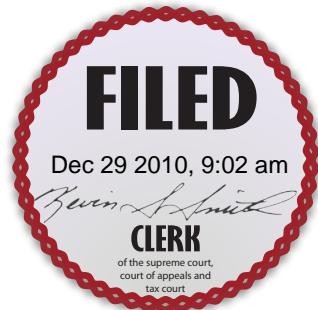


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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E-Z CONSTRUCTION )  
COMPANY, INC., )  
 )  
Appellant-Respondent, )  
 )  
vs. ) No. 10A01-1002-PL-110  
 )  
SELLERSBURG STONE CO., INC., )  
 )  
Appellee-Petitioner. )  
 )

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APPEAL FROM THE CLARK SUPERIOR COURT  
The Honorable Vicki L. Carmichael, Judge  
Cause No. 10D01-0810-PL-941

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**December 29, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

This a contract dispute between a plaintiff supplier and defendant prime contractor. The defendant appeals an award of service charges to the plaintiff. We conclude that the trial court did not err in assessing service charges. We affirm.

## **Facts and Procedural History**

E-Z Construction Company was awarded a contract by the Clark County Board of Commissioners to complete an expansion of the Clark-Floyd Landfill. E-Z contracted with Sellersburg Stone Company for the provision of necessary dirt, stone, and clay. Pursuant to the parties' supplier agreement, SSC would provide its fill materials at a rate of \$66.00 per load and add a service charge of 18% per annum to any accounts thirty days overdue. Each of SSC's shipments came with a written disclaimer indicating that the seller made no warranties of any kind on the product's fitness for a particular purpose.

Between August 2007 and May 2008, SSC delivered 4377 loads of fill material to the project site at a total price of \$256,946.47. At some point, however, E-Z took issue with the quality of SSC's fill materials and the rate at which SSC delivered them. E-Z allegedly had to rework certain parts of the project due to SSC's sub-standard materials and slow delivery. E-Z maintained that SSC was responsible for associated costs. E-Z deducted these sums from SSC's invoice amounts and withheld total payment in the amount of \$101,777.64.

SSC filed a Verified Claim for Payment with the Board of Commissioners. SSC claimed that E-Z failed to fully pay its invoices, so SSC asked the Board to withhold

payment to E-Z until E-Z paid SSC. As a result of the filing, the Board withheld a sum of \$110,823.24 from its final payment to E-Z.

SSC next filed a complaint in Clark Superior Court. SSC alleged that E-Z contracted for and accepted shipments of materials but failed to pay for them. E-Z asserted that the supplied materials did not comply with contract specifications.

The case was tried to the bench, and in January 2010, the trial court entered judgment in favor of SSC. The court found that SSC disclaimed any warranties respecting the fitness of their product for a particular purpose. The court also found no showing that the rate at which the fill materials were delivered was unreasonable. The court awarded SSC \$101,777.64 for the materials that were delivered and accepted. The court also found that SSC's 18%-per-annum service charge was spelled out clearly in the parties' written agreement. Accordingly, the court awarded SSC an additional \$38,665.02 in service charges. E-Z now appeals.

### **Discussion and Decision**

E-Z argues that the trial court erred in awarding SSC service charges. SSC responds that E-Z's appeal is frivolous and that SSC should now be entitled to appellate attorneys' fees.

#### **I. Service Charges**

E-Z argues that the trial erred in awarding SSC service charges totaling \$38,665.02. E-Z characterizes the service charges as "prejudgment interest" and maintains that "a claimant on a public construction project is not entitled to an award of prejudgment interest when the actions of the claimant have caused contract funds to be

held in trust by a public contracting entity pending a final determination of the merits of the claim.” Appellant’s Br p. 4. In the alternative, E-Z argues that the award is excessive for being based in part on non-ascertainable sums.

Indiana Code section 5-16-5-1 establishes procedures to help subcontractors, suppliers, and laborers recover payment from prime contractors for services rendered on public works projects. Section 5-16-5-1 provides that, upon the timely filing of a claim, the State agency involved shall “withhold final payment to the contractor until such contractor has paid to the subcontractor or subcontractors, materialmen for material furnished, labor employed in such construction or those furnishing any service in relation to or in connection with such construction, erection, alteration or repair, all bills due and owing the same.” Where no dispute exists between the parties interested in the funds withheld, the State agency pays off the claim and deducts that money from the amount owed to the prime contractor. But “[w]here there is a dispute between any of the parties claiming to be entitled to such funds so withheld, or any part thereof, sufficient funds shall be retained by such board, commission, trustee, officer or agent acting on behalf of said state or commission created by law until such dispute is settled and the correct amount is determined, when payment shall be made as aforesaid . . .” Ind. Code § 5-16-5-1. Section 5-16-5-1 further provides that “nothing in this chapter contained shall prevent or preclude a full, final, and complete settlement upon a contract with the contractor or contractors after thirty (30) days from the date of the completion and acceptance of the work as completed upon the furnishing of satisfactory evidence

showing the payment in full of all subcontractors, materialmen, laborers or those furnishing services in the performance of said contract . . .”

Prejudgment interest, meanwhile, is awarded to compensate an injured party for the lost use of money. *Fackler v. Powell*, 923 N.E.2d 973, 977 (Ind. Ct. App. 2010). Interest is computed from the time the principal amount was demanded or due and is allowable at the permissible statutory rate unless a contractual provision specifies otherwise. *Id.* A prejudgment interest award is justified only where there has been an unreasonable delay in payment of an ascertainable amount. *R & R Real Estate Co., LLC v. C & N Armstrong Farms, Ltd.*, 854 N.E.2d 365, 371 (Ind. Ct. App. 2006), *reh’g denied*. “Where a good faith dispute exists concerning a portion of a claim, interest is properly limited to the undisputed (ascertainable) portion of the claim.” *NIPSCO v. Stokes*, 595 N.E.2d 275, 279 (Ind. Ct. App. 1992). Whether there has been an unreasonable delay in payment so as to justify an award of interest is a question of fact. *Clow Corp. v. Ross Twp. School Corp.*, 179 Ind. App. 125, 131-32, 384 N.E.2d 1077, 1083 (1979). This Court cannot weigh the evidence on such questions but must consider only the evidence most favorable to the appellee. *Id.* at 132, 384 N.E.2d at 1083.

A claimant who has effected the withholding of funds under Section 5-16-5-1 may recover, in a subsequent action for breach of contract, both the contract price due for his work as well as prejudgment interest. *Ideal Heating Co., Inc. v. Falls & Noonan, Inc.*, 177 Ind. App. 233, 236-37, 378 N.E.2d 946, 948-49 (1978). In *Ideal Heating*, the plaintiff subcontractor agreed to perform pipe-covering work for the remodeling of a high school. *Id.* at 234, 378 N.E.2d at 947. The plaintiff completed 95% of the agreed work.

*Id.* The plaintiff submitted bills totaling \$10,500 but received only \$5,500 from the defendant prime contractor. *Id.* The plaintiff secured a withholding of funds pursuant to Section 5-16-5-1 and then filed an action seeking, among other things, the balance of the contract price along with interest. *Id.* at 234, 378 N.E.2d at 947-48. The defendant claimed that the plaintiff was not entitled to recover the contract price—which encompassed overhead and profit—because Section 5-16-5-1 limits recovery to the cost of labor and materials. *Id.* at 235, 378 N.E.2d at 948. This Court disagreed. *Id.* at 236, 378 N.E.2d 948-49. We noted that Section 5-16-5-1 entitles a claimant to the recovery of “all bills due and owing the same.” *Id.* at 236, 378 N.E.2d at 948. “The clear intent of this provision is that the subcontractor shall receive the contract price due for his work, not merely an amount to cover its costs.” *Id.* We further upheld the lower court’s award of prejudgment interest, finding sufficient evidence from which the court could find an unreasonable delay in payment. *Id.* at 236-37, 378 N.E.2d at 949.

In line with *Ideal Heating*, we conclude that the trial court did not err in awarding service charges to SSC. The service charges were recoverable under Section 5-16-5-1 as a portion of the contract price. To the extent the trial court’s award of service charges represents “prejudgment interest,” the facts and time-span of this case sustain a finding of (a) an unreasonable delay in payment by E-Z or (b) an ascertainable sum equaling \$101,777.64 so as to justify the award. Moreover, as *Ideal Heating* indicates, SSC’s election to secure the funds pursuant to Section 5-16-5-1 pending resolution of the dispute does not preclude recovery of interest from the time principal was first due. For these reasons we affirm the judgment of the trial court.

## **II. Appellate Attorneys' Fees**

SSC claims that this appeal was frivolous and brought in bad faith. Accordingly, SSC now requests an award of appellate attorneys' fees.

The Indiana Appellate Rules authorize this Court to "assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Ind. Appellate Rule 66(E). We will assess appellate damages only against an appellant who in bad faith maintains a wholly frivolous appeal. *Harness v. Schmitt*, 924 N.E.2d 162, 168 (Ind. Ct. App. 2010). A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious. *Id.*

Although we have found E-Z's claims non-meritorious, we cannot say that the appeal is frivolous or that E-Z has pursued it in bad faith. We therefore deny SSC's request for appellate attorneys' fees.

Affirmed.

MAY, J., and ROBB, J., concur.