[Cite as *Stalloy Metals, Inc. v. Kennametal, Inc.*, 2012-Ohio-5597.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STALLOY METALS, INC.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2012-G-3054**
- vs -	:	
KENNAMETAL, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 10M000478.

Judgment: Affirmed in part; reversed in part and remanded.

Charles P. Royer and *Daniel M. Singerman,* McCarthy, Lebit, Crystal & Liffman Co., L.P.A., 1800 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115 (For Plaintiff-Appellant).

Mark S. Fusco and *William R. Hanna,* Walter & Haverfield LLP, 1301 E. Ninth Street, Suite 3500, Cleveland, OH 44114 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Stalloy Metals, Inc., appeals the judgment of the Geauga County Court of Common Pleas, following a bench trial, in which the court found in favor of appellee, Kennametal, Inc., on Stalloy's breach-of-contract claim. At issue is whether Kennametal breached its contract with Stalloy to purchase scrap carbide. For the reasons that follow, we affirm in part; reverse in part and remand.

{¶2} On May 3, 2010, Stalloy filed a complaint against Kennametal alleging breach of contract. The complaint alleged that Kennametal had agreed to purchase 120,000 pounds of scrap carbide from Stalloy at $12.25/pound for a total price of $1,470,000. While the case was pending, Kennametal filed a motion in limine to exclude parol evidence of an oral agreement permitting Stalloy to ship the carbide in containers weighing more than the weight specified in the contract. The court decided to hear the trial evidence before ruling on the issue. The case proceeded to bench trial.

{¶3} Sugar Peck, president of Stalloy, testified that Stalloy was in the business of processing scrap carbide. Stalloy purchased the material from various manufacturers, sorted it into different grades, re-packaged it, and then sold and shipped it to its customers.

{¶4} Ms. Peck testified that Stalloy had sold scrap carbide to Kennametal for many years. In October 2008, she learned about Kennametal's carbide recycling program, pursuant to which Kennametal now purchases its scrap carbide.

{¶5} Ms. Peck reviewed the terms and conditions of Kennametal's purchasing program that were posted on its website. She wanted to sell 120,000 pounds of carbide to Kennametal. On Friday, October 17, 2008, she called Kennametal and spoke to its buying agent, David Burns.

{¶6} Ms. Peck told Mr. Burns she had 120,000 pounds of carbide to sell. She asked him if Kennametal was interested in buying it. Mr. Burns said that Kennametal was interested and quoted her a price of $12.25/pound, which Ms. Peck accepted.

{¶7} Ms. Peck was familiar with the provision in Kennametal's terms and conditions regarding shipping, which provided that no more than 1,000 pounds of

recyclable carbide could be shipped in any one container. She told Mr. Burns that Stalloy had already packaged the carbide in 2,000-pound containers, and asked if it would be acceptable for her to ship it that way. She said she could have the scrap re-packaged in 1,000-pound containers, but it would take two weeks to get the smaller drums. Mr. Burns asked Ms. Peck if a tow motor could lift 2,000 pounds. She said the carbide Stalloy purchases is typically packaged in 2,000-pound containers and that is how Stalloy generally re-packages it. As a result, Mr. Burns said there was no need to re-package it, and it was all right to send it in the 2,000-pound containers. Mr. Burns said he would like to get a truck there that same day to start picking up the scrap. He said he would call her back to let her know if that could be done.

{¶8} At 12:30 p.m., Mr. Burns sent Ms. Peck a confirmation order by e-mail stating Kennametal had purchased 120,000 pounds of recyclable carbide at $12.25/pound.

{¶9} At 1:00 p.m., Ms. Peck sent an e-mail to Mr. Burns stating that Kennametal's confirmation order had been received and was accepted, and that Stalloy could ship on Monday, October 20, 2008, if Kennametal's truck was ready.

{¶10} At 2:00 p.m., Mr. Burns sent Ms. Peck an e-mail saying he was working on getting three trucks to Stalloy to pick up the scrap. He said he was not sure it would happen that day, but he would let her know when he found out.

{¶11} Ms. Peck testified that when she got off the phone, she told her operations manager, Dennis Morley, to write up the shipping tickets because she had just sold the carbide they had for sale.

{¶12} Mr. Morley testified he was aware of Kennametal's 1,000-pound weight limitation. He asked Ms. Peck if they needed to re-package the carbide in 1,000-pound drums, but Ms. Peck indicated that shipping the carbide in the 2,000-pound containers was acceptable to Kennametal.

{¶13} Martha Henson, scrap buyer for Stalloy, testified for the defense. On cross-examination, she testified she overheard Ms. Peck's end of her telephone conversation with Mr. Burns. Ms. Henson heard Ms. Peck ask Mr. Burns if it would be acceptable to ship the carbide in 55-gallon drums containing 2,000 pounds each. Immediately after this conversation, Ms. Peck instructed her personnel to ship the 60 barrels of carbide each containing 2,000 pounds, for a total of 120,000 pounds. In its judgment, the trial court found: "Thus one evaluating the testimony would be entitled to infer that Sugar Peck's question to David Burns with respect to 2,000 pound drums was answered by him in the affirmative."

{¶14} Ms. Peck testified that on Monday, October 20, 2008, and Tuesday, October 21, 2008, the trucking company Kennametal hired arrived at Stalloy and picked up the carbide. Stalloy's personnel loaded the carbide onto the three trucks, and it was thereafter delivered to a Kennametal facility in North Carolina.

{¶15} Ms. Peck testified that during the week of October 20, 2008, the price of carbide dropped "like a rock" due to the economy. On Wednesday, October 22, 2008, Kennametal's trucking company called Ms. Peck, and told her that Kennametal had received the first two truckloads on Tuesday, but was not accepting the third truckload.

{¶16} Ms. Peck called Mr. Burns. He said he had no idea what was going on, but he would call her back. However, Mr. Burns did not return the call. Instead, he sent

her an e-mail later that day in which he said he was informed that Kennametal was not accepting shipments this large right now so he had to send the carbide back.

{¶17} Ms. Peck testified she had a conference call with Paul Treml, manager of Kennametal's carbide recycling program, and Mr. Burns' boss, Ron O'Rourke. Mr. O'Rourke said he had no idea why the materials were rejected.

{¶18} Ms. Peck testified that one week later, on October 29, 2008, Tom Barrett of Kennametal sent her a letter saying that Kennametal would not accept Stalloy's shipment because it did not comply with the provision in the terms and conditions requiring that no more than 1,000 pounds of carbide be shipped in any one container. Mr. Barrett's letter also advised Ms. Peck that Kennametal had suspended its carbide recycling program and was not accepting carbide under the program until further notice. This was the first time Ms. Peck was informed there was a problem with the weight of the containers.

{¶19} A few days later, Ms. Peck met with Mr. Barrett at Kennametal's facility in Solon, Ohio. She told him that Mr. Burns had said the drums were fine the way they were. He asked her if she had it in writing and she said she did not. He said, "well, then you have no proof." She said that Stalloy would re-package it and send it back if that was how he wanted it, but he refused her request to cure. Ms. Peck said they both know this has nothing to do with packaging and that Kennametal rejected the shipment because the market price had dropped. Mr. Barrett did not respond to this statement.

{¶20} Thereafter, Kennametal returned the entire shipment. Stalloy eventually sold the material to another purchaser in a series of transactions at an average price of $7.12/pound for a total of approximately $854,400.

{¶21} David Burns, Kennametal's buying agent, testified that Kennametal manufactures and sells metal working tools made of carbide. He was assigned to Kennametal's carbide recycling program, and was the primary contact person to take calls from sellers wanting to sell recyclable carbide. Pursuant to this program, sellers sell scrap carbide to Kennametal, and Kennametal recycles it to make new products. He said that Kennametal started this program because it was less expensive for it to purchase and recycle scrap carbide than to buy the raw materials. He said that, pursuant to the terms and conditions of the carbide recycling program, carbide was to be shipped to Kennametal in closed metal containers and no more than 1,000 pounds of carbide was to be shipped in any one container.

{¶22} Mr. Burns testified that after Ms. Peck told him she had 120,000 pounds of carbide to sell, he called Mr. Treml, manager of the carbide recycling program, asking if he should pursue this. Mr. Treml said yes and told Mr. Burns to quote a price of $12.25/pound.

{¶23} Mr. Burns said he called Ms. Peck back and offered her $12.25/pound, and Ms. Peck agreed. He then e-mailed her a confirmation order. He made arrangements for a truck company to send three trucks to pick up the scrap. He said he did not have any discussion with Ms. Peck regarding the weight of the containers.

{¶24} Mr. Burns sent an e-mail to Ms. Peck saying he was working on getting three trucks to her to pick up the scrap. He said that once he learned when the pick-up would occur, he would e-mail her the bills of lading.

{¶25} Mr. Burns testified that on October 22, 2008, he was instructed by Kennametal's in-house attorney to contact Ms. Peck and tell her that Kennametal had

decided to reject the shipment. He sent an e-mail to Ms. Peck saying he was informed that Kennametal was "not accepting quantities this large right now so * * * we have to send this scrap back. * * * Sorry for the confusion and any problem this may cause."

{¶26} Mr. Burns conceded on cross-examination that, shortly after the return of this shipment, Kennametal suspended the carbide recycling program because in the fall of 2008, the price of carbide went down significantly. He testified the price went from $12/pound in the summer to $4/pound by the end of the year.

{¶27} Thomas Barrett, director of Kennametal's carbide recycling program, testified that on October 28, 2008, he sent a letter to various Kennametal employees saying that, effective immediately, Kennametal was suspending the carbide recycling program. As a reason, he said that "the value of carbide started dropping big last week." The week Mr. Barrett was referring to was the week of October 20, 2008, the same week that Kennametal rejected Stalloy's shipment.

{¶28} Mr. Barrett also testified that on October 29, 2008, he sent a letter to Ms. Peck, which was prepared by Kennametal's in-house counsel, saying that Kennametal rejected Stalloy's shipment because it did not conform to the 1,000-pound weight limit for containers.

{¶29} Scott Powell, shipping and receiving supervisor at Kennametal, testified via deposition that Kennametal's employees had no safety problems removing Stalloy's carbide from the trucks that delivered them. He said the containers were on pallets and Kennametal's employees safely removed them from the trucks with Kennametal's tow motors. Mr. Powell said the containers could have been emptied, but he chose not to empty them due to the large size of the entire shipment. For this reason, he called his

boss, Mr. O'Rourke, and told him a truckload of carbide had been delivered. Mr. O'Rourke told him to reject it.

{¶30} Mr. Powell testified that sellers sometimes ship drums containing more than 1,000 pounds of carbide and Kennametal often accepts them, although they exceed the 1,000-pound weight limit in the terms and conditions. He identified bills of lading showing that between 2007 and 2009, Kennametal accepted some 16 shipments of carbide from different sellers in containers weighing between 1,300 and 2,850 pounds. Six of these shipments included individual containers weighing more than 2,000 pounds each. Mr. Powell said the instant case was the first time Kennametal had ever rejected a shipment due to the weight of the containers used to ship carbide.

{¶31} Mr. Powell said that Kennametal's tow motors are able to pick up drums containing 2,000 pounds of carbide, and Kennametal has used their tow motors to do this with no problems. He said he had never seen a tow motor tip when emptying this amount of carbide. In contrast to his deposition testimony, at trial, Mr. Powell said there was a safety issue with drums weighing more than 1,000 pounds.

{¶32} Following the trial, the court entered judgment in favor of Kennametal on Stalloy's complaint. The court found that, due to the no-oral modification clause in the terms and conditions, the parol evidence rule prevented Stalloy from relying on the parties' oral agreement to vary the 1,000-pound weight limitation in the terms and conditions. Thus, the court found it could not consider the alleged oral agreement between the parties to vary the weight limitation. The court found that since the parol evidence rule prevented any modification of the weight restriction, Kennametal was entitled to reject Stalloy's shipment and did not breach the parties' contract.

{¶33} Stalloy appeals the trial court's judgment, asserting four assignments of error. For its first assigned error, Stalloy alleges:

{¶34} "The Trial Court erred by finding that oral approval and instructions provided by Kennametal's representative did not modify the 1,000-pound container term contained in the Terms and Conditions where Uniform Commercial Code §2-209 expressly states: (a) that in contracts between merchants, no-oral modification clauses do not control unless the contract is signed by the seller; and (b) that a buyer may modify or waive terms such as the 1,000-pound container term relied upon by Kennametal."

{¶35} As a preliminary matter, we note that the terms and conditions of Kennametal's carbide recycling program provide: "These terms and conditions shall be construed and interpreted in accordance with the laws of Pennsylvania * * *." Further, the parties agree that the law of Pennsylvania controls this action. Consequently, we apply the law of Pennsylvania in addressing Stalloy's appeal.

{¶36} "Because contract interpretation is a question of law, this Court is not bound by the trial court's interpretation." *Chen v. Chen*, 2003 Pa. Super. 497, 840 A.2d 355, 360 (2003). "Our standard of review over questions of law is de novo * * *." *Kripp v. Kripp*, 578 Pa. 82, 91 n.5 (2004). When a written contract is clear and unequivocal, its meaning must be determined by its contents alone. *Capek v. DeVito*, 564 Pa. 267, 273-74 (2001). In construing a contract, we must determine the intent of the parties and give effect to all of the provisions therein. *Id*. An interpretation will not be given to one part of the contract which will annul another part of it. *Id.* The contract must be interpreted as a whole, and an interpretation that gives effect to all of the contract's

provisions is preferred. *Midomo Co., Inc. v. Presbyterian Housing Dev. Co.*, 1999 Pa. Super. 233, 739 A.2d 180, 191 (1998).

{¶37} Likewise, the interpretation of a statute is a question of law. *Wilson v. Transport Ins. Co*., 2005 Pa. Super. 401, 889 A.2d 563, 570 (2005). "As with all questions of law, the appellate standard of review is de novo * * *." *In re Wilson*, 2005 Pa. Super. 211, 879 A.2d 199, 218 (2005). The goal in interpreting any statute is to ascertain and effectuate the intent of the General Assembly. *Cimino v. Valley Family Medicine*, 2006 Pa. Super. 342, 912 A.2d 851, 853 (2006). The plain language of a statute is the best indication of the legislative intent that gave rise to the statute. *Id.* When the language is clear and unambiguous, we discern intent from the language alone. We must construe a statute in such a way as to give effect to all its provisions, if possible, thereby avoiding the need to label any provision as mere surplusage. *Id. See also* 1 Pa.C.S.A. § 1921(b).

{¶38} First, Stalloy argues it was not bound by the no-oral modification clause in the terms and conditions because, according to 13 Pa.C.S.A. § 2209(b), it had to *separately sign* that provision before it was bound by it. We do not agree.

{¶39} The shipping provision in the terms and conditions provides:

{¶40} "Recyclable Carbide is to be shipped in closed metal containers; no more than 1,000 lbs. of Recyclable Carbide shall be shipped in any single container."

{¶41} Further, the no-oral modification clause of the terms and conditions provides:

{¶42} "These terms and conditions constitute the exclusive terms and conditions of sale and purchase of the Recyclable Carbide between the parties. * * * These terms and conditions may be modified only by written instrument executed by both parties."

{¶43} Moreover, 13 Pa.C.S.A. § 2209(b) provides:

{¶44} "A signed agreement which excludes modification * * * except by a signed writing cannot be otherwise modified * * *, but *except as between merchants* such a requirement on a form supplied by the merchant must be separately signed by the other party." (Emphasis added.)

{¶45} According to the clear and unambiguous provisions of 13 Pa.C.S.A. § 2209(b), a no-oral modification clause is enforceable where the clause on a form supplied by a merchant is separately signed by the other party, "except as between merchants." As a result, the statute provides that the requirement of a separate signature for a no-oral modification clause does not apply where both parties to the transaction are merchants. The comments to this section indicate it was enacted to protect consumers. Comment 3 provides: "[N]ote that if a *consumer* is to be held to [a no-oral modification] clause on a form supplied by a merchant it must be separately signed." (Emphasis added.) As a result, the drafters of the U.C.C. chose to require merchants to obtain the separate signature of consumers to a no-oral modification clause before they will be subject to such provision. In contrast, where both parties are merchants, neither party requires such protection, and a no-oral modification clause is enforceable without a separate signature of the party to be charged.

{¶46} Despite the clear and unambiguous language of 13 Pa.C.S.A. § 2209(b), Stalloy argues that the requirement of a separate signature applies where both parties

are merchants. It further argues that because it did not separately sign the no-oral modification provision of the terms and conditions, the parties' oral agreement to allow containers weighing more than 1,000 pounds modified the parties' contract. However, Stalloy's argument contradicts the express terms of 13 Pa.C.S.A. § 2209(b), and violates the purpose of the separate signature requirement, i.e., consumer protection.

{¶47} Stalloy's reliance on *Widett v. Federal Reserve Bank of Boston*, 1982 U.S. Dist. LEXIS 12197 (D. Mass.1982), is misplaced. *Widett* was merely a ruling on a motion for summary judgment by a trial court, not a final judgment of an appellate court. Moreover, its ruling was based on the district judge's misquote of 13 Pa.C.S.A. § 2209. While this section provides that a separate, signed writing is required to charge a party with a no-oral modification clause "except as between merchants," the district judge, in attempting to quote this section, omitted the phrase "except as," thus incorrectly stating that the separate signature requirement applies when both parties are merchants, which is the opposite of what the statute actually provides.

{¶48} We therefore hold that the no-oral modification clause was binding on Stalloy, and it could not rely on parol evidence of the parties' alleged oral conversation to modify the terms and conditions regarding shipping.

{¶49} Second, Stalloy argues the parol evidence rule does not apply where, as here, the parties engage in *a subsequent oral agreement*. It thus argues the trial court erred in refusing to consider the subsequent Peck-Burns conversation regarding the weight of the containers in determining whether the parties modified the weight limit in the contract.

{¶50} The parol evidence rule seeks to preserve the integrity of written agreements by precluding the introduction of contemporaneous or prior declarations to alter the meaning of written agreements. *See Rose v. Food Fair Stores*, *Inc*., 437 Pa. 117, 120 (1970). The rule does not apply, however, where a party seeks to introduce evidence of subsequent oral modifications. *See Kersey Mfg. Co. v. Rozic*, 207 Pa. Super. 182, 185 (1965), *rev'd on other grounds*, 422 Pa. 564 (1966). As the *Kersey* court held, a "written agreement may be modified by a subsequent written or oral agreement and this modification may be shown by writings or by words or by conduct or by all three. In such a situation the parol evidence rule is inapplicable." *Id*.

{¶51} Stalloy argues that because the terms and conditions were drafted prior to the parties' contract, their conversation about the weight of the containers occurred subsequent to the contract, making their oral conversation not subject to the parol evidence rule.

{¶52} However, the contract provided that the terms and conditions could only be modified by a written instrument executed by both parties. There is no dispute that the parties' oral conversation was not memorialized by any writing. As a result, according to the express terms of the contract, the parties' oral conversation could not be used to modify the terms and conditions. Stalloy's reliance on *First Nat'l Bank v. Lincoln Nat'l Life Ins. Co*., 824 F.2d 277 (3d Cir.1987) for the proposition that a written contract with a no-oral modification clause can be modified by a subsequent oral agreement is misplaced. That case involved an insurance policy, not a sales contract. The Supreme Court of Pennsylvania in *Universal Builders, Inc. v. Moon Motor Lodge, Inc*., 430 Pa. 550, 557 (1968), has held: "*Unless a contract is for the sale of goods*, *see*

the Uniform Commercial Code * * * § 2-209(2), * * * the contract can be modified orally although it provides that it can be modified only in writing." (Emphasis added.) Because the instant contract is one for the sale of goods, the parties' oral conversation could not be used to modify the terms of the parties' contract.

{¶53} In any event, even if the no-oral modification clause did not prohibit consideration of the parties' conversation regarding the weight limit, the parol evidence rule would still apply because the parties' conversation occurred *during* the parties' negotiations. Therefore, the conversation was not subsequent to the contract, but, rather, was contemporaneous to it. The fact that the terms and conditions were drafted prior to the parties' contract is of no consequence because the terms and conditions were made part of the parties' contract. Thus, the parol evidence rule precluded reliance on the parties' contemporaneous oral conversation to modify the terms and conditions.

{¶54} We therefore hold that the trial court did not err in concluding that the parol evidence rule prevented Stalloy from relying on the parties' oral agreement regarding the weight limitation to *modify* the parties' contract. However, we note that, while Stalloy raised the issue of waiver in the trial court, the court did not consider whether such evidence could be used on the issue of whether Kennametal *waived* enforcement of the requirement of a writing to modify the 1,000-pound weight limitation.

{¶55} 13 Pa.C.S.A. § 2209(d) provides: "Although an attempt at modification * * * does not satisfy the requirements of subsection (b) [enforcing no-oral modification clauses] * * * it can operate as a waiver."

{¶56} The Supreme Court of Pennsylvania in *Universal Builders*, *Inc*., *supra*, at 559-560, stated:

{¶57} [A] provision in a contract for the sale of goods that the contract can be modified only in writing is waived, just as such a provision in a construction contract is waived, under the circumstances described by Restatement, Contracts, § 224 (1932), which provides: "The performance of a condition qualifying a promise in a contract * * * containing a provision requiring modifications to be in writing * * * may be excused by an oral agreement or permission of the promisor that the condition need not be performed, if the agreement or permission is given *while the performance of the condition is possible, and in reliance on the agreement or permission, * * * the promisee materially changes his position*." Obviously a condition is considered waived when its enforcement would result in something approaching fraud. 5 Williston on Contracts, § 689 at pp. 306-07 (3d ed.1961). Thus the effectiveness of a non-written modification in spite of a contract condition that modifications must be written depends upon whether enforcement of the condition is or is not barred by equitable considerations, not upon the technicality of whether the condition was or was not expressly and separately waived before the non-written modification.

{¶58} In view of these equitable considerations underlying waiver, it should be obvious that when an owner requests a builder to do extra work, promises to pay for it and watches it performed knowing that it is not authorized in writing, he cannot refuse to pay on the

> ground that there was no written change order. *Focht v. Rosenbaum*, 176 Pa. 14 (1896). When Moon directed Universal to "go ahead" and promised to pay for the extras, performance of the condition requiring change orders to be in writing was excused by implication. It would be manifestly unjust to allow Moon, which mislead Universal into doing extra work without a written authorization, to benefit from non-performance of that condition. (Emphasis added.)

{¶59} Further, in order for one attempting to modify a contract to be able to succeed on a claim of waiver, he must show either that he reasonably relied on the other party's having waived the requirement of a writing *or* that the waiver was clear and unequivocal. *Cloud Corp. v. Hasbro, Inc*., 314 F.3d 289, 297 (7th Cir.2002) (explaining U.C.C. §2-209).

{¶60} When Mr. Burns agreed that Stalloy could ship its carbide in containers weighing 2,000 pounds and permitted Stalloy to load its carbide onto the three trucks hired by Kennametal knowing it was not authorized in writing, Kennametal could not refuse to pay on the ground that there was no writing authorizing this change. When Mr. Burns told Ms. Peck that it would be acceptable for her to ship the carbide in 2,000-pound drums and agreed to make the purchase on this basis, performance of the condition requiring a modification in writing could be found to have been excused by implication.

{¶61} We also note that Kennametal actually removed Stalloy's carbide from the trucks at its facility in North Carolina. This is evidence the court could consider in

determining whether Kennametal waived the requirement of a writing to modify the weight restriction.

{¶62} In addition, the fact that Ms. Peck's repeated requests for the reason for Kennametal's rejection were met with stonewalling for one full week *after* its rejection of the shipment is further evidence that could also be considered on the issue of waiver.

{¶63} Moreover, Kennametal regularly accepted shipments of carbide from other sellers in containers weighing more than 1,000 and even more than 2,000 pounds in violation of the weight limitation in the terms and conditions. Such evidence could also be considered in determining waiver.

{¶64} Further, there is evidence here of reasonable reliance. Ms. Peck acted in good faith in selling and shipping Stalloy's carbide to Kennametal in the 2,000-pound containers because she *reasonably* believed there was no need to re-package the carbide and that those containers were acceptable. *Cloud*, *supra*, at 298.

{¶65} It does not escape our attention that, although Stalloy argued waiver in the trial court and on appeal, Kennametal does not even address the issue in its brief. In the trial court, Stalloy argued in its memorandum in opposition to Kennametal's motion in limine to exclude parol evidence that "Kennametal modified and/or waived the 1,000 pound shipping requirement. Further, in its appellate brief, Stalloy argues that "the UCC provides that even binding no-oral modification clauses can be waived where there is an attempt at modification as described in UCC 2-209(4)."

{¶66} We therefore hold that, while the trial court correctly found that it was prevented from considering the parties' alleged oral agreement on the issue of *modification*, the court erred in not considering the parties' conversation on the issue of

waiver. On remand, the trial court is instructed to consider each of the foregoing categories of evidence, along with any other evidence in the record, that it finds to be relevant in determining whether Kennametal waived the requirement of a writing to modify the weight limit of the containers.

{¶67} Stalloy's first assignment of error is sustained.

{¶68} For its second assignment of error, Stalloy alleges:

{¶69} "The Trial Court erred by failing to properly apply Uniform Commercial Code §2-202 which states that terms in a commercial contract may be supplemented or explained by course of performance, course of dealing or usages of trade."

{¶70} Stalloy argues the trial court erred in not considering the Peck-Burns conversation and Kennametal's purchases from third parties under the carbide recycling program as evidence of course of dealing, usage of trade, and course of performance, pursuant to 13 Pa.C.S.A. § 2202 to explain the weight limitation in the parties' contract. We do not agree.

{¶71} 13 Pa.C.S.A. § 2202, regarding parol evidence, provides:

{¶72} Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

{¶73} (1) by course of performance, course of dealing or usage of trade * * *.

{¶74} In *North Penn Oil & Tire Co. v. Phillips Petroleum Co*., 358 F.Supp. 908 (E.D. Pa.1973) (construing Pennsylvania law), the court stated that 13 Pa.C.S.A. § 2202 "permits oral evidence of *consistent* additional terms to a contract to explain or supplement the contract but only where the court finds that the written terms were not intended as a complete and exclusive statement of the contract." (Emphasis added.) *Id*. at 920.

{¶75} Here, parol evidence was offered not to simply explain the weight limitation, but, rather, to contradict the weight restriction. Consequently, the Peck-Burns conversation was not admissible under 13 Pa.C.S.A. § 2202.

{¶76} However, even if the parties' conversation and Kennametal's purchases from third parties could be seen as explaining the weight restriction, it still would not be admissible under this provision. First, contrary to Stalloy's argument, the parties' conversation and Kennametal's purchases from third parties are not evidence of the course of performance of the parties. "Course of performance" is defined at 13 Pa.C.S.A. § 1303(a): as "a sequence of conduct between the parties to a particular transaction that exists if: * * * (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and * * * (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection."

{¶77} We do not see how such conversation or other purchases equate to a "sequence of conduct" involving "repeated occasions for performance" by Stalloy. Thus, the Peck-Burns conversation and Kennametal's purchases from third parties are not

evidence of a course of performance by Stalloy that could be used to explain the weight limitation of the contract.

{¶78} Further, the Peck-Burns conversation and Kennametal's purchases from third parties are not evidence of the parties' course of dealing. A "course of dealing" is defined at 13 Pa.C.S.A. § 1303(b) as "a sequence of conduct concerning *previous transactions between the parties to a particular transaction* that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." (Emphasis added.)

{¶79} While Ms. Peck testified that Stalloy had been doing business with Kennametal for many years, she did not present any testimony or other evidence regarding any specific previous transactions between the parties that could be seen as establishing a common basis of understanding for interpreting their conduct. The Peck-Burns conversation and Kennametal's purchases from other sellers are not, by any reasonable construction, evidence of a course of dealing between the parties that could be used to explain their contract. While there was considerable evidence presented regarding Kennametal's purchases from third parties, which is potentially relevant to the issue of waiver, we do not see how such evidence could be seen as evidence of what the parties in this case intended.

{¶80} Similarly, there is no evidence here of a usage of trade that could be used to explain the parties' contract. The fact that Kennametal has regularly accepted delivery of carbide in containers weighing well in excess of 1,000 pounds does not mean that it is a usage of trade. A "usage of trade" is defined at 13 Pa.C.S.A. § 1303(c) as "any practice or method of dealing having such regularity of observance in a place,

vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." Kennametal's practice of accepting shipments in containers weighing in excess of 1,000 pounds is not evidence of a practice having such regularity of observance in a place, vocation or trade as to justify an expectation that it would be observed in the instant sale. In short, Stalloy has not presented evidence of any such usage of trade that could be used to explain the parties' contract.

{¶81} Stalloy's second assignment of error is overruled.

{¶82} Stalloy contends for its third assignment of error:

{¶83} "The Trial Court erred as a matter of law when it held that the Terms and Conditions constituted an integrated contract."

{¶84} Stalloy argues that the trial court erred in finding that the parties entered an integrated contract because the terms and conditions did not contain a price term and a quantity term. Consequently, Stalloy argues the Peck-Burns conversation is the "primary evidence" of the parties' contract. However, Kennametal's confirmation order, which was accepted by Ms. Peck via e-mail, included these terms so that Stalloy cannot reasonably argue they were not part of the parties' contract.

{¶85} Moreover, there is no dispute that the parties understood the terms and conditions were part of their contract. Ms. Peck testified that before contacting Kennametal, she went online and reviewed the terms and conditions of its carbide recycling program. After doing so, she discussed the 1,000-pound limit in the terms and conditions with Mr. Burns.

{¶86} We note that, while Stalloy mentions in its brief that the terms and conditions were not expressly incorporated into the purchase order, it does not argue

that the terms and conditions were not part of the contract. Further, Stalloy does not reference any authority for the proposition that in these circumstances, the terms and conditions were not part of the contract. We also note that Stalloy introduced the terms and conditions as an exhibit at trial.

{¶87} Stalloy's third assignment of error is overruled.

{¶88} For its fourth and final assigned error, Stalloy alleges:

{¶89} "The Trial Court erred as a matter of law when it held that Kennametal's Terms and Conditions were unambiguous."

{¶90} Stalloy argues that the provision in the terms and conditions requiring a prospective seller to telephone Kennametal for "approval and instructions" when it desires to sell more than 5,000 pounds of carbide in any one month is ambiguous, allowing for modification of the 1,000-pound weight limit of each container.

{¶91} When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. *Hutchinson v. Sunbeam Coal Corp*., 513 Pa. 192, 200 (1986). However, when an ambiguity exists, parol evidence is admissible to explain or clarify the ambiguity. *Steuart v. McChesney*, 498 Pa. 45, 53 (1982); *Herr Estate*, 400 Pa. 90, 94 (1960). A contract is ambiguous if it is reasonably susceptible of different constructions. *Hutchinson*, *supra*. The Supreme Court of Pennsylvania has stated: "In the absence of fraud, accident or mistake a written contract speaks for itself, and *parol evidence will not be received to vary or contradict it*." *Safe Deposit & Trust Co. v. Diamond Coal & Coke Co*., 234 Pa. 100, 110 (1912); *accord Boyd Estate*, 394 Pa. 225, 233 (1958). Thus, when a contract is ambiguous,

parol evidence is admissible to *explain or clarify* the ambiguity, but not to vary or contradict the contract.

{¶92} The "approval and instructions" provision provides:

{¶93} "The maximum weight of Recyclable Carbide that Seller may sell to Kennametal in any one-month period via the online Carbide Recycling Program is 5,000 lbs. All sales * * * by the Seller in any one-month period must be aggregated to determine whether the maximum weight of 5,000 lbs. has been * * * exceeded. In the event that Seller desires to sell more than the maximum permissible weight of Recyclable Carbide to Kennametal, Seller must contact Kennametal at 1-866-227-2433 for approval and instructions."

{¶94} We agree with the following conclusion of the trial court:

{¶95} This Court does not accept the argument that the "Instructions and Approval language" permits parol evidence of an oral agreement contradicting an unambiguous shipping instruction such as that set forth in the Terms and Conditions. The instructions and approval provision simply does not go far enough in suggesting that the terms and conditions may be changed. The last paragraph is very clear that the Terms and Conditions cannot be changed except by a written instrument signed by the parties. The existence of the "instructions and approval" clause does not change the applicability of that paragraph.

{¶96} Stalloy argues that, because the shipment here was to be more than 5,000 pounds, requiring Stalloy to seek approval and instructions, it could introduce

parol evidence to contradict the express 1,000-pound weight limitation. However, this argument is not supported by the foregoing case law. Even if the "instructions and approval" provision was ambiguous, it could not be used to *contradict* the express 1,000-pound weight limit. Construing all terms of the contract as a whole and giving effect to each of them, the approval and instructions term simply provides that if the amount of carbide to be sold was more than 5,000 pounds, the seller must contact Kennametal for approval of this amount. If we were to construe the "approval and instructions" provision as broadly as Stalloy argues we should, it would render meaningless all of the other clear and unambiguous terms of the contract.

{¶97} Stalloy's fourth assignment of error is overruled.

{¶98} For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.