

# **The Construction Conversation**

## **Ohio's Legislative, Administrative, and Judicial Two-Way Newsletter**

October, 2020

A Service of Luther L. Liggett, **Graff & McGovern, LPA**  
www.GraffMcGovern.com

### **Judicial: Party Preference at Stake in Supreme Court Races**

Last election, Ohio's Supreme Court seated two new Democratic Justices to the seven-member panel. Next week, two current Republican Justices run for re-election. Republicans need at least one win to maintain a Republican majority on the bench. (Cont'd page 2.)

### **Legislative: Lame Duck to be Fat Goose**

The Ohio General Assembly only passed 54 bills of 1,149 introduced (775 in the House, 374 in the Senate) in the two-year session. After the General Election, the legislature will meet 5 days in November, and 8 days in December, to consider all remaining legislation. (Cont'd page 2.)

### **Judicial: Written Estimate Constituted Enforceable Contract**

A material supplier of lumber for a commercial apartment project sued to enforce a mechanics' lien based on a signed estimate. The trial court erred in dismissing the case because the quantity of the lumber was not stated in the estimate, as required under law for the sale of goods. (Cont'd p. 2.)

### **Judicial: Contractor Cannot Hide Assets to Avoid Litigation**

A homebuilder attempted to transfer the contractor's assets to avoid liability under a construction contract to build a

home. The court found against the contractor, following the assets as a fraudulent transfer. (Cont'd p. 3.)

### **Judicial: Bank Foreclosure May Require Contractor Claim Resolution**

A developer defaulted on a construction loan with subsequent foreclosure and bankruptcy. Separately, the unpaid construction contractors asserted claims against the assets. (Cont'd p. 3.)

### **Judicial: Default in Favor of Contractor Does Not Include Attorney Fees**

A homeowner failed to file any responsive pleading when sued by a contractor who began building a pool deck. The owner discontinued the project and refused to pay for the completed work, causing the contractor to hire an attorney to collect. (Cont'd p. 3.)

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## **Judicial: Party Preference at Stake in Supreme Court Races (Cont'd)**

In 2018, Justices Melody J. Stewart and Michael P. Donnelly won a 6-year term, previously serving as judges in Cuyahoga County.

Judges in Ohio run on a Party ticket in the Primary for nomination, but are not identified by party in the General Election.

Currently, the Supreme Court is held by a 5-2 Republican majority. But, Republican incumbent Judy L. French and Sharon L. Kennedy are up for re-election.

Justice French is opposed by former Secretary of State and current Court of Appeals Judge Jennifer Brunner (both from Franklin County.)

Playing the “name-game”, Justice Kennedy (Butler County) is opposed by Cuyahoga County Judge John O’Donnell, in his third Supreme Court run. Recently, Justice Terrence O’Donnell, a Republican also from Cleveland, retired from the Supreme Court.

2020 presents the strongest Democratic challenge since 1987 when the Supreme Court last held a Democratic majority.

## **Legislative: Lame Duck to be Fat Goose (Cont'd)**

The legislature will give priority to legislation which passed one chamber and has had three committee hearings in the second chamber, with little opposition. This will make for an unusually busy end to the two-year session.

The legislature also will consider State pandemic and budget relief, given continued lagging public revenues.

Not even introduced is a Capital Appropriations Bill for construction funding through June, 2022. The State will fill a current expense budget with reserves after the election, with another deficit looming next July.

In January, 2021, all legislation must begin anew with the arrival of new legislators.

First order of business will be to elect a new Speaker of the House (most likely current Speaker Bob Cupp from Lima), and a new Senate President due to term limits (most likely Senator Matt Huffman from Lima.)

## **Judicial: Written Estimate Constituted Enforceable Contract (Cont'd)**

The material supplier delivered the materials to the site, but the contractor refused to pay, on the excuse that the project construction was postponed.

The trial court also invalidated the supplier’s mechanics’ lien, determining that there was no valid underlying contract.

The Court of Appeals reversed, noting that the quantities upon which the estimate was based were shown on the contractor’s blueprints. Both the supplier and the contractor had signed the estimate. Accordingly, the supplier had an enforceable contract.

The contractor further argued that, since the materials were not incorporated into the building, no mechanics’ lien rights arose. The Court of Appeals ruled that it

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does not matter how or when the materials are used, having been delivered, and therefore creating a mechanics' lien.

*Premier Const. Co. v. Maple Glen Apts.* 12<sup>th</sup> Dist. Clermont, 2020-Ohio-4779.

## **Judicial: Contractor Cannot Hide Assets to Avoid Litigation (Cont'd)**

The homeowners filed a lawsuit for breach of contract and violation of the Ohio Home Construction Service Supplier Act.

During discovery, the homeowners discovered that the contractor had transferred all assets to another company, which then dissolved. Thus, at the time of contracting, the contractor was a mere shell.

The jury found the contractor liable, and the court awarded attorney fees in favor of the homeowner.

On the contractor's appeal, the Court of Appeals affirmed the verdict, agreeing to the finding of a fraudulent transfer. The result was that the individual owners of the contractor entity were held personally liable.

*Hanamura-Valashinas v. Transitions by Firenza, LLC*, 11<sup>th</sup> Dist. Lake, 2020-Ohio-4887.

## **Judicial: Bank Foreclosure May Require Contractor Claim Resolution (Cont'd)**

The trial court dismissed the contractors' claims on summary judgment.

But, the Court of Appeals reversed, on the legal theory of tortious interference in the construction contractors' agreements.

Because the bank lenders knew that construction was ongoing, foreclosure

deprived the contractors of payments rightfully owed. What caused a bank loan default, and what were the events causing the default, are fact issues to be determined at trial. Accordingly, the contractors were entitled to move forward with their claims.

*APCO Industries, Inc. v. Braun Constr. Group, Inc.*, 10<sup>th</sup> Dist. Franklin, 2020-Ohio-4762.

## **Judicial: Default in Favor of Contractor Does Not Include Attorney Fees (Cont'd)**

The contractor moved for default judgment, and the trial court granted judgment, plus attorney fees against the homeowner.

The Court of Appeals upheld the default judgment for breach of contract, but as a matter of law reversed the award of attorney fees. While a defaulting party admits the facts, errors of law cannot be defaulted.

Ohio follows the "American Rule" in which each party bears their own costs, unless a statutory or contractual agreement otherwise exists. Under the "plain error" doctrine, the Court of Appeals applied the Rule and awarded only actual losses.

*Zerger v. Schafer*, 7<sup>th</sup> Dist. 2020-Ohio-4817.

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Join us in

## **The Construction Conversation**

### **Call-In**

on

**Wednesday, November 11, 2020**

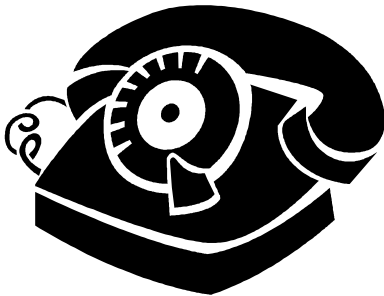
3:00 p.m.

### **Join Zoom Meeting**

<https://us02web.zoom.us/j/81610537295>

Meeting ID: 816 1053 7295

Dial by your location +1 929 205 6099



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