IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2013-CA-00923

WILLIAM T. KELLEY, individually, and d/b/a WILLIAM T. KELLEY, LLC, — APPELLANTS

vs.

CORINTH PUBLIC UTILTIES COMMISION, CITY OF CORINTH, MISSISSIPPI, and CITY OF CORINTH GAS AND WATER DEPARTMENT — APPELLEES

INITIAL BRIEF OF PLAINTIFFS/APPELLANTS WILLIAM T. KELLEY AND WILLIAM T. KELLEY , LLC

ORAL ARGUMENT REQUESTED
PURSUANT TO M.R.A.P. 34(B)

APPEAL FROM:

THE CIRCUIT COURT OF ALCORN COUNTY, MISSISSIPPI,
CAUSE NO. CV09-279RA

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Certificate of Interested Persons

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.

- William Kelley, individually
- William Kelley, LLC
- City of Corinth
- Corinth Public Utilities Commission
- City of Corinth Gas and Water Department
- Hon. James Roberts, Circuit Court Judge

/s/ David L. Calder
David L. Calder, Miss. Bar No. 7686
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II. STATEMENT OF THE CASE.

A. Nature of the case.

On July 2, 2007, Appellants William Kelley and William Kelley, LLC (collectively referred to as "William Kelley" throughout this brief) entered into a private contract with the City of Corinth Gas and Water Department (hereinafter also referred to as CG&W) for the installation of water and gas lines in Kelley's private subdivision that he was developing known as Magnolia Lake Estates. Trial Court Record, 160 (hereinafter cited as : "R. __"); R. 679-700 (CG&W Answer to Third Amended Complaint, ¶ 10, 40 & 42). Mr. Kelley was told that CG&W was initiating a new program to compete with private construction contractors for the installation of utility services, and after seeking bids from several sources, he entered a contract with CG&W for the work. R. 1000, Affidavit of William Kelley, ¶¶ 7-8.

During the construction project, CG&W stopped working before the project was finished, and they also caused significant damages to William Kelley's property. Id., ¶¶19-25.

Defendants have admitted that a "FINAL INVOICE" was "prepared on January 2, 2008 and submitted to Kelley for payment." R. 161-64, Aff. of Latch, ¶ 7 (Ex. D to Defendants' Motion for Summary Judgment); R. 166 (Ex. F, Invoice). However, Mr. Latch also testified: "CG&W employees completed their final work on the gas lines at Magnolia Lake Estates on January 24, 2008. The installation of all gas lines and water lines at Magnolia Lake Estates was complete by January 24, 2008." Thus, it is clear that the Final Invoice and demand for payment was premature, as CG&W continued to work on the project after January 2, 2008.

Mr. Kelley's lender, Regions Bank, denied final payment to CG&W because they had not finished the construction project. Thereafter, Kelley entered negotiations with CG&W to complete the work, and CG&W initially agreed to repair certain deficiencies and restore the roadways and other areas to the condition the property was in when CG&W began the project. R. 1000, Aff. of Kelley, ¶¶ 17-22. However, after some failed efforts to repair the damage, CG&W subsequently advised Mr. Kelley that they did not have the equipment necessary to reconstruct the roadbeds and drainage areas that had been damaged by CG&W during the installation of the underground utility services, and that they would not make any further effort to repair the damage they had caused. *Id.*, ¶¶ 24-30.

In May 2008, Mr. Kelley was told for the first time by the CG&W that they were not going to do any additional work, and that they required final payment. *Id*., ¶ 33. Mr. Kelley refused to tender final payment until the work was completed by repairing the damage. When he asked if that was CG&W's final word on the matter, he was advised by John Rhodes, Manager of CG&W that he could present his claim to the Corinth Public Utilities Commission,

(hereinafter: CPUC or the Commission), "… **which had final authority over such matters."** *Id*., ¶¶ 34 & 40. Mr. Kelley requested payment of $310,000 for the expenses he incurred in repairing the damage caused by CG&W. As of May 2008, no formal action had been taken by the Commission in regard to Plaintiff's claims. Significantly, Defendants have produced no entry in the minutes of the Commission that authorized the submission of a demand for final payment from Kelley.

In retaliation, based on the amount owed under the contract, CG&W filed a construction lien against Kelley's property, R. 167-169. The Commission did not formally act on Kelley's claim until he appeared at the CPUC meeting on July 14, 2008. R. 522-23 Aff. of Latch. At that time, his claim was rejected by the Commission, which also refused to remove the lien. R. 524-25 Minutes of CPUC. Because of that lien, the City refused to issue any building permits so that Kelley could sell the lots in his subdivision. As a result, Kelley lost the entire development to foreclosure and suffered substantial monetary damages. After the hearing before the CPUC on July 14, 2008, the Commission refused to change its position concerning the construction lien and formally denied Kelley's request that CG&W either repair the damage or allow him a credit on the remaining amount of $70,032.81 that he owed under the contract for the installation of the utilities. R. 524-525.

Mr. Kelley was required to hire other contractors to finish the utilities installation, and to repair the damages to his property. When he tried to secure final approval of the subdivision from the City, his request was denied, R. 667-68 (City's Answer, ¶¶ 19 & 28), because he had not paid the $70,032.81 owed to CG&W under the contract. Kelley could not pay CG&W because he had used his remaining funds to repair the damages CG&W had caused. Further, Kelley could not secure additional funding because of the CG&W construction lien. Since

Kelley could not secure subdivision approval, he could not sell lots or generate income to repay the bank. He ultimately lost the property in foreclosure and lost significant profits.

To the extent that Mr. Kelley's claims may have triggered the Mississippi Tort Claims Act (hereinafter: MTCA), he timely filed a Notice of Claim on February 15, 2009. Defendants did not respond to the Notice of Claim. There is a factual dispute concerning whether an e-mail from the financing bank's agent, William Lambert, who was never an agent or representative of Mr. Kelly, could be construed to start the statute of limitations to run in this case. Defendants have produced no evidence from the minutes of the CPUC to indicate that the Commission authorized the issuance of a demand for final payment prior to February 15, 2008. To the contrary, under the facts presented by Defendants, Kelley's claim was not formally denied by the Commission until July 14, 2008. R. 524-525.

Before the one year statute of limitations expired, Mr. Kelley properly submitted his notice of claim under the MTCA and he subsequently timely filed suit. All of the Defendants responded by filing joint Motions to Stay All Discovery and Motions for Summary Judgment under Rule 56, Miss.R.Civ.P., contending that (a) they were all political subdivisions and as such, were completely protected under the MTCA; and (b) the statute of limitations for tort claims had expired because the notice of claim was not timely submitted.

The trial court granted Defendant's motion to stay all discovery, R. and denied Plaintiff's repeated requests to lift the stay, R. 360 & 927. Plaintiff was not allowed to develop any facts concerning the underlying contract with CG&W, the damages which it caused during their construction work, the relationship between CG&W, CPUC and the City, whether CG&W was acting as a private contractor in this case, the terms of the contract that CG&W entered with Kelley, the final decision by the CPUC to deny Kelley's request to repair the damage or allow an

offset in the amount he owed under the contract, or remove the construction lien so that he could sell the lots and homes in the subdivision. Most importantly, Plaintiff was not allowed to develop the facts concerning when the statute of limitations began to run.

Plaintiff was granted leave to amend his complaint and additional legal theories were added in support of recovery. The parties filed cross-motions for summary judgment. **It was not until after the final oral argument on the summary judgment motions that Defendants produced for the first time any information concerning the by-laws of Corinth Public Utilities Commission.** R. 1074-1083 (Supplemental Letter to trial court from Defendant's counsel with by-laws attached). **Significantly, nothing in the by-laws authorizes CG&W to act as a private contractor for the installation of new utility services on private property.**

After a lengthy summary judgment process, the Circuit Court ultimately ruled in Defendants' favor, and dismissed Kelley's claims on statute of limitations grounds. R. 1094-98. This appeal stems from the Circuit Court's rulings. A supplemental order was entered on November 2013, but because that occurred after the Record had been transmitted to this Court, that Order is not currently a part of the Record on Appeal, and is not properly before this Court.[1]

B. Course of proceedings.

Because some of William Kelley's claims against the City of Corinth invoked the MTCA, he was required to file a Notice of Claim before initiating a civil action. Mr. Kelley, through his counsel, timely filed a Notice of Claim on February 15, 2009. (R. 1054 - PE 8). This Notice of Claim was ignored by all Defendants.

William Kelley initiated a civil action on June 9, 2009, in the Circuit Court of Alcorn

[1] Rule 30(a), Miss.R.App.P. provides that "appeals shall be on the record as designated." In this brief, Plaintiffs have not fully addressed the trial court's findings and conclusions in the Supplemental Order issued on November 7, 2013 concerning the breach of contract or inverse condemnation issues because that Order is not currently a part of the Record. In the event that leave to supplement the Record should be granted pursuant to Miss.R.App.P. 10(e) or (f), Plaintiffs respectfully request the opportunity to address these issues by way of supplemental briefing.

County, Mississippi, Cause No. CV09-279-RA. (R. 12.) The action was filed against the City of Corinth, the Corinth Public Utilities Commission, and the City of Corinth Gas and Water Department. A First Amended Complaint was filed on October 1, 2009. (R. 37.) In this First Amended Complaint William Kelley alleged ten claims: (1) negligence, defective workmanship, and negligent construction; (2) tortious breach of contract or quasi-contract, and unjust enrichment; (3) breach the implied covenant of good faith and fair dealing; (4) breach of express and implied warranties; (5) intentional and/or negligent infliction of emotional distress and mental anguish; (6) respondeat superior and vicarious liability; (7) negligent misrepresentation; (8) fraudulent inducement, rescission, and restitution; (9) damage to business reputation and tortious interference with prospective economic advantage (business relations); and (10) punitive damages, attorneys' fees, and interest. (R. 37.)

All three of the named Defendants appeared in the underlying action, (R. 104 – Answer and Defenses of CPUC and CG&W; R. 318 - Answer of City of Corinth) and they filed a Motion for Summary Judgment, R. 122, and a Motion to Hold All Discovery in Abeyance. R. 119-121. Plaintiffs opposed Defendant's motion to stay discovery, arguing that there was a genuine issue of material fact as to when the statute of limitations began to run for the MTCA claims, that the breach of contract claims which would not be governed by the one year statute of limitations, and that discovery should be allowed as to all claims. R. 267-275 (Plaintiffs' Opposition to Motion to Stay, ¶¶ 8-10). The trial court granted Defendants' Motion to Stay, and denied Plaintiff's renewed motion to lift the stay. R. 360.

On December 4, 2009, CPUC and CG&W initially moved for summary judgment on all of Kelley's claims. R. 122. The City joined in the motion. R. 354. Before the trial court ruled, Kelley moved for leave to file a Second Amended Complaint. R. 276. The trial court Kelley's

request. R. 359. In the Second Amended Complaint, Kelley alleged (1) negligence, defective workmanship, and negligent construction; (2) tortious breach of contract or quasi-contract, and unjust enrichment; (3) breach the implied covenant of good faith and fair dealing; (4) breach of express and implied warranties; (5) intentional and/or negligent infliction of emotional distress and mental anguish; (6) respondeat superior and vicarious liability; (7) negligent misrepresentation; (8) fraudulent inducement, rescission, and restitution; (9) damage to business reputation and tortious interference with prospective economic advantage (business relations); and (10) breach of contract; and (11) punitive damages, attorneys' fees, and interest. (R. 362.) The main addition to the Second Amended Complaint was clarification of the breach of contract claim.

CPUC and the CG&W answered the Second Amended Complaint on April 20, 2010. R. 391. The City answered on April 21, 2010. R. 481. While these proceedings were taking place, Defendants' motions for summary judgment were still pending, but no discovery was allowed by the trial court on any issues. R. 360. On April 17, 2010, Kelley responded to the motions for summary judgment. R. 422. After this response was filed, all Defendants filed supplemental motions for summary judgment. R. 526 & 567.

While these summary judgment proceedings were pending, Kelley moved for leave to file a Third Amended Complaint. This motion was heavily objected to, but ultimately granted. R. 359. The Third Amended Complaint was filed September 1, 2011. R. 635. The City answered this complaint on September 9, 2011. R. 665. CPUC and CG&W answered on September 19, 2011. R. 679.

On November 17, 2011, the CPUC and CG&W filed a second supplemental motion for summary judgment. R. 702. Kelley responded on January 9, 2012, and filed a renewed cross-

motion for summary judgment. R. 719. The City answered William Kelley's cross-motion on February 9, 2012. R. 867. CPUC and CG&W responded to the cross-motion on February 10, 2012. R. 875.

Kelley filed his final summary judgment reply brief on April 10, 2012, (R. 951), along with a Statement of Disputed Facts (R. 930), a Statement of Undisputed Facts (R. 936), and an attachment of summary judgment exhibits (R. 997). For purposes of this Brief, the Statement of Facts section below will refer to exhibits attached in R. 997.

The Circuit Court heard oral arguments on the competing summary judgment motions in on December 13, 2012. After the hearing, the Circuit Court allowed each party to file a final supplemental brief in response to arguments raised at the hearing. CPUC and CG&W filed their supplemental brief on January 9, 2013. R. 1071. Kelley filed his supplemental brief on January 29, 2013. R. 1087.

Contrary to CG&W's assertions, they provided no evidence that CG&W was created by the City of Corinth; the only entity created was the Corinth Public Utilities Commission – not a separate utilities contractor. They are not one and the same. The only powers given to the Commission were the powers to "control, manage, and operate" existing or future utility systems "owned and operated" by the City of Corinth. **These powers do not extend, under any circumstances, to the construction of private utilities within a private subdivision on land that has not been formally dedicated to and accepted by the municipality.**

C. Disposition by the Trial Court.

On April 19, 2013, the Circuit Court entered an Order granting summary judgment in favor of Defendants, and dismissing Kelley's claims under the MTCA. R. 1094. In that Order, the Circuit Court ruled as follows:

(a) The City of Corinth was covered under the Mississippi Torts Claims Act;

(b) CPUC was a political subdivision covered under the MTCA;

(c) Because CPUC operated the nonprofit CG&W, then the MTCA also applied to CG&W;

(d) Defendants were immune from liability for Plaintiffs' claims of fraudulent inducement and tortious interference with business relations under Miss. Code Ann. § 11-46-3;

(e) Defendants, as governmental entities, were not liable nor did they waive immunity for any employee's fraud, malice, libel, slander, defamation or criminal offense under Miss. Code Ann. § 11-46-5(2);

(f) Defendants were immune from any liability for tortious breach of contract under *Robinson v. State Farm Bureau Casualty Co.*, 915 So. 2d 516, 520 (Miss. Ct. App. 2005);

(g) Defendants, as governmental entities, were immune from any liability for punitive damages, attorney's fees and pre-judgment interest under Miss. Code Ann. § 11-46-15(2); and

(h) All of Plaintiff's tort claims were barred under the Mississippi Torts Claims Act because the one-year statute of limitations began to run on February 5, 2008, and since Plaintiff's Notice of Claim was not filed until February 15, 2009, then the statute of limitations had expired.

R. 1094.

D. The Trial Court's Supplemental Order Addressing Plaintiff's Breach of Contract and Inverse Condemnation Claims is not Properly before this Court.

The trial court's order was filed on April 24, 2013, CR 1094, and Plaintiff timely perfected an appeal. R. 1104. Plaintiff also filed a Motion under Rule 60(a), Miss.R.Civ.P. to clarify the trial court's decision, because some of Plaintiff's claims had not been addressed. R. 1100. On November 5, 2013 the Circuit Court entered a Supplemental Order granting Defendants summary judgment on Plaintiff's remaining claims based on breach of contract and inverse condemnation. However, at the time that Order was entered, the Clerk of Court had

already transmitted the Record on Appeal to this Court on October 2, 2013. R. 1137. Therefore, since the trial court's Supplemental Order was entered **AFTER** the Record had been transmitted to this Court, it is not currently part of the Record. No motion has been filed with this Court to supplement the Record pursuant to Rule 60(a), Miss.R.Civ.P. or Rule 10(e) or (f), Miss.R.App.P.

III. STATEMENT OF FACTS.

In 2006 William Kelley purchased approximately 54 acres of land in Corinth, Mississippi, with the intention of developing the property into a residential subdivision known as "Magnolia Lake Estates." (R. 1000 - PE 1 – Aff. of Kelley, ¶¶ 3, 5). Mr. Kelley retained the services of Ricky Newcomb, a licensed professional engineer, to assist in designing the subdivision and supervising construction. *Id*. at ¶ 5.

In accordance with applicable regulations, Kelley submitted an application to the City of Corinth for preliminary approval of the Magnolia Lake Estates subdivision. The City granted preliminary approval, and allowed Mr. Kelley to proceed with developing the subdivision. *Id.*, Aff. of Kelley. However, during the relevant time the subdivision was not accepted by the City.

Mr. Kelley financed this project through Regions Bank in Collierville, Mississippi. *Id.*, ¶ 9. With the requisite financing in place, Kelley began the subdivision infrastructure. He built the subdivision roads, graded the adjacent areas, staked out the lot lines, improved a small lake in the subdivision, and even constructed a model home on one of the lots. *Id*., ¶ 10.

As part of the infrastructure, Mr. Kelley had to install certain utilities. This was required before he could secure final subdivision approval and begin selling lots. Mr. Kelley was not a utilities installer, and therefore he and his engineer subcontracted this work out. Accordingly, Mr. Kelley, through his engineer, opened the utilities work up for bids. During the bidding

process, Mr. Kelley received three proposals from three different subcontractors. *Id*., ¶ 6; R. 1017, Aff. of Ricky Newcomb,¶ 4.

CG&W was one of the subcontractors who submitted a bid for the utilities installation. R. 1000, Aff. of Kelley, ¶ 7 (R. 1033-37 - PE 3 - Contract and Construction Documents). Based on the facts in the Record, Corinth Public Utilities Commission claims that it operates CG&W as a not-for-profit entity. (R. 1038-39 - PE 4 - Documents from CG&W's website). However, CG&W is not a legal entity created by any act of the Legislature or other local and private legislation, and there is no legislative act providing the functions and purposes of CG&W. (R. 526 - Supp. Motion for Summary Judgment by CPUC and CG&W at 11).

While CG&W may enjoy CPUC's status as a governmental entity for operating and maintaining the Corinth Gas and Water systems, in this case, CG&W acted as a contractor to construct new utility service on private property that had not been formally dedicated to the City. **CG&W's bid for the installation of the utilities in Magnolia Lake Estates was not a government function: it was a private bid by CG&W operating as a contractor, for a private construction project.** CG&W happened to submit the lowest bid for the utilities installation. (R. 1000 – PE 1 – Aff. of Kelley, ¶ 7; R. 1017 – PE 2 – Aff. of Newcomb, ¶ 5).

Prior to accepting this bid, Mr. Kelley and his engineer, Mr. Newcomb, had discussions with representatives of the City of Corinth Gas and Water Department about the scope of the project. At that time, the subdivision roads had already been built and improved. Therefore, it was very important that any utilities subcontractor understand and agreed in advance that if they caused any damage to the subdivision or the roads they would restore the property back to the condition it was in before the utilities were installed. This was a condition precedent to final subdivision approval. (R. 1000 - PE 1 - Aff. of Kelley, ¶ 11). In this case, the CG&W

expressed its understanding and agreement. *Id*.

Based on CG&W's representations, Mr. Kelley accepted their bid. (R. 1000, Aff. of Kelley, ¶ 7; R. 1017, Aff. of Newcomb, ¶ 5). Once the bid was accepted by Mr. Kelly on July 2, 2007, a binding contract between Kelley and CG&W was formed. *Edwards v. Wurster Oil Co.*, 688 So. 2d 772, 775 (Miss. 1997) (citing *Fanning v. C.I.T. Corp.*, 187 Miss. 45, 52, 192 So. 41 (1939). **Significantly, an entry was made in the minutes of CPUC on July 9, 2007 confirming the receipt by CG&W of $82,000 from William Kelley as the initial payment under the terms of this contractual agreement.** R. 531-532 (CPUC Minutes).

The contract between the parties required Mr. Kelley to pay 60% of the estimated installation costs up front. (R. 422, PE 3 - Contract and Construction Documents). The contract also indicated that Mr. Kelley would have the proposed right-of-way and utility easements constructed to finish grade before the utilities could be installed. *Id*. In other words, before the CG&W ever set foot on Mr. Kelley's property, CG&W required that the roads and contouring of the adjacent land would already be at finished grade. This is why it was important to have the understanding up front that any damage to the subdivision would be repaired by CG&W, and the roads would be put back in their original condition. *Id*. The estimated cost of construction was $133,684.38. *Id*.

After Mr. Kelley paid 60% of the upfront costs, and finished the subdivision roads, CG&W went to work installing the utilities. It is undisputed that during the course of construction, CG&W caused considerable damage to the property. However, any time Mr. Kelley raised these concerns, CG&W repeatedly assured him that they were not finished, and they would restore the property to its original condition and repair any damages. (R. 1000 – PE 1 – Aff. of Kelley, ¶ 13).

On January 2, 2008, CG&W presented a final payment invoice to Mr. Kelley for the remaining amount due under the contract amount. (R. 166 (Ex. F, Invoice). However, by its own admission, at the time the final payment invoice was presented, CG&W had not finished work on the project. R. 161-64, Aff. of Latch, ¶ 7. Mr. Latch has testified: **"CG&W** employees completed their final work on the gas lines at Magnolia Lake Estates on January 24, 2008. The installation of all gas lines and water lines at Magnolia Lake Estates was complete by January 24, 2008." However, CG&W never provided formal notice to Mr. Kelley as to when it deemed their work completed. (R. 1000 – PE 1 – Aff. of Kelley, ¶ 13). Plaintiff has been denied all discovery on this issue, including any opportunity to cross-examine CG&W representatives about the work that Mr. Kelley contends they performed after February 2008. R. 1000, Aff. of Kelley, ¶ 31. Mr. Kelley has testified that in March or April 2008, CG&W employees returned to the subdivision to perform repair work, and their efforts caused additional damage to the land in the subdivision. *Id*.

Regions Bank, the financing institution for this development, required that each subcontractor submit a specific request for payment to the bank directly. This was not something William Kelley controlled. (R. 1000 - PE 1 - Aff. of Kelley, ¶ 37.) Regions Bank hired an independent architect firm out of Iuka, Mississippi, to inspect the progress of work to determine if the work requested in the subcontractor's payment request was done. In this particular case, William Lambert was the architect hired by Regions Bank to do the inspection. (R. 1048 - PE 6 – Aff. of William Lambert, ¶ 3).

On February 1, 2008, Mr. Lambert, at the request of Regions Bank, inspected the work performed by CG&W to determine whether the contract was complete and if final payment was warranted. (R. 1048 – PE 6 – Aff. of Lambert). Mr. Lambert, <u>on behalf of Regions Bank</u>,

notified CG&W that he could not approve the request for payment "because [Corinth Gas and Water's] work was not completed on the Magnolia Lake Estates project at that time." (R. 1048 – PE 6 – Aff. of Lambert, ¶ 6). On February 5, 2008, William Lambert sent an e-mail (again, on behalf of Regions Bank) to Will Herrin, a loan officer with Regions Bank, outlining his review of the project. In this email, Mr. Lambert noted that Mr. Kelley was the owner of the project, and that the "contractor was the Corinth Gas and Water Department, and the contract" was for the installation of utilities in Magnolia Lake Estates. (R. 1062 - PE 9 – e-mail from William Lambert). Mr. Lambert noted in this email "I would hope that this matter would be resolved by minimum construction standards by the contractor listed prior to payment." *Id*. This email serves as evidence that the architect hired by the bank did not feel the CG&W's contract work was finished.

Notably absent from Mr. Lambert's email is any indication that this message was sent to William Kelley. *Id.* The "owner," of the project, William Kelley, was not even aware of the email or the inspection at the time. (R. 1000 – PE 1 – Aff. of Kelley, ¶¶ 14-20, ¶ 29, ¶¶ 36-39.)

Subsequently, and independent of William Lambert's email, Mr. Kelley began to discuss finalizing the project with CG&W. On February 19, 2008 William Kelley reached out to Chris Latch of CG&W by telephone. R. 1000 – PE 1 – Aff. of Kelley, ¶ 17. Mr. Kelley set up a meeting with CG&W for February 25 or 26, 2008. At that meeting, Mr. Kelley and his engineer, Ricky Newcomb, advised CG&W that they were concerned about the condition of the property, and they asked CG&W to restore the property as they had previously agreed to do. *Id*. at ¶ 17. Mr. Kelley was repeatedly assured by CG&W officials that they would finish the work and repair the damages. *Id*. at ¶ 13.

In March or April of 2008, CG&W did return to Magnolia Lake Estates to finish their

work, but unfortunately they only made things worse, and cause substantial additional damage to Mr. Kelley's property. R. 1000 - PE 1 - Aff. of Kelley, ¶¶ 18, 26-32. Mr. Kelley relied on CG&W's promises that they would repair the damages and restore the property. In further discussions concerning the condition of the property, CG&W's representatives simply told him they would get back to him as to when they would complete their work. R. 1000 - PE 1 - Aff. of Kelley, ¶ 26-32. Finally, **IN MAY 2008**, Mr. Kelley was told by John Rhodes, head of CG&W, that they were finished working on the subdivision and they would not do any additional work. (R. 1000 - PE 1 - Aff. of Kelley, ¶ 33). **At that time, CG&W demanded final payment and told William Kelley that if he had issues with their work, he could just sue them.** ***Id.*** On June 10, 2008, CG&W filed a construction lien against William Kelley's property for the balance that he owed under the contract. R. 1051 - PE 7 - Construction Lien. The language of the CG&W construction lien is relevant to this case:

(a) First, the construction lien was filed "in compliance with and pursuant to Mississippi Code Annotated § 85-7-131 and § 85-7-133 (1972), as amended." **These construction lien statutes apply to private contractors doing private "contract" work.** There is no indication that they apply to government entities or political subdivisions.

(b) Second, the lien states "Notice is hereby given that Corinth Gas & Water Department with its principal place of business located at 305 West Waldron Street, Corinth, Mississippi **did furnish and supply labor and materials to William T. Kelley as owner of the following described property** situated in Alcorn County, Mississippi…" **This language is an admission that there was a contractual agreement between William Kelley and the CG&W for the purchase and installation of the utilities.**

(c) Third, **the lien states "the materials furnished and supplies were used in installation of water mains and lines for improvements on the aforementioned property."** The property referenced was the Magnolia Lake Estates property. This is another illustration of CG&W's recognition that they had a contract with William Kelley.

R. 1051.

After hitting a dead end with CG&W, Mr. Kelley was advised by John Rhodes to go directly to the Corinth Public Utilities Commission. R. 1000 - PE 1 - Aff. of Kelley, ¶ 34. On July 14, 2008, Mr. Kelley and his engineer, Mr. Newcomb appeared before the CPUC, and presented their claims. *Id.*; R. 1017 - PE 2 – Aff. of Newcomb, ¶ 19.

On July 21, 2008, Frank Berry, chairman of the Corinth Public Utilities Commission, wrote a letter to Mr. Kelley using CG&W's letterhead and stated: "Based on this review [the Commission] did not see any reason to change its position in the matter." (R. 1000 - PE 1 - Aff. of Kelley, Ex. A). The Commission's "position" referred to CPUC's refusal to remove the construction lien from the property. **This was the final word that Mr. Kelley received from Defendants about their work on the project.**

At that point, Mr. Kelley was under the gun because of his financing. He was also facing citations from the Mississippi Department of Environmental Quality as a result of damages caused by CG&W. Therefore, Mr. Kelley had no choice but mitigate his damages by hiring other subcontractors at a cost of $310,000 to finish CG&W's work by repairing the damages they had caused. R. 1000 - PE 1 – Aff. of Kelley, ¶ 21; R. 1017 - PE 2 – Aff. of Newcomb, ¶ 16.

After finishing the utilities installation and repairing the property, Mr. Kelley applied for final subdivision approval. However, the City would not approve this subdivision because of the construction lien that CG&W had filed against the property. In addition, CPUC would not sign off on the utilities installation unless the utilities subcontractor, CG&W, was paid in full.

Mr. Kelley had no money left to bond around the construction lien because he had used all his available funds to finish the utilities installation and repair the damages caused by CG&W. As a result, Mr. Kelley ended up losing the entire property to the bank in foreclosure; he lost the ability to sell lots, and he lost the ability to build homes. This caused him to suffer

catastrophic damages. *See* R. 635 – Plaintiff's Third Amended Complaint.

On February 15, 2009, Mr. Kelley, through counsel, filed a Notice of Claim with the City of Corinth. R. 1054 - PE 8. There was no response by any of the Defendants to the Notice of Claim, and therefore on June 9, 2009 William Kelley commenced this action. R. 12.

IV. SUMMARY OF ARGUMENT.

The outcome of this case hinges upon three primary issues: (1) whether the Circuit Court erred in concluding that under the facts alleged in this case CG&W was acting as a political subdivision and not as a private contractor; (2) whether the Circuit Court erred in concluding that since CG&W was a political subdivision, then there was no "contract" with William Kelley, and even if CG&W was a private contractor, Mr. Kelley could not establish the elements of a contract; and (3) whether the Circuit Court erred in concluding that the statute of limitations applicable to this case began to run on February 5, 2008 when William Lambert sent an e-mail to Regions Bank regarding his view of the condition of the property, even though CG&W had not given Mr. Kelly formal notice that CG&W considered its work to be complete, or that it did not intend to make any further repairs. Each issue will be summarized below, and then outlined in detail in the Argument section.

A. <u>The City of Corinth Gas and Water Department was not operating as government entity or a political subdivision in this instance.</u>

Plaintiff respectfully submits that under the undisputed facts in this case, CG&W acted as **a private utilities installer, a private contractor working on private property.** CG&W competitively bid the installation project; they reduced their bid to writing and required the owner, Mr. Kelly, to approve the bid before proceeding with work; they required payment of 60% of the contract price before they began the work; they failed to complete the work; they demanded final payment; the lending institution's independent inspector recognized that CG&W

was the "contractor," and after final payment was refused and negotiations ended, CG&W filed a construction lien. There has been no discovery in this case, but CG&W's own website identifies itself as a "not-for-profit" entity. This is not the same as a political subdivision. Mr. Kelley contends that whether or not CPUC "owned" and "operated" the CG&W for the purposed of operating and maintain the City owned utility systems, in this case CG&W put on its private contractor hat, and installed a private utility system on private land that had never been dedicated to or accepted by the City of Corinth. Plaintiff respectfully submits that CG&W stood alone as a private entity for purposes of the contract it entered in this case.

B. <u>There was a binding contract between William Kelley and CG&W</u>.

Defendants have admitted that there was a valid contract between William Kelley and CG&W. In the Answer to the Third Amended Complaint, CG&W **<u>ADMITTED</u>** that **"CG&W entered a written agreement with William T. Kelley for the installation of water lines in Magnolia Lake Estates … and that a written agreement exists between CG&W and Plaintiff."** R. 679-700 (CG&W Answer to Third Amended Complaint, ¶¶ 40 & 42). The Circuit Court, in its April 19, 2013 Order, recognized that there was an "agreement" between William Kelley and the CG&W. Yet, in the Court's November 5, 2013 Supplemental Order, which is not currently a part of the Record before this Court, the trial court ruled that there was no contract. The evidence in this case weighs heavily in William Kelley's favor – it simply cannot be disputed that CG&W, while acting as a private contractor, did in fact enter into a contract with Kelley for the installation of utilities in the privately owned Magnolia Lake Estates subdivision.

C. <u>The statute of limitations did not begin to run when William Lambert reported to Regions Bank that CG&W had not completed the project, and therefore were not entitled to final payment.</u>

Under Mississippi law, the statute of limitations for a claim begins to run when the cause of action actually accrues. The Court of Appeals has held that "final review before acceptance" of a construction project is the "means to assure compliance with construction contract obligations" in order to identify the date of any breach. *Air Comfort Systems, Inc. v. Honeywell, Inc*., 760 So.2d 43, 48 (¶ 22) (Miss. App. 2000).

In this case, Mr. Kelley respectfully submits that his claims against CG&W did not accrue until he was advised that CG&W would no longer work on his project, which was well after February 15, 2008. Under Defendant's theory that governmental entities such as CPUC can only act through their minutes, Plaintiff's claims did not accrue until July 14, 2008 when the Commission formally addressed Kelley's claims in its official minutes. As far as the City of Corinth is concerned, Mr. Kelley's claims would not have begun until the City of Corinth denied final subdivision approval – sometime *after* CG&W filed their construction lien.

V. ARGUMENT.

Appellate standard of review.

When the Mississippi Supreme Court reviews a trial court's grant of summary judgment, the standard of appellate review is *de novo*. *Miller v. R.B. Wall Oil Co., Inc*., 970 So.2d 127, 130, (¶ 6) (Miss. 2007). The review is confined to those facts which appear in the record. *Id*. (citations omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c).

In reviewing the case *de novo*, the appellate court views the evidence "in the light most favorable to the party against whom the motion has been made." *Kilhullen v. Kan. City S. Ry*., 8

So.3d 168, 174 (Miss. 2009) (quoting *Daniels v. GNB, Inc*., 629 So.2d 595, 599 (Miss.1993)). However, the opposing party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Miss. R. Civ. P. 56(e).

Analyzing the evidence in the light most favorable to Mr. Kelley, *Pratt v. Gulfport-Biloxi Regional Airport Authority*, 97 So.3d 68, 71 (¶ 5) (Miss. 2012), the facts create a "reasonable inference," that there was a valid and binding contractual agreement with CG&W for the installation of the utility services in questions. *Buckel v. Chaney*, 47 So.3d 148, 156 (¶ 26) (Miss. 2010). *See* R. 679-700 (CG&W Answer to Third Amended Complaint, ¶¶ 40 & 42). Such an inference establishes a genuine issue of material fact that must be resolved after the parties are afforded an opportunity for discovery, and this issue should not be resolved by way of summary judgment before any discovery is allowed.

As a general rule, a party may obtain discovery "regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party." Miss. R. Civ. P. 26(b)(1). Discovery-related matters are reviewed under an abuse-of-discretion standard. *Blossom v. Blossom*, 66 So.3d 124, 126 (¶ 9) (Miss.2011). A trial court's decision to limit discovery may be reversed if there has been an "abuse of discretion." *Id*. (quoting *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So.2d 1192, 1209 (¶ 57) (Miss.2003)).

In the case at bar, Plaintiff was completely precluded from obtaining any discovery about the date that CG&W ended work on Plaintiff's project, whether any subsequent representations were made that additional repairs would be done, and whether there was a valid contract for the installation of the utility service in the subdivision. Plaintiff's repeated requests for discovery were rejected. Under these circumstances, Plaintiff respectfully submits that the complete

preclusion of any discovery constituted an abuse of discretion by the trial court. This restricted Plaintiff's ability to respond to Defendant's Motion for Summary Judgment. However, Plaintiff respectfully submits that the affidavits and evidence submitted were sufficient under Rule 56(f), Miss.R.Civ.P. to give rise to genuine issues of material fact that preclude summary judgment in favor of Defendants.

ISSUE NO. 1: Whether the Circuit Court erred in dismissing Appellants' breach of contract claims.

A. The Circuit Court erred in dismissing Appellant William Kelley's breach of contact claims.

The Circuit Court's April 19, 2013 Order did not address William Kelley's breach of contract claims. On November 5, 2013, the Circuit Court entered a Supplemental Order purporting to dismiss William Kelley's breach of contract and inverse condemnation claims. The trial court appears to have dismissed these claims on four theories: (1) the claims were merely re-labeled tort claims; (2) William Kelley failed to "show the existence of a valid and binding contract," (3) there was no indication that William Kelley's "cost estimate document" was duly approved or spread upon the minutes of the Public Utilities Commission; and (4) William Kelley failed to identify a breach of the contract. Addressing these issues in the event that this Court finds them properly presented, it is William Kelley's position that the Circuit Court erred in rendering these conclusions.

1. William Kelley's breach of contract claims were not merely re-labeled tort claims.

This case, as it relates to Defendant CG&W, is primarily a breach of contract action. All of William Kelley's tort claims arise out of Corinth Gas and Water's breach of a construction agreement. The Circuit Court, however, ruled that because William Kelley's contract claims stem from the same set of facts as his tort claims, then he is precluded from alleging an

additional theory. The Court stated "Having carefully reviewed the Plaintiff's breach of contract claim, the Court find that such breach of contract claim is simply a re-labeled tort claim, and is therefore subject to the provisions of the MTCA." Unfortunately, the Court did not provide any basis for this conclusion, and the Court completely ignored William Kelley's arguments.

There can be no question that all of the claims alleged in Plaintiff's Third Amended Complaint stem from Mr. Kelley's contract with CG&W. The bottom line is this: had CG&W performed the work they were obligated to do, Mr. Kelley would have secured subdivision approval and would not have had to file this action. Literally all of his claims stem from this relationship where CG&W was acting as a private contractor, not a governmental entity.

Essentially, the Circuit Court has penalized William Kelly for pleading alternative theories. Yet, this is authorized under Rule 8(e)(2) of the Mississippi Rules of Civil Procedure. A party may state as many separate claims as he has, regardless of consistency. *Jordan v. Wilson,* 5 So.3d 442, 447-48 (¶ 19) (Miss. App. 2008) (alternate theories of assault and negligence precluded summary judgment).

The Circuit Court cited *Alexander v. Taylor,* 928 So. 2d 992, 995-996 (Miss. App. 2006) to support its ruling that William Kelley's contract claims were re-labeled tort claims and therefore subject to the MTCA. It is respectfully submitted that this case does not stand for the Circuit Court's position. First, *Alexander v. Taylor* was only dealing with issues involving the statute of limitations. The Court held that "regardless of what might be discerned as the primary purpose of the suit, each claim is separately examined in light of the statute of limitations applicable to it." *Id.* at 996. This ruling actually supports a finding that William Kelley can plead alternative theories of recovery.

Second, the Circuit Court only analyzed William Kelley's breach of contact claims through the lens of the MTCA. However, the MTCA does not apply to express contract claims. When a political subdivision enters a contract with a private party, it waives sovereign immunity from suits brought to enforce the contract, or for damages arising from a breach of that contract. *Montgomery v. Miss.*, 498 F. Supp. 2d 892, 905 (S.D. Miss. 2007); *City of Jackson v. Stewart*, 908 So.2d 703, 710-11 (¶¶ 33-38) (Miss. 2005); *Spiegel v. Western Sur. Co.*, 908 So. 2d 859, 863-64 (¶ 18) (Miss.App. 2005)("the MTCA does not apply to actions for breach of an express contract"). Further, this Court has held: "Where the state has lawfully entered into a business contract with an individual, the obligations and duties of the contract should be mutually binding and reciprocal. There is no mutuality or fairness where a state or county can enter into an advantageous contract and accept its benefits but refuse to perform its obligations." *Cig Contr. Inc. v. Miss. State Bldg. Comm.*, 399 So.2d 1352, 1355 (Miss. 1981). Sovereign immunity does not bar breach of contract actions. *Stewart, supra*, 908 So.2d at 710-11 (¶¶ 33-38); *Spiegel, supra*, 908 So. 2d at 863-64 (¶ 18).

Third, the Court in *Alexander v. Taylor, supra*, recognized that "multiple claims governed by different statutes of limitations may be joined in one suit." 928 So.2d at 996. Fourth, the Court in *Alexander* recognized that suits in tort against government entities have to be brought under the MTCA. Other actions that are not in tort are not subject to the MTCA, yet a litigant is not required to bring one suit under the MTCA, and another under the non-MTCA claims. *Id*.

Fifth, the *Alexander* Court did not set a specific test or standard for whether a claim is improperly characterized something other than a tort claim for purposes of evading the MTCA. Rather, the Court cited Miss. Code Ann. § 11-46-11(3) (Rev. 2002) for the position that the one year statute of limitations under the MTCA only controls "all actions subject to and brought

under" the MTCA. *Alexander v. Taylor,* 928 So.2d at 995. William Kelley's breach of contract claims, as outlined above, are not "subject to," and they were not "brought under" the MTCA.

In summary, there is no question that Mr. Kelley was completely within his rights to allege a breach of contract against CG&W. The Circuit Court erred in arbitrarily construing Mr. Kelley's contract claims as "re-labeled tort" claims. Mr. Kelley's breach of express contract claims are not subject to the MTCA. Therefore, the Circuit Court erred in granting Defendants summary judgment in regard to these contract claims.

2. There was valid and binding contract between William Kelley and the City of Corinth Gas and Water Department.

CG&W admitted in their Answer to the Third Amended Complaint that there was a valid contract with William Kelley. R. 679-700 (CG&W Answer to Third Amended Complaint, ¶¶ 40 & 42). The Circuit Court's April 19, 2013 Order recognized an "agreement" between Mr. Kelley and CG&W. Yet, on November 5, 2013, the Circuit Court entered a Supplemental Order which provided: "Here, Plaintiff has failed to show the existence of a valid and binding contract." It is William Kelley's position that the Circuit Court erred in this ruling, especially since the Court appears to have ignored Plaintiff's contract allegations.

A contract requires the following elements: (1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with legal capacity to make a contract; (5) mutual assent; and (6) no legal prohibition precluding contracting formation. *Adams Community Care Center, LLC v. Reed,* 37 So.3d 1155, 1158, ¶ 7 (Miss. 2010) (citations omitted). The facts of this case demonstrate that there was in fact an "agreement," or a contract, between the two parties. Black's Law Dictionary, at 291 (West 1979).

(a) There were two or more contracting parties.

In this case, there were clearly two contracting parties: William Kelley and Corinth Gas

and Water Department. As a not-for-profit entity, CG&W had the ability to contract, as evidenced by the following:

(a) CG&W submitted a competitive bid for the work in Magnolia Lake Estates, underbidding two other competent contractors;
(b) CG&W took money from William Kelley under the contract and began performing the requisite work; and
(c) CG&W demanded final payment, and were told that they were not finished; they subsequently filed a construction lien.

These are all factors which indicate the existence of a contract. Because there were parties capable of contracting, the first element for a contract is met.

(b) There was valid consideration.

Consideration is defined as (a) an act other than a promise; (b) a forbearance; (c) the creation, modification or destruction of a legal relation; or (d) a return promises, bargained for and given in exchange for the promise. *Davis v. Paepke,* 3 So.3d 131, 136, ¶ 13 (Miss. 2009) (citations omitted). All that is required for valid contract consideration is a benefit or a promissor, or a detriment to the promisee. *Id*. (citations omitted). In this case, the City of Corinth Gas and Water Department agreed to install underground water lines for Mr. Kelley's subdivision for a set price. This is valid consideration.

(c) The contract was definite.

The agreement in this case was sufficiently definite: CG&W was required to install water lines in William Kelley's subdivision, for an agreed upon price, in accordance with local industry standards. The contract documents outline what work would be done, the type and quantity of the materials, and also imposed conditions upon both parties. R. 1033 – PE 3 – Contract Documents).

The Circuit Court did not analyze the elements of a contract as outlined above; rather, the Circuit Court took Mr. Kelley to task for alleging an oral agreement. The oral agreement the

Circuit Court referred to was agreement between the parties that the work would be performed to industry standards, and that the City of Corinth Gas and Water Department would restore the property to its original condition. The Circuit Court did not deny the communications between the parties, but reasoned that under existing Mississippi law, government entities cannot be bound by oral contracts. William Kelley respectfully submits that the Circuit Court missed the point.

Plaintiff respectfully submits that for the purposes of this relationship, CG&W was not a government entity – it acted in a stand-alone capacity as a private contractor. *See, e.g., Flye v. Spotts*,94 So.3d 240, 247-48 (¶¶ 15-16) (Miss. 2012). The Circuit Court initially recognized that there *was* an agreement between CG&W for the installation of the water lines on private property. Further, it has never been refuted that Mr. Kelley and his engineer met with representatives of CG&W to discuss the scope of the project **before** any work began. Any agreements that were made between the parties were consumed in the overall utilities contract. It is all part of the construction package that was agreed to by CG&W.

It is axiomatic that *any* construction work must be performed in accordance with local industry standards – this is inherent in every construction contract, and does not need to be specifically delineated in the written contract documents. *See George B. Gilmore Co. v. Grant*, 582 So.2d 387, 390-391 (Miss. 1981), where the Court recognized that construction needs to be performed in a workmanlike manner, and that the contractor needs to exercise reasonable care in the construction process. Mississippi law states "when a person contracts to do certain work he is charged with the *common-law duty of exercising reasonable care and skill* in the performance of the work required to be done by the contract and the parties may not substitute a contractual standard for this obligation." Further, "accompanying every contract is a common law duty to

perform with care, skill and reasonable experience, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract. *George B. Gilmore,* 582 So.2d at 391.

The unrefuted testimony in this underlying case is as follows. First, the owner, William Kelley, has testified that as part of the agreement, CG&W agreed to repair and restore the property to its original condition after they installed the underground utilities – this was the industry standard. R. 1000 – PE 1 – Aff. of Kelley, ¶¶ 10-11. Kelley's engineer, Ricky Newcomb, testified that as a licensed professional engineer, he was familiar with the standards and practices generally followed for the installation of water lines. R. 1017 - PE 2 - Aff. of Newcomb, ¶ 4. Mr. Newcomb submitted expert testimony and stated: "The standard of practice in the construction industry for the installation of such utility service is to utilize construction techniques, practices, and skill, so that erosion is minimized, and after the utility service is installed, the land is restored to its original condition." *Id*. at ¶ 6.

In other words, the issue in this case is not merely enforcement of an oral agreement – rather, it is a suit for damages in both tort and contract for CG&W's failure to perform the work with the level of care, skill and reasonable experience that is the standard in the industry. Again, this is inherent in every contract. *George B. Gilmore,* 582 So.2d at 391. It does not require separate delineation. Therefore, the Circuit Court erred in concluding that there was no "oral" agreement – here, the contract was sufficiently definite – it identified the work that needed to be done. It also carried with it the common-law duties of care.

(d) The parties had the legal capacity to enter a contract.

The Circuit Court did not analyze whether or not William Kelley had the legal authority to enter a contract, but there can be no question that he did. He was a real estate developer and

owner of the subdivision. He was in the business of entering contracts. None of the Defendants have questioned whether he had the legal capacity to enter a contract.

As to CG&W, either they had the legal capacity to enter into a contractual relationship with Mr. Kelley, or they intentionally and purposefully perpetrated a fraud upon him. According to CG&W's website, they are a not-for-profit entity. R. 1038 (PE 4 - Documents from CG&W's website). According to the contract documents which Defendant has admitted, CG&W submitted a competitive bid on their own letter head (R. 1033 – PE 3), and they filed a construction lien on their own letterhead (R. 1051-52 - PE 7). These documents indicate that CG&W had the legal capacity to enter a contract in its private, nongovernmental capacity.

Although it is not clear, it appears the Circuit Court held that CG&W did not have the legal capacity to enter a contract because there is no record of a contract on the minutes with the Corinth Public Utilities Commission. This ruling indicates that the Circuit Court did not truly understand the parties' relationships. First and foremost, the agreement that the Circuit Court recognized in its April 19, 2013 Order was *not* between William Kelley and the Corinth *Public Utilities Commission*; rather it was between William Kelley and the City of Corinth *Gas and Water Department*.

Second, CG&W, as a not-for-profit entity, does not keep minutes. Therefore, it would be practically impossible for this contractor to record the contract on its minutes which do not exist. The fact that there are no minutes is prima facie evidence that CG&W was not a political subdivision in regard to this agreement.

Plaintiff respectfully submits that the City of Corinth Gas and Water Department, as a not-for-profit entity, had the legal capacity to enter a contract. Therefore, the fourth element for establishing a contract is met.

(e) There was mutual assent.

To prove there is valid and binding contract, the parties must prove there was mutual assent between the parties. In this case, the mutual assent between the parties is obvious. William Kelley opened his project for bid – CG&W submitted the low bid. Discussions between the parties ensued and Mr. Kelley accepted the bid. Mr. Kelley then proceeded to prepare the subdivision according to the specifications required by CG&W. R. 1033-37. CG&W then started their work. The fact that CG&W took Mr. Kelley's money and started working on the project is prima facie evidence that CG&W agreed to be bound to the contract.

(f) The parties could legally enter the contract.

The final element deals with whether or not a contract can legally be entered. In this case, there was no prohibition precluding the formation of a legal contract. In fact, having the utilities installed was a pre-requisite to final subdivision approval for Magnolia Lake Estates. The terms of the agreement were not illegal.

In summary, it is imminently clear that William Kelley has proven there is a valid and binding contract between him and the City of Corinth Gas and Water Department.

3. The contract was with the City of Corinth Gas and Water Department – they do not keep minutes.

At the risk of repetition, the Circuit Court concluded there was not a valid contract between Mr. and CG&W because the Corinth Public Utilities Commission did not have a record of this agreement on their minutes. However, CG&W **ADMITTED** the existence of a contract in its Answer to the Third Amended Complaint: "CG&W entered a written agreement with William T. Kelley Kelley for the installation of water lines in Magnolia Lake Estates … [and] … a written agreement exists between CG&W and Plaintiff." R. 679-700 (CG&W Answer to Third Amended Complaint, ¶¶ 40 & 42.)

As outlined previously, there are multiple reasons why there are no minutes with the Corinth Public Utilities Commission as to the specific terms and conditions of the contract.

First, the contract that Mr. Kelley entered was not with the Corinth Public Utilities Commission; it was with CG&W. Second, CG&W does not keep minutes. Third, even if it were proven that CG&W has some governmental purpose, the fact remains that when it entered into a contract with William Kelley, it stood alone as a private contractor and engaged in a proprietary activity. In other words, the City of Corinth Gas and Water Department did not have to record the terms and conditions of the parties' relationship on any minutes.

4. William Kelley has established a breach of the contract.

In the Circuit Court's November 5, 2013 Supplemental Order, the Court opined that Mr. Kelley could not sustain his contract action because there was no evidence of a breach of the contract. Yet, in its April 19, 2013 Order, it stated: "The Plaintiff alleges, and for purposes of this motion is accepted as true, that the Department did not repair the damage." R. 1094, 1095. Further, Mr. Kelley has offered more than ample evidence, both in the form of expert witness testimony and actual photograph evidence, to prove the damages caused by CG&W. It has been proven, and never refuted, that CG&W breached the contract because CG&W failed to install the utility service without causing unnecessary damage, and/or it failed to repair the damage it caused in doing the work. If these facts are true, then CG&W breached the agreement. On these grounds, the Circuit Court erred in dismissing William Kelley's breach of contract claims.

ISSUE NO. 2: Whether the Circuit Court erred in determining that the statute of limitations for any of Appellants' claims began to run on February 5, 2008.

A. The Circuit Court erred in determining that any statute of limitations applicable to this case began running on February 5, 2008.

The statute of limitations for each claim has to be analyzed under the specific elements of that claim. *Alexander v. Taylor*, *supra,* 928 So.2d at 995. In general, most tort claims against a government entity are subject to the one-year statute of limitations relevant to the Mississippi Tort Claims Act. However, not all legal claims against a government entity are subject to the MTCA. For example, breach of contract claims are subject to Mississippi's general three year statute of limitations. Miss. Code Ann § 15-1-49(1) (West 2013). In addition, "actions arising from construction deficiencies" are subject to a six year statute of limitations. Miss. Code Ann § 15-1-41 (West 2013). It cannot be disputed that under either statute, Plaintiffs' claims for breach of contract were timely asserted.

In this particular case, William Kelley has pled a variety of theories, including some tort claims and some breach of contract claims. Each theory has its own statute of limitations. For any torts against those Appellees which may be considered political subdivisions, such as the City of Corinth for example, Mr. Kelley concedes that the one-year statute of limitations under the MTCA would apply. However tort claims and breach of contract claims against governmental subdivisions or entities that take on the role of a private contractor, such as CG&W, are not subject to the one-year statute of limitations.

For present purposes, the only statute of limitations at issue is the one-year statute of limitations which may apply to any MTCA tort claims alleged in William Kelley's Third Amended Complaint. There is a genuine issue of material fact in regard to when the statute of limitations began to run.

Under Mississippi law, the statute of limitations relative to any claim begins as soon as all of the elements giving rise to a cause of action are made known. *Bailey v. Estate of Kemp,*

955 So.2d 777, 785 (Miss. 2007). When there is a contract, and a component of the contract remains to be fulfilled, the statute of limitations does not begin to run. *Id*. (citations omitted). In this case, the Circuit Court improperly resolved a disputed issue of material fact by concluding that the statute of limitations began to run on February 5, 2008, based on an e-mail sent by William Lambert, who was an agent of Regions Bank, and not William Kelley, in response to an alleged request for final payment by CG&W. R. 1000, Aff. of Kelly, ¶¶ 18-23; R. 1017, Aff. of Newcomb, ¶¶ 14 & 20; CR 1048-1050, Aff. of Lambert, ¶¶ 3-8. However, at the time that Mr. Lambert sent that e-mail, neither Mr. Lambert nor Kelley's engineer and construction manager, Mr. Newcomb, had received notice from CG&W that their work was completed, or that CG&W did not intend to repair the damage or restore the land in the subdivision to the condition that it had been in before CG& W began its work. R.1017, Aff. of Newcomb, ¶ 20; R. 1048-1050, Aff. Lambert, ¶¶ 7-8. Furthermore, CG&W has admitted that its employees performed work on the project through January 24, 2008, which was almost a month after the "final invoice was prepared on January 2, 2008. CITE

Significantly, there is no evidence in the record concerning when CG&W submitted a formal request for final payment to Mr. Kelley, and there is no record in the Minutes of the Corinth Public Utilities Commission indicating that the project had been completed, or that final payment should be demanded from Mr. Kelley. There is also no evidence in the Record that CG&W notified Plaintiff or his construction manager that the work was complete and ready for inspection and final acceptance, which is a standard practice for contractors working on an owner's private property. However, there is evidence in the Record in the form of Mr. Kelley's affidavit which creates a genuine issue of fact concerning CG&W's agreement to make certain repairs on the property, including restoring the property to the condition that

CG&W required before their work began. R. 1000, Aff. of Kelley, ¶¶ 8-11. These assurances were made to Kelley before the work began and after the problems arose. R. 1000, Aff. of Kelley, ¶¶ 9-10. The agreement provided in part: "The developer must have the proposed city right-of-way and utility easement to finished grade prior to construction of utilities. The proposed city streets will need to have a good gravel base prior to construction of the utilities." It is the damage that CG&W caused to the streets, ditches, drainage areas, proposed city right-of-way and utility easements that is at issue in this case. Plaintiff had to pay outside contractors $310,000 to repair this damage because CG&W refused to restore the property. *Id*.

Specifically, Plaintiffs respectfully submit that there are genuine issues of fact in regard to the significance of the e-mail that Defendants rely upon to assert that the statute of limitations under the MTCA expired before the claim was filed. Mr. Lambert has indicated in his affidavit that he never received any notice from Corinth Gas and Water that it did not intend to complete the work on the subject project by making the necessary repairs to the streets and other areas that CG&W required to be at "finished grade" before the work began, but which were not at "finished grade" after CG&W installed the underground utility lines. R. 1048-1050, Aff. of Lambert, ¶¶ 7-8.

In spite of these factual disputes, the trial court stated "It is clear that the Plaintiffs knew of the condition on February 5, 2008, which would have started the statute of limitations clock by virtue of this email." It is William Kelley's position that the Circuit Court erred in this decision. First and foremost, there is absolutely no evidence that William Kelley knew about the February 5, 2008 email at the time it was sent. R. 1000 - PE 1 – Aff. of Kelley, ¶¶ 23, 38. Mr. Lambert was an architect independently hired by Regions Bank to monitor the progress of Kelley's construction project, but he was not Kelley's agent. R. 1048-50 - PE 6 – Aff. of Lambert, ¶¶ 2-3). Mr. Lambert's sole responsibility was to monitor the construction project and report to the bank so contractors on the project could be paid in a timely manner as portions of

the construction work were completed. *Id*. at ¶ 4. Mr. Kelley had nothing to do with this relationship.

Second, the February 5, 2008 e-mail was submitted to Bill Herrin of Regions Bank. It was not sent to William Kelley. Third, the Circuit Court's analysis of Mr. Lambert's February 5, 2008 e-mail is clearly erroneous. Sometime in January of 2008, CG&W applied for a "final payment" under the contract. In order to approve any payment, Mr. Lambert was required to inspect the project and ensure that the work for which the payment was requested had been completed. According to the facts in the record, Mr. Lambert inspected the project on February 1, 2008. R. 1062 - PE 9 - February 5, 2008 email from William Lambert. Mr. Lambert reviewed CG&W's pay request documents on February 4, 2008 on behalf of the bank. *Id.* Mr. Lambert did not approve payment of the final amount requested by CG&W because the work required under the contract was not finished. R. 1048 - PE 6 - Aff. of Lambert, ¶ 5. In addition, the work performed by CG&W was never formally tendered to William Kelley or his construction manager, Ricky Newcomb for inspection and acceptance. R. 1000, Aff. of Kelly, ¶¶ 35-38; R. 1017, Aff. of Newcomb, ¶¶ 20-24. Under CG&W's approach, Mr. Kelley would be required to pay all the money owed under the contract, regardless of whether CG&W completed the work or not, simply because CG&W requested final payment.

As stated previously, when a component of the contract remains to be fulfilled, the statute of limitations does not begin to run. *Bailey v. Estate of Kemp*, 955 So.2d 777, 785 (Miss. 2007). In this case, the facts in the record indicate that as of February 5, 2008, the contract was not finished. The facts also indicate that as of February 5, 2008, William Kelley was not aware that CG&W had asked for final payment. At that time, the project had not been inspected by his project engineer, Mr. Newcomb, and CG&W's work had not been accepted.

On February 19, 2008 William Kelley reached out to Chris Latch of CG&W to determine the status of the project. R. 1000 - PE 1 - Aff. of Kelley, ¶ 17. Mr. Kelley and Mr. Newcomb subsequently expressed to Mr. Latch and other representatives of CG&W that they were concerned about the condition of the property, and they asked CG&W to restore the property as they had previously agreed to do – a construction industry standard. *Id*. at ¶ 17. Mr. Kelley was repeatedly reassured by CG&W employees that they would finish the work and repair the damages. *Id*. at ¶ 13.

In March or April of 2008, CG&W did return to Magnolia Lake Estates to finish some of their work. Unfortunately they only made things worse, and substantially damaged Mr. Kelley's property. R. 1000 - PE 1 - Aff. of Kelley, ¶¶ 18, 26-32. In May 2008, Mr. Kelley was told by John Rhodes, head of CG&W, that they were done working on the subdivision and they would not do any additional work. R. 1000 - PE 1 – Aff. of Kelley, ¶ 33. This is when the elements for Mr. Kelley's claims were established, and therefore, when any applicable statute of limitations began to run.

Mr. Kelley, through counsel, filed a Notice of Claim with the City of Corinth and the Corinth Public Utilities Commission on February 15, 2009. R. 1054. His lawsuit was filed on June 9, 2008. R. 12. In order to determine which statute of limitations applies, it is necessary to analyze Kelley's specific claims through the lens of the applicable statutes of limitations:

- For breach of contract actions the statute of limitations is six years. Miss. Code Ann. § 15-1-29. Assuming that the earliest date William Kelley's actions began to accrue was March 2008, and considering that this action was filed in June 2009, then William Kelley's breach of contract claims against the City of Corinth Gas and Water Department were filed within the applicable statute of limitations.

- For actions arising out of construction deficiencies, the statute of limitations is six years. Miss. Code. Ann. § 15-1-41. Assuming that the earliest date William Kelley's actions began to accrue was March 2008, and considering that this action

was filed in June 2009, then William Kelley's claims for negligence arising out of construction were filed within the applicable statute of limitations.

- For actions which may involve tort claims against the State or its political subdivisions, the action must be filed within one year "next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based" unless tolled. Miss. Code Ann. § 11-46-11(3); *Caves v. Yarbrough*, 991 So. 2d 142, 144 (Miss. 2008). Assuming that the earliest date William Kelley's actions began to accrue was March 2008, and considering that this action was filed in June 2009, then William Kelley's tort claims were filed within the applicable statute of limitations. As to the City of Corinth, assuming that Corinth is liable for refusing to grant subdivision approval due to the City of Corinth Gas and Water Department's lien which was filed in June 2008, then any tort claims were clearly timely filed.

Mr. Kelley submits that the best way to look at this case, from a statute of limitations perspective, is that the damages element for any of his claims were not actually known until he mitigated his damages by independently hiring subcontractors to repair the damages caused to his property by CG&W. This was sometime after June 2008. If the Court does not agree that this is the appropriate date for determining when the statute of limitations began to accrue, then the appropriate date is May 2008, when CG&W stated they were finished with the construction project and would no longer do any additional work.

ISSUE NO. 3: Whether the Circuit Court erred in determining that the City of Corinth Gas and Water Department is a political subdivision and therefore protected by the Mississippi Tort Claims Act in this instance, since it was operating as a private contractor.

A. The Circuit Court erred in determining that in this unique instance, the City of Corinth Gas and Water Department was a political subdivision and therefore protected by the Mississippi Tort Claims Act.

The Mississippi Tort Claims Act ("MTCA") provides the exclusive civil remedy against a governmental entity and its employees for acts or omissions which give rise to a lawsuit. *City of Jackson v. Sutton*, 797 So. 2d 977, 980 (¶ 9) (Miss. 2001)(emphasis added). This remedy is exclusive only to tort claims, implied warranties or implied contracts. Miss. Code Ann. § 11-46-

3(1); *Watts v. Tsang*, 828 So. 2d 785, ¶ 17 (Miss. 2002). The MTCA does *not* apply to actions based on express contracts. *Montgomery v. Miss.*, 498 F. Supp. 2d 892, 905 (S.D. Miss. 2007).

In order for an entity to be a political subdivision, for purposes of availing itself of immunity under the MTCA, it must first fall within the definition of a political subdivision under Miss. Code Ann. § 11-46-1(1):

> "Political subdivision" means any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including, but not limited to, any county, municipality, school district, community hospital as defined in Section 41-13-10, Mississippi Code of 1972, airport authority or other instrumentality thereof, whether or not such body or instrumentality thereof has the authority to levy taxes or to sue or be sued in its own name."

In the underlying summary judgment proceedings, Mr. Kelley repeatedly asserted for the purposes of the work done in his privately owned subdivision, CG&W was *not* a government entity or a political subdivision. Based on the contract that it entered in this case, CG&W was acting as an independent contractor who submitted a bid to install the certain utilities on private property, under certain terms and conditions which required Kelley to have all the roadbeds finished to grade and all the drainage areas properly completed. The trial court, in its Order dated April 19, 2013, did not analyze these facts. Rather, the court simply stated:

> It is undisputed that the [Corinth Public Utilities Commission] is a five member group established by the City in 1954 to **operate and control** the City's gas and water systems.[2] The Resolution contained within the June 7, 1954, minutes of the Board of Mayor and Aldermen of the City of Corinth make clear that the Commission was created for the purpose of operating the City's gas and water distribution system. The Resolution demonstrates that the Commission operates that Department. Furthermore, the bylaws of the Commission itself at Article I, Section 3 states that the Commission shall control, manage, and operate the water and gas departments of the City of Corinth. In summation, the evidence clearly demonstrates that the Commission is a political subdivision of the City and

[2] "Operate and control" – not "install" or "construct."

> operates and controls the water and gas delivery for the City. As such, the [Mississippi Tort Claims Act] applies to all Defendants.

(emphasis added). In this case, Mr. Kelley, not the Defendants, was bearing the full cost of installing the water service in the subdivision. *See* Miss. Code Ann. § 77-3-205 (West 2013).

The Circuit Court appears to have been confused as to what Plaintiff was claiming – he was claiming that CG&W, for purposes of *this* case, was not acting as a political subdivision – it was a private contractor. In its ruling, the Court made no specific reference to CG&W and ignored the undisputed facts by summarily concluding, without any recitation to the Record, that the Mississippi Tort Claims Act applied to "all" of the named Defendants, which necessarily included CG&W.

It is Plaintiff's position that the facts of this case prove that the relationship between Mr. Kelley and CG&W was that of owner and contractor, **NOT** that of owner and governmental body. A summary of the pertinent facts (as recited in the Statement of Facts section above) confirms this fact:

- Mr. Kelley had to install water lines for his private subdivision before he could secure final subdivision approval before he could sell lots, and before the subdivision could be accepted by the City. He was not a utilities installer. He had to subcontract this work out.
- Mr. Kelley opened the project up for bids, and he received three construction bids from three different subcontractors.
- CG&W submitted the lowest bid for the water lines installation.
- According to CG&W's website, it is a not-for-profit entity. A not-for-profit entity is not a government entity; it is a private entity. Miss. Code Ann. § 79-11-127(z). *See Oxford et al v. Northeast Miss. Electric Power Assn.*, 704 So. 2d 59, 67 (¶ 28) (Miss. 1997), where the Mississippi Supreme Court indicated that public utilities, even if not-for-profit, are private entities, and therefore not subject to government shield.
- The City of Corinth Gas and Water Department was not created by any act of the Legislature or other local and private legislation.

- There is no legislative act providing the functions and purposes of CG&W.

- The bid submitted by CG&W included the following:

  - The letterhead was "City of Corinth Gas & Water Department";

  - The heading was "Magnolia Lake Development";

  - In each of the three bullets identified on the bid, the word "construction" was used, indicating that the CG&W was agreeing to provide construction work on William Kelley's behalf pursuant to the original plans and additions to the plans;

  - The bid required William Kelley to pay 60% of the estimated installation costs up front.

  - The bid required William Kelley to have the subdivision work site completed, including final grading of lots, ditches, and roads, with stonework in place, road beds compacted with a gravel base and ready for asphalt and right-of-way and utility easements constructed to finish grade before the utilities were installed. R. 1033-37.

- As is typical when finalizing an agreement, William Kelley and Ricky Newcomb discussed the scope of the project with representatives of the City of Corinth Gas and Water Department. The City of Corinth Gas and Water Department agreed to restore the property to its pre-construction condition.

- Both Ricky Newcomb and William Lambert have testified in their affidavits that it is standard industry practice to restore the property to its pre-construction condition, and therefore, it is part of the contract. R. 1017, Aff. of Newcomb); R. 1048, Aff. Lambert)

- William Kelley accepted the bid. Once the bid was accepted, a binding contract between William Kelley and the City of Corinth Gas and Water Department was formed. *Edwards v. Wurster Oil Co.*, 688 So. 2d 772, 775 (Miss. 1997) (citing *Fanning v. C.I.T. Corp.*, 187 Miss. 45, 52, 192 So. 41 (1939).

- William Kelley paid the down-payment, and CG&W commenced the work.

- On January 2 2008, CG&W requested final payment before the work on the project was completed. Final payment was denied because their work was not finished.

- Regions Bank was the lender. They had a construction loan open for William Kelley. William Lambert, an architect, was hired by Regions Bank to monitor the

progress and approve draw requests. As the agent for the lender, Mr. Lambert knew how the construction loan was set up. He knew who the actual parties were. Mr. Lambert noted the following in his February 5, 2008 e-mail to Regions Bank:

- The "Owner" of the project was William Kelley;
- The "Contractor" was the City of Corinth Gas and Water Department; and
- The "Contract" was the utilities work in Magnolia Lake Estates.

- On June 10, 2008, the City of Corinth Gas and Water Department filed a construction lien against William Kelley's property.

- The language of the construction lien provided:
  - The construction lien was filed "in compliance with and pursuant to Mississippi Code Annotated § 85-7-131 and § 85-7-133 (1972), as amended."
  - "Notice is hereby given that Corinth Gas & Water Department with its principal place of business located at 305 West Waldron Street, Corinth, Mississippi did furnish and supply labor and materials to William T. Kelley as owner of the following described property situated in Alcorn County, Mississippi…"
  - "The materials furnished and supplies were used in installation of water mains and lines for improvements on the aforementioned property." The property referenced was the Magnolia Lake Estates property.

- The filing of a construction lien is prima facie evidence that a contract existed, and that the contractor stood as a private party. In a 2010 law review article, it was pointed out that under Miss. Code Ann. § 85-7-131 unless there is an implied or express contract between the landowner and the contractor, there can be no construction lien. Robert P. Wise, *Mississippi Construction Payment Claims: Mississippi Lien, Stop Notice, Payment Bond, Prompt Payment, and Open Account Laws*, 29 Miss. C. L. Rev. 539, 542-43 (2010) (discussing Miss. Code. Ann. § 85-7-135). The only persons or entities who can file construction liens are "architects, engineers, surveyors, laborers, and materialmen and/or contractors." *Noble House, Inc. v. W & W Plumbing & Heating, Inc.*, 881 So. 2d 377, 386 (Miss. 2004) (citations omitted).

- The Circuit Court noted that there were no minutes on record with the Corinth Public Utilities Commission to reflect the "contract." However, The Corinth Public Utilities Commission did not submit a bid – the City of Corinth Gas and Water Department did. The Corinth Public Utilities Commission did not file a construction lien – the City of Corinth Gas and Water Department did. Further, the City of Corinth Gas and Water Department does not *keep* minutes of its activities. This is prima facie evidence that for purposes of this case, the City of Corinth Gas and Water Department was *not operating as a political subdivision.*

- CG&W was not a governing authority under any municipality, and they were not a "commission" as created under any municipality. *See* Miss. Code Ann. § 21-37-47.

- In its April 19, 2013 Order, the Circuit Court stated there was an "agreement" between the City of Corinth Gas and Water Department and Mr. Kelley, but refused to recognize the validity of Plaintiff's contract claims.

These facts depict a relationship between an owner/developer and a private subcontractor. **For all intents and purposes, CG&W acted as a private contractor in this case.** *See, e.g., Flye v. Spotts*,94 So.3d 240, 247-48 (¶¶ 15-16) (Miss. 2012). In *Flye*, this Court recently held that a volunteer fire department was an independent contractor with the county. Although "fire protection" is usually deemed a governmental activity that is immune from liability under the MTCA, the Court held that the legislature had not extended immunity to a private volunteer fire department, which acted as an independent contractor. Id. at 247 (¶ 15). The Court concluded that the trial court erred in finding genuine issues of material fact existed as to the volunteer fire department's status, and held as a matter of law that the volunteer fire department and its employee WERE NOT IMMUNE under the MTCA for their alleged acts of negligence. Id. at 247 (¶ 16).

Even if CG&W could somehow fit within the definition of a political subdivision under Miss. Code Ann. § 11-46-1(1), they stepped out of that role in their relationship to William Kelley in this case. In *Bradley v. Jackson*, 153 Miss. 136, 119 So. 811, 815 (Miss. 1928) the Court held that "in the exercise of its non-governmental or private powers, the municipality stands as an individual or private corporation, so far as its acts are concerned." Only in the establishment and regulation of public entities such as schools, hospitals, poorhouses, fire departments, police departments, jails, workhouses, and buildings for those purposes, does a

municipalities act in a government capacity – not a private capacity. *Jones v. City of Amory*, 184 Miss. 161, 185 So. 237 (Miss. 1939) (citations omitted).

Here, CG&W engaged in a proprietary activity. Under existing Mississippi law, proprietary activates are those activates which, while beneficial to the community and very important, are not vital to a City's functioning. *Morgan v. City of Ruleville*, 627 So.2d 275, 279 (Miss. 1993). If a government entity engages in proprietary activities, they are not protected by the Mississippi Tort Claims Act. Installing utility service in a privately owned subdivision is not a governmental activity, as evidenced by the other private contractors who submitted bids to do the same work. R. 1017, Aff. of Newcomb, ¶ 4. In this case, CG&W's construction work on William Kelley's property was not vital to the City of Corinth's functioning. Any other utilities contractor could have done the same work.

In summary, the facts of this case establish that CG&W was not acting as a political subdivision for the purposes of its relationship with William Kelley. It entered into a contractual relationship for the installation of water lines in a private subdivision. This is a private act. Even if this Court concludes that CG&W *is* a political subdivision, under *Bradley v. Jackson* and other similar cases, CG&W acted as a private entity, and therefore stood alone as a private contractor in this case. Under these circumstances, CG&W is not protected by sovereign immunity under the MTCA or the discretionary function exemption. This would require a reversal of the Circuit Court's Order granting summary judgment in favor of the Defendants.

ISSUE NO. 4: Whether the discretionary function exception under the MTCA immunizes CG&W from liability in this case.

Even if the Court determines that CG&W is entitled to protection under the MTCA, CG&W is not shielded from liability in this case by the rule concerning discretionary functions. In *Little v. Mississippi Dept. of Transp.*, 129 So.3d 132 (Miss. 2013) this Court recently clarified

proper standards for analyzing discretionary function immunity. The Court stated: "The language of Section 11-46-9(1)(d) requires us to look at **the function performed - - not the acts that are committed in furtherance of that function** - - to determine whether immunity exists." *Little*, 129 So.3d at 136 (¶ 8) (emphasis added). *See, e.g.*, *Miss. Transp. Comm'n v. Montgomery*, 80 So.3d 789, 798 (¶ 32) (Miss.2012); *Pratt v. Gulfport-Biloxi Reg'l Airport Auth*., 97 So.3d 68, 72 (¶ 10) (Miss.2012). If the **function** is ministerial, rather than discretionary, there is **no immunity** for the acts performed in furtherance of the function. A ministerial function is one that is "positively imposed by law." *Little*, 129 so.3d at 136 (¶ 8). The function at issue in *Pratt* involved right-of-way maintenance by the State Highway Department, and the Court explained that "[t]he decision of whether to cut down a tree is not a function, but rather an act performed in furtherance of the ministerial function of maintaining highway rights-of-way."

This Court rejected the Court of Appeals' determination that right-of-way maintenance was a discretionary function, because "… where a statute mandates the government or its employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity." Id. at 136-37 (¶ 9).

Noting that the prior decision in *Montgomery* had left some issues unclear, the Court clarified in *Little* that "where a statute mandates the government or its employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity." Id. at 138 (¶ 11) (citing *Montgomery*, 80 So.3d at 798 (¶ 31). The Court concluded: "it is the function, not the act, to which the MTCA grants or denies immunity." Id. at 138 (¶ 12). Therefore, the Court overruled the previous cases that prescribed immunity for functional acts. Id.

As a general rule, and absent express statutory authority, a public body cannot do any type of work on private property except in certain limited circumstances. *See Mississippi State Highway Com'n v. Wood,* 487 So.2d 798, 801 (Miss. 1986). In *Wood,* the Court held that "the Highway Department may go upon private land to perform public work if the work is necessary for the operation and maintenance of highways."

Plaintiffs do not concede that CG&W was operating as a public entity in regard to the work it contracted to perform in this case. However, analogizing the holding in *Wood* to the case at bar, if this Court concludes that CG&W could go upon the private property owned by Plaintiff to do the work because the Court determines that the initial installation and construction of the water and gas lines falls under the designated authorization for Corinth Public Utilities Commission to "operate and maintain" systems for water and gas service, this does not absolve Defendants from liability for the damages they caused.

In the case at bar, there are statutes that govern the duties of the City and CPUC in operating and maintain the City's water system. Miss. Code Ann. § 21-27-11, et seq (West 2013) (municipal operation of utility systems); Miss. Code Ann. § 21-27-201, et seq (West 2013) (operation of water systems). Specifically, under Miss. Code Ann. § 21-27-23(d), the City is authorized to "own, operate and maintain any such (utility) system or combination of any and all of said systems into one (1) system."

CPUC and the City have formally undertaken the duty to operate and maintain the gas and water utility systems for the City of Corinth. Therefore, the duties arising from these operations are not discretionary, but rather, are ministerial. The result obtained in *Little* is directly applicable to the case at bar. If the MTCA applies to Defendant's conduct in digging the ditches to install the underground utilities in the Magnolia Lake Estates Subdivision, these

actions were actions performed in furtherance of Defendants' ministerial function of maintaining the utility services for the City of Corinth. At a minimum, Plaintiffs should have been afforded the opportunity to conduct discovery on these issues.

ISSUE NO. 5: Whether the Circuit Court erred in failing to allow any discovery on any of the issues presented in this case.

A. The trial court erred in staying all discovery.

As a general rule, a party may obtain discovery "regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party." Miss. R. Civ. P. 26(b)(1) (emphasis added). However, discovery-related matters are reviewed under an abuse-of-discretion standard. *Blossom v. Blossom*, 66 So.3d 124, 126 (¶ 9) (Miss.2011). Thus, we "will not disturb discovery orders unless there has been an abuse of discretion." Id. (quoting *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid*, 853 So.2d 1192, 1209 (¶ 57) (Miss.2003)).

In *Grant v. Ford Motor Co.*, 89 So.3d 655 (¶ 36) (Miss. App. 2012), the Court recognized that a party may defend against summary judgment by asserting "that he cannot for reasons stated present by affidavit facts essential to justify his opposition; the result of such proof is that the trial court should continue the case to allow discovery to develop further." (citing *Partin v. N. Miss. Med. Ctr., Inc*., 929 So.2d 924, 938 (¶¶ 57-58) (Miss. App.2005); *Bowie v. Montfort Jones Memorial Hosp.*,861 So.2d 1037, 1042 (¶ 14) (Miss. 2003). In *Partin*, the Court found that there was no abuse of discretion in refusing to allow additional discovery before the summary judgment hearing because the plaintiff had not exercised due diligence in conducting discovery before the motions were filed, or asked that the hearing be delayed. *Partin*, 929 So.2d 939 (¶¶ 58-60).

In contrast, in the case at bar, Plaintiffs propounded comprehensive discovery requests with the initial Complaint. However, after requesting an extension of time to respond to those

requests, Defendants, instead of answering the discovery, filed their initial Motion for Summary Judgment and Motion to Stay All Discovery. Plaintiffs opposed Defendants' Motion to Stay Discovery, arguing that much of the information relevant to Plaintiffs' claims was in the exclusive possession and control of Defendants, but on March 30, 2010, the trial court granted Defendants' request to stay all discovery. R. 360. Therefore, Plaintiff was unable to develop any factual information to support his claims through deposition testimony or the discovery of documents that are in the exclusive possession and control of Defendants.

One clear example of the deficiency in discovery in this case is that the e-mail from William Lambert upon which Defendants rely in support of motion has never been properly authenticated by the testimony of any party, as usually required under the Rules of Evidence. Another example is that after the last hearing on the cross-motions for summary judgment, Defendants produced for the first time certain by-laws of the CPUC which Defendants considered helpful to their case, but Plaintiff has never obtained all of the by-laws, or any documents related to the creation of CG&W.

Plaintiff has not been afforded the opportunity to obtain through discovery other information directly relevant to the issues concerning when the statute of limitations began to run in this case, the facts surrounding the formation of the contract with CG&W, what representations and efforts were made concerning CG&W's attempts to repair the damage caused in Plaintiff's subdivision, and how often CG&W has installed utility services on private property that has not been formally dedicated to or accepted by the City.

Under the facts and circumstances presented in this case, Plaintiff respectfully submits that the trial court abused its discretion by refusing to allow any discovery on the issue of how and when CG&W tendered the work performed under the contract, whether CG&W agreed to

make remedial repairs, and whether the action by the Corinth Public Utilities Commission in formally denying Plaintiff's claim was the actual date that the cause of action accrued.

In this regard, Defendants seek to have it both ways. First, they argue that CG&W cannot be held liable because there is nothing in the CPUC "minutes" to support the finding that a contract was formed with Mr. Kelley. However, Defendants ignore the fact that **the "minutes" of the Commission from July 14, 2014 marked the first date that Kelley's claim was formally denied by the Commission**, and they contend that somehow, CPUC "spoke" through the e-mail sent by Mr. Lambert on February 5, 2008 or through the demand for final payment sent by CG&W on January 2, 2008, to formally notify Mr. Kelly that the utility construction work was completed, and that no repairs would be performed in regard to the damage caused during the construction. There is simply no indication of such a decision by the Commission in the official minutes of CPUC, and nothing that could be construed as speaking for CPUC to give Mr. Kelly notice that the statute of limitations had begun to run on any claims that were governed by the MTCA.

Plaintiff respectfully submits that the trial court abused its discretion in staying all discovery in this case, and refusing to allow even narrowly tailored discovery to address the statute of limitations, contract formation and discretionary immunity issues. Therefore, at a minimum, this case should be remanded for appropriate discovery

ISSUE NO. 6: Whether the Circuit Court erred in dismissing Plaintiff's claim for damages based on inverse condemnation.

As an alternative theory of recovery, assuming *arguendo* that the Court determines that CG&W was either immune from liability under the MTCA, or that the claims are barred under the statute of limitations, Defendants would still be responsible for compensating Plaintiff for the damages caused to his private property by such work under the doctrine of inverse

condemnation. Section 17 of the Constitution of 1890 provides: "**Private property shall not be taken <u>or damaged</u> for public use except on due compensation being first made to the owner or owners thereof**, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public." (emphasis added).

In *Parker v. State Highway Commission*, 173 Miss. 213, 162 So. 162, 163 (1935), this Court previously explained that prior to the adoption of this Constitutional provision, "a citizen was only protected against the taking of his property for public use without due compensation; he had no protection against injuries to his rights as owner of private property, less than the appropriation of the property itself." However, with the addition of the words "or damaged" to Section 17, the Court held that citizens were guaranteed a right and a remedy for damages that extended beyond the actual "taking" of the property: "[S]ince the adoption of this Constitution the burden formerly resting upon the citizen rests upon the agency damaging the property, as well as the appropriation thereof." Id.

In *Parker*, the Court held that the State Highway Department could be held liable for damages caused through the lawful construction of a highway, where the owner of property adjacent to the highway suffered a separate and distinct harm apart from that borne by the general public. The Court stated: "The common-law remedy existing in favor of the property owner for damages to his property, beyond the appropriation thereof, is clear in this case. The Legislature has granted the highway commission in express terms the right to use and to be sued." Id. at 165.

The Court also noted that "municipalities as well as all persons, natural or artificial, are included within its prohibitions, and a municipality which lowers an established grade of a highway and causes abutting lots to be injured must compensate the owner for all damage sustained thereby." Id. (citing *City of Vicksburg v. Herman*, 72 Miss. 211, 16 So. 434 (1894)). In *Herman*, supra, this Court said, relative to the words "or damaged" in our Constitution: "The words are without limitation or qualification. They embrace within their inhibition all those attempting to convert private property to public use, - artificial as well as natural persons, municipal and other corporations alike, - and they cover all damages of whatever character." *Herman*, 16 So. at 434.

Under these standards, the Court in both *Parker* and *Herman* held that the private landowner was entitled to compensation from state entities because of work they performed that caused damage to the landowners' properties. The same result should obtain in the case at bar. Plaintiffs respectfully submit that they stated a viable cause of action against Defendants under Section 17 of the Constitution of 1890 which is not barred by the MTCA or the one year statute of limitations.

VI. CONCLUSION.

In summary, there can be no question that a contract existed between William Kelley and the City of Corinth Gas and Water Department. All of the evidence of record points to a contractual relationship. If the honorable Supreme Court agrees with this position, then the Circuit Court's ruling will have to be reversed. Arguably, this means that none of the Appellees are protected by the Mississippi Tort Claims Act for William Kelley's contract-related claims. For sure, however, William Kelley's contract-related claims against the City of Corinth Gas and

Water Department would not be preempted, because the City of Corinth Gas and Water Department was not a political subdivision.

It has also been established that the essential elements for William Kelley's claims were not known or established until William Kelley had to hire someone to repair the damages caused by the City of Corinth Gas and Water Department. Barring this, then William Kelley's causes of action would not have begun to accrue until May 2008, when he was told by representatives of the City of Corinth Gas and Water Department that they were finished with his project and they would not do any additional work. Again, if the honorable Supreme Court agrees with William Kelley's position, then the Circuit Court's rulings will have to be reversed.

Respectfully submitted, this the 14th day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served via the Court's electronic notification system and via electronic transmissions sent via e-mail upon the following individuals by the means designated below this 14th day of March, 2014:

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