IN THE SUPREME COURT OF MISSISSIPPI

MICHAEL BOURNE, HONEY E. HOLMAN, EASTOVER LAKE ASSOCIATION, AND BRIAN M. ALLEN ET AL. **APPELLANTS**

VS. **CAUSE NO. 2011 CA-00267**

ESTATE OF T.L. CARRAWAY, JR., THOMAS L. CARRAWAY, JR. LIVING TRUST, AND CITY OF JACKSON, ET AL. **APPELLEES**

AND

THE CITY OF JACKSON, MISSISSIPPI **APPELLANT**

VS. **CAUSE NO. 2011 CA-00267**

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On Appeal From the Chancery Court of Hinds County, Mississippi Cause Number G-2006-1760-O/3 Honorable Denise Owens

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Brief of Appellee City of Jackson, a Combined Response to (1) Appellant Brief of Eastover Lake Association, (2) Appellant Brief of Michael Bourne, et al., and (3) Appellant Brief of Bryant Allen (Deceased) et al.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to M.R.A.P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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11. T.L. Carraway Living Trust
12. Eastover lake Association, Inc.
13. Jack Herrin
14. Leigh M. Herrin
15. C. Lee Lott
16. Nina D. Lott
17. Randle C. Voyles
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19. Catherine D. Robinson
20. Linda H. Barrett
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22. Grace P. Lee
23. Michael Borne
24. Bryant M. Allen
25. Doris J. Allen
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29. Steve G. Rogers
30. Anne W. Rogers
31. Auburn C. Lambeth
32. Glenn F. Morris
33. Mildred M. Morris
34. Scott G. Lamb
35. Gail T. Lamb
36. Denise Owens, Chancellor

Respectfully submitted,

CITY OF JACKSON

/s/James Anderson, Jr.

By: _____

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ORAL ARGUMENT REQUESTED

The City of Jackson ("City") respectfully requests that this Court grant oral argument due to the unprecedented ruling by the trial court. The lower court dismissed the Third-Party Plaintiffs' sole claim against the City, but then found the City liable to the original plaintiffs who had not filed any claim whatsoever against the City. The central issues before this Court in this appeal in regards to the City: (1) whether a plaintiff may recover against a third-party defendant where the plaintiff never filed a direct action against that third-party defendant; (2) whether an indemnity claim against a municipality may be used to circumvent the one year statute of limitations of the Mississippi Tort Claims Act ("MTCA") where the party bringing the indemnity claim had a direct cause of action based on the same factual allegations; and (3) whether a trial court may, under the MTCA, apportion unspecified and unlimited monetary damages to a municipal third-party defendant based on speculation that alleged negligence by the municipality may have accelerated damages from a pre-existing and continuing tort committed by another party. R. at 3204-3227. The City submits that oral argument in this matter will aid the Court in addressing these distinct issues in this consolidated appeal.

STATEMENT OF THE ISSUES

The issues that this Court should resolve on this appeal are:

I. Whether the trial court was correct in finding that the Defendants/Third-Party Plaintiffs have an implied easement by necessity.

II. Whether the trial court was correct in rejecting the Defendants/Third-Party Plaintiffs assertion that the City had somehow "taken" the culvert system.

III. Whether the Defendants/Third-Party Plaintiffs may assert the "Corporate Shield Doctrine" as a defense although it was not previously raised before the trial court.

IV. Whether all claims, asserted and unasserted, against the City are barred by the MTCA's one-year statute of limitations.

V. The trial court exceeded its authority in granting the Plaintiffs relief.

VI. Whether the trial court was correct was correct in denying the indemnity claims against the City.

VII. Whether the remaining arguments put forth by the Defendant Eastover Lake Association. Are without merit.

STATEMENT OF THE CASE

A. Proceedings Below

In October of 2006, the Plaintiff, T.L. Carraway, filed his Complaint against the Defendant Eastover Lake Association, Inc. ("Defendant Eastover Lake Association"), and the Defendants who own property containing Eastover Lake ("Lake Owner Defendants"). R.E.[1] at 119, R. at 1. In his Complaint, T.L. Carraway alleged that the Defendants' drainage culvert had fallen into disrepair causing a sinkhole in his backyard. R.E. at 126, R. at 7; See R. at 3203. Importantly, Carraway did not assert any claim against the City of Jackson. In their answers the Lake Owner Defendants and Defendant Eastover Lake Association denied any responsibility or ownership for the culvert system. R. at 106-230. Interestingly, although they denied any responsibility for the culvert system, Eastover Lake Association and several of the Lake Owner Defendants filed third-party complaints asserting an indemnity claim against the City of Jackson ("City"). R. at 367-705. The Defendants/Third-Party Plaintiffs alleged that the damage to the culvert system was the sole result of negligent work performed by the City in May 2002. They asserted that if it was their culvert system, and they were liable to the Plaintiffs, then the City should indemnify the Defendants. The Plaintiffs again chose not to file any claims against the City. R. at 1-24.

On February 18, 2011, the City timely filed its Notice of Appeal, appealing the chancery court's ruling that the City was liable to the Plaintiffs for unspecified costs of repairs to the culvert system and Plaintiffs' property although all of the claims against the City had been dismissed and the Plaintiffs had never made a

[1] "R.E." refers to the the City of Jackson's Record Excerpts which were filed by the City of Jackson in conjunction with its appellant brief.

claim against the City. R.E. at 34-35. The Defendants/Third-Party Plaintiffs also appealed the chancery court decision which found that an implied easement of necessity exists in their favor, and found them liable to the Plaintiffs for damages resulting from their active negligence in the maintenance and upkeep of the culvert system. R.E. at 33-37.

B. **Statement of Facts**

Eastover Subdivision was developed by Eastover Corporation ("Eastover Developer") between 1949 and 1963. R.E. at 75; R. at 2584. As part of that development, Eastover Lake was constructed. R.E. at 75; R. at 2584. Eastover Lake consists of a man-made earthen dam, concrete spillway and drainage or overflow culvert system (collectively "culvert system"). R.E. at 75; R. at 2584. The culvert system takes overflow water from Eastover Lake to the Pearl River. R.E. at 75; R. at 2584. The intake end of the culvert system is located at the southeastern corner of Eastover Lake. The culvert system stretches approximately 250 feet along a culvert pipe. The culvert pipe is underground and runs southeasterly from Eastover Lake, underneath Lake Circle Drive, continuing underground and parallel to the eastern property line of the fee simple property that was, at the filing of the original Complaint, owned by T.L. Carraway, Jr. R.E. at 75; R. at 2584.

T.L. Carraway owned lot 19 in Eastover Subdivision. The physical address of the property is 2680 Lake Circle Drive, Jackson, Mississippi 39211 ("Subject Property"). Trans. at 375. T.L. Carraway purchased the Subject Property in 1984 and lived with his wife, Sylvia Carraway ("Mrs. Carraway"), until he recently

passed away. Trans. at 374. Upon T.L. Carraway's death, the ownership of the property was transferred to the T.L. Carraway Living Trust, Mrs. Carraway still resides at the property. At the trial on this matter, T.L. Carraway Living Trust was made a party to this action. R. at 2618. The T.L. Carraway Living Trust and the Estate of T.L. Carraway are collectively known as the Plaintiffs.

In 1962, Eastover Developer designated streets and right of ways to the City of Jackson ("City"). Between Lots 19 and 20 lies a 10 foot utility easement, which was allegedly designated to and accepted by the City by way of a plat. See Exhibit 22. However, the aforementioned Plat for "Eastover Section 27", Exhibit 22, explicitly reserved the 5' and 10' utility easements for the developer, Eastover Corporation. Trans. at p. 285, l.7-21; *See also* Exhibit 22.

In 1978, Eastover Development Corporation conveyed ownership of Eastover Lake, the dam, the spillway and the associated easements and right of ways to each of the Defendants who own property upon which Eastover Lake sits ("Lake Owner Defendants"). R.E. at 75; R. at 2584. In addition, a flowage easement was conveyed to Defendant Eastover lake Association, Inc. ("Eastover Lake Association") for the inundation, ownership, control, operation and maintenance of Eastover Lake. R.E. at 75; R. at 2584. Also conveyed was a "perpetual drainage ditch easement" to the Lake Owner Defendants and "all others" having a natural easement for the flowage of surface waters into Eastover Lake. R.E. at 75; R. at 2584. Exhibits 36, 56.

In the late 1990's Kirk Carraway, a contractor and second cousin to T.L. Carraway, inspected the Carraway property for the purpose of constructing an addition to the Carraway's house. Trans. at 1062-1067. Kirk Carraway noticed

that the subject property had severe erosion problems in the area around the outlet of the spillway drainage pipe. Kirk Carraway spoke with T.L. Carraway and Mrs. Carraway about the erosion problem, warning them that the erosion would get worse and stressed that someone should have a look at the erosion issue. Trans. at 1062-1067.

In January of 2002 Steve Rogers, then President of the Eastover Lake Association, wrote a letter on behalf of the association to the Lake Owner Defendants informing them that the culvert system needed repair and reminding them that such repair was their responsibility. Trans. at 240-241; Exhibit 10. Subsequent letter from Rogers to the Lake Owner Defendants were along the same line. Exhibits 11-15.

In the summer of 2002, the City began work on the sanitary sewer line adjacent to Lake Circle Drive in the area closest to the southeastern corner of Eastover Lake, and adjacent to, or near the front yard of the Plaintiffs. R.E. at 75; R. at 2584. The sewer line is actually located within the right of way of Lake Circle Drive. See Exhibits 22, 52, 53, and 54. Sections of the street were excavated in the 2600 block of Lake Circle Drive to gain access to the underground sewer line. R.E. at 75; R. at 2584. It was necessary for the City's Public Works employees to remove a small section of the Eastover Lake drainage culvert in order to safely access the sanitary sewer line for its repairs. R.E. at 75; R. at 2584. Upon the commencement of the City's work on the sewer line in the summer of 2002, Mrs. Carraway discussed the already existing sinkhole with Doug Davis, a heavy equipment operator for the City. Trans. at 684. Davis told her that he "...couldn't go behind her house to do a job, [he] had to work within

the city easement, that she would have to talk to [his] supervisor...." Trans. at 684-685. Davis gave her the personal cell phone number of Ronnie Hopson, his supervisor at the site. Trans. at 660, 685.

Mrs. Carraway called Hopson about the sinkhole. Trans. at 660-661. In fact, Mrs. Caraway showed Ronnie Hopson, Davis' supervisor at the site, the sinkhole located in her backyard directly over the drainage culvert. Trans. at 660-662. The sinkhole and the erosion along the sides of the outlet of the spillway were present prior to the City's work. Trans. at 660-662; Trans. at 1062-1067. In fact, the culvert pipe, as well as the system as a whole, including the apron of the inlet and other sections upstream of the section the City worked on, had failed and was in extreme disrepair prior to the City's work in the summer of 2002. Trans. at 570, 660-662, 1062-1067; Exhibits 10, 16 and 79.

In April 2004, Joe Rankin, a local designer, discovered the sinkhole while attempting to find a place to construct a gazebo. Trans. at 461-462 After learning of the growing nature of the sinkhole from Rankin, Mrs. Caraway sought assistance from Rogers. Rogers and Eastover Lake Association provided no assistance. Trans. at 436. In addition, Rogers failed to inform Mrs. Caraway that the Lake Owners Defendants actually owned the culvert system. Trans. at 436-437, 439-440. Instead she was referred to the City. Since neither Eastover Lake nor the culvert system belonged to the City, the City was prohibited from providing relief to the Carraways. T.L. Carraway filed a Complaint against the Defendant Eastover Lake Association and the Lake Owner Defendants in October 2006. R.E. at 130; R. at 1. In his Complaint, T.L. Carraway alleged that the Defendants' drainage culvert had fallen into disrepair causing a sinkhole in his

backyard. T.L. Carraway alleged that the Lake Owner Defendants and Defendant Eastover Lake Association (collectively "the Defendants") are responsible for maintaining the culvert system and are therefore liable for damages to his property. R.E. at 130; R. at 1. Thereafter, the Defendants filed third-party complaints for indemnity against the City. R. at 376-694. The Defendants alleged that any damage to the culvert system was solely the result of negligent work performed by the City in May 2002. R. at 376-694.

The trial in this matter was completed on April 2, 2010, and the trial court issued its final order and opinion on or about January 21, 2011 ("Amended Order and Opinion"). R.E. at 39-62; R. at 3204-3227. As to the Plaintiffs' claims against the Defendants, the trial court found that an implied easement by necessity exists in favor of the Lake Owner Defendants and the Defendant Eastover Lake Association. R.E. at 43-44; R. at 3208-3209. The trial court then described the easement to consist of the entire current culvert system which includes the earthen dam, the spillway, the culvert drainage pipe, and the outlet area. R.E. 44-45; R. at 3209-3210. The trial court found that an easement by prescription did not exist. R.E. at 48; R. at 3213.

The trial court dismissed all of the Defendants'/Third-Party Plaintiffs' indemnity claims against the City. R.E. at 59-62; R. at 3224-3227. The trial court dismissed the Defendants' indemnity claims against the City because the Defendants themselves were liable to the Plaintiffs for active negligence. R.E. at 60; R. at 3225. The trial court also dismissed any claims that the City had somehow "taken" the culvert system.

Although the Plaintiffs had not asserted any claim whatsoever against the City and all of the Defendants' claims against the City had been dismissed, the trial court found the City, as well as the Defendants/Third-Parry Plaintiffs, jointly and severally liable to the Plaintiffs for the sinkhole and other damages. R.E. at 96-115; R. at 3094-3113. Interestingly, the trial court was specially requested *by the Plaintiffs* to explain the basis for finding the City liable absent a surviving claim against it. *See* Motion to Amend Judgment, R.E. at 116-118, R. at 3114-3116. The trial court responded in its Amended Order and Opinion:

> "....the Defendants (third-party plaintiffs) are barred from indemnity against the City because the Defendants actively and affirmatively participated in the wrongdoing in this matter.
>
> Even so, regardless of whether or not the Defendants" [sic] acted passively or actively, the Defendants' still would have been liable for the damage sustained by the Plaintiffs in this matter. The Court re-emphasizes that the City's negligent work coupled with the Defendants' failure to repair and maintain the lake and culvert system resulted in damage to the Plaintiffs' property. The basis for proportion of liability is that there has been a long term erosion of the soil underneath the culvert pipe for an extended period of time. Therefore, ***the Defendants would have still been liable to the Plaintiff, at some point, even if the City's negligent work was never done. To what extent, the Court is unaware.*** Nonetheless, it is the actions of both the City and the Defendants that ultimately contributed to the current damage to the Plaintiffs' property. Therefore, the Defendants' indemnity claim against the City is denied because the Defendants themselves are liable to the Plaintiffs for active negligence. In addition, the Court has already apportioned damages...." (emphasis added) R.E. at 60-61, R. at 3225-3226.

The trial court ordered that the City, Lake Owner Defendants and Defendant Eastover Lake Association immediately repair the Defendants' culvert system and eliminate the erosion." Despite there being no surviving claims against the City, the trial court ruled that the City was "...liable [to the Plaintiffs] for 40% of the costs to repair the [Defendants'] culvert system and to eliminate

the erosion." R.E. at 61-62; R. at 3226-3227. The trial court went on to order that the City and the Defendants "...have the soil and vegetation replaced which had been eroded due to the failure of the culvert system," and ruled that the City was liable [to the plaintiffs] for 40% of that as well. R.E. at 52; R. at 3227.

SUMMARY OF THE ARGUMENT

After the commencement of this litigation by the Plaintiffs, the Defendants were allowed to file third-party complaints against the City for indemnity. The trial court dismissed all of the Defendants/Third-Party Plaintiffs' indemnity claims; therefore, the Third-Party Plaintiffs may not recover anything from the City. It should also be noted that the indemnity claims are re-characterized negligence claims which were initiated well after the MTCA's one-year statute of limitations; therefore, the trial court should have dismissed the indemnity claims under Miss. Code Ann. §11-46-11(3).

The Plaintiffs in this matter did not seek any recovery against the City in the pleadings, nor present proof in the record that Plaintiffs were entitled to recovery against the City for Plaintiffs' damages. After the City was brought in as a third-party defendant, the Plaintiffs chose not to file a claim against the City under M.R.C.P. Rule 14. In addition, the statutory prerequisites for making a claim under the Mississippi Torts Claim Act ("MTCA"), Miss. Code Ann. §11-46-1, et seq., mandate that the person making a claim file a timely notice of claim. *See* Miss. Code Ann. §11-46-11. The Plaintiffs never filed a notice of claim, nor sought to comply with any of the MTCA's pre-requisites; therefore, the any monetary claims for damages by the Plaintiffs are barred. *See* Miss. Code Ann. § 11-46-

11(1); *See also Gorton v. Rance*, 52 So.3rd 351, ¶20-21 (Miss. 2011). Thus, the Plaintiffs' decision to not assert any claim against the City bars any recovery by the Plaintiffs from the City.

Any possible claims that could have been made against the City are in the matter are necessarily based on alleged negligence by City employees; therefore, those claims are governed by the MTCA. As noted above, all claims against a municipality are required to meet certain statutory prerequisites. The remedies for any successful claims under the MTCA are likewise limited by the MTCA. The MTCA allows only for limited monetary damages. The MTCA limits monetary damages to $500.000. The trial not only ignored the MTCA prerequisites and the absolute requirement that the plaintiff assert a direct claim against the City, but also failed to apply the MTCA's s limitations on the remedy for successful claims. Neither the Plaintiffs, nor the Third-Party Plaintiffs, presented any evidence concerning the actual cost of returning the Plaintiffs' property to its former state. None of the parties presented any evidence upon which to base a monetary award. Further, there was no evidence from which the trial court could base its apportionment of damages. The trial court's finding that the City was responsible for "...40% of the costs to repair the culvert system and to eliminate the erosion..." was speculative in that: (1) the trial found the erosion damages alleged, including the sinkhole, existed prior to the City's action; (2) the trial court found that there was no way to determine the extent the City's actions may have accelerated the pre-existing and ongoing erosion; (3) the trial court was admittedly unable discern what damages existed prior to the City's action. The MTCA does not allow for the award of uncertain and unproven monetary

damages against a municipality, nor does the MTCA allow a court the apportion fault based on conjecture and speculation. Therefore, the trial courts award of "40% of the cost of repair" must be reversed.

The trial court also erred in giving weight to expert opinions against the City that were neither based upon the actual findings of fact, nor based upon a reasonable degree of certainty. A trial court may not accept expert opinion after having rejected the factual basis of the opinion.

A court of equity is not free to abandon the mandates of the law; a court of equity must follow the law. The law requires that the trial court's finding that the City is liable to the plaintiffs must be reversed.

STANDARD OF REVIEW

A review by a Mississippi Appellate court of a chancellor's decision is reviewed under an abuse of discretion standard. *Miller v. Pannell*, 815 So. 2d 1117, 1119 (Miss. 2002). As a result, an appeals court will not disturb a chancellor's factual findings unless they are manifestly wrong or clearly erroneous or the chancellor has applied an incorrect legal standard. *In Re Estate of Ladner v. Ladner*, 909 So. 2d 1051, 1054 (Miss. 2004). While an appellate court applies a limited standard of review on appeals from chancery court, a *chancellor's interpretation and application of the law is* ***subject to a de novo standard of review***. Id., (emphasis added). The Court has ruled that it will apply a *de novo* standard of review when examining questions of law decided by a Chancery Court. *See Bailey v. Estate of Kemp*, 955 So.2d 777,781 (Miss. 2007). The Court has specifically ruled that it reviews errors of law, which include the proper application of the Mississippi Tort Claims Act, de novo. *See Fairley v. George County*, 800 So.2d 1159, 1162 (Miss.2001). As a result, the Chancellor's findings and conclusions as they relate to the City of Jackson should be subject to a *de novo* review. However, as set forth below, the Chancellor's decision, regardless of the standard of review applied, must be reversed.

ARGUMENT

I. The trial court was correct in finding that the Defendants/Third-Party Plaintiffs have an implied easement by necessity.

As noted in the Amended Order and Opinion, an implied easement exists when a party proves by clear and convincing evidence, that: (1) the dominant estate and servient estates were under common ownership at one time: (2) the use was continuous; (3) the use is apparent; (4) the use has been permanent; and, (5) the use has been necessary. *Delancy v. Mallette*, 912 So.2d 483 (Miss. Ct. App. 2005); *Gulf park Water Co., Inc. v. First Ocean Springs Dev. Co.*, 530 So.2d 1325, 1330 (Miss. 1988). It should be noted that if the Plaintiffs' claims fail, the third-party indemnity claims fail as well. Although it is of no benefit to the City that this Court affirm the trial court's finding that an implied easement exists in favor of the Defendants/Third-Party Plaintiffs, the City can find no basis from which to argue that the trial court's factual findings do not fulfill each element necessary to establish that the Defendants/Third-Party Plaintiffs possess an implied easement by necessity in regards to the culvert system. *See* Record at 3208-3210.

II. Whether the trial court was correct in rejecting the Defendants/Third-Party Plaintiffs assertion that the City had somehow "taken" the culvert system.

The Defendants'/Third-Party Plaintiffs' "taking" defense has morphed into new and novel "taking" theories since it was initially asserted in their respective pleadings. Several of the Defendants/Third-Party Plaintiffs failed to make any "taking" claim whatsoever in their third-party complaints, namely: Eastover Lake

Association, Inc.; Grace P. Lee and Sidney S. Lee; and lee Lott, Jr. and Nina D. Lott. *See* R. at 462-616, 629-635, and 662-668. The remaining Defendants/Third-Party Plaintiffs alleged in their Third-Party Complaints that "...the negligent work by the City of Jackson on the Eastover Lake drainage culvert has caused the culvert to fail. This failure caused the sinkhole on the property which has ***rendered the plaintiff's property not economically viable.*** This is a taking under the United States Constitution and the Constitution of the State of Mississippi, and ***plaintiff is entitled to just compensation*** as a result" (emphasis added). *See* R. at 373, 379, 407, 435, and 529. It must also be noted that the trial court never authorized the filing of a "taking" claim against the City; the third-party complaint attached to the motion for leave to bring in a third-party defendant did not contain a "taking" claim, nor any language that would imply such a claim would be made. See R. at 316-362. In short, none of the Defendants/Third-Party Plaintiffs ever alleged in the pleadings that there was a "taking" of their culvert system. These facts alone support the trial court's dismissal of all of their specious "taking" claims.

Assuming, arguendo, that the taking claims are not procedurally barred, the novel "taking" claims are still without merit. The Defendants/Third Party Plaintiffs first argue that the City assumed ownership of the lakes culvert system when the City approved and accepted the Plat submitted by the developers in 1962. They argue that by allegedly accepting the utility easement between Lots 19 and 20, "...the City became the owner (in fee simple) to Lake Circle Drive and the underlying portion(s) of the Lake's dam." *See* Appellant Brief of Bryant Allen et al. at p.23. In support of their argument they refer to the Amended Order and

Opinion in which the trial court noted that "In 1962, Eastover Deve.. designated streets, right of ways, and easements to the City of Jackson (the "City"). Between Lots 19 and 20 lies an easement which was dedicated to and accepted by the City." R. at 3205. Defendants/Third-Party Plaintiffs then proceed to cite several cases, none of which support this dubious proposition. The truth of the matter is the developer, Eastover Corporation, reserved the 5' and 10' easements for itself, just as it had on previous plats relating to the development which were not submitted to the City. *See* Exhibits 21, 22, and 23. Neither the culvert system, nor Eastover Lake, appear at all on the referenced plat containing the subject property (or any of the other plats for that matter). In addition, the lake and culvert are not described, or referenced at all, on any of the plats. Id. Consequently, it is legally impossible for ownership of the culvert system, or any part thereof, to have been transferred to the City by virtue of a plat that neither contained, described, nor referenced the culvert system.

It is well-settled law in Mississippi that land sold according to a plat or map will dedicate the streets, alleys, squares, and other public ways ***marked on the map or plat*** to the public for public use. *Nettleton Church of Christ v. Conwill,* 707 So.2d 1075, ¶5 (Miss. 1997)(emphasis added); See, e.g., *Luter v. Crawford,* 230 Miss. 81, 92 So.2d 348 (1957); *Skrmetta v. Moore,* 227 Miss. 119, 86 So.2d 46 (1956); *Panhandle Oil Co. v. Trigg,* 148 Miss. 306, 114 So. 625 (1927); *Indianola Light, Ice & Coal Co. v. Montgomery,* 85 Miss. 304, 37 So. 958 (1904); *City of Vicksburg v. Marshall,* 59 Miss. 563 (1882); *Briel v. City of Natchez,* 48 Miss. 423 (1873); *Vick and Rappleye v. Mayor and Alderman of Vicksburg,* 1 How. 379 (Miss.1837).

Mississippi Code Annotated section 21-19-63 provides for statutory dedication. The statute reads as follows:

> "The governing authorities of municipalities may provide that any person desiring to subdivide a tract of land within the corporate limits, shall submit a map and plat of such subdivision, and a correct abstract of title of the land platted, to said governing authorities, to be approved by them before the same shall be filed for record in the land records of the county. Where the municipality has adopted an ordinance so providing, no such map or plat of any such subdivision shall be recorded by the chancery clerk unless same has been approved by said governing authorities. In all cases where a map or plat of the subdivision is submitted to the governing authorities of a municipality, and is by them approved, all streets, roads, alleys and other public ways ***set forth and shown on said map or plat*** shall be thereby dedicated to the public use, and shall not be used otherwise unless and until said map or plat is vacated in the manner provided by law, notwithstanding that said streets, roads, alleys or other public ways have not been actually opened for the use of the public."
>
> (Emphasis added).

The lake and the culvert system are absent from the plat submitted to the City by the developer. *See* Exhibit 22. Therefore, neither the lake nor the culvert system were ever dedicated to the city for public use. The developer retained ownership of Eastover Lake and the culvert system for private use as evidenced by the fact that in 1978, Eastover Development Corporation conveyed ownership of *Eastover Lake, the dam, the spillway and the associated easements and right of ways* to each of the Lake Owner Defendants. R.E. at 75; R. at 2584. In addition, the developer conveyed a flowage easement to Eastover Lake Association for the inundation, ***ownership***, control, operation and maintenance of Eastover Lake. R.E. at 75; R. at 2584. It is clear that Eastover Lake and the culvert system that serves it were purposely omitted from the plat to avoid any contention that the lake was owned, controlled or maintained by the public.

Inasmuch as the Defendants'/Third-Party Plaintiffs' contention that the p... transferred ownership of the culvert system to the City was obvious meritless, the trial court was correct in dismissing their dubious "taking" claim.

Enamored with "taking' theories, the Defendants/Third-Party Plaintiffs then assert that there has been a "regulatory taking." See Brief of Bryant Allen et al. at pp.24-25. They erroneously argue that "...[b]y outlawing the private replacement and/or repair of the overflow culvert system, the city encumbered any private ownership rights so as to have effected a taken." Id. This claim is completely meritless. First, JCO[2] Secs. 110-19 and 110-20 provide a simple process that allows any private person(s) to cut into and/or excavate underneath City streets to do repairs, construction, etc. See JCO Sec. 110-19 and 110-20[3]. Basically all that is required is proper documentation and approval from the City. *Id.* It is true that utility connections requiring cuts into City streets or sidewalks must be performed by the city. See JCO Sec. 110-131. However, the overflow culvert system is not a considered a utility under Sec. 110-131. The ordinances cited by the Defendants/Third-party Plaintiffs have no application to JCO Sec. 110-131, or any other sections or articles of Chapter 110 of the Jackson Code of Ordinances.

JCO Sec. 122-76 states, in part, "...The following words, terms and phrases, **when used in this article**, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:..." (emphasis added). *See* JCO Sec. 122-76. In other words, the definitions are applicable only to Article I of Chapter 122 of the Jackson Code of Ordinances.

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[2] JCO is an acronym for City of Jackson Code of Ordinances.

[3] A copy of all ordinances cited are included attached hereto as an addendum pursuant to M.R.A.P. 28(f).

Likewise, the definitions contained JCO Sec. 122-302 are limited to Article IV of Chapter 122 of the Jackson Code of Ordinances. It states, "***As used in this article***, the following terms shall have the designated meanings:..." (emphasis added). *See* JCO 122-302. A "regulatory taking' cannot be supported by "cutting and pasting" totally unrelated ordinances.

Lastly, the Defendant/Third-Party Plaintiffs assert there has been a "physical taking of the overflow culvert system." They argue that the City took the property since it "exercised dominion over the overflow culvert system....without anyone else's permission...." See Appellant Brief of Bryant Allen et al. at p. 25. This assertion is factually incorrect and also without any legal basis. The City was given explicit "permission" to enter the property and disturb obstructions, such as the culvert, by virtue of the public utility easements wherein the City's sewer lines were buried. *See* Exhibit 22.

As previously noted, the relevant Plat did not contain any description or reference to the culvert system; in addition to being reserved to the developer, the utility easements described on the Plat were unencumbered by the culvert system. Id. The Defendants/Third-Party Plaintiffs bear the burden of proving that it was the intent of the original creator that the culvert system not be considered an obstruction. See *Calvert v. Griggs*, 992 So.2d 627, 632 (¶14) (Miss. 2008). Intent is a question of fact, and is "shown by the circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which the [easement] has been used and occupied." *Rowell v. Turnage,* 618 So.2d 82, 86 (Miss. 1993) (quoting 25 Am.Jur.2d *Easements* § 91 (1966)). Where there is any doubt or ambiguity concerning the intention of the

parties to the creation of an easement, the language granting the easement will be construed against the grantor. *Boggs v. Eaton,* 379 So.2d 520, 522 (Miss.1980); *Ouber v. Campbell,* 202 So.2d 638, 641 (Miss.1967). The Defendants/Third-Party Plaintiffs failed to meet their burden of proving that the original creators intended to allow the servient estate, then owned entirely by the developer, to construct a privately owned culvert system within the afore-mentioned utility easements and the city's right of way. The record is, in fact, bare on the issue. Consequently, the culvert system constituted an obstruction to the any public utility easements it crossed. The developer and all of the Defendants/Third-Party Plaintiffs were on notice of the existence and of the utility easements, and the fact that their real estate was the servient estate to the street right of way. The City was, therefore, well within its rights, by virtue of the right of way, to remove and replace such portions of the culvert system which hindered its ability to repair the sewer lines below.

The trial court's decision to give no weight to the afore-mentioned "taking" claims is well supported by the record and the law.

III. The Defendants/Third-Party Plaintiffs may not assert the "Corporate Shield Doctrine" as a defense since it was not previously raised before the trial court.

The Landowner Defendants have belatedly asserted that they are protected from any liability by virtue of the "Corporate Shield Doctrine." See Appellant Brief of Michael Borne et al. at pp.5-7. The Landowner Defendants may no such assertion or argument to the trial court. An appellant may not raise a new issue on appeal that he had not first presented to the trial court for determination.

McDonald v. McDonald , 39 So.3d 868, 885 (¶54) (Miss. 2010). Therefore, the Landowners Defendants' assertion that they are protected by the "corporate shield" of Eastover Lake Association is procedurally barred. Id.

IV. All claims, asserted and unasserted, against the City are barred by the MTCA's one-year statute of limitations.

The City would agree with the Defendants/Third-Party Plaintiffs assertion that the lawsuit against them may well be barred by the three (3) year statute of limitations set forth in Miss. Code Ann, 15-1-49. Implicit in the Defendants/Third-Party Plaintiffs argument is the fact that their statute of limitations defense was not waived by virtue of their active participation in discovery. By the very same token, the City's statute of limitations defense could not be considered waived as alleged the Defendants/Third-Party Plaintiffs. The trial court noted its Amended Order and Opinion, its final ruling on the matter, that "[t]he City's claim that the Defendants are time barred from filing an indemnity claim is denied based on the *foregoing reasons,*" referring to the same reasons the trial court denied the Defendants' statute of limitations defense. See. R. at p. 3227. It should be noted that the City, having been brought in as a third-party, set forth its affirmative defenses well after the Defendants/Third-Party Plaintiffs had asserted theirs. Further, the Defendants/Third-Party Plaintiffs initiated and actively participated in discovery prior to the City initiating any discovery.[4] Finally, the hearing on the City's Motion for Summary Judgment, where it put forth its statute of limitations defense, took place at the same exact

[4] The Defendants/Third-Party Plaintiffs served discovery with the third-party complaints and noticed depositions prior to the City having filed any discovery whatsoever.

time as the motions for summary judgment of the Defendants/Third-Party Plaintiffs. If, in fact, the trial court had ruled the City's statute of limitations defense had been waived, it would have been a clear abuse of discretion.

The City's statute of limitations defense claims are governed by the one year statute of limitations of the Miss. Torts Claims Act ("MTCA"). The MTCA states that "...[a]ll actions brought under the provisions of this chapter shall be commenced within one (1) year next after *the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after....*" Miss. Code Ann. §11-46-11(3) (emphasis added). The MTCA further states that "...[t]he limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter, *notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter." Id. (emphasis added).* Whether the claim is labeled negligence, contribution, or indemnity, the statute of limitations expires one year from the alleged wrongful conduct. *Id.*

Just as the "discovery rule" applied to the Defendants' three (3) year statute of limitations, it also applies to actions brought under the MTCA. *See Saul v. South Cent. Regional Medical Center, Inc.,* 25 So.3d 1037 (Miss. 2010), citing *Caves v. Yarbrough,* 991 So.2d 142, 155 (Miss.2008) (citing *Barnes v. Singing River Hosp.,* 733 So.2d 199, 205-06 (Miss.1999)). The limitations period for MTCA claims does not begin to run until all the elements of a tort exist."

Therefore, the operative question is whether statutory notice was provided within a year next following the earliest date, by exercise of reasonable diligence, the claimant should have known of the injury/damages and the acts or omission which caused them. *See Caves,* 991 So.2d at 155-56 (emphasis added). The determination is dependant and based on findings of fact made at trial. *Id.*

In the instant case, the trial court made substantive findings of fact as to when the parties knew or should have known of the damages to the culvert system. In a letter dated June 11, 2004, Mr. Rogers, then president of Eastover Lake Association, Inc., makes reference to the damage to the Plaintiffs' property and the possibility that it was connected to the City's work in 2002. *See* R.E. at 109; See also Exhibit 11. Further, the trial court noted that Defendants 'pointed the finger at the City's work' in a letter dated December 12, 2005. *See* R.E. 108 p.13; See also Exhibit 13. The lower court's findings of fact clearly show that the Defendants knew (or should have known) in June of 2004 of the erosion damage and it's possible connection to the City's 2002 work. The Defendants notices of claim and subsequent third-party complaints, all submitted and/or filed in 2007, were all filed well after the applicable one year statute of limitations. As a result, all of the possible claims against the City are barred.

The Defendants/Third-Party Plaintiffs' have argued that since their claim was for indemnity, the statute of limitation does not begin to run until the plaintiffs were awarded a judgment against them. Obviously this is incorrect. A previously discussed, the MTCA statute of limitations begins to run "*the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based*" regardless of the characterization. The basis of their

indemnity claim is an allegation of negligence against the City. Consequently, both the Plaintiffs and the Third-Party Plaintiffs knew or should have known that they had actionable claims for negligence against the City in June of 2004. Both the Plaintiff and the Third-Party Plaintiffs failed to file negligence claims against the City within the MTCA's one year statute of limitation. Therefore, all negligence claims and any claims dependent thereon were extinguished.

The trial court concluded that the tort Plaintiffs alleged against the Defendants was a continuing tort, citing *Stevens v. Lake*, 615 So.2d 117 (Miss. 1992). The Court reaffirmed that viewpoint more recently in *Pierce v. Cook*, 992 So.2d 612, (Miss.2008), "a "continuing tort" is one inflicted over a period of time; it involves a *wrongful conduct that is repeated until desisted*, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation" (emphasis added). *Pierce at* 619 (Miss.2008). Based on the established facts in the case, the City could not have committed a "continuing tort." The City completed all of its work in the relating to the culvert system in the summer of 2002. *See* R. at 3206-3207. Unlike the Defendants'/Third-Party Plaintiffs' obligation to the Plaintiffs, the City did not owe a continuing duty to the Defendants/Third-Party Plaintiffs to maintain the culvert system. Therefore, the trial courts reliance on the "continuing tort" doctrine is misplaced in regards to the indemnity claims against the City. All of the parties were aware of the allegations against the City no later than June 2004. See R. at 3217; See also Exhibit 11. Therefore, all possible claims against the City were time barred by the MTCA prior to the Plaintiffs filing their suit in October

2006, and well before the Third-Party complaints were filed in October 2007. See R. at 3207-3208.

Finally, it should be noted that if the Plaintiffs' claims against the Defendants/Third-Party Plaintiffs be found to be barred by the applicable statute of limitations, the indemnity claims against the City are likewise barred and must be dismissed.

V. The trial court exceeded its authority in granting the Plaintiffs relief.

A. The MTCA and M.R.C.P. Rule 14 bar recovery by the Plaintiffs against the City unless the Plaintiffs have filed a direct action against the City.

The trial in this matter was completed on April 2, 2010. Following the conclusion of trial, the Court entered its judgment. The trial found that the Third-Party Plaintiffs' sole indemnity claim against the City was barred. *See* R.E. at 61; R. at. 3226 It is important to note that at no point during the entire pendency of the litigation of this matter did the Plaintiffs seek to recover damages from the City; the plaintiffs never made a claim against the City. The City was not named as a party to the litigation until the Defendants filed their claim for indemnity against the City in October 2007. Nevertheless, the trial court erroneously found the City liable *to the Plaintiffs* for 40% of unspecified damages.

Assessment of liability to the City and allowance of recovery by the Plaintiff against the City goes beyond the scope of the pleadings. The indemnity claim against the City is the only claim against the City, and that sole claim was

brought by the Defendants, not the Plaintiff, in this action. The relevant portion of the Judgment states as follows:

> ***"A. SOLE* COUNT:INDEMNTIY** ....liability exists only when the party seeking indemnity, the indemnitee, is free of fault and has discharged a debt that should be paid ***wholly*** by the indemnitor..." R.E. at 59; R. at 3224.
>
> "....the Defendants (third-party plaintiffs) are barred from indemnity against the City because the Defendants actively and affirmatively participated in the wrongdoing in this matter.
>
> Even so, regardless of whether or not the Defendants" [sic] acted passively or actively, the Defendants' still would have been liable for the damage sustained by the Plaintiffs in this matter. The Court re-emphasizes that the City's negligent work coupled with the Defendants' failure to repair and maintain the lake and culvert system resulted in damage to the Plaintiffs' property. The basis for proportion of liability is that there has been a long term erosion of the soil underneath the culvert pipe for an extended period of time. Therefore, ***the Defendants would have still been liable to the Plaintiff, at some point, even if the City's negligent work was never done. To what extent, the Court is unaware.*** Nonetheless, it is the actions of both the City and the Defendants that ultimately contributed to the current damage to the Plaintiffs' property. Therefore, the Defendants' indemnity claim against the City is denied because the Defendants themselves are liable to the Plaintiffs for active negligence. In addition, the Court has already apportioned damages...." (Emphasis added) R.E. at 60-61, R. at 3225-3226.

This trial court's conclusion is contrary to controlling Mississippi authority. The trial court was further correct in its interpretation and application of Mississippi law regarding common-law indemnification. "Common-law indemnity is not a fault-sharing mechanism" (internal citations omitted), and that the Defendants' indemnity claim against the City is precluded or barred by the Defendants' own liability and fault. R.E. at 59, R. at 3224; *see also J.B. Hunt Transport, Inc. v. Forest General Hospital*, 34 So.3d 1171 (Miss. 2010); *Bush v. City of Laurel*, 215 So.2d 256, 259-60 (Miss. 1968); *Home Ins. Co. v. Atlas Tank Mfg. Co.*, 230 So.2d 549, 551 (Miss. 1970). The contradiction lies in the trial

court's conclusion that the City, in addition to the Lake Owner Defendants and Defendant Eastover Lake Association, is liable for the damage to the Plaintiff's property. *Id.*

Since the Plaintiffs in this matter did not seek any recovery for damages to Plaintiff's property against the City in the pleadings. Therefore, the assessment of liability and damages against the City is a remedy outside the scope of the pleadings. Such is prohibited by Mississippi law.

It should be noted that neither the Plaintiffs nor the Defendants/Third-Party Plaintiffs made any direct claim for contribution against the City. Even if they had, further recovery by way of contribution under the indemnity circumstances present in this case is similarly prohibited by Mississippi law. As cited and relied upon by this Court in its Judgment, the case of *J. B. Hunt J.B. Hunt Transport, Inc. v. Forest General Hospital,* 34 So.3d 1171 (Miss. 2010) addresses indemnity recovery: "indemnity is an all or nothing proposition damage-wise, it is also an all or nothing proposition fault-wise; apportionment of damages is not contemplated by indemnity." *J. B. Hunt Transport, Inc. v. Forest General Hospital,* 34 So.3d at 1175; *see also* Miss Code Ann. § 85-5-7(4) (Rev. 1999).

Furthermore, the Defendants/Third-Party Plaintiffs in the instant litigation brought their indemnity claim against the City pursuant to M.R.C.P. 14(a). Under that same provision, the Plaintiff was provided an opportunity to "...assert any claim against the third-party defendant arising out of the...occurrence...." M.R.C.P. 14(a). The Plaintiff never brought a claim against the City or amended the Complaint to include a claim against the City. As a

result, the Plaintiff cannot recover against the City through Rule 14 of the Mississippi Rules of Civil Procedure.

In interpreting the Mississippi Rules of Civil Procedure, the Mississippi Supreme Court routinely looks to federal case law for guidance in the construction and application of the State's rules because Mississippi's Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. *See Mississippi Comp Choice, SIF v. Clark, Scott & Streetman*, 981 So. 2d 955, 959 (Miss. 2008). As such, federal case law construes Rule 14 of the Federal Rules of Civil Procedure to prohibit recovery by a plaintiff from a third-party defendant, unless the plaintiff has amended or amends his or her complaint to file a direct action against the third-party defendant. *See Meadows v. Anchor Longwall and Rebuild, Inc., et al.*, CA 3rd, No. 07-2580, Jan. 13, 2009; *George v. Brehm*, 246 F.Supp. 242, 246 (W.D. 1965) (construing Rule 14 of Fed. R. Civ. Pro. to prevent recovery by plaintiff against third-party defendant unless plaintiff files direct action against third-party defendant). More recently, the Court of Appeals for the Fourth Circuit held that a district court abused its discretion in amending a plaintiff's complaint *sua sponte* to include a direct claim against a third-party defendant, when plaintiff had never asserted such a claim. *See Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661,668-69 (4th Cir. 1989).

Controlling and applicable Mississippi case and statutory authority do not permit the City to be liable to the Plaintiff in this action, as the Plaintiffs never asserted any claim against the City. The trial court's assessment to the City of 40% liability for the Plaintiff's damages, where damages against the City was never sought by the Plaintiff, is error. Such an award against the City in this

action violates controlling Mississippi case precedent, statutory authority and the Mississippi's Rules of Civil Procedure. Accordingly, the Judgment against the City must be reversed.

B. The MTCA bars the equitable relief fashioned against the City by the trial court.

Mississippi case law clearly prohibits a court of equity from ignoring unambiguous statutory principles and mandates to shape relief. *In re Estate of Miller*, 840 So.2d 703, 708 (Miss.2003). The MTCA waives sovereign immunity to all claims for money damages *arising out of torts*. Miss. Code Ann. § 11-46-5. Thus, the Third-Party Plaintiffs' indemnity claims are all governed by the MTCA since the claims arise out of an allegation of negligence and request a money damages. The lower court, though a court of equity, was still obliged to follow the mandates of the MTCA. Equity must follow the law. *Warner's Griffith Mississippi Chancery Practice* § 34 (1991), See also *Bank of Crystal Springs v. First Nat'l Bank*, 427 So.2d 968 (Miss. 1983), *Dulion v. Harkness*, 31 So. 416 (Miss. 1902). Specifically Warner's Griffith Mississippi Chancery Practice provides:

> Whatever may have been the course of action in the formative period of the law, courts of equity no longer assume to annul or directly disregard the positive provisions of the established law. Courts of equity are now bound by express rules of law ***concerning property and its interest*** and particularly is this true of constitutional and valid statutory requirements and provisions. ***The maxim that equity follows the law is especially applied in the construction and as to the effect of statutes. Wherever the rights or duties of the parties in a given state of facts are definitely defined and established by law, statutory or common, equity must observe those rights and enforce those duties.***

> ***. . . Where the law has positively declared that there shall be no right and no remedy, equity cannot assume to create a right, nor interpose to punish a remedy ....***"
>
> *Warner's Griffith Mississippi Chancery Practice* § 40 (1991) (emphasis added).

As demonstrated by the record and instant facts, the trial court ignored the statutory authority controlling the only claim actually asserted. The provisions of the MTCA control that sole claim, and are unambiguous evidence of clear legislative intent that sovereign immunity is not waived in regard to claims neither brought under, nor in compliance with, the MTCA. The legislative intent of the MTCA is that the waiver of sovereign immunity be limited to claims that are properly noticed and timely filed. Courts of equity **must apply the statutes** according to their plain meaning. *Mississippi Dep't of Wildlife Fisheries and Parks v. Mississippi Wildlife Enforcement Officers' Ass'n, Inc.*, 740 So. 2d 925, 932 (Miss.1999). "The ultimate goal of the court in construing a statute is to discern and give effect to the legislative intent," and a court cannot create an exception to a statute by construction. *Id.* The trial court was clearly in error by finding the City liable to the Plaintiffs where the Plaintiffs had neither noticed, filed or asserted any claim against the City. The chancery court committed further error by going beyond the bounds of the remedy provisions of the MTCA in an attempt fashion equitable relief of an unspecified nature and unknown costs. By so doing, the Chancellor in the case at bar effectively disregarded the plain language of MTCA and shaped impermissible equitable relief for an un-pled claim. Therefore, the lower court's judgment against the City is in error.

The Mississippi Supreme Court has previously reached a similar conclusion in other cases. In *In re Estate of Smith*, 891 So.2d 811 (Miss. 2005), the Mississippi Supreme Court disagreed with the Chancellor's decision and instead determined that the Chancellor ignored controlling law in violation of the equitable maxim that equity must follow the law. *Id.* In *Estate of Smith,* the Mississippi Supreme Court reversed the chancery court's decision stating, "[C]ourts have consistently held that under the equitable doctrine that 'equity follows the law,' **courts of equity cannot modify or ignore an unambiguous statutory principle in an effort to shape relief.**" *Estate of Smith*, 891 So.2d at 813, quoting *Estate of Miller*, 840 So.2d 703, 708 (Miss.2003) (emphasis added), see also *Farmer v. State of Mississippi Dep't of Public Safety*, 907 So.2d 981 (Miss. Ct. App.2005).

Where a rule of the common law or statute is direct, and governs the case, a court of equity is as much bound by it as a court of law. *Dibrell v. Carlisle*, 48 Miss. 691 (Miss. 1873) (equity follows the law). Otherwise stated, "[a] court of equity, no more than a court of law may act on its own conceptions of what is right in a particular case, for established rules and precedents are equally binding on both law and equity courts, and where the rights of parties litigant are clearly defined by statutes, legal principles and precedents may not be unsettled or ignored and **not even a court of equity has any discretion as to what the law may be**." *Milgram v. Jiffy Equip. Co.*, 247 S.W.2d 668, 677 (MO. 1952).[5] Because the Chancellor was manifestly in error for ignoring the provisions of the

[5] This equitable maxim has been also been recognized in other jurisdictions.

MTCA as to remedies, established rules, precedent and equitable maxims, the trial court's decision against the City must be reversed.

C. There are no barriers preventing the Defendants/Third-Party Plaintiffs from repairing the culvert system

Should the Court affirm the trial decision regarding liability of the Defendants/Third-Party, the City would note that there are no insurmountable legal barriers in the City's ordinances that would prevent the Defendants/Third-Party Plaintiffs from moving forward with repairing the culvert system, *supra*. The City would point out that the record fails to contain any information from which one could determine practical aspects involved in repairing the culvert system. While such a void in the record would prohibit a monetary award against the City under the MTCA, it provides no basis from which to assume that repairing the culvert is impractical or impossible, as alleged by opposing counsel.

VI. The trial court was correct in denying the indemnity claims against the City.

The trial court's findings of fact contradict its legal determination that the City's actions were, in part, the proximately caused the sinkhole/erosion, the Plaintiffs' damages. Assuming, arguendo, that all claims against the City had not been dismissed, any viable claim of against the City would be dependent on the City's actions being found to be both negligent and the proximate cause of the damage complained of by the Plaintiffs. However, the trial courts findings of fact negate the possibility that City's actions were the proximate cause of the sinkhole/erosion in question.

First, the trial court found that the erosion above and around the outlet of the culvert system were all present prior to the city's work in the summer of 2002. The trial court accepted as true the testimony from Kirk Carraway who testified that there was erosion around the outlet when he inspected the property in the late 1990's. The trial court also accepted as true the testimony of Ronnie Hopson regarding the erosion. Hopson testified that there was already "...a sinkhole or cave-in, as we call it, in [the Carraways'] backyard...." In short, the trial court found that prior to the City's work in 2002, there was already a sinkhole and extensive erosion next to the outlet of the culvert system. The trial court stated that "...the sinkhole worsened after the City performed its work in the summer of 2002...the sinkhole is a result of long term erosion." R.E. at 56; R. at 3221.

Second, the trial court specifically found that "...there was no evidence as to when the erosion process actually commenced. Such may be impracticable to determine, if not impossible given the years that have gone by since the lake and culvert system were first constructed." The trial court then states its sole reason for finding the City liable, "However, this Court does have evidence of a sinkhole in the Plaintiffs' back yard, negligent work done by the City and failure to repair and maintain the culvert system on behalf of the [Defendants/Third-Party Plaintiffs]. Those are the facts." R.E. at 58; R. at 3223. In short, the trial court glosses over the third-party plaintiffs/defendants burden of having to prove proximate cause and damages associated with the City's actions.

The trial court concluded that the City's work was in part responsible for the sinkhole by combining the expert testimony of Alain Gallet, the plaintiff's

expert, and Jill Butler, the expert for the Third-Party Plaintiffs/Defendants. Gallet testified that the headwall and apron at the intake section of the culvert system were in a state of disrepair and there was evidence of water bypassing the pipe at the inlet, upstream from where the City performed its work. See Trans. at 504-506. Gallet testified that the Plaintiff's damages were the result of "...a long term erosion process due to water bypassing the pipe and exiting along the outlet and eroding a little bit at a time..." Trans. at 504. Gallet also testified that there was "...evidence of water bypassing the pipe at the inlet..." Id. Gallet did not testify that the City's work was the proximate cause of the erosion, he merely stated it 'may' have contributed. When an expert's opinion is not based on *a reasonable degree of certainty,* or the opinion is articulated in a way that does not make the opinion probable, the finder of fact cannot use that information to make a decision. See *Kidd v. McRae's Stores Partnership,* 951 So.2d 622, 626 (¶ 19) (Miss.Ct.App.2007). Failure to properly qualify an expert opinion typically occurs in testimony that is speculative, using phrases such as " probability," " possibility," or even "strong possibility." Id. It is the intent of the law that if an expert cannot form an opinion with *sufficient certainty* so as to make a judgment, neither can a finder of fact use that information to reach a decision." Id.

Therefore, in order to conclude the City work caused the erosion, the trial court really relied just on Butler's opinion. Butler testified that in her opinion water was not bypassing the pipe at the inlet, she summarily dismissed Gallet's personal observations that there was water escaping at the inlet. She also ignored the fact that there was evidence of remedial work for leakage at the first few

sections of the culvert pipe. See Trans. at 504. She opined that all of the erosion and the sinkhole were the result of "piping" caused by the City's work. However, Butler's opinion was based on the erroneous assumption that the erosion/sinkhole was not present until after the City's work. When asked 'what possibility would there be that the City's work would have caused [the sinkhole] if the hole was already present at the time the City did its work, Butler responded: "...I don't know – you know, there's a lot of reasons that could have caused it. The other utilities that were there. Testimony has been made that there was a cable line, a gas line, some other things." However, there was no such testimony in the record. When questioned again on whether Hopson's testimony that the sinkhole was already present at the time the City performed its work, would change her opinion, Butler stated.

> "...Well, you know, Mr. Hopson never did or probably didn't think about, to be honest with you, when he mentioned that Mrs. Carraway called him back there to look at a hole in her yard. I don't see where he measured from anything or described anything that I could tell where that hole was. You know, I worked for the city engineer for four years, and I've had a lot of people call me behind their house to look at a hole. Sometimes it's just a hole where a stump rotted; sometimes a dog dug a hole, and a lot of people, they might call something a sinkhole and it's something else, or they might think it's something else and it actually be a sinkhole. So sitting here today, we don't actually know what it was that he was saying she wanted him to look at." Trans. at 994-995.

Butler finally admitted that if the sinkhole was already there at the time the city was doing its work, "...it might change [her] opinion." . Trans. at 996.

Butler's opinion that the City's work caused the sinkhole lacks credibility based on the trial court's findings of fact: the erosion was present and continuing to develop years prior to the City's work, as Kirk Carraway testified; the sinkhole was already present at the time of the City's work, as Hopson testified; the inlet to

the culvert system had long been in a state of disrepair, as Gallet testified; and the culvert system needed repairs prior to the City's work, as denoted in Roger's testimony and letters to fellow lake owners. Butler's opinion cannot be "combined" with Gallet's because her opinion is not based on the actual findings of fact. Under *Daubert,* the opinion of an expert "must be supported by appropriate validation i.e., ' good grounds,' based on what is known." *Davis v. Christian Broth. Homes of Jackson, Miss., Inc.,* 957 So.2d 390, 410 (¶ 47) (Miss.Ct.App.2007) (quoting *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Butler failed and/or refused to give an opinion based on the actual facts as determined by the trial court. A trial court is not free to accept an expert's opinion while at the same time rejecting the factual basis of that very same opinion. Id. Inasmuch as the trial court's finding of liability is dependent on Butler's faulty testimony, the trial court's ruling should be reversed accordingly.

VII. Remaining 'fringe' arguments put forth by the Defendant Eastover Lake Association.

Finally, Eastover Lake Association argues that it "owns nothing", 'riparian law" does not apply, and 'it has no common law duty as a contractor.' These are all meritless arguments born of desperation. While the landowners attempted to divest themselves of liability by their belated "corporate shield" argument, their shadow, Eastover Lake Association, asserts it owns nothing and therefore owes nothing. Neither, of course, is correct. The Defendants/Third-Party Plaintiffs, are opposing sides of the same token, and both owed an affirmative duty to the Plaintiffs regarding maintenance of the overflow culvert system. While the City

would note an absence of liability on the Defendants would mandate dismissal of any claims against the City. The City would acknowledge its belief that both the landowners and Eastover Lake Association were properly found liable to the Plaintiff for active negligence. The City would, therefore, adopt the arguments of the Plaintiffs on these issues to the extent they establish the Defendants were actively negligent.

CONCLUSION

The City of Jackson has met its burden on appeal to demonstrate that the Chancellor abused her discretion, was manifestly wrong, clearly erroneous and/or misapplied the law: liability may not attach where a claim was never asserted; the MTCA's statute of limitations may not be circumvented by merely re-characterizing a claim as one of indemnity; and the limited remedies of the MTCA may not be expanded upon, even by a court of equity. In addition, should the Court find that Plaintiffs claims against the Defendants/Third-Party Plaintiffs should be dismissed, the indemnity claims the City should likewise be dismissed.

The City of Jackson respectfully requests that this Court reverse the chancery court's Judgment to the extent it places any liability on the City, and render judgment in favor of the City of Jackson. The City of Jackson prays for any other appropriate relief to which it may be entitled.

Respectfully submitted this the 9th day of December, 2011.

THE CITY OF JACKSON, MISSISSIPPI
/s/James Anderson, Jr.
By: _____
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CERTIFICATE OF SERVICE

The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing City of Jackson's ***Appellee Brief*** to the following:

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So certified, this the 9th day of December, 2011.

/s/James Anderson, Jr.
JAMES ANDERSON, JR.

ADDENDUM

Determination of the issues presented by the parties requires the study of the certain sections of the City of Jackson Code of Ordinances. Accordingly, the following relevant sections are reproduced and attached hereto pursuant to M.R.A.P. 28(f):

City of Jackson Code of Ordinances Sec. 110-19

City of Jackson Code of Ordinances Sec. 110-20

City of Jackson Code of Ordinances Sec. 110-131

City of Jackson Code of Ordinances Sec. 122-76

City of Jackson Code of Ordinances Sec. 122-301

City of Jackson Code of Ordinances Sec. 122-302

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City of Jackson Code of Ordinances Sec. 122-302

Sec. 110-19. - Regulation of work on or under city streets.

(a) *Submission of plan; approval required.* It shall be unlawful for any person, corporation, firm, partnership, or any branch or department of the city to perform any work on or under the surface of the right-of-way of any dedicated street as now laid out within the city or any street which may be dedicated to the city in the future without first having submitted a plan for the proposed work to the public works department and having received written approval thereon. The word "street" as used in this chapter shall mean and include any street, alley, road, or other public way including sidewalks within the city.

(b) *Lawful conduct of work; emergency procedures.* Any party set forth in subsection (a) of this section, in the performance of such work as described in such subsection, shall abide by all ordinances of the city and the rules and regulations of the public works department in the performance of such work. In cases of emergency where such work must be performed at a time when the public works department is not open to the general public, the work shall proceed and the application for permission for the performance thereof shall be made to the public works department within 48 hours after the commencement of the work.

(c) *Exemptions.* There are excluded from the provisions of this section landscaping and the ordinary maintenance of landscaping by property owners, including work performed pursuant to the landscape ordinance of the city, within the nonpaved street right-of-way abutting their land; individual service lines which do not call for the cutting of a sidewalk or roadway; as well as any and all work done and performed in connection with overhead utilities.

(d) *Grant of permission free of charge.* The city shall not charge any fees of any kind as a prerequisite to the obtaining of permission to do any work covered by the provisions of this section.

(e) *Authority for public works director to formulate rules and regulations.* The public works director is hereby authorized to formulate the rules and regulations for the implementation of this section, taking into consideration traffic and pedestrian flow. A copy of such rules and regulations shall be maintained in the office of the city clerk.

(f) *Locations, widths and radii of proposed driveways in the landscape improvement taxing district.* Notwithstanding any other subsection in this section or any other ordinances of the city, all driveway locations, widths, and radii requirements in the landscape improvement taxing district, also referred to as the central business district core area, shall be reviewed and approved by the site plan review committee prior to a permit being issued by the public works department. The site plan review committee shall consider pedestrian flow, pedestrian safety, the city's adopted comprehensive plans, Jackson Redevelopment Authority's plans, downtown plans, landscape plans, the historic preservation ordinance, transportation plans, and limiting access to enhance pedestrian flow and safety and avoid its disruption, prior to recommending the granting of a driveway permit.

(Code 1971, § 26-23.1)

Sec. 110-20. - Deposits on or alterations of streets.

It shall be unlawful to sink, alter or cut into any public street or square, or remove therefrom or deposit therein any dirt, rubbish or other material without permission from the city council.

(Code 1971, § 26-24)

Sec. 110-131. - Utility connections requiring cuts in streets or sidewalks to be done only by city.

No permit will be granted to any person for any sewer, water, or gas connection, or conduit for wires of any kind where such construction requires cutting through any paved street or concrete sidewalk. Such work shall be done only by the city.

(Code 1971, § 26-41)

Sec. 122-76. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Approving authority means the city engineering section of the utilities division of the public works department or the director of public works or other designated official of the city or his duly authorized deputy, agent or representative.

BOD (biochemical oxygen demand) means the quantity of oxygen utilized in the biochemical oxidation of organic matter under standard laboratory procedure in five days at 20 degrees Celsius, expressed in milligrams per liter.

Building drain means that part of the lowest horizontal piping of a drainage system which receives the discharge from soil, waste, and other drainage pipes inside the walls of the building and conveys it to the building sewer, beginning five feet outside the inner face of the building wall.

Building sewer means the extension from the building drain to the public sewer or other place of disposal.

Chlorine requirement means the amount of chlorine in milligrams per liter, which must be added to sewage to produce a residual chlorine content or to meet the requirements of some other objective, in accordance with procedures set forth in the definition for the term "standard methods."

Garbage means solid wastes from the domestic and commercial preparation, cooking, and dispensing of food, and from the handling, storage, and sale of produce.

Hydrogen ion concentration. See the definition for pH.

Industrial wastes means the liquid wastes from industrial manufacturing processes, trade, or business as distinct from sanitary sewage.

Natural outlet means any outlet into a watercourse, pond, ditch, lake, or other body of surface water or groundwater.

pH means the logarithm of the reciprocal of the weight of hydrogen ions in grams, per liter of solution.

Properly shredded garbage means the wastes from the preparation, cooking, and dispensing of foods that have been shredded to such a degree that all particles will be carried freely under the flow conditions normally prevailing in public sewers, with no particle greater than one-half inch in any dimension.

Public sewer means a sewer in which all owners of abutting properties have equal rights, and is controlled by public authority.

Regulatory agency means the state department of environmental quality, office of pollution control.

Sanitary sewer means a sewer which carries sewage and to which stormwater, surface water, and groundwater are not intentionally admitted.

Service charge means the basic assessment levied on all users of the public sewer system whose wastes do not exceed in strength the concentration values established as representative of normal sewage.

Sewage means a combination of the water-carried wastes from residences, business buildings, institutions, and industrial establishments, together with such groundwater, surface water, and stormwater as may be present.

Sewage treatment plant means any arrangement of devices and structures used for treating sewage.

Sewer means a pipe or conduit for carrying sewage.

Sewerage works means all facilities for collecting, pumping, treating, and disposing of sewage.

Slug means any discharge of water, sewage, or industrial waste which in concentration of any given constituent or in quantity of flow exceeds for any period of duration longer than 15 minutes more than five times the average 24-hour concentration or flows during normal operation.

Standard methods means the examination and analytical procedures set forth in the most recent edition of "Standard Methods for the Examination of Water, Sewage, and Industrial Wastes," published jointly by the American Public Health Association, the American Waterworks Association and the Water Pollution Control Federation.

Storm drain (sometimes termed "storm sewer") means a sewer which carries stormwater and surface water and drainage, but excludes sewage and industrial wastes, other than unpolluted cooling water.

Surcharge means the assessment in addition to the service charge which is levied on those persons whose wastes are greater in strength than the concentration values established as representative of normal sewage.

Suspended solids means solids that either float on the surface of, or are in suspension in water, sewage, or other liquids, and which are removable by laboratory filtering.

Watercourse means a channel in which a flow of water occurs, either continuously or intermittently.

(Code 1971, § 29-95; Ord. of 9-20-94)

Cross reference— *Definitions generally, § 1-2.*

Sec. 122-301. - General powers and purpose.

(a) The director of the department of public works or his designee may regulate the use, grading, paving, maintenance, and operation of public rights-of-way and public storm drain systems so as to reduce, to the maximum extent practicable, the addition of pollutants to stormwater in quantities or concentrations that could reasonably be expected to cause or contribute to either a violation of an applicable water quality standard or any condition of a stormwater national pollutant discharge elimination system (NPDES) permit issued to the city; or any other act that causes or contributes to damage to a public storm drain system. The director of the department of public works or his designee may regulate the use of public storm drain systems through permits or written approvals for activities that could release pollutants or stormwater to a public storm drain system.

(b) Nothing in this article shall be construed as an assumption by the City of Jackson of any other person's duties or responsibilities arising under any applicable law, including the common law. Nothing in this article shall be construed to create any right or cause of action vested in any person or entity other than the City of Jackson.

(Ord. No. 2000-27(9), § 0.1, 4-1-00)

Sec. 122-302. - Definitions.

As used in this article, the following terms shall have the designated meanings:

Applicable water quality standard means a numeric or narrative water quality criterion established by the State of Mississippi or the United States of America that limits the quantity or concentrations of pollutants that may be present in waters of the state.

Nonresidential user means any real property that is actually or intended to be used for commercial, industrial, agricultural, recreational purposes, or not as a single-family dwelling residential purpose.

Residential user means any real property that is actually or intended to be used for a single-family dwelling residential purpose.

NPDES permit means an authorization to discharge pollutants issued pursuant to Section 1342 of Title 33 of the United States Code.

Pollutant means solid, liquid, gaseous, or other substances that can alter the chemical or physical properties of water, including, but not limited to the following: Fluids, solid wastes, pesticides, herbicides, fertilizers, solvents, sludge, petroleum and petroleum products, biological materials, radioactive materials, sand, dirt, animal wastes, cements, acids and bases.

Pollution means the presence of pollutants on land or in water.

Public storm drain system means all or any part of the storm drains, basins, ditches, pipes, graded areas, and gutters located within publicly owned easements, public rights-of-way, public parks, streets, roads, or highways, or in common areas of real property leased from the city, that are used for collecting or conveying stormwater.

Release means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, placing, leaching, dumping, or disposing into or on any land in a manner that significant materials, pollutants, or stormwater come to be located in a public storm drain system.

Significant materials means any solid, liquid, or gaseous substance other than stormwater, that can release pollutants, including, but not limited to the following: Raw materials, fuels, solvents, detergents, finished materials, hazardous substances designated under Section 101(4) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601(14); any chemical for which a report must be filed pursuant to Section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 11023; fertilizers, pesticides, herbicides, and waste materials, including garbage, trash, ashes, slag, yard waste, animal waste, and sludge.

Stormwater means stormwater runoff, snow melt runoff, and surface runoff and drainage.

Waters of the state means all waters within the jurisdiction of this state, including all streams, lakes, ponds, wetlands, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, situated wholly or partly within or bordering upon the State of Mississippi, except lakes, ponds, or other surface waters which are wholly

landlocked and privately owned, and which are not regulated under the Federal Clean Water Act.

(Ord. No. 2000-27(9), § 1.2, 4-1-00)