

IN THE COURT OF APPEALS OF IOWA

No. 2-286 / 91-1071

FILED

SEP 29 1992

CLERK SUPREME COURT

EARNEST A. SMITH, d/b/a B & S BUILDING COMPANY,

Appellee,

vs.**MIKE MURRAY,**

Appellant.

Appeal from the Iowa District Court for Polk County,
Ray A. Fenton, Judge.

Defendant appeals a district court judgment assessing
damages against him. **AFFIRMED; REMANDED WITH INSTRUCTIONS.**

James E. Brick of Brick, Gentry, Bowers, Swartz,
Stoltze, Schuling & Levis, P.C., Des Moines, for appellant.

Michael Laughlin and Jon Griffin of Bertroche Law
Offices, Des Moines, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden,
JJ.

HAYDEN, J.

Mike Murray hired his brother-in-law, Earnest A. Smith, to do construction work at two of Murray's business locations in Des Moines, Iowa. The two projects are referred to as the "Broadway Project" and the "East University Project." Towards the completion of the projects, Murray and Smith began disputing the liability for extra work done on both projects. Unable to come to an agreement, Smith brought suit in the district court seeking to recover \$25,794.64 for extra work performed on the two projects. Murray filed a counterclaim seeking to recover his expenses in hiring additional workmen to complete the job. The district court found for Smith, awarding him \$13,307.37 plus interest. The damage award was divided as follows: \$2018 for the Broadway Project and \$11,289.37 for the East University Project. Murray appeals.

The district court tried this action at law. On a review of such an action, appellate review is not de novo, but is confined to errors assigned. Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983) (citations omitted); Iowa R. App. P. 4. We are bound by fact findings of the district court when they are supported by substantial evidence in the record. Iowa R. App. P. 14(f)(1). "Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings." Waukon Auto Supply v. Farmers & Merchants Sav. Bank, 440 N.W.2d 844, 846 (Iowa 1989) (citation omitted). Moreover, issues

are deemed waived or abandoned when a party fails to state or identify an issue in his or her appellate brief. Hubby, 331 N.W.2d at 694. Our appellate rules provide: "[f]ailure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 14(a)(3). With these principles in mind, we turn to the specifics of this case.

I. In determining whether the district court's damage award was correct, we need to establish the costs involved in each project.

A. Broadway Project. The "Broadway Project" was an agreement by Smith to construct a 30- by 100-foot preengineered all-steel addition to an existing building. The accepted bid price was \$47,000. The district court found the amount of extras incurred by Smith totaled \$2337.23. This amount included \$40.25 for paint, \$798.72 for carpet, \$230.26 for plumbing, \$768.00 for framing, and \$500 for backfill. The district court determined Murray was entitled to a credit of \$3700 because the parties had negotiated allowances for items used in the construction. The district court also determined Murray paid \$43,619.25 of the bid price. The credit plus the amount paid means Murray paid a total of \$47,319.25; thus he overpaid a sum of \$319.25. Due to overpayment, the district court deducted the \$319.25 from the amount of extras owed, \$2337.23, and concluded Murray owed a total of \$2018 on the Broadway Project.

B. East University Project. The second project consisted of three separate construction jobs at the East University site. The project included (1) a steel building, (2) an office and showroom, and (3) an apartment added to an existing structure. Smith agreed to do the construction for amounts of \$55,110.43, \$15,417.10, and \$54,455.10 respectively. In reviewing the contract prices of the three items, we determine the district court made computational errors. The district court erroneously used the figure of \$55,000.43 to reflect the contract price of the steel building. We conclude the district court made an addition error with regard to the contract price of the steel building. The agreed upon base price was \$49,191.30 plus a superintendent's fee of \$1000 plus a ten percent profit fee of \$4919.13. The total of these figures amounts to \$55,110.43. The district court also improperly rounded up the cost of the office by ninety cents. The record shows the cost of the office and showroom was \$15,417.10, rather than \$15,418. The computational error of the district court amounted to \$109.10. The correct total amount of these figures (\$55,110.43; \$15,417.10; and \$54,455.10) is \$124,982.63.

The evidence shows Murray was having trouble getting the city's approval for the East University Project plan. Extra work over and above the original proposal proved necessary to receive approval. These extras included corrections to the water drainage from the steel building,

which was not figured in the original proposal. Once the East University Project plan received approval, it was not the same plan as the one upon which the parties had originally agreed. The district court found Smith alleged expenses for extras in the amount of \$31,859.75. Murray disputed approximately \$18,000 of these expenses. The district court made some adjustments to the \$31,859.75 and concluded Smith incurred \$25,338.22 in expenses for extras. The adjustments to the additional expenses amount were for those extras which Smith listed as expenses and yet testified Murray had paid for and received credit. Therefore Smith should not receive payment for the same items twice. With the deletion of these extras, the court also subtracted ten percent of their total amount. The ten percent represented a sum Smith would have been entitled to under the profit fee agreement for extras.

The correct agreed upon contract price, which was \$124,982.63, and the amount of additional expenses are added to reach a total figure owed to Smith of \$150,320.85. The district court credited Murray for payments made to Smith in the amount of \$80,325.35 and payments Murray made to others for expenses on the projects. These credits totaled \$135,234.88. By subtracting the amount of credits, \$135,234.88, from the total cost, \$150,320.85, a balance of \$15,085.97 remains.

In addition, the district court included another credit for Murray. When Smith left the East University Project

there was unfinished work. Murray had to pay a third party to finish the job at a cost of \$3687.50. By subtracting the \$3687.50, the ending balance Murray owed on the East University Project equaled \$11,398.47.

We make a special note of the appellant's failure to specify where the district court's figures were allegedly in error. Murray contends he is not liable for the extras; however, he failed to direct us to the record to provide specific proof of which extras the district court allegedly erred in including or excluding in its calculation of extra expenses. Our appellate rules require a party to cite to proof or authority to support an allegation. Iowa Rule App. P. 14(a)(3), (g). In this case, the appellant failed to substantiate his allegations.

The issue before this court on appeal is whether the district court erred in determining certain work items performed by Smith were extras. We conclude the items were extras and affirm the district court decision. Due to addition errors, we remand this case to the district court to make an adjustment to the judgment accordingly.

II. Next, we address the primary issue on appeal: whether the district court erred in allowing Smith to recover for extras not authorized in writing by Murray. Murray argues Smith performed the work without written change orders thus in violation of the following contract provision: "[a]ny alteration or deviation from [the] specifications involving extra costs will be executed only

upon written orders, and will become an extra charge over and above the estimate." In addition, Murray denies he requested much of the extra work and contends he is not liable because the extra work was contemplated by the original contract. Smith contends Murray requested and acquiesced with regard to the extras and thereby waived the written change order provision. The burden of proving waiver is on the party relying on the waiver. Pillsbury Co. v. Ward, 250 N.W.2d 35, 39 (Iowa 1977) (citing Iowa Movers & Warehousemen's Ass'n v. Briggs, 237 N.W.2d 759, 764 (Iowa), cert. denied, 429 U.S. 832, 97 S. Ct. 94, 50 L. Ed. 2d 96 (1976)).

A written change order provision "is not of the essence of the contract, but is a detail in the performance, and the requirement of writing may be waived." Berg v. Kucharo Constr. Co., 237 Iowa 478, 489, 21 N.W.2d 561, 567 (1946) (quoting 17 C.J.S. Contracts § 371 (1939) (currently stated at 17 C.J.S. Contracts § 371(4) (1963)); see also Central Iowa Grading, Inc. v. UDE Corp., 392 N.W.2d 857, 860 (Iowa App. 1986). The general rule with regard to the avoidance of a written change order is as follows:

Although stipulations in building or construction contracts requiring written orders or agreements for extra work or alterations are valid and binding so long as they remain in effect, it is equally well settled that they may be avoided by the parties to the contract. The courts have adopted various theories of avoidance which may be classed as those of independent contract, modification or rescission, waiver, and estoppel. . . . Among the acts or conduct amounting to

waiver are the owner's knowledge of, agreement to, or acquiescence in such extra work, a course of dealing which repeatedly disregards such stipulation, and a promise to pay for extra work, orally requested by the owner and performed in reliance thereon.

Berg, 237 Iowa at 488, 21 N.W.2d at 566-67 (quoting 9 Am. Jur. Contracts § 17 (n.d.)); see also Central Iowa Grading, Inc., 392 N.W.2d at 860.

The waiver of a written change order provision does not entitle a builder to perform extra work without any approval. Generally, recovery is allowed for extra work only if it was performed with knowledge or consent of the adverse party. Central Iowa Grading, Inc., 392 N.W.2d at 860 (citing 17A C.J.S. Contracts § 34 (1963)).

In applying these principles to the facts of this case, we conclude substantial evidence supports the finding Murray waived the written change order provision. The evidence shows Murray knew of the extra work performed by Smith, and in fact made several requests for extra work. Some extras were added in order to gain the city's approval, some were requested by Murray, and some were discussed as the construction continued. Such work was not contemplated by the original construction contracts, rather it constituted extras for which Smith is entitled to remuneration. We affirm the district court in holding Murray waived the contract provision.

We hold Smith is entitled to be compensated for \$13,416.47 plus interest for extra work performed. There

are computational errors which require we remand for correction. We remand the judgment to the district court with instructions to increase the appellee's judgment by an amount of \$109.10. We affirm the district court decision in all other respects. We do not retain jurisdiction.

Costs on this appeal are taxed to appellant.

AFFIRMED; REMANDED WITH INSTRUCTION.