

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BOHN ENGINEERING, INC.,

Plaintiff-Appellant,

v

ROGER VANDERWOUD, d/b/a VANDERWOUD  
DIE DESIGN,

Defendant-Appellee.

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UNPUBLISHED

May 2, 1997

No. 190822

Kent Circuit Court

LC No. 94-002188-CK

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

This case arises out of an oral contract between plaintiff tool and die shop and defendant, whereby defendant agreed to design four dies for plaintiff “as soon as possible.” The dies were to be used in the manufacture of automobile parts. Plaintiff brought this action claiming that it was damaged by defendant’s late delivery of one of the four die designs (job 496), and further claimed that the design was unacceptable. Defendant counterclaimed seeking payment for the design. Plaintiff appeals as of right from the November 9, 1995, judgment in favor of defendant on his counterclaim. The court awarded defendant \$5,325 in payment for the die design, as well as costs and attorney fees in the amount of \$5,592. We affirm.

I

Plaintiff first claims on appeal that the trial court erred in admitting an IGES tape product header because it was inadmissible hearsay. The evidence in issue was computer tape which contained the auto manufacturer’s detailed specifications for the parts to be designed. There is no dispute that defendant needed the IGES tape before he could begin the die design. As evidence that defendant did not receive the IGES tape until mid-March, defendant sought to admit the “product header” from the IGES tape. The product header appeared at the beginning of the IGES tape, and could be printed-out into hard copy form by defendant’s computer. The date “1 Mar 1993” appeared on the product header, which defendant believed to be the date that the tape was created by the auto manufacturer. The trial court questioned defendant at length regarding his assumption that the date printed on the

product header was the date that the tape was created. Ultimately, the court admitted the evidence over plaintiff's objection, but told plaintiff's counsel that he could argue the weight to be given to the evidence at a later time.

Plaintiff also claims that the Quality Model & Pattern invoice admitted by the court was inadmissible hearsay. Defendant sought to admit the invoice as additional evidence that he did not receive the IGES tape until mid-March. The invoice was dated March 17, 1993, and contained the notation, "Read Tape IGES Files." Relying on the invoice, defendant testified that March 17, 1993, was the day that he had the IGES tape transferred to floppy disk for use in his computer. The trial court allowed the document into evidence, but stated that it did not necessarily establish that March 17, 1993, represented the date that defendant had the tape converted, unless further evidence was provided to support such a conclusion.

Hearsay is a statement (oral or written), other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801. Both of the documents in dispute were created by individuals other than defendant, and they were being offered to prove the truth of the matter asserted. Because the documents do not fit within any of the recognized hearsay exceptions, they are inadmissible hearsay evidence. MRE 802, 803. Therefore, the trial court may have abused its discretion in admitting the evidence at trial. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

However, an error in the admission of evidence is harmless and not grounds for disturbing a judgment or order, unless a failure to take such action is inconsistent with substantial justice. MCR 2.613(A). In nonjury cases the admission of incompetent evidence is usually harmless because the court may easily correct its error by disregarding the inadmissible evidence. 3 Martin, Dean & Webster, Michigan Court Rules Practice, p 572. Moreover, the error is harmless unless a substantial right was affected, and where the same facts are shown by other competent testimony. *Chmielewski v Xermac Inc*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996); *Duke v American Olean Tile Co*, 155 Mich App 555, 572; 400 NW2d 677 (1986).

Any error in admitting the hearsay evidence was harmless in this case. First, the court explicitly declined to decide whether defendant received the IGES tapes before or after March 17, 1993. Therefore, the court did not rely on the dates contained in the documents in reaching its decision; it is apparent from the record that the court was not convinced that the date printed on the product header was necessarily the date that it was created. In addition, when the court admitted the Quality Model & Pattern invoice, it specifically stated that, in the absence of other supporting evidence, the document did not prove that the tape was converted on March 17, 1993. Thus, the court did not rely on the dates that appeared on the IGES product header or the Quality Model & Pattern invoice in reaching its decision. Moreover, as indicated below in Issue III, once the improper evidence has been excluded, there is sufficient competent evidence to support the court's conclusion that defendant delivered an acceptable design "as soon as possible."

Plaintiff claims that it was error to allow Robert Usher to testify as an expert because he was not qualified as an expert in die design. At trial, plaintiff's counsel conceded that Usher was an expert in the building of dies, but objected to his testimony on the basis that he was not an expert in die design. An expert witness must be qualified as an expert through knowledge, skill, experience, training or education. MRE 702; *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). Usher testified that he had been in the tool and die business since 1952, and had owned his own tool and die shop for the past twenty years, where approximately 3,500 dies have been built. Usher estimated that he had reviewed approximately 2,000 die designs, and had done elementary die work himself. He was familiar with the die design process because he was normally the person at his shop who ordered, reviewed and made any necessary modifications to the designs. However, on cross-examination, Usher testified that he did not consider himself an expert in die design.

We find that the trial court did not abuse its discretion in allowing Usher testify as an expert in this case. *Phillips, supra*. Although Usher did not consider himself "an expert" in the area of die design, he has owned his own shop for twenty years and has built thousands of dies. In addition, he was the person in his shop who ordered, reviewed and made modifications to the die designs. Usher also had some experience with elementary designs. Gaps or weaknesses in an expert's expertise are a fit subject for cross-examination and go to the weight of the testimony, not its admissibility. *Wischmeyer v Schanz*, 449 Mich 469, 480; 536 NW2d 760 (1995); *Woodruff v USS Great Lakes Fleet, Inc.*, 210 Mich App 255, 260; 533 NW2d 356 (1995). Furthermore, this case can be distinguished from *Davis v Link Inc.*, 195 Mich App 70; 489 Mich 103 (1992), which also involved the design and manufacture of a die. In that case, the plaintiff's proffered expert was a mechanical engineer, but had never worked for a tool and die designer, had never attended a tool and die design school, had never served as an apprentice for a tool builder or tool designer, and had never worked as a tool builder or tool designer. *Id.* at 74. Unlike the proposed expert in *Davis*, Usher has had extensive experience in reviewing die designs and building dies. Accordingly, we find no error in the court's admission of his testimony as an expert.

### III

Plaintiff next claims that the trial court clearly erred in finding that the design for job 496 was delivered "as soon as possible." The date that defendant received the IGES tapes was one of the primary issues at trial because defendant could not begin substantive work on the designs until he received the tape. Plaintiff claims that evidence preponderated in favor of a finding that defendant received the IGES tapes in early February. Plaintiff believed that the four designs should take one to two weeks each. Accordingly, if defendant began in early February, the designs should have been completed by the end of March at the latest. Therefore, plaintiff asserts that delivery of design 496 in late May was not "as soon as possible." Plaintiff could not produce any direct evidence of the date that defendant received the IGES tape, but relied on circumstantial evidence to show that defendant received the tape in February. In response, defendant presented circumstantial evidence in support of his claim that he did not receive the tapes until March 17, 1993.

The trial court's finding that the design for job 496 was delivered "as soon as possible," regardless of whether defendant received the IGES tape by early February or mid-March, was not clearly erroneous. MCR 2.613(C); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995). As the trial court emphasized, the term "as soon as possible" was an ambiguous term that had to be given a reasonable interpretation because it could be interpreted differently by different people. If plaintiff was concerned about time constraints, it could have better protected itself by giving defendant a specific deadline. Plaintiff could also have better protected itself by reducing the contract to writing. Furthermore, the fact that defendant worked almost full-time (at least 37½ hours per week) on the designs supports the court's finding that he completed the designs "as soon as possible." Finally, defendant's expert testified that, all things considered, defendant delivered the design within a reasonable time. Accordingly, we affirm the trial court's finding on this issue.

#### IV

Finally, plaintiff claims that the circuit court failed to address the issue of whether defendant's design was adequate. In the alternative, plaintiff argues that, even if the trial court made a finding that defendant's design was acceptable, such a finding would be clearly erroneous based on the evidence presented at trial. The issue of the design's adequacy was raised in plaintiff's trial brief and was a contested issue at trial.

Findings of fact regarding matters contested at a bench trial are sufficient if they are brief, definite and pertinent, and it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation. *Triple E v Mastronardi*, 209 Mich App 165, 176; 530 NW2d 772 (1995). We find that, although the trial court did not specifically label the cause of action, it was aware of the issue and found in favor of defendant on this claim. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

In this bench trial, the court stated that the issue for it to decide was "what I feel the contract called for and whether I feel the defendant complied with it or not." The trial court acknowledged that there was an honest dispute as to "what the contract called for, about whether the defendant complied with the terms of that contract, and about whether certain things were communicated in a certain way." Based on these statements, we believe the trial court was aware of the issues before it. *Triple E, supra*.

In deciding the case, the trial court made the following findings:

I am reasonably of the belief that taking everything into account, everything into consideration, that the defendant did supply what he was contracted to do, at least with respect to Part 496, as soon as possible.

\* \* \*

. . . I simply don't see any reason in the Court's mind to deny plaintiff payment for the services rendered.

In addition, the trial court repeatedly stated that plaintiff failed to show that defendant breached its contract.

Looking at the trial court's findings as a whole,<sup>1</sup> we find that the court considered and rejected plaintiff's claim that defendant's design was unacceptable. We do not believe that appellate review would be facilitated by requiring further explanation from the trial court. *Triple E, supra*. However, assuming *arguendo* that the trial court failed to rule on the issue, we are not precluded from addressing plaintiff's claim. Plaintiff raised the issue below and is pursuing it on appeal. Thus, the issue is appropriately before this Court. *Peterman, supra*; *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996).

Plaintiff contends that the evidence at trial did not support a finding that defendant's design for part 496 was acceptable. This Court reviews a trial court's findings of fact in a bench trial under the clearly erroneous standard. MCR 2.613(C); *Hofmann, supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* In applying this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Hofmann, supra*. In this case, we find that the evidence supported a finding that defendant's design was adequate.

In its trial brief, plaintiff alleged that defendant's die design "resulted in too much stock waste and was too expensive to build." Plaintiff reiterated these complaints at trial. However, defendant testified that the excess waste was purposeful, so as to "err on the plus side [rather] than the minus side" so as to avoid a "crash."<sup>2</sup> Defendant stated that the amount of waste could be easily changed once the design was tested in the shop. In addition, defendant's expert opined that defendant's design was adequate and did not call for unacceptable amounts of stock waste. Other than its general allegation, plaintiff presented no evidence showing that defendant's design was unacceptable. Based on the record, we are not left with a definite and firm conviction that a mistake was made when the trial court found that defendant had properly performed its duties under the contract.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Richard Allen Griffin  
/s/ Martin M. Doctoroff  
/s/ Stephen J. Markman

<sup>1</sup> Although some of these findings were made as the trial court decided defendant's counter-claim, the issue was essentially the same -- whether defendant properly complied with the terms of the oral contract.

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<sup>2</sup> A “crash” was described as “one part swinging over hitting into a part that’s trailing it.” The danger of this apparently increases if the spacing between parts is not adequate.