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THE CURIOUS CASE OF *CLEVELAND CONSTRUCTION*:  
LAW OF THE CASE, DISCRETIONARY REVIEW, AND THE  
DILEMMA FACING OHIO ATTORNEYS

Jason Snyder\*

I. INTRODUCTION

In *City of Cincinnati v. Cleveland Construction*, a disappointed bidder lost a city contract regarding the expansion of the City Convention Center. Cleveland Construction, Inc. (Cleveland) was the lowest bidder for the contract, but the City of Cincinnati (Cincinnati) awarded the contract to Valley Interior Systems (Valley) on the grounds that Valley's bid was the "lowest and best bid."<sup>1</sup> Unlike Cleveland, Valley had complied with the contract's requirement that 35% of all subcontractors included in a bid be small businesses as part of the City's Small Business Enterprise Program (SBE Program).

Cleveland filed suit alleging that Cincinnati had violated Cincinnati Ohio Municipal Code § 3-321-37(c)(4),<sup>2</sup> which places a cap on the difference between the lowest bid that satisfies the requirements that make it "best," and the actual lowest bid.<sup>3</sup> Thus, according to Cleveland, Cincinnati had violated Cleveland's due process rights because Cincinnati did not have discretion to award the contract to Valley when Cleveland was the lowest bidder. Cleveland also alleged that Cincinnati's SBE Program was a sham cover for impermissible gender-based and race-based quota systems; therefore, Cleveland believed its equal protection rights had been violated.<sup>4</sup>

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1. CINCINNATI, OHIO, MUNICIPAL CODE § 321-37 (2010) (requiring the City to award a contract to the "lowest and best bid" and giving the City discretion in determining what constitutes the "best" bid).

2. Entry Denying Defendant's Motions for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and Injunctive Relief at 5, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. May 13, 2005); CINCINNATI, OHIO, MUNICIPAL CODE § 321-37(c)(4) (2010). As will be discussed in Part III *infra*, this limitation only applies when the factor that determines the "best" bid is compliance with City's Small Business Enterprise Outreach Program.

3. CINCINNATI, OHIO, MUNICIPAL CODE § 3-321-37(c)(4) (requiring the City to award a contract to the lowest bidder if the bidder that would be "lowest and best" is more than 10% or \$50,000 higher than the lowest bid).

4. Entry Denying Defendant's Motions for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and Injunctive Relief at 5, *Cleveland Constr., Inc. v. City of Cincinnati*,

*City of Cincinnati v. Cleveland Construction* involved two interesting and oft-discussed constitutional questions: (1) whether a disappointed bidder for a government contract has a property interest in the contract such that due process is violated if the government awards the contract to another bidder, and (2) whether a government business outreach program directed at minority- or gender-owned businesses triggers strict judicial review. This Casenote will not focus on either of those issues. Instead, it will focus on a more important issue that arose out of the Supreme Court of Ohio's decision in *Cleveland Construction*, namely, how the law of the case doctrine and discretionary review of limited issues by a court of last resort forces attorneys into an unenviable dilemma: either expend precious time and effort arguing issues not accepted for review or risk having those issues decided without argument.

This Casenote will begin, in Part II, by setting out the relevant parts of the Cincinnati Municipal Code, namely, the portions related to Cincinnati's SBE and SBO Programs. Part II will also survey the Ohio case law that lays out the law of the case doctrine. Part III will provide an analysis of *City of Cincinnati v. Cleveland Construction, Inc.*, the lower court decisions that brought it to the Supreme Court of Ohio, and the case's subsequent history. Part IV will then argue that, under the law of the case doctrine, the lower courts correctly found that the Supreme Court of Ohio had decided the case in its entirety, leaving Cleveland with no surviving equal protection claim.

The decision illustrates the dilemma facing attorneys arguing before the court. In other words, when the Supreme Court of Ohio grants discretionary review on limited issues in a case, attorneys must wager space in their brief, time at oral argument, and effort doing research on whether the court will limit its decision to only those issues for which review was granted or not. If an attorney determines that the court will not limit its decision and the court does, then the time and effort is lost. If an attorney bets that the court will limit its decision and the court does not, those claims for which the court did not grant review may be lost. In Part V, this Casenote will conclude by arguing that the solution to this dilemma is for the court to amend

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No. A0402638 (Ohio Ct. Com. Pl. May 13, 2005).

Ohio Supreme Court Rule 3.6 and reject the practice of accepting only limited issues when it grants discretionary review.<sup>5</sup> Therefore, this Casenote begins where the Supreme Court ended, with “judgment [ ] entered for the city.”<sup>6</sup>

## II. STATUTORY PROVISIONS AND RELATED CASES

### A. *The Cincinnati Municipal Code*

*City of Cincinnati v. Cleveland Construction* deals with the interplay of relatively complicated municipal ordinances. Therefore, a brief explanation of Cincinnati’s SBE program and Subcontracting Outreach programs (SO programs) is necessary. Ordinances regarding the procurement of Cincinnati’s contracts are laid out in Title III Cincinnati Municipal Code (CMC) Chapter 321, while the SBE program itself is set out in Title III CMC Chapter 323.

Like all municipal corporations in Ohio, the majority of Cincinnati’s contracts must be awarded through a bidding process.<sup>7</sup> CMC 321-37(a) requires that Cincinnati awards contracts to the “lowest and best bidder.”<sup>8</sup> However, Cincinnati has great discretion in determining what makes a bid “best.” Some of the discretion is self-limiting; CMC 321-37(b), for example, allows Cincinnati to award a contract to a bidder who does not submit the lowest bid but uses recycled materials as long as the bid is less than \$10,000 or 3% higher an otherwise qualified, lower bid.<sup>9</sup> Other factors used to

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5. OHIO S. CT. PRACTICE R. 3.6 (West 2010) (providing that “If the appeal is a discretionary appeal asserting a question of public or great general interest, the Supreme Court will either: (a) [d]ecline jurisdiction to decide the case on the merits; or (b) [g]rant jurisdiction to hear the case on the merits, accepting the appeal, and either order the case or limited issues in the case to be briefed and heard on the merits or enter judgment summarily.”).

6. *City of Cincinnati v. Cleveland Constr., Inc.*, 888 N.E.2d 1068, 1072 (Ohio 2008). This note will use the unconventional short cite of “*City of Cincinnati*” to distinguish the Ohio Supreme Court case from the lower court cases which will use the short cite “*Cleveland Construction*.” This differentiation is for note cases only; in the main text this case will, unless otherwise unclear, refer to the Ohio Supreme Court case as *Cleveland Construction*.

7. OHIO REV. CODE ANN. § 715.011 (West 2010).

8. CINCINNATI, OHIO, MUNICIPAL CODE § 321-37 (2010).

9. *Id.*

determine the best bid have fewer limitations; CMC 321-37(c)(1) and (2) allow Cincinnati to use information regarding a contractor's past performance and payment of a prevailing wage.

Two factors that go into the best bid calculation stem from the City's SBE Program. The SBE Program allows businesses that meet certain criteria for size and income to register as SBEs with Cincinnati, thereby receiving benefits when bidding on Cincinnati contracts.<sup>10</sup> One of these benefits is that SBE status is a factor in determining the best bid; bidders for Cincinnati contracts are required to use SBE subcontractors for a certain percentage of the contract, as determined by the City.<sup>11</sup>

The SBE Program also sets goals for minority- and female-owned business (so-called MBEs and WBEs) participation, which is tracked and reported internally by Cincinnati as part of the SO Program.<sup>12</sup> The purpose of the SO Program is to meet the MBE/WBE goals set out in the SBE Program. Finally, the SBE Program requires the Cincinnati City Manager to promulgate rules for the SO Program.<sup>13</sup>

According to the City Manager's SBE and SO rules, compliance with the SBE and SO Programs are factors that Cincinnati uses to determine the best bid. At the discretion of Cincinnati, a bidder that fails to comply with the SBE program may be disqualified from the award.<sup>14</sup> Cincinnati may also disqualify a bidder for failure to make a good faith effort to comply with the SO Program, subject to the limitation that the lowest bid that does comply with the SO Program is less than \$50,000 or 10% higher than the bid of the disqualified bidder.<sup>15</sup> Thus, a bidder's failure to comply with the SO Program gives the city discretion subject to a price cap limitation, while a bidder's failure to meet the SBE Program gives the city discretion with no limitation.

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10. CINCINNATI, OHIO, MUNICIPAL CODE § 323-1-S (2011).

11. CINCINNATI, OHIO, MUNICIPAL CODE § 323-7 (noting the annual goals for all city contracts is 30%, but individual contracts may vary depending on the availability of SBEs for that type of contract).

12. *Id.* (noting the annual goals for MBEs and WBEs are 30% of all SBEs used in construction contracts).

13. CINCINNATI, OHIO, MUNICIPAL CODE § 323-31.

14. CINCINNATI, OHIO, MUNICIPAL CODE § 321-37(c)(4).

15. *Id.*

*B. The Law of the Case Doctrine*

The law of the case doctrine “provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.”<sup>16</sup> While the doctrine is not “a binding rule of substantive law,” it is “necessary to ensure consistency of results in a case, to avoid endless litigation by settling issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.”<sup>17</sup> Therefore, “Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.”<sup>18</sup>

Most commonly, the doctrine applies when an appellate court remands a case for further proceedings. On remand, the trial court cannot exceed the mandate of the reviewing court; that is, it may only consider the issues that the appellate court remanded and those that the trial court did not decide prior to the appeal. Any issues decided by the trial court before the appeal and not the subject of the appeal are outside the mandate and may not be reconsidered.

The Supreme Court of Ohio dealt with such a situation in *Nolan v. Nolan*.<sup>19</sup> In *Nolan*, a wife brought a divorce action against her husband. At trial, all issues were decided, including a division of the family home, and an entry of final decree.<sup>20</sup> Both parties appealed, and the court remanded the case for further proceedings to decide which party actually occupied the family home.<sup>21</sup> On remand, the trial court restructured the entire agreement and made no findings as to occupancy.<sup>22</sup> The court of appeals affirmed this new decree by the trial court. The Supreme Court of Ohio reversed, however, on the grounds that the trial court exceeded the mandate given by the court

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16. *Nolan v. Nolan*, 462 N.E.2d 410, 412–413 (Ohio 1984).

17. *Id.*

18. *State ex rel. Sharif v. McDonnell*, 741 N.E.2d 127, 129 (Ohio 2001) (per curiam).

19. *Nolan*, 462 N.E.2d 410.

20. *Id.*

21. *Id.*

22. *Id.* at 413.

of appeals because the remand order was only for findings on occupancy.<sup>23</sup> According to the court, “[P]ermit[ting] the trial court to so markedly deviate from the basis of the remand would defeat the aforementioned purposes of the doctrine of the law of the case, particularly that of consistency of result.”<sup>24</sup>

The doctrine, however, also applies to subsequent appeals. Thus, an appellate court cannot reconsider an issue already decided by an equivalent court. For example, early in a lawsuit against a municipality, the trial court will decide if the government is entitled to sovereign immunity. If the trial court rules that sovereign immunity does not apply and the city appeals the ruling, the court of appeals settles the issue. If the appellate court affirms the trial court’s decision, the parties proceed to trial, and the plaintiff wins, the court of appeals cannot reconsider the issue of sovereign immunity when the municipality appeals the final judgment.<sup>25</sup>

The Supreme Court of Ohio dealt with a similar issue in *State ex rel. Sharif v. McDonnell*.<sup>26</sup> In *Sharif*, Judge McDonnell refused to issue findings of fact and conclusions of law because Sharif had untimely filed for post-conviction relief.<sup>27</sup> Sharif appealed the dismissal, and the court of appeals dismissed pursuant to Ohio Revised Code § 2953.21 and ordered “once the trial court issues findings of fact and conclusions of law, appellant may file an appeal.”<sup>28</sup> Sharif again requested Judge McDonnell issue findings of fact and conclusions of law, and again Judge McDonnell refused.<sup>29</sup> Sharif then filed a petition for a writ of mandamus with the court of appeals to compel Judge McDonnell to issue the findings.<sup>30</sup> The same panel of the court of appeals granted the writ and affirmed “that R.C. 2953.21 did not appear to require Judge McDonnell to issue

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23. *Id.* at 413–14.

24. *Id.* at 414.

25. Note, the doctrine only applies to an equivalent court and does not apply to higher courts. Thus, a court of appeals sitting en banc or a court of last resort would not be bound by the law of the case doctrine.

26. *State ex rel. Sharif v. McDonnell*, 741 N.E.2d 127 (Ohio 2001) (per curiam).

27. *Id.* at 129.

28. *Id.* at 128.

29. *Id.*

30. *Id.*

findings of fact and conclusions of [sic] law because Sharif had not timely filed his petition. The court, nevertheless, ruled that the law-of-the-case doctrine required Judge McDonnell to issue these findings and conclusions.”<sup>31</sup> In affirming the court of appeals, the court, quoting *Nolan*, held “a trial court must ‘follow the mandate, *whether correct or incorrect*, of the Court of Appeals.’”<sup>32</sup>

Further, according to the law of the case doctrine, if the Supreme Court of Ohio does not expressly issue a remand order, then there is no remand order.<sup>33</sup> In *Lewis*, the Court noted:

We crafted our language in the [] mandate to order that the trial court carry this judgment into execution. We did not remand the cause for further proceedings. See R.C. 2505.39 (“A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings” [emphasis added]). In fact, if we had intended a remand for further proceedings in this litigation, we would have expressly provided for that action.<sup>34</sup>

Therefore, if the Supreme Court does not expressly issue a remand order, the mandate to the trial court is to enter judgment as ordered, even if the court was incorrect in not issuing a remand order.

Ohio Supreme Court Practice Rule 3.6 relates to the law of the case doctrine. According to Rule 3.6, in cases of great public interest or concern, the court may accept a whole case for review, accept limited issues in a case for review, or enter judgment summarily.<sup>35</sup>

### III. *CITY OF CINCINNATI V. CLEVELAND CONSTRUCTION, INC.*

In December 2003, the City of Cincinnati (Cincinnati) issued an invitation to bid on various contracts for construction projects as part of the Cincinnati Convention Center. For the drywall contract, the city required all bids to have 35% of the subcontracts awarded to

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31. *Id.*

32. *State ex rel. Sharif v. McDonnell*, 741 N.E.2d 127, 129 (Ohio 2001) (per curiam).

33. *State ex rel. State v. Lewis*, 789 N.E.2d 195, 201 (Ohio 2003).

34. *Id.*

35. OHIO S. CT. PRACTICE R. 3.6.



businesses registered under the city's SBE Program; thus, the contract would go to the lowest bid that met the SBE requirement, (i.e. the "lowest and best bid.")<sup>36</sup> As part of the SBE Program, the city included information on Cincinnati's SO Program. The SO Program informs contractors of Cincinnati's goals for minority- and woman-owned subcontractors (so-called MBEs and WBEs), estimates the percentage of MBEs and WBEs that could participate in the contract, and requires contractors to make a good faith effort to reach these estimates as part of the SBE Program or risk having their bid rejected.<sup>37</sup> While, according to the SO Program rules, the city has discretion to reject bids, the city maintained that it has never considered a contractor's failure to meet the participation goals of the SO Program when rejecting a contractor's bid as non-compliant under the SBE Program.<sup>38</sup> Further, CMC 321-37 provides that if the primary factor in determining the lowest and best bid on a city contract is the SO requirements, then the city may impose a \$50,000 or 15% higher price cap and award the contract to the next qualified bid.<sup>39</sup> The Convention Center drywall contract for subcontractors estimated the availability of 13.09% minority and 1.05% female.<sup>40</sup>

Initially, Cincinnati received three bids for the drywall contract, a bid from Valley Interior Systems with 34% SBE participation that

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36. CINCINNATI, OHIO, MUNICIPAL CODE § 321-37.

37. Entry Denying Defendant's Motions for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and Injunctive Relief at 5, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. May 13, 2005).

38. CINCINNATI, OHIO, MUNICIPAL CODE § 321-37 ("If . . . evaluation determines that a bidder has failed to achieve levels of minority and women business enterprise participation as might be reasonable on the basis of objective data regarding availability and capacity of such businesses, the bidder shall be subject to an inquiry by the Office of Contract Compliance"); See Plaintiff's Verified Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Damages, Jury Demand Endorsed Hereon, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. March 30, 2004) 2004 WL 3686803 (detailing City's response to inquiries about the inclusion of percentages for the availability of MBEs and WBEs for the drywall contract by arguing, "[T]he City of Cincinnati's Disparity Study found that Minorities and Females were underutilized in city contracting projects . . . . The minority and female business owner would also have to be certified with the City as a Small Business Enterprise. If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive. However, we expect the utilization of SBEs to be reflective of the availability estimates.").

39. CINCINNATI, OHIO, MUNICIPAL CODE § 321-37.

40. Plaintiff's Amended Complaint, *supra* note 38, at Exhibit B.

exceeded SO availability estimates, a bid from Cleveland Construction, Inc. with 10% SBE participation that failed to meet the SO availability estimates, and a bid by Kite, Inc. with 0% SBE participation that failed to meet the SO availability estimates.<sup>41</sup> Because none of the bids met the 35% SBE requirement, all the bids were rejected and the contract was rebid.<sup>42</sup>

Valley, Cleveland Construction, and Kite all submitted new bids. Valley's second bid of \$10,135,022 met the 35% SBE requirement while Cleveland Construction's second bid of \$8,889,000 did not. Kite's second bid met the SBE requirement but was higher than both Valley's and Cleveland Construction's bids.<sup>43</sup>

After the second round of bidding, Cincinnati awarded the contract to Valley. Cleveland Construction subsequently filed suit alleging that the City's SO Program violated the Equal Protection Clause of the Fourteenth Amendment. Cleveland Construction further alleged that Cincinnati had impermissibly deprived Cleveland Construction of its constitutionally protected property interest in the contract by not enforcing CMC 321-37's price cap limitation, thereby violating the Due Process Clause of the Fourteenth Amendment.<sup>44</sup>

Cleveland moved for a temporary restraining order seeking to prevent Valley from performing the drywall work, but the trial court denied the motion. Cincinnati then attempted to remove the case to federal court, but ultimately, the case was remanded back to state court. Cleveland Construction elected to wait until after discovery to pursue a preliminary injunction.<sup>45</sup>

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41. Plaintiff's Verified Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Damages, Jury Demand Endorsed Hereon, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. March 30, 2004) 2004 WL 3686803.

42. CINCINNATI, OHIO, MUNICIPAL CODE § 321-43 (providing the City discretion to "reject any bid for any reason or all bids for no reason"); CINCINNATI, OHIO, MUNICIPAL CODE § 321-37 (explaining that contract should be awarded to "lowest and best bid").

43. *City of Cincinnati v. Cleveland Constr., Inc.*, 888 N.E.2d 1068, 1069 (Ohio 2008).

44. Entry at 1, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. July 13, 2005) 2005 WL 4927190 (describing how Cleveland sought lost profits on the contract under 42 U.S.C. § 1983, declarative judgment that the SO Program was unconstitutional, injunctive relief to prohibit the city from using the SO Program insofar as the Program used racial and gender classifications, injunctive relief to prevent Valley from performing the contract, and attorney's fees and court costs).

45. Entry Denying Defendant's Motions for Summary Judgment and Denying Plaintiff's Motion

The trial court next entered a directed verdict for Cincinnati on the issue of lost profits on the due process claim. The court also dismissed the jury and had remaining claims tried by the bench.<sup>46</sup> The trial court ruled in favor of Cleveland Construction on its due process claims, holding that Cincinnati had abused its discretion because it had awarded the bid to Valley even though Valley's bid was more than \$50,000 higher than Cleveland's.<sup>47</sup> The trial court also entered declaratory judgment against the city's SO Program for violating the Equal Protection Clause of the Fourteenth Amendment and enjoined Cincinnati from using the SO Program. The court, however, held that Cleveland Construction was not entitled to damages on its equal protection claim because Cincinnati rejected Cleveland Construction's bid for failure to meet Cincinnati's permissible SBE requirement and not for failure to meet the city's unconstitutional SO requirement.<sup>48</sup> Finally, the court refused to enjoin Valley from performing under the contract.<sup>49</sup> The court then awarded Cleveland Construction \$433,290 in attorney's fees.<sup>50</sup>

Both parties appealed. Cincinnati argued that the trial court had erred on several grounds, including: (1) finding that Cincinnati violated Cleveland Construction's due process rights because the trial court had improperly applied CMC 321-37, (2) finding the SO program created impermissible race- and gender-based classifications in violation of the Equal Protection Clause, and (3) awarding attorney's fees. Cleveland, on the other hand, argued that the trial court had erred by entering a directed verdict for Cincinnati on the issues of (1) lost profits, (2) refusing to declare the Valley's contract

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for Partial Summary Judgment and Injunctive Relief at 5, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. May 13, 2005).

46. Entry at 1, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. July 13, 2005) 2005 WL 4927190 (ruling that Cleveland Construction was not entitled to lost profits on its Due Process claim following the Ohio Supreme Court's decision in *Cementech v. Fairlawn*, 849 N.E.2d 24 (Ohio 2006), in which the court held that a disappointed bidder was not entitled to recover lost profits when a municipality violated the bidder's due process rights in not awarding the contract).

47. Entry, *supra* note 46, at 5.

48. *Id.* at 9 (describing how the City maintained that the SO Program was not subject to strict scrutiny but stipulated that the SO Program would not survive if it were subject to strict scrutiny).

49. *Id.*

50. *Id.* at 13

void, and denying its motion for a new trial.<sup>51</sup> The First Circuit Court of Appeals reversed the trial court's directed verdict on the issue of lost profits for the due process claims and the denial of a new trial, affirmed the rest of the trial court's decision, and remanded the case for a new trial on lost profits.<sup>52</sup>

Cincinnati appealed to the Supreme Court of Ohio with five propositions of law: (1) that a disappointed bidder does not have a constitutionally protected property interest in a public contract; (2) that to prove deprivation of procedural due process rights, a disappointed bidder must establish that the government entity did not provide sufficient notice and opportunity to be heard; (3) that a disappointed bidder "cannot recover lost profits in a 42 U.S.C. 1983 action for deprivation of procedural due process";<sup>53</sup> (4) that a plaintiff does not have standing to seek an injunction against the operation of a municipal corporation unless the plaintiff pleads imminent injury in fact; and (5) that a subcontracting outreach program is not impermissibly race-based or gender-based when all bidders have an equal opportunity to comply with the subcontracting outreach program and the program does not create a preference. The court granted discretionary review of propositions (1) and (3).

The court never mentioned the city's SO Program or that CMC 321-27's price cap limitation was meant only to apply to the SO Program. Instead, the court simply held that because the Cincinnati Municipal Code and the procurement forms all indicate that Cincinnati has wide discretion in awarding all contracts, the city did not abuse its discretion in awarding the contract to Valley, and therefore, Cleveland Construction did not have the constitutionally protected property interest necessary to prevail on a due process claim.<sup>54</sup> Since Cleveland did not have a protected property interest, the court chose not to decide whether a disappointed bidder was

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51. *Cleveland Constr., Inc. v. City of Cincinnati*, 864 N.E.2d 116, 123 (Ohio Ct. App. 2006).

52. *Id.* at 133–34 (explaining that the trial court erred on the issue of lost profits because the Ohio Supreme Court's holding in *Cementech* applied only to state law claims).

53. Memorandum in Support of Jurisdiction by Defendant–Appellant City of Cincinnati at 7–14, *City of Cincinnati v. Cleveland Constr., Inc.*, No. 07-0114 (Ohio July 16, 2007) 2007 OH S. Ct. Briefs LEXIS 268.

54. *City of Cincinnati v. Cleveland Constr., Inc.*, 888 N.E.2d 1068, 1072 (Ohio 2008).

entitled to lost profits in a § 1983 action. According to the court, “[t]he judgment of the court of appeals is therefore reversed, and *judgment is entered for the city*.”<sup>55</sup> Cleveland Construction recognized that the Supreme Court of Ohio had not issued a remand order and moved for reconsideration and clarification.<sup>56</sup> The motion was denied.<sup>57</sup>

Cleveland returned to the trial court to set a trial date for lost profits on its equal protection claim, which Cleveland argued survived the court’s decision since the court did not accept the issue for review, and the issue had last been remanded by the court of appeals for a new trial.<sup>58</sup> The court denied the motion and entered judgment for Cincinnati “[c]onsistent with the Supreme Court of Ohio’s decision.”<sup>59</sup>

Cleveland appealed to the First Circuit Court of Appeals. Prior to the hearing, however, Cleveland sought to have Judge Mallory removed from the case because his brother, Mark Mallory, is the Mayor of Cincinnati.<sup>60</sup> Justice Pfeifer rejected Cleveland’s Affidavit of Disqualification, but in doing so he noted:

[T]he apparent confusion among the parties regarding what matters are at issue before Judge Mallory and the other judges on the appellate panel. Judge Mallory and the attorneys for Cleveland Construction and the City of Cincinnati disagree as to the exact issues that remain for the court of appeals to resolve. This confusion stems, no doubt, from the various ruling of the trial court, the court of appeals in the first appeal, and this Court [sic]. Nevertheless, although it is not entirely clear whether Cleveland Construction’s equal protection claim is still alive or was extinguished by these prior rulings, that question is not dispositive for

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55. *Id.* at 288 (emphasis added).

56. OHIO APP. R. 26 (2010).

57. Reconsideration Entry, *Cleveland Constr., Inc. v. City of Cincinnati*, No. 2007-0114 (Ohio Aug. 8, 2008).

58. *Cleveland Constr., Inc. v. City of Cincinnati*, 864 N.E.2d 116, 122-23 (Ohio Ct. App. 2006).

59. Entry Denying Plaintiff’s Motion to Set a Trial Date and Entering Judgment for Defendant City of Cincinnati, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. May 18, 2009) (denying motion for new trial).

60. Judgment Entry at 2, *Cleveland Constr., Inc. v. City of Cincinnati*, No. C-0900419; 10-AP-012 (Ohio April 21, 2010) (denying the disqualification of Judge Mallory).

purposes of this affidavit-of-disqualification proceeding.<sup>61</sup>

Thus, the court of appeals was set for its second hearing on *Cleveland Construction*.

The court of appeals noted that Cleveland had argued in its motion for reconsideration that the Supreme Court of Ohio's decision appeared to enter judgment for Cincinnati on all claims, but that the equal protection claim had not been accepted for review. Therefore, the court of appeals affirmed the judgment of the trial court and entered judgment for Cincinnati.<sup>62</sup> Cleveland Construction appealed to the Supreme Court of Ohio, but the court denied certiorari 5–2.<sup>63</sup>

#### IV. DISCUSSION

##### *A. Dude, Where's My Claim?*

Cleveland's equal protection claim effectively disappeared. After the first appeal, Cleveland was awaiting a trial on damages for its equal protection and due process claims. When the Supreme Court of Ohio granted certiorari, Cleveland could have expected, at worst, to lose its due process claim but still sit for trial on the equal protection claim. Yet, despite never arguing the merits of the equal protection claim in front of the court, judgment was entered against Cleveland on that claim.

There is no doubt that the second decisions of the trial court and the appeals court were both correct. Under the law of the case doctrine, lower courts do not have the authority to exceed the mandate of a superior court, even if the decision is wrong.<sup>64</sup> At the same time, a remand order is only issued by the Supreme Court of Ohio when it does so expressly.<sup>65</sup> Therefore, when the court orders "judgment for the city," and does not issue a remand order, then the

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61. *Id.* at 4.

62. Judgment Entry, *Cleveland Constr., Inc. v. City of Cincinnati*, No. C-090419 (Ohio Ct. App. April 30, 2010).

63. Entry, *Cleveland Constr., Inc. v. City of Cincinnati*, No. 2010-1019 (Ohio Sept. 29, 2010) (declining jurisdiction).

64. State *ex rel.* Sharif v. McDonnell, 741 N.E.2d 127, 128 (Ohio 2001) (per curiam).

65. State *ex rel.* State v. Lewis, 789 N.E.2d 195, 201–02 (Ohio 2003).

trial court is bound to enter judgment and no more. Similarly, the court of appeals is bound by the Court's mandate and can do nothing to reverse the decision of the trial court.

Of course, the Supreme Court of Ohio did not exceed its authority by entering judgment for Cincinnati. According to Ohio Supreme Court Practice Rule 3.6, when the court accepts "a case public or great general interest" for review, the court may "order the case or limited issues in the case to be briefed and heard on the merits or enter judgment summarily."<sup>66</sup> Rule 3.6 does not require the court to hear any issue in a case before granting judgment.<sup>67</sup> Therefore, the court can, at its prerogative, enter judgment without hearing an issue. Thus, the lower courts did not make Cleveland's equal protection claims disappear.

### *B. Poorly Conceived Decision*

If the lower courts were not Harry Houdini, then the Supreme Court must have been. But was the trick a sleight of hand or a slip of the tongue? In other words, did the court perceive an equal protection claim that it saw as frivolous and make it disappear, or did the court intend only to reiterate a recent holding<sup>68</sup> but inadvertently banish Cleveland's equal protection claim to the nether world along with the due process claim?

Several factors point toward the court using an intentional sleight of hand. First, the court was aware of the equal protection claim; one of Cincinnati's propositions of law, albeit one not accepted for review, dealt with equal protection issues. Second, Cleveland asked the court for clarification to prevent losing its equal protection argument. Finally, if the court inadvertently destroyed Cleveland's equal protection claim, it could have granted review a second time

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66. OHIO S. CT. PRACTICE R. 3.6 (emphasis added).

67. See *supra* note 5 and accompanying text (providing full text of relevant provisions). Note that the Court may both decline jurisdiction or "[g]rant jurisdiction to hear the case on the merits, accepting the appeal, and . . . enter judgment summarily." *Id.* (emphasis added). In other words, once the Court has granted jurisdiction it may "either order the case or limited issues in the case to be briefed and heard on the merits or," instead of ordering the case to be briefed and heard, enter judgment. *Id.* (emphasis added).

68. *Cementech, Inc. v. Fairlawn*, 849 N.E.2d 24, 27–28 (Ohio 2006).

and explicitly remanded the case for proceedings on the equal protection claim.<sup>69</sup>

On the other hand, the opinion itself gives no indication that the court considered the equal protection claim. For instance, the court did not address relevant Cincinnati Municipal Code provision CMC 321-37(c)(4), which provides:

In the event that the selection of the lowest and best bidder is based primarily upon the [SO requirements], the contract award may be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars (\$50,000.00), whichever is lower.<sup>70</sup>

The court conflated the SBE and SO program, however, and held that the price cap limitation applies to the SBE Program.<sup>71</sup> In fact, the court never discussed the difference between the SBE and SO Programs. Instead, it interpreted CMC 321-37(c)(4) as a discretionary price cap. According to the court, “[t]he [interpretation], advanced by the city, is that Cincinnati Municipal Code 321-37(c)(4) is merely a limitation that the city may impose upon a contract at its discretion (‘the contract award may be made subject to’ a cap).”<sup>72</sup>

Second, the court never mentioned Cleveland’s equal protection claim. It simply denied review of that claim and never mentioned it again. Finally, Justice Pfeifer recognized the confusion in his judgment entry on Cleveland’s Affidavit for Disqualification. As noted above, Justice Pfeifer understood the confusion as stemming from the multitude of decisions from various courts. According to Justice Pfeifer, Cleveland’s Motion to Set Trial Date for Issues Remanded for New Trial “is premised on its belief that there remains

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69. An astute observer may realize that, had the Court granted certiorari a second time, the issue before the Court would have been whether the trial court improperly refused to set a date for trial on the equal protection claim, and so it would be improper for the Court to decide whether the equal protection claim still existed. A more astute observer would realize that, under *Cleveland Construction*, the issue before the Court no longer limits what issues the Court decides.

70. CINCINNATI, OHIO, MUNICIPAL CODE § 321-37. The quote should read, “factors 3 or 4” in place of [SO Program]. Factor 3 is unrelated; it involves non-discrimination practices in hiring. Factor 4 is the SO Program, not the SBE Program.

71. *City of Cincinnati v. Cleveland Constr., Inc.*, 888 N.E.2d 1068, 1071 (Ohio 2008).

72. *Id.* at 1071–72.



a viable damages claim stemming from the trial court's finding that the race- and gender-based classifications in Cincinnati's SBE Program violated equal protection."<sup>73</sup>

However, given the subsequent procedure, it is best to assume that the court intentionally killed Cleveland's claim. While the case's history provides strong arguments on both sides, it would have been intellectually dishonest of the court to deny Cleveland's motion for clarification or deny certiorari a second time if the court had inadvertently destroyed the equal protection claim. It is better to believe that the court intentionally entered judgment for Cincinnati on all claims, rather than believe the court attempted to cover up a mistake by not clarifying its decision.

### *C. They're Making Another Sequel?*

The Supreme Court of Ohio recently denied certiorari on Cleveland's second appeal.<sup>74</sup> But that was not the end of Cleveland's possible claims. Originally, the trial court awarded Cleveland \$433,000 in attorney's fees. The court of appeals affirmed the award.<sup>75</sup> Upon first review, the Supreme Court of Ohio did not accept this issue.

As already discussed, the trial court denied Cleveland's Motion to Set a Date for Trial, the only issue before the court at the time. Similarly, in Cleveland's second appeal, the only issue before the First District Court of Appeals was whether the trial court improperly denied Cleveland's motion. Thus, the courts have awarded Cleveland attorney's fees; and that award has never been vacated or reversed. Cleveland could legitimately return to the trial court and demand its award. It is unlikely, however, that Cleveland lost its equal protection claim, but that somehow it won the award of

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73. Judgment Entry at 4, *Cleveland Constr., Inc. v. City of Cincinnati*, No. C-0900419; 10-AP-012 (Ohio April 21, 2010). Note that "SBE Program" should read "SO Program."

74. Entry, *Cleveland Constr., Inc. v. City of Cincinnati*, No. 2010-1019 (Ohio Sept. 29, 2010) (denying jurisdiction).

75. *Cleveland Constr., Inc. v. City of Cincinnati*, 864 N.E.2d 116, 133 (Ohio Ct. App. 2006) ("[W]e reverse the trial court's entry of a directed verdict . . . . We remand the cause for new trial on the issue of liability and damages . . . . In all other respects, the court's judgment is affirmed.").

attorney's fees. Still, just because Cleveland will not retain the award does not mean that Cleveland's claim to the award is illegitimate.

*D Consistent Litigator: The Dilemma Apparent*

Returning to the discussion in Part IV.B, a reading of *Cleveland Construction* consistent with the court intentionally destroying Cleveland's equal protection claim and its award of attorney's fees is only possible under the following assumptions: (1) the court intended to rule on Cleveland's equal protection claim, even though it did not do so explicitly and did not accept the proposition of law for review and (2) Justice Pfeiffer was being coy when he said that the existence of the equal protection claim was the premise behind Cleveland's Motion to Set a Trial Date.<sup>76</sup>

Just because the court did not accept Cleveland's equal protection claim for review does not mean that Cleveland and Cincinnati failed argue the point. In fact, both parties argued the equal protection issue in their merit briefs. In its merit brief, Cleveland claimed:

[T]he undisputed facts establish that (1) the City based the drywall contract award on Valley's compliance with the subcontracting outreach percentages, and (2) Valley's bid exceeded the monetary cap of CMC 321-37 [sic] by twenty-four times. The City awarded the drywall contract to Valley, rather than Cleveland, and ignored the fact that it had no discretion under CMC 321-37 [sic], so it could achieve race and gender-conscious subcontracting percentage goals that, at the time, were part of the City's SBE Program. Both the trial court and the First District Court of Appeals determined that these goals violated the equal protection clause of the U.S. Constitution's 14th Amendment by encouraging and pressuring all bidders, including Cleveland, to discriminate based on race and gender in order to obtain the SBE Program's subcontracting outreach percentages.<sup>77</sup>

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76. Alternatively, Justice Pfeiffer could have been as confused as Cleveland, since he dissented in *City of Cincinnati*.

77. Merit Brief for Appellee-Respondent Cleveland Construction, Inc. at \*3-\*4, *City of Cincinnati v. Cleveland Constr., Inc.*, No. 07-0114 (Ohio Sept. 4, 2007) 2007 OH S. Ct. Briefs LEXIS 405 (alterations in original).

Cleveland continued later, “[T]he equal protection violations were also obvious at that point because the City’s program document, the SBE Rules and Guidelines, as well as the forms from the rules and Guidelines incorporated within the bid documents, stated racial goals and preferences on their face.”<sup>78</sup> Even though the court did not accept the equal protection issue for review, Cleveland at least presented the issue.

Further, both parties included the opinions of the trial court and the court of appeals as appendices. The trial court had found that, while Cincinnati’s SO Program violated the Equal Protection Clause, Cleveland did not lose the contract because of the unconstitutional SO Program, but rather because of the constitutional SBE Program. In other words, the violation of Cleveland’s equal protection rights did not damage Cleveland in any way. According to the trial court, “Cleveland Construction failed to establish that Cincinnati’s race and sex based [sic] classification (as opposed to Cincinnati’s small business preference) resulted in the loss of the contract at issue.”<sup>79</sup> The court of appeals reversed, but in doing so, the court never actually discussed the issue. Instead, the court noted that Cleveland had appealed the trial court’s finding on causation during a discussion of the directed verdict on the due process claim.<sup>80</sup> Rather cryptically, the court of appeals sustained the assignment of error without even noting that it related to the equal protection, and not the due process, claim.

Thus, the court may have understood Cleveland’s equal protection claim was ultimately doomed. No remand order would have changed the fact that Cincinnati awarded the contract to Valley because Valley met the permissible SBE requirements and Cleveland did not. Cleveland could not present evidence that Cincinnati never used the SO Guidelines, let alone present evidence that Cincinnati awarded the contract to Valley based on the SO Guidelines. Consistent with all the material in the record and Cleveland’s presentation of the

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78. *Id.* at \*29; *see also id.* at \*33 n.111 (citing to the equal protection claim in *W. H. Scott Construction Co., Inc. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999)).

79. Final Judgment Entry, *Cleveland Constr., Inc. v. City of Cincinnati*, No. A0402638 (Ohio Ct. Com. Pl. Aug. 19, 2005).

80. *Cleveland Constr.*, 864 N.E.2d at 130–31.

equal protection issue in its merit brief, the court may have decided there was no need to remand the issue when Cleveland had no chance of success.

Yet, the consistent reading makes the dilemma facing attorneys more apparent. That is, attorneys have two options when the court accepts limited issues for discretionary review: (1) either argue the issues not accepted for review or (2) argue only the issues accepted for review. Thus, the choice creates four outcomes an attorney can face in front of the Ohio Supreme Court. If the attorney argues the unaccepted issues and the court does not decide the issues, then the attorney has wasted time and effort preparing the arguments.<sup>81</sup> If the attorney argues the unaccepted issues and the court decides the issues, then the attorney may be in position to win the case, but, assuming both parties' argue unaccepted issues, there is an equal chance they will lose. On the other hand, if the attorney does not argue unaccepted issues, and the court decides the issues, then the party is at risk of having the issue decided against them without ever giving an argument.<sup>82</sup> At the same time, if the attorney acts reasonably and does not argue unaccepted issues, and the court does not decide the unaccepted issues, then the attorney is merely held even—the party neither gains nor loses anything. Undoubtedly, this is the outcome in the vast majority of cases, but it may not always be the safest bet.

Cleveland had a potential claim that was remanded by the court of appeals and not accepted for review by the court. Comparably, the attorney's fees are a nominal amount considering Cleveland would, in effect, be making the exact argument it had already made before the court of appeals. The cost of protecting against having the issue adversely decided without argument is well worth it, even though, in this case, it was to no avail for Cleveland.<sup>83</sup>

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81. And, in some cases, clients may be charged additional fees.

82. Alternately, the issue could be decided in their favor.

83. I grant, of course, that Cleveland hardly argued the issue before the court. At most Cleveland presented the issue to the court. Nonetheless, the author believes Cleveland would agree the cost of attorney's fees incurred while arguing the equal protection issue before the Court would have been well worth it, considering the City would have had to pay these costs had Cleveland ultimately prevailed.

*E. The Solution*

The dilemma is not caused by the doctrine of law of the case; the real culprit is granting discretionary review on limited issues in a case. In other words, Ohio Supreme Court Practice Rule 3.6(B)(3) is the problem. The Rule provides:

[I]f the appeal is a discretionary appeal asserting a question of public or great general interest, the Supreme court will either: (a) Decline jurisdiction to decide the case on the merits; or (b) Grant jurisdiction to hear the case on the merits, accepting the appeal, and either order the case or limited issues in the case to be briefed and heard on the merits or enter judgment summarily.<sup>84</sup>

The problem is with the practice of granting review of limited issues in a case, not the doctrine of the law of the case.

This Casenote is not the first time that the practice of accepting limited issues has been criticized. In *Meyer v. United Parcel Service*, Justice Pfeifer said:

I disagree with this Court's [sic] practice of picking and choosing, within a case, the issues we are willing to review. If a case is worthy of review, in the interests of providing justice to the parties and because, until we see the entire record, it is exceedingly difficult to ascertain the interplay of various issues, all appealed issues should be before us.<sup>85</sup>

More recently, Justice Pfeifer claimed the Court had done away with limited reviews. According to Justice Pfeifer, "[a]pparently a majority of this Court [sic] now agrees with my dissent in *Meyer* because, even though this court accepted jurisdiction over [only one proposition of law], the majority opinion also addresses [the other unaccepted propositions of law]."<sup>86</sup>

But the process is not complete. Even if the Justice Pfeifer is correct and the court no longer accepts limited issues for appeal, the court still claims it does and acts accordingly. Justice Pfeifer

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84. OHIO S. CT. PRAC. R. 3.6.

85. *Meyer v. United Parcel Serv., Inc.*, 909 N.E.2d 106, 118–19 (Ohio 2009) (Pfeiffer, J., dissenting) (alteration in original).

86. *State ex rel. Associated Builders & Contrs. of Cent. Ohio v. Franklin Cnty. Bd. of Comm'rs*, 926 N.E.2d 600, 610–11 (Ohio 2010) (Pfeiffer, J., dissenting).

continued:

I do not disagree with that approach; in fact, I applaud it. But wouldn't it be better for parties and their attorneys if this Court [sic] accepted jurisdiction without limitation? The current practice is confusing. Attorneys don't know whether they should argue issues that aren't before us; based on this case, they should. Attorneys also don't know whether they can safely ignore issues that we have told them are not before us; based on this case, they shouldn't.<sup>87</sup>

Had Justice Pfeifer's warning come before the court accepted Cincinnati's appeal, Cleveland may have more fully argued its equal protection claim, perhaps resulting in a judgment entered in its favor.<sup>88</sup> The Supreme Court of Ohio recognizes the dilemma; the question is whether the court will do anything to address it.

#### V. CONCLUSION

In *City of Cincinnati v. Cleveland Construction*, the Supreme Court of Ohio exercised its discretion under Rule 3.6 and accepted only Cleveland's due process claim. However, the court also exercised its discretion under Rule 3.6 to enter judgment summarily. In doing so, the law of the case doctrine dictates that the court destroyed Cleveland's equal protection claim without having ever heard arguments on the issue. The practice of accepting only limited issues for discretionary review but then entering judgment on an entire case creates a dilemma for attorneys: either argue unaccepted issues or risk losing them. The solution to the dilemma is simple—the Supreme Court of Ohio should amend Ohio Supreme Court Practice Rule 3.6 to only allow for the acceptance of an entire case for review.

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87. *Id.* (alteration in original).

88. Because the City had already stipulated that the SO Program would not survive strict scrutiny, if the Court had held that the SO Program was subject to strict scrutiny, there would have been no issues of fact or law regarding the equal protection claim left to decide.