2010-CA-00177-COA RT

STATEMENT OF ORAL ARGUMENT

In its initial brief, T.C.B. predicted that it would file a request for oral argument pursuant to Rule 34 (b). Now that the briefs have been filed, T.C.B. feels more strongly than ever that this is a case where oral argument should be granted. T.C.B.'s claim is for millions of dollars. While the transcript and record of this appeal are lengthy, much of the volume of testimony is irrelevant to the simple issues involved. This is a case where oral argument can assist the court in recognizing what is important on this appeal and what is not.

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I. FORE FAILS TO CONTRADICT T.C.B.'S ENTITLEMENT TO PAYMENT IN FULL FOR SUBCONTRACT WORK.

Fore's opposition to T.C.B.'s direct appeal is largely diversionary. It scarcely touches the controlling material facts. The tactic is understandable. There is simply no way for this contractor, in law or in equity or consistent with common sense for that matter, to justify its refusal to pay over millions of dollars due to its subcontractor – for more than nine months of work

- done by T.C.B. under the watchful eye of the owner's representative
- billed for each week by T.C.B. to Fore at the agreed subcontract price ($8.90 per cubic yard of debris)
- periodically and promptly billed for by Fore to Harrison County at the agreed contract price ($10.64 per cubic yard), and
- following owner and FEMA verification and auditing, duly paid for by Harrison County to Fore at the contract price.

This lawsuit relates only to work on the part of T.C.B. done, accepted, approved, invoiced, and paid for in the manner described above. Other disputes that arose on the job, and concerning which Fore continues to try to divert the Court, are not material here.

A. FORE DOES NOT CONTEND THAT ANY PARTY OTHER THAN T.C.B. PERFORMED THE WORK IN ZONE 2, SOUTH OF HIGHWAY 53 AND NORTH OF I-10.

Trial Exhibit 11, which stands unchallenged, reflects that virtually all (95%) of debris removal in Zone 2, south of Highway 53 and north of I-10, was done by T.C.B. (*See* R. Exhibit Volume 1 of 6. *See, also*, Appendix 3, Brief Of Appellant.)

The Fore Brief nowhere challenges that, while Fore had a contract with the County to remove Katrina debris from the road rights-of-way in the part of Zone 2 south of Highway 53 and north of I-10, Fore itself did not fulfill that part of its contract. Fore makes no pretext in its Brief at having performed that sizeable part of its contract with its own equipment and personnel. Undisputed, also, is that no other subcontractor of Fore was engaged to fulfill that part of the Fore contract.

Equally undisputed, therefore, is that T.C.B., and T.C.B. alone, over a period of time exceeding nine months, was the party who (at great out-of-pocket expense, obviously) performed that part of Fore's contract. Fore in its Brief tries to downplay that T.C.B. did **all** of the work at issue by pointing to the compromise jury verdict. (Br. at 16) Begging the question of whether there was a genuine material fact issue of any kind for the jury (to be discussed later beginning at page 7) does not change in any way the established fact of "who did the hauling and who did not."

B. FORE DOES NOT DISPUTE THAT T.C.B.'S WORK IN ZONE 2 WAS MONITORED FOR AND ACCEPTED BY HARRISON COUNTY (AND ULTIMATELY BY FEMA).

Not only did T.C.B. in fact do **all** of the work that is at issue, it was unquestionably well done and in full compliance with Fore's contractual commitment to Harrison County. The Fore Brief contains no suggestion it was otherwise.

The original Brief Of Appellant describes how and why the County engaged the engineering firm, Beck, to oversee, supervise, inspect, and audit the performance of the various Katrina clean-up contracts (ps. 4-5). Fore, by offering no opposition whatever in its Brief,

affirms that every load of debris involved in this case was approved by Beck and then by the County and finally by FEMA.

C. FORE DOES NOT DISPUTE ITS DAILY RECEIPT OF JOB TRUCK TICKETS EVIDENCING HAULS BY T.C.B. IN ZONE 2.

An integral part of the Beck supervisory role was the daily issuance of an individual ticket identifying each and every T.C.B. truck or trailer and verifying the size of each load and the street address where it was collected, with Fore receiving a copy on a daily basis. (Trial Exhibit 7, R. Exhibit Volume 1 of 6) (*See*, *also*, Brief Of Appellant at 8.)

Fore does not contest that this was the practice. The implications of Fore receiving daily, for months, tickets reflecting T.C.B. hauls in Zone 2 south of Highway 53 are apparent. The Fore Brief does not suggest there is any accepted business practice that would enable it to allegedly ignore such repeated notification of T.C.B. work. Nor does its Brief include any legal analysis that would permit this contractor to successfully hide from the daily barrage of job records on the lame premise it was April of 2006 before it "began investigating in detail" T.C.B.'s load tickets." (Br. at 8)

D. FORE DOES NOT DISPUTE ACCEPTING FINANCIAL BENEFITS IN THE MILLIONS OF DOLLARS FROM T.C.B.'S WORK.

The key concessions in Fore's Brief are certainly not highlighted. But they are there.

> . . . T.C.B. was invoicing Fore for work that was south of Highway 53 . . . (Br. at 5)
>
> Fore did receive payment for work that T.C.B. performed south of Highway 53 in Zone 2. (Br. at 17)

Trial Exhibit 4 is a recapitulation of

- T.C.B. invoices to Fore
- Fore invoices to the County
- County payments to Fore
- Fore **partial** payments to T.C.B.

and not a single date or a single monetary entry on that spreadsheet is disputed in Fore's Brief. Thus, it stands uncontradicted that, at $8.90 per cubic yard, the T.C.B. work in Zone 2 aggregated $10,273,125; that, at $10.64 per cubic yard, Fore's billings to Harrison County for T.C.B. work aggregated $12,292,176, that the County paid Fore the full $12,292,176 for the T.C.B. work; that Fore pocketed its profit of $2,019,051 on the T.C.B. work; and that Fore paid T.C.B. only $3,638,689, holding for itself and converting to its own use the remaining $6,634,436. (*See* R. Exhibit Volume 1 of 6. *See, also*, Appendix 5, Brief Of Appellant.)

Again begging the question of whether there was a genuine material fact issue of any kind for the jury, Fore implies there is some credible basis in the record for a jury to conclude that T.C.B. is entitled to less than the full $6,634,436. (Br. at 16)

Fore's unexplained implication is nonsense, given the uncontradicted analysis reflected on Exhibit 4. The extent to which Fore adopted T.C.B.'s work and thereby accepted for itself financial benefits from that work is not debateable. Fore benefitted from **all** of the T.C.B. work at issue in this case. Fore billed for **all** of it. Fore collected for **all** of it. Fore, therefore, by operation of law, approved the modification of the subcontract to encompass **all** of such work.

E. FORE HAS NO LEGAL OR EQUITABLE BASIS FOR REFUSING TO PAY T.C.B. FOR WORK DONE IN ZONE 2.

Fore maintains that, all else aside, Mr. Fore's testimony made a question for the jury whether Fore had to pay T.C.B. any part of the $6,634,436 and if so how much. The Brief repeatedly recounts for the Court Mr. Fore's testimony he individually did not agree for his company's subcontract with T.C.B. to be modified to extend to territory south of Highway 53. (Br. at 6, 8, 14) If no agreement had actually been the case, Fore could have refused to bill the County for T.C.B.'s "unauthorized" work. That, of course, is not what Fore did. Fore treated the work exactly as all other "authorized" subcontract work and invoiced the County for the same.

As demonstrated in the original Brief Of Appellant (ps. 16-20), Fore cannot both embrace and take advantage of T.C.B. work as though it was authorized and then turn around and not pay the subcontractor by claiming the work to have been unauthorized.[1]

Throughout the Brief are reminders Mr. Fore did not stop with merely denying agreement on his part to modify the territorial scope of the subcontract. Mr. Fore went further at trial and protested he had no idea, for months, that T.C.B. was engaged in clearing debris from roadways south of Highway 53 and north of I-10 and likewise did not know T.C.B. was "invoicing" his company for hauling debris south of Highway 53. (Br. at 5, 6, 7, 8) The Brief even asserts Mr.

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[1] The testimony of Mr. Fore not only does not set up a scenario for a jury to be empowered to return a compromise verdict, the testimony is nonsensical. Mr. Fore's company did not itself perform the work south of Highway 53 and north of I-10. Fore had assigned that area to no other subcontractor. The truth could only be one of the following: **either Fore intended to default on that major part of the work it had contracted to do – or – there was in fact a mutual understanding that T.C.B. was assigned the work.**

Fore's alleged complete unawareness spread across the company, culminating in the conclusory assertion that "Cotton Fore and his company had no knowledge of T.C.B.'s hauling and invoicing." (Br. at 5, 6, 7)[2]

Referencing once again the unrefuted authorities set forth in the Brief Of Appellant at pages 16-20, our law does not allow this kind of testimony (inconsistent on all counts with the party's own actual conduct) to set up a bona fide dispute to be resolved by a jury.

Fore does not even pretend in its Brief to cite authority for, or to otherwise justify, the result that an affirmance would countenance – the result where, in the face of billing for every T.C.B. load and collecting dollars for itself for every such load, Fore gets away with not paying T.C.B. just by having a principal willing to say he "and his company" did not know T.C.B. was working south of Highway 53.[3]

The Brief at page 9 misstates T.C.B.'s position (" . . . Mississippi law on estoppel bars Fore from his testifying in a jury trial as to the material fact of whether or not an oral modification of the contract occurred."). The T.C.B. position is not whether Mr. Fore can get on the stand and, if willing, say what he allegedly did or did not do and what he allegedly knew or did not know. The T.C.B. position is, no matter what Mr. Fore is willing to say, under the circumstances of this case, the testimony of Mr. Fore does not create a jury issue. In fact, under

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[2] Mr. Fore's story, i.e. that he "and his company" billed and collected for the work without knowing anything about it defies common sense and every notion of credibility. Even Fore's counsel are confused by the story, acknowledging elsewhere in the Brief T.C.B. was in fact "invoicing Fore for work that was south of Highway 53" and that "Fore [received] payment for work that T.C.B. performed south of Highway 53 in Zone 2." (Br. at 5, 17)

[3] On page 17 the Fore Brief goes far afield by citing a case dealing with a claim for extra pay over and beyond the contracted sum.

the circumstances here, the law **implies** the contrary. Under the law, notwithstanding Mr. Fore's testimony, the Fore company is held by its course of conduct to have approved the modification of the subcontract.

The Fore Brief does not contest the holdings of the cases referenced in the Brief Of Appellant:

Wood Naval Stores Export Assn. v. Gulf Naval Stores Company, 220 Miss. 652, 71 So. 2d 425 (1954)

- "A party can not claim benefits under a transaction or instrument and at the same time repudiate its obligations." 71 So. 2d at 430.
- "Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent therewith." *Id.*

Hoerner v. First National Bank Of Jackson, 254 So. 2d 754 (Miss. 1971)

- "The acceptance of the benefits flowing from [the loans to his company] could not be other than an implied approval by operation of law." 254 So. 2d at 762.

Bailey v. Estate of Kemp, 955 So. 2d 777 (Miss. 2007)

- "It is axiomatic that estoppel forbids one from both gaining a benefit under a contract and then avoiding the obligations of that same contract." 955 So. 2d at 782.
- "This doctrine, termed a 'quasi-estoppel' precludes a party from asserting to another's disadvantage a right inconsistent with a position [it has] previously taken; and 'applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.'" *Id.*

Dodging taking on the fundamental principles illustrated by these three cases (and scores of others), Fore attempts to dismiss them as unpersuasive because those controversies did not center on whether a written contract was orally modified. (Br. at 14-15) Fore, however, does not explain why they are not closely analogous. The Baileys were, by their course of conduct, held estopped to deny the validity of a contract. Certain members of the Wood Naval Stores Export Association were, by their course of conduct, held estopped to deny their continuing membership in the Association. Mr. Hoerner, by his course of conduct, was held estopped to deny knowledge of a series of loans to his company.

The *Hoerner* case provides an excellent example of why Mr. Fore's testimony did not make out a case for the jury. Mr. Hoerner was just as adamant as Mr. Fore in denying receiving notification of loans to his company. But notwithstanding what Mr. Hoerner was willing to say, the outcome was that by law he was held to have in fact accepted the benefits of the loans. Any other result, recognizing his conduct, would have been unjust and inequitable, contrary to good conscience and morals. 254 So. 2d at 761. Mr. Hoerner was estopped to avoid his obligations by taking an inconsistent position at trial. He ratified the transactions from which he had realized benefits. His "acceptance of the benefits," the Court concluded, "could not be other than implied approval [of the transactions] by operation of law." 254 So. 2d at 762.

Evidencing signs of desperation, Fore urges "that the *Hoerner* and *Bailey* cases be discarded because they were tried in chancery and not in circuit. (Br. at 13, 14) Unfazed with no support for this premise and with the fact that the *Wood Naval Stores* case was tried in circuit, Fore implies that estoppel is only applicable in a proceeding in chancery. Surely Fore is not

seriously suggesting that a party who would be estopped in a chancery courtroom from having it both ways would have a free ride if by happenstance it found itself in a circuit courtroom.

F. FORE'S CHALLENGE OF THE SUFFICIENCY OF T.C.B.'S PLEADINGS IS BASELESS.

Unable to find any precedent to cite to the Court, or to formulate any meritorious justification or theory, that would permit it to

- adopt and accept the benefits of nine months of subcontract work done by T.C.B. south of Highway 53
- bill the owner, at the contract rate, for every truck load of that T.C.B. work
- receive payment from the owner, at the contract rate, in the millions of dollars for that T.C.B. work

and yet

- arbitrarily refuse to pay T.C.B., at its subcontract rate, for much of that work,

Fore retreats to the argument T.C.B.'s "complaint and amended complaint only gave notice of a claim of breach of contract," and that T.C.B. "did not raise [estoppel] as an affirmative claim in his [sic.] complaint or amended complaint at any time . . . [or] during [the] motion for summary judgment . . . [or] during [the] motion for directed verdict . . . [and] in its written motion for J.N.O.V. arguably did not raise or urge [estoppel] sufficiently to the trial court to be addressed at appeal." (Br. at 11, 16)

Fore provides practically no discussion, absolutely no foundation, for these scattergun statements. The Brief throws out these broadscale assertions and leaves it at that. This last straw

effort to find some way to hold onto money earned by and due to T.C.B. is wrong for a variety of reasons.

1. T.C.B. was not required to file a reply to Fore's answer as a prerequisite for proving a course of conduct establishing estoppel.

The Brief mentions only part of the story in its conclusory contention the complaint and amended complaint only gave notice of a claim of breach of contract. (Br. at 11, fn 15)[4] The complaint expressly alleged breach of the subcontract **as orally modified**; Fore flatly **denied** the oral modification. (*See* Complaint, ¶ 5 and Answer, ¶ 5.) (R. 22-30, 31-40) What the Brief does not recognize or acknowledge is that, once issue was joined on whether or not the subcontract had been orally modified, T.C.B. had every right to respond to Fore's denial at trial in multiple ways, including demonstrating that the subcontract was modified, by operation of law, based on Fore's **course of conduct** – a conclusion also characterized in law as **ratification** and/or **estoppel**.

T.C.B. was not obliged to file a pleading in response to Fore's denial in order to prove that Fore's course of conduct foreclosed any purported denial. Indeed, Rule 7(a) M.R.C.P. prohibits the filing of a reply to an answer.

2. Alternatively, from the outset, Fore had fair notice that its course of conduct was central to T.C.B.'s case.

The reality is that the complaint and amended complaint against Fore did not merely give notice T.C.B. was claiming breach of contract in the abstract. The complaint detailed instance

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[4] Actually, Fore was on notice from the outset its conduct was central to T.C.B.'s case. *See* the discussion immediately below.

after instance of Fore having actually been paid by Harrison County for work performed by T.C.B., leaving Fore with "no legitimate or arguable basis for not paying [T.C.B. invoices]." (Complaint, ¶¶ 8-17, 21) (R. 22-30) The amended complaint repeated those detailed allegations. (R. 141-161)

It was not necessary for the complaint to include the word "estoppel" or the word "ratification." "Rule 8 does not have 'a magic words requirement.'" *Scott v. City Of Goodman*, 997 So. 2d 270, 276 (Miss. App. 2008). Rule 8(a) requires only "a short and plain statement of the claims showing that the pleader is entitled to relief . . . ." The Comment to Rule 8 points up for the bar and the courts that the pleader should aver the ultimate essential facts upon which the action is based. That is precisely what T.C.B. did.

In *Scott v. City Of Goodman*, the Court of Appeals reasons that "a basic objective of the rules is to avoid civil cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader's claim . . . ," citing 5 Wright and Miller, *Federal Practice and Procedure*: Civil 3d § 1215 (2004). Accordingly, factual allegations underlying an actionable theory may be "direct or inferential." 997 So. 2d at 276.

T.C.B.'s motion for summary judgment opened with the representation that Fore "has been paid for months by Harrison County for the work T.C.B. did as a subcontractor for Fore [and, therefore, the] case is about [Fore's] illegal and unjustifiable failure to pay T.C.B. for work

T.C.B. did for Fore and for which Fore has already been paid." (Motion at 1) The Motion outlined in detail the underlying course of conduct evidencing estoppel.[5]

A reading of T.C.B.'s motion for directed verdict destroys Fore's lament that the issue of estoppel was not then at the forefront of the case.[6] The record speaks for itself. (R. 784-785) The motion, understandably and appropriately succinct, referencing the motion for summary judgment, reminded the trial court of the course of conduct by which Fore was legally bound:

- Fore accepted the T.C.B. work
- Fore submitted the T.C.B. work to the County
- Fore was paid by the County for the T.C.B. work.

Counsel for T.C.B. reinforced the motion with a reminder to the trial court Mr. Fore's undertaking to deny authorizing T.C.B. to pick up trash below Highway 53 was not "sufficient [at law] to overcome [Fore's] acceptance of the work and the money . . . ." That reminder

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[5] From October 2005 through July 2006, T.C.B. worked in Fore's Zone 2 picking up Hurricane Katrina debris south of Highway 53. No other Fore subcontractor worked in this area except for T.C.B. Every day for nine months Harrison County representatives and monitors retained by Beck Disaster Recovery Services observed T.C.B.'s work and documented the amount of the debris, the location it was picked up, the truck number that actually did the hauling, etc. Every day these tickets were filled out by Beck Disaster Recovery Services . . . and made available to Fore, and every week T.C.B. billed Fore, showing the street addresses where the debris was picked up. Fore in turn billed the county based on the same truck tickets that had been documented by Beck, and the county paid Fore. Fore personnel observed T.C.B.'s work daily and communicated on a regular basis with personnel of T.C.B. concerning the work that was ongoing, the tickets that were being included on spreadsheets, and the invoices that were being billed to the county. **Not one time during the nine months this process went on did any personnel of Fore ever give any notice, either verbal or written, to T.C.B. that Fore had not agreed for T.C.B. to pick up debris south of Highway 53.** (Motion at 1, 7, 8) (Emphasis added.) (R. 41-90)

[6] At page 12 Fore quotes from the record the T.C.B. verbal motion for directed verdict.

was, to be sure, a tacit summary of the dominant impact of conduct over inconsistent testimony, i.e. estoppel.

Fore goes so far as to say T.C.B. in its written motion for J.N.O.V. "arguably did not raise or urge the issue sufficiently to the trial court to be addressed on appeal." (Br. at 16) There is no explanation for that outlandish assertion. To the contrary, T.C.B.'s seven page post trial motion outlines the essential facts upon which the conclusion follows that the subcontract was modified by operation of law. The motion, which Fore has the audacity to characterize as "arguably" not raising or urging "sufficiently" the issue of estoppel, contains on pages 3-4 a discussion of the "black letter law" where estoppel disallows a party such as Fore from taking the inconsistent position of accepting the benefits of a contract while disaffirming it in part – citing the *Bailey* and *Wood Naval Stores* cases from the Supreme Court of Mississippi. (R. 803-810)

3. Fore made no objection at trial based on alleged insufficiency of pleadings.

The record of the trial presents, in every material detail, Fore's actual course of conduct in stark contrast with Mr. Fore's incredible claim it was near the end of the nine month period before he knew T.C.B. had been hauling in Zone 2 south of Highway 53. T.C.B.'s proof was never objected to by Fore on the ground (raised here for the first time) that facts invoking the principle of estoppel had not been sufficiently included in the pleadings. What Fore argued at trial, wrongly, was that Mr. Fore's testimony disclaiming modification created a jury question.

To this moment, neither at trial nor here, has Fore claimed prejudice based on some notion of lack of fair notice of T.C.B.'s position. To this moment, neither at trial nor here, has

Fore claimed surprise by T.C.B.'s position Fore was bound by its conduct. That is because facts establishing estoppel have always been the foundation of the lawsuit.[7]

II. FORE FAILS TO CONTRADICT T.C.B.'S ENTITLEMENT TO PAYMENT IN FULL FOR PREJUDGMENT INTEREST.

In this section T.C.B. combines

- its reply to Fore's argument in response to T.C.B.'s initial brief on this issue (pp. 18-20 of Fore's Brief) and
- its response to Fore's cross appeal concerning interest (pp. 22-25 of Fore's brief).

A. FORE'S CONTENTION THAT PREJUDGMENT INTEREST SHOULD BE LIMITED TO THE PERIOD OF TIME SINCE THE COMPLAINT WAS FILED, RATHER THAN WHEN PAYMENT WAS DUE.

Fore argues that because prejudgment interest is discretionary with a trial court, the court also has discretion to modify the time period when the prejudgment interest should accrue.

Clearly the trial court here has exercised its discretion to award prejudgment interest, and the cases cited in T.C.B.'s initial brief uniformly hold that prejudgment interest, if awarded, should begin to accrue on the date the contract was breached.[8] Fore's argument is that the circuit court had discretion to ignore these authorities and to only apply part of the law, that is, to award

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[7] Fore provides its own summation of "T.C.B.'s theory of the case" to be **"clearly** that because the facts showed that T.C.B. did work south of Highway 53 and invoiced Fore for that work, and Fore got paid under a separate general contract for that work, then an oral modification existed." (Emphasis added)

[8] *Baxter v. Shaw Associates, Inc., 797 So. 2d 396, 403 (Miss. 2001); Mississippi Rice Growers Association (A.A.L.) v. Illinois Central Railroad Company, 295 F. 2d 681 (Miss. 1961); Stockett v. Exxon Corporation, 312 So. 2d 709, 712 (Miss. 1975); Cain v. Cain*, 967 So. 2d 654, 663 (Miss. App. 2007)); *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp., 743 So. 2d 954, 971 (Miss. 1999); and Burnsed Oil Company v. Grynberg, 320 Fed. Appx. 222, 232 2009 WL 793015 (C.A.5 Miss.).*

prejudgment interest but to delay accrual of the interest to the date suit was filed. (A difference of just a few months interest on millions of dollars is substantial.)

Fore cites no authority for the proposition that the Court has discretion to apply only part of a principle of law, and Fore gives the Court no citation of authority, either from this Court or other state courts, indicating that prejudgment interest in breach of contract cases should begin to run only when suit is filed.

Mistakenly, Fore cites *Upchurch Plumbing, Inc. v. Greenwood Utilities, 964 So. 2d 1100 (Miss. 2007)* as authority for the proposition that prejudgment interest should be awarded only from the date of filing suit, not from the date payment is due under a contract.

However, in *Upchurch Plumbing*, the trial court granted prejudgment interest at the rate of 8% per annum from the date money was due under the contract. See the trial court's finding of fact number 11 quoted at ¶ 9, *964 So. 2d at 1105*. The trial court awarded 8 % prejudgment interest from three different dates the plaintiff had to pay expenses to repair the equipment involved, March 13, 1998, September 9, 1998, and November 21, 1998. In other words, prejudgment interest was awarded by the trial court from the dates the defendants should have paid the plaintiff the contested damages, not from the date of filing of the complaint. This ruling by the trial court was affirmed. *Upchurch Plumbing* stands for the proposition that prejudgment interest should be awarded from the date payment is due under a contract; it does not help Fore at all.

T.C.B. cannot help but comment upon Fore's statement that, "The trial court awarded T.C.B. prejudgment interest from the date suit was filed because that was what T.C.B.'s attorney

asked for (Tr. 6, 883; Tr. 7, 902)." (Fore's brief, p.19). It appears that the undersigned did in fact mistakenly say "from the date suit was filed" in a colloquy with the trial court when the verdict was returned (Tr. p. 883). The court inquired whether that is truly what was meant or not, and the inaccurate statement was immediately corrected: "Well, best case for the defendant is the date the lawsuit was filed. But I really think it's the date the money became due and owing." (Tr. 6, 883-4)

Later, in argument on post-trial motions, the topic came up again and the trial court once more asked for clarification of T.C.B.'s position and the undersigned specifically stated, "I ask from the date of the breach, from the date the money was due." (Tr. 7, 902). The court was then referred to the spreadsheet which was in evidence (Trial Exhibits 4, App. 5 to T.C.B.'s initial brief) and the court was reminded that consistently throughout the case, in the initial complaint, the amended complaint, the motion for summary judgment, indeed, at every point, T.C.B. had requested prejudgment interest from the date payments become due. (See discussion at Tr. 7, 902-905.)

Submitted with this brief as an appendix is a calculation pursuant to M.R.A.P. 14(c) showing the precise amount of prejudgment interest due since the date Fore breached its subcontract with T.C.B.; this calculation is similar to that reflected in Trial Exhibit 4, App. 5, and is the same interest calculation method sought in the complaint.

T.C.B. has consistently demanded prejudgment interest from the date Fore breached its contract to pay T.C.B. for the work T.C.B. did and for which the County paid Fore.

B. RESPONSE TO FORE'S CROSS APPEAL THAT NO INTEREST AT ALL SHOULD BE ALLOWED.

Fore's position that no prejudgment interest at all should be allowed, because T.C.B.'s claim is "unliquidated," is wrong for two reasons.

First T.C.B.'s claim against Fore is most assuredly liquidated and fixed. In fact, Fore has not offered one shred of evidence that any of T.C.B.'s calculated damages appearing on Exhibit "4", (App. 5) is in any way inaccurate.

Second, the authorities Fore cites at pp. 22-25 of its brief are not analogous to the facts of this appeal.

1. The liquidated nature of T.C.B.'s claim.

It is hard to imagine a case where damages can be more liquidated and fixed than in this case. Exhibit "4" was offered into evidence at trial, and no witness challenged the accuracy of any computation shown on this exhibit. (See App. 5 to T.C.B.'s initial brief.) For forty-two straight weeks, beginning September 19, 2005 and continuing through July 2, 2006, T.C.B. sent an invoice to W.C. Fore Trucking precisely stating the amount of money that was due for T.C.B.'s work, totaling $10,273,125.77. On over a dozen occasions, W.C. Fore turned T.C.B.'s haul tickets into Harrison County, beginning October 13, 2005, and continuing through October 30, 2006. During this whole period of time, W.C. Fore received $12,292,176 in payments from Harrison County for T.C.B.'s work (marked up from $8.90 to $10.64 per cubic yard) and the Harrison County money went straight into W.C. Fore's checking account, where much of it remains.

Damages have been precisely determined in this case, where a total claim of $10,273,125 is not shown to be inaccurate by even one penny.

Nor has Fore directed this Court's attention to even one item of evidence in the record of this case disputing the undeniable fact that Fore accepted payments from Harrison County for every bit of T.C.B.'s work, never once denying (until after suit was filed) that T.C.B. did the work, and constantly accepted the benefits of T.C.B.'s work, i.e, payment from Harrison County.

2. The cases cited by Fore in its brief.

One of the cases cited by Fore can be easily dismissed. *American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387 (Miss. 1995) is a case where the Court upheld, rather than denied, an award of pre-judgment interest. It supports T.C.B.'s position, not Fore's.

Two of the cases Fore cites, *Stanton & Associates, Inc. v. Bryant Construction Company, Inc.*, 464 So. 2d 499 (Miss. 1985) and *Benchmark Health Care Center, Inc. v. Cain*, 912 So. 2d 175 (Miss. App. 2005) involve cases where the amount due was uncertain and not based on a contract. *Stanton & Associates* involved a *quantum merit* claim arising over an hourly rental for a bulldozer, with each side contesting the value of the hourly work. The jury compromised based on conflicting evidence.

Benchmark Health Care Center, Inc. v. Cain, supra involved a $130,774 jury verdict, a large part of which was lost profits and only a portion of which involved a precisely calculated sum of money.

Prejudgment interest was denied in *Stanton* because there was never a contract at all and in *Benchmark* because the court could not tell which party of the jury's verdict was for the

original contract balance and which part was for lost profits or consequential damages. Neither of those cases supports Fore's cross-appeal.

Similarly, *Warwick v. Matheny*, 603 So. 2d 330 (Miss. 1992), is materially distinguishable and does not support Fore's argument that T.C.B.'s claim is not liquidated. In *Warwick*, an automobile dealer sued investors for breach of contract for refusing to purchase stock in the automobile dealership. *Id.* at 333–35. At trial, the jury found for the plaintiff and awarded money damages for the diminution in value of his stock caused by the defendants' breach. *Id.* at 335. The circuit court denied the dealer's post-trial motion for prejudgment interest on the damages sum, and the dealer cross-appealed on that issue. *Id.* at 342. In finding no abuse of discretion in the circuit court's denial of prejudgment interest, the Mississippi Supreme Court concluded that the dealer's damages were not liquidated because several issues bearing on the amount of damages were contested, including the value of the stock at the time of breach. *Id.*

Here, by contrast, the amount of T.C.B.'s damages was never contested by Fore. Rather, by disputing whether the contract had been modified and thus whether any damages were owed at all, Fore contested liability only. As the Mississippi Court of Appeals recognized in *Cain v. Cain*, *supra*, "[I]nterest may be awarded when the amount of damages is certain, even if the fact of liability for those damages is disputed." 967 So. 2d at 664. Absent any dispute concerning the amount of damages due T.C.B., its claim was liquidated and the circuit court's award of prejudgment interest was appropriate.

Even if T.C.B.'s damages were not deemed liquidated, the circuit court's award of prejudgment interest should still be affirmed. The Mississippi Supreme Court has indicated it could "envision cases where, in the discretion of the trial court [prejudgment] interest should be allowed although the amount of the loss is in dispute and for this reason we do not foreclose the allowance of interest in every case where the claim is unliquidated." *Commercial Union Ins. Co. v. Byrne*, 248 So. 2d 777, 783 (Miss. 1971); *accord Sentinel Indus. Contracting Corp. v. Kimmins Industrial Serv. Corp.*, 743 So. 2d 954, 971 (Miss. 1999); *Preferred Risk Mut. Ins. Co. v. Johnson*, 730 So. 2d 574, 577 (Miss. 1998); *Sports Page Inc. v. Punzo*, 900 So. 2d 1193, 1206–07 (Miss. App. 2005).

It is difficult to envision a stronger case for a trial court's exercise of discretion to award interest.

Lastly, T.C.B. feels it must remind the Court that its punitive damage claim remains a subject of its appeal. If this case is remanded for a trial on the issue of punitive damages, then prejudgment interest will likewise be justified due to Fore's willful refusal to pay a just debt without any arguable basis; *See supra* at 663, "The court may award prejudgment interest . . . when there has been a bad faith denial of payment."

III. FORE FAILS TO CONTRADICT T.C.B.'S ENTITLEMENT TO ATTORNEY'S FEES AND TO A JURY HEARING ON PUNITIVE DAMAGES.

T.C.B. has analyzed the argument in its opening Brief under Part III (ps. 24-26), and Fore's response in its Brief at ps. 20-22, and does not feel that an extensive reply on the issues of punitive damages and attorney's fees is in order. Those briefs have fully presented the competing contentions on these issues.

If this Court concurs with T.C.B. that it is entitled to be compensated for the full amount undeniably due, then in the process T.C.B. will have proven that Fore's failure to pay amounts to a reckless disregard of T.C.B.'s right to receive payment for its work for which Fore has itself, without dispute, been paid. See *Polk v. Sexton*, 613 So. 2d 841 (Miss. 1993) (when one party willfully disregards its financial obligations to another purely out of a desire to gain more money than is due under a contract, punitive damages are warranted). 613 So. 2d at 845. *See, also, Sudeen v. Castleberry*, 794 So. 2d 237 (Miss. App. 2001) and *Gill v. Gipson*, 982 So. 2d 415 (Miss. App. 2008).

On remand T.C.B. should have the right to a hearing on punitive damages and attorney's fees. *See Sudeen, supra.*

This 6th day of January, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William F. Goodman, Jr., attorney for appellant/cross-appellee, T.C.B. Construction Company, Inc., certify that I have this day served a copy of this Reply Brief Of Appellant and Brief Of Cross-Appellee by United States mail with postage prepaid on the Circuit Court and counsel of record as follows:

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