

RENDERED: NOVEMBER 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000310-MR

KEN JORDAN AND
KEN JORDAN CONTRACTORS, LLC

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 13-CI-004376

GARY HIBBELN

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: Ken Jordan and Ken Jordan Contractors, LLC (collectively “Jordan”) appeal from the Jefferson Circuit Court’s judgment after a bench trial awarding \$45,000 in compensatory damages to Gary Hibbeln. This case was previously before this Court on the same issue: whether the damages award is supported by substantial evidence.

In our prior opinion,¹ we vacated the award as clearly erroneous and remanded for a finding either that damages are supported by substantial evidence or are speculative. Upon review, we vacate and remand for compliance with our prior mandate, which is the law of this case concerning the damages issue.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a breach of contract dispute, the basis of which was Jordan's alleged failure to complete some tasks – and unsatisfactory completion of others – under the parties' agreements for Jordan to renovate Hibbeln's house. A bench trial was held. At its conclusion, the circuit court found Jordan liable for breach of contract. Regarding the issue of damages, the circuit court found that: “[n]either party was able to testify as to the specific amount charged for each task listed,” Hibbeln's expert was only able to estimate the cost of some – but not all – of the tasks, and Hibbeln's expert “acknowledged those figures were ‘ballpark’ estimates” at best. February 24, 2016 Order at 2.

Nevertheless, the circuit court concluded “approximately 50% of the total contemplated repairs were either not completed or not completed in a satisfactory manner. Accordingly, judgment shall be entered for the Plaintiff in the amount of \$45,000 plus court costs.” *Id.* An annual post-judgment interest rate of twelve percent was imposed.

¹ *Jordan v. Hibbeln*, No. 2016-CA-000406-MR, 2018 WL 3090442 (Ky. App. June 22, 2018).

Jordan subsequently filed a motion to alter, amend, or vacate the judgment, requesting, *inter alia*, that the circuit court identify how it arrived at the \$45,000 damages figure and hold a hearing pursuant to Kentucky Revised Statutes (KRS) 360.040 to modify the twelve percent post-judgment interest. The circuit court denied Jordan's motions, and Jordan appealed.

During the first appeal, this Court found "Hibbeln failed to provide the court with sufficient evidence to determine calculable, non-speculative damages. The lack of evidence renders the circuit court's award of \$45,000 in damages erroneous." *Hibbeln*, 2018 WL 3090442, at *5. Consequently, we vacated the judgment and remanded, giving the circuit court explicit direction to enter a new judgment explaining the non-speculative method used for calculating damages and the evidence supporting the award.²

Specifically, we directed the circuit court to determine either:

(1) that Hibbeln failed to carry his burden of presenting non-speculative proof of his damages, or (2) that Hibbeln did carry his burden of presenting non-speculative damages, but that the [prior] judgment failed to articulate that proof in a way that would facilitate rather than frustrate appellate review.

Id. at *6.

² In reference to the insufficiency of the evidence in this case, we found that "[w]ithout an itemization of the costs of the tasks listed in the proposals, and even further, a classification of what work was completed in full, completed in part, completed but not satisfactorily, or not completed at all, damages are speculative at best." *Hibbeln*, 2018 WL 3090442, at *6.

On remand, the circuit court entered a new judgment stating:

The Court of Appeals ordered the Court to clarify its judgment entered on February 24, 2016. The judgment was and is in favor of [Hibbeln] in the amount of \$45,000. The Court heard proof and argument. The Court determined [Hibbeln] paid [Jordan] \$90,000 for reconstruction work to his home. After hearing the proof and argument, the Court determined that [Jordan] completed one-half of the work contemplated by the parties' contract and awarded [Hibbeln] a judgment in the amount of \$45,000 representing one-half of the money paid [Jordan].

February 7, 2019 Order at 1.

Jordan filed a motion to alter, amend, or vacate the new judgment.

The circuit court denied Jordan's motion. This appeal followed.

ANALYSIS

As set forth above, this Court's prior decision resolved the exact issue raised in this subsequent appeal. Accordingly, it is the law of the case.

As the term "law of the case" is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate.

Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982) (citation omitted).

“That doctrine is the mechanism by which matters once litigated and finally determined remain so.” *TECO Mech. Contractor, Inc. v. Kentucky Labor Cabinet*, 474 S.W.3d 153, 158 (Ky. App. 2014).

Here, we previously held that the circuit court’s damages award of \$45,000 was not supported by substantial evidence and, therefore, was clearly erroneous. Under the law-of-the-case doctrine, we will not reconsider our prior decision absent new, substantially different evidence. *See Wright v. Carroll*, 452 S.W.3d 127, 130 (Ky. 2014) (“Where multiple appeals occur in the course of litigation, the law-of-the-case doctrine provides that issues decided in earlier appeals should not be revisited in subsequent ones when the evidence is substantially the same.”). Thus, our review is limited to whether the circuit court properly applied our mandate.

The mandate rule, a tenet of the law-of-the-case doctrine, dictates that the circuit court was bound by our earlier opinion. The mandate rule “provides that on remand from a higher court a lower court must obey and give effect to the higher court’s express or necessarily implied holdings and instructions.” *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010) (citations omitted). In addition to serving litigants’ interest in finality, the mandate rule serves “the equally important interest courts have in judicial economy, by preventing the drain on

judicial resources that would result if previous decisions were routinely subject to reconsideration.” *Id.*

In its original judgment, the circuit court failed to show its damages award was supported by substantial evidence. On remand, we directed the circuit court to articulate its reasoning or enter judgment in favor of Jordan as to damages. Instead, without expressing any alternative rationale, the circuit court entered a duplicate judgment in favor of Hibbeln “in the amount of \$45,000 representing one-half of the money paid” by Hibbeln to Jordan. This was a blatant violation of the mandate rule.

In the case at bar, “[t]he mandate was plain and clear. The opinion on which it was issued is the law of this case. The circuit court has no alternative but to comply with it.” *E’Town Shopping Ctr., Inc. v. Holbert*, 452 S.W.2d 396, 397 (Ky. 1970) (citations omitted). The circuit court cannot simply disregard this Court’s prior mandate. On remand, the circuit court must either: (1) set forth sufficient facts to establish a reasonable, measurable damages award in favor of Hibbeln; or (2) find that Hibbeln failed to carry his burden of proving non-speculative damages.

Our ruling renders Jordan’s post-judgment interest rate argument moot. However, to promote judicial economy, we will briefly address it.

Upon entering judgment, the circuit court affixed a twelve percent interest rate and denied Jordan's motion for reconsideration of the interest rate imposed. During the pendency of Jordan's initial appeal to this Court, KRS 360.040 was amended.

At the time the circuit court entered its original judgment, the version of the statute in effect read:

A judgment shall bear twelve percent (12%) interest compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%). Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%). All interested parties must have due notice of said hearing.

(Emphasis added).

The prior version of KRS 360.040 gave circuit courts some discretion to lower the statutory interest rate on judgments for unliquidated damages if the circuit judge, "after a hearing on that question, [was] satisfied that the rate of interest should be less than twelve percent (12%)." "The statutory language clearly indicates that the decision to fix the post-judgment rate of interest at less than 12% is one necessarily left to the sound discretion of the trial court." *Univ. Med. Ctr.*,

Inc. v. Beglin, 432 S.W.3d 175, 178-79 (Ky. App. 2014). “[A] trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Here, the circuit court did not abuse its discretion by denying Jordan’s motion to lower the post-judgment interest rate without a hearing on the issue.

CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court’s order is vacated. This case is remanded for further proceedings complying with this Court’s mandate as stated herein.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

J. Fox DeMoisey
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert Anthony Florio
Louisville, Kentucky