

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 8, 2004 Session

**EATHERLY CONSTRUCTION COMPANY v. HTI MEMORIAL  
HOSPITAL D/B/A MEMORIAL HOSPITAL**

**Appeal from the Chancery Court for Davidson County  
No. 01-1293-II Carol McCoy, Chancellor**

**No. M2003-02313-COA-R3-CV - Filed September 12, 2005**

This is a breach of contract action arising from the construction of a water line and pumping station for a new hospital. Eatherly Construction Company filed suit to recover \$35,250 for installation of 705 linear feet of twelve-inch ductile iron pipe that was omitted from its bid and \$10,000 of retainage funds withheld by the owner, HTI Memorial Hospital Corporation. The hospital denied Eatherly's claims and filed a counterclaim to recover *inter alia* liquidated damages of \$500 per day for each day the construction was delayed beyond the agreed completion date and attorney fees. The trial court summarily dismissed Eatherly's bidding error claim of \$35,250 and the hospital's claim for attorney fees. Following a bench trial, Eatherly was awarded the \$10,000 retainage while the hospital's claim for liquidated damages was dismissed. Both parties appealed. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Todd E. Panther, Nashville, Tennessee, for the appellant, HTI Memorial Hospital Corporation d/b/a Nashville Memorial Hospital.

Angus Gillis, III, Nashville, Tennessee, for the appellee, Eatherly Construction Company.

**OPINION**

HTI Memorial Hospital Corporation (Memorial) planned to construct a new acute care hospital, Skyline Medical Center. Part of the massive construction project required the construction of a new pumping station and the installation of 705 linear feet of a twelve-inch water line under an existing interstate highway.<sup>1</sup>

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<sup>1</sup> When completed, the pumping station and water line would become part of a system that provides water for a water tank located above Skyline Medical Center that was operated by the Madison Suburban Utility District.

Memorial circulated a Request for Bids for construction of the water line to a number of contractors.<sup>2</sup> Eatherly was one of several contractors to bid on the water line. It submitted a bid of \$432,035 for the water line on November 11, 1999. Its bid however contained a \$35,250 error. The specifications called for the installation of 705 linear feet of 12 inch ductile iron pipe. Eatherly priced that part of the work at \$50 per unit price (per linear foot). Eatherly correctly entered \$50 in the "Unit Price" column of its bid; however, it failed to write the extended price of \$35,250 in the "Extension" column on the bid form. The bid form at issue, entitled "Water Main Take-Off/Unit Price Schedule," comprised two pages and some sixty pre-printed lines of items and quantities stated thereon. Of course, the columns for the UOM unit prices and extension prices appeared as blank lines. When the bid was completed by Eatherly and submitted to Memorial, the bid form was in the following format:

Water Main Take-Off/Unit Price Schedule

Item	Qty.	UOM Unit Price	Extension
12/12/12 Tee	1 EA	<u>0</u>	<u>0</u>
12" Gate Valve	1 EA	<u>1,800.00</u>	<u>1,800.00</u>
16/12 Reducer	1 EA	<u>0</u>	<u>0</u>
16" D.I.P. Pipe	1140 LF	<u>64.00</u>	<u>72,960.00</u>
...	...	...	...
12" D.I.P. Pipe	705 LF	<u>50.00</u>	<u>1 3</u>
...	...	...	...
Site Restoration:			
Asphalt Paving	LS	<u>24,500.00</u>	<u>24,500.00</u>
Conc. Paving . . .	LS	<u>2,500.00</u>	<u>2,500.00</u>
Landscaping, Seed & Sod	LS	<u>500.00</u>	<u>500.00</u>
...	...	...	...
	[total bid]	<u>                    </u>	<u>\$432,035.00</u>

The mathematical product that should have been entered in the extension column for 705 linear feet of ductile pipe was \$35,250.<sup>4</sup> As a result of the error in the extension column, the total bid of \$432,035 for the water line work was \$35,250 less than Eatherly intended.

<sup>2</sup> The pumping station was not part of the first request for bids circulated by Memorial.

<sup>3</sup> It is disputed whether the "mark" in the extension column is the arabic symbol for the numeral "one" or whether it is nothing more than a random mark of no significance. None of the witnesses recall noticing the "mark" prior to substantial completion of the water line.

After submitting the bid for construction of the water line, Memorial requested Eatherly to submit an additional bid, for construction of a pumping station.<sup>5</sup> As requested, Eatherly submitted a bid, via letter dated November 30, 1999, for the pumping station in the amount of \$126,425. Unfortunately, Eatherly did not notice nor correct its prior \$35,250 error for the water line when it submitted the bid for the pumping station. Thus, Eatherly's original bid of \$432,035 for the water line was not corrected. The aggregate total of Eatherly's bid for the pumping station and the water line, with the \$35,250 error embedded therein, was \$566,836.<sup>6</sup>

Eatherly's bid for the pumping station and the water line (hereinafter the "Work") was the lowest bid submitted for the Work. The next lowest bid was \$593,710. Memorial awarded the contract for the Work to Eatherly because it was the "lowest responsive, responsible bidder."<sup>7</sup>

The parties entered into a contract for the Work (the Agreement) on February 7, 2000. The Agreement is comprised of numerous documents which are referred to as the "Contract Documents." The contract documents which comprise the Agreement are identified in Article 8 of Section 00500. Contract documents relevant to the issues presented include the Invitation for Bid, Instruction to Bidders, General Conditions, Specifications, Eatherly's bid, Notice of Award and Notice to Proceed. The Work to be performed by Eatherly was identified in Article 1 of the Agreement as the "Old Due West/New Due West Water Main/Pump Station."

Memorial issued the Notice to Proceed on February 11, 2000.<sup>8</sup> Eatherly commenced work on the water line and pumping station shortly thereafter. Eatherly did not submit a request for payment until after it had substantially completed the installation of the 705 linear feet of water line under Interstate 65. The \$35,250 bidding error was discovered by Eatherly while it was preparing its first request for payment. Eatherly informed Memorial of the \$35,250 error when it submitted its first request for payment, and requested that its compensation be increased accordingly. Memorial declined the invitation to pay more than the stipulated sum required of it in the Agreement. Thereafter, a number of differences arose resulting in the commencement of this litigation on April 25, 2001 when Eatherly filed suit against Memorial alleging the contract price should be increased because of the error in the bid. Eatherly also sought to recover \$10,000 which it contended Memorial wrongfully retained. Memorial filed an answer denying liability. Memorial also filed a counterclaim contending it was entitled to \$27,500 as liquidated

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<sup>4</sup> The record and briefs repeatedly state the extension amount incorrectly as being \$32,250. The correct extension amount is \$35,250, the product of 705 units multiplied by \$50 per unit.

<sup>5</sup> The reason it was not in the initial Request for Bids was that the drawings and specifications for the pumping station were not complete when the request was circulated. Instead of requesting another formal bid submittal, Memorial requested Eatherly submit its bid for the additional work in letter form.

<sup>6</sup> The original bid for the water line was \$432,035. The bid for the pumping station was \$126,425. In addition thereto, one and one-half percent was added for the cost of the bond, \$8,376.00, resulting in an aggregate bid for the water line and pumping station of \$566,836.

<sup>7</sup> Paragraph 16.10 of the Instructions to Bidders Section of the Contract Specifications provides, "If the Contract is to be awarded, it will be awarded to the lowest responsive, responsible Bidder. . . ."

<sup>8</sup> The Notice to Proceed included a stated contract price of \$557,474, less than the \$566,836 stated in the Agreement. The change in the contract price is not material to the issues and will not be discussed.

damages due to Eatherly's failure to complete construction on time, and attorney fees. Eatherly answered the counterclaim denying it was liable to Memorial on any of the claims.

Following discovery, the parties filed competing motions for partial summary judgment. Memorial sought a monetary judgment against Eatherly for liquidated damages and attorney fees and dismissal of Eatherly's claim of \$35,250 for the ductile iron pipe. In its competing motion for partial summary judgment, Eatherly sought dismissal of Memorial's claims for liquidated damages and attorney fees and a \$35,250 judgment against Memorial for the ductile iron pipe.

In June 2003 the trial court granted in part and denied in part the competing motions for summary judgment. In pertinent part the trial court:

1. found paragraph 4.18.1 of the General Conditions, upon which Memorial based its claim for attorney fees, applied to an action for indemnification, not breach of contract. The court also found that Memorial's claim was not an indemnification action, thus paragraph 4.18.1 did not apply and Memorial was not entitled to attorney fees.
2. denied summary judgment to both parties on the issue of liquidated damages.
3. with regard to Eatherly's claim for \$35,250.00 for the ductile iron pipe bid error, found the contract was for a stipulated sum which could be reformed if the stipulated sum was the result of a mutual mistake.
4. found the mistake was unilateral, not mutual. The Bid Proposal Form and Instructions to Bidder, upon which Eatherly relied to contend Memorial too made a mistake, did not impose an affirmative duty on Memorial, its engineer, or Madison Suburban Utility District to tabulate the bids and identify any bid errors that might exist.

Following a full evidentiary hearing, the surviving claims were decided as follows: Eatherly was granted a judgment for the \$10,000 retainage, and Memorial's counterclaim for liquidated damages due to construction delays was dismissed. The dismissal of the counterclaim occurred after Memorial put on its case in chief, pursuant to Tenn. R. Civ P. 41.02.

#### **ISSUES**

Both parties appeal. Memorial presents two issues. One, whether the trial court erred by dismissing Memorial's claim for liquidated damages pursuant to a Tenn. R. Civ. P. 41.02(2) motion. Two, whether the trial court erred by dismissing Memorial's claim for attorney fees on summary judgment. Eatherly presents three additional issues, all of which relate to its claim of \$35,250 for the installation of 705 feet of twelve-inch ductile iron pipe, which Eatherly failed to include in its bid. Eatherly contends the trial court erred by dismissing its claim on summary judgment, by not awarding it the amount prayed for and by not awarding it an equitable remedy

of \$26,974 which represents the difference between Eatherly's bid and the total bid of the next lowest bidder.

### STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mutual Automobile Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

The interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc.* 995 S.W.2d 88, 95 (Tenn. 1999). Issues as to interpretation and application of unambiguous contracts are likewise issues of law, the determination of which enjoys no presumption of correctness on de novo appellate review. *Doe v. HCA Health Services of Tennessee, Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001). Therefore, the trial court's interpretation of a contract is not entitled to a presumption of correctness under Tenn. R. App. P. 13(d) on appeal. *Angus v. Western Heritage Insurance Co.*, 48 S.W.3d 728, 739 (Tenn. Ct. App. 2000). Accordingly, we will review the contractual issues *de novo* and reach our own independent conclusions regarding their meaning and legal import. *Guiliano*, 995 S.W.2d at 95; *Hillsboro Plaza Enterprises v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993). When resolving disputes concerning contract interpretation, we

are to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language. *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 333-34 (Tenn. 1983). All provisions in the contract should be construed in harmony with each other, if possible, to promote consistency and to avoid repugnancy between the various provisions of a single contract. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *citing Rainey v. Stansell*, 836 S.W.2d 117, 118-19 (Tenn. Ct. App. 1992).

The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention consistent with legal principles. *Rainey v. Stansell*, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992); *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975). A primary objective in the construction of a contract is to discover the intention of the parties from a consideration of the whole contract. *McKay v. Louisville & N.R. Co.*, 182 S.W. 874 (Tenn. 1916). In construing contracts, the words expressing the parties' intentions should be given their usual, natural and ordinary meaning, *Taylor v. White Stores, Inc.*, 707 S.W.2d 514 (Tenn. Ct. App. 1985), and neither party is to be favored in the construction. *Ballard v. North American Life Ins. Co.*, 667 S.W.2d 79 (Tenn. Ct. App. 1983).

The court, at arriving at the intention of the parties to a contract, does not attempt to ascertain the parties' state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written. *Rainey v. Stansell*, 836 S.W.2d 117, 118-119 (Tenn. Ct. App. 1992); *citing Sutton v. First National Bank of Crossville*, 620 S.W.2d 526 (Tenn. Ct. App. 1981). All provisions of a contract should be construed as in harmony with each other, if such construction can be reasonably made, so as to avoid repugnancy between the several provisions of a single contract. *Rainey*, 836 S.W.2d at 119; *citing Bank of Commerce & Trust Co. v. Northwestern Nat'l. Life Ins. Co.*, 26 S.W.2d 135 (Tenn. 1930).

### **LIQUIDATED DAMAGES**

The trial court dismissed Memorial's claim for liquidated damages pursuant to a Tenn. R. Civ. P. 41.02(2) motion of Eatherly at the close of Memorial's case in chief. The trial court held the liquidated damages provision was a penalty and, therefore, was unenforceable. That ruling was based upon the specific finding that Memorial failed to establish that the liquidated sum, \$500 a day, was a reasonable estimation of the damages it would likely suffer in the event of a delay. Ruling from the bench, the trial judge stated:

I didn't hear anything with regards to how this contract was negotiated and that figure was calculated. The term adhesion contract was inserted in one of the closing arguments. I'm not willing to step up and say that this was an adhesion contract, but I will state that there is a lack of evidence as to how this provision was negotiated and what was the foresight that these individuals had when they entered into it as to what might be the potential harm.

Mr. Dennis said that it's insignificant at \$500 a day as to the damages that they might sustain for a breach, and I would concur that \$500 a day would be insignificant if I had some evidence to tie it to. And it might mean that there are other facts that could have been inserted into the proof. It may be that everybody was working so hard that you didn't sustain necessary harm to compensate you.

For all these reasons, the Court finds that the liquidated damages provision is a penalty and is unenforceable under existing case law in this state. Therefore, the motion is granted.

Tenn. R. App. P. 13(d)'s presumption of correctness requires appellate courts to defer to a trial court's findings of fact. *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000). Furthermore, we use the Tenn. R.App. P. 13(d) standard to review a trial court's disposition of a Tenn. R. Civ. P. 41.02(2) motion because the trial court has used the same reasoning to dispose of the motion that it would have used to make a final decision at the close of all the evidence. *College Grove Water Util. Dist. v. Bellenfant*, 670 S.W.2d 229, 231 (Tenn. Ct. App. 1984); *Nold v. Selmer Bank & Trust Co.*, 558 S.W.2d 442, 444 (Tenn. Ct. App. 1977). Thus, we review the record *de novo* with a presumption the trial court's findings are correct, unless the evidence preponderates against the trial court's factual determinations or the trial court committed an error of law affecting the outcome of the case. *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984); *Smith v. Inman Realty Co.*, 846 S.W.2d 819, 821 (Tenn. Ct. App. 1992). Moreover, we give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses. *Thompson v. Adcox*, 63 S.W.3d 783, 787 (Tenn. Ct. App. 2001).

The liquidated damages provision at issue pertained to the timely completion of the installation of a pumping station and water lines to service the Skyline Medical Center. The liquidated damages provision is set forth in the agreement under the subtitle "Contract Time." It provides:

### ARTICLE 3. CONTRACT TIME

- 3.1 The Work will be substantially completed, as described in paragraph 8.1.3 of the General Conditions, 120 calendar days from the Notice to Proceed.
- 3.2 Damages for Delay. The OWNER [Memorial] and Contractor [Eatherly] recognize that the Project has highly important environmental and economic significance and is required for compliance with Federal and State Regulations, that time is of the essence of this Agreement, and that the OWNER will suffer direct financial loss if the project is not completed as described in Article 3.1, and if the Work is not finally completed within 120 days after the date of substantial completion as set above. Accordingly, Contractor agrees to pay OWNER as liquidated damages the amount of \$500.00 per day for each day that the project is not substantially completed after the period stated in Article 3.1 and the additional amount of \$500.00 per calendar day for each day that the project has not been finally completed after the date as set forth above.
- 3.3 These liquidated damages are cumulative and additive and represent a reasonable estimate of OWNER's expenses for extended delays and

administrative costs associated with such delay. In addition to these liquidated damage amounts, there will be additional other amounts for delay damages incurred by the OWNER as a result of unavoidable delays by CONTRACTOR.<sup>9</sup> These actual delay damages will include, but not be limited to, inspection, engineering services, delay damage settlements or awards, penalties, and professional fees incurred in connection with such settlements, awards or penalties and fines imposed by regulatory agencies, contract damages and loss of use. Delay damages for excess cost of field inspection and engineering services will be assessed in accordance with the Supplementary Conditions.

Memorial submitted the Notice to Proceed on February 11, 2000. Thus, Eatherly was to complete the Work by June 10, 2000. Memorial contends that Eatherly did not complete the Work until August 12, 2000; thus it is entitled to \$500 for each of the 63 days for a total liquidated damage of \$31,500. Eatherly denies liability on two grounds. It challenges the validity of the liquidated damages provision and contends the Work was completed in a timely manner because it was granted additional time to complete the Work.

Damages are deemed “liquidated” if parties to a contract agree in advance on the amount of damages to be recovered for compensation upon the occurrence of a particular defaulting event. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 97 (Tenn. 1999); *see also V.L. Nicholson*, 595 S.W.2d 474, 484 (Tenn. 1980). The term "liquidated damages" is defined by case law as:

[A] "sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur." *V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd., Inc.*, *supra*; *Kimbrough & Co. v. Schmitt*, 939 S.W.2d 105, 108 (Tenn. Ct. App. 1996), perm. app. denied (Tenn. 1996). The stipulated amount represents an estimate of potential damages in the event of a contractual breach where damages are likely to be uncertain and not easily proven. *V.L. Nicholson*, 595 S.W.2d at 484.

*Guiliano*, 995 S.W.2d at 96-97. The purpose of liquidated damages is to provide a means of compensation in the event of a breach where “damages would be indeterminable or otherwise difficult to prove.” *Id.* at 98; *V.L. Nicholson*, 595 S.W.2d at 484. By stipulating to the damages that might reasonably arise from a breach, the parties estimate the potential damages likely to be sustained by the non-breaching party. "If the [contract] provision is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an enforceable stipulation for liquidated damages." *Guiliano*, 995 S.W.2d at 98; *V.L. Nicholson*, 595 S.W.2d at 484 (*citing City of Bristol v. Bostwick*, 240 S.W. 774 (Tenn. 1922)). If, however, the stipulated amount is unreasonable in relation to the potential or estimated damages, then it will be treated as a penalty. *Guiliano*, 995 S.W.2d at 98. If the provision is found to be a penalty, then it is unenforceable as against public policy. *Id.* at 101.

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<sup>9</sup> Contractor is typed two ways in the contract documents, “Contractor” and “CONTRACTOR.” There is no apparent reason for the two spellings.

Determining the propriety of the parties' agreement as to liquidated damages requires an assessment of two competing interests. One is the freedom of parties to bargain for and to agree upon terms. The other is limitations set by public policy. Generally, parties to a contract are free to agree upon other terms that may not seem desirable to outside observers. *See Chapman Drug Co. v. Chapman*, 341 S.W.2d 392, 398 (Tenn. 1960). In that respect, courts should not interfere in the contract, but should carry out the intentions of the parties and the terms bargained for in the contract, unless those terms violate public policy. *See McKay v. Louisville & N.R. Co.*, 182 S.W. 874, 875 (Tenn. 1916) (citing *Baltimore & Ohio S.W. Ry. Co. v. Voight*, 176 U.S. 498, 505 (1900)).

When parties agree to a liquidated damages provision, it is generally presumed that they considered the certainty of liquidated damages to be preferable to the risk of proving actual damages in the event of a breach. 22 AM.JUR.2d *Damages* § 726.

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Liquidated damages permit the parties to allocate business and litigation risks and often serve as part of the contractual bargain. In addition, they lend certainty to the contractual agreement and allow the parties to resolve defaults and other related disputes efficiently, when actual damages are impossible or difficult to measure. C.T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 157 (1935).

*Guiliano*, 995 S.W.2d at 100.

Tennessee follows what is called the “prospective approach” when addressing the propriety of a liquidated damages clause. *See Guiliano*, 995 S.W.2d at 100. Under the prospective approach, courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed “at the time of contract formation.”<sup>10</sup> *Id.* at 100. Those circumstances include:

[W]hether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract.” *Id.* at 100-101; *see also V.L. Nicholson*, 595 S.W.2d at 484. If the provision satisfies those factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages.

*Guiliano*, 995 S.W.2d at 100-101.

The liquidated sum must be a reasonable estimation, determined at the time the parties entered into the contract, of potential damages. *Id.* at 101. In *Guiliano* both the Court of Appeals

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<sup>10</sup> This prospective approach incorporates the cardinal rule of contract interpretation, requiring courts to ascertain the intentions of the parties based upon the language in the contract. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 100-101 (Tenn. 1999), *see also Bob Pearsall Motors, Inc.*, 521 S.W.2d at 580; *Nunnally v. Warner Iron Co.*, 94 Tenn. 282, 29 S.W. 124 (1895).

and the Supreme Court found the liquidated sum, agreed upon at the time the parties entered into the contract, was a reasonable estimate. *Id.* That finding was based on the fact that neither the prospective employee, Anthony Guiliano, nor the prospective employer, Cleo Inc., “had certain knowledge, when forming the contract, that the appellant would be able to secure other employment in the event that Cleo terminated his employment without cause.” *Id.*

It was within the fair contemplation of the parties that the appellant might not be able to find a similar professional position at the same salary and that he might suffer damages that would be difficult to prove, including loss of professional status, prestige, and advancement opportunities. The language . . . reflects the parties' intentions to compensate and to protect [Guiliano] against those potential losses in the event of a breach by Cleo.

*Id.* The *Guiliano* court further opined that “the extent of actual damages [sustained by Guiliano] has no bearing on the appellant's recovery of liquidated damages. . . . The liquidated sum is recoverable based upon our conclusion that it was [a reasonable estimation of damages]<sup>11</sup> at the time the parties entered into the contract and that it reflects the parties' original intentions to compensate for a termination of employment.” *Id.* at 101.

In *Guiliano*, the parties used a relevant and material economic value, that value was the annual salary of Anthony Guiliano. It represented the value for which Mr. Guiliano was willing to work and the value for which Cleo Inc. was willing to compensate him for his services. The significance of this value is that the parties did not pull a figure out of the air. To the contrary, they used a previously agreed upon value (Guilano’s salary) which value was relevant to the damage Guiliano was likely to sustain in the event his employment was terminated in violation of the agreement.

Here, the trial court specifically found there was no proof in the record to support a finding that the liquidated sum agreed upon was a reasonable estimate of the damages to be incurred by Memorial. The best, if not only evidence offered by Memorial to support its contention that \$500 per day is reasonable is that the parties “agreed” to the amount.<sup>12</sup> While the fact the parties “agreed” to the amount is relevant, and it is a factor to be considered in order to determine whether the amount was a reasonable estimate at the time the parties entered into the contract, that evidence – the parties’ agreement – standing alone does not preponderate against the trial court’s specific finding to the contrary.

In the trial court, Memorial had the burden to establish that the liquidated sum was a reasonable estimate of potential damages. *See Guiliano*, 995 S.W.2d at 100-101. The trial court found Memorial failed to meet that burden by making the specific finding that the evidence was

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<sup>11</sup> The quoted sentence only stated “reasonable” but the following paragraph, which was the conclusion of the opinion, substantially repeated the sentence but the phrase “a reasonable estimation of damages” was substituted for “reasonable.” *See Guiliano* at 101.

<sup>12</sup> The only other “evidence” offered by Memorial in support of the “reasonableness” of the \$500 per day value were the conclusory statements by Mike Dennis and John Massey. The essence of their testimony substantiated only the difficulty ascertaining actual damages in the event of construction delays. Their testimony provided no guidance as to how the figure \$500 per day was ascertained or its reasonableness.

inadequate to establish the liquidated sum agreed upon was a reasonable estimate. As a consequence of the trial court's finding, Memorial must establish on appeal the evidence preponderates against the trial court's finding of fact. *See* Tenn. R. App. P. 13(d). Specifically, Memorial must establish that the evidence supports another finding of fact with greater convincing effect. *See Rawlings*, 78 S.W.3d at 296; *see also Walker*, 40 S.W.3d at 71. The evidence in the record does not preponderate against that finding. Accordingly, we affirm the decision to dismiss Memorial's counterclaim for liquidated damages.<sup>13</sup>

#### ATTORNEY FEES - INDEMNIFICATION

Memorial claims it is entitled to recover its attorney fees from Eatherly, contending it is entitled to do so by contract based upon paragraph 4.18.1 of the General Conditions of the Contract Documents. The trial court summarily dismissed Memorial's claim for attorney fees concluding that paragraph 4.18.1 was merely an indemnification provision. We agree with the trial court.

The Agreement expressly provides that the so-called attorney fee provision, as Memorial characterizes it, is an indemnification provision.<sup>14</sup> The first indication of this is the title of the relevant section, which is numbered "4.18." It is entitled, "INDEMNIFICATION." The text of section 4.18 reads in pertinent part:

4.18.1 [T]he Contractor shall and does agree to indemnify, . . . and hold harmless the Owner, . . . from and against all claims, damages, losses, . . . causes of action, . . . and expenses (including attorney's fees) of any . . . description, directly or indirectly arising out of, caused by, or resulting from . . . : (1) breach of any of the Contractor's covenants, agreements, obligations or duties under the Contract Documents. . . . The Contractor shall promptly advise the Owner . . . of any action . . . as to which this indemnification may apply, and the Contractor, at the Contractor's expense shall assume on behalf of the Owner (and the other Indemnities) and conduct with due diligence and in good faith the defense thereof. . . .

4.18.2 In respect to any and all claims against the Indemnitees . . . the indemnification obligation under the Contract shall not be limited in any way by any limitation on the amount or type of damages. . . .

4.18.4 The Contractor shall indemnify, defend and hold harmless the Owner from and against any claim, demand or cause of action arising . . . to which such claim, demand or cause of action relates.

4.18.5 It is agreed with respect to any legal limitations . . . affecting the validity or limiting the enforceability of the indemnification obligation under this

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<sup>13</sup> The dismissal of Memorial's counterclaim for liquidated damages renders the reason for the delay in the completion of the Work moot. Thus, we will not address that component of this issue.

<sup>14</sup> Memorial contends section 4.18 entitles it to recover its attorney fees because it is merely asking that it be "indemnified" for its attorney fees. We find this contention to be without merit.

Paragraph 4.18, such legal limitations are made apart of the indemnification obligation and shall operate as an amendment . . . ; and as so modified, the indemnification obligation shall continue in full force and effect.

In construing contracts, the words expressing the parties' intentions should be given their usual, natural and ordinary meaning, *Taylor v. White Stores, Inc.*, 707 S.W.2d 514 (Tenn. Ct. App. 1985), and neither party is to be favored in the construction. *Ballard v. North American Life Ins. Co.*, 667 S.W.2d 79 (Tenn. Ct. App. 1983). Here, the words expressing the parties' intentions are those the parties placed in section 4.18. We find the liberal use of the words "indemnification" and "Indemnitees" significant. We also find that Eatherly's duties under section 4.18 are contingent upon there being a claim against Memorial by a third party. This is apparent because Eatherly is to "assume on behalf of the Owner (and the other Indemnities) and conduct . . . the defense thereof."

Applying Memorial's rationale would produce an absurd result in litigation that is only between Eatherly and Memorial. If section 4.18 applied to this litigation, Eatherly would be required to assume and conduct Memorial's defense. We need not discuss the absurdity of Eatherly conducting Memorial's defense in an action wherein Eatherly is the plaintiff. Nevertheless, there is another reason section 4.18 cannot be construed as Memorial contends. That is the indemnification provision only applies if and in the event a third party makes a claim based upon a breach of contract by Eatherly for which Memorial could be liable. Such a scenario cannot occur in a two party action between Memorial and Eatherly.

Tennessee courts follow the American Rule whereby litigants must pay their own attorney's fees unless there is a statute or contractual provision providing otherwise. *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005); *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000). The contract documents do not afford Memorial the right to recover its attorney fees in the litigation at issue. Accordingly, we affirm the trial court's holding that Memorial is not entitled to recover its attorney fees from Eatherly.

#### **THE \$35,250 ERROR**

Eatherly contends the trial court erred by summarily dismissing its claim of \$35,250 for the installation of 705 feet of twelve-inch ductile iron pipe, the price for which Eatherly failed to include in its bid. This claim is based upon two provisions in the contract documents. One, Eatherly contends that Memorial had a contractual duty to tabulate the bid – after it was submitted by Eatherly – to assure its accuracy and that it failed to do so. Two, Eatherly contends the contract documents provide that the bids are controlled by the unit prices stated therein, not the extension prices, and the "sum to be paid" is to be derived by "correctly extending the unit prices and then correctly adding the correctly extended figures." Memorial counters, stating the contract was for a stipulated sum which is not subject to modification absent agreement of the parties. In support of this argument, Memorial primarily relies on paragraph 4.1 of the Agreement which reads: "The OWNER shall pay CONTRACTOR a stipulated sum for performance of the Work in accordance with the Contract Documents on the basis of the prices indicated on the Bid Form." We find the contract documents support Memorial's position and the trial court's decision.

The court's task is to ascertain and give effect to the contracting parties' intentions by fairly construing the terms of their written agreement. *See Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990); *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975). We must construe a contract as written and is not at liberty to make a new contract for parties who have spoken for themselves. *See Petty v. Sloan*, 277 S.W.2d 355, 359 (1955); *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993). It is our responsibility to enforce contracts according to their plain terms without favoring either contracting party. *See Cocke County Bd. of Highway Comm'rs v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985); *Heyer-Jordan & Assocs., Inc. v. Jordan*, 801 S.W.2d 814, 821 (Tenn. Ct. App. 1990).

If the contract is unambiguous, we must enforce it according to its terms. *See Cummings v. Vaughn*, 911 S.W.2d 739, 742 (Tenn. Ct. App. 1995). Determining whether a contractual provision is ambiguous is a question of law. *See Anderson v. DTB Corporation*, 1990 WL 33380, at \*2 (Tenn. Ct. App. Mar.28, 1990). It requires that we construe the provision in light of the entire agreement, *see Cocke County Board of Highway Commissioners v. Newport Utilities Board*, 690 S.W.2d at 237, and to give the words their common, ordinary meaning. *See Wilson v. Moore*, 929 S.W.2d 367, 373 (Tenn. Ct. App. 1996).

It is undisputed that the 705 linear feet of ductile iron pipe was to be provided and installed by Eatherly. It was itemized in the bid Eatherly submitted and it was expressly required of Eatherly in the contract documents. Eatherly admits the omission of the extension price of \$35,250 was due to its oversight; however, it contends that of the contract documents required Memorial, along with the Engineering and Utility District, to tabulate the bid after it was submitted to assure its accuracy and that Memorial failed to do so. This contention is based upon a section the Bid Proposal Form which, Eatherly contends, places a duty upon Memorial to tabulate and correct any errors in Eatherly's bid. In pertinent part, the Bid Proposal Form provides:

After Bid Proposals are received, tabulated and evaluated by the Owner, the Engineer and the Utility District, and the successful bidder for each package has been determined, said bidder will be contacted to determine any scope duplications or omissions.

The trial court did not accept Eatherly's contention that the above placed an affirmative duty on Memorial to identify and correct bidding errors by Eatherly. Neither do we. The section above contemplates that bid proposals will be tabulated and evaluated after they are received; however, the language therein does not place an affirmative contractual duty on Memorial, as Eatherly contends, to identify and correct Eatherly's errors or be liable for the consequences.

Eatherly also contends the contract documents, specifically the Instructions to Bidders, requires errors, such as that committed, be corrected, no matter when the error is ascertained, based upon the specified unit price, the extension price and the total bid price notwithstanding. This contention is based upon section 14.5 of the Instructions to Bidders. It provides:

Discrepancies between the indicated sum of any column of figures and the correct sum thereof shall be resolved in favor of the correct sum. Discrepancies in the extension of the Unit Price times the estimated quantity for any line item shall be resolved in favor of the correct extension.

The primary fallacy with Eatherly's argument is the timing of its application. Eatherly contends it can be applied whenever the error is ascertained. Particularly, Eatherly contends it can and should be applied post contract and post performance of the Work. We disagree.

The section upon which Eatherly relies is in the Instructions to Bidders. After reviewing the contract documents, it becomes obvious that this section of the contract documents is for the limited purpose of correcting errors in bids prior to Notice of Award and prior to executing the Agreement.<sup>15</sup> It is obviously a mechanism to correct known errors in bids in order to award the contract for the work to the lowest responsive, responsible bidder. Section 14.5 has no application to ascertainment of errors after the parties enter into the Agreement, as is the case here.

The timing of Eatherly's request also precludes application of that portion of Section 14.5 that would have obligated Memorial to resolve the discrepancy in its extension of the unit price for the pipe in favor of the correct extension. Indeed, both parties would have been obligated to resolve the discrepancy based upon the extension price had the error been ascertained prior to the parties entering in to the agreement. Unfortunately for Eatherly, that time has passed along with Eatherly's ability to apply Section 14.5.

It should be acknowledged that the unit prices set forth in the bid have great significance, just not the significance Eatherly contends. For one, the unit prices are significant when change orders come into play because they establish the unit price when the parties agree to increase or decrease the number of such units. Simply put, Eatherly's reliance on the unit price and the duty of the parties to resolve discrepancies based upon unit prices is misplaced and has no application to the facts at issue.

#### REFORMATION OF CONTRACT

As an alternative to the contract theories discussed above, Eatherly contends it is entitled to reform the contract, as an equitable remedy, and an award in the amount of \$26,974, which represents the difference between Eatherly's total bid and that of the next lowest bidder. Specifically, Eatherly claims it is entitled to equitable relief because Memorial knew or should have known Eatherly made a mistake in its bid.

The trial court dismissed Eatherly's claim for reformation of the contract finding *inter alia* no mutuality of mistake, that the mistake was the unilateral mistake of Eatherly, and the requested relief could not be granted without prejudice to Memorial. We find no error with the trial court's decision.

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<sup>15</sup> The unit price is also utilized to price change orders but that application of the unit price protocol is not applicable to the matters in dispute.

A mutual mistake will provide a basis for equitable relief if the proof is clear and convincing. *Pierce v. Flynn*, 656 S.W.2d 42 (Tenn. Ct. App. 1983). A contract, which by reason of a mutual mistake in its execution does not conform to the real agreement of the parties, may be reformed when the mistake is established by clear and convincing proof. *Commercial Standard Ins. Co. v. Paul*, 245 S.W.2d 775, 778 (Tenn. Ct. App. 1951)(citing *Pittsburg Lumber Co. v. Shell*, 136 Tenn. 466, 189 S.W. 879; *Tennessee Valley Iron & R. Co. v. Patterson*, 14 S.W.2d 726; GIBSON'S SUITS IN CHANCERY, 4th Ed., Sec. 945, pp. 770, 771). The Chancellor's finding of no mutual mistake comes to this court with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d).

Mutual mistake has been defined as "one common to both parties to a contract, each laboring under the same misconception . . . respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." 17 C.J.S., CONTRACTS, § 144. A mistake is remediable only if it relates "to a fact which constitutes, or goes to, the very essence, or basis, of the contract. . . ." *Id.* Our cases have recognized that equitable relief on the ground of mutual mistake is available "not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction." *Robinson v. Brooks*, 577 S.W.2d 207, 208 (Tenn. Ct. App. 1978), quoting from 12 C.J.S., CANCELLATION OF INSTRUMENTS, § 27b.(1).

*Steadman v. Bailey*, 1986 WL 4587, \*1 (Tenn. Ct. App. April 18, 1986).

In *Cofransesco Construction Co. v. Superior Components, Inc.*, 371 S.W.2d 821 (Tenn. Ct. App. 1963), upon which Eatherly relies, we held that a building supplier, Superior, was entitled to reform its contract with a general contractor to which it had quoted a price for lumber. Superior submitted an erroneous bid of \$1,319 for the lumber. It intended to submit a bid of \$5,319. The court found that although Cofransesco did not participate in or cause Superior to make the bidding error, Cofransesco knew or should have known Superior's bid was the result of a mistake, and granted Superior's petition to reform the contract.

The bid error in *Cofransesco* was significant and obvious. This is due to the fact the error was more than 75% less than the intended bid. That fact alone was sufficient to establish Cofransesco knew or should have know Superior's bid was an error. Eatherly's error, unlike that by Superior, was insignificant. Instead of being more than seventy-five (75%) percent less than the intended bid amount, Eatherly's bid was a mere five (5%) percent less than the intended bid.<sup>16</sup> More significantly, it was only four (4%) percent less than the next lowest bidder.

Eatherly's burden of proof was to establish by clear and convincing evidence that Memorial knew or should have known of the error by Eatherly. *Commercial Standard Ins. Co.*, 245 S.W.2d at 778. Eatherly failed to satisfy this burden of proof. Accordingly, we affirm the trial court's dismissal of Eatherly's claim for reformation of the contract.

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<sup>16</sup> Eatherly's total bid for the Work was \$566,836, which was \$35,250 less than the intended bid of \$602,086. The next lowest bid was \$593,710.

**IN CONCLUSION**

The judgment of the trial court is affirmed and this matter is remanded with costs of appeal assessed against HTI Memorial Hospital Corporation.

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FRANK G. CLEMENT, JR., JUDGE