IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO.: 2010-CA-00177-COA

T.C.B. CONSTRUCTION COMPANY, INC.	**APPELLANT/ CROSS-APPELLEE**
VS.	
W.C. FORE TRUCKING, INC.	**APPELLEE/ CROSS-APPELLANT**

REPLY BRIEF OF THE APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY

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REPLY TO BRIEF OF CROSS-APPELLEE

I. Reply to T.C.B's position regarding the liquidated nature of T.C.B.'s claim.

In its Brief of Cross-Appellee at page 17, T.C.B. states that its claim against Fore is "most assuredly liquidated and fixed" solely based on T.C.B. having submitted into evidence an exhibit claiming a balance of $6,634,436 was due from Fore. Although T.C.B. did claim in its complaint and at trial that Fore owed it $6,634,436, T.C.B.'s position blatantly disregards the fact that Fore disputed this amount during trial, and that the jury, after considering all the evidence and testimony at trial, awarded T.C.B. only $4,098,314. Additionally, when the $520,730 verdict that Fore received from T.C.B. on its counterclaim is taken into account, the amount Fore owed T.C.B. pursuant to the jury verdict was $3,577,584. This is over three (3) million dollars less than the $6.6 million balance that T.C.B. claims was "most assuredly" liquidated and fixed.

In both of its briefs, T.C.B. continuously ignores the fact that the trial record and testimony transcripts contain sufficient evidence presented by Fore which supports the jury's verdict. Instead, T.C.B. advances the same argument that it made in the original motion for summary judgment; i.e., because T.C.B. submitted invoices to Fore claiming a $6.6 million balance was due under the contract between the two, Fore owes this total. T.C.B. advances this same argument as it applies to the award of prejudgment interest and states that the amount it invoiced Fore is "most assuredly" a liquidated and fixed amount – notwithstanding the evidence at trial and the jury's verdict.

The Supreme Court has stated that on appeal it "will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be

reasonably drawn from the evidence." *Spotlite Skating Rink, Inc. v. Barnes,* 988 So. 2d 364, 368 (Miss. 2008) (quoting *Ala. Great S. R.R. Co. v. Lee*, 826 So. 2d 1232, 1235 (Miss. 2002)). On appeal, the Court will affirm the denial of a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict, where there is "substantial evidence to support the verdict"; but the Court will reverse if "the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *Martin*, 998 So.2d at 964 (quoting *White v. Stewman,*932 So. 2d 27, 32 (Miss. 2006)).

The jury clearly had substantial evidence to support its verdict of an award over 3 million dollars less than T.C.B. was claiming. It took the jury over six and a half hours to "fix" the principal amount. The jury returned a verdict for only about half of the amount of the total T.C.B. invoices, and the jury verdict did not specify which of the 42 invoices the jury considered to have been included in its verdict of finding a partial oral modification of the written contract. Therefore, it would be impossible to calculate prejudgment interest from a specific invoice due date or date of breach. In fact, this same logic should lead one to conclude that the damages in this case were unliquidated and the principal was only fixed upon judgment. Therefore, the circuit court abused its discretion in awarding T.C.B. prejudgment interest where the amount due (about $3.5 million as established by the jury) was not liquidated when the claim was originally made or the principal amount was not fixed prior to judgment.

II. Reply to T.C.B.'s analysis of cases cited.

In its Brief of Cross-Appellee at page 18, T.C.B. argues that the case of *American Fire Protection, Ins. v. Lewis*, 653 So. 2d 1387 (Miss 1995), as cited by Fore, should be "easily

dismissed" because the Court upheld[1], rather than denied, an award of prejudgment interest. T.C.B. claims American Fire Protection supports T.C.B.'s position, not Fore's. However, Fore's brief clearly cites the *American Fire Protection* case at page 1391, among other cases cited, as standing for the proposition that under Mississippi law ***" no award of prejudgment interest is allowed where the principal amount has not been fixed prior to judgment."*** *See Warwick v. Matheney,* 603 So.2d 330, 342 (Miss.1992); *Stanton & Assoc., Inc. v. Bryant Constr. Co.,* 464 So.2d 499, 504 (Miss.1985); *American Fire Protection, Inc. v. Lewis,* 653 So.2d 1387, 1391 (Miss.1995). The fact that the Court in the *American Fire Protection* case reversed the trial court's failure to award prejudgment interest does not change the fact the *American Fire Protection* case can be cited for the proposition that no award of prejudgment interest is allowed where the principal amount has not been fixed prior to judgment.

T.C.B. also tries to distinguish *Stanton & Assoc., Inc. v. Bryant Constr. Co.*, 464 So. 2d 499 (Miss. 1992). T.C.B. argues that the *Stanton* case involved an amount uncertain which the *Stanton* parties disagreed on that could only be established by the jury verdict. This seems a lot like the case between T.C.B. and Fore. Like the *American Fire Protection* case above, Fore cited the *Stanton* case for the proposition that no award of prejudgment interest is allowed where the principal amount has not been fixed prior to judgment. T.C.B. argues in its Brief of Cross-Appellee that prejudgment interest was denied in *Stanton* because there was never a contract at all. However, the *Stanton* Court held the following: "There being no contractual agreement for attorney fees or prejudgment interest and no semblance of the quality of proof necessary to support a punitive damages award, the awards of prejudgment interest and attorneys fees in this case were improper and must be vacated. *Clow Corp. v. J.D. Mullican, Inc.,* 356 So. 2d 579, 584

[1] Actually, T.C.B. is wrong in this statement of the *American Fire Protection* case. The Court in this case reversed on cross-appeal the lower court's failure to award pre-judgment interest.

(Miss.1978). Moreover, no award of prejudgment interest may rationally be made (or computed) where the principal amount has not been fixed prior to judgment." *Stanton & Assoc., Inc. v. Bryant Constr. Co.*, 464 So. 2d at 504 (Miss. 1992). This holding is what Fore cited in its brief and can clearly be applied to the case at bar to find that the trial court abused its discretion in awarding prejudgment interest. The jury returned a verdict for only about half of the amount of the total T.C.B. invoices, and the jury verdict did not specify which of the 42 invoices the jury considered to have been included in its verdict of finding a partial oral modification of the written contract. Therefore, like the *Stanton* case, it would be impossible to compute prejudgment interest from a specific invoice due date or date of breach.

T.C.B. in its Brief of Cross-Appellee also argues that *Benchmark Health Care Center, Inc. v. Cain*, 912 So. 2d 175 (Miss. Ct. App.2005), does not apply to the case at bar because the amount due was uncertain and not based on contract. The first sentence of the *Benchmark* case states, "H. Ted Cain d/b/a Quest Rehab (Quest) filed suit against Benchmark Health Care, Inc. (Benchmark) in the Circuit Court of Lauderdale County on August 22, 1998, asserting ***breach of contract.***" *Id.* at 177 (emphasis added). Clearly the *Benchmark* case was based on contract, notwithstanding T.C.B.'s assertion. Additionally, in regards to the *Benchmark* case, T.C.B. stated in its brief that "prejudgment interest was denied because the court could not tell which party [sic] of the jury's verdict was for the original contract balance and which part was for lost profits and consequential damages. Neither of those cases supports Fore's cross-appeal."

However, Fore's cross-appeal is supported by the *Benchmark* case. The *Benchmark* case is analogous and controls the case at bar. Just like the *Benchmark* case, the written contract between T.C.B. and Fore did not set forth a total contract price even though it contained a formula for calculating the cost of work performed, i.e., $8.90 per cubic yard hauled for debris

hauled north of Highway 53. Also like *Benchmark*, there was a legitimate dispute between the Fore and T.C.B. over how much money was owed under the contract. Further, exactly like the *Benchmark* case, the jury verdict in the case at bar was unclear as to which of the T.C.B. invoices it found reflected debris that was hauled pursuant to an oral modification since the jury awarded damages over $3 million less than the total T.C.B. was claiming. Therefore, just like the *Benchmark* case, the damages in the case at bar are unliquidated and prejudgment interest should not have been awarded.

Finally, T.C.B. claims that the case of *Warwick v. Matheney,* 603 So.2d 330 (Miss.1992), cited by Fore, is materially distinguishable and does not support Fore's argument that T.C.B.'s claim is not liquidated. To advance its argument on this point, T.C.B. states that the amount of T.C.B.'s damages was never contested by Fore. This statement by T.C.B. is patently false. Anyone who briefly reviews even part of the record will see that that amount of T.C.B.'s damages was clearly contested by Fore.

There were several contested issues regarding the measure of damages in the *Warwick* case, including the value of the stock at the time of the breach. The only amount that was ever certain was the price the Warwicks agreed to pay for the stock. In the case between T.C.B. and Fore, there were contested issues that would affect the measure of damages, including in which areas ***south*** of Highway 53, if any, did there exist an oral modification to the written contract that covered debris removal ***north*** of Highway 53. Just like the price certain that the Warwicks agreed to pay for the stock in the *Warwick* case, the only amount that was certain in the case at bar was the price that Fore would pay T.C.B. for debris hauled pursuant to the written contract ***north*** of Highway 53, i.e. $8.90 per cubic yard. Just like the *Warwick* case, damages were not liquidated in the case at bar.

T.C.B. also cites *Cain v. Cain*, 967 So. 2d 654 (Miss. App. 2007), for the proposition that interest may be awarded when the amount of damages is certain, even if the fact of liability for those damages is disputed. However, T.C.B. ignores the logical conclusion that the use of the proposition espoused in *Cain* assumes that a judgment was rendered for the total amount of the original claim, or nearly so. This did not occur in the case between T.C.B. and Fore where the jury verdict represented nearly a 50% reduction in the amount of the claim that T.C.B. brought forth. T.C.B. cannot cite any cases similar to the case between it and Fore where there existed such a very large difference (over $3 million) between what the plaintiff was claiming and the jury's verdict in which the Court found an award of prejudgment interest to be appropriate. In cases such as these, the courts have said that prejudgment interest is not appropriate because the damages are unliquidated, liability is disputed, or the principal amount has not been fixed prior to judgment.

Respectfully submitted, this 23rd day of February, 2011.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day personally mailed via first class United States Mail, postage prepaid, the original and three copies of the Reply Brief of the Appellee/Cross-Appellant, along with an electronic disk of same for filing to:

Ms. Kathy Gillis, Clerk
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I have personally mailed by first class United States Mail, postage prepaid, a copy of the above referenced Reply Brief of the Appellee/Cross-Appellant to:

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