No. _____

In The
Supreme Court of the United States

THE WEITZ COMPANY, LLC,

Petitioner,

v.

MACKENZIE HOUSE, LLC, *et alia*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal court sitting in diversity refuse to follow a state high court's decision on an issue of state law when no subsequent state judicial or legislative authority has overruled, superseded, criticized, or questioned that decision, and the decision has been followed by the state's intermediate appellate court?

LIST OF PARTIES

The Weitz Company, LLC, the petitioner identified in the caption, was the plaintiff and counterclaim defendant in the district court and was the appellant in the Eighth Circuit.

MacKenzie House, LLC, the respondent identified in the caption, was a defendant and counterclaim plaintiff in the district court and was an appellee in the Eighth Circuit.

Three other respondents in this Court are not identified in the caption. MH Metropolitan, LLC, was a defendant and counterclaim plaintiff in the district court and was an appellee in the Eighth Circuit. Arrowhead Contracting, Inc., was a third-party defendant and counterclaim plaintiff in the district court and was an appellee in the Eighth Circuit. Concorde Construction Co., Inc., was a third-party defendant in the district court and was an appellee in the Eighth Circuit.

RULE 29.6 STATEMENT

The Weitz Company, LLC, is wholly-owned by The Weitz Group, LLC, which in turn is owned by The Weitz Company I, Inc., The Weitz Company II, Inc., and The Weitz Company III, Inc., all of which are private companies. No publicly held company owns 10% or more of the stock of The Weitz Company, LLC, or any of its parent entities.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF *CERTIORARI*

Petitioner The Weitz Company, LLC, respectfully prays the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit (Appendix 1-15) is reported at 665 F.3d 970. The opinion of the district court concerning the issue in this petition (App. 20-38) is unreported. The district court's final judgment incorporating that prior opinion (App. 16-19) is unreported.

JURISDICTION

The Eighth Circuit first entered a judgment on December 8, 2011 (App. 41). On January 5, 2012, it granted a timely petition for rehearing, vacated the December 8 judgment, and issued a new judgment (App. 1-15, 41). Thereafter, a new timely petition for rehearing was denied on February 10, 2012 (App. 43). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit has stayed its mandate pending the Court's disposition of this petition (App. 39-40).

STATUTORY PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, provides, in relevant part, "The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

This case raises important questions of how federal courts sitting in diversity must treat state high courts' decisions on issues of state law under this Court's landmark decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, otherwise known as the *Erie* doctrine.

Specifically, this case concerns whether, under *Erie*, federal courts are bound to apply state high court decisions on issues of state law that are old and rarely cited but nonetheless have never been overruled, superseded, criticized, or even questioned by any intervening judicial or legislative authority in that state. Does *Erie* require the federal court to follow the state decision, as every previous reported federal appellate and trial court faced with this situation faithfully has? Or, may the federal court instead criticize the state decision's logic and refuse to follow it, as the Eighth Circuit did in this case? Nationally important principles of federalism at the heart of these questions merit this Court's intervention.

A. Procedural history

This case stems from a construction contract dispute under Missouri state law. The basic facts and procedural history are stated in the Eighth Circuit's opinion (App. 2-3).

MacKenzie House, LLC, and MH Metropolitan, LLC (collectively "MH"), Colorado limited liability companies, were the respective developer and owner of the Metropolitan Apartments ("the Project"), a multi-building apartment project in Kansas City, Missouri (App. 2). MH hired The Weitz Company, LLC, an Iowa limited liability company, to be the Project's general construction contractor (App. 2). Weitz subcontracted with Arrowhead Contracting, Inc., a Kansas corporation, and Concorde Construction Co., a Missouri corporation (App. 2).

The parties agreed Weitz would complete the project in 507 days with a maximum price of $14,401,609 (App. 2). MH's contract with Weitz contained a liquidated damages provision for delays: "[Weitz] agrees that [it] shall pay to the Owner liquidated damages in accordance with the following schedule for each calendar day that Completion of a Building is delayed beyond the Scheduled Completion Date for such Building. . . . " (App. 22-23).

Weitz began work in the spring of 2005 (App. 2). Thereafter, the project was delayed (App. 2). Weitz blamed Arrowhead and Concorde for the delays, but MH blamed Weitz, asserting several breaches of their contract (App. 2-3). As a result, MH withheld

payment on two of Weitz's applications (App. 3). In response, on December 26, 2006, Weitz stopped work on the Project (App. 3). At that point, the Project's first building was four months late and the entire Project was two months late (App. 3). On January 18, 2007, MH terminated its contract with Weitz (App. 3). Ultimately, MH finished the Project without Weitz between June and November 2007 (App. 3).

In February 2007, Weitz sued MH in the United States District Court for the Western District of Missouri for the unpaid balance of its contract (App. 3). The district court had diversity jurisdiction substantively applying Missouri state law (App. 9-11). MH counterclaimed for breach of contract, in part seeking liquidated delay damages for the entire period from the August 2006 initial delay on the first building until the Project's eventual completion without Weitz in November 2007 (App. 3). Weitz made third-party claims against Arrowhead and Concorde (App. 3). Arrowhead counterclaimed for breach of its subcontract (App. 3).

A jury awarded MH $4,991,970.87 against Weitz, of which $3,022,520 were liquidated delay damages (App. 3, 16-19). The majority of those liquidated delay damages – more than $2 million – were for the eleven-month period *after* MH had terminated its contract with Weitz in January 2007. Weitz timely appealed to the U.S. Court of Appeals for the Eighth Circuit (App. 1).

B. The existing law of Missouri precludes liquidated delay damages in construction contracts from accruing during the period after the contract has terminated.

State courts throughout the United States long have been split on whether liquidated delay damages in a construction contract can accrue during the period after the contract is terminated. *See, generally*, 15 A.L.R.5th 376 (discussing the split back to the 19th century). On one hand, some hold they cannot accrue after the contractor has lost his ability to control the date of completion. *See, e.g.*, *City of Elmira v. Larry Walter, Inc.*, 546 N.Y.S.2d 183, 184-85 (App. Div. 1989), *aff'd,* 564 N.E.2d 655 (N.Y. 1989). On the other, some hold they can accrue for a "reasonable" time after the contract is terminated. *See, e.g., Constr. Contracting & Mgmt., Inc. v. McConnell*, 815 P.2d 1161, 1167-69 (N.M. 1991).

Both before the district court (App. 32-37) and again before the Eighth Circuit (App. 9-11), Weitz explained that the law of Missouri, as first announced in *Moore v. Bd. of Regents for Normal Sch. in Dist. No. 2*, 115 S.W. 6 (Mo. 1908), and later reapplied in *Twin River Constr. Co. v. Pub. Water Dist. No. 6*, 653 S.W.2d 682 (Mo. App. 1983), long had followed the first approach. Under these Missouri state authorities, the law of Missouri was that Weitz could not be held liable for liquidated delay damages for the period after January 2007.

1. *Moore v. Bd. of Regents*, 115 S.W. 6 (Mo. 1908)

In *Moore*, a contractor agreed to construct a gymnasium building for a school. 115 S.W. at 6-7. The contract provided that, "upon [the contractor's] failure to so complete [the building] at the above mentioned time they shall pay [the school] the sum of [$20.00] per day for each week day intervening after said date until the completion of the work." *Id.* at 7 and 12.

When the contractor delayed construction,[1] the school terminated the contract and proceeded to complete the building itself. *Id.* The contractor sued, claiming the school had prevented it from completing the building and demanding a balance due. *Id.* at 6. In response, the school sought to set off from any liability $20 per day for 313 days under the liquidated delay damages clause – that is, all the time from the date it terminated the contract until it completed the building. *Id.* at 7. The trial court instructed the jury it could not award the school any liquidated delay damages for the time after the scheduled contract completion date. *Id.*

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[1] The Eighth Circuit suggests "the facts in *Moore* were different from those here" because, in *Moore*, "the project was not yet late when the owner terminated the contract" (App. 9). This is incorrect: the *Moore* contractor admitted it did not "proceed with the construction of the building until the spring of 1904, thereby causing much delay," blaming this, like Weitz, on outside conditions. 115 S.W. at 7.

The Supreme Court of Missouri approved. *Id.* at 12-13. It held the liquidated delay damages provision was to compensate the school "only on condition that [the contractor] completed the contract but failed to finish it in the time specified." *Id.* at 13. While the parties could have contracted specifically otherwise, absent such a provision it was "obvious" that the liquidated delay damages provision "was not the measure of damages" of the cost to complete the project. *Id.* Thus, the trial "court was unquestionably right in refusing the" school liquidated delay damages for the period after the contract terminated. *Id.*

2. *Twin River Constr. Co. v. Pub. Water Dist.*, 653 S.W.2d 682 (Mo. App. 1983)

In the 104 years since *Moore*, the question whether a general liquidated delay damages clause in a construction contract allows for such damages to accrue after the contract has terminated has arisen in a reported Missouri appellate decision only one other time, in *Twin River*, 653 S.W.2d at 682. There, the Missouri Court of Appeals, Eastern District, expressly followed *Moore* to reverse exactly the same post-termination liquidated delay damages at issue in this case, holding it was "not disposed to depart from [*Moore*] until a contrary rule is declared by our Supreme Court." *Id.* at 694.

In *Twin River*, a contractor agreed to construct a water main extension for a water district; the contract contained a nearly identical liquidated delay

damages clause to *Moore* and this case. *Id.* at 687. Construction was delayed. *Id.* at 688. Then, when the contractor informed the water district it had completed the project, the district disagreed and demanded the contractor perform 26 items it asserted were incomplete. *Id.* at 688. When the contractor refused, the water district terminated the contract. *Id.* By then, the project was past its agreed completion date. *Id.* The water district completed the project itself. *Id.*

The contractor sued, demanding a balance due. *Id.* at 684. The water district countered it was entitled to a set-off of liquidated delay damages for the 369-day period from the date the project should have been completed to the date it ultimately completed the work itself. *Id.* at 689. The trial court agreed. *Id.*

Following *Moore*, the Missouri Court of Appeals reversed the portion of these damages attributable to the period after the date the water district terminated the contract. *Id.* at 693-94. It held *Moore* "appears to be the sole Missouri case addressing this question. That case refused to allow liquidated damages after the date on which the owner took charge of the work." *Id.* at 693. While the court observed the nationwide split over this question, it held that, for the time being, *Moore* had answered it for Missouri. *Id.* at 694.

3. The district court's treatment of *Moore* and *Twin River*

The district court immediately saw the facts of this case were "eerily similar" to those in *Moore* (App.

33). The liquidated delay damages provision is nearly identical. *Cf.* App. 22 *with* 115 S.W. at 6-7. The timeline and procedure, too, mirror *Moore*. Both cases involve a contractor who stopped work on a project followed by the owner terminating the contract for cause. In both, the owner ultimately completed the project on its own. Also in both, the contractor sued the owner for a balance due, and the owner countered the contractor was responsible for the delay including liquidated delay damages all the way through the date it ultimately completed the project.

Nonetheless, the district court held "the issue" the Supreme Court of Missouri decided in *Moore* "was the meaning of [the] particular contract [in that case] and not a broad principle of law" (App. 34). As a result, it believed "the Missouri Supreme Court has not ever (much less recently) addressed the issue" of whether liquidated delay damages can accrue during the period after the contract terminates (App. 34). It therefore concluded it was "obligated to divine how [the Supreme Court of Missouri] would resolve the issue if presented with the issue today" (App. 34). It disregarded *Twin River*, opining that decision "rests upon an interpretation of *Moore* that the undersigned finds wanting" (App. 34-35).

Instead, after reviewing the history of liquidated delay damages clauses, the district court held "there is no principled reason for terminating . . . recovery" under one (App. 36). It believed a "contrary holding" would present the owner of a construction project "a Hobson's choice" (App. 36-37). As a result, it divined,

"if the Missouri Supreme Court were to address the issue today, it would opt in favor of" allowing liquidated damages after the date of contract termination (App. 37).

C. The Eighth Circuit's decision

Unlike the district court, the Eighth Circuit did not believe the Supreme Court of Missouri's decision in *Moore* was limited to the facts of that case and not a broad principle of law.[2] It recognized that, in *Moore*, the "Missouri Supreme Court limit[ed] . . . liquidated damages for construction delay to the time *before* the owner removes the contractor from the project" (App. 9) (emphasis in the original).

The court believed, though, that, today, "if faced with this case, the Missouri Supreme Court would not follow *Moore*" (App. 9). It stated, "[I]f we find clear evidence that the [state] Supreme Court would not uphold [the prior decision], we shall not apply it to this case" (App. 9) (quoting *Gilstrap v. Amtrak*, 998 F.2d 559, 561 (8th Cir. 1993)). It then proceeded to criticize the logic of *Moore*, questioning *Moore*'s reliance on an earlier New York case, *Gallagher v.*

[2] The Eighth Circuit issued its first opinion on December 8, 2011 (App. 2 n.2, 41). That opinion can be found online at http://www.ca8.uscourts.gov/opndir/11/12/103713P.pdf. The court later vacated that decision, issuing a new opinion adding more content to the section addressing the issue this petition concerns (App. 2 n.2, 9-11, 41). *Cf.* App. 9-11 *with* http://www.ca8.uscourts.gov/opndir/11/12/103713P.pdf at pp. 7-8.

Baird, 66 N.Y.S. 759 (App. Div. 1900), which it believed was misplaced (App. 9-10).

The Eighth Circuit noted that, in *Twin River*, "a Missouri intermediate appellate" court "acknowledge[d] the divided authorities [on the issue in this case] but follow[ed] *Moore*" (App. 10). Holding that "Intermediate court decisions, however, are not dispositive as to how a state's highest court would resolve a matter," it declined to address *Twin River* (App. 10). Then, without citing any Missouri state authorities at all, the court held:

> In the absence of guidance from the highest state court (or a statute on point), the federal court's task is to predict how the Missouri Supreme Court would rule if confronted with the issue today. . . . If the Missouri Supreme Court were to address the issue today, it would allow liquidated damages for a reasonable time after abandonment by the contractor or termination by the owner.

(App. 10-11). The Eighth Circuit affirmed the district court (App. 2).

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision below refuses to follow an on-point state high court decision on an issue of state law that no intervening state judicial or legislative authority ever has overruled, superseded, criticized, or even questioned. If its decision is

allowed to stand, the Eighth Circuit will become the first federal court successfully to have done this in living memory. For, in a string of seminal *Erie* doctrine decisions between 1940 and 1972,[3] this Court made plain that basic principles of federalism preclude a federal court sitting in diversity from acting as a state's highest court when unquestioned, applicable state law already exists.

Except for the decision below, every post-*Erie* federal court faced with an on-point and unquestioned state high court decision on an issue of state law that is old or rarely cited has followed it, even if reluctantly so. It thus has become well-accepted that, "Even if, in the considered judgment of the federal court or that of the courts of other states, the rule of law that was announced by the forum state's highest court is anomalous, antiquated, or simply unwise, it must be followed by the federal court nonetheless. . . ." 19 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FED. PRACTICE AND PROCEDURE § 4507 (2d ed. 2001).

Indeed, the only "exceptional circumstances" in which federal courts ever justifiably have disregarded an on-point state high court decision without a later decision expressly overruling it are: (1) "when the

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[3] *Gooding v. Wilson*, 405 U.S. 518, 525-26 (1972); *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Bernhardt v. Polygraphic Co. of Am., Inc.,* 350 U.S. 198, 205 (1956); *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940); *Six Cos. of Cal. v. Jt. Highway Dist. No. 13*, 311 U.S. 180, 187-88 (1940).

state court itself has ignored the decision in later cases but without expressly overruling it;" (2) "when a recent dictum from [the state court] discredits an outdated holding;" and (3) when the state legislature changes positive law "in an apparent effort to change the principle of law declared in that decision." *Id.* (citations omitted).

None of those exceptional circumstances are present here. Instead, citing no Missouri state judicial decisions or legislative changes in support, the opinion below overrules an on-point decision of the Supreme Court of Missouri on an issue of Missouri state law solely because it disliked the decision's logic and purely speculated Missouri's highest court today would turn 180 degrees around.

In so holding, the Eighth Circuit's decision creates a direct conflict with the First Circuit, a direct conflict with one of its own prior opinions, and numerous direct conflicts with longstanding *Erie* doctrine decisions of this Court. These conflicts impair the otherwise stable and uniform federal judicial approach to already-decided issues of state law. Indeed, if the Eighth Circuit's mechanisms in this case are correct, *Erie* must be turned on its head. So, too, must fundamental concepts of federalism and states' sovereignty over their own laws.

This case offers the Court a rare and much-needed opportunity to clarify its increasingly aging opinions confirming the binding effect on all federal courts of on-point and unquestioned state high court

decisions on issues of state law. The Court should not let it go to waste.

I. The opinion below fundamentally contradicts this Court's longstanding *Erie* jurisprudence.

A. This Court repeatedly has confirmed federal courts may not refuse to follow state high court decisions on issues of state law without any intervening, contrary state authority.

"Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

In recent years, most of this Court's *Erie* decisions have concerned whether an issue requires application of state substantive law or federal procedural law. *See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442-44 (2010). When, as here, however, all parties agree an issue requires application of state substantive law,

> the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited, or restricted.

West, 311 U.S. at 236 (citing *Erie*, 304 U.S. at 78).

This binding effect "is basic to the federalism system developed for diversity cases. . . ." Childress & Davies, FED. STANDARDS OF REVIEW § 2.15 (3d ed. 1999). Early on in its *Erie* jurisprudence, this Court explained this principle is necessary to preserve the States' natural right to determine their own laws. "[T]he obvious purpose of" holding federal courts to state high court decisions on issues of state law "is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship." *West*, 311 U.S. at 223.

Generally, the operation of this part of *Erie* is simple: "The latest and most authoritative expression of state law applicable to the facts of the case controls." *Id.* "[S]tate law as announced by the highest court of the State is to be followed" by all federal courts. *Bosch*, 387 U.S. at 465. This is because "the State's highest court is the best authority on its own law." *Id.* Conversely, *only* "[i]f there be *no decision* by that court" may "federal authorities" then "apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Id.* (emphasis added).[4]

[4] Even then, "the mortality rate may be high" on federal decisions attempting to guess what a state high court would do on an undecided issue of state law. *Ford Motor Co. v. Mathis*, 322 F.2d 267, 269 n.1 (5th Cir. 1963). "Such are the perils of diversity jurisdiction." *Id.* at 269. Conversely, in this case, these

(Continued on following page)

As the Fifth Circuit once concisely summed it up, federal courts

> are bound to follow state law, whether or not we agree with the reasoning upon which it is based or the outcome which it dictates. This is the ultimate significance of the *Erie* decision. [If there are no] subsequent [state] decisions criticizing, distinguishing, or modifying [a given state decision, it] remains the latest, most authoritative expression of [state] law . . . [and] is controlling for our purposes.

Delta Air Lines v. McDonnell Douglas Corp., 503 F.2d 239, 245 (5th Cir. 1974).

With this rubric in mind, federal courts at all levels unanimously have refused to lessen the binding effect of existing, unquestioned state high court decisions simply because they may be old or rarely cited. Instead, as long as the decision has not been overruled, superseded, criticized, or at least questioned by a state judicial or legislative authority in the interim, it always has been followed, no matter how old it may be. *See, e.g.*, *Gooding*, 405 U.S. at 525-26 (applying 60-year-old Georgia decisions to set aside criminal conviction); *Bernhardt*, 350 U.S. at 205 (following 45-year-old Vermont decision to reverse lower court); *Gilstrap v. Amtrak*, 998 F.2d 559, 560-61

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perils are entirely avoidable: no guessing is needed, as the Supreme Court of Missouri has decided the state law question at issue.

(8th Cir. 1993) (following never-cited, 80-year-old Washington decision to reverse district court); *In re Ryan*, 851 F.2d 502, 509 (1st Cir. 1988) (following never-cited, 120-year-old Vermont decision to reverse bankruptcy court); *Simmons v. Hartford Ins. Co.*, 786 F.Supp. 574, 580 (E.D.La. 1992) ("the Louisiana Supreme Court has spoken, albeit over one hundred years ago. Since the Louisiana Court has spoken, this Court need not speculate as to whether it might rule differently today").

The Supreme Court of Missouri's decision in *Moore v. Bd. of Regents*, 115 S.W. 6 (Mo. 1908), "limiting liquidated damages for construction delay to the time *before* the owner removes the contractor from the project" (App. 9), is a decision of the highest court in the State of Missouri, "the final arbiter of what is [Missouri] law." *West*, 311 U.S. at 236. As the Eighth Circuit recognized in its opinion by not citing any contrary, subsequent Missouri state authority, the Supreme Court of Missouri never has "given clear and persuasive indication that its pronouncement" in *Moore* "will be modified, limited or restricted." *West*, 311 U.S. at 236. Thus, following *Erie* and its progeny, for the time being *Moore* must be "accepted as defining state law. . . ." *Id*. As the "latest and most authoritative expression of state law applicable to the facts of th[is] case," it "controls." Childress & Davies at § 2.15.

In refusing to apply *Moore* below, the Eighth Circuit cited two of its own decisions, *Pa. Nat'l Mut. Cas. Ins. Co. v. City of Pine Bluff*, 354 F.3d 945, 952

(8th Cir. 2004), and *Maschka v. Genuine Parts Co.*, 122 F.3d 566, 573 (8th Cir. 1997), for the proposition that, "In the absence of guidance from the highest state court (or a statute on point), the federal court's task is to predict how the Missouri Supreme Court would rule if confronted with the issue today" (App. 10-11). As a general principal echoing this Court's decisions in *West* and *Bosch*, *supra*, this would be well-taken.

Here, however, *Pa. Nat'l* and *Maschka* are inapposite: in both, *no* state court decision addressed the question at issue. *Pa. Nat'l*, 354 F.3d at 952 ("no Arkansas decision covers these precise facts"); *Maschka*, 122 F.3d at 573 (the "Nebraska Supreme Court has not ruled one way or the other on the issue"). Plainly, in those situations, the federal court must "apply what [it] find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Bosch*, 387 U.S. at 46. As the Eighth Circuit paraphrased, the federal court "predict[s] what [the state's highest court] would rule if confronted with the issue today" (App. 10-11).[5]

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[5] Generally, a federal court also can certify an unclear question of state law to the state's highest court. *Lehman Bros. v. Schein*, 416 U.S. 386, 389 (1974). This is not so in Missouri: the Supreme Court of Missouri long "has held it lacks jurisdiction to render opinions on questions of law certified by federal courts." *Nanninga v. Three Rivers Elec. Coop.*, 203 F.3d 529, 531 n.2 (8th Cir. 2000) (citing *Zeman v. V.F. Factory Outlet, Inc.*, 911 F.2d 107, 108-09 (8th Cir. 1990)).

But that is not so here, because, as the Eighth Circuit noted, the Supreme Court of Missouri *has* decided the issue (App. 9), just not to the Eighth Circuit's liking (App. 10-11). As this Court long has confirmed, however, a federal court's intellectual disagreement with the logic of a state court's existing authority is insufficient cause for the federal court to act *as* the state court and overrule that existing authority. Here, the "highest court of the state" "has spoken;" "unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted" – and it has not (App. 9-11) – "its pronouncement *is to be accepted by federal courts as defining state law*. . . ." *West*, 311 U.S. at 236 (emphasis added).

The opinion below directly contravenes this mandate. Without any contrary Missouri authority even questioning *Moore*, let alone overruling or superseding it, the Eighth Circuit nonetheless refused to accept *Moore* as defining Missouri state law. And it did so merely because it baldly speculated that, "If the Missouri Supreme Court were to address the issue today, it would allow liquidated damages for a reasonable time after abandonment by the contractor or termination by the owner" (App. 11). *Erie* does not allow for this result.

B. This Court consistently has held a more recent intermediate state appellate court decision following an unquestioned older state high court decision means federal courts should follow the older decision.

As the Eighth Circuit recognized below, the only Missouri state authority addressing the issue in this case subsequent to *Moore*, *Twin River Constr. Co. v. Pub. Water Dist. No. 6*, 653 S.W.2d 682 (Mo. App. 1983), "follow[ed] *Moore*" (App. 10). Thus, the Eighth Circuit was confronted not only with the Supreme Court of Missouri's 104-year-old opinion in *Moore* ruling the issue in Weitz's favor, but also with a far more recent Missouri state appellate court decision holding *Moore* was good law and doing the same.

Nonetheless, the opinion below disparaged and refused to follow *Twin River* because it was "a Missouri intermediate appellate case" (App. 10). The court stated, "Intermediate court decisions . . . are not dispositive as to how a state's highest court would resolve a matter" (App. 10). As a result, it did not consider *Twin River* any further (App. 10).

For the proposition that intermediate state appellate court decisions have no binding effect on federal courts, the Eighth Circuit cited its own decision in *Bogan v. Gen. Motors Corp.*, 500 F.3d 828, 831 (8th Cir. 2007), and this Court's seminal *Erie* doctrine decision in *Six Cos. of Cal.*, 311 U.S. at 188 (Opinion 8). But neither case holds intermediate state appellate court decisions are meaningless and of no effect

on federal courts. In *Bogan*, the Eighth Circuit refused to follow a string of Missouri Court of Appeals decisions that the Supreme Court of Missouri later had criticized. 500 F.3d at 830-32. And *Six Cos.* holds the opposite of the Eighth Circuit's conclusion, as the opinion's parenthetical summary of it seems to acknowledge (App. 10). In *Six Cos.*, this Court held that, where the Supreme Court of California had not overruled or disapproved of a California Court of Appeal decision, that intermediate decision binds federal appellate courts, directing the Ninth Circuit to follow it. 311 U.S. at 187-88.

Indeed, this Court repeatedly has confirmed that an unquestioned, on-point decision of an intermediate state appellate court has equally binding effect unless and until the state's highest court has said otherwise. And when an intermediate state appellate court decision expressly follows an earlier high court decision, as *Twin River* did for *Moore*, it is proof the earlier decision remains good law. *Bosch*, 387 U.S. at 465. This is especially true when a state intermediate appellate court is one "of statewide jurisdiction, the decisions of which are binding on all trial courts in the absence of a conflicting decision of the [state high court]. . . ." *Gooding*, 405 U.S. at 525 n.3. In such a case, "federal courts follow these holdings. . . ." *Id.* That the intermediate court opinion may be "more than 50 years" old does not make it any less "authoritative" as to state law. *Id.* at 526 n.4.

When a federal court must decide whether a state high court decision remains good law, a subsequent intermediate appellate court decision following it "is a datum for ascertaining" so. *Bosch*, 387 U.S. at 465. The intermediate decision cannot "be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Bosch*, 387 U.S. at 465. Federal courts "must follow" intermediate state appellate court decisions "in the absence of convincing evidence that the highest court of the state would decide differently." *Stoner*, 311 U.S. at 467.

Thus, following this Court's *Erie* jurisprudence, *Twin River* must be accepted as a datum showing *Moore* remains good law. It cannot be disregarded unless more "persuasive" data shows the Supreme Court of Missouri would overrule it. *Bosch*, 387 U.S. at 465; *Stoner*, 311 U.S. at 467; *Six Cos.*, 311 U.S. at 187-88. The Supreme Court of Missouri recently reconfirmed that, though sitting in three districts, the Missouri Court of Appeals comprises one court of statewide jurisdiction whose decisions bind all lower courts unless overruled by the state Supreme Court itself. *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 567 n.3 (Mo. banc 2010). As such, federal courts must follow its as-yet unquestioned rulings on issues of Missouri law. *Gooding*, 405 U.S. at 525 n.3; *Six Cos.*, 311 U.S. at 187-88.

For, "whether or not" a federal court "agree[s] with the reasoning upon which" *Moore* and *Twin River* are "based or the outcome" they dictate, it "is

bound to follow" them. *Delta*, 503 F.2d at 245. "This is the ultimate significance of" *Erie*. *Id.* There is no "subsequent" Missouri "decision criticizing, distinguishing, or modifying" *Moore* or *Twin River*. *Id.* Thus, they remain "the latest, most authoritative expression of" Missouri law, and are "controlling" in all federal courts. *Id.*

In refusing to do anything other than wave *Moore* and *Twin River* away, the opinion below expressly contravenes this Court's direction. It parrots the requirements this Court has held necessary to reject a state high court opinion: "clear evidence" and "other persuasive data" showing "the highest court of the state would [now] decide otherwise" (Opinion 7-8). But it offers no such "evidence" or "persuasive data" – e.g., other, later, contrary Missouri judicial or legislative decisions, *Bernhardt*, 350 U.S. at 205; *Stoner*, 311 U.S. at 467, 19 Wright & Miller at § 4507 – showing *Moore* and *Twin River* no longer are the law of Missouri.

Instead, the opinion merely assumes from its own intuition that, today, both *Moore* and *Twin River* would be overruled (Opinion 7-8). This conflicts with all this Court's pronouncements of this facet of the *Erie* doctrine. In *Moore*, Missouri chose one side of the existing jurisdictional split over the substantive legal question at issue. The Eighth Circuit's unsupported surmising is not evidence Missouri now would switch to the other.

II. The opinion below creates a direct circuit split over whether an on-point state court decision on an issue of state law unquestioned by any subsequent state authority binds a federal court hearing that issue.

The opinion below cites no other case in which a federal court refused to follow a state high court decision otherwise unquestioned in that state (App. 9-11). This is because none exists. As explained above, the obvious reason is that the *Erie* doctrine does not allow for such a result. *West*, 311 U.S. at 236. Indeed, the Eighth Circuit's refusal not only contravenes this Court's *Erie* decisions, but also directly conflicts with the few other federal appellate decisions that have encountered this situation. *See Ryan*, 851 F.2d at 502; *Gilstrap*, 998 F.2d at 559.

In *Ryan*, the First Circuit, reviewing a bankruptcy court decision, had to determine whether, under Vermont law, an otherwise properly recorded mortgage deed that lacked the signature of one of two statutorily required witnesses could serve as constructive notice to a future purchaser. 851 F.2d at 507-10. Apparently, the Vermont Supreme Court had decided the issue only once, in *Day v. Adams*, 42 Vt. 510 (1869), which held "that a mortgage deed which lacked the signatures of two witnesses was 'defective' under the Vermont recording statute, . . . [e]ven though physically registered with the town clerk,

[and] could not serve as constructive notice. . . ." *Ryan*, 851 F.2d at 502. No Vermont case ever had overruled or questioned *Day*. *Id.* at 507-08.

Though confronted with *Day*, the bankruptcy court held, as the Eighth Circuit did here, that *Day* "was no longer good law, having been decided in 1869 and being a precedent that the current Vermont Supreme Court – in the bankruptcy court's view – would no longer follow . . . [as] modern courts 'are more willing to disregard a minor error in form if ignoring the error will not prejudice other parties' rights.'" *Id.* at 508 (citation omitted). Instead, the bankruptcy court "replaced the rule of *Day v. Adams* with one of its own creation. . . ." *Id.*

The First Circuit reversed. It recognized that, "in an appropriate case, a federal court 'must not consider itself bound by old state court decisions if it is convinced by other persuasive data that the highest court of the state would [now] decide otherwise.'" *Id.* at 509 (citations omitted). But it observed "the 'data' needed to convince a federal court to ignore old state decisions must be more 'persuasive' than exists here." *Id.* It held this Court's *Erie* jurisprudence discussed above commanded this result:

> In *Bernhardt*[, 350 U.S. at 198], the United States Supreme Court was presented with the issue of whether a federal court, sitting in diversity, should follow a 1910 decision of the Vermont Supreme Court. The Court ruled that, notwithstanding its age, the Vermont Supreme Court decision clearly established the law of Vermont:

> [A]s we have indicated, there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule.
>
> 350 U.S. at 205 . . . The same, we think, is basically true in respect to *Day v. Adams*.

851 F.2d at 509 (footnotes omitted). Furthermore, some other jurisdictions used the same rule as *Day*. *Id.* at 509-10. Thus, there was no "'persuasive data' that the Vermont Supreme Court would no longer follow the *Day v. Adams* rule. . . ." *Id.* at 510.

The opinion below directly conflicts with *Ryan*. As with the First Circuit's observations about *Day*, there is no confusion in the Missouri decisions in *Moore* and *Twin River*, no developing line of Missouri authorities casting a shadow over *Moore* and *Twin River*, and no dicta, doubts, or ambiguities in the opinions of Missouri judges on the substantive question of Missouri law at issue that promises to undermine the rule of *Moore* and *Twin River*. Thus, despite the age of *Moore*, it "clearly established the law of" Missouri. *Ryan*, 851 F.2d at 509. Moreover, other jurisdictions continue to employ the rule in *Moore* today (App. 9-10). The Eighth Circuit's opinion gives no "persuasive data" that would warrant not following these unquestioned Missouri decisions. *Id.* at 509-10.

Indeed, the Eighth Circuit itself previously had followed the same rule of action and decision as the First Circuit in *Ryan*. The opinion below cites the Eighth Circuit's previous decision in *Gilstrap*, *supra*, restating the rule in *West* that if a federal court finds "persuasive data" constituting "clear evidence that the [state] Supreme Court would not uphold [a prior decision], we shall not apply it to this case" (App. 9, 11). But the *Gilstrap* court applied these principles to reach exactly the opposite conclusion of the opinion below.

Gilstrap involved "a narrow question of Washington state law: is a common carrier liable for tortious acts committed by its employee against a passenger when the employee acts outside the scope of his or her employment?" 998 F.2d at 560. The district court held it was not and dismissed the plaintiff's claims. *Id.* Apparently, the Washington Supreme Court had decided this issue only once, in *Marks v. Alaska S.S. Co.*, 127 P. 1101 (Wash. 1912), holding a steamship company owed its passengers an "absolute duty of protection from the assaults and aggressions of its servants." *Gilstrap*, 998 F.2d at 561. Because *Marks* was "an eighty-year-old case that has been rarely cited (not at all by the Washington appellate courts)" and was "out of step with modern tort law," the Eighth Circuit was urged to reject it. *Id.*

Following the same reasoning as *Ryan*, however, the Eighth Circuit disagreed and reversed the district court. *Id.* at 561-62. It held it only could disregard

Marks if there were "clear evidence that the Washington Supreme Court would not uphold" the 1912 decision. *Id.* at 561. But the *Erie* doctrine commanded there could not be "real doubt on the current validity of" *Marks*. *Id.*

For, as in this case, a Washington intermediate appellate court had recognized a similar principle as *Marks* in the 1980s and some other jurisdictions agreed with the holding *Marks* announced. *Id.* at 561-62. Thus, just like in *Ryan*, there was no "clear evidence that the Washington Supreme Court would overrule *Marks* if given the opportunity," and *Marks* had to remain "good law" in federal court. *Id.* at 562.

While "the age of the decision and the absence of recent citation to it suggest that the Washington Supreme Court might well reconsider" *Marks* if given the opportunity, it was not *clear* this would happen. *Id.* A federal court is not bound by an old state decision "if it 'is convinced by other persuasive data that the highest court of the state would [now] decide otherwise,'" but "'the "data" needed . . . must be more "persuasive" than exists here.'" *Id.* (quoting *Ryan*, 851 F.2d at 509).

The Eighth Circuit's opinion below holding otherwise conflicts with its own prior ruling in *Gilstrap* following the First Circuit in *Ryan*. There is no clear evidence – let alone identifiable, persuasive evidence – that the Supreme Court of Missouri would not uphold *Moore* if faced with it today. The opinion below "fails to cast any real doubt on the current validity of

the [*Moore*] holding." *Gilstrap*, 998 F.2d at 561. Just as in *Gilstrap*, an intermediate Missouri appellate court has followed *Moore* in more recent years and other jurisdictions agree with *Moore* in their law. No single Missouri authority has indicated in any way that the rule in *Moore* no longer is the law of Missouri.

This Court should quell these conflicts.

III. This case presents a rare opportunity for this Court to clarify the "persuasive data" that constitutes "convincing evidence" needed to show that a state court would not follow an earlier decision today.

As explained above, this Court has held that a state high court decision may not "be disregarded by a federal court unless [the federal court] is convinced by *other persuasive data* that the highest court of the state would decide otherwise." *Bosch*, 387 U.S. at 465 (emphasis added). A state high court decision must be followed "in the absence of *convincing evidence* that the [state court] would decide differently." *Stoner*, 311 U.S. at 467 (emphasis added).

The Eighth Circuit's refusal in this case to follow the Supreme Court of Missouri's decision in *Moore* confuses what constitutes "persuasive data" and "convincing evidence" in this context. The opinion below uses these terms several times as passwords allowing it to disregard an on-point, unquestioned

decision of Missouri's highest court and an intermediate decision following the high court (App. 9-11).

Until the opinion below, however, the only federal courts to have encountered this issue unanimously have held the only data and evidence sufficiently "persuasive" and "convincing" enough to warrant refusing to follow a state high court decision on an issue of state law are intervening state judicial or legislative authorities overruling, superseding, criticizing, or at least questioning the prior state high court decision. *Bernhardt,* 350 U.S. at 205; *Ryan*, 851 F.2d at 509-10; *Gilstrap*, 998 F.2d at 561-62; *Delta*, 503 F.2d at 245; *see also* 19 Wright & Miller at § 4507.

Indeed, the "persuasive" and "convincing" rubric itself originates in this Court's directive in *West* that a state court's "pronouncement is to be accepted by federal courts as defining state law unless *it* has later given *clear* and *persuasive* indication that *its* pronouncement will be modified, limited, or restricted." 311 U.S. at 236 (emphasis added). Plainly, given the federalism concerns involved in a federal court deciding what is or is not state law, this Court expressly contemplated in *West* that the *only* "persuasive data" and "convincing evidence" sufficient to show that a state high court's decision should be disregarded must be from the legal instrumentalities of the state itself. And until the opinion below, that always is how this rubric has been applied. 19 Wright & Miller at § 4507.

This Court, however, has not approached this issue since its 1972 decision in *Gooding*, 405 U.S. at 525-26. As a result, the Court's opinions on this particular facet of the *Erie* doctrine are increasingly aging. The Court should take this rare opportunity to re-clarify the importance of letting state courts make decisions on issues of state law and requiring federal courts faithfully to follow those decisions unless and until the state itself has decreed otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 2012

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 10-3713

The Weitz Company LLC, Appellant, v. MacKenzie House, LLC; MH Metropolitan, LLC; Arrowhead Contracting, Inc.; Concorde Construction Co., Inc., Appellees.	* * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 20, 2011
Filed: January 5, 2012

Before MELLOY, SMITH, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

The Weitz Company, LLC sued MacKenzie House, LLC and MH Metropolitan, LLC for breach of a construction contract. Arrowhead Contracting, Inc. and Concorde Co., Inc. are third-party defendants. MH Metropolitan counterclaimed for breach of the same contract, seeking liquidated damages and the cost to

complete the project. Arrowhead also counterclaimed. The jury returned a verdict of $4,991,970.87 for MH Metropolitan, of $556,110 for Arrowhead, and for Concorde on Weitz's claim. The district court[1] denied post-judgment motions. Weitz appeals. Jurisdiction being proper under 28 U.S.C. § 1291, this court affirms.[2]

I.

MacKenzie House was the developer of a multi-building apartment project known as the Metropolitan Apartments. MacKenzie was also the managing member of MH Metropolitan, the owner of the Apartments. MH Metropolitan hired Weitz as the general contractor. Weitz initially agreed to complete the project within 458 days for a maximum price of $13,498,006. The time for completion was ultimately extended to 507 days, with the maximum price increased to $14,401,609. Weitz subcontracted with Arrowhead and Concorde, among others.

Work on the Apartments was delayed. Weitz attributes the delays to its subcontractors. MH Metropolitan blames Weitz, asserting several material breaches, including failing to provide required lien waivers, allowing liens to be filed against the project, providing poor quality construction, and falsifying a

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[1] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

[2] This opinion supercedes the opinion filed on December 8, 2011.

pay application. MH Metropolitan contends it exercised its contractual right to withhold payment on two of Weitz's applications. Weitz stopped work on December 26, 2006. By then, the first Building of the project was four months late, and the entire project two months late. On January 18, 2007, MH Metropolitan terminated Weitz for cause, finishing the project without Weitz.

The next month, Weitz sued MacKenzie House and MH Metropolitan for the unpaid contract balances. MH Metropolitan counterclaimed for breach of contract, seeking liquidated damages and the cost to complete. According to MH Metropolitan, Weitz's mismanagement was cause to stop payment and cancel the contract. Weitz made third-party claims against Arrowhead and Concorde for their allegedly defective work, the cost to complete their work, and the delays they allegedly caused. Arrowhead counterclaimed for amounts due under its subcontract, arguing Weitz terminated it improperly.

The jury awarded MH Metropolitan liquidated damages of $3,022,520 due to project delay, and $1,969,450.87 for the cost of completion. The jury also awarded Arrowhead $556,110, and found for Concorde. The district court denied post-judgment motions, entering judgment on the jury's verdict. Weitz appeals.

II.

Weitz contends that the district court erred as a matter of law in six ways by: not granting judgment

as a matter of law against MH Metropolitan; excluding evidence of two other construction projects involving the parties; miscalculating the liquidated damages and completion costs; declining to enter judgment on Weitz's breach-of-contract claims against Arrowhead; not entering a default judgment against Concorde for failing to appear at trial; and ruling that MacKenzie House could not be vicariously liable for the acts of MH Metropolitan.

A.

Weitz argues that the district court erred in failing to grant it judgment as a matter of law on MH Metropolitan's breach-of-contract claim.

This court reviews de novo a denial of a motion for judgment as a matter of law. ***Chalfant v. Titan Distrib., Inc.***, 475 F.3d 982, 988 (8th Cir. 2007). Judgment as a matter of law is granted if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." **Fed. R. Civ. P. 50(a)(1)**. This court makes all reasonable inferences in favor of the nonmoving party and views the facts most favorably to that party. ***Chalfant***, 475 F.3d at 988.

During the twelve-day trial, MH Metropolitan presented evidence that Weitz committed several material breaches – failing to provide the required lien waivers, allowing liens to be filed against the project, causing substantial delays in the project,

completing poor quality construction, and falsifying a pay application. MH Metropolitan submitted testimony and videos showing Weitz's poor quality construction. The jury also heard that Weitz could not properly prepare, update, or follow its schedules, which contributed to delaying the project. The project architect concluded that Weitz breached the contract in at least these respects. The evidence at trial also established other breaches. As a result, MH Metropolitan exercised the contractual right to withhold payment and terminate Weitz for cause. As the jury instructions noted, to recover for breach of contract, a party must show its own substantial compliance with the contract. ***Brockman v. Soltysiak***, 49 S.W.3d 740, 745 (Mo. App. 2001). Weitz alleges that it complied with the contract, but whether a contract has been substantially performed depends on the facts and circumstances of the particular case. ***In re Estate of English***, 691 S.W.2d 485, 489 (Mo. App. 1985). The jury as fact finder resolved this issue against Weitz. *See* ***Browning v. President River Boat Casino-Missouri, Inc.***, 139 F.3d 631, 634 (8th Cir. 1998) ("Appellate review of a jury verdict is extremely deferential"). There was a legally sufficient evidentiary basis for the jury's verdict. *See* **8th Cir. R. 47B**.

B.

Weitz maintains that the district court incorrectly excluded evidence of two other construction projects – one ending in litigation[3] – involving the parties.

This court respects the district court's "'wide discretion in admitting and excluding evidence, and its decision will not be disturbed unless there is a clear and prejudicial abuse of discretion.'" ***McPheeters v. Black & Veatch Corp.***, 427 F.3d 1095, 1101 (8th Cir. 2005) (citation omitted). To warrant reversal, such a prejudicial abuse of discretion must also affect the substantial rights of a party. ***Id.*** Likewise, the denial of a motion for a new trial is reviewed for an abuse of discretion. ***Chalfant***, 475 F.3d at 992. "The crucial determination 'is whether a new trial should have been granted to avoid a miscarriage of justice.'" ***PFS Distrib. Co. v. Raduechel***, 574 F.3d 580, 589 (8th Cir. 2009) (citation omitted).

MacKenzie House was the developer on the two other projects Weitz references (other corporate entities MacKenzie House managed owned the projects). Even assuming that MH Metropolitan and MacKenzie House are one entity, however, evidence of prior or other acts "is not admissible to prove the character of a person in order to show conformity therewith." **Fed. R. Evid. 404(b)**. "[P]rior acts include prior lawsuits." ***Batiste-Davis v. Lincare, Inc.***, 526 F.3d 377, 380

[3] *Weitz Co. v. MH Washington*, 631 F.3d 510 (8th Cir. 2011).

(8th Cir. 2008). Evidence of prior or other acts "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." **Fed. R. Evid. 404(b).** This type of evidence is admitted only when one of these legitimate purposes is at issue in the case. ***King v. Arens***, 16 F.3d 265, 268 (8th Cir. 1994); ***Donald v. Rast***, 927 F.2d 379, 381 (8th Cir. 1991).

The only claims in this case are for breach of contract. The issue at trial was whether the parties complied with the contract. Proving a breach here does not put motive, intent, plan, or knowledge at issue. *See* ***Unit Drilling Co. v. Enron Oil & Gas Co.***, 108 F.3d 1186, 1194 (10th Cir. 1997). Weitz argues that MH Metropolitan "opened the door" to the evidence, but points to no instance where MH Metropolitan focused on the other projects. In addition, the district court instructed the jury not to speculate about the previous projects and to decide the case solely on the law and the evidence in this trial. In light of the instruction, the few instances where MH Metropolitan alluded to another project do not affect Weitz's substantial rights. The district court properly exercised its discretion in excluding the evidence of other projects.

C.

According to Weitz, the district court erred in miscalculating the liquidated damages and completion costs.

Weitz asserts that the liquidated damages clause is a penalty. The interpretation of a contract is a question of law, reviewed de novo. ***Simeone v. First Bank N.A.***, 971 F.2d 103 (8th Cir. 1992). Here, the liquidated damages clause was a reasonable forecast of delay damages – as the parties agreed at the time of contracting – and is thus enforceable. *See* ***Diffley v. Royal Papers, Inc.***, 948 S.W.2d 244, 246 (Mo. App. 1997); ***Information Sys. & Networks Corp. v. City of Kansas City***, 147 F.3d 711, 714 (8th Cir. 1998) (applying Missouri law).

Weitz argues that the liquidated damages are overstated because they were measured based on the wrong number of buildings. The district court properly ruled that the parties' agreement is unclear about how many buildings should be used. Because of this ambiguity, the issue was properly submitted to the jury, and this court will not overturn their reasoned verdict. *See* ***Graham v. Goodman***, 850 S.W.2d 351, 354 (Mo. banc 1993) ("The trial court must then determine from the evidence whether the surrounding circumstances are such that a fact issue exists for the jury to resolve."); ***Fitch v. Doke***, 532 F.2d 115, 117 (8th Cir. 1976) ("Where, however, the contract is ambiguous, the meaning of its terms is to be determined by the jury in the light of the evidence of the

surrounding circumstances and the practical construction of the parties."). *See generally* ***Browning***, 139 F.3d at 634 ("Appellate review of a jury verdict is extremely deferential").

Weitz seeks to apply a Missouri Supreme Court decision limiting liquidated damages for construction delay to the time *before* the owner removes the contractor from the project. ***Moore v. Board of Regents***, 115 S.W. 6, 12-13 (Mo. 1908). The facts in *Moore* were different from those here: there, the project was not yet late when the owner terminated the contract. ***Id.*** at 12-13. More importantly, if faced with this case, the Missouri Supreme Court would not follow *Moore*. *See* ***Gilstrap v. Amtrak***, 998 F.2d 559, 561 (8th Cir. 1993) ("Our task is fairly simple: if we find clear evidence that the [state] Supreme Court would not uphold [the prior decision], we shall not apply it to this case"). *Moore* relied on a New York case for the principle that liquidated damages are not the correct measure of damages when the contractor does not complete the project. ***Gallagher v. Baird***, 66 N.Y.S. 759, 763 (App. Div. 1900). *Gallagher* actually stands for the proposition that the cost to complete is a better measure of damages when a contractor abandons the project before the contracted completion date. ***Id.*** at 762-63 ("There was no completion or attempt to complete, but an utter abandonment, and such [liquidated damages] clause was not intended to cover such a case, nor was provision made in the contract for

such a contingency.").[4] That conclusion does not resolve the calculation of liquidated damages in this case where the project is late when the owner terminates the contract.

Weitz also invokes a Missouri intermediate appellate case that acknowledges the divided authorities, but follows *Moore*. ***Twin River Const. Co. v. Public Water Dist. No. 6***, 653 S.W.2d 682, 693-94 (Mo. App. 1983). Intermediate court decisions, however, are not dispositive as to how a state's highest court would resolve a matter. *E.g.*, ***Bogan v. General Motors Corp.***, 500 F.3d 828, 831 (8th Cir. 2007); *cf.* ***Six Companies of California v. Joint Highway Dist. No. 13***, 311 U.S. 180, 188 (1940) (instructing federal appellate courts to follow intermediate state appellate court decisions when "there is no convincing evidence that the law of the State is otherwise."); ***Washington v. Countrywide Home Loans, Inc.***, 2011 WL 3962831, *3 (8th Cir. 2011) (noting intermediate appellate court decisions must be followed if they are the best evidence of the law). In the absence of guidance from the highest state court (or a statute on point), the federal court's task is to predict how the Missouri Supreme

[4] At any rate, other cases in New York allow liquidated damages against a contractor who abandons a project. *See generally* Jay M. Zitter, Annotation, *Liability of Contractor who Abandons Building Project Before Completion for Liquidated Damages for Delay*, 15 **A.L.R. 5th** 376, §§ 4-5 (1993) (compiling two contrary lines of New York cases about whether the abandoning contractor can or cannot be held liable for liquidated damages for period of time reasonably necessary to complete project).

Court would rule if confronted with the issue today. *E.g.*, ***Pennsylvania Nat'l Mut. Cas. Ins. Co. v. City of Pine Bluff***, 354 F.3d 945, 952 (8th Cir. 2004); ***Maschka v. Genuine Parts Co.***, 122 F.3d 566, 573 (8th Cir. 1997). If the Missouri Supreme Court were to address the issue today, it would allow liquidated damages for a reasonable time after abandonment by the contractor or termination by the owner. *See* ***Gilstrap***, 998 F.2d at 562 ("'[I]n an appropriate case, a federal court must not consider itself bound by old state court decisions if it is convinced by other persuasive data that the highest court of the state would [now] decide otherwise." (alteration in original) (citation and internal quotation marks omitted)).

Weitz contends that the contract precluded MH Metropolitan from claiming certain damages as part of the completion costs. "When a breach [in a construction contract] results from a combination of defective construction and a failure to complete the work, the owners' damages are calculated using the reasonable cost of reconstruction, repair, and completion in accordance with the contract." ***Ernery v. Freeman***, 84 S.W.3d 529, 536 (Mo. App. 2002); *see also* ***Information Systems***, 147 F.3d at 713 (applying Missouri law). Weitz would categorize some of MH Metropolitan's damages as "delay damages" and "theft and property damages" that the contract bars MH Metropolitan from recovering. MH Metropolitan responds that the damages are in fact costs to complete incurred when it became the contractor on the project. The district court correctly decided that these are

issues of fact for the jury. The jury rejected Weitz's damages arguments, and this court will not overturn its reasoned verdict. *See* ***Browning***, 139 F.3d at 634 ("Appellate review of a jury verdict is extremely deferential").

D.

Weitz claims that the district court should have entered judgment as a matter of law for it on the breach-of-contract claims against Arrowhead.

This court reviews de novo a denial of a motion for judgment as a matter of law and grants it if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." ***Chalfant***, 475 F.3d at 988; **Fed. R. Civ. P. 50(a)(1)**. This court makes all reasonable inferences in favor of the non-moving party and views the facts most favorably to that party. ***Chalfant***, 475 F.3d at 988.

Weitz largely reargues its version of the facts. On each point, there was sufficient evidence to reject Weitz's position. The jury was entitled to credit Arrowhead's evidence that Weitz committed the first material breach and did not substantially perform its agreement with Arrowhead, excusing Arrowhead from performance. After receiving the evidence, the jury chose – as it was entitled to do – to reject Weitz's evidence. This court finds a legally sufficient evidentiary basis for that choice. *See* **8th Cir. R. 47B**.

E.

Weitz asserts that the district court erred in refusing to enter a default judgment against Concorde when it failed to appear at trial, or in the alternative, refusing to grant Weitz judgment as a matter of law on its claims against Concorde. This court reviews decisions on default judgments for abuse of discretion. ***Forsythe v. Hales***, 255 F.3d 487, 490 (8th Cir. 2001).

Concorde was represented by counsel for much of the litigation – filing an answer, complying with all pretrial orders, and responding to all discovery requests and dispositive motions. By these acts, particularly by filing an answer, Concorde did defend, and the district court was not required to enter a default judgment against it. *See* ***United States v. Harre***, 983 F.2d 128, 130 (8th Cir. 1993) ("Because [the party] filed an answer . . . he indicated a desire to defend against the action."); *cf.* ***Ackra Direct Marketing Corp. v. Fingerhut Corp.***, 86 F.3d 852, 857 (8th Cir. 1996) (stating it is within the district court's discretion to enter default judgment even after filing of answer if party's later conduct includes 'willful violations of court rules, contumacious conduct, or intentional delays.' (citation omitted)). About two and a half weeks before trial, Concorde's attorneys moved to withdraw; the court granted the motion on January 13, 2010. On the morning of January 25, when trial began, Concorde was not represented by counsel. The district court denied Weitz's motion for a default judgment, and Weitz – unopposed – submitted its claims against

Concorde to the jury. Choosing not to appear for trial – especially after defeating motions to dismiss a counterclaim – does not necessarily constitute the "willful violation" of court rules that places a defendant in default. *See* ***Harre***, 983 F.2d at 130. (Default judgment for failure to defend is appropriate when the party's conduct includes "willful violations of court rules, contumacious conduct, or intentional delays."). The jury rejected Weitz's claims, and the district court properly allowed that decision to stand. *Cf.* ***Pfanensteil Architects, Inc. v. Chouteau Petroleum Co.***, 978 F.2d 430, 433 (8th Cir. 1992) ("When there are multiple defendants who may be jointly and severally liable for damages alleged by plaintiff, and some but less than all of those defendants default, the better practice is for the district court to stay its determination of damages against the defaulters until plaintiff's claim against the nondefaulters is resolved. . . . to avoid the problems of dealing with inconsistent damage determinations. . . .")

As the district court concluded, it would be unjust to grant judgment to Weitz after the jury rejected its contentions.

F.

Weitz contends that the district court should have ruled that MacKenzie House – which did not sign the contract – could be vicariously liable for the acts of MH Metropolitan. Because the district court properly

found against Weitz on all issues, there is no reason to consider the issue of vicarious liability.

* * *

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

THE WEITZ COMPANY, L.L.C., Plaintiff/Third-Party Plaintiff vs. MacKENZIE HOUSE, L.L.C. and MH METROPOLITAN, L.L.C., Defendants/Counterclaimants, ARROWHEAD CONTRACTING, INC., CONCORDE CONSTRUCTION COMPANY, INC., POLAR AIRE HEATING AND COOLING SERVICE, INC., CONSTRUCTION BUILDING SPECIALTIES, INC., AND FIDELITY DEPOSIT COMPANY OF MARYLAND, Third-Party Defendants.	JUDGMENT IN A CIVIL CASE Case No. 07-0103-CV-W-ODS (Filed Aug. 4, 2010)

__X__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** The issues have been considered and a decision has been rendered by the Court.

IT IS ORDERED AND ADJUDGED

1. Granting Plaintiff's Motions to Dismiss Defendants' Counterclaims pursuant to an Order issued on November 26, 2007.

2. Granting in part and denying part Plaintiff's Motion for Partial Summary Judgment pursuant to an Order issued on August 1, 2008.

3. Denying parties' cross-motions for partial summary judgment pursuant to an Order issued on December 29, 2008.

4. Denying Arrowhead Contracting, Inc.'s Motion for Partial Summary Judgment pursuant to an Order issued on November 19, 2009.

5. Denying Defendants' Motion for Partial Summary Judgment pursuant to an Order issued on November 19, 2009.

6. Granting Plaintiff's Motion for Partial Summary Judgment with respect to claims involving Concorde Construction Company pursuant to an Order issued on November 19, 2009.

7. Denying Plaintiff's Motion for Partial Summary Judgment with respect to claims involving Horizon Plumbing, Inc., pursuant to an Order issued on November 19, 2009.

8. Denying Plaintiff's Motion for Partial Summary Judgment with respect to claims involving Arrowhead Contracting, Inc., pursuant to an Order issued on November 19, 2009.

9. Granting in part and denying in part Plaintiff's Motion for Summary Judgment pursuant to an Order dated November 19, 2009.

10. Granting Plaintiff's Motion for Partial Summary Judgment with respect to claims involving Concorde Construction Company pursuant to an Amended Order issued on November 20, 2009.

11. Denying Horizon Plumbing, Inc.'s Motion for Judgment on the Pleadings pursuant to an Order issued on January 19, 2010.

12. Granting judgment on Jury Verdict Form A in favor of MH Metropolitan and against The Weitz Company on The Weitz Company's breach of contract claim.

13. Granting judgment on Jury Verdict Form C in favor of MH Metropolitan and against The Weitz Company on MH Metropolitan's breach of contract claim and awarding MH Metropolitan $4,991,970.87.

14. Granting judgment on Jury Verdict Form D in favor of Arrowhead Contracting and against The Weitz Company on The Weitz Company's breach of contract claim.

15. Granting judgment on Jury Verdict Form E in favor of Arrowhead Contracting and against The Weitz Company on Arrowhead Contracting's breach of contract claim and awarding Arrowhead Contracting $556,110.00.

16. Granting judgment on Jury Verdict Form F in favor of Concorde Construction and against The Weitz Company on The Weitz Company's breach of contract claim.

17. Denying Plaintiff's Motion for Default Judgment against Concorde Construction Company pursuant to an Order issued on April 30, 2010.

18. Granting Plaintiff's Motion for Judgment as a Matter of Law against Horizon Plumbing and granting in part and denying in part a Plaintiff's

motion for attorney fees and awarding Plaintiff $115,619.80 in attorney fees and $12,576.30 in costs pursuant to an Order issued on May 6, 2010.

19. Granting Arrowhead Contracting, Inc.'s Motion for Attorney Fees and Costs and requiring Plaintiff to pay Arrowhead Contracting $438,625.56 in fees and $226,810.66 in costs pursuant to an Order dated June 3, 2010.

20. Denying MH Metropolitan's Motion for Attorney Fees pursuant to an Order dated August 4, 2010.

ANN THOMPSON,
Clerk of Court

DATE: 08/04/2010

/s/ Eva Will-Fees
Eva Will-Fees,
Courtroom Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

THE WEITZ COMPANY, L.L.C., Plaintiff/Third-Party Plaintiff vs. MacKENZIE HOUSE, L.L.C. and MH METROPOLITAN, L.L.C., Defendants/Counterclaimants, ARROWHEAD CONTRACTING, INC., CONCORDE CONSTRUCTION COMPANY, INC., POLAR AIRE HEATING AND COOLING SERVICE, INC., CONSTRUCTION BUILDING SPECIALTIES, INC., and FIDELITY DEPOSIT COMPANY OF MARYLAND, Third-Party Defendants.	)	Case No. 07-0103-CV-W-ODS

ORDER AND OPINION GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Aug. 1, 2008)

Pending is Plaintiff's Motion for Partial Summary Judgment. For the following reasons, the motion (Doc. # 121) is granted in part and denied in part.

I. BACKGROUND

Defendant MH Metropolitan, LLC, owns a project to build an apartment complex at 45th and Madison in Kansas City, Missouri. Defendant MacKenzie House, LLC, is MH Metropolitan's managing member. Plaintiff was the general contractor originally retained to construct the apartments and other buildings/ amenities for the complex. The contract was terminated on January 18, 2007, allegedly because Plaintiff failed to meet certain deadlines. The propriety of the termination, which is in dispute, is not relevant to the issues raised in this motion. Plaintiff initiated this lawsuit, contending it was due money under the contract. Defendants[1] counterclaimed, alleging Plaintiff owes money pursuant to a liquidated damages clause contained in the contract. The issue of whether the clause was triggered is also beyond the scope of the motion; instead, Plaintiff's motion attacks the provision's enforceability and certain issues related to its application that do not depend on disputed facts about the construction's progress.

On July 9, 2008, the Court directed the parties to supplement the record by delivering "a single, complete set of the documents they agree combine to constitute their agreement." The parties have

[1] There may be some dispute as to whether one, the other, or both Defendants have asserted the counterclaim. The issue is not important to the present motion, and for the sake of convenience the Court will continue to refer to the Defendants collectively.

complied, agreeing on all points except with respect to one document; however, they agree the one document is not relevant to the issues raised in Plaintiff's motion. The parties' have submitted (1) an AIA Document A111, (2) an AIA Document A201, and (3) a series of addendums, memos, and other documents. While the bulk of the agreement consists of AIA form contracts, virtually every section has been modified in some way.

The liquidated damage provision appears in section 4.7 of Document A111 and reads as follows:

> *Liquidated Damages*. The Contractor agrees that the Contractor shall pay to the Owner liquidated damages in accordance with the following schedule for each calendar day that Completion of a Building is delayed beyond the Scheduled Completion Date for such Building. The following liquidated damages amounts shall accrue separately, on a building-by-building basis:
>
> $760.00 for each calendar day that Completion of each Building of the Project is delayed more than 21 days after Scheduled Completion Date for such Building.
>
> $2,280.00 for each calendar day that Completion of each Building of the Project is delayed more than 45 days after Scheduled Completion Date for such Building.
>
> $3,040.00 for each calendar day that Completion of each Building of the Project is delayed

> more than 75 days after Scheduled Completion Date for such Building.
>
> $3,800.00 for each calendar day that Completion of each Building of the Project is delayed more than 105 days after Scheduled Completion Date for such Building.

Defendants contend the liquidated damage applies to four "Buildings" that were not completed on time: the "North Building," the "Center Building," the "South Building," and the "Garage." They have also calculated the schedule cumulatively; for instance, for a delay in completion between seventy-six and 105 days, Defendants do not simply claim $2,280 per day for that time period. Instead, they claim the $2,280/day provision is *added to* the $760/day provision, resulting in liquidated damages $3,040 per day for the 76th through 105th days. Defendants have also calculated the liquidated damages through the Buildings' date of completion[2] and not the date the contract with Plaintiff was terminated.

Plaintiff's motion contends the liquidated damages provision is unenforceable because it is a penalty. Alternatively, Plaintiff challenges various aspects of Defendants' calculation; specifically (1) the number of "Buildings" involved, (2) the cumulative application of the monetary provisions, and (3) use of the actual

[2] The buildings for which Defendants seek liquidated damages were completed by November 16, 2007.

completion date as the terminating point instead of the date the contract with Plaintiff was terminated.

II. DISCUSSION

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See generally Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Get Away Club, Inc. v. Coleman*, 969 F.2d 664 (8th Cir. 1992). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984), *cert. denied*, 470 U.S. 1057 (1985). However, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the . . . pleadings, but . . . by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

A. Enforceabilty [sic] of the Liquidated Damages Provision

Plaintiff contends the liquidated damages provision is unenforceable because it constitutes a penalty. "'The general rule is liquidated damages clauses are valid and enforceable, while penalty clauses are invalid. Liquidated damages are a measure of compensation which, at the time of contracting, the parties agree shall represent damages in case of breach. Penalty clauses, on the other hand, are a punishment for breach.'" *Valentine's, Inc. v. Ngo*, 251 S.W.3d 352, 355 (Mo. Ct. App. 2008) (quoting *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 880-81 (Mo. Ct. App. 1994)). "For a damage clause to be valid as fixing liquidated damages: (1) the amount fixed as damages must be a reasonable forecast for the harm caused by the breach; and (2) the harm must be of a kind difficult to accurately estimate." *Diffley v. Royal Papers, Inc.*, 948 S.W.2d 244, 246 (Mo. Ct. App. 1997); *see also Information Systems & Networks Corp. v. City of Kansas City*, 147 F.3d 711, 714 (8th Cir. 1998).

Here, the parties agreed the liquidated damage provision "represents a good faith estimate on the part of the Contractor and the Owner as to the actual potential damages that the Owner will incur as a result of late Completion of any such specified Building." A111 Contract, § 4.7.1. While not determinative, this declaration should be considered in determining whether the provision is a valid estimation or an invalid penalty. *E.g.*, *Diffley*, 948 S.W.2d at 247. In addition, the clause applies only if the construction

project is not completed on time. This circumstance is important because Missouri courts recognize that "[t]ypically, liquidated damages appear in construction contracts and real estate sales where the damages incurred because . . . a building's completion is delayed or because real estate is not on the market are virtually impossible to calculate." *AAA Uniform & Linen Supply, Inc. v. Barefoot, Inc.*, 81 S.W.3d 133, 138 (Mo. Ct. App. 2002); *see also Sides Construction Co. v. City of Scott City*, 581 S.W.2d 443, 446-47 (Mo. Ct. App. 1979).

The harm to the complex's owner – the lost revenue stream from renting the units – is difficult to predict and calculate, so it is the type of harm that is amenable to liquidated damages. As for the reasonableness of the forecast, Plaintiff has not suggested a comparison to the lost rental value of the property. Plaintiff argues the various increases to the daily rate demonstrate the provision is a penalty for nonperformance, but this is not accurate. The (lost) revenue stream becomes more valuable with the passage of time because an apartment building's occupancy starts low and builds over time, and increasing the daily rate of damage is a valid means of approximating that hard-to-calculate value.

Plaintiff's primary argument can be summarized thusly: the amount of liquidated damages sought is so large that it can only be characterized as a penalty. Plaintiff compares the amount of liquidated damages sought to the total price contemplated in the contract and asks the Court to conclude the liquidated

damages are so high they must be a penalty. This comparison is not viable because the liquidated damages are intended to be an approximation of the harm suffered, not the cost of the building. *Cf. Taos Construction Co. v. Penzel Construction Co.*, 750 S.W.2d 522, 526 (Mo. Ct. App. 1988) ("Taos cites no authority for the proposition that, because the liquidated damages assessed to it constitute almost 66 percent of the amount of the subcontract, the clause is actually a penalty clause. Taos looks to the wrong benchmark; any 'disproportion' must be measured against the amount of harm, not the dollar amount of the subcontract.").

All that was required at the time of contracting was for the liquidated damages to be a reasonable forecast of damages. *E.g.*, *Paragon Group*, 878 S.W.2d at 881; *Gaines v. Jones*, 486 F.2d 39, 46 (8th Cir. 1973). The parties agreed, and the clause appears to be, a reasonable forecast of the anticipated lost revenue from delayed completion. Plaintiff has not suggested to the contrary, so the Court concludes the liquidated damages clause is enforceable.

B. The Number of Buildings

Plaintiff contends Defendants have misconstrued the contract by claiming liquidated damages for four Buildings, while Defendants argue the contract contemplates the four Buildings discussed earlier (North, South, Center, and Garage). The Court concludes the

parties' agreement is unclear on this point and the matter will have to be decided by a jury.

The complex consists of two residential structures. Between those structures is another structure that serves as a combination clubhouse and leasing office. The garage is under all three buildings. The issue is: how many of these structures constitute a "Building" within the meaning of section 4.7? The parties capitalized the terms, indicating it is a term of special meaning in the contract – but the term is not explicitly defined. The closest attempt to define the term appears in section 4.4, where the parties agreed

> Completion ("Completion") of a building (the term building to include residential buildings, the leasing office, clubhouse, parking garage, swimming pool, collectively referred to herein as "Building") shall be deemed to have been achieved on the later to occur of. . . .

This provision is unclear. If all the individually listed items are *collectively* referred to as "Building," does this mean there is only one Building? Does the parenthetical indicating "the term building . . . include[s]" various specified structures mean each structure is a separate Building? If this were the case, one would expect the parenthetical to say each of the items is individually referred to as a Building, not that the collection of items will be so referenced. Moreover, what significance should be attached to the fact the parenthetical does not capitalize "building," as would be expected when referring to a defined term? Finally,

countering the intimation from section 4.4 that there is only one "Building" is the fact that section 4.7 seems to contemplate more than one Building – but section 4.4 does not clearly suggest how many "Buildings" there are.

Section 4.3 also addresses the term "Building" by providing "[t]he Contractor shall achieve Substantial Completion of the first Building not later than 406 days from the date of commencement, subject to adjustments of this Contract Time as provided in the Contract Documents." This suggests there is more than one Building, but does not indicate how many or what they are. This section also declares Plaintiff "shall achieve Substantial Completion of the entire Work not later than 458 days from the date of commencement," but does not indicate what, in addition to the first Building, constitutes the "entire Work:" is it one more Building, several Buildings, or a combination of Buildings and non-Buildings?

Defendant invites the Court to consider a schedule that is an agreed part of the contract as indicating what the "Buildings" are. This schedule, appearing as page number TWCe000209, lists five buildings or structures and for each lists a duration for construction, an early start date, and an early finish date. This may show what the parties intended to be constructed as part of the project, but it does not necessarily demonstrate what they meant when the [sic] utilized the term "Building." Section 4.2.1 provides that the Project Schedule will show, among other things, "commencement and completion dates for each building,

structure and amenity." Assuming the aforementioned schedule is the Project Schedule, section 4.2.1 does not state the Project Schedule identifies "Buildings:" it says the Project Schedule identifies buildings, structures and amenities. Even if "Buildings" and "buildings" are the same, the Project Schedule's inclusion of "structures" and "amenities" means some of the items listed are not Buildings (or buildings), but nothing indicates the difference.

Section 4.8 establishes incentive fees if "the first residential Building" is completed by a particular deadline, but declares an "incentive fee shall not apply to the second residential Building." This could be interpreted as meaning there are some "non-residential Buildings" that nonetheless constitute "Buildings" for purposes of the liquidated damages clause. On the other hand, Section 4.7.1 addresses the harm to Defendants if "Completion of a Building or other improvement" is not accomplished by the scheduled date – but only provides liquidated damages in the event a Building is not completed on time. This suggests there are some things being constructed that are not Buildings.

The parties also make various arguments based on the dictionary definitions of various words and the realities of what was being constructed. These arguments do not clearly augur in favor of one part or the other, and all of them ignore the parties' intent to adopt a particularized, non-ordinary definition of the term. Unfortunately, they have not clearly indicated

the meaning to be employed, and summary judgment cannot be granted on this issue.

C. The Method of Addition

Plaintiff challenges Defendants' cumulative method of calculating the liquidated damages. On this point, the Court agrees with Plaintiff. To restate the issue: the contract provides in pertinent part that

> The following liquidated damages amounts shall accrue separately, on a building-by-building basis:
>
> > $760.00 for each calendar day that Completion of each Building of the Project is delayed more than 21 days after Scheduled Completion Date for such Building.
> >
> > $2,280.00 for each calendar day that Completion of each Building of the Project is delayed more than 45 days after Scheduled Completion Date for such Building.
> >
> > $3,040.00 for each calendar day that Completion of each Building of the Project is delayed more than 75 days after Scheduled Completion Date for such Building.
> >
> > $3,800.00 for each calendar day that Completion of each Building of the Project is delayed more than 105 days after Scheduled Completion Date for such Building.

This natural and logical interpretation suggests that (1) for days twenty-two through forty-five the liquidated damages are $760 per day, per Building, (2) for

days forty-six through seventy-five the damages are $2,280 per day, per Building, (3) for days seventy-six through 105 the damages are $3,040 per day, per Building, and (4) for days beyond 105, the damages are $3,800 per day, per Building. Defendants disagree, contending that the fact that the "amounts shall accrue separately" means each clause applies in a cumulative fashion. This interpretation ignores the more obvious contextual meaning; namely, that the damages are calculated "separately, on a building-by-building basis." Thus, completion of one Building will terminate the accrual of liquidated damages, but only with respect to that Building.

D. Effect of Termination of the Contract

Plaintiff contends Missouri law dictates that the liquidated damages ceased to accrue when it was terminated in January 2007, and offers the Missouri Court of Appeals' decision in *Twin River Construction Co. v. Public Water Dist. No. 6* as "binding" support for the proposition. In *Twin River*, the Missouri Court of Appeals relied on a 1908 decision from the Missouri Supreme Court to reject a claim for "liquidated damages for a 'reasonable' time after abandonment by the contractor or termination by the owner" because "liquidated damages are no longer available" after the contract ends because "the contractor should not be responsible once he loses his ability to control the date of completion." 653 S.W.2d 682, 694 (Mo. Ct. App. 1983) (citing *Moore v. Board of Regents*, 115 S.W. 6 (Mo. 1908)). Plaintiff misstates this Court's obligations

when applying state law, and the Court reaches a different conclusion on the matter.

When there is no statute on point and a state's highest court has not clearly opined on the matter, a federal court is obligated to predict how the state's highest court would resolve the matter. *E.g.*, *Pennsylvania Nat'l Mutual Casualty Ins. Co. v. City of Pine Bluff*, 354 F.3d 945, 952 (8th Cir. 2004); *Maschka v. Genuine Parts Co.*, 122 F.3d 566, 573 (8th Cir. 1997). Decisions of the intermediate and lower courts are an indication of how the state's highest court might rule, but they are not dispositive and, hence, not binding. "Our task . . . is to predict how the Missouri Supreme Court would resolve this issue, not how the intermediate state courts have resolved it." *Bogan v. General Motors Corp.*, 500 F.3d 828, 831 (8th Cir. 2007); *see also Minnesota Supply Co. v. Raymond Corp.*, 472 F.3d 524, 534 (8th Cir. 2006); *Continental Casualty Co. v. Advance Terrazzo & Tile Co.*, 462 F.3d 1002, 1007 (8th Cir. 2006).

The *Twin River* court acknowledged other jurisdictions have reached an opposite conclusion, but felt constrained to follow *Moore*. Closer examination of *Moore* reveals the Missouri Supreme Court did not purport to establish a broad principle of law, but rather was considering only the terms of the contract in the case before it. The case involves facts eerily similar to those in the case at bar. The litigants were parties to a contract that called for the plaintiff to construct a gymnasium for the defendant. The defendant terminated the contract before the building was

completed; the plaintiff alleged the termination was wrongful and sought compensation for the labor and materials expended prior to the termination. The defendant alleged termination was proper because the plaintiff failed to meet certain deadlines established in the contract. The defendant further sought liquidated damages pursuant to a contract provision "providing that in case of the failure of the plaintiffs to complete the building within the time limited in the contract that they should pay the defendants $20 a day for each week day intervening after the completion of the work. . . ." The plaintiff contended the delays were the fault of the defendant and events that were excluded under the contract. *Moore*, 115 S.W. at 6-7. In affirming the trial court's refusal to submit the issue of liquidated damages to the jury, the Missouri Supreme Court analyzed the contract's language and concluded "[t]his penalty of $20 a day was allowed defendants only on condition that plaintiffs completed the contract but failed to finish it in the time specified." *Id*. at 13. Perhaps the then-existent hostility to liquidated damages affected the interpretation, but the fact remains that the issue decided was the meaning of that particular contract and not a broad principle of law.

Having determined the Missouri Supreme Court has not ever (much less recently) addressed the issue, this Court is obligated to divine how it would resolve the issue if presented with the issue today. *Twin River* does not aid this effort because it rests upon an interpretation of *Moore* that the undersigned finds

wanting. The best course is to consider general contract principles. In that regard, the Court observes that prevailing views on the matter have changed over time. Originally, liquidated damages for delayed completion were not permitted if the contractor did not complete the project, but "by the 1940's the trend was to the contrary. This shift in perspective is also apparent when one compares Williston's 1920 edition of *Contracts* with the current, 1961 edition: The early edition flatly stated that liquidated damages could not be recovered if the contract was totally abandoned, while the current edition concludes that the courts are far from uniform on this issue." *Construction Contracting & Management Inc. v. McConnell*, 815 P.2d 1161, 1167 (N.M. 1991). Indeed, *Twin River* acknowledged the different views of other jurisdictions. 653 S.W.2d at 694. As suggested by the New Mexico Supreme Court in *McConnell*, many jurisdictions changed their views in or after the 1950s and now allow liquidated damages even if the contractor does not complete the project. *E.g.*, *Austin Griffith v. Goldberg*, 79 S.E.2d 447, 455 (S.C. 1953) ("[W]e hold that where a the [sic] contractor abandons the work after the time fixed for completion, the clause providing for liquidating damages applies from the time fixed for completion until the work is abandoned, and for a further period of time reasonably necessary to complete the job. Of course, the owner may not increase his recovery either by unreasonable delay in taking over the job, or by failing to complete it with

diligence and dispatch."); *see also City of Boston v. New England Sales & Mfg. Corp.*, 438 N.E.2d 68, 69-70 (Mass. 1982).[3]

"There was a time when the courts were quite strong in their view that almost every contract clause containing a liquidated damage provision was, in fact, a forfeiture provision which equity abhorred, and therefore, nothing but actual damages sustained by the aggrieved party could be recovered in case of contract breach caused by delay past the proposed completion date." *Sides Construction Co.*, 581 S.W.2d at 446-47. In "modern times," this hostility has relaxed and, as it has, so too has the view that terminating the contract terminates the damage caused by the contractor's delay. Damages from the delay do not end simply because the contractor is no longer working on the project, and if one accepts (as the Court has here) that the liquidated damages provision is intended to compensate the owner for that delay, there is no principled reason for terminating that recovery. A contrary holding presents the owner a Hobson's

[3] In some of these cases, the "abandonment" refers to the contractor's unilateral and voluntary abandonment of the project. The Court sees no difference between (1) a contractor who abandons a contract before it is completed and (2) a contractor who is properly discharged by the owner before it is completed – provided, of course, that the project is eventually completed. If the owner abandons the project, liquidated damages cannot be allowed to accumulate in perpetuity, and so are probably not allowed at all. *Cf. Oregon State Highway Comm'n v. DeLong Corp.*, 495 P.2d 1215, 1229-30 (Or. Ct. App. 1972).

choice between (1) terminating the breaching contractor so the project can be finished, but foregoing full recovery for the delay, and (2) waiting until the contractor eventually finishes to preserve recovery of damages. Allowing liquidated damages beyond the termination date presents concerns for the contractor, but those concerns are adequately addressed by requiring the owner to establish that the contractor was properly terminated and by allowing the contractor to argue and prove that the owner was not diligent in completing the project.[4] For these reasons, the Court concludes that if the Missouri Supreme Court were to address the issue today, it would opt in favor of the now-prevailing view.

III. CONCLUSION

Plaintiff's Motion for Summary Judgment is granted in part and denied in part. The Court concludes the liquidated damage provision is not a penalty and is valid and enforceable, and that Defendants may be entitled to liquidated damages from the time completion was due until completion actually occurred, regardless of the fact that Plaintiff was terminated before the project was completed. The Court also concludes Defendants' "cumulative method" of calculating the amounts due is not permitted under

[4] Nothing herein is intended to suggest Defendants properly terminated Plaintiff or that they diligently completed the project after Plaintiff's termination.

the contract. Finally, the Court concludes the contract is ambiguous as to the number of "Buildings" for which liquidated damages may be recovered, and this issue will have to be decided by a jury.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES
DISTRICT COURT

DATE: August 1, 2008

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-3713

The Weitz Company, LLC, an
Iowa Limited Liability Company

Appellant

v.

MacKenzie House, LLC, a
Colorado Limited Liability Company, et al.

Appellees

The Weitz Company, LLC, an
Iowa Limited Liability Company

Appellant

Appeal from U.S. District Court for the
Western District of Missouri – Kansas City
(4:07-cv-00103-ODS)

ORDER

In light of Appellees' Motions for Reconsideration, the Order of February 17, 2012 is hereby vacated.

Having reviewed Appellees' Oppositions to Appellant's Motion to Stay the Mandate and the supersedeas bonds approved by the district court on October 13, 2010, Appellant's motion to stay the mandate pending the filing and disposition of a petition for writ of certiorari in the United States Supreme

Court is granted. The mandate is stayed pending further order of this court.

February 23, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-3713

The Weitz Company, LLC, an
Iowa Limited Liability Company

Appellant

v.

MacKenzie House, LLC, a
Colorado Limited Liability Company, et al.

Appellees

The Weitz Company, LLC, an
Iowa Limited Liability Company

Appellant

Appeal from U.S. District Court for the
Western District of Missouri – Kansas City
(4:07-cv-00103-ODS)

ORDER

The petition for rehearing by the panel is granted. The petition for rehearing en banc is denied as moot.

This court's opinion and judgment, dated December 8, 2011, are hereby vacated.

January 05, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-3713

The Weitz Company, LLC, an
Iowa Limited Liability Company

Appellant

v.

MacKenzie House, LLC, a
Colorado Limited Liability Company, et al.

Appellees

The Weitz Company, LLC, an
Iowa Limited Liability Company

Appellant

Appeal from U.S. District Court for the
Western District of Missouri – Kansas City
(4:07-cv-00103-ODS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 10, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans