

**IN THE COURT OF APPEALS 03/26/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00135 COA**

**CITY OF JACKSON, MISSISSIPPI**

**APPELLANT**

**v.**

**HEMPHILL CONSTRUCTION CO., INC.**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT LEWIS GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

JANE E. TUCKER

BETTY MALLETT

ATTORNEYS FOR APPELLEE:

DAVID W. MOCKBEE

MARY ELIZABETH HALL

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: GRANTED APPELLEE'S MOTION FOR SUMMARY  
JUDGMENT

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

Hemphill Construction Co., Inc. (Hemphill) sued the City of Jackson (Jackson) for the sums of \$49,824.14 and \$135,125.64 for additional work which it performed on two contracts for laying sewer lines in South Jackson. From the trial court's granting Hemphill's motion for summary judgment against it, Jackson appeals. Because we find that there were material issues of fact created, first, by the ambiguity within the terms of the two contracts and secondly, by both parties' allegations that the other party breached the terms of the contracts, we reverse and remand.

### **I. Facts**

In the fall of 1989, Jackson solicited bids for the installation of sewer pipe. This project was divided into two parts, each one of which was made the subject of a separate contract. Hemphill submitted bids pursuant to Jackson's solicitation on February 20 and February 27, 1990, and the Jackson City Council accepted Hemphill's two bids. On May 23, 1990, Hemphill and Jackson entered into Contract "D," City Project No. 189.5(D), 54" and 42" Trahan Basin Interceptor Sewer, under the terms of which Hemphill agreed to install sewer pipe from Old Byram Road to Terry Road for an original contract price of \$3,673,820 (Contract "D"). On June 19, 1990, Hemphill and Jackson entered into Contract "E," City Project No. 189.5(E), 54" Trahan Basin Interceptor Sewer, under the terms of which Hemphill agreed to install sewer pipe from the Trahan Waste Water Treatment Plant to Old Byram Road for an original contract price of \$3,965,380 (Contract "E").

On October 31, 1989, before Hemphill had submitted either bid to Jackson, the Occupational Safety and Health Agency (OSHA) published a proposed regulation which would change the standards for trench excavation. This regulation was originally scheduled to become effective on January 2, 1990, almost two months before Hemphill submitted either of its bids to Jackson. However, on December 21, 1989, OSHA postponed the effective date of its new excavation regulations until March 5, 1990. This date, March 5, 1990, was *after* Hemphill submitted its two bids to Jackson. OSHA's new excavation regulation went into effect on March 5, 1990.

On July 1, 1990, Hemphill wrote Jackson's engineer to advise him that OSHA's new trenching standards which had become effective on March 5, 1990 would compel additional construction costs, for which it was entitled to be reimbursed beyond the original contract price. In its letter to the project engineer Hemphill wrote, "Once these costs can be determined, we will respectfully request additional compensation to comply with these new OSHA regulations." Nearly eight months later, on February 19, 1991, after the project had been completed, Hemphill advised the project engineer of the additional costs which the new trenching standards had compelled it to incur. Jackson refused to pay Hemphill these additional costs, so Hemphill sued Jackson to recover them.

As we noted, the trial court granted Hemphill's motion for summary judgment against Jackson. The trial court noted in its summary judgment that it had considered Hemphill's motion for summary

judgment, Jackson's response to Hemphill's motion, the pleadings, the parties' respective affidavits and exhibits, and the testimony of Hemphill's president about the amount of damages preparatory to its granting Hemphill's motion for summary judgment. The trial court then found "that there are no genuine issues of material fact and that Hemphill is entitled to Summary Judgment as a matter of law against the City of Jackson, Mississippi pursuant to Rule 56 of the Mississippi Rules of Civil Procedure." The trial court issued no separate opinion regarding its summary judgment, and the summary judgment contains neither finding of fact nor conclusion of law on which the trial court rested its grant of summary judgment to Hemphill.

In our recitation of the facts and events from which this litigation arose, we omitted reference to the contracts' provisions in order to analyze and evaluate them in relation to Hemphill's and Jackson's arguments on the one issue with which Jackson raises in its appeal for this Court to decide.

## **II. Issue and the Law**

The question for this Court to resolve is whether the trial court erred when it awarded Hemphill summary judgment against Jackson. In its brief, Jackson fashions the issue as follows:

The trial court erred in granting summary judgment for Hemphill Construction Co. The unambiguous terms of the contract spelled out the provisions for obtaining a change in the contract price and it was clear that Hemphill Construction Co. did not comply with those provisions.

### **A. Jackson's Argument:**

Jackson's brief contains the following summary of its argument:

Both of the contracts at issue in this case contained definite prices for which the contracted-for work was to be done. The contracts also spelled out a specific procedure by which that price could be changed. Under that procedure, no change in the contract price could be had unless the contractor notified the City of Jackson in writing of the need for the change and the City authorized such via a change order. Hemphill Construction Co. did not comply with the contracts' provisions for obtaining a change in the contract price. Therefore, under the unambiguous terms of the contracts, Hemphill Construction was not entitled to compensation over and above that authorized under the original contracts. Therefore, the trial court's grant of summary judgment for Hemphill Construction Co. was erroneous as a matter of law.

### **B. Hemphill's Response:**

In its brief, Hemphill counters Jackson's argument with the following summary of its argument:

First the City, by drafting its Contracts to require bidders to base their bids upon OSHA trench standards in effect as of the dates of the bid openings, received the benefit of the lower bid prices while assuming the risk and responsibility that new OSHA standards might become effective during the life of the Contracts and thus increase the costs to perform the Contracts.

Second, since Hemphill complied with the terms of the Contracts for obtaining Contract price increases, the City was likewise required by the Contracts to issue "appropriate Modification[s]," increasing the Contract prices and the City cannot take advantage of the fact that it has failed and refused to fulfill its obligations under the Contracts to issue "appropriate Modification[s]" to avoid its responsibility.

In short, while Hemphill fulfilled all of its obligations under the Contracts, the City did not. Thus, the City's failure to issue "appropriate Modification[s]" as required by both Contracts cannot now be used by the City to avoid its contractual obligations to pay Hemphill for the additional costs incurred by it to comply with the post-bid changes in the OSHA trench excavation standards.

### **C. Standard of review for summary judgments**

Rule 56 (c) of the Mississippi Rules of Civil Procedure provides:

The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

M. R. C. P. 56(c).

The burden of proving by production rather than by persuasion that no genuine issues of material fact exist is borne by the movant. *Newell v. Hinton*, 556 So. 2d 1037, 1041-42 (Miss. 1990); *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990); *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198 (Miss. 1988). As an appellate court we approach the issue of the propriety of the granting of summary judgment on a *de novo* basis. The Mississippi Supreme Court elaborated on the concept of a *de novo* approach to the issue of whether a trial court erred when it granted summary judgment in *Seymore v. Brunswick Corp.*, 655 So. 2d 892, 894-95 (Miss. 1995):

We employ a *de novo* standard of review in reviewing a lower court's grant of summary judgment. Thus, we use the same standard that was used in the trial court. We must review all evidentiary matters before us in the record: affidavits, depositions, admissions, interrogatories, etc. The evidence must be viewed in the light most favorable to the nonmoving party who is to be given the benefit of every reasonable doubt. The burden of demonstrating that no genuine issue of material fact exists is on the moving party. However, this burden on the moving party is one of production and persuasion, not of proof. A motion for summary judgment lies only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. This Court does not try issues on a rule 56 motion, it only determines whether there are issues to be tried. In reaching this determination, this Court examines affidavits and other evidence to determine whether a triable issue exists, rather than for the purpose of resolving that issue.

#### **D. Analysis and Resolution of the Law as it relates to this Issue Consistent With the Standard of Review**

Jackson argues that it owed Hemphill no increase in the price for completing the two contracts because Hemphill did not comply with Article 11.2 of the General Conditions of both contracts. Article 11.2 provides:

The Contract Price may only be changed by a Change Order. Any claim for an increase in the Contract Price shall be based on written notice delivered to OWNER and ENGINEER within fifteen days of the occurrence of the event giving rise to the claim. Notice of the amount of the claim with supporting data shall be delivered within forty five days of such occurrence unless the ENGINEER allows an additional period of time to ascertain accurate cost data. All claims for adjustment in the Contract Price shall be determined by ENGINEER if OWNER and CONTRACTOR cannot otherwise agree on the amount involved. Any change in the Contract Price resulting from any such claim shall be incorporated in a change order.

Article 1.1A.8 of the General Conditions of both contracts defined "change order" as:

A written order to CONTRACTOR signed by OWNER authorizing an addition, deletion, or revision in the Work, or an adjustment in the Contract Price or the Contract Time issued after the Effective Date of the Agreement.

The OSHA regulation which changed the standards for trench excavations became effective on March 5, 1990, after Hemphill had submitted its bids to Jackson on February 20 and 27, 1990.

Jackson argues that pursuant to Article 11.2 of both contracts, Hemphill had until March 20, 1990, to deliver to both OWNER and ENGINEER a written notice of its claim for an increase in the Contract Price which the change in the standards for trench excavation caused. Hemphill waited until July 1, 1990 to write Jackson's engineer to advise him that OSHA's new trenching standards would compel additional construction costs, for which it was entitled to reimbursement in addition to the original contract price. Almost eight more months passed before Hemphill advised the project engineer on February 19, 1991 of the additional costs which the new trenching standards had compelled it to incur. The project had been completed by that date.

To summarize Jackson's argument, Hemphill is entitled to no contract price increase because it breached the contracts in three ways. First, it failed to notify both Jackson as owner and Jackson's project engineer of the increase in Contract Price to which it claimed to be entitled because of OSHA's change in specifications for excavating trenches. Second, it did not notify anybody of its claim for an increase in the Contract Price until July 1, 1990, and this date was much more than fifteen days after the day on which the cause for the price increase had occurred, March 5, 1990. Third, Hemphill did not notify Jackson of the amount of its claim until nearly eight months after July 1, 1990, the date on which Hemphill notified Jackson of its claim for the increase in the Contract Price. Article 11.2 of the General Conditions required Hemphill to give that notice within forty five days of the date of notification "unless ENGINEER allows an additional period of time to ascertain accurate cost data." Hemphill does not claim that the project engineer gave it any extra time to ascertain accurate cost data.

Hemphill counters Jackson's argument on this issue by relying on and asserting different provisions in the two contracts. Hemphill begins its argument by asserting that because Jackson directed it to base its bids for both contracts upon OSHA standards "in effect at the time of opening of bids, Jackson received the benefit of lower bid prices but concomitantly assumed the risk and responsibility that new OSHA standards would become effective during the life of the two contracts and that Hemphill would incur additional costs to comply with such new standards." The relevant part of Article 3.1.E of the General Provisions contained in both contracts, on which Hemphill rests this part of its argument, reads as follows:

Reference to standard specifications, manuals, or codes of any technical society, organization or association, or to the code of any governmental authority, whether such references be specific or by implication, shall mean the latest standard specification, manual or code in effect at the time of opening of bids . . . ."

Hemphill continues its argument on this issue by asserting that it complied with the contracts' procedures for its obtaining Contract Price increases. It rests this part of its argument on its interpretation of Article 6.7.A. of the contracts' General Provisions. Article 6.7.A. provides:

If CONTRACTOR observes that the Specifications or Drawings are at variance therewith, CONTRACTOR shall give ENGINEER prompt written notice thereof, and any necessary changes shall be adjusted by an appropriate Modification. If CONTRACTOR performs any Work knowing or having reason to know that it is contrary to such laws, ordinances, rules, and regulations, and without such notice to ENGINEER, CONTRACTOR shall

bear all costs arising therefrom; however, it shall not be CONTRACTOR'S primary responsibility to make certain that the Specifications and Drawings are in accordance with such laws, ordinances, rules and regulations.

Hemphill then reminds this Court that Article 1.1.A.20 of the contracts' General Provisions defines "Modifications" as:

(a) A written amendment of the Contract Documents signed by both parties, (b) a Change Order, or (c) a Field Order.

Therefore, a "modification" required by Article 6.7.A includes a "change order" under Article 11.2 of the General Provisions. We quote from Hemphill's brief: "In fact, Article 11.2 necessarily implicitly incorporates Article 6.7.A by reference as a basis for the issuance of a change order. Otherwise, Article 6.7.A has no meaning and no validity." Hemphill concludes that "[n]otice to the Engineer in express compliance with Article 6.7.A was necessarily sufficient notice under Article 11.2. entitling Hemphill to compensation for its additional costs by the issuance of 'appropriate Modification[s].'" To Hemphill it seems inescapable that Article 11.2 mandated that Jackson issue change orders following written notice of Hemphill's claims and written notice of the amounts of the claims. Hemphill contends that its written notices of July 1, 1990 and February 19, 1991 were timely. If those notices were timely, then Jackson breached the contracts by failing to issue change orders, which were included within the definition of "appropriate Modification." Jackson disputes that contention as we previously noted.

We summarize our understanding of Hemphill's analysis of this issue as follows:

FIRST, the change in OSHA's March 5, 1990, standards for trench excavations required a change in the contracts' specifications pursuant to Article 6.7.A.

SECOND, Hemphill gave proper notice of that change to the engineer pursuant to Article 6.7.A.

THIRD, Jackson had no alternative but to issue a change order.

In *Brown v. Hartford Insurance Company*, 606 So. 2d 122, 126 (Miss. 1992), the Mississippi Supreme Court instructed the bench and bar that "[w]hen construing a contract, we read the contract as a whole, so as to give effect to all of its clauses." (citations omitted). Our initial task is to give effect to all of the clauses, or provisions, of these two contracts, if we can. If we find that we cannot give effect to all of the provisions because of irreconcilable conflict among them, then we may consider whether some of the provisions are sufficiently specific to control over more general

provisions. However, in *Williams v. Batson*, 186 Miss. 248, 187 So 2d 236, 239 (1939), the Mississippi Supreme Court stated that "[t]he principal that specific provisions control over general provisions [can] . . . be invoked only when necessary to make clear that which is doubtful."

With these maxims of interpretation of contracts in mind, we initiate our consideration of Hemphill's argument as we earlier analyzed it that the trial court did not err when it granted summary judgment for it and against Jackson. This Court agrees with the first phase of Hemphill's argument, *i.e.*, that the change in OSHA's March 5, 1990, standards for trench excavations required a change in the contracts' specifications. It is on the second and third phase of Hemphill's argument that we pause for detailed analysis and thorough review.

Article 6.7.A., on which Hemphill bases the second phase of its argument requires that it give Jackson's engineer "*prompt* written notice" of a variance between the contract and the specifications or drawings. The change in OSHA's regulations occurred on March 5, 1990, but it was not until July 1, 1990, or 117 days later, that Hemphill notified Jackson of the change. Was this notice timely under the circumstances, especially when Article 11.2 required Hemphill to give Jackson notice of a claim for an increase in the contract price "within fifteen days of the event giving rise to the claim? This Court finds that whether Hemphill's July 1 notice of the change in specifications was "prompt" was a question of fact about which there was a material issue. To say the very least, the appropriate meaning of the word 'prompt' as it was used in Article 6.7.A. was ambiguous.

The third phase of Hemphill's argument presents an even clearer material issue of fact. Jackson had issued no change order in response to Hemphill's July 1 notice to the engineer. Without the issuance of a change order, an issue of fact of whether the engineer agreed that there was a variance between the contract and its specifications remains. That issue of fact is material to whether Hemphill was in fact entitled to an increase in the contract price pursuant to Article 11.2. Finally, there remains an issue of whether Hemphill can unilaterally increase the contract price by proceeding to excavate the trenches in accordance with OSHA's change in standards for trench excavation. For example, Jackson always had the option of canceling the two projects and negotiating a settlement with Hemphill for the value of the work that it had already accomplished on a *quantum meruit* basis. This option alone presented issues of fact which were material to whether Hemphill was entitled to an increase in the contract price under either contract.

Article 10.3 provides that additional work which is done without a work order does not entitle Hemphill to an increase in the contract price. Yet Hemphill proceeded to perform the additional work of excavating the trenches for the sewer pipe without first having obtained a change order from Jackson. Article 6.7.A. required that "any necessary changes shall be adjusted by an appropriate Modification." We previously noted that Article 1.1.A.20 of the contracts' General Provisions defines "Modifications" as:

- (a) A written amendment of the Contract Documents signed by both parties, (b) a Change Order, or (c) a Field Order.

From the state of the record, we can only conclude that as applied to the facts and events in this case, Article 6.7.A. becomes ambiguous. Jackson's failure to issue a change order to comport with

OSHA's change in standard's for trench excavation may have been a breach of these two contracts. On the other hand, Hemphill's failure to wait for Jackson to issue a change order may have amounted to nothing more than its assumption of a contract risk. We are, after all, unable to give effect to all of the provisions of these two contracts because of the ambiguity which we have found in the application of Article 6.7.A. to the facts and events in this case.

In *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So. 2d 1355 (Miss. 1989), the supreme court contended with the issue of whether the trial judge was correct in awarding judgment to a materials supplier, Sheppard Building Supply, Inc., against the owner of an apartment complex, Kight, into the construction of which its building supplies had gone. *Id.* at 1356. The general contractor, Britt, had not paid Sheppard; but he and Kight had executed an agreement by which they agreed that Kight would pay Britt's suppliers directly from the proceeds of the contract to build the apartment complex as Britt earned them. *Id.* at 1357. The supreme court noted that the problem with the agreement was that it did not state either the amount Kight was to pay Britt's sub-contractors who were listed in the agreement or the duration of their agreement. *Id.* The supreme court affirmed the judgment against Kight, owner of the recently constructed complex. *Id.* at 1359. That court noted, "[a]s regards our standard of appellate review, the interpretation of an ambiguous writing by resort to extrinsic evidence presents a question of fact. *Dennis v. Searle*, 457 So. 2d 941, 945 (Miss. 1984)." *Id.* at 1358.

In *Dennis v. Searle*, 457 So. 2d 941, 947 (Miss. 1984), the Mississippi Supreme Court reversed in part the chancellor's grant of summary judgment for the vendors of a home damaged by termite infestation in a case which involved the interpretation of the contract for the sale of the home. The supreme court stated:

Where a contract is clear and unambiguous, its meaning and effect are matters of law which may be determined by the court. On the other hand, where the contract is ambiguous and its meaning uncertain, *questions of fact are presented which are to be resolved by the trier of the facts after plenary trial on the merits.*

*Id.* at 945 (emphasis added).

From our consideration and analysis of Jackson's and Hemphill's arguments on the issue of whether the trial court erred when it granted Hemphill's motion for summary judgment, we have found ambiguity in the application of Article 6.7.A. to the facts and events of this case. Thus, we conclude that there are material issues of fact which can only be resolved by the trier of the facts, i.e., a jury, "after plenary trial on the merits."

Hemphill cites three decisions of the Board of Contract Appeals, a federal entity, which, it asserts, is appropriate precedent for its contention that the trial court did not err when it entered summary judgment. This court has considered these opinions, but it remains unpersuaded that it should adopt them as authoritative on the issue at hand. These opinions involve disputes between agencies of the federal government with their contractors. They appear to apply laws from other jurisdictions and

federal administrative principles, but not Mississippi law. In *Griffith v. Gulf Refining Co.*, 215 Miss. 15, 61 So. 2d 306 (1952), the vanquished appellee filed a petition for rehearing in which it urged the Mississippi Supreme Court to rely on decisions rendered by appellate courts in other states to reverse its decision favorable to the appellant. In response to the petition for rehearing, the supreme court wrote:

It is our conception that we are free to decide for ourselves all questions arising under the common law or under the statutory provisions of this state, that we are not bound by the decisions of courts of other jurisdictions on similar questions, that it is proper for us to consider them and that we may follow them only if we are satisfied of the soundness of the reasoning by which they are supported. Such decisions may have persuasive authority and we may still refuse to follow them if opposed to the public policy of this state. They may be entitled to respectful consideration if well reasoned and are promotive of justice, but they are not technically of force as precedents and we are at perfect liberty to disregard them.

*Griffith*, 61 So. 2d at 307 (citations omitted). We find in the case *sub judice* that Mississippi cases are adequate precedent on which to rest our conclusion that the trial court erred when it entered summary judgment for Hemphill.

### **III. Conclusion**

This Court does not try issues on a rule 56 motion, it only determines whether there are issues to be tried. Hemphill argues in its brief that Jackson breached the contracts, and Jackson argues that Hemphill also breached the contracts. We have noted the ambiguity in Article 6.7.A. of both contracts which the events and facts in this case created. The Mississippi Supreme Court has clearly held that matters of are questions of fact to be resolved by the fact finder, which in this case is a jury. Because we find that there are material issues of fact which were created by ambiguity in the terms and provisions of the contracts, we conclude that the trial court erred when it entered summary judgment for Hemphill. We therefore reverse and remand the summary judgment for Hemphill.

**THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND REMANDED. COSTS ARE ASSESSED TO APPELLEE.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**