

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

COASTAL CONSTRUCTION GROUP, )  
INC., a Washington corporation, )  
JAMES C. HEWITT and TARINA )  
THOMAS, as individuals, )  
 )  
Respondents, )  
 )  
v. )  
 )  
STELLAR J CORPORATION, a )  
Washington corporation, and )  
TRAVELERS CASUALTY AND )  
SURETY COMPANY, a foreign )  
corporation, )  
 )  
Appellants, )  
 )  
TACOMA ELECTRIC SUPPLY, LLC, )  
a Washington limited liability company, )  
THE CITY OF CHEHALIS, )  
WASHINGTON, )  
 )  
Defendants. )  
\_\_\_\_\_ )

No. 66932-0-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: October 31, 2011

Becker, J. — Coastal Construction Group Inc. subcontracted with Stellar J Corporation to perform electrical work and supply materials on a project to replace two wastewater pumping stations for the city of Chehalis. There were

project delays, and Stellar stopped paying Coastal. Coastal sued Stellar and prevailed after a nine-day jury trial. We affirm the judgment in all respects.

Stellar was awarded the contract in 2004. Part of the job was to build a temporary bypass pumping system to maintain the flow of sewage until the new pump stations were fully operational.

Coastal is an industrial electric contractor in Aberdeen, Washington, formed in 2002 by James Hewitt. In March 2005, Coastal subcontracted with Stellar to perform electrical work on the project. The subcontract authorized Coastal to assist in demolition and other work before the new pump station foundation slabs were poured. After the new buildings were completed, Coastal would install two motor control centers. The total subcontract price was \$160,597.69.

In addition to the subcontract, Stellar and Coastal entered into a separate purchase order contract where Coastal would supply certain electrical materials to Stellar for \$190,454. The bulk of the price was for the two motor control centers. The purchase order called for final delivery no later than August 15, 2005. Coastal subcontracted with Tacoma Electric Supply LLC to supply the two control centers.

There were numerous delays on the project. A concrete cutting subcontractor performed late. Demolition was delayed from June into August 2005. The new pump buildings were completed in December 2005 instead of in September 2005. Another subcontractor, Flowserve Corporation, was responsible for delivering submersible

pumps by September 2005, but they were not delivered until January 2006. Coastal delivered the motor control centers on January 19, 2006, instead of August 15, 2005, as specified. Stellar failed to get the system for supervisory control and data acquisition running on time. The city required this system to be in place before allowing Stellar to turn off the bypass pumping. The project was scheduled to finish in November 2005 but was not officially deemed complete until May 2006. Even then, Coastal continued to work until October 2006, trying to resolve additional deficiencies in the components supplied by other manufacturers. Due to the delays, the temporary bypass pumping was continued longer than expected. That increased the cost of the project.

The parties' labor subcontract, at § 9, allowed for a 15 percent markup for backcharge work:

SUBCONTRACTOR agrees to make no claims for extras unless the same shall be fully agreed upon in writing by the CONTRACTOR prior to the performance of any such extra work. Backcharge work performed by either SUBCONTRACTOR or CONTRACTOR for the account of the other will be performed for an agreed lump sum amount or on a time and material basis providing a mark-up of fifteen (15%) percent.

Coastal and Stellar began an exchange of correspondence arguing over who had caused delays on the project. On April 29, 2006, Stellar's president, Robert Kinghorn, wrote to Hewitt, responding to accusations and questions Coastal had posed to Stellar. According to Kinghorn, Coastal had responsibility for the cost overruns charged to Stellar for continued operation of the bypass pumping due to late delivery of the control centers, and accordingly Kinghorn said Stellar was recouping "backcharges" from Coastal

for those delay costs.

Stellar was late in paying Coastal's invoices in early 2006 and then stopped paying Coastal's invoices altogether. By April 30, 2006, Coastal had invoiced Stellar a total of \$376,841.93 for materials and labor, including \$9,322.41 in change orders. Stellar had paid Coastal \$266,008.82. Coastal estimated the amount unpaid at \$92,690.33, not counting the \$18,142.24 properly withheld as retainage by Stellar. In May 2006, Coastal filed a lien against Stellar's bond.

Coastal did not pay Tacoma Electric in full for the motor control centers. Tacoma Electric filed a lien against Stellar's bond and retainage on the project for the unpaid amount.

On July 19, 2006, Coastal initiated this lawsuit by filing a complaint in Lewis County against Stellar and Tacoma Electric for breach of contract. Travelers Casualty and Surety Company, Stellar's bonding company, was also named in the suit as a defendant in a claim by Coastal to foreclose its lien. The city of Chehalis was also a named defendant.

On August 7, 2006, Stellar moved to dismiss the action for improper venue. On August 25, 2006, the court denied the motion.

On September 18, 2006, Stellar answered and counterclaimed that Coastal had breached the purchase order contract by not paying Tacoma Electric and by refusing to indemnify Stellar against Tacoma Electric's claim. Stellar also counterclaimed against Coastal for intentional misrepresentation. Stellar pleaded third party claims of

intentional misrepresentation against Hewitt and Coastal's financial officer Tarina Thomas.

Coastal dismissed Tacoma Electric by stipulation in January 2009. Tacoma Electric assigned its claim against Stellar to Coastal.

On April 13, 2009, Stellar moved for summary judgment dismissal of Coastal's claims against Stellar and for judgment in favor of Stellar on its counterclaim for indemnification. The trial court denied the motion.

The parties held a pretrial conference on November 6, 2009. Stellar was to designate expert witnesses by December 1, 2009. They were to be deposed by December 10, 2009. Trial was set to begin on January 4, 2010.

On November 24, 2009, Stellar moved for leave to amend its complaint and for a continuance. The court denied these motions, and later granted Coastal's motions to prohibit Stellar from arguing any affirmative counterclaims not pleaded, specifically the counterclaims mentioned in Stellar's motion to amend.

Coastal moved to exclude Roy Rogers, one of Stellar's expert witnesses. Coastal claimed the witness had been declared at the last minute and no report of his opinion had been provided. The trial court granted the motion.

Stellar made several pretrial motions. One was to void the choice of Oregon law in the subcontract; Stellar wanted Washington law to govern. Another motion was to exclude evidence of a settlement agreement between Flowserve and Stellar. These motions were denied. Stellar also moved to prohibit Coastal from presenting

evidence establishing damages by a total cost methodology. The trial court reserved ruling on that motion.

The trial lasted from January 4 to January 15, 2010. Coastal put on its case in chief the first three days. Witnesses included Hewitt, Thomas, and Chehalis wastewater superintendent Patrick Wiltzius. Coastal also presented Nick Castorina as an expert witness. After a voir dire on Castorina's qualifications, Stellar moved to exclude his testimony on the basis that he was not qualified as an expert. The court denied the motion.

Castorina's testimony analyzed the causes of the various delays in the project. He concluded that the delay in installing the motor control centers was caused by Stellar. He quantified Coastal's damages and explained his calculations.

At the close of plaintiff's evidence, Stellar moved for a directed verdict and to strike Castorina's testimony on the basis that he had used an impermissible total costs method of calculating damages. The motions were denied.

Stellar began the defense case on January 7. Witnesses included Stellar project manager Jeff Walker and Stellar vice president Robert Kinghorn, who discussed and critiqued Castorina's testimony. On cross-examination, Coastal questioned Kinghorn about Flowserve's lawsuit against Stellar and introduced the settlement agreement between the two into evidence.

Stellar called Jeffrey Busch as an expert witness. He covered the same topics as Castorina, but concluded that

Coastal was at fault for the project delays. He also critiqued Castorina's analysis of Coastal's claimed damages.

Stellar renewed its motion for directed verdict. It was again denied. Coastal, Hewitt, and Thomas moved for a directed verdict to dismiss Stellar's claims of intentional misrepresentation. The motion was granted under the economic loss rule. Coastal also moved to dismiss Stellar's claim that Coastal breached the purchase order contract by failing to indemnify Stellar from Tacoma Electric's suit. The trial court denied that motion.

The court instructed the jury on January 15.<sup>1</sup> Later on January 15, the jury returned a verdict in favor of Coastal on all questions. The jury found that Stellar materially breached Coastal's purchase order contract and its labor subcontract and that those breaches were the proximate cause of Coastal's damages. The jury awarded Coastal \$270,056.12 on the subcontract and \$52,000 on the purchase order contract. The jury also found against Stellar's claim that Coastal breached the purchase order contract by failing to pay Tacoma the remaining balance due for the motor control centers. The court entered judgment on the verdict and included prejudgment interest, attorney fees and costs, and postjudgment interest as requested by Coastal. The final

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<sup>1</sup> Pattern instructions for a contract case are scarce. We congratulate the trial court for the comprehensive set of instructions assembled for this complex case. There are no assignments of error concerning the instructions or the three page special verdict form.

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judgment against Stellar was for \$809,921.71. Both Stellar and Travelers were designated as judgment debtors.

Stellar appeals.



### DENIAL OF SUMMARY JUDGMENT

Stellar's motion for partial summary judgment to dismiss Coastal's claims alleged that Coastal forfeited its right to sue for breach of contract by failing to deliver the motor control centers on time. Coastal responded with evidence that Stellar caused the delays that resulted in Coastal's late delivery of the control centers. Stellar replied that a careful review of the facts would reveal that Stellar was not at fault for Coastal's late performance. Stellar assigns error to the trial court's denial of the motion.

A denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact. Johnson v. Rothstein, 52 Wn. App. 303, 304, 759 P.2d 471 (1988). That was the case here. Whether Coastal breached its purchase order contract by delivering the control centers after August 15, 2005, was an issue that required resolution of material facts, and it was resolved by the jury in Coastal's favor. The pretrial order denying summary judgment is not appealable.

### MOTION TO AMEND

Stellar moved to amend its answer and add counterclaims approximately one month before trial. As discussed above, Stellar raised Coastal's failure to deliver the motor control centers on time as an affirmative defense to Coastal's claim for breach of contract and was unsuccessful in its effort to establish the affirmative defense as a matter of law

through the motion for summary judgment. Stellar's motion to amend sought to counterclaim against Coastal for breach of contract for delivering the motor control centers late and for failing to perform electrical work on time. Stellar also sought to add a third party claim against Chehalis for indemnification, to add a claim against Travelers as surety on Coastal's bond, and to clarify various affirmative defenses. Stellar's motion to amend was accompanied by a motion to continue the trial date.

The court denied the motions:

THE COURT: All right. Well, I'm denying all the motions across the board. While amendments are to be freely given absent a showing of prejudice, it's clear to me that there is prejudice here. It appears to me this is a tactical maneuver on the part of Stellar J to delay the trial. . . . Everything was either known or should have been known at the time of the pre-trial conference, and, frankly, much earlier, and Mr. Elpel indicated he knew all about this before the lawsuit was filed over three and a half years ago.

. . . the amendment does change the entire trial, there are new theories for liability, new theories for damages, adding new parties, the cost factor to the plaintiffs and the -- or the third party defendants, whatever, however you characterize the new people in the lawsuit, it's clear discovery would have to be restarted. There are ethical concerns with respect to the addition of Travelers into this lawsuit. . . .

. . . I can't ignore this motion was brought to be heard on the last possible day for making any amendments to the pleadings. So I'm denying every one of these motions.

This court reviews denial of a motion to amend a pleading for manifest abuse of discretion. In all cases, the touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party. Herron v. Tribune Pub. Co., 108 Wn.2d 162, 165-66, 736 P.2d 249 (1987).

As the trial court explained in its

ruling, there was clear prejudice to Coastal and the city. Travelers was represented by Stellar's counsel at the time, so allowing Stellar to sue Travelers would create a conflict of interest. The city had been assured that it was involved in the lawsuit only as a nominal party because it held the remainder of the retainage funds, and consequently had not engaged in discovery and had not brought in the third party defendants that would likely be named if the city had to defend itself against a charge of negligence. Because Stellar had no real explanation for why it waited until almost the eve of trial to seek amendments that would necessitate a continuance and completely change the complexion of a lawsuit that had already been going on for three and a half years, the trial court acted within its discretion in denying the motion.

#### ORDER IN LIMINE TO LIMIT ARGUMENT

The court granted Coastal's motion in limine to prevent Stellar from arguing the counterclaims Stellar had wanted to include by the proposed amendment. Stellar assigns error to this ruling. We review for abuse of discretion. Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 769-70, 162 P.3d 1153 (2007).

Stellar's existing counterclaims against Coastal were for failure to indemnify and intentional misrepresentation. Stellar wanted to argue a claim for damages arising from Coastal's failure to deliver the motor control centers by August 15, 2005. Stellar contends this theory merely clarified the existing counterclaims, but Stellar fails to

plausibly show that it was anything but a new theory.

Stellar admitted withholding \$82,000 in payments on its original subcontract with Coastal and asked the court to prevent Coastal from arguing damages in excess of the amount. Stellar assigns error to the court's refusal to limit Coastal in that fashion, arguing that it was "incongruent" with the court's decision to prevent Stellar from arguing its claim for damages. There was no inconsistency. Coastal's claim for delay damages was within its pleadings, while Stellar's claim for delay damages was not. We find no abuse of discretion in the court's rulings on the motions in limine.

#### EXCLUSION OF EXPERT WITNESS

On March 27, 2008, Coastal asked Stellar by interrogatory to disclose expert witnesses and the substance of their testimony. Stellar did not disclose its expert witnesses. Coastal disclosed its expert witnesses in May 2009.

The trial court entered a pretrial scheduling order on November 6, 2009, calling for defense experts to be designated by December 1 and deposed by December 10. On December 1, Stellar filed a form designating Roy Rogers, CPA, to testify to damages and to refute experts called by Coastal, and designating Jeffrey Busch to testify on construction management issues.

On December 14, Coastal moved in limine to exclude Rogers on the basis that Stellar's disclosure did not include the substance of Rogers' expected testimony. After hearing argument on December 30, the trial court granted the motion, finding the discovery delay

willful and no lesser sanction appropriate:

THE COURT: Well, I'm granting the motion. Frankly, I was prepared to grant the motion with respect to Mr. Busch if it had not been withdrawn. I find that it is a willful violation. The designation of the date or the date to designate experts does not override the civil rules other than the discovery process which requires just—more than just here's the name, go figure it out. The fact that the plaintiff may have violated an order is also not a defense. If you have a problem with that, you bring the motion. You didn't.

The scheduling here from what I can see, as Mr. Roberts just indicated, I can't understand why you waited until October to depose Mr. Castorina, but you did. And then you say, well, okay, well, they're being unreasonable because they're not ready to finish this deposition when we are. Also, this is your case in chief and I don't quite understand why you needed to have Mr. Castorina's deposition before preparing your own case in chief. So for all those reasons I think this is willful.

I also wanted to make a record here that this business of messing around with the dates for the designation of provision of the reports and opinions of the expert is all part of what I perceive to be an attempt on the part of the defendants to get this matter continued. And this is a continuing part of that which I believe happened back on December 4th when we had the arguments about amending the complaint.

Now, other sanctions won't work here, there is monetary sanctions that are not going to cure the problem. The problem here is a lack of notice and a violation of the civil rules, continuance rewards the defendant's actions here, those are the two that I can see might be imposed. So at this late date other sanctions won't work. I'm granting Coastal's motion to exclude his testimony.

Stellar assigns error to this ruling.

The admission or exclusion of expert testimony is discretionary with the trial court. Vasquez v. Markin, 46 Wn. App. 480, 491, 731 P.2d 510 (1986), review denied, 108 Wn.2d 1021 (1987). The facts are unlike those in the case cited by Stellar, Freeland v. Amigo, 103 F.3d 1271 (6th Cir. 1997). In that case, the exclusion of the only expert

witness in a medical malpractice action was reversed on appeal because it was the most drastic sanction possible and it was imposed upon plaintiffs “who were blameless, and as a result, lost their day in court.” Freeland, 103 F.3d at 1277. Here, Stellar was not blameless. Stellar willfully failed to submit the substance of the anticipated expert’s testimony. And the trial court selected an appropriate sanction—not a case-ending sanction as in Freeland. We find no abuse of discretion.

#### CHOICE OF LAW

The subcontract provided, at clause 23, that “the laws of Oregon should govern the validity of this agreement.” Before trial, the court ruled that Oregon law would govern where it conflicted with Washington law. Because of this, Stellar argues, the jury was improperly instructed on how to decide whether Coastal gave Stellar proper notice of change orders for extra costs. Stellar wanted to give an instruction based on Mike M. Johnson, Inc. v. Spokane County, 150 Wn.2d 375, 386, 78 P.3d 161 (2003). That case determined that under Washington law, failure to follow a contractual notice provision bars a claim for extra costs incurred on a construction project, unless those procedures are waived by the party for whose benefit the provision is meant. Under Washington law, actual notice of extra costs does not excuse noncompliance with contract procedures for notice of change orders. Mike M. Johnson, 150 Wn.2d at 391.

The issue whether Coastal had

complied with contractual notice procedures was first raised in Stellar's trial brief. The brief relied on Mike M. Johnson. Coastal responded that Oregon law should be applied instead, based on the subcontract provision for Oregon law. According to Coastal, actual notice was sufficient to satisfy the contractual notice requirement under Oregon law. See Brownson v. Lewis, 233 Or. 152, 157-58, 377 P.2d 327 (1962). Stellar did not dispute this was an accurate statement of Oregon law.

Stellar moved to void the contractual choice of law provision and for a ruling that Washington law would govern the trial. After swearing in the jury, the court heard argument on the motion and denied it. Stellar appeals this ruling.

Choice of law is a question of law that this court reviews de novo. Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 693-94, 167 P.3d 1112 (2007).

Because the parties agreed that Oregon law would control the subcontract, this case does not call for the application of the "most significant relationship" test. Erwin, 161 Wn.2d at 693. It falls under *Restatement (Second) Conflict of Laws* § 187(1) (1971): "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." *Restatement (Second) of Conflict of Laws* § 187(1), quoted in O'Brien v. Shearson Hayden Stone, Inc., 90 Wn.2d 680, 685, 586 P.2d 830 (1978).

Stellar argues that Coastal waived the provision choosing Oregon law by litigating other matters under

Washington law before the trial began.

“A party to a contract may waive a contract provision, which is meant for its benefit, and may imply waiver through its conduct.” Mike M. Johnson, 150 Wn.2d at 386. Waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive. Mike M. Johnson, 150 Wn.2d at 386. When parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis. Erwin, 161 Wn.2d at 692. In the argument before the trial court, it was undisputed that no conflict of law issue had arisen previously. Thus, there had been no opportunity for Coastal to waive Oregon law. The trial court ruled that because no conflict had previously arisen, Coastal’s failure to assert Oregon law was not an unequivocal act evidencing an intent to waive the contractual choice of Oregon law.

Stellar contends a conflict did arise previously when Coastal relied on Washington law to resist Stellar’s motion to change venue. In the same clause specifying that Oregon law would control the subcontract, the parties had agreed to lay venue in Clark County Superior Court. However, the main contract between Stellar and the city had a venue provision allowing suit in any Washington court. Early on, Stellar sought to place venue in Clark County. Coastal successfully argued at the time that the main contract should control venue rather than the subcontract choice of Clark County. Coastal also argued that under lien foreclosure statutes, its claim against Travelers could be brought only in Lewis County, where the



project was located. See chapter 39.08 RCW (contractor's bonds). Thus, the controversy over venue did not raise a conflict of laws issue; rather, it raised an issue of contract interpretation.

Stellar also argues that it should have been allowed to disavow the choice of law provision because Coastal disavowed the choice of venue provision contained in the same clause by resisting Stellar's early motion to dismiss. Coastal's resistance to venue in Clark County was based on the argument that a venue clause in the main contract controlled venue. Stellar did not point to any clause in another contract that controlled choice of law. Thus, the trial court was not inconsistent in upholding the choice of law provision.

We conclude that the trial court did not err by deciding that Oregon law would govern at trial.

### SETTLEMENT AGREEMENT

Stellar contends the trial court erred in allowing the jury to hear evidence concerning a settlement agreement between Stellar and Flowserve and by admitting the agreement itself into evidence.

Stellar backcharged Coastal for costs associated with project delays. Stellar defended the backcharges at trial on the basis that the project delays were Coastal's fault. To undermine this defense, Coastal wanted the jury to hear about the settlement agreement between Flowserve and Stellar. Flowserve, a sewage pump supplier on the project, filed a lien on Stellar's bond for \$117,794.89. Stellar asserted a

counterclaim for the cost of three extra months' rental of bypass pumping equipment and associated costs for a total claim of \$116,163.21. The parties settled on October 16, 2009. The settlement agreement showed that Flowserve compensated Stellar for costs Stellar incurred as a result of Flowserve's failure to timely install submersible pumps.

The issue of the admissibility of the settlement agreement arose before trial. Stellar moved in limine for an order to exclude evidence of the settlement. The court denied Stellar's motion, finding that ER 408 did not require exclusion of the agreement under the circumstances and that Stellar's arguments went to the weight of the evidence rather than its admissibility.

Coastal argued in closing that Flowserve was responsible for a large part of the project delay and that the settlement agreement showed that Stellar had already been compensated for the costs of delay that Stellar backcharged Coastal for. Stellar responded that Coastal was mistaken because the damages Stellar was allocating to Coastal were project delays that occurred after Flowserve had performed on the contract. In rebuttal, Coastal reiterated that Stellar's backcharges against Coastal were unjustified because Stellar had already been paid for the project delays in the settlement with Flowserve.

Stellar contends the settlement agreement should not have been admitted because it was irrelevant, prejudicial, and submitted for an improper purpose in violation of ER 408. A trial court's decision to admit evidence is reviewed for abuse of discretion. Hensrude v. Sloss, 150 Wn. App. 853, 860, 209 P.3d 543

(2009).

Coastal argues the settlement was relevant to the issue of damages, to refute the backcharge amounts withheld, and to impeach Stellar's witnesses who were taking inconsistent positions. We agree. The settlement was evidence that Stellar had been compensated for a significant amount of costs caused by the project delays. The evidence supported Coastal's theory that Coastal performed late because Flowserve performed late. Arguably Flowserve's delay caused the costs Stellar did charge Coastal for. The court did not abuse its discretion by finding the settlement was relevant.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403. "The trial court has broad discretion in balancing the probative value of evidence against the potentially harmful consequences that might result from its admission." Lockwood v. AC&S, Inc., 109 Wn.2d 235, 256, 744 P.2d 605 (1987). The term "unfair prejudice" as it is used in rule 403 "usually refers to prejudice that results from evidence that is more likely to cause an emotional response than a rational decision by the jury." Lockwood, 109 Wn.2d at 257. Stellar does not explain how the settlement agreement encouraged a decision based on emotion. The settlement, as used at trial, provided factual support for Coastal's argument that it was being charged for delays it did not cause and for which Stellar had already been compensated. The court did not err in concluding that the admission of the settlement agreement was not unfairly prejudicial

to Stellar.

Stellar asserts that admission of the settlement agreement was improper under ER 408. ER 408 bars admission of settlement agreements to prove “liability for or invalidity of a claim or its amount. . . . This rule . . . does not require exclusion when the evidence is offered for another purpose.” ER 408. Coastal offered the agreement to undermine Stellar’s defense to the breach of contract action. We see no basis for finding a violation of ER 408.

In short, the trial court did not abuse its discretion by admitting the settlement agreement into evidence.

#### PRESENTATION OF DAMAGES

Stellar repeatedly raised the issue that Coastal was presenting, through its expert witness Nick Castorina, an impermissible “total costs” claim for damages. The total cost method is defined as follows in Seattle Western Industries, Inc. v. David A. Mowat Company, 110 Wn.2d 1, 6, 750 P.2d 245 (1988):

The total cost method of proving damages consists of subtracting the bid on the project or the estimated cost of completion from the actual total cost. This approach has been termed a “last resort” method of determining damages, and is sometimes permitted only where no better method of proof of damages is available. See New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 696 P.2d 185 (1985); John F. Harkins Co. v. School Dist., 313 Pa. Super. 425, 460 A.2d 260 (1983). The usual objections to the method are that it assumes the initial bid was reasonable and fails to take into account causes of cost overruns other than the defendant's acts.

Stellar moved to strike Castorina’s

declaration in support of Coastal's opposition to summary judgment, moved in limine to prevent any evidence of a total cost claim, moved at trial to disallow and then to strike Castorina's testimony on the basis that he used a total cost claim method of calculating Coastal's damages, and moved for a directed verdict that Coastal had not presented a valid method for determining damages in the case. The trial court denied the motions. Stellar assigns error to those rulings.

The subcontract specified that Coastal would be paid \$160,597.69, plus a markup for backcharge work. The purchase order specified that Coastal would be paid \$190,454.00 for the motor control centers and other materials.

Castorina testified that Coastal invoiced Stellar for \$376,841.93 for labor, materials, and change orders. Stellar had paid approximately \$266,000 on those invoices. Castorina said that Stellar should have paid Coastal an additional \$110,000 on the original subcontract and purchase order, \$19,000 for increased overhead costs during the 155-day delay period, and \$213,000 for the extra work plus \$31,000 for the 15 percent markup. These components total approximately \$373,000. The jury awarded Coastal \$270,056.12 on the subcontract and \$52,000 on the purchase order, for total damages of \$322,056.12.

To arrive at the total amount Stellar owed Coastal, Castorina did not simply add up Coastal's total costs and subtract the bid price. He considered the original bid, the subcontract, the purchase order, Coastal's invoices, Coastal's change orders, the amounts paid to Coastal, and his analysis of what part of Coastal's damages was due to

Coastal's own conduct.

Q. What were the total invoices for labor and material initially?

A. Initially it was \$376,841.93.

. . . .

A. Remember, 18,000 of that is retention, but the amount that was paid was \$266,008.82 and leaving a balance unpaid of \$92,690.33, and that's against those last three invoices.

. . . .

A. . . . You have additional overhead because you're having to pay for your overhead, all your non job charge people in the office, everything, those were time related, those are one component. Then you have, more importantly, the impact and the impact on the efficiencies, operation, extra cost for performing all the extra work, jumping around, not having any real rhythm to your work there.

Castorina testified that it would be difficult to quantify the financial impact for any one particular issue of delay. Rather, he quantified Coastal's damages by the amount invoiced, the extra overhead costs arising from project delays, and impacts on Coastal's performance due to delays. Castorina explained how he evaluated the reasonableness of the bid and concluded the bid was reasonable. He said he had also looked at the amount of costs for extra work done beyond the contract amount and found them to be reasonable. He considered whether Coastal was responsible for any of the delay costs but determined Coastal was not.

Using an illustrative exhibit, Castorina explained that \$110,000 of the total amount of damages in his estimate represented the unpaid amount due under the base contract. He next estimated \$213,000 as the "jumping around" costs of inefficiency attributable to the 155-day delay, and \$31,000 as the cost of extended overhead for that period of

time:

A. . . . It is not the contract balance, this is what I call the impact cost, the cost of performing the additional work, the inefficiencies, the jumping around, that's the \$213,000, and it's made up of their actual costs less what was invoiced on the project.

Q. What's the next line, the \$31,000, what does that represent?

. . . .

A. That represents, we talked about my analysis said the project was delayed 155 days. Those are your extended overhead costs associated with that 155 days, there is \$19,000 associated with that there.

Q. And so I understand your opinion correctly, items three and four would represent the impacts and delays that you talked about, the 155 days, that would be your opinion as to those?

A. The impacts and delays, that's correct.

Q. And then items one and two are your opinions with regard to the unpaid contract amounts?

A. Absolutely, yes.

Stellar argues Castorina used a total cost method to calculate Coastal's damages, citing S.L. Rowland Construction Company v. Beall Pipe & Tank Corporation, 14 Wn. App. 297, 540 P.2d 912 (1975), review denied, 87 Wn.2d 1001 (1976). In S.L. Rowland, this court confronted an issue whether a contractor could collect on a total cost claim in quantum meruit. S.L. Rowland, 14 Wn. App. at 301. S.L. Rowland is not particularly helpful here. Coastal did not make a claim for quantum meruit. Coastal claimed damages for breach of contract based on the terms of the contract.

Seattle Western is instructive. Seattle Western subcontracted with David A. Mowat Company, the general contractor, to help build the Merrill-Ring bridge for the city of Everett. Seattle Western had also contracted with the Mowat company on another project, the Swamp Creek Project, Phase 1. Because of changes in the bridge project, Seattle

Western's work on that project was delayed. The delay caused Seattle Western to have to work on both projects simultaneously, a task it was not equipped to do efficiently. The delay on the bridge project led to delays and added expenses on the Swamp Creek project. Seattle Western sued the city's design firm, among other defendants, for breach of contract, negligence, and misrepresentation. The case went to trial, and the jury found against the design firm, awarding Seattle Western \$596,175 in damages.

The design firm appealed and argued that the trial court erroneously permitted Seattle Western to prove damages by a total cost method of calculation. The Supreme Court found Seattle Western's proof of damages was permissible:

SWI points out that it used a "modified" total cost approach in that it deducted from the total cost minuend whatever additional costs it or its subcontractors caused. See Nebraska Pub. Power Dist. v. Austin Power, Inc., 773 F.2d 960, 966 (8th Cir. 1985). We find nothing objectionable in the proof of damages in this case.

. . . .

There is ample evidence in the record to establish the fact of damage here. The Merrill-Ring and the Swamp Creek projects had to proceed simultaneously in a shop that was not equipped for such a volume of work. The effects were described in detail at trial. The work was done later in the year, and under more adverse weather conditions than had been planned. Much of the work was done in temporary shelters. Pieces had to be moved between the main shop, the temporary facilities and a concrete pad, on which the plan had been diagramed, for custom fitting. To complete both projects, it was necessary to work around the clock.

As to calculation of damages suffered on the Merrill-Ring Project, SWI presented evidence that it was not possible for SWI to segregate the costs of rework caused by the change in truss orientation from normal contract costs. As noted above, SWI deducted the cost overruns caused by it and/or Cooney from the actual cost figure. SWI also offered evidence to show that its original bid and actual costs



were reasonable. Regarding the Swamp Creek Project, SWI offered evidence to show its profit on Phase II of the Swamp Creek Project, a job virtually identical to Phase I. SWI also offered evidence that Phase I required 6,000 more man-hours than Phase II. SWI discounted the profit on Phase II by 5 percent to represent cost savings from experience with Phase I, and estimated its loss on Phase I, as a result of the Merrill–Ring rework, to be \$180,299. TAMS offered evidence that SWI's damages were less than contended, but the jury was entitled to, and apparently did, disbelieve it. We conclude that SWI presented sufficient competent evidence affording the jury a reasonable basis for calculating the loss to SWI caused by TAMS.

Seattle Western, 110 Wn.2d at 6-7.

As in Seattle Western, Coastal presented ample evidence to prove the fact of damage. Coastal showed that it had to work in the winter under more adverse conditions than in the fall, and had to work less efficiently, because of delays caused by Stellar and the subcontractors Stellar was responsible for. Coastal submitted invoices that had not been paid and change orders to support these claims.

Coastal presented expert testimony that the damages pertaining to individual issues of delay could not be quantified. Castorina considered and rejected Stellar's argument that Coastal was responsible for damages attributable to delay. He testified that Coastal's bid was reasonable and the costs charged for the extra work on the project were also reasonable. Castorina explained his method of calculating delays and the financial impact of those delays. Stellar presented some contradictory evidence, but the jury was free not to believe it.

We conclude Castorina did not use an impermissible method of calculating damages. There was sufficient evidence to allow the jury to calculate damages without resorting to speculation or conjecture. The trial court did not err by denying Stellar's motions to disallow Castorina's approach to calculation of damages.

Stellar argues that its motion to strike Castorina's testimony should have been granted on the additional basis that Castorina was not qualified to testify as an expert in the case. Whether to admit expert testimony is within the discretion of the trial court. State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). Castorina testified at length about his career in welding, construction, and construction scheduling. Judging him to be qualified as a witness was not an abuse of discretion.

Stellar argues that the court should have granted a motion for directed verdict because Coastal did not present sufficient evidence that Stellar's contract breaches proximately caused damages to Coastal. We reject this argument. Castorina's testimony supplied sufficient evidence of proximate cause.

Stellar argues that to the extent the city was responsible for any damages alleged by Coastal, Stellar should not have been prevented from presenting such evidence because it was probative and relevant to Stellar's defense of Coastal's alleged damages. Stellar cites four exhibits that it claims supported its position on this issue. All four exhibits are marked as "Admitted Exhibit."

Stellar's failure to cite any instance in

the record where it was denied the opportunity to present evidence on this issue precludes review of this assignment of error. RAP 10.3(a)(6) (brief must contain citations to “relevant parts of the record”).

Stellar argues that the trial court erred by allowing Coastal to argue for damages in excess of the amount withheld on its original subcontract, \$82,277, because such relief was beyond what Coastal sought in its complaint. This contention is meritless because it is unsupported by authority or reference to the record. And in any event, Coastal did plead damages caused by project delay or extra work.

#### COUNTERCLAIMS FOR INTENTIONAL MISREPRESENTATION

Stellar counterclaimed against Coastal, and brought third party claims against Hewitt and Thomas, alleging that they were liable in tort for intentionally misrepresenting that Coastal would pay Tacoma Electric the monies for which Tacoma Electric was suing Stellar. When Coastal failed to pay Tacoma Electric in full for the motor control centers as required by the purchase order agreement, Tacoma Electric sued Stellar for the amount withheld.

Near the end of the defense case, Coastal, Hewitt, and Thomas moved to dismiss these claims by directed verdict. The trial court granted the motion, finding that although there was enough evidence to go forward with the claims, they were barred by the economic loss rule. Stellar assigns error to that decision.

Under the economic loss rule,

the availability of a tort remedy “depends on the existence of a tort duty arising independently of a contract's privately negotiated terms, not on whether an injury can be labeled an economic loss.” Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 383, 241 P.3d 1256 (2010). Stellar's claims of intentional misrepresentation do not arise independently of contract. Thus, Stellar's claims are “nothing more than a contractual breach or a difference in the profits, revenue, or costs that the plaintiff had expected from a business enterprise.” Eastwood, 170 Wn.2d at 393-94. Stellar's obligation to pay Tacoma Electric is not traceable to any independent tort duty on Coastal's part to pay Tacoma Electric; this was a contractual duty. Even though Stellar had no contractual relationship with Hewitt and Thomas, Stellar's claims against them likewise fail because they do not arise from breach of a duty in tort that is independent of the privately negotiated contractual agreements concerning the project.

Stellar argues that the “ABC” rule of equitable indemnity provides an exception to the economic loss rule that would allow it to pursue its intentional misrepresentation claims. Stellar raised the equitable indemnity rule below, but only in support of a claim for attorney fees and costs against Coastal for defending the suit against Tacoma Electric. Because the argument that equitable indemnity provides an independent basis in tort for the claims of intentional misrepresentation is raised for the first time on appeal, we decline to review it.

#### LIQUIDATED DAMAGES

Stellar claims that Coastal's damages were unliquidated, and as a result, it was improper for the trial court to enter judgment against Travelers, Stellar's surety.

A bond is a contract that governs the surety's liability to the obligee. It is interpreted using general principles of contract construction and performance. If unambiguous, it should be construed in accordance with the parties' plain intent. If ambiguous, it should be construed in favor of liability of the surety. Colorado Structures, Inc. v. Ins. Co. of the W., 161 Wn.2d 577, 588, 167 P.3d 1125 (2007).

Stellar's bond with Travelers states that "if said Principal [Stellar], . . . shall fail to pay for any materials, provisions, or other supplies used in, upon, for, or about the performance of the work contracted to be done, or for any work or labor thereon of any kind . . . then said surety [Travelers] will pay the same." Coastal's damages were for materials furnished and labor performed as required by the parties' subcontract and purchase order. The language in the bond is broad enough to cover those damages. Therefore, the trial court did not err in imposing judgment jointly and severally on Travelers for Coastal's damages against Stellar.

Further, Coastal's damages were liquidated. An award is unliquidated if reliance upon opinion and discretion was necessary to determine the reasonableness of the amounts expended for extra work arising outside of a contract. Kiewit-Grice v. State, 77 Wn.

App. 867, 872-73, 895 P.2d 6, review denied, 127 Wn.2d 1018 (1995).

Castorina did opine that Coastal's claimed costs were reasonable, but he did not rely on opinion and discretion to calculate Coastal's damages. He calculated them based on specific numbers found in the bid, contracts, change orders, and invoices. Consequently, the jury was able to compute Coastal's damage with exactness from the concrete facts presented at trial. Because the claim submitted by Coastal was for liquidated damages, Stellar's argument that judgment was improperly entered against Travelers must fail.

#### INTEREST

Coastal requested, and the trial court awarded, prejudgment interest at the Oregon law rate of nine percent for a total of \$99,214.50. Stellar argues prejudgment interest was impermissible because Coastal's damages were unliquidated. As discussed above, we reject this argument.

Stellar next contends that the trial court erred by awarding postjudgment interest at the Washington statutory rate of 12 percent per annum. See RCW 4.56.110 (interest on judgments). Stellar claims the rate should have been the Oregon law rate of nine percent, which the trial court imposed for prejudgment interest. Stellar argues it was inconsistent for the court to impose prejudgment interest using the rate called for by Oregon law and then turn to Washington law for the rate of postjudgment interest.

Before trial, the trial court decided that Oregon law would govern substantive issues of law but that

Washington law would govern matters of procedure. “As a general rule, the forum state will apply its own procedural law, even if the law of some other state governs the merits of the case.” 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 54:3, at 446 (2d ed. 2009). The statute governing postjudgment interest falls within Title 4 RCW, “Civil Procedure.” By contrast, prejudgment interest is determined by state usury law, RCW 19.52.010, because it is not considered interest on a judgment, but interest on a forbearance of money. 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35:13, at 495 n.10 (2d ed. 2009).

For the proposition that determination of the rate of postjudgment interest is substantive rather than procedural, Stellar cites Paul v. All Alaskan Seafoods, Inc., 106 Wn. App. 406, 428-29, 24 P.3d 447 (2001). That case is not helpful. There, the court decided that the trial court had discretion whether to apply a state or federal interest rate to prejudgment interest in a federal maritime case. Stellar also relies on Jackson v. Fenix Underground, Inc., 142 Wn. App. 141, 146-47, 173 P.3d 977 (2007). In that case, the court decided that the specific interest rate agreed upon in a settlement between the parties controlled, whereas here, the contract did not contain an agreement on an interest rate.

Stellar fails to demonstrate that the issue of what interest rate applies to a judgment is substantive rather than procedural. We conclude the trial court did not err by imposing the Washington rate.

ATTORNEY FEES ON APPEAL

Coastal's request for attorney fees on appeal is granted. Coastal has prevailed on appeal, as below, on its claims for breach of contract and a claim to foreclose its lien on Stellar's bond. Prevailing party attorney fees are authorized by provisions in the subcontract and purchase order contracts, by RCW 39.08.030 (foreclosure of lien on contractor's bond), and by RCW 60.28.030 (foreclosure of liens on public works). We do not reach Coastal's argument that RCW 39.04.250 is an additional basis for an award of fees.

Affirmed. Coastal is awarded attorney fees on appeal subject to compliance with RAP 18.1.

Becker, J.

WE CONCUR:

Leach, J.

Dupe, C. S.