IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-00550-COA

ACE PIPE CLEANING, INC. **APPELLANT**

v.

HEMPHILL CONSTRUCTION COMPANY, INC. AND FEDERAL INSURANCE COMPANY **APPELLEES**

DATE OF JUDGMENT:	02/28/2012
TRIAL JUDGE:	HON. WILLIAM E. CHAPMAN III
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	C. DALE SHEARER JAMES DENNIS BOONE
ATTORNEYS FOR APPELLEES:	DAVID W. MOCKBEE JUDSON ROY JONES
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT AWARDED TO APPELLEES
DISPOSITION:	AFFIRMED: 05/21/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., MAXWELL AND FAIR, JJ.

GRIFFIS, P.J., FOR THE COURT:

¶1. Ace Pipe Cleaning Inc. commenced this action for payment for services provided on a public construction project. The circuit court granted summary judgment in favor of the general contractor and the bonding company and found that the contract was void and unenforceable, under Mississippi Code Annotated section 31-3-15 (Rev. 2010), because Ace did not have a certificate of responsibility. In this appeal, Ace argues that the circuit court was in error to grant the summary judgment based on section 31-3-15, to not allow Ace's equitable claim for quantum merit, and to allow the surety the same rights as the general

contractor. We find no error and affirm.

FACTS

¶2. West Rankin Utility Authority awarded a public contract to Hemphill Construction Company Inc. to install 30,000 feet of sewer pipe. The project was divided into six parts: (1) clean segments of the sewer main; (2) control flow in segments of the sewer main; (3) perform point repairs as directed; (4) install slip lining in segments of the sewer main; (5) rehabilitate manholes; and (6) provide a television inspection of the rehabilitated sewer and manholes.

¶3. On October 31, 2008, Hemphill and Ace entered a subcontract. Ace agreed to perform a portion of the work on the project in exchange for the payment of $464,718.50. Ace was to clean the pipes and perform the television inspection of the pipe after it was cleaned. Ace did not have a certificate of responsibility when it submitted its bid or when it entered into the subcontract.

¶4. Ace began work on the project on or about November 3, 2008. On December 31, 2009, Ace stopped work due to Hemphill's failure to pay.

¶5. In the complaint, Ace asserted claims against Hemphill for breach of contract, for failure to pay Ace $266,312.18 under the parties' subcontract, and for quantum meruit, seeking $266,312.18 for the reasonable value of services Ace had provided to the project for which it had not been compensated. The complaint also asserted a claim against Federal Insurance Company on the payment bond that it issued on the project, due to Hemphill's failure to pay Ace for services rendered pursuant to the subcontract.

¶6. On September 8, 2011, Hemphill and Federal filed a motion to dismiss or alternatively

for summary judgment. They argued that Ace had violated Mississippi Code Annotated section 31-3-15 because it did not obtain a certificate of responsibility from the Mississippi State Board of Contractors. As a result, they argued that the subcontract was void, and the statute also barred Ace's quantum meruit claim. They also argued that the payment-bond claim failed because a surety holds the same rights and defenses as the contractors they insure.

¶7. Ace responded that the subcontract was not void because the pipe-cleaning work did not qualify Ace as a contractor and, as a result, Ace did not need a certificate under section 31-3-15. Ace also argued that Hemphill knew that Ace did not have a certificate and did not raise the issue until after Hemphill accepted the benefits of Ace's services. Ace also argued that section 31-3-15 did not foreclose its equitable claim for quantum meruit. Finally, Ace claimed that Federal was not entitled to summary judgment for the same reasons Hemphill was not.

¶8. On March 1, 2012, the circuit court entered an order that granted Hemphill and Federal summary judgment. The circuit court held that Ace was required to have a certificate of responsibility and, because it did not, the subcontract was void. The circuit court also held the quantum meruit claim was barred by section 31-3-15. The circuit court concluded that Ace's claim against Federal was invalid because its claim against Hemphill was invalid. It is from this judgment that Ace now appeals.

STANDARD OF REVIEW

¶9. When this Court reviews a "grant of summary judgment, [we] employ[] a de novo standard of review." *United Plumbing & Heating Co. v. AmSouth Bank*, 30 So. 3d 343, 345

(¶4) (Miss. Ct. App. 2009). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." M.R.C.P. 56(c).

¶10. We consider "all of the evidence before the [trial] court in the light most favorable to the non-moving party." *United Plumbing*, 30 So. 3d at 345 (¶4). The party that opposes the motion "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." M.R.C.P. 56(e). Summary judgment must be entered if the non-movant does not sufficiently show "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *United Plumbing,* 30 So. 3d at 345 (¶5) (quoting *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 683 (Miss. 1987).

ANALYSIS

I. Whether the subcontract was void under section 31-3-15.

¶11. Mississippi Code Annotated section 31-3-15 provides:

> No contract for public or private projects shall be issued or awarded to any contractor who did not have a current certificate of responsibility issued by [the State Board of Public Contractors] at the time of the submission of the bid, or a similar certificate issued by a similar board of another state which recognizes certificates issued by said board. *Any contract issued or awarded in violation of this section shall be null and void.*

(Emphasis added).

¶12. Here, the question is whether Ace is to be considered a "contractor" that was

required to have a "current certificate of responsibility." Mississippi Code Annotated section 31-3-1 (Rev. 2010) defines a contractor as "[a]ny 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 . . . ."

¶13. Ace argues that it is not required to have a certificate of responsibility under the plain language of the statute. Ace claims that its work under the subcontract was limited to pipe cleaning, and this is not identified in the definition of "contractor" under section 31-3-1.

¶14. Hemphill claims that Ace was required to have a certificate of responsibility. Hemphill argues that the State Board of Public Contractors "shall have the power and responsibility to classify the kind or kinds of works or projects that a contractor is qualified and entitled to perform under the certificate of responsibility issued to him. Such classification shall be specified in the certificate of responsibility." Miss. Code Ann. § 31-3-13(g) (Rev. 2010).

¶15. The Board, pursuant to this authority, issued the following rules and regulations:

> 2. The Board will classify each applicant and issue a Certificate of Responsibility for the type or types of contracts on which he may bid on the following basis:
>
> > a. The applicant will not be classified or permitted to bid on or perform a type or types of work not included in his request.
> >
> > b. *The applicant shall state on the application the classification of work he desires to perform and contract, such classification to be selected and determined from the following list of major classifications*:
> >
> > (1) Building Construction
> > (2) Highway, Street and Bridge Construction

(3) Heavy Construction
(4) Municipal and Public Works Construction
(5) Electrical Work
(6) Mechanical Work
(7) *SPECIALTY - A contractor performing work other than in the above major classifications must qualify as a specialty contractor.*

¶16. Hemphill makes three arguments. First, Hemphill claims that Ace could have applied for a certificate of responsibility under the classifications of either "Municipal and Public Works Construction" or "specialty contractor." Second, Hemphill argues that, in addition to the pipe-cleaning work, Ace performed a closed-circuit-television inspection, i. e., "T.V. inspection" of the sewer lines. Hemphill contends that the Board of Contractors specifically lists "T.V. [I]nspection of Sewer Lines & Rehabilitation" as a specialty classification. Third, Hemphill argues that the owner, West Rankin Utility Authority, required that all contractors submitting a proposal on the project possess a current certificate of responsibility with the classification for the type of work it contracted to perform. The project's "Contract Documents and Specifications," which were incorporated into the subcontract, provided:

> All Proposals submitted in excess of $50,000 shall contain[,] on the outside envelope of such bid, the Contractor's current Certificate of Responsibility Number issued by the Mississippi [S]tate Board of Public Contractors.
>
> Prior to filing Proposals on public projects (in excess of $50,000), the prospective Bidder must obtain a Certificate of Responsibility from the Mississippi State Board of Public Contractors establishing his classification as to the value and type of construction on which he is authorized to bid.

¶17. We reject Ace's argument that the plain language of section 31-3-1 does not require Ace to have a certificate of responsibility. Indeed, cleaning is not part of the definition of contractor under section 31-3-1. However, the statute defines tasks that are covered in

general and broad categories, i.e., "any erection, building, construction, reconstruction, repair, maintenance or related work on any public . . . project." Miss. Code Ann. § 31-3-1. We find that the task of pipe cleaning could be encompassed under one of the listed tasks, i.e., "reconstruction, repair, maintenance or related work." *Id.*

¶18. There are other authorities that provide guidance to determine whether pipe cleaning services, similar to those performed by Ace, were beyond the scope of section 31-3-15.

¶19. In *Clancy's Lawn Care & Landscaping, Inc. v. Mississippi State Board of Contractors*, 707 So. 2d 1080, 1081-82 (¶¶4-7) (Miss. 1998), the Board considered whether "pruning, mulching, weeding, fertilizing, insecticide and fungicide treatment, plant replacement, mowing, trimming, and litter removal" required a certificate of responsibility. The Board concluded that if fifty percent of the total cost of the project constitutes a job that does not require a certificate of responsibility, then a certificate of responsibility is not needed. *Id.* at 1082 (¶7). The supreme court said that the Board had the authority to decide "that mowing and/or litter removal contracts do not require a certificate of responsibility." *Id.* at 1085 (¶19).

¶20. In *Wastewater Plant Service Co., v. Harrison County Utility Authority*, 28 So. 3d 686, 693 (¶27) (Miss. Ct. App. 2010), this Court considered what types of activities required a certificate of responsibility. This Court held that a certificate of responsibility was not required to manage and operate a wastewater facility and interceptor system. *Id.* We noted that the maintenance of the facility was not the major component of the project. *Id.* Also, we concluded that the contract was not for an activity that would normally require a certificate of responsibility like building or constructing. *Id.*

¶21. The Attorney General has issued several opinions on this very issue. The Attorney General has concluded "that maintenance of the beach as described is analogous to janitorial work in a building and does not require a certificate of responsibility." Miss. Att'y Gen. Op., 2001-0663, 2001 WL 1513805, *Meadows* (Oct. 26, 2001). The Attorney General has also concluded that the removal of damaged limbs from trees on public property does not meet the definition of a public project. Miss. Att'y Gen. Op. 1999-0185, 1999 WL 325652, *Bowman* (Apr. 30, 1999). Thus, a tree surgeon that removes those limbs is not considered a contractor and does not need a certificate of responsibility. *Id.* Finally, the Attorney General has opined that a municipality need not comply with public-construction statutes when it enters into a contract to operate or maintain a water system, but must abide by the public-construction laws if it extends or makes capital improvements. Miss. Att'y Gen. Op., 2000-0673, 2000 WL 1899949, *Snyder* (Nov. 27, 2000).

¶22. We note that Ace's work under the subcontract included the TV inspection of the sewer lines. Hemphill correctly argues that Board specifically lists "T.V. inspection of Sewer Lines & Rehabilitation" as a specialty classification. For this portion of the work, it may not be argued that a certificate of responsibility was required. However, approximately eighty-one percent of the total subcontract cost was for pipe-cleaning services, not TV inspection. Because fifty percent of the total cost of the project constitutes a job that does not require a certificate of responsibility (i.e., TV inspection), a certificate of responsibility is not needed. *Clancy's Lawn Care*, 707 So. 2d at 1082, 1085 (¶¶7, 19). As a result, this case will be decided on whether the pipe-cleaning services required a certificate of responsibility.

¶23. The purpose of the subcontract was to clean the sewer pipes to prepare for the slip-lining project. This work was not performed to maintain or operate the sewer lines. Instead, the pipe cleaning was a necessary part of the "reconstruction, repair, maintenance or related work on [the] public" project. Miss. Code Ann. § 31-3-1. For this reason, we conclude that Ace was required to have a certificate of responsibility. As a result, consistent with our decision in *United Plumbing & Heating Co., Inc. v. AmSouth Bank*, 30 So. 3d 343, 347 (¶11) (Miss. Ct. App. 2009), we must find that the subcontract between Ace and Hemphill was void because Ace did not have the required certificate of responsibility. As a result, any obligations under the contract, including payment, were also void. *Id.* For these reasons, we find that the circuit court was not in error in granting summary judgment on Ace's breach-of-contract claim.

II. Whether Hemphill and Federal are estopped from arguing the subcontract was void.

¶24. Next, Ace argues that Hemphill cannot declare the contract void where it had full knowledge of Ace's alleged non-compliance, but still accepted the benefits of Ace's services. Ace cites authority from other states that have held that a party cannot assert a contractor's lack of licensing as a defense to a breach-of-contract claim if the party knew full well the contractor was unlicensed. *See, e.g., Linsenmeyer v. Jackson*, 410 P.2d 693, 696 (Ariz. Ct. App. 1966); *Kirkendall v. Heckinger*, 307 N.W.2d 699, 703 (Mich. Ct. App. 1981); *Day v. W.Coast Holdings, Inc.*, 699 P.2d 1067, 1071 (Nev. 1985).

¶25. Ace claims that Mississippi courts have yet to announce whether a party can be equitably barred from asserting a contract is void pursuant to section 31-3-15. The

Mississippi Supreme Court has held:

> [W]here 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 Stores Export Ass'n v. Latimer, 220 Miss. 652, 664, 71 So. 2d 425, 430 (1954).

¶26. Here, the subcontract was void. Hemphill did not have the right to accept or reject the transaction, because the subcontract was void and unlawful under the statute. As such, the doctrine of quasi-estoppel does not apply. Accordingly, we find that the circuit court was not in error in granting summary judgment and not allowing Ace's claims to proceed on estoppel grounds.

III. Whether Ace has a valid claim for quantum meruit.

¶27. Ace also asserted a claim for quantum meruit. Quantum meruit 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 [the] claimant's reasonable expectation of compensation." *In re Estate of Fitzner*, 881 So. 2d 164, 173 (¶25) (Miss. 2003) (citations omitted). The elements are:

> (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and (4) under such circumstances as reasonably notified [the] person sought to be charged that [the] plaintiff, in performing such services, was expected to be paid by [the] person sought to be charged.

Id. at 173-74 (¶25) (citation omitted). Quantum meruit:

> applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good

> conscience and justice he should not retain but should deliver to another, the courts imposing a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong.

Id. at 174 (¶25) (internal citations omitted).

¶28. Ace argues that there are no reported Mississippi cases holding that section 31-3-15 bars quantum meruit claims for work actually performed and accepted by the other party. Hemphill responds that Mississippi law "prevent[s] relief on a claim based on a contract that is illegal or against our state's public policy." *Price v. Purdue Pharma L.P.*, 920 So. 2d 479, 484-85 (¶13) (Miss. 2006). Also, Hemphill argues that in *Lowenburg v. Klein*,125 Miss. 284, 285, 87 So. 653, 654 (1921), the court held that "[t]he law, in short, will not aid either party to an illegal agreement; it leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it . . . ."

¶29. The circuit judge cited *United Plumbing*, 30 So. 3d 343. Ace points out that *United Plumbing* did not involve a dispute between parties to a construction contract; rather, it was the last-ditch effort of an ambitious (if not desperate) attempt to force the project lender to pay the contractor and subcontractors after the project owner went bankrupt. *Id.* at 344-45 (¶¶4-5). Ace also argues that quantum meruit was not at issue in that appeal. *See id.* at 345, 348 (¶¶3, 14-16). Ace is correct that *United Plumbing* is not authority as to the issue of quantum meruit.

¶30. We turn our attention to cases from other jurisdictions that have examined disputes between contractors and subcontractors.

¶31. Some jurisdictions have concluded that the subcontractor cannot recover in quantum

meruit. A Florida appellate court affirmed the trial court's conclusion that an unlicensed subcontractor could not recover against the general contractor or its surety in law or equity. *Scott & Son Engineering, Inc. v. Tarafa Construction, Inc.*, 907 So. 2d 553, 553 (Fla. Dist. Ct. App. 2005) (applying statute that says contracts will be unenforceable in law or equity). Additionally, the Georgia Court of Appeals held that when an unlicensed contractor cannot enforce its contract, it also cannot recover under a quantum meruit theory. *JR Construction/Electric, LLC v. Ordner Construction Company*, 669 S.E.2d 224, 227 (Ga. Ct. App. 2008). The court reasoned that "'[i]f the express contract was void because [it was] contrary to public policy, the implied promise was void in its inception.'" *Id.*

¶32. Other jurisdictions have adopted an intermediate approach. The District Court of Appeal, First District, Division 1, of California stated: "[I]t is well settled that the failure to obtain a required contractor's license will bar the contractor from recovery for his work in an action brought by him, but will not bar him from offsetting as a defense sums which would otherwise be due him under the illegal contract." *S & Q Constr. Co. v. Palma Ceia Dev. Org.*, 3 Cal. Rptr. 690, 692 (Cal. Dist. Ct. App. 1960).

¶33. Some jurisdictions allow the subcontractor to recover through an equitable remedy. The Idaho Supreme Court held that it would not enforce an illegal contract and generally would "'leave the parties where it finds them.'" *Barry v. Pac. W. Constr.*, 103 P.3d 440, 445 (Idaho 2004). However, the court said that "although illegal contracts are unenforceable as a matter of public policy, circumstances arise where denying a party relief would frustrate the public interest more than 'leaving the parties where they lie.'" *Id.* at 446. The court observed that allowing the subcontractor to recover its profits would effectively enforce the

illegal agreement. *Id.* at 447. However, the court found that the subcontractor could recover through unjust enrichment. *Id.*

¶34. The Court of Appeal of Louisiana found that although the subcontractor did not have a license, he should be allowed to recover an amount that "represents his actual cost of the materials, services, and labor without any allowance for overhead and profits." *Hagberg v. John Bailey Contractor*, 435 So. 2d 580, 587 (La. Ct. App. 1983). The court concluded it would "be unconscionable to permit Bailey to deny payment to Hagberg because Hagberg did not have a valid Louisiana contractor's license when it was Bailey who had the correlative responsibility of confirming that Hagberg was a licensed subcontractor . . . and where Bailey did not raise the licensing issue until fifteen months after Hagberg had commenced work." *Id.* The Tennessee Supreme Court has also allowed an unlicensed subcontractor to recover his actual expenses through quantum meruit. *Gene Taylor & Sons Plumbing Co., v. Corondolet Realty Trust*, 611 S.W.2d 572, 577 (Tenn. 1981).

¶35. Ace argues that it performed a significant amount of work with the expectation of being paid. Hemphill claims that the contract is void and defends this action with the contention it has no obligation to pay. Hemphill has been paid for the work performed by Ace, and Hemphill will be entitled to keep the amounts paid.

¶36. Nevertheless, we have determined the subcontract to be void and unenforceable. The subcontract was in fact illegal. Mississippi Code Annotated section 31-3-21(1) (Rev. 2010) provides that "[i]t shall be unlawful for any person who does not hold a certificate of responsibility . . . to submit a bid, enter into a contract, or otherwise engage in or continue in this state in the business of a contractor, as defined in this chapter." The law will not aid

a party to an illegal agreement. *Lowenburg,* 125 Miss. at 285, 87 So. at 654. A party to an illegal contract also cannot recover "on the ground of an implied promise on the part of the party receiving the benefits therefrom to pay therefor, as the law will imply no promise to pay for benefits received under an illegal contract by reason of the performance thereof by the other party." *Id.* (internal quotation omitted).

¶37. However, "if the plaintiff is a lawbreaker at the time of his injury, that alone is not enough to bar the plaintiff from recovery." *Price,* 920 So. 2d at 485 (¶15). "The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and . . . not a contributing cause of the injury, a recovery may be permitted." *Id.* at (¶14).

¶38. This Court is of the opinion that a claim of quantum meruit would circumvent the legislative decision to declare such contracts void. As other jurisdictions are divided in their approach to this issue, and the Mississippi Supreme Court has not decided this issue, we find no reason to stray from the longstanding principle of refusing to give effect to illegal contracts. For these reasons, we find no error in the circuit court's summary judgment that prohibited Ace from recovering under a quantum meruit theory.

IV. Whether it was error to grant summary judgment in favor of Federal.

¶39. The Mississippi Supreme Court has held that "[t]he surety's liability and obligation are the same as the principal's, and the surety is liable only if the principal is liable." *Fid. & Guar. Ins. Co. v. Blount,* 63 So. 3d 453, 460 (¶29) (Miss. 2011). As we have held that Hemphill has no liability, Federal also is not liable. For this reason, we find that the circuit court did not err when it granted summary judgment in favor of Federal.

¶40. THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BARNES, ISHEE, ROBERTS, MAXWELL AND FAIR, JJ., CONCUR. LEE, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY CARLTON AND JAMES, JJ. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY JAMES, J. IRVING, P.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION.

LEE, C.J., DISSENTING:

¶41. With respect to the majority, I must dissent. I cannot find that pipe cleaning falls under a classification requiring a certificate of responsibility by the Board; thus, I would reverse the trial court's grant of summary judgment in favor of Hemphill and Federal.

¶42. As the majority states, the purpose of the subcontract between Ace and Hemphill was to clean sewer pipes to prepare for the slip-lining project. The majority generally concludes that pipe cleaning was a necessary part of the "reconstruction, repair, maintenance or related work on [the] public" project by a contractor under Mississippi Code Annotated section 31-3-1 (Rev. 2010), thus requiring a certificate of responsibility. Included in the record is a list of the services requiring a certificate of responsibility. The list is extensive but does not include pipe cleaning as a job requiring a certificate of responsibility. The Board has the "authority to determine what types of work required a contractor to obtain a certificate of responsibility." *Clancy's Lawn Care & Landscaping, Inc. v. Miss. Bd. of Contractors*, 707 So. 2d 1080, 1084 (¶15) (Miss. 1997) (citing Miss. Code Ann. § 31-3-13(g)).

¶43. The majority cites to *United Plumbing* to find the subcontract void because Ace did not have a certificate of responsibility. However, I find that case inapplicable because United Plumbing did have a certificate of responsibility, just not under the appropriate classification

of work it had contracted to perform. *See United Plumbing & Heating Co., Inc. v. AmSouth Bank*, 30 So. 3d 343, 347 (¶10) (Miss. Ct. App. 2009). The majority also cites to several Attorney General opinions that would seem to support Ace's position, namely that the cleaning of public property and any related inspections are services that do not require a certificate of responsibility.

¶44. Since I find Ace was not required to have a certificate of responsibility, I likewise find the contract was valid; thus, summary judgment was inappropriate, and Ace's claims against Hemphill should proceed in the trial court.

CARLTON AND JAMES, JJ., JOIN THIS OPINION.

CARLTON, J., DISSENTING:

¶45. I respectfully dissent from the majority's opinion. I submit that Mississippi Code Annotated section 31-3-15 (Rev. 2010) fails to bar Ace's claims for breach of contract or quantum merit.[1] A public entity awarded this public contract to the general contractor, Hemphill, and not the subcontractor, Ace. To receive the award of this public contract, section 31-3-15 required Hemphill (as the general contractor receiving the award) to possess a certificate of responsibility. The plain language of section 31-3-15 places the requirement to possess the certificate squarely upon the particular contractor awarded the public or private project. The statute places no requirement on any subcontractors with whom the general contractor may individually contract to perform various work for the general contractor to

[1] Damages for breach of contract should place the party in the position that the party would have occupied but for the breach. *See J.O. Hooker & Sons Inc. v. Roberts Cabinet Co., Inc*, 683 So. 2d 396, 402 (Miss. 1996) (subcontractor does not assume the general/prime contractor's specific contractual duties existing in the contract between the general/prime contractor and the owner or public entity).

fulfill the general contractor's contractual obligations. No privity of contract exists between the subcontractors and the owner or public entity as a result of the contract between the subcontractors and general contractor.

¶46. Moreover, a general contractor is not an agent of the owner or public entity. *See Summerall Elec. Co. v. Church of God at Southaven,* 25 So. 3d 1090, 1094-96 (¶¶16-28) (Miss. Ct. App. 2010). For example, the general contractor bears responsibility to the owner or public entity for any acts and omissions committed by its employees or subcontractors. If a subcontractor performs faulty work, the owner need look only to the contractor for its remedy. *See* Philip L. Bruner & Patrick J. O'Connor Jr., *Bruner and O'Connor on Construction Law* § 5:53 (2002).

¶47. A contractor, however, is not prohibited from

> flowing down to the subcontractors' safety responsibilities that arise in connection with the performance of their subcontractor work. The presumption is that a general contractor will require, by provisions in the subcontract, all those with whom it subcontracts to indemnify and insure that general contractor against such derivative legal liability.

Id. However, the subcontractor is not somehow vicariously liable for the statutory requirements imposed on the general contract, including the duty of the general contractor to possess a certificate of responsibility when awarded a public contract exceeding $50,000. *See* Miss. Code Ann. § 31-3-21(2) (Rev. 2010).[2] Section 600.57 of the Mississippi Bureau of Building and Grounds Construction Procurement Procedural Manual clearly provides that the

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[2] If the general contractor that was awarded a public contract exceeding $50,000.00 lacked a certificate of responsibility, then in addition to other penalties, the State Board of Contractors could, after notice and a hearing, issue an order of abatement directing the contractor to cease the construction contract. *See generally* 7 Jeffrey Jackson & Mary Miller, Encyclopedia of Mississippi Law § 5, at 78-79 (Supp. 2012).

contract is between the general contractor and the owner or public entity. The procurement manual further requires, in section 600.55, that the general contractor receiving the contract award must provide the general contractor's list of subcontractors within seven days of the contract award. The manual also states that the subcontractors must be acceptable to the Bureau.[3] However, the State's procurement manual contains no requirement for the subcontractors listed to possess any certificate of responsibility, and the subcontractor list is not provided simultaneously with the general contractor's bid.

¶48. The record reflects that in this case, Ace, the subcontractor, was not awarded the public contract for this project by the public entity. Here, Hemphill received the public-project-contract award as the general contractor, and therefore, Hemphill bore responsibility to the pubic entity for performance under the contract. If Hemphill, as general contractor herein, lacked a certificate of responsibility upon award of the public contract, then this defect would indeed have voided that public contract pursuant to section 31-3-15.

¶49. Since the public contract in this case was not awarded to Ace, and since the plain language of section 31-3-15 placed no requirement on a subcontractor, hired by the general contractor,[4] to obtain a certificate of responsibility, Ace's lack of a certificate of responsibility

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[3] *See also Moran Hauling v. Dep't of Fin. & Admin.*, 105 So. 3d 1126, 1129 (¶14) (Miss. Ct. App. 2012) (cites State's procurement manual's requirement of listing subcontractors used by general contractor within seven days of contract award); *See* www.dfa.state.ms.us (procurement-manual procedures).

[4] "At common law, subcontractors are common creditors of the contractor for whom they agree to provide materials or services." *Summerall Electric Co.*, 25 So. 3d at 1092 (¶8). No privity of contract exists between a subcontractor and an owner. *Id.*; *see e.g., J.O. Hooker & Sons*, 683 So. 2d at 402 (A subcontractor does not assume the general contractor's specific contractual duties arising from the contract between the general contractor and the public housing authority). *See MS State Building Comm'n v. S & S Moving Inc.*, 475 So. 2d

resulted did not impact the validity of the subcontract between Ace and Hemphill. Moreover, Hemphill must prove a material breach of contract by Ace to terminate the subcontract between them, and the subcontract between Hemphill and Ace is not void under the statute due to Ace's lack of a certificate of responsibility. The question of whether other actions or inactions of Ace constituted a material breach of contract would present a question of fact. Additionally, the question of whether Hemphill's actions constitute a breach of the subcontract shows a question of material fact, which requires an application of the terms of the subcontract to the facts of the case regarding the work performed by Ace and the failure of Federal to pay on its bond.

¶50. In *J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co.*, 683 So. 2d 396, 402 (Miss. 1996), the Mississippi Supreme Court explained that basic contract law establishes that not every breach gives a party the right to terminate a contract. Clearly, Hemphill could not rescind its subcontract with Ace absent a material breach by Ace. *See id.* (citation omitted). Ace sought damages for breach of contract or, alternatively, quantum merit for the reasonable cost of work and services provided to Hemphill pursuant to the subcontract between Ace and Hemphill.[5] *See G.B. "Boots" Smith Corp. v. Cobb,* 860 So. 2d 774, 778 (¶16) (Miss. 2003) (damages for breach of contract should put party in same position party would have occupied

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159, 161-62 (Miss. 1985) (subcontractor could bring suit against State for nonpayment by government contractor and also finding State waived sovereign immunity for contracts into which Legislature allowed the State to enter); *see also Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co*, 791 So. 2d 254, 258 (¶14) (Miss. Ct. App. 2000).

[5] *See Timberton Golf L.P. v. McCumber Constr. Inc*, 788 F. Supp. 919, 924 (S.D.Miss 1992) (arbitration agreement in contract not invalid even though Mississippi statute voided contract if lacking a certificate of responsibility).

but for the breach).

¶51. I respectfully submit that the trial court erred in finding that the subcontract at issue was void pursuant to section 31-3-15 due to Ace's lack of a certificate of responsibility. This statute fails to void Ace's subcontract with Hemphill, and I would therefore reverse the trial court's grant of summary judgment and remand Ace's claims against Hemphill for breach of contract or, alternatively, quantum merit, and Ace's claim against Federal on the payment bond on the project.

JAMES, J., JOINS THIS OPINION.