SUPREME COURT OF MISSISSIPPI
CASE NO.: 2010-CA-00177

T.C.B. CONSTRUCTION COMPANY, INC. **APPELLANT**

VS.

W.C. FORE TRUCKING, INC. **APPELLEE**

BRIEF OF THE APPELLANT

APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY

ORAL ARGUMENT REQUESTED

William F. Goodman, Jr. MS Ba[redacted]
Watkins & Eager, PLLC
Post Office Box 650
Jackson, MS 39205
T: (601) 965-1900
F: (601) 354-3623
E: goodmanjr@watkinseager.com

Lawrence C. Gunn, Jr. MS Bar[redacted]
Post Office Box 1588
Hattiesburg, MS 39403-1588
T: (601) 544-6771
F: (601) 544-6773
E: larry@lcgunn.com

Attorneys for Appellant

CERTIFICATE OF INTERESTED PARTIES

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 or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. T. C. B. Construction Company., Inc., 5913 Highway 53, Poplarville, MS 39470, Appellant;

2. Jennifer L. Fagan, Sole Shareholder of T. C. B. Construction Company., Inc., 5913 Highway 53 Poplarville, MS 39470;

3. William F. Goodman, Jr. MS Bar #4897, Watkins & Eager, PLLC, Post Office Box 650, Jackson, MS 39205, Attorney for Appellant;

4. Lawrence C. Gunn, Jr. MS Bar #5075, Post Office Box 1588, Hattiesburg, MS 39403-1588, Attorney for Appellant;

5. W.C. Fore Trucking, Inc., Appellee

6. Wallace C. Fore, Sole Shareholder of W.C. Fore Trucking, Inc.;

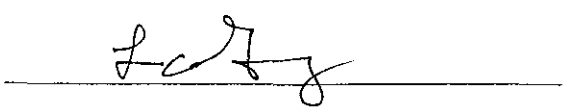
7. Michael E. Cox, The Law Office of Michael E. Cox & Associates, P.A., P. O. Box 4908, Biloxi, MS 39531, Attorney for Appellee;

8. James K. Wetzel, James K. Wetzel & Assoc., P.O. Box I, Gulfport, MS 39502-0001, Attorney for Appellee;

9. Fidelity & Deposit Company of Maryland, payment bond surety for W.C. Fore Trucking, Inc.;

10. David Krebs, Krebs, Farley & Pelleteri, PLLC, 400 Poydras Street, Suite 2500, New Orleans, LA 70130, Attorney for Fidelity & Deposit Company of Maryland; and

11. Ellie Burnham Word , KREBS, FARLEY & PELLETERI, PLLC, One Jackson Place, 188 Capitol Street, Suite 900, Jackson, MS 39201, Attorney for Fidelity & Deposit Company of Maryland.



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STATUTE AND RULES

STATEMENT OF ORAL ARGUMENT

T.C.B. respectfully requests oral argument in this case and will, after filing of the Appellee's brief, file a request for oral argument pursuant to Rule 34(b). As the Court will see, the record and transcript in this case are voluminous, yet the issues are simple. The majority of the record before the Court consists of irrelevant testimony. Oral argument may be helpful to the Court in that it will allow counsel for the parties to demonstrate to the Court which facts and legal issues really need to be addressed.

STATEMENT OF THE ISSUES

(1) Whether as a matter of law the subcontractor (T.C.B. Construction Company, Inc.) is entitled to judgment against the contractor (W. C. Fore Trucking, Inc.)

- for the full amount of work indisputably done under the subcontract (and for which the contractor billed the owner and for which the contractor was paid by the owner), and
- for the full amount of prejudgment interest, calculated from the dates payment was due by the contractor to the subcontractor.

(2) Whether under these circumstances the contractor's refusal to pay entitles the subcontractor to proceed on remand with additional claims for punitive damages and attorneys' fees.

STATEMENT OF THE CASE

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

This is a breach of contract case. Harrison County contracted a portion of its Hurricane Katrina clean-up work to W.C. Fore Trucking, Inc., which in turn subcontracted with T.C.B. to haul debris in the part of Fore's contracted territory north of Highway 53. Soon thereafter,

according to T.C.B., Fore and T.C.B. orally agreed to enlarge the scope of the subcontract to extend to areas south of Highway 53. Performance of all of the work was strictly monitored by R.W. Beck & Associates, an engineering firm engaged by the county.

When T.C.B. was not paid for all of its work (even though the county had paid Fore for all of T.C.B.'s work), T.C.B. sued Fore and its surety, Fidelity & Deposit Company of Maryland.[1]

At trial Fore put forth only one purported "defense." Seizing on the fact that T.C.B.'s subcontract originally extended to only the geographical area north of Highway 53, not those areas south of Highway 53, Fore denied there was ever an oral agreement to modify the subcontract to include the enlarged territory. (Tr. 5, 659; 674-7; 685-7) This denial came after T.C.B. fully performed the work south of Highway 53, after T.C.B. billed Fore, after Fore billed the county for all of T.C.B.'s work, after Beck audited all the billings, and even after the county paid Fore over $12,000,000 for all of T.C.B.'s work.

Harrison County ultimately paid Fore $18,623,184.26. Of this amount, $12,292,176 was for work T.C.B. performed. If Fore had honored its price to T.C.B. of $8.90 per cubic yard, Fore would have paid T.C.B. $10,273,125 and would have made a profit of $2,019,051 on T.C.B.'s work. Instead, Fore only paid T.C.B. $3,638,689, retaining the extra $6,634,436. (See Ex. P-4, App. 5)

Fore never disputed the mathematical accuracy of T.C.B.'s claim for $6,634,436 or that Harrison County has paid Fore for all T.C.B.'s work. Fore's sole defense was that nothing is owed, because Fore never agreed for T.C.B. to do this work in the area south of Highway 53.

[1] The trial court severed the claims against Fidelity & Deposit Company of Maryland. Claims against Mr. Fore, individually, were dismissed during trial, and that dismissal is not an issue on appeal.

Fore contended he was entitled to simply keep all the money, because T.C.B. should not have done the work without a written modification to its subcontract. (Tr. 5, 701-3)

The trial court denied T.C.B.'s pre-trial motions for summary judgment (R. III, 445-8) and its motion for directed verdict at trial (Tr. 6, 784-5) and, over T.C.B.'s objection, allowed the jury to determine whether there was in fact a modified subcontract, and if so, how much T.C.B. was entitled to recover. The jury found for T.C.B. on the issue of modification, but returned a compromise verdict in favor of T.C.B. for $4,098,314 and, curiously, a verdict in favor of Fore on a so-called "counterclaim" against T.C.B. for $520,730 (R. VI, 796-7). The circuit judge entered judgment in favor of T.C.B. for the difference between these two amounts, $3,577,584, awarded T.C.B. prejudgment interest calculated from the date suit was filed rather than from the date of the delinquency of the judgment amount, and certified the judgment pursuant to Rule 54(b), allowing an appeal to this Court. (R. VI, 798-9)

Final judgment as to T.C.B.'s claims against Fore was initially entered by the Court on November 3, 2009. Post trial motions were timely filed by both parties, and these motions were denied on December 30, 2009 (R. VI, 828-9). This appeal was filed within the thirty day time limit of M.R.A.P. (4) on January 27, 2010. (R. VI, 843-4)

B. Statement of the Uncontradicted and Material Facts

After Hurricane Katrina, Harrison County faced the monumental and expensive task of cleaning up storm debris, and it competitively bid this work through three separate contracts for different areas of the county, known as Zones 1, 2, and 3. These zones are depicted in Exhibit D-7, App. 1 to this brief.

T.C.B. was the successful bidder in Zone 1, the large northeastern rural area of the county, and in Zone 3, the Henderson Point area. None of T.C.B's work in either of those zones is involved in this case.

This case involves Zone 2, which was awarded to W.C. Fore Trucking. Zone 2 comprised the large area of Harrison County west of Highway 49 and north of the incorporated municipalities of Gulfport, Long Beach, and Pass Christian. This area is more densely populated than Zone 1 and contained large amounts of debris from the storm's devastation, more in the south end than the north.

Harrison County is experienced in hurricane debris clean-up. The supervisors knew that the undertaking would be massive and that professional outside help was needed. It contracted with a national engineering firm, R.W. Beck & Associates, to assist with overseeing the bidding process, supervising the work, inspecting the work to ensure that it was done properly, auditing billings for accuracy, and ensuring that the county received full reimbursement from FEMA. R.W. Beck's retention in this case accomplished what was intended. In the compilation of data from 30,000 individual truck tickets and calculations of millions of dollars we discuss in this brief, not one mathematical inaccuracy or clerical mistake has been detected.(Tr. 6, 761) All the work tickets turned in by T.C.B. to Fore were checked and approved by Beck, paid to Fore by the county, and audited and reimbursed by FEMA. The county has paid Fore for every bit of T.C.B.'s work, and the only controversy between any of the multiple parties involved is this dispute between Fore and T.C.B. Fore has simply refused to pay T.C.B. for the majority of the work that it did for Fore, that R.W. Beck audited and approved, that the county paid for, and that FEMA has reimbursed to the county.

Fore's winning bid in Zone 2 was $10.64 per cubic yard. (Ex. P-1, ¶ V) Fore's contract was awarded by the county on September 9, eleven days after the storm. Fore's contract with Harrison County required Fore to completely cover the entire Zone 2 area and to make four "passes" through this area until all of the debris was picked up from road right-of-ways.(¶ II(G)) It was Fore's responsibility to establish routes for collecting the debris (¶ II(F)) and to do everything necessary to ensure that Harrison County was entitled to be reimbursed by FEMA for the expense of this clean up work (¶ X(E)). During the course of the contract, Fore was required to designate a company representative as a contact person (¶ III (G)). County officials, R.W. Beck, FEMA representatives and the contractors themselves met weekly to discuss job progress. (Tr. 2, 277-9)

On September 16, a week after Fore was awarded the contract by Harrison County, Fore and T.C.B. entered into the subcontract which is Ex. P-3 (App. 2). By this subcontract, T.C.B. agreed to pick up Fore's contracted storm related debris north of Highway 53 in Zone 2. The subcontract price was $8.90 a yard. In other words, for every yard of debris T.C.B. hauled, the county would pay Fore $10.64 and Fore in turn agreed to pay T.C.B. $8.90.

There is an important sentence in the subcontract:

> "Good Faith"; It is understood that in order for this contract to work, all parties will work together "in good faith"; and thus the contract can and will be modified based upon the facts and circumstances of all debris removal.

By this sentence, the parties anticipated future modifications to the subcontract, and T.C.B.'s case is based on such a modification. T.C.B.'s witnesses testified that Fore's principal, Wallace C. Fore, asked T.C.B. to expand its operations south of Highway 53 shortly after work began. Dickie Joe Ladner, Mrs. Fagan's father and the secretary of T.C.B., testified to several telephone calls he had with W.C. Fore in the first few days after the subcontract was signed.

(Tr. 2, 267-70) He stated that Fore asked T.C.B. to expand its area of operations south of Highway 53 in several stages, ultimately agreeing that T.C.B. would clean Zone 2 all the way south to I-10 (Tr. 2, 271). According to Mr. Ladner, these several telephone conversations all occurred within the first two weeks after T.C.B. started work under its subcontract, and in any event by the end of September (Tr. 2, 266-71).

Mr. Ladner's wife, Jenny Ladner, described a face-to-face conversation with Mr. Fore, where he actually drew a line with a yellow highlighter on a map indicating the expanded area of T.C.B.'s operations. (Tr 3, 392-4) She also testified to conversations with a foreman of Fore, Lamont Ladner (no relation to her), who suggested that T.C.B. should ask Mr. Fore for this extra territory in Zone 2 because Fore's other work crews had more work than they could handle. (Tr. 3, 389)

The uncontradicted documentary evidence in the case shows that T.C.B. began working south of Highway 53 as early as September 25, just nine days after Fore and T.C.B. signed the subcontract. Exhibit 16 (App. 4) is a schedule – not refuted by any witness – that shows the dates Fore quit work in this area and the dates T.C.B. started. Fore's other crews left this area and never worked again in the disputed territory until the last few days of the job, May of 2006. All Fore's contractual duties to Harrison County – establishing collecting routes, picking up the debris, attending weekly progress meetings, coordinating with Beck and the county – were performed by T.C.B. Fore did nothing in the disputed territory from late September until May of the following year. (Tr. 2, 269)

The massive documentation that was before the circuit court shows that 65% of Fore's total billings to Harrison County (at $10.64 per cubic yard) were for truck tickets of debris actually hauled by T.C.B. (billed to Fore at $8.90 per cubic yard). Harrison County paid Fore

$18,623,184.26; of this total $12,292,176 was for work T.C.B. did. (Ex. P-4, App. 5) Fore's sole defense at trial was that the contract was never modified for T.C.B. to work south of Highway 53. Mr. Fore claimed that even though his forces never worked in this vast area after late September, 2005, and even though the county paid Fore for 799,000 cubic yards of debris from this area, he nonetheless did not feel he must pay for T.C.B.'s work since he never agreed with T.C.B. on this large area, did not know T.C.B. was doing the work, and really never noticed that the county had paid him for T.C.B.'s work south of Highway 53. (Tr. 5, 701-20) To justify his failure to tell T.C.B. to cease work south of Highway 53, he insisted he never knew T.C.B. was working in the area. He was at a loss to explain how the debris got cleaned up from October, 2005, until April, 2006, since none of his other personnel worked at all in this area between these dates.

It is incredible to think Fore could not have noticed T.C.B.'s work.

Before starting any work on the clean-up contract, T.C.B. trucks had to be certified by R.W. Beck. These certifications took place at Fore's place of business. A Beck engineer measured each truck or trailer and calculated the cubic yardage volume. That vehicle was identified with a number for work in Zone 2 and had a placard affixed to it with an identifying number, such as "KHF432." The letters KHF stood for "Katrina Hurricane – Fore," and the numeric portion of the designation identified an individual truck. (Tr. 3, 395-8) Fore disavowed any knowledge of the number of T.C.B. trucks working under his contract. (Tr. 5, 649-52)

On a daily basis an R.W. Beck debris monitor, as representative of Harrison County, directed T.C.B. crews where to work. (Tr. 3, 401) On location, a crew, consisting of anywhere from two to five or six workers, worked with various items of machinery picking up hurricane related storm debris and loading it into the pre-certified trucks or trailers. The Beck monitors

made sure the crews picked up only debris that would be eligible for FEMA reimbursement. Beck monitors, not the truck drivers or workers themselves, filled out truck tickets that identified the truck number, the names of the principal worker or subcontractor, the type of debris, and the street address where the debris was picked up. (Tr. 3, 400-1)

When the debris was hauled to the disposal site, a second R.W. Beck representative, once again acting as the official representative of Harrison County, computed the actual hauled volume by first measuring the percentage that the truck or trailer was filled and then multiplying that percent by the certified volume of the vehicle to arrive at the quantity that would be used for payment. Beck's employees entered these volumetric calculations on the truck tickets. No T.C.B. or Fore personnel had any involvement until they were completely filled out, when the trucker would then sign acknowledging he had received his copy of the ticket. (Tr. 3, 398-401)

The tickets were made in five counterparts. (Tr. 2, 263) After the trucker took his copy, there remained a copy for T.C.B., for Fore, for R.W. Beck, and for the county. These tickets were distributed to all interested parties on a daily basis. (Tr. 3, 400-2)

Each week T.C.B., in keeping with its subcontract, invoiced Fore for the payment of haul tickets from the preceding week. T.C.B.'s bookkeeper, a CPA with several years experience in construction accounting work, developed a system in cooperation with Fore's office manager and bookkeeper, Darlene Fore, to ensure that any clerical errors were detected and corrected. At the end of the week, T.C.B.'s accountant prepared a spreadsheet that identified all T.C.B. generated work for the prior week. She then furnished a computerized copy of this spreadsheet to Mrs. Fore, so that Mrs. Fore could compare the T.C.B. numbers to her own. Any discrepancies or mathematical mistakes were reconciled by these two ladies personally. An example of how these two accountants reconciled any billing questions is Ex. 7. (Tr. 4, 463-73)

Reconciling the spreadsheets before the invoices were prepared had the effect of catching and correcting any potential errors before the spreadsheets were given to Beck and to Harrison County. Mrs. Fore actually "cut and pasted" the T.C.B. spreadsheets into Fore's billing invoices to Harrison County. Thus when Harrison County paid Fore for T.C.B.'s work, it was paying off the same computerized data -- T.C.B.'s pre-corrected spreadsheet -- which T.C.B. used to bill Fore. (Tr. 4, 473-5) This system worked so well that, after 30,000 truck tickets, 42 invoices from T.C.B. to Fore, and 12 accumulative invoices from Fore to the county, detailing over $18,623,184.26 of hauling, $12,000,000 of which was T.C.B.'s work, not a single mistake or inaccuracy in any of T.C.B.'s billings was ever discovered by R.W. Beck or Harrison County (Tr. 6, 761), and Fore was paid for every load of debris T.C.B. hauled for Harrison County.

Exhibit "P-4" (App. 5) is a detailed summary prepared by T.C.B.'s controller that summarizes the billings from T.C.B. to Fore, Fore's billings to Harrison County, and the payments from the county to Fore. (Tr. 4, 475-82) At trial, these figures were not contested. Not one witness testified to any inaccuracy on Exhibit "P-4." R.W. Beck carefully audited all billings, the county paid Fore for all T.C.B.'s work, and FEMA has reimbursed Harrison County for all T.C.B.'s work, not finding any part of it ineligible. And this could not have happened but for the cooperative work between T.C.B.'s bookkeeper and Mrs. Fore in reconciling T.C.B.'s work before it was turned in.

The uncontradicted evidence in this case shows that the subcontract must have been orally modified to expand T.C.B.'s operations south of Highway 53. T.C.B. not only performed subcontract work for Fore north of Highway 53, but also performed the majority of Fore's contract south of Highway 53. In fact, the large area south of Highway 53 and north of I-10, where T.C.B. worked, makes up more than half of Fore's Zone 2 territory, and T.C.B. did 95%

of the work in this area even though no written contract was ever entered into expanding T.C.B.'s work south of Highway 53. (See Ex. P-11, App. 3)

At first, Fore paid T.C.B. regularly. The far right hand column of Ex. 4 (App. 5) shows that Fore remitted payments regularly to T.C.B. from November, 2005, through March, 2006, the remittance being made within a few days after Harrison County paid Fore for T.C.B.'s work. After March, however, Fore quit paying T.C.B. The column on Exhibit 4 labeled "W.C. Fore Trucking Invoices to Harrison County" shows repeated invoicing from Fore to Harrison County from May through November, 2006, and the date under the column labeled "Harrison County payments to W.C. Fore" indicates many millions of dollars worth of payments by the county to Fore after March, 2006. Fore, however, kept all of this money, paying T.C.B. nothing after the March 13, 2006, payment. At first, T.C.B. was not alarmed by the delay in paying, because county payments to Fore might lag two or three months behind the dates the actual work was done, and by the time T.C.B. realized Fore intended to keep all of the balance of the money, the job was nearly over.

All of this evidence proves several uncontradicted facts:

- After the last days of September, 2005, two weeks after Fore was awarded the contract to clean up Zone 2, Fore ceased working in the entire area south of Highway 53 and north of I-10. (Tr. 2, 269; Tr. 3, 383)
- From late September, 2005, until the last few days of the job, T.C.B.'s crews and no other Fore personnel worked in the area south of Highway 53 and north of I-10. (Tr. 2, 269)
- Every day Beck employees, Harrison County's representatives, filled out trucking or haul tickets showing the debris T.C.B.'s crews cleaned up and the street address where the debris was picked up. (Tr. 3, 401)

- Every day Fore got copies of T.C.B.'s truck tickets that had been completed by R.W. Beck. (Tr. 3, 400-2)
- Once a week, T.C.B. submitted a spreadsheet to Fore summarizing billing data and identifying the street address where each load of debris was picked up. (Tr. 4, 475-82)
- On a weekly basis, T.C.B. and Fore clerical personnel analyzed, audited, and reconciled T.C.B.'s spreadsheets. (Tr. 4, 469-73)
- The billings from T.C.B. to Fore identified every one of the truck tickets T.C.B.'s crews hauled in the disputed territory and, among other information, identified the street address where the debris was collected. (Tr. 4, 472)
- Harrison County paid Fore $12,292,176, at the rate of $10.64 per cubic yard, every cent that was turned in on T.C.B.'s tickets. (Ex. P-4, App. 5)

Even though Fore testified that T.C.B. never had a subcontract for work south of Highway 53, the massive volume of documented evidence proves in excruciating detail that Fore unequivocally accepted T.C.B.'s work in the area south of Highway 53 and north of I-10, billed Harrison County for every bit of T.C.B.'s work, and received payment from Harrison County for 100% of T.C.B.'s work.

Fore's testimony at trial that there was never a modification of the subcontract to perform work south of Highway 53 simply cannot, either factually or legally, serve to create a disputed issue of fact for a jury to decide, nor can it constitute a legal defense to T.C.B.'s claim for payment. The trial court should have directed a verdict in T.C.B.'s favor on both liability and the amount of damages. The trial court's failure to direct a verdict on liability is an error that is now harmless, since the jury found the contract was modified exactly as T.C.B. contended.

What is yet uncorrected, however, is the mistake made by the judge and jury as to the amount of damages due to T.C.B. The judgment limits T.C.B.'s recovery to $3,577,583 of the $6,634,436 worth of work done under the modified subcontract. The uncontradicted evidence shows that T.C.B. should recover the full amount.

C. Statement of Immaterial Testimony.

Except for the large amount of money involved and the brazenness of the actions of Fore, this is a relatively straightforward and simple case. Virtually nothing stated in the preceding part of this brief is contradicted.

However, Fore presented a great deal of extraneous matter at trial in an effort to, we think, confuse the trial judge and jury. The tactic has worked so far.

For instance, Fore contended that all contracts must be in writing and that oral modifications to written contracts, such as the subcontract with T.C.B., are invalid. (Tr. 5, 673-4; 702) Fore went so far as to call an "expert" witness in the area of law, an engineer who is one of Fore's former business partners. This "expert" opined that under the law of Mississippi oral modifications to contracts are invalid. Of course, he was forced to concede on cross-examination that this Court has consistently held to the contrary, including the recent case of *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So. 2d 954 (Miss. 1999), where this Court recognized the principle that oral modifications to written contracts are valid and enforceable, especially where the work has been completed and one party has been paid. This witness's testimony was simply a distraction. (Tr. 4, 503-530)

Next, Fore offered a great deal of testimony concerning T.C.B.'s removal of a large pile of hurricane debris known as the "stockpile." (Tr. 5, 653-5) This was an area, located south of Highway 53, on county property where citizens had hauled debris in the first days or weeks after

the storm. T.C.B. thought it had a contract with the county to remove this debris on an emergency basis. Fore protested, because the debris was in his Zone 2 area, and he wanted to be paid his marked up price of $10.64 per cubic yard and for T.C.B. to only be paid $8.90 per cubic yard, the subcontracted price. T.C.B. acquiesced in Fore's position and the stockpile debris was billed through Fore, just like the other work T.C.B. did. T.C.B.'s tickets were accepted by Fore, turned in to the county, and paid to Fore 100% at $10.64 per cubic yard. (Tr. 2, 272-6) Fore has remitted none of this money to T.C.B., and we are at a loss to understand why so much testimony at trial was devoted to this controversy surrounding removal of the "stockpile" debris. Ultimately, the work for removing the stockpile was treated just like all of the other work T.C.B. did; it was billed to Fore, who in turn billed the county and got paid (without paying T.C.B.).

Another red herring at trial is Fore's oft-repeated contention that T.C.B. is actually controlled and run by Mrs. Fagan's father, Dickie Joe Ladner, and not by Mrs. Fagan. (Tr. 5, 659) Of course, it makes absolutely no difference for purposes of this case who the manager of T.C.B. might be, and it was really never made clear at trial why this "defense" matters at all. We still do not know.

Fore and attorneys for Fore made several insinuations in front of the jury about some sort of "FBI investigation," (Tr. 5, 664-6; 681-3) even though the Court in an in limine order had instructed them to make no such comment (Tr. 5, 692). Of course, any testimony concerning an "FBI investigation" is a fabrication and falsehood, but it is the sort of insinuation that might have confused the jury, even though there is a complete lack of any evidence about any sort of FBI investigation in the record.

Finally, Fore went so far as to contend that some of the subzones cleaned by T.C.B. actually had no hurricane or very little hurricane related debris in them. For instance, he

maintained that Zones 2X and 2Y, which were cleaned by T.C.B., actually had no tree limbs and other debris at all, or practically none at all, and insinuated that somehow T.C.B. fabricated or falsified its billings in these two subzones. (Tr. 5, 678-9) What is not explained, of course, is how T.C.B. could have done this, since truck tickets were completed by Harrison County representatives, R.W. Beck personnel, not by T.C.B. workers, and, even more amazingly, why Harrison County has paid Fore for every bit of T.C.B.'s work done in this area where Fore claims there was no work done. Fore, naturally, has not offered to repay Harrison County and FEMA for this work he testified was not actually done.

None of this immaterial testimony disproves the undeniable fact that Fore has been paid for all T.C.B.'s work but has so far refused to pay T.C.B.

SUMMARY OF THE ARGUMENT

I. As a matter of law, Fore owes the full amount to T.C.B., given that Fore has accepted the benefits of T.C.B.'s work and has been paid by Harrison County for 100% of T.C.B.'s work.

Fore is estopped as a matter of law from denying a modification of the subcontract and from disputing the amount due under the modified subcontract.

That the subcontract was modified to extend to work done south of Highway 53 was established as a matter of law. That T.C.B. was entitled to the full amount claimed under the subcontract, plus prejudgment interest, was also established as a matter of law. Accordingly, the trial court should have directed a verdict for T.C.B.

A. By operation of law, the subcontract was modified to extend to work south of Highway 53.

The conduct of Fore in accepting $12,292,176 in payments from the county for T.C.B.'s work estops Fore from denying its obligation to pay T.C.B. *Bailey v. Estate of Kemp*, 955 So. 2d 777 (Miss. 2007); *Hoerner v. First National Bank of Jackson*, 254 So. 2d 754 (Miss. 1972).

The precise amount T.C.B. should have recovered, based upon undisputed evidence, is $6,634,436. No evidence contradicted this amount shown on Ex. P-4 (App. 5).

T.C.B. is entitled to judgment as a matter of law that Fore is indebted to it for the full amount sought.

II. The Circuit Court improperly computed prejudgment interest due to T.C.B. on that portion of the claim for which judgment has been rendered in T.C.B.'s favor.

By statute, Miss. Code 75-17-1 (Rev. 2009), and by case law, *Stockett v. Exxon Corporation*, 312 So. 2d 709 (Miss. 1975); *Guardianship of Duckett*, 991 So. 2d 1165, 1182 (Miss. 2008), the prevailing party in a breach of contract dispute is entitled to recover interest at 8% per annum (where no different rate is stated in the contract), and this interest should accrue from the date of delinquency.

It was error for the circuit court to limit T.C.B.'s right to prejudgment interest from the date suit was filed, rather than from the date the judgment amount became due.

III. The circumstances of this case amount to such egregious and malicious refusal to pay on behalf of Fore that the issues of punitive damages and entitlement to attorney's fees should be determined on remand.

The law of this state recognizes the right to recover punitive damages and attorney's fees where a breaching party's conduct amounts to "malice," i.e., where a defaulting party willfully and recklessly disregards the rights of the plaintiff; *McCorkle v. McCorkle*, 811 So. 2d 258 (Miss. Ct. App. 2001); *Puckett v. Gordon*, 16 So. 3rd 764, 771 (Miss. App. 2009), citing *Greenlee v. Mitchell*, 607 So. 2d 97, 108 (Miss. 1992).

Decisions of this Court have affirmed the principle that a party who breaches a contract without any legal or justifiable reason, and whose actions are motivated by nothing more than greed or indifference, should be subjected to an award of punitive damages and attorney's fees. *Polk v. Sexton*, 613 So. 2d 841 (Miss. 1993); *Sudeen v. Castleberry*, 794 So.2d 237 (Miss. 2001).

ARGUMENT

I. As a matter of law, Fore owes the full amount to T.C.B., given that Fore has accepted the benefits of T.C.B.'s work and has been paid by Harrison County for 100% of T.C.B.'s work.

Fore is estopped as a matter of law from denying a modification of the subcontract and from disputing the amount due under the modified subcontract.

That the subcontract was modified to extend to work done south of Highway 53 was established as a matter of law. That T.C.B. was entitled to the full amount claimed under the subcontract, plus prejudgment interest, was also established as a matter of law. Accordingly, the trial court should have directed a verdict for T.C.B.[2]

A. By operation of law, the subcontract was modified to extend to work south of Highway 53.

The $12,292,176 Fore received for T.C.B.'s work was billed by Fore to the county at $10.64 per cubic yard, Fore's contracted price. This is undisputed. It is also undisputed that T.C.B. billed Fore $10,273,125 (at $8.90 per cubic yard, the subcontract price) and that Fore accepted T.C.B.'s work reflected on over 30,000 truck tickets, accepted T.C.B.'s accounting of the volumes and amounts T.C.B. had hauled, billed Harrison County based on T.C.B.'s accounting, and got paid for T.C.B.'s work. Fore does not contest even one penny of the

[2] The additional and separate error in not submitting to the jury T.C.B.'s claims for punitive damages and attorneys' fees is discussed in Point II below.

amounts reflected on Exhibit "4 (App. 5)," nor does Fore challenge the quantities of debris hauled by T.C.B. reflected in Exhibit "11" (App. 3). Thus Fore admits that all T.C.B.'s work was accepted and that Fore received the money for T.C.B.'s work.

A party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations, *Wood Naval Stores Export Assc. v. Gulf Naval Stores Company*, 220 Miss. 652, 664, 71 So. 2d 425, 430 (1954).

Wood Naval Stores was followed by this Court in *Bailey v. Estate of Kemp*, 955 So. 2d 777 (Miss. 2007). There this Court, relying upon *Wood*, affirmed the principle that "[E]stoppel forbids one from both gaining a benefit under a contract and then avoiding the obligations of that same contract." 955 So. 2d at 782, ¶ 21.

In *Bailey*, a property owner had a contract with an attorney to sell distressed and speculative properties, with the attorney receiving a percentage of the profits. This arrangement went on for years. Profits were split the same way on each sale of land. Eventually one large property appreciated in value, was sold, and then the land owner denied having a contract to divide profits. This Court did not allow the property owner, who had accepted benefits of the contractual arrangement for several years, to repudiate what had been acknowledged as a contractual arrangement to the land owner's benefit over a period of time.

The principle of estoppel recognized in *Bailey* applies here. By operation of law, Fore agreed to a modification of the subcontract even though he testified at trial he did not. That is because he is held to his conduct and is estopped to successfully contend otherwise.

The case of *Hoerner v. First National Bank of Jackson*, 254 So. 2d 754 (Miss. 1972) contains a reasoned analysis of estoppel under analogous circumstances. Mr. Hoerner's continuing guaranty given to individually guarantee future loans by the bank to his corporation

stipulated that his undertaking was conditioned upon the bank obtaining his approval of future loans. The corporation defaulted owing multiple loans to the bank. At trial, bank employees testified that each time a loan was made they obtained Hoerner's approval by telephone. He emphatically denied that testimony and insisted that the bank never received his individual approval. Even so, there was no genuine issue of fact. Hoerner was held to be estopped to disclaim personal liability under the guaranty. 254 So. 2d at 761. He accepted benefits of the loans made to the corporation, including receiving cash bonuses from the business. The Court explained:

> Estoppel of this character arises from the conduct of a party, using the word "conduct" in its broadest meaning as including his spoken words, his positive acts, and his silence where there is a duty to speak . . . We conclude that Hoerner could not accept the benefits obtained by the authority of his continuing guaranty agreement and belatedly reject the guaranty . . . *The acceptance of the benefits flowing from [the loans] could not be other than an implied approval by operation of law.* [emphasis added]

254 So. 2d at 761-762.

Here Fore accepted T.C.B.'s work, billed the county, and received payment for T.C.B.'s work, in the process accepting the benefit – millions of dollars – of the arrangement between Fore and T.C.B.

The principle of estoppel forbids Fore from now repudiating its obligation to pay for T.C.B.'s work.

There was no jury issue on liability. By operation of law, based on Fore's acceptance of the benefits of the modified agreement, the subcontract was indeed modified.

The trial court, however, misunderstood the binding effect of Fore's conduct. The trial court misunderstood that Fore is held to have agreed to the modification despite his testimony to the contrary. As a result of this misunderstanding, the trial court gave instruction P-1A (R. V,

750) and D-8 (R. VI, 758) to the jury, allowing the jury to decide if T.C.B.'s subcontract was modified. Submitting the issue to the jury was unnecessary and erroneous, but that error by the trial court was cured by the jury, which expressly found that the subcontract "was modified by the parties." (R. VI, 796)

B. There is likewise no genuine issue as to the exact contractual amount due T.C.B. for work indisputably done.

That exact amount is $6,634,436.69. The bookkeeping entries summarized on Exhibit P-4 (App. 5) are uncontradicted. Since liability for all work done is established (both by operation of law and corroborated by the jury), payments for all cubic yardage summarized on that exhibit are due as a matter of law.

The trial court's error in submitting to the jury the determination of the amount due under the subcontract was compounded by also submitting to the jury the question of whether Fore was entitled to recover by counterclaim for an asserted overpayment. That assertion has absolutely no support in the record. The unquestioned modification of the subcontract precludes any possibility of a purported overpayment by Fore to T.C.B.

The jury's confusion may have been caused in part by Exhibit D-11, a calculation which was offered by Fore to support its principal theory of the case. Under Fore's theory, nothing was owed to T.C.B. for hauling south of Highway 53. It is undisputed that the debris hauled by T.C.B. north of Highway 53 would have computed to a payment of $3,117,958, yet Fore actually paid T.C.B. more than this amount, $3,638,689, before stopping payments altogether. If Fore's theory had been correct and there was no modification of the contract at all and no right of T.C.B. to receive payment for all of its work, in other words, if T.C.B. was entitled to nothing for 799,176 cubic yards of debris hauled south of Highway 53, then T.C.B. should reimburse Fore $520,730.

However, the jury verdict laid to rest Fore's incredible assertion that T.C.B. never had a modified subcontract to haul south of Highway 53. Once such modification was determined by the jury, there was no legal basis for the jury to award Fore money for "overpayment" for the debris hauled north of Highway 53.

In summary, the trial court committed a series of errors relating to the contractual amount due T.C.B. First, it was error to submit to the jury the determination of the amount of T.C.B.'s recovery – there being no genuine issue as to the amount. Second, it was error to submit to the jury the determination of whether any amount was due to Fore by way of counterclaim – there being no evidentiary foundation for any such award. Third, it was error for the trial court in ruling on post-trial motions not to have entered judgment in favor of T.C.B. for the undisputed amount and not to have stricken the jury's award on the purported counterclaim. That series of errors below can, and should, be corrected by rendering final judgment here in favor of T.C.B. for all work indisputably done.

II. The Circuit Court improperly computed prejudgment interest due to T.C.B. on that portion of the claim for which judgment has been rendered in T.C.B.'s favor.

The circuit court ruled that T.C.B. is entitled to recover prejudgment interest "at the legal rate of eight percent (8%) from and after the date of the filing of the original complaint." (RE 2, R. VI, 798-9)

The trial court used the correct interest rate, but erred in not awarding interest from the day the delinquent sums became due, instead ruling that interest would only begin to accrue from the date the complaint was filed.

Mississippi Code §75-17-1 (Rev. 2009) provides in material part:

> The legal rate of interest on all notes, accounts, and contracts shall be eight percent 8% per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this section or as otherwise authorized by law.

There is no rate of interest stated in T.C.B.'s subcontract with Fore, so §75-17-1 provides the contract rate, i.e., eight percent. The statute does not specify the date when interest should begin to accrue. The legislature must have thought it entirely unnecessary to pass a law stating that interest should begin to accrue when a contractual amount becomes overdue. Common sense dictates that money is delinquent when the contract is breached. And such has long been the law of Mississippi, beginning with at least *Mississippi Rice Growers Association (A.A.L.) v. Illinois Central Railroad Company*, 295 F. 2d 681 (Miss. 1961), citing Laws, 1942, §36, which holds that interest begins to accrue from the time money is due.

The principle was also affirmed in *Stockett v. Exxon Corporation*, 312 So. 2d 709 (Miss. 1975), where the court noted, "Mississippi has long held that the prevailing party in a breach of contract suit is entitled to have added legal interest on the sum recovered computed from the date of the breach of the contract to the date of the decree." *Id. at 712.*

The purpose of prejudgment interest is to provide parties with compensation for money that has been illegally withheld, *Guardianship of Duckett*, 991 So. 2d 1165, 1182 (Miss. 2008) ("the purpose of prejudgment interest is to provide parties with compensation for the detention of money overdue") 991 So. 2d at 1182. Stated another way, interest starts running when money is due, not when suit is filed.

Numerous other cases have recognized the proposition that parties who breach contracts must pay interest on amounts due to compensate the plaintiff for that breach of contract, calculated from the date the breach occurred. *Cain v. Cain*, 967 So. 2d 654, 663 (Miss. App.

2007) ("The purpose of awarding prejudgment interest is not to punish the wrongdoer but to compensate the innocent party for the detention of the overdue funds."); *Baxter v. Shaw Associates, Inc.*, 797 So. 2d 396, 403 (Miss. 2001) ("If prejudgment interest is to be awarded, it dates from the breach of contract."); *Sentinel Industrial Contracting v. Kimmins Industrial Service Corp.*, 743 So. 2d 954, 971 (Miss. 1999), ("The trial judge should have awarded Kimmins prejudgment interest on the damages for breach of contract in this case, calculated at eight percent (8%) per annum from the date of the breach to the date of judgment.") See also *Burnsed Oil Company v. Grynberg*, 320 Fed. Appx. 222, 2009 WL 793015 (C.A.5 Miss.)

The language used by the trial court in its judgment, "from and after the date of the filing of the original complaint," indicates the trial judge's possible confusion over Miss. Code §75-17-7 (Rev. 2009). That statute provides:

> All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

This statute specifies the rate of interest on judgments. There are two sentences in this statute. The first sets post-judgment interest in contract suits at the rate provided in the contract. In this particular case, since no rate is specified in T.C.B.'s subcontract, the "default" rate of eight percent provided in §75-17-1 applies.

The second sentence of §75-17-1 applies to "all other judgments or decrees . . ." In those cases, interest, whether prejudgment or post-judgment, may not begin to run until the complaint is filed. But that sentence applies only to judgments or decrees that are not based upon a contract. In this case, T.C.B.'s claim is based on a contract, and thus the limitation of the second sentence of §75-17-7 does not apply.

We anticipate the contention by Fore that no prejudgment interest should be awarded to T.C.B. in this case because the amount of its claim is "unliquidated." It is true that in the case of suits based on tort or some other non-contractual theory, decisions of this Court limit pre-judgment interest, particularly in the types of claims brought under a bad faith theory against insurance companies, such as *Preferred Risk Mut. Inc. Co v. Johnson*, 730 So. 2d 574 (Miss. 1998); see also *Coho Resources, Inc. v. McCarthy*, 829 So. 2d 1 (Miss. 2002).

However, this Court made clear in *Sentinel Industrial Contracting*, supra, that the mere fact that there is a dispute as to the amount due does not render the claim unliquidated. There this Court ruled, "The trial judge should have awarded Kimmins prejudgment interest on the damages for breach of contract in this case, calculated at eight percent (8%) per annum from the date of the breach to the date of judgment." 743 So. 2d at 971.

Fore's position that the damages in this case were unliquidated, ignores the definition of "unliquidated" explained in *Benchmark Health Care Center, Inc. v. Cain*, 912 So. 2d 175, 183 (Miss. App. 2005): "Unliquidated damages are damages that have been determined by a verdict or award, but cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." Damages in this case were in fact determined by a fixed formula, i.e., $8.90 per cubic yard for all debris hauled. See Jury Instruction P-4, (R.VI, 752) which states in relevant part "[Y]ou should award T.C.B. a judgment in an amount equal to all cubic yardage of debris hauled by T.C.B. for W.C. Fore at a rate of $8.90 per cubic yard, less any payments made by W.C. Fore Trucking to plaintiff." Thus the indebtedness of Fore to T.C.B. is not "unliquidated" in the sense urged by Fore in its motion. Damages that can be computed from the terms of the contract, i.e., $8.90 per cubic yard, are "liquidated." See *Benchmark at 183.*

III. The circumstances of this case amount to such egregious and malicious refusal to pay on behalf of Fore that the issues of punitive damages and entitlement to attorney's fees should be determined on remand.

T.C.B. recognizes that most breach of contract cases are inappropriate for punitive damages. However, past decisions of this Court have not hesitated to award punitive damages in cases of outrageous or extreme conduct by one party, or even if punitive damages are not awarded, to allow one side to recover attorney's fees if the breaching party's conduct would otherwise entitle the plaintiff to recover punitive damages; see *Puckett v. Gordon*, 16 So. 3rd 764, 771 (Miss. App. 2009), citing *Greenlee v. Mitchell*, 607 So. 2d 97, 108 (Miss. 1992).

There must be a remedy for cases where one party breaches a contract without any justifiable or arguable reason and withholds money simply because that party has the ability to do so. T.C.B. feels this is a case for punitive damages, and the judgment of the circuit court dismissing T.C.B.'s claim for punitive damages must be reversed and remanded for a trial limited to the issue of punitive damages.

Punitive damage law in Mississippi is governed by Miss. Code §11-1-65 (Rev. 2002); the relevant part of this statute is subsection (1):

> In any action in which punitive damages are sought:
>
> (a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice . . . . .

The legislature employed the word "malice," which is a term that this Court has defined as a "willful or conscious wrong" or conduct that amounts to a reckless disregard of the rights of the opposite party. *Bounds v. Watts*, 159 Miss. 307, 131 So. 804 (1931); *McCorkle v. McCorkle*, 811 So. 2d 258 (Miss. Ct. App. 2001); *Bradfield v. Schwartz*, 936 So. 2d 931 (Miss. 2006).

Applying this definition to a contractual setting, the term "malice" would apply to any conduct of a party to a contract that amounts to willfully or consciously denying the rights of the other party under the contract. Applied here, the uncontradicted evidence shows that Fore was paid for all of T.C.B.'s work and never made any effort to attempt to pay T.C.B. any part of the $6,634,436.69 that was due. Fore willfully denied T.C.B.'s right to receive payment.

Fore has consciously denied T.C.B. the right to be paid for its work. Exhibit D-18 is a letter from Mr. Fore dated June 19, 2006, responding to T.C.B.'s initial demand letter. Not one place in this letter does Mr. Fore mention the defense relied on at trial, that there was no modification of T.C.B.'s subcontract. In the letter he professed a potential set off against T.C.B. for interest on delayed payments from the county (a "defense" not raised at trial), but there is not one mention in the letter about his current theory, that the subcontract was never modified.

The actions of the defendant in this case are similar to those in several decisions of this Court where punitive damages or attorney's fees have been awarded against defendants who withheld money they had no justification for not paying.

For instance, in *Polk v. Sexton*, 613 So. 2d 841 (Miss. 1993) this Court, citing abundant authority, affirmed an award of punitive damages for a breach of a lease agreement that contained an option to purchase. When the tenant attempted to exercise the option, the landlord invented a variety of excuses why he would not consummate the sales agreement, when the real reason was the property had escalated in value and he could now sell it for twice what he had earlier agreed. In other words, the landlord breached his sales contract purely out of a desire to get more money, recklessly disregarding the rights of the other party to exercise the option. This Court, in affirming the award of punitive damages and attorney's fees, agreed with the

chancellor's finding of a "gross and willful" breach of contract by the landlord. 613 So. 2d at 845.

There are other cases of the Court where willful or reckless breaches of contract have also resulted in awards of punitive damages or attorney's fees. For instance, *Gill v. Gibson*, 982 So. 2d 415 (Miss. Ct. App. 2008) involved the case of an oil and gas operator intentionally allowing an assigned lease to lapse so that he could acquire a new lease directly from the land owner, cutting the original leaseholder out of royalty payments. The lower court's award of punitive damages for this intentional breach of contract was affirmed.

In *Sudeen v. Castleberry*, 794 So.2d 237 (Miss. 2001), a purchaser of a large tract of land refused, without any justification whatsoever, to pay the real estate commission he had contracted to pay. The lower court's award of punitive damages and attorney's fees was affirmed by this Court. See also *Jenkins v. CST Timber Company*, 761 So. 2d 177 (Miss. 2000), where this Court reversed dismissal of a punitive damage claim, finding the evidence was sufficient to support a claim for punitive damages where one party to a series of timber transactions had repeatedly breached obligations to pay commissions.

The actions of Fore in this case are similar in many respects to those of the defendants in the cases cited above. In each instance, the defendants in these cases were under a clear obligation to pay money and, motivated by either greed, indifference, or some other willful motive, failed to honor their contractual obligations. In this case, Fore has no valid defense to T.C.B.'s claim for the full amount due. This has not prevented Fore, however, from concocting a variety of excuses, none of which are valid. Allowing a jury to consider whether this conduct warrants punitive damages or an assessment of T.C.B.'s attorney's fees is in order at this time.

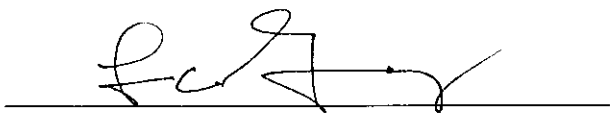
CONCLUSION

T.C.B. requests this Court, for reasons stated in Part I above, to enter judgment against Fore for $3,056,825.69, the difference in the $6,634,436.69 figure reflected on Exhibit P-4 and the $3,577,584 previously awarded by the circuit court's judgment.

Further, T.C.B. asks this Court to rule that T.C.B. should recover interest pursuant to §75-17-1 at eight percent per annum since the date of delinquency of the sums reflected in plaintiff's Exhibit P-4.

Finally T.C.B. asks the Court to remand this case to the Circuit Court of Harrison County for a trial limited to the issues of punitive damages and attorney's fees.

Respectfully submitted,



William F. Goodman, Jr. MS Bar [redacted]
Watkins & Eager, PLLC
Post Office Box 650
Jackson, MS 39205
T: (601) 965-1900
F: (601) 354-3623
E: goodmanjr@watkinseager.com

Lawrence C. Gunn, Jr. MS Bar [redacted]
Post Office Box 1588
Hattiesburg, MS 39403-1588
T: (601) 544-6771
F: (601) 544-6773
E: larry@lcgunn.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have this day forwarded via United States Mail, postage prepaid, the original and three copies of the Brief of Appellant, along with an electronic disk of same for filing to:

Ms. Kathy Gillis, Clerk
Mississippi Supreme Court
P.O. Box 249
Jackson, MS 39205

I have caused to be mailed by Unites States Mail, postage prepaid, a copy of the above referenced Brief of Appellant to:

Honorable Roger T. Clark
Circuit Court of Harrison County
P. O. Box 1461
Gulfport, MS 39502

Michael E. Cox
The Law Office of Michael E. Cox & Associates, P.A.
P. O. Box 4908
Biloxi, MS 39531

James K. Wetzel
James K. Wetzel & Assoc.
P.O. Box I
Gulfport, MS 39502-0001

This the 3rd day of September, 2010.

LAWRENCE C. GUNN, JR