Opinion issued May 12, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-14-00317-CV

PELCO CONSTRUCTION COMPANY, Appellant

V.

CHAMBERS COUNTY, TEXAS, KURT AMUNDSON, AND AMUNDSON CONSULTING, INC., Appellees

---

On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Case No. CV-26356

CONCURRING OPINION ON REHEARING

This is the second appeal in this somewhat complex case involving a 1,000-page contract and a muddled procedural history. In this appeal, Pelco Construction Company briefed multiple issues, including challenges to summary judgments on numerous claims, charge error, and the grant of JNOV in the Chambers County's

favor. We are remanding the case for a new trial at which Pelco presumably will again request submission of the mitigation instruction that the trial court refused. The charge error is preserved and fully briefed. Nevertheless, the majority chose not to reach this issue.

It serves neither the parties nor judicial economy to ignore the complained-of charge error and remand for a new trial in which the very same issue is likely to feature prominently. Accordingly, I write separately to provide trial court guidance, narrow the issues on remand, nudge the case further toward final disposition, and perhaps save the parties, the courts, and the taxpayers the cost of a third appeal in this case. *See MCI Sales & Serv. v. Hinton*, 329 S.W.3d 475, 495 n.19 (Tex. 2010) (addressing issue that would "feature prominently on retrial" even though issue was not necessary to ultimate resolution of case).

In its third issue, Pelco contends that the trial court erred in refusing to submit a mitigation instruction with the damages question. I agree. At trial, the question of whether the County mitigated its damages was hotly contested, and the evidence on the issue conflicted. Most importantly, the jury heard evidence that the County accepted a bid of $781,105.15 to complete the project despite having receiving bids that were significantly lower: $725,000 and $682,000. Pelco thus raised some evidence to support submission of a mitigation instruction. It later requested a proper mitigation instruction, and the trial court abused its discretion in refusing it.

See Columbia Rio Grande Healthcare, L.P. v. Hawley, 284 S.W.3d 851, 862 (Tex. 2009) (noting instruction is proper if it assists jury, accurately states law and finds support in pleadings and evidence).

The majority declined to reach the issue on the theory that it was not necessary to do so. It suggests that reaching the charge error is inconsistent with the notion that we should exercise judicial restraint. In most cases, shorter opinions are better—less is more. But this is not such a case. Here, there is good reason to depart from our usual practice of addressing only the issues necessary to resolve the appeal. By failing to address the charge error, the majority increases the likelihood that we will have to address it in a later—third—appeal, by which time the parties, one of which is a governmental entity funded by taxpayers, will have tried the case for a second time and incurred far greater expense but still not achieved finality. *See Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 609 (Tex. 2014) (addressing issues that may be presented to the trial court on remand in order to assist trial court); *Hinton*, 329 S.W.3d at 495 n.19 (addressing issue that would "feature prominently on retrial" even though issue was not necessary to ultimate resolution of case).

With these observations, I concur in the Court's judgment only.

Rebeca Huddle
Justice

Panel consists of Justices Jennings, Higley, and Huddle.

Huddle, J. concurring.