

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000129-MR

CENTRAL CONCRETE, INC.

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 99-CI-01183

JENKINS-ESSEX CONSTRUCTION, INC.;  
MANN CONCRETE CONSTRUCTION, INC.;  
AND GENERAL ACCIDENT INSURANCE COMPANY

APPELLEES

AND

NO. 2001-CA-000168-MR

JENKINS-ESSEX CONSTRUCTION, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 99-CI-01183

CENTRAL CONCRETE, INC.

CROSS-APPELLEE

OPINION  
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM, AND McANULTY, JUDGES.

McANULTY, JUDGE: Central Concrete, Inc. (Central) appeals from a judgment of the Hardin Circuit Court that awarded Jenkins-Essex Construction, Inc. (Jenkins-Essex) \$140,000 after a jury found Central had been negligent in supplying concrete for a construction project. Jenkins-Essex cross-appeals from the trial court's denial of its motion for pre-judgment interest. After reviewing the record and the arguments of counsel, we affirm.

In early 1997, Jenkins-Essex contracted to serve as general contractor on a commercial building expansion project for Ambrake Corporation (Ambrake) that included construction of a 30,000 foot building with a concrete slab floor. After its bid was accepted by Ambrake, Jenkins-Essex contracted with Mann Concrete Construction, Inc. (Mann Concrete), to serve as a subcontractor for laying and finishing the concrete flooring. As part of the project, Jenkins-Essex ordered the necessary ready-mix concrete from Central, whom they had used as their exclusive concrete supplier for over 30 years. The order called for a concrete mix with a strength of 4,000 pounds per square inch (psi). On July 24, 1997, Central supplied 302 cubic yards of ready-mix concrete in 38 trucks. Pursuant to instructions from employees of Mann Concrete, 454 gallons of water was added to 31 of the truckloads at the site in amounts varying from 5 to 35 gallons.<sup>1</sup>

Sometime in December 1997, personnel at Ambrake noticed the concrete floor was experiencing delamination, or spalling,

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<sup>1</sup>Four trucks had 5-7 gallons added, twenty trucks had 10-15 gallons added, and seven trucks had 20-35 gallons of water added on site. Each truckload contained 8 cubic yards of concrete.

with chips separating from the surface. Ambrake notified Jenkins-Essex of the problem, who also notified Mann Concrete and Central, both of whom denied responsibility and blamed the other for the problem. Ambrake had four core samples taken from various locations by Law Engineering which indicated corrected compressive strength levels between 2,200 psi and 2,950 psi and an average of 2,480 psi. Ambrake also had two core samples taken and tested by CTL Engineering, which included both a visual and petrographic examination. The samples were found to be air-entrained concrete with total air void content of 13.8% and 8.1% and compressive strength of 2,460 psi and 3,800 psi, respectively.

Jenkins-Essex contacted Greenbaum Associates, a geotechnical and civil engineering firm, to assist with its analysis of the problem. Greenbaum took six additional core samples, tested them for compressive strength, and performed 49 Schmidt Hammer tests on the concrete near these core samples and those taken by Law Engineering. The tests on the floor slab revealed that 45% of the samples had compressive strength between 1,500 psi and 2,000 psi and 55% had been 2,000 psi and 2,900 psi. Greenbaum also found a reasonable correlation between the Schmidt Hammer test results and the compressive strengths of the core samples.

After negotiating various options, Jenkins-Essex eventually decided to remove the concrete floor and installed a new floor in order to satisfy Ambrake's demand for a floor with a strength of approximately 4,000 psi. Jenkins-Essex's direct cost

was approximately \$162,600.<sup>2</sup> In August 1999, Jenkins-Essex filed a complaint for damages related to the faulty concrete floor against Mann Concrete and Central<sup>3</sup> based on breach of contract, negligence, and breach of implied warranties. During trial, Sandor Greenbaum testified as an expert for Jenkins-Essex and Dr. J. P. Mohsen testified as an expert for Central. The jury rendered a verdict finding Central 100% at fault and awarding Jenkins-Essex \$140,000 in damages. Central filed motions for Judgment Notwithstanding the Verdict (J.N.O.V.) and alternatively, a new trial pursuant to Kentucky Rules of Civil Procedure (CR) 50.02 and CR 59.01, which were denied. Jenkins-Essex filed a motion for pre-judgment interest, which likewise was denied by the trial court. This appeal and cross-appeal followed.

Central presents three complaints on appeal. First, it argues the jury instructions were erroneous with respect to the level of strength of the concrete Central had a duty to provide for the floor slab for the Ambrake project. The court instructed the jury that while Central was contractually obligated to provide concrete with a strength of 4,000 psi, delivery of concrete between 3,500-4,000 psi was within acceptable tolerances in the construction industry and in order for the jury to find Central had failed to comply with its duty, the jury had to find

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<sup>2</sup>At trial, Jenkins-Essex sought recovery of \$180,577.54, which included direct costs, overhead, and profit.

<sup>3</sup>The complaint also named Radcliff Concrete, which owned Central and operated out of the same facilities, and General Accident Insurance Co. with whom Jenkins-Essex had general commercial insurance coverage.

the strength level of the concrete it delivered was less than 3,500 psi. Central contends that by including this element in the instructions, the court was erroneously assuming a fact about which there was disputed evidence, see, e.g., Kellyguard Security Services, Inc. v. Church, Ky. App., 576 S.W.2d 228 (1978); Conley v. Foster, Ky., 335 S.W.2d 904 (1960), and that it gave undue prominence to certain facts, see e.g., Geyer v. Mankin, Ky. App., 984 S.W.2d 104 (1998); Fields v. Rutledge, Ky., 284 S.W.2d 659 (1955).

This language was based on testimony from Jenkins-Essex's expert, Sandor Greenbaum, who stated several times that the construction industry recognizes a 500 psi tolerance in the strength level for test cylinders and core samples. He intimated that this acceptable tolerance account was a margin of error level for interpreting test results based on statistical variance methodology. Central's expert did not challenge this testimony, but it points to testimony from Bert Jenkins that the Jenkins-Essex/Ambrake contract required a 4,000 psi level for the floor slab as creating a disputed factual issue.

Even assuming this aspect of the instructions was erroneous, it is clear that Central was not harmed by any error. Central mistakenly states this language prejudiced it because the instructions tended to suggest to the jury that weakening of the concrete by Mann Concrete's introduction of water was "acceptable." In fact, the instruction benefitted Central by requiring the jury to accept a lesser level of strength (3,500 psi) in order to satisfy its legal duty. The inclusion of the

tolerance language did not favor Mann Concrete at the expense of Central because it specifically refers to the strength level of delivered concrete before any water was added by Mann. Central's position that it was somehow prejudiced because it was not held to the higher strength level of 4,000 psi as suggested by Bert Jenkins is counter-intuitive. Although erroneous jury instructions are presumed to be prejudicial, the presumption can be overcome by an affirmative showing that no prejudice resulted from the error. See generally McKinney v. Heisel, Ky., 947 S.W.2d 32 (1997). The inclusion of language in the instructions allowing a 500 psi tolerance range was favorable to Central, rather than prejudicial, and was supported by evidence in the record.

Central contends the trial court should have granted its motion for mistrial based on alleged inadmissible testimony by Bert Jenkins in violation of the court's order excluding certain evidence concerning other construction projects. Prior to trial, the court granted Central's motion in limine by "prohibiting [either party] from offering any testimony by or through any witness of any references to concrete that Central Concrete, Inc. supplied to any projects or jobs other than the Ambrake project." Bert Jenkins testified on direct examination in response to a question about why Central was Jenkins-Essex's exclusive concrete supplier that he trusted Central and "[w]hen we had had problems before, they had taken care of their problems." Central objected and moved for a mistrial arguing Jenkins' testimony violated the court's earlier order and that it

suggested there had been prior problems with the strength of the concrete supplied by Central. The trial court denied the motion but did admonish the jury to decide the case "based only in evidence pertaining to the Ambrake project."

A trial court may declare a mistrial based on manifest urgent or real necessity. Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 906 (2000). In Gould v. Charlton Co., Ky., 929 S.W.2d 734 (1996), the court stated:

It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way. . . .

Mistrials in civil cases are generally regarded as the most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed.

Id. at 738 (internal citations omitted). See also Burgess v. Taylor, Ky. App., 44 S.W.3d 806, 814 (2001). A trial court has discretion in deciding whether a particular situation constitutes sufficient manifest necessity to justify declaring a mistrial.

Id. It is ordinarily presumed that a jury will follow an admonition or curative instruction and it will remove any prejudice caused by an offensive argument unless it appears the argument was so prejudicial under the circumstances that an admonition will not cure it. See Price v. Commonwealth, Ky., 59 S.W.3d 878, 881 (2001); Hayes v. Commonwealth, Ky., 58 S.W.3d 879, 882 (2001).

The trial court denied the mistrial motion stating the testimony did not violate the order because it did not clearly involve the quality of the concrete supplied on other projects but could have involved other types of problems. It also felt any objectionable inference that could have been drawn from Jenkins' general reference to "problems" was resolved by the admonition. Viewing the entire record, we agree with the trial court that the testimony was not unduly prejudicial. It occurred during questioning on the background description of the parties' general relationship. It was generic and did not specifically address strength deficiencies in the concrete supplied by Central or that Central had committed similar negligent acts in the past. Central has not shown the testimony resulted in manifest injustice. The trial court did not abuse its discretion in deciding the drastic remedy of declaring a mistrial was not necessary and that any potential prejudice was cured by the admonition.

Central also maintains that the trial court erred by failing to grant its motion for a directed verdict based on the grounds that Mann Concrete's actions constituted a superceding cause for Jenkins-Essex's damages. It asserts that there was undisputed evidence that Mann Concrete added at least 454 gallons to 302 cubic yards of concrete, which would have altered or weakened the strength of the concrete. Central states the only



evidence of the strength of the concrete prior to the addition of water by Mann Concrete indicates a strength exceeding 4,000 psi.<sup>4</sup>

"A superceding cause is an act of a third person or force which by its intervention prevents the actor from being liable for harm which his antecedent negligence is a substantial factor in bringing about." Restatement (Second) of Torts § 440 (1965). See also Briscoe v. Amazing Products, Inc., Ky. App. 23 S.W.3d 228, 229 (2000). In Kentucky, the question of whether an undisputed act or circumstance is a superceding cause is a legal issue for the court and not a factual matter for the jury. Fryman v. Harrison, Ky., 896 S.W.2d 908, 910 (1995) (citing Montgomery Elevator Co. v. McCulloch, Ky., 676 S.W.2d 776 (1984)). In NKC Hospitals Inc. v. Anthony, Ky. App., 849 S.W.2d 564, 568 (1993), the court set-out the attributes of a superceding cause:

- 1) an act or event that intervenes between the original act and the injury;
- 2) the intervening act or event must be of independent origin, unassociated with the original act;
- 3) the intervening act or event must, itself, be capable of bringing about the injury;
- 4) the intervening act or event must not have been reasonably foreseeable by the original actor;
- 5) the intervening act or event involves the unforeseen negligence of a third party [one other than the first party original actor or

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<sup>4</sup>During trial, Central introduced compressive strength results conducted by Damon Board, Central's vice-president, for Jenkins-Essex on three test samples created at the time the concrete was delivered that indicated 28 day strength levels of 4,085-4,405 psi.

the second party plaintiff] or the intervention of a natural force;

6) the original act must, in itself, be a substantial factor in causing the injury not a remote cause. The original act must not merely create negligent condition or occasion; the distinction between a legal cause and a mere condition being foreseeability of injury.

In House v. Kellerman, Ky., 519 S.W.2d 380, 383 (1974), the court stated:

If there is no issue as to whether the act or event actually occurred, whether it constituted an independent cause superseding and eliminating the alleged negligence of the defendant as a legal cause should be determined by the court. If it was not, or if reasonable minds could differ on the question the case should be submitted to the jury under the usual instructions, leaving it to the lawyers to argue in their summations to the jury whether the event in question played such a major role as to exclude the defendant's negligence from being a "substantial factor" in causing the accident. (Emphasis added)

An analysis of the evidence indicates that Mann Concrete's conduct did not satisfy several of the characteristics of a superceding cause. For example, Mann Concrete's action was not, itself, capable of bringing about the injury that occurred. While it is undisputed that the addition of water will weaken concrete, Greenbaum testified that the total amount of water added by Mann Concrete was not sufficient to reduce the strength of the 302 cubic yards of concrete more than 500 psi. Although Central's expert, Dr. Mohsen, criticized some of Greenbaum's analysis, he testified that excess water tends to bleed to the top rather than merely alter the hydration process uniformly, which suggests that the added water would cause additional

delimitation more than affect the overall strength of the concrete. He declined to give an opinion on the extent the added water weakened the concrete.

The actions of Mann Concrete also were foreseeable. In fact, Central's delivery truck drivers actually added the water to the concrete mixture on the trucks at the direction of Mann Concrete's employees. Cf. NKC Hospitals, Inc., supra (negligence by doctor foreseeable by hospital whose employees knew of doctor's actions and defense that nurses merely following orders of doctor did not excuse hospital). Additionally, Central's drivers knew the exact amount of water being added, so Central was aware of any alleged negligence by Mann Concrete in adding excessive amounts of water. Finally, Central's position was that the strength of concrete as delivered exceeded 4,000 psi and that it was not negligent at all, rather that its negligent was superceded by Mann Concrete's negligence in breaking the chain of causation. Central has not shown that Mann Concrete's conduct constituted a superceding cause as a matter of law. As a result, the trial court did not err in failing to grant Central a directed verdict based on this issue.

On cross-appeal, Jenkins-Essex challenges the trial court's denial of its request for approximately \$13,918 in prejudgment interest. In the leading case on prejudgment interest, Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (1990), the court said that prejudgment interest should be awarded as a matter of course for liquidated damages, while such an award is discretionary with the trial court for unliquidated damages. The court noted that determining whether an amount is "liquidated" is

not always clear, but it stated in general “‘liquidated means’ [m]ade certain or fixed by agreement of parties or operation of law.” Id. at 141 (quoting Black’s Law Dictionary 930 (6th ed. 1990)). The trial court held that Jenkins-Essex’s damages were not liquidated and based on all the circumstances, felt an award of prejudgment interest would be inappropriate.

Jenkins-Essex contends the damages were liquidated because the cost to remedy the problem was ascertainable. It asserts that the cost to replace the floor was “certainly ascertainable by referring to the going market rate to perform this type of work.” However, Bert Jenkins testified that he had received an estimated cost to replace the floor from another contractor that was substantially over \$200,000. Central disputed the damages claim related to overhead and profit claimed by Jenkins-Essex. It also alleged contributory fault by Mann Concrete and Jenkins-Essex, and the case was submitted to the jury for apportionment under a comparative fault approach. Jenkins-Essex’s reliance on the Restatement (Second) of Contracts §354 and various out-of-state breach of construction contract cases is misplaced because this case was submitted to the jury under negligence principles.<sup>5</sup> Those cases are also distinguishable given the uncertainty of the responsibility of the various parties in this case. We hold that the trial court did not err in finding that the damages were not liquidated or abuse its discretion in deciding not to award prejudgment interest.

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<sup>5</sup>For instance, performance by Mann, Central, and Jenkins-Essex were expressed in terms of “duty” and “ordinary care” and causation was expressed in terms of “substantial factor.” Jenkins-Essex did not object to the jury instructions.

For the foregoing reasons, we affirm the judgment of the Hardin Circuit Court.

ALL CONCUR.

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