IN THE

Supreme Court

of the

State of South Dakota

No. 26729

STERN OIL COMPANY,
AND
STATE OF SOUTH DAKOTA
EX REL STERN OIL COMPANY,

PLAINTIFFS/APPELLANTS,

v.

BORDER STATES PAVING COMPANY,
AND
LIBERTY MUTUAL INSURANCE COMPANY,
AS ITS SURETY.

DEFENDANTS/APPELLEES

Appeal from the Circuit Court
Third Judicial Circuit
Brown County, South Dakota

The Hon. Jon Flemmer
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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Notice of Appeal filed on June 24, 2013

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Jurisdictional Statement

Stern Oil Company appeals from the following decisions, which are appealable under SDCL 15-26A-3(1) and/or (2):

1. the final order entered in this action on the 17th day of May, 2013, Notice of Entry of which was served on the 24th day of May, 2013, granting summary judgment to Defendant Border States Paving, Inc.;

   and

2. the portion of the intermediate order entered on the 12th day of September, 2012, granting summary judgment to Defendant Liberty Mutual Insurance Company, (along with the intermediate Judgment of Dismissal entered on September 12, 2012, dismissing that party from the action.)

Statement of Legal Issues

1.

Certain contracts are enforceable by third-party beneficiaries. In this case, a subcontractor directed the prime contractor to make payments directly to the subcontractors' creditors. This was done for the creditors' benefit because the subcontractor was not bonded. Testimony from the subcontractor appeared to confirm the existence of this arrangement, and testimony from the prime contractor's accountant indicated that funds were available to make these payments. *Does the record contain facts supporting the existence and breach of this payment arrangement?*

Trial court's decision: The circuit court granted summary judgment for the prime contractor because it determined, (a) that the subcontractor was not owed money under its subcontract during the time in question because the prime contractor had "discretion" to withhold funds; (b) that a subsequent affidavit categorically proved there was no such agreement; and (c) that there was no "consideration" given by the prime contractor for this arrangement.[1]

Relevant law:

SDCL 53–2–6
Guilford v. Northwestern Public Service, 1998 SD 71, ¶ 12
SDCL 53-6-1

[1] Hearing Transcript, April 30, 2013, pp. 22-25

2.

The theory of unjust enrichment prevents a party from knowingly receiving a benefit to which it is not entitled. As the prime contractor on a state highway project, Border States assumed the duty to promptly pay all subcontractors and bore the risk that the project would be unprofitable. Stern Oil provided $111,000 of fuel to that project. Border States knew of this, received direction to pay that amount, yet chose to selectively pay some suppliers, but not others. *Is Border States equitably permitted to retain this financial benefit?*

Trial court's decision: The circuit court granted summary judgment for the prime contractor because it determined, (a) that the subcontractor (Weatherton Contracting) was not owed money under its subcontract during the time in question because the prime contractor (Border States) had "discretion" to withhold funds; and (b) that Border States received no benefit because it ultimately paid more than the subcontract amount.[2]

Relevant law:

Hofeldt v. Mehling, 2003 S.D. 25

[2] Hearing Transcript, April 30, 2013, pp. 22-25

3.

Because of the remedial nature of public works bonds, statutes governing them are liberally construed. In this case, Defendants had actual notice of Stern Oil's claim almost immediately after it arose. Meanwhile, Stern Oil was led to believe its fuel was used for another public works project, and therefore made a claim on another bond and diligently pursued litigation and discovery for that purpose. It commenced this suit within 60 days of the deposition which revealed the Defendants' paving project and bond. *Based on the circumstances, did Stern Oil substantially comply with the notice and suit requirements of this bond, and can the statute of limitations be tolled?*

Trial court's decision: The circuit court granted summary judgment for the bonding company because it determined that the statute of limitations had run and it was "not prepared to make new law at this time" regarding an equitable exception. The trial court did recognize that substantial compliance may provide an exception to the notice statute, but did not rule on that issue due to its view of the statute of limitations.[3]

Relevant law:

SDCL 31-23-3
SDCL 31-23-4
S.D.R.Civ.Pro. 56(f)
Myears v. Charles Mix County, 1997 S.D. 89
Dakota Truck Underwriters v. S. Dakota Subsequent Injury Fund, 2004 S.D. 120

Statement of the Case

[3] Hearing Transcript, July 12, 2012, pp. 44-45

Plaintiff and Appellant is Stern Oil Company, a fuel supplier seeking payment for invoices related to a state highway project. The Defendants and Appellees include the project's prime contractor and its bonding company. The Defendants filed and prevailed on two motions for summary judgment. Stern Oil now appeals.

At the first hearing, on July 12, 2012, the Hon. Jon Flemmer of the Third Judicial Circuit (Brown County) granted summary judgment and dismissed the Plaintiff's bond claim against Liberty Mutual, as well as the Plaintiff's negligence claim against the prime contractor, Border States Paving. At the second hearing on April 30, 2013, the Court granted summary judgment and dismissed the Plaintiff's third-party beneficiary and unjust enrichment claims against Border States.

In addition, the Defendants filed a Rule 11 motion against Stern Oil. (Record 73, Record 71). That motion was also heard at the July 12, 2012 hearing. The trial court denied the Rule 11 motion, finding "that this is not a frivolous matter."[4]

[4] Hearing Transcript, April 30, 2013, p. 47

Statement of Facts

Most of the facts are not in dispute. Stern Oil is a statewide purveyor of fuel and supplies with headquarters in Freeman, South Dakota.[5] Border States is a North Dakota paving company with offices in Fargo, North Dakota.[6] Liberty Mutual was its bonding company for the state highway project at issue here.[7] Weatherton Contacting Company was a gravel/aggregate subcontractor that supplied its material to numerous public works projects.[8]

During the summer of 2008, Weatherton Contracting Company was a subcontractor on two public projects, namely, the Aberdeen Airport Taxiway D reconstruction, and the Highway 281 resurfacing project.[9] Weatherton supplied crushed aggregate material for both jobs from its pit near Waubay, South Dakota.[10]

Weatherton's Waubay pit was equipped with a crusher, a generator, and other equipment, which could crush approximately 5,000 tons of material per day.[11] Running this equipment required about 500 gallons per

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[5] Record 22

[6] *Id.*

[7] *Id.*

[8] Record SEP (Larry Holzman Depo., p. 7 (located at Exhibit 103 to Daniel K. Brendtro Affidavit, July 12, 2012)).

[9] *Id.,* p. 52

[10] *Id.*

[11] *Id.,* p. 19

day of diesel fuel, as well as motor oil and lubricants.[12] Diesel fuel was delivered to the site on a regular basis, often in a 7,000 gallon tanker trailer.[13] Motor oil was delivered to the pit in 55-gallon drums, and grease was delivered in tubes, 40 at a time.[14]

It was common for Weatherton Contracting to change fuel suppliers regularly, usually "because…all of a sudden somebody's got a better price."[15] One of Weatherton's fuel suppliers during the summer of 2008 was Stern Oil, which made eight deliveries to the pit between June 4, 2008, and September 9, 2008. In total, Stern Oil invoiced Weatherton for $111,190.87 worth of diesel, oil, grease, and oil filters.[16]

When Stern Oil's fuel bill went unpaid, it attempted to recover payment for the fuel from Weatherton Contracting.[17] A default judgment was entered against Weatherton in June 2009.[18] Stern Oil believed that its fuel and oil products had been used for the Aberdeen Airport project, and, therefore, it commenced suit against the contractor and bonding company

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[12] *Id.*

[13] *Id.,* pp. 23-24

[14] *Id.,* pp. 31-32

[15] *Id.,* p. 27

[16] Record SEP (Gillas Stern Affidavit (located at Exhibit 106 to Daniel K. Brendtro Affidavit (July 12, 2012))

[17] Record SEP (Exhibit 104 to Daniel K. Brendtro Affidavit (July 12, 2012)

[18] *Id.*

for that project.[19] Notably, there is a statutory waiting period to bring such a suit: it can *only* be brought by a private party during a period which is more than six months but less than one year after "the complete performance of [a public works] project and final settlement thereof." SDCL 5-21-6. In contrast, there is a separate statutory timeline for bringing claims against a performance bond for a road projects. *See,* SDCL 31-23-4 (within "one year after the date of final settlement" of the project in question, with no waiting period).

Stern Oil's lawsuit against the airport bond was timely commenced in November of 2010.[20] The Answer in that case (*Stern Oil v. Upper Plains Contracting and Liberty Mutual*) was served on December 29, 2010.[21]

Three months later, during discovery in the *Upper Plains* case, Stern Oil learned from Weatherton that the unpaid Stern fuel had not been used on the Airport project, but instead on the Highway 281 project.[22] Specifically, Carl Weatherton had testified that *all* of the Stern Oil invoices were for the Highway 281 project. (However, Weatherton's foreman would later clarify in deposition testimony that although the *fuel* was used solely for the Highway 281 project, he believed that at least some of the

[19] Record SEP (Gillas Stern Affidavit (located at Exhibit 106 to Daniel K. Brendtro Affidavit (July 12, 2012)); and Record SEP (Exhibit 105 to Daniel K. Brendtro Affidavit (July 12, 2012).

[20]Record SEP (Affidavit of Daniel K. Brendtro, July 12, 2012, Exh. 105); Record 269-70

[21] Record 269-70

[22] Record SEP (Carl Weatherton Depo., p. 8, located at Exhibit 101 to Daniel K. Brendtro Affidavit, July 12, 2012).

shipments of motor oil, filters, and grease to the Waubay pit had likely been consumed during the Airport crushing job.)[23]

In any event, by the time Stern Oil learned that its diesel fuel had been used in the Highway 281 project, the statute of limitations had passed to make a claim on that bond. Significantly, the Answer in the airport bond lawsuit had been served on December 29, 2010, which was nine days before the one-year statute of limitations on the Highway 281 would run (on January 7, 2011). However, there was nothing in the Airport bonding company's Answer which in any way identified the Highway 281 project or the Defendants/Appellees in this case.[24] Notably, the law firm which drafted that Answer and defended the airport contractor was the very same firm that had regularly represented Border States since the 1990's, including in prior litigation related to the Highway 281 project.[25]

Stern Oil also learned through discovery that Border States had known about its $111,000 worth of unpaid fuel bills since November 28, 2008. Stern Oil also learned through discovery that Weatherton Contracting had "directed" Border States to pay those fuel bills out of funds Weatherton was owed on the Highway 281 project.

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[23] Record SEP (Larry Holzman Depo., pp. 30-33, located at Exhibit 103 to Daniel K. Brendtro Affidavit, July 12, 2012)

[24] Record 269-70

[25] Record SEP (Korey Bender Depo., pp. 74-75, located at Exhibit C to Daniel K. Brendtro Affidavit, April 30, 2013). In general, the Answer provided nothing in the way of a factual basis for Stern Oil to proceed with a claim against anyone else.

This information had been conveyed to Border States in a spreadsheet emailed from Weatherton Contracting. The document was date-stamped in Border States' mail room on November 28, 2008, and its vice-president wrote Stern Oil's toll-free number next to the amounts owed to it.[26] In the document, Weatherton Contracting directed Border States to issue payments by a "joint check" to Stern Oil in the amount of $33,470.34 and another via a direct, one-party check to Stern Oil in the amount of $77,542.03. (The spreadsheet is reprinted in the Appendix.)

In his deposition testimony and other communications, Carl Weatherton indicated that he expected Border States to follow his instructions, and he did not realize until three years later that Border States had failed to do what they were "supposed" to do.[27] He described the spreadsheet in a manner which clearly suggested he had expected Border States to follow his directives:

> …here is the break down on the 281 job and stern oil should have been paid from this money owed on that project[28]

In light of this new information regarding Border States, Stern Oil then gave notice and commenced this lawsuit within 60 days of the deposition. Its Amended Complaint identified four claims: (1) an action

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[26] Record SEP (Nancy Slotten Depo., pp. 38-40) (located at Exhibit A to Affidavit of Daniel K. Brendtro, April 30, 2013).

[27] Record SEP (Carl Weatherton Depo., p. 29) (located at Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101)

[28] [sic]. Record SEP (Carl Weatherton Depo., p. 33, and Exhibit 1) (located at Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101)

against the payment bond, on a theory that the statute of limitations in this action should be waived or tolled in light of the circumstances; (2) an action against Border States alleging that Stern Oil was a third-party beneficiary of the payment arrangement between Weatherton and Border States; (3) an equitable claim against Border States for unjust enrichment; and (4) a negligence claim against Border States. (Stern Oil is not pursuing the negligence claim on this appeal.)

Standard of Review

On an appeal from summary judgment, the "burden of showing the absence of material fact" falls upon the moving party from the court below. *U.S. Bank Nat. Ass'n v. Scott*, 2003 S.D. 149, ¶ 46 (Gilbertson, J., dissenting). The review here is *de novo;* this Court undertakes its own review of the record, independent of the trial court's determination. *State Farm Auto Ins. Co. v. Gertsema*, 2010 S.D.9, ¶ 8. This Court affirms a summary judgment "only when there are no genuine issues of material fact and ... [a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Mueller v. Cedar Shore Resort, Inc.,* 2002 SD 38, ¶ 10

"Contract interpretation is a question of law reviewed de novo." *Detmers v. Costner,* 2012 S.D. 35, ¶ 20. However, "[i]f in dispute...the existence and terms of a contract are questions for the fact finder." *Behrens*

v. Wedmore, 2005 S.D. 79, ¶ 20 (quoting *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992))

Argument

1. Stern Oil has identified sufficient and disputed facts in order for its third-party beneficiary claim to be heard by a jury

The parties in this appeal do not dispute the law underlying the third-party beneficiary claim, but instead the facts supporting it. It is axiomatic that third parties can assert rights under agreements made between others. In South Dakota, this principle is found in SDCL 53–2–6, which provides that

> [a] contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

This Court has interpreted the term "expressly" to mean that this statute "excludes enforcement of a contract by persons who are only incidentally or remotely benefited by the agreement." *Trouten v. Heritage Mut. Ins. Co.*, 2001 S.D. 106 (adopting the rule from *Harper v. Wausau Ins. Co.*, 56 Cal.App.4th 1079, 1086 (1997)).[29] However, this Court has long-recognized that the "express" intent of the contract "might, in a given case, sufficiently appear from the contract itself but it must frequently be shown *by other proof*." *Trouten v. Heritage Mut. Ins. Co.*, 2001 S.D. 106, ¶ 13 (quoting *Fry v. Ausman,* 135 N.W. 708, 710 (1912))(emphasis added).

[29] *Harper v. Wausau* involved California's statute on third-party beneficiaries, which includes phrasing identical to South Dakota's statute. *Compare,* California Civil Code § 1559 ("A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.")

Here, in a light most favorable to the non-moving party, Stern Oil was a third-party beneficiary of a payment arrangement established between Border States and Weatherton Contracting. Nearly all of the facts regarding this are undisputed and are discussed below. Briefly, Weatherton Contracting sent a payment memo "directing" Border States to send funds to its suppliers; Border States assented to this either expressly or by its conduct and failure to object; and Weatherton Contracting relied upon this arrangement to its detriment.

The trial court focused on three aspects of the third-party beneficiary claim: (a) whether Weatherton Contracting was actually owed money under its subcontract during the time in question; (b) whether Carl Weatherton's affidavit eliminated any disputes of fact about this agreement; and (c) whether there was "consideration" for this arrangement. The trial court's conclusions were wrong as to all three issues.

(a) At the time of the payment agreement, funds were owed to Weatherton Contracting, and the Sub-Contract Agreement required prompt payment of them

Border States' primary payment duties were set forth in the Sub-Contract Agreement it entered with Weatherton Contracting. Ultimately, the trial court concluded that the agreement gave Border States "discretion" to withhold payments to Weatherton, although it did not cite any contract language in support of this. The trial court believed that Weatherton Contracting was "not owed anything under the subcontract he had with Border States," and that Border States was allowed to make payments "based on its discretion."[30] In the trial court's view, the decision not to pay Weatherton's suppliers is what Border States was "required to do under the [Sub-Contract]."[31]

But the trial court's view is not supported by the language of the Sub-Contract Agreement or by the Record. Instead, Border States was required to pay Weatherton for the work as soon as it received the funds from the State, and Border States could withhold funds *only* for claims actually made by suppliers and creditors. Specifically, the contract provided that "[t]he Contractor shall…upon receipt of payment from the Owner,

[30] Hearing Transcript, April 30, 2013, p. 23-24

[31] *Id.*

promptly pay the Sub-Contractor for such work."[32] The passage about "discretion" is quite narrow and states that "if notification of any claims have been made against the Sub-Contractor…arising out of labor or materials furnished…the Contractor may at his discretion withhold such amounts otherwise due or to become due hereunder to cover **said** claims."[33] (The Sub-Contract is reprinted in the Appendix.)

The Record contains no evidence of "claims that [had] been made against the Sub-Contractor…arising out of labor or materials furnished…." Without such claims being made, there was no trigger for Border States to begin withholding payment and "exercising discretion." (The trial court did not provide any explanation of how the 'discretion' clause of the Sub-Contract had been triggered.) Instead of following the language of the contract, Border States decided to pick and choose when to pay, how much to pay, and who to pay. This may have been to Border States' benefit, but it was not a procedure permitted by the contract.

It is undisputed that Weatherton Contracting was owed a substantial amount of money in November 2008 when it sent the payment spreadsheet. The testimony of Border States' Controller is dispositive as to this issue. He explained the significance behind a list of the progress payments received from the State (Exhibit 2A), along with the dates and

[32] Record 53

[33] Record 53 (Affidavit of Nancy Slotten, Exhibit C)

amounts that payments were made to Weatherton and his suppliers.[34] Using the explanations provided by the Controller, the Record indicates that for several months after the payment spreadsheet was received (on November 28, 2008) there was a balance due to Weatherton Contracting, and for much of that time the balance *exceeded* the Stern Oil bills:

Date	Action	Amount	Balance due to Weatherton Contracting
9/27/2008	Progress Payment	$106,641.12	$106,641.12
9/28/2008	Progress Payment	$427,270.52	$533,911.64
10/10/2008	*Paid out to Weatherton/suppliers*	($510,646.19)	$23,265.45
10/11/2008	Progress Payment	$92,528.56	$115,794.01
10/25/2008	Progress Payment	$71,540.66	$187,334.67
10/26/2008	*Paid out to Weatherton/suppliers*	($158,602.33)	$28,732.34
11/8/2008	Progress Payment	$29,367.21	$58,099.55
11/28/2008	PAYMENT SPREADSHEET RECEIVED BY BORDER STATES		
12/15/2008	Progress Payment	$77,233.96	$135,333.51
2/4/2009	Paid out to Weatherton/suppliers	-$6,121.16	$129,212.35
5/9/2009	Paid out to Weatherton/suppliers	-$22,996.45	$106,215.90
5/23/2009	Paid out to Weatherton/suppliers	-$65,859.18	$40,356.72

In light of these figures and Border States' own testimony, the trial court's analysis was incorrect, and it overlooked undisputed facts. Nothing in the Record suggests that Border States was allowed to withhold funds under the Sub-Contract based on its "discretion." Instead, it should have made payment promptly as directed by Weatherton, including the payments to Stern Oil.

(b) Carl Weatherton's affidavit is impermissible because it is conclusory and contradicts his prior testimony and the Record

[34] Record SEP. Lyle Zahradka Depo., pp. 18-24 (located at Exhibit B to Affidavit of Daniel K. Brendtro (April 30, 2013)). In these pages, he is testifying about a portion of a deposition exhibit, which is located at Exhibit F to the Affidavit of Daniel K. Brendtro, (filed April 30, 2013).

The trial court also granted summary judgment by relying on a five sentence affidavit from Carl Weatherton. The first two sentences in the affidavit are prefatory and have no bearing on this case.[35] The other three sentences are contradicted by his prior statements. (The Affidavit is reprinted in the Appendix.)

In paragraph 3 of Carl's affidavit, he states that he "*requested* that Border States pay several of Weatherton's suppliers for the Project, by way of joint check or direct check."[36] This is materially different from his deposition testimony, in which he agreed that he "*directed*" Border States to pay his suppliers.[37] The implication is quite significant: "directed" suggests that he believed Border States had no discretion, while "requested" suggests discretion.

In paragraph 4 of Carl's affidavit, he states that, "[a]lthough I *requested* payment to Stern Oil, Border States did not agree to pay Stern Oil."[38] This, too, is contrary to his deposition testimony and prior statements. Exhibit 1 to Carl's deposition is an email he sent to Border States' attorney, Tom Olson, explaining the significance of the November 28, 2008, payment spreadsheet. He says:

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[35] *I.e.,* that he was an "owner of Weatherton Contracting" and that his company "supplied aggregate under a subcontract…."

[36] Record 266 (Carl Weatherton Affidavit, ¶ 3).

[37] Record SEP (Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101 (Carl Weatherton Depo., pp. 7-8, and Exhibit 1)).

[38] Record 266 (Carl Weatherton Affidavit, ¶ 4).

> …here is the break down on the 281 job and stern oil should have been paid from this money owed on that project[39]

Similarly, Carl testified at his deposition that these "were joint checks, supposed to be issued out to the [suppliers];"[40] that because of the spreadsheet, "Stern Oil should have been paid all they were owed;"[41] and that Border States was either supposed to have "paid the bill or they need to send us a check for the 33 [thousand] and the 77 [thousand]."[42] He also agreed with the following: "Q: So as we sit here today, it's your testimony that you believe Border States owes you and Stern Oil about 111,000 bucks? A: If they haven't paid."[43]

In paragraph 5 of Carl's affidavit, he states that "Border States refused [to issue the supplier checks] on the basis that it paid more than the final amount due under the Subcontract."[44] This, too, contradicts his prior testimony. Carl was asked, "Q: Have you talked to anybody at Border States about why these checks weren't written? A: No."[45]

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[39] [sic]. Record SEP (Carl Weatherton Depo., p. 33, and Exhibit 1) (located at Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101)

[40] Record SEP (Carl Weatherton Depo., p. 29, and Exhibit 1) (located at Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101)

[41] Record SEP (Carl Weatherton Depo., pp. 5-6) (located at Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101)

[42] Record SEP (Carl Weatherton Depo., p. 34) (located at Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101)

[43] Record SEP (Carl Weatherton Depo. p. 31) (located at Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101)

[44] Record 266 (Carl Weatherton Affidavit, ¶ 5).

[45] Record SEP (Carl Weatherton Depo., p. 35) (located at Affidavit of Daniel K. Brendtro (July 12, 2012), Exhibit 101)

Furthermore, Carl clearly has the dates wrong. He is suggesting that the reason Border States refused to pay the funds in November 2008 is because of cost overruns that occurred several months later. The timing of those two events does not match, and it is implausible. In short, Carl's affidavit does not remove doubts about the facts, but instead creates more of them. Carl's own testimony creates two, disputed versions of the same story, and it suggests a third version of the parties' contract.

This Court disapproves of affidavits like Carl Weatherton's. *Guilford v. Northwestern Public Service,* 1998 SD 71, ¶ 12 (party against whom summary judgment is sought cannot create issues of material fact by contradicting own earlier sworn testimony); *Taggart v. Ford Motor Credit Co.,* 462 N.W.2d 493, 501 (S.D.1990) (party cannot contradict one's own prior testimony in an attempt to defeat summary judgment); and *see, Carpenter v. City of Belle Fourche*, 2000 S.D. 55, ¶ 26 (rule banning contradictory affidavits is "to prevent sham issues from being interjected to sidetrack" summary judgment process).

Instead, summary judgment affidavits must fairly represent the testimony to be received at trial, and, thus, they cannot be "manufactured" or "conclusory." *DFA Dairy Fin. Servs., L.P. v. Lawson Special Trust*, 2010 S.D. 34, ¶ 32 Subsequent affidavits from a witness are admissible only if they "provide an explanation for the prior inconsistent admission…or clarify any perceived ambiguity." *Id.* Affidavits without such detail are

"impermissible because they do provide a proper basis to contradict, modify, or recant" prior, sworn statements. *Id.* (citing *Johnson v. Matthew J. Batchelder Co., Inc.,* 2010 S.D 23, ¶ 13 as an example of when the procedure is allowed, i.e., when the later affidavit addresses "newly discovered evidence"). Carl Weatherton's affidavit does not meet any of these requirements.

Furthermore, Carl Weatherton's affidavit is not only inconsistent with his own testimony, but also with the Record. In particular, the trial court relied heavily upon Paragraph 4, in which Carl claims that "Border States did not agree to pay Stern Oil."[46]

Instead, we can infer from the Record that Border States *did* agree. Border States had agreed to the same type of arrangement previously.

> *Q: Okay. And you're saying that you recall making joint payments to Weatherton on some of his subs on [the Lyman County] project?*
>
> A: I believe so.
>
> *Q: And what would be the reason to make joint payments like that?*
>
> A: Either the subcontractor asked us to do that or Weatherton asked us to do that, and we agreed to provided he had, you know, monies due under the contract.[47]

[46] Hearing Transcript, April 30, 2013, p. 24.

[47] Record SEP (Korey Bender Depo., p. 9 (located at Exhibit C to Affidavit of Daniel K. Brendtro, April 30, 2013))

Furthermore, the Record contains no evidence that Border States actively disagreed with the spreadsheet, nor does it contain any evidence that it advised Weatherton Contracting that it was refusing to make payment in the manner it had been instructed. Based on the parties' course of dealing, Weatherton Contracting was entitled to rely on this silence and interpret it as assent:

> *Q. Okay. So your understanding, then, is that the way to disagree, then, in the course of your relationship with Weatherton, was to speak up if that's not how you wanted it done?*
>
> A:…[I]f I make a proposal, if you don't agree with the proposal, yes, I would believe the next thing to do was either make a counterproposal or disagree.
>
> *Q: Or otherwise we just assume that the proposal was accepted?*
>
> A: That's my recollection at this time.
>
> *Q: And that's a fair way to treat the relationship you had with Weatherton Contracting?*
>
> A: To my recollection.[48]

This prior course of dealing matches the inferences we find in Carl's deposition: that Carl Weatherton apparently believed Border States had agreed to make payments, as he had directed. Further, Weatherton Contracting relied on this payment arrangement, to its detriment: it made

[48] Korey Bender Depo., 26-27

no further payments to Stern Oil, and it ultimately incurred a default judgment for those unpaid bills.

In short, "the controversy before the Court presents a classic example of a situation in which summary judgment is improper." *U.S. Bank Nat. Ass'n v. Scott*, 2003 S.D. 149, ¶ 47 (Gilbertson, J., dissenting). There are significant and material facts in dispute about the third-party beneficiary claim which can only be resolved by a jury. Carl Weatherton's conclusory, five sentence affidavit is not a legitimate substitute for trial.

(c) This payment agreement was supported by adequate consideration

As consideration for this arrangement, Weatherton Contracting agreed to forego its right to sole and direct payment on the subcontract, and, instead, participated in payment benefits only indirectly. This is all that is required to meet the low threshold for consideration.

The trial court addressed this issue only in passing, and found (without any further comment) that "there was no additional consideration for Border States to enter into such an agreement."[49] In other words, the trial court was looking for a benefit running to Border States in order to find consideration. This is not the proper analysis.

Instead, consideration can involve "either a benefit to the promisor or a detriment to the promisee." *MidAmerican Energy Co. v. Great Am. Ins. Co.*, 171 F. Supp. 2d 835, 853, 2001 WL 1301749 (N.D. Iowa

[49] Hearing Transcript, April 30, 2013, p. 25

2001)(applying Iowa state law). *See, also,* SDCL 53-6-1 (espousing this same principle with more complicated syntax); *Garrett v. BankWest, Inc.,* 459 N.W.2d 833, 840 (S.D. 1990)(applying SDCL 53-6-1). Thus, it is not necessary for Border States to have benefitted from the agreement, as long as Weatherton Contracting was burdened by it.

Here, the consideration was in the form of a burden to Weatherton Contracting. Weatherton burdened or "prejudiced" itself by directing the payment of money it was otherwise entitled to receive. Rather than receive payment outright, it directed its payment elsewhere.

Moreover, Weatherton relied upon this agreement. Weatherton was subsequently sued by Stern Oil for the unpaid funds, and Weatherton received a default judgment against it for those same unpaid invoices, plus interest. As a matter of law, Stern Oil's third-party beneficiary claim does not fail for "failure of consideration."

In summary, the trial court was incorrect as to all three of these issues, and therefore, Stern Oil's third-party beneficiary claim is not ripe for summary judgment. The same is true regarding Stern Oil's unjust enrichment claim, which we take up next.

2. Stern Oil presents a *prima facie* case for unjust enrichment

Unjust enrichment occurs "when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying." *Hofeldt v. Mehling*, 2003 S.D. 25, ¶15, 658 N.W.2d 783 (quoting RESTATEMENT OF RESTITUTION, § 1 (1937)). "When unjust enrichment is found, the law implies a contract obligating the beneficiary to compensate the benefactor for the value of the benefit conferred." *Id.,* ¶ 16.

There are three "elements" of such a claim: (1) a party conferred a benefit; (2) the recipient was aware he was receiving a benefit; and (3) inequity in allowing the recipient to retain this benefit without paying for it. *Id. See, also, DFA Dairy Financing Services, L.P. v. Lawson Special Trust*, 2010 S.D. 34, ¶ 28. The third element requires a trial court to balance the equities of the case, which must necessarily occur *after* hearing all the evidence, not before. *See, Hofeldt v. Mehling*, 2003 S.D. 25 (citing *Rehfeld v. Flemmer,* 269 N.W.2d 804, 808 (S.D.1978))(court "exercises its discretion *after weighing the equities of a case"*). To the extent that the underlying facts are in dispute, summary judgment is inappropriate.

In a light most favorable to Stern Oil, it can meet every element. Stern Oil provided $111,000 worth of diesel fuel to help pave Highway 281. This was a benefit to Border States because it was the general contractor on

that project, and therefore Border States was ultimately responsible for the prosecution and payment of the work. Border States became aware of this contribution on November 28, 2008, when it received the payment spreadsheet from Weatherton Contracting. At the time it received the payment spreadsheet, Weatherton Contracting was owed money under its subcontractor agreement. Yet, rather than issue payment as required, it failed to do so, to the detriment of both Stern Oil and Weatherton Contracting. This is unfair, both to Weatherton Contracting and to Stern Oil.

Border States twice filed for summary judgment on this issue. After the first attempt, the trial court denied the motion and entered a detailed order pursuant to Rule 56(d), which found that the first two elements were not in dispute and that "[t]he only matter for trial, then, is (c) whether it is inequitable for Border States to retain this benefit without paying for it, and if not, an amount of damages to be fixed to equitably compensate Stern Oil Company."[50]

However, after the second motion, the trial court reversed that decision. At the second hearing, the trial court concluded that "Border States didn't receive a benefit without paying for it....Border States paid either to Weatherton or on Weatherton's behalf amounts in excess of what

[50] Record 217, ¶ 2.

it was contracted to pay to get the material that Weatherton was to provide...."[51]

In essence, the trial court was saying that Border States didn't receive a benefit because Border States lost money on its subcontract. Instead, the correct analysis is that Border States avoided losing *even more* money on its subcontract by ignoring the command to pay Stern Oil's bill. This is underscored by the timing of the November 28, 2008, pay request: it arrived in Border States' office at a time when the project was not yet over budget, and when a substantial amount of money was owed to Weatherton. If Border States had paid the funds due when it should have, all of the suppliers would have been paid, and Border States would have ended up paying the full and true costs of its subcontract, rather than escaping part of those costs. Border States' own witness agreed that "the prospect of losing money on a project is part of the risk that goes along with bidding."[52]

It is unfair for Border States to retain this money because it created the situation by breaching its subcontract with Weatherton Contracting. Rather than following the terms of its agreement, Border States pursued a course of action that benefitted itself, and it did this by exercising "discretion" that was not permitted under its contract. (*See,* § 1(a), above).

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[51] Hearing Transcript, April 30, 2013, p. 22

[52] Record SEP, Nancy Slotten Depo., p. 21 (located at Exhibit A to Affidavit of Daniel K. Brendtro, April 30, 2013).

Border States' cost overruns on this project are its own problem, not one that can be transferred to Stern Oil, and particularly not on a motion for summary judgment. The unjust enrichment claim should proceed to trial so that the trial court can balance the equities in light of all of the circumstances.

3. Allowing Stern Oil's bond claim will serve the remedial purpose of the public highway payment bond statutes

In this case, Stern Oil also pursued payment for its fuel under the payment bond on the Highway 281 project, pursuant to the process set forth in Chapter 31-23. There is no dispute that Stern Oil did not meet the deadlines imposed by Chapter 31-23. The question before this Court is whether those deadlines are inflexible and rigid, or whether they are to be interpreted more broadly, in light of the remedial nature of these statutes.

All state paving projects are required to obtain a payment bond. *See,* SDCL 31-23-1.[53] All suppliers of labor and material are then permitted to bring suit against the bond for unpaid amounts. *See,* SDCL 31-23-2. Suppliers connected to the project through a subcontractor are required to serve the prime contractor with written notice, either by mail or in the same manner as a summons. *See,* SDCL 31-23-3. Suits brought using this

[53] *Compare,* SDCL 5-21-1 (more generally requiring payment bonds "for the construction of public improvement," which applied to the Aberdeen Airport bond at issue in this case)

procedure must be brought within one year after final settlement of the contract. *See,* SDCL 31-23-4.

The trial court recognized that substantial compliance may provide an exception to Stern Oil's failure to give notice of its claim, but that the statute of limitations on the bond claim had expired five months prior to the commencement of this suit, and, therefore, that existing law required its dismissal.[54] Stern Oil also filed a Rule 56(f) affidavit requesting leave to conduct additional discovery on exceptions to the statute of limitations. The trial court did not address this affidavit. Stern Oil asks this Court to remand the case for further discovery and proceedings.

This Court has decided only a handful of cases involving Chapter 31-23, none of which address the notice requirements or statute of limitation. One principle is clearly embedded within the handful of cases involving Chapter 31-23, which is that they are construed broadly, in favor of indemnity. *State for Use & Benefit of J. D. Evans Equip. Co., Sioux Rd. v. Johnson*, 160 N.W.2d 637, 640 (S.D. 1968); *State for Use of Farmers State Bank v. Ed Cox & Son*, 132 N.W.2d 282, 287 (S.D. 1965). This fits with the purpose of Chapter 31-23: to encourage businesses to supply labor and materials to state projects without the fear of non-payment.

(a) Notice statutes are liberally construed, especially in situations where the receiving party has actual notice

[54] Hearing Transcript, July 12, 2012, pp. 44-45

Within other realms of South Dakota law, this Court has made it clear that actual notice is sufficient, even when the notice statute is not strictly complied with. For example, this Court liberally construes the 180-day notice rule for claims against the state and its subdivisions. *Myears v. Charles Mix County*, 1997 S.D. 89, ¶ 10 (construing SDCL 3-21-2). This Court recognizes that "if our Legislature wanted a strict construction of this enactment, it could have so stated. On the contrary, the South Dakota code and "the subjects to which it relates and its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice." *Id., (*quoting SDCL 2-14-12).

Within the view of that "liberal" construction, this Court has adopted the rule of "substantial compliance." It requires nothing more than that actual notice be given in a manner that is sufficient to meet the objectives of the statute:

> "Substantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Id. at ¶ 13 (quoting *Larson v. Hazeltine,* 1996 SD 100, ¶ 19).

If we apply these principles here, Stern Oil's claim is not barred by the six-month notice requirement in SDCL 31-23-3. Border States had

actual notice of the unpaid fuel bills on November 28, 2008, which was within six months of the dates of all of the fuel deliveries (July 8th, July 29th, August 19th, and September 9th of 2008).[55] Border States acknowledges it received notice, and it is a fair inference that it understood that Stern Oil was a fuel supplier to its project.

The notice was given by Weatherton Contracting, rather than by Stern Oil, but to meet the purpose of SDCL 31-23-3, it is not essential that the fuel supplier is the one who gives the notice, nor is it essential that the notice be mailed. Instead, those requirements are in place to ensure a manner of recording actual notice. Those requirements are unnecessary when there is no dispute that actual notice was indeed received.

The clear purpose of SDCL 31-23-3 is to ensure that the prime contractor has notice of the unpaid bills, an opportunity to investigate further, and an opportunity to pay them. Border States was given notice sufficient to allow it to do investigate and pay, yet it chose not to. Under these facts, actual notice is all that should be required for Stern Oil to proceed with its bond claim.

(b) The one-year statute of limitations should be equitably tolled for five months under these facts

This Court has recognized and discussed various exceptions which permit an action to be filed after the statute of limitations has run. *See,*

[55] Record SEP (Affidavit of Gillas Stern, located at Exhibit 106 to Affidavit of Daniel K. Brendtro, July 12, 2012)

Dakota Truck Underwriters v. S. Dakota Subsequent Injury Fund, 2004 S.D. 120, ¶¶ 19-31 (extending a statute through equitable tolling); *Id.,* ¶ 32 (discussing equitable estoppel); *Kobbeman v. Oleson,* 1998 S.D. 20, ¶ 21 (recognizing waiver). Thus, the one-year period found in SDCL 31-23-4 is not a fixed and rigid rule, but one which must be analyzed in light of the circumstances of this case.

In light of these fact-based defenses, Stern Oil filed a Rule 56(f) affidavit prior to the summary judgment hearing, requesting time to conduct additional discovery on the statute of limitations issue.[56] Little or no fact discovery was able to be undertaken regarding the statute of limitations issue prior to the time that the trial court granted summary judgment for the bonding company and dismissed them from this suit.[57] The trial court did not address the Rule 56(f) affidavit when it granted summary judgment on the bond claim.

"The doctrine of equitable tolling should be applied where a party acts diligently, 'only to find himself caught up in an arcane procedural

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[56] Record 200

[57] *Id.* The Plaintiffs attempted to move the case along in a diligent fashion but did not have a meaningful opportunity to complete discovery prior to the motions hearing. Defendants' Answer in this case was served on December 13, 2011. (Record 23.) Plaintiffs filed a motion for a scheduling order on March 14, 2012. (Record 33.) Defendants immediately filed an "Objection" to the Motion for Scheduling Order because the Defendants did not want to engage in discovery until after they had filed and argued a motion for judgment on the pleadings (requiring no discovery), which they informed the court would be filed on April 6, 2012. (Record 35.) However, Defendants then, instead, filed a motion for summary judgment on April 17, 2012. (Record 42). One week later, Defendants served a Rule 11 motion on April 23, 2012, which they then filed on June 7, 2012. (Record 71). Plaintiff served written discovery on June 8, 2012, and the summary judgment hearing was held on July 12, 2012.

snare.'" *Dakota Truck Underwriters v. S. Dakota Subsequent Injury Fund*, 2004 S.D. 120, ¶ 20 (quoting *Warren v. Department of Army,* 867 F.2d 1156, 1160 (8th Cir.1989)). For the doctrine to apply, three things must be shown: "(a) a timely notice, (b) lack of prejudice to the defendant, and (c) reasonable and good-faith conduct on the part of the plaintiff." *Id.,* ¶ 24

The record suggests all three elements can be met here. Border States received actual, timely notice that its bond was at risk for the Highway 281 project.[58] Neither Border States nor its surety have presented any evidence which would suggest prejudice. Instead, Stern Oil's claim was one which they anticipated would be made, but one which they clearly hoped would go away if they waited.

Stern Oil's conduct in this matter was reasonable and in good faith. Stern Oil delivered fuel for a public works project and Weatherton Contracting did not pay the bill. Stern Oil correctly determined that Weatherton Contracting had been providing material to the Aberdeen Airport project, and its products were being used for that purpose. Only later did Stern Oil learn that its products were also being used (primarily) for the Highway 281 project.

Stern Oil diligently pursued the bond claim on the Airport project, but due to the procedural requirements of pursuing that bond claim (i.e.,

[58] Border States received this notice first from Weatherton Contracting in 2008, and arguably may have received notice again when Border States' attorney reviewed, investigated, and answered the Aberdeen airport bond lawsuit on behalf of Upper Plains.

waiting until the 6-12 month window after the airport project had concluded, per SDCL 5-21-6), it was then too late to correct its mistake. Perhaps one option would have been for Stern Oil to commence lawsuits against every unknown yet conceivable defendant, but this is certainly not in the public's interest. Instead, the public's interest is in encouraging fuel suppliers to continue providing fuel to public works projects. This is a situation akin to what this Court discussed in *Dakota Truck Underwriters:* "where a party acts diligently, only to find himself caught up in an arcane procedural snare." 2004 S.D., ¶ 20.

To paraphrase that case, "we are not dealing with plaintiffs who have slept on their rights or with burdening defendants with surprise or stale claims…The unique circumstances of this case require the application of the doctrine of equitable tolling to extend the statute of limitations by five months."

Conclusion

Stern Oil asks this Court to reverse the trial court's orders and permit it to proceed with its third-party beneficiary and unjust enrichment claims against Border States, and its bond claim against Liberty Mutual.

Respectfully submitted this 27th day of August, 2013.

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Certificate of Compliance

The undersigned hereby certifies that Appellant's Brief complies with

SDCL 15-26A-66(b) because of the following particulars:

1. Appellants/Respondent's Brief was prepared and printed in a proportionately spaced typeface using Microsoft Office Word 2007 in Georgia font, size 13.

2. According to the word count function of that program, this Brief contains 7,410 words, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificates of counsel.

Respectfully submitted this 27th day of August, 2013.

_____

Daniel K. Brendtro

Certificate of Service

I, Daniel K. Brendtro, one of the attorneys for Appellant, hereby certify that on August 27, 2013, I served two true and correct copies of the Appellant's Brief in the above-entitled matter by U.S. Mail, postage prepaid, on each of the following:

Thomas R. Olson
Olson Construction Law
1898 Livingston Ave.
West St. Paul, MN 55118

and sent the original and 15 copies of this Appellant's Brief in the above-entitled matter by U.S. Mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of Supreme Court
500 East Capitol Ave.
Pierre, South Dakota 57501-5070.

Respectfully submitted this 27th day of August, 2013.

_____
Daniel K. Brendtro

Appendix
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STERN OIL, et al v. BORDER STATES, et al.

NO. 26729

Appeal No. 26729

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STERN OIL COMPANY, AND STATE OF SOUTH DAKOTA EX REL. STERN OIL COMPANY

PLAINTIFFS AND APPELLANTS,

v.

BORDER STATES PAVING COMPANY, INC. AND LIBERTY MUTUAL INSURANCE COMPANY, AS ITS SURETY,

DEFENDANTS AND APPELLEES.

APPELLEES' BRIEF

Appeal from the Third Judicial Circuit Court, Brown County
Hon. Jon Flemmer
CIRCUIT COURT JUDGE

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Notice of Appeal was filed on June 24, 2013.

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REQUEST FOR ORAL ARGUMENT

Appellees Border States Paving Company, Inc. and Liberty Mutual Insurance Company, as its surety, hereby request oral argument.

TABLE OF AUTHORITIES

South Dakota Cases

Statutes

Other Cases

Rules

Treatises

JURISDICTIONAL STATEMENT

The South Dakota Supreme Court has jurisdiction to hear this appeal under S.D.C.L. §§ 15-26A-3 (1) and (2). The Fifth Judicial Circuit Court of Brown County, Hon. Jon Flemmer, issued the Final Order on May 17, 2013; and an intermediate order granting summary judgment to Defendant Liberty Mutual Insurance Company and partial summary judgment to Defendant Border States Paving Company, Inc., issued on September 12, 2012. Notice of Entry granting summary judgment to Border States Paving Company, Inc. was served on May 24, 2013.

STATEMENT OF LEGAL ISSUES PRESENTED

I. Did Stern Oil put forth evidence of acceptance, consideration, and a signed writing for its allegation that Border States agreed to pay Weatherton's debt to Stern Oil?

Trial Court Decision:

The trial court held that there was no genuine issue of material fact disputing that:

a. There was no agreement whereby Border States agreed to pay monies owed to Stern Oil by Weatherton Contracting;

b. There was no consideration for Border States to pay monies owed to Stern Oil by Weatherton Contracting; and

c. Weatherton Contracting is not owed money under its subcontract with Border States.

(Order May 17, 2013.)

Relevant law:

- *Jennings v. Rapid City Reg'l Hosp., Inc.*, 2011 S.D. 50, 802 N.W.2d 918
- *Trouten v. Heritage Mutual Ins. Co.*, 2001 S.D. 106, 632 N.W.2d 856
- *American Prairie Const. Co. v. Hoich*, 560 F.3d 780 (8th Cir. 2009)
- *Cargill, Inc. v. American Pork Producers, Inc.*, 426 F.Supp. 499 (D.S.D. 1977)
- S.D.C.L. § 53-1-1 (2013)
- S.D.C.L. § 53-1-2 (2013)
- S.D.C.L. § 53-2-6 (2013)
- S.D.C.L. § 56-1-4 (2013)

II. Did Stern Oil put forth evidence that Border States received anything from Stern Oil, or that the alleged receipt was unjust?

Trial Court Decision:

The trial court held that there was no genuine issue of material fact disputing that:

a. Border States did not receive any benefit without paying; and

b. There is nothing inequitable about allowing Border States to retain what it paid for.

(Order May 17, 2013.)

Relevant Law:

- *Hofeldt v. Mehling*, 2003 S.D. 25, 658 N.W.2d 783
- *Sherman v. Meyer*, 312 N.W.2d 373 (S.D. 1981)
- *W.J. Bachman Mech. Sheetmetal Co., Inc. v. Wal-Mart Real Estate Bus. Trust*, 2009 S.D. 25, 764 N.W.2d 722
- *Babcock v. Carrothers Const. Co., L.L.C.*, 124 P.3d 1084 (Kan. 2005)

III. Did Stern Oil put forth sufficient evidence to allow the Court to disregard the statutory notice requirement and statute of limitations with which Stern Oil failed to comply?

Trial Court Decision:

The trial court held that there was no genuine issue of material fact disputing that:

a. Stern Oil's bond claim was not timely filed before the statute of limitations expired.

(*See* Hearing Tr. pp. 43-44, July 17, 2013; *See also* Order September 12, 2012.)

Relevant Law:

- *Myears v. Charles Mix County*, 1997 S.D. 89, 566 N.W.2d 470
- *Stark v. Munce Bros. Transfer & Storage,* 461 N.W.2d 587 (S.D. 1990)
- *Dakota Truck Underwriters v. South Dakota Subsequent Injury Fund*, 2004 S.D. 120, 689 N.W.2d 196
- *Murray v. Mansheim*, 2010 S.D. 18, 779 N.W.2d 379
- S.D.C.L. § 31-23-1 (2013)
- S.D.C.L. § 31-23-3 (2013)

STATEMENT OF THE CASE

Defendants and Appellee's Border States Paving Company, Inc. ("Border States") and Liberty Mutual Insurance Co. ("Liberty Mutual") ask this Court to affirm summary judgment against Stern Oil Company ("Stern Oil"), because there are no genuine issues of material fact supporting any of Stern Oil's claims.

As a supplier on a highway construction project, Stern Oil's proper remedy against the prime contractor, Border States, and its surety, Liberty Mutual, was a timely bond claim. After failing to perfect its bond claim, Stern Oil now asserts several meritless claims against Border States and Liberty Mutual.

After a hearing on July 12, 2012, Hon. Jon Flemmer for the Fifth Judicial Circuit Court of Brown County granted summary judgment for Border States on Stern Oil's untimely bond claim and negligence claim.[1] With dismissal of the bond claim, the Court also dismissed Liberty Mutual as a party to the action. After a hearing on April 30, 2013, the Court granted Border States' Second Motion for Summary Judgment on Stern Oil's remaining claims of third party beneficiary and unjust enrichment.

The Court properly dismissed the bond claim, as Stern Oil failed to meet the statutory notice requirement, and because the claim was barred by the statute of limitations. The Court properly dismissed the third party beneficiary and unjust enrichment claims, because after months of discovery, Stern Oil could not set forth sufficient facts to support either claim.

[1] Stern Oil is not appealing the trial court's dismissal of its negligence claim.

There are no genuine issues of material facts regarding any of Stern Oil's three claims before this Court, and Border States respectfully request that this Court affirm summary judgment.

STATEMENT OF THE FACTS

Border States was the primary contractor on South Dakota Department of Transportation Project NH 0281(77)173 – Brown And Spink Co (the "Project"). (Record 18 ¶ 14.)[2,3] Border States provided a payment bond on the Project. (*Id.* 17 ¶ 6). The payment bond is governed by South Dakota Codified Laws § 31-23-3 (*Id.* 20 ¶ 30), and was issued by Liberty Mutual. (*Id.* 17; *see also* Record 24.)

Weatherton Contracting Co., Inc. ("Weatherton") entered into a Subcontract Agreement (the "Subcontract") with Border States to perform certain labor and provide certain material for construction of the Project. (*Id.* 58 (Subcontract, page 2, ¶ II, attached to Slotten Aff. as Ex. C).)[4] Pursuant to the Subcontract, in 2008 Weatherton supplied labor and material to the Project. (*Id.*) The final Subcontract amount, based on the final quantities performed by Weatherton, was $908,191.03. (Record 38 ¶ 4.) Border States paid all bills due under the Subcontract and tendered payments under the Subcontract as follows:

a. Payment directly to Weatherton $137,000.00;

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[2] There appears to be a discrepancy with some of Stern Oil's citations to the Record. (e.g. Stern Oil states that "Border States is a North Dakota paving company with offices in Fargo, North Dakota," citing to Record 22. Page 22 of the Record is Stern Oil's Certificate of Service to its Amended Complaint.) A copy of the Register of Actions, which Border States received from the trail court's clerk, and which was used for purposes of citing to the Record in this brief, is enclosed in the Appendix.

[3] A copy of the Amended Complaint is enclosed in the Appendix.

[4] A copy of the Subcontract is enclosed in the Appendix.

b. Joint checks to Weatherton and Weatherton's suppliers $576,853.59; and

c. Payment directly to Weatherton's suppliers $286,780.99.

(*Id.* 39 ¶ 5.) In total, Border States paid Weatherton and Weatherton's suppliers $1,000,634.58. (*Id.*)

The SDDOT gave final acceptance of the Project on August 10, 2009. (Record 58 (Final Acceptance, attached to Slotten Aff. As Ex. D).) Final payment on the Project was issued on January 6, 2010, and received on January 8, 2010. (*Id.* ¶ 4; *See also* E-mail from State of S.D. attached to Slotten Aff. As Ex. B).)

In 2008, Stern Oil sold and delivered fuel and petroleum products to Border States' Subcontractor, Weatherton. (*Id*. 17 ¶ 8.) Stern Oil was not, however, a party to the Subcontract. (*See generally* Record 58 (Subcontract, attached to Slotten Aff. as Ex. C).) Nor was Border States a party to any agreement between Stern Oil and Weatherton. (*See generally* Record 16-17.) Additionally, Border States did not agree to pay Stern Oil for the fuel and petroleum Stern Oil sold to Weatherton. (Record 266 ¶ 4.)[5]

In 2009, Stern Oil was awarded a default judgment against Weatherton for unpaid fuel bills. (Record SEP (Exhibit 104 to Daniel k. Brendtro Affidavit (July 12, 2012).)

STANDARD OF REVIEW

The standard under which the South Dakota appellate court "review[s] summary judgment is well established":

> Summary judgment shall be granted 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. *[The South Dakota appellate court] will affirm only when there are no genuine issues of material fact and the legal questions have been correctly decided.* All

[5] A copy of Mr. Weatherton's Affidavit is enclosed in the Appendix.

> reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.

U.S. Bank Nat'l Ass'n v. Scott, 2003 S.D. 149, ¶ 14, 673 N.W.2d 646, 651 (internal quotations and citation omitted) (emphasis added). A "party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment." *Id.* Thus, the "moving party will be entitled to judgment as a matter of law when the nonmoving party has failed to make a sufficient showing for an essential element of their case with respect to which they have the burden of proof." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal brackets removed).

ARGUMENT

I. No Genuine Issues of Material Fact Exist in Support of Stern Oil's Third-Party Beneficiary Claim, and Thus the Claim Fails As A Matter Of Law.

No material facts exist to support Stern Oil's claim that Weatherton and Border States entered into a valid agreement for Stern Oil's benefit as a third-party. There is no evidence that Border States consented to any agreement benefiting Stern Oil, or that it received any consideration to enter such an agreement. Stern Oil also cannot enforce the Subcontract between Border States and Weatherton. Thus, Stern Oil's third party beneficiary claim should be dismissed.

South Dakota recognizes that contracts are enforceable by third parties when a contract is intended to benefit a third party. S.D.C.L. § 53-2-6 (2013). But in order for a third party to enforce a contract, the contract itself must be valid and enforceable. *See Jennings v. Rapid City Reg'l Hosp., Inc.*, 2011 S.D. 50, ¶ 35, 802 N.W.2d 918, 929

(Konenkamp, J., dissenting) (third party beneficiary's rights are subject to the defenses and claims that a promisor may have against a promise) (citing E. Allan Farnsworth, *Vulnerability of Beneficiary to Defenses and Claims*, Contracts § 10.9, 772 (2d ed. 1990)); *Trouten v. Heritage Mutual Ins. Co.*, 2001 S.D. 106, ¶ 13, 632 N.W.2d 856, 858 (recognizing that a third party can enforce a contract if it was made expressly for its benefit and the agreement has "good and sufficient consideration") (quoting *Fry v. Ausman*, 29 S.D. 30, ¶36-37, 135 N.W. 708, 710 (1912)).

A contract is defined by South Dakota law as "an agreement to do or not to do a certain thing." S.D.C.L. § 53-1-1 (2013). In order to form a contract, the following elements must be met:

1. The agreement must be entered into by parties capable of contracting;
2. The parties must consent to enter the agreement;
3. The agreement must be lawful; and
4. There must be sufficient cause or consideration.

S.D.C.L. § 53-1-2 (2013).

A. No contract existed between Weatherton and Border States to pay Stern Oil.

Stern Oil claims to be a third party beneficiary of "an express or implied agreement for Border States to issue certain payments to Stern Oil." (Record 20 ¶ 35.) Despite Stern Oil's allegation, there is no evidence that Border States consented to such an agreement or that there was any consideration for Border States' agreeing to undertake such a duty. Therefore, Stern Oil's third party beneficiary claim fails as a matter of law as no evidence exists which shows that Weatherton and Border States entered into a valid contract for the benefit of a third party (i.e. Stern Oil).

i. There is no evidence that Border States consented to an agreement to pay Stern Oil.

Stern Oil alleges that Border States' assent can be "infer[red] from the Record" because Border States "agreed to the same type of arrangement previously." (Appellant's Br. 22.) However, Mr. Weatherton stated under oath, "Although I requested payment to Stern Oil, Border States did not agree to pay Stern Oil." (Record 266 ¶ 4.)[6] Mr.

[6] Stern Oil characterizes Mr. Weatherton's affidavit as "conclusory and contradict[ory]." (Appellant's Br. 18.) Stern Oil cites to authority stating that a party may not attempt to defeat summary judgment with affidavits that contradict earlier testimony, and that "eleventh-hour affidavits" should not be used for the purpose of "*creating* a material issue of fact." *Taggart v. Ford Motor Credit Co.*, 462 N.W.2d 493, 503 (S.D. 1990) (emphasis added). Border States is not attempting to defeat summary judgment or create material issues of fact. The affidavit is consistent with prior testimony: neither Mr. Weatherton's deposition testimony nor Mr. Weatherton's affidavit asserts the existence of an agreement between Border States and Weatherton to pay Stern Oil. Additionally, as Stern Oil correctly states, a witness's subsequent affidavits are "admissible only if they 'provide an explanation for the prior inconsistent admission… or clarify any perceived ambiguity.'" (Appellant's Br. 21 (quoting *DFA Dairy Fin. Servs., L.P. v. Lawson Special Trust*, 2010 S.D. 34, ¶ 23, 781 N.W.2d 664, 670-71)). To address the "perceived ambiguity" which Stern Oil raised in the first summary judgment motion, we sought Mr. Weatherton's affidavit, which clarifies the ambiguity regarding the alleged agreement between Border States and Weatherton. If Stern Oil disagreed with this, it had over two years to talk with or take Mr. Weatherton's deposition to clarify the record. Thus, we are left with undisputed evidence that no agreement was formed.

Stern Oil's legal counsel has repeatedly tried to characterize what he would have liked Mr. Weatherton's testimony to have been, versus reciting what Mr. Weatherton actually stated in an attempt to create some type of agreement with Border States (*See, e.g.,* Pl.'s Br. In Opp'n to Def.'s Second Mot. Summ. J. 4, Apr. 23, 2013 ("Carl specifically testified to facts that suggest an agreement between his company and Border States that benefitted Stern Oil as a third-party beneficiary."); *Id.* ("At his deposition in 2011, Carl Weatherton believed that the spreadsheet's instructions and Border States response to it created an agreement that obligated Border States to issue payment to Stern Oil..."); *Id.* at 8 ("Carl Weatherton has already testified that the November 2008 invoice created a duty in Border States to issue payment per the instructions."); *Id.* at 14 ("Carl Weatherton believed that Border States had agreed to make payment and apparently relied on that understanding."); *Id.* at 14 ("We can infer from Carl Weatherton's testimony, however, that Border States must have assented in some way, because Carl believed an agreement had been created."). However, nothing in the record shows any agreement between Border States and Weatherton. Mr. Weatherton may have agreed that he "directed"

Weatherton's statement shows that an agreement to pay Stern Oil was never made because Border States did not consent to pay. *See* S.D.C.L. § 53-1-2(2) (2013) (consent is an essential element to the existence of a contract). Additionally, Stern Oil cites to prior testimony from Border States showing that it had previously agreed to make joint payments to *some of* Weatherton's suppliers, just as Border States did in this case. (Appellant's Br. 22.) There is no indication that Border States at any time agreed to pay all monies owed to all of Weatherton's suppliers. As the trial court held, Weatherton's statement refutes Stern Oil's allegation, leaving no genuine issue of material fact.

Stern Oil tries to characterize Weatherton's request to Border States as a demand, stating that Weatherton "directed," "instruct[ed]," and even "commanded" Border States to pay Weatherton's outstanding fuel bill. (Appellant's Br. 10-11, 28.) First, Weatherton did not have any legal right to "command" the general contractor with which it subcontracted on the Project to issue payments to a supplier. And, Stern Oil provides no factual evidence that Weatherton had such authority. In contrast, the Subcontract allowed Border States in its discretion to issue joint checks or to pay Weatherton's suppliers directly: it did not give Weatherton the authority to require this. (*See* Record 58 (Subcontract, page 2, ¶ II, attached to Slotten Aff. as Ex. C).) Instead, Weatherton only *requested* that Border States make payments through direct and joint check. (*Id.* 266, ¶

Border States to issue a check, but the record does not support that Mr. Weatherton believed, inferred, or thought that an agreement with Border States to pay Stern Oil existed. At no point does Mr. Weatherton state that there was or that he believe there was an "agreement" with Border States. (*See* Record SEP (Carl Weatherton Depo., located at Exhibit 101 to Daniel K. Brendtro Affidavit, July 12, 2012).) And, as the trial court accurately observed, legal counsel's characterizations are not a substitute for actual evidence.

4.) Border States agreed to make some of those payments, as the Subcontract permitted. *See* Record 58 (Subcontract, page 1-2, ¶ II, attached to Slotten Aff. as Ex. C).) But there is no evidence that Border States agreed to pay all of Weatherton's subcontractors above and beyond the Subcontract price.

Stern Oil also argues implied consent through Border States' "conduct and failure to object." (Appellant's Br. 14.) This allegation is without merit as Border States' decision to pay other suppliers did not create a duty to pay Stern Oil. Border States' conduct of paying some of Weatherton's suppliers is consistent with the actual agreement made with Weatherton: Border States agreed to pay some suppliers through joint or direct check. Border States did not agree to pay Stern Oil through joint or direct check, as Border States had already paid more than the final Subcontract amount due. (Record 266 ¶ 5.)

Further, Stern Oil states that Weatherton "relied" on Border States' alleged implied assent "to its detriment." (Appellant's Br. 23.) But, Mr. Weatherton expressly claimed that no agreement was made. (Record 266 ¶ 4.) Regarding implied assent through conduct, the South Dakota Supreme Court has held:

> [A]s between the parties, in determining whether exhibited conduct of the one manifests a volition to assent to the agreement, *all of the circumstances known to the other party* must be considered in determining whether his purported reliance on such conduct as a manifestation of assent was justified.

Fed. Land Bank of Omaha v. Houck, 68 S.D. 449, 463, 4 N.W.2d 213, 220 (1942) (emphasis added). The "circumstances known to the other party" (i.e. Weatherton) in this case are that there was no agreement. Weatherton could not have relied on conduct and lack of assent if Weatherton knew there was no contract. Furthermore, if Weatherton

relied on silence and interpreted it as assent, this would be a remedy for *Weatherton*, not Stern Oil.

Both parties to the alleged agreement concur that there was no agreement to pay Stern Oil, and summary judgment on the third party beneficiary claim should be affirmed.

ii. There is no evidence of valid consideration supporting an agreement to pay Stern Oil.

After incorrectly citing to the record to suggest that Border States entered into an agreement with Weatherton to pay Stern Oil, Stern Oil alleges that there was valid consideration to support such an agreement. As there is no evidence of consideration for an alleged agreement between Border States and Weatherton to pay Stern Oil, Stern Oil's claim must fail as a matter of law.

Good consideration is defined as:

> Any benefit conferred or agreed to be conferred upon the promiser by any other person to which the promiser is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promiser.

S.D.C.L. § 53-6-1 (2013).

Stern Oil alleges consideration in the form of a burden undertaken by Weatherton to "forego its right to sole and direct payment" that it was "otherwise entitled to receive." (Appellant's Br. 24-25.) However, Weatherton did not have a right to sole and direct payment under the Subcontract with Border States. (*See* Record 58 (Subcontract, page 2, ¶ II, attached to Slotten Aff. as Ex. C).) Thus, Stern Oil alleges that Weatherton gave up a right *it never held in the first place*.

The Subcontract between Border States and Weatherton expressly provided that "if notification of any claims have been made against the Sub-Contractor . . . the Contractor may, at his discretion, withhold such amounts otherwise due or to become due hereunder to cover said claims and any cost or expense rising or to arise in connection therewith pending settlement thereof." (*Id.* (Subcontract, page 1 ¶ 2, attached to Slotten Aff. As Ex. C).) Therefore, there was nothing for Weatherton to forego—Border States exercised its discretion to cover certain claims with available Subcontract funds.

Although Stern Oil alleges that Weatherton was owed enough to cover the entire fuel bill between November 2008 and June 2009, this assumes that Border States had an obligation to pay Stern Oil. (Appellant's Br. 17.) Border States had *no duty* to pay Weatherton's fuel bill. With no obligation to pay Weatherton's fuel bill, the balance of progress payments otherwise due to Weatherton from November 2009 to June 2009 is completely immaterial. To the extent that Border States exercised its *discretionary right* to pay Weatherton's suppliers, it was entitled to do so with available Subcontract funds. Thus, Weatherton suffered no detriment, and Border States obtained no benefit, when it paid some of Weatherton's suppliers directly or by joint check.

There is no evidence of *consent* or *consideration* for the alleged agreement between Border States and Weatherton. Without sufficient evidence for these elements, Stern Oil was unable to carry its burden of proof for the claim to go to trial. Summary judgment against Stern Oil on its third party beneficiary claim is proper and should be affirmed.

B. Border States fully performed under the Weatherton Subcontract.

Stern Oil also cannot make a third party beneficiary claim to enforce the Subcontract between Border States and Weatherton, because Border States fully performed its obligations under the Subcontract. Border States completed performance under the Subcontract by fully paying the final contract price. In fact, Border States paid Weatherton and Weatherton's suppliers a total of $1,000,634.58, significantly more than the final contract price of $908,191.03. (Record 38-39 ¶¶ 4-5.)

These payments were made by direct checks to Weatherton, joint checks to Weatherton and its suppliers, and direct checks to Weatherton's suppliers. (*Id.* ¶ 5.) The trial court held that "Border States was free to use Weatherton's money to pay Weatherton's debtors so long as there were amounts available to be used for that purpose under the Weatherton contract." (Hearing Tr. 23, Apr. 30, 2013.) Weatherton *requested* that Border States pay amounts claimed by its suppliers, and Border States made payments to some suppliers "based on their discretion." (Hearing Tr. 24, Apr. 30, 2013.) Through these payments, Border States completely fulfilled its contract with Weatherton. Therefore, even if Stern Oil had produced evidence to support that Stern Oil was a third party beneficiary to the Subcontract between Weatherton and Border States, Stern Oil still could not enforce the Subcontract between Weatherton and Border States as a third party beneficiary: it is undisputed that Border States paid everything due under the Subcontract.

C. Stern Oil's third party beneficiary claim is barred by the statute of frauds.

Stern Oil has not alleged a signed writing for the claimed agreement, as required by the South Dakota statute of frauds, and thus its third party beneficiary claim must fail.

Under South Dakota law, "[a] guaranty is a promise to answer for the debt, default, or miscarriage of another person." S.D.C.L. § 56-1-1 (2013). Absent certain narrow statutory exceptions, "a guaranty must be in writing and signed by the guarantor." S.D.C.L. § 56-1-4 (2013). "[T]o be valid[,] a guarantee must either be in writing or must be of a type that can be equated with one of the [statutory] exceptions." *American Prairie Const. Co. v. Hoich*, 560 F.3d 780, 791 (8th Cir. 2009) (quoting *Cargill, Inc. v. American Pork Producers, Inc.*, 426 F.Supp. 499, 509-10 (D.S.D. 1977)). Further, an agreement to loan money or extend credit falls within the statute of frauds and also requires a signed writing. S.D.C.L. § 53-8-2 (2013).

In this case, the agreement Stern Oil alleges, under which Border States would pay Weatherton's debt to Stern Oil, is either a guarantee or extension of credit, both of which fall within the statute. Notably, Stern Oil has already obtained a judgment against Weatherton Contracting. (*See* Record SEP (Brendtro Aff., Ex. 104, filed July 11, 2012).) Although Stern Oil previously argued that the agreement between Weatherton and Border States was excepted from the statute of frauds as the agreement was a promise for consideration to answer for the obligation of another, the judgment against Weatherton flatly contradicts that exception. (Pl.'s Br. In Opp'n to Def.'s Second Mot. Summ. J. 15, Apr. 23, 2013); *See also* S.D.C.L. § 56-1-5 (2013).

If, as Stern Oil suggests, Border States undertook an original obligation as the principal debtor (no writing required), versus allegedly guaranteeing Weatherton's debt (signed writing required), Stern Oil would have had no valid basis to obtain a judgment against Weatherton. *See, e.g.*, *Cargill, Inc. v. Am. Pork Producers, Inc.*, 426 F. Supp. at 510 (interpreting the meaning of "guarantee" under S.D.C.L. § 56-1-1 to mean that

"when a person agrees to accept a debt as his own, it follows that said person is no longer a guarantor but in fact a principal debtor").

As Stern Oil already obtained a judgment for the same debt it now seeks from Border States, there can be no rational basis to seek *another judgment for the same debt*, unless Stern Oil maintains that Border States "guaranteed" Weatherton's debt. That is exactly the type of arrangement that the statute of frauds mandates "must be in writing and signed by the guarantor." *See* S.D.C.L. § 56-1-4 (2013). Stern Oil's third party beneficiary claim is barred and summary judgment is proper.

In sum, Stern Oil has not put forth *any evidence* to support *legal counsel's* speculative allegations. Because Stern Oil fails to allege that Border States consented to any agreement, that any valid consideration was exchanged for the alleged agreement, that Border States owed further monies under the Subcontract with Weatherton, or that the agreement is evidenced by a signed writing, summary judgment on Stern Oil's third party beneficiary claim should be affirmed.

II. Stern Oil's Unjust Enrichment Claim Fails as a Matter of Law.

Summary judgment dismissing Stern Oil's unjust enrichment claim should be affirmed. The claim fails as a matter of law because Border States did not receive any benefit other than what it was already contractually entitled to receive, and it is not unjust for Border States to retain this contractual benefit.

Three conditions are necessary for a party to prevail on an unjust enrichment claim: (1) receipt of a benefit; (2) awareness of the benefit; and (3) allowing retention of the benefit without payment would be inequitable. *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 16, 658 N.W.2d 783, 788 (citations omitted).

A. As a matter of law, a "benefit" must be something more than what the receiver is already contractually entitled to receive.

South Dakota recognizes that a party is not unjustly enriched when it receives only the benefit it was entitled to under the agreement or contract. *Hofeldt*, 2003 S.D. at ¶ 18, 658 N.W.2d at 789. In *Hofeldt*, the South Dakota Supreme Court denied a claim for unjust enrichment brought by a land seller after a purchaser occupied, farmed, and collected subsidies on the land before clear title was issued. *Id.* at ¶ 1, 658 N.W.2d at 785. During the five-year period after execution of the sale, but before the seller could provide clear title, the purchaser occupied the property without paying rent and received government farm subsidies for the land. *Id.* at ¶ 5, 658 N.W.2d at 786. After the seller conveyed clear title, he sued, contending that the purchaser was unjustly enriched by receipt of the farm subsidies, because the purchaser did not pay rent on the farmland. *Id.* at ¶ 14, 658 N.W.2d at 788.

In holding for the purchaser, the Court found that the seller failed to show any inequity in allowing the purchaser to retain the farm subsidies without compensating the seller. *Id.* at ¶ 18, 658 N.W.2d at 788-89. The purchaser did not receive any benefit he would not otherwise have been entitled to had the seller timely performed his obligations and provided clear title. *Id.* (citations omitted); *see also Season Comfort Corp. v. Ben A. Borenstein Co.*, 655 N.E.2d 1065. 1071 (Ill. App. Ct. 1995) ("one is not unjustly enriched by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution").

Because Stern Oil has not alleged a benefit beyond that which Border States was contractually entitled to receive, Stern Oil's unjust enrichment claim fails as a matter of law. Under the Subcontract between Border States and Weatherton, Weatherton was to

provide labor and materials on the Project for the final contract price of $908,191.03. (Record 38 ¶ 4.) Included in that price were all materials that were necessary to complete Weatherton's work, regardless of who the suppliers were. (*See* Record 58 (Subcontract, attached to Slotten Aff. as Ex. C).) Weatherton agreed "to pay all costs in connection" with the work. (*Id.* (Subcontract, page 2 ¶ II, attached to Slotten Aff. as Ex. C).)

Border States paid for the benefits it was entitled to receive under the Subcontract with Weatherton. (*Id.* 38-39 ¶¶ 4-5.) Like the purchaser in *Hofeldt*, Border States did not receive any more than it was entitled to receive by contract. Like the seller in *Holfeldt*, Weatherton did not timely perform its contractual obligation "to pay all costs in connection" with the work. (*Id.* 58 (Subcontract, page 2 ¶ II, attached to Slotten Aff. as Ex. C).) Weatherton's failure to perform its obligation did not leave Border States with an additional benefit beyond what it was contractually entitled.

B. <u>As a matter of law, there is nothing inequitable about Border States refusing to pay another company's debt.</u>

i. Border States paid more than the original contract price.

There is also nothing "inequitable" about what Border States received because Border States ultimately paid *more* than what Weatherton was owed under the Subcontract. Other jurisdictions have consistently held that property owners are not unjustly enriched by the work of subcontractors or suppliers when property owners pay the full contract price. *See W.J. Bachman Mech. Sheetmetal Co., Inc. v. Wal-Mart Real Estate Bus. Trust*, 2009 S.D. 25, ¶ 34, 764 N.W.2d 722, 733. While the Court did not address this issue in depth in *W.J. Bachman*, the South Dakota Supreme Court recognized that several jurisdictions have adopted this rule, and noted that:

> [I]n many situations payment of the general contractor necessarily includes payment for all work contemplated by the general contractor whether performed by the general contractor or a subcontractor. Therefore, in many situations, full payment of the general contractor may include payment of the item at issue: the only dispute being whether the general contractor or the subcontractor must absorb the cost of the improvement.

Id. at ¶ 32 n.9, 764 N.W.2d at 733 n.9; *see also Blum v. Dawkins, Inc.*, 683 So.2d 163 (Fla. Dist. Ct. App. 1996) (supplier who was not entitled to recover on its lien claim was also not entitled to recover on its unjust enrichment claim when homeowners had paid more than the contract price for their home); *Moore v. Henley*, 969 S.W.2d 266 (Mo. Ct. App. 1998) (court rejected subcontractor's claim against owner for unjust enrichment on basis that subcontractor failed to prove that the owners had not paid the general contractor); *Breckenridge Mat. Co. v. Allied Home Corp.*, 950 S.W.2d 340 (Mo. Ct. App. 1997) ("[E]ven though the subcontractors have not been paid, there can be *no unjust enrichment* because the law will not require the owner to pay twice" (emphasis added). The *W.J. Bachman* Court did not need to apply the rule, because unlike in this case, there was no evidence that the owner in *W.J. Bachman* paid *anything* for additional property improvements. *W.J. Bachman* 2009 S.D. at ¶ 33, 764 N.W.2d at 733.

Border States fully performed on the contract by paying Weatherton and Weatherton's suppliers a total of $1,000,634.58, significantly more than the final contract price of $908,191.03. (Record 38-39 ¶¶ 4-5.) Although Stern Oil alleges that Border States "breach[ed] its subcontract with Weatherton" and did not pay the "full and true costs of its subcontract," (Appellant's Br. 28-29) the trial court properly determined that legal counsel's allegations lacked any evidentiary basis. (*See* Order May 17, 2013 ¶ 2.) Border States performed its Subcontract with Weatherton through payments made by

joint and direct check. (Record 39 ¶ 5.) The "full and true cost" of the Subcontract was the Subcontract price, not the bills that Weatherton owed to its individual suppliers.

Stern Oil also sets forth, without citing any legal or factual authority, a sweeping proposition that general contractors are "ultimately responsible for the prosecution and payment" of all work contributed to the project. (Appellant's Br. 27.) Stern Oil cites to no legal authority or contractual provision in the prime contract or Subcontract to support this expansive conclusion. Contractors and suppliers who contribute to the project already have a remedy under the South Dakota performance bond statutes. *See* S.D.C.L. § 31-23 (2013). The prime contractor is only responsible for "prosecution and payment" of work contributed to the extent that the performance bond statute so provides.

Like the property owners in the cases above, Border States paid the full price of the contract and should not be required to pay twice for a benefit it was contractually entitled to receive. Because Border States already paid for the work, there is no unjust enrichment in this case. There is nothing *inequitable* about Border States receiving the benefits that it paid for.

ii. Border States' refusal to pay Weatherton's debt is not inequitable because there is no evidence of bad faith.

Outside of South Dakota, courts have held that a subcontractor's supplier cannot maintain an unjust enrichment claim against the prime contractor unless there is evidence of bad faith. Stern Oil's unjust enrichment claim should be dismissed as Border States did not act in bad faith when it refused to pay Stern Oil's untimely payment bond claim.

In a Kansas case, Babcock, a sub-subcontractor, brought an unjust enrichment claim against the prime contractor after the subcontractor defaulted. *Babcock v. Carrothers Const. Co., L.L.C.*, 124 P.3d 1084, at *1 (Kan. 2005). The prime contractor

expressly agreed to directly pay some, but not all, of the subcontractor's debts to sub-subcontractors. *Id.* The debt to Babcock was not part of that agreement. *Id.* At the completion of the project, the prime contractor paid over $100,000 more for the work performed by the subcontractor than the final contracted amount. *Id.* Babcock was not paid by either party. *Id.*

Relying on a prior Kansas Supreme Court decision, the *Babcock* court analogized the case to the situation where a subcontractor sues a property owner on a theory of unjust enrichment. *Id.* at *2-*3 (citing *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.*, 910 P.2d 839, 847 (Kan. 1996) (holding that a subcontractor cannot recover from a property owner under unjust enrichment without evidence of bad faith or misleading by the property owner)). Like the court in *Haz-Mat*, the *Babcock* court held that without privity of contract, there can be no unjust enrichment between a sub-subcontractor and a prime contractor unless there is evidence of misleading, inducement, or fraud. *Babcock*, 124 P.3d at *3. Finding no such evidence, summary judgment for the prime contractor was affirmed. *Id.* at *2-*3.

Similarly, in *Farwest*, a Washington court found no unjust enrichment as there was no evidence that the prime contractor misled a subcontractor's supplier. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 741 P.2d 58, 65 (Wash. Ct. App. 1987). In that case, the subcontractor went bankrupt. *Id.* at 59. While the prime contractor paid other suppliers directly, the steel supplier was not paid. *Id.* When the steel supplier brought an unjust enrichment claim against the prime contractor, the court held that the prime contractor's enrichment was not at the supplier's expense. *Id.* at 65. The prime

contractor was "a mere incidental beneficiary of the contract between [the supplier] and [the subcontractor]." *Id.* Quoting American Jurisprudence, the court stated:

> [W]here a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person.

Id. at 65 (quoting 66 Am. Jur. 2d *Restitution and Implied Contracts*, § 16 at 960).

The court reasoned that restitution was not justified because there was no evidence of misleading by the prime contractor. *Farwest*, 741 P.2d at 65. The court also noted that the prime contractor, by paying suppliers directly and replacing the defaulted subcontractor, ultimately paid more than the final contracted price for the work. *Id.*

These cases demonstrate that even if a benefit is conferred by suppliers and accepted by prime contractors, the enrichment is not unjust unless there is bad faith. Retention of the benefit alone is not enough.

Border States did not act in bad faith, commit fraud, or mislead Stern Oil, and Stern Oil has not provided any evidence of such conduct. Like the contractors in *Babcock* and *Farwest*, Border States agreed to pay some, but not all, of Weatherton's suppliers. That agreement was not made in bad faith and did not constitute fraud or misleading. Border States had no direct communication with Stern Oil. Moreover, Border States could not have misled or induced Stern Oil, because Stern Oil was not even aware that its fuel was used on a project with Border States until several years had passed from when it provided fuel. (Appellant's Br. 6-9 (time between when Stern Oil provided fuel (2008) and date (April 2011) Stern Oil learned that its fuel was used on Border States' project).) Stern Oil's mistake regarding where its fuel was used and its failure to

bring a timely bond claim were not caused by Border States and there is no evidence of any wrongdoing by Border States.

Additionally, like the contractor in *Farwest*, Border States was a mere incidental beneficiary to the contract between Stern Oil and Weatherton. Weatherton's failure to pay its supplier did not give rise to a right of restitution against Border States. While Stern Oil may have claims against Weatherton, this does not translate to claims against Border States. Stern Oil's only remedy against Border States was through a bond claim, on which it failed to timely act.

iii. Stern Oil failed to exercise the proper remedy of a statutory bond claim.

Finally, in claims involving property improvements, South Dakota recognizes that a contractor providing improvements without a direct contract (i.e. a subcontractor) with the property owner is limited to its secured statutory remedies (e.g. mechanics' lien, payment bond), and if it fails to secure those remedies it may not alternatively recover under unjust enrichment. *Sherman v. Meyer*, 312 N.W.2d 373, 374 (S.D. 1981). In *Sherman*, homeowners hired a contractor to perform work, who then subcontracted out some of the work. *Id.* at 373. The subcontractor was not paid for its work by the contractor. *Id.* After failing to foreclose on its mechanics' lien, the subcontractor brought an unjust enrichment claim against the homeowners. *Id.*

In dismissing the subcontractor's claim, the court recognized that the subcontractor's proper remedy was a mechanics' lien or a contractual remedy *against the contractor*, and that there was no privity of contract between the subcontractor and the homeowner. *Id.* at 374. "Absent a properly perfected mechanic's lien or privity of contract, the subcontractors have no personal claim against an owner of property." *Id.*

(citing *McLaughlin Elec. Supply v. American Empire Ins. Co.*, 269 N.W.2d 766 (S.D. 1978) and *Keeley Lumber and Coal Co. v. Dunker*, 76 S.D. 281, 77 N.W.2d 689 (1956)); *see also Kuchenski v. Kramer Sheet Metal, Inc.*, 377 N.W.2d 133, 136 (N.D. 1985) (holding that there was "no affirmative obligation for [the prime contractor] to insure that [the subcontractor] was paid" after the subcontractor failed to give timely notice under its mechanic's lien).

Since the protections of mechanics' liens are not available on public projects, contractor surety bonds are used to provide the same payment security. 4 Philip L. Bruner & Patrick O'Connor, Jr., *Bruner and O'Connor on Construction Law* § 8:152 (2012); 17 Am. Jur. 2d *Contractors' Bonds* § 26; 73A C.J.S. *Public Contracts* § 50. "Such security is not afforded laborers and materialmen on public highway projects. Therefore, performance bonds are now required to equalize the remedies of laborers and materialmen on both private and public construction." *State ex rel. Farmers State Bank v. Ed Cox and Son*, 81 S.D. 165, 183, 132 N.W.2d 282, 292 (1965) (Hanson, J., dissenting). Further, several states have looked to mechanic's lien laws to interpret bonding statutes for public projects. *See Cedar Vale Co-op Exch., Inc. v. Allen Utilities, Inc.*, 694 P.2d 903, 906 (Kan. App. 1985) ("Contractors' bonds are thus closely aligned with, and in fact take the place of, mechanics' liens. This being so, it is fair to analogize rules applicable to mechanics' liens to contractors' bonds"); *Massachusetts Gas & Elec. Light Supply Co. v. Rugo Const. Co.*, 71 N.E.2d 408, 410 (Mass. 1947) (analogizing the effects of bond statute with mechanics' lien law); *State ex rel. W.M. Carroll & Co. v. K.L. House Const. Co., Inc.*, 656 P.2d 236, 237-38 (N.M. 1982) (analogizing to mechanics' lien law to interpret scope of bond statute).

Like the subcontractor in *Sherman*, Stern Oil failed to timely perfect its statutory bond claim, and is not in privity of contract with Border States. Stern Oil's proper remedy was the forfeited bond claim or a civil suit against Weatherton. Stern Oil cannot claim that Border States acted inequitably after Stern Oil failed to timely bring its bond claim. *See Talley v. Talley*, 1997 S.D. 88, ¶ 28, 566 N.W.2d 846, 852 ("A party seeking equity in the court must do equity, including entering the court with clean hands. A person who does not come into equity with clean hands… should be left in the position in which the court finds him.") (citing *Shedd v. Lamb*, 1996 S.D. 117, ¶ 26, 553 N.W.2d 241, 245 and *Kane v. Schnitzier*, 376 N.W.2d 337, 341 (S.D. 1985)). Just like the subcontractor's unjust enrichment claim in *Sherman*, Stern Oil's unjust enrichment claim should be dismissed.[7]

In sum, summary judgment on Stern Oil's unjust enrichment claim should be affirmed, because there are no genuine issues of material fact and Stern Oil has not provided any evidence to support essential elements of its claim. Border States did not receive a benefit beyond what it was contractually entitled to receive, and Border States' actions were not unjust.

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[7] In denying an unjust encrichment claim under factually similar circumstances the court in *Season Comfort Corp.* held that:

> It is axiomatic that an unjust enrichment claim is viable only when there is no adequate remedy at law. Here, [plaintiff] did have an adequate remedy at law against [defendants] but its remedy was either not properly pursued or as against defendant its remedy is merely "uncollectible."

Season Comfort Corp. v. Ben A. Borenstein Co., 655 N.E.2d at 1071.

Like the plaintiff in *Season Comfort*, Stern Oil had an "adequate remedy at law," and such remedy was "not properly pursued" (i.e. Stern Oil failed to provide payment bond notice or initiate suit on a timely basis) or its remedy was "merely 'uncollectible.'" *Id.*

III. Stern Oil's Statutory Claim against Border States' Bond Fails as a Matter of Law.

Dismissal of Stern Oil's surety bond claim should be affirmed. The claim is expressly barred by South Dakota Codified Law § 31-23 because Stern Oil's written notice of a claim was late by almost two years, and its suit was late by almost five months. Therefore, the Court should affirm summary judgment dismissing Stern Oil's bond claim.

A. Stern Oil failed to substantially comply with the 6-month notice requirement in South Dakota Codified Law § 31-23-3.

There is no evidence that Stern Oil substantially complied with the notice requirements of South Dakota Codified Law § 31-23-3. Section 31-23-3 required Stern Oil to provide written notice to Border States within six months from the date which it supplied the last of the material for which its claim is made:

> Any person having direct contractual relationship with a subcontractor but not contractual relationship express or implied with the contractor furnishing a performance bond under § 31-23-1 shall have a right of action upon the said bond upon giving *written notice* to said contractor *within six months from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made*...

S.D.C.L. § 31-23-3 (2013) (emphasis added). South Dakota Codified Law § 31-23 is remedial in nature, but it does not guarantee payment as Stern Oil suggests. Recovery from a bond furnished pursuant to S.D.C.L. § 31-23-1 is expressly conditioned by the notice requirement of § 31-23-3. Timely notice by a subcontractor is therefore a condition precedent to recovery against a bond. *See, e.g.*, *United States ex rel. Am. Radiator & Standard Sanitary Corp. v. Northwestern Eng'g Co.*, 122 F.2d 600, 602-03 (8th Cir. 1941) (interpreting Miller Act notice requirement); *Fastrack Crushing Serv., Inc.*

v. Abatement Int'l/Advatex Assocs., Inc., 893 A.2d 674, 677 (N.H. 2006); *Safety Signs, L.L.C. v. Niles-Wiese Const. Co., Inc.*, 820 N.W.2d 854, 860 (Minn. 2012); 17 Am. Jur. 2d *Contractors' Bonds* § 113. To conclude otherwise would necessitate interpreting S.D.C.L. § 31-23-3 as a useless legislative enactment.

There is no dispute that Stern Oil first provided written notice under this statute with the "Notice of Claim" attached to its original complaint. (*See* Notice of Claim Under SDCL § 31-23-3, June 3, 2011 (enclosed with Stern Oil's Original Complaint).[8] This notice references South Dakota Codified Law § 31-23-3, and is dated June 3, 2011. (*Id.*) In this document, Stern Oil acknowledges that it supplied "the material for which such claim is made" in *2008*. (*Id.*) Thus, even if we assume that Stern Oil supplied fuel and materials until December 31, 2008, the very latest that notice could have been provided under the statute would be June 30, 2009. Accordingly, Stern Oil's notice in June 2011 was almost two years late. Based on the lack of timely notice alone, Stern Oil's claim on the bond is groundless and should be dismissed.

B. Notice requirements in bond statutes are strictly construed.

Stern Oil urges this Court to wholly disregard express language in S.D.C.L. § 31-23-3, which requires written notice from all potential bond claimants *within six months of completing their work*. Stern Oil took almost *two and a half years* (30 months) to provide written notice, and now asks this Court to order Border States to continue defending this lawsuit without offering any authority that would permit such an extraordinary result.

[8] A copy of the Notice of Claim, along with the Service of Process Transmittal is enclosed in the Appendix.

Stern Oil offers a sweeping assertion that the Court should adopt a "broad" interpretation of S.D.C.L. § 31-23 (and ignore the express language of the statute) because the statute has a purpose of "encouraging businesses to supply labor and materials . . . without the fear of non-payment." (Appellant's Br. 31.) The first case Stern Oil cites, however, does *not* permit the Court to remove an express requirement from the statute. *See State ex rel. J. D. Evans Equip. Co., Sioux Rd. v. Johnson*, 83 S.D. 444, 449-50, 160 N.W.2d 637, 640 (1968) (interpreting the phrase "every person who has furnished labor or materials in the prosecution of the work" to include fuel suppliers). The second case Stern Oil cites does not even interpret the payment bond statute, but interprets a *contract* and a *bond*, separate from the statute. *See State ex rel. Farmers State Bank v. Ed Cox and Son*, 81 S.D. at 173-74, 132 N.W.2d at 287.

Although Stern Oil argues that it "substantially complied" with the six-month notice requirement in S.D.C.L. § 31-23-3, the case Stern Oil cites to support this proposition, *Myears v. Charles Mix County*, 1997 S.D. 89, ¶ 10, 566 N.W.2d 470, 473 (*See* Appellant's Br. 31), clearly shows that Stern Oil did *not* substantially comply with the statute. *Myears*, found substantial compliance with the 180-day notice rule for tort claims against the State, *when the plaintiff provided notice within the 180-day period*, but to the wrong State officials. *Myears,* 1997 S.D. at ¶ 17, 566 N.W.2d at 475. Conversely, the *Myears* court also held that the motorist's wife's claim was invalid *because she did not provide notice within the 180-day period. Id.* ("On the other hand, we affirm summary judgment against Tracy Myears, Ernest's wife, as no prior notice, substantial or otherwise, was given on her claim before the statutory period expired."). Thus, Stern Oil's argument was already squarely rejected by this Court.

Despite Stern Oil's suggestion to the contrary, this Court has *not* been willing to ignore statutory notice requirements. *See Id.; See also Stark v. Munce Bros. Transfer & Storage,* 461 N.W.2d 587 (S.D. 1990) (affirming dismissal of appeal after plaintiff failed to serve a timely appeal upon the Department of Labor as required by S.D.C.L. § 1-26-31); *Hein v. Marts,* 295 N.W.2d 167, 170 (S.D. 1980) ("as a general rule, where a method of giving notice is prescribed by statute, there must be strict compliance with the prescribed method in form of notice" (citations omitted)).

In short, nothing offered by Stern Oil supports the extraordinary proposition that litigants are entitled to disregard the express notice requirement in S.D.C.L. § 31-23-3.

C. Stern Oil's bond claim is barred by the statute of limitations provided in South Dakota Codified Law § 31-23-4.

i. Stern Oil failed to commence its suit within one year of final acceptance of the project.

Under South Dakota Codified Law § 31-23-4, Stern Oil's lawsuit is also untimely. Section 31-23-4 provides in relevant part that "no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract." S.D.C.L. § 31-23-4 (2013).

Final acceptance of the Project occurred on August 10, 2009. (Record 58 (Final Acceptance Letter, attached to Slotten Aff. as Ex. D).) Final payment was made on January 6, 2010 and received on January 8, 2010. (*Id.* ¶ 4; *see also* E-mail from State of S.D. attached to Slotten Aff. as Ex. B.) Therefore, the last *possible* date of "final settlement" was January 8, 2010, and the last possible date that Stern Oil was permitted to initiate a lawsuit on the surety bond was January 8, 2011. Because Stern Oil's lawsuit was not initiated until June 3, 2011, its lawsuit was late by almost five months. (*See*

Record 2) Based on the expired statute of limitations alone, dismissal of Stern Oil's bond claim should be affirmed.

D. The doctrines of equitable tolling, equitable estoppel, and waiver do not permit Stern Oil to avoid the statute of limitations.

Stern Oil argues that the statute of limitations on its bond claim should be equitably tolled. In extreme circumstances, South Dakota courts have permitted a statute of limitations to be equitably tolled in order to allow a plaintiff to proceed with an untimely claim. This Court has recognized that "[g]enerally, *strict compliance* with a statute of limitations is required to preserve a claimant's right to bring an action," but equitable tolling may be permitted where circumstances "truly beyond the control of the plaintiff" prevented timely initiation of the suit. *Anson v. Star Brite Inn Motel*, 2010 S.D. 73, ¶¶ 14-15, 788 N.W.2d 822, 825-26 (quoting *Dakota Truck Underwriters v. South Dakota Subsequent Injury Fund*, 2004 S.D. 120, ¶¶ 17, 20, 689 N.W.2d 196, 201-02) (emphasis added).

South Dakota courts look to three elements when considering equitable tolling: (a) a timely notice, (b) lack of prejudice to the defendant, and (c) reasonable and good-faith conduct on the part of the plaintiff. *Dakota Truck*, 2004 S.D. at ¶ 24, 689 N.W.2d at 202 (citations omitted). However, "[t]he *threshold* for consideration of equitable tolling is inequitable circumstances not caused by the plaintiff that prevent the plaintiff from timely filing." *Anson*, 2010 S.D. at ¶ 16, 788 N.W.2d at 826 (citations omitted) (emphasis added). Therefore, equitable tolling does not apply at all unless "extraordinary circumstances beyond the plaintiff's control have prevented timely filing." *Id.*

In support of its equitable tolling argument, Stern Oil cites *Dakota Truck*, which involved South Dakota Subsequent Injury Fund claims filed by workers' compensation

insurers. 2004 S.D. 120 at ¶¶ 2-5, 689 N.W.2d at 198-99. The insurers did not file their reimbursement claims under the 1999 legislation because the claims had vested but not ripened by the June 1999 cutoff date. *Id.* Subsequently, parts of the 1999 legislation were deemed unconstitutional, and new legislation permitted vested but unripe claims to go forward. *Id.* at ¶¶ 6-8, 689 N.W.2d at 199. Had the insurers filed their unripe claims, they would have met the statute of limitations under the new legislation. The Court held that equitable tolling was proper because of the "unique circumstances" of the statutory scheme, and because the insurers were entitled to assume constitutionality of the 1999 legislation while it was in place. *Id.* at ¶¶ 27, 31, 689 N.W.2d at 203-04.

Stern Oil likens this case to *Dakota Truck*, and suggests that like the insurers in *Dakota Truck*, Stern Oil "act[ed] diligently, only to find [itself] caught up in an arcane procedural snare." (Appellant's Br. 36.) *See Dakota Truck*, 2004 S.D. at ¶ 28, 689 N.W.2d at 203. This is not a case of a "procedural snare" caused by "extraordinary circumstances beyond the plaintiff's control". Stern Oil mistakenly pursued a case against a different defendant before it had all the facts. The limitations period expired because Stern Oil did not exercise proper due diligence in finding the proper payment bond against which to claim, all of which was "within" and not "beyond the plaintiff's control." Since this is not a situation that requires equitable tolling, the statute of limitations should be strictly construed.

Stern Oil also suggests that equitable estoppel and waiver may allow the Court to disregard the statute of limitations in this case. (Appellant's Br. 33-34.) There is no evidence in the record to support either of these doctrines. For equitable estoppel to apply, there must be "representations or concealment of material facts" and "the

representations or concealment must have been made with the intention that it should be acted upon." *Dakota Truck*, 2004 S.D. at ¶ 32, 689 N.W.2d at 204 (quoting *Cooper v. James*, 2001 S.D. 59, ¶ 16, 627 N.W.2d 784, 789). There is *no evidence* that Border States concealed facts from Stern Oil or made any misrepresentations with the intent of inducing Stern Oil's reliance. As the parties did not have any direct dealings prior to the commencement of this action, Border States could not have misled Stern Oil.[9] (*See* Appellant's Br. 6-9.)

Additionally, waiver only applies where a defendant in possession of a right "does or forbears the doing of something inconsistent with the existence of the right." *Wehrkamp v. Wehrkamp*, 2009 S.D. 84, ¶ 8, 773 N.W.2d 212, 215 (citations omitted). Stern Oil has not put forth *any evidence* that Border States did anything inconsistent with its right not to be sued on its payment bond beyond the statute of limitations period.

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[9] As part of its Statement of Facts, Stern Oil vaguely insinuates concealment or wrongdoing by Border States through my actions. (*See* Appellant's Br. 9-10 ("Notably, the law firm which drafted that Answer and defended the airport contractor was the very same firm that had regularly represented Border States since the 1990's, including in prior litigation related to the Highway 81 project.").)

These facts are immaterial and unsupported by the record. There is no evidence regarding *if*, *when* or *how* I may have learned this fact prior to asking Mr. Weatherton in 2011. The "inferences" drawn by Stern Oil are nothing more than speculation. Additionally, I was never Stern Oil's attorney, I never owed a duty of candor to Stern Oil, and I never had a duty to perform a reasonable inquiry on Stern Oil's behalf to ensure that its allegations in either lawsuit had evidentiary support. *See* S.D.C.L § 15-6-11(b)(3) (2013). I did, however, owe a duty of confidentiality to my own clients. *See* Rules 1.6 of the Rules of Professional Conduct. To suggest that attorneys are "agents" of all their clients, *so that all confidential information they may learn from one client is imputed to all other clients*, is a truly desperate argument. To further point to an honest response by another defendant in a separate matter to insinuate bad faith or concealment by Border States in this matter, *solely on the basis of common legal representation*, exemplifies the complete lack of substance in Stern Oil's arguments.

Border States had a right to rely on the statute of limitations period and did nothing inconsistent with that right.

Furthermore, this Court has expressed reluctance to extend the statute of limitations period due to public policy concerns:

> Although the Statute of Limitations is generally viewed as a personal defense to afford protection to defendants against defending stale claims, it also expresses a societal interest or public policy of giving repose to human affairs. . . . Because of the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense.

Kobbeman v. Oleson, 1998 S.D. 20, 22, 574 N.W.2d 633, 640 (internal quotations omitted) (citations omitted).

Finally, Stern Oil argues that it was not permitted sufficient time for discovery to develop equitable defenses to dismissal of its untimely bond claim. (Appellant's Br. 34.) However, over a year passed between when Stern Oil's Complaint was served (June 3, 2011) and the summary judgment hearing that dismissed Stern Oil's complaint (July 12, 2012). After more than a year, Stern Oil could not "substantiate [its] allegations with sufficient probative evidence" in support of the equitable defense arguments. *See Schwaiger v. Mitchell Radiology Assocs., P.C.*, 2002 S.D. 97, ¶ 7, 652 N.W.2d 372, 376 (the party challenging summary judgment "must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor *on more than mere speculation, conjecture, or fantasy*") (emphasis added) (citations omitted). Stern Oil still sets forth only speculation, conjecture, and fantasy.

Last, without any supporting evidence, Stern Oil tries to convince this Court to disregard a clear and established statute of limitations. In *Murray v. Mansheim*, the State Supreme Court noted that, "[i]n South Dakota, statutes of limitations are not mere

technicalities." 2010 S.D. 18, ¶ 21, 779 N.W.2d 379, 389 ("We have consistently held that, 'compliance with statutes of limitations is strictly required and doctrines of substantial compliance or equitable tolling are not invoked to alleviate a claimant from a loss of his right to proceed with a claim'") (citing *Dakota Truck,* 2004 S.D. at ¶ 17, 689 N.W.2d at 201); *see also Anson v. Star Brite Inn Motel*, 2010 S.D. 73, ¶ 14, 788 N.W.2d 822, 825 (analyzing the importance of statute of limitations, which "allows potential defendants 'to be freed from the consequences of their actions after a statutory period of time resulting in peace of mind for the individual, less docket congestion, fewer administrative problems for the courts, and less work for law enforcement agencies'") (citations omitted).

In sum, Stern Oil failed to provide timely written notice of its bond claim and failed to timely commence suit on its bond claim. Summary judgment dismissing Stern Oil's surety bond claim should be affirmed.

CONCLUSION

The undisputed facts prove that Stern Oil's claims against Border States are frivolous, meritless, and do not create any claim for relief. There are no genuine issues of material fact. Stern Oil had almost two years to conduct discovery between when it filed its Complaint and the conclusion of the second motion for summary judgment to provide some scintilla of evidence to support its claims. Yet, it still could not establish the evidentiary existence of essential elements of its claims. Therefore, Border States and Liberty Mutual Insurance Co. respectfully request this Court affirm summary judgment against all of Stern Oil's claims.

Respectfully Submitted,

OLSON CONSTRUCTION LAW, P.C.

Dated: October 10, 2013

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type volume limitation in S.D.C.R. § 15-26A-66(b)(2). According to the Word Count function of Microsoft Office, Professional Hybrid 2007 version, this brief contains 9,660 words and 49,885 characters (not including spaces).

Dated: October 10, 2013

_____
Thomas R. Olson, Attorney for Defendants-Appellees Border States Paving Co., Inc., and Liberty Mutual Insurance Company.

APPENDIX

IN THE

Supreme Court

of the

State of South Dakota

No. 26729

STERN OIL COMPANY,
AND
STATE OF SOUTH DAKOTA
EX REL STERN OIL COMPANY,

PLAINTIFFS/APPELLANTS,

v.

BORDER STATES PAVING COMPANY,
AND
LIBERTY MUTUAL INSURANCE COMPANY,
AS ITS SURETY.

DEFENDANTS/APPELLEES

Appeal from the Circuit Court
Third Judicial Circuit
Brown County, South Dakota

The Hon. Jon Flemmer
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed on June 24, 2013

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On an appeal from a summary judgment motion, it is the burden of the moving party "to show clearly" that there are no issues of fact. *Bohlen v. Tyler,* 2002 S.D. 28, ¶ 7. Border States has not clearly shown the absence of material disputes.

1. Disputed facts prevent summary judgment on Stern Oil's third-party beneficiary claim

In this suit, Stern Oil seeks to recover as the third-party to a payment arrangement made for its benefit by Weatherton Contracting and Border States. Border States has provided four arguments regarding this claim: (a) its lack of consent to this agreement; (b) failure of consideration for this agreement; (c) its full performance of a *different* agreement; and (d) the Statute of Frauds for guaranties. None of these defenses are viable for purposes of summary judgment.

a. CONSENT: The Record suggests Border States gave its implied assent to the payment arrangement

Border States expends the bulk of its effort arguing that there wasn't actual "consent" for a third-party beneficiary payment arrangement.[1] Its position is flawed for two reasons. First, although Border States repeatedly asserts that it never agreed to an *express* contract, it overlooks evidence of its assent to an *implied* contract.[2] Second, Border States has not sufficiently explained why it is allowed to rely upon Carl Weatherton's conclusory affidavit in order to disprove the existence of an agreement.

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[1] Appellee's Brief, pp. 6-9.

[2] From the beginning, Stern Oil has alleged either an express or an implied contract. *See,* Amended Complaint, ¶ 35

"An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by *conduct*." SDCL 53-1-3 (emphasis added). "The 'conduct' can be both acts and words....We look to the totality of the parties' conduct to learn whether an implied contract can be found." *Setliff v. Akins*, 2000 S.D. 124, ¶13. *See, also, Weller v. Spring Creek Resort, Inc.,* 477 N.W.2d 839, 841 (S.D.1991) (evidence of intention is to be "gathered by implication or proper deduction from the conduct of the parties, language used, or acts done by them, or other pertinent circumstances attending the transaction.") "The facts are viewed objectively and if a party voluntarily indulges in conduct reasonably indicating assent he may be bound even though his conduct does not truly express the state of his mind." *Weller* at 841 (quoting *Federal Land Bank of Omaha v. Houck,* 4 N.W.2d 213, 219–20 (1942)).

The Record is replete with examples of Border States' implied assent to the November 28, 2008, payment spreadsheet. All of these circumstances were detailed in Stern Oil's opening brief (pages 16-23) and were not refuted. Here, a jury could infer the existence of an implied contract based on the parties' acts, words, conduct, and circumstances.

To summarize, in the fall and winter of 2008, Weatherton Contracting was owed a substantial amount of money on its subcontract. In turn, Weatherton Contracting owed a substantial amount of money to its suppliers, and Border States was aware of this. Weatherton sent a payment spreadsheet "directing" payments to be made directly to its suppliers. Paying the suppliers directly was not something called for by the parties' written contract, however it was

something that had happened previously in Weatherton's course of dealing with Border States, and it made sense for Border States to pay them directly because Weatherton was not bonded.

Border States did not make a counterproposal or disagree with Weatherton's spreadsheet and payment instructions. Instead, there is evidence in the Record that Border States began making payments directly to Weatherton's suppliers. Significantly, Border States admitted in deposition testimony that its pattern of dealing with Weatherton meant that if Weatherton made a proposal then Border States' agreement with that proposal could be inferred unless Border States expressly took steps to "make a counterproposal or disagree."

On this summary judgment motion, Border States is entitled to all reasonable inferences. A jury could use all of these words, actions, and circumstances to infer assent by Border States. As a matter of law, it cannot be said that no such payment arrangement existed.

Border States sidesteps the issue of implied assent, and instead, focuses exclusively on the absence of express consent. As part of this argument, Border States repeatedly invokes a single, conclusory line from Carl Weatherton's affidavit (i.e., where he claims "Border States did not agree to pay Stern Oil.") Border States also sidesteps the problems posed by conclusory affidavits.

In defense of Carl Weatherton's affidavit, Border States first asks the Court to hold that conclusory affidavits are permissible for the moving party in summary judgment proceedings, since this Court's prior cases only prohibit their use by the non-moving party. (Appellee's Brief, p. 6, fn. 6). This would be an

odd rule for the Court to adopt. Conclusory affidavits are impermissible not because of who files them, but because they are not probative, and, therefore, not a substitute for trial. *See,* SDCL 15-6-56(c); *DFA Dairy Fin. Servs,* 2010 S.D. 34, ¶ 32; *Chem-Age Industries, Inc. v. Glover,* 2002 S.D. 122, ¶ 18 (focus of summary judgment hearings is "the existence of admissible and *probative* evidence").

The better rule is to hold that it is just as impermissible for the moving party to short-circuit the litigation process with conclusory affidavits. *E.g., Sweet v. TCI MS, Inc.*, 47 So. 3d 89, 93 (Miss. 2010) (citations omitted) (holding that a moving party cannot use conclusory affidavits and noting that "[t]his Court has expressed disdain for conclusory, self-serving affidavits used to support summary judgment. Such affidavits, unsupported by material facts relevant to the issue at hand, are not a sufficient basis for granting summary judgment.")

In further defense of Carl's affidavit, Border States asks this Court to believe that it "provides an explanation for [his] prior inconsistent admission." (Appellee's Brief, p. 6, fn. 6). This is a stretch. The substance of Carl's affidavit is only three sentences long, and it does not make any reference to his prior testimony. Likewise, it does not mention or clarify the three instances in his deposition where he suggests his own apparent reliance upon Border States' implied consent (i.e., he believed that the checks were "supposed to be issued;" he thought that "Stern Oil should have been paid" as a result of the spreadsheet; and the spreadsheet meant that Border States "either paid the bill or they need to send us a check.") There is nothing explanatory about Carl's affidavit. The only thing that Carl's affidavit does is create more disputes of fact, which were

outlined on pages 18-20 of Stern Oil's brief (and which Border States fails to address whatsoever).

Even if Carl's perfunctory affidavit were credible and admissible, *the most* that his snippet of testimony can prove is that Border States did not give its *express* consent to the payment arrangement. But this single sentence does nothing to disprove *implied* assent, because implied assent is a product of conduct, not words.[3] Border States has no answer for the key piece of Carl's deposition, when he says that either his company or Stern Oil is still owed the funds in dispute here.[4]

In sum, Carl Weatherton's affidavit is unhelpful and inadmissible. But even if it were admitted, it creates disputed facts, rather than eliminating them, and it does nothing to disprove an implied payment arrangement. His affidavit is no substitute for a trial. Border States has failed to demonstrate the absence of disputed facts on the issue of implied assent.

b. CONSIDERATION: Border States cannot prove a lack of consideration because the terms of the Sub-Contract are clearly in dispute

On the issue of consideration, Border States advances a new argument on appeal. At the trial court level, Border States had argued only that there was "no

[3] Border States appears to suggest that Carl's affidavit proves he knew there was no actual agreement, and therefore that he did not rely on an implied agreement. Appellee's Brief, p. 9. This is conjecture, and it contradicts the Record. Carl's conclusory affidavit is not specific, it does not explain what Carl knew and when he knew it, and, significantly, it wholly contradicts the inferences that can be drawn from his deposition testimony, namely, that when he reviewed the relevant documents three years later, he still thought that Border States should have paid the amounts in the spreadsheet. There is no meaningful way to resolve those inconsistencies with his affidavit.

[4] Weatherton Depo., 29:5-6

evidence that Border States *received* anything in exchange for" the payment arrangement. This is an incomplete view of consideration; it includes *either* a benefit gained *or* a prejudice suffered. Border States now concedes this. (Appellee's Brief, p. 9).

On appeal, Border States argues, instead, that Weatherton Contracting was not prejudiced because it had no right to payment under the Sub-Contract. This argument requires legal and factual leaps which are unsupported by the Record.

Specifically, Border States cites to language in the Sub-Contract which it claims allowed it to "withhold" certain funds from Weatherton Contracting based on its own "discretion." As Border States explained in its opening brief, there are two problems with its reliance upon this language. First, the withholding provision is only triggered "if notification of any claims [sic] have been made against the Sub-Contractor …." There is nothing in the Record which indicates the "notification" of any "claims" made against the Sub-Contractor. Second, even if Border States had received notification of a claim, the Sub-Contract only permitted it to withhold the funds necessary to settle or cover "said claims." Since Border States provides no evidence, we are left to guess the size of the purported claims for which it was withholding funds.

On a summary judgment motion, it is the moving party's burden to dispense with all factual issues at the trial court level. *Bohlen v. Tyler,* 2002 S.D. 28, ¶ 7; SDCL 15-6-56(c). Instead, Border States is advancing a new argument on appeal without any evidence. It is significant and telling that Border States failed to include any paragraphs in its Statement of Undisputed Facts related to the

issue of consideration. Stern Oil (and this Court) should not be left to guess at the facts which might support this defense. *See, Discover Bank v. Stanley,* 2008 S.D. 111, ¶ 25 ("The party opposing a motion for summary judgment should not have to guess at what its opponent plans to present in court.") Border States' failure to address this issue below has denied Stern Oil the opportunity to meaningfully address it. *Id.* at ¶ 26.

In sum, we cannot say as a matter of law that the payment arrangement fails for lack of consideration. This Court cannot grant summary judgment based on Border States' conjecture.

c. FULL PERFORMANCE: Border States' alleged 'full performance' of the Sub-Contract is in dispute and does not excuse payment to Stern Oil

Third, Border States argues that Stern Oil can't "enforce the Subcontract between Weatherton and Border States [because] Border States paid everything due under the Subcontract."[5] Border States' argument is not supported by the facts, and it offers no legal authority to explain why performance of one agreement excuses its performance on another.

It is crucial to recognize that Stern Oil is not bringing a claim to enforce the Sub-Contract, signed in 2007, but instead, it is alleging the right to enforce the payment arrangement adopted by the parties in 2008.

Furthermore, it is inaccurate for Border States to argue that it "*fully* performed" its duties under the written Sub-Contract. Border States paid *more*

[5] Appellee's Brief, p. 11

than the contracted amount ($1,000,634.58 versus $908,191.03), so it seems more accurate to say that Border States "*over*-performed."

Something is amiss here. A contracting party does not generally pay more than she is required. Thus, the overpayment allows us to infer that the payment provisions of the Sub-Contract were amended in some way, or that there was a side-agreement of some kind (such as the one alleged by Stern Oil). Yet again, we are left to guess at the facts which Border States wants this Court to use in support of summary judgment.

As a matter of law, we cannot conclude that Border States' "overpayment" on its Sub-Contract excuses it from the third-party payment arrangement. Instead, the overpayment creates questions and disputes of fact.

d. STATUTE OF FRAUDS: This agreement is not a guaranty or loan which must be in writing

Border States' final argument is that the Statute of Frauds bars this type of agreement without a signed writing. However, its argument hinges upon the idea that the third-party payment arrangement fits the definition of a "guaranty." It does not.

A guaranty is the "promise to answer for the debt, default, or miscarriage of another." SDCL 56-1-1. "Guaranty" is a term of art in the finance and banking industries, and it "relates to the future, as a collateral promise designed to protect the promise from loss in case another fails to perform his duty....[A] guaranty is not breached until a ***future*** default occurs, and is unenforceable unless in writing." BLACK'S LAW DICTIONARY, 712 (7th ed.) (quoting Simpson, *Handbook on the Law of Suretyship,* 23 (1950)) (emphasis added).

Stern Oil has never alleged that Border States was acting to guaranty the *future* default of Weatherton Contracting. Instead, Stern Oil alleges that in November of 2008, Border States assumed the *present* and primary duty to pay that debt. The alleged agreement had nothing to do with the possibility of Weatherton's default at some point in the future. Instead, the arrangement was that Border States would immediately pay specific debts of Weatherton, in lieu of paying Weatherton directly. This is not a 'guaranty.'

Instead, this set of facts makes Border States an original obligor on the Stern Oil bill, rather than a guarantor. *See, Cargill, Inc. v. American Pork Producers, Inc.,* 426 F.Supp. 499, 510 (D.S.D. 1977) (holding that by assuming a debt, person becomes principal debtor, and not the guarantor; and noting "[i]t further follows logically that when a person is in fact a principal debtor, then semantics aside, he ought not be treated as a guarantor, and that in substance is the meaning of the statute");*Grimsrud Shoe Co. v. Jackson*, 22 S.D. 114, 115 N.W. 656, 659 (1908) (promise deemed an original obligation when alleged guarantor received debtor's property pursuant to an agreement to pay it toward debtor's debts). No writing is required for an original obligation like this. *See,* SDCL 56-1-6; SDCL 56-1-7; *American Prairie Constr. Co. v. Hoich,* 560 F.3d 780, 791 (8th Cir. 2009) (no writing required when transaction can be "equated with" a statutory exception).[6]

[6] Border States asserts in the alternative that this arrangement was an agreement to loan money or extend credit, subject to a different Statute of Frauds, found in SDCL 53-8-2(4). However, Border States offers no analysis

Border States' argument about a guaranty serves only to confuse the issue. If the third-party agreement was in force, as alleged, Border States' status in November 2008 was as the primary obligor, and the Statute of Frauds therefore does not apply. This conclusion is unchanged by virtue of the default judgment that Stern Oil initially obtained against Weatherton Contracting. At the time that Stern Oil proceeded directly against Weatherton, it was unaware of Border States' involvement with the fuel at issue, and, likewise, unaware of the payment arrangement that had been entered into for its benefit.

Summary judgment was granted in error on the third-party beneficiary claim. There are sufficient facts by which a jury could infer the existence and breach of Border States' duty to pay Weatherton Contracting's fuel bill with Stern Oil. That payment arrangement was supported by valid consideration, it did not need to be in writing, and the duty to pay was not excused by other payments that Border States made.

2. Stern Oil's bond claim also survives summary judgment

Stern Oil has also alleged the right to pursue a bond claim outside of the normal statutory windows, due to the unique circumstances of this case. Specifically, Border States had actual notice of Stern Oil's bond claim long before it gave formal notice. In addition, when the statute of limitations expired, Stern

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or explanation of how this was a loan or a credit extension. It is impossible for Stern Oil to respond, except generally. It is apparent from the Record that nobody loaned anyone any money here, and nobody extended credit. In addition, this Court has waived the requirement of a writing in situations of reliance (such as here, with Weatherton's apparent expectation that Border States would pay Stern Oil). *See, Fed. Land Bank of Omaha v. Matson*, 5 N.W.2d 314, 315 (S.D. 1942)

Oil was diligently pursuing a bond claim on another South Dakota public works project. Soon thereafter it learned that Border States and Liberty Mutual were the proper parties. Curiously, it also learned at that time that all of those various entities were represented by the same attorney. Stern Oil requests the opportunity to continue discovery on statute of limitation and tolling issues.

a. The notice requirement in SDCL 31-23-3 is satisfied by actual notice and substantial compliance

In its opening brief, Stern Oil outlined this Court's doctrine of substantial compliance as it pertains to notice statutes. (Appellant's Brief, pp. 31-32). Border States does not dispute that this is the law in South Dakota. Nor does Border States dispute that it had actual notice of Stern Oil's bond claim as of November 28, 2008, well within the 6-month requirement. Nor does Border States provide any explanation why the notice given on November 28, 2008, by Weatherton Contracting does not meet the substantial compliance threshold. Nor does Border States offer an explanation of how the purpose of SDCL 31-23-3 would be served any better by strictly requiring Stern to have given notice, rather than Weatherton.

Instead, Border States cites three cases in support of the proposition that "this Court has *not* been willing to ignore statutory notice requirements." (Appellees' Brief, pp. 26). These three cases do not help Border States.

In the first case, *Myears v. Charles Mix County,* 1997 S.D. 89, ¶ 17, this Court refused a tort claim against the County when "no prior notice, substantial or otherwise was given on [a motorist's] claim before the statutory period expired" under SDCL 3-21-2. *Id.* That is not the situation here, where notice of

Stern Oil's bond claim was given prior to the deadline, specifically when Weatherton Contracting sent the payment spreadsheet on November 28, 2008.

In the second case, *Stark v. Munce Bros. Transfer & Storage,* 461 N.W.2d 587, 589 (S.D. 1990), this Court dismissed a worker's compensation appeal when the employee failed to serve notice of the appeal upon the Department of Labor. A notice of appeal has nothing to do with the a notice statute; the concepts are unrelated. A notice of appeal is jurisdictional, but this Court has never held that a notice statute is jurisdictional. *E.g., People ex rel. S. Dakota Dep't of Soc. Servs.*, 2011 S.D. 26, ¶ 8.

In the third case, *Hein v. Marts,* 295 N.W.2d (S.D. 1980), this Court determined that a letter sent by a water district to attorney Rick Johnson was not sufficient notice upon his Clients because he had not appeared for them as counsel of record in any prior proceeding. The key issue there was notice in the context of due process, rather than a "notice statute." The case also turned on the issue of agency. For both reasons the case is inapposite.

None of those cases provide Border States with any help, and Border States fails to address Stern's actual argument, which is that the doctrine of substantial compliance was satisfied by the written notice of Stern Oil's claim that it received on November 28, 2008.

Border States' other defense to the bond claim involves the statute of limitations. Stern Oil urges the Court to allow tolling or permit further discovery to determine the extent of any statute of limitations defenses.

b. These unique circumstances warrant tolling or further discovery

Absent clairvoyance, it is difficult to imagine what else Stern Oil could or should have done in order to pursue its Highway 281 bond claim within the statute of limitations. When Stern Oil's fuel bill went unpaid, it filed suit against Weatherton Contracting. Weatherton failed to respond to the suit, and Stern obtained a default judgment.

At that time, the information available to Stern Oil suggested that its fuel had been used as part of the Aberdeen Airport project, and it patiently waited to file a claim on that bond. However, within three months of commencing that suit, Stern learned that its fuel was used, instead, on the Highway 281 project (even though both projects had been serviced by the same gravel pit). But by that time the statute of limitation on the Highway 281 bond had run.

The procedural snare that led to this result arose out of the differing commencement periods for the two bonds at issue, found in SDCL 5-21-6 and SDCL 31-23-4, respectively, and the fact that the Waubay pit was providing aggregate to two different public works projects at almost the same time. Complicating the matter is the fact that Stern's grease and lubricants were used on both projects, while its fuel was used solely to crush aggregate for the Highway 281 project. In addition, Weatherton Contracting had gone out of business at the time the bond claims were being investigated and pursued. It was a unique, perfect storm.

In addition, it is at least odd and peculiar that the same law firm represented both of these contractors and their bonding companies during the time when the key statute of limitations was about to run. Stern Oil requested the opportunity to conduct further discovery with a Rule 56(g) affidavit in order

to determine if there was any evidence to support a claim for equitable tolling, but it was denied this opportunity. It is a fair inference that Border States was not surprised by this stale claim, but, instead was keenly watching it through the attorney it shared with Upper Plains (the airport contractor). At the very least, this is an issue worthy of further investigation.

Border States' only defense to further discovery is its allegation that Stern Oil had ample time ("over a year") to conduct discovery. (Appellees' Brief, p. 30). But this claim is disingenuous, and it ignores the actual sequence of events at the trial court level. *See,* Appellant's Brief, p. 34, fn. 57 (providing a detailed timeline of the case from commencement until summary judgment was granted on the bond claim). Stern Oil was not permitted much time at all in which to conduct discovery on the statute of limitations issue.

The simplest and fairest remedy is to remand the case for further discovery on the statute of limitations tolling issue. If there is evidence, Stern Oil has a right to find it. If there is none, Border States and its surety will ultimately be granted summary judgment.

3. The remedy of unjust enrichment provides a mechanism for the trial court to dispense equity, after hearing all of the evidence

If the legal remedies of a bond claim or a third-party beneficiary claim are unavailable, Stern Oil then alleges that it is entitled to recover in equity. Border States raises only two defenses: that it did not receive a benefit, and that retaining any benefit it received is not inequitable because those benefits were contractual.

All semantics aside, Border States did receive the benefit of Stern Oil's unpaid fuel bill. Border States asserts that this was not a benefit because it fully performed the Sub-Contract, and, therefore, it should not be required to "pay twice." But this argument sidesteps (and confuses) the critical issue, which is that Border States voluntarily assumed an *additional* duty *beyond* the Sub-Contract when it received payment directives from Weatherton Contracting and assented to pay those suppliers.

Thus, all of the cases cited by Border States are factually distinguishable because they do not involve a payment directive like the one Weatherton Contracting issued to Border States, and to which Border States allegedly assented.

Furthermore, Border States cannot point to anywhere in the Record where it affirmatively told Weatherton that Stern Oil's bill would not be paid as directed. Even three years later, Carl Weatherton was still under the impression that Stern had been paid. Thus, it appears that Border States' actions served to induce and mislead Weatherton Contracting into doing nothing about its unpaid Stern Oil bill. This is not equitable.

When the Record is filled with such disputed facts and disputed inferences, it is impossible for this Court to balance the equities. The balancing function is better left to the trial court after those disputes are resolved at trial, and that is all that Stern Oil asks.

Conclusion

Stern Oil asks this Court to remand all three claims for further proceedings. There are sufficient, disputed facts to support its third-party

beneficiary claim. Although the statute of limitations has passed on its bond claim, Stern should be entitled to conduct discovery on any tolling issues. And in the alternative to either of these claims, the trial court should resolve the factual disputes prior to balancing the equities on the unjust enrichment claim.

Respectfully submitted this 12th day of November, 2013.

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Certificate of Compliance

The undersigned hereby certifies that Appellant's Reply Brief complies with SDCL 15-26A-66(b) because of the following particulars:

1. Appellant/Respondent's Reply Brief was prepared and printed in a proportionately spaced typeface using Microsoft Office Word 2007 in Georgia font, size 13.

2. According to the word count function of that program, this Brief contains 4,208 words, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificates of counsel.

Respectfully submitted this 12th day of November, 2013.

Daniel K. Brendtro

Certificate of Service

I, Daniel K. Brendtro, one of the attorneys for Appellant, hereby certify that on November 12, 2013, I served two true and correct copies of the Appellant's Reply Brief in the above-entitled matter by U.S. Mail, postage prepaid, on each of the following:

Thomas R. Olson
Olson Construction Law
1898 Livingston Ave.
West St. Paul, MN 55118

and sent the original and 15 copies of this Appellant's Reply Brief in the above-entitled matter by U.S. Mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of Supreme Court
500 East Capitol Ave.
Pierre, South Dakota 57501-5070.

Respectfully submitted this 12th day of November, 2013.

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Daniel K. Brendtro