

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000910-MR

DRACS CONSULTING GROUP, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE CHARLES L. CUNNINGHAM JR., JUDGE  
ACTION NO. 10-CI-007666

V-SOFT CONSULTING GROUP, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, NICKELL AND TAYLOR, JUDGES.

TAYLOR, JUDGE: DRACS Consulting Group, Inc. (DRACS) brings this appeal from a February 20, 2014, findings of fact, conclusions of law, and judgment of the Jefferson Circuit Court concluding that V-Soft Consulting Group, Inc. (V-Soft) breached a contract between the parties but that no direct damages resulted therefrom. We affirm.

The underlying relevant facts were succinctly set forth by the circuit

court as follows:

Mamta Malhotra was employed with the Defendant V-Soft Consulting [on July 28, 2008]. V-Soft entered into a business contract [Contractor Agreement] with DRACS Consulting . . . which allowed DRACS to provide Ms. Malhotra's services to fulfill their customer's staffing needs. The [Contractor Agreement] between V-Soft and DRACS provided the rate for Ms. Malhotra's services at \$75/hr. and that Georgia law would govern the agreement. Also included in the [Contractor Agreement] was a provision that was Article 5.i[.] which reads:

In consideration that the Contractor will have direct contact with Customers as a result of working with DRAC[S] during the term of this Agreement, the Contractor agrees not to solicit or perform services directly or indirectly to Customer. This shall remain in effect during this agreement and for a period of one year from the termination of this agreement.

In 2009, DRACS was providing staffing for Convergys Customer Management Group, Inc. DRACS was not the exclusive provider of staffing for Convergys, which is a multi-national corporation[.] The business arrangement between DRACS and Convergys allowed for a rate of \$125/hr[.] for Ms. Malhotra's services, creating what is known in the industry as a "spread" of \$50/hr.

Ms. Malhotra worked for Convergys through DRACS from July 2008 through March 29, 2009. On March 17, 2009[,] Ms. Malhotra sent an email to personnel at Convergys thanking them for allowing her to work and stating her desire to be considered for any available future projects. Convergys never responded directly to this email. Testimony from trial established that Ms. Malhotra was a fantastic employee and both Convergys and DRACS were pleased with her work. DRACS began

looking for a new placement for Ms. Malhotra before March 29, but despite her positive reviews DRACS was unable to place her in new placement after March 29. Convergys did not renew their contract with DRACS but eventually did require additional staffing services. In May of 2009, Convergys was filling staffing needs through CSI/Wipro. CSI/Wipro, like DRACS, contracted with V-Soft to fulfill their staffing needs and assigned Ms. Malhotra to fill a position with Convergys. CSI/Wipro paid V-Soft a rate of \$57/hr[.] for Ms. Malhotra's services, less than the \$75/hr[.] rate V-Soft could obtain for Ms. Malhotra from DRACS. A representative of V-Soft testified at trial their preference in doing business with DRACS over CSI/Wipro because they could command a higher compensation rate. (Footnote omitted.)

By October of 2010, roughly 18 months after Ms. Malhotra last worked through DRACS, DRACS was still seeking a placement for her talents. DRACS offered Ms. Malhotra's considerable talents to many different companies, but with no firm commitments. At this point, DRACS approached Convergys about potential placements for Malhotra. During this conversation, about new potential business dealings, Convergys disclosed that Ms. Malhotra was already employed at their Jacksonville site, albeit through a different recruitment agency (CSI/Wipro).

Findings of Fact, Conclusions of Law and Judgment Following Bench Trial at 1-3.

Thereupon, DRACS filed a complaint against V-Soft in the Jefferson Circuit Court. DRACS claimed that V-Soft breached Article 5.i. of the Contractor Agreement by employing Malhotra with Convergys through its contract with CSI/Wipro. DRACS asserted that “[h]ad V-Soft not breached, and instead used DRACS for the initial work at Convergys . . . then DRACS would have been the agency for the entire 3,951 hours, [that Malhotra worked] and would have earned

\$50.00 per hour.” DRACS Brief at 16. Thus, DRACS sought damages of \$197,550 in lost revenue and \$219.32 in costs.

The circuit court tried the case without a jury. Kentucky Rules of Civil Procedure (CR) 52.01. Initially, the circuit court noted that Georgia’s substantive law governed per Article 5.b. of the Contractor Agreement.<sup>1</sup> The circuit court then determined that V-Soft breached Article 5.i. of the Contractor Agreement:

The Court finds that [V-Soft] has breached the contract prohibiting V-Soft from indirectly performing services for customers they encountered through their contract with DRACS. Likewise, the Court finds that Ms. Malhotra did directly solicit business from the DRACS customers she encountered through her placement.

Findings of Fact, Conclusions of Law and Judgment Following Bench Trial at 4.

The court, however, found that DRACS suffered no direct damages due to V-Soft’s breach and that DRACS’ alleged loss of earnings constituted indirect or consequential damages, which were expressly prohibited by Article 5.c. of the Contractor Agreement. The circuit court also declined to award DRACS attorney’s fees or costs. This appeal follows.

Under CR 52.01, the circuit court’s findings of fact are upheld if substantial evidence of a probative value supports same, and its conclusions of law are reviewed *de novo*. *Cheaney v. Wright*, 474 S.W.2d 402 (Ky. 1971). As fact-finder, the credibility of witnesses and weight of the evidence are within the sole

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<sup>1</sup> In this appeal, both parties agree that Georgia law applies per Article 5.h. of the Contractor Agreement. *See General Electric Co. v. Martin*, 574 S.W.2d 313, 322 n.1 (Ky. App. 1978). It is noted that while the substantive law of Georgia is applicable, the procedural law of Kentucky controls in this case. *See Travelers Ins. Co. v. Mahon*, 273 Ky. 691, 117 S.W.2d 909 (1938).

province of the circuit court. *White v. Howard*, 394 S.W.2d 589 (Ky. 1965). Our review proceeds accordingly.

DRACS contends that the circuit court erred by determining that its lost earnings constituted indirect or consequential damages within the meaning of Article 5.c. of the Contractor Agreement. In particular, DRACS views its loss of earnings as direct damages under Article 5.c. of the Contractor Agreement and, thus, was recoverable:

The damages are direct damages because they arose naturally and ordinarily from the breach of contract, and they are compensatory damages because they will compensate DRACS for the loss sustained and nothing more, to simply replace the loss caused by V-Soft's breach of the Contractor Agreement. Had V-Soft not breach[ed] the Contractor Agreement and instead given DRACS the opportunity for the business, DRACS would have been able to broker the business. DRACS continued to have a relationship with Convergys, and Convergys desired the services of Malhotra based on her prior performances. There is no dispute regarding the number of hours worked by Malhotra or the respective parties' "spreads." Accordingly, such damages are reasonably certain, and are recoverable direct compensatory damages under Georgia law.

DRACS Brief at 17.

In Georgia, "[t]he construction of a contract is a question of law for the court." Ga. Code Ann. (O.C.G.A.) § 13-2-1. And, plaintiff carries the burden of proving damages caused by a breach of contract. *Olagbegi v. Hutto*, 320 Ga. App. 436, 740 S.E.2d 190 (2013).

We begin by examining Article 5.c. of the Contractor Agreement; it reads:

LIMITATION OF LIABILITY. WITHSTANDING ANYTHING CONTAINED IN SECTION 5 OF THIS AGREEMENT TO THE CONTRARY, UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTIES FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR EXEMPLARY DAMAGES (EVEN IF THAT PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), ARISING FROM ANY PROVISION OF THE AGREEMENT (INCLUDING SUCH DAMAGES INCURRED BY THIRD PARTIES), SUCH AS, BUT NOT LIMITED TO, LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOST BUSINESS; PROVIDED THAT THIS SECTION DOES NOT LIMIT EITHER PARTY'S LIABILITY TO THE OTHER FOR (A) WILLFUL AND MALICIOUS MISCONDUCT; (B) DIRECT DAMAGES TO REAL OR TANGIBLE PERSONAL PROPERTY; (C) BODILY INJURY OR DEATH CAUSED BY NEGLIGENCE; OR (D) INDEMNIFICATION OBLIGATIONS HEREUNDER.

Under the terms of Article 5.c., indirect and consequential damages are generally not recoverable by a party, and examples of same are specifically listed as “loss of revenue or anticipated profits or lost business.” Georgia law is instructive upon when lost revenues or lost profits constitute direct damages or consequential damages. The Georgia Court of Appeals has recognized that lost profits may constitute either direct damages or consequential damages:

[T]here are two types of lost profits: (1) lost profits which are direct damages and represent the benefit of the bargain . . . and (2) lost profits which are indirect or consequential damages[.]

*Imaging Sys. Int'l, Inc. v. Magnetic Resonance Plus, Inc.*, 490 S.E.2d 124, 127, 227 Ga. App. 641, 644 (1997).

In this case, the circuit court concluded that DRACS' lost revenue of \$197,550 were consequential damages and were barred under the terms of Article 5.c. The court stated:

At trial, the testimony of the parties was that V-Soft would have preferred to continue its business relationship with DRACS because they were receiving a higher hourly rate through DRACS placement but was unable to do so because DRACS simply had no work to offer Ms. Malhotra. The Court fully believes DRACS did everything in its power to find a placement for Malhotra and had been doing so even before her first placement expired. The problem for DRACS remains that their inability to find a placement in addition to their lack of knowledge that Malhotra was already employed demonstrates the lack of direct damages. While not fully explained, the inference the Court reaches is that Convergys took its business needs to CSI/Wipro because that outfit was undercutting DRACS rates. DRACS did not lose Convergys business because Ms. Malhotra and V-Soft entered into some clandestine contract arrangement and stole customers or snuck away to earn higher rates. If that had been the circumstances surrounding the breach, those damages would likely qualify as direct damages.

The circuit court found that DRACS was unable to find Malhotra a position after March 29, 2009, and that V-Soft preferred placing Malhotra with DRACS because of a higher billing rate. These findings are supported by substantial evidence, including the testimony of the owner of DRACS, J. Wade Vickery. Also, the Director of Operations for V-Soft, Jai Bokey, testified that V-soft received a higher billing rate for Malhotra's services from DRACS, but DRACS had no placement for Malhotra after March 29, 2009. Thus, there is substantial evidence to support the circuit court's findings that V-Soft's breach of the Contractor Agreement did

not cause DRACS to lose the business opportunity of placing Malhotra with Convergys.<sup>2</sup> Consequently, lost revenues do not flow directly from V-Soft's breach of the Contractor Agreement. As a result, we hold that under Georgia law DRACS' loss of revenues constitute consequential damages and that pursuant to Article 5.c., such damages are not recoverable under the Contractor Agreement. *See Imaging Sys. Int'l, Inc.*, 490 S.E.2d 124.

DRACS alternatively asserts that consequential damages are recoverable because V-Soft willfully and maliciously breached the Contractor Agreement. Under Article 5.c., DRACS maintains that consequential damages, including lost revenues, are recoverable if V-Soft's breach was willful and malicious. DRACS contends that V-Soft intentionally breached the Contractor Agreement which "exhibited a reckless disregard for the rights of DRACS sufficient to establish willful and malicious breach." DRACS Brief at 13. Additionally, DRACS argues:

V-Soft was also aware that, had it used DRACS for the Jacksonville, Florida[,] assignment at Convergys, per the Contractor Agreement V-Soft would have received \$75.00 per hour from DRACS. The fact that V-Soft accepted less under the Task Order with CSI is evidence that V-Soft had an ulterior motive; at the Trial, V-Soft testified that, two years after placing Malhotra with Convergys through CSI and Wipro, V-Soft became a preferred vendor of Wipro, giving V-Soft opportunity for a significant increase in business with Wipro. This provide[s] the motivation for V-Soft to willfully breach the Contractor Agreement.

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<sup>2</sup> DRACS also challenges the circuit court's finding of fact that DRACS was unable to place Malhotra with Convergys because of a "cheaper vendor." First, we view this issue as moot considering our resolution of the appeal, and second, we note that the circuit court may draw reasonable inferences from the evidence presented at trial. *See K.H. v. Cabinet for Health and Family Servs.*, 358 S.W.3d 29 (Ky. App. 2011).



V-Soft's failure to contact DRACS or make any attempt to include DRACS in the business arrangement is further evidence of the willfulness and maliciousness of the breach.

DRACS Brief at 14.

Under Article 5.c. of the Contractor Agreement, the prohibition against recovery of consequential damages is expressly limited to situations where a party does not engage in "willful and malicious misconduct." If a party's breach of the Contractor Agreement is found to be both willful and malicious, the prohibition against recovery of consequential damages is rendered inoperable by the plain terms of Article 5.c.

Here, the circuit court did not believe that V-Soft's breach of the Contractor Agreement was willful and malicious. The court concluded:

DRACS also asks this Court to find a willful and malicious breach by V-Soft. That conclusion would not be supported by the record. As stated above, V-Soft suffered when their business arrangement with DRACS ended and they were forced to place Malhotra [sic] through CSI/Wipro. DRACS suggests that the motivation by V-Soft was to take a short-term loss in an effort to earn more business later after becoming a preferred vendor. While this theory is novel, it was refuted by the testimony of the V-Soft representative who claimed V-Soft did less business with Wipro after becoming a preferred vendor. The Court has no reason to believe this was a "malicious" or willful breach. It appears V-Soft had to keep Ms. Malhotra working and for innocuous reasons turned to Wipro once DRACS could no longer provide work placements.

Findings of Fact, Conclusions of Law and Judgment Following Bench Trial at 6-7. The circuit court heard the evidence, and as fact-finder weighed such evidence. *See Mays v. Porter*, 398 S.W.3d 454 (Ky. App. 2013). Ultimately, the circuit court did not believe that V-Soft acted maliciously in breaching the Contractor Agreement. There exists substantial evidence of a probative value to support the circuit court's findings and conclusion, and we are unable to conclude that the court committed an error of law. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964). Hence, the circuit court did not commit reversible error.

DRACS further argues that the circuit court committed reversible error by failing to award it attorney's fees, costs and/or nominal damages. For the following reasons, we disagree.

As to an award of attorney's fees and costs, O.C.G.A.13-6-11 controls our inquiry; the statute provides:

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

The circuit court determined that DRACS was not entitled to litigation expenses as V-Soft did not act in bad faith, was not stubbornly litigious, and did not cause DRACS unnecessary expense. Specifically, the circuit court reasoned:

Under Georgia law, attorney's fees and costs are only award[ed] in a breach of contract case where bad faith is shown or in those rare cases where the parties are

aggressively overly litigious and stubborn. The Court finds neither of those circumstances here. V-Soft may have breached the contract with DRACS, but not one fact would suggest the breach was malicious or in bad faith. The testimony during trial leads the Court to believe that V-Soft very much wanted to do business through DRACS and would have preferred to get the hourly rate for its employees DRACS was offering. Likewise, the Court has not perceived any difficulties between the parties which would rise to the level of awarding attorney[’s] fees or costs.

Opinion and Order at 2. Considering the evidence adduced at trial, we conclude that the circuit court did not err by denying DRACS attorney’s fees and cost per O.C.G.A. § 13-6-11.

And, as to an award of nominal damages, O.C.G.A. § 13-6-6 is applicable, and it reads:

In every case of breach of contract the injured party has a right to damages, but if there has been no actual damage, the actual party may recover nominal damages sufficient to cover the costs of bringing the action.

Under Georgia law, the award of nominal damages is left to the fact-finder.

*Corrosion Control, Inc., v. William Armstrong Smith Co.*, 157 Ga. App. 291, 277 S.E.2d 287 (1981). However, a judgment will not be reversed for failure of the fact-finder to award nominal damages:

Had the case been submitted to the jury and they had found against the plaintiff generally, it would have been proper to allow the verdict to stand; and even if it plainly appeared that he was entitled to nominal damages only, and the court had refused a new trial, we would not reverse the trial court because of such refusal, it having been repeatedly ruled by this court that a new trial will

not be ordered simply to allow a plaintiff an opportunity to recover merely nominal damages.

*Id.* at 292.

In this case, the circuit court, as fact-finder, did not award DRACS nominal damages. Even if such were error, Georgia law clearly provides that a judgment will not be reversed for such an error. *Pinholster v. McGinnis*, 155 Ga. App. 589, 271 S.E.2d 722 (1980). Thus, no reversible error occurred.

We view any remaining contentions of error as moot or without merit.

For the foregoing reasons, the findings of fact, conclusions of law, and judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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