

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Klipper Construction Associates, Inc.	:	
	:	
v.	:	
	:	
Warwick Township Water and Sewer	:	
Authority and Carroll Engineering	:	No. 471 C.D. 2014
Corporation	:	
	:	
Appeal of: Warwick Township Water	:	
and Sewer Authority	:	
	:	
Klipper Construction Associates, Inc.	:	
	:	
v.	:	
	:	
Warwick Township Water and Sewer	:	
Authority and Carroll Engineering	:	No. 792 C.D. 2014
Corporation	:	Argued: October 6, 2014
	:	
Appeal of: Klipper Construction	:	
Associates, Inc.	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge  
          HONORABLE P. KEVIN BROBSON, Judge  
          HONORABLE JAMES GARDNER COLINS, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
SENIOR JUDGE COLINS**

**FILED: December 16, 2014**

These consolidated matters are an appeal by defendant Warwick Township Water and Sewer Authority (the Authority) and a cross-appeal by plaintiff Klipper Construction Associates, Inc. (Contractor) from an order of the Bucks County Court of Common Pleas (trial court) molding a \$726,809.08 jury verdict in a construction case brought by Contractor against Authority and its

engineer, Carroll Engineering Corporation (Engineer). These appeals do not challenge the jury's liability verdict against the Authority or the amount of damages awarded by the jury to Contractor. The Authority appeals from the trial court's molding of the jury's verdict to disregard the jury's finding in the Authority's favor on its claim for indemnity against Engineer and from the trial court's awards of interest under 62 Pa. C.S. § 3941 and attorney fees under 62 Pa. C.S. § 3935(b), in the subchapter of Title 62 Part II commonly referred to as the Prompt Pay Act. Contractor cross-appeals the trial court's denial of a penalty under Section 3935(a) of the Prompt Pay Act and from the amount of attorney fees awarded by the trial court and its denial of litigation expenses. For the reasons set forth below, we reverse except as to the trial court's award of attorney fees and denial of expert witness fees, and remand.

### ***Facts and Procedural History***

In 2007, Contractor was the low bidder for and entered into a construction contract with the Authority for upgrades of the Authority's Fish Creek Wastewater Treatment Plant (the Contract). (Plaintiff's Ex. 7 Notice of Award, Reproduced Record (R.R.) at 11a; Plaintiff's Ex. 2 Contract Agreement, R.R. at 12a-18a.) The Contract required substantial completion of the project by July 7, 2008 and readiness for final payment by August 5, 2008. (Plaintiff's Ex. 2 Contract Agreement ¶4.02, R.R. at 13a; Plaintiff's Ex. 8 Notice to Proceed; 7/9/13 Trial Notes of Testimony (N.T.) at 91, R.R. at 249a.) The Contract provided for liquidated damages of \$700 per day for failure to meet these deadlines, but provided for extension of the deadlines for delays beyond Contractor's control, including delays due to the Authority's negligence or to conduct of parties other than Contractor and its subcontractors and suppliers. (Plaintiff's Ex. 2 Contract

Agreement ¶4.03, R.R. at 13a; Plaintiff's Ex. 3 General Contract Conditions ¶¶12.03-12.04; ; 7/9/13 N.T. at 87-89, R.R. at 245a-247a.) The Contract price was \$2,091,500, but the Contract provided that it could be increased to compensate Contractor for delay, interference or disruption attributable to actions or inactions of the Authority or anyone for whom the Authority was responsible. (Plaintiff's Ex. 7 Notice of Award, R.R. at 11a; 7/9/13 N.T. at 90-91, R.R. at 248a-249a; Plaintiff's Ex. 3 General Contract Conditions ¶12.06.B.)

The project was substantially completed in October 2008, beyond the Contract deadlines. (7/9/13 N.T. at 225-27, 229, R.R. at 383a-385a, 387a; 7/11/13 N.T. at 125, R.R. at 858a.) Contractor's work was significantly delayed by subsurface rock conditions on the project. (7/9/13 N.T. at 116-19, 137-40, 150-53, 157-58, R.R. at 274a-277a, 295a-298a, 308a-311a, 315a-316a; 7/10/13 N.T. at 37, 87-88, 231, R.R. at 441a, 491a-492a, 635a.) Contractor requested extension of the Contract deadlines, but was given only three weeks of extensions, to July 28, 2008. (7/9/13 N.T. at 177-79, R.R. at 335a-337a; 7/11/13 N.T. at 47, 72, R.R. at 780a, 805a.)

The Authority and Engineer had a separate contract that provided that Engineer was to perform design services for the project that was the subject of the Contract, that Engineer was to prepare the bid documents for the Contract, and that Engineer was to administer construction of the project, including reviewing Contractor's applications for payment under the Contract. (Defendant's Ex. 63 Engineering Services Agreement, R.R. at 2a-10a; 7/11/13 N.T. at 176-78, R.R. at 909a-911a.) The Authority could not pay Contractor's applications for payment under the terms of its bonds for the project unless Engineer made a recommendation on whether the payment should be made. (7/11/13 N.T. at 148,

188-89, 211-12, R.R. at 881a, 921a-922a, 944a-945a.) Engineer recommended that the Authority pay Contractor only \$1,757.50 of Contractor's final \$107,137.82 application for payment. (Plaintiff's Ex. 104 Payment Application 16 Engineer Recommendation, R.R. at 45a-47a.) The Authority did not pay the Contract balance because it decided, based on Engineer's recommendations and conclusions, that liquidated damages should be withheld for delays in completing the project. (7/11/13 N.T. at 127-31, 147-49, 166, R.R. at 860a-864a, 880a-882a, 899a; Plaintiff's Ex. 105 7/2/09 Letter from Authority to Contractor.) Engineer never certified the project for final payment based on its conclusion that Contractor failed to complete all punch list items. (7/15/13 N.T. at 104, R.R. at 1132a.)

On February 18, 2009, Contractor filed a 10-count Complaint against the Authority and Engineer seeking payment of the balance under the Contract plus its increased costs of performance, asserting breach of contract and constructive fraud claims and six other legal theories. (Complaint, R.R. at 23a-43a.) On August 3, 2011, Contractor filed a 9-count Amended Complaint against the Authority and Engineer asserting breach of contract and constructive fraud claims and five other legal theories, again seeking payment of the balance under the Contract and its increased costs, and also asserting a claim for lost profits due to inability to obtain bonding, which it contended was caused by the Authority's withholding of payment under the Contract. (Amended Complaint, R.R. at 48a-68a.) The Authority and Engineer both asserted cross-claims against the other for indemnity and contribution. (Authority's Answer and New Matter, R.R. at 98a; Engineer's Answer and New Matter, R.R. at 148a-150a.)

A jury trial was held from July 8, 2013 to July 15, 2013. Contractor testified at trial that it did not receive soil boring reports of the rock conditions

from Engineer when it bid the job, although Engineer had possession of those reports. (7/9/13 N.T. at 48-52, 59-62, 94-116, 119, R.R. at 206a-210a, 217a-220a, 252a-274a, 277a.) Contractor also testified that Engineer delayed readiness for final payment under the Contract and increased its costs by adding punch list items beyond the Contract requirements and by sending multiple punch lists adding new items to be completed. (*Id.* at 215-18, 226-42, R.R. at 373a-376a, 384a-400a.) It was undisputed that the Authority did not make final payment under the Contract and that this unpaid balance was at least \$107,137.82. (Plaintiff's Ex. 104 Payment Application 16 Engineer Recommendation, R.R. at 45a-47a; Plaintiff's Ex. 105 7/2/09 Letter from Authority to Contractor.) In addition, Contractor introduced evidence that it incurred over \$100,000 in increased costs not compensated by change orders and testified that it was unable to obtain bonding from late 2009 through 2010 as a result of the withholding of the Contract balance. (7/10/13 N.T. at 10-15, 32-46, R.R. at 414a-419a, 436a-450a.) Contractor asserted that it lost over \$900,000 as a result of the loss of bonding because it worked when it had no bonding as a subcontractor with a 50/50 profit split on a job that had a \$1.8 million profit. (*Id.* at 15-16, 21-24, 46-56, R.R. at 419a-420a, 425a-428a, 450a-460a.)

Contractor's legal theories other than breach of contract and constructive fraud were all dismissed by voluntary withdrawal or compulsory nonsuit during trial. (Civil Court Sheet, R.R. at 1305a-1306a.) After the close of testimony, Contractor's claims against the Authority for breach of contract and constructive fraud, Contractor's claim against Engineer for constructive fraud, the Authority's cross-claim for indemnification against Engineer, and Engineer's cross-claim for indemnification against the Authority were submitted to the jury on

special interrogatories. (7/15/13 N.T. at 209-26, R.R. at 1237a-1254a; Jury Verdict Sheet, R.R. at 1307a-1309a.) The trial court instructed the jury that Engineer was liable to the Authority for indemnity if the Authority was held liable to Contractor solely as a result of negligent conduct by Engineer. (7/15/13 N.T. at 219-20, R.R. at 1247a-1248a.) Engineer did not make any objection to this jury instruction or to the submission of this common law indemnity claim to the jury. (*Id.* at 122-84, 219-26, R.R. at 1150a-1212a, 1247a-1254a.)

The jury verdict sheet asked four questions concerning Contractor's claims against the Authority: whether the Authority breached the Contract (Question 1), whether the Authority "acted in bad faith by withholding Klipper Construction Associates, Inc.'s contract balance" (Question 2), whether the Authority was liable to Contractor for constructive fraud (Question 3), and Contractor's damages from the Authority's conduct (Question 4). (Jury Verdict Sheet, R.R. at 1307a-1308a.) The verdict sheet directed the jury to skip and not answer Question 3 concerning constructive fraud if it answered "yes" to Question 1 and found that the Authority breached the Contract. (*Id.*, R.R. at 1307a.) With respect to damages, the jury was not asked to determine the amount to which Contractor was entitled under the Contract or the amounts awarded on Contractor's different damages claims, but was directed only to "[s]tate the total amount of damages, if any, Plaintiff Klipper Construction Associates, Inc. has proven, which resulted from the conduct of Defendant, Warwick Township Water and Sewer Authority." (*Id.*, R.R. at 1308a) (emphasis added).

The jury verdict sheet asked two questions concerning Contractor's claims against Engineer, whether Engineer was liable to Contractor for constructive fraud (Question 5), and if the jury answered "yes" to that question, the

amount of Contractor's damages from that conduct (Question 6). (*Id.*) Question 5 directed the jury "to proceed to question #7," the interrogatory on the Authority's cross-claim against Engineer, if it found that Engineer was not liable for constructive fraud. (*Id.*) Question 7 stated and instructed the jury as follows:

As to the Defendants' Cross Claims against each other:

Answer Question 7 only if you have awarded damages in response to Question 4, otherwise skip answering Question 7 and proceed to Question 8

Question 7:

Do you find that Warwick Township Water and Sewer Authority engaged in any conduct independent of Carroll Engineering Corporation that caused damages to Klipper Construction Associates, Inc.?

\_\_\_ Yes

\_\_\_ No

If your response is "Yes" then Warwick Township Water and Sewer Authority cannot recover against Carroll Engineering Corporation on its cross claim. If your response is "No" then Carroll Engineering Corporation will be responsible to pay the amount specified in your response to Question 4 in addition to other damages, if any, that you have found Carroll Engineering Corporation liable to pay.

(*Id.*) (emphasis added). The jury was instructed to answer Question 8, the interrogatory concerning Engineer's cross-claim against the Authority, only if it found against Engineer in Questions 5 and 6. (*Id.*, R.R. at 1309a.)

The jury verdict sheet was drafted by and agreed to by counsel for all of the parties, including counsel for Engineer, and the language of Question 7 was drafted by counsel for Engineer. (7/15/13 N.T. at 51-53, 182-84, 233-35, 246, 249-50, R.R. at 1079a-1081a, 1210a-1212a, 1261a-1263a, 1274a, 1277a-1278a.) The verdict sheet jointly submitted by the parties was given by the trial court to the

jury without objection by any party's counsel, including counsel for Engineer. (*Id.* at 233-35, 249, R.R. at 1261a-1263a, 1277a.)

After the jury had been given the verdict sheet, the jury sent a question to the trial court asking: "Can we award damages without finding fraud?" (*Id.* at 235, R.R. at 1263a.) During the discussions between counsel and the trial court on how to respond to the jury's question, after counsel for Contractor and the Authority contended that a finding of fraud was not required for the Authority's indemnity claim against Engineer, counsel for Engineer asserted that the verdict sheet was defective because it permitted the jury to answer Question 7 without finding that the Authority was liable for constructive fraud in Question 3 and did not separate out breach of contract damages. (*Id.* at 235-50, R.R. at 1263a-1278a.) Engineer's counsel did not contend in these discussions that it was error to permit the jury to answer Question 7 if found in Question 5 that Engineer was not liable to Contractor for constructive fraud and did not request that jury deliberations be stopped while the errors in the verdict sheet were resolved. (*Id.* at 235-53, R.R. at 1263a-1281a.)

While these discussions were going on, the jury sent a second question asking the trial court to "[d]efine indemnify." (*Id.* at 250-51, R.R. at 1278a-1279a.) The trial court expressed concern that "whether the verdict sheet is right or wrong, everybody has agreed to it," and ruled that the verdict sheet could be changed only if there was unanimous agreement on the changes. (*Id.* at 249-50, 252-53, R.R. at 1277a-1278a, 1280a-1281a.) Counsel for the Authority and counsel for Contractor did not agree to modification of the verdict sheet. (*Id.* at 250, 252-53, R.R. at 1278a, 1280a-1281a.) The trial court did not withdraw or change the verdict sheet and responded to the jury's questions without reference to



Question 7, instructing that Question 1 did not require a finding of fraud but Questions 3 and 5 did, and that indemnification is reimbursement by one defendant to another defendant who has been found liable to the plaintiff. (*Id.* at 253-55, R.R. at 1281a-1283a.) Counsel for Engineer made no further objection or request concerning the verdict sheet, although he recognized that there was a “risk of the confusion that [Questions] 7 and 8 would engender” in the trial court’s response to the jury on fraud. (*Id.* at 251-55, R.R. at 1279a-1283a.)

Following this instruction, the jury resumed its deliberations and returned a verdict. In its verdict, the jury answered “yes” to Questions 1 and 2, finding a breach of contract by the Authority and bad faith by the Authority in withholding the Contract balance, and awarded \$726,809.08 in response to Question 4. (Jury Verdict Sheet, R.R. at 1307a-1308a; 7/15/13 N.T. at 256-57, R.R. at 1284a-1285a.) The jury answered “no” to Question 5, finding that Engineer was not liable to Contractor for constructive fraud and, in accordance with the verdict sheet instructions, did not answer Question 6 and addressed Question 7, the Authority’s cross-claim for indemnity. (Jury Verdict Sheet, R.R. at 1308a; 7/15/13 N.T. at 257-58, R.R. at 1285a-1286a.) The jury answered “no” to Question 7, finding that Engineer was responsible to pay all damages found against the Authority. (Jury Verdict Sheet, R.R. at 1308a; 7/15/13 N.T. at 258, R.R. at 1286a.) In accordance with the verdict sheet instructions, the jury did not answer Question 3, concerning whether the Authority was liable to Contractor for constructive fraud, or Question 8 concerning Engineer’s indemnity claim. (Jury Verdict Sheet, R.R. at 1307a, 1309a; 7/15/13 N.T. at 257, 259, R.R. at 1285a, 1287a.) When the jury returned its verdict, counsel for Engineer did not assert that the jury’s answer to Question 7 was inconsistent with any of its other answers, did

not request that the jury be polled or be sent back for any further deliberations, and made no objection of any kind to the verdict before the jury was dismissed. (7/15/13 N.T. at 256-62, R.R. at 1284a-1290a.)

Engineer timely filed a post-trial motion for judgment notwithstanding the verdict (judgment n.o.v.) on the Authority's indemnity cross-claim or, in the alternative, to mold the verdict to remove the jury's finding in favor of the Authority on its cross-claim. Contractor also timely filed a post-trial motion to mold the verdict to add interest, a penalty under Section 3935(a) of the Prompt Pay Act, and \$329,560.50 in attorney fees, an expert witness fee of \$24,789.99, and \$20,402.75 in other litigation expenses under Section 3935(b) of the Prompt Pay Act. The Authority did not file any post-trial motion. Engineer's post-trial motion did not challenge any of the jury's findings in Contractor's favor.

On February 12, 2014, the trial court entered an Order and Decision granting Engineer's motion to mold the verdict to provide that the Authority is solely liable to Contractor for all damages and other amounts awarded. This Order and Decision also awarded Contractor interest at 6% per annum from February 28, 2009 on \$147,942.08 of the verdict and reduced attorney fees, but denied Contractor's requests for a penalty and expert witness fees and awarded no other litigation expenses. On February 24, 2014, the trial court entered an amended order vacating the February 12, 2014 order to correct a typographic error in the amount of attorney fees and otherwise reissuing the rulings in its February 12, 2014 Order and Decision. This February 24, 2014 Amended Order ordered that "[a]ll damages including all costs, interest and attorney's fees awarded to Plaintiff, Klipper Construction, Associates, Inc., are payable by Defendant, Warwick Township Water and Sewer Authority," and added \$43,871.90 in interest and

\$29,660.45 in attorney fees to the jury's \$726,809.08 verdict, for a total of \$800,341.43. (R.R. at 1633a-1634a.) Judgment in the amount of \$800,341.43 was entered against the Authority in accordance with the February 24, 2014 Order on March 6, 2014. The Authority timely appealed this judgment to this Court. Contractor filed a timely cross-appeal from the denial of a penalty under Section 3935(a) of the Prompt Pay Act, the reduction of its attorney fees and the denial of expert witness fees and other litigation expenses.

### ***Discussion***

The questions before this Court in these appeals are: (1) whether the trial court erred in molding the jury's verdict in favor of Engineer notwithstanding the jury's finding that Engineer was liable for the damages it awarded against the Authority; (2) whether the trial court erred in its award of interest given the absence of a jury finding as to the amount of the unpaid Contract balance; and (3) whether the trial court erred in its denial of a penalty, award of reduced attorney fees and denial of expert witness fees and other litigation expenses under the Prompt Pay Act.<sup>1</sup> We address each of these in turn.

---

<sup>1</sup> These rulings are reviewed for abuse of discretion. *Herbert v. Parkview Hospital*, 854 A.2d 1285, 1288 (Pa. Super. 2004) (molding of verdict); *Allegheny Energy Supply Co., LLC v. Wolf Run Mining Co.*, 53 A.3d 53, 65 (Pa. Super. 2012) (award of interest); *Pietrini Corp. v. Agate Construction Co.*, 901 A.2d 1050, 1053 (Pa. Super. 2006) (Prompt Pay Act penalty, attorney fees and expenses). Abuse of discretion is shown where the trial court misapplies the law or its decision is manifestly unreasonable, arbitrary or capricious, or was motivated by partiality. *James Corp. v. North Allegheny School District*, 938 A.2d 474, 483 n.7 (Pa. Cmwlth. 2007); *Constructo Temps, Inc. v. Workers' Compensation Appeal Board (Tennant)*, 907 A.2d 52, 55 (Pa. Cmwlth. 2006) (*en banc*), *aff'd without op.*, 947 A.2d 724 (Pa. 2008). The issue of waiver, discussed below in our analysis of the trial court's molding of the verdict in favor of Engineer, is a question of law as to which the standard of review is *de novo* and the scope of review is plenary. *Straub v. Cherne Industries*, 880 A.2d 561, 566 n.7 (Pa. 2005).

### ***The Molding of the Verdict in Favor of Engineer***

The Authority argues that the trial court erred in molding the verdict to remove Engineer's liability because the verdict showed an intent to make Engineer liable for the damages it awarded against the Authority. We agree.

Both the verdict sheet and verdict in this case were flawed. The verdict sheet directed the jury not to address whether the Authority was liable to Contractor in tort if it found a breach of contract, did not permit the jury to separate monies owed under the Contract from consequential damages due to the withholding of payment or conduct during the performance of the Contract, and instructed the jury that it could find Engineer liable for all damages it awarded without finding either the Authority or Engineer liable to Contractor in tort or making any finding of other wrongful conduct by Engineer. The jury's verdict was inconsistent, as it found that the Authority was liable to Contractor solely for breach of contract and that Engineer was not liable to Contractor, but that Engineer was liable on the Authority's cross-claim for all damages awarded to Contractor, even though the sole basis for the Authority's cross-claim was common law indemnity<sup>2</sup> and it made no findings of wrongful conduct by Engineer. These defects, however, were not capable of correction by molding the verdict.

---

<sup>2</sup> The Authority argues in its brief that it also had a claim for express contractual indemnity under paragraph 2 of the Standard Terms and Conditions in its contract with Engineer, which provides that "Client [the Authority] agrees to indemnify and hold CEC [Engineer] harmless from and against any and all damages, liabilities, and costs, including costs of defenses, arising out of the use of documents and information produced by Client excepting only those damages, liabilities and costs for which CEC is to be liable." (Defendant's Ex. 63 Engineering Services Agreement, R.R. at 9a ¶2.) This language only provides Engineer indemnity from the Authority for liability arising out of use of documents and information produced by the Authority and limits Engineer's indemnity rights. Nothing in this language provides for indemnification of the Authority by Engineer.

A trial court may mold a jury verdict to conform to the clear intent of the jury or to correct a defect in the verdict where the correction is consistent with the jury's clear intent. *Mendralla v. Weaver Corp.*, 703 A.2d 480, 485-46 (Pa. Super. 1997) (*en banc*) (upholding molding of verdict to remove unsupported item of damages because jury intent as to damages award was clear); *Semanderes v. Department of Transportation*, 566 A.2d 1290, 1292 (Pa. Cmwlth. 1989) (*en banc*) (upholding molding of verdict to add language identifying the parties that was clearly intended by the jury). Such a motion can be granted only where the jury's intent is clear; where the jury's intent is not obvious, the verdict cannot be molded and the defect can be cured only by further deliberations or a new trial. *Gorski v. Smith*, 812 A.2d 683, 708 (Pa. Super. 2002); *Mendralla*, 703 A.2d at 486; *Krock v. Chroust*, 478 A.2d 1376, 1380-81 (Pa. Super. 1984). Molding of a verdict is improper where the jury's intent is unclear or where the molded verdict would be contrary to what reasonably appears to be the jury's intent. *Viriden v. Hosler*, 127 A.2d 110, 116 (Pa. 1956) (molding of verdict to make other defendant liable would be improper because it would override jury's intent to exonerate that defendant and would usurp the jury's function); *Gorski*, 812 A.2d at 708 (molding verdict to increase \$0 damage award in one of several counts was improper where it reasonably appeared that jury could have intended to award no damages on that count); *Krock*, 478 A.2d at 1381 (molding of verdict to reduce one element of damages was error where it was unclear from lump sum verdict whether jury awarded damages for that element).

Here, it cannot be said that the jury clearly intended that only the Authority be liable for the judgment and that Engineer be absolved of liability. Question 7 of the verdict sheet specifically instructed the jury that “[i]f your

response is ‘No’ then Carroll Engineering Corporation will be responsible to pay the amount specified in your response to Question 4.” (Jury Verdict Sheet, R.R. at 1308a.) The jury’s answer of “No” to Question 7 therefore did not merely find a lack of separate conduct by the Authority independent of Engineer’s actions, it indicated an intent by the jury to hold Engineer liable for the damages that it awarded against the Authority. At a minimum, there is no clear or obvious intent to exonerate Engineer. Accordingly, the trial court erred in holding that the verdict could be molded to remove the jury’s finding that Engineer was liable on the Authority’s cross-claim.

Because the verdict was inconsistent, the appropriate remedy would ordinarily be to order a new trial. *Thompson v. Iannuzzi*, 169 A.2d 777, 779 (Pa. 1961); *Mendralla*, 703 A.2d at 486; *May v. Pittsburgh Railways Co.*, 224 A.2d 770, 772 (Pa. Super. 1966). This remedy, however, is not available here because Engineer waived the right to seek a new trial for inconsistency of the verdict.

Post-trial relief based on inconsistency in the jury’s answers to the special interrogatories on its verdict sheet is barred by waiver unless the party seeking relief objects to the verdict when rendered. *Straub v. Cherne Industries*, 880 A.2d 561, 566-68 (Pa. 2005); *Criswell v. King*, 834 A.2d 505, 513 (Pa. 2003); *City of Philadelphia v. Gray*, 633 A.2d 1090, 1095 (Pa. 1993); *Shelhammer v. John Crane, Inc.*, 58 A.3d 767, 771-72 (Pa. Super. 2012); *Picca v. Kriner*, 645 A.2d 868, 871-72 (Pa. Super. 1994).<sup>3</sup> Engineer did not object to the verdict sheet before

---

<sup>3</sup> *Samuel-Bassett v. Kia Motors America, Inc.*, 34 A.3d 1 (Pa. 2011), relied on by Engineer, is not to the contrary. The molding of the verdict in *Samuel-Bassett* involved an issue of how the verdict would apply to absent class members in a class action and did not involve an inconsistency in the jury’s verdict, and the Court in fact found the issue waived by failure to raise it prior to post-trial motions. *Id.* at 45-47.

it was submitted to the jury and, indeed, actively participated in creating the defects in the verdict sheet. While Engineer did make an objection after jury deliberations were underway and the jury was sending questions concerning the Authority's and Engineer's liability for Contractor's damages, Engineer made no objection when the jury returned its verdict. Had Engineer raised the inconsistency at the time of the jury's verdict and requested that the jury deliberate further to reconcile its verdict under proper instructions, the jury could have corrected the inconsistency with additional or different findings and returned a consistent verdict that found Engineer liable on the cross-claim or exonerated Engineer, averting the need for a new trial. *See Picca*, 645 A.2d at 871-72. Engineer's silence, when timely objection could have resolved the issue, waived any claim that the verdict against it on the Authority's cross-claim was invalid based on the jury's other answers on the verdict sheet. *Straub*, 880 A.2d at 566-68; *Criswell*, 834 A.2d at 513; *Gray*, 633 A.2d at 1095; *Shelhammer*, 58 A.3d at 772; *Picca*, 645 A.2d at 871-72.

In addition, Engineer did not seek a new trial for inconsistency of the verdict or defects in the verdict sheet in its post-trial motion. Post-trial motions must specify the relief requested and the grounds on which it is sought. Pa. R. C.P. No. 227.1(b)(2), (d). Matters not raised in a party's post-trial motion cannot be a basis for relief on appeal. *Sovereign Bank v. Valentino*, 914 A.2d 415, 426-27 (Pa. Super. 2006); *Gorski*, 812 A.2d at 708 n.10; *Hall v. Owens Corning Fiberglass Corp.*, 779 A.2d 1167, 1169 (Pa. Super. 2001). Engineer's motion for post-trial relief sought judgment n.o.v. or, alternatively, the molding of the verdict to overrule and remove the jury's answer to Question 7, not a new trial. (Engineer's Motion for Judgment Notwithstanding the Verdict and/or to Mold the Verdict and

Memorandum of Law, R.R. at 1310a, 1315a-1323a, 1326a, 1331a-1339a.) Although Engineer did briefly state that the trial court should “in the alternative, vacate the jury’s July 15, 2013 verdict and grant a new trial” in one paragraph of its motion (*id.* Motion ¶22, R.R. at 1314a; *see also id.* Memorandum of Law, R.R. at 1330a), that request was based solely on the claim that the verdict was against the weight of the evidence, not on inconsistency of the verdict or error in the verdict sheet. (Engineer’s Second Supplemental Memorandum of Law, R.R. at 1606a-1608a.)

Moreover, Engineer repeatedly represented to the trial court that it was seeking only dismissal of the jury’s answer to Question 7 and that no new trial was necessary. (Engineer’s Motion for Judgment Notwithstanding the Verdict and/or to Mold the Verdict and Memorandum of Law, R.R. at 1339a; Engineer’s Supplemental Memorandum of Law, R.R. at 1411a-1424a; Engineer’s Second Supplemental Memorandum of Law, R.R. at 1601a-1602a, 1611a.) The trial court did not believe that Engineer sought a new trial and concluded that it was therefore precluded from remedying the flaw in the jury’s verdict by granting a new trial. (5/8/13 Trial Court Op. at 11, 13, R.R. at 1668a, 1670a.) Engineer has not asserted that the trial court erred in its understanding of Engineer’s post-trial motion or that the trial court could or should have granted a new trial.

Engineer argues instead that the trial court’s molding of the verdict can be sustained on the ground that it was entitled to judgment as a matter of law, contending that there was no contractual agreement by it to indemnify the Authority and that common law indemnity is not available for breach of contract



liability.<sup>4</sup> Engineer is correct that there is no basis for a contractual indemnity claim by the Authority. However, its contention that common law indemnity is barred is based entirely on the jury's answers in the defective verdict sheet finding that the Authority was liable for breach of contract rather than on Contractor's tort theory of liability. Judgment n.o.v. cannot be granted based solely on inconsistency between a jury's findings in a defective verdict sheet. *Straub*, 880 A.2d at 567-68. Judgment n.o.v. may be granted only where, viewing the evidence at trial in the light most favorable to the prevailing party, the movant was entitled to judgment in its favor as a matter of law or a reasonable jury could not have found against the movant. *Id.* at 567; *Department of General Services v. United States Mineral Products Co.*, 927 A.2d 717, 723 (Pa. Cmwlth. 2007), *aff'd*, 956 A.2d 967 (Pa. 2008); *Gorski*, 812 A.2d at 698. The contention that one finding on a verdict sheet precludes the jury from making another finding that the jury was expressly instructed that it could make is not a ground for judgment n.o.v., but rather is a claim of error in the verdict sheet that is waived by failure to timely object to the inconsistent verdict. *Straub*, 880 A.2d at 567-68.

---

<sup>4</sup> Engineer also contends that the Authority's failure to file any post-trial motion waived its right to appeal the trial court's molding of the verdict in Engineer's favor. This argument fails for two reasons. First, the Authority's appeal is from the trial court's grant of Engineer's post-trial motion, not from the jury's verdict at trial. Rule 227.1 does not apply to an appeal from the trial court's post-trial grant of another party's post-trial motion. *Newman Development Group of Pottstown, LLC v. Genuardi's Family Markets, Inc.*, 52 A.3d 1233, 1248-51 (Pa. 2012); *Atwell v. Beckwith Machinery Co.*, 872 A.2d 1216, 1220 (Pa. Super. 2005). Second, the Authority was not required to file a post-trial motion if it was satisfied with the verdict on the issue in question and did not object to entry of judgment on the verdict. *Jara v. Rexworks Inc.*, 718 A.2d 788, 791-92 (Pa. Super. 1998). Thus, while its failure to seek post-trial relief precludes the Authority from challenging the jury's verdict on bad faith, *see* p. 24, *infra*, the Authority is not barred from arguing that the trial court should have entered judgment in its favor on its cross-claim in accordance with the jury's verdict.

Engineer does not contend that the evidence at trial could not have supported a verdict against the Authority for which it could recover common law indemnity from Engineer under different findings by the jury. To the contrary, there was evidence that the Authority's failure to pay Contractor, Contractor's consequential damages from the nonpayment and increased costs incurred by Contractor were caused by actions of Engineer for which it could be primarily liable and for which the Authority could be found to be only passively responsible, and that the Authority and Engineer had a contractual principal-agent relationship with respect to the Contract and project. (Defendant's Ex. 63 Engineering Services Agreement, R.R. at 2a-10a; 7/9/13 N.T. at 215-18, 226-42, R.R. at 373a-376a, 384a-400a; 7/11/13 N.T. at 127-31, 147-49, 166, 176-78, 188-89, 211-12, R.R. at 860a-864a, 880a-882a, 899a, 909a-911a, 921a-922a, 944a-945a; 7/15/13 N.T. at 104, R.R. at 1132a; Plaintiff's Ex. 104 Payment Application 16 Engineer Recommendation, R.R. at 45a-47a.)

Such evidence could support an indemnity claim. *See Willet v. Pennsylvania Medical Catastrophe Loss Fund*, 702 A.2d 850, 854-55 (Pa. 1997) (party who prevented settlement negotiations could be liable for indemnity for delay damages); *Builders Supply Co. v. McCabe*, 77 A.2d 368, 370-71 (Pa. 1951) (principal held passively responsible for acts of agent can recover indemnity); *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 622 (Pa. Super. 1983) (indemnity is recognized where justice requires that the responsibility rest on the defendant whose conduct was the source of the harm). Indeed, Engineer did not object to the submission of the Authority's cross-claim to the jury and conceded at argument of its post-trial motion that the jury could have validly found in favor of the Authority on its indemnity cross-claim on the evidence at trial if it had not made its breach of

contract and constructive fraud findings on the defective verdict sheet. (7/15/13 N.T. at 122-84, 219-26, R.R. at 1150a-1212a, 1247a-1254a; Post-Trial Argument Transcript at 5, R.R. at 1492a.) Accordingly, the trial court's molding of the verdict to disregard the jury's verdict on the Authority's cross-claim and impose all damages, costs, interest and attorney fees solely on the Authority cannot be sustained as a judgment n.o.v. and must be reversed.

Engineer is correct, however, that common law indemnity cannot exist for one portion of the jury's damages award, the balance owed under the Contract. The jury could find that Engineer was responsible for the Authority's nonpayment of the Contract balance. Thus, the Authority can recover indemnity from Engineer for all damages, interest, penalties and attorney fee awards that resulted from the nonpayment. The jury could also find that Engineer was responsible for additional costs caused by its conduct in administering the Contract, to the extent that it awarded damages on that claim. The Authority, however, owes the Contract balance under the Contract itself and not as a result of Engineer's conduct. Because there is no basis for common law indemnity for the Contract balance, Engineer has shown that under the evidence at trial it was entitled to judgment n.o.v. on that limited portion of the jury's verdict, to the extent that the amount owed under the Contract can be determined. The trial court, on remand, should therefore mold the verdict to order that the Authority is solely liable for the unpaid Contract balance awarded to Contractor and should otherwise enter judgment in accordance with the jury's verdict that Engineer is responsible for all damages awarded to Contractor.

### ***The Award of Interest***

The trial court awarded Contractor interest under 62 Pa. C.S. § 3941(b), which provides:

Interest.--The final payment due the contractor from the government agency after substantial completion of the contract shall bear interest at a rate of 6% per annum for all contracts without provisions for retainage and at a rate of 10% per annum for all contracts with provisions for retainage, the interest to begin after the date that such payment becomes due and payable to the contractor. However, where the government agency has issued bonds to finance the project, interest shall be payable to the contractor at the rate of interest of the bond issue or at the rate of 10% per annum, whichever is less, but in no event shall the interest payable to the contractor be at a rate of interest less than the legal rate of interest.

(Emphasis added.) There is no dispute that the 6% interest rate applied by the trial court was correct and there is no challenge to the period for which the trial court awarded interest.

The Authority argues that no interest could be awarded because it is not possible to determine the amount of the unpaid final payment due under the Contract from the jury's lump sum damages award. We do not agree. The jury made a finding that the Authority owed and did not pay Contractor the Contract balance. (Jury Verdict Sheet, R.R. at 1307a.) Although the jury did not make any finding as to the amount owed by the Authority to Contractor under the Contract, the evidence was undisputed that this unpaid balance was at least \$107,137.82. (Plaintiff's Ex. 104 Payment Application 16 Engineer Recommendation, R.R. at 45a-47a; Plaintiff's Ex. 105 7/2/09 Letter from Authority to Contractor.) There was therefore a sufficient, non-speculative basis for the trial court to award interest under 62 Pa. C.S. § 3941(b).

The trial court, however, awarded interest on \$147,942.08, not \$107,137.82. This was error. While there was some evidence that the withheld amount was \$147,942.08 (7/10/13 N.T. at 25-32, 187, 229, R.R. at 429a-436a, 591a, 633a; 7/11/13 N.T. at 191, R.R. at 924a), Contractor points to no evidence that this amount was undisputed and other evidence suggested that only \$107,137.82 was unpaid. (7/10/13 N.T. at 9, R.R. at 413a; Plaintiff's Ex. 105 7/2/09 Letter from Authority to Contractor.) Given Contractor's own testimony that the amount remaining to be paid under the Contract was "something just over \$100,000" (7/10/13 N.T. at 9, R.R. at 413a), it cannot be said that the jury necessarily found that the unpaid Contract balance was \$147,942.08.

Contractor argues that the fact that the jury's lump sum award ended in eight cents shows that it must have awarded \$147,942.08 as the Contract balance. However, the jury awarded \$726,809.08, not \$747,942.08 or \$726,942.08 and the Contract balance is not the only possible source of an award that includes cents. Items of increased costs that Contractor sought as damages also included cents. (*See, e.g.*, Plaintiff's Exs. 87 and 93.) There is no way to tell from the jury verdict whether such items or which of them were included in the damages award. It therefore cannot be concluded without speculation that the lump sum awarded by the jury demonstrates a determination that the unpaid Contract balance was \$147,942.08.

Because it cannot be determined from the verdict that the jury found an unpaid Contract balance of \$147,942.08, the trial court's award of \$43,871.90 in

interest must be reversed. On remand, the trial court should award interest only on the undisputed unpaid Contract balance of \$107,137.82.<sup>5</sup>

### ***The Prompt Pay Act***

The Prompt Pay Act provides for a penalty and reasonable attorney fees and litigation expenses where the government's failure to pay its contractor is in bad faith. 62 Pa. C.S. § 3935; *A. Scott Enterprises, Inc. v. City of Allentown*, \_\_ A.3d \_\_, \_\_ (Pa. Cmwlth. Nos. 2163 C.D. 2013, 2289 C.D. 2013, 379 C.D. 2014, filed October 21, 2014), 2014 WL 5335358 at \*7; *James Corp. v. North Allegheny School District*, 938 A.2d 474, 488 (Pa. Cmwlth. 2007). Section 3935 of the Prompt Pay Act provides in relevant part:

(a) Penalty.--If ... a claim with ... a court of competent jurisdiction is commenced to recover payment due under this subchapter and it is determined that the government agency, contractor or subcontractor has failed to comply with the payment terms of this subchapter, ... the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent

---

<sup>5</sup> This would be an interest award of \$31,771.50 for the period on which the trial court calculated interest. The appropriate period for the interest award, however, may not be the same on remand. If Contractor is receiving post-judgment interest on the entire verdict, *see* 42 Pa. C.S. § 8101; *A. Scott Enterprises, Inc. v. City of Allentown*, \_\_ A.3d \_\_, \_\_, 2014 WL 5335358 at \*10 (Pa. Cmwlth. Nos. 2163 C.D. 2013, 2289 C.D. 2013, 379 C.D. 2014, filed October 21, 2014), the period for which interest is calculated under 62 Pa. C.S. § 3941(b) would terminate as of the date from which post-judgment interest on the entire verdict began to run. *Zimmerman v. Harrisburg Fudd I, LP*, 984 A.2d 497 (Pa. Super. 2009), cited by Contractor, does not require a different result. In *Zimmerman*, the court held only that a higher pre-judgment interest rate continued after judgment, not that a plaintiff can receive both continued pre-judgment interest and post-judgment interest for the same period. *Id.* at 502 & n.8. Here, there is no difference in the interest rate under Section 3941(b) and the legal rate of interest that applies to the verdict as a whole. There is therefore no reason to treat the interest on the unpaid Contract balance differently from the rest of the verdict once post-judgment interest is accruing on the entire verdict.

that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith to the extent it was withheld pursuant to section 3934 (relating to withholding of payment for good faith claims).

(b) Attorney fees.--Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the ... court ... together with expenses, if it is determined that the government agency, contractor or subcontractor acted in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious.

62 Pa. C.S. § 3935 (emphasis added). An award of both a penalty and legal expenses is mandatory under Section 3935 of the Prompt Pay Act if the jury finds that the government withheld contract payments in bad faith. *A. Scott Enterprises, Inc.*, \_\_ A.3d at \_\_, 2014 WL 5335358 at \*7. The trial court, however, has discretion as to the amount of the penalty and attorney fees and expenses and is not required to award the maximum permitted by the statute. *Id.*, at \_\_, 2014 WL 5335358 at \*8.

The trial court here awarded no penalty under Section 3935(a) of the Prompt Pay Act, but did award Contractor attorney fees under Section 3935(b). Contractor contends that the trial court was required to award it a 1% per month penalty on its claimed Contract balance of \$147,942.08 and that the trial court abused its discretion in awarding only 9% of the \$329,560.50 in attorney fees that it sought and in failing to award an expert witness fee and other litigation expenses. The Authority contends that the trial court's denial of any penalty was proper and the award of attorney fees was in error because its reasons for withholding payment from Contractor did not constitute bad faith.

The Authority's argument must be rejected because it has been waived. Whether the government's conduct constitutes bad faith under the Prompt Pay Act is an issue of fact for the jury to determine. *A. Scott Enterprises, Inc.*, \_\_\_ A.3d at \_\_\_, 2014 WL 5335358 at \*6; *James Corp.*, 938 A.2d at 490. Challenges to the sufficiency of the evidence to support a jury finding are waived unless they are raised in post-trial motions. *Hall*, 779 A.2d at 1169; *Lynch v. Bridges & Co.*, 678 A.2d 414, 416 (Pa. Super. 1996). Neither the Authority nor Engineer challenged the jury's finding of bad faith by post-trial motion. The Authority filed no post-trial motion at all. Engineer's motion for post-trial relief challenged only the jury's finding against it on the Authority's cross-claim in Question 7, not the jury's findings against the Authority, and did not raise any issue as to the sufficiency of the evidence to support a finding of bad faith.

Contractor's assertion that the trial court erred in failing to award any penalty is correct. As noted above, a finding of bad faith requires the trial court to make a penalty award under Section 3935(a) of the Prompt Pay Act. *A. Scott Enterprises, Inc.*, \_\_\_ A.3d at \_\_\_, 2014 WL 5335358 at \*7. We must therefore reverse the trial court on this issue.<sup>6</sup> Contractor, however, is not entitled to a penalty award on \$147,942.08. As is discussed above, because the verdict awarded damages in a lump sum, it is not possible to determine without speculation that the jury found an unpaid Contract balance of \$147,942.08. The penalty may therefore be assessed only on the undisputed unpaid amount of \$107,137.82. Moreover, the trial court is not required to impose the full 1% per month penalty provided by Section 3935(a). Under the Prompt Pay Act, "the

---

<sup>6</sup> We note that the trial court did not have the benefit of this Court's decision in *A. Scott Enterprises, Inc.*, which was decided after the briefing and argument in this appeal.



amount of the award of attorney's fees and interest penalty is discretionary." A. *Scott Enterprises, Inc.*, \_\_\_ A.3d at \_\_\_, 2014 WL 5335358 at \*8 (emphasis in original). The trial court on remand may therefore exercise its discretion as to the appropriate amount of the penalty up to the statutory limit of 1% per month.

With respect to Contractor's request for attorney fees and expert fees, the trial court exercised its discretion. Under Section 3935(b) of the Prompt Pay Act, Contractor may be awarded only attorney fees that it incurred in collecting payment due under the Contract, not fees on other claims. *James Corp.*, 938 A.2d at 490-91; *see Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022, 1031-32 (Pa. Super. 2005) (where multiple claims are litigated and only some are under a statute authorizing recovery of attorney fees, attorney fee award must be limited to fees incurred in pursuing claims brought under fee-shifting statute). Contractor, however, sought an award of all of its attorney fees in this case without any significant reduction and did not provide the trial court with any method to allocate its attorney fees between its successful claim for the Contract balance and its claims for which attorney fees were not recoverable. (Post-Trial Argument Transcript at 96-99, R.R. at 1583a-1586a.)

The trial court awarded Contractor 9% of the attorney fees that it sought based on the fact that Contractor litigated eleven claims and its successful claim for the unpaid Contract balance for which fees could be awarded amounted to one eleventh, 9%, of the total number of claims it pursued. The trial court was correct that Contractor's nine-count Amended Complaint asserted a total of eleven claims, seven claims against the Authority and four claims against Engineer. (Amended Complaint, R.R. at 48a-68a.) Three of these claims sought various types of damages from the Authority for breach of contract (*id.*, R.R. at 54a-59a),

but only one of the eleven claims in Contractor's Amended Complaint, Count III, asserted a claim for payment of the Contract balance for which Contractor could be awarded attorney fees under the Prompt Pay Act. (*Id.*, R.R. at 57a-59a.)

Contractor pursued all of the claims in its Amended Complaint well into trial and prevailed only on the breach of contract claims against the Authority. The trial court could reasonably conclude that assertion of a large number of separate causes of action into trial necessarily caused substantial legal expense beyond the cost of recovering the Contract balance. *Neal*, 882 A.2d at 1032. Moreover, the unpaid Contract balance was a small percentage of the \$726,809.08 in damages that Contractor recovered at trial. A trial court may properly consider the number of legal claims pursued that are not subject to the right to attorney fees and the percentage of damages attributable to such claims in determining a reasonable attorney fee under a statute that provides for attorney fees. *Id.* at 1032 n.12 (suggesting that "it would not be unreasonable" for the trial court to reduce attorney fees in proportion to the percentage of plaintiff's damages award that was under the fee shifting statute).

Contractor argues that its attorney fees could not be reduced based on the other claims it asserted because proof of its claim for payment under the Contract was intertwined with its other causes of action, since it was required to show the cause of the project delays to defeat the Authority's liquidated damages defense. We do not agree. Contrary to Contractor's contention, *Ambrose v. Citizens National Bank of Evans City*, 5 A.3d 413 (Pa. Super. 2010), does not require that fees be awarded without reduction for other claims that the plaintiff chooses to litigate simply because they involve overlapping or intertwined evidence. In *Ambrose*, the fees in question were incurred in responding to issues

raised by the defendant that plaintiffs were forced to litigate to prevail on the claims for which attorney fees were recoverable, not in pursuit of other damages claims filed by plaintiffs for which attorney fees could not be awarded. *Id.* at 419-20. In addition, the court in *Ambrose* held the trial court’s award of fees incurred in litigating an overlapping issue was within its discretion, not that the court was required to award fees for other claims, even when the party seeking attorney fees made no attempt to demonstrate which parts of its attorney fees were actually attributable to the claim for which fees could be awarded. *Id.* at 418-20. Finally, the language of the statute in *Ambrose*, Section 9.1 of the Wage Payment and Collection Law,<sup>7</sup> is significantly different from the language of the Prompt Pay Act. *Compare* 43 P.S. § 260.9a(f) (“The court in any action brought under this section shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs for reasonable attorneys’ fees of any nature to be paid by the defendant”) (emphasis added) *with* 62 Pa. C.S. § 3935(b) (“the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the ... court”) (emphasis added).

The trial court has great latitude and discretion with respect to the amount of an attorney fee award under the Prompt Pay Act. *A. Scott Enterprises, Inc.*, \_\_\_ A.3d at \_\_\_, 2014 WL 5335358 at \*8; *James Corp.*, 938 A.2d at 489. Given the number of other claims pursued by Contractor into trial, the fact that the bulk of its damages verdict was not under the Prompt Pay Act, and Contractor’s failure to make any attempt to exclude attorney fees incurred on other claims or

---

<sup>7</sup> Act of July 14, 1961, P.L. 637, § 9.1, added by the Act of July 14, 1977, P.L. 82, § 6, *as amended*, 43 P.S. § 260.9a(f).

provide the trial court with any other basis for determining the amount of reasonable attorney fees to litigate the claim for the Contract balance, we cannot say that the trial court exceeded that broad discretion in the reduced attorney fee award that it made.

Contractor also argues that it was entitled to its expert witness fees and other litigation expenses under the Prompt Pay Act. Litigation expenses, including expert witness fees, are recoverable under Section 3935(b) of the Prompt Pay Act, but only where they are incurred in seeking payment under the contract. *James Corp.*, 938 A.2d at 491. Such fees and expenses incurred on other damages claims cannot be awarded under the Prompt Pay Act. *Id.*

The expert witness for whom Contractor seeks \$24,789.99 in fees, Richard Merkofer, testified as an expert in “scheduling and delay analysis” in support of Contractor’s claim that it was entitled to recover increased costs for extended job overhead for 49 days of delay. (N.T. 7/12/13 at 104-05, 120-30.) Merkofer admitted that he was testifying only to the quantification of the delays, not who was actually responsible for the delays, and that his analysis “has nothing to do with liquidated damages for final payment.” (N.T. 7/12/13 at 146-48, 154-55.) Given these facts, the trial court did not err in concluding that Contractor’s expert witness fees were not related to securing payment of the Contract balance and that they were therefore not recoverable under the Prompt Pay Act.

The trial court, however, did not consider or exercise its discretion with respect to Contractor’s claim for \$20,402.75 in other litigation expenses. Because an award of legal costs is mandatory under Section 3935(b) of the Prompt Pay Act where contract payments have been withheld in bad faith, *A. Scott Enterprises, Inc.*, \_\_\_ A.3d at \_\_\_, 2014 WL 5335358 at \*7, the trial court, on

remand, must make a determination of what portion of those litigation expenses relate to Contractor's claim for the unpaid Contract balance and the amount of non-expert witness litigation expenses to be awarded to Contractor.

***Conclusion***

For the foregoing reasons, we reverse the trial court's molding of the verdict in favor of Engineer, its award of \$43,871.90 in interest, and its denial of any penalty under the Prompt Pay Act, and affirm the trial court's award of attorney fees to Contractor under the Prompt Pay Act and its denial of expert witness fees. The matter is remanded to the trial court with instructions to enter judgment in favor of the Authority on its indemnity cross-claim against Engineer with respect to \$619,671.26 of the jury's damages award and all interest, penalties and attorney fees awarded to Contractor and to mold the verdict in favor of Engineer to make the Authority solely liable for \$107,137.82 of the jury's verdict. On remand, the trial court shall recalculate its interest award on an unpaid Contract balance of \$107,137.82 and conduct further proceedings to determine the amount of the penalty and litigation expenses, other than expert witness fees, to be awarded to Contractor under the Prompt Pay Act.

---

JAMES GARDNER COLINS, Senior Judge

Judge Covey did not participate in this decision.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Klipper Construction Associates, Inc.	:	
	:	
v.	:	
	:	
Warwick Township Water and Sewer	:	
Authority and Carroll Engineering	:	No. 471 C.D. 2014
Corporation	:	
	:	
Appeal of: Warwick Township Water	:	
and Sewer Authority	:	
	:	
Klipper Construction Associates, Inc.	:	
	:	
v.	:	
	:	
Warwick Township Water and Sewer	:	
Authority and Carroll Engineering	:	No. 792 C.D. 2014
Corporation	:	
	:	
Appeal of: Klipper Construction	:	
Associates, Inc.	:	

**ORDER**

AND NOW, this 16<sup>th</sup> day of December, 2014, the order of February 24, 2014 of the Bucks County Court of Common Pleas (trial court) in the above-captioned matter is REVERSED insofar as it molded the jury's verdict in favor of defendant Carroll Engineering Corporation (Engineer), awarded plaintiff Klipper Construction Associates, Inc. (Contractor) \$43,871.90 in interest, and denied any penalty under the Prompt Pay Act. The order of the trial court is AFFIRMED insofar as it awarded \$29,660.45 in attorney fees to Contractor under the Prompt

Pay Act and denied Contractor's request for expert witness fees. This matter is REMANDED to the trial court for proceedings consistent with this opinion, with instructions to enter judgment in favor of defendant Warwick Township Water and Sewer Authority (the Authority) on its indemnity cross-claim against Engineer in accordance with the jury's verdict with respect to \$619,671.26 of the jury's damages award and all interest, penalties and attorney fees awarded to Contractor and to mold the verdict in favor of Engineer to provide that the Authority is solely liable for \$107,137.82 of the jury's verdict. On remand, the trial court shall also recalculate its interest award on a contract balance of \$107,137.82 and conduct further proceedings to determine the amount of the penalty and litigation expenses, other than expert witness fees, to be awarded to Contractor under the Prompt Pay Act.

Jurisdiction relinquished.

---

JAMES GARDNER COLINS, Senior Judge