



Ohio School Facilities Commission
30 W. Spring Street, 4th Floor
Columbus, Ohio 43215

John R. Kasich
Governor

Richard M. Hickman
Executive Director

Testimony Request Slip

Commission Meeting Date July 11, 2013

Please return the completed form and fourteen (copies) of your testimony and materials to the Commission Secretary prior to the start of the meeting.

Name: Don Gregory, Esq.

Title/Organization Representing: Scioto Valley Local School District Board

Address: P.O. Box 600, 1414 Piketon Road

Piketon, OH 45661

Phone: 740-289-4456 E-mail: dgregory@keglerbrown.com

Topic to be addressed in testimony:

Proposed IBI settlement, including: Scioto Valley S.D. position on IBI Litigation and
request for School District money to fund settlement given Project and litigation history;
OSFC/OFCC promises and assurances to Scioto Valley; disparate treatment of Scioto
Valley as compared to other similarly situated school districts.

Check if handouts or materials are provided



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Commission Meeting Date July 11, 2013

Please return the completed form and fourteen (copies) of your testimony and materials to the Commission Secretary prior to the start of the meeting.

Name: Superintendent Todd Burkitt

Title/Organization Representing: Scioto Valley Local School District Board

Address: P.O. Box 600, 1414 Piketon Road

Piketon, OH 45661

Phone: 740-289-4456 E-mail: dgregory@keglerbrown.com

Topic to be addressed in testimony:

OSFC/OFCC promises and assurances to Scioto Valley; disparate treatment of Scioto

Valley as compared to other similarly situated school districts; Scioto Valley needs for

Additional construction/funding to fully complete Project consistent with School

District needs and to make School District whole.

Check if handouts or materials are provided

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July 8, 2013

Via E-Mail Matt.Westerman@ofcc.ohio.gov

Matthew L. Westerman, Esq.
Ohio Facilities Construction Commission (OFCC)
30 West Spring Street, 4th Floor
Columbus, Ohio 43215

RE: *Ingle-Barr, Inc. v. Scioto Valley Local School District Board*, The Supreme Court of Ohio, Case No. 2011-0928; *Ingle-Barr, Inc. v. OSFC*, Case No. 2005-09278

Matt:

I am writing in response to your June 25, 2013 letter regarding the above-referenced cases and the underlying Project.

The Scioto Valley Local School District Board ("Scioto Valley" or the "School District") was deeply disappointed to receive that letter, in which you indicated the OSFC/OFCC's ("OSFC") intent to, without the School District's consent: (a) settle a Court of Claims lawsuit with Ingle-Barr, Inc. (IBI) using the School District's money (and present such settlement agreement to the Commission at its July 11, 2013 meeting); (b) deny Scioto Valley a gymnasium and completion of the Project consistent with current OFCC guidelines for the minimum facilities appropriate for a school district; and (c) renege on the parties' understanding that the Scioto Valley and Eastern Local School Districts would be treated the same upon conclusion of the IBI litigation.

This inequitable position is particularly disappointing given the tone of your letter and the backtracking it represents from the parties' prior dealings. Most disturbing is that the effect of all the above deprives Scioto Valley of any relief for the considerable expense it incurred successfully defending the above-referenced lawsuit. In that lawsuit, the OSFC refused to help the School District after it was sued by IBI but the OSFC had indicated from the beginning that the parties would be able to come to a satisfactory resolution at the conclusion of the litigation that made the School District whole.

You may not be familiar with the underlying facts and developments in this litigation, given your more recent involvement with the matter. This firm and the School District have been on the ground floor of the situation, and as a result, your June 25, 2013, letter contains several factual errors and mistaken assertions we would like to address here. As background, I am attaching:

1. copies of the relevant Fourth District Court of Appeals decisions in IBI's lawsuits against the School District. Attached as Exhibits A1 and A2;
2. a Powerpoint Presentation given at the mediation of those cases in 2007, attended by the OSFC. Attached as Exhibit B; and
3. the Supreme Court's denial of Ingle-Barr, Inc.'s petition for jurisdiction seeking Supreme Court review of IBI's appellate losses. Attached as Exhibit C.

The above Supreme Court entry ended approximately six years of litigation for Scioto Valley, which had spent more than half a decade successfully defending itself against lawsuits arising out of the OSFC building program, through no fault of its own. In August 2011, after the Supreme Court denied review of IBI's appeal in the substantively identical Eastern Local case, we wrote to Executive Director Richard Hickman detailing the concerns of both the Eastern Local School District and the Scioto Valley Local School District and asking for relief. I am attaching that letter (without attachments) as Exhibit D.

As we noted then, what made the litigation of particular concern to the OSFC and School Districts was Ingle-Barr had directly sued individual school districts to pay *contract claims* arising out of State of Ohio projects contracted for under the Standard OSFC Contractor Contracts that OSFC was using for school construction projects. Though you state in your letter that Scioto Valley could have obtained a defense by the OSFC simply by "bring[ing] in the State as a party at the beginning of the litigation in Pike County" that statement is misguided and leaves out some very important points.

First, when the lawsuits in Pike County were first filed by IBI, the School Districts (Eastern Local and Scioto Valley) asked the OSFC, and the Attorney General's office, to assist them. At the time, the OSFC instructed the School Districts they had to defend the Pike County litigation on their own 'because you were sued' but in conversations with the OSFC, a clear understanding was reached that the School Districts would, at the end of the day, be taken care of. Second, the only way the School District could have "brought in" the OSFC into the litigation would have been by SUING the OSFC as a cross-claim defendant, something the OSFC did not want. The School District honored that request. Finally, because the School Districts were not a valid party to the suit, had they sued the OSFC ("brought them in") through a cross-claim, they would have been opening themselves up to an argument they had waived their defenses –the *successful defenses*– of lack of jurisdiction to the claim and no direct school district liability under the OSFC form contracts.

Though the Eastern Local and Scioto Valley School District cases were very similar, Scioto Valley was more complex and had several different legal challenges in that IBI first sued Scioto Valley for allegedly breaching a settlement agreement. The lower court ultimately dismissed that claim, voiding the settlement agreement as having been procured by mutual mistake (of both parties) or by IBI fraud. In that same suit, the lower court, 4th Appellate District rejected IBI's motion for partial summary judgment seeking the right to cash a "settlement check" that was tendered to it. Having lost that litigation, IBI then sued Scioto Valley for breach of contract (the same claims it brought against Eastern Local) but this time added a claim for unjust enrichment.

Scioto Valley thus incurred several different layers of lawsuits but, with OSFC's approval, successfully litigated all of them (at great expense) without suing OSFC. Meaning, IBI, after having lost

each step of the way, then proceeded with suit against the OSFC in the Court of Claims (where its claims always should have been brought). Though the OSFC has over \$700,000 in backcharges for liquidated damages and other damages (see attached Powerpoint Presentation exhibit) your letter indicates that rather than pursuing or collecting anything from IBI for those backcharges, the OSFC instead wishes to walk away from those, pay IBI \$100,000, **and use School District funds to help pay for the settlement.**

The primary reason for this shocking development, as articulated in your June 25, 2013 letter is the OFCC's fear that the already judicially voided check—a check submitted in the context of settlement negotiations that are inadmissible and in furtherance of a settlement agreement procured by fraud or mistake—creates a risk that is the driving force behind its desire to use School District money to settle the claim. While the School District has no problem with OFCC deciding how to use its money to litigate or settle lawsuits, the School District has deep concerns when OFCC **spends the School District's money** on such an unwarranted settlement. These concerns are heightened when OFCC, in the process, also indicates it is now walking away from the parties prior understanding that OFCC would ensure that the School District have the funds it needs to complete the work and finally get the gymnasium and related facilities to which it is rightfully entitled.

The OSFC was created because of the Ohio's Supreme Court's finding unconstitutional Ohio's previous method of school construction funding, which had left it to the individual school districts to fund projects and litigate claims arising out of those school construction projects on their own. See *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 ("DeRolph I"). In *DeRolph I* the Ohio Supreme Court held that such a system violated § 2, Article VI of the Ohio Constitution because it was unfair to poorer school districts (like Scioto Valley here). As a result, the General Assembly created a new school financing system under the statutory framework set forth in R.C. 3318.01 to 3318.33. The OSFC was thus established to provide financial assistance to Ohio school districts on a **first need basis**.

OSFC contract documents that were created in the aftermath of the DeRolph decisions were the same contracts the state used for the projects at Scioto Valley and Eastern Local. But both School Districts—as among the first to have Projects built with a litigious contractor under those contracts (OSFC forced the School District to use IBI)—became the front lines of litigation defending IBI's claims that the OSFC contracts imposed 100% financial liability (joint and several) liability on individual school districts for monies owed under those state contracts.

IBI's attempt to return to the pre-DeRolph era of direct school district liability to contractors was rejected by the trial court, the Fourth Appellate District, and the Ohio Supreme Court. The success of School District at every level of trial and appellate jurisdiction in Ohio created excellent precedent that confirms and preserves the core function of the OSFC—to provide the equitable funding necessary to build and maintain quality-learning environments across the state. See Exhibit E a fall 2011 article in BrickerConstructionLaw.com, discussing the final resolution of the IBI cases, titled "Who is the 'Owner' for Purposes of Pursuing Damages by a Contractor on an OSFC Co-funded Construction Project."

The line of cases resulting from IBI's lawsuits against Eastern Local and Scioto Valley has thus been recognized as something that helps inoculate *all* Ohio local school district boards from being

leveraged by the threat of costly litigation into spending their own money to settle dubious claims. Unfortunately, to secure such good precedent for the State and the more prosperous school districts that are now receiving school construction funding, Eastern Local and Scioto Valley were both forced to expend their own limited funds. Given the multiple suits and exhaustion of all levels of appeal in Ohio, the costs to both the Eastern Local and Scioto Local School District Boards were significant. The litigation expenses were particularly onerous here, as they were borne by two of the poorest school districts in the state.

Though the litigation expenses become part of the Project cost to both school districts, in each case increasing the School district boards' respective funding percentage well beyond what their taxpayers were to contribute to the Projects under the Project Funding Agreements, the OFCC **only followed through on granting relief to Eastern Local**. This happened in December 2011, when the State closed out the Eastern Local Project Fund, allowing the Eastern Local School District to retain the balance of the fund for its own purposes, and granting it relief in the ability to use the balance of the fund for its own purposes.

Your statement in your June 25, 2013 letter that a similar offer was made to the Scioto Valley Local School District is simply wrong. OSFC Attorney Jerry Kasai verbally informed Scioto Valley that the OSFC could not close out the fund at the time given some differences in the cases and case postures that made such resolution infeasible in OFCC's mind. Scioto Valley was NEVER given the opportunity to close out the fund.

This was not a big problem, however, because the OSFC quietly assured Scioto Valley that a similar result would be forthcoming, though it may be slightly different form of relief given the lesser amount of money in the fund plus Scioto Valley's need for a new gymnasium and demolition of the existing gym. Such discussions and representations had been made as far back as November 2007. Scioto Valley was thus led to believe that when the IBI litigation in the Court of Claims concluded the OSFC would take care of the School District's concerns regarding insufficient funds and the need for additional construction money to complete the work and modernize the School District's facilities. Such assurances had been made to the School District for a long time, including to Superintendent Burkitt and Treasurer Williams at the November 2007 mediation with OSFC. Due to the pending litigation, OFCC asked only for patience and stressed its commitment to working things out equitably, just as had been done with Eastern Local.

The School District agreed. Your June 25, 2013 letter, however, represents a 180 degree change. Though a fair amount of confusion appeared early this year—particularly in April when you first approached the School District about the OFCC's intent to settle—we always believed the OFCC would honor the parties understandings and help amicably resolve the issues left open at Scioto Valley, from the incomplete construction to the significant funds spent to secure meaningful and lasting precedent in the State. As I indicated in my August 2011 letter to Executive Director Hickman, "it has always been our understanding that there would be an equitable adjustment of these expenses at the end of the day" to acknowledge and accommodate the disparate effect of the IBI litigation on the School Boards. Your June 25, 2013 letter, which indicates that Eastern Local will be the only one to receive such an equitable adjustment, and that OFCC intends to do nothing for Scioto Valley, was a shock.

Scioto Valley is fine with the OFCC settling with IBI if it believes that is the correct course of action provided OFCC uses its money and its money alone to do so. The School District is **not** interested in contributing any money to any proposed settlement. It has been through enough. The largest concern it has, however, has always been ensuring that it would receive something approaching full relief for all it has been through. The biggest step that could be done toward this is obtaining financial assistance to help the School District complete the Project so it may have the facilities Ohio students are entitled to.

The School District has always viewed the OSFC/OFCC as an ally. The about-face, represented by your June 25, 2013 letter, has reluctantly forced the School District to a position where it feels it must respectfully present its concerns at the Commission meeting on July 11, 2013. Scioto Valley only wants a fair and equitable response from the Commission members, many of whom we believe will be disturbed by what the School District has endured, and particularly the vastly different treatment of the Scioto Valley and Eastern Local School Districts. Scioto Valley has always believed it would be, as Eastern Local was, made whole by OFCC. With the political will and the Commission members' personal involvement and attention, we believe the School District can be made whole. The time to reconfirm those commitments is now, however, before the ink is dry on any settlement that bleeds out all remaining Project funds, demands additional payment from School District, and leaves the Scioto Valley taxpayers and students in the cold.

Sincerely,



Eric B. Travers

EBT/dh

Encl.

cc: Superintendent Todd Burkitt
Donald W. Gregory, Esq.

[Cite as *Ingle-Barr, Inc. v. Scioto Valley Local School Dist. Bd.*, 2009-Ohio-5345.]
IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

INGLE-BARR, INC.,

Plaintiff-Appellant,

vs.

SCIOTO VALLEY LOCAL SCHOOL
DISTRICT BOARD,

Defendant-Appellee.

Case No. 07CA767

DECISION AND JUDGMENT ENTRY

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy G. Crowley, 150 West Wilson Bridge Road,
Ste. 101, Worthington, Ohio 43085, and Michael J.
Fusco, Fusco, Mackey, Mathews & Gill, L.L.P., 655
Cooper Road, Westerville, Ohio 43081.

COUNSEL FOR APPELLEE: Donald W. Gregory and Eric B. Travers, Kegler,
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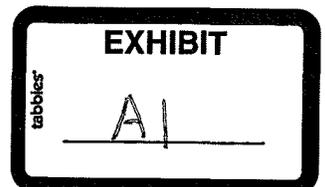
CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-24-09

ABELE, P.J.

{¶ 1} This is an appeal from a Pike County Common Pleas Court summary judgment in favor of the Scioto Valley Local School District Board (District), defendant below and appellee herein, on the claim that Ingle-Barr, Inc. (Ingle-Barr), plaintiff below and appellant herein, brought against the District.

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:



"THE TRIAL COURT ERRED IN DECLARING AND CONCLUDING IN ITS 'JUDGMENT ENTRY' THAT IT CONSTITUTED 'A FINAL JUDGMENT AS TO PLAINTIFF AND DEFENDANT' AND '... AS BETWEEN THESE PARTIES."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN BOTH ITS 'DECISION' AND IN ISSUING ITS 'JUDGMENT ENTRY' WHEREIN IT DECREED THAT 'DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT IS GRANTED AND PLAINTIFF'S COMPLAINT IS HEREBY DISMISSED WITH PREJUDICE BASED UPON THE FOURTEENTH DEFENSE OF DEFENDANT'S ANSWER."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE SV AND DISMISSING WITH PREJUDICE APPELLANT IBI'S COMPLAINT."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING APPELLANT IBI'S MOTION FOR SUMMARY JUDGMENT FOR ENFORCEMENT OF THE PARTIES' \$285,000.00 SETTLEMENT AGREEMENT."

FIFTH ASSIGNMENT OF ERROR:

"EVEN IF THE TRIAL COURT DID CORRECTLY FIND THAT A MUTUAL MISTAKE EXISTED CONCERNING THE \$104,466.00 PAYMENT, THE TRIAL COURT NONETHELESS ERRED IN DENYING APPELLANT IBI'S ALTERNATIVE 'MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S ENTITLEMENT TO \$180,534.35 AS PARTIAL PAYMENT OF SETTLEMENT AMOUNT' AND/OR IN DENYING APPELLEE SV'S CROSS-MOTION FOR JUDICIAL REFORMATION OF THE SETTLEMENT AGREEMENT."

{¶ 3} The facts are relatively undisputed. In 2002, the parties' contract provided that Ingle-Barr perform construction and renovation work at the Jasper elementary school for \$2,683,000. In 2004, the parties entered into a second "Site Improvements" contract for the Jasper elementary school for \$332,232. Ingle-Barr also performed extra work at the site.

{¶ 4} Disagreements arose over the final contract payments and the parties pursued mediation. On May 16, 2005, the parties agreed that Ingle-Barr accept \$285,000 in settlement of its claims against the District. In the process of making payment, however, the District discovered that Ingle-Barr double-billed, and the District double-paid, in excess of \$104,000 for some of the work. Accordingly, the District refused to pay Ingle-Barr the amount set forth in the settlement agreement.

{¶ 5} Ingle-Barr commenced the instant action and alleged breach of the settlement agreement and requested \$285,000 in damages. The District denied liability and asserted various affirmative defenses, including "fraud or mistake" in entering the settlement agreement.

{¶ 6} Subsequently, both parties requested summary judgment. The District produced evidence to substantiate its claim that Ingle-Barr had double-billed for the same work. Ingle-Barr did not contest the double-billing but, rather, relied on the settlement agreement as a negotiated contract whereby each side agreed to compromise on the payment problems that arose from construction.

{¶ 7} The trial court issued a lengthy decision in favor of the District. After it

noted that no dispute exists over the double-billing and payment issue, the court concluded that each side was, at the very least, "unmindful" of the double-billing during settlement as their positions would have undoubtedly changed if they had been, in fact, aware of the problem. Thus, the court ruled that the District was entitled to judgment in its favor as a matter of law "based upon the Fourteenth Defense stated in the Answer" (fraud or mistake). This appeal followed.

I

{¶ 8} In its first assignment of error, Ingle-Barr raises several arguments concerning both civil and appellate procedure. First, it objects to the inclusion of Civ.R. 54(B) language in the judgment. Although we agree that this language is unnecessary, and that all claims have been resolved, appellant has not been prejudiced in any manner by the inclusion of the "no just reason for delay" language. Next, Ingle-Barr objects to the trial court's comment that the August 9, 2007 entry is a "final judgment as between these parties." The basis for the objection appears to be its concern that the District is establishing a "res judicata defense" on every issue surrounding the construction contracts so that Ingle-Barr can never sue for monies that remain due and owing. This concern is meritless. Ingle-Barr's complaint, and the trial court's judgment, are based on the settlement agreement. No claim for breach of the construction contract was raised in this case and no such claim has been decided on the merits. As a result of this case, the doctrine of res judicata could not be used to bar subsequent suit on the construction contracts.

{¶ 9} Accordingly, for these reasons, we find no merit in appellant's first assignment of error and it is hereby overruled.

II

{¶ 10} Ingle-Barr asserts in its second assignment of error that the trial court's decision that summary judgment was granted to the District based on the "Fourteenth Defense stated in the Answer" violates the Civil Rules. Appellant contends that this violates Civ.R. 54(A) which provides that "[a] judgment shall not contain a recital of pleadings."

{¶ 11} First, we note that Civ.R. 54(A) applies to judgments. The language to which appellant objects appears in the trial court's decision, not its judgment. Second, the trial court did not recite pleadings in its decision; rather, it merely pointed to a single defense in one of those pleadings. This action helps to explain the trial court's reasoning and aids appellate review. Third, we fail to see prejudice resulting from the inclusion of the language in the court's decision. The rule's purpose is to make the judgment "a straightforward statement of the holding without an extensive recital of trial details." See Fink, Greenbaum & Wilson, Guide to the Ohio Rules of Civil Procedure (2001 Ed.)54-4, §54-3. Here, the judgment appealed is "straightforward" and no doubt exists as to the relief afforded to the parties.

{¶ 12} Accordingly, we hereby overrule appellant's second assignment of error.

III

{¶ 13} Ingle-Barr asserts in its third assignment of error that the trial court erred by granting the District summary judgment. We disagree.

{¶ 14} Our analysis begins with the concept that appellate courts review summary judgments de novo. Broadnax v. Greene Credit Service (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167; Coventry Twp. v. Ecker (1995), 101 Ohio App.3d 38, 41, 654 N.E.2d 1327. In other words, appellate courts afford no deference to trial court summary judgment decisions, Hicks v. Leffler (1997), 119 Ohio App.3d 424, 427, 695 N.E.2d 777; Dillon v. Med. Ctr. Hosp. (1993), 98 Ohio App.3d 510, 514-515, 648 N.E.2d 1375; and, instead, conduct an independent review to determine if summary judgment is appropriate. Woods v. Dutta (1997), 119 Ohio App.3d 228, 233-234, 695 N.E.2d 18; McGee v. Goodyear Atomic Corp. (1995), 103 Ohio App.3d 236, 241, 659 N.E.2d 317.

{¶ 15} Under Civ. R. 56(C), summary judgment is appropriate when a movant can show (1) that no genuine issues of material fact exists, (2) that it is entitled to judgment as a matter of law, and (3) after the evidence is construed most strongly in favor of the non-movant, reasonable minds can come to one conclusion and that conclusion is adverse to the non-moving party. Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201; Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. The moving party bears the initial burden to show that no genuine issue of material facts exist and that he is entitled to judgment as a matter of law. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. If the movant satisfies its burden, the onus shifts to the non-moving party to provide rebuttal evidentiary materials. See Trout v. Parker (1991), 72 Ohio App.3d 720, 723, 595 N.E.2d 1015; Campco Distributors, Inc. v. Fries (1987), 42 Ohio App.3d

200, 201, 537 N.E.2d 661. With these principles in mind, we turn our attention to the case at bar.

{¶ 16} Ingle-Barr's first contends that the District did not demonstrate that it is entitled to summary judgment based on fraud. We agree. Without dwelling on the legal requirements for fraud, no evidence was adduced to demonstrate that Ingle-Barr knowingly misled the District about the double-payment. It is plausible that Ingle-Barr may have been, like the District, unaware of the accounting mistake.¹ However, the District's answer also asserted the defense of mistake. Ingle-Barr argues that the District was not entitled to summary judgment on this basis. We disagree.

{¶ 17} A settlement agreement is a contract. See e.g. National City Mortgage Co. v. Wellman, 174 Ohio App.3d 622, 883 N.E.2d 1122, 2008-Ohio-297, at ¶14; Pierron v. Pierron, Scioto App. Nos. 07CA3153 & 07CA3159, 2008-Ohio-1286, at ¶7. Thus, the law of contracts applies to the case sub judice. The doctrine of mutual mistake permits a contract rescission when an agreement is formed on a mutual mistake of fact. FPC Financial v. Wood, Madison App. No. 2006-02-005, 2007-Ohio-1098, at ¶59, citing State ex rel. Walker v. Lancaster City School Dist. Bd. of Edn. (1997), 79 Ohio St.3d 216, 220, 680 N.E.2d 993. A "mutual mistake" is a mistake made by both parties at the time the contract was entered and has a material effect on the agreed exchange of performances. Reilley v. Richards (1994), 69 Ohio St.3d 352, 353, 632 N.E.2d 507; Weber v. Budzar Industries, Inc., Lake App. No. 2004-L-098,

¹ The trial court explicitly stated that the parties were "unmindful" of the double-billing and payment, thus suggesting that it awarded summary judgment to the District on the basis of mistake, not fraud.

2005-Ohio-5278, at ¶34. Regarding settlement agreements, the Seventh District Court of Appeals noted that "[i]f each party is mistaken as to a material fact of settlement, then there could be no meeting of the minds, and thus no valid contract for settlement." Connolly v. Studer, Carroll App. No. 07CA846, 2008-Ohio-1526, at ¶24.

{¶ 18} In the instant case, the amount of money due and owing for construction work at Jasper Elementary is a "material fact" involved in the parties' settlement negotiations. In fact, it is difficult to conceive of any fact more material than the amount owed for the construction work. The District pled "mistake" as a defense to the enforcement of the settlement agreement and, thus, had the burden to produce Civ.R. 56(C) evidentiary materials to support that defense. In its summary judgment motion, the District included the affidavit of Dennis Thompson, District Superintendent, attesting to the double-billing and introducing various billing documents to support that attestation. The burden then shifted to Ingle-Barr to produce rebuttal evidentiary materials. Ingle-Barr, however, failed to submit any Civ.R. 56(C) evidentiary materials in rebuttal and did not contest the double-billing. Actually, Ingle-Barr acquiesced to that portion of the District's argument. Accordingly, no genuine issues of material fact remained on the existence of a mutual mistake of fact and the District was entitled to judgment in its favor.

{¶ 19} As noted above, the typical remedy for a mutual mistake of fact is contract rescission. In this case, however, Ingle-Barr did not request rescission and the District did not request rescission in its counterclaim or Answer. At common law, the defense of mutual mistake allows for avoidance of the contract. See Calamari & Perillo Contracts (2nd Ed. 1977) 299, §9-24; Knowlton, Contracts (2nd Ed. 1887) 175. However, because

neither party requested rescission or reformation, we believe that the trial court arrived at the correct remedy by refusing to enforce the settlement agreement and dismissing Ingle-Barr's complaint.

{¶ 20} Ingle-Barr counters that considering the double-billing allows parole evidence to alter the terms of the settlement agreement. We disagree. Neither this Court nor the trial court construed the terms of the contract. To the contrary, as the Seventh District noted in Connolly, supra, mutual mistake of fact means that no "meeting of the minds" occurred and, thus, no contract existed to begin with.

{¶ 21} Accordingly, for these reasons, we find no merit in appellant's third assignment of error and it is hereby overruled.

IV

{¶ 22} Ingle-Barr asserts in its fourth assignment of error that the trial court's denial of its motion for summary judgment constitutes reversible error. We disagree. Just as no dispute exists concerning the double-billing and double-payment, no dispute exists that the District did not pay the amount specified in the settlement agreement. We therefore treat Ingle-Barr as having carried its initial burden on summary judgment. However, as noted above, the District also carried its burden of rebuttal by submitting evidentiary materials to establish a mutual mistake of fact sufficient to avoid the contract. As a result, Ingle-Barr did not establish that it is entitled to judgment in its favor as a matter of law. Thus, appellant's fourth assignment of error is without merit and is hereby overruled.

V

{¶ 23} In its fifth assignment of error, Ingle-Barr asserts that even if the trial court correctly determined that the settlement agreement is avoidable due to mutual mistake, the court nevertheless erred by not granting Ingle-Barr's alternative, partial motion for summary judgment.

{¶ 24} It is undisputed that the District tendered to Ingle-Barr a check for \$180,534.35, but its tender was rejected. The District argued that this was a settlement offer, not a concession that such amount was due and owing. We agree this is an issue that deserves further attention, but for the following reasons we will not reverse the summary judgment on this basis.

{¶ 25} First, although the Civ.R. 56(C) evidentiary materials mentions this check, neither party sufficiently developed evidence to properly address the issue and the District's defense. Therefore, Ingle-Barr did not carry its initial Civ.R. 56(C) burden and was not entitled to judgment as a matter of law.

{¶ 26} Second, and more important, Ingle-Barr's claim in the case sub judice is based solely on the settlement agreement. Although Civ.R. 56(A) allows a party to request summary judgment on any "part of [a] claim," we believe the "claim" to which the rule refers is a claim asserted in the case. Ingle-Barr's claim to \$180,534.35 is premised on the original construction contract(s) rather than the settlement agreement. Ingle-Barr cannot in this case seek compensatory damages under the construction contract(s) when it did not plead breach of those contracts.

{¶ 27} Our decision should not be construed as determining that Ingle-Barr is not entitled to all, or part, of that money. This is an issue for another time and, as we

stated above, Ingle-Barr may bring an action against the District under the original construction contract(s). However, as to its alternative motion for summary judgment, we find no error in the trial court decision to decline to grant Ingle-Barr summary judgment on that basis. Accordingly, appellant's fifth assignment of error is hereby overruled.

{¶ 28} Having reviewed all the errors assigned and argued by Ingle-Barr in its brief, and having found merit in none of them, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & Harsha, J.: Concur in Judgment Only

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

COURT OF APPEALS

F I L E D
DEC - 2 2009

John E. Williams
PIKE CO. CLERK

INGLE-BARR, INC.,

Plaintiff-Appellant,

vs.

SCIOTO VALLEY LOCAL SCHOOL
DISTRICT BOARD,

Defendant-Appellee.

:
: Case No. 07CA767

: ENTRY ON APPLICATION FOR
: RECONSIDERATION

This matter comes on for review of an application for reconsideration filed by appellant, Ingle-Barr, Inc. Appellant asks us to reconsider our September 24, 2009 decision and judgment in which we affirmed a summary judgment in favor of appellee, Scioto Valley Local School District Board, on a claim brought it by Ingle-Barr.

Although App.R. 26(A) does not specify an exact standard against which an application for reconsideration should be measured, the test generally applied is whether the application calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered when it should have been. See e.g. State v. Wong (1994), 97 Ohio App.3d 244, 246, 646 N.E.2d 538, 539; Woerner v. Mentor Exempted Village School Dist. Bd. of Edn. (1993), 84 Ohio App.3d 844, 846, 619 N.E.2d 34, 36; State v. Gabel (1991), 75 Ohio App.3d 675, 676, 600 N.E.2d 394; Skillman v. Browne (1990), 68 Ohio App. 615, 617,

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589 N.E.2d 407, 408; Columbus v. Hodge (1987), 37 Ohio App.3d 68, 523 N.E.2d 515, 516.

Ingle-Barr asserts that the decision contains "several obvious errors." The arguments set forth in its application, however, are little more than a repeat of the arguments from its merit brief that we rejected in our decision and judgment and continue to reject.

First, appellant faults us for relying on what it calls a "relatively obscure case" in citing Connolly v. Studer, Carroll App. No. 07CA46, 2008-Ohio-1526, for the principle that material mistakes of fact in entering a settlement agreement vitiate the "meeting of the minds" and thus prohibit the formation of a valid contract. Appellant neglects to enlighten us as to its precise criteria for determining obscurity, but we need not dwell on this argument. There is no dispute that a settlement agreement is a contract. National City Mortgage Co. v. Wellman, 174 Ohio App.3d 622, 883 N.E.2d 1122, 2008-Ohio-297, at ¶14; Pierron v. Pierron, Scioto App. Nos. 07CA3153 & 07CA3159, 2008-Ohio-1286, at ¶7. Even if we were to discount Connolly, the fact remains that two prominent treatises support the proposition that mutual mistake allows contract avoidance. Also, no shortage of case authority exists on this point. See e.g. Fairfax Homes, Inc. v. Blue Belle, Inc., Licking App. No. 2007CA77, 2008-Ohio-2400, at ¶¶18-20; FPC Financial v. Wood, Madison App. No. 2006-02-005, 2007-

Ohio-1098, at ¶59. The double-billing on the construction contract is a mutual mistake when the parties entered into the settlement agreement that is the subject of this action.

Appellant attempts to distinguish the contract at issue in Connolly as an oral settlement agreement, whereas the contract at issue in the case sub judice is a written contract. We, however, see no substance to that distinction. Appellant then cites dicta from Litsinger v. American Sign Co. (1967), 11 Ohio St.2d 1, 227 N.E.2d 609, for the principle that when parties to a contract manifest an intent to be bound by the terms of their agreement, courts should not interfere. As a general proposition of law, we agree. Freedom of contract is fundamental. Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849, at ¶9. However, we conclude, as did the trial court, that just such a mistake existed.

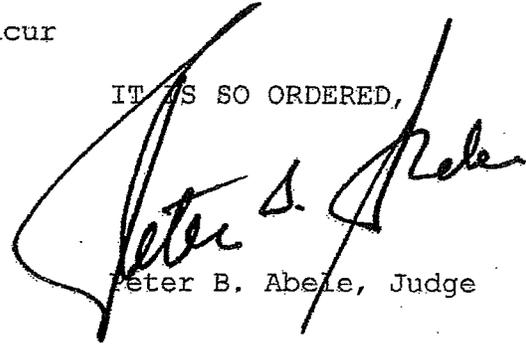
Appellant also continues to assert that it is due monies under the original contract(s) and requests that we grant damages. As we noted in our decision, however, this case involved the breach of the settlement agreement, not a breach of the construction contract(s).

Finally, as noted above, these are all issues that we considered in our decision and judgment and appellant has not persuaded us that the decision contains an obvious error.

Accordingly, for these reasons we hereby deny appellant's application for reconsideration.

Kline, P.J. & Harsha, J.: Concur

IT IS SO ORDERED,

A handwritten signature in black ink, appearing to read "Peter B. Abele". The signature is written in a cursive style with a large, sweeping initial "P".

Peter B. Abele, Judge

Ingle-Barr, Inc. v. Scioto Valley Local Sch. Dist. Bd.

Court of Appeals of Ohio, Fourth Appellate District, Pike County
May 2, 2011, Date Journalized
Case No. 10CA811

Reporter: 193 Ohio App. 3d 628; 2011 Ohio 2353; 953 N.E.2d 363; 2011 Ohio App. LEXIS 1998

INGLE-BARR, INC., Plaintiff-Appellant, vs. SCIOTO VALLEY LOCAL SCHOOL DISTRICT BOARD, Defendant-Appellee.

Subsequent History: Discretionary appeal not allowed by *Ingle-Barr, Inc. v. Scioto Valley Local Sch. Dist. Bd.*, 2011 Ohio 5129, 2011 Ohio LEXIS 2433 (Ohio, Oct. 5, 2011)

Prior History: CIVIL APPEAL FROM COMMON PLEAS COURT.
Ingle-Barr, Inc. v. Scioto Valley Local Sch. Dist. Bd., 2009 Ohio 5345, 2009 Ohio App. LEXIS 4510 (Ohio Ct. App., Pike County, Sept. 24, 2009)

Disposition: JUDGMENT AFFIRMED.

Core Terms

summary judgment, unjust enrichment, local school district, trial court, non-moving, motion to dismiss

Case Summary

Procedural Posture

Appellant corporation challenged a Pike County Common Pleas Court (Ohio) summary judgment (*Civ. R. 56*) decision in favor of appellee school district board, on the corporation's claims of breach of contract and unjust enrichment.

Overview

In 2002, the corporation entered into a \$ 2,683,000 construction contract with the State of Ohio, by and through the board, to renovate and build an addition to an elementary school. In 2004, the same parties entered into a second contract for \$ 332,232 to perform additional work. The corporation asserted in its first assignment of error that the trial court erred by granting summary judgment to the board. The appeals court, however, found nothing in the evidentiary materials to contradict the fact that the contract was between the corporation and the State of Ohio. Although the board's name did appear on documents, it was in the capacity of an agent binding the State of Ohio. The party with

which the corporation contracted was the State of Ohio, and that was the party from which it had to seek compensation for any breach of those contracts. As the corporation was a party to an express contract with the State of Ohio concerning construction work, an action for unjust enrichment would not lie against the board. The company could not ignore the contracts and seek compensation from whatever, or whomever, had benefitted from its work.

Outcome

The judgment was affirmed. It was ordered that the board recover costs from the corporation.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review
Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 Generally, appellate courts review summary judgments de novo. In other words, appellate courts afford no deference to trial court decisions, and conduct their own independent review to determine if summary judgment is appropriate.

Civil Procedure > ... > Summary Judgments > Burdens of Proof > Movant Persuasion & Proof
Civil Procedure > ... > Summary Judgments > Burdens of Proof > Nonmovant Persuasion & Proof
Civil Procedure > ... > Summary Judgments > Entitlement as Matter of Law > Appropriateness

HN2 Summary judgment under *Civ. R. 56(C)* is appropriate when a movant can show that (1) no genuine issues of material fact exist, (2) it is entitled to judgment as a matter of law, and (3) after the evidence is construed most strongly in favor of the non-movant, reasonable minds can come to one conclusion and that conclusion is adverse to the non-moving party. The moving party bears the initial burden to show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. If that burden is met, the onus shifts to the non-moving party to provide rebuttal evidentiary materials.

Contracts Law > Contract Interpretation > General Overview

EXHIBIT

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HN3 Contracts mean what they say.

Contracts Law > Remedies > Equitable Relief > General Overview
Contracts Law > Types of Contracts > Express Contracts
Contracts Law > Types of Contracts > Quasi Contracts

HN4 Ohio law does not recognize an equitable claim for unjust enrichment when an express contract covers the exact same subject matter. A quasi-contract theory of recovery is used to facilitate recovery for unjust enrichment when no actual contract exists.

Counsel: FOR APPELLANT: Timothy G. Crowley., Columbus, Ohio; Michael J. Fusco, Fusco, Mackey, Mathews & Gill, L.L.P., Westerville, Ohio.

FOR APPELLEE: Donald W. Gregory and Eric B. Travers, Kegler, Brown, Hill & Ritter, L.P.A., Columbus, Ohio.

Judges: Abele, J., Kline, J. & McFarland, J.: Concur in Judgment & Opinion.

Opinion

[***364] [*629] DECISION AND JUDGMENT ENTRY

PER CURIAM.

[**P1] This is an appeal from a Pike County Common Pleas Court summary judgment in favor of the Scioto Valley Local School District Board (Scioto), defendant below and appellee herein, on the claims brought against it by Ingle-Barr, Inc. (Ingle-Barr), plaintiff below and appellant herein.

[**P2] Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE SCIOTO VALLEY LOCAL SCHOOL DISTRICT BOARD'S MOTION TO DISMISS, AND ITS MOTION FOR RECONSIDERATION, COLLECTIVELY TREATED AS A MOTION FOR SUMMARY JUDGMENT, AND DISMISSING WITH PREJUDICE PLAINTIFF-APPELLANT INGLE-BARR, INC.'S COMPLAINT, AND, IN PARTICULAR, IN DETERMINING THAT DEFENDANT-APPELLEE 'IS NOT A PARTY' TO THE CONSTRUCTION CONTRACTS THAT

ARE THE SUBJECT OF PLAINTIFF-APPELLANT'S COMPLAINT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE SCIOTO VALLEY LOCAL SCHOOL DISTRICT BOARD'S MOTION TO DISMISS, AND ITS MOTION FOR RECONSIDERATION, COLLECTIVELY TREATED AS A MOTION FOR SUMMARY JUDGMENT, AND DISMISSING WITH PREJUDICE PLAINTIFF-APPELLANT INGLE-BARR, INC.'S COMPLAINT, AND, IN PARTICULAR, IN DETERMINING THAT PLAINTIFF-APPELLANT MAY NOT RECOVER FROM THE DEFENDANT-APPELLEE 'BASED ON QUASI CONTRACT'."

[**P3] In 2002, Ingle-Barr entered into a \$2,683,000 construction contract with the State of Ohio, by and through Scioto, to renovate and build an addition to Jasper Elementary School. In 2004, the same parties entered into a second contract for \$332,232 to perform additional work.

[**P4] Ingle-Barr commenced the instant action on September 6, 2007 and alleged the breach of these contracts, as well as unjust enrichment, and requested \$267,134.44 in damages. Before it answered, Scioto filed a motion to dismiss and argued that it is not a party to the contracts upon which Ingle-Barr brought suit and that [**630] quasi contract could not be used in this instance against a governmental entity.

[**P5] Initially, the trial court overruled Scioto's motion to dismiss. Scioto, however, filed a motion to reconsider and argued that the trial court, in a related case, had ruled against Ingle-Barr and should also do so in this case.

[**P6] On May 6, 2010, the trial court notified the parties that it intended to treat Scioto's motion to dismiss and motion for reconsideration as a motion for summary judgment, and scheduled a deadline for the submission of *Civ.R. 56(C)* evidentiary materials. After both sides submitted affidavits, the court granted summary judgment.¹ This appeal followed.

I

[**P7] Ingle-Barr asserts in its first assignment of error that the trial court erred by granting summary judgment to Scioto. **HN1** Generally, appellate courts review summary judgments de novo. See *Broadnax [***365] v. Greene Credit Service* (1997), 118 Ohio

¹ Scioto filed an answer and counterclaim on March 9, 2010, but the summary judgment dismissed that claim as well. Thus, no *Civ.R. 54(B)* issues are afloat.

App.3d 881, 887, 694 N.E.2d 167; Coventry Twp. v. Ecker (1995), 101 Ohio App. 3d 38, 41, 654 N.E.2d 1327; Maust v. Bank One Columbus, N.A. (1992), 83 Ohio App.3d 103, 107, 614 N.E.2d 765. In other words, appellate courts afford no deference to trial court decisions, Hicks v. Leffler (1997), 119 Ohio App.3d 424, 427, 695 N.E.2d 777; Dillon v. Med. Ctr. Hosp. (1993), 98 Ohio App.3d 510, 514-515, 648 N.E.2d 1375, and conduct their own, independent review to determine if summary judgment is appropriate. Woods v. Dutta (1997), 119 Ohio App.3d 228, 233-234, 695 N.E.2d 18; McGee v. Good-year Atomic Corp. (1995), 103 Ohio App.3d 236, 241, 659 N.E.2d 317.

[**P8] **HN2** Summary judgment under Civ. R. 56(C) is appropriate when a movant can show that (1) no genuine issues of material fact exist, (2) it is entitled to judgment as a matter of law, and (3) after the evidence is construed most strongly in favor of the non-movant, reasonable minds can come to one conclusion and that conclusion is adverse to the non-moving party. Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St.3d 367, 369-370, 1998 Ohio 389, 696 N.E.2d 201; Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. The moving party bears the initial burden to show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. Vahila v. Hall (1997), 77 Ohio St.3d 421, 429, 1997 Ohio 259, 674 N.E.2d 1164; Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. If that burden is met, the onus shifts to the non-moving party to provide rebuttal evidentiary materials. See Trout v. Parker (1991), 72 Ohio App.3d 720, 723, 595 N.E.2d 1015; Campco Distributors, Inc. v. Fries [*631] (1987), 42 Ohio App.3d 200, 201, 537 N.E.2d 661. With these principles in mind, we turn our attention to the case at bar.

[**P9] An affidavit by Todd Burkitt, Superintendent of the Scioto Valley Local School District, attested to the authenticity of the two construction contracts underlying Ingle-Barr's case. He also attested that Scioto "is not a party" to either contract. This is sufficient for Scioto to carry its initial Civ.R. 56(C) burden and shift the burden of persuasion to Ingle-Barr. We, however, find nothing in the evidentiary materials to contradict the fact that the contract is between Ingle-Barr and the State of Ohio. Both contracts state that they are between "Ingle-Barr, Inc." and "the State of Ohio". . . through the President and Treasurer of the Scioto Valley Local School District Board." Although Scioto's name does appear on the documents, it is in the capacity of an agent binding the State of Ohio.

[**P10] **HN3** Contracts mean what they say. See National Life & Accident Ins. Co. v. Ray (1927), 117 Ohio St. 13, 22, 5 Ohio Law Abs. 110, 5 Ohio Law Abs. 402, 158 N.E. 179. Here, the party with which Ingle-Barr contracted is the State of Ohio, and that is the party from which it must seek compensation for any breach of those

contracts. We also point out that under almost identical circumstances, we affirmed a summary judgment when Ingle-Barr attempted to bring an action against a local school district under construction contracts, even though those contracts were between Ingle-Barr and the State of Ohio. See Ingle-Barr, Inc. v. Eastern Local School Dist. Bd., Pike App. Nos. 10CA808 & 10CA809, 2011 Ohio 584. We see no reason to depart from our ruling in that case.

[**P11] Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

[**P12] In its second assignment of error, Ingle-Barr asserts that the trial [*366] court erred by ruling that its claim for unjust enrichment could not be maintained against Scioto.

[**P13] Without commenting on the trial court's ruling directly, we do agree that unjust enrichment does not lie in this case. **HN4** Ohio law does not recognize an equitable claim for unjust enrichment when an express contract covers the exact same subject matter. See Allied Environmental Servs., Inc. v. Miami Univ., Court of Claims No. 2004-06887, 2006 Ohio 5668, at ¶40; Cleveland Mack Leasing, Ltd. v. Chefs Classics, Inc., Mahoning App. No. 05MA59, 2006 Ohio 888, at ¶34; Davidson v. Davidson, Auglaize App. No. 17-05-12, 2005 Ohio 6414, at ¶19. A quasi-contract theory of recovery is used to facilitate recovery for unjust enrichment [*632] when no actual contract exists. See generally Calamari & Perillo, Contracts (2nd Ed. 1977) 19-20, Section 1-12.

[**P14] In the case sub judice, Ingle-Barr is a party to an express contract with the State of Ohio concerning construction work. Thus, an action for unjust enrichment will not lie against Scioto. Ingle-Barr is a party to two contracts with the State of Ohio. That is the party from whom it should seek compensation. The company cannot ignore those contracts and seek compensation from whatever, or whomever, has benefitted from its work.

[**P15] Accordingly, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J., Kline, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:

Peter B. Abele, Judge

BY:

Roger L. Kline, Judge

BY:

Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

MEDIATION

November 15, 2007

*Ingle-Barr, Inc. v. OSFC and the
Eastern Local School District*

And

*Ingle-Barr, Inc. v. OSFC and the
Scioto Valley Local School District*

KEGLER BROWN
& HILL & RITTER
A LEGAL PROFESSIONAL ASSOCIATION

OUR FIRST ORDER OF BUSINESS IS KNOWING YOURS

tabbles®

EXHIBIT

13

Scioto Valley School Projects

General Trades Contract:
\$2.683 Million

Site Improvements Contract:
\$332,232.00

Scioto Valley: \$2.683 Million General Trades Contract between Ingle-Barr and the State of Ohio

State of Ohio
Ohio School Facilities Commission
CONTRACTOR CONTRACT

THE CONTRACT, evidenced by this Contract Form, made and entered into by and between:

Ingle-Barr, Inc.

(the "Contractor") and the State of Ohio (the "State"), through the President and Treasurer of the Scioto Valley Local School District Board (the "School District Board") on the date executed by the School District Board.

The Contractor shall perform the entire work described in the Contract Documents and reasonably inferable by the Contractor as necessary to produce the results intended by the Contract

ARTICLE I

1.1 The Contractor shall perform the entire Work described in the Contract Documents and reasonably inferable by the Contractor as necessary to produce the results intended by the Contract Documents, for:

Bid Package 31: General Trades
Scioto Valley Local School District
Addition & Renovations to
Jasper Elementary
Piketon, Ohio

to additions and deductions by Change Order as provided in the Contract Documents, the amount of \$2,683,000.00 (the "Contract Price"), based upon the Bid Form, dated July 30, 2002 submitted

K-1 OF December 2000

KEGLER BROWN
HILL & RITTER
A LEGAL PROFESSIONAL ASSOCIATION

OUR FIRST ORDER OF BUSINESS IS KNOWING YOURS

General Trades Contract Completion Date: Nov. 4, 2003 General Trades Liquidated Damages: \$2,000 per day

ARTICLE 3

3.1 The Contractor shall diligently prosecute the Work and shall complete all Work so that Contract Completion can occur on or before November 4, 2003, unless the Contractor timely requests and

within the established time for Contract Completion, and that each applicable portion of the Work shall be completed upon the respective milestone completion date, unless the Contractor timely requests and the School District Board grants an extension of time in accordance with the Contract Documents.

3.3 Upon failure to have all Work completed within the period of time above specified, or failure to have the applicable portion of the Work completed upon any milestone completion date, the State shall be entitled to retain or recover from the Contractor, as Liquidated Damages, and not as a penalty, the applicable amount set forth in the following table for each and every day thereafter until Contract Completion, unless the Contractor timely requests and the School District Board grants an extension of time in accordance with the Contract Documents.

3.3 Upon failure to have all Work completed within the period of time above specified, or failure to have the applicable portion of the Work completed upon any milestone completion date, the State shall be entitled to retain or recover from the Contractor, as Liquidated Damages, and not as a penalty, the applicable amount set forth in the following table for each and every day

More than \$10,000,000 \$3,000

3.4 The amount of Liquidated Damages is agreed upon by and between the Contractor and the State

More than \$2,000,000 to \$5,000,000 \$2,000

4.1 The Contract Documents embody the entire understanding of the parties and shall be the basis of the Contract between the State and the Contractor. The Contract Documents shall be considered to be incorporated by reference into this Contract Form as if fully rewritten herein.

4.2 The Contract and any modifications, amendments or alterations thereto shall be governed, construed and enforced by and under the laws of the State of Ohio

4.3 If any term or provision of the Contract, or the application thereof to any person or circumstance, is finally determined, to be invalid or unenforceable by a court of competent jurisdiction, the remainder of the Contract or the application of such term or provision to other persons or

8-3 CM December 2000

Site Improvements Contract \$332,232 Contract Completion January 15, 2004

State of Ohio
Ohio School Facilities Commission

CONTRACT DOCUMENTS

THE CONTRACT, evidenced by this Contract Form, made and entered into by and between:

Ingle-Barr, Inc.

(the "Contractor") and the State of Ohio (the "State"), through the President and Treasurer of the Scioto Valley Local School District Board (the "School District Board") on the date executed by the School District Board.

Documents, for:

Bid Package 37; Site Improvements

Pleasanton, Ohio

ARTICLE 2

2.1 The School District Board shall pay the Contractor for the performance of the Contract, subject to additions and deductions by Change Order as provided in the Contract Documents, the amount of \$332,232.00 (the "Contract Price"), based upon the Bid Form, dated June 28, 2002 submitted by the Contractor:

Base Bid \$332,232.00
No Alternates

3.1 The Contractor shall diligently prosecute the Work and shall complete all Work so that Contract Completion can occur on or before January 15, 2004, unless the Contractor timely requests and the School District Board grants an extension of time in accordance with the Contract

KEGLER BROWN
HILL & RITTER
A LEGAL PROFESSIONAL ASSOCIATION

P. 1

CM

December 2000

OUR FIRST ORDER OF BUSINESS IS KNOWING YOURS

Scioto Valley Site Improvements Contract Liquidated Damages of \$500 Per Day

Documents.

3.3 Upon failure to have all Work completed within the period of time above specified, or failure to have the applicable portion of the Work completed upon any milestone completion date, the State shall be entitled to retain or recover from the Contractor, as Liquidated Damages, and not as a penalty, the applicable amount set forth in the following table for each and every day thereafter until Contract Completion, unless the Contractor timely requests and the School District Board grants an extension of time in accordance with the Contract Documents.

More than \$50,000 to \$150,000	\$250
More than \$150,000 to \$500,000	\$500
More than \$500,000 to \$2,000,000	\$1,000
More than \$2,000,000 to \$5,000,000	\$2,000
More than \$5,000,000 to \$10,000,000	\$2,500
More than \$10,000,000	\$3,000

3.4 The amount of Liquidated Damages is agreed upon by and between the Contractor and the State because of the impracticality and extreme difficulty of ascertaining the actual amount of damage

Contract Amount

\$1 to \$50,000

More than \$50,000 to \$150,000

More than \$150,000 to \$500,000

Dollars Per Day

\$150

\$250

\$500

valid and enforced to the fullest extent permitted by law.

4.4 The Contract shall be binding on the Contractor and State, their successors and assigns, in respect to all covenants and obligations contained in the Contract Documents, but the Contract may not be assigned by the Contractor without the prior written consent of the School District Board.

K-3

CM

December 2000

**KEGLER BROWN
HILL & RITTER**
A LEGAL PROFESSIONAL ASSOCIATION

OUR FIRST ORDER OF BUSINESS IS KNOWING YOURS

Both Projects Not Complete Until August 16, 2004

First Cause Of Action — Breach Of Contract

4. After mediation proceedings on May 10, 2005, Plaintiff IBI and Defendant School District Board, executed a written Agreement dated May 16, 2005, a copy of which is attached hereto, marked Exhibit "A", and incorporated herein by reference.
5. Under the provisions of Paragraph 1 of the parties' Agreement, Defendant School District Board agreed to pay to Plaintiff IBI "the total sum of Two Hundred Eighty-Five Thousand Dollars (\$285,000.00) . . . within five (5) business days after the School District Board's approval at a meeting (anticipated to occur on Monday, May 16, 2005) to vote its approval of this settlement agreement".

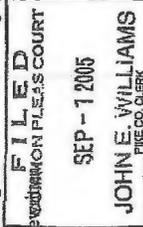
7. Paragraph 3 of the parties' Agreement provided that "The parties hereby acknowledge and agree that the School District Board accepted and occupied the entire Jasper Elementary School Project on August 16, 2004 (the "Completion And Acceptance Date") upon which date

Final Completion by IBI occurred."

demands by Plaintiff IBI that it do so.

Second Cause Of Action — Interest From "Final Completion" Date

9. Plaintiff IBI hereby incorporates by reference all of the allegations set forth in Paragraphs 1 through 8, inclusive, hereof as if the same were herein fully set forth.



Forum Selection Clause in all Ingle-Barr-Ohio Contracts

State of Ohio
Ohio School Facilities Commission

INSTRUCTIONS TO BIDDERS

ARTICLE I - CONTRACT INFORMATION

1.1 PROJECT BID REQUIREMENTS

- 1.1.1 When the entire cost of the Project exceeds \$50,000, the School District Board is required by applicable law to solicit separate bids for, at least, the following branches of Work:

8.2 FORUM FOR MONEY DAMAGES

- 8.2.1 The Ohio Court of Claims shall be the exclusive jurisdiction for any action or proceeding for any money damages concerning any agreement or performance under the Contract Documents or in connection with the Project.

- 1.2.3 The award of separate Contracts for the Project requires sequential, coordinated and otherwise interrelated Contractor operations and may involve interference, disruption, hindrance or delay in the progress of any individual Contractor's Work. Each Contractor shall be an intended third party beneficiary of the Contract of each other Contractor performing Work on the Project. Each Contractor shall cooperate with the Architect, the Construction Manager and any other Contractors to minimize interference, disruption, hindrance or delay of any Work on the Project.

IB-1

CM

December 2001

**KEGLER BROWN
HILL & RITTER**
A LEGAL PROFESSIONAL ASSOCIATION

OUR FIRST ORDER OF BUSINESS IS KNOWING YOURS

Ingle-Barr Sues in Pike County

- Eastern Local School District Board Moves to Dismiss
- Scioto Valley Local School District Board Moves to Dismiss
- Motions Pending

Billed and Paid Twice for the Same Work

Scioto Valley Local School District • P. O. Box 600

INVOICE NUMBER	PO NUMBER	FUND	FUNC	OBJ	SPCC	SUBJ	OBJ	NET AMOUNT
REV PAY APP3	0057592	05	010	423	9991	000000	00	\$ 102466.00
								TOTAL \$ 102466.00

Check No. 77368

Vendor No. 032763 - INGLE-BARR, INC.
MESSAGE:

Scioto Valley Local School District
P. O. Box 600
Piketon, Ohio 45661

Fifth Third Bank
Waverly, Ohio

No. 77368

DATE

56-773/422

PAY TO THE ORDER OF
 709D 709D 709D 709D 709D 709D 709D 709D
 INGLE-BARR, INC.
 PO BOX 874
 CHILLICOTHE OH 45601

\$ 102,466.00

NON-NEGOTIABLE

KEGLER BROWN
 HILL & RITTER
 A LEGAL PROFESSIONAL ASSOCIATION

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Ingle-Barr Cashes First Pay App. #3 payment

Vendor No. 032763 - INGLE-BARR, INC.
 MESSAGE:

INVOICE NUMBER	DATE	AMOUNT	STATUS	DATE	AMOUNT	STATUS	DATE	AMOUNT	STATUS
0000003	0054896	05	010	5500	423	9991	000000	000	00
									Check No. 7724 NET AMOUNT \$ 104466.00
									TOTAL \$ 104466.00

School Valley Local School District
 P.O. Box 800
 Chillicothe, Ohio 45601

Fifth Third Bank
 Newark, Ohio

No. 77224

DATE

08/19/2004

56-73422

909D

INGLE-BARR, INC.
 P.O. BOX 874
 CHILLICOTHE OH 45601

PAY
 TO THE ORDER OF

NON-NEGOTIABLE

School Valley Local School District
 P.O. Box 800
 Chillicothe, Ohio 45601

INGLE-BARR, INC.
 P.O. BOX 874
 CHILLICOTHE OH 45601

**KEGLER BROWN
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2nd Pay Application No. 3" Paid -- \$102,406

ODR # 21522

Application and Certification for Payment

To School District: Jasper Elementary School,
3185 Jasper Rd,
Piketon, Ohio 45661

Project Name: Application No.: 03

From Contractor: IngLe-Barr Inc.
P.O. Box 874
Chillicothe, Ohio

Bid Package: Construction Manager:
43001 Gilbane/Regency/Polytech
Architect Midwest Ohio

Contract Number: OSFC Project#: SITE WORK

Contract Date:

Contract Invoice Summary	
1. Original Contract Value	332,232.00
2. Net Change by Change Orders	332,232.00
3. Contract Value To Date	308,900.00
4. Total Completed & Stored To Date	
5. Completed Labor Retainage (8%)	
6. Stored Material Retainage	8,292.00
7. Total Retainage	

Current Payment Due 102,466.00

11. Balance to Finish, including Retainage 31,624.00

Change Order Summary: Additions _____ Deductions _____

Total charged in previous months _____

Totals _____

Net Changes by Change Order _____

The Contractor certifies that the work covered by this pay request has been completed in accordance with the Contract Documents and that all progress payments previously paid by the State have been applied by the Contractor to discharge in full all of Contractor's obligations incurred in connection with the work covered by all prior pay requests.

Contractor Signature: *[Signature]* Date: 8/18/04

Based upon on-site observations, the firms affirm that the work has progressed to the percentage of completeness indicated on this pay request.

Construction Manager:

By: *[Signature]* Date: 8.24.04

Architect: *[Signature]* Date: 8-27-04

Approved by: *[Signature]* Date: 9.9.04

School District Treasurer: *[Signature]* Date:

By: *[Signature]* Date:

RECEIVED
AUG 26 2004
Tanner Stone & Co.

Actual Payments were \$405,704.00

- Site Improvements Contract payments:

<u>Pay App.</u>	<u>Amount</u>	<u>Paid Date</u>	<u>Check #</u>
• #1:	\$106,548.00.	1/8/04	75769
• #2:	\$ 91,594.00.	4/19/04	76498
• #3:	\$104,466.00	8/19/04	77224
• 2nd "#3":	<u>\$102,466.00</u>	9/7/04	77368
	\$405,704.00		

- TOTAL Paid: \$405,074.00.
- Site Improvements Contract Sum: \$332,232.00.
- Over-Payment (Before Backcharges): **\$ 72,842.00**

Ingle-Barr Hides Receipt of Payment

Law Offices of

Timothy G. Crowley
150 West Wilson Bridge Road
Suite 101
Worthington, Ohio 43085

Telephone 614-848-7883
Fax 614-431-8120

March 25, 2005

Richard D. Cardwell, Esq.
PECK SHAFER & WILLIAMS, LLP
175 South Third Street, Suite 600
Columbus, Ohio 43215-3528

Re: Scioto Valley Local School District
Jasper Elementary School
Bid Package No. 37: Site Improvements
OSFC Project No. 10-0067
Ingle-Barr Project No. 21522

Dear Mr. Cardwell:

Pursuant to our recent telephone conferences, enclosed please find duplicate copies of the following documents related to the above project upon which my client, Ingle-Barr, Inc., is owed the sum of \$74,286.83:

A. "Contractor Contract" dated February 25, 2004 for \$332,232.00 Contract Price

The gross amount billed by Ingle-Barr was \$376,894.83. The total of payments received is \$302,608.00. Therefore, the balance due and owing is the \$74,286.83 stated above.

C. Application and Certificate for Payment documents totalling \$76,286.83 (of which \$2,000.00 has been paid):

1.	No. 4	\$43,980.68	current payment due
2.	No. 5	\$32,306.15	current payment due

The gross amount billed by Ingle-Barr was \$376,894.83. The total of payments received is \$302,608.00. Therefore, the balance due and owing is the \$74,286.83 stated above.

Please deliver the second set of copies to the Ohio School Facilities Commission for its review and consideration. In the event that this matter cannot be resolved without litigation in the Court of Claims, these documents will be incorporated by reference into Ingle-Barr's Complaint filed therein.

KEGLER BROWN
HILL & RITTER
A LEGAL PROFESSIONAL ASSOCIATION

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Ingle-Barr Refuses to Credit the School Board and OSFC for the \$104,466 payment

Affidavit ¶15, Williams Affidavit ¶27 only serves to underscore Defendant's institutional

IBI could reasonably and justifiably assume that an institution that provides education would itself possess certain skills and study habits:

- Do your homework.
- Bring your books and materials to class.
- Know what subjects you will be tested on.
- Possess a proficiency in mathematics.
- Double check your answers before turning in your test for grading.

There Is No Basis For This Court To Reform Or Rescind The \$285,000.00 Settlement Agreement.

No teacher in Defendant's schools would accept a student's excuse that he or she reasonably and justifiably relied upon someone else (particularly not an adversary) to provide the test answers.

real estate because of previous owners' deeds. It has no application to the facts and legal considerations in the instant case.

The clear intent of the parties herein was to agree upon a "global settlement" of all claims related to the Jasper Project for a settlement sum of \$285,000.00 [Affidavit Of Rodney

Court of Common Pleas Rejects Ingle-Barr's arguments

- **Ingle-Barr Complaint Against Scioto Valley, seeking enforcement of the Settlement Agreement is dismissed, and the Agreement found null and void on grounds of fraud or mistake.**

Pike County Court Dismisses Ingle-Barr's Suit Against Scioto Valley for Fraud or Mistake

- **Ingle-Barr Refiles a Complaint in Pike County arising out of the Scioto Valley Projects in the Court of Common Pleas, this time as a Breach of Contract Action.**
- **School Board Moves to Dismiss on Res *Judicata* and Forum Selection Grounds.**
- **Court sets Oral Argument on the School Board's Motion to Dismiss Set for November 27, 2007.**

Scioto Valley Contracts

The Backcharges

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HILL & RITTER
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Scioto Valley Project Accounting

Bid Package 31: General Trades Contract:

Total Contract (through Pay App. #15): \$3,092,970.85

Paid to date: \$2,981,512.68

Contract Balance (*Before Backcharges*): \$ 111,458.17

Site Improvements Contract

Contract Sum: \$332,232.00

Paid to date: \$405,074.00

Over-Payment (*Before Backcharges*): **\$ 72,842.00**

Scioto Valley General Trades Contract
Mechanical Construction Backcharge: \$41,029.00

**The OSFC, Gilbane, Tanner Stone,
and the School District negotiated a
settlement of that claim for
\$41,029.00.**

**KEGLER BROWN
& RITTER**
A LEGAL PROFESSIONAL ASSOCIATION

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Scioto Valley: Liquidated Damages*

On Site Improvements Contract: \$112,500.00

Site Improvements Contract Completion **January 4, 2004**

Date:

Site Improvements Liquidated Damages: **\$500.00 per day**

Actual Completion date:

August 16, 2004*

Unexcused Days Late:

225 days

225 x \$500 =

\$112,500*

*LDs estimated are conservative as actual completion date was later

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HILL & RITTER**
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Scioto Valley:

Liquidated Damages* on General Trades Contract: \$572,000.00

General Trades Contract Completion Date: Nov. 4, 2003

General Trades Per Diem Liquidated

\$2,000 per day

Damages:

Actual Completion Date:

August 16, 2004*

Unexcused Days Late:

286 days

286 X \$2,000 =

\$572,000*

*LDs estimated are conservative as actual completion date was later

KEGLER BROWN

HILL & RITTER

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Total Backcharges Scioto Valley Projects:

\$725,529

Site Improvements LDs - \$112,500
General Trades LDS - \$572,000
Mechanical Constr. Delay Claim + \$ 41,029

Total Backcharges Scioto Valley: \$725,529

Scioto Valley Combined Contract Balance

Both Contracts Balance: \$38,616.17

(\$111,458.17 - \$72,842 overpayment)

Less

Combined Backcharges: \$725,529

=

Due from Ingle-Barr \$686,912.83

Eastern Local School District

The same OSFC standard
contracts as used for the
Projects in Scioto Valley

KEGLER BROWN
HILL & RITTER
A LEGAL PROFESSIONAL ASSOCIATION

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Eastern Local School Projects

New Athletic Fields Contract:

\$596,877.00

Site Improvements (Parking Lot)

Contract: \$590,963.00

Eastern Local Contracts: Bid Package 12D - Site Improvements



State of Ohio
Ohio School Facilities Commission

CONTRACTOR CONTRACT 05.12.12 11.10.12

THE CONTRACT, evidenced by this Contract Form, made and entered into by and between:

*Ingle-Barr Inc.
20 Pyleys Lane
Chillicothe, Ohio 45601*

(the "Contractor") and the State of Ohio (the "State"), through the President and Treasurer of the

1.1 The Contractor shall perform the entire Work described in the Contract Documents and reasonably inferable by the Contractor as necessary to produce the results intended by the Contract Documents.

Bid Package 12D-2, Site Improvements

*Eastern High School
1170 Tile Mill Road
Beaver, Ohio 45613*

2.1 The School District Board shall pay the Contractor for the performance of the Contract, subject to additions and deductions by Change Order as provided in the Contract Documents, the amount of \$590,663.00 (the "Contract Price").

\$590,663.00 (the "Contract Price")

Base Bid: \$590,963.00

Alternate SI-1 - Utilize Lime Stabilization: (\$35,000.00)

Alternate SI-2 - Supply & Install Exterior Benches, Tables: \$18,000.00

Alternate SI-3 - Supply & Install Bus Drive Gates: \$19,500.00

Alternate SI-4 - Supply & Install Additional Landscaping: \$19,200.00

Alternate SI-5 - Utilize Extruded Curbs: (\$22,000.00)

2.2 The Contract Price shall be paid in current funds by the School District Board upon Applications for Payment submitted by the Contractor and approved by the State as provided in the Contract Documents.

Eastern Local -- Athletic Fields LDs: \$1,000 Per Day Site Improvements LDs: \$1,000 Per Day

ARTICLE 3

3.1 The Contractor shall diligently prosecute the Work and shall complete all Work so that Contract Completion can occur on or before December 12, 2002, unless the Contractor timely requests and the School District Board grants an extension of time in accordance with the Contract Documents.

3.3 Upon failure to have all Work completed within the period of time above specified, or failure to have the applicable portion of the Work completed upon any milestone completion date, the State shall be entitled to retain or recover from the Contractor, as Liquidated Damages, and not as a penalty, the applicable amount set forth in the following table for each and every day thereafter until Contract Completion, unless the Contractor timely requests and the School District Board grants an extension of time in accordance with the Contract Documents.

<u>Contract Amount</u>	<u>Dollars Per Day</u>
\$1 to \$50,000	\$150
More than \$50,000 to \$150,000	\$250
More than \$150,000 to \$500,000	\$500
More than \$500,000 to \$2,000,000	\$1,000
More than \$2,000,000 to \$5,000,000	\$2,000

<u>Contract Amount</u>	<u>Dollars Per Day</u>
\$1 to \$50,000	\$150
More than \$50,000 to \$150,000	\$250
More than \$150,000 to \$500,000	\$500
More than \$500,000 to \$2,000,000	\$1,000

is finally determined, to be invalid or unenforceable by a court of competent jurisdiction, the remainder of the Contract or the application of such term or provision to other persons or

K-2

OSFC

December 2000

**KEGLER BROWN
HILL & RITTER**
A LEGAL PROFESSIONAL ASSOCIATION

OUR FIRST ORDER OF BUSINESS IS KNOWING YOURS

Notice of Breach to Ingle-Barr on Athletic Fields

Gilbane

Gilbane
2 Easton Oval, Suite 110
Columbus, OH 43219
Telephone 614.418.3000
Facsimile 614.418.3030
www.gilbaneco.com

Gilbane

Gilbane
2 Easton Oval, Suite 110
Columbus, OH 43219
Telephone 614.418.3000
Facsimile 614.418.3030
www.gilbaneco.com

As authorized under paragraph GC 5.3.2, if such deficiencies are not cured within three (3) working days after your receipt of this notice, the Eastern Local School District may employ upon the Work the additional force, or supply the materials or such part of either as is appropriate, to correct the deficiency in your Work, and issue a Change Order deducting the cost of correcting such deficiencies from payments

Ingle-Barr, Inc.
20 Plyleys Lane
Chillicothe, Ohio 45661
(740) 702-6117

Re: Eastern Local School District

If you have any questions regarding this issue, please do not hesitate to contact me.

Sincerely,
Gilbane Building Co.

1.5 |

then or thereafter due your company. If the payments then or thereafter due are not sufficient to cover such costs, you and your surety will be liable for the insufficiency.

Subject: Sitework/Seeding Repairs

Gentleman:

This notice is provided to you in accordance with the provisions of paragraphs GC 5.3 and 6.1.

Generally, under paragraph GC 6.1.1, time is of the essence to the Contract Documents and all obligations thereunder. By executing the Contract, you acknowledged that the time for Contract Completion, and by signing the Construction Schedule, that any specified milestone completion dates, are reasonable. Moreover, under paragraphs GC 6.1.1.3 and 6.1.1.4, you are required to prosecute the

S. Roka, OSFC
T. Brannon, OSFC
D. Berry, RJ Surety
L. Hill, Benwanger Overmyer Associates
R. Cardwell, Peck, Schaeffer & Williams
L. Belcastaine, CS&F
J. Temponeiras, TSCO
B. Butler, GBCO
CF

Pursuant to paragraph GC 5.3.1, your company has provided Defective Work and has failed and neglected to prosecute the Work for the above-referenced Contract with the necessary diligence so as to complete the Work within the time specified in the Contract Documents or any portion of the Work by the applicable milestone dates set forth within the Construction Schedule as follows:

Finally, please note that failure to complete all Work by the Contract Completion date, or failure to have the applicable portion of the Work completed upon any milestone completion date may result in an assessment of Liquidated Damages against a future Application for Payment pursuant to Section 3.3 of the Contract and paragraphs GC 3.2.4, 9.2.3, 9.6.1 and 9.6.2.

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KEC

HILL & RITTER

A LEGAL PROFESSIONAL ASSOCIATION

OUR FIRST ORDER OF BUSINESS IS KNOWING YOURS

Notice of Breach to Ingle-Barr on Site Improvements



Gilbane
2 Easton Oval, Suite 110
Columbus, OH 43219
Telephone 614.418.3000
Facsimile 614.418.3030
www.gilbaneco.com

July 28, 2004

Pursuant to paragraph GC 5.3.1, your company has provided Defective Work and has failed and neglected to prosecute the Work for the above-referenced Contract with the necessary diligence so as to complete the Work within the time specified in the Contract Documents or any portion of the Work by the applicable milestone dates as set forth within the Construction Schedule as follows:

1. See Attached letter from CTL dated July 28, 2004.
2. Repairs to the wearing course of asphalt at the parking lot south of the running track.
3. Repairs to the access drive servicing the track and ball fields, insufficient depth of asphalt.
4. Repairs to the parking lot immediately south of the building to provide positive drainage.

Completion, and by signing the Construction Schedule, that any specified milestone completion dates, are reasonable. Moreover, under paragraphs GC 6.1.1.3 and 6.1.1.4, you are required to prosecute the Work in a reasonable, efficient and economical sequence, in cooperation with the other Contractors, the Construction Manager and the Architect and in the order and time as provided in the Construction Schedule, and in a manner so as not to interfere with, disturb, hinder or delay the Work of other Contractors and such other Contractors' Subcontractors and Material Suppliers.

Pursuant to paragraph GC 5.3.1, your company has provided Defective Work and has failed and neglected to prosecute the Work for the above-referenced Contract with the necessary diligence so as to complete the Work within the time specified in the Contract Documents or any portion of the Work by the applicable milestone dates as set forth within the Construction Schedule as follows:

1. See Attached letter from CTL dated July 28, 2004.
2. Repairs to the wearing course of asphalt at the parking lot south of the running track.
3. Repairs to the access drive servicing the track and ball fields, insufficient depth of asphalt.
4. Repairs to the parking lot immediately south of the building to provide positive drainage.

KEGLER BROWN
& HILL & RITTER
A LEGAL PROFESSIONAL ASSOCIATION

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Both Contracts Terminated for Cause August 18, 2004

Gilbane
Gilbane
2 Easton Oval, Suite 110
Columbus, OH 43219
Telephone 614.418.3000
Facsimile 614.418.3030
www.gilbaneco.com

August 18, 2004

CERTIFIED MAIL

Rod Poole
Vice President
Ingle Barr, Inc.
20 Plyleys Lane
Chillicothe, Ohio 45661
(740) 702-9117

Re: Eastern Local School District
New Eastern K-12 School
Bid Package No. 11: Phase 11B - New Athletic Fields

Subject: Work Supplementation Notice

Gentleman:

This letter serves as notice that in accordance with the two letters dated July 29, 2004 regarding Sitework Repairs

This letter serves as notice that in accordance with the two letters dated July 29, 2004 regarding Sitework Repairs and Asphalt Repairs, the project is proceeding with correction of all defective work and completion of all incomplete work. This work will be performed by another contractor(s) in accordance to the contract documents. As such, Ingle Barr is directed to cease and desist stop all work on the aforementioned contracts.

WV

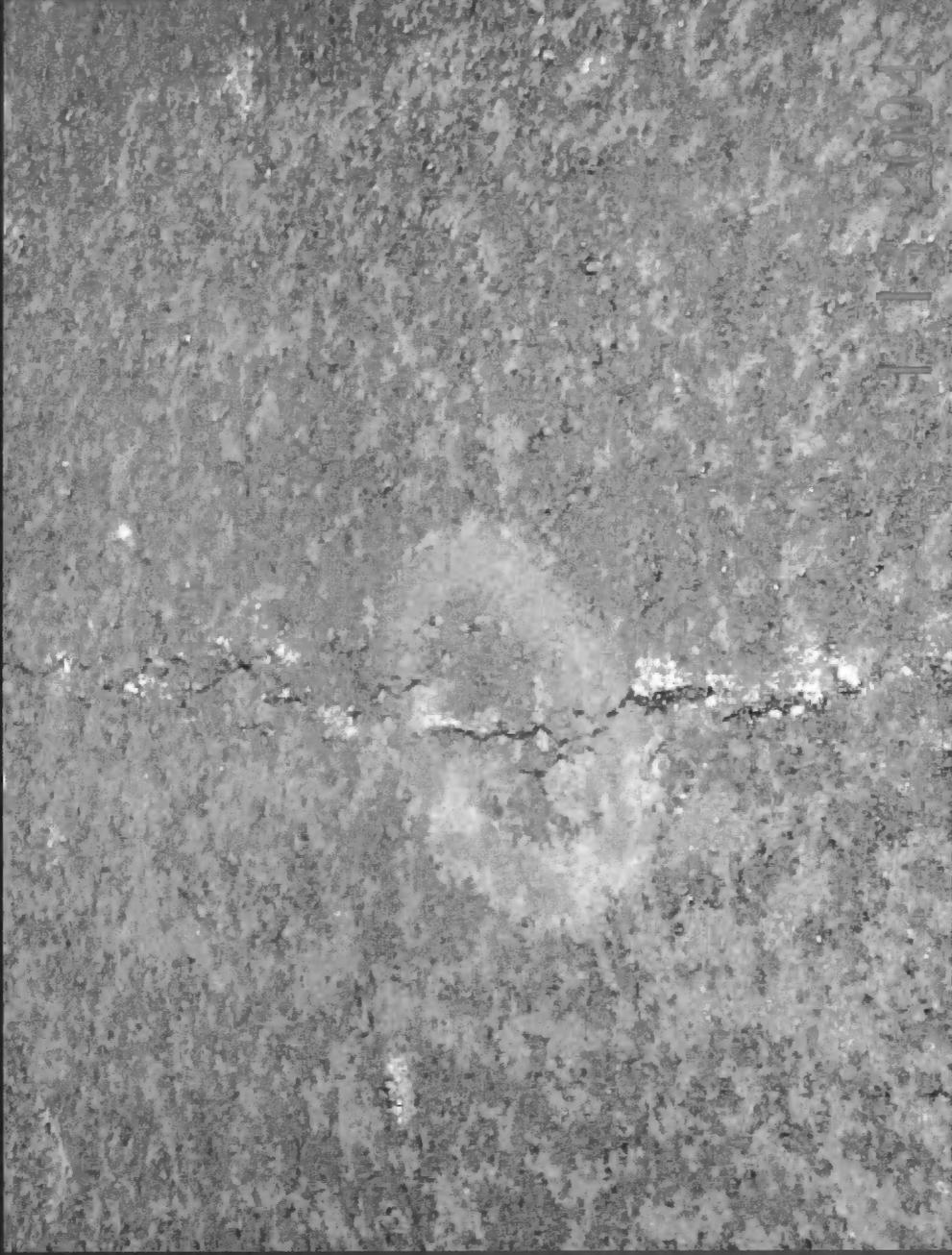
Warren Whitesell
Project Manager

Cc: L. Howard, ESLSD
S. Roka, OSFC
T. Branham, OSFC
D. Berry, RJ Surety
L. Hall, Berwanger Overmyer Associates
R. Cardwell, Peck, Schaffer & Williams
L. Baldassarre, CSSF
J. Tomponeras, TSCO
B. Butler, GBCo
CF

**KEGLER BROWN
& RITTER**
A LEGAL PROFESSIONAL ASSOCIATION

LESS IS KNOWING YOURS

01-13-04 Separation of asphalt



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HILL & RITTER**
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Why Terminated?

Ingle-Barr's Work:

- **Poor**
- **Slow**
- **Substandard**

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HILL & RITTER
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01-13-04 Separation of Asphalt South End



1.13.2004

KEGLER BROWN
HILL & RITTER
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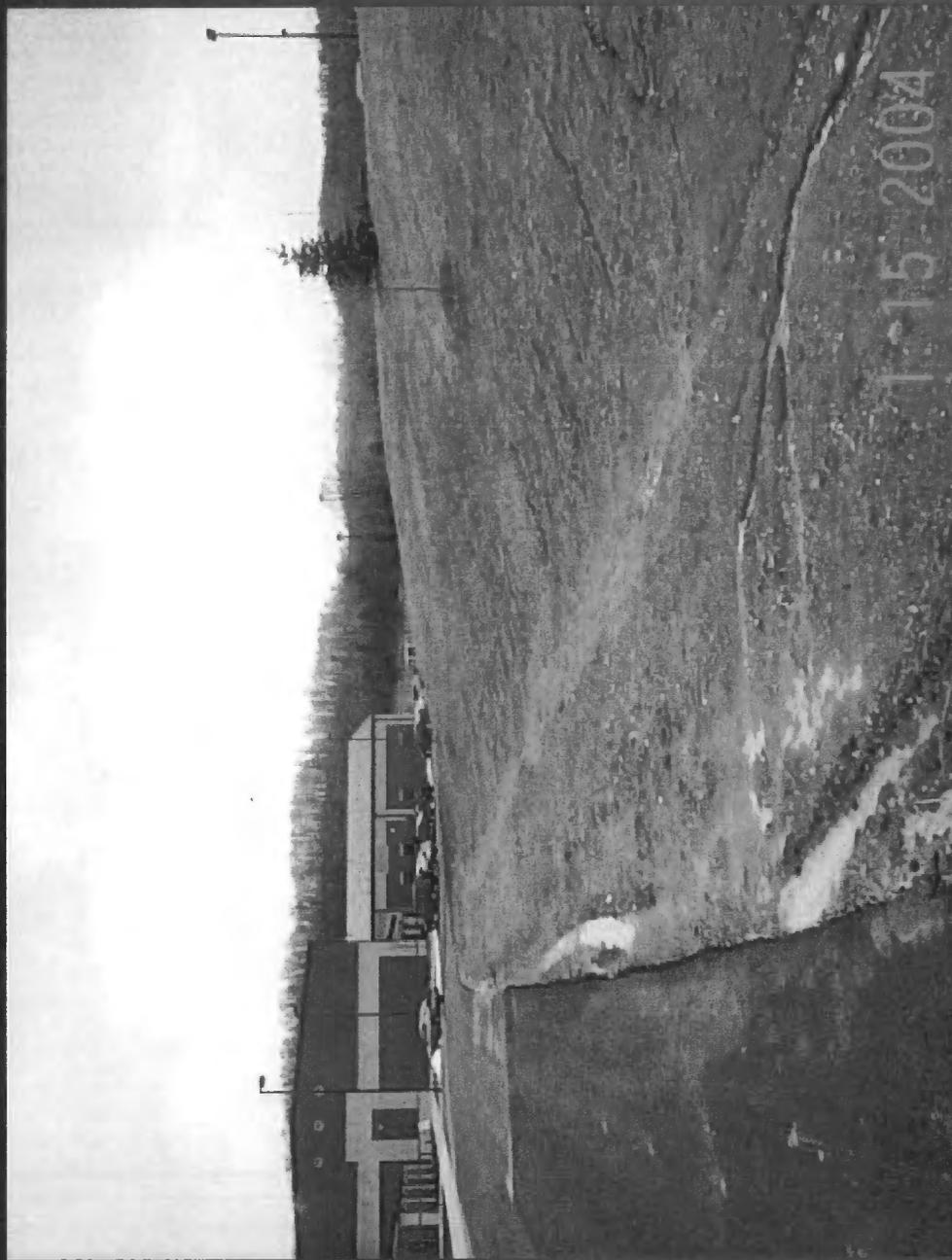
01-15-04 muddy slurry asphalt core



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HILL & RITTER
A LEGAL PROFESSIONAL ASSOCIATION

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01-15-04 Unprotected slope



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HILL & RITTER**
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01-15-04 Unprotected storm drain



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HILL & RITTER**
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1-20-04a Water Ponding on Upper Lot

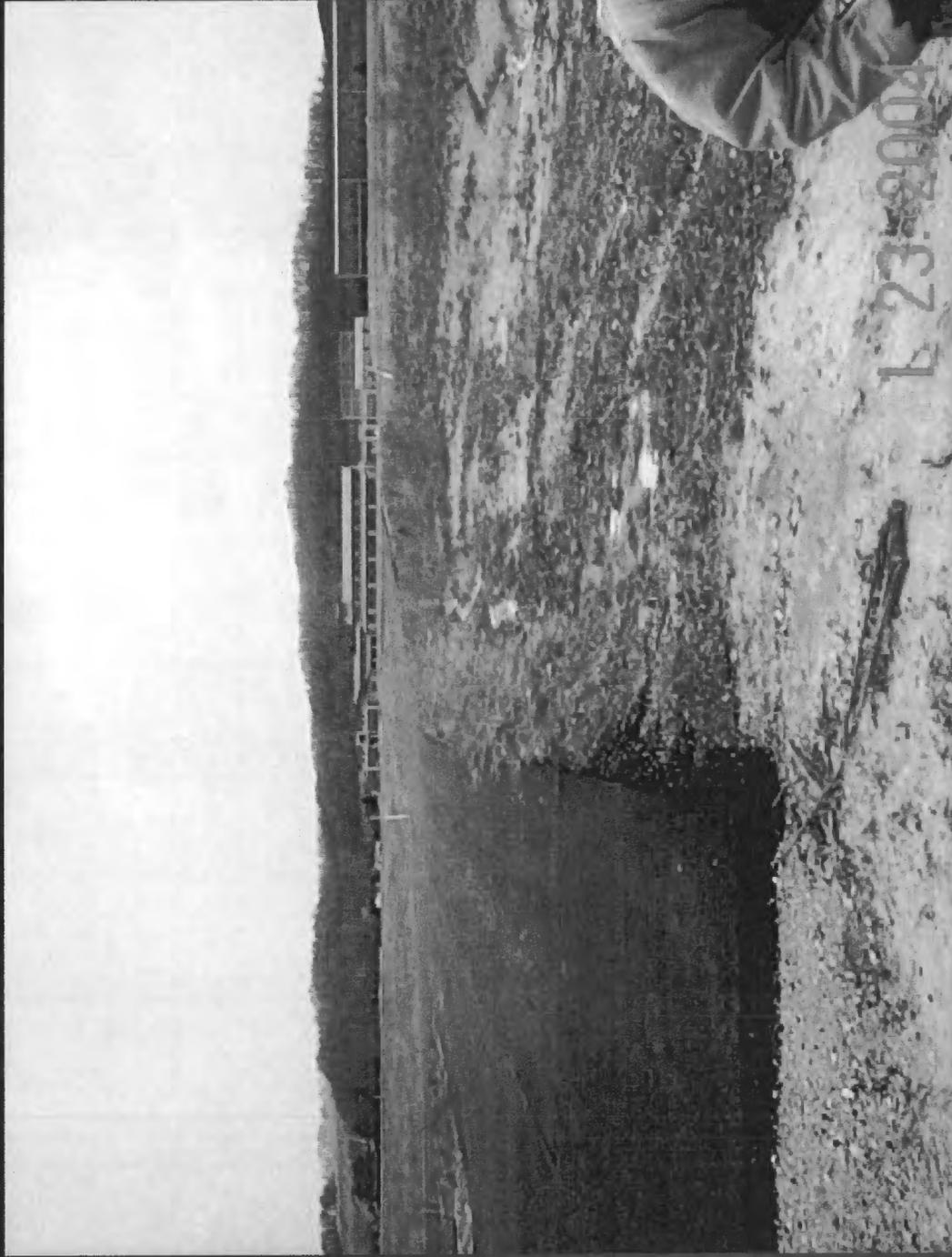


1.20.2004

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HILL & RITTER
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1-23-2004 Grading and Backup of Pavement BP



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1-23-2004 Debris in Ballpark



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1-23-2004 Erosion at Catch Basin in Ballpark



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1-23-2004 Pond and Exposed Natural Gas Line



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1-23-2004 Poor Grading at Pond



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1-23-2004 Erosion at Pond



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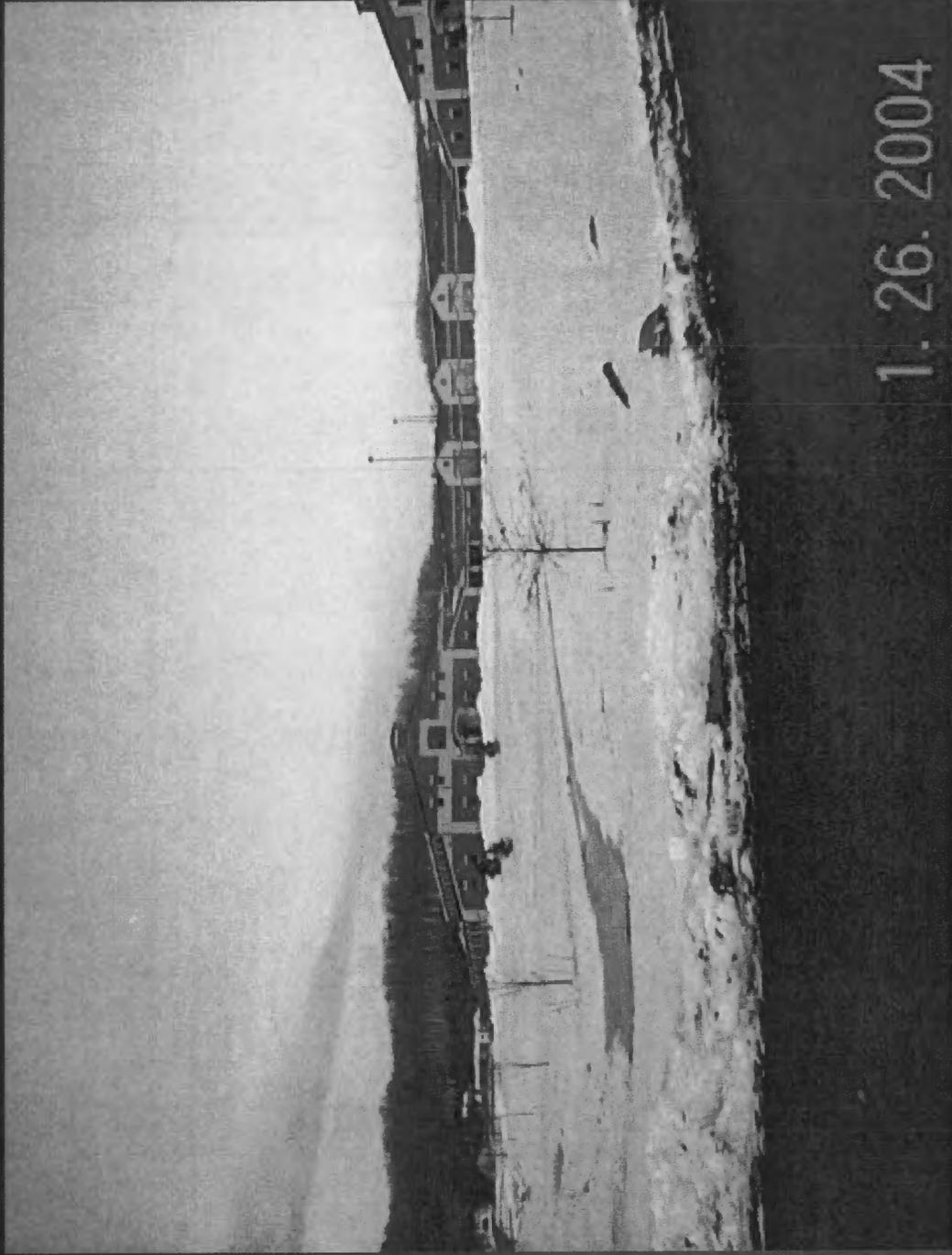
1-26-04 Asphalt joints upper lot



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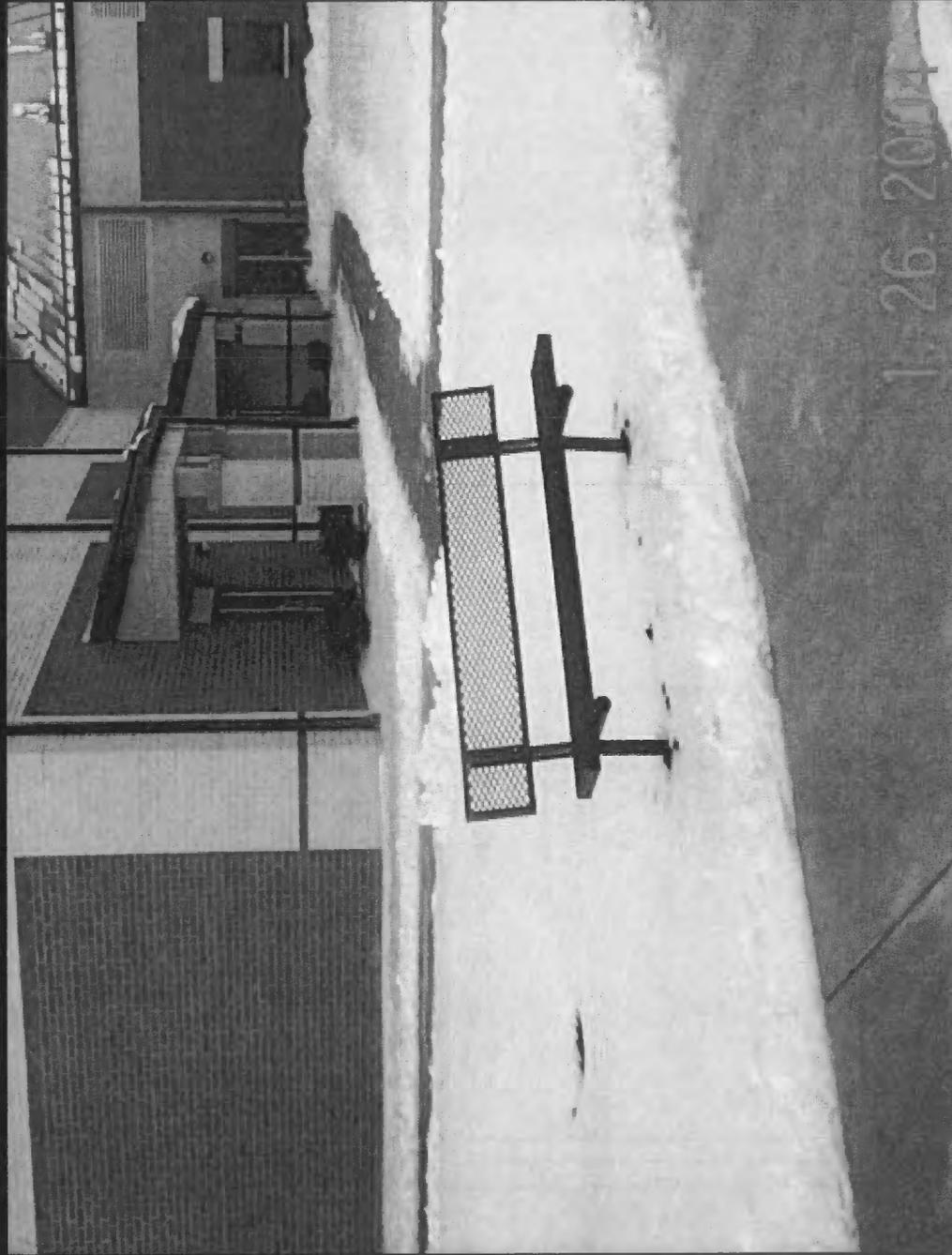
1-26-04 Poor Grading Front of Building



**KEGLER BROWN
HILL & RITTER**
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1-26-04 Incorrect Benches



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1-26-04 Incorrect concrete curb



**KEGLER BROWN
HILL & RITTER**
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1-26-04 Unsealed catch basin



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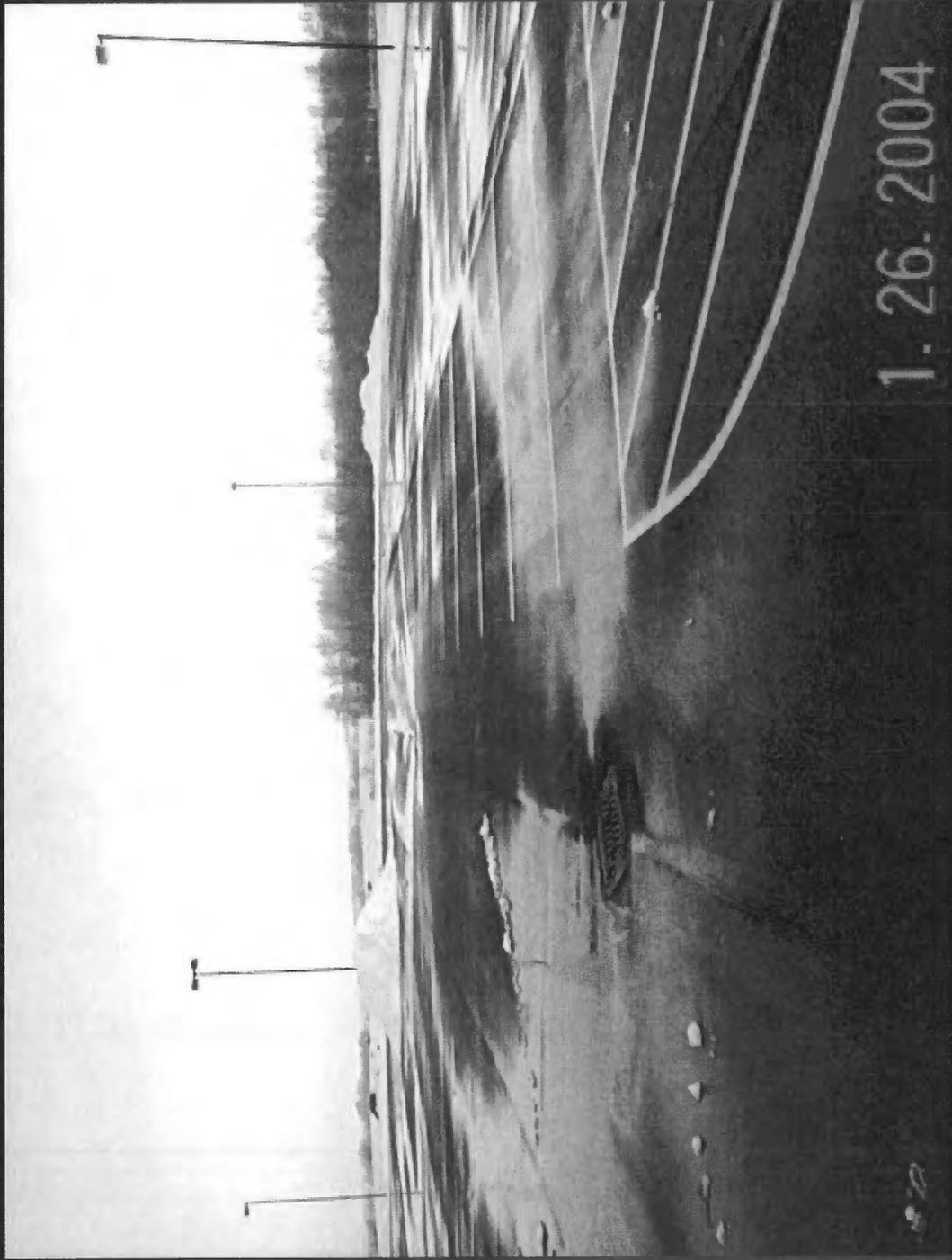
1-26-04 - Water Ponding on Concrete Stairs



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HILL & RITTER**
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1-26-04 Water Ponding on Upper Lot

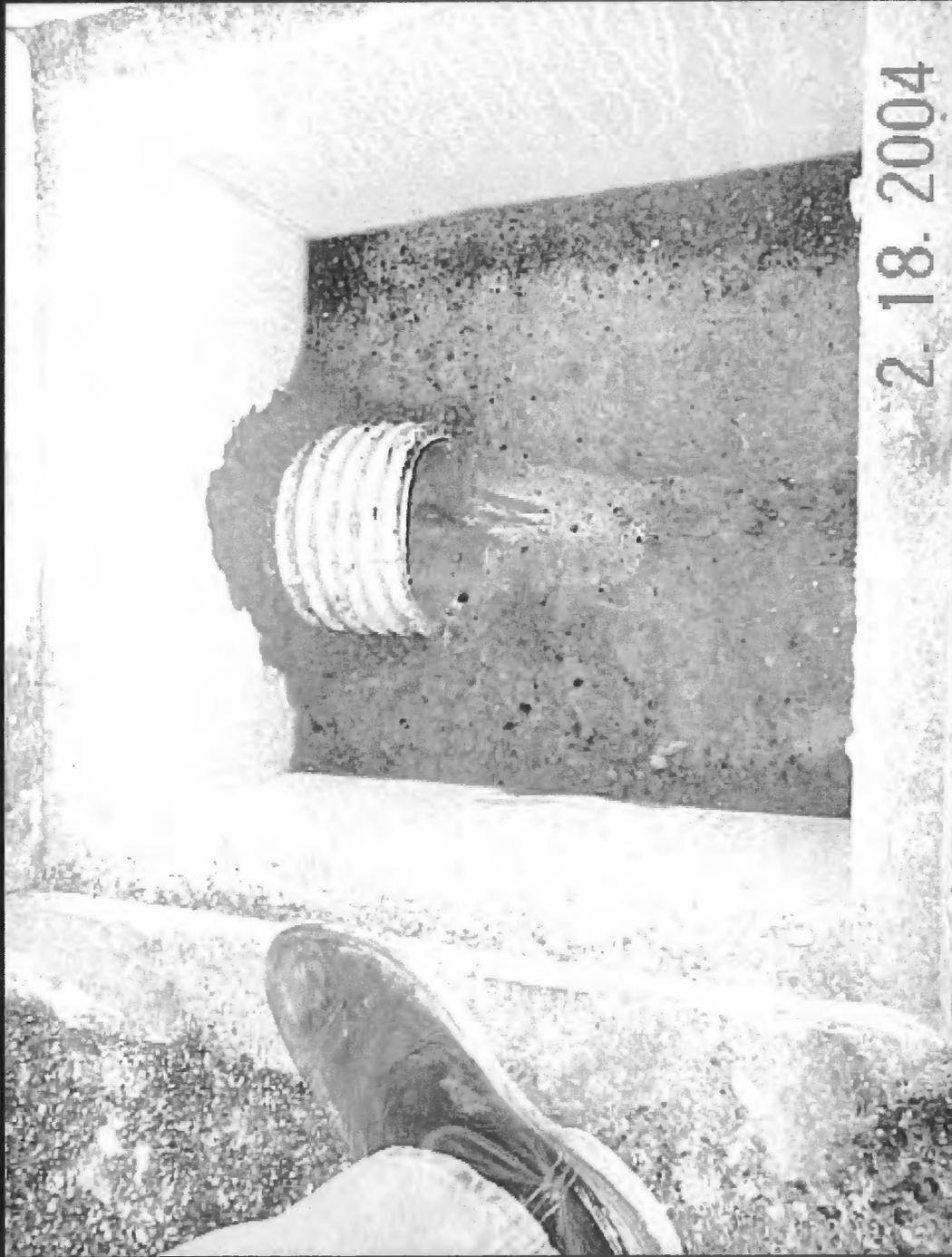


1. 26. 2004

**KEGLER BROWN
HILL & RITTER**
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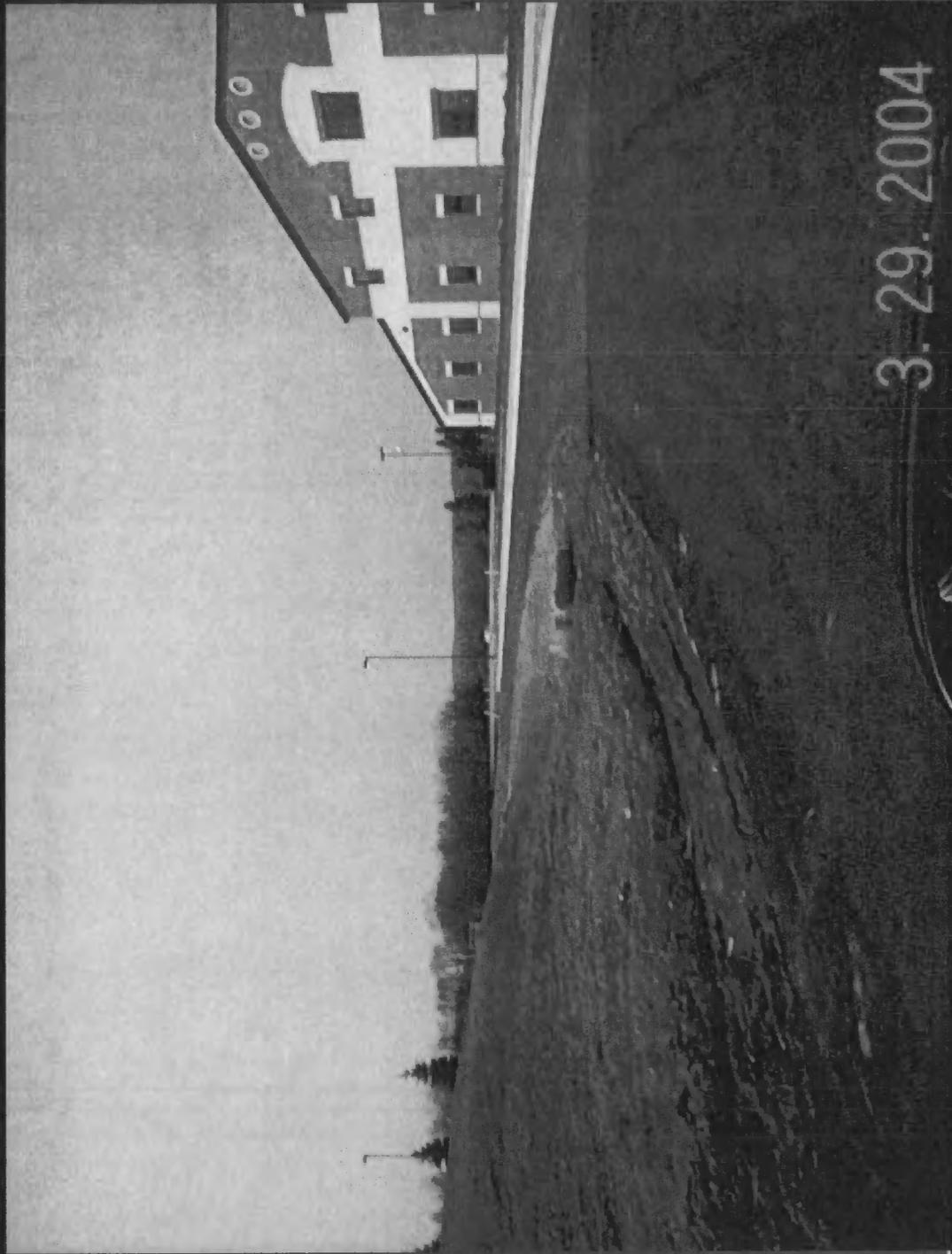
Debris-Clogged Drainage



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03-29-04 Strawbales



3.29.2004

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04-15-04 Large Rocks at Temporary Track Access



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HILL & RITTER**
A LEGAL PROFESSIONAL ASSOCIATION

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04-15-04 Large Rocks in Topsoil



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04-15-04 Large Rocks in Topsoil by Building



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A LEGAL PROFESSIONAL ASSOCIATION

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04-15-04 Large Rocks in Topsoil South
of Main Building



4-15-2004

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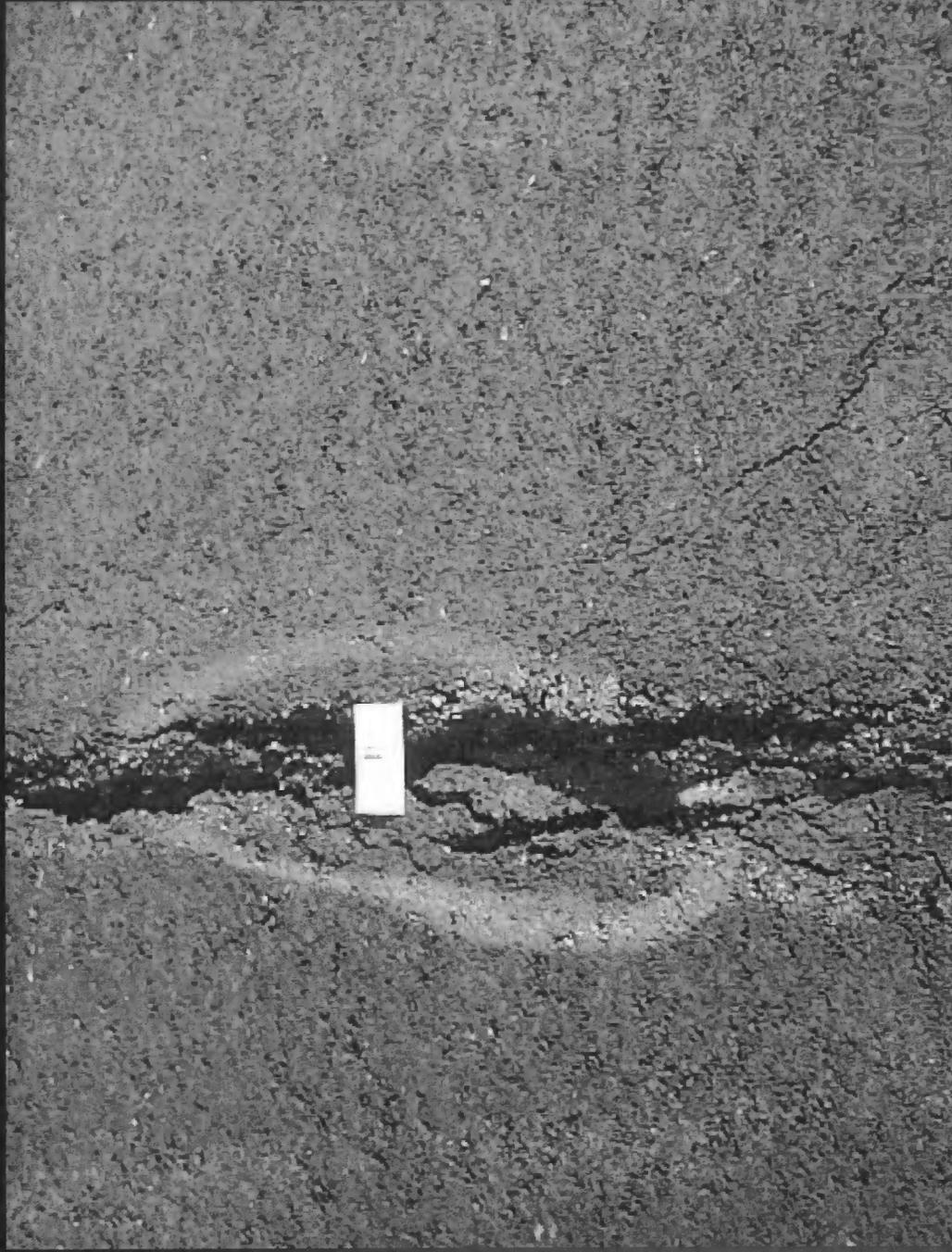
Parking Lot Damage



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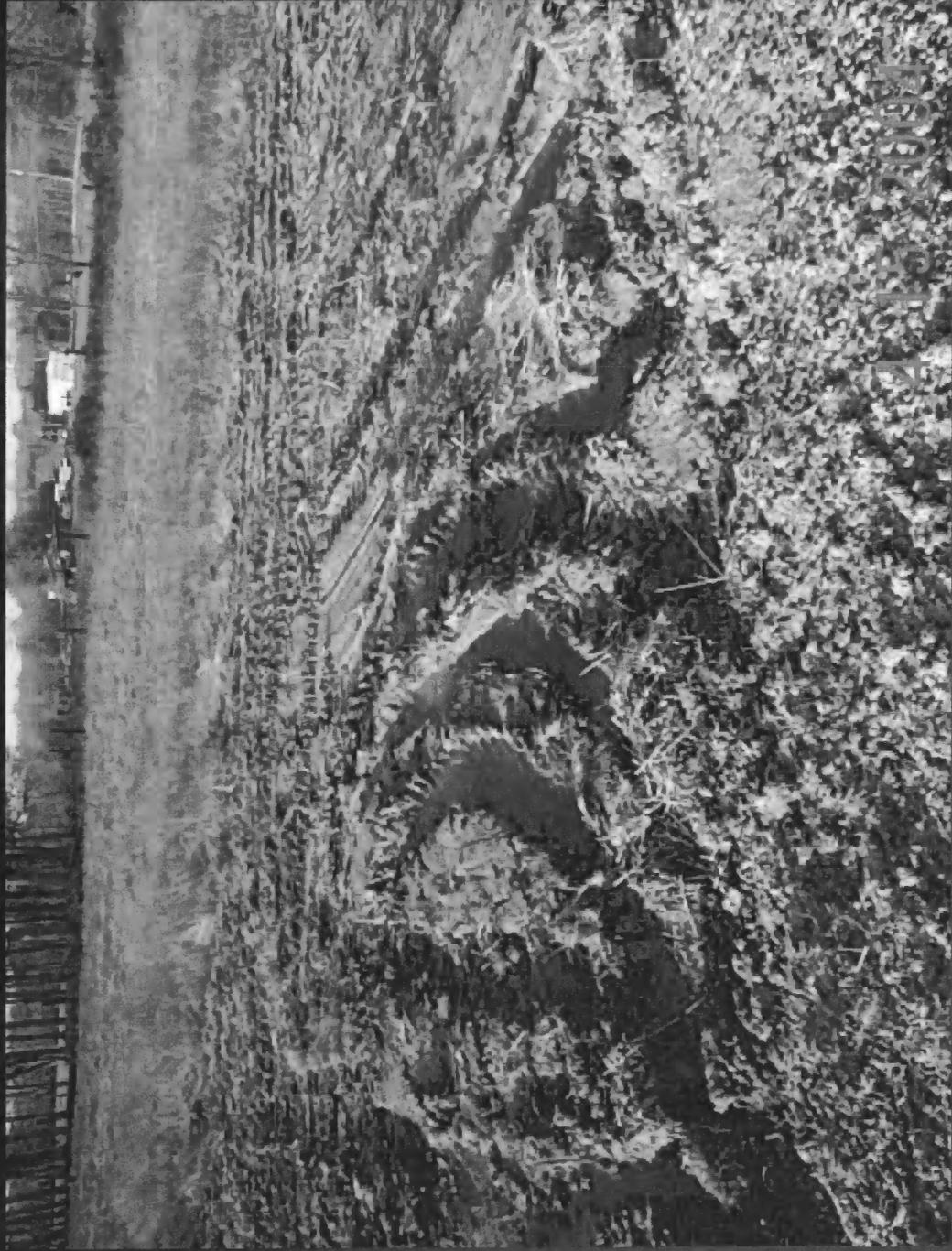
Parking Lot Damage Close-up



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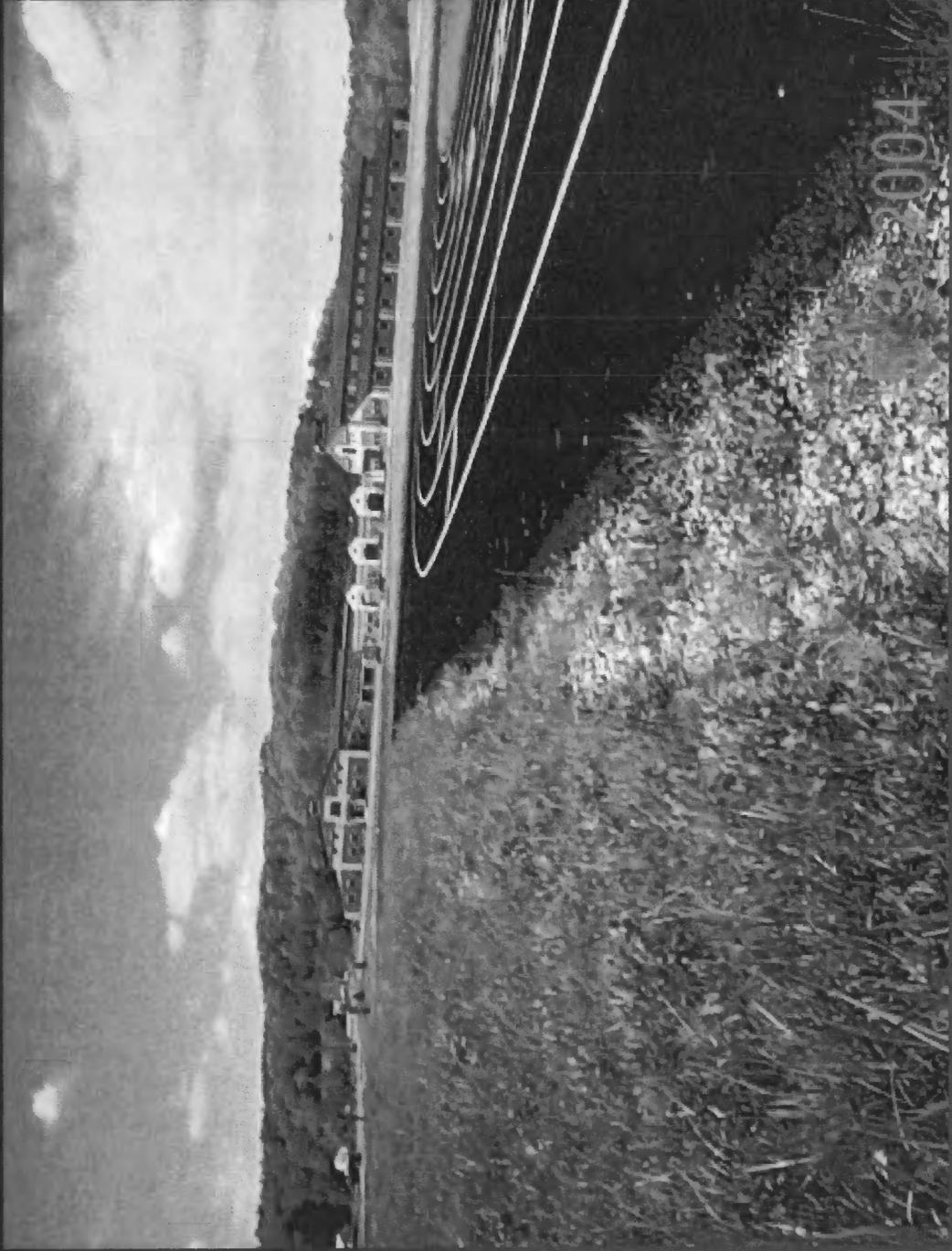
Sloppy Work



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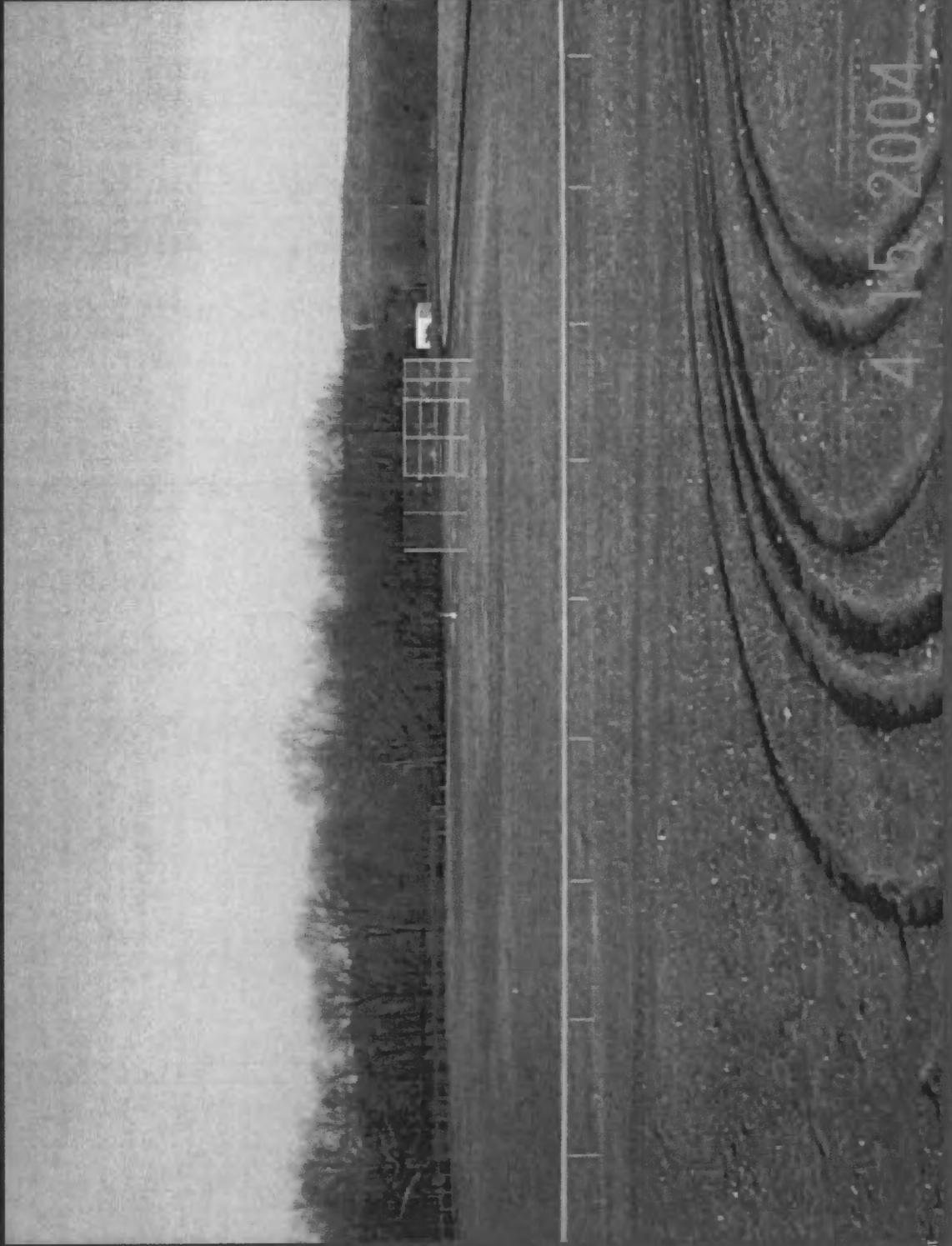
05-03-04 -- 4 - 6 inch Drop from Track Surface



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Baseball Field: Uneven even from Afar



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4.15.2004

YOUR

Poor Grading, Poor Seeding, Poor Work 05-03-04 Cattails in Baseball Field



5.3.2004

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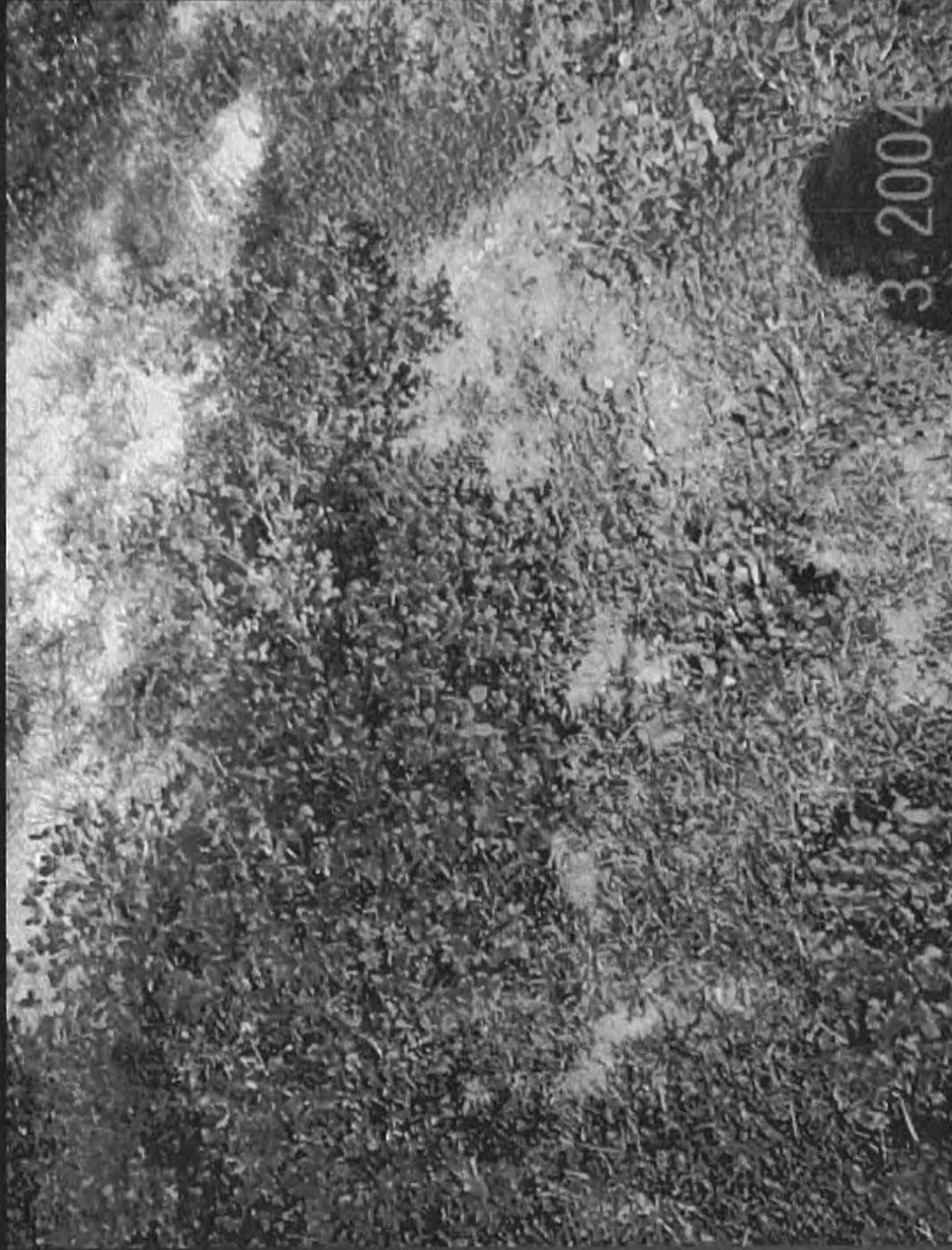
05-03-04 Baseball Infield From Home Plate



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05-03-04 Baseball Outfield



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05-03-04 Baseball Infield West



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Substandard Work
05-03-04 Pitcher's Mound



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05-03-04 Front Detention Pond



5. 3. 2004

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Horrible Grading

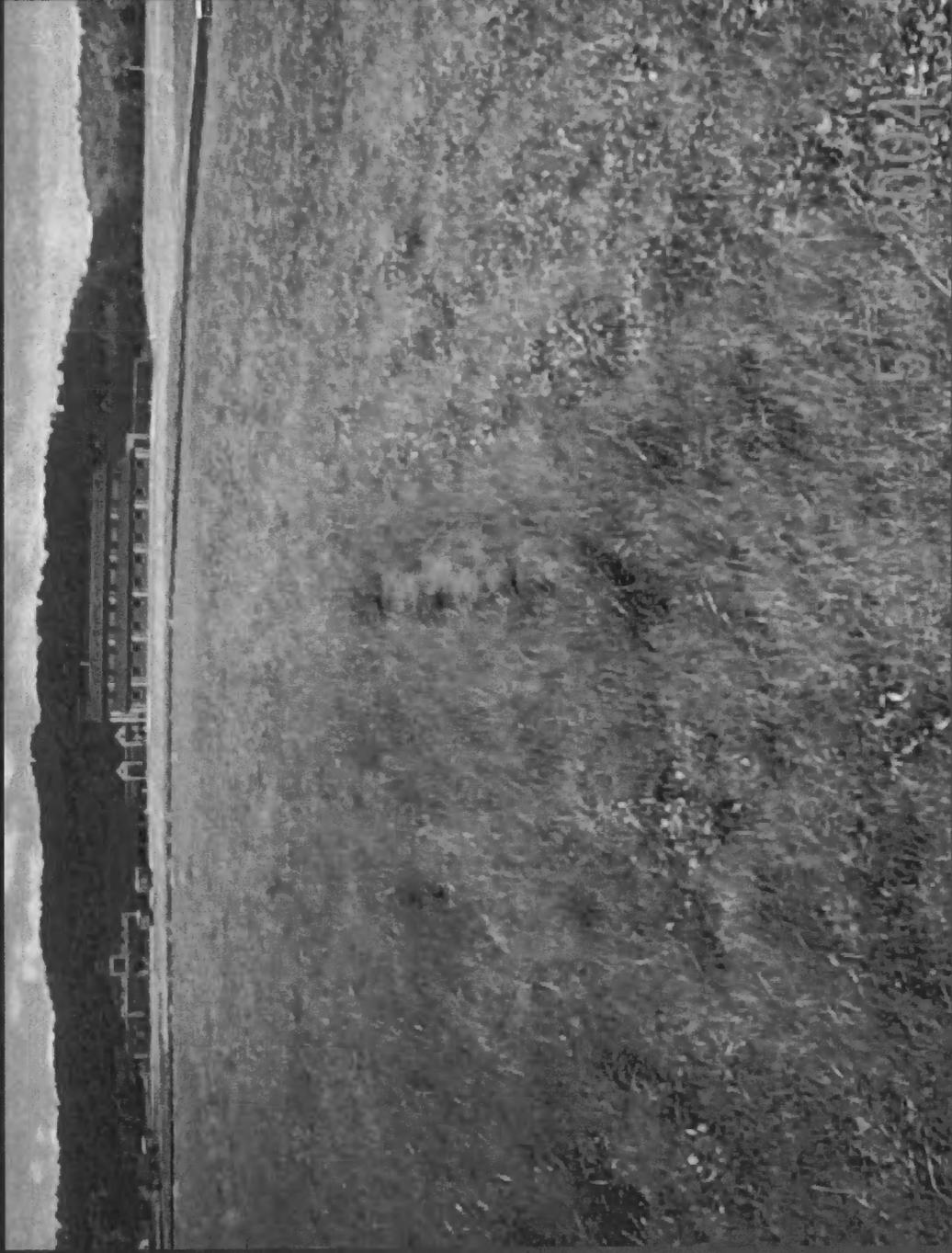
05-03-04 Ponding Water Inside Track E Side



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05-03-04 Ponding Water Inside Track (East Side)



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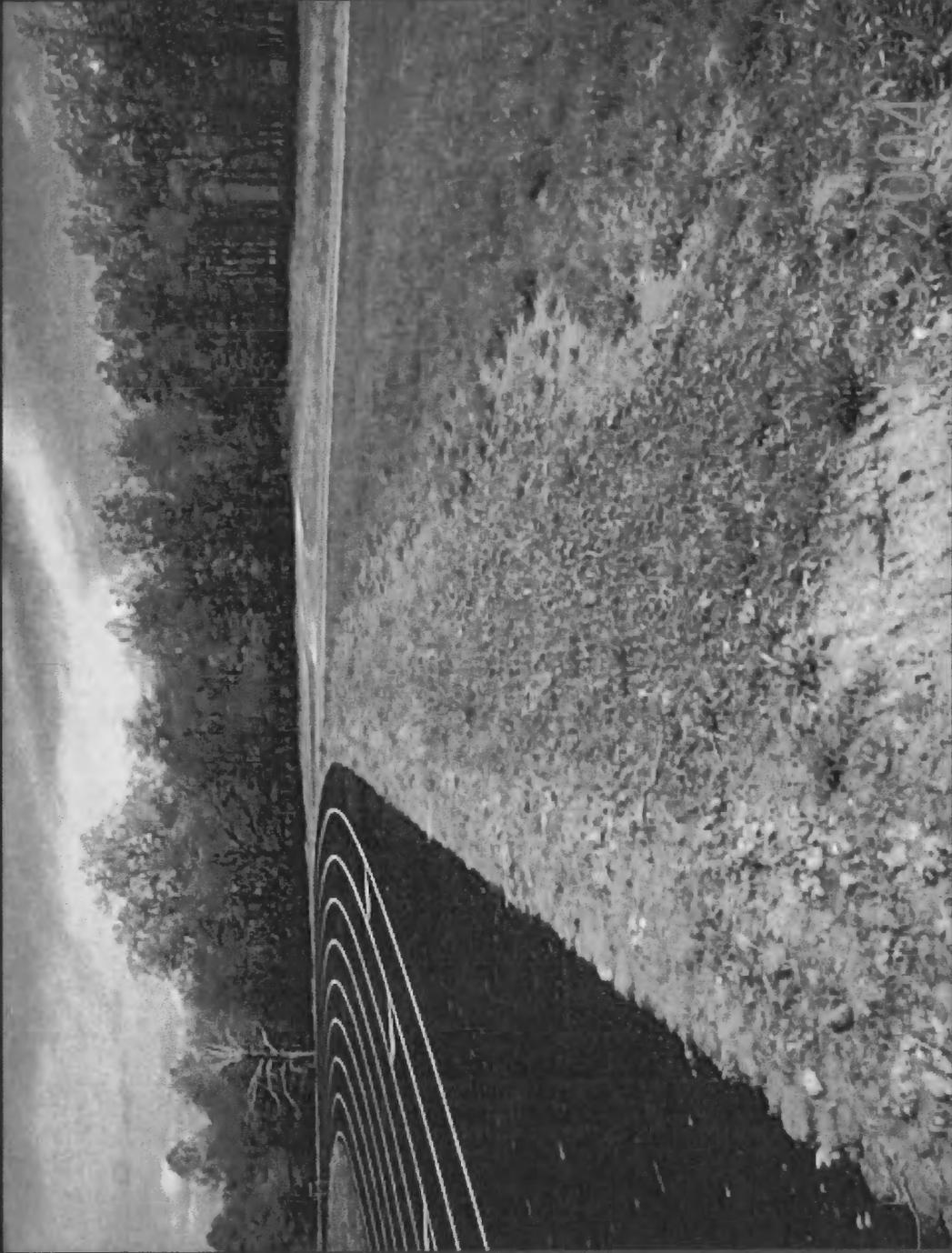
05-03-04 SE Catch Basin at Track



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05-03-04 Soil Back Up to Track Surface



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Eastern Local: Costs to Repair and Complete Ingle-Barr's Work

Date	Vendor	Description	Amount
Oct. 20, 2004	Lowell Howard	Supervision	\$ 7,350.00
Nov. 16, 2004	Allard Excavating	Parking Lot	\$136,144.63
Nov. 16, 2004	J&G Paving	Asphalt Replacement	\$160,216.42
Nov. 16, 2004	JAG Milling	Milling Back Parking Lot	\$ 11,469.46
Nov. 20, 2004	Lowell Howard	Supervision	\$ 350.00
Dec. 20, 2004	Lowell Howard	Supervision	\$ 525.00
Jan. 20, 2005	Allard Excavating	Parking Lot	\$ 50,062.51
Feb. 4, 2005	Lowell Howard	Supervision	\$ 1,050.00
Oct. 30, 2005	Wal•Mart	Grass Seed/Turf	\$ 51.76
Nov. 17, 2005	John Fuller	Landscape Direct	\$ 2,000.00
May 31, 2006	John Moore	Landscaping Work	\$ 10,000.00
Jun. 30, 2006	Darren King	Seeding/Fertilizing	\$ 1,075.00
Sept. 28, 2006	KC Landscaping	Landscaping/Fertilizing	\$ 6,061.50

TOTAL REPAIR & COMPLETION

\$388,765.25

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Eastern Local Athletic Fields Liquidated Damages

\$831,000.00

Athletic Fields Contract Completion

Date:

May 10, 2002

Athletic Fields Liquidated Damages:

\$1,000.00 per day

Date of Termination:

August 18, 2004

Unexcused Days Late:

831 days

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Eastern Local Site Improv. Liquidated Damages
\$286,000

- **Site Improvements**
- **Contract Completion Date – Dec. 12, 2002**
- **Date of Termination – August 18, 2004**
- **Unexcused days late: 286 days**

Liquidated Damages = \$286,000

Eastern Local: Total Backcharges

\$1,505,765.25

\$286,000.00 12D Site Improvements LDs

+

\$831,000.00 Athletic Fields LDs

+

\$388,765.25 Completion and Correction Costs

=

**\$1,505,765.25 Total Eastern Local
Project Backcharges**

Liquidated Damages Alone

- **Scioto Valley Projects:**

(\$572,000 + \$112,500) (*conservative est. of lds)

\$ 684,500*

- **Eastern Local Projects:**

(\$286,000 + \$415,500)

\$ 1,117,000

Combined Liquidated Damages: \$1,801,500

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Conclusion: Completion and Correction Backcharges alone exceed combined Ingle-Barr Claims

Ingle-Barr Claims (excl. interest): \$414,020.42

*(\$267,134.43 for Scioto Valley Projects +
\$146,885.99 for Eastern Local Projects)*

**OSFC & School District Backcharges for only
Completion/Correction/Delay Claims by Others
(excl. interest): \$429,794.25***

(Scioto Valley \$41,029.00 + Eastern Local \$388,765.25)

**Not Including Contractually Specified Liquidated Damages for Delay*

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A Reasonable Settlement

OSFC and the School Districts are committed to resolving the outstanding issues related to Ingle-Barr's contracts at Eastern and Scioto Valley.

For purposes of the mediation, the OSFC and both School Districts are willing to recognize and discuss some of the "Change Orders" that Ingle-Barr is asserting.

Any settlement, though, must take into consideration and resolve the backcharges for delay, repair, and completion on each respective Project.

Ingle-Barr, Inc. v. Scioto Valley Local Sch. Dist. Bd.

Supreme Court of Ohio
October 5, 2011, Decided
2011-0928.

Reporter: 2011 Ohio LEXIS 2433; 129 Ohio St. 3d 1489; 2011 Ohio 5129; 954 N.E.2d 662

County, 2011)

Ingle-Barr, Inc. v. Scioto Valley Local School Dist. Bd.

Judges: Pfeifer, J., dissents.

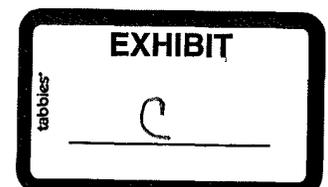
Notice: DECISION WITHOUT PUBLISHED OPINION

Opinion

Prior History: [*1] *Pike App. No. 10CA811, 193 Ohio App. 3d 628, 2011 Ohio 2353, 953 N.E.2d 363. Ingle-Barr, Inc. v. Scioto Valley Local Sch. Dist. Bd., 193 Ohio App. 3d 628, 2011 Ohio 2353, 953 N.E.2d 363, 2011 Ohio App. LEXIS 1998 (Ohio Ct. App., Pike*

APPEAL NOT ACCEPTED FOR REVIEW

Pfeifer, J., dissents.



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MARY F. BRENNING
KRISTY N. BRITTSCH
JOHN P. BRODY
ERIN C. CLEARY
ROBERT G. COHEN
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ANDREW J. SONDERMAN
*Resident in Marion Office
**Resident in Cleveland Office
***Admitted in Michigan, but not Ohio

August 10, 2011

Via Hand Delivery

Richard Hickman, Executive Director
Ohio School Facilities Commission (OSFC)
10 West Broad Street, Suite 1400
Columbus, Ohio 43215

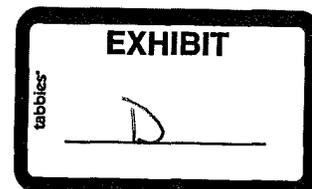
RE: Request for assistance: *Ingle-Barr, Inc. v. Eastern Local School District Board*
The Supreme Court of Ohio, Case No. 2011-0732; and
Ingle-Barr, Inc. v. Scioto Valley Local School District Board, The Supreme Court
of Ohio, Case No. 2011-0928

Mr. Hickman:

This firm represents the Eastern Local School District Board ("Eastern Local") and the Scioto Valley Local School District Board ("Scioto Valley") (collectively the "School Boards"). I am writing with regard to the above referenced cases and the adverse financial impact they have had on the School Boards.

For your convenience, I am attaching copies of the relevant Fourth District Court of Appeals decisions in both cases and the Supreme Court's denial of Ingle-Barr, Inc.'s petition for jurisdiction in Case No. 2011-0732 (the *Eastern Local* litigation). The attached Supreme Court entry reflects the culmination of almost six years of litigation that Eastern Local has spent to defend itself against lawsuits the contractor (Ingle-Barr) filed against it in August 2005, all of which arose from the OSFC building program. Similarly, Scioto Valley has also spent the last six years litigating to resolve Ingle-Barr claims arising out of the OSFC building program. The last of this litigation is currently pending before the Ohio Supreme Court.

What makes the litigation of concern to the OSFC (and the School Boards), is that in all cases the contractor Ingle-Barr was seeking money damages directly from the individual school districts to pay *contract claims* arising out of Standard Form OSFC Contractor Contracts prepared and used by the OSFC for school construction projects. In the litigation at issue, Ingle-Barr sought to impose liability on the School Boards for 100% of its claims under the OSFC Contracts. In its motion for Supreme Court review, the contractor asserted the following as its proposition of law:



A school district which has entered into a Project Agreement with the Ohio School Facilities Commission ("OSFC") ... is **jointly liable** ... to a construction contractor under a standard form OSFC "Contractor Contract" for money damages arising from the construction and improvement of public school buildings and facilities and such a contractor **can recover from the school district** in a county court of common pleas.

Ingle-Barr Proposition of Law (emphasis added).

As you know, the OSFC was established, and the OSFC Contractor Contracts drafted, to prevent exactly what the contractor was claiming as its proposition of law. The OSFC's existence in this regard was a direct result of the Ohio's Supreme Court's holding that Ohio's previous method of school construction funding was unconstitutional. The 'old system' largely left it to the individual school districts to fund projects and litigate claims arising out of those school construction projects on their own, using whatever monies they could collect based on the property tax and other revenue streams available to them. In *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 ("DeRolph I") the Ohio Supreme Court held that such a system violated Section 2, Article VI of the Ohio Constitution, as it was unfair to poorer school districts (like the Scioto Valley and Eastern Local school districts).

The Ohio Supreme Court thus ordered the General Assembly to create a new school financing system. Because of DeRolph I and its progeny, the detailed statutory framework set forth in R.C. 3318.01 to 3318.33 now governs public school construction project in Ohio.

The OSFC was created as part of this new framework and developed the contract documents used here: contracts that on their face are between the State and the contractor, but that Ingle-Barr asserted imposed joint and several (100%) liability for breaches on the individual local school districts. Luckily, Ingle-Barr was rebuffed in its efforts to turn the clock. Its efforts were rejected by the trial court. They were rejected by the Fourth Appellate District Court. And they now have been rejected by the Ohio Supreme Court.

The success of the Scioto Valley and Eastern Local school boards at every level of trial and appellate jurisdiction in Ohio has created excellent precedent that confirms and preserves the core function of the OSFC—to provide the equitable funding necessary to build and maintain quality-learning environments across the state. As such, the scarce funds of individual school districts—particularly poorer school districts like Scioto Valley and Eastern Local—can be devoted not to funding basic school construction (including the litigation of claims arising from such projects) but to educate their students. The line of cases resulting from the above-referenced litigation also helps inoculate *all* Ohio local school district boards from being

Richard Hickman, Executive Director
Ohio School Facilities Commission (OSFC)
August 10, 2011
Page 3

leveraged by the threat of costly litigation into spending their own money to settle dubious claims.

Unfortunately, to secure such good precedent for the OSFC and all Ohio school districts, Eastern Local and Scioto Valley were both forced to expend their own limited funds. As you can expect, given the multiple suits (four lawsuits total) and levels of appeal (three appeals decided by the 4th Appellate District and two trips to the Ohio Supreme Court for review), the costs to both School Boards have been significant. These litigation expenses are particularly onerous here, as they have had to be borne by two school districts that are among the poorest in the entire state. It seems an unexpected drawback of being a poorer school district—and thus among the first in line for OSFC funding—was that the School Boards' were guinea pigs forced to litigate to establish the extent and parameters of individual school district liability under the Standard Form OSFC Contractor Contracts (and whether those contracts carry forward the intent of the legislature in creating the OSFC). The litigation expenses have become part of the Project cost to both School Boards, and in each case have increased the School Boards' respective funding percentage well beyond what their taxpayers were to contribute to the Projects pursuant to the applicable OSFC Project Funding Agreements.

Thus far, the State has not contributed one dime to offset these costs, though it has always been our understanding that there would be an equitable adjustment of these expenses at the end of the day. We are thus writing to request a meeting with you to discuss the situation and a possible resolution that will fairly and reasonably acknowledge and accommodate the disparate and inequitable effect of the above referenced litigation on the Eastern Local School District Board and the Scioto Valley Local School District Board.

Please contact me at your earliest convenience to discuss the above.

I look forward to hearing from and meeting with you.

Sincerely,



Eric B. Travers

EBT/dh
Encl.

cc: Superintendent Charles Shreve
Superintendent Todd Burkitt
Donald W. Gregory, Esq.
Jerry Kasai, Esq.

What the Courts Are Saying

Who is the "Owner" for Purposes of Pursuing Damages by a Contractor on an OSFC Co-funded Construction Project?

The Contractor Contract form for co-funded Ohio School Facilities Commission ("OSFC") projects states that the contract is between the contractor and "the State of Ohio (the "State"), through the President and Treasurer of the . . . School District Board"; the contract form is signed by the School District Board President and Treasurer under the heading "STATE OF OHIO, BY AND THROUGH THE SCHOOL DISTRICT BOARD." Ingle-Barr, Inc. entered into two separate contracts using the "Contractor Contract" form for co-funded OSFC projects. In January 2006, Ingle-Barr filed two lawsuits against the Eastern Local School District Board in the Pike County Court of Common Pleas alleging breach of contract and unjust enrichment based upon two separate contracts with the State of Ohio for improvements to the Eastern Local School District facilities.

The trial court found that the contracts were between Ingle-Barr and the State of Ohio and dismissed both complaints on a motion for summary judgment. Eastern Local School District was not a party to either contract, so it could not be found liable for breach of contract. The appropriate party from which to seek damages was the State of Ohio through the Ohio Court of Claims. On appeal, the Fourth Appellate District Court of Appeals agreed with the trial court and affirmed its decision.

In reviewing the trial court's decisions and considering the arguments raised by Ingle-Barr on appeal, the appellate court determined that summary judgment had been appropriate. The court found that the "clear language of those paragraphs [of the contracts] limit Eastern's role to simply binding the State to those contracts with Ingle-Barr" (*Ingle-Barr, Inc. v. E. Local School Dist. Bd.*, 2011-Ohio-584, Paragraph 8).

Ingle-Barr appealed to the Ohio Supreme Court, which declined jurisdiction in the case (*Ingle-Barr, Inc. v. Eastern Local School District Board*, Ohio Supreme Court, Case No. 2011-0732).

What does this mean for school construction projects in Ohio that are part of an OSFC co-funded building program? Any claim for contractual damages against

the Owner on a co-funded OSFC project must be brought against the State of Ohio in the Court of Claims and not against a school district board of education in the local common pleas court.

Interestingly, a few months later Ingle-Barr sued the Scioto Valley Local School District Board, again in the Pike County Court of Common Pleas, with the same result from both the trial court and the Fourth Appellate District Court of Appeals. The second lawsuit included an assignment of error based upon the argument that Ingle-Barr should be able to recover from the Board of Education based on a quasi contract theory. The trial court's decision that the quasi contract theory could not be used to recover against the Board of Education was affirmed by the appellate court. The appellate court found that "Ohio law does not recognize an equitable claim for unjust enrichment when an express contract covers the exact same subject matter" (*Ingle-Barr, Inc. v. Scioto Valley Local School District Board*, 2011-Ohio-2353, Paragraph 13). The Ohio Supreme Court has yet to consider the appeal on this lawsuit.

What is a "public improvement" for purposes of the application of the prevailing wage law?

When a construction project is undertaken by a private entity without the use of public funds, the question is often asked whether the prevailing wage law applies. Based upon a recent decision by the Tenth Appellate District Court of Appeals, the answer is that the use of the project can trigger the application of the prevailing wage law.

The Franklin County Court of Common Pleas ruled in favor of a private developer on this question in *Kimberly Zurz, Director Ohio Department of Commerce, et al., v. 770 West Broad AGA, LLC.*, 192 Ohio App. 3d 521 (2011), finding that the prevailing wage law did not apply because no public funds had been spent in the construction of the improvements. The appellate court reversed that decision and remanded the case to the lower court for further proceedings. The appellate court