IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00790 COA

DENOTEE MARTIN CONTRACTORS, INC.

APPELLANT

v.

CARR OIL COMPANY, BANK OF NEW ALBANY, MISSISSIPPI STATE TAX COMMISSION, AND BILL KIZER

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: UNION COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RODNEY E. SHANDS

ATTORNEY FOR APPELLEES:

LESTER F. SUMNERS

NATURE OF THE CASE: CONTRACT - PRIORITY OF JUDGMENT LIENS AND LIENS TO SECURE ASSIGNMENTS PER UNIFORM COMMERCIAL CODE IN GARNISHMENT ACTION

TRIAL COURT DISPOSITION: RENDERED JUDGMENT FOR SECURED CREDITORS OF SUBCONTRACTOR AGAINST GENERAL CONTRACTOR'S CLAIM FOUND TO BE UNSECURED PURSUANT TO THE UNIFORM COMMERCIAL CODE

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

COLEMAN, J., FOR THE COURT:

This case began as a simple garnishment action by Carr Oil Company (Carr Oil) against Denotee Martin Contractors, Inc. (Martin) to obtain a portion of some money that Martin owed to Bill Kizer (Kizer). Martin owed Kizer for work Kizer had done as Martin's subcontractor on a road construction project in Pontotoc County. Because the Mississippi State Tax Commission, the Bank of New Albany, and Kizer had competing claims to the money that Martin owed Kizer, Carr Oil moved to add these three parties to the garnishment proceeding. The trial court sustained Carr Oil's motion, and after Bank of New Albany, the State Tax Commission, and Kizer were made parties to this litigation, Martin filed a cross-claim against Kizer. The trial court conducted a bench trial of the issues, which were (1) the extent to which the Uniform Commercial Code (UCC) determined the priorities of the various parties' claims and (2) whether Kizer had breached his subcontract with Martin.

The trial court held that a certain post-contractual agreement between Martin and Kizer was Kizer's assignment to Martin of the proceeds from another Martin-Kizer subcontract for work on a road construction project in Lafayette County. The trial court found that Martin's failure to file a UCC notice of lien, or financing statement, on this assignment rendered it's assignment unsecured. Thus, the court held, Martin's claim against Kizer based on this post-contractual agreement fell last in priority among all four competing claims. The sum of the other three superior claims was $116, 684.06. Martin owed Kizer $116,894.50. Thus, if the three other claims which totaled $116,684.06 were superior to Martin's claim, only $210.44 was Martin's.

Martin now appeals from the trial court's ruling that its claim had last priority. Because we agree that the post-contract agreement between Martin and Kizer was an assignment and was therefore subject to the recording requirements of the Uniform Commercial Code, we affirm that part of the trial court's judgment, but we reverse the trial court's dismissal without prejudice of Martin's cross-claim against Kizer.

I. Facts

A. Relationship between Martin and Kizer

Martin as general contractor and Pontotoc County entered into a contract for a road construction project in Pontotoc County (the Pontotoc project). On October 17, 1989, Martin and Kizer entered into a subcontract in which Kizer agreed to perform the "dirt work" and other construction on this project. Originally, the Pontotoc project was to be completed within three hundred and twenty calendar days, but the Pontotoc County later extended this period by an additional forty calendar days. By February 2, 1990, Martin had contracted with the Mississippi State Highway Department to serve as the general contractor on another road construction project in Lafayette County (the Lafayette project). On February 2, 1990, Martin and Kizer entered into a second subcontract by which Kizer agreed to perform the "dirt work" and other construction on the Lafayette project.

Kizer began working on the Pontotoc project in October, 1989, but he stopped working on this project in December, 1989. Kizer did not resume work on the Pontotoc project until June, 1990,

when he put one employee back to work on the Pontotoc project for several days. However, on or about November 29, 1990, Kizer finally abandoned the unfinished Pontotoc project. After Kizer's abandonment of the project, a Pontotoc County supervisor attempted to work on the project.

Martin sought an injunction from the federal court against the Pontotoc County Board of Supervisors' interference with its completion of the Pontotoc project. In response to the federal court's urging Martin and the board of supervisors to resolve their differences short of further litigation, Martin and Pontotoc County agreed to replace Kizer as the Pontotoc project's "dirt work" subcontractor. To effect the agreement, Kizer and Martin then entered into an agreement, dated June 14, 1991, the entirety of which read as follows:

> Date: June 13, 1991
>
> To: Bill Kizer
>
> Kizer Contractors, Inc.
>
> Route 1, Box 289
>
> Myrtle, MS 38650
>
> Re: CDBG #8-1125-058-CE-01
>
> Pontotoc County, MS
>
> This agreement entered into between Denotee Martin Contractors, Inc., (noted hereafter as Prime Contractor) and Bill Kizer dba Kizer Contractors, Inc. (noted hereafter as Subcontractor). Be it understood that the Subcontractor is currently working on Project No. CDGB#8-1125-058-CE-01 under a previous agreement. Be it further understood that on June 17, 1991, the Prime Contractor will move to the aforementioned project certain items of construction equipment and certain skilled workmen as he deems fit to complete the aforementioned project in a timely manner. The costs incurred for the additional labor will be charged against any monies due to the Subcontractor as may be required to complete this project. This in no way voids the previous agreement the Subcontractor is now working under.
>
> This agreement entered into on the 14th day of June 1991 between Denotee Martin dba Denotee Martin Contractors, Inc., and Bill Kizer dba Kizer Contractors, Inc.
>
> S/Bill Kizer S/Denotee Martin Bill Kizer, Owner Denotee Martin, President

This agreement freed Kizer to work exclusively on the Lafayette project, and Martin finished the Pontotoc project without Kizer's further help. Martin and Kizer also finished the Lafayette project.

B. Kizer's creditors

On November 27, 1987, the State Tax Commission (Commission) enrolled a sales tax lien against Kizer in the amount of $47, 631.46 on the judgment roll of Union County. On August 5, 1991, a writ of garnishment was served on Martin in the amount of $17,793.41, pursuant to this lien. Kizer paid $2,586.79 on this obligation on or about November 7, 1991, and $3,013.27 on November 26, 1991. These two payments plus the interest which had accrued on the unpaid balance resulted in an unpaid balance of $14,587.11. On August 23, 1991, the Union County Circuit Court granted a default judgment to Carr Oil against Kizer for $52,873.11. By the time that this case was tried, this amount, along with accrued interest, had increased to $61,906.20. Bank of New Albany had loaned Kizer fifty thousand dollars in September, 1990, to alleviate Kizer's cash flow problem while he was working on the Pontotoc project. Because it appeared to be in Martin's interest for Kizer to continue working on the Pontotoc project, Donatee Martin encouraged the bank to make the loan to Kizer. As security for this loan, Kizer assigned his subcontract for the Pontotoc project to the Bank of New Albany. Martin subsequently executed an acknowledgment of Kizer's assignment. This acknowledgment read as follows:

> Denotee Martin Contractors, Inc., by and through the President, Denotee Martin, and pursuant to authority given to him as such President, does hereby acknowledge the assignment of the Rental Agreement dated October 17, 1989 between Denotee Martin Contractors, Inc. and Kizer Construction Co. to the Bank of New Albany, New Albany, Mississippi as collateral on a Promissory Note between Kizer Construction Co. and said Bank and does hereby agree and consent to make the Bank of New Albany a joint payee with Kizer Construction Co. on all future payments under said Rental Agreement until notified by said Bank that said Note has been satisfied. Denotee Martin Contractors, Inc., does agree to be responsible to said Bank of New Albany to the extent of the sum of any payment for which the Bank is not listed as a joint payee. In the event Denotee Martin Contractors, Inc., listed as Party One in said Rental Agreement, takes over for Kizer due to any of the conditions and/or failures of Kizer, listed as Party Two in said Agreement, to do or perform any act or work or for failure to do or perform any act or work, and no further payments are due Kizer, then Denotee Martin Contractors, Inc. shall have no further responsibility to Bank for any remaining balance due Bank by Kizer. Denotee Martin Contractors, Inc. is not in any way guaranteeing nor incurring liability on the note between Kizer and Bank other than making Bank a copayee as and when Kizer is paid by Denotee Martin Contractors, Inc. for work performed under this Rental Agreement.

Dated this the 7th day of September, 1990.

DENOTEE MARTIN CONTRACTORS, INC.

BY: S/Denotee Martin

Denotee Martin, President

Bank of New Albany filed a UCC-1 Financing Statement in the Uniform Commercial Code Index in the office of the Union County Chancery Clerk on September 11, 1990, to secure Kizer's assignment of the Pontotoc subcontract to the bank.

More than one year later, Kizer executed an assignment of his interest in the Lafayette project subcontract to Bank of New Albany. The text of Kizer's assignment of his Lafayette project subcontract read as follows:

ASSIGNMENT OF CONTRACT PROCEEDS

LAFAYETTE COUNTY CONTRACT #BR 0848(6)A

GENERAL CONTRACTOR: Denotee Martin Contractors, Inc.

New Albany, MS

SUBCONTRACTOR Bill Kizer

Myrtle, MS

> I, Bill Kizer, having been contracted by Denotee Martin Contractors, Inc., to perform certain jobs associated with the above numbered contract in Lafayette County, Mississippi, do hereby assign to Bank of New Albany, for security on loans presently and heretofore afforded me, all proceeds derived from execution of jobs associated with said contract, and hereby direct Denotee Martin Contractors, Inc., to name Bank of New Albany as co-payee on any and all future payments under terms of said contract. I, also, relinquish the privilege to cancel this assignment with the expressed intent being that, Bank of New Albany is now owner of all future payments, and shall apply all payments on my loans with said institution; and that Bank of New Albany, only, has the authority to cancel this assignment.

ATTEST: Dated: 11-12-91

S/ James R Collins

James R Collins, Senior Vice Pres.

S/Bill Kizer

Bill Kizer

Bank of New Albany filed a UCC-1, Financing Statement, in the Uniform Commercial Code Index in the office of the Union County Chancery Clerk on November 15, 1991, to secure its interest in Kizer's assignment of his Lafayette subcontract to the bank.

II. Litigation

On September 4, 1991, Carr Oil filed a suggestion of garnishment in which it stated that Martin was indebted to Kizer. The circuit court clerk then issued a writ of garnishment, which was served on Martin on September 6, 1991. On September 13, 1992, Martin filed its answer to the writ of garnishment, in which it stated the following:

> Denotee Martin Contractors, Inc., is indebted to Defendant for equipment rental in the Lafayette County Project No. BR-0848(6)A in the current sum of Ten Thousand Three Hundred Forty-Seven Dollars Fifteen Cents ($10,347.15). This sum is due but not yet payable. A prior garnishment exists on this sum from the Mississippi Tax Commission which will take precedence over this garnishment. Future sums will probably be due in the future depending on certain aspects of the contract between the parties and will be subject to previous garnishments. Defendant is engaged in another project with Garnishee being Pontotoc County Road Project Number CDGB-#8-1125-058-CE-01. All payments under this contract have been assigned and made jointly payable to the Bank of New Albany in New Albany, Mississippi and thus are not subject to garnishment without the consent of said joint payee.

On September 8, 1992, almost one year after it filed its first suggestion of garnishment, Carr Oil filed a second suggestion for garnishment demanding a total of $58,084.67. The circuit court clerk again issued a writ of garnishment, which a Union County deputy sheriff again served on Martin. On October 5, 1992, Martin filed its answer to this second writ of garnishment. This time the answer read as follows:

> Denotee Martin Contractors, Inc., is indebted to Defendant for equipment rental in the Lafayette County Project No. BR-0848(6)A in the current sum of Twenty-three Thousand

> Seven Hundred Ninety-six Dollars ($23,796). This sum is due and payable pursuant to the liens, garnishments, and agreements between various payees. A prior Garnishment exists on this sum from the Mississippi State Tax Commission which will take precedent over this Garnishment. Garnishee has, pursuant to Contract and Agreement, withheld retainage for expenses incurred in this job as well as a related job in Pontotoc County. The retainage is withheld pursuant to Contract and Agreement as stated hereinabove, primarily, and set off and/or recoupment additionally. Garnishee anticipates that Defendant may be entitled to additional future payment the amount of which is unknown at this time on said job.
>
> Garnishee has the payment as stated hereinabove in his possession at this time and is awaiting direction and agreement from the various Garnishors as to the amount of payment to each party.

After Martin filed its answer to the second writ of garnishment, Carr Oil moved to add Kizer, the State Tax Commission, and the Bank of New Albany as parties to the action. In its motion, Carr Oil stated on information and belief that Martin was withholding an additional $68,534 by way of satisfaction of an alleged debt owed by Kizer to Martin on a separate transaction between it and Kizer. Carr Oil further alleged that Kizer disputed that he owed Martin the amount of $68,534 or any other amount and that Kizer therefore had "a claim to some part or all of the funds potentially subject to the garnishment." Carr Oil advised the Court of the Bank of New Albany's competing claim to some portion of the debt between Martin and Kizer and that this competing claim resulted from Kizer's November 13, 1991, assignment of his right to payment on the Lafayette County project subcontract. Carr Oil further alleged that Bank of New Albany had "perfected said assignment by filing notice thereof in the UCC filing books of the Union County Chancery Clerk." Carr Oil averred that Bank of New Albany's claim exceeded thirty thousand dollars.

In apparent response to Carr Oil's motion to add parties, Martin Contractors filed an amended answer to the garnishment petition in which it stated:

> [T]he Agreement . . . was between Defendant [Kizer] and Garnishee and was in the nature of an assignment from Defendant to Garnishee."

Martin also attached a copy of the June 14, 1991, agreement between it and Kizer. Martin further stated that:

> [T]he agreement . . . predated all garnishments and liens against [Kizer] and . . ., pursuant to the original Contract and subsequent Agreement (assignment) between the parties, the only funds which are subject to garnishment are the funds to which [Kizer] has an interest and in which his right to recover has matured, being the sum of Twenty-three Thousand Seven Hundred Ninety-six Dollars ($23,796).

Notwithstanding Martin's objections to Carr Oil's motion for joinder, the trial court sustained the motion, which made Kizer, the State Tax Commission, and the Bank of New Albany parties to the garnishment action. Kizer then filed his Contest of Garnishee's Answer by Defendant in which he alleged that Martin owed him $92,330.00 rather than the $23,796.00 that Martin admitted in its amended answer. As authority for asserting this position, Kizer cited Section 11-35-47 of the Mississippi Code of 1972. Subsequently, Carr Oil also filed a contest of garnishment answer in which it alleged, *inter alia,* that Martin owed Kizer $92,330.00 rather than $23,796.00.

Bank of New Albany filed its Response or Claim of Bank of New Albany in which it asserted its claim against the funds that Martin had received for the Lafayette project in an amount sufficient to retire its loan, which was then $32,485.00. Bank of New Albany asserted that it had "assignment of all contract proceeds due on both the Pontotoc and Lafayette County jobs perfected by acknowledgment from Martin as to the Pontotoc job and by a UCC filing on November 13, 1991, as to the Lafayette County job, with actual notice of such filing being delivered to Martin on a timely basis."

Martin filed another answer in which it again alleged that:

> [Kizer] had previously assigned future funds which might become due [Kizer] to [Martin] by a valid, written *assignment* and that [Kizer] had defaulted under the terms of the original Rental Agreement Contract between [Kizer] and [Martin]. (emphasis added)

Martin also alleged that Kizer was "contractually obligated to [it] for retainage . . . ."

Martin also responded to Kizer's contest of garnishee's answer and filed a cross-claim in which it affirmatively alleged that "[Kizer] had previously *assigned* all future funds due [it] under the terms of a Rental Agreement, [which] . . . [Kizer] failed to complete in a timely fashion, his portion of the Contract between the parties." (emphasis added). Martin then included in this pleading a cross-claim against Kizer for breach of his Pontotoc County subcontract with it. Once more Martin referred to the agreement dated June 14, 1991, in which Kizer *assigned* future funds to which he might be entitled unto Martin.

As its final pre-trial response to all of the foregoing pleadings and motions, Martin filed one last amended answer in which it reduced the amount of its debt to Kizer from $23,796.00, as it had pleaded in an earlier amended answer, to $11,750.38. It explained that it had incurred $105,144.42 in excess cost for completing the Pontotoc project, rather than the $68,534.00 that it had originally pleaded. Martin also explained that the State Highway Commission had paid the previously withheld retainage on the Lafayette project and that it had credited Kizer with $24,564.88 as his share of the retainage. Thus, Kizer had earned a total credit of $116, 894.50 as his share of the income from the Lafayette project. Martin then proposed to debit Kizer's share of $116, 894.50 for its excess cost of completing the Pontotoc project in the amount of $105,144.42, leaving a balance of $11,750.38. Put another way, Martin proposed that Carr Oil, Bank of New Albany, and the State Tax Commission should accept $11,750.38 as the entire balance of its obligation to them as a result of the garnishment.

On June 16, 1994, after a bench trial, the court rendered its judgment. The court found that:

> [T]he instrument signed on or about June 14, 1991, which Martin argues constituted an assignment by Kizer to Martin of all payments from the Lafayette County job for expenses Martin incurred in finishing the Pontotoc County job, is a document governed and controlled by the provisions of the Uniform Commercial Code.
>
> The Court further finds that since Martin did not perfect his interest by following the requirements of the Mississippi Uniform Commercial Code, that his interest is subordinate to the other parties who did perfect their interest pursuant to Mississippi Uniform Commercial Code filing requirements or by garnishment proceedings, etc. The Court, therefore, finds that the Mississippi Tax Commission has first priority. Carr Oil Company has second priority, and that Bank of New Albany has third priority on the money earned by Kizer under his subcontract with Martin on the the Lafayette County project, which at the time of the hearing was in the amount of $116,894.50.
>
> It is therefore ordered and adjudged that the Mississippi State Tax Commission have and receive the sum of $16,935.16.
>
> That Carr Oil Company have and receive the sum of $64,146.20.
>
> That the Bank of New Albany have and receive the sum of $38,602.70.
>
> It is further ordered and adjudged that the Court does not at this time make any ruling regarding the contested claim of Martin for any alleged losses suffered by virtue of the Pontotoc County project to which it might be entitled to recover from Kizer, and that part of this case is dismissed without prejudice as being rendered moot by this proceeding which was limited to the determination of the priority of competing rights to a fixed sum of money.

After the trial court rendered its judgment, Martin filed a motion for a new trial or in the alternative, amendment of judgment, which the trial court denied.

III. Issues and the law

Martin raises thirteen issues in its appellate brief. These issues are as follows:

> ISSUE I. Whether the trial court erred in finding that the document between General Contractor and Subcontractor was an instrument governed by the UCC rather than a contract modification addendum between two private contracting parties?
>
> ISSUE II. Whether the trial court erred in determining that the UCC umbrella extended to contracts between parties simply because they entered into more than one contract?

ISSUE III. Whether the trial court erred in not determining that MCA 75-9-104(f) was applicable even if the instrument between General Contractor and Subcontractor was governed by the UCC?

ISSUE IV. Whether the trial court erred in not finding that MCA 75-9-104(i) was applicable as an exception to the recording requirement of the UCC in this case even if the UCC was applicable to the contract?

ISSUE V. Whether the trial court erred in not finding that the instrument between the General Contractor and Subcontractor fell within the exception contained in MCA 75-9-302(1)(a) even if governed by the UCC?

ISSUE VI. Whether the trial court erred in not finding that MCA 75-9-318 should apply as an exception even if the instrument between the General Contractor and Subcontractor modifying earlier contracts was governed by the UCC?

ISSUE VII. Whether the trial court erred in finding that funds held by General Contractor had inured to the Subcontractor's benefit thus putting the funds within the grasp of creditors?

ISSUE VIII. Whether the trial court erred in overruling Appellant's objection to the Circuit Court's joinder of parties and jurisdiction of the Circuit Court to litigate, in a granishment proceeding, contract issues between a general contractor and a subcontractor and when creditors pleadings sought equitable relief?

ISSUE IX. Whether the trial court erred in not applying equity as originally pled by garnishees in awarding large judgments to Appellees?

ISSUE X. Whether the trial court erred in finding that the Appellees, despite approving General Contractor's previous deductions from Subcontractor's draw in accordance with the contract agreement, were entitled to priority over the General Contractor?

ISSUE XI. Whether the trial court erred in finding that the Bank was entitled to priority

over General Contractor despite the fact that the Bank subsequently sought and obtained a Financing Statement from Subcontractor after learning of the prior existence of the contract addendum agreement between Subcontractor and General Contractor?

ISSUE XII. Whether the trial court erred in overlooking the evidence that the General Contractor stood in the position of surety for the Subcontractor and is entitled to be indemnified for sums paid to laborers, materialmen, equipment, and other expenses in completing the subcontract for Subcontractor?

ISSUE XIII. Whether the trial court erred in refusing to consider the Crossclaim filed by General Contractor?

This Court considers each of Martin's thirteen issues in the order in which he presented them to it.

A. ISSUE I. Whether the trial court erred in finding that the document between General Contractor and Subcontractor was an instrument governed by the UCC rather than a contract modification addendum between two private contracting parties?

Martin argues that the only way that its June 14, 1991, agreement with Kizer could be found to be an instrument governed by the UCC, would be if the document had been labeled as a "simple lien assignment." Martin argues that if this agreement is not an assignment, then the UCC does not apply.

The trial judge's determination that the June 14 agreement was an assignmmet subject to the UCC depended on his interpretation of that agreement and the other relevant contracts and agreements. In *Dennis v. Searle,* 457 So. 2d 941, 945 (Miss. 1984), the Mississippi Supreme Court stated:

> Where a contract is clear and unambiguous, its meaning and effect are matters of law which may be determined by the court. On the other hand, where the contract is ambiguous and its meaning uncertain, questions of fact are presented which are to be resolved by the trier of the facts after plenary trial on the merits. (citations omitted).

Martin does not argue that the terms of the subcontracts or the June 14 agreement are ambiguous. If the instruments are not ambiguous, then the trial court may interpret them as a matter of law. The terms of June 14 agreement were interpreted by the trial judge to constitute an assignment, and we cannot reverse this determination unless we become persuaded that he erred as a matter of law.

We note with considerable interest that in some of its initial pleadings filed at the outset of this litgation, Martin referred to the ageement as "an assignment." We also note that in his opening argument before the trial judge, Martin's counsel made the following assertions:

> The Bank of New Albany in late 1990 after Mr. Kizer was obligated to Mr. Martin under these two subcontracts, made a loan to their customer, Bill Kizer, for which Bill Kizer assigned his interest under a Pontotoc County project only. That was acknowledged by Denotee Martin Contractors, Incorporated; and payments made subsequent . . . to that acknowledgment that the bank would be made co-payee which was done. After that time the defendant, Mr. Kizer, before any other liens or garnishments attached, made an agreement which is *in the nature of an assignment*, we contend, to Denotee Martin Contractors that he was having to leave the Pontotoc project for underperformance and was going to the Lafayette County project which he was equally obligated on; and he was assigned or agreed to any future monies that he might be due would be payable to Denotee Martin Contractors for Denotee Martin Contractors taking up his portion of the Pontotoc subcontract and completing it for him.
>
> On August -- seventy days later the Mississippi State Tax Commission gives a lien. Excuse me, issues a garnishment. They're number two.
>
> A month later from that on September 4, 1991, Carr Oil issues a garnishment. They're number three.
>
> In November 1991 the bank issues a notice of a lien of assignment that Kizer had given on the Lafayette County project, which we contend he had assigned back in June of '91. They're number four. *The question is priority of lien*. (emphasis added).

Notwithstanding its previous descriptions of the June 14 agreement as an assignment, Martin now contends that it was not an assignment but was instead a "contractual addendum agreement." Martin argues that its change of appellation from an "assignment" to a "contractual addendum agreement" occurred because the June 14 agreement was "a contractual modification agreement between two contracting parties that were already in a contractual relationship with each other as to how proceeds from one would apply to the other." Martin asserts that this agreement "was a contractual transfer of the right to monies pursuant to an existing contract between the parties and a transfer of funds to satisfy an indebtedness that existed as a result of the failure to perform under the contract."

In *Carr & Howard Construction Co. v. Panhandle State Bank*, 347 S.W. 2d 793, 795 (Tex. Civ. App. 1961), the Texas Court of Civil Appeals defined "assignment" as follows: "[t]he term 'assignment' designates the act by which one person causes to vest in another his right or property or interest therein." The Mississippi Supreme Court has also stated:

> To constitute an assignment there must ordinarily be a valid and perfected transaction between the parties wherein the intent to vest the assignee with a present right in the thing assigned is manifest, and there must be a present *transfer* of the assignor's right, which is so far complete as to deprive the assignor of his control over the subject of assignment.

Service Fire Ins. Co., v. Reed, 220 Miss. 72 So. 2d 197, 199 (1954) (emphasis added) (citations

omitted).

The first subcontract executed on October 17, 1989, was for the Pontotoc project. The parties to the primary contract for the Pontotoc project were Pontotoc County and Martin. The site of the project was in Pontotoc County. The second Martin-Kizer subcontract, which was for the Lafayette project, was executed on February 2, 1990. The parties to the primary contract for the Lafayette County project were Martin and the State Highway Department. Lafayette County was the site of the second project. Kizer was to receive different amounts of compensation for performing similar, but not identical, dirt and pipe-laying work on the two different projects.

The subject of the agreement dated June 14, 1991, was the Pontotoc project. The testimony of Denotee Martin and other witnesses established that Martin and Kizer made this June 14 agreement to mollify the Pontotoc County Board of Supervisors' dissatisfaction with Martin's difficulties in completing the Pontotoc project. By that time Denotee Martin had filed an action in the federal district court to enjoin a Pontotoc County supervisor's interference with his company's completion of its contract with Pontotoc County. Denotee Martin testified that Kizer and Martin Contractors made this June 14 agreement in response to the federal judge's encouragement to Martin and the board of supervisors that they resolve their differences without resorting to further litigation.

The phrase "Lafayette County" appeared nowhere in the June 14 agreement. The June 14 agreement also did not state that Kizer would continue to work full time on the Lafayette County project. The agreement was silent about the Lafayette project as well as Kizer's responsibility as a subcontractor for Martin on that project. However, the June 14 agreement stated that "[t]he costs incurred for the additional labor will be charged *against any monies due to the Subcontractor* as may be required to complete this project." (emphasis added). We find that this statement communicated Kizer's effective transfer of his right, title, and interest in and to "any monies due to [him] as may be required to complete this project." Because it transferred Kizer's interest in "any monies due him" from any project, it necessarily served the function of Kizer's assigning to Martin his interest in "any monies due him" from the Lafayette County project. Thus, this Court finds that the June 14 agreement was an assignment as that word has been defined and employed by the Mississippi Supreme Court.

Section 75-9-102 of the Mississippi Code determines whether the June 14 agreement is covered by the UCC. Included within its terms are assignments which are created by contract. We therefore hold that the June 14 agreement, which we have interpreted to have been Kizer's assignment of his income from his subcontract on the Lafayette County project to Martin, was subject to the UCC. We thus affirm the trial court's determination that the June 14 agreement was governed and controlled by the provisions of the UCC and conclude that Martin's argument that the June 14 agreement was a "contractual addendum agreement," -- and not an agreement -- fails. We affirm the trial court's adjudication as a matter of law that the June 14 agreement was an assignment and that it was subject to the provisions of the Uniform Commercial Code.

> **B. ISSUE II.** Whether the trial court erred in determining that the UCC umbrella extended to contracts between parties simply because they entered into more than one contract?

The court’s judgment does not specifically determine "that the UCC umbrella extended to contracts between parties because they entered into more than one contract." However, to support its position on this issue, Martin’s brief contains the following argument:

> The contract addendum agreement entered into in June, 1991, is the bridge that connects the Pontotoc contract and the Lafayette contract. Pursuant to the contract addendum agreement between the parties executed in June, 1991, General Contractor retained the sum of $105,144.42 which he had received pursuant to the general contract on the Lafayette County project and applied the same to the indebtedness incurred for and on behalf of the Subcontractor in completing the subcontract on the Pontotoc County project between the parties.

We reject the proposition that the June 14 agreement "is the bridge that connects the Pontotoc contract and the Lafayette contract" because nowhere in the June 14 agreement is the Lafayette project mentioned. Instead, only the Pontotoc project is the subject of the June 14 agreement. The relationship between the June 14 agreement and the Lafayette project is only that Kizer assigned to Martin that portion of his compensation for completing the Lafayette project as Martin determined was necessary to reimburse it for its "costs incurred for the additional labor" required to complete the Pontotoc project. That those costs were to be charged "against any monies due to the Subcontractor" was broad enough to include more than just Kizer’s payment for his completing his subcontract for the Lafayette project.

A second reason to reject Martin’s argument that the June 14 agreement "bridged" the two subcontracts so that it became a "contract addendum agreement" for the Lafayette project is that Kizer’s earlier assignment of his interest to Bank of New Albany in the Pontotoc project had become void. Kizer had abandoned the Pontotoc project to Martin. Martin’s acceptance of Kizer’s assignment to the Bank of New Albany of the Pontotoc project provided:

> In the event Denotee Martin Contractors, Inc., . . . takes over for Kizer due to any . . . failures of Kizer to do or perform any act or work or for failure to do or perform any act or work, and no further payments are due Kizer, then Denotee Martin Contractors, Inc. shall have no further responsibility to Bank for any remaining balance due Bank by Kizer. Denotee Martin Contractors, Inc. is not in any way guaranteeing nor incurring liability on the note between Kizer and Bank other than making Bank a copayee as and when Kizer is paid by Denotee Martin Contractors, Inc. for work performed under this Rental Agreement.

Martin does not dispute that Kizer agreed to leave the Pontotoc project so that Martin might complete it. Martin’s agreement that he would not be liable for any further payment to the Bank of New Albany on Kizer’s assignment to the bank if Kizer failed to complete his work on the Pontotoc County project clearly left Kizer’s later assignment of his Lafayette County project subcontract as the

only effective assignment to Bank of New Albany. Thus, if the June 14 agreement ever built a bridge between the two subcontracts for the Pontotoc County and the Lafayette County projects as Martin Contractors argues, Kizer's abandonment of the Pontotoc County project demolished that bridge under the terms of Martin's acceptance of Kizer's assignment of his Pontotoc County project to the bank. The June 14 agreement was not a bridge between Kizer's and Martin Contractors' two subcontracts for the Pontotoc and the Lafayette County projects.

> **C. ISSUE III.** Whether the trial court erred in not determining that MCA 75-9-104(f) was applicable even if the instrument between General Contractor and Subcontractor was governed by the UCC?

On this issue, Martin Contractors argues that Kizer "is specifically transferring a right of payment, *under a contract*, to General Contractor [Martin Contractors], who is also to do the performance under the contract. Thus, Section 75-9-104(f) of the Mississippi Code exempts the June 14 agreement from the UCC's application to it. Section 75-9-104(f) reads as follows:

> This chapter does not apply
>
> (f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a pre-existing indebtedness . . . .

Miss. Code Ann. § 75-9-104(f) (1972).

Martin Contractors relies on *Frazier v. National Electric Supply Co.*, 362 So. 2d 609 (Miss. 1978) to support its position on this issue. In *Frazier*, a general contractor, C E. Frazier Construction Company, had the general contract for the construction of the Student Union Center at Delta State University. *Id*. at 609. After he had completed the project, Frazier retained $13,185.18 under the provisions of his subcontract with Edward M. Jones d/b/a Jones Electric Company because Jones had not satisfactorily fulfilled the terms of his subcontract. *Id.* Jones had assigned his right to the retainage to National Electric Supply Company, Inc., a creditor to whom Jones was indebted. *Id.* at 609-10. The apparent purpose of Jones' assignment to National Electric was to provide security for another job in which Jones was involved and for which National Electric had advanced funds to Jones. *Id.* The subcontract between Frazier and Jones contained a provision that Jones could "not assign this subcontract or any amounts due or to become due thereunder without the written consent of [Frazier]." *Id.* at 610.

National Electric sued Frazier, Jones, and Frazier's bonding company, United States Fidelity and Guaranty Company (USF&G), for the retainage owed Jones but assigned to National Electric. *Id.* One of Frazier's defenses to the suit was the provision in Jones' contract which prohibited the assignment. *Id.* The trial court entered judgment for National Electric against Frazier, USF&G, and

Jones. *Id*. Frazier and USF&G appealed. *Id.* The issue which involved Section 75-9-104 was whether the prohibition against assignment contained in the subcontract violated the chapter on secured transactions of the Uniform Commercial Code. *Id.* The Mississippi Supreme Court held that "[s]uch a prohibition against assignment is not invalid under the chapter on sales or under any other provision of the Commercial Code." *Id.* at 611. The supreme court held that "[t]he attempt to assign the retainage to National was invalid and that the suit of National against Frazier and USF&G should have been dismissed." *Id.*

It is true that the Mississippi Supreme Court permitted the contractor to keep the funds previously withheld from subcontractor and his subsequent assignees and creditors, but the supreme court's reason for doing so was the nonassignability of the subcontract. It was not because the subcontract was exempt from the application of Section 75-9-104 by the operation of Section 75-9-104(f) as Martin argues.

The operative clause in Section 75-9-104(f) is: "a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract." In *First National Bank v. Autrey*, 673 P.2d 448 (Kan. Ct. App. 1983), one of the few cases to address this issue, the Kansas Court of Appeals opined:

> The Bank first contends that K.S.A. 84-9-104(f) excludes the assignment from coverage under Article 9 of the Uniform Commercial Code. This provision excludes a "transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract." The Bank's claim is that since it was to pay under the compensation contract and also to receive the payments via the assignment, this exclusion applies. The Kansas Comments to this section make clear, however, that this exception applies only to situations in which the assignor both delegates a duty to perform and assigns the right to payment to the same person. K.S.A. 84-9-104, Kansas Comment 1983, subsection (f). *See also* Clark, Law of Secured Transactions under the Uniform Commercial Code, ¶ 1.8(6)(c) (1980). Here, Martin did not delegate a duty to perform and the Bank's contention lacks merit.

Id. at 449-50. We readily acknowledge that the Mississippi Code contains no comments after Section 75-9-104, but because of the apparent lack of litigation on this particular issue, we conclude that the Kansas opinion is sound when it concludes: "[t]his exception applies only to situations in which the assignor both delegates a duty to perform and assigns the right to payment to the same person." In the case *sub judice*, Kizer assigned no duty to perform any part of the subcontract for the Pontotoc project to Martin. The assignment was by Kizer to Martin Contractors, and it was of income only. There was no assignment of any duty to perform any under either subcontract by Kizer. The June 14 agreement contained only Kizer's agreement to abandon any further duty which the subcontract for the Pontotoc project imposed on him and Martin's consent to Kizer's abandonment.

From our analysis of Issue II, we determined that the June 14 agreement was not a "bridge" which joined the two subcontracts; thus they remained separate and apart. Not one of Kizer's three creditors claims that it is entitled to recover from Martin Contractors because Martin Contractors owed Kizer under the terms of their subcontract for Pontotoc County project. Kizer's subcontract

with Martin Contractors for the Lafayette County project is the sole source of all three creditors' respective claims to the sum of $116,894.50, which Martin Contractors owes Kizer because Kizer completed that subcontract.

The fact that neither Martin Contractors nor Kizer assigned to the other party any duty of performance under the Lafayette County project excludes the June 14 agreement from the exception to UCC coverage created by Section 75-9-104(f). As this Court has already adjudicated, the June 14 agreement "transfer[red] a right to payment under a contract [the Lafayette County project subcontract] to an assignee [Martin Contractors]." But the transfer of Kizer's right to payment under the Lafayette County project subcontract to secure Kizer's obligation to pay Martin Contractors for its labor in completing the Pontotoc County project is an assignment of Kizer's right to that payment. Thus, the June 14 agreement as an assignment of Kizer's right to payment under the subcontract for the Lafayette County project is excluded from Section 75-9-104(f). The trial judge did not err by failing to determine that Section 75-9-104(f) applied to the June 14 agreement.

> **D. ISSUE IV.** Whether the trial court erred in not finding that MCA 75-9-104(I) was applicable as an exception to the recording requirement of the UCC in this case even if the UCC was applicable to the contract?

In *Associates Discount Corp.* v. *Fidelity Union Trust Co.*, 268 A.2d 330, 332 (N.J. Sup. Ct. 1970), the court confronted this very issue. It opined:

> [UCC § 9-104(I)], however, cannot mean that a general creditor, as the bank is here with respect to the funds in question, may abrogate a perfected security interest simply by having a right to and opportunity for a set-off. All this section means is that a right of set-off may exist in a creditor who does not have a security interest.

Because Martin Contractors cites only section 75-9-104(I) and no case to support his position that section 75-9-104(I) does apply to its claimed set-off against Kizer, we adopt the quoted portion of *Associates Discount Corp.* on which to rest our adjudication that the trial court did not err in not finding that Section 75-9-104(I) of the Mississippi Code of 1972 was applicable as an exception to the recording requirement of the UCC in this case.

> **E. ISSUE V.** Whether the trial court erred in not finding that the instrument between the General Contractor and Subcontractor fell within the exception contained in MCA 75-9-302(1)(a) even if governed by the UCC?

Section 75-9-302(1)(a) of the Mississippi Code of 1972 must be interpreted and understood in conjunction with Section 75-9-305 of the Mississippi Code of 1972. The operative sentence in Section 75-9-305 is the following: "A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this chapter." Miss. Code Ann. § 75-9-305 (1972). Again, Martin Contractors relies exclusively on the statute and submits no cases to support its position on this issue. Instead, it

argues:

> Now assuming the General Contractor needed a security interest for any reason, then if it came into possession of those items delineated under Section 305, being money, etc., then filing would not be required. Again it makes absolutely no sense for the General Contractor to consider filing a UCC Financing Statement on funds that it would hold first. He was and would continue to be in possession of funds first before they would ever inure to Subcontractor's benefit."

This argument misses the point of the portion of Section 75-9-305 that we have quoted. The security interest in the money which Kizer might ultimately owe Martin Contractors under the June 14 agreement becomes perfected under Section 75-9-305 only "from the time possession is taken without relation back and continues only so long as possession is retained."

The record does not clearly reflect when Martin Contractors received payment for the completion of the Lafayette County project, if indeed he ever received any payment; but it is clear that Martin Contractors could not have received any portion of that money until after November 15, 1991, the date that Bank of New Albany filed its second Financing Statement to secure Kizer's assignment of his interest in the Lafayette County project. By November 15, 1991, both the State Tax Commission and Carr Oil had perfected their liens against any money that Martin Contractors might owe Kizer by their having already served it with writs of garnishment. Thus, all three of Kizer's creditors were secure in their claims against Kizer's debt to Martin Contractors before the Mississippi State Highway Department paid Martin Contractors any portion of what it owed for Martin Contractors' completion of the Lafayette County project.

Section 75-9-305 requires that the creditor who is to be secured only by the possession of the money which is the subject of the security must first have taken possession of the money before the security interest attaches. The creditor's potentially taking possession of the money at a later time is simply insufficient to avoid Martin Contractors' need to file its UCC financing statement in accordance with Section 75-9-305. We decide ISSUE V. adversely Martin Contractors.

> **F. ISSUE VI.** Whether the trial court erred in not finding that MCA 75-9-318 should apply as an exception even if the instrument between the General Contractor and Subcontractor modifying earlier contracts was governed by the UCC?

To support its contention that Section 75-9-318 of the Mississippi Code of 1972 "should apply as an exception . . . even if the instrument between the General Contractor and Subcontractor modifying earlier contracts was governed by the UCC," Martin Contractors argues:

> The [Bank of New Albany] as subsequent assignee [of Kizer] can only take pursuant to [Kizer's] performance or lack thereof under the contract between [Martin Contractors] and [Kizer]. In other words, the Bank's assignment is expressly subject to all terms of the contract between [Martin Contractors] and [Kizer]; and, additionally, *all claims and defenses* [Martin Contractors] has against [Kizer as subcontractor]. Furthermore, even if the contract modification agreement had been subsequent to the Bank's lien or any other judgment creditor, as long as the modification was in good faith and in accordance with reasonable commercial standards, the creditors are still subject to the claims and defenses of [Martin Contractors]. Also, the garnishments of Mississippi State Tax Commission and Carr Oil are explicitly subject to the terms of the contract between [it] and [Kizer] and all claims and defenses that [Martin Contractors] has against [Kizer].

Martin Contractors cites no authority to support its contention that "the garnishments of Mississippi State Tax Commission and Carr Oil are explicitly subject to the terms of the contract between [it] and [Kizer] and all claims and defenses that [Martin Contractors] has against [Kizer]." Unlike the claim of Bank of New Albany, which depends on Kizer's assignment, the claims of the Mississippi State Tax Commission and Carr Oil depend not on any assignment from Kizer but, instead, on judgment liens which each of them had obtained against Kizer and on which both of them had issued writs of garnishment. The Uniform Commercial Code does not apply to judgment creditors.

Martin Contractors cites *Benton State Bank v. Warren*, 562 S.W.2d 74 (Ark. 1978) to support its position on this issue. In *Benton State Bank*, the Warrens, husband and wife, the general contractors, executed four subcontracts for concrete work, rough carpentry, finish carpentry, and heating and air conditioning with Harps General Contractors. *Id.* at 74. Construction of an apartment complex in Little Rock was the subject of these four subcontracts. *Id.* The subcontracts provided that if there were unpaid suppliers of labor and materials the Warrens had the option to make progress-payment checks payable jointly to Harps and to the suppliers. *Id.* at 75. Harps assigned his right to receive these progress payments to Benton State Bank. *Id.* at 74. Benton State Bank had previously loaned Harps $60,000 to pay a tax delinquency, and it had taken a lien on Harps' cattle to secure the debt. *Id.* at 75. Harps assignment of the progress payments from the Warren subcontracts was intended to serve as additional security for the $60,000 loan. *Id.*

The total amount of Harps' progress payments to the Benton State Bank was $82,686.24. *Id.* Of this sum the bank used $27,271,86 to repay loans to Harps on the Warrens' apartment project, and $9, 393.42 was applied to the repayment of other Harps' loans. *Id.* The balance of $46,020.96 was deposited in Harps' general account. *Id.* When the Warrens learned that several of Harps' suppliers of labor and material for the apartment project had not been paid, they took over the completion of the apartment construction project and sued the bank for a balance of $13,367.12, which was their net loss from having to pay Harps' suppliers because the bank did not pay them. *Id.*

The Arkansas Supreme Court noted the relevancy of Section 9-318 to the issue in *Benton State Bank*, but it held the bank liable to the Warrens for the following reasons:

> In the case at bar the equities clearly do not stand entirely in favor of either party. No

> doubt the Warrens were remiss in making no apparent effort to verify Harps's representations that all previous bills for labor and materials had been paid. On the other hand, the bank was certainly not an innocent recipient of the progress payments, without notice of possible claims on the part of the Warrens against Harps.

Id. at 77. Then, the Arkansas Supreme Court concluded:

> When all the circumstances are considered, we cannot say that the chancellor's decision in favor of the Warrens is clearly against the preponderance of the evidence.

Id. We view *Benton State Bank* as the Arkansas Supreme Court's resolution of the equities between the general contractor and the bank as assignee not as a question of law, *i. e.*, the application of UCC Section 9-318 to determine who must bear the loss, but rather as a question of fact. It became a question of fact when the Arkansas Supreme Court held that "the chancellor's decision in favor of the general contractors was not against the preponderance of the evidence." *Id.* at 77. Thus, we decline to decide this issue, which we view as an issue of law, on an appellate decision like *Benton State Bank* which determined that the issue was one of fact.

We previously resolved ISSUE II. against Martin Contractors because we concluded that the June 14 agreement did not bridge the subcontracts for the Pontotoc and the Lafayette County projects so as to transform them into one contract. The State Tax Commission, Carr Oil, and Bank of New Albany do not claim that Kizer is entitled to any income as the result of the completion of the Pontotoc County project. All three of them acquiesce that Martin Contractors owes Kizer nothing on the Pontotoc County project even though Martin Contractors eventually completed it after the June 14 agreement. Instead, their claims rest on the debt which Martin Contractors owes Kizer for *its successful completion of the Lafayette County project*.

Martin Contractors has no claim nor defense against Kizer based on its subcontract for the Lafayette County project, which was completed. In fact, Kizer's completion of the Lafayette County project creates the basis for Martin Contractors' claim that Kizer owes it $105,144.42. The June 14 agreement is the sole source of Martin Contractors' claim that it is entitled to receive this sum of $105,144.42 rather than the State Tax Commission, Carr Oil, and Bank of New Albany. Martin Contractors does not dispute that Kizer completed the Lafayette County project and is therefore owed for his work to complete that project pursuant to the terms of the subcontract between Kizer and it. We decided in our determination of ISSUE I. that the June 14 agreement was an assignment, and not a "contract addendum agreement," and was thus subject to the application of the UCC.

Martin Contractors' claim is against the State Tax Commission, Carr Oil, and Bank of New Albany. Martin Contractors' claim is not for Kizer's breach of the subcontract for the Lafayette County project; it is against the other three creditors for priority of payment of the sum that Kizer owes Martin Contractors. Martin Contractors has a claim against Kizer for reimbursement of its "labor

expense" which it incurred in the completion of the Pontotoc County project; and as we have already held, the June 14 agreement did not join the subcontract for the Pontotoc County project with the subcontract for the Lafayette County project. We thus conclude that Martin Contractors has no defense or claim under the subcontract for the Lafayette County project to raise against the State Tax Commission, Carr Oil, and Bank of New Albany. The trial court's ruling cannot negate "all claims and defenses" that Martin Contractors had against Kizer because it cannot negate things that never existed. We resolve this ISSUE VI adversely to Martin Contractors.

> **G. ISSUE VII.** Whether the trial court erred in finding that funds held by General Contractor had inured to the Subcontractor's benefit thus putting the funds within the grasp of creditors?

On its behalf, Martin Contractors argues:

> To be garnishable, funds must inure to the debtor's benefit. Funds that are not av ailable to the debtor are not susceptible to the grasp of any creditor, regardless of how many UCC filings he has. Section 11-35-23 states that the property and effects bound by garnishment will be that compensation to which the Garnishee is indebted or shall become indebted to the Defendant.

Martin Contractors cites *American Jurisprudence 2nd* for the proposition that:

> [W]here a contract between the defendant and garnishee has not been fully performed by defendant at the time of attachment by plaintiff, the garnishment is not chargeable.

6 *Am. Jur 2d, Attachment and Garnishment,* § 129 (1963). It continues its argument by quoting from *American Jurisprudence*:

> In the case of a construction contract where the employer is not to become indebted to the contractor until performance in all particulars, there is no indebtedness owing to the contractor which may be reached in a garnishment proceeding until the terms of the contract have been performed. Nor are sums retained under a provision for the retention of a certain percentage of the price agreed upon until the contract is fully performed subject to garnishment prior to complete performance of the contract.

6 *Am. Jur. 2d, Attachment and Garnishment,* § 130 (1963).

We repeat that Martin Contractors owed Kizer nothing under the terms of the Pontotoc County project subcontract. None of Kizer's three creditors so claim. The subcontract for the Lafayette

County project created Martin Contractors' debt of $116,894.50 owed to Kizer. The State Tax Commission, Carr Oil, and Bank of New Albany attempted to collect their respective debts which Kizer owed each of them claiming superior priority to this debt of $116,894.50. We have not quoted from the subcontract for the Lafayette County project, but nowhere does it contain any provision for Martin Contractors' retaining any portion of this debt of $116,894.50. Neither does it contain any provision about when Martin Contractors will owe Kizer for his completion of the Lafayette County project.

The following rule appears in *American Jurisprudence 2nd*:

> As a general rule, where a contract to render services is silent as to the time of payment, payment is due when the services have been rendered.

17A Am. Jur 2d, *Contracts*, § 494 (1991). We accordingly hold that under the terms of the subcontract for the Lafayette County project, Martin Contractors became indebted to Kizer in the amount of $116,894.50 when Kizer completed that project. There is no dispute that Kizer completed the Lafayette County project.

As of Kizer's completion of the Lafayette County project, his right of recovery of $116,894.50 had matured; and Martin Contractors could not withhold it from him. Martin Contractors' entitlement to receive more than $105,000 of that money was created, not by the subcontract for the Lafayette County project, not by the subcontract for the Pontotoc County project, but by the June 14 agreement by which Kizer effectively assigned to Martin Contractors so much of that money as would compensate Martin Contractors for its additional labor costs in completing the Pontotoc County project. Thus, the debt of $116,894.50 had inured to Kizer's benefit, and the trial court's judgment which implicitly held that it had inured to Kizer's benefit was correct. We decide ISSUE VII. against Martin Contractors.

> **H. ISSUE VIII.** Whether the trial court erred in overruling Appellant's objection to the Circuit Court's joinder of parties and jurisdiction of the Circuit Court to litigate, in a garnishment proceeding, contract issues between a general contractor and a subcontractor and when creditors pleadings sought equitable relief?

Martin Contractors objected to Carr Oil's motion to join the State Tax Commission and Bank of New Albany as additional parties to this litigation because: (1) Carr Oil had no standing to litigate a contractual dispute between Kizer and Martin Contractors, (2) Kizer may have had a claim for set off and/or recoupment against Carr Oil, (3) Carr Oil sought, under the guise of garnishment to become a "third party referee, as, apparently, an advocate on behalf of [Kizer], in litigating contracts, agreements, and assignments to which it was never a party . . .," and (4) Martin Contractors had offered to interplead into court the sum of $23,796.00, which it contended was the correct amount of its debt owed Kizer, "for disbursement as the court may deem fit" in accordance with the priority of

liens and garnishment law. One reason Carr Oil moved to add Kizer's other creditors was that it believed that Martin Contractors owed Kizer $68,534, rather than $23,796.00. We noted earlier that Martin Contractors owed Kizer $116,894.50; but that it claimed that it was entitled to retain $105, 144.42 for the extra costs it had incurred to complete the Pontotoc County project. Martin Contractors based its claim to retain $105,144.42 on the June 14 agreement.

Martin Contractors did not object to the joinder of the State Tax Commission and the Bank of New Albany on the ground that the equitable nature of the issues required that the case be transferred to chancery court. Martin Contractors did not move to transfer the case to chancery court. In its brief Martin Contractors objects to the joinder of these two additional parties because once they were joined, both Carr Oil and Bank of New Albany raised certain equitable defenses, *i. e.,* equitable estoppel and unjust enrichment, against it. Martin Contractors also notes that "[t]he few Mississippi cases that deal with the issue of contracts . . . and the UCC have all been litigated in Chancery Court." It concludes its argument on this issue by writing:

> After overruling [Martin Contractors'] objection, the Circuit Court in its ruling totally overlooked equity and issued a judgment that will without doubt unjustly enrich creditors whose claims have nothing to do with contracts between the parties.

In its judgment which it rendered after it had taken the case under advisement, the circuit court did two things. First it established the priority of the claims of the State Tax Commission, Carr Oil, Bank of New Albany, and Martin Contractors to the balance of $116,894.50 which Martin Contractors owed Kizer for his completion of the Lafayette County project. Second, it dismissed without prejudice Martin Contractors' claim against Kizer for indemnification against its loss on the Pontotoc County project per the June 14 agreement. It dismissed this claim because it had been "rendered moot by this proceeding which was limited to the determination of the priority of competing rights to a fixed sum of money." Neither of the trial court's actions in its judgment relied on principles of equity.

Martin Contractors does not dispute that the circuit court had jurisdiction of this claim when it began as a garnishment action. It further advises this Court:

> We had no problem with the Circuit Court, in a garnishment proceeding, determining the right of priority to the funds offered to be interpled into the Court by [Martin Contractors] , but we objected to litigating, in a garnishment proceeding, contracts and agreements which would be issues that would be entirely distinct from the Court's deciding priority of competing claims.

Because the trial court decided the priority of competing claims, to which Martin Contractors did not object, and hence did not adjudicate any issue "that would be entirely distinct from the Court's deciding priority of competing claims," we find no basis on which to decide this issue other than unfavorably to Martin Contractors. We recognize the inconsistency between Martin Contractors' argument on this issue, which is that the trial court ought not to litigate "contracts and agreements

which would be issues that would be entirely distinct from the Court's deciding priority of competing claims," and its position in ISSUE XIII., which is that the trial court erred when it dismissed without prejudice its cross-claim against Kizer. We will contend with that inconsistency when we discuss ISSUE XIII.

> **I. ISSUE IX.** Whether the trial court erred in not applying equity as originally pled by garnishees in awarding large judgments to Appellees?

Martin Contractors initiates its argument on this issue with the following sentence:

> The result of the Circuit Court's erroneous assumption of jurisdiction of this matter is a ruling that blindly overlooks equity and awards huge judgments to subsequent creditors of Subcontractor despite evidence of substantial payments towards same and other avenues of relief available to the creditors.

Martin Contractors then proceeds to quarrel about: (1) the trial court's determining that Kizer still owed Bank of New Albany a balance of $35,602.70 on an original debt of $50,000.00 after Kizer and Martin Contractors had already paid the bank $35,470.00; (2) the trial court's award of $64,146.20 to Carr Oil to pay a judgment of $47,873.11 without considering any set-off against that debt to which Kizer was entitled for work that he had done for Carr Oil, and (3) while Kizer had earned another $40,000.00 from jobs other than the Pontotoc and Lafayette County projects, not one of the three creditors had sought to garnish or to attach those sums which others owed Kizer.

In its motion for a new trial or in the alternative, amendment of judgment, Martin Contractors raised no issues about whether the amounts which the trial court adjudicated were due the State Tax Commission, Carr Oil, and Bank of New Albany were incorrect. Martin Contractors did not file a motion to alter or amend this judgment pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure; neither did it file a motion for relief from judgment pursuant to Rule 60 (b) of the Mississippi Rules of Civil Procedure. In its brief, Martin Contractors does not explicate what these amounts ought to have been; and it offers no cases nor other authorities to persuade this Court that this issue has any merit.

"Appellant's failure to cite any authority in support of these assignments of error precludes this Court from considering these claims on appeal." *Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 370 (Miss. 1992). In the absence of authority on which this Court might rest its decision that the trial court did err in not applying equity as originally pled by garnishees in awarding large judgments to Appellees, we decline to consider and to decide this issue.

> **J. ISSUE X.** Whether the trial court erred in finding that the Appellees, despite approving General Contractor's previous deductions from Subcontractor's draw in accordance with the contract agreement, were entitled to priority over the General Contractor?

By agreement Kizer's three creditors apportioned a sum of $10,347.15 which Martin Contractors had tendered in response to Carr Oil's first writ of garnishment. While Martin Contractors owed Kizer $62,478.45 for work which he had done on the Lafayette County project in 1991, Martin Contractors deducted $52,131.30 for reimbursement of the expenses which he had paid for Kizer on this project. Martin Contractors complains that one year later, when the three creditors discovered that Kizer would be left with only $11,750.38 for division among them after Martin Contractors had withheld the sum of $105,144.42, the trial court permitted all three of them "to leapfrog past [Martin Contractors]" and be given a judgment for $116,894.50 against it.

Martin Contractors offers neither legal argument nor precedent to support its position on this issue. We again rely on the proposition that "Appellant's failure to cite any authority in support of these assignments of error precludes this Court from considering these claims on appeal." *Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 370 (Miss. 1992). We also decline to consider and to decide this issue.

> **K. ISSUE XI.** Whether the trial court erred in finding that the Bank was entitled to priority over General Contractor despite the fact that the Bank subsequently sought and obtained a Financing Statement from Subcontractor after learning of the prior existence of the contract addendum agreement between Subcontractor and General Contractor?

Our earlier resolutions of ISSUES I and II have also decided this issue adversely to Martin Contractors. Bank of New Albany's obtaining financing statements for assignments of Kizer's two subcontracts and subsequently filing them established the bank's priority of its assignments over the June 14 agreement by which Kizer assigned his right to the income from the Lafayette County project to Martin Contractors. Martin Contractors cites *Central National Bank v. Wonderland Realty Corp.*, 195 N.W.2d 768 (Mich. Ct. App. 1972), for the proposition that some jurisdictions have held that where a judgment creditor admitted knowledge of an unperfected security interest, it could not subsequently claim priority of lien. This case persuades this Court of nothing because it interpreted and applied Michigan statutes to arrive at this conclusion.

The bank prudently secured its interest in Kizer's two assignments by filing its financing statements, but Martin Contractors filed nothing to secure Kizer's assignment of his income from the Lafayette County project to Martin Contractors pursuant to the June 14 agreement. We have already determined that the June 14 agreement was an assignment. Thus, the bank's filing of its financing statements gave its assignments from Kizer priority over Martin Contractors' assignment. We resolve this issue adversely to Martin Contractors.

> **L. ISSUE XII.** Whether the trial court erred in overlooking the evidence that the General Contractor stood in the position of surety for the Subcontractor and is entitled to be indemnified for sums paid to laborers, materialmen, equipment, and other expenses in completing the subcontract for Subcontractor?

Martin Contractors offers no definition of "surety" in its brief. Thus, we adopt the following

definition of that word from *Nicklin v. Harper*, 860 P.2d 31, 36-37 (Kan. Ct. App. 1993):

> A surety is defined as "one who becomes responsible for the debt, default or miscarriage of another; but in a narrower sense, a surety is a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for such payment or performance." *SNML Corp. v. Bank*, 41 N. C. App. 28, 36, 254 S.E.2d 274 (1979). "Every suretyship involves three parties: (a) the one for whose account the contract is made, whose debt or default is the subject of the transaction and who is called the principal; (b) the one to whom the debt or obligation runs, the obligee in suretyship, called the creditor; and (c) the one who agrees that the debt or obligation running from the principal to the creditor shall be performed, and who undertakes on his own part to perform it if the principal does not, called the surety." Stearns, *Law of Suretyship* § 1.4 (5th ed. 1951).

There were but two parties to the June 14 agreement -- Kizer and Martin Contractors. Pontotoc County, the only possible third party for whose benefit Martin Contractors' suretyship would have been created, was not a party to either the original subcontract nor the June 14 agreement. Martin Contractors fails to explain the manner in which Pontotoc County, the one for whom it proposes to serve as surety for Kizer's completion of his subcontract, would enforce its right of performance and/or payment for Kizer's default against it. We find nothing in the record to support Martin Contractors' contention that it became a surety to Pontotoc County for Kizer's performance of its subcontract.

We acknowledge that under Martin Contractors' theory of the case *sub judice*, both subcontracts became one by virtue of the June 14 agreement and that therefore perhaps Martin Contractors became surety for both Pontotoc County and the State Highway Department. Even so, the State Highway Department had no more claim against Martin Contractors as surety for Kizer's performance of the subcontract for the Lafayette project than did Pontotoc County have for the Kizer's performance of the subcontract for the Pontotoc project.

Moreover, Martin Contractors is already obligated to Pontotoc County and the State Highway Department to complete both road building projects, so we interpret Martin Contractors' argument to mean that it has become a surety for itself by virtue of the June 14 agreement. In *Ford Motor Credit Co. v. Machias Ford, Mercury, Inc*., 509 A.2d 658, 659 (Me. 1986), the issue was whether the appellant had posted a satisfactory surety's bond which Maine law required for its appeal. The court opined:

> Sufficient for the disposition of this appeal is our determination that an instrument signed only by Machias Ford's treasurer in her official capacity does not furnish any surety, sufficient or insufficient. A surety is one who undertakes to perform in the event of default by the principal. One cannot be a surety for one's own performance.

Id. We determine that Martin Contractors cannot serve as its own surety for an obligation that it

already has. We hold that Martin Contractors is not entitled to be indemnified for sums paid to laborers, materialmen, equipment, and other expenses in completing the subcontract for Subcontractor as though it were Kizer's surety. We thus resolve this issue adversely to Martin Contractors.

> **M. ISSUE XIII.** Whether the trial court erred in refusing to consider the Crossclaim filed by General Contractor?

In its judgment, the trial court found that Martin Contractors owed Kizer $116,894.50 for his completion of the Lafayette County project. The sum of the three debts which Kizer owed the State Tax Commission ($16,935.16), Carr Oil ($64,146.20), and Bank of New Albany ($35,602.70) was $116,684.06, or $10.44 less than the amount of Martin Contractors' debt which it owed Kizer. While the trial court found that Martin Contractors' interest in Kizer's income from the subcontract for the Lafayette County project was subordinate to the interests of Kizer's other three creditors, it did not adjudicate to whom the $10.48 should be paid. Instead, the trial court dismissed without prejudice Martin's cross-claim against Kizer for loss from the Pontotoc County project because that claim had become moot. The trial court found that Martin Contractors' claim had become moot because "this proceeding . . . was limited to the determination of the priority of competing rights to a fixed sum of money."

The sum of $10.48 is minuscule, but Martin Contractors' cross-claim against Kizer for "all attorney's fees, court costs and expenses that he has incurred in this matter," created doubt about to whom that sum ought to be paid after the other three creditors had first been paid. Moreover, remote as it might seem, there remained the possibility that Kizer would pay one or more of his other three creditors from other sources of income. Were that to occur, then an additional balance from Martin Contractors' debt to Kizer would remain unaccounted for in the judgment. We previously determined in ISSUE VII. that Martin Contractors must pay Kizer when he had completed the subcontract for the Pontotoc County project. Therefore, unless Martin Contractors' cross-claim against Kizer was adjudicated by the trial court, the correct party to receive any sum in excess of the claims of the State Tax Commission, Carr Oil, and Bank of New Albany remained undetermined.

Moreover, it was also possible that the amount of Martin Contractors' claim against Kizer was exaggerated, perhaps even to the point that Kizer might yet be entitled to a portion of the remainder of the $116,684.06 which Martin Contractors owed him upon completion of the Pontotoc County project. In *Blair v. Cleveland Twist Drill Co.*, 197 F. 2d 842, 845 (7th Cir. 1952), the United States Court of Appeals for the Seventh Circuit opined:

> Rules 13 and 14 are both intended to avoid circuity of action and to dispose of the entire subject matter arising from one set of facts in one action, thus administering complete and even handed justice expeditiously and economically. They are remedial and should be liberally construed. While both permit of some discretion on the part of the court, there must be sound reason for the exercise of such discretion to deny the relief made possible thereunder.

We conclude that the trial court erred when it found that Martin Contractors' claim had become moot because "this proceeding . . . was limited to the determination of the priority of competing rights to a fixed sum of money." Because the trial court had properly sustained Carr Oil's motion to add Kizer, the State Tax Commission, and the Bank of New Albany as parties to this litigation, Martin Contractors' cross-claim against Kizer expanded the scope of the issues in the case *sub judice*.. No longer were the issues limited to the "determination of the priority of completing rights to a fixed sum of money." Instead, the case expanded to include the adjudication of this cross-claim between the original debtor, Kizer, and the garnishee, Martin Contractors.

The record contains appreciable evidence on the amount of loss which Martin Contractors claimed that it had sustained on the Pontotoc County project for which Kizer was liable to it under the terms of the June 14 agreement. While the dismissal without prejudice of Martin Contractors' cross-claim may not have prejudiced its rights to pursue an entirely independent claim against Kizer, such pursuit would violate the purpose and spirit of Rules 13 and 14 of the Mississippi Rules of Civil Procedure. Moreover, the judgment does not specify whether the balance of Martin Contractors' debt -- be it $10.48 or $16,945.64 -- should be paid to Kizer or retained by Martin Contractors to compensate it for its loss caused by its completion of Kizer's portion of the Pontotoc County project. Thus, we decide ISSUE XIII. favorably to Martin Contractors and reverse and remand to the trial court that part of the judgment which dismissed without prejudice Martin Contractors' cross-claim against Kizer.

IV. Summary

Not one of Kizer's three creditors claim that Martin Contractors owes Kizer for his work on the Pontotoc County project. Neither does any party contest that Martin Contractors' debt of $116, 684.06 to Kizer was created by Kizer's completion of the Lafayette County project. Neither the subcontract for the Pontotoc County project nor the subcontract for the Lafayette County project is the basis for Martin Contractors' claim for $105,144.42 against Kizer. The June 14 agreement is the only basis on which Martin Contractors can base that claim. We have affirmed as a matter of law the trial court's determination that the June 14 agreement was an assignment and that it therefore was subject to the Uniform Commercial Code. This Court has accordingly rejected Martin Contractors' assertion that the June 14 agreement was instead a "contractual modification agreement" which "bridged," or combined the two subcontracts into one contract and that the resulting one contract was not subject to the Uniform Commercial Code.

This Court reserved its consideration of *Travelers Indemnity Co. v. Clark*, 254 So. 2d 741 (Miss. 1971) for this summary because it concludes that *Travelers* confirms its resolution of Martin Contractors' first twelve issues adversely to Martin Contractors. All of Martin Contractor's first twelve issues depend either on the assertion that the June 14 agreement was not an assignment or that if it was an assignment, then various sections of the Uniform Commercial Code exempted it as an assignment from the application of the UCC. In *Travelers*, Stiger Construction Company entered into three separate construction contracts with three separate entities, Webster County, Yalobusha County, and the Chiwapa Watershed Improvement Drainage District in Pontotoc County. *Id.* at 743. Travelers Indemnity Company was the surety for all three of Stiger's contracts. *Id.* at 747.

Each one of Stigers' bond applications contained an assignment to Travelers of the proceeds of the

contract to secure not only the obligations of the contractor under the particular contract, but any other obligation and liability of the contractor to the surety. *Id.* Under this provision, Travelers claimed that since the funds available on the Webster and Yalobusha contracts were insufficient to indemnify it, it was entitled to be indemnified from the proceeds of the Chiwapa contract. *Id.* Travelers relied on *Horne v. State Building Commission*, 233 Miss. 810, 103 So. 2d 373 (1958); but the supreme court distinguished the *Horne* case because in *Horne* the owner, contractor, and surety were the same in the two contracts involved. *Id.* However, in *Travelers Indemnity Co.* there were three different owners. *Id.*

The Mississippi Supreme Court held that:

> [T]he assignment contained in the bond application may not be used to create a security interest in the proceeds of an entirely independent and different construction contract unless there is compliance with provisions of the Uniform Commercial Code. When the surety seeks to use the assignment in the bond applications to reach beyond the immediate contract so as to claim a security interest in another contract involving another owner, the assignment loses its identity as an aid to the equitable lien which a surety of a defaulting contractor has. The assignment thereupon becomes, to the extent that such cross-indemnification is claimed thereunder, a mere financing transaction subject to the filing requirements of the Uniform Commercial Code.

Id. Travelers Indemnity Co. supports our affirming as a matter of law, the trial court's determination that the June 14 agreement was Kizer's assignment of his income from the any other available source, which included the Lafayette County project, to Martin Contractors for the purpose of compensating it for its "labor costs" in completing the Pontotoc County project for Kizer. Because the June 14 agreement was an assignment which was subject to the application of Article 9 of the Uniform Commercial Code, it became necessary for the trial court to establish the priority of Martin Contractor's unsecured assignment to the claims of the three of Kizer's creditors who were secured, whether by the UCC or their judgment liens. This Court holds that the trial court correctly established the priority of Kizer's creditors' liens and assignments against the sum of $116,684.06, which it found that Martin Contractors owed and must therefore pay Kizer for his completion of the Lafayette County project. The trial court also correctly held by implication that the June 14 agreement did not authorize Martin Contractors to retain the sum of $116,684.06 which Kizer had earned by his completion of the Lafayette County project.

Nevertheless, the trial court overlooked the purpose and spirit of the Mississippi Rules of Civil Procedure, Rules 13 and 14 in particular, when it *sua sponte* dismissed Martin Contractors' cross-claim against Kizer for reimbursement of its loss on the Pontotoc County project to which the June 14 agreement may have entitled it. Therefore, this Court affirms that part of the trial court's judgment which established the priority of the judgment and UCC-secured liens among the State Tax Commission, Carr Oil, Bank of New Albany, and Martin Contractors; but it reverses the trial court's dismissal without prejudice of Martin Contractors' cross-claim against Kizer.

THE JUDGMENT OF THE CIRCUIT COURT OF UNION COUNTY IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. COSTS OF THIS APPEAL ARE

ASSESSED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, AND PAYNE, JJ., CONCUR. SOUTHWICK, J., CONCURS WITH SEPARATE WRITTEN OPINION. MCMILLIN, J., NOT PARTICIPATING.

IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00790 COA

DENOTEE MARTIN CONTRACTORS, INC.

APPELLANT

v.

CARR OIL COMPANY, BANK OF NEW ALBANY;

MISSISSIPPI STATE TAX COMMISSION; AND

BILL KIZER

APPELLEES

SOUTHWICK, J., concurring

The majority's opinion reaches the correct result. Since I arrive at that location by a slightly different route, I write separately.

The agreement of June 14, 1991 was an assignment of either contract rights or of an account. No security interest was involved, but instead this conveyance created a right to payment in Martin Contractors. Under Section 75-9-102, Uniform Commercial Code, Article 9 applies to transactions creating security interests, and also to "any sale of accounts. . . ." Miss. Code Ann. § 75-9-102 (Supp. 1996). Therefore, if this is an account, the fact that no security interest was transferred is irrelevant.

An earlier version of the UCC had separate definitions for "account" and "contract rights." A contract right was "any right to receive payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper." 8A Ronald A. Anderson, *Anderson on the Uniform Commercial Cod*e, § 9-106.23, at 510 (1996). The UCC was then amended to the version we have in Mississippi, in which the separate categories of account and contract rights were merged into the single category of an account, "whether or not it has been earned by performance." The distinction was that before performance there was merely a contract right, and after performance that right became an account. Thus now an "account" includes a right to receive payment under a contract even when that right was not yet earned by performance. That is exactly what Kizer assigned to Martin.

The present definition of a UCC "account" under Section 75-9-106 is a "right to payment . . . for services rendered which is not evidenced by an *instrument. . . .*" This means the conveyance of an account is exempt from the filing requirements of the UCC if it is evidenced by an instrument. What that means is an instrument separate from the account itself -- a negotiable instrument. Miss. Code Ann. § 75-9-105 (Supp. 1996). Conveyances of "instruments" are governed by their own rules. This account is evidenced by the contracts entered with the State Highway Commission and between Martin and Kizer, but there is no "instrument."

Thus, absent other exceptions, the assignment of an account by Kizer to Martin was covered by Section 75-9-102(1)(b). The question that to my mind has not been properly addressed is whether this assignment of an account created in Martin a right of set-off, and if so, whether that right has priority as of the June 14, 1991 date. The majority dismisses the set-off issue as not being sufficiently developed in the appellant’s brief. I agree, but the question remains.

Section 9-104(i) does not create any new, UCC set-off rights, but neither does the UCC interfere with pre-existing set-off rules. One authority stated that "creditors hold a common law or statutory right to set off obligations owed by them to a debtor against obligations owed by the debtor to them. This right, chiefly (if not exclusively) exercised by banks, is often more descriptively called a banker’s lien. . ." 8 William D. Hawkland, Uniform Commercial Code Series, § 9-104.10, at 216-217 (1996). The statutory right of set-off in Mississippi was detailed for a century in what became section 11-7-63, *et seq.*, of the Mississippi Code. That was repealed effective July 1, 1991, with the matter now just being subject to Mississippi Rule of Civil Procedure 13(a) on counterclaims. *See* M.R.C.P. 13 comment. Case law on set-offs included such esoterica as whether there was a "mutual indebtedness" and whether the set-off amount was certain. *Gerald v. Foster*, 168 So. 2d 518, 521 (Miss. 1964).

Since Mississippi allowed a set-off basically on any unrelated transactions, and in fact the statutory right has always been very much like a counterclaim, it would be absurd to say that section 9-104(i) applies to anyone with a right and opportunity to bring a counterclaim. What we are dealing with here, though, is an account that was held by Martin, consisting of money owed to Kizer. Martin was

to that extent Kizer's debtor, much like a bank is the debtor of its depositors. Martin was also Kizer's creditor, since Martin was owed the excess costs on the Pontotoc project. Thus the set-off rights "chiefly (but not exclusively)" exercised by banks are analogous to the Martin-Kizer arrangement.

Even if this is a set-off, the exclusion under section 9-104 is only from the filing requirements of Article 9. Our court has said "the right of set-off is separate from the priority provisions of Article 9." *Bank of Crystal Springs v. First Nat'l Bank*, 427 So. 2d 968, 971 (Miss. 1983). The various situations catalogued under section 9-104 leave those creditors unaffected by the need to make UCC filings, but does not otherwise give them any rights. Many courts have held that Article 9 does not affect the existence of the interests listed under section 9-104, but does govern their priority. 8 Hawkland, *supra* § 9-104:10, at 216 n.6. When the right of set-off attaches is unaffected by Article 9, but the priority of the right compared to other rights is governed by Article 9.

There are two dates that could set the priority of Martin's right to set-off against the money that came into its hands on the Lafayette project for expenses on the Pontotoc project. First, it might attach when the June 14, 1991 modification was entered. Second, it could attach when those funds were paid by the state highway department to Martin. The first date is prior to any other creditor's rights; the second date is unclear to me.

These observations are raised to indicate the absence of clear case law, as well as the truncated nature of the Appellant's presentation of the issue. On the basis of the briefing to date, I believe the Court would err in deciding the case on the issue of a set-off. Thus I join the majority in affirming, but invite such additional briefing on rehearing on this issue as the Appellant may wish to make.