SUMMARY
August 1, 2024

2024COA78

No. 22CA2154, *Ralph L. Wadsworth Construction Company LLC v. Regional Rail Partners* — Contracts — Breach of Contract; Construction — Public Works — Contractor's Bonds and Lien on Funds — Verified Statement of Claim — Excessive Amounts Claimed

A division of the court of appeals, as a matter of first impression, addresses two issues under the Colorado Public Works Act, sections 38-26-101 to -110, C.R.S. 2023: (1) whether an unliquidated breach of contract claim for delay damages can be included in a verified statement of claim and (2) the effect of filing an excessive verified statement of claim.

COLORADO COURT OF APPEALS **2024COA78**

Court of Appeals No. 22CA2154
City and County of Denver District Court No. 19CV30345
Honorable Darryl F. Shockley, Judge

Ralph L. Wadsworth Construction Company, LLC,

Plaintiff-Appellee and Cross-Appellant,

v.

Regional Rail Partners; Balfour Beatty Infrastructure, Inc.; Graham Contracting Ltd.; Travelers Casualty and Surety Company of America; Balfour Beatty, LLC; and Graham Business Trust,

Defendants-Appellants and Cross-Appellees.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE TOW
Lipinsky and Grove, JJ., concur

Announced August 1, 2024

Berg Hill Greenleaf Ruscitti LLP, Giovanni M. Ruscitti, Rudy E. Verner, John P. Storti, Lawrence Myers, Boulder, Colorado, for Plaintiff-Appellee and Cross-Appellant

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¶ 1 In this contract dispute involving the design and construction of a transit rail line, plaintiff, Ralph L. Wadsworth Construction Company LLC (Wadsworth), sued defendants, Regional Rail Partners (Regional Rail), Balfour Beatty Infrastructure, Inc., Graham Contracting Ltd., Travelers Casualty and Surety Company of America (Travelers), Balfour Beatty, LLC, and Graham Business Trust.[1] Regional Rail brought counterclaims. After a bench trial, the court entered a split verdict, entering judgment (1) in favor of Regional Rail and against Wadsworth for $514,666.64 and (2) in favor of Wadsworth and against Regional Rail for $5,718,135.00. Wadsworth and Regional Rail appeal.[2]

¶ 2 Regional Rail's appeal requires us to interpret, for the first time in a reported appellate decision, two aspects of the Colorado

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[1] Regional Rail is a joint venture between Balfour Beatty Infrastructure's predecessor and Graham Contracting. Balfour Beatty LLC and Graham Business Trust served as guarantors for Regional Rail. As will be explained below, Travelers posted a contractor's bond on behalf of Regional Rail.

[2] While all six defendants, represented by the same counsel, filed the notice of appeal, only Regional Rail filed the opening brief. Because any liability of the other five defendants is entirely derivative, and Regional Rail is the only defendant against whom the judgment was entered, we deem Regional Rail to be the only appellant.

Public Works Act (the Public Works Act), sections 38-26-101 to -110, C.R.S. 2023: (1) whether an unliquidated breach of contract claim for delay damages can be included in a verified statement of claim under section 38-26-107, C.R.S. 2023, and (2) the effect of filing an excessive verified statement of claim under section 38-26-110, C.R.S. 2023.[3]

¶ 3 We conclude that the trial court erroneously found there was a reasonable possibility that the entire amount Wadsworth claimed was due at the time it filed its amended verified statement of claim. Instead, we conclude that, as a matter of law, there was no such reasonable possibility and that Wadsworth knew its claim included amounts that were attributable to unliquidated breach of contract

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[3] Wadsworth refers to the statute at issue in this case as the Colorado Public Works Act, while defendants refer to it as the Little Miller Act (after the analogous federal statute, the Miller Act, 40 U.S.C. §§ 3131-3134). Colorado appellate courts have referred to this statute by a variety of names: the "Colorado Public Works Act," *W. Metal Lath v. Acoustical & Constr. Supply, Inc.*, 851 P.2d 875, 876 (Colo. 1993); the "Contractors' Bond Statute," *Trs. of Colo. Carpenters & Millwrights Health Benefit Tr. Fund v. Pinkard Constr. Co.*, 199 Colo. 35, 38, 604 P.2d 683, 685 (1979); and the "Public Works Trust Fund statute," *Franklin Drilling & Blasting Inc. v. Lawrence Constr. Co.*, 2018 COA 59, ¶ 2. We opt for the Colorado Public Works Act (or, for short, the Public Works Act), as it is the name most recently used by our supreme court. *W. Metal Lath*, 851 P.2d at 876.

claims encompassing amounts other than those for "labor, materials, sustenance, or other supplies," as permitted by section 38-26-107. Thus, Wadsworth's amended verified statement of claim was excessive. We further conclude that the unambiguous language of section 38-26-110 results in forfeiture of Wadsworth's entire claim.

¶ 4 In light of this conclusion, we reverse the judgment to the extent it awarded Wadsworth any amounts that were included in Wadsworth's amended verified statement of claim. But we reject Regional Rail's challenges to the trial court's resolution of its counterclaims for damages. Thus, we affirm the judgment with respect to those counterclaims.

¶ 5 As for Wadsworth's appeal, we conclude that the trial court erroneously entered judgment in Regional Rail's favor on its claim for liquidated damages because Regional Rail contributed to the delays on which the claim was based. Accordingly, we reverse that portion of the judgment as well.

¶ 6 In sum, we affirm the judgment in part and reverse it in part, and we remand the matter to the trial court to enter an amended

judgment and to resolve both parties' competing claims for attorney fees and costs.

I. Background

¶ 7 Regional Transportation District (RTD) engaged Regional Rail to design and build the North Metro Rail Line between Denver Union Station and Thornton. Regional Rail contracted with Wadsworth to perform work related to several segments of the rail line. Under the contract between Regional Rail and Wadsworth, as modified periodically by change orders, Wadsworth was to be paid $60,210,783, of which Regional Rail had paid Wadsworth almost $58 million at the time of trial.[4]

¶ 8 The project suffered myriad disputes and delays, with the parties disagreeing over who bore the bulk of the blame. In early 2018, Wadsworth retained an expert to assess the financial impact of the delays it believed were attributable to Regional Rail. In April of that year, Wadsworth's expert prepared a report (the April 2018 claim summary) concluding that Regional Rail owed Wadsworth

[4] These figures appear in the parties' joint proposed trial management order.

$12,408,496.60 as an "equitable adjustment due to the ongoing delays, disruptions and changes" incurred on the project.[5]

¶ 9 On September 11, 2018, Wadsworth filed a verified statement of claim with RTD pursuant to section 38-26-107(1), claiming that Regional Rail owed it $15,774,855.56, plus interest, for the labor, materials, or other supplies that Wadsworth had provided to Regional Rail on the project. A week later, Wadsworth filed an amended verified statement of claim for $12,764,572.40, plus interest, for the "labor, materials, or other supplies for the construction of improvements upon the real and personal property known as the North Metro Rail Line project." Wadsworth explained that the difference between the verified statement of claim and the amended verified statement of claim was that the latter did not include the contractual retention amount, which Regional Rail had asserted was not yet owed.

¶ 10 Wadsworth did not concede that the retention was not yet due but agreed that it would "remove the retention amount for now." At

[5] In its complaint, Wadsworth alleged that the April 2018 claim summary concluded that the amount owed was $12,446,517.00. The basis for the additional $38,020.40 is unclear.

the same time, Wadsworth provided Regional Rail with a breakdown of the amended claim, explaining that it included

(1) $12,408,496.60 for the April 2018 claim summary;

(2) $1,064,115.15 for "additional amounts due but not yet paid" by Regional Rail; and (3) "less $708,039.35 for negotiated settlements" with Regional Rail related to previously resolved disputes and change orders.

¶ 11 Pursuant to section 38-26-108, C.R.S. 2023, Regional Rail petitioned the Adams County District Court to substitute a corporate surety bond as security in place of the amended verified statement of claim and requested that the court release the amended verified statement of claim in Adams County Case No. 18CV1729.[6] The bond, issued by defendant Travelers, was for $19,147,858.90 — 150% of the amended verified statement of claim amount, plus estimated costs up to the date the bond was posted. The trial court granted Regional Rail's petition to substitute the bond in place of the amended verified statement of claim and directed the clerk to execute a certificate of release.

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[6] We may take judicial notice of the contents of court files in related proceedings. *Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 64.

¶ 12 A few months later, Wadsworth initiated this action and subsequently, with the court's permission, filed an amended complaint. Wadsworth asserted a variety of claims, including breach of contract; a claim against the substituted bond; failure to promptly pay construction funds under the Prompt Payment Act, § 24-91-103(2), C.R.S. 2023; unjust enrichment; breach of the implied covenant of good faith and fair dealing; fraudulent misrepresentation and concealment; and negligent misrepresentation.[7] Wadsworth alleged that, throughout the project, delays caused by Regional Rail — such as sections of the project not being ready for construction at the times promised, land acquisitions not being finalized, right-of-way issues, and incomplete designs — repeatedly prevented Wadsworth from performing work. Wadsworth alleged that these issues caused it to incur significant damages.

¶ 13 Defendants raised multiple affirmative defenses to Wadsworth's claims, including that the amended verified statement

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[7] Wadsworth's contract claims included passthrough claims filed on behalf of two of its subcontractors, referred to as Gerdau and Lobato.

of claim was excessive and that Wadsworth contributed to the delays underlying Wadsworth's claimed damages. In addition, Regional Rail brought two counterclaims against Wadsworth. It asserted a multi-part breach of contract claim seeking liquidated damages and a variety of back charges. And it asserted a claim styled as "false verified statement of claim and bond claim," seeking a ruling that Wadsworth forfeited all amounts claimed pursuant to section 38-26-110 and an award of the "costs and attorney fees Regional Rail incurred in bonding over, contesting, and otherwise responding to Wadsworth's excessive verified statement of claim and excessive bond claim."

¶ 14 After a ten-day bench trial, the trial court issued a lengthy order containing the following findings and conclusions:

- Regional Rail did not prove that Wadsworth filed an excessive verified statement of claim because there was a reasonable possibility that the amount claimed was due.
- Wadsworth prevailed against Regional Rail on its breach of contract claim and the passthrough claim as to Gerdau.

- Wadsworth failed to establish its claims of breach of the implied duty of good faith and fair dealing, unjust enrichment, fraudulent misrepresentation, fraudulent inducement, fraudulent concealment, and negligent misrepresentation.

¶ 15 Based on these findings and conclusions, the court awarded Wadsworth $3,787,406 in damages, plus $1,930,729 in unpaid construction funds to be paid no later than ten days after Regional Rail received final payment from RTD. As to Regional Rail's counterclaims, the court awarded Regional Rail $200,000 in liquidated damages and $314,666.64 in back charges.

¶ 16 Regional Rail appeals, asserting that the trial court erred because (1) Wadsworth's verified statement of claim was excessive and (2) the court incorrectly valued Regional Rail's counterclaims. Wadsworth cross-appeals, contending that (1) it was entitled to prejudgment interest pursuant to section 5-12-102, C.R.S. 2023, on its breach of contract claim; (2) the trial court erred by awarding Regional Rail liquidated damages; (3) Regional Rail does not have the right to withhold Wadsworth's unpaid contract balance until RTD issues final payment to Regional Rail on the full project; and

(4) it is entitled to penalty interest under section 24-91-103(2) of the Prompt Payment Act. Wadsworth does not challenge the trial court's ruling in defendants' favor on Wadsworth's claims for breach of the implied duty of good faith and fair dealing, unjust enrichment, fraudulent misrepresentation, fraudulent inducement, fraudulent concealment, and negligent misrepresentation.

II. Verified Statement of Claim

A. Legal Framework

¶ 17 Because the Mechanics' Lien Act, sections 38-22-101 to -133, C.R.S. 2023, does not apply to public construction projects, the General Assembly enacted the Public Works Act to provide suppliers of labor and material for public construction projects with similar protections. *South-Way Constr. Co. v. Adams City Serv.*, 169 Colo. 513, 516-17, 458 P.2d 250, 251 (1969) (construing the statutory predecessor to the Public Works Act). The Public Works Act creates several avenues by which a subcontractor can ensure that it gets paid for the work it performs on a public construction project.

¶ 18 As pertinent here, one of the avenues permits a subcontractor to file with the contracting public entity a verified statement of

amounts due from and unpaid by the contractor. § 38-26-107(1). A public entity that receives such a verified statement of amounts due and unpaid (referred to as a verified statement of claim) must withhold from any payments to the contractor the amount claimed by the subcontractor until any disputes between the contractor and subcontractor are resolved. § 38-26-107(3). In essence, the verified statement of claim creates a lien on funds held by the public entity. *Heinrichsdorff v. Raat*, 655 P.2d 860, 862 (Colo. App. 1982).

¶ 19 With the court's approval, the contractor may elect to substitute a bond for the verified statement of claim. § 38-26-108. The verified statement of claim is discharged once the court approves such a bond. § 38-26-108(4).

¶ 20 In 2003, the General Assembly added a penalty provision addressing excessive claims. Ch. 254, sec. 2, § 38-26-110, 2003 Colo. Sess. Laws 1691-92. Section 38-26-110(1) provides that a subcontractor forfeits "all rights to the amount claimed" if the subcontractor files a verified statement of claim for an amount greater than what is due, without a reasonable possibility that the amount claimed is actually due, and with the knowledge that the claim is greater than the amount due. This penalty also applies to

excessive claims against bonds substituted for a verified statement of claim. § 38-26-110(1).

¶ 21 No published appellate case has addressed section 38-26-110. But the Public Works Act is a remedial provision, and its structure (though not its language) is similar to that of the Mechanics' Lien Act. Because the statutes share a common purpose, we glean guidance — at least with respect to how that purpose is effectuated — from cases discussing the Mechanics' Lien Act. For example, the Mechanics' Lien Act's excessive lien provision, section 38-22-128, C.R.S. 2023, is aimed at punishing and deterring those who abuse the protective processes by knowingly claiming amounts that are not yet due. *Honnen Equip. Co. v. Never Summer Backhoe Serv., Inc.*, 261 P.3d 507, 512 (Colo. App. 2011). From the similar structure of the excessive lien provision in the Public Works Act, we can infer a similar legislative intent underlying the analogous provision in the Public Works Act. Thus, like its Mechanics' Lien Act counterpart, the Public Works Act's excessive lien provision is to be liberally construed in favor of the filer of the verified statement of claim, but it must be strictly construed in determining whether the

filer has the right to file a verified statement of claim. *See Indep. Tr. Corp. v. Stan Miller, Inc.*, 796 P.2d 483, 493 (Colo. 1990).

¶ 22 But while the *purposes* of the Public Works Act and the Mechanics' Lien Act are similar, the *language* of the two is quite different in some respects. Where the language differs, the statutes are not given like effect. *See Trs. of the Colo. Carpenters & Millwrights Health Benefit Tr. Fund v. Pinkard Constr. Co.*, 199 Colo. 35, 39-40, 604 P.2d 683, 685-86 (1979) (rejecting two trial courts' reliance on a case applying the Mechanics' Lien Act to a dispute under the Public Works Act because the relevant language of the two statutes differed).

1. Standard of Review

¶ 23 Whether a verified statement of claim is excessive is an issue of fact. *See* § 38-26-110 (referring to whether a verified statement of claim is excessive as a "fact" that can be demonstrated in a proceeding under the statute); *cf. Tighe v. Kenyon*, 681 P.2d 547, 552 (Colo. App. 1984) (holding that whether a mechanics' lien is excessive involves a finding of fact). A trial court's findings of fact will not be disturbed on appeal unless they are clearly erroneous,

meaning there is no evidence in the record to support them. *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 521 (Colo. App. 2011).

¶ 24 When determining whether a verified statement of claim is excessive, we view the matter in light of the information available at the time of filing to the person who filed the verified statement of claim. *Cf. E.B. Roberts Constr. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 864 (Colo. 1985) (assessing whether a mechanics' lien was excessive).

¶ 25 To the extent that our resolution of this issue requires us to review the trial court's legal conclusions, including its interpretation of the Public Works Act, our review is de novo. *See Roane v. Elizabeth Sch. Dist.*, 2024 COA 59, ¶ 23.

2. The Permissible Scope of a Verified Statement of Claim

¶ 26 A subcontractor can file a verified statement of claim for "the amount due and unpaid" for "furnished labor, materials, sustenance, or other supplies used or consumed by a contractor or . . . subcontractor in or about the performance of the work contracted to be done" or for "laborers, rental machinery, tools, or equipment to the extent used in the prosecution of the work." § 38-26-107(1); *cf.* § 38-22-101(1) (stating that a mechanics' lien

claimant is entitled to a lien in the amount of the "value of . . . services rendered or labor done or laborers or materials furnished").

¶ 27 A person is barred from claiming an amount "greater than the amount due." § 38-26-110. "'Due' is defined as '[i]mmediately enforceable' or '[o]wing or payable; constituting a debt.'" *Byerly v. Bank of Colo.*, 2013 COA 35, ¶ 41 (quoting Black's Law Dictionary 574 (9th ed. 2009)) (discussing an excessive mechanics' lien). In other words, an amount is not "due" if it will only be owed upon some contingency or after the satisfaction of a condition precedent. *See id.* In the context of a mechanics' lien, our supreme court has observed that the mere fact that certain amounts might be recoverable in an action for breach of contract does not make those amounts lienable. *See Indep. Tr. Corp.*, 796 P.2d at 493-94, 494 n.16.

¶ 28 Knowledge is "an awareness . . . of a fact or circumstance." *JW Constr. Co. v. Elliott*, 253 P.3d 1265, 1271 (Colo. App. 2011) (quoting Black's Law Dictionary 950 (9th ed. 2009)). A claimant's acknowledgment that a part of the amount claimed "might at some stage in the future" be paid indicates knowledge that the amount

claimed was not due at the time the verified statement of claim was filed. *Byerly*, ¶ 42.

3. Remedy for an Excessive Verified Statement of Claim

¶ 29 While the language regarding what is lienable is similar between the Mechanics' Lien Act and the Public Works Act, the language regarding the impact of filing an excessive lien diverges significantly. The Mechanics' Lien Act provides that the lien claimant "shall forfeit all rights to *such lien*," § 38-22-128 (emphasis added), whereas the Public Works Act provides that the person who filed the verified statement of claim "shall forfeit all rights to the *amount claimed*," § 38-26-110(1) (emphasis added).

¶ 30 The difference between these provisions is significant. Generally, regardless of the status of a lien, a claimant retains the right to pursue other remedies to obtain a money judgment. *See Tighe*, 681 P.2d at 551. Thus, if a claimant forfeits the lien, it loses the protections that a lien provides (such as priority in line), but the claimant does not forfeit the ability to seek the judgment through other means.

¶ 31 But statutory language that provides for forfeiture of "the amount claimed" must mean something different. *See Bd. of Cnty.*

Comm'rs v. City of Woodland Park, 2014 CO 35, ¶ 10 ("We presume that the legislature did not use language idly. Rather, the use of different terms signals the General Assembly's intent to afford those terms different meanings.") (citation omitted). In our view, the language of section 38-26-110 is unambiguous: the claimant forfeits the right to pursue *any* remedy for that amount. While this sanction may seem drastic, it is the only reasonable reading the statutory language can bear.

B. Application

¶ 32 With this legal landscape in mind, we turn to whether the trial court correctly analyzed defendants' affirmative defense[8] that Wadsworth's amended verified statement of claim was excessive.

¶ 33 The trial court found that there was a reasonable possibility that the amount Wadsworth included in its amended verified statement of claim was due. But the court did not explain its reasoning or point to any specific evidence to support this finding. Indeed, it did not even discuss what it means to be "due." Nor did it

[8] As noted, Regional Rail also pleaded the excessive lien as a counterclaim. Our analysis does not change whether we treat it as a defense or a claim.

consider whether the specific amounts claimed were limited to "labor, materials, sustenance, or other supplies" as permitted by section 38-26-107(1).

¶ 34 In fact, the court made no specific factual findings at all related to the amended verified statement of claim. Although included under the heading "Findings of Fact," the trial court's discussion of Wadsworth's damages was little more than a recitation of the competing experts' testimony, without any ultimate findings as to what aspects of that testimony the court found persuasive. Then, under the heading "Conclusions of Law," the trial court awarded specific amounts of damages — totaling $5,718,155 — for the following categories: delay damages, lost productivity damages, specific issue damages, unpaid contract balances, and passthrough damages.

¶ 35 We cannot discern the basis of the trial court's summary determination that there was a reasonable possibility that the $12.7 million claimed in the amended verified statement of claim was due. Indeed, we cannot glean from the record *any* support for this finding, especially given (1) the substantial disparity between the amount claimed ($12.7 million) and the amount proved at trial

($5,718,135);[9] and (2) the lack of any discussion regarding what evidence established any possibility that the full amount claimed was for "labor, materials, sustenance, or other supplies" and was due at the time Wadsworth filed the amended verified statement of claim (or at the time it levied a claim against the bond).

¶ 36 To the contrary, in our view, the record unequivocally establishes there was no such possibility. First, while Wadsworth's expert testified as to how he calculated $12.4 million of the claimed amount, Wadsworth presented no evidence regarding the basis for the remainder of the $12.7 million total.

¶ 37 Moreover, the bulk of the $12.4 million that Wadsworth itemized was for "the impacts, delays, disruptions, interference, design issues, access issues, and other problems associated with the Project." In particular, the claim included amounts for lost profits, contractual mark-ups, and nonrental equipment costs. The items identified as "extended overhead" included recompense for time that the company's equipment stood idle due to the delays.

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[9] We acknowledge that the mere existence of the disparity does not conclusively establish excessiveness. *Cf. E.B. Roberts Constr. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 864 (Colo. 1985).

None of these items falls within the ambit of "labor, materials, sustenance, or other supplies used or consumed by a . . . subcontractor in or about the performance of the work contracted to be done." § 38-26-107(1). Nor do they qualify as "suppl[ying] laborers, rental machinery, tools, or equipment *to the extent used in the prosecution of the work*." *Id.* (emphasis added). And there is no reasonable basis to assert that they do.

¶ 38 Nor can it reasonably be said that this unliquidated claim for delay damages was "due" at the time Wadsworth filed the amended verified statement of claim. The parties were vigorously disputing who had caused the delays. The purpose of the verified statement of claim process is to secure reimbursement for labor and materials *actually provided*, not to give a claimant prelitigation leverage in an unresolved dispute over delay damages — particularly where those damages do not relate to amounts due for actual labor, materials, sustenance, or other supplies. *Cf. Lambert v. Superior Ct.*, 279 Cal. Rptr. 32, 36 (Ct. App. 1991) (concluding that delay damages did not qualify as "the reasonable value of the labor, services, equipment, or materials furnished," and thus were not lienable under California's mechanics' lien statute (quoting Cal. Civ. Code § 3123 (West

1991))); *Consol. Elec. & Mechs., Inc. v. Biggs Gen. Contracting, Inc.* 167 F.3d 432, 436 (8th Cir. 1999) (holding that the Miller Act does not permit claims for lost profits or delay damages beyond out-of-pocket expenses).

¶ 39 Thus, there can be no reasonable possibility that these amounts were properly included in the amended verified statement of claim.

¶ 40 Of course, to be an excessive claim, Wadsworth must also have known it included amounts that did not fall within the statute. The trial court did not analyze whether Wadsworth knew that some of the amounts claimed were not for "labor, materials, sustenance, or other supplies" that were due at the time it filed the amended verified statement of claim in September 2018. But here too, the

record unequivocally establishes that Wadsworth did, in fact, have such knowledge.[10]

¶ 41 Wadsworth's president, Brandon Squire, acknowledged that the $12.4 million included amounts "in excess of the agreed to change orders" and included lost profits. Squire testified that the claim was "to make [Wadsworth] whole for the damages that [it] had incurred to date" and included "the amount we were reasonably justified because of [Regional Rail's] breach of contract."

¶ 42 In other words, by Squire's own admission, Wadsworth knew the claim encompassed change orders to the contract that Wadsworth was *seeking* but to which Regional Rail had not agreed and unliquidated claims for damages that Wadsworth had not yet proved. Thus, even if an unliquidated claim could be considered "due," Squire knew that Wadsworth's amended verified statement of

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[10] Notably, the trial court's judgment is internally inconsistent in at least one aspect. In ruling that Regional Rail would not be required to pay Wadsworth the unpaid contract balance until after RTD paid Regional Rail, the court opined that "the contract is *clear* that [the unpaid contract balance] *is not due* until [Regional Rail] receives the payment from RTD." (Emphasis added.) We cannot reconcile the trial court's view of the clarity of the contractual language regarding when the contract balance was due with its finding that there was a reasonable possibility the amount was due at the time Wadsworth filed its claim.

claim included amounts that were not for "labor, materials, sustenance, or other supplies." Squire's admission is sufficient to establish the company's knowledge that the claim was excessive. *See Indep. Tr. Corp.*, 796 P.2d at 493-94, 494 n.16.

¶ 43 Accordingly, we conclude that, as a matter of law, the evidence established that the amended verified statement of claim (as well as the subsequent claim against the bond) was for an amount greater than the amount due, that there was no reasonable possibility that the entire amount of the claim was due or was related to lienable amounts, and that Wadsworth knew that the claim was for an amount greater than the amount due because it included amounts that were not lienable. Wadsworth's amended verified statement of claim (and its subsequent claim against the bond) was, therefore, excessive. As a result, Wadsworth forfeited its entire claim. We must therefore reverse the judgment in favor of Wadsworth.

III. Regional Rail's Counterclaims

¶ 44 Regional Rail also contends that the trial court erred by (1) equally apportioning damages between Regional Rail and Wadsworth for costs to replace the defective concrete on straddle

bent 8 (SB8) and (2) ignoring several of Regional Rail's claims for damages. We disagree with both contentions.

A. Apportionment of Damages — SB8

¶ 45 Regional Rail contends that the trial court erroneously awarded Regional Rail only half of its damages related to its direct costs associated with the replacement of Wadsworth's defective concrete on SB8 — and that the court did so with no explanation. Specifically, Regional Rail contends that this was contrary to the plain language of the contract. We disagree.

¶ 46 Evidence showed that, after Wadsworth poured SB8, Wadsworth's concrete supplier, Brannan, tested the concrete on SB8 and concluded that it did not meet the specified concrete strength. Regional Rail directed Wadsworth to demolish SB8 and rebuild it with the same concrete mix design. But Wadsworth was concerned that SB8 should have been designated a mass concrete structure — a type of project that had been contractually excluded from Wadsworth's scope of work. In a mass concrete structure, the dimensions and size of the unit of concrete are such that it is difficult to properly dissipate the heat that is generated during the concrete curing process. This can result in thermal or chemical

stressors in the concrete that can significantly reduce its durability and strength over time. Thus, a contractor pouring a mass concrete structure needs to have measures in place, known as a cooling plan, to avoid the high temperatures in the concrete during curing.

¶ 47 Wadsworth raised these concerns with Regional Rail, which in turn raised the issue with Stantec, Regional Rail's engineering design firm. Stantec denied that SB8 needed to be designated a mass concrete structure. Regional Rail directed Wadsworth to demolish and rebuild SB8, which Wadsworth did.

¶ 48 Ultimately, Regional Rail acknowledged that SB8 should have been designated a mass concrete structure from the beginning. Regional Rail then designed a cooling plan and hired a different subcontractor to build SB8 as a mass concrete structure.

¶ 49 The contract provides as follows:

> In the event Work or materials are determined to be defective or unsatisfactory, Subcontractor shall promptly uncover or remove and satisfactorily restore the defective or unsatisfactory work at no expense to Contractor. Notwithstanding review and/or acceptance, Subcontractor shall save, hold harmless, defend and indemnify Contractor from the consequences of all defective work

> caused by Subcontractor or anyone the Subcontractor is responsible for as well as defects, errors and omissions in the working or shop drawings, quality control plans and documentation of every other kind prepared by Subcontractor as part of its obligations herein.

The contract also provides that "mass concrete plans for straddle bents (pour sequence/cooling tubes)" is a "specific exclusion" from the work Wadsworth was to perform.

¶ 50 The trial court found both parties responsible for the defective concrete issues on SB8:

> There was no dispute that the concrete provided by Brann[a]n had issues reaching the correct strength. There was also no dispute that SB8 should have been designated as mass concrete by Stantec in the initial design. Both the concrete and design issues were rectified in the rebuild of SB8. [Wadsworth] reached a settlement with Brann[a]n based on the concrete provided, and the Court has taken that into consideration in the calculation of damages.

It awarded Regional Rail $54,769.76 for additional flaggers and $176,042.90 for out-of-pocket expenses due to SB8 issues.

¶ 51 Review of a judgment following a bench trial presents a mixed question of fact and law. *Sandstead-Corona v. Sandstead*, 2018 CO 26, ¶ 37. We review the trial court's factual findings under a clear

error standard and its legal conclusions de novo. *Kroesen v. Shenandoah Homeowners Ass'n*, 2020 COA 31, ¶ 55. The proper measure of damages is a question of law, *id.* at ¶ 56, but the fact finder has the "sole prerogative to assess the amount of damages, and its award will not be set aside unless it is manifestly and clearly erroneous," *Lawry v. Palm*, 192 P.3d 550, 565 (Colo. App. 2008).

¶ 52 First, we reject Regional Rail's assertion that the trial court did not explain why it apportioned damages. Regional Rail ignores that the trial court found that Stantec should have designated SB8 as a mass concrete structure in its initial design. And under the contract, "mass concrete plans for straddle bents (pour sequence/cooling tubes)" are specifically excluded from Wadsworth's scope of work. Thus, as the trial court found — with record support — Regional Rail played a role in causing the issues with SB8.

¶ 53 Further, we disagree with Regional Rail that the trial court's apportionment of damages is contrary to the language of the contract. Regional Rail again ignores that mass concrete structures were specifically excluded from Wadsworth's scope of work. The

trial court accounted for that in its apportionment of damages, and we discern no clear error.

¶ 54 Moreover, had SB8 been correctly designated as a mass concrete structure to begin with, Wadsworth would not have built it. But because Regional Rail failed to correctly designate SB8 as a mass concrete structure initially, Wadsworth built it and then had to demolish and rebuild it. Regional Rail would have suffered at least some, if not all, of the damages it attributed to the SB8 defective concrete issues — hiring additional flaggers for demolition and additional rental fees for the cooling system[11] — even if Wadsworth had built SB8 to the strength of concrete initially designated because it still would not have been mass concrete strength and would have needed to be demolished and rebuilt by another subcontractor.

¶ 55 Thus, the trial court did not err by declining to award Regional Rail the full amount of its "direct costs associated with the replacement of Wadsworth's defective concrete."

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[11] Regional Rail also claims in its brief that it incurred costs to winterize its work because of Wadsworth's delay but fails to cite any record support for this assertion.

B. Discrete Claims for Damages

¶ 56 Regional Rail also contends that we should reverse the trial court's judgment to the extent it limited Regional Rail's recovery on its counterclaims and remand to the trial court for it to make findings related to Regional Rail's discrete counterclaims that it (1) replaced Suncor's asphalt due to damage Wadsworth caused; (2) repaired damage that Wadsworth caused to adjacent property owned by Burlington-Northern/Santa Fe Railroad (BNSF); (3) completed a bike path Wadsworth was paid for but never built; (4) performed additional engineering testing and work to determine if Wadsworth's defective construction needed to be replaced; and (5) incurred additional costs to provide security for Metro Waste Water because Wadsworth did not protect Metro Waste Water's site. We disagree.

¶ 57 In its written order, the trial court specifically noted each of Regional Rail's claims. It then generally paraphrased Wadsworth's defenses to these claims. The trial court then identified the claims on which it was ruling in Regional Rail's favor, saying that its judgment was "[b]ased on the credible evidence presented at trial."

¶ 58 Notably, for each of the claims Regional Rail contends were insufficiently analyzed, there was conflicting testimony as to whether Wadsworth was responsible. For example, there was testimony that

- Wadsworth did not cause the damage to Suncor's asphalt;
- Regional Rail had performed the work that damaged BNSF's property;
- Wadsworth never agreed to the requested change order covering the bike path work because Regional Rail had presented insufficient documentation to support the request;
- Wadsworth was not contractually responsible for the additional engineering testing; and
- Regional Rail, as the general contractor, was responsible for providing security at the waste water facility and that there was inadequate documentation for any claim that Wadsworth was the party responsible for leaving the gate at the facility open.

¶ 59 The resolution of these conflicts in the evidence was for the trial court. *Gold Hill Dev. Co., L.P. v. TSG Ski & Golf, LLC*, 2015 COA 177, ¶ 7. While the trial court's findings could have been more complete, *see* C.R.C.P. 52, they nevertheless "allow us to understand the basis of its order." *Vento v. Colo. Nat'l Bank*, 985 P.2d 48, 52 (Colo. App. 1999). We thus discern no error.

IV. Wadsworth's Cross-Appeal

¶ 60 Wadsworth challenges the omission of prejudgment interest on its judgment; the trial court's denial of penalty interest under the Prompt Payment Act, § 24-91-103(2); the trial court's order regarding the timing of Regional Rail's payment of the judgment; and the judgment in favor or Regional Rail for liquidated damages.

¶ 61 Our resolution of the excessive claim issue in Regional Rail's favor, however, also resolves all but the last of these claims. Because we conclude that Wadsworth forfeited its entire claim, there is no judgment to which such interest, penalty, and timing requirements can be applied. Thus, we do not address these contentions further.

¶ 62 We turn, then, to Wadsworth's remaining contention — that the trial court erred by awarding Regional Rail liquidated damages

because Regional Rail delayed and disrupted Wadsworth's work on all segments of the project, which precludes an award of liquidated damages as a matter of law. We agree.

¶ 63 Regional Rail sought liquidated damages flowing from delays on the Denargo Bridge and Skyway Bridge to 112th segments of the project. The trial court found that Regional Rail was late with respect to each of these parts of the project. Specifically, it found that

> [Regional Rail] delayed and disrupted [Wadsworth's] work [on the Denargo Bridge and Skyway Bridge to 112th segments] with late [construction drawings], including at Areas E-F Drainage and Earthwork, Early Drainage packages, and 88th Station Walls. [Wadsworth] provided timely notice to [Regional Rail] of these impacts. These items were crucial in the scheduling of [Wadsworth's] work and impacted their efficiency and ability to adhere to their planned schedule. [Wadsworth] relied on information [Regional Rail] provided to prepare a baseline schedule for each Segment that reflected [Wadsworth's] planned sequence and durations of work. These delays and disruptions put [Wadsworth] behind schedule and over budget.

¶ 64 "A liquidated damages clause addressing delay in a construction contract will not be enforced 'where [the] delay is due in whole or in part to the fault of the party claiming the clause's

benefit.'" *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 481 (Colo. App. 2003) (quoting *Medema Homes, Inc. v. Lynn*, 647 P.2d 664, 667 (Colo. 1982)).

¶ 65 Because the trial court found that Regional Rail had at least in part caused delays to all parts of the project for which it sought liquidated damages, the trial court erred by awarding Regional Rail liquidated damages. *See id.* We thus reverse that aspect of the judgment.

V. The Parties' Requests for Attorney Fees and Costs

¶ 66 Regional Rail seeks attorney fees and costs pursuant to section 38-26-110, which provides for fees and costs incurred in responding to an excessive verified statement of claim. We agree that Regional Rail is entitled to such fees and costs. Because the trial court is in a better position than we are to determine the reasonableness of those fees, we remand the case for the trial court to make that determination. *See Deutsche Bank Tr. Co. Ams. v. Samora*, 2013 COA 81, ¶ 36; C.A.R. 39.1.

¶ 67 Wadsworth requests appellate attorney fees and costs for defending Regional Rail's appeal and for pursuing its cross-appeal, pursuant to C.A.R. 39.1 and its contract with Regional Rail, which

contains a prevailing party provision providing for an award of appellate attorney fees and costs. Because both parties received a favorable ruling on some aspect of this appeal, the trial court is in the best position to determine which party prevailed under the terms of the contract. *See W. Stone & Metal Corp. v. DIG HP1, LLC*, 2020 COA 58, ¶ 13.

VI. Disposition

¶ 68 We reverse the judgment to the extent it awarded Wadsworth any amount included in its amended verified statement of claim. In addition, we reverse the judgment in favor of Regional Rail for liquidated damages. We affirm the judgment in all other respects.

¶ 69 The case is remanded for further proceedings consistent with this opinion regarding the parties' claims for attorney fees and costs.

JUDGE LIPINSKY and JUDGE GROVE concur.