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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0647**

Michael O'Byrne
d/b/a Michael O'Byrne Construction,
Respondent,

vs.

Lumber One, Avon, Inc.,
Appellant.

**Filed March 17, 2009
Affirmed
Schellhas, Judge**

Olmsted County District Court
File No. 55-C8-03-000997

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Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

After remand, appellant challenges the district court's award of damages as unsupported by probative evidence and subject to mathematical error. Because we

conclude that the district court's calculation of damages is supported by probative evidence and contains no mathematical error, we affirm.

FACTS

Respondent Michael O'Byrne, a contractor, obtained a jury verdict of \$166,036 in its breach-of-contract action against appellant Lumber One, Avon, Inc. (Lumber One). Stating that O'Byrne's cost figures lacked documentary evidence and were of "doubtful credibility," the district court granted Lumber One conditional remittitur to \$103,530, and O'Byrne accepted the reduced award.

In the first appeal before this court, Lumber One challenged the judgment after remittitur and the district court's denial of its motion for a new trial. *O'Byrne v. Lumber One, Avon, Inc.*, No. A06-1121, 2007 WL 1599175 (Minn. App. June 5, 2007) (*O'Byrne I*). By notice of review, O'Byrne challenged the grant of remittitur. *Id.* at *1-2. In *O'Byrne I*, we affirmed the district court's grant of remittitur and denial of a new trial, but we "reverse[d] the remittitur award and remand[ed] for reconsideration, upon specific competent evidence, the amount of [O'Byrne's] damages." *Id.* at *3. We reasoned that:

In light of the evidence supporting its findings that [O'Byrne's] claim of at least a \$6,000 profit per lot lacked documentary support and was not credible, and that respondent's calculation of costs was considered unreasonable by others working in the field, the district court did not abuse its discretion by granting appellant's motion for remittitur

Id. at *3. And, we explained that we reversed "[a]bsent findings of fact and a legal analysis in sufficient detail to allow this court to fully comprehend the basis of the trial court's decision." *Id.* at *3 (quotation omitted). We further stated that "[u]pon remand

the district court may, in its discretion, reopen the record and receive additional evidence on damages.” *Id.*

On remand, the district court held a hearing and concluded that the evidence in the record provided a sufficient basis for recalculating the amount of O’Byrne’s damages. The court set forth its reasoning in two letters to counsel, dated January 16, 2008 and February 22, 2008.

The district court explained in its first letter that, based on the trial testimony of contractor Dan Cassidy,¹ the costs pertaining to jobs completed by O’Byrne should have been at least \$2,025 higher than the costs to which O’Byrne testified. The district court added \$2,025 to the \$6,700 in total costs per lot to which O’Byrne testified at trial, arriving at a total cost per lot of \$8,725. The district court also noted that, although O’Byrne’s full contract price was \$12,700 per lot, according to O’Byrne’s trial testimony, \$2,500 of this amount was for block walls, which O’Byrne passed on to his brother, who did the work, so O’Byrne earned no profit from the pass-through for the block walls. The district court therefore subtracted \$2,500 from O’Byrne’s full contract price per lot and arrived at an adjusted contract price of \$10,200 per lot. Then the district court subtracted the total cost per lot (\$8,725) from \$10,200 to arrive at a profit per lot of \$1,475, and multiplied this profit by the 29 lots to arrive at a new damages award of \$42,775.

Subsequently, in its second letter, the district court notified the parties that it had made a mistake pertaining to the \$2,500 per-lot cost of block walls in its calculation of O’Byrne’s damages. The district court explained that the \$10,200 adjusted contract price

¹ Lumber One called Cassidy as its witness.

per lot, referenced in its earlier letter, did not include the \$2,500 O'Byrne charged for block walls but the \$6,700 figure for total costs per lot did include the \$2,500 cost for block walls. Thus, the district court determined that in its earlier calculation, it "should either have been using the full contract price, \$12,700 (rather than \$10,200)" or it "should have been reducing the \$6,700 by the same \$2,500." Therefore, the district court concluded, the proper calculation of profit per lot was \$12,700 minus \$8,725, or \$3,975 per lot, which amounted to \$115,275 for the 29 lots. The district court therefore reduced the total damages awarded to O'Byrne to \$115,275. O'Byrne consented to the remittitur.

Lumber One challenges the district court's calculation of O'Byrne's lost profits. This appeal follows.

D E C I S I O N

In our review of a conditional remittitur, we apply a standard of clear abuse of the district court's discretion. *Sorenson v. Kruse*, 293 N.W.2d 56, 62 (Minn. 1980). A district court must calculate a conditional remittitur based on "factors germane to its conclusion." *Bebeau v. Mart*, 310 N.W.2d 465, 470 (Minn. 1981). "It is not the duty of the appellate court to determine the credibility of the evidence, to weigh it, or to resolve conflicts therein." *Johnson v. Lorraine Park Apts. Inc.*, 268 Minn. 273, 276, 128 N.W.2d 758, 771 (1964); *see also Schoenfeld v. Buker*, 262 Minn. 122, 127, 114 N.W.2d 560, 564 (1962) (stating that the function of a reviewing court is "not to provide a hearing de novo or to substitute its judgment for that of the trial court"). The evidence is reviewed in the light most favorable to the judgment of the district court, and the judgment will not be reversed merely because the reviewing court views the evidence differently. *Rogers v.*

Moore, 603 N.W.2d 650, 656 (Minn. 1999). A district court’s factual findings are erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Gjovik v. Strope*, 401 N.W.2d 664, 667 (Minn. 1987).

Lumber One argues first that the district court’s calculation of O’Byrne’s damages was flawed because the district court failed to rely on probative evidence in arriving at its figures. Lumber One bases its argument on the district court’s statements made in connection with its first remittitur determination—that O’Byrne’s cost figures lacked documentary evidence and were of doubtful credibility, and that what specificity O’Byrne supplied at trial “came so late in the case and in such a form as to reasonably place its credibility in doubt.” But, on remand, although the district court relied in part on these cost figures to calculate the amount of O’Byrne’s lost profits, it also relied on the cost figures presented at trial by Cassidy.

We do not agree with Lumber One’s assertion that the district court rejected O’Byrne’s cost calculations entirely, when it granted remittitur. It was the jury’s province, as fact-finder, to determine the trial witnesses’ credibility and the weight to assign to evidence as long as “there is some evidence, even though of doubtful probative value, to sustain a finding.” *Whitman v. Speckel*, 237 Minn. 36, 42, 53 N.W.2d 558, 561 (1952). While the district court found that O’Byrne’s testimony lacked documentary support and was of “doubtful credibility,” these assessments pertain to the weight of that evidence and do not constitute a negation of its probative value or rejection of the evidence in its entirety. We conclude that the district court’s calculation of O’Byrne’s damages is reasonably supported by the evidence and is not manifestly contrary to the

weight of the evidence on the record. *See Rogers*, 603 N.W.2d at 656 (stating that the district court's decision should not be reversed unless its findings are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole" (quotation omitted)).

Lumber One also argues that the district court erred when it corrected its calculation of O'Byrne's damages by subtracting its calculation of O'Byrne's costs per lot (\$8,725) from the full \$12,700 contract price per lot rather than from \$10,200. But the district court adequately explained its correction in its second letter to counsel, pointing out that its \$8,725 calculation of O'Byrne's costs per lot included the \$2,500 amount for block walls, but the \$10,200 adjusted contract price per lot that the court had used did not. The district court correctly recognized that including \$2,500 in the total cost per lot and also subtracting the amount from the contract price per lot had the effect of counting the \$2,500 cost of block walls twice. The district court's use of the full \$12,700 contract price per lot in its final calculation of O'Byrne's damages was correct.

Affirmed.