

NEBRASKA SUPREME COURT

McGill Restoration, Inc. v. Lion Place Condominium Association

309 Neb. 202 (2021) · No. No. S-20-416 · Decided May 14, 2021

SUMMARY

The Nebraska Supreme Court affirmed a judgment for McGill Restoration in its breach-of-contract action against Lion Place Condominium Association for unpaid restoration work. The court held that Lion waived its right to a jury trial, that expert testimony was required to establish whether the contractor performed in an unworkmanlike manner, and that the trial court properly excluded or limited certain testimony and settlement-related evidence. The court also upheld the awards of damages, attorney fees, and prejudgment interest.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Freudenberg, J.; Heavican, C.J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.
JURISDICTION	Nebraska
DECIDED	May 14, 2021
DOCKET	No. S-20-416
DISPOSITION	affirmed
PROCEDURAL POSTURE	Lion Place Condominium Association appealed from a Douglas County District Court judgment entered after a bench trial in favor of McGill Restoration on its breach-of-contract claim. The appeal challenged the denial of a jury trial, evidentiary rulings concerning expert and compromise-negotiation evidence, the judgment amount, prejudgment interest, and attorney fees.
STANDARD OF REVIEW	Factual findings in a bench trial of a law action are reviewed for clear error; the appellate court does not reweigh evidence and views it most favorably to the successful party. Relevancy and evidentiary rulings are reviewed for abuse of discretion. Whether the correct legal standards for admitting expert testimony were applied is reviewed de novo, while application of those standards is reviewed for abuse of discretion. Discovery rulings and attorney-fee determinations are reviewed for abuse of discretion. Preliminary factual questions under

	Neb. Rev. Stat. § 27-408 are reviewed for clear error. Prejudgment-interest awards are reviewed de novo.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Lion Place Condominium Association v. McGill Restoration, Inc.

TOPICS

breach of contract construction law expert testimony evidence appellate procedure

PRACTICE AREAS

contract law construction law evidence civil procedure appellate procedure remedies

QUESTIONS PRESENTED

1. Whether Lion waived its statutory right to a jury trial through its counsel's oral consent in open court to a bench trial.
2. Whether the district court properly excluded a letter and testimony concerning compromise negotiations under Neb. Rev. Stat. § 27-408.
3. Whether the district court properly limited or excluded testimony from contractors designated as fact and expert witnesses.
4. Whether expert testimony was required to establish that McGill's technical restoration work was performed in an unworkmanlike manner.
5. Whether the district court properly excluded or disregarded Lion's proposed expert testimony for lack of foundation.
6. Whether the district court properly awarded attorney fees based on Lion's frivolous defense and counterclaims.
7. Whether the district court properly awarded prejudgment interest despite the complaint's failure to specify the date from which interest would be calculated.

HOLDINGS

1. A civil litigant waives the right to a jury trial under Neb. Rev. Stat. § 25-1126(3) when the party's attorney consents in open court to a bench trial and the consent is entered on the court's journal. An attorney's authority to manage civil litigation includes the authority to waive a jury trial.
2. Evidence of statements and conduct made during compromise negotiations concerning a disputed claim is inadmissible under Neb. Rev. Stat. § 27-408, including when offered as an admission against interest or to impeach a witness with an inconsistent statement.
3. Ordinarily, expert testimony is required to establish that technical construction or restoration services were performed in an unworkmanlike manner because the applicable standard of care is outside ordinary knowledge. Lay evidence may suffice for failure to achieve a specific result only when the contract

expressly guarantees that result, not when it merely requires workmanlike performance according to industry standards.

4. A trial court may exclude an expert opinion when the witness lacks sufficient knowledge of the work, applicable industry standards, relevant products, scope of the contract, or factual basis for causation; an opinion based solely on temporal correlation is unreliable.
5. Attorney fees may be awarded when a party persists in asserting a claim or defense after it knows or reasonably should know that it cannot prevail, and the amount of the award is reviewed for abuse of discretion.
6. Failure to specify the date from which prejudgment interest is claimed in the pleading does not preclude a statutory award when the opposing party had notice of the interest claim and an opportunity to be heard before judgment.

KEY QUOTATIONS

“That authority is not absolute; it does not, for example, encompass settlement of a claim without a client’s specific consent or silence in open court. But it encompasses the choice, in a civil action as opposed to a criminal action, to waive a jury trial.” (226)

“Allowing such an exception would swallow the exclusionary rule premised on the idea that settlement negotiations would be inhibited if the parties knew that statements made in the course of compromise negotiations might later be used against them as admissions of liability.” (231)

“It is true that expert testimony is not necessarily required to establish a breach by the failure to achieve a promised particular result that can be shown by lay witness observations, but that is when the contract explicitly guarantees a certain result and not just to perform in a workmanlike fashion according to industry standards.” (236)

“Simply because the facade demonstrated deterioration after McGill performed its work does not mean it was a failure by McGill to substantially comply with its duties under the contract that caused the deterioration.” (238)

FACTUAL BACKGROUND

McGill Restoration orally agreed to perform facade-repair work for Lion Place Condominium Association for \$25,000 and completed the work in 2009, including some additional work without charging extra. Lion did not pay the invoice and did not complain about the work until approximately three years later. Lion later observed deterioration and obtained repair bids, but it did not provide properly founded expert testimony connecting the deterioration to McGill's work or establishing that McGill failed to meet industry standards. The district court found that McGill substantially performed the contract in a workmanlike manner and that Lion's defenses and counterclaims were unsupported.

PROCEDURAL HISTORY

McGill sued Lion in county court for breach of contract and quantum meruit based on unpaid repair work. Lion asserted defenses and counterclaims for breach of contract, breach of warranties, and negligence, causing

transfer to district court because of the amount of the counterclaim. After a three-day bench trial, the district court awarded McGill \$25,000 plus prejudgment interest and later awarded \$5,920 in attorney fees. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Maloley v. Central Neb. Pub. Power & Irr. Dist., 303 Neb. 743, 931 N.W.2d 139 (2019)
- Jaeger v. Jaeger, 307 Neb. 910, 951 N.W.2d 367 (2020)
- Pitts v. Genie Indus., 302 Neb. 88, 921 N.W.2d 597 (2019)
- Roskop Dairy v. GEA Farm Tech., 292 Neb. 148, 871 N.W.2d 776 (2015)
- Yeransian v. Willkie Farr, 305 Neb. 693, 942 N.W.2d 226 (2020)
- Jacobson v. Shresta, 288 Neb. 615, 849 N.W.2d 515 (2014)
- Cave v. Reiser, 268 Neb. 539, 684 N.W.2d 580 (2004)
- Luethke v. Suhr, 264 Neb. 505, 650 N.W.2d 220 (2002)
- Baker v. Blue Ridge Ins. Co., 215 Neb. 111, 337 N.W.2d 411 (1983)
- Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652 (4th Cir. 1988)
- Dycus v. Dycus, 307 Neb. 426, 949 N.W.2d 357 (2020)
- Mitchell v. Eyre, 190 Neb. 182, 206 N.W.2d 839 (1973)
- Schwarz v. Platte Valley Exterminating, 258 Neb. 841, 606 N.W.2d 85 (2000)
- Bargmann v. Soll Oil Co., 253 Neb. 1018, 574 N.W.2d 478 (1998)
- McLaughlin Freight Lines v. Gentrup, 281 Neb. 725, 798 N.W.2d 386 (2011)
- CCC Group, Inc. v. South Cent. Cement, Ltd., 450 S.W.3d 191 (Tex. App. 2014)
- Korth v. Luther, 304 Neb. 450, 935 N.W.2d 220 (2019)
- George Clift Enters. v. Oshkosh Feedyard Corp., 306 Neb. 775, 947 N.W.2d 510 (2020)
- AVG Partners I v. Genesis Health Clubs, 307 Neb. 47, 948 N.W.2d 212 (2020)
- VRT, Inc. v. Dutton-Lainson Co., 247 Neb. 845, 530 N.W.2d 619 (1995)
- Pioneer Enterprises v. Edens, 216 Neb. 672, 345 N.W.2d 16 (1984)

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