RENDERED: OCTOBER 10, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000835-MR

JAMES SCOTT HOOVER AND
H & H PAINTING, LLC — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CI-05707

D.W. WILBURN, INC.; DOUGLAS WILBURN;
ANTHONY SKIDMORE; AND FAYETTE COUNTY
BOARD OF EDUCATION — APPELLEES

AND

NO. 2013-CA-000884-MR

D.W. WILBURN, INC. — CROSS-APPELLANT

v.

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CI-05707

H & H PAINTING, LLC — CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: James Hoover and H & H Painting, LLC (collectively referred to as Appellants) appeal from the trial court's granting of directed verdict in favor of D.W. Wilburn, Inc., Douglas Wilburn, and Anthony Skidmore (collectively referred to as Appellees).[1] The directed verdict dismissed Appellants' tort claims against Appellees, leaving only issues of breach of contract for the jury to determine. Appellants also appeal the trial court's granting of a judgment notwithstanding the verdict (JNOV) after the jury found in favor of Appellants. Appellees have filed a protective cross-appeal. We find there were no errors in this action and affirm.

H & H Painting[2] (hereinafter H & H) worked as a subcontractor for D.W. Wilburn, Inc.[3] (hereinafter Wilburn) from 2005 until 2010. H & H provided commercial painting services on a number of projects. The projects at issue are the Leestown Middle School (hereinafter Leestown), the Morehead State University Center for Health, Education, and Research (hereinafter Morehead), and the Caudill Middle School (hereinafter Caudill).

[1] The Fayette County Board of Education was also named a party to this appeal. They were a party to the underlying action, but the issues in this appeal do not pertain to them; therefore, they will be ignored.
[2] Owned by James Hoover.
[3] Owned by Douglas Wilburn.

On May 7, 2009,[4] H & H was awarded a contract through another general contractor called Denham-Blythe, Inc. From this point on, Appellants allege that the working relationship they had with Appellees began to sour. They claim Appellees tried to run them out of business by not paying for the work they were doing on the projects. They also allege that Mr. Skidmore called Mr. Hoover and threatened to put him out of business. In addition, an anonymous fax was sent to the offices of Denham-Blythe which indicated that H & H was not in compliance with its corporate renewal with the Kentucky Secretary of State.[5]

On or about March 5, 2010, H & H stopped working on the Morehead and Leestown projects. H & H alleged it walked off these projects because Wilburn had not paid for the work that had been done at these locations. Soon thereafter, H & H alleged it was also unable to complete the Denham-Blythe contract because Wilburn was not paying it the money owed, thereby resulting in an overall lack of funding.

Appellants filed a complaint against Appellees alleging breach of contract, intentional infliction of emotional distress (IIED), intentional interference with a contractual relationship, and restraint of trade pursuant to KRS 367.175.[6] The matter was tried before a jury from January 7 to 9, 2013. At the close of Appellants' proof, Appellees moved for a directed verdict on all of Appellants'

[4] There was conflicting testimony about this date. It could have also been March 7, 2009. For our purposes we will use the May date.
[5] This was true and quickly remedied by H & H.
[6] Other claims were made; however, these are the only ones that made it to trial and are relevant to this appeal.

claims. The trial court sustained the motion as it pertained to the IIED, interference with a contract, and KRS 367.175 claims. It also dismissed individual defendants Mr. Wilburn and Mr. Skidmore as only the tort claims were brought against them.

Ultimately, the jury found in favor of H & H in regards to the breach of contract claims for the Morehead and Leestown projects. The jury awarded H & H $83,086 in damages for the Morehead project and $38,800 for the Leestown project. According to the wording of the jury instructions, these amounts represented the amount of money H & H had earned, but not been paid by Wilburn. Post-judgment, Appellees filed a motion for JNOV, arguing that the verdict should be set aside because Appellants failed to proffer sufficient proof to prove damages. Appellees also filed motions to alter, amend, or vacate judgment and for a new trial. The trial court granted the motion for JNOV and denied the other motions as being moot. This appeal followed.

Appellants' first argument on appeal is that there was sufficient proof to reach the jury on the tort claims and that the trial court erred in granting directed verdict in favor of Appellees. Appellants' evidence concerning the tort claims consisted of the following: Mr. Wilburn forbade H & H from submitting bids to other general contractors as a condition for bidding with Wilburn; Mr. Skidmore called Mr. Hoover and threatened to put him out of business after he successfully bid a contract with Denham-Blythe; an anonymous fax was sent to Denham-Blythe stating H & H was not in compliance with its corporate renewal with the Kentucky

Secretary of State; H & H's pay was shorted and delayed after it began working with Denham-Blythe; one year after completing the Caudill project, $24,180.85 was secretly diverted from H & H's Morehead account to cover alleged overpayments for the Caudill project; a Wilburn supervisor informed Mr. Hoover that he believed Mr. Wilburn was looking for an excuse to cancel H & H's contracts; Wilburn hired other painters to supplement H & H's work; Wilburn's payroll manager wrote a check to H & H for $21,000, but was unable to deliver it because Mr. Wilburn would not authorize it; and finally, Mr. Wilburn allegedly told Mr. Hoover that he would never get the $21,000 check and stated "I've had enough of your shit. You've threatened me with liens and you want money for retainage, and I'm tired of this shit. I'm not giving you shit."

> In general, a motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made. When reviewing such a motion, the court may not consider the credibility of evidence or the weight it should be given; this is a function reserved to the trier of fact. The court must draw all inferences to be drawn from the evidence in favor of the party against whom the motion is made. The trial court must then determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be palpably or flagrantly against the evidence, so as to indicate that it was reached as a result of passion or prejudice. If it concludes such would be the case, a directed verdict should be given, otherwise the motion should be denied.

Simpson County Steeplechase Ass'n, Inc. v. Roberts, 898 S.W.2d 523, 527 (Ky. App. 1995)(citations omitted).

We will first address the claim of IIED.

> A prima facie case of IIED/outrage requires that:
>
> 1) the wrongdoer's conduct must be intentional or reckless;
> 2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
> 3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
> 4) the emotional distress must be severe.

Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 788 (Ky. 2004)(citation and footnote omitted). *Stringer v. Wal-Mart Stores, Inc.* deftly explains the requirements that must be met for a claim of IIED and provides ample examples of cases which have had sufficient proof to meet the requirements and those which have failed.

> Because "[i]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery," Kentucky courts have turned to the commentary to § 46 for guidance in assessing whether conduct is actionably extreme and outrageous:
>
> > *Extreme and outrageous conduct*. The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character,

> and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs will necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no reason for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam[.]

With these goalposts in mind, Kentucky courts have found plaintiffs' proof of outrageous conduct sufficient to support an outrage/IIED claim in cases where the defendants: (1) harassed the plaintiff "by keeping her under surveillance at work and home, telling her over the CB radio that he would put her husband in jail and driving so as to force her vehicle into an opposing lane of traffic"; (2) intentionally failed to warn the plaintiff for a period of five months that defendant's building, in which plaintiff was engaged in the removal of pipes and ducts, contained asbestos; (3) engaged in "a plan of attempted fraud, deceit, slander, and interference with contractual rights, all carefully orchestrated in an attempt to bring [plaintiff] to his knees"; (4) committed same-sex sexual harassment in the form of "frequent incidents of lewd name calling coupled with multiple unsolicited and unwanted requests for homosexual sex"; (5) was a

> Catholic priest who "used his relationship [as marriage counselor for] the [plaintiff] husband and the wife to obtain a sexual affair with the wife"; (6) agreed to care for plaintiff's long-time companion-animals, two registered Appaloosa horses, and then immediately sold them for slaughter; and (7) subjected plaintiff to nearly daily racial indignities for approximately seven years.
>
> Outrageousness has been found lacking, however, in less-egregious cases where the defendant: (1) refused to pay medical expenses arising out of an injured worker's compensation claim; (2) wrongfully converted the plaintiff's property in a manner that breached the peace; (3) negligently allowed his vehicle to leave the road and struck and killed a child; (4) committed "reprehensible" fraud during divorce proceedings by converting funds belonging to his spouse for the benefit of defendant and his adulterous partner; (5) wrongfully terminated the plaintiff; (6) displayed a lack of compassion, patience, and taste by ordering plaintiff, who was hysterical over the fact that she had just delivered a stillborn child in her hospital room, to "shut up" and then informing her that the stillborn child would be "disposed of" in the hospital; (7) erected a billboard referencing defendant's status as a convicted child molester; (8) wrongfully garnished plaintiff's wages pursuant to a forged agreement; and (9) impregnated plaintiff's wife. Courts have found other elements of the prima facie case missing, or have otherwise found recovery pursuant to § 46 unavailable, in cases where the defendant: (1) a Catholic priest, sexually abused a ten-year-old boy; (2) breached a promise to marry; (3) chained a high school student to a tree by his ankle and neck; and (4) shot and killed a beloved family pet, which had been misidentified as a stray dog.

Id. at 788-91 (citations and footnotes omitted).

In this appeal, the trial court found Appellants' evidence lacking to support a claim of IIED. We agree. While IIED would seem to be a factually intensive issue to determine, as previously stated, the trial court must first determine if the defendant's conduct is so outrageous as to permit recovery. In ruling on the

motion for directed verdict on this issue, the trial judge specifically stated that he was assuming all the evidence which Appellants presented was true. The judge believed that the statements made by Mr. Wilburn and Mr. Skidmore were not "so outrageous that it offends decency and morality". The judge also stated there was no follow-through on the threats to put H & H out of business because H & H was able to get the Denham-Blythe contract. In addition, Mr. Hoover testified that he signed three or four more contracts with Wilburn even after he was threatened to be put out of business.

With the above IIED examples listed in *Stringer* in mind and examining the evidence presented in Appellants' case, we believe that a directed verdict was properly granted as to this claim. Appellees made a couple of threats to put Appellants out of business, but Appellants kept getting jobs. As for the anonymous fax, the contents of the fax were true and it did not prevent Appellants from getting the Denham-Blythe job. Finally, the other evidence presented by the Appellants amounts to nothing more than contractual disputes, which is a regular occurrence in a business setting.

Next we move on to the claim of intentional interference with a contractual relationship. Appellants claim Appellees interfered with their relationship with Denahm-Blythe.

> The *Restatement (Second) of Torts* § 766 (1979) correctly states the legal requirements to prevail upon a claim of intentional interference with an existing contract:

> One who intentionally and ***improperly interferes*** with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Id. (Emphasis added).

Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC, 182 S.W.3d 529, 533-34 (Ky. App. 2005).

We believe that a directed verdict was also properly granted on this issue. Appellants presented no evidence that Appellees caused Denham-Blythe to not perform on their contract. Even if we were to assume the anonymous fax came from one of the appellees, the fax did not affect the relationship between Denham-Blythe and Appellants. Mr. Hoover testified that the fax had no effect. This was corroborated by Michael Patterson, a project manager at Denham-Blythe. In addition, H & H worked on the Denham-Blythe job for almost a year. H & H then walked off the job because it had insufficient funds to complete it. H & H first breached the Denham-Blythe contract, not the other way around.

We now move to the restraint of trade claim. This is based on KRS 367.175 which states in relevant part:

> (1) Every contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

> (2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

In granting the motion for directed verdict on this issue the trial court found that there was absolutely no evidence to support this claim. We agree.

There are two ways a defendant can violate KRS 367.175: a restraint of trade that is *per se* unreasonable and violating the rule of reason. *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 874 (Ky. App. 2007). "A restraint of trade may be adjudged unreasonable if it is *per se* unreasonable or violates the rule of reason. Examples of *per se* unreasonable conduct include price-fixing arrangements, tying arrangements, agreements among competitors to divide markets or to allocate customers, group boycotts, and agreements to limit production." *Id*. "As for a restraint which violates the rule of reason, 'showing merely injury to oneself as a competitor is insufficient.' *Weight–Rite Golf Corp. v. U.S. Golf Ass'n,* 766 F.Supp. 1104, 1110 (M.D. Fla. 1991)." *Kenney* at 874.

Under the Rule of Reason,

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the

> evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Weight–Rite Golf Corp. at 1109 (*quoting Chicago Board of Trade v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918)).

> However, showing merely injury to oneself as a competitor is insufficient.
>
> > [I]njury to a competitor need not result in injury to competition. The use of unfair means in substituting one competitor for another without more does not violate the antitrust laws.... [The plaintiff] must show harm to competition in general, as well as its own injury as a competitor.

Weight–Rite Golf Corp. at 110 (citation omitted).

Appellants do not allege any facts that would amount to *per se* unreasonable conduct. Furthermore, there is no evidence that even suggests Appellees violated the rule of reason. No evidence was presented that showed competition in general was harmed or how the painting business in the Fayette County area was affected.

Appellants' final argument on appeal is that the trial court's JNOV was granted in error.

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed

> issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985). A reviewing court may not disturb a trial court's decision on a motion for a JNOV unless that decision is clearly erroneous. *Bierman v. Klapheke,* 967 S.W.2d 16, 18 (Ky. 1998).

"Upon the breach of a contract by one party, the other may by election rescind and recover the value of any performance rendered, or stand by the contract and recover damages sustained by its breach as if he had performed." *Columbian Fuel Corp. v. Skidmore*, 308 Ky. 447, 453-454, 214 S.W.2d 761, 765 (Ky. 1948). The jury in this case found in favor of Appellants in regards to the Morehead project and Leestown project. The jury awarded Appellants $83,086 for the Morehead project and $38,800 for the Leestown project. It is unclear from the evidence presented whether Appellants were trying to recover the value of the performance rendered or recover damages as if they performed the contract.

The evidence presented at trial regarding the amount of damages Appellants were trying to recover was brought out during Mr. Hoover's testimony. Mr. Hoover testified that H & H was owed around $30,000 for the Morehead project and $50,000 for the Leestown project. He later expands on these figures stating that for the Morehead project, H & H was owed $15,000 for the amount they had not yet submitted pay requests for and $22,000 as part of a retainage fee, for a total of $37,000. As for the Leestown project, Mr. Hoover testified that the entire contract was for $90,000 and that they had completed 50% to 60% of the job. This

allowed him to estimate that H & H was still owed $50,000. There was also some discussion about the figure $24,180.85. This amount was allegedly taken out of H & H's Morehead account in order for Wilburn to recoup an overpayment made to H & H on another project. To summarize, Mr. Hoover's testimony revealed that he estimated H & H was owed $61,180.85 ($37,000 + $24,180.85) for the Morehead project and $50,000 for the Leestown project.

Appellants also submitted into evidence a number of payment applications. These applications were submitted by H & H to Wilburn and reflected the amount of work H & H had performed on the Morehead and Leestown projects and how much money H & H believed it was owed. These payment applications were submitted once a month. The totals on the applications were then either paid or adjusted up or down according to the judgment of the architect who oversaw the projects.

We believe that the trial court correctly granted Appellees' motion for JNOV. Even considering all evidence in favor of Appellants, there was no evidence to support the damages figures awarded by the jury. The amounts supplied by Mr. Hoover's testimony are not close to jury award amounts. In addition, the payment applications were not discussed at any length during Mr. Hoover's testimony. These documents were mentioned briefly and then submitted into evidence for the jury to make of them what they could. No testimony was presented as to what amounts, if any, were paid by Wilburn to H & H from these payment applications.

In their brief, Appellants attempt to show this Court some figures in order to explain how they believe the jury came up with their award amounts. We will quote that paragraph fully.

> On three occasions, Mr. Hoover and his witnesses testified that his work on the Morehead Center job, with contract for $223,896, plus a $61,000 change order, was 90-95% complete. And his work on the Leestown Middle School, with contract for $90,000 was 60% complete. This is the "proportionate share" required by the Wilburn Contract, *and is confirmed by the unpaid pay requests from November, 2009 forward*. Hoover testified that this entitled him to $60,000 on Morehead, plus ten (10%) percent retainage on a total contract of $284,896.00 (including the $61,000 change order), or $88,489.60 total. On Leestown, plaintiff claimed $50,000 unpaid on a total contract of $90,000, plus ten (10%) percent retainage of $9,000, or total of $59,000. Those sums should be increased by the $24,180.85 secretly withheld on the Morehead job. Proof supports the jury awards of [] $83,086.00 on Morehead and $38,800 on Leestown. (Emphasis in original).

As for the Leestown project, the above paragraph conforms to the testimony provided, that Appellants believe they were owed around $50,000; however, this does not account for the $38,800 amount awarded by the jury. As for the Morehead project, we disagree with Appellants' version of the testimony. Mr. Hoover did not testify that he was entitled to $60,000 on the Morehead project. He testified that he was owed $37,000. If we take Mr. Hoover's testimony as fact and include the $24,180.85 sum allegedly removed from H & H's Morehead account for overpayment, that would still only amount to a little over $61,000.

It is also worth noting that even Appellants' trial counsel believed the evidence provided in support of the contract claim was weak. At the close of Appellants' proof at trial, defense counsel moved for a directed verdict as to all claims. A bench conference was held during which arguments were made. In trying to convince the trial judge not to grant a directed verdict as to the tort claims, Appellants' trial counsel stated "[i]f something had to go, it would be the contract claims, it wouldn't be the tort claims." Trial counsel also stated that the contract proof "is pretty sketchy" and that "the paperwork is pretty poor". We agree that the contract evidence was poor. Mr. Hoover only gave estimates as to how much he believed he was owed. Also, the applications for payment were not fully explained or fleshed out for the jury.

Based on the foregoing, we affirm the judgment of the trial court and Appellees' cross-appeal is therefore moot.

THOMPSON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

COMBS, JUDGE: I concur with the majority opinion on all points except the issue of damages. The jury found that money was owed to the appellants for contractual work performed – impliedly on the basis of *quantum meruit.*

I agree with the majority opinion that the evidence offered as to the amount of damages was incomplete, contradictory, and confusing. Therefore, rather than

disallowing damages *in toto*, I would remand for a trial with respect to the correct amount of damages to which appellants are entitled.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEES:
John F. Lackey Richmond, Kentucky	Michael R. Eaves Alicia A. Still