IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
May 20, 2003 Session

SDS & ASSOCIATES, INC. v. BUILDING PLASTICS, INC.

A Direct Appeal from the Chancery Court for Shelby County
No. 110075-1 The Honorable Walter Evans, Chancellor

No. W2002-01532-COA-R3-CV - Filed August 22, 2003

This appeal involves breach of contract action by appellant corporation which provided telecommunication services to appellee corporation. Appellee corporation filed a counter-claim for breach of a separate contract between the parties whereby appellant was to provide freight auditing services to appellee. The trial court rendered judgment for appellant on the first contract in an amount less than that sued for and rendered judgment for the appellee on the counter-claim. Appellant appeals. We affirm.

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

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

Daniel F. B. Peel, Charles M. Weirich, Jr., Memphis, For Appellant, SDS & Associates, Inc.

Michael G. McLaren, Michael W. Higginbotham, Memphis, For Appellee Building Plastics, Inc.

OPINION

This case involves an alleged breach of contract. Appellant SDS & Associates, Inc. ("SDS"),[1] and appellee Building Plastics, Inc. ("BPI"),[2] entered into a written contract on July 23, 1996, whereby SDS agreed to act as an Expense Reduction Analyst for the purpose of examining

---

[1] Formed by President Michael Siano ("Mr. Siano") in 1993, SDS is an auditing consulting corporation that specializes in providing expense reduction analysis to clients. According to Siano, SDS's expertise includes expense reduction examination and analysis in the following areas: telecommunications, freight, and utilities.

[2] BPI is a corporation headquartered in Memphis, Tennessee, specializing in the distribution of plastic products, sheet vinyl, hardwood and ceramic tile, and other specialty products. According to Chief Financial Officer, Wallace R. McAlexander, Jr. ("Mr. McAlexander"), BPI has distribution facilities in Nashville, Little Rock, Jackson (Mississippi), Dallas, Houston, San Antonio, New Orleans, and Mobile.

and analyzing appellee's telecommunications and freight expenses. The parties' contract reads in pertinent part:

> **SDS & ASSOCIATES, INC. (SDS)** and **BUILDING PLASTICS, INC. (BPI)** hereby enter into this letter of Agreement whereby **SDS** shall serve as an Expense Reduction Analyst to **BPI** to examine and analyze the following listed expenses of **BPI** and to make recommendations to achieve savings in these areas:
>
> **TELECOMMUNICATIONS, UTILITIES, FREIGHT, OFFICE SUPPLIES, COMPUTER SUPPLIES, PRINTING, AND TAXES _____.**
>
> **SDS** will furnish **BPI** with a written report as to recommendations that may be made in the above areas without sacrificing quality or service. **BPI** will then determine which (if any) of these recommendations they wish to implement.
>
> **SDS** will then assist in the implementation of these recommendations to achieve the cost savings.
>
> **BPI** agrees to pay **SDS** on each recommendation for cost savings that is implemented, a fee equal to fifty cents of every dollar saved during the **THIRTY-SIX MONTH PERIOD** immediately following the full implementation of the recommendation. The fee will be paid on a monthly basis following the date of full implementation of the particular recommendation.
>
> **********
>
> The expiration date for **SDS** to submit savings recommendations shall be the later of: a) twelve (12) months from the date of contract approval, or b) written notification from either party.

That same day, BPI drafted a Letter of Authorization, stating that SDS was "authorized to act as a consultant on behalf of [BPI]." This letter did not explicitly authorize SDS to terminate BPI's existing or future telecommunications agreements.

On August 21, 1996, a meeting was held to discuss freight auditing services. Misters Siano and McAlexander were present on behalf of SDS and BPI respectively, as were representatives from Transcom Logistics ("Transcom"), a subcontractor selected by SDS to provide "freight auditing"

services to BPI.[3] At the meeting, Transcom provided BPI with a brochure that included detailed information regarding both "freight auditing" and "freight payment" services. On August 30, 1996, the parties entered into the following written agreement:

> SDS & Associates will provide Freight auditing to Building Plastics Inc. (BPI) for a monthly fee of $1,000.00.
>
> SDS & Associates will secure contracts with the carriers for Freight Services to BPI other than the carriers that give truckload rates daily. Each year SDS will review any comments to improve Freight Auditing services. This agreement is for three years that is approved by both parties.

At the time of BPI's initial contract with SDS, BPI was in the final year of a three-year telecommunications contract with MCI.[4] This contract, hereinafter referred to as "MCI I," had an indicated start date of June 15, 1994, and was to remain in effect until its termination date of June 15, 1997. Under MCI I, BPI was required to meet an annual minimum volume commitment of $180,000.00. Failure to satisfy the volume commitment term of the contract would trigger the application of an underutilization penalty. In addition to the volume commitment and underutilization provisions, the contract included provisions governing automatic renewal and early termination. We quote at length the pertinent provisions from the MCI I agreement:

> **AUTOMATIC RENEWAL:** On the ending date of the Term Commitment, this Agreement shall automatically renew at equivalent Term and Annual Volume Commitments, unless Customer has met the requirements stated under "Termination without Liability."
>
> **UNDERUTILIZATION AND EARLY TERMINATION CHARGES:** The Tariff Imposes Underutilization Charges if Customer fails to meet Annual Volume Commitment and Early Termination Charges in the event Customer cancels MCI Vision service or this Agreement without satisfying the conditions for Termination without Liability. MCI billed charges that apply toward Annual Volume Commitment ("Qualified Volume") are specified by the Tariff.

---

[3] SDS and Transcom agreed to an even split of the $1,000.00 monthly fee paid by BPI for services rendered under the August 30, 1996 contract. BPI paid all fees directly to SDS.

[4] According to the trial court's Order setting forth the court's findings of fact, SDS's audit revealed that "even though BPI had the major part of their long distance traffic with MCI, there were additional carriers such as AT&T, BellSouth, GTE and Southwestern Bell for long distance service." The court noted that these "carriers charged monthly recurring fees and variable costs per minute rates for intralata (within the lata or region), intrastate (within the state) and interstate (between states) telephone calls."

(i) Underutilization Charges: If at the end of any year of the Term, Customer's Qualifying Volume fails to meet or exceed the Annual Volume Commitment, Customer shall pay the difference between the Qualifying Volume and the Annual Volume Commitment.

(**ii) Early Termination Charges for Termination with Liability:** If Customer terminates MCI Vision service prior to the expiration of this Agreement or prior to any renewal period, Customer will be required to pay the difference between Qualifying Volume and the Annual Volume Commitment for the year of termination, plus 35% of the Annual Volume Commitment for each additional year remaining in the unexpired term. If Customer has Qualifying T-1 Digital Access Circuit(s) covered by this Agreement, Customer will in addition be subject to Early Termination Charges associated with those services as specified by the Tariff, should circuits be discontinued prior to the expiration of this Agreement. If Customer cancels the Agreement prior to expiration, Customer will be required to repay any promotional credits that were given contingent upon the VIP Plus Agreement, in addition to the Early Termination Charges noted above.

(iii) Termination without Liability: Customer may terminate this Agreement without liability upon the expiration date by providing written notice to MCI, which must be received at least 30 days prior to the Agreement expiration date. Customer may discontinue this Agreement without liability upon signing a new MCI VIP Plus or Customized Business Program agreement and meeting three conditions: (1) Customer's annualized Qualifying Volume equals or exceeds Annual Volume Commitment of Agreement and (2) Customer commits to a new MCI Vision VIP Plus or MCI Customized Business Program with a volume commitment exceeding the Annual Volume Commitment of this Agreement and (3) Customer commits to a new Term Commitment equal to or greater than the Term Commitment of this Agreement.

In the months following the parties' entry into the July 23, 1996 agreement , SDS reviewed BPI's long distance billing and telecommunications expenses. After conducting its audit, SDS requested bids for BPI's telecommunications services from several long-distance providers, including: Sprint, LDDS, LCI International, and MCI.[5] SDS reviewed the bids, and subsequently presented BPI with a written analysis of the costs per minute rates offered by the respective carriers.

[5] SDS's recommendation to switch from MCI to LCI was made before receipt of MCI's requested bid. BPI's contract with LCI was also entered into prior to receipt of MCI's bid.

In October 1996, SDS provided BPI with a written report "detailing savings under the LCI proposal as compared with the existing MCI contract." SDS's report included a written recommendation that BPI accept LCI's proposal for a one-year long distance telecommunications contract.[6] On October 25, 1996, in reliance upon SDS's recommendation, BPI signed a one-year telecommunications contract with LCI for interstate, intrastate, and international telecommunications services.

Implementation of SDS's recommendation to switch to LCI took place in January 1997. In February 1997, SDS submitted an invoice to BPI for $7,027.93, representing SDS's portion of the January 1997 savings realized by BPI under the new LCI contract. BPI paid this invoice in full. BPI acknowledges that this is the only SDS invoice that it has paid.

In the spring of 1997, Mr. McAlexander notified SDS that Transcom had embezzled $29,034.85 in freight payments from BPI. By letter dated March 26, 1997, Mr. McAlexander explained that BPI had several outstanding invoices from multiple freight carriers. Mr. McAlexander noted that the amounts stated in these invoices "were billed to [BPI] by Transcom but not paid to the carrier." As a result of Transcom's unlawful conduct, BPI terminated its August 21, 1996 "freight auditing" contract with SDS. SDS maintains that it had no knowledge of its subcontractor's embezzlement, and further asserts that it was not aware that BPI had discussed a freight payment agreement with Transcom.

In June 1997, BPI received an invoice from MCI for $13,030.70. The invoice, dated June 25, 1997, charged BPI an underutilization penalty of $11,712.99, plus applicable taxes in the amount of $1,317.71, for failure to satisfy the annual volume commitment specified in the MCI I agreement for the final year of the contract. Upon receipt of this bill, and after discussions with MCI representatives, BPI further learned that the MCI I contract automatically renewed in June 1997 because no termination notice was submitted to MCI. The automatic renewal provision of the MCI I agreement dictated that the contract renew for an additional three-year term with the same $180,000.00 annual volume commitment. At the time of renewal, BPI was still under contract with LCI.

---

[6] The parties dispute whether SDS's recommendation was limited to a suggestion that BPI switch to LCI for an initial one-year term. At trial, appellant introduced a type-written list of notes compiled by Mr. Siano during an October 18, 1996 meeting with BPI. This list included the following "recommendation":

> SDS's recommends going to flat rate pricing structure with LCI for one year and the second and third year use the loss of business and LCI's new pricing as leverage and get MCI to give you more competitive pricing and incentives to convert back to MCI.

Although Mr. Siano admitted that he never provided a copy of his recommendations list to BPI, he testified that he made the above recommendation in an oral statement to BPI at the October 18, 1996 meeting. SDS further notes that BPI followed Mr. Siano's oral recommendation and returned to MCI for the second and third years of the parties' July 23, 1996 contract. BPI maintains that no such oral recommendations were ever made.

BPI contends that in entering the LCI contract, appellee relied upon representations from SDS that BPI had satisfied the annual volume commitment for the final year of the MCI I agreement. At trial, BPI introduced a document containing computations calculated by an SDS representative and showing that BPI had in fact exceeded its annual commitment, and containing the hand-written statement, "over volume."[7] On cross examination, Mr. Siano stated that he did not come to a conclusion as to whether BPI had reached its volume commitment for the remaining term of the MCI I agreement prior to recommending a switch to LCI. Despite this admission, Siano maintained that he instructed BPI to check with MCI to determine for certain whether appellee met its annual volume commitment for the final term of the MCI I agreement.

BPI acknowledges that it failed to send a letter of termination to MCI. However, appellee asserts that SDS did not instruct BPI to send a termination notice, and further contends that it relied upon SDS, as an Expense Reduction Analyst assisting in the implementation of the new LCI contract, to terminate the existing MCI I agreement. SDS maintains that it advised BPI to send a letter of termination to MCI, and additionally asserts that it is the customer's responsibility to comply with and satisfy such termination requirements.

---

[7] On direct examination, Mr. McAlexander testified that Mr. Siano misinterpreted the annual volume commitment requirement in the MCI I agreement, stating:

> Q: Had you had any discussions with Mr. Siano regarding the utilization, underutilization or volume commitment?
>
> A: Yes, Mr. Siano represented to us in two different documents that we had achieved the underutilization requirement. He did an analysis computing the total contract obligation to be [$]540,000, which was $180,000 a year for three years.
>
> His calculations indicated we had exceeded [$]540,000, and he had stated that we were over the volume requirement and were therefore not subject to the underutilization penalty in the third year of the 1994 MCI contract.
>
> Q: Was he wrong?
>
> A: Yes, he was wrong.
>
> Q: Did you rely on those representations regarding utilization and volume commitment?
>
> A: Yes, we did.

BPI further asserts that Mr. Siano misinterpreted BPI's volume commitment under the MCI I agreement as a single total of $540,000.00, rather than as a volume commitment of $180,000.00 per year for the three-year term of the contract.

In June 1997, BPI terminated the parties' July 23, 1996 contract, "and all other agreements with SDS & Associates." In a letter dated July 22, 1997, BPI confirmed termination of the parties' agreements for SDS's alleged breach of contract. BPI based its allegations of breach of contract on grounds that BPI suffered financial loss and damage to its corporate credit record and corporate reputation as a result of SDS's failure to "exercise due professional care in the hiring and supervision" of Transcom, failure to audit "the monthly invoices of all telecommunications providers to determine if BPI had incurred duplicate or erroneous telecommunications charges," and Transcom's unlawful conduct.

On November 26, 1997, upon expiration of its contract with LCI, BPI entered into a new contract with MCI, said contract to be hereinafter referred to as "MCI II." The MCI II agreement required a three-year commitment and an annual volume commitment of $240,000.00. Mr. McAlexander testified that BPI was forced to return to MCI to avoid the underutilization penalty and an estimated $306,000.00 in annual minimum usage fees under the renewal contract. Mr. McAlexander further noted that MCI did not waive these penalties when BPI entered into the MCI II agreement, but rather built the penalties into the fees charged appellee under the new contract. SDS paints a significantly different picture, alleging that MCI waived the underutilization penalty and suggesting that BPI has never paid any of the accumulated penalties.

On October 10, 1997, SDS filed a Complaint for Breach of Contract against BPI. SDS's Complaint alleged that BPI violated the parties' July 23, 1996 contract by failing to pay SDS an estimated $312,738.96 in fees, representing fifty percent of the purported savings realized by BPI over a 36-month period as a result of the recommendations made by appellant. Alternatively, SDS sought judgment in the amount of "all unpaid invoices at the time of the hearing of this cause before the Court and for specific performance to pay all future obligations as they become due and owing per the terms of the [July 23, 1996] Agreement."[8]

BPI filed an Answer and Counterclaim on November 24, 1997. In its Counterclaim, BPI alleged that SDS breached the parties' July 23, 1996 contract by recommending Transcom as a freight services provider. As support for its breach of contract claim against SDS, BPI noted that it suffered "serious damages" when Transcom "failed to properly route freight, pay invoices,

---

[8] SDS presented the following factual explanation in support of its damages claim:

> [D]efendant BPI failed to pay invoices submitted for payment by SDS to BPI for the months of March, April, May, June and July of 1997 in the respective amounts of $8,085.06, $8,706.63, $7,781.09, $9,256.44 and $8,909.54. These invoices ... have gone unpaid; and, therefore, constitute a breach of the Agreement by BPI. Plaintiff estimates the total dollar savings by BPI with respect to its un-invoiced and future telecommunications costs to be $18,000.00 per month. This expected savings translates into an estimated monthly payment to SDS of $9,000.00 or half of the expected realized savings per month by BPI. Therefore, the total estimated amount due and owing for the unpaid portion of the 36 month term is approximately $312,738.76.

fraudulently accepted payment from BPI without paying carriers, produced bogus invoices, and otherwise acted unprofessionally and in breach and derogation of its duties to BPI."

SDS filed an Answer in response to BPI's Counterclaim on February 10, 1998. SDS acknowledged that it recommended Transcom be used to audit BPI's freight bills, but denied that "[t]his recommendation... included the actual payment of freight bills." Rather, SDS asserted that BPI, "on its own initiative and without consultation with SDS[,] entered into a separate agreement with Transcom to pay its freight bills." According to SDS, appellant's recommendation of Transcom was strictly limited and confined to "freight auditing" services.

On July 27, 2001, SDS filed an Amended Complaint seeking payment from BPI for unpaid invoices totaling $411,851.64. The total prayed for by SDS represented "[a] "fee equal to fifty cents of every dollar saved" for the remainder of the unpaid portion of the thirty-six (36) month period" specified in the parties' July 23, 1996 agreement. Appellant's Amended Complaint alternatively set forth a claim for recovery based on the theory of quantum meruit.[9]

A non-jury trial was held before the Chancery Court of Shelby County, Tennessee from January 14, 2002 through January 29, 2002. On March 13, 2002, BPI filed a Motion for Acceptance of appellee's proposed findings of fact or, in the alternative, a Motion for the Appointment of a Special Master or for Further Evidentiary Hearing with regard to the issue of damages. BPI quoted from the court's preliminary ruling on the issue of SDS's fee entitlement, noting that it appeared to the court that "SDS was entitled to receive one-half of the savings that would have accrued to BPI for the period in existence of the LCI Contract." BPI referenced its own calculation of savings and fees due under the LCI contract, and noted that in the event the trial court was unwilling to accept BPI's calculation of savings and fees owed to SDS, appellee was petitioning the court "to conduct further evidentiary hearings to determine the proper amounts to be considered, or, in the alternative that the Court refer this matter to a Special Master for the determination of the proper savings to BPI under the LCI contract and for a calculation of the fees due SDS."

On April 1, 2002, the trial court entered its Findings of Fact and Conclusions of Law. In its Findings of Fact the court determined that BPI's failure to provide a notice of termination to MCI caused the MCI I agreement to be subject to automatic renewal, thereby contractually binding BPI to "another three (3) year commitment of $180,000.00 annual minimum usage with MCI, while it was also under a long-distance contract with LCI." The court additionally concluded that "BPI's decision to enter into [the MCI II agreement] was not the result of any written recommendation from SDS regarding the second and third years of the consulting agreement."

With regard to the issue of savings, the court set forth the following calculation for determining BPI's savings under the LCI contract:

---

[9] SDS filed a Second Amended Complaint on December 14, 2001, amending its quantum meruit claim to seek judgment in the amount of $823,370.28, this amount representing the reasonable value of services performed by appellant on behalf of BPI.

> The correct calculation for BPI's savings under the LCI Contract for the 14 month period before the cutoff, requires a computation of BPI's cost per minute under MCI I, which incorporate the annual credits, other discounts and taxes under the Contract, in addition to charges by other telecommunications vendors providing such services before the switch to LCI took place.
>
> The Court adopts Defendant's amended computations of BPI's total savings under the LCI Contract when compared to MCI I, as $142,772.68... as being more correct. However, the underutilization fee of $13,030.70 owed by BPI for early termination should further reduce the total savings to $129,741.98. Of this amount, SDS would be entitled to fees of one-half (½) that amount, or $64,870.99. Of this amount, BPI has already paid $7,027.93, leaving a balance of $57,843.06.

The court next addressed the August 21, 1996 "freight auditing" contract between SDS and BPI. We quote at length the court's findings with regard to this agreement:

> On the freight auditing contract between SDS and BPI, Transcom rendered services to BPI as SDS's agent and/or subcontractor.
>
> During the period of Transcom's rendering services to BPI, $29,034.85 of BPI's funds were embezzled by Transcom. SDS does not challenge said amount, but denies that said freight payments were covered under its auditing agreement with BPI.
>
> The proof is clear that at the first meeting where the parties agreed to the freight auditing arrangement, Transcom was present and provided BPI with its brochure which clearly included "paying for freight invoices as part of the services it could render for clients."
>
> BPI never executed any agreement with or paid Transcom directly for any services rendered by Transcom under the SDS agreement. All payments by BPI for auditing services were made directly to SDS.
>
> All services rendered by Transcom to BPI were a direct result of the auditing agreement BPI had with SDS.
>
> BPI sustained a loss of $29,034.85 as a result of Transcom's actions as agent for SDS.

In its Conclusions of Law, the court found that it was BPI's responsibility to notify MCI of appellee's intent to terminate its contract with the long distance carrier. The court additionally found that the notes prepared by SDS President Michael Siano regarding the corporation's recommendations to BPI as to the suggested course of action on the second and third years of the LCI contract, could not be considered by the court as said notes were never provided to appellee. On this basis, the court concluded that the "duration of the written agreement dated 7/23/96 with LCI is only for one year."

The court proceeded to offer the following conclusion as to the early termination and underutilization penalties, and the fees owed SDS:

> SDS should not be responsible for any penalties BPI may have suffered due to BPI's failure to properly notify MCI of its termination.
>
> The underutilization charge from MCI is a proper deduction from the total computed savings because under the MCI I contract, it states very clearly that BPI has a $180,000 commitment, and if it fails to meet that commitment (upon termination and giving the 30 days advance notice), all MCI would be entitled to would be the underutilization fee (of $13,030.70).
>
> So on the original complaint, SDS would be entitled to receive fees equal to one-half of the total savings, after deducting the underutilization charge and appropriate discounts for the period of time that the LCI contract was in existence.

Upon concluding its analysis of SDS's breach of contract claim, the court next considered and denied appellant's claim for recovery quantum meruit. With regard to BPI's counterclaim seeking the recovery of funds embezzled by Transcom, the court found that Transcom's unlawful conduct was attributable to SDS, as the contractor, thereby entitling BPI to a set-off of $29,034.85. After factoring in the aforementioned set-off and $12,216.00 in prejudgment interest, the court calculated SDS's total net award as $41,024.21. A Final Judgment was entered on May 7, 2002 reflecting the court's findings of fact and conclusions of law.

SDS filed a Rule 54.04(2) Motion for Discretionary Costs on May 16, 2002. Pursuant to this motion, SDS sought an award of $5,768.39 to cover costs incurred for "court reporter expenses and expert witness fees for depositions and the trial of this matter." The court denied SDS's motion.

SDS appeals, presenting the following issues for review, as stated in its brief:

> A. Whether the trial court erred by basing its award of damages to SDS & Associates, Inc. ("SDS") on wholly new evidence submitted by Building Plastics, Inc. ("BPI") after the conclusion of the trial.
>
> B. Whether the trial court erred in awarding BPI a set-off of $13,030.70 against SDS for an "underutilization penalty" where BPI's damages were uncertain, remote, conjectural, and speculative because MCI waived payment of the penalty.
>
> C. Whether the trial court erred in refusing to award SDS contract damages equal to one-half the cost savings for the second and third years of the parties' contract where SDS substantially performed its obligations under the agreement.
>
> D. Whether the trial court erred in awarding damages to BPI for its breach of contract counterclaim for the embezzlement of funds by a third party based upon inadmissible parol evidence and hearsay.
>
> E. Whether the trial court erred by denying SDS's motion for costs expressly allowable under Tenn. R. Civ. P. 54.04(2) without articulating a reason for denying the costs requested.

Since this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. ***See*** Tenn. R. App. P. 13(d).

I.

The first issue presented for review is the question of whether the trial court erred in basing its award of damages "on wholly new evidence submitted by [BPI] after the conclusion of trial." At the conclusion of the trial in this matter, the court offered a preliminary ruling on the issues presented, including the question of the amount of fees owed to SDS for savings to BPI as a result of appellant's recommendation to switch to LCI. The court expressed dissatisfaction with the computations of savings offered by Mr. Siano and appellee's expert Ms. Sharon Watkins, and thereby ordered the parties to recompute the actual savings incurred by BPI. In ordering the parties to recompute the actual savings incurred, the trial court stated:

> The Court was really not overly impressed with the way Mr. Siano or Ms. Watkins made those computations because I think that neither side gave the full and proper credit that the other side should have received. So the Court will defer to the attorneys and your experts to

> recompute what the appropriate discounts in order to come up with the appropriate cost per minute figures should be.
>
> Now, the Court would be inclined to – Mr. Siano's computations, in the Court's opinion, were more accurate except they did not include the appropriate discounts. Ms. Watkins' figures were tied to a bid by MCI that was never accepted. So the attorneys can redo this or work it up so that the Court can understand in some identifiable form what the actual amount of the computed savings may be....
>
> MR. PEEL: Can I ask one follow-up question, your Honor? I hate to belabor this, but there were questions about whether or not feature charges were included and different discounts. I think we're actually probably talking about different years of the contract, but in computing the cost per minute, the effective cost per minute, there's going to be – the Court may have to give us some guidance or we're going to end up with two different sets, I think, of calculations and I'm pretty sure the Court doesn't want that.
>
> THE COURT: Well, you come up with your computations and Mr. McLaren will come up with his computations, and then the Court will accept one or the other or neither.

In response to the court's request, both parties submitted revised savings computations as part of their respective Proposed Findings of Fact and Conclusions of Law.[10] After reviewing the parties' submissions, the court adopted BPI's amended computations in a Finding of Facts and Conclusions of Law order entered April 1, 2002. The court's order calculated BPI's total savings as follows:

> The Court adopts Defendant's amended computations of BPI's total savings under the LCI Contract when compared to MCI I, as $142,772.68 (as set out in attached Exhibits #1 & 2) as being more correct. However, the underutilization fee of $13,030.70 owed by BPI for early termination should further reduce the total savings to $129,741.98. Of this amount, SDS would be entitled to fees of one-half (½) that amount, or $64,870.99. Of this amount, BPI has already paid $7,027.93, leaving a balance of $57,843.06.

The trial court is afforded wide discretion in the admission or rejection of evidence, and the trial court's action will be reversed on appeal only when there is a showing of an abuse of discretion.

[10] SDS's Proposed Findings of Fact and Conclusions of Law was not made part of this record.

See Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439 (Tenn. 1992); ***Davis v. Hall***, 920 S.W.2d 213, 217 (Tenn. Ct. App. 1995).

Upon our review of the record in this case and the comments of the court in its preliminary ruling, we find that the trial court did not abuse its discretion in adopting BPI's recalculation of savings. As noted, the trial court expressed dissatisfaction with the savings computations of each parties' respective experts. On this basis, the court requested that both parties submit amended computations for the court to consider. Hence, both parties, without objection, were given an equal opportunity to submit amended computations for the court's consideration. After considering each parties' proposed calculations, the court acted within its discretionary power in choosing to accept BPI's computations over those submitted by SDS.

Moreover, we are satisfied that the trial court had the opportunity to hear and examine all of the relevant evidence to ensure that BPI's amended calculations accurately reflected the evidence in the record. We note additionally that there is no indication or allegation that the trial court did not carefully examine BPI's amended computations to establish that said computations accurately represented the court's views and conclusions. For these reasons, we find SDS's first issue without merit.

II.

The second issue for review is the question of whether "the trial court erred in awarding BPI a set-off of $13,030.70 against SDS for an "underutilization penalty" where BPI's damages were uncertain, remote, conjectural, and speculative because MCI waived payment of the penalty."

In June 1997, BPI received an invoice from MCI assessing a $13,030.70 underutilization penalty for appellee's failure to meet its $180,000.00 annual volume commitment for the final year of the MCI I agreement. The trial court determined that the underutilization penalty should be applied to reduce SDS's total savings share, concluding:

> The underutilization charge from MCI is a proper deduction from the total computed savings because under the MCI I contract, it states very clearly that BPI has a $180,000 commitment, and if it fails to meet that commitment (upon termination and giving the 30 days advance notice), all MCI would be entitled to would be the underutilization fee (of $13,030.70).
>
> So on the original complaint, SDS would be entitled to receive fees equal to one-half of the total savings, after deducting the underutilization charge and appropriate discounts for the period of time that the LCI contract was in existence.

SDS objects to the court's deduction of the underutilization penalty, asserting that MCI waived the penalty when BPI signed the MCI II agreement in 1998. According to SDS, MCI's alleged waiver of the penalty renders the contract damages sought by BPI "uncertain, contingent, conjectural, or speculative," and therefore unrecoverable.

BPI acknowledges that "[t]he proof at trial was clear that BPI did not pay the $13,030.70 directly to MCI as a penalty." In his testimony before the trial court, Mr. McAlexander admitted that the underutilization penalty was waived, but maintained that the penalty was built into the new rates that BPI negotiated with MCI under the second contract, stating:

> THE COURT: You said you had to go back to MCI. Did you get a legal opinion to that effect or you just made that decision that you had to go back?
>
> THE WITNESS: We visited with MCI. Specifically Sherry Nymoen visited with MCI, and they indicated that these penalties, the 13,000 that were billed, plus the penalties that are part of the tariff are enforceable, would be subject to collection, collection action and legal action if we did not return to MCI.
>
> THE COURT: But did you consider the increased cost that you would be paying from the LCI rates that you were presently under because the new rates, as Ms. Watkins testified to, were worse than the rates that you had under LCI?
>
> THE WITNESS: That's correct, and the reason they were worse was because we did not have a competitive bid situation, and effectively they raised those rates to recover these charges that they were waiving.
>
> We were captive at that point in time. We were faced – our alternatives – as of this point in time when I wrote this letter, we had three alternatives. We could renew with LCI. We would have had a hundred eighty thousand dollars a year penalty for each year – for the next three years with MCI.
>
> THE COURT: So they actually charged you the penalties that they were telling you that they were waiving in exchange for your signing a contract for three more years as opposed to staying with LCI and paying the penalty.
>
> THE WITNESS: Buried in those rates, that is correct, Your Honor.

****

Q: [Appellee Counsel] Okay. So was indeed or wasn't the underutilization billed to BPI?

A: That's correct.

Q: Which is it? Was it billed, or was it not?

A: Yes, it was billed. It was billed to BPI.

Q: So whatever testimony from Mr. Siano or Ms. Watkins about billing – it's your testimony that it was billed, and that's the bill?

A: That's correct.

****

Q: Okay. And when you entered into that contract with MCI, MCI – the second MCI contract, what was your understanding with respect to the existing underutilization penalty that you had been billed for?

A: The existing underutilization penalty for the third year had been credited as well as the underutilization penalty that was accruing on the rollover of the MCI One contract.

So both the 13,000-dollar bill penalty and the penalty that was accruing by virtue of the fact that we had a hundred eighty thousand dollar commitment in the rollover were both forgiven.

On cross examination, Mr. McAlexander again acknowledged that the underutilization penalty was waived as a part of renewal. SDS introduced no testimony to rebut Mr. McAlexander's assertions that the underutilization penalty was "built into" the MCI II agreement rates.[11]

When the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge, who has the opportunity to observe the witnesses in their manner and demeanor while testifying, is in a far better position than this Court to decided those issues. ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412, 415 (Tenn. Sp. Workers Comp. 1995); ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997). The weight, faith, and credit to be given to any witness's testimony

[11] Mr. Siano testified only that he was "not aware of any" underutilization penalty payments made by BPI to MCI.

lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. ***Id.***; ***In re Estate of Walton v. Young***, 950 S.W.2d 956, 959 (Tenn. 1997).

From the court's ruling deducting the underutilization penalty from SDS's savings total, it is apparent that the court found favor in Mr. McAlexander's testimony that the penalty was built-into the MCI II agreement rates. Recognizing that the trial court is in the best position to judge the credibility of a witness, and because there is no countervailing evidence in the record to indicate that the underutilization penalty was not factored into the MCI II rates, we affirm the finding of the trial court that the underutilization penalty should be applied to reduce SDS's total savings award. We therefore find SDS's second issue without merit.

III.

The next issue presented for review is the question of whether the trial court erred in refusing to award appellant "contract damages equal to one-half the cost savings for the second and third years of the parties' contract." SDS premises its allegation of error on the doctrine of substantial performance, asserting that BPI relied upon appellant's written analysis and oral recommendation(s) in switching from LCI to MCI in November 1997, thereby entitling SDS to a percentage of the savings realized by BPI under the MCI II agreement for the second and third years of the parties' July 23, 1996 contract.

In ***Warren v. Metro. Gov't of Nashville & Davidson County***, 955 S.W.2d 618 (Tenn. Ct. App. 1997), we discussed the role of a Court in interpreting a contract:

> Courts are to interpret and enforce the contract as written according to its plain terms. ***Petty v. Sloan***, 197 Tenn. 630, 277 S.W.2d 355, 358 (1955); ***Home Beneficial Ass'n v. White,*** 180 Tenn. 585, 177 S.W.2d 545, 546 (1944). We are precluded from making new contracts for the parties by adding or deleting provisions. ***Central Adjustment Bureau, Inc. v. Ingram***, 678 S.W.2d 28, 37 (Tenn. 1984); ***Shell Oil Co. v. Prescott***, 398 F.2d 592 (6th Cir. 1968). When clear contract language reveals the intent of the parties, there is no need to apply rules of construction. An ambiguity does not arise in a contract merely because the parties may differ as to interpretation of its provisions. ***Oman Construction Co. v. Tennessee Valley Auth.***, 486 F.Supp. 375 (M.D. Tenn. 1979). A contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one; a strained construction may not be placed on the language used to find an ambiguity where none exists. ***Empress Health and Beauty Spa, Inc. v. Turner***, 503 S.W.2d 188, 190-91 (Tenn. 1973). We are to consider the agreement as a whole in determining whether the meaning of the contract is clear or ambiguous. ***Gredig v. Tennessee Farmers Mut. Ins. Co.***, 891

> S.W.2d 909, 912 (Tenn. Ct. App. 1994). If a contract is plain and unambiguous, the meaning thereof is a question of law for the court. ***Petty v. Sloan***, 277 S.W.2d at 358.

Id. at 622-23.

The parties' July 23, 1996 contract provides that "**SDS** will furnish **BPI** with a written report as to recommendations that may be made in the above areas without sacrificing quality or service. **BPI** will then determine which (if any) of these recommendations they wish to implement." (emphasis in original). SDS admits that it never provided BPI with a written recommendation to switch to MCI after the expiration of the LCI agreement. SDS contends, however, that it made an oral recommendation to BPI in the fall of 1996 to use LCI as leverage to force MCI to offer more competitive pricing and incentives. In addition to this alleged oral recommendation, SDS asserts that the written analysis it provided to BPI comparing the carrier bids, along with the notes compiled by Mr. Siano during or shortly after the parties' October 18, 1996 meeting,[12] are further evidence to support a finding that BPI was aware of, and acted upon, SDS's "recommendation" to return to MCI.

Based upon our reading of the plain language of the parties' July 23, 1996 contract, we find that SDS's oral recommendation, if in fact such a recommendation was ever made, does not comply with the written recommendation requirements set forth in the agreement. Therefore, we are unable to find that SDS is entitled to a percentage of the savings realized by BPI under the MCI II agreement, for the time period encompassing the second and third years of the parties' July 23, 1996 contract. We thus find SDS's issue without merit.

IV.

We next consider the issue of "[w]hether the trial court erred in awarding damages to BPI for its breach of contract counterclaim for the embezzlement of funds by a third party based upon inadmissible parol evidence and hearsay." SDS specifically asserts that the trial court erred in awarding BPI $29,034.85 in damages representing freight payments embezzled by Transcom without SDS's knowledge, where such award "was based upon parol evidence of a prior oral agreement between BPI and Transcom for freight payment services," and upon an unauthenticated Transcom brochure that should have been excluded as hearsay.

To briefly reiterate the pertinent facts, SDS and BPI entered into a written "freight auditing services" contract on August 30, 1996, whereby SDS agreed to "provide Freight auditing to Building Plastics Inc. (BPI) for a monthly fee of $1,000.00." SDS retained Transcom as a subcontractor to provide the contract services to BPI. The parties' agreement was born of a meeting held on August 21, 1996, and attended by representatives of BPI, SDS, and Transcom. In his direct examination testimony, Mr. McAlexander stated that BPI's agreement with SDS included the payment of freight

[12] We reiterate that these notes, or a copy of these notes, were never provided to BPI.

bills. Mr. McAlexander explained that he was given a Transcom brochure during the meeting, and that said brochure listed freight payment as an included service.

The brochure, entered as an exhibit at trial, detailed Transcom's freight payment capabilities, stating:

> **Freight Payment** that goes a step beyond. We provide the services needed to reduce errors, eliminate duplicate payments and reduce overhead. However, we feel the real value is our ability to provide *specialized management reporting* on a moments notice!

Mr. McAlexander testified that BPI entered into the August 30, 1996 agreement with SDS on the understanding that the services provided under the contract included the freight auditing and freight payment services specified in Transcom's brochure.

In the Spring of 1997, BPI learned that Transcom embezzled $29,000.00 in freight payments from BPI. Upon learning of Transcom's indiscretions, BPI terminated its August 30, 1996 contract with SDS and eventually filed a counterclaim against appellant for recovery of the embezzled funds.

In its Findings of Fact and Conclusions of Law order of April 1, 2002, the trial court listed the following factual findings:

> The proof is clear that at the first meeting where the parties agreed to the freight auditing arrangement, Transcom was present and provided BPI with its brochure which clearly included "paying for freight invoices as a part of the services it could render for clients."
>
> BPI never executed any agreement with or paid Transcom directly for any services rendered by Transcom under the SDS agreement. All payments by BPI for auditing services were made directly to SDS.
>
> All services rendered by Transcom to BPI were a direct result of the auditing agreement BPI had with SDS.
>
> BPI sustained a loss of $29,034.85 as a result of Transcom's actions as agent for SDS.

Based upon these facts, the trial court found that the funds embezzled by Transcom were attributable to SDS.

To reiterate, the trial court is afforded wide discretion in the admission or rejection of evidence, and the trial court's action will be reversed on appeal only when there is a showing of an

abuse of discretion. ***See Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439 (Tenn. 1992); ***Davis v. Hall***, 920 S.W.2d 213, 217 (Tenn. Ct. App. 1995).

As stated, SDS challenges the trial court's award on two specific and related grounds. First, SDS alleges that court's award was "based upon parol evidence of a prior oral agreement between BPI and Transcom for freight payment services, apart from the services being performed pursuant to the clear terms of the freight auditing agreement between SDS and BPI." SDS asserts that the term "freight auditing," as incorporated in the parties' August 30, 1996 contract, is plain and unambiguous, and does not include freight payment. Second, SDS alleges that the brochure relied upon by BPI as evidence of an agreement that included freight payment services, is inadmissible hearsay as "[n]o witnesses from Transcom testified at trial to authenticate or prove up the brochure."

We address first SDS's contention that the court's award was based upon parol evidence of a prior oral agreement for freight payment services. As a general rule, parol evidence is inadmissible to contradict, vary, or alter a written contract when the written instrument is valid, complete, and unambiguous, absent fraud or mistake or any claim or allegations thereof. ***Airline Const., Inc. v. Barr***, 807 S.W.2d 247, 259 (Tenn. Ct. App. 1990) (citations omitted).

SDS asserts that the trial court improperly considered the Transcom brochure in violation of the parol evidence rule, arguing that the brochure contradicts and varies the plain and unambiguous language of the August 30, 1996 contract. The August 30, 1996 agreement states that SDS will provide "freight auditing" to BPI in exchange for a monthly fee of $1,000.00. Despite the language of the contract, the court, in its preliminary rulings from the bench, concluded:

> [T]he proof is clear that at the first meeting where the parties agreed to the freight auditing arrangement, Transcom apparently was there with its brochure and it included very clearly as the first part of the services that it could render something to the effect of paying for freight invoices or something to that effect.

The court's finding that freight payment was a service introduced to BPI is further supported by the following exert from Transcom's brochure, defining Transcom's role with regard to BPI's "freight negotiations" and "freight payment startup" needs:

> **B.P.I.**
>
> **Freight Negotiations and Freight Payment Startup**
>
> Our goal is made [sic] the conversion to an outside freight payment as smooth as possible with all of the preliminary work being performed by Transcom.
>
> First we will need any accounting codes that are presently assigned to freight payment.

> Input is needed from your accounting department and your traffic department on invoicing and reporting formats.
>
> If agreeable, we will send out a letter to all present carriers instructing them to send freight bills to Transcom as of an agreed to startup date. (see enclosed sample letter). Any freight bills that you receive can be grouped and mailed to our offices once a week.
>
> We process freight bills on Monday through Wednesday. Invoicing is prepared for all account [sic] each Thursday. Friday is reserved for problem bills, EDI transfer, and wire fund transfers for certain carriers. In most cases, all bills are processed within 3 work days of receipt and if a bill is processed clear it is posted for immediate payment. A report is available at any time that details the time between receipt of freight bill, actual freight bill date, and date of payment.
>
> **********
>
> We will not process any freight bills before our startup date unless the bill is a certified original. Any exception must be cleared by your accounting department before payment is issued. This should eliminate any duplicate payment during changeover.
>
> All collections calls should be directed to our office.
>
> We are always [sic] to assist your company attorneys in any matter regarding the proper payment of a freight bill or the settlement of any claim.

The record in this case indicates that Mr. Siano was present at the meeting when Transcom gave the brochure to BPI, that Transcom was an agent of SDS, and that there is no evidence of any "outside" written or oral agreements between BPI and Transcom as to freight payment services. Based on the facts of this case, and specifically in light of Transcom's agency relationship with SDS and the brochure excerpts cited above, we find that the August 30, 1996 contract between SDS and BPI included freight payment services.

SDS next asserts that the Transcom brochure was inadmissible hearsay evidence as no Transcom representative authenticated or "proved up" the brochure at trial. As a further basis for its assertion, SDS contends that the brochure was entered into evidence for the purpose of proving "the truth of the matter asserted," i.e, the fact that "a freight payment agreement existed for which SDS was allegedly responsible." The court overruled SDS's hearsay objection at trial on the basis that the brochure was "handed out in the presence of Mr. Siano pursuant to the

freight auditing contract which was entered into between SDS and BPI," and was introduced for the purpose of showing what materials were "handed out by or on behalf of SDS."

Based upon our review of the record and the trial proceedings, we find that the trial court did not commit an abuse of discretion in admitting Transcom's brochure into evidence. To the court's reasoning, we would add that even if the brochure was introduced into evidence for the purpose of proving the truth of the matter asserted, i.e. that "a freight payment agreement existed for which SDS was allegedly responsible," as suggested by SDS, the brochure is admissible pursuant to Tenn. R. Evid. 803(1.2)(C). This rule states:

> (1.2) Admission by Party-Opponent: A statement offered against a party that is[:]
>
> **********
>
> (C) a statement by a person authorized by the party to make a statement concerning the subject.

The evidence in the record shows that the brochure was given to BPI by Transcom, in the presence of Mr. Siano, at a time when Transcom was acting as an agent on behalf of SDS. The undisputed purpose of the August 21, 1996 meeting at which the brochure was handed out was to discuss the parties' eventual freight auditing agreement. The brochure, as stated, detailed the services of which Transcom was capable and willing to provide under the parties' August 30, 1996 agreement. Moreover, the brochure specifically defined Transcom's plan and ability to provide freight payment services to BPI as part of this agreement. Because it is apparent from the evidence that Transcom was authorized to provide BPI with a brochure defining a freight payment services plan, we find that the exception provided in Tenn. R. Evid. 803(1.2)(C) applies, and thus the brochure constitutes admissible hearsay. Appellant's issue is therefore without merit.

V.

The final issue presented for review is the question of "[w]hether the trial court erred by denying SDS's motion for costs expressly allowable under Tenn. R. Civ. P. 54.04(2) without articulating a reason for denying the costs requested." In the present case, SDS sought $5,768.39 in discretionary costs for "court reporter expenses and expert witness fees for depositions and the trial of this matter."

Tenn. R. Civ. P. 54.04(2) provides:

> **Rule 54.04 Costs**

> (2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs. Subject to Rule 41.04, a party requesting discretionary costs shall file and serve a motion within thirty (30) days after entry of judgment.

SDS specifically objects to the trial court's decision to deny its Motion for Discretionary Costs on the basis that the court failed to articulate a precise reason in support of its ruling. SDS relies upon the holding of an Eastern Section case of this Court in ***Lockett v. Charles Blalock & Sons, Inc.,*** No.2001-01000-COA-R3-CV, 2002 WL 111304, at *5 (Tenn. Ct. App. Jan. 29, 2002), which remanded the case to the trial court for a determination of reasonableness where the "record" did not show any basis for denial of requested discretionary costs.

We do not read ***Lockett*** to require a trial court to articulate in writing a specific reason for denying a party's request for discretionary costs. In ***Woodlawn Memorial Park, Inc. v. Keith***, 70 S.W.3d 691 (Tenn. 2002), our Supreme Court made the following statement concerning the rule allowing an award of discretionary costs:

> As is indicated by the language of the Rule, "[t]rial courts are afforded a great deal of discretion when considering whether to award costs," ***see, e.g., Mix v. Miller***, 27 S.W.3d 508, 516 (Tenn. Ct. App. 1999), and "the trial judge may apportion the costs between the litigants as, in [his or her] opinion, the equities demand." ***Perdue v. Green Branch Mining Co.***, 837 S.W.2d 56, 60 (Tenn. 1992) (citing Tenn. Code Ann. § 20-12-119 (1980)). Consequently, "appellate courts are generally disinclined to interfere with a trial court's decision in assessing costs unless there is a clear abuse of discretion." ***Id.*** An abuse of discretion occurs when the court either applies an incorrect legal standard or reaches a clearly unreasonable decision, thereby causing an injustice to the aggrieved party. ***See Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (citing ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999)).

Id. at 697-98.

Apparently, the trial court considered the entire record involving the claims and counter-claims of the parties hereto and the results reached in the trial court's opinion. We have

examined the record as a whole and cannot find that the trial court abused its discretion in denying an award of discretionary costs to the appellant.

The judgment of the trial court is affirmed, and the case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are assessed one-half to appellant, SDS & Associates, Inc., and its surety and one-half to appellee, Building Plastics, Inc.

_____

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.