

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-00177-COA

T.C.B. CONSTRUCTION COMPANY, INC.

**APPELLANT/
CROSS-APPELLEE**

v.

W.C. FORE TRUCKING, INC.

**APPELLEE/
CROSS-APPELLANT**

DATE OF JUDGMENT:	11/03/2009
TRIAL JUDGE:	HON. ROGER T. CLARK
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	LAWRENCE CARY GUNN JR. WILLIAM F. GOODMAN JR.
ATTORNEYS FOR APPELLEE:	JAMES K. WETZEL MICHAEL E. COX
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	DENIED MOTION FOR SUMMARY JUDGMENT AND ALLOWED THE JURY TO DECIDE IF THE CONTRACT HAD BEEN MODIFIED AND DETERMINE DAMAGES
DISPOSITION:	AFFIRMED IN PART, REVERSED AND RENDERED IN PART, AND REMANDED - 11/15/2011
MOTION FOR REHEARING FILED:	12/13/2011 - DENIED; AFFIRMED IN PART, REVERSED AND RENDERED IN PART, AND REMANDED - 06/12/2012
MANDATE ISSUED:	

MODIFIED OPINION ON REHEARING

EN BANC.

MAXWELL, J., FOR THE COURT:

¶1. The motion for rehearing is denied. The court's original opinion is withdrawn, and this opinion is substituted in lieu thereof.

¶2. T.C.B. Construction Company, Inc. (TCB) sued W.C. Fore Trucking, Inc. (Fore) for breach of contract. The suit was based on Fore's non-payment for work TCB performed removing debris south of Highway 53 in Harrison County, Mississippi, after Hurricane Katrina. Fore disagreed that the subcontract between the two companies was modified to include this area. Although the jury found Fore had modified the subcontract, it awarded TCB only \$3,577,583.34 in damages, which in effect compensated TCB for only half of the work it undisputably performed. On appeal, TCB argues it was entitled, as a matter of law, to \$6,634,436.69, based on the undisputed amount of debris it removed. Specifically, TCB claims it was entitled to summary judgment or a directed verdict in its favor because Fore was estopped from denying the subcontract's modification.

¶3. Under Mississippi's quasi-estoppel doctrine, a party cannot claim the benefits of a transaction and at the same time repudiate its obligations. Fore accepted the benefits of the modified subcontract with TCB, billing Harrison County (County) for each cubic yard of debris TCB removed south of Highway 53. And Fore admits that neither it nor any other subcontractor besides TCB performed the work for which Fore was compensated. Based on Mississippi's quasi-estoppel doctrine, we find Fore is estopped from denying it owed TCB any portion of the approximately \$8.5 million it collected from the County for TCB's work south of Highway 53. Thus, the circuit court erred by submitting the issues of modification and damages to the jury. We reverse the circuit court's \$3,577,583.34 judgment and render judgment in TCB's favor in the amount of \$6,634,436.69.

¶4. The circuit court correctly awarded TCB prejudgment interest of eight percent. But we find this interest should have been awarded from the date of breach, not the date TCB

filed its complaint. Therefore, we remand to the circuit court to calculate prejudgment interest. We affirm the circuit court's directed verdict in favor of Fore on the issues of punitive damages and attorney's fees.

BACKGROUNDS FACTS

¶5. On August 29, 2005, the County began clearing debris left in the wake of Hurricane Katrina from its right of ways. It divided the county into three zones. Fore won the contract to remove debris in Zone 2. The County agreed to pay Fore \$10.64 per cubic yard of debris removed from this zone.

¶6. On September 16, 2005, Fore entered into a subcontract with TCB to haul debris in Zone 2 north of Highway 53 for \$8.90 per cubic yard. The subcontract required TCB to send Fore daily reports, referred to as "truck tickets." The subcontract also had an express good-faith clause, which stated "the contract can and will be modified based upon facts and circumstances of all debris removal."

¶7. TCB immediately began clearing debris in Zone 2 north of Highway 53. Nine days later, on September 25, 2005, TCB began clearing debris south of Highway 53. TCB's representatives testified TCB moved south of Highway 53 at the request of Fore's principal, W.C. Fore (W.C.). TCB continued moving south, eventually clearing debris to I-10. Though W.C. denied his company had asked TCB to clear south of Highway 53, after September 25, neither Fore nor any other subcontractor cleared any debris from this area. It is undisputed that TCB was the only company that removed debris south of Highway 53.

¶8. An independent accounting firm, R.W. Beck & Associates (Beck), oversaw the debris removal. Each day Beck inspected the trucks removing the debris. It also calculated the

cubic yardage and verified the location from which the debris had been removed. Once Beck approved the truck tickets, it sent copies to Fore. TCB also sent Fore weekly invoices. Fore utilized the figures contained in TCB's invoices to create its own invoices, which Fore submitted to the County for payment. Beck verified the invoices and told the County these invoices should be paid; and the County, in turn, looked to the Federal Emergency Management Agency (FEMA) for funds to pay Fore's invoices.

¶9. Fore claims in March 2006 it first learned TCB had been hauling debris from south of Highway 53. Although Fore stopped paying TCB's invoices at this point, it does not dispute it billed the County for all of the debris TCB hauled south of Highway 53. And the County paid Fore in full for each invoice submitted. In total, Fore received \$12,292,176.10 from the County based on debris cleared by TCB. This represents approximately 1,155,280 cubic yards, at \$10.64 per cubic yards. TCB claims it is entitled to \$10,273,125.77 of that money, or \$8.90 for each yard it undisputably hauled. Fore's payments to TCB totaled only \$3,638,689.08, a difference of \$6,634,436.69.

PROCEDURAL HISTORY

¶10. TCB sued Fore for breach of contract. To recover for breach of contract, a plaintiff has the burden to prove by preponderance of the evidence: (1) the existence of a valid and binding contract, (2) the defendant's breach of the contract, and (3) resulting monetary damages. *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992). TCB argued: (1) the subcontract, in which Fore promised to pay TCB \$8.90 for each cubic yard of debris it removed, was orally modified to include debris removal south of Highway 53 as well as north of Highway 53; (2) TCB removed debris south of Highway 53 on Fore's behalf, but

despite having billed the County for this work, Fore did not pay TCB; and (3) TCB suffered damages of \$6,634,436.69. Fore countered that the subcontract only concerned the area north of Highway 53 and was never modified. But Fore conceded it had billed the County for TCB's work south of Highway 53, received payment in full, and did not compensate TCB. Fore argued TCB was only entitled to \$3,117,958 for the approximately 350,332 cubic yards TCB cleared north of Highway 53. Fore counterclaimed for the difference between what it paid TCB (\$3,638,689.08) and what TCB earned north of Highway 53 (\$3,117,958.09)—an alleged “overpayment” of \$520,730.99.

¶11. Before trial, TCB moved for summary judgment. It argued there were no disputed facts concerning the modified subcontract's existence because Fore actually utilized TCB's invoices to bill the County for debris removed south of Highway 53, thus proving the subcontract had been modified. The circuit judge denied summary judgment, finding W.C.'s denial of the modification was sufficient to create a disputed fact issue. At the close of trial, TCB moved for a directed verdict. TCB argued it was entitled to a judgment as a matter of law in the amount of \$6,634,436.69 because W.C.'s contradictory testimony was not sufficient to overcome the completion of the contract and Fore's acceptance of the work and money. The circuit judge denied the request for a directed verdict.

¶12. The circuit court submitted the issues of the modified subcontract's existence, breach, and the amount of damages to the jury. TCB questioned whether the jury should decide the amount of damages and argued that if the jury found the subcontract had been modified then it should award TCB the set amount of money represented by invoices Fore accepted from TCB and billed to the County. The circuit judge rejected TCB's argument that the amount

of damages was set, deciding “to leave the amount of the verdict up to the jury in its discretion” In a special interrogatory verdict form, the jury found the subcontract had been modified but that TCB was only entitled to \$4,098,314.33 for breach of the modified subcontract. It also awarded Fore \$520,730.99 on its “overpayment” counterclaim. The result was a \$3,577,583.34 net award for TCB.

¶13. The circuit judge awarded TCB prejudgment interest of eight percent, accruing from the date TCB filed its complaint. The circuit judge refused to submit TCB’s punitive damages claim to the jury.

ISSUES ON APPEAL

¶14. On appeal, TCB argues the issues of the existence of the modified subcontract and the amount of damages owed for Fore’s breach should not have been submitted to the jury. Instead, TCB claims, as a matter of law, that Fore owed it \$6,634,436.69 based on Mississippi’s doctrine of quasi-estoppel, as applied in *Hoerner v. First National Bank of Jackson*, 254 So. 2d 754, 761-62 (Miss. 1972). Fore asserts the doctrine of quasi-estoppel is not applicable to TCB’s claim. And even if the doctrine did apply, Fore contends TCB waived the argument at the trial level by not specifically pleading and arguing estoppel.

¶15. As to prejudgment interest, TCB claims that because the amount of damages was liquidated, it is entitled to the eight-percent prejudgment interest from the date of breach, not the later date of filing the complaint. Fore cross-appeals on this issue, asserting TCB’s damages were unliquidated; thus, the award of prejudgment interest was an abuse of discretion.

¶16. TCB also requests that we remand the issue of punitive damages for a jury trial.

DISCUSSION

I. Modified Subcontract and Damages

¶17. TCB moved for a directed verdict in its favor on its breach-of-contract claim. We review the denial of a directed verdict de novo. *Figueroa v. Orleans*, 42 So. 3d 49, 52 (¶11) (Miss. Ct. App. 2010) (citing *Windmon v. Marshall*, 926 So. 2d 867, 872 (¶20) (Miss. 2006)). “If the Court finds that the evidence favorable to the non-moving party and the reasonable inferences drawn therefrom present a question for the jury, the motion should not be granted.” *Entergy Miss., Inc. v. Bolden*, 854 So. 2d 1051, 1055 (¶7) (Miss. 2003) (quoting *Pace v. Fin. Sec. Life of Miss.*, 608 So. 2d 1135, 1138 (Miss. 1992)). “However, ‘our rules and case law allow for questions to be removed from the jury’s consideration when there exists no factual question for it to resolve.’” *Figueroa*, 42 So. 3d at 52 (¶11) (quoting *Bolden*, 854 So. 2d at 1055 (¶8)).

¶18. The circuit court found W.C.’s denial of the subcontract’s modification was sufficient to create jury questions on the issues of modification and damages. But our review shows there were no jury issues to be resolved. Fore admits it did not reject a single one of TCB’s daily truck tickets or weekly invoices. Likewise, prior to TCB filing suit, Fore did not protest that TCB was working in an area outside of the area covered in the subcontract. Fore also admits it billed the County—and received payment from the County—for TCB’s work represented by these invoices. Mississippi law prevents Fore from simultaneously benefitting from the modified subcontract—by receiving over \$8.5 million from the County because of TCB’s work south of Highway 53—and then in turn repudiating any obligation to pay TCB its approximately \$7.15 million share. Fore’s undisputed conduct, as a matter

of law, established the subcontract's modification. And TCB's unquestioned invoices proved Fore owed TCB a remaining balance of \$6,634,436.69.

A. Mississippi's Quasi-estoppel Doctrine

¶19. Quasi-estoppel is an equitable principle that applies to certain bars, such as ratification, acquiescence, or acceptance of benefits. This long-standing doctrine is applied to preclude contradictory positions by preventing a person from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Wood Naval Stores Exp. Ass'n v. Latimer*, 220 Miss. 652, 664, 71 So. 2d 425, 430 (1954). Quasi-estoppel is based on the unconscionability of allowing a person to maintain a position inconsistent with one to which he acquiesced or from which he accepted a benefit. *Bailey v. Estate of Kemp*, 955 So. 2d 777, 782 (¶21) (Miss. 2007). This doctrine "applies where 'the conscience of the court is repelled by the assertion of rights inconsistent with a litigant's past conduct[.]'" *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 575 F. Supp. 2d 696, 712 (D. Md. 2008) (applying Mississippi law) (quoting *Unruh v. Indus. Comm'n of Ariz.*, 301 P.2d 1029, 1031 (Ariz. 1956)).

¶20. In addressing the equitable concepts embodied in the quasi-estoppel doctrine, the Mississippi Supreme Court has explained:

Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent therewith. A party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations.

Wood Naval, 220 Miss. at 664, 71 So. 2d at 430 (citation omitted).

¶21. In *Hoerner*, the Mississippi Supreme Court applied the doctrine of quasi-estoppel to

reverse a chancellor’s ruling that Fred Hoerner was not personally liable under a guaranty agreement. *Hoerner*, 254 So. 2d at 761-62. The guaranty agreement required Hoerner’s prior approval before the bank issued a guaranteed loan. *Id.* at 760. At trial, Hoerner adamantly denied giving approval for the loans. And the trial court rejected as inadmissible parol evidence the testimony by bank employee’s that Hoerner had approved each loan over the phone. *Id.* Thus, based on Hoerner’s “undisputed” testimony, the trial court found he was not liable. *Id.*

¶22. On appeal, the supreme court determined the bank’s evidence should have been admitted. *Id.* at 761. But instead of reversing and remanding for the trial court to consider this evidence, the supreme court reversed and rendered in the bank’s favor. *Id.* at 761-62. Recognizing the “more cogent issue” on appeal was whether Hoerner had approved the loans, the supreme court found “sufficient evidence reflected by the record to signify Hoerner’s approval.” *Id.* at 761. The supreme court found Hoerner was “estopped to disclaim liability under the continuing guaranty clause.” *Id.* The *Hoerner* court based its opinion on evidence of Hoerner’s conduct—that he received benefits from the loan and presided over board meetings where the loans were approved. *Id.*

¶23. The supreme court held proof of Hoerner’s actual approval was unnecessary because Hoerner’s “acceptance of the benefits flowing from [the loans] could not be other than *an implied approval by operation of law.*” *Id.* at 762 (emphasis added). The *Hoerner* court recognized: “Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent therewith.” *Id.* Thus, “based on equity and good

conscience[,]” the supreme court reversed the judgment in favor of Hoerner and rendered judgment in the bank’s favor based on evidence of Hoerner’s conduct. *Id.* at 761-62.

¶24. Earlier, in *Wood Naval*, the supreme court similarly looked to the conduct of two association members. *Wood Naval*, 220 Miss. at 664-65, 71 So. 2d at 429-30. Because the two members elected to continue as members of the association and “availed themselves of the advantages which the association had to offer,” they were estopped from denying their continued membership. *Id.* at 664-65, 71 So. 2d at 430.

¶25. More recently, in *Bailey*, the supreme court relied on the same estoppel principle to uphold a contract for services provided to sell out-of-state rental properties. The *Bailey* court held:

This doctrine, termed “quasi-estoppel,” precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position it has previously taken, and applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. This is exactly the situation at hand; the Baileys cannot profit under this contract and also seek to have it declared invalid where their obligations under the contract are concerned.

Bailey, 955 So. 2d at 782 (¶21) (internal citation and quotations omitted). In *Bailey*, our supreme court found the contract should also be upheld “as a matter of equity,” because to avoid the obligations the contract created would have resulted in a “windfall.” *Id.* at 783 (¶24).

¶26. As equitable principles go, our inquiry focuses solely on the application of the doctrine of quasi-estoppel, as expressed in *Hoerner*, *Wood Naval*, and *Bailey*, to Fore’s actions related to the subcontract. Because Judge Carlton’s separate opinion delves into equitable estoppel, quantum meruit, and unjust enrichment, we briefly note these equitable

doctrines are inapplicable to this appeal. These doctrines, which are not relied on by the appellant nor the majority, are neither synonymous with quasi-estoppel—or with each other.¹ See, e.g., *In re Estate of Fitzner v. Jurotich*, 881 So. 2d 164, 173-74 (¶¶23-26) (Miss. 2003) (separately addressing equitable estoppel and quantum meruit). For example, while equitable estoppel requires the plaintiff to show detrimental reliance on a promise, quasi-estoppel does not. Compare *Powell v. Campbell*, 912 So. 2d 978, 981-82 (¶¶11-13) (Miss. 2005) (discussing equitable estoppel) with *Bailey*, 955 So. 2d at 782 (¶ 21) (discussing quasi-estoppel). Instead, quasi-estoppel requires showing a party's position is unconscionable because it is inconsistent “with one to which he acquiesced, or from which he accepted a benefit.” *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508, 512 (5th Cir. 2002) (citation omitted) (noting quasi-estoppel is “inapplicable where the conduct allegedly giving rise to the estoppel is not shown to have benefited the party sought to be estopped”).

¶27. In *Hoerner*, *Wood Naval*, and *Bailey*, quasi-estoppel operated to prohibit the defendants' assertions that were inconsistent with their previous acceptances of benefits—subsequent bank loans (*Hoerner*), continued association membership benefits (*Wood Naval*), and real-estate investment services (*Bailey*)—and, therefore, prohibited the

¹ Equitable estoppel involves the enforcement of a promise that does not rise to the level of a contract based on the detrimental reliance of the person to whom the promise was made. E.g., *Powell v. Campbell*, 912 So. 2d 978, 981-82 (¶¶11-13) (Miss. 2005). “Quantum meruit recovery is a contract remedy which may be premised either on express or ‘implied’ contract, and a prerequisite to establishing grounds for quantum meruit recovery is claimant's reasonable expectation of compensation.” *In re Estate of Fitzner v. Jurotich*, 881 So. 2d 164, 173 (¶25) (Miss. 2003). And unjust enrichment “is based on a promise, which is implied in law, that one will pay a person what he is entitled to according to ‘equity and good conscience.’ . . . It is an obligation created by law in the absence of any agreement[.]” *1704 21st Ave., Ltd. v. City of Gulfport*, 988 So. 2d 412, 416 (¶10) (Miss. Ct. App. 2008).

defendants from denying the existence of the contractual basis for the plaintiffs' claims. Here, the unambiguous contractual language stated the subcontract between Fore and TCB "can and will be modified based upon facts and circumstances of all debris removal." TCB essentially argues Fore is estopped from denying the modification of its subcontract with TCB since the "facts and circumstances of all debris removal" undisputedly showed (1) Fore's previous acceptance and ratification of TCB's invoices for debris removed south of Highway 53, (2) Fore's submissions of these invoices to the County for payment, (3) Fore's receipt of payment from the County for debris TCB removed south of Highway 53, and (4) the fact that TCB—not Fore nor any other company—was the only contractor that had removed debris south of Highway 53. Because Fore ratified, accepted, and greatly benefitted from TCB's debris removal south of Highway 53, TCB argues quasi-estoppel precludes Fore from later flip flopping to an entirely inconsistent position aimed solely at shirking its obligation to pay TCB.

B. Operation of Quasi-Estoppel on TCB's Claim

¶28. Generally, "[q]uasi-estoppel is a factual determination and thus the province of the jury[.]" *Stinnett v. Colo. Interstate Gas Co.*, 227 F.3d 247, 258 (5th Cir. 2000). But if the evidence is undisputed as to the material facts, estoppel may be established as a matter of law. M.R.C.P. 56(c). *See Allen v. Dempster Mill Mfg. Co.*, 402 S.W.2d 809, 810 (Tex. Ct. App. 1966) (finding estoppel established as a matter of law because of undisputed record).

¶29. Bearing in mind that quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken," we find none of the material facts related to the inconsistency between Fore's present assertion and its

previous actions are disputed. *Bailey*, 955 So. 2d at 782 (¶21). Fore does not deny its previous conduct but instead admits it accepted the benefits of the modified subcontract—a contract that explicitly provided it “can and will be modified based upon facts and circumstances of all debris removal.” And for months, Fore accepted daily truck tickets and weekly invoices that showed TCB was removing debris south of Highway 53, without any protest by Fore that TCB was working outside the bounds of the area covered in the subcontract.

¶30. Fore argues W.C. was the only corporate agent that could bind Fore to the modified subcontract, and W.C. testified *he* did not know TCB was working south of Highway 53 because the “ladies” in the bookkeeping department handled these invoices without his knowledge. Therefore, Fore argues it cannot be bound to the modified subcontract through quasi-estoppel. But what Fore does not argue is that its bookkeeping employees were unauthorized to accept the invoices or submit them to the County for payment or that Fore, *the corporation*, was without knowledge it was accepting the benefit of TCB’s work.²

² We note W.C.’s personal knowledge is not the legal equivalent of the corporation’s. Rather, a corporation, like Fore, is charged with the collective knowledge of its employees and agents acting on its behalf. *Gutter v. E.I. Dupont De Nemours*, 124 F. Supp. 2d 1291, 1309 (S.D. Fla. 2000) (citing 3 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 790 (1994)) (charging corporation “with constructive knowledge . . . of all material facts of which its officer or agent receives notice or acquires knowledge while acting within the course of employment”); *see also First Ala. Bank of Montgomery, N.A. v. First State Ins. Co.*, 899 F.2d 1045, 1060 n.8 (11th Cir. 1990) (noting “the general rule is that a principal is chargeable with and bound by the knowledge of his agent while acting within the scope of his authority”); *United States v. Bank of New England, N.A.*, 821 F.2d 844, 855-56 (1st Cir. 1987) (finding corporations liable for collective knowledge of all employees and agents acting on behalf of corporation); *Apex Oil Co. v. United States*, 530 F.2d 1291, 1295 (8th Cir. 1976) (holding “knowledge of the employees is the knowledge of the corporation”).

Neither does it assert TCB unreasonably relied on the fact Fore was accepting, reviewing, and submitting for payment TCB's invoices. Thus, we find proof of W.C.'s actual knowledge that TCB was working south of Highway 53 is not necessary to apply quasi-estoppel because Fore indisputably accepted the benefits of TCB's work. *See Hoerner*, 254 So. 2d at 762 (holding proof of Hoerner's actual approval was unnecessary because Hoerner's "acceptance of the benefits flowing from [the loans] could not be other than *an implied approval by operation of law*").

¶31. First, only TCB, not Fore nor any other subcontractor, removed debris from that area. Second, TCB submitted invoices to Fore's accountants depicting TCB had removed debris from this area. Fore then reviewed TCB's invoices and utilized the figures provided by TCB to generate its own invoices, which Fore submitted to the County for payment. Third, an independent accounting firm also inspected TCB's trucks daily before they left the area south of Highway 53. This process required that Beck calculate the cubic yardage and verify the location from which the debris was removed. After approving the truck tickets, Beck sent copies of these tickets, which included the removal location, to Fore. Fourth, by submitting invoices to the County, Fore represented to the government that the amount and location of debris being removed from Zone 2 was accurate. And Fore has never claimed it submitted bills to the County that were potentially fraudulent, based on work it did not know had been performed. We find, based on these various interactions with TCB, Beck, and the County as well as on the undisputed fact that TCB was the only company providing debris removal in this area, it defies credibility to suggest Fore, *the corporation*, had no knowledge TCB was submitting invoices for work south of Highway 53.

¶32. Fore does not deny these interactions or dispute that only TCB performed debris removal south of Highway 53. Instead, Fore simply argues it gets to keep every cent of the over \$8.5 million the County paid it for TCB’s debris removal south of Highway 53 because the subcontract was not modified. We find, as a matter of law, that Fore cannot keep this windfall. *See Bailey*, 955 So. 2d at 783 (¶24). As in *Hoerner*, we find Fore’s acceptance of the benefits of TCB’s work “could not be other than an implied approval by operation of law.” *Hoerner*, 254 So. 2d at 762. Quasi-estoppel applies because “the conscience of the court is repelled” by Fore taking the position it does not have to pay TCB its contract rate when Fore operated as if the subcontract included debris removal south of Highway 53. *Huggins Realty*, 575 F. Supp. 2d at 711-12.

¶33. Judge Carlton’s separate opinion focuses on the denial of TCB’s motion for a judgment notwithstanding the verdict and finds the evidence supports the jury’s verdict. “Our standards of review for a denial of a judgment notwithstanding the verdict and a directed verdict are . . . identical.” *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 252 (Miss. 1993) (superseded by statute on other, unrelated grounds) (citing *Munford, Inc. v. Fleming*, 597 So. 2d 1282, 1284 (Miss. 1992)). Under this standard:

If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [we are] required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Id. (citing *Munford*, 597 So. 2d at 1284). “The above standards of review, however, are predicated on the fact that the trial judge applied the correct law.” *Id.* (emphasis added).

“If the trial court ‘has exercised its discretionary authority against a substantial misperception of the correct legal standards, our customary deference to the trial court is pretermitted . . . for the error has become one of law.’” *Id.* (citing *Southern v. Glenn*, 568 So. 2d 281, 284 (Miss. 1990); *Nationwide Mut. Ins. Co. v. Evans*, 553 So. 2d 1117, 1119 (Miss. 1989); *Gibson v. Manuel*, 534 So. 2d 199, 204 (Miss. 1988)). Here, we find the trial court erred by failing to apply the doctrine of quasi-estoppel to the issue of the subcontract’s modification. Based on the undisputed facts presented at summary judgment and at trial, Fore is estopped from disclaiming its obligation under the modified subcontract. *See Hoerner*, 254 So. 2d at 761. Thus, the trial court should have granted TCB’s motion for a directed verdict.

¶34. Just as the issue of modification was not a jury issue, neither was the issue of damages. The circuit court decided to leave the amount of damages to the jury’s discretion. We find the submission of the issue of damages to the jury to be error. Fore presented no evidence to dispute the amount of cubic yards TCB removed.³ And the subcontract provided for a rate \$8.90 per cubic yard, leaving no jury question about the amount of TCB’s compensation under the modified subcontract.

¶35. Judge Carlton’s separate opinion claims TCB failed to submit a jury instruction asking for damages in the set amount of \$6,634,436.69. But TCB moved for summary judgment, arguing there were no disputed factual issues, and then moved for a directed verdict for the same reasons. We hold that the issue of damages should not have gone to the jury.

³ Contrary to Judge Carlton’s separate opinion, the figure of \$6,634,436.69 did not include any bills that Fore contested should not have been submitted for compensation. Instead, the figure is based on the undisputed amount of compensation the County paid Fore.

Nonetheless, TCB explained to the circuit court that it had not prepared an instruction on damages because it was unsure whether the court would award it the amount of its claim or submit the issue to the jury. Though TCB continued to maintain that it should be entitled to the set amount, the circuit court decided to submit the issue of the amount of damages to the jury.

¶36. In *A&F Properties*, this court held it was error to find the defendant breached the contract but not award the undisputed amount plaintiff would have received but for the breach. *A&F Props., LLC v. Lake Caroline, Inc.*, 775 So.2d 1276, 1281-82 (¶¶13-17) (Miss. Ct. App. 2000). In that case, we reversed the jury’s award and rendered an award in the amount of plaintiff’s full claim. *Id.* Similarly, TCB is entitled to be placed in the same position it would have been absent Fore’s breach of the modified subcontract. Therefore, we reverse the jury’s damage award and render judgment in TCB’s favor in the amount of \$6,634,436.69.

C. Fore’s Claim of Waiver

¶37. Fore argues TCB did not plead estoppel—only breach of contract—and, therefore, cannot recover under this equitable theory of quasi-estoppel. Fore further claims TCB neither asserted “estoppel” in its motion for summary judgment nor in its ore tenus motion for a directed verdict but instead raised this equitable theory for the first time on appeal. TCB counters that quasi-estoppel was not a separate claim or an alternative ground for recovery. Instead, quasi-estoppel arose as TCB’s response to Fore’s breach-of-contract defense that the subcontract was never modified. Having considered Fore’s argument, we find TCB did not waive the application of quasi-estoppel.

¶38. Quasi-estoppel is not an independent claim that must be pled. *E.g., Hoerner*, 254 So. 2d at 762 (applying quasi-estoppel to a breach-of-guaranty claim). Rather, quasi-estoppel is an affirmative defense. *See* M.R.C.P. 8(c); *see also Stimpson v. Plano Indep. Sch. Dist.*, 743 S.W.2d 944, 945 (Tex. Ct. App. 1988) (discussing the affirmative defense of estoppel). Typically, it is the defendant who affirmatively pleads quasi-estoppel to show the plaintiff's claim is based on an inconsistent position. *E.g., Wood Naval*, 220 Miss. at 659, 71 So. 2d at 427 (noting that the defendant alleged estoppel in its answer). But a plaintiff like TCB may also assert quasi-estoppel in response to the defendant's answer. *See Schachar v. N. Assur. Co. of Am.*, 786 S.W.2d 766, 768 (Tex. Ct. App. 1990) (discussing how quasi-estoppel may be asserted as "a defense urged by the original plaintiff to the defendant's affirmative pleading").

¶39. TCB correctly points out that Mississippi's pleading rules do not require the plaintiff to file a response to the defendant's answer. TCB argues it was not until Fore filed its answer that it first learned Fore was denying the modification of the subcontract. But we are satisfied TCB did not waive the defense of quasi-estoppel at the pleadings stage because TCB alleged sufficient facts in its complaint to support the theory. *Scott v. City of Goodman*, 997 So. 2d 270, 276 (¶14) (Miss. Ct. App. 2008) (holding M.R.C.P. 8 does not require "magic words"); *"Moore" Burger, Inc. v. Phillips Petroleum, Co.*, 492 S.W.2d 934, 936 (Tex. 1972) (finding estoppel defense was not waived, even though "plaintiff did not use the words 'estoppel' or 'promissory estoppel' in its trial pleadings," because "it pleaded facts which, if true, would give rise to the legal concept").

¶40. TCB pled that the subcontract existed because Fore accepted the benefit of the

modified subcontract. And in its motions for summary judgment and motion for a directed verdict, TCB argued W.C.'s inconsistent testimony that the subcontract had not been modified could not be used to dispute Fore's previous conduct. Specifically, when moving for a directed verdict, TCB's attorney argued:

The evidence is undisputed that all of this work was done that we've been arguing about, that the tickets were given to [W.C.]. He accepted them, turned them into the County and the County has paid it. I believe that the evidence would justify at this point a motion for entry of judgment in favor of [TCB] for the amount of [\$6,634,436.69] just like I thought summary judgment should have been granted . . . I don't think [W.C.'s testimony] is evidence sufficient to overcome the completion of the contract and the acceptance of the work and the money by [W.C.].

While TCB did not use the magic word "estoppel," it did argue W.C.'s denial of the modification was not "sufficient to overcome the completion of the contract and the acceptance of the work and the money" Thus, we find TCB sufficiently raised and argued the application of quasi-estoppel to the circuit court.

¶41. Further, we note that in *Hoerner*, a case that directs us to apply quasi-estoppel under these circumstances, the supreme court did not attribute its application of estoppel to the bank's pleadings or defenses below. *Hoerner*, 254 So. 2d at 760. Instead, the bank appealed the trial court's refusal to admit its evidence refuting Hoerner's denial of the loan approval. *Id.* at 760-61. Based on the record facts below, the supreme court applied quasi-estoppel, concluding that as a matter of law the loans were ratified by Hoerner's conduct. *Id.* at 761 ("We are of the opinion that Hoerner is now estopped . . ."). Reviewing the trial record here, we are of the same opinion as the supreme court in *Hoerner* and find no procedural bar to the application of quasi-estoppel to Fore's inconsistent assertions.

II. Prejudgment Interest

¶42. Both TCB and Fore appeal the circuit court’s award of prejudgment interest. TCB argues, because its damages were liquidated, prejudgment interest should have been awarded from the date of the breach of the subcontract, not the later date when it filed its complaint for breach of contract. Fore claims, because TCB’s damages were unliquidated, no prejudgment interest should have been awarded. We affirm the award of prejudgment interest but remand this case to the circuit court to calculate the interest from the date of the breach.

A. Standard for Awarding Prejudgment Interest

¶43. A trial judge may “award prejudgment interest to the prevailing party in a breach of contract suit if prejudgment interest was requested in the complaint.” *Cain v. Cain*, 967 So. 2d 654, 663 (¶19) (Miss. Ct. App. 2007) (citing *Warwick*, 603 So. 2d at 342). We review the award or denial of interest for abuse of discretion. *Moeller v. Am. Guarantee & Liab. Ins. Co.*, 812 So. 2d 953, 958 (¶11) (Miss. 2002).

¶44. When damages are liquidated or there has been a bad-faith denial of payment, “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.” *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 971 (¶53) (Miss. 1999) (reversing denial of prejudgment interest on subcontractor’s successful breach-of-contract claim); *see also U.S. Fid. & Guar. Co. v. Estate of Francis ex rel. Francis*, 825 So. 2d 38, 50 (¶36) (Miss. 2002) (finding that “[p]rejudgment interest may be allowed in cases where the amount due is liquidated when the claim is originally made or when the

denial of a claim is frivolous or in bad faith”). “Liquidated” damages are “damages that are set or determined by a contract when a breach occurs.” *Moeller*, 812 So. 2d at 959 (¶18) (citing Black’s Law Dictionary 395, 397 (7th ed. 1999)). “The purpose of awarding prejudgment interest [on liquidated claims] is not to punish the wrongdoer but to compensate the innocent party for the detention of the overdue funds.” *Cain*, 967 So. 2d at 663 (¶19).

¶45. In contrast, “unliquidated” damages “cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury.” *Moeller*, 812 So. 2d at 960 (¶18) (quoting Black’s at 397). “No award of prejudgment interest is allowed where the principal amount has not been fixed prior to judgment.” *Estate of Francis*, 825 So. 2d at 50 (¶36) (citation omitted).

¶46. If there is a bona fide dispute as to whether the plaintiff is entitled to recover damages *and* in what amount, the claim is not liquidated. *Estate of Gillies v. Gillies*, 830 So. 2d 640, 647 (¶25) (Miss. 2002). In *Gillies*, there was a dispute not only over whether the defendant owed the plaintiff damages but also over how much was owed. *Id.* The trial court properly rejected the claim for prejudgment interest because the plaintiff’s award was based on quantum meruit and his damages were measured by the reasonable value of his services, not a fixed contract rate for his services. *Id.*; *see also Warwick*, 603 So. 2d at 342 (holding that damages were not liquidated because there were several contested issues surrounding the *measure* of damages—namely the value of stock the defendants contracted to buy).

¶47. But prejudgment “[i]nterest may be awarded when the amount of damages is certain, even if the fact of liability for those damages is disputed.” *Cain*, 967 So. 2d at 664 (¶23) (reversing denial of prejudgment interest on breach and remanding to trial court to calculate

and award prejudgment interest). In *Cain*, the parties disputed whether a services contract had been orally modified. The plaintiff requested a set amount of damages—the amount in outstanding invoices sent to the defendant. *Id.* at 664 (¶¶21-22). The defendant argued the contract had been modified, and it owed nothing more to the plaintiff. *Id.* at 663 (¶20). The jury found for the plaintiff. The trial court denied prejudgment interest to the plaintiff because the defendant disputed it owed plaintiff any damages. *Id.* This court reversed the denial of prejudgment interest as an abuse of discretion because there was “no dispute as to the amount of damages at stake.” *Id.* at 664 (¶23). Thus, the damages were liquidated and “fixed as of the date of the breach of contract.” *Id.* We remanded to the trial court to calculate and award prejudgment interest, calculated from the date of the defendant breach the contract.

B. TCB’s Liquidated Damages

¶48. Citing *Gillies* and *Warwick*, Fore argues the amount of damages was disputed; thus, the circuit court abused its discretion by awarding prejudgment interest at all. Though the contract rate of \$8.90 was fixed, Fore argues the extent to which the subcontract was modified required jury resolution. Fore supports its argument with the fact the jury returned a damages award for less than TCB’s requested amount.

¶49. We disagree and find TCB and Fore’s dispute is similar to that in *Cain*. Fore denied it owed *anything* for work south of Highway 53 because the subcontract had not been modified. But it did not dispute the amount of work TCB performed south of Highway 53. Indeed, it used the exact figures from TCB’s invoices to generate the bills Fore sent to the County. As we determined Fore’s undisputed conduct left no jury issue as to Fore’s

contractual obligation to pay these invoices, we find there is no dispute as to how much is owed on these invoices. Thus, TCB's damages are liquidated and were fixed at the time Fore breached the subcontract by failing to pay TCB for its work.

¶50. The circuit court correctly awarded TCB eight-percent prejudgment interest. But it erroneously set the date the interest began to accrue as the date TCB filed suit. This interest actually began to run at the time of breach. Mississippi Code Annotated section 75-17-1(1) (Rev. 2009) provides: "The legal rate of interest on all notes, accounts and contracts shall be eight percent (8%) per annum, calculated according to the actuarial method" And Mississippi Code Annotated section 75-17-7 (Rev. 2009) 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.

In interpreting these two statutes, the Mississippi Supreme Court has made the distinction between judgments based on a contract and other judgments. *In re Duckett v. Duckett*, 991 So. 2d 1165, 1181 (¶34) (Miss. 2008). "Under Section 75-17-7, if the judgment of the lower court *is not based on a contract or note*, and the lower court decides to award prejudgment interest at 'a per annum rate set by it,' it may only calculate that interest 'from a date determined by the court to be fair but in no event prior to the filing of the complaint.'" *Id.* (quoting Miss. Code Ann. § 75-17-7) (emphasis added). But for judgments based on breach of contract, the supreme court, relying on both sections 75-17-1 and 75-17-7, has held eight-percent prejudgment interest should run from the date of the breach of contract. *Sentinel Indus.*, 743 So. 2d at 971 (¶53) (citing *Stockett v. Exxon Corp.*, 312 So. 2d 709, 712 (Miss.

1975)); *see also Estate of Baxter v. Shaw Assocs., Inc.*, 797 So. 2d 396, 403-04 (¶¶30, 34) (Miss. Ct. App. 2001) (discussing both the general rule that interest runs from the date of breach of contract and the supreme court’s application of section 75-17-1 in determining prejudgment interest in breach-of-contract cases). On remand, the circuit court should calculate the eight-percent prejudgment interest from the earlier date of the breach—the time Fore had received payments from the County but did not to pay TCB its share.

III. Punitive Damages and Attorney’s Fees

¶51. In addition to full compensation under the modified subcontract, TCB seeks remand of the issue of punitive damages and attorney’s fees to the circuit court. We find the circuit court did not abuse its discretion in denying punitive damages.

A. Standard for Recovering Punitive Damages

¶52. The prevailing party in a breach-of-contract action may recover punitive damages “where such breach is attended by intentional wrong, insult, abuse, or such gross negligence as amounts to an independent tort.” *Fought v. Morris*, 543 So. 2d 167, 173 (Miss. 1989). Attorney’s fees are also recoverable when a punitive damages award would be proper. *Puckett v. Gordon*, 16 So. 3d 764, 771 (¶26) (Miss. Ct. App. 2009) (finding, absent a contract provision or statutory authorization, attorney’s fees may not be awarded “unless punitive damages are also proper”).

¶53. The Mississippi Supreme Court has cautioned that punitive damages “are appropriate only in extreme cases” and “should be awarded only with caution and within narrow limits.” *Fought*, 543 So. 2d at 173 (citations and internal quotations omitted). That is because the purpose of punitive damages is punishment, not compensation. *See Puckett*, 16 So. 3d at

771 (¶24) (describing punitive damages as exemplary “added damages”); *Sudeen v. Castleberry*, 794 So. 2d 237, 249 (¶35) (Miss. Ct. App. 2001) (“What is otherwise a windfall is deemed necessarily granted to the plaintiff as his reward for public service in bringing the wrongdoer to account.”).

¶54. “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, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.” Miss. Code Ann. § 11-1-65(1)(a) (Supp. 2011). The trial court must consider the “totality of the circumstances to determine if a reasonable, hypothetical trier of fact could find either malice or gross neglect/reckless disregard.” *Doe*, 835 So. 2d at 81 (¶17) (citing *Ross-King-Walker, Inc. v. Henson*, 672 So. 2d 1188, 1191 (Miss. 1996)).

B. Standard of Review

¶55. TCB asserts the question of whether to submit the issue of punitive damages to the trier of fact is one of law, prompting our de novo review. To this end, TCB argues the line of Mississippi Supreme Court cases relying on *Hurst v. Southwest Mississippi Legal Services Corp.*, 798 So. 2d 1347, 1351 (Miss. 1998)—which instruct that our standard of review is abuse of discretion—are “an aberration.” See e.g., *Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So. 2d 1138, 1148 (¶22) (Miss. 2007); *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (¶15) (Miss. 2006); *Tillman v. Singletary*, 865 So. 2d 350, 354 (¶18) (Miss. 2005); *Doe ex rel. Doe v. Salvation Army*, 835 So. 2d 76, 81 (¶17) (Miss. 2003).

¶56. However, “[t]here is no right to recover punitive damages. The award of such

damages *has always been discretionary.*” *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 460-61 (Miss. 1983) (considering Mississippi law on punitive damages as far back as 1854) (emphasis added). Further, in 1993, the Legislature adopted Mississippi Code Annotated section 11-1-65 to govern “the propriety and manner” of awarding punitive damages. 1993 Miss. Laws Ch. 302 (H.B. 1270). The statute clearly gives the trial court discretion over whether to submit the issue of punitive damages to the jury:

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages *may be considered* by the same trier of fact.

(d) The court shall determine whether the issue of punitive damages *may be submitted* to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

Miss. Code Ann. § 11-1-65(1) (Supp. 2011) (emphasis added); *see Doe*, 835 So. 2d at 79 (¶7) (“[T]he statute clearly states that if certain criteria are met then the court determines whether the issue of punitive damages *may be submitted* to the trier of fact.”) (citing Miss. Code Ann. § 11-1-65(1)(d) (Supp. 2011)). Thus, “[t]he trial court’s determination whether a case warrants the consideration of punitive damages will not be overturned absent an abuse of discretion.” *Mariner Health Care*, 964 So. 2d at 1148 (¶22) (citing *Bradfield*, 936 So. 2d at 936 (¶15)).

C. The Circuit Court’s Decision

¶57. After the jury’s verdict, the circuit court granted Fore’s motion for a directed verdict on the issue of punitive damages because it found no evidence of malicious conduct by Fore. TCB argues Fore’s decision not to pay TCB any part of the outstanding \$6,634,436.69 in

invoices is evidence of malice on Fore's part. While we find Mississippi law estops Fore, based on its conduct, from denying the subcontract had been modified, our holding does not necessitate a rejection of the circuit judge's finding that Fore's denial of the modification was not malicious.

¶58. The punitive-damages statute establishes a high evidentiary burden—clear and convincing evidence—and accords the trial court discretion over this issue. And the supreme court cautions punitive damages are for the extreme cases. Fore took a hard-line business position by arguing it owed TCB nothing for the work south of Highway 53, an approach prohibited under Mississippi's quasi-estoppel principle. But the circuit court found some validity in W.C.'s testimony that he did not know TCB was performing work for Fore south of Highway 53. Though the question is admittedly close, we do not find the trial court abused its discretion as gatekeeper by finding Fore's actions did not necessitate submission of the punitive-damages issue.

¶59. Because we affirm the circuit court's ruling on punitive damages, we likewise affirm its denial of attorney's fees. *Puckett*, 16 So. 3d at 771 (¶26).

¶60. THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED IN PART, REVERSED AND RENDERED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE/CROSS-APPELLANT.

GRIFFIS, P.J., BARNES AND ROBERTS, JJ., CONCUR. RUSSELL, J., CONCURS IN PART WITHOUT SEPARATE WRITTEN OPINION. LEE, C.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY IRVING, P.J., AND RUSSELL, J. CARLTON, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION. ISHEE AND FAIR, JJ., NOT PARTICIPATING.

LEE, C.J., CONCURRING IN PART AND DISSENTING IN PART:

¶61. I respectfully dissent as I find that the trial court erred in granting W.C. Fore’s motion for a directed verdict on the issues of punitive damages and attorney’s fees. The jury should have been allowed to consider T.C.B. Construction’s (TCB) claim for punitive damages and attorney’s fees. Fore blatantly decided not to pay \$6,634,436.69 in invoices submitted by TCB. Fore made excuses as to why it did not pay TCB, but the excuses were found to be without merit at trial. Fore admitted it billed Harrison County and received payment for all work done by TCB. TCB bore the expense of its work and paying its employees while Fore denied payment. Fore should be punished for its willful conduct, and under our law, the means of doing this is to award punitive damages.

¶62. Punitive damages are to be awarded when the claimant can “prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice” Miss. Code Ann. § 11-1-65 (1)(a)(Supp. 2011). “[T]he plaintiff is entitled to recover punitive damages ‘only if he has demonstrated a willful or malicious wrong or the gross, reckless disregard for the rights of others.’” *McCorkle v. McCorkle*, 811 So. 2d 258, 270 (¶29) (Miss. Ct. App. 2001) (quoting *Boling v. A-1 Detective & Patrol Serv. Inc.*, 659 So. 2d 586, 588 (Miss. 1995). “The kind of wrongs to which punitive damages are applicable are those which, besides the violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries, but injuries inflicted in the spirit of wanton disregard for the rights of others.” *Summers ex rel. Dawson v. St. Andrew’s Episcopal Sch., Inc.*, 759 So. 2d 1203, 1215 (¶52) (Miss. 2000). Attorney’s fees are recoverable if the facts are of such gross or willful wrong as to justify the infliction of

punitive damages. *See Netterville v. Miss. State Bar*, 404 So. 2d 1026, 1028 (Miss. 1981).

¶63. This is a clear case of wanton disregard for TCB's rights. Fore asserts that punitive damages and attorney's fees were correctly denied because it did not act maliciously. Fore claims that it did not know TCB was performing work south of Highway 53; thus, it did not know it owed TCB the money. I find this argument disingenuous and contradictory to the defense put on at trial. At trial, Fore's defense was that it hired TCB to perform debris removal north of Highway 53. TCB claimed that the subcontract was modified orally to include debris removal south of Highway 53. Fore denied knowledge of an oral agreement. Fore's denial came after TCB submitted invoices to Fore, and Fore billed the County for the work south of Highway 53. The performance of TCB's work was monitored by R.W. Beck & Associates. Beck audited all the bills, and the County paid Fore over \$12 million for TCB's debris removal north and south of Highway 53. In addition, after TCB sent Fore a letter demanding to be paid, Fore responded on June 19, 2006, stating that TCB had not been paid because of a potential set off for interest on delayed payments from the County. Fore did not deny knowledge that TCB was performing the work.

¶64. I find that the foregoing facts present clear and convincing evidence of malicious conduct. Fore's actions were willful and inflicted in the spirit of wanton disregard for TCB's rights. *Summers*, 759 So. 2d at 1215 (¶52). Fore blatantly denied payment to TCB despite TCB having spent an enormous amount of money completing the debris removal south of Highway 53. When asked why it refused to pay TCB, Fore responded that it did not pay based on nothing other than a technicality in the contract. This is sufficient to submit the issues of punitive damages and attorney's fees to the jury. To deny punitive damages in this

case gives companies no incentive to pay what is due if they think they can get away with not doing so based on a technicality. If they risk nothing other than being ordered to pay what was owed originally, they may as well take their chances at trial. This is the purpose of punitive damages – to discourage similar malicious behavior in the future. For these reasons, I dissent as to the issues of punitive damages and attorney’s fees. I concur with the majority on the remainder of the issues.

IRVING, P.J., AND RUSSELL, J., JOIN THIS OPINION.

CARLTON, J., CONCURRING IN PART AND DISSENTING IN PART:

¶65. I respectfully dissent in part and concur in part with the majority. I find that the record reflects that substantial evidence⁴ exists in support of the jury verdict herein. *U.S. Fidelity and Guar. Co. of Miss. v. Martin*, 998 So. 2d 956, 964 (¶19) (Miss. 2008) (“A motion for [a] JNOV is a challenge to the legal sufficiency of the evidence, and this Court will affirm the denial of a JNOV if there is substantial evidence to support the verdict.”).⁵

⁴ In denying the appellant’s post-trial motion for a JNOV, the trial court again found sufficient evidence supporting the jury verdict.

⁵ In *Wal-Mart Stores, Inc. v. Johnson*, 807 So. 2d 382, 392 (¶27) (Miss. 2001), the supreme court explained our standard of review as follows:

When this Court reviews the action of the jury after the trial court has refused to grant a new trial on the question of damages, the question then becomes whether the verdict was either so excessive or inadequate as to shock the conscience and to indicate bias, passion and prejudice on the part of the jury, or, whether the jury failed to respond to reason.

Dorris v. Carr, 330 So. 2d 872, 874 (Miss. 1976); *see also Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1160-61 (Miss. 1992) (holding that an appellate court has no authority to vacate an award of damages merely because it believes the jury erred or because, had it been the trier of fact, it would have awarded a greater or lesser sum).

In *Busick v. St. John*, 856 So. 2d 304, 307 (¶7) (Miss. 2003), the Mississippi Supreme Court set forth that:

When the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found. *Snapp v. Harrison*, 699 So. 2d 567, 569 (Miss. 1997); *Starcher v. Byrne*, 687 So. 2d 737, 739 (Miss. 1997); *Junior Food Stores, Inc. v. Rice*, 671 So. 2d 67, 76 (Miss. 1996); *Bell v. City of Bay St. Louis*, 467 So. 2d 657, 660 (Miss. 1985). “In reviewing a jury verdict, this Court resolves all conflicts of evidence in the appellee's favor and determines all reasonable inferences from testimony given towards the appellee's position. Reversal occurs only where the facts presented are so overwhelming in favor of the appellant's position that reasonable jurors could not have found for the appellee.” *Thompson Mach. Commerce Corp. v. Wallace*, 687 So. 2d 149, 151-52 (Miss. 1997) (citations omitted).

¶66. Fore, in its motion for rehearing, also asserts that the majority misapprehended the law by applying an erroneous standard for reviewing a jury verdict. Among other cases, Fore cites to *In re Estate of Dabney*, 740 So. 2d 915, 191 (Miss. 1999), and *McMillan v. King*, 557 So. 2d 529, 522 (Miss. 1990), in support of its argument. Fore argues that the evidence in the record supports the jury verdict on the theory presented to the jury; thus, the judgment must be affirmed. Fore argues that the majority erroneously believed that TCB was entitled to a judgment as a matter of law. Fore correctly points out that since TCB challenged the jury verdict, on appeal, the evidence must be considered in the light most favorable to Fore. *Busick*, 856 So. 2d at 307 (¶7). I note that the Mississippi Supreme Court has provided clear precedent on many occasions regarding the deferential appellate standard for reviewing jury verdicts. See *Snapp*, 699 So. 2d at 569; *Starcher*, 687 So. 2d at 739; *Junior Food Stores*, 671

So. 2d at 76; *Bell*, 467 So. 2d at 660.

¶67. In the case before us, the jury found in favor of TCB as to the existence of the disputed oral modification finding TCB orally agreed with Fore to perform as Fore's subcontractor in the removal of debris south of Highway 53 as a modification to its existing subcontract with Fore for work north of Highway 53. Fore unsuccessfully claimed that TCB had removed debris south of Highway 53 in violation of its contract and billed that debris as though collected in Zone 2, an area north of Highway 53 and covered by the written subcontract between TCB and Fore. Fore denied agreeing to allow TCB to haul debris south of Highway 53, and albeit unsuccessful, Fore denied possessing any knowledge that TCB was hauling debris from south of Highway 53 in violation of the contract.

¶68. After finding that the oral modification occurred, the jury then awarded TCB the amount of \$4,098,314.33 for performing the oral modification of debris removal south of Highway 53. A review of the jury instructions⁶ shows the trial court instructed the jury that if they found a modification existed, then they were to award TCB an amount equal to all cubic yardage for debris hauled by TCB for Fore at a rate of \$8.90 per cubic yard, less any payments made by Fore to TCB. Similarly, the jury instruction setting forth the special interrogatories provided no sum certain for any award, and it contained no references to the

⁶ The transcript of the jury-instruction conference reflects that the parties and the judge discussed at length the applicability of quantum meruit. TCB agreed that this case failed to constitute a quantum meruit case, and TCB had not pled quantum meruit. TCB's case constituted a contract case to determine whether there was a meeting of the minds as to the formation of an oral modification to the subcontract, and if so, then the price set forth in the contract would be awarded, less payments made by Fore. The only evidence of reasonable value was the cost set forth as a term of the contract. *See* record transcript pages 791-92. The transcript of the jury-instruction conference shows that TCB withdrew the instruction that seemed to raise the issue of quantum meruit.

invoices. Clearly, no jury instruction informed the jury of any requirement to award a sum certain to TCB in the event the jury found such modification to exist. The jury-instruction conference shows TCB failed to assert a request for an instruction seeking any sum certain.

¶69. I concur with the trial judge's finding that disputes of material fact existed as to the oral modification as shown by the conflicting testimony and Fore's denial. I, therefore, find no abuse of discretion in the trial court's denial of TCB's request for a directed verdict as to the modification. Like the trial court, I find equitable estoppel fails to apply where disputes of material fact exist as to the alleged representation or oral agreement, particularly where as in this case, the disputed representation constitutes the alleged representation or promise upon which the other party allegedly relied to their detriment. The trial court explained that the debate of material fact was not really over whether or not the invoices to the County and payments from the County to Fore were consistent to the penny with the amount of cubic yards purported to have been removed. Rather, it explained that the question was whether or not the debris removal south of Highway 53 was authorized by the disputed oral modification to the subcontract. Clearly, such disputed material facts lie within the jury's province to resolve.

¶70. With respect to the related doctrine of quantum meruit mentioned in TCB's post trial filings, the record shows that during the jury-instruction conference, TCB acknowledged that it failed to put on proof of reasonable certain compensation, other than the contract terms, as is required to recover on a theory of quantum meruit. *See Tupelo Redevelopment Agency v. Gray Corp, Inc.*, 972 So. 2d 495, 514-15 (¶¶56-59) (Miss. 2007). After reviewing the findings of the trial court, I will return to address the application by the majority of estoppel

by operation of law to reverse the jury verdict herein.

¶71. The jury found for Fore in its counterclaim against TCB, returning a verdict finding that Fore overpaid TCB for debris removal north of Highway 53. The record also shows that some of TCB's bills should not have been submitted to Fore for compensation. Therefore, since the jury verdict as to the counterclaim was also supported by substantial evidence, I respectfully submit that our standard of review requires affirmance of the jury's verdict as to the counterclaim as well.

¶72. I concur with the majority's opinion on the issue of punitive damages. Upon review, I find no abuse of discretion in the trial court's grant of Fore's request for a directed verdict on the issue of punitive damages, since a question of fact existed as to whether the parties orally modified the written subcontract between them. *King v. Progressive Gulf Ins. Co.*, 913 So. 2d 1065, 1068 (¶9) (Miss. Ct. App. 2005).⁷ The record reveals conflicting testimony as to whether or not an oral modification occurred as displayed by Fore's denial and also by its claim that TCB had fraudulently submitted invoices for debris that Fore claims TCB improperly removed south of Highway 53, without authority or contract. Fore argues that TCB submitted invoices for unauthorized work done south of Highway 53 in order to bill more for the zone north of Highway 53, the area covered by TCB and Fore's written subcontract. The special interrogatory jury instructions and verdict show that the jury voted 9 to 3 in finding a modification existed. Showing a factual dispute, the fact-finder disagreed as to the existence of an oral modification and failed to provide a unanimous verdict as to this

⁷ See generally *Greater Canton Ford Mercury, Inc. v. Lane*, 997 So. 2d 198 (Miss. 2008).

issue of fact.

¶73. I also find that the trial court properly awarded prejudgment interest from the date of the complaint, since such an award is within the trial court's discretion. *Gordon v. Gordon*, 929 So. 2d 981, 984 (¶14) (Miss. Ct. App. 2006). I note the damages were not liquidated,⁸ and the trial court also found insufficient evidence of bad-faith refusal to pay. The parties not only disputed whether the oral modification existed, but Fore also claimed that TCB had hauled debris and billed for its removal in violation of its contract. Fore claimed TCB submitted invoices as though the debris had been collected in Zone 2, north of Highway 53, the area covered by their subcontract. Fore successfully claimed that TCB received an overpayment. The transcript shows that during the discussion of jury instructions,⁹ the trial court acknowledged that the amount of compensation allegedly due remained undetermined and that TCB explained that jury instruction was drafted intentionally leaving the award amount blank. Significantly, the record shows that some of the bills submitted regarding compensation should not have been submitted, and that the trial court also submitted Fore's counterclaim to the jury.

¶74. As stated, I would not apply estoppel by operation of law to prohibit Fore from presenting its evidence of a denial of a material fact as to the oral modification. Instead, I would affirm the jury verdict since the record reflects substantial evidence in support of the verdict. The majority applies equitable estoppel by operation of law to reverse this case.

⁸ *Warwick v. Matheney*, 603 So. 2d 330, 342 (Miss. 1992) (damages are not liquidated when several contested issues surround the measure of damages).

⁹ See record transcript page 795.

Jurisprudence establishes that equitable estoppel should only be used in exceptional circumstances. *Eagle Mgmt., LLC v. Parks*, 938 So. 2d 899, 904 (¶12) (Miss. Ct. App. 2006) (citing *Powell v. Campbell*, 912 So. 2d 978, 982 (¶12) (Miss. 2005)). Moreover, equitable estoppel should not be applied by operation of law when disputes of material fact exist, and the trial judge found such disputes existed in this case. “Equitable estoppel [is] generally defined as ‘the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.’” *Id.*

¶75. When disputes as to material facts exist, generally, it is the role of the trier of facts to resolve questions raised by an allegation of estoppel,¹⁰ and the role of the jury in this case was to say whether the modification occurred based upon the disputed facts presented. *See also Biglane v. Rawls*, 247 Miss. 226, 261, 153 So. 2d 665, 681 (1963); *Cobb v. City of New Hope*, 682 So. 2d 1375, 1377 (Ala. Civ. App. 1996).¹¹ In the present case, the oral modification forms the basis of the representation that TCB claims it detrimentally relied upon. The jury must decide whether the disputed facts presented adequately established a claim for estoppel. In *Biglane*, 247 Miss. at 261, 153 So. 2d at 681, Justice Rodgers

¹⁰ *See generally Barnes, Broom, Dallas & McLeod, PLLC v. Estate of Cappaert*, 991 So. 2d 1209, 1213-14 (¶¶15-27) (Miss. 2008) (Even though a contract might have been determined to exist, a question of fact may still remain where the record reflects conflicting evidence as to amount of fees due and claims of excessive fees asserted.); *see also Morris Newspaper Corp. v. Allen*, 932 So. 2d 810, 820 (¶29) (Miss. Ct. App. 2005).

¹¹ *See also Byblos Corr. v. Salem Farm Realty Trust*, 692 A.2d 514 (N.H. 1997); *Nesbitt v. Erie Coach Co.*, 204 A.2d 473 (Pa. 1964).

explained in his dissenting opinion that the universal rule seemed to be that, usually, the question of estoppel constituted a question of fact for the jury, and he acknowledged that “[c]onflicting evidence as to whether certain representations relied on as a basis of estoppel were made precludes the determination, as a matter of law, whether there is an estoppel.” Justice Rodgers also explained that conflicting evidence raises an issue of fact to be determined by the jury. *Id.* Therefore, I find no error in the trial court’s determination that a jury question existed since Fore’s denial created a disputed material fact as to whether the oral modification of the subcontract occurred and also as to the amount of compensation.¹² To raise estoppel, the party asserting estoppel must show by a preponderance of the evidence the representation reasonably relied upon as well as a detrimental reliance upon that representation or promise, or the fraudulent conduct in inducement or representation, or unconscionable conduct.¹³ The supreme court has also provided that the court would not give effect to equitable estoppel when both parties are both informed except under extraordinary circumstances. *McAlister v. McAlister*, 254 Miss. 877, 888, 183 So. 2d 513, 518 (Miss. 1966).

¶76. The majority cites to a Texas case, *Allen v. Dempster Mill Manufacturing Company*, 402 S.W.2d 809 (Tex. Civ. App. 1966), in applying equitable estoppel by operation of law. *Allen* pertains to an employee who kept receiving retirements checks while also receiving a

¹² See *AmFed. Co., LLC v. Jordan*, 34 So. 3d 1177, 1182 (¶20) (Miss. Ct. App. 2009) (providing this Court’s standard of review for a trial court’s denial of a motion for directed verdict and denial of a JNOV motion).

¹³ See also *Miss. Dep’t of Public Safety v. Stringer*, 748 So. 2d 662 (Miss. 1999); *McAlister v. McAlister*, 254 Miss. 877, 883-84, 183 So. 2d 513, 515 (Miss. 1966); *Nesbitt v. Erie Coach Co.*, 204 A.2d 473 (Pa. 1964).

salary, and no dispute of material fact existed.¹⁴ In the present case, however, I concur with the trial judge's finding that disputes of material fact indeed existed as to the modification and therefore the application of equitable estoppel is inappropriate.¹⁵ The majority finds estoppel bars Fore from denying the oral modification essentially because Fore was unjustly enriched by TCB's work wherein Fore billed the County for TCB's invoices and failed to remit payment to TCB.¹⁶ The majority fails to find, however, that no dispute of material fact existed as to the representation or formation of the disputed oral modification to the subcontract. The majority ignores the factual dispute created by Fore's denial of the oral modification, the very representation TCB claimed detrimental reliance upon. Instead, the majority finds estoppel exists because Fore was unjustly enriched. However, estoppel requires some representation by a party upon which another detrimentally relies, or some fraud in the formation of the agreement or inducement of performance of the other to the other's detriment, or evidence that refusal to enforce the representation or promise causes injustice or fraud.¹⁷ Additionally, the representation or promise based on the modifications

¹⁴ See generally *In Re Estate of Firtzner*, 881 So. 2d 164 (Miss. 2003); *General Authority for Supply Commodities, Cairo, Egypt v. Ins. Co. of N. Am.*, 951 F. Supp. 1097 (S.D.N.Y. 1997).

¹⁵ The trial judge herein provided no instructions to the jury to consider a certain sum, stating: "I'm going to leave the amount of the verdict up to the jury in its discretion." TCB raised no objection to this ruling.

¹⁶ This key dispute as to the representation, or oral modification, was addressed by the trial court in the record, and the court recognized that the key dispute of material fact concerned whether the or not the removal of debris south of Highway 53 was authorized by Fore.

¹⁷ *C.E Frazier Constr. Co. v. Campbell Roofing and Metal Works*, 373 So. 2d 1038 (Miss. 1979).

of the subcontract must be shown by sufficient proof. Unjust enrichment alone fails to raise estoppel.¹⁸ TCB bears the burden of establishing estoppel by a preponderance of the evidence and also bears the burden of proof to establish a modification to establish some representation by Fore upon which TCB allegedly detrimentally relied.

¶77. TCB's post-trial filings comment upon quantum meruit, and I will briefly address the applicability of this contractual remedy based upon the evidence and jury instructions in this case. The related contractual remedy of quantum meruit allows for recovery of work done outside of a contract, or not contemplated by the contract. However, TCB failed to present sufficient proof¹⁹ for the jury to consider quantum meruit as a theory of recovery, and TCB failed to sufficiently raise quantum meruit for the jury to consider, as acknowledged by the parties in the jury-instructions conference. Quantum meruit applies as a contractual remedy when a party performs additional work not contemplated by the oral²⁰ contract that the other party accepts with the knowledge that the other party desires compensation for such services.²¹ Quantum meruit offers TCB no solace on appeal since TCB asserted and only

¹⁸ *Citizens Nat'l Bank of Meridian v. L.L. Glascock, Inc.*, 243 So. 2d 67 (Miss. 1971).

¹⁹ Such recovery requires proof of reasonable measure of compensation.

²⁰ I find that quantum meruit applies as a contractual remedy in cases involving written or oral contracts where additional work is performed, in anticipation of payment, where the work is not contemplated by the oral or written contract and sufficient proof of reasonably certain compensation due is shown.

²¹ *Tupelo Redevelopment Agency*, 972 So. 2d at 514-15 (¶¶56-59) (The court explained that in order for a party to recover under a theory of quantum meruit, an award would require a finding by the court that labor was not anticipated by the contract, and also that there were no provisions of the contract by which payment could be made for unanticipated labor.).

provided evidence of the contract price for work required under the disputed oral modification of the subcontract and no evidence or reasonable measure of compensation. *See Tupelo Redevelopment Agency*, 972 So. 2d at 514-15 (¶¶56-59). TCB acknowledged an understanding of these requirements for quantum meruit as a contractual remedy during the jury-instruction conference. TCB, therefore, admitted inapplicability of quantum meruit since it provided only proof of the contract price and no other amount of reasonably certain compensation.²² The record reflects that during the jury-instruction conference, TCB possessed no need for an instruction on quantum meruit, as TCB did not think this case constituted a quantum-meruit case.²³ The record shows TCB presented a case for breach of contract, but TCB did not plead, assert, or present necessary proof required for the remedy of quantum meruit. Counsel for TCB stated to the trial judge as follows:

Your Honor, if you're not going to going to give a quantum meruit instruction for the defense I don't need this one, and I can't tell if they are really requesting such an instruction. I don't think it's a quantum meruit case because there has been no evidence of a reasonable value other than the \$8.90 that we put into evidence. If they're not going to request a quantum meruit instruction from their viewpoint then I withdraw this one. If they want one, then I want this one.

The trial court then refused the jury instruction, and TCB asserted no objection but, as stated, agreed that this case was not a quantum-meruit case. Consistent with that representation, the jury instructions show that TCB failed to request any instructions for a sum certain. The

²² Proof of a reasonable amount of compensation is a prerequisite to establishing grounds for recovery under a quantum meruit theory. *Langham v. Behnen*, 39 So. 3d 970, 975 (¶13) (Miss. Ct. App. 2010).

²³ *See* record transcript page 792.

special interrogatory jury instructions²⁴ likewise failed to raise the equitable remedies sufficiently that were raised by TCB post-trial and now on appeal. *Downtown Grill, Inc. v. Connell*, 721 So. 2d 1113, 1119 (¶19) (Miss. 1998) (Plaintiff possessed duty to request jury instructions on his theory of recovery.).

¶78. The majority applies quasi-estoppel by operation of law to prohibit Fore from factually disputing the oral modification. My dissent evaluates the application of quasi-estoppel and also evaluates the application of related doctrines of equitable estoppel and quantum meruit, albeit briefly, while distinguishing between the doctrines.

¶79. The majority cites *Bailey v. Estate of Kemp*, 955 So. 2d 777 (Miss. 2007), *Hoerner v. First National Bank of Jackson*, 254 So. 2d 754 (Miss. 1972), and *Wood Naval Stores Export Association v. Latimer*, 220 Miss. 652, 71 So. 2d 425 (1954). A review of these cases, however, reflects that the decisions substantively support the analysis of this dissent. In *Hoerner*, the Mississippi Supreme Court explained its application of estoppel as “hold[ing] a person to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury.” *Id.* at 761. In the disputed breach-of-contract case before us, the oral modification of the subcontract constitutes the “representation made or a position assumed,” as described in

²⁴ The special interrogatories only request that the jury provide whether they find that the proof showed by a preponderance of evidence that the oral modification occurred, and if so, what amount of money TCB was entitled to receive for hauling debris south of Highway 53. However, the special interrogatories, like the other jury instructions, failed to provide any language regarding equitable estoppel, quantum meruit, or other equitable basis for relief.

Hoerner — which TCB seeks to enforce against Fore by use of estoppel. *Id.* As previously stated, neither the doctrine of quasi-estoppel nor equitable estoppel serve to relieve the party asserting estoppel from proving the contract, representation, promise, or conduct upon which they relied to their detriment. For example, the guaranty agreement in *Hoerner* constituted a written contract, and the supreme court applied estoppel to prohibit Fred Hoerner from escaping liability for the continuing guaranty in the written contract. *Id.* In *Hoerner*, estoppel did not establish the prior written contract as claimed by the majority in this case. Similarly, in *Bailey*, 955 So. 2d at 782 (¶21), the supreme court acknowledged that the equitable doctrine of quasi-estoppel “precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position it has previously taken,” and “applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.” *Id.* In determining whether quasi-estoppel applied to that contract dispute, the supreme court recognized that it must first determine if there was a valid contract between the parties. *Id.* at (¶20). The court found a valid contract to exist, and, then, the court found that the contract should be upheld as a matter of equity. *Id.* at 783 (¶24). The *Bailey* court dealt with a formal written, signed and notarized contract where all the parties previously executed the agreement. The existence of the prior written contract was not in dispute; rather, the parties disputed the ability to enforce the written contract due to delay in enforcement of rights under the contract and due to economic duress in formation of the written contract.

¶80. The *Bailey* court cites to *Bott v. J.F. Shea Company, Inc.*, 299 F.3d 508, 511 (5th Cir. 2002), wherein the United States Court of Appeals for the Fifth Circuit addressed whether

estoppel applied to preclude a claim of breach of a contract based on the failure of a subcontractor to obtain coverage for a general contractor as an additional insured. The construction contract between the general contractor and the subcontractor required the subcontractor to secure insurance coverage for the general contractor. *Bott*, 299 F.3d at 510. The contract specified how the general contractor's name should be reflected as an additional insured, but the insurance obtained and certificates provided by the subcontractor failed to use that specific name. *Id.* When the general contractor requested indemnity for a personal-injury liability, the insurance company denied coverage. *Id.* The general contractor then sued the subcontractor for breach of contract. *Id.*

¶81. In *Bott*, the Fifth Circuit recognized that quasi-estoppel “precludes a party from asserting, to another's disadvantage, a right inconsistent with a position [it has] previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.” *Id.* at 512. The *Bott* court found, however, that despite the general contractor's receipt of the insurance certificates with the improper name and despite the fact that general contractor allowed the subcontractor to commence work and be paid for its completion, the general contractor was not precluded from later enforcing the contract provisions against the subcontractor. *Id.* at 512-13. The court found that the general contractor's failure to enforce the contract provisions against the subcontractor was not a waiver of the subcontractor's obligations under the contract, even though the general contractor had acted inconsistently by accepting the insurance certificates with the incorrect name and allowing the subcontractor to work without proper insurance. *Id.*; see also *Wood Naval*, 220 Miss. at 662-

666, 71 So. 2d at 429-30.²⁵ In finding contractual liability, the law has consistently required sufficient proof of the pre-existing contract.

¶82. In conclusion, with respect to equitable estoppel, I concur with the trial judge's determination that a dispute of material fact as to the issue of modification existed and also as to damages; therefore, such disputes bar an application of equitable estoppel by operation of law. Based on our limited scope of review, we cannot retry the case for the parties on appeal nor can the parties retry their case on appeal. *Gale v. Thomas*, 759 So. 2d 1150, 1159 (¶40) (Miss. 1999). Therefore, I must respectfully dissent.

²⁵ The Mississippi Supreme Court held association members to their prior association articles of agreement. The court also held that the members were estopped from denying their membership, or to claim they were no longer bound by the articles of agreement, due to conduct inconsistent with a denial of membership. The court did not apply estoppel to establish the underlying articles of agreement of the association membership; rather, the members' subsequent conduct relating to the articles of agreement and subsequent change in their partnership status, applied to estop them from denying their membership in that prior agreement.