Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Sep 15 2011, 9:34 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

BEN L. SPURLOCK, Jr.
Greenfield, Indiana

ATTORNEYS FOR APPELLEE:

JON C. ABERNATHY
ANDREW B. JANUTOLO
Goodin Abernathy LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EVERY MEADOWS, LLC,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 30A01-1012-PL-650
	)	
McKNIGHT EXCAVATING, INC.,	)	
And CHAD McKNIGHT,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry K. Snow, Judge
Cause No. 30D01-0807-PL-730

September 15, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-plaintiff Every Meadows, LLC (Every Meadows) appeals the trial court's denial of its motion to correct error. Specifically, Every Meadows argues that the trial court erred by excluding evidence of lost profits as impermissible hearsay and by not permitting its attorney to testify at trial. Additionally, Every Meadows contends that the jury verdict awarding it zero dollars is inadequate as a matter of law in light of its verdict that appellees-defendants McKnight Excavating, Inc, and Chad McKnight (collectively, "McKnight") breached the parties' contract. Finding no error, we affirm the decision of the trial court.

FACTS

In 2003, Every Meadows was created to develop the Every Meadows subdivision located near Greenfield. The property consists of approximately thirty-five acres of dry land and a twenty-two acre pond. The land was previously owned by Etta Reedy, an elderly woman incapacitated by her health conditions. Reedy originally leased the land to farmers, but her estate planning attorney, Ben L. Spurlock, convinced her to rezone the property for residential development in an effort to increase the value of her estate. Every Meadows appointed The Ben L. Spurlock Company, a pre-existing home building company owned and operated by Spurlock, to be Every Meadows's agent for development of a residential subdivision.

Because the property was farmland, it required excavating in advance of any development. The development also required various under-drains and inlets, which handle storm water, along with a unique irrigation system manufactured by Shaeffer

Waste Water Solutions that would treat reclaimed waste water and redistribute the water to areas throughout the property. The unique system eliminates mounds systems and septic tanks.

Every Meadows hired McKnight to perform excavation work at the property, including installation of the Schaeffer System and the installation of various storm sewers, swales, and inlets. More particularly, the Construction Contract (the Contract) required McKnight to: 1) excavate streets, curbs and swales; 2) install the Schaeffer System; 3) install a forced main system; and 4) haul dirt to install the Schaeffer System. Def. Ex. C p. 2-3. The Contract contained values attached to each task. Id. The Contract also required McKnight to begin the work within fourteen calendar days after the "date of the notification to proceed," and to complete the work within 120 days of the date of notification unless the parties made other arrangements. Id. at 4. The Contract specifically excluded any provision for erosion control work by McKnight, reserving this task for Every Meadows. Tr. p. 425, 427.

The Contract also contained a liquidated damages clause, stating:

> McKnight agrees to pay as liquidated damages, and not as a penalty, the sum of $250.00 for each calendar's day's delay in completing this Contract after expiration of the time herein limited for its completion, including any approved extension of time because of unavoidable delay.

Def. Ex.C p. 4. However, the Contract also states that:

> Should the work be stopped by any public authorities for a period of 30 days or more through no fault of McKnight, or should the work be unduly stopped by Every [Meadows], or should Every [Meadows] unjustly fail to pay McKnight any payment within twenty days after it is due, then

> McKnight upon seven days' written notice to Every [Meadows] may stop his performance under this contract and recover from Every [Meadows] payment for the work completed on a proportional basis.

Def. Ex. C. p. 6.

McKnight began work in May 2006 and continued excavation work until December 2006, when the Hancock County Highway Department issued a stop-work order because of erosion control issues, which lasted until the spring of 2007.[1] Because of erosion control issues, the property suffered serious problems, including mud infiltrating inlet pipes and degradation of swales and other excavation efforts. The Hancock County Surveyor's Officer issued a stop-work order in April 2007. To address the county's erosion control complaints, Every Meadows agreed to pay McKnight an additional $9200; however, this subsequent agreement did not provide for the ongoing maintenance of the erosion control measures, which still remained with Every Meadows.

After McKnight implemented the erosion control measures, Hancock County lifted the stop-work order on or around July 2, 2007. However, because Every Meadows did not maintain the erosion control measures, the property sustained additional damage, which further delayed the project. On July 27, 2007, the Hancock County Surveyor's Office sent a letter to Every Meadows detailing forty items in need of repair or

[1] There seems to be some confusion surrounding this stop-work order. In its Appellant's Brief, Every Meadows asserts that "[t]here was an unwarranted delay by the Hancock County Highway of the proof role of the streets from December 2006 until the Spring of 2007. Due to erosion problems that developed during the winter months, there was a 45-day work stop order until corrections were made." Appellant's Br. p. 6-7. However, in its Reply Brief, Every Meadows states that "[t]he Highway never issued a stop work order. The stop work order was in the spring of 2007 by the Hancock Surveyor's Office and lasted only 45 days." Reply Br. p. 2.

completion. On July 31, 2007, the Hancock County Highway Commission issued Every Meadows a final inspection report detailing thirty-two items in need of repair or completion that would have to be addressed before the subdivision could be platted and recorded.

On September 25, 2007, McKnight faxed a letter to Every Meadows offering to complete certain portions of the work required by the county agencies in an effort to fulfill the Contract. The offer was refused by Every Meadows.

On April 15, 2008, The Hancock County Surveyor's Office issued a letter containing twenty-eight items that still needed to be repaired or completed before the platting of the subdivision would be permitted. Every Meadows hired Walnut Acres, an excavating company, to address many of the remaining concerns that were preventing the plat from being recorded. On June 21, 2008, Walnut Acres completed many of the listed items in preparation for the recording of the plat. The Hancock County Surveyor's Office approved the plat for recording on September 25, 2008, after all of the items were completed.

On July 9, 2008, Every Meadows filed its complaint[2] against Huber Transport, LLC; Triple H. Trucking, LLC; and McKnight. After initial discovery, the parties filed a stipulation of dismissal as to Huber Transport, LLC and Triple H. Trucking, LLC. On October 20, 2009, the trial court ordered dismissal of those parties. On that day, Every

[2] Every Meadows failed to include the original complaint in the record. Indeed Every Meadows did not file an Appellant's Appendix with its Appellant's Brief.

Meadows filed an amended complaint, which was answered by McKnight on November 13, 2009.

On November 18, 2009, Every Meadows filed a motion for summary judgment on the issues of breach of contract, negligence, fraud, and punitive damages. On December 18, 2009, McKnight filed a cross-motion for partial summary judgment on the issues of fraud and punitive damages. On January 7, 2010, the trial court held a hearing on Every Meadows's motion for summary judgment, which was denied the same day.

On February 10, 2010, McKnight filed a motion to disqualify counsel, Ben L. Spurlock, Jr. On February 11, 2010, the trial court held a hearing on McKnight's cross-motion for partial summary judgment and motion to disqualify. The trial court denied McKnight's cross-motion for partial summary judgment the same day. However, the trial court ruled that to disqualify Attorney Spurlock would "work a substantial hardship" on Every Meadows and denied the motion to disqualify. Appellee's App. p. 7. The trial court further determined that although Spurlock could continue as counsel, he would not be permitted to testify at trial. Id.

On October 11, 2010, a jury trial commenced. On October 13, 2010, after Every Meadows had presented its case, McKnight moved for dismissal of defendant, Chad McKnight, and the fraud count based on insufficient evidence. The trial court granted both motions.

Also on October 13, after final arguments, the jury returned with a verdict finding that McKnight had breached the Contract but assessed zero damages. On November 3,

2010, Every Meadows filed a motion to correct error, which was denied on November 29, 2010. On December 8, 2010, Every Meadows filed a motion to reconsider, and the trial court set the matter for a hearing on December 29, 2010. On December 16, 2010, McKnight filed a response and on December 21, 2010, the trial court, after reviewing McKnight's response, determined that it had no jurisdiction to rule on the motion to reconsider and vacated the December 29 hearing. Every Meadows now appeals.

DISCUSSION AND DECISION

Every Meadows contends that the trial court erred by denying its motion to correct error. Every Meadows essentially makes three arguments: 1) the trial court erred by excluding evidence of lost profits as hearsay; 2) Attorney Spurlock should have been allowed to testify; and 3) the jury's verdict awarding zero damages was inadequate as matter of law.

I. Standard of Review

Every Meadows is appealing from denial of a motion to correct error. When reviewing a trial court's denial of a motion to correct error, we will reverse only when there has been an abuse of discretion. Centennial Mortgage, Inc. v. Blumenfeld, 745 N.E.2d 268, 273 (Ind. Ct. App. 2001). An abuse of discretion will be found when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences which may be drawn therefrom. Id. The trial court's decision on a motion to correct error comes to us cloaked with a presumption of correctness, and the

appellant has the burden of showing an abuse of discretion. Peterson v. Burton, 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007).

As an initial matter, Every Meadows argues that the trial court erred by failing to rule on its motion to reconsider the denial of Every Meadows's motion to correct error. However, in Jackson v. Pempleton, this Court stated that unless the trial court had altered or amended, or supplemented its findings and/or judgment in its ruling on the first motion to correct error, the trial court was without jurisdiction to reconsider the motion to correct error. 559 N.E.2d 1193, 1193 (Ind. Ct. App. 1990).

In the instant case, the trial court did not alter, amend, or supplement its findings or judgment. Consequently, the trial court was without jurisdiction to reconsider its denial of Every Meadows's motion to correct error.

II. Hearsay

Every Meadows argues that the trial court erred by excluding records "concerning interest paid on borrowed money and loss of profits" under the business records exception to the rule excluding hearsay. Appellant's Br. p. 4. The decision to admit or exclude evidence is within the trial court's sound discretion, and this Court will not reverse the trial court's decision absent an abuse of discretion. Tolliver v. State, 922 N.E.2d 1272, 1278 (Ind. Ct. App. 2010), trans. denied. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

The Indiana Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Generally, hearsay is not admissible unless it meets the requirements of an exception. Evid. R. 802.

One exception to the hearsay rule is for records of regularly conducted business activity. Evid. R. 803(6). The rule specifically provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Here, Every Meadows offered seven promissory notes and a mortgage document into evidence under the business records exception through Daniel Calvert, who Every Meadows admits was not the record keeper or an officer of the company for which the records were kept. Appellant's Br. p. 24. Moreover, Calvert's testimony indicates that the documents were untrustworthy, inasmuch as the documents were notarized seven months before Reedy signed them. Tr. p. 342-43. In light of these circumstances, we cannot say that the trial court erred by excluding the documents as impermissible hearsay.

III. Attorney Not Permitted To Testify

Every Meadows argues that the trial court erred by not permitting its attorney, Ben Spurlock, to testify at trial. As stated above, the issue first arose through McKnight's motion to disqualify Spurlock. The trial court denied McKnight's motion to disqualify, determining that it would work a substantial hardship on Every Meadows. Nevertheless, the trial court ordered that as long as Spurlock acted as an advocate for Every Meadows, he could not testify at trial.

Indiana Professional Conduct Rule 3.7 states, in relevant part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work a substantial hardship on the client.

Even more relevant to the instant case, "[t]he tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness." Prof. Cond. R. 3.7, cmt 2.

In this case, as stated above, Every Meadows was created in 2003 for the express purpose of developing the Every Meadows subdivision. Appellee's App. p. 14. The assets for Every Meadows came from the Etta Reedy Revocable Living Trust, and Spurlock was Reedy's estate planning attorney. Id. at 15-16. Spurlock convinced Reedy to rezone the property for residential development in an effort to increase the value of her

estate, and Reedy executed a quitclaim deed, which deeded the land to Every Meadows. Id. at 16.

The only person who attended Every Meadows's annual meetings was Spurlock. Additionally, the Ben L. Spurlock Company, Inc. is Every Meadows's agent. Id. at 14-15. This company is a preexisting home building company owned and operated by Spurlock. Moreover, Spurlock admitted that Reedy was not competent to testify at trial. Appellant's Br. p. 9. Under these facts and circumstances, it is clear that Spurlock was so enmeshed in Reedy's estate planning affairs, including the Every Meadows business venture, that his role as advocate and witness could potentially confuse and mislead the jury. As such, we cannot say the trial court erred by essentially forcing Spurlock to choose between representing Every Meadows and testifying as its witness.

Even assuming solely for the sake of argument that the trial court erroneously compelled Spurlock to make a choice, there were other witnesses who were able to attest to the issues which Spurlock sought to introduce through his own testimony. Although Every Meadows argues that the seven promissory notes and the mortgage document would have been admitted had Spurlock been allowed to testify, Calvert testified that his wife would be an appropriate witness to authenticate the documents. To be sure, Spurlock elicited testimony that Calvert's wife was an officer of Every Meadows and kept the business records. Tr. p. 345. Although Calvert claimed that his wife was unable to testify because of her poor health, Spurlock could have taken her deposition at any time before trial to ensure that the testimony and exhibits were properly authenticated.

Consequently, we cannot say that the trial court abused its discretion when it prevented Spurlock from acting as both counsel and as a witness.

IV. Damages

Finally, we arrive to the crux of Every Meadows's argument, which is that the jury's verdict awarding zero damages was inadequate as a matter of law in light of its verdict that McKnight breached the Contract. In support of this contention, Every Meadows contends that the jury incorrectly interpreted Jury Instruction 15 (Instruction 15) and that if McKnight breached the Contract, as the jury concluded, then it has to be responsible for actual and liquidated damages.

A. Standard of Review

A jury determination of damages is entitled to great deference on appellate review. Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 462 (Ind. 2001). This Court will not substitute its own idea of a proper damage award for that of the jury, but instead, will look only to the evidence supporting the jury's verdict and the reasonable inferences to be drawn from that evidence. Id. We will not disturb a damage award if there is any evidence in the record which supports the amount of the award, even if it is conflicting. Id.

Moreover, a panel of this Court recently affirmed a jury verdict awarding a plaintiff zero damages but finding the defendant liable. Flores v. Gutierrez, No. 45A04-1101-CT-28, slip op. at 8 (Ind. Ct. App. Aug. 10, 2011). More particularly, the Flores

Court determined that there was evidence presented that plaintiff's damages were not caused by the defendant's actions, thus supporting zero damages. Flores, slip op. at 8.

B. Instruction 15

Although Every Meadows's argument is somewhat unclear, it appears to contend that the jury failed to interpret Instruction 15 correctly,[3] and as a result, it awarded Every Meadows zero damages. More particularly, after deliberations began, the jury asked a question regarding Instruction 15. The parties were brought into chambers with the trial judge and the question was read; however, the discussion was not held on the record. Ultimately, the trial court stood on the plain language of the instruction and refused to comment on the question. The jury was informed to read the instruction without further comment. Every Meadows claims that the jury's quick decision to award zero damages is evidence that they did not understand the instruction and that the trial court should have clarified the instruction rather than telling the jury to reread it.

Instruction 15 stated:

> To recover damages from McKnight Excavating, Every Meadows, LLC should prove all of the following by the greater weight of the evidence:
>
> 1. The parties entered into a contract;
> 2. Every Meadows LLC performed its part of the contract;
> 3. McKnight Excavating, Inc. failed to perform its part of the contract or performed in a defective manner;
> 4. Defendant's breach of contract damaged the Plaintiff;
> 5. The parties reasonably anticipated those damages when they entered into the contract; and
> 6. The breach of contract was a responsible cause of those damages.

[3] Every Meadows does not argue that Instruction 15 is an incorrect statement of the law.

> As I have stated, the Plaintiff must prove these propositions. The Defendant has no burden to disprove them.

Tr. p. 573 (altered to display in list format).

Initially, we note that the trial court must exercise discretion when determining whether certain inquiries of the jury should be answered. Exec. Builders, Inc., v. Trisler, 741 N.E.2d 351, 357 (Ind. Ct. App. 2000). Additionally, as will be discussed in more detail below, the jury's decision to award Every Meadows zero damages is not evidence that the jury misinterpreted Instruction 15. Indeed the award is consistent with an accurate understanding of the jury instruction.

C. Actual and Liquidated Damages

Every Meadows argues that in light of the jury's conclusion that McKnight breached the Contract, its award of zero damages is inadequate as a matter of law and that it had to award actual and liquidated damages. In support of its argument that it is entitled to actual damages, Every Meadows claims $2,000 in damages to a county road; $11, 607 for cost of repairs performed by Walnut Acres; $160,000 in lost profits; and various replacement costs.

Here, the jury heard testimony from Alvin Skoog of Falcon Engineering, Inc., who prepared several pages of the construction drawings outlining an erosion control plan. Tr. p. 103-104. This erosion control plan, incorporated into the Contract, was part of the drawings by which Every Meadows and McKnight agreed to be bound. McKnight's specifically defined duties under the Contract did not include erosion control; Every

Meadows was responsible under the Contract for everything in the construction plans not specifically contracted to McKnight. Tr. p. 182; Def. Ex. C; Def. Ex. I. And the jury heard significant evidence that erosion control was not adequately performed or maintained by Every Meadows. Tr. p. 177-78, 283, 506-512. Consequently, the jury could reasonably conclude that Every Meadows did not perform its part of the contract and, therefore, not award it any damages. See Rogier v. American Testing & Engineering Corp., 734 N.E.2d 606, 620 (Ind. Ct. App. 2000) (recognizing the common law doctrine that a party who has breached a contract cannot take advantage of his breach to relieve him of his contractual obligations).

Similarly, Jury Instruction 21[4] (Instruction 21) is also illuminating, particularly when read in conjunction with Instruction 15. More particularly, Instruction 21 provided:

> A plaintiff must use reasonable care to minimize damages after the harm. The plaintiff may not recover for any item of damages they have they could have avoided through the use of reasonable care. The Defendant has a burden of proving by the greater weight of the evidence that the Plaintiff failed to use reasonable care to minimize their damages. You should not consider failure to minimize damages as fault. Rather you may consider failure to minimize damages to reduce the amount of damages that the Plaintiff claims.

Tr. p. 574-75.

In this case, in light of the evidence presented at trial, the jury could have concluded that the damages that Every Meadows incurred were the result of its failure to minimize its damages by not maintaining the erosion control measure that McKnight had

[4] Every Meadows does not argue that Instruction 21 is an incorrect statement of the law.

implemented. Tr. p. 177-78, 278, 283, 506-512. See Belle City Amusements, Inc. v. Doorway Promotions, Inc., 936 N.E.2d 243, 251 (Ind. Ct. App. 2010) (stating that a party seeking damages in a breach of contract action must prove by a preponderance of the evidence that the breach was the cause in fact of the loss).

As for liquidated damages, they are typically only appropriate when actual damages are not easily determinable. Rogers v. Lockard, 767 N.E.2d 982, 992-93 (Ind. Ct. App. 2002). Indeed, where actual damages are identifiable, the liquidated damages clause becomes a penalty and is unenforceable. Id. at 993.

According to Every Meadows, its actual damages are readily identifiable. Under these circumstances, it is prevented from also seeking liquidated damages. And inasmuch as we have determined that the jury's decision to award Every Meadows zero damages was not erroneous, this argument fails, and we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

KIRSCH, J., and BROWN, J., concur.