STATE OF MICHIGAN

COURT OF APPEALS

PHOENIX CONTRACTING, INC.,

Plaintiff-Appellee,

v

JOHN M. OLSON CO., WAL-MART STORES, INC., FEDERAL INSURANCE CO., JOHN M. OLSON, MARK MILLICK, and JOHN OLSZEWSKI,

Defendants-Appellants.

UNPUBLISHED
December 11, 2001

No. 220681; 225146
Genesee Circuit Court
LC No. 95-038903-CK

Before: Whitbeck, P.J., and Holbrook, Jr., and Zahra, JJ.

PER CURIAM.

Defendants John M. Olson Company (JMOCO), Wal-Mart Stores, Inc., Federal Insurance Company, John M. Olson, Mark Millick, and John Olszewski appeal as of right. Following a bench trial, the trial court entered an amended judgment awarding Phoenix $232,980.25 from JMOCO and Federal Insurance, and $189,265.57 from Wal-Mart, Millick, Olson, and Olszewski. We affirm.

I. Basic Facts And Procedural History

Some time in the early 1990s, Wal-Mart decided to construct a store in Burton, Michigan, and chose JMOCO as its general contractor. The two corporations signed a contract in 1994. Pursuant to this prime agreement, JMOCO separately subcontracted with Phoenix to perform a variety of earthmoving services for a total of $296,720. The subcontract specified the tasks that Phoenix agreed to perform, as well as tasks Phoenix had no obligation to undertake:

> PHOENIX CONTRACTING & MATERIALS CORP.
>
> EXHIBIT "D" (REVISED)
>
> SCOPE OF WORK
>
> The Subcontractor shall provide all earthwork per the plans and specifications prepared by BSW International & CESO, Inc. as enumerated in Exhibit A,

including but not limited to the following (The following supersedes all other sections of the contract):

Specification Sections: 02110 Site Clearing

02220 Excavating, Backfilling & Compacting

1. Install silt fence.

2. Strip topsoil from building pads, pond, parking lot and Daly Farms Road. Stockpile on-site; No off-site disposal.

3. Mass balance site. ~~All excavated material from this contract to remain on site.~~ REMOVE EXCESS MATERIAL OFF-SITE (OTHER THAN TOPSOIL) JTP

4. Grade building pad.

5. Regrade parking lot to + or - 0.1'.

6. Regrade walks.

7. Excavate and regrade truck wells.

8. Access road around building perimeter and access road from Daly Farm Road to building, 10" deep by 20' wide, of 2" x 3" stone.

9. Mud mat off of E. Court Street - as per soil erosion requirements.

10. Place 2" x 3" stone in Daly Farms Road, 10" deep excluding entire shoulder.

11. Place 2" x 3" stone in 100' by 200' staging area 10" deep.

~~12. Place 4" of bank run sand in building.~~ JTP

13. Cut heavy growths of grass and remove with cleared plant material prior to stripping.

14. Spreading topsoil is ~~not~~ included. ~~It will be included in the landscaping contract.~~ JTP

15. Surface water control only.

16. Work to be performed as weather and soil moisture conditions allow.

The following items are not included:

1. Permits, fees, inspection, testing and bond.

2. Tree protection.

3. Maintenance of construction roads.

4. Footing excavation and backfill.

5. Proof rolling prior to paving.

6. Excavation and backfill for other trades.

7. Haul away of excavated material for other trades on-site or off-site.

8. Undercuts and backfill of undercuts.

9. Sodding, seeding or mulching.

10. Handling or disposing of contaminated and/or toxic material.

11. Surveying.

12. Demolition.

13. Barricading and lighting.

14. All work in Court Street R.O.W.

15. Underground utilities.

16. Soil stabilization.

17. Regrading areas disturbed by other trades

AGC clean up will be utilized on this project.

> The scope of the Subcontractor's Work includes all items required for the complete proper prosecution and completion of the Work set forth above, including without limitation, all items incidental to or reasonably inferable from such Work, whether or not expressly shown on the Drawings or expressly set for in the Specification.[1]

The construction project encountered problems almost from the first day. Originally slated to begin in spring 1994, construction did not begin until October 1994. However, Wal-Mart was reportedly unwilling to alter June 1995 as the time to open the store for business. As

---

[1] The strikeouts to the first list appear in the original, added by hand and initialed by John T. Peace, JMOCO's project manager. The underscoring indicates material added by hand to the list, with the exception of the line indicating the items excluded from the subcontract, which appears underlined in the original. The only material omitted from this exhibit is the heading indicating that the list continued to the second page consisted of tasks excluded from the subcontract.

the subcontractor responsible for preparing the site, Phoenix was one of the first trades at the construction site. As Phoenix began work, engineers discovered that the topographical survey was incorrect, resulting in a significant shortfall of more than 6,000 yards of soil. Then, as Phoenix began its massive earthmoving work, it discovered that much of the soil was clay and silt that could not be stabilized as previously planned, forcing them to remove this material. To make matters worse, the weather was extremely rainy that fall and a hard freeze did not come until very late. According to the descriptions by individuals who were at the worksite, it was a sea of mud. Not only did this make Phoenix's work harder because it had to concentrate on "dewatering" the site, it washed out part of a construction road. Further, the presence of rain made it impossible to test many areas of the site to determine whether they had been compacted sufficiently to prevent settling in the future.

That fall, there was no question that Phoenix was performing high quality work despite the conditions. Craig Lemonds, a CTI engineer performing soil testing at the site on an almost daily basis, said that Phoenix made "almost a heroic effort considering the weather." Though John Peace, JMOCO's project manager for the Burton store, might not have used the word "heroic," he had only positive things to say about the work Phoenix was performing. Howard (Ted) Hagan, JMOCO's project superintendent commented positively on Phoenix's work:

> From the day Phoenix moved in on the job Frank Mancuso [a Phoenix employee], weather permitting, worked seven days a week as many hours as he could. He probably woulda [sic] worked 26 hours a day if he could. He did a good job.

Even John Olszewski, the project manager who replaced Peace after winter forced Phoenix to stop working, was pleasantly surprised that the project had moved ahead so quickly in spite of the weather conditions.

According to John Baker, Phoenix's project manager for the Burton store, when Phoenix stopped working on December 22, 1994, Phoenix had completed items 1, 2, 4, 7, 8, 10, 11, 13, 15, and 16 on the list of tasks appended to the subcontract in exhibit D. Of course, item 12 had been removed from the list, but he said that item 3, mass balancing and removing excess material, was ninety to ninety-five percent complete. Baker estimated that item 5, regrading the parking lot within one-tenth of a foot, was very nearly complete. Item 6, regrading the walks, had not been performed, but was only a very small percentage of the work required under the subcontract, comprising only about one percent of the total work. Phoenix did not create the mud mat required by item 9 because the project had used a different street to gain access to the construction site, where Phoenix had provided the requisite mud mats out of crushed stone or concrete to remove mud from truck wheels. Phoenix had not put the topsoil in place, as item 14 required. However, Baker explained, that would be one of the last steps at the construction site and could not be done in winter.

Not surprisingly, as construction progressed during the months that Phoenix was on the job, JMOCO and Wal-Mart discovered that they needed Phoenix to alter its work from the list in exhibit D to accommodate the problems plaguing the project. Recognizing the uncertainties inherent in any construction project of this size, Article VII of the subcontract provided that JMOCO and Wal-Mart could order "extra and/or additional work, deletions, or other

modifications to the Work, such changes to be effective only upon written order of" JMOCO and Wal-Mart.

JMOCO's first written change order, dated January 8, 1995, deducted $15,000 from the subcontract price for sand that was unnecessary after JMOCO deleted item 12 from exhibit D. Change order 1, however, added $20,000 to the contract price for spreading topsoil, resulting in a net addition of $5,000 to the subcontract price, which was then worth $301,720. Baker freely admitted that Phoenix never had a chance to perform this change order because of the dispute over payment that arose over the winter months.

Though dated January 9, 1995, the second written change order from JMOCO referred to work Phoenix had performed in October and November 1994. Change order 2 corresponded to SIS (superintendent's instruction to subcontractor) 2 and SIS 4, which Hagan, JMOCO's project superintendent, had signed. SIS 2 and SIS 4 both indicated that JMOCO and Wal-Mart would be "backcharged" for subgrade undercut work to stabilize the soil.[2] Change order 2 was this backcharge. It added $61,930 for two days of subgrade undercutting and $46,019 for an additional five days of subgrade undercutting, adding $107,949 to the subcontract price. Change orders 3.1 and 3.2, both dated March 24, 1995, appeared on Wal-Mart letterhead and also related to subgrade undercutting Phoenix performed in October 1994. Change order 3.1 was for $61,930 and change order 3.2 was for $46,019, constituting Wal-Mart's authorization for change order 2. In total, change order 2 and the supporting documentation brought the price of Phoenix's subcontract to $409,669, without including JMOCO's fees. Payment for this change order is at the center of this lawsuit.[3]

JMOCO change order 3, which was also dated January 9, 1995, added $99,305 to the subcontract. This change order corresponded to SIS 3, dated October 28, 1994, and SIS 11, dated November 22, 1994. SIS 11 notes that JMOCO had accepted Phoenix's work under change order 3 except for extra stone and suggests that either this work acceptance or the rejection of the extra stone also applied to SIS 3. Change order 3 increased the subcontract price total to $508,974.

JMOCO also accommodated Phoenix's extra work by issuing purchase orders. Purchase order 10093, dated February 6, 1994 [sic], corresponded to SIS 15 and was for $15,770.15 for construction road maintenance performed in December 1994. Purchase order 10094, dated February 8, 1995, related to work by several subcontractors. With respect to Phoenix, this purchase order added $6,285 and $15,097.[4] Added together, these purchase orders were $37,142.15, bringing the total amount Phoenix would be due if it performed under the contract to $546,116.15.

---

[2] Exhibit D to the subcontract stated that Phoenix was not obligated to undercuts or backfills, which is why this work was the subject of a change order rather than a part of Phoenix's contractual work.

[3] JMOCO change order 2 and Wal-Mart change orders 3.1 and 3.2 all concern the same work and costs and, therefore, are regularly referred to as change order 2.

[4] Whether the purchase order included a fractional dollar (cents) for the $15,097 fee is not clear from the photocopy in the record.

A December 7, 1994, reference letter for Phoenix confirmed Baker's belief that Phoenix had performed the majority of the work under the subcontract and change orders. In the letter, Peace indicated that Phoenix had "satisfactorily performed 95%" of the work under the contract as of November 30, 1994. Further:

> Their personnel are capable and knowledgeable. Their equipment is in good running condition and suited to perform the work in a timely and orderly manner.
>
> As of this date, their work is on schedule despite inclement weather and substantial additional work. We would not hesitate to use Phoenix Contracting for future work in their field and would recommend them to others.

JMOCO paid Phoenix $50,000 in December 1994. When Baker inquired about the other payments due to Phoenix, Peace reportedly stated that Phoenix would receive $372,425 between January 6 and January 9, 1995, because he was waiting for a necessary signature on the check from Millick, who shared ownership of JMOCO with Olson. When Baker called Peace again around January 6, 1995, Peace allegedly said that JMOCO could not pay Phoenix $107,949, which was for the work described in SIS 2 and SIS 4, and approved in change order 2, because Wal-Mart had not yet paid JMOCO.

However, as Phoenix later discovered, JMOCO had applied to Wal-Mart for money to pay for this sitework. JMOCO's application for payment, which was dated December 5, 1994, indicated that forty percent of the work under the $1,319,500 sitework budget was complete, costing $527,800. Phoenix was the only subcontractor to perform sitework at the time encompassed by this pay application. Additionally, the overall budget included work that other subcontractors would perform at a later time. Consequently, though this pay application referred to forty percent site work completion, this indicated that Phoenix had actually performed more than forty percent of its own work. After subtracting the ten percent retainage fee, the money JMOCO requested Wal-Mart to provide to pay Phoenix was $475,020, approximately sixty-five percent of the $736,349 JMOCO requested to pay other subcontractors at the site.

Wal-Mart issued a check to JMOCO on December 23, 1994, for the full $736,349 JMOCO had requested. JMOCO made a second payment application on January 9, 1995, requesting an additional $3,650 total, of which $3,285 was for topsoil removal Phoenix performed. Phoenix received this payment in late January or sometime in February 1995. JMOCO did pay Phoenix $264,476. Though JMOCO applied for and received from Wal-Mart a sum that would cover the $107,949 it still owed Phoenix later that winter, Baker said, JMOCO still did not pay that amount to Phoenix.

Apparently, the problems between JMOCO and Phoenix began when JMOCO asked Olszewski to review the work being done at the Burton store. Though Olszewski had no specific or major complaints about Phoenix's work – in fact he had not been at the site while Phoenix was working there – he believed that Phoenix had been paid for work it had not yet performed. More importantly, from Olszewski's perspective, the way Peace had "frontloaded" pay applications to advance money to Phoenix made it more difficult to force Phoenix to finish its work later in the project and to pay for another subcontractor to finish the work. Hagan estimated that Phoenix had completed slightly more than fifty percent of its contract, supporting

Olszewski's belief that Phoenix had been overpaid an amount that equaled almost the entire price of the subcontract.

Peace stood by his representations that Phoenix had done the majority of its work. As Peace later explained, he had discussed the need to perform the extra work embraced by change order 1 and 2 with different Wal-Mart representatives. Given their unyielding stance on the opening date and their statements to the effect that a maximum effort should be made to complete the project on time, Peace said he had had every reason to believe that Wal-Mart intended to pay JMOCO for this extra working it was asking Phoenix to perform. Because there simply was no choice but to do the work, he and Hagan authorized Phoenix to perform it, as the documents themselves indicated. While this meant that the paperwork followed the actual work, the arrangement was necessary and, as Phoenix consultant and engineer Dan Mancuso explained, quite typical in the construction industry. Furthermore, Peace indicated that Phoenix had been clear from the beginning that, because it was a small business, it could not afford to go months without being paid. Thus, Peace said, with Wal-Mart's permission, he had applied for payments for Phoenix upfront. Evidently, by the time they were actually paid, Peace believed that Phoenix had performed the all the work covered by the payment and more. In Peace's view, this was not frontloading.

Olszewski replaced Peace by the beginning of February 1995 as the project manager for JMOCO.[5] Representatives from Phoenix and JMOCO, including Olszewski, met in February 1995 to discuss Phoenix's payment demand. According to Baker, because Phoenix was a small company, it could not afford to go long periods without being paid for its work. It was willing to perform its remaining obligations under the subcontract, such as spreading topsoil. However, Baker said, at the meeting JMOCO's representatives attempted to force them to take $36,000 *less* than Phoenix was due for work it had already performed. Olszewski called this a price adjustment that he thought necessary because of cost overruns and prevailing pricing. Baker also indicated that JMOCO asked Phoenix to perform other work for free. For instance, though JMOCO had approved the work Phoenix had done raising Daily Farms Road[6] to subgrade, subcontractors working over the winter had ruined the work and JMOCO wanted Phoenix to restore the road. JMOCO also wanted Phoenix to restore the staging area used throughout the project and to remove the stock pile of building pad spoils,[7] neither of which was its responsibility under the subcontract.

Phoenix and JMOCO representatives met again in April 1995. Baker's impression of that meeting was that JMOCO would not pay Phoenix unless Phoenix accepted a discount for work it had already performed, returned to work, and performed extra work for free. By the time the

---

[5] Though Peace was asked to resign during this transition, he said that he held no grudge toward JMOCO and that he neither had a connection with Phoenix nor any interest in the outcome of the trial.

[6] This was variously referred to Daily Farms Drive, Daily Farm Drive, Daly Road, and Daly Drive.

[7] Spoils are the material removed from the earth, including dirt, silt, and clay, during excavation. Thus, building pad spoils were materials removed from the earth in the process of creating a stable layer of stone and sand on which to build the store structure.

parties met for a second time in April, JMOCO had paid $99,305 for the gravel pad it had authorized Phoenix to build, but were withholding more than $107,000 because Wal-Mart was refusing to pay for it, according to Olszewski.

By late April or early May 1995, Phoenix claimed that JMOCO still owed it more than $125,000. In an exchange of increasingly adamant letters, Phoenix and JMOCO related their respective positions concerning payment and Phoenix's continued work. First, Phoenix alleged that JMOCO owed it $125,686: $107,949 for its work described in change order 2, $1,967 for 21AA stone placed in the staging area, which was not included in the subcontract and which Hagan approved, and $15,770 for crushed concrete. Phoenix rejected the suggestion that it had overbilled for any of its work. In a second letter, Phoenix specified the debris and damage at the worksite that prevented it from performing the rest of its responsibilities under the subcontract or was not its responsibility to fix. Phoenix again demanded payment and indicated that, absent prompt payment, JMOCO would be in default under the subcontract.

JMOCO replied to this second letter, indicating that it had sent two notices to Phoenix to resume work, tried to contact Baker, and presented a first notice of default. JMOCO indicated that some of the spoil piles and other debris Phoenix had identified as outside the scope of its responsibility would be taken care of by others. JMOCO said that another company would level areas disturbed because of utilities. JMOCO would perform Phoenix's job regrading certain areas, but JMOCO expected Phoenix to create a detention basin, work on an entrance off Court Street, shape Daily Farms Road, place the subbases for the sidewalks, spread the topsoil, prepare the soil for the parking lot, and continue other work under the subcontract. The letter also stated:

> JMOCO has received payment for the $107,000 change order from Wal-Mart. However, this dollar amount along with the additional miscellaneous stone work outstanding, cannot be paid for two reasons. One, Phoenix Contracting is extremely overbilled for the amount of work that remains to be completed. Secondly, JMOCO has twice had a change order rejected by Wal-Mart that corresponds to Phoenix Contracting's Change order #3, dated 01-09-95. Any payments received against that change order should be considered payment towards the $107,000 approved change order for undercutting less cost of work to complete and retainage.

JMOCO closed the letter by stating that Phoenix had an obligation to continue its work and that the letter was a second notice of default.

Phoenix responded that it had never received any notice to return to the work site, despite JMOCO's promise that the site would be cleaned it was still full of debris, and it had no more responsibilities concerning Daily Farms Road. Phoenix proceeded to address each of the areas JMOCO claimed it had to fix, indicating the work it had completed and its willingness to return to work once the site was remedied. Phoenix hotly contested JMOCO's claim that it need not be paid for work it had performed.

Despite exchanging more letters, JMOCO and Phoenix never resolved their differences. In mid-May 1995, with the opening day looming, JMOCO subcontracted with WPM to complete Phoenix's work as well as to perform other work. WPM construction manager Ronald Weidenfeller never saw Phoenix's subcontract with JMOCO and, therefore, had no definite

knowledge of which portions of WPM's work at the construction site accounted for work Phoenix had failed to perform and extra work JMOCO wanted finished. Phoenix estimated that it would cost approximately $35,000 to complete the work remaining under the subcontract, excluding extra work not covered by the subcontract. Peace suggested that the cost of completion might be slightly higher, around $47,000 even when using the same cost figures, such as time spent and price of materials, that JMOCO used. According to JMOCO's calculations, however, it cost significantly more, somewhere around $165,000, a figure Olszewski and Hagan evidently determined by examining WPM's charges and attributing certain activities to Phoenix's subcontract.

Phoenix sued, alleging that it had a statutory construction lien (Count I) and an equitable lien (Count II) on the project. Phoenix also claimed that defendants breached the subcontract (Count III), that it was entitled to payment from the Federal Insurance a bond JMOCO had filed on behalf of Wal-Mart (Count IV), that JMOCO, Olson, Millick, and Olszewski had committed conversion by keeping the money Wal-Mart appropriated for Phoenix (Count V), and that that money was being held in trust for Phoenix (Count VI). Phoenix asked to recover $172,987.45 plus costs, interest, and attorney fees. Though some defendants moved for partial summary disposition on the basis of an arbitration clause in the subcontract and on the conversion count, the trial court denied both motions.

The evidence at trial, matching the facts outlined above, tended to fall into one of four categories: financial information concerning the amounts due under the subcontract, change orders, and purchase orders; the amount of work Phoenix completed by December 22, 1994, when it left the project; whether that work was satisfactory; and how much work was left to be finished that was part of Phoenix's responsibility under the subcontract.

Though the witnesses disagreed regarding the percentage of the subcontract Phoenix had completed, no one estimated that it was less than fifty percent. While defendants brought out testimony that suggested that Phoenix had not compacted the soil to a level that passed CTI's tests, there was contrary testimony that CTI may have applied more stringent compaction standards than required and that most of the compaction was determined to be adequate in spring 1995. There was specific evidence from Phoenix concerning which areas of the worksite had been disturbed by other trades after Phoenix left the site, coupled with documentary evidence of the areas that JMOCO has accepted as complete. This confirmed Phoenix's claim that JMOCO was attempting to have it perform work excluded by exhibit D to the subcontract, which, among other things, did not require Phoenix to regrade "areas disturbed by other trades."

Olszewski suggested that Phoenix had not performed adequately. For instance, he said that the crushed concrete that Phoenix purchased pursuant to purchase order 10093 for $15,770.15 was of poor quality, containing broken bricks and wires that punctured tires on the vehicles passing over the surface where it was placed. Further, Daily Farms Road did not comply with the project specifications though JMOCO had accepted the work Phoenix did there.

The trial court accepted the vast majority of Phoenix's proposed factual findings, rejecting only the claim for conversion. In a seventeen-page opinion, the trial court found that defendants had breached the subcontract; that Phoenix had demonstrated that it was due money under both the statutory and equitable lien theories; that excusing Wal-Mart from its share of this debt would allow it unjust enrichment; that Phoenix had a right to demand payment from Wal-

Mart's bond; and that the money Wal-Mart paid to JMOCO was in trust for Phoenix and was payable to Phoenix. The trial court agreed with Peace's estimation that the work WPM had completed for Phoenix cost close to $47,000. The trial court awarded Phoenix $141,375, excluding costs, fees, sanctions, and interest.

II. Arbitration

A. Standard Of Review

Defendant claim that JMOCO, Federal Insurance, Olson, Millick, and Olszewski were entitled to have the claims against them in Counts III, IV, V, and VI resolved in arbitration. Determining whether defendants were entitled to have their dispute with Phoenix resolved through arbitration rather than this judicial proceeding requires contractual interpretation, which is subject to review de novo.[8] Review de novo is also appropriate because the trial court denied defendants' request to submit the case to arbitration in the context of a motion for partial summary disposition under MCR 2.116(C)(7).[9]

B. The Arbitration Language

Before trial, JMOCO, Federal Insurance, Olson, Millick, and Olszewski moved for partial summary disposition relying on Article XVIII of the subcontract, which is entitled "DISPUTES":

> Claims, disputes, and other matters in question arising out of or relating to this Subcontract shall be determined by the method and forum designated for resolution of claims, disputes and other matters in question between the Contractor and the Owner in the Prime Contract, if any therein is designated. *In any dispute not involving the Owner*, the parties agree to submit to the court of competent jurisdiction in the location in which the Project Site is situated; provided, however, that *the Contractor may, in its sole option, require that any controversy or claim between the Contractor and Subcontractor arising out of or related to this Subcontract or the breach thereof, may be submitted to arbitration*, which shall be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, which proceedings shall be held in Southfield, Michigan, or such other place as Contractor may designate. The pendency of a dispute shall not interfere with the progress of the Work by Contractor nor limit the right of Contractor to proceed, in good faith, to remedy an alleged default by Contractor.[10]

---

[8] See *Perry v Sied*, 461 Mich 680, 681, n 1; 611 NW2d 516 (2000).

[9] See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[10] Emphasis added.

Defendants contend that the arbitration agreement in Article XVIII was enforceable pursuant to MCL 600.5001(2) and was an irrevocable statutory arbitration agreement under the reasoning used in *Hetrick v Friedman*.[11]

"An arbitration agreement is a contract by which the parties forgo their rights to proceed in civil court in lieu of submitting their dispute to a panel of arbitrators."[12] However, "'a party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration' . . . [and] a party cannot be required to arbitrate when it is not legally or factually a party to the agreement."[13] Consequently, this Court must apply the common-sense legal test in *DAIIE v Reck*[14] to determine whether any of the claims in this case required the parties to submit to arbitration. This test asks:

> 1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract[?[15]]

Implicitly, this test relies on the rules of contract construction.[16] As this Court explained in another case concerning arbitration:

> "'The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties.'" *Goodwin, Inc v Coe Pontiac*, 392 Mich 195, 209; 220 NW2d 664 (1974), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924) (emphasis in *Goodwin*). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991).
>
> However, . . . any ambiguity concerning whether a specific issue falls within the scope of arbitration . . . must be resolved in favor of submitting the question to the arbitrator for resolution. See *AT & T Technologies*[, *Inc v Communications Workers of America*, 475 US 643, 650; 106 S Ct 1415, 89 L Ed 2d 648 (1986)]. . . . In *First Options* [*of Chicago, Inc v Kaplan*, 514 US 938, 945; 115 S Ct 1920; 131 L Ed 2d 985 (1995)], the Court explained that when the parties have a contract that provides for arbitration of some issues, "the parties

---

[11] *Hetrick v Friedman*, 237 Mich App 264; 602 NW2d 603 (1999).

[12] *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996).

[13] *St Clair Prosecutor v AFSCME*, 425 Mich 204, 223; 388 NW2d 231 (1986), quoting *Kaleva-Norman-Dickson School Dist v Kaleva-Norman-Dickson Teacher's Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975).

[14] *DAIIE v Reck*, 90 Mich App 286, 290; 282 NW2d 292 (1979).

[15] *Id*.

[16] See, generally, *Grazia v Sanchez*, 199 Mich App 582, 586; 502 NW2d 751 (1993) ("Contract principles apply to arbitration agreements.").

> likely gave at least some thought to the scope of arbitration." Therefore, the law "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter." *Id*.[17]

The language of the subcontract itself reveals that Article XVIII provides for dispute resolution that encompasses arbitration at JMOCO's discretion, passing the first element of the test in *Reck*. With respect to the question of the scope of dispute resolution generally, Article XVIII addresses two different situations: when the owner is involved in the dispute and when the owner is not involved in the dispute. Arbitration is an option *only* in this second situation, in which the dispute does not involve Wal-Mart.

Evidently hoping to avoid the preclusive language in Article XVIII, only defendants directly related to JMOCO moved for partial summary disposition on the basis of the arbitration agreement. The language in Article XVIII is particular. The second sentence that grants JMOCO the option of demanding arbitration refers to "any dispute not involving the Owner." However, Wal-Mart was "involv[ed]" with the disputes surrounding each of these claims at issue in the motion for partial summary disposition. In Count III, the statutory lien claim, Phoenix asked the trial court to award it monetary damages against JMOCO *and* Wal-Mart. In Count IV, Phoenix's right to recover from the bond concerning the Wal-Mart store in Burton was at issue. JMOCO officially posted this bond on behalf of Wal-Mart. The trial court ultimately entered a judgment of no cause of action with respect to the conversion claim in Count V, so whether Wal-Mart was involved in that claim is not at issue on appeal. Finally, with respect to Count VI, concerning whether JMOCO and its personnel were holding money in trust for Phoenix, this claim relied on money Wal-Mart transferred to JMOCO. Clearly, Wal-Mart, JMOCO, Olson, Millick, and Olszewski were not placed in the same position when having to defend against the claims. In some of these counts, Wal-Mart was merely a player in the facts surrounding the claims. However, the dictionary defines the verb "to involve," of which "involving" is a form, as meaning:

> 1. to include as a necessary circumstance, condition, or consequence; imply; entail . . . . 3. to include within itself or its scope. 5. to cause to be troublesomely associated, as in something embarrassing or unfavorable . . . . 7. to implicate, as in guilt or crime, or in any matter or affair . . . .[18]

Wal-Mart is factually part of the "scope" of the "circumstances," and the facts "implicate" matters concerning its conduct that would "entail" being presented in the action. Further, while perhaps not embarrassing, these counts create a troublesome association between Wal-Mart and the litigation. In short, facts surrounding Wal-Mart are so intertwined with Counts II, IV, and VI, that the dispute encompassed by those claims involved Wal-Mart.

Because Wal-Mart was involved in the facts surrounding this action, which unquestionably concerns "[c]laims, disputes, and other matters in question arising out of or

---

[17] *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 233-234; 590 NW2d 580 (1998) (footnote omitted).

[18] *Random House Webster's College Dictionary* (1997), p 689.

relating to this Subcontract," Article XVIII directs the parties to consult the prime agreement between Wal-Mart and JMOCO for any provisions concerning dispute resolution. Only if the prime agreement imposes a duty to arbitrate the disputes arising in this case would JMOCO and the other defendants moving for partial summary disposition under MCR 2.116(C)(7) have any merit to their arguments.

Subsection 4.5 of the general conditions in the prime agreement does provide boilerplate language permitting arbitration under certain circumstances. More importantly, however, the prime agreement includes supplementary conditions that

> modify, change, delete from or add to the General Conditions of The Contract for construction . . . . Where any Article of the General Conditions is modified or any Paragraph, Subparagraph or Clause thereof is modified or deleted by these Supplementary Conditions, the unaltered provisions of that Article, Paragraph, Subparagraph or Clause shall remain in effect.

With respect to the arbitration language in subsection 4.5, the supplementary conditions state:

> 4.5 Delete Paragraph 4.5 in its entirety and replace with the following:
>
> 4.5 ARBITRATION
>
> 4.5.1 References to arbitration in Paragraph 4.5 or any other paragraph of the General Conditions is hereby deleted and rendered null and void, of no force or effect and not a part of the Contract.

These supplementary conditions speak for themselves. The boilerplate arbitration language appearing in subsection 4.5 or any other place in the general conditions no longer has any effect and are "not a part of the Contract." There is no question that the supplementary conditions removed any and all arbitration agreements from the prime agreement. Thus, because the relevant contract, the prime agreement, does not have an agreement to arbitrate disputes, it is not necessary to consider the other elements outlined in *Reck*.

Defendant's argument concerning *Hetrick* is something of a red herring. In *Hetrick*, this Court was asked to consider the distinction between a statutory arbitration agreement, which MCL 600.5001 makes irrevocable without mutual assent, and common-law arbitration, which may be revoked unilaterally.[19] In light of the language in the arbitration agreement itself, the *Hetrick* Court determined that the basis for the agreement was statutory, not common-law, and, therefore, the trial court erred in dismissing the suit on the basis of the plaintiffs' unilateral revocation of the agreement.[20]

In this case, however, the threshold question does not require categorizing the type of arbitration language used in the subcontract that applies only when Wal-Mart is not involved in the dispute. Rather, the Court must determine whether an agreement to arbitrate exists at all, a

[19] *Hetrick*, *supra* at 267-269.

[20] *Id*. at 269-270.

matter not in dispute in *Hetrick*. Because the dispute in this lawsuit, even with respect to the claims that Phoenix pressed only against JMOCO, Federal Insurance, Olson, Millick, and Olszewski, all "involved" Wal-Mart, Article XVIII of the subcontract specified that the prime agreement governed arbitration. The unambiguous language in the supplementary conditions to the prime agreement leave no doubt that there is no arbitration agreement for these defendants to enforce. Thus, the trial court did not err in refusing to grant this motion for partial summary disposition.

III. Wal-Mart

Defendants have presented for appeal an issue contending that the trial court erred in including Wal-Mart in the judgment because it had been dismissed from the suit by the parties' stipulation or, evidently, by operation of law when the construction lien against Wal-Mart was discharged. To say that the six sentences comprising this whole argument are cursory is an understatement. This failure to brief this issue constitutes abandonment.[21] Furthermore, there is no merit to these arguments. The record does not decisively establish that the parties agreed on the same terms to dismiss Wal-Mart once JMOCO filed a bond on its behalf or that those terms had been fulfilled. There is no evidence in the record that anyone filed the bond certificate with the Genesee County Register of Deeds in order to discharge the construction lien, which MCL 570.1116(2) requires. Additionally, though a court speaks through its written orders,[22] defendants have failed to point to an order in the record dismissing Wal-Mart, and comments during closing arguments suggest that none exists. Thus, we have no basis to conclude that the portion of the judgment affecting Wal-Mart was erroneous because it had been dismissed.

The issue presented does not refer to the unjust enrichment claim against Wal-Mart in any manner. Nevertheless, defendants have also chosen to contend that Wal-Mart could not be directly liable to Phoenix on an unjust enrichment theory because Wal-Mart paid JMOCO for Phoenix's work. This argument is not only briefed inadequately, defendants have failed to present it for our review.[23] Like the argument concerning Wal-Mart's supposed dismissal, this argument has no merit. As their sole authority, defendants cite *Spartan Asphalt v Grand Ledge Mobile Home Park*.[24] In *Spartan Asphalt*, this Court concluded that summary disposition in favor of the defendant on a *quantum meruit* claim was appropriate because the allegations in the complaint did not demonstrate unjust enrichment.[25] Further, this Court commented, the complaint did not "exclude the possibility that the defendant had paid its general contractor for the services and materials furnished by the plaintiff."[26]

---

[21] See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[22] See *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999).

[23] MCR 7.212(C)(5).

[24] *Spartan Asphalt v Grand Ledge Mobile Home Park*, 71 Mich App 177; 247 NW2d 589 (1976).

[25] *Id*. at 187.

[26] *Id*.

What defendants here fail to acknowledge is that the Michigan Supreme Court reversed this Court's decision in *Spartan Asphalt* the next year.[27] Though focusing exclusively on the portion of this Court's opinion interpreting the mechanics lien statute at issue, not unjust enrichment, the Supreme Court still remanded the case for further proceedings.[28] Apparently, the Supreme Court did not find this Court's reasoning concerning unjust enrichment persuasive. Thus, it is questionable whether an opinion of this Court addressing a rule of pleading not at issue here, reversed on appeal on the basis of an interpretation of a statute irrelevant to this case, has any precedential effect in this action. While other case law *might* support defendants' unjust enrichment argument, they have not seen fit to discover it and we have no obligation to do so for them.[29]

IV. Statutory Interest

A. Standard Of Review

Defendants contend the trial court erred in applying a twelve-percent statutory interest rate to the judgment against JMOCO and Federal Insurance. Whether the trial court applied the correct statutory interest is a question of law reviewed de novo.[30]

B. Consent

Evidently, defendants first intend to argue that Phoenix stipulated to applying an interest rate below twelve percent by preparing the original judgment without identifying an interest rate. Therefore, defendants claim, Phoenix was bound to the terms of the original judgment and the trial court erred in applying a twelve percent interest rate when considering the issue with respect to the motion to amend the judgment.

Defendants accurately cite *Wold v Jeep Corp*[31] for the proposition that when a party signs an order that the party also "approved as to content and form, the order is the equivalent of a consent judgment." Yet, as Phoenix points out, its lawyers did not sign the original judgment, nor did the lawyers indicate any approval with respect to form or content. The signature, added to approval of form and approval of content, were the three factors the *Wold* Court found significant in the order under consideration in that case. The *Wold* Court did not comment to any extent whatsoever that the identity of the party preparing the order had any bearing on whether an alleged error in the order could be corrected. Consequently, though it might be logical to conclude that a party has only limited, if any, relief available when it makes a mistake when preparing an order, *Wold* does not go so far.

---

[27] *Spartan Asphalt v Grand Ledge Mobile Home Park*, 400 Mich 184; 253 NW2d 646 (1977).

[28] *Id*. at 187-191.

[29] See *Mitcham*, *supra*.

[30] See *Alex v Wildfong*, 460 Mich 10, 21; 594 NW2d 469 (1999).

[31] *Wold v Jeep Corp*, 141 Mich App 476; 367 NW2d 421 (1985).

Moreover, as Phoenix also notes, *Wold* is no longer good law to the extent that it can be read to mean that a lawyer's signature along with the words "approved as to form and content" can legally transform a contested case into a case settled by consent. In *Ahrenberg Mechanical Contracting, Inc v Howlett*,[32] the Michigan Supreme Court adopted the reasoning in *Kirn v Ioor*,[33] which explained the practice of having the prevailing party prepare orders. In doing so, the Court suggested that there must be evidence of real consent, not merely agreement that the order reflects the trial court's ruling from the bench, to bar the party preparing the order from seeking redress for what it considers an error.[34]

The reason for the error in the original judgment in this case is not clear. Nor is it apparent that Phoenix spent any time arguing the interest rate before it recognized the error in the judgment. However, there is no proof that Phoenix agreed at all that its award would be calculated without a twelve-percent interest rate. As a result, there is insufficient evidence of Phoenix's consent to the original judgment to conclude that it was, in fact, a consent judgment beyond review.

C. "Written Instruments"

The second part of defendants' argument focuses on whether twelve percent was the appropriate interest rate for the bond and contract claims against JMOCO and Federal Insurance. To be clear, the trial court applied the twelve-percent interest rate in MCL 600.6013(5) only to these two defendants. The trial court applied the variable interest rate in MCL 600.6013(6) to the other defendants. In a nutshell, defendants now argue that neither the bond nor the subcontract were "written instruments" and, therefore, the interest on the award against JMOCO and Federal Insurance also had to be calculated using the interest rate in MCL 500.6013(6).

MCL 600.6013 provides in pertinent part:

> (5) For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.
>
> (6) Except as otherwise provided in subsection (5) and subject to subsection (11), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as

[32] *Ahrenberg Mechanical Contracting, Inc v Howlett*, 451 Mich 74, 77-79; 545 NW2d 4 (1996).

[33] *Kirn v Ioor*, 266 Mich 335, 336-338; 253 NW 318 (1934).

[34] *Ahrenberg*, *supra* at 78-79.

> certified by the state treasurer, and compounded annually, pursuant to this section. Interest under this subsection shall be calculated on the entire amount of the money judgment, including attorney fees and other costs. However, the amount of interest attributable to that part of the money judgment from which attorney fees are paid shall be retained by the plaintiff, and not paid to the plaintiff's attorney.

The Michigan Supreme Court's decision in *Yaldo v North Pointe Ins Co*[35] resolves this issue. In *Yaldo*, the Supreme Court construed the term "written instrument" in MCL 600.6013(5), explaining that it was "clear and unambiguous" and plainly encompassed a written insurance contract.[36] In reaching this conclusion, the Supreme Court rejected the defendant's argument that by using the word "instrument," the Legislature only intended for subsection 5 to apply to negotiable instruments or other written documents that include specified interest rates.[37] While the Supreme Court bolstered its reasoning by citing a number of cases that used "written instrument," "written contract," and "insurance contract" interchangeably, the Court did not limit its holding to insurance contracts.[38] The Court clearly applied the statute as written and, there being no dispute that the insurance contract was in writing, concluded that it fell within the statutory interest rate described in subsection 5.[39]

Opinions interpreting and applying *Yaldo* demonstrate that the Supreme Court's broad understanding of what constitutes a "written instrument" under subsection 5 goes beyond the insurance context. For instance, this Court in *Auto Club Ins Ass'n v State Farm Ins Cos*[40] used *Yaldo* to create an operational definition of a "written instrument" as "an agreement or understanding reduced to writing as a means of giving formal expression to an act or contract, which includes an insurance policy." By mentioning that the definition "includes" insurance policies, the Court in *Auto Club* specified that insurance policies are only a subset of a large group of written contracts and agreements that fall under MCL 600.6013(5). Similarly, in *Everett v Nikola*,[41] this Court built on *Yaldo's* foundation outside the insurance context when it applied the twelve percent interest rate in subsection 5 to a written fee agreement.

To use the language in *Auto Club*, *supra*, the subcontract in this case is "an agreement or understanding reduced to writing as a means of giving formal expression" to JMOCO's and Phoenix's respective rights and responsibilities concerning the work at the Burton store site. The bond is a formal, written agreement for surety. Defendants seize on the phrase "written instrument containing a rate of interest" in MCL 600.6013(5) and, examining that phrase out of context, claim that neither of these documents are a "written instrument" within the meaning of

---

[35] *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998).

[36] *Id*. at 346.

[37] *Id*.

[38] *Id*. at 346-347.

[39] *Id*. at 346.

[40] *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 169; 561 NW2d 445 (1997).

[41] *Everett v Nikola*, 234 Mich App 632, 638; 599 NW2d 732 (1999).

subsection 5 because neither include a rate of interest. From their view, only a negotiable instrument, a note, or something similar would fall under this statutory language. This, however, is an unconvincing interpretation of the statute. As the *Yaldo* Court recognized, the unambiguous introductory statement in subsection 5 indicates that the twelve-percent interest rate applies to a "judgment is rendered on a written instrument."[42] Only if there were another interest rate specified in the written instrument would the twelve-percent interest rate *not* apply. Defendants have not pointed to any interest rate in the subcontract or bond that would apply to this award. Furthermore, the Michigan Supreme Court has already flatly rejected defendants' proposition that subsection 5 applies only to documents like negotiable instruments.[43] Therefore, the trial court did not err in applying the twelve-percent interest rate in subsection 5 to the portions of the judgment concerning JMOCO and Federal Insurance.

V. Completion Cost

A. Standard Of Review

We review[44] de novo the portion of defendants' argument concerning whether the subcontract excused them from paying Phoenix.[45] They also contend that the trial court's factual findings concerning the cost to complete Phoenix's work were erroneous. This Court reviews the trial court's factual findings to determine whether they were clearly erroneous.[46]

B. Article III

Substantively, defendants claim that JMOCO was entitled to withhold payment from Phoenix for work Phoenix did not perform. Indeed, Phoenix has never contested defendants' right to do so and presented evidence to the trial court concerning the cost to complete its unfinished work. However, apparently defendants maintain that JMOCO had no duty under the subcontract to pay for work that Phoenix *had* performed because Phoenix misrepresented the amount of work it had completed. Although defendants fail to phrase their argument in light of the trial court's findings, in the first part of their argument under this issue they contest the trial court's determination that Article III did not excuse JMOCO's failure to pay Phoenix.

Article III of the subcontract requires JMOCO to make regular, monthly progress payments to Phoenix for the work it performed. However, Article III also states:

> If the Contractor determines that the balance of the Subcontract Price then remaining unpaid will not be sufficient to complete *the Work in accordance with*

---

[42] *Yaldo*, *supra* at 345.

[43] *Id*. at 346.

[44] Defendants have technically failed to present this issue for our review. MCR 7.212(C)(5). However, we have chosen to address elements of the contract because it is relevant to the issue properly presented.

[45] See *Old Kent Bank v Sobczak*, 243 Mich App 57, 61; 620 NW2d 663 (2000).

[46] MCR 2.613(C).

> *the Subcontract Documents*, no additional payments will be due the Subcontractor under this contract unless and until the Subcontractor, at no cost to the Contractor, performs and pays in full for, a sufficient portion of the Work so that such balance of the Subcontract Price then remaining is determined by the Contractor to be sufficient to so complete the Work.
>
> The Subcontractor shall not stop the Work in the event of a dispute as to payments owed *as long as all uncontested amounts have been paid* in accordance with the Subcontract documents. [Emphasis added.]

In arguing that Article III allowed JMOCO to withhold more than $100,000 from Phoenix, defendants make three critical errors.

First, defendants misconstrue the language in Article III that indicates that JMOCO, under certain circumstances, could demand that Phoenix perform work required by the *subcontract* "at no cost" or withhold payment. The trial court found that, as Baker testified, JMOCO was withholding payments already due to Phoenix in order "to bully Phoenix into making the [$36,000] discount and additional work" JMOCO wanted. In other words, JMOCO was not relying on Article III to require Phoenix to live up to its obligations under the subcontract, it was attempting to extort additional work from Phoenix. When that was unsuccessful, JMOCO simply decided not to pay Phoenix. Baker's testimony, the letters exchanged between Phoenix and JMOCO, exhibit D to the subcontract, which lists Phoenix's duties as well as tasks that Phoenix has no obligation to complete, and the fact that JMOCO had not cleaned up the site as it was required to do and had promised to do before Phoenix could return to work all support this finding.

Second, defendants ignore that Hagan or Peace accepted the work for the change orders actually performed, including change order 2 for $107,949. Though Hagan claimed at trial that not all the work Phoenix represented as done had been performed, Baker, Peace, and JMOCO's records directly contradicted Hagan's testimony. Olszewski, who most vehemently opposed paying Phoenix for the change orders, was not on the site while Phoenix was working. He saw the site only after additional inclement weather and other trades disturbed the site. The main thrust of Olszewski's testimony was that he was concerned about the overall cost overruns on the project. The evidence strongly suggested that the tight construction timeframe, poor soil conditions, and inclement weather caused these problems, not Phoenix. That Olszewski thought he could have *coerced* Phoenix back to the job site had JMOCO withheld more money is relevant to whether JMOCO breached its duty to provide timely progress payments, not whether Article III required Phoenix to continue to work when not paid. Moreover, as the trial court found, because Wal-Mart not only advanced money to JMOCO to pay for the change orders, but ultimately approved even change order 2, JMOCO had no reason to continue to deny payment to Phoenix. The trial court properly weighed the evidence and evaluated the credibility of witnesses and found the evidence and testimony supporting Phoenix more persuasive.[47]

---

[47] See *In re BKD*, 246 Mich App 212, 220; 631 NW2d 353 (2001) ("This Court recognizes that the trial court, while not infallible, is in a better position to weigh evidence and evaluate a witness' credibility.").

Accordingly, the facts as the trial court found them supported Phoenix's decision not to return to work pursuant to the language in Article III.

Third, defendants erroneously suggest that Article III excused JMOCO's failure to pay Phoenix because Phoenix was breaching the subcontract by not working at the job site during most of the dispute. In fact, this dispute arose at a time when Phoenix had no obligation to be at the job site. As item 16 in exhibit D to the subcontract indicates, Phoenix was only to perform work "as weather and soil moisture conditions allow[ed]." Phoenix worked as long as possible until the weather made work impossible. Much of the work Phoenix conceded had not been done, such as spreading topsoil, could not be completed until the end of the whole project, and certainly not during winter and early spring weather conditions. Not one witness at trial contended that Phoenix should have or could have been at the job site in January, February, March, or the beginning of April 1995. Thus, Phoenix's refusal to work called into question its rights under Article III for only a short period in late spring 1995. As the above analysis indicates, this refusal to work was proper.

Defendants also claim that the testimony of Weidenfeller and Olszewski, and even some testimony by Peace and Baker, established that they were entitled to deduct $165,000 as the cost to complete Phoenix's work. However, the trial court explained:

> WPM devised a series of codes . . . to specify the work to be done; and reported time and material for each code daily. From this [Hagan] . . . and, later, Olszewski decided how much to charge to Phoenix's contract and came up with $165,317. That is more than the values ($73,000 and $88,120) Phoenix had estimated for all of the topsoil removal and earth balancing . . . . But it is obvious in the photo, exhibit 11b, that almost all of that work was done before WPM came to the jobsite.
>
> Baker watched the work WPM was doing. He calculated how much of WPM's invoices was for work Phoenix would need to do to fully perform its contract. He used WPM's high rates for equipment and overtime and found WPM's work for Phoenix cost [JMOCO] $47,286 actually. That is only $10,324 more than the $35,962 if it had been paid for what it had already done and if it was not required to do work, without pay, excluded in the contract.

The record leaves no doubt that JMOCO incurred the cost of paying WPM for all its work. The trial court was keenly aware of the testimony and evidence adduced at trial that tended to support this $165,000 figure as the cost to complete all the sitework. However, in light of the aerial photographs of the worksite showing the progress Phoenix had made, the trial court had good reason to conclude that this $165,000 estimate did not reflect work that Phoenix had left to do under the subcontract. The trial court gave a completely plausible reason, grounded in the evidence, to give a photograph more weight than the testimony from Olszewski, a defendant, and Hagan, a JMOCO employee.[48] Though Weidenfeller's testimony supported $165,000 as a cost that JMOCO incurred, he never saw Phoenix's subcontract and was unable to detail which parts

[48] See *BKD, supra*.

of the work WPM conducted accounted for work Phoenix was obligated to perform. Furthermore, this finding regarding the cost to complete Phoenix's subcontract work is consistent with the trial court's proper finding that Phoenix had completed more of the subcontract work than defendants claimed it had performed. Though some might have found Olszewski and Hagan persuasive witnesses, it is impossible to say that the trial court committed *clear* error when it rejected their testimony and found a completion cost that was consistent with other evidence adduced at trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra