

RENDERED: JUNE 11, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000091-MR

J.A. STREET & ASSOCIATES, INC.

APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 05-CI-00361

BUD RIFE CONSTRUCTION COMPANY, INC.;
RAMSEY PRESTONSBURG DEVELOPMENT, LLC

APPELLEES

OPINION
AFFIRMING IN PART
REVERSING IN PART AND
REMANDING

** ** * * * * *

BEFORE: VANMETER, ACTING CHIEF JUDGE; KELLER, JUDGE;
GRAVES,¹ SPECIAL JUDGE.

VANMETER, ACTING CHIEF JUDGE: J.A. Street & Associates (Street) appeals
from the Findings of Fact, Conclusions of Law, and Judgment of the Floyd Circuit

¹ Retired Judge John W. Graves sitting as temporary Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Court entered on May 14, 2008. For the reasons stated below, we affirm in part, reverse in part and remand.

I. FACTS

Ramsey Prestonsburg Development, LLC (Ramsey) and Street entered into a contract for Street to be the general contractor for the construction of a grocery store on an undeveloped tract of land owned by Ramsey. Street, with Ramsey's consent, solicited bids from contractors for the site preparation. Bid packages were sent to prospective bidders, which included a "subsurface condition" survey conducted by an entity, S&ME. The purpose of the survey was to evaluate site conditions that would affect the construction project. The survey disclosed that there was unsuitable soil and other conditions which would have to be removed and replaced prior to the commencement of construction.

Ramsey rejected the solicited bids for the site work as being too high. Ramsey suggested that Street contact Bud Rife Construction Company, Inc. (Rife), with whom Ramsey had a prior relationship. A bid was solicited from Rife, and the bid package sent to Rife included the S&ME report. Rife submitted a bid proposal on a bid form dated November 10, 2003, and with Ramsey's consent, Street accepted Rife's bid. The bid form disclosed that the anticipated site work would encompass the removal and/or replacement of 28,000 cubic yards of soil. A revised bid form changed the cubic yardage to 23,000, reflecting a change in yardage discussed between Ramsey and Rife. The bid form also contained a provision for "additional work" consisting of the removal or replacement of

unsuitable soils. However, the rate for the additional work was left blank. The total amount quoted in the revised bid form for the site work was \$215,790.

Street signed a subcontract with Rife for the work contained in the revised bid form. The subcontract between Street and Rife provided that the “Materials to be furnished and the work to be done by the Subcontractor [Rife] consist of Site Grading-includes storm drain, fire line, water line, tap fees and sanitary sewer, as per Bid Form dated 11/10/03.” The subcontract made no reference to the “additional work” section left blank on the bid form. Consistent with the bid form, the subcontract called for Street to pay Rife \$215,790. Under the subcontract, Rife was to submit invoices to Street for progress payments for the work it performed.

By letter dated January 29, 2004, Ramsey agreed that it would pay Street on a cost plus five percent basis. Under this arrangement, Rife would bill Street for the work performed by Rife, and Street would pay Rife. Ramsey would pay Street the cost of the site work plus five percent for its management and oversight of Rife’s work.

Project estimates called for the site work to begin in early March, 2004, with the site work to be completed in April, 2004. The site work on the project did not proceed according to the original plans. First, adverse weather conditions caused many complications and delays. Second, site conditions were discovered which differed significantly from the conditions disclosed by the S&ME report. Specifically, the S&ME report was in error as to the amount of

unsuitable soil that needed to be removed and replaced. Third, the unsuitable soil had to be transported a greater distance from the site than was initially anticipated. And fourth, excavation of the site by Rife disclosed the presence of an area which contained various types of debris unsuitable for construction.

Although the subcontract called for Street to pay Rife \$215,790, during the course of the project, three change orders were submitted to and approved by Ramsey increasing the subcontract price to \$320,195.41.² The three change orders were dated July 22, 2004, October 4, 2004, and November 10, 2004.

At the outset of the project, Rife was unable to submit its invoices timely to Street in order to be paid as Rife wished. As a result, Rife asked Ramsey to make direct payments. Ramsey agreed to do so and paid Rife directly for its first three invoices in the total amount of \$165,985.72.

After the first three payments, Street began to make the progress payments to Rife. Although Street was aware that Ramsey made the first three payments, it failed to include these payments in its accounting system utilized to track the payments it was making to Rife. A pattern evolved whereby Rife submitted its invoices for work already performed and Street paid Rife according to the submitted invoices, sometimes withholding a ten percent retainage. Street had a general policy that as long as the total payments made to a subcontractor were less than what was owed under the base subcontract and any approved change orders, then Street would make the payments as billed by the subcontractor.

² The three change orders were not signed by any of the parties, but all parties agree that the change orders modified the subcontract.

However, because Street mistakenly did not account for the \$165,985.72 that Ramsey initially paid Rife, Street's payment of several invoices submitted by Rife caused the total amount of the payments to exceed the subcontract price, including the three change orders. In all, Rife was paid \$408,208.24 by Ramsey and Street. This amount was \$81,525.24 above the base subcontract price, including the three change orders, of \$320,195.41.

After discovering its mistake in the fall of 2004, Street requested that Rife return the overpayment. Rife refused to return the overpayment, claiming that it billed for the work it performed and therefore earned the overpayment. In January, 2005, Rife walked off the job site and did not perform any other services for Street.

Street sued Rife to recover the \$81,525.24 it alleges it overpaid Rife as well as its attorney fees. Additionally, Street sought to recover from Rife the \$21,744³ it paid to Mountain Enterprises, Inc. to complete the work Rife allegedly failed to perform and to correct the allegedly defective work that Rife performed. Rife counterclaimed arguing that it earned the overpayment and that it should be paid an additional amount in excess of \$100,000 for work it completed for which it had not been paid. The additional unpaid invoices submitted by Rife were the following: #175 in the amount of \$15,068; #179 in the amount of \$12,256; #188 in

³ During the trial court proceedings, Street asserted that it should recover from Rife the \$23,696 it paid to two contractors to complete the work that Rife left unfinished and to correct the defective work performed by Rife. Street paid \$1,952 to Hensley Landscaping, LLC, and \$21,744 to Mountain Enterprises. In the present appeal, Street apparently is only seeking recovery of the \$21,744 it paid to Mountain Enterprises.

the amount of \$4,201.31; #189 in the amount of \$457.89; #190 in the amount of \$1,239.86; #191 in the amount of \$1,757.50; #192 in the amount of \$534.60; and #195 in the amount of \$106,502; for a total of \$142,017.16.

Ramsey filed an Intervening Complaint against Street alleging that because Street overpaid Rife, Street overcharged it in the amount of \$112,961.83.⁴ This sum was computed by adding the total payments Ramsey made to Rife directly, \$165,985.72, and to Street, \$267,171.11, and subtracting the original subcontract price, \$320,195.41.⁵ Ramsey sought recovery of that amount from Street. Ramsey further sought a judgment that it did not owe Street the \$21,744 for the work performed by Mountain Enterprises, which Ramsey refused to pay to Street. Street counterclaimed to recover from Ramsey any amount Street was required to pay Rife, plus five percent.

A one-day bench trial was held in the Floyd Circuit Court on October 31, 2007. On May 14, 2008, the trial court entered its Findings of Fact, Conclusions of Law, and Judgment. The trial court concluded that the section in the bid form for “additional work” was incorporated into the subcontract. Because the bid form was silent with respect to the rate Rife would charge for the “additional work,” the trial court concluded that Rife could recover the reasonable value of such services.

⁴ The trial court awarded Ramsey \$112,961.83 instead of \$112,961.42. This appears to be a slight miscalculation.

⁵ $\$165,985.72 + \$267,171.11 - \$320,195.41 = \$112,961.42$.

In determining the reasonable value for the additional services provided by Rife, the trial court concluded that with the exception of invoice #195, Rife was entitled to recover the amount provided in the unpaid invoices it submitted. With respect to invoice #195, the court noted that the first three items listed on the invoice, the water line, storm sewer, and sanitary sewer, were three items specifically set out in the original subcontract. The remaining items listed on the invoice were for items related to the water line, storm sewer, and sanitary sewer. Because Rife was paid the full amount under the original subcontract, the trial court concluded that Rife was not entitled to recover the \$106,502 set forth in invoice #195. Accordingly, the trial court concluded that Rife was only entitled to recover \$35,515.16 as the reasonable value for the additional services it performed.

The trial court also concluded that because Rife was entitled to recover the full value of services as billed, Rife was entitled to recover the retainage Street deducted from three payments in the total amount of \$24,948.58. Thus, the trial court determined that Rife was entitled to recover from Street the total sum of \$60,463.74 (\$35,515.16 for unpaid invoices plus \$24,948.58 for retainage withheld), plus post-judgment interest.

With regard to the extra work which Street alleged had to be performed by Mountain Enterprises because Rife performed those services defectively and/or had not completed the work, the trial court concluded Street failed to carry its burden of proof, and thus denied those claims for payment. The

trial court stated that it was not persuaded that the additional work or services were required as a result of any failure of Rife.

With respect to Ramsey, the trial court concluded that Ramsey was not obligated to pay Street for work performed by Rife in excess of the original subcontract amount unless Ramsey specifically agreed to an increase in costs. Thus, the court determined that Ramsey was only obligated to pay Street the amount in the original subcontract plus the three change orders approved by Ramsey. The court concluded that the total payments made by Ramsey for the services performed by Rife exceeded the amount approved by Ramsey by \$112,961.42, and that Ramsey was entitled to judgment against Street for this amount. The trial court further concluded that because Ramsey never consented to the additional work performed by Mountain Enterprises, Ramsey did not owe Street the \$21,744.00 Street paid to Mountain Enterprises.

Street filed a motion to alter, amend or vacate, and the trial court conducted a hearing on Street's motion on June 6, 2008. On December 18, 2008, the trial court entered an order denying Street's motion, and this appeal followed.

II. STANDARD OF REVIEW

In this matter, the trial court acted as a finder of fact and reviewed the evidence firsthand. Unless we conclude that the trial court's findings of fact are clearly erroneous, we will not set them aside. CR⁶ 52.01; *A&A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 509 (Ky.App. 1999). "The trial

⁶ Kentucky Rules of Civil Procedure.

court's conclusions of law, however, including its interpretation of the written contract, are subject to independent appellate determination.” *A&A Mech.*, 998 S.W.2d at 509.

III. ANALYSIS

Because this case involves two contracts, we will address the subcontract between Street and Rife first and then we will address the contract between Street and Ramsey.

A. Street-Rife Subcontract

1. Quantum Meruit

Street first contends that the trial court erred in applying *quantum meruit* because the subcontract was an express contract between Street and Rife. Although we agree that the subcontract constituted an express contract, we conclude that the trial court properly applied *quantum meruit* to determine the reasonable amount Rife should receive as compensation for the additional services it provided.

“An express contract is one wherein all the terms and conditions between the parties are set forth[.]” *Dorton v. Ashland Oil Ref. Co.*, 303 Ky. 279, 197 S.W.2d 274, 275 (1946). Case law recognizes two types of implied contracts, those implied in fact and those implied by law. As noted by this court in *Perkins*

v. Daughtery, 722 S.W.2d 907, 909 (Ky.App. 1987), “[a] contract implied in fact is a true contract, shown by evidence of facts and circumstances from which a meeting of minds concerning the mutual promises may be reasonably deduced. A contract implied by law allows for recovery *quantum meruit* for another’s unjust enrichment.” (Internal citations omitted).

Street contends that the trial court erred in applying *quantum meruit* because it had an express contract and not an implied contract with Rife. In support of its argument, Streets cites to *Damron v. Stewart & Weir*, 253 Ky. 394, 69 S.W.2d 685, 687 (1934), which concluded that “if work is done under an express contract, the rights of the parties are measured by the contract and neither can rely upon an implied contract.” Thus, Street argues that the rights of the parties are limited to the terms of the subcontract and three change orders. Because the subcontract did not include a provision for additional work, Street argues that Rife cannot recover for the additional work it performed unless it was agreed to in a change order.

We agree with Street that the subcontract was an express contract that was modified by three change orders. We also conclude that the trial court erred in determining that the section for “additional work” left blank on the bid form was incorporated in the subcontract. The only reference that the subcontract makes to the bid form is the following:

Description of Work: Materials to be furnished and the work to be done by the Subcontractor [Rife] consist of Site Grading-includes storm drain, fire line, water line,

tap fees and sanitary sewer, as per Bid Form dated 11/10/03.

Because the subcontract does not refer to any additional work or to the blank section of the bid form providing for “additional work,” it was not incorporated into the subcontract.

However, we do conclude that a subsequent express oral agreement was made for the additional work Rife conducted beyond what was provided in the subcontract and three change orders. Specifically, there was testimony from representatives of both Rife and Street that Street agreed to the additional work that Rife performed. Therefore, an express oral agreement existed for the additional work. The trial court specifically found that “the change order procedure was not adhered to by any of the parties.”

However, the parties did not have an agreement with respect to the price Street was to pay for the additional work. As stated in *Simmons v. Atteberry*, 310 S.W.2d 543, 545 (Ky. 1958), an express contract as to services may exist even though no agreement as to price has been made. In such a situation, the trial court may hear evidence and adjudge fair and reasonable compensation. *Id.* Thus, as explained in *Meem-Haskins Coal Corp. v. Pratt*, 299 Ky. 767, 187 S.W.2d 435, 438 (1945):

[T]here should be a recovery on a *quantum meruit* theory where the plaintiff has performed services under what was intended to be an express agreement as to all the terms, but there is proof that there was not a meeting of the minds of the parties on one or more of the terms. Under such circumstances, the law presumes that the

defendant agreed to pay the reasonable value of the services. It is a contract implied in fact and differs from an express contract only in the character of evidence necessary to establish it.

Because no agreement existed as to the price for the additional services Rife performed, the trial court was correct in determining that Rife is entitled to receive the reasonable value for such services.

2. Course of Dealings

Street's second argument is that the trial court erred in it determining that the payments made from Street to Rife by mistake created a "course of dealings." We disagree.

Street contends that in order for Rife to receive compensation for the additional work it performed, a change order had to be executed. Kentucky courts have held that even if a provision in a written contract requires changes to the contract to be in writing, such a provision can be altered by the parties' course of dealings or waiver. *Willey v. Terry & Wright of Ky., Inc.*, 421 S.W.2d 362, 363 (Ky. 1967); *Wehr Constructors, Inc. v. Steel Fabricators, Inc.*, 769 S.W.2d 51, 53-54 (Ky.App. 1988). Under such contracts, the courts have held the owner liable for alterations or extras made without his written order, if he orally agreed to or acquiesced in them. *Willey*, 421 S.W.2d at 363. In such instances, the amount of the recovery is limited to the reasonable value thereof. *Wehr*, 769 S.W.2d at 54.

Although three change orders modified the subcontract, no provision in the subcontract required changes to be in writing. As noted, the trial court found

that none of the the parties adhered to the change order procedure. The course of dealings between Street and Rife indicated that Rife would bill Street through invoices for work that it often had already completed and that Rife did not have to receive written approval prior to doing the extra work. Instead, Street would give Rife verbal approval prior to Rife beginning the extra work. Moreover, the three change orders were approved by Ramsey after Rife had performed the additional work pursuant to Street's verbal approval.

Further, Street at no time raised any objection to the work that Rife was conducting or to the invoices it was submitting to Street until it discovered the mistake of its overpayment. Although Street did not execute another change order for the additional work that Rife was conducting, it still paid the invoices that Rife submitted to it for the additional work. Because Street did not raise a question with respect to the invoices it paid, the charges are presumed to be correct. *See Willey*, 421 S.W.2d at 363. Accordingly, by their course of dealings, the parties showed that they did not intend for there to be a requirement that a change order had to be executed prior to Rife doing or being compensated for any additional work it conducted.

Furthermore, a unilateral mistake does not prevent the parties' course of dealings from providing a contract term. In *Giem v. Searles*, 470 S.W.2d 327 (Ky. 1971), the Court concluded that despite a unilateral mistake by one of the parties with respect to the contract price, the parties' course of dealings did create a term in their contract. In *Giem*, a building supply company submitted a bid to a

contractor for millwork, lumber and other items. Although the unit prices for the items listed in the bid were correct, a mathematical error was made as to the total price for certain items. When the time for payment came, the supplier that made the mathematical error in its bid invoiced the contractor for the accurate amount and not the amount contained in the contract. This occurred several times until the contractor realized that the amount it was paying was greater than the contract price and subsequently brought suit to recover the amount it had overpaid. The former Court of Appeals determined that because the contractor paid the invoices without protest, its repeated course of performance obligated it to pay as it had during the course of the contract. *Id.* at 328-29.

As in *Giem*, Street's unilateral mistake does not prevent the parties' course of dealings from providing a contract term. As noted above, the course of dealings between Rife and Street was that Rife invoiced Street for the additional work it performed and Street paid the invoices. Thus, although Street made a mistake as to the total amount it had paid Rife, the course of dealings indicated the intention of the parties. Accordingly, Street is not entitled to recover from Rife on the theory that it mistakenly overpaid Rife. Therefore, we conclude that Street did not need to give written approval of the extra work as the parties' course of dealings abrogated the same.

3. Modification of Contract

Street also contends that the trial court erroneously modified the subcontract between it and Rife because the subcontract could only be modified by

a change order. As discussed above, we conclude that there was an oral agreement between Street and Rife to conduct the additional work. Thus, we will not address this issue again here.

4. Judgment Amount

As stated above, the trial court was correct in concluding that Rife should receive the reasonable value for the additional services it performed. With this standard in mind, we must now determine whether the trial court properly calculated the reasonable value of such services.

Street contends that the judgment erroneously ordered double payment of invoices. We agree. The trial court adjudged that Street still owed Rife additional compensation, but only in the amount of \$60,463.74. The trial court calculated this sum by adding the \$24,948.58 for the retainage deducted from Rife's paid invoices to the \$35,515.16 for the unpaid invoices. It appears the trial court, in determining the amount which it deemed Rife to be entitled, miscalculated the amount for the unpaid invoice portion of its calculation.

Upon review of the unpaid invoices, and as conceded by Rife in its brief to this court, the correct amount should be \$27,324 and not \$35,515.16. The miscalculation occurred because the total contained in the judgment included invoices #188, #189, #190, #191, and #192 twice. These invoices were already included in the third change order, and had therefore been paid. However, invoice #175 in the amount of \$15,068 and invoice #179 in the amount of \$12,256, in the

total amount of \$27,324 were unpaid. Thus, the correct total amount for the reasonable value of the additional services performed by Rife is \$52,272.58.

Street further contends that the trial court erred in determining that Rife should not be required to pay it \$21,744 for the cost it paid to Mountain Enterprises. The trial court concluded that Street failed to carry its burden of proof that Rife performed its services defectively and/or had not completed the work. Thus, the trial court denied Street's claim for payment for the services performed by Mountain Enterprises.

As discussed above, we will not set aside the trial court's findings of fact unless they are clearly erroneous. *A&A Mech.*, 998 S.W.2d at 509. The trial court heard little evidence that Rife performed its services defectively or had not completed the work. Thus, we cannot say that it was clearly erroneous for the trial court to find that Rife completed its obligations under the subcontract and did not perform its services defectively.

Finally, Street contends that, pursuant to the subcontract, it is entitled to recover its attorney fees from Rife. We disagree. The subcontract provided that Rife shall indemnify Street from and against all claims, damages, loss and expenses including but not limited to attorney fees arising out of performance of the subcontract provided that the claim, damage, or loss "is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's work itself)[.]" Because Street's claim, damage, or loss is not attributable to "injury, sickness, disease, or death, or to injury to or

destruction of tangible property,” this provision of the subcontract is not applicable to the instant case.

B. Street-Ramsey Contract

Street contends that because its agreement with Ramsey requires Ramsey to pay the cost of the site work plus five percent, Ramsey is required to pay Street the amount Street is required to pay Rife. We agree.

The trial court found that Ramsey was not obligated to pay Street for work performed by Rife in excess of the original subcontract amount unless Ramsey specifically agreed to an increase in costs. Evidence was presented at the bench trial that Ramsey was paying Street the five percent fee to oversee and monitor the site work, which included getting prior consent for permitting extra work on the site. Mark Winniger, the project manager for Street, testified that his duty was to see that the work was performed properly within the contract price. Bill Ramsey, the manager of Ramsey, testified that the additional work performed in excess of the subcontract and three change orders was not approved by Ramsey. Street counters with Bud Rife’s testimony that Bill Ramsey approved the additional work.

The clear contract between Street and Ramsey for the site work, as shown by the record and as found by the trial court, was on a cost plus five percent fee basis. This situation, however, was not one in which Ramsey was a completely absentee, hands-off owner, having little or no experience with construction

projects. We take judicial notice⁷ that the distance from Pikeville, Ramsey's business location, to Prestonsburg, the project location, is approximately 25 miles, and the two locations are connected by a four lane highway, U.S. Hwy. 23. When bids came in over an amount acceptable to Ramsey, he suggested Street obtain a bid from Rife. When Street's billing procedures were unacceptable to Rife, Ramsey made direct payments to Rife at Rife's request. When additional site problems arose, Ramsey was advised and authorized additional work. The factual findings of the trial court disclose that Rife's obligations were in a constant state of flux, and that Ramsey was right in the middle of it.

Furthermore, just as Street at no time raised any objection to the work that Rife was conducting or to the invoices it was submitting to Street until it discovered the mistake of its overpayment, Ramsey similarly raised no objections to Rife's work and paid the invoices submitted to it by both Rife and Street. As noted by the trial court, Ramsey had a prior relationship with Rife, was aware of the unforeseen problems encountered, and sided with Rife as to remedial measures when decisions were to be made. None of the parties adhered to the change order procedures. And Ramsey paid the invoices that Street submitted to it for the work. Because Ramsey did not raise a question with respect to the invoices it paid, those charges are presumed to be correct. *See Willey*, 421 S.W.2d at 363. Just as the subcontract between Street and Rife was modified by the parties' course of dealings, so too the contract between Street and Ramsey was modified. By their

⁷ Under Kentucky Rules of Evidence (KRE) 201 "judicial notice may be taken at any stage of the proceeding."

course of dealings, the parties showed that they did not intend for there to be a requirement that a change order had to be executed prior to Rife doing work or being compensated for any additional work it conducted.

Ultimately, the parties are bound by the contracts they enter into, and courts are not at liberty to remake those contracts, or impose terms the parties did not make themselves. *Perry v. Perry*, 143 S.W.3d 632, 633 (Ky.App. 2004). The trial court found that Rife was entitled to additional compensation. That obligation falls on Ramsey, not Street. We therefore vacate the trial court's order requiring reimbursement from Street to Ramsey under the parties' contract. In addition, the trial court erred in failing to require Ramsey to reimburse Street for any additional amounts Street is required to pay Rife. In this regard, Ramsey has already paid a total of \$433,156.83, of which Rife has already received \$408,208.24 and Street withheld \$24,948.59 as retainage. As Rife is to receive an additional \$52,272.58, Ramsey's portion is \$27,324, and Street's portion is \$24,948.59.

Finally, we note that the trial court's judgment is not clear as to whether it allowed or disallowed the five percent fee Street was to receive under the contract. In its Findings of Fact, ¶ 63, the trial court states "[t]he subject invoices reflect that Street had billed Ramsey, and Ramsey had paid Street, pursuant to the cost plus 5% contract a total sum of \$20,299.09 as the plus 5% component of the agreement between Street and Ramsey." \$20,299.09 is 5% of \$405,981.80. When the trial court calculated the amount Street was to repay Ramsey, that amount was based on the difference between the gross amount paid

by Ramsey both to Rife and to Street less the original contract price, including change orders. No further mention of the five percent fee was made. Although unclear from the trial court's judgment, the trial court may have concluded that Street breached its contract with Ramsey and was therefore not entitled to its five percent fee. However, that finding of fact must be made by the trial court. Thus, we remand to the trial court for additional factual findings, consistent with this opinion, as to whether Street was entitled to its five percent fee. If so, the trial court should award the fee based on the cost of the project, \$460,480.83.

We also conclude that the trial court did not err in finding that Ramsey did not owe Street any additional funds as a result of the work performed by Mountain Enterprises. The trial court made a factual finding that Street had failed to carry its burden that Rife had performed services defectively and/or failed to complete the work. Based on the evidence presented, we cannot say that the trial court's findings were clearly erroneous. Therefore, Ramsey is not liable for the \$21,744 that Street paid to Mountain Enterprises.

V. CONCLUSION

For the reasons set forth herein, we affirm in part and reverse in part and remand. On remand, the Floyd Circuit Court shall alter its judgment so as to award Rife \$52,272.58, which payment shall be made \$27,324 by Ramsey, and \$24,948.59 by Street, plus the post-judgment interest awarded by the trial court. Post-judgment interest shall be paid by Ramsey and Street in proportion to their respective share of the principal judgment amount due. Additionally, the Floyd

Circuit Court shall make factual findings as to whether Street is entitled to its five percent fee, and make an appropriate award in that respect.

GRAVES, SENIOR JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KELLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the portion of the majority's opinion holding that the trial court was correct in concluding that Rife should receive the reasonable value for the additional services it performed in the amount of \$52,272.58. I also agree that the trial court did not err in concluding that both Rife and Ramsey should not be required to pay Street \$21,744 for the services performed by Mountain Enterprises. Additionally, I concur with the majority's conclusion that Street is not entitled to recover its attorney fees from Rife.

However, I respectfully dissent with that portion of the majority opinion finding that Ramsey is required to pay Street the amount Street has to pay Rife for the additional work plus five percent. The trial court found that Ramsey was not obligated to pay Street for work performed by Rife in excess of the original subcontract amount unless Ramsey specifically agreed to an increase in costs. I agree with that finding.

Evidence was presented during trial that Ramsey was paying Street the five percent fee to oversee and monitor the site work, which included getting prior consent for permitting extra work on the site. Even Mark Winniger, the

project manager for Street, testified that it was his duty to see that the work was performed properly within the contract price.

Additionally, Bill Ramsey, the Manager of Ramsey, testified that the work performed in excess of the subcontract and three change orders was not approved by Ramsey. Street contends that this testimony directly conflicts with Bud Rife's testimony that Bill Ramsey approved the additional work. Although there was conflicting testimony, the trial court, as the finder of fact, has the sole responsibility to weigh the evidence before it and judge the credibility of all witnesses. It is not bound to accept the testimony of any witness as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-65 (1941). Therefore, based on the testimony of Mark Winniger and Bill Ramsey, I cannot say that the trial court's findings were erroneous. Thus, I believe that the trial court was correct in finding that Ramsey was entitled to a judgment against Street for the excess amount it had paid Street.

However, I do agree with the majority that it is not clear from the trial court's judgment whether it concluded that Street was entitled to its five percent fee. Thus, it is unclear whether the trial court factored in the five percent Street was to receive when it calculated the excess amount Ramsey paid to Street. Therefore, I would remand to the trial court for additional factual findings as to whether Street was entitled to its five percent fee. If so, I would direct the trial court to factor the five percent fee into its calculations when determining the excess amount Ramsey paid to Street.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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