No. COA11-381 EIGHTEENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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SOUTHERN SEEDING SERVICE, INC. Plaintiff-Appellant v. W.C. ENGLISH, INC.; LIBERTY MUTUAL INSURANCE COMPANY; and TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA Defendants-Appellees	)	From Guilford County Civil Action No. 12411

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BRIEF OF APPELLANT
SOUTHERN SEEDING SERVICE, INC.

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ISSUES PRESENTED

I. WHETHER A NO-DAMAGES-FOR-DELAY PROVISION IN THE SUBCONTRACT BETWEEN THE PARTIES POTENTIALLY CONFLICTS WITH A PRICE-ESCALATION PROVISION IN THE SUBCONTRACT, TO BAR PLAINTIFF-APPELLANT'S RECOVERY UNDER THE PRICE-ESCALATION PROVISION.

II. WHETHER DEFENDANT-APPELLEE WAIVED THE NO-DAMAGES-FOR-DELAY PROVISION OF THE SUBCONTRACT BY FAILING TO ASSERT IT EITHER DURING THE PROJECT, OR AS AN AFFIRMATIVE DEFENSE, WITHIN DEFENDANT'S PLEADINGS, MOTIONS, OR ARGUMENTS AT TRIAL.

III. WHETHER A BREACH OF THE PRICE-ESCALATION PROVISION OF THE SUBCONTRACT IS OUTSIDE THE TERMS OF A PAYMENT BOND REQUIRED BY THE STATE FOR THE PROJECT, WHERE THE PRICE-ESCALATION PROVISION IS NOT IN THE PRIME CONTRACT WITH THE STATE.

IV. WHETHER THE COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR A NEW TRIAL OR MOTION TO AMEND JUDGMENT, WHERE THERE WAS NO TESTIMONY OR EVIDENCE AT TRIAL REGARDING THE APPLICATION OF THE PRICE-ESCALATION PROVISION OF THE SUBCONTRACT OR THE APPLICATION OF THE PAYMENT BOND LANGUAGE TO THE DISPUTE BETWEEN THE PARTIES.

STATEMENT OF THE CASE

Plaintiff Southern Seeding Service, Inc. commenced this action by filing a complaint on 23 September 2009 in Guilford County Superior Court. (R pp 4–9). A bench trial was held on 14–15 July 2010 before the Honorable Shannon R. Joseph. (T pp 1–220). On 8 September 2010, Judge Joseph entered a Judgment in favor of Defendants. (R pp 226–37). Plaintiff filed Motions for a New Trial and to Amend Judgment with the Court on 16 September 2010. (R pp 238–65). On 11 October 2010, Judge Joseph denied Plaintiff's Motions. (R p 266).

Plaintiff filed a Notice of Appeal on 3 November 2010 as to the Court's Judgment and as to the Order denying Plaintiff's Motions. (R p 267). A transcript of the trial was ordered on 12 November 2010 and delivered on 10 January 2011. (R p 270). The proposed record was served on 11 February 2011, and the record was settled by stipulation on 25 March 2011. (R p 275). The record was filed in the Court of Appeals on 28 March 2011, and docketed on 30 March 2011. (R p 2).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Plaintiff-Appellant appeals as of right from the Superior Court's 16 September 2010 Judgment and 11 October 2010 Order. The Judgment was a final judgment because it determined the entire controversy between the parties, and the Order further shows that Plaintiff-Appellant exhausted its options at the

trial court. Appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE FACTS

In July 2003, Southern Seeding Service, Inc. ("SSS") submitted a proposal to W.C. English, Inc. ("English") to perform as a second-tier grassing[1] subcontractor on the Greensboro "Western Loop" highway construction project ("Project") for the North Carolina Department of Transportation ("NCDOT"). (T p 79, Pl. Exh. 2). SSS's proposal quoted unit prices for grassing work. For instance, $2080 per hectare was SSS's unit price for seeding and mulching, which was consistent with industry costs at the time and consistent with the bids of its competitors.[2] (T pp 173-74). SSS's proposal stated that the unit price quotation assumed the work would be performed before the Project's specified completion date (1 July 2007), and that if the work was ongoing "beyond said time without fault on our part, unit prices herein quoted shall be equitably adjusted to compensate us for increased cost." (Pl. Exh. 2). That clause is referenced hereafter as the "price-escalation provision."

English sought to be a first-tier subcontractor on the Project, and assisted APAC-Atlantic, Inc. ("APAC") in its bid to

[1] Grassing work includes seeding, mulching, topdressing, mowing, fertilizer, matting, and reforestation. Each line item task had a unit price and a bid quantity estimated by NCDOT. (Pl. Ex 4).
[2] English admitted at trial that it had received a grassing bid for the Project which was lower than the bid of SSS. (T p 174).

become the prime contractor. (T p 150). Bids were opened on 15 July 2003, and APAC was the low bidder. (R p 35). APAC entered into the prime contract with NCDOT on 7 August 2003. (R p 5). The prime contract included a completion date of 1 July 2007, after which liquidated damages would accrue at $10,000 per day. (Pl. Exh. 3, p 1). The contract also contained a number of Intermediate Contract Times ("ICTs"), after which additional "milestone" liquidated damages would accrue until intermediate portions of the work were complete. (Pl. Exh. 3, pp 1–11). On 13 August 2003, in accordance with N.C. Gen. Stat. § 44A-26, APAC obtained a payment bond for the project. (Pl. Exh. 15).

On 8 September 2003, English delivered a proposed grassing subcontract to SSS, which included the unit price for seeding and mulching, and other specific grassing tasks with separate unit prices,[3] as well as the price-escalation provision contained in the July proposal from SSS to English. (R pp 44–45). Twenty-nine additional terms were appended to the subcontract form, one of which provided that SSS would not be "entitled to compensation or damages for any delay in the commencement,

[3] NCDOT awards contracts based on unit prices for specific tasks times the DOT's estimated quantities. The final price paid is based on final measured quantities. See N.C. Std. Spec. §§ 109-2, 109-7 (2002), available at http://www.ncdot.org/doh/preconstruct/ps/specifications/dual/Division1.pdf. This unit price arrangement is carried down into subcontracts for portions of the work — subcontractors and prime contractors alike are paid based on actual units performed. (See R pp 146–49).

prosecution, or completion of the Work except to the extent that Contractor [English] shall receive such compensation or damages from Owner or other third party." (R pp 46-53). That term is referenced hereafter as the "no-damages-for-delay provision." On 23 October 2003, English executed this subcontract with SSS (the "Subcontract"), which included both the price-escalation provision and the no-damages-for-delay provision. (R p 53).

On 9 September 2003, English executed its first-tier subcontract with APAC. (R p 32). English's scope of work included all grading and erosion control work (to be self-performed by English) and grassing work (to be performed by SSS). The subcontract form supplied by APAC to English originally contained a no-damages-for-delay provision similar to the one in the English-SSS second-tier subcontract form. However, English and APAC negotiated to remove that term and replace it with the following provision: "Subcontractor [English] shall be allowed to file any claim for damages, delays, increased cost, or time extension in accordance with NCDOT specifications." (R p 30). The 2002 edition of the NCDOT Standard Specifications for Roads and Structures (the "NCDOT Specs") applied to this project. (T pp 75-76).

Two years into the Project, in September 2005, SSS informed English that its costs were increasing due to fuel prices, and asked English to coordinate a fuel price adjustment with NCDOT.

(Def. Exh. 2). English informed SSS that a fuel price adjustment for grassing work was not possible.[4] (T p 94). At the same time, SSS began to experience increased costs due to English's failure to fully complete its grading work so that SSS's grassing could begin. In August 2005, for instance, SSS had a seeding crew on the job, but less than one acre of the Project was prepared for seeding due to English's failure to complete its erosion control work. (R p 166). On 29 August 2005, NCDOT suspended English's grading operations on the Project due to English's failure to maintain erosion control devices. (R pp 75, 166, T pp 155-57).

In December 2005, and again in March 2006, NCDOT expressed its concerns about the Project's completion, and asked APAC to prepare a recovery plan to get the Project back on schedule. (R p 170). In May 2006, APAC expressed its concerns about English's ability to meet the recovery plan, and warned that NCDOT would again suspend grading operations if English could not complete and maintain its erosion control work. (R pp 171-73). NCDOT did in fact re-suspend English's grading operations on 31 May 2006. (R pp 178-79). At the end of June 2006, ICT #2 was incomplete

[4] As described in footnote 5 below, grassing work items were "minor" items to NCDOT, and the prime contract between NCDOT and APAC did not provide for fuel adjustments for grassing work. APAC and English, however, did receive unit price adjustments for excavation work items during the Project due to fuel price increases. (T pp 41-42, Pl. Exh. 3, p 12). See also N.C. Std. Spec. § 109-8 (2002) (providing for price adjustment due to fuel price fluctuations for items specified in the prime contract).

and milestone liquidated damages of $280,000 had accrued. (Pl. Exh. 5). English asked SSS to accelerate by working overtime the weekend before the Fourth of July 2006 to help English complete ICT #2 and avoid the milestone liquidated damages which would be assessed against APAC and passed down to English. (T pp 157–58, 181). SSS did so, allowing ICT #2 to be completed on 2 July 2006. (Def. Exh. 4, p 2). With this assistance from SSS, English ultimately avoided liquidated damages for ICT #2. (Def. Exh. 4, p 2). On 13 July 2006, SSS complained to English about work conditions, specifically that SSS's grassing work could not be performed in a planned, orderly sequence due to English's grading work being suspended and incomplete; and that English's out-of-sequence grading work forced SSS to perform its grassing work in a disrupted and inefficient manner. (R p 187).

Throughout the Project, APAC was repeatedly concerned about English's failure to properly perform its grading and erosion control activities, and particularly its ability to complete ICTs on time. (R p 190). In August 2006, APAC advised English that APAC would provide its own grading crew and take over part of English's grading work if English did not supplement its grading crews. (R pp 191–93, T pp 161–63). APAC was concerned that English's failures created a compressed seeding schedule. (R p 193). APAC provided a grading crew and two outside grading contractors to supplement English. (R p 126, T p 162). ICT #20

was completed thirty-seven days late. (Def. Exh. 4, p 4). ICT #21 was completed twenty-eight days late. (Def. Exh. 4, p 3).

In July 2007, the project was incomplete and liquidated damages began to accrue at $10,000 per day. (R p 92). In August 2007, APAC was negotiating with NCDOT to waive liquidated damages that had accrued as a result of the earlier ICTs. (R pp 136–39, 198). SSS asked APAC to include a request for increased costs of subcontractors in those negotiations. (R p 157). At the time, the average industry cost for seeding and mulching exceeded $4000 per hectare. (T p 168, Pl. Exh. 28).

In October 2007, SSS reminded English of the price-escalation provision in the Subcontract and advised that SSS was keeping records of its actual costs after 1 July 2007. (R p 202). English informed APAC that it intended to ask NCDOT to pay for the increased costs of SSS, but APAC told English that there was no basis in the NCDOT Specs for English to recover the increased costs of SSS. (R pp 199–200). In December 2007, SSS again notified English of its intent to recover its extra costs, and again advised English to request compensation for the extra costs of subcontractors when it negotiated for waivers of liquidated damages. (Pl. Exh. 8).

SSS completed its work on 21 March 2008. (R p 232, Pl. Exh. 9). On 25 March 2008, English authorized SSS to negotiate directly with NCDOT to quantify its escalated prices for overrun

quantities of certain items of the grassing work.[5] (Pl. Exh. 10). In June 2008, SSS completed its negotiations with NCDOT for escalated unit prices for grassing work quantity overruns, with NCDOT accepting SSS's requested increase in unit prices. (R pp 203-05, Pl. Exhs. 12, 13). In August 2008, English requested additional compensation for SSS for those overrun quantities for grassing work, and that request was paid by NCDOT, at the increased unit price requested by SSS and English, plus mark-ups for both English and APAC. (R pp 146-47, 209-10).

In July 2008, SSS notified APAC and its statutorily-required payment bond surety of SSS's rights under the Subcontract to recover increased costs for grassing work performed after 1 July 2007. (R pp 212-13). SSS invoiced English for its increased costs after 1 July 2007 in November 2008, and sent proof of its claim to APAC and its payment bond surety in December 2008. (Pl. Exhs. 1, 18). English agreed to pay SSS only for the portion of material price increase that occurred after 1 July 2007, so that SSS would not be compensated

[5] NCDOT allows contractors and subcontractors to adjust their unit prices for pay items when the quantities estimated at the start of the Project by NCDOT are overrun during the Project. For major work task items, contractors and subcontractors can obtain increased unit prices once the overruns exceed 15% (i.e., actual quantities reach 115% of the originally estimated quantities); for minor work task items, the unit prices can be increased after the tasks overrun by 100% (i.e., actual quantities reach 200% of the originally estimated quantities). (T pp 40-41). See also N.C. Std. Spec. § 104-5(B) (2002).

for the price increases that occurred during the four years between July 2003 and July 2007. (Pl. Exh. 20). SSS rejected the proposed payment of $2300 for the portion of the price increase that occurred after 1 July 2007. (Pl. Exh. 21, T p 60).

In January 2009, English submitted a delay damages claim to APAC, seeking over $1 million for its own extended jobsite and home office overhead and idled equipment while its work was suspended. (R pp 262–65). English's delay claim did not include any of SSS's increased grassing costs. In April 2009, APAC advised English that it would not forward English's delay damages claim to NCDOT until APAC completed negotiations with NCDOT for a Project time extension, which would reduce or absolve APAC and English from liquidated damages. (R p 216).

On 23 June 2009, NCDOT granted the requested time extension, retroactively extending the Project's completion date from 1 July 2007 to 14 March 2008, effectively waiving nearly all liquidated damages that had accrued. (Defs. Exh. 4). As a result, APAC and English were forgiven $2.56 million that they otherwise would have owed to NCDOT. (R p 41). Afterward, APAC forwarded English's delay damages claim to NCDOT. (R pp 152–53).

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for conclusions of law from a non-jury trial is de novo. Town of Green Level v. Alamance County,

184 N.C. App. 665, 668–69, 646 S.E.2d 851, 854 (2007). The trial court's findings of fact are not binding on appeal when no competent evidence supports them. Id.

A trial court's denial of a motion to amend its judgment is reviewed for abuse of discretion. James River Equip., Inc. v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 344, 634 S.E.2d 548, 555, disc. Review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 650 (2006). The trial court's ruling will be reversed upon a showing that it was arbitrary and not the result of a reasoned decision. Id.

II. THE NO-DAMAGES-FOR-DELAY PROVISION DOES NOT BAR RECOVERY UNDER THE PRICE-ESCALATION PROVISION

In concluding that the price-escalation provision in the Subcontract was not operable here, the trial court made a number of critical errors of law (regarding contract interpretation) and fact (regarding the obligations of the parties under the Subcontract). Any one of those errors is sufficient reason to overturn the Judgment.

A. The Superior Court erred factually and legally in concluding that SSS seeks to recover "delay damages"

SSS seeks only to recover an equitable adjustment for work performed after a date agreed upon by both parties to the Subcontract. The trial court erred in concluding that "there is a potential conflict" between the price-escalation provision and the no-damages-for-delay provision in the Subcontract. North

Carolina courts have historically treated claims for construction delay damages as distinct from claims for increased construction costs, even when both claims arise out of the same duration-extending circumstances. See, e.g., APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth., 110 N.C. App. 664, 678, 431 S.E.2d 508, 516 (1993), Davidson & Jones, Inc. v. N.C. Dep't of Admin., 315 N.C. 144, 154 337 S.E.2d 463, 468 (1985).

In the construction context, the term "delay damages" generally refers to costs associated with idled equipment and extended overhead that are borne by a contractor while delayed in its work, due to circumstances beyond its control. (R p 257). See, e.g., Bolton Corp. v. T.A. Loving. Co., 94 N.C. App. 392, 404, 380 S.E.2d 796, 804 (1989) (including a contractor's "extended 'general conditions' expenses, that is, the cost of keeping tools and equipment on the site for the extended period" in that contractor's estimate of its "delay damages"). North Carolina courts have consistently distinguished between "delay damages" and escalated costs incurred during actual performance of the contract work, which is what SSS seeks to recover here.

In APAC-Carolina, APAC was the general contractor on an airport runway extension and taxiway construction project. APAC-Carolina, 110 N.C. App. at 667, 431 S.E.2d at 509. Under the contract, all excavation was "unclassified," meaning that APAC would be paid the contract unit price of $1.99 per cubic yard of

material excavated by its excavation subcontractor, regardless of material type. Id. The actual subsurface material encountered by the subcontractor "was more complicated, time-consuming and expensive than the work estimated to be $1.99 per cubic yard." Id. at 668, 431 S.E.2d at 510. APAC sued the owner to recover its subcontractor's increased costs of excavation. Id. In a separate claim, APAC sought to recover delay damages for the time when its own work was suspended due to the additional time required for excavation. Id. This Court denied APAC's delay damages because its contract with the owner contained a no-damages-for-delay provision.[6] Id. at 678, 431 S.E.2d at 516. The Court separately denied APAC's requested price escalation for excavation, not because the contract barred delay damages, but because the contract specified the unit price and did not provide for price escalation: "APAC is therefore entitled to $1.99 per cubic yard for the total amount of unclassified excavation." Id. at 675, 431 S.E.2d at 514. See also Davidson & Jones, Inc. v. N.C. Dep't of Admin., 315 N.C. 144, 154, 337 S.E.2d 463, 468 (1985) (expressly distinguishing between "duration-related expenses at the time of the excavation," which delay damages were *not* prohibited by the terms of the contract, and "additional payment for the rock excavation itself," which

[6] This occurred before N.C. Gen. Stat. § 143-134.3 was enacted, rendering such provisions unenforceable in public contracts.

was prohibited where the contract specified the unit price for additional quantities and did not provide for price escalation).

Here, as in APAC-Carolina, the Subcontract had an express no-damages-for-delay provision, and SSS does *not* seek to recover for the labor and equipment inefficiencies and other increased costs it experienced prior to 1 July 2007 as a consequence of English's repeated grading and erosion control defaults and delays. (T pp 70, 159). However, unlike APAC-Carolina, the Subcontract here expressly provides for an equitable adjustment in unit prices. Similar to Davidson & Jones, where the contract provided for the contractor's extra costs due to additional *quantities* beyond those estimated in the fixed-price contract, the Subcontract here provides for price escalation for grassing work performed beyond the Project's original completion *date*.

The main difference between the case at bar and the cited cases is that, in APAC-Carolina and Davidson & Jones, the unit price was *fixed* for quantities exceeding the original estimates. Here, the Subcontract calls for the grassing unit prices to be "equitably adjusted to compensate SSS] for increased cost" of performing grassing work after the original completion date (1 July 2007). SSS proved at trial that it incurred increased costs after 1 July 2007 in performing its grassing work.[7] (Pl. Exhs. 1,

[7] SSS also proved that it did not contribute to the circumstances which required it to perform grassing work after 1 July 2007;

18, 26-28). The Subcontract's price-escalation provision is a distinct remedy from delay damages, which the Subcontract addresses separately. The trial court erred by concluding that an equitable price adjustment would amount to delay damages.

B. The Superior Court erred legally in concluding that the no-damages-for-delay provision barred delay damages where a time extension was not timely granted

As set forth above, SSS disagrees with the trial court's conclusion that the increased costs SSS incurred after 1 July 2007 were "delay damages,"[8] or that these increased costs were somehow governed by the no-damages-for-delay provision. But even if SSS's increased costs after 1 July 2007 were subject to the no-damages-for-delay provision, the trial court erred in giving effect to the provision on the facts of this case.

English's boilerplate no-damages-for-delay provision limited SSS's remedy for delay "to a reasonable extension of time, only." However, where a no-damages-for-delay provision is dependent on a time extension, the provision is inapplicable if the time extension is granted only after delay damages have been incurred. Watson Elec. Constr. Co. v. City of Winston-Salem, 109 N.C. App. 194, 199, 426 S.E.2d 420, 423 (1993).

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this was stipulated by English and admitted by its Vice President John W. Jordan, Jr. (T pp 152-55).

[8] Although SSS also incurred increased costs prior to 1 July 2007 due to English's defaults and delays, SSS does not seek to recover those damages here.

In Watson, the contract purported to limit an electrical contractor's remedy for delays "to a time extension for completion of the Contract and not damages." Id. at 198, 426 S.E.2d at 422. The electrical contractor was in fact hindered by other "contractors' disorganization and delay," causing the electrical subcontractor to incur increased labor costs in attempting to complete its work within the contract completion date. Id. at 196, 198, 426 S.E.2d at 421–22. This Court held that the no-damages-for-delay provision was inapplicable because it was conditioned on the grant of a time extension. Id. at 199, 426 S.E.2d at 423. Although a 92-day time extension was eventually granted after the contract completion date had passed, it was an ineffective remedy because it was granted after the electrical contractor had incurred damages. Id.

Here, as in Watson, SSS experienced increased costs attempting to help English and APAC complete the Project not just within the completion date, but also within the milestone dates of a number of intermediate ICTs. The no-damages-for-delay provision purported to limit SSS's remedy for delays to a time extension. However, as in Watson, time extensions were not granted while the grassing work was in progress. Over one year after SSS fully completed its work (and almost two years after the Project's specified completion date), time extensions were granted both for the overall completion date and the ICTs.

While the retroactive time extensions served to eliminate $2.56 million in liquidated damages that would have been owed by English and APAC, the extensions were no remedy at all for SSS.[9] In Watson, this Court remanded for the trial court to determine what remedy the parties intended in the event a time extension was not timely granted, as there was no other remedy in the contract. Id. Here, unlike Watson, the only remedy sought by SSS, a price escalation for work performed after 1 July 2007, is expressly provided in the Subcontract.

C. The Superior Court erred legally by preferring the boilerplate no-damages-for-delay provision to the specially negotiated price-escalation provision

Even if there were "a potential conflict" between the price-escalation provision and the no-damages-for-delay provision, as the trial court concluded, the court erred by preferring the boilerplate no-damages-for-delay provision so as to eviscerate the specially negotiated price-escalation provision. Where general terms conflict with specially negotiated terms in the same contract, such as price adjustments which are activated by specific conditions, "the general terms should give way to the specifics." Wood-Hopkins Contracting Co. v. N.C. State Ports Auth., 284 N.C. 732, 738, 202 S.E.2d 473,

[9] In August 2007, APAC began negotiating with NCDOT to waive liquidated damages that had accrued as a result of missed ICTs. (R pp 136–39, 198). SSS asked APAC to include increased costs of subcontractors in those negotiations. (R p 157).

476 (1974). General terms and boilerplate provisions are to be construed against the contract drafter. Id.

In Wood-Hopkins, the N.C. Ports Authority drafted a construction contract that contained both a fixed "lump sum" contract price and a unit price of $2 per cubic yard of compacted underwater fill. Id. at 736–37, 202 S.E.2d at 475–76. The unit price was specially negotiated to allow the contractor "an adjustment for the work he actually performed" due to changes in the riverbed that were beyond his control. Id. During performance of the contract, previously intact soil eroded from the riverbed, forcing the contractor to fill and compact soil at those locations. Id. at 738–39, 202 S.E.2d at 477. After the contractor's work was completed and accepted, the Ports Authority denied that the contractor was owed anything over the fixed total price. Id. at 736, 202 S.E.2d at 475. However, the N.C. Supreme Court held, "The very fact that a specific price was inserted for fill negates a lump sum claim." Id. at 737, 202 S.E.2d at 476. In other words, the unit price that applied specifically to compacted underwater fill, which was specially negotiated by the contractor, superseded the fixed-price term, which favored the contract drafter (the Ports Authority) and which applied generally to the entire construction project.

Likewise, the very fact that the price-escalation provision was inserted in this Subcontract negates any claim that it is

barred by the boilerplate no-damages-for-delay provision. The no-damages-for-delay provision favors English, the Subcontract drafter. It applies generally to the entire construction project. For example, it prevented SSS from recovering its delay damages incurred prior to 1 July 2007, such as idle time for manpower and equipment and increased project management and other general requirements costs, despite the fact that all parties agree the delays were not the fault of SSS. (T pp 152-55). However, the price-escalation provision was specially negotiated by SSS to allow for an adjustment in its compensation if it happened to be performing Subcontract work after 1 July 2007, regardless of the reason (so long as SSS was not at fault) and regardless of whether SSS suffered delay damages.

The trial court here, however, construed English's no-damages-for-delay provision broadly in favor of English, allowing the definition of "compensation or damages for any delay" to encompass the "increased cost" of grassing after that fixed date. Just as the unit price for compaction in Wood-Hopkins was an addition or exception to the fixed total price, the trial court here should have resolved any possible conflict with the boilerplate no-damages-for-delay provision in favor of the specially negotiated price-escalation provision that applied only to grassing performance after a specific date.

D. The Superior Court erred legally by giving effect to an illegal pay-when-paid provision to reconcile a potential conflict between two other provisions

Even if there were a "potential conflict" between the price-escalation provision and the no-damages-for-delay provision, the trial court's method of resolving the conflict (using a pay-when-paid qualifier in the no-damages-for-delay provision to give independent meaning to the price-escalation provision) is contrary to North Carolina law. "Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable." N.C. Gen. Stat. § 22C-2 (2010). In the construction context, a pay-when-paid clause coupled with the owner's nonpayment of delay damages is not a valid defense to a contractor's failure to pay delay damages to its subcontractor. Am. Nat'l Elec. Corp. v. Poythress Commercial Contractors, Inc., 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (holding unenforceable a provision that allowed a subcontractor to recover delay damages only to the extent that the general contractor was "paid for said delay by the project owner").

As in Poythress, the Subcontract here included an illegal pay-when-paid qualifier in its no-damages-for-delay provision. However, instead of severing the illegal pay-when-paid clause,

the trial court enforced it at the expense of the specially negotiated price-escalation provision. Finding a "potential conflict" between an equitable price adjustment and the no-damages-for-delay provision, the trial court concluded that, by giving effect to the pay-when-paid clause, "an equitable adjustment in unit prices would be permitted to the extent English received compensation of increased unit prices for delays in the work from any outside source, including NC DOT or APAC." (R p 236). This is clear error in contract construction under North Carolina law. The trial court was obligated to sever either the pay-when-paid clause, or the entire no-damages-for-delay provision which was "dependent on the illegal provision." Poythress, 167 N.C. App. at 101, 604 S.E.2d at 317.

Either option would result in the award of damages to SSS. If the court severed only the pay-when-paid qualifier from the no-damages-for-delay provision, it would then have to determine whether there was an *actual* conflict between the price-escalation provision and the no-damages-for-delay provision, or that there was not (as SSS urges here). If the court persisted in finding that the two provisions were in conflict, it would be obligated to enforce the specially negotiated price-escalation provision in favor of the general no-damages-for-delay provision inserted by the drafter (English). But it was clear error to

allow the illegal pay-when-paid clause to eviscerate the specially negotiated price-escalation provision.

E. The Superior Court erred factually by concluding that English and APAC were unable to recover delay damages

Even if the pay-when-paid clause were enforceable, the trial court erred in concluding that "English had no contractual remedy against APAC to receive adjustment in unit prices for delay beyond the original completion date. Nor did APAC have a contractual remedy to receive adjustment to its unit prices from NC DOT." (R p 236). In fact, in English's subcontract with APAC, the boilerplate no-damages-for-delay clause was deleted and replaced with the following specially negotiated provision: "Subcontractor [English] shall be allowed to file any claim for damages, delays, increased cost, or time extension in accordance with NCDOT specifications."[10]

NCDOT Specs do not bar delay damages. See N.C. Std. Spec., Div. 1 — General Requirements (2002), available at http://www.ncdot.org/doh/preconstruct/ps/specifications/dual/Division1.pdf. In fact, NCDOT is prohibited from imposing a blanket limitation on damages for delay in its construction contracts. N.C. Gen. Stat. § 143-134.3 (2010). One North Carolina court stated that N.C. Gen. Stat. § 143-134.3 was enacted "[i]n reaction to abuse

[10] It bears repeating that APAC and English were spared $2.56 million in liquidated damages they otherwise would have owed for delays. (R p 41, Def. Exh. 4). The remittance of this sum is tantamount to price increases in the APAC and English contracts.

by various government agencies," and that its enactment shows that no-damages-for-delay provisions "are contrary to public policy and should therefore be [n]arrowly construed." Nello L. Teer Co. v. N.C. Dep't of Transp., No. 02-CvS-4863, 2004 WL 5218006, at *37 (N.C. Super. Mar 23, 2004), appeal withdrawn by NCDOT after argument, No. COA05-384 (2005) (unpublished).

As a result of N.C. Gen. Stat. § 143-134.3, the NCDOT Specs expressly limit damages for delay only in very narrow circumstances, none of which are operative here in barring payment to SSS. See N.C. Std. Spec. § 105-15 (2002) (barring delay damages arising out of load limit reductions), N.C. Std. Spec. § 108-1 (2002) (barring delay damages arising prior to the date of project availability), N.C. Std. Spec. § 108-10(B) (limiting the remedy for weather-related delays to a time extension). Because the NCDOT Specs expressly limit delay damages only in narrow circumstances, it must be presumed that delay damages are available in other circumstances, such as delay due to the fault of another contractor.

In fact, the NCDOT Specs expressly provide that "[c]onsideration will be given" where the work "is delayed in excess of 40 percent of the total contract time." N.C. Std. Spec. § 108-10 (2002). Furthermore, the NCDOT Specs provide for time extensions "and remittance of liquidated damages only to the extent and in the proportion that such delays were caused by

the conditions set forth in Article 108-10." N.C. Std. Spec. § 108-12 (2002). Because both time extensions and remittance of liquidated damages were granted in this case, it must be presumed that the conditions of N.C. Std. Spec. § 108-10 were satisfied, and therefore NCDOT may have been *obligated* to provide compensation for delay under that Article.

Furthermore, the NCDOT Specs provide for adjustment of contract unit prices in various circumstances, including circumstances that occurred on this project. See N.C. Std. Spec. § 109-7 (2002) (providing for adjustment in contract unit prices "in accordance with Article 109-8" and "pursuant to an executed supplemental agreement or work performed in accordance with the applicable provisions of Section 104"); see also N.C. Std. Spec. § 104-3 (2002) (providing for price adjustment due to material changes in plans or construction details), N.C. Std. Spec. § 104-4 (2002) (providing for price adjustment due to work suspensions), N.C. Std. Spec. § 104-5 (2002) (providing price adjustment for quantity overruns), N.C. Std. Spec. § 109-8 (2002) (providing price adjustment for fuel price fluctuations).

The trial court found that the price adjustment requested by SSS here was in part due to fuel price increases between the original date of contract and 1 July 2007. (R p 232). By the trial court's logic, SSS therefore could have been entitled to a unit price adjustment under N.C. Std. Spec. § 109-8 if APAC had

negotiated for a fuel price adjustment for grassing work in its prime contract with NCDOT. However, APAC's eventual contract with NCDOT only provided for fuel price adjustment for excavation and paving activities. (Pl. Exh. 3, p 12).

Under the trial court's construction of the Subcontract, the specially negotiated price-escalation provision is ineffective because a third-party, APAC, failed to negotiate for fuel price escalation for grassing work in its prime contract with NCDOT. This interpretation would make the Subcontract's price-escalation provision illusory, because English would have no incentive to negotiate for a price-escalation provision in its first-tier subcontract with APAC if English would otherwise be absolved of its obligation in the Subcontract to pay for SSS's increased costs. If, as the trial court found, "English had no contractual remedy against APAC to receive adjustment in unit prices," then English did not negotiate the price-escalation provision with SSS in good faith, and the no-damages-for-delay provision should not be enforced against SSS.

Likewise, SSS experienced increased costs associated with NCDOT-ordered grading work suspensions earlier in the Project. SSS asked English and APAC to include claims for the increased costs of SSS when it negotiated supplemental agreements with NCDOT, and English failed to do so. However, N.C. Std. Spec. §§ 104-4 and 109-7 expressly provide for supplemental agreements

including price adjustments in work suspension situations, and the trial court clearly erred in concluding that neither English nor APAC had the "opportunity" to receive compensation from NCDOT for those delays. Via thirteen supplemental agreements obtained in accordance with the NCDOT Specs, English and APAC obtained waivers of $2.56 million in liquidated damages arising out of their delays that would otherwise have been owed. (Def. Exh. 4). In remitting liquidated damages, English and APAC were richly compensated for their delays; the trial court's conclusion to the contrary is non-sensical error.

In addition, sometime after 9 April 2009, English submitted a claim for its own extra costs arising out of NCDOT's suspensions of grading operations, and APAC forwarded the claim to NCDOT for processing. SSS previously asked English and APAC to request compensation for the extra costs of SSS arising from the work suspension, but English declined to do so. Although SSS does not seek to recover those earlier damages in this action, the trial court's logic would encourage such inequitable behavior whenever there is a pay-when-paid clause in a construction subcontract. A general contractor with a pay-when-paid clause would have no incentive to compensate its subcontractors for their actual damages, even when (as here) there is a mechanism to recover the damages from the owner.

The trial court's interpretation of the Subcontract rendered the specially negotiated price-escalation provision illusory by English's subsequent failure to seek recovery for those increased prices when it made its own claim for delay damages. In light of English's failure to petition NCDOT for the price escalation that it contractually agreed to pay SSS, it is inequitable to use the pay-when-paid provision to allow English to avoid paying SSS the specially negotiated price escalation.

III. APPELLEE WAIVED THE NO-DAMAGES-FOR-DELAY PROVISION

A. English's failure to assert the no-damages-for-delay provision is a waiver of that affirmative defense

English failed to assert the no-damages-for-delay provision as a defense to the claim by SSS for price escalation in its Answer to the Complaint by SSS, in English's Motion for Summary Judgment, or at the Superior Court trial (aside from an oblique reference to the no-damages-for-delay provision in its opening argument). English therefore waived the defense, and the trial court erred in denying recovery to SSS on that basis.

In response to a complaint, a defendant's answer must include "any matter constituting an avoidance or affirmative defense," including such matters arising out of "transactions" between the parties, or the defense is waived. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2010). Provisions of a contract between the parties, which would influence a plaintiff's right to recovery,

constitute matters in "avoidance or affirmative defense" and are waived if not asserted in the pleadings. Robinson v. Powell, 348 N.C. 562, 500 S.E.2d 714 (1998) (holding that defendant waived the defense of ratification by failing to mention the alleged ratification instrument in either his answer or summary judgment motion); see also Weaver-Sobel v. Sobel, No. COA04-474, 624 S.E.2d 432 (Table) (2006) (unpublished) (holding that a prenuptial agreement between the parties was "a matter in 'avoidance or affirmative defense'" that was required to be pled in response to a claim for equitable distribution).

At least one North Carolina court has determined that a no-damages-for-delay provision is an affirmative defense that must be specifically pled or else is waived. Nello L. Teer Co. v. N.C. Dep't of Transp., No. 02-CvS-4863, 2004 WL 5218006, at *34, *40 (N.C. Super. Mar 23, 2004), appeal withdrawn by NCDOT after argument, No. COA05-384 (2005) (unpublished) (granting a contractor an equitable adjustment in unit prices under N.C. Std. Spec. § 104-3 for "alterations in the plans or details of construction that materially change the character of the work and the cost of performing the work," despite NCDOT's claim that additional payment was barred by the no-damages-for-delay provision in N.C. Std. Spec. § 105-8, where NCDOT raised the no-damages-for-delay provision only at trial and failed to assert it as a defense in its pleadings). See also Tacon Mechanical

Contractors Inc. v. Grant Sheet Metal, Inc., 889 S.W.2d 666, 671 (Tex. App. 1994) (Contractor's "argument that the delay provision in the instant contract precludes liability [to its subcontractor] for delay damages is a classic avoidance defense."), Gibbons-Grable-Goettle v. Ne. Ohio Reg'l Sewer Dist., No. 49132, 1986 WL 1061, at *4 (Ohio Ct. App. Jan. 23, 1986) (unpublished) (Government agency's denial of its contractor's inefficiency claim "under the no damages for delay clause precisely fits this definition [of an affirmative defense], since it asserts that the contract negates a claim for 'delay' damages, even if such a claim would otherwise exist.").

Where the defendant waives an affirmative defense by failing to assert it in the pleadings, the issue may properly be considered by the trial court only with the consent of the plaintiff. Johnson v. N.C. Dep't of Transp., 107 N.C. App. 63, 67, 418 S.E.2d 700, 702 (1992) (allowing NCDOT to raise the statute of limitations in argument on a motion to dismiss, where the plaintiff was not "'surprised' by D.O.T.'s utilization of the limitations defense" and the trial court "considered both the arguments of and authorities submitted by both parties relating to the limitations issue"). Unlike Johnson, the record here clearly indicates that SSS was surprised at trial by English's use of the no-damages-for-delay defense. (T p 23).

English did not assert the no-damages-for-delay clause in either its Answer or its Motion for Summary Judgment. The record and trial transcript here are completely devoid of any legal authority or argument that the no-damages-for-delay provision bars recovery by SSS, aside from one fleeting reference to its assertion in opening arguments by English. (T p 22). The trial court erred by denying recovery to SSS on the basis of the no-damages-for-delay provision, since English waived that defense by failing to assert it before trial, and particularly since the trial court did not receive testimony or argument on that issue.

B. English's conduct shows that the parties did not intend the no-damages-for-delay provision to apply to, modify, or govern the price-escalation provision

Between 1 July 2007 and the trial three years later, on 14-15 July 2010, English never asserted, nor did its conduct indicate, that the no-damages-for-delay provision barred recovery under the price-escalation provision. Where a contract provision is ambiguous, the intent of the parties governs its interpretation, and the conduct of the parties is a "safe guide" in interpreting their intent. T.A. Loving Co. v. Latham, 20 N.C. App. 318, 327–28, 201 S.E.2d 516, 522–23 (1974) (holding that construction project owner was obligated to pay the additional costs of its general contractor, where communications between the owner and general contractor prior to litigation

were inconsistent with owner's position at trial that it offered only a conditional guarantee to pay the additional costs).

In October 2007, when SSS reminded English of the price-escalation provision, English did not invoke the no-damages-for-delay provision. In fact, English agreed that it owed SSS for increased costs, but only to the extent SSS's material prices increased after 1 July 2007. While there may have been a dispute as to the baseline for measuring the price increase, the conduct of both parties indicates that both they clearly believed that the provision entitled SSS to some price escalation.

Alternatively, if English knew that it would later assert the pay-when-paid qualifier to the no-damages-for-delay provision in order to avoid paying SSS's increased costs after 1 July 2007, then it should be estopped from asserting that position at trial. SSS relied on English's failure to assert the pay-when-paid clause by continuing to perform its work at an increased cost rate after 1 July 2007, when all acknowledged that SSS was not obligated to pay liquidated damages for non-completion as of 1 July 2007. English benefited from the accelerated work that it asked SSS to perform during June 2006 and SSS's work at increased costs after 1 July 2007, and it is inequitable now to allow English to rely on the pay-when-paid clause to avoid paying SSS for its increased costs after 1 July 2007, since English never asserted that defense before trial.

IV. THE PAYMENT BOND CAN NOT LIMIT RECOVERY UNDER THE PRICE-ESCALATION PROVISION

A. The Superior Court erred legally in concluding that the payment bond applied only to the terms of the prime contract and not those of the Subcontract

The trial court clearly erred in concluding that the language of the payment bond provided by APAC limited its application "only to payment for labor and materials of the work provided in the contract between APAC and NCDOT," and therefore did not extend to the terms of the Subcontract between English and SSS, such as the price-escalation provision.

The terms of the N.C. Payment Bond Act are conclusively presumed to be written into payment bonds on public projects, regardless of the language of the bond itself. N.C. Gen. Stat. § 44A-30 (2010). The Act makes the payment bond responsible for "payment for all labor or materials for which a contractor or subcontractor is liable." N.C. Gen. Stat. § 44A-26(a)(2) (2010). The payment bond is responsible for the contractual obligations of the first-tier subcontractor even where those terms are more onerous to the surety than the terms of the prime contract between the owner and principal. Symons Corp. v. Ins. Co. of N. Am., 94 N.C. App. 541, 546, 380 S.E.2d 550, 553 (1989).

In Symons, a supplier to a first-tier subcontractor sought recovery on a payment bond for the cost of rental equipment, plus interest at the agreed-upon rate of 1.5 percent per month.

Id. at 542, 545, 380 S.E.2d at 551, 553. The surety argued that it was only obligated to pay the statutory interest rate of eight percent per year. Id. This Court held in favor of the supplier, holding the surety liable for the higher interest rate in the agreement between the supplier and the subcontractor. Id. at 546, 380 S.E.2d at 553. See also Boatwright Distribution & Supply, Inc. v. N. State Mech. Inc., No. COA09-1077, 2010 WL 3464837, 699 S.E.2d 142 (Table) (N.C. Ct. App. Sept. 7, 2010) (unpublished) (awarding interest to a first-tier subcontractor's supplier at the higher rate of 1.5 percent per month, and rejecting the payment bond surety's contention that its obligation was limited to the rate in the principal's contract).

As in Symons and Boatwright, SSS contracted with a first-tier subcontractor (here, English) to the payment bond principal (here, APAC). Under N.C. Gen. Stat. § 44A-26(a)(2), APAC's payment bond surety is liable for the contractual obligations of the first-tier subcontractor. English obligated itself to pay escalated prices to SSS for work performed by SSS after 1 July 2007. It is irrelevant whether APAC's contract with NCDOT and first-tier subcontract with English provide for price escalation. As in Symons and Boatwright, the payment bond surety is liable for the terms to which the first-tier subcontractor (English) agreed, even if those terms are more onerous to the surety than the terms to which the general contractor agreed.

B. The Superior Court abused its discretion by failing to amend its judgment with a reasoned response to Appellant's assignments of error

It is abuse of discretion for a trial court to deny a motion to amend judgment where the underlying judgment is "based on erroneous findings of fact and a misapplication of the law." Jackson v. Culbreth, 199 N.C. App. 531, 539, 681 S.E.2d 813, 818 (2009) ("Reading Rules 52 and 59 together, we hold that the trial court, upon defendant's Motion to Reconsider, should have amended its findings, made additional findings, and amended its judgment . . ..").

Here, the trial court acknowledged at the start that it was not familiar with or proficient in the law pertaining to the payment bond claim. (T p 7). The issue of the surety's obligation was not argued at trial. The trial court's Judgment contains no finding of fact regarding the payment bond, aside from the fact that SSS alleged that the payment bond surety was liable to it. The trial court clearly erred by concluding in its Judgment that any breach of the Subcontract between SSS and English was "outside the terms of the bond." (R p 237).

SSS submitted a Motion to Amend Judgment, along with a Motion for New Trial, pursuant to N.C. Gen. Stat. § 1A-1, Rules 52 and 59 (2010). In its Motion to Amend Judgment, SSS demonstrated the trial court's numerous errors of law and fact. In its Order denying the Motions, the trial court said that it

"considered the documents submitted by Plaintiff in support of its motions," yet, as in Jackson v. Culbreth, the court failed to make any additional findings of fact or conclusions of law to support its decision. This was abuse of discretion, and the trial court's Judgment and Order should be overturned.

CONCLUSION

For the reasons stated herein, Plaintiff-Appellant asks this Court to hold that Defendants-Appellees English and Liberty are liable to Plaintiff-Appellant under the price-escalation provision of the Subcontract, and to reverse the Superior Court's Judgment to the contrary.

Respectfully submitted this 29th day of April 2011.

Electronically submitted
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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

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This the 29 day of April 2011.