IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 12, 2007 Session

BIG CREEK LANDSCAPING, LLC v. HUDSON CONSTRUCTION COMPANY

Direct Appeal from the Chancery Court for Davidson County
No. 04-1717-III Ellen Hobbs Lyle, Chancellor

No. M2006-01657-COA-R3-CV - Filed October 22, 2007

This appeal involves a dispute between a contractor and a landscaping subcontractor over the subcontractor's installation of undersized trees and the contractor's subsequent invocation of the take over clause upon the landscaper's failure to cure the defect. Both parties asserted breach of contract, and the trial court awarded damages to the defendant contractor for the cost of completing the job through a third-party landscaper and for attorney's fees and expenses. Concurring with the trial court that the subcontractor breached the contract when it installed undersized trees and, despite sufficient notice and opportunity to cure, failed to do so, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J., and HOLLY M. KIRBY, J., joined.

Richard M. Smith, Nashville, Tennessee, for the appellant, Big Creek Landscaping, LLC.

Hugh C. Howser, Jr., Mary Ellen Morris and James A. Beakes, III, Nashville, Tennessee, for the appellee, Hudson Construction Company.

OPINION

On February 3, 2003, Hudson Construction Company ("Hudson") subcontracted with Big Creek Landscaping ("Big Creek") to perform all landscape and irrigation work for the Wal-Mart Super Center it was constructing for Wal-Mart Stores. Section Two of the contract provided that Big Creek would perform all landscape work according to the plans and specifications. It further stated that "no deviations from plant list, caliper, or height requirements [were] allowed" and that

Big Creek's work was "subject to the approval of Metro Urban Forrestation [sic] Department before acceptance."

The contract also contained a take over clause in Section Seven:

> If Subcontractor fails to comply or becomes disabled from complying with the provisions herein as to character and time of performance, and **the failure is not corrected within forty-eight hours after written request by Contractor to Subcontractor,** Contractor may, without prejudice to any other right or remedy, take over and complete the performance of this Subcontract at the expense of Subcontractor, or Contractor may, without taking over the work, furnish the necessary materials and may employ any other person or persons including another subcontractor to finish the work and provide the materials therefor, . . . and in case of such discontinuance of Subcontractor's employment by Contractor, Subcontractor shall not be entitled to receive any further payment under this Subcontract until the said work shall be wholly finished and Contractor shall have received payment in full therefor from Owner, at which time, if the unpaid balance of the amount to be paid under this Subcontract exceeds the expenses incurred by Contractor in finishing the work, such excess shall be paid by Contractor to Subcontractor; but if such expense shall exceed such unpaid balance, then Subcontractor shall pay the difference to Contractor. As used in this Section the word "expense" shall mean actual cost to contractor plus fifteen [percent] (15%) for overhead. The expense incurred by Contractor as herein provided, either for furnishing materials or for finishing the work, and any damages incurred as a result of such default, shall be chargeable to and paid by Subcontractor and Contractor shall have a lien upon all materials, tools, and appliances taken possession of, as aforesaid, to secure the payment thereof. (Emphasis added.)

The original plan called for a nonexistent size of tree: six feet tall with a 2-inch caliper.[1] Two-inch caliper trees are generally ten to fourteen feet tall. After learning of this problem, Carlson Consulting Engineers ("Carlson Consulting"), the engineering firm overseeing the project for Wal-Mart, revised the plant schedule to reflect taller trees, all with 2-inch calipers, and noted on the plan that the revision was based upon the urban forester's comments. Along with a change order request, Hudson also issued a letter of explanation in which it clarified that Metro Nashville required 2-inch caliper trees and explained the resulting price increase. Of the 934 trees listed on the plan, 467 required specification revisions. After consulting with a supplier recommended by Carlson Consulting, Big Creek compiled a revised price quote listing the required changes and expressly noting the requirements of the "Nashville Planning Commission." It specified the types of trees, all of which had 2-inch calipers, and reflected a total installation cost of $ 81,324.[2] Including materials and labor, this change represented a net increase of $62,522 to the contract price. In response to Big Creek's revised quote and request

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1 The caliper measurement reflects the diameter of the tree's trunk at a specified height.

2 The total installation cost comprised the price of the trees, totaling $ 31,441, and the labor and additional equipment, totaling $ 49,883. Installation of the larger trees required additional labor, rock removal, and equipment time.

for authorization to proceed, Hudson sent, via facsimile dated October 30, 2003, the instruction to go forward with the tree changes at quoted prices. The parties memorialized the resulting price increase in a change order dated January 27, 2004, in which Hudson agreed to compensate Big Creek with an additional $62,251.50 for the 2-inch caliper trees.

Although the original plan called for a nonexistent size of tree, there is no dispute between the parties that, after corrected, the contract called for trees with a 2-inch caliper. Further, the parties did not attempt to modify the provision that prohibited deviations from the caliper sizes specified in the plan. Finally, there is no dispute that the work of Big Creek was subject to the approval of the urban forestry department before acceptance.

Notice of Nonconforming Trees

William "Billy" Brymer (Mr. Brymer), the owner and manager of Big Creek, placed orders for 2-inch caliper trees with a nursery chosen by Carlson Consulting and then installed the trees on the job site. He testified that he never measured the trees but instead relied on the supplier's representations as to their sizes.

The parties first learned of the nonconformance following Carlson Consulting's landscape and irrigation inspection on February 11, 2004. In a punch list transmitted by facsimile to Hudson from Carlson Consulting on February 16, 2004, the inspector noted that only the Allee Elms met plan specifications; that all other trees were undersized, averaging slightly over 1-1/2 inch caliper; and that the minimum size required by Metro Nashville was a 2-inch caliper. The punch list included other landscaping shortcomings and, under the heading "All dead, defective, and/or rejected plants removed and replaced before final acceptance," the inspector noted that the trees were too small and had been incorrectly installed.

Hudson then sent the punch list by facsimile to Big Creek and followed up with a written notice of nonconformance. Dated February 17, 2004, the letter ("February 17 letter") stated as follows:

> Per Wal-Mart Change order number 18 and quote–dated October 29, 2003, all trees were to be of [,] at a minimum, 2" caliper. Upon a site inspection today by Charles Morrow, Project Superintendent and Jim Flynn, Wal-Mart Construction Manager, the trees in place are less than 2" in caliper. All trees less than the specified caliper size are to be replaced immediately. Contact this office with a timely schedule of completion.

Events Following the Notice of Nonconformance

At Mr. Brymer's request, project superintendent Charles Morrow ("Mr. Morrow") and the supplier met him at the work site to address the problem of the tree sizes. Although Mr. Brymer offered to replace all of the undersized trees, Mr. Morrow instructed him to replace the trees with less than a 1-3/4 inch caliper, in hopes of obtaining a waiver of the city's 2-inch caliper requirement from Stephan Kevitt ("Mr. Kevitt"), the urban forester with the Metropolitan Department of Codes Administration. He testified to providing this instruction because the trees

were already in the ground; because the temporary certificate of occupancy ("CO") was about to expire[3]; and because Mr. Kevitt had stated he would not issue another temporary CO. Mr. Morrow sent Mr. Brymer a letter on February 25, 2004 ("February 25 letter"), confirming this instruction:

> Per our telephone conversation today, all trees . . . that are not 1-3/4" caliper or larger are to be replaced with correct size trees.
>
> This work has to be completed by March 15, 2003[4] so that the landscape can be inspected [by] Carlson Consulting and the city of Nashville for final sign off.
>
> Please inform me of the progress of this work.

Carlson Consulting then conducted another landscape and irrigation inspection on February 27, 2004, and transmitted a corresponding punch list to Hudson on March 2, 2004. Hudson then transmitted the punch list to Mr. Brymer. The list omitted several problems shown on the first landscape inspection, but the language regarding the nonconforming tree sizes remained.

The record does not reveal when Mr. Brymer replaced the fifty-one trees with less than 1-3/4-inch calipers, but he had done so by March 11, 2004, when a Carlson Consulting representative drafted the following letter to Mr. Kevitt ("letter to Mr. Kevitt"):

> This letter is to inform you that all the trees planted on the Hamilton Church Wal-Mart site are in accordance with the approved Landscape Planting Plan except the following items: . . . 51 trees were replaced that were under 1-3/4". There [are] still a number of trees that are 1-3/4" to 2" in size.

Mr. Brymer conceded on cross-examination to having been present for the drafting of this letter and to having retained a copy of it for his records.

Invocation of the Take Over Provision

Sheridan Ames, a Hudson project manager, testified at trial that Hudson learned on March 11 that Mr. Kevitt would not accept anything smaller than 2-inch caliper trees. That afternoon, Mr. Morrow transmitted by facsimile, and sent via certified mail, the following letter to Mr. Brymer ("the 48-hour notice"):

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[3] The record makes clear that time was of the essence at this stage. In a subsequent correspondence, Mr. Morrow wrote to Mr. Brymer that "as you are aware, my temporary C.O. runs out on 3/23/04. This work has to be completed and inspected by 3/12/04 so the City of Nashville can do their inspection the week of 3/15/04 before we can receive a permanent C.O." In yet another letter to Mr. Brymer just two days later, a senior project manager at Hudson stated that a Wal-Mart construction manager had just visited the job site to find no landscapers present and that everything "ha[d] to be completed and inspected by next week without exception."

[4] Mr. Morrow intended to type 2004 rather than 2003; Mr. Brymer confirmed at trial that he knew it was a typo.

> The trees are not in compliance with the plans and specifications for the above project. An independent landscaper will be hired to evaluate and detect the extent of the non-compliance [sic] work.
>
> Consider this your **48 hour notice** (per Section 7 of your contract with Hudson Construction Company) to address the incorrect work deficiencies. (Emphasis in original.)

Within two hours, Mr. Brymer had responded with the following facsimile:

> I have done everything you have asked me to do on this project. I don't know what else to do. I have no idea what grade level of trees this arborist is looking for. My supplier is a grade A supplier in this part of the country. The trees on this project are grade A. I can and will get you confirmation of this upon demand.
>
> If there is a tree supplier that the arborist was leaning toward I needed to know this. He should have informed the architect in the planning stages of this project. I did not see anywhere on the architects punch list about the trees being of poor quality.

Hudson never responded to Mr. Brymer's facsimile and took no further action until a day after receiving a proposal from a third party landscaper on the cost of completing the work. The March 16 proposal reflected, among other services, the removal of the undersized trees (at a cost of $2,500) and the installation of over four hundred conforming trees to comply with the plan specifications. The third party landscaper quoted a total cost of $85,040. Just after 10:00 a.m. on March 17, 2004, Thom Smith (Mr. Smith)[5] of Hudson sent a list of nonconforming trees and the following correspondence ("the final notice"), by facsimile, to Mr. Brymer:

> Billy, Here is a preliminary list of trees that fail to comply with plans and specifications and need to be replaced. Be advised that final approval will be determined by the city of Nashville, Urban Forestry Department. We need to know today in writing of your intentions of taking care of this problem. If we do not hear from you today we will proceed to taking [sic] care of this situation.

According to Mr. Brymer's testimony, he did not call or contact Hudson at that time. Instead, he went to the job site and looked at the trees, measured them, and compared them to other commercial sites in the area. He did not contact Hudson until he left a voice mail for Mr. Smith the next morning some time after 8 o'clock. Mr. Smith returned his telephone call and told him that Hudson had hired another landscaping company to correct the mistakes and complete the job.

Claim and Counterclaim for Breach of Contract

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5 Mr. Smith had replaced Mr. Morrow as the project superintendent.

On June 9, 2004, Big Creek filed a complaint against Hudson[6] for breach of contract and unjust enrichment because Hudson refused to pay Big Creek for the materials and labor it supplied. The complaint sought damages in the amount of $86,000 plus attorney's fees. Hudson answered and counterclaimed on October 5, 2004. It denied liability and charged Big Creek with breaching the contract by failing to plant 2-inch caliper trees and failing to replace the nonconforming trees. Because Hudson had to hire another landscaper to replace those trees, it counterclaimed for $123,145.57 (the landscaping cost plus a fifteen percent back charge pursuant to the contract) and attorney's fees. Following the denial of Hudson's motion for partial summary judgment on October 4, 2005, the matter proceeded to a bench trial on April 17, 2006.

The chancellor entered a memorandum and order on May 8, 2006, ruling that Big Creek was required by contract to provide 2-inch caliper trees; that Big Creek breached the contract by failing to do so; that the February 25 letter from Hudson merely regulated or staged Big Creek's cure (rather than changing the size term by novation or modification); and that Big Creek had failed to cure the defect after adequate notice of nonconformance and an opportunity to cure it. The court awarded damages of $123,145.57, plus attorney's fees and expenses, to Hudson and, following an evidentiary hearing on attorney's fees, entered the final order on July 11, 2006.

On June 14, 2006, prior to the entry of the final order, Big Creek filed a motion to alter or amend the judgment. Contending that evidence in the record established the supplier's willingness to exchange the nonconforming trees at no cost, Big Creek requested that the court reduce Hudson's award by the value of those trees ($17,797). After entry of the final order, Big Creek elected to withdraw its motion and then filed its notice of appeal on August 7, 2006.

Issues Presented and Standard of Review

Big Creek presents the following issues on appeal:

(1) Whether the trial court erred in ruling that Big Creek Landscaping, LLC breached the contract with Hudson Construction Company;

(2) Whether the trial court erred in ruling that the February 25, 2004, letter from Mr. Morrow of Hudson Construction Company to Big Creek Landscaping, LLC did not constitute a change order to the contract;

(3) Whether the trial court erred by not giving a credit to Big Creek Landscaping, LLC for the trees planted and incorporated into the project which were removed by Hudson; and

(4) Whether the trial court erred in ruling that Hudson Construction Company gave Big Creek Landscaping, LLC proper notice and an opportunity to cure any alleged defect.

Our standard of review of a trial court sitting without a jury is *de novo* upon the record. *Wright v. City of Knoxville*, 898 S .W.2d 177, 181 (Tenn. 1995). There is a presumption of

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6 Big Creek originally named Wal-Mart Stores, Inc., as a defendant also, but later voluntarily dismissed the claim.

correctness as to the trial court's findings of fact, unless the preponderance of evidence is otherwise. Tenn. R. App. P. 13(d). Thus, we may not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence.

This Court reviews credibility determinations made by the trier of fact with great deference. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn.1999)(citing *Mays v. Brighton Bank*, 832 S.W.2d 347, 352 (Tenn. Ct. App. 1992)). The rationale for this deference is that trial courts observe witnesses as they testify and can draw inferences from their demeanor, thus placing those courts in the better situation to assess witness credibility. *Id*. Accordingly, appellate courts will re-evaluate a trial judge's credibility determination only when clear and convincing evidence to the contrary exists. *Id.*

We review the trial court's conclusions on matters of law *de novo*, with no presumption of correctness. Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). This dispute requires the interpretation of the contract between the parties. Because contract interpretation is a matter of law, we review the trial court's determinations regarding such questions under this less deferential standard, with no presumption of correctness. *Barnes v. Barnes*, 193 S.W.3d 495, 498 (Tenn. 2006).

Analysis

I. Breach

Big Creek asserts that because it planted the trees prior to issuance of the change order authorizing payment for the 2-inch caliper trees, it did not breach the contract. The trial court found that the change order was effective to change the contract. Yet, Hudson did not obtain approval of the change order until January 27, 2004, after Big Creek had already installed the trees. Big Creek seeks to make the most of this chronology of events. We find this argument unpersuasive, however, because the contract called for these trees well before the execution of the change order.

Our review of the record reveals that the alteration of the plans and specifications occurred far earlier than approval of the change order. First, among the stipulated exhibits are the Site Planting Plan and the Planting Notes and Details, which were prepared by Carlson Consulting on October 30, 2002, but later revised on January 3, 2003, to correct the caliper/height inconsistency previously noted. The plans incorporate the revisions, note they are per "urban foresters comments," and specify 2-inch caliper trees. Second, Mr. Brymer provided revised price quotes specifically noting the city's requirement in October of 2003. And, in response to Big Creek's request to proceed with the changes, Hudson responded with written authorization to do so before Mr. Brymer even placed the tree order. The change order dated January 27, 2004, therefore, merely operated to increase the price term according to the changes effected by the plan's earlier revision. In short, the obligation to supply trees with calipers of two inches existed at the time Mr. Brymer ordered and installed the trees. We affirm the trial court's ruling that Big Creek breached the terms of the contract when it installed undersized trees.

II. Modification

We now consider whether Mr. Morrow's February 25 letter changed the terms of the contract. After a series of conversations with Mr. Brymer, Mr. Morrow wrote the following:

> Per our telephone conversation today, all trees . . . that are not 1-3/4" caliper or larger are to be replaced with correct size trees.
>
> This work has to be completed by March 15, 2003 so that the landscape can be inspected [by] Carlson Consulting and the city of Nashville for final sign off.
>
> Please inform me of the progress of this work.

Big Creek argues that, pursuant to section 5(a) of the contract, Mr. Morrow's letter was a written order changing the terms of the contract by lowering the 2-inch caliper requirement to 1-3/4 inches. Section 5(a) of the contract provided as follows:

> Contractor may, at any time by written order . . . , make changes in additions to and omissions from the work to be performed and materials to be furnished under this Subcontract, and shall make an appropriate adjustment in the subcontract price and time of performance. If Subcontractor shall disagree with such adjustment, Subcontractor shall give written notice to Contractor and any further adjustment shall be agreed upon in writing by the parties hereto, but Subcontractor shall immediately proceed with the performance of this Subcontract as so changed. Any change or modification shall be subject to all the terms and conditions of this Subcontract.

The trial court ruled that the letter merely regulated Big Creek's cure in light of the pressing deadline by directing the replacement of the smallest trees first. According to the trial court, the letter did not constitute a modification or a novation for the following three reasons. First, no additional consideration accompanied the letter. Second, the plain meaning of the letter did nothing to relieve Big Creek of its original obligation. Third, Mr. Morrow's testimony established that, in the conversations leading up to the letter, he made clear - - and Mr. Brymer understood - - that Big Creek's obligation to provide trees of 2-inch caliper had not changed.

Even though one could read the letter, standing alone, as stating the cure itself instead of a partial cure, we agree with the trial court's conclusion. In spite of the letter's ambiguity in this regard, the terms of the contract and the factual circumstances surrounding the drafting of the letter make clear that it is neither a modification nor a waiver of the 2-inch caliper requirement. Such an interpretation cuts against the grain of reason.

> Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would

not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred.

Turner v. Zager, 363 S.W.2d 512, 519 (Tenn. Ct. App. 1962)(quoting 12 Am. Jur. *Contracts* § 250); *Commerce St. Co. v. Goodyear Tire & Rubber Co.*, 215 S.W.2d 4, 11 (Tenn. Ct. App. 1948).

Considering the circumstances surrounding the drafting of this letter, we view Mr. Brymer's interpretation to be patently unreasonable. The record reveals that the expiration of the temporary CO was fast approaching when Hudson learned that some number of the one thousand trees on site, already installed, failed to meet the caliper requirement. Further, the trial court found that during their conversation immediately preceding the drafting of the letter, Mr. Morrow explained, and Mr. Brymer understood, that Mr. Brymer's obligation to install 2-inch caliper trees had not changed. Mr. Morrow, however, told him he would *attempt* to secure a waiver from Mr. Kevitt for trees with calipers between 1-3/4 and 2 inches.

We cannot say the evidence preponderates against this finding of fact: Mr. Morrow testified that he told Mr. Brymer what he was attempting to do. Further, he stated he never represented that the city would accept less than 2-inch caliper trees. Finally, Mr. Brymer conceded on cross-examination that Mr. Morrow never told him he was relieved of the obligation to plant 2-inch caliper trees. According to Mr. Brymer, Mr. Morrow represented that the city would accept the smaller caliper size; nonetheless, we believe the trial court reached its decision based upon a credibility determination. Appellate courts will re-evaluate a trial judge's credibility determination only when clear and convincing evidence to the contrary exists. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). Nothing in the record compels us to question the trial court's determination.

Alongside this factual backdrop is abundant documentary evidence even more unfavorable to Big Creek's interpretation. First, and most probative of all, is the written contract itself. Notwithstanding the broad, form contract language of section 5(a), two specific terms inserted by the parties render this purported modification untenable. Those terms prohibited deviations from the caliper requirements and specified that Big Creek's work was subject to the approval of the Department of Urban Forestry prior to acceptance. Mr. Brymer conceded that the parties never modified these terms. Pursuant to the latter term, acceptance of the trees could not occur without Mr. Kevitt's approval. Ironically, Mr. Brymer expressed a distinct lack of curiosity regarding Mr. Kevitt's decision when asked if he ever accepted the work: "I don't even have a clue if he ever went and looked at the site."

In addition to the contract itself, the February 17 letter, which provided the initial notice of nonconformance, contained unequivocal language about Big Creek's obligations under the contract. In essence, the letter stated that the subcontract required 2-inch caliper trees, that Hudson expected strict compliance with that term, and that Big Creek was to replace all undersized trees immediately.

In light of the factual backdrop, the unequivocal language of the February 17 letter, and the terms of the contract itself, reason dictates that Mr. Morrow's letter was a strategic staging of the cure, not a modification or waiver of the caliper requirement. Mr. Brymer's assumption that

the letter modified his obligation was untenable because the terms still required Mr. Kevitt's approval prior to acceptance of the work. Not only was it unreasonable to assume Hudson would attempt such a modification, but it was also unreasonable to rest upon this assumption and to assume the risk of rejection without further clarification. We find no error in the trial court's conclusion on this point.

III. Notice and Opportunity to Cure

The third issue Big Creek raises is whether Hudson provided proper notice of rejection and an opportunity to cure the tender of nonconforming trees. The more specific question, as we perceive it, is whether the 48-hour notice was an effective notice of rejection.

The parties addressed the size defect through multiple written exchanges occurring in the following order. The February 17 letter explicitly identified the nature of the defect. Mr. Morrow's February 25 letter directed Big Creek to replace a portion of the nonconforming trees immediately. Then, Hudson transmitted a second punch list to Big Creek indicating that the size defect remained. Further, in Mr. Brymer's presence, Hudson drafted the letter to Mr. Kevitt informing him that a number of trees (with caliper sizes between 1-3/4 inches and 2 inches) were still not in accordance with the approved site plan. Mr. Brymer retained a copy of this letter. The 48-hour notice, transmitted to Mr. Brymer the next day, made the fact of rejection clear but did not expressly state the nature of the defect. Then, four days after the expiration of the 48-hour window to cure, Mr. Smith transmitted by facsimile the final notice providing the following: (1) a reminder that the landscaping was subject to the approval of the Department of Urban Forestry; (2) an instruction that Hudson would take over the project if Big Creek failed to confirm in writing by the end of the day that it would replace the nonconforming trees; and (3) a list of the number and types of nonconforming trees.

The trial court found that Hudson had provided sufficient notice and an opportunity to cure based upon the course of the parties' communication after Mr. Morrow's February 25 letter. In particular, the trial court noted the letter drafted to Mr. Kevitt in Mr. Brymer's presence and the 48-hour notice. The chancellor specifically found that the evidence preponderated against Big Creek's assertion of insufficient notice because Mr. Brymer's purported failure to understand the nature of the defect was objectively unreasonable. Rather, when read together, the two documents constituted sufficient notice.

On appeal, Big Creek contends the 48-hour notice was ineffective for lack of particularity. Mr. Brymer testified that he did not know the unstated defect involved caliper size when he received the letter. He thought he had cured any size defects by replacing the fifty-one trees. Even though he retained a copy of the letter to Mr. Kevitt, Mr. Brymer testified that it failed to clarify the nature of the defect because it did not state the trees needed to be replaced. Big Creek also argues that, at the time Hudson transmitted the 48-hour notice, it did not know which or how many trees failed to conform to the contract and so could not have provided sufficient notice in any event. It further characterizes Mr. Brymer's response facsimile as a "direct request for more information" that remained unanswered by Hudson. Big Creek even challenges the final notice from Mr. Smith, contending the list of the number and type of trees failed to specify how they were defective or where they were located. Big Creek was simply

"waiting for someone at Hudson to provide specific information of exactly which trees needed to be replaced." Finally, Big Creek argues that this Court's decision in *McClain v. Kimbrough Construction Co., Inc.,* 806 S.W.2d 194 (Tenn. Ct. App. 1990), compels a decision in its favor. For the following reasons, we decline to adopt Big Creek's position.

We begin this inquiry by emphasizing two important distinctions between the facts of this case and those of *McClain*. First, unlike the subcontract in *McClain*, this subcontract contained a take over clause that allowed the contractor to complete the defaulting subcontractor's work after providing notice of the defect and an opportunity to cure it. In *McClain*, the central issue was whether, under those facts, the contractor possessed the right to terminate the subcontract where the terms did not include a take over clause. *McClain*, 806 S.W.2d at 197. This dispute involved the sufficiency of Hudson's notice when invoking the take over provision, not its ability to terminate the contract. Another important distinction between the facts in *McClain* and the ones at bar reveals that, unlike the one in *McClain*, this dispute involved a transaction in goods governed by the sales article of the Uniform Commercial Code ("UCC").[7] The owner supplied the bricks for the job in *McClain*, and the subcontractor merely provided the services. *Id.* at 197. In contrast, Big Creek agreed to supply the trees themselves and to install them.

Under the UCC, parties to a transaction in goods may vary the effect of code provisions by agreement. Tenn. Code Ann. § 47-1-102 (3) (prohibiting the disclaimer of the obligations of good faith, diligence, reasonableness, and care; and allowing parties to agree to the standards for measuring these obligations, so long as they are not manifestly unreasonable). In this case, the take over clause set the time for cure at forty-eight hours, and Big Creek takes no issue with the propriety of that length of time. Instead, Big Creek's primary challenge is the sufficiency of Hudson's notice of defect, which is required by the take over provision. Because the contract does not address the requisite substance for notice, we look to the code for guidance on this point.

If a seller tenders nonconforming goods such as undersized trees, the Code provides three options to the buyer: rejection of the goods, acceptance of the goods, or acceptance of any commercial unit and rejection of the rest. Tenn. Code Ann. § 47-2-601 (2001). Rejection must occur within a reasonable time after the tender of the goods, and the buyer must seasonably notify the seller of the rejection for it to be effective. *Id.* § 47-2-602 (1). Where the buyer rejects the goods without identifying a particular defect[8], it waives the ability to rely on the defect to establish breach or to justify the rejection if the seller could have otherwise cured the defect. *Id.* § 47-2-605. The official comments to the section on the buyer's waiver of objections clarify the section's underlying purposes and policy:

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7 Tenn. Code Ann. §§ 47-2-101 through 47-2-725 (2001).

8 Tennessee Code Annotated Section 47-2-605 provides that:

> (1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach:
>
> (a) where the seller could have cured it if stated seasonably; or
>
> (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

1. The present section rests upon a policy of permitting the buyer to give a quick and informal notice of defects in a tender without penalizing him for omissions in his statement, while at the same time protecting a seller who is reasonably misled by the buyer's failure to state curable defects.

2. Where the defect in a tender is one which could have been cured by the seller, a buyer who merely rejects the delivery without stating his objections to it is probably acting in commercial bad faith and seeking to get out of a deal which has become unprofitable.

Id. cmt. 1, 2. The Code also provides that:

> A person has "notice" of a fact when:
> (A) he has actual knowledge of it;
> (B) he has received a notice or notification of it; or
> (C) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

Id. § 47-1-201 (25).

Here, Hudson invoked the take over provision because of Big Creek's failure to install trees conforming to the contract. We conclude that, in order to sufficiently notify Big Creek of the nonconformance and commence the 48-hour period for cure under the subcontract, Hudson must have communicated the nature of the defect in connection with its notice of rejection. We conclude that Hudson met this requirement. The 48-hour notice did not specify the nature of the defect, but the course of the parties' communication immediately preceding its issuance made the nature of the defect clear.

As previously noted, the code requires a buyer to state a particular defect "in connection with rejection," Tenn. Code Ann. § 47-2-605 (1), but it does not explicitly require that the buyer identify the defect in the same writing containing the rejection. The first official comment to this section indicates that it seeks to protect the seller from being "reasonably misled" by the buyer's failure to particularize. *See id.*§ 47-2-605 cmt. 1. As the trial court found, and we have concurred, *supra*, Mr. Brymer's subjective belief that the February 25 letter modified the contract was patently unreasonable. Big Creek relies on this belief in arguing that Mr. Brymer did not understand the nature of the unstated defect because he thought he had already cured the caliper problem by replacing fifty-one trees in accordance with the February 25 letter. We agree with the trial court that the evidence preponderates against the reasonableness of this assertion because Mr. Brymer had received two documents stating the defect after receiving the February 25 letter and before receiving the 48-hour notice. Indeed, Mr. Brymer received the 48-hour notice only one day after witnessing a Carlson Consulting representative draft the letter to Mr. Kevitt. Prior to that, he had also received the second punch list from Hudson indicating the existence of the defect. With both documents in hand and with knowledge that the trees were subject to the approval of Mr. Kevitt before acceptance, Mr. Brymer had no reason to be misled by the omission of the defect particulars in the 48-hour notice.

We likewise see no basis for refuge in Mr. Brymer's response to the 48-hour notice. Big Creek stretches the language of the letter when it characterizes it as a "direct request for more information." In the letter, Mr. Brymer never requested information of Hudson and never offered to cure the nonconformity or even to take further action. The only step he offered to take was to provide confirmation of the grade of trees upon Hudson's request.

The second official comment to the section indicates that a buyer "who merely rejects . . .without stating his objections . . . is probably acting in commercial bad faith." *Id.* cmt. 2. The record in no way suggests bad faith on Hudson's part. It notified Big Creek of the nonconforming trees as early as February 17, attempted to secure a waiver in light of the pressing deadline, and provided a final notice and opportunity to respond four days after the 48-hour period to cure had elapsed. In contrast, Big Creek failed to measure the trees prior to installation, rested upon an unreasonable assumption that it had cured the defect, never inquired about Mr. Kevitt's decision, declined to pursue a more direct means of communication when it received the 48-hour notice and purportedly failed to understand it, and voluntarily chose not to respond within the time period specified in the final notice so as to preserve any possibility of finishing the contract.

Finally, according to the definition of "notice" provided by the code, we conclude that Mr. Brymer did have notice of the nature of the defect when he received the 48-hour letter from Hudson. When he received the 48-hour notice, Mr. Brymer had reason to know "from all the facts and circumstances known to him," of the precise nature of the defect. We accordingly affirm the trial court's conclusion regarding the sufficiency of Hudson's notice to Big Creek.

IV. Set-Off

We now turn to Big Creek's final issue on appeal: whether the trial court erred in failing to reduce Hudson's damages by the value of the trees that were later removed and replaced. Big Creek contends that the trial court overlooked definitive evidence establishing its entitlement to a credit for some 400 trees the third party landscaper removed and replaced. It asserts that sufficient evidence in the record exists to establish that its supplier would have exchanged the nonconforming trees at no cost. Even if true, this fact alone would not compel the trial court to reduce Hudson's award.[9]

Further, Big Creek never pled the defense of set-off, litigated the issue, or even challenged the amount of Hudson's demand for damages in this respect. The trial transcript contains only two references to the replaced trees: first, in Big Creek's opening statement, and, second, during its cross-examination of Mr. Ames. In his opening statement, counsel for Big Creek merely stated, "You know those 400 trees they ripped out? Where are they? The nursery doesn't have them. [Mr. Brymer] didn't get them. Where are they?" While cross-examining Mr. Ames, who had testified to the costs incurred by Hudson after Big Creek's breach, counsel asked, "Mr. Ames, . . . what did y'all or [the third party landscaper] do with the 402 trees you

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9 For example, Big Creek did not establish Hudson's obligation to exchange the trees with the supplier after rightfully rejecting them. Further, the record is silent regarding whether Mr. Brymer even demanded the return of the trees following his telephone conversation with Mr. Smith. Nor is there evidence in the record as to the salvage value or the condition of the trees at the time they were replaced.

removed?" Mr. Ames replied, "He disposed of them in any manner which he deemed appropriate." When questioned twice more about what the landscaper did with the trees, Mr. Ames twice replied, "I don't know what he did with the trees." Big Creek pursued the matter no further and never argued entitlement to a credit before the trial court.

Big Creek cannot now complain that the trial court erred by failing to give a credit that Big Creek never requested. It did, however, request a set-off, although not denominated as such, in a motion to alter or amend the judgment filed on June 14, 2006, but it then withdrew the motion two days after entry of the final order. "Issues not raised in the trial court cannot be raised for the first time on appeal." *Correll v. EI DuPont de Nemours & Co.*, 207 S.W.3d 751, 757 (Tenn. 2006); *Barnes v. Barnes*, 193 S.W.3d 495, 501 (Tenn. 2006); *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991). Accordingly, we decline to address Big Creek's demand for this credit.

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are taxed to Big Creek Landscaping, LLC, and its surety, for which execution shall issue if necessary.

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DAVID R. FARMER, JUDGE