

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

THE PRESENT ACTION FOR YOUR CONSIDERATION IS A CONTRACT ACTION. IT IS A CONTRACT FOR THE CONSTRUCTION OF A PUBLIC HOUSING PROJECT IN PAINTSVILLE, JOHNSON COUNTY, KENTUCKY.

THE PLAINTIFF, RAY BELL CONSTRUCTION COMPANY, INC., WAS THE PRIME CONTRACTOR FOR THE PROJECT. THE DEFENDANT, HOUSING AUTHORITY OF PAINTSVILLE, KENTUCKY, IS THE ONE FOR WHOM THE PROJECT IS BEING CONSTRUCTED. THE DISPUTE IN THIS ACTION ARISES FROM THE SUBSURFACE PORTION OF THE CONTRACT. IT REQUIRES DRILLING AND EXCAVATION THROUGH THE EARTH TO A LAYER OF BEDROCK THEREUNDER AND THE INSTALLATION OF FORTY-FOUR (44) CAISSONS WHICH WERE FILLED WITH CONCRETE TO ESTABLISH A SOLID FOUNDATION FOR THE BUILDING. THE SPECIFICATIONS OF THE CONTRACT REQUIRING DESIGN PROVIDES THAT THE CAISSONS BE EMBEDDED IN NOT LESS THAN EIGHT (8.0) FEET OF ROCK EMBEDMENT, ON A LINE IN ELEVATION OF FIVE HUNDRED THIRTY-TWO (532) FEET, PLUS OR MINUS.

A SUB-CONTRACTOR OF PLAINTIFF SUBMITTED A BASE BID, IN THE SUM OF THREE HUNDRED FIFTEEN THOUSAND DOLLARS (\$315,000). SUBSEQUENTLY, AFTER ITS BID WAS ACCEPTED, THE PLAINTIFF, CONTRACTOR, SUBMITTED TO THE DEFENDANT, HOUSING AUTHORITY OF PAINTSVILLE, A UNIT PRICE RATE FOR DIRT, BOULDERS AND SHALE EXCAVATED FROM THE CAISSONS. IT IS THE CONTENTION OF THE PLAINTIFF THAT IN ACCORDANCE WITH THE PRACTICES OF THE SUB-SURFACE DRILLING INDUSTRY THE UNIT PRICE RATE WAS TO APPLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

DUTY TO FOLLOW INSTRUCTIONS

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

CONSIDERATION OF THE EVIDENCE, ETC.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

CREDIBILITY OF WITNESSES

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Plaintiff or to the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

IMPEACHMENT

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

EXPERT WITNESSES

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

BURDEN OF PROOF

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that claim.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

DUTY TO DELIBERATE

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

VERDICT FORMS

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman or forewoman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

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A SUB-CONTRACTOR OF PLAINTIFF SUBMITTED A BASE BID, IN THE SUM OF THREE HUNDRED FIFTEEN THOUSAND DOLLARS (\$315,000). SUBSEQUENTLY, AFTER ITS BID WAS ACCEPTED, THE PLAINTIFF, CONTRACTOR, SUBMITTED TO THE DEFENDANT, HOUSING AUTHORITY OF PAINTSVILLE, A UNIT PRICE RATE FOR DIRT, BOULDERS AND SHALE EXCAVATED FROM THE CAISSONS. IT IS THE CONTENTION OF THE PLAINTIFF THAT IN ACCORDANCE WITH THE PRACTICES OF THE SUB-SURFACE DRILLING INDUSTRY THE UNIT PRICE RATE WAS TO APPLY

TO UNDERAGE OR OVERAGE IN VARIANCE WITH THE REQUIRED EIGHT (8.0) FEET BEDROCK REQUIREMENT. IT IS FURTHER THE CONTENTION OF THE PLAINTIFF, PURSUANT TO SAID UNIT PRICE, THAT THE DEFENDANT OWES THE SUM OF ONE HUNDRED SIXTY THOUSAND EIGHT HUNDRED TWENTY AND 35/100 DOLLARS (\$160,820.35) FOR ROCK IN EXCESS OF THE EIGHT (8.0) FOOT SPECIFICATION (WHETHER FROM BEDROCK OR BOULDER) TAKEN FROM THE CAISSONS.

IT IS THE CONTENTION OF THE DEFENDANT THAT THE BASE BID WAS COMPENSATION FOR EXCAVATION OF THE SUBSTANCIES ABOVE THE NOT LESS THAN EIGHT (8.0) FOOT BEDROCK LIMIT. IN THE EVENT THE CAISSONS WERE EMBEDDED DEEPER THE UNIT PRICE WOULD APPLY AS AN ADDITION: IN THE EVENT THE CAISSONS WERE NOT REQUIRED TO GO TO THE ELEVATION LEVEL THE DIFFERENCE WOULD BE DEDUCTED FROM THE BASE BID.

THE ISSUE, IS NOT THE EXISTENCE OF A CONTRACT BUT THE INTERPRETATION OF A PORTION THEREOF, THAT IS, WHETHER OR NOT THE CONTRACT REQUIRES PAYMENT FOR THE EXCAVATION OF ROCK ABOVE THE ELEVATION LINE IN EXCESS OF THE EIGHT (8.0) FOOT SPECIFICATION.

THE JURY IS INSTRUCTED THAT A COMPLETE CONTRACT CAN RESULT ONLY WHEN THERE IS A MUTUAL MEETING OF MINDS OF THE PARTIES ON ALL TERMS; THAT IS, THE PARTIES MUST AGREE TO THE SAME THINGS AT THE SAME TIME. THIS INVOLVES AN OFFER BY ONE SIDE WHICH IS ACCEPTED AND AGREED TO BY THE OTHER SIDE.

WHERE THE MEANINGS OF THE TERMS OF A CONTRACT ARE AMBIGUOUS AND THE INTENT OF THE PARTIES AS TO HOW THESE TERMS ARE TO BE INTERPRETED IS NOT CLEAR, IT BECOMES A QUESTION OF FACT FOR THE JURY.

IN DETERMINING THE MOST REASONABLE INTERPRETATION OF THE PERTINENT TERMS OF THE PARTIES CONTRACT, THE JURY SHOULD CONSIDER THE INTENT OF EACH OF THE PARTIES AS TO HOW THOSE PERTINENT CONTRACT TERMS WERE TO BE INTERPRETED, THE COURSE OF CONDUCT OF THE PARTIES IN NEGOTIATING AND PERFORMING THE CONTRACT, THE TESTIMONY OF EXPERT WITNESSES REGARDING PROPER INTERPRETATION OF THE CONTRACT TERMS, THE INDUSTRY STANDARDS FOR THE PERTINENT CONTRACT TERMS, AND ALL RELEVANT FACTORS AND CIRCUMSTANCES SURROUNDING THE EXECUTION OF THE CONTRACT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

INTERROGATORY NO. 1

DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE THAT IT WAS THE INTENT OF THE PARTIES IN THE SUBSURFACE PORTION OF THEIR CONTRACT AND AGREEMENT TO PROVIDE ADDITIONAL COMPENSATION FOR THE ROCK OR BOULDERS EXCAVATED IN EXCESS OF EIGHT (8.0) FEET OF ROCK ABOVE THE ELEVATION LINE OF FIVE HUNDRED THIRTY-TWO (532) FEET, PLUS OR MINUS?

YES _____

NO _____

(IF THE JURY'S ANSWER IS "NO" IT WILL PROCEED NO FURTHER AND MAY REPORT TO THE COURT. IF THE JURY'S ANSWER IS "YES" IT WILL ANSWER THE FOLLOWING INTERROGATORY.)

INTERROGATORY NO. 2

WHAT AMOUNT, IF ANY, DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE TO BE DUE AND OWING AS ADDITIONAL COMPENSATION BY REASON OF SAID EXCAVATION OF ROCK?

\$ _____

(THE AMOUNT TO BE AWARDED, IF ANY, IS NOT TO EXCEED THE SUM OF ONE HUNDRED SIXTY THOUSAND EIGHT HUNDRED TWENTY AND 35/100 DOLLARS (\$160,820.35).

DATE: _____

FOREPERSON

A S T E R L I S T
G R A N D J U R O R S

PIKEVILLE

AUGUST, 1983

- | | |
|--|---|
| <p>51. RUBY E. PRESTON
Paintsville, Johnson</p> <p>52. RALPH NIECE, JR.
Eolia, Letcher</p> <p>53. HAROLD D. MILLS ✓
Tomahawk, Martin</p> <p>55. EVA JEAN SLONE ✓
Sidney, Pike</p> <p>59. ETTY A. DAVIDSON ✓
Brinkley, Knott</p> <p>61. ROBERT BAILEY ✓
Gunlock, Magoffin</p> <p>64. HENRY TAYLOR RISNER ✓
Prestonsburg, Floyd</p> <p>66. RICHARD D. JUSTICE ✓
Pikeville, Pike</p> <p>68. HENRY BILLITER, JR. ✓
Pikeville, Pike</p> <p>71. BILLIE YOUNG ✓
Tutor Key, Johnson</p> <p>75. TAYLOR JUSTICE, Jr. ✓
Pikeville, Pike</p> | <p>76. LOU ANN ABBOTT ✓
Paintsville, Johnson</p> <p>78. WAYNE ADAMS ✓
Redfox, Knott</p> <p>80. BURGESS KESTNER ✓
Staffordsville, Johnson</p> <p>81. ANNA CAMPBELL BACK ✓
Redfox, Knott</p> <p>87. CHARLENE BOSTIC FREEMAN ✓
S. Williamson, Pike, <i>Garrett</i></p> <p>89. JAMES MULLINS ✓
Pikeville, Pike</p> <p>90. JIMMY SAGRAVES ✓ <i>Saggraves</i>
Flatgap, Johnson</p> <p>92. MILLARD JUSTICE
Prestonsburg, Floyd</p> <p>94. CLIFFORD GREGORY ONEY
Lick Creek, Pike</p> <p>95. PHYLLIS J. MADDEN
Pikeville, Pike</p> <p>96. ANNA LOIS O'NEAL
Garrett, Floyd</p> <p>98. MARSHEL TACKET
Whitesburg, Letcher</p> |
|--|---|

*On a line of
in elevation*

*532 feet, plus or
minus*

*Casson were to be
subject to a line of
feet, more or less
dip in a shale bed
under the soil.*

What has witness opinion w/ regard
to interpretation of K to do with
plaintiff's interpretation of K?

may show that they have some or
similar opinions?

Court views a change order as an
amendment - if it is agreed it would
be an agreed amendment - but if it

K. Provides for base bed & Casement
embedded not less than 8.0 feet
in bed rock

Provides that unit price be submitted
for additions & deductions

Provides that the rate of pay is
for level feet of rock

However, whether or not ~~pay~~ compensation
made for excavation of rock above the
bed rock is unclear

Judge

H. B. Noble died last
night - heart attack -

to a conflict
in substantial and
n.

h

What amount, if any, to ^{does the jury find by a preponderance} ~~be~~ due ^{and?} ~~and?~~ _{the} ^{introduce} ~~plaintiff~~ as ~~additional~~ Compensation for such ~~additional~~ excavation of rock.

OFF. NO.	DOCKET YE. NUMBER	FILING DATE MO DAY YEAR	J	N/S	D	F	S DEMAND	JUDGE MAG NO	COUNTY	JURY DEN	DOCKET YE. NUMBER
43	7 83 7 82	46 224-	12 07 82	4	190	1	3 2	160	J 2308 A 309	88888	83 46 82 224-

PLAINTIFFS: RAY BELL CONSTRUCTION COMPANY, INC.,
a Tennessee Corporation

DEFENDANTS: HOUSING AUTHORITY OF PAINTSVILLE
KENTUCKY

ASSIGNED FOR TRIAL, BY JURY AT PIKEVILLE JUDGE UNTHANK

DATE SEPTEMBER 7, 1983 AT 10:00 A.M.

~~McDermott & Purdom~~

CAUSE
(CITE THE U.S CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC §1332 RE: breach of contract, change in order of labor and materials (Inter-district transfer from Catlettsburg office - 82-224)

David O. Welch *Smith*
WELCH, MCDERMOTT & PURDOM
910 First Bank Building
Ashland, Kentucky 41101

John David Preston
~~PERRY & PRESTON~~
Drawer C
Paintsville, KY 41240

- 7/8/83 #21 LIST OF EXPERT WITNESSES, of deft
- 7/18/83 #22 LIST OF EXPERT WITNESSES, of plff
- ~~7/22/83 #23 MOTION, of deft for S/J~~
- ~~#24 MEMORANDUM, of deft n/suppt~~
- 7/25/83 #25 AMENDED LIST OF EXPERT WITNESSES, of plff
- 7/26/83 #27 LIST OF WITNESSES, of deft (CLERK'S NOTE: styled as plffs list) (Exhibit list placed on left side of record)
- 8/2/83 #28 SECOND AMENDED LIST OF EXPERT WITNESSES, of plff (w/additional-witness-list-incl)
- #29 PRE-TRIAL MEMORANDUM, of plff (w/add. list of witnesses incl)
- 8/9/83 #30 OBJECTIONS & RESPONSE, of plff to deft, Housing Authority of Paintsville to mot for S/J.
- 8/29/83 #32 PROPOSED INSTRUCTIONS, of deft
- PROPOSED JURY INSTRUCTIONS, placed on left side of record, of deft
- 9/1/83 #33 AGREED STATEMENT OF FACTS, of ptys.

For Atty's Use

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

9/7/83

- | | |
|---|---|
| 3. MELVINA C. HALL
Garner, Knott | 34. CLAUDE M. NEWBERRY
Prestonsburg, Floyd |
| 5. ROGER DARRELL MUSIC
Shelbiana, Pike | 35. PEGGY BOWEN
Warfield, Martin |
| 6. TERESA L. VAN HOOSE
Manila, Johnson | 36. MAXINE DOBSON
Prestonsburg, Floyd |
| 7. DONALD LEE KITTS
Hardy, Pike | 40. GARDIS OUSLEY
Martin, Floyd |
| 8. ALLINE LITTLE
Pikeville, Pike | 42. HERBERT SPENCER
Campton, Wolfe |
| 12. ELIZABETH LORRAINE WRIGHT
Virgie, Pike | |
| 13. DORIS HALL
Dorton, Pike | |
| 14. DONALD L. RILEY
Harold, Floyd | |
| 18. LORETTA GAYLE MAY
Huddy, Pike | |
| 21. INIS SUE CHARLES
Pikeville, Pike | |
| 22. WILLIAM R. CLAY
Ligon, Floyd | |
| 23. MICHAEL G. NEWSOME
Grethel, Floyd | |
| 24. LOUISE ARNETT
Salyersville, Magoffin | |
| 26. ANNA S. BOOTEN
Turkey Creek, Pike | |
| 28. SUSAN STAMPER
Isom, Letcher | |
| 29. LYNETTE BOYD
Harold, Floyd | |
| 31. LINDA GAIL MONTGOMERY
Salyersville, Magoffin | |
| 32. <u>KERNIE DEAN MILLER</u>
Feds Creek, Pike | <u>absent.</u> |

JUN 12 1981

OB 97

AT LEXINGTON
DAVIS T. MCGARVEY
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

IN RE: POST TRIAL CONTACTS WITH JURORS

ORDER

No party, attorney, or representative of any party or attorney shall communicate with or interview any juror after trial except as permitted by the Court.

Court approval for interviews of or communication with jurors after trial will be granted only upon proper showing of good cause and subject to such conditions as the trial court shall prescribe.

This the 8th day of June, 1981.

Bernard T. Moynahan, Jr.
BERNARD T. MOYNAHAN, JR., Chief Judge

Eugene E. Siler, Jr.
EUGENE E. SILER, JR., Judge

Scott Reed
SCOTT REED, Judge

William O. Bertelsman
WILLIAM O. BERTELSMAN, Judge

G. Wix Unthank
G. WIX UNTHANK, Judge

2 True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By Shirley J. Watkins

D. C.

DIST	OFF.	DOCKET		FILING DATE			J	N/S	O	D	R	S DEMAND	JUDGE/ MAG NO	COUNTY	JURY DEM.	DOCKET	
		YR.	NUMBER	MO	DAY	YEAR										PT1	DEF
643	7	83	46	12	07	82	4	190	1	3	2	160	4308 4309	88888	D	83	46
	7	82	224-													82	224-

PLAINTIFFS

DEFENDANTS

RAY BELL CONSTRUCTION COMPANY, INC.,
a Tennessee Corporation

HOUSING AUTHORITY OF PAINTSVILLE
KENTUCKY

ASSIGNED FOR PRE-TRIAL CONFERENCE AT PIKEVILLE JUDGE UNTHANK

DATE AUGUST 16, 1983 AT 10:00 A. M.

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC §1332 RE: breach of contract, change in order
of labor and materials (Inter-district transfer from Catlettsburg
office - 82-224)

GS

ATTORNEYS

David O. Welch
WELCH, MCDERMOTT & PURDOM
910 First Bank Building
Ashland, Kentucky 41101

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Drawer C
Paintsville, KY 41240

DON L. SMITH

- 7/8/83 #21, LIST OF EXPERT WITNESSES, of deft
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EXHIBIT AND WITNESS LIST

Ray Bell Construction Company vs. Housing Authority of Paintsville					DISTRICT COURT Eastern District of Kentucky	
PLAINTIFF'S ATTORNEY			DEFENDANT'S ATTORNEY		DOCKET NUMBER	
David O. Welch			John David Preston		Pikeville, 83-46	
PRESIDING JUDGE			COURT REPORTER		TRIAL DATE(S)	
Hon. G. Wix Unthank			Susan Lindstrom		September 7, 1983	
					COURTROOM DEPUTY	
					Brenda J. England	
PLF. NO.	DEF. NO.	DATE OFFERED	Marked	Admitted	DESCRIPTION OF EXHIBITS* AND WITNESSES	
A	A				Contract between parties	
B	P				Proposed Change Order No. 1, January 11, 1982	
C					Letter of July 28, 1981 from plaintiff to Harry Homan - Plaintiff's submission of computations for overage and additional payment	
D					Drilled Shaft Manual, U. S. Department of Transportation, Volumes 1 (and 2) (?)	
E					Standards and Specifications for the Foundation Drilling Industry, Revised Edition of May 1, 1980	
F					Model/Drawing of Sample Drilled Shaft Foundation	
G					Computations of Fuller, Mossbarger, Scott and May for pay purposes	
H					Change Order on McKee Manor Project	
I					Letter dated April 21, 1982 from J. B. Wells to plaintiff	
J	H				Letter dated May 3, 1982 from Don Smith to J. B. Wells	
K					Letter dated July 1, 1981 from plaintiff to Harry Homan - Submission of single-unit prices for overage and underage	
L					List of Expert Witnesses, with qualifications and experience	

*Include a notation as to the location of any exhibit not held with the case file or not available because of size.

WELCH, McDERMOTT AND PURDOM
ATTORNEYS AT LAW

SUITE 910 FIRST BANK BUILDING
P. O. BOX 1653
ASHLAND, KENTUCKY 41105-1653

DAVID O. WELCH
RALPH T. McDERMOTT
PEGGY E. PURDOM

TELEPHONE:
606-325-8446

August 30, 1983

Hon. G. Wix Unthank, Judge
United States District Court
Eastern District of Kentucky
U. S. Courthouse
Pikeville, Kentucky 41501

SUBJECT: Ray Bell Construction Company vs.
Housing Authority of Paintsville, Kentucky
United States District Court, Eastern District
of Kentucky, Civil Action No. 83-46

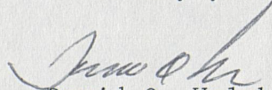
Dear Judge Unthank:

Enclosed please find copy of plaintiff's proposed Instructions, the originals of which have been tendered to the Clerk of the Court. We wish to advise the Court that the enclosed Instruction, identified by pencil marking as Instruction No. "A", is submitted under protest by plaintiff, and is simply tendered in response to the Instruction previously submitted by defendant. It is plaintiff's position that both such Instructions do not clearly identify the matters in issue which are appropriate for determination by the jury.

Also enclosed is a copy of Instructions and Interrogatory, marked in pencil for identification purposes as Instructions Nos. 1, 2, and 3 and Interrogatory No. 1. It is plaintiff's position that these Instructions and Interrogatory more properly set forth the issues which will be appropriate for determination by the jury.

A copy of the foregoing Instructions, as well as a copy of this letter, has been furnished to counsel for defendant.

Sincerely yours,


David O. Welch

DOW:esh

Encls.

cc: Mr. John David Preston

INSTRUCTION NO. A

The plaintiff contends that the proper interpretation of the contract between the parties entitles plaintiff to recover the amount claimed for excavation of rock, including boulders and cobbles, in the strata above the bedrock. The defendant contends that the proper interpretation of the parties' contract is that plaintiff is to be paid for rock excavation only for excavation into the bedrock itself.

You are instructed that if you believe from the evidence that the most reasonable interpretation of the pertinent terms of the parties' contract is that payment should be made for excavation of rock, including boulders and cobbles, in the strata above the bedrock, then the law is for the plaintiff, and you shall award plaintiff the sum of \$160,820.35; otherwise, the law is for the defendant, and you shall so find.

In determining the most reasonable interpretation of the pertinent terms of the parties' contract, the jury should consider the intent of each of the parties as to how those pertinent contract terms were to be interpreted, the course of conduct of the parties in negotiating and performing the contract, the testimony of expert witnesses regarding proper interpretation of the contract terms, the industry standard for defining the pertinent contract terms, and all relevant factors and circumstances surrounding the execution of the contract.

Citations:

A. L. Pickens Co. v. Youngstown Sheet & Tube Co., 650 F2d 118 (6th Cir. 1981).

Cook United, Inc. v. Watts, Ky., 512 S.W.2d 493 (1974)

O. P. Link Handle Co. v. Wright, Ky., 429 S.W.2d 842 (1968).

Billups v. Hughes, Ky., 259 S.W.2d 6 (1953).

INSTRUCTION NO. _____

Upon returning to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and be your spokesperson here in Court.

You will note that the Interrogatory (question) requires an answer of "Yes" or "No" or "Cannot agree." Your foreperson will write the answer of the jury in the space provided below the Interrogatory.

The submitted Interrogatory should be answered "Yes" only if you unanimously find by a preponderance of the evidence that it should be so answered. The Interrogatory should be answered "No" only if you unanimously find by a preponderance of the evidence that it should be so answered. A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto. If all of you cannot agree that the interrogatory should be answered "Yes" and if all of you cannot agree that the Interrogatory should be answered "No," you should answer the Interrogatory "Cannot agree."

When you have completed the answer to the Interrogatory and the foreperson has dated and signed the Interrogatory, you will return to the Courtroom.

INSTRUCTION NO. 2

You are instructed that in accordance with the custom and practice in the Drilled Shaft Foundation Construction Industry, the word "rock" as used in these Instructions and Interrogatory, means any material, including cobbles or boulders, which cannot be drilled with a conventional earth auger and/or underreaming tool, and requires the use of special rock augers, core barrels, air tools, blasting and/or other methods of hand excavation. All earth seams, rock fragments, and voids included in the rock excavation area will be considered rock for the full volume of the shaft from the initial contact with rock.

INSTRUCTION NO. 3

You are instructed that the phrase "base bid," as used in these Instructions and Interrogatory, is defined to mean the bid submitted by plaintiff without consideration of any additions or deductions for overage and underage for earth and rock excavation.

INTERROGATORY NO. 1

Are you satisfied from the evidence that plaintiff and defendant intended that the amount of plaintiff's base bid for construction of the Drilled Shaft Foundations was to include the cost of excavation of only eight (8) feet of rock in each shaft and that payment for excavation of material in each shaft was to be made upon that understanding?

Yes _____ No _____ Cannot Agree _____

TO: Judge
FROM: Donald
DATE: 8-16-83
RE: 83-46
Ray Bell Construction Company, Inc., v. Housing Authority
of Paintsville, Kentucky

Synopsis: Plff brings this action to recover the additional sum of \$160,820.35 from def., in addition to the amount of plff's bid submitted for the construction of a high-rise senior citizens home in Paintsville.

Plff alleges that the express terms of the construction contract allowed for a variance from the bid price based on the actual amount of work performed by plff. Plff's bid was based on an estimate determined by defendant's engineers as to the possible amount of work necessary for the proper foundation construction of the housing unit.

It seems that at one time a Change Order was signed that approved plff's request for additional compensation, but now defendant alleges that it was signed by mistake.

Pending Motions:

1. #23 & 24 - Def. has moved for summary judgment.

Comments:

1. The PC was conducted by a telephone conference. The parties are ready for the PTC.

WELCH, McDERMOTT AND PURDOM
ATTORNEYS AT LAW

SUITE 910 FIRST BANK BUILDING
P. O. BOX 1653
ASHLAND, KENTUCKY 41105-1653

TELEPHONE:
606-325-8446

DAVID O. WELCH
RALPH T. McDERMOTT
PEGGY E. PURDOM

March 1, 1983

The Hon. G. Wix Unthank, Judge
United States District Court
Federal Building
Pikeville, Kentucky 41501

Attention: Don Stanford, Law Clerk

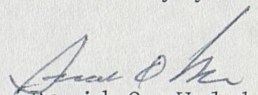
SUBJECT: Ray Bell Construction Company, Inc.
v. Housing Authority of Paintsville, Kentucky
United States District Court No. 83-46

Dear Mr. Stanford:

Thank you for your note of February 28, 1983, copy of which is attached.

The above case has been transferred to Pikeville and must be located in the Clerk's office there. Enclosed you will find copy of Judge Wilhoit's Order of February 1, 1983 transferring and copy of Judge Unthank's Order of February 11, 1983 providing for Preliminary Conference. Unfortunately we did not change the civil action number on our pleading after the transfer and that probably accounts for the confusion. That change has now been made on the face of the proposed Order which is being returned for entry.

Sincerely yours,


David O. Welch

DOW:s1
Enclosure

2-28-83

Dear Mr. Welch:

Apparently your office sent
the enclosed Agreed Order
Extending Time to Answer
Interrogatories to the wrong
court.

This case is filed in
Catlettsburg; our court has no
record of it being transferred
to the Pikeville Division.

Therefore, I am returning the
whole thing to you.

Thank you.

Sincerely,

Don Stanford
Don Stanford,
Law Clerk to
Judge Unthank

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG

FILED

FEB 2 1983

CIVIL ACTION NO. 82-224

RAY BELL CONSTRUCTION COMPANY, INC.
a Tennessee Corporation

AT CATLETTSBURG
CLERK, U.S. DISTRICT COURT
PLAINTIFF

VS.

ORDER

HOUSING AUTHORITY OF PAINTSVILLE
KENTUCKY

DEFENDANT

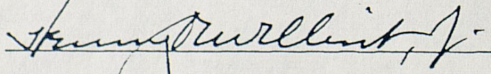
This matter comes before the Court on defendant's motion to transfer to the Pikeville Division of the Eastern District of Kentucky. In support of said motion, defendant states that the matters alleged in the complaint occurred in Johnson County, Kentucky, an area which falls under the auspices of the Pikeville Division. With this in mind, and the Court being sufficiently advised,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) That defendant's motion to transfer this action to the Pikeville Division be, and hereby is SUSTAINED.

(2) That this action be transferred to the United States District Court for the Eastern District of Kentucky at Pikeville.

This 1 day of February, 1983.


HENRY R. WILHOIT, JR., Judge

Copies:

David C. Welch
John David Preston

2-2-83
CMB

main

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG
PIKEVILLE

CIVIL ACTION NO. ~~82-224-~~
83-46

Eastern District of Kentucky
FILED
FEB 14 1983
AT PIKEVILLE
CLERK, U.S. DISTRICT COURT

RAY BELL CONSTRUCTION COMPANY, INC.
a Tennessee Corporation

PLAINTIFF,

VS:

ORDER

HOUSING AUTHORITY OF PAINTSVILLE
KENTUCKY

DEFENDANT.

All responsive pleadings having been filed, the above-styled action is hereby set for preliminary conference to be held in the Courtroom of the United States Courthouse, Pikeville, Kentucky, on the 27th day of May 1983, at the hour of 10:00 A.M.

On or before the 13th day of May, 1983, each party shall prepare and file with the Court a preliminary trial memorandum as set forth by standing order of this Court, dated the 22nd day of September, 1980, a copy of which is attached hereto.

The Court suggests the presence of both party and counsel at the preliminary conference, but same is not mandatory if inconvenient to the party.

Failure to comply with the terms of this order will result in appropriate sanctions.

ORDERED this 11th day of February 1983.

*Copied: John C. Collins
Richard W. Martin
2/14/83
mlb*

G. Wix Unthank
G. WIX UNTHANK, JUDGE