IN THE SUPREME COURT OF GUAM

B.M. Co.,
A Guam Partnership
Plaintiff-Appellant/Cross-Appellee

vs.

JIMMY K. AVERY AND MARIA F. AVERY
Defendants-Appellees/Cross-Appellants

Supreme Court Case No.: CVA00-026
Superior Court Case No.: CV0422-95

SUPPLEMENTAL OPINION

Filed: October 23, 2002

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Appeal from the Superior Court of Guam
Argued and submitted on September 21, 2001
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice (Acting)[1], JOHN A. MANGLONA, Designated Justice, and RICHARD H. BENSON, Justice *Pro Tempore*

CARBULLIDO, J.:

[1] On December 27, 2001, this court issued an Opinion in this case, cited as 2001 Guam 27. Thereafter, the court granted rehearing for the purpose of addressing one issue on appeal: whether the lower court erred in denying the Plaintiff-Appellant/Cross-Appellee B.M. Co.'s (hereinafter, "BM Co.") post-trial motions as to the jury's findings on BM Co.'s affirmative claims for damages in the underlying breach of contract action. We find that the lower court erred in denying BM Co.'s motion for a new trial and in rejecting BM Co.'s proposed jury instruction as it related to BM Co.'s affirmative claims for additional work. We therefore reverse the trial court's decision with regard to those issues, and supplement the original Opinion with the instant Opinion accordingly.

I.

[2] This appeal arises out of a breach of contract action between BM Co. and the Defendants-Appellees/Cross-Appellants Jimmy and Maria Avery (hereinafter "Averys"). The facts of this case are set forth fully in our December 27, 2001 Opinion. *See BM Co. v. Avery*, 2001 Guam 27, ¶¶ 2-6. The additional facts relevant to this Supplemental Opinion are as follows. In the lower court, BM Co. claimed that it was entitled to $42,027.00 for worked performed and amounts retained under the contract with the Averys. The jury denied these affirmative claims. BM Co. thereafter filed a motion to alter or amend judgment and for a new trial as to this amount, which the trial court denied. BM Co. appealed the judgment and the trial court's post-judgment rulings.

[1] Chief Justice Siguenza recused himself from deciding this matter. Justice F. Philip Carbullido, as next senior member of the panel, was designated as the Acting Chief Justice.

[3] On appeal, BM Co. presented numerous issues, including a challenge to the trial court's denial of BM Co.'s post-trial motions as to its affirmative claims for damages. On December 27, 2001, this court issued an Opinion, addressing all issues with the exception of BM Co.'s aforementioned challenge. As a result, on January 11, 2002, BM Co. filed a Petition for Rehearing, requesting that this court consider the argument raised on appeal but not addressed in our December 27, 2001 Opinion. Similarly, on January 10, 2002, the Averys filed a Motion for Clarification, seeking a clarification on whether the court's failure to address BM Co.'s argument was tantamount to an affirmance of the lower court's decision on that issue. On February 14, 2002, this court granted both the petition for rehearing and clarification motion for the purpose of addressing the sole issue of whether the trial court erred in denying BM Co.'s post-trial motions in which BM Co. sought to overturn the jury's denial of its affirmative claims for damages.

II.

[4] This court has jurisdiction over this matter pursuant to Title 7 GCA § 3107 (1994).

III.

A. Argument on Appeal

[5] At trial, BM Co. claimed that the Averys owed them a total of $98,027.52 on the contract, broken down as follows:

Item No. 1:	Electrical Change Order	$11,502.00
Item No. 2:	Revisions to Doors and Windows	$ 7,730.00
Item No. 3:	Toilet Exhaust System	$ 2,688.00
	4% GRT	$ 107.52
	Retention Due to Defective Roof Slab	$20,000.00
	5% Contract Retention	$56,000.00
	Total Amount Due to Contractor	$98,027.52

[6] Of this above total, the Averys eventually agreed to pay the $56,000.00 contract retention amount. BM Co. argued that it was entitled to the remaining balance totaling $42,027.52, ($98,027.52 – 56,000.00), averaged to $42,020.00. The jury failed to adjust its damage award by this claimed amount. BM Co. asserts that because the evidence supports a finding on this claimed amount, the jury erred in denying BM Co.'s claim for this amount. BM Co. further argues that the trial court erred in denying BM Co.'s motion for a judgment notwithstanding the verdict ("JNOV") and a new trial as to the jury's finding on this claim.

[7] Furthermore, BM Co. claims that several of the items for which the Averys were liable represented items for additional work: specifically, an electrical change order, revisions to doors and windows, and an exhaust system. BM Co. admits that these work orders were not reduced to writing via a change order, but were agreed upon orally between the parties. BM Co. contends that the trial court's denial of its proposed jury instructions regarding the performance of additional work resulted in prejudice.

[8] The Averys assert that BM Co. did not raise the argument that the jury verdict was unsupported by the evidence in its post-trial motion, and therefore, BM Co. is barred from raising the issue on appeal. Furthermore, the Averys assert that BM Co. based its motion only on an argument that defense counsel's opening statement acknowledging the above monies due is binding on the Averys. The Averys contend that counsel's opening statements are not judicial admissions binding on a client and, therefore, the trial court properly denied BM Co.'s post-trial motion on that ground.

B. Standard of Review

[9] At the outset, we note that in its Opening Brief, BM Co. seeks review of the trial court's ruling on its JNOV and new trial motions. Our review of the record reveals that BM Co. raised a challenge to the jury's findings on its affirmative claims via a new trial motion and a Guam Rule of Civil Procedure 59(e) motion to alter or amend the judgment. In its moving papers, BM Co. did

not seek to overturn the jury's verdict via a motion for JNOV.[2] Therefore, notwithstanding BM Co.'s erroneous characterization of the issue on appeal, we herein elect substance over form, and review whether the trial court erred in denying BM Co.'s motion to alter or amend the judgment and motion for a new trial on its affirmative claims.

[10] We review a lower court's denial of a motion for a new trial for an abuse of discretion. *See J.J. Moving Servs., Inc. v. Sanko Bussan (Guam) Co.*, 1998 Guam 19, ¶¶ 14, 26. When reviewing the denial of a motion for a new trial, the inquiry is "whether the verdict is either supported by substantial evidence or whether the jury's decision is against the clear weight of the evidence." *Leon Guerrero v. DLB Constr. Co.*, 1999 Guam 9, ¶ 21. We similarly review both the trial court's denial of a motion to alter or amend the judgment and the court's rejection of a proposed jury instruction for an abuse of discretion. *Guam Bar Ethics Comm. v. Maquera*, 2001 Guam 20, ¶ 8 (reviewing the denial of a motion under Rule 59(e) for an abuse of discretion); *Owens-Corning Fiberglas Corp. v. Brennan*, Civ. No. 92-00064A, 1993 WL 470426, at *4 (D. Guam App. Div. Oct. 19, 1993) (reviewing the court's decision to reject a proposed jury instruction for an abuse of discretion).

C. Discussion

1. The trial court's denial of BM Co.'s new trial and Rule 59(e) motions.

[11] BM Co. argues that the lower court erred in denying its post-judgment motions. The Averys assert that BM Co.'s argument is barred because it was not raised previously in the lower court. We disagree with the Averys. In its Decision and Order filed on September 13, 2000, the lower court explicitly rejected BM Co.'s challenge to the jury's findings on its affirmative claims, finding that

[2] We note that during the hearing on its post-trial motions, BM Co. argued that it was entitled to a JNOV as to its affirmative claims for damages. However, in its motion which was filed in the lower court, BM Co. challenged the verdict through a motion to alter and amend and for a new trial. Furthermore, the lower court treated BM Co.'s challenges as such, and not as a request for a JNOV. Accordingly, we are constrained to similarly review BM Co.'s instant challenges in the context of its Rule 59(e) and new trial motions.

"statements made by Defense Counsel in opening arguments" are not evidence which supports its affirmative claim for damages. While the trial court addressed only the effect of statements made by counsel, our review of BM Co.'s post-trial motions on the issue of BM Co.'s affirmative claims reveals that reference was made to its present argument that the evidence, both documentary and testimonial, does not support the jury award. Specifically, in its post-trial motions, BM Co. argued that the judgment should be amended because the Averys' counsel made statements which amounted to judicial admissions, and that "these admissions are in accord with the admissions of Jimmy Avery in Exhibit 204 and his testimony at trial where he admitted" to withholding amounts owed on account of the retention for the defective roof panel, the electric change order, revisions to doors and windows, and revisions to the toilet exhaust fan. Record on Appeal, tab 210 (Plaintiff's Motions and Memorandum for JNOV, to Alter or Amend Judgment, and For a New Trial, p. 13, Jun. 9, 2000). Furthermore, referencing its earlier discussion, BM Co. later argued that it was entitled to a new trial because the jury's "refusal to award Plaintiffs the amounts even the Defendants admit were owing to them . . . [was] contrary to the weight of the evidence in this case." Record on Appeal, tab 210 (Plaintiff's Motions and Memorandum for JNOV, to Alter or Amend Judgment, and For a New Trial, p. 18, Jun. 9, 2000). Therefore, because the issue was in fact addressed in BM Co.'s post-judgment motions, it is properly before us on appeal. *See Dumaliang v. Silan*, 2000 Guam 24, ¶ 12 (stating the general rule that this court only reviews issues raised previously in the lower court).

[12] The $42,020.00 that BM Co. seeks to recover is the balance due for work that BM Co. claims to have performed for the Averys. BM Co. argues that the jury erred in rejecting its claim for $42,020.00, and the trial court erred in denying its post-judgment motions as to this claim, because evidence at trial, including statements made by the Averys' counsel and documentary and testimonial evidence, supported the claim.

[13] The standard of review for a jury award of damages is whether the award is supported by substantial evidence. *See Leon Guerrero*, 1999 Guam 9 at ¶20. Substantial evidence is relevant evidence that a reasonable person may accept as sufficient to support a conclusion, even if inconsistent conclusions may be drawn from the evidence. *Id*. A new trial may be granted if the jury's failure to award damages renders the award insufficient or inadequate. *See DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 837-38 (9th Cir. 1963); *see also McHose v. Physician & Clinic Servs., Inc.*, 548 N.W.2d 158, 162 (Iowa App. Ct. 1996) ("An inadequate damage award merits a new trial as much as an excessive one."); *Craigmiles v. Egan*, 618 N.E.2d 1242, 1248 (Ill. App. Ct. 1993); *Thayer v. Pittsburgh-Corning Corp.*, 703 N.E.2d 221, 228 (Mass. Ct. App. 1998) (discussing the standard of review for new trial motions based on an inadequate award of damages). "A jury has substantial discretion in determining the amount of damages, but a new trial may be awarded if the damages are manifestly inadequate, if clear proof of the damages has been ignored, or if the award bears no reasonable relation to the loss suffered." *Craigmiles*, 618 N.E.2d at 1248; *see also Thorpe v. City and County of Denver*, 494 P.2d 129, 131 (Colo. Ct. App. 1971).

[14] The trial court denied BM Co.'s motion as to this claim for $42,027.00 solely based on a finding that counsel's statements do not have the force and effect of evidence presented at trial. Specifically, the trial court found that "Plaintiff's argument that the judgment should be further reduced by $42,027.00 due to statements made by Defense Counsel in opening arguments . . . [is] non-persuasive and without merit." Appellant's Excerpts of Record, tab F, p. 34 (Decision and Order, Sept. 13, 2000). The trial court reasoned that, as the jury was instructed, statements by counsel are not evidence, and that, consequently, the opening statements by the Averys' counsel, acknowledging the amount owing to BM Co., were not binding on the Averys.

[15] While the general rule is that statements of counsel are not evidence, certain statements by counsel can still be considered judicial admissions binding on the client. *Kohne v. Yost*, 818 P.2d 360, 362-63 (Mont. 1991). It is clear that, in rejecting B.M. Co.'s claims, the trial court did not

analyze why the statements made in this case did not qualify as judicial admissions. However, because we do not have a copy of the opening statement,[3] this court cannot determine whether the statements made by the Averys' counsel were of such a nature that they would be binding as judicial admissions. Accordingly, we are unable to determine whether the lower court's rejection of BM Co.'s argument was an error warranting a new trial. In such circumstance, the lack of an adequate record before us would warrant a reversal with instructions on remand to review counsels' statements in light of the rule announced above; however, such a result is unnecessary in light of our holding, as discussed below, that BM Co. is nonetheless entitled to a new trial on its affirmative claims.

[16] BM Co. argues that the jury's verdict was contrary to the documentary and testimonial evidence at trial and that the trial court erred in failing to consider this evidence in denying its motion for a new trial. We agree. A review of the record indicates that a letter from Jimmy K. Avery, dated May 20, 1994, in which Mr. Avery details and acknowledges owing the claimed $42,020.00, was admitted into evidence. This letter states, in pertinent part:

> Presently we recognize the following credits to BM Co. from their claim.
>
Item No. 1	Electrical change order	$11,502.00
Item No. 5	Revisions to door & windows	$ 7,730.00
Item No. 6	Toilet exhaust fan	$ 2,795.00
	Retention for defective roof panel	$20,000.00
	5% Contract Retention	$56,000.00
	Total	$98,027.00

Trial Exhibit No. 204. The May 20, 1994 letter details and acknowledges the amounts retained by the Averys and the value of additional work performed by BM Co. In addition to this letter, testimony was elicited regarding BM Co.'s claims for additional work. Specifically, the Averys' counsel asked Mr. Avery the following: "Did you agree to add $11,502.00 to that price for an electrical change order?" to which Mr. Avery replied, "Yes, I did." Transcript, vol. V, p. 128 (Trial,

[3] Transcripts of opening arguments were not requested by BM Co. and were not made part of the record except as referenced in the trial court's Decision and Order.

May 15, 2000). Counsel next asked, "Okay. Did you agree to add $7,730.00 to that price for the revision of the door windows in the store?" to which Mr. Avery replied, "That's correct; yes." Counsel later asked, "And did you agree to add $2,688.00 to this price for the toilet exhaust fan system?" to which Mr. Avery replied, "I did." Transcript, vol. V, p. 128 (Trial, May 15, 2000).

[17] In the instant case, the first change order issued under the contract contained an express provision requiring that all future additional work be accompanied by a written change order.[4] BM Co. admits that the additional work it claims payment for was done without a written change order, but asserts that the parties nonetheless agreed to the work. BM Co. argues that because the documentary and testimonial evidence supported its claim for additional work, the lower court erred in denying its post-judgment motions for this claim. The issue which arises here is whether the lower court was required to consider the evidence regarding additional work for which there was no written change order where the contract required that all change orders be made in writing. We find that the lower court should have considered this evidence, and its failure to do so in denying BM Co.'s motion for a new trial was an abuse of discretion.

[18] Additional work is basically any work in connection with a construction contract that arises apart from the original contract. *See Frank T. Hickey, Inc. v. Los Angeles Jewish Cmty. Council*, 276 P.2d 52, 58, 128 Cal. App. 2d 676, 683 (Ct. App. 1954) (citations omitted); *C.F. Bolster Co. v. J.C. Boespflug Constr. Co.*, 334 P.2d 247, 252, 167 Cal. App. 2d 143, 151 (Ct. App. 1959) (citations omitted); 11 CAL. JUR. 3D *Building and Construction Contracts* § 25 (1996). Generally, if a construction contract requires all additional work done to be accompanied by a written change order before the contractor can receive any remuneration, then an owner may demand compliance with this requirement before being charged for any such work. *See Greenwald v. Royal Indem. Co.*, 245

[4] Appellees' Supplemental Excerpts of Record, tab 14 (Defendants' Trial Exhibit N) (Scope of Change Order No. 001, ¶ 11) ("The contractor will adhere only to a written change order from AES or from the owner. Actions taken on a verbal instruction will not be honored as a part of accomplished contract work."); *see also* Appellees' Supplemental Excerpts of Record, tab 3 (Trial Transcript of Proceedings Continued Jury Trial, vol. III, May 11, 2000).

P.2d 1115, 1117, 112 Cal. App. 2d 183, 186 (Dist. Ct. App. 1952) (citations omitted); 11 CAL. JUR. 3D *Building and Construction Contracts* § 26 (1996). However, a provision requiring a written change order can be impliedly waived if the circumstances or the conduct of the parties indicate that the parties intended to waive the provision. *See Wilson v. Keefe*, 309 P.2d 516, 518, 150 Cal. App. 2d 178, 180-81 (Dist. Ct. 1957) (holding that where a contractor supplied extra material for the construction of a building on the request and with the full knowledge of the owner, but neither party suggested compliance with a provision of the construction contract that such extras be agreed on in advance and fixed in writing, such conduct waived compliance with the provision); *see also Cascade Elec. Co. v. Rice*, 245 N.W.2d 774, 775-76 (Mich. Ct. App. 1976) (citations omitted); *Shreves v. D.R. Anderson Constructors, Inc.*, 293 N.W.2d 106, 110 (Neb. 1980) (citations omitted); *Reif v. Smith*, 319 N.W.2d 815, 817 (S.D. 1982); *Ken Cucchi Constr., Inc. v. O'Keefe*, 973 S.W.2d 520, 524-25 (Mo. Ct. App. 1998); *Wisch & Vaughan Constr. Co. v. Melrose Props. Corp.*, 21 S.W.3d 36, 42-43 (Mo. Ct. App. 2000); *Consol. Fed. Corp. v. Cain*, 394 S.E.2d 605, 607 (Ga. Ct. App. 1990) (citations omitted); 11 CAL. JUR. 3d *Building and Construction Contracts* § 26 (1996).

[19] Here, the May 20, 1994 letter in which Mr. Avery acknowledged an agreement as to the work done and its value, coupled with Mr. Avery's testimony at trial further acknowledging that he agreed to the additional work,[5] evinces conduct tending to indicate a waiver of the written change order requirement. *See, e.g., Custom Builders, Inc. v. Clemons*, 367 N.E.2d 537, 540 (Ill. Ct. App. 1977) (holding that testimony by owner that she orally agreed to modifications of construction contract established her waiver of the contract requirement that changes be ordered in writing) (citations omitted).

[5] There is a discrepancy of $107.00 between the amount Mr. Avery acknowledges owing for the toilet exhaust fan system in the May 20, 1994, letter and the amount referenced during his testimony at trial. Nonetheless, the evidence clearly showed that Mr. Avery admitted to owing for work performed regarding the exhaust fan system.

[20] The existence of a waiver of written change order requirement is a question of fact for the jury to determine. *See Cascade Elec.*, 245 N.W.2d at 776 (citing *Klas v. Pearce Hardware & Furniture Co.*, 168 N.W. 425, 427 (Mich. Ct. App. 1918)) (citations omitted). The jury award in this case did not reflect any credit to BM Co. for items of additional work which Mr. Avery admitted in his letter and his trial testimony he owed to BM Co. Thus, the jury's award was contrary to the clear weight of the evidence. Accordingly, in denying BM Co.'s post-trial motions, the lower court erred in failing to consider the evidence supporting BM Co.'s claims for additional work. Because the trial court failed to consider material evidence that BM Co. identified in its post-trial motions, the trial court abused its discretion. *See English v. Green,* 787 A.2d 1146, 1149 (R.I. 2001) (citing *Kurczy v. St. Joseph Veterans Ass'n*, 713 A.2d 766, 770 (R.I. 1998)) (reviewing a motion for a new trial and finding that a trial court's decision to grant or deny the motion will not be disturbed unless the trial judge has "overlooked or misconceived material and relevant evidence or was otherwise clearly wrong.").

[21] Accordingly, the trial court erred in denying BM Co.'s motion for a new trial as to its affirmative claims against the Averys.

[22] On appeal, BM Co. also argues that the lower court erred in failing to render judgment in its favor as to these affirmative claims for damages. We disagree. A motion to alter or amend the judgment is allowed under Guam Rule of Civil Procedure 59(e), which models Federal Rule of Civil Procedure 59(e). Guam R. Civ. P. 59(e). "A motion to amend the judgment under Fed.R.Civ.P. 59(e) is appropriate if the court in the original judgment has failed to give relief on a claim on which it has found that the party is entitled to relief." *Cont'l Cas. Co. v. Howard*, 775 F.2d 876, 883 (7th Cir. 1985) (citation omitted) (holding that because the jury found that the plaintiff was not entitled to relief, the trial court properly denied the Rule 59(e) motion). However, a court may not alter or amend a judgment in a way that increases an award of damages in favor of one party unless the jury found that the non-moving party was liable and the movant is entitled to an increase in the amount of damages as a matter of law. *Compare DePinto*, 323 F.2d at 837-38, *with Liriano v. Hobart Corp.*,

170 F.3d 264, 272-73 (2d Cir. 1999), *and Robinson v. Cattaraugus County*, 147 F.3d 153, 161 (2d Cir. 1998). "The trial court does have power, where the record warrants, to set aside a jury verdict for plaintiff, on the ground that the jury award of damages is inadequate. But when that is done the only recourse is to grant a new trial." *DePinto*, 323 F.2d at 838.

[23] Here, BM Co. claimed that the jury's award was insufficient because the jury failed to award damages on its affirmative claims. BM Co. requested that the lower court amend the judgment in its favor by increasing the damage award against the Averys in the amount of $42,020.00. Such an amendment to the award would be improper considering that the jury did not find the Averys liable for breach of contract. Furthermore, while the weight of the evidence favors BM Co.'s claims, we do not find that the evidence supports a finding that the Averys should be held liable for the amounts claimed as a matter of law. Under the facts, the trial court could, at most, grant a new trial as to these claims. Accordingly, we find that the trial court did not err in denying BM Co.'s Rule 59(e) motion as to BM Co.'s affirmative claims for damages.

2. The lower court's rejection of BM Co.'s proposed jury instructions.

[24] BM Co. also argues that the trial court erred in rejecting its proposed Instructions Numbers 23[6] and 8. BM Co.'s proposed Instruction No. 8 provides:

> A contract in writing may be altered by a contract, in writing, *or by an oral agreement performed by at least one of the parties*.

Appellant's Excerpts of Record, tab O (Plaintiff's Proposed Voir Dire Questions and Jury Instructions, May 8, 2000) (emphasis added). The court rejected BM Co.'s proposed instruction and gave the following instruction, designated as Instruction 3O, instead:

[6] In its Appellant's Brief, BM Co objects to the lower court's rejection of two proffered jury instructions, 3Z and 8; however, our review of the record shows that instruction 3Z which BM Co. refers to was actually designated and submitted to the lower court as proposed instruction 23. Record on Appeal, tab. 170 (Plaintiff's Proposed Jury Instructions, May 15, 2000). In an effort to be consistent with the record, we herein refer to BM Co.'s proposed instruction 3Z as proposed instruction 23.

> A contract in writing may be altered by a contract, in writing, *or by an executed oral agreement, and not otherwise*.

Record on Appeal, tab 192 (Jury Instructions, May 23, 2000) (emphasis added).

[25] BM Co.'s proposed Jury Instruction No. 23 provides:

> If you find that the Averys or AES required BM Co. to perform extra or additional work that was not actually required by the contract and for which a change order should have been issued, then you may award BM Co. damages even though no change order was actually issued.

Record on Appeal, tab 170 (Plaintiff's Proposed Jury Instructions, May 15, 2000). The trial court rejected this jury instruction and did not provide an alternative jury instruction in its place. BM Co. challenges the trial court's rejection of its proposed jury instructions.

[26] We first note that BM Co. did not raise this error in its post-trial motions. Therefore, this court is precluded from reviewing the instant challenge in the context of the lower court's denial of BM Co.'s post-judgment motions. While we decline to review BM Co.'s challenge regarding the jury instructions in the context of BM Co.'s post-trial motions, we nonetheless find that BM Co. adequately preserved for appeal its challenge regarding proposed Instruction Number 23. Furthermore, we find the court's error with regard to Instruction Number 23 forms a separate ground supporting a new trial as to BM Co.'s claims for additional work.[7]

[27] In order to preserve for appeal a challenge to a jury instruction, the challenging party must have clearly stated to the trial court the matter to which the party objects and the grounds for that objection. Guam R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter objected to and the ground of the objection."); *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1156-57 (7th Cir. 1989) (finding that in order to assign error for a lower court's failure to give an instruction, the party "must have objected thereto before the jury retired to consider its verdict,

[7] Our holding on this issue does not support a new trial for any portion of the $42,020.00 which does not represent items of additional work.

stating distinctly the matter objected to and the grounds of the objection."). Moreover, to preserve an objection to a given instruction, "[t]he objecting party must do more than submit a proposed instruction to the trial court." *Dawson v. New York Life Ins. Co.*, 135 F.3d 1158, 1165 (7th Cir. 1998). "The mere tender of an alternative instruction without objecting to some specific error in the trial court's charge or explaining why the proffered instruction better states the law does not preserve the error on appeal." *Campbell v. Vinjamuri*, 19 F.3d 1274, 1277 (8th Cir. 1994) (quoting *Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 871 F.2d 1402, 1408 (8th Cir. 1989) (holding that the appellant failed to preserve his objection on appeal because he failed to specifically object to the court's refusal to use his proffered instruction). The "failure to object in the most specific language will not waive the argument for appeal [only] if the objecting party's position is clear to the judge and further objection would be unavailing." *Dawson*, 135 F.3d at 1165.

[28] BM Co. asserts that the trial court rejected its proposed jury instructions on the ground that they were inadequate statements of the law. However, BM Co. has failed to cite any portion of the record which shows that BM Co. both objected to the trial court's refusal of its proposed instructions and stated the grounds for its objection. It is the appellant's duty to submit an adequate record on appeal and identify portions of the record to support the argument. *See Guam Bar Ethics Committee*, 2001 Guam 20 at ¶ 39. Parties should not expect the court to find the proverbial needle in a haystack. Nonetheless, the court has reviewed the voluminous record[8] and finds that BM Co. did not preserve its challenge to the court's decision rejecting proposed Instruction Number 8, but properly preserved its challenge to the trial court's decision regarding proposed Instruction No. 23.

[29] While our independent review of the record shows that BM Co. submitted proposed Instruction Number 8, *see* Appellant's Excerpts of Record, tab O (Plaintiff's Proposed General Voir Dire Questions and Jury Instructions, May 8, 2000), our review does not reveal that the proper

[8] The record in this case consists of eight volumes of transcripts of the lower court proceedings, totaling over 1,300 pages, and designated documents totaling nearly 1,000 pages.

objection was made to the given instruction, which was designated as Instruction Number 3O. The mere fact that BM Co. proposed alternative language, and that the trial court rejected the proposed instruction, is inadequate to preserve this issue for appeal. *See* GRCP 51; *Jardien*, 888 F.2d at 1157 (holding that the defendant's failure to object to the court's refusal of a proposed instruction amounted to a waiver of that issue on appeal). Furthermore, the record before us does not support a finding that BM Co.'s objection to Instruction Number 8, as given, was clearly before the trial court to the extent that further objection would be unavailing.[9] While the proper objection may have in fact been made, BM Co. has neither presented this court with a record that such was the case, nor indicated where in the record the objection was made. Accordingly, we decline to hypothesize on whether the objection was made and find that the BM Co. has waived any challenge to that decision on appeal. *See Guam Bar Ethics Committee*, 2001 Guam 20 at ¶ 39, n.10 ("A party's failure to provide a sufficient record may preclude review of the issue.").

[30] However, the record shows that BM Co. clearly stated its reasons underlying its proposed Jury Instruction No. 23. *Compare* Record on Appeal, tab 170 (Plaintiff's Proposed Jury Instructions, May 15, 2000), *with* Record on Appeal, tab 171, pp. 1-3 (Plaintiff's Brief re Constructive Changes, May 15, 2002). Therefore, the issue is properly before us.

[31] A trial court has wide discretion as to what instruction to give the jury in any case. *See Anderson v. Alfa-Laval Agri, Inc.*, 564 N.W.2d 788, 792 (Wis. Ct. App. 1997); *In re V.L.K.*, 24 S.W.3d 338, 343-44 (Tex. 2000). On review, the inquiry is whether the jury was likely misled by the instruction given and whether a different outcome would likely have resulted had the proposed instruction been given. *See Owens-Corning Fiberglas Corp.*, 1993 WL 470426, at *4; *Anderson*, 564 N.W.2d at 793. Here, the issue is whether the trial court erred in completely rejecting proposed

[9] Note that *the Averys* submitted an objection to BM Co.'s proposed Instruction Number 8. *See* Record on Appeal, tab 181, pp. 4-5 (Defendant's Objection to Plaintiff's Proposed Jury Instructions, May 17, 2002). However, we have not found anything in the record which contain an argument *by BM Co.* as to why its proposed instruction should be adopted in place of the given instruction.

Instruction Number 23 without giving an alternate instruction.

[32] As stated previously, BM Co.'s proposed Instruction No. 23 provided:

> If you find that the Averys or AES required BM Co. to perform extra or additional work that was not actually required by the contract and for which a change order should have been issued, then you may award BM Co. damages even though no change order was actually issued.

Record on Appeal, tab 170 (Plaintiff's Proposed Jury Instructions, May 15, 2000). The trial court rejected this instruction and gave no modified or alternative instruction in its place.

[33] BM Co. argues its proposed jury instruction was an accurate recitation of the law governing construction contracts and therefore should have been submitted to the jury. BM Co. further contends that had the instruction been given, the jury would have awarded BM Co. the amounts claimed for additional work because the evidence supported the award. In addition, BM Co. argues that the instructions actually given did not sufficiently advise the jury that BM Co. could recover if it found that BM Co. had performed work pursuant to an oral agreement with the Averys or the architect.

[34] Generally, a trial court's decision to reject a requested instruction will be upheld even where the court could have given an instruction that was of more assistance to the jury, if the instruction actually given accurately and sufficiently instructed the jury of the law to be applied. *See Anderson*, 564 N.W.2d at 792-93. "As long as the instructions advise the jury as to the law it is to apply, the court has the discretion to decline to give other instructions even though they may properly state the law to be applied." *Id*. at 792 (citation omitted).

[35] With the above principles in mind, we find that the trial court erred in rejecting proposed Instruction No. 23. The crux of BM Co.'s claim is that it should be able to recover for additional work even in the absence of a written change order if the conduct of the parties or other evidence suggest that the parties agreed to the work. Proposed Instruction Number 23 adequately encapsulates the law in this area, which has been articulated as follows:

> A provision in a private building or construction contract that alterations or extras must be ordered in writing can be avoided by the parties to the contract when their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provision, or when the owner . . . by his or her acts or conduct is estopped from reliance on it.

13 AM. JUR. 2D *Building and Construction Contracts* § 23 (2000). Additionally, whether such a waiver, rescission, or modification occurred is a factual issue for the jury to decide. *See Cascade Elec.*, 245 N.W.2d at 776 (citing *Klas*, 168 N.W. at 427).

[36] Considering that the proposed instruction recited a legally cognizable theory of recovery, the jury should have been given some instruction as to the recoverability for additional work done without a change order should the jury find that the written change order requirement was in any way waived or rescinded by the parties. *See Consol. Fed. Corp.*, 394 S.E.2d at 607 (holding that the trial court did not err in instructing the jury on the rule regarding waiver of written change order requirements) (citations omitted); *see also Pioneer Roofing Co. v. Mardian Constr. Co.*, 733 P.2d 652, 666 (Ariz. Ct. App. 1986) (holding that it is proper for the trial court to instruct the jury on the waiver doctrine, where the underlying theory of the doctrine is supported by evidence that the parties waived the writing requirement) (citations omitted). The principle set forth in proposed Instruction No. 23 was not substantially covered by any other given instruction. *See Smoky, Inc. v. McCray*, 396 S.E.2d 794, 800 (Ga. Ct. App. 1990). Accordingly, we find that an instruction on the waiver theory governing recovery for additional work was necessary as indicated by the facts of the case, and that it was an abuse of discretion for the trial court to refuse to give *any* instruction to this end. Such failure prejudiced BM Co. and therefore warrants a new trial as to its affirmative claims for damages for additional work. *See Dawson*, 135 F.3d at 1165 ("If the misleading instruction did prejudice the complaining party, then the proper remedy is a new trial.") (citations omitted).

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IV.

[37] In accordance with the foregoing, we find that the trial court did not err in rejecting BM Co.'s motion to alter or amend the judgment with regard to its affirmative claims for damages. We therefore **AFFIRM** the court's decision on that motion. We further find that trial court erroneously overlooked material evidence which supported the grant of BM Co.'s motion for a new trial, thereby warranting a new trial as to BM Co.'s affirmative claim for damages. Accordingly, we find that the trial court abused its discretion in denying BM Co.'s motion for a new trial on its affirmative claims for damages and therefore **REVERSE** that decision. Additionally, we find that the lower court's rejection of BM Co.'s proposed Instruction No. 23, covering the law regarding waiver of a contract writing requirement, and the court's failure to give an alternate instruction, amounts to an abuse of discretion. We therefore find that BM Co. is entitled to a new trial on the portion of its affirmative claims for damages that represent additional work performed on the contract and **REVERSE** the lower court judgment to that extent. The findings made herein supplement the Opinion issued on December 27, 2001.