

**ARKANSAS COURT OF APPEALS**

DIVISION III  
No. CA12-610

WESLEYAN CORPORATION  
APPELLANT

V.

ANDERSON ELECTRIC OF PINE  
BLUFF, INC.  
APPELLEE

Opinion Delivered FEBRUARY 20, 2013

APPEAL FROM THE JEFFERSON  
COUNTY CIRCUIT COURT  
[NO. CV-09-1052-2]

HONORABLE ROBERT H. WYATT,  
JR., JUDGE

AFFIRMED

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**KENNETH S. HIXSON, Judge**

Appellant Wesleyan Corporation appeals the entry of judgment against it in favor of appellee Anderson Electric of Pine Bluff, Inc., following a bench trial in Jefferson County Circuit Court. Appellant asserts two points on appeal: (1) that the trial court abused its discretion in not granting appellant a continuance, and (2) that the trial court's findings are clearly erroneous requiring reversal. We affirm.

Appellee filed a complaint against appellant in October 2009 seeking judgment on an unpaid contract. Appellee alleged that it provided labor, equipment, and materials in relation to electrical work provided for appellant over several months in 2008 on a particular building in Pine Bluff. Appellant answered the complaint through its attorney in February 2010, but that attorney properly withdrew from representation in December 2010. The appellant chose



not to retain another attorney. Approximately fourteen months later, on February 3, 2012, the case was set for a March 21, 2012 one-day bench trial.

On February 21, 2012, appellant filed a motion for continuance and motion to compel discovery, asserting that it was not in receipt of the file from its prior attorney, it needed to employ new counsel, and it needed appellee to provide discovery responses. Appellant's registered agent, William "Bill" W. Ruth, signed the motions on behalf of appellant. Before the appellee responded to the motions, the trial court filed an order two days later on February 23 requiring that a licensed attorney file an entry of appearance on behalf of appellant by March 1 or that the corporation would be found in default.

On February 28, appellee filed a motion to strike appellant's February 21 motions on the basis that appellant, a corporation, was required to be represented by a licensed attorney in the state of Arkansas but was not. Appellee alleged that Bill Ruth represented that he was an attorney licensed to practice in Texas, not Arkansas, and that Bill Ruth should be held in contempt.

On March 1, Daniel W. Pilkington entered his appearance as attorney of record for appellant. On March 2, attorney Pilkington filed another motion for a continuance of the March 21 bench trial based on his recent retention as counsel. On March 5, the trial court entered an order denying the motion for a continuance.

On March 12, attorney Pilkington moved again for a continuance, asserting that (1) Terry Cannon was a necessary witness but unavailable to attend the scheduled March 21 date for the bench trial; (2) counsel needed more time to prepare because he "[had] just



received the file from the Defendant’s previous attorney”; and (3) “Defendant did not receive the Plaintiff’s response to interrogatories within 30 days of trial.”

The trial court did not act on the motion prior to the bench trial. At the trial, appellant’s attorney orally renewed his request for a continuance. Attorney Pilkington argued that witness Terry Cannon could not attend, but he admitted that he did not subpoena the witness because “I was asked not to by my client.” Pilkington added that his client (Bill Ruth) was not present because his client’s wife had an outpatient surgical procedure on March 16 (a hysterectomy) and because his client had court proceedings that he was attending on March 20 and 22 in Texas.<sup>1</sup> Pilkington admitted that flights were available in Abilene, Texas, near his client’s home. Pilkington reiterated that he did not receive appellee’s discovery responses within thirty days of bench trial, but he admitted that it was lack of timely receipt from his own client. Pilkington argued once more his lack of time to prepare due to his hire on March 1.

The trial court rejected all the bases presented for a continuance, making the following findings: The defense witness was not subpoenaed to attend; there was no indication that it was medically necessary for Mr. Ruth to provide his wife postoperative care; Mr. Ruth was able, but chose not, to be present; and Mr. Ruth was not diligent in seeking new counsel

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<sup>1</sup>Mr. Ruth’s attorney proffered a letter dated March 13, 2012, from another Texas attorney, Mr. King, to Mr. Ruth about the setting of a March 22 court hearing in Texas to hear “respective motions.” Mr. King stated, “I am not opposed to the date indicated.” Mr. Ruth was aware in early February of the March 21 Arkansas bench trial setting. An earlier motion for continuance had already been denied on March 5.



where more than a year had passed between prior counsel being relieved and present counsel appearing.

The denial of a motion for a continuance is within the sound discretion of the trial court, whose ruling will not be reversed unless there is an abuse of discretion and a showing of resulting prejudice. *Dunaway v. Garland Cnty. Fair & Livestock Show Assoc., Inc.*, 97 Ark. App. 181, 245 S.W.3d 678 (2006). When the request for a continuance concerns a lack of time to prepare, we will consider the totality of the circumstances; a lack of diligence alone is sufficient to deny a motion for continuance. *City of Dover v. City of Russellville*, 346 Ark. 279, 57 S.W.3d 171 (2001).

We have no hesitancy in holding that the trial court did not abuse its considerable discretion in this instance. The evidence supports the trial court's determination that appellant was not diligent in seeking new counsel or presenting relevant witness testimony. A fair reading of the evidence indicates deliberate choices by Mr. Ruth, on behalf of appellant, to delay or avoid this bench trial. We hold that the trial court did not abuse its discretion in denying a continuance.

Appellant's other point on appeal concerns the resulting judgment after the bench trial, which held appellant liable for \$16,123.39 that remained to be paid on the electrical-work contract. The standard of review on appeal from a bench trial is that we conduct a de novo review and reverse only if the trial court's findings of fact are clearly erroneous or clearly against the preponderance of the evidence. *Taylor v. Hinkle*, 360 Ark. 121, 200 S.W.3d 387 (2004). A finding is clearly erroneous when, although there is evidence to support it, we are



left with a distinct and firm conviction that a mistake has been committed. *Id.* Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.*

Darryl Anderson, appellee's owner, testified about the original negotiated price of \$129,000 for his company to perform specific electrical work for appellant pursuant to certain plans and specifications. Bill Ruth negotiated on behalf of appellant. The September 28, 2007 bid price did not include extras or "change orders." Anderson testified that Ruth orally agreed to pay the extras or change orders. As work progressed through 2008, governmental regulations necessitated adjustments and additional work. Anderson testified as to each invoice billed to Ruth. Ten invoices were entered into evidence. Referencing a bookkeeping document that was entered into evidence, Anderson recited the payments credited to this account and stated that \$16,123.39 remained unpaid. He stated that no one ever complained to him about the quality of his company's work, but it became clear to him that Ruth was not going to pay.

Ruth chose not to appear to testify at the bench trial. The only documentary evidence presented on behalf of appellant was the original 2007 bid with its enumerated exclusions and a detailed billing statement showing the \$16,123.39 due from appellant.

An oral modification to a written contract must be established by clear and convincing evidence. *Freeman v. Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987). The trial court found Anderson to be a credible witness, awarded judgment for the amount evidenced by Anderson's invoices less payments, granted a \$3500 attorney fee and \$250 in costs, and requested appellee's attorney to prepare the judgment. There was substantial evidence of



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record to support the trial court's award of judgment for the amount remaining unpaid. We cannot say that the trial court's findings are clearly erroneous.

Appellant also contends that the trial court's award of \$3500 in attorney fees is erroneous because fees were not formally requested in a timely manner nor were they reasonable under the factors listed in *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). Appellee responds that from the initiation of this lawsuit, appellee requested attorney fees and costs; that when judgment was rendered from the bench, appellant's attorney offered no objection to the amount or reasonableness of the attorney-fee award; and that the trial court gave appellant a five-day window within which to object to the proposed judgment, and no objection was lodged. Moreover, appellant filed a motion for new trial alleging that due to the denial of a continuance, appellant did not receive a fair trial. No mention of attorney fees or costs was made in the motion for new trial. Because the attorney-fee issue is not preserved for review, *Burke v. Strange*, 335 Ark. 328, 983 S.W.2d 389 (1998), we do not address it.

Affirmed.

GLADWIN, C.J., and WYNNE, J., agree.

*Worsham Law Firm, P.A.*, by: *Richard E. Worsham*, for appellant.

*Owens Law Firm*, by: *C. Thompson "Tom" Owens*, for appellee.