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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001699-MR

M.J.W., INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 11-CI-007927

HOLDERFIELD CONSTRUCTION, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: M.J.W., Inc., has appealed from the judgment of the Jefferson Circuit Court entered following a jury trial which awarded damages to Holderfield Construction, Inc. ("HCI"), on its claim for breach of contract, and from a subsequent order awarding costs, pre-judgment interest and post-judgment interest. Following a careful review of the record, the briefs and the law, we affirm.

M.J.W. is a small, closely-held corporation with a single officer—Marian J. Wilbers. M.J.W. owned a parcel of real estate located on Bardstown Road in Louisville, Kentucky, upon which was located a two-story building housing an Indian cuisine restaurant. In August of 2010 the building sustained substantial damage from a fire in the restaurant's kitchen. In June of the following year, M.J.W. contracted with HCI to renovate and repair the property. The interpretation of the contents and scope of this contract is at the center of the present controversy.

The contract called for payment of $139,186.91 and included an itemized breakdown of the costs of repairs and restoration work. The contract explicitly excluded kitchen equipment procurement and installation. The contract referenced an estimate given to M.J.W.'s property and casualty insurer, Travelers Insurance Company ("Travelers"), who would ultimately be paying for the majority of the work. The estimate was not attached to the contract. HCI was to complete all activities within sixty days, "excluding weather delays, change orders, work stoppages and new work that may be required by any tenants." Not referenced in the written contract was the parties' agreement that HCI would work closely with Travelers, Louisville Metro Code Enforcement and the Louisville Health Department to obtain necessary approvals and requirements for bringing the building up to current building and health code standards while keeping out-of-pocket expenses for M.J.W. and Mrs. Wilbers to a minimum.

HCI began work on the project on June 6, 2011. During the course of construction, the initial scope of the work changed numerous times as issues related to the fire damage were uncovered, code requirements were learned and enforced, and kitchen equipment was installed. Although Mrs. Wilbers believed the building would be "grandfathered" against many code-required changes and upgrades because of its pre-fire condition, code inspectors disagreed. As a result, a 1,000 gallon underground grease trap would have to be installed, an additional bathroom would need to be constructed, a side exit door newly-installed by HCI would have to be relocated, and other more minor changes and corrections to the original scope would be necessary. No written change orders or modifications to the original contract were executed.

M.J.W. did not make timely payments as called for in the contract. Further, based on a belief the original contract specified a fixed price to complete all necessary work to rehabilitate the building—regardless of additional work not contemplated or envisioned when it was executed—M.J.W. resisted calls to pay any sums in excess of the amount included in the original contract, even when informed of the need to do so by Travelers. M.J.W. ultimately paid $143,512.14 to HCI, an amount approximately $4,325 more than the original terms. Although the project was not complete, HCI contended M.J.W. owed more than $86,000 for additional work that had been performed on the property. After repeated unfruitful efforts to collect the monies due, HCI ceased operations on the project in October

2011 and did not return. M.J.W. hired another contractor to complete the job at an additional expense of $64,280.

On November 18, 2011, HCI filed a mechanic's lien against the property. In January of 2012, one of HCI's subcontractors also filed a mechanic's lien to secure payment of amounts allegedly owed to it; no action to collect on this lien was instituted. HCI filed the instant suit alleging various claims including breach of contract, foreclosure, unjust enrichment, *quantum meruit*, fraud and defamation. The suit sought compensatory and punitive damages. M.J.W. responded and filed counterclaims for breach of contract, slander of title, negligence, violation of building codes and unjust enrichment. Following a period of discovery, a ten-day jury trial commenced on April 9, 2013. The jury awarded HCI $86,061.88 on its breach of contract claim and the trial court entered a judgment in conformity with the verdict on May 3, 2013. All other claims of both parties failed. Multiple post-trial motions were heard, including M.J.W.'s motion to alter, amend or vacate or, in the alternative, for a judgment notwithstanding the verdict (JNOV), and HCI's Bill of Costs and motion for interest on the judgment. On August 29, 2013, the trial court issued an opinion and order upholding the judgment and awarding HCI $6,429.63 for costs and prejudgment interest. This appeal followed.

On appeal, M.J.W. raises four allegations of error in seeking reversal. First, M.J.W. contends it was entitled to a directed verdict on HCI's breach of contract claim. Second, M.J.W. argues the trial court erred in instructing the jury

as to the amount of damages it could award. Next, M.J.W. avers the trial court failed to properly restrict evidence of M.J.W.'s insurance coverage. Finally, M.J.W. contends the award of prejudgment interest was improper. After a lengthy and thorough review, we reject each allegation of error.

In reviewing evidence supporting a judgment entered upon a jury verdict,

> the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact.

Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998). This Court's review of a trial court's denial of a directed verdict and a motion for JNOV is the same. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky. App. 1987). Either motion should only be granted if 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." *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 915 (Ky. App. 2006) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)). We will not disturb a trial court's decision on a motion for directed verdict or JNOV unless that decision is clearly erroneous. *Bierman*, 967 S.W.2d at 18. Denial of a motion for a directed verdict should only be reversed on appeal when it is shown the verdict was "palpably or flagrantly against the evidence so as to

indicate that it was reached as the result of passion or prejudice." *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) (internal quotation marks omitted).

M.J.W. argues it was entitled to a directed verdict because the undisputed facts revealed the contract in this matter was plain and unambiguous; the contract called for a fixed price; the scope of the project was fully contained in the agreement, a fact HCI should have been deemed to have judicially admitted; M.J.W. fully performed its obligations; and HCI did not complete performance. In contrast, HCI argues the contract was ambiguous and was modified on numerous occasions throughout the course of the project as to price and scope; extrinsic evidence was necessary to determine the parties' intentions; and its judicial admissions, if any, supported a finding of ambiguity.

While both parties spend significant time in their arguments focused on the relative weight and credibility of the testimony and documentary evidence presented to the jury, such matters are clearly beyond the scope of our limited review. *Bierman*. 967 S.W.2d at 18. Further, M.J.W.'s insinuations regarding the impropriety of the admission of certain pieces of evidence are—contrary to the mandates of CR[1] 76.12—unsupported by citation to the record or to applicable precedent, and are therefore of dubious value.

What is clear, however, is that the evidence presented regarding the contract, possible amendments thereto, scope of work and total amounts due was conflicting and contradictory, thus presenting issues of fact and credibility

[1] Kentucky Rules of Civil Procedure.

peculiarly within the jury's province to decide. When viewing the evidence in the light most favorable to HCI, and giving it every fair and reasonable inference that can be drawn from the evidence, nothing leads us to believe the jury verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. Thus, the circuit court did not err in denying M.J.W.'s motion.

M.J.W. next argues the trial court erred in instructing the jury it could award HCI up to $86,061.88 on its breach of contract claim. Errors alleged regarding jury instructions are considered questions of law and are to be reviewed on appeal under a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). The instruction at issue read as follows:

> Instruction No. 5—Damages—Breach of Contract
> (Herein "Instruction")
>
> If you have found for Holderfield under Instruction Nos. 3 and/or 4 for breach of contract, you shall determine from the evidence and award Holderfield a sum of money that will fairly and adequately compensate it for damages caused by MJW and/or Mrs. Wilbers (not to exceed $86,061.88, the amount claimed). The damages you award for breach of contract must be the amount of money that will place Holderfield in the position it would have been placed if MJW and/or Mrs. Wilbers had performed its/her/their duties under the contract.

The trial court then instructed the jury where to record the amount of any damages found and how to proceed further with the instructions.

In this Commonwealth, jury instructions "should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." *Cox v. Cooper,* 510 S.W.2d 530, 535 (Ky. 1974). This simple standard is reiterated by a long line of Kentucky cases calling for a similar approach. *Bayless v. Boyer,* 180 S.W.3d 439, 450 (Ky. 2005). Jury instructions "must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth,* 618 S.W.2d 177, 178 (Ky. 1981) (citing *Simpson v. Commonwealth,* 313 Ky. 599, 233 S.W.2d 118, 120 (1950)).

> The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.

Ballback's Adm'r v. Boland–Maloney Lumber Co., 306 Ky. 647, 208 S.W.2d 940, 943 (1948).

M.J.W. contends the instruction given was erroneous because HCI should have been limited in its recovery to $50,000—the amount HCI's president testified was owed to his company; the remaining $36,000 represented sums owed by HCI to its subcontractors. According to M.J.W., because the subcontractors are the real parties in interest, HCI does not have standing to collect monies owed to these other non-parties to the suit who had no direct contractual relationship with M.J.W. It is argued that allowing HCI to do so would serve to subject M.J.W. to the possibility of duplicative liability, as the judgment does not require HCI to turn

over any monies to these subcontractors who, if not paid by HCI, could later assert equitable claims against M.J.W. arising from nonpayment for their participation in the project. We disagree and believe the trial court properly instructed the jury.

M.J.W. is correct—the trial court's order does not explicitly or implicitly require HCI to disburse proceeds of the judgment to any subcontractors, materialmen, or any other person holding a potential claim against M.J.W. arising from the project. However, contrary to M.J.W.'s doomsday predictions of uncertain liability, HCI is statutorily obligated to disburse the funds to the potential claimants. KRS 376.070(1) requires

> [a]ny contractor, architect or other person who builds, repairs or improves the property of another under such circumstances that a mechanic's or materialman's lien may be imposed on the property shall, from the proceeds of any payment received from the owner, pay in full all persons who have furnished material or performed labor on the property.

This statute is both preceded and followed by sections governing materialmen's liens, but is not made dependent on the assertion of a lien. *Henry A. Petter Supply Co. v. Hal Perry Construction Co.*, 563 S.W.2d 749 (Ky. App. 1978). *See also Commonwealth of Ky. for the Benefit of United Pacific Ins. Co. v. Laurel County,* 805 F.2d 628 (6th Cir. 1986). The contractor is legally obligated to pay in full, out of the sum received on the primary contract, all claims for material and labor, and if the amount received by the contractor is insufficient to pay all claims, they must be paid on a *pro rata* basis. *Blanton v. Commonwealth*, 562 S.W.2d 90 (Ky. App.

1978). In addition, KRS 376.990 imposes a fine and imprisonment for a violation of KRS 376.070.

Thus, the amount of damages permitted by Instruction No. 5 in excess of the amount claimed as being due directly to HCI for its services cannot be considered a windfall or an amount improperly collected for a non-party as it simply cannot legally inure to HCI's benefit and must be properly disgorged in payment of valid claims to those who supplied materials or labor to the project. The amount of damages allowed under the instructions was the amount necessary to make HCI whole in the event M.J.W. was found to have breached the parties' contract. The instruction as given comported with the evidence, properly and intelligibly stated the law, and in no way can be said to have been calculated to mislead the jury. *Howard*, 618 S.W.2d at 178; *Ballback's Adm'r*, 208 S.W.2d at 943. Thus, we discern no error.

Third, M.J.W. argues the trial court erred in failing to restrict evidence of insurance coverage, policy and proceeds pursuant to the trial court's order on M.J.W.'s motion *in limine* to disallow such evidence. Kentucky law is well-settled —evidence of insurance policies is not to be presented to juries. *White v. Piles*, 589 S.W.2d 220 (Ky. App. 1979). Deliberate disclosure of insurance coverage is universally seen in our jurisprudence as prejudicial misconduct. *Ideal Pure Milk Co. v. Whitaker*, 243 S.W.2d 479, 480 (Ky. 1951).

Here, the trial court ruled before the beginning of trial the issue of insurance was irrelevant to the issue of whether M.J.W. breached its contract with

HCI. The trial court ordered substantial redactions from trial exhibits and deposition transcripts to cleanse them of the word "insurance" and other language suggesting existence of same. The trial court went to great lengths to insure the jury was not apprised of the existence of any policy of insurance or payments thereunder. Indeed, in our review of the substantial record, the word "insurance" was not uttered or included in any documentary evidence presented to the jury. Counsel for both sides were careful to not inadvertently elicit offending testimony and were quick to object if a witness came too close to the line.

Nevertheless, M.J.W. goes to considerable effort to show the trial court erroneously permitted HCI to introduce testimony and evidence implying the existence of insurance, particularly with respect to the testimony of Travelers' adjuster who was referred to throughout the trial as an "estimator" working closely with the parties during the course of the renovation and restoration work. M.J.W. argues the jury was plainly able to see through the "charade," resulting in substantial prejudice no less harmful than the outright mention of the word "insurance." M.J.W's assertions miss the mark.

The trial court took every possible precaution to sanitize the proceedings of the mention of insurance coverage. There is no indication of any deliberate act to put the matter before the jury. Our extensive review of the trial reveals there was nothing "tangible or definite that might have been seized upon," *id*., evincing a purpose or intent to taint the jury. In nearly every case where exclusion of the mention of insurance coverage is required, perpetuating a legal

fiction upon the jury is inescapable. This trial was no different. Contrary to M.J.W.'s vehement assertions, nothing in the record leads us to conclude the jury must have known a policy of insurance was in play and rendered a factually unjustified verdict based on their divination of such information. We again discern no error.

Finally, M.J.W. contends the trial court erred in awarding HCI prejudgment interest because HCI did not make a timely request for such relief. Upon closer inspection, it is clear this argument was never presented to the trial court and the matter was therefore not properly preserved for appellate review. While M.J.W. did resist HCI's request for prejudgment interest, the challenge was on completely different grounds. It is axiomatic that a trial court must be given the opportunity to rule and a party may not raise an issue for the first time on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010). Thus, further discussion of the issue is unwarranted and would be improper.

Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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