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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001564-MR (Direct)
AND
NO. 1998-CA-001601-MR (Cross)

BELL COUNTY COAL CORPORATION
and DARRELL HUFF — APPELLANTS/CROSS-APPELLEES

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE FARMER HELTON, JUDGE
ACTION NO. 94-CI-00122

CUMBERLAND VALLEY CONTRACTORS, INC.
and DEL RIO, INC. — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART AND REVERSING IN PART ON APPEAL
AND
AFFIRMING ON CROSS-APPEAL
** ** ** ** **

BEFORE: GUDGEL, Chief Judge; COMBS and MILLER, Judges.

COMBS, JUDGE: The appellants, Bell County Coal Corporation and Darrell Huff, appeal from the judgment of the Bell Circuit Court awarding damages to the appellees, Del Rio, Inc., and Cumberland Valley Contractors, Inc. The appellees cross-appeal on the issue of punitive damages. Having carefully reviewed the record, we affirm the judgment of the court in part and reverse in part on appeal and affirm on the cross-appeal.

This appeal arises out of an action originally filed by Cumberland Valley Contractors, Inc., and Del Rio, Inc. (the appellees), against Bell Coal Corporation and Darrell Huff, its managing engineer (the appellants), in which they sought to recover damages associated with their operation of the #5 Mine, an underground coal mine, on Bell's leasehold. In October 1989, Bell and Cumberland entered into a mining contract whereby Cumberland was to mine coal reserves located on the left and right side of Hignite Creek on Bell's leasehold from J. M. Huber Corporation.[1] The contract contained a 60-day cancellation clause. Cumberland operated the #5 Mine for approximately three years until December 1992, when it assigned all of its rights and interests under the mining contract to Del Rio. Del Rio continued operating the #5 Mine until the spring of 1993, when it closed the mine. The mine was subsequently sealed by Bell.

In March 1994, the appellees (the plaintiffs below) filed an action against the appellants alleging negligence, breach of contract, and misrepresentation. The appellees sought punitive damages in addition to compensatory damages for lost equipment and lost profits as a result of the appellants' failure to prepare accurate mine projection maps. Under the mining contract, Bell undertook to provide all engineering services and to prepare the mining plans and projections, which Cumberland

[1]The appellees' complaint also named Huber as a defendant with Bell and Huff. However, the court granted a directed verdict in favor of Huber and dismissed all the claims against it. The omission of Huber's dismissal in the February 24 order was a peripheral issue raised as a factor impairing the finality of the order.

agreed to follow "diligently." In their original complaint and amended complaint, the appellees stated four incidents in which the inaccuracy of the projection maps prepared by Bell and Huff prevented them from accessing the coal reserves on the right side of Hignite Creek -- ultimately causing the closure of the mine. Bell filed a "counterclaim" against Del Rio for indemnification in the event that Bell be adjudged liable to Cumberland.

The first incident occurred in January 1991, when Cumberland cut into unmapped core holes while attempting to access the coal reserve on the right side of Hignite Creek. A sediment pond had been constructed above the core holes, and water from that pond poured into the mine. Cumberland tried unsuccessfully to plug the core holes but was forced to abandon this section of the mine due to the impossible mining conditions created by the water from the sediment pond above. Subsequently, in May 1991, as Cumberland was mining in a new submain, it again encountered difficult mining conditions. Cumberland abandoned this section without being able to access the coal reserve. Thereafter, Cumberland learned that the mine projection map had failed to identify accurately Cumberland's geographic location with respect to its attempted mining operation. Cumberland believed that it was closer to the coal reserves than it was in reality -- again as a result of bad mapping.

The third incident occurred in April 1993. By this time, Cumberland had assigned its mining operation to Del Rio. Del Rio as assignee began mining; it cut into old mine works, and once again water flooded into the mining section. Although no

miners were injured, Del Rio lost all of the mining equipment, materials, and supplies in that section.[2] Finally, in January 1994, Del Rio cut into its own old mine works. The section was inundated with water, and Del Rio lost supplies and materials. Del Rio claimed that it lost confidence in the appellants' engineering services and had no choice but to close the #5 Mine.

Filed originally in Bell Circuit Court, the case was removed to the United States District Court; three years later it was remanded back the Bell Circuit Court. Upon remand to the circuit court, the case proceeded to trial. The court submitted the case to the jury solely on the issue of compensatory damages -- having declined to submit as to punitive damages. At the close of a five-week trial, the jury awarded compensatory damages to the appellees totaling $5,852,106.00, which it allocated as follows: $795,000.00 on the claims for loss of equipment and $5,057,106.00 for lost profits. On February 24, 1998, the court entered an order setting out the jury's award. Although the order indicated that it was a final and appealable judgment, it nonetheless failed to dispose of Bell's counterclaim. Subsequently, the parties filed post-trial motions. On April 13, 1998, the court entered an amended judgment. The appellants filed a motion to alter, amend or vacate the judgment, which the court denied. This appeal and cross-appeal followed.

Procedural Propriety as to Timeliness of the Appeal

[2]Del Rio was using equipment furnished to it by Cumberland.

As a preliminary procedural matter, we will first address the appellees' contention that the appellants' appeal is untimely. The appellees previously moved this Court to dismiss the appellants' appeal on the ground that it was untimely and, therefore, that we lacked jurisdiction. A three-judge motion panel of this Court denied that motion to dismiss, and Cumberland and Del Rio have asked us to revisit this issue.

The record shows that the court had specifically stated that the February 24 order was not meant to be final and appealable; the judge intended it to be an interlocutory order entered in order to allow the damages to accrue interest while the court disposed of Bell's counterclaim. The February 24 order also failed to reflect that the trial court had granted a directed verdict in favor of J.M. Huber Corporation and had dismissed all claims against it at the close of the evidence. Moreover, the February 24 order did not dispose of all the issues or claims of the parties (essentially, Bell's counterclaim and Huber's dismissal) and thus was not substantively a "final order" within the meaning of Civil Rule (CR) 54.01 and CR 54.02 -- despite its recitation of finality as a matter of form. On April 13, the court entered another "final order" ultimately disposing of all remaining issues. Another CR 59.05 motion to alter, amend, or vacate was filed and was denied. This appeal and cross-appeal ensued.

After carefully reviewing both the trial record and the appellate record, we find that the motion panel properly denied the motion to dismiss this action based on the amended order of

April 13. This appeal is properly premised on the final order of April 13 ultimately adjudicating all remaining issues. That amended order of April 13 (incorporating by reference the interlocutory order of February 24) is the only final judgment entered by the trial court. The CR 59.05 motion challenging the February 24 order was essentially futile and inchoate as an attack on a non-final order. The CR 59.05 motion challenging the April 13 order thus was not successive. Additionally, a motion to pursuant to CR 59.05 must be served not later than ten days after entry of "final judgment." Appellants complied with this ten-day requirement. We hold that the appeal was timely filed.

The Exculpatory Clause

The appellants first argue on appeal that the appellees' action against them was barred by the clear terms of the parties' mining contract. Paragraph 30 of the contract provided in pertinent part:

> Owner [Bell] shall in no event assume or be liable for any loss incurred by Contractor under this Agreement. Owner does not assume any responsibility or liability for the present or future condition of the Premises and Owner shall not be liable to Contractor for any damage to or destruction of the Premises or Contractor's property or the property of [sic] other person due to fires, floods, or any other accident or natural catastrophe which occurs on or within the Premises.

The appellants contend that this exculpatory clause is enforceable and, therefore, that they cannot be held responsible for any loss that Cumberland or Del Rio may have sustained.

In general, the case law in this jurisdiction discourages reliance on exculpatory clauses designed to insulate a party against his own negligence or liability. Meiman v. Rehabilitation Center, Inc., Ky., 444 S.W.2d 78 (1969). Such releases must be interpreted narrowly and construed strictly with respect to the "protected party." An exculpatory clause is "generally void and unenforceable if it is violative of the law or contrary to some rule of public policy." City of Hazard Municipal Housing Commission v. Hinch, Ky., 411 S.W.2d 686, 689 (1967). However, "one may contract away future negligence if such is not wilful and wanton and not resultant in personal injury." Jones v. Hanna, Ky. App., 814 S.W.2d 287, 289 (1991). An important factor in assessing the validity of an exculpatory clause is whether the parties to an agreement were on equal footing with one another; i.e., whether the release constituted a volitional agreement by one party to assume and bear all the risks as opposed to an attempt or artifice by the other party to insure against its own negligence. Meiman, supra at 80.

In the case before us, Bell promised in the mining contract to provide all engineering services and to prepare the mining plans and projections:

> 11. Engineering Services. Owner [Bell] will provide engineering services at its sole expense.
>
> 12. Mining Plans. (a) it is understood that the Premises to be mined by Contractor hereunder may be adjacent to other areas which are presently being mine or will in the future be mined by other contractors or by Owner and, as such, the Premises may constitute only a portion of the total area of operations. Therefore, in order to allow

> Owner overall coordination of operations on its lands, Owner will prepare mining plans and projections and review the same with Contractor prior to Contractor's commencing operations hereunder, and thereafter Contractor shall diligently follow the same in its operations hereunder . . . . (Emphasis added).

Thus, Bell voluntarily assumed all the engineering services and accordingly had a duty to perform these functions with reasonable care. Bell also exacted a promise from Cumberland that it would "diligently follow" the mining plan. The manner in which Bell performed its duty directly affected the ability of the appellees to perform the mining operation -- as well as having an impact on the lives, safety, and property of others. Case law is clear that public policy is violated when a party undertakes such a responsibility and then -- through an exculpatory clause -- attempts to circumvent the burden of its concomitant duty of care: "to secure in advance indemnity against the result of your own negligence is clearly against public policy." Jones, supra at 289.

Cumberland and Del Rio testified that Huff was in possession of logs and maps which properly identified the existence and location of the core holes and of the old mine works. However, Huff failed to indicate their location on the projection maps. This omission, Cumberland and Del Rio contend, supports a finding of negligence that Bell and Huff breached their statutory duties pursuant to the mining regulations set forth in Kentucky Revised Statutes (KRS) Chapter 352. We agree with both contentions.

KRS 352.450 requires the "operator or superintendent" of an underground mine to make a "map of the workings of the mine which is accurate and of professional quality" to be filed with the commissioner of the Department of Mine and Minerals. The statute sets forth a list of conditions that the map must show, including in relevant part: (1) "All pillared, worked-out, and abandoned areas;" (1)(b); (2)"Water pools above;" (1)(i); (3) "All known drill holes that penetrate the coal bed being mined;" (1)(o). KRS 352.450(1)(b),(i),(o). An "operator" means the "licensee, owner, lessee, or other person who operates or controls a coal mine." KRS 352.450(1)(y).

After reviewing these statutes and the pertinent case law, we agree that appellants breached their duty of care in such a manner as to nullify their reliance on the exculpatory clause. Bell and Huff possessed the information required to avoid the catastrophes in the mining operation that occurred in this case. Their negligence in providing that information as required by their contract resulted in the injury to Cumberland and Del Rio. That negligence was sufficient to form the necessary predicate for invalidating the exculpatory clause. We therefore are of the opinion that Bell and Huff were not entitled to invoke the exculpatory clause in the contract in order to insulate themselves from the consequences of their own negligence under the facts of this case. We find no error in the proceedings below on this issue.

Lost Profits

Bell next challenges Del Rio's recovery of damages for lost profits on several grounds.[3] We need only address one. Bell asserts that Del Rio did not have an exclusive right to mine the premises and, therefore, that any claim for lost profits was speculative. We are compelled to agree as to the speculative nature of the lost profits.

In Pauline's Chicken Villa, Inc. v. KFC Corp., Ky., 701 S.W.2d 399 (1985), the Kentucky Supreme Court addressed the issue of lost profits, holding as follows:

> The rule in this state is that which is set out in Restatement (Second) Contracts, Sec. 352: "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."
>
> Thus, the test is not whether the business is a new or unestablished one, without a history of past profits, but whether the damages in the nature of lost profits may be established with reasonable certainty.

Id. at 401. The record substantiates that although Del Rio attempted to establish its claim for lost profits with expert testimony, lost profits in this case are too speculative. The mining of coal involves uncertain variables which may affect the production and profitability of a particular coal mine. Based on the facts and circumstances of this case, Del Rio cannot overcome or eliminate these unidentifiable factors and prove with "reasonable certainty" damages in the nature of lost profits. Id. The authorities cited by Del Rio are neither persuasive nor controlling as to the issue of lost profits. The facts of this

[3]Del Rio alone asserted a damage claim for lost profits.

case dictate that conclusion compellingly. Therefore, we must vacate that portion of the judgment allowing for lost profits.

Professional Malpractice and Limitation of Action

Huff next argues that Del Rio's claims based upon the incidents of January 1991 and May 1991 are barred by KRS 413.245. This statute of limitations provides:

> **Actions for professional service malpractice.** . . . a civil action whether brought in tort or in contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured. Time shall not commence against a party under legal disability until removal of the disability. (Emphasis added).

Del Rio did not file its complaint until April of 1994 -- three years after the 1991 mining incidents. Huff argues that these claims were not filed within the one-year period mandated in KRS 413.245 and that they were clearly barred by this time limitation.

However, Del Rio argues that the 1991 claims were not barred because its cause of action did not accrue until the incident of April 1993 when it failed in its final attempt in a series of efforts to access the coal reserve on the right side of Hignite Creek. It contends that the 1991 incidents were only the first attempts in a continuing, ongoing endeavor to reach these reserves and that its damages did not become fixed, apparent, and non-speculative until it had exhausted all of its opportunities to continue mining in April 1993.

Del Rio in essence urges this court to adopt and apply the theory of continuing negligence to the facts of this case, arguing that its 1991 claims are part of a continuing injury leading up to and culminating in the 1993 incident. Del Rio also argues in the alternative that the "discovery rule" would have entitled it to file its claim in 1994 for the injury that had commenced in 1991 but which it did not discover until 1993.

KRS 413.245 provides for two periods of limitation: the "first being one year from the date of the *occurrence* and the second being one year from the date of *discovery* if it is later in time." Alagia, Day, Trautwein & Smith v. Broadbent, Ky., 882 S.W.2d 121 (1994). The discovery rule in this jurisdiction provides that a cause of action accrues when the injury is, or should have been, discovered. Under the occurrence rule, there can be no occurrence for purposes of accrual of a cause of action until the damages arising out of the negligent act become fixed and non-speculative. Meade County Bank v. Wheatley, Ky., 910 S.W.2d 233 (1995).

Del Rio maintains that it did not discover Huff's negligence regarding the projection maps of 1991 until after the original complaint had been filed and the parties had engaged in discovery. Upon learning during discovery that Huff possessed logs and maps indicating the existence and location of the core holes, Del Rio quickly filed an amended complaint. Until this revelation, Del Rio could not have known that the 1991 projection maps had been negligently prepared. We need not reach the issue of continuing negligence as we are satisfied that Del Rio filed

its action in timely fashion within one year of its discovery of the negligence. We hold that its claim is not barred by KRS 413.245.

Real Party in Interest — The Loan Receipt

Bell next contends Cumberland was not the real party in interest with respect to its claim for lost mining equipment and that, therefore, pursuant to CR 17.01, the trial court erred in allowing Cumberland to prosecute this claim. Bell maintains that Royal Indemnity Company (Royal) was the real party in interest as to the lost equipment based upon a Proof of Loss, Bill of Sale, and "loan receipt" executed by Cumberland and Royal.

Cumberland had obtained an insurance policy from Royal insuring its equipment against property damage. Cumberland filed a claim under this policy based upon the April 1993 incident in which it lost equipment due to flooding. Royal and Cumberland executed a document entitled "Proof of Loss" in which Cumberland claimed property damages in the amount of $795,000.00; it granted Royal the subrogation rights to its right, title, and interest in and to the property for which the claim had been made. Royal also obtained a "loan receipt" from Cumberland, which stated that the $795,000.00 insurance payment was a loan which was recoverable only in the event that Cumberland should make a net recovery from any party that caused or would be found liable for the damage to the insured property. Additionally, Royal and Cumberland executed a "Bill of Sale" under which Cumberland

granted, sold, transferred, and delivered to Royal the equipment for which it had claimed damages under the insurance policy.

A "loan receipt" is a legal fiction created by the parties to a transaction for the purpose of allowing an insurance company to file a subrogation action in the name of its insured in order to avoid any possible prejudice that juries might harbor against insurance companies. Ratcliff v. Smith, Ky., 298 S.W.2d 18 (1957). Traditionally, Kentucky courts have permitted and upheld this rather curious type of loan agreement. In Aetna Freight Lines, Inc. v. R.C. Tway Co., Ky., 298 S.W.2d 293, 296 (1956), the Supreme Court of Kentucky held:

> While it is clear that the difference between a loan of the type under consideration and an absolute payment is mere fiction, that ground alone is insufficient to declare the transaction a nullity. Rather we will look to the purpose of the fiction created by the parties to the transaction. It is clear the purpose of the loan agreement was to insulate [the insurer] from a prejudice which juries frequently apply against insurance companies. Our courts have long been award of this prejudice, as exemplified by our decisions in personal injury cases where the element of insurance has been improperly injected.

The Court further stated that it could not say that "an agreement which is intended to avoid the operation of an undue prejudice is against public policy." Id. at 919. Moreover, where the insured and the insurer have executed a loan receipt, the insured is the real party in interest and is entitled to sue for the entire amount of damage.

R.C. Tway is still good law in Kentucky -- despite the fact that the concept is somewhat antiquated in Kentucky due to the development of insurance law since the loan receipt was used

as a subterfuge to mask the existence of insurance. A loan receipt remains a valid device for pursuing a "subrogation claim." We hold, therefore, that the court did not err in allowing Cumberland to prosecute the claim for damages regarding its lost equipment and that Royal was neither the real party in interest nor an indispensable party. Additionally, we agree with Cumberland that the bill of sale was not an assignment of its right to recover; Cumberland did not assign or waive its right to maintain this action.

Limitation of Discovery

The appellants argue that the trial court erroneously limited discovery and that they were not allowed to fully cross-examine the appellees' expert/accountant. Specifically, the appellants allege that Cumberland and Del Rio transferred or diverted millions of dollars in expenses to other mining operations and entities -- thereby improperly reducing expenses and increasing profits, resulting in inflating the amount of their claim for lost profits. They unsuccessfully sought to compel discovery of the financial statements and records of the appellees' other mines/businesses.

Pursuant to Cr 26.02, the parties may obtain discovery of any matter that is not privileged but which is relevant to the subject matter in the pending action. However, the trial court retains power to control discovery and to prevent abuse. Ray v. Stone, Ky. App., 952 S.W.2d 220(1997). Moreover, "[i]t is the duty of the court to keep the inquiry within reasonable bounds

and to restrict questions to those having substantial relevancy to a sensible investigation." Carpenter v. Wells, Ky., 358 S.W.2d 524, 526 (1962), quoting Foremost Promotions v. Pabst Brewing Co., D.C., 15 F.R.D. 128.

In this case, we cannot say that the trial court erred in failing to compel the appellees to provide the financial records and statements of their other mines and businesses. The appellants had full access to all of the appellees' financial records, statements, and other related materials with respect to the #5 Mine. As this action is based solely upon the operation of the #5 Mine, we cannot conclude that the appellees records from other operations were so relevant as to imply or constitute reversible error.

Another issue raised by the appellants is whether the court erred in failing to allow any evidence on the issue of mitigation of damages. They argue in circuitous fashion that they should have been allowed to introduce evidence that after Del Rio abandoned the #5 Mine, it began operations at other mines that were more successful and profitable. In other words, the flooding of the #5 Mine -- which ultimately led to Del Rio's decision to close it down -- redounded to its financial advantage because it enabled Del Rio to pursue more lucrative mining operations. We find this contention wholly lacking in logic as well as in merit.

The Indemnity Clause

The appellants also contend that under the indemnity clause in the mining contract, they are entitled to a judgment against Del Rio in the amount of $795,000.00. Paragraph 23 (a) states that the contractor agrees:

> to indemnify and save harmless Owner [Bell] from and against any and all liabilities, obligations, damages, penalties, claims . . . incurred or suffered by, or asserted against Owner by third parties or governmental authorities arising out of Contractor's use, occupancy or operation of the Premises.

The appellants maintain that Cumberland was a third party under the terms of paragraph 23(a) because it was no longer a party to the contract after having assigned its interest to Del Rio. The equipment lost in flooding incidents was owned by Cumberland. All the mining equipment and supplies used in the mining of the #5 Mine was owned by Cumberland. Following the same rationale that guided our examination of the mining contract's exculpatory clause, we find that Bell cannot seek indemnity against its own actions which evidence a reckless or wanton disregard for the lives, safety, and property of others. Bell's own negligence was the cause of the loss -- not any action taken by Cumberland or Del Rio -- regardless of the argument attempting to characterize one as contractor by virtue of assignment and the other as a third party -- rendering the contractor liable for indemnification. We can find no legal precedent capable of sustaining this reasoning.

Jury Instructions

The appellants challenge the court's instructions to the jury as improper on several grounds. The argue that the jury instructions: (1) erroneously imposed strict liability on them, (2) generally referred to state and federal law without identifying specific duties, (3) cited to inapplicable MSHA laws, and (3) failed to allow the jury to determine whether specific breaches of duties resulted in actual damages.

In this jurisdiction, the "general rule for the content of jury instructions is that they should be couched in terms of duty." Rogers v. Kasdan, Ky., 612 S.W.2d 133, 136 (1986). Instructions provide only the bare bones guidelines to a jury, and this skeleton may then be fleshed out by counsel during closing argument. Cox v. Cooper, Ky., 510 S.W.2d 530 (1974). After reviewing the elements of the claims asserted in light of the evidence presented at trial, we find that the instructions were essentially correct and that they adequately instructed the jury on the elements of the claims alleged. As to the remaining evidentiary issues raised by the appellant, we have examined the record and find no reversible error.

Separation of Items of Damages

Appellants allege error as to the failure of the court to separate or allocate the damages awarded as to Cumberland and Del Rio, respectively. We find no error on this issue as Cumberland and Del Rio have operated as effective alter egos and legal counterparts for one another.

The Supersedeas Bond

The final issue raised by the appellants on appeal is whether the court erred in requiring them to execute a supersedeas bond sufficient to include a penalty of $286,455.00 in order to stay execution of the judgment pending appeal. We again find no error.

KRS 26A.300 provides as follows:

> (1) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure, there shall be no damages assessed on the first appeal as a matter of right contemplated by Section 1115 of the Constitution of Kentucky.
> (2) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure pending any other appeal, damages of ten percent (10%) on the amount stayed shall be imposed against the appellant in the event the judgment is affirmed or the appeal is dismissed after having been docketed in an appellate court. (Emphasis added).

The statute is clear in forbidding assessment of a penalty in a first appeal — which is the situation in this case. However, the damages allowed by section two for a second appeal are contemplated and provided for by CR 73.04(2):

> (2) When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, cost on the appeal, interest, and damages for delay, unless the trial court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.

While collection of the penalty is forbidden if only one matter of right appeal is involved, CR 73.04(2) clearly contemplates that the supersedeas bond should cover the ultimate

assessment of a penalty if later appeals ensue. That damage assessment does not become ripe for collection until a second appeal occurs. However, we do not read the statute and the rule as forbidding the assessment of a potential penalty upon the initial setting of a supersedeas bond. Consequently, we find no error on this issue.

The Cross Appeal — Punitive Damages

On cross-appeal, the sole issue raised by the appellees is whether the court erred in denying its motion and failing to submit on the issue of punitive damages. The question as to whether to instruct on punitive damages is solely within the discretion of the trial court, which is in the very best position to evaluate whether the evidence presented compels such an instruction. Davis v. Graviss, Ky., 672 S.W.2d 928 (1984).

Although, the appellees argue alternative theories of punitive damages based on the state of flux existing in the law at the time of trial (tendering alternate sets of instructions accordingly), we find no error based on an abuse of discretion in the trial court's refusal to instruct on this issue. Therefore, we affirm as to the cross-appeal.

Based upon the foregoing reasons, we affirm the judgment of the circuit court except as to that portion of the judgment relating to lost profits. On cross-appeal, we affirm the judgment of the circuit court denying punitive damages.

ALL CONCUR.

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