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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000440-MR
AND
NO. 2012-CA-000495-MR

DUGAN & MEYERS
CONSTRUCTION COMPANY — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 07-CI-03886 AND 08-CI-01309

SUPERIOR STEEL, INC., AND
BEN HUR CONSTRUCTION
COMPANY, INC. — APPELLEES/CROSS-APPELLANTS

AND

THE ASCENT AT ROEBLING'S BRIDGE
LLC; CORPOREX DEVELOPMENT AND
CONSTRUCTION MANAGEMENT LLC;
AND WESTCHESTER FIRE INSURANCE
COMPANY — CROSS-APPELLEES

AND

NO. 2012-CA-000441-MR
AND
NO. 2012-CA-000494-MR

THE ASCENT AT ROEBLING'S
BRIDGE LLC; CORPOREX
DEVELOPMENT AND CONSTRUCTION
MANAGEMENT LLC; AND
WESTCHESTER FIRE INSURANCE
COMPANY APPELLANTS/CROSS-APPELLEES

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DUGAN & MEYERS CONSTRUCTION
COMPANY APPELLEE/CROSS-APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON,[1] LAMBERT AND MAZE, JUDGES.

LAMBERT, JUDGE: These appeals arise from a complex construction contract case involving the building of The Ascent at Roebling's Bridge Condominiums (the Ascent). We have thoroughly considered the record, the briefs, and the oral

[1] Judge Caperton concurred in result only in this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

arguments in this matter, and we hold that the judgment must be vacated, and this matter must be remanded for a new trial.

The Ascent is a 21-story, 72-unit condominium and garage project in Covington, Kentucky. The Ascent, as the owner and developer of the property, entered into a contract with Corporex Development and Construction Management LLC (Corporex) for Corporex to be the design builder of the project. In March 2006, Corporex entered into a contract with Dugan & Meyers Construction Company (D&M), an Ohio corporation, to provide construction management services for the Ascent, which included furnishing materials, labor, services, tools, equipment, supervision, and other items necessary to construct and complete the work as defined by the construction management contract (CM Contract). Pursuant to the terms of the CM Contract, Corporex was to pay D&M a lump sum of $2.2 million, a $975,000.00 contractor's fee as well as any participation in savings and a potential bonus, and for the actual cost of the work, which was described in Article 6.1 of the CM Contract. Excluded from the CM Contract was any extra work that had not been authorized by Corporex or the Ascent pursuant to Article 8, which addressed change orders. The CM Contract contained an indemnification provision in Article 14.4 that required D&M to indemnify Corporex for certain claims. D&M entered into subcontracts with trade contractors to perform specific portions of the work. Some of the subcontractors were chosen by the Ascent or Corporex, and those entities negotiated the subcontracts separately.

Superior Steel, Inc. is a Tennessee corporation and is a fabricator and supplier of structural steel used in construction. Ben Hur Construction Company, Inc. (Ben Hur) is a Missouri corporation and is a construction subcontractor that erects structural steel, metal decking, and other components. Following negotiations for budget pricing, D&M issued a letter of intent to enter into a subcontract with Superior Steel to provide and erect the structural steel and other components for the construction project. There was some dispute about whether a written contract had been agreed upon. The jury later determined that a subcontract existed between D&M and Superior, which it identified as Exhibit 226. The terms of the subcontract called for D&M to pay Superior Steel a fixed price of $1,814,000.00 subject to any additions and deductions provided for in the subcontract. The subcontract also contained a prevailing party provision, a pay-if-paid clause, and an indemnity clause. The indemnity clause did not provide indemnity to D&M from Corporex or the Ascent. Superior Steel entered into a separate subcontract with Ben Hur to erect the steel components and agreed to pay Ben Hur $444,000.00 for this work, subject to additions and deductions for changes that had been agreed upon in writing and signed by Superior. We shall refer to these as the Steel Contracts.

Issues arose between Superior Steel and D&M related to extra work performed due to changes in the scope and design of the project. Structural design drawings issued by Corporex on July 28, 2006, were provided to Superior Steel by D&M during the summer of 2006. Based upon these drawings, D&M requested

Superior Steel to submit a proposal for the steel work, which it did in September 2006. Superior Steel claimed the drawings were preliminary, incomplete, and did not contain all of the information needed to prepare a complete and accurate bid. These drawings were revised several times in the ensuing months to address changes to the termination of the building's metal roof decking (roof edge) and the roof tip, as the original drawings did not provide full support of the roofing membrane.

As a result of these changes, Superior Steel and Ben Hur were required to provide extra materials and perform additional work beyond the scope of the original contract. D&M directed Superior Steel and Ben Hur to perform this extra work and to keep track of their time and costs. Ben Hur's Vice President, Mark Douglas, met with D&M's President and Project Manager, Jay Meyers and Dan Dugan, and Corporex's Vice President, Mike O'Donnell, before beginning the extra welding work to ensure that Ben Hur would be paid. Mr. Meyers and Mr. O'Donnell directed Ben Hur to proceed with the extra work and keep track of time and costs. Once the steel work on the building was completed, including the extra work, D&M refused to pay for the extra work upon submission of the documentation of the extra costs and also refused to release an additional amount in "retainage." In late December 2007, Superior Steel and Ben Hur filed separate mechanics' liens in the Kenton County Clerk's office when they were not paid for the costs associated with the design drawing revisions, roof edge conditions, and roof tip changes. Superior Steel's lien was in the amount of $664,353.40, and Ben

Hur's lien was in the amount of $361,246.09. The filing of the liens precipitated this litigation.

On April 22, 2008, an action related to the Steel Contracts was commenced in Kenton Circuit Court and was assigned Case No. 08-CI-01309.[2] Superior Steel and Ben Hur filed a complaint against the Ascent, Corporex, D&M, and Westchester Fire Insurance Company (Westchester) seeking compensatory damages, punitive damages, interest, and costs. Westchester, a New York corporation, provided the surety under the bonds that had been filed with the court as substitute collateral for the mechanics' liens filed by Superior and Ben Hur. In the complaint, Superior Steel and Ben Hur alleged claims of breach of contract, unjust enrichment, promissory estoppel, breach of express and implied warranties, negligent misrepresentation, negligence, negligent supervision, and surety bonds. We shall refer to this as the Steel Case.

On July 17, 2009, the Ascent and Corporex moved for leave to file cross-claims against D&M to assert claims for breach of contract, negligent performance of contract, constructive fraud, and indemnification. This motion was

[2] The matter on appeal arises from the second lawsuit filed related to this construction project. On December 20, 2007, D&M filed a complaint in Kenton Circuit Court against WT Acquisition Company Limited d/b/a Waltek & Co. Ltd., a Cincinnati limited liability company (Waltek), and North American Specialty Insurance Company, a New Hampshire corporation (NAS). This action was assigned as Case No. 07-CA-03886. Waltek was a subcontractor on the project that had been chosen to furnish and install a complete, watertight curtainwall system. NAS acted as the surety for Waltek. D&M alleged six counts against Waltek and/or NAS, including breach of contract, breach of warranty, indemnification, bad faith, breach of fiduciary duty, and delay, and sought compensatory, consequential, and punitive damages as well as costs and interest. D&M later named the Ascent and Corporex as additional defendants in its first amended complaint and alleged claims related to the concrete work performed in the project. Several cross-claims and counterclaims were filed. The two cases were consolidated by order entered September 17, 2008, and the earlier action is still pending below.

granted on August 18, 2009. On August 11, 2009, D&M moved for leave to file a cross-claim against the Ascent and Corporex to seek payment under the CM Contract and to assert a contributory and indemnity claim related to Superior Steel's and Ben Hur's claims on the construction project. This motion was granted by agreed order entered August 28, 2009.

On April 8, 2010, the Ascent and Corporex filed a motion for partial summary judgment addressing the complaint filed by Superior Steel and Ben Hur. On April 9, 2010, the Ascent and Corporex filed a motion for partial summary judgment of D&M's cross-claim, arguing that D&M had no right under the construction agreement to recover its fees and costs from the Ascent or Corporex regarding the claims filed by Superior Steel and Ben Hur. They argued that D&M could not recover fees or costs unless Corporex approved them, and that the fees and costs had to be determined to be reasonably and properly resulting from D&M's work. D&M's costs and fees arising from its disputes with Corporex would not be recoverable as actual costs of the work pursuant to Article 6.1(c) of the CM Contract.

On May 10, 2010, D&M filed a motion for summary judgment on the cross-claim of the Ascent and Corporex seeking a dismissal of their cross-claims. On July 9, 2010, the circuit court entered an order denying the April 8th motion for partial summary judgment, noting that the defendants were asking the court to dismiss Superior Steel's and Ben Hur's claims for additional compensation for extra work performed as a result of certain design changes involving the perimeter

column connections. A challenge to the method of calculating the claim for damages would have to wait for an assessment of the evidence presented at trial.

The court granted the motion of the Ascent and Corporex, finding that the language of Article 6.1(c) of the contract pertaining to reimbursement for legal, mediation, and arbitration costs and fees was clear and unambiguous, and that Corporex was required to approve them in order to be liable to reimburse D&M for these costs. However, the court stated that D&M retained the right to seek reimbursement of attorney fees and costs by way of common law indemnity or contribution. Finally, the court denied D&M's May 10th motion for summary judgment finding that genuine issues of material fact precluded the entry of summary judgment.

A trial in the Steel Case was scheduled for January 27, 2011, but it was later postponed due to the unavailability of a key fact and expert witness and was rescheduled for May 12, 2011. Numerous motions *in limine* were filed prior to trial, which the court ruled on by order entered April 29, 2011. The trial went forward on several claims, including Superior Steel's claim against D&M for breach of contract; Superior Steel's and Ben Hur's claims against D&M, Corporex, and the Ascent for unjust enrichment; D&M's claim against Corporex for common law indemnification; and Corporex's claims against D&M for breach of contract and negligence. On May 23, 2011, D&M moved the court for a directed verdict on Superior Steel's and Ben Hur's claims for negligence, negligent supervision, promissory estoppel, unjust enrichment, and breach of implied warranty, noting

that they had not tendered jury instructions for, and it appeared they were not going forward with, the last claim. D&M went on to argue why it was entitled to a directed verdict on the other claims in an attached memorandum.

On June 3, 2011, the Ascent and Corporex filed a bench memorandum on its breach of contract and negligent performance of a contract claims against D&M, arguing that it was entitled to bring both claims simultaneously to the jury. They also filed a bench memorandum related to D&M's failure to comply with conditions precedent. In addition, Superior Steel and Ben Hur filed a bench memorandum related to Corporex's failure to make payment of earned retainage on the base contract work.

At the conclusion of the trial, the jury returned a verdict including the following findings:

- That a written contract as set forth in Exhibit 226 was entered into between Superior Steel and D&M to fabricate and erect the structural project.
- That Superior Steel and Ben Hur had performed extra work on the forces table/design load increase in the amounts of $94,415.87 and $205,583.74, respectively.
- That Superior Steel and Ben Hur had performed extra work on the roof edge condition in the amounts of $27,814.83 and $69,778.97, respectively.
- That Superior Steel and Ben Hur had performed extra work on the roof tip in the amounts of $1,786.56 and $8,932.82, respectively.

- That D&M had not failed to exercise ordinary care in the performance of its obligations under the CM Contract with Corporex.

The parties were ordered to file proposed judgments following the trial, and they presented their respective arguments at a hearing on June 20, 2011. Following the hearing, the court directed the parties to file post-trial briefs related to their proposed judgment entries. Superior Steel and Ben Hur argued that the judgment should be based upon breach of contract rather than unjust enrichment, and asserted that the equitable remedy of unjust enrichment is not available when an explicit contract exists. They noted that this suit was fundamentally a contract dispute and that the parties and the court omitted several non-contract claims from the jury instructions to simplify the case and to focus on the contractual nature of the dispute. Superior Steel and Ben Hur also argued that the defendants were attempting to avoid liability for attorney fees permitted by Section 11.6 of the contract by arguing that the judgment should be based on unjust enrichment. Therefore, Superior Steel and Ben Hur requested that the court enter a judgment in the amount of $603,456.19, representing the $408,312.79 in damages awarded by the jury and the $195,143.40 awarded via the partial directed verdict for retainage, against D&M on the breach of contract claim as well as a judgment for D&M in the same amount against Corporex on its claim for indemnification.

In its brief filed August 4, 2011, D&M argued that the only legal theory supporting the separate judgments to Superior Steel and Ben Hur was unjust enrichment, noting that those were two different legal entities with separate claims

and recoveries. D&M contended that Ben Hur should recover its damages against the Ascent under the theory of unjust enrichment. D&M further contended that Ben Hur did not have a contract with D&M and was not a party to Superior Steel's subcontract with D&M. Therefore, Ben Hur did not have any breach of contract claims against any of the defendants. D&M also argued that Superior Steel should recover under an unjust enrichment theory against the Ascent because the jury's verdict did not establish that the damages were due to breach of contract. In addition, D&M argued that the pay-if-paid clauses created a condition precedent to D&M's requirement to pay. Therefore, Superior Steel was only entitled to payment from D&M if D&M first received payment from Corporex under the pay-if-paid clauses. Superior Steel and Ben Hur argued that the jury rejected the pay-if-paid defense D&M raised when it found that D&M ordered and agreed to pay for the extra work.

On September 9, 2011, the circuit court entered an interlocutory judgment and order related to the jury's verdict and its pretrial rulings. The parties filed motions objecting to the interlocutory judgment and order and moved the court to amend it. The court stayed execution of the interlocutory judgment and order, set a briefing schedule, and scheduled a hearing on the parties' objections for November 3, 2011.

Superior Steel and Ben Hur, as the prevailing parties, filed a motion for attorney fees, costs, and expenses in the total amount of $904,778.68 pursuant to Section 11.6 of the contract between Superior Steel and D&M. Referring to

themselves as the "Steel Team," Superior Steel and Ben Hur were represented by Frost Brown Todd, LLC throughout the litigation and had incurred and were billed for attorney fees in the amount of $766,650.20 through September 30, 2011. They also incurred $73,505.92 in expert fees, $52,199.56 in litigation costs, and $12,440.00 to construct the three demonstrative connection exhibits displayed to the jury.

The Ascent and Corporex objected to the motion for attorney fees. They argued that only Superior Steel, which had paid $345,673.07 of the total amount, was eligible to recover attorney fees under the terms of the contract. The costs Ben Hur paid – $559,105.61 – should be excluded. Additionally, they argued that the fees awarded to Superior Steel should be commensurate with the amount it was owed for the extra work, which was $124,017.26. Furthermore, they argued that the claim for attorney fees could only be made against D&M, not the Ascent or Corporex.

In its memorandum filed November 23, 2011, D&M took issue with the term "Steel Team" and argued that Superior Steel and Ben Hur were two separate parties with separate claims and recoveries. D&M also argued that the law firm only billed Ben Hur, not Superior Steel, meaning that the only client obligated to pay the firm was Ben Hur. However, Ben Hur was not entitled to recover any attorney fees because it was not a party to the subcontract between Superior Steel and D&M. Furthermore, the circuit court should reduce the amount of fees it might award by the amount Ben Hur was obligated to pay. Finally, D&M

argued that any award of attorney fees to Superior Steel must pass through to Corporex and the Ascent.

In the reply, Superior Steel and Ben Hur stated that when the two entities decided to retain counsel to resolve their claims, they entered into an oral agreement that each would pay attorney fees and expert fees in proportion to its share of the total claim, which at the time was 39% for Superior Steel and 61% to Ben Hur. This split was maintained throughout the course of the litigation. They also argued that Ben Hur was entitled to recover attorney fees because its extra work and a portion of the unpaid retainage arose from Ben Hur's obligation to perform the steel erection work under its subcontract with Superior Steel. Alternatively, they argued that Ben Hur was entitled to recover the litigation costs under equitable principles.

By separate motion, Superior Steel and Ben Hur requested pre-and post-judgment interest in the amount of $603,456.19.

On February 3, 2012, the circuit court entered final judgment. In summary, the court awarded damages to Superior Steel and Ben Hur against D&M, but ordered the Ascent and Corporex to indemnify D&M for those damages. D&M would therefore not be liable to pay the damages to Superior Steel and Ben Hur until it had received indemnification. The circuit court also awarded attorney fees and costs to Superior Steel and held D&M, Corporex, and the Ascent jointly liable for payment of these amounts. The court awarded the unpaid retainage to Superior Steel and the award to Ben Hur under the doctrine of unjust

enrichment. Finally, the court declined the request to decrease the post-judgment interest rate.

Specifically, and after addressing the jury's verdict and the associated legal rulings, the court set forth its decision as follows:

> 1. That the Plaintiff, Superior Steel, Inc., shall recover a Judgment against the Defendants, Dugan & Meyers Construction Company, and The Ascent at Roebling's Bridge, LLC, jointly and severally, [in] the amount of $124,017.26 for the value of services, equipment and materials provided on the Ascent project. This amount shall bear pre-judgment interest from and after April 22, 2008 at the rate of 3.25% compounded annually to the date of the entry of this Judgment. Thereafter, the amount awarded by the Judgment, including accrued interest, shall bear interest at the legal rate post-judgment rate of 12%, compounded annually, until paid in full.
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> 2. That the Plaintiff, Superior Steel, Inc., shall also recover a Judgment against Dugan & Meyers Construction Company, and The Ascent at Roebling's Bridge, LLC, jointly and severally, [in] the amount of $195,143.40 for unpaid retainage. This amount will bear pre-judgment interest at the legal rate of 3.25% from and after April 22, 2008, until the entry of this Judgment and thereafter at the legal post-judgment rate of 12%, compounded annually, until paid in full.
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> 3. That the Plaintiff, Ben Hur Construction Company, Inc., shall recover from the Defendants, Dugan & Meyers Construction Company and The Ascent at Roebling's Bridge, LLC, jointly and severally, the amount of $284,295.53 for the value of services and equipment it provided on the Ascent project, plus pre-judgment interest at the legal rate of 8% until the entry of this Judgment and thereafter at the legal post-judgment rate of 12%, compounded annually, until paid in full.

4. That the Defendant, Dugan & Meyers Construction Company, shall recover a Judgment against the Defendants, Corporex Development and Construction Management, LLC and The Ascent at Roebling's Bridge, LLC, jointly and severally, for indemnification in full for all sums, including attorney's fees, costs and expenses, which it is required to pay to the Plaintiffs pursuant to this judgment.

5. That the Judgments in favor of Superior Steel against Dugan & Meyers in the amount of $124,017.26 and $195,143.30, plus pre-judgment and post-judgment interest, shall be stayed until the earlier of: (i) the date that Corporex satisfies in full Dugan & Meyers' Judgment against Corporex; or, (ii) the date that The Ascent satisfies in full Dugan & Meyers' Judgment against The Ascent; or, (iii) Corporex or The Ascent satisfies in full the Judgment entered in favor of the Plaintiff, Superior Steel, Inc.

6. That the Judgment in favor of Ben Hur against Dugan & Meyers in the amount of $284,295.53, plus pre-judgment and post-judgment interest, shall be stayed until the earlier of: (i) the date that Corporex satisfies in full Dugan & Meyers' Judgment [] against Corporex; or, (ii) the date that The Ascent satisfies in full Dugan & Meyers' Judgment against The Ascent; or, (iii) Corporex of The Ascent satisfies in full the Judgment entered in favor of the Plaintiff, Superior Steel, Inc.

7. That the Plaintiff, Superior Steel, Inc., shall recover a Judgment against the Defendant, Dugan & Meyers, for reasonable attorney's fees, costs and expenses in the amount of $349,241.70. This Judgment for attorney's fees in favor of Superior Steel, Inc. against Dugan & Meyers shall also be stayed until the earlier of: (i) the date that Corporex satisfies in full Dugan & Meyers' Judgment against Corporex; or, (ii) the date that The Ascent satisfies in full Dugan & Meyers' Judgment against The Ascent; or, (iii) Corporex or The Ascent satisfies in full the Judgment entered in favor of the Plaintiff, Superior Steel, Inc.

> 8. That the Cross-Claims of the Defendants, Corporex Development and Construction Management, LLC, and The Ascent at Roebling's Bridge, LLC, against the Defendant, Dugan & Meyers Construction Company, are DISMISSED.
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> 9. That the Plaintiffs, Superior Steel, Inc. and Ben Hur, are awarded their recoverable costs from the Defendants, Dugan & Meyers Construction Company, Corporex Development and Construction Management, LLC, and The Ascent at Roebling's Bridge, LLC, jointly and severally.
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> 10. That the Defendants, Dugan & Meyers Construction Company, Corporex Development and Construction Management, LLC, and The Ascent at Roebling's Bridge, LLC, jointly and severally, shall pay all additional court costs imposed by the Kenton Circuit Court Clerk for extraordinary services pursuant to CR 3.02(3)(b).

Related to its award of attorney fees and costs to Superior Steel, the circuit court declined to treat Superior Steel and Ben Hur as a unitary plaintiff because Ben Hur did not have a written contract with D&M as Superior Steel did. And while the court found that as the prevailing party, Superior Steel had a contractual right to an award of attorney fees, expenses, and costs from D&M, it could not made this same ruling as applied to Ben Hur 1) because Ben Hur did not have a contract with D&M and 2) because the court could not find any compelling legal precedent to support the award on equitable grounds. The court calculated the amount of the fees to be awarded to Superior Steel by using the split Superior Steel and Ben Hur had agreed upon, 39%/61%. A stipulated order to stay

execution on the judgment was entered on February 29, 2012, and these appeals and cross-appeals now follow.

DIRECT APPEAL NO. 2012-CA-000441-MR

We shall first address Corporex, the Ascent, and Westchester's (collectively, "the appellants") direct appeal from the final judgment.[3]

At the oral argument, counsel for the appellants argued that the circuit court did not follow the line of contracts that had been negotiated and entered into between the parties to this action. Counsel argued that under the general contract between D&M and Corporex, Corporex agreed to pay D&M from three buckets of money: 1) a lump sum for general conditions; 2) a contractor's fee; and 3) the actual cost of the work. These appeals address the third bucket; namely, the actual cost of the work, which was the aggregate sum of the subcontracts D&M entered into with subcontractors. Extra work, or work done by subcontractors beyond this subcontracted amount, was not the actual cost of work unless it met all conditions in Article 8 of the contract. Article 6 defined what constituted the actual cost of the work, which did not include extra work unless it met several conditions. The contract between Corporex and D&M did not contain a prevailing party clause, while the Steel Subcontract between D&M and Superior Steel contained such a clause. When instructing the jury, the court failed to include the theory of the claims and was imprecise regarding the parties. Counsel stated that the court

[3] In footnote 2 of its brief, the appellants state that Westchester was named as an appellant because of the statement in the judgment that if Superior Steel and Ben Hur were unable to satisfy the judgments, they would be permitted to seek a judgment against Westchester pursuant to the bonds the company had issued.

should have looked at the contracts between D&M and Corporex to decide whether the extra work claims were allowable and proper pursuant to the terms of the contract. The circuit court never made a finding on whether D&M had complied with the contractual provisions or that Corporex had breached its contract to D&M. With these additional arguments in mind, we shall consider the issues raised in the appellants' direct appeal.

1. Failure to permit Corporex to present breach of contract claim against D&M; instruction on negligence claim.

This argument includes two issues related to jury instructions. The appellants assert that the circuit court erred when it 1) did not permit Corporex to present a separate breach of contract claim against D&M to the jury and 2) instructed the jury solely on the negligence claim. "Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review." *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006), citing *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006).

Corporex brought cross-claims for breach of contract and negligence against D&M related to its allegation that D&M failed to adequately oversee and manage the construction project. The circuit court opted to submit only the negligence claim to the jury, having determined that the claims were mutually exclusive. The breach of contract claim related to D&M's alleged failure to manage the steel bid process in accordance with the CM Contract. The separate

claim for negligence related to D&M's alleged failure to exercise ordinary care in managing in the building project, which resulted in money damages to Corporex. Corporex cited *Kevin Tucker & Assoc., Inc. v. Scott & Ritter, Inc.*, 842 S.W.2d 873, 874 (Ky. App. 1992), for the proposition that a plaintiff may sue in tort and contract when an act constitutes both. Here, the court only permitted the jury to decide one claim, the negligence claim, reasoning that Corporex would have to choose a remedy, but ultimately did not permit Corporex to choose which remedy to submit to the jury.

Corporex goes on to assert that the negligence instruction was erroneous because it assumed that it, Corporex, was responsible for the cost of the extra work, an issue that was disputed between Corporex and D&M. The instruction provided that "Corporex is responsible for that extra work except to the extent that such extra work was due to the negligence of the Defendant, Dugan & Meyers, in performing its duties under the construction management contract." In the instruction it tendered, Corporex proposed to instruct the jury to decide whether D&M failed to exercise ordinary care and whether the failure "was a substantial factor in causing Corporex to incur unanticipated additional costs of engineering, material and labor provided by either Superior Steel or Ben Hur." This did not include a presumption regarding which party was responsible for the extra work or the cost of the extra work. The appellants request that this Court vacate the circuit court's determination on its negligence claim against D&M and remand for a retrial on its breach of contract and negligence claims.

In response, D&M states that Corporex did not preserve this error for review by objecting to the instruction and jury question; that Corporex argued for, submitted, and approved the form of the instruction and question; and that even if the instruction and question constituted error, this did not prejudice Corporex and was not reversible error. D&M argues that Corporex voluntarily abandoned its breach of contract claim. Rather, Corporex opted to permit the negligence claim to go forward when it admitted that its cross-claim against D&M was a negligence claim. Furthermore, it submitted a proposed jury instruction that was substantially adopted by the circuit court. D&M cites *Wright v. House of Imports, Inc.*, 381 S.W.3d 209 (Ky. 2012), in support of its argument that a party cannot complain that its substantial rights have been affected by the instructions or that a manifest injustice has resulted if a trial court adopts that party's proposed instructions. D&M also argues that the instructions as a whole fairly stated the law of the case and were therefore not prejudicial. Regarding the failure to include the breach of contract instruction, D&M states that the instruction provided to the jury embodied both claims, in that the jury had to review the obligations in the CM Contract to determine whether D&M failed to exercise ordinary care.

In reply, the appellants contend that Corporex preserved the jury instruction issue by tendering an instruction on breach of contract and that its later agreement to one aspect of the negligence instruction did not waive the objection. They also argue that Corporex never abandoned its breach of contract claim and stated that it was specifically preserving its previous objections.

First, we agree with the appellants that the circuit court erred in only instructing the jury on Corporex's negligence claim, not its contract claim. As the appellants argue in their brief, a plaintiff is not required to choose to sue in contract if his claim also arises in tort:

> Scott & Ritter insist that Tucker cannot possibly recover from them because the duties that exist between the parties and the measure of damages for any breach of duty all must be controlled by the contracts between the parties. From *dicta* in *Penco, Inc. v. Detrex Chemical Industries*, Ky. App., 672 S.W.2d 948 (1984), Scott & Ritter conclude that any time an act constitutes both a tort and a breach of contract, the plaintiff must waive the tort and sue in contract. We do not believe that this is now or ever was the law. *See Hovermale v. Central Kentucky Natural Gas Co.*, Ky., 282 S.W.2d 136 (1955); *Alberti's Adm'x v. Nash*, Ky., 282 S.W.2d 853 (1955); CR 18.01.

Kevin Tucker & Assoc., Inc. v. Scott & Ritter, Inc., 842 S.W.2d 873, 874 (Ky. App. 1992), disapproved of on other grounds by *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000). In its cross-claim, Corporex made two separate and distinct claims, although both related to D&M's alleged failure to adequately oversee and manage the construction project. The claim for breach of contract related to D&M's failure to manage the steel bid process, while the negligence claim related to D&M's failure to exercise ordinary care in managing the Ascent project. These two claims are not mutually exclusive, and the circuit court should have instructed the jury on both claims.

Furthermore, we agree that the circuit court's negligence instruction was erroneous because it assumed that Corporex was responsible for the extra

work. Instruction No. VI instructed the jury that "Corporex is responsible for that extra work except to the extent that such extra work was due to the negligence of the Defendant, Dugan & Meyers, in performing its duties under the construction management contract." The appellants assert that this question – which entity was responsible for the extra work and its costs – was the heart of the dispute between Corporex and D&M and that the language the circuit court used ignored the contractual relationships among the parties. The appellants' tendered instruction more properly conveys the law and circumstances of this case. That instruction provides, in part, as follows:

> You will find for Corporex and The Ascent if you are satisfied from the evidence as follows:
>
> 1. Dugan & Meyers breached its duty of ordinary care; and
>
> 2. Dugan & Meyers' failure to exercise ordinary care was a substantial factor in causing Corporex to incur unanticipated additional costs for engineering, material and labor provided by either Superior Steel or Ben Hur.

We specifically disagree with D&M's arguments that the appellants abandoned its breach of contract claim or failed to preserve its objection to the negligence instruction adopted by the circuit court.

Accordingly, we must vacate the judgment and remand for a new trial before a jury properly instructed on Corporex's breach of contract claim and its negligence claim.

2. Unjust enrichment judgment against the Ascent

The next argument we shall address is whether the circuit court erred in awarding judgments in favor of Superior Steel in the amount of $124,017.26 and in favor of Ben Hur in the amount of $284,295.53 against the Ascent on an unjust enrichment theory for the extra work on the forces table/design load increase, the roof edge condition, and the roof tip. The appellants point out that the jury returned a verdict finding that Superior Steel and Ben Hur were owed the same amounts on contract theories, meaning that there should not have been a claim for unjust enrichment. Because the jury found that a contract existed, the equitable doctrine of unjust enrichment was not available because the plaintiffs had an adequate legal remedy. In making this argument, the appellants relied upon *Codell Const. Co. v. Commonwealth*, 566 S.W.2d 161, 165 (Ky. App. 1977) ("The doctrine of unjust enrichment has no application in a situation where there is an explicit contract which has been performed."). This remained true, the appellants maintain, even though the contract remedy was against D&M, not the Ascent, because it was a legal remedy for the same grievance concerning the same subject. The appellants also argue that unjust enrichment is not a viable claim against the Ascent, as the property owner, because contracts govern the chain of relationships between the Ascent and Corporex, between Corporex and D&M, between D&M and Superior Steel, and between D&M and Ben Hur. Furthermore, the appellants argue that each of the contracts addresses the situation where additional work is performed. The appellants also argue that Ben Hur should have filed its own complaint against Superior Steel rather than be a joint plaintiff in the present case.

Finally, the appellants argue that the circuit court did not instruct the jury about unjust enrichment or extra work as to the Ascent, and that the extra work instruction only mentioned Superior Steel, not Ben Hur.

The appellants request that this Court vacate the circuit court's judgment on unjust enrichment and hold as a matter of law that this claim cannot proceed against the Ascent because Superior Steel and Ben Hur possessed adequate legal remedies under the contracts they signed, which contained specific provisions governing claims for extra work.

Superior Steel and Ben Hur contend that the circuit court's judgment against the Ascent for unjust enrichment is supported by the verdict, the evidence at trial, and by Kentucky law. They point out that the Ascent had not paid any party for the extra work performed on the project that it required because of the design changes. They argue that no contract existed between Superior Steel or Ben Hur and the Ascent and that the cases the appellants cite to do not support reversal because those cases involved situations where the plaintiff had a contract directly with the defendant from whom it sought to recover under an unjust enrichment theory. That was not the case here. Superior Steel and Ben Hur also dispute the appellants' citations to secondary sources to support their argument that the cases were relevant because the remedy was for the same grievance concerning the same subject. Superior Steel and Ben Hur explain that because the Ascent had not paid anyone for the extra work, they should be able to bring a contract action against a general contractor and an equitable action against the project owner where the

owner had not paid anyone for the work, noting this has been recognized in other jurisdictions. Because the Ascent, as the owner of the building, both caused the extra work by changing the design and benefited from the extra work at Superior Steel and Ben Hur's expense, without having paid for that extra work, Superior Steel and Ben Hur contend that the circuit court properly entered the judgments against the Ascent for unjust enrichment and against D&M for breach of contract while at the same time entering a judgment for D&M against the Ascent and Corporex for common law indemnification.

In reply, the appellants continue to argue that Superior Steel and Ben Hur had an adequate legal remedy, which would preclude an equitable claim for unjust enrichment. They also argue that the Ascent did not participate in the relevant transactions, other than generally participating in the construction process as a whole, nor did the Ascent participate in the underlying contractual transactions between Ben Hur and Superior Steel, and Superior Steel and D&M. Additionally, the appellants point out that Superior Steel and Ben Hur did not address the argument that the circuit court did not submit an instruction for extra work as to the Ascent, meaning that it should not have included an unjust enrichment judgment instruction as to the Ascent because that would not have been in accordance with the jury's verdict.

During oral argument, counsel for the appellants argued that no case in the country holds that the owner is responsible under unjust enrichment when a contract is in place. Counsel cited to the recent case of *Bell v. Commonwealth*, 423

S.W.3d 742 (Ky. 2014), in which the Supreme Court of Kentucky discussed the differences between courts of equity and courts of law:

> Modern jurisprudence is first a creature of the governing constitutions, then of code (statutes), and of case law precedent. To the extent the courts are given rule-making authority, those rules are also binding. Equity practice, in general, is merged with law, or the statutory provisions. Only when there is no law or precedent does a court have the authority to exercise pure equity. *Cf. Vittitow v. Keene*, 265 Ky. 66, 95 S.W.2d 1083, 1084 (1936) ("[E]quity principles ... cannot be given effect, nor may they be resorted to when to do so would be in direct conflict with settled legislatively enacted rules of practice approved and followed by courts of equity from an ancient day to the present time."). Thus, "the equity powers of the courts have definite limits." *Barger v. Ward*, 407 S.W.2d 397, 400 (Ky. 1966).
>
> . . . .
>
> Equity is only a supplement to the law for when there is no remedy at law. But it is a simple tenet that if there *is* a statute or case precedent or rule going a certain way, a trial court may not depart from it on the basis of equity. Law trumps equity. *See S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 820 (Ky. App. 2008) ("It is well settled that equitable considerations and estoppel cannot be permitted to prevail when in conflict with positive written law." (quoting *Louisiana State Troopers Ass'n., Inc. v. Louisiana State Police Retirement Bd.*, 417 So.2d 440, 445 (La. Ct. App. 1982))).

Bell, 423 S.W.3d at 747-48 (Ky. 2014) (emphasis in original). Accordingly, the appellants contend that the circuit court could not make an equitable award when a contractual remedy existed. We agree.

As the appellants argue, each of the contracts in the chain of contracts between the parties addresses extra work not specifically covered by the bid. Article 5.2 of the contract between the Ascent and Corporex provides: "This Contract is based upon the items identified above only [construction, CM fee, CM overhead, Arch & Engineering]. Other proposed items, if accepted, must be added to the Contract by Change Order." Article 8 of the contract between Corporex and D&M provides:

> 8.1 Changes in the work, Contractor Compensation or Schedule may only be accomplished by execution of a written Change Order. A Change Order is a written instrument, signed by the Contractor and Design Builder, (and Owner if required hereunder), stating their agreement upon a change in the Work, Contractor Compensation and/or Schedule. Any request for Change Orders from Contractor shall be accompanied by all Subcontractor documentation required by Design Builder. The overhead and fee, if any, to be paid to Subcontractor or Design Professionals, or adjustment to General Conditions, if any, shall be negotiated for each change. Compensation for Contractor shall be determined in accordance with Paragraph 4.1 hereof.
>
> 8.2 In the event Contractor and Design Builder cannot agree to a Change Order related to a change in the Work Design Builder shall have the right, if it elects, to order Contractor to proceed with the Work and the terms of the accompanied Change Order will be resolved in accordance with the terms of Article 12.
>
> 8.3 It is the intent of this Agreement and the Contractor to include all of the Work required to deliver a comprehensive scope and to produce without exception a complete job. The design development drawings and specifications are meant to convey as much information as possible but shall not necessarily be used to limit the scope of Work when details do not fully explain or

establish those limits. The Contractor hereby expressly acknowledges that the Project is defined as a design/build procedure wherein the Contractor accepts responsibility to provide initiative, creativity and value engineering in order to cause whatever supplemental, direction and/or supervision is required to complete the intent of the Work or task which may require clarification or added detail. The Contractor will cause lower tier Subcontractors to conduct themselves according to a similar standard of comprehensiveness, and professional services to the Owner. The express purpose of this condition is to avoid subsequent claims for added costs or Change Orders based on limitations of drawings, detail or alternatively the Contractor will reduce cost wherein a drawing detail or specification in the opinion of the Contractors will allow a more simplified or more effective method to be employed. Where fire or life safety codes would have jurisdiction, the code would apply and the requirement would then establish at least minimum standards. The end result shall be such that all parts will work.

8.4. It is expressly understood that requests for Change Orders will not be approved for:

a. Conflicts in the Plans and Specifications. The Plans and Specifications were to be thoroughly reviewed by the Contractor during the bidding process and any conflicts brought to the attention of Design Builder. Therefore, any conflicts subsequently determined shall be resolved [in] the best interest of the Owner and the Project and shall not be cause for a Change Order to the Work.

b. Lack of details in the Plans and Specifications. Prime Contractor acknowledges by executing this Agreement that it has sufficient details necessary to complete the scope of Work as defined by the Contract Documents. The lack of detail shall not be a cause for Change Orders or additional compensation.

It is further understood:

> c. No Extra Work or Costs shall be recognized unless the approved, designated representative of Design Builder and/or Owner shall have issued, prior to the beginning thereof, its written order therefore. No increase or decrease in the price of the Work to be performed shall be made, nor shall any claim be made for damages or anticipated profits except upon the written approval of Design Builder.
>
> d. If Extra Work is authorized to proceed on a time and material (T&M) basis, daily record sheets are to be maintained and signed by the Project Representative. Failure to do so could prevent payment.
>
> e. All changes must be authorized by Design Builder (Mike O'Donnell).

Article 7 of the contract between D&M and Superior Steel provides for changes to the subcontract work. Article 7.1 provides as follows:

> When the Contractor orders in writing, the Subcontractor, without nullifying this Agreement, shall made any and all changes in the Subcontract Work which are within, or related to, the general scope of this Agreement. Any adjustment in the Subcontract Amount or Subcontract Time shall be authorized by a Subcontract Change Order. No adjustments shall be made for any changes performed by the Subcontractor that have not been authorized by the Contractor via a Subcontract Change Order. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the Subcontract Work.

The article goes on to address adjustments in the subcontract amount, substantiation of the adjustment, incidental changes, and time limitations. Article 7.11, relating to the payment of claims, provides:

> No additional compensation shall be paid by the Contractor to the Subcontractor for any claim arising out of the performance of this Subcontract, unless the Contractor has collected corresponding additional compensation from the owner, or other party involved, or unless by written agreement from the Contractor to the Subcontractor prior to the execution of the Work performed under said claim, which agreement and work order must be signed by an officer of the Contractor.

Finally, Section 2.1 of the contract between Superior Steel and Ben Hur provides as follows:

> Superior Steel, Inc., (SSI) agrees to pay the Subcontractor for the full, and faithful and complete performance of the Subcontract the sum of FOUR HUNDRED FORTY-FOUR THOUSAND DOLLARS AND NO/100'S ($440,000.00) subject to additions and deductions for changes agreed upon in writing and signed by Superior Steel, Inc. or determined as hereinafter set forth; and further agrees to make all partial and final payments on account thereof solely in accordance with the terms and provisions of this Subcontract Document and the Subcontract Document entered into between Superior Steel, Inc. and Dugan & Meyer [sic].

Therefore, we must hold that the circuit court erred as a matter of law in awarding a judgment against the Ascent under an unjust enrichment theory because of the contractual relationships that were in place, which preclude the application of an equitable remedy. Accordingly, we must vacate the circuit court's judgment on this issue.

3. Indemnification

Next, the appellants argue that the circuit court erroneously determined that they were responsible under an indemnification theory for the

extra work and attorney fee awards. They state that the circuit court based the indemnification determination on the jury's finding that D&M was "not negligent" on Corporex's cross-claim, but that it failed to specify whether this was accomplished through a contractual or common law theory for holding that the appellants owed a duty to indemnify D&M. Regardless, the appellants contend that D&M has no legal right to indemnification under either theory. First, the CM Contract between D&M and Corporex, while it did contain an indemnification clause that was not invoked, did not provide D&M with any indemnification right from Corporex or the Ascent for attorney fees or extra work amounts. The contract between the Ascent and Corporex did not include a provision calling for indemnification of D&M by either party. Second, the appellants contend that D&M is not entitled to assert a common law indemnification claim against them because the CM Contract contained an indemnification provision that represented the whole of the parties' agreement on that subject. Furthermore, there was no allegation of tortious wrongdoing by either Corporex or the Ascent that would support a claim for common law indemnification.

In its responsive brief, D&M posits that the provision of the CM Contract requiring D&M to pay for the actual costs of the work was a functional equivalent of an indemnification clause and that its purpose was to ensure that D&M would be paid for its subcontractors' work. D&M asserts that the Steel Contract contained multiple pay-if-paid clauses stating that D&M had an obligation to pay Superior Steel for its work only if D&M had first received

payment from Corporex. For the extra work by Superior Steel and Ben Hur at issue in this case, D&M stated that Corporex had never paid it any of the amounts due. D&M pointed out that the net result of the circuit court's judgment, which included a provision that Corporex and the Ascent indemnify D&M for any amount it would be required to pay pursuant to the judgment, was that all amounts were to be paid by Corporex and the Ascent, the parties that benefitted from the extra work and the party (Corporex) contractually responsible for paying for the extra work. To implement the contractual payment terms and allow the judgment against D&M to pass through to the appellants, the circuit court entered an indemnification judgment in favor of D&M against the appellants for all amounts owed to Superior Steel and Ben Hur. D&M argued that it also had a common law right to indemnification from the Ascent for any amounts due to the appellants, noting that common law indemnity is not limited to tort actions, but rather depends on the equities of the case.

In reply, the appellants state that D&M had never before argued that it had a contractual right to indemnification via a functional equivalent of an indemnification clause in the CM Contract and was precluded from doing so for the first time on appeal.

At the oral argument, counsel for the appellants pointed out that D&M argued it was entitled to common law indemnification, which requires wrongful conduct. However, no wrongful conduct was found, and the circuit court specifically stated that this was not a bad faith claim and that the indemnification

award was not based on wrongful conduct. Furthermore, the jury was not instructed on, and therefore did not make a finding of, wrongful conduct. Only on appeal did D&M argue that it was entitled to contractual indemnity.

We must agree with the appellants that D&M does not have a legal right to indemnification from them under either a contractual or common law theory. "The question[] of whether . . . there should be indemnity [is a] question[] of law once the issues of contested fact have been determined by the jury." *Robinson v. Murlin Phillips & MFA Ins. Co.*, 557 S.W.2d 202, 204 (Ky. 1977). As the appellants assert in their brief, application of the contracts entered into in this matter do not support a contractual right of indemnification entitling D&M to this right from either of the appellants. Therefore, we hold that the contracts at issue do not give D&M a contractual right of indemnification from either appellant. And as to common law indemnification, the Supreme Court of Kentucky has explained, "the right to indemnity is of common law origin and is available to one exposed to liability because of the wrongful act of another with whom he/she is not in pari delicto." *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 780 (Ky. 2000). While we note that there was an allegation that a representative from Corporex specifically authorized Superior Steel and Ben Hur to perform the extra work, there was no allegation in this case of any tortious wrongdoing that would permit D&M to invoke common law indemnification.

Therefore, we must reverse the circuit court's decision to grant an indemnity judgment against the appellants in this case. Furthermore, we note that

we have vacated the award of prevailing party attorney fees to Superior Steel in the companion appeal.

4. Liability for attorney fees that D&M owes to Superior Steel

Next, the appellants contend that they should not have to indemnify D&M for the award of Superior Steel's attorney fees because the CM Contract did not contain an indemnification provision for any of the subcontractors' attorney fees. Therefore, the award of attorney fees cannot be passed on to the appellants. While the contract between D&M and Superior Steel contained a prevailing party provision related to attorney fees, the CM Contract did not include a similar provision or a provision expressly indemnifying D&M for an award of attorney fees. The circuit court's ruling did not apply the "American Rule," followed in Kentucky, that in the absence of a statute or an express contractual provision, attorney fees are not allowed as costs or recoverable as damages. The appellants cite to *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 842 (Ky. 2005), and *Dulworth & Burress Tobacco Warehouse Co. v. Burress*, 369 S.W.2d 129, 133 (Ky. 1963), in support of this argument.

In response, D&M argues that should this Court affirm the award of prevailing party attorney fees to Superior Steel in the companion appeal, the only outcome consistent with the facts, the jury's verdict, and Kentucky law is to pass the payment of the fees through to the appellants, the parties responsible for refusing to pay the amounts of the extra work and causing Superior Steel to incur attorney fees and costs. D&M asserts that the appellants are responsible for the

payment of these amounts under the provision of the CM Contract requiring Corporex to pay D&M for the actual cost of the work, defined in Article 6.1(c) as "[l]egal . . . fees and costs approved by [Corporex,] other than those arising from disputes between [Corporex] and [D&M,] reasonably and properly resulting from [D&M's] performance of the Work." It follows that Corporex caused Superior Steel to incur fees and costs when it refused to pay retainage owed or to pay for the extra work performed. D&M went on to argue that the Ascent was also liable to D&M for the attorney fees and costs it owed to Superior Steel pursuant to the equities of the case.

In its reply brief, the appellants dispute D&M's argument that the award of attorney fees represents actual costs of the work under the CM Contract because there was no evidence that Corporex had ever approved the costs, disagreeing with D&M's argument that it had approved them.

Here, we must again agree with the appellants that they cannot be held responsible for the payment of the attorney fees through an indemnity judgment based upon the terms of the contracts between the parties.

5. Award of Pre-Judgment Interest for Extra Work

For its final argument, the appellants contend that the circuit court abused its discretion in awarding pre-judgment interest to Superior Steel and Ben Hur for the unliquidated amounts for extra work they were awarded solely on the length of time it took for the jury to return a verdict, without considering that the

claims were reduced throughout the course of the trial. They argue that the basis for this decision is not supported by the law.

Superior Steel and Ben Hur argue that the award of pre-judgment interest should be affirmed. They contend this award was proper because the amounts owed for the extra work were liquidated, not unliquidated as the appellants argue, because the appellants knew the approximate amount of the extra work claimed by the end of the summer of 2007. Superior Steel and Ben Hur go on to argue that even if the amounts were unliquidated, the circuit court did not abuse its discretion in awarding pre-judgment interest because it was based upon considerations of fairness and to accomplish justice. They argue that despite the Ascent's clear liability for the costs of the extra work, Superior Steel and Ben Hur had been deprived of those funds for more than five years.

In reply, the appellants disagree with Superior Steel and Ben Hur's assertion that the amount awarded for extra work constituted liquidated damages, pointing out that the appellants admit that such amounts varied and were approximate.

In *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136 (Ky. 1991), relied upon by Superior Steel and Ben Hur, the Supreme Court of Kentucky examined the definitions of liquidated and unliquidated damages and how the law treats both types of damages relative to the award of pre-judgment interest:

> When the damages are "liquidated," prejudgment interest follows as a matter of course. Precisely when the amount involved qualifies as "liquidated" is not always clear, but

> in general "liquidated" means "[m]ade certain or fixed by agreement of parties or by operation of law." *Black's Law Dictionary* 930 (6th ed. 1990).

Id. at 141. Unliquidated damages are "defined in *Black's* as '[d]amages which have not been determined or calculated, ... not yet reduced to a certainty in respect to amount.' *Black's supra* at 1537." *Id*.

> The award of prejudgment interest, as it would apply to the contract theory in this case, is covered in the *Restatement (Second) of Contracts* § 354, "Interest as Damages," as follows:
>
> > "(1) If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.
> >
> > (2) In any other case, such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due."
>
> Thus, where the subject matter of the breach of contract claim falls under subsection (1) above, interest is due as a matter of course, and where, as in this case, it falls under subsection (2) above, interest "may be allowed as justice requires."

Id. at 144. The *Nucor* Court went on to clarify that "the decision whether to award interest under the *Restatement (Second) of Torts* § 913, or the parallel decision that must be made under *Restatement (Second) of Contract*s § 354, both involve 'judicial discretion,' not issues of fact for a jury to decide." *Id*. The trial court

must balance the undisputed facts and equities in order to decide whether pre-judgment interest on unliquidated damages is warranted. *Id*. at 145.

We disagree with Superior Steel and Ben Hur's assertion that the damages awarded for the extra work constituted liquidated damages because the amounts they were claiming were approximations and varied throughout the proceedings. Therefore, we hold that these damages represented unliquidated damages, and that the decision to award pre-judgment interest was left to the circuit court's discretion. We agree with Superior Steel and Ben Hur that the circuit court did not abuse its discretion in deciding to award pre-judgment interest. The court considered the entirety of the litigation before opting to award this, not solely on the consideration that the jury took only one hour to return a verdict in favor of Superior Steel and Ben Hur for the full amounts requested. However, in light of our holdings above, we must vacate this ruling and permit the circuit court to decide this issue, if necessary, following the retrial of this matter.

Accordingly, we vacate the circuit court's judgment pursuant to the appellants' direct appeal in Appeal No. 2012-CA-000441-MR.

DIRECT APPEAL NO. 2012-CA-000440-MR

Next, we shall consider D&M's direct appeal against Superior Steel and Ben Hur. D&M requests that this Court vacate limited portions of the circuit court's judgment awarding prevailing party attorney fees to Superior Steel and damages against D&M to Ben Hur. D&M notes that the net result of the judgment did not require it to pay anything because all amounts were to be paid by Corporex

and the Ascent, who benefitted from the extra work Superior Steel and Ben Hur performed.

1. Application of "Pay-if-Paid" Clauses in Steel Subcontract

D&M presents four separate issues related to the application of the pay-if-paid clauses in the subcontract, which all relate to whether D&M should have been held liable to Superior Steel for breach of contract. For its first argument, D&M contends that the subcontract between it and Superior Steel contained numerous, enforceable pay-if-paid provisions that provided that Superior Steel was only entitled to payment from D&M if D&M first received payment from Corporex. D&M argues that the court should have instructed the jury on the condition precedent to its obligation to pay Superior Steel and permitted the jury to consider the impact of the pay-if-paid condition on Superior Steel's obligation to recover from D&M. D&M goes on to argue that the circuit court should have entered a judgment in D&M's favor on Superior Steel's breach of contract claim based upon the evidence that Corporex did not pay D&M any amounts that were owed to Superior Steel. While the judgment in effect enforced the pay-if-paid provision of the subcontract by staying the judgment against D&M until Corporex or the Ascent had satisfied the judgments against them, the circuit court's failure to allow the jury to decide whether D&M breached the subcontract or to enter a judgment in favor of D&M on the breach of contract claim "artificially" made Superior Steel the prevailing party under the subcontract, entitling it to attorney fees and costs. Had the circuit court followed the pay-if-paid provisions, D&M

would have been the prevailing party on Superior Steel's breach of contract claim and would have been entitled to an award of attorney fees and costs.

Next, D&M contends that the circuit court erred in refusing to instruct the jury on Superior Steel's breach of contract claim. Instead, the circuit court determined that whether a contract was breached was a legal question, when the jury in this case was answering fact questions. D&M argues that this legal statement is incorrect, and that whether a contract has been breached is a question for the jury: "The interpretation of the contract is a question for the court. Whether under the evidence there has been a breach of the contract as interpreted by the court is a question for the jury." *Harlan Fuel Co. v. Wiggington*, 262 S.W. 957, 958 (Ky. 1924), citing *Frankfort Modes Glass Works v. Arbogust*, 145 S.W. 1122 (Ky. 1912). Instead, the circuit court should have permitted the jury to consider the pay-if-paid clauses of the subcontract and the evidence that Corporex had not paid D&M for the extra work Superior Steel performed. The jury could have then determined whether D&M had breached the subcontract.

Next, D&M argues that the circuit court erred in entering judgments in favor of Superior Steel against it for breach of contract. D&M states that while the end result of the judgment was to pass the responsibility for payment to the Ascent and Corporex, the judgment is inconsistent with the jury's finding of no fault on the part of D&M. It states that Superior Steel's only available claim was for unjust enrichment against Corporex and the Ascent, the parties that benefitted from the extra work that had been performed.

Finally, D&M asserts that the circuit court should not have awarded prevailing party attorney fees and costs to Superior Steel from D&M under the subcontract. As with its previous arguments, the basis for this argument is D&M's assertion that the circuit court should have granted a directed verdict in its favor on the pay-if-paid clauses or instructed the jury on its breach of contract claim. D&M, in turn, would have then been the prevailing party. Superior Steel and Ben Hur had asserted that they were entitled to attorney fees and costs pursuant to applicable provisions of the Steel Contract between D&M and Superior Steel.

In response, Superior Steel and Ben Hur state that D&M's appeal is an attempt to avoid responsibility for the attorney fee award in the event that this Court reverses the indemnification award to D&M, which passed the ultimate responsibility for the payment of these fees up-the-ladder to the Ascent and Corporex. They argue that the judgment was consistent with the clear terms of the subcontract and gave full effect to the pay-if-paid provisions. They further point to additional clauses in the subcontract related to multi-party dispute resolution that contemplate that D&M could be found to be liable to Superior Steel, then recover from the Ascent and Corporex in the same or a separate lawsuit. Next, they argue that the jury implicitly rejected D&M's pay-if-paid argument by finding that D&M had agreed to pay for the extra work. Finally, they argue that because the jury found that D&M agreed to pay for the extra work, D&M should be found to have waived and be estopped from asserting the pay-if-paid clauses.

In reply, D&M contends that the jury did not make any findings relative to the pay-if-paid clauses of the subcontract.

At oral argument, counsel for D&M argued that it had not breached the contract with Superior Steel because of the application of the pay-if-paid clauses and could not be held liable to Ben Hur because there was no contractual relationship between Ben Hur and D&M. Alternatively, the jury should have been permitted to consider the pay-if-paid clauses to determine whether D&M breached the subcontract by not paying Superior Steel.

Here, we must review the pay-if-paid clauses, which are essentially conditions precedent to performance under the contract. "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Restatement (Second) of Contracts* § 224 (1981). Applying Ohio law, this Court addressed the definition of a condition precedent in *Dimension Service Corp. v. Don Jacobs Imports, Inc.*, 2012-CA-001874-MR, 2014 WL 97465 (Ky. App. Jan. 10, 2014):[4]

> In *Kern v. Clear Creek Oil Co.*, 2002–Ohio–5438, 149 Ohio App.3d 560, 565–66, 778 N.E.2d 115, 119 (Ohio Ct. App. 2002), the Ohio Court of Appeals defined a condition precedent as follows:
>
> > A condition precedent is a condition that must be performed before the obligations in the contract become effective. Essentially, a condition precedent requires that an act must take place

[4] "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." CR 76.28(4)(c).

> before a duty of performance of a promise arises. If the condition is not fulfilled, the parties are excused from performing. Whether a provision of a contract is a condition precedent is a question of the parties' intent. Intent is ascertained by considering not only the language of a particular provision but also the language of the entire agreement and its subject matter. [Internal citations and quotation marks omitted.]
>
> "The failure of a condition precedent constitutes a legal excuse for non-performance under Ohio law." *Agilysys, Inc.*, 2008 WL 5188278 at *12.

Dimension Service Corp, 2014 WL 97465 at *10. Related to construction law, the 4th Circuit Court of Appeals discussed pay-when-paid clauses, a form of a condition precedent, construing Virginia law:

> Pay-when-paid clauses are valid in Virginia "where the language of the contract in question is clear on its face." *Galloway Corp. v. S.B. Ballard Constr. Co.*, 250 Va. 493, 464 S.E.2d 349, 354 (1995). A contractor and subcontractor may create a valid pay-when-paid clause by including in their contract "an express condition clearly showing that to be the intention of the parties." *Id*. (internal quotation marks omitted). On the other hand, Virginia courts will not enforce pay-when-paid clauses if there is an ambiguity in the contract, which " 'exists when language is of doubtful import, admits of being understood in more than one way, admits of two or more meanings, or refers to two or more things at the same time.'" *Id*. at 355 (quoting *Allen v. Green*, 229 Va. 588, 331 S.E.2d 472, 475 (1985)).

Universal Concrete Products v. Turner Const. Co., 595 F.3d 527, 529-30 (4th Cir. 2010) (footnote omitted).

Considering the provisions of the contract set forth in D&M's brief, we must agree with D&M that the jury should have been explicitly instructed with

regard to the pay-if-paid provisions, which provide that Superior Steel is entitled to payment from D&M if D&M receives payment from Corporex. Because the circuit court did not include such an instruction, the jury could not decide whether D&M had breached the subcontract. The jury should have been instructed to determine if D&M's obligation to pay Superior Steel ever arose, and thus if D&M was in breach, or if D&M was not obligated to pay Superior Steel until it first received payment from Corporex, and thus it did not breach the contract. We do not agree that D&M waived these provisions by agreeing to pay for the extra work. Therefore, we must vacate the circuit court's judgment on this issue, including the judgment in favor of Superior Steel against D&M for breach of contract and the award prevailing party attorney fees and costs to Superior Steel from D&M.

2. Breach of Implied Contract Judgment in favor of Ben Hur

For its second argument, D&M asserts that the circuit court erred in entering judgments in favor of Ben Hur for breach of implied contract. D&M contends that there was no evidence or ruling that there was an implied contract between D&M and Ben Hur related to the extra work and that only Superior Steel had a breach of contract claim against it. Therefore, Ben Hur's damages could only be recovered from Corporex and the Ascent under an unjust enrichment theory.[5]

Superior Steel and Ben Hur argue that an implied contract existed between Ben Hur and D&M, citing to testimony that Mark Douglas of Ben Hur

[5] We note that we have already vacated the circuit court's entry of a judgment against the Ascent and Corporex under an unjust enrichment theory.

met with Jay Meyers of D&M regarding payment for the extra work as well as evidence of authority D&M had over Ben Hur's work on the project. Alternatively, they argue that the award to Ben Hur could have been awarded as a component of Superior Steel's claims or through unjust enrichment. In its reply brief, D&M disputes that any other legal theory supports an award to Ben Hur against it and specifically states that Ben Hur refused the requests of Corporex and D&M to perform the extra work but would only do so when Superior Steel demanded it do so.

In *Davis v. Davis*, 343 S.W.3d 610, 614 (Ky. App. 2011), this Court addressed implied contracts, explaining:

> In order to establish an implied contract, *Rider* [*v. Combs*, 256 S.W.2d 749 (Ky. 1953),] provides:
>
> > To establish a contract implied in fact, the evidence must disclose an actual agreement or meeting of the minds although not expressed and such is implied or presumed from the acts or circumstances which according to the ordinary course of dealing and the common understanding of men shows a mutual intent to contract.
>
> *Id*. at 749. While *Rider* addresses the performance of personal services, we perceive no reason that this case should not apply in cases involving real estate, as Todd suggests.

Davis v. Davis, 343 S.W.3d at 614.

We must agree with D&M that because the jury never decided or was instructed to determine whether an implied contract existed between Ben Hur and D&M, Ben Hur cannot recover via an implied contract. Furthermore, we do not

agree that D&M waived this argument below. Therefore, the circuit court erred in entering a judgment in Ben Hur's favor under an implied contract. On remand, Ben Hur is not precluded from seeking such an instruction.

Accordingly, we vacate the circuit court's judgment on the direct appeal by D&M in Appeal No. 2012-CA-000440-MR.

CROSS-APPEALS BY SUPERIOR STEEL AND BEN HUR

In their cross-appeals, Superior Steel and Ben Hur argue that they were entitled to all of the attorney fees they requested. They do not dispute the circuit court's finding that Superior Steel, as the prevailing party, had a contractual right to recover its fees in the amount of $349,241.70 from D&M pursuant to the Steel Contract and that the fee award was included in the indemnification judgment against the Ascent and Corporex. However, they contest the circuit court's decision to not award Ben Hur the remaining share of the attorney fees. The circuit court held that Ben Hur did not have a contractual right to an award of attorney fees and that an award could not be supported on equitable grounds. Superior Steel and Ben Hur contend that this result is inequitable because it permits D&M, and ultimately the Ascent and Corporex, to escape some liability because they (Superior Steel and Ben Hur) chose to share the same legal counsel and expenses. They request that the remaining fees be awarded pursuant to the contract between D&M and Superior Steel coupled with the indemnification award, or assessed directly against the Ascent and Corporex in the circuit court's

discretion under equitable principles based upon the conduct of the Ascent and Corporex, citing *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998).

In their response, the Ascent and Corporex contend that the circuit court did not err in rejecting Ben Hur's claim for attorney fees under an equitable theory, and they continue to dispute Superior Steel and Ben Hur's characterization of themselves as the "Steel Team." They also continue to argue that Ben Hur was not entitled to recover its portion of the attorney fees under Section 11.6 of the contract between Superior Steel and D&M due to lack of privity. Further, they point out that *Batson v. Clark*, *supra*, involved bad faith, which was not an issue in the present case.

In its response, D&M also disputes the characterization of Superior Steel and Ben Hur as the "Steel Team" and argues that because Ben Hur was not a party to the subcontract between it and Superior Steel, Ben Hur cannot recover fees or costs as a prevailing party under that contract. D&M also argues that no Kentucky law supports an equitable award, and points out that the allegations Superior Steel and Ben Hur cite would support an equitable award against the Ascent and Corporex, not D&M.

In reply, Superior Steel and Ben Hur argue that there was no justification for the circuit court's decision to split the attorney fees between them; rather, they claimed that this was an informal arrangement between them to share the litigation costs on an equitable *pro rata* basis based upon each party's portion of the claim. They argue that the excluded portion of the fees was not related

solely to Ben Hur's representation and the same amount would have been incurred if Superior Steel had been the only plaintiff.

At the oral argument, counsel for Superior Steel and Ben Hur argued that the contract did not define "prevailing party" and that Ben Hur should be permitted to recover attorney fees as a prevailing party by application of the contract between Superior Steel and D&M.

In *Bell*, *supra*, the Supreme Court of Kentucky addressed the award of attorney fees, stating that "attorney's fees in Kentucky are not awarded as costs to the prevailing party unless there is a statute permitting it or as a term of a contractual agreement between the parties. They may also be awarded as a *sanction* but only under limited circumstances." *Bell*, 423 S.W.3d at 748 (emphasis in original). Pursuant to this precedent, we cannot hold that Ben Hur is entitled to payment of its portion of the attorney fees because it was not a party to the subcontract between Superior Steel and D&M, and there was no prevailing party provision in its contract with Superior Steel that would enable it to recover its attorney fees. In addition, we find no abuse of discretion in the circuit court's decision not to award fees to Ben Hur.

However, in light of our earlier holdings, we must vacate the award of attorney fees pending a retrial of this matter. In any event, Ben Hur will not be entitled to recover its attorney fees because it was not a party to the contract between Superior Steel and D&M.

For the foregoing reasons, the judgment of the Kenton Circuit Court is vacated, and this matter is remanded for a new trial consistent with this opinion.

CAPERTON, JUDGE, CONCURS IN RESULT ONLY.

MAZE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: This is an extremely complex case. Although I fully agree with the majority's decision to vacate the judgment and remand for a new trial, I can appreciate how the trial court reached most of the decisions which led to the result. In fact, it seems that the various strategies of the disparate parties shaped many of those decisions. The trial court's ultimate result was probably fair to all parties involved. Unfortunately, the trial court's method of reaching that result was erroneous, and that is why this matter must be tried again.

From the record before us, it appears that the trial court had boxed itself into a corner through its pre-trial rulings and instructions. Those decisions led to the jury verdict, which the trial court attempted to set right in its final judgment. As set out in the majority opinion, the most significant errors arose from the following rulings:

- The trial court required Corporex to choose between its breach of contract and negligence claims, and then instructed the jury only on the negligence claim.
- The trial court's negligence instruction assumed that Corporex was negligent, even though that factual matter was disputed.

- The trial court allowed Superior Steel and Ben Hur jointly to pursue claims against D&M, Corporex and the Ascent even though only Superior Steel had a contract with D&M and neither had a direct contractual relationship with Corporex and the Ascent.
- The trial court failed to instruct the jury on whether an implied contract existed between D&M and Ben Hur.
- The trial court failed to instruct the jury on whether D&M had breached its obligations to Superior Steel in light of the pay-if-paid clause.

Again, I am not bringing these matters up merely to criticize the trial court. In fact, I believe all of the parties had a hand in how this case turned out. However, it does demonstrate how rulings can ripple through litigation and lead to much larger problems toward the end. To me, the most significant problems arose from the trial court's decisions to allow the unjust-enrichment and indemnification claims to go forward.

I can appreciate why the trial court reached these conclusions. Indeed, I am deeply troubled by the discussions involving the proposed design changes. In 2006, the Ascent and Corporex repeatedly revised the structural design drawings. These resulted in significant changes to the termination of the roof edge and roof tip. Superior Steel and Ben Hur both noted that these changes would require additional steel and welding work beyond the specifications called for in the contracts.

D&M directed Superior Steel and Ben Hur to begin the work and keep track of their time and costs. Nevertheless, Ben Hur wanted additional assurances that it would be paid for the additional welding work. D&M's President, Jay Meyers, and Corporex's Vice President, Mike O'Donnell, both directed Ben Hur to proceed with the extra work and keep track of time and costs.

Both D&M and Corporex now argue that Ben Hur is limited to the remedies provided under its contract with Superior Steel. I find this position to be inconsistent with the role that each took in directing Ben Hur to go forward with the additional work. Moreover, the Ascent and Corporex received the benefit of this additional work through the added value to the completed building. Given these circumstances, I find it unconscionable that the Ascent, Corporex and D&M would attempt to avoid paying their subcontractors by asserting the lack of a direct contractual relationship. Likewise, I believe that the trial court properly allocated the ultimate fault by requiring the Ascent and Corporex to indemnify D&M for its liabilities to the subcontractors.

But while I agree with the trial court's desire to balance the equities among the parties, I am compelled to agree with the majority that the law simply does not allow these remedies in this situation. It is well-established that the doctrine of unjust enrichment does not apply where there is an explicit contract which has been performed. *Codell Const. Co. v. Commonwealth*, 566 S.W.2d 161, 165 (Ky. App. 1977). Each of the parties in this case is under separate contracts which spell

out their respective rights, obligations and remedies. Under such circumstances, a claim for unjust enrichment is not appropriate.

Similarly, D&M's right to indemnity from the Ascent and Corporex must arise either from the contract or from a clearly established common-law right. The contracts at issue do not give D&M a contractual right of indemnification from either the Ascent or Corporex. A common-law right to indemnity may arise from tortious misconduct. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 780 (Ky. 2000). But while I have strong reservations about Corporex's actions directing Ben Hur to go forward with the additional welding work, there is no allegation that this amounted to tortious wrongdoing. And finally, our Supreme Court has recently held that trial courts do not have the authority to award attorney fees based on its general equity powers. *Bell v. Commonwealth*, 423 S.W.3d 742, 749-50 (Ky. 2014). Even if D&M was entitled to indemnity from the Ascent and Corporex, it would not be entitled to indemnification for any award of attorney fees unless provided under the contract.

In sum, each party to this case has remedies under its respective contract, although some contracts provide better remedies than others. The parties negotiated those contract relationships and generally should be bound by those terms. Unfortunately, the parties and the trial court deviated from the contracts both in their course of dealings and in this litigation.

As a particularly pertinent example: the paid-if-paid clause sets out the circumstances under which Superior Steel may recover attorney fees D&M. In this

case, Superior Steel and Ben Hur attempted to assert joint claims against D&M even though only Superior Steel had a direct contract. While the trial court properly limited attorney fees to only Superior Steel, it did not instruct the jury determine whether D&M had breached its contractual obligations in light of the pay-if-paid clause. In the absence of such a finding, the issue of attorney fees cannot be decided.

To set the matter back on course, this litigation should attempt to follow the contractual and legal remedies as closely as possible. I regret that this matter must return to the trial court for even more proceedings and expense. However, I can see no other outcome than the conclusions spelled out in the majority opinion.

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