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**IN THE
COURT OF APPEALS OF INDIANA**

CONSTRUCTION LABOR)
CONTRACTORS, INC.,)
)
Appellant-Plaintiff,)
)
vs.) No. 18A02-1008-CC-881
)
MASIONGALE ELECTRICAL-)
MECHANICAL, INC.,)
)
Appellee-Defendant.)

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
The Honorable Darrel K. Peckinpaugh, Master Commissioner
Cause No. 18C01-0811-CC-192

April 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Construction Labor Contractors, Inc. (“CLC”) appeals from the denial of its Motion to Correct Error seeking additur following a judgment in its favor against Appellee-Defendant Masiongale Electrical-Mechanical, Inc. (“Masiongale”). We reverse and remand with instructions.

Issue

CLC raises three issues on appeal which we consolidate and restate as the following single issue: whether the trial court abused its discretion by denying CLC’s Motion to Correct Error following a judgment in CLC’s favor for \$2,438.39 in damages.

Facts and Procedural History

CLC is in the business of providing temporary manual labor to construction projects. It pays its workers’ salaries and handles all their associated payroll functions, such as withholding income taxes, paying Social Security taxes, and maintaining unemployment and workers’ compensation insurance. CLC then charges its customers a single rate for the labor it provides based on each employee’s trade and skill level. When CLC provides workers to a job with prevailing wage requirements, CLC increases its rates to clients to reflect the increased cost of labor.

In August 2007, CLC Field Representative Dave Szarf (“Szarf”) approached Masiongale President Ken Masiongale regarding the possibility of CLC providing labor to Masiongale for its work as a subcontractor to a construction job at Indiana University-Southeast (“I.U.-Southeast project”). Masiongale signed a Client Services Agreement (“the

Agreement”) with CLC on October 11, 2007 that provided that CLC would supply Masiongale with workers that “will be of the quality, and have the knowledge the Client requested,” but was silent as to the specific skill level or number of employees Masiongale needed, or the specific rates that CLC would charge. Plaintiff’s Ex. 3. The contract also included a clause in section 2(d) which stated:

If Client utilizes a CLC employee to work on a prevailing wage job, Client agrees to notify CLC with the correct prevailing wage rate and correct job classification for duties CLC employees will be performing. Failure to provide this information, or providing incorrect information may result in the improper reporting of wages, resulting in fines and penalties being imposed upon CLC. The Client agrees to reimburse CLC for any and all fines, penalties, wages, lost revenue, administrative and/or supplemental charges incurred by CLC.

Id.

Ken Masiongale requested two electricians from CLC, and testified that he requested these electricians be unskilled. CLC sent two workers, but Masiongale eventually dismissed them both. When Masiongale dismissed a worker, CLC sent a replacement, and in total sent nine workers, of which Masiongale rejected seven. Masiongale explained that he had to turn some of CLC’s workers away, “mainly because they weren’t punctual.” Tr. 171.

CLC did not pay any of its workers on the IU-Southeast project pursuant to a prevailing wage scale, because, according to CLC general manager Bob Beckwith (“Beckwith”), Masiongale did not provide CLC with a wage scale for the project. Masiongale maintained that the I.U.-Southeast project was not subject to a prevailing wage. However, a few of CLC’s workers thought otherwise after being on the work site, and informed CLC management of their concerns. CLC investigated, and asked Masiongale

“several times” whether the I.U.-Southeast job was subject to a prevailing wage requirement; each time he replied that it was not. Tr. 42.

Eventually, one of the workers contacted the Indiana Department of Labor (“DOL”) regarding the I.U.-Southeast project. The DOL investigated and determined that CLC underpaid its workers because the I.U.-Southeast project was subject to the Indiana Common Construction Wage Scale. The DOL audit report formally classified CLC’s assigned workers in “unskilled” and “skilled” categories, and, based on those classifications, determined that CLC had underpaid them by \$19,198.02. CLC has since paid its workers in compliance with the DOL audit.

Relying on section 2(d) of the Agreement, CLC issued a revised invoice to Masiongale requesting additional payment for the labor CLC had provided, and, when Masiongale refused to pay, CLC sued for breach of contract seeking \$30,812.26 in damages. After CLC failed on summary judgment, the court held a bench trial over three separate days (December 16, 2009, January 20, 2010, and March 10, 2010), and on June 3, 2010, it entered judgment in favor of CLC for \$2,438.39 plus costs of the action. CLC filed a Motion to Correct Error pursuant to Indiana Trial Rule 59 on July 3, 2010, which the trial court denied on July 12, 2010. CLC now appeals.

Discussion and Decision

Standard of Review

A trial court has broad discretion when granting or denying a Motion to Correct Error, and we will reverse its decision only when it abuses that discretion. White v. White, 796

N.E.2d 377, 379 (Ind. Ct. App. 2003). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court or the reasonable inferences that may be drawn therefrom, or if the trial court has misinterpreted the law. Hawkins v. Cannon, 826 N.E.2d 658, 662 (Ind. Ct. App. 2005), trans. denied.

We also consider the standard of review for the underlying ruling. Shane v. Home Depot USA, Inc., 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007). In this case, the underlying ruling is a general judgment for damages in favor of CLC for \$2,438.39 plus costs of the action. The trial court's memorandum decision does not constitute special findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52. Gallant Ins. Co. v. Wilkerson, 720 N.E.2d 1223, 1226 (Ind. Ct. App. 1999). However, we may examine the memorandum to determine the meaning and effect of the order. Smithers v. Mettert, 513 N.E.2d 660, 662 (Ind. Ct. App. 1987), trans. denied. When the trial court does not make special findings, we review its decision as a general judgment and, without reweighing the evidence or considering witness credibility, affirm that judgment if sustainable by any theory consistent with the evidence. Walker v. Nelson, 911 N.E.2d 124, 127 (Ind. Ct. App. 2009).

Applicability of Section 2(d) and Breach

As an initial matter, we address Masiongale's argument that it did not breach the Agreement because section 2(d) is inapplicable in this case, and, therefore it was not required to provide wage rate and job classification information to CLC. Masiongale maintains that the I.U.-Southeast project was not a "prevailing wage" project because the term "prevailing wage" in the contract refers only to federally funded projects governed by the Davis-Bacon

Act,¹ whereas the Indiana Common Construction Wage Law governs projects funded with state money, which was the case with the I.U.-Southeast project. We disagree.

Unless the terms of a contract are ambiguous, we will give them their plain, ordinary meaning. Kiltz v. Kiltz, 708 N.E.2d 600, 602 (Ind. Ct. App. 1999), trans. denied. Clear and unambiguous terms are conclusive, and we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. Id. The terms of a contract are not ambiguous merely because controversy exists between the parties concerning the proper interpretation of terms. Id. A contract is ambiguous only where a reasonable person could find its terms susceptible to more than one interpretation, and reasonably intelligent persons would honestly differ as to the term's meaning. Cummins v. McIntosh, 845 N.E.2d 1097, 1104 (Ind. Ct. App. 2006), trans. denied; Four Seasons Mfg., Inc v. 1001 Coliseum, LLC, 870 N.E.2d 494, 501 (Ind. Ct. App. 2007).

The Common Construction Wage Act, codified in I.C. § 5-16-7-1, is Indiana's prevailing wage law. See City of Jasper v. Collignon, 789 N.E.2d 80, 95 (Ind. Ct. App. 2003) (“[T]he common construction wage statute was first passed in 1935 as the ‘prevailing wage law.’”), trans. denied; also E.L.C. Elec., Inc. v. Indiana Dept. of Labor, 825 N.E.2d 16, n.1 (Ind. Ct. App. 2005) (referring to I.C. §§ 5-16-7-1 through 5-16-7-5, the statutory provisions for the prevailing wage law, as the “Common Construction Wage Act.”); Bayh v. Indiana State Bldg. and Const. Trades Council, 674 N.E.2d 176 (Ind. 1996) (upholding the constitutionality of amendments to I.C. § 5-16-7, “the Prevailing Wage Act”). While

¹ 40 U.S.C.A. §§ 3141-3148 (West 2011).

Masiongale is correct that the Davis-Bacon Act is a federal prevailing wage law, both the Davis-Bacon Act and the Indiana Common Construction Wage Act are specific names of laws that fall within the general umbrella of prevailing wage laws. Stampco Constr. Co. v. Guffey, 572 N.E.2d 510, 513 (Ind. Ct. App. 1991) (“[T]he Davis-Bacon Act and I.C. §5-16-7-1 *et seq.*...require payment of wages at the prevailing rate”). Consequently, we do not find the phrase “prevailing wage law” in section 2(d) ambiguous, even though the parties disagreed as to its meaning. Kiltz, 708 N.E.2d at 602. Thus, because the I.U.-Southeast project was subject to the Indiana Common Construction Wage Act, a prevailing wage law, Masiongale was contractually obligated to provide CLC with the applicable wage scale. In entering judgment in favor of CLC, the trial court found, based on the evidence and the perceived credibility of witnesses, that Masiongale had breached the terms of the Agreement.

Damages

The trial court entered judgment in favor of CLC on its complaint for breach of contract, and ordered Masiongale pay \$2,438.39 in damages. The court did not award CLC its requested \$30,812.26 because “defendant should not be responsible for the additional costs of the skilled workers that were sent to defendant, but...defendant should be responsible for the additional costs associated with the unskilled workers that were sent as requested.” App. p. 159. CLC maintains that the trial court erred in determining that Masiongale requested unskilled workers.

Section 2(a) of the Agreement states that “CLC will guarantee that the CLC employee sent to the Client’s job site will be of the quality and have the knowledge the Client

requested.” Ex. 3. Although Masiongale’s specific labor request is not included in the contract, Ken Masiongale testified that he requested “unskilled” electricians from CLC and explained that he had his own electricians on site and mainly needed laborers for hand-digging and backfilling. Ken Masiongale also made a note on the back of Szarf’s business card, which was introduced into evidence, and reads “unskilled ele- \$21.00-23.” Ex. K. From this evidence the trial court could have determined that Masiongale requested only unskilled labor. CLC’s arguments to the contrary are an invitation to reweigh the evidence and judge witness credibility on appeal, which we will not do.² Walker, 911 N.E.2d at 127. Thus, we do not find error in the trial court’s determination that Masiongale requested unskilled workers.

Next, we review the trial court’s calculation of damages associated with Masiongale’s failure to provide prevailing wage information for the requested unskilled workers. We will reverse an award of damages only when it is not within the scope of the evidence before the finder of fact. Crider & Crider, Inc. v. Downen, 873 N.E.2d 1115, 1118 (Ind. Ct. App. 2007). The computation of damages is a matter within the trial court’s discretion, and no degree of mathematical certainty is required so long as the amount awarded is supported by the evidence in the record. Romine v. Gagle, 782 N.E.2d 369, 382-83 (Ind. Ct. App. 2003) (quoting Gasway v. Lalen, 526 N.E.2d 1199, 1203 (Ind. Ct. App. 1988)), trans. denied.

² Moreover, we decline to address CLC’s argument that the parties modified the contract because CLC did not raise this argument at trial. “Issues not raised at the trial court are waived on appeal.” Cavens v. Zaberdac, 849 N.E.2d 526, 533 (Ind. 2006). CLC’s argument that “the theory was certainly implied by the evidence” (Appellant’s R. Br. p. 4) is also unavailing. “In order to properly preserve an issue for appeal, a party must, at a minimum, ‘show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.’” Cavens, 849 N.E.2d at 533 (quoting Endres v. Ind. State Police, 809 N.E.2d 320, 322 (Ind. 2004)).

However, a damage award must be supported by probative evidence and cannot be based upon mere speculation, conjecture, or surmise. Crider & Crider, 873 N.E.2d at 1118. The award must be referenced to some fairly defined standard, such as cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances. Id.

In a breach of contract case, the measure of damages is the loss actually suffered by the breach. Sheppard v. Stanich, 749 N.E.2d 609, 611 (Ind. Ct. App. 2001). In other words, the non-breaching party may recover the benefit of the bargain. Fitzpatrick v. Kenneth J. Allen and Associates, P.C., 913 N.E.2d 255, 265 (Ind. Ct. App. 2009) (quoting Berkel & Co. Contractors, Inc. v. Palm & Associates, Inc., 814 N.E.2d 649, 658 (Ind. Ct. App. 2004)). However, a party injured by a breach of contract is limited in his recovery to the loss actually suffered, and he must not be placed in a better position than he would have enjoyed had the breach not occurred. Crider & Crider, 873 N.E.2d at 1118.

Here, if CLC is awarded \$30,812.26, it will be placed in a better position than it would have been in without the breach. After the DOL audit, CLC issued a revised invoice listing the hours CLC employees worked, the rates that CLC charged for their work, and the rates that CLC would have charged for their work had it been aware of the prevailing wage (thus, the wages it would have charged had there been no breach). Ex. 17. Specifically, CLC charged between \$20.60—\$23.70 for its workers before knowledge of the prevailing wage, but after obtaining the scale, CLC charged \$28.45 for the workers DOL determine to be unskilled, and \$61.52 for the workers that the DOL determined to be skilled. Ex. 17. Thus,

without breach, Roderick Major, Derwin Sawyers, John Harris, Jr., and Titus Phillips would have been billed out at \$28.45 per hour, but because of the DOL's audit, CLC now attempts to bill each out at \$61.52 per hour. Ex. 17. It was CLC's prerogative to fill Masiongale's order for unskilled electricians with these workers (one of which was a Journeyman with twenty-five years' experience), but it cannot now use the DOL audit to essentially strike a better deal than the original. We therefore agree with the trial court that CLC is not entitled to the \$30,830.78 in damages sought.

However, we find that the trial court erred in calculating damages. Again, the award of damages must be within the scope of evidence before the court. Crider & Crider, 873 N.E.2d at 1118. Here, a judgment of \$2,438.39—purportedly, “the additional costs associated with the unskilled workers sent as requested” as shown in Exhibit 17—is not within the scope of evidence concerning the additional costs for unskilled labor associated with the prevailing wage scale. CLC's employees, both skilled and unskilled, provided a total of 1,371.25 hours to the IU-Southeast project. Ex. 17. CLC's rate for unskilled workers, had it known of the prevailing wage, was \$28.45 per hour. Ex. 17. Multiplying the 1,371.25 hours CLC employees worked by \$28.45 per hour yields \$39,012.06. Because Masiongale has already paid \$31,830.78, CLC is therefore still due \$7,181.22. This amount would give CLC the benefit of the bargain with Masiongale to supply two unskilled workers at the applicable prevailing wage rate.

Conclusion

While we again acknowledge the deference we afford trial courts in calculating

damages, we cannot discern how the court here could have reached its conclusion given the scope of evidence offered at trial. Therefore, we reverse the trial court's decision and remand the matter with instructions to enter a judgment in favor of CLC for \$7,181.22 in damages.

Reversed and Remanded.

NAJAM, J., and DARDEN, J., concur.