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

MCLEA DEVELOPERS, INC. **APPELLANT**

VS.

ST. PAUL GUARDIAN INSURANCE COMPANY **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF
LOWNDES COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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St. Paul Guardian Insurance Company

ORAL ARGUMENT IS NOT REQUESTED

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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 disqualification or recusal.

1. McLea Developers, Inc. d/b/a Leach Construction, Appellant;
2. Mike Leach, principal of Leach Construction;
3. James C. Helveston, Attorney for Appellant;
4. St. Paul Guardian Insurance Company, Appellee;
5. Mark D. Herbert, Attorney for Appellee;
6. Bradford C. Ray, Attorney for Appellee.

So certified this, the 4th day of August, 2009.

By: [redacted]
Bradford C. Ray

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

I. STATEMENT OF THE ISSUE

A. WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL SHOULD BE APPLIED TO BAR ST. PAUL'S STATUTE OF LIMITATIONS DEFENSE

II. 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. ("McLea") filed its Complaint in the Circuit Court of Lowndes County, Mississippi against Cordova Constructors, Inc., Cordova Constructors of Mississippi, Inc. ("Cordova") and St. Paul Guardian Insurance Company ("St. Paul"). (R. 6). The Complaint against Cordova alleged damages of $158,686.85 against Cordova for services on the Golden Triangle Regional Airport Authority ("GTRAA") project in Lowndes County, Mississippi. St. Paul issued a payment and performance bond for the project. McLea's Complaint against St. Paul includes a claim against St. Paul's payment bond, a claim on open account and a claim for punitive damages. (R. 6).

On or about May 22, 2006, St. Paul filed its Answer and Affirmative Defenses asserting the statute of limitations as a defense. (R. 41). On March 28, 2008, St. Paul filed its Motion for Summary Judgment based on its affirmative defense that McLea had failed to bring its lawsuit against St. Paul within the applicable statute of limitations set forth at Mississippi Code Ann. § 85-7-189. (R. 81). 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. (R. 282). In its response, McLea conceded that the statute of limitations barred its claims against St. Paul. (R. 282). Opposing the Motion, McLea argued, with no supporting evidence, that St. Paul should be estopped from asserting the statute of limitations as a defense because St. Paul allegedly induced McLea's attorney into believing that McLea would be paid without the necessity of filing a lawsuit. (R. 282, 364).

On November 7, 2008, the Honorable Lee J. Howard issued his Order Granting St. Paul's Motion for Summary Judgment. (R. 408). Therein, Judge Howard found that McLea's

Complaint was barred by § 85-7-189 of the Mississippi Code. Moreover, Judge Howard held that McLea's evidence, at best, established that St. Paul "made no promise to come to an agreement with the Plaintiff. The Defendant was merely silent in regards to the stop notice letter carbon copied to it. Mere silence does not constitute a promise to induce a plaintiff not to timely sue." (R. 410). Most importantly, Judge Howard held, "***Plaintiff has shown no evidence of any inequitable or fraudulent conduct by the Defendant.***" (R. 410).

On November 20, 2008, McLea filed a Motion to Reconsider arguing that it did present evidence of inequitable conduct. (R. 412). On January 13, 2009, St. Paul filed its Response to the Plaintiff's Motion to Reconsider. (R. 431). On March 4, 2009, the trial court entered an Order Reaffirming St. Paul's Motion for Summary Judgment. (R. 445).

B. STATEMENT OF THE FACTS

On August 7, 2003, Cordova entered into a contract with the GTRAA for the American Eurocopter project (the "Project"). (R. 96). On or about August 8, 2003, Cordova obtained a payment bond for the project from St. Paul. (R. 107). Thereafter, Cordova subcontracted earthwork to McLea. (R. 114). Cordova proposed a written subcontract to McLea, however, McLea refused to execute the agreement performing work pursuant to a written proposal. (R. 114, 131, 161, 162).

After beginning work, a dispute arose concerning McLea's work. (R. 114). Due to McLea's failure to perform its subcontract properly, Cordova was forced to terminate McLea's services and engage Triangle Maintenance and Kimes & Stone to complete the work. (R. 114). Due to McLea's failure to perform, Cordova incurred not less than $235,717.63 in damages. (R. 114). St. Paul has a pending Motion to Amend its Answer to assert a counterclaim against McLea for Cordova's damages as well as additional damages McLea has caused St. Paul. (R. 3).

On January 6, 2004, McLea sent a stop payment notice addressed to the GTRAA alleging that Cordova had not fully paid McLea for its work. (R. 132). McLea copied St. Paul on this stop payment notice. (R. 132). McLea neither demanded payment from St. Paul nor did McLea request St. Paul to investigate Cordova's alleged non-payment. (R. 132). Acknowledging that no claim against St. Paul had been made, McLea testified that the stop-payment notice merely advised the GTRAA that McLea had not been paid. (R. 168). McLea testified further that if the owner had made payment pursuant to the stop-payment notice, there would be no need to make a claim against St. Paul. (R. 170). As further evidence that no claim against St. Paul had been made, McLea's letter stated, "...we are notifying the payment and performance bond company of Leach Construction Company's potential bond claim pursuant to Section 85-7-187 of the Mississippi Code..." (R. 132).

In addition to expressly stating a claim against the bond, the terms of the payment bond also required McLea state a claim with substantial accuracy of the amount due. (R. 107). Attached as Exhibit "1" to McLea's Complaint is an itemization of what is allegedly owed by Cordova. (R. 12). This document reflects the billing history from McLea to Cordova. (R. 157). In its 30(b)(6) deposition, McLea testified that invoices were to be paid within thirty (30) days of submitting an invoice. (R. 164). As of January 6, 2004, the invoices that were due and owing were the August 21, 2003 invoice, the September 22, 2003 invoice, the October 20, 2003 invoice, the November 20, 2003 invoice, and the November 20, 2003 EXTRA invoice. (R. 12). Accordingly, the most that was billed and owed as of January 6, 2004 was $485,729.10[1]. (R. 12). As of January 6, 2004, Cordova had paid McLea a total of $442,624.44[2]. (R. 12). McLea's stop-payment notice admits that retainage should be deducted from the amount allegedly due. (R. 132). McLea testified that retainage on the project was five (5%) percent and that retainage

[1] $197,170.41 + $155,814.44 + 102,109.59 + $21,992.50 + $8,642.16 = $485,729.10.
[2] $197,170.41 + $155,814.44 + 89,639.59 = $442,624.44.

was not due until it had completed its work. (R. 168). McLea further testified that as of January 6, 2004, retainage withheld from its contract was $26,210.84. (R. 168).

Based upon the above facts, the most that could have been due as of January 6, 2004 was $16,893.82[3] without consideration of backcharges assessed against McLea by Cordova. This is roughly ten (10%) percent of McLea's claim against St. Paul. Furthermore, on January 6, 2004, Cordova corresponded with McLea documenting a dispute with McLea's work and contract performance. (R. 134). Cordova placed in dispute $45,550, or the entire amount of the $16,893.82 allegedly due. (R. 134).

In an attempt to free the GTRAA from the § 85-7-181 freeze on the project funds, on January 8, 2004, the project engineer advised Cordova that the GTRAA needed a letter from St. Paul authorizing payment to Cordova without waiver of any rights under the performance or payment bonds. (R. 336). The engineer's letter was not addressed to or sent to St. Paul. (R. 336). This letter was not sent to McLea. (R. 336). This letter did not contain any language advising St. Paul that a claim was being made against the payment bond. (R. 336). There is no evidence in the record that a claim was made against St. Paul's bond in or around January 2004.

Pursuant to Cordova's request, on January 9, 2004, St. Paul affirmed its bond obligations to the Owner in approving payment to Cordova. (R. 137). This letter was written by an agent of St. Paul to the project engineer. (R. 137). St. Paul did not send this letter to McLea. (R. 137). Through this affirmation, St. Paul acknowledged that Cordova and McLea were involved in a dispute concerning contractual sums allegedly due and approved by the GTRAA to Cordova. (R. 137). Because Cordova had fully disputed McLea's claim, St. Paul was not at liberty to interfere with Cordova's contractual relationship with one of its subcontractors.

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[3] Invoices Due $485,729.10
Amounts Paid ($442,624.44)
Retainage ($26,210.84)

Approximately three (3) weeks later, on January 29, 2004, McLea filed a lawsuit against Cordova Constructors, Inc. in the United States District Court for the Northern District of Mississippi (the "Federal Action"). (R. 139). St. Paul was not a party to the Federal Action. Prior to filing the Federal Action, McLea never made a claim on St. Paul's payment bond. (R. 145). Therein, McLea filed a Motion for Continuance in the Federal Action. (R. 392). In this Motion, McLea admitted it did not learn of St. Paul's January 9, 2004 payment authorization to Cordova until October 2005. (R. 392).

On May 14, 2004, the architect issued its Certificate of Substantial Completion certifying that the entire project "is sufficiently complete in accordance with the Contract Documents ***so that the Owner can occupy or utilize the Work for its intended use***." (R. 192). (emphasis added). The next day, on May 15, 2004, the Owner's lessee took possession of the Project, thereby triggering § 85-7-189 of the Mississippi Code. (R. 194). Consequently, all those with claims against the payment bond had one year from May 15, 2004, or until May 15, 2005, in which to file suit against St. Paul. Miss. Code Ann. § 85-7-189.

Realizing that a claim had never been made against St. Paul's bond, McLea attempted to submit a notice of claim to St. Paul on December 16, 2005, nearly two (2) years after McLea first alleged its business had been destroyed in the Federal Action. (R. 190). Prior to December 16, 2005, St. Paul was never presented with a demand for payment or with an opportunity to investigate a claim of McLea. (R. 145).

III. SUMMARY OF THE ARGUMENT

This case is clear cut in that the statute of limitations clearly bars McLea's lawsuit against St. Paul. McLea has admitted that the statute of limitations bars its claim against St. Paul's payment bond. To salvage what is clearly a lost cause, McLea argues that St. Paul should be estopped from asserting the statute of limitations as a bar to McLea's lawsuit. To establish

estoppel, Mississippi law provides that McLea bears the burden of proving inequitable or fraudulent conduct on the part of St. Paul. Equitable estoppel must *only* be applied in the most egregious of circumstances. *Southern Win-Dor, Inc. v. RLI Ins. Co.*, 925 So. 2d 884 (Miss. App. 2005). Indeed, the allegation of fraudulent/inequitable conduct alone is not enough. McLea's burden includes proving that the fraudulent/inequitable conduct caused McLea to submit an untimely lawsuit.

In the case at bar, the assertion of fraud or inequitable conduct on St. Paul's part is unsupported by the evidence. St. Paul took only those actions as allowed under the law. St. Paul made no promises or representations to McLea that St. Paul would not assert the statute of limitations as a defense. Further, St. Paul did not promise McLea that St. Paul would pay McLea's claim without the necessity of filing suit. In fact, most of the alleged proof came in the form of an affidavit from McLea's previous attorney, Mr. Dewitt Hicks, who testified essentially that St. Paul's silence induced him into believing McLea would be paid without having to file a lawsuit. (R. 311). With all due respect to Mr. Hicks, his testimony is clearly motivated by his incentive to lay blame for what is clearly a failure to sue within the applicable statute of limitations. St. Paul should not be held liable and punished for what should be considered as a legal malpractice lawsuit for missing the statute of limitations. Indeed, the proof supporting McLea's claim for equitable estoppel is all based on silence on the part of St. Paul. St. Paul made no promises or representations whatsoever to McLea supporting a claim of equitable estoppel. The trial court correctly held that "***mere silence does not constitute a promise to induce a plaintiff not to timely sue.***" (R. 410). There is absolutely no evidence before the trial court and no evidence in the record supporting McLea's claim of equitable estoppel. Because equitable estoppel does not apply, the trial court properly granted St. Paul's Motion for Summary Judgment.

IV. ARGUMENT

A. STANDARD OF REVIEW

In reviewing a trial court's decision to grant or deny a motion for summary judgment, Appellate Courts in Mississippi employ the *de novo* standard in reviewing a trial court's decision. *O'Neal Steel, Inc. v. Millette,* 797 So. 2d 869, 872 (Miss. 2001). In conducting the de novo review, the Court looks at all evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. *Lee v. Golden Triangle Planning & Dev. Dist., Inc.,* 797 So. 2d 845, 847 (Miss. 2001).

B. THE TRIAL COURT DID NOT ERR IN GRANTING ST. PAUL'S MOTION FOR SUMMARY JUDGMENT

First of all, the trial court encountered no issues regarding the application of and/or the running of the statute of limitations against McLea's lawsuit. Indeed, in response to St. Paul's Motion for Summary Judgment, McLea put forth no argument against the running of the statute of limitations thereby admitting that its lawsuit against St. Paul was barred. Rather, McLea argued before the trial court and now before this Court the existence of two (2) material issues of fact. *See* Brief of Appellant at B. Material Issues of Fact. Those alleged issues are 1) whether St. Paul performed its obligations under the terms of the payment, and 2) whether St. Paul engaged in fraudulent or inequitable conduct which should prevent St. Paul from asserting the statute of limitations as a defense. *Id.*

1. McLea's lawsuit is barred by § 85-7-189.

The construction of the American Eurocopter Project was a private project. The statute of limitations concerning a private payment bond claim is governed by § 85-7-189, which provides,

> When suit is instituted on a payment or performance bond, it shall not be commenced until after the complete performance of said contract and final settlement thereof and shall be commenced within one (1) year after the

> performance and final settlement of the contract and not later ... ***But said time for the institution of said action shall not begin to run until*** (a) the obligee shall have made said final settlement ... (b) after the written acceptance of the project by the owner; or (c) ***after the actual occupancy or use by the owner, whichever is earlier.***

Miss. Code Ann. § 85-7-189 (emphasis added).

On May 14, 2004, the architect issued its Certificate of Substantial Completion for the ***entire project.*** (R. 192). According to the architect's certificate, "Substantial Completion is the stage in the progress of the Work when the Work or designated portion is sufficiently complete in accordance with the Contract Documents so that the Owner can ***occupy or utilize the Work for its intended use.***" (R. 192). On May 15, 2004, the Owner's lessee began occupancy and/or use of the entire project for its intended purposes. (R. 194). Accordingly, the Owner's occupancy/use on May 15, 2004 began the running of the statute of limitations. Miss. Code Ann. § 85-7-189. Consequently, all those with a claim against St. Paul's payment bond had **one year** from May 15, 2004 in which to bring their lawsuit. McLea had until May 15, 2005, in which to sue St. Paul. McLea filed the underlying civil action on February 1, 2006. (R. 6). McLea's complaint was filed almost one (1) year after the statute of limitations had run. According to § 85-7-189, McLea's claims against St. Paul's payment bond are barred. McLea did not even address St. Paul's argument that the statute of limitations barred its lawsuit. (R. 282, 364).

2. St. Paul had no obligation as McLea failed to make a claim against St. Paul's payment bond

McLea would have this Court believe that St. Paul had an obligation to McLea pursuant to the terms of St. Paul's payment bond. It has long been held that sureties have a right to stand upon the strict terms of their contract. *Weatherby v. Shackleford* 1859 WL 3656, *5 (Miss. Err. & App. 1859). The liability of a surety is determined by the express terms and extent of its undertaking. *Metropolitan Cas. Ins. Co. of N. Y. v. Koelling*, 57 So. 2d 562, 563 (Miss. 1952). Accordingly, the law of contracts governs bonds, and the liability of St. Paul is determined by

analyzing the express terms of the payment bond. *L&A Contracting Co. v. Southern Concrete Serv., Inc.*, 17 F.3d 106 (5th Cir. 1994). *See also* Restatement (Third) of Suretyship & Guaranty § 14 (1996).

a. McLea's January 6, 2004 stop-payment notice does not constitute a claim against the payment bond

In its brief, McLea completely ignores the obligatory language in the payment bond that governs when St. Paul has an obligation to a bond claimant. (R. 107). Rather, McLea argues that it put St. Paul on notice on January 6, 2004, of Cordova's alleged withholding of payment from McLea. (R. 337). Assuming the legal sufficiency of this letter, McLea then leaps over the chasm of Paragraph 4 of the payment bond and assumes an obligation upon St. Paul pursuant to Paragraph 6. *See* Appellant's Brief at p. 8. McLea's argument in omitting the obligatory language of Paragraphs 4 and 6 of the payment bond is telling.

Paragraph 6 does not provide for an automatic obligation on the part of St. Paul merely because a person or entity has provided labor or materials to a bonded project. (R. 107). Such a conclusion is refuted by Paragraph 6 of the bond, which provides in relevant part, "***[w]hen the claimant has satisfied the conditions of paragraph 4, the Surety shall promptly and at the Surety's expense take the following actions***." (R. 107). Accordingly, Paragraph 6 is not triggered until McLea satisfied the terms of Paragraph 4.

Paragraph 4 of the payment bond provides:

> **4. *The Surety shall have no obligation to Claimants under this Bond until*:**
>
> 4.1 Claimants who are employed by or have a direct contract with the Contractor have given ***notice to the Surety*** ... and sent a copy, or notice thereof, to the Owner, ***stating that a claim is being made under this Bond and, with substantial accuracy, the amount of the claim.***

(R. 107).

Pursuant to paragraph 4, ***McLea was required to expressly state that a claim was being made under the bond*** before St. Paul had an obligation to do anything. (R. 107). As established below, McLea did no such thing.

McLea argues that its January 6, 2004 letter to the project owner satisfies the notice requirements set forth in the payment bond. (R. 132). McLea glosses over the purpose and legal effect of its January 6, 2004 letter. This letter was not a claim against St. Paul payment bond; however, this letter was a stop-payment notice pursuant to § 85-7-181 of the Mississippi Code, which as set forth below cannot be a claim against St. Paul's bond. (R. 132).

A stop-payment notice is rooted in Mississippi statutory law set forth at § 85-7-181 of the Mississippi Code. Mississippi Appellate Courts have held that this statute is to be narrowly construed. *Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., Inc.*, 791 So. 2d 254, 258 (Miss. App. 2000). A stop-payment notice freezes funds in the Owner's hands that are due the contractor. Miss. Code Ann. § 85-7-181. It is used by those with a direct contractual relationship to the owner's contractor, and then only constitutes a claim against funds held by the owner that are owed to the contractor. *Chic Creations*, 791 So. 2d at 258. Indeed, the Mississippi Court of Appeals has held that the stop payment statute does not give subcontractors and materialmen a claim against someone entirely outside the owner-contractor-subcontractor hierarchy. *Id.* Moreover, the stop notice statute does not give those claiming its benefit a lien against funds held by the owner that are not owed to the contractor. *Id.* This holiday exempts St. Paul from the reach of a stop-payment notice. Because the statute is narrowly construed and a stop-payment notice applies to a limited fund, it does not follow that it constitutes a claim against the surety.

McLea's stop-payment notice was not addressed to St. Paul but was addressed to the GTRAA. (R. 132). This shows that McLea's primary intention through submitting a stop-

payment notice was to freeze funds in the hand of the project owner and not St. Paul. The terms of McLea's stop payment notice reveals no claim against St. Paul's bond or a request that St. Paul take any action. (R. 132). When the owner paid the funds to Cordova, § 85-7-181 provided McLea with a cause of action against the owner, not the surety.

This is the precise reason behind the separation of the stop-payment statute set forth at § 85-7-181 and claims against a surety set forth at § 85-7-185 *et seq.* The legislature obviously saw fit to separate claims against an owner's funds from those of the surety. Assuming *arguendo* that McLea provided adequate notice to St. Paul that a claim was being made against the bond and copied the GTRAA, McLea could not argue that its bond claim also constituted a stop-payment notice to the GTRAA thereby freezing funds in the hands of the GTRAA. Such a result is illogical. Likewise, McLea's stop-payment notice to the GTRAA does not constitute a claim against the bond.

Additionally, the language of McLea's stop-payment notice negates its argument that this letter was also a bond claim. Rather than expressly stating that a claim was made against the payment bond, McLea's stop-payment notice states, ". . . ***we are notifying the payment and performance bond company of Leach Construction Company's potential bond claim pursuant to Section 85-7-187 of the Mississippi Code*** . . . ." (R. 132). (emphasis added).

On January 6, 2004, § 85-7-187 provided,

> If no suit shall be brought by the obligee within six months from the completion and final settlement of the contract, then any person supplying therein labor or materials shall have a right of action on said bond for his use and benefit against said contractors and the sureties thereon and to prosecute same to final judgment and execution, subject to the rights and demands of the owner.
>
> Miss. Code Ann. § 85-7-187 (1999).

This cannot constitute an express statement that a claim was being made under the bond. Section 85-7-187 applies to lawsuits brought against the surety. It has nothing to do with a bond

claim as contemplated by paragraph 4 of the payment bond. (R. 107). If anything, McLea's stop-payment notice advised St. Paul that it would be filing a lawsuit against St. Paul pending the outcome of its stop-payment notice. Notifying St. Paul that a *potential lawsuit* would be filed is far different from making a claim against St. Paul's bond. *See L&A Contracting Co.,* 17 F.3d 106 (in the performance bond context, a claim must be made in clear, direct, and unequivocal language demanding that the surety immediately perform under the terms of its bond); *U.S. for the Use and Benefit of Blue Circle West, Inc. v. Tucson Mechanical Contracting, Inc.*, 921 F. 2d 911, 915 (9th Cir. 1990)(notifying the contractor of a potential claim on the payment bond is insufficient. Everyone knows that there are claimants who *might* look to the contractor or bonding company for payment. There is no duty to inquire if a claim may ripen, and the claimant must notify that it is looking to the bonding company to satisfy the debt.) Additionally, as McLea only advised St. Paul of a potential lawsuit, McLea obviously had every intention of filing suit. Arguing that St. Paul's silence in response to the stop-payment notice caused McLea to file an untimely lawsuit is wholly disingenuous. St. Paul's silence should have sparked Mr. Hicks to file suit against St. Paul. Indeed, the very thing McLea said it would do in its stop-payment notice. (R. 132). Now, since McLea failed to sue St. Paul timely, McLea urges this Court to overturn the trial court's finding that St. Paul's silence could not have caused McLea's failure to file a timely lawsuit.

Additionally, McLea testified that if the owner had made payment pursuant to the stop-payment notice, it would be logical that there would be no need to make a demand against St. Paul's bond. (R. 170). It is clear that McLea's intent through the stop payment notice was to make a claim against the owner rather than St. Paul. McLea's stop-payment notice utterly fails to comply with paragraph 4.1 of the payment bond as it is not a claim against the payment bond. (R. 107). Consequently, St. Paul had no obligation to McLea pursuant to Paragraph 6.

b. McLea did not state a claim with substantial accuracy.

McLea argues that St. Paul is attaching a technical interpretation of the term "claim" to Paragraph 4 of the payment bond; however, so has the Mississippi Court of Appeals. *See Younge Mechanical, Inc. v. Max Foote Const. Co., Inc.*, 869 So. 2d 1079 (Miss. App. 2004)(the Mississippi Court of Appeals upheld the grant of a surety's Motion for Summary Judgment due to the subcontractor's failure to state a claim with substantial accuracy). In addition to expressly stating a claim on the bond, a claimant must state with substantial accuracy the amount of the claim. (R. 107). McLea's claim against St. Paul in the instant civil action is for $158,686.85. *See* Complaint. The stop-payment notice claims $106,491.53 from the Owner. (R. 132). McLea's claim in the stop-payment notice is highly inflated.

Attached as Exhibit "1" to the Complaint is an itemization of what is allegedly owed. This document reflects the billing history from McLea to Cordova. (R. 12). In the 30(b)(6) deposition, McLea testified that invoices were to be paid within thirty (30) days of submitting an invoice. (R. 164). As of January 6, 2004 (McLea's stop-payment notice), the invoices that were allegedly due and owing were the August 21, 2003 invoice, the September 22, 2003 invoice, the October 20, 2003 invoice, the November 20, 2003 invoice, and the November 20, 2003 EXTRA invoice. (R. 12). Accordingly, the most that McLea billed and was possible owed as of January 6, 2004 was $485,729.10[4]. *See* Exhibit "I" to McLea's Complaint. As of January 6, 2004, Cordova had paid McLea a total of $442,624.44[5]. (R. 12). McLea testified that retainage on the project was five (5%) percent and that retainage was not due until it had completed its work. (R.

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[4] 8/21/03 Invoice: $197,170.41
9/22/03 Invoice: $155,814.44
10/20/03 Invoice: $102,109.59
11/20/03 Invoice: $21,992.50
11/20/03 Invoice: $8,642.16
Total billed and due as of 1/6/04: $485,729.10

(R. 12).

[5] $197,170.41 + $155,814.44 + 89,639.59 = $442,624.44.

168). McLea's stop-payment notice admits that retainage should be deducted from the amount allegedly due. (R. 132). McLea further testified that as of January 6, 2004, retainage withheld from its contract was $26,210.84. (R. 168). Based upon the above facts, the most that could have been outstanding as of January 6, 2004 was $16,893.82[6]. This is roughly ten (10%) percent of McLea's lawsuit against St. Paul. This can hardly be construed as stating a claim with substantial accuracy. McLea's stop-payment notice fails to satisfy the terms of the payment bond or Mississippi law. Furthermore, on January 6, 2004, Cordova corresponded with McLea documenting a dispute with McLea's work placing in dispute $45,550 or the entire amount of the $16,893.82 actually due. (R. 134). Even if the Court concluded that a stop-payment notice could constitute a claim against a payment bond, McLea failed to state a claim with substantial accuracy. Due to this failure, McLea's stop-payment notice fails to constitute a claim against the bond, and St. Paul had no obligation to McLea.

c. Having notice of a payment dispute does not constitute a claim against the payment bond

In order to free the GTRAA from the § 85-7-181 freeze on the project funds, on January 8, 2004 the project engineer advised Cordova that the GTRAA needed a letter from St. Paul authorizing payment to Cordova without waiver of any rights under the performance or payment bonds. (R. 336). The engineer's letter was not addressed to or sent to St. Paul. (R. 336). Moreover, this letter did not contain any language advising St. Paul that a claim was being made against the payment bond. (R. 336). Cordova requested a consent of surety[7] from St. Paul but St. Paul was never advised that a claim was being made against its bond. (R. 145).

On January 9, 2004, and in response to Cordova's request, St. Paul issued a letter acknowledging receipt of the alleged nonpayment by Cordova to Leach Construction Company

[6] $485,729.10 - $442,624.44 - $26,210.84 = $16,893.82.

[7] A consent of surety is obtained by the design professional on behalf of the owner to avoid a wrongful release of funds claim by the surety. ***See St. for use of Natl. Surety Corp. v. Malvaney***, 72 So. 2d 424 (Miss. 1954).

(i.e. McLea). (R. 339). The clear language of St. Paul's letter authorizes payment by the project owner over the stop-payment notice of McLea, but acknowledges that the GTRAA's payment over the stop-payment notice would not relieve St. Paul of "its obligations to the Owner as set forth in the Surety Company's bond." (R. 339). This letter was addressed to the project engineer and was not sent to McLea showing that St. Paul had yet to be put on notice that a claim was being made against the payment bond. (R. 339).

The purpose of requesting a consent of surety is clear. To avoid responsibility for paying over McLea's stop-payment notice, the GTRAA wanted St. Paul to affirm it would respond to the merits of a potential claim against the payment bond by McLea if such a claim was made. No such claim was ever made.

McLea argues that even if the stop-payment notice did not constitute a claim against the payment bond, St. Paul "was clearly on notice of the McLea claim by January 9, 2004." *See* Appellant's Brief at p. 9. Pursuant to paragraph 5 of the payment bond, McLea argues that the project engineer's letter to Cordova satisfies paragraph 4 of the payment bond. *Id.* Paragraph 5 of the payment bond provides "[i]f notice required by Paragraph 4 is given by the Owner to the Contractor or to the Surety, that is sufficient compliance." (R. 107). Pursuant to Paragraph 4, there must have been evidence that McLea was making a claim against St. Paul's bond and was looking to St. Paul for payment. (R. 107). McLea submitted no such evidence that the Owner provided this notice to Cordova or St. Paul. In fact, the letter from the project engineer to Cordova does not even mention that McLea was making a claim against the payment bond. (R. 336). The letter dealt only with Cordova's efforts to be paid over McLea's stop-payment notice. Moreover, it was never communicated to St. Paul that McLea was making a claim against the payment bond until December 16, 2005, when McLea made an untimely demand against St. Paul. (R. 145).

McLea's argument rests on the notion that if a Surety has knowledge of a payment dispute, then that constitutes notice of a claim against the payment bond. This argument is illogical. Surely, most, if not all, payment bond sureties know that there are numerous payment disputes on bonded projects. However, mere notice of a payment dispute is not enough. Sureties like St. Paul, are not primarily liable for the debts of their principals to laborers and material suppliers. Restatement (Third) of Suretyship & Guaranty §§ 15 and 21. Indeed, St. Paul is secondarily liable for these debts behind the general contractor Cordova who remains primarily liable. *Id.* Sureties are placed in a precarious position and cannot interfere in the contacts of their principals, which is why a claimant such as McLea must make a demand against St. Paul asking St. Paul to insert itself into the McLea/Cordova relationship. The law is clear that to make a claim against a bond it must be done so in clear, direct, and unequivocal language demanding that the surety immediately perform under the terms of its bond *L&A Contracting Co.*, 17 F.3d 106.

In 1990, the Court of Appeals for the 9th Circuit addressed Blue Circle's (a material supplier) claim to TMCI (the general contractor) regarding the Baca Masonry's (TMIC's subcontractor) failure to pay Blue Circle for materials provided. *Tucson Mechanical Contracting, Inc.*, 921 F. 2d at 912. After sending TMCI letters regarding a potential payment dispute, Blue Circle thereafter filed suit against TMCI and its payment bond surety Fairmont. *Id.* at 913. In looking at the sufficiency of the notice, the Court of Appeals held that "***[i]t is not enough that the contractor receive notification that there is a supplier out there with uncollected bills; there must be some indication to the prime contractor that it is being looked to for payment.***" *Id.* at 914 (emphasis added). As in the case at bar, the *Tuscon* Court, addressing the sufficiency of the notices held Blue Circles notices as merely putting ***"... TMCI on notice that Blue Circle was a potential claimant on TMCI's Miller Act bond. Such notice***

in insufficient. Every contractor bonded pursuant to the Miller Act knows that there are suppliers out there who might look to it for payment under the bond." *Id.* at 915. Most important, in addressing Blue Circle's argument that once TMCI had notice that there was a potential bond claimant, it had a duty to inquire as to whether that claim would ripen the Court held, "***[s]uch reasoning, were we to accept it, would fatally undermine the Miller Act notice requirement.***" *Id.* (emphasis added).

The *Tuscon* decision speaks directly to the issue before this Court. McLea's stop-payment notice and/or St. Paul's knowledge of a potential payment dispute does not satisfy the notice requirement under the payment bond. Said notice must specifically give the surety notice that the claimant is looking to the surety for payment. McLea's stop-payment notice fails to satisfy this requirement and St. Paul's knowledge of the payment dispute between McLea and Cordova creates no obligation to investigate said dispute.

d. Mississippi law does not recognize waiver by a surety of the statute of limitations defense

McLea argues that because St. Paul did not respond to McLea's stop-payment notice, then St. Paul has waived its right to assert the statute of limitations as a defense. There are no Mississippi cases recognizing that a surety may waive its right to assert the statute of limitations defense in any situation let alone one where a litigant has failed to state a claim against the bond. In support of its waiver argument, McLea cites a Maryland appellate decision and a Florida federal court decision, which are not binding on this Court. *See J.C. Gibson Plastering Co., Inc. v. XL Specialty Ins. Co.*, 521 F. Supp. 2d 1326 (M.D. Fla. 2007); *Natl. Union Fire Ins. Co. of Pittsburgh, PA. v. David A. Bramble, Inc.*, 879 A.2d 101 (Md. 2005). These cases are factually dissimilar from the instant matter and should not be considered.

In *Gibson Plastering*, Gibson, a subcontractor on a housing development project alleged it did not receive payment from the general contractor. *J.C. Gibson Plastering Co., Inc.*, 521 F.

Supp. 2d at 1327-28. Gibson sent the surety a claim against payment the bond for a specific sum allegedly due and owing and the surety responded to the claim requesting copies of all records supporting Gibson's claim. *Id.* at 1328. The bond claimant in *Gibson* wrote the bonding company and expressly stated a claim against the bond through a fourteen (14) page letter detailing the factual and legal basis for its claim. *Id.* at 1328. This is not to say that a 14 page letter is required to make a bond claim, however, anything, *Gibson* stands for the proposition that a bond claimant must send notice to the surety, and that notice must expressly claim the benefits of the bond and demand payment from the surety. *Id.* As set forth above, McLea has not expressly stated a claim on the payment bond. *See* 2.a. and b., *supra.* Accordingly, this decision does not mandate that St. Paul is precluded from asserting the statute of limitations since the bond claimant therein expressly stated a claim against the payment bond.

As is present herein, the summary judgment issue in *Gibson* was whether its February 9, 2007 notice complied with paragraph 4 of the bond, triggering the obligations under paragraph 6. *Id.* at 1329. In holding the questions raised involved legal questions, the *Gibson* Court held there was no dispute as to the timing or content of the communications; the only dispute was whether the communications were sufficient to meet the obligations of the payment bond. *Id.* at 1330. The Court held these communications involved questions of law to be answered on summary judgment. *Id.* Therefore, ***whether McLea's stop-payment notice and other letters constitute a claim against the payment bond involved legal questions for the trial court to determine***. *Id.* McLea attached the letters in issue to its response. (R. 282). Accordingly, the trial court addressed these letters on summary judgment and did not err in granting St. Paul's Motion for Summary Judgment. (R. 408).

In *Bramble*, the payment claimants (Wadsworth and Bramble) both sent letters directly to the surety stating a claim on the payment bond for the alleged sums due. *Bramble*, 879 A.2d at

104, 106. The sureties therein responded to the claimants requesting additional information and failed to respond within the time set forth in the bond. *Id.* This decision does not provide the Court with any guidance, as the *Bramble* Court did not address the issue of the provisions of paragraph 4 and 5 and whether a stop-payment notice to the owner in the form as drafted by McLea constitutes a claim on the bond. *See generally, Bramble*, 879 A.2d 101. Moreover, the sureties in *Bramble* admitted that they breached the provisions of paragraph 6 of the bond. *Id.*, at 109. In the case at bar, St. Paul does not admit that it breached its bond obligations to McLea because McLea's stop-payment notice does not constitute a claim against the payment bond. Accordingly, *Bramble* should not be considered by the Court.

3. St. Paul should not be estopped from asserting the statute of limitations as a defense

Despite having no obligation to McLea under the payment bond, McLea alleges that St. Paul's failure to respond pursuant to ¶ 6 of the payment bond operates as a waiver by St. Paul of its statute of limitations argument. There is no law in Mississippi on the waiver issue; however, the Mississippi Court of Appeals has recently applied equitable estoppel principles to determine whether a surety waived or should be estopped from asserting the statute of limitations as a defense. *Southern Win-Dor, Inc. v. RLI Ins. Co.*, 925 So. 2d 884 (Miss. App. 2005).

In *RLI*, Southern, a material supplier, delivered materials to Green, the general contractor. *Id.* at 885. RLI issued a payment bond for the project. *Id.* In December 1999, Green filed a complaint against Southern, and Southern thereafter filed a counterclaim against Green. *Id.* at 886. During the litigation, Southern filed a proof of claim with RLI stating a claim on RLI's payment bond. *Id.* RLI responded by denying the claim pending the outcome of litigation between Southern and Green. *Id.* After Green filed for bankruptcy, Southern sought to substitute RLI for Green. *RLI,* 925 So. 2d at 886. RLI filed a motion to dismiss as it had not been made a party within the one year statute of limitations set forth at § 31-5-53.

As in the case at bar, it was undisputed in *RLI* that the claim against the surety was barred by the statute of limitations. *Id.* However, Southern claimed, as does McLea, that RLI should be estopped from raising the statute of limitations. The Mississippi Court of Appeals held that a defendant should be estopped to set up the statute of limitations in bar of plaintiff's claim "***when the delay which would otherwise give operation to the statute has been induced by the promise or representation that the statutory bar would not be interposed, or by inducing plaintiff to believe that an amicable adjustment of the claim will be made without suit, or by other forbearance to sue induced by defendant.***" *RLI* at 887 (citations omitted). Finding that the surety therein made no promise to induce the claimant not to timely sue, the Court of Appeals affirmed the trial court's grant of the surety's motion to dismiss. *Id.* at 889.

Under Mississippi law, "a party is required to show inequitable or fraudulent conduct in order to estop another party from asserting a statute of limitations defenses." *Id.* (citations omitted). McLea bears this burden of proof by clear and convincing evidence. Further, "***equitable estoppel should only be applied against the statute of limitations in the most egregious of cases . . . .***" *Id.* at 888 (emphasis added). Additionally, ". . . the fact that a barred claim is a just one or has the sanction of moral obligation does not exempt it from the limitations period. These statutes of repose apply with full force to all claims and courts cannot refuse to give the statute effect merely because it seems to operate harshly in a given case." *Id.*

As set forth below, McLea has brought forth no evidence from which the Court can conclude that St. Paul induced McLea into filing an untimely lawsuit. In fact, the alleged actions for which McLea complains has nothing to do with McLea's failure to file a timely lawsuit against St. Paul.

a. St. Paul made no promise or representation that it would refrain from asserting the statute of limitations as a defense

The record is utterly devoid of any evidentiary proof establishing that St. Paul agreed it

would refrain from asserting the statute of limitations as a defense. McLea brought forth no evidence before the trial court and McLea never alleged that St. Paul promised or represented that it would not assert the statute of limitations or that McLea could sue after the statute of limitations had run. There is no correspondence between McLea and St. Paul whereby St. Paul requested that suit not be filed and there is no evidence before the Court to support estoppel on this theory. Therefore, there are no genuine issues of fact for trial.

b. St. Paul made no promises or representations that it would pay McLea without the necessity of filing suit

McLea's sole support for its assertion of equitable estoppel as a bar to the statute of limitations defense is based upon the self-serving affidavits of Mike Leach (president of McLea) and his previous attorney, Dewitt Hicks. Mr. Leach and Mr. Hicks have sworn and will testify that St. Paul silence in response to McLea's stop-payment notice allegedly induced McLea into believing that St. Paul would pay McLea's alleged claim without the necessity of filing suit. (R. 285, 311). Catching on to McLea's only argument that silence alone induced it to file an untimely lawsuit, the trial court made the following holdings:

> Plaintiff claims that the Defendant's silence induced the Plaintiff not to file a lawsuit. Plaintiff argues that since the Defendant did not dispute this letter that both parties were in agreement that the problem could be worked out without having to go to court.
>
> However, as stated earlier in *RLI*, Mississippi courts have held that defendants will not be equitably estopped when they have made no promise to the plaintiff. *Id.* at 887. Similar to the defendant in *RLI*, ***the Defendant in the case sub judice made no promise to come to an agreement with the Plaintiff. The Defendant was merely silent in regards to the stop notice letter carbon copied to it. Mere silence does not constitute a promise to induce a plaintiff not to timely sue.***
>
> ...
>
> While Plaintiff's previous attorney signed an affidavit stating that he believed that a resolution could be had without going to court, this cannot keep the Defendant from asserting the statute of limitations defense. Even though the attorney may have genuinely believed that things have been resolved, there must be more than a belief – there must be some legal basis.

(R. 408).

(i) Dewitt Hicks' affidavit

Dewitt Hicks, McLea's attorney that assisted in filing the Federal Action, testified that he was induced into believing that McLea's claim would be paid without the necessity of filing a lawsuit. (R. 311). It was not disputed before the trial court that St. Paul made no promise to and took no affirmative conduct directed to Mr. Hicks to induce him into his alleged beliefs. Except for Mr. Hick's self-serving affidavit, there is no evidence that St. Paul took an affirmative fraudulent or inequitable conduct directed to Mr. Hicks. The conduct that allegedly induced Mr. Hicks was St. Paul's alleged inaction or failure to respond to McLea's stop-payment notice to the GTRAA. (R. 311). This, in and of itself, defeats McLea's equitable estoppel argument as McLea must prove some affirmative fraudulent or inequitable conduct rather than mere silence.

McLea relies upon letters sent at or near the time of its stop payment notice in support of its claim of equitable estoppel. On behalf of McLea, on January 6, 2004 Mr. Hicks issued a stop-payment notice to the project Owner and provided St. Paul with a copy of the letter alleging that Cordova was allegedly withholding funds due McLea. (R. 132). In addition to the stop payment language the letter specifically states, ". . . we are notifying the payment and performance bond company of Leach Construction Company's ***potential bond claim*** pursuant to Section 85-7-187 of the Mississippi Code . . . ." (R. 132). (emphasis added). If anything, Mr. Hicks was notifying St. Paul of McLea's potential lawsuit. Certainly, St. Paul's silence in response to Mr. Hicks' letter should not have induced Mr. Hicks, an attorney, into believing his client would be paid without the necessity of filing suit. Indeed, as an attorney, Mr. Hicks' testimony is disingenuous as St. Paul's silence should have prompted Mr. Hicks to file suit against St. Paul rather than to allegedly believe McLea would be paid.

In response to a request from the project engineer, St. Paul acknowledged the alleged nonpayment of Cordova to McLea and approved payment by the GTRAA to Cordova through a consent of surety to the engineer on January 9, 2004. (R. 137). Dewitt Hicks testified that pursuant to the consent of surety that payment to Cordova would not relieve St. Paul of its obligations under the payment bond, he was induced to believe that payment would be made. (R. 311).

Despite Mr. Hicks testimony, the January 9, 2004 letter was addressed to the project engineer. (R. 137). This letter was neither addressed to Mr. Hicks nor does it show that he received a copy of this letter. (R. 137). There was no promise or affirmation in the January 9, 2004 correspondence that St. Paul would pay or arrange for payment to McLea. (R. 137). Additionally, there was no request in this letter that McLea withhold a lawsuit against St. Paul or that St. Paul would not raise the statute of limitations as a defense. (R. 137). In fact, and to be precise, St. Paul agreed, "that this payment to Cordova Constructors, Inc. ***shall not relieve the Surety Company of any of its obligations to the Owner*** as set forth in the Surety Company's bond." *Id.* (emphasis added). Through this letter, St. Paul affirmed its obligations to the project Owner, not McLea.

Dewitt Hicks' alleged inducement was not the result of St. Paul's actions. Indeed, Mr. Hicks is not entitled to assert he was induced by this January 9, 2004 letter since St. Paul made no representations to him or McLea. *RLI*, 925 So. 2d at 888 (requiring McLea to prove St. Paul engaged in affirmative conduct or made representations to McLea inducing it to refrain from filing suit). If anything, St. Paul's consent to payment should have induced Mr. Hicks, McLea's attorney, into filing suit against all involved.

Mr. Hicks further testifies that the January 9, 2004 letter made no reference to and did not address McLea's alleged January 6, 2004 claim. (R. 311). Through his testimony, Dewitt Hicks

admits St. Paul's letter makes no promises or representations to McLea that its alleged claim would be paid. Based on no representation by St. Paul, Mr. Hicks claims he was induced to believe that St. Paul would pay or arrange for payment of the claim without the necessity of filing a lawsuit. (R. 311). Mr. Hicks would have this Court believe that, as an attorney, he was induced by no action on the part of St. Paul into believing McLea would be paid without filing suit, an element McLea must prove as required by *RLI* by affirmative conduct.

Furthermore, and most important, Mr. Hicks *never* testified that he relied upon the January 9, 2004 letter. (R. 311). On March 8, 2006, McLea filed a Motion for Continuance in the Federal Action. (R. 392). In contrast to Dewitt Hicks' affidavit, in its Motion for Continuance, McLea alleged that in October of 2005, it learned that St. Paul issued a payment bond and that St. Paul, "with full knowledge of McLea's claim, authorized payment by the owner of the Eurocopter project to Cordova without interpleading the funds or including McLea as a payee on the check." (R. 392). Through this motion, ***McLea admitted that it had no knowledge of the January 9, 2004 correspondence until sometime in October 2005, months after the statute of limitations barred McLea's lawsuit.*** (R. 392). Consequently, McLea and its attorney could not have been induced by the January 9, 2004 correspondence into believing St. Paul would pay or arrange for payment without filing a timely suit or induced McLea into missing the statute of limitations.

Additionally, and in yet another attempt to argue that he was induced to take no action, Mr. Hicks testified that on June 30, 2004, Cordova wrote a letter to the GTRAA directing it to make project payments to St. Paul, which allegedly induced Mr. Hicks into believing that St. Paul would pay McLea's claim without the necessity of filing suit. (R. 311, 325). This letter was written by Cordova and addressed to the project owner. (R. 325). This letter was not written by St. Paul. (R. 325). This letter was neither addressed to Mr. Hicks nor does it show

that Mr. Hicks received a copy of this letter. (R. 325). There was no affirmation in the June 30, 2004 correspondence that St. Paul would pay or arrange for payment to McLea or that the statutory bar would not be asserted. (R. 325). Mr. Hicks' affidavit is devoid of any reference to conversations he had with Cordova or St. Paul in response to this June 30, 2004 letter supporting a claim for equitable estoppel. (R. 325). If in fact Mr. Hicks relied upon this letter, it should have sparked him to make a claim on the payment bond or file suit against St. Paul. As in the January 9, 2004 letter, one thing is certain, St. Paul took no affirmative action and made no representations to McLea or its attorney to induce McLea in believing that St. Paul would pay McLea without filing suit or that the statute of limitations would not be asserted.

Under Mississippi law, a party asserting equitable estoppel "is required to show inequitable or fraudulent conduct in order to estop another party from asserting a statute of limitations defenses." *RLI*, 925 So. 2d at 887. ***The conduct complained of must not be any conduct, but must be fraudulent or inequitable conduct that led to the delay in filing suit.*** *Id.* Dewitt Hicks' affidavit fails to prove that St. Paul took any action or made any promises inducing him to believe that McLea would be paid without the necessity of filing suit. (R. 311). Application of equitable estoppel to the statute of limitations should be applied only in the most egregious of cases. *RLI*, 925 So. 2d at 888. This is not one of those cases.

(ii) Mike Leach's affidavit

Regurgitating the testimony of Dewitt Hicks, Mike Leach testified that because "St. Paul never advised McLea that any portion of its claim was in dispute", he was induced into believing that St. Paul would pay or arrange for payment of McLea's alleged claim. (R. 285). Essentially, Mike Leach testifies that he was induced to believe that St. Paul would pay or arrange for payment of McLea's alleged claim through a lack of response or alleged silence by St. Paul in response to McLea's stop-payment notice.

Under Mississippi law, "***a party is required to show inequitable or fraudulent conduct in order to estop another party from asserting a statute of limitations defenses.***" *RLI*, 925 So. 2d at 887. Accordingly, to prohibit St. Paul from asserting a statute of limitations defense, McLea must prove affirmative conduct or action on the part of St. Paul designed to cause the delay in filing suit. *Id.*

On the face of Mike Leach's sworn affidavit, McLea's claim for equitable estoppel must fail. (R. 285). Mike Leach has merely stated that St. Paul never advised McLea that its alleged claim was in dispute. (R. 285). McLea has not identified any affirmative conduct or statements by St. Paul that could have led the trial court or this Court to estop St. Paul from asserting the statute of limitations defense. Indeed, the trial court correctly held that "mere silence does not constitute a promise to induce a plaintiff not to timely sue." (R. 408). As a result, St. Paul must not be estopped from asserting the statute of limitations, and the trial court's granting of St. Paul's Motion for Summary Judgment must be affirmed.

c. The remaining allegations of inequitable conduct are wholly unrelated to McLea's failure to file a timely lawsuit and must not be considered by the Court.

McLea alleges that St. Paul acted fraudulently and/or inequitable when Cordova requested that the GTRAA forward the remaining project funds to St. Paul. (R. 340). McLea argues that when St. Paul accepted the project funds, St. Paul became an escrow agent with a duty to investigate the claims of subcontractors. *See* Appellant's Brief at p. 12. McLea's argument that St. Paul, as a payment and performance bond surety, became an escrow agent is unsupported by authority which the Court is not required to Consider. *Carter v. Miss. Dept. of Corr.*, 860 So. 2d 1187, 1193 (Miss. 2003) (failure to cite to legal authority to support an argument will procedurally bar that issue from being considered on appeal.) St. Paul's obligations are determined by the strict terms of the payment and performance bond. *Koelling*,

57 So. 2d at 563. To the extent St. Paul has an obligation to investigate a subcontractor's claim, that obligation is determined by the terms of the payment bond. (R. 107). Clearly, St. Paul is not required to go out and look for potential claimants. *Tucson Mechanical Contracting, Inc.*, 921 F. 2d at 915. As set forth above, McLea did not state a claim against St. Paul's payment bond until long after the statute of limitations barred the claim. (R. 23). Accordingly, St. Paul had no obligation to investigate a non-existent claim. (R. 355).

McLea attempts to paint St. Paul in a bad light by alleging that St. Paul has misappropriated the money that it received or that St. Paul is still in possession of said money. McLea's allegations that St. Paul misappropriated the money or still has the money in its possession is made without evidentiary basis whatsoever. As a surety, the doctrine of equitable subrogation clearly provides St. Paul with a right to the contract funds when completing a project, which is precisely what St. Paul was doing when Cordova issued the June 30, 2004 letter. (R. 325). *Trinity Universal Insurance Company*, 382 F.2d 317.

In *Trinity*, the Fifth Circuit held:

> A different situation occurs when the surety completes the performance of a contract. The surety is not only a subrogee of the contractor, and therefore a creditor, but also a subrogee of the government and entitled to any rights the government has to the retained funds. . . . On the other hand, the surety may undertake to complete the job itself. ***In so doing, it performs a benefit for the government, and has a right to the retained funds and remaining progress money to defray its costs. The surety who undertakes to complete the project is entitled to the funds in the hands of the government not as a creditor and subject to setoff, but as a subrogee having the same rights to the funds as the government.***

Trinity Univ., 382 F.2d at 320 (emphasis added).

Based on *Trinity*, in completing the project with Cordova, St. Paul was entitled to the project funds just as Cordova and the GTRAA. Having a legal right to the funds, St. Paul did not act fraudulently. Even assuming St. Paul's actions rise to the level of fraud (which they could not be since St. Paul had a legal right to the funds in issue) McLea's equitable estoppel claim still

fails because the alleged inequitable/fraudulent conduct/letters were not addressed to McLea, were not relied upon by McLea and has no causal relationship to McLea's failure to file a timely lawsuit. *RCI,* 925 So. 2d. at 888. St. Paul is puzzled as to how exercising its right to the benefit of using project funds in completing a project caused McLea to file an untimely lawsuit. Such a conclusion is illogical.

McLea also claims that because St. Paul cannot account for the project funds it received, McLea is entitled for a jury to infer that 1) St. Paul breached a duty to pay legitimate claims of subcontractors, 2) St. Paul misappropriated the money it received, and 3) St. Paul still has the money in its possession. *See* Appellant's Brief at p. 13. Despite McLea's argument on appeal, McLea's Complaint lacks any claim or allegation putting St. Paul on notice that St. Paul was required to account[8] for funds received on the project or that St. Paul was being charged for misappropriation or fraud. (R. 6). Rather, the Plaintiff's Complaint is a claim against St. Paul's payment bond and has claim for an accounting. (R. 6). The facts related to St. Paul's receipt and disbursement of retainage funds received has nothing to do with this lawsuit or whether McLea was induced to submit an untimely lawsuit. Because there is no evidence to support a finding that St. Paul acted fraudulently, St. Paul must not be estopped from asserting the statute of limitations as a defense.

VI. CONCLUSION

Despite Appellant's contention, this case involves no genuine issues of material fact concerning McLea's claim for equitable estoppel. Indeed, the cases cited by McLea state that the impact of the letters and/or communications involved herein are legal issues for the trial court

[8] McLea maintains that it put St. Paul on notice through its 30(b)(6) deposition notice that it would inquire of St. Paul regarding the receipt and disbursement of project funds. (R. 440). Counsel for St. Paul objected to this line of questioning by objecting to this entire designation area. (R. 443). Indeed, discovering facts at St. Paul's deposition (which occurred on August 13, 2008) related to St. Paul's receipt of project funds cannot be used years after the statute of limitations barred McLea's lawsuit to argue that St. Paul should be estopped from asserting the statute of limitations. Clearly, an accounting at this stage of the litigation has no bearing on McLea's failure to file a timely lawsuit.

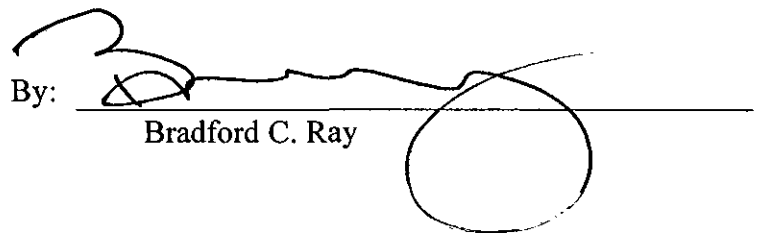
to determine. Having properly determined that this matter does not involve egregious conduct in which equitable estoppel should be applied, the trial court properly granted St. Paul's Motion for Summary Judgment. Accordingly, St. Paul requests that this Court affirm the trial court's grant of St. Paul's Motion for Summary Judgment.

This, the 4th day of August, 2009.

Respectfully submitted,

ST. PAUL GUARDIAN INSURANCE COMPANY

By Its Attorneys
WATKINS LUDLAM WINTER & STENNIS, P.A.



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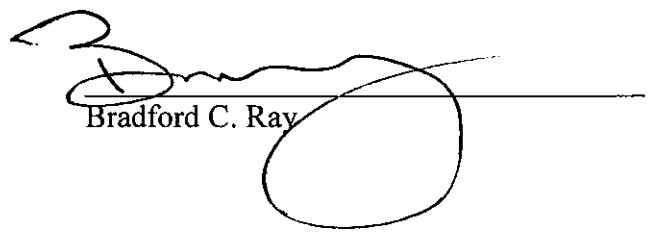
CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this date mailed, via United States first-class mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

James C. Helveston, Esq.
Post Office Box 835
West Point, MS 39773

The Honorable Lee J. Howard
Circuit Court Judge
Post Office Box 1344
Starkville, Mississippi 39760

This the 4th day of August, 2009.



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