

IN THE COURT OF CLAIMS OF OHIO

2014 OCT -8 PM 3:11

GRAND VALLEY LOCAL SCHOOL DISTRICT )  
BOARD OF EDUCATION, et al., )

Plaintiffs, )

vs. )

BUEHRER GROUP ARCHITECTURE & )  
ENGINEERING. INC. et al. )

Defendants, )

Case No. 2014-00469-PR

Judge Patrick M. McGrath

**ORIGINAL**

**REPLY OF PLAINTIFFS/COUNTERCLAIM DEFENDANTS OHIO SCHOOL FACILITIES COMMISSION AND GRAND VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION TO DEFENDANT JACK GIBSON CONSTRUCTION COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR JUDGMENT ON THE PLEADINGS**

Now comes the Plaintiffs/Counterclaim Defendants, the Ohio School Facilities Commission ("OSFC") and the Grand Valley Local School District Board of Education ("Grand Valley" or "School District") (collectively "Plaintiffs") by and through counsel, and respectfully submit this Reply Memorandum to Defendant Jack Gibson Construction Company's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment or in the alternative Motion for Judgment on the Pleadings. Defendant Gibson fails to demonstrate that it ever possessed a contract for the \$156,000 it alleges it is owed, and has misstated the language contained within the Memorandum of Understanding attached to its Counterclaim. Additionally, Defendant Gibson fails to rebut that the School District Board ever approved funding for anything to Defendant Gibson over and above the \$20,000 purchase order issued to Defendant Gibson.

**ON COMPUTER**

## I. ARGUMENT

### A. Defendant Gibson Fails to Demonstrate It Possessed a Contract

Defendant Gibson argues that it possessed a contract for \$156,000, yet does not refer to anything, whether a contract or board resolution, which would document a contract amount of \$156,000. It cites to the language of a Memorandum of Understanding (“MOU”) as supporting its argument of the existence of a contract, however even the language cited to by Defendant Gibson does not support this position. First, Defendant Gibson fails to point out that the MOU was never signed by any representative of the School District-let alone the Superintendent and Treasurer of the School District. Additionally, Defendant Gibson misrepresents the language of the MOU and cites to the reference of “remedial work” which *includes* the defective work of Gibson, to be repaired for free by Gibson, as its alleged documentation of the existence of a contract.<sup>1</sup> Even then, the language of the MOU only specifies “the approximate scope of work,” without specifying an amount. Counterclaim at Exhibit 1. The actual language of the MOU, with language which Defendant Gibson omitted from its Memorandum in Opposition, reads:

WHEREAS, certain aspects of the design and workmanship related to the masonry have not met the Owners expectations and the OSFC alleges that Gibson’s masonry subcontractor did not perform in a workmanlike manner, i.e. in accordance with the plans and specifications....

\*\*\*

WHEREAS, Gibson denies that that its work on the Project was deficient in any manner but agrees to *work with the Owners to attempt to address any of their concerns related to the Project; and*

WHEREAS, Gibson has agreed to work with the Owners *to identify and correct certain masonry and other work (“remedial work”) that does not meet the Owners expectations* (bolded language omitted by Gibson) and the Owners have

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<sup>1</sup> Defendant Gibson obviously never fixed its defective work on the Project, which is why Defendant Gibson was sued in Ashtabula County Common Pleas Court

agreed that certain aspects of the remedial work will include betterment, and that reasonable compensation will be due Gibson for such items and *will need to be evaluated prior to and/or as work progresses, with payment after satisfactory completion of said work*; and

WHEREAS, the Owners have identified certain remedial work that is not the responsibility of Gibson or its subcontractors and Gibson has agreed to correct this work; and

WHEREAS, it is the intent of the Owners to provide reasonable compensation for remedial work that is not attributed to Gibson or its subcontractors *as agreed by the Parties*; and

WHEREAS, Gibson and the Owners have retained consultants to determine the items of remedial work referenced herein, and the consultants have agreed as set forth in Attachments A and B *to the approximate scope of the work*; (*Id.*, emphasis added.)

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As is apparent from the above there was no agreement reached as to what Defendant Gibson would be paid for performing work that was not part of Gibson's defective work. "Remedial work" was defined as work not meeting the Owners expectation, and was not defined as work which Gibson would be paid for. Even the remedial work, including Gibson's non-defective work, was only referred to as the "approximate scope of work." *Id.* The betterment portion of the remedial work was not guaranteed to receive a payment from the Owners and was required "*to be evaluated prior to and/or as work progresses, with payment after satisfactory completion of said work.*"

The Memorandum of Understanding relied upon by Defendant Gibson may represent a road map of how the parties hoped to resolve the issue of defective work installed by Gibson, however it is not a contract upon which suit may be had against a public authority in this Court. Other than the \$20,000 fully paid purchase order approved by the School District, there is no documentation pointed to by Defendant Gibson which indicated any formal approvals by the

School District over and above the \$20,000. Furthermore, Defendant Gibson cannot point to any approval by the OSFC of Commission approval of a contract. If there were, Defendant Gibson would have presented such documentation with its Memorandum in Opposition.

Defendant Gibson fails to demonstrate that there was ever a meeting of the minds that Defendant Gibson was entering into a contract for \$156,000. Obviously, if the School District issues a Purchase Order for \$20,000, it believed that Defendant Gibson was going to perform \$20,000 of work. If Defendant Gibson exceeded the \$20,000 amount, it proceeded to perform work at its own risk. It is black letter law of this State that Defendant Gibson works at its own risk if it performs extra work without the written authorization for the extra work. *Foster Wheeler v. Franklin County Convention Center Authority*, 78 Ohio St. 3d 353, 678 N.E. 2d 519 (1997).

Defendant Gibson relies upon the case of *Tri-County North Local Board of Education v. McGuire & Shook Corp.*, 784 F. Supp. 541 (S.D. Ohio 1989), as authority that school districts do not have to comply with the requirement that every contract issued by a school district must contain a certificate from the school district treasurer that a certificate of the appropriation for that contract be attached. Even taking Gibson's argument at face value (which Plaintiffs do not), this argument falls short. Essentially, Gibson is arguing that it does not need a written contract with all the terms of price and scope, whether required by statute or not, as long as there are funds available somewhere.

In other words, under this skewed argument, Gibson asserts it only needs to say it is owed money and need not possess a contract for it to have an entitlement as long as funds are

available.<sup>2</sup> Defendant Gibson's argument misses the point that public bodies are required to follow a process to award contracts over a threshold amount. School district contracts for construction in excess of \$25,000 are required to either be competitively bid, or have a board resolution declaring an "urgent necessity." R.C. 3313.46. Here Defendant Gibson has offered no evidence that an advertising and award process was followed for any contract in excess of \$25,000, or that an urgent necessity was declared by the Grand Valley Board of Education, nor is there anything but a \$20,000 purchase order signed on behalf of the School District. Simply put, the reason for that is, those events never occurred. It is well settled that contracts entered into by public authorities in disregard of statutes are void and no recovery can be had for the value of any work performed. *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406, 54 N.E. 372 (1899).

This case is similar to a prior case from this Court regarding the alleged existence of a contract, *Greeno v. Board of Trustees of Bowling Green State University, et al*, 10<sup>th</sup> Dist. No. 88AP-906, 1989 WL 29350 (March 28, 1989), attached, where the plaintiff brought suit alleging he had a contract with Bowling Green State University ("BGSU") to establish an equestrian and harness racing program. *Id.* at 1. The plaintiff had seemingly reached agreement with employees of BGSU in establishing such a program and made investments in additional facilities to support such a program. *Id.* at 2-3. The Board of Trustees for BGSU eventually voted against the program. *Id.* Plaintiff Greeno sued for \$5 million he claimed to have expended in establishing such a program. *Id.* at 2. The Court of Claims determined that no contract existed due to the absence of an acceptance by Bowling Green of the offer. *Id.* The Court of Appeals affirmed stating that "appellant could not reasonably assume that the agreements had actually

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<sup>2</sup> It should be noted that the contract at issue in *Tri-County* complied with all the statutory requirements regarding price, scope, award process and also involved a situation where that school district's treasurer had been terminated for his failure to attach the Treasurer's Certification required by R.C. 5705.41(D) to purchase orders. *Id.* at 3-4.

been entered into until the official agreement had, in fact, *been signed by himself and representatives of Bowling Green endowed with the proper authority to commit the university to the program.*" *Id.* at 4, emphasis added.

As with the *BGSU* case, Gibson can neither point to any contract listing \$156,000 as the contract amount, nor to any person endowed with authority from either the School District or OSFC who entered into a contract for \$156,000 with Defendant Gibson. The most Gibson can point to is a purchase order for \$20,000, which was fully paid. Furthermore, Defendant cannot point to a School District Board resolution either approving a contract to Gibson, or declaring an urgent necessity. The only way Defendant Gibson could establish the existence of a valid contract would be to show approval by the School Board or OSFC of such a contract, and then actually produce a written and executed contract between those parties. The fact of the matter is that Defendant Gibson cannot do either as these things do not exist.

## II. CONCLUSION

This is a matter which is properly sited is the Common Pleas Court, not the Ohio Court of Claims. This Court should not permit artful pleading of a non-existent contract to enable jurisdiction in this Court.<sup>3</sup> For the above stated reasons, and those stated in the original Motion for Summary Judgment, Plaintiffs Ohio School Facilities Commission and Grand Valley Local School District, Board of Education respectfully request that the Court dismiss Defendant Gibson's Counterclaim and remand this matter back to the Ashtabula County Common Pleas Court.

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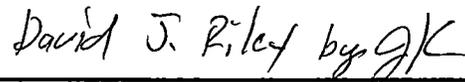
<sup>3</sup> Even if Gibson's allegations were true as to amounts spent on "remedial work," that amount would still not be recoverable in the Court of Claims, although it could be used as a set-off in the Common Pleas action.

Respectfully submitted,  
MIKE DeWINE  
Ohio Attorney General



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DAVID A. BEALS (0038495)  
RICHARD SILK (0074111)  
JERRY KASAI (0019905)  
Assistant Attorneys General  
150 East Gay Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215  
Phone: 614.466.7447  
Fax: 614.466.9185  
[David.beals@ohioattorneygeneral.gov](mailto:David.beals@ohioattorneygeneral.gov)  
[Richard.Silk@ohioattorneygeneral.gov](mailto:Richard.Silk@ohioattorneygeneral.gov)  
[Jerry.Kasai@ohioattorneygeneral.gov](mailto:Jerry.Kasai@ohioattorneygeneral.gov)  
Attorneys for Plaintiff OSFC



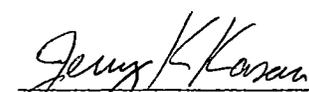
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DAVID J. RILEY (0068584)  
The Riley Law Firm  
24502 Cornerstone  
Westlake, OH 44145  
(440) 801-1960  
[RileyLaw@roadrunner.com](mailto:RileyLaw@roadrunner.com)  
Attorney for Plaintiff Grand Valley Local  
School District Board of Education

## CERTIFICATE OF SERVICE

A copy of the foregoing Reply to the Memo in Opposition to Motion for Judgment on the Pleadings was sent via regular U.S. Mail and email, to the following counsel this 8<sup>th</sup> day of October 2014:

|  |  |
|--|--|
| Joseph A. Gerling (0022054)<br>Scott A. Fenton (0068097)<br>Lane Alton & Horst LLC<br>Two Miranova Place, Ste 500<br>Columbus, OH 43215<br><a href="mailto:jgerling@lanealton.com">jgerling@lanealton.com</a><br><a href="mailto:sfenton@lanealton.com">sfenton@lanealton.com</a><br><i>Counsel for Gibson</i> | Brian C. Lee, Esq.<br>Jason D. Winter<br>Riannon A. Ziegler<br>Reminger Co., LPA<br>101 W. Prospect Ave, Ste 1400<br>Cleveland, OH 44115<br><a href="mailto:blee@reminger.com">blee@reminger.com</a><br><a href="mailto:jwinter@reminger.com">jwinter@reminger.com</a><br><a href="mailto:rzeigler@reminger.com">rzeigler@reminger.com</a><br><i>Counsel for Buehrer</i> |
| Velotta Asphalt Paving<br>c/o Carter Donahoe<br>3413 East Monmouth Road<br>Cleveland Heights, OH 44118   | Patrick F. Roche<br>Davis & Young<br>1200 Fifth Third Center<br>600 Superior Avenue East<br>Cleveland, OH 44114<br><a href="mailto:proche@davisyoung.com">proche@davisyoung.com</a><br><i>Counsel for Boak</i>   |
| Brian L. Buzby (0023124)<br>Porter Wright Morris & Arthur LLP<br>41 S. High Street<br>Columbus, OH 43215<br><a href="mailto:bbuzby@porterwright.com">bbuzby@porterwright.com</a><br><i>Counsel for Hartford</i>  | Brian McMillan<br>McMillan Construction<br>26457 State Route 58<br>Wellington, OH 44090  |
| David C. Comstock Jr.<br>Comstock, Springer & Wilson<br>100 Federal Plaza E. Suite 296<br>Youngstown, OH44503-1811<br><a href="mailto:dcj@csandw.com">dcj@csandw.com</a><br><i>Counsel for Boak</i>  | Rober C. Kokor<br>48 West Liberty<br>Hubbard, OH 44425<br><i>Counsel for Hirschman Construction Services</i>   |
| Cari Fusco Evans<br>Fischer, Evans & Robbins<br>4504 Stephan Circle, NW, Suite 100<br>Canton, OH 44718<br><a href="mailto:cfevans@fer-law.net">cfevans@fer-law.net</a><br><i>Counsel for Westfield</i>   | J. William Pustelak<br>Dba Pustelak<br>9070 Peach St.<br>Waterford, PA 16441   |

  
\_\_\_\_\_  
DAVID A. BEALS (0038495)

**Greeno v. Board of Trustees**

Court of Appeals of Ohio, Tenth District, Franklin County. | March 28, 1989 | Not Reported in N.E.2d (Approx. 3 pages)

1989 WL 29350

Only the Westlaw citation is currently available.

**CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND  
WEIGHT OF LEGAL AUTHORITY.**

Court of Appeals of Ohio, Tenth District, Franklin County.

Edward E. GREENO, Plaintiff-Appellant,

v.

BOARD OF TRUSTEES et al., Defendants-Appellees.

No. 88AP-906. | March 28, 1989.

Appeal from the Ohio Court of Claims

**Attorneys and Law Firms**

Lane, Alton &amp; Horst, Jack R. Alton and Jeffrey J. Jurca, for appellant.

Anthony J. Celebrezze, Jr., Attorney General, and Mark T. D'Alessandro, for appellees.

**OPINION**

McCORMAC, P.J.

\*1 Plaintiff-appellant, Edward E. Greeno, brought suit in the Ohio Court of Claims against defendants-appellees, Bowling Green State University and its Board of Trustees. The complaint alleged that appellant and appellees had entered into an agreement to establish a course of studies which would provide field experience to students interested in harness racing and in equestrian studies. Appellant was to be responsible for providing the physical facilities. Because of this agreement, appellant stated that he improved his physical facilities. The complaint then alleged that Bowling Green canceled the agreement. Appellant asserted that he suffered monetary damages for his expenses in preparing for the program as well as loss profits. He also claimed to have suffered emotional damages and embarrassment due to the sudden cancellation of the program. He prayed for \$5,000,000 in damages.

The Court of Claims determined that no express contract or contract implied in fact existed due to the absence of an acceptance by Bowling Green of the offer. The court also addressed appellant's alternative argument that the doctrine of promissory estoppel applied to the facts and found the doctrine inapplicable to the case. Appellant appeals the judgment and raises the following assignments of error:

"I. The trial court erred in finding that the doctrine of promissory estoppel did not bind the Board of Trustees of Bowling Green State University.

"II. The trial court erred in finding that there was no contract between plaintiff and defendant."

Appellant owned a used car dealership; however, he devoted most of his time to raising and training Standardbred horses. He testified that this was how he earned his living. Appellant owns approximately twenty-six acres of land. Around 1982, he built a new home, a barn, and a race track on the parcel of land.

In 1984, appellant approached Findlay College with the idea of implementing a college program which would provide practical hands-on experience with Standardbred horses and harness racing. Although Findlay was initially receptive, discussions broke down and no agreement was reached.

Appellant approached Bowling Green State University with his idea in early 1985. The head of the continuing education program referred him to Julie Lengfelder, Chair of the Recreation and Dance Division of the School of Health, Education and Recreation Department. Lengfelder was interested in the proposal and started meeting approximately

**SELECTED TOPICS****Merit Systems Protection**

Board Procedures

Employee Allegation of Agency Breach of Settlement Agreement

**Secondary Sources****§ 40:617.Settlement of appeal**

16 Fed. Proc., L. Ed. § 40:617

...The judge may initiate attempts to settle an appeal to the Merit Systems Protection Board informally at any time. The parties may agree to waive the prohibitions against ex parte communications during ...

**Merit Systems Protection Board  
Jurisdiction over Individual Right of  
Action (IRA) Appeal**

24 A.L.R. Fed. 2d 459 (Originally published in 2007)

...This annotation collects and analyzes federal court cases where the issue of jurisdiction of the Merit Systems Protection Board has been raised, generally through a denial of jurisdiction by the Board ...

**Enforceability of Waiver of Right to  
Appeal in Federal Employees' Last  
Chance Agreement**

16 A.L.R. Fed. 2d 593 (Originally published in 2007)

...This annotation collects and summarizes those cases in which courts have determined the enforceability of a waiver of the right to appeal in a federal employees' last chance agreement. Some opinions di...

See More Secondary Sources

**Briefs****Brief for Respondent, Department of  
the Interior**

2000 WL 34416768

John W. BURKS, Petitioner, v.  
DEPARTMENT OF THE INTERIOR,  
Respondent.  
United States Court of Appeals, Federal  
Circuit.  
July 03, 2000

...The undersigned counsel of record is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. She is also u...

**Brief and Appendix for Respondent,  
Department of Veterans Affairs**

2003 WL 24841813

Jacqueline L. WASHINGTON-THOMAS,  
Petitioner, v. DEPARTMENT OF VETERANS  
AFFAIRS, Respondent.  
United States Court of Appeals, Federal  
Circuit.  
September 26, 2003

...Pursuant to Rule 47.5, respondent's counsel states that she is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or si...

**Brief of Respondent, the United States  
Postal Service**

2010 WL 830430

Gary P. EVANS, Petitioner, v. UNITED  
STATES POSTAL SERVICE, Respondent.  
United States Court of Appeals, Federal  
Circuit.  
February 18, 2010

...Pursuant to Rule 47.5, respondent's counsel states that he is unaware of any

once a week with appellant and others to work on the proposed program.

Lengfelder brought in other Bowling Green staff to participate in developing the proposed program. She reported to the director of HPER, Dr. Betty van der Smissen, informing her of the proposal. Van der Smissen instructed Lengfelder to follow-up on the proposal and to get more information. During the spring of 1985, van der Smissen met with Lengfelder, appellant, and an individual named Phil Martin who was working with appellant to develop the curriculum proposal.

\*2 The program needed to receive academic approval, which involved a several step process, including approval by the undergraduate council. Additionally, to complete the process, Bowling Green and appellant must have entered into a contract which also depended upon Bowling Green and Findlay College reaching an agreement. A joint venture with Findlay was necessary because Findlay was equipped to offer certain necessary courses that Bowling Green did not have the capabilities to offer.

Lengfelder, van der Smissen, and appellant discussed the necessary improvements to appellant's facilities if the proposed program were to be implemented. In August 1985, Lengfelder wrote to appellant informing him that she was preparing a new package to resubmit to the first step of the academic approval process in the coming fall.

The proposal did not clear the academic approval process until February 1986. At that time, the matter of finalizing the terms and signing the agreements between Bowling Green and appellant and Bowling Green and Findlay remained to be done.

Pursuant to standard practice, the proposed Standardbred Equine Program between Bowling Green and Findlay was submitted to the Board of Trustees for approval. Approval of the board was customarily sought when it was necessary for Bowling Green to enter into agreements with outside organizations. The board voted against entering into the agreement in May 1986. This vote prevented the proposed program from being implemented and negotiations between appellant and Bowling Green ended.

The Ohio Supreme Court has held that, for a valid contract to exist, "there must be a meeting of the minds of the parties, and there must be an offer on the one side and an acceptance on the other." *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, at 79. The term "meeting of the minds" refers to the manifestation of mutual assent between the parties of an agreement to the exchange and consideration, or to the offer and acceptance. (Restatement of the Law 2d, Contracts (1981) 52, Section 17, Comment c.) The trial court found no meeting of the minds between appellant and appellees and, consequently, ruled that there was no express contract.

In support of his argument that an express contract existed, appellant pointed to the numerous improvements that he made to his property, allegedly in reliance upon appellees' promise that the program would be implemented and upon the publicity put out by Bowling Green. This argument fails to establish an express contract. Appellant began many of the improvements prior to and during the negotiation stages; it was not until February 1986 that the program actually passed through the academic approval process. In turn, much of the publicity which Lengfelder and van der Smissen put out was done before the academic approval process was complete.

Appellant testified that he knew of the necessity of reaching a signed agreement between himself and appellees and between appellees and Findlay before the program could finally be implemented. While the publicity did suggest that the program would be implemented in the fall of 1986, it was improvidently put out by Lengfelder and van der Smissen without proper authority. The proposed program was a detailed one and an unusual arrangement between two parties. Bowling Green customarily put into writing and signed all of its agreements with individuals and organizations outside of Bowling Green. Given these circumstances, appellant could not reasonably assume that the agreements had actually been entered into until the official agreement had, in fact, been signed by himself and representatives of Bowling Green endowed with the proper authority to commit the university to the program.

\*3 This evidence also supports the trial court's determination that no contract implied in fact existed. To recover upon either an express or an implied in fact contract theory, the proponent must prove that an agreement based on a meeting of the minds of the parties and on mutual assent existed to which the parties intended to be bound. *Lucas v. Costantini* (1983), 13 Ohio App.3d 367, at 369, citing *Columbus, Hocking Valley & Toledo Ry. Co. v. Gaffney* (1901), 65 Ohio St. 104.

other appeal in or from this action that was previously before this Court or any other appellate court under the same or sim...

See More Briefs

#### Trial Court Documents

##### In re North American Petroleum Corp. USA

2011 WL 2750779  
In re North American Petroleum Corp. USA  
United States Bankruptcy Court, D.  
Delaware.  
February 18, 2011

...FN1. On January 24, 2011, the Court issued its Preliminary Findings of Facts and Conclusions of Law (D.J. 177) (the "Preliminary Findings"). This supplements the Preliminary Findings and is the Court's...

##### In re Bldg. Materials Holding Corp.

2011 WL 2750746  
In re Bldg. Materials Holding Corp.  
United States Bankruptcy Court, D.  
Delaware.  
April 15, 2011

...FN1. The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Con...

##### In re Srhs Bankruptcy, Inc.

2011 WL 4802743  
In re Srhs Bankruptcy, Inc.  
United States Bankruptcy Court, M.D.  
Tennessee.  
October 04, 2011

...FN1. The Debtors in these Cases, along with the last four digits of each Debtor's federal tax identification number, are: SRHS Bankruptcy, Inc. (f/k/a Sumner Regional Health Systems, Inc.) (3738), TMC ...

See More Trial Court Documents

Appellant's second assignment of error is overruled.

Appellant also asserts that the trial court improperly ruled that the doctrine of promissory estoppel did not apply to the facts of the case. In *Talley v. Teamsters Local No. 377* (1976), 48 Ohio St.2d 142, the Ohio Supreme Court adopted the Restatement of the Law 2d, Contracts (1981) 242, Section 90, definition of promissory estoppel:

"Promise Reasonably Inducing Action or Forbearance

"(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." *Id.* at 146.

The trial court found that appellees had made no identifiable promise which reasonably should have been expected to induce appellant to act.

The facts in the record support the trial court's conclusion. Appellant expended a great deal of energy attempting to get his proposed program approved and implemented. The facts do support appellant's optimism that the program would be approved; Lengfelder and van der Smissen liked the idea of the program, were enthusiastic, and communicated to appellant their belief that the program would go through. However, these facts do not suffice to create a promise of the nature necessary for the doctrine of promissory estoppel to be invoked, particularly in view of appellant's knowledge that approval of the Board of Trustees was required before there was a binding agreement. The improvements could properly be found to have been made to enhance appellant's opportunity to obtain program approval rather than upon justified reliance upon Lengfelder's and van der Smissen's ability to predict how the board might act. See *McCroskey v. State* (1983), 8 Ohio St.3d 29.

Appellant's first assignment of error is overruled.

Appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

*Judgment affirmed.*

STRAUSBAUGH and REILLY, JJ., concur.

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