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

REPLY 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 _____ day of March, 2007.

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

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Undisputed Facts:

While the facts have been outlined in several prior briefs, at this point in the briefing process there are several core facts which appear undisputed.

Tupelo Redevelopment Authority (hereinafter "TRA") contracted with Gray Corporation (hereinafter "Gray") to perform work on the Tupelo Redevelopment Project (hereinafter "Project"). Gray contracted with Ragland Engineering (hereinafter "Ragland") to perform certain work. Ragland didn't have a written contract but had an oral contract and a writing from Ragland that outlined the specific cost of each item to be provided by Ragland to the project.

TRA's agents represented TRA on the project site. The designs for the project had be corrected and changed multiple times and ultimately had to be discarded all together. Gray and Ragland were forced to perform additional work that was outside the scope of its original contract with TRA. During the work, Gray was asked to act on oral change orders by TRA which were ultimately placed in the form of written change orders.

TRA's agents promised Gray that a final change order would be forthcoming and based upon those representations Gray and Ragland performed the extra work. Gray never received a final change order. TRA's contract with Gray required TRA to provide a change order and that it was never the responsibility of Gray to request a change order.

Gray sent bills for Ragland's extra work to TRA which were denied. Gray sponsored Ragland's claim for extra money along with Gray's own claim for delay damages from TRA. Gray never agreed that Ragland's method of calculating his damages was accurate. Gray sponsored Ragland's bill based upon Gray's belief that the bill was legitimately the bill of TRA and that TRA could argue with the amount of the claim and the method of calculating damages.

What did the jury believe?

The jury awarded Gray virtually all of the money to which Gray claimed that it was entitled. Additionally, the jury awarded Ragland all of the money that Ragland asked for. While TRA wants to hide behind its governmental immunity, clearly the jury rejected its defenses and found TRA to be liable on all counts. The jury found that Gray and Ragland performed extra work to which both were entitled to be compensated. In doing so, the jury found that TRA waived its rights under the contract. As the prior briefs have established, there is substantial evidence in the record to support the jury's finding that TRA was liable for extra costs.

If Ragland performed extra work and TRA benefitted from the extra work, then why is TRA not paying for it?

In his closing argument, Ragland's counsel laid out the true nature of his case. Ragland spent no time arguing that Gray owed Ragland anything. Ragland's entire closing was about Hartford. Specifically, Ragland argued that Hartford should never have allowed the case to come to court and that Hartford had done nothing to help the situation despite clear evidence that Ragland was owed more money. Ragland's counsel repeatedly told the jury that "Hartford just wants to walk" and "Hartford wants to be rewarded. . .for doing nothing." The jury was never told that Hartford was only Gray's bonding company and that it was Gray's money, not Hartford's, that the jury was being asked to award. As far as the jury was concerned, Gray was caught in the middle. Gray agreed that Ragland was owed more money because of extra work, but agreed with TRA that Ragland's damages were overstated. Ragland's solution was to convince the jury that the only loser should be Hartford.

If the jury had passed the Ragland's damages through to TRA, then the taxpayers of Tupelo would be required to pay the extra cost. Ragland's solution required Hartford, the great insurance company from Connecticut, to write its check and go back north. The jury reasonably believed that

it could give Ragland, Gray and the taxpayers of Tupelo what they had bargained for – mostly at the expense of Hartford, an insurance company. Unfortunately, as soon as the verdict was dry, Hartford paid Ragland $475,000.00 without the consent of Gray, ran back to Connecticut and sued Gray for the settlement amount in U.S. District Court.

> It is well established in this state that evidence of insurance or lack thereof may not be presented at a trial to show who would have to pay the judgment. *Morris v. Huff,* 238 Miss. 111, 118-19, 117 So.2d 800, 802-03 (1960); *Snowden v. Webb,* 217 Miss. 664, 675-76, 64 So.2d 745, 750 (1953). This Court has stated, "... it may not be conveyed to the jury that the defendant in the case has no protection by insurance, and if the verdict is against him, he, not the insurance company, must pay it.... It would be manifestly unfair to permit a defendant in a damage suit to show that he carried no insurance and whatever verdict rendered would be enforced upon him personally."
>
> *Jackson v. Daley*, 739 So.2d 1031, *1039 (Miss.,1999)

Consider this statement from Ragland's closing arguments:

> . . .We're suing Hartford. Hartford Fire and Insurance Company of Hartford, Connecticut, and Gray. Hartford had a bond for which is was compensated. And the judge instructed you what the consequences of that bond is, but it says, if you read it, and it's in evidence, Exhibit 1, they are going to pay the people that provide labor and materials that go into this project. That's a promise.
>
> The Court has instructed you that that bond is responsible for whatever actions you might decide TRA caused through Gray, Mr. Ragland to take. We're not suing TRA. Hartford was paid to do a job. And out of everybody involved, Hartford didn't even try to do a job. Didn't even try. Hartford was supposed to step in and get this stuff resolved money-wise and hasn't done so.
>
> Trial Transcript at pages 1246 - 1247.

In *Cade v. Walker*, 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." 771 So. 2d 403, 407 (Miss. App. 2000).

The argument served no purpose that the create anger against Hartford Insurance to suggest that the jury should punish Hartford for its inaction. Evidence of pride, prejudice and bias exists throughout the argument and renders the jury's verdict meaningless.

The jury had a poor instruction regarding indemnity.

If the Court decides to remand this case to Lee County Circuit Court for a new trial, the Court should consider the language used by the trial court in instruction number C15. On page 1226 - 1227 of the trial transcript, the Court read the instruction regarding indemnity to the jury as follows:

> Gray has asserted a claim for indemnity against TRA for whatever judgment, if any, may be entered against Gray and in favor of Ragland on Ragland's claim for extra compensation, over and above the amount of Ragland's original price to perform its work.
>
> When one party is found liable for damages which another party in all fairness should be made to pay, the first party is entitled to a judgment against the second party for the same amount. Therefore, if you find that Gray is liable to Ragland for Ragland's claim for extra compensation above the amount of Ragland's subcontract price, and if you further find that TRA, ***but not Gray***, caused Ragland's damages, if any, then it is your sworn duty to return a verdict in favor of Gray and against TRA for any judgment you may find Ragland entitled to recover against Gray in Ragland's claims for extra compensation in accordance with other instructions of this Court.
>
> (Emphasis added.)

The instruction is an improper statement of law regarding indemnity because it told the jury that the jury could pass through any of Ragland's damages to TRA if the jury found that "TRA, but not Gray, cause Ragland's damages. . ." The instruction does not make clear that TRA could be found liable for some of Ragland's damages while Gray could be found liable for others. See Miss. Code Ann §85-5-7 and §11-7-15. See also *Home Ins. Co. of New York v. Atlas Tank Mfg. Co.*, 230 So.2d 549 (Miss. 1970) regarding equitable considerations in indemnity.

The overwhelming weight of the evidence outlined in more detail in other briefs suggests that the jury found that Ragland performed substantial extra work, but refused to pass any of the cost to

TRA. For example, on page 17 of his Appellee's Brief, Ragland discusses the infamous trench that Ragland said cost $505,979.60. In his original bid, Ragland said that the cost of the trench would be $17,000.00. There is no conceivable way that Gray could be responsible for the extra cost of the duct trench that was not part of the original plans. To the extent that Ragland and Gray were required to dig a deeper trench, the cost was TRA's.

In *Hartford Casualty. Ins. Co. v. Haliburton Co.*, the Mississippi Supreme Court held that two prerequisites be met to claim noncontractual implied indemnity. 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 instruction should have told the jury that the jury could pass through to TRA any portion of the damages that the jury attributed to TRA while apportioning damages to Gray that were attributable to Gray. The decision by the jury to blame Gray for all of the extra work for TRA is not supported by the record and is against the overwhelming weight of the evidence.

Ragland's method of calculating damages remains speculative and he is unable to cite any law which supports his method of calculating his damages.

In Ragland's Brief on pages 14 - 27, Ragland discusses his damage calculation line by line. Ragland conceded, however, that all of his calculations are based upon the quantum meruit. Despite his line by line bids as to quantities, he chose to substantially inflate each item despite the fact that the cost of the line items did not increase. Only the quantity increased.

For example, in line item number 83 on his bid, Ragland agreed to place poles on the site for $62.00 per pole. However, when Ragland used his magical formula to determine the amount he would have bid if had known about the extra expense and work, he testified that he would have charged $300.00 per pole.

Ragland's entire calculation on damages is based upon pure speculation. He is attempting to determine what he would have bid for the project in hindsight. Unfortunately, projects are not bid in hindsight. In the competitive bidding process, potential bidders calculate their bids based on numerous factors. According to Ragland's brief,

> He looked at all of the problems he actually encountered and then placed a value on the total job he actually performed in those conditions just as he would to if he were a contractor bidding on that work who was told in advance that it would experience those problems.
>
> Ragland's brief of December 4, 2006, page 30

According to Ragland, "The procedure he used is exactly what a contractor does every day." According to that logic, based upon the information that Ragland was given at the beginning of the project, his cost per pole was $63.00. There is no rational reason to elevate the bid to $300.00 per pole based upon hindsight.

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).

In Ragland's Reply Brief, he cites authority which will not deny him a recovery because of uncertainty in his damages. However, Ragland presented no authority for the method of calculating his damages even if his figures are accurate.

Here Ragland presented a speculative, 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." His original bid included fixed costs based on a cost-per-linear foot or cost-per-pole. When the quantities were increased by TRA, the costs to Ragland were fixed because the cost of each included the cost of labor. The burden of proof is upon Ragland to establish his damages and he failed to meet the burden.

CONCLUSION

Ragland failed to establish his damages and the Court should reverse and render as to the Ragland's speculative claim for damages including the claim for attorney's fees. Alternatively, whatever amount of damages were proven by Ragland should have also been assessed against TRA except for Ragland's contract balance of $76,245.92 due from Gray.

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.

THIS, the 26th day of March, 2007.

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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SO, CERTIFIED, this, the 26 day of March, 2007.

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