IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUMMERALL ELECTRIC CO., INC. Appellant,

v. No. 2008-CA-02120

CHURCH OF GOD AT SOUTHAVEN
IN DESOTO COUNTY, MISSISSIPPI Appellee,

and

DON SOUTH PLUMBING, INC. AND SOUTH
AND SONS CONSTRUCTION, CO. INC. Appellant,

v.

CHURCH OF GOD AT SOUTHAVEN
IN DESOTO COUNTY, MISSISSIPPI Appellee

I. 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 and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1) Honorable Mitchell M. Lundy, Jr., Chancellor
2) Church of God at Southaven, Appellee
3) Summerall Electrical Co., Inc., Appellant
4) Don South Plumbing, Inc., Appellant
5) South and Son Construction Co., Inc., Appellant
6) Joseph M. Sparkman, Jr., Attorney for the Appellant
7) William A. Brown, Attorney for the Appellee
8) Gordon C. Shaw, Jr., Attorney for the Appellee

8) Gordon C. Shaw, Jr., Attorney for the Appellee

9) Byron R. Mobley, Former Attorney for Appellee

William A. Brown ([redacted]
Attorney of Record for the Appellee
Church of God at Southaven

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V. STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

The Appellants, Summerall Electric Co., Inc., Don South Plumbing, Inc., and South and Son Construction, Co. Inc., (incorrectly identified in the Appellant's complaint as South and Sons Construction, Co. Inc.) (hereinafter referred to as "Appellants") appeal a decision by the Chancery Court of DeSoto County, Mississippi denying the complaint of Appellants and removing the construction liens filed by the Appellants against the Church of God at Southaven (incorrectly identified in the Appellant's complaint as Church of God at Southaven in DeSoto County, Mississippi, hereinafter "Church").

National Church Services (hereinafter "NCS") held itself out as a duly qualified general contractor, and contracted with the Church to build a new sanctuary. NCS, as a general contractor, hired numerous subcontractors including the Appellants. The Church paid NCS, as a general contractor, a total of one-million twenty-eight thousand two-hundred and ninety dollars ($1,028,290.00). The Church was unaware NCS failed to pay the subcontractors until after all the payments to NCS were made.

In finding against the Appellants, the court held there was no principal-agent relationship between NCS and the Church, and found the Appellants were subcontractors to NCS and in the best position to protect themselves against non-payment and the Appellants failed to mitigate damages or protect themselves by filing a stop-notice. Consequently the Appellants' recovery against the Church was precluded.

B. COURSE OF THE PROCEEDINGS.

Appellant Summerall Electric Co., Inc. filed its lawsuit against NCS, Inc., Trustmark Corporation, and the Church in the Chancery Court of DeSoto County,

Mississippi on February 8, 2007, in cause number 07-02-0252. The same day, Appellants Don South Plumbing and South and Son Construction filed their lawsuit against the Church in cause number 07-02-0299. (R.5) Prior to the trial, Defendant Trustmark Corporation was voluntarily dismissed (R. 2). Chip Green, President of NCS, was served with a cross claim by the Church and a default judgment was obtained, NCS itself could not be served. (T at 5). The two matters were consolidated by agreement of the parties as both lawsuits arose out of the same set of operative facts. (R. 2 and 6).

C. DISPOSITION IN THE COURT BELOW.

The cause came to be heard on August 14 and 15, 2008, by the Honorable Chancellor Mitchell M. Lundy, Jr. Testimony was given by Sidney Elliot, a Building Official with the City of Southaven, MS; Larry Massey, Senior Pastor of the Church of God at Southaven; Rick Neely, a former NCS employee; Bill Shelby, Chairman of the Building Committee for the Church; Blair Carlson of Summerall Electric Co. Inc.; and Pat South and Don South of Don South Plumbing, Inc. and South and Son Construction Co. Inc.

D. *STATEMENT OF THE FACTS.*

Appellants are subcontractors engaged in the business of contracting with general contractors to construct commercial and residential properties in Mississippi. Appellee is a non-profit church. The Church's pastor, Larry Massey, presented his vision of a new sanctuary to the congregation which voted to build it. (T. at 58 and 59 lines, 10-27). During the approval process Pastor Massey began searching for a general contractor. (T. at 62 lines 6-9). Pastor Massey was given the name of NCS and its president Chip Green, a former pastor. (T. at pp. 64, lines 23-26, and pp. 65

lines 1-9, and pp. 67 lines 23-28). Chip Green claimed to have built more than 60 churches over a period of 20 years. (T. at 67, lines 12-20). Pastor Massey requested references from Chip Green, and subsequently contacted Pastor Chris Sistar in Henderson, South Carolina about the construction project NCS was currently building for them. (T. at 68, lines 19-29; pp. 69, lines 1-3). Pastor Massey also contacted a member of the Church of God State Council of South Carolina to check the background of NCS. (T. at 70, lines 8-15). After positive responses, from Pastor Sistar and a State Council member, the Church contracted to have NCS build the Sanctuary. (T. at 69, lines 9-12; pp. 70 lines 8-15; pp. 80 lines 10-29). Neither Pastor Massey nor Billy Lee Shelby, the chairman of the Building Committee, was experienced in construction. (T. at 76, 341, lines 25-28; pp. 167 lines 9-11; pp. 168, lines 5-29; pp.169, line 1).

When the Church signed a contract with NCS, the Church believed NCS would be licensed in Mississippi through a reciprocity agreement with South Carolina. (T. at 78, lines 10-12). NCS also assured the City of Southaven that they were applying for a Mississippi License, and therefore the City allowed construction to begin work with NCS as the contractor. (T. at. 19, lines 6-18; pp. 22, lines 26-29; pp. 23, lines 1-6). At the time the Church believed that NCS had the necessary license in order to work in the City of Southaven. (T. at 116, lines 5-8). NCS then contracted with the Appellants as subcontractors to perform work on the construction of the Sanctuary. (T. at 155, lines15-29; pp. 156, lines 1-11 and 23-29; pp. 157, lines 11-19; pp. 277, lines 3-8). All of the written contracts between NCS and the Appellants, signed by the Appellants, show NCS as the General Contractor and the Appellants as subcontractors. (R.E. Tabs, 3, 4, 5). Construction on the project began in March of 2006. At no point did the City of Southaven stop the construction due to NCS's failure to obtain a license. (T. at 238,

lines 11-13; pp. 258 lines 20-25). Later, when the Church became aware the license may not have been received, NCS assured the Church they were correcting the issue. (T. at 183, lines 20-24). Once construction started NCS presented applications for payment to the Church stating that the subcontractors had been paid. (T. at 187 lines 9-19). The Church paid NCS believing that the subcontractors were being paid. (T. at 187 lines 20-23). The Appellants never gave a stop notice or otherwise notified the Church that the Appellants had not been paid. (T. at 281 lines 1-5, 26-29; pp. 315 lines 13-19). Subsequently the Appellants filed this lawsuit to recover the amount NCS did not pay them. (T. at 274, lines 15-17).

VI. SUMMARY OF THE ARGUMENT.

The determination of agency is, as noted by the Appellants, one of fact. The facts show that no party believed NCS was acting as an agent for the Church when the contracts and subcontracts were signed, nor was that their intent. As noted in *Alladin Construction Company, Inc. v. John Hancock Life Insurance Company* a determination of agency is ultimately one of intention. 914 So. 2d 169, 177 (Miss. 2005). Based on the contracts and testimony at trial, all parties clearly intended NCS to be the contractor.

The Chancellor's decision is supported by credible evidence, not manifestly wrong, nor clearly erroneous. The stated purpose of the title 31, chapter three of the Mississippi Code is to protect persons from the fraudulent acts of contractors. The Appellant's interpretation of this statute would create liability on the part of the owner rather than protect an owner. The status of a party as a contractor does not depend on the existence of a valid contract. NCS could be a contractor even if there were no valid contract. NCS performed the functions of a contractor, and all parties believed NCS was the contractor.

Likewise, the determination of who is in the best position to prevent the loss is a determination of fact, and the facts support the Chancellor's decision. The Appellants are subcontractors who have been engaged in the construction industry for many years. The Appellants have the unique advantage of knowing whether or not they have received payment for their work. The Appellants failed to take advantage of statutory provisions to protect themselves. A subcontractor who fails to take advantage of those statutory provisions has no right to recover from the owner. *See Engle Acoustic & Tile, Inc. v. Grenfell*, 223 So. 2d 613 (Miss. 1969); *Timms v. Pearson*, 876 So. 2d 1083 (Miss. Ct. App. 2004). The Church is a religious organization and the chairman of their building committee and the Pastor were unfamiliar with the practices of the construction industry. Clearly, the Appellant subcontractors were in the best position to protect their selves and avoid the loss.

The Chancellor's decision does not break any new ground and upholds well settled law. Nothing about the rationale or the decision creates any new risk for non-payment on the part of the subcontractor. This law has been settled at the very least since *Engle* in 1969, and up until now there has been no indication of an undue burden on the courts, or that it is unreasonable to expect subcontractors to be aware of and abide by those statutes for their own benefit.

VI. ARGUMENT.

A. STANDARD OF REVIEW.

The findings of a Chancellor shall only be disturbed if those findings were "manifestly wrong, clearly erroneous, or not supported by substantial credible evidence." *Brown v. Ainsworth,* 943 So. 2d 757, 760 (2006 Miss. App.); *accord Timms v. Pearson,* 876 So.2d (2004 Miss. App.). "If substantial evidence supports the chancellor's findings, [the Court] will not reverse, even though '[the Court] might have found otherwise as an original matter.'" *Id.* While deference is given to a Chancellor's determination of fact, the Court reviews the chancellor's determinations of law *de novo. Id.*

B. WHETHER NCS WAS AN AGENT OF THE CHURCH.

There is substantial evidence in the record to support the Chancellor's decision that no principal-agent relationship existed between the Church and NCS. Because of the substantial evidence, the Appellants' contention that the Chancellor committed manifest error when he failed to find NCS was an agent for the Church must fail.

"Absent terms creating the relationship of principal and agent, a determination of the existence of such relationship is one of fact." *Engle* at 617. Here, there were no terms in the contract between NCS and the Church that create a principal-agent relationship. This issue then turns on a factual inquiry. "Whether an agency has in fact been created is to be determined by the relations of the parties as they exist under their agreements or acts, with the question being ultimately one of intention." (*Alladin*, 176-177 citing *Engle* 223 So.2d at 617-8). Here, the best evidence of the intent of the parties is the written contract between NCS and the Church and the contracts between NCS and the Appellants. The contracts, regardless of whether they are enforceable by

the contractor, show the intent of the parties that NCS act as the general contractor for the construction project. (R.E. Tabs 3,4,5). The contract, between NCS and the Church, calls for NCS to build the Sanctuary. (R.E. Tab 2). NCS was free to subcontract portions of the work if they chose to do so. Additionally, the contracts between NCS and the Appellants refer to NCS as the general contractor and the Appellants as "sub-contractors." (R.E. Tabs 3,4,5). Clearly all parties, at the time the contracts were formed, understood NCS was the general or prime contractor. In fact, during the trial the Appellants testified that they were the subcontractors and NCS was the contractor on the project. (T. at 277, 310, 312, 317). Only when the Appellants filed suit did they assert there was an agency relationship between NCS and the Church.

"The most characteristic feature of an agent's employment is that he is employed primarily to bring about business relations between his principal and third person." *Bailey,* at 474. Here, NCS was employed to build the sanctuary for the church not necessarily to hire subcontractors to build the sanctuary. Put another way, the primary purpose of NCS's employment was to build a building, not to simply find contractors for the Church to hire to build the building. The contract between NCS and the Church provided that "NCS shall fully execute the work." (R.E. Tab 2). Furthermore, in the contracts between NCS and the Appellants, NCS had the power to take control of the subcontractor's materials and complete the work with a supplemental work force if the subcontractor was not completing its work in a timely manner. (R.E. Tabs 3,4,5). NCS was charged with building the Sanctuary and controlling the project, not finding contractors or subcontractors to build it while the Church controlled the work. The *Associated Dealers* Court defined a general contractor as "the party to a building contract who is charged with the total construction and who enters into sub-contracts for

such work as electrical, plumbing and the like." 589 So. 2d at 1247-8 (quoting Black's Law Dictionary 349 & 621 (5th Ed. 1983). The actions of all parties and the contracts they signed support the Chancellor's finding that NCS was the general contractor and did not act as an agent of the Church.

Even had there been some indicia of agency, an agent must have either actual or apparent authority to bind the principal. *Eaton v. Porter*, 645 So. 2d 1323. Here, there was no actual authority because there was no agreement granting NCS the power to act as an agent. Therefore, at most any authority could only be implied. The Mississippi Supreme Court stated the extent to which apparent authority "binds the principal is predicated upon the perceptions of the third party in his dealings with the agent." *Eaton v. Porter*, 645 So. 2d 1323,1325 (Miss. 1994). "Apparent authority exists when a reasonably prudent person, having knowledge of the nature and the usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have." (*Id.*). Here, a reasonably prudent sub-contractor, being aware of the normal workings of the construction industry would not be justified in supposing that NCS would have the authority to bind the Church. NCS was referred to as the "contractor" in all documents signed by the Appellants. (R.E. Tab 3,4,5). Furthermore, the subcontractors knew at all times they were contracting with NCS and not the Church. (T. at 277, lines 3-8; pp. 324, lines 13-18). NCS, not the Church, had the power to control the subcontractors and complete the work should the subcontractors not meet the standards of their contract with NCS (R.E. Tabs 3,4,5). NCS did not have apparent authority to act as an agent of the Church.

The first issue the Chancellor addressed was whether or not the Church was liable under a principal-agent relationship. (R.E. Tab 1; and R. at 190). The Chancellor looked to the actions of the parties and the contracts to determine whether there was a principal-agent relationship. (R.E. Tab 1; R. at 191). The court also noted that all of the contracts between the Appellants and NCS referred to the Appellants as subcontractors and NCS as the contractor. (R.E. Tab 1, R. at 192). Furthermore, as noted by the Chancellor, the Church did not have any control over NCS. (R.E. Tab 1; R. at 194).

Appellants argue that a letter composed and signed by the supervisor for NCS on behalf of NCS, but on letterhead of the Church, while on site at the Church creates liability on the part of the Church. (R.E. Tab 16; and R. at 21). Surely the simple act of lending a sheet of paper cannot create an agency; particularly in light of the overwhelming evidence showing that all parties knew that NCS was acting as a general contractor on the project and had no authority to bind the Church.

Appellants argue *Bailey v. Worton* is analogous to the instant matter. 752 So.2d 470 (Miss. App. 1999). However, the factual differences between *Bailey* and the case *sub judice* are numerous. First, in *Bailey* there was evidence that the subcontractor believed the builder was in fact the owner of the property, and, had the subcontractor known of the existence or identity of the true owner, he would have chosen to contract directly with the true owner instead. *Bailey* at 476. Here, the subcontractors knew that NCS was not the owner of the property, but still chose to contract with NCS. Furthermore, in *Bailey* the builder was not hired by the owner, there was no contract for the builder to build for the owner, and at no point did the subcontractors believe they were subcontractors to the builder since the subcontractors believed that the builder was the owner of the lot. *Id.* at 475-6. Here, the Appellants knew at all times they were

working as subcontractors to NCS and were never under the false belief that they were contracting with the property owner (T. at 277and 317).

C. WHETHER THE CHANCELLOR CONSIDERED TITLE 31, CHAPTER THREE OF THE MISSISSIPPI CODE, AND IF NOT WHETHER SUCH WAS REVERSIBLE ERROR.

1. The Statute Is Intended To Protect Owners, Not Penalize Them.

The argument asserted by the Appellant is contrary to the purpose of title 31, chapter three of Mississippi Code which, as stated in section two of that chapter, is:

> to protect the health safety and general welfare of *all persons dealing with those who are engaged in the vocation of contracting* and to afford such persons an effective and practical *protection against incompetent, inexperienced, unlawful and fraudulent acts of contractors.* (emphasis added).

The reason for requiring a certificate of responsibility is that "the certificate of responsibility serves to *protect owners* from 'incompetent, inexperienced, unlawful and fraudulent acts of contractors,' by making null and void any contracts for construction for which a certificate of responsibility should have been issued." *Associated Dealers,* 589 So. 2d 1245, 1248 (1991 Miss.)(emphasis added). Here, the Appellants are subcontractors, licensed persons engaged in the vocation of contracting, attempting to hold a church, obviously not engaged in the vocation of contracting, responsible for performance done under contracts made by the Appellants with a fraudulent general contractor.

The contract may be made "null and void" by operation of law, as stated by the Mississippi Supreme Court, in order to "protect owners from 'incompetent, inexperienced, unlawful and fraudulent acts of contractors.'" (*Id.*). But, the argument asserted by Appellants frustrates the very purpose of the code provisions as plainly stated therein. Here, the Appellants are attempting to create an obligation by the

landowner Church to the subcontractors based on the alleged nullification of the contract; such a use of the statute is contrary to the stated purpose of title 31, chapter three of the Misssissippi Code.

2. Even If the Contracts Were Null and Void, The Status of a Party As a Contractor Is Not Necessarily Altered.

Even if the application of title 31, chapter three of the Mississippi Code may render the contract null and void so that an unlicensed contractor may not benefit from a contract, both the Appellants and the Church believed that NCS was the general contractor, and NCS performed the functions of a general contractor. In *Associated Dealers*, the owner, who had not obtained a certificate of responsibility, was held to be the general contractor for purposes of the construction because the owner acted as a general contractor performing all the functions of a general contractor. *Associated Dealers*, 589 So. 2d 1245, (Miss. 1991). Here, the Church did not perform the functions of a general contractor, NCS did. According to the written contracts between NCS and the Appellants, and the written contracts between NCS and the Church, it was the intent of all parties that NCS act as a general, or prime contractor for the project. (T. at 85,155, 156-7,177, 231, 247, 277, 305-306, 312, 313, 321). All of the contracts entered into by the Appellants refer to NCS as the "contractor" and the Appellants as the "subcontractors" and the Church consistently referred to NCS as the contractor. (T. at 155, 156, 156-7, 231, 277, 299, 305-6). Appellants never claimed to believe they had any sort of contract with the Church. (T. at 277 and 311-2).

In *Timberton Golf, L.P. v. McCumber Construction, Inc.* the court held that an arbitration agreement, contained within a contract to develop a golf course, was not nullified by the general contractor's failure to comply with Miss. Code Ann. § 31-3-15 and obtain a certificate of responsibility. 788 F. Supp. 919, 925 (S.D. Miss. 1992).

Here, simply because the contract may be null and void by operation of statute does not mean that all parts of the contract are completely disregarded. NCS was intended to be the general contractor and acted as a general contractor, and the potential nullification of the contracts with NCS does not alter the status of NCS as a contractor.

According to Miss. Code Ann. § 31-3-1 the definition of a contractor is "any person contracting or *undertaking as prime contractor, subcontractor, or sub-subcontractor of any tier* to do any erection, building, construction, reconstruction, repair, maintenance or related work on any public or private project." Miss. Code Ann. § 31-3-1 (July 1, 2008) (emphasis added). The key here is the inclusion of the words "contracting or undertaking." Certainly NCS was "undertaking" as a prime contractor. The status of a party as a contractor is not dependent on the existence of, or language in, a contract. Therefore, NCS could be the prime contractor, for the purposes of lien rights, even without the existence of a valid contract. After all an unlicensed driver is still a driver when they undertake to drive a car. The lack of a valid license does not negate their status as a driver. Likewise, not being a licensed contractor does not negate the status of NCS as a contractor.

D. THE CHANCELLOR OBVIOUSLY DID CONSIDER TITLE 31, SECTION 3 OF THE MISSISSIPPI CODE.

Appellants assign as error the absence of a written analysis of title 31, section three of Mississippi Code by the Chancellor. These statutes essentially set forth the requirements of a general contractor, and were established to protect persons dealing with contractors. If these steps are not followed a contract with the general contractor is null and void under the statute, but the Southern District of Mississippi Court held that parts of a contract may remain intact despite nullification under title 31, chapter three of the Mississippi Code. *Timberton*, 788 F. Supp. 919.

If the Chancellor determined the contract to be unquestionably valid, recovery by the Appellants would have been automatically precluded by their failure to file stop notices under Miss. Code Ann. § 85-7-181. *See generally Engle*, 223 So. 2d 613 (the subcontractor's failure to file a stop notice precluded recovery against an owner); *Timms*, 876 So.2d (recovery was precluded because the subcontractors failed to file a stop notice). Instead, the Chancellor proceeded with an analysis to determine if an agency relationship existed between NCS and the Church indicating, implicitly, the Chancellor considered the possibility that the contract may not comply with title 31, chapter three of the Mississippi Code. Otherwise, failure to file a stop notice by the Appellants would automatically preclude recovery and there would have been no reason for the Chancellor to delve into the Appellant's agency argument. If the Chancellor erred at all in excluding a detailed written analysis of this issue such error was harmless. The nullification of a contract by this statute precludes recovery by an unlicensed contractor against an owner, but does not impute liability for unpaid work to a property owner.

E. WHETHER THE APPELLANTS WERE IN THE BEST POSITION TO PREVENT THE LOSS.

The Appellants are all engaged in the construction industry. The record establishes that all Appellants are familiar with the standard practices of the construction industry and were or should have been acutely aware of their rights as subcontractors. (T. at 251, lines 13-21; pp. 300, lines 18-21). The Church, on the other hand, is a religious organization, lacking savvy and experience in the construction industry. (T. at 76, lines 8-24;pp. 168, lines 5-29; pp. 169, line 1). Bill Shelby, chairman of the Church's Building Committee, testified that he was unaware of the standard construction practices in DeSoto County, Mississippi. (T. at 230, lines 14-17).

The Appellants clearly had a greater level of sophistication and understanding of relevant practices and laws than did the Church. The greater experience and savvy of the Appellants puts them in a much better position to understand the potential risks of a construction project and also to take measures to minimize them.

Appellants were, or should have been, aware of the requirements of the Mississippi Code in order for a subcontractor to obtain a lien. If a subcontractor (or other supplier) gives notice to an owner that its payments have not been received then the owner may become liable but only for *unpaid work accrued after the notice.* Miss. Code Ann. § 85-7-181 (July 1, 1987) (emphasis added). In *Timms* the Court held an owner was not responsible for payment to subcontractors for work performed since the subcontractors failed to file a stop work notice when the contractor did not pay them. 876 So.2d. Here, none of the Appellants gave a single stop notice. (T. at 280, lines 26-29; pp. 281, lines1-5; pp. 315, lines13-19). Consequently, as the Mississippi Supreme Court stated, "the courts cannot aid those who neglect the opportunities afforded by statute." *Engle*, 223 So. 2d at 620.

Engle is similar in many ways to the case *sub judice.* The Appellants cite *Engle* as an example of the court deciding who should bear the loss between two innocent parties, but apparently have misinterpreted the holding. 223 So. 2d 613. "The determination of 'who was in the best position to have prevented the loss from occurring' is one of fact." *Id.* at 618. In *Engle*, as here, the subcontractors did not file a stop work notice prior to the owner paying the general contractor. *Id.* at 619. The *Engle* Court noted that "we cannot state that . . . the failure of the appellants to avail themselves of the statutory remedy was of a lesser degree of importance than the misplaced trust of the Owners in [the contractor]." *Id.* Finally, the *Engle* Court held that

the subcontractors must bear the loss because "the courts cannot aid those who neglect the opportunities afforded by statute." *Id.* at 620. Here, the subcontractors never filed a stop work notice and did not avail themselves of the statutory aid provided by Miss. Code Ann. § 85-7-181. (T. at 280, lines 26-29; pp. 281, lines1-5; pp. 315, lines13-19).

Furthermore, the Appellants were in the unique position of knowing whether or not they were being paid by NCS. The Church had no reason to doubt NCS was making payments made to the sub-contractors because the subcontractors continued working. As in *Engle*, "advance payments, whether intentional or unintentional, as long as they extinguish the debt and predate the stop notice, preclude liability on the part of the owner." *Engle,* at 619. Here, a stop notice was never filed, and payments were made by the Church to NCS to extinguish the debt. Absent notice it is not the responsibility of a property owner to ensure that the subcontractors are being paid by a general contractor; the burden is on the subcontractors to ensure that they are paid. The legislature, by enacting Miss. Code Ann. § 85-7-181, has provided subcontractors with the tools to protect themselves. If subcontractors choose to ignore those protections then they, not the owner, must suffer the consequences.

F. THE COURT'S RULING DOES NOT PLACE SUBCONTRACTORS IN JEOPARDY.

Appellants assert that subcontractors, under the Chancellor's decision, are at risk for non-payment of work done in the last thirty to sixty days of a project. It is important to note that the Chancellor's decision does not alter the well settled law in Mississippi and the way the construction business itself has operated for many years. *See generally Engle*, 223 So. 2d 613 (the subcontractor's failure to file a stop notice precluded recovery against an owner); *Timms*, 876 So.2d (recovery was precluded because the subcontractors failed to file a stop notice). For many years the problems

predicted by Appellants in their brief have never materialized. Subcontractors, as all businesses, are responsible for knowing the law as it relates to their business practices. Subcontractors possess the tools to minimize their own losses, but "the courts cannot aid those who neglect the opportunities afforded by statute." *Engle*, 223 So. 2d at 620. If there is any deficiency in the statute then it would be up to the legislature to address the issue, but the statute is clear.

Conversely, if the Church were responsible for double payment to benefit the Appellants who failed to avail themselves of the statutory relief Miss. Code Ann. § 85-7-181, a tremendous injustice would result. The statute clearly prohibits such an outcome when it provides "[t]he owner shall not be liable in any event for a greater amount than the amount contracted for with the contractor." Miss. Code Ann. § 85-7-181.

VII. CONCLUSION.

The Chancellor's decision that there was no agency relationship is supported by substantial evidence and is not manifestly wrong or clearly erroneous. The decision is well founded and the law has been properly applied. It is well settled that a Chancellor's decision should only be overturned if it is "manifestly wrong, clearly erroneous, or not supported by substantial credible evidence." *Brown,* 943 So. 2d at 760.

The stated purpose of the title 31, chapter three of the Mississippi Code is to protect owners, not penalize them. Under the statute NCS clearly fits the definition of a contractor, and furthermore the status of a party as a contractor does not depend on the existence of a valid or enforceable contract. The Chancellor obviously considered the statute as evidenced by the otherwise unnecessary agency analysis in the court's opinion.

The Appellants, each engaged in the vocation of construction, are in a much better position to prevent the loss than the Church. The Appellants have been provided statutory protections which they failed to utilize and were privy to unshared information concerning their payment status. It is well established law that a subcontractor who fails to utilize the statutory protections Miss. Code Ann. § 85-7-181 may not recover. The specific provisions of that statute should apply rather than the general provisions of Miss. Code Ann. § 31-3-1.

For the foregoing reasons the Court must affirm the findings of the Chancellor. The findings are not manifestly wrong or clearly erroneous, and are supported by credible evidence. The statutes and case law are clear, and therefore the Appellee does not request an oral argument at this time.

Respectfully submitted, this the 2 day of July, 2009.

Church of God at Southaven

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has this day placed a true and correct copy of the foregoing in the U.S. Mail, First Class postage prepaid, properly addressed to:

Joseph M. Sparkman, Jr.
Sparkman-Zummach, P.C.
P.O. Box 266
Southaven, MS 38671-0266

Honorable Mitchell M. Lundy, Jr.
DeSoto County Chancellor
P.O. Box 471
Grenada, MS 38901

I further certify that pursuant to M.R.A.P. 25(a), I have mailed the original and three (3) true and correct copies of the above and foregoing in the U.S. Mail, First Class postage prepaid, properly addressed to:

Hon. Kathy Gillis
Clerk for the Mississippi Supreme Court
P.O. Box 249
Jackson, MS 39205-0249

I further certify that pursuant to M.R.A.P. 28(m), I have mailed the addressee immediately above an electronic copy of the above and foregoing on an electronic disk and state this document was written in .doc format.

on this the 2nd day of July, 2009.

William A. Brown

ADDENDUM

Miss. Code Ann. § 31-3-1

Miss. Code Ann. § 31-3-2

Miss. Code Ann. § 85-7-181

TITLE 31. PUBLIC BUSINESS, BONDS AND OBLIGATIONS
CHAPTER 3. STATE BOARD OF PUBLIC CONTRACTORS

GO TO MISSISSIPPI CODE OF 1972 ARCHIVE DIRECTORY

Miss. Code Ann. § 31-3-1 (2008)

§ 31-3-1. Definitions

The following words, as used in this chapter, shall have the meanings specified below:

"Board": The State Board of Contractors created under this chapter.

"Contractor": Any person contracting or undertaking as prime contractor, subcontractor or sub-subcontractor of any tier to do any erection, building, construction, reconstruction, repair, maintenance or related work on any public or private project; however, "contractor" shall not include any owner of a dwelling or other structure to be constructed, altered, repaired or improved and not for sale, lease, public use or assembly, or any person duly permitted by the Mississippi State Oil and Gas Board, pursuant to Section 53-3-11, to conduct operations within the state, and acting pursuant to said permit. It is further provided that nothing herein shall apply to:

(a) Any contract or undertaking on a public project by a prime contractor, subcontractor or sub-subcontractor of any tier involving erection, building, construction, reconstruction, repair, maintenance or related work where such contract, subcontract or undertaking is less than Fifty Thousand Dollars ($ 50,000.00);

(b) Any contract or undertaking on a private project by a prime contractor, subcontractor or sub-subcontractor of any tier involving erection, building, construction, reconstruction, repair, maintenance or related work where such contract, subcontract or undertaking is less than One Hundred Thousand Dollars ($ 100,000.00);

(c) Highway construction, highway bridges, overpasses and any other project incidental to the construction of highways which are designated as federal aid projects and in which federal funds are involved;

(d) A residential project to be occupied by fifty (50) or fewer families and not more

than three (3) stories in height;

(e) A residential subdivision where the contractor is developing either single-family or multifamily lots;

(f) A new commercial construction project not exceeding seventy-five hundred (7500) square feet and not more than two (2) stories in height undertaken by an individual or entity licensed under the provisions of Section 73-59-1 et seq.;

(g) Erection of a microwave tower built for the purpose of telecommunication transmissions;

(h) Any contract or undertaking on a public project by a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of fire protection systems where such contract, subcontract or undertaking is less than Five Thousand Dollars ($ 5,000.00);

(i) Any contract or undertaking on a private project by a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of fire protection systems where such contract, subcontract or undertaking is less than Ten Thousand Dollars ($ 10,000.00);

(j) Any contract or undertaking on a private or public project by a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of technically specialized installations if performed by a Mississippi contractor who has been in the business of installing fire protection sprinkler systems on or before July 1, 2000; or

(k) Any contractor undertaking to build, construct, reconstruct, repair, demolish, perform maintenance on, or other related work, whether on the surface or subsurface, on oil or gas wells, pipelines, processing plants, or treatment facilities or other structures of facilities. Nothing herein shall be construed to limit the application or effect of Section 31-5-41.

"Certificate of responsibility": A certificate numbered and held by a contractor issued by the board under the provisions of this chapter after payment of the special privilege license tax therefor levied under this chapter.

"Person": Any person, firm, corporation, joint venture or partnership, association or other type of business entity.

"Private project": Any project for erection, building, construction, reconstruction, repair, maintenance or related work which is not funded in whole or in part with public funds.

"Public agency": Any board, commission, council or agency of the State of Mississippi or any district, county or municipality thereof, including school, hospital, airport and all other types of governing agencies created by or operating under the laws of this state.

"Public funds": Monies of public agencies, whether obtained from taxation, donation or otherwise; or monies being expended by public agencies for the purposes for which such public agencies exist.

"Public project": Any project for erection, building, construction, reconstruction, repair, maintenance or related work which is funded in whole or in part with public funds.

HISTORY: SOURCES: Codes, 1942, § 8968-01; Laws, 1958, ch. 473, § 1; Laws, 1960, ch. 393, § 1; reenacted, 1980, ch. 498, § 1; reenacted without change, 1985, ch. 505, § 7; reenacted and amended, 1988, ch. 527, § 1; Laws, 1992, ch. 505, § 1; Laws, 2000, ch. 475, § 1; Laws, 2004, ch. 358, § 1; Laws, 2008, ch. 478, § 1, eff from and after July 1, 2008.

TITLE 31. PUBLIC BUSINESS, BONDS AND OBLIGATIONS
CHAPTER 3. STATE BOARD OF PUBLIC CONTRACTORS

GO TO MISSISSIPPI CODE OF 1972 ARCHIVE DIRECTORY

Miss. Code Ann. § 31-3-2 (2008)

§ 31-3-2. Declaration of purpose

The purpose of Chapter 3, Title 31, Mississippi Code of 1972, is to protect the health, safety and general welfare of all persons dealing with those who are engaged in the vocation of contracting and to afford such persons an effective and practical protection against incompetent, inexperienced, unlawful and fraudulent acts of contractors.

HISTORY: SOURCES: Laws, 1985, ch. 505, § 6; reenacted, 1988, ch. 527, § 2, eff from and after July 1, 1988.

TITLE 85. DEBTOR-CREDITOR RELATIONSHIP
CHAPTER 7. LIENS
LIEN ON AMOUNT DUE CONTRACTOR

GO TO MISSISSIPPI CODE OF 1972 ARCHIVE DIRECTORY

Miss. Code Ann. § 85-7-181 (2008)

§ 85-7-181. Amount due contractor or master workman may be bound by written notice; suit

When any contractor or master workman shall not pay any person who may have furnished materials used in the erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, railroad embankment, the amount due by him to any subcontractor therein, or the wages of any journeyman or laborer employed by him therein, any such person, subcontractor, journeyman or laborer may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section; and, thereupon the amount that may be due upon the date of the service of such notice by such owner to the contractor or master workman, shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata, of all sums due such person, subcontractor, journeyman or laborer who might lawfully have given notice in writing to the owner hereunder, and if after such notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court, the amount due on the contract; and thereupon all persons entitled hereunder, so far as known, shall be made parties and summoned into court to protect their rights, contest the demands of such contractor or master workman and other claimants; and the court shall cause an issue to be made up and tried and direct the payment of the amount found due in accordance with the provisions hereof; or in case any person entitled to the benefits hereof, shall sue the contractor or master workman, such person so suing shall make the owner and all other persons interested, either as contractors, master workmen, subcontractors, laborers, journeymen or materialmen, so far as known, parties to the suit (and any such party not made a party in any suit hereunder authorized may intervene by petition), and, thereupon the owner may pay into the court the amount admitted to be due on the contract or sufficient to pay the sums claimed, and the court shall cause an issue to be made up and award the same to the person lawfully entitled; in either case the owner shall not be liable for costs; but if the owner, when sued, with the contractor or master workman, shall deny any indebtedness sufficient to satisfy the sums claimed and all costs, the court shall, at the instance of any party interested, cause an issue to be made up to ascertain the true amount of such indebtedness and shall give judgment and award costs, and reasonable attorney's

fees, according to the rights of the several parties in accordance herewith. In case judgment shall be given against such owner, such judgment shall be a lien, from the date of the original notice, and shall be enforced as other liens provided in this chapter. The owner shall not be liable in any event for a greater amount than the amount contracted for with the contractor.

The provisions of this section allowing the award of attorney's fees shall only apply to actions the cause of which accrued on or after July 1, 1987.

HISTORY: SOURCES: Codes, 1880, § 1381; 1892, § 2714; 1906, § 3074; Hemingway's 1917, § 2434; 1930, § 2274; 1942, § 372; Laws, 1904, ch. 153; Laws, 1918, ch. 128; Laws, 1987, ch. 392, § 2, eff from and after July 1, 1987.