NO. 09-40586

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HARTFORD FIRE INSURANCE COMPANY,

Plaintiff - Appellant,

v.

CITY OF MONT BELVIEU, TEXAS,

Defendant - Appellee.

On Appeal from the United States District Court
for the Southern District of Texas

Brief of Appellant

James D. Cupples
Sonia M. Mayo
WILLIAMS, CUPPLES & CHAPMAN, L.L.P.
1331 Gemini, Suite 201
Houston, Texas 77058
Telephone: (281) 218-8888
Facsimile: (281) 218-8788

Byron C. Keeling
Ruth B. Downes
KEELING & DOWNES, P.C.
1500 McGowen, Suite 220
Houston, Texas 77004
Telephone: (832) 214-9900
Facsimile: (832) 214-9908

Attorneys for Appellant
Hartford Fire Insurance Company

CERTIFICATE OF INTERESTED PERSONS

Case No. 09-40586: Hartford Fire Ins. Co. v. City of Mont Belvieu, TX

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff/Appellant:

Hartford Fire Insurance Company

Parent of Plaintiff/Appellant:

Hartford Financial Services Group, the stock of which is publicly traded on the New York Stock Exchange

Supersedeas Bond Surety for Plaintiff/Appellant:

Hartford Casualty Insurance Company

Counsel for Plaintiff/Appellant:

James D. Cupples and Sonia M. Mayo
Williams, Cupples & Chapman, L.L.P.

Byron C. Keeling and Ruth B. Downes
Keeling & Downes, P.C.

Defendant/Appellee:

City of Mont Belvieu, Texas

Counsel for Defendant/Appellee:

J. Grady Randle and Christopher L. Nichols
Randle Law Firm, Ltd., L.L.P.

Nominal Defendant:

Williams Industries, Inc.

Counsel for Nominal Defendant:

Peter B. Schneider and William T. Jones, Jr.
Grady, Schneider & Newman, L.L.P.
801 Congress, 4th Floor
Houston, Texas 77002

/S/
By:______________________________
Byron C. Keeling
Attorney of Record for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Hartford respectfully requests oral argument in this appeal. Oral argument may be helpful to the Court because this appeal involves matters of first impression in the Fifth Circuit: (i) whether, under Texas law, the doctrines of promissory estoppel and quasi-estoppel may excuse a municipality from its failure to file suit on a performance bond within the one-year limitations period in Section 2253.078(a) of the Texas Government Code; and (ii) whether, under Texas law, a municipality may file suit against a surety on a performance bond even after the contractor has substantially completed the underlying construction contract.

STATEMENT OF JURISDICTION

Hartford filed this case in federal district court on the basis of diversity of citizenship. Hartford is a citizen of Connecticut, and the City is a citizen of Texas. Therefore, diversity jurisdiction was proper under 28 U.S.C. § 1332(a)(2).

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court entered a final judgment on March 31, 2009. (R. 1906). Hartford timely filed a Rule 59 motion for new trial on April 8, 2009. (R. 2006). On May 14, 2009, the district court entered an order denying Hartford's motion for new trial (R. 2307), and on the same day, it entered an amended final judgment that disposed of all parties' claims. (R. 2310). Hartford timely filed a notice of appeal on June 4, 2009. (R. 2316).

STATEMENT OF ISSUES

Pursuant to Rule 28(a)(5) of the Federal Rules of Appellate Procedure, Hartford identifies the following issues that are relevant in this appeal:

1. Did the district court err in denying Hartford's motions for judgment as a matter of law when the evidence at trial was legally insufficient to support the jury's findings that the doctrines of promissory estoppel and quasi-estoppel excused the City from its failure to file suit on Hartford's performance bond within the one-year limitations period in Section 2253.078(a) of the Texas Government Code?

2. Did the district court err in denying Hartford's motions for judgment as a matter of law when, as a matter of law, Hartford's performance bond expired — and

Hartford owed no further obligations to the City on the bond — once Williams substantially completed its work on the Eagle Pointe project?

3. Did the district court err in awarding $218,747.65 in attorney's fees and $260,704.62 in prejudgment interest to the City?

STATEMENT OF THE CASE

Hartford Fire Insurance Company ("Hartford") is the surety on a performance bond that it issued to a general contractor, Williams Industries, Inc. ("Williams"), on a public construction project. The owner of the project — and the obligee on the bond — is the City of Mont Belvieu ("the City"). Williams substantially completed its work on the project on July 19, 2001. (DX 21; PX 27, at Change Order 67).

Hartford filed the present action on July 5, 2007, seeking a declaration that the one-year statute of limitations in Section 2253.078(a) of the Texas Government Code barred the City from asserting any claim on the performance bond. (R. 18). On August 20, 2007, the City filed a counterclaim against Hartford on the performance bond. (R. 37).

On May 12, 2008, Hartford filed a motion for summary judgment arguing that the City had failed to file its counterclaim within the applicable limitations period — one year from the date on which Williams substantially completed the Eagle Pointe project. (R. 181). The City filed a response advancing an assortment of defenses to limitations. (R. 235). The district court rejected all but two of the City's defenses,

finding that the summary judgment evidence raised a genuine fact issue on the City's promissory estoppel and quasi-estoppel defenses. (R. 566, 707).

The case proceeded to a jury trial on January 22, 2009. At the close of the City's evidence, Hartford filed a motion for judgment as a matter of law on the City's counterclaim. (R. 1327; *see also* 4 T. 650). The district court denied Hartford's motion. (4 T. 659). The jury subsequently returned a verdict in the City's favor on the City's counterclaim. (R. 1386).

The district court entered judgment in the City's favor for $468,492.01 in damages and $218,747.65 in attorney's fees. (R. 1906-10). Hartford renewed its motion for judgment as a matter of law, and it also filed a motion for new trial. (R. 1916, 2006). The City, in turn, filed its own post-judgment motion asking the district court to award prejudgment interest. (R. 2137).

On May 14, 2009, the district court denied Hartford's motions and granted the City's motion, entering an amended final judgment identical to the court's prior final judgment except that it awarded the City $260,704.62 in prejudgment interest on the City's damages. (R. 2310-14). This appeal followed.

STATEMENT OF FACTS

On April 20, 1998, the City and Williams entered into a contract in which the City hired Williams as the general contractor for the construction of the Eagle Pointe Recreation Center. (DX 1; 1 T. 101). Hartford, as surety for Williams, issued a

payment bond and a performance bond for the project. (DX 2). The performance bond specifically incorporated the statute governing bonds on public construction contracts, stating that "this bond is executed pursuant to the provisions of Chapter 2253 of [the] Texas Government Code . . ., and all liabilities on this bond to all such claimants shall be determined in accordance with the provisions of said Chapter to the same extent as if it were copied at length herein." (*Id.*; *see* 2 T. 267-68).

The Eagle Pointe Project

When the City and Williams originally entered into their construction contract, they contemplated that Williams would complete its work on the Eagle Pointe project sometime in 1999. (1 T. 116). Shortly after Williams began working on the project, however, the City discovered that the architectural plans for the project contained serious design flaws. (1 T. 114). The City directed Williams to stop working on the project and began working with its architects to develop new plans for the project. (PX 3; 2 T. 318-19). The changes in the architectural design caused a significant delay in the construction of the project. (4 T. 601). They also materially increased Williams's costs on the project. (PX 25, at 3-4).

Williams resumed its work on the project in September 2000. (PX 25, at 4). By spring 2001, Williams had finished enough of its work that the City began issuing certificates of substantial completion for various phases of the project. (DX 4; *see also* 4 T. 617; DX 26). On May 7, 2001, the City issued a certificate of occupancy

for the Eagle Pointe Recreation Center, and it took possession of the premises. (PX 12; *see* 3 T. 325-26; 4 T. 597). From March 2001 to February 2002, the City's architects prepared a series of "punch lists" identifying items for Williams to repair in the center. (PX 26). Nonetheless, by July 2002, the City had begun using the center for its intended purpose. (4 T. 586, 598; *see also* 4 T. 629 (noting that the recreation center was "open, operating and occupied" by February 2003)).

Williams experienced significant financial difficulties during its involvement in the Eagle Pointe project. (2 T. 365). Over the period from late 2001 to July 2002, Williams engaged in extended negotiations with the City for an equitable adjustment in the contract price for the project. (2 T. 320-21; 4 T. 532; *see* PX 25, at 18 ("Williams requests compensation in the amount of $1,342,379.")). During the same period, Hartford began receiving payment bond claims from unpaid subcontractors on the project. (1 T. 130; 2 T. 326; 4 T. 538). On hearing of Williams's negotiations with the City, Hartford urged the City to "exercise reasonable caution in the payment of any further contract funds to Williams because of Williams' alleged non-payment of subcontractors and suppliers." (PX 30).

Williams's negotiations with the City culminated in Change Order 67, which the City and Williams signed on July 2, 2002. (DX 21) (attached as Tab 9 to Record Excerpts). The parties agreed that the date of substantial completion for the Eagle

Pointe project was July 19, 2001. (*Id.*). Moreover, under Paragraph 5 of the change order, the City promised to pay an equitable adjustment to Williams:

> Whereas the City and Williams Industries have reached an agreement to cover the cost of all current and future claims which Williams Industries has or may have. And whereas Williams Industries and in turn its Bonding Company - The Hartford Fire Insurance Company have agreed that all warranties will remain in force. And also, that Williams Industries will pursue completion of remaining punch list and/or warranty items or compensate the City for expenditures which the City may have to make to achieve the required repairs . . . . The City agrees to pay Williams Industries an additional . . . $214,359.29.

(*Id.* ¶ 5). Although mentioned in Paragraph 5, Hartford was not a signatory to Change Order 67. (*Id.* at 1; *see* 4 T. 605). Nor did Hartford participate in any of the negotiations that led to Change Order 67. (1 T. 121-22; 4 T. 606).

Don Stephens, the vice president of Williams, suggested that the City pay the equitable adjustment — and other amounts that it owed under Change Order 67 — in the form of a check jointly payable to Williams and to Hartford. (1 T. 132). On July 9, 2002, the City sent a copy of Change Order 67 to Hartford, along with a check in the amount of $686,217.00 payable both to Williams and to Hartford. (PX 31). Hartford used the funds to pay some of the subcontractors on the Eagle Pointe project and other Williams projects, as well as to reimburse itself for $53,000 in adjustment costs. (1 T. 202-04). The $686,217.00 check was insufficient to cover all of the payment bond claims that Hartford had received from subcontractors on Williams's projects. (2 T. 274).

Hartford's Investigation of the City's Claim

On October 30, 2002, Louis Stranahan, the project manager for the Eagle Pointe project, sent a letter to Hartford complaining that Williams had made no progress on any punch list or warranty repairs to the recreation center. (PX 36). Hartford sent an engineer, Richard Divine, to investigate Stranahan's concerns. (1 T. 138-41). In meetings with Divine, Stranahan identified several specific items of repair, principally relating to the wave pool in the recreation center. (DX 71, 48; 1 T. 143-47). At the time, the total cost of the items of repair that Stranahan had identified to Divine was around $50,000. (1 T. 143). On March 19, 2003, Hartford's attorney, Jim Cupples, wrote a letter to the City stating that Hartford would pay for some of these repairs and requesting additional information from the City on the remaining items of repair. (DX 44; 1 T. 140). Cupples's letter expressly reserved all of Hartford's rights and defenses. (DX 44, at 2).

On June 3, 2003, Stranahan promised to send Divine a detailed description of the necessary repairs, along with supporting cost documentation. (DX 51). Hartford did not receive the promised information until November 3, 2003, when the City sent a letter to Hartford attaching a spreadsheet of "preliminary warranty claims" and two binders of supporting documentation. (DX 53). Even then, there were two problems with the information that Hartford received from the City:

- First, the City's spreadsheet dramatically expanded the scope of the repairs from $50,000 to more than $486,000, identifying several additional items of repair that the City had never previously disclosed to Hartford. (DX 54; *see* 1 T. 147, 154-55).

- Second, the City's binders, while helpful, still did not contain all of the information that Hartford needed to evaluate the City's claim: in particular, the City's binders did not include all of the invoices documenting the repairs that the City had already made to the recreation center. (1 T. 151; 2 T. 397-98; *see also* 4 T. 619, 621 (admitting that it would be reasonable for Hartford to want to see invoices on work that the City had actually performed)).

The City had no contact with Hartford between January 2004 and September 2004. (1 T. 155). On October 6, 2004, the City's attorney, Grady Randle, wrote a letter to Hartford acknowledging that the City had a potential limitations problem on its bond claim:

> The City of Mont Belvieu is concerned about the possible statute of limitations and I am requesting a tolling agreement from you. If there is no agreement reached prior to October 30, 2004, I will be forced to file suit against Hartford for not performing under the bond. Please let me know if you are agreeable to entering into a tolling agreement and how quickly Hartford can process these claims and get them resolved. It has now been nearly two years since the original claim was made.

(PX 46) (attached as Tab 10 to Record Excerpts). *Hartford did not enter into any tolling agreement with the City.* (1 T. 155-58).

On October 29, 2004, Jim Cupples wrote a letter to Grady Randle confirming that Hartford was still awaiting documentation reflecting the cost of the repairs that the City had already made to the Eagle Pointe recreation center. (PX 47). With respect to Randle's request that Hartford advise him how quickly it could process the City's bond claim, Cupples stated: "Hartford stands ready to proceed with the process as soon as we can get the data." (*Id.*). The City, however, never sent any additional documentation to Hartford. (4 T. 634). Nor did the City ever update its spreadsheet of repairs — which, *five years later*, would form the basis for the City's alleged damages at trial against Hartford. (4 T. 616).

From November 2004 to July 2007, the only further contact that the City had with Hartford was a brief exchange of Rule 408 settlement discussions in 2006. (R. 1198; 2 T. 253-54; 4 T. 615).[1]

Procedural History

Hartford filed the present action on July 5, 2007, seeking a declaration that the statute of limitations in Section 2253.078 of the Texas Government Code barred the City from asserting any claim on the performance bond. (R. 18). On August 20, 2007, the City filed a counterclaim against Hartford, asserting that "Plaintiff is liable to Defendant because Plaintiff has failed to pay under a bond and has breached the

[1]The district court excluded the City's exhibits documenting these settlement discussions. (1 T. 15-16). However, over Hartford's Rule 408 objection, the district court permitted the City to elicit testimony from Hartford's representative, Ken Cranston, confirming that Hartford had engaged in settlement discussions with the City in April 2006. (2 T. 253).

contract with the City." (R. 37-38; *see* 1 T. 161). Over six years had passed from the date that Williams substantially completed its work on the Eagle Pointe project to the date that the City filed its counterclaim against Hartford. (1 T. 162).

On May 12, 2008, Hartford filed a motion for summary judgment on the basis of the statute of limitations in Section 2253.078 of the Texas Government Code. (R. 181). The City filed a response asserting several defenses to Hartford's limitations argument, including Sections 16.065 and 16.069 of the Texas Civil Practice & Remedies Code, and the equitable defenses of judicial estoppel, equitable estoppel, quasi-estoppel, and promissory estoppel. (R. 235). In a lengthy order, the district court ruled as follows:

1. The limitations period in Section 2253.078 begins to run from the date of substantial completion and, "[h]ere, it has been conclusively shown by the record, and the parties agree, that Williams Industries completed 'substantial completion' of the Project in July 2001." (R. 574) (attached as Tab 8 to Record Excerpts). "Therefore, the statute of limitations for the City to bring a suit against Plaintiff ran in July 2002." (*Id.*).

2. Section 16.069 of the Texas Civil Practice & Remedies Code, which extends the limitations period on a counterclaim, does not apply "where a plaintiff brings a suit for declaratory judgment asserting that defendant's claim is time-barred as a matter of law." (R. 578).

3. Section 16.065 of the Texas Civil Practice & Remedies Code, which extends the limitations period when a party has "acknowledged" the justness of a claim, was of no help to the City because to the extent that Hartford acknowledged the City's claim, it did so in 2003 or 2004, and the City did not file its counterclaim until 2007. (R. 582-83). "Plaintiff's acknowledgment of its outstanding obligations under the performance bond does not allow the City to bring this suit because the

City did not file suit within one year of Plaintiff's acknowledgment." (R. 583).

4. The City had no valid defense of judicial estoppel because the City offered no evidence of any "sworn statements made by Plaintiff in a judicial proceeding." (R. 585).

5. The City had no valid defense of equitable estoppel because "there is no evidence that Plaintiff made a material misrepresentation or omission of facts to the City." (R. 586-87).

6. The City had a potential defense of quasi-estoppel because "Plaintiff made representations to the City that the warranties would remain in effect even after substantial completion of the Project," and because "[t]he Court deduces from the evidence that . . . the City was relying on Plaintiff's representations." (R. 588).

7. The City had a potential defense of promissory estoppel because "Plaintiff's earlier representations and actions clearly indicated that the warranties would remain in force even after substantial completion of the Project," and because "the Court finds it entirely foreseeable that the City relied upon Plaintiff's representations." (R. 589-90).

Based on this analysis, the district court concluded that the summary judgment evidence raised a genuine issue of material fact requiring a trial on the City's quasi-estoppel and promissory estoppel defenses. (R. 707).

The case proceeded to trial on January 22, 2009. The jury returned a verdict in the City's favor, finding as follows:

a. that Hartford breached the performance bond that it had issued to the City (Question 1);

b. that the City filed its counterclaim against Hartford more than one year after the final completion, abandonment or termination of the Eagle Pointe project (Question 3);

c. that the City's failure to file its counterclaim within the limitations period was excused under the doctrines of promissory estoppel and quasi-estoppel (Questions 4 & 5); and

d. that the City suffered damages in the amount of $468,492.01 (Question 6).

(R. 1386-93). The district court entered a judgment awarding the City $468,492.01 in damages, $218,747.65 in attorney's fees, and $260,704.62 in prejudgment interest. (R. 2310-14). This appeal followed.

SUMMARY OF ARGUMENT

An owner, such as the City, must file suit on a performance bond within one year of the substantial completion of a public construction project. The City filed suit against Hartford *over six years* after Williams substantially completed the Eagle Pointe project. In an effort to excuse its failure to comply with the applicable statute of limitations, the City cites the doctrines of promissory estoppel and quasi-estoppel. The evidence at trial, however, is legally insufficient to support either doctrine. With respect to promissory estoppel, the City cannot show that Hartford made any definite promise on which the City reasonably and justifiably could have relied to induce the City to delay filing suit until after the limitations period had expired. With respect to quasi-estoppel, the City cannot show that Hartford is unconscionably asserting a position inconsistent with a position that Hartford previously asserted to acquire a benefit from the City.

Even irrespective of the statute of limitations, the City has no valid bond claim against Hartford. The purpose of a performance bond is to secure the completion of a construction contract. A contractor "completes" a construction contract when it achieves substantial completion. Therefore, when a contractor achieves substantial completion, it discharges the surety from any further obligations on a performance bond. The City has admitted, and the evidence conclusively shows, that Williams substantially completed the Eagle Pointe project in July 2001. Williams's substantial completion of the project discharged Hartford from its performance bond. Neither promissory estoppel nor quasi-estoppel can resurrect Hartford's performance bond, which expired as of the date of Williams's substantial completion. The district court erred in failing to render judgment in Hartford's favor as a matter of law.

Because the City cannot recover on Hartford's performance bond, the district court's judgment is not only improper in awarding damages to the City, but also in awarding attorney's fees, interest and costs. Even assuming for the sake of argument that the district court's judgment is correct on liability grounds, the district court's award of prejudgment interest is excessive. The district court improperly awarded prejudgment interest on expenses that the City has yet to incur; it calculated its award on the basis of historical interest rates rather than the interest rate in effect as of the date of its final judgment; and it improperly calculated its award as compound interest rather than simple interest.

Hartford respectfully requests that this Court reverse the district court's judgment and render judgment that the City recover nothing from Hartford.

STANDARD OF REVIEW

The standard of review for the issues that Hartford has raised in this appeal is as follows:

Review of Hartford's Motions for Judgment as a Matter of Law. Hartford's first two issues in this appeal raise arguments that Hartford preserved in its motion (and renewed motion) for judgment as a matter of law. *See infra* at Sections I & II. This Court reviews *de novo* a district court's ruling on a motion for judgment as a matter of law. *Polinar v. Texas Health Sys.*, 537 F.3d 368, 375-76 (5th Cir. 2008). In doing so, the Court should consider all of the evidence, giving credence to evidence favoring the City, as well as to any uncontradicted and unimpeached evidence favoring Hartford, at least to the extent that the evidence comes from disinterested witnesses. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). A mere scintilla of evidence is insufficient to sustain the jury's verdict. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

Review of District Court's Prejudgment Interest Award. Hartford's third issue challenges the district court's award of prejudgment interest to the City. *See infra* at Section III. The amount of a prejudgment interest award is a question of law that this

Court reviews *de novo*. *DP Solutions, Inc. v. Rollins*, 353 F.3d 421, 435 (5th Cir. 2003).

ARGUMENT

I. The Evidence is Legally Insufficient to Support the Jury's Finding that the Doctrines of Promissory Estoppel and Quasi-Estoppel Excuse the City's Failure to File Suit Within the One-Year Limitations Period

Hartford's performance bond on the Eagle Pointe project incorporates the Texas statute governing surety bonds on public construction contracts — Chapter 2253 of the Government Code. (DX 2). Section 2253.078(a) of the Government Code states that a "suit on a performance bond may not be brought *after the first anniversary* of the date of final completion, abandonment, or termination of the public work contract." TEX. GOV'T CODE ANN. § 2253.078(a) (Vernon Supp. 2009) (emphasis added). Thus, Section 2253.078(a) imposes a one-year limitations period on performance bond claims. This one-year limitations period "has always been strictly enforced." Laird E. Lawrence & Bonnie Lee Daniel, *Contruction Warranties in Texas*, 13 CONSTR. LAWYER 20, 24 (1993).

The term "final completion," as used in Section 2253.078(a), is legally the same as "substantial completion." *Commercial Union Ins. Co. v. La Villa Indep. School Dist.,* 779 S.W.2d 102, 105 (Tex. App.—Corpus Christi 1989, no writ). *See TransAmerica Ins. Co. v. Housing Auth.*, 669 S.W.2d 818, 823 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); *see also* R. 574, 1378. Because the City admitted that

Williams had substantially completed the Eagle Pointe project on July 19, 2001, the district court concluded that the statute of limitations for the City to file suit against Hartford ran on July 19, 2002 — the first anniversary of the date of substantial completion. (R. 574). Thus, the district court ruled that "[t]he City's claims are time-barred" because the City did not file suit until 2007. (R. 575).

Ultimately, the district court found that the evidence raised genuine fact issues on two of the City's defenses to Section 2253.078(a) — promissory estoppel and quasi-estoppel. (R. 588-90). The City, however, has never cited a case holding that promissory estoppel or quasi-estoppel are valid defenses to a statute of limitations. Nor can it. Texas courts have not used either doctrine as a basis for estopping a party from invoking limitations.[2] In those rare cases in which Texas courts have enforced an equitable exception to limitations, they have applied the doctrine of equitable estoppel, not promissory estoppel or quasi-estoppel. *See, e.g., Frank v. Bradshaw*, 920 S.W.2d 699, 703 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Leonard v. Eskew*, 731 S.W.2d 124, 129 (Tex. App.—Austin 1987, writ ref'd n.r.e.).[3]

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[2]*See, e.g., Fightertown, Inc. v. K-C Aviation, Inc.*, No. 05-96-01998-CV, 1999 WL 701491, *7 (Tex. App.—Dallas Sept. 10, 1999, pet. denied) (not designated for publication) (declining to apply quasi-estoppel to preclude a limitations defense); *Sun v. Al's Formal Wear of Houston, Inc.*, No. 14-96-01516-CV, 1998 WL 726479, *8 (Tex. App.—Houston [14th Dist.] Oct. 15, 1998, no pet.) (not designated for publication) ("Appellant cites no authority to support his claim that promissory estoppel can be used to bar a limitations claim.").

[3]The district court ruled that the City could not rely on the doctrine of equitable estoppel because "there is no evidence that Plaintiff made a material misrepresentation or omission of facts to the City." (R. 586-87). The City does not challenge that ruling.

To invoke promissory estoppel or quasi-estoppel as a defense to limitations, as the City does here, is to try to force a square peg down a round hole. The elements of these doctrines simply do not lend themselves to a situation where a party seeks to avoid a statute of limitations. And here in particular, the evidence in the record is legally insufficient to support the elements of the City's promissory estoppel and quasi-estoppel defenses.

A. <u>The District Court Erred in Denying Hartford's Motions for Judgment as a Matter of Law on the City's Promissory Estoppel Defense</u>

To sustain a promissory estoppel defense, the City had to prove four elements at trial: (1) that Hartford made a promise to the City; (2) that the City reasonably and substantially relied on Hartford's promise; (3) that Hartford knew or should have known that its promise would lead the City to some definite and substantial injury; and (4) that injustice can be avoided only by enforcing the promise. *Nagle v. Nagle*, 633 S.W.2d 796, 800 (Tex. 1982). In Hartford's motions for judgment as a matter of law, Hartford argued that the City had offered no evidence to prove the first and second of these elements. (R. 1342-49, 1927-38). The district court erred in denying Hartford's motions.

1. *The Record Contains No Evidence of the Type of Representation or Promise Sufficient to Serve as the Basis for Promissory Estoppel*

Promissory estoppel, as its name implies, requires a promise — not just vague assurances, but a clear and specific *promise. See Herod v. Baptist Found.,* 89 S.W.3d

689, 695 (Tex. App.—Eastland 2002, no pet.); *Gillum v. Republic Health Corp.,* 778 S.W.2d 558, 570 (Tex. App.—Dallas 1989, no writ); *see Addicks Servs., Inc. v. GGP-Bridgeland, L.P.*, No. H-06-3478, 2008 WL 4747343, *4 (S.D. Tex. Oct. 27, 2008) ("The doctrine of promissory estoppel requires more than vague and indefinite assurances. . . ."). To give rise to a promissory estoppel, a representation must be sufficiently definite in its terms to be legally binding as a contract. *Neeley v. Bankers Trust Co.*, 757 F.2d 621, 630 n.7 (5th Cir. 1985).

In the course of this lawsuit, the City has cited three alleged "promises" as the basis for its promissory estoppel defense: (1) Change Order 67; (2) Jim Cupples's letters of March 19, 2003, and October 29, 2004; and (3) Hartford's implied promise allegedly to extend the limitations period or to pay the City's bond claim. None is sufficient to support the jury's finding of promissory estoppel.

a. Change Order 67 is Not a Promise By Hartford that Can Serve as the Basis for the Defense of Promissory Estoppel

The City contends that it relied on the provision in Change Order 67 stating that "all warranties will remain in force." (DX 21). Change Order 67, however, is not a "promise" enforceable against Hartford. First, Hartford was not a signatory to Change Order 67, and the evidence conclusively shows that Hartford did not even know of Change Order 67 at the time that the City entered into it with Williams. (1 T. 121-22, 134-35; 4 T. 519). While Change Order 67 is certainly a promise that Williams made to the City, it is not a promise that *Hartford* made to the City. *See*

Cook v. Smith, 673 S.W.2d 232, 235 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *see also Commercial Union*, 779 S.W.2d at 106 (noting that a contractor's representations will not extend the Section 2253.078(a) limitations period against a surety).

Second, the provision in Change Order 67 stating that "warranties will remain in force" is too indefinite to form the basis for promissory estoppel. At best, this provision is only a vague and undefined assurance of continued performance, not the type of specific and detailed promise legally enforceable as a contract. *See, e.g., Herod*, 89 S.W.3d at 693 (holding that the statement, "you'll just continue on as the chief administrative officer," was too indefinite to support the defense of promissory estoppel). In particular, Change Order 67 contains no terms defining the *duration* of any alleged promise that warranties would remain in force. *See Oakrock Expl. Co. v. Killam*, 87 S.W.3d 685, 691 (Tex. App.—San Antonio 2002, pet. denied).

The evidence in the record is insufficient to show that Change Order 67 is the type of promise that can form the basis for a promissory estoppel defense.

b. Jim Cupples's Letters Cannot Serve as the Basis for the City's Defense of Promissory Estoppel

The City also relies on two letters from Hartford's attorney, Jim Cupples, to support its promissory estoppel defense. In the first letter dated March 19, 2003, Cupples commented that Hartford was willing to pay for some $32,352 in plaster and pump room floor work, but that Hartford needed additional information from the City to evaluate the remaining items of repair. (DX 44, at 1-2). Cupples further stated that

"while Hartford conducts its investigation into the warranty and non-conforming work claims, it continues to reserve all of its rights and defenses in this matter and it is without waiver of same." (*Id.* at 4). By reserving Hartford's rights, Cupples's letter protected Hartford from any subsequent claim that Cupples's letter estopped Hartford from asserting its rights. *See Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County*, 52 S.W.3d 128, 133 (Tex. 2000).

In the second letter dated October 29, 2004, Cupples stated — in response to the City's request that he advise how quickly Hartford could process the City's bond claim — that Hartford was still awaiting documentation from the City and "stands ready to proceed with the process as soon as we can get the data." (PX 47). The term "stands ready" is "too indefinite, as a matter of law, to form a binding promise." *Hartford Fire Ins. Co. v. C. Springs 300, Ltd.*, 287 S.W.3d 771, 779 (Tex. App.—Houston [1st Dist.] 2009, pet. filed). Indeed, the City never fulfilled the condition on which this alleged "promise" rested: it never provided any additional documentation that would have enabled Hartford to "proceed with the process." (PX 47; *see* 4 T. 634).

Cupples's letters were part of an extended series of negotiations in which, over a period of two years, (a) the City initially identified a small number of repairs, (b) Hartford expressed a willingness to resolve some of these repairs and requested additional information about the remaining repairs, (c) the City then dramatically

increased the scope of the repairs, and (d) Hartford requested still further supporting documentation, which the City never provided to Hartford. In this context, Cupples's letters cannot form the basis for an estoppel under Texas law:

- The mere exchange of information between potential litigants "should not suspend the running of the applicable limitation statute or estop a litigant from asserting it as a defense." *Phillips v. Sharpstown Gen. Hosp.*, 664 S.W.2d 162, 168 (Tex. App.—Houston [1st Dist.] 1983, no writ). *See Fiengo v. General Motors Corp.*, 225 S.W.3d 858, 861 (Tex. App.—Dallas 2007, no pet.) (holding that the defendant's request that the plaintiffs "be patient" and await additional information is not the type of representation that would estop the defendant from invoking the statute of limitations).

- Engaging in settlement negotiations, without more, does not estop a party from invoking the statute of limitations. *Dean v. Frank W. Neal & Assocs., Inc.*, 166 S.W.3d 352, 361 (Tex. App.—Fort Worth 2005, no pet.). *See Lockard v. Deitch*, 855 S.W.2d 104, 105-06 (Tex. App.—Corpus Christi 1993, no writ) (holding that a promise to "try to work towards a settlement" does not suspend the running of limitations).

- A promise to "take action" does not estop a party from invoking the statute of limitations. *Rendon v. Roman Catholic Diocese,* 60 S.W.3d 389, 392 (Tex. App.—Amarillo 2001, pet. denied). *See also Dean*, 166 S.W.3d at 360-61 (holding that unsuccessful efforts to make contractual repairs do not suspend the running of limitations).

If the City's theory of the estoppel effect of Cupples's letters were valid, then no litigant could ever extend a partial offer of settlement, or request additional information about a claim, without assuming the risk that its opponent might interpret its actions as an estoppel against the statute of limitations. Fortunately, as one Texas court has observed in a case involving promissory estoppel, "[n]egotiations and information exchanges of this type have been found to [be] insufficient to estop a

defendant from asserting limitations as a defense." *Fightertown, Inc. v. K-C Aviation, Inc.*, No. 05-96-01998-CV, 1999 WL 701491, *7 (Tex. App.—Dallas Sept. 10, 1999, pet. denied) (not designated for publication).[4]

As a matter of law, Cupples's letters expressing Hartford's willingness in 2003 and 2004 to investigate the City's claim and to participate in settlement discussions with the City are not the type of "promises" that can support the jury's finding of promissory estoppel.

c. As a Matter of Law, a Promise Not to Invoke Limitations Cannot Arise Solely By Implication

To establish an estoppel defense to limitations, a plaintiff typically must prove that the defendant *expressly* represented that it would extend the limitations period, that it would not enforce any statute of limitations, or that it would pay all of the plaintiff's claim. *Fiengo*, 225 S.W.3d at 862. The district court here, in the section of its summary judgment order denying the City's equitable estoppel defense, found that Hartford made no such *express* representation. (R. 587). The City argues that Cupples's letters, coupled with the fact that Hartford never formally denied the City's

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[4]The City complains that Cupples's letter of March 19, 2003, expressed a willingness for Hartford to pay *part* of the City's claim. At best, however, a promise to make a *partial* payment is simply a settlement offer, which is insufficient to suspend the running of limitations. "It is common knowledge that parties who do not believe they are liable for what the plaintiff seeks (or believe they are not liable at all) often make business decisions to settle such claims." *Cathedral of Hope v. FedEx Corp. Servs., Inc.*, No. 3:07-CV-1555-D, 2008 WL 2242546, *7 (N.D. Tex. May 30, 2008). The fact that a defendant tries to do so cannot serve as the basis for an estoppel. *Id.* (holding that pre-suit settlement discussions for amounts in excess of $100 do not estop a defendant from invoking a $100 liability limitations clause).

claim, *implied* that Hartford did not intend to raise the statute of limitations. The City's argument effectively takes the "promise" out of promissory estoppel.

An implied representation is insufficient to support the defense of promissory estoppel. *See Flores v. Burger King Corp.*, No. H-06-0116, 2006 WL 3044462, *2-3 (S.D. Tex. Oct. 19, 2006); *cf. Lockard,* 855 S.W.2d at 106 (distinguishing *Leonard*, which had applied the doctrine of equitable estoppel to suspend limitations, on the basis that it involved an "*express* agreement to toll the statute of limitations") (emphasis in original). By definition, an implication that arises from acts or conduct is not a "promise" at all — much less the type of specific promise necessary to sustain the defense of promissory estoppel. *See Neeley*, 757 F.2d at 630 n.7; *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 503 (Tex. 1998).

The City offered no evidence at trial to establish the type of *express* promise necessary for promissory estoppel. Absent any evidence that Hartford made a promise that can serve as the basis for estoppel, the City has no valid promissory estoppel defense to the statute of limitations.

2. *The Record Contains No Evidence that the City Reasonably Relied on Any Promise From Hartford*

Promissory estoppel requires proof of "reasonable and justified" reliance upon a promise. *Barrand, Inc. v. Whataburger, Inc.*, 214 S.W.3d 122, 140 n.5 (Tex. App.—Corpus Christi 2006, pet. denied). Even assuming for the sake of argument

that Hartford made a specific and detailed promise to the City, the City did not reasonably or justifiably rely on any such promise.

a. The Alleged "Promises" that Hartford Made to the City Were Not the Type of Promises on Which the City Could Reasonably Rely

The evidence at trial was insufficient to show that the City relied at all — much less reasonably relied — on Hartford's conduct or representations. Over the entire period from 2001 to 2007, the City had the benefit of legal counsel. (4 T. 524). The City cannot claim that it reasonably relied on Hartford's representations when it had the benefit of its own counsel's advice about its obligations. *See In re R.O.,* No. 03-04-00506-CV, 2005 WL 910231, *6 (Tex. App.—Austin April 21, 2005, no pet.) (not designated for publication) (finding no evidence of reliance for purposes of promissory estoppel where the plaintiff consulted a lawyer about her obligations); *cf. Coastal Bank SSB v. Chase Bank of Tex., N.A.,* 135 S.W.3d 840, 843 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (noting that the fact that a party has legal representation is a factor in evaluating reliance).

Indeed, by the time that the City received Jim Cupples's letters in 2003 and 2004, the City had asserted its bond claim and was involved in settlement discussions with Hartford. The City cannot claim that it reasonably relied on any representations that it received from Hartford's counsel during settlement negotiations. *See Ortiz v. Collins*, 203 S.W.3d 414, 422 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (finding no evidence of reliance for purposes of promissory estoppel because reliance

"is not justified when the representation takes place in an adversarial context"); *see also Wright v. Sydow*, 173 S.W.3d 534, 554 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("Generally, a non-client cannot justifiably rely on an attorney's representations when those representations occur in an adversarial context.").

Moreover, by the time that the City received Cupples's letters, the statute of limitations *had already expired.* The limitations period for the City's performance bond claim expired in July 2002 — one year after Williams's substantial completion of the Eagle Pointe project. (R. 574). The City cannot claim that Cupples's letters in 2003 and 2004 induced the city to miss a statutory deadline that expired in 2002. *See Hill v. Barlette*, 181 S.W.3d 541, 546 (Tex. App.—Texarkana 2005, no pet.) ("The events inducing a person to delay a particular action until after a particular date logically must occur before that date."); *see also Villages of Greenbriar v. Torres*, 874 S.W.2d 259, 264 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

The City itself was well aware that it had a limitations problem. On October 6, 2004, the City's lawyer sent a letter to Hartford expressing concern "about the possible statute of limitations." (PX 46). The letter stated that if Hartford did not agree to enter into a tolling agreement by October 30, 2004, the City would "be forced to file suit." (*Id.*). Hartford declined to enter into a tolling agreement with the City; yet, the City did not file suit against Hartford until 2007. The City cannot claim that it reasonably relied on Hartford's representations to believe that it had no

limitations problem when it expressly acknowledged that it had a limitations problem and needed to secure a tolling agreement from Hartford by October 30, 2004 — a tolling agreement which it never received. (1 T. 158).

In the absence of any legally sufficient evidence of reasonable reliance, the City's promissory estoppel theory is no defense to the statute of limitations.

b. There is No Evidence that the City Acted With the Necessary Due Diligence to Assert the Defense of Promissory Estoppel

As part of the element of reliance, a plaintiff who asserts an estoppel defense to limitations must not have "blindly relied upon a situation as being what it seemed rather than as being what it in reality was." *Leonard*, 731 S.W.2d at 135 (quoting *Neal v. Pickett*, 280 S.W. 748, 753 (Tex. Comm'n App. 1926, judgment adopted)). "He must be diligent to file the cause of action he knows he has; he may not continue to rely upon the defendant's original inducement beyond a point when it becomes unreasonable to do so. . . ." *Id.* at 129. *See Flores*, 2006 WL 3044462, at *2 (quoting *Leonard* and applying the requirement of due diligence in a case involving promissory estoppel).

As a matter of law, even when it initially would have been reasonable for a plaintiff to rely on a promise, a plaintiff may not reasonably assume that the promise lasts indefinitely. *See Slusser v. Union Bankers Ins. Co.*, 72 S.W.3d 713, 719 (Tex. App.—Eastland 2002, no pet.). In particular, a plaintiff may not reasonably assume that the estoppel effect of a promise suspends the running of limitations for a period

even longer than the original limitations period. *See Heart Hosp. IV, L.P. v. King*, 116 S.W.3d 831, 836 (Tex. App.—Austin 2003, pet. denied) ("It is disingenuous to the purpose of the equitable tolling theory to think that it would allow a plaintiff twice as long to refile a suit as he had to file it initially."); *see also Flores*, 2006 WL 3044462, at *3 n.10 (noting that the plaintiff's continued reliance on the defendant's promise "for two years was not reasonable").

By October 6, 2004, the City was aware not only that it had a cause of action against Hartford, but also that the statute of limitations was a potential problem. (PX 46). The City claims that it elected to delay filing suit after receiving Jim Cupples's letter of October 29, 2004. (PX 47; *see* 4 T. 634). But even assuming for the sake of argument that the City reasonably relied on Cupples's letter, the diligent course of action would have been for the City to file suit within a few months after receiving Cupples's letter — when it became apparent that Hartford was not going to pay the City's claim. The City did not do so. Instead, the City waited another three years after receiving Cupples's letter before filing suit against Hartford — *three times as long as the original one-year statutory limitations period.*

The City does not contend that it relied on any promise from Hartford after October 2004. In fact, the record contains only one reference to any communications between the City and Hartford from October 2004 to August 2007 — Ken Cranston's testimony, over a Rule 408 objection, that the parties participated in settlement

discussions in 2006. (2 T. 253; *see supra* note 1).[5] Settlement discussions do not support an estoppel defense. *Dean*, 166 S.W.3d at 361.[6] Consequently, the record "is silent regarding any semblance of justification" for the City's three year delay in filing suit against Hartford. *Leonard*, 731 S.W.2d at 135. Absent any such evidence, the district court erred in denying Hartford's motions for judgment as a matter of law on the City's promissory estoppel defense.

B. The District Court Erred in Denying Hartford's Motions for Judgment as a Matter of Law on the City's Quasi-Estoppel Defense

To sustain its quasi-estoppel defense, the City had to prove (1) that Hartford acquiesced to or accepted a benefit under a transaction, (2) that Hartford's present position is inconsistent with its position at the time when Hartford acquiesced to or accepted the benefit of the transaction, and (3) that it would be unconscionable for Hartford to maintain its present position, which is to the City's disadvantage. *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). Additionally, under the facts of this case, the City had to prove that it reasonably relied on Hartford's actions in accepting the benefit of the transaction, which induced the City

[5] The only documentary evidence in the record dated between October 2004 and August 2007 is a 2005 settlement agreement between Hartford and Williams in an entirely separate lawsuit. (DX 64). The City's administrator, Bryan Easum, admitted at trial that the City neither knew of nor relied upon this settlement agreement. (4 T. 522-23).

[6] Significantly, the City itself admits that Hartford specifically raised the one-year statute of limitations during the parties' settlement discussions in March 2006. (R. 101; R. 1199). Yet, even then, the City still failed to file suit within one year of the parties' settlement discussions.

not to file suit within the limitations period. *See Douglas v. Moody Gardens, Inc.*, No. 14-07-00016-CV, 2007 WL 4442617, *4 (Tex. App.—Houston [14th Dist.] Dec. 20, 2007, no pet.) (not designated for publication).

In Hartford's motions for judgment as a matter of law, Hartford argued that the City had offered no evidence sufficient to prove any of these elements. (R. 1342-51, 1927-41). The district court erred in denying Hartford's motions.

1. *There is No Evidence that Change Order 67 is the Type of Conduct or Representation that Can Form the Basis for Quasi-Estoppel*

Quasi-estoppel requires that a party have asserted a position inconsistent with a position that he previously asserted to acquire a benefit under a transaction. *Lopez*, 22 S.W.3d at 864. Here, the City argues that Hartford has now asserted a position (*i.e.,* that the statute of limitations bars the City's bond claim) inconsistent with the position Hartford previously asserted in Change Order 67 (*i.e.*, that "all warranties would remain in force") to acquire a benefit in the form of a $686,217.00 check jointly payable to Williams and to Hartford. (R. 251; 5 T. 681). But even assuming that Change Order 67 is enforceable against Hartford (despite the fact that Hartford did not sign it), there is no inconsistency between Hartford's current position and Change Order 67.

If the City's theory of quasi-estoppel were valid, then limitations would cease to be a meaningful defense to a contract claim. Consider the following scenario:

a. Paul Plaintiff signs a contract hiring Don Defendant to build a house;

b. just before the one-year warranty period expires, Plaintiff identifies some problems in the house;

c. Plaintiff pays Defendant an additional $20,000.00 to fix the problems under a new contract specifying that "all warranties will remain in force;"

d. Defendant does not adequately fix the problems; and

e. *more than four years later* (after the statute of limitations expires on a contract claim), Plaintiff sues Defendant for breach of the new contract.

Under the City's theory, the doctrine of quasi-estoppel would bar Defendant from asserting the four-year statute of limitations in Texas on breach of contract claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. 16.004 (Vernon Supp. 2009). There is no inconsistency, however, in accepting the benefits of a transaction and subsequently taking the position that, in the interim, the statute of limitations expired on a cause of action to enforce the transaction. *See Dodd v. Terrill*, No. 05-93-00268-CV, 1994 WL 24378, *7 (Tex. App.—Dallas Jan. 28, 1994, writ denied) (not designated for publication) (holding that enforcing the default provisions in a contract is not inconsistent with accepting a benefit under the contract); *see also Nieman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368, 371 (5th Cir. 1990).

Likewise, taking the position as of July 2, 2002, that "all warranties would remain in force" — even to the extent that position is attributable to Hartford — is not inconsistent with taking the position in 2007 (*five years later*) that the one-year statute of limitations had expired.

2. *The District Court Erred in Instructing the Jury that Quasi-Estoppel Does Not Require Reliance, and There is No Evidence that the City in Fact Reasonably Relied on Hartford's Actions*

In many cases quasi-estoppel does not require proof of reliance. However, quasi-estoppel necessarily encompasses an element of reliance where the plaintiff contends that the defendant *induced* the plaintiff to act. *See, e.g., Douglas*, 2007 WL 4442617, at *4 ("[I]n this case, the particular quasi-estoppel/unconscionability reasoning offered by Douglas necessarily requires a reliance component due to her suggestion she was precluded from filing a workers' compensation claim based on Moody's earlier position."); *see also Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 136 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'd). Here, the City contends that Hartford *induced* the City to delay filing its suit until after the statute of limitations had expired. (R. 1200; 3 T. 511; 4 T. 691).

If there were no reliance requirement when a party invokes quasi-estoppel as a defense to limitations, then a party could escape the effect of a limitations deadline even without any evidence that the defendant did anything to induce the party to delay filing suit. This would run counter to the purpose of estoppel as a defense to limitations. As Texas courts have repeatedly emphasized in equitable estoppel cases, a plaintiff must prove reasonable reliance when it claims that the defendant's actions induced it to delay filing suit until after limitations has expired. *See Rendon*, 60 S.W.3d at 391; *see also Gardner v. Cummings*, No. 14-04-01074-CV, 2006 WL

2403299, *5 (Tex. App.—Houston [14th Dist.] Aug. 22, 2006, pet. denied) (not designated for publication).

Significantly, in denying Hartford's motion for summary judgment on quasi-estoppel grounds, the district court concluded that the evidence raised a genuine fact issue on whether Hartford had *induced* the City to delay filing its suit. (R. 588 (citing *Gardner*, 2006 WL 2403299, at *5)). Yet, at trial, the district court instructed the jury: "Misrepresentation by one party, and reliance by the other, are not necessary elements of quasi-estoppel." (R. 1379). Hartford objected to the district court's instruction. (4 T. 645). The court's instruction improperly misled the jury to believe that the City had no obligation to prove that it reasonably relied on Hartford's conduct to delay filing suit until after limitations had expired.

And in fact, there is no evidence that the City reasonably relied on Hartford's conduct. *See supra* at 23-28. Even if the City reasonably believed in 2002 that Change Order 67 had extended all of the warranties on the Eagle Pointe recreation center, the City knew by October 2004 that it had a potential limitations problem on its bond claim against Hartford. (PX 46). However, the City did not file suit against Hartford for another three years — three times the length of the one-year limitations period. The City cannot validly claim that, even after October 2004, it continued to rely on Change Order 67 as the reason for its delay in filing suit. *See Slusser*, 72

S.W.3d at 719 ("Although his reliance on the statements may have been reasonable in 1992 and 1993, Slusser's continued reliance was not justifiable.").

Absent evidence of reliance, the City's quasi-estoppel theory has no legitimate basis. Contrary to the City's theory, Hartford's conduct did not induce, and could not have induced, the City to delay filing suit until after limitations had expired.

3. *There is No Evidence, and No Valid Legal Basis for the City to Argue, that Hartford's Current Position is Unconscionable*

Quasi-estoppel requires that it be "unconscionable" to allow the defendant to maintain a position inconsistent with its earlier position. *Lopez*, 22 S.W.3d at 864. The concept of "unconscionability" requires some form of culpable or egregious conduct. *See Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 677 (Tex. 1998). It is not "unconscionable" for a defendant to change its position if it has a valid legal or contractual basis for doing so. *See Cook Composites, Inc.*, 15 S.W.3d at 136 (holding that a defendant which did not enforce a contractual requirement was not later estopped from enforcing the same requirement under a different clause in the contract); *see also Fasken Land & Minerals, Ltd. v. Occidental Permian Ltd.*, 225 S.W.3d 577, 594 (Tex. App.—El Paso 2005, pet. denied).

The Fourteenth District Court of Appeals addressed the unconscionability element of quasi-estoppel in *Douglas*, 2007 WL 4442617, at *4. The plaintiff in *Douglas* failed to file a timely workers' compensation claim after suffering an on-the-job injury. After suing her employer for negligence, the plaintiff argued that quasi-

estoppel barred her employer from asserting its rights as a workers' compensation subscriber, allegedly because her employer had previously filed a form denying that the plaintiff had suffered her injury in the course of her employment. The court in *Douglas* ruled that the evidence did not raise any genuine issue of material fact sufficient to support the plaintiff's estoppel theory:

> As we have explained, Douglas had her own attorney to advise regarding her rights and responsibilities under the act, including the need to timely file a workers' compensation claim. If she had filed a claim, she may have been compensated for her injury. Alternatively, if the workers' compensation process had ultimately yielded a determination that her injury was not compensable, she could have filed a negligence suit without being subject to the exclusivity provision of the act. Consequently, Douglas is not denied recovery for her injury based on Moody's inconsistent positions. Rather, she is denied recovery because *she* elected not to timely pursue a workers' compensation claim. Therefore, it is not unconscionable for Moody to rely on the exclusivity provision of the act as a defense to this suit.

Id. (emphasis in original).[7]

As with the plaintiff in *Douglas*, the City had its own lawyer to advise it about its responsibilities under Chapter 2253 of the Government Code, including the need to file a timely suit on the performance bond. Under Chapter 2253, the statute of limitations for any claim on the bond was one year. Even assuming for the sake of argument that Hartford had agreed to extend the period for a bond claim under

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[7]The City contends that *Douglas,* as an unpublished opinion, is not binding precedent. This is untrue. Rule 47.7(b) of the Texas Rules of Appellate Procedure states that all unpublished Texas appellate opinions issued after January 1, 2003, "have precedential value." TEX. R. APP. P. 47.7(b) cmt. The opinion in *Douglas* was issued in 2007.

Change Order 67, the City at best could only reasonably believe that Change Order 67 extended the limitations period for an additional year. Yet, even after the City's own lawyer expressed concern in 2004 about the possible running of limitations, the City did not file any suit against Hartford until August 7, 2007. The City's failure to comply with the statute of limitations is not a result of Hartford's conduct; rather, it is a result of the City's own decision not to timely pursue its bond claim.

By 2007, Hartford had a valid legal basis for taking the position that limitations barred the City's bond claim. *See Cook Composites, Inc.*, 15 S.W.3d at 136. There is nothing unconscionable — and in particular, there is no deception, fraud, or other culpable conduct — in Hartford taking the position that Chapter 2253 of the Texas Government Code barred the City from asserting its bond claim *six years* after limitations began to run, *four years* after the City entered into Change Order 67, and *three years* after the City's own lawyer raised limitations concerns. Nor is there any inconsistency in Hartford asserting the defense of limitations *four years* after Change Order 67. Accordingly, the district court erred in denying Hartford's motions for judgment as a matter of law on the City's quasi-estoppel defense.

II. As a Matter of Law, the City May Not Recover on Hartford's Performance Bond, Which Expired When Williams Substantially Completed the Eagle Pointe Project

Even if the City had offered legally sufficient evidence to sustain its promissory estoppel or quasi-estoppel defenses (and it did not), the district court still

should have rendered judgment in Hartford's favor. As a matter of law, estoppel cannot resurrect a contract that has already terminated. Here, for more than a year, the City's position was that Williams substantially completed the Eagle Pointe project on July 19, 2001. (R. 244, 624, 719). Less than two weeks before trial, the City changed its position, unilaterally amending its responses to Hartford's requests for admission to argue that Williams never substantially completed the project. (R. 770). As the City apparently recognized, Williams's substantial completion of the Eagle Pointe project terminated Hartford's performance bond.

In Hartford's motions for judgment as a matter of law, Hartford argued that Williams's substantial completion discharged Hartford from any further obligations to the City on the performance bond. (RR. 1335-38, 2272-74). The district court erred in denying Hartford's motions.

A. <u>As a Matter of Law, a Performance Bond Expires Once the Contractor Has Substantially Completed the Construction Contract</u>

The purpose of a performance bond is merely to secure the completion of a construction contract, not to secure the performance of warranty work or punch list repairs. *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 674 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). A contractor fulfills its duty to perform a construction contract by achieving substantial completion. *Coastal Chem, Inc. v. Brown*, 35 S.W.3d 90, 96-97 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). *See also Vance v. My Apartment Steak House, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984).

Thus, substantial completion discharges a surety from any further obligations to an owner on a performance bond. *Commercial Union Ins. Co.*, 779 S.W.2d at 105-06; *TransAmerica Ins. Co.*, 669 S.W.2d at 823.

Because a performance bond only secures the completion of a construction contract, a performance bond does not cover warranty work arising after substantial completion. Substantial completion is a "one-time event." *Coastal Chem, Inc.*, 35 S.W.3d at 97. An owner, such as the City, which identifies problems that arise after substantial completion may have a potential claim for warranty work, but its claim rests solely against the contractor, not the surety. *Id.* at 96 ("Once Coastal accepted John Brown's work as substantially complete, any claims of defective workmanship did not invalidate the achievement of substantial completion. Instead, Coastal's remedy for any defective workmanship was in John Brown's continuing obligations under the warranty provision.").

This is true not just in Texas, but throughout the United States. As Philip Bruner and Patrick O'Connor concluded in their construction law treatise:

> The duration of the surety's performance bond liability usually is limited by express terms of the bond, contract or statutory suit limitation provisions. In the absence of such express limitations, the bond duration *traditionally has been deemed to extend only to the point of "substantial completion"* — physical completion of the construction work to the point that the work can be occupied and used by the owner for its intended purposes — at which point the owner is determined to have received performance substantially as bargained for and thus is not legally justified in terminating the bonded contract for default.

4 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., CONSTRUCTION LAW § 12:22 (ed. 2009) (emphasis added). *See, e.g., Bank of Brewton, Inc. v. International Fidelity Ins. Co.*, 827 So. 2d 747, 753 (Ala. 2002). Indeed, this Court has ruled that a contractor must *materially breach* the construction contract to trigger a surety's liability on a performance bond. *L&A Contracting Co. v. Southern Concrete Servs., Inc.*, 17 F.3d 106, 110 (5th Cir. 1994). The very definition of "substantial completion" is that the contractor has sufficiently completed its work to the point that it "cannot be said to have *materially* breached the bonded contract." 4 BRUNER & O'CONNOR, *supra* § 12:22 (emphasis in original). *See Vance*, 677 S.W.2d at 482.

Because Williams substantially completed the Eagle Pointe project, Hartford had no liability to the City on Hartford's performance bond.

B. Both the City's Admissions and the Evidence at Trial Conclusively Establish that the Eagle Pointe Project Reached Substantial Completion in July 2001

The City cannot seriously deny that Williams substantially completed the Eagle Pointe project. As the district court itself stated: "it has been conclusively shown by the record, and the parties agree, that Williams Industries completed 'substantial completion' of the Project in July 2001." (R. 574).

1. *The City Judicially Admitted that Williams Substantially Completed the Project in July 2001, and the District Court Erred in Refusing to Strike the City's Improper Efforts to Backtrack on Its Admissions*

Once a party formally admits a fact, "the party requesting an admission is entitled to rely on the conclusiveness of it." *Armour v. Knowles*, 512 F.3d 147, 154

n.13 (5th Cir. 2007). The only method by which a party can amend or revoke an admission is to obtain leave of court under Rule 36(b). FED. R. CIV. P. 36(b). If the party fails to "avail himself of the procedural mechanism" for avoiding the effect of his admission, his admission is "conclusively established." *In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001). *See Hulsey v. State of Tex.,* 929 F.2d 168, 171 (5th Cir. 1991). Here, the City admitted, in response to Hartford's requests for admission, that "the Project was substantially completed in July 2001." (R. 719).

Moreover, in the parties' joint pretrial order, the City affirmed, as a stipulation of fact, that Williams achieved substantial completion of the project in July 2001. (R. 624). A stipulation of fact is equally as conclusive as an admission of fact. *See Quest Med., Inc. v. Apprill*, 90 F.3d 1080, 1087 (5th Cir. 1996) ("Under federal law, stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them . . . unless manifest injustice would result therefrom or the evidence contrary to the stipulation was substantial."). "Before agreeing to a stipulation, a litigant has the duty to satisfy himself concerning the matters which his opponent proposes for stipulation." *Downs v. American Emp. Ins. Co.*, 423 F.2d 1160, 1164 (5th Cir. 1970).

Just twelve days before trial, the City served an "amended" set of admissions unilaterally purporting to retract its earlier admission and to *deny* that Williams had

ever achieved substantial completion "as to the Project." (R. 772).[8] The City filed no motion, as is required under Rule 36(b), to amend its previous admissions, nor did the City make any effort to prove the kind of extraordinary circumstances that would permit it to amend or withdraw its admissions. FED. R. CIV. P. 36(b). Nor did the City ever withdraw its stipulation of fact in the parties' joint pretrial order. *See Quest Med., Inc.,* 90 F.3d at 1087. Hartford filed a motion to strike the City's "amended" admissions. (R. 753). The district court denied Hartford's motion. (R. 1310).

The district court erred in refusing to strike the City's eleventh-hour "amended" admissions. The City's original responses to Hartford's requests for admission — as well as the City's stipulation of fact, which the City never withdrew — conclusively establish that Williams substantially completed the Eagle Pointe project in 2001.

2. *The Evidence at Trial Conclusively Establishes that Williams Achieved Substantial Completion on the Eagle Pointe Project in 2001*

Even if the City had not already admitted that Williams substantially completed the Eagle Pointe project in 2001, the evidence at trial left no question that Williams substantially completed the project. First, the City and Williams agreed in Change Order 67 that substantial completion occurred on July 19, 2001. (DX 21). The City

[8]The timing of the City's amended admissions was no accident. After the district court stated in its summary judgment order that Williams had achieved substantial completion in 2001, Hartford filed a second motion for summary judgment arguing that Williams's substantial completion had discharged Hartford from any liability on the performance bond. (R. 712). The district court struck Hartford's motion as untimely. (R. 725). In the meantime, the City unilaterally amended its admissions, apparently recognizing the validity of Hartford's argument. (R. 770).

itself invoked Change Order 67 as the basis for many of its allegations — most notably, its quasi-estoppel allegations — against Hartford. Having done so, the City cannot claim the benefit of *some* of the language in Change Order 67 without being bound by *all* of it. *See Nationwide of Bryan, Inc. v. Dyer*, 969 S.W.2d 518, 520 (Tex. App.—Austin 1998, no pet.) (noting that a contracting party "cannot pick and choose which provisions apply; she is bound by all of the contract terms").

Second, the plain terms of the construction contract confirm that Williams achieved substantial completion. The construction contract defines "substantial completion" as the "progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents *so the Owner can occupy or utilize the Work for its intended use.*" (PX 1A, ¶ 9.8.1) (emphasis added). Louis Stranahan, the project manager, admitted at trial that the City occupied and began utilizing the Eagle Pointe project by 2002:

> Q: "Substantial completion" means exactly what it says, that the project is substantially complete. Do you agree with that?
>
> A: Yes, sir.
>
> Q: And here, for purposes of substantial completion, it is the stage of the work where the project is sufficiently complete so that the owner can utilize or occupy it for its intended purpose. That's what the contract between Williams and the City says. Right?
>
> A: Yeah.
>
> . . .

Q: The City could and did occupy the Eagle Pointe Recreation Center in May, 2001?

A: Yes.

Q: And the City began utilizing the Eagle Pointe Recreation Center for its intended purpose at least by 2002. Right?

A: Oh, yes.

(4 T. 596-98). In fact, the City issued a certificate of occupancy for the project in May 2001. (PX 12).[9]

At trial, the City argued that Williams never achieved substantial completion on the Eagle Pointe project. (4 T. 533). Hartford objected to the City's efforts to offer evidence contrary to the City's admissions. (*Id.*). But even if the district court correctly overruled Hartford's objections, the City's evidence established only that Williams never finished all of the punchlist and warranty work on the project. (4 T. 534). Punchlist and warranty work that remain due on a project do not negate the fact of substantial completion. *Coastal Chem, Inc.*, 35 S.W.3d at 97. Thus, the City's evidence does not controvert the evidence that Williams substantially completed the Eagle Pointe project when the City occupied and began utilizing the project for its intended purpose in 2002. *See DeClaire v. G&B McIntosh Family L.P.*, 260 S.W.3d

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[9]The City issued an unconditional certificate of substantial completion on the wave pool in 2001. (DX 4; *see* DX 26; 4 T. 617). At a minimum, the City's certificate of substantial completion bars the City from recovering any damages relating to repairs on the wave pool. *See Commercial Union Ins. Co.*, 779 S.W.2d at 105-06. The damages that the City calculated for repairs on the wave pool represent at least $180,355.27 of the jury's $468,492.01 damages award. (DX 54, at 1).

34, 45 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (stating that under Texas substantive law, evidence seeking to vary or contradict the plain terms of a contract "has no legal effect").

Williams's substantial completion of the Eagle Pointe project discharged Hartford from its performance bond. Consequently, the City may not recover on its cause of action against Hartford for breach of the performance bond.

C. As a Matter of Law, Estoppel Cannot Resurrect a Contract that Has Already Expired

Because Williams's substantial completion discharged Hartford from its bond, the City no longer had any contract with Hartford after 2001. The City relies on the doctrines of promissory estoppel and quasi-estoppel to support its breach of contract claim against Hartford. Neither estoppel theory, however, can resurrect a discharged bond. Estoppel "does not create a contract right that does not otherwise exist." *Sun Oil Co. (Delaware) v. Madelay*, 626 S.W.2d 726, 734 (Tex. 1981). *See also "Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936 (Tex. 1973) (same rule for promissory estoppel); *Epstein v. Wendy's Int'l, Inc.*, No. 14-04-00704-CV, 2006 WL 535759, *4 (Tex. App.—Houston [14th Dist.] March 7, 2006, pet. denied) (not designated for publication) (same rule for quasi-estoppel).

Nor can estoppel resurrect a contract that terminated before the alleged acts of estoppel occurred. *Baker v. Penn Mut. Life Ins. Co.*, 617 S.W.2d 814, 815 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). In *Baker*, the insured on a life insurance

policy had defaulted on his premiums, and as a result, the policy had terminated. *Id.* at 814. The insurer, Penn Mutual, offered to reinstate the policy, but the insured died before he could accept the offer. *Id.* at 815. The plaintiff beneficiary filed suit to recover the policy proceeds, arguing that Penn Mutual's actions estopped it from asserting that the policy was no longer in effect. The court of appeals disagreed:

> No waiver or estoppel could restore validity to the contract after the subject matter of the contract, the insured, ceased to exist. Therefore, no liability could attach to Penn Mutual's actions as a matter of law.

Id. at 816. *See McIntire v. Armed Forces Benefit Ass'n*, 27 S.W.3d 85, 89-90 (Tex. App.—San Antonio 2000, no pet.) (holding that a defendant's actions in continuing to bill for coverage did not revive an insurance contract that had already expired).

Hartford's performance bond expired in 2001, when Williams substantially completed the Eagle Pointe project. No theory of estoppel can revive a contract that has already terminated. Accordingly, the district court erred in denying Hartford's motions for judgment as a matter of law.

III. The District Court Erred in Its Award of Attorney's Fees and Interest to the City

In the district court's amended final judgment, the district court awarded the City $218,747.65 in attorney's fees and $260,704.62 in prejudgment interest. (R. 2310-14). In addition, the district court awarded postjudgment interest at the rate of 0.49% per annum. (R. 2314). The district court's award of attorney's fees and interest is erroneous.

A. Because the City Cannot Prevail on the Merits of Its Bond Claim, the City Has No Right to Recover Any Attorney's Fees or Interest

If this Court reverses the district court's judgment on liability grounds, then it should likewise reverse the district court's award of attorney's fees, interest and costs. *Albright v. Good Shepherd Hosp.,* 901 F.2d 438, 440 (5th Cir. 1990); *see Pressey v. Patterson*, 898 F.2d 1018, 1026-27 (5th Cir. 1990) ("Since we have reversed the ruling upon which the liability of the City was based, the plaintiff cannot be a prevailing party, and the award of attorneys' fees must fall."). This would be true even if the Court were to reverse the underlying judgment only in part, as the award of attorney's fees would no longer be reasonable under the circumstances. *See, e.g., Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006).

B. The District Court's Award of $260,704.62 in Prejudgment Interest to the City is Excessive

The district court awarded $260,704.62 in prejudgment interest — an amount more than half again as much as the damages that the district court awarded to the City. (R. 2314).[10] The size of the district court's prejudgment interest award is a function of at least three factors.[11] First, the district court awarded prejudgment interest not only on the expenses that the City had actually incurred, but also on

[10]Texas law governs the award of prejudgment interest in a diversity case such as the present case. *See Harris v. Mickel*, 15 F.3d 428, 429 (5th Cir. 1994).

[11]A fourth factor contributing to the size of the award is the district court's ruling that prejudgment interest began to accrue on November 3, 2003, effectively granting the City a windfall for the four years it waited before filing its counterclaim against Hartford in 2007. (R. 2314).

estimated expenses that the City has yet to incur. Second, the district court calculated its award on the basis of historical interest rates rather than the rate in effect as of the date of judgment. Third, the district court calculated its award as compound interest rather than simple interest. In each instance, the district court erred.

1. *The City is Only Entitled to Recover Damages on Expenses that It has Actually Incurred, Not on "Estimates" of Future Expenses*

Interest is compensation "for the use, forbearance, or detention of money." TEX. FIN. CODE ANN. § 301.002(a)(4) (Vernon Supp. 2009). By definition, a plaintiff has not lost the use of money unless the plaintiff has actually spent the money. Thus, "[a] plaintiff is not entitled to recover prejudgment interest on damages until those damages have actually been sustained." *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 554 (Tex. 1985). To hold otherwise would overcompensate a plaintiff "by awarding interest on losses not yet incurred." *Id.* at 555. *See also KMG Kanal-Muller-Gruppe Deutschland GmbH & Co. KG v. Davis,* 175 S.W.3d 379, 397 (Tex. App.—Houston [1st Dist.] 2005, no pet.).[12]

The district court calculated its award of prejudgment interest on the jury's award of $468,492.01 in damages — the same amount that the City calculated as its

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[12]The Texas Supreme Court in *C&H Nationwide* ruled that former Article 5069-1.05 allowed plaintiffs to recover prejudgment interest on future damages in tort cases. *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 324-25 (Tex. 1994). Since *C&H Nationwide,* the Texas Legislature has enacted Chapter 304 of the Texas Finance Code, which forbids awards of prejudgment interest on future damages in tort cases. TEX. FIN. CODE ANN. § 304.1045 (Vernon Supp. 2009). The common law rule in *Cavnar* — which forbids awards of prejudgment interest on "losses not yet incurred" — remains applicable in breach of contract cases. *Davis*, 175 S.W.3d at 397.

damages in the spreadsheet of "preliminary warranty claims" that it sent to Hartford on November 3, 2003. (DX 54). Several of the items on the City's spreadsheet, however, were "estimates" of future expenses that the City had not actually incurred as of 2003. As Louis Stranahan testified:

> Q: Now, I'm asking, as of September 4th, 2003, if it was an estimate or a bid, does that mean the City has spent money or has not spent money?
>
> A: In most cases, it means the City had not spent money.

(4 T. 561). Even as of the time of trial, the City could offer no evidence confirming that it had spent any money on the "estimates" in its spreadsheet. (4 T. 619-21).

The items on the City's spreadsheet listed as "estimates" of future expenses total $190,565.00. (DX 54). The district court erred in calculating prejudgment interest on the entirety of the jury's $468,492.01 damages award; at most, the district court should have calculated prejudgment interest only on $277,977.01 in damages ($468,492.01 - $190,565.00).

2. *The City Is Only Entitled to Recover Prejudgment Interest at the Rate in Effect as of the Date of Judgment, Not on Past Interest Rates*

The prejudgment interest rate is the prevailing rate applicable *as of the date of judgment*. *See Farnsworth v. Deaver*, 147 S.W.3d 662, 666 (Tex. App.—Amarillo 2004, no pet.); *see also* TEX. FIN. CODE ANN. § 304.103 (Vernon Supp. 2009). Here, the district court calculated its award of prejudgment interest on the basis of a series of exhibits that the City attached to its motion requesting an award of prejudgment

interest. (R. 2147, 2231-45, 2249-50; *see* R. 2314-15). The district court did not use the interest rate applicable as of the date of judgment; instead, it used different rates for each month after November 2003, with the rates ranging from a low of 5.25% to a high of 10.25%. (R. 2250, 2314-15).

To justify the district court's use of a fluctuating set of interest rates, the City argues that Article 7 of the construction contract provides that "[p]ayments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below . . . . Prime Rate plus 2%." (DX 1, at Bates No. 383). Article 7 does not apply: the City did not file suit to recover payments due under the construction contract, but rather payments allegedly due under the performance bond.[13] Even if Article 7 were arguably applicable, nothing in Article 7 specifies the date or dates on which a court must calculate "Prime Rate plus 2%." Consequently, nothing in Article 7 is inconsistent with the rule that prejudgment interest rate is the prevailing rate applicable as of the date of judgment.

As of the date of the district court's amended final judgment, May 14, 2009, the prejudgment interest rate was 5%. (R. 2231; *see* www.occc.state.tx.us/pages/

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[13]The term "Contract," as used in Article 7, encompasses the contract documents identified in Article 9. (DX 1, at Bates Nos. 380, 384-86). Article 9 does not identify the performance bond as one of the contract documents. (*Id.*). To be sure, the performance bond incorporates the terms of the construction contract. (DX 2). That, however, does not mean that the term "Contract" in Article 7 must include a bond that Williams and the City chose not to include in the definition of "Contract." Article 7 says only that payments due under the "Contract" shall bear interest at the rate of prime plus 2%. *See Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 302 (Tex. 1993) (noting that a court should enforce an unambiguous contract as the contract is written).

int_rates/Index.html (Judgment Rate Summary)). According to the City's evidence, the "Prime Rate plus 2%" as of May 14, 2009, was 5.25%. (R. 2237, 2250). The district court erred in applying interest rates in excess of 5% or 5.25%.

3. *The City is Only Entitled to Recover Prejudgment Interest as Simple Interest, Not Compound Interest*

Under Texas law, prejudgment interest is computed as simple interest, not as compound interest. *See Johnson & Higgins, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998); *see also* TEX. FIN. CODE ANN. § 304.104 (Vernon Supp. 2009) ("Prejudgment interest is computed as simple interest and does not compound."). At the City's request, the district court here calculated its award of prejudgment interest as compound interest, improperly compounding its award *daily* to assess interest on top of previously accumulated interest. (R. 2147, 2250, 2314). This was error.

Citing Article 7 of the construction contract, the City argues that "prime rate means compounding." (R. 2147).[14] Even if Article 7 were arguably applicable (and it is not; *see supra* at 48), nothing in Article 7 suggests that the City is entitled to

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[14]To support its argument, the City cited *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, Civ. A. No. H-89-3203, 1994 WL 486743 (S.D. Tex. Feb. 17, 1994), *rev'd*, 64 F.3d 1553 (Fed. Cir. 1995), emphasizing that the court in *Exxon Chemical* "found compounding on a daily basis." (R. 2147). The court in *Exxon Chemical* actually awarded prejudgment interest compounded quarterly, not daily. *Exxon Chem. Patents, Inc.*, 1994 WL 486743, at *3. Nothing in the opinion in *Exxon Chemical* says that "prime rate means compounding." Nor is the opinion in *Exxon Chemical* even relevant: the court in that case applied the federal law governing prejudgment interest awards in patent cases, not the Texas law governing prejudgment interest awards in diversity cases. *Id.*

recover prejudgment interest calculated as compound interest. The term "prime rate" is *not* synonymous with compound interest. "Compound interest" is interest that accumulates both on unpaid interest and principal. *Spiller v. Spiller*, 901 S.W.2d 553, 557 (Tex. App.—San Antonio 1995, writ denied). The "prime rate" is a composite rate reflecting the lowest interest rate charged by certain banks on loans. *See, e.g., In re Tirey*, 350 B.R. 62, 69 (S.D. Tex. 2006). As its name implies, the term "prime rate" refers only to the *rate*, not to whether interest is simple or compound.

The district court's award of prejudgment interest as compound interest violates established Texas law. This Court should either modify the district court's award or remand this case for a proper calculation of prejudgment interest.

CONCLUSION AND PRAYER

The district court erred in denying Hartford's motions for judgment as a matter of law: the evidence conclusively established that the one-year statute of limitations in Section 2253.078 of the Government Code barred the City's bond claim; and as a matter of law, Hartford had no liability to the City on its performance bond after Williams substantially completed the Eagle Pointe project. Accordingly, Hartford respectfully requests that this Court reverse the district court's judgment and render judgment that the City recover nothing. In the alternative, Hartford requests that the Court modify the district court's prejudgment interest award or remand this case either for a new trial or for a proper calculation of prejudgment interest.

Respectfully submitted,

/S/

By:__________________________________

Byron C. Keeling
Texas Bar No. 11157980
Ruth B. Downes
Texas Bar No. 06085330
KEELING & DOWNES, P.C.
600 Travis, Suite 6750
Houston, Texas 77002
Telephone: (832) 214-9900
Facsimile: (832) 214-9908

James D. Cupples
Texas Bar No. 05252300
Sonia M. Mayo
Texas Bar No. 24002552
WILLIAMS, CUPPLES & CHAPMAN, L.L.P.
1331 Gemini, Suite 201
Houston, Texas 77058
Telephone: (281) 218-8888
Facsimile: (281) 218-8788

Attorneys for Appellant Hartford Fire Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct printed and electronic copy of this Brief of Appellant has been served on the following counsel of record for Appellee City of Mont Belvieu, Texas, on this 18th day of September, 2009, via hand delivery:

Mr. J. Grady Randle
Mr. Christopher L. Nichols
Randle Law Office Ltd., L.L.P.
Memorial City Plaza II
820 Gessner, Suite 1570
Houston, Texas 77024-4494

/S/

____
Byron C. Keeling

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/S/

Byron C. Keeling
Attorney for Appellant

Dated: September 18, 2009