Skidmore Script

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Skidmore & Associates
A Legal Professional Association

Winter 2003

Mechanic's Lien Law Becomes More Lien-ient

By: Eric E. Skidmore, Esq.

The mechanic's lien law is a tedious set of rules governing the process by which workers preserve, protect and secure payment rights in the furnishing of labor or materials in construction projects. The process depends upon a formalized means of communicating back and forth between an owner intending to improve real property and subcontractors who actually build the improvements or supply the materials. Ohio Courts have strictly interpreted these communication rules, which could have perilous consequences to an unwary and noncompliant subcontractor. Recently, the Ohio legislature enacted House Bill (H.B.) 514 relaxing some aspects of serving certain written communications between owners and subcontractors. H.B. 514 was signed by Governor Taft on December 13, 2002 and will become effective March 14, 2003. In order to understand the changes propounded by H.B. 514, I will first review the basic mechanics of the mechanic's lien law and highlight the revisions to the rigid communication process. The overall effect of H.B. 514 is to provide some flexibility in the service of written communications by and between an owner and subcontractor, which should make it easier for a worker to get paid.

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I. What is a Mechanic's Lien?

A mechanic's lien is a claim created by statute for the purpose of securing priority of payment of the price or value of work performed or materials furnished in erecting or repairing a building or structure.[1] Article II, Section 33 of the Ohio Constitution authorizes the legislature to pass laws "to secure mechanics, artisans, laborers, subcontractors and material men their just dues by direct lien upon the property upon which they have bestowed labor or…furnished material".[2] In practical terms, the mechanic's lien law is the means available to plumbers, electricians, roofers, excavators, masons, brickyards, lumberyards, etc. to preserve and perfect their payment rights. The mechanic's lien laws governing privately owned land are contained in Ohio Revised Code (O.R.C.) §§ 1311.01 through 1311.22. O.R.C. §§ 1311.25 through 1311.32 governs instances where publicly owned land is involved.

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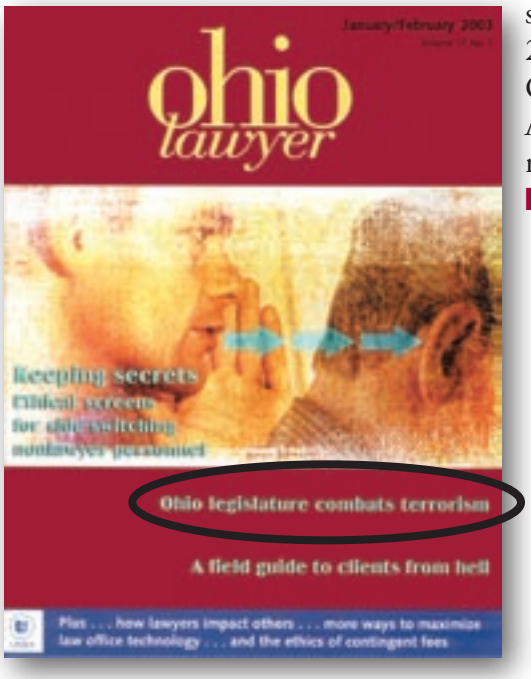
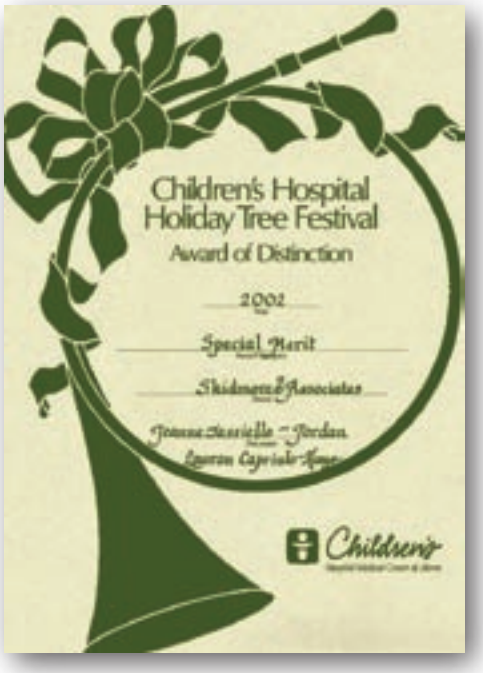
Anti-terrorism Article Gets Ink

Skidmore Script (Fall, 2002) featured an article reviewing Ohio's new anti-terrorism statute. The article was accepted for publication in the January/February 2003 edition of *Ohio Lawyer*, which has a circulation of 28,000. "I was pretty excited about the article being printed because we all worked so hard to provide a polished product for our first newsletter. It is nice to know that the article had a broader appeal, which is a testament to the quality of legal writing that we all aspire to achieve," said Eric Skidmore. " I had fun with the article because I wrote it at home at our kitchen table with Nerf balls whizzing by my head and in between giving my son noogies," Skidmore stated. The cover of Ohio Lawyer is displayed herein with written permission. Copyright 2003 by the Ohio State Bar Association. All rights reserved. ■



S&A Sponsored Festival Tree Achieves Merit

In late November 2002, the firm sponsored a Festival Tree and donated it to the Holiday Tree Festival hosted by the volunteers of Children's Hospital Medical Center of Akron. The event attracted over 250,000 visitors and raised money for patient care, medical research and specialized equipment.



The tree was titled "Vintage Akron" and was decorated with memorabilia from Akron's past. The firm's decorators, Lauran Kunze and Jeanne Jordan, spent a year bidding on the Internet to acquire mementos about Akron. Items were acquired from as far away as England and Australia. Ms. Kunze and Ms. Jordan spent two days preparing the tree for the auction. Over 400 items of Christmas art were donated, judged and auctioned. Vintage Akron received a Special Merit Award of Distinction from the judges. The firm's own Barbara C. Clinefelter stitched and donated a Christmas afghan to accompany the tree. For more details about the Festival Tree and decorators, or to see photos, go to www.skidmorelaw.com and click the News menu. ■

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Mechanic's Lien (cont.)

II. What are the Routine Procedures of the Mechanic's Lien Law?

The following is a summary of the procedure required to preserve and perfect mechanic's liens relative to commercial construction projects located on privately owned land:

A. Owner Records a Notice of Commencement (NOC)

The owner of real property who contracts for the construction of an improvement must prepare and record a NOC.[3] This should be done prior to anyone performing labor or work or the furnishing of materials at the construction site.[4] The NOC must be in affidavit form listing original contractors, the legal description of the real property and a description of the proposed improvements.[5] It shall be posted on the real property and served upon the original contractor and only upon subcontractors and material suppliers upon written request.[6]

B. Subcontractor Serves the Owner with a Notice of Furnishing (NOF)

If a NOC is recorded, then a subcontractor or material supplier who intends to preserve his right to payment must serve a NOF upon the owner of the real property to be improved.[7] The subcontractor and material supplier must request service of the NOC from the owner. Recording the NOC triggers the subcontractor's duty to prepare and serve the owner with a NOF. The NOF gives the owner notice that there are interests out there and they want to be paid. The NOF must be served before commencing work on the project or within the first 21 days after work or material deliveries begin.[8] If the NOC is not recorded the subcontractors and material suppliers do not have to serve a NOF upon the owner to preserve their payment rights.[9]

The Ohio Supreme Court has concluded that the mechanic's lien statute should be "strictly construed" with respect to the creation of the lien. Any defect in the creation of a mechanic's lien could be fatal which may lead a court to disregard the purported claim ...

C. Subcontractor Records an Affidavit of Mechanic's Lien

A subcontractor seeking to perfect a right to payment for labor or materials expended on a construction project must execute and record an Affidavit of Mechanic's Lien.[10] The subcontractor must use the prescribed form and file it within the proper time period.[11] The failure to file an Affidavit of Mechanic's Lien is a fatal impediment to getting paid for labor or materials provided.

D. Subcontractor Enforces a Mechanic's Lien by Filing a Foreclosure Action

If the owner fails to pay the subcontractor for labor or materials provided, the subcontractor will retain an attorney to prepare and file a Complaint for Foreclosure.[12] The subcontractor's right to payment secured by a properly perfected mechanic's lien will be reduced to judgment and the owner's improved real property will be ordered sold at a sheriff's sale. The real property is liquidated in order to pay the subcontractor.

III. What Happens when a Subcontractor Does Not Comply with the Mechanic's Lien Law?

The Ohio Supreme Court has concluded that the mechanic's lien statute should be "strictly construed" with respect to the creation of the lien.[13] Any defect in the creation of a mechanic's lien could be fatal which may lead a court to disregard the purported claim and exclude it from the distribution of proceeds when the improved property is sold at sheriff's sale. For example, a building materials supplier lost $37,738.24 by incorrectly identifying the owner of record of the improved property in its Affidavit of Mechanic's Lien.[14] In another case, a subcontractor furnished materials, equipment and labor for electrical work related to a proposed truck terminal construction project.[15] The owner filed and recorded a NOC. The subcontractor mailed a NOF to the owner by first class mail, postage prepaid. The owner received the NOF, but the record did not indicate

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Mechanic's Lien (cont.)

the date of receipt. A mechanic's lien worth $117,975.56 was invalidated because first class mail is not a method of service that includes written evidence of receipt, which was required by O.R.C. § 1311.05(A).[16]

IV. What did the Legislature Do?

A. H.B. 514 Provides Some Flexibility in Serving Certain Formal Communications by and between an Owner and Workers

H.B. 514 relaxes the strict compliance attributes of O.R.C. § 1311.19 concerning service of notices, affidavits and other documents (i.e. NOC, NOF, Affidavit of Mechanic's Lien). O.R.C. § 1311.19(A)(2) currently provides that service of these documents shall be by "[c]ertified or registered mail, overnight delivery service, hand delivery or any other method which includes a written evidence of receipt" (emphasis supplied). H.B. 514 adds subsection (C) to O.R.C. § 1311.19, which recognizes the proper service of a NOC, NOF or Affidavit of Mechanic's Lien if "[t]he person served acknowledges [its] receipt [or]…[i]t can be proved by a preponderance of the evidence that the person being served actually received [it]…" This is a very low burden of proof to establish. Also, H.B. 514 establishes a presumption that the NOC, NOF or Affidavit of Mechanic's Lien was received within three days after its mailing. Regardless of the elasticity of this revision, one will always have a valid service of a NOC, NOF or Affidavit of Mechanic's Lien if one provides service in a manner that generates a written and signed receipt.

B. H.B. 514 Assists Subcontractors when an Owner Records a Late NOC

H.B. 514 protects a subcontractor and material supplier when the owner delays recording the NOC. The NOF is not required until the owner has recorded a NOC. Today, if a worker provides labor or materials prior to the owner's recording of a belated NOC the worker's payment and lien rights slip away with every passing day a NOF is not served on the owner within 21 days after the NOC was belatedly recorded. Under this scenario, the owner would not have to pay the worker and would benefit by filing the NOC late.

H.B. 514 protects the unsuspecting worker by excusing the worker from filing a NOF prior to the owner's belated recording of a NOC. Pursuant to the revisions, if the worker provided all labor and materials prior to the belatedly recorded NOC, then the worker would preserve all lien and payment rights against the owner. If the worker provided labor and materials before and after the belated recording of a NOC then the worker would preserve payment and lien rights on labor and materials prior to the NOC, but would be required to serve the owner with a NOF within 21 days of the NOC to preserve payment and lien rights for work provided after the NOC. If the worker fails to do so, all payment and lien rights for work provided after the NOC could be precluded.

C. Expanded Definition of Improvement and Gender Neutral Terminology

Other changes to the mechanic's lien statute include the expansion of the definition of "improvement" to include the excavation, cleanup or removal of hazardous material or waste from real property.[17] H.B. 514 substitutes gender neutral terminology used in the statute such as "material supplier" for "material man" and "worker" for "workman".

V. Conclusion

The mechanic's lien law will continue to be a cognitive tease despite the amendments of H.B. 514. However,

(Cont. Pg. 5)

Mechanic's Lien (cont.)

H.B. 514 does allow some flexibility in serving important written communications between the principal parties in a commercial construction setting. Some mechanic's liens will survive to secure payment interests that would have been rendered defective prior to the passage of H.B. 514. As a result, more subcontractors will be paid "their just dues" and fewer owners will acquire the benefit of improvements without paying for the labor and materials. ■

1. Black's Law Dictionary 885 (5th Ed. 1979).
2. Article II, Section 33 of the Ohio Constitution.
3. O.R.C. § 1311.04(A)(1).
4. Id.
5. O.R.C. § 1311.04(B).
6. O.R.C. § 1311.04(G) (posted); (D) (upon request of subcontractor, etc.); (H) (upon original contractor).
7. O.R.C. § 1311.05(A) notes the NOF shall also be served upon the original contractor named in the NOC.
8. O.R.C. § 1311.05(D)(1).
9. O.R.C. § 1311.04(K) (failure to post); 1311.04(J) (failure to provide upon request); 1311.04(H) (failure to provide to original contractor); 1311.04(M) (risk of hidden liens).
10. O.R.C. § 1311.06(B).
11. O.R.C. §§ 1311.06(B) and (C).
12. O.R.C. § 1311.16.
13. Robert V. Clapp Co. v. Fox, 124 Ohio St. 331 (1931); Crock Construction Co. v. Stanley Miller Construction Co., 66 Ohio St. 3d 588 (1993).
14. Hoppes Builders and Development Co. v. Hurren Builders, Inc., 118 Ohio App. 3d 210, 213-214 (2nd Dist. 1996) (did not comply with O.R.C. § 1311.06).
15. Carey Electric Co. v. ABF Freight System, Inc., 1999 WL 958476 (2nd Dist. 1999).
16. Id. at *2.
17. O.R.C. § 1311.01(J).

Recent Cases:

Secular laws are made by judicially determined precedent and legislative enactment. Each issue of Scidmore Script includes summaries of recent court decisions and legislative activity that may be relevant to the areas of real estate law, construction law, corporate law, employment law, probate and estate law, litigation and alternative dispute resolution (arbitration/mediation). Members of our staff brief the cases and bills to provide a concise preview of the law and highlight areas of developing concern. If you would like to obtain the full text of these materials, please call or email Tracy L. Maciel at 330.253.1550 or tlm@skidmorelaw.com.

BUSINESS ORGANIZATIONS – Piercing Corporate Veil: Buyer inquired to Seller about purchasing a franchise of The Yogurt Exchange. Buyer took out a bank loan of $102,000 to begin operations. Seller promised to supply items and services to help Buyer. Seller represented to Buyer that the initial $102,000 loan would be sufficient capital and that Buyer would make a profit in the first year and take certain denominations for salaries and bonuses. Buyer opened for business in April of 1989 and their capital was depleted within weeks. In October of 1991, the franchise closed and the Buyer declared bankruptcy. Buyer sued Seller and four officers of Seller. Buyer filed for summary judgment. Officers of the Seller countered, alleging that they were immune from liability and Buyer failed to produce evidence to pierce the corporate veil. Issue: whether the officers of a corporation can be held liable for allegations of fraud regarding representations made and disclosures omitted during the sale of a franchise on behalf of the Seller corporation? The trial court granted summary judgment to buyer. Piercing the corporate veil is a concept placing liability on individual shareholders for the corporation's liabilities. An agent who makes fraudulent representations is liable in tort regardless of whether the corporation is also liable. The Court of Appeals reversed, stating that the Buyer need not pierce the corporate veil to hold individuals liable who allegedly personally committed transgressions and/or fraud. Buyer had a direct cause of action for fraud. The issue was remanded back to the trial court for determination. *Yo-Can, Inc. v. The Yogurt Exchange, Inc.*, 149 Ohio App. 3d 513 (7th Dist., 2002).

COMMERCIAL LAW – Parole (Oral) Evidence: This is a case about how a law firm's alleged misrepresentations in negotiating the sale of a radio station were excluded from interpreting the intent of the parties' written sales agreement. Citicasters Company (Buyer) entered into negotiations to buy WRBP, a radio station located in Youngstown, Ohio. Stop 26 (Seller) owned WRBP. A shareholder of Seller was also an attorney in a law firm. Law Firm represented the Seller in negotiating the sale. In May 1998, Buyer entered into an asset purchase agreement with Seller to purchase the radio station. The agreement expressly recited that "[t]his agreement…embody the entire agreement and understanding of the parties…and supercede any and all prior agreements, arrangements and understandings relating to the matter herein". The agreement noted the existence of liens on the radio station and stated that it was the Seller's responsibility to secure the release of the liens. Buyer advanced $775,000.00 to Seller to secure the release of certain liens against the radio station. The Buyer and Seller ultimately could not consummate the sale. Buyer filed a lawsuit against the Law Firm alleging that it had made misrepresentations concerning the financial status of the Seller and that Buyer had relied on those statements in entering into the agreement and in advancing the funds. Law Firm filed a motion to dismiss arguing that the agreement was an "integrated document" and that oral statements or misrepresentations were precluded from evidence because they were not included in the agreement. The trial court agreed and granted the motion. Buyer appealed. The Court of Appeals affirmed concluding that if contracting parties "integrate" their negotiations into an unambiguous and final written agreement, any evidence of prior negotiations relating to the agreement are excluded by the trial court. This is commonly called the "parole evidence rule". Affirmed. *Citicasters Co. v. Bricker & Eckler, LLP*, 149 Ohio App. 3d 705 (1st Dist., 2002).

Recent Cases (cont.)

EMPLOYMENT LAW – Age Discrimination: A 65-year-old male security guard had worked for the Cuyahoga Community College (College) since 1974. Supervisor began making comments about guard's age. Supervisor called guard a "dinosaur", told him that he was too old and that he needed to retire. Then a 16-year-old girl made a complaint that guard engaged in inappropriate conduct with her. The College conducted an investigation and concluded that the guard had engaged in inappropriate behavior and terminated the guard. Guard sued the College for age discrimination. College's Motion for Summary Judgment was granted. Guard filed appeal. The trial court's dismissal of the age discrimination claim was affirmed because the guard did not meet the College's legitimate expectations of performance of his duties since there is a reasonable belief that while on the job he engaged in inappropriate sexual conduct. Trial court's judgment is affirmed. *Surry v. Cuyahoga Community College*, 149 Ohio App. 3d 528 (8th Dist., 2002).

EMPLOYMENT LAW – Covenant Not To Compete: Employer provides psychological services to residents in nursing homes. Employer hired psychologists (employee) to perform the services. In 1995, employer entered into a contract with employee, which contained a covenant not to compete. In 1998, employer decided to close the business notifying all employees and its nursing home customers. Employer orally notified employee that employer would not seek to enforce the covenant not to compete if employee wanted to continue to provide services to the nursing home customers. Employee arranged to provide services to the nursing homes. Employer was advised that the contracts containing covenants not to compete might have value. Employer wanted to sell the company rather than shutting it down. Employer sold the business to purchaser. Purchaser sued employee in an attempt to enforce the covenant not to compete. Employee filed a motion for summary judgment, which was granted by the trial court. Trial court concluded that there was a de facto termination of the company that employee was entitled to rely on and the covenant not to compete was unenforceable. Purchaser appealed. The court of appeals affirmed the trial court's finding concluding that at the time employee began competing with purchaser, purchaser's predecessor had abandoned its competitive interest in servicing the nursing homes. Affirmed. *Premier Assoc., Ltd. v. Loper*, 149 Ohio App. 3d 660 (2nd Dist., 2002).

EMPLOYMENT LAW – Intentional Tort: Employee began working at a plant processing beryllium in 1978. Employer did not always achieve the level of two micrograms per cubic meter of air recommended by OSHA. Employer retained professionals to monitor hazards and inform employees how to minimize exposure, distributed a safety manual, conducted monthly safety meetings, provided ventilation and protective equipment and regularly tested employees for beryllium exposure. Employee was diagnosed with chronic beryllium disease (CBD). Employee sued employer asserting that employer deliberately exposed employee to hazardous working conditions knowing that injury and disease would occur. Employer filed a motion for summary judgment, which the trial court granted. The court of appeals affirmed the trial court concluding that the evidence presented showed employer did not disregard the safety of any of its employees and worked diligently to protect its employees from CBD. Affirmed. *Renwand v. Brush Wellman, Inc.*, 149 Ohio App. 3d 692 (8th Dist., 2002).

EMPLOYMENT LAW – Workers' Compensation: Employee worked as a polisher for Supreme Bumper, Inc. from 1964 to 1996. Employee used a polishing wheel to strip off the outer layer of chrome from old car bumpers and then buffed and polished the underlying nickel base before the bumpers were replaced. Employee quit his job in 1996 after being diagnosed with squamous cell carcinoma of the left maxillary sinus. Employee died in 1998. Wife filed a workers' compensation claim for death benefits, which was allowed. Wife also filed for an additional award based on employer's violation of specific safety requirements (VSSR), which required employer to furnish adequate respiratory equipment to control employee's exposure to harmful air contaminants. The Ohio Industrial Commission granted the VSSR claim. Employer filed for a writ of mandamus against the Commission, which was denied by the Court of Appeals. Employer appealed. The Ohio Supreme Court affirmed concluding that the evidence supported the Commission's finding that the employer knew that the concentrations of nickel and chrome dust were in excess of those which normally would not have resulted in injury to an employee's health. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St. 3d 134 (2002).

ENERGY AND UTILITIES – Parties: The Ohio Consumer Council (OCC) sued a natural gas marketer on behalf of its residential customers for breach of contract and promissory estoppel to which the OCC was not a party. At the time, gas marketers were not public utilities subject to the jurisdiction of the Public Utilities Commission (PUCO). The enabling statute creating the jurisdiction and powers of the OCC intended to provide consumer representation at public expense by use of the OCC in actions before the PUCO, or in court where the PUCO failed to act on a matter in which it had jurisdiction, or where the PUCO had acted in a way that expressly affected consumers. The trial court dismissed the complaint for OCC's lack of standing to pursue a contract claim against an entity not subject to the jurisdiction of the PUCO. The OCC appealed. The Court of Appeals affirmed the trial court. *Tongren v. D&L Gas Marketing Ltd.*, 149 Ohio App. 3d 508 (10th Dist., 2002).

GOVERNMENT – Elections: The city council of Westlake passed an ordinance that privatized trash collection. The ordinance was passed as emergency legislation, and thus was not subject to referendum. A committee advocating the use of public employees in city trash collection circulated a petition proposing an amendment to the city charter. City council claimed the petition lacked sufficient signatures and the amendment could possibly be unconstitutional. Therefore, they refused to add the proposed amendment to the meeting agenda. The petitioners sought a writ of mandamus to compel the city council to submit the petition to the Board of Electors and have the proposed amendment on the general election ballot. The Supreme Court held the petition was legally sufficient and the city council violated their duty to submit the charter amendment to the electors under § 8 Article XVIII of the Ohio Constitution. The Supreme Court reasoned that the council's reasons for not adding the proposal to the meeting agenda were frivolous and irrelevant, and

Recent Cases (cont.)

the petition was legally sufficient. The Supreme Court issued the writ of mandamus to compel submission of the proposed charter amendment on the next regularly scheduled election due to the city council's unlawful denial. State ex rel. Committee for the Charter Amendment, *City Trash Collection v. City of Westlake*, 97 Ohio St. 3d 100 (2002).

GOVERNMENT – Elections: A registered elector of Pickerington circulated a petition to amend the city charter regarding the procedure for zoning ordinances. Only three of the six proposed changes had capital letters and preliminary "whereas" clauses. The city council did not submit the amendment on the ballot. The elector sought a writ of mandamus to compel the city council to place the charter amendment on the ballot. The Supreme Court denied mandamus because the charter amendment did not meet the statutory requirements of Ohio Revised Code § 731.31. The Supreme Court reasoned that the petition was not a full and correct copy of the title and text of the proposed ordinance. By capitalizing the language of only three out of the six proposed amendments, the petition could have misled petition signers that only the three capitalized provisions were being proposed. The Supreme Court held the city council had no duty to order submission of the amendment to the electorate. *State ex rel. Hackworth v. Hughes*, 97 Ohio St. 3d 110 (2002).

LITIGATION – Damages: In October 1996, Esther was diagnosed with metastic brain tumors. Esther underwent radiation therapy, which stabilized, but did not shrink, the tumors. In March 1997, Doctor began treating her. Doctor recommended intra-arterial chemotherapy (IAC) to shrink the tumors. IAC delivers chemotherapy to brain tumors by means of an arterial catheter threaded through an artery in the area the tumor is located without subjecting the rest of the body's organs to the drugs toxicity. In April 1997, Esther began the treatment, which seemed to be working by shrinking the tumors, relieving pain and alleviating symptoms. Esther went through 3 (of 12 planned) treatments and tolerated it well. Esther's health insurance carrier was Anthem Blue Cross and Blue Shield (Anthem) a wholly owned subsidiary of Anthem Insurance Companies, Inc. (AICI). Prior to the fourth treatment Anthem decided not to continue to pay for the IAC sessions because Anthem concluded that the treatment was experimental. Esther's doctors set forth an administrative appeal. The appeal languished and Esther tried intravenous chemotherapy but did not tolerate it well. Esther's conditioned worsened and there was dramatic growth in the tumors. There was months of delay in Anthem's administration of the appeal. In late October 1997, Anthem concluded that IAC was experimental and would not cover the sessions. Esther died on November 6, 1997 and Anthem's letter denying coverage arrived on November 11, 1997. Esther's husband sued Anthem and AICI for breach of contract and bad faith. A jury returned a verdict awarding husband $49 million in punitive damages. Anthem appealed. The Court of Appeals reversed. Husband appealed to the Ohio Supreme Court. The Ohio Supreme Court reversed the Court of Appeals and reinstated the jury's verdict but reduced the punitive damage award to $30 million. The Ohio Supreme Court then distributed $10 million to husband and $20 million to a cancer research fund at the Ohio State University. Reversed. *Dardinger v. Anthem Blue Cross*, 98 Ohio St. 3d 77 (2002).

MUNICIPAL CORPORATIONS – Bidding: This case is about an architectural firm (architect) that submitted a bid to design a parking deck to a contractor who in turn submitted a bid package to the City of Oxford (City). The City did not award the project to the contractor and the architect sued the City alleging the contractor was the lowest and best bidder. City moved for summary judgment, which was granted by the trial court. Architect appealed. In Ohio, in order to have standing to challenge the award of a contract on a public construction project, the party must have submitted a bid on the project. The contractor is the one who submitted the bid to the City, not the architect. The bid was on the contractor's letterhead and signed by the contractor's president. The court of appeals affirmed the trial court holding that the architect did not have standing to sue the City because the architect did not submit the bid to the City. *Treadon v. Oxford*, 149 Ohio App. 3d 713 (12th Dist., 2002).

MUNICIPAL CORPORATIONS – Water & Sewer: Between 1977 and 1993, 26 residential subdivisions were built in Hudson Township. Contracts provided that water lines were constructed at the developers' expense and then transferred to Summit County. In 1994, the village of Hudson and Hudson Township merged to create the City of Hudson. County intended to sell the water service system to the City of Akron. Hudson sued County and Akron seeking declaratory judgment and injunction. Hudson alleged that the water system passed to it by operation of law upon its incorporation. The trial court ruled against Hudson holding that Hudson could not prevent County from selling the water system to Akron. Hudson appealed. The court of appeals affirmed the trial courts conclusion that County owned the water system but reversed the trial court holding that the County could not transfer the water system to Akron. All parties appealed. The Ohio Supreme Court affirmed in part concluding that County owned the water system and reversed in part holding that County could sell the water system to Akron. *Hudson v. Summit Cty.*, 97 Ohio St. 3d 296 (2002).

REAL PROPERTY – Boundaries: The original deed to real property was recorded in 1865. The deed was executed and the legal description of the parcel established a westernmost boundary property line along the west bank of the Vermillion River. Over the years, the Vermillion River bed shifted from its position as depicted in 1865. In 1971, landowner purchased the real property and in 1999 sold it to purchaser. In 2001 purchaser sued neighbor contending that the westernmost boundary line to the real property was that described in 1865 regardless of whether or not the riverbed had shifted. The trial court denied purchaser's Motion for Summary Judgment. Purchaser appealed. As a general rule, where a waterline is a boundary of given land, that line remains the boundary no matter how it shifts. The Court of Appeals affirmed the trial court concluding that the west bank of the river is the boundary line between the two properties even though the water line differs from its location in 1865. *Kern v. Clear Creek Oil Co.*, 149 Ohio App. 3d 560 (5th Dist., 2002).

REAL PROPERTY – Condominiums: The declarations of a condominium association were recorded in November 1991 containing the following terms: "…amendment of this Declaration…shall require the

Recent Cases (cont.)

consent of Unit Owners exercising not less than seventy-five percent (75%)…[except] all Unit Owners shall be required for any amendment effecting a change in …[t]he fundamental purpose to which any Unit or the Common Areas are restricted". In 1998, the Declaration was amended to add the following restriction "[e]ach unit conveyed after May 1, 1998 shall be for the purpose of owner occupancy". This type of occupancy restriction is passed to prevent unit owners from renting their units. The amendment was approved by over 75% of the voting power of the association except one unit owner declined. Unit owner sued the association to invalidate the amendment. The unit owner filed for summary judgment, which was granted by the trial court. Association appealed. The court of appeals affirmed the trial court concluding that the proposed amendment purported to change the fundamental purpose to which any unit is restricted, by providing that each unit must be occupied by its owner. The court of appeals held that consent of all unit owners was required; therefore, the amendment was invalid. *Horne v. Northland Condominium Owners Assn.*, 150 Ohio App. 3d 230 (2nd Dist., 2002). ■

Ohio Legislative Update

CONSTRUCTION

H.B. 25 County Building Codes: This bill authorizes a board of county commissioners to create county building codes that include regulations providing for a review of the effects of proposed new construction on existing surface or subsurface drainage. It defines "proposed new construction" as the means of erecting, repairing or maintaining single-family, two-family or three-family dwellings. The drainage issue would be reviewed and reasonable drainage mitigation imposed prior to the issuance of a building permit. A procedure of review shall include a meeting and completion of the review within 30 days of filing for a building permit; written notice of the board meeting served on applicant; and an appeal process. Introduced: January 31, 2003. Assigned: Energy & Environment Committee.

JUDICIAL SELECTION

Senate Joint Resolution 7 Appointment of Chief Justice: Proposed constitutional amendment to provide for the appointment of the Chief Justice and Justices of the Supreme Court of Ohio by the Governor for ten-year terms, subject to retention elections by the electors of the State, and creates a Supreme Court Nominating Commission to submit to the Governor the names of nominees to the Supreme Court.

LITIGATION

H.B. 82 Jury Duty: Permits a person who is 70 years of age or older to be excused from jury duty. Introduced: February 2003. Assigned: Not yet assigned.

PROBATE AND ESTATE PLANNING

H.B. 51 Probate Law Amendments: This bill addresses comprehensive revisions to the probate law relative to the election by a surviving spouse, notice of admission of a will to probate, accounts of administrators and executors, distribution of estate assets, presentation of creditors' claims to distributees, and dispute resolution procedures in probate court. Introduced: February 11, 2003. Assigned: Judiciary Committee.

H.B. 78 Government Claims in Probate: Requires the state or any political subdivision to present all claims against an estate within one year after the death of a decedent. Introduced: February 2003. Assigned: Not yet assigned.

REAL PROPERTY

H.B. 53 County Recorders: This bill would allow a county recorder to maintain registered land records by use of photographic, magnetic, electronic or other means or displays. Introduced: February 11, 2003. Assigned: County & Township Government Committee.

H.B. 89 Apartment Building Code: Requires the Ohio Board of Building Standards to adopt rules for apartment buildings relative to security features for exterior doors, windows and sliding glass doors. Introduced: February 2003. Assigned: Not yet assigned.

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