IN THE SUPREME COURT OF GUAM

FARGO PACIFIC, INC.,
Plaintiff-Appellant/Cross-Appellee,

vs.

KORANDO CORPORATION,
Defendant-Appellee/Cross-Appellant.

Supreme Court Case No.: CVA05-004
Superior Court Case No.: CV0766-01

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on March 6, 2006
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice[1]; ROBERT J. TORRES, JR., Associate Justice.

TORRES, J.:

[1] This is a cross-appeal between Plaintiff-Appellant/Cross-Appellee Fargo Pacific, Incorporated ("Fargo"), a prime contractor, and Defendant-Appellee/Cross-Appellant Korando Corporation ("Korando", a subcontractor. Fargo sued Korando for additional costs incurred in fixing defective work performed by Korando pursuant to a subcontract. Korando counterclaimed for work done purportedly outside the original scope of the subcontract. After a bench trial, the Superior Court issued its Findings of Fact and Conclusions of Law, holding that Korando breached its subcontract with Fargo. The court also determined that because the scope of the project was changed after the breach, Fargo's damages were limited to "the contract amount of $39,000.00 and $16,000.00 which is the difference in the contract amount and and [sic] the cost to rectify Defendant's work at $60,000.00." Furthermore, each party was to bear its own attorney's fees and costs. A judgment in favor of Fargo was subsequently entered without review or approval as to form by Korando, in the amount of $44,400.00 together with costs. Fargo appealed and Korando cross-appealed.

[2] On appeal, we must determine whether the trial court's verdict is supported by substantial evidence, whether attorney's fees are recoverable under the indemnity provision of the subcontract, and whether the trial court erred in signing the proposed judgment submitted by Fargo without allowing Korando the opportunity to review the judgment.

[3] The trial court's findings are, for the most part, well grounded in the record and we affirm with the following exceptions: (1) we reverse the finding of consequential damages to Fargo to

[1] Associate Justice Frances M. Tydingco-Gatewood heard oral argument in this case. Prior to issuance of this Opinion, she was sworn in as Chief Judge of the District Court of Guam.

include the cost of re-hydroseeding; (2) we remand to determine how much of the rectification work performed by Korando is attributable to the change in design; (3) we reverse the trial court's holding that Fargo is not entitled to attorney's fees and costs and remand for a computation of Fargo's attorney's fees and costs; and (4) we remand for calculation and entry of a judgment that awards to Korando the costs of suit associated with prosecuting its counterclaim for the additional work.

I.

[4] Fargo had a standing Solution Order Concept ("SOC") contract with the United States Department of the Navy – a contract in which Fargo was selected to perform miscellaneous work within the Naval Station in Sumay, Guam. Fargo's Excerpts of Record ("ER") 1, ER 43 ("Solution Order Concept, Statement of Work, Work Request 31968"). One of the contracts that arose in Fargo's umbrella Solution Order Concept contract was to prepare the Blue Jacket Football Field on the Naval Station for recreational use. *Id*. The scope of work was to: (1) crown the field to a 1% slope from the "center to each side" of the field for suitable water drainage; (2) install an irrigation system; and (3) upgrade restrooms and install electrical water coolers. Fargo's Supplemental Excerpts of Record ("Fargo's SER") 1, Defendant's Tr. Ex. 4 (Statement of Work, Work Request No. 31968).

[5] In anticipation of the bid, Fargo's general manager Jay Park called architect Muni Abdullah of Von Watson & Associates architecture firm to request guidance on a plan for the work. Tr. Vol. I at 82. Abdullah referred Park to the Architectural Design Guide to plan the work. Fargo's engineer, Aryel Nucum, then created a schematic drawing which was introduced at trial as Defendant's Ex. 4. Fargo presented its plan to the Navy based on Nucum's sketch, and the Navy accepted the bid. Tr. Vol. I at 86. After being awarded the contract by the Navy, Park returned to architect Abdullah and asked for a complete set of drawings based on Nucum's schematic. Tr. Vol. I at 82. Based on

Nucum's design, Abdullah then created what was known throughout the trial as the "Von Watson" plan for a 1% slope of the field. Tr. Vol. I at 95-96.

[6] Fargo is not experienced in crowning land, so it subcontracted the crowning work to Korando. ER 2. The subcontract price was $39,000.00. ER 23-57, Plaintiff's Tr. Ex. 2, Subcontract of December 21, 1999. Korando based their subcontract bid on the "Von Watson" plan. Tr. Vol. IV at 6-9. Korando designed the 1% slope to run from the midline (the 50-yard line) of the field to the end zones. This plan was admitted as Defendant's Ex. 55 at trial.

[7] Korando completed the grading and laid the required four inches of topsoil. Nucum, who was also the quality control representative for Fargo, inspected the field, found it visually acceptable, and discharged Korando from its subcontract. Korando's SER 7, at 6 (Korando's Answer and Counterclaim). Fargo then proceeded to install a sprinkler system which required the use of heavy equipment to do trenching, backfilling and compacting of the field.

[8] After the sprinkler installation, Navy Contracting Officer Brian M. Gilligan came to inspect the field. He rejected the grading work due to the amount of rocky material in the topsoil. Korando's Further Supplemental Excerpts of Record Ex. 14, (Letter from Gilligan to Fargo of March 28, 2000). Gilligan requested a re-survey of the field to see if a 1% slope existed. Meanwhile, Fargo, having discharged Korando after a visual inspection of the field, paid $23,400.00 of the subcontract amount.

[9] Fargo also noticed, and notified Korando, that there was ponding on the field from the heavy rains. Tr. Vol. I at 18-19. If the sloping had been done correctly, theoretically there would be proper runoff drainage and no ponding on the field. Fargo and Korando employees together surveyed the field and confirmed that there was not a 1% slope. Tr. Vol. IV at 6; Fargo's SER 61, Plaintiff's Tr. Ex. 8 (Letter from Jay Park to Byong Kim of March 28, 2000). After Fargo communicated to

communicated to Korando that there was not a 1% slope, Korando accused Fargo of ruining its prior sloping during Fargo's installation of the sprinkler systems. Korando alleged that the use of the heavy equipment and the digging of trenches to lay pipe had created the rocky soil and damaged the 1% slope. Fargo, on the other hand, insisted that Korando had never achieved the specified 1% slope. Fargo's SER 62 (Plaintiff's Tr. Ex. 9); Tr. Vol. III at 148. Korando and Fargo nevertheless continued to work on the field together to try to fix the problems.

[10] Subsequently, Fargo sent the Navy an email asking permission to hydroseed the field. Defendant's Tr. Ex. 18 (Email from Park to Gilligan of March 29, 2000). In this same letter, Fargo said that they would also "make sure the field has a 1% slope." Defendant's Ex. 18. Navy representatives John Salas and Walter Cruz inspected the field and notified Fargo to proceed with hydroseeding the field, which Fargo did. Defendant's Tr. Exs. 19, 21.

[11] A month later, the Navy noticed that there were still poor growth spots and ponding on the field. Fargo's SER 65, Defendant's Tr. Ex. 23. Fargo retained engineer Rogelio ("Roger") Reveche, who re-surveyed the field and found that there was not a 1% slope. Tr. Vol. III at 9-10. In fact, there was a low point between the 50-yard line and the end zone. ER at 7 (Findings of Fact and Conclusions of Law ("FFCL") ¶ 29).

[12] After the inspection, the Navy and Fargo discovered that the Von Watson plan did not conform to the football field slope standard recommendation found in the "Architectural Design Guide." ER at 4 (FFCL ¶ 12). The Von Watson plan provided that the slope would be from the 50-yard line to the end zones. The "Architectural Design Guide" recommends a field drainage of 1% slope be cut along the longitudinal center mid-line to the sidelines. Tr. Vol. II at 73 (the "grading of the [field] should be from the centerline"). In order for Fargo to fix the slope properly, the Navy

required Fargo to follow a new design for sloping, from the center of the field lengthwise from end zone to end zone. Korando's SER 9.

[13] Fargo took steps to correct the sloping. They solicited another bid to rectify the slope requirement for the project and Maeda Pacific Corp. responded. Maeda presented two different bids: "Option 1," in the amount of $159,000.00, based on the new design sloping longitudinally from the centerline, per the Architectural Graphic Standards Ninth Edition; and "Option 2," a bid for $60,000.00, premised on the slope of the field according to the original Von Watson plan.

[14] Fargo ultimately did not contract for the rectification, performing most of the rectification work itself, although Korando continued to help with correcting the grading. Fargo alleged it incurred $121,328.00 worth of labor, equipment and costs in the re-grading and sued Korando for this amount. Korando counterclaimed for the balance due under the subcontract, $15,600.00 and for $50,200.00 that Korando claimed it incurred for additional work on the redesigned field. ER at 58-95, Plaintiff's Trial Ex. 54 ("Rectification of Crowning of Football Field"). Korando's claim for $50,200.00 was based on daily reports that were faxed from Fargo to Korando after the new design work began. Korando's Supplemental Excerpts of Record Ex. 13, Defendant's Tr. Ex. 63, ("Summary of Cost for Rectification of Football Field Project").

[15] After a bench trial, the Superior Court issued its Findings of Fact and Conclusions of Law ("FFCL"), holding, *inter alia*, that: (1) Korando had not graded the field to 1%, so it was not entitled to payment under the subcontract, and had to return the $23,400 earlier received; and (2) Fargo's damages were limited by $60,000.00, which was a projected cost of rectification if Fargo followed the original Von Watson plan.

[16] The trial court did not award the $121,328.85 claimed by Fargo, because Korando's breach was based on the Von Watson plan. The trial court found that Korando was responsible only for the

grading and finishing of the field specified in the Von Watson plan and was not responsible for any work that needed to be performed in accordance with the new design.

[17] The trial court found that Fargo had to absorb any additional expenses associated with the redesign because the scope of the project changed *after* Korando breached the contract. The court also ruled that each party was to bear its own costs and attorney's fees since technically neither party "prevailed." A judgment, prepared by Fargo's counsel and submitted to the trial court without knowledge or approval of Korando's counsel, was then entered in favor of Fargo for $44,400.00 together with costs; an award which appeared to be different from the award in the court's previously issued Findings of Fact and Conclusions of Law.

[18] Both parties moved for reconsideration. The trial court issued a Decision and Order on the reconsideration motions essentially affirming all of its prior findings and conclusions. Judgment was entered. Fargo then appealed, and Korando cross-appealed.

II.

[19] This court has jurisdiction over an appeal from a final judgment. 48 U.S.C. § 1424-1(a)(2) (West, Westlaw through Pub. L. 109-414 (excluding Pub. L. 109-401) (approved Dec. 18, 2006)); 7 GCA § 3107(b) (2005).

III.

[20] Fargo submits and Korando agrees that the measure of damages is a mixed question of law and fact warranting *de novo* review. The interpretation of the attorney's fee provision in the contract, Fargo asserts, also deserves *de novo* review. Korando, disagrees, arguing that the grant or denial of fees pursuant to a contractual agreement should be reviewed for an abuse of discretion. As for the trial court's signing of the judgment without affording Korando an opportunity for review and comment, Korando believes this issue involves a conclusion of law that is reviewed *de novo*.

[21] Findings of fact made following a bench trial are reviewed under a clear error standard. *Guam United Warehouse Corp. v. DeWitt Transp. Serv., Inc.* 2003 Guam 20 ¶ 13. Therefore, the trial court's findings in this case that there was a breach, followed by a change in design, are reviewed for clear error. *See Guam United Warehouse Corp.,* 2003 Guam 20 ¶ 13 (stating that the finding of the existence of a contract is a finding of fact, reviewable for clear error). "[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* (quoting *Town House Dep't Stores, Inc. v. Hi Sup Ahn et al*, 2000 Guam 32 ¶ 13). While conclusions of law are reviewed *de novo,* issues such as whether a binding contract was entered into by the parties depend on the intention of the parties and are a question of fact. *Id.*

[22] A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). Under this standard, the reviewing court does not substitute its judgment for the trial court's. *People v. Flores,* 2004 Guam 18 ¶ 7.

[23] In considering whether the evidence is sufficient to sustain the trial court's judgment, the reviewing court must examine the evidence in the light most favorable to the successful party,

resolve any controverted fact in favor of the successful party, and give the successful party the benefit of every reasonable inference from the evidence. *Guam United Warehouse Corp.,* 2003 Guam 20 ¶ 41.

[24] An interpretation of the law governing the award of attorney's fees is reviewed *de novo*. *Taniguchi-Ruth & Assoc. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 22.

[25] Korando argues that the trial court's adoption of a party's findings of fact is an issue of law and therefore reviewable *de novo*. We disagree. Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations, which is why they are reviewed deferentially under the clearly erroneous standard. *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998). The court's adoption of proposed findings submitted by a party does not change this standard but "[f]indings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge." *In re Alcock*, 50 F.3d 1456, 1459 n.2 (9th Cir. 1995); *see Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 199) (noting while review is for clear error, the reviewing court will review with "particularly close scrutiny" when findings are adopted). "[W]hen the trial court has adopted the prevailing party's proposed findings of fact virtually verbatim, 'close scrutiny' of the record is appropriate." *Takano-Towa Guam, Co., Ltd. v. Cox*, Civ. No. 92-00060A, 1993 WL 128214 (D. Guam App. Div 1993), (quoting *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1386 (9th Cir. 1986) (where a trial court adopts proposed findings verbatim, the standard of review was held to be close scrutiny)). We will therefore review the findings contained in the judgment for clear error in accordance with these principles.

IV.

[26] Fargo claims on appeal that the trial court improperly interpreted the meaning of "damages," resulting in lower compensation for Fargo, and that the subcontract with Korando requires reimbursement of all Fargo's costs reasonably incurred as a result of Korando's breach, even for costs outside Korando's original scope of work. Fargo further appeals the trial court's interpretation of entitlement to attorney's fees under the contract between the parties.

[27] Korando, in its cross-appeal, challenges the trial court's finding that Korando breached the subcontract, and consequently its conclusion that because of this breach, Korando was not entitled to recovery on its counterclaim for work performed on the new design. Korando further argues the trial court erred in signing the proposed judgment submitted by Fargo without permitting review by Korando.

A. Korando's Breach

[28] We must review whether the trial court committed clear error in finding that Korando breached the subcontract by not achieving the 1%slope. The court found that Fargo and Korando agreed to the Von Watson plan that called for a drainage slope of 1% from the midline of the field to the end zones. Tr. Vol. II at 70; Tr. Vol. I at 95-96.

[29] The Von Watson plan did require drainage of the field from the middle to the end zones at a 1% slope. Fargo's SER 1-3, Plaintiff's Tr. Ex. 2, (SOC Statement of Work, Work Request 31968, Exhibit A, (a)). The subcontract provides that "[s]ubcontractor agrees to perform all: labor, materials, equipment, supervision & surveying crown football field in 1% slope with min. 4" thick topsoil." ER 24, Plaintiff's Tr. Ex. 2 (Subcontract Agreement of December 21, 1999). Exhibit A to the subcontract, under "Scope of Work," states that Korando will "[p]rovide new top soil, grade, and compact. Crown playing field with a 1% slope from center to each side for adequate drainage." A

plain reading of this clause reveals that the 1% slope was at the top, "crowned" level. The trial court, therefore, appropriately found that the contract required a 1% slope upon completion of the project.

[30] There was also substantial evidence that Korando did not complete the required 1% slope. Fargo's expert witness John Duenas testified that based on his computer models, Korando's assertion that they graded the field to 1% was not possible given the existing conditions. Tr. Vol. III at 129-149. Korando's expert witness Tor Gudmundsen , when confronted, was not able to refute this opinion. Tr. Vol. VI at 97-98. The failure to grade the field to 1% was also established by the testimony of Roger Reveche. Tr. Vol. III at 2-20. While Korando claimed the failure was due to Fargo's trenching work following Korando's grading, this was refuted by the testimony of expert witness Duenas. Tr. Vol. III, at 148; Ex. 59. Duenas further testified that unless Korando was to raise the field, the 1% slope would not be possible because cutting the field to the end zones would result in the end zones' being lower than the adjacent street. Tr. Vol. III at 158, 160-161. Moreover this methodology created erosion problems. Tr. Vol. III, at 131-163. The testimony of Korando's chief witness Byong Kim, on cross-examination, substantiated that compacting the soil *after* installation of the sprinkler system may have caused damage to the work done. Tr. Vol. V, at 26-27. There was evidence to the contrary, i.e., the reports of Fargo's engineer and quality control representative, Aryel Nucum, that the field was graded to a 1% slope. Korando's SER Ex. 11, Defendant's Tr. Ex. 53 ("Contractor Production Reports"). However, under the clear error standard of review, we only look at whether the trial court's finding of fact is supported by substantial evidence. Though another trier of fact may have found differently, the trial judge found that these witnesses established that Korando did not establish the 1% slope required under the subcontract.

[31] We further recognize there was evidence that Jay Park of Fargo told the Navy there was a 1% slope when he knew or had reason to believe that there may not have been a 1% slope. The trial

court did not address this alleged inconsistency. However, Fargo was ultimately responsible for rectification, which it chose to undertake according to a new plan (from the centerline rather than the 50-yard line). For this reason, we find no error in the trial court's failure to address the statement by Park that the field had a 1% slope. His credibility does not change the scope of work that Korando was responsible for completing, or the plans that Fargo and the Navy agreed upon after it was determined that the field would be sloped differently.

[32] A review of the evidence therefore does not leave us with the definitive and firm conviction that the trial court made a mistake in concluding that Korando had not complied with their contractual obligation to grade the field at 1% prior to the sprinkler installation and hydroseeding. Korando breached the subcontract and was liable for consequential damages.

B. Consequential Damages

[33] Having determined it was not error for the trial court to find that Korando breached the contract by not grading the field to a 1% slope, we now must evaluate what consequential damages are permitted to Fargo as a result of the breach. Fargo was entitled to consequential damages pursuant to paragraph 12 of the subcontract.[2] ER 29. The measure of consequential damages under Guam law is "the amount which will compensate the parties aggrieved for all the detriment proximately caused [by the breach], or which, in the ordinary course of things, would be likely to result therefrom." 20 GCA § 2201 (2005).

[34] In deciding on the appropriate damages to award Fargo, the trial court relied on the bid for the rectification of the field submitted by Maeda Pacific Corp.. Maeda's bid presented two options:

[2] Paragraph 12(a) of the subcontract provides in pertinent part . . . "If Subcontractor shall fail to . . . correct or replace any damaged or defective work or materials, Contractor shall . . . have the right to . . . furnish such labor, equipment, materials and supplies as may be required to correct any such default and to charge the entire cost and any expense, including legal fees, incurred by Contractor in connection therewith to Subcontractor . . . "

first, to slope the field longitudinally and second, latitudinally ("x-sectionally"). The estimated costs for the former were $159,000.00, while the latter was $60,000.00. Korando's SER Ex. 8, Defendant's Tr. Ex. 44 ("Proposal for Regrading of Football Field" from Maeda Pacific Corp. to Jay Park of July 20, 2000. Fargo argues, however, that they should not go uncompensated for all of their rectification expenses simply because the Maeda quote for the Von Watson plan was only $60,000.00, arguing on appeal that "[i]t remains unclear why the [trial] court still refused to award Fargo all the costs it incurred in having to redo Korando's work." Appellant's Brief, at 9 (July 11, 2005).. Fargo argues that under Guam law, they are entitled to all of its out-of-pocket expenses, and are not limited not to the expenses that Maeda would have incurred. Fargo submits, "[i]t is unclear why the trial judge did not award Fargo these additional costs above the $60,000." Appellant's Brief at 8 (July 11, 2005). Fargo believes the trial court erred in its interpretation of "consequential damages," when it did not allow Fargo to recover all of its rectification expenses. In its prayer for relief, Fargo requested $121,328.85 in consequential damages, representing Fargo's total out-of-pocket expenses for rectification work performed on the field after Korando's initial grading did not accomplish a 1% slope. ER at 59. This breaks down to $29,880.28 in labor, $3,745.00 in equipment, and $87,703.57 in materials. Fargo argues that the trial judge imposed a limitation on Fargo's consequential damages that was not legal or proper.

[35] At trial, Fargo attempted to impeach the Maeda bid to rectify the plan and show that the bid was unreliable, but Fargo failed to persuade the trial judge. Tr. Vol. VII, at 5-10. We do not believe the trial court acted unreasonably in using the Maeda bid as a basis for determining the damages to award to Fargo for the defective slope work, particularly in light of the trial judge's finding that the plan changed from the Von Watson latitudinal plan to the Architectural Guide's longitudinal plan, a change that Korando should not be held financially responsible for.

[36] Yet Fargo contends that the trial judge misunderstood the evidence, because the court found that the new design backfill "would not involve bring (sic) in more materials than would have been required under the Von Watson plan." ER 13, Decision and Order of February 10, 2005, at 2, corrected ¶ 37. Fargo's position is best stated in the testimony of its witness Percival Guzman: "Maeda's proposal is not inclusive of the hydroseeding works, providing topsoil, spreading topsoil, QC manager, they're not gonna provide QC manager, and all those other related works like adjusting the goal and testing of soils." Tr. Vol. VII, at 22. Fargo claims Korando should be liable for all costs emanating from Korando's breach. The trial court disagreed and held that Korando should only be liable for damages based on the scope of the work under the Von Watson plan which was in effect at the time that Korando entered into the subcontract. The Von Watson plan was later changed at the Navy's request and Fargo agreed. The trial court ruled that Fargo could not receive its full rectification costs.

[37] Korando itself did not agree with the trial court using the $60,000.00 as a basis to award damages to Fargo. Korando argues that even if it breached the subcontract, the trial court erred because Maeda's quote included $32,785 worth of topsoil, and the Von Watson plan did not include any additional topsoil importation. The trial court, however, actually found that the Von Watson plan would require importation of topsoil. The trial court amended only Finding of Fact number 37, to read: "according to the Navy, the 'new design' would not involve bring (sic) in more backfill material than would have been required under the Von Watson plan." ER 14 at 2 (Decision and Order, Feb. 10, 2005. New topsoil would be necessary under either plan -- for the Von Watson plan, which Korando was supposed to have carried out, as well as for the "new design" which Korando was not responsible for. ER 303-304, Plaintiff's Tr. Ex. 25 (Letter from Gilligan to Fargo of July 20, 2000). Though the evidence could have been viewed differently – for instance, that Korando could

could have done the 1% slope without importing topsoil, that is in fact not what the trial court found. Under a clearly erroneous standard, "if the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Yang v. Hong*, 1998 Guam 9 ¶¶ 6–7 (quoting *Service Employees Int'l Union, AFL-CIO, CLC v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1317 n.7 (9th Cir. 1992)). Although Korando did not want the trial judge to take the importation of topsoil into its calculation of rectification of the Von Watson plan, it is reasonable for the trial court to have done so and therefore, there was no clear error.

[38] A review of the record reflects that the trial judge did not misunderstand the evidence or misapply the law of consequential damages. Fargo itself was responsible for procuring the Von Watson plan. (FFCL ¶ 4). Both Fargo and the Navy initially approved the Von Watson Plan. (FFCL ¶ 13). Korando was subcontracted to follow the Von Watson plan (FFCL ¶ 5), while the rectification plan was not the same as the Von Watson plan. (FFCL at 10). The court found that the "scope of the project had changed after the breach." FFCL at 11. This is substantiated in the record. The letter from Lt. Gilligan memorializes that the slope would change from center to sides instead of centerfield to ends. Korando was contracted to grade the field at 1% from the 50-yard line to the end zones under the Von Watson plan. The trial court correctly concluded that Korando was not responsible for any additional work caused by the change in design. The court found that the Navy required the design change and Korando should not be burdened with the additional costs occasioned by this change. The trial court did not misunderstand the evidence or misapply the law, but reached a legally sound conclusion supported by substantial evidence. *Fagan v. Dell'Isola* 2006 Guam 11 ¶¶ 12, 13 (internal citations omitted).

[39] There is, however, one exception we have with the trial court's calculation of damages. In its calculation of damages, the trial court utilized the figure of $60,000.00, relying on Maeda's bid to correctly implement the Von Watson plan. The Maeda bid did not include any cost for hydroseeding and there is evidence that Fargo had to hydroseed the field more than once. The first hydroseeding occurred after authorization from the Navy while the second hydroseeding took place as part of the rectification work. Korando's SER Ex. 11, Defendant's Tr. Ex. 53, Report No. 113. There is logic to Fargo's argument that the second hydroseeding was caused by Korando's breach. We are therefore persuaded that the cost of the second hydroseeding should have been correctly calculated as an element of consequential damages, because the additional hydroseeding was not caused by the change in the direction of the sloping. Evidence introduced at trial showed that the cost of hydroseeding was $30,000.00. ER at 58-75, Plaintiff's Tr. Ex. 54 ("Rectification Crowning of Football Field – Cost Summary, Materials, Invoices," at 62).

[40] To summarize, the trial judge made a substantiated finding that Korando breached its duty to establish a 1% slope as required by the Von Watson plan. (FFCL ¶ 29; at 9). The rectification work that occurred, however, was simply not based on the same project Korando contracted for but included work pursuant to a new design. (FFCL ¶ 31; at 10). Accordingly, the trial court awarded Fargo rectification costs based on the Von Watson plan. The law of consequential damages dictates that the party who suffered due to the breach is entitled to be reimbursed its losses incurred as a result of the breach. 20 GCA § 2201 (2005). Fargo's losses include the additional costs that were occasioned by having to re-do the work under the Von Watson plan, but the court erred in not including the $30,000.00 cost of hydroseeding the field.

C. Korando's Additional Work

[41] We now turn to Korando's claim that it is entitled to recovery for additional work performed on the new design. There is evidence in the record that Korando assisted with some of the construction performed in accordance with the new design. ER 76-213, Plaintiff's Tr. Ex. 55 ("Rectification Crowning of Football Field – Actual Manpower Incurred," Report No. 43). Documentary evidence reflects Korando assisted with the new sloping design for a number of months.[3] This assistance was given by Korando after the change in design, "not as an acknowledgment of defective works, but a good gesture of cooperation and helping each other." Fargo's SER 141 (Letter from Korando President to Fargo General Manager, July 21, 2000). The assistance provided by Korando after the change order was to start "scraping and screening of topsoil right away and within the proposed schedule." Fargo's SER 141.

[42] Korando presented the figure of $50,200.00 as the cost of additional work in Korando's SER 13 (Defendant's Tr. Ex. 63,"Rectification Crowning of Football Field – Cost Summary, Materials, Invoices"). In the testimony which accompanied the submission of the $50,200.00 figure, it is not possible to determine how much work was the result of the new design and how much work would have been required under the original Von Watson. Korando's President Kim presented testimony explaining how he arrived at the figure of $50,200.00. Tr. Vol. IV, at 75. Between that figure, the daily work reports, and Kim's testimony, it is not possible to determine exactly how much of the $50,200.00 represents extra work for grading the field longitudinally, and how much, if any, is work that Korando would have to perform anyway in achieving a 1% slope. The testimony at trial and the exhibits admitted into evidence are insufficient for this court to determine the portion of the $50,200.00 which is chargeable to rectification expenses for the work not properly done, and that

[3] ER 196 to 206 indicates Korando spent several hours (199.5 hours, as shown in ER 196-204, Plaintiff's Tr. Ex. 55, Reports 218, 219, 239, 240, 241, 246, 248, 254, 255, 261 and 270) on site assisting with rectification, (a

portion which is attributable to the new design, for which Korando is not responsible. Therefore, we remand to the trial court for the trial court to determine exactly how much of Korando's post-change $50,200.00 was the result of the new design and how much was attributable to the original Von Watson plan. Korando is entitled to be paid for work performed on the new design under the theory of quantum meruit. *Tanaguchi-Ruth + Associates v. MDI Guam Corp.,* 2005 Guam 7 ¶ ¶ 24, 25.

D. Recovery of Attorney's Fees

[43] In his Findings of Fact and Conclusions of Law, the trial judge stated that "[w]ith regard to attorney fees and costs, the Court finds that neither party is the prevailing party based on the damages sought for the claims made. Each party will bear its own attorney fees and costs." ER 10, at 10.

[44] Fargo took issue with this holding in its motion for reconsideration, relying on the indemnity provision contained in paragraph 13(d) of the subcontract[4] and *Continental Heller Corp. v. Amtech Mechanical Services, Inc.*, 61 Cal. Rptr. 2d 668 (Ct. App. 1997). The court in *Continental Heller* held that a very similar indemnification agreement in a construction subcontract entitled the contractor to indemnity, including attorney's fees in the event of a breach. *Id.*

[45] The trial court ruled that *Continental Heller*[5] was not precedent because the indemnity language was not identical. The subcontractor in *Continental Heller* agreed to indemnify the contractor only, while Korando agreed to indemnify both the contractor and the owner. The trial

total of 807 hours, as shown in ER 131-174, Reports 6 through 40).

[4] Paragraph 13(d) provides "[s]ubcontractor shall indemnify the Contractor and Owner against, and save them harmless from, any and all loss, damages, costs, expenses and attorneys' fees suffered or incurred on account of any breach of the obligations and covenants of this section, and any other provisions or covenant of this Subcontract."

[5] The trial court mistakenly referred to the *Continental Heller* case as "Fleming" (see ER at 21-22 (Decision & Order of February 10, 2004, at 9 lines 10, 14, and 27).

court's analysis was further supported by the fact that the *Continental Heller* subcontract included an obligation to indemnify the contractor from "all loss, damages, etc., 'including attorneys' fees' which arise[] out of or is in any way connected with the performance of work under this [s]ubcontract." *Id.* at 673. Unlike the *Continental Heller* case, paragraph 13(c)[6] of the Fargo/Korando subcontract does not mention loss, damages or attorney's fees. Korando believes "[i]n this respect subsection 13(d) must be read as merely enlarging on the indemnification provision found in subsection 13(c)." Appellee/Cross-Appellant's Combined Opposition and Opening Brief at 35 (Aug. 22, 2005). The trial court stated:

> [T]he holding in Fleming [sic][meaning *Continental Heller*] [is] inapplicable to the case at hand. The provision in issue in Fleming [sic] is different from the provision included in the Subcontract here in that the provision in Fleming [sic] only made reference to the subcontractor indemnifying the contractor. However, in the present case, Section 13(d) of the Subcontract makes reference to the Contractor and the Owner. The Court finds that Section 13(d) when read in conjunction with the other provisions included under the heading "Indemnity" only refers to Defendant's liability in indemnifying Plaintiff against third parties . . .

[46] Fargo maintains these reasons are not compelling enough to depart from *Continental Heller*. We agree. The distinction between saying "Contractor and Owner" or merely "Contractor" does not sufficiently distinguish the holding in *Continental Heller*. When a contractor and an owner are referred to together in a sentence, it does not change the singular meaning of either word. The contractor remains the contractor and the owner remains the owner, so adding the word "owner" to the sentence does not change the meaning of the word "contractor." Therefore, we disagree with this distinction and find that the trial court was in error in using it as grounds to distinguish *Continental Heller*.

[6] Paragraph 13(c) of the subcontract states, "Subcontractor shall indemnify the Contractor and the Owner against, and save them and the premises harmless from any and all claims, suits or liens, by others than the Subcontractor, arising in connection with this Subcontract and anything done hereunder." ER at 30, Plaintiff's Trial Ex. P-2

[47] We are also not convinced that the subcontract language, "shall indemnify the Contractor and the Owner against, and save them and the premises harmless from any and all claims, suits or liens, by others" found in paragraph 13(c) is clarified by the language of paragraph 13(d). A plain reading of paragraph 13 reveals that each subparagraph addresses a different type of liability for which the indemnitor is providing indemnity. Accordingly, in subparagraph (a), the subcontractor indemnifies the contractor for injuries (torts); in subparagraph (b), for patent infringement; in subparagraph (c), for claims and liens of other contractors; and subparagraph (d), for breach of contract. Accepting Korando's argument that paragraph 13(d) must be read as merely enlarging the indemnity provision found in paragraph 13(c) would mean the last clause of paragraph 13(d), "shall indemnify . . . from . . . breach of . . . any other provisions or covenants of this subcontract" is surplusage. The last clause of paragraph 13(d) is not surplusage but is intended to provide for indemnification for breach of "any other provisions" of the contract. If we were to read paragraph 13(d) as merely enlarging paragraph 13(c), it would render this language meaningless, and the law prevents us from interpreting a contract in such a way as to render parts of it surplus. *Reliant Energy Serv., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 828 (5th Cir. 2003) (stating that contract interpretation must, "where possible, construe the words so as to harmonize all while rendering none superfluous").

[48] We are further unpersuaded by Korando's argument that the indemnity provision of paragraph 13(d) violates the mutuality provision of 5 GCA § 32203. The mutuality provision Korando cites is from Chapter 32 of Title 5 of the Guam Code Annotated, entitled "Trade Practices and Consumer Protection." The stated policy of this Chapter is to protect consumers ("[t]his [law] shall be liberally construed in favor of the consumer and shall be applied to promote its underlying

P-2 ("Subcontract Agreement," paragraph 13(c))

purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty, and to provide efficient and economical procedures to secure such protection," 5 GCA § 32108). The Guam Trade Practices and Consumer Protection Law specifically excludes "business consumers" under 5 GCA § 32103(d), and is meant to address situations where there is a "disparate bargaining position." 5 GCA § 32104. Korando has not made a convincing argument that the mutuality provisions of Guam's consumer protection laws are applicable to this case.

[49] The trial court's rationale for rejecting the holding in *Continental Heller* and denying Fargo indemnity for attorney's fees was in error, but we must still decide whether Fargo is entitled to attorney's fees under the subcontract. In *Fleming v. Quigley*, 2003 Guam 4, it was confirmed that Guam follows the "American rule" for attorney's fees in civil cases. *Id.* ¶ 13. The American rule is that each party bears its own expenses of litigation, including attorney's fees. *Id.* ¶ 7. Guam recognizes the exception that attorney's fees are allowed where they are provided for in a contract. *Mobil Oil Guam, Inc. v. Tendido*, 2004 Guam 7 ¶¶ 43-49. In *Mobil Oil*, this court upheld a contractual provision providing that attorney's fees were recoverable in the case of one party having to "enforce" the contract, using the meaning of the term as found in Black's Law Dictionary (7th ed.). The *Mobil Oil* court also held that a party was in "default" if that party failed to perform a legal or contractual duty. *Id*. ¶ 44.

[50] The court in *Continental Heller* was faced with language almost identical to that in the subcontract agreement between Fargo and Korando: "[T]he Subcontractor shall indemnify the Contractor, and save it harmless from any and all loss, damage, costs, expenses and attorney's fees suffered or incurred on account of any breach of the aforesaid obligations and covenants, and any other provision or covenant of this Subcontract." *Continental Heller*, 61 Cal. Rptr. 2d at 673

(emphasis omitted). The California appellate court found this language made the subcontractor liable for attorney's fees even though no third-party indemnification issues were involved. *Id.* The *Continental Heller* court distinguished other cases where the contract provisions pertaining to attorney's fees "were limited to attorney fees incurred in defending against the underlying claims," such as defending against claims "'arising out of or resulting from the performance of the [w]ork.'" *Id.* at 672-73, citing *Hillman v. Leland E. Burns, Inc.*, 257 Cal. Rptr. 575 (1989).

[51] Korando argues that the *Continental Heller* case occurred in California where there is a statutory provision stating that the prevailing party is entitled to attorney's fees – section 1717 of the California Civil Code. There is no similar statutory provision under Guam law for the award of attorney's fees to the "prevailing" party, such as there is in California.[7] However, the court in *Continental Heller* never once mentioned section 1717. The statutory provision for attorney's fees was not relied on by the court because generally, if there is a contractual provision for attorney's fees, there is not a need to resort to a statutory provision for attorney's fees.

[52] Guam shares other statutes regarding attorney's fees and indemnification with California. For instance, 7 GCA § 26601 is derived from California Code of Civil Procedure § 1021. Guam's § 26601 has been modified to reflect, for the most part, limits on contingent fees rather than its original version.[8] Guam also shares a statutory definition of "indemnity" with California as 18 GCA § 30101 (2005), entitled "What is Indemnity," is derived from California Civil Code § 2772, and prior Guam

[7] California Civil Code § 1717 provides that the party who is found to be the prevailing party may be awarded attorney fees. Cal. Civ. Code § 1717 (2006).

[8] The originally adopted Guam Code of Civil Procedure § 1021, of the same title, provided, "[t]he measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided." This section became split into present-day subsections (f) and (g) of 7 GCA § 26601.

prior Guam Civil Code § 2772,[9] and provides: "Indemnity is a contract by [which] one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." From this definition alone, it is clear that paragraph 13(d) of the subcontract operates to allow Fargo to recover from Korando for the "legal consequence" of Korando's actions. 18 GCA § 30101. Paragraph 13(d) obligates Korando to indemnify Fargo for any breach by Korando and Korando is liable for damages or costs on account of that breach including attorney's fees. We hold that *Continental Heller* stands as firm precedent to assess attorney's fees against Korando based on the particular language of the indemnification agreement. There is no doubt Fargo "suffer[ed]" "attorneys' fees . . . on account of a breach of the obligations" of the subcontract.

[53] Korando argues that a court may make a reasonable award of attorney's fees to a prevailing party even if there is otherwise no statute which mandates fees to the "prevailing" party. Here, there

[9] Guam also shares a statute on interpreting a contract of indemnity with California. Title 18 GCA § 30107 provides:

> In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:
>
> 1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable;
> 2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof;
> 3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion;
> 4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so;
> 5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former;
> 6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former;
> 7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action.

See Cal. Civ. Code § 2778 (West, Westlaw through 2006 legislation).

is no prevailing party, therefore, attorney's fees should not be awarded. In the *Anderson v. Melwani*, 179 F.3d 763 (9th Cir. 1999), the court remanded to determine whether the award was inequitable and unreasonable. In *Anderson*, the contract between the parties provided that in the event of a lawsuit to "enforce or interpret the terms of [the contract], the *prevailing* party shall be entitled to recover reasonable attorney's fees." *Id.* at 764 (emphasis added). On the other hand, in this case, the contractual provision between Fargo and Korando does not require a prevailing party. The trial court's Decision and Order, found that "both parties prevailed on significant issues." ER at 20 (Decision and Order, Feb. 10, 2005) . This conclusion is not critical because the provision under which Fargo is entitled to attorney's fees does not contain a reference to whether a party prevailed or not. It simply states, "subcontractor shall indemnify the Contractor and Owner against and save them harmless from any and all loss, damages, costs, expenses and attorney's fees suffered or incurred on account of any breach . . . ." ER at 31 Plaintiff's Ex. 2 (Subcontract Agreement ¶ 13(d)).Unlike *Anderson*, the contractual provision between Fargo and Korando does not allow attorney's fees to the prevailing party. Instead, the subcontract indemnifies the "Contractor" for any attorney's fees "incurred on account of any breach." ER at 31, Plaintiff's Ex. 2 (Subcontract Agreement ¶ 13(d)).

[54] The trial court found, appropriately, that Korando breached its subcontract "because it failed to achieve the required 1% slope at the sub-grade level." ER at 9 (FFCL at 9). The suit that arose under this subcontract was occasioned by Korando's breach, and invoked the provisions of paragraph 13(d). This case fits squarely into the *Continental Heller* decision. Because the language in *Continental Heller* is almost identical to the language in the subcontract and there is no sound reason to depart from *Continental Heller's* holding, Korando must indemnify Fargo for its attorney's

fees in this case.[10] We therefore reverse the trial court's determination that Fargo is not entitled to attorney's fees. The fact that Fargo incurred legal fees on account of Korando's breach means that Fargo is indemnified for its legal fees under paragraph 13(d) of the subcontract. We remand to the trial court the determination of the amount of attorney's fees to which Fargo is entitled. This includes any attorney's fees incurred in pursuing this appeal.

E. Judgment Issued Without Review

[55] We now examine Korando's argument that the trial judge erred when he signed the judgment presented to him by Fargo. After the trial court issued its Findings of Fact and Conclusions of Law, Fargo submitted a proposed judgment to the court without first presenting it to Korando's counsel for review and approval. Fargo did this by filing an Ex Parte Motion for Entry of Corrected Judgment and a document captioned "Judgment." Fargo purportedly mailed the judgment to Korando counsel four days after presenting it to the trial judge, which was the same day that the trial judge signed the Judgment. Korando claims not to have been notified in advance of the Ex-Parte Motion.[11]

[56] The judgment, which ordered that Fargo recover from Korando "the sum of $44,400.00 with interest thereon at the rate of 6% per annum as provided by law, and its costs of actions," differed from the trial court's Findings of Fact and Conclusions of Law in two respects. First, the judgment allowed Fargo to recover its costs when the court had previously held each party should bear its own costs. Second, the judgment provided for a sum certain of $44,400.00, an amount which did not

[10] Interestingly, the indemnity language obligates only the subcontractor and not the contractor or owner. Since the indemnity is not mutual, only the contractor and owner are indemnified on account of any breach.

[11] Rule 9 of the Rules of the Superior Court of Guam requires that all applications for ex-parte orders be accompanied by a declaration containing, *inter alia*, "that a good faith effort has been made to advise counsel . . . of the date, time, place and substance of the ex-parte application." Fargo's Ex-Parte Motion for Entry of Corrected Judgment does not include such a declaration. Guam Ct. R. 9.

appear anywhere in the trial court's Findings of Fact or Conclusions of Law or in the Decision and Order issued after the motions for reconsideration and to amend the judgment filed by the parties.

[57] On appeal, Korando argues that the judgment should be vacated because Fargo violated Rule 5(G) of the Rules of the Superior Court of Guam which reads:

> G. Orders. After a hearing the Court may require the prevailing party to prepare an order which is consistent with the ruling of the Court in that matter. The prevailing party shall expeditiously submit the order to the opposing counsel for his review and signature who shall then expeditiously return the order to the prevailing party. The order shall then be expeditiously submitted to the court for its final approval, signature and filing. In the event that the parties are unable to agree upon the wording of the order, then a hearing shall be requested by the party required to prepare the order.

Guam Ct. R. 5.

[58] Fargo previously filed with this court a Motion for Partial Dismissal arguing that Korando's appeal on this issue should be dismissed because Korando raises it for the first time on appeal. Since the signing of the judgment was not raised in any of Korando's post-trial motions, Fargo asserted Korando waived its objections to the entry of the judgment.

[59] Korando claimed that this matter was preserved as an objection in the trial court when Korando submitted a Proposed Amended Judgment. Although Korando acknowledged it filed the Proposed Amended Judgment after Fargo filed the notice of appeal, Korando insisted it raised this matter with the trial court before Korando received the notice of appeal. In denying Fargo's Motion for Partial Dismissal of Korando's cross-appeal, we indicated we would address the issue in our consideration of the appeal. Initially, we must consider whether to even entertain Korando's appeal of the trial court's signing of the judgment without Korando's approval or review.

[60] "[W]hile generally this court will not address issues raised for the first time on appeal, it may exercise its discretion to do so in the following circumstances: (1) when review is necessary to

prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; [or] (3) when the issue is purely one of law." *Sinlao v. Sinlao*, 2005 Guam 24 ¶ 30 (internal quotation marks omitted). Even assuming *arguendo* that Korando failed to preserve the issue below, there appear to be sufficient reasons to exercise our discretion to entertain this ground for appeal, including review to prevent a miscarriage of justice or preserve the integrity of the judicial process, or because the issue is purely one of law. The circumstances surrounding the submission and signing of the judgment, including the failure to provide prior notice to Korando and the marked differences from the court's prior Findings of Fact and Conclusions of Law further support our decision to review this issue.

[61] Fargo defends its inclusion of a statement of costs in the judgment by stating that "an award of costs to Fargo are mandatory under 7 GCA § 26602 because Fargo received a 'judgment in his favor' while Korando is not entitled to costs on its counterclaim because it received nothing in his favor." Mot. for Partial Dismissal of Korando's Cross-Appeal, Supreme Court Case No. CVA05-004, at 3 n.2 (Sept. 12, 2005,). Title 7 GCA § 26602 (2005) provides, in pertinent part: "Except as otherwise expressly provided in this Title costs are allowed of course to the plaintiff upon a judgment in his favor in . . . an action for the recovery of money or damages." 7 GCA § 26602. Similarly, a defendant who prevails is likewise entitled to costs under 7 GCA § 26606: "Costs must be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in § 26602 . . ."

[62] The trial court ruled that Fargo prevailed in their action on breach of contract, but were not entitled to recover all the damages they requested. Specifically, the trial court found that although Korando breached the contract, Fargo could not recover for damages incurred as a result of the change in design. The trial court also ruled that Korando therefore successfully defended part of the

suit against them, and received partial judgment in its favor. Though the trial court addressed which party "prevailed," ER 20 at 8 (Decision and Order Feb. 10, 2005), this is not the appropriate standard for recovery of costs in this case.

[63] Our analysis *supra*, explaining why Korando, pursuant to paragraph 13(d) of the subcontract, had to indemnify Fargo for attorney's fees incurred as a result of Korando's breach is equally applicable to the recovery of costs by Fargo. Fargo does not need to rely on 7 GCA § 26602 in order to recover its costs, since the indemnity provision contained in the contract obligates Korando to pay for Fargo's costs. *See Continental Heller*, 61 Cal. Rptr. 2d at 673. The judgment was clearly different from the Findings of Fact and Conclusions of Law in ordering that Fargo could recover from Korando Fargo's costs of action, but we find no error in allowing reimbursement of Fargo's costs.

[64] Our determination that Fargo should be indemnified for its costs does not, however, end the inquiry concerning the awarding of costs. We have an obligation to review whether Korando is also entitled to recover any of its costs given our holding that Korando may recover for work attributable to the new design. *See infra* at at 16-17. Title 7 GCA § 26606 (2005) provides that, "[c]osts must be allowed of course to the defendant upon a judgment in his favor." We have concluded Korando is entitled to have a judgment entered in its favor for work performed pursuant to the new field design. Therefore, we remand to the trial court to determine the amount of costs of suit to be allowed to Korando for prosecuting its counterclaim for the additional work.

[65] We now examine the portion of the judgment which awarded Fargo the amount of $44,400.00, an amount which did not previously appear in the Findings of Fact or Conclusions of Law or in the Decision and Order. Close scrutiny of the judgment and record indicates there is a basis for awarding $44,400.00. Page 10 of the Findings of Fact and Conclusions of Law states:

> The only evidence before the Court as to the cost of such rectification work, as per the original Von Watson plan, is Maeda Pacific's quote . . . [of] $60,000.00. Therefore, in addition to the $23,400.00 it must return to Plaintiff, Defendant shall also pay Plaintiff $16,000.00 which is the difference between its original bid price of $39,000.00 and the cost of rectifying its work at $60,000.00.

ER 10 at 10.

[66] The trial court apparently made a mathematical error in its original Findings of Fact and Conclusions of Law in holding that Fargo's damages were limited to "the contract amount of $39,000.00 and $16,000.00 which is the difference in the contract amount and the cost to rectify Defendant's work at $60,000.00." ER at 10 (Decision and Order, Feb. 10, 2005). This is incorrect. The correct difference between those two figures is $21,000.00. Adding $21,000.00 plus $23,400.00 (the amount Korando had already been paid) brings the actual amount of Fargo's damages to $44,400.00. The trial judge simply made a subtraction error.

[67] While we are extremely disturbed by the trial court's willingness to sign the judgment without due process to Korando and in clear contravention of Rules 5 and 9 of the Rules of the Superior Court of Guam, we cannot say that the amount awarded to Fargo in the judgment is in error. The trial judge must, however, be more conscientious in ensuring due process and compliance with the rules particularly when a party appears ex parte or submits proposed findings ex parte.

V.

[68] The trial court's conclusions that there was a breach of the subcontract by Korando and that Fargo can recover only damages based on the original design is well substantiated in the record. We cannot say the trial court's Findings of Fact and Conclusions of Law that Korando breached the contract is in clear error, with the exception of the calculation of damages. The additional $30,000.00 in additional hydroseeding costs incurred by Fargo was not occasioned solely by the new design. Additional hydroseeding had to occur due to the breach, even without a design change, and

these costs are recoverable under the law of consequential damages. Therefore, we affirm the trial court with the modification that Fargo be permitted to recover an additional $30,000.00 from Korando for the expenses associated with having to hydroseed the field for a second time.

[69] Korando's claim for $50,200 in rectification work is remanded to determine how much is attributable to the new design and how much is for the old design. Korando is responsible for any rectification work associated with sloping the field under the old design (the "Von Watson" plan). Korando is not responsible for any additional work performed to slope the field under the new design (sloping under the Architectural Design Guide) and is entitled to payment from Fargo for this work.

[70] We further hold that the indemnity provision of the subcontract requires Korando to indemnify Fargo against any loss, damages, costs and expenses including attorney's fees incurred on account of Korando's breach of the subcontract. The attorney's fees include fees incurred in pursuing this appeal. Moreover, based on our decision to require Fargo to pay Korando for rectification work incurred in connection with the new design, Korando is also allowed its costs of suit related to its counterclaim for the additional work in accordance with 7 GCA § 26606. The case is therefore remanded to the trial court for determination of costs and attorney's fees to be awarded to Fargo and determination of the costs to be awarded to Korando.

[71] Finally, we affirm the judgment amount of $44,400.00 awarded to Fargo for consequential damages even though the judgment was not provided to Korando for review or approval in accordance with the Rules of the Superior Court of Guam. The trial court's earlier statements in the Findings of Fact and Conclusions of Law regarding calculation of damages clearly establish that the court simply committed a mathematical error. We do however caution the trial judge to be particularly vigilant when reviewing ex parte matters.

[72] Therefore, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings consistent with this Opinion.