

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

SUR-REPLY BRIEF OF TUPELO REDEVELOPMENT AGENCY

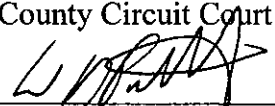
ORAL ARGUMENT REQUESTED

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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



WILLIAM D. PRESTAGE
Attorney of Record for Tupelo
Redevelopment Agency

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ARGUMENT

- I. **Undisputed evidence during the trial of this matter established that the entire amount of the contract price had been paid prior to trial; the only claims at issue were extra-contractual in nature.**

Despite Gray's contention that it was awarded by the jury "virtually all of the money to which Gray claimed that it was entitled," the reality of the situation is that the only damages Gray requested to recover during trial were delay damages, as there were no outstanding contractual claims at the time. Therefore, Gray's award of \$258,118.00 was well in excess of the damages requested. Shawn Gray, during his direct testimony, argued that the amount of delay damages was \$158,757.31.

Q. And is the total amount Gray is claiming for its delay the \$158,757.31?

A. That's correct.

Q. Has that number changed since it was first submitted on March the 1st, 2002?

A. No, it has not.

Shawn Gray Direct, Tr. p. 559.

TRA is aware of no claims, other than indemnification and delay damages, for which Gray presented evidence or requested during the trial of this matter. There were no contractual issues in dispute at the time, as the entire contract amount had been paid. Debbie Brangenberg, who worked as project coordinator for TRA during this project, testified during the trial when asked by Gray's attorney, that despite disagreements over the quality of some work, the entire amount of the contract had been paid to Gray.

Q. Now, you also testified with respect to some disputes that came up at the end of the job with respect to the quality of the work, right?

A. Yes.

Q. It's true, isn't it, that ultimately all of those issues were resolved?

A. They were resolved.

Q. And also when those disputes came up, in fact, Gray disputed some of the issues that TRA had raised, didn't they?

A. Yes.

Q. And in the end, Gray was paid every penny of its retainage on the project, wasn't it?

A. Yes.

Q. So TRA didn't deduct any money as a result of these issues, did they?

A. No.

Debbie Brangenberg – Cross by Kelly, Tr. p. 1099 (emphasis added).

Likewise, Shawn Gray acknowledged that the only live claims Gray had at the time of trial were extra-contractual.

Q. So your claim now and Mr. Ragland's claim is for extra beyond the contract type of damages, correct?

A. We still reserved our rights of the claims that we had filed in that agreement, yes.

Q. Beyond the contract price?

A. Right.

Shawn Gray – Cross by Armistead, Tr. pp. 602-603

In fact, well before trial, the last installment of the retainage was paid to Gray. See Letters from Guy Mitchell and Samuel Kelly, attached to TRA's Motion for Leave to file Sur-Reply Brief as Exhibits "A" and "B" respectively. This was simply a non-issue at trial; hence, Gray never asked for recovery of any retainage at trial.

Therefore, no contractual claims between TRA and Gray enumerated in Gray's claim letter dated March 1, 2002, were at issue at the time of trial. TRA had undisputedly paid the contract price in full and released the entire retainage to Gray prior to trial.

II. Gray's early claims set forth in its pre-lawsuit claim letter were abandoned at trial, as Gray's claim of damages was limited to claims of delay damages and indemnification.

Despite Gray's contention that it claimed entitlement to the \$258,118.00 it was awarded, the fact remains that Samuel Kelly, on behalf of The Gray Corporation, did not request such an amount in his closing argument. There was no request for retainage or "overhead" expenses. The only requests of recovery were \$195,000.00 for delay damages and indemnification of whatever amount the jury awarded Ragland.¹ See Closing Arguments by Mr. Kelly, Tr. pp. 1254-1266, 1281-1289.

TRA wants nothing more than to clarify the record with regard to what was requested by and what was awarded to Gray during the trial of this matter. The truth of the matter is that several of the numerous claims included in the March 1, 2002, claim letter submitted to TRA were nullified prior to this trial through either TRA's payment in full of the retainage, or Gray's decision to not put forth evidence of these claims at trial. Gray's request for damages was for nothing more than \$195,000 in delay damages and indemnification from TRA.

Respectfully submitted, this the 3rd day of May, 2007.

THE TUPELO REDEVELOPMENT AGENCY

By: 

GUY W. MITCHELL, III

MSB # 

WILLIAM G. ARMISTEAD, SR.

MSB # 

WILLIAM D. PRESTAGE

MSB # 

¹ Despite Mr. Kelly's request of \$195,000 for delay damages in his closing argument, the evidence presented at trial through the testimony of Shawn Gray established the amount of delay damages claimed as \$158,757.31.

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CERTIFICATE OF SERVICE

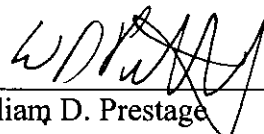
I, William D. Prestage, one of the attorneys for Tupelo Redevelopment Agency, do hereby certify that I have this day served a true and correct copy of the above and foregoing Sur-Reply Brief of Tupelo Redevelopment Agency, by depositing it in the United States Mail, properly addressed and first class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

Thomas W. Prewitt, Esq.
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108 E. Jefferson St.
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Honorable Thomas J. Gardner, III
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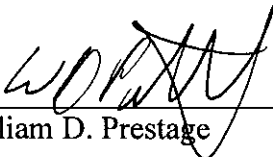
Dated, this the 3rd day of May, 2007.



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 Sur-Reply Brief of Tupelo Redevelopment Agency and an electronic diskette containing the same on the 3rd day of May, 2007, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



William D. Prestage