IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CIVIL ACTION NO. 2006-TS-00218

TUPELO REDEVELOPMENT AGENCY	**APPELLANT/ CROSS-APPELLEE**
VS.	
THE GRAY CORPORATION, INC.	**APPELLEE/ CROSS-APPELLANT**

ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE TUPELO REDEVELOPMENT AGENCY

ORAL ARGUMENT REQUESTED

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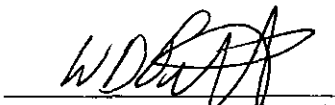
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant, Tupelo Redevelopment Agency, 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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Tupelo Redevelopment Agency, Appellant/Cross-Appellee
2. Ronald J. Ragland, Sr. d/b/a/ Ragland Engineering and Ragland Construction, Plaintiff in underlying action/Cross-Appellant
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. Sean B. 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. William D. Prestage, Attorney for Tupelo Redevelopment Agency

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



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I. TRA's Reply to Brief of Appellee/Cross-Appellant Gray.

A. The evidence at trial did not support Gray's contention that TRA waived enforcement of any of its contractual rights.

In the case *sub judice*, it is uncontradicted that the contract between Gray and TRA required a change order to be in writing for approval of any additional work. Gray, however, bases its entire claim on the mere allegation that TRA, through its agent, waived this contractual requirement and should be held liable for all asserted claims regardless of the absence of a change order. Specifically, Gray's entire claim rests on alleged representations of TRA's Project Manager, Steve Brister, that a final change order would be forthcoming with essentially no limit. This allegation is unfounded and unsupported by evidence. TRA, due to its budgetary constraints and bidding requirements as a governmental agency, does not even have the ability to approve an "open ended" change order as is claimed by Gray. In fact, these representations were completely denied by Mr. Brister at trial. Mr. Brister testified that it was explained to the contractors many times that any change order request must be in writing and presented to the owner of the project for approval. [Transcript, hereinafter "T." at 967-968]. He further testified that he had "no authority to direct or approve any Change Order without TRA's endorsement." [T. at 968]. A contractual provision requiring obtainment of such an order is in accord with Mississippi law that "a contractor who proceeds with work without procuring a written Change Order proceeds at his peril." City of Mound Bayou v. Roy Collins Constr. Co., 499 So. 2d 1354, 1358 (Miss. 1986).

Perhaps the most instructive cases in regard to the particular issues presently before this Court are Citizens Nat'l Bank of Meridian v. L. L. Glasscock, Inc., 243 So. 2d 67 (Miss. 1971), and Delta Constr. Co. of Jackson v. City of Jackson, 198 So. 2d 592, 598 (Miss. 1967). These Mississippi Supreme Court cases were thoroughly discussed in TRA's original brief to this

Court. Gray, however, has an interesting way of dealing with controlling case law converse to its position -- ignore it and hope it goes away. It is worth noting that neither of these cases were cited by Gray, much less distinguished, from the current factual situation at issue. Since these two cases were thoroughly discussed in TRA's original brief in this action, we will not burden this Court with repetition of the entire arguments, but rather reiterate the pertinent holding in Glasscock that:

> The owner being desirous of limiting its financial obligation, should not have its pocketbook exposed to the custom of architects and contractors unless it agrees thereto. In this instance the owner agreed to pay for extra work only if it was authorized in writing prior to its execution. Having contracted directly upon the point, there was no leeway for an award on a quantum meruit basis. Glasscock, 243 So. 2d at 70-71.

Also, this Court in Delta, correctly and fairly noted that:

> The contract in the instant case requiring a supplemental agreement for extra work over minor changes is essential, because municipalities and other governmental agencies obtained funds with which to build public improvements from bond issues based upon estimates furnished to them, and municipalities must reserve the right to stop a project if they determine the extra work will exceed the amount of money allocated to any given phase of a project. Delta Construction, 198 So. 2d at 600.

These holdings are directly applicable to the issues at hand. Gray's brief did not dispute this. TRA is a governmental agency of the City of Tupelo who financed this project through the use of urban renewal bonds. In order to protect itself and limit its financial obligation, the contract between TRA and Gray expressly required that Change Orders be in writing. The entire purpose of this type of provision is to protect the interests of TRA and prevent exactly this type of situation.

Gray relies heavily on the case of Eastline Corp. v. Marion Apartments, 524 So. 2d 582 (Miss. 1988), in support of its allegation that TRA waived the Change Order requirement of the contract at issue. The Eastline Corp. case was an interlocutory appeal from a trial court's exclusion of testimony concerning sums expended on additional work when the contract

provided that all additional work must be approved in writing. Eastline Corp., 524 So. 2d at 582. Gray calls attention to the fact that the Court determined that Eastline acted in good faith by proceeding without acquiring a Change Order. [Gray's Brief, p. 14]. However, the Eastline Corp. Court went on to note that "Marion [the owner of the project] had not yet presented any evidence when the trial below was interrupted by this interlocutory appeal." Id. at 585. The Court also remarked that Marion may be able to rebut everything that Eastline had established. Id. It is also important to note that the Eastline Corp. Court, rather than simply holding that the contractor had acted in good faith as Gray's brief would suggest, actually held that:

> The evidence in the case sub judice appears to support that Eastline acted in good faith when it proceeded with additional work without obtaining the necessary change orders; that Marion had knowledge of Eastline's performance of additional work; that Marion promised to pay for the additional work and Eastline obtained this assurance before proceeding; and that Marion's acquiescence in the additional work is evidenced by its agent's signature on the certificate of substantial completion. Id.

The Eastline Corp. case, based on these findings, was reversed and remanded for a full trial on the merits. Id. It was not a holding as to whether or not any contractual requirement was waived as addressed in the Glasscock and Delta Construction, Inc. cases TRA has cited *supra*.

Gray's brief goes on to make the bold assertion that, "The [sic] 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.'" [Gray's Brief, p. 15]. However, upon review of the cited portion of the trial transcript, T. at 816-26 to 817-13, TRA is unable to locate any such conclusion, much less this cited quotation. In fact, the closest resemblance to the quotation included in Gray's brief was Judge Gardner's statement that "at least three or four witnesses testified that during all this time the field supervisor or whatever you want to call him, Jesco, insisted or said, let's go ahead with the project, whatever you have to do to do it." [T. at 817-8 to 817-13]. In fact, this portion of the transcript is the trial court's

response to a directed verdict motion prior to TRA's putting on any proof with regard to the issues argued. Judge Gardner never made the finding that "the contract was abandoned." To make such an allegation is a blatant mischaracterization of the facts and evidence.

Gray also cites Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp., 743 So. 2d 954, 963 (Miss. 1999), as supportive authority. The contract between the parties in Sentinel, however, contained a significant article which is not present in the contract at issue. Article 7 of the contract at issue in Sentinel provided that "Notwithstanding that a CHANGE ORDER has not been issued, CONTRACTOR shall promptly comply with the instructions, authorizations and notices given by OWNER in connection with WORK." Sentinel, 743 So. 2d at 961. The contract at issue in the case sub judice contains no such article. The Sentinel Court's holding was based largely on this contractual provision, along with the good faith of the parties.[1] The factual situation before the Court in Sentinel is inapplicable to the present situation, as the Court held:

> 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. Id. at 964-965 (emphasis added).

The testimony in the case *sub judice* is wholly insufficient to establish any waiver on behalf of TRA regarding the Change Order provision of its contract with Gray. There was no showing of any request for a Change Order during the project at issue. Therefore, TRA did not refuse Gray's requests and require them to proceed with extra work as was the case in the authority Gray cites. Further, there was absolutely no showing of a lack of good faith on behalf

[1] The pertinent portion of the Sentinel opinion was included in Gray's brief (although incorrectly cited as being on page 946 of the opinion).

of TRA in its dealings with Gray, nor any "persistent pattern of conduct" waiving the contractual provisions regarding Change Orders.

Gray's brief states that "TRA allowed Gray time extensions, but payment for the extensions was never given. . ." [Gray's Brief, p. 12]. What payment does Gray expect? It is uncontradicted that in the case *sub judice*, TRA granted all three requests for time extensions made by Gray. [T. 591]. TRA's granting of these time extensions in no way necessitates any "payment" to Gray.

Further, Gray's brief sets forth the argument that paragraph 10 of the contract between Gray and TRA "places the burden squarely upon TRA to issue any written change orders for the project." [Gray's Brief, p. 11]. This argument simply makes no sense. How would TRA, or the owner of any project, be expected to know when a Change Order is necessary without the contractor's prompting? It is obvious that the burden is on the contractor to not do any additional work without being issued a Change Order covering the work. Paragraph 10.3 of the contract between TRA and Gray plainly states that "Additional Work performed by the Contractor without authorization of a Change Order will not entitle him to an increase in the Contract Price or an extension of the Contract Time. . ." [R. 657].

Gray's assertion that TRA waived any contractual provision is wholly defeated by Renee Gray's January 17, 2002 correspondence which states, "Owner requested a change in this item or work during the course of the project and you stated changes to this work would require a Change Order. . . Therefore, Gray is not willing to perform the work defined by item No. 8 without a Change Order." [T. 767; Exhibit P-115]. This letter was drafted toward the end of the project and clearly states that Gray is not willing to perform extra work without obtaining a Change Order. This letter alone invalidates Gray's allegation that it understood all extra work

would be covered under a "final Change Order." Gray's position regarding a waiver of these provisions is contrary to the overwhelming weight of the evidence presented at trial.

B. TRA, as a state agency, is entitled to statutory and common law safeguards.

It is clear that Miss. Code Ann. § 31-7-13 only allows changes or modifications of a contract made by an agency or governing authority if they are "necessary under the circumstances without the necessity of further public bids" and can be "made in a commercially reasonable manner." Miss. Code Ann. § 31-7-13. The statute goes on to state that the architect or engineer hired by an agency or governing authority can "authorize changes or modifications to the original contract without the necessity of prior approval. . . when any such change or modification is less than 1% of the total contract amount." Id. In the case *sub judice*, extra work and delay damages well in excess of 1.3 million dollars are being claimed by Ragland. There has been no showing that these costs are commercially reasonable. Further, these extensive costs could not be agreed to without going through the process of advertising for and accepting public bids. Clearly, these costs are in excess of 1% of the total contract amount at issue and are beyond the discretionary latitude provided for in Section 31-7-13.

Gray attempts to distinguish the authority cited by TRA from the situation presently before this Court, without ever citing any original authority in support of its contrary position. In fact, the same general public policy which prevents a county's Board of Supervisors from being held liable for extra work which was not approved by the Board is controlling in the present case. The Court, in Butler v. Bd. of Supervisors for Hinds County, 659 So. 2d 578 (Miss. 1995), stated clearly that:

> a board of supervisors can contract and render the county liable only by a valid order duly entered upon its minutes, that all persons dealing with a board of supervisors are chargeable with knowledge of this law, that a county is not liable on a *quantum meruit* basis even though it may have made partial payments on a void oral contract, and, moreover, that in such

> case there is no estoppel against the county. Numerous other cases supporting these views are cited in the foregoing authorities, and we are of the opinion that the public interest requires adherence thereto, notwithstanding the fact that in some instances the rule may work an apparent injustice. Butler, 659 So. 2d at 582 (emphasis added).

Gray alleges that it 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. . ." [Gray's Brief, p. 19]. If this is the case, what choice was TRA presented with? According to Gray's logic, TRA, despite its being a governmental agency, has no option other than being liable and paying more than $1.3 million in claimed extra work which it did not approve. Public policy prohibits this. TRA did not even have the ability to approve such additional work without conforming to the bidding requirements set out in Mississippi statutory law.

Mississippi law clearly establishes the need to control spending with regard to public construction projects. Public policy requires that the financial interests of a governmental agency be protected even though sometimes "the rule may work an apparent injustice." No testimony or documentation in the record shows that TRA was aware of or authorized more than $1.3 million of additional work on this project. Therefore, the mere assertion of extra work of the magnitude claimed in the March 1, 2002 claim letter does not create liability on behalf of TRA.

C. Gray is not entitled to recover on its claim for delay damages.

Gray alleges that the compensation it seeks for 89 days of delay between December 5, 2000 and April 5, 2001 does not arise "on account of change orders executed by [Gray]." [Gray's Brief, p. 21]. However, it is clearly set out in Gray's March 1, 2002 claim letter that the delay damages claimed are directly connected with problems arising from the Component C electrical

portion of the project. Gray requested and received Change Order No. 1, which added $195,329.10 to its contract with TRA, as a result of the needed modifications to Component C electrical work. Gray now attempts to recover for delay damages arising from these modifications to Component C electrical work despite express language in the Change Order stating that it constitutes full compensation for all delays related thereto. In fact, two of the minute entries included in Gray's argument for delay damages were from meetings occurring on April 18 and May 3, 2001, well after the December 5, 2000-April 5, 2001 time frame for which Gray is attempting to recover. Gray's argument on this issue simply falls short and its attempt to recover such delay damages should be barred.

In fact, the first time the alleged delay damages from December 5, 2000, and April 5, 2001, were mentioned as being a result of problems with Component C electrical work was the March 1, 2002, claim letter drafted by an attorney on behalf of Gray. The June 18, 2001, letter from Renee Gray, written well after this alleged delay period, only stated that the "electrical portion of the contract has been substantially delayed as a result of unusually severe weather." (emphasis added). [R. 861; P-78]. Renee Gray's complete failure to even mention any problems with Component C electrical work is telling of the lack of legitimacy of this claim.

TRA granted all three requests for time extensions made by Gray during this project. [T. 591]. Mr. Brister even testified that his records indicated that work was progressing through the entire time period for which delay damages are claimed. [T. 975-976]. There was simply no showing that the delay damages claimed by Gray fit into any of the four exceptions under which "no damage for delay" provisions would not be enforced. These "no damages for delay" clauses will generally be enforced absent delay not contemplated by the parties, amounting to abandonment of the contract, caused by bad faith, or amounting to active interference. E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas, 551 F.2d 1026, 1029 (5th Cir. 1977).

Accordingly, the trial court erred in refusing to grant TRA's motion for directed verdict with regard to Gray's claims of delay damages stemming from Component C electrical work for which a Change Order was issued.

D. It was error for the trial court to deny TRA's Motion for Directed Verdict as to Gray's indemnification claim.

It is well settled under Mississippi law that in order for Gray to be entitled to indemnity from TRA, "(1) The damages which the claimant [Gray] 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." Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968) (emphasis added).

In the case *sub judice*, Gray failed to establish either prerequisite. Gray presented no evidence showing any "legal obligation" to pay Ragland for damages during the trial of this matter. Even the trial court acknowledged that "There is no showing of any compulsion that is as a result of a judgment rendered by a Court that would require Gray to do anything." [T. 816].

Just as important was Gray's failure to make the requisite showing that Gray "did not actively or affirmatively participate in the wrong" for which it was seeking indemnity. The jury in this case assessed a verdict against Gray constituting $850,551.32, by far the lion's share of the verdict. Evidence established that Gray failed to properly coordinate work, hindered Ragland's ability to adequately bid on the project, failed to adequately document changes in work, failed to secure written Change Orders, failed to properly perform its own work, failed to have other work performed timely and out of Ragland's way, and failed to handle Ragland's payroll properly. [T. 191, 204, 213, 217, 239, 247, 258, 260, 268]. Gray's improper conduct and misrepresentations are further elaborated on in the Brief of Appellee – Ronald J. Ragland, Sr. [Ragland's December 4, 2006 Brief at p. 21-27, 46-48].

This evidence of wrongdoing alone prevents Gray from receiving indemnity for any judgment it owes Ragland. Simply put, indemnity is founded on fairness. "When 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." Bush v. City of Laurel, 215 So. 2d at 259.[2]

Indemnification has absolutely no application to the matter before this Court. Gray's failure to establish either of the prerequisites necessary to maintain a claim of indemnification is fatal to its claim for such relief. The lower court erred in denying TRA's motion for directed verdict as to Gray's claim for indemnification.

II. TRA's Response to Pertinent Issue Raised in Gray's Cross-Appeal

A. Gray is not entitled to an additur.

It is important to note that Gray's argument regarding whether "Gray is entitled to an additur since there is no justification for the discrepancy between the jury verdicts against Gray and TRA," cites absolutely no authority in support of its position. It is well-settled under Mississippi law that the appellant carries the duty to provide authority for any error claimed. Groves v. Slaton, 733 So. 2d 349 (¶ 15) (Miss. Ct. App. 1999) (citing Drennan v. State, 695 So. 2d 581, 585-86 (Miss. 1997)). Any argument not supported by authority need not be considered. Grey v. Grey, 638 So. 2d 488, 491 (Miss. 1994). Therefore, this Court need not consider Gray's allegation of error stemming from the lower court's refusal to award an additur to Gray's judgment against TRA.

If, however, this Court does elect to give consideration to Gray's additur argument, TRA would show that when reviewing the trial court's decision to deny a motion for an additur, this

[2] In fact, Gray's brief acknowledges the fact that the trial court awarded Ragland attorneys fees based on a finding of bad faith. [Gray's Brief, p. 2].

Court is limited to an abuse of discretion standard. Burge v. Spiers, 856 So. 2d 577, 579 (¶ 6) (Miss. Ct. App. 2003). The burden of proving damages is on the party who seeks the additur. Gaines v. K-Mart Corp., 860 So. 2d 1214, 1220 (¶ 21) (Miss. 2003). The evidence must be reviewed in a light most favorable to the party against the additur and must give that party the benefit of all favorable inferences drawn therefrom. McClatchy Planting Co. v. Harris, 807 So. 2d 1266, 1270 (¶ 16) (Miss. Ct. App. 2001). An additur should be granted with great caution because it signifies "a judicial incursion into the traditional habitat of the jury." Burge, 856 So. 2d at 579-80 (¶ 6) (citing Gibbs v. Banks, 527 So. 2d 658, 659 (Miss. 1988)). A jury award should not be set aside unless "so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." Rodgers v. Pascagoula Pub. Sch. Dist., 611 So. 2d 942, 945 (Miss. 1992).

Gray's argument seeking an additur seems to simply be a rehash of its indemnification argument discussed *supra*. Gray's argument that it "did not have any part in making Ragland's work harder or more costly," was clearly contradicted by the evidence presented at trial. As discussed *supra*, as well as in TRA's original brief, the proof presented at trial showed that Gray delayed Ragland by failing to properly coordinate the work with other subcontractors; hampered Ragland's ability to bid on and work the subject project by only giving him a portion of the project documents (Component C specifications) without the benefit of the other component specifications which indicated the location of other underground utilities; failing to document changes to the work allegedly encountered by Ragland; failing to secure written Change Orders from TRA to cover alleged extra work incurred by Ragland; failing to properly perform its own work in the sub-grade of the site; failing to have other work performed timely to be out of Ragland's way; and failing to handle Ragland's payroll properly. [T. 191, 204, 213, 217, 239, 247, 258, 260, 268] [*See also* Ragland's December 4, 2006 Brief at p. 21-27, 46-48].

Clearly the evidence put forth at trial did not show that TRA was solely responsible for any damages claimed by Ragland. It was well within the province of the jury to determine that Gray was responsible for the greater part of any harm suffered by Ragland. Gray was not entitled to an additur, and the trial court was clearly within the exercise of its discretion in denying such an award.

III. Conclusion

During the trial of the matter *sub judice*, Gray advanced only two theories of recovery against TRA. The evidence at trial clearly demonstrated that these claims for delay damages and indemnification are meritless.

For the reasons set forth herein and in TRA's original brief, the verdict and judgment rendered in the trial court below were wholly unsupported by well-settled Mississippi law as well as the clear provisions in the contract between TRA and Gray.

The trial court's judgment against TRA should be reversed and rendered. The denial of Gray's request for an additur, however, was well within the lower court's discretion and should be upheld.

Respectfully submitted, this the 22nd day of January, 2007.

THE TUPELO REDEVELOPMENT AGENCY

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CERTIFICATE OF SERVICE

I, William D. Prestage, one of the attorneys for Tupelo Redevelopment Agency, do hereby certify that I have this day served a true and correct copy of the above and foregoing Reply Brief of Appellant/Cross-Appellee Tupelo Redevelopment Agency, by depositing it in the United States Mail, properly addressed and first class postage prepaid as follows:

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Dated, this the 22nd day of January, 2007.

William D. Prestage

CERTIFICATE OF FILING

I hereby certify that I have served via first-class, United States mail, postage prepaid, the original and three copies of the Reply Brief of Appellant/Cross-Appellee Tupelo Redevelopment Agency and an electronic diskette containing the same on the 22nd ~~th~~ day of January, 2007, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

William D. Prestage