IN THE SUPREME COURT OF MISSISSIPPI

TUPELO REDEVELOPMENT AGENCY

APPELLANT

V.

CAUSE NO. 2006-TS-00218

THE GRAY CORPORATION, INC.

APPELLEE/CROSS-APPELLANT

V.

RONALD J. RAGLAND, SR. d/b/a RAGLAND ENGINEERING, AND RAGLAND CONSTRUCTION

CROSS-APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF LEE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE/CROSS-APPELLANT

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Tupelo Redevelopment Agency, Appellant
2. Ronald J. Ragland, Sr. d/b/a Ragland Engineering and Ragland Construction, Cross-Appellee
3. The Gray Corporation, Inc., Appellee/Cross-Appellant
4. Shawn and Renee Gray, Principals of The Gray Corporation, Inc.
5. Eugene Hill, Principal of The Gray Corporation, Inc.
6. The Hartford Fire and Insurance Company, Co-Defendant in underlying action
7. Thomas W. Prewitt, Attorney for Ronald J. Ragland, Sr., d/b/a Ragland Engineering and Ragland Construction
8. Samuel C. Kelly, Former Attorney for The Gray Corporation, Inc. and The Hartford Fire

and Insurance Company (allowed to withdraw as counsel following trial)

9. Ron A. Yarbrough, Former Attorney for the Gray Corporation, Inc. and The Hartford Fire and Insurance Company (allowed to withdraw as counsel following trial)

10. B. Sean Akins, Appellate Attorney for The Gray Corporation, Inc.

11. Guy W. Mitchell, III, Attorney for Tupelo Redevelopment Agency

12. William G. Armistead, Sr., Attorney for Tupelo Redevelopment Agency

13. Kevin B. Smith, Attorney for Tupelo Redevelopment Agency

14. Honorable Thomas J. Gardner, III, Lee County Circuit Court Judge

This the 31st day of October, 2006.

B. SEAN AKINS, MSB NO. 9555
ATTORNEY FOR APPELLEE/
CROSS-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

CASES:

STATEMENT OF THE ISSUES

The issues raised by Tupelo Redevelopment Authority's ("TRA") appeal of the jury's award of $258,118 in damages to Gray Corporation ("Gray") are:

1. Whether the jury had an evidentiary basis to find TRA waived enforcement of the change order requirement in its contract when TRA ignored the requirement throughout the contract's performance and induced Gray to continue working by representing that a change order would be issued to cover Gray's and its subcontractor, Ronald Ragland's extra costs?
2. Whether being a public agency relieved TRA as a matter of law from the consequences of its waiver of the change order requirement?
3. Whether the jury had an evidentiary basis to find the no-damage-for-delay clause inapplicable because the delay was not contemplated by the parties and other exceptions to the no-damage-for-delay clause applied?
4. Whether the jury had an evidentiary basis to find that Gray is entitled to indemnification for sums awarded Ragland for extra work and delays caused by TRA?

The issues raised by Gray's cross appeal of the $1,216,016.12 judgment entered in favor of its subcontractor, Ronald Ragland, are:

1. Whether Ragland was entitled to recover for breach of contract on a theory of *quantum meruit* when the parties' contract contained all the essential terms of the parties' bargain including the contract price?
2. Whether Ragland made out a *prima facie* case for *quantum meruit* recovery when he based his damage calculation on guesstimates of his labor, costs and reasonable profits?
3. Whether a new trial or *remitter* should be granted when Ragland based his damage calculation on guesstimates of his labor, costs and reasonable profits and there is no rational basis for the jury's award other than passion, bias or prejudice?

4. Whether Ragland may recover attorney's fees as well as recovery in *quantum meruit*?

5. Whether the court properly applied the lodestar method in calculating the award of attorney's fees to Ragland based on a 40% contingency rate?

The issue raised by Gray's cross-appeal against TRA is:

1. Since Gray is entitled to indemnification for an award to Ragland for extra work or costs caused by TRA, is Gray entitled to an *additur* in the amount of any award to Ragland?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Court Below

The course of proceedings is accurately outlined by TRA in its brief. However, TRA omits from its brief that the $850,551.32 awarded Ragland included $231,378 for electrical engineering design services and $123,016.12 for the alleged balance due under its subcontract with Gray. (T.1305)

The trial court denied Gray's Motion for Judgment Notwithstanding the Verdict, a New Trial or for Remittitur. (RE 1).

The trial court granted Ragland's post trial motion seeking attorney's fees and interest for bad faith. (RE 2). The trial court's award of attorneys' fees based on a 40% contingency rate increased the total award to Ragland to $1,216,605.20. (RE 1).

After attorneys' fees were awarded against it for bad faith, Gray's surety, Hartford Fire and Insurance Company ("Hartford"), settled with Ragland for $475,000.00 plus whatever rights Hartford has in the Gray's judgment against TRA. Hartford then filed a lawsuit seeking indemnification against Gray and its owners and others in the United States District Court for the Northern District of Mississippi (Case No. 3:05CV246BA). That case has been stayed pending the outcome of this appeal.

B. Statement of the Facts

Gray Corporation was awarded a $1,725,347.08 contract by TRA to construct infrastructure for the Tupelo Fairgrounds project in October, 2000. Long before Gray moved the first dirt on the project, TRA sealed the fate of the Project by selecting Allen & Hoshell to prepare the plans for the electrical system. Unknown to Gray, TRA's plans were bad (T. 1051) and they were not coordinated with the plans for the site work and underground utilities prepared by TRA's other engineer, Cook Coggin. (T. 1006 - 1007). The plans also omitted items the Joint Task Force discovered were needed *after* construction began. As set forth with more particularity below, the plans were substantially re-written over a period of months. But while they were being re-written, Gray was required to soldier on and continue to perform.

A contractor's price—and a contractor's schedule—are only as good as the construction plans and specifications upon which they are based. Gray relied upon the adequacy and correctness of TRA's electrical plans and proper coordination of other components of plans when Gray submitted its bid and entered into a contract with TRA to build the Project. (T. 498 - 503). Ragland also relied upon the adequacy and correctness of TRA's electrical plans when Ragland submitted its proposal to Gray to install the electrical system. (T. 154) Gray's bid and Ragland's price for this work was $216,000.00 (T: 502-503 and 509-510).

Gray also reasonably relied upon the adequacy and accuracy of TRA's electrical plans when Gray submitted a schedule and sequence for construction of the Project. The sequence and schedule Gray submitted and TRA approved contemplated the Project would begin at the end of October 2000 and would be completed in an orderly sequence on or before August 19, 2001. (T. 508-09, 513, Exhibit DG-14)

Less than one month after being awarded the contract by TRA, Gray entered into a subcontract agreement with Ragland to perform the electrical portion of the Project for $216,000.00

on November 5, 2000. (T. at 510-9 to 511-15.) The agreement was oral but the parties agreed on all essential terms of the contract including line item prices, scope of work, and billing. (T. at 338-24 to 339-29; RE 12.) Most importantly, the original price terms were itemized in a writing Ragland supplied Gray. (T. at 532, RE 15).

TRA issued a Notice to Proceed to Gray on or about November 13, 2000, and work started. (Exhibit DG-14.) Soon after work began, Ragland began to notice deficiencies in the engineering plans for the Project which he raised as early as the preconstruction meeting on November 7, 2000. (T. at 516). The deficiencies delayed Gray and Ragland.

Gray was ready for Ragland to begin work on Component C on December 6, 2000, but Ragland could not begin because of the ongoing problems with the electrical plans. (T. at 521-24.) The plans did not accurately reflect the Project requirements. As reflected in the meeting minutes for the Project, numerous quantities of work were inaccurate and the scope of the work itself was not properly defined. (Trial Exhibit P-18, RE 19.) Ragland sent Gray information concerning needed changes for the electrical problems, and Gray forwarded the information to TRA. (T. at 516-21 to 518-15; Trial Exhibit DG-16; RE 20.)

TRA and its agents, JESCO and Allen & Hoshall, asked Ragland to help properly identify quantities of work and project requirements. (Trial Exhibit P-18: March 21 and April 4 minutes; RE 19.)[1] The parties began working together to correct the deficiencies in the original plans. While the changes were being made to the plans, TRA, through its Project Manager, JESCO, promised Gray and Ragland that they would be compensated for the increased cost of the revisions with a future change order. (Trial Exhibit DG-32; RE 22.) Gray was told to proceed with work and that a change order would be issued later. (Trial Exhibit P-18: January 5, January 22, and January 31; RE 19 and 23.)

1

Trial Exhibit P-18 was a composite exhibit of the minutes of several meetings. The dates are referenced in the notations.

Change Order No. 1 was issued on February 27, 2001, to address Component C modifications for the revised drawings as of February 19, 2001. (Exhibit DG-7I.) Change Order No. 1 only included compensation for the differences in quantities and not for the delayed time or electrical changes made. After Change Order No. 1 was issued, TRA and its agents were made aware of continuing problems and made more changes. (Trial Exhibit P-18: March 21 and April 18; RE 19.) Allen & Hoshall issued four different sets of drawings, but none corrected the problems so TRA asked Ragland directly to prepare electrical drawings for the Project. (T. at 1051-16.) This was work that Gray and Ragland had not anticipated doing on the Project and for which they were not paid.

The defects in the plans delayed the work of Gray and Ragland because the dirt work could not be finished until the electrical work was complete. Gray did not receive a change order for a time extension for the electrical delay. (T. at 674-29 to 675-5.) This required the work to be accelerated to finish on time. Therefore, the work was more costly due to working overtime and using additional labor and equipment.

Throughout the project, TRA demanded work and then issued change orders after the work was done. Two other change orders were issued for water and sewer utilities and the extension of Road A. (T. at 587-18; Exhibits P-7 and P-8.). Change orders 1, 2 and 3 were all issued by TRA **after the work had been done** not before as required by the change order clause in the contract. TRA ignored the change order first requirement throughout the job. Instead it directed Gray to do the work then issued the change order. (T. 1056)

Throughout this time, Gray and Ragland were assured by TRA's on site representatives that they understood an additional change order would be needed and would be issued to compensate for the extra expense. (Exhibits DG-62, and DG-70; RE 25 and 27. T: 161-162, 187-188, 251, 384). Under the conditions of the contract between TRA and Gray, Gray was not required to request a

change order; TRA was required to issue one. (Exhibit P-1: Article 10; T. at 672-20 to 673-20; RE 3.)

Gray was aware of the provision requiring a change order to be issued before additional work is done, but TRA's agents instructed Gray to proceed with the work without first securing one. (T. at 587-18 to 588-16.) Because TRA had promised the other change orders before they were issued, and because that is how TRA handled the three other change orders it issued during the project, Gray and Ragland proceeded with the work under the reasonable belief a final change order would be issued. (T. at 1056).

Cook Coggin was contractually obligated to prepare the final change order at the end of the Project. (T. at 871-7; Trial Exhibit P-9.) The final change order was promised to address all outstanding issues. However, the final change order was never issued as promised.

On March 1, 2002, Gray asserted a claim for $771,912.91 for delay and extra work in a claim letter to TRA. (Trial Exhibit DG-132; RE 7.) The claim was timely made according to Paragraph 11.2.2 of the Project contract because a claim for equitable adjustment can be made anytime before final payment is received. (Trial Exhibit P-1; RE 4.)

On March 1, 2002, Gray issued a letter to TRA seeking $158,757 for 89 days of delay plus Ragland's claim of $458,178.00. (T: 557-560). The amount of Ragland's claim was supplied by Ragland. However, when Ragland filed suit, it increased the amount of its demand to $534,454.00 Shortly before trial, Ragland amended his Complaint to demand $1.4 million. (T: 332-333). The only explanation Ragland offered at trial for this increase was that he had seen photographs that reminded him of conditions and problems he had not adequately included in his earlier computations.

Ragland acknowledged in testimony only $74,000.00 of the balance owed under the terms of its subcontract by Gray. (T.348 350) Ragland sought to recover the balance of the $1.4 million

on the basis of *quantum meruit.*

During the project, Ragland represented to Gray in writing that he was documenting his extra costs on the job. Without notifying Gray, Ragland decided not to track his costs because "it was too much trouble." (T: 366) Indeed Ragland admitted he did not even have the full documentation of what his payroll and other actual costs were so they could not be audited. (T: 358-60) Instead, Ragland reached $1.4 million by estimating what the value of the extra work he performed was without reference to his actual costs. (T. 379-380).

While disputing Ragland's computation of damages, Gray sought indemnification from TRA for any sums awarded Ragland on the basis of the faulty plans and specifications and other wrongdoing by TRA or its agents.

SUMMARY OF THE ARGUMENT

TRA's Appeal:

The jury awarded Gray damages against TRA because the evidence established that Gray was damaged by the defective and uncoordinated electrical plans TRA provided Gray to build the project with.

This award was not barred by the change order clause in the contract between TRA and Gray. Under Mississippi law, an owner may waive a contract requirement by its performance or by its words. At trial, Gray introduced evidence demonstrating that TRA ignored the change order clause throughout the course of construction. TRA's pattern of performance throughout the job was to direct Gray to do work before a change order was issued not after. In effect, TRA said to Gray, do the work, then we will settle up.

Ronnie Gray and Gray's subcontractor, in a rare example of agreement, testified that TRA's agents directed them to do extra work and promised that a final change order would be issued and that they relied on this promise because that is what the pattern of practice was on this job. Gray 's

evidence was sufficient to make out a prima facie case of waiver. TRA disputed this testimony, but such disputes are for the jury to decide. The trail Court submitted the issue of waiver to the jury which resolved it in Gray's favor. There is no basis for setting that verdict aside.

The award to Gray is also not barred by TRA's status as a government entity. *Miss. Code Ann.* § 31-7-13 does not bar the claim because the work for which Gray was compensated was authorized, reasonable and necessary. Contrary to the implications in TRA's Brief, the doctrine of waiver applies to government contracts as well as to private contracts when there is evidence that the public owner did not follow the contract or directed the contractor to proceed subject to a later claim for a change order.

In that regard, this Court has recognized that no-damage-for–delay clauses in public contracts are to be strictly construed and will not be enforced when any of four exceptions apply. Gray introduced evidence at trial that the delay encountered by Gray due to TRA's defective plans were not contemplated by the parties and fell within other exceptions as well. TRA disputed this evidence, but such disputes are for the jury to decide and the trial court submitted the issue of whether Gray's delays fell within the exceptions. The jury found in Gray's favor and there is no basis for setting their verdict aside.

Gray was also entitled to a jury instruction on implied indemnity for any sums owed Ragland as a result TRA's wrongdoing. The Court's instruction excluded an award of indemnity for any active negligence by Ragland. As set forth below, Gray believes the jury did not follow the instruction and that an addittur should be awarded.

Gray's Appeal of the Award to Ragland:

The trial court found and Ragland admitted it entered into a subcontract agreement with Gray and that the parties agreed on the prices for Ragland's work. Ragland sued Gray to recover under that contract, but instead of basing its claim on excess contract costs, it submitted evidence based

on a quantum meruit. Under Mississippi law, a contractor cannot recover damages under a quantum meruit theory when he has a contract spelling out the price for his work. Accordingly, Ragland's damage claim failed as a matter of law and the trial court should have granted Gray judgment notwithstanding the verdict.

Ragland also failed to offer evidence sufficient to make out a prima facie case on the *quantum meruit* damages claimed. No documentation was provided of Ragland's actual costs because Ragland decided it was 'too much trouble" to keep up with what costs he was incurring. The only proof of damages offered was Ragland's testimony about what he would have quoted the job for had he known what he knows now. In support of that evidence, Ragland did not rely on proof of what he has charged and received in the pat or even industry norms. All he offered was ipsi dixit—just "because he said so." This testimony is insufficient as a matter of law to make out a prima facie case. Accordingly, the trial court should have Gray judgment notwithstanding the verdict.

Alternatively, the trial court should have granted a new trial or a *remittitur* because the jury's award to Ragland was against the overwhelming weight of the evidence and reflected bias and prejudice.

Gray's Cross Appeal for Additur:

No evidence was presented at trial to explain the vast discrepancy in the amount of the judgment awarded against Gray and the amount awarded against TRA. The damages were never allocated by Ragland between Gray and TRA. Ragland testified throughout the trial that the damages incurred were attributable to the acts and omissions of TRA and its agents. Therefore, the trial court erred in not allowing an *additur* to Gray's judgment against TRA.

ARGUMENT

I. THE VERDICT AGAINST TRA SHOULD BE SUSTAINED.

A. The issue of waiver was appropriately submitted to the jury.

The trial court instructed the jury to return a verdict against TRA only if the jury found that TRA had by conduct or words waived the change order requirement of the contract. **(T.1227-29).**

The Court's instruction properly stated Mississippi law. Throughout the performance of the contract, TRA ignored the change order requirement and promised Gray that it would receive a change order at the end of the job. TRA's conduct and words induced Gray and its subcontractor Ragland to continue performance.

That contract requirements can be waived by conduct or orally is a well established rule of law in Mississippi. As this Court pointed out in *Canizaro v. Mobile Communications Corp. of Am.* 655 So. 2d 25 (Miss. 1995): "[A] party to a contract may by words or conductwaive a right to which he would otherwise have been entitled." *Id.* at 29. [2] Similarly, in *City of Mound Bayou v. Roy Collins Constr. Co., Inc.*, 499 So. 2d 1354 (Miss. 1986) when a representative of a City ordered the contractor to perform additional work, then tried to invoke a change order clause to bar recovery for the work, the Court "recognized that there are circumstances in which a contractor should recover for additional work, even where the contract requires a change to be executed in writing." *Id.* at 1358. The Court determined that a contractor is entitled to recover when its "work was orally ordered, requested, directed, authorized or consented by the owner or his duly authorized agent." *Id.* at 1358-1359 (citing 2 A.L.R.3rd 620, 661 (1965)).

After hearing the testimony of the witnesses, the trial judge correctly concluded that there was adequate evidence TRA had abandoned the formalities of the Contract by its course of conduct during performance and by its promises of a final change order to submit the issue of waiver to the

[2] See *also Crosby-Mississippi Res., Ltd. v. Florida Gas Transmission*, 815 F.Supp. 977 (S.D. 1993)(modification of price term by course of conduct); *Canizaro v Mobile Communications Corp of America*, 655 So.2d 25 (miss. 1995) (waiver by conduct).

jury. Just as in *Canizaro*, the actions of TRA during Gray's performance were sufficient to constitute a waiver of the change order requirement. In the interest of expediency and efficiency, TRA and its representatives directed Gray to perform any additional work and a change order would be issued at the appropriate time. As Ronnie Gray testified:

> [T]he project manager for this project, Jesco, directed us in time of essence, in time of essence. You proceed with this work, we'll get a change order. Yes, the change order will come. . . . These were discussions that were several times a week. So, hey, they told us to proceed with the work. We did. Change order will follow. Yes, it did on three occasions, but it didn't on the final occasions. So we took that, we was directed to go to work. Yeah, promised change order, promised change order, go. We took that on faith.

(T. at 587-25 to 588-11.)

Mr. Ragland also testified a final change order was promised. Most importantly, Messrs. Ragland and Gray had reason to believe these promises because that is how three other change orders were issued—work first, change order later.

Of significance, paragraph 10 of the contract places the burden squarely upon TRA to issue any written change orders for the Project. There is no obligation on the part of Gray to give written notice that a change order is required. TRA's representatives were in the field observing Gray and Ragland's performance and were fully aware of the extra work necessary to complete the Contract to the satisfaction of TRA. These inspectors were the "eyes and ears" of TRA at the project site. It is, therefore, disingenuous for TRA to claim it was unaware that both Gray and Ragland were incurring additional cost for which TRA was obligated to provide an equitable adjustment. Succinctly stated, based upon TRA's course of conduct, it was reasonable for Gray to rely upon TRA's direction to proceed with the extra work and the representation that TRA would issue a change order at the conclusion of the Project. (Exhibit P-18: January 5; RE 18.)

Further justification for Gray's entitlement to damages against TRA is that the parties recognized the plans prepared by Allen & Hoshall for TRA and furnished to Gray were defective

and had to be redesigned. (T. at 104-25 to1051-10.) This created unanticipated delays for Gray and its subcontractor. The corrected plans required more labor, material and equipment to perform than initially calculated thereby increasing Gray's performance cost. TRA knew the error and/or omissions in the plans constituted a change for which Gray was entitled to an equitable adjustment. JESCO's meeting minutes reflect that changes were being made to correct the plans. (Trial Exhibit P-18: December 6, January 5, and March 21; RE 19.) JESCO directed Gray to proceed with the changes with TRA's knowledge and consent. (T. at 527-11 to 529-27.)

Gray was assured during several instances that a change order would be coming such as in the meeting notes of December 6, 2000, January 3, 2001, and January 22, 2001. (Trial Exhibits P-18; T. at 518-20 to 530-7; RE 19 and 23.) The meeting notes from January 5, 2001 reflect that JESCO authorized Gray "[i]n the interest of time" to "proceed with the changes outlined in these minutes" because the change order would later be issued after approval by TRA. (Trial Exhibit P-18 and T. at 527-19 to 529-2; RE 19.) Change Order No. 1 was not issued by TRA until February 27, 2001. (Trial Exhibit D-7I; T. at 534-27 to 535-21.) This is consistent with how TRA handled Change Order Nos. 2 and 3. Therefore, Gray was operating under the belief that a final change order was going to be issued upon completion of the Project and it would compensate be paid for the additional work. (T. at 529-20 to 530-7.)

TRA also abandoned the Contract by not complying with Paragraph 12 regarding time extensions. (Trial Exhibit P-1; T. at 674-21 to 675-24 and 1056; RE 5.) Gray made repeated requests for time extensions in compliance with Paragraph 12, but TRA never issued a change order granting the requested extension because TRA told Gray the extensions would be taken care of in a final change order. (T. at 675 and 1055 to 1056.) TRA allowed Gray time extensions, but payment for the extensions was never given because the extensions were not part of a change order as required by the Contract.

TRA argues in its brief that the testimony of its witnesses and certain correspondence that the only change order promised was a change order to adjust final quantities. There testimony is directly contradicted by the testimony of Messrs. Gray and Ragland. This swearing match was submitted to the jury and the jury resolved it in Gray's favor. The standard of review is clear. The evidence must be construed in the light most favorable to Gray and Gray must be given the benefit of all reasonable inferences that can be drawn from the evidence. Only if reasonable jurors could not have credited the testimony of Ragland and Gray and the evidence that TRA ignored the change order requirement can the juries verdict be set aside. See *Cousar v. State*, 855 So.2d 993, 998 (Miss. 2003); *Entergy Mississippi, Inc. v Bolden*, 854 So.2d 1051, 1055 (Miss. 2003); *Shelton v State*, 853 So.2d 1171 (Miss. 2003). The jury's verdict is supported by substantial evidence and should not be overturned.

The jury's decision is consistent with applicable law. Other contractors have also been the victim of broken promises by owners. In *Eastline Corp. v. Marion Apartments,* 524 So. 2d 582 (Miss. 1988) the contractor entered into a contract to build apartments with a "changes in work" clause requiring an approval for any changes causing an increase or decrease in the amount due on the contract. No charge for extra work was to be allowed without the approval of the representative. *Id.* at 583. The construction project deadline was extended at least twice due to several delays. *Id.* The plans and surveys provided by the owner did not conform to the actual site or meet the required standards which created many problems. *Id.* The contractor incurred additional expense to correct the unanticipated construction problems. *Id.* at 584. The owner, like the TRA, refused to pay because the contractor did not comply with the "changes in work" clause. *Id.* Much like Gray, the additional work was performed before the change orders were obtained because the contractor was pressured to avoid any further delay by processing the change order request. *Id.* The lower court refused to grant the contractor any relief for the extra work notwithstanding the oral representation

that it would be paid because the contract required a written change order prior to performing the extra work. The Mississippi Supreme Court reversed and remanded. The Mississippi Supreme Court found that the written contract had been orally modified when the owner asked the contractor to perform additional work without an official written change order as required by the contract.

Much like Gray, the contractor in *Eastline* was asked to perform the work without the change order to avoid any further delay in the project. *Id.* at 584. The contractor performed under the instructions: "Get the project done. Get it done. We'll take care of it later." *Id.* Mr. Gray testified that this same promise had been made by JESCO's project manager who reminded Mr. Gray that time was of essence, to proceed with the extra work and a change order would be forthcoming. (T. at 587-25 to 588-11.) Steve Brister, the project manager working for JESCO testified that a change order took a great amount of time and effort to have TRA approve the changes. TRA could take up to two weeks to gather all the agency members together, vote on it, and then issue a change order. (T. at 973.) The trial judge concluded, just as the *Eastline* Court that Gray had acted in good faith by proceeding with the extra work without securing the required change orders. *Id.* at 585.

Gray provided additional work on the Project to meet the changes made to the plans by TRA. This additional work was requested by TRA with the understanding that Gray would be compensated in the final change order. Steve Brister expressed to Gray and to Carson Neal of Cook Coggins that the time extension for electrical work changes not covered in the prior change orders did not need a separate change order because the changes would be consolidated in the final change order. (T. at 542-11 to 544-20; Trial Exhibit DG-65; RE 26.)

The additional work was needed because the plans designed by Allen & Hoshall were initially defective. Carson Neal and Steve Brister both testified that TRA was aware changes had to be made to Component C because there were problems with the drawings. (T. at 872-29 to 873-13 and 1048-12 to 1051-10.) TRA is the party responsible for not performing its contractual

obligations in good faith by not ensuring the plans for the Project were workable and for not latter making the agreed change order. Just as Thomas Barnes for TRA testified, TRA was responsible for its agents ensuring that the plans and specifications for the Project were coordinated so that the plans were workable. (T. at 935-15 to 936-26.) Steve Brister testified that JESCO and Cook Coggins were unable to review all the plans and specifications to coordinate all phases of the project because Allen & Hoshall did not have Component C plans ready in time. (T. at 1047-25 to 1048-11.) By this conduct, TRA breached its implied duty of good faith and fair dealing under Paragraph 16.3 of the Project contract. (Exhibit P-1; RE 6.)

The Judge Gardner, the trial court judge, properly concluded after hearing testimony "the contract was abandoned at some point during this thing, and it became a matter then of going ahead with the project." (T. at 816-26 to 817-13; RE 10.) The trial court denied TRA's motion for directed verdict on the issue because the court concluded there was a preponderance of evidence which demonstrated that TRA, through JESCO, directed Gray to continue its performance despite the ongoing changes due to the erroneous plans. In Mississippi, "where the owner orders the contractor to perform extra work outside the contract, the contractor is entitled to compensation for that work, despite the fact that no change order was issued." *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So.2d 954, 963 (Miss. 1999).

In *Sentinel,* the Mississippi Supreme Court recognized the inherent inequity in allowing a party to a contract to demand performance of extra-contractual work and then to deny compensation because a change orders had not been issued. Although *Sentinel* involved a private contract dispute between a prime contractor and its subcontractor, virtually the same factual circumstances are present in this case. Accordingly, the Court's rationale in *Sentinel* is equally applicable to the circumstances confronted in this case.

> Through Article 7[3] of the prime contracts, Sentinel/Centre represented to Kimmins that Kimmins should continue work regardless of the non-issuance of a change order. Representatives of Sentinel/Centre agreed in their testimony at trial that they did not want Kimmins to cease work on the project during disputes over change order requests. Kimmins relied on this contract provision and the threat of default termination by Sentinel/Centre in proceeding with the extra work ordered by Sentinel/Centre to Kimmins's detriment. We therefore find that Sentinel/Centre is now estopped from asserting that Kimmins may not receive compensation for the extra work due to the lack of change orders. Allowing Sentinel/Centre to maintain these inconsistent positions-requiring Kimmins to proceed with the extra work without issuance of a change order while refusing payment based on the lack of an advance written change order-would cause an injustice. We find that Kimmins was entitled to the jury award in its favor based upon Sentinel/Centre's "persistent pattern of conduct" in requiring Kimmins to perform work outside the scope of their contract and their failure to act in good faith when they refused to issue change orders.

Id. at 946.

TRA's waiver of Paragraph 10 precluded Gray's requirement to be issued a written change order before proceeding with extra work. Therefore, TRA should not be allowed to stand behind the contract as protection when TRA is the party who abandoned the contract.

B. It makes no difference that TRA is a public agency.

TRA cannot claim immunity from liability to Gray for extra work which was authorized, reasonable and necessary for completion of the Project. The TRA argues that governmental entities, such as TRA, are protected from being gouged by contractors for excessive payments for work not approved under *Miss. Code Ann.* § 31-7-13 which states in pertinent part as follows:

> (g) **Construction contract change authorization.** In the event a determination is made by an agency or governing authority after a construction contract is let that changes or modifications to the original contract are necessary or would better serve the purpose of the agency or the governing authority, such agency or governing authority may, in its discretion, order such changes pertaining to the construction that are necessary under the circumstances without the necessity of further public

[3] Article 7 of the prime contract (which terms and conditions were incorporated into the subcontract) provided as follows:

> Notwithstanding that a CHANGE ORDER has not been issued, CONTRACTOR shall promptly comply with instructions, authorizations and notices given by OWNER in connection with WORK. OWNER shall issue a CHANGE ORDER with respect to such instructions, authorizations and notices if appropriate under the provisions of 7.3.

Sentinel, 743 So. 2d at 961.

> bids; provided that such change shall be made in a commercially reasonable manner and shall not be made to circumvent the public purchasing statutes. In addition to any other authorized person, the architect or engineer hired by an agency or governing authority with respect to any public construction contract shall have the authority, when granted by an agency or governing authority, to authorize changes or modifications to the original contract without the necessity of prior approval of the agency or governing authority when any such change or modification is less than one percent (1%) of the total contract amount. The agency or governing authority may limit the number, manner or frequency of such emergency changes or modifications.

Miss. Code Ann. § 31-7-13(g) (Supp. 2004). However, this statute does not prohibit work that is "necessary", "commercially reasonable" or "authorized" by an agent of the owner. The work that Gray was authorized to do for TRA which caused increased cost was necessary, and the work was approved by TRA's agent JESCO working as the project manager." *Cf., Miss. Code Ann.* § 31-7-57(Rev. 2005).

The additional work Gray and Ragland performed for TRA was necessary because the plans were defective. The cost of performance increased as a direct result the modification required to be made in the plans. The changes to the plans required more labor, equipment and material than was originally expected when Gray prepared its bid. (Trial Exhibits DG-7D, E, G, and H.) Working conditions were made more difficult for Gray and its subcontractors. Making these changes delayed completion of the project for which Gray is entitled to additional compensation beyond the actual cost to execute the change order work. *See generally, Aetna Casualty & Surety Company v. Doleac Electric Company, Inc.*, 471 So.2d 325, 329-31 (Miss. 1985)(contractor entitled to delay damages associated with breach of contract). (Trial Exhibit DG-132; RE 7.)

Gray also proceeded with the Project under the direction of TRA. Gray had been told that JESCO was the project manager in charge and Gray was required to follow JESCO's direction or be in breach of the contract. Gray therefore complied with JESCO's direction, the authorized agent of TRA who instructed Gray to proceed with performance of the extra work to avoid further delays to the completion of the Project.

Mississippi Attorney General Opinion *Baker*, January 26, 1995, cited by TRA makes two points pertinent to the case. First, that variations from the unit price are not considered "additional work," and second, that a change order is required when the "scope of the work" changes. The first point is relevant because some of the increased costs being claimed are for a change in the quantity of units used to complete the Project. As a direct consequence of the changes to correct errors and/or omissions in the plans the specified quantities for various items such as conduit, concrete, and electrical wiring were increased. However, Gray was never compensated for these items with a change order as required by the Contract and as promised by TRA.

TRA also relies upon *Butler v. Board of Supervisors of Hinds County, Mississippi*, 659 So. 2d 578 (Miss. 1995) in an effort to absolve itself of liability. TRA's reliance upon *Butler* is misplaced. *Butler* involved claims asserted against Hinds County by a painting subcontractor (Butler's Commercial Painting Company) for additional work performed during the restoration of and additions to the Hinds County Courthouse. The prime contractor was Dunn Construction Company. There was no privity of contract between the painting subcontractor and the Hinds County Board of Supervisors. When Butler encountered what it considered a differing site condition, the Architect directed Butler to perform the additional work necessary to correct the condition. *Id.* at 580. Butler subsequently asserted a claim for this additional work against the Hinds County Board of Supervisors. The trial court dismissed Butler's claim on the 12(b)(6) motion of Hinds County finding:

> . . . Though *Butler did not contract with the Board of Supervisors*, they would have the Court extend the Board's waiver of immunity to Butler, thereby enabling them to claim the provisions of *a contract to which they were not a party*. This would require the Court to alter the contract at issue.

Id. at 581. (Emphasis added). The Mississippi Supreme Court adopted the findings of the trial court judge and affirmed its decision.

Contrary to TRA's contention, *Butler* does not cloak TRA with absolute immunity from liability for payment of the costs incurred by Gray to perform additional work. The holding in *Butler* is limited to those circumstances where a party (Butler) not in privity of contract with a public body (Hinds County) performs work without the authority of that public entity. TRA's reliance upon *Butler* is therefore misplaced. In the case *sub judice*, *Butler* stands for the proposition that Ragland cannot sue TRA directed, because TRA's contract was with Gray. Ragland must go through Gray to get paid by TRA.

Further, the refusal to issue a change order does not insulate TRA from liability. TRA seeks to convince this Court that because there is no written change order it has no liability to Gray for the performance of the extra work which was essential to the completion of the Project. Gray was given a Hopson's choice—to suspend its performance until it received a change order thereby delaying the Project and subjecting it to liquidated damages or proceed with the work and risk TRA seeking to claim the benefit of the immunity which it contends it is entitled to receive under its reading of *Butler*. TRA cannot be allowed to use this clause to force Gray to perform additional work and then claim Gray has no authority to proceed with the extra work. Such conduct is a breach of TRA's duty of good faith and fair dealing under the Contract for which TRA has properly been found to be liable.

There is no question that the TRA directed the performance of all of the additional work claimed by Gray with TRA's full knowledge and consent. "[U]nder Mississippi law, where the owner orders the contractor to perform extra work outside the contract, the contractor is entitled to compensation for that work, despite the fact that no change order was issued." *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So. 2d 954, 963 (Miss. 1999); *see also City of Mound Bayou*, 499 So. 2d at 1356-60 (where city's representatives ordered extra work, city must compensate contractor for that work even though no written change order was executed).

Although government entities have some protection, this protection was not intended to be unlimited. When a government entity breaches the duty of good faith, it should not be allowed absolute protection. TRA is not blameless in this case. TRA failed to ensure that the project plans given to Gray were workable. (T. at 1047-19 to 1048-11.) As testified, this was the duty of TRA to ensure that all of its agents saw that the plans and specifications were correct and properly coordinated. (T. at 935-15 to 936-29.) It is not the fault of Gray that additional work created higher costs because Gray did not design the plans. Gray is not responsible for miscalculating costs in the bids it submitted as TRA would like to allege. Gray submitted its bid according to the plans initially given to Gray by TRA which were designed by TRA's agents.

TRA cites *Farrish Gravel Co. v. Mississippi State Highway Comm'n*, where the Mississippi Supreme Court denied the contractor damages for the increase in cost of petroleum products that were used by the road contractor. 458 So. 2d 1066 (Miss. 1984). However, *Farrish* is distinguishable from the case *sub judice* because Farrish was seeking relief from a contractual provision which it only objected to after the project was bid on and completed. *Id.* at 1070. Farrish voluntarily entered into the contract knowing the clause in the contract would not adjust for rising fuel costs and willingly took this risk. Gray had increased costs due to negligence on the part of TRA, and TRA was aware of the increased costs. Gray did not make after-the-fact assertions, but had numerous discussions with TRA regarding the changes, and Gray was assured that the changes would be taken care of in a final change order. Gray was aware of the contractual provisions with TRA, but because TRA waived these provisions, Gray is not required to abide by them. Gray timely filed a claim with TRA before the completion of Project and final payment was received. Therefore, TRA was rightfully denied statutory protection as a governmental entity.

C. Gray's claim for delay damages is within one of the four exceptions to enforcing a no-damages-for-delay clause.

At trial, Gray sought compensation for the eighty-nine (89) days of delay due to the errors

and/or omissions to the plans. (Trial Exhibit DG-132; RE 7.) The time period of the delay was from December 5, 2000 to April 5, 2001. Although part of this time occurred before Change Order No. 1, none of the change orders issued by TRA included compensation for time delays Gray established at trial. Change Order No. 1 only corrected changes in quantity. (Trial Exhibit DG-7I.) It did not correct all of the errors and/or omissions with the electrical plans because additional changes were made after Change Order No. 1 was signed on February 27, 2001. The need for additional changes to the electrical plans was noted in JESCO's meeting minutes from March 21, April 4, April 18, and May 3, 2001. (T. at 535-9 to 540-25; Trial Exhibit P-18; RE 19.) These changes are not addressed in any subsequent change orders. The circuit court therefore denied TRA's motion for a directed verdict on the issue of delay damages since Gray had offered sufficient evidence to establish that the damages associated delay caused by the electrical plans was included in Change Order No. 1. (T. at 823.)

In Mississippi, "no damage for delay clauses" are enforceable, but "they are construed strictly against those who seek their benefit." *Mississippi Transp. Comm'n v. SCI, Inc.*, 717 So. 2d 332, 338 (Miss. 1998) (citing *J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 642 N.E.2d 1215, 1221 (Ill. 1994)). When construed against TRA, the no-damage-for-delay clause simply does not apply to Gray. Paragraph 11.9 of the Project contract states:

> Claims for Delay Due to Change: No claim for delay damages will be allowed the Contractor on account of change orders executed by him. In support of this stipulation the following language will be set out on the face of each change order:
>
> 'It is further understood and agreed that this modification constitutes payment in full on behalf of the Contractor and its Subcontractors and suppliers for all costs and markups directly or indirectly attributable to the change order herein, for all delays related thereto, and for performance of the changes within the time frame stated.'

(Trial Exhibit P-1; RE 4.) The delay damages claimed by Gray and Ragland do not arise "on account of change orders executed by [Gray]." Gray's claim is premised on deficiencies in the plans and specifications, TRA's failure to timely resolve the deficiencies, and ongoing changes throughout

the Project for which Gray was promised a change order by TRA's agents. Because TRA never issued the promised "final change order," Paragraph 11.9 has no application, especially when strictly construed against TRA.

However, if this Court finds that the "no damage for delay clause" of the contract should be enforced, Mississippi law recognizes four exceptions to enforcing such a clause. The exceptions as set out in *Mississippi Transp. Comm'n v. SCI, Inc.* are when the delay: "(1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation or other bad faith on the part of the one seeking the benefit of the provision; (3) has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; or (4) is not within the specifically enumerated delays to which the clause applies." *Id* at 338. At least three of the exceptions apply to the case *sub judice* so the clause should not be enforced.

The trial court instructed the jury on the exceptions to the no-damage for delay clause and instructed the jury not to return a verdict for delay damages if it did not find any of the exceptions applied. (T. 1238-1240). Gray submitted ample evidence that its delay fell within the exceptions.

The delay in construction due to the defective plans provided by TRA was not intended nor could the parties have contemplated that such a delay would result. It was unseen that four months would be needed to correct the original plans to make them workable. (T. 556-18 to 560-13.) During this time period Gray's subcontractor, Ragland, could not move forward with the electrical work. Ragland was asked by TRA to make corrections to the plans which increased the cost of subcontract work Gray was responsible for paying. (Trial Exhibit P-18: March 21 and April 4; RE 19.) Due to the delay in electrical work, Gray's overall project was delayed because the electrical work had to be completed before the base work was finished. At the time the contract was entered into, Gray had no way of knowing that the plans given to him by TRA would be incorrect and

require additional work and time from Ragland. The problems did not arise from performance of the contract, but were beyond Gray's intended scope.

TRA breached its duty of good faith by instructing Gray to proceed with the work then attempting to hide behind provisions in the contract that it abandoned during construction. As previously addressed, TRA failed to properly provide adequate plans to its contractors to do the project, and TRA failed to properly coordinate and supervise the project. TRA had a duty of good faith and fair dealing to make the necessary corrections. This failure caused the delays and additional costs, that TRA recognized during construction. (Trial Exhibit P-18: January 22; RE 23.) TRA promised Gray that everything would be taken care of latter, but in the essence of time, keep working because a change order will come latter. This expected change order never came to compensate Gray for the additional labor. TRA denied Gray the means necessary to obtain fair compensation for the attendant costs. This "misrepresentation" also renders the no-damage-for-delay clause unenforceable.

The delay that Gray seeks damages for is "not within the specifically enumerated delays" to which Paragraph 11.9 of the contract applies. Paragraph 11.9 is very narrow in focus and is limited to delays "on account of change orders executed." There has been no change order executed regarding the current claims of Gray and Ragland. Change Order Number One is the only change order that affected the electrical portion of the project, and Change Order Number One did not make all the necessary changes that were required for the electrical part. (Trial Exhibit P-18: March 21 and April 18; RE 19.) More changes were needed latter for which a change order was not issued, but Gray was promised by TRA agents that one would be forthcoming at the end of the project. (Trial Exhibit DG-62 and 70; RE 25 and 27.) Therefore, even if this Court finds the clause for delay damages applies, an examination of the facts shows at least one exception applies and the clause should not be enforced.

The evidence—viewed in the light most favorable to Gray—was sufficient to submit to the jury the issue of whether the exceptions to the no-damage-for –delay clause applied.

D. Indemnification is appropriate where one party is found responsible for the acts or omissions of a third-party.

Ragland's damages incurred from the Project were a direct consequence of TRA's actions and not those of Gray. As the subcontractor, Ragland had no express contract with TRA under which to sue for damages. Instead, Ragland brought a claim against Gray, the general contractor with whom Ragland contracted. TRA is therefore liable to Gray to the same extent that Gray is liable to Ragland. When one party is found to be liable to another for the acts or omissions of a third-party, indemnification is implied as a matter.

The trial court instructed the jury to return a verdict for gray on its indemnity claim against TRA only if the jury found that the damages to Ragland were caused by TRA not Gray. (T. 1226-27).

The trial court's instruction was consistent with Mississippi law. Mississippi jurisprudence recognizes the right to indemnification in three different instances. *Bush v. City of Laurel*, 215 So. 2d 256 (Miss. 1968). The obligation to indemnify may come from a contractual relation, from an implied contractual relation, or out of liability imposed by law. *Id.* at 259. TRA has the obligation to indemnify Gray for Ragland's claims because of TRA and Gray's implied contractual relationship. As stated in *Bush v. City of Laurel*, "[w]hen one person is required to pay money which another person in all fairness should pay, then the former may recover indemnity from the latter in the amount which he paid, provided the person making the payment has not conducted himself in a wrongful manner so as to bar his recovery." *Id.* at 259-260 (citing 42 C.J.S. § 20 (1944)). Therefore, because Gray is now required to pay Ragland for claims that directly resulted from the actions of TRA, the trial judge was required to find TRA liable to pay Gray the full amount of Ragland's jury award against Gray.

There are two prerequisites which Gray has satisfied to be entitled to indemnity against TRA. *Hartford Casualty. Ins. Co. v. Haliburton Co.*, 826 So. 2d 1206, 1216 (Miss. 2001). The two prerequisites are: "(1) that the damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the injured person; and (2) it must appear that the claimant did not actively or affirmatively participate in the wrong." *Id.*

The damages Ragland claims against Gray arise from a legal obligation. Gray and Ragland had an express contract for Ragland to perform the electrical portion of the work on the Project. Gray executed the Subcontract and furnished it to Ragland. However, Ragland refused to sign the Subcontract. (Trial Exhibit DG-7C, DG-7K, and DG-7P; RE 14-16.) Instead, Gray and Ragland orally agreed on the price for each line item, scope of work, and to payments which Ragland confirmed in writing. (T. at 338-10 to 339-29; RE 13.) This acceptance created an oral, express contract between Ragland and Gray. Ragland had no direct contractual relationship with TRA. Ragland dealt with TRA only through Gray. Therefore, Ragland brought a claim against Gray which was the only entity with whom he had a contractual relationship. This oral agreement constituted a binding legal obligation on the part of Ragland to perform the electrical portion of the Project.

Further, Gray did not actively participate in causing any damages to Ragland. The damages Ragland claims were a direct result of TRA's failure to furnish a full and complete set of plans for the Project to Gray. The errors and/or omissions to the plans caused delays and increased Gray's and Ragland's performance costs. Gray was neither directly nor indirectly responsible for the error and/or omissions in the plans. (T. at 346.) The plans were the responsibility of TRA to coordinate and ensure were workable as drawn. (T. at 935-15 to 936-26.) Agents of TRA drew the project plans and managed the Project. Therefore, TRA is solely responsible for any problems which caused the increase in the costs for which Ragland has claimed against Gray.

Ragland testified at trial that the problems were due to too many people working on the project and that TRA and not Gray was responsible for the mishaps due to guessing on the plans. (T. at 346.) TRA is the one who directed Ragland directly to perform significant engineering work. (T. at 351.) TRA instructed Ragland to draw up his own plans by a given deadline because of the defects in TRA's plans and specifications. (T. at 351-14 to 352-3.) The cost of these new plans and extra work done to overcome the problems are a large part of the total claim Ragland has brought to recover from Gray. (T. at 350-19 to 355-26; RE 13.)

In *Hartford Casualty Ins. Co. v. Haliburton Co.*, the Mississippi Supreme Court denied the insurance company's indemnity claim against an oil company insured. 826 So. 2d 1206 (Miss. 2001). The insured caused a gas leak, and the insurance company paid settlements to the damaged. *Id. Hartford* is distinguishable from the case *sub judice* because the insurance company was not under the compulsion of law to pay the settlements, but paid voluntarily. *Id.* at 1216. In order to prevail on the indemnity claim, the insurance company had to prove: "(1) it was legally liable to an injured third party; (2) it paid under compulsion; and (3) the amount it paid was reasonable." *Id.* The insurance company was seeking damages for potential liability, and one cannot recover on the theory that one might have been liable to the party if one had not settled. *Id.*

Gray made no settlements with Ragland, but joined TRA as a third party defendant because TRA was the party responsible for the damages alleged by Ragland. Although at the time of trial, Ragland did not have a binding judgment against Gray, once the judgment arose, Gray then had the opportunity to bring an indemnity action against TRA. If Gray had not joined TRA before the trial, Gray would have to bring a whole new suit in circuit court against TRA putting on the same evidence and clogging up the court's docket again. Just as the circuit court judge found at trial, the court would be trying the very same case again. (T. at 1132-26 to 1134-4; RE 11.) This was the reason the judge did not grant TRA's directed verdict on the issue because the judge found that

TRA's argument would only be appropriate if Gray had paid a settlement to Ragland for its claims. (T. at 1133-14.)

TRA is the party responsible for the delays and increased costs that were incurred from the defective plans, and TRA was rightfully held responsible. Gray should be indemnified by TRA because Gray has been required to pay money which TRA should in all fairness pay, and Gray did not participate in any wrongful conduct. Therefore, Gray is entitled to pass through Ragland's claims to TRA because Gray brought the claim before acceptance off final payment from TRA. Accordingly, Gray is entitled to an *additur* to reflect the damages awarded to Ragland and for which TRA is responsible.

II. THE AWARD TO RAGLAND SHOULD BE REVERSED

A. JNOV should have been granted on Ragland's *quantum meruit* claim.

The trial court erred in denying Gray's motion for a for a judgment notwithstanding the verdict on Ragland's *quantum meruit* claim. Judgment notwithstanding the verdict should be granted whenever "the plaintiff fails to establish a prima facie case." *Wilson v. General Motors Acceptance Corp.*, 883 So.2d 56, 63 (Miss. 2004).

In this case, Ragland sought recovery from Gray under two theories: (1) express contract, and (2) *quantum meruit*. Both theories were submitted to the jury. The Court instructed the jury that a contract existed between the parties and that the jury should determine what Ragland was owed under that contract. The Court also instructed the jury it could award damages to Ragland for extra work under a *quantum meruit* theory.

These claims are mutually exclusive. A *quantum meruit* claim arises out of a *quasi* or constructive contract: "an obligation created by law, in the absence of an agreement." *Franklin v. Franklin ex rel.*, 858 So. 2d 110, 120 (Miss. 2003). One who claims a *quasi*-contract exists must show that **no legal contract** existed between the parties, but that in good conscience the claimant

should be paid. *Id.* at 121 (emphasis supplied). If an oral contract existed, there can be no recover based upon *quantum meruit* because the agreement would control the recovery.

The controlling case is *Redd v. L & A Contracting Co.*, 151 So.2d 205 (Miss. 1963). In that case a sub-subcontractor sued the prime contractor for labor performed and material furnished based upon *quantum meruit*. The Mississippi Supreme Court rejected the sub-subcontractor's claim because it had entered into a contract with the subcontractor, and the prime contractor had no reason to believe the sub-subcontractor was doing any work for the prime contractor. *Id.* This Court stated that because *quantum meruit* literally means "as much as he deserves" that when a person employs one to do work for him, without an agreement for compensation, the law implies a promise that the employer will pay the worker as much as he may deserve for his services. *Id.* at 207. "However, the law will not imply a promise to pay the value of services rendered and accepted, where there is proof of a special agreement to pay therefore a particular amount in a particular manner." *Id.* at 208. The Court went on to state that "[i]t is only where parties do not expressly agree, that the law interposes and raises a promise." *Id.* "Where there is a contract, parties may not abandon same and resort to *quantum meruit*." *Id.* (quoting *Carter etal. v. Collins*, 117 So. 336).

This case is distinguishable from *Ladner v. Manuel,* 744 So. 2d 390 (Miss. App. 1999). in which the Mississippi Court of Appeals allowed a builder to recover under a *quantum meruit* claim. In that case, there was no agreement between the parties on contract price.

The undisputed evidence in this case established there was a subcontract between Ragland and Gray with specific payment provisions. Mr. Ragland admitted that Gray and Ragland agreed to price, scope of work, time of performance, and time for payment. (T. at 337-21 to 339-29; RE 13) Theses elements created a legally binding express contact between the parties. Only after Ragland asserted a claim for extra compensation did he abandon the agreed upon prices and seek

recovery under a *quantum meruit* theory. Therefore, Ragland is not entitled to "abandon same and resort to quantum meruit." *Redd,* 151 So.2d at 208.

B. Ragland failed to prove his *quantum meruit* damages with reasonable certainty

The Court also erred in failing to grant Gray judgment notwithstanding the verdict on Ragland's calculation of its $1.4 million *quantum meruit* claim. Ragland's damage calculation did not make out a *prima facie* case because the proof offered by Ragland amounted to mere guesstimates.

Characterizing the claim as a *quantum meruit* claim does not relieve a plaintiff of its obligation to prove its damages with reasonable certainty. For instance, in *Ladner v. Manuel,* 744 So.2d 390 (Miss. App. 1999), the claimant supported his *quantum meruit* calculation with .documentation of the hours worked and machinery used. No such documentation was provided here.

Of approximately 119 exhibits introduced into evidence at trial, Ragland submitted one exhibit on damages. (Trial Exhibit P-186, RE 9). This exhibit offered no calculations and no supporting documentation. Ragland did not submit a single timesheet, equipment record, invoice or other similar documentation in support of his damage claim. Indeed he admitted he could not even document his actual costs. Ragland also failed to produce any work product resulting from his alleged "engineering services." Instead, Ragland submitted a series of numbers, without any support, and then totaled the numbers to arrive at his claim.

Ragland admitted he did not try to keep up with his extra costs after telling Gray that he was doing so because it was "too much trouble." (T.366) Because Ragland deliberately chose not to keep up with his costs, Gray could not audit them. He offered a damage summary that could not be verified by any method. Ragland's *quantum meruit* proof amounted to nothing more than "*ipsi dixit*"—just because he said so.

The courts have long applied strict rules to claims for extra work based on what construction lawyers refer to as the "total cost method." The total cost method involves taking the contractor's bid for the project then subtracting all the contractor's costs, then stating the difference represents the extra work. The problem with the total cost method is that it assumes the contractor's bid was valid and that all of its costs were attributable to the owner and not due at all to the contractor's inefficiency. In the frequently-cited case of *Propellex Corporation v. Brownlee,* 342 F.3d 1335 (Fed. Cir. 2003), the Court outlined the strict burden of proof imposed on a contractor who seeks to rely on the total cost method:

> "Before a contractor can obtain the benefit of the total cost method, it must prove: (1) the impracticability of proving its actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs. [Citation omitted]
>
> The *modified total cost method* is the total cost method adjusted for any deficiencies in the contractor's proof in satisfying the requirements of the total cost method. [Citations omitted]

* * *

> The four requirements for the total cost method are distinct requirements and a ***contractor must prove all of them*** before it can obtain the benefit of the total cost method."

See also, Servidine Const. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); *Boyeiian v. United States*, 423 F.2d 1231 (Ct. Cl. 1970).

Here Ragland presents an even more unreliable formula.—an estimate of what his estimate would have been had he known how the project would turn out. He offered no evidence as to the reasonableness of his calculation based on industry rates or norms. And he offered no documentation of what his actual costs were-- other than "just because I say so."

For example, at trial Ragland sought $326,400 for his engineering services. Ragland testified he arrived at that figure because he values his engineering services at $100,000 a year, and the Project took him 1.36 years yielding total value of 136,000. Ragland presented no evidence showing

his engineering services were required for 1.36 years. No time sheets were presented showing how long Ragland used his engineering services or what services he performed even though he had represented to Gray he was documenting his extra work and costs.

Ragland then multiplied the $136,000 value by a factor of 2.4—a 240% markup. (T. at 310.) Ragland testified he did so because that is what "TRA agreed to give Allen & Hoshall for their services." (T. at 310-6). He offered no testimony that this is the customary multiplier or a reasonable multiplier or that Allen and Hoshall used a "yearly value" rather than an hourly base rate prior to mark up.

If Ragland provided 2000 hours a year of engineering services to the Project, his method of calculation yields an effective hourly rate of $240 an hour. Ragland offered no testimony or evidence that this was his customary hourly rate or within industry norms—or even that he worked 2000 hours. The entire engineering claim boiled down to "just because I said so."

His calculation for his labor was just as weak. At trial, Ragland claimed that he was owed $326,400.40 for the labor his crew of three men performed from December 6, 2000 to November 15, 2001. (Exhibit P-186; RE 9.) Of this amount, Ragland testified that his crew spent 80% of the time on the Project. (T. at 308-15.) This was not verified by time sheets. In fact, Ragland's own employee, Lance Hopkins, testified that they did not spend 80% of the time working on the Project as Ragland claimed because Ragland had other projects ongoing at that time. (T. at 792-26 to 793-8) Ragland could not present any documentation of how much he paid his crew for this work, when the work was done, and for how long. (T. at 356-8 to 359-13)

As noted above, Ragland's subcontract provided he would be paid $62 per light pole. Ragland's claim asked for $300 per pole and Ragland offered no explanation or documentation of costs that would justify this increase. (T. at 322-29 to 323-28) Ragland's *quantum meruit* calculation did not make out a *prima facie* case. Accordingly, JNOV should have been granted.

C. The Jury's Verdict was Against the Overwhelming Weight of the Evidence.

The Court also erred in failing to grant Gray judgment notwithstanding the verdict on Ragland's damage claim because the final award is against the overwhelming weight of the evidence and evidences passion and bias on the part of the jury.

The jury ultimately awarded $231,378.00 to Ragland for engineering services. It had no rational basis for doing so. In addition to the calculation problems described above, Thomas Barnes testified for TRA, that the changes that Ragland made were only minor and did not require the amount of work Ragland claimed he performed. (T. at 908-19 to 909-17.) Also, the award cannot be reconciled with what Ragland gave Gray as estimates his engineering work would cost, the figures testified to would be either $7,000 to $8,000 or $27,000 to $28,000. (T. at 653 to 655-21) The $7,000 to $8,000 was the figure used by Gray in the pay estimate. (T. at 653-13.) This is a much lower figure than the awarded $231,378.

Ragland testified throughout the trial that the contract balance owed him by Gray was $76,245.92. (T. at 348-19 to 349-12; Exhibit P-13; RE 17.) Therefore, there is no reasoning for the jury's award of almost $50,000 more than the agreed contract balance. The judgment is against the overwhelming weight of the evidence and clearly must have been the result of bias or prejudice of the jury.

Without providing any evidence for the totals given, Ragland re-figured each line item of his subcontract to change the contract prices to reflect what he would ask for now because his job was more difficult than he anticipated. (T. at 310-19 to 324-27.) After agreeing to a contract, one is not allowed to later adjust the prices without any more evidence than simply because the job was harder than expected. This is all the justification Ragland showed for changing prices for items such as the light poles which were originally contracted for $62 per pole, and now, Ragland expects to be paid $300 per pole. (T. at 322-29 to 323-28.)

The chaos continued at trial when Ragland's most costly item, Item 69 (digging a trench), was increased from originally costing about $17,000 to Ragland claiming $505,979.60 because he had to dig deeper than expected. However, Ragland's testimony that the trenches were on average ten feet deep is refuted by pictures of the trenches and other workers on the Project that the trenches averaged six feet deep. (T. at 570-7, 700-8 to704-4, and 981; Exhibit P-31; RE 18.) Ragland's own employee testified that he measured the elevation of the trenches to put into the computer for Ragland, and the depths were five to six feet. (T. at 793-18 to 797-17.) Without presenting any reasoning for such an outlandish award the jury's verdict is "contrary to the overwhelming weight of evidence."

D. A New Trial Should Be Granted or a *Remittitur.*

The trial Court erred in not granting Gray's motion for a new trial on damages or for a *remittitur*. As noted above, Ragland's damage proof did not make out a prima facie case and was against the weight of the evidence. If the Court believes the proof credible enough to award some measure of damages, it should either order a new trial or use its power under Section 11-1-55 of the Mississippi Code to order a *remittitur*. In *Cade v. Walker*, 771 So.2d 403, 407 (Miss. App. 2000), the Mississippi Court of Appeals held that a *remittitur* may be ordered if either "(1) the jury or trier of fact was influenced by bias, prejudice, or passion or (2) the damages awarded were contrary to the overwhelming weight of credible evidence."

Given the speculative nature of Ragland's evidence, Gray should only be required to pay the contract balance amount of $76,245.92 (T. at 348-19 to 349-5.).

Alternatively, the three costliest items in Ragland's claim total $1,168,223 (engineering and surveying + performance + duct trench) and have no evidentiary support. (Exhibit P-186; RE 9.) When these items are subtracted from Ragland's claim, the net amount remaining is $519,981.00.

Because Ragland admits having been paid $352,707.31, Ragland's judgment should be reduced at a minimum to no more than $167,273.69 ($519,981- $352,707.31). (Exhibit P-13; RE 17.)

E. Attorney fees are not appropriate when a judgment is based on a *quantum meruit* claim.

Ragland should not be allowed to recover damages based on *quantum meruit* because Ragland and Gray had an oral, express agreement. However, if this Court determines the *quantum meruit* judgment should stand, Ragland's award of attorney fees must be reversed. In the Amended Final Judgment, the circuit court increased Ragland's judgment against Gray to $1,216,605.20. This additional $366,053.90 above the jury verdict was allowed for attorney fees.

In the absence of a statute, contract, or an award of punitive damages, there can be no recovery of attorney fees. *Litten v Grenda County*, 437 So.2d 387, 388 (Miss. 1983). If Ragland's suit does not fit into either category, "but turns out to be merely a suit in *quantum meruit*-attorneys fees and prejudgment interest are not available." *Stanton & Assoc. v. Bryant Constr. Co., Inc.*, 464 So. 2d 499, 502 (Miss. 1985). Ragland made the decision to abandon the oral contract between Ragland and Gray and base his claim on *quantum meruit*. Therefore, Ragland is not allowed to recover attorneys' fees because Ragland cannot assert a statutory provision appropriate to provide attorney fees with his claim based on *quantum meruit*.

F. The award of attorneys' fees was excessive.

In the instant case, the trial judge determined that Ragland was entitled to "an assessment of attorney's fee of forty percent (40%) of the principal amount of the November 2, 2005 Judgment as amended..." The determination of reasonable attorneys' fees is a matter reserved to the discretion of the trial court. *Gilchrist Tractor Co. v. Stribling*, 192 So2d 409, 418 (Miss. 1996). The trial court's discretion is not unfettered but governed by factors outlined in Canon 1.5 of the Mississippi Rules of Professional Conduct. In determining the reasonableness of the amount of

attorneys' fees, the following factors are to be considered by the court:

(1) the time and labor required, the novelty and difficulty of the questions involved, the the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Canon 1.5.

These factors are customarily referred to as the *McKee* factors after the case styled *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982). The *McKee* factors overlap with and are consistent with the factors used in federal cases. The Mississippi Supreme Court has expressly approved the federal standard in conjunction with the application of the factors set forth in Canon 1.5. for both contingency and non-contingency cases. *See, In Re Estate of Alexander Taylor Gillies, Jr.*, 830 So.2d 640 (Miss. 2002); *Mauck v. Columbus Hotel Company*, 741 So.2d 259 (Miss. 1999).

The award by the trial judge is tantamount a blanket endorsement of Ragland's attorneys' fees without any meaningful analysis. The Court has vacated the award of attorneys' fees under circumstances and instructed the lower courts as follows:

> The trial court must support an award of attorney's fees with factual determinations as to the reasonablemess of the fee award. *BellSouth*, 912 So.2d at 447. The award should be supported by the evidence and should not be "plucked out of the air." *Browder*, 765 So.2d at 1287-88 (quoting *Dynasteel Corp. v. Aztec. Indus., Inc.*, 611 So2d 977, 986 (Miss. 1992).

III. GRAY IS ENTITLED TO AN ADDITUR SINCE THERE IS NO JUSTIFICATION FOR THE DISCREPENCY BETWEEN THE JURY VERDICTS AGAINST GRAY AND TRA.

No evidence was presented at trial to explain the vast discrepancy in the amount of the judgment awarded against Gray and the amount awarded against TRA. The damages were never allocated by Ragland between Gray and TRA. Ragland testified throughout the trial that the damages incurred were attributable to the acts and omissions of TRA and its agents. (T. at 350-19 to 355-26; RE 13.) One example is the $86,505.00 that Ragland claims for part of his survey work he testified was performed to provide information to TRA to fix the problems for Change Order No, 1. (T. at 355-13.) Therefore, the trial court erred in not allowing an additur to Gray's judgment against TRA.

TRA is the party responsible for creating defective plans for the project which Ragland was asked to help redesign. (T. at 306-16.) The defective plans caused increased amounts of work and materials to complete the Project. Gray did not contribute to the plans or cause of delay in any manner. (T. at 334-14.) Allen & Hoshall were the primary cause of the defective plans that created Ragland's claims. (T. at 1049-5 to 1051-10; Exhibit P-18: February 15; RE 24.) Because Allen & Hoshall were not allowed to be a party to this action, the jury could not assess damages directly against Allen & Hoshall. Instead, the jury had to assess the damages to TRA. This is similar to asking the jury to place a judgment against the City of Tupelo itself while most jurors are taxpayers of and would suffer the consequence of a judgment against their own city. With the lack of justification for such a discrepancy, the jury 's verdict appears to be "influenced by bias, prejudice, or passion."

Ragland claimed additional compensation for the extra work was caused by having to redesign the defective plans produced by Allen & Hoshall. (T. at 350-10 to 352-3.) Ragland was not hired by Gray for engineering work, but to complete construction on Component C. (T. at 300

to 301-21.) When TRA discovered that the current plans were unworkable, TRA asked Ragland to help correct the plans. (T. at 306-16 and 340-7; Exhibit P-18: March 21 and April 4; RE 19.) As testified at trial, Ragland dealt directly with TRA at times. (T. at 340-20 and 522-12; Exhibit DG-25; RE 21.) Therefore, Gray should not be held responsible for the work Ragland was asked to do by TRA which was not a part of Gray and Ragland's initial agreement.

TRA would like to claim that Gray is to be held liable to Ragland because of alleged malfeasance on the part of Gray. However, from the testimony presented at trial, Gray did not have any part in making Ragland's work harder or more costly. Ragland asserted that his work was delayed because Gray was late in getting the curb and gutter in timely for him to place the light poles. (T. at 425-15.) Gray testified that the curb work was behind schedule because of the changes to the electrical component determining where to place the poles and the grade changes to the parking lot. Until the decision was made, the curbs could not be set. (T. at 558-2 to 559-3 and 696-28 to 698-22.) Ragland even testified that the poles were the responsibility of the owner to order, and the poles did not arrive until July despite Ragland asking for them in December. (T. at 231-19.) Eugene Hill testified that he had an agreement with Ragland as to how Ragland would be charged by Gray for the rental of equipment. (T. at 689-19 to 696-24.) Ragland disputes the amount he was charged for the use of Gray's equipment, but all hours were noted each day and the evidence was produced at trial. (Trial Exhibits DG-115 and DG-116.) Renee Gray testified that she made the deductions from Ragland's employees for social security, medicare, unemployment, and workers compensation according to the standard rates that were required. (T. at 743-7 to 758-5.) Evidence was presented showing Ragland was charged according to standard rates despite his allegations that he was overcharged for his payroll. (Trial Exhibits DG-8E, DG-8F, DG-8G, DG-8H, DG-8I, and DG-8K; RE 28 and 29.)

Testimony also showed Ragland received full payment for all estimates it was owed and for the personal loan to Shawn Gray despite Ragland's allegation that Gray was playing games with its money. (T. at 565-10 to 568-25.) Gray received a loan from Ragland out of one of the pay estimates, but Ragland was paid back with an additional $5,000. (T. at 568-22.) Therefore, the evidence shows Gray did not conduct itself improperly at any time during the Project.

Whatever amount of damages was proven by Ragland must be assessed against TRA with the exception of Ragland's contract balance of $76,245.92 which was due from Gray. The amount awarded Ragland from Gray was $1,216,605.20. The judgment less the contract balance equals $1,140,359.30 ($1,216,605.20 - $76,245.92 = $1,140,359.30) and must be directly assessed against TRA. Therefore, Gray should have been granted an *additur* of $882,241.30 ($1,140,359.30 - $258,118 = $882,241.30) on the judgment against TRA

CONCLUSION

The Court should affirm the jury's verdict against TRA as to Gray and should reverse and render a judgment in favor of Ragland against Gray in the amount of $76,245.92. Alternatively, the Court should reverse the jury's verdict as to Ragland and remand the case to Lee County Circuit Court to determine the proper damages Ragland is owed by TRA through Gray.

THIS, the 31st day of October, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, B. Sean Akins, attorney of record for the Appellee/Cross-Appellant, do hereby certify that I have this day mailed, through United States Mail, proper postage prepaid, a true and correct copy of the foregoing document to the following:

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Honorable Thomas J. Gardner, III
Lee County Circuit Court Judge
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SO, CERTIFIED, this, the 31st day of October, 2006.

B. Sean Akins
Attorney for Appellee/Cross-Appellant