment of pleadings under Civ.R. 15. Civ.R. 15(B) allows parties to try issues that are not contained in the pleadings; such can only take place if the parties have expressly or implicitly consented to the trial of those issues or if no objection to the evidence on such issues is made. *State ex rel. Evans v. Bainbridge Twp. Trustees* (1983), 5 Ohio St.3d 41, 44-46:

> 1. An implied amendment of the pleadings under Civ.R. 15(B) will not be permitted where it results in substantial prejudice to a party. Various factors to be considered in determining whether the parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue entered the case; whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory; and, whether the witnesses were subjected to extensive cross-examination on the issue.
>
> 2. Under Civ.R. 15(B), implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it

> must appear that the parties understood the evidence was aimed at the unpleaded issue.

Id. at syllabus.

{¶30} " 'Whether an unpleaded issue is tried by implied consent is to be determined by the trial court, whose finding will not be disturbed, absent showing of an abuse of discretion.' " *Columbus v. Briggs Rd. Shopping Ctr. Corp.*, 10th Dist. No. 08AP-537, 2009-Ohio-440, at ¶ 11, quoting *Evans* at 46.

{¶31} Giffin alleges, at the post-trial frivolous conduct hearing and in his appellate briefs, that Cohen violated the Ohio Home Sales Solicitation Act by not providing statutorily required language regarding a three-day cancellation window. The trial court found that Giffin, after having judgment entered against him, searched for some law that could have posed a colorable argument based on the facts. The trial court did not find that these post-trial arguments presented a good-faith basis for Giffin's claim.

{¶32} The trial court did not abuse its discretion coming to this conclusion that the unpleaded issues, raised at the post-trial frivolous conduct hearing, were not tried by implied consent.

{¶33} Finding it was proper for the trial court to conclude that Cohen did not violate the CPSA, the second, third, and fourth assignments of error are overruled.

Fifth Assignment of Error

{¶34} The fifth assignment of error asserts that the trial court erred in finding there were oral modifications to the contract and that the trial court failed to consider the effects of the Uniform Commercial Code section 2-209 (R.C. 1302.12).

{¶35} As discussed briefly, "It is familiar law that stipulations in written contracts may be waived by the parties, and that a construction placed by the parties upon a written contract in the progress of its performance, with full knowledge of all the circumstances, will be binding. * * * The rule is peculiarly just when applied to building contracts, when changes are made, the necessity for which develops as the work progresses and while the parties are intent on the accomplishment of the undertaking, no fraud or undue advantage being shown." *Edge Constr. Co., Inc.*, quoting *Expanded Metal Fireproofing Co. v. Noel Constr. Co.* (1913), 87 Ohio St. 428, 440.

{¶36} As Judge Cardozo stated, "[w]henever two men contract, no limitation self-imposed can destroy their power to contract again." *Beatty v. Guggenheim Exploration Co.* (1919), 225 N.Y. 380, 122 N.E. 378, 381. 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.* (Dec. 24, 1992), 10th Dist. No. 92AP-303.

{¶37} A non-oral modification contractual clause is waived orally if the waiver is established by clear and convincing evidence. *Aire-Flo Corp. v. Situation Corp.* (Jan. 31, 1991), 10th Dist. No. 89AP-629, at 3.

{¶38} The trial court found clear and convincing evidence that Giffin engaged in a course of dealing in which he repeatedly orally approved change orders of which he had full knowledge. The trial court concluded that Cohen did not breach the contract by not obtaining written change orders before making alterations to the original contract.

{¶39} The trial court's findings are supported by clear and convincing evidence. Giffin deviated from the terms of the original contract by orally requesting Cohen to stain

and lacquer rather than paint the bi-fold doors, and to install an additional cabinet. Giffin also verbally approved Cohen to order four additional steel braces to accommodate a style of countertop different from that found in the contract. Giffin unilaterally purchased the new countertop. Giffin approved the cutting and reassembly of a cabinet that did not fit in the basement. Giffin also verbally approved the installation of quarter-inch drywall and non-installation of a door jamb extension to accommodate the lacquering of the bi-fold doors. This shows that there was a repeated pattern of oral modification to the contract and that both parties, with each having full knowledge of all the circumstances, allowed for the oral modification of the contract.

{¶40} The fifth assignment of error is overruled.

Sixth Assignment of Error

{¶41} The sixth assignment of error asserts the trial court erred in finding that Giffin and Kennedy engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(iii)-(iv) in their prosecution of this matter.

{¶42} R.C. 2323.51(B) provides that if a party is adversely affected by the frivolous conduct of another, the court may award that party costs, reasonable expenses, and reasonable attorney fees incurred as a result. Before awarding attorney fees, a trial court:

> (a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

> (b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in frivolous conduct and to each party who allegedly was adversely affected by frivolous conduct;
>
> (c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division allows the parties and counsel of record involved to present any relevant evidence at the hearing * * *.

R.C. 2323.51(B)(2)(a) through (c).

{¶43} The trial court, at the conclusion of trial, gave notice of a hearing date of August 13, 2010. The purpose of the hearing was to determine whether or not frivolous conduct had occurred and/or was a violation of Civ.R. 11 as a result of both Giffin and Kennedy's actions. At the hearing, Giffin, Kennedy, and Cohen's attorney, Brendan Hummer all presented evidence.

{¶44} The trial decision and the frivolous conduct hearing decision were issued by the trial court on November 12, 2010, finding that Giffin and Kennedy did engage in frivolous conduct and awarded Cohen costs, reasonable expenses, and reasonable attorney fees. The trial court did not find a violation of Civ.R. 11.

{¶45} Giffin claimed at oral argument that the purpose of the August 13 hearing was unclear, that if the trial decision had been released he would have presented evidence from his wife who had separate interactions with Cohen. This argument is disingenuous. A review of the trial transcript clearly shows that the trial judge was explicit as to what issues needed to be resolved and the purpose of the hearing. Giffin's assertion at oral argument as to the purpose of the August 13, 2010 hearing being vague is not well-taken.

{¶46} After the November 12 decisions, the trial court set another hearing for March 10, 2011, with the purpose of determining the reasonable amount of the award. The trial court awarded $12,810 plus interest based on Mr. Hummer's attorney's fees on behalf of Cohen.

{¶47} The trial court followed R.C. 2323.51(B), properly conducted the necessary hearings and made a proper determination as to whether there was any frivolous conduct in the prosecution of this case.

{¶48} The question then remains as to whether there was frivolous conduct. R.C. 2323.51(A)(2) states, in the relevant part:

> "Frivolous conduct" means either of the following:
>
> (a) Conduct of an inmate or other party to a civil action, * * * or other party's counsel of record that satisfies any of the following:
>
> * * *
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶49} The analysis under R.C. 2323.51 involves a mixed question of law and fact. *Williams Creek Homeowners Assn. v. Zweifel*, 10th Dist. No. 07AP-689, 2008-Ohio-2434, ¶83. In accordance with R.C. 2323.51(A)(1), the frivolous conduct statute requires individual examination of each claim or defense, rather than examination of the complaint as a whole, to determine whether frivolous conduct exists. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 53.

{¶50} The finding of a trial court for frivolous conduct shall not be overturned absent a lack of clear and convincing evidence.

{¶51} The trial court found that Giffin's allegation of breach of contract, violations of the CSPA, fraud and/or negligence against Cohen constituted frivolous conduct. The trial court's findings are supported by competent and credible evidence.

{¶52} The trial court found that Giffin's and Kennedy's allegations of a breach of contract were frivolous under R.C. 2323.51(A)(2)(a)(iii)-(iv) as they lacked evidentiary support. Evidence at trial clearly demonstrated that Cohen substantially performed his contractual duties in a workmanlike manner, that any modifications to the original contract were made either on the request of Giffin or necessitated by unforeseen circumstances, and that Giffin had full knowledge of the modifications. Further, Giffin was satisfied with Cohen's performance, that he retained the full benefit of the contract, and that he did not incur any ascertainable damages. The trial court found that Giffin's allegations regarding his breach of contract claim were devoid of evidentiary support, as were his factual contentions. At the August 13, 2010 frivolous conduct hearing, Giffin or Kennedy failed to

show otherwise. The trial court's finding that Giffin's allegation of Cohen's breach of contract was frivolous, is supported by competent and credible evidence.

{¶53} The trial court's finding that Giffin's allegations that Cohen violated the CSPA for failure to produce receipts for materials purchased were frivolous is supported by competent and credible evidence. The failure to produce such receipts does not constitute a violation of the CSPA or Ohio Adm.Code 109:4-3. Giffin offered no specific authority or colorable argument as to why the failure to produce receipts for materials purchased is a violation of the CSPA.

{¶54} Giffin also claimed to bring this action on grounds that Cohen violated the Ohio Home Sales Solicitation Act. Giffin did not include this argument in his pleadings or at trial. These allegations were made for the first time at the August 13, 2010 post-trial frivolous conduct hearing. The trial court does not find this argument presents a good-faith basis for Giffin's claim.

{¶55} Giffin's claim that Cohen engaged in fraudulent and/or negligent conduct is also frivolous. The trial court found that there was no evidentiary support for Giffin's allegations and factual contentions. There is competent and credible evidence that Cohen performed all his duties under the contract, performed additional work not required of him, and that any changes made to the contract were done with Giffin's full knowledge and the parties' mutual approval, and there is no evidence that Cohen sought any unjust economic advantage over Giffin. Most importantly, Cohen was continually providing Giffin with information about the project giving updates and invoicing the additional cost. It was proper to find Giffin's claim of fraud and/or negligence as frivolous prosecution of a case.

{¶56} The trial court concluded that Giffin's conduct was frivolous as it was based on denials and factual contentions not supported by the evidence. The trial court found, and competent credible evidence shows, that Giffin at first denied any alterations to the original contract. The evidence, however, demonstrated that the changes that he disputes resulted from change orders he either made in writing, requested orally, or assented to, and that all were done with his knowledge and in the absence of any fraudulent, unfair, deceptive, or unconscionable activity by Cohen. The record shows that Giffin was provided with multiple written updates to the contract listing the alterations, a final contract signed by Giffin that lists these changes and their prices, and that Giffin tendered full payment for the work performed. Therefore, Giffin engaged in frivolous conduct by filing and prosecuting this action up through trial.

{¶57} Giffin argues that Cohen was in default of an answer until June 4, 2010 and therefore interest should be calculated from that day and no attorney fees should be awarded for work done prior to that day. No authority for this proposition has been presented by Giffin and he offers no colorable argument to support his position.

{¶58} The sixth assignment of error is overruled.

Cohen's Motion for Appellate Attorney Fees and Expenses

{¶59} Cohen's attorney, Mr. Hummer, has filed a motion with this court arguing that this appeal is frivolous and that under App.R. 23, this court should award reasonable attorney fees and expenses. We do not find this appeal to be frivolous and will not award additional attorney fees or expenses.

{¶60} Giffin has presented six assignments of error. While Giffin in many of the assignments of error makes the same arguments he did at trial, the sixth assignment of error questions the trial court's determination of whether frivolous conduct occurred. While this court upholds the trial court's determination, the question of whether Giffin committed frivolous conduct through the trial phase is a valid one. To appeal the determination of that question was not frivolous in this case.

{¶61} Having overruled all of the assignments of error, the judgment of the Franklin County Municipal Court is affirmed. The motion for additional fees is also overruled.

Judgment affirmed;
motion for attorney fees denied.

FRENCH and CONNOR, JJ., concur.

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