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REPLY BRIEF OF THE APPELLANT

Undisputed evidence should be taken as true by the finder of facts. *A&F Properties, LLC v. Lake Caroline, Inc.*, 775 So. 2d 1276 (¶ 11) (Miss.Ct.App.2000); *Gillespie v. Kelly,* 809 So. 2d 702 (Miss.Ct.App.2001). McLea Developers, Inc. would ask the Court to strongly consider the following undisputed evidence:

A. On January 9, 2009, St. Paul issued a letter to Project Engineer, Dell Coward expressly acknowledging the McLea claim. R. 339. Therefore, in spite of its protests that McLea did not follow technical claims procedures, St. Paul cannot deny that it had notice of the McLea claim.

B. St. Paul requested that all funds owed to Cordova (the general contractor) by the Golden Triangle Regional Airport Authority (the owner), be paid directly to St. Paul. R. 348-349. St. Paul has admitted that the reason for this arrangement was so that it could make sure "that the money went to the right people." R. 351

C. St. Paul received approximately $175,000.00 that would have been payable to Cordova under the construction contract. R. 354

D. St. Paul cannot account for how one red cent of the contract money was spent. R. 354.

St. Paul argues that it had a right to the contract funds so that it could complete the construction project, and it expresses "puzzlement" as to why it's inability to account for the money that it received is being questioned. However, by St. Paul's own admission, it took possession of the contract funds to make sure that the legitimate claims of subcontractors were paid. R. 351. These were specific, identifiable deposits of money

which belonged to Cordova but which were entrusted to St. Paul for the specific purpose of paying subcontractors on the project. This includes the McLea claim of which St. Paul was well aware. The existence of this escrow fund created the inherent presumption that St. Paul would make a proper disbursement of the funds. *Alladdin Construction Company, Inc. v. John Hancock Life Insurance Co.* (¶ 16) 914 Si, 2d 169 (Miss. 2005). Had St . Paul made a proper disbursement, it should be able to provide specific detail as to the identity of the payees and the amount of each payment. This they have been unable or unwilling to do. A reasonable jury could infer from these undisputed facts that St. Paul misappropriated the money that was entrusted to it for payment to legitimate subcontractors or that it still has the money in its possession. Either scenario would constitute the kind of inequitable conduct that should estop St. Paul from hiding behind a statute of limitations defense.

In reviewing the decision of the trial court, the Appellate Court must employ the *de novo* standard of review. *O'Neal Steel, Inc. v. Millette* 797 So. 2d 869 (Miss. 2001). The Court must look only to the evidence presented by McLea, afford truthfulness to it and indulge all favorable inferences that can be drawn therefrom. *Biloxi Regional Medical Center v. David* 555 So. 2d 53 (Miss. 1989). Clearly, when that standard is applied, the Order of the Trial Court Granting Summary Judgment should be reversed and McLea should be given an opportunity to present its case to a jury.

On page 1 of its brief, St. Paul states: "Belatedly, McLea filed its Response to St. Paul's Motion for Summary Judgment on August 25, 2008, just four (4) days before the hearing on St. Paul's Motion." This allegation has nothing to do with the merits of the case. It was never noticed for hearing or brought to the attention of the Trial Court. St

Paul's allegation appears to be nothing more than an effort to denigrate Plaintiff's counsel and should be disregarded by the Court.[1]

Respectfully submitted,

McLEA DEVELOPERS, INC.

By: James C. Helveston
James C. Helveston, [redacted]

[1] By agreement of the parties, the 30(b)(6) deposition of St. Paul Guardian Insurance Company was originally scheduled for August 8, 2008. On the day prior to the deposition, Defense counsel contacted Plaintiff's counsel to request that the deposition be re-scheduled because his 30(b)(6) designee was just returning from vacation. Defense counsel indicated that it would be more convenient for the designee to conduct the deposition on August 13, 2009. Plaintiff's counsel expressed concern about the impending August 29th hearing on Defendant's Motion for Summary Judgment but agreed to the continuance as an accommodation for the Defendant. The St. Paul 30(b)(6) deposition was taken on August 13th, Plaintiff's counsel received the deposition transcript on August 19th and faxed the McLea Response to Defense counsel four business days later. On the eve of the hearing, Defense counsel filed his Motion to Strike the McLea Response as untimely. R. 377. However, Defense counsel never called this Motion up for hearing nor should he have, since any delay was the direct result of the continuance of the St. Paul deposition which Defense counsel requested and to which Plaintiff's counsel agreed purely as a professional courtesy to his client and to him. St. Paul's attempt to take advantage of the courtesy extended to its attorney by Plaintiff's counsel is disingenuous, and the allegation that McLea's Response to the Motion for Summary Judgment was untimely filed should be disregarded by the Court.

CERTIFICATE OF SERVICE

I, James C. Helveston, Attorney for the Apellant, McLea Developers, Inc., hereby certify that I have this day caused to be served by first class mail, postage prepaid, a true and correct copy of the above Reply Brief of the Appellant on the following persons:

Bradford C. Ray, Esquire
633 N. State Street
Jackson, MS 39205

Honorable Lee J. Howard
P. O. Box 1344
Starkville, MS 39760

SO CERTIFIED, this the 17th day of August, 2009.

James C. Helveston

James C. Helveston