CASE NO. 2006-TS-00218

IN THE
SUPREME COURT
For The State of Mississippi

TUPELO REDEVELOPMENT AGENCY
Appellant

vs.

THE GRAY CORPORATION, INC.
Appellee

vs.

RONALD J. RAGLAND, SR.
Appellee

BRIEF OF APPELLEE - RONALD J. RAGLAND, SR.

On Appeal from the Circuit Court of
Lee County, Mississippi

ORAL ARGUMENT REQUESTED

Thomas W. Prewitt
Mississippi Bar No. [redacted]
Kenneth M. Heard, III
Mississippi Bar No. [redacted]
Post Office Box 2327
Madison, Mississippi 39130
Telephone: (601) 427-2327

ATTORNEYS FOR APPELLEE
RONALD J. RAGLAND, SR.

January 23, 2007

CASE NO. 2006-TS-00218

IN THE
SUPREME COURT
For The State of Mississippi

TUPELO REDEVELOPMENT AGENCY
Appellant

vs.

THE GRAY CORPORATION, INC.
Appellee

vs.

RONALD J. RAGLAND, SR.
Appellee

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, Ronald J. Ragland, Sr., certifies that the following 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. Honorable Thomas J. Gardner, III, Lee County Circuit Court Judge
2. Ronald J. Ragland, Sr.
3. Tupelo Redevelopment Authority
4. The Gray Corporation, Inc.
5. William D. Prestage, William G. Armistead, Sr. & Guy W. Mitchell, III of the firm of Mitchell, McNutt & Sams of Tupelo, Mississippi, Counsel for TRA
6. B. Sean Akins of the firm of Fortier & Akins, Counsel for Gray
7. Thomas W. Prewitt & Kenneth M. Heard, III, Counsel for Ragland;
8. Samuel C. Kelly & Ron A. Yarbrough, former Attorneys for Gray and Hartford

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

I. STATEMENT OF THE ISSUES

1. Whether the Jury had Sufficient Evidence to Support an Award for Damages in the amount of $258,118.00

2. Whether TRA Waived its Contractual Rights of Change Orders and No Damage for Delay

II. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

This civil case involves a construction project in Tupelo concerning which the general contractor was The Gray Corporation, Inc. ("Gray" or "the Contractor"), and the Owner was the Tupelo Redevelopment Agency ("TRA"). Although another subcontractor initiated this action, Ronald J. Ragland, Sr. d/b/a Ragland Engineering and Ragland Construction ("Mr. Ragland") filed his Intervention Complaint on August 10, 2002, in the Circuit Court of Lee County, Mississippi (Vol. 1, R. 43).[1] Mr. Ragland, one of Gray's subcontractors, sued Gray and Gray's payment bond surety, The Hartford Fire and Insurance Company ("Hartford" or "the Surety"). Asserting its own claim for damages against TRA and a claim for indemnity for whatever of Mr. Ragland's claim was awarded Ragland, Gray made TRA a Third Party Defendant (Vol. 1, R. 120-166; R.E. 18).

After engaging in extensive discovery, on July 25, 2005 the case went to trial before twelve persons (Vol. 13, R. 1563), and on August 5, 2005, the jury returned a verdict in favor of Ragland against Gray for $850,551.32, against the Surety and Gray jointly and severally for $619,173.32, and in favor of Gray against TRA in the amount of $258,118.00 (Vol. 10, R. 1272-1273).[2]

The Court entered its Judgment on November 2, 2005 (Vol. 11, R. 1362-64) noting it retained jurisdiction to consider additional post hearing motions concerning, among other

---

[1] All references to the record will include a volume and page number. The trial transcript will be referenced by utilizing the letters (Tr.) with the corresponding transcript page number (i.e., Tr.- 1 and so on). The transcript begins with (Tr.- 1) and ends with (Tr.- 1308).

[2] Question No. 7 in the Jury Verdict Form asked "the amount of **damages** that Gray is entitled to recover from TRA. (Emphasis supplied). The Jury answered: $258,118.00

things, attorneys' fees, the penalty described in Miss. Code Ann. § 31-5-27, and post Judgment interest (Vol. 11, R. 1362-1364).

TRA wanted to clear the title to its real estate of Gray's Judgment lien by paying the Judgment and the accrued interest in full. Thus, TRA paid $260,437.78 into Court on December 12, 2005 (Vol. 12, R. 1553).[3]

The next day (December 13, 2005), TRA sought an Order which would "...*satisfy and cancel* the Judgment against TRA in favor of (Gray) and hereby remove the lien upon all of TRA's property..." (Vol. 12, R. 1502)(Emphasis added). After considering the Motion (there was no hearing on TRA's *ore tenus* Motion), the trial court "Ordered, Adjudged and Decreed that the Judgment against (TRA) in favor of Gray of $258,118.00... *is satisfied and cancelled*" (Vol. 12, R. 1502)(Emphasis added).

On December 15, 2005, Mr. Ragland and Hartford settled Ragland's judgment claim against Hartford and, as part of that settlement, Hartford assigned all of its rights in the Gray Judgment and to the money TRA paid into Court ("the Fund") to Mr. Ragland. Specifically, Hartford assigned "...all of their right, title and interest in the funds which have been deposited by the Tupelo Redevelopment Agency in the registry of the Circuit Court of Lee County, Mississippi in satisfaction of the Judgment..." (Vol. 12, R. 1534). Formal documents evidencing the settlement included the General Indemnity Agreement by which Gray had already assigned to Hartford its rights to funds arising from the Project (Vol. 12, R. 1534). Additionally, the settlement documents referenced an assignment of the rights in the verdict and the funds represented by it from Gray to its Surety. Thus, upon consummation of the settlement, only Mr. Ragland had rights to the Fund.

---

[3] That represented the judgment of $258,118.00, plus accrued interest.

On December 28, 2005, Mr. Ragland filed his Motion seeking to have the Clerk directed to pay him the Fund and the accrued interest (Vol. 12, R. 1504-1544). On January 6, 2006, TRA filed a Motion to prevent Mr. Ragland from getting his hands on the Fund and requested that the Fund act as security for an appeal it was going to file or that the supersedeas be fixed at only 25% of the Judgment (Vol. 12, R. 1552).

The Court granted TRA's Motion on January 12, 2006, by Order entered January 17, 2006 (Vol. 12, R. 1572-1573) providing that "the status quo be maintained so as to protect the right of TRA to appeal..." and further providing that Mr. Ragland "may not circumvent the stay by proceedings based upon any provision of the UCC and the filing assigned to him by Hartford..." (Vol. 12, R. 1573).

Since Mr. Ragland is entitled to the Fund, he has every right to resist TRA's appeal.

B. Statement of the Facts

1. Gray's Damage Claim and the Jury's Response

On October 20, 2000, Gray and TRA entered into a contract for the construction of portions of the Tupelo Fairgrounds Project ("the Project") (Shawn Gray-Tr. 504). TRA breached the contract and damaged Gray (Vol. 1, R. 120-166; R.E. 18). Gray's Third Party Complaint sought damages in the amount of $979,464.67 (R.E.18) of which $771,912.91 represented the total amount of a Claim filed by Gray with TRA on March 1, 2002, of which $458,178.00 represented what Gray contended was Mr. Ragland's claim for TRA sponsored delays. The remaining $207,551.76 represented Gray's then claim for the balance of its contract with TRA (R.E. 18, p.127).

Gray alleged that TRA delayed it for 89 days at a cost of $158,757.31 in damages (Shawn Gray-Tr. 557-559; Hill-Tr. 688). Obviously, the jury agreed. Gray also alleged that

TRA owed it $30,000.00 retainage left unpaid pursuant to a Partial Release and Settlement Agreement (Vol. 4, R. 573-576; R.E. 9). Again, it is obvious that the jury agreed. Gray also claimed entitlement to $70,823.00, representing its overhead to which it was entitled because it had to continue to administer the subcontractors' activities during the events concerning which the lawsuit was filed (Ex. DG-132, R.E. 8; Shawn Gray-Tr. 547-548), and, once again, it is obvious the jury agreed.[4]

Thus, *exclusive of any claim to indemnity*, Gray proved damages of $259,580.31 and recovered a jury verdict of $258,118.00.

Concerning Gray's claim, the Court instructed the jury:

> [I]f you find from a preponderance of the evidence that TRA, including its agents and their employees, failed to prepare full, complete and accurate plans and specifications or hindered, delayed, disrupted or interfered with Gray's work or that of Gray's subcontractors or failed to properly discharge their responsibilities for administering the contract for the project, then it is your sworn duty to find that TRA is liable for all damages, if any, that proximately resulted to Gray, including all damages, if any, sustained by Ragland, except for the contract balance claim.

(Instruction C-6 ; Vol. 10, R. 1221-22; R.E. 19).

The trial Court also instructed the Jury that:

> "...Gray...must establish...by a preponderance of the evidence: (1) that...(TRA) has broken or breached the contract or a provision of the contract; and (2) that (Gray) has suffered monetary damages as a result of the breach as further explained in other instructions from the Court."

(Instruction C-21; Vol. 10, R. 1248; R.E. 20).

---

[4] Gray's claim included profit on the Ragland claim which apparently the jury did not award. It also included profit on the Gray costs for the 89 days, and again, apparently the jury did not award that element.

The Court also submitted, without objection, Special Interrogatories and a Jury Verdict Form which, among other things, asked:

> 6. Do you find from a preponderance of the evidence in this case that Gray in entitled to recover of its claims against TRA?

This question was answered "Yes" (Vol. 10, R. 1273; R.E.16).

The Jury was also asked:

> 7. If your answer to Question 6. is "yes," what amount do you find from a preponderance of the evidence to be the amount of damages that Gray is entitled to recover from TRA?

The jury answered "$258,118.00" (Vol. 10, R. 1273; R.E.16).

TRA did not submit an Interrogatory which asked the jury to identify how much, if any, of any amount awarded Gray represented its direct claim and how much, if any, represented an indemnity claim. The Special Verdict Form asked specifically for damages caused by TRA, and the jury answered with almost exactly the same amount that Gray asked for: $258,118.00.

2. The Project: How this Mess got Started

The Project was divided into three components, A & B, being work performed by Gray and its other subcontractors and, Component C, which was the underground (primarily) electrical work Gray subcontracted to Mr. Ragland (Ragland-Tr.154). Gray's project schedule was reasonable (Shawn Gray-Tr. 506) and was based, in part, on the plans and technical specifications for the electrical work which were designed and prepared by Allen & Hoshall, an engineering firm employed by TRA (Neal-Tr. 867).

As it turned out, those plans and specifications were completely defective and deficient, and subsequent attempts by Allen & Hoshall to correct the deficiencies were unsuccessful (Ex. DG-132; R.E. 8). The problems were identified as early as November,

2000 (Shawn Gray-Tr.516). Since the problems continued, months later, TRA directed Mr. Ragland to correct the plans and specifications himself (Ragland-Tr. 208). There were continuous problems and revisions: When a utility made a change, "we had to start all over... We [had to] start at the beginning..." (Ragland-Tr.184; Ex. P-18). When TRA, Allen & Hoshall or the Joint Use Authority (the utilities) made revisions, they asked (him) "to take them and review them, work up another take-off and price it" (Ragland-Tr.186).

As a consequence of the defective plans and specifications, Gray's time on the Project, originally intended to be 10 months, was extended to 14 months (Shawn Gray-Tr. 560).

TRA ultimately told Gray to direct Mr. Ragland to draw his own plans and specifications (Ragland-Tr. 208), and he did so (Ragland-Tr. 198). In addition to the extra engineering work Mr. Ragland had to perform, all of the changes to the plans made his work much more difficult and dramatically increased the quantity of the work he had to perform, extending his work from an anticipated six weeks to 1.36 years (Ragland-Tr. 207; Ex. P-19). Of course, throughout this process, Gray was involved as the General Contractor. That continued involvement was the backbone of its entitlement to overhead associated with the subcontractor's claims.

Throughout this process, TRA, through its construction manager and engineer, repeatedly promised to issue a final Change Order to Gray to recognize the extra work which it and Mr. Ragland had performed. These "Promises" are identified in section 4 of this Statement of Facts.

Beginning Thanksgiving in 2001, Mr. Ragland, as directed by Gray, and Gray began to generate a formal money claim which was ultimately submitted to TRA on March 1, 2001

(Shawn Gray-Tr. 544-548). That claim constituted a "claim letter" (a narrative of the facts) written by Gray's lawyer, a draft of Mr. Ragland's first claim (written by him), and an identification of the money involved and how Gray got there (Ex. DG-132; R.E. 8)!

3. Gray was Entitled to Damages Caused by TRA

The defects in the plans which delayed Mr. Ragland's work also delayed Gray's work since, in many cases, Gray's work on other Components was to follow Mr. Ragland's electrical work. The delay in the electrical caused delays in Gray's base work, stone work, curb and gutter work, sidewalk , and asphalt work (Neal-Tr. 879). Ultimately, the 89 days the Project was extended cost Gray $158,757.31 (Shawn Gray-Tr. 558-560, 590; Hill-Tr. 688; Ex. P-19, Ex. DG-132; R.E. 8).

Additionally, pursuant to the Partial Release and Settlement Agreement (Vol. 4, R. 573-576; Ex. DG-112; R.E. 9), and the uncontradicted testimony of Carrson Neal (Neal-Tr. 839-841), the jury was informed that Gray's work was finally completed; thus, Gray became entitled to the retainage that TRA was holding ($30,000.00) for completion of the Project. Gray, while strenuously denying substandard work had been performed, acknowledged that subsequent to the December 5, 2001 substantial completion date, there remained certain punch list and warranty work to the performed on the project (Ex. DG-81). Gray fully completed all work which was required of it for substantial completion of the Project, namely work on the expansion joints and asphalt striping, and became entitled to the full retainage held by TRA.

Finally, Gray included in its March 1, 2002 claim letter (Ex. DG-132; R.E. 8) a claim ($70,823.00) for the overhead general contractors add to subcontractor's claims. Since

Gray was required to continue to expend overhead while administering the subcontracts during the events identified in the record, it was entitled to the overhead it sought.

During the trial, TRA did not contest Gray's entitlement to overhead or to the amount of that overhead.

4. TRA Promised Gray Change Orders for Extra Work and Delays

Although Gray made repeated requests for change orders to address the additional time and money it had been required to expend, TRA refused to issue those change orders promising instead to address them in a final, close out Change Order (Shawn Gray-Tr. 675; Brister-Tr.1055-56). Gray knew that due to the delay, Mr. Ragland and Gray were going to be damaged (Shawn Gray-Tr. 534). Carrson Neal of Cook Coggins, TRA's Engineer, admitted that delays in Component C work would have a negative impact on other aspects of the project (Neal-Tr. 879).

Due to all of the defects and delays, Gray was assured by Steve Brister and Carrson Neal, agents of TRA, that the related time and cost increases would be "handled" through a change order at the end of the project (Shawn Gray-Tr. 520).

Shawn Gray testified:

> [T]he project manager for this project, Jesco, directed us in time of essence, in time of essence (sic) You proceed with this work, we'll get a change order. Yes, the change order will come. . . These were discussion 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.

(Shawn Gray-Tr. 587-588).

Those assurances that a final Change Order would be issued are contained in letters by Jesco's agent, Brister;

- January 9, 2001: "*These changes shall be the basis of a future modification to the contract*, once all drawings and specification revisions, quantity changes, and pricing is complete, confirmed, and approved" (Ex. DG-32)(Emphasis added);
- July 10, 2001: "*A final Change Order will be issued* to reconcile all units for work in place. The extension of time will be a part of the final Change Order" (Ex. DG-62)(Emphasis added);
- July 11, 2001: [Time Extension of 29 days due to wet conditions at site] "not necessary at this time, *this can be part of Final Change Order* (Ex. DG-65) (Emphasis added);
- August 24, 2001: "A Change Order for the *approved time extension* will not be issued at this time. *A final Change Order will be issued* to reconcile all units for work in place. The extension of time will be a part of the final Change Order"(Ex. DG-70)(Emphasis added).

Carrson Neal admitted that a final Change Order would be issued to Gray at the conclusion of work (Neal-Tr. 849), and that the decision not to issue it was implemented only after Gray filed its claim on March 1, 2002 (Neal-Tr. 850).

On February 27, 2001, TRA issued a Change Order, No. 1, which did not add any days for delay, nor did it resolve all of the issues relating to the ongoing and ever increasing deficiencies in the electrical plans and specs (Shawn Gray-Tr. 534-535; Ex. DG-7l). Prior to the Change Order, on February 15, 2001, the Jesco Meeting Notes clearly state that "there will be no additional time, cost of extended overhead, additional cost of equipment, additional cost for materials, any cost for delays, etc. included or allowed by this Change Order" (Ex. P-18); consequently these elements were not included in Change Order No. 1 (Ex. P-6).

Change Order No. 1 did not recognize the items that were continually being revised during the project by the Joint Use Authority. When a utility made a change, "we had to

start all over... We start at the beginning" (Ragland-Tr.184; Ex. P-18). When TRA, Allen & Hoshall or the Joint Use Authority (the utilities) made revisions, they asked (him) "to take them and review them, work up another take-off and price it." (Ragland-Tr.186).

These design issues were ongoing and being revised well into 2001, and were being handled in the field by Mr. Ragland, at the request of TRA and Gray (Shawn Gray-Tr. 537-540). Two more change orders were subsequently issued by TRA, but neither recognized the delay or electrical component issues caused by the deficient plans and specifications.

5. Mr. Ragland's Verdict

Mr. Ragland's verdict against Gray was for $850,551.32 (Vol. 12, R. 1563-1564). It was based on days of testimony and numerous documents. The evidence supporting the verdict is outlined and discussed in Mr. Ragland's Appellee Brief responding to Gray's appeal of Mr. Ragland's Judgment.

III. SUMMARY OF THE ARGUMENT

TRA erroneously argues that Gray's Judgment is based upon delay damages and a "pass through" indemnity claim against TRA at trial (TRA's Appellant Brief, pp. 12-13) and refuses to address the substance of the proof supporting Gray's judgment. Thus, in addition to its request to be indemnified for any judgment in favor of Mr. Ragland, Gray also prosecuted its *own* claim which included its costs for the 89 days longer on the Project experienced at TRA's hands ($158,757.31), its claim for retainage ($30,000.00) and its claim, as a general contractor, for overhead ($70,823.00) due on Eubank and Mr. Ragland's claims as subcontractors. The total of those three elements is $259,580.31 or only approximately $1,400.00 more than the jury decided was due Gray ($258,118.00).

Through Jury Instruction C-6 , the Jury was to return a verdict for all damages TRA caused Gray *and all of* Gray's subcontractors (Vol. 10, R. 1222, R.E. 18)! The Verdict form was crafted to include the amount, if any, the jury found was responsive to Gray's indemnity argument. If the jury had decided that Gray was entitled to indemnification for any portion of Mr. Ragland's verdict against Gray, the verdict for Gray would likely have been much larger since Mr. Ragland's verdict against Gray was $850,551.32. Instead, the jury fixed Gray's damages against TRA at $258,118.00, which was about $1,400.00 *less* than Gray requested for its own damages! Perhaps the jury didn't add correctly, or perhaps it thought cross examination proved that all of the amount of direct damages Gray claimed weren't due, but the fact is that the jury was told that it could not award Gray anything for its indemnity claim *if* Gray had participated in creating the damages (Instruction C-24; R.E. 20) and it appears that nothing was included in the amount due Gray for that reason.[5]

Thus, the explanation for the verdict is simply that the jury believed that the project had been extended by the 89 days, that Gray was entitled to its retainage and that it was entitled to its overhead for handling the operations of its subcontractors, Eubank and Ragland. There need be nothing complicated about this.

The Court's instruction on the indemnity issue (Instruction C-24; R.E. 21) gave the jury plenty of room to deny Gray's plea for indemnity but at the same time recognize that Gray was delayed, that it was entitled to its retainage and to its overhead on the Eubank and Ragland claim. Something must explain the fact that the jury didn't include Mr.

---

[5] Mr. Ragland neither concedes nor admits that Gray was not entitled to indemnification for some of Mr. Ragland's damages; however, Mr. Ragland leaves that argument to Gray and addresses here only his entitlement to the "Fund" represented by the Gray judgment against TRA.

Ragland's $850,551.32 verdict in Gray's Judgment against TRA. Instruction C-24 made it clear that Gray would not be entitled to indemnity from TRA *if* the Jury found that "the person making the payment [seeking indemnity] has not conducted himself in a wrongful manner so as to bar his recovery," (Vol. 10, R. 1253, R.E. 21) and:

> If you find that Gray has no implied or common law right of indemnification against the Tupelo Redevelopment Agency, then you must return a verdict in favor of the Tupelo Redevelopment Agency as to all of Gray's claims for indemnification.

The jury followed the instruction and apparently agreed that Gray wasn't entitled to Indemnity and, therefore, did not include Mr. Ragland's money, but did find that Gray was entitled to its own damages. Those damages were reduced to a Judgment and the Judgment to the "Fund."

IV. ARGUMENT

A. Standard by Which to Measure the Verdict on Appeal

There was enough evidence to support the verdict of $258,118.00. It was the jury's duty to resolve the fact issues. It did and having done so, this Court will not substitute its determination for that of the jury.

> "Once the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found."

Bell v. City of Bay St. Louis, 467 So. 2d 657, 660 (Miss. 1985).

"This Court will not intrude into the realm of the jury by determining the credibility of a witness and making findings of fact," *Upchurch ex rel. Upchurch v. Rotenberry*, 761 So. 2d 199, 204 (Miss. 2000). The jury is the judge of the weight of the evidence and the credibility of the witnesses. *Jackson v. Griffin*, 390 So. 2d 287, 289 (Miss. 1980). "[U]nless

it is clear to this Court that the verdict is contrary to the overwhelming weight of the credible testimony, this court will not set aside the verdict of a jury" *Travelers Indem. Co. v. Rawson*, 222 So. 2d 131, 134 (Miss. 1969).

The record confirms that the jury did its job.

B. Proof Established Gray's Damages

1. Delay Damages-$158,757.00

No witness disputed Gray's assertion that it was held on the project 89 day's longer than it other wise would have been but for the TRA caused delays. The Claim (Ex. P-19 and Ex. DG-132; R.E. 8) contains the calculations and the extra costs Gray says it experienced as a consequence. Both Shawn Gray and Eugene Hill were interrogated about Gray's claim (Shawn Gray-Tr. 558-560, 590; Hill-Tr. 688). Gray's claim letter stated that:

> "for the extensive delays resulting from the defective plans, the loss of productivity of their workers and equipment,...and losses incurred by Gray and Ragland when their laborers and equipment stood idle for months while the defective drawings were revised and re-revised."

(Ex. DG-132; R.E. 8)

Gray identified the 89 days:

> "Component "B" site work was delayed for approximately 119 days from December 6, 2000 until April 5, 2001, when the delays to the electrical work allowed to continue[,] [d]uring this time, thirty days were lost due to weather[,] [t]hus the total compensable delay period to Gray is 89 days (119 minus 30 days=89 days)."

(Ex. DG-132; R.E. 8).

Further, Gray "is entitled to recover its daily cost for equipment, labor and overhead which were paid for by Gray but were unused as a result of the electrical delays" (Ex. DG-132; R.E. 8).

The effects of the deficient plans and specifications were immediately felt by Gray in its inability to timely perform on the Project. TRA was responsible for both the quality of and the quantities of the plans and specifications issued to Gray (Brister-Tr. 1047-1048). Gray relied on these plans and specifications when it bid on and accepted bids by subcontractors on the Project (Shawn Gray-Tr. 498-503), in its submission of a schedule and sequence of construction (Shawn Gray-Tr. 498-503, 508-09), and when attempting to coordinate the work. The parties recognized that the plans prepared by Allen & Hoshall for TRA and furnished to Gray were defective and had to be continually drafted and then redrafted (Ragland-Tr. 157-158; Brister-Tr. 1050-51).

By December of 2000, Gray was ahead of schedule (Shawn Gray-Tr. 557-559; Hill-Tr. 687-688) and was ready to have Mr. Ragland begin Component C electrical work. Carrson Neal agreed (Neal-Tr. 876-877). Proposed changes to the plans and specifications by TRA were still ongoing, and thus electrical installation was moved back to begin April 5, 2001 (Shawn Gray-Tr. 521-522). The defects in the plans delayed Gray's base work, stone work, curb and gutter work, sidewalk and asphalt work (Neal-Tr. 879). Ultimately, the 89 days the Project was extended cost Gray $158,757.31 (Shawn Gray-Tr. 558-560, 590; Hill-Tr.688; Ex. P-19, Ex. DG-132; R.E. 8).

2. Contract Retainage-$30,000.00

The jury was informed TRA had not paid Gray's retainage (Vol. 1, R.120-166; R.E.18) of $30,000.00. That amount was identified in the Partial Release and Settlement

Agreement between TRA and Gray (Vol. 4, R. 573-576; Ex. DG-112; R.E. 9) of which page 2, section 4 provides:

> Except as otherwise provided in this letter agreement, TRA accepts the Project as complete and agrees to pay GRAY One Hundred Seventy Seven Thousand Five Hundred Dollars ($177,500) of the approximately Two Hundred Seven Thousand Five Hundred Dollars ($207,500) in retainage currently being held by TRA as soon as that amount can be processed through the TRA and the City of Tupelo. *TRA shall continue to retain the remainder of approximately Thirty Thousand Dollars ($30,000) until approval and acceptance of the work on the expansion joints and asphalt striping by Neal and the TRA.* GRAY shall be entitled to a pro-rata reduction of the remainder of the retainage being withheld by TRA ($30,000) as the work on the expansion joints and asphalt striping is completed, approved, and accepted.

(Vol. 4, R. 574; Ex. DG-112; R.E. 9)(Emphasis added).

Carrson Neal testified that Gray had completed this work, thus entitling Gray to the $30,000 retainage:

> "The contractor was allowed to seal the joints, put a sealant in the joints in lieu of tearing out the sidewalks and reforming the joints...[t]he asphalt surface had to be milled,...repaved...some of the asphalt was just sealed over with a slurry seal because some of the aggregate was showing in the asphalt... [T]he contractor was allowed to do some work..."

(Neal-Tr. 840).

TRA took possession of the property and closed the Project. Gray earned its retainage.

3. Overhead on Subcontractor's claims-$70,823.00

Gray included its claim ($70,823.00) for the overhead general contractors add to subcontractor's claims in the March 1, 2002 claim letter (Ex. DG-132; R.E. 8). Since Gray was required to continue to administer the subcontracts during the events identified in the record, it was entitled to the overhead it sought.

TRA did not contest Gray's entitlement to overhead or to the amount of that overhead.

C. The Verdict and the Instructions Fit Together

No one objected to the form of the Special Interrogatories and the Verdict. Thus, when the jury was asked how much was due Gray, it answered the question it was asked. Now, however, TRA argues that the answer included "Monetary damages for indemnity" but there is absolutely no proof of such.

"On appeal, individual jury instructions should not be considered in isolation, but should be considered as a whole." *Rials v. Duckworth*, 822 So. 2d 283, 286 (Miss. 2002) "This Court does not review jury instructions in isolation, rather, they are read as a whole to determine if the jury was properly instructed." *Peoples Bank & Trust Co. v. Cermack*, 658 So. 2d 1352, 1356 (Miss. 1995). Jury Instructions C-6 and C-21 clearly set out the proof required of Gray in its claims against TRA. Likewise, the Indemnity instructions, C-15, (Vol. 10, R. 1238) and C-24 (Vol. 10, R. 1252-53) permitted the jury to assess the equitable remedy or not. Since the jury was told to include in the amount due Gray, if any, *such portion of the claims of its subcontractors as TRA was responsible for*, the only reasonable reading of the verdict is that the jury didn't include any money for Gray's indemnity claim or only approximately $1,400! (Emphasis added).

> The resolution of disputed facts such as this is a duty that devolves upon the jury sitting as finders of fact. (citation omitted) ... [o]ur system of jurisprudence has determined that citizen jurors, employing their native intelligence and collective life experiences, are best qualified to make those judgments. Absent some clear indication that the jurors in a particular case somehow ignored that duty, neither the trial court, nor this Court reviewing the record on appeal, are permitted to interfere in the conclusions reached by these jurors.

Upchurch ex rel. Upchurch v. Rotenberry, Supra at 206.

The Instructions do not contradict each other but instead compliment each other.

This Court cannot guess or assume that the verdict represented indemnity damages but should take the verdict at face value in light of the Court's instructions to the jury concerning how to fill it out. It would be wrong to interpret the verdict in the manner now sought by TRA. There is no reason to believe that the jury did anything but follow the instructions. Let it be!

D. TRA Waived its Contractual Rights with Gray by its Conduct

TRA says that it did not waive enforcement of its contractual rights with Gray (Appellant TRA Brief, pp. 13-22, 25-28) and, therefore, Gray needed a change order before it can recover. TRA, by its conduct, altered the contractual obligations between itself and Gray, yet, it refuses to address its own conduct. In *Delta Wild Life & F., Inc. v. Bear Kelso Plant Inc.,* 281 So. 2d 683, 686 (Miss. 1973), the Court held, "What the parties to a contract consistently do thereunder is evidence of what the contract between them required that they should do." The subsequent actions of parties pursuant to a contract may support a finding that the original contract has been modified to an extent consistent with the subsequent course of conduct. *Stinson v. Barksdale*, 245 So. 2d 595, 597-98 (Miss. 1971).

TRA ignored the change order requirement and promised Gray that at the end of the Project, it would have a change order which reflected all extra work and additional time. TRA's conduct and words induced Gray and Mr. Ragland to continue performance.

1. The Written Change Order Clause

Mississippi Jurisprudence holds owners accountable for extra work required of their contractors, regardless of the formalities of contract, when the owner knows that the work

was not contemplated in the original contract document, and the contractor does such work with an expectation of getting paid. 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). Jury Instruction No. DG-7 informed the jury that:

> an owner, like TRA, may waive the change order provision if its conduct, including that of its agents,. . . , indicates a willingness to pay for extra work and if an owner or its agents have actual notice of the facts giving rise to the claim for extra work and an owner or its agents directed Gray to perform extra work.

(Vol. 10, R. 1263-64).

In *City of Mound Bayou v. Roy Collins Const. Co., Inc.*, 499 So. 2d 1354 (Miss. 1986), this Court noted that:

> It has been held that the contractor was entitled to recover for alterations or extras notwithstanding compliance with a stipulation requiring a written order, where it appeared that work was orally ordered, requested, directed, authorized or consented by the owner or his duly authorized agent.

499 So. 2d 1354, 1358-59 (citing 2 A.L.R. 3rd 620, 661 (1965).

In *City of Mound Bayou,* 499 So. 2d at 1356-60, the owner and its engineer orally directed the contractor to perform work which was not within the scope of the contract and also orally assured the contractor that at completion it would be paid for all the work it performed. The *Mound Bayou* Court provided relief for the contractor for, when Mound Bayou refused to honor its promise, it "failed to perform their contractual language in good faith." *Id.* at 1359. This jury heard the same type and quality of proof: work now, we will pay you later. TRA admitted the promise: "*A final Change Order will be issued* to reconcile all units for work in place[,] [t]he extension of time will be a part of the final Change Order"

(Ex. DG-62); "not necessary at this time, *this can be part of final Change Order*" (Ex. DG-65); "*A final Change Order will be issued* (Ex. DG-70) (Emphasis added).

Jesco's Meeting Notes tell the same tale; a Change Order is forthcoming, you just keep working (Ex. P-18).

Likewise, Carrson Neal admitted that a final change order would be issued to Gray at the conclusion of work (Neal-Tr. 849), and then admitted that the decision not to issue that change order was implemented only after Gray filed its claim against TRA, asserting entitlement to more money (Neal-Tr. 850). When Gray asserted its contractual rights, TRA punished it.

This conduct perfectly fits the *Mound Bayou* matrix and must receive the same result.

TRA's reliance on the "Public Fisc" argument is not appropriate, since, it was TRA that refused to issue the required Change Order.

2. The "No Damage for Delay" Clause

TRA argues that it should not be responsible for Gray's delay damages because the contract contained a "no damage for delay" clause notwithstanding that the Court instructed the jury on that issue and the jury found against TRA.

Jury Instruction C-25 provided:

> Mississippi law recognizes four exceptions when a "no damage for delay" clause may not be enforced: (1) when there is a delay that was not intended or contemplated by the parties to be within the purview of the provision; (2) delays that resulted from fraud, misrepresentation or other bad faith on the part of the one seeking the benefit of the provision; (3) delays that have extended to such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; and (4) delays not within the specifically enumerated delays to which the clause applies. With respect to these four exceptions, Gray Corporation bears the burden of

establishing the existence of exceptions (1), (3) or (4) by a preponderance of the evidence, or exception (2) by clear and convincing evidence.

(Vol. 10, R. 1254-55; R.E. 22).

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). TRA does not object to the language in Instruction C-25 since it correctly recognizes the four exceptions to enforcing such a clause.

The fight before the jury centered on the question of whether the 2nd exception (fraud-bad faith) fit TRA's conduct. That will be argued only briefly here since the jury obviously resolved that issue against TRA.

a. [Delay] Resulted from Fraud, Misrepresentation or other Bad Faith on the Part of the One Seeking the Benefit of the Provision

Evidence clearly and convincingly showed a pattern of bad faith and misrepresentations on the part of TRA. In *SCI*, the Court found that the Commission's refusal to grant *timely* extensions was found to be enough to meet the bad faith exception. *Id.* at 338. Here, TRA refused to grant Change Orders while misrepresenting to Gray that it would.

Steve Brister with Jesco wrote that "the extension of time will be a part of the final Change Order," (Ex. DG- 62, 70), and in August 2001 that a time extension was "not necessary at this time, *this can be part of final Change Order*" (Ex. DG-65) (Emphasis added). He stated as much many times, and knew that Gray and Mr. Ragland relied on what he said (Shawn Gray-Tr. 519, 542-543).

TRA directed Gray and Ragland to perform work outside of the scope of the contract, obstructed, hindered, delayed and disrupted Gray and Ragland's work, required extra/additional work that was more difficult than reasonably anticipated, and required acceleration of the work, and then did not issue a final change order to address all of these damages to Gray and Ragland. It was TRA who kept repeating the mantra "Work doubly hard now, we'll pay later," "work doubly hard now, we'll pay later" in order to have Gray and Ragland complete the project while minimizing the damages and delays caused by TRA's own shortcomings. To then refuse to pay Gray and Ragland under the auspices of contract provisions which were ignored by TRA itself, evidences the bad faith that *Mississippi Transp. Comm'n v. SCI, Inc.* contemplated.

In undisputed testimony, Carrson Neal of Cook Coggin (TRA) testified that the decision to not issue a final Change Order addressing all the issues related to defects in the plans and resulting delays was made only after Gray filed its claim against TRA (Neal-Tr. 850). Even if this Court does not recognize bad faith through TRA's course of conduct (the jury obviously did), this admission by TRA to deny compensation because a contractor attempted to assert its legal rights is beyond the bounds of decency and fair play. TRA admits bad faith when it admits it decided not to pay Gray only after it asserted a claim for work which TRA knew Gray had performed, and which TRA had required of Gray.

3. Closing Summary of Argument

Mound Bayou and *SCI* both hold owner's accountable for compensating contractors they have told to perform work not contemplated in the contract. An owner may not require extra work to be performed, and then not pay. TRA promised Gray Change Orders for extra work and delays, accepted the work which was done in reliance on those promises,

and then never paid Gray. It is this bad faith, fraudulent misrepresentations made by TRA to get more out of Gray and Mr. Ragland, that both *Mound Bayou* and *SCI* determined to deny the owner protection otherwise available to it. The jury wrote the Change Order that TRA refused to write, and this Court should uphold its enforcement. Thus, Gray proved its entitlement to the costs associated with the 89 days of delay.

Any argument related to Indemnity is between Gray and TRA. Mr. Ragland is simply arguing his entitlement to the Fund represented by the Verdict as it was handed down through the Special Interrogatories and Jury Verdict Form.

Question No. 7 in the Jury Verdict Form asked" the amount of damages that Gray is entitled to recover from TRA. (Emphasis supplied). The Jury answered : $258,118.00. Gray proved its damages.

V. CONCLUSION

The Court should at least affirm the Judgment in the amount of at least $258,118.00.

Respectfully submitted,

RONALD J. RAGLAND, SR.

THOMAS W. PREWITT
Mississippi Bar No. [redacted]
KENNETH M. HEARD, III
Mississippi Bar No. [redacted]
7720 Old Canton Road, Suite A
Madison, Mississippi 39110
Post Office Box 2327
Madison, Mississippi 39130-2327
(601) 427-2327

ATTORNEYS FOR APPELLEE/CROSS-APPELLANT

CERTIFICATE OF SERVICE

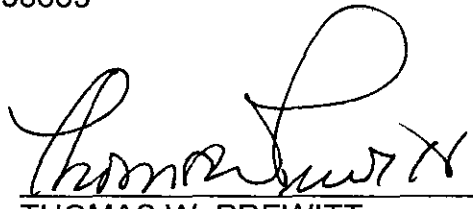
I, THOMAS W. PREWITT, do hereby certify that I have mailed, via United States Mail, postage fully prepaid thereon, a true and correct copy of the above and foregoing ***Brief of Appellee/Cross-Appellant Ronald J. Ragland, Sr.*** to:

Honorable Thomas J. Gardner, III
Lee County Circuit Court
Post Office Drawer 1100
Tupelo, Mississippi 38802-1100

William D. Prestage
Mitchell, McNutt & Sams
Post Office Box 7120
Tupelo, Mississippi 38802-7120

B. Sean Akins
Fortier & Akins, P.A.
108 E. Jefferson Street
Ripley, Mississippi 38663

THIS, the 23rd day of January, 2007.



THOMAS W. PREWITT