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# 1997 Survey of Rhode Island Law: Cases: Contract Law

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**Contract Law.** *Marshall Contractors, Inc. v. Brown University*, 692 A.2d 665 (R.I. 1997). The failure of parties negotiating a construction-project contract to reach a mutual agreement regarding the scope of work to be performed prevents the emergence and existence of an implied-in-fact contract.

In *Marshall Contractors, Inc. v. Brown University*,[1] the Rhode Island Supreme Court held that contract negotiations aimed at defining the scope of the project evidenced the lack of mutual agreement between the parties to a construction-project contract.[2] A court may find an implied-in-fact contract if it determines, from the relations and communication between the two parties, that the parties have mutually agreed to all the material terms of the contract.[3] The scope of work to be performed is the most vital term in a costly construction contract.[4] In *Marshall*, the court found that the evidence of communications between the two parties during the negotiations and construction did not amount to a mutual agreement on the scope of the work to be performed in light of the contract cost. Therefore, no contract could be implied.

## FACTS AND CASE TRAVEL

On August 5, 1986, Marshall Contractors, Inc. (Marshall), submitted a design and construction proposal for a new university sports complex to Brown University (Brown).[5] Three other contractors also submitted proposals.[6] In the proposal, Marshall estimated a bare construction cost of approximately 4.6 million dollars based on its understanding of the scope of work to be performed as outlined in the proposal.[7] On May 12, 1987, Brown selected Marshall's proposal and authorized it to formalize the design. Brown also authorized Marshall to commence preliminary site work although a formal contract had not been executed.[8]

Once the formal design was completed, Brown, in a letter of intent dated November 11, 1987, authorized Marshall to proceed

1. 692 A.2d 665 (R.I. 1997).
2. *See id.* at 670.
3. *See id.* at 669.
4. *See id.*
5. *See id.* at 666-67.
6. *See id.* at 666.
7. *See id.*
8. *See id.*

with construction with a fixed contract price of approximately 7.2 million dollars.[9] The letter of intent indicated that Brown wanted a list of items agreed upon and indicated the letter was to become "the contract basis of compensation."[10] The letter also stated a formal contract would be "forthcoming."[11]

During construction, the parties never executed a formal contract because of disagreements over the scope of the project in light of Brown's project cost limit.[12] As construction continued, so did the negotiations and disagreements. Marshall continually submitted change orders and billings for "extras" it considered not part of the scope of the original design.[13]

Eventually, Marshall forwarded a document to Brown, detailing what it believed to be the scope of the project and intending it to be the formal contract for the project.[14] Brown rejected the document and submitted to Marshall proposed changes including its definition of the scope of the project.[15] In spite of this rejection, construction continued.[16] On January 17, 1989, as construction neared completion without a formal contract ever being executed, Marshall wrote a letter advising Brown that the final contract cost would be closer to 8.7 million dollars.[17] Marshall attempted, unsuccessfully, to meet with Brown's president to resolve the contract problems.[18]

Marshall filed a civil action in Rhode Island Superior Court to recover additional costs that it expended outside the scope of the original project design, as Marshall understood the scope to be.[19] Marshall's complaint included three claims: unjust enrichment, quantum merit, and willful and intentional-bad faith and coer-

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9. *See id.*
10. *Id.*
11. *Id.*
12. *See id.*
13. *See id.*
14. *See id.* at 666. The document was submitted on December 21, 1987 and was entitled "Standard Form of Agreement Between Owner and Design/Builder." The document included Marshall's understanding of the scope of the project and was intended to be a formal contract for the project. *See id.* at 666, 670.
15. *See id.* at 666.
16. *See id.*
17. *See id.* at 667.
18. *See id.* (stating that in a civil action filed on November 3, 1989, Marshall sought to recover construction costs it believed were not included in the original scope of the project).
19. *See id.*

cion.[20] Brown's answer alleged that an implied-in-fact contract existed in which both parties mutually agreed on the scope and cost of the project.[21]

The trial judge bifurcated the trial, first deciding without a jury the issue as to whether the parties agreed to a contract.[22] The trial court concluded that an implied-in-fact contract had materialized between the parties on or about May 1, 1987.[23] The trial court stated that "the conduct of the parties, the scope in the proposal, the scope of the response, the proposal to build by Marshall, which was accepted by Brown University forms, in the Court's judgment, [amounted to] an agreement on the essential terms of the contract."[24] As a result of this ruling, the trial court limited Marshall's request for recovery at the jury trial to work performed outside the scope of the implied-in-fact contract.[25] The jury found in favor of Brown.[26] The trial court denied Marshall's request for a new trial.[27] Marshall appealed to the Rhode Island Supreme Court.[28]

## BACKGROUND

Generally, implied-in-fact contracts have the same legal effect as express contracts.[29] In *Bailey v. West*,[30] the Rhode Island Supreme Court defined an implied-in-fact contract as an express contract in which the elements of a valid contact can be found from the relations and communications between the parties, rather than from a single written document.[31] The communications and conduct of the parties should evidence the parties' mutual assent to the material terms that would be included in an intended formal

20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.* at 668.
24. *Id.*
25. *See id.*
26. *See id.* at 669.
27. *See id.*
28. *See id.*
29. *See* A and B Constr., Inc. v. Atlas Roofing and Skylight Co., 867 F. Supp. 100, 108 (D.R.I. 1994).
30. 249 A.2d 414 (R.I. 1969).
31. *See id.* at 416; *see also* LiDonni, Inc. v. Hart, 246 N.E.2d 446, 449 (Mass. 1969); 1 Williston on Contracts § 1:5 (4th ed. Lord, 1990).

contract.[32] According to the court, the heart and essence of a construction contract is the scope of a project.[33]

In *Rhode Island Five v. Medical Associates of Bristol County, Inc.*,[34] the supreme court ruled that ongoing contract negotiations did not amount to an agreement if the communications between the parties evidenced a lack of mutual agreement as to the scope of the project.[35] Such conduct evidenced the fact that the parties did not arrive at a "meeting of [the] minds;" thus, an implied-in-fact contract could not emerge.[36]

### ANALYSIS AND HOLDING

In *Marshall*, the Rhode Island Supreme Court considered the trial court's conclusion that an implied-in-fact contract had been formed between the two parties.[37] The court found that the letters between Brown and Marshall evidenced ongoing contract negotiations to define the scope of the project.[38] The court considered the fact that both parties had been writing letters defining the scope of the project during the construction.[39] Since mutual agreement as to the scope of a project was vital to the formation of a contract, no implied-in-fact contract could be found if the scope was never agreed upon.[40]

To determine whether the scope of the project had been agreed upon, the court analyzed the progression and content of the negotiations. The court determined that the communications between Marshall and Brown did not amount to a mutual agreement but were futile attempts to reach a mutual understanding binding the parties.[41] On May 12, 1987, Brown authorized Marshall to begin design work for the project without a formal contract.[42] Twenty-seven months later, Brown acknowledged in a memorandum to

32. *See Marshall*, 692 A.2d at 669.
33. *See id.*
34. 668 A.2d 1250 (R.I. 1996).
35. *See id.* at 1254; *see also* Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2nd Cir. 1986) (as amended).
36. *Rhode Island Five*, 668 A.2d at 1254.
37. *Marshall*, 692 A.2d at 665.
38. *See id.* at 669-70.
39. *See id.* at 669.
40. *See id.*
41. *See id.* at 670.
42. *See id.* at 669.

Marshall that there were still areas of disagreement over the scope of the project.[43]

According to the court, the ongoing communications undermined the trial court's conclusion that an implied-in-fact contract existed between the parties. Additionally, the submission by Marshall of the "Standard Form of Agreement Between Owner and Designer/Builder," and Brown's ultimate rejection of Marshall's proposed agreement and counteroffer, further evidenced the disagreement over the contract scope.[44] The court concluded no implied-in-fact contract existed at this point.[45] Rather, only an offer by Marshall and a counteroffer by Brown that Marshall never accepted existed.[46] Therefore, no contract could be implied-in-fact because neither party accepted the terms proposed by the other. Marshall's appeal was sustained and remanded to the superior court for a new trial.[47]

## CONCLUSION

The Rhode Island Supreme Court's decision in *Marshall* provides a clear rule for parties entering contracts. Because the scope of work to be performed in a construction contract is the essence of such contract, mutual agreement as to the scope is vital to the determination that parties are in agreement. Ongoing contract negotiations where no agreement results regarding the scope of the project clearly indicates the lack of mutual assent necessary to find an implied-in-fact contact that binds the two parties.

Karen M. Hagan

43. *See id.* at 669-70.
44. *See id.* at 670.
45. *See id.*
46. *See id.*
47. *See id.*

**Contract Law.** *Stanley-Bostich, Inc. v. Regenerative Environmental Equipment Co.*, 697 A.2d 323 (R.I. 1997). A subsequent provision to a contract binding parties to arbitration materially alters the terms of the original contract and will not be included in the contract unless the parties clearly expressed their mutual assent to the provision.

Section 10-3-2 of the Rhode Island General Laws requires arbitration clauses to be clearly written and expressed.[1] In *Stanley-Bostich, Inc. v. Regenerative Environmental Equipment Co.*,[2] the Rhode Island Supreme Court refused to allow the defendant to use title 6A, section 2-207 of the Rhode Island Uniform Commercial Code to circumvent the legislature's clear intent to ensure that arbitration agreements are mutually agreed upon. In certain circumstances, section 2-207 allows an original contract to be amended with additional or different terms without voiding the original contract.[3] Between merchants, section 2-207 requires the presence of a clear expression of assent to the additional or different terms if they materially alter the original agreement.[4] The court concluded an arbitration provision materially alters the original agreement because it requires the parties to waive many of their substantive and procedural rights to adjudicate under state law.[5] Such a waiver must be clearly indicated by an agreement.[6]

## FACTS AND CASE TRAVEL

The defendant, Regenerative Environmental Equipment Company, Inc. (REECO) proposed to engineer, fabricate and install a

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1. Section 10-3-2 of the Rhode Island General Laws provides in part:
> [w]hen clearly written and expressed, a provision in a written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two (2) or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

R.I. Gen. Laws § 10-3-2 (1956) (1996 Reenactment).

2. 697 A.2d 323 (R.I. 1997).

3. *See* R.I. Gen. Laws tit. 6A, § 2-207(2) (1956) (1992); *see also infra* note 39.

4. *See* R.I. Gen. Laws § 2-207(2).

5. *See Stanley-Bostich*, 697 A.2d. at 329 (citing Diskin v. J.P. Stevens & Co., 836 F.2d 47, 51 (1st Cir. 1987)).

6. *See* McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994).

re-therm thermal-oxidation system (re-therm system) for the plaintiff, Stanley-Bostich, Inc. (SBI).[7] The proposal was dated August 7, 1987. It consisted of several pages and expired within sixty days if not accepted by SBI. One page included a price quotation.[8] The terms and conditions of sale were written on the back side of the price-quotation page in the form of boilerplate provisions.[9] One of the terms stated that controversies arising out of or relating to the sale shall be settled by the American Arbitration Association in New Jersey.[10] The next page included a price-adjustment clause.[11]

On August 11, 1987, REECO sent SBI a price quotation for the cost of engineering services for one of the re-therm models described in the August 7th proposal.[12] On August 12, 1987, SBI sent REECO a purchase order for "engineering services only" at a cost of $64,000.[13] SBI's purchase order had its own terms and conditions of sale, including a provision directing that the contract that resulted would be construed according to the laws of the state of the buyer.[14]

REECO acknowledged SBI's purchase order in a letter dated August 18, 1987.[15] The letter also pointed out that its terms of sale, as enumerated in its August 7th proposal, would prevail over SBI's terms on its purchase order. SBI accepted and signed

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7. *See Stanley-Bostich*, 697 A.2d at 324.

8. *See id.* (stating that this provision provided the costs of two different re-therm units).

9. *See id.*

10. *See id.* The provision stated controversies relating to the contract "shall be settled by arbitration in the City of Morristown, County of Morris, New Jersey in accordance with the rules and procedures . . . of the American Arbitration Association." *Id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.* at 324 n.1 (citing the provision within SBI's purchase order). The provision stated:

> GOVERNING LAW: The contract resulting from this order is to be construed according to the laws of the state from which this order issues, as shown by the address of Buyer printed on the face of this order. The parties agree that any controversy arising under this order shall, at Buyer's option, be determined by the courts of the state from which this order is issued as aforesaid, and Seller hereby submits and consents to the jurisdiction of the courts of said state.

*Id.*

15. *See id.*

REECO's letter on August 28, 1987.[16] On November 9, 1987, SBI sent a purchase order to REECO requesting the purchase of a retherm system in the amount of $1,094,000. This purchase order, showing SBI's address as East Greenwich, Rhode Island, contained the same provision regarding the governing law of the contract.[17] REECO confirmed SBI's purchase order in a letter dated December 1, 1987, but rejected SBI's terms of sale in favor of its own as stated in the August 7th proposal.[18] Although the letter instructed SBI to sign and return a copy to REECO, SBI did not do so. In spite of SBI's failure to sign and return a copy of the confirmation letter, REECO fabricated and shipped the equipment to SBI, who paid REECO $1,094,000.[19]

In May of 1989, REECO sent SBI an invoice for $99,266 for additional compensation.[20] This was allegedly owed pursuant to the price-adjustment clause in REECO's August 7th proposal.[21] SBI refused to pay the additional sum, contending the price-adjustment clause was not part of the contract.[22]

The defendant, James Mueller, a subsequent assignee of REECO's contract, demanded arbitration in New Jersey.[23] SBI responded by filing a complaint in Rhode Island Superior Court, requesting injunctive relief, a finding that the contract was not arbitrable and a determination of whether SBI owed any money to the defendant.[24] The trial court concluded that the arbitration

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16. *See id.*

17. *See id.*; *see also supra* note 4.

18. *See Stanley-Bostich*, 697 A.2d at 324. The pertinent part of the letter stated:

> We have received and thank you for your above referenced purchase order. In accordance with our proposal . . . dated 8/7/97 we will furnish the following equipment and services for your East Greenwich, Rhode Island facility . . . . As previously agreed (Ref. REECO Acknowledgment letter 08/18/87), in lieu of the 'TERMS' noted on the reverse side of your purchase order, please refer to the 'TERMS AND CONDITIONS OF SALE' on the reverse side of the price quotation page of our proposal. Although the intent is similar, we believe those noted in our proposal to be more applicable to the nature of the equipment to be supplied under this order and will, therefore, apply.

*Id.* at 328.

19. *See id.* at 325.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

clause was clearly expressed in REECO's August 7th proposal.[25] Additionally, the trial court found the clause was incorporated by reference under section 2-207 of the Rhode Island Uniform Commercial Code by REECO's December 1st letter of confirmation. The court reasoned that SBI's failure to respond to the December 1st confirmation letter indicated its acceptance, and thus the arbitration provision became part of the contract. SBI appealed.[26]

## BACKGROUND

At common law, arbitration agreements were not enforceable. These agreements were considered against public policy because they deprived parties of the right to adjudicate controversies in state courts.[27] The Rhode Island General Assembly, recognizing a need for efficient and alternative dispute resolution, created a statutory right to contract for binding arbitration.[28] The current version of section 10-3-2 of the Rhode Island General Laws requires that an arbitration provision be clearly written and expressed in a contract.[29] Because arbitration provisions are a matter of contract law,[30] all the elements of a contract must be met before an arbitration provision is binding on the parties. Most importantly, the parties must mutually assent to arbitration, and such assent must be evidenced in the agreement before a person waives his rights to adjudication.[31] Although section 10-3-2 requires that an arbitration provision be in writing, section 2-207 of the Rhode Island Uniform Commercial Code allows, in certain circumstances, for the subsequent alteration of a contract by adding or changing terms of the original contract, without unequivocal evidence that both parties mutually assented to such terms.[32] At common law, such alterations would act as a counteroffer and be considered a rejection

25. *See id.*

26. *See id.*

27. *See* Donahue v. Associated Indem. Corp., 227 A.2d 187, 189 (R.I. 1967).

28. *See Stanley-Bostich*, 697 A.2d at 326; *see also* R.I. Gen. Laws § 10-3-2 (1956).

29. *See* R.I. Gen. Laws § 10-3-2 (1956) (1996 Reenactment); *see also supra* note 1 and accompanying text.

30. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (holding that arbitration is a matter of contract requiring the parties' agreement).

31. *See* McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994).

32. *See* R.I. Gen. Laws tit. 6A, § 2-207(1) (1956) (1992 Reenactment). Section 2-207(1) provides:

of the original offer.[33] Section 2-207(2) provides that additional terms of a contact are merely proposals of additions to an original agreement.[34] However, between merchants, additional terms will become part of the contract, not mere proposals, unless the offer indicates that the terms cannot be altered, the additions materially alter the original offer or a party objects to them within a reasonable time.[35]

In *Diskin v. J.P. Stevens & Co.*,[36] the First Circuit held that arbitration provisions materially alter the terms of the original contract.[37] In *Diskin*, the court was interpreting arbitration clauses.[38] Under New York law, an arbitration clause is a material addition to a contract because it involves the waiver of many of a party's substantive and procedural rights to adjudicate controversies under state law.[39] Therefore, such waiver must be clearly indicated by the parties.[40]

If the terms conflict, then they do not become part of the contract. In *Ionics, Inc. v. Elmwood Sensors, Inc.*,[41] the First Circuit interpreted both the Massachusetts and Rhode Island versions of

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> A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

*Id.*

33. *See Stanley-Bostich*, 697 A.2d at 327 (stating that the mirror-image rule requires the terms of acceptance be identical to the terms of the offer).

34. *See* R.I. Gen. Laws tit. 6A, § 2-207(2) (1956) (1992 Reenactment). Section 2-207(2) provides:

> The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) They materially alter it; or
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> (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

*Id.*

35. *See id.*

36. 836 F.2d 47 (1st Cir. 1987).

37. *See id.* at 50-51.

38. *Id.* at 50.

39. *See id.* (citing *In re* Marlene Indus. Corp., 380 N.E.2d 239, 242 (N.Y. 1978)).

40. *See id.* at 51 (citing *Marlene*, 380 N.E.2d at 242).

41. 110 F.3d 184 (1st Cir. 1997).

section 2-207 Uniform Commercial Code.[42] In *Ionics*, the court held that in the context of sales transactions, forms between two parties that contain conflicting terms are considered to be objected to by the parties and do not become part of the contract even though the buyer has accepted the goods.[43]

### ANALYSIS AND HOLDING

In *Stanley-Bostich*, the Rhode Island Supreme Court first determined that an arbitration provision is governed by the law of contracts, as required by section 10-3-2 of the Rhode Island General Laws and *United Steelworkers.*[44] Additionally, *Bush v. Nationwide Mutual Insurance Co.*[45] requires the presence of mutual assent in the writings of the parties before an arbitration agreement is binding upon the parties.[46] The court found the terms in SBI's offer and REECO's proposal were not a clear expression of mutual assent to arbitration. Rather, they were actually conflicting terms and thus did not bind the parties to arbitration under section 10-3-2.[47]

The court then addressed REECO's contention that under section 2-207 the arbitration provision was nevertheless binding.[48] REECO contended that its December 1st confirmation letter was accepted by SBI; therefore, its terms, including the arbitration provision, prevail.[49] Based on an analysis of section 2-207, the court concluded that the December 1st confirmation letter fell short of the requirements set forth in section 2-207(1). The court found the December 1st confirmation letter was actually an acceptance of SBI's November 9th purchase order.[50] Because REECO's confirmation letter did not express that it would accept SBI's purchase

42. *See id.* at 187. The court concluded that the two states have adopted similar versions of section 2-207 of the Uniform Commercial Code. *See id.* at 187 n.2.

43. *See id.* at 189; *see also* Mass. Gen. Laws ch. 106, § 2-207 (1990) (providing in part that "[w]here clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent to himself"); *id.* at U.C.C. cmt. 6.

44. *Stanley-Bostich*, 697 A.2d at 326 (citing United Steelworkers of Am. v. Warrior Gulf Navigation Co., 363 U.S. 574 (1960)); *see also supra* note 36.

45. 448 A.2d 782 (R.I. 1982).

46. *See id.* at 784.

47. *See Stanley-Bostich*, 697 A.2d. at 327.

48. *See id.*

49. *See id.*; *see supra* note 19 (stating the pertinent contents of the letter).

50. *See Stanley-Bostich*, 697 A.2d at 329.

order on the condition that SBI agree to the arbitration provision, it did not fall within the requirement of section 2-207(1).[51] The court reasoned that the statute requires a party to make its position clear that acceptance is conditional on the assent of the other party for its terms to apply.[52] A party should not proceed with the transaction until assent is attained.

The court then analyzed section 2-207(2) to determine if the additional terms in REECO's acceptance became part of the contract.[53] Because the parties were merchants, additional or different terms may become part of the original contract, not just mere proposals.[54] The court, relying on *Diskin*, concluded that an arbitration provision materially alters a contract's terms. Therefore, it does not automatically become part of the original contract.[55] The parties must clearly express their mutual assent to an arbitration provision.[56] The court sustained SBI's appeal because the arbitration provision was not expressly agreed upon and therefore was not binding upon SBI.[57]

## CONCLUSION

The court's decision in *Stanley-Bostich* has solidified the General Assembly's position that arbitration agreements must be agreed upon by the parties and such agreement must be clear and unequivocal. Once a party agrees to arbitration, it has given up the valuable right to chose adjudication to resolve controversies. Provisions in Rhode Island's Uniform Commercial Code are meant to ease the formality of altering contracts between merchants. However, they are not a tool to bind a party to terms not agreed to when such terms materially alter the original contract.

Karen M. Hagan

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51. *See id.* at 328.

52. *See id.* (citing Taft-Peirce Mfg. Co. v. Seagate Tech., Inc., 789 F. Supp. 1220, 1226 (D.R.I. 1992)).

53. *See id.* at 329.

54. *See id.*; *see also* R.I. Gen. Laws tit. 6A, § 2-207(2) (1956) (1992 Reenactment).

55. *See Stanley-Bostich*, 697 A.2d at 329.

56. *See id.*

57. *See id.*