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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001242-MR

C. E. PENNINGTON COMPANY — APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
2004-SC-228-D AND 2004-SC-239-D

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 94-CI-00255

B & H ELECTRICAL CONTRACTORS,
INC., AND UNIVERSITY OF KENTUCKY — APPELLEES

AND: NO. 2001-CA-001243-MR

G. E. MAIER COMPANY — APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
2004-SC-228-D AND 2004-SC-239-D

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 94-CI-00255

UNIVERSITY OF KENTUCKY AND
C. E. PENNINGTON COMPANY
APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND McANULTY, JUDGES; JOHN D. MILLER, SENIOR JUDGE.[1]

PER CURIAM: C. E. Pennington Company and G. E. Maier Company bring these appeals from an Order and Judgment of the Franklin Circuit Court, entered May 10, 2001, sitting without jury; and from Findings of Fact, Conclusions of Law, and Judgment of the Franklin Circuit Court, entered April 9, 2001, sitting without jury. Pennington appeals two of the court's awards: 1) $47,100.00 in liquidated damages to the University of Kentucky (UK), arguing that the court erred in awarding said damages without UK providing proof of actual monetary damages; and 2) prejudgment interest on a damage award of $39,000.00 to B & H Electrical Contractors (B&H). Pennington and Maier appeal the court's award to UK of $406,112.06 in replacement costs for installation of a netting system in the Nutter Field House, and prejudgment interest thereon, arguing that the court erred in its application of the law. Pennington and Maier also argue that delay by the trial court violated their civil due process. We affirm.

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

FACTUAL HISTORY

We adopt the facts as stated in the concurring opinion from the first appeal:

> Pennington was the general contractor for the construction of a $6 million field house at the University. Pennington subcontracted the installation of a $300,000 netting system to Maier. Two aspects of the project are relevant here. The project fell behind schedule and the netting system did not work properly. Because of the delay the University withheld $47,000[2] [sic] from the payment due Pennington as liquidated damages under the contract, and after becoming frustrated with Maier's attempts to repair the netting system the University replaced it at a cost of $406,000[3] [sic]. At trial, the University sought $406,000 [sic] from Pennington for replacing the net and Pennington claimed over against Maier for a like amount. Pennington sought the $47,000 [sic] from the University which it had withheld as liquidated damages.
>
> In what was essentially a separate lawsuit, another subcontractor on the job, B & H, sought $39,000 from Pennington for extra electrical work caused by Pennington's damaging work it had already completed.
>
> After a bench trial the court below awarded the University the $406,000 [sic] it sought against Pennington and Pennington was granted judgment over against Maier. It upheld the University's withholding of $47,000 [sic] in liquidated damages. It also awarded B & H $39,000 against Pennington for extras. In addition the court awarded prejudgment interest on both the $406,000 awarded to the University and the $39,000 awarded to B & H.
>
> Both Pennington and Maier

[2] The actual amount was $47,100.00.

[3] The actual amount was $406,112.06.

> appealed.
>
> Pennington's appeal related to the $39,000 awarded B & H and the $47,000 [sic] withheld by the University as liquidated damages. The sole issue raised by Pennington on the B & H claim was whether prejudgment interest was proper. The sole issue raised in the appeal on liquidated damages was whether the University could withhold liquidated damages without proving actual monetary damages.
>
> Maier's appeal dealt with the $406,000 [sic] award to the University. Essentially Maier attacked the trial court's legal and factual conclusions underpinning the amount awarded and further argued that, whatever the amount, it should not include prejudgment interest.

On October 31, 2003, this Court issued an unpublished opinion affirming the circuit court. On February 9, 2005, the Kentucky Supreme Court accepted discretionary review, vacated the prior opinion, and remanded the case to this Court for consideration of the merits of the issues raised on appeal.[4] Back before this Court, in addition to the issues outlined in the facts above, the parties filed supplemental briefs alleging a denial of due process.

ISSUES I - IV:

PENNINGTON AND MAIER V. UK

THE NETTING SYSTEM

FACTS:

[4] C.E. Pennington Company v. B&H Electrical Contractors, Inc.; G.E. Maier Company; and University of Kentucky, 2004-SC-0228-DG; G.E. Maier Company v. University of Kentucky; C.E. Pennington Company; and B&H Electrical Contractors, Inc., 2004-SC-0239-DG.

In order to address Pennington’s and Maier's four issues pertaining to the netting system, the following facts are helpful.

UK contracted with Pennington, who in turn subcontracted with Maier, who in turn subcontracted with Alpha Pro Fab (Alpha), for a netting system, to be installed as one of the final components of the construction of the Nutter Field House. The netting system consisted of a series of nets raised and lowered with nine hoisting machines consisting of sheaves and motors and airplane cables. The nets were used to subdivide the field house floor into various areas for use for different activities. The main floor area was a football field surrounded by a 290 meter track. The track area was separated from the football field area by six perimeter nets, four on the sides and corners, and one end net in each end zone. The football field was divided by a center net at the fifty yard line. There were also four batting cages along one side enclosed by nets.

After some delays, Alpha installed the bulk of the netting system in April, 1993. Although the field house itself was declared substantially complete in July, 1993, this certificate excluded the netting system. By September, 1993, correspondence from the project architect to Pennington advised that the netting system was not in conformance with the contract. A series of meetings, evaluations and correspondence

indicated that there were operational problems, such as nets not lowering properly and failed fuses; general safety concerns; plus the system not generally meeting contract specifications. For example, non-insulated copper jump wires had been installed to bypass fuses. In October, 1993, the project architect gave Pennington a list of variances from the contract and a time certain to get the system within contract specifications.

Following a meeting on January 5, 1994, with Pennington and Maier, who agreed that problems existed, Maier sent in an installer to rework many of the system's components and thus bring the netting system into compliance with the contract. On April 15, 1994, the system was still not working and the project architect gave Pennington final notice to complete the system. On May 10, 1994, the netting system was declared substantially complete, with the exception of punch list items including installation of brakes on the batting cage netting and a safety device feature on the center curtain. UK paid Pennington for the netting system but withheld $15,000.00 for the incomplete work. Pennington and Maier assured UK that the system met the contract specifications, and Maier issued an extended five-year written warranty to UK, in addition to the standard contract's one-year warranty.

The field house and thus, the system, saw more use when school began in the fall of 1994. Warranty calls were made

monthly to Pennington, Maier, and Alpha from September, 1994, through February, 1995. The majority of the problems consisted of cables tangling and nets not reaching the floor.

There was conflicting evidence regarding responses to the warranty calls. Pennington, Maier, and Alpha indicated on several occasions that although one of them responded, the responder either could not do any work because UK refused to make a lift available or there was no problem because the nets were lowered to the turf. In contrast, UK indicated that either there was no response; someone responded but did not do any work; or someone responded and performed some installation of parts. On one occasion, another subcontractor, B&H Electric, performed electrical service to the batting cages.

In January, 1995, during this period of problem calls, UK asked runner-up bidder and contract system specification drafter Athletic and Performance Rigging (APR) to evaluate the netting system. APR reported questions of structural integrity, more specifically that the cabling was "an accident ready to happen." Thomas McReynolds, a structural engineer with forty years experience, spent three hours looking at the system, reporting that while he did not see anything that indicated imminent failure, he recommended inspection of the system by a rigging expert and that the system not operate during the upcoming football banquet. Pennington was notified of the

netting problems and was directed to notify Maier that immediate action was required.

In February, 1995, Maier recommended to UK the installation of specific parts to alleviate the warranty problem calls, and informed Pennington that Alpha would be down to review the warranty items the week of February 20 or February 27.

Meanwhile, UK had the netting system independently inspected from February 10 through 14, 1995. Structural engineer McReynolds selected Randy Davidson, who had over fifty years experience in rigging and described himself as "Dr. Doom," to assist in the investigation. Ethan Buell, McReynolds' partner and a structural engineer, also assisted.

After the first day, as the inspection revealed that the "wiring/cables" on the batting cages were "so taut as to constitute an imminent hazard," it was recommended that the cages be safe-tied off. At the end of the four days, the investigation concluded that the system posed a potential and substantial danger and imminent hazard while being used and while in static modality. The recommendation that the system be safe-tied off was immediately carried out.

McReynolds and Davidson submitted independent reports. McReynolds identified problems with truss sizing, spacing, and connection; block connections; hoisting drums; head and mule

blocks; mounting frames; and cables and cable connections; and recommended replacement of major components. Davidson also identified problems with these major components, concluding that many were substandard and/or damaged.

On March 2, 1995, the project architect advised Pennington of the continued netting system problems and the inspection, and requested efforts to render the system in compliance with the specifications. Pennington was directed to provide the name of a qualified subcontractor by March 13, 1995, (exclusive of Maier and Alpha); and informed that failure to do so would result in UK finding a qualified contractor and seeking reimbursement from Pennington. Although Pennington, at its request, was given an additional two days to recommend a replacement subcontractor, it never complied. On March 21, 1995, UK sought a proposal from APR to complete the netting system, per Article 26 of the contract.

In response to UK's evaluation, on April 25, 1995, a business associate of Alpha spent five hours inspecting the system at the request of Pennington, Maier, and Alpha. In direct contrast to UK's evaluation, his report concluded that the system was safe, worked in smooth operation, and was within or exceeded industry standards, with only some maintenance and/or replacement items needed.

UK notified Pennington on July 27, 1995, that it was intending to contract with APR to bring the netting system into compliance with the contract. On August 18, 1995, Pennington notified Maier that it would seek to recover from Maier any damages it might suffer from a recovery by UK.

On September 23, 1995, a civil engineer spent two to three hours inspecting the system on behalf of Pennington, Maier, and Alpha. He concluded that the system was not complete; 80% of the cables at the drums were kinked or bird-caged and needed replacement; all drums needed to be reworked or replaced; cable clamps were improperly installed; warped shim plates required replacement; and some truss connections were missing.

On September 1, 1995, UK contracted with APR, who after determining that repair would prove more costly than replacement, began work in December, 1995, to remove the old netting system and install a new one. This work was completed on March 26, 1996, at a total cost to UK of $406,112.06.

ISSUES I-IV:

SUMMARY OF ISSUES:

Before us, Pennington and Maier contend trial court error in finding a breach of warranty on the netting system and damages in the amount of $406,112.06, plus prejudgment interest. Appellants claim error on four specific theories: 1) UK's claims are barred by its acceptance and payment; 2) Pennington

and Maier did not have sufficient opportunity to correct the warranty deficiencies; 3) even assuming a breach of warranty, UK is not entitled to damages for replacement of the netting system; and 4) an award of prejudgment interest is inequitable due to the trial court's delay in trying the case and rendering a decision. For the following reasons, we conclude that the trial court's findings are supported by substantial evidence and that the trial court correctly applied the law.

ISSUE I:

ACCEPTANCE OF AND PAYMENT FOR THE SYSTEM

The contract between Pennington and UK, signed October 29, 1991, contains Articles 24 and 49 which provide:

> ARTICLE 24 – CORRECTION OF WORK AFTER FINAL PAYMENT
> Neither the final certificate of payment nor any provisions in the Contract Document shall relieve the Contractor of responsibility for faulty materials or workmanship and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other Work resulting therefrom, which shall appear within a period of one year from the date of the **certificate of substantial completion approved** by the Owner. The Owner shall give notice of observed defects with reasonable promptness.
> ARTICLE 49 – GUARANTEE AND WARRANTY
> Neither the final certificate of payment nor any provisions in the Contract Documents nor partial or entire use or occupancy of the premises by the Owner shall constitute an acceptance of work not done in accordance with the Contract Documents or relieve the Contractor of liability in respect to any

> express warranties or responsibility for faulty materials or workmanship. The Contractor shall guarantee that labor, equipment and materials will be free of defects for a period of one (1) year from the date **shown on the certificate of substantial completion unless special conditions and/or additional warranty periods are required and as defined in Part V** of Contract Documents, if applicable. **The Owner will give notice of observed defects with reasonable promptness. Expendable** items and wear from ordinary use are excluded from this guarantee. Prior to the final payment of the Work, the Contractor shall assemble and present to the Architect all guarantees and warranties required by the Contract Documents.

(Emphases in original.)

Following the bench trial, the trial court concluded as a matter of law that Pennington breached the above contract provisions and, pursuant to Article 49, Shreve v. Biggerstaff, 777 S.W.2d 616, 617 (Ky.App. 1989), and Weil v. B.E. Buffaloe & Co., 251 Ky. 673, 65 S.W.2d 704 (1938), that UK did not waive the defects in the netting system by declaring the project substantially complete. Before us, Pennington and Maier argue that the trial court erred as a matter of law in concluding that UK's actions did not amount to a wavier, arguing both that the defects were open and obvious, and that changes in the system which led to problems were approved by UK. We disagree.

The record is clear that UK began having chronic problems with the system with more use of it during the fall

1994 semester, and in response, exercised their warranty rights by notifying Pennington and Maier, with limited success. The record is also clear that despite these warranty problems, UK did not become aware of defects in the system caused by a failure to meet original and amended contract specifications of many of the major system components until a detailed evaluation of the system nine months after the substantial completion date.

The authorities cited by Pennington and Maier fail to persuade us. In Weil, *supra* at 65 S.W.2d 710-11, a case relied on by the trial court, the appellate court stated:

> (T)he owner of the building does not forfeit his right to assert a claim against the builder for damages by taking possession of it. It may be otherwise where the owner, having knowledge of the defects, has stood by silently and then accepted the work as a sufficient compliance with the contract and later raises objection. . . . But, under the circumstances here disclosed, where seasonable complaint was made, and the contractor showed some defiance, and willfully proceeded to use the objectionable material, and the construction would have been delayed in a substantial degree if he had been legally stopped, it must be regarded that there was an election by the owner to accept the work and recover for the breach of contract and that the contractor cannot escape the consequences of the breach.

Citations omitted. When Pennington and Maier admit, as in Shreve, *supra*, that there were defects in the installation, UK does not forfeit their claim for damages by "taking possession

and assuming control . . . or by not discovering all of the defects or omissions in . . . construction(,)" citing Cassinelli v. Stacy, 238 Ky. 827, ___, 38 S.W.2d 980, 985 (1931).

"Generally, the interpretation of a contract . . . is a question of law for the courts and is subject to *de novo* review." Cantrell Supply, Inc. v. Liberty Mutual Insurance Co*.*, 94 S.W.3d 381, 385 (Ky.App. 2002*).* Based on our review, we believe that the trial court correctly applied the law.

ISSUE II:

ADEQUATE NOTICE AND OPPORTUNITY

Pennington and Maier next argue that the trial court erred as a matter of law in concluding that they were given adequate notice and opportunity to correct the netting system deficiencies. We disagree.

The trial court concluded that Pennington and Maier failed to correct the netting system deficiencies, despite adequate notice and opportunity, based on the following findings: 1) from the time of the installation of the system in April, 1993, until the date of substantial completion on May 9, 1994, Pennington and Maier were on notice of issues related to the system, including electrical and operational problems; 2) operational problems peaked during the fall of 1994, prompting monthly calls to Pennington, Maier, and Alpha from September, 1994, through January, 1995, only some of which resulted in

problems being addressed; 3) in February, 1995, UK had the system evaluated by APR, a structural engineer, and a rigging expert, resulting in identification of numerous problems and safety issues, causing the system to be safe-tied off; 4) in March, 1995, Pennington was notified that the installation was not pursuant to contract specifications, and was asked to provide the name of a contractor other than Maier or Alpha to provide the remedy; 5) Pennington failed to provide the name of another contractor; 6) in April, 1995, Pennington, Maier, and Alpha's evaluation resulted in findings of problems that were correctable; and 7) in May, 1995, Pennington was notified that UK had arranged to have the system corrected by another contractor.

Before us, in asserting that they could not have, as a matter of law, breached their warranty as they were not provided with a sufficient amount of time to correct the maintenance problems, Pennington and Maier rely solely on Middletown Engineering Company v. Climate Conditioning Company, Inc., 810 S.W.2d 57, 60 (Ky.App. 1991), arguing that Middletown holds as a matter of law that one hundred twenty-six days to cure a defect does not amount to a breach of warranty, or as they state: "as a matter of law, the fact that a repair may take longer than four months to correct does not even raise an inference of a

breach of warranty." Our reading of Middletown, however, yields a different interpretation.

In that case, the issue pertained to whether the trial court's grant of summary judgment was proper; in other words, if there existed a genuine issue of material fact. The appellate court found that no evidence, or genuine issue of material fact, existed as to the untimeliness of the repair, thus no error in the grant of summary judgment. The court's statement, that "(t)he fact that repair took 126 days in and of itself raises no inference one way or another as to whether the seller failed to correct the defect within a reasonable period," merely pointed out that there was no evidence in that case that the time frame amounted to a breach of warranty.

In the instant case, Pennington and Maier were on notice of problems with the system beginning as early as within five months following substantial completion, which continued for five months until safety concerns prompted UK to seek additional evaluations and assistance. During this time frame, despite numerous warranty calls that put them on notice, Pennington and Maier's response was inconsistent and inadequate. The evaluation following the safety concerns revealed that the system was not installed pursuant to contract specifications. We are not persuaded by Pennington and Maier's sole authority,

and thus do not conclude that the trial court incorrectly applied the law in this case.

ISSUE III:

AWARD OF $406,112.06 TO UK
IN DAMAGES TO REMOVE AND REPLACE
THE NETTING SYSTEM

With regard to the replacement of the netting system, the trial court found that UK contracted with APR to perform corrective work and that APR determined that reuse of the previous system would be more costly than replacing the entire system; concluding:

> 7. Pursuant to Murray v. McCoy, Ky.App., 949 S.W.2d 613 (1996), Baker Pool Co. v. Bennett, Ky., 411 S.W.2d 335 (1967) and State Property & Buildings Commission of Dept. of Finance v. H.W. Miller Const. Co., Ky., 385 S.W.2d 211 (1964), the cost of replacing the defective netting system is the appropriate measure of damages.
> * * *
> 9. The Court concludes as a matter of law that if UK is entitled to recover damages from Pennington for the alleged defective installation and/or breach of warranty concerning the netting system installed by Maier, then Pennington has a contractual right with Maier to recover the identical damages from Maier.
> 10. UK is entitled to recover its costs to remove and replace the defective netting system totaling $406,112.06.

Before us, Pennington and Maier argue that the trial court erred as a matter of law in concluding that UK was entitled to the cost of replacement as damages, arguing that the

applicable case law holds that at most, UK was entitled to the cost of remedying the defective construction, because UK failed to produce any evidence of the cost of repair versus replacement. We disagree.

Murray v. McCoy, 949 S.W.2d 613, 614-15 (Ky.App. 1996), sets forth the applicable law on this issue:

> The measure of damages in cases where there is faulty construction not in accordance with a building contract is stated in Baker Pool Company v. Bennett, Ky., 411 S.W.2d 335, 338 (1967):
>
> In the case at bar there is the issue and conflicting testimony as to whether or not the pool could be repaired. If it could reasonably have been repaired, then the measure of damage is different from the measure if the jury determines that it cannot be repaired. The law in this situation was fully discussed in State Property & Buildings Commission, etc. v. H.W. Miller Construction Company, Inc., Ky., 385 S.W.2d 211, wherein we pointed out that if the structure can reasonably be repaired 'the real measure of damages for defective performance of a construction contract is the cost of remedying the defect, so long as it is reasonable'. We then pointed out that if the structure cannot be repaired, or if the expense of repair is unreasonable, the test is the difference between market value of the building as it should have been constructed and the market value as it actually was constructed.

(Citations omitted.) The court went on to state that damages for both repair and diminution in value are not exclusive of one another:

> The purpose of remedial damages is to put the owner in the same position he would have been in had the contract been performed. State Property & Buildings Commission, etc. v. H.W. Miller Construction Company, Inc., Ky., 385 S.W.2d 211 (1964). Although generally, repairs will successfully remedy defects caused by the contractor's poor workmanship, there are those situations where the repairs will not give the owner a structure as valuable as the original contract contemplated.

Id. at 615.

Pennington and Maier argue that the trial court misapplied the applicable law by concluding that replacement of the system was the appropriate amount of damages in this case, as opposed to reasonable costs for repair, arguing that UK failed to present any evidence that repair would be more costly than replacement.

Remembering that the netting system consisted of a series of nets raised and lowered with nine hoisting machines consisting of sheaves and motors and airplane cables, the following was offered in evidence:

> 1. An evaluation revealed that there were significant problems with trusses; hoisting drums; cables and cable guides; attachment of mounting frames; cable connections; and rigging materials, such that replacement was recommended on multiple components.
> 2. From March 15, 1995, until the netting system was replaced and completed on March 26, 1996, UK was without use of the facility for which the netting system was contemplated, as the four perimeter nets were safe-tied off for safety reasons.

3. In its June 29, 1995, proposal, APR indicated that "the safest and most cost effective means of restoring the netting systems original specified quality would be to replace the entire system," listing 14 items of replacement, with the exception of some existing wiring at the control station, at a cost of $358,808.00.

4. APR further explained in its proposal why the existing netting system components were not to be re-used:

"The existing winch motors were modified during the initial installation to allow the motor to pull more amps and thus increased the lifting capacity. This modification voided any warranty and will effect [sic] the life of the motor.

The mounting frames and supports appear unacceptable and possibly would not safely hold any type of motorized winch or any imposed loads.

The trusses that now exist are 9-1/2" triangular trusses fabricated by Alpha Pro Fab. During our inspection, we found the support Z's to be non-uniform and poorly fabricated. This will effect [sic] the load capacity and could result in a serious failure. The original specification called for a minimum of 14" triangular trusses. These trusses were specified to allow the system to be supported on 30'0" centers. It is questionable if these trusses, now being used, will allow for the imposed loads. There is no loading information available on the existing trusses, so Athletic and Performance Rigging cannot warrant the existing trusses as to capacities or suitability. . . .

The netting throughout the facility is showing signs of heavy wear. During our inspection, we found the four (4) perimeter nets to be different sizes and contain various amounts of down lines indicating field modifications. The existing nets have D-rings on 3'0" centers and many of these D-rings have broken loose and need replacement. The cost to re-fabricate the

nets and put the D-rings on 18" centers would be greater than a total replacement. I have enclosed a statement from the Carron Net Company concerning any re-work on the existing netting.
The control station that is presently being used, is not to specification. The new control station shall allow the winches to be run individually or in a series. The existing wiring can be re-used, which shall save an [sic] substantial amount of money. There will be additional conduit and wiring required to the new motor locations. The control station shall be fabricated as originally specified and installed in the same locations, using the existing wiring. As discussed in our meeting June 12, 1995, the existing cables and blocks are unacceptable and should be replaced. Many of the cables are kinked and have been spliced together. The rigging blocks are not as specified and unacceptably designed. During our examination of the existing equipment, we found a variety of major problems that will effect [sic] the long term use of the netting system. It is our opinion that re-use of any of the major components in the existing netting system, would be more expensive as well as detract from the integrity of the system as regards safety and function. Athletic and Performance Rigging cannot accept the liability associated with using another contractors equipment or warranty any such materials. We feel it would be in the best interest of the University to replace the entire netting system, using a sole manufacturer which will assure safety, reliability, and service." Exhibit UK-184.
5. Although anticipating replacement of some components, in a July 19, 1995, memo UK recommended reuse of:
a. the netting, to which APR replied that "the labor involved in taking down the nets, removing the "D" rings and reinstalling new "D" rings made the reuse of the netting impractical and more expensive than

providing new nets. The number of down lines on the perimeter nets varies due to field modifications and added net panels. APR has indicated that the perimeter nets should be uniform and should lower and raise in the same manner, which is the reason for the relocation of the "D" rings. Many of the "D" ring connections on the existing netting have also failed due to the way the cable rubs against the strings as the nets are raised and lowered. All new connections would have to be made to prevent that failure in the future."

b. the trusses: to which APR replied that "the existing trusses are smaller than specified and may not be able to carry the required load over a sustained period of time without failing. APR will provide 14" trusses as specified and have provided engineering load data indicating the maximum deflection. The existing trusses are 9-1/2" and have demonstrated a tendency to flex and displace under loading."

c. the electric housing motors: to which APR replied that "the existing motor controls were modified during the initial installation to allow the motor to pull more amps and thus increase the lifting capacity. APR's concern is that this modification would void any warranty and will effect [sic] the life of the motor." Exhibit UK-185.

6. In contrast, Pennington and Maier presented somewhat conflicting evidence that although the system had problems, the problems were correctable.

According to Murray, the purpose of remedial damages is to put the owner in the same position he would have been in had the contract been performed, and such damages can consist both of repair cost and diminution in value. The evidence supported the inability of UK to re-use major components of the

system, essentially, that as the cost of repair exceeded replacement, the cost to repair would be the cost to replace. Additionally, UK was without full use of the field house in the manner in which it was constructed for over a year, from February, 1995, until March, 1996. Based on the above, as the evidence of damages has sufficient probative value to induce conviction in the mind of a reasonable person, (*see generally* Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972)), we find no error by the trial court.

ISSUE IV:

AWARD TO UK OF
PREJUDGMENT INTEREST
ON $406,112.06 DAMAGES AWARD

The trial court concluded that UK was entitled to recover prejudgment interest on the $406,112.06 damages award for Pennington's and Maier's failure to honor its warranty obligations. Pennington and Maier argue that justice and equity do not allow for an award of interest due to the delay in the trial court's trying of the case and rendering a decision. We disagree.

While we cannot agree with UK that the damages imposed herein amount to fixed and ascertainable damages subject to prejudgment interest as a matter of law, we do believe that under Nucor Corporation v. General Electric Co., 812 S.W.2d 136, 141 (Ky. 1991), whether to assess damages in this instance is

subject to judicial discretion, and, in light of all the circumstances, we can find no abuse of that discretion.

Pennington's and Maier's argument relates specifically to that time between the beginning of the bench trial in May, 1998, and the rendering of the decision in April and May, 2001. Because pursuant to Nucor, in reviewing the trial court's discretion we are directed to look at deficiencies in the performance of the injured party, it is important to note that UK was timely in its pursuit of this breach of warranty claim. The Field House was declared substantially complete except for the netting system in July, 1993. The netting system was installed in April, 1993, and problems immediately ensued up through substantial completion on May 9, 1994, with Maier backing the system with an extended five-year warranty. Warranty calls were made from September, 1994, through January, 1995, not all of which were answered or completed. Evaluations of the system resulted in its being safe-tied off in February, and March, 1995, for safety reasons. Negotiations with APR through the summer of 1995 resulted in APR beginning installation in December, 1995, and completing same March 26, 1996. The next day, March 27, 1996, UK was allowed to cross-claim against Pennington for breach of warranty on the netting system. In the meantime, UK made payment to APR on May 9, 1996 for replacement of the netting system. Maier was added in as a

third-party defendant on July 25, 1996. UK made the request for a trial date in October, 1997, when the date of May 18, 1998, was set.

Although Pennington and Maier's complaint rests upon the delay from the beginning of the trial on May 18, 1998, and the rendering of the decision on April 9, 2001, the record indicates that Pennington and Maier were parties to the delay. Following the recess of the trial in May, 1998, the *parties* did not request a new date until February, 1999, and at that time *specifically* requested that it be continued to the end of August, 1999. Following the trial ending in September, 1999, Pennington and Maier failed to utilize the procedures set forth in Kentucky Supreme Court Rule (SCR) 1.050(8) to alert the trial court that the case was ready for submission. UK has been without the use of this money since May, 1996. The trial court balanced the facts and equities and determined that prejudgment interest was appropriate. We can find no abuse of discretion.

ISSUE V:

PENNINGTON V. UK

LIQUIDATED DAMAGES OF $46,100.00
AWARDED TO UK AGAINST PENNINGTON

The October 29, 1991, contract between Pennington and UK contained a liquidated damages provision. Part V, Article 3 provided:

> It is mutually understood and agreed by and between the parties hereto that time is of the essence in the performance of this contract and that the Owner, the University of Kentucky, will sustain substantial monetary and other damages in the event of a failure or delay by the Contractor in the completion of the work hereby contracted. It is further understood and agreed upon and made part of this Contract that the work must be begun, performed, and completed without delay by the Contractor and if the Contractor fails to begin, perform with interruption, and completes said work in due and proper time, he may be declared in default of this Contract. Fixed and liquidated damages in the amount of $300.00 per calendar day shall be assessed against the Contractor for each calendar day during which the work under this contract remains incomplete after the Substantial completion date, as the same may be revised by any extensions for time granted by the Owner in accordance with Article 21, "Delays and Extensions of Time" of the General Conditions of this contract.

Due to a 157 day delay in substantial completion, UK assessed liquidated damages against Pennington at the contract rate of $300.00 per day for a total of $47,100.00. Post-trial, Pennington argued before the trial court that liquidated damages were improper as UK had failed to provide evidence of actual damages. The trial court disagreed, concluding that UK was justified in assessing the liquidated damages against Pennington.

Before us, Pennington argues that the trial court erred as a matter of law in concluding that UK was justified in

assessing liquidated damages, arguing insufficient evidence of actual damages suffered by UK. We disagree.

The Kentucky Supreme Court addressed this issue in Mattingly Bridge Company, Inc. v. Holloway & Son Construction Co., 694 S.W.2d 702 (Ky. 1985). In that case, the prime contractor, Holloway, had a contract with the Kentucky Department of Highways that assessed liquidated damages at $750.00 per day past the completion date agreed upon in the contract. Although the Department did not formally accept completion for more than six months past the breach date, Holloway and the Department agreed upon a liquidated amount of 17 2/3 days. Holloway had a subcontract with Mattingly that also allowed for liquidated damages, and provided for a completion date 15 days earlier than that between Holloway and the Department of Highways. In turn, although it was undisputed that Mattingly's breach of its date of completion did not cause Holloway's breach, Holloway assessed liquidated damages against Mattingly for 193 days computed from the completion date in the subcontract to the date when the Department of Highways formally accepted the project. The Court found that the language of the Mattingly subcontract tied the end date of the time period for liquidated damages to the prime contract, and therefore remanded to the trial court to reduce the amount of liquidated damages to 32 2/3 days, the number of days in breach between Mattingly's

substantial completion date and the date agreed upon by Holloway and the Department.

Several points in Mattingly are of import to us. One, the Mattingly Court indicated that it was reasonable to interpret the failure of Mattingly to complete by the date in the subcontract a *per se* trigger of Holloway's right to liquidated damages. Pennington's breach which is not in dispute, triggered UK's right to liquidated damages.

Two, insofar as UK's having to prove actual damages, the Court indicated that while:

> Historically contract provisions specifying liquidated damages were viewed with disfavor, as devices to extract penalties and forfeitures and against public policy . . . . In time the rule evolved that such devices would be recognized as a useful commercial tool to avoid litigation to determine actual damages.

Id. at 705(citations omitted). Additionally, "(t)he liquidated damages clause seeks to substitute the words of the contract for an evidentiary determination of what damages flowed from such default, and such an arrangement was not unreasonable in the circumstances." *Id*., at 706. Thus, the liquidated damages provision is an accepted tool to *avoid litigation to determine actual damages*.

Three, the Court in Mattingly directed, that in any event, insofar as liquidated damages:

> (T)wo restrictions remain: they should be used only (1) where the actual damages sustained from a breach of contract would be very difficult to ascertain *and* (2) where, after the breach occurs, it appears that the amount fixed as liquidated damages is not grossly disproportionate to the damages actually sustained.

Id. at 705(citations omitted)(emphasis in original). Insofar as the first prong, we have no doubt that ascertainment of actual damages to UK for inability to use the field house as a multipurpose sports practice facility would be very difficult. It appears to us that this type of situation would be the type perfectly suited for a liquidated damages contract provision.

As to the second prong, the Mattingly Court again provides assistance. The Court found that 32 2/3 days gave Holloway full benefit of its contract with Mattingly for liquidated damages, while any sum over the 32 2/3 days could only be viewed as a windfall; grossly disproportionate to the actual injury; and in essence a penalty or forfeiture. In the instant case, the claim of 157 days (which is not disputed on appeal by Pennington) gives UK the full benefit of its contract with Pennington for liquidated damages for breach (also not disputed by Pennington). Pennington, as the party challenging the damages, has the burden of proving that the damages exact a penalty. *See generally* Uncle George Orphans Home, Inc. v.

Landrum, 551 S.W.2d 582, 584 (Ky.App. 1977). This they have failed to do.

Pennington places reliance on Wehr Constructors, Inc. v. Steel Fabricators, Inc., 769 S.W.2d 51 (Ky.App. 1988), to support its claim that proof of actual damages is necessary to support an assessment of liquidated damages. In Wehr, a prime contractor assessed liquidated damages against a subcontractor for delay under a subcontract provision. While it was found that the subcontractor did breach the contract by a delay, it was also found that Wehr sustained no loss. Referring to the second prong in Mattingly, Wehr indicated that "(t)his second requirement (that liquidated damages is not grossly disproportionate to the damages actually sustained) presupposes that some actual damage has occurred." *Id*. at 55. To impose liquidated damages against the subcontractor in Wehr, in a case where Wehr sustained no damages, would be grossly disproportionate and, as stated in Mattingly, a "windfall" for Wehr. There is no such windfall herein for UK. It is undisputed that UK was without the full intended use of its facility for months beyond the completion date as anticipated in the contract between Pennington and UK. Pennington breached that contract, and UK is entitled to recover liquidated damages for the breach. Where the relevant facts are undisputed and the dispositive issue becomes the legal effect of those facts, our

review is *de novo*. Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet, 80 S.W.3d 787, 790 (Ky.App. 2001). Having reviewed the applicable law, we conclude that the trial court correctly applied the law to the facts in this issue.

Further, due to our conclusion that UK is entitled to the liquidated damages in the amount of $47,100.00, we need not address Pennington's cross-claim for prejudgment interest on that amount.

ISSUE VI:

PENNINGTON V. B&H

AWARD OF PREJUDGMENT INTEREST ON
$39,000.00 IN DAMAGES
TO B&H AGAINST PENNINGTON

The November 4, 1991, subcontract between Pennington and B&H contained the following provision:

> Article 5
> Changes in the Work
> 5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work which would be inconsistent with the changes made by the Modifications to the Prime Contract.
> 5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions,

> deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.
>
> 5.3 The Subcontractor shall make claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

On November 12, 1992, B&H completed installation of the lighting fixtures on the steel girders in the field house, pursuant to the subcontract. On December 10, 1992, Pennington met with B&H to discuss the impact on the lighting fixtures if Pennington power-washed the steel girders in preparation for painting. It was undisputed that B&H advised Pennington to protect the lighting fixtures during the power-wash or risk

water damage. According to Pennington, B&H further advised that regardless of protection the lights would still function if they were not turned on for a while after the washing. Pennington power-washed the girders. When the lights were turned back on the ballasts in thirty-two of the fixtures failed because of water damage. B&H immediately fixed the lights at Pennington's direction. The labor invoice included overtime hours; plus charges for lift rental, fuel for lifts, and material. When B&H presented a bill for $19,556.16, Pennington refused to pay.

The trial court concluded as a matter of law that under the subcontract the replacement of the ballasts constituted "extra work"; that Pennington did not need to give written approval of the extra work as the parties' course of dealing abrogated same; that Pennington's authorization for extra work was silent as to the value, thus B&H could recover its reasonable expenses; that Pennington breached the subcontract by refusing to pay B&H; and B&H was entitled to recover liquidated damages in the amount of $19,556.16 (the total amount of the bill), plus prejudgment interest at the rate of 8% from April 22, 1993 (the date of the bill).

Before us, Pennington contends that the issue was not one of liquidated damages but of reasonableness of repairs; thus arguing that the trial court erred as a matter of law in concluding that the damages were liquidated and in awarding

prejudgment interest as a matter of right instead of applying equitable principles. Ultimately, Pennington argues that the prejudgment interest award was in error. We disagree.

In making the initial award of $19,556.16, the trial court classified the damages alternatively as "special" and as "liquidated." According to Nucor, *supra* at 141, "liquidated" is defined generally as "(m)ade certain or fixed by agreement of parties or by operation of law," and as it constitutes an unpaid debt, subject to prejudgment interest. Special damages are those "alleged to have been sustained in the circumstances of a particular wrong," more in the nature of "unliquidated damages" which "cannot be determined by a fixed formula and must be established by a judge or jury." Black's Law Dictionary (8th Ed. 2004).

> Where the terms of a contract specify a sum payable for non-performance, it is a question of construction whether this sum is to be treated as a *penalty* or as *liquidated damages*. The difference in effect is this: The amount recoverable in case of a penalty is not the sum named, but the damage actually incurred. The amount recoverable as liquidated damages is the sum named as such.

William R. Anson, Principles of the Law of Contract 470 (Arthur L. Corbin ed., 3d Am. ed. 1919).

According to Nucor, *supra* at 144, while prejudgment interest follows from liquidated damages as a matter of right, whether prejudgment interest may be allowed in unliquidated

types of damages is left to judicial discretion, "in the light of all the circumstances," citing to Comment d, Restatement (Second) of Contracts § 354, "Interest on Damages."

We find no abuse of discretion in the award of prejudgment interest. Pennington makes no claim that the findings of the trial court are clearly erroneous, and upon our review, it is clear that the trial court's findings of fact that B&H's expenses were reasonable are supported by the record. Pennington admitted that it was told by B&H to cover the lighting fixtures and to not directly spray the fixtures when power-washing the steel girders. Pennington further admitted to power-washing the fixtures, only covering the lights and ballasts "to some degree." It is further undisputed that while fully operational before the power-washing, thirty-two of the lighting fixtures failed when turned on after the power-washing. It is undisputed that B&H repaired the damage. As such, the evidence has sufficient probative value to support the trial court's conclusion. Kentucky State Racing Commission, *supra* at 308.

According to Nucor, *supra* at 143:

> Interest is charged not only because of the value to the one who uses money, but also as compensation to the one who has been deprived of the use of money. Interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of

> fairness; it is denied when its exaction would be inequitable ... the tendency of the courts is to charge and allow interest in accordance with the principles of equity, to accomplish justice in each particular case.

Quoting 47 C.J.S. "Interest & Usury" § 6 (1982). B&H immediately rectified the damage caused by Pennington in December, 1992; asked for payment in April, 1993; filed a lien on the damages in January, 1994; and originated this lawsuit in February, 1994. We therefore cannot conclude that the court's award of prejudgment interest is an abuse of discretion. *See generally* Church and Mullins Corp. v. Bethlehem Minerals Co., 887 S.W.2d 321, 325 (Ky. 1992).

ISSUES VII AND VIII:

PENNINGTON AND MAIER V. B&H AND UK

VIOLATION OF CIVIL DUE PROCESS

Lastly, Pennington and Maier assert civil due process violations, contending prejudice by the trial court in rendering its findings of fact, conclusions of law, order, and judgment in April and May, 2001, after having conducted the bench trial for four days in May, 1998, and for six days in August and September, 1999. Upon review of these issues, we agree with B&H and UK that these issues are not preserved for our review, in that they were never raised before the trial court. Although Pennington and Maier point to their prehearing statements as sufficient preservation, a review of this particular reference

indicates that both appellants raised delay only in the context of the award of prejudgment interest, issues that have been addressed earlier in this opinion.

Additionally, by their own actions they establish that this issue was not brought to the trial court's attention. In October, 1997, the court set a trial date of May 18, 1998, *upon UK's request*, *not appellants'*; *appellants jointly moved to continue* the May 18, 1998 trial date; and in February, 1999, following the recess of the initial four days of trial, *the parties* requested that the trial be continued *specifically* to the end of August, 1999.

Furthermore, appellants failed to utilize the procedures in SCR 1.050(8) to alert the trial court that the case was ready for submission.

It is well settled that "a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." Combs v. Knott County Fiscal Court, 283 Ky. 456, 141 S.W.2d 859, 860 (1940). We thus decline to consider appellants' due process violation claims.

For the foregoing reasons, the judgment and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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