

Commonwealth Of Kentucky
Court Of Appeals

NO. 1999-CA-000569-MR

MARKSBURY CORNETT ENGINEERING CORPORATION

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS KNOPF, JUDGE
ACTION NO. 97-CI-002223

C & F ELECTRIC CORPORATION

APPELLEE

OPINION
AFFIRMING IN PART - REVERSING AND REMANDING IN PART
** **

BEFORE: BARBER, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Marksbury Cornett Engineering Corporation (MCE) appeals from a judgment entered October 13, 1998, by the Jefferson County Circuit Court in favor of C&F Electric Corporation (C&F). We affirm in part and reverse and remand in part.

This suit arose from the construction of the Newburg Middle School (the project) which was owned by the Jefferson County School Board (the JCSB). On December 13, 1995, MCE, the project's general contractor, subcontracted the electrical component of its contract with the JCSB to C&F. It is undisputed

that C&F abandoned the project in April 1997 without completing the work.

Between April 29, 1997, and May 14, 1997, C&F filed three statements of lien with the Jefferson County Clerk's office on sums owed to MCE by the JCSB in the amount of \$66,461, \$47,126.34, and \$86,975.87 pursuant to KRS 376.210. On April 25, 1997, C&F filed suit against MCE and the JCSB seeking, among other grounds for relief, damages resulting from unreasonable delay of the project by MCE and enforcement of public liens pursuant to KRS 376.210 in the amount of \$200,382.34.¹

On June 19, 1997, MCE filed a counterclaim against C&F seeking, among other relief, attorneys' fees and costs incurred by MCE when C&F allegedly filed liens on funds owed to MCE in an amount over and above what was owed C&F pursuant to KRS 376.220(3).

The matter was ultimately tried before a jury. C&F called William Stratton (Stratton), an accountant, to testify in regard to its claim of damages for delay. Stratton testified that he reviewed C&F's job cost records and determined that C&F accrued \$35,497.99 in overtime on the project, and that the amount accrued by C&F in overtime was the proper measure of delay damages. When asked why he used overtime to calculate delay damages, Stratton stated:

¹In September 1997 MCE bonded off C&F's three liens by securing bonds through Great American Insurance Company (Great American) pursuant to KRS 376.100. Once the liens were extinguished following bonding, the JCSB released the funds owed to MCE, the JCSB was dismissed, and Great American was added as a party defendant.

Well, in a perfect world if a contractor knows that there are going to be delay damages and that they are going to have to litigate, they would start from the point in time of delay and calculate all the additional labor and materials that they would incur on that particular job. In this instance, we did not have that information. We had two or three items that gave us comfort, I guess, and the \$35,000 being a reasonable number. We had a time line on the construction job that showed the masonry to be completed basically in eight months or so and the actual on it ended up thirteen or fourteen months. So, it did not correspond with the time line and C&F had to keep people on the job longer than they anticipated.

MCE objected to Stratton's testimony on the ground that it was "based on facts not ordinarily relied upon by experts in doing calculations." MCE's objection was overruled.

On cross-examination, Stratton testified that in reaching his opinion, he reviewed job cost records, the construction schedule, and the general and subcontract. Stratton stated that his figure of \$35,497.99 in delay damages was "100% of [C&F's] overtime on the project," and that his use of overtime "was a reasonable method to determine what the damages were that C&F incurred on the contract." Stratton agreed that there were other methods that could have been used to calculate C&F's delay damages, but stated:

If you had the information, as I've talked earlier, that you knew you were going to be in the delay and you are [sic] actually tracked that information, that would be the most appropriate way to do that calculation, yes.

Stratton acknowledged that "contractors stay overtime on projects all the time," and that some overtime occurs "in situations where

there are no cases of delay caused by a general contractor." The following line of questioning then ensued:

Q: But in your opinion and what you are trying to tell these people is that all the overtime on this project was a result of [MCE's] delays which you . . . attribute the overtime.

A: No. That's not what I'm saying. What I'm saying is that the methodology was the only methodology that I had available and, in my opinion, the overtime hours was [sic] a reasonable method to calculate what the delay damages were in this particular situation.

C&F also produced testimony from several of its executives and employees to establish that its work was delayed on the project due to problems between MCE and the masonry contractor.

At the conclusion of C&F's case in chief, MCE moved for a directed verdict, arguing that C&F had put on insufficient proof of delay damages and had produced no proof regarding the filing and perfection of its liens. The trial court took the issue of delay damages under submission and indicated that it would address issues surrounding C&F's liens at a later date. MCE renewed its motion at the conclusion of evidence, this time including a motion for directed verdict on its counterclaim for attorneys' fees and costs. The trial court denied MCE's motion as to the issue of delay damages, and the parties agreed to brief issues regarding C&F's liens and reserve them for a ruling following the trial.

The jury found that MCE's failure to properly direct and supervise work on the project caused C&F to incur delay

damages and awarded C&F \$20,000. The jury found in favor of MCE as to the rest of C&F's claims, including its claim to enforce the three liens. As to MCE's counterclaim, the jury found in MCE's favor on its breach of contract claim, but awarded no damages, apparently finding that the amount spent by MCE to repair and/or complete C&F's work did not exceed the balance owed to C&F under the term of the contract.

Following the trial, MCE presented its motion for post-trial directed verdict on its counterclaim for attorneys' fees and costs under KRS 376.220. On September 22, 1998, the trial court entered an order denying MCE's motion, finding that because the liens asserted by C&F were not greater than the amount owed MCE under the terms of its contract with the JCSB, KRS 376.220 did not apply. The trial court entered judgment in favor of C&F in the amount of \$20,000 and dismissed MCE's counterclaim by order entered October 13, 1998.

On October 23, 1998, MCE filed a motion for judgment notwithstanding the verdict (JNOV), arguing that there was insufficient evidence to support the verdict. In an opinion and order entered March 3, 1999, the trial court denied MCE's motion. This appeal followed.

MCE maintains that the trial court erred in refusing to grant its motions for directed verdict and JNOV in regard to C&F's claim for delay damages. In support of its argument, MCE alleges that C&F's evidence pertaining to delay damages was insufficient to support a verdict, and that Stratton was not qualified to give expert testimony on construction delay cause

and effect. The purpose of a motion for directed verdict and motion for JNOV is the same, and as such the standard of review is identical. Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991).

In ruling on either:

a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either . . . unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985). We are to consider the evidence in the same light on appeal. Lovins, 814 S.W.2d at 922. Furthermore, "[o]nce the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgement for that of the trial court unless the trial judge is clearly erroneous." Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18 (1998). Having reviewed the testimony presented on the issue of delay damages, we believe that such an error has occurred in this case.

Although there is no reported Kentucky case law setting forth the standard for measuring delay damages in a construction case, federal case law provides that:

The measure of damages for delay in the performance of a construction contract is the actual loss sustained by reason thereof and the burden rests on the contractor to show by a fair preponderance of the evidence the actual or proximate amount. If this cannot be done with a reasonable degree of certainty, damages cannot be recovered.

Grand Trunk Western R. Co. v. H.W. Nelson Co., Inc., 116 F.2d 823, 837 (6th Cir. 1941). In an extensive analysis of the level of proof required to show delay damages, the United States Court of Claims stated:

A claimant need not prove his damages with absolute certainty or mathematical exactitude. [citations omitted] It is sufficient if he furnishes the court with a reasonable basis for computation, even though the result is only approximate. [citations omitted] Yet this leniency as to the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation, and resultant injury. [citations omitted] It [is] plaintiffs' obligation . . . to prove with reasonable certainty the extent of unreasonable delay which resulted from defendant's actions and to provide a basis for making a reasonably correct approximation of the damages which arose therefrom. [citations omitted] Broad generalities and inferences to the effect that defendant must have caused some delay and damage because the contract took 318 days longer to complete than anticipated are not sufficient. [citations omitted]

Wunderlich Contracting Company v. United States, 351 F.2d 956, 968-969 (Cl. Ct. 1965). This measure of damages was adopted by the Sixth Circuit in Messmer Construction Co. v. Tennessee Valley Authority, 769 F.2d 1114 (1985). Although there are no reported Kentucky cases dealing specifically with this issue, case law is clear that a "jury should not be allowed to engage in speculation or guesswork as to the probable damages . . . where no evidence is offered on the point. [citations omitted] Damages must be shown with reasonable certainty." Com., Dept. Of Highways v. Jent, Ky., 525 S.W.2d 121, 122 (1975). Damages are required to be shown with reasonable certainty, "both as to their nature and

in respect to the cause from which they proceed." Louisville & N.R. Co. v. Lankford, Ky., 200 S.W.2d 297, 298 (1947).

Stratton was the only witness who testified as to the amount of delay damages incurred by C&F as a result of MCE's conduct. In his opinion, \$35,497.99, which he admitted was "100% of [C&F's] overtime on the project," constituted the totality of delay damages sustained by C&F. The problem with Stratton's testimony, however, is that he was unable to testify that all of the overtime incurred by C&F on the project was solely attributable to MCE. In fact, Stratton readily admitted that contractors often incur overtime on construction projects, and that overtime is not always caused by the general contractor. Stratton also agreed that he was not testifying that all of the overtime incurred by C&F was caused by MCE. Due to the absence of testimony that all of C&F's overtime was caused by MCE, the trial court erred in not granting a directed verdict in favor of MCE on the issue of delay damages.

C&F's argument that the testimony of its employees supports the jury verdict does not change our opinion. MCE concedes on appeal that "evidence was introduced from which a jury could find [MCE] delayed C&F." However, as MCE points out, none of these witnesses established that MCE was the sole cause of C&F's incurrence of \$35,000 in overtime on the project. C&F cannot prove the amount of delay damages owed by MCE by tossing out \$35,000 in total overtime and asking the jury to decide what portion of that amount is attributable to MCE or relying on MCE to show what part of that amount is not attributable to its

conduct. C&F bears the burden of approximating the delay damages incurred as a result of MCE's conduct, and as its proof on that issue fell short the trial court erred in denying MCE's motion for directed verdict. As we have ruled in favor of MCE as to its argument regarding its motion for directed verdict, we need not address its argument concerning the admissibility and propriety of Stratton's testimony.

MCE also maintains that the trial court erred in holding that it could not recover its attorneys' fees and costs incurred in defending against C&F's liens pursuant to KRS 376.220(3), which provides in part:

If any person files a statement asserting a lien against any contractor or any fund due the contractor, for an amount in excess of the amount actually due, the person filing the lien shall be liable to any person damaged thereby to the extent of such damage, including reasonable court costs and attorneys' fees incurred by the injured parties.

MCE contends that "the amount actually due" language of KRS 376.220(3) refers to the amount due to C&F, and argues in its brief on appeal that "a claimant who liens public funds in an amount that exceeds what is actually owed the claimant is liable to the contractor to the extent the contractor is damaged by the filing of the lien." As there is no case law construing KRS 376.220, MCE is correct that the general rules regarding statutory construction control. We are not to look past the language used in the statute unless the intent of the legislature cannot be discerned from the language used. Princess Manufacturing Company v. Jarrell, Ky., 465 S.W.2d 45, 48 (1971).

Furthermore, a "statutory enactment should be liberally construed in respect of the purpose for which it was enacted." Department of Revenue v. Derringer, Ky., 399 S.W.2d 482, 484 (1966). MCE is not, however, correct in arguing that the trial court erred in construing the statute in question.

We need look no further than the language of the statute itself in upholding the trial court's ruling on this issue. Under KRS 376.220(1):

The liens provided for in KRS 376.210 shall not be for a greater amount in the aggregate than the contract price of the original contractor[.]

Based on this language, the trial court did not err in holding that "the phrase 'in excess of the amount actually due' seems to refer to the unpaid balance due the contractor (i.e., the maximum limit recoverable per the lien)."

Having considered the parties' argument on appeal, the trial court's order of March 3, 1999, is reversed and the matter is remanded with instructions to enter an order granting a JNOV in favor of MCE. The trial court's order of September 22, 1998, is affirmed.

BARBER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FURNISHES SEPARATE OPINION.

DYCHE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I would affirm the trial court in toto.

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