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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

C&C Plumbing and Heating, LLP,

Plaintiff and Appellee,

v.

Williams County, North Dakota,

Defendant, Third-Party Plaintiff, and Appellee,

v.

American General Contractors, Inc.,

Third-Party Defendant, Fourth-Party Plaintiff, and Appellant,

v.

Davis Masonry, Inc.

Fourth-Party Defendant, Fifth-Party Plaintiff, and Appellee,

v.

Parsons Commercial Technology Group, Inc.

Fifth Party Defendant, and Appellee.

Supreme Court No. 20130297
Williams County No. 09-cv-0179

BRIEF OF FOURTH-PARTY DEFENDANT/FIFTH PARTY PLAINTIFF/ APPELLEE DAVIS MASONRY, INC.

Appeal from Judgment of Williams County District Court
Dated September 11, 2013

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STATEMENT OF ISSUES

[1] (1) Did the trial court err in its apportioning of the obligation for payment between the County and AGC of the claims of Davis Masonry, Inc. (Davis) on the Williams County Law Enforcement Center Addition Project (LEC) in Williston, North Dakota as follows: Williams County (County) – 47% - and American General Contractors, Inc. (AGC) – 53% thus entitling Davis judgment against AGC for $63,070.20?

[2] (2) Did the trial court err in determining that AGC was not entitled to any offsets against its acknowledged obligation to Davis of $96,771.20?

[3] (3) Can AGC raise, for the first time on appeal, a question of an award to Davis of its claim against the County and AGC for prompt payment interest by AGC?

[4] (4) Did the trial court err in denying AGC's specific claimed offset for fire stopping when AGC represented to Davis that there was no fire stopping on the LEC pertaining to masonry?

STATEMENT OF THE CASE

[5] This case is an appeal by AGC of a number of issues which arise out of the construction of the LEC. The case was initiated by C & C Plumbing and Heating, LLP (C & C) against the County. The County in turn initiated a claim against AGC. AGC in turn counterclaimed against the County and initiated a claim against Davis. Davis responded with claims against both the County and AGC.

[6] The case was tried to the court on a bench trial, The Honorable William W. McLees, in 3 separate trial sections (May 29 – June 1, June 25 – June 29 and July 9 – July 11, 2012 for a total of 12 trial days, with 3294 pages of testimony and hundreds of pages of documents received into evidence. There were also a number of summary judgment motions including extensive briefing and submitting hundreds of pages of exhibits just to the motions.

[7] The court issued its 94 page opinion and order for judgment on July 19, 2013. Judgment was entered on September 11, 2013.

[8] AGC has appealed (as to Davis) a portion of the award in favor of Davis directly from AGC. AGC has NOT appealed the amount due Davis on the original contract with AGC in the amount of $96,771.20 BUT has appealed the trial court's denial of certain offsets denied by the trial court.

[9] AGC is also appealing (as to Davis) an award of money (53% of $119,000 = $63,070.20) from AGC to Davis for extra work done per FCA #30 and the apportionment of costs applying a 47% / 53% allocation between the County and AGC.

[10] AGC has also appealed the award from the County to AGC for issues UNRELATED to Davis.

STATEMENT OF FACTS

[11] The County determined to build an addition to the Williams County Courthouse in 2006. This addition project was referred to as the Williams County Law Enforcement Center Project (herein LEC). The overall cost of the project was in excess of $17,000,000.00. (App. p. 194, ¶1 and Tr. V. I, p. 209, l. 16 – 24)

[12] The County hired 3D/International, Inc. as construction manager for the LEC. Parsons Commercial Technology Group, Inc. assumed 3D's role as construction manager. (Tr. V. I, p. 30, l. 15 - p. 33, l. 4)

[13] Construction manager projects do not have a general contractor with any number of subcontractors working for the general contractor but instead are broken down into "prime" contracts under the direction and supervision of the construction manager. There were 28 prime contracts for the LEC. (Id. and Tr. V. I, p. 34, l. 22-25)

[14] AGC bid on 5 of the prime contracts for the LEC and were awarded all 5 contracts it bid on for a total of about $3,700,000. (Tr. V. 1, p. 36, l. 17-25)

[15] One of the prime contracts bid by AGC was masonry for $1,421,600. (Id.)

[16] AGC, through Pius Scheer president and 75% owner of AGC, solicited a bid from Davis for the masonry contract. (Tr. V. X, p. 2638, l. 3 – 11 and V. X, p. 2646, l. 12 - p. 2648, l. 7)

[17] Davis submitted a bid to AGC for the masonry and specifically excluded certain work and expenses. The Davis bid and accepted by AGC contained the following exclusions: *"Exclusions, heating and covering, sheltering ... mortar or grout testing ..."* and these exclusions are acknowledged by AGC. (Trial Exhibit #2203, Tr. V. IV, p. 1102, l. 13 - p.1104, l. 18, and V. V, p. 1296, l. 10 – 25)

[18] Davis entered into a Standard Form Subcontract with AGC on March 12, 2007 which incorporated Davis' bid proposal and acceptance by AGC. (Trial Exhibit # 2203)

[19] AGC did not incorporate Davis exclusions into its acceptance of the masonry contract for the LEC with the County and in fact was contractually bound to pay for heat and shelter of the work until building enclosure. (Trial Exhibit # 1005)

[20] The contract documents signed by AGC for the LEC include a provision that the contractor (AGC) is responsible for heat and shelter to protect its work until the building is substantially enclosed. (Tr. V. V, p. 1182, l. 13 - p. 1183, l. 4)

[21] The LEC was fraught with delays from the onset ultimately resulting in a 6 month delay in getting the building enclosed and 7 ½ month delay in completion. The LEC was originally supposed to be enclosed by August 15, 2008 but did not get enclosed until February 19, 2009. (App. p. 196, ¶9)

[22] The fault or cause of those delays is important if not critical to the case but the claims and counterclaims also included number of issues pertaining to offsets claimed by the County and by AGC. (See, Opinion of the Court App. p. 193 – 286)

[23] Neither the County nor AGC faulted Davis for any of the delays on the LEC. (Tr. V. VI, p. 1050, l. 3 – 14 (AGC) and V. XII, p. 3182, l. 22 - p. 3183, l. 2)

[24] The trial court determined that the project was delayed 6 months to building enclosure and that a portion of those delays were inherent in the construction industry (4 months at the very beginning of the contract) and the remaining delays were apportioned to the County (47%) and AGC (53%) and not inherent in the construction industry. (App. p. 234, 274 – 75, ¶78, ¶152, and ¶160)

[25] Davis began laying block ("masonry" is block laying (Tr. V. IV, p. 946, l. 6 - 17)) on August 28, 2007 (instead of April 15, 2007 as anticipated) (Tr. IV, p. 950, l. 24 – p. 951, l. 4) and finished on July 21, 2008. (App. p. 284, ¶186)

[26] On November 2, 2007 it became apparent that the LEC would not be enclosed before the weather turned cold. Block and mortar must be kept above freezing before it is placed, while it is being placed and for a period of at least 7 days to "cure" after placed. (Tr. V. IV, p. 952, l. 5 - p. 954, l. 7)

[27] On November 2, 2007 Davis reported the upcoming need for winter "heating and covering and sheltering" to AGC and that Davis had excluded that from its bid and to inquire as to whether AGC was going to cover that cost. AGC told Davis that AGC would not cover winter heating and covering and sheltering. (Tr. V. IV, p. 954, l. 8 – p. 956, l. 2)

[28] Davis then informed the construction manager (Parsons) and agent for the County of the need for heating and covering and sheltering of its work. (Tr. V. IV, p. 956, l. 16 – p. 957, l. 19)

[29] Davis informed AGC and the County that Davis would not work in cold weather conditions without assurances of being paid for the costs of heating and covering and sheltering. (Id.)

[30] Parsons then, with the express consent of the County, entered into Field Change Authorization #30 (FCA #30) directly with Davis to cover the costs of heating and covering and sheltering of the masonry work and materials. (Tr. V. XII, p. 3257, l. 21 – p. 3257, l. 16)

[31] The County stated in FCA #30 as follows:

> DESCRIPTION OF CHANGE
>
> Provide material and labor for temporary shelter and heat of masonry work to comply with cold weather protective requirements per specifications.
>
> Temperatures are in the 20's and 30's
>
> REASON FOR CHANGE
>
> American General's failure to supply temporary shelter and heat for masonry enclosure due to low temps. Cost will be billed back to American General.
>
> (Trial Exhibit # 1007A)

[32] Davis completed its masonry work including providing heat and cover and shelter. The masonry work was inspected, approved and accepted by the County and Davis work was supported by documentation. (Tr. V, VI, p. 959, l.3 – p. 961, l. 9, Trial Exhibit # 1035)

[33] Davis presented its billing for FCA #30 and the County refused to pay contending that the obligation for this cost was on AGC. (Tr. V. XII, p. 3149, l. 21 – p. 3150, l. 23)

[34] The total of the heat and cover and shelter under FCA #30 plus the Prompt Payment Interest statute (N.D.C.C. §§ 13-01.1-01 & 05) brought Davis claim under FCA #30 to $649,000. (Trial Exhibit # 1033 and Tr. V. XII, p. 3164, l. 16 - p. 3165, l. 9)

[35] Davis settled a portion of its claim against the County but not AGC and not for the full measure of its damages. The settlement was with reservation to present the remainder to the trial court. The County paid $530,000.00 out of $649,000.00 due with a proviso that the County and Davis would present the claims under FCA #30 to the court

for determination with an allocation of recovery (if any) of the first $530,000.00 to the County and the remainder $119,000.00 to Davis. (Id.)

[36] The trial court, applying a 47%/53% allocation of cause for delays and contract provisions requiring AGC to provide heat and shelter and covering for its work (AGC held the masonry contract but Davis did the work), awarded Davis 53% of the claimed $119,000 to Davis from AGC which comes to $63,070.00 plus interest. (App. p. 284 – 85, ¶¶ 187 – 188) AGC has appealed this determination.

[37] Apart from and in addition to Davis' claims under FCA #30, Davis was not paid the full amount due under its subcontract with AGC and for masonry work done, inspected and accepted by the County. That sum is $96,475.20. (Tr. V. XII, p. 3147, l. 21 - p. 3149, l. 6 and Trial Exhibit # 1035)

[38] AGC DOES NOT dispute that Davis has done the work and that work has been accepted totaling $96,475.20. AGC is claiming certain offsets against that amount and refused to pay Davis. (Tr. V. XI, p. 2988, l. 11 – p. 2989, l. 5)

[39] Davis testified that it should not be denied a grout revision for $5,084.00 (a portion of the claim for $96,475.20) because Davis was not informed of a contract revision until AFTER Davis had done $5,084.00 of work. (Tr. V. XII, p. 3148, l. 2 – p. 3149, l. 6)

[40] Davis disputed each item of offset claimed by AGC and testified as to each one as not being a proper or valid offset against the amounts due Davis. (Tr. V. XII, p. 3151 – p. 3162, l. 6) Stating that ALL back charges (offsets) claimed by the County and in turn advanced by AGC were disputed. (Tr. V. XII, p. 3162, l. 7 – l. 11)

[41] Davis also disputed and offered testimony as to why each of the additional items of offset being claimed directly by AGC are disputed. (Tr. V. XII, p. 3162, l. 12 – p. 3164, l. 15)

[42] The trial court did not accept AGC's claims for offsets as to Davis. In essence the trial court found that those offsets are at issue between the County and AGC and in turn applied the 47%/53% allocation and of the remaining amount due for heat and shelter and covering. However, as to Davis the trial court denied any other offsets to AGC. (App. p. 282 – 284, ¶¶183-185)

[43] As to fire stopping (a claimed offset by AGC and separate appeal item) Davis spoke with Pius Scheer who is the president and 75% owner of AGC. Pius Scheer handled the bids and in particular handled all pre-bid contact with Davis. (Tr. V. XII, p. 3162, l. 12 – p.3163, l. 6)

[44] Prior to submitting his bid, Davis spoke to Pius Scheer about fire stopping. Davis specifically asked and was informed by Pius Scheer that there was NO fire stopping on the LEC. There was no need to exclude fire stopping on the LEC as far as Davis was concerned since there was not going to be any. (Id.)

[45] Despite the fact that the assignment of claim was introduced as an exhibit at trial (Trial Exhibit # 1033) and covered in testimony (Tr. V. IV, p. 984, l. 22 – p. 985, l. 3) and discussed by counsel (Tr. V. IV, p. 1128, l. 7 – 24) and throughout the 3200 pages of testimony, hundreds of pages of exhibits, briefing for dozens of motions (AGC filed nine (9) briefs with the court) and through the judgment and motion to challenge the judgment, NOT ONE SINGLE TIME did AGC challenge the interest amount agreed to by Davis and the County for FCA #30 nor did AGC raise the specter of a challenge to the

interest amount. For the very first time, and now on appeal, AGC questions its obligation to pay the portion of the FCA #30 award attributed to interest.

[46] Also, AGC has, for the very first time on appeal, raised the parol evidence rule and the statute of frauds (N.D.C.C. § 9-06-07) as a basis to support its claim for the fire stopping offset. (Fire stopping testimony found at Tr. V. XII, p. 3162, l. 12 – p. 3163, l. 6)

STANDARD OF REVIEW

[47] "The findings of the district court (at a bench trial) will not be reversed unless they are clearly erroneous." Smith Enters. Inc. v. In-Touch Phone Cards, Inc. 2004 ND 169, ¶13, 685 N.W. 2d 741 citing Tallackson Potato Co., Inc v. MTK Potato Co., 278 N.W. 2d 417, 422 (N.D. 1979); N.D.R.Civ.P. 52(a). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made." Moen v. Thomas, 2001 ND 95, ¶19, 627 N.W. 2d 146. "On appeal, the trial court's findings of fact are presumed to be correct, and the complaining party bears the burden of demonstrating a finding is clearly erroneous." Id. "At a bench trial, the trial judge weighs the credibility of the evidence." Id. at ¶20 "We give due regard to the trial court's opportunity to assess the credibility of the witnesses and the court's choice between two permissible views of the evidence is not clearly erroneous." Id. Curtis Const. Co., v. American Steel Span, Inc. 2005 ND 218, ¶13, 707 N.W. 2d 68.

[48] N.D.R.Civ.P. 52(a)(6) states: "Findings of fact, including findings in juvenile matters, whether based on or oral or other evidence, must not be set aside unless clearly

erroneous, and the reviewing court must give due regard to the trial courts' opportunity to judge the witnesses' credibility." With the Explanatory Note to 52(a) stating: "A choice between two permissible views of the evidence is not clearly erroneous when the trial courts' findings are based either on physical or documentary evidence, or on inferences from other facts, or on credibility determinations. Prior decisions of the supreme court to the contrary are to be disregarded." (Id.)

[49] The standard of review for an appeal from a bench trial is well-established and just recently reiterated in Forbes Equity Exchange, Inc., v. Jensen, 2014 ND 11, ¶8.

LAW AND ARGUMENT

INTRODUCTION

[50] The district court, at a bench trial, found that the County entered into 28 different bid divisions or prime contracts including a separate bid from AGC for masonry which in turn had been bid to AGC by Davis. (App. p. 195, ¶¶ 4 and 5)

[51] The district court also found that there was a "milestone schedule" which included a substantial completion date of August 15, 2007 for "building enclosure and roofing". (App. p. 196, ¶8)

[52] The district court also found that:

> Unfortunately for all those involved with the construction of the LEC, things did not go at all as planned, and "Building Enclosure and Roofing" was not achieved until February 15, 2008, with "Substantial Completion" of the LEC having been accomplished on February 19, 2009. This works out to six (6) months of delay in achieving "Building Enclosure and Roofing", and seven and one-half (7 ½) months of delay in accomplishing "Substantial Completion" of the LEC. (App. p. 196, ¶9)

[53] The district court heard volumes of testimony, received a great volume of documents, and considered a number of motions all focused on the reasons for the delays on the LEC. (Summarized by trial court in Opinion of the Court, App. p. 193 - 286)

[54] The district court found that the reasons for the delay and obligations were essentially three-fold: (1) "delays inherent in the construction industry"; (2) the County, through its agent Parsons, for "active interference" with the contractors; and (3) AGC for errors in its work, insufficient manpower and other matters and contract obligations (specifically requiring AGC to provide temporary shelter and heat in its contracts with the County). (App. p. 273-4, ¶157.)

[55] The district court found factoring in all the elements of delay and causes therefore as well as AGC's contract obligations to protect its work (including masonry) that:

> Accordingly, and recognizing the total amount of delay on this project was approximately seven and one-half (7½) months, of which approximately four (4) months was "delay inherent in the construction industry" and the other approximately three and one-half (3½) months was largely attributable to Parsons' usurpation of Arnco's (Arnco Diversified, Inc. another AGC subcontractor) exclusive authority to control the means and methods of steel erection on this project, the Court deems it appropriate to require the County and AGC to *share* the responsibility for providing temporary shelter and heat on this project----with AGC being required to pick up fifty-three percent (53%) of the "tab" (for temporary shelter and heat), and the County (Williams) forty-seven percent (47%) (i.e., four (4) months ÷ seven and one-half [7½] months = .47." (App. p. 274 -75, ¶160)

[56] The district court specifically addressed the "additional" costs (offsets) claimed by AGC against Davis including the fire stopping and found the claims of AGC that:

> [AGC's claim against] Davis to assume responsibility for payment of these "additional" costs is <u>not</u> supported by the greater weight of the evidence." <u>See</u>, Davis post trial brief p. 12 and 13 addressing fire stopping – not included in contract; frame installation – not part of masonry contract; and winterization - EXCLUDED from Davis contract but

> INCLUDED in AGC contract.) (Emphasis by the court) (App. p. 283, ¶185)

[57] The district court then found:

> The end result is the amount previously determined by this Court to be due and owing (from AGC to Davis) in connection with the subcontract between AGC and Davis (i.e., $96,771.20 – See February 2, 2012 Letter Opinion, at page 14) will not be reduced by any offsets claimed by AGC. Accordingly, AGC owes Davis $96,771.20 in connection with AGC's subcontract with Davis, plus prejudgment interest at the legal rate of 6% per annum from the date Davis completed its work under this subcontract, July 21, 2008. (App. p. 283 – 4, ¶186)

[58] The district court rejected all of AGC's claimed offsets against the original subcontract between Davis and AGC as not supported by the evidence. (App. p. 283, ¶¶184 and 185)

[59] The district court also specifically addressed the unpaid amounts from the assignment of claim pursuant to the settlement with the County and held:

> While the evidence indicates that Davis has not been fully compensated for the work it performed under FCA #30 (i.e., it is "short" by $119,000.00) it is clear (from the Assignment of Claim executed by the County and Davis) Davis agreed to accept the sum of $530,000.00 from the County in full satisfaction of that entity's payment obligation under FCA #30. While the Assignment of Claim provides the first $530,000.00 in damages awarded in relation to FCA #30 is to be paid to the County, and the next $119,000.00 is to be paid directly to Davis, the Court has determined AGC is responsible for just fifty-three percent (53%) of the total cost (of FCA #30) (i.e., $649,000.00 X .53 = $343,970.00) of providing temporary shelter and heat on the project. Recognizing AGC has been ordered by this Court, as part of its decision in this case, to reimburse the County $280,900.00 of the $530,000.00 amount the County has paid to Davis pursuant to their Assignment of Claim, this means Davis is entitled to recover an additional $63,070.00 from AGC for work performed by Davis under FCA #30 (i.e., $343,970.00 - $280,900.00 = $63,070.00). (App. p. 285 – 286, ¶188)

[60] Upon review of AGC's appellate brief it is clear that AGC is requesting this Court to substitute its judgment on the evidence for that of the district court. There is a dearth

of issues of law and much argument over the interpretation of the evidence. There is excessive focus on a "given" - that the LEC was delayed - and woefully little to explain why or how the trial court erred, as a matter of law or was clearly erroneous, in its view of the evidence in determining that the cause of the delay on the LEC was other than a combination of three factors. AGC also fails to address its contract obligations to pay for shelter and heat until building enclosure. Instead AGC contends that because the LEC was delayed it somehow is excused from ALL obligations (for heat and shelter) under the contract whereas the trial court apportioned those expenses. The trial court did not find that the contract was breached or otherwise voidable or for that matter that AGC was relieved of its obligations because the LEC was delayed.

[61] The trial court noted that the parties (and based on the opinion, it is clear the court was referring to the County and AGC and not Davis) that the case was an invitation to ""Monday Morning Quarterbacking" to an unparalleled degree, at least in the annals of this Court." (App. p. 228, ¶59) What is ironic is that is exactly what AGC seeks in this appeal – for this court to "Monday Morning Quarterback" the trial court or more "legally" phrased – to substitute this court's judgment on the evidence for that of the trial court. The trial court did not have the benefit of being on the construction site of the LEC. This court does not have the benefit of being at the trial. (See N.D.R.Civ.P. 52 (a))

[62] It is also worthy to note that despite the massive amount of testimony, the trial court noted a failure to produce what it thought could be important testimony to the trial court. The trial court noted: "In addition (to "Monday Morning Quarterbacking"), the Court is asked to do this in the absence of any input (i.e., testimony) from what would appear to have been some rather key "players" in the construction project (LEC),

including the project surveyors (name and company not provided), Pace Construction ("Pace") (i.e., the excavation contractor), and Anderson Steel ("Anderson") and Tooz Construction ("Tooz") (i.e., the steel manufacturers)." (App. p. 228, ¶59) The court was left to sort through huge amounts of testimony and documents and render an opinion but with "one hand tied behind its back". This court is in the same predicament.

[63] However, the parties did provide the trial court with copious amounts of testimony about the nature and basis of their claims. The County provided the trial court with a summary of delays (Trial Exhibit # 56) and testimony on each of the items referenced (See generally trial transcript) and AGC likewise presented a great deal of testimony on its claims. Clearly, there was evidence for the trial court to apportion damages as it did 47%/53%.

[64] **1. Did the trial court err in its apportioning of obligations for payment between the County and AGC for a portion of the costs of the claims of Davis Masonry, Inc. (Davis) on the Williams County Law Enforcement Center Addition Project (LEC) in Williston, North Dakota as follows: Williams County – 47% and AGC – 53% thus entitling Davis judgment against AGC for $63,070.20?**

[65] Weiss v. Anderson, 341 N.W. 2d 367, 370 (N.D. 1983) citing Hoge v. Burleigh County Water Management District, 311 N.W. 2d 23, 28 (N.D. 1981) stated:

> The trial court's findings are to be given the same weight as a jury verdict and in reviewing those findings, the evidence must be viewed in a light most favorable to the findings. On appeal, it is not the function of this court to substitute its judgment for that of the trial court. We must give due regard to the opportunity of the trial court to judge the credibility of witnesses and unless clearly erroneous, the findings of fact of the trial court, sitting without a jury, are binding on appeal. Questions of fact by the trial court upon conflicting evidence are not subject to reexamination by this court. The mere fact that we might have viewed the facts differently if we had been the initial trier of the case does not entitle us to reverse the lower court."[Citations omitted.]

[66] The district court had the benefit of seeing and hearing the testimony in support of the County (most notably Cheryl Badinger and Dan Kalil, even Neil Scheer acknowledged errors by AGC) and for AGC (Neil Scheer and Scott Arnson (Arnco)). Each side blamed the other for the delays. There is simply not enough time or allotted pages in this brief to reiterate all of the testimony presented for both the County and AGC contributions to the delays. Since AGC is the appellant seeks to avoid all responsibility for delays and damages, it should be noted that the County did provide not only a summary of delays but testimony in support of that claim. Furthermore, AGC was not completely relieved of its contractual responsibilities for heat and shelter on the basis of delays. The trial court concluded that the County and AGC each bear an obligation to Davis for a percentage of the costs associated with the delay most particularly related to heat and shelter and finding the County is obligated for 47% of the costs and AGC is obligated for 53% due Davis. It is not proper for this court to now substitute its judgment for that of the trial court.

[67] **2. Did the trial court err in determining that AGC was not entitled to any offsets against its acknowledged obligation to Davis of $96,771.20?**

[68] AGC has admitted, in testimony of Neil Scheer, that Davis did the work for the unpaid amount under the original contract of $96,771.20. (Tr. V. XI, p. 2988, l. 11 – p. 2989, l. 5) What AGC sought were offsets which the trial court rejected as being "not supported by the greater weight of the evidence". (Emphasis by court). (App. p. 283, ¶¶184 and 185)

[69] Davis presented evidence on each and every one of the offsets claimed by AGC and that testimony (Orville Davis Tr. V. IV, p. 942 -1090 and V. XII, p. 3142 - 3255) was found by the trial court to be more persuasive.

[70] The party claiming an offset bears the burden of proof that he is entitled to the offset. Curtis Const. Co., Inc., v. American Steel Span, Inc., 2005 ND 218,¶21, 707 N.W. 2d 68 and U.S. v. Smith, Not Reported in F. Supp. 2d, 2010 WL 55484, N.D. Iowa, 2010.

[71] Not only did AGC fail to carry its burden but there was ample evidence in the form of testimony from Orville Davis countering each claim by AGC for offset.

[72] **3. Can AGC raise, for the first time on appeal, a question of an award to Davis of its claim against the County for prompt payment interest?**

[73] Davis asserted a claim against the County and AGC for heating, covering and sheltering under FCA #30.

[74] Davis and the County reached a settlement of that claim wherein the County paid Davis $530,000.00 out of a total obligation of $649,000.00.

[75] The trial court awarded Davis $63,070.00 by applying its 47%/53% allocation to the difference between what was determined to be the County's obligation (i.e., $343,970) and the amount claimed (i.e., $119,000.00) and then applying the 53% allocation to AGC's obligation to Davis.

[76] AGC now, and for the very first time, has challenged the portion of the obligation of the County under the prompt payment interest statute. (N.D.C.C. § 13-01.1-01, 05 & 06). Throughout the entirety of the pre-trial and trial not one word was said by AGC contesting the claim being brought by Davis regarding this interest amount or the unpaid

portion of FCA #30 on the basis of interest not being collectable from AGC notwithstanding that there was testimony directly on this claim and an exhibit presented clearly claiming the interest.

[77] "We (ND Sup. Ct.) do not consider questions that were not presented to the trial court and that are raised for the first time on appeal." Overboe v. Farm Credit Services of Fargo, 2001 ND 58,¶11, 623 N.W. 2d 372, 375 quoting from Robert v. Aircraft Inv, Co., Inc., 1998 ND 62, ¶14, 575 N.W. 2d 672. Further clarifying that ". . . because an issue was not presented to the trial court, the issue is not reviewable on appeal". Id.

[78] In Messer v. Bender, 1997 ND 103, ¶10, 564 N.W. 2d 291, 293-94 this court stated: "[W]e do not consider questions that were not presented to the trial court and that are raised for the first time on appeal." Eastburn v. B.E., 345 N.W. 2d 767, 773 (N.D. 1996) (quoting American State Bank and Trust Co. of Williston v. Sorenson, 539 N.W. 2d 59, 63 (N.D. 1995)); Bentley v. Bentley, 533 N.W. 2d 682, 683 (N.D. 1994): Klose v. Klose, 524 N.W. 2d 94, 95 (N.D. 1994). The rule limiting appeal to issues raised at the trial court stems from the principle:

> [I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking the chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable. 5 Am. Jur. 2d Appellate Review §690 (1995) (footnotes omitted).

[79] To be sure the nature of the claim being asserted for FCA #30 including interest was well publicized in the trial court and at no time by motion, testimony, objection to the exhibits, briefs or otherwise did AGC raise this issue (interest not collectable from AGC) to the trial court.

[80] AGC was obligated under its contract with the County to provide heat and shelter for its work. This includes Davis masonry work. Davis specifically excluded that expense. When AGC refused to cover heat and shelter and Davis made it clear that it could not continue in the cold conditions the County entered FCA #30 with Davis. There should be no misconception however that AGC was contractually bound to provide heat and protection for its work which included the masonry contract AGC had with the County. Therefore AGC should stand for its share of the losses for which Davis has incurred including prompt payment interest.

[81] **4. Did the trial court err in denying AGC's specific claimed offset for fire stopping when AGC represented to Davis that there was no fire stopping on the LEC pertaining to masonry?**

[82] Davis was invited to bid the LEC by Pius Scheer the president and 75% owner of AGC.

[83] Orville Davis, president and owner of Davis (Masonry, Inc.) spoke directly with Pius Scheer and inquired of him whether there was any fire stopping on the LEC pertaining to the masonry bid. He was directly and specifically told by Pius Scheer that there was no fire stopping on the LEC as part of the masonry contract. Orville Davis so testified without challenge or testimony or evidence to the contrary. Pius Scheer did not testify. One can assume if he had he would have affirmed what Orville Davis said.

[84] AGC has now, for the first time on appeal, raised the parol evidence rule, N.D.C.C. § 9-06-07, to support its claim that its claim for the fire-stopping offset arguing that since it was not specifically excluded from the contract it (AGC) has no obligation to pay and is entitled to the offset. (Tr. V. XII, p. 3162, l.12- p. 3163, l.6)

[85] The trial court rejected AGC's claim for the fire stopping offset along with all other claims for offset by AGC.

[86] AGC's argument (parol evidence rule) was never raised to the trial court and as such should suffer the same rejection as the never before raised subject of prompt payment interest challenge. (See argument and citations above regarding issue number 3 supra.)

[87] Further, even if raised by objection, the trial court would have been well within its discretion to deny that objection as the statements of Pius Scheer fall within a well-recognized exception to the parol evidence rule.

[88] Graber v. Engstrom, 384 N.W. 2d 307, 309 (N.D. 1986) citing Smith v. Michael Kurtz Construction Company, 232 N.W. 2d 35, 39 (N.D. 1975) held: ". . . [i]t is not error to permit parol evidence to explain vague and ambiguous written contract provisions **or to show representations made prior to the written contract which induced the party to sign the contract.**" (Emphasis added). An ambiguous contract is not as argued by AGC the only exception to the parol evidence rule.

[89] Smith v. Michael Kurtz, Id. distinguished the effect of oral representations as an inducement to sign a contract as apart from the claim or issue of modifying a written contract. Smith, Id. at 39 quoting from DeRue v. McIntosh, 127 N.W. 532, 535 (S.D. 1910) stated:

> This provision (parol evidence/statute of frauds) of our code embodies the common-law rule upon the subject of written contracts, and while the execution of a contract in writing, whether the law requires it to be written or not, supersedes all of the oral negotiations or stipulations concerning the matter, which precedes or accompanied the execution of the instrument, **nevertheless, as contended by the appellant, there are exceptions to the rule. One of the exceptions seems to be that**

> **agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words where the parol contemporaneous agreement was the inducing and moving cause of the written contract or where the parol agreement forms part of the consideration for a written contract, and where the executed written contract upon the faith of the parol contract or representation, such evidence is admissible.** (Emphasis added)

[90] This principle was upheld by this court in Johnson Farms v. McEnroe, 1997 ND 179, ¶16, 568 N.W. 2d 920, 923 citing Erickson v. Wiper, 157 N.W. 592, 596, (N.D. 1916) in turn quoting DeRue supra at 534. "The [Wiper] Court also held the predecessor statute to N.D.C.C. §9-06-07, governing when a written contract supersedes oral negotiations was not violated by the admission of parol evidence where the parol contemporaneous agreement was the inducing and moving cause of the written contract or where the parol agreement forms part of the consideration for a written contract, and where . . . the written contract [is executed] upon the faith of the parol contract or representations."

[91] The trial court rightly rejected the offset claimed by AGC as it was uncontroverted that Pius Scheer represented that there was no fire stopping in the masonry contract which falls within an exception to the parol evidence rule.

CONCLUSION

[92] Davis requests this court affirm the determination of the trial court in all things as to Davis finding that Davis is entitled to judgment against AGC for $159,841.40 plus interest on this amount at the statutory rate representing the trial courts determination that Davis was under-paid on it original contract and entitled to the grout revision totaling $96,771.20 and that AGC is denied its claimed set offs against Davis and further that

AGC's share (53%) of the costs of FCA #30 not fully recovered by Davis of $63,070.20 plus interest.

[93] The trial court found that both the County and AGC caused delays on the LEC which it apportioned 47% to the County and 53% to AGC based on the evidence presented and there is no basis to substitute this court's opinion for that of the trial court.

[94] The trial court denied, as was a proper finding, all of AGC's claimed offsets against the masonry contract (Davis).

[95] AGC cannot, for the first time on appeal, question the prompt payment interest portion of the trial court's determination of the amount due Davis on FCA #30 for heat and shelter excluded from Davis' contract but included in AGC's obligations.

[96] AGC cannot, for the first time on appeal, assert an offset based on the statute of frauds to deny a representation made by AGC (Pius Scheer) that the LEC Masonry scope of work did not include fire stopping.

[97] DATED February 6, 2014 MCGEE, HANKLA, BACKES & DOBROVOLNY, P.C.

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[98] **CERTIFICATE OF SERVICE**

I hereby certify that, on February 4, 2014, I served the foregoing document on the following by electronic mail transmission, pursuant to N.D. Sup. Ct. Admin. Order 14(D):

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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 04 2014

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA