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Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002509-MR

MID STATES STEEL PRODUCTS COMPANY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-00430

THE UNIVERSITY OF KENTUCKY

APPELLEE

AND: NO. 2003-CA-002694-MR

UNIVERSITY OF KENTUCKY

CROSS-APPELLANT

v. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-00430

MID STATES STEEL PRODUCTS COMPANY

CROSS-APPELLEE

AND:

NO. 2004-CA-001434-MR

MID STATES STEEL PRODUCTS CO.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-00430

HNTB CORPORATION

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND
REMANDING IN PART

** ** * * *

BEFORE: BUCKINGHAM,¹ JOHNSON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Mid States Steel Products Co. appeals and the University of Kentucky (UK) cross appeals from a judgment of the Franklin Circuit Court on claims brought by each party arising out of a contract between them in connection with an expansion project for UK's Commonwealth Stadium. The court conducted a three-week bench trial and entered a judgment resolving the numerous issues before it. Some issues were resolved favorably to Mid States, and some were resolved favorably to UK. The court's rulings on practically all issues

¹ This opinion was completed and concurred in prior to Judge David C. Buckingham's retirement effective May 1, 2006. Release of the opinion was delayed by administrative handling.

have now been appealed to this court for our review. Mid States also appeals from a summary judgment dismissing its complaints against HNTB Corporation. Having reviewed the voluminous record, the numerous arguments raised by the parties, and the judgment of the trial court, we affirm in part, reverse in part, and remand in part.

In the late 1990s, UK undertook an expansion project for its football stadium (Commonwealth Stadium). The project entailed enclosing both end zones of the stadium and adding approximately 7,000 seats and 40 luxury suites. Construction of the project could not begin until after the last home football game of the 1998 season and had to be completed before the first home game of the 1999 season.

Mid States, a fabricator of structural steel products, was the successful bidder for the structural steel fabrication and erection for the project. Mid States subcontracted the erection portion of the work to Powell Construction Co., which was not a party to this litigation. The design of the project, including the architectural and structural steel design drawings, was provided by HNTB Corporation pursuant to its contract with UK.

Following the trial of this case, the court made numerous findings of fact. These are set forth hereinafter. On August 5, 1998, Mid States and UK signed a contract following

Mid States' successful bid. On August 11, 1998, Mid States received a Notice to Proceed, which was effective on August 12, 1998. However, Mid States had not received final complete design drawings from HNTB upon which it was to fabricate the structural steel.

In mid-October 1998, UK and its consultants decided to modify the design of the steel frame to accommodate Dant-Clayton, the seating supplier. Mid States received the first of these modifications on October 27, 1998. The modifications comprised major changes to the work. Such changes delayed Mid States in the performance of its work and significantly increased its costs. The changes delayed the start of fabrication from late September until early November.

In an effort to have the work completed in a timely manner, the contract provided for milestone dates for the completion of the work. The contract also required Mid States to pay liquidated damages to UK if it did not complete its work by the milestone dates. Early in the project, Mid States began documenting the problems and adverse conditions it faced in a series of letters to UK. Those letters documented Mid States' right to relief from the milestone dates and requested additional payments to compensate Mid States for some of its additional costs and expenses.

A December 3, 1998 letter from Mid States to UK established Mid States' right to an extension of the date for substantial completion of the structural steel until at least May 2, 1999. UK never responded to any of Mid States' several requests for adjustments to the milestone dates. Rather than requesting Mid States to quantify its claim, UK directed Mid States to stop writing claim letters and to proceed without the paperwork normally required under the contract.

Despite the fact that Mid States did not meet any of the original milestone dates set forth in the contract, UK never gave Mid States notice that its failure to do so constituted a breach of the contract. Rather, UK encouraged and accepted Mid States' continued performance of the contract. Further, UK did not provide Mid States with any notice of new or adjusted milestone dates that it considered subject to liquidated damages.

Mid States planned to erect the steel in the east end of the stadium beginning on the south side of Quadrant D and proceeding around to the north side of Quadrant C. In late November or early December, after fabrication had commenced, Turner Construction Co., UK's construction manager, notified Mid States that it must erect the steel across the entire front of the east end and only back to column line D to accommodate the precast supplier. This constituted a change in the work which

required Mid States to change and re-sequence fabrication efforts that were underway in its shop, resulting in the disruption of fabrication and erection work.

In order to overcome the early delays, UK requested Mid States to start erection on December 7, 1998, to accommodate UK's precast supplier. Mid States had no obligation under the contract to begin erection on that date, and its early erection efforts were not fully productive due to several factors. Full-scale erection did not commence until January 8, 1999.

In a letter dated January 12, 1999, UK agreed to reimburse Mid States for certain requested costs. The parties also agreed that certain categories of additional costs would be waived by Mid States. To induce Mid States' continued performance, the letter expressly recognized that Mid States did not waive potential claims for other categories of costs. In the letter, UK also accepted Mid States' January 8, 1999 proposal to accelerate the fabrication. Later, UK agreed to pay erection overtime and extra equipment rental at the rates quoted by Mid States in its January 18, 1999 quotation letter.

From January 1999 until the erection of the structural steel was completed, Mid States and its erection subcontractor were confronted with additional events and conditions which further changed the scope of the work and delayed it. Among the changes that increased the scope of Mid States' work beyond

original contract requirements were the addition of window washing platforms, the addition of window mullion tubes, and the addition of channel handrails. In addition, UK's consultants continued to design and redesign significant components of the steel frame during the first four months of 1999. The changes ranged from the redesign of the wing areas and truck entrance to changes in suite expansion joints, vomitory entrances, roof details, and the relocation of bracing and beams. These changes delayed and interfered with the performance of the work that was subject to milestone dates under the contract. Finally, Mid States also experienced several days of unusually inclement weather, from which it was entitled to milestone date relief.

In short, the field erection effort was hampered and delayed by various factors beyond the control of Mid States and its subcontractor. Mid States would have been entitled to extensions to the milestone dates as well as relief from all liquidated damages. Mid States was able to achieve the milestone for the completion of the structural steel on May 14, 1999.² That date was several weeks in advance of the date that would have been allowed had the contract been properly administered by UK and its consultants.

In cases tried upon the facts without a jury, the court is required to find the facts specifically and to separately

² Detail work was not completed until June 17, 1999.

state its conclusions of law thereon. CR³ 52.01. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Id. In its 26-page ruling, the trial court made extensive findings of fact and conclusions of law before rendering its judgment. Having reviewed the arguments of the parties in these appeals, it is apparent that most of the challenges are to the fact findings of the court. As will be explained hereinafter, we fail to find that any of the challenged fact findings were clearly erroneous.

MID STATES' APPEAL AGAINST UK

Mid States argues on appeal that the trial court erred in dismissing several of its damage claims against UK and erred in awarding UK a judgment on its counterclaim. In essence, Mid States appeals from practically every portion of the court's judgment that was adverse to it. We will begin by examining Mid States' argument that the court erred in awarding UK a judgment on UK's counterclaim.

The fabrication and erection of channel handrails for the stadium were part of Mid States' scope of work pursuant to a change order. After the channel handrails were fabricated and erected by Mid States, a problem arose with the appearance of rust stains. The court determined that Mid States was liable

³ Kentucky Rules of Civil Procedure.

for the problem based on its failure to meet requirements under the contract.

UK obtained an estimate in the amount of \$148,630 from Wilhite, Ltd., to remedy the defective handrails. UK offered the estimate at trial as evidence of its damages. However, UK offered no witness to establish the foundation requirements for the document or to give testimony in connection with the figures therein.

Mid States objected to the estimate as being hearsay and thus inadmissible. In response, UK stated that the estimate was not being offered as evidence of damage. Noting that mere uncertainty as to the amount of damages does not preclude recovery, the court held that the estimate of \$148,630 offered by UK was the best evidence that could be offered and afforded a reasonable basis for estimating UK's loss. The court found that the amount was the maximum amount of recovery on the claim, and it ordered UK to pay a credit to Mid States if the lowest responsible competitive bid to remedy the defective handrails came in below that amount.

After advertising bid documents, UK received three bids. Two of the bids were in excess of the Wilhite estimate of \$148,630. The other bid was for \$58,801.22, and it came from Mid States. UK rejected Mid States' bid as not a responsible bid offering the best value to UK. Thereafter, in an order

entered subsequent to the initial judgment, the court awarded a judgment to UK on its counterclaim for \$148,630.

Mid States argues on appeal that the Wilhite bid was inadmissible evidence to support the claim because it was hearsay. Mid States also points to UK's acknowledgment at trial that the estimate was not being offered as evidence of damages. Mid States further notes that UK never requested the court to reopen the record to accept additional evidence and never advised the court that it had any additional evidence to offer. As Mid States asserts, the court never conducted any post-trial or post-judgment evidentiary hearing. In short, Mid States argues that UK failed to offer any competent evidence of the amount of its damages.

In response, UK relies on the trial court's reasoning that mere uncertainty as to the amount of damages does not preclude its recovery. See Hanson v. American National Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993), overruled in part on grounds by Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483, 495 (Ky. 2002), wherein the court held that "mere uncertainty as to the amount will not preclude the right of recovery." Id. at 309. UK also notes that Mid States offered no proof challenging the amount of the estimate or the method used in the estimate to correct the problem. UK argues that Mid

States failed to provide any factual or legal authority to establish that the court's ruling was clearly erroneous.

"[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000). We conclude that the trial court abused its discretion in allowing the Wilhite estimate to be introduced into evidence as proof of damages because the estimate constituted inadmissible hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE⁴ 801(c). The Wilhite estimate was a document prepared at UK's direction in anticipation of litigation. It was offered to prove the truth of the matter asserted (damages). The person who prepared the estimate did not testify and, therefore, was not subject to cross-examination by Mid States. We conclude the document was inadmissible hearsay. See Wright v. Premier Elkhorn Coal Co., 16 S.W.3d 570, 572 (Ky.App. 1999).

The trial court determined that Mid States was liable on UK's claim in connection with the channel handrails. However, UK was required to prove all elements of its claim, including damages. See CR 43.01. Because the Wilhite estimate was the only evidence of damages submitted by UK, UK failed to

⁴ Kentucky Rules of Evidence.

prove all elements of its claim. Therefore, the judgment in favor of UK in the amount of \$148,630 is reversed.⁵

The remainder of Mid States' arguments relates to the court's dismissal of various damage claims. Among the damage claims made by Mid States were: under utilization of shop due to initial delay (\$221,245), excess shop personnel hours (\$824,940), excess trucking costs (\$52,554), and excess erection labor (\$414,840). The court rejected some of these claims as being barred by the no damages for delay clause in the contract and some as being barred by the notice clause in the contract. Further, the court determined that even if the claims were not barred by those clauses, Mid States' damages were too speculative to be recoverable. Finally, the court also stated that Mid States failed to prove the essential elements required to assert a total cost or modified total cost damage claim.⁶

⁵ Mid States goes to some length in its reply brief to address the issue of whether the estimate was admissible under the business record exception to the hearsay rule. UK did not raise this argument in its brief; therefore, we will address it simply by noting that the estimate was not admissible as a business record under KRE 803(6) since it was not a record kept in the course of a regularly conducted business activity. See Galbraith v. Starks, 117 Ky. 915, 79 S.W. 1191, 1193 (1904).

⁶ Mid States' claim for excess erection labor was apparently summarily rejected by the court prior to the trial. The parties refer in their briefs to this claim as a "pass-through" claim asserted by Mid States on behalf of Powell, its subcontractor. The parties suggest the court rejected this claim on the grounds that Mid States was not the real party in interest. See CR 17.01. However, no written summary judgment was ever entered disposing of this claim. Nevertheless, we conclude that the court finally disposed of the claim on the last page of its judgment when it stated that "[a]ll other claims for damages by Mid States are hereby **DENIED.**" We will not resolve the specific issue as to whether Mid States had standing to assert this claim since it is unnecessary to the resolution of the case.

We conclude that the trial court did not err in dismissing Mid States' aforementioned claims for two reasons. First, the claims were barred by the no damages for delay clause in the contract. Article 21 of the General Conditions portion of the contract stated in relevant part as follows:

Extensions of time shall be the Contractor's sole remedy for any and all delays. No payment or compensation of any kind shall be made to the Contractor for damages because of impacts, hindrance in the orderly progress of the Work or delay from any cause in the progress of the Work, whether such hindrances or delays be avoidable or unavoidable. The Contractor expressly agrees not to make, and hereby waives, any claim from damages on account of any delay, obstruction, or hindrance for any cause whatsoever, including but not limited to the aforesaid causes. The Contractor agrees that the sole right and remedy in the case of any delay shall be an extension of the time fixed for completion of the Contract. Without limitation, the Owner's exercise of its rights under the changes clause, regardless of the extent or number of such changes, shall not under any circumstances be construed as compensable delays. The Contractor acknowledges that the Contract Amount includes and anticipates any and all delays whatsoever from any cause, whether such delays be avoidable or unavoidable.

In Humphreys v. J.B. Michael & Co., 341 S.W.2d 229 (Ky. 1960), overruled in part on other grounds by Foley Constr. Co. v. Ward, 375 S.W.2d 392 (Ky. 1963), the court upheld the enforceability of a no damages for delay clause in a road construction contract between a contractor and the state. Id. at 234. See also John

E. Green Plumbing & Heating Co., Inc. v. Turner Constr. Co., 742 F.2d 965, 966 (6th Cir. 1984). Because each of Mid States' claims that were denied by the trial court were based on delay, the trial court properly denied the claims pursuant to the contract provision.⁷

We also conclude that the trial court properly dismissed Mid States' remaining damage claims due to Mid States' failure to prove the essential elements required to assert a total cost or modified total cost damage claim as required in W.R.B. Corp. v. U.S., 183 Ct. Cl. 409, 426 (1968). The total cost method determines the amount of change or damages to be recovered by subtracting the contract amount from the total cost of performance. See Bagwell Coatings, Inc. v. Middle South Energy, Inc., 797 F.2d 1298, 1307 (5th Cir. 1986). The modified total cost approach adjusts the contract amount to allow for mistakes the contractor may have made in his or her estimate and adjusts the total costs for problems attributable to the contractor. See Seattle W. Indus. v. David A. Mowat, 750 P.2d 245, 249 (Wash. 1988). Mid States apparently used the modified

⁷ Mid States argues that the claims were based on change of work and that the no damages for delay clause was thus not applicable. If Mid States intended to recover damages based upon changes in work, it should have asserted its rights under Article 18 of the Contract at the time such changes were being made. We note that throughout the contract, such as with the additional crane and with the channel handrails, change orders were processed to reflect the change in scope of work. Thus, Mid States' failure to do so precludes it from being awarded damages based on changes of work.

total cost approach, as evidenced by its concession that approximately \$54,000 of its costs were attributable to itself.

Assuming, without deciding, Kentucky courts accept this method of establishing damages, we note that under this method, the contractor must prove not only that he or she was not liable for the extra cost, but that the defendant was responsible. See Glasgow, Inc. v. Dept. of Transp., 529 A.2d 576, 579 (Pa. 1987). Mid States failed to do this. The trial court made a determination that part of the delay and additional expense incurred by Mid States was attributable to a change in the scheduling and sequencing of the field erection effort dictated by UK's construction manager, Turner Construction Co. Another delay was caused in UK's decision to modify the design of the steel frame to accommodate the seating supplier, Dant-Clayton. Yet another, and more significant, reason for delay was the failure of HNTB to provide final complete design drawings. These three facts alone support the court's ruling that Mid States did not prove that UK was entirely responsible for its damages. See W.R.B. Corp., supra. In short, we agree with the trial court that Mid States failed to prove all elements of its claim and that its damages were too speculative to be recoverable.

UK'S CROSS-APPEAL AGAINST MID STATES

As was the case with Mid States, UK has appealed from practically every portion of the court's judgment that was decided adversely to it. The first of the four issues raised by UK in its cross-appeal is that the trial court erred in awarding Mid States' claims for erection overtime premium (\$134,849) and for an additional erection crane (\$83,809). The first part of UK's argument is that Mid States should not have been allowed to assert these claims because it was not the real party in interest. UK argues that these were claims on behalf of Mid States' subcontractor, Powell, and that only Powell had standing to assert them.

The trial court determined that Mid States and UK had agreed that UK would pay Mid States for overtime premium and extra equipment rental in accordance with the rates quoted in Mid States' January 18, 1999 quotation.⁸ In fact, change orders were issued by UK reflecting this agreement. Thus, Mid States was not asserting this claim on behalf of Powell, but it was asserting it on its own behalf. This establishes Mid States' right to recover these amounts from UK, as Mid States is the real party in interest. See CR 17.01.

Rather than contest the existence of the agreement, UK contends that its agreement to pay for overtime premium and extra equipment rental was expressly conditioned upon Mid States

⁸ UK did not contest this finding.

completing all work subject to the milestone dates in advance of March 31, 1999. The court found otherwise, and the evidence was sufficient to support the court's ruling on this matter. Mid States' January 18, 1999 quotations letter expressly stated that Mid States was proceeding with the understanding that it would be paid. No reference was made to any condition to payment. The letter also requested UK's representative to contact Mid States immediately if it misunderstood the direction "in any way."

The court determined that no probative evidence was offered to establish that UK actually communicated the alleged condition to Mid States at any time before August 1999. On August 8, 1999, UK sent a letter informing Mid States that it was reversing the three prior change orders paying for overtime premium and extra equipment rental. The court determined that reasonable inferences "strongly suggest that the alleged condition was merely asserted by the University as a pretext for withholding payment." In short, we conclude that the court did not err in awarding Mid States judgment on this portion of its claim. The court's fact findings in this regard were not clearly erroneous.⁹

⁹ UK argues that Jack Miller's testimony was sufficient probative evidence that the condition was communicated in January 1999. This ignores the fact that the court had the authority to determine the weight and credibility to give the evidence presented. See CR 52.01; Sherfey v. Sherfey, 74 S.W.3d

UK's second argument is that the trial court erred when it awarded Mid States \$199,304 that UK withheld from payment in connection with the responsibility for the final field coat of urethane paint on the steel structure. The court ruled before trial that Addendum No. 6, which UK contends places responsibility for the field finish coat on Mid States, was issued in violation of UK's Instructions to Bidders in that it was issued later than five working days prior to the date of receipt of bids. Following this initial ruling by the court, the only issue at trial in connection with this matter was whether Mid States had waived the late issuance of Addendum No. 6. The court found that it had not done so, and the court awarded Mid States judgment on its claim of \$199,304.

UK now argues on appeal that the five-day notice requirement in the Instructions to Bidders was waived by Mid States as a matter of law when it signed the contract. UK bases its argument on Article 7 of the contract which listed contract documents as including "all Addenda." Thus, UK now argues that whether Mid States otherwise waived any objection to the issuance of Addendum No. 6 is irrelevant because Addendum No. 6 became a part of the contract as a matter of law.

777, 782 (Ky.App. 2002). Thus, we find no error in the fact that the court rejected UK's evidence on this matter.

This issue was not raised to the trial court. As we have noted, the issue at trial was whether Mid States had waived its objection to the enforceability of the addendum. The Kentucky Supreme Court has held that appellants "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). Therefore, this argument is not subject to our appellate review. At any rate, because the addendum was issued in violation of the bid instructions, it never became a part of the contract and was not enforceable.

Alternatively, the court determined that Addendum No. 6 did not require Mid States to furnish and apply the final field coat. The court determined that the addendum was reasonably susceptible to more than one interpretation, and it thus considered parol evidence pursuant to the doctrine of contemporaneous construction. See Billips v. Hughes, 259 S.W.2d 6, 7 (Ky. 1953); A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co., 650 F.2d 118 (6th Cir. 1981). UK now argues that the court's consideration of this evidence was erroneous because Addendum No. 6 was not ambiguous or susceptible to more than one interpretation.

We reject UK's argument in this regard for more than one reason. First, UK did not object to this evidence in the trial. Second, Addendum No. 6 did not clearly place

responsibility for the final field coat on Mid States. In fact, there was much evidence to support the court's finding that the addendum did not require Mid States to furnish and apply the final field coat. Furthermore, UK's own interpretation of the addendum has not been consistent throughout the proceedings, leaving us to conclude that the addendum was not as clear as UK would have us believe.

In short, the court did not err in this regard for several reasons. First, Addendum No. 6 was never a part of the contract. Second, Mid States did not waive any challenge to its enforceability. Third, Addendum No. 6 did not require Mid States to apply the final field coat.

UK's third argument is that the trial court erred in refusing to assess liquidated damages against Mid States because Mid States failed to meet the milestone dates and failed to prove entitlement to extensions of time as required by the contract. The contract between the parties provided for milestone dates for Mid States' performance of the erection of the steel. The contract also provided for liquidated damages to be paid by Mid States in the amount of \$2,000 per day for each day the work was not completed beyond the milestone dates. UK

asserted a claim against Mid States for liquidated damages in the amount of \$156,000.¹⁰

There is no question that Mid States did not meet any of the original milestone dates set forth in the contract. However, the court entered fact findings that there were delays in performance that were not caused by Mid States. These delays included, among other things, the fact that Mid States never received final complete design drawings from HNTB, that design modifications were approved by UK to accommodate Dant-Clayton, and that changes in the sequence of erection was directed by Turner, UK's construction manager. In addition, the court found UK further delayed and interfered with Mid States' work by adding to the scope of work required under the contract and by designing and redesigning components as construction was ongoing. Furthermore, UK has acknowledged that Mid States' failure to meet the original milestone dates did not constitute a breach of the contract.

Article 21 of the contract allowed for the adjustment of milestone dates. Article 18.1 required that modifications must be in writing. UK argues that Mid States never complied with the requirements of Article 21 for proving time extensions.

¹⁰ Since UK asserted its claim, it has acknowledged that Mid States was entitled to an extension of milestone dates under the contract. Based on the testimony of UK's own expert, it concluded Mid States is entitled to a credit of \$18,000. Thus, UK's claim is now for \$138,000.

Thus, it maintains that the court erred by not awarding UK liquidated damages. This argument ignores findings of fact made by the court.

The trial court found that beginning in August 1998, Mid States wrote a series of letters to UK pursuant to Article 21 in which it requested relief from the milestone dates due to various circumstances. The letters continued through December 1998. The court also found that UK did not respond to those letters, either by advising Mid States that it was bound by the original milestone dates or by fixing new milestone dates.¹¹ Based on these circumstances, the court found that Mid States was entitled to relief from the original dates.

We agree with the trial court's analysis of this issue. The court concluded that once the original milestone dates had passed, Mid States had a contractual right to know, in advance, the specific new deadlines, if any, by which UK expected Mid States to commence and complete its work or else be subject to liquidated damages. We see no error in the court's reliance on SIPCO Services & Marine, Inc. v. U.S., 41 Fed. Cl. 196, 218-19 (1998). Furthermore, we agree with the trial court

¹¹ During oral argument, UK cited to a memo dated January 12, 1999, from Jack Miller to Mid States. UK argued this was evidence that Mid States was informed it was bound by the original milestone dates. Once again we note UK has ignored the fact that the trial court had the authority to accept, weigh, and draw reasonable inferences from the evidence. See CR 52.01; Sherfey, 74 S.W.3d at 782. As the findings are supported by substantial evidence, we find no error in this regard.

that any other construction of the contract would be contrary to its express and implied provisions, including the parties' obligations of good faith and fair dealing. See Ranier v. Mount Sterling Nat'l Bank, 812 S.W.2d 154, 156 (Ky. 1991). ("In every contract, there is an implied covenant of good faith and fair dealing.") As the trial court determined, UK's failure to provide Mid States with timely advance notice of new milestone dates results in UK's surrender of its right to later impose liquidated damages for any failure by Mid States to begin or complete its work.

In addition to rejecting UK's liquidated damages claim on that basis, the court determined an alternative ground upon which to reject the claim. In a January 1999 telephone conversation, Jack Miller, UK's representative,¹² told Kenneth Galbraith of Mid States that Mid States should stop writing letters documenting its right to relief from the milestone dates and liquidated damages. The court found that Mid States reasonably relied on Miller's instructions and was induced to stop taking action to protect itself against the imposition of liquidated damages. Thus, the court concluded that UK was precluded by principles of equity and its contractual obligations of good faith and fair dealing from thereafter

¹² Jack Miller was UK's representative responsible for capital project management.

assessing liquidated damages against Mid States. The court cited Wehr Constructors, Inc. v. Steel Fabricators, Inc., 769 S.W.2d 51, 53-4 (Ky.App. 1988).

UK argues that Miller's statement was not sufficient evidence that UK had waived the contractual requirements. This was a factual determination by the court, and we may not set it aside unless it was clearly erroneous. See CR 52.01; Sherfey, supra. Further, the holding of this court in Wehr Constructors, Inc., makes it clear that clauses requiring written notice or approval may be excused where there has been modification, waiver, or abrogation, by either written or oral agreement. 769 S.W.2d at 53. Thus, we conclude that the finding was not clearly erroneous, and we thus reject UK's argument for this additional reason.

UK's fourth and final argument is that the trial court erred in denying UK's motion for attorney fees, costs, and expenses. UK cites Article 39.2 of the contract which states in part that:

The Owner shall recovery from the Contractor all attorney's fees, costs and expenses incurred if the Owner prevails in the litigation of disputes under the Contract. The Contractor shall be liable to the Owner for all attorney's fees, costs and expenses incurred by the Owner to enforce the provisions of the Contract.

UK argues that it prevailed in the litigation because "Mid States recovered only 16.67% of its claimed damages against UK and UK recovered 100% of its counterclaim against Mid States." Alternatively, citing cases from other jurisdictions as authority, UK contends that it is entitled to recover at least 83.33% of its attorney fees, costs, and expenses based on the percentage for which it prevailed in defending against Mid States' claims and enforcing the contract provisions.

The court determined that Mid States prevailed on the whole of the case. It noted that Mid States was successful on some, although not all, of its claims and that it recovered a substantial net judgment against UK. Thus, the court denied UK's motion.

We see no error or abuse of discretion in this regard. Although several of Mid States' claims were denied, judgment on several of its claims was awarded resulting in a substantial judgment against UK. Furthermore, with our reversal of the judgment in favor of UK on its counterclaim, the result is that UK did not prevail in any manner on its claim. In short, there was no abuse of discretion in the court's ruling.

MID STATES' APPEAL AGAINST HNTB

When Mid States filed its initial complaint with the circuit court, it included HNTB Corporation as a defendant as well as UK. As we have noted, HNTB was hired by UK to provide

the architectural and structural steel design drawings for the project. In its complaint and amended complaint, Mid States alleged causes of action against HNTB based on breach of contract and negligence.

Before the bench trial of this case began, the court granted summary judgment to HNTB and dismissed Mid States' claims against it. Although the written summary judgment order does not state specific grounds in support thereof, the parties apparently agree that the court reasoned there was no legal basis for Mid States' claims against HNTB in the absence of privity of contract.¹³ After the court entered summary judgment in favor of HNTB, Kentucky law in this regard developed further.

In Presnell Constr. Managers, Inc. v. EH Constr., 134 S.W.3d 575 (Ky. 2004), the Kentucky Supreme Court joined the majority of jurisdictions and adopted § 552 of the RESTATEMENT (SECOND) OF TORTS. Id. at 582. Section 552 states as follows:

- (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

¹³ The court had earlier advised the parties in a telephonic conference that HNTB's summary judgment motion would be granted.

- (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
 - (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
 - (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
- (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

In adopting § 552, the court held that “[w]e agree that privity is not necessary to maintain a tort action, and, by adopting § 552, we agree that the tort of negligent representation defines an independent duty for which recovery in tort for economic loss is available.” Id. Based on § 552, Mid States argues that this court should reverse the circuit court’s summary judgment order in favor of HNTB and remand for further proceedings. We agree and remand for further proceedings.

As we have noted, Mid States’ two-part claim against HNTB alleged causes of action for breach of contract and

negligence. We will address the negligence claim first. The basis of the negligence claim was stated by Mid States in Count IV of its First Amended Complaint as follows:

The conduct complained of herein, specifically including failure to disclose the condition of its drawings, and delays in providing timely and accurate design information, constitutes negligence on the part of HNTB the proximate cause of which was damage to Mid States.

Although it is not entirely clear from its brief, it appears that Mid States claims that HNTB was negligent in its design drawings and negligent in its delays in timely providing the drawings.

To the extent Mid States may be alleging negligent or faulty design drawings, summary judgment to HNTB was appropriate. Liability under § 552 is limited to loss suffered when the false or faulty information provided is relied upon by the injured party. Because Mid States acknowledges that it was aware of the problems in the design drawings at all times, its claim that it relied upon those drawings is without support. Therefore, the court properly awarded summary judgment to HNTB on this portion of Mid States' negligence claim.

However, to the extent Mid States' negligence claim consists of an allegation of negligent misrepresentation as to assurances made by HNTB concerning when complete drawings would

be provided, a valid claim has been stated.¹⁴ Because final complete design information had not been supplied when Mid States submitted its bid for the steel fabrication and erection portion of the project, Mid States was concerned and inserted in its written proposal a provision stating that incomplete, inaccurate, or inconsistent drawing information would result in delay. Mid States alleges that it submitted its bid after being assured by HNTB that final complete drawing information would be forthcoming. In fact, it appears that Mid States never received final complete design drawings from HNTB.

Having concluded that Mid States may state a claim alleging negligent representation in light of the Presnell case, we now turn to the other grounds raised by HNTB in support of its summary judgment motion. Our review of the portion of the tape where the court granted HNTB summary judgment, apparently based on lack of privity, reveals that the court rejected HNTB's other arguments.

HNTB claims that any cause of action against it by Mid States is barred by KRS¹⁵ 413.245. KRS 413.245 provides a one-year statute of limitations for professional negligence. HNTB asserts that the statute is applicable because it rendered

¹⁴ See Donnelly Constr. Co. v. Oberg/Hunt/Gilleland, 677 P.2d 1292 (Ariz. 1984), for a factually similar case.

¹⁵ Kentucky Revised Statutes.

"professional services" as defined in KRS 413.243. Further, HNTB relies on Old Masons' Home of Kentucky, Inc. v. Mitchell, 892 S.W.2d 304 (Ky.App. 1995), wherein a person providing architectural services pursuant to a contract fell within the purview of KRS 413.245. Id. at 306. HNTB thus argues that the circuit court could have granted summary judgment to it because Mid States' professional malpractice claim was barred by the one-year statute of limitations.

The question becomes whether Mid States' claim was one for professional malpractice or was one for ordinary negligence. The answer depends on the nature of the claim. As we have noted, the claim apparently had two parts. The first part was based on faulty design drawings, and we have determined that that claim was properly dismissed. That portion of the claim was a professional malpractice claim. However, the second portion of Mid States' negligence claim was that it relied on assurances from HNTB concerning when the final complete design drawings would be forthcoming and that it suffered damages when the information proved to be inaccurate.

Although there is no Kentucky case on point, we believe the analysis by the Texas Court of Appeals in Safeway Managing Gen. Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166 (Tex.Ct.App. 1998), is persuasive. In that case the court held that "[a] negligent misrepresentation claim is not equivalent to

a professional malpractice claim. . . . Under a negligent misrepresentation theory, liability is not based on professional duty; instead, liability is based on an independent duty to avoid misstatements intended to induce reliance." Id. at 169. In short, we conclude that the one-year statute of limitations for professional malpractice is not applicable to this portion of Mid States' claim.

We then face the issue of what statute of limitations is applicable. Mid States has not made any suggestion to us in this regard. We conclude that KRS 413.120(7) is the applicable statute. That statute provides a five-year limitations period for "[a]n action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated." Under this statute, Mid States' claim would not be barred.

HNTB also argues that it was properly awarded summary judgment because Mid States' negligence claim was not supported by expert witness testimony. We reject this argument. While professional negligence claims usually must be supported by expert witness testimony, Mid States' claim is not a professional negligence claim. Rather, it is an ordinary negligence claim that does not require expert testimony.

HNTB next argues that Mid States' complaints did not plead a claim based on § 552. It asserts that the first time Mid States mentioned a negligent misrepresentation claim was in

its memorandum in opposition to HNTB's summary judgment motion. It further notes that the memorandum was filed shortly after this court rendered its decision in the Presnell case, which decision was later affirmed by the Kentucky Supreme Court.

In the Presnell case the complaint alleged that "Presnell . . . supplied faulty information and guidance" to the project's contractors. The court held that the allegation was sufficient to avoid dismissal. Id. at 582. Because Mid States' negligence claim in its First Amended Complaint alleged failure to disclose and delays in providing timely and accurate information, we conclude that the allegation was sufficient to state a valid cause of action for negligent misrepresentation and to avoid summary judgment dismissing it. See CR 8.01(1).

HNTB further argues that the no damages for delay provision in the Mid States/UK contract precludes Mid States from recovering any damages for delay aside from an extension of time for completion of the project. While it is true that Mid States could not recover damages for delay from UK, HNTB's argument overlooks Section 42.2 of the contract wherein Mid States reserves the right to recover damages caused by other contractors.¹⁶ In short, the Mid States/UK contract does not

¹⁶ We believe that Mid States would not have been precluded from seeking damages from HNTB even in the absence of a clause such as Section 42.2.

preclude Mid States from asserting a cause of action against HNTB.

Finally, we turn to the portion of Mid States' complaints alleging a cause of action against HNTB for breach of contract. In its First Amended Complaint, Mid States alleged that "[t]he conduct complained of herein constitutes a breach of the statutory and contractual obligations of HNTB under the HNTB Contract to Mid States as an intended third-party beneficiary." On page 22 of its brief, Mid States urges us to likewise reverse the circuit court's summary judgment dismissing this portion of its claim. However, Mid States cites no authority to support its position and makes no reference to any portion of the record. Further, Mid States does not reply to the authority cited by HNTB in its brief on this issue. Therefore, we are not persuaded that the circuit court erred in dismissing Mid States' breach of contract claim against HNTB. This portion of the summary judgment in favor of HNTB is affirmed.

The judgment of the Franklin Circuit Court is affirmed in part, reversed in part, and remanded in part.

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