

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000283-MR

H & H PAINTING, LLC

APPELLANT

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

D.W. WILBURN, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: TAYLOR, K. THOMPSON, AND L. THOMPSON, JUDGES.

TAYLOR, JUDGE: H & H Painting, LLC, brings this appeal from a December 27, 2017, Judgment of the Fayette Circuit Court following a jury trial upon remand by this Court in Appeal No. 2013-CA-000835-MR. We reverse and remand.

H & H Painting (H & H) performed commercial painting services as a subcontractor for D.W. Wilburn, Inc. (Wilburn) on several projects. Relevant herein, H & H was contracted to provide painting services on two specific projects:

Leestown Middle School (Leestown) and Morehead State University Center for Health, Education, and Research (Morehead).

In May 2009, H & H was also awarded a contract through another general contractor, Denham-Blythe, Inc. (Denham-Blythe). After it was awarded the Denham-Blythe contract, H & H's relationship with Wilburn deteriorated. H & H asserted that Wilburn attempted to put it out of business by not paying H & H for services performed on the Leestown and Morehead projects per the contract. H & H further alleged that a representative of Wilburn directly threatened to put H & H out of business. H & H also maintained that Wilburn's refusal to pay breached the parties' contract and caused a general lack of funding that rendered it incapable of completing work under the contract with Denham-Blythe.

In early 2010, H & H ceased work on the Morehead and Leestown projects. H & H claimed it was forced to do so because Wilburn refused to pay H & H for work performed as required by the contract. On October 4, 2010, H & H filed a complaint against Wilburn claiming, *inter alia*, breach of contract as to the Leestown and Morehead projects.

H & H's claim for breach of contract was presented to the jury. The jury ultimately determined H & H had substantially performed its duty under the contract with Wilburn as to the Leestown and Morehead projects. The jury then awarded H & H damages of \$38,800 for the Leestown project and \$83,086 in

damages for the Morehead project. Wilburn thereafter filed a motion for judgment notwithstanding the verdict (JNOV). Kentucky Rules of Civil Procedure 50.02. Therein, Wilburn argued the jury verdict should be set aside as H & H had not presented sufficient proof of damages. The trial court agreed that the evidence of damages was “vague and inconclusive” and did “not support the jury verdict.” Hence, the trial court granted Wilburn’s motion for JNOV. H & H then undertook an appeal to this Court (Appeal No. 2013-CA-000835-MR).

In Appeal No. 2013-CA-000835-MR, the Court of Appeals affirmed in part, reversed in part, and remanded. This Court affirmed upon all issues except the JNOV. Upon the JNOV, this Court reversed and remanded stating:

The jury in this case found in favor of [H & H] in regards to the Morehead project and Leestown project. The jury awarded [H & H] \$83,086 for the Morehead project and \$38,800 for the Leestown project. It is unclear from the evidence presented whether [H & H was] 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 [H & H was] 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.

[H & H] 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 should not have granted the motion for JNOV. Even though the evidence offered as to the amount of damages was incomplete, contradictory, and confusing, the jury still found in favor of [H & H] on the breach of contract issue. The jury determined [H & H was] owed damages; therefore, rather than disallowing damages *in toto*, we believe the trial court should hold a new trial with respect to the amount of damages to which [H & H is] entitled.

Appeal No. 2013-CA-000835-MR at 14-15.

Upon remand to the trial court, a jury trial ensued but no damages were awarded to H & H. By judgment entered December 27, 2017, the trial court dismissed H & H's claim for damages resulting from Wilburn's breach of contract.

This appeal follows.

H & H contends that the trial court violated the law of the case doctrine which resulted in the trial court erroneously instructing the jury on damages in contravention of this Court's mandate in the prior appeal (Appeal No. 2013-CA-000835-MR). For the following reasons, we agree.

It is well-established that the law of the case doctrine "requires obedience to appellate court decisions in all subsequent stages of the litigation." *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005). Under the law of the case doctrine, a trial court "must strictly follow the mandate given by an appellate court in that case." *Id.* And, the proper application of the law of the case doctrine presents a question of law for appellate review. *University Medical Center, Inc. v. Beglin*, 432 S.W.3d 175, 178 (Ky. App. 2014). Thus, our review thereon is *de novo*. *Id.*

In Appeal No. 2013-CA-000835-MR, this Court concluded the trial court erred by granting the JNOV in favor of Wilburn and held that H & H was entitled to a new trial to determine the amount of damages owed. The Court of Appeals clearly limited the new trial only to the issue of the amount of damages flowing from Wilburn's breach of contract as to the Leestown and Morehead projects. The Court emphasized that the jury found in favor of H & H upon the breach of contract issue, so that issue was resolved. In other words, Wilburn's

liability for breaching the contract had been established. The only issue to be determined on remand was the amount of damages owed to H & H.

Despite the clarity of this Court's Opinion in Appeal No. 2013-CA-000835-MR, the trial court, nevertheless at the second trial, erroneously instructed the jury to determine whether H & H was entitled to damages. The jury instructions read, in relevant part, as follows:

INTERROGATORY NO. 1

Do you believe from the evidence that H & H Painting provided labor on the Leestown Elementary School project for which it was not paid?

YES:

NO:

INTERROGATORY NO. 2

Do you believe from the evidence that H & H Painting provided painting labor on the Morehead State University project for which it was not paid?

YES:

NO:

As noted, the issue of H & H's entitlement to damages under the contract is separate and distinct from the issue of the amount of damages owed to H & H. The trial court should have merely instructed the jury to fix an amount of compensation owed to H & H on each project. By instructing the jury upon the

issue of entitlement to damages, the trial court contravened this Court's mandate in the prior appeal and violated the law of the case doctrine.

Accordingly, we reverse and remand for a new trial upon the sole issue of the amount of damages H & H is owed under the contract for its work on the Leestown and Morehead projects.

For the foregoing reasons, the Judgment of the Fayette Circuit Court is reversed and this cause is remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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