

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

**GREENBRIAR DIGGING SERVICE LIMITED
PARTNERSHIP and INSURANCE COMPANY
OF THE WEST**

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:07-CV-00601-DPJ-JCS

SOUTH CENTRAL WATER ASSOCIATION, INC.

DEFENDANT

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED
BY GREENBRIAR DIGGING SERVICE LIMITED PARTNERSHIP
AND INSURANCE COMPANY OF THE WEST**

Greenbriar Digging Service Limited Partnership (“Greenbriar”) and Insurance Company of the West (“ICW”), without waiving their right to appeal the Court’s Order of March 26, 2009, submit these Proposed Findings of Fact and Conclusions of Law.

Findings of Fact

1. On April 6, 2004, Greenbriar entered into a contract with South Central for that project designated as “Contract III: Ozone Water Treatment Facility” (“the Project”), the essential purpose of which was to install an ozone system to reduce the color in the water produced by South Central’s well number 4.

2. The project was designed by Diversified Consultants, Inc. (“the Project Engineer”), who had a contract with South Central for the design of the ozone system and its accessory parts.

3. The Project Engineer designed the ozone system after consultation with Hankin Ozone Systems, Limited, a manufacturer of ozone generating equipment now known as Ozocan Corporation (“Ozocan”) and D&W Systems Sales, Inc., the retail seller of the ozone system.

4. The project was designed around the Ozocan system, and the ozone generator referenced in the Project Engineer’s specifications is the “Hankin Ozone Systems Limited OzoPulse Model PH 58 ozone generator, or equal”.

5. Greenbriar had no input into the design of the project.

6. The Contract’s Technical Specifications at Page I-3 through I-4 call for only one ozone generator capable of producing 100 pounds of ozone per day.

7. Greenbriar’s submittal of its proposed ozone equipment was based upon the Ozocan system described in the Project Engineer’s specifications, and the Project Engineer approved Greenbriar’s submittal.

8. Greenbriar installed the equipment as specified by the contract documents and as approved by the Project Engineer.

9. The Contract between Greenbriar and South Central includes the following:

GUARANTEE REQUIREMENTS: The contractor shall guarantee that the ozonation system will reduce the color in raw well water from Well 4 to twenty (20) units or less in the finished water, as noted in these Contract Documents. This guarantee shall include the repair, without cost to the Owner, of any defect due to design, materials, and/or workmanship.

10. The system installed by Greenbriar reduces the color of the water to 20 units or less at a flow rate between 600 and 700 gallons per minute.

11. In April 2005, Greenbriar considered the project complete and applied for its final payment of \$77,655.29.

12. By letter dated April 5, 2005, Greenbriar's surety gave its written consent to South Central to make final payment to Greenbriar.

13. The Project Engineer and South Central claimed that the Contract had not been fully satisfied because the color in the water had not been reduced to 20 units or less at a well flow rate of 1200 gallons per minute.

14. Thereafter, Ozocan began investigations to determine why its equipment was not satisfying the Project Engineer and what modifications could be made to obtain the Project Engineer's approval.

15. Ozocan ultimately recommended a substantially different ozone generator with related equipment and accessories different from what was called for in the specifications.

16. The Project Engineer testified that the wrong size equipment had been originally specified.

17. The Project Engineer testified that Greenbriar did not deviate from his design.

18. The Project Engineer essentially admits that his design is defective and testified that he designed the system with the wrong size equipment.

19. The Project Engineer sized the equipment and specified it by model

number, the same model number that Greenbriar relied upon and installed.

20. South Central has been using the Project since April 15, 2005, except for when it has been down for maintenance.

21. After South Central refused to make the final payment of \$77,655.29, Greenbriar brought this suit to recover Greenbriar's final payment of \$77,655.25, and ICW and Greenbriar sought declaratory relief in the form of a Judgment that they have no liability to South Central on the contract and performance bond. South Central counterclaimed for breach of the contract and the performance bond.

22. By Order entered March 26, 2009 the Court found Greenbriar liable to South Central reserving for trial the issue of South Central's damages.

Conclusions of Law

1. The burden is upon South Central to prove the damages it claims it suffered. *Boling v. A-1 Detective & Patrol Svc., Inc.*, 659 So. 2d 586, 590 (Miss. 1995).

2. When a project is completed substantially according to plans and specifications, the measure of damages is determined by the cost of repairing the defects to make the project conform to the specifications where such may be done at a reasonable expense or by the diminished value, which is the difference in the value of the project with the defective work and what the value would have been had there been strict compliance with the contract. *The Sumrall Church of the Lord Jesus Christ v. Johnson*, 757 So. 2d 311, 314 (Miss. 2000). There has been no proof offered by either party as to the diminished value of

the project; accordingly, the Court must determine the reasonable expense necessary to repair the existing system and make the project conform to the specifications.

3. Bearing in mind that the purpose of damages is to put the aggrieved party in the same position it would have been in had there been no breach, *Theobald v. Nosser*, 752 So. 2d 1036, 1042 (Miss. 1999) appeal after remand 784 So. 2d 142, rehearing denied, the Court finds that South Central's damages are \$320,000 to be reduced by \$77,655.29, the amount of the final payment otherwise due Greenbriar but withheld by South Central, for a total judgment of \$242,344.91.

Respectfully submitted,

GREENBRIAR DIGGING SERVICE
LIMITED PARTNERSHIP AND
INSURANCE COMPANY OF THE WEST

By: /s/ Ron A. Yarbrough
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CERTIFICATE OF SERVICE

I, Ron A. Yarbrough, hereby certify that I have electronically forwarded a copy of this document to:

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This the 3rd day of June, 2009.

/s/ Ron A. Yarbrough
Ron A. Yarbrough