

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Cleveland Construction, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-822 (C.C. No. 2003-10724)
Kent State University,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 24, 2010

Daniel R. Wireman; Chamberlain, Hrdlicka, White, Williams & Martin, LLP, and Seth Price, for appellee.

Richard Cordray, Attorney General, William C. Becker, Lisa J. Conomy, Jon C. Walden, James E. Rook and Mark R. Wilson, for appellant.

APPEAL from the Court of Claims of Ohio

KLATT, J.

{¶1} Defendant-appellant, Kent State University ("Kent State"), appeals from a judgment of the Court of Claims of Ohio in favor of plaintiff-appellee, Cleveland Construction, Inc. ("CCI"). For the following reasons, we affirm in part and reverse in part, and we remand this matter to the trial court for further proceedings.

{¶2} In February 2002, CCI submitted a successful bid to serve as the lead contractor for the construction of four residence halls on Kent State's main campus. The

project included construction of Quad B, consisting of Buildings 151 and 152, and Quad C, consisting of Buildings 153 and 154. On March 15, 2002, Kent State issued to CCI a notice to proceed, directing CCI to commence work on March 18, 2002. The notice designated July 25, 2003 as the deadline for substantial completion of all four buildings, and it set August 11, 2003 as the deadline for project completion and owner occupancy.

{¶3} CCI immediately encountered two significant problems: (1) the building pads were not constructed to the correct grade, and (2) Braun & Steidl Architects ("BSA"), the associate¹ for the project, had neglected to secure building permits from the state. Both problems prevented CCI from beginning construction on March 18. To solve the first problem, Kent State hired CCI to finish the building pads. In the meantime, BSA sought the appropriate building permits. BSA attained the foundation permits on April 25, 2002, and on that same day, CCI began installing foundations for the buildings.

{¶4} Kent State and CCI met in November 2002 to discuss how to overcome the delay occasioned by the project's late start. Kent State needed the residence halls to house students for the fall 2003 semester. Consequently, rather than extend the project schedule past August 2003, Kent State proposed paying CCI additional monies to accelerate its work on the project.

{¶5} Ultimately, the parties signed a change order in which Kent State agreed to pay CCI \$142,500 for the additional effort required to accelerate. Factoring in this acceleration, CCI produced a recovery schedule that maintained August 11, 2003 as the project completion date. The recovery schedule, however, shifted the substantial

¹ As the associate, BSA provided Kent State with professional design services and contract administration for the project.

completion dates to: (1) July 23, 2003 for Building 154; (2) July 30, 2003 for Building 153; (3) August 1, 2003 for Building 151; and (4) August 8, 2003 for Building 152.

{¶6} On January 23, 2003, many of the principals involved in the project met to discuss the project's status. The meeting's participants included individuals from: (1) CCI, including Jon Small, President of CCI; (2) BSA; and (3) Kent State's Office of the University Architect. During the meeting, CCI informed the others that poor weather had impeded its productivity. CCI pointed out that northeast Ohio had experienced record rainfall and low temperatures in December 2002, and the extremely low temperatures continued into January 2003.

{¶7} Following the meeting, CCI formally requested an extension of time under Article 6 of the General Conditions² governing the project. Pursuant to Article 6:

6.2.1 If the Contractor is interfered with, disrupted, hindered or delayed at any time in the progress of the Work by any of the following causes, the Contract time shall be extended for such reasonable time which the Associate determines, in consultation with the Department and the Owner,³ has been caused by the interference, disruption, hindrance or delay in the Work:

6.2.1.1 Delay due to suspension of the Work for which the Contractor is not responsible; inclement weather conditions not normally prevailing in the particular season; labor dispute; fire; flood[.]

{¶8} In its February 10, 2003 Article 6 request, CCI sought to modify the construction schedule to allow it 30 more working days to complete each building. CCI explained that low temperatures, rain, and snow during November, December, and

² All contractual provisions discussed in this opinion appear in the General Conditions portion of the contract.

³ The contract identifies the Office of the University Architect as both the "Department" and the "Owner."

January had reduced its production time and hindered the installation of roofing materials.

{¶9} Article 6.5.1 required BSA to respond to CCI's Article 6 request within ten days of its receipt of the request. In a letter dated February 20, 2003, BSA informed CCI that it was considering granting CCI a time extension, but only for one building. BSA stated that Kent State was reviewing the potential impact of a time extension, and that Kent State expected to issue a definitive response in the next week.

{¶10} At the subsequent weekly job progress meeting, Kent State told CCI that if it granted an extension of time, the extension would affect only Building 152. Kent State then deferred making a decision for over three months. On May 16, 2003, Kent State issued a change order granting CCI a 60-day extension for Building 152 only. Thus, while the change order gave CCI until October 7, 2003 to substantially complete Building 152, the substantial completion dates for the other three buildings remained the same. Kent State and BSA hoped that giving CCI a 60-day extension on one building would allow completion of the other three buildings on time.

{¶11} Although CCI disagreed with the resolution of its Article 6 request and refused to sign the change order, it prepared a recovery schedule consistent with the revised deadlines. Unfortunately, CCI almost immediately encountered difficulty in adhering to the recovery schedule. May 2003 proved to be the rainiest May in the Akron-Kent area in 30 years. Then, on June 2, 2003, Local 219 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry went on strike.

{¶12} On June 3, 2003, CCI sent to BSA two Article 6 requests. In the first, CCI sought a 15-day extension to accomplish work delayed due to the rain. CCI explained

that the wet weather had hindered work on the exterior insulation finish system ("EIFS"), masonry, steel, and site excavation, and had stalled completion of the sidewalks and retaining walls on the north end of the site, the west side of Building 154, and the courtyard of Quad C. In the second Article 6 request, CCI sought an extension in time commensurate with the duration of the pipe fitters' strike. CCI informed BSA that it could not commence drywalling on the second through fourth floors of Building 151 until the plumbers finished their rough-in work on those floors and that work passed inspection. Because the striking union members were primarily employed by the plumbing contractor, the strike stymied the scheduled drywalling.

{¶13} BSA replied to CCI's Article 6 requests in a letter dated June 13, 2003. In that letter, BSA stated that, "[a]lthough the specifications allow for an extension in time for labor disputes and weather delays, Kent State University does not have the ability to delay the occupancy of Buildings 151, 153 and 154." BSA directed CCI to plan for "the immediate expansion of work force to accommodate the completion [of Buildings 151, 153, and 154]," and it indicated that Kent State would "entertain" requests for the payment of costs associated with the expanded work force.

{¶14} In total, the pipe fitters' strike lasted 14 days. Consistent with BSA's instruction in its June 13 letter, CCI began working overtime, and continued working overtime after the strike ended. Kent State did not pay CCI for that overtime.

{¶15} On June 20, 2003—after the conclusion of the strike—Kent State issued a change order responding to both of CCI's Article 6 requests. The change order provided that Kent State would grant a ten-day extension of time for Building 151 only. Thus, the

substantial completion date for Building 151 moved from August 1 to August 11, while the substantial completion dates for the other three buildings remained the same.

{¶16} CCI refused to sign the change order. According to Small, President of CCI, a ten-day extension for a 14-day strike did not adequately redress CCI for the time lost because of the strike. Also, the change order failed to allow any additional time to overcome the delay caused by May's extraordinarily inclement weather.

{¶17} Throughout June and July 2003, CCI and the other contractors accelerated their work to achieve timely completion of the project. However, beginning in late June, excessive rain again interrupted work on the project. Indeed, July 2003 proved to be the rainiest July in the Akron-Kent area in 30 years. In early July, CCI notified BSA that, due to the weather, site work was falling behind schedule and was "almost to the point where added manpower and shifts will not enable the project to meet the designated milestone dates."

{¶18} On July 22, 2003, CCI submitted its fourth Article 6 request which asked for a 33-day extension due to the rainy weather. CCI pointed out that the project site had experienced 33 days of rain from late June through the first three weeks of July. The rain had delayed the completion of the site and exterior building masonry, EIFS, landscaping, gutters and downspouts, and underground utilities.

{¶19} BSA replied to the Article 6 request within a day, stating:

CCI has known since the time of bid that the completion date for this project is tied to the opening of school this fall. [Kent State] needs time, prior to then, to fine clean and set up furniture that has been ordered since last year. [Kent State] has made agreements with students for these rooms and plans are already in place for the use of these buildings. * * *

This project has to complete on time[;] there are no viable options to on[-]time completion nor are there adequate places to house students if this project fails. CCI's request for extension in time is denied based on [Kent State]'s need for the successful completion of this project on time.

Acceleration is an acceptable alternative. We suggest that CCI provide an acceleration schedule and cost of acceleration for review.

{¶20} Although CCI worked overtime to meet the deadlines for substantial completion, it could not overcome the numerous delays. CCI achieved substantial completion of Building 153 on August 15, 2003—16 days after that building's scheduled substantial completion date. CCI also achieved substantial completion of Building 154 on August 15, 2003—23 days after that building's scheduled substantial completion date. On August 22, 2003, CCI achieved substantial completion of Building 151—11 days after that building's scheduled substantial completion date. Despite the belated completion of these three buildings, students were able to move in before the beginning of the fall 2003 semester.

{¶21} Construction on Building 152 continued throughout the fall and winter of 2003. CCI finally achieved substantial completion of Building 152 on February 25, 2004. On April 29, 2004, Kent State barred CCI from performing any more work on the project, except for landscaping and warranty-related work.

{¶22} On October 23, 2003, CCI filed a breach of contract claim against Kent State. In response, Kent State filed an answer and counterclaim for breach of contract. The trial court bifurcated the liability and damages portions of the case. Over the course of an 11-day liability trial, witnesses from CCI, BSA, and Kent State testified to the above facts.

{¶23} On February 4, 2008, the trial court issued its liability decision. In relevant part, the trial court found that Kent State breached its contract with CCI by: (1) failing to remit to CCI the unpaid balance of the contract amount, (2) waiting over three months to resolve CCI's February 2003 Article 6 request, (3) refusing to grant CCI a reasonable extension of time for the pipe fitters' strike and the extraordinarily inclement weather of May and July 2003; and (4) improperly denying various change order requests that CCI submitted over the course of the project. On Kent State's counterclaim, the trial court found that CCI breached the contract by: (1) providing defective masonry work, (2) failing to properly construct airshafts and the tower grilles, (3) failing to provide a functional temporary parking lot, and (4) leaving landscaping work unfinished.

{¶24} After issuing its liability decision, the trial court held a damages trial. In its damages decision, the trial court found that CCI had established damages in the amount of \$3,382,612.32 and that Kent State had established damages in the amount of \$352,879.72. Setting off Kent State's damages against CCI's damages, the trial court awarded CCI damages in the amount of \$3,029,732.60, plus prejudgment interest. The trial court reduced its damages decision to judgment on July 23, 2009.

{¶25} Kent State now appeals and assigns the following errors:

[1.] The Court of Claims erred by [f]ailing to apply binding law requiring Cleveland Construction Inc. ("CCI") to adhere to the written terms of the Contract.

[2.] The Court of Claims erred by [r]uling that CCI did not have to exhaust its administrative remedies by submitting its claims through Article 8, the dispute resolution provisions of the Contract, prior to filing suit.

[3.] The Court of Claims erred by [r]uling that CCI is entitled to recovery where CCI's own breaches of the Contract were the cause of CCI's damages.

[4.] The Court of Claims erred by [a]warding CCI damages inconsistent with facts and testimony presented at trial.

{¶26} Kent State's first two assignments of error concern two related, but distinct affirmative defenses. Because both of the parties' arguments conflate these two defenses, we will delineate each defense and the related assignment of error before addressing the merits of the parties' arguments.

{¶27} Kent State's first assignment of error focuses on its waiver defense. Kent State asserts that the trial court erred in allowing CCI to pursue claims arising from delay and the denied change order requests when CCI waived those claims by failing to initiate the administrative dispute resolution process provided in Article 8 of the contract. Pursuant to Article 8.1.1 of the parties' contract:

Any claim against the State shall be made in writing to the Associate and filed prior to Contract Completion, provided the Contractor notified the Associate no more than ten (10) days after the initial occurrence of the facts, which are the basis of the claim. To the fullest extent permitted by law, failure of the Contractor to timely provide such notice shall constitute a waiver by the Contractor of any claim for additional compensation or for mitigation of Liquidated Damages.

Relying on the second sentence of this section, Kent State argues that CCI waived all claims that it did not timely file with BSA. Kent State contends that it proved that CCI did not timely file its claims under Article 8 for the weather and strike delays and the denial of change order requests 39/160, 44-R, 64, 93, 128, 148, 154, and 206. Thus, according to Kent State, the trial court should have found for it on CCI's breach of contract claims that related to the delay and the denial of the change order requests.

{¶28} Kent State's second assignment of error focuses on its exhaustion of administrative remedies defense. Kent State argues that the trial court erred in ignoring

R.C. 153.12(B), which precludes a contractor from bringing a breach of contract action against the state unless "administrative remedies provided for in [a public improvement] contract * * * are exhausted." The administrative dispute resolution process detailed in Article 8 required CCI to first file all claims with the associate. If the associate decided against CCI, then CCI could appeal the associate's decision to the project administrator. If the project administrator could not reach a mutually agreeable resolution of CCI's claim, CCI could appeal to the Office of the University Architect. Kent State contends that it proved that CCI did not submit its delay and change order request claims through each step of the administrative dispute resolution process. Consequently, Kent State argues that R.C. 153.12(B) bars CCI from filing these claims in the Court of Claims.

{¶29} We will start our analysis with Kent State's first assignment of error. When construing the terms of a contract, a court's principal objective is to determine the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 1999-Ohio-162. A court must presume that the intent of the parties resides in the language that they used in the contract. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. If a court is able to determine the intent of the parties from the plain language of the contract, then the court must apply the language as written and refrain from further contract interpretation. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶18; *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶9. When " 'the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.' " *Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, ¶12 (quoting *Shifrin v. Forest City Ents., Inc.* (1992), 64 Ohio St.3d 635, 638).

{¶30} Here, the language of Article 8.1.1 is unambiguous: CCI waived all claims for additional compensation that it did not file with BSA. The trial court, however, disregarded this contractual language on the basis that the Article 8 dispute resolution procedures were "inherently unfair." The trial court found that all the individuals responsible for adjudicating CCI's Article 8 claims participated in making the very decisions that gave rise to the claims. The trial court held that it was inherently unfair to require CCI to pursue a dispute resolution process wherein individuals who were personally involved in the dispute acted as adjudicators. Thus, the trial court held that CCI's failure to invoke the Article 8 procedures did not preclude its claims.

{¶31} In so holding, the trial court rewrote the contract to provide for a more equitable result. However, courts cannot decide cases of contractual interpretation on the basis of what is just or equitable. *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, ¶20. See also *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶29 (holding that a contract "does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto" and that "it is not the province of courts to relieve parties of improvident contracts"). When a contract is unambiguous, a court must simply apply the language as written. *St. Marys* at ¶18. Here, the language of Section 8.1.1 is plain and unambiguous. Consequently, we conclude that the trial court erred when it, in effect, deleted the second sentence of Section 8.1.1 from the parties' contract.

{¶32} Kent State's first assignment of error also includes the argument that CCI failed to comply with Article 6. As we stated above, Article 6.2.1 required Kent State to

extend the time for the completion of the project if CCI encountered a delay caused by "inclement weather conditions not normally prevailing in the particular season." Article 6.4.1 set forth the time restriction on submittals of requests for Article 6 extensions, stating:

Any request by the Contractor for an extension of time shall be made in writing to the Associate no more than ten (10) days after the initial occurrence of any condition which, in the Contractor's opinion, entitles the Contractor to an extension of time. Failure to provide such timely notice to the Associate shall constitute a waiver by the Contractor of any claim for extension, damages or mitigation of Liquidated Damages, to the fullest extent permitted by law.

{¶33} Relying on this provision, Kent State now argues that CCI waived any claim for damages arising from inclement weather because it failed to give Kent State proper notice. Kent State, however, never made this argument to the trial court. In fact, Kent State disavowed the argument when objecting to the introduction of a letter that referenced the delay occasioned by the severe winter weather. While explaining the objection, Kent State's attorney stated:

[Kent State] has at no point, Your Honor, contended that [CCI] failed to give notice of anything. To the contrary, notice came in in a deluge on a regular basis.

(Liability Tr. 369.)

{¶34} Generally, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed. *State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME, Loc. 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶10 (quoting *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 1997-Ohio-71). Here, Kent State not only failed to challenge the Article 6 notices before the trial court, it conceded that it received the Article 6 notices, thus removing the

issue from the realm of contention. Consequently, we decline to review the question of whether CCI waived any claims due to the alleged untimely submittal of its Article 6 requests.

{¶35} Given the above conclusions, we sustain Kent State's first assignment of error to the extent that Kent State argues that the trial court erred in disregarding the plain language of Article 8.1.1. We overrule Kent State's first assignment of error to the extent that it argues that CCI failed to comply with Article 6.

{¶36} We now turn to Kent State's second assignment of error: the trial court erred in rejecting its exhaustion of administrative remedies defense. The exhaustion of administrative remedies doctrine is a judicially-created rule designed to promote economy in the resolution of disputes for which an administrative remedy exists. *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, ¶9; *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111. According to that doctrine, a party seeking relief from an administrative decision must first pursue available administrative remedies before pursuing action in a court. *Dworning* at ¶9; *Nemazee* at 111. Ohio courts recognize some exceptions to the doctrine. *Dworning* at ¶10. Of relevance to this case, courts do not require exhaustion of administrative remedies if resort to those remedies would be a vain act. *Nemazee* at 114-15.

{¶37} R.C. 153.12(B) presents a rare instance where a statute requires a plaintiff to exhaust its administrative remedies before bringing suit. Unlike the judicially-created exhaustion of administrative remedies doctrine, R.C. 153.12(B) does not include any exceptions. Nevertheless, CCI urges this court to apply the vain act exception to this case.

{¶38} When interpreting a statute, a court must first examine the plain language of the statute itself to determine the legislative intent. *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, ¶10; *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, ¶12. If the statute's meaning is clear, unequivocal, and definite, then statutory interpretation ends, and the court applies the statute according to its terms. *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶19; *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶11. This process requires the court to enforce an unambiguous statute as it is written, making neither additions to nor deletions from the statutory language. *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶20. See also *Columbia Gas Transm. Corp.* at ¶19 ("Courts may not delete words used or insert words not used.")

{¶39} Here, because R.C. 153.12(B) does not contain any ambiguity, we must apply it as written. The rules of statutory interpretation prohibit courts from adding language to statutes, and thus, we cannot engraft any exceptions onto R.C. 153.12(B).

{¶40} Moreover, even if this court incorporated the vain act exception into R.C. 153.12(B), that exception would not relieve CCI of its duty to exhaust the Article 8 dispute resolution procedures. In the context of the exhaustion of administrative remedies doctrine:

[A] "vain act" occurs when an administrative body lacks the authority to grant the relief sought; a vain act does not entail the petitioner's probability of receiving the remedy. The focus is on the *power* of the administrative body to afford the requested relief, and not on the happenstance of the relief being granted.

Nemazee at 115 (emphasis sic). To escape the mandate of R.C. 153.12(B), CCI argues that the arbiters named in Article 8 were unlikely to reverse their own previous decisions

and grant CCI the relief it sought. Notably, CCI does *not* challenge these individuals' ability to afford it additional time and/or money. As CCI's argument focuses on the likelihood of receiving a favorable remedy, not the arbiters' power to grant a favorable remedy, the vain act exception would not apply here.

{¶41} Instead of conducting the above analysis, the trial court relied upon our decision in *Conti Corp. v. Ohio Dept. of Adm. Serv.* (1993), 90 Ohio App.3d 462, to conclude that CCI did not have to exhaust its administrative remedies under R.C. 153.12(B). In *Conti*, the defendant, Youngstown State University, asserted that the contractor failed to file an Article 8 claim for man-hours expended on accelerated performance. Relying on R.C. 153.12(B), Youngstown State University argued that, in bypassing the Article 8 dispute resolution process, the contractor relinquished its right to assert its claim in the Court of Claims. The trial court rejected Youngstown State University's argument, finding that:

[T]he Article 8 procedures, as applied by [the Ohio Department of Administrative Services], rose "to the level of a vain act and the rights to appeal to the next level [were] mere vapors. To require a contractor to submit to such is against public policy and plaintiff was certainly not required to submit to it for additional claims."

Id. at 470-71 (emphasis omitted). Based on these findings, this court held that the contractor was relieved of its duty to pursue its claims through the Article 8 dispute resolution process. We went on to conclude that, even if the duty remained, the contractor had satisfied that duty by filing the claims in question pursuant to Article 8. The Department of Administrative Services had refused to process the contractor's claims, telling the contractor that it had already exhausted the Article 8 process.

{¶42} Essentially, the *Conti* court dispensed with R.C. 153.12(B)'s requirement that a contractor exhaust the Article 8 procedures because the trial court had found that those procedures were unlikely to end in a result favorable to the contractor. Importantly, *Conti* neglected to set forth any legal reasoning to support its holding. CCI argues that the vain act exception to the exhaustion of administrative remedies doctrine justifies the *Conti* holding. As we discussed above, this argument fails. R.C. 153.12(B) does not include a vain act exception, and even if it did, that exception would not allow a plaintiff to pursue its claim in court if the plaintiff avoided Article 8 procedures due to a high likelihood of an adverse outcome. Moreover, we cannot conceive of any legal rationale to support the proposition that a court can ignore a clear statutory mandate because it believes that that mandate results in inequity. As we stated above, courts must apply unambiguous statutes according to their terms. *Hubbell* at ¶11. " 'Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.' " *Id.* at ¶22 (quoting *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223).

{¶43} A court may overrule one of its prior decisions where:

- (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶48. Because our holding in *Conti* lacks any legal support, we conclude that it was wrongly decided. Additionally, the holding lacks workability. Effectively, *Conti* allows a contractor to ignore Article 8 with impunity, thus undermining public improvement contracts. As Kent State

points out, the Article 8 process provides the public owner with the ability to resolve a dispute without costly and time-consuming litigation, as well as to make adjustments during construction in light of known, defined costs. Our holding in *Conti* deprives the public owner of these contracted-for benefits. Finally, we conclude that no undue hardship arises from overruling *Conti*. In considering this factor, a court " 'must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations.' " *Galatis* at ¶58 (quoting *Robinson v. Detroit* (2000), 462 Mich. 439, 466). In the 16 years since we issued *Conti*, no appellate court has relied upon that decision for the proposition that a contractor can file suit in the Court of Claims without first exhausting its administrative remedies. *Conti*, thus, is not so fundamental to parties' expectations that abandoning it will create an undue hardship.

{¶44} With all three *Galatis* factors met, we conclude that a departure from the doctrine of stare decisis is necessary and appropriate. As the Supreme Court of Ohio has recognized:

"It does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid public purpose to allow incorrect opinions to remain in the body of our law."

Id. at ¶60 (quoting *State ex rel. Lake City. Bd. of Commrs. v. Zupancic* (1991), 62 Ohio St.3d 297, 300). Consequently, we overrule *Conti* to the extent that it held that a contractor can eschew the Article 8 process if it demonstrates that the Article 8 adjudicators were unlikely to provide it the relief it sought.

{¶45} In sum, we conclude that the trial court erred in refusing to apply R.C. 153.12(B). Accordingly, we sustain Kent State's second assignment of error.

{¶46} Our rulings on Kent State's first and second assignments of error confirm that Kent State asserted viable waiver and exhaustion of administrative remedies defenses. However, we cannot hold that Kent State prevailed on either or both defenses.

{¶47} Waiver is an affirmative defense. Civ.R. 8(C); *513 E. Rich St. Co. v. McGreevy*, 10th Dist. No. 02AP-1207, 2003-Ohio-2487, ¶13. Likewise, we conclude that a defense based on R.C. 153.12(B) is also an affirmative defense. Like all other affirmative defenses, Kent State's exhaustion of administrative remedies defense admits that if CCI has a claim, i.e., CCI's breach of contract claim, Kent State has a legal reason, i.e., R.C. 153.12(B), why CCI cannot recover on that claim. *State ex rel. Plain Dealer Publishing Co. v. Cleveland* (1996), 75 Ohio St.3d 31, 33 (holding that an affirmative defense " 'admits that the plaintiff has a claim (the "confession") but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the 'avoidance')' ").

{¶48} Because both waiver and failure to exhaust administrative remedies are affirmative defenses, Kent State bore the burden of proving both defenses at trial. *Olentangy Condo. Assn. v. Lusk*, 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶23 (" 'It is well settled in Ohio that the defendant asserting an affirmative defense has the burden of proof in establishing such defense.' "). The trial court never evaluated the evidence to determine whether Kent State met its burden. Therefore, we must remand this matter to that court for it to decide whether Kent State should prevail on its waiver and exhaustion of administrative remedies defenses given the evidence in the record.⁴

⁴ We note that Kent State has only preserved these defenses against the breach of contract claims arising from the weather and strike delay and the denial of change order requests 39/160, 44-R, 64, 93, 128, 148, 154, and 206. Kent State did not argue on appeal that the waiver and exhaustion of administrative remedies defenses precluded CCI's breach of contract claim for the unpaid contract balance, and thus, it has waived those defenses as against that claim. Thus, on remand, the trial court need only determine whether the defenses preclude CCI's delay and change order request claims.

{¶49} By Kent State's third assignment of error, it argues that the trial court erred in allowing CCI to recover damages when CCI's own breaches of the contract were the cause of those damages. This argument is double pronged. First, Kent State contends that the trial court erred in determining that CCI was late in completing Buildings 151, 153, and 154 because of the extraordinarily inclement weather and strike. Kent State asserts that CCI's ineptitude caused the delayed completion, and thus, the trial court should have reduced CCI's damages to reflect this breach of the contract. Second, Kent State argues that CCI cannot recover damages for man-hours it expended for remedial work to correct its own mistakes.

{¶50} Throughout the liability trial, the parties each had their own explanation of what went wrong in the construction of the residence halls. Importantly, the parties disagreed about who and/or what caused the delay in the completion of Buildings 151, 153, and 154. On one hand, CCI contended that three bouts of extremely inclement weather plus the pipe fitters' strike resulted in the delay. According to CCI, because it was not responsible for the delay, Kent State breached Article 6 by not extending the time for construction to accommodate the delay. On the other hand, Kent State maintained that CCI's incompetence in scheduling and construction resulted in the delay. According to Kent State, because CCI perpetrated the delay, CCI breached the contract with its failure to meet major milestone and completion deadlines.

{¶51} Based upon the evidence adduced at the liability trial, the trial court found that CCI proved "by a preponderance of the evidence that the project was delayed as a result of both inclement weather and the 2003 labor strike." Liability decision, at 32. Additionally, the trial court found that, "[a]though [Kent State] assert[ed] that most of the

delay and inefficiency by [CCI] was caused by [CCI]'s own inadequate performance, the evidence presented by the parties does not support [Kent State]'s assertion." Liability decision, at 17. In other words, the trial court found that, for the most part, the weather and strike—not CCI's poor performance—caused the delay at issue. On appeal, Kent State argues that the evidence establishes the opposite of the trial court's finding, i.e., CCI, in fact, caused the delay.

{¶52} 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. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In reviewing a trial court's factual findings, an appellate court must presume that the findings are correct because the trial court is best able to observe the witnesses and use those observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81. If the evidence is susceptible to more than one interpretation, an appellate court must construe it consistently with the trial court's judgment. *Central Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d. 581, 584.

{¶53} In the case at bar, CCI presented both testimonial and documentary evidence establishing that the inclement weather and strike delayed the completion of the residence halls. First, CCI introduced the February 10, June 3, and July 22 Article 6 notices, each of which explained how the weather or the strike had hindered construction. Jim Hughey, a director of construction with CCI, and Dan Dietrich, a project manager with CCI, both testified with more specificity about how the May and July weather and the strike impeded CCI's work, thus significantly delaying construction. When asked what caused the delay in the completion of construction, Small, President of CCI, pointed to the

"horrendous" weather during the winter of 2002 and 2003 and the summer of 2003, the pipe fitters' strike, and Kent State's indecisiveness.

{¶54} Given this testimony, we conclude that competent, credible evidence supports the trial court's finding that the delay in completion of Buildings 151, 153, and 154 stemmed from the weather and strike, not CCI's allegedly poor performance. Therefore, we reject Kent State's argument that the trial court erred in not reducing CCI's damages for CCI's alleged failure to coordinate and deliver work in compliance with the contract.

{¶55} In the second part of Kent State's argument, it maintains that the trial court erred in failing to subtract from its damages calculation those damages that CCI sustained as a result of its own defective work. The trial court relied on the damages calculation of David Pattillo, CCI's expert witness, in awarding damages for acceleration costs arising from Kent State's refusal to properly grant extensions of time. Pattillo used the modified total cost method to compute CCI's damages. To figure CCI's additional labor costs pursuant to this method, Pattillo examined CCI's job cost records and payroll to see what types of activities showed an increase in labor hours because of acceleration. Pattillo identified five areas in which CCI expended additional labor hours as a result of acceleration: framing, drywall, acoustical ceiling, EIFS, and clean-up/punch-out. For each area, Pattillo determined the amount of actual hours that CCI expended during the acceleration period,⁵ and compared that amount to the amount of hours that CCI

⁵ Pattillo interpreted the liability decision as limiting CCI's damages recovery to only the additional costs incurred from February 1 to August 31, 2003.

stimated the job would require.⁶ The difference between the two amounts equaled the total additional labor hours expended during the acceleration period. Pattillo then deducted from that total the hours that CCI spent on: (1) remedial work, (2) work subject to a change order request, and (3) any work that Pattillo could not attribute to CCI's effort to accelerate. Lastly, Pattillo multiplied his final total by the regular rate for the particular labor, and marked up that number by ten percent for overhead, ten percent for profit, and one percent for bond costs.

{¶56} Kent State now contends that Pattillo's calculations allowed CCI to collect damages for the costs it incurred to fix the construction mistakes that it made. Kent State points to five instances where CCI had to do remedial work, and it alleges that CCI recovered damages for fixing these "self-inflicted wounds." First, the shear walls that CCI prefabricated off-site did not meet the dimensions set forth in the plans and specifications. CCI had to retrofit the shear walls with additional components on-site. Second, CCI had to relocate the floor joists in Building 152 because it initially installed the floor joists so that they conflicted with the toilet locations. Third, in some instances, CCI misaligned the window openings in the masonry on the exterior wall with the window openings in the stud wall, making the resulting opening too small for the window frame. CCI had to modify the opening in the stud wall to line up with the opening in the masonry. Fourth, CCI had to rebuild the airshafts in Building 154 after it constructed the wrong size of shaft in relation to the showers abutting the shafts. Fifth, CCI reframed approximately one-half

⁶ Pattillo adjusted CCI's estimate if he thought it was unreasonable based on industry-recognized cost data publications.

of the student room doors in Building 154 because it did not initially install the door frames correctly.

{¶57} We agree with Kent State that CCI cannot collect damages for extra work needed to fix its own errors. Resolution of Kent State's argument turns upon whether the record contains competent, credible evidence that the additional labor cost portion of the damages award included only those costs arising from Kent State's breach. As we state above, Pattillo testified that he deducted from his damages calculation man hours spent correcting defective work. Pattillo's damages report includes a chart showing that he excluded hours CCI expended in repairing the shear walls, relocating the floor joists, and reframing the windows. Moreover, in calculating the amount of additional man hours spent on framing during the acceleration period, Pattillo deducted over 7,000 hours that he could not ascribe to the acceleration effort. The rebuilding of the airshafts and the reframing of the doors are both framing activities unrelated to acceleration. Thus, we must conclude that Pattillo removed all the man hours associated with that work from the additional framing hours attributable to the acceleration. Consequently, contrary to Kent State's assertions, the damages award did not include the cost of the remedial work.

{¶58} In its reply brief, Kent State contends that even if CCI accounted for the direct value of its corrective work, it failed to account for the indirect cost associated with the time spent on remediation. According to Kent State, CCI could have mitigated its acceleration damages had CCI directed the hours spent on remedial work to the completion of unfinished work. We disagree. Potentially, time spent on remedial work may have further delayed completion of Buildings 151, 153, and 154. However, Kent State offers no evidence that time spent on remedial work increased the amount of

additional hours CCI had to work to overcome the delay caused by the weather and strike. Thus, while the remedial work may have adversely impacted CCI's ability to timely complete the project, it did not add to the cost of CCI's acceleration.

{¶59} In sum, we reject Kent State's challenge to the trial court's factual findings regarding the cause of the delay in the completion of Buildings 151, 153, and 154, as well as Kent State's contention that the damages award allowed CCI to recover for the cost of remedial work. Accordingly, we overrule Kent State's third assignment of error.

{¶60} By Kent State's fourth assignment of error, it argues that the trial court erred in awarding \$1,205,718 to CCI to compensate it for the acceleration costs arising from Kent State's breach of the contract. Kent State contends that the evidence does not prove that amount of damages. We disagree.

{¶61} As we stated above, the trial court based its acceleration damages award on Pattillo's damages calculation. Pattillo actually made two damages calculations. The first appears in the report he prepared for the liability trial, and the second appears in the report he prepared for the damages trial. The trial court's damage award relies upon the latter report.

{¶62} The first report stated that CCI's total damages totaled \$1,041,768.05. In the second report, Pattillo increased that amount to \$1,205,719.15. As Pattillo explained during the damages trial, the amount of damages listed in the two reports differed for multiple reasons. First, Pattillo revised the damages calculation in response to the trial court's liability decision, which rejected some of CCI's claims. Pattillo consequently removed the costs associated with the rejected claims from his damages calculation. Second, Pattillo adjusted the wage rates he used to calculate the damages to correspond

with the period CCI accelerated to overcome delay due to the inclement weather and strike. Third, the damages report incorporated additional labor costs for EIFS and clean-up/punch-out, as well as additional supervision costs; three categories of damages that did not appear in the liability report.

{¶63} On appeal, Kent State contends that CCI's damages are capped at the total included in the liability report. Kent State then whittles down that total by subtracting "credit due" to it. This analysis ignores Pattillo's damages report and Pattillo's damages trial testimony. The trial court could have rejected Pattillo's damages calculation for all the reasons Kent State now attacks it, but instead, the trial court choose to rely upon it. Despite the arguable weaknesses in Pattillo's calculation, the trial court found it to be credible evidence of the extent of CCI's damages. We cannot second-guess that determination.

{¶64} Likewise, Kent State's challenge to the data Pattillo used to calculate the damages fails. In order to compute the costs associated with CCI's acceleration, Pattillo relied upon CCI's job cost records to determine the amount of labor hours actually worked on the project. Kent State criticizes these records as unreliable. However, Pattillo testified that he tested the reliability of CCI's job cost system, and he found that it accurately tracked CCI's job costs. The trial court found this testimony credible. Again, we cannot second-guess such a determination.

{¶65} In sum, we conclude that Pattillo's damages report and testimony are competent, credible evidence that support the trial court's damages award. Accordingly, we overrule Kent State's fourth assignment of error.

{¶66} For the foregoing reasons, we sustain in part and overrule in part Kent State's first assignment of error, we sustain Kent State's second assignment of error, and we overrule Kent State's third and fourth assignments of error. We affirm in part and reverse in part the judgment of the Court of Claims of Ohio, and we remand this matter to that court for further proceedings consistent with law and this opinion.

*Judgment affirmed in part and reversed in part;
cause remanded.*

BRYANT and McGRATH, JJ., concur.
