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**River Ridge Dairy, L.L.P., Plaintiff, vs. Hammers Construction Company, Inc., Defendant, and Hammers Construction Company, Inc., Third Party Plaintiff, Respondent, vs. Symington Construction Co., Third Party Defendant, Appellant.**

C1-02-2

## COURT OF APPEALS OF MINNESOTA

*2002 Minn. App.*

September 11, 2002, Filed

**NOTICE:** [\*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

**PRIOR HISTORY:** Kittson County District Court. File No. C000168. Hon. Donald Aandal.

**DISPOSITION:** Affirmed in part and reversed and remanded in part.

**COUNSEL:** Steven R. Peloquin, Peloquin & Minge, P.A., New York Mills, MN (for respondent).

Sidney J. Spaeth, Leah Marie Warner, Vogel, Weir, Hunke & McCormick, Fargo, ND (for appellant).

**JUDGES:** Considered and decided by Schumacher, Presiding Judge, Peterson, Judge, and Parker Judge. \*

\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

**OPINION BY:** Peterson

**OPINION****UNPUBLISHED OPINION**

In this appeal from an attorney-fee award, appellant Symington Construction Co., a third-party defendant that was awarded attorney fees pursuant to a contractual provision after prevailing at trial, argues that the district court abused its discretion by awarding only \$ 200 for attorney fees. By notice of review, respondent Hammers Construction Company, Inc., a third-party plaintiff in the district court, appeals from a judgment in favor of Sym-

ington. We affirm the judgment in favor of Symington and reverse [\*2] and remand the attorney-fee award.

**FACTS**

River Ridge Dairy, L.L.P., hired Hammers to design and build a dairy barn. Hammers hired Symington as a subcontractor to build the barn. Hammers provided drawings for the barn to Symington, and Symington ordered a building package, which included engineered shop drawings and pre-designed and manufactured building materials, from Butler Manufacturing.

The Butler drawings provided for insulation to be installed immediately below the metal roof panels, above support pieces called purlins. The Hammers drawing provided for the insulation to be placed below the purlins, which created an air space between the metal roof and the insulation. Symington installed the insulation below the Purlins. Symington also installed flashing material at the upper end of the air space, near the ridge of the roof.

About one year after the barn was completed, insulation and ice chunks began falling from the ceiling of the barn. Roger Henrichs, a representative of River Ridge's insurer, determined that condensation was forming in the space between the metal roof and the insulation. The condensation made the insulation wet, and some of the wet insulation [\*3] collapsed and fell to the floor.

River Ridge contacted Hammers and demanded that it remedy the condition. Hammers then contacted Symington and demanded that it remove the flashing near the ridge of the roof, which Hammers claimed had been improperly installed. Symington did not respond. River Ridge sued Hammers, and Hammers brought a third-party action against Symington. After the action began, Hammers sent a crew to River Ridge to correct the con-

dition causing the condensation. Hammers spent \$ 3,859.34 to make the repairs. River Ridge accepted the corrections and, pursuant to a stipulation between River Ridge and Hammers, the court dismissed River Ridge's suit against Hammers but preserved Hammers' third-party claim against Symington.

After a two-day bench trial, the district court entered judgment in favor of Symington. Symington brought a motion for costs in the amount of \$ 1,116.60 and attorney fees in the amount of \$ 23,448. The court awarded Symington the full amount of costs requested and \$ 200 for attorney fees.

## DECISION

1. Hammers argues that the district court's finding that the insulation became wet as "a result of Hammers' design of placing insulation [\*4] below the purlin rather than above as called for in the Butler design" is clearly erroneous and not supported by the evidence.

An appellate court may not reverse a trial court due to mere disagreement with its findings. Rather, we will reverse a lower court's findings of fact only when those findings are clearly erroneous. Findings of fact are considered clearly erroneous only if they are not reasonably supported by the evidence.

*Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999) (citing Minn. R. Civ. P. 52.01).

Although there was evidence that supported Hammers' theory that the condensation problem was caused by the flashing, there was also evidence that supported the district court's finding. The district court specifically cited the testimony of Brent Whittaker, a Butler representative, who testified that in the past, Butler placed insulation below the purlins in barns that it built, and over time, it caused problems in nearly every barn.

Hammers contends that had the flashing been installed pursuant to its design, the condensation problem would not have arisen. Hammers argues that Symington caused the condensation problem because (1) Symington [\*5] was contractually obligated to build a barn that conformed in all respects to Hammers' design, and Symington did not install the ridge flashing according to Hammers' design, and (2) Symington had an affirmative duty to discover and question any inconsistencies between the Hammers and the Butler plans. Hammers argues further that (1) it never waived Symington's duty to perform its work accurately and to indemnify Hammers for any loss caused by Symington's failure to perform its work correctly, and (2) its contract with Symington required Symington to assume strict responsibility for the accuracy of its work or for any loss or damage to Hammers caused by Symington's failure to perform its work correctly.

Each of these arguments rests on the premise that Symington did not install the ridge flashing according to Hammers' design. But the only evidence that Hammers cites as proof that Symington did not install the ridge flashing according to Hammers' design is a single drawing in the plans, which only shows where the flashing was to be installed near the open ridge of the barn roof and contains the notation, "field verify flashing." Although Hammers' brief refers to "flashing detail," this [\*6] drawing does not contain any details about how the flashing was to be installed, and Hammers does not explain how Symington's installation failed to follow Hammers' design.

Hammers argues that because River Ridge considered the condensation problem solved after Hammers changed the flashing, the problem was caused by Symington's failure to install the flashing according to the plans. But this argument assumes that the plans showed how the flashing was to be installed and that Hammers changed the flashing to conform to the plans. Without evidence that the plans showed how the flashing was to be installed, it cannot be determined whether Symington or Hammers followed the plans. Hammers failed to prove that Symington failed to install the flashing according to Hammers' design.

2. Symington argues that the district court abused its discretion by limiting its attorney-fee award to \$ 200. A reviewing court will not reverse a trial court's denial of attorney fees absent an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). The prevailing party in litigation is entitled to recover attorney fees and costs if there is a contract [\*7] between the parties authorizing such an award. *Barr/Nelson, Inc. v. Tonto's Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). The contract between Symington and Hammers provides that a prevailing party in any dispute between the parties arising out of or relating to the contract or its breach "shall be entitled to recover from the other party reasonable attorney's fees."

To determine the amount of attorney fees to award, a district court should first determine a "lodestar" figure "by multiplying the number of hours reasonably expended on the litigation \* \* \* by an hourly rate." *Johns v. Harborage I, Ltd.*, 585 N.W.2d 853, 863 (Minn. App. 1998). Then, "the court must consider the results obtained in determining whether to adjust the fee upward or downward." *Id.*

The trial court is permitted to exclude from the "lodestar" figure hours that were not "reasonably expended." The trial court must, however, "make findings or otherwise concisely explain why it felt the hours claimed are reasonable or unreasonable." Failure to do so will result in remand.

*Bucko v. First Minnesota Sav. Bank*, 452 N.W.2d 244, 252 (Minn. App. 1990) (citation omitted) [\*8] (quoting *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 629-30 (Minn. 1988) *rev'd in part on other grounds*, 471 N.W.2d 95 (Minn. 1991)).

Although the trial alone in this matter lasted approximately 12 hours, the district court limited Syming-

ton's attorney-fee award to \$ 200 without including any findings or explanation for the award. Because the district court failed to make findings or otherwise explain why it felt the hours claimed are reasonable or unreasonable, we reverse and remand the attorney-fee award.

**Affirmed in part and reversed and remanded in part.**