

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUMMERALL ELECTRIC CO., INC.

Appellant,

v.

No. 2008-TS-02120

CHURCH OF GOD AT
SOUTHAVEN IN DESOTO COUNTY,
MISSISSIPPI

Appellee,

and

DON SOUTH PLUMBING, INC. AND SOUTH
AND SONS CONSTRUCTION, CO. INC.

Appellant,

v.

CHURCH OF GOD AT
SOUTHAVEN IN DESOTO COUNTY,
MISSISSIPPI

Appellee.

CERTIFICATE OF INTERESTED PERSONS

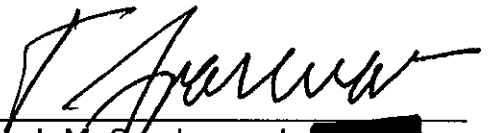
THE UNDERSIGNED counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Honorable Mitchell M. Lundy, Jr., Chancellor
2. Summerall Electrical Co., Inc., Appellant
3. Don South Plumbing, Inc., Appellant
4. South and Sons Construction Co., Inc., Appellant
5. Church of God at Southaven in DeSoto County, Mississippi, Appellee

6. Joseph M. Sparkman, Jr., Attorney for Appellant

7. William A. Brown, Attorney for Appellee

8. Byron R. Mobley, Former Attorney for Appellee



Joseph M. Sparkman, Jr. [REDACTED]
Attorney of record for Appellants

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STATEMENT OF THE ISSUES

1. Did the Chancellor commit reversible error when he failed to consider the mandates of M.C.A. §31-3-1 et. seq. as National Church Services, Inc. was not a licensed contractor in the State of Mississippi and therefore, any contract entered into with Appellee is null and void?

2. Did the Chancellor commit reversible error when he failed to find that National Church Services, Inc. was an agent for Appellee and the principal is bound by the actions of its agent?

3. Did the Chancellor commit reversible error when he failed to find Appellee was in the best position to prevent the loss?

4. Does the application of the Court's rationale in rendering its decision could expose all subcontractors within the State to non-payment for any labor or materials supplied on a construction project within the 30 days of the completion of the improvement?

STATEMENT OF THE CASE

NATURE OF CASE:

This is a case where Appellants have not been paid for labor and materials supplied by them for the construction of a sanctuary for Appellee. National Church Services, Inc.(hereinafter referred to as "NCS"), held itself out to be a reputable and able commercial general contractor. Appellee hired NCS to oversee the construction. NCS hired numerous subcontractors including Appellants herein. Appellee paid NCS according to the Applications for Payment which were submitted to Appellee. NCS received the money but did not pay Appellants. Appellee had personal knowledge National Church Services, Inc. was not a licensed contractor in the State of Mississippi prior to the first piece of material being brought onto the construction site.

COURSE OF THE PROCEEDINGS:

Appellant Summerall Electric Co., Inc filed its' lawsuit against NCS, Inc.; National Church Services, Inc.; Appellee Church of God at Southaven; and Trustmark Corporation in the Chancery Court of DeSoto County, Mississippi on February 8, 2007 and was assigned Cause Number 07-02-0252. (R.E. Tab 1)¹. Appellant Don South Plumbing, Inc. and South and Sons filed its' lawsuit against NCS, Inc.; National Church Services, Inc.; Appellee Church of God at Southaven; and Trustmark Corporation in the Chancery Court of DeSoto County, Mississippi on

¹ As used in this brief:

"R" refers to the trial court's Record of the proceedings.

"R.E" refers to the Record Excepts.

"T" refers to the Transcript of the proceedings.

February 8, 2007 and was assigned Cause Number 07-02-0299 (R. 5). NCS could not be served through the Mississippi Secretary of State (R. 2). NCS had not been duly served and was not properly before the Court at the trial of this matter.

Defendant Trustmark Corporation was voluntarily dismissed (R. 2 and 6). Appellee filed a Cross Complaint against NCS (R. 2). Since both lawsuits arose out of the same set of operative facts, the matters were consolidated by agreement of the parties counsel on February 1, 2008(R. 2 and 6).

DISPOSITION IN COURT BELOW:

The trial of this cause came on to be heard by the Honorable Chancellor Mitchell M. Lundy, Jr. on August 14 and 15, 2008. At trial, oral testimony was heard by the Court from Sidney Elliott, Building Official with the City of Southaven, MS; Larry Massey, Senior Pastor of Appellee; Rick Neely, Member of Appellee's congregation and site supervisor for NCS; Bill Shelby, Appellee's Chairman of the Building Committee; Blair Carlson of Appellant Summerall Electric Co. Inc.; and Pat South of Appellant Don South Plumbing, Inc. and South and Sons Construction, Co. Inc. The trial produced thirty three (33) items of physical evidence which was introduced and placed into the trial record.

At the completion of the testimony and arguments of counsel, the Court took the matter under advisement. On September 3, 2008, the Court signed his Findings of Fact and Conclusions of Law and same as filed with the Clerk of the Court on September 15, 2008 (R. 188-195; R.E. Tab 4). The Final Order was entered on October 29, 2008 (R. 196; T.E. Tab 2). The Order Denying Appellants' Motion to Amend or Alter Judgment was entered on December 9, 2008 (R. 210; R.E. Tab 3).

Appellants' Notice of Appeal was timely filed.

STATEMENT OF FACTS

Appellee is a not-for-profit, unincorporated, local congregation of a religious organization which is located at 700 Church Road East, Southaven, MS 38671². Appellee owns 12.59 acres, more or less, at that location³. Appellee has erected other buildings upon that parcel of property previously. In the first half of the year 2005, its' pastor, Larry Massey, presented to the congregation his vision to build a new worship facility or sanctuary.⁴ After Pastor Massey was given the name of NCS in a casual conversation as a possible builder, he conducted a brief inquiry into NCS's reputation and abilities. He learned the President of NCS was Chip Green⁵. Pastor Massey contacted one reference source who had an active building project to ascertain the abilities of NCS. That reference was Pastor Chris Sistar in Henderson, South Carolina ⁶⁷. The Construction Agreement⁸ between Appellee and NCS was executed on September 24, 2005⁹. The Construction Agreement was

² R.E. Tab 5 - See Response #1; T. 56

³ R.E. Tab 5 - See Response #2

⁴ T. 61, lines 13-24

⁵ T. 65, lines 7-9

⁶ T.68, lines 6 to T.69, line 3 and T. 74, lines 6-17

⁷ At the point in time Pastor Massey contacted Mr. Sistar, the project for him had not been completed. However, as the completion of the project, NCS had failed to pay the subcontractors on the Sistar project the sum of \$360,000.00 (T.69, lines 20-25).

⁸ R.E. Tab 6

⁹ R.E. Tab 6

executed by Pastor Massey before the Appellee's building committee was even formed¹⁰. Pastor Massey did not consult an attorney to review the contract before execution; nor did he contact the Mississippi Secretary of State to confirm NCS was authorized to transact business in the State of Mississippi; nor did he contact the Mississippi State Board of Contractors to verify NCS was a licensed contractor in the State of Mississippi; nor did he confirm with anyone that NCS had a certificate of responsibility¹¹. Pastor Massey did not know whether or not NCS was a solvent company¹². Pastor Massey never subsequently questioned NCS about its failure to post the bond required by Appellee's lending institution¹³.

The consideration to be paid to NCS by Appellee under the Construction Agreement as One Million One Hundred Thousand Dollars (\$1,100,000.00) plus the cost of the surety bond¹⁴. The construction was to be financed through private contributions i.e it was a not a publicly funded project¹⁵. The bid from NCS was not received in a sealed envelope. It did not bear on the outside of the envelope the NCS's state contractor's license number. There was no indication on an outside envelope that the enclosed bid was less than \$100,000.00¹⁶.

¹⁰ R.E. Tab 5 - See Response # 25

¹¹ T. 75, line 17- T. 76, line 7

¹² T. 83, line 17-19

¹³ T. 84, line 29-T. 85, line 20

¹⁴ R.E. Tab 6 at page 2

¹⁵ T. 78, line 28- T. 79, line 19

¹⁶ T. 82, lines 9-6

Appellee's church member, Billy Lee Shelby, was requested by Pastor Massey to serve as the Chairman of the Building Committee¹⁷. The Construction Agreement had already been executed when Mr. Shelby assumed his duties¹⁸. The Building Committee had no voice in the selection of NCS as the general contractor¹⁹. Apparently they were powerless to voice any objections. Mr. Shelby had no construction experience other than being a weekend warrior on some minor construction projects around his home²⁰. Mr. Shelby did not investigate the procedures used by Pastor Massey in the selection of NCS²¹. Mr. Shelby did not conduct any independent investigation of NCS²².

Mr. Shelby knew NCS was not a licensed Mississippi contractor while the dirt work was being performed²³. Not only did Mr. Shelby know, but Pastor Massey and the entire Building Committee knew NCS was not a licensed contractor²⁴. However, the Building Committee never acted upon this information to confirm the ability of NCS to complete its obligations under the Construction Agreement²⁵. Furthermore,

¹⁷ T. 172, line 16

¹⁸ T.176, line 2-5

¹⁹ T. 170, lines 17-19

²⁰ T. 168, lines 5-23

²¹ T.172, lines 2-5

²² T. 172, line 29 -T. 173, line 3

²³ T. 178, line 25-29

²⁴ T. 179, lines 1-11

²⁵ T. 182, lines 16-24

Bill Shelby and his building committee did nothing to independently confirm the correction of this deficiency²⁶. Basically, Pastor Massey and Appellee's Building Committee were walking blindly into a construction project which would costs in excess of One Million Dollars and no one seemed to be concerned about the vulnerable state which they had placed themselves in.

Mr. Shelby was not aware of the requirements of Mississippi Code Annotated §31-3-15²⁷. Mr. Shelby has no knowledge of the requirement for a general contractor to have a Certificate of Responsibility for any privately funded construction project equal to or exceeding \$100,000.00²⁸. Clearly this commercial construction project was well over \$100,000.00 ²⁹.

Construction was scheduled to commence on October 1, 2005³⁰. Construction was scheduled to be completed by February 25, 2006³¹. However, as of March 6, 2006, the concrete foundation had not even been poured. However actual construction in the form of rough in plumbing had been performed and the first floor foundation was scheduled to be finally poured by March 16, 2006³².

At the commencement of the project, lien waivers were received from

²⁶ T. 182, line 25 - T. 187, line 3

²⁷ T. 180, lines 23-28

²⁸ T. 181, lines 12-21

²⁹ T. 181, lines 22-25

³⁰ T. 206, line 27- T. 207, line 3

³¹ T. 207, lines 4-5

³² T. 208, lines 3-28; see also Trial Exhibit 18

subcontractors. This is reflected in the notes of Bill Shelby dated March 15, 2006³³. Although Appellee's Building Committee Chairman knew what a subcontractor's lien waiver was by his own admission by at least March 15, 2006, he acknowledges an "oversight" on his part to receive partial lien waivers from all subcontractors after the foundation was poured³⁴. Based upon Mr. Shelby's own handwritten notes in his construction notebook, the sum of \$1,028,290.00 of the \$1,100,000.00 contract had been paid out to NCS as of September 22, 2006³⁵. The project was no where close to being completed.

Appellee paid NCS based upon the Applications for Payment that were received periodically from NCS³⁶. However, even a cursory examination of the Applications for Payment could have alerted Appellee's representatives the documents were not completed in accordance with its own form. Interestingly enough, some of the applications were not even signed by an architect to verify the work was progressing in accordance with its' plans and specifications³⁷. Others are signed by Chip Green as the architect on the project³⁸. Appellees had no knowledge whether Chip Green was a licensed architect although Appellee knew he was an

³³ R.E. Tab 10; Trial Exhibit 19, T. 200, line 25 - T. 203, line 10

³⁴ T. 203, line 11 - T. 204, line 11

³⁵ Part of Trial Exhibit 18; R.E. Tab 9

³⁶ Trail Exhibit 23; R.E. Tab 7

³⁷ See Application for Payment dated September 24, 2006 which is part of Trial Exhibit 23; R.E. Tab 7

³⁸ See Applications for Payment dated May 11, 2006; June 6, 2006; September 4, 2006; November 30, 2005; September 1, 2005; all which are part of Trial Exhibit 23; R.E. Tab 7;

employee of NCS and not unbiased third party³⁹.

Appellants entered into written agreements with NCS to perform their various trades on the worship center i.e. Summerall was to perform the electrical; South & Sons was to perform the concrete; and Don South Plumbing was to perform the plumbing (Trial Exhibits 14-16). Rick Neely, site supervisor for NCS and by now a former member of the Appellee's Building Committee, stated all work performed by Appellants was quality work and did not have to go in behind them to correct any deficiencies⁴⁰. However, Appellants have not received payment in full for their labor and materials provided to Appellee's sanctuary. Appellee asserts all money which was borrowed to construct the sanctuary have been expended through payments to NCS and NCS is at fault because it did not pay Appellants for its' services.

SUMMARY OF THE ARGUMENT

Appellants have performed the tasks which were assigned to them and have done so in an exemplary manner. However, they have not been paid for the labor and materials. Appellants have followed the customary commercial construction practices in DeSoto County, Mississippi and have suffered monetary loss.

Appellee was lulled to sleep by NCS. Appellee let its' guard down. Appellee faith and confidence in NCS was misplaced. However, Appellee knew early it was dealing with an entity that had not been investigated thoroughly and knew was deficient on the basic requirements to construct the project. Although Appellee had actual knowledge that NCS was not recognized as a valid legal entity in the State of

³⁹ R.E. 5- Responses #32 and #31.

⁴⁰ T. 148, line 23 - T. 150, line 6

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³⁹ R.E. 5- Responses #32 and #31.

⁴⁰ T. 148, line 23 - T. 150, line 6

Mississippi; had not obtained a Mississippi contractors license and had not procured a Certificate of Responsibility from the Mississippi Board of Contractors, Appellee continued to plow forward blindly and did not heed the warning signs along the way. There is no question that Appellee had notice of NCS problems long before Appellants. Appellee continued to trust in the pie crust promises and representations of NCS to Appellants' financial detriment.

Appellee's acts and/or omissions in trying to bury its head in the sand now and play the victim is a classic example of what our legislature attempted to avoid with the enactment of M.C.A. §31-3-2. NCS was not a licensed Mississippi Contractor. NCS did not have a certificate of responsibility as required by M.C.A. §31-3-15. Therefore, in accordance with M.C.A. § 31-3-15, the Agreement between Appellee and NCS is null and void.

Therefore, NCS acted at all times relevant herein, not as a general contractor for Appellee under the Agreement for Construction, but as an expressed or implied agent. Therefore, Appellee, as principal, is bound by the acts and/or omissions of its' expressed agent. NCS failed to pay Appellants although the work was completed in a workmanlike manner. Therefore, in the absence of a contract creating a different type of legal relationship, the application of M.C.A. §31-3-15 requires the failure of NCS to pay its subcontractors to be imputed to Appellee.

ARGUMENT

It is recognized that on appeal, the findings of a Chancellor will not be disturbed when supported by substantial evidence "... unless the chancellor abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was

clearly erroneous". *Hamilton v. Hopkins*, 834 So.2d 695 (Miss. 2003). Where legal questions are raised, review is de novo. *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 721 (Miss 2002); *Forrest v. McCoy*, 941 So.2d 889 (Miss Ct. App. 2006).

Proposition 1

Did the Chancellor commit reversible error when he failed to consider the mandates of M.C.A. §31-3-1 et. seq. as National Church Services, Inc. was not a licensed contractor in the State of Mississippi and therefore, any contract entered into with Appellee is null and void?

In his findings of fact and conclusions of law, the Chancellor does not even address the implication of M.C.A. §31-3-1 et. seq. to the facts before it. (R.E. Tab 4). The failure of the Court to consider the implication of Mississippi law upon the facts presented in this case is reversible error. The Chancellor's findings of fact may be set aside when manifestly wrong. *Dungam v. Dick Moore, Inc.*, 463 So.2d 1094,1100 (Miss. 1985).

It is uncontroverted that Pastor Massey did not investigate to determine if NCS was authorized to transact business in this State; if NCS was a licensed contractor in the State of Mississippi; or if NCS possessed a certificate of responsibility at the time the bid from NCS was received (T. 75, line 22 - T. 76, line 11). Clearly, the construction project exceed \$100,000.00 (R.E. Tab 6; R.E. Tab 5-Response #43-1). Clearly, the construction project was a private project (T. 79, lines 4-5; T. 182, lines 2-15). Clearly the bid from NCS was not submitted to Pastor Massey with the certificate of responsibility number appearing on the exterior of the envelope. The construction contract dated September 24, 2005 had already been signed by Pastor Massey before the Building Committee was ever assembled and

Bill Shelby appointed as its Chairman. However, even after the Building Committee was formed, its' members and Pastor Massey knew NCS was not a licensed Mississippi contractor. Although they possessed this knowledge, they did nothing about it and permitted NCS to proceed with construction activities (R.E. Tab 6; R.E. Tab 5-Response #43-2). The record is void of any proof that NCS ever received its Mississippi contractor's license and its certificate of responsibility number as required under M.C.A. 31-3-1 et. seq.

The law is clear. Without the bid being submitted in a seal envelope with the certificate of responsibility number of NCS appearing on the outside of the envelope, the bid should not have been opened or considered. M.C.A. §31-3-21(2). Even though Appellee did not follow the law and accepted NCS's bid and entered into a written contract, the law again is abundantly clear— that contract shall be null and void. M.C.A. §31-3-15.

The Chancellor did not consider the application of Mississippi law in reaching his conclusion and his omission is plain error.

Proposition 2

Did the Chancellor commit reversible error when he failed to find that National Church Services, Inc. was an agent for Appellee and the principal is bound by the actions of its agent?

An agent is one who stands in the shoes of his principal; he is his principal's alter ego. An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by his authority. He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do. 2 C.J.S. Agency § 1 c

(1936). The most characteristic feature of an agent's employment is that he is employed primarily to bring about business relations between his principal and third persons, and this power is perhaps the most distinctive mark of the agent as contrasted with others, not agents, who act in representative capacities. *Bailey vs. Worton*, 752 So.2d 470, 474 (Miss. 1999) citing *First Jackson Securities Corp. v. B.F. Goodrich Company*, 253 Miss. 519, 532-33, 176 So.2d 272, 278 (1965). NCS was an agent acting within the scope of its authority granted by Appellee.

There are three essential elements to apparent authority: (1) acts or conduct of the principal indicating the agent's authority; (2) reliance thereon by a third person, and (3) a change of position by the third person to his detriment. All must concur to create such authority. *Id.*; *Gulf Guaranty Life v. Middleton*, 361 So.2d 1377, 1383 (Miss. 1978); *Steen v. Andrews*, 78 So.2d 881, 883 (Miss. 1955).

The power of an agent to bind his principal is not limited to the authority actually conferred upon the agent, but the principal is bound if the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have i.e. apparent authority. The agent's authority as to those with whom he deals is what it reasonably appears to be. *McPherson v. McLendon*, 221 So.2d 75, 78 (Miss. 1969). Where the relationship of principal and agent exists, if the principal places his agent in a position where he appears, with reasonable certainty, to be acting for the principal, and his acts are within the apparent scope of his authority, such acts bind the principal. On principles of estoppel, a principal, having clothed an agent with semblance of authority, will not

be permitted, after others have been led to act in reliance on appearances thus produced, to deny, to the prejudice of such others, what he has theretofore tacitly affirmed as to the agent's powers. *General Contract Corp. v. Leggett*, 224 Miss. 262, 269, 79 So.2d 843, 844 (1955). Where an agent, with the knowledge and consent of his principal, holds himself out as having certain powers and transacts business with a third person, the principal is estopped from denying the authority of the agent. *Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660, 678, 56 So. 609, 613 (1911).

The facts under *Bailey*, which originated out of DeSoto County Chancery Court, also permit this Court to find NCS was Appellee's agent. Under *Bailey*, a subdivision developer agreed to let a homebuilder build a house on one of the subdivision lots in an effort to stimulate activity in the neighborhood. Title to the lot remained in the developer's name. However, the developer had absolute nothing to do with the construction of the home. A paving subcontractor paved the driveway for the residence after assurances from the builder that the sub would be paid for his work. Never once did the sub speak with the developer nor rely upon any direct representation of the developer to pay for his paving work. The only involvement of the developer was waiting to be paid for his lot when the completed residence was sold. However the lower court, which was affirmed by this Court, found that the builder was an implied agent for the developer and the construction lien filed in accordance with M.C.A. §85-7-131 was proper against the developer. This Court found the developer gave unconditional authority to erect the improvement and thus, was the builder's principal. Agency is predicted upon the perceptions of the third party in his dealings with the agent i.e. apparent authority exists when a reasonably

prudent person, having knowledge of the nature and the usages of the business involved, would be justified in supposing, based upon the character of the duties entrusted to the agent, the agent has the power he is assumed to have. *Bailey* at 475 citing *Eaton v. Porter*, 645 So.2d 1323, 1325 (Miss. 1994). There is no indication in *Bailey* the subcontractor even knew who the owner of the lot was. There is no link whatsoever in the subs dealings with the owner . However the lower Court found agency was established under Mississippi law and the lower Court's decision was affirmed by this Court.

NCS was cloaked with Appellee's authority (T. 215, lines 11-13; T.86, lines 1-3). When NCS pulled off the job, it was on Appellee's letterhead that notice was given to the City of Southaven to remove Appellant Summerall Electric as the electrical trade permit holder on the project (Trial Exhibit 5). Appellants knew Appellee was the owner of the improvement (T. 273, lines 3-8). Appellants knew the purpose of the improvement (T. 273, lines 9-12). In fact, Appellee confirmed they were in ultimate control of the project when Pastor Massey sent a letter on Appellee's letterhead to the City of Southaven on March 8, 2007 directing what action was to be taken on its building project (R.E. Tab 11). Appellant Summerall believed NCS had the authority to act on behalf of Appellee (T. 254, lines 25-29). Representatives of Appellee spoke with Appellants about the job. Appellants assisted Appellee with the selection of various components of the sanctuary. (T. 259, lines 22-T. 260, line 2).

The blind confidence and trust placed in NCS by Appellee can not relieve the ultimate obligation to pay the one to whom money is rightfully due. To allow such

would produce illogical consequences. An example would be when an adult residential tenant decides to save some of his own effort and gives the rent money to his child with detailed instructions to pay the landlord. However when the child stops by the candy store and uses the rent money to purchase candy, the parent is somehow relieved of his obligation to pay rent? Surely not.

Obviously, Appellee could have chosen to build the sanctuary without the assistance of NCS. However, Appellee desired to rely upon the representations of NCS that it was a qualified commercial builder. Therefore, Appellee appointed NCS to transact its business and manage its affairs and, under *Bailey*, a principal-agent relationship existed and the Court committed reversible error in finding no agency relationship existed between Appellee and NCS.

Proposition 3

Did the Chancellor commit reversible error when he failed to find Appellee was in the best position to prevent the loss?

The Mississippi Supreme Court has previously addressed an exact or very similar fact situation as presented in this cause. In *Engle Acoustic & Tile, Inc. v. Grenfell*, 223 So. 2d 613 (Miss. 1969), the Court was called upon to determine as between two innocent parties, who would bear the loss. See *First National Bank of Jackson v. Deposit Guaranty Bank & Trust, Co.*, 156 So.2d 814 (Miss 1963); *Weil Bros. v. Keenan*, 178 So.2d 90 (Miss. 1938); and *Railway Express Agency v. Bank of Philadelphia*, 150 So.2d 525 (Miss 1933). Should the subcontractors lose the value of their labor and materials provided to a construction project or should the owners of the property lose and be forced to make a double payment when the owner paid

the general contractor but the general contractor failed or refused to pay the subcontractors? The *Engle* Court held "[t]he determination of 'who was in the best position to have prevented the loss from occurring' is one of fact". *Id.* at 618.

When Supreme Court of Mississippi has before it "two innocent parties, and the rule is that where one of the two innocent parties must suffer from the fraud of a third, he who reposes trust and confidence in the fraudulent agent ought to suffer the loss". Citing *Weil Bros. v. Keenan* at 94.

Appellants followed the usual and customary commercial construction business practices of DeSoto County, Mississippi. They did nothing out of the ordinary and continued to work toward completion of the project even though the payments for their labor and material were initially slow and then nonexistent. Bill Shelby is not familiar with those customary practices (T. 230, lines 14-17).

However it is abundantly clear that Appellee knew well in advance of any construction being done by Appellants that NCS's abilities were questionable. (R.E. Tab 5-Responses # 45 and 46). Although Bill Shelby knew what a partial construction lien waiver was and had in fact used them as of March 15, 2006 (R.E. Tab 10), he was lulled to sleep by the practices of NCS. Bill Shelby, as chairman of Appellee's Building Committee, testified "I did nothing" to confirm the workers were being paid prior to executing a Owners and Contractors Affidavit and Agreement Interim (R.E. Tab 8; Trial Exhibit 11; T. 223, line 5- T. 225, line 28). Shelby testified that, at the commencement of the project, Appellee had complete confidence in NCS. However as time went on, Shelby testified that trust and confidence had been misplaced (T. 230, line 26-T. 231, line 9).

Appellee's only testimony as to the investigation of NCS was through one telephone call which Pastor Massey made to Pastor Sistar. Since Pastor Sistar's project had not been completed, the record is void of any testimony from anyone who was satisfied with a project NCS had completed. Bill Shelby and the Building Committee did not investigate NCS. But we do know, Appellee did nothing but carry on business as usual once it learned NCS was not a Mississippi licensed contractor.

Clearly, Appellee followed NCS blindly for more than a year. Appellee unequivocally states it had complete faith and confidence in NCS and allowed NCS free rein to complete the construction project. Appellee accepted Applications for Payment which were signed only by persons who were in the direct employment of NCS. No outside independent source verified their accuracy. Appellee was aware that the project had not even been commenced by the time the Construction Agreement had called for the project to be completed.

As between the parties, Appellee clearly reposed the superior trust and confidence in NCS, the fraudulent party. Under *Weil Bros. v. Keenan*, the Chancellor committed reversible error in finding that Appellants were in the best position to have prevented the loss as same is contrary to the weight of the substantial evidence to the contrary.

Proposition 4

Does the application of the Court's rationale in rendering its decision could expose all subcontractors within the State to non-payment for any labor or materials supplied on a construction project within the 30 days of the completion of the improvement?

In normal construction agreement, workmen and suppliers bill the

owner/contractor for the work and materials supplied for the last calendar month. Usually, payment applications are due by the 10th day of the following month. Payment of that application is due from the owner/contractor usually within ten (10) to twenty (20) days after the payment application is due. Therefore, if labor or material is supplied on a construction project on the first day of a month, it is totally reasonable that the laborer or supplier will not expect payment for that labor or material under common construction practices until fifty (50) to sixty (60) days thereafter. Obviously this time period can be lengthened by promises to pay by the owner/contractor or reasonable justification for late payments i.e. lost in the mail.

The lower Court found that Appellants were more at fault than Appellee in they did not file their liens earlier or place the owner on notice of nonpayment. If the lower Court's decision be taken to its logical conclusion, such a precedent would flood our Chancery Clerk's offices with unnecessary recordings alleging nonpayment when payments were a few days late, offend numerous owners/contractors, cause subcontractors to incur unnecessary attorney's fees and expenses, cause subcontractors to become title abstractors to determine the legal status of the other players, cause a subcontractor to understand legal ease, and upset the commonly accepted business practices of commercial construction. It would be almost impossible for a laborer or materialmen to protect themselves from nonpayment if this Court's rationale was upheld. Owners/Contractors would have free rein not to pay for labor and materials supplied within the last thirty (30) to sixty (60) days of construction and there is nothing a laborer or supplier could do to protect their interests.

Appellant Summerall commenced his work in earnest in June of 2006. Payments were received July 13, 2006 for some small jobs completed before June, 2006. Pay applications were submitted monthly. Therefore, the next payment would have been due in August 2006. However, payments were not forthcoming for payment applications submitted on June 20, 2006; August 1, 2006; September 5, 2006 and October 10, 2006 and Appellant Summerall left the job site. Thus the payments were less than sixty (60) days late at the time that Appellant Summerall cease work activities on the project. Liens were filed by Appellants in November 2006.

As a result of his failure to find on behalf of Appellant in this cause, the Chancellor committed reversible error in his finding that Appellants did not act with due diligence in protecting themselves is clearly erroneous.

CONCLUSION

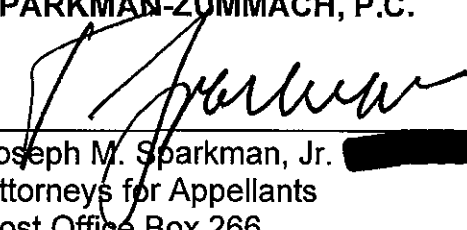
The judgment of the Chancery Court of DeSoto County, Mississippi should be reversed with directions for the Chancery Court to determined the amount of damages sustained by Appellants herein and enter judgment against Appellee for such amount. In addition, if Appellants are mistaken in the relief heretofore prayed, then for such other relief which this Court deems proper and truth and justice demands under the premises.

Oral argument has been requested. In accordance with Rule 34(b) of the Mississippi Rules of Appellate Procedure, argument would be beneficial to the Court as the statutory section referenced in this matter not been thoroughly applied by holdings of this Court and previous holdings of this Court regarding agency are

inconsistent with the findings of the lower Court in this Cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has this day placed a true and correct copy of the foregoing in the U.S. Mail, First Class postage prepaid, properly addressed to:

William A. Brown
Attorney at Law
Post Office Box 276
Hernando, MS 38632

Honorable Mitchell M. Lundy, Jr.
DeSoto County Chancellor
Post Office Box 471
Grenada, MS 38901

I further certify that pursuant to M.R.A.P. 25(a), I have mailed the original and three (3) true and correct copies of the above and foregoing in the U.S. Mail, First Class postage prepaid, properly addressed to:

Hon. Betty W. Sephton
Clerk, Supreme Court of Mississippi
Post Office Box 249
Jackson, MS 39205-0249

I further certify that pursuant to M.R.A.P. 28(m), I have mailed to the addressee immediately above an electronic copy of the above and foregoing on an electronic disk and state this document was written in .wpd and .pdf format.

on this the 30th day of April, 2009.



Joseph M. Sparkman, Jr.

ADDENDUM

M.C.A. § 31-3-1

M.C.A. § 31-3-2

M.C.A. § 31-3-13

M.C.A. § 31-3-15

M.C.A. § 31-3-21

31-3-1

TITLE 31 PUBLIC BUSINESS, BONDS AND OBLIGATIONS CHAPTER 3 STATE BOARD OF PUBLIC CONTRACTORS

The following words, as used in this chapter, shall have the meanings specified below:

"Board": The State Board of Contractors created under this chapter.

"Contractor": Any person contracting or undertaking as prime contractor, subcontractor or sub-subcontractor of any tier to do any erection, building, construction, reconstruction, repair, maintenance or related work on any public or private project; however, "contractor" shall not include any owner of a dwelling or other structure to be constructed, altered, repaired or improved and not for sale, lease, public use or assembly, or any person duly permitted by the Mississippi State Oil and Gas Board, pursuant to Section 53-3-11, to conduct operations within the state, and acting pursuant to said permit. It is further provided that nothing herein shall apply to:

(a) Any contract or undertaking on a public project by a prime contractor, subcontractor or sub-subcontractor of any tier involving erection, building, construction, reconstruction, repair, maintenance or related work where such contract, subcontract or undertaking is less than Fifty Thousand Dollars (\$50,000.00);

(b) Any contract or undertaking on a private project by a prime contractor, subcontractor or sub-subcontractor of any tier involving erection, building, construction, reconstruction, repair, maintenance or related work where such contract, subcontract or undertaking is less than One Hundred Thousand Dollars (\$100,000.00);

(c) Highway construction, highway bridges, overpasses and any other project incidental to the construction of highways which are designated as federal aid projects and in which federal funds are involved;

(d) A residential project to be occupied by fifty (50) or fewer families and not more than three (3) stories in height;

(e) A residential subdivision where the contractor is developing either single-family or multifamily lots;

(f) A new commercial construction project not exceeding seventy-five hundred (7500) square feet and not more than two (2) stories in height undertaken by an individual or entity licensed under the provisions of Section 73-59-1 et seq.;

(g) Erection of a microwave tower built for the purpose of telecommunication transmissions;

(h) Any contract or undertaking on a public project by

a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of fire protection systems where such contract, subcontract or undertaking is less than Five Thousand Dollars (\$5,000.00);

(i) Any contract or undertaking on a private project by a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of fire protection systems where such contract, subcontract or undertaking is less than Ten Thousand Dollars (\$10,000.00);

(j) Any contract or undertaking on a private or public project by a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of technically specialized installations if performed by a Mississippi contractor who has been in the business of installing fire protection sprinkler systems on or before July 1, 2000; or

(k) Any contractor undertaking to build, construct, reconstruct, repair, demolish, perform maintenance on, or other related work, whether on the surface or subsurface, on oil or gas wells, pipelines, processing plants, or treatment facilities or other structures or facilities. Nothing herein shall be construed to limit the application or effect of Section 31-5-41.

"Certificate of responsibility": A certificate numbered and held by a contractor issued by the board under the provisions of this chapter after payment of the special privilege license tax therefor levied under this chapter.

"Person": Any person, firm, corporation, joint venture or partnership, association or other type of business entity.

"Private project": Any project for erection, building, construction, reconstruction, repair, maintenance or related work which is not funded in whole or in part with public funds.

"Public agency": Any board, commission, council or agency of the State of Mississippi or any district, county or municipality thereof, including school, hospital, airport and all other types of governing agencies created by or operating under the laws of this state.

"Public funds": Monies of public agencies, whether obtained from taxation, donation or otherwise; or monies being expended by public agencies for the purposes for which such public agencies exist.

"Public project": Any project for erection, building,

construction, reconstruction, repair, maintenance or related work which is funded in whole or in part with public funds.

Sources: Codes, 1942, § 8968-01; Laws, 1958, ch. 473, § 1; Laws, 1960, ch. 393, § 1; reenacted, 1980, ch. 498, § 1; reenacted without change, 1985, ch. 505, § 7; reenacted and amended, 1988, ch. 527, § 1; Laws, 1992, ch. 505, § 1; Laws, 2000, ch. 475, § 1; Laws, 2004, ch. 358, § 1; Laws, 2008, ch. 478, § 1, eff from and after July 1, 2008.

31-3-2**TITLE 31 PUBLIC BUSINESS, BONDS AND OBLIGATIONS
CHAPTER 3 STATE BOARD OF PUBLIC CONTRACTORS**

The purpose of Chapter 3, Title 31, Mississippi Code of 1972, is to protect the health, safety and general welfare of all persons dealing with those who are engaged in the vocation of contracting and to afford such persons an effective and practical protection against incompetent, inexperienced, unlawful and fraudulent acts of contractors.

Sources: Laws, 1985, ch. 505, § 6; reenacted, 1988, ch. 527, § 2, effective from and after July 1, 1988.

31-3-13

TITLE 31 PUBLIC BUSINESS, BONDS AND OBLIGATIONS CHAPTER 3 STATE BOARD OF PUBLIC CONTRACTORS

The board shall have the following powers and responsibilities:

(a) To receive applications for certificates of responsibility, to investigate and examine applicants for same by holding hearings and securing information, to conduct examinations, and to issue certificates of responsibility to such contractors as the board finds to be responsible. One-fourth (1/4) of the certificates scheduled for renewal on the last day of December 1980, shall be reviewed by the board on the first Tuesday in January 1981. The remaining certificates shall be subject to renewal in the following manner: One-fourth (1/4) on the first Tuesday in April 1981; one-fourth (1/4) on the first Tuesday in July 1981; and one-fourth (1/4) on the first Tuesday in October 1981. The board is authorized to extend the dates of expiration of certificates to coincide with the scheduled date of review of individual contractors. Except for the certificates extended from December 31, 1980, to the first Tuesday in January 1981, the board shall charge fees for the extension of certificates as follows:

(i) Twenty-five Dollars (\$25.00) if the date of renewal of the extended certificate is the first Tuesday in April 1981;

(ii) Fifty Dollars (\$50.00) if the date of renewal of the extended certificate is the first Tuesday in July 1981; and

(iii) Seventy-five Dollars (\$75.00) if the date of renewal of the extended certificate is the first Tuesday in October 1981.

The extended certificates renewed in compliance with this paragraph (a) and all original certificates and renewals thereof issued on or after July 1, 1980, shall expire one (1) year from the date of issuance. No certificate or any renewal thereof shall be issued until the application has been on file with the board for at least thirty (30) days. Application for renewal of certificates of responsibility, together with the payment of a special privilege license tax as provided under this chapter, shall serve to extend the current certificate until the board either renews the certificate or denies the application.

No certificate of responsibility or any renewal thereof shall be issued until the applicant furnishes to the board his Mississippi state sales tax number or Mississippi state use tax number and his state income tax identification numbers.

Additional fees may be required as provided in Section 31-3-14.

The board shall conduct an objective, standardized examination of an applicant for a certificate to ascertain the ability of the applicant to make practical application of his knowledge of the profession or business of construction in the category or categories for which he has applied for a certificate of responsibility. The cost of the test and the cost of administering the test shall be paid for by applicants for certificates of responsibility at the time applications are filed. The board shall investigate thoroughly the past record of all applicants, which will include an effort toward ascertaining the qualifications of applicants in reading plans and specifications, estimating costs, construction ethics, and other similar matters. The board shall take all applicants under consideration after having examined him or them and go thoroughly into the records and examinations, prior to granting any certificate of responsibility. If the applicant is an individual, examination may be taken by his personal appearance for examination or by the appearance for examination of one or more of his responsible managing employees; and if a copartnership or corporation or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the executive staff of the applicant's firm, according to its own designation.

(b) To conduct thorough investigations of all applicants seeking renewal of their licenses and of all complaints filed with the board concerning the performance of a contractor on a public or private project.

(c) To obtain information concerning the responsibility of any applicant for a certificate of responsibility or a holder of a certificate of responsibility under this chapter. Such information may be obtained by investigation, by hearings, or by any other reasonable and lawful means. The board shall keep such information appropriately filed and shall disseminate same to any interested person. The board shall have the power of subpoena.

(d) To maintain a list of contractors to whom certificates of responsibility are issued, refused, revoked or suspended, which list shall be available to any interested person. Such list shall indicate the kind or kinds of works or projects for which a certificate of responsibility was issued, refused, revoked or suspended.

(e) To revoke by order entered on its minutes a certificate of responsibility upon a finding by the board that a particular contractor is not responsible, and to suspend such certificate of responsibility in particular cases pending investigation, upon cause to be stated in the board's order of suspension. No such revocation or

suspension shall be ordered without a hearing conducted upon not less than ten (10) days' notice to such certificate holder by certified or registered mail, wherein the holder of the certificate of responsibility shall be given an opportunity to present all lawful evidence which he may offer.

(f) To adopt rules and regulations setting forth the requirements for certificates of responsibility, the revocation or suspension thereof, and all other matters concerning same; rules and regulations governing the conduct of the business of the board and its employees; and such other rules and regulations as the board finds necessary for the proper administration of this chapter, including those for the conduct of its hearings on the revocation or suspension of certificates of responsibility. Such rules and regulations shall not conflict with the provisions of this chapter.

(g) The board shall have the power and responsibility to classify the kind or kinds of works or projects that a contractor is qualified and entitled to perform under the certificate of responsibility issued to him. Such classification shall be specified in the certificate of responsibility.

The powers of the State Board of Contractors shall not extend to fixing a maximum limit in the bid amount of any contractor, or the bonding capacity, or a maximum amount of work which a contractor may have under contract at any time, except as stated in paragraph (a) of this section; and the Board of Contractors shall not have jurisdiction or the power or authority to determine the maximum bond a contractor may be capable of obtaining. The board, in determining the qualifications of any applicant for an original certificate of responsibility or any renewal thereof, shall, among other things, take into consideration the following: (1) experience and ability, (2) character, (3) the manner of performance of previous contracts, (4) financial condition, (5) equipment, (6) personnel, (7) work completed, (8) work on hand, (9) ability to perform satisfactorily work under contract at the time of an application for a certificate of responsibility or a renewal thereof, (10) default in complying with provisions of this law, or any other law of the state, and (11) the results of objective, standardized examinations. A record shall be made and preserved by the board of each examination of an applicant and the findings of the board thereon, and a certified copy of the record and findings shall be furnished to any applicant desiring to appeal from any order or decision of the board.

(h) The board shall enter upon its minutes an order or decision upon each application filed with it, and it may state in such order or decision the reason or reasons for its order or decision.

Upon failure of the board to enter an order or decision upon its minutes as to any application within one hundred

eighty (180) days from the date of filing such application, the applicant shall have the right of appeal as otherwise provided by this chapter.

The holder of any valid certificate of responsibility issued by the Board of Public Contractors prior to January 1, 1986, shall be automatically issued a certificate of responsibility by the State Board of Contractors for the same classification or classifications of work which the holder was entitled to perform under the State Board of Public Contractors Act.

Sources: Codes, 1942, § 8968-07; Laws, 1958, ch. 473, § 7; Laws, 1960, ch. 393, § 4; Laws, 1980, ch. 498, § 7; Laws, 1985, ch. 505, § 10; Laws, 1986, ch. 378; reenacted and amended, 1988, ch. 527, § 8; Laws, 1998, ch. 415, § 4, effective from and after July 1, 1998.

31-3-15

**TITLE 31 PUBLIC BUSINESS, BONDS AND OBLIGATIONS
CHAPTER 3 STATE BOARD OF PUBLIC CONTRACTORS**

No contract for public or private projects shall be issued or awarded to any contractor who did not have a current certificate of responsibility issued by said board at the time of the submission of the bid, or a similar certificate issued by a similar board of another state which recognizes certificates issued by said board. Any contract issued or awarded in violation of this section shall be null and void.

Sources: Codes, 1942, § 8968-08; Laws, 1958, ch. 473, § 8; Laws, 1960, ch. 393, § 5; Laws, 1980, ch. 498, § 8; Laws, 1985, ch. 505, § 11; reenacted, 1988, ch. 527, § 9, eff from and after July 1, 1988.

31-3-21

TITLE 31 PUBLIC BUSINESS, BONDS AND OBLIGATIONS

CHAPTER 3 STATE BOARD OF PUBLIC CONTRACTORS

(1) It shall be unlawful for any person who does not hold a certificate of responsibility issued under this chapter, or a similar certificate issued by another state recognizing such certificate issued by the State of Mississippi, to submit a bid, enter into a contract, or otherwise engage in or continue in this state in the business of a contractor, as defined in this chapter. Any bid which is submitted without a certificate of responsibility number issued under this chapter and without that number appearing on the exterior of the bid envelope, as and if herein required, at the time designated for the opening of such bid, shall not be considered further, and the person or public agency soliciting bids shall not enter into a contract with a contractor submitting a bid in violation of this section. In addition, any person violating this section by knowingly and willfully submitting a bid for projects without holding a certificate of responsibility number issued under this chapter, as and if herein required, at the time of the submission or opening of such bid shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

(2) All bids submitted for public or private projects where said bid is in excess of Fifty Thousand Dollars (\$50,000.00) with respect to public projects and in excess of One Hundred Thousand Dollars (\$100,000.00) with respect to private projects shall contain on the outside or exterior of the envelope or container of such bid the contractor's current certificate number, and no bid shall be opened or considered unless such contractor's current certificate number appears on the outside or exterior of said envelope or container, or unless there appears a statement on the outside or exterior of such envelope or container to the effect that the bid enclosed therewith did not exceed Fifty Thousand Dollars (\$50,000.00) with respect to public projects or One Hundred Thousand Dollars (\$100,000.00) with respect to private projects. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

(3) In the letting of public contracts preference shall be given to resident contractors, and a nonresident bidder domiciled in a state having laws granting preference to local contractors shall be awarded Mississippi public contracts only on the same basis as the nonresident bidder's state awards contracts to Mississippi contractors bidding under similar circumstances; and resident

contractors actually domiciled in Mississippi, be they corporate, individuals, or partnerships, are to be granted preference over nonresidents in awarding of contracts in the same manner and to the same extent as provided by the laws of the state of domicile of the nonresident. When a nonresident contractor submits a bid for a public project, he shall attach thereto a copy of his resident state's current law pertaining to such state's treatment of nonresident contractors. As used in this section, the term "resident contractors" includes a nonresident person, firm or corporation that has been qualified to do business in this state and has maintained a permanent full-time office in the State of Mississippi for two (2) years prior to January 1, 1986, and its subsidiaries and affiliates of such a person, firm or corporation. Any public agency awarding a contract shall promptly report to the State Tax Commission the following information:

(a) The amount of the contract.

(b) The name and address of the contractor reviewing the contract.

(c) The name and location of the project.

(4) In addition to any other penalties provided in this chapter, and upon a finding of a violation of this chapter, the State Board of Contractors may, after notice and hearing, issue an order of abatement directing the contractor to cease all actions constituting violations of this chapter until such time as the contractor complies with Mississippi state law, and to pay to the board a civil penalty to be deposited into the State Board of Contractors' Fund, created in Section 31-3-17, of not more than three percent (3%) of the total contract being performed by the contractor. The funds collected from civil penalty payments shall be used by the State Board of Contractors for enforcement and education.

Sources: Codes, 1942, § 8968-11; Laws, 1958, ch. 473, § 11; Laws, 1960, ch. 393, § 7; Laws, 1968, ch. 511, § 1; Laws, 1980, ch. 498, § 11; Laws, 1985, ch. 505, § 13; reenacted and amended, 1988, ch. 527, § 12; Laws, 1992, ch. 505, § 2; Laws, 1999, ch. 363, § 1, eff from and after July 1, 1999.