

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-TS-00542

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MCLEA DEVELOPERS, INC.

APPELLANT

VS.

ST PAUL GUARDIAN INSURANCE COMPANY

• APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Court may evaluate possible disqualifications or recusal.

1. McLea Developers, Inc. d/b/a Leach Construction Company, Appellant
2. St. Paul Guardian Insurance Company, Appellee
3. James C. Helveston, Attorney for Appellant
4. Dewitt T. Hicks, Former Attorney for Appellant
5. Bradford C. Ray, Attorney for Appellee

SO CERTIFIED, on this the 6th day of July, 2009

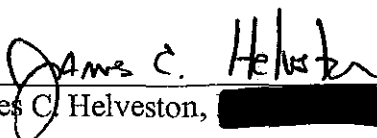


James C. Helveston, 

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STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT, ST. PAUL GUARDIAN INSURANCE COMPANY
- II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS
- III. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT, ST. PAUL GUARDIAN INSURANCE COMPANY SHOULD NOT BE EQUITABLY ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition of the Case Below

On February, 1, 2006, the Plaintiff, McLea Developers, Inc. (hereinafter, "McLea") filed its Complaint against the Defendants, Cordova Constructors, Inc. and Cordova Constructors of Mississippi, Inc. (hereinafter, "Cordova"). The Complaint alleged that Cordova was the general contractor on the American Eurocopter construction project performed for the Golden Triangle Regional Airport Authority (hereinafter "GTRAA") in Lowndes County, Mississippi. The Complaint sought a judgment against Cordova in the amount of One Hundred Fifty-Eight Thousand Six Hundred Eighty-Six and 85/100 Dollars (\$158,686.85) for services rendered and materials furnished by McLea in connection with the American Eurocopter project. R.6. The Complaint also named St. Paul Guardian Insurance Company (hereinafter, "St. Paul") as the surety on a Payment Bond which St. Paul issued to Cordova in connection with the American Eurocopter project. R.27. Although Cordova filed an Answer to the Complaint, it has made no further appearances in this case and is believed to be a defunct corporation. St. Paul filed an Answer to the Complaint on May 22, 2006 and asserted as its Sixth Affirmative Defense that the McLea claim is barred by the applicable statutes of limitation. R.40.

On March 28, 2008, St. Paul filed its Motion for Summary Judgment asserting that McLea had failed to file its Complaint within one year after completion of the American Eurocopter project and that its claim against the Payment Bond issued by St. Paul was barred by § 85-7-189 of the 1972 Mississippi Code. R.81. McLea responded to St. Paul's Motion for Summary Judgment on August 25, 2008 and asserted that St. Paul should be estopped from raising the statute of limitations defense because it had induced McLea into believing that it would be paid for its work on the American Eurocopter project without the necessity of filing

suit and because St. Paul had breached its obligations under the terms of the Payment Bond. R. 282. On November 7, 2008, the Trial Court issued its Order Granting St. Paul's Motion for Summary Judgment. R.408. The Court made the specific findings that the McLea claim was barred by § 85-7-189 and that there was no evidence of inequitable conduct by St. Paul which would cause it to be estopped from asserting the statute of limitations defense. R.408. On November 20, 2008, McLea filed a Motion to Reconsider asserting that it had indeed presented evidence sufficient for a reasonable jury to infer that St. Paul had engaged in inequitable conduct. R. 412. The Court entered an Order Reaffirming St. Paul's Motion for Summary Judgment on March 4, 2009 and this appeal followed.

B. Statement of the Facts

In August of 2003, McLea entered into an agreement with Cordova to perform certain site preparation work in connection with the American-Eurocopter project in Lowndes County, Mississippi. R. 285 The Defendant, St. Paul issued a Payment Bond in connection with that project. R. 314. The terms of said bond provide that Cordova and St. Paul, jointly and severally, bind themselves to pay for labor, materials and equipment furnished for use in the Construction Contract entered into by and between Cordova and the GTRAA, the owner of the project. R. 314. McLea would not have entered into the agreement with Cordova to provide labor and materials for the American Eurocopter project without a Payment Bond. R. 285. McLea performed its work on the project in a good and workmanlike manner and in a timely fashion. However, Cordova wrongfully withheld payment to McLea in the amount of One Hundred Fifty-Eight Thousand Six Hundred Eighty-Six and 85/100 Dollars (\$158,686.85). R. 285.

On January 6, 2004, McLea's attorney, Dewitt T. Hicks, Jr., notified GTRAA, Cordova and St. Paul that Cordova was wrongfully withholding payment of funds due McLea for its work on the American Eurocopter project. R. 321. McLea never received a response from St. Paul

indicating that any portion of the McLea claim was in dispute. On January 9, 2004, Mary H. Tibbets, Attorney-In-Fact for St. Paul, wrote a letter to Dell Coward, the Project Engineer for the American Eurocopter Project, and acknowledged receipt of the notice of non payment of sums owed by Cordova to McLea. In said letter, St. Paul authorized GTRAA to pay the sum of \$106,491.53 to Cordova and specifically stated that this payment would not relieve St. Paul of its obligations under the Payment Bond. R. 324. The letter made no indication that any portion of the McLea claim was in dispute.

On or about June 30, 2004, Cordova, acting at the request of St. Paul, directed that all payments to which it was entitled in connection with the American Eurocopter project be paid to St. Paul. A June 30, 2004 letter from Larry Patterson, President of Cordova, to GTRAA memorializes an agreement between Cordova and St. Paul to work closely with the owner, the Architect and all subcontractors to bring payment issues to a successful conclusion. R. 340. McLea attorney, Dewitt T. Hicks has sworn and will testify that based on the assumption by St. Paul of the responsibility for dealing with the claims of subcontractors and because St. Paul had never questioned the legitimacy of the McLea claim, he was induced into believing that St. Paul would pay the McLea claim without the necessity of filing suit. R. 311

St. Paul's corporate representative has admitted that St. Paul requested that all funds due Cordova be paid to St. Paul and that St. Paul would make sure that the legitimate claims of subcontractors were paid. R. 348-349; 351-353. St. Paul has also admitted that it received approximately \$175,000.00 that would otherwise have been paid to Cordova under the construction contract but it cannot account for where any of that money was paid. R. 354.

SUMMARY OF THE ARGUMENT

The Defendant, St. Paul should be estopped from asserting the Statute of Limitations Defense because it failed to perform its obligations under the Payment Bond and because its actions induced McLea into believing that it would be paid for its work on the American Eurocopter project without the necessity of filing suit. St. Paul should be estopped from asserting the statute of limitations on the additional grounds that it has engaged in inequitable conduct. Specifically, St. Paul requested that all funds due Cordova be paid to St. Paul and that it would make sure that the legitimate claims of subcontractors would be paid. R. 348-349; 351-353. St Paul has admitted that it received approximately \$175,000.00 that would have been payable under the American Eurocopter construction contract but it cannot account for where any of that money was disbursed. R. 354. McLea is entitled to all reasonable inferences that can be drawn from the fact that St. Paul cannot account for any of the Cordova money. A reasonable jury could make any or all of the following inferences:

- A. St. Paul breached its duty to make sure that the legitimate claims of subcontractors were paid.
- B. St. Paul misappropriated the money that it received.
- C. St. Paul still has the money in its possession.

Because St. Paul cannot account for a penny of the Cordova money that it received and pledged to distribute to subcontractors, it has violated a fiduciary duty to all of the Cordova subcontractors, including McLea. As a result of its inequitable conduct, St. Paul should not be permitted to hide behind the statute of limitations.

ARGUMENT

A. Criteria for Summary Judgment

In order to prevail in its Motion for Summary Judgment, the Defendant, St. Paul, must establish that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law Mississippi Rules of Civil Procedure 56 (c). In *Brown v. Credit Center, Inc.* 444 So. 2d 358 (Miss. 1983), the Mississippi Supreme Court noted that a motion for Summary Judgment can never serve as a substitute for the trial of disputed fact issues and established the following criteria for ruling on the Motion:

The argument that there exists no genuine triable issue of material fact is the functional equivalent of a request for a peremptory instruction. It merely occurs at an earlier stage in the life of a civil action. The trial court must review carefully all of the evidentiary matters before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If in this view the moving party is entitled to judgment as a matter of law, Summary Judgment should be entered forthwith in his favor. Otherwise the Motion shall be denied...

Trial Judges must be sensitive to the notion that Summary Judgment may never be granted in derogation of a party's constitutional right to trial by jury. Mississippi Constitution Art.3 Sec. 31 (1890)

The Supreme Court defined what constitutes a material issue of fact in *American Legion Post 42 v. Ocean Springs* 562 So. 2d 103 (Miss. 1990). The Court held as follows:

A Motion for Summary Judgment must be denied where there are still questions remaining regarding material facts. An issue of fact may be present where there is more than one reasonable interpretation that may be given undisputed testimony; where materially differing but nevertheless reasonable inferences may be drawn from the uncontradicted facts; or when the purported establishment of the facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable confidence that the full factors of the matter have been disclosed.

...when doubt exists whether there is a fact issue, the non-moving party gets the benefit. Indeed, the party against whom the Summary Judgment has been sought should be given the benefit of every reasonable doubt.

We recognize that the reasonable minds may often differ on the question of whether there is a genuine issue of material fact. In this context we find appropriate the admonition in a leading commentary on Federal Rule 56: If there is to be error at the trial level, it should be in denying Summary Judgment and in favor of a full, live trial. 6 Moore's Federal Practice Sec. 56-15 (1-2)p. 56-435 (1982)

Summary Judgments in whole or in part should be granted with great caution.

In *Sanford v. Federated Guaranty Insurance Co.* 522 So.2d 214 (Miss. 1988), the Court re-emphasized that a Motion for Summary Judgment is the functional equivalent of a Motion for Directed Verdict. The Court must, therefore, look only to the evidence of the non-movant, afford truthfulness to it and indulge all favorable inferences that could be drawn therefrom. If the evidence and reasonable inferences can support a verdict for the non movant, the case should not be taken from the jury. *Biloxi Regional Medical Center v. David* 555 So.2d 53 (Miss. 1989); *Hall v. Mississippi Chemical Exp. Inc.* 528 So.2d 796 (Miss. 1988); *Edwards v. Cleveland Food, Inc.* 437 So.2d (Miss.1983).

B. Material Issues of Fact

The case before this Court is replete with material issues of fact which preclude Summary Judgment for the Defendant, St. Paul. They include the following:

1. Did the Defendant, St. Paul fail to perform its obligations under the terms of the Payment Bond?

On August 7, 2003, the Defendant, Cordova Constructors of Mississippi, Inc. entered into a contract with the Golden Triangle Regional Airport Authority for the construction of the American Eurocopter plant in Lowndes County, Mississippi. On or about August 8, 2003, St. Paul issued an American Institute of Architects Form A312 Payment Bond in connection with the project which provides as follows:

The Contractor, (Cordova) and the Surety (St. Paul), jointly and severally bind themselves, their heirs, executors, administrators,

successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract which is incorporated by reference. R. 327.
¶ 1

Pursuant to an agreement with Cordova, McLea provided labor and materials in connection with the American Eurocopter project. Therefore McLea falls within the protection of the Payment Bond and can enforce St. Paul's contractual obligations under the bond even though McLea was not a party to the contract. *Aladdin Construction Company, Inc. v. John Hancock Life Insurance Company*, 914 So. 2d 169 (¶ 15) (Miss. 2005).

On January 6, 2004, McLea's attorney, Dewitt T. Hicks, Jr., gave notice to the Golden Triangle Airport Authority and to St. Paul that Cordova was wrongfully withholding payments from McLea which McLea earned as a subcontractor on the American Eurocopter project. R. 337. Saleh Stevens, the St. Paul 30(b)(6) designee, has testified that he has no reason to believe that this notice was not received by St. Paul and actual receipt constitutes sufficient compliance with the notice provisions of the Bond. R.345. The receipt of notice by St. Paul triggered the provisions of Paragraph 6 of the Bond which state that the Surety shall:

6.1 Send an answer to the Claimant, with a copy to the Owner within 45 days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.

6.2 Pay or arrange for payment of any undisputed amounts.
R. 327

St. Paul has admitted that it did not respond to the January 6, 2004 notice and gave no answer to Dewitt Hicks or McLea stating that any portion of the McLea claim was in dispute, thus violating the terms of the Bond. R.346-347.

St. Paul asserts that the January 6, 2004 letter from Dewitt Hicks does not comply with the notice provisions of Paragraph 4 of the Bond and that it recieved no notice of the McLea

claim. However, Paragraph 5 of the Bond provides that if the notice required by Paragraph 4 is given by the Owner to the Contractor or to the Surety, that is sufficient compliance. R. 327. On January 8, 2004, Project Engineer, Dell Coward wrote a letter to Larry Patterson, President of Cordova, and notified him of the Leach claim. Mr. Coward further advised Patterson that Cordova would receive no further payments in connection with the American Eurocopter project without the following:

A letter from your bonding company expressly acknowledging the Leach Construction Company (McLea) claim in the amount stated in the claim and authorizing the owner to make payment in full without deduction of the amount claimed and without waiver of any rights of any party under the payment and performance bonds.
R. 336.

On January 9, 2004, St. Paul issued the letter required by the Project Engineer and specifically acknowledged receipt of notice of the alleged nonpayment of sums by Cordova Constructors, Inc. to McLea. R.339. Even if it is assumed, for the sake of argument, that the January 6, 2004 Dewitt Hicks letter did not constitute sufficient notice, St. Paul was clearly on notice of the McLea claim by January 9, 2004. At that point, St. Paul had a duty to answer the claim in accordance with Paragraph 6 of the Bond and it has admitted that it made no such answer R. 346-347.

In *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Bramble*, 879 A.2d 101 (Md. 2005), the Maryland Court of Appeals considered an AIA Payment Bond identical to the one issued by St. Paul in the case *sub judice*. The Court held that a surety may waive its right to assert bond defenses and/ or to contest the validity of bond claims by failing to perform its obligations under the terms of the bond. The Court specifically reviewed the provisions of Paragraph 6 of the Payment Bond which require the surety to respond to the bond claimant within 45 days after receipt of a claim and to state the basis for any disputed amounts. The Court stated that this language should be construed strongly in favor of the parties to be protected and

disfavoring the denial of claims on technical grounds. It reasoned that the provisions of Paragraph 6 should be strictly enforced and that unless a surety (1) answers a claimant's claim; (2) delineates the amounts in dispute, and (3) lists the basis for challenging payment of any disputed amount, the surety waives its defenses and/or right to contest the validity of a subcontractor's claims. According to the *Bramble* court, the 45 day time period and the specificity of the procedures for a surety to dispute a claim safeguard the purpose of the bond, namely that subcontractors who supply goods and labor to a general contractor are paid for their work.

The *Bramble* decision is the first appellate court analysis of Paragraph 6 of the AIA Form A312 Payment Bond but its holding was recently followed by a U. S. District Court in Florida in *J. C. Gibson Plastering Co., Inc., v. XL Specialty Insurance Company*, 521 F. Supp. 2d 1326 (2007). *Bramble* is also consistent with the holding of the Mississippi Supreme Court that a compensated surety, such as St. Paul in the case *sub judice*, is not entitled to a strict or technical construction of the contract. *Hartford Accident & Indemnity Co. v. Hewes* (190 Miss. 225, 199 So. 93 (1940)). The Court made a similar finding in *Metropolitan Casualty Insurance Co. v. Koelling* 57 So. 2d 562 (Miss. 1952) in which it held:

The liability of a surety company is, of course, governed by the express terms and extent of its undertaking. If its service is gratuitous, it is favored by the law. Such favoritism does not extend to the compensated surety. While its liability may not be extended beyond the terms of the contract, if the contract is susceptible of two constructions, one of which will uphold and the other defeat the claim, in that event, the construction favorable to the insured will be adopted.

St. Paul is attempting to attach a technical definition to the term "claim" as an excuse for not answering the notices which it received from both Dewitt Hicks and Cordova. However, the holdings in *Hartford Accident & Indemnity Co. V. Hewes* and *Metropolitan Casualty v. Insurance v. Koelling (supra)*, make it abundantly clear that St. Paul cannot escape its

contractual obligation with a strict, technical interpretation of the Bond. A jury should be permitted to determine if St. Paul breached its duty to McLea by failing to respond in accordance with Paragraph 6 of the bond after it had clear and certain knowledge of the McLea claim. If a jury determines that St. Paul did, indeed, breach that duty, it should not be permitted to assert defenses to the bond claim, including the statute of limitations defense.

2. Did St. Paul engage in inequitable conduct which should prevent it from asserting the statute of limitations defense?

Both McLea officer, Mike Leach and McLea's attorney, Dewitt Hicks have sworn and will testify that St. Paul's failure to place them on notice that any portion of the McLea claim was in dispute induced them into believing that St. Paul would pay the claim without the necessity of filing suit R.285; R. 311. An even stronger inducement was created on June 30, 2004, when Cordova, acting at the request of St. Paul, wrote a letter to the Owner of the American Euorcopter project instructing the Owner to pay all funds to which Cordova was entitled directly to Mr. Saleh A. Stevens of the St. Paul Surety Claims Department. R.340 The last paragraph of that letter reads as follows:

Cordova is working with St. Paul / Guardian to expedite the resolution of this matter. We will work closely with the Authority, the Architect, all subcontractors, and the Surety to bring these issues to a successful conclusion.

During the St. Paul 30(b)(6) deposition, Saleh Stevens testified that St. Paul did indeed request that all Cordova funds be paid over to St. Paul and that he agrees with everything contained in the June 30, 2004 letter. R. 348-349. Then, Mr. Stevens was questioned regarding the nature of the "issues" referred to in the last sentence of the letter. He testified as follows:

Q. Well, in the last sentence of the letter: We will work closely with the Authority, the architect, all subcontractors and the Surety to bring these issues to a successful conclusion, what issues was he talking about?

A. I can't specifically say, because I don't recall. This is '04. But I would assume it would just be all issues relating to the completion and closeout of the project.

Q. So you can't say as we sit here today that one of those issues was to make sure that legitimate claims of subcontractors and materials were paid?

A. I—for the most part – you're correct for the most part. I cannot say that that wasn't one of the considerations. R. 350

Q. But that was the arrangement, wasn't it, that those funds would go directly to St. Paul and not the contractor so that St. Paul could make sure that the money went into the right hands?

A. It's correct that we asked for the money to be directed to the Surety. Correct.

Q. And that's to make sure that the money went to the right people?

A. Generally. If you want to be overbroad for the sake of moving this along, that's pretty much accurate. R. 351.

Q. The money that was paid to St. Paul that would have otherwise gone directly to Cordova, who made the decision about how that money would be disbursed?

A. To the extent that there was a sole decision, I would say that it was me. R. 352-353.

Although evasive, St. Paul's 30(b)(6) designee finally admitted that the money due Cordova was paid to St. Paul, in part, to make sure that the legitimate claims of subcontractors were paid and that St. Paul decided to whom the money would be disbursed. Thus, St. Paul became an escrow agent with the duty to investigate the claims of sub contractors and to make sure that legitimate claims were paid.

The Mississippi Court of Appeals considered a similar factual situation in *Alladdin Construction Company, Inc. v. John Hancock Life Insurance Company* (¶ 16) (*supra*) and held as follows:

Vendor Funds Escrow payments were specific, identifiable deposits of money belonging to [John Hancock] which it *entrusted* to [McMo] for *the specific purpose of paying* the subcontractors or suppliers to the project...

The existence of escrow funds inherently presumes that the party receiving escrow funds shall act as the escrow agent for proper disbursement. (emphasis added)

St. Paul designee, Saleh Stevens testified that pursuant to the agreement described in the June 30, 2004 letter, St. Paul did indeed receive approximately \$175,000.00 that would have been payable to Cordova under the Construction Contract R.354. Stevens further testified that those funds were disbursed by St. Paul, although incredibly, he could not identify the payees or account for how one nickel of that money was spent. R.354. The shocking thing about this admission is that St. Paul had known for over a month prior to the 30(b)(6) deposition that it would be asked to account for the Cordova funds that it received but could not do so. R. 275. McLea is entitled to all reasonable inferences that can be drawn from the fact that St. Paul cannot account for any of the Cordova money *Biloxi Regional Medical Center v. David* 552 So. 2d 796 (Miss. 1989); *Edwards v. Cleveland Food, Inc.* 528 So. 2d (Miss. 1998). A reasonable jury could make any or all of the following inferences:

- A. St. Paul breached its duty to make sure that the legitimate claims of subcontractors were paid.
- B. St. Paul misappropriated the money that it received
- C. St. Paul still has the money in its possession

The doctrine of equitable estoppel can be invoked to prevent the defendant from raising the statute of limitations as a result of its own inequitable misconduct *Izard v. Mikell* 173 Miss. 770; 163 So.

498 (1935). Because St. Paul accepted the Cordova money and pledged to make a proper distribution to subcontractors but can't account for how one penny of the money was disbursed, it has violated a fiduciary duty to all of the Cordova subcontractors, including McLea, and it should not be permitted to hide behind the one year Statute of Limitations.

St. Paul representative, Saleh Stevens has also admitted that prior to disbursing the escrowed funds, St. Paul did nothing to investigate the McLea claim nor did it give notice to McLea or its attorney, Dewitt Hicks that the money was being disbursed R.355-356. Attorney, Dewitt Hicks has sworn and will testify that because St. Paul had assumed the responsibility of escrow agent and had never questioned the validity of the McLea claim, he was induced into believing that St. Paul would pay the claim without the necessity of filing suit. R.311.

In *Izard v. Mikell* (supra), the Mississippi Supreme Court addressed a similar case of surety misconduct and said this:

The prevailing rule is that the doctrine of equitable estoppel may, in the proper case, be invoked to prevent the defendant from relying upon the statute of limitations, it being laid down as a general principle that, when a defendant electing to set up the statute of limitation has previously, by deception or by violation of duty toward the plaintiff, caused him to subject his claims to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold. Thus, the defendant will be estopped to set up the statute of limitation in bar of plaintiff's claim when the delay which would otherwise give operation to the statute (was the result of) inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit. (emphasis added).

Whether the actions and omissions of St. Paul were sufficient to induce McLea and its attorney, Dewitt Hicks to believe that the McLea claim would be paid without the necessity of filing suit is a material question of fact which should not be taken from the jury.

Every contract contains an inherent duty of good faith and fair dealing. *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992). In *Cothorn v. Vickers*, 759 So.2d 1241, 1248 (§ 17) (Miss. 2000), the Court determined that the covenant requires that “neither party will do anything which injures the right of the other to receive the benefits of the agreement.” This covenant imposes not only a duty not to prevent or hinder the other parties performance but may impose a duty to “take some affirmative steps to cooperate in achieving these goals.” *Cenac*, 609 So.2d at 1272. The covenant of good faith and fair dealing demands that St. Paul not be allowed to raise the statute of limitations after it violated its duty under Paragraph 6 of the Payment Bond and, even more importantly, after it violated its duty as escrow agent to investigate and pay the legitimate claims of subcontractors.

Conclusion

A Motion for Summary Judgment lies only when there is no genuine issue of material fact and should never be used as a substitute for the trial of disputed factual issues. *Dethlefs v. BeanMaison Development Corp.* 458 So. 2d 714 (Miss. 1984). The case before this Court contains numerous factual issues which can only be resolved by a jury after a trial on the merits. McLea respectfully asks that the Order of the Trial Court Granting Summary Judgment to the Defendant, St. Paul Guardian Insurance Company be reversed so that it can be permitted its constitutional right to a trial by jury.

Respectfully submitted,

EDWARDS, STOREY, MARSHALL
HELVESTON & EASTERLING, LLP

By: James C. Helveston

James C. Helveston
Attorney for Plaintiff